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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No.: 2021-CP-27-00069
Appellate Case No. 2025-001116

Mark W. McGilton,..... Respondent,

v.

1223 May River Road, LLC, D.R. Horton, Inc., and
Lotty Trucking, LLC f/k/a Ramos Trucking, LLC,..... Defendants,

of which D.R. Horton, Inc. is the Appellant,

AND

1223 May River Road, LLC, ...Third-Party Plaintiffs,

v.

Kenneth Scott Builders, Inc., ...Third-Party Defendants.

RECORD ON APPEAL
VOLUME III

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Appeal 2025-001116

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STATE OF SOUTH CAROLINA
COUNTY OF JASPER

IN THE COURT OF COMMON PLEAS
C.A. NO.: 2021-CP-27-00069

Mark W. McGilton,

Plaintiff,

v.

1223 May River Road, LLC;
D.R. Horton, Inc.; and Lotty Trucking, LLC
f/k/a Ramos Trucking, LLC,

Defendants.

AFFIDAVIT OF JASON M. IMHOFF

1223 May River Road, LLC,

Third-Party Plaintiff,

v.

Kenneth Scott Builders, Inc.,

Third-Party Defendant.

1. My name is Jason Imhoff and I have been licensed to practice law in South Carolina since 2001.
2. I along with John Crawford and other attorneys at Kenison, Dudley & Crawford, LLC represent Defendant D.R. Horton in the present matter.
3. This affidavit is provided in rebuttal to Ben Shelton's affidavit and allegations.
4. There are too many wild accusations, and frankly, baseless and absurd allegations to respond to; however, these included points may be helpful to the court.
5. I have practiced law for 23 years and make it a policy not to bring motions to compel or sanctions and resolve disagreements to the court unless absolutely necessary.

6. I have never threatened someone with sanctions to resolve a case or obtain a favorable settlement and I did not do so in this case.
7. My personal philosophy and practice are that while we can aggressively advocate for our clients we should do so ethically, work through disagreements, and treat each other fairly and honestly.
8. It was, and is my opinion, that Mr. McGilton's case began to fall apart in the spring of 2024 when we had reasonable and well received arguments on D.R. Horton's Motion for Summary Judgment in front of Judge Bonds. These arguments were based on lack of prior precedence and the novel nature of this case. Mr. Shelton had also let the most culpable party out of the case based upon the law he was arguing.
9. Thereafter, it became clear that Plaintiffs were changing their strategy from proving facts and liability to playing games of "gotcha".

Settlement Offer and Threat of Sanctions

10. During the deposition on July 18, 2024 of Mr. Urestegui, Mr. Urestegui testified that he was working for Kenneth Scott Builders who was working for 1223 May River Road, LLC, on the day of the accident and was not working for D.R Horton. He also testified that he only left the D.R. Horton site one time with his dump truck. At a break, I requested and received authority from D.R. Horton to renew a settlement offer, which I did. Mr. Shelton rejected the offer and told me to "stay tuned" or "wait for the rest" as he was going to resolve that testimony with documents later in the deposition. The discussion was less than two minutes and did not affect the deposition in any manner.

11. After the deposition as I was leaving, I ran into Mr. Shelton outside. I told Mr. Shelton that the offer was still on the table. Mr. Shelton and I had a normal, typical disagreement about how the deposition went and clearly disagreed. During that discussion, Mr. Shelton grew very heated. Mr. Connor walked by and can confirm the location and maybe some of the exchange, especially that the day and case was not going well for Mr. McGilton.
12. Also, during that discussion, I again expressed my frustration with Mr. Shelton's perceived antics and "gotcha" strategy. Mr. Shelton failed to include in his affidavit that I told him I don't like discovery disputes, playing gotcha, and misrepresentations as we believed we had witnessed from him. I specifically requested that we get along, play fairly, and litigate the case on the merits of the case and novel issue of law. (which I personally find interesting) I told him we had informed our client of our perception of his behavior, and they were growing frustrated. I shared my opinion that if he kept up with that strategy, I was certain my client would make us start filing motions for sanctions based on his continuing conduct. He took it as a threat. I specifically told him it wasn't a threat, but my client wasn't going to continue turning the other cheek if he continued with this strategy. It was not a "threatening" conversation or any different than any other post deposition conversation I've had with opposing counsel except that it was probably bad timing considering Mr. Shelton's anger and frustration. It also was not in furtherance of settlement but rather a recommendation that we clean up the nonsense in this case or we'd end up with more – as we have.
13. The veracity of these statements can be compared to our June 27th, 2024 letter in which we again plead with Mr. Shelton to try the case on the merits. There was no threat other than

if he continued the “gotcha” games we would be compelled to file legitimate motions in turn, which, again, we try to avoid.

14. Our position can further be verified by the timing. According to Mr. Shelton we threatened to file frivolous sanctions motions against him personally if he didn’t accept the settlement offer. However, Mr. Shelton rejected the offer that day, July 8, 2024, and no sanctions motion was filed. In fact, no sanctions motion was filed until Mr. Shelton filed a surprise motion to strike D.R Horton’s pleadings on August 19, 2024 without consultation with defendants, without an understanding of the actual meaning of the document, and without acknowledging that the documents he received were the document he specifically negotiated for and had for 8-10 months.
15. Mr. Shelton’s sanctionable behavior continued as set forth below and he continued to prevent depositions, provided subpoena responses at the last minute and produced unprepared experts. (See brief in support of motion for sanctions)
16. Instances of this behavior include, but are not limited to:
 - a. Mr. Shelton admitted to myself and Mr. Crawford that he had intentionally hidden his experts’ opinions so D.R. Horton would not designate rebuttal experts.
 - b. Mr. Shelton’s written and oral representations regarding his experts’ opinions, especially at the hearing on the motion for summary judgement and in his brief, were misrepresented to overcome Summary Judgment.
 - c. Mr. Shelton told me he was only attending depositions via Zoom, and I should do the same, and then would show up in person.
 - d. Mr. Shelton would not produce his experts’ subpoena reports prior to depositions until the day or hours before their depositions.

- e. Mr. Shelton presented experts which had been retained for years with only “preliminary opinions” despite trial and a discovery deadline within 60 days away.
- f. Mr. Shelton scheduled Dr. Hsu’s deposition with only enough time for his questions and intentionally took every minute of that time.

Dr. Hsu’s Deposition

- 17. Ben Shelton told me explicitly that he was going to take all depositions via Zoom and asked that I consider attending to save on time and costs. Instead, Mr. Shelton, without any communication or consultation with defense counsel scheduled the deposition of Dr. Hsu in person with only enough time preserved for him to complete his video deposition with no time for Defendants. The disagreement about who would go first, whether a discovery deposition was necessary, how much time was allotted all took less than five minutes. I preserved my objections on the record as I have done for 23 years.
- 18. Ultimately, the deposition proceeded, Mr. Shelton was able to ask ALL of his questions but, as planned, there was no time left for Defendants. However, by consent, all parties agreed that the deposition would be rescheduled, a discovery deposition would occur first and then the video deposition would complete. There was no delay, prejudice, motion, or other fallout from that deposition and ultimately the parties resolved it themselves as we should.

D.R. Horton’s Motion for Sanctions

- 19. As stated above, Mr. Fryar appeared at his deposition on July 19, 2024 with a “preliminary report”, seven (7) years after the accident. Mr. Fryar was retained on February 23, 2024. The discovery deadline was September 15, 2024. Mr. Shelton was producing

experts for deposition who had not completed their opinions seven years after the accident and less than one month away from the discovery deadline.

20. On June 25, 2024, we subpoenaed the file of Plaintiff expert Lindsay Moore. We received a password protected file on August 23, 2024 but could not open it until Monday morning, August 26, 2024, without assistance from Ms. Moore. Again, Plaintiff's late production.
21. When I inquired if I had Ms. Moore's entire file she replied in the affirmative. She then, quite accidentally, revealed that her report was not truthful or supported, it was twice the amount she could verify or testify to at trial, and she had realized her issue that morning and created a second "real" report that she neither produced nor revealed until questioning proceeded.

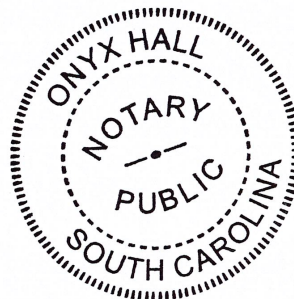
Plaintiff's Motion for Sanctions

22. I did not "hide" evidence, craft a strategy to trick Mr. Rowland, or convince Mr. Rowland to believe D.R Horton was something other than a "developer". In fact, it was Mr. Rowland, who was specifically hired to find D.R. Horton liable, who chose that description. (See Exhibit A)
23. Mr. Shelton made no attempts to consult prior to the filing of the motion or since.

 Jason M. Imhoff (SC Bar # 69355)
 Kenison, Dudley & Crawford, LLC
 325 W McBee Avenue, Suite 301
 Greenville, SC 29601

SWORN to and subscribed before me
 This the 11th day of October, 2024.

Onyx Hall
 Notary Public, State of South Carolina
 My Commission Expires: 07-26-2033



1 Q. Okay. So do you have to pull a permit
2 to do grading work on a multi-lot development?

3 A. Yes. Yes. You have to have a permit,
4 yes.

5 Q. Okay. And to pull a permit, do you have
6 to have a grading license?

7 A. That I don't know the answer to.

8 Q. Okay. Do you know if D.R. Horton has a
9 grading license?

10 A. I don't know that either.

11 Q. Okay. In this case, in your analysis of
12 this case, what is D.R. Horton? Is it an owner,
13 developer, general contractor, engineer, what are
14 they in this case?

15 A. I would say that that -- who is in what
16 role against all the tiers of this is one of the
17 most taxing questions in the whole case. We
18 know -- if you -- if you asked me who is
19 D.R. Horton, I would say they're a developer. I
20 also know just from general experience that they
21 typically would hire a GC, a builder to build
22 individual houses, and that they might have
23 multiple ones of those in any given development.
24 So I -- I can't say that they acted as the
25 general contractor. In my interpretation of it,

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER) C.A. NO.: 2021-CP-27-00069

Mark W. McGilton,

Plaintiff,

v.

1223 May River Road, LLC;
D.R. Horton, Inc.; and Lotty Trucking,
LLC f/k/a Ramos Trucking, LLC,

Defendants.

1223 May River Road, LLC,

Third-Party Plaintiff,

v.

Kenneth Scott Builders, Inc.,

Third-Party Defendant.

**DEFENDANT D.R. HORTON, INC.'S
MEMORANDUM IN SUPPORT OF
MOTION FOR SANCTIONS PER RULE
37(d), SCRCP, AGAINST PLAINTIFF**

TO: PLAINTIFF MARK W. MCGILTON AND HIS ATTORNEY, BENJAMIN T. SHELTON, ESQUIRE:

Defendant D.R. Horton, Inc. ("D.R. Horton"), by and through its undersigned counsel, hereby submits this Memorandum in Support of D.R. Horton's Motion for Sanctions Against Plaintiff, filed September 4, 2024, and requests the Court sanction and assess costs and fees against Plaintiff for discovery violations pursuant to Rule 37 of the South Carolina Rules of Civil Procedure.

BACKGROUND

The facts of this case are explained in detail in D.R. Horton's Memorandum in Opposition to Plaintiff's Motion for Rule to Show Cause, filed simultaneously with this Memo in Support. D.R. Horton directs the Court to that Memorandum for a fuller discussion of this case's procedural and factual history. However, a lengthy recitation is not necessary to understand the present Motion.

This action arises out of a motor vehicle collision that occurred more than six years ago, in March 2018. (*See* Compl. ¶ 9.) This June, Judge Bonds entered an order in this case resolving several discovery and scheduling matters and setting trial for October 21, 2024. (Order of June 13, 2024, attached hereto as **Exhibit 1**.) The Order further stipulated that discovery was to be completed by September 15, 2024 and mediation was to take place by October 15, 2024. (*Id.* at 1.)

Lindsay Moore

In compliance with Judge Bonds' Order, on June 25, 2024, D.R. Horton noticed the deposition of Lindsay Moore, a "life care planner" retained by Plaintiff to give an opinion on Plaintiff's future medical expenses, for August 26, 2024. (Moore Notice of Dep., attached hereto as **Exhibit 2**.) The same day, D.R. Horton issued a subpoena for Moore's deposition and instructing her to produce, *inter alia*, copies of her notes, the medical records she relied upon, and "any reports, plans of treatments, life care plan, future care plan and estimates, including all calculations" by August 16, 2024. (Moore Subpoena, attached hereto as **Exhibit 3**.) The notice of deposition and subpoena both state that the deposition was to start at 10 a.m. and take place at Plaintiff's counsel's office in Hilton Head. (Moore Notice of Dep. at 1; Moore Subpoena at 1.)

Despite the subpoena directing Moore to provide her files to D.R. Horton by August 16, 2024, she did not do so until August 23, 2024. Even then, the file was password protected and D.R. Horton had difficulty accessing it until the morning of the deposition. Moreover, shortly before the deposition, Plaintiff's counsel informed D.R. Horton that Moore would be attending via Zoom, not in-person at counsel's office. D.R. Horton agreed to go ahead with the Zoom deposition rather than wait an hour for Moore to arrive because the parties had a hearing scheduled that afternoon.

The obfuscation continued after the deposition began. When directly asked if she had provided "everything" in her file and "everything" she used to come up with her calculations, Moore responded that she had. (Moore Dep. Tr., attached hereto as **Exhibit 4**, 20:4–9.) However, she later admitted that she had updated the report that very morning and failed to provide it to D.R. Horton. (Moore Dep. Tr. 65:1–8.) Moreover, she admitted that the report she initially provided D.R. Horton contained amounts that she had no basis for including—and that she had removed from the "updated" report she disclosed only after being questioned about it. (*E.g.*, Moore Dep. Tr. 30:21–23, 58:24–59:4.)

Michael Fryar

The deposition of Michael Fryar evinced similar issues. D.R. Horton issued a notice and subpoena for Fryar's deposition to take place on July 19, 2024. (Fryar Notice of Dep., attached hereto as **Exhibit 5**, at 1; Fryar Subpoena, attached hereto as **Exhibit 6**, at 1.) Fryar had been retained by Plaintiff on February 23, 2024 "[t]o perform a vocational rehab assessment and determine earning capacity for [Plaintiff]." (Fryar Dep. Tr., attached hereto as **Exhibit 7**, 17:25–18:3, 18:19–21.) Despite having been retained five months before the deposition, and the deposition taking place only a month and a half before the discovery deadline, Fryar admitted that

his report was preliminary because he did not have enough information from Plaintiff's treating physicians. (Fryar Dep. Tr. 6:1–10.)

Andy Rowland

Similarly, Andy Rowland, Plaintiff's main expert against D.R. Horton, appeared at his deposition and testified that he had not developed his final opinions because he was waiting on documents. He testified that he had spoken to Plaintiff's counsel about that issue. Again, Plaintiff's expert was not prepared to give final opinions and testimony years after the accident and weeks before the discovery deadline.

LEGAL STANDARD

The Rules of Civil Procedure exist to "give the trial lawyer the means to be prepared for trial." *Downey v. Dixon*, 292 S.C. 42, 46, 362 S.E.2d 317, 319 (Ct. App. 1987). A party that fails to comply with its discovery obligations is subject to sanctions under Rule 37 of the South Carolina Rules of Civil Procedure. *See, e.g., id.* at 44 n.1, 362 S.E.2d at 318 n.1 (noting that Rule 37(b) provides for sanctions when a party violates a court order and Rule 37(d) allows for sanctions when a party fails to respond to interrogatories or appear for a deposition). "In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and degree of prejudice." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 82 716 S.E.2d 877, 885 (2011) (citation omitted).

ARGUMENT

The witnesses Plaintiff produced for depositions in this matter were unprepared to provide testimony as to Plaintiff's damages. "Producing an unprepared witness is tantamount to a failure to appear under Rule 37(d)." *Atanassova v. Gen. Motors, LLC*, 2:20-cv-01728-RMG, 2021 U.S. Dist. LEXIS 94363, at *4 (D.S.C. Mar. 12, 2021) (interpreting the analogous federal rule). Despite

this case being over six years old, Moore, Rowland and Fryar stated that they needed additional information before they could provide full opinions and testimony. In addition, Moore failed to timely provide subpoenaed documents and, most egregiously, failed to disclose the existence of a report until explicitly questioned about it by D.R. Horton. These actions have hindered D.R. Horton's ability to fully and timely prepare this case for trial. *Cf. Hilton Head Beach & Tennis Resort v. Sea Cabin Corp.*, 305 S.C. 517, 519–20 & n.2, 409 S.E.2d 434, 436 & n.2 (Ct. App. 1991) (concluding that the trial court erred by allowing a party to use a document at trial that was first disclosed during the deposition of the party's officer two weeks before trial and that the party did not discover until the last day of trial). Moreover, they have caused D.R. Horton to waste valuable time and resources preparing for and taking unnecessary depositions. In the case of Moore's deposition, this included unnecessary travel to Hilton Head from the Upstate.

Therefore, D.R. Horton seeks sanctions congruent with the blatant discovery abuse displayed by Plaintiff, as authorized and contemplated by Rule 37(d), SCRCF, and for attorney's fees, costs, and any and all other sanctions this Court finds just and proper.

KENISON, DUDLEY & CRAWFORD, LLC

s/ Jason M. Imhoff

Jason M. Imhoff (SC Bar # 69355)

John T. Crawford, Jr. (SC Bar # 69682)

325 West McBee Avenue, Suite 301

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Counsel for Defendant D.R. Horton, Inc.

October 16, 2024
Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

v.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., AND LOTTY
TRUCKING,
LLC F/K/A RAMOS TRUCKING, LLC,

Defendants.

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiffs,

v.

KENNETH SCOTT BUILDERS, LLC,
Third-Party Defendants.

IN THE COURT OF GENERAL SESSIONS
FOURTEENTH JUDICIAL CIRCUIT

CASE No(s): 2021CP2700069

ORDER

The court finds that the Defendant failed to comply with the scheduling order and has not shown good cause for such violation. The court rules:

- The Defendant is allowed to use their experts and must disclose them to the Plaintiff by Friday, June 14. The Defendant will provide a CV and a detailed outline of the experts' testimony.
- Depositions: Defendant will make the experts available to the Plaintiff at the time and place of the Plaintiff's choosing. If an agreement cannot be made, the court is to be immediately contacted.
- Discovery: All discovery will be complete by September 15, 2024.
- Mediation: The parties are to mediate the case by October 15, 2024. An insurance representative with full authority to settle the case must be present at the mediation. The Plaintiff is to pick the mediator and the date and time of mediation. The Defendant is responsible for the costs of mediation.

- If the Plaintiff is not ready for trial due to the recent delay caused by the Defendant, the court will consider granting a continuance.
- The case is set for a date certain trial on October 21, 2024, before Judge Hughston.



Jasper Common Pleas

Case Caption: Mark W. McGilton VS 1223 May River Road, Llc , defendant, et al
Case Number: 2021CP2700069
Type: Order/Form 4

So Ordered

s/ Robert Bonds, 2770

Electronically signed on 2024-06-13 11:21:40 page 3 of 3

ELECTRONICALLY FILED - 2024 Jun 13 1:48 PM - JASPER - COMMON PLEAS - CASE#2021CP2700069
ELECTRONICALLY FILED - 2024 Oct 16 9:57 PM - JASPER - COMMON PLEAS - CASE#2021CP2700069

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., AND LOTTY TRUCKING,
LLC F/K/A RAMOS TRUCKING, LLC,

Defendants.

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiffs,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2023-CP-27-00069**DEFENDANT D.R. HORTON, INC.'S
NOTICE OF DEPOSITION OF
LINDSAY MOORE****TO: LINDSAY MOORE AND COUNSEL OF RECORD FOR ALL PARTIES:**

YOU WILL PLEASE TAKE THAT, pursuant to Rule 30 of the South Carolina Rules of Civil Procedure, the undersigned attorney for Defendant D.R. Horton, Inc. will take the following person's deposition on the date and the time and place appointed below, upon oral examination before a Notary Public or some other officer authorized by law to take depositions pursuant to Rules 26 of the South Carolina Rules of Civil Procedure, at which time you are notified to appear and take such part as you may be advised and as shall be fit and proper:

<u>DEPONENT</u>	<u>DATE</u>	<u>TIME</u>	<u>PLACE</u>
Lindsay Moore	August 26, 2024	10:00 a.m.	Shelton Law Firm 1000 William Hilton Pkwy, Suite E-6 Hilton Head, SC

**Court Reporter Clark Bolen*

YOU WILL PLEASE TAKE FURTHER NOTICE that the oral examination will continue from day to day until completed and that these depositions are being taken for the purpose of discovery, for use at trial and for all other purposes as permitted under the rules of this Court and all applicable statutes and laws.

KENISON, DUDLEY & CRAWFORD, LLC

s/ Jason M. Imhoff

Jason M. Imhoff (SC Bar # 69355)

325 West McBee Avenue, Ste. 301

Greenville, South Carolina 29601

Telephone: (864) 242-4899

Facsimile: (864) 242-4844

imhoff@conlaw.com

Counsel for Defendant D.R. Horton, Inc.

June 25, 2024

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

IN THE COURT OF COMMON PLEAS
C.A. NO.: 2021-CP-27-00069

Mark W. McGilton,

Plaintiff,

v.

1223 May River Road, LLC;
D.R. Horton, Inc.; and Lotty Trucking,
LLC f/k/a Ramos Trucking, LLC,

Defendants.

1223 May River Road, LLC,

Third-Party Plaintiff,

v.

