

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Lawton McIntosh Circuit (10th) Court Judge

Case No: 2012-207852

JERRY HOLTZCLAW, d/b/a
GREEN THUMB LANDSCAPE &
IRRIGATION

Respondent

V

DENNIS WALDREP

Appellant

RECEIVED

OCT 25 2013

SC Court of Appeals

AMENDED RECORD ON APPEAL

Dennis Waldrep
209 Amethyst Way
Seneca, SC 29672
Proceeding Pro Se

INDEX

ITEM

PAGE

Letter from Circuit Court Dated July 7, 2011	1-4
Summons and Complaint	5-8
Answer to Complaint and Counterclaim	9-12
Exhibits Introduced at Trial "A" through "N"	13-17
Cross Examination of Henry Chandler by Mr. Hood	18-60
Direct Examination of Henry Chandler by Ms. Berger	61-78
Direct Examination of Mr. Waldrep by Ms. Berger	79-106
Cross Examination of Mr. Waldrep by Mr. Hood	107-123

Cross Examination of Mr. Holtzclaw by Ms. Berger	124-182
Direct Examination of Mr. Holtzclaw by Mr. Hood	183-222
Cross Exam of Jerry Holtzclaw by Ms Berger	223-227
Reply-Direct Examination of Mr. Holtzclaw by Mr. Hood	228-229
Reply-Direct Examination of Ben thrasher by Mr Hood	230-236
Defendant's Response to Court's Sua Sponte Request and Argument	237-256
Rule 15(b) Motion	257-260
Order Denying Defendant's Motion for Reconsideration	261-264
Motion Transcript	265-320
Expert Witness Transcript of Mr. Jordan	321-329
Initial Brief of Appellant Dennis Waldrep	330-362
Reply Brief of Appellant	363-375

Designation of Matter

376-377

Green Thumb Contract dated: 8/13/06

378-380

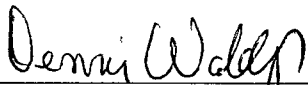
Scope of Work documents

381-384

Greenthumb Estimate

385-386

Respectfully submitted,

A handwritten signature in cursive script, reading "Dennis Waldrep". The signature is written in dark ink and is positioned above a horizontal line.

DENNIS WALDREP, APPELLANT



State of South Carolina
The Circuit Court of the Tenth Judicial Circuit

R. Lawton McIntosh
Judge

Post Office Box 8002
100 South Main Street
Anderson, SC 29622-8002
Phone: (864) 260-4059
Fax: (864) 224-8320
lmcintosh@sccourts.org

July 7, 2011

William C. Hood, Esquire
505 North McDuffie Street
Anderson, South Carolina 29621

Catherine J. Berger, Esquire
Post Office Box 10
Piedmont, South Carolina 29673

Re: Jerry Holtzclaw, d/b/a Green
Thumb Landscape & Irrigation vs.
Dennis Waldrep
CA No. 2008-CP-37-0526

Dear Mr. Hood and Ms. Berger:

- 1) Defendant's Motion to Hold Decision in Abeyance is denied.
- 2) Defendant's Motion to Amend Pleadings to Conform to Evidence is denied.
- 3) William Hood is to draft an order granting judgment for the Plaintiff. Please include in your findings the following:
 - a) Plaintiff met defendant through defendant's wife as a result of performing maintenance work in defendant's neighbor. Plaintiff initially performed maintenance work on Defendant's property, commencing around 2002. Defendant approached Plaintiff regarding replacing grass that died in the front yard, which Plaintiff performed. Around 2006, Defendant approached Plaintiff regarding installing fencing and a retaining wall in his back yard. Defendant had a generally sloping back yard; and he was seeking to create more useable space. Defendant also wanted Plaintiff to perform irrigation services. Plaintiff advised Defendant that he was new in the irrigation field and had never built a retaining wall before. However, Plaintiff advised Defendant that his cousin, Ben Thrasher, had built retaining walls previously and that he would seek to associate Thrasher on the

project. Thereafter, Plaintiff prepared a quote and presented it to Defendant, outlining the cost for the work being requested by Defendant. The total of the original quote was Fifteen Thousand Four Hundred Eighty Five (\$15,485) Dollars. Defendant accepted the original quote; and the terms of the parties' understanding was reduced to a written contract. The written contract provides that all change orders are to be in writing. Shortly in to the job, Defendant approached Plaintiff regarding extending the length of the retaining wall, adding another retaining wall, removing a walkway and patio as well as other work. The requested additional work dramatically increased the scope of the project. Although neither party disputed that changes were requested and performed which significantly added to the cost and scope of the project, the changes were never put in writing as provided by the contract. For example but not exhaustively, the original quote was for four hundred sixty five (465) blocks while the changes increased the number to two thousand two hundred ninety nine (2,299) blocks. Grading hours increased from thirty two (32) hours to eighty (80) hours; irrigation went from three (3) zones to a twelve (12) zone system. Three (3) concrete slabs which were initially to be removed increased to ten (10) slabs and a sidewalk being added. Driveway work increased to an entire driveway plus two (2) catch basins and drains. Two (2) pallets of sod increased to sixteen and a half (16½) pallets. No lighting was originally anticipated; but eight (8) lamps and lights were added. A complete landscape design was added. Other additions include fill dirt and top soil, river rock, brush clearing and deck removal, staining deck and adding septic tank risers.

- b) During the project, Plaintiff provided Defendant with periodic statements reflecting his costs and expenses, but which did not include his profit margins. Plaintiff continued this practice throughout the project. Plaintiff testified that he advised Defendant on multiple occasions that his profit margins were not included in the statements. Defendant did not recall these conversations but did remember Plaintiff advising him once the job was completed. Throughout the project Plaintiff did not receive any questions or complaints from Defendant regarding the scope or the cost of the project (other than to question Plaintiff regarding irrigation costs contained in the original quote). The project started around September, 2006 and ended around May, 2007.
- c) Once the job was complete, Plaintiff met with Defendant and was told that the work looked good. Plaintiff advised Defendant that he would figure up the final bill and would present it to him shortly. The total cost of the project was One Hundred Twenty One Thousand Five Hundred Thirty Seven and fifty three/100 (\$121,537.53) Dollars, of which Plaintiff had paid Sixty Five Thousand (\$65,000) Dollars (without questions). The balance due on the final bill was Fifty Two

Thousand, Nine Hundred Ninety Eight and ninety eight/100 (\$52,998.98) Dollars. Plaintiff and his wife met with Defendant to present the bill. Defendant advised Plaintiff that he wanted to review the breakdown and had questions about the man hours being charged. Plaintiff, his wife and Thrasher met with Defendant a second time. Defendant reiterated his concerns regarding man hours being charged and offered to pay a total of Twenty Thousand (\$20,000) Dollars on the final bill. This action followed.

- d) Plaintiff used Allen Block in construction of retaining walls. Defendant asserted but did not establish that retaining walls over six (6") inches in height were required by code to be engineered. Defendant further asserted but did not establish that Plaintiff was required to be licensed through LLR to perform the work on the subject project. I find that Defendant has failed to establish either one of these defenses and further find that Allen Block only "recommends" the use of an engineer upon the wall being over a certain height. Nothing contained in the statutes or regulations establishes that Plaintiff was required to be licensed by the state.
- e) During the course of the project, Defendant's basement was flooded, which resulted in Defendant filing a claim against Plaintiff's carrier. Defendant admitted that he was paid in full for that claim and that no damages were being sought in this suit for that incident.
- f) Defendant presented several witnesses during his defense. Henry William Chandler, a licensed engineer, testified. Mr. Chandler did not perform any tests, but simply visited Defendant's property and viewed pictures and reviewed measurements supplied to him. Notwithstanding Mr. Chandler's opinions, which I find are not credible, it is patently obvious that Mr. Chandler did not review the manufacturers' specifications for Allen Block. If he had, he would have readily seen the construction tolerances specified by the manufacturer. The tolerances specified are within the specification of settling testified to by Chandler.
- g) Defendant also presented Mr. Frederick, from Landscape Perfections. Frederick had performed irrigation work for Defendant in 2008. At the time of his initial work, Defendant did not mention having any prior irrigation problems to him. Frederick is also a certified Allen Block installer. His general observation of the wall was that it looked fine.
- h) Steve Jordan also testified for Defendant. Jordan was on the job during a good portion of the project; and he also prepared an estimate to "correct" Plaintiff's work in the amount of Fifty Five Thousand Seven Hundred Twenty One (\$55,721) Dollars. Jordan testified that only one and a half (1 ½") inch variance

or settling over the course or length of the wall are allowed for walls such as the one in question. Jordan testified that he had reviewed Allen Block's specifications and that the manufacturer only allowed one and a quarter ($1\frac{1}{4}$) inch variance over the length and height of the retaining wall. Jordan is not a licensed contractor or engineer but has taken a cad course through Tri-County Tech. Jordan's testimony is not credible in that it is directly contradicted by the manufacturer's own specifications for the subject wall entered into evidence. Jordan had financial incentive for his conclusions.

- i) Defendant testified that the first time Plaintiff told him profit had not been billed was thirty (30) days before the end of the job.
- j) The subject wall was out of variance a total of 8.125" inches over the length of the wall. The wall was over eighty five (85') feet in length. The wall's variance was within the tolerances specified by the manufacturer.
- k) Plaintiff is entitled to judgment against Defendant in the amount of Fifty Two Thousand Nine Hundred Ninety Eight and ninety eight/100 (\$52,998.98) Dollars. However, Defendant is entitled to a set-off of Four Hundred Fifty (\$450) Dollars for the transit purchased and billed to Defendant, One Thousand Two Hundred Fifty (\$1,250) Dollars to repair the patio damage cause by Plaintiff and Two Thousand Two Hundred (\$2,200) Dollars for the drainage pipe correction work performed by Jordan.

I request that Bill Hood prepare this order including the above findings and such others and conclusions of law as are proper. Mr. Hood is to present the order to Ms. Berger PRIOR to its submission to me.

Thank you,

Lawton McIntosh, Judge
Tenth (10th) Judicial Circuit

RLMc:sfs

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF OCONEE)

✓ Jerry Holtzclaw, d/b/a)

✓ Green Thumb Landscape)
& Irrigation,)

Plaintiff)

vs.)

SUMMONS

2008-CP-37- 415

FILED
CLERK OF COURT
S/ J. C. SMITH
2008-09-08 A 11:04

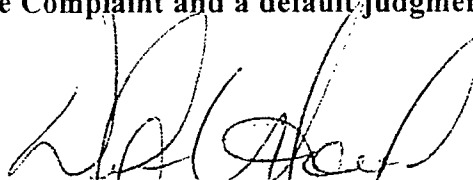
✓ Dennis Waldrep,)

Defendant)

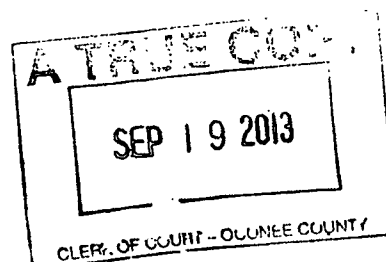
TO THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the within Complaint on the subscriber at the office of William C. Hood, 505 North McDuffie Street, Anderson, South Carolina 29621, within thirty (30) days after service hereof, exclusive of the day of such service; and if you fail to answer the Complaint in the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and a default judgment may be filed against you.

April 2, 2008



William C. Hood
505 North McDuffie Street
Anderson, South Carolina 29621
(864) 375-0530
(864) 375-0640 (fax)
Attorney for the Plaintiff



alm

STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS

Jerry Holtzclaw, d/b/a)
Green Thumb Landscape)
& Irrigation,)

Plaintiff)

vs.)

Dennis Waldrep,)

Defendant)

Complaint

2008-CP-37- 415

(Non-Jury)

FILED OCONEE, SC
SALLIE C. SMITH
CLERK OF COURT
2008 APR - 8 A 11:04

Plaintiff alleges:

- 1] Plaintiff is a resident of Oconee County, South Carolina.
- 2] Defendant is a resident of Oconee County, South Carolina.
- 3] Beginning in August of 2006, Plaintiff did, at the request and directive of the Defendant, provide labor and materials for an extensive landscaping project on Defendant's property located at 209 Amethyst Way, Seneca, South Carolina.
- 4] After all due credits are given, there remains due from Defendant on account the sum of Fifty-Two Thousand, Nine Hundred Eighty-Eight and 98/100 (\$52, 988.98) Dollars.
- 5] Demand for payment of the balance due on account has been made and Defendant has failed and refused to make payment.

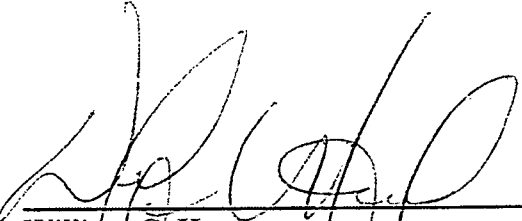
WHEREFORE, Plaintiff prays:

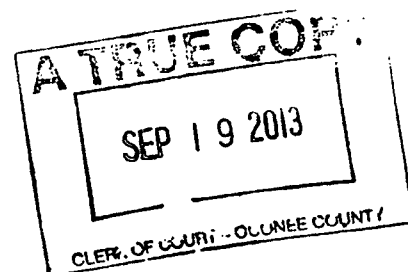
alt

1] That he be granted judgment against the Defendant in the sum of Fifty-Two Thousand, Nine Hundred Eighty-Eight and 98/100 (\$52, 988.98) Dollars, together with interest thereon at the legal rate from September 1, 2007 until the date of judgment, and the costs and disbursements of this action.

2] For such other relief as the Court may find proper.

April 2, 2008


William C. Hood
505 North McDuffie Street
Anderson, South Carolina 29621
(864) 375-0530
(864) 375-0640 (fax)
Attorney for the Plaintiff



VERIFICATION

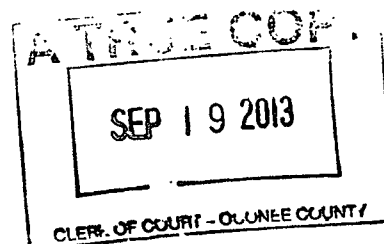
Personally appeared before me **Jerry Holtzclaw**, who being first duly sworn, states that he is the Plaintiff in the foregoing action; that he has read the foregoing pleadings and that all matters alleged therein are true and correct to the best of his knowledge, with the exception of those matters alleged on information and belief, and as to those, he believes them to be true.

Donald Jerry Holtzclaw, II
JERRY HOLTZCLAW

Sworn to and subscribed before me,
this 2nd day of April, 2008.

Phyllis H. Shrasher
Notary Public for South Carolina
My Commission Expires: 5-14-17

FILED OCTOBER 30
SALLIE C. SMITH
CLERK OF COURT
2008 APR - 8 A 11:04



STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)
)
JERRY HOLTZCLAW, d/b/a)
GREEN THUMB LANDSCAPE &)
IRRIGATION,)
)
Plaintiff,)
)
DENNIS WALDREP,)
)
Defendant.)

COURT OF COMMON PLEAS

CIVIL ACTION NO. 2008-CP-37-415

ANSWER TO THE COMPLAINT
AND COUNTERCLAIM

FILED OCONEE, SC
JULIE C. SMITH
CLERK OF COURT
2008 MAY 21 P 2:43

The Defendant, DENNIS WALDREP, answers the Complaint of the Plaintiff
as follows:

FOR A FIRST DEFENSE

1. Admits, upon information and belief, the allegation contained in
Paragraph 1 of the Complaint.
2. Admits the allegation contained in Paragraph 2 of the Complaint.
3. Admits the allegation that in August of 2006, the Plaintiff
commenced landscaping work at the Defendant's property but denies the
4. Denies the allegations contained in Paragraph 4 of the Complaint.
5. Denies the allegations as contained in Paragraph 5 of the Complaint.

FOR A SECOND DEFENSE

6. The Defendant paid a total of \$65,600.00 to the Plaintiff as work was
completed and that there are no sums due to Plaintiff. Contrary to the parties'
understanding, the Defendant paid for materials directly to the following entities.
Plaintiff was required to provide these materials, failed to do so and is seeking
monies from Defendant for materials Plaintiff did not provide.

ENTERED
COMPUTER

copies mailed

- a. \$2,174.18 paid to NG Turf for sod;
- b. \$2,454.18 to NW Supply for irrigation;
- c. \$921.00 to Landscape Supply for mulch;
- d. \$600.00 for stump removal;
- e. \$400.00 to Ben Thrasher for electrical supplies.

FOR A THIRD DEFENSE

7. That the Plaintiff implied as a matter of law that the work and services he supplied in the landscaping project would be good and workmanlike.

8. That the Plaintiff has breached this implied warranty of good and workmanlike services as follows:

- a. improper installation of drainage pump causing the pump to freeze, damage the pump housing and cracked the main line exiting the pump and the line entering the pump from the lake;
- b. main supply line servicing three irrigation zones was installed backwards causing water forced backwards through the manifold which left three zones bone dry, leading to the destruction of twenty-one (21) plants and trees;
- c. trash left in the lines and manifolds, causing them to stay open all the time which lead to a constant charge thus showing the leaks which caused excessive water expense;
- d. the line cycling the water from the lower pond to the top pond was too small, causing the pumps to work against each other causing them to fail early;
- e. improper installation of over flow drain which caused excessive water usage;
- f. the electric supply to the waterfall was not to Code;
- g. edging installed was not as requested and was missing around some beds;
- h. failed to waterproof exterior once Plaintiff raised the landscape which caused major flooding in the home after a heavy rain.

9. That numerous demands were made upon the Plaintiff to remedy these unworkmanlike, faulty and negligent conditions caused by the Plaintiff.

10. That the Plaintiff failed and refused and continues to refuse to remedy same.

11. That the Defendant has incurred damages totaling the sum of \$10,845.88 to correct the damages and unworkmanlike conditions of the Plaintiff.

COUNTERCLAIM

12. The Defendant states he has a claim against the Plaintiff in the amount of \$10,845.88. The Counterclaim arose out of the same transaction or occurrence as the Plaintiff's claim as a result of the following events:

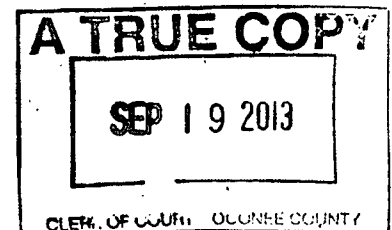
13. The Defendant re-alleges and re-asserts his responses to Paragraphs 1 through 5, inclusive, and Paragraphs 8 through 11, inclusive, of the Answer to the Complaint as if fully reiterated herein verbatim.

WHEREFORE, the Defendant prays for Judgment against the Plaintiff in the sum of \$10,845.88 plus costs and disbursements of this action and for such other relief as this Court may find just.



CATHERINE J. BERGER
P.O. Box 10
Piedmont, SC 29673
(864)845-3367
Attorney for Defendant

Piedmont, South Carolina
May 23, 2008



STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)
)
JERRY HOLTZCLAW, d/b/a)
GREEN THUMB LANDSCAPE &)
IRRIGATION,)
)
Plaintiff,)
)
DENNIS WALDREP,)
)
Defendant.)

COURT OF COMMON PLEAS

CIVIL ACTION NO. 2008-CP-37-41

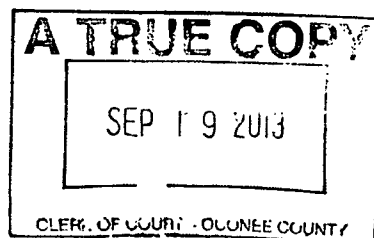
CERTIFICATE OF SERVICE

I, Catherine J. Berger, attorney for the Defendant, do hereby certify that on the 23rd day of May, 2008, I caused the attached Answer to Complaint and Counterclaim to be served upon counsel of record by depositing a true and correct copy of same in the United States Mail, first class, postage prepaid, the return address clearly indicated on the envelope, and addressed as follows:

William C. Hood, Esq.
505 N. McDuffie Street
Anderson, SC 29621


CATHERINE J. BERGER
P.O. Box 10
Piedmont, SC 29673
(864)845-3367
Attorney for Defendant

Piedmont, South Carolina
May 23, 2008



FILED
CLERK OF COURT
JULIE C. SMITH
OCONEE COUNTY, SC
MAY 27 P 2:43

FILED
CLERK OF COURT
JULIE C. SMITH
OCONEE COUNTY, SC
2008 MAY 27 P 2:43

ENTERED
COMPUTER


Hood is Plaintiff Attorney
Berger is my Attorney

Exhibit A

This is the Direct Examination by Hood to my Expert Witness Henry Chandler who is a Forensic Structural Engineer.

Pages 224 Chandler tells that the Steps were not in Code. Page 234 Chandler goes more into details of the Failure of the Lower Wall near the Lake. Page 236 Chandler goes into detail of why a Wall should have an engineered drawing. Page 239 Chandler discusses that the wall is in Failure Mode. Page 243 Chandler discusses that the Allan Block Web-Site says you need to use an Engineer to Design the Wall and Jerry never did. Pages 244, 247 & 248 Chandler argues that he did not see any or very little GEO-Grid which is a fabric that secures the Blocks into the Backfill to keep it from falling over. Page 255 & 256 Chandler talks about that there is no Drains in the Wall because nothing is visible and you should see all the Drains coming out of the Wall. Page 257 Chandler answers what will happen when the Wall goes into Failure.

Exhibit B

This is the Direct Examination by Berger to my Expert Witness Henry Chandler who is a Forensic Structural Engineer.

Page 205 he has been an Engineer since 1991 and very familiar with Retaining Walls. Page 207 (lines 16-25) Engineer says any wall over 4 feet must be designed and stamped by an Engineer and this never was. Page 209 (lines 3-12) the wall is currently in Failure mode because it has Settled 8.5 inches. Page 209 lines 20 should have Soil samples to confirm the Soil you are working with. Page 212 lines 1-4 shows the Steps are also settling and are a Hazard and out of Code as well. Pages 213 (line 20-25) & 214 (lines 1-11) the Judge asks about Chandler's Education and questions if his Civil Engineering Degree ask if that is different than his Structural Engineer Degree!! Page 216 (lines 1-25) he is asked if he thinks the wall was built to Specs and he says no and says he did not see any Drains in the wall. Page 218 (lines 9-25) Engineer talks about the 2 sets of Steps that are also defective. Complete

Exhibit C

This is the Direct Examination by Berger to Dennis Waldrep.

Page 377 my Attorney shows me the Final itemized Bill and asked if I ever sign it and I never did even see it until the Job was completed and Jerry waited 90 days to get me the itemized Bill. Page 378 we had a Contact on the retaining Wall nearest to our home and after it was completed we never had a contact and paid as we went. Page 380 Jerry and his wife came to our home with the completed Bill in Aug or Sept 2007 with charges of his Profit for the first time I ever saw it. Page 381 my understanding was as he completed each phase then the check I wrote was the final check there never was anything mention of what I was paying was only his cost. Page Jerry finished the wall around April or May 2007. Page 388 he gave me his final Bill in Sept 2007 and prior to that date I was not expecting a large Bill or any Bill because he never told me until 60-90 days that he did

not Bill me for his Profit!! Page 388 line 21 I was never asked to sign any change orders. Page 393 line 18- there was water damage in our basement do to no waterproofing by Jerry when he raised up the landscape on our house about 3 feet and it rained real hard and water came in through the Brick. There was an insurance claim with his Liability Policy and they paid. Pages 398 & 398 after the landscape project was completed I contracted to have an Aluminum Fence installed and when they started to install it the contractor called me and said the yard next to the retaining wall was not level because his showed how much off that is was. He had to install the fence every 8 feet it was offset by the fall of the wall which was off about 1" every 8-10 feet. Page 400 is where Jerry brought the Bill which had an amount due of \$ 52,000 which was his profit and he never told me that any additional amount would be due until 30-60 days prior to completion and he said maybe \$10,000 so the \$52,000 floored me. Page 400 & 401 I countered to pay him \$20,000 and he refused to accept and started the lawsuit. The last few pages are discussing the problems that we had after Jerry left with the irrigation that he installed.

Exhibit D

Cross Examination by Hood to Dennis Waldrep.

Page 406 Hood Cross examining me about the Bill and that I was never told that the end of the job would be a final Bill. Page 409 Hood hands me and goes over my deposition With him and it is going over the Scope of work which is the final Bill. What Hood did in the deposition was handed be the Scope of Work which is the Final Bill that Jerry gave me 90 days after he completed the job and went through each item and asked me if that work was completed, and it was but I never saw the additional charges that was on this sheet until 90 days after the work was completed.

Pages 410 line 23 & 411 lines 1-25 talks about that he charged me \$2,000 to split and stack wood and it was about a cord which I could buy for \$200 and he charged me \$2,000 on his final Bill, as I said he was trying to manipulate the Bill to get to the number he was trying to reach.

Exhibit E (1of2)

Cross Examination by Berger to Jerry Holtzclaw (Plaintiff).

Page 84 his cousin Ben Thrasher was a partner and never was compensated and Page 85 Line # 10 he says Ben worked 1000s of hours without any Pay!! Jerry and Ben were to Split the Profits at the end of the Job. Page 87 Line 12 forward was the Spreadsheet for the Wall One which was the first Job Jerry did and there was a contract for the First wall. Page 87 Berger asks if Jerry gave receipts to me for materials and he says he Did Not. Page 89 Line 20 for the first wall there was a Down Payment of 35% of the total Price which was paid and 50% with half completion and the balance at completion. Page 90 when the rest of the work was completed he prepared the Scope of Work with his Profit added in at that time and there was no date on that document. Page 91 Berger questions when Jerry gave us the copy of his Scope of the Work and he says at the completion on the Job and it was 90 days after the Completion of the Job. Page 91 Line 17 his Profit on top of what I had already paid was \$52,000. Page 92 Line 18 Berger asks Jerry if he had ever erected a retaining Wall and he said NEVER in his life. Page 93 lines 23 thru Page 94 Berger question Jerry if he is familiar with the County Codes and he seems like he

does not in his answers and Berger goes on and asks about a Permit which never was obtained by him and he was not sure if he should have one. Page 96 Berger questions Jerry about change orders and we never signed any change orders the whole project. Page 100 Line 9 Berger asks if Jerry had the Soil samples tested and he said no because it was his first wall he Ever Erected, Line 22 Berger asks if Jerry consulted a Civil Engineer and again he says No. Page 101 Line 12 Berger asks if Jerry has a Design for the Wall and again NO, line 24 his Partner Ben Thrasher has an Electrical back ground nor Civil. Page 107 Berger questions Jerry about providing us a copy of the spreadsheet expense and he says he "thinks he did! Page 108 goes on to say Jerry was not sure if he gave us copies but thought he did.

Exhibit E (2of2)

Cross Examination by Berger to Jerry Holtzclaw (Plaintiff).

Page 110 Berger asks if he ever Consult the County code for the Wall and he said NO. Line 17-20 Berger asks if Jerry had ever not been paid by the Waldrep's in the past for work he did for us and he said NO. Page 111 Berger about the wood that his men cut and split and stacked where he charged me \$ 2,000 which he says was 3 cords and I could buy a cord for \$200!! Page 113 line 4-13 Berger asks if he earned ANY MONEY during this Project and he says None. Pages 119 line 24 – Page 120 Berger asks if Jerry put in Track Drains in the Walls and he said no and Allan Block calls for the Drains. Page 120 line 22 Berger question Jerry why he did not put in Drains and he again says it was his first wall. Page 120 Berger questions Jerry about the Water Damage and his Insurance Claim that paid us for their claim.

Exhibit F

Direct Examination by Hood to Jerry Holtzclaw

Page 63 Hood asks about the Flooding and Jerry agrees that it was his problem and his Insurance paid the claim. Page 67 lines 5-10 Jerry says that the \$ 65,000 that I paid him was all for expenses except he purchased a Transit for \$ 450 and a few lunches!!! This Direct Examination from Hood to Jerry mainly goes over the Bill and his Scope of Work.

Exhibit G

Judge asking Holtz on how he was living without any Profits.

Page 426 the Judge asks Jerry how he lived during the year project if he never received any Profits and he says he had Lawn maintenance and Churches to Mow even though in his testimony he said this took up all of his time. Page 427 Jerry says his wife was receiving Loans to go to Scholl and they used that money as well. Page 428 Lines 1-11 the Judge says even if Jerry and his crew "Never worked without Permits will not Affect His Decision". The problem here is if there would have been a Permit the County Inspector would have over seen the Project to Prevent the Defective or Failing Wall!!!

Exhibit H

Judge gave us time to come back with evidence to prove the 1% Document presented is not accurate.

Page 468 Line 22 – Page 469 Line 13- The Judge calls both Attorneys into his chamber and told the court that he thought that this was a Badly Constructed wall until he saw the exhibit that was presented late in the Trial by the Plaintiff from the Allan Block Web-Site that says the Settlement of the Wall can be 1% of the length of the Wall. His law clerk took the 85 ft. wall with a 1% tolerance could settle 10.1 ins. and it was 8.5 inches and it seems to be within tolerance. We later sent in documentation from the NCMA (National Concrete Masonry Association) that the Code is 1% of the length of Wall or 3 Ins. Maximum over the length of the Wall.

The judge goes on to say in Lines 11-13 he will not allow Jerry to get the Full Amount it is entirely Too High!!! Line 14 he will give us time to show that the calculations from the Allan Block Web-Site are wrong. Page 470 line 24 to Page 471 line the Judge says if we can show that these tolerance are incorrect then he will have an Engineer and measure the Wall and then if the measurements are correct he will not let Jerry get Paid!!!

Exhibit I

Defendant's response to Court's SUA Sponte.

This is what my Attorney sent in to Prove our case before we had our Reconsideration Hearing. My Attorney states on Page 3 that from the NCMA (National Concrete Masonry Association) that we spoke to DIRECTLY myself my Attorney and Chandler (Engineer) because my Expert Witness Chandler is a Member (Paying Annually as a Member) they told us that no matter how long the Wall is the Maximum Amount of Settlement is 1% over the total Length or 3 inches whichever is Less which is attached to the same Document on Page 15 Exhibit B. The Plaintiff got their information off the Allan Block Web-Site with only example that was on the site and it does say on Page 14 Figure 14 1% of the Length of the Wall and the Judge made his decision totally from that example. We spoke to Allan Block and they told us that when you start a large Project like ours you need an Engineer to create a Design for you and you should know from the NCMA Code what the National Code of Settlement is and this was just 1 example on their Site because the NCMA is the Code for ALL RETAINING WALLS and the Allan Block Web-Site would not have enough room to put the complete code on their site. If the Judge would have read this Argument from my Attorney even not totally understanding it he should have sent the County Engineer (as he said on Exhibit H Page 472) to measure the Wall and confirm the Measurements and then the County Engineers could have explained to the Judge what the NCMA Code means and that it is a Maximum of 3 inches of Differential Settlement is all that is allowed for any type of Wall.

During or Reconsideration Hearing my Attorney never once made mention of this in the Hearing and when it was over I asked her why she did not say anything and she said that the Judge could READ IT FOR HIMSELF!!!

Another unbleavable ruling was on Exhibit C Page 16 we were over billed by actual receipts of \$10,803, I was Billed for 2124 Allan Blocks and his receipts were for 1497 Allan Blocks and again the Judge did not acknowledge this at all, I went and counted all the Blocks and the 1497 is what is on our Property!!!!

Exhibit J

Defendant's Motion to Amend.

This is our Motion to Amend the Suit, my Attorney told me that when she and the other Attorney was called into the Judge's chamber that he said we could amend the case and as you see he Denied this later and said he never said this!!!!

Exhibit K

Judge Denies Motion to Amend.

Exhibit N

Reconsideration Hearing.

My Summary to the Suit

This is my Summary of this Appeal, Jerry says that I owe him \$52,000 because he did not charge me for his Profit until the Job was completed and he NEVER told me this until the last 30 days before the Job was coming to completion and he then told me maybe \$10,000 but never anything close to \$52,000. We had a contract for the first Wall and no Contract for the Balance of the Project. It boils down to he says I was aware and I know he never told me this until he brought the final Bill 90 days after the Completion of the Project!!!

On my Counter Claim I was Sueing because the Wall had Settled at that Time 8.5 inches and the most allowed is 3 inches and the Judge apparently did not read the information that my Attorney sent in, which is in my Exhibit I Summary above.

Finally on Exhibit H after the Judge allows us to go back and prove the 1% is incorrect he says in Lines 11-13 that he will not allow the Plaintiff to get the full amount because it is entirely too high and he did get the full amount on the initial Judgement!!!!!!

1 the first time. If there's anything else I haven't seen, I
2 would certainly like to see it.

3 THE COURT: Are there any other documents you haven't
4 exchanged, do it now, please, and if it's not, let's clear
5 the record. This is a 2008 case that was filed in 2008.
6 Why in the world have documents not been exchanged until
7 June 7, 2011, three years later?

8 MR. HOOD: Well, I told you, Your Honor, I sent
9 discovery requests in June of '08. That was my point and
10 I'm just now seeing this stuff.

11 MS. BERGER: I only have one other thing you may not
12 have seen before now and that is this. (Ms. Berger shows
13 Mr. Hood a document and they have a discussion off the
14 record) I have nothing further of Mr. Chandler, Judge.

15 THE COURT: Mr. Hood, cross examination?

16 MR. HOOD: If it please the Court, Your Honor.

17 CROSS EXAMINATION OF HENRY CHANDLER BY MR. HOOD

18 Q Mr. Chandler, you said you first went to this property
19 on October 15, 2008?

20 A Yes, sir.

21 Q And what did you do when you went there on October 15,
22 2008?

23 A I took photographs, I looked at the general
24 conditions, tried to make a preliminary evaluation of
25 the site with the owner and gave him some ideas of

- 1 what needed to be done.
- 2 Q You made photographs?
- 3 A Yes.
- 4 Q Do we have those?
- 5 A I don't know.
- 6 Q Do you have them?
- 7 A I don't have them here, no, sir.
- 8 Q What were they photographs of?
- 9 A The retaining wall and the steps.
- 10 Q And what did these photographs depict?
- 11 A The retaining wall and the steps.
- 12 Q Which retaining wall?
- 13 A The lower, the taller retaining wall.
- 14 Q What was the purpose of the photographs?
- 15 A To document it so I could go back to the office and
- 16 write a proposal about what I thought needed to be
- 17 done.
- 18 Q All right. So, they are in a file that you have for
- 19 this investigation that you did?
- 20 A They are on a computer, yes, sir. They are digital.
- 21 Q And do you have anything with you today concerning the
- 22 investigation that you did, photographs or otherwise?
- 23 A I didn't do any investigation. I took some
- 24 photographs so I could write a proposal.
- 25 Q All right. Again, let me ask you, what was the

1 purpose of the photographs?

2 A So I would not forget what to include in the proposal.

3 Q All right. So, on the first visit, you took some
4 photographs and you did what else?

5 A I talked with the owner about the condition of some of
6 the walls.

7 Q Be more specific, please. You talked to the owner
8 about the conditions of the wall?

9 A Yes, sir.

10 Q And what was that discussion about?

11 A How some of the steps had settled irregularly and
12 deferentially causing trip hazzards and that they
13 didn't meet code.

14 Q The steps, you mean, didn't meet code?

15 A Didn't meet code. That the retaining wall was, had
16 some waves and ruts in it and it didn't look like it
17 was level or laid out level. In some cases, it looked
18 like it was very much out of square, out of plumb.

19 Q You discussed that with Mr. Waldrep?

20 A In relative terms, yes, sir. I didn't know what his
21 expertise was and so I kept it in relative words.

22 Q All right. So, you took photographs and you discussed
23 the steps and the wall with Mr. Waldrep.

24 A Yes, sir.

25 Q What else did you do?

- 1 A I went back to the office.
- 2 Q Did you take any measurements of anything?
- 3 A No, sir. Not really.
- 4 Q The dimensions of the wall?
- 5 A I didn't need to. I had the photographs.
- 6 Q The height of the wall?
- 7 A I didn't need that.
- 8 Q That's irrelevant?
- 9 A It's in the photographs. Three blocks equal two feet.
- 10 So, if you've got six blocks, that's four feet.
- 11 Q So, you got everything that you needed in these
- 12 photographs?
- 13 A To write a proposal, yes, sir.
- 14 Q Did you do any measurements concerning the alleged
- 15 settlement of the walls?
- 16 A No, sir.
- 17 Q Would that not be relevant to what you were doing?
- 18 A You could see the wave in it and the wave was more
- 19 than the height of the top cap. The top cap is two
- 20 inches tall and the wave was deeper than the top cap
- 21 and so that was more than two inches of settlement,
- 22 which is outside the specifications.
- 23 Q And these specifications that you are talking about,
- 24 this is from what?
- 25 A Allan Blocks installation manual.

1 Q Can you cite me to what you are speaking of? Do you
2 have the reference to that?

3 A I don't have the book with me, no, sir. It's online.

4 Q All right. But you don't have the manual and you
5 can't cite to me where that is provided for in the
6 manual?

7 A Not that specific page, no, sir.

8 Q All right. Anything else you did on that first visit?

9 A No, sir.

10 Q And did you subsequently go back for another visit?

11 A No, sir.

12 Q You've only been there one time?

13 A Yes, sir.

14 Q And all you did then was take photographs and talk to
15 Mr. Waldrep?

16 A Yes, sir. That's right.

17 Q And you said in response to Ms. Berger's questions,
18 before you went out there, it was obvious to you there
19 were issues with the wall after you had spoken with
20 Mr. Waldrep on the phone?

21 A The second time.

22 Q The second time what?

23 A Last week, he had another surveyor out there or he had
24 a surveyor or somebody out there with a Roden
25 instrument and they measured the top of that wall.

1 Q I'm not sure how that is responsive to my question.
2 Let me go back and say it again. You said that prior
3 to your first visit, you talked to Mr. Waldrep on the
4 phone.

5 A Oh, yes, sir.

6 Q And in discussions with him, it was obvious to you
7 there were some issues with the wall.

8 A Yes, sir.

9 Q And that was before you ever went out there.

10 A Yes, sir.

11 Q All right. So, you had pretty much made up your mind
12 before you ever got there, did you not?

13 A No. No. What he described to me led me to believe I
14 needed to drive over to look at it and see if there
15 was enough information ---

16 Q But is that not what you testified to awhile ago? You
17 said that it was obvious to you that there were issues
18 with the wall before you ever even looked at it. Is
19 that not what you said?

20 A I don't recall.

21 Q Now, with respect to, and you said you inspected two
22 walls?

23 A Yes, sir.

24 Q The, what we call the original or upper wall, was the
25 first one, the shorter wall?

- 1 A Show me that on a drawing.
- 2 Q All right. I believe it would be photo No. 21. Would
3 you look at that, please.
- 4 A Yes, sir.
- 5 Q All right. Was that the first wall you took a look
6 at?
- 7 A No, sir.
- 8 Q All right. How about pick out the wall you did look
9 at.
- 10 A This one, the big wall in the back.
- 11 Q Well, would it be the lower wall, the wall closest to
12 the lake?
- 13 A Yes, sir.
- 14 Q Okay. I misunderstood you. I thought you looked at
15 the small five or six block wall first.
- 16 A Oh, the one on the left side of the house, I looked at
17 that, as well. Or the right side of the house and you
18 are looking up ---
- 19 Q Let's come at this a different way. Looking at
20 photograph No. 21 and the wall in that photograph.
21 Did you ever inspect or do any evaluation on that
22 wall?
- 23 A That's the other side of the house.
- 24 Q No. 21.
- 25 A No. No.

1 Q No? You never evaluated that wall at all?

2 A (Witness looks at photo album) That's the one I
3 looked at that morning, that one.

4 Q All right. You are referring to photograph No. 61 and
5 that's where the steps are, which would be on the left
6 side of the house looking back up from the lake.

7 A Yes, sir.

8 Q Also depicted in Nos. 59 and 60.

9 A That's correct.

10 Q All right. You evaluated that wall.

11 A Yes, sir.

12 Q All right. Yes, sir.

13 Q And what other walls did you evaluate?

14 A The lower wall.

15 Q All right. Would that be the one in photograph No.
16 24?

17 THE COURT: Hang on. Let me make sure I'm clear, just
18 for the record. Mr. Chandler, you did not inspect the wall
19 shown in photograph No. 21, but you did inspect the wall
20 depicted in No. 58? Do you see where those reference
21 numbers are?

22 MR. CHANDLER: Yes, sir.

23 THE COURT: And you also looked at the wall depicted
24 in No. 61?

25 MR. CHANDLER: Nos. 58 and 61 are the same. One is

1 just looking up the hill and one is looking down the hill.

2 THE COURT: Gotcha.

3 MR. CHANDLER: Those are the same steps.

4 THE COURT: Okay. And then you looked at the wall
5 closest to the lake?

6 MR. CHANDLER: The lower wall, which is...

7 THE COURT: Gotcha. Okay. Thank you.

8 Q No. 23?

9 A Nos. 23 and 24.

10 Q Okay. Now, again, when you say you inspected it, this
11 was on October 15th when you came out there and took
12 some photographs.

13 A At least from my observations. Inspection is probably
14 too detailed.

15 Q Well, let's get it right, now. A while ago you said
16 you did not do an inspection, so did you or did you
17 not inspect the wall?

18 A I did not inspect the wall.

19 Q All right. Let's do it again. What did you do
20 besides take photographs and talk to Mr. Waldrep?

21 A I made observations.

22 Q And what kind of observations did you make?

23 A That the wall had settled in excess of the
24 specifications allowed by Allan Block. The steps were
25 irregular ---

- 1 Q Okay.
- 2 A --- in height and standard, which was outside the
- 3 variance allowed by code.
- 4 Q Okay. Is that it?
- 5 A Yes, sir.
- 6 Q You didn't make any other observations?
- 7 A That's -- no, sir. That's it.
- 8 Q No other testing?
- 9 A I didn't do any testing.
- 10 Q Thank you. Now, you said that you were provided some
- 11 information that indicated there to have been, did you
- 12 say, a six-inch variation in the elevation of the
- 13 wall?
- 14 A Not more than eight inches.
- 15 Q Not more than eight inches.
- 16 A Yes, sir.
- 17 Q And this information was provided to you by whom?
- 18 A Through Mr. Waldrep.
- 19 Q Mr. Waldrep gave you some information that said this
- 20 wall was as much as over eight inches out of level,
- 21 let's say. Is that a fair way to say it?
- 22 A Yes, sir.
- 23 Q And you relied on that?
- 24 A Yes, sir.
- 25 Q You didn't find it important to know the source of the

1 information or ---

2 A He mentioned it. I didn't write it down. I don't
3 have that file. It may be the guy that did the
4 survey.

5 Q You don't know who did it or how he did it or what
6 qualification he had to do it, you don't know any of
7 that?

8 A No, sir.

9 Q So, you're just taking that at face value that it
10 varies that much?

11 A Oh, no, sir. I can show you in that photograph.

12 Q Okay. Show me in which photograph?

13 A If you'll look at photograph No. 92. That's a four-
14 foot level right there, because it spans approximately
15 three blocks and three blocks equals four feet in
16 length and you can look on that level right there and
17 see that it's an inch-and-a-half out of plumb in four
18 feet. Well, that's already outside the
19 specifications.

20 Q All right. But I'm trying to get you to tell me how
21 it is that you get the eight inches.

22 A I was told that.

23 Q All right. That's purely based on what somebody told
24 you and you don't know the source of that information.

25 A Sir, I ---

1 Q Is that typically the way you get information in
2 making engineering opinions, is take whatever somebody
3 tells you?

4 A Sir, I rely on input from other people. Yes, sir.

5 Q But don't you have to -- it doesn't have to be
6 reliable information of the type engineers would
7 normally rely on?

8 A It was one of the owner's subcontractors, sir.

9 Q Okay. Now, along the same lines, you said that you
10 could observe a dip, was it a dip or dips in the wall?

11 A There was definitely a dip ---

12 Q A dip.

13 A --- in the wall in the vicinity where the low-lying
14 area was on that wall and there's also a wave,
15 whatever, in the stairwell of that same wall.

16 Q Okay. But just sticking with the wall for right now
17 and the photograph No. 92 that you were referring to
18 that shows the level on top of the wall, is that the
19 area you are talking about where there was a dip in
20 the wall? (Mr. Hood shows photograph to witness)

21 A (Witness looks through photo album) Yes, sir, I
22 suppose so. That looks about the right place with
23 respect to the house and the ---

24 Q You would agree that that is the area that we are
25 looking at where the level is, that would be the area,

1 what you are calling, "a little dip" in the wall?

2 A Yes, sir.

3 Q All right. And at that point, according to this
4 level, it's about an inch or two.

5 A About an inch-and-a-half.

6 Q So, if there's a dip, that means it goes back up.
7 Doesn't it?

8 A The whole wall is built at an angle. The whole wall
9 is at a slope and at just that one area does it have a
10 dip in it.

11 Q Okay.

12 A It's a progressive failure all the way to that end and
13 then there's an emphatic curve in that area.

14 Q All right. Stay with me right now. I'm talking about
15 the dip, we're talking about just one limited area
16 where there is a swag or a dip in the wall. It's
17 visible, is it not?

18 A Yes, sir.

19 Q Now, as far as the longer change in elevation which
20 you are referring to, that all goes back to this
21 unknown source who's giving you this information. You
22 don't have any information other than that as to the
23 change in elevation from one end of the wall to the
24 other. Am I correct?

25 A Say that again?

1 Q Other than this information that you got through Mr.
2 Waldrep as to the change in elevation along the length
3 of the wall, you don't have any other information on
4 which to base that opinion or conclusion. Do you?

5 A I have that photograph, No. 92.

6 Q But that is, as you pointed out, just one small
7 segment of the wall.

8 A Yes, sir. But that one small segment falls outside
9 the specifications allowed by Allan Block.

10 Q Okay. I understand what you're saying there, but I'm
11 referring to the eight inch variation you're talking
12 about over the length of the wall. You have nothing
13 to support that other than some information that was
14 given to you by Mr. Waldrep.

15 A Sir, I get survey information from other people all
16 the time.

17 Q Yes or no?

18 A That's correct. I rely on other people to provide me
19 with accurate information.

20 Q And do you rely on just anybody to give you that
21 information?

22 A No, sir.

23 Q Now, you stated, I believe, that as a rule of thumb, I
24 believe is the term you used, any wall over four feet
25 must be engineered.

1 A Yes, sir.

2 Q Is that correct?

3 A Yes, sir.

4 Q Now, would you explain what that means when you say it
5 needs to be engineered?

6 A You've got to take into account local stability, the
7 soil that you are using for the backfill behind the
8 wall, you've got to account for the thickness of the
9 grid, the type of grid, the length of the grid behind
10 the wall, how far it has to go back to support that,
11 you've got to account for the in fills of the block
12 itself, you've got to account for the weight of the
13 mass you're supporting. It's going to end up being a
14 wedge behind the wall. You've got to account for the
15 global stability on that wedge to make sure it's not
16 going to over top or slide through the soil medium
17 that you're trying to support. You've got to take
18 into account hydrostatic pressure. You've got to take
19 into account the foundation that supports all of it.
20 All that needs to be taken into account. That's why
21 you get an engineer involved.

22 Q Is that the type work that you do?

23 A Yes, sir. It is.

24 Q You do engineering for the construction of these
25 walls?

1 A I do.

2 Q And could you have done it for this wall?

3 A Yes, sir.

4 Q This lower wall we're looking at?

5 A Any of them, yes, sir.

6 Q Would you tell me exactly what you would have done to
7 engineer that wall?

8 A What I just said. I would have taken into account the
9 soil properties.

10 Q I want you to tell me what you take into account, what
11 do you actually do? Do you have to test, calculate,
12 what do you do?

13 A In this particular case, I did not know where the fill
14 material would have come from. I would have asked the
15 owner or whoever he was going to ask to build the wall
16 where are you getting your fill material. If it's on
17 site, I would look at the onsite soils. If it's
18 offsite, I wait until they get a stockpile at the site
19 and take a look at it then. I'd go back to the office
20 and do a couple of calculations. I use a program
21 called, "SR Wall". It's the National Council of
22 Masonry Association Program used to design retaining
23 walls, segmental MSC walls, Mechanically Stabilized
24 Earth Walls. At that point, once you do that design
25 and the calculations, put in the safety factors that

1 you want for global stability, overturning, sliding,
2 friction, soil friction and it actually tells you how
3 much grid is required to make that wall stabile,
4 meeting those safety factor criteria.

5 Q All right.

6 A I print that sheet of paper, I review it, I stamp it
7 and I issue it to the contractor for construction.

8 Q How long would it take you to do all that?

9 A Overnight. Including the drawings, two details and
10 the calculations, three, three-and-a-half hours.

11 Q Now, you are familiar with the term pre-engineered?

12 A Yes, sir.

13 Q What does that mean?

14 A Pre-engineered is a guideline that most of the block
15 manufacturers use now to let a contractor look at what
16 he's got so he can go ahead and order the components
17 he needs to construct the system. It's not to be used
18 for construction. It says that very clearly in their
19 manuals. All walls have to be designed for
20 engineering, especially in this area, you're in a
21 seismic zone. You have to take into account seismic
22 in this area.

23 Q So, you'd have to do earthquake calculations or
24 something?

25 A It's all a part of that program. Yes, sir.

1 Q How many, how many backyard retaining walls have you
2 engineered?

3 A Twenty-five or thirty, maybe a few more than that.

4 Q And you would agree that the countryside is full of
5 backyard retaining walls that have not gotten the
6 stamp of an engineer on it?

7 A I've also seen some that have fallen, too. Yes, sir.

8 Q Well, that's ultimately the question, is it not, is
9 whether the wall is structurally sound or not. That's
10 the ultimate concern, is it not?

11 A Yes, durability, life expectancy of the wall. Yes,
12 sir.

13 Q That's the whole purpose of this engineering
14 requirement that you're talking about.

15 A Life safety.

16 Q And you gave the opinion, I believe, that this wall is
17 in failure mode.

18 A Yes, sir.

19 Q And again, what is that based on?

20 A Once it falls outside the specifications by the
21 manufacturer or by the code, it's in failure mode.

22 Q Well, what does failure mode mean?

23 A Failure mode means that it is not in the same
24 condition that it would be had it been done correctly.
25 It is outside the parameters.

1 Q Well, does that mean it's going to collapse?

2 A It will. Yes, sir.

3 Q Eventually, it means it will fall in.

4 A Yes, it will fall over.

5 Q Fall over. That's what failure mode means.

6 A Yes, sir.

7 Q And again, your opinion or conclusion that this wall
8 is in failure mode is based on what, now? And please
9 be specific what you relied upon giving that opinion.

10 A I relied upon some surveying that was provided to me.

11 Q And be specific. Surveying that was provided for you,
12 what are you referring to?

13 A The information that I got from Mr. Waldrep last week.

14 Q Okay. Some information Mr. Waldrep gave you.

15 A Right.

16 Q From some unknown source.

17 A From a contractor. I don't know, he'll give you his
18 name, I'm sure. The photograph No. 92, shows that the
19 wall is already in failure mode. The steps that are
20 irregular and improperly spaced that are outside code
21 compliance of Chapter Three of the International
22 Residential Code.

23 Q All right. Well, when something goes in failure mode,
24 what sort of consequences do you expect to observe?

25 A It could take three years. Because there is no grid

1 or very minimal grid behind the wall, so it's not
2 built per even the guidelines in the book, that
3 doesn't even follow those guidelines and so because of
4 that, what you can expect is from that grid up, any
5 water that pushes on that wall, the soil is going to
6 push on that wall, that wall is eventually going to
7 topple over.

8 Q All right. What time period would that normally occur
9 if you've got a wall that's not properly constructed,
10 how long is it going to take before this wall -- and
11 I'm sure it varies according to circumstances, but
12 what would be a normal likely period that you would
13 likely see a failure of the wall?

14 A I've seen them fail as early as nine months. Pelham
15 Road, there's a gas station on Pelham Road in
16 Greenville that a twenty-four high foot retaining wall
17 built improperly, it failed in nine to twelve months
18 depending on where it was on the wall. I've seen them
19 four years old that still haven't fell.

20 Q What about this one? It's over four years old, four
21 going on five years old.

22 A Yes, sir. And it's in failure mode.

23 Q So ---

24 A It's already started.

25 Q Okay. Aside from, again, this information that you

1 relied on, are there any other signs that this wall is
2 in failure mode? Is there any cracking?

3 A Sir, segmental blocks, it's all cracks. There are no
4 rigid joints between the blocks.

5 Q Is there any separation, then?

6 A It's hard to tell from those photographs. There is a
7 little bit, but on eighteen inches, you are talking
8 about an eight inch curve on eighty feet and you're
9 talking about an eight-inch block. You can do the
10 algebra on it and you're going to find out a little
11 bit of difference on it, but you've got to add all
12 those differences up to get the synergy associated
13 with that inch bit.

14 Q All right. Can you visually look at these photographs
15 you took and see anything wrong with this wall to
16 indicate it's failing?

17 A That, that ---

18 Q Other than that dip in the wall.

19 A No, sir. That's enough.

20 Q All right. Now, again, you told me, I believe, that
21 it is prudent -- no, excuse me. You said it is a rule
22 of thumb that all walls over four feet be engineered.

23 A It's a generally accepted engineering practice.

24 Q Now, you also made the statement that it is prudent to
25 do soil testing. Now, is that any kind of a

1 requirement from any source?

2 A Yes, sir, by Allan Block.

3 THE COURT: By what, please?

4 MR. CHANDLER: Allan Block, the manufacturer of those
5 blocks.

6 Q Now, again, can you cite me any provision to that
7 effect?

8 A Their web page. I reviewed it again last night. They
9 said very clearly that you can use these calculations
10 for planning purposes, but you go get an engineer
11 involved to make sure the seismic, the grid spacing,
12 and all that is accurate.

13 Q Now, you said also that you believe top soil was used
14 as backfill on this wall.

15 A Yes, sir. There's evidence in that photograph of a
16 darker material, not indicative of this region, of
17 being soil.

18 Q Would you point that photograph out to me, please?

19 A (Witness looks through photograph album) Sorry, I
20 can't put my hands on it. (Continues to look) I
21 didn't write the photograph number down, sir. I don't
22 see it now.

23 Q On all those photographs you are seeing, would you
24 agree with me that all that dirt around those walls
25 appears to be pretty much red clay soil? Would you

1 disagree with that?

2 A Some of it is red clay, yes, sir.

3 Q Now, would you also agree that you would expect to
4 find topsoil up at the top on the surface of the yard
5 or lawn where you are going to plant grass?

6 A Yes, sir.

7 Q So, I'm trying to figure out how you can make a
8 conclusion as to what kind of dirt is there. If you
9 are looking at the surface, how do you know what's
10 under it?

11 A It's one of the -- it's one of the during construction
12 photographs, sir. I'm sorry, sir, I don't see it.

13 Q All right. Now, do you have any information that
14 would indicate to us that there is any failure of this
15 wall caused by a failure to do soil testing or because
16 the soil was not properly filled behind the wall?