Kenneth Scott Builders, Inc.,

Third-Party Defendant.

CERTIFICATE OF SERVICE

The undersigned, Cara Smith, of the law offices of Kenison, Dudley & Crawford, LLC for the Defendant D.R. Horton, Inc., do hereby certify that I have served the below listed **DEFENDANT D.R. HORTON, INC.'S NOTICE OF DEPOSITION OF LINDSAY MOORE** upon counsel of record *via email* in this action this 25th day of June, 2024.

Benjamin T. Shelton Stephen Harrison Williams Shelton Law Firm, LLC P.O. Box 21069 Hilton Head Island, SC 29925 ben@sheltonlawsc.com harrison@sheltonlawsc.com <i>Counsel for Plaintiff</i>	Warren P. Johnson Darrell T. Johnson, Jr. Joshua R. Fester Law Office of Darrell Thomas Johnson, Jr., LLC 300 Main Street Hardeeville, SC 29927 Tdjohnson1@johnsonslawoffice.com wpj@johnsonslawoffice.com jfester@johnsonslawoffice.com <i>Counsel for Defendant Lotty Trucking, LLC f/k/a Ramos Trucking, LLC</i>
Kevin W. Mims W. Chase McNair Luzuriaga Mims, LLP 50 Immigration Street, Suite 200	

Charleston, SC 29403 kmims@lmlawllp.com cmcnair@lmlawllp.com <i>Counsel for Third-Party Defendant Kenneth Scott Builders, LLC</i>	

KENISON, DUDLEY & CRAWFORD, LLC

s/Stephanie S. Simpson

Stephanie S. Simpson

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., AND LOTTY TRUCKING,
LLC F/K/A RAMOS TRUCKING, LLC,

Defendants.

SUBPOENA IN A CIVIL CASE

CIVIL ACTION NO. 2023-CP-27-00069

PENDING IN JASPER COUNTY

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiffs,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendants.

TO: LINDSAY MOORE
C/O BENJAMIN T. SHELTON, ESQ.
ben@sheltonlawsc.com

☐ YOU ARE COMMANDED to appear in the above named court at the place, date and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME:

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
SHELTON LAW FIRM 1000 William Hilton Pkwy, Ste. E6 Hilton Head Island, SC 29928	August 26, 2024, beginning at 10:00 a.m.

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):

A complete copy of your medical records file for Mark McGilton, DOB: 1/11/1966, SSN: xxx-xx-0937, for any and all treatment rendered, to include, but not limited to, patient intake forms, patient questionnaires, history/physical, insurance information provided upon intake, new patient forms, x-rays, films, images, consultation notes, notes of any kind, including electronic, correspondence of any kind, including electronic, reports, exams, treatment, treatment plans, therapy notes, diagnostic reports, diagnostic test results, problem list, medication list/allergies, immunizations, x-rays, lab reports, doctors' and nurses' notes, prescriptions, discharge summary, Op reports, consultations, emergency records, patient call logs, behavioral and/or mental health records, any records regarding treatment for alcohol and drug abuse, billing invoices, patient account payables and receivables, accounting statements, insurance claims, insurance payments, insurance denials, billing statements for ANY AND ALL dates of treatment, any reports, plans of treatments, life care plan, future care plan and estimates, including all calculations.

Please mail to:

Jason M. Imhoff, Esquire
Kenison Dudley & Crawford, LLC
325 West McBee Avenue, Ste. 301
Greenville, SC 29601

No later than:

August 16, 2024

Please submit via email:

simpson@conlaw.com

You may produce via email: imhoff@conlaw.com
simpson@conlaw.com

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION.

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Jason M. Imhoff, Esquire, KENISON, DUDLEY & CRAWFORD, LLC., 325 West McBee Ave., Ste. 301, Greenville, SC 29601 (864) 242-4899

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1) AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Jason M. Imhoff

Attorney for Defendant D.R. Horton, Inc.

June 25, 2024

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)

DATE: _____, SCCA FORM 254 (7/93)

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on Reverse)

cc: All Counsel of Record

ELECTRONICALLY FILED - 2024 Oct 16 9:57 PM
CLERK OF COURT - COMMON PLEAS - CASE#2021CP2700069

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 JASPER COUNTY

4 DEPOSITION OF LINDSAY MOORE
5 VOLUME I
6 AUGUST 26, 2024

7 MARK W. MCGILTON,

8 Plaintiff,

9 vs. CASE NO. 2023-CP-27-00069

10 1223 MAY RIVER ROAD, LLC, D.R. HORTON, INC., AND
11 LOTTY TRUCKING, LLC f/k/a RAMOS TRUCKING, LLC,

12 Defendants.

13 _____
14 1223 MAY RIVER ROAD, LLC,

15 Third-Party Plaintiff,

16 vs.

17 KENNETH SCOTT BUILDERS, LLC,
18

19 Third-Party Defendant.
20 _____
21
22
23
24
25

1 TIME: 10:00 AM

2
3 LOCATION: SHELTON LAW FIRM
4 HILTON HEAD ISLAND,
5 SOUTH CAROLINA
6
7

8 REPORTED BY: MACKENZIE ALLEN
9 CLARK BOLEN
10 CHARLESTON, SC 29407
11 843-762-6294
12 WWW.CLARKBOLEN.COM
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25

A P P E A R A N C E S

ON BEHALF OF PLAINTIFF:

SHELTON LAW FIRM
BY: BENJAMIN SHELTON
1000 William Hilton Parkway
Suite E-6
Hilton Head Island, SC 29926

ON BEHALF OF D.R. HORTON, INC.:

KENISON, DUDLEY & CRAWFORD
BY: JASON IMHOFF
325 West McBee Avenue
Suite 301
Greenville, SC 29601

ON BEHALF OF KENNETH SCOTT BUILDERS, LLC:

LUZURIAGA MIMS
BY: RYAN CONNER
50 Immigration Street
Suite 200
Charleston, SC 29403

I N D E X

EXAMINATION

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EXHIBITS

EXHIBIT	DESCRIPTION	PAGE
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Exhibit No. 2	Retained by Counsel	23

1 LINDSAY MOORE,
2 having been first duly sworn, was examined and
3 testified as follows:

4 EXAMINATION

5 BY MR. IMHOFF:

6 Q. Good morning, Ms. Moore. My name is
7 Jason Imhoff. I represent D.R. Horton in this
8 case filed by Mr. McGilton. Will you state your
9 full name for us, please.

10 A. Sure. Lindsay Woods Moore.

11 Q. What is your profession, Ms. Moore?

12 A. I'm a physician assistant and a
13 certified life care planner.

14 Q. Have you ever had your deposition taken
15 before?

16 A. Yes, I have.

17 Q. Is it a lot? A lot of times, many
18 times?

19 A. Yes, many times.

20 Q. If you don't mind, then I'm just going
21 to be brief. We're doing this by Zoom, as you
22 know, although I think we're all right by each
23 other because I'm down here in Hilton Head too.
24 I'm in a hotel room. I don't know about the
25 Internet. So if I cut out, I apologize. Just

1 tell me you didn't hear my question or repeat my
2 question or whatever.

3 Obviously if you need a break, let us
4 know if you need a break. If you have any
5 questions, please ask me. I'll assume that you
6 understood my question and you're answering that
7 unless you tell me, "Please repeat that, explain
8 it, rephrase it," something like that. Is that
9 fair?

10 A. That's fair. Sounds good.

11 Q. Having done this before, do you have any
12 questions before we get started?

13 A. I don't. I'm good to go.

14 Q. Let's get through your background real
15 quick. Where do you live?

16 A. I live in Mount Pleasant, South
17 Carolina.

18 Q. How long have you lived there?

19 A. I have lived in the Charleston area
20 since 2006.

21 Q. And you told me a minute ago that you're
22 a physician assistant and certified life care
23 planner. Tell us about your education, please.
24 Let's go backwards from the last thing you did.

25 A. So you want to go from the most recent

1 education backwards?

2 Q. Yes.

3 A. I am a certified life care planner. So
4 I attended Capital University Law School for a
5 certificate program to complete my training hours
6 to then sit for the exam to become a certified
7 life care planner.

8 Q. Let me stop you there. So you went to
9 Capital University Law School. Where is that?
10 I'm sorry. I don't know.

11 A. Columbus, Ohio.

12 Q. When did you do that?

13 A. 2013 to '14.

14 Q. And they gave you, you said, an exam and
15 then a certification; is that right?

16 A. Well, that's a certificate program,
17 which I completed, and it allowed me to sit for
18 the national exam.

19 Q. How long is the certificate program,
20 either via hours or weeks or days or however
21 you --

22 A. It's 136 graduate hours of training.

23 Q. What does that mean by graduate hours?

24 A. I don't know. It's offered through a
25 graduate program. I'm not -- I mean, I would

1 assume that it's likely because in order to be
2 eligible for that program, you have to have a
3 professional degree already. So I mean, I
4 already have a master's degree prior to that, but
5 I think you have to at least have had a
6 bachelor's in your field. So that's probably the
7 reason why that's labeled in that manner. But I
8 couldn't tell you for sure.

9 Q. Let me ask it a little different way.
10 That 136 hours, did you actually sit in Columbus,
11 Ohio, for that 136 hours before you sat for the
12 exam?

13 A. So it was a combination of -- majority
14 of it was kind of virtual with like -- you were
15 in class for that period of time, yes, but it was
16 more of a -- sort of like -- well, it was before
17 Zoom was a thing, but -- or as big. So phone
18 conferences for a couple of hours a couple of
19 nights per week. So you did it through that
20 total number. And then at the end of the
21 program, there was like an intense weekend where
22 you came up to -- at the culmination of the
23 program for several hours at the end.

24 Q. Before the exam?

25 A. Yes.

1 Q. And did you pass that exam on your first
2 try?

3 A. Yes.

4 Q. Did you get that certificate?

5 A. Yes. I mean, there wasn't a -- there's
6 not a -- the exam is separate than the program.
7 The program is just the educational training, and
8 you conclude with a -- with like a certificate of
9 completion. And then the national exam, you
10 mean -- if you want, you can sit for it. If you
11 don't, you don't have to. Of course, most people
12 would. That's one of the reasons of doing the
13 educational track.

14 And then yes, I did sit for the exam and
15 passed on my first time. And I have continued to
16 maintain my certification since that time.

17 Q. What year was that?

18 A. Completed it, I guess, in 2014. And
19 then you renew every four -- excuse me. Every
20 five years.

21 Q. Is that required by the State of South
22 Carolina?

23 A. There were no state requirements
24 specifically for life care planners. This is a
25 national certification. So it's not like a --

1 it's unlike my medical field where it's licensed
2 and overseen by the State. That's not how --
3 that doesn't occur for life care planning
4 specifically.

5 Q. Do you happen to have a CV? That might
6 be faster for us to run through it.

7 A. Yes. I most certainly do.

8 Q. I'm looking in your file that you sent
9 us. Would it be in there?

10 A. If it was requested, it would have been
11 in there. But I don't believe it's in there. I
12 don't think that it was specifically stated. But
13 I'd be happy to add it to -- put it on this link
14 if you would like, like in the chat. Would that
15 be helpful?

16 Q. Yes, please. Sure, yeah. That'd be
17 great. Or e-mail it to Ben or whatever.

18 A. I'll put it in here, and then
19 afterwards, I can do that. It's just easier
20 since I'm in this -- at the moment, I'm in the
21 Zoom.

22 It should be up there for you.

23 Q. Great. Thank you.

24 I can't open it right now. I'll try
25 either at a break or whatever. So I guess we're

1 going to have to just keep talking through it.

2 What was the --

3 A. I'm sorry to interrupt you, but are you
4 -- do you have the link open, because I'll just
5 drop it in there too.

6 Q. So the link that you sent us, I can't
7 access that either. My paralegal has to transfer
8 it over to our software, which is Box, and then
9 send me a link. But yes, please put it in that
10 link, and then maybe she'll send it to me.

11 A. The link has it now as well. Okay?

12 Q. Okay. Thank you. What other education
13 have you received?

14 A. I have a master's of science in
15 physician assistant studies from the Medical
16 University of South Carolina. And I completed
17 that degree in 2008.

18 Q. Did you say the Medical University of
19 South Carolina?

20 A. That's right.

21 Q. MUSC?

22 A. Yeah.

23 Q. MUSC does physician assistant degrees
24 also?

25 A. Yes.

1 Q. I'm sorry. I haven't done one of these
2 in a long, long time.

3 A. They're probably one of the first
4 programs in the state of South Carolina. They've
5 been around probably the longest.

6 Q. When did you receive your degree?

7 A. I completed that in 2008.

8 Q. 2008, you said that. I'm sorry. I
9 actually wrote it down too. Where did you go to
10 undergrad?

11 A. University of Georgia.

12 Q. When did you graduate?

13 A. I graduated in 2005 with a bachelor's of
14 science in education in exercise and sports
15 science.

16 Q. Any other education that you believe is
17 relevant or pertinent to your opinions or your
18 life care plan?

19 A. Yeah, certainly. There's a couple other
20 kind of certifications that I've maintained or I
21 have received that I think are relevant. So I'd
22 say -- I'm a certified billing and coding
23 specialist. I'm also a certified brain injury
24 specialist, which I guess on this particular case
25 is not as pertinent.

1 Q. Are those on your CV?

2 A. Yes. Certified brain injury -- yes,
3 they're all on my CV.

4 Q. Great. Anything else that you think is
5 relevant or important to your opinions and
6 testimony today?

7 A. I mean, I think that covers my
8 educational background.

9 Q. Let's talk about your employment. Where
10 are you presently employed?

11 A. I am the owner of Moore Medical
12 Consulting where I'm a life care planner, and I
13 do various consulting reports. I'm also a
14 physician assistant in the emergency room. And
15 that is through a company called TeamHealth. I
16 work at all of the Trident Health facilities.
17 It's the same position I've held since I came out
18 of school in 2008. Just my employer has kind of
19 changed as contracts changed and things like
20 that. But I've been an emergency room physician
21 assistant since I graduated PA school in 2008.
22 So I still work clinically in that setting as
23 well.

24 Q. What emergency rooms do you work at in
25 Charleston?

1 A. So I work through all of Trident Health
2 in the Charleston area. So Trident Medical
3 Center is the main one. Summerville Medical
4 Center is the other main hospital. And then we
5 have four freestandings, but we're really only
6 working in like two or three of them even though
7 I'm credentialed in a couple of them. So the
8 freestandings that we do work in the most would
9 be Centre Pointe and Brighton Park. We also have
10 facilities in Moncks Corner and James Island.

11 Q. Do you work full-time as an emergency
12 room physician assistant?

13 A. No. I work part-time at this point as a
14 PA.

15 Q. How long have you been part-time?

16 A. I mean, it's been -- I'd have to look
17 back. It's been a very gradual kind of
18 transition. But I would say since I had my
19 children. So probably seven years. But the
20 amount of hours has kind of fluctuated and
21 changed. But probably as -- part-time in general
22 has been since then.

23 Q. Did I ask you -- when did you start
24 Moore Medical Consulting?

25 A. I started it at the same time that I

1 started the educational program at Capital
2 University. So 2013.

3 Q. 2013?

4 A. I didn't start doing casework until I
5 completed the full certification program. But I
6 set up my business in order to kind of start the
7 educational stuff underneath the business.

8 Q. Is the idea to transition over to
9 working full-time for yourself and away from
10 emergency room work? Is that sort of the idea?

11 A. No. Actually, that wasn't. It kind of
12 happened by just happenstance. I mean, kind of
13 getting more into my personal life, which is --
14 I'm certainly open about, so I don't mind. But I
15 had numerous miscarriages and could not hold a
16 pregnancy. And a lot of my -- kind of the advice
17 given to me was I needed to kind of -- to get out
18 of the ER a little bit where I was constantly --
19 I mean, I had four jobs, I think, at that time.

20 I had adrenaline going all the time, and
21 my body wasn't able to sustain a pregnancy. I
22 wanted a family. So to be quite honest, that's
23 where it all started. I went part-time in the ER
24 before I really ever started this to try to have
25 a family. Ultimately, as you hear, I've kind of

1 been successful in that. But then it
2 transitioned and then kind of grew organically.

3 Q. Are you the sole member of your
4 consulting company?

5 A. Yes, I am.

6 Q. And how much -- I mean, does it depend
7 on who calls? About how much work do you do a
8 year? How many hours a week or hours a year do
9 you deal with Moore Medical Consulting?

10 A. I mean, I would say that I am -- I mean,
11 I'm full-time in the consultant role at this
12 point. I still work a few shifts in the ER. And
13 so -- but yeah, the combination of those, I'm
14 most definitely full-time.

15 Q. How do you bill through Moore? It
16 separates? How do you do it?

17 A. Can you clarify? What do you mean by
18 that?

19 Q. Sure. Do you bill hourly? And if you
20 bill hourly, do you have different hourly rates
21 depending on what you're doing, like review,
22 investigation, deposition, trial, that type of
23 stuff, or do you just have a set fee? How do you
24 bill your clients?

25 A. Yeah, Sure. No problem. So I bill an

1 hourly rate, 275, for consulting, and then
2 deposition testimony or trial is 350 an hour.
3 This case might have been slightly lower just
4 because it's been going on for so many years. So
5 whatever was signed in the retainer agreement
6 would be the rates I charged. So this one might
7 be a little bit lower.

8 Q. Do you know how much you have billed on
9 Mr. McGilton's case so far?

10 A. I couldn't tell you off the top of my
11 head, but all of the invoices are in the link. I
12 did include all of that at the request of the
13 subpoena. So we could look at it, but I couldn't
14 tell you off -- I didn't add it all up, to be
15 honest.

16 Q. We'll come back to that. I've got some
17 other questions real quick. Do you typically
18 represent the injured or do you work for the
19 injured, the plaintiff's attorney?

20 A. I mean, a majority of my work is
21 probably on the plaintiff's side. I absolutely
22 do work for both plaintiff and defense. I
23 actually had a trial starting today on the
24 defense side where I have prepared a report. But
25 it's my opinion that my -- the volume of work

1 that I do reflects kind of what the need is in
2 the market for the type of work that I do.

3 So typically an injured person needs to
4 understand the cost of care more often than a
5 defendant needs to understand the methodology of
6 someone else having prepared a report. But
7 nonetheless, I do work for both sides.

8 Q. Have you ever been convicted of a crime?

9 A. I have not.

10 Q. Have you ever been involved in a lawsuit
11 either as a plaintiff or a defendant?

12 A. I have not.

13 Q. Have you ever had any action taken
14 against any of your licenses, a malpractice claim
15 or complaint?

16 A. No, not at all.

17 Q. I'm going to try to show you my screen.
18 Okay?

19 A. Okay.

20 Q. This may not be how your file is set up.
21 Okay? But as I understand it, this was just
22 transferred over to our software, Box.

23 A. Okay.

24 Q. I'm just going to go through these real
25 quick. And if you could confirm this is your

1 entire file. Okay? So I have McGilton's medical
2 records here in one folder, and then I'm going to
3 open it. Okay?

4 A. Okay.

5 Q. Your life care plan. This is our
6 subpoena, something you copied. There is some
7 client interview guides.

8 A. Yes. One second. I'm pulling up the
9 file so I have it right open beside yours if you
10 don't mind just to make sure you're hitting
11 everything. But I'm with you. Go ahead.

12 Q. Okay. So I have this McGilton client
13 interview guide.

14 A. Uh-huh.

15 Q. And then next to that, I have Doctor --
16 I don't know -- how do you say that?

17 A. Hsu.

18 Q. Hsu. That looks like an invoice. We're
19 going to come back to that. There's some
20 recommendations signed by him. There's another
21 invoice. Recommendations by Dr. Mitchell.

22 A. Right.

23 Q. Resource list. Retainer agreement. I'm
24 not sure what this e-mail -- or e-mails --
25 invoices. Medical release form by Mr. McGilton.

1 Retainer agreement. Patient disclosure. Notice
2 of Deposition and subpoena.

3 A. Yes.

4 Q. That's what we have in our file. Is
5 that everything you have in your file?

6 A. Yes. Yes.

7 Q. And is that everything you used to come
8 up with your life care plan for Mr. McGilton?

9 A. Yes.

10 Q. How were you provided Mr. McGilton's
11 medical records?

12 A. I'm assuming via a link. But I mean, I
13 don't -- I can't tell you. I mean, it would have
14 had to have been from a link. Well, I guess
15 sometimes I have received them on a disk. I
16 don't know how to answer that question. It's
17 been years ago. I just know that I was provided
18 the records.

19 Q. Yeah, that was a bad question. Let me
20 ask a different one. Did you go to the medical
21 providers and get them yourself, or did you get
22 them from Mr. McGilton's attorney?

23 A. I did not obtain them myself. They
24 would have been provided to me from the attorney.

25 Q. I have put on my screen hopefully a

1 medical spreadsheet of Mark McGilton, which looks
2 like it's all of his medical bills from 2018 on.
3 Is this something that you prepared or something
4 that was provided to you?

5 A. No. I most definitely did not write
6 that up myself. That's not of mine. It would
7 have been provided to me.

8 Q. Okay.

9 MR. IMHOFF: Madam Court Reporter,
10 this is going to be the main exhibit, Abridged
11 Life Care Plan, Mark McGilton, dated completed,
12 February 22, 2024. That will be Exhibit
13 Number 1.

14 (Exhibit No. 1 was marked for
15 identification.)

16 Q. And we'll come back to that. McGilton
17 Client Interview Guide, can you tell me what that
18 is?

19 A. Sure. As part of the process when I'm
20 preparing a report, I interview the client and I
21 ask some detailed questions. As you can see,
22 this is like a 20-page in-depth document about
23 the injury, how it's affected them, learning more
24 about their injury and their treatment, their
25 medical providers, medications, things like that.

1 And then if I have updated calls with them, I'll
2 add that in as well.

3 Q. Is this a form that you've created, or
4 is this an industry-type form?

5 A. I created it.

6 Q. It says that you did it by Zoom; is that
7 right?

8 A. Yes.

9 Q. It has a start time of 10:00 but not an
10 end time. Do you have any idea how long you
11 talked to Mr. McGilton?

12 A. I mean, I can't remember. That would be
13 representing the very first interview I did with
14 him. I don't have the length of time. I didn't
15 document when it ended. But they typically take
16 two hours on average to complete. As you see,
17 it's 20 pages of questioning. But I don't have
18 that offhand.

19 Q. Is the best way to determine how long
20 you spent with Mr. McGilton either that day or
21 any subsequent day through your billing?

22 A. Yes. Sometimes they're a rough idea
23 [sic]. But it's lumped together from any time I
24 like had conversations with him. So most of the
25 time, they would -- I would have some notes

1 updated here. But if I asked some simple
2 question like, "Did you follow up with Dr. Hsu?
3 Did you get an imaging study obtained," I might
4 not have like specific notes on it. But that
5 time would be built into that category in my
6 billing as well.

7 Q. But if I looked on 8/10 -- well, it has
8 two dates. It has 8/10/21 and 8/29/23. Do you
9 see that?

10 A. Yes.

11 Q. Okay.

12 MR. IMHOFF: And, Madam Court
13 Reporter, we'll make this Exhibit Number 2, Moore
14 Medical Consulting, LLC, Interview Guide, Mark
15 McGilton, Dates of 8/10/21 and 8/29/23, please.

16 (Exhibit No. 2 was marked for
17 identification.)

18 Q. So looking at this, why does it have two
19 different dates on it?

20 A. Well, the second date is an updated
21 interview where I was taking more extensive notes
22 as well. It doesn't mean that there weren't
23 other calls in between that time, but that would
24 have been the one that I -- the date of August
25 29, 2023, where I had some more extensive notes.

1 And there may be dates later down in the document
2 as well of follow-up conversations.

3 But yes. I mean, I guess to answer your
4 question previously, there would very likely be a
5 total amount of time in my billing entry for that
6 date for how many hours I worked on this case.

7 Q. And then a second on 8/29/23, you have a
8 different entry for talking to him in working on
9 this case?

10 A. Yes, I would.

11 Q. Have you ever met Mr. McGilton in
12 person?

13 A. I've seen him on video. I don't believe
14 that I have met him in person, no.

15 Q. Do you check his answers against any
16 third party or medical documents to see if he's
17 telling you what he's telling other doctors or
18 reporting what doctors said?

19 A. Well, as part of the process of
20 evaluating a case, I mean, most certainly I am
21 looking at the medical records as well as the
22 interview and the information that he provides,
23 and I would note if there's any significant
24 differences or red flags or things like that.
25 But I mean -- so yes.

1 But at the same time, I guess I'm not
2 kind of -- I mean, I am taking it and analyzing
3 the compilation of all of the data from the
4 interview guide to the medical records to
5 conversations I had with the providers. Yes.

6 Q. I do have another question. So do you
7 just update this same interview guide as you get
8 more information, or are there potentially
9 multiple of these?

10 A. There are not multiple of the documents.
11 I do update them on that same sheet if I'm kind
12 of going through and asking more thorough
13 questions. I will be transparent. I've not
14 always been the absolute best of writing the
15 exact date and time if I just have some quick
16 conversation with him if I'm asking a particular
17 thing. Like sometimes -- like right before --
18 you noticed in that report I'm asking about the
19 medication or to confirm that it has not changed
20 or that the milligrams are the same or something
21 like that.

22 I obtain the information I need, process
23 the information. I can't say that I always have
24 come and written that conversation into this
25 interview guide. But certainly the larger

1 conversations that are more extensive are noted
2 here. And no, I don't have any additional notes
3 outside of what you see written here.

4 Q. And I assume from this invoice you
5 talked to Mr. McGilton's physicians; is that
6 right?

7 A. Yes.

8 Q. What are those telephone conversations
9 about for a life care planner?

10 A. Those conversations are about their
11 medical treatment of the individual and what they
12 recommend or believe is reasonably likely to
13 occur in the future.

14 Q. And you charge \$350 an hour for that it
15 looks like?

16 A. No. That would be the doctor charging
17 me for his time.

18 Q. Oh, okay. Sorry about that. Wow. All
19 right.

20 This document, it looks like it's a fax
21 from 2023 with your firm name on it. It says
22 returned. Tell us what this is, please. I
23 understand you've labeled it in your file MD
24 Recommendations?

25 A. Yes. So if you'll scroll down to that

1 second page, this is essentially -- this is a
2 summary of the conversation that I had with
3 Dr. Hsu. And it's confirming this is what he
4 recommended and stated and his signature
5 confirming that.

6 Q. And so in this -- and how do you say
7 Dr. Joe's last name, if you know?

8 A. I believe it's Hsu.

9 Q. Hsu?

10 A. That's what I believe, yes.

11 Q. That's what I'm going to say. He'll
12 correct me when I take his deposition if it's
13 wrong. So Dr. Hsu, it looks like he recommends
14 two things here: a CT scan of his lower
15 extremity, et cetera, et cetera, and hardware
16 removal in his femur; is that right?

17 A. Yes.

18 Q. And then do you take those
19 recommendations or likely future scenarios and
20 then put them into your life care plan? Is that
21 the idea?

22 A. Yes. That's true.

23 Q. And you do that with each one of his
24 medical providers?

25 A. I do.

1 Q. So I think we were just talking about --
2 here is another one of your forms and
3 doctor recommendations. But this one is from
4 Dr. Paul Mitchell in 2021; is that right?

5 A. Yes, it is.

6 Q. Can you please tell us what this -- and
7 I'll open it and make it bigger if you'd like me
8 to -- but this resource list is? What does
9 that --

10 A. This is the support that shows where
11 each of the cost for the items that I have listed
12 in this report are derived.

13 Q. I'm going to go through these. So the
14 first one in bold is called Projected
15 Evaluations. What does projected evaluations
16 generally mean?

17 A. That would include like whenever someone
18 needs a consult or an evaluation. It might be a
19 consult by a different type of specialist, like a
20 neurologist or something like that if that's been
21 recommended. And then as you see here, this one
22 is a physical therapy evaluation. So prior to
23 starting any therapy, whether it's physical
24 therapy, occupational therapy, it's considered an
25 evaluation.

1 The things that go in this category
2 would be divided that way based on how medical
3 billing occurs. So in other words, they -- these
4 type of services incur a separate billing code
5 for the evaluation compared to ongoing visits or
6 subsequent visits. And that's why it's broken
7 out separately.

8 Q. Under this projected evaluation, you
9 have physical therapy evaluation, a procedure
10 code of life, how many times, and then some cost
11 information resources. Let me make sure that I
12 understand. You are going to testify that you
13 believe he will need to have several physical
14 therapy evaluations, five to ten over his
15 lifetime; is that right?

16 A. So yes, that is how this is set up. But
17 for clarification, I do need to make some changes
18 on this particular report. Originally I had some
19 of these services in, but I don't have
20 confirmation from the physician on some of those
21 items and I would clarify that. So I would not
22 put them in a final report without that. So at
23 this time, physical therapy evaluation should be
24 to be determined, and I would update that.

25 Q. And that's what my question was going to

1 be, is where did this recommendation come from.
2 And you're saying you don't have that one yet; is
3 that right?

4 A. That's -- that's right. I believe
5 whenever I was costing this, these would be kind
6 of things that he was involved in or would likely
7 be part of treatment that would be reasonable and
8 necessary for the types of injuries he sustained.
9 So I went ahead and costed those out so I'd have
10 them prepared whenever I had the doctor
11 conversation. And then I need to make sure that
12 whatever the doctor is recommending is what is
13 included in the final report.

14 And so that's kind of how it would be on
15 the final report, is whatever the physician
16 recommends. But I had preemptively go [sic]
17 ahead and costed so I would save myself time.
18 And in this particular item, it should be to be
19 determined until that is confirmed by the
20 physician. So I would update my report on that.

21 Q. Are you aware of any physical therapist
22 or physician recommending this at this time?

23 A. I don't have that at this time. I
24 certainly think it's a reasonable modality that
25 he would require. And transparently, I had a

1 little difficulty here in that I spoke with
2 Dr. Hsu but only briefly. I did not get to
3 elaborate on all of the typical categories of
4 care in that initial conversation that I would
5 have liked to.

6 And he -- so then we scheduled -- we
7 were trying to schedule a follow-up conversation
8 with Dr. Hsu, which I was not successful in
9 getting the second follow-up conversation. So I
10 had to rely on information I had from the first
11 one, which was helpful but did not kind of
12 elaborate on some of the categories of care here.
13 So they are still open until he makes an opinion
14 on it. And I would update my report based on
15 that.

16 Q. The cost information resources,
17 2023 PMIC medical fee, GAF. And it's got some --
18 probably a reference number and cost. What is
19 the 2023 PMIC medical fee? What is that?

20 A. So I use a consistent set of resources
21 when I'm costing CPT codes. So what happens is I
22 determine the appropriate code for that item.
23 And then once I do that, I use databases such as
24 these. So these are three separate databases
25 that have research that compiles hundreds and

1 thousands of costs for that particular code or
2 item in order to provide like the cost for that
3 item.

4 Now, the cost that they provide is a
5 national cost. And then what you see, GAF,
6 that's a geographic adjustment factor. So
7 basically it's based on where the individual
8 lives. You multiply the national number by the
9 GAF, and that gives you a local or regional cost.
10 And that's what you see listed.

11 Q. I assume those are standard reference
12 sources for your type of work and also approved
13 for your type of work; is that right?

14 A. Yes. Both of those statements are true.
15 These are generally accepted resources to use in
16 the life care planning community and by other
17 experts in my field, absolutely. I have reviewed
18 them. I believe they're valid and accurate and
19 that I can rely upon them, yes.

20 Q. Do you work -- or maybe it's these folks
21 that do it, these resources. Do they average
22 costs? Do they find a walk-in cost? Is it an
23 insurance cost, a Medicaid cost? Do you know?

24 A. Yeah. I mean, each resource is slightly
25 different. But for the majority of them, it's a

1 combination of charged information, of billing
2 data, of information kind of obtained from --
3 like EOBs and things like that. But it's a
4 compilation of hundreds and thousands of data
5 points regarding specific codes and those costs.

6 Q. I'm going to get off on a little bit of
7 a tangent just for a minute. Okay?

8 A. Okay.

9 Q. And just sort of see what you think.
10 It's been a while since I've done personal injury
11 stuff. But when I was, there were all kinds of
12 costs that hospitals would charge, and it would
13 be dependent on the patient's status, insurance
14 status, Medicaid status, Medicare, whatever. And
15 I know there's two hospitals in the upstate. I
16 don't know if they're still doing it. But they
17 would mark it up by like 1,000 percent or more if
18 a person was uninsured where if you're Medicaid,
19 Medicaid is going to pay what Medicaid is going
20 to pay.

21 Do you know if these resources -- or if
22 you are working through those issues about what
23 the cost is, dependent upon the person's
24 insurance status?

25 MR. SHELTON: Objection to form.

1 Answer the question.

2 A. Sure. So according to the methodology
3 of life care planners, we utilize charged rates;
4 however, I will tell you that each of these
5 resources are a combination of all the things
6 that you just stated: Medicare, Medicaid,
7 negotiated rates, charged rates. They are not
8 solely charged rates only to imply that they
9 might be, as you were trying to say, multiple
10 times higher than what's actually the market
11 value of that service.

12 It is a compilation of all of that data.
13 And actually, majority is probably more paid
14 rates involved in that data than there are
15 charged rates. But it is -- it's all-inclusive.

16 Q. What is your role as a life care
17 planner?

18 A. My role is to work with individuals who
19 have been injured, had a catastrophic injury, or
20 maybe in some cases have chronic medical
21 conditions to understand how those specific
22 injuries impact their life, how it's made -- has
23 changed their quality of life or their ability to
24 interact in their environment and to work with
25 their treatment team to understand what medical

1 needs they have in the future.

2 And ultimately, my goal is to cost those
3 medical needs and educate the parties involved on
4 what items are necessary and what the costs of
5 those medical treatments or future treatment is
6 likely to be.

7 Q. So you're trying to put together a
8 future cost of medical bills for these folks. Is
9 that a --

10 A. Essentially.

11 Q. I mean, I don't want to take off from
12 what you said. But for my own information --
13 okay. Let's do this. Which of these projected
14 evaluations are to be determined, if you don't
15 mind?

16 A. Yeah, not a problem. The physical
17 therapy evaluation is the only one under the
18 evaluation category that is.

19 Q. The second one is therapeutic
20 modalities, physical therapy visits. Is this
21 also to be determined?

22 A. Yes. Yes, I would say so.

23 Q. And that's -- you need to talk to
24 Dr. Hsu again?

25 A. Yes. That would be -- yes. That would

1 be helpful for him to outline if he believes that
2 intermittent therapy is reasonable. I mean, I
3 would certainly just note based on my education
4 and training that I absolutely think this reason
5 is -- excuse me -- this item is reasonable. But
6 my opinion will be based on Dr. Hsu's or
7 Dr. Mitchell's final comments regarding that on
8 this particular case or on any case.

9 Q. So are all of your projected medical
10 care based on either Dr. Hsu or Dr. Mitchell?

11 A. Yes. When we're ready to testify at
12 trial in this case, absolutely. Everything is
13 going to be supported from the physician if it's
14 in my report. And then I am, again, applying the
15 appropriate CPT code and the total cost and using
16 my education and experience to make sure we're
17 kind of asking the appropriate categories of care
18 and treatment to consider what a patient may need
19 over their lifetime.

20 Q. And so I know that Doctor -- we've
21 already seen Dr. Mitchell's and Dr. Hsu's
22 recommendations that they signed.

23 A. Yes.

24 Q. And so my question is, the first two
25 were put in here by you without them recommending

1 it based on your experience and education. Are
2 there any more that you put in that they did not
3 put in their reports or tell you to put in?

4 A. Yes, there are.

5 Q. So we've got the first two. Let's go
6 under diagnostic testing. Any in there that are
7 to be determined?

8 A. Yes. The x-ray imaging for the hip and
9 right ankle, I have not, again, had -- been able
10 to reach Dr. Hsu in a follow-up conversation to
11 elaborate on those needs. So right now, they
12 would be to be determined as well.

13 Q. So that's the first two there. And is
14 the CT of lower extremity and urine drug screen
15 recommended by one of these physicians?

16 A. Yes. The CT of the lower extremity has
17 been recommended by Dr. Hsu if he continues to
18 have persistent pain and needs -- wants to
19 further address it in his left femur area or
20 thigh. And the urine drug screen is supported by
21 Dr. Mitchell six times per year.

22 Q. Gotcha. So that one -- the fourth one
23 has Paul Mitchell pain management as your
24 reference. The third one, the CT of the lower
25 extremity, does not. Would you typically put the

1 medical provider's information in that column?

2 A. I mean, if I have a medical record or
3 billing information where a person is currently
4 receiving care or treatment and a billing
5 document that I can accurately interpret, then I
6 would certainly utilize that. So that's why you
7 see the first resource would be his own costing.
8 And then the third -- I use three resources for
9 every item, and I use a consistent method of how
10 I -- the order of those. And so that's why you
11 see the third resource dropped off, because I
12 utilized his own billing for one of the items.

13 Q. I know, but I'm talking about CT of
14 lower extremity. Where did that come from?

15 A. I mean, it's similar to all the other
16 items. I mean, it has an appropriate CPT code.
17 And then I researched that within the resources I
18 have available to produce a range of the cost for
19 that item.

20 Q. Let me clarify my question. So has a
21 physician recommended this in their signed
22 recommendation report since that you put it on
23 here and it's not to be determined?

24 A. I mean, Dr. Hsu has recommended it, and
25 he said -- just to make sure we're kind of very

1 clear on exactly how he stated it -- that he
2 would need a CT of his lower extremity for
3 further characterization if he continues to have
4 thigh pain.

5 Q. Does he continue to have thigh pain?

6 A. Yes. He has thigh pain. But at this
7 point, the thigh pain has not risen to the level
8 that he is electing to have further imaging
9 studies at this time.

10 Q. The next one is pain management office
11 visits. And you say that comes from Dr. Paul
12 Mitchell?

13 A. That's right.

14 Q. The next, orthopedic surgeon visits, 10
15 to 15 over a lifetime. And I don't see a
16 reference. Where did this come from?

17 A. Yes. Again, that would be something I
18 would like for further clarification on the
19 frequency of that item from Dr. Hsu.

20 Q. The next one is medications.

21 A. Yes.

22 Q. And help me, how long is this for?

23 A. I mean, that's indefinitely.

24 Q. Oxycodone, 10 milligrams for the rest of
25 his life?

1 A. Yes.

2 Q. Do you prescribe oxycodone in the
3 emergency room?

4 A. Yes, I do.

5 Q. Are there limitations on how much you
6 can prescribe or when you can prescribe it?

7 A. Yes. I mean, certainly there's many
8 rules and regulations related to the use of
9 narcotics. In my particular case, I am -- my
10 scope is emergency room medicine. So I'm only
11 able to write an acute course of this medication,
12 so a certain number of days for the medication.
13 I am not a pain management provider -- a
14 long-term pain management provider. And they're
15 under different regulations. But either way,
16 yes, I can prescribe this medication. Yes, there
17 are rules and regulations and state guidelines in
18 how to do so.

19 Q. Let me ask you this. Would you, as a
20 physician assistant, prescribe oxycodone for the
21 rest of a patient's life?

22 A. I mean, again, my background is not pain
23 management and actively treating. I'm not -- I
24 haven't been asked to evaluate this case in
25 manner of that and whether he should be on that

1 medication. What I can tell you and testify to
2 is in his individual case, he has received
3 consistent treatment from his provider within the
4 scope that is appropriate based on all of the
5 regulations. And his provider is the one that is
6 recommending this moving forward. So I would
7 defer specific questions if you're interested in
8 that to him, the doctor who is actually managing
9 and writing those medications for him.

10 Q. Okay.

11 A. But they are under the appropriate
12 guidelines. I can tell you that at this time.
13 And it's been consistent.

14 Q. The future medical intervention, are any
15 of these to be determined? Well, I guess there's
16 only one of them, RFA ankle in office.

17 A. Right, yes. Radiofrequency ablation,
18 that has been offered and discussed by
19 Dr. Mitchell. And the frequency -- Dr. Mitchell
20 noted that it can be repeated one time every six
21 months; however, I will say again for this item I
22 would put it as to be determined from the sense
23 that at this time Mr. McGilton has not proceeded
24 with that, and it would be included if he does
25 proceed with it and it's successful.

1 Q. Do you know when the accident was?

2 A. Yes. March of 2018.

3 Q. And so this patient has lived with this
4 for six years; is that right?

5 A. Yes.

6 Q. And can you support this future medical
7 intervention and potential surgical intervention
8 on your own after six years of not getting it, or
9 would you have to rely on Dr. Hsu?

10 A. Well, the radiofrequency ablation would
11 be under the scope of Dr. Mitchell as pain
12 management provider. And the hardware removal
13 would be from Dr. Hsu as an orthopedic surgeon.
14 I mean, of course, as we've stated throughout, I
15 mean, I would defer to his own providers as far
16 as what they believe is reasonable to occur in
17 the future.

18 I mean, he has had an extensive history
19 of original injuries as well as follow-up kind of
20 surgeries that were necessary based on the
21 original injury themselves. So I mean, it's not
22 surprising that six years out he still has future
23 medical needs or potential needs related to the
24 original injuries he sustained.

25 Q. Has Dr. Hsu indicated that he believes

1 there's a likelihood to a reasonable degree of
2 medical certainty that these surgical
3 interventions -- hardware removal of femur, et
4 cetera -- are going to occur such that you feel
5 confident putting them in your report?

6 A. Sure. I absolutely feel confident in
7 relaying the information that Dr. Hsu provided to
8 me, which I will state to you, which is that
9 the -- he may require a hardware removal in the
10 future if his hardware is bothersome to him,
11 which is why you see it listed out as a potential
12 surgical intervention.

13 And then I would further elaborate based
14 on my conversation with Dr. Hsu that the goal
15 would not be to remove hardware unless you need
16 to; however, in some individuals, particularly
17 those like Mr. McGilton where he's a smaller
18 individual and his hardware is more prominent.
19 In that particular population, it can be more
20 bothersome and have an increased influence of
21 requiring removal. But still, even given that
22 information, again, it's a potential to occur at
23 this time, and it's not something that I would
24 say is a higher probability. But it's certainly
25 recognized and a possibility, especially given

1 his body habitus.

2 Q. You said a higher probability. So I
3 asked to a reasonable degree of medical
4 certainty. Do you have something that gives you
5 a reasonable degree of medical certainty that
6 this work is going to be done by Mr. McGilton
7 after six years?

8 A. So again, I mean, the six years is kind
9 of -- I mean, if -- at any point if hardware is
10 bothersome and is necessary to be removed, it can
11 be. So six years is kind of irrelevant to the
12 conversation. I mean, it would be appropriate at
13 six years or any years whenever it's bothersome
14 to him.