17 A Well, you said yourself that it's clay, right? Red
18 clay near the surface, which is a harder design
19 criteria than if it were a sandy soil. There's no
20 geogrid at all holding this five-foot-high wall up and
21 that would have required two, maybe three, grids if
22 it's in backfill, just so that wall, from that
23 photograph No. 50, 60, 61, that block of steps and
24 wall, it's four foot ten, that's almost a five-foot
25 wall that has no geogrid behind it holding it up.

1 Q All right. We are referring to photograph Nos. 50-61?

2 A If they did back fill with red clay like you said, it
3 would require at least three layers of geogrid to
4 support that wall and if it was a sandy backfill or
5 gravel backfill, it would require maybe one or two.

6 Q Well, in the first place, this isn't the wall that
7 you're saying is in failure mode.

8 A This is a part of the problem, yes, sir. This is a
9 part of the wall that's adjoining the house that's
10 backfilled and there's a flower garden ---

11 Q What I'm asking you is, you've given the opinion that
12 the lower wall was in failure mode, the one with the
13 dip in it.

14 A Yes, sir.

15 Q That's a different wall than the one you're looking at
16 now.

17 A Okay.

18 Q All right. I'm asking you if the wall you are
19 referring to, the wall with the steps, is that one in
20 failure mode?

21 A The steps are in failure mode.

22 Q All right. The steps are in failure mode. Okay. But
23 there's nothing wrong with the wall there that you are
24 able to see.

25 A Yes, sir. It doesn't have any grid supporting the

1 wall at all.

2 Q All right. I understand, the picture that you are
3 looking at there, you're saying it didn't show any
4 grid. What I'm saying, as it sits now, as that wall
5 sits right now, is there anything wrong with it?

6 A The way it was constructed.

7 Q Well, assuming what you are looking at here. But what
8 I'm saying is, if you look at the wall the way you
9 looked at the lower wall, did you make a conclusion
10 that the upper wall with the steps is in failure mode?
11 I haven't heard you say that before. I'm just asking,
12 is it?

13 A Oh, I don't know if it is or not, but it was not built
14 correctly. The steps are in failure mode, but ---

15 Q Is there any sign that there is anything wrong with
16 that wall? It's sinking, it's cracking, it's un-
17 level, there's anything wrong with it?

18 A The steps.

19 Q Other than the steps not being exactly right.

20 A No, sir.

21 Q All right. Let's go back to the lower wall, the one
22 you say is in failure mode. Now, you weren't there
23 when this wall was built. Is that correct?

24 A That's correct.

25 Q So, do you know anything about the geogrid or whatever

1 was placed in that wall?

2 A No, sir. But the geogrid, the way those walls are
3 built, you take a block and you sit it and the grid
4 comes out almost to the face of it and then you sit
5 another block on top of it and they are staggered, you
6 know, you can see they're staggered on the wall, and
7 if you look at the face of that wall, you should be
8 able to see the geogrid right there between the two,
9 almost like a sandwich and you should be able to see
10 that geogrid layer right there between those two
11 blocks, because the top block squeezes on the bottom
12 block and that creates the shear that holds that block
13 in place and holds the friction together for that
14 retaining wall. That's how those walls are
15 constructed. If you look at the face of that wall
16 very closely, there is only one spot between two
17 blocks that you can even see a piece of geogrid. That
18 would lead me to believe that there is only one layer
19 of grid in that wall to begin with. With just one
20 layer on a six-and-a-half or seven foot wall, that's
21 improper.

22 Q That would lead you to believe that, but that doesn't
23 prove anything. Does it? Simply because you don't
24 see the geogrid sticking out between blocks.

25 A Well, if I don't, that proves that the geogrid isn't

1 in there correctly, which is just as bad. If it
2 doesn't tie in with the block, then it can't use the
3 shear of the block itself to hold itself in place.

4 Q And you mean it doesn't tie in.

5 A If the blocks are not -- if you take the two blocks
6 and you lay that piece of grid between those two
7 blocks and you sit that other block on top of it, if
8 you don't bring it all the way up to the face, then
9 you don't develop the shear of that block to hold that
10 geogrid in place and if you don't do that, then the
11 wall can slip and fall on a localized failure instead
12 of a global failure.

13 Q How wide are these blocks?

14 A Sixteen inches wide.

15 Q All right. Sixteen inches. You've got sixteen inches
16 of this block in which you can, between which you can
17 compress this geogrid and you're telling me if it's a
18 half-inch inside the block, that's totally wrong?

19 A The face is only an inch thick in the front, sir. The
20 center of it is hollow.

21 Q Okay.

22 A The center of those blocks are hollow. It's just a
23 shell. You fill the center of it with gravel.

24 Q All right.

25 A And that helps with the shear strength.

1 Q All right. You're concluding from that that there is
2 not proper geogrid in there.

3 A Yes, sir.

4 Q Is there another way you could check for that?

5 A You could take the wall down.

6 Q Isn't there some other things you could do like bore
7 down or something of that nature?

8 A Yes, sir, I can. I can bore where the fence is, if
9 you come up on top, you can drill several holes and
10 you can determine if there is grid there.

11 Q All right. So, there are ways you can check all this
12 stuff, but that hasn't been done.

13 A No, sir.

14 Q You're awfully anxious to take this wall down.

15 A It's already failing. The wall is already coming
16 down.

17 Q You also said you noted in some of those photographs,
18 the gravel did not come all the way to the top.

19 A Yes, sir.

20 Q Again, the gravel doesn't come all the way up to the
21 surface of the yard. Does it?

22 A No, sir.

23 Q I mean, you're going to leave some soil between the
24 surface and where the gravel starts, are you not?

25 A Yes, sir. The sketch shows one block from the top.

1 One block from the top is where the topsoil goes. The
2 rest of it is supposed to be gravel.

3 Q There are some photographs here that show gravel not
4 coming up to the top block?

5 A Yes. There was. No. 25, photograph No. 25.

6 Q Could I see that, please, No. 25?

7 A Yes, sir.

8 Q Well, it's a little bit hard to tell, but it looks
9 like to me that's about to the level of the top block.

10 A With the dirt around it?

11 Q Oh, you're talking about right here. No. 25.

12 A That's topsoil on the middle of that, a block-and-a-
13 half down.

14 Q All right. Any other evidence of that?

15 A No, sir.

16 Q All right. Again, on this geogrid issue, you stated
17 the opinion, your opinion, that the specifications
18 were not followed. That's what I had in my notes.
19 You said, in your opinion, the specifications with
20 respect to the installation if the geogrid were not
21 followed?

22 A Yes, sir.

23 Q And again, are you basing that on the fact that you
24 couldn't see it peeping out between the blocks?

25 A No, sir. There was one photograph of that other wall

- 1 that shows that it is not in there at all.
- 2 Q All right. But other than that one wall in that one
- 3 photograph, is that what you are basing it on?
- 4 A Not just that. No, sir.
- 5 Q Well, what?
- 6 A Visual evidence. The fact that the wall is settling.
- 7 It's hard -- if a geogrid is installed and it's
- 8 installed correctly, you can pretty much take the face
- 9 off that retaining wall -- that face just becomes a
- 10 facade at that point, a weather-resistant barrier to
- 11 keep the soil from washing away from behind it because
- 12 the grid and the compacted soil between those layers
- 13 of geogrid will stand up by itself. That's the sole
- 14 purpose of putting that grid in there. At that point,
- 15 that block wall becomes nothing more than a facade.
- 16 You can take it off as long as you protect it from
- 17 erosion. You can put a different kind of face on
- 18 there. It doesn't matter what the face is. It only
- 19 matters what that MSE, mechanically stabilized earth,
- 20 looks like behind that wall. That's the infilled
- 21 soil, that's where you develop all of your strength of
- 22 a retaining wall. If you develop that correctly,
- 23 you're not going to be able to get an eight inch drop
- 24 in that block in eighty feet. You're not going to be
- 25 able to see an inch-and-a-half gap, because that grid

1 is going to hold that block together and it will keep
2 it, it will allow it to almost create grout. I've
3 seen that happen before where there are cavities
4 underneath the wall, but the grid itself is holding
5 the block together.

6 Q All right. And all that goes back, again, to the
7 assumption that we've got this eight inch fall.

8 A We know we've got an inch-and-a-quarter in four feet,
9 more than an inch-and-a-half in four feet.

10 Q Now, one of the other things that you mentioned with
11 respect to the drainage is, there's supposed to be
12 four inches of gravel under the block. Is that
13 correct?

14 A Yes, sir.

15 Q All right. Is that under the bottom, the first
16 course?

17 A Yes, sir.

18 Q All right. There's supposed to be four inches of
19 gravel underneath the first course of block.

20 A Well, graded granular material.

21 Q Okay. And you somehow made a determination that there
22 were only two inches?

23 A I saw a photograph that Mr. Waldrep sent me showing it
24 as being two inches.

25 Q Do we have that photograph? Does anybody have that

1 photograph?

2 A I think I have it in my notes.

3 Q Which are where?

4 A Right there, sir. (Indicating)

5 MR. HOOD: May he, Your Honor?

6 THE COURT: Sure.

7 (Mr. Chandler retrieves his notes and returns to the
8 witness stand)

9 Q All right. You just handed me a photograph that
10 appears to be a base of a wall with a bunch of leaves
11 around it and it looks like there's been kind of a
12 hole dug out. Is that right?

13 A Yes, sir.

14 Q And where did you get this from?

15 A Mr. Waldrep.

16 Q And what is this, in your understanding, supposed to
17 depict?

18 A It's the bottom of the retaining wall, the lower
19 retaining wall. It's the bottom one.

20 Q All right. Well, I can see it's the bottom of a wall,
21 but what does it tell you?

22 A It tells me that -- from the bottom of the wall down
23 to where you get to soils, there's only two inches of
24 gravel there.

25 Q You're not digging under the wall, are you? That's

1 kind of out in front of it.

2 A Well, sure, but that's what the photograph shows. It
3 shows that out in front of that wall. You've got
4 gravel that is not in front of the wall, it's
5 underneath the wall.

6 Q All right. Who did this digging and measuring and
7 whatever is involved in this photograph?

8 A Mr. Waldrep.

9 Q So, Mr. Waldrep is giving you that information, too,
10 about how much gravel is underneath the wall?

11 A Yes, sir.

12 Q And did he tell you it was two inches?

13 A Yes, sir.

14 Q You haven't confirmed that by your own observations or
15 any other way?

16 A No, sir. I have not.

17 Q And so, you're making an opinion based on that, that
18 this wall is not constructed properly.

19 A Well, not just that.

20 Q Well, that's one of the reasons that you're basing
21 your opinion ---

22 A That's one of the reasons. Yes, sir.

23 Q All right. You also have a problem with the drainage
24 on this wall. Is that right?

25 A Yes, sir.

1 Q And what do you know about the drainage?

2 A I know that I did not see any outfall or drainage,
3 four inch perforated pipe drain lines.

4 Q Where did you look?

5 A On the ends, in the middle, between the wall and about
6 fifty feet down from the wall.

7 Q Fifty feet down from the wall meaning what?

8 A Coming down the slope towards the lake. If you've got
9 to drain that to daylight, it's got to be lower than
10 the wall and so it's got to come out on the low end,
11 which is between the bottom of the wall and the lake
12 itself.

13 Q So, you looked for an outlet for the drainage and
14 didn't find it.

15 A That's right.

16 Q Did you ask anybody?

17 A I did.

18 Q Who?

19 A Mr. Waldrep.

20 Q Okay. So, you couldn't find it, but that doesn't
21 necessarily mean it's not there.

22 A Well, it's only two years old. It would be very
23 visible. It would be sticking up out of the ground.
24 It's not a very good outflow if it's covered up.

25 Q All right. Did you see some other drainage basins and

1 other areas where water was collected around these
2 walls?

3 A Say that again, sir?

4 Q Did you see any other drainage intakes for surface
5 water when you were looking on the property?

6 A I don't recall. There probably are, yes, sir.

7 Q Well, if they are there, then they would have to drain
8 somewhere, would they not? If the water goes in, it
9 has to come out somewhere.

10 A Yes, sir.

11 Q Do you see any outlets for that?

12 A No, sir. They could have been lower down.

13 Q Okay. Well, these could have been lower down, too,
14 couldn't they?

15 A It could be.

16 Q You just didn't find them, but you can't say for a
17 positive fact there are none there.

18 A No, sir. I did not find them.

19 Q How hard did you look?

20 A I was there for a couple hours, not looking at just
21 that, though.

22 Q All right. Let me ask you this, please, sir. In view
23 of your observations here, what is your prediction as
24 far as what's going to happen with this wall if it
25 stays the way it is?

1 A It's going to settle a little bit further and then the
2 top is going to start to splay out over the front and
3 since there is no geogrid to hold it together, the
4 blocks will start tumbling off. Every time there is a
5 rain storm, they will get a little bit bigger and it
6 will start cascade and before long it will be four or
7 five blocks during a rain storm instead of one or two.

8 Q So, that means it will just start leaning over, so to
9 speak? Is that what you are saying?

10 A From about the halfway point up, it will start to
11 lean, yes, sir.

12 Q And again, that's based on your belief that there is
13 no geogrid in place here. Is that correct?

14 A There's not sufficient geogrid.

15 Q Okay. And that, in turn, is based upon the fact that
16 you couldn't see it sticking out anywhere.

17 A There's no photograph showing it anywhere. We've got
18 a hundred, there's a hundred and seven photographs
19 here, sir, and not a single one of them shows any
20 geogrid on the job site.

21 Q I guess what I'm trying to get at here is that what
22 you are recommending is that this whole wall be torn
23 down. Is that right?

24 A Yes, sir.

25 Q And do you know what the estimated cost of tearing it

1 down and rebuilding it might be?

2 A About \$7.00 a square foot to take it down and about
3 \$25 to put it back.

4 Q Have you calculated how much money that would be?

5 A I don't recall.

6 Q So, you are making that recommendation on some
7 assumptions that there is no geogrid in place to hold
8 the wall up when there could easily be, there
9 certainly could be a way to test that. To find out
10 what geogrid is in place would be a whole lot less
11 expensive than doing that.

12 A But if the grid is not there, sir, aren't we in the
13 same ---

14 Q But you are making an assumption. I'm saying if the
15 proof is not there, there is, I would assume, a
16 relatively easy testing that could be done to find
17 that out for sure.

18 A But the wall is already built. So, if we find the
19 grid in there, that means the grid wasn't installed
20 right or the soil wasn't compacted, some negligence
21 was involved with the construction of that wall that
22 allowed it to settle eight inches, so it still has to
23 come down, so proving the grid is in there is not
24 going to solve anything.

25 Q Do you have any other opinion that you've drawn

1 concerning any of these walls?

2 A The walls adjacent to the house need to be taken down,
3 the brick of the house needs to be properly
4 waterproofed and the walls need to be reinstalled.

5 Q That's one other question I wanted to ask you about.
6 You also gave the opinion that the construction of
7 these walls constituted a modification to the
8 structure.

9 A Yes, sir.

10 Q All right. Now, are we talking about the structure
11 being the house?

12 A Yes, sir.

13 Q And explain to me again how a wall changes the
14 structure of a house that it is adjacent to.

15 A That foundation wall sitting there just like this, all
16 of a sudden, if you come out in front of it and you
17 build a retaining wall and you backfill that retaining
18 wall in front of it with soil, you put a sprinkler
19 system, a irrigation system or something like that
20 three feet high above what the foundation, the sub-
21 grade used to be, the finished floor used to be, all
22 of a sudden, three foot higher and that wall is
23 subject to irrigation water and it's not
24 waterproofed, you are adding water pressure,
25 hydrostatic pressure on that wall that it wasn't

1 designed to take.. If it was designed to take it, it
2 would have been waterproofed.

3 Q So, you're saying there is some sort of a pressure to
4 the structure itself because of this wall?

5 A Yes, sir. Anytime you do that kind of modification to
6 a house, you've got to get a permit.

7 Q And is that the point behind that opinion? I'm just
8 trying to understand. You gave the opinion that this
9 wall constitutes a modification of the structure.
10 What is the relevancy of that opinion to what we're
11 talking about today?

12 A You've added a surcharge load to a lateral wall
13 without compensation to the resistance of it. So, in
14 other words, you've added an extra four hundred and
15 fifty pounds, say half of that, two twenty-five,
16 pushing against that house at the bottom of the wall
17 without any resistant compensation in design or
18 construction inside to push back.

19 Q Did you see any indication of any problems at this
20 point, four, going on five years, out?

21 A Sir, mold is a deadly killer. It's a silent killer.
22 I mean, there is probably water leaking through that
23 brick right now.

24 Q All right. Are we talking about -- let me understand.
25 Are we talking about the problem being moisture? Are

1 we talking about the problem being structural?

2 A Yes, sir. Both.

3 Q All right. Well ---

4 A It's not just the soil pushing on the wall. Every time
5 that thing gets rained on or filled up with water from
6 the irrigation or whatever, it's the soil plus the
7 water both pushing against it and at that time, it
8 becomes a fluid and that pushes on it.

9 Q All right. Well, let me ask you this. Have you seen
10 any -- did you see any indication of any structural
11 issues in that area, four going on five years now, out
12 from when that wall was built? Any evidence at all
13 that there are any structural problems?

14 A I haven't investigated it yet, sir.

15 Q Then the answer to that is "no". You have no
16 indication that there are any structural issues there.

17 A You showed me on photograph ---

18 Q Answer my question.

19 A I'm sorry. Sir, what was your question?

20 Q You have seen and can tell us about no indication of
21 any structural problems with respect to the wall of
22 the house, four going on five years out now, since
23 this wall was constructed.

24 A No.

25 Q No. Okay. All right. Let's talk about the moisture

1 issue. Is there waterproofing there?

2 A No, sir.

3 Q How do you know?

4 A Well, right here is a photograph, No. 58, showing the
5 wall only two blocks high and there is no
6 waterproofing on the brick itself.

7 Q Point to me on No. 58 that you are talking about.

8 A This spot right here. If you'll look at one of the
9 other photographs when it is completed, it shows that
10 wall being more than two blocks high.

11 THE COURT: You are referring to next to the house,
12 going upstairs, on No. 58?

13 MR. CHANDLER: No. 58, right there, sir. This right
14 here.

15 THE COURT: All right.

16 A In a later photograph, somewhere in this book, it
17 shows that that wall is not two blocks high, but four
18 blocks high and you can see right now on the two
19 blocks high that the brick itself or the structure is
20 not waterproofed.

21 THE COURT: Are you looking at No. 58 and then No. 61?

22 MR. CHANDLER: No. 58 and No. 61, yes, sir. I was
23 trying to find the finished photograph of that to show how
24 high the wall actually was. I saw it at four blocks.

25 THE COURT: Okay. Go ahead.

1 Q All right. Well, on No. 58, let me draw your
2 attention back to that photo.

3 A Okay, sir.

4 Q Would you go to it, please. There is some yellow
5 stuff showing along there where that wall joins onto
6 the house. Do you know what that is?

7 A Some old waterproofing.

8 Q Old?

9 A Old.

10 Q How can you tell that?

11 A Well, it doesn't come to the top of the block.

12 Q What does that tell you about whether it's old or
13 not?

14 A No. The photograph No. ---

15 Q All I'm asking right now, is that not some indication
16 that there is some waterproofing in that

17 A Look at photograph No. 53. That will describe --
18 that's not new right there. That's old waterproofing
19 on that.

20 Q Well, new or old, is there evidence in that photograph
21 that there is waterproofing there?

22 A Yes.

23 Q All right. Thank you, sir. I think that's all I
24 have.

25 THE COURT: Any redirect, Ms. Berger?

1 Alewine water sealed the front corner, the downward
2 left side of the house and also this right-hand side
3 of the house, also.

4 Q All right. Then is it correct to say that you did not
5 agree to and did not perform any waterproofing nor was
6 paid to do any waterproofing?

7 A That's correct.

8 Q Or billed for any waterproofing?

9 A That's correct.

10 Q All right. Thank you.

11 THE COURT: Thank you, sir. You may step down. You
12 are free to stay inside the courtroom at this point.

13 MR. HOOD: That completes the case in chief for the
14 Plaintiff.

15 THE COURT: Okay. Ms. Berger?

16 MS. BERGER: I'm ready. If I can get a witness,
17 Judge.

18 (After being duly sworn by the Clerk of Court, Henry
19 Chandler testified as follows:)

20 CLERK OF COURT: Have a seat, please.

21 DIRECT EXAMINATION OF HENRY CHANDLER BY MS. BERGER

22 Q State your full name, please.

23 A My full name is Henry William Chandler.

24 Q Okay. And what is your occupation, Mr. Chandler?

25 A I am a civil engineer.

1 Q And how long have you been so educated?

2 A Since 1983.

3 Q And where were you educated?

4 A I have a bachelor of science in civil engineering from
5 The Citadel in Charleston and a Masters in Business
6 from Clemson University. I did some graduate work at
7 South Carolina in engineering.

8 Q What experience do you have in ---

9 THE COURT: Hang on a second. Turn around here,
10 please. I did some work for you back in my practice or did
11 I do some work against you in my practice?

12 MR. CHANDLER: No, sir.

13 THE COURT: I was just checking to make sure I didn't
14 have a conflict of interest. All right. Go ahead.

15 MR. CHANDLER: Yes, sir.

16 Q Mr. Chandler, are you in business?

17 A Yes, ma'am. GME Engineering.

18 Q And what do you do, principally?

19 A Civil engineering, retaining walls, foundations,
20 construction surfaces, Chapter 1s and Chapter 17
21 inspections for The International Building Code, code
22 compliance for residential work.

23 Q And how long have you been doing that type of work?

24 A GME Engineering, I started in 1991. I did some active
25 duty time. I got out and worked for a couple of

1 companies and started GME Engineering in '91.

2 Q And you have familiarity with the erection and failure
3 of retention walls. Is that correct?

4 A Yes, ma'am.

5 Q Could you approximate about how many times you have
6 been involved with either the failure of or evaluating
7 retention walls?

8 A Probably twelve to fifteen different cases, anywhere
9 from four feet in height up to twenty-eight feet.

10 Q And would they be principally, residential or
11 commercial or a combination?

12 A Both. Yes, ma'am.

13 Q Now, you are familiar with the Waldrep property.

14 A Yes, ma'am..

15 Q And when was the first time you had an occasion to be
16 at the premises?

17 A October 15, 2008.

18 Q And for what purpose were you there?

19 A Mr. Waldrep called and after several discussions, it
20 was obvious there were some issues with the retaining
21 wall. He asked me to go over there and look at it and
22 at that time I brought a camera and went up there and
23 began to collect enough information to write a
24 proposal to explain how we would fix the wall.

25 Q Okay. And took place about when?

1 A October of 2008.

2 Q And let's talk about the first wall, the smaller wall.

3 A Yes, sir. Yes, ma'am.

4 Q Do you have any memory of the dimensions of that wall,
5 the height of that wall?

6 A The small wall, no, ma'am. Maybe five or six blocks
7 tall.

8 Q And what would that be in feet?

9 A Three blocks equal two feet, so six blocks would be
10 four.

11 Q Okay. And that would be the initial retention wall?

12 A The one that touches the house. Yes, ma'am.

13 Q Okay. Did you evaluate that at that time?

14 A No, ma'am. I didn't do a full scale evaluation other
15 than that it needed to be, parts of it needed to be
16 torn down and evaluated because it didn't look like it
17 was built to code.

18 Q Now, let's go to the larger retention wall.

19 A Yes, ma'am.

20 Q Was that the reason you were initially requested to go
21 to the Waldrep property?

22 A It is.

23 Q And what is the length, what are the general
24 dimensions of that wall?

25 A It's approximately, if memory serves me right, about

1 80 to 85 feet long and varies up to 6'10" tall.

2 Q And did you make an evaluation of that wall?

3 A Yes, ma'am. I did.

4 Q And what did you conclude after examining it?

5 A The wall in October of '08, had already begun to
6 settle. Where it did a turn and the steps were
7 constructed, the steps were improperly constructed.
8 Steps have to be installed or constructed in
9 accordance with three of the international residential
10 codes.

11 Q Was that not done?

12 A No, ma'am. No, ma'am. Steps, between the highest and
13 the shortest step there is only a 3/8" variance
14 allowed and in this particular case, the difference
15 between the tall step and the short step was about 6".

16 Q Talk about the length of the retention walls. Of
17 course, you're in the business and are a civil
18 engineer, but a wall of that size and that height and
19 length, would that typically be one conducive to
20 consulting an engineer or designer first?

21 A Yes, ma'am. The rule of thumb is any wall over four
22 feet must be designed and stamped by an engineer.

23 Q What is your familiarity with the code in Ocone
24 County concerning the parameters of retention walls on
25 residential property?

1 A They mimic the International Residential Code and I
2 think they adopted it pretty much at the same time the
3 State adopted its codes and having talked with the
4 CBO, the Chief Building Officer up here, his name is
5 Shandon Chambers, I believe it is, he and I have gone
6 through several discussions about retaining walls
7 before and he pretty much says anything over four feet
8 has to be designed.

9 Q And the International Residential Code, which you are
10 saying Oconee County has adopted that as its own?

11 A Yes, ma'am.

12 Q And have you had an occasion to evaluate the larger
13 wall since 2008?

14 A I have. I had telephone conversations with Mr. Waldrep
15 and have also been provided with some surveying data
16 by one of the other vendors out there. They collected
17 it and that data indicates that the wall had settled
18 over eight inches in less than that 80 feet.

19 Q What should be the life span, if you will, of a wall
20 like the ones on the Waldrep's property?

21 A Segmental retaining walls are generally designed, the
22 ones that are designed properly, have a life span of
23 about 50 years.

24 Q And your more recent evaluation, when was that done of
25 the larger wall?

1 A This past week when I got some data in about the
2 subsequent settlement of the wall.

3 Q And have you drawn any conclusions as to its integrity
4 after your most recent evaluation?

5 A Yes, ma'am. The retaining wall, as it exists right
6 now, is in failure mode. It's outside the parameters
7 of generally accepted engineering and construction
8 practices and it's outside the specifications allowed
9 by Allan Block for construction of retaining walls.
10 Allan Block's specifications are an inch-and-a-quarter
11 settlement out of plumb, out of level, and this is
12 more than eight inches out of level.

13 Q A retention wall -- what's the main purpose of a
14 retention wall, particularly, with regard to the
15 Waldrep's property?

16 A You can use them to improve or increase usable land
17 area. You can use them to minimize earth work
18 associated with parking lots where you're getting more
19 ground without having to move more earth and in Mr.
20 Waldrep's case it's to take a very moderate to steeply
21 sloped property and break it up into manageable,
22 level, usable areas.

23 Q Before, in your expertise, before erecting either of
24 these walls, would it have been prudent and/or in the
25 industries, would it have been prudent to do soil

1 samples and testing?

2 A Yes, ma'am, only so much that you needed to collect
3 enough soil samples or have enough knowledge of the
4 particular region to determine what type of soil
5 you're working with.

6 Q And would you characterize the soil at the Waldrep
7 property, relative to whether it should be used as
8 backfill or the like, as poor quality?

9 A I don't know the whole cross section out there, but
10 from the photographs that I looked at, there is a lot
11 of topsoil being used as backfill and that's against
12 all codes.

13 Q Why is that?

14 A Topsoil is very compressible when it's dry and you can
15 squeeze a lot of it into a small area, but as soon as
16 it gets wet, it will start to swell again and when it
17 swells, it expands.

18 Q Do you know if topsoil was used as backfill in a
19 portion of either retention wall on the Waldrep's
20 property?

21 A The only evidence I have is visual evidence from the
22 photographs.

23 (Ms. Berger hands photograph album to Mr. Chandler)

24 Q Photograph No. 21.

25 A Yes, ma'am.

1 Q Can you tell us what that depicts?

2 A Yes, ma'am. It shows a retaining wall that is
3 abutting the foundation of the structure. I don't see
4 any gravel or drain coming out of the bottom of that
5 retaining wall, which would indicate that it wasn't
6 constructed in accordance with Allan Block
7 specifications or general accepted engineering
8 practices.

9 Q Can you tell if there is any sealant between the
10 structure of the home and the walls and Allan Blocks
11 that are adjacent?

12 A No, ma'am. I can't.

13 Q Okay. Now, it's true that you didn't work there, Mr.
14 Chandler, at the time construction was ongoing. Is
15 that right?

16 A Yes. That's correct.

17 Q Now, referring your attention to photograph No. 58.

18 A Yes, ma'am.

19 Q The condition of the steps and what's depicted in that
20 photograph, does that represent the current condition?

21 A No, ma'am. The steps, when I was there -- I don't
22 know when this photograph was taken, but ---

23 THE COURT: Which picture is that, please?

24 MS. BERGER: No. 58.

25 THE COURT: All right. Sorry.

1 A The steps, when I was there October 8th, had already
2 begun to settle differentially and on several steps
3 there were trip hazzards associated with the steps.
4 That's in violation of Chapter 3 of the code. The
5 retaining wall on the right side that abuts the house,
6 there's no evidence of any waterproofing against that
7 at all, so what you've got, you've introduced one,
8 two, three, four, five, you've introduced five foot
9 and four inches of additional soil, backfill, against
10 the foundation wall and I don't know that it was
11 designed to carry that extra foundation load and
12 there's irrigation in there and so now you're adding
13 water to a wall that you didn't waterproof.

14 Q And it adds extra pressure to that wall?

15 A It adds pressure to the wall and probably, the
16 absorption rate of the brick allows moisture to
17 penetrate that brick and get between the brick and the
18 interior of the house.

19 Q Based on that examination of the property, both
20 currently and previously, and looking at photograph
21 No. 58 which was during construction, was the work
22 completed, to date as of the photograph No. 58, in
23 your opinion, in a workman-like manner?

24 A No, ma'am. It's not done professionally, at all.

25 Q And how would you characterize that, as a failure or

1 what?

2 A That photograph doesn't show failure, but it shows
3 amateur. It shows somebody that's not properly
4 licensed or properly experienced to be able to perform
5 that work.

6 Q Now, steps of that sort, if done properly, what would
7 be the life expectancy of the steps?

8 A With very little traffic like at a residence, would be
9 about 40, 50, 60 years.

10 Q In your opinion, will these steps last that long?

11 A No, ma'am. They are already out of code.

12 Q Okay. The retaining walls that were erected by Mr.
13 Holtzclaw in this instance, would that constitute, in
14 your opinion, a modification to an existing structure?

15 A Yes, ma'am, because the way the new retaining wall
16 abuts an existing structure, that's a modification to
17 the load bearing capacity of the existing structure.
18 In that particular case, it becomes a modification of
19 the structure itself.

20 THE COURT: Give me your educational background to
21 reach that conclusion, please.

22 MR. CHANDLER: Civil engineering at The Citadel. I've
23 been ---

24 THE COURT: Isn't a civil engineer different from a
25 structural aspect of engineering?

1 MR. CHANDLER: No, sir. It's not any different than a
2 doctor specializing in heart versus lungs. Civil
3 engineering encompasses all the structure. Back when I
4 went through school, we didn't have structural engineering.
5 We just had civil engineering and you could branch out and
6 do hydrology or you could branch out and do structural.

7 THE COURT: Gotcha.

8 MR. CHANDLER: And I was an expert witness on a
9 structural case and ---

10 THE COURT: I don't need to hear that. I just wanted
11 to hear of your education. Thank you.

12 MR. CHANDLER: Yes, sir.

13 Q I know, Mr. Chandler, you were not there while
14 construction was ongoing, but I will show you now,
15 photograph No. 26. Could you describe what is
16 depicted in that photograph for us, please.

17 A Yes, ma'am. That shows the retaining walls. It looks
18 like the lower retaining wall and the upper retaining
19 wall. The backfill behind it doesn't show any gravel.
20 There's generally a two-foot layer right directly
21 behind the block wall of gravel so that any water that
22 gets behind the wall can drain out and prevent
23 hydrostatic pressure from building up.

24 Q From what you can discern, there's no gravel.

25 A Yes, ma'am.

1 Q Would it be important to have gravel at that point in
2 the construction process?

3 A Yes, ma'am.

4 Q Okay. Mr. Chandler, I'm going to show you what's been
5 marked Defendant's Exhibit No. 2, for identification.
6 If you could indicate to the Court what that is.

7 A Yes, ma'am. That is, well, it says, "Typical Gravity
8 Retaining Wall," is the title of the sketch.

9 Q Now, you are familiar with Allan Block.

10 A Yes, ma'am.

11 Q And is it a fair statement that Allan Block has an
12 aesthetic quality to it?

13 A It does. Yes, ma'am.

14 Q Okay. Then what would be the reenforcement or the
15 structural component of a reenforcement wall, such as
16 the Waldreps have on their property?

17 A Retaining walls are usually Allan Block, which is a
18 smaller block. Any block over, say, four blocks tall
19 generally requires a geogrid, which is a high-strength
20 grid to put down and compact the soil almost in a
21 sandwich and you keep doing that about every two feet,
22 interchanging the soil and the grid until you get to
23 the height that you need the wall to be. The grid
24 block, itself, is not much more than a facade at that
25 point.

1 Q In your opinion, were the manufactured suggested
2 specifications followed for these two retention walls
3 built on the Waldrep's property?

4 A No, ma'am.

5 Q And how so?

6 A The gravity retaining wall cross section shown in this
7 exhibit required, is showing a four-inch gravel drain
8 or bedding area underneath the block and we exposed
9 one of the blocks and it only had two inches. I've
10 not seen any drains to daylight on any of the
11 retaining walls and that's required by the drawings
12 and their specifications as well and I haven't seen,
13 there's just a couple of spots where I've seen any
14 gravel at all behind the wall.

15 Q What about drainage? Were you able to discern
16 anything from your most recent evaluation of the
17 failure of the walls whether drainage was properly
18 done on the property?

19 A The Allan Block specifications require a drain about
20 every 50 feet that drains to daylight. I saw no
21 evidence of any drains.

22 Q Would you be able to now that the walls have been
23 erected on the property, recently? Would you be able
24 with the naked eye and/or with your expertise
25 determine if proper drainage ---

1 A Yes. That's what I'm saying. In October of '08, I
2 could not find a drain anywhere. They are supposed to
3 drain to daylight, which means that at some point,
4 that four-inch pipe that's being used to carry the
5 water away has to pop out of the ground and to
6 daylight so that you can see it.

7 MS. BERGER: Your Honor, I would offer this exhibit
8 into evidence.

9 THE COURT: Any objection, Mr. Hood?

10 MR. HOOD: I'm sorry?

11 THE COURT: Any objection to Defense Exhibit No. 2?

12 MR. HOOD: (Looks at document) I'd like to hear a
13 little bit more about what it is. This is the first time
14 I've seen it.

15 MS. BERGER: Okay. I'm sorry. I'm certain I gave it
16 to you with Mr. Chandler's CV, but I'll get back to it.

17 MR. HOOD: Are you going to give me a copy to use?

18 MS. BERGER: No, that's all right. I won't offer it
19 right now.

20 Q Now, Mr. Chandler, you've prepared an evaluation of
21 your most recent evaluation of the retention walls at
22 the Waldrep property. Correct?

23 A Yes, ma'am.

24 Q And have you come to any estimates or prepared any
25 proposal relative to what it would cost to remedy,

1 certainly the bearing wall having failed, and the
2 smaller wall needing remedial repairs?

3 A Yes, ma'am. I did. When I ran through that
4 calculation, my understanding was, the left wall that
5 we saw in the photograph, No. 58, where the steps were
6 bad, that section of wall, and the tall wall down at
7 the lower part of the property were the only two areas
8 I really looked at.

9 Q Other than the lack of drain lines where you could not
10 find proper drainage that you testified to and the
11 failure of the steps and the failure of the large
12 wall, did you discern any other problems with the work
13 done by Mr. Holtzclaw and Green Thumb Landscaping?

14 A There are two sets of steps that I saw that I -- well,
15 there's more than two retaining walls that are bad
16 that need to be worked on. The fence is not level,
17 because the wall slipped and settled irregularly,
18 causing the fence to do the same.

19 Q I'll now show you photograph Nos. 59 and 60. Are you
20 familiar with what is depicted there?

21 A Yes, ma'am. The steps on the left side of the...

22 Q And are those -- describe where on the property they
23 are.

24 A They are on the right side of the house looking at the
25 lake.

1 Q And did you have a chance to visually examine those
2 the last time that you did your evaluation?

3 A Yes, ma'am. I did. That's the set of steps that have
4 the trip hazzards associated with it.

5 Q Now, looking then, to photograph No. 61, are you able
6 to discern anywhere that there is any sealant there
7 between the property and the blocks?

8 A No. There's no waterproofing associated with that.
9 Additionally, the wall is over four-foot tall and it
10 doesn't have any geogrid to structurally support the
11 soil behind it.

12 Q In your opinion, in photograph No. 61, does that look
13 like those blocks are just laid there just to take a
14 photograph?

15 A I think that's backfill behind it, so it looks like
16 it's there to stay.

17 Q Thank you.

18 MR. HOOD: Your Honor, I have to offer an objection to
19 these exhibits based on the fact that none of this was
20 provided to me. Today, this is the first time I have seen
21 any of this and I submitted requests for production back in
22 June of '08 requesting all documents, photographs,
23 information likely to be relied upon at trial. I've not
24 seen any of this.

25 THE COURT: Isn't it simply a diagram of a proposed

1 retaining wall that he prepared for litigation?

2 MS. BERGER: Your Honor, I need to respond to
3 counsel's comment.

4 THE COURT: Let me ask that first and then ---

5 MS. BERGER: Yes, certainly, Judge. Exhibit No. 2 is
6 right from the Allan Block manual and it's for
7 demonstrative purposes, not to establish what or wasn't
8 done. It's an aid for the Court and the witness. With
9 regard to Exhibit No. 3, Mr. Chandler's proposal, dated
10 June 2, 2011, counsel and I spoke last week. I disclosed
11 Mr. Chandler, I gave a preliminary report that he prepared
12 in 2008 to him, we've exchanged written discovery, we -- I
13 offered to meet last week to exchange the proposal. His
14 client and his people came to my client's home last week
15 and we agreed between us that we would exchange documents
16 today. There's no mystery, there's no surprise. It's a
17 two-page proposal with what it may cost to remedy this
18 issue. There's no surprise here, Judge. We had an
19 understanding and an agreement. I didn't withhold anything
20 improperly and Mr. Chandler was disclosed as was all the
21 other documents that I have thus far. It was prepared June
22 2nd, because that is the day he was at the property and
23 that's the same week that, huh, you know, Mr. Hood's people
24 were at the property. I can't help if they don't have a
25 report, but what's fair is fair. That's our agreement and

1 understanding.

2 THE COURT: Mr. Hood, is that correct?

3 MR. HOOD: I spoke to Ms. Berger, I believe, last
4 Friday and we were talking about photographs, exchanging,
5 looking at exhibits and that sort of thing and I told her
6 then that I thought it was a little late to be trying to do
7 that at that late stage, because I didn't know when we
8 could get together and look at anything and we did agree to
9 meet here early this morning, but I didn't even see that
10 this morning. That's the first time I've seen any of that,
11 but in any event, it's not my practice to be ---

12 THE COURT: Let me just say this: I hear you. I'm
13 going to allow it in. I'm going to look at it. I'll make
14 a decision and I'll decide if I consider it admissible or
15 not. May I look at it ---

16 MS. BERGER: Yes, sir.

17 THE COURT: --- in the meantime, please, ma'am.

18 MR. HOOD: Your Honor, if I could request, too, at
19 this point and maybe to avoid further problems as we go
20 along, I don't like to be nit picky about rules for our
21 purpose here, but I'm making this point at this time,
22 because I don't know if there are more documents coming my
23 way that I haven't seen yet and it's a little disconcerting
24 when you're trying to sit here and listen and take all this
25 in and having to review documents that you're seeing for

1 client next?

2 MS. BERGER: I am, Your Honor.

3 THE COURT: Let's go ahead and take a lunch break now
4 and come back at 1:30 and that way we won't have to stop
5 during his testimony.

6 MS. BERGER: Thank you, Your Honor.

7 THE COURT: We'll be in recess until 1:30.

8 (Lunch Break)

9 JUNE 8, 2011 - AFTERNOON

10 (After being duly sworn by the Clerk of Court, Dennis
11 Waldrep testified as follows:)

12 CLERK OF COURT: Please be seated.

13 DIRECT EXAMINATION OF DENNIS WALDREP BY MS. BERGER

14 Q Would You state your full name, please.

15 A I'm Dennis D. Waldrep.

16 Q And where do you reside?

17 A Seneca, South Carolina, 209 Amethyst Way.

18 Q And who do you reside there with?

19 A My wife.

20 Q Anyone else?

21 A My daughter, temporarily.

22 Q And when did you purchase the property? What year?

23 A We've had it, twelve, no, thirteen years now, so
24 around '88.

25 Q Okay. And you are employed?

1 A Self-employed.

2 Q Okay. Now, Mr. Waldrep, you had occasion to meet with
3 Mr. Holtzclaw, Jerry Holtzclaw, and Ben Thrasher
4 concerning certain landscaping improvements you made
5 to your property. Is that right?

6 A That is correct.

7 Q When did you first meet with them?

8 A It would have been -- I met with Jerry, initially. He
9 did our landscaping work in the Fall of '06, I guess
10 it was, September.

11 Q When did Mr. Holtzclaw begin doing your landscaping
12 work?

13 A Probably two or three years prior.

14 Q And what types of things was he doing on your
15 property?

16 A He kept the yard up, he mowed it, edged it, blowed it,
17 put in bushes, maintained our irrigation system, just
18 general landscaping upkeep.

19 Q So, at that point, he had not erected any structures
20 on your property.

21 A No. No.

22 Q At your initial meeting with Mr. Holtzclaw, did he
23 provide you with a proposal of the work that he was
24 seeking to have done at your home?

25 A After we discussed it with him, yes, he did.

- 1 Q Okay. I'm going to show you what has been marked as
2 Plaintiff's Exhibit No. 1, for identification and ask
3 you to look at that, please.
- 4 A Yeah, that was given to us.
- 5 Q At the beginning?
- 6 A Yes, it was.
- 7 Q Did you sign that document?
- 8 A We didn't sign this, but I recall signing a contract.
- 9 Q But your signature is not on that?
- 10 A No. No, it's not.
- 11 Q Okay. And that was submitted in writing in that
12 format to Mr. Holtzclaw. Is that right?
- 13 A Yes.
- 14 Q And that Exhibit No. 1 includes, among other things,
15 the erection of a back retaining wall, front retaining
16 wall, drainage work to be done, et cetera.
- 17 A That's right.
- 18 Q And the -- were any other figures other than that
19 proposal provided to you for the work that's described
20 in Exhibit No. 1?
- 21 A No. That was all.
- 22 Q What was your understanding of the expense relative to
23 the work described in Exhibit No. 1 to be done by Mr.
24 Holtzclaw on your property?
- 25 A That would be the total price, we would pay it over, I

1 think it was, three different draws, I believe, but
2 that would be the total price and the only price.

3 Q And that was just over \$12,000.00?

4 A Yeah. I think it's a little bit more than that, about
5 fifteen, with everything.

6 Q Did you pay for that work?

7 A I did.

8 Q And at the conclusion of that work, were there some
9 changes that you agreed with Mr. Holtzclaw would be
10 done on your property?

11 A Yes, there was.

12 Q When did you decide to make changes or have additional
13 work be done by him?

14 A After we completed the first wall, the wall nearest to
15 our home, I asked him to go ahead and extend the wall
16 further around the house, make it longer. So, we went
17 ahead and they continued doing that. At the same
18 time, we talked about doing the second further
19 retaining wall closest to the lake, the one in
20 question now, but that was kind of done at the same
21 time.

22 Q Okay. Let's talk about the first wall. We are
23 talking about the one near the home ---

24 A Yes.

25 Q --- that you call the upper wall.

1 A The upper wall, yes.

2 Q And what was the length of that wall that you had
3 agreed with Mr. Holtzclaw would be built on your
4 property?

5 A Well, I would probably say -- the initial one or the
6 one that we added ---

7 Q The one nearest your home.

8 A Okay.

9 Q The dimensions of the initial wall.

10 A Okay. The initial wall would probably have been
11 around, using my memory, probably around fifty feet,
12 probably.

13 Q And by how much did you want Mr. Holtzclaw extend the
14 length?

15 A Probably about twenty more feet, to circle around.

16 Q Less than fifty percent?

17 A Yes.

18 Q Okay. And did you and Mr. Holtzclaw and/or Mr.
19 Thrasher discuss what the additional cost would be to
20 extend that upper wall?

21 A We did not.

22 Q Did you ask for the cost?

23 A I did not.

24 Q Okay. Now, the first phase, as you indicated, was
25 done and you paid Mr. Holtzclaw how much money for

1 that?

2 A Well ---

3 Q Strike that. Let me re-phrase it. What was the
4 initial amount of money you paid Mr. Holtzclaw
5 relative to the work described on Exhibit No. 1?

6 A Initially, I paid him a \$5500.00 deposit to get
7 started.

8 Q Now, would that have been work done between August of
9 '06 until the end of September '06?

10 A Yes.

11 Q Okay. I'm going to show you what has been marked
12 Plaintiff's Exhibit No. 4, for identification, and ask
13 you to look at that multiple page document. Have you
14 seen that before?

15 A Yes.

16 Q When was the first time you saw that document?

17 A When Jerry and his wife came to my house on a Saturday
18 or Sunday. It could have been a Saturday afternoon.

19 Q What month and year was that?

20 A It probably would have been August, probably August or
21 September. No, I take that back. It was, I guess it
22 was, yeah. It would have been August or September of
23 '07.

24 Q Okay. After all the work was completed.

25 A Oh, yeah. After. I never saw it prior.

- 1 Q Okay. Now, Mr. Waldrep, looking at the top section
2 that describes the dates between August 18 and
3 September 8, '06. Do you see that section?
- 4 A August 18 to ---
- 5 Q Do you see that area on the document?
- 6 A Yes. Right there. Yes.
- 7 Q Okay. For the top portion on that first page all the
8 way until just above the date that begins September
9 29, '06 to October 12, '06, did you ever see those
10 figures from Mr. Holtzclaw and Mr. Thrasher?
- 11 A No. No. Never did.
- 12 Q And did Mr. Holtzclaw or Mr. Thrasher or anyone with
13 Green Thumb provide you with receipts for materials
14 for the project?
- 15 A I don't recall they ever did.
- 16 Q Did you enter into some other understanding with Mr.
17 Holtzclaw concerning the additional work on the
18 extension of the upper wall?
- 19 A Well, basically, as he completed each phase, I wrote
20 him a check as he asked for money.
- 21 Q When this first phase was completed and you paid him
22 the \$5500.00 and the \$12,000.00 to \$15,000.00, what
23 was your understanding about the cost of that portion
24 that had been completed?
- 25 A That is was complete. It was pay as I went and so as

1 he completed each job, I was completely, it was
2 finalized as far as I was concerned. Nothing was ever
3 said to the contrary.

4 Q Did Mr. Holtzclaw or Mr. Thrasher or anyone at Green
5 Thumb ever indicate to you that there would be a
6 profit equation that you would be billed for at the
7 end of this ongoing project that expanded?

8 A At any point?

9 Q At the beginning of the project ---

10 A No.

11 Q --- Phase One ---

12 A No. Absolutely not.

13 Q And you -- did Mr. Holtzclaw ever indicate to you
14 there would be a distinction between labor help,
15 people that worked for him, and his own profit, in
16 quoting the job?

17 A Did he ever, did he ever ---

18 Q Did he ever break that down for you in a conversation
19 at any point?

20 A At the very end, that is when he said he did not
21 include his profit within thirty ---

22 Q But at the beginning ---

23 A No.

24 Q --- in the first phase, the first wall being done,
25 your understanding was you had paid for the work done

1 that far.

2 A Absolutely.

3 Q Now, going back to that exhibit again, did you receive
4 any portion as the work was ongoing, in terms of those
5 figures and that spreadsheet from Mr. Holtzclaw?

6 A Never did.

7 Q Now, I'm showing you what has been marked Plaintiff's
8 Exhibit No. 2, for identification, and ask if you
9 recognize that document.

10 A I do.

11 Q And if you would look at the last page. Is that your
12 signature?

13 A It is.

14 Q Okay. Now, reference page two, if you would. There
15 is a blank line there for the amount of the work. Did
16 you ever receive a filled-in copy or a copy that had
17 any numbers or figures filled in from Mr. Holtzclaw?

18 A I never did. No.

19 Q Did you ask him for it?

20 A I did not.

21 Q Did Mr. Holtzclaw indicate that he was going to ask
22 you for incremental payments, a percentage down as the
23 work progressed?

24 A No.

25 Q Now, let's talk about the second retaining wall, the

1 lower wall, the larger wall. What was the length of
2 that wall as you agreed Mr. Holtzclaw would erect on
3 your property, approximately?

4 A Well, the one in question is about eighty-five to
5 ninety feet.

6 Q In length?

7 A In length, coming out of the yard and cutting back
8 around.

9 Q And at the time you asked Mr. Holtzclaw to erect that
10 retaining wall, the lower wall as we're calling it,
11 did you have some change of agreement with him that
12 you were going to extend that wall beyond eighty-five
13 or ninety feet?

14 A I wouldn't say, "had an agreement". Once they -- we
15 really have two walls down there, the really long wall
16 that's in question and then a smaller wall.

17 Q Let's talk about the really long wall. The wall in
18 question that's the length of eighty-five to ninety
19 feet. Did you and Mr. Holtzclaw agree to extend that
20 beyond that understanding, that it would be eighty-
21 five to ninety feet in length?

22 A I don't understand the question. I'm sorry.

23 Q Okay. What was your agreement, verbal agreement or
24 understanding, with Mr. Holtzclaw as to the length of
25 the lower retaining wall that he was going to erect on

1 your property?

2 A Oh, we basically, we knew where we wanted it to stop
3 and start.

4 Q The size of it. I'm asking you to describe the length
5 of it.

6 A Oh, I'm sorry. It's either eighty-five or ninety feet
7 in length and approximately, well, not approximately,
8 it is exactly ten blocks tall.

9 Q Did you and Mr. Holtzclaw change that understanding of
10 the length? Was it going to increase?

11 A It did increase with the other side, but that side did
12 not.

13 Q And what was the height of the wall that you and Mr.
14 Holtzclaw agreed that he would build?

15 A Well, like I said, it is ten blocks tall, so that's
16 around six-and-a-half, I think it's just under seven
17 feet.

18 Q Now, the lower retention wall was built by Mr.
19 Holtzclaw, Mr. Thrasher and their employees on your
20 property. Is that right?

21 A That's right.

22 Q And when Mr. Holtzclaw completed the work, the
23 proposal, the final contract, and all the changes that
24 you wanted on the length of that retaining wall, did
25 you have any knowledge of any problems with its

1 integrity or its stability?

2 A When it was, when they had finished the wall, I had no
3 knowledge at that time of those issues.

4 Q All right. Now, I'm going to show you what has been
5 marked as Plaintiff's Exhibit No. 13, for
6 identification, and ask if you would look at that
7 document and tell me if you have ever seen it before.

8 A I have.

9 Q When was the last time?

10 A This was presented to me with the final bill which
11 would have been around September, August or September,
12 September of '07.

13 Q Did Mr. Holtzclaw provide you with any of the figures
14 or any portion of the figures contained in this
15 document before that time?

16 A No.

17 Q Okay. And about when did Mr. Holtzclaw complete the
18 work on your property, month and year?

19 A It was probably around April or May of '07.

20 Q And when he completed the work, you had paid him
21 certain amounts of money. Is that right?

22 A That's right.

23 Q I'm now going to show you what has been marked
24 Defendant's Exhibit No. 12, for identification, and
25 ask if you recognize those documents.

1 A I do.

2 Q And they are?

3 A This was, these were checks that I had written to
4 Landscape Perfection to Steve Jordan and miscellaneous
5 over here. Inside of here, we've got numerous checks
6 to Jerry Holtzclaw ---

7 Q Okay.

8 A --- and Green Thumb Landscaping.

9 Q Would the document in front of you represent all of
10 the checks that you paid to Mr. Holtzclaw and Mr.
11 Jordan of Landscape Perfection connected with this
12 work?

13 A Yes, it would.

14 Q Now, of the amounts paid to Mr. Holtzclaw when he
15 completed the work, did he indicate to you -- he left
16 the premises with his staff and crew and employees,
17 right?

18 A Yes.

19 Q Okay. And did he ask you for any additional money
20 relative to the completion of work on your home?

21 A Before he gave me that final bill?

22 Q When he completed the work, did he present you a bill?

23 A He did.

24 Q The day he completed the work?

25 A No. No.

1 Q When did he first tender to you a bill for his
2 services?

3 A The final bill would have been in September, because
4 actually, football had just begun and so it probably
5 would have been the first of September.

6 Q How many months after completion did he tender the
7 bill to you?

8 A Probably, ninety days. Probably, three months.

9 Q When he left the premises, did you ask him if you owed
10 him anything?

11 A I did not.

12 Q What was your understanding with Mr. Holtzclaw when he
13 completed the work, as to whether any additional sums
14 would be owed?

15 A My understanding was that I had paid him in full.

16 Q Okay. Now, with regard to the extension of the length
17 of the upper retaining wall and the lower retaining
18 wall, were any change orders or documents presented to
19 you by Mr. Holtzclaw and Mr. Thrasher to prove it?

20 A No.

21 Q And for any changes in additional landscaping that was
22 done on this project, did Mr. Holtzclaw or his
23 associates ask you to sign any changes, whatsoever, in
24 connection with changes you were undertaking with
25 them?

1 A No.

2 Q Now, the scope of work, this exhibit No. 13 that you
3 said you received several months after completion of
4 the work, when you received that from Mr. Holtzclaw,
5 where did that take place?

6 A In my home.

7 Q And who was present?

8 A Probably my wife and, I believe, Jerry and his wife
9 came over that, I think it was a Sunday afternoon.

10 Q Was Mr. Thrasher there?

11 A Not at this first meeting.

12 Q Okay. Anyone else associated with Green Thumb?

13 A No.

14 Q And when you received that bill, did you review it
15 with Mr. Holtzclaw at that time?

16 A I about fell over.

17 Q Please, just try, just answer the question. Did you
18 review it with him at that time?

19 A We, we, again, we're talking a couple of years ago,
20 but we discussed it and I said, "Jerry, I've got to
21 digest this. This might take awhile." It took him
22 three months to get this to me, but ---

23 Q Try to focus on my question.

24 A Yes.

25 Q At that time, did you have an opportunity to review it

1 either with your wife or on your own?

2 A When he gave it to me, he was not there very long, so
3 I had time to review it then, after that.

4 Q So, at that first meeting with Mr. Holtzclaw, you
5 didn't review it in detail with him?

6 A He may have brought, he may have brought bills with
7 him at that time. He may have. I'm not sure. I
8 can't, it was either at that meeting or the next
9 meeting, he may have brought some documentation, which
10 was the first time I saw it.

11 Q At that first meeting, then, with Mr. Holtzclaw at
12 your home with your wife, did you express any concerns
13 or any complaints about the cost of the work that was
14 done by him?

15 A Oh, yeah.

16 Q What did you say to him?

17 A Again, my memory is short, but I would have said, "I
18 had no idea that it was ever going to be this
19 additional much money, Jerry."

20 Q I'm going to ask you to look at that exhibit, Mr.
21 Waldrep, and see if there is anything on that scope of
22 work that Mr. Holtzclaw prepared that you discussed
23 with him or complained about, in terms of dollars.

24 A Well, the biggest item would have been the retaining
25 wall where he charged \$27,818.00.

1 Q And you challenged him on that at that meeting?

2 A Yeah. And he told me that was the going rate and he
3 told me whatever that number was, \$20.00 a block. I
4 was never told in a prevailing rate of what the local
5 people in the area are charging.

6 Q Did Mr. Holtzclaw agree to make any adjustment on the
7 amount at that meeting?

8 A Well, what he said was, "Well, it took me a while to
9 get it to you, you take it back, review it, and we'll
10 try to negotiate it." That's what he said.

11 Q All right. Is there anything else on there, that
12 scope of work that Mr. Holtzclaw provided you, any
13 figures that you challenged at that first meeting with
14 him?

15 A Yeah, there's a number of items. I know one thing we
16 got into a discussion about was brush clearing.
17 Forty-eight hours, forty-eight man-hours.

18 Q Okay. Let's talk about what you said to Mr. Holtzclaw
19 and what he responded, if anything, relative to the
20 brush clearing.

21 A He just said it took a long time for his guys to clean
22 it, at forty-eight man-hours at \$75.00 an hour. And
23 the same with the wood splitting. It's a small number
24 in the whole scope, but you can buy a cord of wood
25 even now, for \$125.00 and he's charging me \$2000.00

1 for a cord, maybe two cords of wood.

2 Q Did you tell that to Mr. Holtzclaw at that initial
3 meeting?

4 A I -- we did either at that meeting or at the next
5 meeting.

6 Q Do you have any recall of how much wood was on your
7 premises that had to be cleared?

8 A Yeah, because they actually stacked it and like I
9 said, it may be a cord-and-a-half, possibly. It's
10 actually still there.

11 Q Anything else that you questioned or complained to Mr.
12 Holtzclaw about on that scope of work that he
13 presented to you?

14 A It was not a big deal, but the stained deck. He met
15 me in Home Depot one Saturday and I was going to, we
16 had a new deck and we had to put this special oil on
17 there and Jerry met me in there and we were talking
18 and he said, "What are you doing?" I said, "I'm
19 buying a brush to clean off the deck so we can put the
20 oil on it." And that was towards the end of the
21 project and he said, "My guys are slow now, I'll do it
22 by the hour to keep them busy." Which, according to
23 what I heard, was \$8.00 or \$10.00 an hour, which that
24 can be done in about a day and he ended up charging me
25 about \$1.00 a square foot, which is quite a bit more.

1 It's a small number, but I don't recall going over
2 every line item with him, but it about floored me when
3 I saw the total, because it was never expected.

4 Q Other than the initial proposal and this other
5 contract that we've already looked at, Exhibit No. 2
6 and Exhibit No. 1, were there any other written
7 documentation that you signed with Mr. Holtzclaw
8 relative to the work done on your property?

9 A No.

10 Q Did he ever provide you with any receipts of materials
11 that he purchased or otherwise acquired for this
12 project?

13 A I do a pretty good job of keeping copies. I have no
14 copies and so I'd say no.

15 Q Now, during Mr. Holtzclaw's ongoing work you had some
16 damage to your property. Is that right?

17 A Yes.

18 Q Okay. About when, in the process while Mr. Holtzclaw
19 was on your property, did that occur?

20 A Well, the first problem we had was the water in the
21 basement. That would have probably been half-way,
22 probably around March, January, maybe February or
23 March. We had a lot of rain and there was no grass
24 down and so the face of my home looking towards the
25 lake on the left-hand side, between me and my, the

1 wall next to me, Ben had piled up a -- they knew a
2 bunch of rain was coming and so Ben had piled up a
3 bunch of dirt to divert the rain.

4 Q Was that while the excavation or grading was going on
5 by Green Thumb?

6 A Yes.

7 Q And were you present and living in the home while this
8 was going on outside the property?

9 A Yes.

10 Q Okay. And after this rainfall, you were living on the
11 property that week. Is that right?

12 A That's right.

13 Q Describe for the Court what damage, if any, occurred
14 to your home at that time.

15 A Yeah. We have, in that basement, a bedroom on the
16 back wall facing the lake, a lake view, and then a
17 room in front of it, a work-out room. So, I went in
18 that work-out room and we have a window there with a
19 well in it and so I went in there and there was red
20 mud that had come in on the inside of the house and I
21 think either Ben was there or I had called Ben, one of
22 the two, and so he came in there and looked at it and
23 all this mud came in that well. Well, me and Ben were
24 outside the house looking at all that mud in that
25 window well down there and my wife started screaming

1 at me, "Get down here. There's water in this back
2 bedroom." So, we went into the house and we went into
3 that back bedroom and we had carpet in there and there
4 was water, I won't say standing, but the carpet was
5 saturated with red mud, it got all the way into the
6 bathroom. We had a pool table there and we had to --
7 it did extensive water damage in there.

8 Q And Mr. Thrasher was there at the time when this was
9 happening?

10 A Yes.

11 Q Was Mr. Holtzclaw there?

12 A I don't think Jerry, I think Jerry was out of town or
13 somewhere.

14 Q Did you incur some damages, though, for the property
15 and the carpeting in your home?

16 A Oh, yes.

17 Q And what would you approximate the damage was?

18 A I think the damage was around \$4000.00 to \$5000.00.

19 Q Did you file a claim with your insurance to be
20 reimbursed for that loss?

21 A I did speak to the insurance company. If I could,
22 could I back up a little?

23 Q We'll get there.

24 A Okay.

25 Q Did you file a claim with your insurance company?

1 A Yes, I did, and they would not pay.

2 Q And after your conversation with your own carrier,
3 that they wouldn't pay, what did you then do, if
4 anything?

5 A I talked to Jerry and I said, because you had all this
6 red mud, all this dirt piled up on here and he had it
7 against the home, what happened was, that water washed
8 down and basically came in through the brick and
9 that's what caused the problems.

10 Q Were you compensated for that loss through Mr.
11 Holtzclaw's or Mr. Thrasher's insurance?

12 A I was. One hundred percent.

13 Q Okay. Now, at the conclusion of the work that Mr.
14 Holtzclaw did on your property, did you know you had
15 any difficulty with the retaining wall, the stability
16 or structure? I may have asked you that already.

17 A I did not, not initially. I did not.

18 Q Now, did you have any discussion with Mr. Holtzclaw
19 before he started the work on your property that you
20 were going to be erecting a fence behind the lower
21 retaining wall, the larger one that we're looking at?

22 A You know, I do not recall.

23 Q Okay.

24 A I do not recall.

25 Q Okay. After Mr. Holtzclaw completed the work, you

1 decided you wanted a fence erected in front of the
2 lower retaining wall. Is that right?

3 A Yeah, I think it's actually required by code, over
4 four feet, I'm pretty sure, anyway.

5 Q When did you decide you were going to have a fence
6 erected in front of that lower retaining wall?

7 A It was always planned on our part.

8 Q When? Approximately?

9 A I would say once Jerry started the second wall, we
10 realized we had to have one and so probably early '07.

11 Q Okay. And you made arrangements, then, to contact a
12 fencing installer. Is that right?

13 A We didn't really contact no one until -- I take that
14 back. Yes, we did, because they did our deck, the
15 deck fencing first.

16 Q All right. You decided to erect a fence in front of
17 this retaining wall that Mr. Holtzclaw built. Is that
18 right?

19 A That's right.

20 Q And you went ahead and started that work. Right?

21 A Yeah, we got everything started.

22 Q Okay. And what was the name of that contractor?

23 A The first one was Bill Burns.

24 Q What was the name of the contractor that you hired
25 that erected the fence on your property?

1 A That was Steve Howard.

2 Q Okay. So, Mr. Howard came out. When did you first
3 discovery there was a problem, if any, with the lower
4 retention wall on your property?

5 A It's probably going to be, if my memory of the notes,
6 it was about a year later, so, August of '08, in that
7 ballpark, was when I was notified there was a problem.

8 Q And you were notified by whom?

9 A Steve Howard called me and said, "Dennis -- he had
10 already put up all these 4x4 posts, I take it back.
11 He was doing one post at a time. He's put the first
12 fence up. He called me up and said, "Dennis, this
13 wall, your wall is not straight or your ground is not
14 straight," and I said, "You've got to be kidding," and
15 he said, "No". So, I went out there and either that
16 same day or the next day and Steve Howard had a
17 transit and we just checked throughout that wall and
18 that's when we first realized that there was a problem
19 with the wall.

20 Q Okay. When you then discovered that, did you contact
21 Mr. Holtzclaw or Mr. Thrasher concerning that wall?

22 A No, because I think a lawsuit had already begun at
23 that time.

24 Q Did you contact anyone else to determine whether or
25 not what the fencing contractor was telling you was

1 accurate?

2 A Yes. I actually contacted Steven Jordan and also,
3 another gentleman here in Seneca. I can't think of
4 his name, on 123.

5 Q Did Mr. Jordan come out to evaluate the wall himself?

6 A He did the same thing as Steve Howard. He evaluated
7 it with a transit to confirm and verify the numbers.

8 Q Is the fence still in place on your property in front
9 of that lower retention wall?

10 A It is.

11 Q You haven't had that re-done?

12 A No. I'll wait until the wall is re-done.

13 Q Now, you mentioned a second meeting with Mr. Holtzclaw
14 concerning the bill which you were charged, for the
15 scope of work, in detail. When did that second
16 meeting take place? If you could approximate how many
17 weeks or months after the completion of the work.

18 A When Jerry came out about the first week of September
19 and met, somewhere around the first of September, I
20 kept the bill, I kept the scope of work and what he
21 dropped off to me for a couple or three or four weeks
22 and he came over, it was him and Ben and, I think,
23 Jerry's wife.

24 Q Anyone else present?

25 A My wife may have been, but I do not recall.

1 Q Okay. Did you have an opportunity to discuss with Mr.
2 Holtzclaw and/or Mr. Thrasher at that meeting, any
3 concerns about the costs of this work?

4 A Oh, yes. We discussed, I discussed I had no idea that
5 there was going to be any type of additional funds of
6 this magnitude added to it.

7 Q And how did Mr. Holtzclaw respond to that?

8 A Now, I will have to go back on memory here. I think
9 he tried to justify the prevailing rate at that time
10 of what they were charging and Ben was there. I do
11 not think Ben had very much to say, I do not believe.
12 So, I listened for the most part and I was not
13 prepared to write a check for \$52,000.00.

14 Q So, you refused to pay any more money for this job?

15 A Well, I refused to pay \$52,000.00.

16 Q And there was discussion at that time whether Mr.
17 Holtzclaw and/or Mr. Thrasher would accept some sum
18 less than the \$52,000.00.

19 A That's right.

20 Q And did you make any offer to pay any amount less than
21 what was requested by them?

22 A I did.

23 Q What?

24 A At that meeting I said, "Jerry, I will pay you
25 \$20,000.00." And as soon as I said that, Ben rushed

1 out of the house and I didn't see him no more and
2 Jerry said, "No, I will not accept that."

3 Q Was that the extent of the counter offer on that
4 issue?

5 A Well, what happened was, after that, I said, "Jerry,
6 you go back and think what you will take and you re-
7 negotiate it and see what you want to take." And he
8 said he would and then within a month or less, I get a
9 letter from another lawyer here in Seneca asking,
10 saying that he would accept thirty-five, but that was
11 my last conversation with any of his crew.

12 Q And at that second meeting with Mr. Thrasher and Mr.
13 Holtzclaw in your home when you refused to pay the
14 \$52,000.00 and made an offer that was refused, did you
15 know you had any difficulty with the integrity of the
16 structure of the lower retaining wall?

17 A No, I did not.

18 MS. BERGER: Your Honor, I would like to offer Exhibit
19 No. 12, for identification.

20 THE COURT: Any objection?

21 MR. HOOD: That's the checks?

22 THE COURT: It's the checks and the reconciliation of
23 monies paid. Any objection?

24 MR. HOOD: No, sir.

25 THE COURT: All right. Admitted, without objection.

1 MS. BERGER: Thank you.

2 (Whereupon, photocopies of checks issued to Landscape
3 Perfection and Green Thumb Landscaping is entered into
4 evidence as Defense Exhibit No. 12, without objection)

5 MS. BERGER: I have nothing further, Your Honor.

6 THE COURT: Thank you, ma'am. All right, Mr. Hood,
7 cross examination.

8 MR. HOOD: Thank you, Your Honor.

9 CROSS EXAMINATION OF DENNIS WALDREP BY MR. HOOD

10 Q Mr. Waldrep, you testified that as you proceeded
11 through this job, you made periodic payments to Jerry
12 and that you considered those to be pay as you go. In
13 other words, you paid for the work as it was done.

14 A That's right.

15 Q Did Jerry tell you that?

16 A He didn't say yes or no. He accepted the funds I gave
17 him.

18 Q At the time you paid those funds, did he go over with
19 you any figures as to the costs that he had incurred
20 to that point?

21 A I never received anything from him. Occasionally, he
22 would pull something out and show the monies that he
23 was paying out. That was about it, but he never gave
24 me anything.

25 Q Okay. I want to be clear about that. When you say,

1 "I never received it," does that mean you never got a
2 paper copy that you kept?

3 A That's right.

4 Q Okay. What I'm asking you is, would he sit down with
5 you, with figures in front of you, and say, "This is
6 what I've spent for blocks and this is what I've spent
7 for labor, this is what I've spent for whatever and it
8 totals up to this and this is how much I've spent
9 already and I need you to pay me "x" amount of
10 dollars."

11 A I can't recall. I'd say he probably did occasionally,
12 but to sit down, no.

13 Q Well, then, how were the numbers of the checks that
14 you wrote arrived at? The amounts.

15 A Jerry would come to my door or he would call me and
16 say, "Mr. Waldrep, I need \$8,000.00, I need
17 \$10,000.00. We're working on the next phase, or we've
18 got to buy block." He would tell me how he is
19 progressing.

20 Q Okay. So, you just took whatever number he gave you
21 and wrote a check for it.

22 A I knew the project was long term. Yes, sir. My yard
23 was torn up and he was putting in blocks and I knew he
24 was buying the material and he was putting it in.

25 Q What I'm saying is, you were content to write him

1 \$10,000.00 checks without any knowledge of what he was
2 paying for, how much had been spent or anything. You
3 were okay doing that.

4 A Well, the way you're putting it, no, but I knew what
5 was going on, sir.

6 Q Just watching the progress.

7 A That's exactly right.

8 Q Well, and then when you got to the end, you said that
9 you were not expecting to owe anything else because
10 you were paying as you went. Is that correct?

11 A That is correct. Can I retract something real quick?

12 Q Yes, sir.

13 A Yes, that was correct, but within the last few weeks
14 to the last thirty days of the project, that's when
15 Jerry broke the news to us, that he did not take his
16 profit until the very end of the project and not a
17 moment before.

18 Q What caused that to come about thirty days before the
19 end of the project?

20 A You need to ask your client, sir. He told me that. I
21 don't know.

22 Q Well, I'm just wondering what circumstances occurred
23 in which he told you that.

24 A Like I said, that's your client, not mine. He told
25 me, but I had nothing to do with it.

1 Q All right. So, it's your testimony that up until
2 thirty days before the job was finished you had no
3 clue that you were not paying as you went.

4 A That's right.

5 Q Okay. So, when the job was finished, after the job
6 was finished, there was a meeting that you
7 subsequently had with Jerry at which time the final
8 bill was presented. Correct?

9 A Yeah.

10 Q And that was in September.

11 A Yes, sir.

12 Q And who arranged that meeting?

13 A Jerry called me and asked if they could come over, him
14 and his wife.

15 Q Come over for what purpose?

16 A To give the final bill.

17 Q So, he came over, presented the bill to you and you
18 said you were not expecting any kind of number that
19 big, but were you expecting -- I thought you said
20 earlier you were not expecting to pay anything.

21 A Like I said, sir, if I could retract my statement.

22 Q You said earlier you weren't expecting to pay anything
23 at the end of the job, you thought you paid as you
24 went.

25 A That was my understanding until the last thirty days

1 of the job. Yes, sir.

2 Q So, what happened -- once you got to that thirty days
3 before the end of the job, what was your expectation?

4 A I was waiting to see the final bill, because that's
5 when he told me he did not include his profit at that
6 time.

7 Q All right. So, you got this final bill and you wanted
8 to look over it and Jerry was glad to let you do that.
9 Correct?

10 A Yes.

11 Q But what I guess I don't understand is, if you had had
12 this clear belief throughout that you were paying as
13 you went, why would you even consider that?

14 A Because nothing was said to the contrary, of never
15 having a job done before except on my home, but it was
16 all told up front, it was cost plus. Jerry never told
17 me one time until the end of the project, thirty days
18 or so during that thirty day period, that he did not
19 figure in his profit for the work.

20 Q So, you thought about it for about three weeks.

21 A Probably so.

22 Q And when you got back together, you, I believe you
23 said you weren't going to pay him \$52,000.00, but you
24 would pay him \$20,000.00.

25 A Jerry told me, "Well, think about it and let's get

1 back together." I can't recall exactly what was said,
2 but basically, my memory was, "See what you think you
3 want to pay and let's try to negotiate it out." So, I
4 came back and I said, "Jerry, I will pay you
5 \$20,000.00," and the answer was, "No".

6 Q Okay. Let me stop you right there. Where did the
7 \$20,000.00 come from?

8 A That was what I was prepared to pay Jerry.

9 Q But what does that mean, you were prepared to pay?

10 A That's what I would have paid Jerry at that time to
11 finalize the deal with him.

12 Q That's just what you thought you should pay him?

13 A I sure wasn't planning on \$52,000.00, so, yes, sir.

14 Q All right. But what I'm trying to arrive at is, did
15 you take his bill, cross things out, adjust things in
16 any way you thought they needed to be adjusted to
17 arrive at what would be a fair figure or did you just
18 pull some number out the air as far as what you
19 thought you were, as you say, prepared to pay?

20 A Well, in my opinion, I had paid Jerry in full, the
21 sixty-five five, because that's all I was prepared to
22 pay. That's all. I had paid all along. No one said
23 anything different that I had to pay more money at the
24 end until the end of the project, so I thought ---

25 Q I understand that, but I'm just trying to figure out

1 how -- was there any rhyme or reason for this
2 \$20,000.00 other than just a figure you through out
3 there.

4 A That was a figure I thought was fair, sir.

5 Q And again, you base that fairness on what?

6 A What I thought was fair at the time, because it was
7 \$20,000.00 more than I paid up until that moment.

8 Q All right. And during this three weeks that you were
9 mulling over this final bill, you had in your hand --
10 if I can find it, I believe it's Exhibit No. 13. Did
11 you have Exhibit No. 13, that's in your hand, for that
12 three week period?

13 A I did.

14 Q And do you recall back in May of 2009 after this
15 lawsuit started, doing a deposition in my office?

16 A Yes, sir. I do.

17 Q Okay. And do you recall us discussing in that
18 deposition this Plaintiff's Exhibit No. 13 and the
19 items listed in it?

20 A I -- what's your question? I apologize.

21 MR. HOOD: Your Honor, I would like to question the
22 witness concerning his deposition. I have the original,
23 sealed, if I could open that.

24 THE COURT: Let the record reflect the deposition is
25 being opened and will be marked as a Court's Exhibit.

1 (Whereupon, Mr. Waldrep's deposition is opened in open
2 court and marked as Court's Exhibit No. 1)

3 Q All right, Mr. Waldrep. I'm going to hand you the
4 original transcript of your deposition on May 21,
5 2009. I will ask you, if you would, turn to page 35.

6 A Okay.

7 Q What I'd like to do is just let you read along with me
8 and I will read the question and I want you to respond
9 to me what your response was as indicated in this
10 transcript. Okay?

11 A Okay.

12 Q And actually, I'm going to go back and start with the
13 question on the bottom of page 34 and then I'll ask
14 you to pick up with the answer on top of page 35.
15 Okay? All right, my question to you was:

16 Q Well, what I'd like to do is, first of all, in
17 looking at this form, and that's in reference to
18 Plaintiff's No. 13, on the left side of this
19 sheet under the heading where it says, "Scope of
20 work, Waldrep Job," there are a number of line
21 items listed there. The first thing I would ask
22 you to do is tell me whether or not there are any
23 items listed on this form, any line items that
24 were not performed by Jerry and his crew.

25 Q And what was your answer?

1 A No. It was all done.

2 Q Okay. So, you did not have any issue with the
3 fact that he did all the work that he listed on
4 that form.

5 A That was never an issue, sir.

6 Q All right.

7 Q Next question:

8 Q Okay. So, all of those, you would agree, was
9 work that was performed by him at your home.

10 Q And your response was:

11 A That's correct.

12 Q Next question:

13 Q Now, moving over to the next column. There's a
14 column that says quantity. Is there anything in
15 that column with respect to any of these line
16 items that you would have any dispute with?

17 Q And what was your answer?

18 A Well, for instance, brush clearing, forty-eight
19 hours to clear out that brush down there was
20 absurd, but that's what he charged me.

21 Q All right. And then I said,

22 Q Okay.

23 Q And you continued and said, what?

24 A The splitting of wood, which is basically two
25 cords of wood, which is still over there. He

1 charged me \$2000.00. I could have bought a cord
2 of wood for \$100.00. So, that was another way to
3 manipulate the bill here.

4 Q Okay. And then I said,

5 Q All right.

6 Q And you continued on:

7 A But he said it. Obviously, he did it and do you
8 want me to elaborate that, yeah, or say it was
9 done or what do you want?

10 Q And I said:

11 Q No.

12 A No? No reason to talk about what I had done
13 after the fact or is that important at this
14 point?

15 Q Okay. Well, no, the first question was all of
16 the line items that you said were, in fact, work
17 performed by him. What I'm asking you now is, do
18 you have any dispute about the quantities that he
19 has attached to any of those items. Now, you
20 just said you -- so far, you have alluded to
21 brush clearing and the split wood. You are
22 saying he did those, but you have some
23 disagreement with, perhaps, the time it took or
24 the amount he charged you.

25 Q And your answer was?

1 A Oh, absolutely.

2 Q But in addition to those two items, or other than
3 those two items, are there any, is there anything
4 in that column that you would have a dispute with
5 concerning how he has measured the work in terms
6 of quantity?

7 Q And you answer?

8 A No. I mean the work, he had done, and I presume
9 those numbers are correct. I mean, I -- because
10 we, yeah, it was done and that's probably
11 correct, I would imagine.

12 Q Okay. And then my next question was:

13 Q Now, on column three, it's got cost of materials.
14 What I'm assuming, and I'm assuming you probably
15 don't have any documentation that would actually
16 back up each one of these items.

17 A No.

18 Q And understanding that, is there anything in that
19 column that you would have any question about or
20 feel may need to be justified in any way?

21 A No. I just have to know, I mean, I presume that
22 that would be the cost of materials for the
23 retaining wall and so forth.

24 Q All right. And then the last column is labor.
25 And again, you've already referred to the brush

1 clearing and splitting and stacking the wood as
2 being something you have a question about, but
3 besides those two items would there be anything
4 in that column in terms of labor charges that
5 have been allocated for each of these items that
6 you would have a dispute with?

7 A Well, the dispute is done after the fact. I
8 mean, he manipulated these numbers to get to the
9 bottom number, so do I agree with it? Absolutely
10 not, but that's what he put on paper. I never
11 saw this until it was done, so ---

12 Q And I said I understand and you continued.

13 A Yeah. So, no. Yeah, I've got a dispute with it
14 because it is not accurate.

15 Q All right. Now, I specifically asked you there, are
16 there any particular items on that billing statement
17 that you could dispute with, either in terms of what
18 he did, how much he did or what he charged and the
19 only two items you specifically mentioned that day was
20 brush clearing and the wood. Is that correct?

21 A I just read it. Yes, sir.

22 Q You didn't mention anything about the wall being a
23 problem at that point, the cost of the wall, and that
24 was a pretty big item, wasn't it? You didn't mention
25 that in your deposition.

1 A No.

2 Q I think the only other thing I wanted to ask you
3 about, Mr. Waldrep, there was some reference made to
4 the fence that was installed adjacent to the wall.
5 Correct?

6 A Yes, sir.

7 Q And you were asked about, were you going to redo the
8 fence or you made the comment you were not going to
9 redo the fence until the wall was redone. Why would
10 you be redoing the fence?

11 A Once the -- well, if you saw the pictures earlier,
12 sir, the fence steps down anywhere from a quarter inch
13 to a half inch to an inch across the whole fence and
14 goes back up because the wall is not straight, which
15 all that's been determined, I believe.

16 Q All right. This is Defendant's Exhibit Nos. 8A-P.
17 Correct?

18 A That's right, sir.

19 Q And what is the problem with the fence there that
20 would make you want to take it down and redo it?

21 A Well, the way that fence is constructed, if they tear
22 the wall down, you have to tear the fence down, too.

23 Q Well, I understand that, but aside from having to take
24 it down because of repairing the wall, is there any
25 reason you would want to repair or redo the fence?

1 A You'd have to replace all those posts on here, sir,
2 the 4x4 foot.

3 Q I realize that, if you took the wall down, but I'm
4 saying, leaving that aside, not taking the wall down,
5 is there any reason that you would have to need or
6 want to replace or redo the fence?

7 A No, it's not.

8 Q There's nothing wrong with it the way it is?

9 A Not unless the wall comes down, you're right.

10 Q All right. That all has to do with whether or not
11 this wall has to come down. You're not saying that
12 some repair has to be made to the fence as it is now.

13 A No, sir.

14 Q Okay. Just a couple more questions about the, you
15 talked about the wall some, but another primary issue
16 here concerning your problems with the work that was
17 performed relates to irrigation. Now, when did you
18 first realize there was any irrigation problem?

19 A Once we turned the irrigation on, which is when Jeff
20 of Landscape Perfection came over, the Spring of '07.

21 Q How about the Spring of '08? Is that right?

22 A Oh, '08. I'm sorry.

23 Q And that's the first time you knew there was a problem
24 with the irrigation?

25 A It had worked up until that time because the pump had

1 not frozen prior to that.

2 Q So, it worked all the way from May of '07 up until, I
3 guess, the winter months when you weren't using it?

4 A Up until the time that the pump froze.

5 Q Well, that would be during the winter.

6 A When the pump froze, yes.

7 Q But all through the growing season or watering season,
8 everything was working fine?

9 A Yes. The pump had not frozen at that time.

10 Q So, the irrigation system was working. You didn't see
11 any problems with it at all?

12 A No, sir.

13 Q All right. And did you have any plants dying during
14 that period of time?

15 A You saw the information. Yes, sir, we did.

16 Q Okay. And that was when? When did the plants start
17 dying?

18 A I cannot answer that. As Jeff said earlier, they had
19 either died or they were dying and never came back to
20 life when Spring came around. I'm sure it was in the
21 Fall of '07.

22 Q Okay. But you said the irrigation system had been
23 functioning properly up until Jeff got there in March
24 of '08. Right?

25 A Do you recall Jeff's conversation about the, not the

1 landscape person, but that the valves had been put on
2 backwards, were not watering the plants? That's what
3 caused them to die. They were not getting irrigated
4 properly.

5 Q Well, that's what I just asked you. Had the
6 irrigation system been functioning properly during the
7 interim and you said it had been.

8 A Okay. If I could clarify. I'm not the irrigation
9 person. You saw the documents and Jeff has testified
10 to that fact, so the pump wasn't working properly,
11 those zones weren't working properly, according to
12 Jeff at Landscape Perfection and he says that's what
13 caused the problem with the plants. That's all I can
14 testify to.

15 Q All I'm asking you, Mr. Waldrep is, from May of '07
16 when this job was finished and Jerry left the job up
17 until March of '08 when you say the problem with the
18 irrigation was discovered, did you observe any problem
19 with the operation with the irrigation system?

20 A I guess I want -- the answer, I guess, would be no if
21 that's what you want me to say. I did not observe it.

22 Q I want you to tell me what the answer is.

23 A I don't look at my irrigation system, sir. I
24 apologize. I don't look at my irrigation system, but
25 we did not detect a problem until the Spring, but up

1 until that time, we had water coming out. We just
2 didn't know that certain zones had problems, that it
3 was installed improperly, which Jeff actually wrote
4 out for the Judge and yourself, and I didn't see it
5 because I'm not an irrigation expert. I apologize.

6 Q All right. I guess what I'm trying to understand, Mr.
7 Waldrep is, your plants don't just die overnight and
8 your plants started dying, I'm assuming, some time in
9 the growing season, summertime, of '07 and if you
10 noticed plants dying, did you not ask questions? Did
11 you not check the irrigation? Did you not call Jerry
12 and say, "All my plants are dying." Did you just let
13 them die until March of '08?

14 A First off, Jerry never came on our property after the
15 final bill, first off, for the record. For the
16 record, Okay? So, I didn't call Jerry and when Fall
17 comes around, you start losing leaves, so you can't
18 really tell if they are dying unless it's a tree, so
19 no, sir, I didn't notice it because we would have lost
20 leaves anyway during the Fall and Winter seasons on
21 those bushes.

22 Q Okay. Thank you, Mr. Waldrep. That's all I have.

23 THE COURT: Redirect?

24 MS. BERGER: Just a few questions.

25 REDIRECT EXAMINATION OF DENNIS WALDREP BY MS. BERGER

JERRY HOLTZCLAW d/b/a GREENTHUMB NURSERY V DENNIS WALDREP

1 Q Mr. Waldrep, Mr. Hood asked you, again, about the
2 meeting when you offered Mr. Holtzclaw and Ben
3 Thrasher \$20,000.00 when you were presented with a
4 \$52,000.00 balance. Right?

5 A That's right.

6 Q At that point, did you have any knowledge that your
7 lower retaining wall was in failure mode?

8 A I did not.

9 Q And with regard to the scope of work that you received
10 at the end of the project with Mr. Holtzclaw's bill,
11 you just went over some questions you were asked at
12 deposition by Mr. Hood.

13 A Yes.

14 Q And he asked you about the brush clearing, which you
15 testified to today under direct examination, right?

16 A That's right.

17 Q Did he ask you any questions about the retaining wall
18 at that point?

19 A He did not.

20 Q Okay.

21 MS. BERGER: Nothing further, Judge.

22 THE COURT: You may step down, sir. Ms. Berger, do
23 you have any other witnesses?

24 MS. BERGER: I do not, Your Honor.

25 THE COURT: Any reply from the Plaintiff?

1 Q Tell me when and by whom those were taken.

2 A Starting with No. 87?

3 Q Yes, sir.

4 A These were taken by Sonya Eaten two Fridays ago, I
5 believe it was, when we were allowed to view the
6 property at that point.

7 Q All right. And so you went out to the property along
8 with who?

9 A I went out with Sonya Heaton, which took the
10 photographs, my wife, another gentleman, Steve Bailey
11 and then Ben Thrasher and another guy that works for
12 him, Buddy Malpass.

13 Q All right. So, all the remaining photographs, No. 87
14 through the end, are photographs that were taken
15 during the last two weeks?

16 A Yes, sir. That's correct.

17 Q All right. Jerry, that's all the questions that I
18 have for you. If you will answer any questions that
19 Ms. Berger may have, please.

20 THE COURT: Cross examination?

21 MS. BERGER: Thank you, Your Honor.

22 CROSS EXAMINATION OF JERRY HOLTZCLAW BY MS. BERGER

23 Q Mr. Holtzclaw, you are the sole proprietor of Green
24 Thumb Landscaping. Is that correct?

25 A That is correct.

1 Q And at the time you were working at Mr. Waldrep's
2 property in Seneca, how many employees were working
3 for you?

4 A At that time?

5 Q That's right.

6 A There was four.

7 Q Can you name them, please?

8 A Yes, sir, I sure can. They was Rick Glassingame was
9 there. A Greg Porter was working there and then there
10 was a Tony, Tony Blackwell was working there and
11 Adrian Richardson, I believe, worked there for a
12 little bit. I believe that's the one.

13 Q Okay.

14 A It may have been a few other ones, too, that came in
15 and out on the project, because actually, I think my
16 brother actually helped us work up there and then I
17 had another friend to help.

18 Q That answers my question.

19 A Sure.

20 Q So, that's a total of four employees that worked for
21 you on Mr. Waldrep's property?

22 A Yes. That's correct.

23 Q Okay. And were all those individuals you just named
24 working for you full time?

25 A Part-time, but full time on this. They had other jobs

1 that they were working on.

2 Q Okay. So, tell me who was part-time.

3 A The part-time ones?

4 Q Yes.

5 A Actually, Rick and Andre, I believe, because they had
6 full-time jobs and Ben was a part-time worker up
7 there, too, but he was brought in as a partner at that
8 time.

9 Q So, that's Ben Thrasher, your cousin, that you
10 referred to earlier?

11 A That is correct.

12 Q So, he was also a part-time employee while---

13 A Well, he wasn't an employee.

14 Q Let me finish my question, please. Mr. Thrasher was a
15 part-time or full-time employee of Green Thumb while
16 you worked on Mr. Waldrep's home in '06. Is that
17 right?

18 A Yeah, well, we were partners on that job. Yes.

19 Q Did he draw a salary?

20 A No, sir. Not from me, he didn't.

21 Q How was he compensated for the work at the Waldrep
22 property based on your Phase 1 and Phase 2 and your
23 proposals?

24 A How was he going to be compensated?

25 Q No. How did you compensate him.

- 1 A He was not compensated, whatsoever.
- 2 Q Okay. He was paid nothing.
- 3 A Nothing.
- 4 Q And how many hours for the entirety of the entire
- 5 project at the Waldrep's home was Mr. Thrasher on the
- 6 premises working for you?
- 7 A The whole time.
- 8 Q How many hours would that be?
- 9 A Estimated, thousands, I guess.
- 10 Q Thousands of hours?
- 11 A I mean, we were up there six days a week for eight,
- 12 nine, ten hours a day.
- 13 Q What was your agreement with Mr. Thrasher as to how he
- 14 would be compensated or paid for the work for the
- 15 Waldrep's which turned out to be thousands of hours
- 16 over the course of almost a year?
- 17 A We were going to split the costs, or split the money
- 18 at the end of the job.
- 19 Q At the end of the job.
- 20 A Yes, ma'am.
- 21 Q And what was your agreement at the beginning of the
- 22 job when you consulted with the Waldrep's with what
- 23 you were going to be splitting with Mr. Thrasher on
- 24 this job?
- 25 A Me, or the agreement between me and Ben or me and Mr.

1 Waldrep?

2 Q Right. The agreement between Mr. Thrasher and
3 yourself.

4 A Me and Ben had agreed upon splitting the money.

5 Q So, Mr. Thrasher -- let me see if I got this straight.
6 Mr. Thrasher worked at the Waldrep property for you on
7 this property.

8 A That is correct.

9 Q And it took several thousand hours of his time.

10 A Estimated, yes.

11 Q And he didn't earn any money until the project was
12 over and you were going to ask Mr. Waldrep to be paid.
13 Is that right?

14 A That is correct. What ---

15 Q That is your testimony?

16 A That is my testimony. What ---

17 Q Okay. Now, of the four individuals you indicated
18 worked part-time for you, Rick, Tony, Andre, and
19 another individual, what was their rate of pay, that
20 you were paying them?

21 A I believe I was paying them around \$8.00 to \$9.00 an
22 hour, I believe.

23 Q Was it \$8.00 or was it \$9.00 an hour?

24 A I believe it was around \$8.00 to \$9.00 an hour. Some,
25 I think, were doing \$8.00, \$8.50 an hour.

1 Q Did they receive weekly pay checks?

2 A Yes, ma'am. I wrote them checks every week for their
3 time spent on the job.

4 Q Exhibit No. 4 that you say you prepared, that runs
5 from different phases starting August 18th. It's a
6 three-paged document.

7 A Yes, ma'am.

8 Q You prepared this document. Is that correct?

9 A That is correct. I did. Me and my wife, actually.

10 Q So, who -- let's talk about the top first page.

11 A Sure.

12 Q That you called "Spreadsheet for Wall One," for the
13 dates of 8/18/06 to 12/28/06.

14 A That's correct.

15 Q At the completion of that first phase, did you give
16 Mr. Waldrep a copy?

17 A Of which, what?

18 Q This right here.

19 A This part here?

20 Q This top section on the first page.

21 A No. Not for just that section. No, ma'am, I did not.

22 Q So, as the project was ongoing, you didn't provide the
23 Waldreps with receipts that you've introduced and
24 examined and testified to?

25 A Receipts for my materials?

1 Q For materials.

2 A No, ma'am. I did not.

3 Q Now, on the initial proposal for the initial work that
4 you were going to do at the Waldrep property, Exhibit
5 No. 1, and you wrote down different things you were
6 going to erect: a back retaining wall, front retaining
7 wall, et cetera, drain pipe, rip rap rock, et cetera,
8 you prepared that proposal. Is that right?

9 A That is correct.

10 Q And you totaled the amount necessary for that initial
11 work including grading and removal of concrete at
12 \$12,460.00. Is that correct?

13 A And plus what's on the back sheet. Yes, ma'am.

14 Q Okay. What date did you prepare that and tender it to
15 the Waldreps?

16 A What date?

17 Q Yes.

18 A I think I stated earlier, roughly, around in August.
19 I don't have the exact date that I made it.

20 Q I see. Do you --

21 MS. BERGER: Excuse me, Judge. Do you have those
22 copies any longer? (Judge McIntosh hands documents to Ms.
23 Berger) Thank you.

24 Q Now, on this proposal, your Exhibit No. 1, a three-
25 pagged document, there's no signature on that proposal.

1 Is there?

2 A Not on that one. That's just an estimate.

3 Q Okay. An estimate. And did you reduce this to a
4 written agreement signed by Mr. And Mrs. Waldrep?

5 A Yes, I did. There were some more details on the
6 statement.

7 Q And that would be Exhibit No. 2?

8 A I'm not sure which exhibit it was, but there was a
9 contract, an agreement between us.

10 Q Okay. Your Exhibit No. 2, which is a four-paged
11 document and it has been signed by you and Mr.
12 Thrasher.

13 A That is correct.

14 Q And it has also been signed by Mr. Waldrep.

15 A Mr. Waldrep. Yes, ma'am, that is correct.

16 Q Now, this is dated 8/13/06. Right?

17 A That is correct.

18 Q And you prepared this.

19 A I prepared that. Yes.

20 Q And on this agreement, you asked for 35% down upon
21 signing of this agreement.

22 A That is correct.

23 Q And then you wanted an additional 35% when the work
24 was half-way or 50% complete.

25 A That's correct.

1 Q And then you wanted 30% of the balance at the time the
2 work was completed.

3 A That is correct.

4 Q Now, the scope of work that you testified to earlier,
5 when did you prepare that?

6 A When did I prepare this?

7 Q Yes.

8 A We actually prepared that one, that one was done ---

9 Q This would be Exhibit No. 13.

10 A Yes. That was done after the work was completed at
11 Mr. Waldrep's home.

12 Q And there's no date on this.

13 A Not to -- No ma'am, there's not.

14 Q So, as this spreadsheet, Exhibit No. 13 was being
15 filled in, you didn't provide the Waldreps with a copy
16 or give them any information on the numbers. Did you?

17 A For this one?

18 Q Right.

19 A Yes, ma'am. I did.

20 Q When did you give him this?

21 A The very first time me and Mr. Waldrep had met, I left
22 that, actually, with him.

23 Q So, this was filled in with 48 man hours and 48 man
24 hours on brush removal at the beginning of the job?

25 A Well, I was keeping up. I mean, I had time cards.

1 Q That's not my question. Did you provide this
2 completed scope of work to the Waldreps at the
3 beginning of the job?

4 A At the beginning of the job? No, ma'am. Sorry.

5 Q At the end of the job.

6 A At the end of the job, yes, ma'am.

7 Q In fact, it was about three months after you completed
8 the work in August of '07. Isn't that right?

9 A That is correct.

10 Q That's your testimony.

11 A Yes, ma'am.

12 Q And wouldn't it be a fair statement that you would
13 know what your out-of-pocket materials were at the
14 time you paid for them?

15 A It was pretty close. I mean, I knew what we had
16 spent, yes, ma'am. That is correct. But ---

17 Q But it took you 90 days to prepare the scope of work
18 that you showed the Waldreps that you still wanted
19 \$52,000.00. Is that right?

20 A Yes, ma'am. We went back through ---

21 Q Thank you. That answers that. Now, is it a fair
22 statement that the Waldreps paid a fair amount of
23 money for materials directly, to this job?

24 A They did pay for some materials directly.

25 Q Okay. Now, you mentioned the direction of the back

1 retaining wall which faces the property, the rim of
2 the property down to the lake.

3 A To the lake. That's correct.

4 Q And I believe you said in your direct examination that
5 the purpose of the wall was to provide the Waldreps
6 some additional living space outside, a place for the
7 dog to play and where they could entertain.

8 A That's correct.

9 Q That was your testimony?

10 A That is correct.

11 Q Isn't it a fact that the retaining wall was sought by
12 the Waldreps to be erected by you for structural
13 support?

14 A What is that again?

15 Q For structural support.

16 A Could you ask the first part of your question again,
17 please?

18 Q Let's re-phrase that. Have you ever erected a
19 retaining wall before you ---

20 A Contracted with Mr. Waldrep?

21 Q Right.

22 A No, ma'am.

23 Q No.

24 A Never touched a piece of block in my life. No.

25 Q But you agreed and were willing to do so for the

1 Waldrep's property. Is that right?

2 A Yes, ma'am. I did.

3 Q In fact, you contracted to build two retaining walls.

4 A That is correct.

5 Q What's the purpose of a retention wall?

6 A Retaining walls are for, to help with some erosion
7 problems, especially if you have a big sloping bank or
8 whatever and that helps retain, you know, keep the
9 ground stable, pretty much.

10 Q And that would be one purpose of the retention wall --

11 A Yes.

12 Q --- on the Waldrep's property, right? The sloping
13 issue?

14 A Yes, ma'am.

15 Q And to have some integrity so that they wouldn't be
16 losing the topography and the dirt and the sod and the
17 bushes and the trees around their property. Is that
18 right?

19 A That's correct.

20 Q And are you familiar with what the requirements are
21 for the erection of a retaining wall in the county of
22 Oconee, in which you have your business?

23 A As far as I know, for any wall over, like, six foot
24 that's constructed of six foot, that they needed to
25 be, you know, engineered, looked at by an engineer. I

1 think it changes from, goes to like a bigger wall or
2 something like that. I'm not really sure. I think if
3 it's something over six foot, it had to be looked at
4 by an engineer, but I'm not sure, no ma'am, I'm not.

5 Q My question really is, is a permit needed for either
6 of the walls that was constructed on the Waldrep's
7 property?

8 A A permit like building it or whatever? As far as I
9 know, there wasn't.

10 Q Would you agree with me that the retaining walls that
11 you contracted and agreed to build on the Waldrep's
12 property were for structural support for their
13 premises?

14 A Structural for the home or ---

15 Q For their home and their property.

16 A I -- for the most part, it was. I mean, there was a
17 slope there and once you start building a wall and
18 leveling it off, yes, they would be support there for
19 that purpose. Yes.

20 Q Now, Mr. Holtzclaw, on your proposal, Exhibit No. 1,
21 which you say you prepared, it indicates that you
22 would do the work in a timely and orderly fashion and
23 all clean-up work would be done before final
24 inspections. Payments due upon stated inspection of
25 the superintendent of the grounds.

1 A That is correct.

2 Q Okay. And that this was a quotation of the contract.
3 Right?

4 A That's on the quotation part, yes, ma'am.

5 Q And the other language in your underlying agreement
6 talks about if there were any change orders, that they
7 would be signed by you and Mr. Waldrep, and/or Ms.
8 Waldrep. Is that right?

9 A Yes, ma'am. I believe so. That ---

10 Q And there were no change orders signed.

11 A No, ma'am, there was not.

12 Q And, in fact, there weren't any change orders even
13 though in your direct testimony you indicated there
14 were a myriad of changes on this job. Right?

15 A That is correct.

16 Q One thing led to another?

17 A I'd agree to that.

18 Q But you didn't see fit to have the Waldreps approve
19 them as you went along. Is that right?

20 A No, ma'am. Not at the time, I didn't. No, ma'am.

21 Q All right. At the end of the job, about three months
22 after you completed and tendered the Waldreps your
23 scope of work, you claimed that you were still owed
24 some money on this project. Is that right?

25 A That is correct.

1 Q And you're asking for, approximately, well, exactly
2 \$52,988.98.

3 A That is correct.

4 Q Now, when you provided this scope of work to the
5 Waldreps, you prepared it. Right?

6 A Yes, ma'am. I did.

7 Q And you have a column that indicates the cost of
8 materials.

9 A That's correct.

10 Q A column for expenses.

11 A That's correct.

12 Q And you've got receipts for that and then you've got a
13 column that indicates installation/labor.

14 A That's correct.

15 Q Okay. Did you indicate to the Waldreps that the labor
16 only related to employees when you tendered this to
17 the Waldreps as your completed ---

18 A On the end or ---

19 Q When you tendered this to the Waldreps ---

20 A When I gave that to them?

21 THE COURT: Hang on for a minute. You need to let her
22 finish her question before you start answering. This lady
23 is trying to take down everything here and ---

24 MR. HOLTZCLAW: Yes, sir.

25 THE COURT: --- when she is finished, you can explain

1 your answer in full. Okay?

2 MR. HOLTZCLAW: Yes, sir, I'm sorry.

3 MS. BERGER: Thank you.

4 Q This document that you prepared, Mr. Holtzclaw,
5 indicates a column entitled installation/labor.
6 Correct?

7 A That's correct.

8 Q Now, does it indicate anywhere on here that there was
9 going to be additional labor?

10 A No, ma'am.

11 Q And you didn't have any conversation with the Waldreps
12 when you tendered this scope of work that you prepared
13 indicating labor doesn't include me, right?

14 A Yes, we did.

15 Q Okay. And you're the contractor on this job for all
16 intent and purposes. Right?

17 A For all intent and purposes. That's correct.

18 Q And at the beginning of this project, which kind of
19 got to be a bigger project with the erection of the
20 retaining walls, drainage, concrete, lots of
21 additional landscaping done, you were paid as the job
22 progressed. Is that right?

23 A That is correct.

24 Q And, in fact, on your Exhibit No. 4, where you've
25 broken out August to September, three pages, you've

1 got labor columns and materials and all that. Right?

2 A That is correct.

3 Q I mean, you were paying these employees, these four
4 people, part-time, as the job was going on. Right?
5 Isn't that right?

6 A Yes, ma'am. I was ---

7 Q I mean, they were working -- none of these gentlemen
8 were working for you week in and week out without
9 getting paid. Right?

10 A Oh, no, sir. I mean, yes, ma'am, they were getting
11 paid.

12 Q And is it a fair statement that this having been the
13 first project in which you personally have installed
14 or erected retention walls on a property, that this
15 job pretty well took up a lot of your time in the
16 course of that year. Is that a fair statement?

17 A Yes, sir. Yes, ma'am. I'm sorry.

18 Q How many days -- you said you were working there six
19 days a week. Is that right?

20 A Some weeks, yes, ma'am.

21 Q And who was supervising the employees while the
22 project was ongoing?

23 A I was. Me and my, Ben Thrasher. We were overseeing.

24 Q So, if you weren't there, Ben Thrasher was on the
25 property. Is that correct?

1 A That's correct.

2 Q Now, is it a fair statement that there were other
3 contractors working on the Waldrep property while you
4 were installing the retention wall and drainage and
5 breaking up concrete?

6 A I believe there were several other contractors that
7 came in.

8 Q And you knew those contractors?

9 A I knew some of them.

10 Q And they were working doing other things un-associated
11 with what you and your employees were doing.

12 A That is correct.

13 Q And are you licensed in South Carolina?

14 A Licensed...

15 Q Do you have a contractor's license?

16 A I do not. I don't have a contractor's license, but I
17 am insured and bonded for my part of the business.

18 Q You said until the job was completed, until you filed
19 a lawsuit against Mr. Waldrep that, at no time did he
20 complain about the quality of your work. Is that a
21 fair statement?

22 A That's -- Yes, ma'am.

23 Q And, in fact, you've been in the landscaping business
24 and are familiar with the Waldrep's property. Right?

25 A Yes, ma'am.

1 Q You've been cutting the grass and doing routine
2 maintenance for ---

3 A For a while.

4 Q --- since 2002, I think you testified to.

5 A Yes, ma'am. That's true.

6 Q And so you are familiar with soil, the topography and
7 the layout of the property. Is that right?

8 A Yes, ma'am. I was.

9 Q Now, before you started erecting retention walls, did
10 you take any soil samples?

11 A No, ma'am. I did not.

12 Q Why not?

13 A I didn't see the need. I've never erected a wall
14 before and stuff and so I didn't know that we needed
15 to have a soil sample done.

16 Q So, as you sit here today, having erected your first
17 retaining wall on the Waldrep's property, you don't
18 know whether taking soil samples would be an important
19 component to preserve the integrity of the walls being
20 built?

21 A That's true. I did not know that.

22 Q So, is it a fair statement that you didn't consult
23 with a civil engineer of any kind before you started
24 on the Waldrep's property?

25 A I didn't see the need to, because those walls are

1 pretty much a week-end project that anybody could do
2 the way they are designed and stuff, the way I
3 understood it.

4 Q So, this project at the Waldrep's turned out to be, in
5 your opinion, a week-end project?

6 A Well, no, ma'am. Not the job itself. It was, but the
7 block work that was used on the job, it is
8 manufactured to be able to be, if you wanted, with a
9 little bit of basic knowledge of math and if you have
10 the equipment to do it, you could go in and actually
11 build a retaining wall.

12 Q Did you create a design for the retention wall?

13 A No, ma'am. I did not.

14 Q And you determined the kind of block that was going to
15 be used, though. Didn't you?

16 A I didn't, personally. I consulted with my cousin at
17 that point because he had a little bit more experience
18 with that.

19 Q Okay. And that would be Mr. Thrasher?

20 A That's correct.

21 Q Does Mr. Thrasher have a civil engineering background?

22 A Not to my knowledge.

23 Q Are you familiar with his educational background?

24 A A little bit. I know he's got some electrical
25 education and I'm not exactly sure exactly what all

1 education he has gotten.

2 Q The Allan Block that was used on the Waldrep project,
3 you said it expanded because 650 additional blocks
4 were needed because of the two walls that were being
5 erected. Is that right?

6 A That is correct.

7 Q Who selected Allan Blocks for those retention walls on
8 the Waldrep's property?

9 A Who selected what type it was going to be?

10 Q Who made the decision that Allan Blocks would be used
11 on this project?

12 A The Waldreps actually determined that type of block.
13 Okay, we presented it and said this was the type of
14 block we would like to use and ---

15 Q So, either you or Ben Thrasher suggested it to the
16 Waldreps?

17 A That is correct.

18 Q And they made the final decision.

19 A That is correct.

20 Q On the components and the color, et cetera. Right?

21 A The color. Yes, ma'am.

22 Q Okay. Now, did -- are you familiar with the Allan
23 Block manufacturer's suggested specifications to
24 install a retaining wall using their material?

25 A A little bit, yes, ma'am.

1 Q And then did you consult them before beginning the
2 Waldrep's property project?

3 A Yes, ma'am. We did. I think my cousin looked at it,
4 actually.

5 Q And what did those specifications indicate in terms of
6 drainage that should be installed in a retention wall
7 the size of the ones you erected on the Waldrep's
8 property?

9 A As far as I know, every third block would have a
10 french drain type behind it. It would be constructed
11 up to like three blocks or three cord and then a pipe
12 would be laid and then backfilled on top of that with
13 gravel to give a french drain type system there.

14 Q Did you install any drainage in either of the
15 retention walls you erected on the Waldrep's property?

16 A Yes, ma'am. We did.

17 Q And you followed the Allan Block requirements? That's
18 your testimony?

19 A I believe so. Yes, ma'am.

20 Q Did you ever review that or make it a part of the
21 agreement with the Waldreps?

22 A To the contract or ---

23 Q Yes. To the contract.

24 A No, ma'am.

25 Q Okay. Now, is it a fair statement, Mr. Holtzclaw,

1 that the Waldreps paid as they went on this project,
2 no matter how big it got. Is that right?

3 A What you are referring to as far as pay, what he paid?

4 Q Go back to your document, No. 4. The spreadsheet,
5 08/18/06 through 9/28/06.

6 A Yes, ma'am.

7 Q That top area. The first down payment, \$5500.00.
8 Your total expenses thus far were \$6111.07. Is that
9 right?

10 A That is correct.

11 Q Which means that the Waldrep's owed you at the end of,
12 well, one expense \$611.07. Is that right?

13 A That is incorrect.

14 Q Show me where that's incorrect.

15 A This shows what I had actually spent out-of-pocket
16 here. This shows what the balance was of what I had
17 on hand was \$611.07 left out of the ---

18 Q That's not my question. Let me re-phrase. The
19 Waldreps initially paid you \$5500.00.

20 A That is correct.

21 Q Is that right?

22 A Yes, ma'am.

23 Q You prepared this document.

24 A That is correct.

25 Q And the lefthand column has amounts: Allan Block,

1 rock quarry, fuel, help, equipment rental, et cetera
2 and those figures in those first expenses for Wall 1
3 totals \$6111.07. Do they not?

4 A That is correct.

5 Q Okay. And doesn't the right column represent
6 crediting against the \$5500.00 that the Waldreps paid?

7 A That is correct.

8 Q So, am I correct that of the first little phase of
9 your expenses on Wall 1 including labor help totaled
10 \$6111.07?

11 A That is correct. It did.

12 Q And you then credited the Waldreps accordingly. The
13 5500 paid for that phase. Correct?

14 A That is correct.

15 Q Which means the difference mathematically is \$611.07.

16 A That was the difference. That is correct.

17 Q Okay. Now, we go to the spreadsheet for Wall 2, the
18 next month that you worked on the project, 9/06 to
19 10/06, the Waldreps paid you \$8000.00. Right?

20 A That is correct.

21 Q And based on your spreadsheet, your expenses,
22 including labor help, totaled \$6752.30. Is the right?

23 A That is correct.

24 Q Meaning they had a credit that month of about a couple
25 thousand dollars. Right?

1 A They did ---

2 Q And of ---

3 A --- but I wouldn't say a couple thousand dollars,
4 because that's what was left out of ---

5 Q Thirteen hundred dollars.

6 A Roughly ---

7 Q Am I right?

8 A --- if you added those, yes, ma'am.

9 Q And as we went to the next month of expenses from
10 October until January of '07, which is really three
11 months, the Waldreps paid you an additional \$7000.00.
12 Correct?

13 A That is correct.

14 Q And that included all the additional Allan Block that
15 had to be purchased to complete the second retaining
16 wall. Correct?

17 A That is correct.

18 Q And the expenses exceeded what they had paid until
19 that point. Right?

20 A That is correct.

21 Q So, now the Waldreps owe you about \$4300.00 at that
22 point. Is that right?

23 A That was what I had spent. Yes, ma'am.

24 Q Okay. And if we went through all of these sheets, you
25 were running a tally and most were paid as you

1 completed a phase. Right?