15 As far as -- again, I break out the
16 reports based on my understanding of how the
17 physician has made the recommendation. And to be
18 clear, it -- in my opinion, the way that Dr. Hsu
19 approached this item is that it was not more
20 likely than not, or in other words, it was not
21 greater than a 50 percent chance that this would
22 occur. But that doesn't particularly mean it's
23 not reasonably certain to occur. I would defer
24 to Dr. Hsu specifically on that language.

25 I am simply breaking out the report

1 based on my understanding of the conversation so
2 that I can be transparent with the jury and in
3 providing this information, which in this case, I
4 would say less than 50 percent likelihood to
5 occur but a possibility. And therefore, it's
6 costed to show what that treatment would be.

7 Q. So the next page, which I believe is
8 page 3, it looks like it's all related to that
9 same procedure, the hardware removal of the
10 femur; is that correct?

11 A. Yes, that's right.

12 Q. And so your testimony on the third page
13 is essentially the same as you testified about on
14 the second page, the potential surgical
15 intervention hardware removal of femur isn't
16 greater than 50 percent likely; is that right?

17 A. Yes. I would agree with that.

18 Q. Oh, shoot. The fourth page is the same
19 thing; is that right?

20 A. It's a continuation of surgical costs,
21 yes.

22 Q. Okay. When's the last time this was
23 updated?

24 A. So I have an updated document right now
25 that is in draft if you want to see the total

1 based on the comments I just stated; however, I
2 would like to -- I mean, I can show it to you now
3 in a draft status. But what I would do is after
4 the deposition, finalize the numbers so that you
5 have the final number based on what the doctors
6 testified to. But if you want to see it, I don't
7 have a problem showing you the total numbers as
8 where they are.

9 Q. Well, let's do this. It's been almost
10 an hour. Let's take a break for a minute. But
11 I'm going to ask the court reporter -- I'm going
12 to talk to the lawyers for a minute.

13 Can you put Ms. Moore in a different
14 room so we can talk without her?

15 (Off-the-record discussion.)

16 (Witness exited Zoom room.)

17 MR. IMHOFF: Ben, she's not ready.

18 MR. SHELTON: The issue is -- on
19 the record is that you're taking a deposition of
20 someone who is -- this is very standard with life
21 care planners. I don't know if you've taken a
22 deposition of a life care planner in awhile, but
23 so much of it is dependent upon what both the
24 witness testifies to as to -- if you look at
25 these needs, it's up to Mr. McGilton if you look

1 at Dr. Hsu's recommendation as to whether he says
2 he wants it or not.

3 And then if you look at -- if you take
4 Dr. Hsu's deposition, then he'll specify with
5 more specificity -- he'll have more specificity
6 as to what the final findings are, and she can
7 rely on that. But if you want to take her
8 deposition later, I'm not going to fight you on
9 it. I'm just stating that this is very standard.

10 MR. IMHOFF: Well, it's not. She
11 specifically said she has been able to follow up
12 with Dr. Hsu to determine whether these things
13 are more reasonable than not. And the case --
14 the case is years and years and years old. It's
15 been four years since the accident. The
16 deposition has been set for a while. I was
17 supposed to drive down here to take this
18 deposition, but she is telling me she has not
19 talked to one of his medical care providers in
20 about -- to me, it looks like 90 percent of this
21 is dependent on those medical providers talking
22 to her before I take their deposition.

23 MR. SHELTON: Well, she's spoken to
24 Dr. Hsu and she has a recommendation from
25 Dr. Hsu. And we're taking Dr. Hsu's deposition

1 next week.

2 MR. IMHOFF: All right. Let's take
3 a break.

4 (A recess was taken.)

5 (Witness enters Zoom room.)

6 Q. Ms. Moore, it sounds like you need some
7 more information to finish your report and have a
8 final report; is that right?

9 A. I mean, no. I can have a final report
10 at this time. I've spoken to both of the
11 providers. But I would say for clarity I would
12 produce to you an updated report, because I had
13 some items in there that I need to have off until
14 I had any additional information. And then if
15 the providers supported or wanted those items to
16 be in the plan, I would be adding those back in.
17 So I do have information to finalize my opinions
18 at this time. But then if they think that those
19 items are necessary, obviously they would be put
20 back in.

21 Q. They're in right now, right?

22 A. That was -- like unintentionally. So
23 that's why I just said I could easily send you a
24 report that should have those numbers out.

25 Q. So as of this morning in subpoena

1 response to be here for your deposition, you have
2 not given me the report that you would call final
3 today; is that right?

4 A. I can give it to you right now, but
5 that's -- I mean, yes, that's true.

6 MR. IMHOFF: All right, Ben, we're
7 going to end this deposition. We're going to
8 reserve our right to reset it once we get a final
9 report. And we'll just -- I guess we'll talk to
10 the judge about that this afternoon too.

11 Ryan, do you got anything you want to
12 say on that?

13 MR. CONNER: I mean, I've got no
14 comments right now. We'll see what the judge has
15 to say.

16 MR. SHELTON: And I'll just
17 comment, first of all, that I believe it was
18 represented to the Court earlier that damages
19 weren't being disputed, one. And then secondly,
20 I would like to ask Lindsay -- Ms. Moore a couple
21 questions if that's okay with you before we end
22 this.

23 MR. IMHOFF: Are you asking her, or
24 are you asking me?

25 MR. SHELTON: Yeah, I'm going to

1 ask her a couple questions.

2 THE WITNESS: Okay. Go ahead.

3 EXAMINATION

4 BY MR. SHELTON:

5 Q. So, Ms. Moore, is it common to have some
6 items on a health care plan or cost projection
7 that are fairly -- that are left open until
8 essentially the time of trial or the time that
9 the witness testifies whether the witness -- or
10 the patient needs the work done or not?

11 A. I mean, yes, I would say that's not
12 uncommon. My -- I have testified and will
13 continue to do so that my opinion is going to be
14 based on the physician's opinion on whether those
15 items are necessary and on the individual's
16 opinion on whether he wants to proceed with that
17 surgery or it's likely.

18 But I would say that all of the items
19 and the cost of each of those items have been
20 shown and are costed here. The only thing we're
21 in -- that's unknown at this time is really like
22 the frequency of some of those items. And again,
23 as I stated before, unintentionally, I left some
24 of those items in. And I could have had some
25 more clarity and not included those in the

1 report. I can send them to you at this moment.

2 But it doesn't change anything. All of
3 the items are costed. All of the -- the only
4 thing we're talking about is the frequency. And
5 I'll, again, stay with my testimony before. It
6 will be based on if the physicians testify on the
7 frequency or need for those items. All we're
8 talking about is the final number. And I'm
9 offering to show you the number without those
10 items in it at this time.

11 Q. So for example, like if Mr. McGilton --
12 first of all, I believe Dr. Mitchell has
13 recommended ablation therapy would be beneficial
14 for Mr. McGilton, correct?

15 A. Yes. He absolutely has recommended
16 that, and that's true. But as we know at this
17 time, Mr. McGilton is not pursuing it. But that
18 doesn't mean that will be his opinion
19 indefinitely, as I have asked him that question.

20 Q. And that's Mr. McGilton's decision,
21 correct?

22 A. Yes. He's 100 percent a candidate for
23 it from my understanding. And based on my
24 conversation with Dr. Mitchell, it's his decision
25 on whether he wants to pursue it or not.

1 Q. And with the hardware removal --
2 somewhat similar, a little bit different. But
3 hardware removal is really dependent upon whether
4 it's needed because of pain thresholds. Would
5 that be fair to say?

6 A. Yes. And I would also state that more
7 recently it has increased in the level of
8 bothersome it is to him. But it's still not
9 risen to the level that he chooses to do
10 something about it at this particular time. But
11 even that is evidence that we know it is worse
12 now than it was during my previous conversation.
13 But it is up to him. And at this time, he's not
14 electing to proceed with that imaging study or
15 have that hardware removed at this time.

16 Q. So the physician -- I'm not asking you
17 to testify on behalf of the physician. But the
18 physician's testimony may still be it depends
19 dependent on the patient's desires, and that
20 could be now or it could be five years from now?

21 A. I mean, I absolutely agree. I don't see
22 how that particular portion of it would change.
23 The only other thing I would make a caveat of
24 this case is lightly unique in the sense that
25 specifically Dr. Hsu noted to me that he is a

1 smaller individual and that hardware is often
2 more prominent and there is a larger percentage
3 of people in that population that do move on to
4 having the hardware removed even though generally
5 unless it's bothersome you don't choose to take
6 it out.

7 Q. Okay. So all the other items in your
8 report are final other than the ones that we're
9 discussing right now; is that correct?

10 A. Yes. I mean, this is really a
11 straightforward -- I mean, a straightforward kind
12 of case. Essentially it's pain management office
13 visits, pain medication, drug screens, and that's
14 the total cost of your care, which again, I do
15 have if you want to see that number. But that is
16 what is supported with the potential of hardware
17 removal and the potential of a radiofrequency
18 ablation if he elects to proceed with it.

19 Q. And again, those are both very much
20 patient driven based on their pain tolerance and
21 pain preferences in many ways?

22 A. I would say those two items are, yes.

23 Q. Okay.

24 MR. SHELTON: Thank you.

EXAMINATION

BY MR. IMHOFF:

Q. Ms. Moore, I've got some more questions. What is the standard for a life care planner putting items into a life care plan that have not been recommended to a reasonable degree of medical certainty by a physician? Do they belong in or not?

A. So I mean, we include items in a plan that have been recommended by the provider. And the items that are in the plan are kind of broken out into a more likely than not to occur and a potential to occur. And how I choose to present the data -- because I feel like that's the most accurate way to represent what the physician -- and in this case, even the client has -- patient have stated.

So I mean, what is included in my report is an accurate and true representation of what the medical providers have stated regarding the future need of medical care for Mr. McGilton.

Q. My question was different than that. Is there a standard for a life care planner about what you can put into your report, certify your report, share with the jury, and testify about in

1 regard to what medical providers have or have not
2 recommended?

3 A. Yes. And I follow that standard.

4 Q. What is that standard?

5 A. Is to have a conversation with the
6 provider and include recommendations and
7 treatment in the future that is reasonably
8 certain to occur and to accurately represent what
9 the physician is recommending, which is what I've
10 done here.

11 Q. And is the life care planner allowed to
12 put in their own recommendations or thoughts
13 about what the patient is -- what treatment the
14 patient is going to receive without support from
15 their medical providers?

16 A. Right. So you -- let me -- I have to
17 provide some clarity for this. But yes, you can
18 include items in a future life care plan within
19 the scope of your medical practice. As a
20 physician assistant, I have a certain scope of
21 practice, and I can make recommendations in the
22 plan within my own scope; however, I
23 consistently -- and most life care planners would
24 prefer rather than inserting it based on our own
25 kind of expertise and scope of practice to

1 defer -- or to obtain all of the recommendations
2 that are in our plans from the treating
3 physicians.

4 That is what I do on a consistent basis.
5 As I have testified to here, I unintentionally
6 left those particular items because I had
7 pre-costed them just to help reduce the amount of
8 work that I do in the future. I unintentionally
9 left them in the plan; therefore, I told you
10 transparently that I would give you a new
11 calculation based on the specific conversations I
12 had with the provider, as that was an
13 unintentional thing that I left in on that total
14 calculation.

15 But again, yes, the plan would be fully
16 supported by the physician. And so again, if
17 they were to in the depositions say that some
18 orthopedic visits are reasonable to occur based
19 on the extent of his injuries, then I would put
20 those in.

21 Q. But you said you unintentionally put
22 them in. That I implies to me that they should
23 not be in that report right now today; is that
24 right?

25 A. Yes. I would agree. And I have a

1 document that shows what the cost is without
2 those items with -- with only the things that are
3 fully supported at this time with the opinions of
4 the doctors.

5 Q. Let's be completely clear on this.

6 A. Would you like to see that document? I
7 can certainly make it very easy. I have no -- I
8 mean, I don't -- where you can see it. It just
9 simply lowers the total number. And of course,
10 again, I will testify accurately to the
11 information that was provided to me.

12 Q. And the things that were unintentionally
13 put in are the physical therapy evaluation,
14 right?

15 A. Yes. And again, it's the frequency of
16 these items and the confirmation of need. I
17 would agree with that, yes. The physical therapy
18 evaluation, the physical therapy visits, the left
19 hip x-ray, the right ankle x-ray.

20 Q. Are you going to keep going? CT of
21 lower extremity, should that be -- was that
22 unintentional?

23 A. No. I would have costed it the same
24 way. I mean, the only thing we're talking about
25 here is changing the frequency. He testified --

1 or excuse me. Dr. Hsu recommended that. It's
2 also in his medical record.

3 Q. Ma'am, I just want to know which ones
4 are unintentionally in this. And so far the
5 first four are unintentional. Is CT of lower
6 extremity and urine drug screen unintentional, or
7 does that belong there?

8 A. No. And again, let me just clarify just
9 so we're very clear here. When I say
10 unintentional, it's not that the items aren't --
11 it's the frequencies and whether that total cost
12 should be included. So I would not include the
13 total cost there for his lifetime without further
14 input from that physician.

15 Q. Right. As we sit right here today,
16 should the CT of lower extremity be in the
17 report?

18 A. It 100 percent would be in the report
19 exactly as you see it here where the terminology
20 is to be determined based on the comment from
21 Dr. Hsu that if the hardware is bothersome for
22 him, a CT of the lower extremity will be
23 obtained. That's his next course of evaluation.

24 Q. All right. Is the orthopedic surgeon
25 visits unintentionally in here and need to be

1 taken out?

2 A. Yes. The total cost of that item, yes,
3 would not be included in the final report as of
4 right now, today.

5 Q. Have you shared the report with us that
6 you would -- that you can testify about today and
7 will you, please?

8 MR. SHELTON: She's offered two or
9 three, four times.

10 A. Yes, absolutely.

11 MR. IMHOFF: I know that. I'm
12 asking her to do it now.

13 THE WITNESS: Sure, absolutely. I
14 can do that. I'm going to do it the same way we
15 did with my CV. I will drop it in your subpoena
16 link and on the Zoom. Okay?

17 All right. It should be in both places.

18 Q. Okay. It will take a second for my
19 paralegal to get it to me a little bit, but I
20 think my memory was that the potential surgical
21 intervention of hardware removal of femur is also
22 to be determined and it shouldn't be in here or
23 was unintentionally put in here for today's
24 deposition. I'm not saying it won't change or a
25 doctor won't say yes. But as of today, it

1 unintentionally shouldn't be in here, right?

2 A. For the femur removal?

3 Q. Right.

4 A. No. I disagree with that. I absolutely
5 would have included it, just like I have in the
6 report once you get a chance to see it. I'd be
7 happy to explain every single item to you. But
8 what I did is show you that as a potential
9 option, which is exactly how Dr. Hsu has noted
10 it. And so no, that would -- I would still keep
11 that in there, but I would also show you the cost
12 without that potential surgery.

13 Q. Because either Mr. McGilton needs to opt
14 for it or Dr. Hsu has to say it's necessary and
15 it's reasonable or most --

16 A. Yes.

17 Q. -- most likely?

18 A. Yes. But it's absolutely appropriate
19 and consistent with life care planning
20 methodology based on the fact that Dr. Hsu has
21 elaborated on it and stated that it's a potential
22 for me to show you or the jury the cost of it.
23 And that's what I've done. But I'm not including
24 it as a certainty. I'm including it as a
25 potential in the same wording and way that

1 Dr. Hsu has noted.

2 Q. Okay.

3 A. But this report should clarify and show
4 you exactly the costs that I would testify to at
5 this time and based on the support I have for
6 this case right now.

7 Q. Okay. I'm going to end your deposition
8 now and reserve the right to reopen it when you
9 complete your report.

10 A. So again, my report is final, just to
11 note to you right now. My report is final of
12 what I just sent to you. It would be updated or
13 changed if there's additional information
14 provided in the depositions. But with no
15 additional information provided in the
16 depositions, my report is unchanged from what I
17 just sent you.

18 Q. Which did you send me? Did you send me
19 the resources, or did you send me the new life
20 care plan?

21 A. I sent you the new report. The new
22 final report for the life care plan.

23 Q. All right. Let me make sure that we're
24 both on the same page here. Okay?

25 A. Yes. Just because I don't want you to

1 be unclear, this is the actual report that I
2 would testify on right now or if the doctors do
3 not add any information or make any changes in
4 their upcoming depositions.

5 Q. The one you just sent me that you
6 haven't previously sent me is the one you're
7 talking about, correct?

8 A. Yes. That's right, that's right.

9 Q. But I also have an abridged life care
10 plan dated February 22, 2024.

11 A. Yes.

12 Q. Are you sending me a different abridged
13 life care plan or a --

14 A. Yes. It is -- I'm sorry to interrupt
15 you. Go ahead and -- if you want to complete it.
16 I didn't mean to interrupt you.

17 Q. Just tell me which document you sent me,
18 because I don't have it yet. What's it called?

19 A. Okay. So I sent you the abridged life
20 care plan updated. So it's the same document. I
21 just took out the items that I told you that I
22 needed to take out based on the conversations
23 with the doctors at this time.

24 Q. And that's down in this section with the
25 projected evaluations? That's what's changed?

1 A. Each of the category items are exactly
2 as we just went through, every line item. And
3 it's just the -- it's the same thing. I did not
4 include those costs in the total lifetime costs
5 in the final table. I think it would make good
6 sense as soon as you're able to actually see it.
7 It should make sense.

8 Q. Why didn't you send me that before
9 today, before we started the deposition?

10 A. Well, I mean, that's a good question.
11 And I mean, quite honestly, I did not realize I
12 had left those in there. So I'm going to be
13 consistent with the methodology that I always
14 have. And as I said, those shouldn't have been
15 included in that total. And so therefore, I
16 corrected it.

17 Q. When did you correct it?

18 A. Today.

19 Q. While we were in the deposition?

20 A. No. Before the deposition. I didn't
21 just calculate numbers while we were in the
22 middle of this deposition.

23 Q. Well, I didn't think so. And that's why
24 I'm wondering. We had some problems with your
25 password which you sent us on Friday.

1 A. Oh, no. That had nothing to do with it.
2 I didn't -- I just was reading the report this
3 morning and recognized it. I'm not one to go --
4 I mean, I'm going to testify consistently with
5 the methodology that I utilized. And once I saw
6 that, I was like, "Hey, those numbers need to be
7 pulled out." And therefore, I did that. And
8 that's why I testified to you and I am doing so
9 now exactly consistent with that.

10 Q. Ms. Moore, my question is, if you had a
11 deposition scheduled at 10 AM this morning about
12 your report and your recommendations and opinions
13 and you realized this morning before the
14 deposition started --

15 A. Yes.

16 Q. -- that your report and representations
17 were wrong, why didn't you tell us before we
18 started the deposition?

19 MR. SHELTON: Objection to form.

20 Answer the question.

21 A. Sure. And I mean, again, it was
22 something I recognized just as we were beginning.
23 And therefore, as soon as we get into questions
24 and asking about this, I'm going to transparently
25 tell you.

1 Q. But you had already changed and
2 developed another report this morning that you
3 never shared with us until I was taking your
4 deposition, correct?

5 A. Yes. And the reason for that is because
6 it was simply removing some of the items. And I
7 did that calculation -- I finished it at probably
8 9:52, and this conversation started at 10 AM. So
9 I decided to get into the conversation and tell
10 you the truth.

11 Q. Okay.

12 MR. IMHOFF: I'm going to end the
13 deposition with my previous reservations and
14 reopen it.

15 MR. SHELTON: Just one follow-up
16 question if you don't mind.

17 EXAMINATION

18 BY MR. SHELTON:

19 Q. And, Ms. Moore, to be clear, those items
20 may ultimately end up in your final report
21 depending on whether Dr. Hsu and/or Mr. McGilton
22 testifies or -- in accordance with a manner that
23 there are necessary treatment [sic], correct?

24 A. Yes.

25 Q. And so you're doing a cost projection.

1 I mean, in a life care plan -- you're projecting
2 a life care plan, correct?

3 A. I mean, yes. I'm trying to outline the
4 future medical needs that this individual had and
5 cost it over his lifetime, yes.

6 Q. And by removing certain items from
7 your -- that would be in a form that would be a
8 report as of today, the actual cost projection is
9 going down, not up, correct?

10 A. Yes. Absolutely. I'm not adding
11 anything. I'm not adding surprises. I'm simply
12 taking away items so that the total cost is lower
13 than it originally was. And then if that changes
14 based on future testimony, I would add them back
15 in. But based on the information I have right
16 now, they're not supported. And therefore, I
17 have the new and accurate total as it is. And it
18 is lower than what the other report was.

19 Q. And you're obviously reserving any
20 changes to your testimony as far as inclusion of
21 those items -- ultimate inclusion of those items
22 after you have an opportunity to review Dr. Hsu's
23 deposition transcript or potentially
24 Dr. Mitchell's deposition transcript, correct?

25 A. Yes. I would agree with that.

1 MR. SHELTON: Thank you. That's
2 all I have.
3 (The deposition was adjourned at
4 11:30 AM)
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1 CERTIFICATE OF REPORTER
2 STATE OF SOUTH CAROLINA
3 COUNTY OF CHARLESTON

4 I, MacKenzie Allen, Court Reporter
5 and Notary Public for the State of South Carolina
6 at Large, do hereby certify that the witness in
7 the foregoing deposition was by me duly sworn to
8 testify to the truth, the whole truth and nothing
9 but the truth in the within-entitled cause; that
10 said deposition was taken at the time and
11 location therein stated; that the testimony of
12 the witness and all objections made at the time
of the examination were recorded stenographically
by me and were thereafter transcribed by
computer-aided transcription; that the foregoing
is a full, complete and true record of the
testimony of the witness and of all objections
made at the time of the examination; and that the
witness was given an opportunity to read and
correct said deposition and to subscribe the
same.

13 Should the signature of the witness
14 not be affixed to the deposition, the witness
15 shall not have availed himself/herself of the
16 opportunity to sign or the signature has been
17 waived.

18 I further certify that I am neither
19 related to nor counsel for any party to the cause
20 pending or interested in the events thereof.

21 Witness my hand, I have hereunto
22 affixed my official seal on September 11, 2024,
23 at Charleston, Charleston County, South Carolina.
24
25

20 MACKENZIE ALLEN

21 My commission expires
22 August 30, 2029
23
24
25

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WORD LIST

< \$ >	30 (1)	afternoon (1)	belong (2)
\$350 (1)	301 (1)	ago (2)	Ben (3)
	325 (1)	agree (5)	beneficial (1)
	350 (1)	agreement (3)	BENJAMIN (1)
< 1 >	< 5 >	ahead (5)	best (2)
1 (3)	5 (1)	ALLEN (3)	big (1)
1,000 (1)	50 (5)	all-inclusive (1)	bigger (1)
10 (4)	54 (1)	allowed (2)	bill (5)
10:00 (2)	< 6 >	amount (3)	billed (1)
100 (2)	65 (1)	analyzing (1)	billing (10)
1000 (1)	68 (1)	and/or (1)	bills (2)
11 (1)	< 8 >	ankle (3)	bit (5)
11:30 (1)	8/10 (1)	answer (4)	body (2)
1223 (2)	8/10/21 (2)	answering (1)	bold (1)
136 (3)	8/29/23 (3)	answers (1)	BOLEN (1)
14 (1)	843-762-6294 (1)	apologize (1)	bothersome (7)
15 (1)		applying (1)	Box (2)
< 2 >	< 9 >	approached (1)	brain (2)
2 (3)	9:52 (1)	appropriate (8)	break (6)
20 (1)	90 (1)	approved (1)	breaking (1)
200 (1)	< A >	area (3)	brief (1)
2005 (1)	ability (1)	asked (4)	briefly (1)
2006 (1)	ablation (4)	asking (9)	Brighton (1)
2008 (5)	able (5)	assistant (9)	broken (2)
2013 (3)	Abridged (4)	assume (4)	BUILDERS (2)
2014 (1)	absolute (1)	assuming (1)	built (1)
2018 (2)	absolutely (12)	attended (1)	business (2)
2021 (1)	accepted (1)	attorney (3)	< C >
2023 (4)	access (1)	AUGUST (3)	calculate (1)
2023-CP-27-00069 (1)	accident (2)	available (1)	calculation (3)
2024 (4)	accurate (4)	availed (1)	call (1)
2029 (1)	accurately (3)	Avenue (1)	called (3)
20-page (1)	action (1)	average (2)	calls (3)
21 (1)	actively (1)	aware (1)	candidate (1)
22 (2)	actual (2)	awhile (1)	Capital (3)
23 (1)	acute (1)	< B >	care (42)
26 (1)	add (5)	bachelor's (2)	CAROLINA (10)
275 (1)	adding (3)	back (7)	CASE (21)
29 (1)	additional (4)	background (3)	cases (1)
29403 (1)	address (1)	backwards (2)	casework (1)
29407 (1)	adjourned (1)	bad (1)	catastrophic (1)
29601 (1)	adjustment (1)	based (27)	categories (3)
29926 (1)	adrenaline (1)	basically (1)	category (4)
< 3 >	advice (1)	basis (1)	cause (2)
3 (1)	affixed (2)	beginning (1)	caveat (1)
		BEHALF (4)	Center (2)
		believe (13)	Centre (1)
		believes (2)	certain (5)

certainly (11)	compilation (3)	created (2)	discussing (1)
certainty (5)	compiles (1)	credentialled (1)	discussion (1)
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certification (4)	complete (5)	CT (10)	disputed (1)
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certify (3)	completion (1)	cut (1)	doctors (6)
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charged (6)	confirming (2)	dates (4)	dropped (1)
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chat (1)	considered (1)	deal (1)	duly (2)
check (1)	consistent (8)	decided (1)	< E >
children (1)	consistently (2)	decision (2)	E-6 (1)
choose (2)	constantly (1)	Defendant (3)	earlier (1)
chooses (1)	consult (2)	Defendants (1)	easier (1)
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compared (1)	CRAWFORD (1)		

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< J >	LOCATION (2)	milligrams (2)	obtain (3)
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JASPER (1)	long-term (1)	mine (1)	occupational (1)
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Joe's (1)	looked (1)	miscarriages (1)	occurs (1)
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typically (4) < U > Uh-huh (1) ultimate (1) Ultimately (3) unchanged (1) unclear (1) uncommon (1) undergrad (1) underneath (1) understand (7) understanding (3) understood (1) uninsured (1) unintentional (5) unintentionally (10) unique (1) University (6) unknown (1) upcoming (1) update (5) updated (8) upstate (1) urine (3) use (6) utilize (2) utilized (2) < V > valid (1) value (1) various (1) video (1) virtual (1) visits (9) VOLUME (2) vs (2) < W > waived (1) walk-in (1) want (11) wanted (2) wants (4) way (9) ways (1) week (3) weekend (1)	weeks (1) Well (22) went (4) We're (18) West (1) we've (3) When's (1) William (1) within-entitled (1) Witness (14) wondering (1) Woods (1) wording (1) words (2) work (24) worked (1) working (4) worse (1) Wow (1) write (2) writing (2) written (2) wrong (2) wrote (1) WWW.CLARKBOL EN.COM (1) < X > x-ray (3) < Y > yeah (9) year (4) years (17) < Z > Zoom (7)

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., AND LOTTY TRUCKING,
LLC F/K/A RAMOS TRUCKING, LLC,

Defendants.

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiffs,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2023-CP-27-00069**DEFENDANT D.R. HORTON, INC.'S
NOTICE OF DEPOSITION OF
MICHAEL FRYAR****TO: MICHAEL FRYAR AND COUNSEL OF RECORD FOR ALL PARTIES:**

YOU WILL PLEASE TAKE THAT, pursuant to Rule 30 of the South Carolina Rules of Civil Procedure, the undersigned attorney for Defendant D.R. Horton, Inc. will take the following person's deposition on the date and the time and place appointed below, upon oral examination before a Notary Public or some other officer authorized by law to take depositions pursuant to Rules 26 of the South Carolina Rules of Civil Procedure, at which time you are notified to appear and take such part as you may be advised and as shall be fit and proper:

<u>DEPONENT</u>	<u>DATE</u>	<u>TIME</u>	<u>PLACE</u>
Michael Fryar	July 19, 2024	10:00 a.m.	Shelton Law Firm 1000 William Hilton Pkwy, Suite E-6 Hilton Head, SC

**Court Reporter Clark Bolen*

YOU WILL PLEASE TAKE FURTHER NOTICE that the oral examination will continue from day to day until completed and that these depositions are being taken for the purpose of discovery, for use at trial and for all other purposes as permitted under the rules of this Court and all applicable statutes and laws.

KENISON, DUDLEY & CRAWFORD, LLC

s/ Jason M. Imhoff

Jason M. Imhoff (SC Bar # 69355)

325 West McBee Avenue, Ste. 301

Greenville, South Carolina 29601

Telephone: (864) 242-4899

Facsimile: (864) 242-4844

imhoff@conlaw.com

Counsel for Defendant D.R. Horton, Inc.

June 26, 2024

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER	)	C.A. NO.: 2021-CP-27-00069
Mark W. McGilton,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
1223 May River Road, LLC;	)	
D.R. Horton, Inc.; and Lotty Trucking,	)	
LLC f/k/a Ramos Trucking, LLC,	)	
	)	
Defendants.	)	CERTIFICATE OF SERVICE
	)	
1223 May River Road, LLC,	)	
	)	
Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
Kenneth Scott Builders, Inc.,	)	
	)	
Third-Party Defendant.	)	

The undersigned, Cara Smith, of the law offices of Kenison, Dudley & Crawford, LLC for the Defendant D.R. Horton, Inc., do hereby certify that I have served the below listed **DEFENDANT D.R. HORTON, INC.'S NOTICE OF DEPOSITION OF MICHAEL FRYAR** upon counsel of record *via email* in this action this 26th day of June, 2024.

Benjamin T. Shelton Stephen Harrison Williams Shelton Law Firm, LLC P.O. Box 21069 Hilton Head Island, SC 29925 ben@sheltonlawsc.com harrison@sheltonlawsc.com <i>Counsel for Plaintiff</i>	Warren P. Johnson Darrell T. Johnson, Jr. Joshua R. Fester Law Office of Darrell Thomas Johnson, Jr., LLC 300 Main Street Hardeeville, SC 29927 Tdjohnson1@johnsonslawoffice.com wpj@johnsonslawoffice.com jfester@johnsonslawoffice.com <i>Counsel for Defendant Lotty Trucking, LLC f/k/a Ramos Trucking, LLC</i>
Kevin W. Mims W. Chase McNair Luzuriaga Mims, LLP 50 Immigration Street, Suite 200	

Charleston, SC 29403 kmims@lmlawllp.com cmcnair@lmlawllp.com <i>Counsel for Third-Party Defendant Kenneth Scott Builders, LLC</i>	

KENISON, DUDLEY & CRAWFORD, LLC

s/Stephanie S. Simpson
Stephanie S. Simpson

STATE OF SOUTH CAROLINA

EXHIBIT 6

ISSUED BY THE COMMON PLEAS COURT IN THE COUNTY OF JASPER

MARK W. MCGILTON,

Plaintiff,

vs.

1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., AND LOTTY TRUCKING,
LLC F/K/A RAMOS TRUCKING, LLC,

Defendants.

SUBPOENA IN A CIVIL CASE

CIVIL ACTION NO. 2023-CP-27-00069

PENDING IN JASPER COUNTY

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiffs,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendants.

TO: MICHAEL FRYAR
C/O BENJAMIN T. SHELTON, ESQ.
ben@sheltonlawsc.com☐ YOU ARE COMMANDED to appear in the above named court at the place, date and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME:

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION

SHELTON LAW FIRM
1000 William Hilton Pkwy, Ste. E6
Hilton Head Island, SC 29928

DATE AND TIME

July 19, 2024, beginning at 10:00
a.m.☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):

A complete copy of your entire file including all records (including any records maintained in electronic format, including but not limited to email) relative to the Project Cypress Ridge and 1223 May River Road. The requested records shall specifically include, but not limited to, the following: communications, reports, documents, plans, specifications, records, inspection reports, field notes, agreements, contracts, releases, waivers, correspondence, emails and/or any and all other materials related to the Project Cypress Ridge and 1223 May River Road.

Please mail to:

Jason M. Imhoff, Esquire
Kenison Dudley & Crawford, LLC
325 West McBee Avenue, Ste. 301

No later than:

July 12, 2024

Please submit via email:

Greenville, SC 29601	simpson@conlaw.com smith@conlaw.com
You may produce via email: imhoff@conlaw.com smith@conlaw.com simpson@conlaw.com	

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS SUIT IS HEREBY DIRECTED PURSUANT TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, AND SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED SHALL TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION.

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
Jason M. Imhoff, Esquire, KENISON, DUDLEY & CRAWFORD, LLC., 325 West McBee Ave., Ste. 301, Greenville, SC 29601 (864) 242-4899

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1) AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Jason M. Imhoff Attorney for Defendant D.R. Horton, Inc. June 26, 2024
ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT) DATE: SCCA FORM 254 (8/83)
(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on Reverse)

cc: All Counsel of Record

IN THE COURT OF COMMON PLEAS
FOR THE STATE OF SOUTH CAROLINA
JASPER COUNTY

DEPOSITION OF
MICHAEL ALLEN FRYAR
JULY 19, 2024

MARK W. MCGILTON,

Plaintiff,

vs.

CASE NO. 2023-CP-27-00069

1223 MAY RIVER ROAD, LLC,
D.R. HORTON, INC., and
LOTTY TRUCKING, LLC f/k/a RAMOS TRUCKING, LLC,

Defendants.

1223 MAY RIVER ROAD, LLC,

Third-Party Plaintiff,

vs.

KENNETH SCOTT BUILDERS, LLC,

Third-Party Defendant.

TIME: 10:02 A.M.

LOCATION: VIA VIDEOCONFERENCE

REPORTED BY: KELLY B. BAEKELANDT, RPR,
CSR (GA)
CLARK BOLEN
CHARLESTON, SC 29405
843-762-6294
WWW.CLARKBOLEN.COM

A P P E A R A N C E S

(ALL APPEARANCES VIA VIDEOCONFERENCE)

ON BEHALF OF PLAINTIFF:

SHELTON LAW FIRM, LLC
BY: BENJAMIN T. SHELTON
P.O. Box 21069
Hilton Head Island, SC 29925

ON BEHALF OF DEFENDANT D.R. HORTON, INC.:

KENISON, DUDLEY & CRAWFORD, LLC
BY: JASON M. IMHOFF
704 East McBee Avenue
Greenville, SC 29601

ON BEHALF OF THIRD-PARTY DEFENDANT KENNETH SCOTT BUILDERS, LLC:

LUZURIAGA MIMS, LLP
BY: D. FOSTER MOE
1156 King Street
Charleston, SC 29403

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1 MICHAEL ALLEN FRYAR,
2 having been first duly sworn, was examined and
3 testified as follows:

4 EXAMINATION

5 BY MR. IMHOFF:

6 Q. Good morning, Mr. Fryar. My name is
7 Jason Imhoff, I represent D.R. Horton in this
8 case that Mr. McGilton, your client, sued
9 D.R. Horton for an automobile accident, as you
10 know.

11 Have you had your deposition taken
12 before?

13 A. Yes, many times.

14 Q. Okay. I'm going to be very brief if
15 that's all right with you then. I think I have
16 to state -- I have to state some of this stuff.
17 So as we -- as we proceed, obviously, if you
18 don't understand my question, you didn't hear it,
19 Microsoft messed something else up, just let me
20 know and I'll try to repeat it, rephrase it, or
21 explain it.

22 If you need a break, you know, just,
23 hey, I need a break.

24 A. Okay.

25 Q. If -- if you have any questions, direct

1 them to me. Please don't ask anybody else or ask
2 anybody for help. Don't phone a friend, those
3 types of things. Okay?

4 A. Sure.

5 Q. All right. So what -- state your full
6 name, please.

7 A. Michael Allen Fryar, and my last name is
8 F-R-Y-A-R.

9 Q. How do you like to be addressed,
10 Mr. Fryar, Dr. Fryar, how do you like to be
11 addressed, Michael?

12 A. I don't have a Ph.D. or a master's
13 degree, so Mr. Fryar is fine or Michael is fine,
14 either way.

15 Q. All right. All right. Mr. Fryar, and
16 what were you retained to do for Mr. McGilton?

17 A. A vocational rehab assessment and
18 earning capacity analysis.

19 Q. I saw your report is preliminary. Are
20 you intending to do more work or develop more
21 opinions to produce a final report?

22 A. The beginning of your question kind of
23 cut out.

24 Q. Okay.

25 A. Yeah.

1 Q. I noticed that your report was
2 preliminary. Are you intending to do more work,
3 finalize it? What -- what are you intending to
4 do --

5 A. Sure.

6 Q. -- or what were you asked to do?

7 A. Sure. It's preliminary because I don't
8 have the permanent restrictions work guidelines
9 from any treating or evaluating doctors. I don't
10 have any work release for Mr. McGilton at all.
11 And I can't -- I don't define function, that's a
12 medical scope of practice, not in the scope of
13 practice of a vocational rehab counselor. So
14 meaning doctor's depositions or any comment from
15 the doctors about function and return to work.

16 Q. All right. We'll come back to that.
17 Let's go through your background. She'll put
18 your CV up -- or I'll put your CV up actually.
19 Let me do that.

20 All right. Mr. Fryar, I hope that I
21 have put your CV on -- on the screen for us to
22 look at. There's a lot of letters under your
23 name. Will you tell us what the letters -- each
24 one of your letters under your name means,
25 please.

1 A. Sure. The first one is a master's of
2 science -- it's actually a dual master's of
3 science in rehab counseling and vocational
4 evaluation.

5 Q. All right. And that's right here under
6 education, the first one, right?

7 A. Yes, sir.

8 Q. Okay.

9 A. And the other ones are -- one's a
10 license there and one's certifications -- and the
11 others are certifications, and then I have other
12 degrees. But the letters are certified life care
13 planner, which is a certification. Certified
14 rehab counselor, which is a national board
15 certification. I'm a registered nurse. I'm a
16 certified case manager, and a qualified rehab
17 professional. That's a designation in
18 North Carolina to work on workers' compensation
19 cases. I've got that since -- continuously since
20 about 2002.

21 Q. What was the CCM? I tried to keep up,
22 but what was the CCM?

23 A. Carolina -- excuse me, certified case
24 manager.

25 Q. Okay. You went to East Carolina

1 University and graduated May 2000?

2 A. Yes.

3 Q. That was your master's degree; is that
4 right?

5 A. That's correct.

6 Q. Yeah. And you got your bachelor's, your
7 undergrad, from UNC?

8 A. That's correct in 1998.

9 Q. It looks like after getting those, you
10 got your RN at the community college?

11 A. Right. I went back and -- and finished
12 up my RN and -- and worked in the hospital for a
13 period of time. And then as a nurse case manager
14 for a long period of time.

15 Q. What's the difference between a case
16 manager and -- and just an RN?

17 A. So RN -- case managers can be either
18 vocational case managers or medical case
19 managers. I was actually doing both since I
20 graduated with my master's degree. But the --
21 the RN is a practicing nurse at the bedside in
22 order to be a nurse case manager. In
23 North Carolina you have to -- typically you have
24 to have your RN license to do medical or case
25 management and workers' comp --

1 Q. Okay.

2 A. -- so that's really that for me. And --
3 and it gave me more information as far as being a
4 life care planner at the end.

5 Q. Okay. I'm going to a lot of dumb
6 questions. I haven't done one of these in a long
7 time, so I'm going to ask you a lot of dumb
8 questions today. I just don't -- I don't know
9 the terminology and I don't know how all this
10 medical stuff works anymore, or at least I've
11 forgotten.

12 A. No problem.

13 Q. So an RN, do you have to do continuing
14 education, renew your license, continue -- all
15 that kind of thing?

16 A. Yep. Every year -- two years you have
17 to do continuing ed and renew your license. And
18 they make sure you don't have any felonies and
19 such.

20 Q. All right. So is that -- is that a
21 state-based license or is that a federal or
22 nationwide license?

23 A. So the RN license now is a magnet
24 license. North Carolina is a magnet state. So I
25 forget the count, but there's -- say it was 40

1 different states that I could work in and apply
2 for because they have a magnet agreement with
3 North Carolina.

4 Q. Okay.

5 A. There's a couple holdout states, but --
6 it's not completely national, but it's a
7 magnet -- I have a magnet license because I'm
8 from North Carolina.

9 Q. Okay. Do you -- does that -- is one of
10 the holdout states South Carolina?

11 A. Yes, I'm pretty sure. Yes.

12 Q. Okay. So could you -- could you
13 practice in South Carolina as a registered nurse
14 today?

15 A. I'd have to submit to -- yes, I could.
16 I could submit my license to that board and say
17 that I'm moving there and I want to work as a
18 bedside nurse in South Carolina.

19 Q. All right. But you'd have to get that
20 done first before you could do it; is that right?

21 A. Right. Only to work as a bedside nurse.
22 Not to work as a case management nurse.

23 Q. I gotcha. All right. It looks like you
24 got a life care planning certificate in 2005.

25 A. Correct.

1 Q. Do you have -- do you hold all of these
2 professional certifications and licenses today?

3 A. Yes, I've had them continuously since I
4 got them.

5 Q. Okay. And have they ever been revoked,
6 license or -- I'm sorry, revoked or suspended?

7 A. No.

8 Q. Okay. You've been at InQuis since 2018?

9 A. Yes. I started off as -- I worked like
10 a contractor then I became part time somewhere in
11 there, now I'm full time, and I'm the senior
12 person in InQuis actually now.

13 Q. Okay. It looks like you have your own
14 firm Fryar Rehabilitation Services at the same
15 time. What -- what is the difference between the
16 two?

17 A. I still have it. So the division there
18 is Fryar Rehab Services, I run all my case
19 management cases through that. My evaluations
20 for workers' comp, long-term disability, social
21 security. Everything that's civil in nature goes
22 to InQuis, and the reason that division happens
23 is so I don't have a conflict.

24 Q. I'll just be honest, I didn't follow
25 that, so break it down for me. What do you do

1 for InQuis that you don't do for Fryar and what
2 do you do for Fryar that you don't do for InQuis?

3 A. So any kind of civil litigated matter
4 where I'm going to be asked to give a forensic
5 opinion either as a life care planner or as a
6 vocational expert, that all goes to InQuis. So
7 if an attorney calls me and it's a civil matter,
8 I refer to InQuis. If it's a workers' comp or
9 long-term disability or social security matter or
10 other venues outside of civil, then I -- that
11 goes through Fryar Rehab. Mainly all my case
12 management work goes through Fryar Rehab and all
13 my civil work goes through InQuis is the way to
14 think about that.

15 Q. Can -- you said earlier assuming there's
16 not a conflict. Help me understand how there's a
17 conflict there.

18 A. So I could be asked to do -- say a
19 plaintiff attorney in a civil case requested me
20 to do something with Fryar Rehab and I didn't
21 know that -- that InQuis had taken on the same
22 case by the defense attorney has been retained,
23 so I would have a problem there because I had
24 spoken to the plaintiff attorney and they had
25 spoken to the defense attorney and we had

1 competing retainers, so we just to make sure that
2 doesn't happen.