2 A Well, I wouldn't say they was paying as I completed
3 phases.

4 Q All right. Let me break the question down a little
5 bit. As each phase was completed and the Waldreps
6 were making a deposit, you were pretty well covering
7 the expenses based on your breakdown of Allan Block,
8 rock quarry, pipe risers, labor help and the like.
9 Right?

10 A Well, yeah, but here's the problem. These were not
11 all completed during this period of time because other
12 work actually started beginning to make progress and
13 this is where all this come from.

14 Q Well, you prepared this at the end. Is that not
15 right?

16 A No, ma'am. I did not prepare that at the end. I
17 prepared this as we went along.

18 Q But you didn't provide the Waldreps with a copy. Did
19 you?

20 A I sat down with them and went through it and ---

21 Q You didn't provide them with a copy.

22 A I believe I did. I believe I did provide them a copy
23 of that each time I sit down with them and went
24 through what was being sent for ---

25 Q When did you provide this spreadsheet?

1 A When I give them that? There was a copy given to -- a
2 total copy was given to them at the end of, when I
3 give them the total bill, but I actually sit down with
4 them for each payment.

5 Q That's not what you testified earlier, Mr. Holtzclaw.

6 A Yes, ma'am, I did.

7 Q No. You said that you had, when you prepared the
8 scope of work, that you did not provide this as you
9 went along.

10 A I prov ---

11 Q You didn't provide the Waldreps ---

12 A I sat down ---

13 Q --- while it was ongoing.

14 A I sat down with them each time with this and broke
15 this down to give them an idea of what was being spent
16 with their money.

17 Q And it's your testimony that you gave them a copy as
18 each phase was done?

19 A I'm pretty sure that I did.

20 Q But now you're not sure.

21 A That's been five years ago. I'm pretty sure that I
22 give them copies each time.

23 Q Let's talk about the first retaining wall.

24 A Sure.

25 Q What are the dimensions of that wall that you erected

1 on the Waldrep's property?

2 A The length, I can give you the amount of block and
3 feet. I think it was like around 85 feet was
4 originally supposed to be done while ---

5 Q You don't have any memory of the length or height of
6 the first retaining wall?

7 A I think the length on it was around 85 feet, the width
8 of it was around 4 to 4 1/2 foot tall.

9 Q Are you guessing?

10 A No, ma'am. I'm pretty sure on the height. On the
11 length, I would be estimating.

12 Q Okay. And what about, what about the dimensions of
13 the larger retaining wall, the one in the backyard
14 that slopes down towards the lake?

15 A Right. Again, the length would probably be around 50
16 to 60 feet and then the height on it is 5'6".

17 Q Five foot six inches?

18 A That wall is, the height on that wall is 5'6".

19 Q It's your testimony that you didn't erect an 8'
20 retaining wall?

21 A The second one? The second wall? No, ma'am. The one
22 closest to the lake? That is a 5'6" wall.

23 Q And you said you didn't get permits for either wall
24 before you began construction. Is that right?

25 A No, ma'am. I didn't.

1 Q And did you ever consult the codes in Oconee County
2 relative to what might be required before you
3 undertook this project?

4 A No, ma'am.

5 Q Now, you said the Waldreps paid you \$65,600.00.
6 Right?

7 A Sixty-five thousand five hundred dollars.

8 Q Right. For the project. Right?

9 A That is correct.

10 Q Are you familiar with the mechanic's lien rules for
11 contractors such as yourself in business and the
12 trades?

13 A I'm a little bit -- not much.

14 Q Have you ever had to file a mechanic's lien to get
15 paid on a job?

16 A No, ma'am.

17 Q Have you ever completed a job for which you haven't
18 been paid other than the Waldrep's?

19 A No, ma'am.

20 Q Not at all?

21 A I've been paid for every job that I've done.

22 Q So, it's a fair statement, sir, that before you
23 undertook to erect these two retention walls and do
24 irrigation and concrete and all kinds of repairs to
25 the Waldrep's home, that you did routine lawn

1 maintenance?

2 A That's correct.

3 Q That's your field of expertise.

4 A That's what I did. Yes, ma'am.

5 Q And the Waldreps would always pay you for that work
6 that you did for them. Is that correct?

7 A That is correct. They did.

8 Q Now, Mr. Holtzclaw, you indicated that wood had to be
9 split and stacked at the property.

10 A That is correct.

11 Q And that was a part of your scope of work for your ---

12 A That is correct.

13 Q --- labor and your material. Is that right?

14 A That is correct.

15 Q How many cords of wood were on that property that had
16 to be cleared?

17 A Three to four, maybe.

18 Q Three to four?

19 A Yeah.

20 Q And how much does that represent in weight, roughly?

21 A Weight? Probably less than a ton, I would say.

22 Q So, two stacks of wood that -- you charged the
23 Waldreps \$2000.00 to stack ----

24 A That is correct.

25 Q --- two stacks of wood. Is that right?

- 1 A That is correct.
- 2 Q And it's your testimony, I believe, earlier that you
- 3 were kind of guessing the man hours. Is that right?
- 4 A Estimating. That's right.
- 5 Q And you said your employees worked for \$8.00 or \$9.00
- 6 an hour. Is that right?
- 7 A That is correct.
- 8 Q So, while this project was ongoing, I believe you said
- 9 that it was your principle job that you were doing.
- 10 Is that right?
- 11 A That is correct.
- 12 Q And so, you were there six days a week while you were
- 13 working on the Waldrep's home.
- 14 A That is correct.
- 15 Q And that took about a year.
- 16 A That is correct.
- 17 Q And while that project was going on, were you doing
- 18 other landscaping and grass cutting for other clients
- 19 and customers that you had?
- 20 A Some. Some. Yes, ma'am.
- 21 Q But you probably couldn't do very much during that
- 22 time. Could you?
- 23 A No, ma'am. I could not.
- 24 Q This job took up a lot of your time. Did it not?
- 25 A Yes, ma'am. That is correct.

1 Q And your wife's not on the payroll of Green Thumb, is
2 she?

3 A No, ma'am.

4 Q Okay. Now, while this project was going on for a
5 year, the Waldreps, according to your testimony, were
6 just paying for materials and your labor help, as you
7 call it.

8 A That's correct.

9 Q And that you were not earning one penny on this job.

10 A That is correct.

11 Q For an entire year.

12 A That is correct.

13 Q And three months after the job was completed is when
14 you indicated to the Waldreps, you owe me \$52,000.00
15 for the rest of the work. Is that right?

16 A That is correct.

17 Q Now, it's a fair statement that Mr. Waldrep had to pay
18 for work that you and your employees did improperly on
19 his premises?

20 A Could you repeat that one more time?

21 Q Do you know a Steve Jordan?

22 A Oh, yes.

23 Q Okay. And he was on the property when you were
24 building retaining walls. Correct?

25 A That is correct. He was.

1 Q And, in fact, there was water damage in the Waldrep's
2 home, that you testified to earlier.

3 A That is correct.

4 Q Is that right?

5 A That is correct.

6 Q And it's your testimony that the original builder of
7 the home didn't properly seal the foundation.

8 A That's what I was told by the guy that did the
9 foundation sealing, actually.

10 Q So, nothing that you did on the property, that's your
11 testimony, caused any damage or water into the
12 Waldrep's home?

13 A No, ma'am. Not as far as I know.

14 Q As far as you know. Now, the irrigation that you said
15 you did. The pump had to be replaced that you said
16 you installed. Isn't that right?

17 A I believe so.

18 Q Yes. And, isn't it a fact that the pump wasn't large
19 enough to support the amount of irrigation that needed
20 to be done at the Waldrep's property? Was it?

21 A That's incorrect.

22 MS. BERGER: Judge, I didn't have anything marked. I
23 wasn't going to introduce on cross, but ... (Ms. Berger
24 has document marked)

25 Q Mr. Holtzclaw, you indicated that you didn't charge

1 the Waldreps for anything mentioned in this
2 counterclaim for the backyard and the patio, right?
3 You didn't charge them for that, because you didn't do
4 any work there. Right?

5 A No, ma'am. I didn't.

6 Q Okay. Now, isn't it true that a part of the rear of
7 the patio was demolished and broken up because of the
8 trenches and equipment that you were using around the
9 Waldrep's property?

10 A A part of it, yes. That's correct. A part of it ---

11 Q And that was your responsibility as the owner of Green
12 Thumb Landscaping. Right?

13 A Yes, ma'am.

14 Q And Mr. Jordan was on the property at that time.

15 A That is correct.

16 Q Is that right?

17 A That is correct.

18 Q And so, a part of that patio had to be resurfaced and
19 redone.

20 A That's correct. It was.

21 Q Due to your negligence.

22 A That's their opinion.

23 Q Isn't that right?

24 A That's what their opinion was.

25 Q Well, you paid for a part of it.

- 1 A I give him a credit back on that. Yes, I did.
- 2 Q Let me show you Exhibit No. 1.
- 3 A Sure.
- 4 Q You've seen that before.
- 5 A Yeah, I believe so. I don't know if I seen this
- 6 actual paper, but I knew that he did some stuff for
- 7 them. Yes, ma'am.
- 8 Q Okay. So, \$1250.00 was paid by the Waldreps to have
- 9 the patio re-poured and re-stamped because of Green
- 10 Thumb's activities on the Waldrep's property. Isn't
- 11 that right?
- 12 A That's -- yes. Whatever he paid, I'm not sure.
- 13 Q Well, that's what it says. Do you have some confusion
- 14 with that?
- 15 A No, ma'am. If that's what he paid, that's what he
- 16 paid.
- 17 Q Well, you were there when it happened. Right?
- 18 A Well, yeah, I was there.
- 19 Q And you know Mr. Jordan remedied the problem. Right?
- 20 A He did repair it.
- 21 Q In fact, you brought photographs that show the patio.
- 22 A Oh, yes.
- 23 Q And it looks beautiful. Right?
- 24 A Yes.
- 25 Q You did a part of the work. Right?

1 A I didn't do the concrete.

2 Q Right. Now, the backyard had to be re-sodded because
3 of the water damage in the yard. Right?

4 A No, it did not.

5 Q No re-sodding was needed?

6 A Not in the backyard. Not to my knowledge.

7 Q What about the front yard?

8 A Not to my knowledge.

9 Q Okay. Let's talk about the larger retention wall that
10 you approximate 5'6" feet in height. Is that right?

11 A That's correct.

12 Q Was that a gravity wall or a re-enforced wall that you
13 installed?

14 A That was re-enforced, actually.

15 Q Re-enforced with what?

16 A It is filled, each block or each layer is filled with
17 No. 57 stone and is actually geogrided back into the
18 bank itself, or the dirt itself.

19 Q And your testimony is, you put drainage in there.
20 Right?

21 A That is correct.

22 Q I believe you testified that as part of the items that
23 you bought during the course of this project was a
24 transit. Is that right?

25 A That is correct.

- 1 Q Well, what did that cost you?
- 2 A Roughly, around \$450.00 to \$470.00, I believe.
- 3 Q And when did you purchase that?
- 4 A Right before we began work at Mr. Waldrep's.
- 5 Q And are you familiar with its use?
- 6 A Yes, ma'am. It's ---
- 7 Q Well, what purpose is the transit, if any, for the
- 8 erection of the retention wall?
- 9 A It's actually ---
- 10 Q Let me finish. That you built at the Waldrep's
- 11 property?
- 12 A It's actually to get it level, the height of the wall,
- 13 to make sure it's level.
- 14 Q And did you use it at the beginning of the project?
- 15 A Yes, ma'am, we did.
- 16 Q And how often did you use it as each wall was erected?
- 17 Let's start with the wall in the front of the home,
- 18 the smaller.
- 19 A It was set up. I mean, it was only set up ---
- 20 Q Who was using it?
- 21 A My cousin, Mr. Thrasher.
- 22 Q Mr. Thrasher.
- 23 A Yes, ma'am.
- 24 Q So, were -- you weren't necessarily on the property
- 25 when Mr. Thrasher was using the transit?

1 A Well, I would help him or people that were there would
2 help him.

3 Q But you don't know how often you would check it to
4 make sure the wall was level?

5 A You take it off, I mean, every so often and we used
6 other things as we went along to build the walls.

7 Q The smaller wall in the front. You said you checked
8 it ever so often. What does that mean?

9 A He checked it when we first began to get it level, to
10 make sure it was getting leveled, especially on the
11 first course and we checked it again as we moved up on
12 the height of the wall to make sure it was still being
13 level.

14 Q The backfill, what was the purpose of the backfilling
15 with the retention wall?

16 A The backfilling of the gravel or the dirt?

17 A The backfilling associated with the retention wall.
18 What was the purpose?

19 A The backfilling ---

20 Q What was the purpose of the backfill that you put on
21 their property?

22 A The backfilling for the walls is to give support to
23 the wall and, also, to act as drainage to the wall.

24 Q Did you put drainage tracks into either of the
25 retention walls?

- 1 A No, ma'am.
- 2 Q No drainage at all?
- 3 A Just the french drain.
- 4 Q And did you put a toe drain in either of the walls?
- 5 A A drain ---
- 6 Q A toe drain.
- 7 A Drainage out of the wall? One of them we did.
- 8 Q Which wall?
- 9 A The second wall actually has a drain coming through
- 10 down to the lake.
- 11 Q On the backfill that you used to support the retaining
- 12 wall on the Waldrep's property, did you use backfill
- 13 from any other premises other than the Waldrep's own
- 14 yard?
- 15 A The dirt, yes, it was.
- 16 Q And where did you get that from?
- 17 A That came from across the street from the new home
- 18 that was being constructed, across from his house.
- 19 Q But you didn't take soil samples before you used that,
- 20 did you?
- 21 A No, ma'am.
- 22 Q And you didn't think that was important?
- 23 A No, ma'am. Like I said, it was the first time I'd
- 24 ever done retaining walls and stuff and ---
- 25 Q Right. But you agreed to undertake this job. Right?

1 A Well, Mr. Waldrep actually allowed us to do the job.

2 Q Well, you gave him a written proposal, didn't you?

3 A I gave him a written proposal.

4 Q And you worked on the property for a year.

5 A Yes, ma'am.

6 Q And you weren't doing it just, you know, to be a nice
7 guy. Right? Now, the photographs that your attorney
8 showed you in this book.

9 A Yes, ma'am.

10 Q Numbers 1 through 86, I believe you said was ongoing
11 construction?

12 A That is correct.

13 Q And beginning at 87 is the way the property looks as
14 of a week-and-a-half ago. Correct?

15 A That is correct.

16 Q Now, and I believe you said that you didn't prepare
17 this in anticipation of litigation with the Waldreps
18 but you wanted to present it to potential future
19 clients.

20 A That is correct.

21 Q And, in fact, you're proud of these photos.

22 A Very proud.

23 Q And you believe that this would be a good selling
24 point to erect another retaining wall for another
25 client.

1 A If I decided to do one, yes, ma'am. That is correct.

2 Q Have you erected any retaining walls since you did the
3 Waldrep's?

4 A No, ma'am. I have not.

5 Q Not a single one?

6 A No, ma'am.

7 Q ~~Would it be~~ a fair statement that most of the
8 photographs of the finished work, photographs 88
9 through 107 show the retention wall in just about
10 every photograph?

11 A It sure does.

12 Q Is that right?

13 A It sure does.

14 Q And it's your testimony that you prepared this hoping
15 you'd get additional work?

16 A The book. Yes, ma'am.

17 Q And since the Waldrep's project was completed in
18 August of '07, you haven't done a single retention
19 wall.

20 A No, ma'am.

21 Q Now, on the photographs that relate to the ongoing
22 construction, you said those were prepared for the
23 same purpose.

24 A Yes, ma'am.

25 Q As a selling point.

1 A And to show what we were doing. Yes, ma'am.

2 Q Now, you testified a bit earlier about having a
3 conversation with Mr. Waldrep about certain trees and
4 other plantings and aesthetic things he wanted on the
5 property.

6 A Yes, ma'am.

7 Q And you didn't prepare the design for that. Did you?

8 A No, ma'am. I did not.

9 Q And you didn't charge for that either. Did you?

10 A No, ma'am. I did not.

11 Q Now, the photographs in the book, there are levels
12 shown?

13 A Yes, ma'am.

14 Q I want to ask you a question about one of those. It's
15 photograph No. 92.

16 A Yes, ma'am.

17 Q There's a gentleman on the far right in the green
18 shirt. Who is that?

19 A That is me.

20 Q That's you.

21 A Yes, ma'am.

22 Q And what is that picture purporting to show?

23 A That is showing a, there was a dip that had curved in
24 the wall or, I guess, a drop in a section of the wall
25 and it was kind of showing from the level, from where

1 it was level here, to where it had dropped here and
2 how much.

3 Q What is that instrument, that orange instrument that
4 you're holding?

5 A That is a level, a four-foot level.

6 Q Did you use a transit when you went out to the
7 property?

8 A Yes, ma'am. We did. Yes, ma'am.

9 Q Okay. And how un-level was it based on that
10 photograph?

11 A According to that one, it was roughly around two
12 inches, roughly around two inches.

13 Q And which retention wall is depicted in that
14 photograph.

15 A That is the lower wall.

16 Q The larger wall.

17 A The larger wall.

18 Q Is that right?

19 A Yes, ma'am.

20 Q And did you take that level on that particular day and
21 measure the entire length of that wall?

22 A Yes, ma'am. I did.

23 Q And did you take photographs of that?

24 A Yes, ma'am. I think No. 95, may be one.

25 Q What is the length of this wall we're talking about in

- 1 picture Nos. 92 and 93?
- 2 A Approximately, I'm not sure approximately the total
- 3 length is, but ---
- 4 Q Over 50 feet?
- 5 A Yes, it's over 50 foot long.
- 6 Q A hundred?
- 7 A No. It's not over a hundred.
- 8 Q Okay. Between 50 and 100?
- 9 A Yes, ma'am.
- 10 Q So, what was the length of the level you were using?
- 11 A Four foot. That's the only one I have.
- 12 Q Okay. So, other than the two photographs, Nos. 92 and
- 13 93, are there any other pictures in there from a week-
- 14 and-a-half ago that show level measurements that you
- 15 took?
- 16 A I'm sure if they are in there. Not to my knowledge.
- 17 They are the only ones that I see.
- 18 Q Okay. So, you only brought the two photographs. Do
- 19 they depict the same four feet?
- 20 A Yes, ma'am.
- 21 Q Of the fifty-plus feet and that's just the one
- 22 retention wall.
- 23 A That's correct.
- 24 Q You didn't do the other one on the property?
- 25 A I checked some of them, yes, ma'am.

1 Q But that's not a part of your brochure and your
2 photographs that you brought to court today.

3 A Not in a part of this one, but I do have some.

4 Q Now, did the Waldreps discuss with you the fact that
5 they were interested in putting fencing behind the
6 retention walls, especially the larger one facing the
7 lake?

8 A When we first met and I give him the contract or we
9 started talking about doing the estimate on the very
10 first one, yes, ma'am, there was some fencing
11 discussed at that point.

12 Q And, in fact, you told him you were going to put a
13 fence up.

14 A Yes, ma'am. I did think there was going to be a fence
15 put there. Yes, ma'am.

16 Q And would it not be significant to know the parameters
17 of the fence being installed before you began building
18 the retention wall?

19 A I didn't give him a price for doing the fencing,
20 because ---

21 Q That wasn't my question. Listen to my question. Did
22 you not think it important to know the parameters, the
23 particulars for the fencing contractor before you
24 started erecting the retention walls?

25 A No, ma'am, I didn't, because the fencing guy came in

1 at a later time. I knew he was wanting to put up a
2 fence of some sort ---

3 Q I realize the fencing wasn't there when you met with
4 the Waldreps to talk about the retention walls, but
5 did you not think it important to know what the
6 particulars of the fence they were going to erect were
7 before you began your work of erecting the retention
8 walls?

9 A I had no -- that was never brought to me what type of
10 fence they were going to use.

11 Q Do you think it was important for this project?

12 A It never crossed my mind.

13 Q Not at all?

14 A Not of that.

15 Q So, the fencing in your mind's eye had nothing to do
16 with the integrity or structure of the retaining
17 walls?

18 A Just depends on what type of fencing you were going to
19 use.

20 Q And it's your testimony that Mr. Waldrep never
21 complained there was a problem now with those walls?

22 A Now?

23 Q Right.

24 A When I was on the job, no, I heard no complaints. The
25 only time I've heard them is up until now.

1 Q But when the job was completed, three months after it
2 was completed, you came to him with, you owe me some
3 money on the job, right?

4 A I presented him with the final bill. Yes, ma'am.

5 Q And you knew there were issues with regard to the
6 patio and the irrigation while you were on the
7 project. Right?

8 A No, ma'am.

9 Q You already testified there was water damage in the
10 home.

11 A No, you said irrigation.

12 Q Now, you mentioned an insurance claim.

13 A Yes, ma'am.

14 Q And who filed the insurance claim?

15 A I filed the insurance claim.

16 Q With you own insurance company?

17 A Yes, ma'am.

18 Q And you did that believing you're not responsible for
19 any of the water damage in the home. Is that right?

20 A Inside the home. That is correct.

21 Q But you took it on yourself knowing that you were
22 working at the Waldreps and they probably had no claim
23 to file a claim through your own carrier?

24 A Well, we were on the job ---

25 Q Is that what you did?

- 1 A Repeat the question?
- 2 Q You filed an insurance claim relative to the water
- 3 damage at the Waldrep's home against your own
- 4 insurance company.
- 5 A I filed -- I had my insurance company come out and
- 6 take a look at the damage.
- 7 Q And you did that thinking you didn't do anything
- 8 improperly at the Waldrep's home?
- 9 A As far as my work was going, no, we didn't.
- 10 Q And rates tend to go up when you file a claim against
- 11 your own company if you're not at fault or if you are
- 12 at fault. Is that right?
- 13 A I believe so. Yes.
- 14 Q Did your rates go up on this?
- 15 A No, ma'am. Not to my knowledge.
- 16 Q Do you know how much the Waldreps were paid by your
- 17 insurance company for the water damage to their home?
- 18 A Actually, I don't.
- 19 Q No idea?
- 20 A No idea. The check was never sent to me or ---
- 21 Q That's not my question. You filed a claim with your
- 22 own company.
- 23 A That's correct.
- 24 Q That right? Did you have any discussion with any
- 25 insurance adjusters while it was ongoing?

1 A I did with the insurance adjuster. I met with him,
2 yes, ma'am.

3 Q And you have no idea what they paid the Waldreps?

4 A I have no idea.

5 Q As far as you're concerned, you filed a claim with
6 your company and that's it, you're done.

7 A Whatever ---

8 Q Is that right?

9 A Yes, ma'am.

10 MS. BERGER: I'm going to be a bit longer, Judge, so I
11 don't know what ---

12 THE COURT: I want to go to about one. It's about
13 twelve-thirty now.

14 MS. BERGER: Okay. May I have five minutes?

15 THE COURT: Yes, ma'am.

16 MS. BERGER: Okay. Thanks.

17 THE COURT: We'll be in recess for five minutes.

18 MS. BERGER: Thank you, Judge.

19 (Brief Break)

20 THE COURT: Are you ready to proceed?

21 MS. BERGER: Yes, I am. Thank you.

22 THE COURT: Okay.

23 CONT. CROSS EXAMINATION OF JERRY HOLTZCLAW BY MS. BERGER

24 Q Now, Mr. Holtzclaw, when you were excavating and
25 getting the ground prepared to install these retention

JERRY HOLTZCLAW d/b/a GREENTHUMB NURSERY V DENNIS WALDREP

1 walls, to erect them for all intent and purposes, a
2 lot of ground cover had to be ripped up. Is that
3 right?

4 A Yes, ma'am.

5 Q And you had worked there for years. Is that correct?

6 A I had. Yes, ma'am.

7 Q And there was an existing base for the foundation of
8 the house, at the rear of the house?

9 A I suppose. Yes.

10 Q And it is true you had to move some soil around with
11 the heavy equipment you brought in. Correct?

12 A That's correct.

13 Q And that equipment moved the soil above the face of
14 the house. Right?

15 A It did. It didn't change as far as ---

16 Q That's not my question. You brought soil, removed
17 soil and excavated soil up above the base of the
18 house. Isn't that correct?

19 A We didn't change the ground. No, ma'am.

20 Q That's not my question. Listen to my question,
21 please. When you moved soil at the rear of the
22 Waldrep's home, when you were erecting these walls and
23 getting ready to do the prep work.

24 A Yes, ma'am.

25 Q You moved soil that was sitting on the level of their

1 backyard higher than the base of the home. Right?

2 A Sure.

3 Q Sure. And you don't know when this home was built.
4 Do you?

5 A I do not.

6 Q You made a reference that the builder must not have
7 properly sealed it. That's your testimony, right?

8 A Yes, ma'am, but ---

9 Q You have no knowledge of that. Right?

10 A I have no idea when the house was built. No.

11 Q You didn't do any sealant work before you moved the
12 soil up higher than the back of the home. Did you?

13 A No, ma'am. That's not in my job description. No.

14 Q That's not my question. You didn't do it. Did you?

15 A No, I did not do any sealant.

16 Q Not on this project. Now, after you were excavating
17 and moving earth up above the baseline of the rear of
18 the home is when there was water damage in the
19 Waldrep's home. Right?

20 A Yes, ma'am.

21 Q It followed on the heels of that. Right?

22 A After a rainstorm. Yes, ma'am.

23 Q And you said there was a rainfall.

24 A Yes, ma'am.

25 Q And then you reported it and your insurance company

1 took care of it.

2 A That's correct.

3 Q You don't feel you had any responsibility for that.
4 Right? You've already testified to that. Is that
5 right?

6 A I suppose.

7 Q Did you re-waterproof the wall after the damage to the
8 home?

9 A The home or the wall?

10 Q The wall.

11 A I didn't, not personally. No.

12 Q Anybody working for you do it?

13 A Nobody personally -- no.

14 Q Okay. Did you charge the Waldreps for that?

15 A No, ma'am. I did not.

16 Q Do you think that was something that was necessary to
17 preserve the integrity of the walls that you had just
18 built on the property?

19 A That didn't have anything to do with the walls, except
20 that ---

21 Q Nothing to do with the walls. Nothing to do with the
22 irrigation you were doing there.

23 A No. Not with those water problems that they were
24 having. No.

25 Q You installed the irrigation along the driveway?

1 Right?

2 A The drip lines. Yes, ma'am, I did.

3 Q Right. You put in piping, too. Right?

4 A Along one side. Yes, ma'am.

5 Q What kind of piping did you use?

6 A It's two-inch, I mean, excuse me. A one-inch PVC pipe
7 line.

8 Q Okay. Is that expandable pipe?

9 A No, ma'am. Not to my knowledge. It's got a little
10 place ---

11 Q You used corrugated pipe. Didn't you?

12 A No, ma'am. Not for irrigation.

13 Q You didn't?

14 A No, ma'am.

15 Q Okay. Along the driveway, there was some concrete
16 that had to be re-done. You put drainage lines
17 alongside the driveway at the Waldrep's home when this
18 project was ongoing. Right?

19 A There was some drainage. Yes.

20 Q I mean, you charged them for it. Right?

21 A I put drainage pipe in.

22 Q Right. And the drainage pipe was corrugated. Right?

23 A That was.

24 Q Right. And that's expandable pipe, is it not?

25 A The corrugated pipe is. Yes.

1 Q So, if enough moisture comes through it there could be
2 a problem, a leak and excessive moisture on that
3 property. Right?

4 A Possibly.

5 Q You didn't see fit to use drain pipe. Is that right?

6 A That is correct.

7 Q And that piping was installed by you before the
8 flooding in the Waldrep's home. Right?

9 A No. There was no piping, to my knowledge, because the
10 driveway hadn't been constructed at the time that ---

11 Q That was not my question. You put in the piping and
12 then the Waldrep's had water damage in their home.

13 A Where are you asking where the piping was put in at?

14 Q Right where you put it, sir.

15 A Where did I put it?

16 Q Alongside the driveway. You put in drainage pipes,
17 did you not?

18 A Eventually we did, but there was no drainage, because
19 there was no concrete drive at the time.

20 Q And that had to be re-done, that work that you did.
21 Right?

22 A Which ---

23 Q The irrigation and the pump, the drainage lines that
24 you put in.

25 A The irrigation and the drainage line didn't have

1 anything to do with ---

2 Q But they had to be re-done.

3 A They may have had to be re-done because of a pump
4 going bad or being not winterized, but ---

5 Q Do you know who re-did that work?

6 A Landscape Perfection.

7 Q Uh-huh. They are, in fact, doing the Waldrep's
8 routine maintenance at their property now. Right?
9 You're not doing it.

10 A I don't know who's doing the maintenance.

11 Q But not you. Right?

12 A I don't do it, but I don't know who's doing it.

13 Q Uh-huh. And you know Jeff Franklin (verbatim) from
14 Landscape Perfection. Right?

15 A I've met him a few times. Yes.

16 Q And he had to redo some of the work that you did on
17 this project. Did he not?

18 A He re-did the irrigation as far as I know. Yes.

19 Q Right.

20 A On ---

21 Q Okay. You indicated that you gave the Waldreps some
22 credits on your Exhibit No. 13. Credits back here.

23 A Yes, ma'am.

24 Q You gave them credits for concrete repair, \$2200.00.
25 Drainage pipe, labor to replace drainage, \$100.00.

1 Okay. The credit that you are talking about now, a
2 couple thousand dollars. Where's that credit on your
3 scope of work?

4 A A credit for ---

5 Q What you just testified to.

6 A What was the ---

7 Q Landscape Perfection.

8 A Why would I give him a credit for a pump that had
9 issues ---

10 Q Other than the pump.

11 THE COURT: Just one second. Both of you, this lady
12 is trying to take down everything that's being said. You
13 let him finish his answers and you let her finish her
14 questions.

15 MR. HOLTZCLAW: Sorry, Judge.

16 MS. BERGER: I'm sorry.

17 THE COURT: Go ahead and finish your answer, please,
18 sir.

19 A Can you repeat the question, please?

20 MS. BERGER: Could you read back the question?

21 COURT REPORTER:

22 Q The couple of thousand dollars, where is that?
23 Where's that credit on your scope of work?

24 A A credit for ---

25 Q What you just testified to.

1 A What was the ---

2 Q Landscape Perfection.

3 A Why would I give him a credit for a pump that had
4 issues ---

5 Q Other than the pump.

6 A So, again, I asked -- you asked me for the credit for
7 the repairs, but I wasn't on the job at the time that
8 these problems had, it was after the fact later on and
9 it was something that should have been done in the
10 winter months to rectify it. You asked me where the
11 credit for \$2000.00 comes from or whatever. I'm not
12 exactly sure which credits you are looking for.

13 Q Let's go back to Exhibit No. 1. The credit for Mr.
14 Jordan. Right?

15 A Yes, ma'am.

16 Q What amount of credits did you give back to the
17 Waldreps relative to this?

18 A I'd have to look on my breakdown list to see what it
19 was, if you don't mind.

20 Q I'll show you the scope of your work.

21 A (Looks at document) There was a concrete repair on
22 the back patio, which is right here of \$2200.00.

23 Q Other than the credits that you reflected on page one
24 of your Exhibit No. 13, were any other credits given
25 to the Waldreps?

1 A Other -- can you repeat that one more time, please?

2 Q Yes. Other than what is depicted on Exhibit No. 13.

3 A That's correct.

4 Q Are there any other credits that you extended to the
5 Waldreps?

6 A No, ma'am. That's all of them.

7 Q To your knowledge, did any other work that you
8 performed in the erection of these retention walls or
9 irrigation or concrete and all of that have to be re-
10 done?

11 A As far as I know, I didn't -- I mean, I'm not sure
12 exactly. You keep referring back to the concrete
13 stuff. I'm not sure if you mean like the concrete
14 like actual pouring of the concrete or what, because
15 all we were contracted to do or all we did was remove
16 concrete and you keep referring to it back as we
17 poured concrete. We didn't do that.

18 Q Are you aware that the Waldreps had to pay Landscape
19 Perfection additional amounts of money to correct work
20 that you and your employees did improperly on this
21 job?

22 A No, ma'am, I do not know what the amount is.

23 Q Are you aware that they had to pay?

24 A Yes. I knew there were some payments there.

25 Q And you are aware then, that Steve Jordan, who was

1 working on the property when you were with your staff
2 had to do some work that you failed to do properly?
3 Is that right?

4 A I credited back to the patio, yes. Other than that, I
5 do not know what he's done on the property.

6 Q Did you take any seismic samples or do any testing
7 relative to the retention walls that you ultimately --

8 A As I quoted before, no, ma'am, I did not take a soil
9 sample or any other things.

10 Q You didn't think any engineering expertise would be
11 needed. Is that right?

12 A No, not on the original contract part of it, because
13 the wall was only like four foot tall.

14 Q And you didn't think an engineer would be needed on
15 the expanded part of the project with the wall. Did
16 you?

17 A No, ma'am. Not at the time. No, I did not.

18 MS. BERGER: I have nothing further, Judge.

19 THE COURT: Redirect?

20 MR. HOOD: Very briefly, Your Honor.

21 REDIRECT EXAMINATION OF JERRY HOLTZCLAW BY MR. HOOD

22 Q Jerry, I just have one question on redirect. Ms.
23 Berger asked you several times about whether you are
24 aware that certain repair work had been done
25 subsequently. Correct?

1 at all concerning the work that was being done
2 regarding the work? Any questions or problems with
3 the work you were doing?

4 A No, sir. Not to my knowledge. The only discussion
5 then that me and Mr. Waldrep actually had was the time
6 frame, some of the time frames of completion.

7 Q In other words, how much longer it was going to take?

8 A How much longer, yes, sir, with the added work. It
9 entailed more time.

10 Q Let me ask you a little more about that, but first of
11 all, I believe you said earlier, you started in
12 September.

13 A Yes, sir. We started in September.

14 Q And when was the job finished?

15 A May.

16 Q May of '07?

17 A May of '07.

18 Q So, September to May.

19 A May.

20 Q Now, with respect to the work that was done, do you
21 consider that a reasonable time period for getting the
22 work done?

23 A It could have been done, probably, a couple weeks
24 sooner. You know, we had some weather inclements
25 there then some other things that were going on at the

1 time. They were adding things to the actual house,
2 waiting for the concrete. We don't do concrete work
3 and so we actually had to bring somebody that does
4 concrete work and kind of having to wait on them and
5 stuff. I mean, it was a little bit longer, but not
6 much more than what it should have been.

7 Q Okay. If you would, pass that last exhibit up.

8 (Witness hands document to Judge McIntosh)

9 Q Now, when you finished the job in May, was there any
10 sort of meetings or whatever with Mr. Waldrep at the
11 time that you completed it to go over the work or
12 anything like that?

13 A We had, once we laid, put down the sod, or finished up
14 the sod, I think we discussed and talked about how
15 good everything was looking and at that time, that's
16 all we discussed really, at that point, and then I
17 think we talked about going back through and taking,
18 about getting the final prices together as far as the
19 job. I think I mentioned that to him at that point,
20 but other than that, there was no other discussion or
21 things like that. We discussed the work itself as I
22 remember it.

23 Q Well, when you actually completed with the work, did
24 you have any discussion at that time about doing your
25 final billing?

1 A Yes, that's what I was meaning. We did discuss that
2 at that point and I just told him, he mentioned that
3 once, you know, I got a chance to sit down and go
4 through all the numbers and added everything up, then
5 I would get back with him as far as, you know, if
6 there were any other payments to be made for the job.

7 Q And did you do that?

8 A I took a little time to get everything together. It
9 took about a month, I think, to get everything
10 together and I was beginning to get into my main, as
11 far as the season, and so it took a little time to get
12 it all together and was able to get back with him.

13 Q All right. So, did you get back later then, with Mr.
14 Waldrep to go over your final billing?

15 A Yes, sir. I sure did.

16 Q And had you prepared a final billing statement at that
17 time?

18 A Yes, I did.

19 Q Excuse me. One thing I did overlook before we get
20 back to that. This is in connection with the previous
21 exhibit, your periodic accountings. You indicated the
22 cost listed on that form were for materials that you
23 actually purchased for the job.

24 A Yes, sir. That is correct.

25 Q Where did those numbers come from?

- 1 A All the receipts.
- 2 Q All right. And did you keep the, you kept and have
- 3 the receipts for costs that are shown on that last
- 4 billing?
- 5 A Yes, sir. Yes, sir.
- 6 Q All right. Now, I'm going to hand you what has been
- 7 marked as Plaintiff's Exhibit Nos. 5-12. That's eight
- 8 different stacks of receipts.
- 9 A Correct.
- 10 Q And can you tell me what each of those stacks
- 11 represent.
- 12 A These stacks represent each time a payment was
- 13 received from Mr. Waldrep and they break down to each
- 14 time we set down to discuss money.
- 15 Q So, there are eight different entries on the previous
- 16 exhibit and there are eight different stacks of
- 17 documents there.
- 18 A That is correct.
- 19 Q And those each represent ---
- 20 A The materials.
- 21 Q --- the materials that are reflected on that
- 22 statement.
- 23 A That is correct.
- 24 Q So, these are just the supporting documents.
- 25 A Those are the supporting documents. That is correct.

1 MR. HOOD: Your Honor, we are not going to go by those
2 item by item. (The witness hands items to Judge McIntosh)

3 Q All right. Going back to your final billing.

4 A Yes, sir.

5 Q I'm going to hand you Plaintiff's Exhibit No. 13. Did
6 you prepare that document?

7 A Yes, I did.

8 Q And is this what you presented to Mr. Waldrep as your
9 final billing for the job?

10 A Yes, sir. I did.

11 Q And tell me how you went about arriving at this
12 document.

13 A Well, what I did was, I took from the invoices and the
14 previous papers, the breakdown that we were giving him
15 each month, and just totaled, started adding up the
16 costs, the retaining wall block itself, the quantity,
17 the cost of materials and then what we originally
18 discussed on the original contract as far as
19 installation, labor and come up with a total price
20 from that, is how we started the process.

21 Q Okay. So, I want you to run down each item on that
22 list with me and just explain how you computed the
23 number.

24 A Okay. The retaining walls, there was a quantity, just
25 on the retaining wall block was \$2124.00. I spent

1 \$12,537.64 on the materials. Then \$19.00 on block
2 times the 2000 blocks and came up with a total
3 installation cost of \$2718.00.

4 Q So, the last column reflects the material costs and
5 the total labor and installation costs?

6 A That's correct.

7 Q Now, on the walls, that was done on a per block basis.

8 A A per block basis. That is correct.

9 Q All right. And the next item was what?

10 A Actually, on the next one, we built some steps on one
11 side of the home and we had to do a little more work
12 than we actually -- we actually ended up charging a
13 little bit more for those because there was a lot more
14 involved with that, a lot more hands on construction
15 with those blocks and that ended up being roughly
16 around 175 blocks added there.

17 Q And I believe that was not, there were not any steps
18 on your original quote.

19 A No, sir. It was not.

20 Q All right.

21 A And then costs of materials for this and then the
22 installation, you know, with installation and labor.

23 Q And your total on that was...

24 A Three thousand three sixty-two fifty-four.

25 Q All right. And the next item was what?

- 1 A The concrete facing, two concrete facings, which was
2 the materials and for us installing those and it was
3 like \$1800.00 on those.
- 4 Q For installation and materials?
- 5 A Materials, yes, sir.
- 6 Q And again, that was not on your original plans.
- 7 A No, sir. It was not.
- 8 Q And the next item is what?
- 9 A The drainage system, which was like 1370 feet of
10 drainage pipe installed on Mr. Waldrep's property and
11 that shows the cost of materials plus the installation
12 and labor on that also.
- 13 Q All right. Your cost of materials for the drainage
14 materials was what?
- 15 A One thousand six forty-four seventy-five.
- 16 Q And then you charged a total of what?
- 17 A One thousand seven twelve fifty.
- 18 Q So, there wasn't much labor on that, it was mostly
19 materials.
- 20 A No. It was mostly materials.
- 21 Q All right. The next item is what?
- 22 A The equipment rental which cost \$1500.00, roughly.
- 23 Q And that was actual cost.
- 24 A That was actual cost.
- 25 Q And that will be reflected in the invoices.

1 A That's correct.

2 Q And what kind of equipment was that, that you had to
3 rent?

4 A Trenchers, we had to rent a, several times, a
5 compacter, a wood chipper to chip up all the brush
6 that we had gotten from the lake. Let's see what
7 else. I believe that was it. There's probably some
8 other things in there that we actually ended up
9 renting, but mainly, those were three main ones.

10 Q All right. And then the next one is what?

11 A Gravel. You know, the gravel, just materials, what we
12 spent.

13 Q And how much was that?

14 A Two thousand three fifty-one eleven.

15 Q And where did the gravel go?

16 A The gravel went in, some went, it mainly went for the
17 retaining walls, all the retaining wall footers and
18 then some for the back patio, new deck. There's some
19 back there.

20 Q Okay. And then you've got, the next one is what?

21 A The hauling of the gravel. Yes, sir, having to haul
22 it in and it was like 154 loads that was brought in.
23 I believe that's correct. Yeah, that's correct.

24 Q The total on that was what?

25 A Nine hundred twenty-four dollars. That's what we

1 actually paid out. We had a guy running to pick up
2 stuff for us and that's what we paid out to him to
3 haul it in.

4 Q Okay. And then you've got the next one, is what?

5 A Metal edging and that was the quantity of that was
6 around 344 feet of metal edging, cost of materials and
7 then installation and labor.

8 Q The cost was four eleven thirty.

9 A For the metal edging? Yes, sir. That's correct.

10 Q And your total installation costs were what?

11 A One thousand one hundred eighteen dollars.

12 Q And so, the difference was the labor.

13 A The difference was the labor.

14 Q How do you compute that? Is that done by the foot or
15 some other way?

16 A I believe it was done by the foot, actually, the foot.

17 Q The next one is what? Mulching?

18 A The mulching. Yes, sir.

19 Q And tell me how you figured that.

20 A The mulching is done by the yard, a scoop and that's
21 pretty regular, and there were 236 yards of mulch put
22 at Mr. Waldrep's which shows the cost of materials
23 was, roughly, around \$3832.00 and then the
24 installation was \$5090.00 and that installation part
25 on mulching is also done by the per yard, which was

1 \$25.00 per yard.

2 Q All right. And is that a regular figure?

3 A Yes, sir. It sure is.

4 Q The next one is what?

5 A Plants and trees.

6 Q All right.

7 A It shows the cost of materials and that was \$4036.35,
8 is what that was in plants and trees.

9 Q Is there no money built into that for labor?

10 A No, sir. There's not.

11 Q Why is that?

12 A Because there's a little bit more involved in dealing
13 with plants, basically, had to go and pick it up,
14 bring the plants and trees back to the property, then
15 setting up and going through and making sure, going
16 over the placement of the plants and everything, then
17 plus having to install them.

18 Q Well, that's what I'm trying to understand. How do
19 you get paid for all that?

20 A Sir?

21 Q How do you get paid for all that?

22 A What I do -- how I charge it?

23 Q Yeah.

24 A How do I charge that? It depends on what I was kind
25 of telling you there and the size of the plants and

1 trees or whatever, but it's normally one-and-a-half to
2 one-and-a-third times whatever the cost ---

3 Q Okay.

4 A --- of the material.

5 Q And is that also a fairly typical ---

6 A Yes, sir.

7 Q All right. The next one was what?

8 A The topsoil. The topsoil is calculated on a per yard
9 basis. At that time, we're talking about 78 yards was
10 there.

11 Q And then you've got what's next?

12 A The river rock and boulders and that was charged on
13 the cost of materials for the rock and the boulders
14 and charged about \$100.00 per boulder to place it in.

15 Q Okay. The next item was?

16 A Cutting down some trees and that's -- the cutting down
17 of the trees was kind of a subcontractor type deal
18 that we brought in.

19 Q Okay. Is that \$1200.00 there actually what you paid
20 him?

21 A That's what I paid him. Yes, sir.

22 Q All right. And the next item is what?

23 A Cleaning out some brush down by the lake and that was
24 done by man hours. At this point, we had some, it was
25 two other guys, three other guys brought in to start

1 handling this job since we had grown at this point,
2 but that was priced by man hour.

3 Q All right. And did you actually keep direct records
4 for each man cutting brush or how many hours or how
5 did you go about doing that?

6 A I tried to, but it's kind of hard to keep up with that
7 kind of stuff. I mean, it was estimated.

8 Q So, it would be fair to say this was an estimate?

9 A It was an estimate.

10 Q And what about the next one, the...

11 A Clearing and stacking of wood, yes, sir. Same thing.
12 It was the same thing. It was so much going on with
13 different projects going on on the property and it's
14 an estimate, also.

15 Q Okay. And the next item was...

16 A Materials, additional materials, anything we had to
17 pick up like at Lowe's, Home Depot, places like that.

18 Q Would there be actual invoices there to support that?

19 A Yes, actual records in there.

20 Q All right. And then you've got, the next one is what?

21 A Buddy Malpass' grading and he did some hauling and I
22 think did some other things for us on the job like
23 bringing the rock and stuff like that. I think he
24 actually hauled a lot of the concrete off that we paid
25 him directly.

1 Q Was that actually what you paid out to him?

2 A That's actually what I paid out to him.

3 Q Nothing there for you?

4 A No, sir.

5 Q All right, next item.

6 A Then the concrete, sidewalk removal and that's taking
7 up the sidewalk from the backyard at that back of the
8 house down to the lake, removal of that and that was
9 just straight up removal costs for that. It's showing
10 under installation/labor costs, but that was just
11 labor costs.

12 Q And then you've got concrete removal again. What was
13 that?

14 A That was actually carrying out the complete driveway
15 in the front yard. Completely removing that and
16 hauling that off, too.

17 Q And that was \$2000.00.

18 A Yes, sir. That's correct.

19 Q All right. And then the next one is what?

20 A The irrigation and it's twelve zones and the paper
21 here reflects the material costs, what we had in it
22 and the installation part of it.

23 Q And how do you charge installation on an irrigation
24 system?

25 A It's done by per zone. If you want me to give a price

1 as to how I price it, is that what you're asking?

2 Q Well, it's done per zone? Is that the way you
3 computed this?

4 A Yes, sir. Some people do it per zone, some people do
5 it per head, by number of actual irrigation heads. I
6 prefer to do it by zone and, basically, it works out
7 to be actually about the same.

8 Q And do you remember, recall, what your per zone cost
9 was to do that?

10 A Yes, sir, I do. I ended up charging Mr. Waldrep or
11 calculated on Mr. Waldrep's job, \$403.75 per zone on
12 that.

13 Q Would that be sort of a reasonable price compared ---
14 MS. BERGER: Objection. No foundation.

15 THE COURT: Lay the foundation, please, sir.

16 Q All right, in your experience as a landscaper, is that
17 consistent with what the prevailing prices would be?

18 A Under. It's actually under and what I did there,
19 because of the job being such an enormous sized job
20 and stuff, we just, I just cut the price. That was a
21 fair price there. I think I priced him on the
22 original quote at \$520.00 or \$500.00 on the repair
23 because of the repair work, not knowing what we were
24 going to get into, but since we actually tore out the
25 system, I just give him a better rate on doing that

1 one.

2 Q Okay. And the next item was?

3 A The drip irrigation and it's done mainly on a separate
4 charge because it's more of a hands on involved there,
5 running out the drip line, staking them down and stuff
6 like that and so I charged that by the foot, per foot.

7 Q And is that typically priced by the foot, as well?

8 A Yes, sir.

9 Q All right. And the next one was what?

10 A The pump. The pump installation at the lake and that
11 was a flat \$2000.00 for the lake pump.

12 Q And the next item?

13 A Sod and it was done based on \$.55 a square foot and
14 had a total sod of 8334 square feet.

15 Q And the next item?

16 A Staining the deck and that was calculated at \$1.25 per
17 square foot for staining the deck and roughly around
18 750 square feet on the deck.

19 Q All right. And the next item?

20 A The deck removal and that one was done by man hours on
21 that and the number of men, plus hauling everything
22 off on that one and it was twenty-five per man and I
23 figured the total of 24 man hours.

24 Q Okay. And the next item?

25 A Let's see. The outdoor lighting was the next and that

1 was Ben's, some of Ben's fees. I'm not sure if it's
2 on here. (Looking at document) Yes, outdoor lighting
3 was just a flat fee for Ben and it was cost and
4 material plus him doing the wiring, which was around
5 \$800.00.

6 Q Total.

7 A Total.

8 Q Materials and wiring.

9 A Yes, sir.

10 Q Well, you've got some wiring listed next. What is
11 that for?

12 A That one is for, I think this was for, I think that
13 was the cost he had for the actual wiring itself, for
14 the...

15 Q Materials?

16 A Materials, yes. It's based on the list of materials.

17 Q You have it listed as cost of materials.

18 A Yes, that's under cost of materials. Yes, sir. Ben
19 entered this. I can't remember exactly what it was
20 used for, but it was for some materials there.

21 Q And the next item was for?

22 A The septic tank risers, which was, there was two of
23 them at \$100.00 and the labor charge on that, which
24 was \$250.00.

25 Q All right. And then you've got what next?

1 A The skid loader time, running the equipment, actual
2 skid loader time there was about 80 hours and it was
3 calculated at, roughly, around \$60.00 an hour for
4 that.

5 Q Okay.

6 A The fill dirt, same thing, the loads, we run about 30
7 loads and that was done on the pricing from the rental
8 contract which turned out to be around \$900.00.

9 Q And where was the dirt hauled from?

10 A The dirt was actually hauled from across the road.
11 Some of it from across the road then like some of the
12 organic topsoil for the beds, we brought in.

13 Q When you say, across the road, what does that mean?

14 A Across the road from Mr. Waldrep's home, there was a
15 new house being built across the street from his home
16 and I believe Mr. Waldrep actually went next door and
17 asked them about using some of their dirt there, so
18 there was no material cost there, it was just straight
19 up moving dirt back and forth from over there.

20 Q All right. Would the charge for that have been
21 different if it had to be brought in?

22 A Yes, sir, because there is material cost in that.

23 THE COURT: Let me ask a question here. You have ~~2~~
24 skid loader times and fill dirt, three loads, what is that
25 charge if you are not charging for material?

1 MR. HOLTZCLAW: Well, the fill dirt is -- well, the
2 skid loader time was actually running more, building the
3 walls, grading back out, cutting in the irrigations, and
4 covering back up, moving the blocks back and forth, events
5 like that is what that was. This other one was, the skid
6 loader, the fill dirt was just the time actually moving
7 that back and forth because of having to go back and forth
8 and skid loaders don't move very quickly. It's a process
9 moving stuff back and forth.

10 THE COURT: I guess the question, Mr. Hood, is that 80
11 hours of skid loader time moving fill dirt or is that
12 different?

13 MR. HOLTZCLAW: It's different. It's different.

14 THE COURT: Okay.

15 MR. HOOD: Does that answer your question, Your Honor?

16 THE COURT: Yes, sir.

17 Q All right. And the last item was what?

18 A The foundation being and that goes back to digging out
19 where they had some water damage and that actually,
20 once we started doing that, our we seen that we had :
21 the back digger." it would only go so far and so we had
22 to actually bring somebody else in that had the
23 equipment to do that.

24 Q Let me, while you are talking about that foundation
25 digging, let me ask you further about that. You

1 mentioned something about some flooding that took
2 place.

3 A Yes, sir. It was in, after the first of the year, we
4 had pretty good rain storms that came through and it
5 had a big washout on one side of the home and it had
6 seeped back through the house and flooded back out
7 through the basement, actually.

8 Q All right. And was there an issue about who was
9 responsible for that flooding?

10 A Yes, sir, a little bit. Mr. Waldrep had approached me
11 about -- I was actually out of town for the weekend
12 and when we got back or on my way back, I got a phone
13 call about the problem and Mr. Waldrep had discussed
14 with me about not having flood insurance and wanted to
15 pursue maybe like talking to my insurance company
16 about filing a claim to fix it, because it was some
17 pretty good damage underneath the home. It flooded
18 pretty good. So, I had contacted my insurance company
19 and had somebody come out and look at it. They sent
20 an actual adjuster out to investigate what had taken
21 place there.

22 Q All right. And was that issue resolved?

23 A Well...

24 Q What I'm trying to clarify, was that issue resolved or
25 is that issue in any way involved in what we are

1 discussing here today?

2 MS. BERGER: Objection. Calls for conclusion.

3 THE COURT: Overruled.

4 A I guess what you're asking is, was there any, was it
5 like, did I receive any money or did Mr. Waldrep
6 receive any money for compensation from my insurance
7 company. Is that what you're asking?

8 Q Well, yeah.

9 A Yes, he did. My insurance guy came or the adjuster
10 came out ---

11 MS. BERGER: I object, Judge, to anything coming in
12 with respect to the amount of any insurance or any claims.

13 THE COURT: I note your objection. Overruled. Go
14 ahead.

15 A I had, once I had contacted the insurance company,
16 once he sent the adjuster out and he came in to
17 investigate ---

18 THE COURT: Don't say what the insurance adjuster
19 said.

20 MR. HOLTZCLAW: Okay. So, what you're saying is don't
21 refer to anything that he said?

22 THE COURT: Don't say anything that the insurance
23 adjuster told you.

24 MR. HOLTZCLAW: Okay, sir. I understand.

25 Q Just tell us what ended up happening.

1 A Okay. The house was flooded, the insurance adjuster
2 came out and determined that, you know, there was some
3 damage there and they compensated Mr. Waldrep for the
4 damage that was done, basically.

5 Q Okay. Now, the reason I raised that question at this
6 point, this, how in any way, does this foundation
7 digging have anything to do with that?

8 A With the job that we were doing?

9 Q Well, with the flooding issue.

10 A With the flooding issue.

11 Q Did this have anything to do with that?

12 A Oh, the foundation digging?

13 Q Yes.

14 A Yes, it did. It did, because it had seeped back
15 through the house the way it did and because of how
16 far we had to dig down, there was an issue with the
17 actual, I guess, the sealant of the basement there and
18 it was actually determined that it wasn't done
19 properly. The sealant wasn't done correctly when the
20 house was built. The actual drainage around the home,
21 from the foundation of the home was installed
22 backwards. What I mean by backwards, the holes should
23 have been facing down into the ground to where when
24 things started washing through, it wouldn't fill up
25 and clog everything up and so, basically, it was on

1 the builder actually. It was his responsibility that
2 it should have been fixed.

3 Q Okay. Well, what I'm trying to understand here, I'm
4 trying to clarify Mr. Holtzclaw is, why did you charge
5 Mr. Waldrep \$1400.00 in here for digging the
6 foundation?

7 A We charged him because we actually did the digging to
8 get down to see where the problem was, what caused it
9 to actually seep back through the house is what we
10 ended up doing. That was our time for doing that.

11 Q And once it was dug out, what was done?

12 A We, I guess one of the guys had a guy come in. A
13 friend of ours told us about a guy that could look at
14 the foundation and give a price on re-sealing that
15 foundation and we actually just didn't do that one
16 section. We actually ended up digging all the way
17 around the house, basically.