3 Q. Okay. All right. Do you have ownership
4 interest in InQuis Global?

5 A. I didn't hear it. I'm sorry. Say it
6 one more time.

7 Q. Do you have ownership interest in InQuis
8 Global?

9 A. No, not presently. That's being
10 discussed, but I don't have it at present.

11 Q. Do you -- do you make a commission or a
12 referral fee when you send cases to InQuis for
13 litigation?

14 A. No.

15 Q. Okay. Are your rates different at
16 InQuis than they are at Fryar?

17 A. Well, InQuis charges 350 an hour. Fryar
18 charges, depending on the service, 100, 125 to
19 200 an hour. So there's some differences, but
20 that's partly because of the venue differential.

21 Q. What does that mean, the venue?

22 A. That's kind of the going rate for
23 workers' comp LTV cases, what I'm charging for
24 Fryar Rehab. The going rate for civil cases
25 based on surveys I've seen for life care planning

1 and vocational expert work is what InQuis
2 charges. So there's a differential between the
3 costing depending on the legal venue.

4 Q. Okay. And I understand what InQuis
5 does. What -- what is Fryar Rehabilitation Case
6 Management, what do you do with a case management
7 case instead of a -- instead of a litigation
8 forensic case?

9 A. I'll give you an example. I'm talking
10 to a gentleman this week who had a pretty serious
11 heart attack. He was a truck driver before,
12 worked in some warehouse and logistics. He got
13 released to sedentary work, and I'm working with
14 him trying to get some training done and trying
15 to get him back to employment. So I'm there --
16 I'm there -- in that regard, he is my client.
17 I'm there as his advocate working with him to
18 return to work.

19 As an evaluator for civil case at
20 InQuis, I'm -- that person is my evaluatee. I'm
21 not their advocate, I'm their evaluator.

22 Q. I understand. So I'm -- I'm not going
23 to waste your time, but I am curious as a case
24 manager, are you -- are you getting them to the
25 right rehabilitation facilities and physical

1 therapy? I mean, are you -- are you sort of
2 planning their overall treatment, is that your
3 role as a case manager?

4 A. Yes, it can be. On a medical case,
5 typically on a -- or on a vocational case is more
6 about the kind of work, talking to the employer
7 from the time of injury, looking at other jobs.
8 But as a nurse case manager, yes, I mean, I --
9 I've done that work my entire life. I've moved
10 people all around the country, serious brain
11 injuries, spinal cord injuries for rehab and
12 recovery.

13 Q. Yeah. So let's talk about for a heart
14 attack victim. I mean, do you -- do you get
15 them -- tell me what you would do, just tell me
16 what you would do for a person with a -- a heart
17 attack as a case manager.

18 A. Well, that -- that was a little more cut
19 and dry. Like that case he's seen a
20 cardiologist, he's already in care. I'm working
21 on that case as vocational, but -- that would be
22 an abnormal case to see in workers' comp case as
23 a case manager.

24 But you would coordinate care, you know,
25 if he needed help getting doctor's appointments

1 set up, imaging set up, surgeries approved,
2 medications approved, I -- I'm basically the --
3 the conduit to make sure everything happens for
4 him medically. I am the person that coordinates
5 it.

6 Q. Oh, all right. So you're sort of like a
7 patient advocate with a lot more knowledge and
8 experience and context. Does that sound right or
9 am I insulting you?

10 A. Right. In the role as case manager,
11 yes.

12 Q. Okay. All right. So are the rest of
13 these employers on your employment history, are
14 they all correct and up-to-date?

15 A. Yes.

16 Q. Is there anything missing, things you
17 chose not to put in here but you did work at a
18 different location or a different business?

19 A. Way back -- I didn't choose to, but way
20 back when I was in graduate school I worked -- I
21 don't think that's in there, I put the Optim
22 Society, but I worked at a center where people
23 have profound mental delays, development
24 disability. It's called Skills Creation. I was
25 kind of a -- a CNA kind of -- they called me a

1 technician I think in that.

2 Q. Okay.

3 A. It was in Greenville, but that was just
4 part time when I was in grad school. That's the
5 only other job I didn't mention.

6 Q. All right. You must have to do
7 continuing education for many of your different
8 things it looks like under your presentations; is
9 that right?

10 A. You broke up --

11 Q. Continuing education courses?

12 A. No, this is where I -- you're looking at
13 the presentations, that's what you're asking
14 about?

15 Q. Right.

16 A. Those are where I presented.

17 Q. Right.

18 A. Those are continuing legal ed seminars.

19 Q. Oh, those are legal. I'm sorry, I
20 didn't see that. You're right.

21 A. Yeah, that I've been asked to present.
22 But most of those when you scroll through are
23 defense organizations, there's plaintiff
24 organizations I've been asked to present at.

25 Q. All right. All right. So when were you

1 retained?

2 A. Give me just a second. The retainer was
3 signed February 23rd of this year.

4 Q. All right. And you were retained
5 through InQuis?

6 A. Well, Mr. Shelton's law firm retained
7 InQuis and -- and I was the expert that was
8 assigned.

9 Q. Got that. Got it. All right. All
10 right. And your rate is what for this? I'm
11 sorry.

12 A. InQuis's rate is 350 an hour.

13 Q. Is that -- all right. They charge 350
14 an hour. Do you know how much they billed to
15 date?

16 A. I think my office told me they had
17 billed around 30 hours total to date, so that's
18 10 or \$11,000.

19 Q. Okay. And what were you asked to do?

20 A. To perform a vocational rehab assessment
21 and determine earning capacity for Mr. McGilton.

22 Q. Break those down for me, if you would.
23 What is a vocational rehab assessment?

24 A. So looking at someone's work history,
25 education, their transferability to jobs in the

1 economy based on medical restrictions. Just a
2 generalized assessment about their symptoms,
3 medical history, medical treatment. That's the
4 data we use to do an earning capacity analysis.
5 And the methodology I use is called the Repel to
6 determine their earning capacity analysis.

7 Q. R-E-P-E-L?

8 A. E-L, yes.

9 Q. R-E-P-E-L?

10 A. Yeah.

11 Q. Yep. Okay.

12 A. Like you're repelling from a mountain.

13 Q. Yep. Okay. When you're doing your voc
14 rehab assessment, what are you -- what are --
15 what are ultimately you trying to find out or
16 assess to put down into writing or give an
17 opinion on?

18 A. So ultimately -- I mean, ultimately
19 the -- the conclusions are what can someone do as
20 far as returning to work. And there's definite
21 terms in vocational rehab that we use.

22 Employability, placability, and earning capacity.

23 Employability is what jobs are
24 transferrable, meaning does the person have those
25 skills, abilities, to be a candidate for the job.

1 Placability is can they find a job in
2 their region that they have the appropriate job
3 searching ability to find the -- the job, do they
4 present well, and other issues there.

5 And then earning capacity looks at,
6 well, what's the earnings likely to be. And
7 in -- within that earning capacity analysis, we
8 look -- we look at what worklife expectancy is
9 based on imperial data for the person.

10 Q. All right. When you're determining what
11 can someone do, so you're looking at their
12 medical records -- what else are you looking at
13 to determine what they can do?

14 A. Well, we're looking at -- that's part of
15 the reason why it's preliminary again, because I
16 don't have permanent work guidelines. I don't
17 have a work release for Mr. McGilton from a
18 treating or evaluating doctor.

19 But I'm looking at their symptoms, their
20 complaints, their work history. Their -- their
21 past medical history sometimes can be a factor.
22 I'm looking at their education. And that -- all
23 of those things lead me to different standards
24 and classifications that the U.S. Department of
25 Labor uses, so I can classify their employment, I

1 can classify their skills. And then ultimately
2 we perform a transferability of skills analysis.
3 Meaning if this person could only do, for
4 example, sedentary work, what do they have
5 transferrable to them with their education,
6 skills at -- at present for employment.

7 Q. Yeah. And I guess I'm trying to break
8 it down. And you're -- you're -- it sounds like
9 you're kind of putting it all back together. So
10 let me -- let's go through your -- let's go
11 through your report. Maybe that will help me
12 understand --

13 A. Okay.

14 Q. -- and a bunch of my questions should be
15 answered. All right. Is the date of your
16 report -- is this the most recent report, this
17 May 22nd, 2024, report?

18 A. That's my only report, yes.

19 Q. Only report. Okay. What is the MVC,
20 motor vehicle crash?

21 A. The motor vehicle collision, yep.

22 Q. Collision. Okay. All right. It looks
23 like you had a Zoom meeting with Mr. McGilton on
24 March 11th, 2024; is that right?

25 A. That's right.

1 Q. Have you spoken with him other than that
2 time?

3 A. No, I haven't. I'm waiting to see
4 what -- I am going to do a follow-up once I have
5 the work guidelines from the physician, so
6 there's really nothing more I can do until I have
7 that.

8 MR. IMHOFF: Let's go off the
9 record just for a minute.

10 (Off-the-record conference.)

11 MR. IMHOFF: All right. For the
12 record, we just had an off-the-record discussion
13 about Mr. Fryar's preliminary report. And what
14 he shared with us is he needs some medical
15 information from treating physicians of
16 Mr. McGilton to have a final report. And after
17 our off-the-record discussion or during our
18 off-the-record discussion, we -- we all agreed
19 and stipulated that it would make more sense that
20 Mr. Fryar gets that information, develops his
21 final opinions, and we complete his deposition
22 after he gets whatever the information is that he
23 needs, whether it come by testimony, deposition,
24 report, or -- or otherwise.

25 Is that correct, Mr. Shelton?

1 MR. SHELTON: Correct.

2 MR. IMHOFF: All right. I'm sorry
3 everyone. I'm sorry about that. Thank you for
4 being -- for working with me.

5 And, Mr. Fryar, thank you, sir.
6 Sorry to make you put a jacket on this morning
7 for that.

8 THE WITNESS: No worries.

9 (The witness, after having been
10 advised of his right to read and sign this
11 transcript, does not waive that right.)

12 (The deposition adjourned at
13 10:34 A.M.)

CERTIFICATE OF REPORTER
STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

I, KELLY B. BAEKELANDT, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the witness in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth in the within-entitled cause; that said deposition was taken at the time and location therein stated; that the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed by computer-aided transcription; that the foregoing is a full, complete and true record of the testimony of the witness and of all objections made at the time of the examination; and that the witness was given an opportunity to read and correct said deposition and to subscribe the same.

Should the signature of the witness not be affixed to the deposition, the witness shall not have availed himself/herself of the opportunity to sign or the signature has been waived.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal on July 26, 2024, at Bluffton, Beaufort County, South Carolina.

KELLY B. BAEKELANDT
REGISTERED PROFESSIONAL REPORTER
RPR, CSR (Georgia)
My Commission expires
June 16, 2026

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October 17, 2024

Via Electronic Filing

Jasper County Clerk of Court
265 Russell Street
Ridgeland, South Carolina 29936

Re: *Mark W. McGilton v. D.R. Horton, Inc., et al.*
CA No.: 2021-CP-27-00069

To Whom It May Concern,

Please find enclosed D.R. Horton, Inc.'s Supplemental Exhibit to its Memorandum in Opposition to Plaintiff's Motion for Rule to Show Cause to Strike, and for Contempt per Rule 37(D), SCRCPP, Against D.R. Horton, Inc. for Continuing Violations of Orders dated September 22, 2022, March 5, 2022, and June 13, 2024 in the above-referenced matter.

Should you have any questions, please contact our office at 864-242-4899.

With kindest regards,



Cara Smith, Paralegal

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF JASPER

CIVIL ACTION NO. 2021-CP-27-00069

MARK W. MCGILTON,
Plaintiff,
vs.
1223 MAY RIVER ROAD, LLC, D.R.
HORTON, INC., and LOTTY
TRUCKING, LLC f/k/a RAMOS
TRUCKING, LLC,
Defendants.

-----/

1223 MAY RIVER ROAD, LLC,
Third-Party Plaintiff,
vs.
KENNETH SCOTT BUILDERS, LLC,
Third-Party Defendant.

-----/

D.R. HORTON, INC.,
Third-Party Plaintiff,
vs.
KENNETH SCOTT BUILDERS, LLC,
Third-Party Defendant.

-----/

Deponent: Jared O'Sako

Date/Time: June 13, 2023 10:14 a.m.

Place: Shelton Law Firm, LLC
10 Hospital Center Commons
Suite 400
Hilton Head, South Carolina

Reporter: Theresa D. Saxon
Hilton Head, South Carolina
tdsaxon@gmail.com 843.338.6388

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SHELTON - O'SAKO (DIRECT EXAMINATION)

Jared O'Sako,
having been produced and first duly sworn as a
witness, testified as follows:

DIRECT EXAMINATION

BY MR. SHELTON:

Q Mr. O'Sako -- is it okay if I call you
Jared --

A Yes.

Q Jared's fine?

A Yes.

Q -- have you ever had your deposition
taken before?

A Yes.

Q How many times?

A Once, I think.

Q Okay. My name is Ben Shelton. I'm at
Shelton Law Firm. I represent the Plaintiff in
the matter of -- it's Mark McGilton v. D.R.
Horton and others. And being that you've had
your deposition taken just once before, I'm
going to go over some of the ground rules, just
to make sure that you're aware of the procedural
aspects of this.

Of course the court reporter is taking

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 down everything we say -- I call it "magic" --
3 and so we have to speak slowly and clearly. If
4 we mumble -- and that's speaking for myself as
5 much as anyone right now -- or speak too
6 swiftly, it's hard for her to take down what we
7 say. Is that fair?

8 A Yes.

9 Q And then give answers just like you're
10 doing right now, "yes" or "no"; if you say
11 "uh-huh" or "huh-uh" or shrug your shoulders or
12 shake your head, she doesn't really have the
13 means to take that down. Understand?

14 A Okay.

15 Q And if I'm asking a question and it's
16 not clear to you what the question is or what
17 I'm looking for, please ask me to clarify. I'll
18 be happy to do so.

19 A Okay.

20 Q If you don't understand a question,
21 please let me know.

22 If you answer a question, I'm going to
23 assume you understood it. Is that fair?

24 A Okay.

25 Q And also, this is being taken under the

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 South Carolina Rules of Civil Procedure. Your
3 previous deposition, was it in South Carolina?

4 A Yes.

5 Q Was it as a representative or employee
6 of D.R. Horton?

7 A Yes.

8 Q Do you know what it was about?

9 A Yes.

10 Q Was it a construction defect case, or
11 was it a breach of contract case? Do you know?

12 A Construction related.

13 Q And do you know whether it was in state
14 court or federal court?

15 A We were in the Beaufort -- we were in
16 the Beaufort County office, down there at the
17 main. And I'm not sure what court.

18 Q That's fine. And you went to court for
19 it?

20 A Yes.

21 Q Did it go to trial?

22 A Yes.

23 Q And when it went to trial, you were at
24 the Beaufort County courthouse?

25 A Yes.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Q And that was the only matter that
3 you've been involved with --

4 A Yes.

5 Q -- as far as a deposition is concerned?

6 A Yes.

7 Q So under the South Carolina Rules of
8 Civil Procedure, if we take a break, which,
9 please, if you need a break for any reason
10 whatsoever, please take it. And if you're
11 hungry, you want lunch, if we go that long,
12 please let us know. I'm happy to accommodate
13 you, anything you need.

14 A Okay.

15 Q But if there's a break taken, just out
16 of an abundance of caution, anything you speak
17 with anyone about, including your attorney, I
18 can inquire about that as long as the deposition
19 is pending.

20 A Okay.

21 Q Oftentimes, it's human nature to say
22 "How am I doing," you know, that type of thing.
23 Just avoid doing that, just to avoid any type of
24 mistake. Okay?

25 A What's that?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Q At a break it's often human nature to
3 talk to your attorney about "How am I doing, am
4 I answering -- am I doing a good job,"
5 et cetera. Just try not to do that, if we take
6 a break, with your attorney.

7 A Fine.

8 Q I mean, you can talk about the weather.
9 You can talk about the ball game last night, "I
10 just watched it," you know, whatever.

11 A Understood.

12 Q And you've got good counsel and ethical
13 counsel. I say that out of an abundance of
14 caution because sometimes things are said and by
15 accident, and people don't understand the rules.

16 (The court reporter asked that
17 the witness listen to the entire
18 question before responding.)

19 BY MR. SHELTON:

20 Q Correct. And the same for me: I'll
21 try to let you fully answer a question before I
22 interject back with another question. Okay?

23 A Okay.

24 Q From time to time your attorney may
25 raise an objection. You still answer the

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 question after that objection unless he
3 specifically tells you not to, and then we can
4 have a side bar and discuss that, if necessary.
5 Okay?

6 A Okay.

7 Q If you need a question read back to
8 you, that's fair enough. The court reporter can
9 read it back to you, or I can read it back to
10 you, to the best of my recollection of what the
11 question was.

12 MR. SHELTON: Anything else you want to
13 cover, John?

14 MR. CRAWFORD: I think you've covered
15 all of it on that subject.

16 BY MR. SHELTON:

17 Q So my understanding is that, Jared, you
18 work for -- I'll call you Mr. O'Sako -- work for
19 D.R. Horton. What's your role with D.R. Horton?

20 A Land development manager.

21 Q And is there a region for that? Are
22 you responsible for a certain region?

23 A Yes.

24 Q What region would that be?

25 A Savannah and Hilton Head.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Q How many projects do y'all have going
3 on right now?

4 A By "projects," can you be more
5 specific?

6 Q You're a land development manager,
7 correct?

8 A Correct.

9 Q So how many -- let's define, what's a
10 development, first of all? I'm talking about
11 like a development as far as a project. I'm not
12 talking about projects within a development.
13 Just development in general.

14 A Okay. So the number of developments
15 would probably be 15.

16 Q And how many of those are in Beaufort
17 County? Round about, I mean.

18 A One.

19 Q One. And which one is that?

20 A East Argent.

21 Q And are you familiar with the project
22 Cypress Ridge?

23 A Yes.

24 Q And when I say "project," the
25 development known as Cypress Ridge, you're

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 familiar with that?

3 A Yes.

4 Q Is that completely built out now? Is
5 that closed out?

6 A Yes.

7 Q As of when?

8 A The last 12 months.

9 Q And I'm going to back up a little bit.
10 When did you first start working for D.R.
11 Horton?

12 A February of 2013.

13 Q And what was your role when you first
14 joined on with D.R. Horton as an employee?

15 A Land development project manager.

16 Q What did you do as a land development
17 project manager when you were hired in 2013?

18 A Worked with engineers to permit
19 projects, bid them out. Awarded the bids and
20 processed pay apps and worked through closeout
21 and then turnover, to turn it over to the
22 vertical team.

23 Q To the what team?

24 A The vertical team, the guys that build
25 the houses.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Q So with the land development side, that
3 would be, are you familiar with the term
4 horizontal development?

5 A Yes.

6 Q What is horizontal development?

7 A As far as an easy way to think of it is
8 everything that's not -- everything that's above
9 ground would be vertical, and everything below
10 ground or at the surface - the paving, grading,
11 drainage, water, sewer, stuff like that - is
12 horizontal.

13 Q Is it fair to say, I mean, my
14 understanding is, and I don't mean to testify
15 here, but it's basically the prep work that goes
16 down for site plan development before you start
17 putting sticks and mortar in to build up,
18 upwards.

19 A Correct.

20 Q Is that a fair way to describe it?

21 A Correct.

22 Q So that when you say "land
23 development," then was that your exclusive role,
24 with horizontal involvement; you weren't
25 involved with vertical development? Is that

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 correct?

3 A Correct.

4 Q And how long were you in the role of
5 land development manager? If I've said it
6 incorrectly, let me know.

7 A Two, three years. I don't know.

8 Q And were you over -- were you involved
9 in certain sites as land development manager
10 when you were in that role, or did you have
11 involvement in several sites across the same
12 region you're in now, in the . . .

13 A I'm still -- I still am land
14 development manager.

15 Q Okay. I thought -- I took a look at
16 your Linked In profile, and I thought you
17 started as something else based on your Linked
18 In profile. I don't have it to show you right
19 now. I'm just -- I'm not trying to argue with
20 you, but --

21 A Well, the thing that you keep saying,
22 you keep saying "land development manager," but
23 that's my current position.

24 Q And what were you prior?

25 A Land development project manager.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Q Project manager. So land development
3 manager and land development project manager are
4 different things.

5 A That's correct.

6 Q So let me -- thank you for clarifying.
7 Land development project manager, that was what
8 you were describing -- the role that you
9 described earlier was as land development
10 project manager?

11 A Correct.

12 Q How long -- and you were a land
13 development project manager for about three
14 years; is that correct?

15 A Seven or eight years.

16 Q Seven or eight years, okay. Thank you.
17 Sorry for the confusion.

18 A That's okay.

19 Q And what job sites did you have as land
20 development project manager as far as areas? Or
21 was it one job site or one development, or was
22 it several developments?

23 MR. CRAWFORD: I object to the form.

24 You can answer.

25 THE WITNESS: Several.

SHELTON - O'SAKO (DIRECT EXAMINATION)

BY MR. SHELTON:

Q Is that over the same area that you're involved in now as far as geographical area, or was it smaller?

A Same.

Q And Cypress Ridge, did it used to be known as Mill Creek?

A It's still one entrance is Mill Creek, and one entrance is Cypress Ridge.

Q Is that the same development, or is it two different developments?

A Same development.

Q When you joined D.R. Horton in 2013, was Mill Creek at the time already in existence?

A Yes.

Q And was it already -- was it being still built out, for lack of a better term, at that time?

A Yes.

Q Now, land development project manager is a step below land development manager; is that correct?

A Yes.

Q When did you become land development

SHELTON - O'SAKO (DIRECT EXAMINATION)

manager?

A Two or three years ago.

Q What was your role in 2016?

A Land development project manager.

Q And would that be the same in 2017 and 2018?

A I'm not sure. I think so.

Q I'm going to ask some kind of background questions. And I'm not -- and if you've had your deposition taken before, this was probably asked before. I'm not trying to be personal here, but where did you go to school? Where did you go to high school?

A Benedictine Military School.

Q And where is that?

A Savannah.

Q And were you born and raised in Savannah?

A No.

Q When did you live before going to -- before high school?

A Pooler.

Q And where were you born?

A Ohio.

SHELTON - O'SAKO (DIRECT EXAMINATION)

Q When did you move down to the Savannah or the area, Pooler area?

A 1976.

Q And what year were you born?

A 1976.

Q So you were born in -- you were raised in Pooler?

A Correct.

Q And I saw you went to Georgia State University. Is that correct?

A No.

Q No, I'm sorry. Where did you go to school?

A Georgia Southern.

Q And do you have -- what degree do you have from Georgia Southern?

A Civil engineering.

Q Where did you work upon graduation from Georgia Southern?

A Thomas and Hutton engineering.

Q What was your job there?

A Civil engineer.

Q And how long were you with Thomas and Hutton?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A 11 years.

3 Q What was your role with Thomas and
4 Hutton over that 11 years? You can kind of walk
5 me through it, if you don't mind.

6 A Civil engineer, do design.

7 Q Design for what?

8 A Neighborhoods.

9 Q And did you do any oversight for
10 projects, or was it design for projects or a
11 little bit of all the above?

12 A Can you restate that?

13 Q Okay. Did you design projects? Like,
14 did you design neighborhoods; is that correct?

15 A I did.

16 Q Okay. And what does Thomas and Hutton
17 do?

18 A They're engineers.

19 Q So what does an engineer do?

20 A It depends on the field.

21 Q What type -- okay, you just said that
22 they're engineers.

23 A Yeah.

24 Q I'm not trying to be hostile. I want
25 to get through this as quickly as possible, and

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 I'll try to ask questions in a more clear
3 manner, okay --

4 A That would be great.

5 Q -- but I asked you, what does Thomas
6 and Hutton do. I mean, I'm -- I'm not -- I'm
7 familiar with Thomas and Hutton. I'm not trying
8 to ask you trick questions. I just -- I'm
9 trying to understand this. You worked for them
10 for -- you know a lot more about them than I do.

11 A Okay. Yeah.

12 Q And so this is my only chance to take
13 your personal deposition.

14 A Okay.

15 Q So Thomas and Hutton, they're -- I
16 understand they're an engineering firm.

17 A Right.

18 Q And I asked you what they do. I mean,
19 what type of engineering do they do? Do they do
20 just residential land development? Do they do
21 commercial land development engineering? Do
22 they do mechanical engineering? Do they have
23 several different areas? And that way I can
24 narrow it down to what you do, what your
25 background is, and that's -- sorry to go on and

SHELTON - O'SAKO (DIRECT EXAMINATION)

on and on. I just want to kind of give a little background as to why I'm asking the questions.

A Thomas and Hutton, you can check out their web site, but what they do is surveying and engineering - civil, structural, water and sewer, the things that fall under civil.

Q And is that the area that you worked in?

A Correct.

Q Did you have an active role in designing neighborhoods?

A Yes.

Q And did you have -- my understanding is that Thomas and Hutton also, like in this instance, for example, works as kind of -- works in, for lack of a better term, project oversight; is that correct?

A Correct. They -- they have a field representative who monitors and reports to the engineer.

Q And then the engineer may also report then to a landowner or developer related to progress, draw requests, et cetera, and whether

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 or not to approve of the same?

3 A Correct.

4 Q Did you do any of that type of project
5 monitoring or oversight, for lack of better
6 terms, while you were working with Thomas and
7 Hutton?

8 A No.

9 Q So you were principally doing
10 engineering and not any type of management. Is
11 that fair to say?

12 A Correct.

13 Q Can you give me an example of a
14 development that you helped engineer?

15 A Sun City Hilton Head.

16 Q Which phase, do you remember?

17 A For 11 years. Probably 25, 30 phases.
18 A lot of it.

19 Q And what year did you start work for
20 D.R. Horton; 2013, is that right?

21 A I think so. It could be 2012. I'm not
22 sure.

23 Q And why did you switch from Thomas and
24 Hutton to D.R. Horton?

25 A I lost my job, with the economy, with

SHELTON - O'SAKO (DIRECT EXAMINATION)

Thomas and Hutton.

Q Was that around --

A '08, I think, or '09, yeah.

Q Did you have any jobs between leaving Thomas and Hutton and D.R. Horton?

A Yes.

Q What did you do?

A I worked for Palm Beach Grading, a site development company.

Q Where are they based out of?

A Hardeeville.

Q Are they still in existence, do you know?

A I don't know. They're not here in Hardeeville, but I don't know if they're -- there was an office down in Miami, but I don't know if it's still around or not.

Q What did you do for home beach grading?

A Palm Beach Grading.

Q Oh, Palm Beach Grading. Thank you.

A Yeah. Bid projects. That was mainly what my role was.

Q So is it your recollection you started there around 2008 or 2009?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A Yes. I started immediately after T&H.

3 Q And "T&H" is Thomas and Hutton,
4 obviously?

5 A Correct.

6 Q And then how long were you with Palm
7 Beach Grading?

8 A Four or five years.

9 Q Did you have any jobs between Palm
10 Beach Grading and D.R. Horton?

11 A Did not.

12 Q Did Palm Beach Grading do work for D.R.
13 Horton?

14 A They did.

15 Q You said they were based out of
16 Hardeeville; is that correct?

17 A Yeah. The location here is in
18 Hardeeville or was. It's not there anymore.

19 Q Where in Hardeeville?

20 A On Main Street.

21 Q Did they own any equipment?

22 A Did they own equipment? Yes.

23 Q What type of equipment did they own?

24 A Bulldozers, excavators, semis,
25 trailers, dump trucks. Heavy equipment.

SHELTON - O'SAKO (DIRECT EXAMINATION)

Q Were they a horizontal development contractor?

A Correct.

Q What's different, if anything, about your job now as land development manager versus land development project manager from before?

A I do a lot of acquisition now, and I did not do that then.

Q When you say "acquisition," is that -- obviously, that's purchasing?

A Purchasing of property, properties themselves.

Q And I want to be careful because I don't want to get in to what's called 30(b)(6) questions relative to what D.R. Horton does per se, I'm asking this for personally, about you, but is it your understanding that D.R. Horton owns the property that it develops?

A Any property that D.R. Horton develops is owned by D.R. Horton.

Q Okay. And to the best of your recollection, going back to 2016 through 2018, you were still in the land development project manager role then. Correct?

SHELTON - O'SAKO (DIRECT EXAMINATION)

A Correct.

Q And do you have a specific year that you know you started the land development manager job?

A I don't recall.

Q Was it pre pandemic or during the pandemic, do you remember?

A No. It would be, I'm going to guess -- I guess so, yeah, I guess during the pandemic.

Q So maybe since --

A I'm guessing three years.

Q Okay. Around 2020?

A 2020, yes.

Q Okay. And if it's different, I mean, that's fine. I'm just trying to pin down what you were doing in 2018. So 2018 you were land -- definitely land development project manager?

A That's correct.

Q That's correct?

A That's correct.

Q And as land development project manager, can you just kind of walk me through, if there is a typical day, what a typical day

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 looks like?

3 A A typical day would be -- with 15
4 different projects, I could be doing anything
5 any day. But a typical day, just go to the
6 office, process emails, phone calls, call
7 everybody that's working on your sites, check
8 in, see what's going on, talk to the engineers,
9 talk with the contractors. That's it.

10 Q And that was as land development
11 project manager?

12 A Correct.

13 Q Where was your office?

14 A Mill Creek.

15 Q Do you have an address for that office?

16 A I don't know.

17 Q And Mill Creek, I mean, is that the
18 same as Cypress Ridge, or do you just stay
19 pretty much --

20 A There's two different entrances, and we
21 used to go into this entrance, Mill Creek, and
22 the office was there. And now we go in Cypress
23 Ridge, and our office is there. It's the same
24 neighborhood, two different entrances.

25 Q Okay. I just want to make sure there's

SHELTON - O'SAKO (DIRECT EXAMINATION)

not any distinguishing characteristics between the two.

A No.

Q And is that where your office is now, the same place?

A It is not.

Q And where is your office now?

A Cypress Ridge.

Q Do you know the address?

A I don't.

Q So in 2016 through 2018, you believe your office was in what you're referencing as Mill Creek?

A That's correct.

Q So you said you would, you know, call anyone that's working on your projects. Do you remember what projects you had going on in late 2016?

A No.

Q Okay. And what would you call a contractor for? You said you called folks on -- you know, anyone who's working your projects every day. I understand you may not be calling every single person on every single project

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 every day, but what would be a typical reason
3 you would call a contractor?

4 A The basic reason is trying to make sure
5 that we're on schedule.

6 Q And "on schedule" being what? I mean,
7 on schedule with the project? On schedule with
8 the -- let me back up a little bit. So you have
9 a development, right? That's the entire
10 neighborhood, correct?

11 A Right.

12 Q And then projects are separate pieces
13 of that development within the development; is
14 that fair to say?

15 A Correct.

16 Q So when I say a "project," that would
17 be something that a contractor has been hired by
18 D.R. Horton to complete within a scope of work
19 within a development?

20 A That's fine.

21 Q Okay. Is there a better way to express
22 it than that?

23 A Phases.

24 Q Phases. And do each of these phases
25 have, then, timelines, I'm assuming?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A Yes.

3 Q And did you have any type of schedule
4 or any type of timeline in your office, either
5 in any type of paperwork or on your computer per
6 phase, to know where certain thresholds should
7 be met?

8 A Typically.

9 Q And as land development project
10 manager, you say you worked out of the Mill
11 Creek office; is that correct?

12 A Correct.

13 Q Did anyone else for D.R. Horton work
14 out of that Mill Creek office at the time? And
15 "at the time," I should say 2016 through 2018.

16 A I'm going to guess 15 people.

17 Q Can you tell me what their roles are?

18 A It would be the whole office personnel.

19 Q So let's start with you. You're the
20 land development project manager. You're in
21 that Mill Creek office. Is there anyone -- do
22 you have a supervisor within that office during
23 that timeframe?

24 A That's hard to say. I don't think so.
25 I don't think so.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Q So on a typical day, you would be the
3 de facto supervisor; is that fair to say?

4 A Correct.

5 Q Who would be -- who did you have as the
6 direct tier underneath you? What were --
7 without naming names, because I understand that
8 could change from time to time, what would their
9 roles be?

10 A I had one guy working with me. His
11 role was more the paperwork side of it,
12 contracts and things like that. He was an
13 attorney.

14 Q And what's his name?

15 A Sean O'Toole.

16 Q He was an attorney, you say?

17 A He was.

18 Q And who else was there in the office
19 physically with you that you would be working
20 with regularly?

21 A The city manager was Ali Heavener.

22 Q You said the city manager?

23 A Correct.

24 Q What is the city manager? Is that --
25 that's within D.R. Horton, and that's not the

SHELTON - O'SAKO (DIRECT EXAMINATION)

city manager of Bluffton. Right?

A Correct.

Q What does the city manager do?

A She was in charge of all departments.

Q And she worked there as well full time?

A Correct.

Q Who else would be someone that you engaged with on a daily basis within that office?

A I don't know about daily, but --

Q Let's say regular basis then.

A You'd have the construction manager.

Q Who was that in 2016 through 2018?

A I believe it was Carl Aten.

Q How do you spell that?

A A-t-e-n.

Q Did Carl report to you?

A No.

Q Who did Carl report to, do you know?

A I don't know.

Q Okay.

A Everybody fell under Ali. I don't know, like -- I don't know exactly what -- Carl may have had one person in between him and Ali.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Q Did Carl have anyone working underneath
3 him?

4 A All the vertical superintendents.

5 Q How many would there be at a given
6 time? I understand that might change from time
7 to time.

8 A 15.

9 Q 15 vertical superintendents?

10 A I have no idea. Yeah. It might be 30
11 today. I have no idea. But back then we
12 weren't as big.

13 Q Would it be fair to say this was the
14 main office for your entire area at the time --

15 A Correct.

16 Q -- the Mill Creek office was?

17 A Correct.

18 Q And now the Cypress Ridge office is
19 still the main office for the entire area?

20 A Correct.

21 Q Are you familiar with Kenneth Scott
22 Builders?

23 A Yes.

24 Q Do you know whether -- I mean,
25 obviously, Kenneth Scott Builders did work at

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Cypress Ridge; is that correct?

3 A Correct.

4 Q Let me back up a little bit. As -- I
5 want to say it right -- land development project
6 manager, you talked a little bit about that
7 role, but what were your main responsibilities
8 as land development project manager?

9 A Main -- main responsibility would be
10 keeping things on schedule.

11 Q And what would be involved with the
12 task of keeping things on schedule, breaking
13 that down a little bit more?

14 A Making calls, communicating with
15 others, checking on progress of projects.

16 Q So for late 2016 through 2018, did you
17 have any role in supervising construction
18 projects in Cypress Ridge?

19 A Meaning what?

20 Q I mean, what does supervise mean to
21 you?

22 A Supervise means to coordinate. I --
23 that's -- I was a coordinator of the engineers,
24 the town inspectors, and the contractor.

25 Q And what would you coordinate with the

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 contractor?

3 A I would coordinate -- I would keep
4 him -- I would make sure that he was calling the
5 inspectors. So we have soils engineers who are
6 doing inspections, which is a different group
7 entirely. The -- that's really it. I mean,
8 it's mainly, "Are you reporting everything? Are
9 you doing this? Are you communicating with the
10 guys that are asking you questions?" Because
11 those guys are the guys that are checking to
12 make sure that they're building stuff according
13 to spec.

14 Q So let's back up a little bit. When
15 you say "he," were you referencing Kenneth
16 Tosky?

17 A No.

18 Q Okay. So "he" would be any contractor?

19 A That's correct.

20 Q Okay. And the soil inspectors, you
21 said they're a different group from Thomas and
22 Hutton?

23 A That's correct.

24 Q What group would they be?

25 A They have changed names multiple times,

SHELTON - O'SAKO (DIRECT EXAMINATION)

but I think currently it's GHD.

Q And what do these soil inspectors do?

A Classify soil.

Q And are you familiar -- I'm sure you're familiar with the different classifications of soil, or are you?

A Yes.

Q What are different classifications of soil?

A Suitable and unsuitable.

Q What's suitable?

A Suitable is the material that is good. It's also known as structural fill. You could build a home on it or build a road on it, or it would support a manhole.

Q And what's unsuitable?

A Unsuitable would be nonstructural.

Q What do you do with unsuitable fill?

A Place it outside the boundary of a building pad or road or anywhere there was going to be some sort of structure.

Q Are they also known as soil techs?

A Yeah.

Q Are the soil techs there to determine

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 the quality of the soil or there for additional
3 reasons?

4 A Quality of the soil works.

5 Q Or the -- you tell me because you know
6 a lot more about it than I do. So what are the
7 soil techs there to do? You're the -- you're
8 the -- at this time the -- the project
9 development -- the land development project
10 manager. Why do you have soil techs come out to
11 the property? What's their role?

12 (Whereupon, the record
13 was read back as requested
14 by the witness.)

15 BY MR. SHELTON:

16 Q The question is tell me more about what
17 the soil techs do. You said that works, so I
18 want you to elaborate on what -- give me
19 technical details of why they're there, please.

20 A They're there to determine if the soil
21 is suitable for the type of use specified in the
22 set of plans that the contractor was given.

23 Q And who provides the contractor with
24 the set of plans.

25 A Thomas and Hutton engineering.

SHELTON - O'SAKO (DIRECT EXAMINATION)

Q And who engages Thomas and Hutton engineering?

A The developer.

Q And the developer is D.R. Horton?

A Correct.

MR. CRAWFORD: And I'm going to object to form. And I hate doing speaking objections, but it seems like we were talking generally --

MR. SHELTON: Right.

MR. CRAWFORD: -- and so are we talking project specific now? Because those names and parties may change as we're talking about particular projects on there. I just don't want to be confused.

MR. SHELTON: Yeah, that's very fair.

BY MR. SHELTON:

Q So let's get dialed in with the Kenneth Scott Builders part.

A Okay.

Q So what role, if any, at Cypress Ridge did you hold while Kenneth Scott Builders was performing work for their various projects at Cypress Ridge?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A Land development project manager.

3 Q And I think you've answered this, but
4 how often were you at Cypress Ridge while that
5 work was being performed?

6 A My office was at that neighborhood, so
7 I was at that neighborhood pretty much daily, I
8 would guess, or every other day.

9 Q And what was your role relative to
10 Cypress Ridge specifically, in late 2016 through
11 the spring of 2018? I understand you were land
12 development project manager, but what was going
13 on at Cypress Ridge during that time period that
14 you were overseeing?

15 A At that time period, obviously, I know
16 that Ken was building the town homes because of
17 all this, but if it wasn't for this, I would not
18 know what was going on in 2016.

19 Q And "this," you're referencing the
20 litigation?

21 A This case, yeah. There's no way I
22 would not know that that's the timeline when we
23 did that project.

24 Q And "Ken" is Ken Tosky?

25 A Correct.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Q And you said he was building the town
3 homes?

4 A Correct. I'm -- yeah, the town homes.
5 I'm guessing the town homes. That's where we
6 started, is town homes.

7 Q And do you know what he was engaged to
8 do? And I'll -- I can break that down later
9 with specifics with some of these exhibits.

10 A Okay.

11 Q That would be better.

12 So I asked earlier, is it fair to say
13 that, you know, you supervised construction
14 projects at Cypress Ridge from 2016 to 2018?

15 A No. I coordinate the different groups.

16 Q Do you have personal knowledge of
17 anyone within D.R. Horton that was in charge of
18 supervising the construction projects at Cypress
19 Ridge during that time frame?

20 A The word supervision can be misleading,
21 and people can have different definitions of
22 supervision.

23 Q I understand.

24 A So I don't -- a supervisor has the
25 ability to dictate means and direction, and we

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 don't -- we don't do that.

3 Q What is -- do you have knowledge of
4 what the construction manager does?

5 A The construction manager is over the
6 superintendents who build the homes.

7 Q So that's related to the vertical
8 construction and not the horizontal
9 construction. Is that fair to say?

10 A Correct.

11 Q Is there anyone that is -- has a role
12 similar to construction manager relative to
13 horizontal construction other than you?

14 A Sean O'Toole.

15 Q So would -- did you oversee the
16 horizontal construction projects at Cypress
17 Ridge?

18 A Yes.

19 Q And did you assist in the hiring of
20 contractors for work at Cypress Ridge?

21 A Yes.

22 Q Is there a process that you follow when
23 selecting, engaging contractors during that
24 timeframe at Cypress Ridge, that timeframe being
25 2016 to 2018?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A Yes.

3 Q Can you describe that process?

4 A The process would be --

5 On the actual selection of the
6 contractor?

7 Q Correct. Selection and ultimate
8 hiring.

9 A Okay. The process is you bid it out,
10 review, compare bids. Review, compare
11 schedules. Because oftentimes, we just ask them
12 to turn in your bid and then turn in what your
13 timeline for you building the project.

14 We -- oftentimes, we don't set the --
15 we don't set the deadline. They set -- they set
16 the deadline. They tell us what they can do.
17 And so they provide us with a schedule.

18 And then, based on -- I guess the next
19 thing would be their history with the different
20 groups that I have a relationship with,
21 including the engineers, and their past
22 performance, whether they be recommended; or
23 current work load, their ability to perform the
24 work.

25 Q What qualities are you looking for in a

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 contractor when you are weighing their ability
3 to perform the work?

4 A Available personnel and equipment.

5 Q What would you want to see in a
6 contractor to be assured that they have
7 available personnel and equipment?

8 A I don't see anything.

9 Q What would you want to know?

10 A We would want to know if they have
11 equipment available and if they have personnel
12 available.

13 Q And that would be the equipment to do
14 the job. Is that fair to say?

15 A That's correct.

16 Q How did you first come to know Kenneth
17 Tosky?

18 A His wife was the -- she was the sales
19 manager.

20 Q Sales manager for?

21 A D.R. Horton.

22 Q Did she work out of Cypress Ridge?

23 A She did.

24 Q And did you know Kenneth Tosky first,
25 or did you know Kenneth Scott Builders first?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A They're the same, aren't they?

3 Q Fair enough. To you, are they one and
4 the same?

5 A They're the same, I think.

6 Q Do you recall your first communication
7 with Kenneth Tosky?

8 A No.

9 Q Do you recall who contacted who? Did
10 you contact him, or did he contact you?

11 A I don't recall.

12 Q Do you know how you got his name?

13 A His wife was the sales manager.

14 Q So did she work in the same office as
15 you?

16 A In Cypress -- or Mill Creek.

17 Q So did it come about just from office
18 talk, that my husband is a contractor, and you
19 should speak with him or something along those
20 lines?

21 A Correct. Correct.

22 Q And do you recall then -- what's the
23 first -- what's the first communication with
24 Kenneth Tosky that you recall? Let me ask that.