18 Q And after you dug it, was it sealed?

19 A Yes, sir. It sure was.

20 Q Okay. So, in so far as you are aware, was any damage
21 or loss that Mr. Waldrep sustained, as a result of any
22 flooding, settled outside these proceedings today?

23 A As far as I know, yes, he did. He had received, I
24 guess, compensation for the flooding. Yes, sir.

25 Q All right. Now, continuing on down this exhibit, what

1 was the, having itemized the total work and charges on
2 this form, what was the total cost that you ended up
3 with for the labor and materials for the work
4 provided?

5 A The total on the -- do you want me to give you the
6 total on both?

7 Q The total for work and ---

8 A The total for labor and installation come out to be
9 \$121,537.55.

10 Q All right. And how much had Mr. Waldrep paid you by
11 the time the job was completed?

12 A Sixty-five thousand five hundred dollars.

13 Q And is that as reflected on the previous exhibit?

14 A That is correct.

15 Q All right. And that left a balance of how much due?

16 A Fifty-six thousand, thirty-seven dollars and fifty-
17 five cents.

18 Q All right. And did you make any further adjustments
19 to that?

20 A Yes, sir, I did. We had some concrete repairs brought
21 up at that time and I give him, I had to give him a
22 credit back down on the back patio. I think he had
23 some charges there for that, that we had to replace
24 there. We had some issues there, so I gave him back
25 \$2200.00. I think there were some blocks charged by

1 another company for having to take down one of the
2 walls and it was 285 and I think they give him a
3 credit back on that and then we had to repair eight
4 feet of drainage pipe material in the front of the
5 house. I believe it was when we were doing the
6 concrete, removing the concrete driveway and I give
7 him the credit back for that which was the material
8 cost of \$.39 per foot for that. I actually give him a
9 labor credit for repairing the drainage. I think it
10 was the same thing which was, roughly, around \$100 and
11 it was based on about 80 foot at that. I believe
12 that's correct. And then some equipment rental that
13 we had to bring in, I give him some credit back on
14 some equipment rental.

15 Q Why did you credit him back that?

16 A Because since we were doing some repair work to the
17 front, some drainage in the very front of the home,
18 there was no need, it wasn't his cost, it was our
19 problem and so we, I compensated him back for that.

20 Q And after giving those credits, then, what did you
21 come up with as the total amount due?

22 A The total was \$52,988.98.

23 Q Okay. And again, let me clarify again, of the
24 \$65,500.00 in payments that had been made, what had
25 been included or what was paid for with that

1 \$65,500.00?

2 A Materials and my help, labor help.

3 Q Was that all out-of-pocket expense for you?

4 A Yes. It was.

5 Q And did the \$65,500.00 include any money for your
6 labor overhead or equipment costs or tools?

7 A No, sir. A little bit. We actually bought a transit
8 out of that money to construct the wall, to help like
9 run the walls and everything. Bought a few lunches
10 with it, but other than that, no.

11 Q Okay. Now, there's another two pages attached to this
12 document that says, "Breakdown of charge description".

13 A Yes, sir. That's correct.

14 Q Did you also prepare that and present that to the
15 Waldreps?

16 A Yes, sir. I sure did.

17 Q And what was the purpose of that?

18 A Just to give them a breakdown of how everything was
19 done pertaining to how the, you know, the charges and
20 how they come about. A breakdown of that.

21 Q And that, does that contain an explanation for each of
22 the line items that we just went through?

23 A That is correct. It does.

24 Q All right. Jerry, if I could ask you to hand that
25 exhibit up, please.

(Witness hands document to Judge McIntosh)

Q Now, once you got this document prepared, did you meet with Mr. Waldrep to go over it?

A Yes, I did.

Q And do you remember about when that would have been?

A The first time me and my wife met with him on a Sunday evening and it was roughly around the end of August, the middle of August, something like that, of 2007.

Q All right. And you finished up the job in May. Is that right?

A In May. That's correct.

Q And could you tell me what happened at that meeting?

A Yes, sir. We sit down and I went through the charges and the breakdown, just like we did a few minutes ago with Mr. Waldrep and had just a normal conversation at that time and Mr. Waldrep said that he would like to go through and look at the sheet and just check over the numbers, I guess, and that's to be expected and I had no problem with that, at all.

Q Okay.

A There was a lot there.

Q Okay. At that point in time, besides saying he just wanted to look over the numbers, did he have any specific complaints about what you presented?

A No, sir. Not at that time. Well, yes he did. I take

1 that back. I think one of the things that he had
2 discussed was some concern about the man hours at that
3 point and how that was being charged and I think he
4 wanted to look at that a little bit closer at that
5 point.

6 Q All right. Did he indicate any problems or questions
7 that he had at that point of the quality of the work,
8 any problems or defects with the work?

9 A No, sir. Not at that point.

10 Q All right. So, then you end up, subsequently, meeting
11 again with Mr. Waldrep?

12 A Yes, sir. We did, about a week later. I think Mr.
13 Waldrep had contacted me, I believe it was, and wanted
14 to meet on a Saturday afternoon and kind of discuss
15 some things.

16 Q Did you go back then?

17 A Yes, sir. I did.

18 Q Did anybody go with you?

19 A Yes, sir. My wife and actually Ben Thrasher actually
20 went this time.

21 Q And when you got there on the second occasion, tell me
22 what happened.

23 A We walked in and we started discussing things with Mr.
24 Waldrep about the payments and I think he, you know,
25 started talking about some of the charges and what,

1 you know, some of the concerns he was having with some
2 of the man hours and at that point, he brought to my
3 attention that he would be willing to pay around
4 \$20,000.00 as a settlement on the job at this point.

5 Q And did he give you any basis for where that came
6 from?

7 A No, sir. Not at this point. The only thing that he
8 said, you know, to kind of chalk it up to a learning
9 experience at this point.

10 Q He said, what, now?

11 A He kind of chalked it up as a learning experience.

12 Q That's what he said?

13 A Yes, sir. That's what he said.

14 Q But did he specify to you any particular, besides
15 generally talking about man hours, did he specify to
16 you any particular items on your bill that he
17 disagreed with or that he was adjusting to arrive at
18 this number?

19 A No, sir.

20 Q All right. Was there any further discussion then
21 about the billings or the payments at that point in
22 time or what happened?

23 A No, sir. Nothing directly as far as the billing and
24 stuff. Just kind of determined that, I told him that
25 was kind of unacceptable after spending a year's time

1 on the job and, you know, I think he said if we had
2 to, we could set down with a mediator or take it to a
3 mediator and ended up leaving it at that at that
4 point.

5 Q Okay. And from that time forward, did you have any
6 other meetings or discussions with Mr. Waldrep about
7 the situation?

8 A No, sir.

9 Q When was the first time you ever had any indication of
10 any specific complaints that he had in connection with
11 any of your work?

12 A I believe it was, I think it was in the winter months
13 and I think, I don't remember if it was through a
14 statement or I had contacted a lawyer and we got some
15 information back and I think he had some issues with
16 the irrigation pump.

17 Q Was it after the lawsuit started?

18 A Yes, sir. It was after the lawsuit had started.

19 Q At any time prior to the time the suit was filed, did
20 you ever get any indication whatsoever from Mr.
21 Waldrep that there was any problem with anything you
22 had done?

23 A No, sir. None at all.

24 Q And you finished the job in May. Is that correct?

25 A In May. That's correct.

1 Q And then you had this final discussion with him in...

2 A In August, the end of August.

3 Q The end of August.

4 A Or the first of September. The end of August or the
5 first of September.

6 Q Were you still doing his maintenance during that
7 period of time?

8 A Yes, sir. I sure was.

9 Q From May through August?

10 A That is correct.

11 Q And during that time you were continuing to do
12 maintenance for him, going to his house, did anybody
13 ever say anything to you then about there being any
14 problems?

15 A No, sir. Not at all.

16 Q Did you ever see any indication while you were still
17 on the site during those months performing maintenance
18 of any problems with anything that you had done?

19 A No, sir. Not at that time.

20 Q Did you see any problems with any of the walls?

21 A No, sir.

22 Q Did you see any problems with the irrigation system or
23 the operation of the irrigation system?

24 A No, sir.

25 Q Did you see any problems with the plants or the

1 conditions of the plants that had been put in?

2 A No, sir. No problems at all.

3 Q Jerry, the last thing I want to do with you is have
4 you make some comments or response to some of the
5 matters that have been raised by Mr. Waldrep in his
6 counterclaim.

7 A Sure.

8 Q I'm just going to go through some of the items
9 mentioned in his counterclaim and ask you to just
10 comment on those if you would.

11 A Yes, sir.

12 Q All right. The first one in his second defense in his
13 counterclaim, he is stating that he directly paid for
14 some materials that were used in the work that was
15 done.

16 A Yes, sir.

17 Q And let me go through those item by item and ask you
18 to comment on what you know about it.

19 A Sure.

20 Q He states in his counterclaim that he paid \$2174.18 to
21 NG Turf for sod.

22 A For sod. Yes, sir. That is correct.

23 Q All right. And was he billed for that amount in your
24 bill?

25 A No, sir. Not on the tail end.

1 Q So, that's not included in what you billed.

2 A No, sir.

3 Q All right. And then he says he paid \$2454.18 to NW
4 Supply for something to do with irrigation.

5 A Yes, sir. That is correct also.

6 Q And was he billed for that on your billing?

7 A No, sir. Not in the material and costs. No.

8 Q All right. He says he paid \$921.00 to Landscape
9 Supply for mulch.

10 A That is correct also, I believe.

11 Q And is that included in what you billed?

12 A No, sir.

13 Q He says he paid \$600.00 for stump removal.

14 A That is correct. When we cut down, had a couple of
15 trees cut down, he paid the stump guy for removal
16 directly.

17 Q Was he billed for that in your billing?

18 A No, sir.

19 Q And he says he paid \$400.00 to Ben Thrasher for
20 electrical supplies.

21 A As far as I know he did. It's not in my billing
22 whatsoever.

23 Q So, did he ---

24 A I think that was on a separate job, because they had a
25 water feature put in at this time, towards the end,

1 and I think Ben had done some electrical work for them
2 to have something to do with that. I had no dealings
3 with none of that.

4 Q Did you have anything to do with that waterfall or
5 that water feature?

6 A Oh, no, sir. No, sir. Sure didn't.

7 Q And as far as you know, that's not billed in your ---

8 A That's not in mine. No, sir.

9 Q All right. Then I'll go to the third defense and let
10 me ask you about this. He said there was improper
11 installation of a drainage pump causing the pump to
12 freeze, damage the pump house, crack the main line
13 exiting the pump and the line entering the pump from
14 the lake. Do you know anything about that?

15 A Just what he stated there. As far as the pump being
16 installed improperly, no, it was not installed
17 improperly. It was working completely fine. As I was
18 there, we checked all the system, all the heads,
19 making sure that they were working properly after
20 installation, making sure, especially with the drip
21 lines, making sure the water was running through the
22 drip lines and so they were all working at this time.

23 Q Well, he's apparently indicating that the pump was
24 damaged by freezing.

25 A That is correct. Yes, sir. Now, that can happen if

1 it's not winterized over the winter months. Water can
2 actually run back up into the pump itself, or water
3 gets held inside the pump itself, and the propellers
4 can become damaged inside the pump and you pretty much
5 have to replace the whole pump.

6 Q And the next thing he says is the main supply line
7 servicing three irrigation zones was installed
8 backwards causing water forced backwards through the
9 manifold which left three zones bone dry leading to
10 the destruction of 21 plants or trees.

11 A I have no recollection of that. I don't see how you
12 can put a manifold in backwards. It directly shows on
13 the manifold which way to install and the proper way
14 the water is going to flow. If that was the case,
15 there would have been no water flow over the last
16 three months that I was doing work there.

17 Q Well, had the manifold been installed in reverse,
18 would that manifold have ever worked at all?

19 A No, it would not. There wouldn't have been no water
20 flow whatsoever to none of that.

21 Q All right. And I think you indicated before that you
22 tested each zone for how it was functioning when the
23 job was completed.

24 A Yes, sir. It was all working at the time.

25 Q All right. Trash left in the lines and manifolds

1 caused them to stay open all the time which lead to a
2 constant charge thus showing the leaks that caused
3 excessive water expense. Do you know what that means?

4 A I'm not sure. That is a possibility if you are
5 getting trash in the manifold. That's just a regular
6 maintenance thing, but as far as the extra cost of
7 water, that has nothing to do with the pump or
8 whatnot, because that's coming directly from the lake.

9 Q How would trash get in?

10 A Actually, the trash can actually be sucked from the
11 pump or from the lake. In the zone coming from the
12 lake, it can work its way back through the line.
13 There is a what they call a foot valve at the end of
14 the pump that's in the lake that has filters on it and
15 stuff, but you're not going to 100% keep stuff from
16 backing through the line and that can get into the
17 manifolds and cause them to clog and not run properly.

18 Q Is there any maintenance that has to be done on those
19 filters?

20 A Yes, sir. You have to like, you need to check -- most
21 people will check them when problems start to arise if
22 they are not working properly at the time. Most
23 people, most contractors, that will be the first
24 inspection they make, if there is any trash in the
25 manifolds or the filters or anything like that needs

1 to be replaced at that point, but just a general,
2 that's just general maintenance of the irrigation.

3 Q Well, to the best of your knowledge, would that have
4 had anything to do at all with the installation of
5 this system?

6 A No, sir. It would not.

7 Q And the next thing says the line cycling the water
8 from the lower pond to the top pond is too small
9 causing the pumps to work against each other.

10 A That had nothing to do with me.

11 Q Is that the same water feature you were talking about
12 earlier?

13 A Yes, sir.

14 Q So, did you do anything with the water feature or
15 charge anything to do with the water feature?

16 A No, sir. I sure did not.

17 Q Improper installation of overflow drain which caused
18 excessive water usage.

19 A I'm not really sure what he's referring to there. I
20 don't know if he's talking about the water pond, here
21 again. I'm just not sure what he's referring to there
22 to be honest with you.

23 Q The electric supply to the waterfall was not to code.

24 A There again, I did not have anything to do with the
25 waterfall feature.

1 Q All right. "G" says edging installed was not as
2 requested and it was missing around some beds.

3 A I wouldn't know where they were missing at. We put
4 the metal edging around all flower beds as requested
5 by Ms. Waldrep.

6 Q All right. And again, did you hear anything about
7 that at any time until here?

8 A No, sir. I did not.

9 Q All right. "H" says failed to waterproof exterior
10 once you raised the landscape which caused major
11 flooding in the home after a heavy rain.

12 A Doing the foundation or waterproofing homes, I'm not
13 in the business of doing that, but I know of no other
14 grader that actually does foundation with just normal
15 grading.

16 Q And the flooding of the home after heavy rain, do you
17 take that to mean what we discussed earlier.

18 A Yes. The flooding of the basement. That's correct.

19 Q All right. And again, your testimony was there was
20 that that was settled separately from all this.

21 A Yes, sir.

22 Q Number nine says numerous demands were made upon you
23 to remedy these conditions. Has anybody ever told you
24 anything about these conditions?

25 A I was never contacted by Mr. Waldrep or anybody on his

1 side.

2 Q Okay. Jerry, the last thing I want to do is hand you
3 Plaintiff's Exhibit No. 14. If I might, this is a set
4 of photographs and I made a copy for everybody to look
5 on with us.

6 THE COURT: Let's do this. We've been going about two
7 hours. Let's take about a ten minute break. I know you're
8 about finished, but I'm about to float away.

9 MR. HOOD: All right. I was only going to say I'm
10 only going to be like three minutes.

11 THE COURT: I'm sorry to do that to you. You can't
12 talk to anybody about your testimony during the break.

13 MR. HOLTZCLAW: Yes, sir.

14 (Brief Break)

15 THE COURT: All right. I've got Exhibit No. 14. Have
16 you seen these?

17 MS. BERGER: Yes, sir.

18 Q All right. I'm handing you Exhibit No. 14. Is that
19 correct?

20 A That's correct.

21 Q I believe that's a series of photographs. Is that
22 correct?

23 A That's correct.

24 Q Let me ask you, with respect to photographs 1 through
25 86.

- 1 A Yes, sir.
- 2 Q Tell me when and by whom these photographs were taken.
- 3 A They were taken by me or my wife.
- 4 Q And when were they taken?
- 5 A They were taken during the process of construction on
- 6 work being done at Mr. Waldrep's house.
- 7 Q And so, were these photographs actually depicting the
- 8 work in progress?
- 9 A That is correct.
- 10 Q And explain why it was you were taking pictures as the
- 11 job went on.
- 12 A To show at later times that we can use, for other
- 13 clients, to put a book like this together to use it as
- 14 reference and mainly for that, really, to kind of
- 15 depict what we were doing on the job.
- 16 Q An example of work that you do.
- 17 A Yes, sir. Exactly.
- 18 Q The taking of these pictures have anything to do with
- 19 any complaints or in anticipation of complaints or
- 20 lawsuits or anything like that?
- 21 A Oh, no, sir. No, sir. Not at all.
- 22 Q And now, the remaining photographs there, starting
- 23 with photograph No. 87 and the rest of the way through
- 24 the book.
- 25 A Uh-huh.

1 Q Tell me when and by whom those were taken.

2 A Starting with No. 87?

3 Q Yes, sir.

4 A These were taken by Sonya Eaten two Fridays ago, I
5 believe it was, when we were allowed to view the
6 property at that point.

7 Q All right. And so you went out to the property along
8 with who?

9 A I went out with Sonya Heaton, which took the
10 photographs, my wife, another gentleman, Steve Bailey
11 and then Ben Thrasher and another guy that works for
12 him, Buddy Malpass.

13 Q All right. So, all the remaining photographs, No. 87
14 through the end, are photographs that were taken
15 during the last two weeks?

16 A Yes, sir. That's correct.

17 Q All right. Jerry, that's all the questions that I
18 have for you. If you will answer any questions that
19 Ms. Berger may have, please.

20 THE COURT: Cross examination?

21 MS. BERGER: Thank you, Your Honor.

22 CROSS EXAMINATION OF JERRY HOLTZCLAW BY MS. BERGER

23 Q Mr. Holtzclaw, you are the sole proprietor of Green
24 Thumb Landscaping. Is that correct?

25 A That is correct.

1 Q And at the time you were working at Mr. Waldrep's
2 property in Seneca, how many employees were working
3 for you?

4 A At that time?

5 Q That's right.

6 A There was four.

7 Q Can you name them, please?

8 A Yes, sir, I sure can. They was Rick Glassingame was
9 there. A Greg Porter was working there and then there
10 was a Tony, Tony Blackwell was working there and
11 Adrian Richardson, I believe, worked there for a
12 little bit. I believe that's the one.

13 Q Okay.

14 A It may have been a few other ones, too, that came in
15 and out on the project, because actually, I think my
16 brother actually helped us work up there and then I
17 had another friend to help.

18 Q That answers my question.

19 A Sure.

20 Q So, that's a total of four employees that worked for
21 you on Mr. Waldrep's property?

22 A Yes. That's correct.

23 Q Okay. And were all those individuals you just named
24 working for you full time?

25 A Part-time, but full time on this. They had other jobs

1 that they were working on.

2 Q Okay. So, tell me who was part-time.

3 A The part-time ones?

4 Q Yes.

5 A Actually, Rick and Andre, I believe, because they had
6 full-time jobs and Ben was a part-time worker up
7 there, too, but he was brought in as a partner at that
8 time.

9 Q So, that's Ben Thrasher, your cousin, that you
10 referred to earlier?

11 A That is correct.

12 Q So, he was also a part-time employee while---

13 A Well, he wasn't an employee.

14 Q Let me finish my question, please. Mr. Thrasher was a
15 part-time or full-time employee of Green Thumb while
16 you worked on Mr. Waldrep's home in '06. Is that
17 right?

18 A Yeah, well, we were partners on that job. Yes.

19 Q Did he draw a salary?

20 A No, sir. Not from me, he didn't.

21 Q How was he compensated for the work at the Waldrep
22 property based on your Phase 1 and Phase 2 and your
23 proposals?

24 A How was he going to be compensated?

25 Q No. How did you compensate him.

1 A He was not compensated, whatsoever.

2 Q Okay. He was paid nothing.

3 A Nothing.

4 Q And how many hours for the entirety of the entire
5 project at the Waldrep's home was Mr. Thrasher on the
6 premises working for you?

7 A The whole time.

8 Q How many hours would that be?

9 A Estimated, thousands, I guess.

10 Q Thousands of hours?

11 A I mean, we were up there six days a week for eight,
12 nine, ten hours a day.

13 Q What was your agreement with Mr. Thrasher as to how he
14 would be compensated or paid for the work for the
15 Waldrep's which turned out to be thousands of hours
16 over the course of almost a year?

17 A We were going to split the costs, or split the money
18 at the end of the job.

19 Q At the end of the job.

20 A Yes, ma'am.

21 Q And what was your agreement at the beginning of the
22 job when you consulted with the Waldrep's with what
23 you were going to be splitting with Mr. Thrasher on
24 this job?

25 A Me, or the agreement between me and Ben or me and Mr.

1 Waldrep?

2 Q Right. The agreement between Mr. Thrasher and
3 yourself.

4 A Me and Ben had agreed upon splitting the money.

5 Q So, Mr. Thrasher -- let me see if I got this straight.
6 Mr. Thrasher worked at the Waldrep property for you on
7 this property.

8 A That is correct.

9 Q And it took several thousand hours of his time.

10 A Estimated, yes.

11 Q And he didn't earn any money until the project was
12 over and you were going to ask Mr. Waldrep to be paid.
13 Is that right?

14 A That is correct. What ---

15 Q That is your testimony?

16 A That is my testimony. What ---

17 Q Okay. Now, of the four individuals you indicated
18 worked part-time for you, Rick, Tony, Andre, and
19 another individual, what was their rate of pay, that
20 you were paying them?

21 A I believe I was paying them around \$8.00 to \$9.00 an
22 hour, I believe.

23 Q Was it \$8.00 or was it \$9.00 an hour?

24 A I believe it was around \$8.00 to \$9.00 an hour. Some,
25 I think, were doing \$8.00, \$8.50 an hour.

- 1 Q Did they receive weekly pay checks?
- 2 A Yes, ma'am. I wrote them checks every week for their
- 3 time spent on the job.
- 4 Q Exhibit No. 4 that you say you prepared, that runs
- 5 from different phases starting August 18th. It's a
- 6 three-paged document.
- 7 A Yes, ma'am.
- 8 Q You prepared this document. Is that correct?
- 9 A That is correct. I did. Me and my wife, actually.
- 10 Q So, who -- let's talk about the top first page.
- 11 A Sure.
- 12 Q That you called "Spreadsheet for Wall One," for the
- 13 dates of 8/18/06 to 12/28/06.
- 14 A That's correct.
- 15 Q At the completion of that first phase, did you give
- 16 Mr. Waldrep a copy?
- 17 A Of which, what?
- 18 Q This right here.
- 19 A This part here?
- 20 Q This top section on the first page.
- 21 A No. Not for just that section. No, ma'am, I did not.
- 22 Q So, as the project was ongoing, you didn't provide the
- 23 Waldreps with receipts that you've introduced and
- 24 examined and testified to?
- 25 A Receipts for my materials?

1 THE COURT: I asked the question. He's answering the
2 question I asked. I'm sure he doesn't want to answer that,
3 but I asked it, so overruled.

4 MR. HOOD: Thank you, Your Honor.

5 A Could you repeat...

6 Q Did any of the money paid by Mr. Waldrep to you go to
7 your personal use or did it all go to pay expenses you
8 incurred?

9 A It went to all expenses that I was taking in at that
10 time.

11 Q Okay. So, the question then is, how then, during the
12 period of time, approximately nine months that you
13 were working on this job, how were you supporting
14 yourself?

15 A At the time, I mean, I do grass maintenance, also, and
16 I do have contracts for that and at the time,
17 actually, I had several contracts. I had some
18 churches, I had some subdivisions, plus some
19 residentials. I had five residentials in the same
20 neighborhood as Mr. Waldrep that I was doing, too, so
21 I was getting money during that time, also, but the
22 winter months and everything, but also, the way I have
23 to plan this out, because of my business, you do have
24 to kind of take that into account for the winter
25 months and how to set back money and stuff, but with

1 this job and the demand that it had, that it turned
2 out to be and as much time as we were up there, I was
3 going broke pretty good there for a little while. My
4 wife was, actually, in school at the time or taking
5 some classes. She had received loan money for that,
6 so each semester that had came around, I think there
7 were two or three during the time we were up there,
8 however it worked out, she would get refunds back from
9 that and, actually, we lived off some of that during
10 that time. She was paying bills out of that and plus,
11 she works, also, and so that's where a lot of the
12 income to survive and to eat off of came from there.

13 THE COURT: All right. That answers my question, sir.

14 Thank you.

15 MR. HOLTZCLAW: Thank you.

16 Q All right, Jerry. One final thing. I think Mr.
17 Chandler, the engineer ---

18 A Yes, sir.

19 Q --- testified that a building permit should have been
20 provided for the construction of this wall and there
21 has been some other considerable discussion about
22 that. Since Mr. Chandler's testimony, did you inquire
23 into that issue further?

24 A Yes, I did.

25 MS. BERGER: Your Honor, I'm going to object to this.

1 This is something clearly, Mr. Holtzclaw could have brought
2 up in his case in chief. He was questioned about the code,
3 he was questioned about permits. Mr. Chandler, the
4 engineer ---

5 THE COURT: I sustain the objection. Let me just tell
6 you this, I'm not concerned about that.

7 MR. HOOD: All right. Well, I thought it had been
8 pretty well addressed.

9 THE COURT: If they worked without permits, that's not
10 going to affect my decision, whatsoever.

11 MR. HOOD: All right. That's all the questions I
12 have.

13 THE COURT: Any questions, Ms. Berger?

14 MS. BERGER: No. I don't have any.

15 THE COURT: Thank you, sir.

16 MR. HOLTZCLAW: Thank you, Your Honor.

17 MR. HOOD: All right, Your Honor. I call Ben
18 Thrasher.

19 REPLY TESTIMONY - BEN THRASHER

20 DIRECT EXAMINATION BY MR. HOOD:

21 Q Okay, Ben, I want to go into two areas with you that
22 were covered during the Defense case. The first is
23 issues regarding the irrigation system. Now, there
24 was testimony from Mr. Frederick, I believe,
25 concerning certain repairs that were made to the

1 job with a \$9.00 profit, whatever, that we had in the
2 block itself, no, it's not, because you've got to
3 include other materials in that, some type of material
4 involved with that. So, it was included with those
5 materials.

6 Q So, whatever the cost is for this geogrid would be
7 within what figures on your accounting sheet?

8 A That is correct.

9 Q It would be within what line item?

10 A Oh, I'm sorry. It ---

11 THE COURT: Stop. I've got it.

12 MR. HOOD: Okay. That's all.

13 THE COURT: Thank you, sir. Do you have any questions
14 as a result of his questions?

15 MS. BERGER: No, Your Honor.

16 THE COURT: Okay. You can step down, sir. Is that
17 your case, Mr. Hood?

18 MR. HOOD: Yes, sir.

19 THE COURT: All right. Very good. May I see the
20 lawyers in my chambers, please.

21 (Brief Break)

22 THE COURT: Let me put this on the record. I called
23 both attorneys back and told them my thoughts on the case
24 and my thoughts are just this, and this is not a ruling at
25 this point, but this is where I'm going. Up until I heard

1 the testimony and saw that exhibit from the Allan website
2 -- and my law clerk pulled it up, because I told you that
3 was what I was going to do to see it more clearly -- I
4 thought it was a badly constructed wall, the lower
5 retaining wall. It appears, if my law clerk's math is
6 correct, and that's very debatable, there's a 10.2 inch
7 allowance for variance for settlement for the length of
8 this wall, which is eight-five to ninety feet, by all
9 testimony. Now, as such, I don't think it's a badly
10 constructed wall. I understand Mr. Waldrep's dismay at the
11 billing. When I heard it, I was taken quite aback and I'm
12 not going to allow you to get that entire amount of the
13 bill. That is entirely too high. Entirely too high.

14 But before we get there, I'm going to have Ms. Berger,
15 I'm going to give her the opportunity, and copy Mr. Hood,
16 to respond solely to the document that was presented from
17 the Allan website to show my calculations were wrong. I
18 don't want another engineering report. Testimony is over
19 at this stage to show a failed wall. The way I'm reading
20 that exhibit, that wall, in testimony presented, the worse
21 case is that that wall sunk 8.125 inches, as shown on
22 Defense Exhibit No. 6, which appears to be within the
23 tolerances.

24 As I told you guys, I'm going to be in Charleston next
25 week, on vacation the week after, so just email me and let

JERRY HOLTZCLAW d/b/a GREENTHUMB NURSERY V DENNIS WALDREP

1 me know when you can get that in to me. Also, I requested
2 that Ms. Berger, in giving me that response to the Allan,
3 provide me a listing of what she contends would be
4 appropriate considerations for me for set-offs against the
5 amounts owed, not that I'm going to give them all. I just
6 want to consider them. One I definitely will give,
7 depending on the ruling if I do rule, ultimately, with the
8 Plaintiff, is the cost to replace that pipe by the driveway
9 and the costs to repair the patio when they ran their
10 machine over it. I mean, that's just easy. I am
11 unpersuaded, totally, about the billing on the irrigation
12 system. Everything that -- and I can't remember the man's
13 name, I have it in my notes -- everything he testified to
14 off that first page, he admitted it's just not related or
15 he didn't know if it was related or not and so the whole
16 entire amount is not appropriate. Twenty dollars was what
17 he put towards this twenty-five fifty to fix the irrigation
18 damaged by improper installation. The rest, he said, was
19 for an upgrade to a 3-horsepower. My mind's not made up on
20 the cost of redoing the plants. I think at some point, as
21 Mr. Hood brought out, you can water them if you see them
22 dying, but at the same time, I haven't made my mind up on
23 that and I haven't made my mind up on the rest of it, but
24 otherwise, my thoughts are this: If you show me that those
25 tolerances are incorrect, then I will have somebody go out

JERRY HOLTZCLAW d/b/a GREENTHUMB NURSERY V DENNIS WALDREP

1 and measure those walls and the loser is going to pay for
2 it. Okay? I'll have an engineer go out there and do it
3 and then report back to me what the measurements are,
4 because yours were different from what the other's were,
5 and so it's not clear to me, and if I find that there is a
6 badly built wall, then I'm not going to let you get paid.
7 Okay? That's just fair. I know that you're young, I know
8 you need the money, but that's not my issue. My issue is
9 trying to see that justice is done. I think, in all
10 honesty, both of you were very honest. Mr. Thrasher was
11 very honest. I know I scolded y'all some during trial, and
12 that's just a part of the process, but I think that the way
13 it appears to me as an outsider looking in, that the ball
14 was dropped, you just dropped the ball in the process and
15 all of a sudden you got this bill and you're like, "Oh, my
16 goodness. I didn't realize I was getting that big of a
17 bill."

18 That being said and done, I want to thank both
19 lawyers. These cases are not like some criminal cases
20 where it's fascinating and riveting. They're methodical
21 and they take a lot of preparation from the attorneys, both
22 of whom did a grand job. I want to thank you for that and
23 I look forward to getting that information from you, Ms.
24 Berger. Naturally, if you want to respond, Bill, let me
25 know and that's what we will do. Otherwise, we are in

JERRY HOLTZCLAW d/b/a GREENTHUMB NURSERY V DENNIS WALDREP

1 recess. Thank you.

2 Do you want to place anything on the record at this
3 stage, from either side?

4 MS. BERGER: Your Honor, to give you the -- you're out
5 for the next two weeks, and so maybe ---

6 THE COURT: Just do it as soon as you can.

7 MR. BERGER: We can do a deadline or something.

8 THE COURT: Thank you very much.

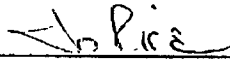
STATE OF SOUTH CAROLINA)
)
 COUNTY OF ANDERSON)

CERTIFICATE

BE IT KNOWN THAT I, THE UNDERSIGNED JO RICE, OFFICIAL COURT REPORTER FOR THE TENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT REPRESENTS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE HEARING IN THE CAPTIONED CASE, RELATIVE TO APPEAL, BEFORE THE CIRCUIT COURT FOR OCONEE COUNTY, SOUTH CAROLINA, SO GIVEN ON JUNE 7-8, 2011 TO THE BEST OF MY SKILL AND ABILITY;

THAT I AM NOT RELATED TO NOR AN EMPLOYEE OF ANY OF THE PARTIES HERETO, NOR A RELATIVE OR EMPLOYEE OF ANY ATTORNEY OR COUNSEL EMPLOYED BY THE PARTIES HERETO, NOR INTERESTED IN THE OUTCOME OF THIS ACTION.

IN WITNESS WHEREOF I HAVE HERE UNTO SET MY HAND AND SEAL THIS 20TH DAY OF OCTOBER, 2012.



 JO RICE
 OFFICIAL COURT REPORTER

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF OCONEE	)	
	)	
JERRY HOLTZCLAW, d/b/a	)	CIVIL ACTION NO. 2008-CP-37-415
GREEN THUMB LANDSCAPE &)	)	
IRRIGATION,	)	
	)	
Plaintiff,	)	
	)	DEFENDANT'S RESPONSE TO
DENNIS WALDREP,	)	COURT'S SUA SPONTE
	)	REQUEST AND ARGUMENT
Defendant.	)	

The Defendant, by and through counsel, pursuant to the Court's sua sponte request for further clarification of construction tolerances and differential settlement and request for argument on setoffs that the Court may determine based upon the evidence and as and for his argument in support of the evidence presented at trial on June 7 and June 8, 2011, respectfully states as follows:

CONSTRUCTION TOLERANCES/DIFFERENTIAL SETTLEMENT

1. That during the rebuttal testimony offered by the Plaintiff, Plaintiff introduced Plaintiff's Exhibit #17 into evidence. A copy of said Exhibit is attached hereto as Exhibit A.

2. That Exhibit A described hereinabove was posted on the website for Allan Block, the manufacturer of the blocks Plaintiff constructed on Defendant's premises. Said exhibit is from the National Concrete Masonry Association (hereinafter referred to as NCMA) manual; however, it is only one of several criteria that must be correctly met to consider the construction of a retaining wall meets the specifications outlined by the manufacturer; i.e. Allan Block.

3. The definitions of settlement and differential settlement with respect to

the design and construction of a segmental retaining wall must be determined in order to properly determine the tolerances for the long-term effect and life of the structure. Settlement is defined as the total amount of consolidation of the soils beneath a structure. Differential settlement is defined as the difference between the minimum and maximum consolidation that occurs over a fixed distance. The measurement of differential settlement cannot be dimensionless; it has to be defined over a specified distance to be used as a control tolerance.

4. Attached hereto as Exhibit B is the CNMA construction tolerances and dimensional tolerances for SRW (segmented retaining walls) under Sections 13.5 and 13.5.1.

5. The diagram shown in Exhibit B illustrates that the maximum differential settlement is 1% of L(ref) or length of reference. The manufacturer (Allan Block) specified a tolerance of 1.25 inches per 10 feet of length or roughly one (1%) percent. This one percent is defined by a fixed distance.

6. Plaintiff's Exhibit A diagram does not define a fixed distance and thus is ambiguous with respect to the subject wall (85 feet in length described in the Court record as the lower retaining wall. Using the logic in Plaintiff's Exhibit A diagram, the dimensions of the subject lower retaining wall; namely eighty-five (85) feet in length and six (6) feet in height, could settle as much as 8.5 inches and still be within construction tolerances. This analysis is not based on the length of reference as defined by the manufacturer in the specifications of ten (10) feet. To use Plaintiff's analysis, a retaining wall of four hundred (400) feet in length could

settle four (4) feet across its length, an eight hundred (800) foot length wall could settle eight (8) feet across its length and be within “construction tolerance”. That analysis would not be acceptable to any engineering or manufacturing authority.

7. The “one percent” criteria is for measuring differential settlement for lengths of less than ten (10) feet (1.25” per 10-0”) to determine if shorter distances are satisfactory as identified in Exhibit B attached hereto. Applying the correct analysis for measuring differential settlement for the subject lower retaining wall of 85 feet in length with a ten (10) foot or less length of reference, the subject wall could at a maximum have a differential settlement of 1.25”. The evidence presented to the Court in Defendant’s Exhibits 4, 5 and 6 show measurements over the ten foot length of reference across the entire length of the wall as out of tolerance over six measurements – the largest by as much as 8.125” – all of which are out of acceptable construction tolerances.

8. It should be noted that the guideline for differential settlement is only one of the several criteria that must be correctly met to consider the construction of a retaining wall meets the specifications outlined by the manufacturer. In Exhibit B, the wall must be constructed using tolerances from the same NCMA manual. Under Construction Tolerances, the following tolerances are identified:

Vertical control – plus or minus 1.25 inches (32mm) maximum
Over a 10 feet (3m) distance; 3 inches (75mm) maximum

Horizontal location control – straight lines: plus or minus
1.25 inches (32mm) maximum over a 10 feet (3m) distance;
3 inches (75mm) maximum

**Rotation – From established plan wall batter: plus or minus
2 degrees**

It is uncontroverted that Defendant's Exhibits 4 and 5 establish that the subject lower retaining wall in question is out of tolerance for vertical control and not within the manufacturer's requirements for allowable construction tolerances.

9. Exhibit B from the NCMA manual provides several sketches that properly illustrate the guidelines for the construction of the wall. These sketches show how each of these components should be used and how they interact with the others. The manual also provides the exacting requirements for tolerances of these retaining walls.

10. Differential settlement is only one of nine essential components for the construction of a retaining wall determined by the manufacturer. The following is a list of those components in the following order of importance:

- 1 – soil backfill**
- 2 – geogrid –layers with backfill**
- 3 – leveling pad**
- 4 – horizontal alignment**
- 5 – block infill**
- 6 – vertical alignment**
- 7 – vertical grainular drain**
- 8 – foundation drain**
- 9 - differential settlement**

11. There is no evidence, either via paid receipt or material invoice, presented by Plaintiff that geogrid was used in the construction of the walls, nor any evidence of the amounts used on this project. The only indication of geo-grid is the Plaintiff's testimony that it was used and several photos taken during construction.

12. There is sufficient proof in the record via Defendant's expert witnesses' testimony and documentary evidence (Defendant's Exhibits 3, 4 and 5) that the lower retaining wall in 2008 (within one year of completion) and again in June 2011 (immediately before the onset of trial) is out of tolerance for both vertical control by as much as 8.125" – well outside the manufacturer's specifications of 1.25" maximum over a ten (10') foot reference and for horizontal control by 3" – well outside the manufacturer's specification of 1.25" over a ten (10') foot reference. Plaintiff failed to present any evidence of horizontal control measurements of the entire lower retaining wall, instead relying on a using a level to measure against one length of reference and failed provide any reports or documentary evidence in support thereof.

SETOFFS

13. Plaintiff's Exhibits 5 through 13, inclusive, itemize all paid receipts for materials used in the subject construction at Defendant's premises. There are no receipts in evidence identifying the purchase of any geo-grid for the five (5) retaining walls constructed by Plaintiff. The only evidence that geo-grid was installed behind the retaining wall blocks is Plaintiff's verbal assertion that geo-grid was used. In fact, of all the photographic evidence presented by Plaintiff (Exhibit 14), there is no visible evidence of geo-grid or the precise amounts that were used.

14. Plaintiff's Exhibits 5 through 12 identify all of the Plaintiff's paid receipts for materials and labor. Plaintiff's Exhibit 4 is the final billing submitted to Defendant after completion of the work. Plaintiff's Exhibit 13 is entitled Scope of

work and sets forth the material and labor costs Plaintiff alleges are due from Defendant. A comparison of the Plaintiff's receipts against the amounts claimed due show discrepancies of amounts and quantities of materials used. Attached hereto is Exhibit C which itemizes and summarizes Plaintiff's actual proof via receipts against what is alleged due. The net result should offset a total of \$10,805.93 against the amount claimed by Plaintiff for lack of proof.

15. Plaintiff's Exhibits identified in Paragraph 11 hereinabove all claims "Installation Labor" as described in the Scope of Work. Attached hereto is Exhibit D. Defendant respectfully avers that the amounts charged for the labor component of the work performed is excessive for the nature and complexity of the work performed. Industry norms and construction practices would be generous at a ten (10%) percent markup of the material costs. As reflected on certain of Plaintiff's installation labor charges, those outlined are excessive and unreasonable. No evidence was adduced at trial that a valid written contract was executed between the parties specifying the total costs for the project completed by Plaintiff until months after completion.

16. The fairness and reasonableness of the costs alleged by Plaintiff should be judged based on an objective fair market standard. Costs, including price, quantity and quality actually paid by Plaintiff whether to suppliers or subcontractors is insufficient in itself to establish the reasonableness of the claimed costs. There must be evidence of same, including Plaintiff's claim for overhead and profit. Here, even if Plaintiff is entitled to be paid his costs plus a markup for

overhead and profit, Defendant should not be required to pay inflated or unreasonable amounts. Here, Plaintiff fails to provide actual cost records for every piece of equipment used, materials used and each man hour. Further, Plaintiff failed to provide any time records or payroll records to establish his labor costs.

17. Exhibit E attached hereto provides a comparison of certain items on Plaintiff's Expense Sheet against the Scope of Work. There are numerous discrepancies between what Plaintiff itemizes as actual costs and/or labor on this project against its final billing, both received in evidence.

18. Further, even under a theory of quantum meruit, the labor costs are excessive. Plaintiff neither plead nor provided evidence of the reasonableness of his labor costs. Defendant respectfully submits that the Plaintiff's request for additional "labor" expenses be reduced by the sum of \$25,949.58.

19. That during the Plaintiffs rebuttal testimony, he admitted during his that one of the Defendant's payments of \$10,000.00 during the course of construction was erroneously credited in the sum of \$7,000.00. That Plaintiff admitted at trial that an additional credit of \$3,000.00 is due the Defendant.

20. That Defendant's Exhibit 1 consisted of an invoice for patio repairs due to the Plaintiff's negligent work on the premises in the amount of \$1,250.00. That any sums due Plaintiff, if any, should be offset by this amount.

COUNTERCLAIM

21. That Defendant's Exhibit 10 consisted of canceled checks for sums paid by Defendant to third party witnesses to redo the defective work performed by the

Plaintiff and for the payment of replacement materials, all of which should be offset in favor of the Defendant in the amount of \$10,845.88.

22. That H. William Chandler, a structural engineer, testified on behalf of the Defendant. He concluded that the lower retaining wall is in failure for the reasons set forth in his proposal and based on his expert opinion. As a direct result of the Plaintiff's faulty work on the retaining wall in question, Plaintiff has incurred damages of \$32,760.00, the cost for replacement of the wall now in failure mode. Defendant respectfully requests he be awarded this additional amount as damages.

23. Plaintiff and Ben Thrasher both testified that they worked on the subject construction project 5 to 6 days per week for the better part of one year with 3 or 4 additional employees. Plaintiff could not recall what the hourly pay of his 3 or 4 employees were except that it was approximately \$8 to \$9 per hour. Plaintiff produced no documentary evidence of payroll records or sums paid to anyone else for labor costs. They further asserted that they received no funds from this project on which to subsist notwithstanding the fact that the Defendant paid sums totaling \$68,500.00 during the construction period. Plaintiff further claims that a remaining amount of \$52,988.98 is due from Defendant because he did not add his "profit" to the work done. It should strain credulity that the Plaintiff worked on the Defendant's premises virtually exclusively without having received substantial sums wholly unrelated to material out-of-pocket costs. A review of Plaintiff's Exhibit spreadsheet detailing expenses from August 18, 2006 to April 30, 2007, wall one and

wall two and the backyard work, includes labor help and totals the sum of \$60,141.49. Plaintiff would suggest that any sums for labor, including Plaintiff's own labor, are included within his own records submitted to the Court. The Defendant respectfully submits that no sums whatsoever are due to Plaintiff under his Complaint.

In summary, Defendant respectfully requests that he should be credited as follows:

- A. Setoffs against any sums that may be due to Plaintiff in the amount of \$40,005.21;
- B. Awarded \$10,845.88 on his counterclaim;
- C. Awarded the sum of \$32,760.00 for the costs for replacement of the failed lower retaining wall;
- D. Plaintiff be denied all relief prayed for in his Complaint; and
- E. For such other and further relief as this Honorable Court deems just.

Respectfully submitted,

Catherine J. Berger, Esq.
Attorney for Defendant/Counter-Plaintiff
P.O. Box 10
Piedmont, SC 29673
(864)845-3367
(864)845-6467 (fax)

Find A Store | Photo Gallery | Video Gallery | Green Opportunities

Want to improve your outdoor living space? Need an idea? Check out our weekend project ideas.

Weekend Projects Homeowners Contractors Designers Featured Stories

Contractors
Become a Certified Contractor
Contractor Training Schedule
Contractor Rewards Program
Installation
Estimating Tools
Weekend Project Ideas
Specifications
Retaining Wall Specifications
General Specifications
Construction Specifications
Geogrid Specifications
Geogrid Wall Construction Specs
Water Management Specs
ASTM C1372 Retaining Wall
ASTM C1282 Freeze-Thaw Durability
Wall Construction Tolerances
LEED Credits
Fence Specifications
Product Descriptions
Project Profiles Case Studies
AB Reinforcement Grid
When Your Wall Needs a Fence: Sleeve-it
Product Literature (Free Download)
Landscape Lifestyles Newsletter
Technical Newsletter
Request More Information

Allowable Construction Tolerances

Construction Tolerances

To ensure that acceptable work standards are understood during retaining wall installation, construction tolerances need to be established. These construction tolerances should consider that the retaining wall is designed to be a flexible structure that tolerates horizontal and vertical variation. However, too much variation can affect the structural stability of the wall.

To maintain horizontal and vertical control, adjustments may be required during modular block installation. Even with tight quality control procedures by block manufacturers, modular block units may vary in height. Shimming a maximum of 0.125 in. (3 mm) per block is acceptable construction practice. It is recommended that shimming material be asphaltic or non-degradable products.

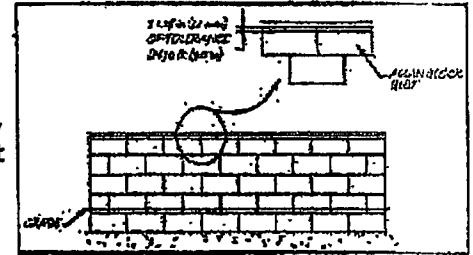


Figure 13: Vertical Control

Acceptable construction tolerances are illustrated in Figures 13 thru 16.

Differential Settlement

Foundation settlements must be estimated with great care for buildings, bridges, towers, power plants, and similar high-cost structures. For structures such as fills, earth dams, levees, and retaining walls a greater margin of error in settlements can usually be tolerated. The construction method of placing the dry-slacked mortarless Allan Block on an aggregate leveling pad creates a flexible but stable retaining wall. Settlement errors that are acceptable while maintaining structural integrity include large total wall settlement and moderate differential settlement as depicted in Figure 14.

Settlement occurs when the weight of the retaining wall structure exceeds the bearing capacity of the soil. Cohesionless soils consisting of sands and gravels often exhibit very little settlement with most of the settlement occurring during or shortly after wall construction. Cohesive soils with high moisture content have the potential for large time-dependent settlement because the weight of the wall can actually compress the foundation soil. The settlement can be estimated using conventional one-dimensional consolidation calculations. When anticipated settlement is greater than the construction tolerances, special design and construction steps need to be taken.

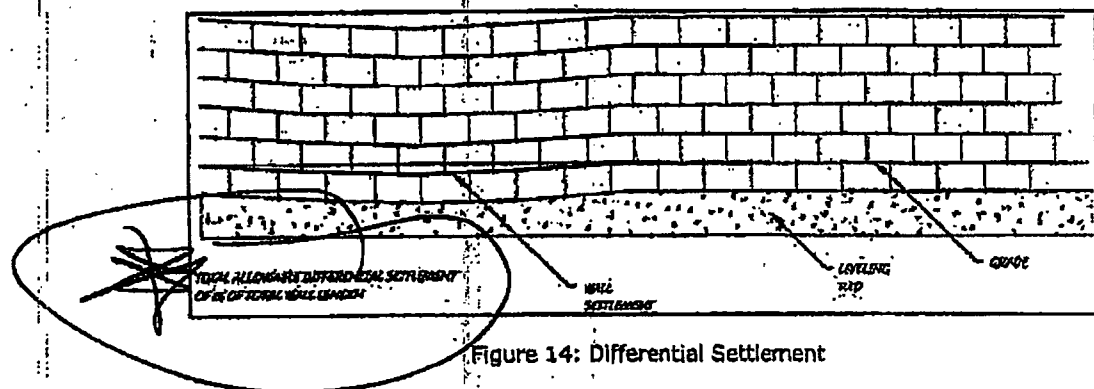


Figure 14: Differential Settlement

Post Construction Finish and Appearance

Depending on wall heights, surcharges, soil conditions and foundation materials, some stress cracks may occur in the wall during and after construction. Since Allan Block walls are flexible structures, some cracking of block is likely, as are spaces between blocks as the wall moves. These openings should not

[Find A Store](#) | [Photo Gallery](#) | [Video Gallery](#) | [Green Opportunities](#)

[Check out the NEW Retaining Wall Estimating APP Here!](#)
[Weekend Projects](#) | [Homeowners](#) | [Contractors](#) | [Designers](#) | [Products](#)

Designers
Technical & Design Assistance
Training & Continuing Education Credits
Specifications
Retaining Wall Specifications
General Specifications
Construction Specifications
Geogrid Specifications
Geogrid Wall Construction Specs
Water Management Specs
ASTM C1372 Retaining Wall
ASTM C1262 Freeze-Thaw Durability
Wall Construction Tolerance
LEED Credits
Fence Specifications
Typical Design Details
AB Walls 10 Design Software
Engineering Methodology Calculations
Designing Balance for Retaining Walls
Installation
Earthquakes vs. Retaining Walls
AB Fence Testing
Internal Compound Stability
Product Approval Reports
Product Descriptions
Project Profiles Case Studies
Geogrid Reinforcement Types
When Your Wall Needs a Fence: Sleeve-it
Literature/Technical Guides
Technical Newsletter
Find an Allan Block Dealer
Find Your Local Manufacturer
Request More Information

Allowable Construction Tolerances

Download:
[.PDF](#) [.DOC](#)

Construction Tolerances

To ensure that acceptable work standards are understood during retaining wall installation, construction tolerances need to be established. These construction tolerances should consider that the retaining wall is designed to be a flexible structure that tolerates horizontal and vertical variation. However, too much variation can affect the structural stability of the wall.

To maintain horizontal and vertical control, adjustments may be required during modular block installation. Even with tight quality control procedures by block manufacturers, modular block units may vary in height. Shimming a maximum of 0.125 in. (3 mm) per block is acceptable construction practice. It is recommended that shimming material be asphaltic or non-degradable products.

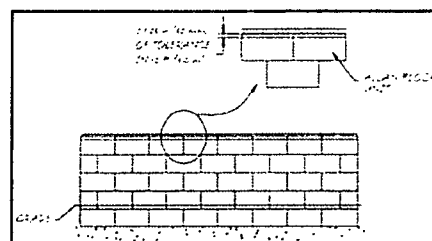


Figure 13: Vertical Control

Acceptable construction tolerances are illustrated in Figures 13 thru 16.

Differential Settlement

Foundation settlements must be estimated with great care for buildings, bridges, towers, power plants, and similar high-cost structures. For structures such as fills, earth dams, levees, and retaining walls a greater margin of error in settlements can usually be tolerated. The construction method of placing the dry-stacked mortarless Allan Block on an aggregate leveling pad creates a flexible but stable retaining wall. Settlement errors that are acceptable while maintaining structural integrity include large total wall settlement and moderate differential settlement as depicted in Figure 14.

Settlement occurs when the weight of the retaining wall structure exceeds the bearing capacity of the soil. Cohesionless soils consisting of sands and gravels often exhibit very little settlement with most of the settlement occurring during or shortly after wall construction. Cohesive soils with high moisture content have the potential for large time-dependent settlement because the weight of the wall can actually compress the foundation soil. The settlement can be estimated using conventional one-dimensional consolidation calculations. When anticipated settlement is greater than the construction tolerances, special design and construction steps need to be taken.

Trust Rating

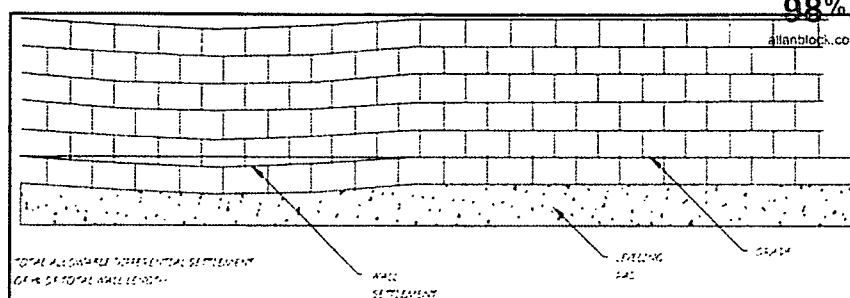


Figure 14: Differential Settlement

EXHIBIT A

exceed 0.25 in. (6 mm) and do not affect the structural integrity of the wall.

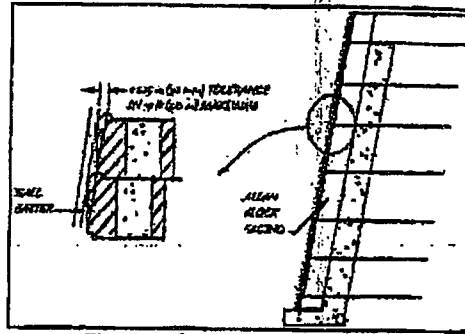


Figure 15: Horizontal Control

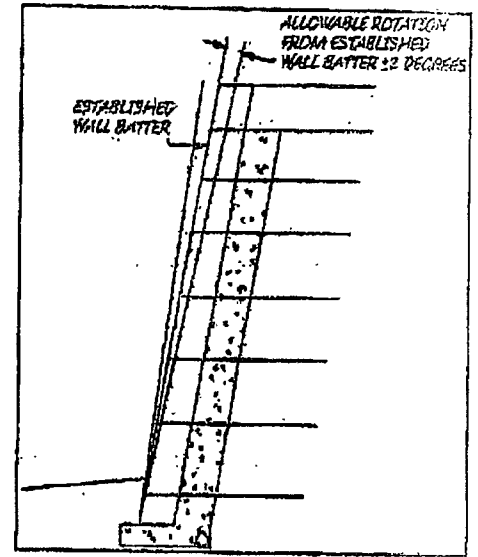


Figure 16: Rotation

WHERE TO BUY | About Us | Contact Us | Allan Block Worldwide | Press Room | Terms and Conditions | FAQ | Links |    [More](#)

Post Construction Finish and Appearance

Depending on wall heights, surcharges, soil conditions and foundation materials, some stress cracks may occur in the wall during and after construction. Since Allan Block walls are flexible structures, some cracking of block is likely, as are spaces between blocks as the wall moves. These openings should not exceed 0.25 in. (6 mm) and do not

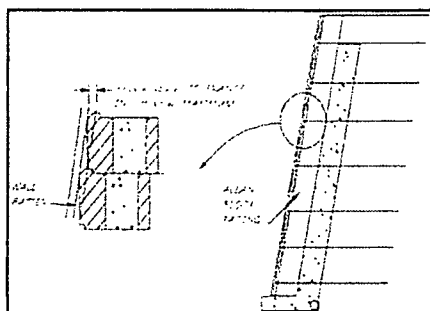


Figure 15: Horizontal Control

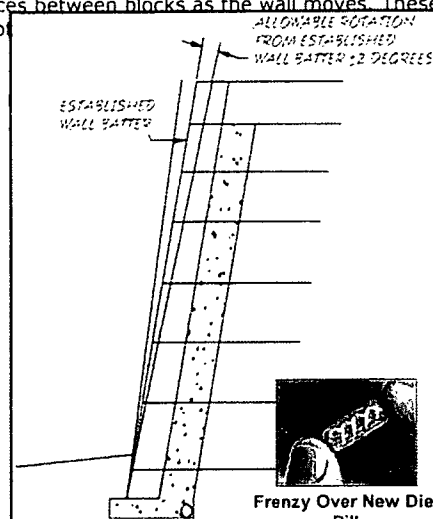


Figure 16: Rotation



Breaking: Holy Grail of Weight Loss
Doctor Gives Exclusive Info About a New Diet Pill Breakthrough



Mom Makes \$77/hr Online Exposed
Seneca: Is it a scam? We investigated & found out how she does it!

Advertisement

Trust Rating

98%

allanblock.com

Section 13.3: Construction Planning

The execution of construction operations for SRWs is dependent on quality surveying information, both to plan and field locate its proper position. The existing and proposed finish grades shown on the drawings should be verified in the field to ensure the planned design heights are in agreement with topographic information from the project grading plan. Once located in the field, it is good practice to have the retaining wall location verified by the owner or the owner's engineer. Any changes in wall location made in the field should be duly noted on as-built drawings prior to finishing the project.

Delivery and storage of all retaining wall materials should be coordinated to ensure maximum access to the work area and availability during construction. This is particularly important for soil used to construct the wall that may have to be placed with a specified moisture content. Likewise, the geosynthetic reinforcement should be stored according to the manufacturer's recommendations.

There are two basic topographical conditions in which SRWs may be constructed; "cut" and "fill". The differences between the two are illustrated in Figure 13-4A. The construction approach, schedule, and cost will be dictated by the type of wall that is required at a site. Additionally, the effects of construction on existing nearby structures and parking areas must be carefully considered for "cut" walls so that foundation support of those structures is not undermined or encroached upon in any way.

Section 13.4: Construction Sequence

The individual characteristics of various SRW units may dictate subtle differences in the construction sequence, however, all SRWs must generally follow these five basic steps in the construction process.

- General wall excavation and leveling pad construction-see Figure 13-4.
- Setting, leveling, and backfilling the first course of SRW units-see Figure 13-5.
- Placement and backfilling of SRW units-see Figure 13-6.
- Placement and tensioning of geosynthetic reinforcement-see Figure 13-7.
- Placement and compaction of reinforced backfill/retained soil in lifts not to exceed 8 in. (203 mm) in thickness.
- Capping the SRW and finish grading-see Figure 13-8.

By following these basic procedures, SRWs can be expected to perform well for the intended design life of the structure, however, to quantitatively evaluate the quality of the constructed SRWs, construction tolerances should be established.

Section 13.5: Construction Tolerances

Construction tolerances should be established prior to the start of construction so both the owner and the contractor will have the same understanding of what is an acceptable standard of work. These tolerances, normally outlined in the construction specifications, should provide a controllable construction erection margin for the contractor. Following are some typical tolerance guidelines.

13.5.1: Dimensional Tolerances for SRW Construction

As with any constructed works, some deviation from construction drawing alignments will occur. As opposed to cast-in-place concrete walls, alignment of SRWs can be simply corrected or modified during construction. Based upon examination of numerous completed SRWs, the following recommended maximum tolerances can be achieved with good construction techniques:

- Vertical control
 ± 1.25 in. (32 mm) maximum over a 10 ft (3 m) distance; 3 in. (75 mm) maximum

Max. Settlement is
3"

- Horizontal location control
straight lines: ± 1.25 in. (32 mm) over a 10 ft (3 m) distance; 3 in. (75 mm) maximum
- Rotation
from established plan wall batter: $\pm 2^\circ$

Horizontal and vertical control can be maintained by surveying the wall during construction. Control of wall rotation during construction can be influenced by SRW unit dimension tolerances, type of soil fill utilized, soil compaction techniques and the uniformity in geosynthetic tension applied during backfilling. Non-uniformity in manual pre-tensioning of the reinforcement may result in localized wall movement (i.e. bulging). Consistent construction techniques should be used throughout wall erection.

Careful planning and attention should be paid to the compaction equipment and procedures used during construction. Compaction within three feet of the front of wall face should be limited to hand operated equipment, preferably a vibrating plate compactor with a minimum weight of 250 lbs (113 kg). Light weight, low energy equipment should be used to compact the first three feet on reinforced fill. This does not, however, reduce the compaction density requirements in this zone. It is important that the soil within the first three feet is well compacted in order to minimize the potential of settlement of the reinforced fill directly behind the SRW units, which may cause the connection between the reinforcement and the SRW unit to be overstressed. The remainder of the reinforced soil zone can be compacted with walk-behind or riding self-propelled compaction equipment, depending upon soil type and available operating area. Non-uniform compaction procedures can result in vertical and horizontal alignment control problems. Upon completion of the wall, landscaping equipment and other vehicles should be kept at least five feet behind the wall face.

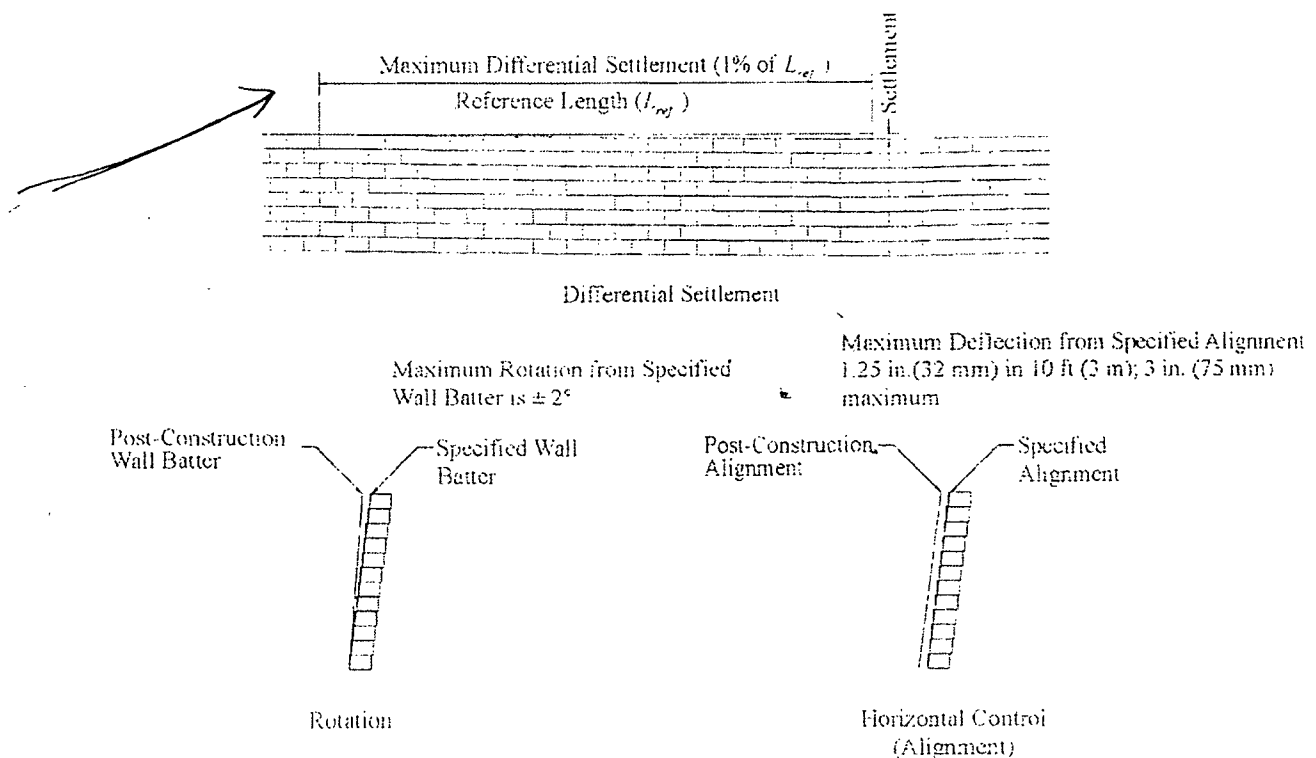


Figure 13-3: Recommended Maximum SRW Construction Tolerances

EXHIBIT C

Plaintiff's Exhibits 5-13 (supplemental receipts)

Plaintiff's Exhibit 4 (final billing) (Cost of Materials)

Discrepancy Def's favor

Name	Qty	Amt.	Name	Qty	Amt.	
RETAINING WALLS:						
AB Blocks	1497	\$ 8,996.98	Retaining walls	2124	\$12,537.64	
AB caps	464	\$ 1,571.11	Block steps	175	\$ 1,012.46	
Rock Quarry		\$ 1,443.38	Gravel		\$ 2,351.11	
SUBTOTAL		\$12,011.47	SUBTOTAL		\$15,901.21	\$3889.74
Equip. Rental		\$ 1,554.65	Equip. Rental		\$ 1,552.95	* 1.70
Northwest Supplies		\$ 1,253.87	Northwest Supplies		\$ 2,075.24	\$ 821.37
All Seasons Lands.		\$ 5,195.00	All Seasons Lands.		\$ 5,143.44	\$ 51.56
Blacks Electrical		\$ 603.95	Wiring		\$ 1,068.17	\$ 464.22
MST Concrete (2 catch basins)		\$ 830.45	Concrete basins 2		\$ 1,061.45	\$ 231.00
Lowe's/Home Depot/ Misc. supplies		\$ 852.61	Misc. mat Lowe's		\$ 959.81	\$ 110.12
Buddy Malpass		\$ 2,816.29	Buddy Malpass		\$ 2,976.29	\$ 160.00
From the Ground-Up		\$ 142.83	From the Ground-Up		\$ 162.18	\$ 19.35
Plants/trees/mulching		\$9,772.06	Plants & Trees		\$ 4,036.35	
			Mulching		\$ 3,832.40	
			Top Soil		\$ 2,110.60	\$ 207.29
River rock		\$ 250.00				
Boulders		\$ 66.94	River rock & boulders		\$ 329.44	\$ 12.50
Trees cut down (Woody Paterson)		NO RECEIPT	Trees cut down (Woody Paterson)		\$ 1,200.00	\$1200.00
Metal edging		NO RECEIPT	Metal edging		\$ 411.30	\$ 411.30
Pump installation		NO RECEIPT	Pump installation		\$ 937.35	\$ 937.35
IRRIGATION:						
Northwest Supplies		\$2,075.45	Irr, Drip Irr. & Drain Sys		\$ 3,485.28	\$1409.83
409.83						
Outdoor Lighting		NO RECEIPT	Outdoor Lighting		\$ 300.00	\$ 300.00
Septic tank risers		NO RECEIPT	Septic tank risers (2)		\$ 100.00	\$ 100.00
Shades of Green		THIS IS LABOR NOT LISTED			\$ 480.00	\$ 480.00

TOTAL DISCREPANCIES IN FAVOR OF DEFENDANT
FOR MATERIAL COSTS-----\$10,805.63
***LESS DISCREPANCY IN FAVOR OF PLAINTIFF----- 1.70**
NET DISCREPANCY IN FAVOR OF DEFENDANT-----\$10,803.93

EXHIBIT D

1. Retaining walls	Installation Labor \$27,818.36	% markup from material cost 122% markup from material cost \$12,537.64
2. Block steps	\$ 3,362.54	232.3% markup from material cost \$1,12.46 described as block steps
3. Metal edging	\$ 1,118.00	29.3% charged (no receipt for materials provided
4. Mulching	\$ 5,900.00	30% markup from material cost of \$3,832.40
5. Plants & Trees	\$ 4,036.35	duplicate charge - \$4,036.35 charged on material side
6. Brush clearing	\$ 3,600.00	48 man hrs. @ \$75.00 per hr.
7. Split wood & stacked wood pile	\$ 2,000.00	40 man hrs. @ \$50.00 per hr.
8. Irrigation	\$ 4,845.00	26% markup from material cost
9. Drip Irrigation	\$ 1,880.00	30.7% markup from material cost
10. Sod	\$ 4,583.70	45% markup from material cost
11. Skid loader time	\$ 5,200.00	80 hrs. @ \$65.00 per hour for rental cost of owned equipment

EXHIBIT E

Description	Plaintiff's Expense Sheet	Scope of Work ⁴¹
MATERIALS:		
Allan Block	\$12,857.77	Retaining Walls \$12,537.64
Rock Quarry	\$ 1,266.12	Gravel \$ 2,351.11
Northwestern Supplies	\$ 2,075.45	Northwestern Supplies \$ 1,253.87
Head-Lee Nursery	\$ 3,903.54	Plants & Trees \$ 4,036.35
All Seasons Land.	\$ 5,143.44	
Subtotal:	\$ 9,046.98	
Malpass Grading (id'd as labor)	\$ 3,306.29	Malpass Grading ((id'd as material)\$2,976.29
Lowe's	\$ 2,532.29	Lowe's \$ 959.81
Black's Electrical	\$ 794.35	Black's Electric.\$ 1,068.17
Subtotal:	\$ 3,324.64	Subtotal: \$2,027.98
LABOR:		
Labor Help	\$19,811.03	Installation/Labor \$80,267.95

RECAP:

Total of entire Expense Sheet (except labor help) - \$38,330.46

Total of Scope of Work (except labor/installation) \$41,269.60

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF OCONEE	)	
	)	
JERRY HOLTZCLAW, d/b/a	)	CIVIL ACTION NO. 2008-CP-37-415
GREEN THUMB LANDSCAPE &)	)	
IRRIGATION,	)	
	)	
Plaintiff,	)	RULE 15(B) MOTION TO AMEND
	)	TO CONFORM TO THE EVIDENCE
DENNIS WALDREP,	)	
	)	
Defendant.	)	

The Defendant, Dennis Waldrep, by and through his attorney, Catherine J. Berger, moves this Honorable Court to Amend its Counter-Claim to conform it to evidence and presented at the trial of the above-captioned matter on June 7 and 8, 2011, pursuant to Rule 15(b), F.R.C.P., and Defendant further states in support of this Motion as follows:

1. The following issues were not raised by the pleadings but were tried by the express and/or implied consent of the parties:

- a. whether Plaintiff was a licensed contractor during the construction work on Defendant's premises; and
- b. whether the Plaintiff's construction work as it related to the segmented retaining walls was properly constructed.

2. Such issues were supported by the evidence admitted at the trial.

3. The Plaintiff's complaint sounds in contract although it was not plead. The Plaintiff's complaint asks for specified damages for landscaping services on Defendant's subject premises; however, the evidence adduced at trial established that the Plaintiff performed structural improvements to Defendant's premises beyond landscaping services.

4. That Paragraph 8 of Defendant's Answer and Paragraph 12 of his Counter-Claim prays for damages of \$10,845.88 for improper installation and faulty work for drainage pump, irrigation, electrical work, edging and waterproofing.

5. Defendant offered extensive evidence was presented at trial by expert testimony and reports that the lower retaining wall is in failure and was not constructed pursuant to manufacturer's specifications with full opportunity for the Plaintiff to test and cross-examine.

6. Defendant provided evidence (Defendant's Exhibit 3) that the lower retaining wall would require total replacement at a cost of \$32,760.00.

7. In Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 363 S.E.2d 891 (S.C. 1987), the complaint alleged five specific violations of a restrictive covenant; however, the Court took testimony at trial concerning a number of violations not specifically mentioned in the complaint or by later amendment. Supreme Court Rule of Civil Procedure 15(b) permits the presentation of evidence within the issues made by the pleadings. The court concluded that the proof and the trial court's subsequent order fell within the reasonable scope of the issues framed by the pleadings. Similarly, in the case at bar, the issue of the integrity of Plaintiff's construction of the retaining walls, and the lower wall in question, fall within the scope of the issues framed by Defendant's pleadings.

8. Plaintiff admitted on cross examination, without objection by counsel, that he was not a licensed contractor at the time the work was performed on Defendant's premises.

7. The presentation of the merits of the defense to this cause of action is preserved by the grant of this Motion and the Plaintiff is not prejudiced by the admission of the evidence and the trial of the issues which resulted from such admissions. In Soil & Material Engineers, Inc. v. Folly Associates, 293 S.E. 498, 361 S.E.2d 779 (S.C.App. 1987), the trial court denied plaintiff's 15(b) motion to amend its reply on the basis that the motion came too late and the testimony "was not inconsistent with the pleadings". The Court of Appeals in reversing and remanding held there was an abuse of discretion by the trial court. The Court of Appeals stated that simply because an amendment to conform to proof was made late in the trial affords no basis for holding that the amendment comes too late. Rather, as the rule makes clear, the question is one of prejudice to the opposing party. In the case at bar, the Court has not as yet ruled on the merits of the case. Further, the issue of whether Plaintiff was a licensed contractor at all times in question is one of fact and has been admitted by the Plaintiff. There is no further discovery or evidence which could be offered to Plaintiff to rebut that fact. Further, the Plaintiff allowed evidence of his lack of licensure to come in without objection. Rule 15(b) directs the court to consider prejudice, "if evidence is objected to at trial on the ground that it is not within the issues made by the pleadings..." In other words, a claim of prejudice must be preserved by a prior

objection to admission of the evidence. Woods v. Rabon, 295 S.C. 343, 368 S.E.2d 471 (S.C.App. 1988).

8. The timing of this Motion may be premature; however, the Defendant respectfully reserves the right to raise this request after this Honorable Court has made a final decision in the cause.

9. The interests of justice are properly served by the grant of this Motion.

Respectfully submitted,



Catherine J. Berger
Attorney for Defendant/Counter-Plaintiff
P.O. Box 10
Piedmont, SC 29673
(864)845-3367
(864)845-6467 (fax)

-4-

2012 FEB 21 AM 10 52

Defendant.

[illegible]

2008-CP-37-415

the Plaintiff, in reply, admitted into evidence the manufacturer's specifications for settlement as published on its website. Those specifications provide that "total allowable differential settlement is 1% of total wall length." Evidence as to the actual degree of settlement along the wall varied. However, the largest elevation differential supported by any evidence was 8.123 inches. The wall is in excess of 85 feet in length. Accordingly, the Court found that Defendant failed to establish non-compliance with the specifications.

At the conclusion of the trial, the Court allowed counsel for Defendant to submit further argument in writing as to why the Court should not find from the evidence of record that the wall is within the settlement tolerance set by the manufacturer. The Court could not, and did not, allow additional evidence or expert opinion to be submitted after the trial had concluded. Based upon the testimony and evidence admitted at trial, the Court confirms its finding that the settlement of the wall is within the tolerance clearly stated in the specification entered in evidence. The Court cannot consider evidence not admitted at trial, and nothing in Defendant's arguments persuaded the Court that its initial findings were in error.

Defendant's motion further argues that the evidence does not contain documentation for every material cost charged by Plaintiff and that there is no documentary evidence to support the labor costs charged by Plaintiff. There was extensive testimony and evidence received concerning the scope and actual cost of the work performed, including the cost of materials and labor. Aside from the adjustments specifically found proper by the Court, the evidence, whether documentary or testimonial in nature, was sufficient to support the amount found due.

Therefore, after deliberate consideration of the arguments of counsel and careful reconsideration of the evidence as a whole, it is

ORDERED that Defendant's Motion for Reconsideration To Amend Findings of Fact and to Alter or Amend the Judgment is hereby DENIED.

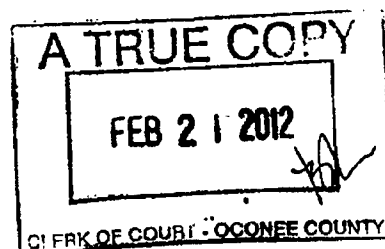
IT IS SO ORDERED.

2/16, 2012

S/ R. LAWTON McINTOSH

R. Lawton McIntosh
Circuit Court Judge

FILED O'CONNOR, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 FEB 21 AM 10 52



Catherine J. Berger
Attorney at Law

Mailing Address: P.O. Box 10 • Piedmont, South Carolina 29673
Phone: (864) 845-3367 • Fax: (864) 845-6467
Licensed in IL and SC

**VIA EMAIL AND
FIRST CLASS MAIL**

February 22, 2012

**Mr. Dennis Waldrep
Legacy Planning Group, Inc.
273 Applewood Center Place
P.O. Box 302
Seneca, SC 29678**

**RE: Holtzclaw v. Waldrep
Case No. 2008-CP-37-415**

Dear Mr. Waldrep:

Enclosed please find a copy of Order Denying Defendant's Motion for Reconsideration, to Amend Findings of Fact and to Alter or Amend Judgment received from the Clerk of Court today, February 22, 2012. Please note the Order was time stamped on February 21, 2012.

If you wish to appeal this ruling, it is necessary that you file a notice of appeal pursuant to Rule 203 as I advised you in my previous letter. The notice must be served on all respondents within thirty (30) days of receipt of written notice of the entry of the judgment or the order. It must be filed within ten (10) days thereafter. Specifically, you must serve the Notice of Appeal NO LATER THAN March 22, 2012, and file it within ten (10) days thereafter or NO LATER THAN April 1, 2012. These are hard and fast deadlines which must be met in order to preserve your right to appeal the matters contained in the enclosed Order.

I will submit my final billing to you shortly.

Very truly yours,



Catherine J. Berger

CJB:eb

Encl.

1 ** Start of Requested Certified Transcript of Record **

2 (Whereupon, the motions hearing commenced, with all
3 parties being present, at approximately 3:02 p.m.)

4 THE COURT: Please be seated.

5 This is the matter of *Jerry Holtzclaw versus Dennis*
6 *Waldrep*. This came to trial before me -- was it in July
7 of this year? Is that when it was?

8 MS. BERGER: Yes, Your Honor.

9 THE COURT: Okay. And I issued a ruling finding
10 for the Plaintiff. The Defendant in this matter has
11 made a motion for reconsideration to amend findings of
12 facts and to alter and/or amend judgment; is that
13 correct?

14 MS. BERGER: Yes, Your Honor, it is.

15 THE COURT: That's what this matter is before me on
16 this motion?

17 MS. BERGER: Yes, Judge.

18 THE COURT: Okay. I'll be glad to hear from you.

19 MS. BERGER: Good afternoon, Your Honor; Counsel.

20 THE COURT: Good afternoon.

21 MS. BERGER: First of all, Your Honor, is our
22 motion for clarification of rulings made by the Court at
23 trial.

24 THE COURT: Okay.

25 MS. BERGER: And when Your Honor had drafted a

1 letter to Counsel directing Mr. Hood to prepare the
2 Final Order, your letter made reference to a denial of
3 the Defendant's motion to amend pleadings to conform to
4 the evidence, and your letter denied that. However,
5 that never made it to the Final Order. So; the first
6 instance is I wanted a clarification of that in some
7 Order by Your Honor.

8 THE COURT: Denial is clarification. You asked me
9 to clarify my prior Order, and I said no. Is that not
10 what you are asking?

11 MS. BERGER: No. Your letter directing Mr. Hood to
12 prepare your Final Order --

13 THE COURT: Oh, okay, excuse me.

14 MS. BERGER: -- made reference to denial of the
15 Defendant's motion to amend pleadings of proof, and that
16 never made it to --

17 THE COURT: Oh, it never made it to an Order?

18 MS. BERGER: -- the Order. As a housekeeping
19 matter.

20 THE COURT: Ah, okay.

21 MS. BERGER: It never made it to the Order that
22 Your Honor signed.

23 THE COURT: Okay. So; I need to do a Form 4
24 denying your motion for clarification. It seems to me
25 that that --

1 MS. BERGER: Well, part of the issue, Judge, was
2 that when you directed Mr. Hood to prepare the Final
3 Order, you also directed him to send it to me prior to
4 submission to you, and it was submitted through the mail
5 to Your Honor and to me --

6 THE COURT: And I prefer that practice because I
7 avoid headaches of unnecessary motions.

8 But let me ask you this. (Pause.)

9 Let me do something just so you have a record of
10 this. I'm looking at your motion for clarification of
11 rulings. And it looks like when you start asking for
12 affirmative relief in that, it starts with paragraph 2,
13 this is paragraph 1 of said letter, states as follows
14 (reading): Defendant's motion to hold the decision in
15 abeyance is denied.

16 All right. To the extent that is not contained in
17 the Order, then that would be upheld because I denied
18 the motion to hold the decision in abeyance.

19 I did -- we did have, if I recall, a motion in
20 chambers where there was a motion to amend the pleadings
21 to conform to the evidence that you had or is not part
22 of the record. Tell me about that.

23 MS. BERGER: Your Honor, I didn't make any motion
24 in chambers at the conclusion of testimony in this case.

25 THE COURT: Now, just one second. I'm not sure I

1 agree with you on that. You didn't make one on the
2 record. But we discussed having some motions made out
3 there. And I think, if I'm not mistaken, you said that
4 it would conform to the evidence presented and I said I
5 wouldn't let you do it at this late date. On this
6 motion to amend there are certain different causes of
7 action. I don't have my notes in front of me, so
8 correct me. Either one?

9 MS. BERGER: My memory, Judge, of that conversation
10 in chambers with Counsel and Your Honor and your law
11 clerk was, you looked at me and said, "I'll give you
12 leave to amend." You handed me a document that was
13 introduced in Plaintiff's rebuttal case that talked
14 about differential settlement --

15 THE COURT: No. I gave you -- excuse me. I
16 interrupted you. Go ahead.

17 MS. BERGER: -- with handwritten notations.

18 And you said, Please explain this to me. Eight and
19 a half feet differential settlement. Explain to me why
20 that is not construction tolerance.

21 THE COURT: Right.

22 MS. BERGER: Then we went back on the record and
23 Your Honor gave me leave to submit argument, no further
24 testimony, no further experts to testify or parties
25 explaining why that analysis was incorrect, that this

1 wall, 80 feet in length, could be a five-foot length,
2 could be off eight and a half inches over the length of
3 the wall, and Your Honor concluded that was within
4 structure and tolerance.

5 THE COURT: Right. Now, why would that go to a
6 motion to amend? Because I know I did not let you amend
7 at that point to assert different causes of action,
8 which is the way it was presented to me from the Clerk's
9 Office later.

10 MS. BERGER: That's my memory, Judge. Obviously in
11 the transcript you denied my motion to hold in abeyance
12 pending the transcript. It's not in the transcript. We
13 had no court reporter in chambers. But, in any event, I
14 want clarification on that motion for purposes of the
15 record today.

16 THE COURT: All right. It would be denied. It was
17 denied, and it is denied, so there is no question about
18 it that it is denied, okay?

19 MS. BERGER: Okay.

20 THE COURT: And that is a motion to amend to assert
21 different causes of action that was raised supposedly
22 post-trial in a chambers meeting with Counsel. To the
23 extent that motion was raised, it is denied, okay? Is
24 that clear enough?

25 MS. BERGER: Yes, it is, Judge.

1 THE COURT: Okay. Now, motion to amend pleadings
2 to conform with the evidence. That's a different motion
3 than the motion to assert different causes of action.

4 MS. BERGER: Correct.

5 THE COURT: Okay. Now, I don't recall that you
6 made that, but what would be your position on that? Did
7 you make that motion, or no?

8 MS. BERGER: That motion, I really made that in
9 writing, Your Honor, and you haven't ruled on that. And
10 that is that based on the record -- and I was gonna go
11 through my motion to clarify --

12 THE COURT: Okay.

13 MS. BERGER -- but I would certainly be happy to
14 take that out of order.

15 THE COURT: Okay. Well, just one second. Did I
16 overlook something? Okay. Excuse me. Number 3? Is
17 that the one you're going to?

18 MS. BERGER: Well, on my motion to clarify, I guess
19 that would be on paragraph number 5, Your Honor, on Page
20 2.

21 THE COURT: No, it would not. We had a motion to
22 hold that decision in abeyance. And then we have the
23 next one?

24 MS. BERGER: The draft and the Final Order that
25 Your Honor entered made a finding that, quote, Defendant

1 asserted but did not establish that retaining walls over
2 six inches in height were required by the code of the
3 engineers.

4 THE COURT: Just a second. Okay. I'm gonna go --
5 you're going back to where we were, paragraph 3 says the
6 draft of (reading): The Final Order and Judgment
7 prepared by Plaintiffs' counsel and entered by the Court
8 on July 22nd, 2011, fails to include this ruling in the
9 Final Order and Judgment.

10 MS. BERGER: The motion to hold the decision in
11 abeyance. You denied that motion, Judge.

12 THE COURT: Okay.

13 MS. BERGER: And it's really now a moot point since
14 we have the transcript.

15 THE COURT: Okay. Got you.

16 The next one is motion to amend pleadings to
17 conform to the evidence. The draft that you had to me,
18 the letters or correspondence to the Court was a motion
19 to assert additional causes of action, not to conform to
20 the evidence, okay? So; I just wanted to make sure I
21 was clear on that.

22 MS. BERGER: We're not asserting additional causes
23 of action.

24 THE COURT: I understand. And that's to the extent
25 I denied that you would be allowed to do that after the

1 evidence. Now, you are saying that you made a motion to
2 amend pleadings to conform to the evidence. Correct?
3 I'm not denying that you did. I'm just saying is that
4 the next point that you're arguing?

5 MS. BERGER: Yes, Judge.

6 THE COURT: Okay. And I'm sorry I've been obtuse
7 up here. I'm just trying to figure out where I am.

8 Okay. And what other paragraphs were you asking me
9 to look at in conjunction with paragraph 4? Just the
10 motion to conform -- amend the pleadings to conform to
11 the evidence; and if so, how?

12 MS. BERGER: Specifically?

13 THE COURT: Uh-huh.

14 MS. BERGER: Specifically based on all of the
15 receipts. And the Plaintiff submitted material
16 receipts, labor receipts, hundreds of pages. And
17 looking at that complete record that the Plaintiff
18 submitted, the receipts do not bear out the
19 out-of-pocket expenses for materials used at the Waldrep
20 premises by about 10,000 -- I've got the exact amount
21 of the ---

22 THE COURT: What amendment of the pleadings would
23 you seek based upon the evidence presented during trial
24 is the question I'm asking you, though. Because you're
25 asking to amend -- again, you really asked to amend that

1 to assert a different cause of action and I said you're
2 not doing that. I denied that. And then it's been
3 phrased as a motion to amend the pleadings to conform to
4 the evidence.

5 So; if you want to amend the pleadings, what
6 amendment are you asking based on what evidence in the
7 pleading?

8 MS. BERGER: To conform to proof because Plaintiff
9 has alleged ---

10 THE COURT: What amendment to your pleadings are
11 you seeking? If you are seeking to amend your
12 pleadings, how are you seeking to?

13 MS. BERGER: Increasing the counter claim. My
14 client filed a counter claim --

15 THE COURT: That's good. That's what I'm leaning
16 toward.

17 MS. BERGER: -- to set off the amount that Your
18 Honor granted the Plaintiff --

19 THE COURT: Okay.

20 MS. BERGER: -- because the receipts don't bear
21 that out. That's on the materials, okay?

22 THE COURT: Got you. Okay. I'm sorry. You and I
23 are just not speaking the same language today.

24 MS. BERGER: I'm sorry, Your Honor, for not being
25 more clear.

1 THE COURT: That's all right, ma'am; you're fine.

2 MS. BERGER: On the labor aspect?

3 THE COURT: That motion -- let's do that -- is
4 denied, okay? Well, actually, I granted the motion and
5 it's still not gonna change my Order at this stage. I
6 think the evidence is the way I ruled. But that way you
7 would have the right to amend to assert a greater amount
8 of set-off, Ms. Berger --

9 MS. BERGER: Yes.

10 THE COURT: -- than what you asserted at trial based
11 on the evidence presented. Do you have a dollar figure
12 that you would assert should be the appropriate amount?

13 MS. BERGER: On material costs, \$10,805.93.

14 THE COURT: Okay.

15 MS. BERGER: On the labor aspect, again, my client
16 asserts that there is no proof of what's reasonable in
17 the community or of labor expenses other than the
18 Plaintiff's verbal assertion that he had three or four
19 guys working on the property at the time and was paying
20 them eight or nine dollars an hour. Not one payroll
21 record, not one time sheet, no proof other than his
22 verbal assertion.

23 And that the labor was excessive in the amount of
24 \$25,949.58.

25 THE COURT: Okay. Do you have the total figure

1 there, or just those figures to --

2 MS. BERGER: That is the total figure.

3 And with the motions that I filed with the Court
4 previously that is all itemized in exhibits --

5 THE COURT: Right.

6 MS. BERGER: -- identifying each and every supplier
7 that the Plaintiffs used on Mr. Waldrep's home.

8 THE COURT: To the extent I denied that motion, I
9 overrule myself, I'll allow you to conform your
10 pleadings to assert the additional set-off for the
11 amount stated.

12 Okay. Paragraph 6, that is a typo of my fault, of
13 my Order instructions. That motion, that ground for
14 clarification is denied.

15 MS. BERGER: On the height of the wall --

16 THE COURT: Over six inches. At the trial was over
17 six feet. And, furthermore, your clients, or your
18 witness's testimony did not establish a code that says
19 that. It's a manufacturer's recommendation based on my
20 memory.

21 Now, six inches is just a misstatement. I went
22 back and looked at my Order instructions. I did say six
23 inches. That was just a...

24 MS. BERGER: So how are we clarifying that, Judge,
25 then?

1 THE COURT: I'm denying you to make me change that
2 and put it in the Order. That's what you're asking me
3 to do that and I will not do that.

4 MS. BERGER: Your Honor, I'd further ask that,
5 since there was no evidence of any Geo grid being used
6 on these retaining walls erected on the Waldrep
7 property --

8 THE COURT: Let's do this, if you would,
9 Ms. Berger.

10 MS. BERGER: Yes.

11 THE COURT: Stay with me. If you would go down to
12 number 7 in your motion for clarification.

13 MS. BERGER: Yes.

14 THE COURT: Okay. Anything that has to do with six
15 inches is not gonna be changed. Obviously, that was six
16 feet was the testimony at trial. I'm not changing that
17 to assert those, the mistake in transmittal of the
18 instruction was on my part into the Order.

19 Furthermore, to the extent that that could be
20 argued to be six feet, there is no evidence presented by
21 the Defendant that that is, in fact, the Code. The
22 evidence was that it was the manufacturer's
23 recommendation.

24 Now, paragraph 8, what are you seeking to have me
25 do, please?

1 MS. BERGER: There's no specific relief in that, in
2 that paragraph, Judge.

3 THE COURT: Ma'am?

4 MS. BERGER: There is no specific relief sought in
5 that paragraph. It's just a statement.

6 THE COURT: Okay. So that's just making basic
7 language subject to the relief being sought?

8 MS. BERGER: Well, Your Honor, basically on July 14
9 the Defendant filed his response to Your Honor's request
10 to explain the length of the wall and why. And my
11 conclusions may be not accurate on whether it's within
12 tolerance, and that that was filed before your ruling
13 today, so I would renew that request.

14 THE COURT: Uh-huh.

15 All right. So; number 9, then, is the Geo grid; is
16 that correct?

17 MS. BERGER: Yes.

18 THE COURT: No evidence that Geo grid was used in
19 the --

20 MS. BERGER: There is no receipt in the record
21 whatsoever.

22 THE COURT: That's, that's denied.

23 Go to the next one, please.

24 MS. BERGER: Paragraph 11, Judge, I believe you
25 have already addressed, and that is that the evidence

1 presented by Plaintiff by way of paid material receipts
2 and labor expense mathematically don't add up. Based on
3 Your Honor's ruling granting \$52,988.98 for the
4 Plaintiff, basically everything he requested in his
5 scope of work summary of expenses on this job.

6 THE COURT: If I recall, what I gave them was what
7 they requested minus the cost to repair faulty repaired
8 work, a cost of a laser beam that they paid for that I
9 thought was an inappropriate charge to this Defendant,
10 as well as a \$10,000-plus mathematical mistake. That's
11 my memory of what I ruled.

12 MS. BERGER: There were some offsets, Judge, but
13 they --

14 THE COURT: I denied your request for offsets. But
15 as far as what they were asking in the Plaintiff's
16 damages, I -- tell me again --

17 And maybe, Mr. Hood, you might be better. They had
18 a claim of X number of dollars. I subtracted from that
19 cost to repair cement, cost to fix cement...

20 MR. HOOD: And a driveway repair.

21 THE COURT: The cost of some kind of laser grader
22 or something like that.

23 MR. HOOD: And the driveway repair. And then, too,
24 I think Your Honor can recall there was also an
25 adjustment that was made --

1 THE COURT: A 2,000-plus ---

2 MS. BERGER: 3,000, Your Honor.

3 THE COURT: 3,000, okay.

4 MR. HOOD: -- credit that was not given.

5 THE COURT: Okay. So...

6 MS. BERGER: My position, Judge, is that in your
7 letter --

8 THE COURT: My math is wrong?

9 MS. BERGER: -- in your find -- no. In your
10 findings you indicate the balance -- paragraph C, Page 2
11 of your letter prior to the entry of judgment, but the
12 language is in the Final Order -- the balance due on the
13 final bill was \$52,998.98. Your Honor indicates that
14 that was a reasonable amount for the work done. No
15 question that the \$3,000 offset was granted.

16 Because Mr. Waldrep -- excuse me -- Mr. Holtzclaw
17 in rebuttal said, Well, he, the Defendant paid an extra
18 \$3,000, we didn't get credit. That didn't make it to
19 Your Honor's findings, but Mr. Hood put it in the Final
20 Order. And, of course, we acknowledge that credit, and
21 there were several credits, but it didn't amount to
22 \$10,000, Judge. So; paragraph 11 really relates to I
23 think what you have already ruled, and that is that you
24 are denying our motion to amend pleadings to what was
25 proved for the labor and the material.

1 THE COURT: Well, obviously it wasn't proven
2 because that's the way I ruled so that I -- that was
3 presented. Am I correct?

4 MS. BERGER: Well, are you denying -- you are
5 denying that. Am I clear on that, Judge?

6 THE COURT: I'm not clear about anything you are
7 telling me, quite frankly, all day. And what I
8 understand what you are saying is that my math was
9 wrong, or then you are saying actually there's a \$10,000
10 difference from what we proved based on his receipts to
11 the Plaintiff. I'm not sure what you are arguing to me.

12 MS. BERGER: Aside from the total amount Plaintiff
13 claimed of 52,000 --

14 THE COURT: Yes, ma'am.

15 MS. BERGER: -- and crediting Mr. Waldrep for the
16 \$3,000 acknowledged paid --

17 THE COURT: Right.

18 MS. BERGER: -- and the several other credits,
19 there are still -- there is still a lack of evidence: A
20 paid receipt, a payroll record, anything to establish
21 the amounts claimed by the Plaintiff, having considered
22 the set-off, Judge.

23 THE COURT: Okay. So, if I understand, Ms. Berger,
24 it's not a matter of me making a clerical error as far
25 as the math that I actually did; you are saying that

1 there is no evidence in the record to support that
2 claim?

3 MS. BERGER: Correct.

4 THE COURT: Okay. That's denied.

5 Let's go to the next one.

6 MS. BERGER: That concludes the motion to clarify
7 the issues, Judge.

8 THE COURT: Okay.

9 MS. BERGER: My other motions, I don't know if you
10 want to hear from Mr. Hood on this before I speak again?

11 THE COURT: Yes. This is a motion for
12 reconsideration to amend findings of fact to alter or
13 amend judgment. So; let me ask you, going back for a
14 clerical just mop up, do you want to prepare an Order
15 granting your motion to amend your pleadings based to
16 conform with the evidence and assert those other figures
17 in there? Do you want to do just do a quick form, a
18 one-pager? That way you have it in the record so if you
19 get this reviewed?

20 MS. BERGER: I will.

21 THE COURT: Okay. And again, both counsel. My
22 practice for this case and for future reference, I want
23 Orders exchanged before they get to me. That way we can
24 talk about problems and get it done before I have to
25 come back in here and try to recount something long

1 after it's done. If you would do that for me, please,
2 Ms. Berger. If you all can't agree to it, then submit
3 it in to me and I will -- just with your arguments and
4 I'll look at it that way. Okay?

5 MS. BERGER: May I ask, just so I'm clear, Your
6 Honor, you want me to prepare a draft order based on
7 your rulings on my motion to clarify?

8 THE COURT: Yeah. And you don't need it on denial
9 on the basis denied. I can put, you know, "denied" and
10 that is acceptable. The one issue on your issue to
11 amend your pleadings to conform to the evidence, okay,
12 which I did grant. So far that is the only one I
13 granted so far; am I correct?

14 MS. BERGER: Yes.

15 THE COURT: Okay. And if you want to articulate
16 the basis for that so that you would have figures in an
17 Order, that's what I would do, based on your itemization
18 you submitted previously.

19 MS. BERGER: Yes.

20 THE COURT: That's what I was saying. Go ahead and
21 just do me a one-page Order that sets itemization. I'll
22 let you amend your Complaint to assert that. So; if I
23 am wrong, at least you've got the numbers in the record,
24 okay?

25 MS. BERGER: And so that I'm clear, Judge, you will

1 want that Order before presenting any argument on the
2 motion for reconsideration?

3 THE COURT: No. We'll go ahead and do that today.

4 MS. BERGER: Okay. Thank you.

5 THE COURT: Okay. Now, we have a motion for
6 reconsideration to amend findings of fact and to alter
7 or amend judgment. We've gone through and we've gone
8 through a motion for clarification.

9 That being said and done, I'll be glad to hear you,
10 Ms. Berger, on the motion for reconsideration and other
11 related relief.

12 MS. BERGER: Thank you, Your Honor.

13 With regard to the judgment entered by your Court
14 after hearing the evidence, what is in the record are
15 the construction tolerances for the Allen Block
16 retaining walls that were erected by the Plaintiffs on
17 the Defendant's property.

18 And what came out in rebuttal was reference to a
19 length of reference, a differential settlement, as part
20 of determining the integrity of the retaining walls
21 erected on the Waldreps' property as to whether they
22 were within construction tolerance and within what is
23 acceptable in the trade so that the Plaintiff could
24 recover for the erection of those walls on Mr. Waldrep's
25 property.

1 Our position in the motion for reconsideration is
2 premised on probably the most germane aspect of this
3 case related to the structural integrity, and that is
4 the length of reference to determine the integrity of
5 the retaining walls on the Waldreps' property must be
6 over a fixed distance, 0 to ten feet.

7 The length of the wall in question that the
8 Defendant's witnesses testified to as being in failure
9 mode, meaning subject to falling and not being in proper
10 design and construction, was 85 feet in length.

11 And the evidence in the record, based on
12 Mr. Jordan's testimony, and Mr. Chandler, the latter of
13 which is the structural engineer, is that you must
14 determine the differential settlement over a ten-foot
15 length of reference, 0 to ten feet, not over the entire
16 length of the wall.

17 And I would respectfully submit to Your Honor that
18 neither Mr. Jordan nor Mr. Chandler nor anyone
19 testifying on Plaintiffs' behalf established that this
20 wall was within construction tolerance. Neither
21 Mr. Jordan nor Mr. Chandler testified that eight inches
22 over an 85-foot wall is within tolerance. It must be
23 taken over a ten-foot section for the vertical and
24 horizontal control.

25 What is in the record as an exhibit, with no

1 objection by Plaintiff, is that the length of reference
2 must be considered. So; on an 85-foot wall what is in
3 the record is that this wall, over several lengths of
4 reference, not over the entire length of the wall, is
5 out of tolerance far in excess of what construction
6 tolerance is allowed for this wall.

7 THE COURT: Let me --

8 MS. BERGER: Vertical tolerance --

9 THE COURT: -- let me ask you this. I recall --
10 and I don't know this, but I'll go back and check -- but
11 I will, I recall that over the length of the wall the
12 testimony was that the wall was out some eight and some
13 odd inches over.

14 Now, I do not specifically recall there being
15 anyone, including you, or your client, who has the
16 burden of proof in this effect, or this part of it, that
17 the wall over this given segment, say ten feet or
18 whatever the fixed tolerance level, is out this far and,
19 therefore, that exceeds the tolerances provided for this
20 wall. Is there any testimony to that effect in the
21 record?

22 MS. BERGER: Your Honor, there are exhibits in the
23 record based on measurements taken by Steve Jordan that
24 measured the entire length of the wall in ten-foot
25 increments. And over one ten-foot segment this wall is

1 off 8.125 feet. The acceptable tolerance for a
2 retaining wall of any length has to be measured over
3 this ten-foot length, and the vertical tolerance is 1.25
4 inches over that length, over that ten feet. One could
5 measure in six-foot, inches increments across the wall.

6 To give an analogy, Your Honor, if there was a
7 400-foot retaining wall, and construction tolerance
8 would allow one to measure across the entire length of
9 it, that wall would be in construction tolerance if it
10 were, if it had a settlement of four feet ---

11 THE COURT: Are you telling me --

12 MS. BERGER: --- and there would be no
13 construction ---

14 THE COURT: Just one second. Are you telling me
15 that you presented evidence -- and I'm not saying you
16 didn't. I'm asking -- that over a given ten-foot
17 segment in this wall, that this particular wall was out
18 of plumb or out of alignment over eight and some odd
19 inches?

20 MS. BERGER: Yes, Your Honor. There were
21 measurements taken by ---

22 THE COURT: Which exhibit was that?

23 MS. BERGER: I don't have the exact exhibit number
24 offhand, Judge.

25 THE COURT: Okay.

1 MS. BERGER: I didn't bring all of the exhibits,
2 but I can certainly ---

3 THE COURT: I hope you did, since they should be in
4 the record.

5 MS. BERGER: They are in the record, there's no
6 question.

7 THE COURT: Okay. Good.

8 MS. BERGER: Mr. Jordan took measurements back in
9 the year 2008, I believe it was the fall, and took
10 measurements again in, right before trial, June of 2011,
11 three years later.

12 THE COURT: Ms. Burton, any reason I can't open up
13 these exhibits?

14 THE CLERK: None.

15 (Court opens exhibits from trial.)

16 All right. If you would, would you show me,
17 please -- I'm gonna ask you to step around here -- or he
18 could give them, Mr. Bibb, and...

19 MS. BERGER: (Complies). It would be Plaintiffs'
20 Exhibit Number 4, Your Honor, dated September 15, 2008.

21 THE COURT: Say that again, please?

22 MS. BERGER: Exhibit Number 4, Plaintiffs' Exhibit
23 Number 4; and Defendant's Exhibit Number 6.

24 THE COURT: Just one second, please. (Pause.)

25 Looking at Exhibit, Defense Exhibit Number 4, what

1 Mr. Jordan says is that (reading): I've referenced -- I
2 started on the north corner of the wall, which would be
3 on the right corner if you are facing the lake. We used
4 each point as a reference point and in equal increment
5 to show elevation drop.

6 And here's a list of the elevation marker of each
7 rail, Plaintiffs' Exhibit number 1 through 14. He says,
8 I notice the elevation change from post 1 to post 9
9 there is a six and a half inch drop in the wall. The
10 standard tolerance in segmented wall construction is one
11 quarter per 25 feet. The elevation drop on this wall he
12 sees is standard over five and a half times in the 85
13 inches or 85 feet of this wall.

14 So; what I'm reading him to say is between post 1
15 and post 9 is there's a six-and-a-half-foot drop in the
16 wall. Is that not what he tells me?

17 MS. BERGER: May I see the exhibit, please?

18 THE COURT: Yes, ma'am.

19 MS. BERGER: Your Honor, what he did was he
20 measured against the entire length of the wall. And I
21 would refer you to Exhibit 6, which I think Your Honor
22 has.

23 THE COURT: I have it and I'm looking at it now.

24 MS. BERGER: Okay. He started at 0 as the starting
25 point and he measured across every ten feet. And at any

1 of those points and at most of those points this wall is
2 off well outside of construction tolerance and I would
3 cite the condition in that exhibit, Judge -- and that is
4 Plaintiffs' Exhibit number 17.

5 THE COURT: Which would be ten percent of the
6 length of the wall or something along those lines?

7 MS. BERGER: Right. Which has to do with the
8 construction tolerances. Vertical is 1.25 inches over a
9 length of reference. And the length of reference is a
10 ten-foot length of reference, not over the entire length
11 of the wall. If that were the case, then by argument
12 you could say this wall could sink eight feet across an
13 85-foot wall and that would be acceptable construction
14 tolerance. And that is not what the tolerances are for
15 these Allen Block bricks that were used in the erection
16 of the retaining walls on the Waldrep property.

17 THE COURT: Okay. Looking at Plaintiffs' Exhibit
18 Number -- it's on the motion for reconsideration -- you
19 have it marked Exhibit 8, 2 of 2. Is that what you
20 referred to as Plaintiffs' Exhibit number -- excuse me
21 -- something -- what did you just go over --

22 MS. BERGER: Exhibit A, yes, Your Honor, those two
23 pages.

24 THE COURT: Okay.

25 MS. BERGER: Directing your attention to the bottom

1 of Page 1 of Exhibit A, 13.5.1, dimensional tolerances
2 for SRG or segmented retaining wall construction. And
3 then it identifies vertical control as being plus or
4 minus 1.25 inches maximum over a ten-foot distance.

5 THE COURT: Okay. So; if I understand what you're
6 telling me, that over a given controlled distance of ten
7 feet, you could have a maximum horizontal deviance of
8 1.25 inches --

9 MS. BERGER: Over the length of reference, no
10 greater than ---

11 THE COURT: -- over ten feet, according to this
12 exhibit.

13 Isn't that what it says, Ms. Berger?

14 MS. BERGER: Yes. Yes, Your Honor.

15 THE COURT: Okay. I'm asking because I want you to
16 look at it.

17 Next, under the vertical control, is that not the
18 same point of reference, ten feet with a maximum of 1.25
19 inches; is that correct?

20 MS. BERGER: Yes.

21 THE COURT: Okay. Now show me -- I'm not
22 disagreeing with you. I just want to get that clarified
23 on the record. What Mr. Jordan says is that between
24 posts 1 and 9 there's a six-and-a-quarter-inch
25 difference, okay, and that's what it says in his letter.

1 Now I think you say accurate in conjunction with six.
2 Now show me what he's -- tell me what he's showing me
3 here, please.

4 MS. BERGER: May I also have, Your Honor, the other
5 exhibit, Exhibit 6?

6 THE COURT: That's what it is (handing).

7 MS. BERGER: Okay. Your question for me is?

8 THE COURT: Well, the point is well taken, that if
9 I am simply looking at the length of the wall, you're
10 adding some -- if there is also tolerances, that they go
11 forward -- in the first page of that exhibit that says
12 in a given ten-foot section you cannot have a vertical
13 or a horizontal discrepancy of more than 1.25 inches
14 more or less. Is that correct, is that what that
15 exhibit says?

16 MS. BERGER: Over a length of reference of ten.

17 THE COURT: I've said that about four times now,
18 Ms. Berger. Is that not correct?

19 MS. BERGER: Yes, Judge.

20 THE COURT: Okay. Now, what I'm asking you, in the
21 exhibits that you presented, and you had a burden of
22 proving in this case, Mr. Jordan said that between
23 Exhibit 1 and Exhibit 9 there's a six point -- and a
24 quarter inches. That's what he says on Plaintiffs'
25 Exhibit Number 2 or 3 or whatever you -- or Defense

1 Exhibit 2 or 3 you just went over with me. But that's
2 not what he says.

3 MS. BERGER: Your Honor, looking at Exhibit 4 ---

4 THE COURT: Does he not say that in that one
5 letter? I'm gonna give you a chance. I just want to
6 make sure I'm understanding what I'm dealing with right
7 now. I'm not saying I agree with you.

8 MS. BERGER: I want to be clear, too, Judge.
9 Exhibit 4, your question relates to Mr. Jordan's letter,
10 right?

11 THE COURT: Yes, ma'am. Four. Okay.

12 MS. BERGER: Yes. Based on his letter, over the 14
13 measurements he took, it is off six-and-a-half inches at
14 the greatest point where ---

15 THE COURT: Does he say at the greatest point?

16 MS. BERGER: No. But he's numbered them, and it's
17 number 9 for his reference (handing).

18 THE COURT: Okay. Go ahead.

19 MS. BERGER: And then, Your Honor, on Exhibit 6,
20 also prepared with measurements taken by Mr. Jordan
21 three years later, in June of 2011, just before trial
22 began in this case, three years after Exhibit 4 and
23 those measurements were done, and that wall was off
24 within that length of reference almost seven feet, or
25 6.2 inches, to be exact, at the most -- at the place

1 where it is most out of tolerance.

2 And our argument, Judge, is that mathematically to
3 determine whether or not this large retaining wall --
4 and that's the one in question that Mr. Waldrep took
5 issue with in terms of its integrity -- is not of a
6 construction tolerance; it wasn't at the time it was
7 erected, and it's not three years after it was erected,
8 current day. And for that reason it's --

9 THE COURT: Let me see if I recall. Number one,
10 your expert, who I found not to be very credible, was
11 your engineer. He did not do measurements. He just
12 took something that was handed to him, he went out and
13 looked at it and eyeballed it and said it's not within
14 tolerances. And I just found his testimony less than
15 credible.

16 However, I thought Mr. Jordan seemed to be credible
17 until I saw that his deviation, based on the
18 manufacturers' stated deviations, his was like a quarter
19 of an inch over 25 feet.

20 And clearly, based on the testimony or the exhibit
21 that was put in in reply to this matter, is what we just
22 went over, and that is your Exhibit A 1 and 2 of your
23 motion to reconsider. And that shows over a ten-foot
24 period it could be 1.25 inches' deviation horizontally
25 or vertically. Correct?

1 MS. BERGER: Yes.

2 THE COURT: So; even though your expert or
3 Mr. Jordan, wouldn't it be correct, it appears from his
4 calculations, Mr. Hood, that he has at least established
5 that those were out of deviation for both the horizontal
6 tolerances by your own exhibit, okay? So; how do you
7 address that?

8 MR. HOOD: Well, Your Honor, do you want me to
9 address this whole subject about the exhibit here and
10 the point she's making on the tolerance issues?

11 THE COURT: Yeah. I mean, it looks to me -- and I
12 think what Ms. Berger -- tell me if I understand.

13 I've been pressing her real hard today. And it is
14 this: That each post shows exact deviation. Or for
15 a -- this was a lower elevation, so I assume these
16 figures represent a vertical reading. It doesn't really
17 say. But one, one says post 0, then it has
18 three-fourths, one-and-a-half inches, three inches.

19 Then you have exhibits -- that's Exhibit 4. Then
20 you have Exhibit 6 that show a total variance of eight
21 and a quarter inches using a transit level from
22 beginning to end of the retaining wall.

23 And the way I read those exhibits and compared the
24 two, what was the rebuttal exhibit that you placed into
25 evidence, was that a maximum differential settlement, 1

1 percent of length reference and reference length was
2 what the equation is that the manufacturer gives us,
3 which is not what the experts testified to.

4 Now, according to what I'm hearing, the reference
5 length is a period of no more than ten feet.

6 MR. HOOD: Well, Your Honor, if I could try to
7 address that -- and I'll be the first to tell you I'm
8 not an engineer and this is somewhat confusing to me.
9 But in looking at Exhibit 17 here, the exhibit from the
10 Allen Block website, what we're focusing on right now,
11 what Ms. Berger has been focusing on is the first
12 section of that. And actually what the Court made its
13 determination on the at the time was not the first
14 section but the second section that's dealing with
15 differential settlement.

16 Now, let me say, first of all, that I think a big
17 part of our problem here is that there was a lot of
18 confusion and lack of clarity, and I would say even
19 contradiction between the testimony of some of the
20 Plaintiff's witnesses. But if the Court will recall,
21 when the engineer testified, I spent a good deal of time
22 trying to get him to tell me what the basis was of his
23 opinion that this wall was in failure mode I think is
24 the way he put it.

25 And the only thing he would refer us to was the

1 Allen Block website, and hence, that is why I went and
2 looked up the Allen Block website.

3 THE COURT: That being said, is the point well
4 taken that is brought out by Ms. Berger, that if you
5 look at the formula that's placed by the manufacturer,
6 the maximum differential segment settlement, and that's
7 1 percent of length of reference shown over the
8 reference length, the reference length according to her
9 had to be ten feet or less based on the tolerances; in
10 other words, it could be no more than 1.25 inches over
11 horizontal or vertical intolerance.

12 MR. HOOD: Well, again, Your Honor, it depends on
13 which part of Exhibit 17 you're focusing on now. What,
14 my argument at trial, and I think what the Court's
15 decision at the time of trial, according to my
16 understanding, was based on the second section, the
17 differential settlement section, which says that the
18 total allowable differential settlement is 1 percent of
19 the total wall length. Hence, that's ---

20 THE COURT: And where is this, please?

21 MR. HOOD: This is in the bottom section of Exhibit
22 17.

23 THE COURT: Would you pass that forward, please?

24 MR. HOOD: Yes, sir. This is my copy of it
25 (handing).

1 THE COURT: Have you seen that?

2 MS. BERGER: It was Plaintiffs' 17.

3 MR. HOOD: I think this is a Court exhibit right
4 here, Your Honor. That's my copy (handing.)

5 And I would like to address that further when Your
6 Honor is ready.

7 THE COURT: So; if you look at differential
8 settlement figure 14, and the manufacturer says -- or
9 excuse me -- Exhibit 17, if you look at figure 14 of
10 Exhibit 17, the total allowable differential settlement
11 is 1 percent of total wall length.

12 MR. HOOD: And that is exactly what the Court based
13 its ruling on at the time. And if I could address that
14 further now, this is, this is my interpretation of
15 reading this, but I think it's quite clear if you read
16 it.

17 The, we're talking about two different things here.
18 There's a construction tolerance. In other words, there
19 is an allowable variation during construction. In other
20 words, at the time the wall was built, Allen Block and I
21 think other standards, too, allowed there to be some
22 deviation during construction. So, in other words, the
23 minute that wall is built, it can be out of alignment by
24 a certain amount.

25 Now, according to my understanding, that's what

1 that section you are looking at at the top deals with.

2 THE COURT: Let me look at this right quick,
3 please.

4 (There was a pause in the proceedings while the
5 Court read a document.)

6 All right. Go ahead.

7 MR. HOOD: All right. So; what we're talking about
8 here, Your Honor, is not any deviations during
9 construction, obviously, because all these measurements
10 were taken considerably later. I think without dispute
11 what we, what we discussed here and what this whole case
12 has been about is settlement of the walls subsequent to
13 construction. That's the issue is settlement. It's not
14 whether the wall at the time it was built was within
15 certain tolerance.

16 And to further support that argument, Your Honor,
17 if you would look at the exhibit that's attached to
18 Ms. Berger's motion, which appears to be an excerpt from
19 a manual relating to segmental retaining walls, it also
20 addresses the same thing down at the bottom of the first
21 page where it says construction tolerance, and again,
22 the same thing that the Allen Block website is talking
23 about.

24 And if you read this, you can clearly see that what
25 they're talking about is tolerances during construction

1 itself. Because it says (reading): These tolerances
2 normally outlined in the construction specifications
3 should provide a controllable construction erection
4 margin for the contractor.

5 And then if you go to the next one, it says
6 (reading): Dimensional tolerances for segmented
7 retaining wall construction. As opposed to
8 cast-in-place concrete walls, alignment of segmented
9 retaining walls can be simply corrected or modified
10 during construction. Based upon examination of numerous
11 completed walls, the following recommended maximum
12 tolerances can be achieved with good construction
13 techniques.

14 In other words, this has to do with the
15 construction thing, how much you can bury the wall as it
16 is built. That's not what we're talking about here.
17 What we are talking about here is settlement, the
18 subsequent settlement of the wall and the resulting
19 effect on the structural integrity. That's what Section
20 2 of this Exhibit 17 is directly addressing:
21 Differential settlement.

22 And it could not be more clearly stated that they
23 evaluate that based on total settlement within the total
24 length of the wall. They use those terms. They don't
25 make any reference in there to any referenced length.

1 That has to do with the construction tolerances.

2 And if you stop and think about it -- and again,
3 I'm not the engineer -- but it makes perfect sense. If
4 you are looking at the structural integrity of a wall as
5 a wall, it would only make sense that you would consider
6 it in terms of the entire wall, not just one little
7 section of it.

8 So; what this clearly references is that it -- and
9 even actually if you look at the diagram there, it's
10 almost identical to the situation that we have in this
11 case, the way they've got it depicted. But what it
12 clearly says is that (reading): It is allowable for
13 there to be a total differential settlement of 1 percent
14 of the total wall length. They clearly use those
15 "total" terms as opposed to any sort of limited segments
16 or referenced segments.

17 THE COURT: Look at Exhibit Number 6, if you would.
18 Because the language that's used by Mr. Jordan is
19 unfortunate in some regard because it says that
20 (reading): At post 0, the first post for the total
21 variance of eight and a quarter using the transit level
22 from beginning to the end of the retaining wall.

23 And I read that to say from one part of the wall to
24 the other it would sound like to me. But if you look at
25 his measurements, it looks like in those increments,

1 those are the actual deviations that are shown as an
2 attachment to that letter, to Exhibit 6. Let me show
3 you what I'm talking about. Likewise, with Defense
4 Exhibit 4.

5 MR. HOOD: You are referring to which one, Your
6 Honor?

7 THE COURT: Defense Exhibit 6. And both of them
8 speak in similar language talking about a total
9 deviation, and it sounds like it's going across the
10 length of the wall. But each one of those measurements
11 shows inches or whatever the amount of deviation there
12 is.

13 MR. HOOD: Yes, sir.

14 THE COURT: So; would that not be at those defined
15 intervals the deviation, as he puts on his letter, on
16 Defense Exhibit 6 or number 4, whatever it is?

17 MR. HOOD: Well, if you are asking me are those the
18 measured differentials, that would be the evidence, yes,
19 sir. But I'm not sure I follow.

20 THE COURT: In other words, for a ten-foot segment
21 in varied in his Exhibit Number 6, I believe, by eight
22 and one -- point 125 inches --

23 MR. HOOD: At the greatest.

24 THE COURT: And over a ten-foot segment?

25 MR. HOOD: Well, no. The eight, the eight-inch

1 variation was over a much longer period, because again
2 the reference point was the point -- and I'm looking at
3 the exhibit --

4 THE COURT: That's what I'm asking you. Is that
5 for -- and I think that's what's being argued by
6 Ms. Berger, that each segment has that much amount of
7 variation that is shown for that segment.

8 Is that correct?

9 MS. BERGER: That's right, Your Honor. But
10 measurements were taken across ten feet over the entire
11 length of the wall. And our position is it's out of
12 tolerance ---

13 THE COURT: But is that --

14 MS. BERGER: --- at most of those points.

15 THE COURT: -- those numbers are for each segmental
16 measurement?

17 MS. BERGER: Yes.

18 THE COURT: And you are saying that measurement
19 goes to the, that's the amount that is going to that
20 segment in the wall or what?

21 MR. HOOD: Well, as I understood it, Your Honor,
22 the testimony was that they basically put a transit at
23 point 0 --

24 THE COURT: All right.

25 MR. HOOD: -- in the wall. And then they just shot

1 points along the length of the wall, and the difference
2 shown at each spot was the difference in elevation
3 between that spot and the place where the transit would
4 be.

5 So; for example, from point 0 to the first post
6 there was a difference of 1.25. And then between 0 and
7 the second post it was a difference of a quarter of an
8 inch.

9 THE COURT: And the transit.

10 I'll hear you in a minute, Ms. Berger.

11 Oh, you want to look? Okay.

12 So; you are saying everything has a reference point
13 back to the 0 --

14 MR. HOOD: Yes, sir.

15 THE COURT: -- for the transit?

16 MR. HOOD: They're not relative to each other.

17 In other words, there's not a -- that was my
18 understanding of the testimony. There was not a
19 difference of --

20 THE COURT: Do you agree or disagree with that,
21 Ms. Berger?

22 MS. BERGER: I disagree with that analysis, Judge.

23 THE COURT: You think it has -- the measurement has
24 to be between each segmental point?

25 MS. BERGER: Between each segmental point. Because

1 length of reference is over every ten-foot area on that
2 85-foot wall, yes.

3 THE COURT: All right. Go ahead.

4 MR. HOOD: Now I'm not sure what she's saying.

5 THE COURT: She, in other words, she's saying that
6 you're not going back to the 0 starting point each time.
7 Each ten-foot segment is out of variance by the amount
8 shown on that exhibit.

9 That's what you are saying; is that not correct,
10 Ms. Berger?

11 MS. BERGER: Yes.

12 MR. HOOD: Would that mean, for example, on this
13 Exhibit 6, that from point 0 to the second post there
14 would be a 1.75 decline in elevation being -- well,
15 excuse me -- 1.5 being 1.25, and then there's another
16 drop of a quarter of an inch from point 1 to point 2?

17 THE COURT: Uh-huh.

18 MR. HOOD: Is that what she's saying.

19 THE COURT: She's saying -- that's what I
20 understand her to be saying. Let me see those exhibits
21 again, please.

22 MR. HOOD: Well, again, my understanding from the
23 testimony, and I think the reason why they called this
24 point 0, this was a benchmark.

25 THE COURT: Let me see those exhibits again because

1 I recall --

2 MR. HOOD: And I think, too, Your Honor, that would
3 be consistent with the testimony of everybody that the
4 lowest place where it's the minus one point whatever,
5 that that's the place where everybody agrees that there
6 was some settlement. So; that clearly is the low point
7 relative to the benchmark spot. I mean, I think there,
8 I think there were even pictures introduced into
9 evidence, as I recall, where they show where the transit
10 was set up. And it was set up at one point, and then
11 these -- which is the I think the typically the way
12 engineers do this. You get a reference point and then
13 you take elevations at different, at different points,
14 so...

15 THE COURT: All right.

16 MR. HOOD: I'm not sure I'm answering your
17 question, but that's my understanding.

18 THE COURT: No, I think you are, because...

19 Ms. Berger, let me ask you, please. Looking at
20 Exhibit Number 4, Defense Exhibit 4 and number 6, both
21 of them defense exhibits, how do you reconcile if you
22 were saying that each one of those sections shows the,
23 say, for example, between post 1 and 2 on Exhibit 4
24 there is a, is out between three quarters of an inch,
25 between 2 and 3 is out one and three quarters of an inch

1 and then 3 and 4 is between two and one quarter of an
2 inch for each segment, or ten feet down, is out by the
3 amount stated. Compared to, when shot back to the first
4 post on Exhibit Number 4 compared to the ninth post on
5 exhibit -- post number 9, which is what he says he's
6 doing?

7 And again, on Exhibit Number 6 -- which would be
8 post, the farthest right number 1 to, he says it's out
9 of total over the length of the wall eight and a
10 quarter. So; it sounds to me if you look at it he is
11 measuring from that base point out to the highest amount
12 of deviation.

13 MS. BERGER: Okay, Your Honor. With regard to
14 Exhibit 4, this was taken, these measurements were taken
15 in 2008.

16 THE COURT: I know what that is. I'm asking you:
17 Does he go back to the original reference point of what
18 he says on number 4 as to the right side of the wall and
19 whatever post number 1 he uses in four and he runs it to
20 the Nth like -- look at 4. You have post number 1 being
21 at 0.

22 MS. BERGER: Correct.

23 THE COURT: They're using that as a reference
24 point. But when you go out to number 9, it shows it
25 being off six and a quarter or six and a half. Right?

1 MS. BERGER: Yes, sir.

2 THE COURT: And is that not, that measurement from
3 the point 1 post to the point 9 post showing it being
4 six and a half inches out at that point over the length
5 of that wall? Because that's what he says.

6 MS. BERGER: The only way I can respond, Your
7 Honor, to that is that the construction tolerance,
8 vertical construction tolerance based on the Allen Block
9 specifications which the Plaintiff introduced and which
10 we introduced as part of our argument ---

11 THE COURT: Assuming that's the length of the wall.
12 It is.

13 MS. BERGER: Over a length of reference.

14 THE COURT: No, ma'am. Give me Exhibit 17.

15 MR. HOOD: I've got, I've got my copy again.

16 MS. BERGER: Here it is (handing).

17 THE COURT: Now look at figure 14. Now, what you,
18 what you attach to your motion -- number one, let me ask
19 you this. These two, Exhibit A 1 of 2 and A 2 of 2 has
20 construction of segmental retaining walls, it seems to
21 be a generic -- it's not off the Allen Block figures.
22 Is that a correct statement?

23 MS. BERGER: Your Honor, that is the Allen Block
24 specifications.

25 THE COURT: That is off --

1 MS. BERGER: Yes.

2 THE COURT: Is this off their website or is this --
3 that is off their website?

4 MS. BERGER: That is off their website and --

5 THE COURT: Attached to your motion?

6 MS. BERGER: Yes, Judge.

7 THE COURT: Okay. Now let me finish my question.

8 Going back to Exhibit Number 14, or figure number
9 14, of Exhibit 17. And it says it has to do with
10 differential settlement. It says (reading): Total
11 allowable differential settlement is 1 percent of total
12 wall length. And let me -- I mean, is that not what it
13 says?

14 MS. BERGER: Your Honor, this is what it says. But
15 if I can please respond?

16 THE COURT: Yes.

17 MS. BERGER: Plaintiff introduced this on his
18 rebuttal case.

19 THE COURT: I understand.

20 MS. BERGER: Mr. Thrasher on rebuttal when this was
21 admitted into evidence said that he downloaded it the
22 night before from the Allen Block website. What is
23 missing from the exhibit that was entered is the 1
24 percent length of reference.

25 And if you look at my Exhibit A attached to our

1 motion for reconsideration, if you look at Page 1 of
2 that exhibit, Judge, it's identical in terms of the
3 vertical control, the horizontal control being 1.25
4 inches maximum over a ten-foot distance.

5 What Mr. Thrasher downloaded from the Allen Block
6 website the night before has the strength for a
7 differential settlement, which is a posting, not part of
8 the Allen Block specifications, its recommendations.

9 But the actual construction tolerances would govern
10 the integrity of this wall. And when Mr. Hood indicates
11 that, you know, the transit measurements were taken
12 starting at 0, Mr. Waldrep is the only one that
13 presented testimony by Mr. Jordan and Mr. Chandler with
14 measurements. Mr. Jordan took the measurements, not
15 Mr. Chandler. I understand that.

16 But the Plaintiff has no measurements other than a
17 level -- and there is a photograph in evidence -- and
18 his verbal assertion that everything was in tolerance.
19 But there's no measurements in the record taken by the
20 Plaintiff over the entire length of the wall.

21 THE COURT: Whose burden was it to establish that
22 the bulk of the wall was badly constructed? In this
23 case.

24 MS. BERGER: Mr. Waldrep. And I believe the
25 evidence has established that, Your Honor, because

1 Mr. Jordan took the measurements. There's nothing to
2 contravene those measurements are not accurate and that
3 this wall is not within construction tolerances.
4 Other...

5 THE COURT: I'll be candid. Listen. I'm trying,
6 okay? I'm just trying to understand your argument and I
7 don't think I do. But go right ahead.

8 MS. BERGER: My point, Your Honor, is that the only
9 evidence of this wall being out of construction
10 tolerance was offered by the Defendant, and I believe
11 he's carried his burden to establish that lower
12 retaining wall is in failure mode based on the testimony
13 and based on the measurements taken.

14 The Plaintiff didn't present any evidence other
15 than, Yes, we did it properly. Yes, we used Geo Grid.
16 We used everything based on what the Allen Block
17 manufacturing recommendations.

18 THE COURT: That doesn't have to and that's what
19 I'm trying to say to you in this case. And where am I
20 missing the point? I'm glad to hear it. But it, when
21 you look at this case and you say that you have
22 Mr. Jordan, who took the measurements, he testified that
23 his measurements are the length of deviation, acceptable
24 deviation was incorrect even by your own exhibits, okay?

25 But when I start looking at the individual figures,

1 that's what causes me concern in this matter because I
2 may be incorrect in my analysis of this case. Because
3 what Mr. Hood argues is that the maximum differential
4 settlement is 1 percent of the length of the wall.
5 That's what figure 14 says, correct? Correct?

6 MS. BERGER: Yes.

7 THE COURT: Okay. You are saying that, on the
8 other hand, any given ten-foot section cannot be out
9 more than 1.25 inches?

10 MS. BERGER: Yes, Your Honor. And in addition to
11 that, the differential settlement is not the only
12 component to determine the integrity of this retaining
13 wall. Your Honor heard a lot of testimony from the
14 structural engineer, the only engineer who testified in
15 this case on this matter. And granted, although he
16 didn't physically take measurements, his testimony
17 supports that he has been involved in the construction,
18 the engineering, the designing of many retention walls.
19 And his verbal inspection of that wall, I respectfully
20 submit to Your Honor, should not negate everything he
21 had to say about whether this wall was in failure mode.
22 Coupled with the fact the Plaintiff proved nothing,
23 established no measurements at all to ---

24 THE COURT: Again, Plaintiff doesn't have to prove
25 something. And I felt that his -- quite frankly, his

1 testimony wasn't credible. So; I didn't think it was
2 credible at all. I can't tell you why. But I remember
3 looking back at it. When I did and I studied my notes,
4 and I said, This is not credible testimony. One, he was
5 making assertions that you had to have permits.

6 Two, that appeared not to be the case and that
7 these were building codes. I just didn't find him to be
8 credible at all.

9 He went out there and eyeballed it and not verbally
10 wrote that, and he went out there and eyeballed it and
11 that's it. And he took measurements given to him by
12 somebody else. I don't find that to be a real problem,
13 but I can see how somebody else could provide him
14 measurements and he's an expert.

15 But the burden that I'm having a problem assessing
16 in this case, which is your client's and solely your
17 client's, is the fact that if you have an intolerance
18 allegation -- and I don't know whether the segmental
19 argument that you are making is correct or not, quite
20 frankly. Do you understand what I'm saying?

21 As opposed to 0, that's in Exhibit 4, post 1 to
22 post 9, as having been out the six and a quarter inches
23 is over, overly high based on individual numbers in
24 between. I just don't know. And I don't think that you
25 provided me enough information at this stage to make

1 that information. So; show me where I'm wrong. I'm
2 glad to listen to you. I've given you plenty of time to
3 argue today.

4 MS. BERGER: Your Honor, I don't know what more I
5 can offer to Your Honor other than as a matter of fact,
6 based on the measurements taken, this lower retaining
7 wall was not in tolerance. It wasn't in tolerance
8 within a year after its completion. It's not in
9 tolerance three years later.

10 You heard the testimony of even the landscaper,
11 that said, when asked by Mr. Hood, How long should a
12 retaining wall last? One of the witnesses said
13 "forever." And I believe Mr. Waldrep has carried the
14 burden to show that this wall is out of tolerance.
15 There is no objective evidence, nothing from the
16 Plaintiff to refute that. That is in the record. Those
17 measurements are in the record. And I respectfully
18 submit to Your Honor that this wall doesn't pass muster.

19 THE COURT: Mr. Hood, let me ask you this. Once
20 the Defendant introduced Exhibits 4 and 6, why is that
21 not a *prima facie* case that she made out or he made out
22 to the wall being out of tolerance, which put the burden
23 on your clients to disprove it once that was done?

24 MR. HOOD: Well, Your Honor, again I think the
25 question of whether this wall was in tolerance or out of

1 tolerance, or whatever, comes down to being a matter of
2 expert testimony, and that was presumably why the
3 engineer was here.

4 And again, I distinctly remember when he was
5 testifying trying to pull out of him what was the
6 authority, what was the basis, what was the document
7 that he was relying upon for his opinions that this wall
8 was in failure mode. And the only thing that he would
9 state was, look at the, look at the Allen Block website.

10 So; that's where they were left based on his
11 testimony. So; that's exactly what we did, we looked at
12 the Allen Block website.

13 Now, what I -- my reading of the Allen Block
14 website would be, as I stated earlier, that we're
15 talking about two different things here on the same
16 page.

17 THE COURT: Yeah.

18 MR. HOOD: One to do with construction limits, the
19 other to do with settlement limits.

20 THE COURT: All right.

21 MR. HOOD: And I think again that this case is all
22 about settlement. And even if you, even if that's not
23 clear, to the extent this raises any questions, then it
24 seems to me that goes to the strength of the expert
25 testimony on the Plaintiffs' side, since that's what he

1 pointed to as the basis of his opinion, to the extent
2 there's ambiguity in that, and it's my job in
3 cross-examining him and representing my client to call
4 into question his testimony, to the extent there's
5 ambiguity in that, it seems like to me that falls at the
6 feet of the Plaintiffs' expert in their case.

7 THE COURT: All right.

8 Anything further, Ms. Berger?

9 MS. BERGER: No, Your Honor.

10 THE COURT: Mr. Hood?

11 MR. HOOD: No.

12 THE COURT: Would you all make sure you don't have
13 those trial exhibits? I'm gonna put them back in here.

14 I'm taking it under advisement. I'm gonna tell
15 both attorneys I'm gonna re-read the Allen Block
16 website.

17 Do you have Exhibits 4 and 6, Defense Exhibits 4
18 and 6, and Plaintiffs' Exhibits 17? I think that's the
19 only ones I have out.

20 (Bailiff handed to Court.)

21 Thank you.

22 (To court reporter): Would you hand me those
23 exhibits, please, ma'am.

24 MR. HOOD: Your Honor, if I could, I might mention
25 one more thing since you said you might look at the

1 Allen Block website further, I'll just throw this out
2 for whatever it might be worth.

3 I've tried to look at that Allen Block website from
4 top to bottom. And I did find another section of that
5 website that deals with, it's under the same section
6 that the wall construction tolerance, Exhibit 17, came
7 out of. I just have the one copy unless it's going to
8 be admitted. It's part 3, wall construction, and there
9 is a section in it that deals with vertical control very
10 similar to what we were seeing in the Exhibit Number 17.

11 And it basically says the same thing. As with any
12 construction work, some deviation from construction
13 drawing alignments will occur. It compares
14 cast-in-place retaining walls -- well, basically it says
15 the same thing here, that it's, it looks like it was in
16 that exhibit attached to Ms. Berger's motion. But this
17 was -- I don't know if that's what came out of the --

18 Is that where you got your exhibits?

19 MS. BERGER: I don't have a copy of what you have.

20 MR. HOOD: Anyway, I'll be glad to hand this up.
21 It's in the website. But it basically is saying the
22 same thing that the exhibit attached to her motion is
23 saying. And again, my argument is it seems clearly to
24 be referring to construction tolerances --

25 THE COURT: I would prefer --

1 MR. HOOD: -- not settlement tolerances.

2 THE COURT: I would prefer that you just give me a
3 cite reference for me to look at. I'll tell you what
4 I'm looking at. I mean, I don't want me to be out there
5 looking in the dark. I mean, quite frankly, it's
6 obvious I'm struggling with this up here because I'm
7 trying to do what I think is the correct thing. And
8 it's not been made very clear to me, quite frankly.

9 That being said and done, whatever website that I
10 need to get, look at would you give it to my law clerk.
11 And I will look it up and let y'all, both attorneys know
12 which website that I referred to.

13 THE LAW CLERK: You got your email address at the
14 top?

15 MR. HOOD: No, it's not printing one.

16 THE CLERK: I can make a copy.

17 MR. HOOD: Well, you can have it. I just copied
18 that right off the website.

19 THE COURT: Again, I want the reference to the
20 website, please.

21 MR. HOOD: (To the Clerk) Thank you.

22 Well, Your Honor, maybe I, maybe I can point it out
23 to you this way. With reference to Exhibit Number 17 --

24 THE COURT: Give it to my law clerk, please.

25 MR. HOOD: With reference to Exhibit 17, over to

1 the left there's a little index in the left margin.

2 THE LAW CLERK: On the left there's an index?

3 MR. HOOD: Looking at Exhibit 17.

4 THE LAW CLERK: I'm just gonna take all the
5 information off. It's her exhibit.

6 MR. HOOD: Okay. Anyway, over to the left there's
7 a little index where you can go to other sections in the
8 website. What we're looking at here is the one that
9 says "wall construction tolerance." If you go up, there
10 is another section that says "construction
11 specifications."

12 THE LAW CLERK: I'll step out there and look.

13 (Law clerk leaves bench and confers with Counsel.)

14 THE COURT: All right. There being no further
15 argument, this matter is under advisement. I will let
16 you know what my response is and I will let you know
17 where I looked outside the course of this Allen website
18 so you can look at that.

19 And at some point I've got to be right or wrong.
20 One way or the other it's got to be right or wrong. I'm
21 gonna look at it one more time. I'm gonna to make a
22 decision. Then you all just have to do what you do
23 after. Both of you know what to do there.

24 All right. Thank you for your arguments, both of
25 you being here, and I'll give you my decision as soon as

1 I have one.

2 MR. HOOD: Thank you, Your Honor.

3 MS. BERGER: Thank you, Your Honor; I appreciate
4 it.

5 (Whereupon, the motions hearing was adjourned at
6 approximately 4:20 p.m.)

7 ** End of Requested Certified Transcript of Record **

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

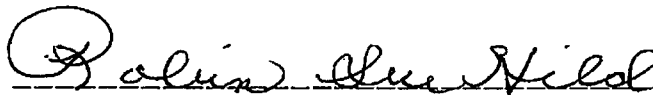
25

Certificate of Court Reporter

I, the undersigned, Robin Sue Hild, FCRR, RPR,
Official Court Reporter for the Tenth Judicial Circuit
of the State of South Carolina, do hereby certify that
the foregoing is a true, accurate and complete
Transcript of Record of the proceedings had and the
evidence introduced in the hearing of the captioned
case, relative to appeal, in the Court of Common Pleas
for Oconee County, South Carolina, on the 10th day of
October, 2011.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto.

October 21, 2011


Robin Sue Hild, FCRR, RPR
Circuit Court Reporter

1 blocks are separate independent pieces and so you're
2 laying those individual and actually your bottom
3 course is what will dictate the rest of the wall and
4 so it's how level you get that very first course and
5 the footing is what will dictate the rest of the wall.

6 Q Okay. And there are also imperfections in the blocks
7 themselves that can cause some ---

8 A Yeah, probably ---

9 Q --- variations of ---

10 A Yeah, sometimes. Depending on the type of block that
11 you use.

12 Q An eighth of...

13 A Of an inch.

14 Q Okay. So, nearly an inch could account for
15 imperfections in the block.

16 * A Right. And with this Allan Block, I think they give a
17 tolerance of about an inch-and-a-quarter vertical or
18 horizontal for that purpose.

19 Q All right. So, if you figure that and figure there's
20 going to be some imperfection in the initial
21 construction of the wall and/or the base of the wall,
22 so it's not going to be perfectly level over eighty
23 plus feet, then you could start out with a wall of
24 this type with several inches of variation from one
25 end to the other without any settlement, could you

1 not?

2 A Probably. Yeah.

3 Q Now, do you have any, other than your experience in
4 putting up these type walls, do you have any
5 certifications or other expertise with respect to
6 actual specifications or construction tolerances or
7 anything of that type?

8 A I don't understand the question. I'm sorry.

9 Q Well, the reason I'm asking is, looking at Exhibit No.
10 4, I'll hand you that.

11 A Yes, sir.

12 Q And I believe that is the first set of elevation marks
13 that you did. Right?

14 A Yes, sir.

15 Q Back in September of '08. And just to be clear so
16 everybody is following what we're doing, what you were
17 doing here in September was essentially the same thing
18 that you were doing on the exhibit that we just went
19 over.

20 A Yes, sir.

21 Q You did it again recently.

22 A Right.

23 Q All right. And so you gave your numbers on this form
24 and then below it you have written down here that the
25 standard tolerance in segmented wall construction is a

1 quarter inch per twenty-five feet. Tell me what that
2 means, first of all, and exactly where do you get that
3 from?

4 * A Well, that means a quarter-of-an-inch per twenty-five
5 foot is the defection of the block being off a little
6 bit or not being perfect and that actually came from
7 Cornerstone which is actually a different style of
8 block than what this Allan Block is. I guess it's the
9 same style, but a different manufacturer. It is
10 carried by Cemex.

11 Q Well, when we're talking about a standard tolerance,
12 you're talking about a tolerance for what?

13 A For the imperfection of the actual block. Not the
14 installation or the footing, just the actual casting
15 of that block.

16 Q Okay. All right. So, that has nothing to do with the
17 issue of settlement of the wall over time. Does it?

18 A No. That would deal more in compaction and water
19 intrusion on that, I think.

20 Q And it also does not address the question that I just
21 discussed with you and that would be some variation
22 simply in initial construction where you, where, over
23 eighty-five feet, you're not going to be perfectly
24 level.

25 A Right. It could be an inch-and-a-half or two inches

1 that would probably still be acceptable for aesthetic-
2 wise and possibly not even causing the wall to go like
3 what's called "in failure mode".

4 Q Is it expected that walls like this are going to
5 settle?

6 A Somewhat, yes, depending on the compaction and the
7 soil type.

8 Q Is it not the case that actually on this type of wall,
9 that is a wall that is not solid and you don't have
10 the blocks mortared together, is actually designed to
11 be able to flex a little bit?

12 A The design of segmented walls is more dealing with the
13 hydrostatic pressure of the water building pressure
14 behind it, that it relieves the water so that it
15 cannot establish a large amount of hydrostatic
16 pressure which like, which like on a solid poured wall
17 you have to allow weep holes and a large drainage
18 system in order to relieve that pressure or it will
19 push that wall down.

20 Q Okay. So, in some respects it is built to be self-
21 draining, in a sense. Is that correct?

22 A Somewhat, yes, sir.

23 Q But another feature of the wall, supposedly is, that
24 it is more flexible than a solid masonry wall.

25 A Right, without showing cracks, because they ---

1 Q That's right. So, it can tolerate more in the sense
2 of settlement without there being any loss of
3 structural integrity. Would you agree with that?

4 A To a certain point, yes, sir.

5 Q And do you have any knowledge about the tolerance
6 levels of that would be allowable for settlement in a
7 wall such as this without structural integrity being
8 compromised?

9 A Yes. Most every block manufacturer of each type of
10 retaining wall block usually defines that in their
11 literature when you pick up the block or visit their
12 website or however you research to establish, you
13 know, once the customer picks, I like the look of this
14 one and that's the block that you choose, you get your
15 background. Every one of them is a little different,
16 so you have to actually kind of dig into it a little
17 bit to be able to understand exactly how they designed
18 it to ---

19 Q What I'm asking in this case, do you know, of your own
20 knowledge, what the tolerance levels are for ---

21 A the Allan Block?

22 Q --- settlement for Allan Block walls of this type.

23 A It's a inch-and-a-quarter vertical or horizontal.

24 Q Inch-and-a-quarter what?

25 A Variance.

1 Q From where to where?

2 A I guess that would be in the total run of the wall.

3 Q Wouldn't that depend on how long the wall is?

4 * A I guess it would be a inch-and-a-quarter is a inch-
5 and-a-quarter no matter how long it is.

6 Q And where do you get that information from?

7 A Off the Allan Block website. That's their total
8 tolerance for them standing behind everything is a
9 maximum of a inch-and-a-quarter and so if you
10 establish your start point anywhere on that wall, if
11 it reached above an inch-and-a-quarter, then you're
12 out of tolerance on their specs.

13 Q And you say that comes off the Allan Block website?

14 A And any literature that's picked up from the
15 manufacturer or whoever is stocking the block where
16 you purchase it at.

17 Q And did you look that up or investigate that or
18 research that for the purposes of this case?

19 A No. That's for my own purposes of construction of
20 Allan Block, Cornerstone, Mesa Block ---

21 Q Excuse me. I thought you just told me it was
22 different for everybody.

23 A It is. That's what I'm saying. Each one of these
24 right here, each sheet for each manufacturer holds its
25 own set of different specifications that you have to

1 follow as a guideline.

2 Q But you're telling me that you just happen to know
3 what it is for Allan Block?

4 A Yeah. Like I say, I just completed one in March of
5 2011 for Jeanna and Shane Johnson in Pickens, South
6 Carolina.

7 Q And what does that have to do with this?

8 A Because I had the literature in front of me for a year
9 using that block, because they really liked the
10 aesthetics of it.

11 Q Okay. I'm still not certain you and I are talking
12 about the same thing, now.

13 A I thought you were referring to what the tolerance
14 level of actual Allan Block versus any other block
15 since this is the block that's in question.

16 Q I'm asking you about a constructed Allan Block wall,
17 not comparing it to anything else.

18 A Yes. That's what I'm talking about. That's the Allan
19 Block tolerance, the inch-and-a-quarter. Cornerstone
20 Block which Cemex carries, actually has an inch-and-a-
21 half tolerance on it and the Mesa Block has an inch-
22 and-three-quarter. They are designed a little
23 differently where these blocks actually interlock
24 together, the Mesa Block uses a ceramic pin or nylon
25 clip to lock these blocks together so you get a little

1 bit more variance on them, because the clip size being
2 a little bit different and the actual block cast being
3 a little bit off, so you get a little bit more of a
4 variance in size.

5 Q It still sounds like to me you're talking about the
6 same thing we were discussing on your Exhibit No. 4,
7 and that is you said the standard tolerance of
8 segmented wall construction was a quarter inch in
9 twenty-five feet. Are you talking about construction
10 standards and what it is supposed to be variations
11 during construction versus settlement over time? That
12 is the question I'm asking.

13 A No, that right there is referring to the actual, if we
14 laid everything perfect, got the footing perfect, it
15 is still going to be at least that much of a variance
16 because of the actual manufacturing of the block is
17 that far off.

18 Q Okay. So, in other words, what that is saying is, a
19 quarter-of-an-inch per twenty-five feet on a eighty-
20 five foot wall, it could be over three quarters of an
21 inch variation simply in the materials themselves.
22 That's what that means.

23 A Right. And the variance on this, I believe, equaled
24 about eight-and-a-half inches, which would be a lot
25 greater.

1 Q But this inch-and-a-half, did you say, is the Allan
2 Block standard?

3 A That's their maximum tolerance.

4 Q For settlement?

5 A For any variance of the wall from start to finish on
6 it, vertical or horizontal.

7 Q Start to finish, meaning what?

8 A Meaning, start point of where the wall starts to the
9 ending point where the wall ends.

10 Q At what point in time, when it's constructed?

11 A I don't think it really lists that, that I can
12 remember. I think that's a total tolerance of the
13 overall period.

14 Q Okay. Well, let me ask you, you don't involve
15 yourself in evaluating walls whose structural
16 integrity is in question, do you? You're involved in
17 installing them.

18 A Well, only if they are in need of repair or
19 replacement for me to be able to bid a price for that,
20 if it was a simple repair for a couple hundred
21 dollars, we would take the top off and redo something
22 on the top, but if it's the bottom course and that
23 whole wall has to come down, so we have to give a
24 purpose as to why we're going to have to take this
25 whole wall down and cause this "x" amount of dollars

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh Circuit (10th) Court Judge

Case No: 2012-207852

JERRY HOLTZCLAW, d/b/a
GREEN THUMB LANDSCAPING
AND IRRIGATION

Respondent

V

DENNIS WALDREP

Appellant

INITIAL BRIEF OF APPELLANT

Dennis Waldrep
209 Amethyst Way
Seneca, SC 29672
Proceeding Pro Se

TABLE OF CONTENTS

Table of Authorities.....	3

Statement of Issues of Appeal	4

Statement of the Case	6

Arguments

1. Defense counsel was ineffective as advocate for the Defendant/Appellant ..	7
resulting in reversible error?	
2. The trial court erred in several evidentiary and procedural instances	14
resulting in prejudice to Defendant/Appellant?	

Conclusion	33

CASES

Small v. Mungo 254 S.C. 438, 175 S.E.2d 802 (1970)

State v. Gracely, 399 S.C. 363, 731 S.E.2d 880 (2012)

State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003)

State v. Wiener, 399 S.C. 547, 732 S.E.2d 861 (2012)

Patel v. Patel 359 S.C. 515, 599 S.E.2d 114 (2004)

Orlando v. Boyd 320 S.C. 509, 466 S.E.2d 353 (1996)

Melton v. Olenik SC Opinion No.4418 (2008)

France v. Southern Equip. Co 689 S.E. 2nd WW.Va.2010)

MacQuish v. United States, 844 F.2d 733, 735 (10th Cir. 1988).

STATUTES

South Carolina Rules of Professional Conduct

Rule1.1 Competence

Rule 1.3 Diligence

Rule1.18 Duties to Prospective client

Rule 201

Section 3 Rule 15

South Carolina Rules of Civil Procedure

OTHER AUTHORITIES

South Carolina Lawyers Weekly No. 001-012-08

32 CJS Evidence Sections 695 and 851

Rule 403 SCORE

STATEMENT OF ISSUES ON APPEAL

1. WAS DEFENDANT/APPELLANT'S COUNSEL INADEQUATE IN REPRESENTING DEFENDANT AT TRIAL TO REQUIRE A REVERSAL OF THE TRIAL COURT'S ORDER?
 - a. DID DEFENSE COUNSEL FAIL TO INTRODUCE KEY EVIDENCE AND/OR MAKE ADEQUATE REFERENCE TO SAID EVIDENCE TO SECURE A VERDICT ON BEHALF OF DEFENDANT?
 - b. DID DEFENSE COUNSEL FAIL TO PROPERLY INTERPRET THE INSTRUCTIONS OF THE COURT OR FOLLOW THE INSTRUCTIONS OF THE COURT RESULTING IN PREJUDICE TO THE DEFENDANT?
 - c. DID DEFENSE COUNSEL FAIL TO ADEQUATELY INTRODUCE EVIDENCE THROUGH DEFENSE WITNESSES OR ILLICIT EVIDENCE ON CROSS EXAMINATION FROM PLAINTIFF'S WITNESSES?
 - d. DID CERTAIN STATEMENTS MADE BY DEFENSE COUNSEL TO HER CLIENT ILLUSTRATE DEFENSE COUNSEL'S INABILITY OR LACK OF PREPARATION TO ADEQUATELY HANDLE THE REQUIREMENTS OF THE TRIAL?
2. DID THE TRIAL COURT ERR IN FAILING TO ADEQUATELY CONSIDER KEY EVIDENCE REGARDING THE POSITION OF PLAINTIFF RELATIVE TO THE PERFORMANCE OF THE PARTIES?

- a. DID THE TRIAL COURT IMPROPERLY CONSIDER CERTAIN ISSUES
RELATIVE TO THE COSTS SUBMITTED BY THE PLAINTIFF AT TRIAL
AND THE PERFORMANCE OF DEFENDANT RELATIVE TO THE
CONTRACT/
- b. DID THE REMARKS MADE BY THE TRIAL COURT INDICATE A BIAS
ON BEHALF OF THE PLAINTIFF OR A FAILURE TO ADEQUATELY
CONSIDER THE POSITION OF THE DEFENDANT/
- c. DID THE TRIAL COURT FAIL TO INVESTIGATE THE WORK
PERFORMED BY THE PLAINTIFF AS IT INDICATED IT WOULD DO ON
THE RECORD?
- d. DID THE TRIAL COURT PROVIDE INSTRUCTIONS TO COUNSEL THAT
WERE NOT FOLLOWED OR MISINTERPRETED THAT SHOULD HAVE
RESULTED IN A MISTRIAL?
- e. DID REMARKS BY THE TRIAL JUDGE INDICATE THAT THE COURT
HAD MADE A DECISION PRIOR TO A FULL HEARING OF THE CASE?
- f. DID THE COURT FAIL TO CONSIDER THE CONTRACT WHICH IS A
CENTRAL ISSUE IN THIS CASE?
- g. DID THE TRIAL COUR ABUSE ITS DISCRETION IN FINDING IN FAVOR
OF PLAITIFF IN THIS MATTER?

STATEMENT OF THE CASE

This case is an appeal from a trial that was held in November of 2012 and resulted in a verdict in favor of the Plaintiff. A copy of the Order entered in that matter is attached hereto as "Exhibit A". It is from that verdict that the Defendant/Appellant Waldrep files this appeal requesting a reversal of that verdict. The underlying action was instituted by the Plaintiff claiming that Waldrep owed money for work that was performed at a property owned by Waldrep. The action was essentially a breach of contract matter wherein the Plaintiff claimed that Waldrep had failed to pay in full for the work that had been performed as his property. A trial was held and a verdict was granted in favor of the Plaintiff. Waldrep has filed this appeal for based on abuse of discretion by the trial court and ineffective assistance of counsel.

Although Waldrep was represented by counsel during the course of the trial it is clear as set forth in the argument section of this brief why counsel was ineffective in its representation of Waldrep and that the ineptitude of counsel was to such a degree that it tainted the trial and deleteriously impacted Waldrep by depriving him of his rights to a full and fair hearing and as such requires a reversal of the verdict of the trial court.

Additionally, Waldrep appeals from the verdict of the trial court due to reversible errors made by the court during the course of the trial that rise to the level of abuse of discretion. A review of the transcript and the "sua sponte" motion for reconsideration reveal that the trial court asked inappropriate questions, considered evidence not properly before the court, disregarded critical evidence in

favor of Waldrep, failed to adequately control or instruct counsel resulting in confusion and prejudice against Waldrep and related matters all of which indicate that the trial court did not properly find in favor of Waldrep or enable Waldrep to have a fair trial. Further the court made improper inferences in favor of plaintiff that were not supported by the evidence such as the Plaintiff's "need" for money regardless of his breach of contract and failure to comply with the provisions thereof. As a result, Waldrep is entitled to a new trial as set forth in the argument

ARGUMENT

Was the representation by Waldrep's counsel insufficient to warrant a new trial? The analysis of counsel's inadequacies also serve to elucidate many of the errors that occurred at trial that substantiate Appellant's claim for abuse of discretion and as such are helpful in understanding the myriad of errors, mistakes and abuses that occurred.

An attorney is required by the Rules of Professional conduct to act competently and in the best interest of the client according to the Rules of Professional Conduct. In this case if she (Waldrep's counsel) was not adequately skilled or prepared to handle this trial it was improper for her to do so. The transcript in this matter clearly reveals that Waldrep's counsel failed miserably in this regard. It is submitted that counsel either lacked the sufficient skills and experience to properly represent Waldrep in a trial of this nature and/or failed to adequately prepare for the trial and as a result multiple, fatal mistakes were made. These mistakes essentially deprived Waldrep of a fair trial and prejudiced him by resulting in a verdict against him without any real evidence to substantiate the verdict or any evidence to refute the presentation made by the Plaintiff. Additionally, the trial judge allowed the trial to go off course by questioning the Plaintiff about his need for money, disregarding the breach of contract issues, seeking proper engineering advice and failing to

provide the attorneys with clear instructions as evidenced by the confusion from the in chambers conference. Interestingly, Plaintiff's counsel was proficient enough to send multiple invoices to Waldrep requesting payment for her horribly substandard performance. Waldrep is in the process of instituting a civil matter for legal malpractice against his former counsel to recover damages.

As indicated, this matter is essentially a breach of contract by a builder/contractor to a homeowner for payment for work performed. The initial contract that began this work (attached hereto as "Exhibit B") was introduced at trial as "Plaintiff's Exhibit 2" to bolster Plaintiff's case. The issue is that the Plaintiff drafted and breached the contract not the Defendant therefore the introduction of this document did not or should not have helped the Plaintiff's case but should have in fact resulted in a verdict for Waldrep. Counsel for Waldrep neglected to bring this and other items to the attention of the court and the court failed to consider these issues when rendering its verdict. For example, the fact that Waldrep fully complied with the terms and conditions of the contract and it was the Plaintiff Green Thumb that breached the agreement between the parties. Waldrep made every payment as required by the document and fully complied with the terms and conditions of the document drafted by the Plaintiff. The Plaintiff never provided any notice in writing that more funds were required (as required by the contract) It wasn't until approximately thirty days from completion of the Project that the Plaintiff advised Defendant verbally that he had left his "profit" off the agreement. This of course begs the question of whether it was an innocent error or fraud in the inducement to secure the project from Defendant. These failures by Waldrep's counsel are not limited to her egregious conduct at trial but also to her failure to properly plead, counterclaim or conduct discovery on behalf of her client.

The contract drafted and provided by the Plaintiff provides, in pertinent part that “All work will be performed in a professional manner according to standard horticulture and construction standards.” This was not properly plead in Waldrep’s answer nor was it elucidated at trial. According to the experts and construction standards set forth by the manufacturer of the concrete products (Allan Block) that were used, the work was not performed in a professional manner and in accordance with construction standards. This is another breach of the contract by the Defendant. that should have resulted in damages being awarded to Waldrep rather than the Plaintiff’s specious claim for more money.

Next, the only additions that are permitted by the terms of the contract are entitled “Concealed Contingencies” This section states that the contract is subject to extra charge for concealed contingencies such as rock, debris, poor drainage situations, etc. Not readily apparent in the materials and work specified. “ This flies in the face of the claims made by the Plaintiff at trial. The Plaintiff claims (and was granted a verdict) because he essentially mispriced the Allan Blocks that was used to improperly build a retaining wall. It is impossible to know if he did this intentionally to obtain the job, was inept because it was his first job of this nature which he admitted at trial or that he believed he could hide additional costs elsewhere. Ultimately, he admitted that he made an error and then sought Waldrep to pay for his error (either intentional or negligent). This is after Waldrep had complied with every term of the contract. This improper pricing of a piece of material that was used is clearly not a “concealed contingency” as set forth in the contract and Waldrep’s counsel neglected to mention this at all and the court failed to consider this when rendering its decision.

Next, the contract clearly indicates that any change order must be signed by the owner or representative. This did not happen. The Plaintiff failed to provide any change

order, signed or otherwise to prove his claim for additional funds. What really happened in this case is that the Plaintiff underpriced the Allan Blocks that he used and to either induce Waldrep to accept the transaction or because he was inept, incompetent or untruthful. Either counsel for Waldrep failed to plead fraud in the inducement, misrepresentation or breach of contract (by failing to use a change order) or the court neglected to properly consider the evidence before it. The contract was drafted solely by the Plaintiff and he breached the document by failing to utilize change orders as stated. Then he improperly used the court system to collect money from Waldrep and benefitted from the inability of counsel to properly represent Waldrep.

In addition to failing to plead effectively and expose the either negligent or intentional plot of Plaintiff to seek more money from Waldrep counsel neglected to produce sufficient evidence to show that the work was done improperly. The work done by the Plaintiff was done in such a manner as to cause significant damages to Waldrep's property and in fact is subject of an insurance claim on Plaintiff's insurance. It is not unreasonable to presume that a contractor has the requisite knowledge to perform the tasks for which he is hired. This however was not the case in this matter. The Mfg. Allan Block sets forth on their website a reference to some basic standards regards the retaining wall that was constructed. While this website information is not technical information in terms of actual specifications or instructions for installation, it does indicate that there are definite and specific requirements that must be adhered to when building a wall of this nature. The trial Judge mentioned that he would undertake to consult the county engineer to examine the detail of these requirements relative to the standards and the work that was actually performed. Unfortunately, the county engineer was never consulted. This was yet another failure on the part of Waldrep's counsel and the court. Simply stated, following the

Judge's comment regarding the engineering, she failed to pursue this course of action in any manner. She did not contact the county engineer, she did not inquire of the court how this investigation was to be made or who should be responsible for the initiation of the action and collection of the information for presentation to the court, she did not call the county engineer as a witness to request his opinion on the matter. She simply did nothing.

Counsel did introduce an expert but her voir dire of this expert was obviously inadequate (or she hired an unqualified expert) because the trial Judge remarked that the abilities or veracity of the expert were in question. Why didn't she supplement this testimony, call the county engineer, and bring in another expert? Again, she simply did nothing.

During the course of the trial and "in chambers" conference was held between his Honor and the lawyers. Counsel represented to Waldrep that the judge had given her an opportunity to produce additional information and Amend our Pleadings. When the trial resumed and counsel endeavored to present the information she believed she was permitted to do as a result of this in chambers conversation and was advised by the Judge that no such opportunity had been granted. Her commentary to her client regarding this obvious error underscores both her inadequacy as counsel in this case and/or her inattention or unpreparedness. She said to her client "I swear that is what he said". However, she made no objection, filed no motion, and requested no interlocutory appeal. Again, she simply did nothing. Did she fail to follow the judge's instruction, did she misunderstand, was she confused, unprepared, unskilled or was the court at fault. We will never know, but what is apparent is that Waldrep has suffered severe prejudice that warrants a new trial where his case can be properly presented.

During counsel's cross examination of the Plaintiff why didn't she question Plaintiff about his breach of contract and reasons why he failed to comply with the terms thereof? The Plaintiff had admitted he had never done a job like this and it was his "first one. Why wasn't this information collected in discovery, why wasn't a deposition of the Plaintiff performed to explore this information and prepare adequately. It seems as though the counsel for Waldrep simply went by the seat of her pants and when it didn't go her way she again did nothing. Except of course, sending Waldrep a bill.

During the trial the judge advised Defense counsel that she had the opportunity to prove their case relative to the construction of the wall. While it can be debated who had the burden of proof, it would appear that this was an opportunity to illustrate to the court not only that the Plaintiff's case was specious at best and resulting from either fraud or negligence but to prove the damages suffered by Waldrep. At this point counsel may have sought to amend her pleadings, call an additional expert, introduce manuals from the National Concrete Masonry Association (NCMA) regarding construction of the wall and/or call the construction official to elicit his opinion or at least ask for the day to review the information. Once again, none of this happened and the interests of Waldrep were again ignored by his counsel.

Another error committed by the counsel for Waldrep and the court is a procedural matter. She was provided with receipt from Plaintiff's counsel on the day of trial. Not in discovery, but on the morning of trial. Clearly, these receipts, provided and constructed in breach of the initial agreement should have been analyzed and utilized against the Plaintiff. Counsel for Waldrep failed to request that the court allow her sufficient time to conduct this analysis, have them reviewed by and expert of otherwise prepare for their use at trial. She allowed this "surprise evidence" to be dropped on her on the morning of trial without

objection and this surprise was instrumental in the verdict in favor of the Plaintiff.

Interestingly, the billed items (Receipts) presented by the Plaintiff totaled \$12,537 (2,214 Blocks) and the receipts totaled \$8,996 (1,497 Blocks). Not even this glaring error was addressed by Waldrep's counsel or the court and as a result, Waldrep is now faced with a judgment against him and a wall that was inadequately constructed and must be repaired at significant cost. If his attorney had performed even in a remotely adequate fashion and the court had properly identified the items in question the outcome of this trial would have been significantly different.

In summary, counsel for Waldrep failed to plead properly, conduct discovery in a remotely competent manner, and perform during trial with at least the basic skills. Her performance was so bad that it caused a verdict against Waldrep. This was not a trial on the merits where the truth surfaced and the verdict was entered. Rather, it was an ambush by the Plaintiff of an attorney that was either unskilled, unprepared or both. The deplorable actions or inactions of Waldrep's counsel would not be so egregious if it wasn't for the life altering nature of the judgment against him.. First, the amount of the judgment is \$52,998.98 and growing each day with interest, his attorney has billed him in excess of \$13,000. Further, the facts that the retaining wall was built to unacceptable standards means that it must be removed and reconstructed a cost which as yet is unknown. This not only threatens his home but the cumulative amount of the financial damages and costs threaten his very livelihood and ability to support himself and his family. All he is asking for is simply a fair trial, one where each side is provided ample opportunity to present a fair trial with at least mildly skilled and prepared counsel. Accordingly, Waldrep respectfully requests that this court allow him a retrial and time to conduct basic discovery to adequately present this case and receive an equitable decision.

While The general rule in civil cases is that the ineffective assistance of counsel is not a basis for appeal or retrial. *MacQuish v. United States*, 844 F.2d 733, 735 (10th Cir. 1988). If a client's chosen counsel performs below professionally acceptable standards, with adverse effects on the client's case, the client's remedy is not reversal, but rather a legal malpractice lawsuit against the deficient attorney. *Id.* at 735-36; *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 n.10 (1962). Waldrep acknowledges the conduct from discovery through reconsideration is so reprehensible it amounts to a threat against his financial stability, his family's ability to retire and even safety in his own home because of the defective retaining wall that may collapse at any time.

Did the trial court commit reversible error in failing to properly admitting and considering key evidence in this matter relative to the performance of the parties? There were several instances during the course of this trial where the trial court either allowed evidence to be admitted that should have been excluded or admitted evidence and failed to adequately consider the gravity of the evidence in favor of both parties. Each of the instances individually amount to reversible error and when taken cumulatively it becomes clear the the court erred that resulted in substantial prejudice to Waldrep thereby requiring that the verdict of the trial court be overturned and a new trial be granted. *France v. Southern Equip. Co* 689 S.E. 2nd WW.Va.2010); 32 CJS Evidence Sections 695 and 851 , *Nowak v McEldowney* 2002 SD 162, 655 N.W. 2d 909.

The contract between the Parties was not properly admitted or considered. Specifically, the contract between the Parties attached hereto as "Exhibit B" outlines the obligations set forth the respective parties and while Waldrep performed all the duties as set forth in the contract the Plaintiff failed to abide by the terms and conditions. Instead the Plaintiff submitted a "scope of work document" that indicated that Waldrep owed the

Plaintiff an additional \$52,998.98. The admission of this document and lack of consideration of the initial contract was improper. The contract in Exhibit B outlined precisely the manner in which additional costs should be addressed and the way a work order or change order are to be handled. The contract states very plainly that “a change order must be signed by the owner or representative (to be determined in writing by the owner) which will state the additional costs” (on page two of the contract written by the Plaintiff). During the deposition of Mr. Waldrep he was presented with a “scope of work” (which was prepared 90 days after the work was completed) document that contained information relative to additional work that was purportedly done at his property and that he allegedly owed the Plaintiff an additional \$52,998.98. During trial this document and the initial contract were introduced. It is well settled that any ambiguities or conflicts in a contract are construed against the party that drafted the document. These two documents taken together are clearly at odds with each other. The Contract, signed by Waldrep details with specificity the manner in which additional work and changes are to be addressed and states that a work or change order, which the “scope of work “ document obviously purports to be regardless of the nomenclature used by the Plaintiff fails to comply with theses prerequisites. There is no signature by Waldrep and not indication that he agreed to the additional work or the additional cost now being requested by the Plaintiff. The first time that Waldrep became aware of this scope of work document was three (3) months from the completion of the job. There are direct conflicts between the contract signed by the parties and the scope of work order used by the Plaintiff at trial to claim additional funds owed. The breach in this case was not by Waldrep but by the Plaintiff. He failed to abide by the terms and conditions of his own contract and the Court erred in allowing him to not only introduce this documents but by according it the weight that it did in awarding

him a verdict in the amount claimed by the scope of work document. The controlling document in this case should have been the contract signed by the parties. The scope of work document was not signed by the owner or representative as required by the contract. Waldrep discussed with Plaintiff at the completion of each phase of the work as it was finished and Plaintiff never, not once, notified Waldrep of additional charges. The document introduced at trial by Plaintiff without signature does not comply with the terms and conditions set out in the contract drafted by the Plaintiff, and is in direct conflict with the contract. The scope of work order is not signed or in any way approved by the owner or a representative. It appears to have been unilaterally prepared by the Plaintiff and presented to Waldrep as a bill.

The mere existence of this scope of work document raises several questions. First, why didn't Plaintiff notify or other present to Waldrep a change order in accordance with the contract? At that point Waldrep had complied with all the terms and conditions of the contract and no reason to assume that he would not continue to do so. Would Waldrep have agreed to have the work performed or performed by this contractor if the estimate for work had been higher by \$52,998.98 or 80% above what had been paid already. Obviously, this proposal would have been rejected. This begs the questions as to whether the Plaintiff was simply negligent in preparing the original estimate and bill or if he fraudulently induced Waldrep to enter into the agreement by providing an artificially low number and once the work had begun he could undertake a way to collect other funds he desired. One instance that leads us to believe that fraud may have been at work is the price charged for removing wood from the Waldrep property. The Plaintiff charged Waldrep \$2,000 for cutting and stacking a cord of wood. As the court may be aware a cord of wood is a stack 4 feet by 4 feet by 8 feet in length. Two thousand dollars for this service is so

clearly excessive that it begs the question that makes one wonder if this is how the Plaintiff planned on recouping his money from his artificially low bid designed to induce Waldrep to enter into the agreement. Additionally, a quantum meruit theory fails on behalf of the Plaintiff in this case as well. The wall that was constructed by the Plaintiff (who was an unlicensed contractor) and admitted that he had never performed this work before was improperly constructed and has resulted in one leak in Plaintiff's property and must be removed and replaced resulting in substantial damages to Waldrep.

Clearly, the original contract controls in this case and the "scope of work" document is at best an attempt by Plaintiff to collect additional funds and at worst a continuation of the fraud perpetuated on Waldrep. In either instance, the trial court erred in considering this document and according it any weight or veracity and awarding the Plaintiff additional funds.

Did remarks or actions by the trial court indicate a bias on behalf of the Plaintiff or a disregard or oversight of Waldrep's procedural rights? During the course of trial the judge made certain remarks that are cause for consternation and give rise to the question that the procedural rights of Waldrep may have been overlooked or abridged in some manner warranting a reversal of the trial court's order. Specifically, Waldrep introduced through the course of trial and during the motion for reconsiderations information that outlined the inadequacies of the work performed by the Plaintiff and the damages that he has suffered at his residence. Additionally, it should have been clear to the court that the Plaintiff did not comply with the terms and conditions set forth in Plaintiff's own contract by producing a manufactured "scope of work" document and delivering to Waldrep receipts on the day of trial which show differing amounts for the number of blocks used and the number of blocks

for which Waldrep was billed. This discrepancy alone is indicative of the mistakes made by the Plaintiff.

Additionally, the court made several troubling remarks which are cause for concern and reversal of the order entered by the court. First, the trial judge remarked that the objections of Waldrep were a result of “buyer’s remorse” Page 471 Lines 12-17. This remark is troubling for several reasons. Initially, it is challenging to determine what the judge meant by calling the actions of a litigant trying to protect his rights “buyers remorse” especially when he complied fully with the terms and conditions of the contract he signed and appears to have been fraudulently induced to enter into the agreement . This is especially true in light of the fact that the trial court appears to have entered an order based on documents that did not comply with the contract, were not signed by Waldrep or even delivered to him in a timely manner. This remark also suggests that the court had already decided against Waldrep and in favor of the Plaintiff before all the evidence and arguments had been heard. Does this not abridge the litigant’s rights and essentially deny him a full and fair hearing?

Another statement made by the trial judge that is cause for alarm surrounds the damages claimed by the Plaintiff. The judge remarked that the Plaintiff “may not get all that he has claimed. This statement can be interpreted to mean that the judge had already decided to award the Plaintiff payment from Waldrep based on fraudulent, unsigned, and improperly constructed documents. This is another error because it essentially denies Waldrep the opportunity to a full and fair hearing. As this case was heard without a jury, the judge is the finder of fact and appears to have made a decision before all the facts were presented and considered.

Next, the trial judge held an in chambers conference that obviously caused confusion and resulted in incorrect action by Defense counsel. Without this opportunity as promised, there was essentially not opportunity for Waldrep to refute the erroneous information that had been presented to the court. Therefore the court relied on this erroneous information in making an award in favor of the Plaintiff again depriving Waldrep of a full and fair hearing. This exchange also suggests another problem that occurred during the course of this trial. As previously indicated, the in chambers conference between the lawyers and the judge left Counsel for the Defendant Waldrep with the impression following this conference that the judge had set out the opportunity for Waldrep to produce evidence to enable the court to consider all the evidence available to make a decision. When counsel endeavored to comply with this directive the trial judge advised that he did not say that. Clearly, there was confusion somewhere in this exchange and this confusion deprived Waldrep of the opportunity to produce necessary evidence and fully make his case to refute the erroneous materials entered by the Plaintiff and prove his damages. At a minimum the judge should have clarified the exchange and perhaps entered a mistrial because the obvious confusion was to such an extent that it again deprived Waldrep of a full and fair hearing on such an extreme problem existing at his residence and essentially enabled the Plaintiff to succeed either in his fraud or negligent behavior.

Moreover, the trial judge indicated that it he would cause the county engineer to investigate the work performed at the Waldrep residence and rely on the results of this investigation in making his decision (Page 471 Lines 2- 6) . This would have resulted in a clear answer for the court and a verdict in favor of Waldrep. Unfortunately, no such investigation occurred. The county engineer never reviewed the work that was performed or the expert's information that clearly revealed that the work performed was substandard.

Indeed the Plaintiff himself stated that this was his first job and last job of this type and it is clear that he either did not know what he was doing or made fraudulent or material misrepresentations all of which severely prejudiced Waldrep.

It is important to note that the work done in this case was by an unlicensed contractor and not only improper from a billing, contractual and billing perspective but has already caused significant damage to Waldrep's property. Waldrep has already been required to make a claim on the Plaintiff's insurance for water damage that occurred at his property and the Plaintiff's Liability Paid due to neglect on his part.

A complete review of this case reveals a rather obvious course of events all of which have led to the deprivation of Waldrep's rights and severely prejudiced his interests and prevented him from collecting damages for which he is clearly entitled. The most obvious and simple analysis of this case is as follows. The Plaintiff promoted himself and his business to Waldrep and produced a contract with specific terms and conditions and prices all of which Waldrep complied. It is unclear what happened behind the scenes but it is reasonable to speculate that one or two issues occurred. First, it is probable that the Plaintiff produced a low number and professional looking contract to fraudulently induce Waldrep to accept the contract by this unlicensed, first timer or the alternative is that the Plaintiff was so unskilled not only at constructing the wall which has already resulted in a damage claim on Plaintiff's insurance but equally unskilled at estimating and pricing a job. The discrepancy appears to be the amount paid for the Allen blocks that were used and the number of said blocks that were used. It seems unlikely that any person, especially a contractor could not ascertain the price of a block. The price quoted is roughly half the price that was ultimately claimed at trial. The number of blocks used ranges from a claim of 2,124 that was Billed to only 1,497 that actually had receipts. Also, the judge never

gave Waldrep credit for the 627 block for which he had already paid. Are we to believe that the Plaintiff cannot count or is the more likely scenario that he managed to persuade Waldrep to do business with him and when he found it to be insufficiently profitable he elected to use the court system to further his unscrupulous behavior?

The list of errors at trial is extensive and all deprive Waldrep of a full and fair hearing and result in the abatement of his rights to seek to be made whole. The trial court made remarks that can clearly be interpreted in favor of the Plaintiff prior to the conclusion of the proceedings which in and of themselves should result in a reversal and new trial. The confusion regarding conference in chambers and the refusal to allow Waldrep to introduce additional evidence or amend his pleadings amounts to reversible error and perhaps even a cause for a mistrial. The reliance on an unsigned, manufactured document (Scope of Work) as a contract between the parties should be construed against the Plaintiff and not against Waldrep and is again an erroneous decision by the trial court.

Procedurally, the production of receipts and delivery of those receipts to a litigant the day of trial and the failure to allow that litigant time to analyze and responds severely prejudices the rights of Waldrep and warrants a new trial. While counsel for Waldrep has obviously proved her inadequacy at multiple instances throughout the course of this matter the trial court made several errors that warrant the reversal of the order and a new trial being granted.

This was not an instance of a contractor performing work and the recipient of that work failing to pay for it. Quite the contrary. This was an instance of an unlicensed business, fraudulently inducing an unsuspecting homeowner into hiring him to build a retaining wall at his property. There was a contract signed and the homeowner complied. Then when the wall proved improperly constructed the contractor constructed documents

with invented numbers that do not match in an effort to essentially extort more money from this homeowner. The wrong number of blocks was set forth in these receipts. It took three months for this contractor to produce a bill. Why such a long time? Did it take that long to fabricate a reason to charge Waldrep extra? From charging \$2,000 for cutting and stacking wood to the wrong number of blocks, to reliance on unsigned documents this case is alarming from start to finish. The contractor breached his own contract and appears to have used the court to benefit from his apparently fraudulent actions. Unfortunately, the homeowner hired the wrong attorney and received insufficient legal advice. However, in conjunction with this bad legal advice the court made several errors that warrant reversal of the trial court's order. Waldrep is still suffering damages at his residence and now has been deprived of his substantive and procedural rights at the trial level. He begs this appellate court to reverse the decisions of the trial court and enter a judgment on his counterclaim in his favor.

All it would have taken to make this case correct would have been a visit to the property by the county engineer. This is an action that the trial judge indicated would occur. It did not and not Waldrep sits in the untenable position of having a dangerous situation at his home and a faulty court order entered against him and is desperately seeking recourse. The Wall is in Failure Mode and not only is dangerous once it starts to actually Fall down and at 80 lbs per Block could hurt someone if the Block hits them, and it will cause the value of my home to be affected as well.

Further examination of the trial transcript reveals multiple inaccuracies and inconsistencies that deleteriously impact the rights of Waldrep and result in an adverse and improper. Beginning on page 426 of the trial transcript the court begins to inquire of the Plaintiff if he made any money on this job and how he was supporting himself during the

course of the job. This exchange continues for approximately a page and one half but the more interesting aspect of this exchange is why. If this case is stemming from a breach of contract and the negligent construction of the wall what do the finances of the contractor have to do with responsibility for the breach and whether the contractor was negligent. The judge continues with an inquiry regarding building permits and then exclaims that “if they worked without permits, that’s not going to affect my decision whatsoever” (Page 428 lines 9-10). This entire exchange seems extraordinarily confusing. Initially, it appeared that the judge was endeavoring to determine the skill level and familiarity with the Plaintiff with the job he had undertaken perhaps to assess skill or credibility. Then following the building permit comment it almost appears that the judge is trying to ascertain whether or not the Plaintiff needs money. The issue of whether the Plaintiff was able to support himself or needed money is irrelevant in both a breach of contract action and/or an action for negligent construction of a wall. The inability of the Plaintiff to adequately quote and price a job and perform the work certainly speaks to his competence, skill and ability but this does not seem to be the goal of the inquiry of the judge. Rather, the judge appears to be trying to understand if the Plaintiff needs money and inadequately priced the job to find a way to award him money. Does the fact that the Plaintiff is inept in this regard the fault of the Defendant Waldrep and should he be forced to pay for the Plaintiff’s inadequacies? This is most certainly abuse of discretion and reversible error.

Similarly, beginning on page 468 of the trial transcript, the judge again delves into the profit margin of the Plaintiff. It is baffling as to why the judge is undertaking the job of calculating the bill and profit margin of the Plaintiff. This is a breach of contract case and the Plaintiff presented the Defendant with a contract that he drafted and an estimate that he prepared. If he performed these tasks in addition to the actual construction work

inadequately then he is both negligent and liable. Whys the judge is apparently trying to justify the additional charges by the Plaintiff that were produced in breach of the initial contract is not only irrelevant but has tainted the trial and verdict and prejudiced the rights of the defendant.

Then on page 469 of the transcript the judge comments between lines 3 and 14 that; “I thought it was a badly constructed wall, the lower retaining wall. It appears that my law clerks math is correct, and that’s very debatable, there’s a 10.2 inch allowance for variance for settlement for the length of this wall, which is eight-five to ninety feet, by all testimony. Now, as such I don’t think it’s a badly constructed wall.” This is based on information the court apparently pulled from the Allen website. The unfortunate aspect of this is that the Allen website is simply a website diagram , it is not an engineering requirement or a building code. The experts in the case testified that the wall was incorrectly constructed and had the judge taken the opportunity to send the county engineer with a transit it would have become immediately clear within minutes that this was the case. The County Engineer (that the judge indicated would review the matter) would certainly have known the National Code of the NCMA. Additionally, the Defendant’s response clearly indicates that the maximum variance is 3 inches, in the SUA Sponte on Exhibit B form the NCMA. A law clerk’s math based on a sales diagram on a company website is hardly an acceptable method to ascertain the adequacy of something as important as a retaining wall. This analysis as conducted by the trial court is another example of abuse of discretion and reversible error.

Interestingly, the court continues on page 469 at line 10 that “I understand Mr. Waldrep’s dismay at the billing, When I heard it, I was taken quite aback and I’m not going to allow you to get the entire amount of the bill. That is entirely too high. Entirely too

high.’ Is this the court’s ideas of a scientific or negligence analysis. Either the contract was breached or it wasn’t or the wall was constructed improperly or it wasn’t. While I appreciate the sensibilities of the judge being offended at the exorbitant price claimed by the Plaintiff this is hardly an appropriate legal analysis and another example of reversible error.

The court continues on that same page at line 15 by saying to defense counsel “I’m going to give her the opportunity, and copy Mr. Hood to respond solely to the document that was presented from the Allen website to show my calculations were wrong”. First, there was not introduction of a document; this was simply an internet diagram that was interpreted and rudimentary calculations performed by a law clerk with unknown engineering experience. Meanwhile the engineers in this case were seemingly dismissed by the judge and the issue appears to be decided in this rudimentary and certainly inadequate fashion. The wall is constructed improperly but the court seemed determined not to ascertain that fact which is again an abuse of discretion and committed reversible error.

On page 470 the judge continues by saying that “If you show e that those tolerances are incorrect, then I will have somebody go out and measure those walls and the loser is going to pay for it. Okay, I’ll have an engineer go out there and do it and then report back to me what the measurements are..... And if I find that there is a badly build wall I’m not going to let you get paid that’s just not fair. I know your young, I know you need the money, but that not my issue.” Here the court seems to completely ignore the issue of the contract the breach by the Plaintiff and the either fraudulent or negligent manner in which the job was quoted and more concerned with the fact that he is young and needs the money. Mr. Waldrep signed a contract and performed under that contract. The Plaintiff then tried

to extort more money from Waldrep and after all of this the sole issue that the court appears to consider is the quality of the wall. This is the first error and the second is that the court never follows through. The Defendant provided documented evidence from the NCMA that the wall was improperly constructed and the court never sends an engineer and instead relies on a website diagram and the calculations of a law clerk to decide a complex engineering issue that involves the safety of a man's home. On page 356 Mr. Jordan indicates that the tolerances are an inch and a quarter which appear to conflict with the calculations provided by the law clerk but this testimony is given little weight.

Later on that page at line 12 the court makes the statement appears to me as an outsider looking in, that the ball was dropped, you just dropped the ball in the process and all of a sudden you got this bill and you're like "oh, my goodness. I didn't realize I was getting that big of a bill" While this is partially correct the basic premise is flawed and should result in a reversal of the trial court findings. Yes, Waldrep never expected a bill because he had signed a contract and performed all duties required of him under that contract, and paid Holzclaw (the Plaintiff) everytime he submitted a bill except the final specious one for \$52,000. Plaintiff failed to secure change order as were required by the contract that the Plaintiff drafted so the Defendant had no reason to assume or be on notice that a large bill was looming in the distance. This becomes even more specious when you consider the nature of the bill. At one point 1,500 blocks and another 2,400 blocks without ever clarifying how many were actually used. He charged the Defendant for 2124 blocks and only produced receipts at trial for 1,497 but the judge did not reduce or alter the judgment to reflect that discrepancy. Additionally the Judge says on Page 469 lines 11-13 that he is not going to allow the Plaintiff to get the entire amount of the Bill because it is Entirely "too High" but the full amount was awarded to the Plaintiff. Additionally, the additionally

funds were because the Plaintiff had priced the blocks improperly. In the initial contract they were priced at \$8 and later he was asking \$16. This is not small error and again either the product of fraud or the product of negligence, neither of which are the fault or responsibility of the Defendant. Now, the Defendant is stuck with an improperly constructed wall that must be torn down and reconstructed to proper specifications. There has been a claim on the insurance (National Grange, Claim # MPF58561) of the Plaintiff paying for water damage resulting from his shoddy work and now this issue has surfaced.

The trial court entered an order Interestingly in that order the court acknowledges that all change order must be in writing according to the original contract but makes a finding contrary to that factual statement. In part B of the Order the Court states in error that the Plaintiff failed to include his profit margins. This is simply not the case. The fact of the matter is that the Plaintiff is intentionally or mistakenly mispriced the blocks used for the retaining wall. There was never a discussion about the so-called profit margin. This is a fabrication by either the Plaintiff or an attempt by the court to pay a Plaintiff that the court had previously acknowledged “needed the money”.

In section “C” of the order whether the Defendant said the work “looked good” is irrelevant. The work either conformed to engineering specification or it did not and in this case it did not. So not only is Plaintiff not entitled to recover to his mispricing debacle he is responsible for the damages incurred by the Defendant for the cost of replacing the wall with one that conforms to the code and engineering requirements.

The rationale of the trial court in Section D of the order is another example of abuse of discretion and reversible error. Here the court states that it is unconvinced of the assertion of Defendant that the wall did not conform to the Allen standards and that Allen Block only “recommends” the use of an engineer. This seems completely inopposite to the

previous assertion of the court that they had examined the Allen website and based upon calculations by the judge's law clerk that the wall was to standard. These two positions do not reconcile. Allen block either has standards or they do not.

Section "H" of the court's order is also baffling. It indicates that Mr. Jordan corrected the Plaintiff's estimate of his work. If this was in fact done why wasn't it provided to the Defendant in accordance with the Contract or was it intentionally withheld as part of some other motivation by the Plaintiff.

Section "I" is equally at odds with the courts findings. It states that the Defendant was told (assuming verbally) that profit had not been billed 30 days before completion of the job. This flies in the face of the contract. This would be analogous to buying a car and receiving a call from the dealership a month later indicating that the engine had not been included in the price. If this was an error by the Plaintiff then it is the Plaintiff who should bear the responsibility for the error.

Similarly, section "J" indicates that the wall is out of variance by 8.125 inches. Manufacturers tolerances are 1.25 inches maximum over a ten foot reference and for horizontal control by 3". Clearly, 8.125 (the calculation done by the law clerk is well outside those tolerances.

Throughout this trial the court mentions fairness and discusses multiple ancillary issues. The basic facts are that the Defendant contracted for work to be performed and signed a contract and complied with the terms and conditions of that contract. Then it became apparent that there were errors in calculation or estimation and that the Plaintiff attempted to fix them with a breach of contract and oral representations about profit, number of bricks, costs etc. Fundamental fairness suggests that this was an arm's length transaction and the Plaintiff clearly made mistakes and now seeks to have the Defendant

pay for them in addition to paying for work that was done improperly and indeed poses a danger to Defendants home. It would be grossly unfair to allow the Plaintiff to submit a fraudulent or incorrect estimate, sign the contract, attempt to fix the contract in an ex post facto manner without a writing of any kind and without any notice to Defendant. There is not mention of how long Plaintiff knew there was an error which leads one to believe that this may have in fact been intentional to allow Plaintiff to now benefit from his actions would be a gross miscarriage of justice.

In this case there were a litany of mistake and error made as set forth in the following list:

2. Plaintiff's failure to comply with the terms and conditions of the contract;
3. Lack of any notice to the Defendant of missing Profit calculation or other charges;
4. No change orders in writing as in original Contract;
5. Inappropriate inquiries by the judge;
6. Failure of the court to consider Proper Standards (NCMA National Code) and engage in proper calculations;
7. Failure of Defendant's attorney to properly conduct discovery or the trial;
8. Negligence or potential fraud by the Plaintiff;
9. Failure of the Trial Court to rely on Experts; One a Civil Engineer (Structural is his Specialty) and the other an Installer of Retaining Walls. Both Experts Chandler (Engineer) and Jordan (Independent Contractor has installed numerous Retaining Walls using different Manufactures' of Blocks) were found non-credible by the Judge.
10. Reliance by the trial court on the calculation of a law clerk to decide a complex Engineering Case;

11. Failure by the Judge to send out County Engineer as mentioned on page 471 Lines 2-6 if Defendant could prove the 1% was wrong which we did and no Engineer was ever sent out to inspect Property.
12. Consideration of issues by the trial court without any grounds to do so such as the financial needs of the Plaintiff.

The Appellant submits that there was insufficient evidence submitted at trial to prove that the Defendant owed the Plaintiff anything. The receipts did not match (1,497 Blocks Paid Receipts and 2,124 Blocks Billed to Defendant), the changes did not comply with the contract that was prepared by the Plaintiff and the sole considerations seems to be that the Plaintiff prices this indeterminate number of Blocks improperly and now seeks to recover almost twice the money he originally quoted the Defendant. There was nothing to put the defendant on notice that the calculations were incorrect or that “profits” were allegedly left out. He simply made an error or used a low bid to induce the Defendant and then sought the Court’s help to collect more money by claiming he “needed” it. This line of questioning by the judge lacked any probative value whatsoever unless it was designed to illustrate the ineptitude of the Plaintiff which seems hard to believe because on the following page the judge states that even if the Plaintiff failed to secure required permits that would not prevent the court from finding in his favor. It seems clear that the trial court understood that the Plaintiff either did not know what he was doing or was acting intentionally to secure additional money from Defendant but did not seem to care that this was an error by the trial court and should be overturned.

Neither the sufficiency nor the manifest weight of the evidence introduced by the Plaintiff at trial would convince the average person that Plaintiff was entitled to more

money. The facts are that he approached the Defendant and they entered into a contract and the Defendant performed all his duties under that contract. Then at least 30 days before the completion of the job the Plaintiff informed the Defendant verbally that he left his profits out and the Defendant would have to pay more. Then 90 days the completion of the Job the Plaintiff delivers the SCOPE OF WORK which was his Final Bill which I then saw for the first time. This is either fraud or negligence, neither one which are sufficient to make the Defendant pay. Additionally, the contract drafted by the Plaintiff and signed by the parties specifically indicated how changes and modifications were to be addresses. The Plaintiff failed to do this. Meaning, that he failed to comply with his own contract. He simply dumped a pile of receipts on which the numbers did not match on the Defendant the morning of trial and asked to get paid more. The Defendant was given no time to analyze the information or prepare a response despite the fact that it was in clear breach of the contract between the parties. The weight of the evidence is so obviously against the Plaintiff that he may in fact need the money but it is not Defendants job to pay it to him. The trial court should be reversed.

Additionally, a review of the actions of the trial court judge amount to an abuse of discretion. First he engages in a discourse with the Plaintiff regarding his need for the money and essentially performed the calculations for the Plaintiff despite the fact that the contract was clear and controlled the transaction. Next, the Judge disregarding the testimony of the expert regarding the sufficiency of the construction undertaken by the Plaintiff and elected instead to use a diagram from the Allan Block website that has not certifications or other proofs indicating that this diagram was the standard to which governed the job performed by the Plaintiff and then to add insult to injury had his law clerk, a person for whom we have no idea of their engineering skills or understanding

perform the calculations. This is the calculations on which the court relied to find in favor of the Plaintiff. Clearly and obviously an abuse of discretion and reversible error..

Defendant spoke to the Technical Department with Allan Block and was told that an installer of Allan Block must rely on the National Code of the NCMA for installing Walls and not a single Diagram that the Plaintiff entered just before the Trial ended and that single Diagram seems to be the Verdict that was in favor of the Defendant, even though the Plaintiff as instructed by the Judge provided the information from NMCA that Specifically states the Maximum Settlement is 3 inches no matter the Length of a Wall and this information was not noted in favor of Defendant. This information was entered to Court as Defendant's Response to Court's SUA Sponte Request and Argument.

Considering all of the error and missteps that took place during this trial it is impossible to call these errors (individually or taken in their totality) harmless error. The errors during this trial were severe and result in substantial prejudice to the Defendant and warrant the reversal of the judgment of the trial court. In this case the appellate court should disturb the trial court's decision because of manifest abuse of discretion.

CONCLUSION

Based on the the reasons set forth above the Appellant respectfully requests that this court grand the appellants request and take the following action:

Reverse the Order of the Trial court as against the Defendant Dennis Waldrep; or in the alternative;

Vacate the Order of the Trial court and grant a new trial in this matter; or in the alternative;

Vacate the Order of the trial Court and staying any proceedings until completion of the malpractice action against Defendant's trial counsel is concluded.

Any other relief as the Court deems just and equitable.

Respectfully submitted,

DENNIS WALDREP, APPELLANT/DEFENDANT IN UNDERLYING ACTION

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

The Honorable R. Lawton McIntosh Circuit (10th) Court Judge

Case No: 2012-207852

JERRY HOLTZCLAW, d/b/a
GREEN THUMB LANDSCAPING
AND IRRIGATION
Respondent

V

DENNIS WALDREP

Appellant

APPELLANT'S REPLY BRIEF TO RESPONDENT'S BRIEF

Dennis Waldrep
209 Amethyst Way
Seneca, SC 29672
Proceeding Pro Se

INTRODUCTION

This reply brief is submitted pursuant to South Carolina Appellate Rule 208 (b)(3). The Appellant filed the within Appeal on February 8, 2012 and the Respondent filed a reply brief on May 24, 2013. This is the Reply brief submitted to Respondent's reply. The Respondent correctly indicates that the underlying matter stems from a complaint filed by the Plaintiff Mr. Holtzclaw against the Defendant/Appellant Mr. Waldrep for money damages for work allegedly performed at the Waldrep residence. There are several remarks that stray from that issues, specifically that the damages are the reimbursement for the expenses incurred by the Plaintiff, but that flies in the face of the breach of contract action upon which this matter is predicated.

At trial of this matter reversible error occurred when the Judge entered judgment in favor of Mr Holtzclaw and dismissing the counterclaim of the Defendant. Simply stated, the work performed by the Plaintiff was, in breach of the agreement between the parties, inadequate, substandard and not in compliance with applicable building codes or standard relative to the materials used in the construction as set forth by the manufacturer of said materials. The Defendant's counterclaim was also improperly denied by the trial court.

The Respondent is the owner/proprietor of Green Thumb Landscape & Irrigation and entered into a written agreement with the Appellant Waldrep to perform services at his property. Specifically, the Plaintiff was to build a wall at the Defendant's

property pursuant to the terms and conditions of the agreement between the parties. The work was governed by a contract drafted by the Plaintiff and signed by the Parties. The contract also required that any changes or additions be in writing and signed by the parties. There were no addendum or changes to the contract signed by the parties as required.

1. RESPONSE TO THE RESPONDENT'S FIRST POINT THE "THE TRIAL JUDGE'S FINDINGS SHOULD NOT BE DISTURBED ON APPEAL IF REASONABLY SUPPORTED BY EVIDENCE.

The Respondent asserts that the action for breach of contract is an action at law, but the Respondent clearly fails to adequately analyze or describe the nature of the contract that is the subject of this litigation. In order for an action for a breach of contract to stand there must be a valid contract. The Respondent is relying on the contract that he drafted and Mr Waldrep performed all of his duties therein and it is the Respondent that failed to perform as set forth by failing to build the wall properly or by charging the amount set forth in the document.

The contract in this case was drafted by the Plaintiff and executed by the parties on August 19, 2006 (attached hereto) This contract states in pertinent part that "In regards to any changes and/or additions to the section contract, the landscape contractor has the right to be paid for the amount stated on the contract before proceeding with any extra work. A change order form must be signed by the owner or representative

(to be determined in writing by the owner) which will state the additional costs.” There were no change orders, no additions signed by the parties and no additional contracts of any type.

Another interesting aspect of the contract is that there is a handwritten annotation in the “Notes”: section that suggests that the price of the Irrigation repairs (sic) needs to be reviewed as it seems to much to relocate....” Obviously, other issues were contemplated by the parties and added to this document. Next, the contract on page four has a section entitled “Scope of Work”. In this section there are twelve tasks listed that are to be done by the Plaintiff per the contract. This section contains that list of work the Plaintiff is to perform on the Waldrep property. Interestingly, there is another section on this page that is entitled “Additional Items”: There are four lines in this section where presumably additional items that the parties contemplate and agree upon would be added to the contract. There are no entries on these lines and they remain blank. If the Plaintiff had things to add to the contract why did he not add them to this section and have the parties sign accordingly.

This case relies on basic contract law. The contract that was drafted by the Plaintiff is signed by both parties and sets forth the work to be done. The contract also indicates that additional work must be agreed to in writing by the parties. If the contract is ambiguous then any ambiguity is to be construed against the drafter, Mr Holtzclaw and not Mr. Waldrep. There were never any additions to the contract, no change orders or addendum executed by the parties. Mr Waldrep complied with the terms and conditions of the original contract and the Plaintiff sought to be compensated for items that were

NEVER a part of the original agreement. If he (the Plaintiff) neglected to include items in the initial contract or made errors in pricing then those errors are the responsibility of the Plaintiff and not the responsibility of Mr. Waldrep. The contract is clear, was never modified and Mr. Waldrep fully complied and performed the terms thereof.

The Respondent contends (page 3 of their response brief) that “once the scope of the original proposal changed, Respondent began periodically accounting to Appellant for his actual cost for materials and labor and received payments based on those accountings”, this representation is patently inaccurate. When did the scope of the original proposal change? At no time were any change orders, new contracts or signed changes prepared in this matter. The Plaintiff never “accounted” to the Defendant for additional work. Is it Plaintiff’s contention that these illusive “accountings” constitute an additional contract? Even if there were such accountings they would not qualify as additional to the contract unless they were signed by the parties. There was never any indication in writing or otherwise that the scope of work had changed. The scope of work was still the items contained on page four of the contract. The Plaintiff never advised that there would be a change to the scope of work or that there would be an additional bill at the end of the job. The Plaintiff at no time, ever, advised Waldrep that he was accumulating additional charges until approximately 90 days after the job was almost completed. Holtzclaw never modified the initial contract or suggested that the initial contract be modified. He never presented Waldrep with proposed modifications. He led Waldrep to believe that he had complied with the terms and conditions of the contract and that these “additional costs” were being fully paid for by Waldrep. At the end of the job,

without any addendum to the contract, Holtzclaw claimed that he was entitled to more money. He made a mistake and now wanted Waldrep to pay for it.

Any “final statement”, was not agreed to by Waldrep nor was it signed by the Parties as required by the initial contract. This statement was not received by the Appellant until ninety days after the work was completed. It is apparent that one of two things happened. Either Holtzclaw decided unilaterally to do additional work and bill Waldrep at the end of the job without properly modifying the initial contract the he drafted. Or, Holtzclaw made errors when he priced the initial job and when he realized the nature of his error he failed to notify Waldrep and secure a written change to the original contract. Then at the end of the job, he tendered a bill which has allegedly been claimed to be the expenses incurred by the Plaintiff. Could he really have performed a job without realizing he had over \$50,000 in unaccounted for expenses. This is somewhat challenging to believe.

I. THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR EVIDENCED BY STATEMENTS MADE DURING TRIAL.

The trial judge made remarks during the course of the trial that amount to reversible error. At one point the Judge indicated that the County Engineer should be consulted to ascertain the quality of the work that was done by the Plaintiff. Unfortunately, the county engineer was never consulted to ascertain the quality of the work performed by the Defendant. This consultation never took place. However, the

mere fact that the judge made this statement underscores the fact that there was a suspicion that the work performed by the Plaintiff was not up to par. This comment goes to the potential breach of contract by the Plaintiff and as such supports the counterclaim of the Defendant not the claim made by the Plaintiff.

Waldrep is now faced with a wall that has been improperly constructed, is failing and in need of repair. A judgment that was improperly entered on a contract on which he fully performed. The error in this case is that Waldrep has not been compensated for the cost of repairing the improper work that was performed by the Plaintiff. The breach of contract was by the Plaintiff Holtzclaw and not Waldrep.

Next, during the trial the Judge asked the Plaintiff if he had ever done this type of job before. The Plaintiff indicated that this was his “first and his last” the judge then said he would not get everything he was asking for. Does this mean the judge had already decided the case without giving Waldrep a full opportunity to be heard.?

The Plaintiff clearly did not have the requisite skills to price and bid a job of this type. He admitted to the trial judge that it was his first job of this type. Next, the contractor did not have a License or permit or the skills to prepare a contract that would address any contingencies that may arise due to his lack of experience. Also, he did not create any addendum or change order to address any alleged changes that were needed. Ultimately, when the job was done, improperly as to require repair, the Plaintiff sued the Defendant for payment for services for sums he claimed were owed. The Defendant did not contract for any services other than what were contained on page four of the contract. Why were the prices so disparate unless the Plaintiff made an error. The Plaintiff also

made specific claims that the additional bill was for reimbursement for expenses or some other equally dubious items. Is it reasonable to assume that a contractor who drafts a xxxxx contract does not include the costs for materials that will be used? Further, is it reasonable that a contractor, upon learning that the job would cost more than was contained in the original contract would fail to notify the homeowner and create an addendum to the original contract that was required by the original contract that he drafted. Instead, the Plaintiff elected to continue with the work until he sprung the bill on the Defendant at the end of the job when it came as a complete surprise. Then when the Defendant objected he was sued.

During the course of the trial the trial judge made remarks that indicated that the court had strayed from the contract issue and was perhaps endeavoring to use hindsight to impart some sort of equity to this transaction. First, the trial judge remarked that the objections of Waldrep were a result of “buyer’s remorse” Page 471 Lines 12-17. This remark is troubling for several reasons. Initially, it is challenging to determine what the judge meant by calling the actions of a litigant trying to protect his rights “buyer’s remorse” especially when he complied fully with the terms and conditions of the contract he signed and appears to have been fraudulently induced to enter into the agreement. This remark also suggests that the court had already decided against Waldrep and in favor of the Plaintiff before all the evidence and arguments had been heard. Does this not abridge the litigant’s rights and essentially deny him a full and fair hearing?

Another statement made by the trial judge that is cause for alarm surrounds the damages claimed by the Plaintiff. The judge remarked that the Plaintiff “may not get all

that he has claimed. This statement can be interpreted to mean that the judge had already decided to award the Plaintiff payment from Waldrep based on fraudulent, unsigned, and improperly constructed documents. This is another error because it essentially denies Waldrep the opportunity to a full and fair hearing. As this case was heard without a jury, the judge is the finder of fact and appears to have made a decision before all the facts were presented and considered.

Next, the trial judge held an in chambers conference that obviously caused confusion and resulted in incorrect action by Defense counsel. Without this opportunity as promised, there was essentially no chance whatsoever for Waldrep to refute the erroneous information that had been presented to the court. Therefore the court relied on this erroneous information in making an award in favor of the Plaintiff again depriving Waldrep of a full and fair hearing. This exchange also suggests another problem that occurred during the course of this trial. As previously indicated, the in chambers conference between the lawyers and the judge left Counsel for the Defendant Waldrep with the impression there was an opportunity to Amend Pleadings. Following this conference that the judge had set out the opportunity for Waldrep to produce evidence to enable the court to consider all the evidence available to make a decision. When counsel endeavored to comply with this directive the trial Judge advised that he did not say that. Clearly, there was confusion somewhere in this exchange and this confusion deprived Waldrep of the opportunity to produce necessary evidence and fully make his case to refute the erroneous materials entered by the Plaintiff and prove his damages. At a minimum the judge should have clarified the exchange and perhaps entered a mistrial

because the obvious confusion was to such an extent that it again deprived Waldrep of a full and fair hearing on such an extreme problem existing at his residence and essentially enabled the Plaintiff to succeed either in his fraud or negligent behavior.

II. THE EVIDENCE DOES NOT SUPPORT THE VERDICT IN FAVOR OF THE PLAINTIFF.

The verdict of the trial court is not supported by the evidence. The case is a simple breach of contract. A contract was presented by Mr. Holtzclaw to Mr Waldrep. It was executed by the Parties and Mr Waldrep fully performed. There was never any addendum in writing or change order pursuant to the terms of contract. It wasn't until 90 days after the completion of the work that Mr Waldrep received a document that he allegedly owed the Plaintiff in excess of \$52,000. This was not part of the initial contract, nor was it part of any addendum or change order or other contract which was executed by Mr Waldrep. The Plaintiff did not sue on a quantum meruit basis because the work performed did not exceed the work that was described in the initial contract. It is clear the the Plaintiff made errors either in pricing or the drafting of the contract.. Now he wants Mr Waldrep to pay for his error. If he had done things properly, he would had drafted an addendum and had both parties sign the document. Perhaps he did not do this because he was afraid that Mr Waldrep would object to the addendum or change orders and the work would be halted. Instead, the Plaintiff surreptitiously continued work as outlined in the initial contract and then submitted an outrageous bill some 90 days after

the conclusion of the work. Maybe he thought he had not made enough money and wanted Mr Waldrep to pay and figured once the job was done he would have no choice. Whatever the case, he did not comply with the contract that he drafted. It is well settled that any ambiguity in a contract is construed against the drafter and Mr Holtzclaw drafted the contract. He cannot now surprise this error on the Mr. Waldrep and demand money for his mistake.

Why didn't Plaintiff notify or otherwise present to Waldrep that a change order was required in accordance with the contract? At that point Waldrep had complied with all the terms and conditions of the contract and had no reason to assume that Plaintiff would not do the same. Would Waldrep have agreed to have the work continued if the estimate for work had been higher by \$52,998.98 or 80% above what had been paid already? Was this a bait and switch by the Plaintiff? Obviously, this proposal would have been rejected. This begs the questions as to whether the Plaintiff was simply negligent in preparing the original estimate and bill or if he fraudulently induced Waldrep to enter into the agreement by providing an artificially low number and once the work had begun he would try to collect another way. One instance that leads us to believe that fraud may have been at work is the price charged for removing wood from the Waldrep property. The Plaintiff charged Waldrep \$2,000 for cutting and stacking a cord of wood. As the court may be aware a cord of wood is a stack 4 feet by 4 feet by 8 feet in length. Two thousand dollars for this service is so clearly excessive that it begs the question that makes one wonder if this is how the Plaintiff planned on recouping his money from his artificially low bid designed to induce Waldrep to enter into the agreement. The wall that

was constructed by the Plaintiff (who was an unlicensed contractor) and admitted that he had never performed this work before was improperly constructed and has resulted in defendant being required to remove and replace this wall at significant expense.

III. THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR

It is important to note that the work done in this case was by an unlicensed contractor and not only improper from a billing, contractual and billing perspective but has already caused significant damage to Waldrep's property. It stands to reason that the Plaintiff also did not know how to properly price or contract a job of this nature. He made errors in the actual performance of the work, and effectively breached the contract, and made errors in the drafting of the contract and in failing to properly add any relevant addendum to the contract signed by the parties.

CONCLUSION

The Appellant submits that there is insufficient evidence to support an action for breach of contract by the Plaintiff. In point of fact, the breach of contract was by the Plaintiff on several counts. First, he failed to perform the work properly, second, he failed to make any changes to the contract in writing signed by the parties. It is well settled that any ambiguities in the contract are construed against the drafter.

The Appellant performed all duties in accordance with the terms and conditions set forth in the original contract. There were no additional items that were

requested by the Defendant other than those set forth on page four of the contract thereby making a quantum meruit action irrelevant. It seems obvious that what happened is that the Plaintiff, an unlicensed contractor did not know how to properly bid and/or price the job to be done for the Defendant and did not possess the requisite skills to perform the work. Ultimately, the problems of Plaintiff came to light and he dumped a bill on the Defendant without ever creating a new contract or addendum that would be signed by the parties. He simply pressed forward and tried to extract the money from the Defendant at the end of the job without complying with the terms and conditions of the contract he drafted.

The Defendant contracted for certain services by Plaintiff which the Plaintiff performed incorrectly. The Defendant fully performed and the Plaintiff breached the contract and now is trying to force Defendant to pay for his mistakes. The plaintiff is not entitled to recover for any ambiguities that may result from the contract. There is insufficient evidence to support the verdict on behalf of the Plaintiff. The Defendant respectfully requests that the judgment of the trial court be vacated and a judgment entered on his counterclaim.

Respectfully Submitted,

DENNIS WALDREP, APPELLANT/DEFENDANT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Lawton McIntosh Circuit (10th) Court Judge

Case No: 2012-207852

JERRY HOLTZCLAW, d/b/a
GREEN THUMB LANDSCAPE &
IRRIGATION

Respondent

V

DENNIS WALDREP

Appellant

DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1. Order of Matter dated July 7, 2011
2. Order of Reconsideration dated: February 16, 2012
3. Initial Contract between the Parties
4. Complaint;
5. Answer;
6. Defendant's Response to the Court's sua sponte motion for reconsideration;

7. Transcript of Proceedings and Reconsideration pp. 2, 12, 15, 91, 92, 95, 99, 108, 114, 128, 129, 206, 207, 208, 209, 351, 354, 356, 426, 427, 428, 451, 452, 453, 454, 455, 456, 468, 469, 499, 470, 471
8. Motion to Amend to Conform to The Evidence Submitted 7-1-2011

I certify that this designation contains no matter which is irrelevant to this appeal.

April 1, 2013

Dennis Waldrep
209 Amethyst Way
Seneca, SC 29672
Proceeding Pro Se

Green Thumb Landscape & Irrigation Retaining Walls/Landscape Contract

Job Name: DENNIS WALDREP Date: 8-13-2006

Job Location: 209 AMETHYST WAY
SENECA SC, 29678

General Contractors: JERRY HOLTZCLAW, II Phone: 864-723-4029
BEN THRASHER JR. Phone: 864-650-0200

Green Thumb Landscape & Irrigation hereby sets forth into an agreement with the above client to perform jobs planned, or items specified on specs subject to all terms and conditions listed below:

Terms:

Thirty Five percent (35%) payment upon signing of contract (Based upon Quoted Price)

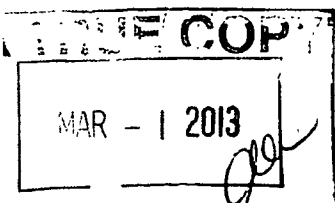
Thirty Five percent (35%) payment when work is 50% work is complete (Based upon Quoted Price)

Thirty percent (30%) payment upon completion of all work (Based on Final Price)

Condition:

- This bid is based on engineering or horticultural information provided by Jerry Holtzclaw & Ben Thrasher at Green Thumb Landscape & Irrigation.
- Any alteration, deletion or addition from original specification will be executed upon orders from the client and will constitute an additional change in the stated bid below.
- Contractors will not be held liable for any damages to existing concrete driveway due to heavy equipment and/or machinery unless specified on this contract.
- Contractor will not be held liable for any vandalism or theft of plants or hard scape materials, lines and grades, backfill and excavating.
- Drainage problems that develop or become evident and are not specified on the plans or addition to the specification sheet are not included in this price.
- All work is to be performed in a professional manner according to standard horticulture, and construction standards.
- Upon nearing completion of the job, client will be informed. Final details should be discussed with job foremen or contact Green Thumb Landscape & irrigation office so all work can end simultaneously and satisfactory.

Final payment is due on completion of work or any warranty will be voided.



All landscape construction shall be guaranteed for a period of three months from installation. Guarantee shall cover labor and materials but shall not cover normal reactions of materials such as fine cracks in concrete products or "checking" or warping of wood products.

Once all contracts are signed, which includes the specification contract, terms of the payment contract, and this guarantee sheet, the contract price stands firm. **In regards to changes and/or additions to the section contract, the landscape contractor reserves the right to be paid for the amount stated on the contract before proceeding with any extra work.** A change order form must be signed by the owner or representative (to be determined in writing by the owner), which will state the additional costs. If contracted materials have been purchase prior to the change in work, client must pay costs incurred to dispose of materials in the change.

The contractor also reserves the right to do necessary field adjustments without notice, due to drainage issues, excessive rock or other obstructions and/or obstacles that might cause potential problems.

Scope: We propose to furnish all materials, tools equipment and labor necessary to complete the job in a professional manner in accordance with the specifications for the sum of \$ _____, (_____), plus applicable sales tax.

Workmanship: All operation shall be completed in a substantial and workmanlike manner. Drawings and details are to serve as a guide and shall be followed as close as practical, but minor on-site adjustments may be made.

Revision: This contract is subject to revision if not accepted within 15 days, as the availability of many materials is not constant. This proposal is based on the current price of labor and materials and can be adjusted for any unanticipated increase.

Concealed contingencies: This contract is subject to an extra charge for concealed contingencies such as rock, debris, poor drainage situations, etc., not readily apparent in estimating the materials and work specified.

This contract is based on all grades being within one tenth on one foot to finis grade prior to the landscape contractor starting work unless otherwise stipulated herein. This contract does not include additional fill dirt off site as may be necessary to establish the proper grade unless otherwise stipulated herein.


Jerry Holtzelaw, Owner/Contractor
Green Thumb Landscape & Irrigation


Ben Thrasher, Contractor

Accepted: The above prices, specifications and conditions are satisfactory and are hereby accepted. Green Thumb Landscape & Irrigation is authorized to do the work as specified. Payments will be made as outlined in the above condition.

Dennis Waddy 8-19-2006
Client's Signature Date

Notes: The price of Irr. Report needs to be reviewed it seems too
Much to reflect 2 hours

Please return copy with payment (if applicable) to:

917 North Crestview Drive, Seneca South Carolina, 29678 (864) 723-4029

Scope of Work

- Back Retaining Wall
- Front Retaining Wall
- Drain
- Rip Rap Rock
- Grading
- Concrete Removal
- New Concrete
- Stamped Concrete
- Irrigation
- Sod
- Plants
- Iron Fencing

Additional Items:

Scope of Work			
Waldrep Job	Quantity	Cost of Materials	Installation Labor
Retaining Walls	2124	\$ 12,537.64	\$ 27,818.36
Block steps	175	\$ 1,012.46	\$ 3,382.54
Concrete Basin	2	\$ 1,061.45	\$ 1,800.00
Drainage system <i>\$1.25/FT</i>	1370FT	\$1,644.75	\$ 1,712.50
Equipment Rental		\$ 1,552.95	\$ -
Gravel <i>TCKS</i>		\$ 2,351.11	\$ -
Gravel-Hauling <i>6.00/Ton</i>	154	\$ -	\$ 924.00
Metal edging <i>3.25/FT</i>	344	\$ 411.30	\$ 1,118.00
Mulching <i>25/100</i>	236	\$ 3,832.40	\$ 5,900.00
Plants & Trees		\$ 4,036.35	\$ 4,036.35
Top Soil	78	\$ 2,110.60	\$ 1,950.00
River Rock & Boulders		\$ 329.44	\$ 700.00
Trees Cut Down (Woody Paterson)		\$ 1,200.00	\$ -
Brush clearing	48 Man Hrs		\$ 3,800.00
Split wood & Stacked wood pile	40 Man Hrs		\$ 2,000.00
Misc Materials from Lowes		\$ 959.81	\$ -
Malpass Grading		\$ 2,976.29	\$ -
Concrete sidewalk removal			\$ 800.00
Concrete Removal			\$ 2,000.00
Irrigation <i>403/200</i>	12 zones	\$1,263.53	\$4,845.00
Drip Irrigation <i>94/PT</i>	2000 FL	\$ 577.00	\$1,880.00
Pump Installation	1	\$ 937.35	\$ 1,150.00
Sod	8,334Sq.ft	\$ 1,007.00	\$ 4,583.70
Stained Deck	750 Sq.ft		\$ 937.50
Deck removal	8 Man Hrs		\$ 600.00
OutDoor lighting		\$ 300.00	\$ 800.00
Wiring		\$ 1,068.17	\$ -
Septic Tank Riser	2	\$ 100.00	\$ 250.00
Skid loader time <i>\$65</i>	80 HRS		\$5,200.00
Field Dirt	30 LOADS		\$ 900.00
Foundation Digging			\$ 1,400.00
Total		\$ 41,269.60	\$ 80,267.95
	Total		\$ 121,537.55
	Credits Back		
	Down Payment	\$ 65,500.00	\$ 56,037.55
	Concrete Repair	\$ 2,200.00	\$ 53,837.55
	30 Blocks (labor)	\$ 285.00	\$ 53,552.55
	Drainage Pipe	\$ 31.12	\$ 53,521.43
	Labor to replace drainage	\$ 100.00	\$ 53,421.43
	Equipment Renal	\$ 432.45	\$ 52,988.98
	Grand Total		\$ 52,988.98

**Dennis and Janet Waldrep
Breakdown**

Charge Description:

Retaining Walls: Based on \$19.00 per block. Final Total of 2124 blocks

Retaining wall steps/side wall \$25.00 based on amount of labor involved. Total of 175 blocks.

Concrete Basin: Labor calculated at \$750.00 a basin totaling \$1500.00 for both plus a \$300.00 delivery fee

Drainage System: Labor calculated at \$1.25ft. Total of 1370 feet.

Gravel Hauling: Hauling calculated at \$6.00 a ton. Total of 154 tons.

Metal Edging: Labor calculated on \$3.25 foot. Total of 344 feet.

Mulching: Labor calculated on \$25.00 per yard. Total of 236 yards.

Plants and Trees: Calculated by cost of planting materials totaling \$4036.35

Top Soil: Labor calculated on \$25.00 per yard. Total of 78 yards.

River Rock/Boulders: \$500.00 for river rock labor. \$100.00 per boulder.

Brush clearing: Labor calculated on \$25.00 per man hour. Estimated at 144 hours.

Splitting/Stacking wood: Labor calculated on \$25.00 man hour. Estimated at 120 hours.

* (Concrete Removal: Labor calculated at \$25.00 per man hour. Estimate of 81 hours.)

Irrigation: Calculated on \$403.75 per zone. Total of 12 zones.

Drip Irrigation: Calculated on \$0.94 per foot. Total of 2000 feet.

Pump Installation: Flat rate of \$2000.00 per lake pump

Sod: Based upon \$0.55 per sq. ft. Total of 8334 sq. ft.

Stain Deck: Labor Calculated on \$1.25 sq. ft. Total of 750 sq. ft.

Deck Removal: Labor calculated on \$25.00 per man hour. Total of 24 man hours.

Outdoor Lighting: Ben's fee

Wiring: Ben's fee

Septic Tank Riser: Flat rate of \$50.00 per riser

Skid Loader Time: Calculated at \$65.00 per hr. Total of 80 hours. Ben's fee

Field Dirt: Hauling fee \$30.00 a truck load. Total of 30 loads. Ben's fee.

Foundation Digging: Labor based on \$25.00 per hour. Total of 40 man hours + \$400 subcontractor charge that was paid.

Credits:

Total Down Payment: \$65,500.00

Concrete Repair on Patio: \$2200.00

Credit 30 blocks labor of wall charged by Steve Jordan: \$285.00

Repairing 80 foot of drainage pipe material: Material cost \$0.39 per foot.

Labor credit for repairing drainage: \$100.00 based on 80ft at \$1.25ft.

Equipment rental credit for repairing drainage: \$432.45

Green Thumb Landscape & Irrigation

Jerry Holtzclaw
917 N. Crestview Drive
Seneca, Sc 29678

Phone: 864-723-4029
Phone: 864-886-4299
Email:
jholtzclaw@hotmail.com

Quotation

To: **Dennis Waldrep**

209 Amethyst Way
Seneca, South Carolina 29672

Phone:
Work:
Cell : 864-230-4020

Quantity	Item	Description	Unit Price	Total
Repair Irrigation	3 Zone	Material & Labor	~~\$1 extra (labor)~~	\$1'800.00
Sod	Zoysia	Material , Labor & Prep work		\$1'225.00
Concrete Drive				
Stamp Concrete				
Iron Fence				
Plants				
Subtotal				\$3'025.00
TOTAL				\$15'485.00

8/18/06 35% Deposit \$5590.00

Green Thumb Landscape & Irrigation

Quotation

To: Dennis Waldrep

209 Amethyst Way
Seneca, South Carolina 29672

Phone:

Work:

Cell : 864-230-4020

Quantity	Item	Description	Unit Price	Total
Back Retaining Wall	Allan Blocks	Blocks, Caps, Labor	\$1 extra (Block) (color)	\$4'080.00
Front Retaining Wall	AllanBlocks	Blocks, Caps, Labor Work	\$1 extra (color)	\$4'760.00
Drain Pipe		Materials,		\$340.00
Rip Rap Rock		Materials, Labor (Not Included Delivery Fee)		\$700.00
Grading		Backfilling Retaining walls , Trenching Drain Pipe , Driveway		\$2'100.00
Cut And Removal of Concrete		Removal of Front Two Concrete Slabs		\$480.00
Subtotal				\$12'460.00
TOTAL				

Quotation valid for 60 days.

Quotation prepared by: Green Thumb Landscape & Irrigation

This is a quotation on the goods named, subject to the conditions noted below:

Green Thumb Landscape & Irrigation will do the work in a timely and orderly fashion. All clean up work will be done before finale inspection and **all payments will be due** upon satisfaction of the superintendent of the grounds.

Contingencies That Might Affect the Quotation:

Any work that is done other than what has been stated in this quotation will be subject to a change in price!

This is a quotation, not a contract.. In order to begin work, a contract must be signed with 35% down.

Jerry Holtzclaw
917 N. Crestview Drive
Seneca, Sc 29678

Phone: 864-723-4029
Phone: 864-886-4299
Email:
jholtzclaw@hotmail.com