25 A The first conversation I had with Ken

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 that I remember?

3 Q Yeah.

4 A I don't remember.

5 Q Do you remember the first conversation
6 you had with him regarding working with D.R.
7 Horton?

8 A No.

9 Q Do you recall the first project that he
10 was hired for by D.R. Horton?

11 A I think -- I think so. I read his --
12 some notes, so I remember what he said, and I'm
13 going to guess I know where that is.

14 Q Yeah, so -- and don't tell me anything
15 that you discussed with your attorney, but
16 anything that you reviewed for the deposition I
17 can ask you about other than attorney
18 communication.

19 So did you read his transcript, is that
20 what you're referencing?

21 A Parts of it.

22 Q Okay.

23 A It was super long.

24 Q And what is your understanding of the
25 first project that he was engaged by D.R. Horton

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 to take part in?

3 A He said he was doing building pad
4 remediation, so I guess that's what he was
5 doing.

6 MR. SHELTON: I'm going to mark this as
7 Exhibit Number 1.

8 (Whereupon, Plaintiff's Exhibit
9 Number 1 was marked for
10 identification.)

11 BY MR. SHELTON:

12 Q I'm handing you what's been marked as
13 Plaintiff's Exhibit Number 1. Mr. O'Sako, the
14 -- and this is KDC Bates mark 383 through 387,
15 as another point of reference.

16 A That's the address for the office
17 building, 209 Argo Circle.

18 Q Okay. And that's the address that you
19 were operating out of, obviously, in June 2016?

20 A Correct.

21 Q And is that also the address that
22 Mr. Tosky's wife was working out of?

23 A She worked next door to me. We worked
24 out of two homes. She worked out of the next
25 one, 207. I don't know the actual, but we were

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 in different buildings.

3 Q Take some time and look at this, as
4 much as you need.

5 And frankly, the final page of this --

6 MR. SHELTON: John, I'm not sure
7 whether those first pages -- I'm going to
8 ask him about it. There's different dates
9 there. So if it doesn't, you can -- you can
10 just take that last page and pull it out.

11 THE WITNESS: Okay. What's the
12 question?

13 BY MR. SHELTON:

14 Q Okay. The question is, do you
15 recognize this document?

16 A No.

17 Q Do you know whether you've ever seen
18 this document before?

19 A No.

20 Q What does the document appear to be to
21 you?

22 A It appears to be a bid from Kenneth
23 Scott to do some work.

24 Q Do some work where?

25 A That's the weird part. It doesn't say,

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 does it?

3 Q On 384, it says "For the Project," it
4 just says "Cypress Ridge." It doesn't say
5 exactly. Do you see that? It's the second page
6 of the exhibit.

7 A Yeah. But that address and all that is
8 our office. I mean, he just -- to me, he's not
9 working at that location.

10 Q Correct.

11 A Okay.

12 Q So can you tell what this bid is in
13 reference to, by the face of it?

14 A It looks to me like what he's doing --
15 this -- we do -- any time we find a new project,
16 we're going to do a test pit. So if I were to
17 purchase a piece of property, a field next door,
18 we're going to send -- we're going to call one
19 of the contractors or GHD -- we'll call GHD, who
20 does soils testing. They can coordinate with a
21 contractor, and they will call them.

22 So in this case, it appears Kenneth
23 Scott got a phone call to go do a test pit at
24 some location, and he went and did a test pit.
25 And the location is not shown.

SHELTON - O'SAKO (DIRECT EXAMINATION)

Q Are locations typically shown in bids to D.R. Horton?

A Yes.

Q And if you look at -- it's the third -- fourth page of this packet, but it's KDC Bate stamp 386.

A Right.

Q It says "From: Sean Michael O'Toole." Is that the Sean O'Toole you were referencing earlier?

A It appears to be.

Q And who is Ashley Nicole Huddleston?

A She was -- she processed payments. Accounting.

Q And it appears that you're cc'd on this. Is that fair?

A Yeah.

Q Would it be typical for you to be carbon copied on any payment request?

A Sure.

Q So is it fair to say that Kenneth Scott was doing some work for D.R. Horton no later than June of 2016?

A No, that's not fair to say. This --

SHELTON - O'SAKO (DIRECT EXAMINATION)

This is a construction proposal?

Q Correct.

A Okay. So he hasn't done the work as of June of '16.

Q Okay. So then if we look at page 386, the email --

A Right, right.

Q -- it says, "Ashley, Please see the attached manual PO request and proposal for Kenneth Scott Builders.

"Let me know if you have any questions."

So that doesn't necessarily mean that he was accepted, that this was accepted. Is that fair to say? Or I'm trying to find out.

A No. This means he was accepted.

Q Okay. So then it's fair to say that he was accepted to do work for D.R. Horton no later than July 15th, 2016?

A That's correct.

Q Okay. Thank you. So I'm going to hand you Exhibit Number 2.

A This doesn't --

Q Yeah, this document -- that's why I was

SHELTON - O'SAKO (DIRECT EXAMINATION)

asking.

A I don't think that goes with this.

MR. SHELTON: For the record, that's
Bates stamped 387, and we're going to not
include that in Exhibit Number 1.

(Whereupon, Plaintiff's Exhibit
Number 2 was marked for
identification.)

BY MR. SHELTON:

Q Exhibit Number 2, same thing, take your
time and look over this, if you don't mind.

A Okay, got it. Okay.

Q What does this document appear to be to
you?

A A construction proposal.

Q And what is it relating to?

A Cypress Ridge pond.

Q And who is it by?

A Kenneth Scott.

Q And does it appear to be dated July
27th, 2016 on the first page there?

A Correct.

Q On the second page, it states "Scope of
Work: Excavate pond, install subgrade drain,

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 install storm pipe and inlet."

3 A Right.

4 Q Do you recall this project?

5 A Yes, I do.

6 Q Do you know whether D.R. Horton
7 received any proposals other than this proposal
8 for this project?

9 A I don't know.

10 Q If you did, would you have a record of
11 that somewhere, as your role as the construction
12 project?

13 A Not necessarily. This is a -- this is
14 a pond bank that had -- had washed in, so it's
15 not really anything that's significant to us.

16 Q Okay. So tell me what this project is
17 in more detail than what I can tell from this
18 document, please.

19 A Okay. I believe that -- I believe that
20 this proposal is at the pond where our new
21 office is, and the sand had washed in -- the
22 pond was already built by a different
23 contractor. The soil eroded in one of the
24 corners and just washed out, sanded out into the
25 pond.

SHELTON - O'SAKO (DIRECT EXAMINATION)

And what he did was he dug what was probably as -- the bank as tall as this ceiling, say 15 feet. He dug a French drain across I guess it would be parallel to the top of -- well, it would be the top of water of that lagoon, approximately -- well, I guess he -- I guess he installed the French drain along the top of the bank to intercept the water that was coming down causing the erosion.

Q And did he dig out the pond as well?

A He did not dig out the pond. He dug out the area that the erosion got into.

Q And "he" being Kenneth Scott or Kenneth Tosky?

A Correct. It appears that way.

Q Was there any negotiation regarding this specific construction proposal, Exhibit Number 2?

A I don't recall.

Q So in this proposal, did it involve moving dirt?

A Yes.

Q It involved excavating, obviously; is that correct?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A Correct.

3 Q Did it involve any type of site
4 preparation?

5 A I'm not sure -- what is your question?
6 You'd have to -- can you rephrase that?

7 Q Sure. I'm just trying to -- it says
8 that the scope of work is to excavate pond and
9 install subgrade drain, install storm drain pipe
10 and inlet.

11 A Okay.

12 Q So they had to prepare the site to
13 install that pipe and inlet. Is that fair to
14 say?

15 A By "prepare site," if you mean that
16 they had to regrade the area that washed out,
17 then that's what they had do. They had to
18 regrade the area that washed out, install a pipe
19 and inlet to catch it so it would never wash out
20 again, is the intent of this proposal.

21 Q What type of equipment does the work
22 that this proposal -- let me rephrase this.
23 What type of thing does the work that you just
24 described regarding this proposal require?

25 A A backhoe, a dozer. That's it.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Q Do you know whether it required a dump
3 truck?

4 A It would require a dump truck if he did
5 the -- well, he did coarse sand, didn't he, it
6 says in here.

7 So he didn't do -- he didn't do rock in
8 it, so, no, a dump truck would not be required.

9 Q So if you look at 252, Bates stamp 252,
10 at the top it says: "Excavation, backhoe,
11 dozer, operators, trucking," and "pump." What
12 trucking would that be in reference to?

13 A There would be no trucking on this one.
14 Here -- here is another thing to
15 consider. This is a proposal. This doesn't
16 mean this is how -- this may be a version of a
17 fix that was discussed. But you can also see
18 there's no unit costs and there's no cost in
19 trucking.

20 Q Right.

21 A I mean, there are no trucks running to
22 do this project.

23 Q Okay.

24 A It appears that at -- at some point we
25 may have had, "Hey, let's dig this whole pond."

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 I don't know. This could have been from a
3 different project he had. But it's weird how
4 there's a bid set out there.

5 Q Do you know whether he ultimately did
6 this work?

7 A He did.

8 Q So is it your understanding this
9 proposal was accepted?

10 A I don't know if it's this proposal. I
11 just know he did the work.

12 Q And do you know if he had any other
13 proposal for this work regarding the pond
14 excavation?

15 A I don't know.

16 Q Did Kenneth Scott Builders own any
17 excavators?

18 A I don't know how -- I don't know the
19 details of ownership of his equipment.

20 Q Do you know whether he owned any
21 tractors?

22 A I don't know any details of the
23 ownership of any of his equipment.

24 Q You don't know whether he owned any
25 equipment at all?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A I don't.

3 Q Would it be normal for D.R. Horton to
4 engage a vertical land contractor that did
5 the --

6 A Horizontal?

7 Q Horizontal, excuse me, thank you --
8 horizontal land contractor that didn't own any
9 equipment?

10 A Yes.

11 Q And what would you expect to see
12 from -- from them? How would they obtain the
13 equipment to do the job?

14 A Typically, everybody rents it or leases
15 it.

16 Q And is it common for a construction
17 company not to own any equipment it uses to do
18 business?

19 A I don't know. I don't know what's
20 common or not common. I don't own a
21 construction company.

22 Q And how long have you been working with
23 construction companies?

24 A In what aspect?

25 Q In general. You were an engineer,

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 correct -- or you are an engineer, correct?

3 A That's correct.

4 Q So did you work for construction
5 companies at Thomas and Hutton?

6 A No.

7 Q Did you send them -- did you do
8 engineering -- did you send them engineering
9 drawings?

10 A We sent -- yes, we would send drawings.

11 Q Did you ever go to any sites to inspect
12 to see whether the drawings were being completed
13 as they were supposed to be?

14 A I went to sites to observe.

15 Q And then when you worked with, was it
16 Palm Beach -- what was it called, I'm sorry --

17 A Palm Beach Grading.

18 Q -- Grading, that was a construction
19 company; is that correct?

20 A Correct.

21 Q Okay. And Palm Beach Grading owned its
22 own equipment, correct?

23 A They had some equipment, but for the
24 most part, you rent and lease equipment.

25 Q Do you know whether they leased it

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 short term or long term?

3 A I don't know.

4 Q For example, if you hire an excavating
5 contractor, do you expect them to either own or
6 have an ongoing lease with an excavator?

7 A I don't expect them to. They could
8 rent it.

9 Q As part of your role with D.R. Horton,
10 do you require contractors you hire to hold
11 insurance?

12 A It's in the contractor's agreement,
13 yeah, that they have to have insurance, correct.

14 Q What types of insurance, do you know?

15 A No, I don't know.

16 Q Do you verify whether companies hold
17 insurance before you engage them?

18 A Me?

19 Q You, yeah, as part of your job. I'm
20 asking you as part of your job.

21 A No.

22 Q Who would, to your knowledge? If you
23 don't know, it's fine. I mean, it's just . . .

24 A Well, we have people that do the
25 insurance stuff, so, you know, I don't deal with

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 insurance.

3 MR. CRAWFORD: And I just want to
4 interject on the record right now, there's
5 been a little bit of overlap between what we
6 consider 30(b)(6) versus a fact witness.
7 Any time you reference the word "you,"
8 you're asking for Mr. O'Sako's, Jared's,
9 personal role and not whether D.R. Horton
10 does something?

11 MR. SHELTON: Correct.

12 MR. CRAWFORD: Okay.

13 MR. SHELTON: And that can be an
14 ongoing understanding, and I can put that on
15 the record:

16 BY MR. SHELTON:

17 Q When I say "you," I'm speaking with you
18 as your role that I'm speaking relative to the
19 time. Okay?

20 A Versus the company.

21 Q Versus the company, correct. And I'm
22 not speaking of you personally, what you do in
23 your personal time off of the job. I'm speaking
24 relative to you as an employee with the company.

25 A But I'm not speaking for the company;

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 is that right?

3 Q You're not -- you're not the official
4 representative of the company for the purposes
5 of this deposition. That's what we were just
6 specifying.

7 A I'm still a little confused on all
8 that, to be honest with you.

9 MR. CRAWFORD: Do you mind going off?

10 MR. SHELTON: Let's go off the record,
11 yeah.

12 MR. CRAWFORD: And I'm going to have a
13 discussion with Jared.

14 MR. SHELTON: That's fine, yeah.

15 MR. CRAWFORD: And Jared can be in the
16 room.

17 MR. SHELTON: Yeah.

18 (Off the record.)

19 BY MR. SHELTON:

20 Q Let's go back on the record.

21 Just to be clear, today I'm asking you
22 questions that you have personal knowledge of.

23 A Okay.

24 Q And we're not here to -- there's no
25 jury in this room, but this is a formal

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 proceeding, obviously. So there are certain
3 objections that your attorney will raise for
4 form, but I'm free to ask you, well, do you know
5 if someone else knows this or do you know if
6 someone else knows that, do you have knowledge
7 of this. And whether or not that ultimately is
8 admissible in court is a different fight for a
9 different day. I'm just trying to figure out
10 what you know and what other people may know
11 within your orbit. Does that make it clear?

12 A Yes.

13 Q Okay. And again, when I said "you," I
14 was speaking with you as the project supervisor,
15 okay, and not as D.R. Horton's corporate
16 representative binding the company, relative to
17 that question.

18 A Okay.

19 Q So as supervisor of the development, do
20 you require all contractors that work on a D.R.
21 Horton job site to be insured?

22 A I don't require that. The company
23 requires insurance.

24 Q Do you have an understanding of
25 different levels of contractors; like, you have

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 your general contractor, then you have
3 subcontractors or the general contractor,
4 et cetera? Do you have any terms for that?

5 A The terms that you used are -- I'm
6 aware of those terms.

7 Q Have you ever heard of first tier,
8 second tier, third tier, anything like -- have
9 you ever heard of those terms?

10 A No.

11 Q As supervisor of a development, do you,
12 within your role, have any role in seeing that
13 subcontractors or other vendors retained by a
14 general contractor hold insurance?

15 A You keep saying I'm a supervisor. I'm
16 not a supervisor. There's no supervision in my
17 title or . . .

18 Q Well -- and I apologize. I promise I'm
19 not trying to trick you. That's just me. Land
20 development project manager. As land
21 development project manager, do you have any
22 role -- do you require -- let me back up after
23 that.

24 As the land development project manager
25 for a site, okay, like Cypress, do you have any

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 role in seeing that anyone that the contractor
3 engages with, whether it be a sub or a vendor,
4 has insurance?

5 A No.

6 Q Did you have any role in monitoring who
7 came to and from your project sites?

8 A No.

9 Q Is there any monitoring that you're
10 aware of as to who comes and goes to a project
11 site?

12 A No.

13 Q Do you have any role in approving of
14 bids or proposals from contractors?

15 A Yes.

16 Q If a contractor does not have
17 insurance, will you accept a bid from a
18 contractor?

19 MR. CRAWFORD: I object to form.

20 You can answer the question.

21 THE WITNESS: We -- we don't -- we
22 don't accept bids -- there's no way I could
23 get a bid from someone who doesn't have
24 insurance, because they're not a vendor.

25 I'm not allowed to just bid. Because

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 you have a shell on a pickup truck, you
3 can't submit a bit to me. You have to be a
4 signed up vendor. And to be a vendor, you
5 have to agree to the terms of the contract,
6 which state that you have insurance.

7 BY MR. SHELTON:

8 Q And does that go for all vendors that
9 are working on D.R. Horton properties, to your
10 knowledge?

11 A Does what go?

12 Q That rule.

13 A What rule?

14 Q The rule that you just described, that
15 you have to have insurance or else you can't be
16 even be a vendor.

17 A Correct.

18 Q So does that -- that applies to any
19 vendors that are working on D.R. Horton's
20 projects?

21 A Any vendor in my department. I don't
22 know all the departments, but I'm sure that
23 you're not allowed on our sites if you don't
24 have insurance.

25 Q And your department is horizontal land

SHELTON - O'SAKO (DIRECT EXAMINATION)

development?

A That's correct.

Q And I already asked this, but just to a certain extent, but my recollection is that you answered that you did not receive any other bids on this exhibit number -- I believe it's Exhibit Number 2?

A No, that's incorrect.

Q Okay.

A I just said I'm unaware if any other bids came in on that.

Q Okay. That's fair to say.

Would it be -- and I don't mean to misconstrue what you testified to. Is that normal? Would you normally -- whether or not there was another bid here, would you normally seek more than one bid for a project?

A We normally seek more than one bid for a contract, that's correct.

Q Had you previously as your role as the land development project manager engaged other horizontal construction companies prior to Kenneth Scott Builders?

A Yes.

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Q Who are some of those companies, if you recall?

A Hiers Construction, Eagle Construction, Dustcom Limited.

Q What was that last one?

A Dustcom Limited.

Q How do you spell that?

A D-u-s-t-c-o-m Limited.

Q Do you know whether those companies own their own equipment?

A No, I don't.

Q Do you know whether those companies have a corporate office?

A I know where their office is, local. Some of them have multiple offices.

And I know some of them -- I know some of them lease their equipment. I mean, I don't know what pieces they -- if they owned any or what of that, but . . .

Q But you as the development project manager would not have a vendor hired for a project that didn't have access to the equipment needed to do the project. Is that fair to say?

A That's fair to say.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Q Did, and again, you, I'm speaking to
3 you as project manager, determine whether
4 Kenneth Scott Builders had either owned
5 equipment or had leased equipment required to
6 perform its obligations under its first bid with
7 D.R. Horton before signing him up?

8 A Can you rephrase that?

9 Q Did you determine as project manager
10 whether Kenneth Scott Builders had the equipment
11 necessary to do the job before accepting the
12 first bid that they were engaged for?

13 A I'm not sure that this is the first bid
14 that he's engaged for, but -- I don't believe it
15 is actually. But we absolutely have to make
16 sure that the person that was going to sign up
17 to be a land development vendor has access to
18 the equipment that's required to be a
19 landscape -- a land development contractor.

20 Q Were you D.R. -- to your knowledge,
21 were you D.R. Horton's main contact with Kenneth
22 Scott Builders during the bidding process?

23 A I don't know that. I mean, it was just
24 me and Sean, so it just depends. Sometimes we
25 had -- sometimes Sean would bid a project. But

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 I definitely had contact with Kenneth Scott
3 during these times.

4 I guess you'd have to be specific, and
5 I'm not going to remember exactly which bid Sean
6 did and which bid -- because a lot of times we
7 would work as a team and say, "Yeah, that makes
8 sense" or "This guy is too busy" or whatever.

9 Q And that's understandable. You or Sean
10 would be the ones that would be in contact. Is
11 that fair to say?

12 A That's correct.

13 Q And is it your experience that D.R.
14 Horton verifies that work is completed before
15 making payment for work?

16 A That's correct.

17 Q Do you expect general contractors that
18 you engage with D.R. Horton to have an office or
19 a location where they base their operations out
20 of and store and maintain their equipment?

21 A No.

22 Q You don't expect them to have a basis
23 of operations?

24 MR. CRAWFORD: I object to form.

25 BY MR. SHELTON:

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Q Do you expect them to have a basis for
3 operations?

4 A It's not required.

5 Q So do you know where Kenneth Scott
6 Builder, Inc.'s basis for operations was in 2016
7 through 2018?

8 A I don't think he had an office. I
9 think he worked out of his truck.

10 Q Do you know whether it was 4 Oakland
11 Place, Bluffton, South Carolina 29909?

12 A Oh, I have no idea.

13 Q Are you familiar with Berkeley Hall?

14 A Yeah.

15 Q Are you aware that that is an address
16 in Berkeley Hall?

17 A I wouldn't know that, but yeah. I
18 mean, I -- that's why I think -- I don't think
19 he had an office.

20 Q So it wouldn't surprise you -- would it
21 surprise you to know that -- let me just
22 rephrase that.

23 So did you know that Kenneth Scott
24 Builders, Inc.'s only basis for operations was
25 Kenneth Tosky's personal residence, at 8 Oakland

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Place, Bluffton, South Carolina at this time
3 period in question?

4 A I did not know that was Kenneth Scott's
5 only place of whatever you -- the rest you just
6 said. I don't know. No, I didn't know that was
7 his only -- I'm not sure if it was. I don't
8 know. He could have had an office somewhere. I
9 don't really know.

10 Q And do you know whether he owned any
11 equipment with his company whatsoever?

12 A I don't.

13 Q You just stated that you don't think
14 that Exhibit 2 or even -- or Exhibit 1 -- do you
15 know of any other project that may have been the
16 first bid that he submitted other than Exhibit 1
17 or Exhibit 2?

18 A I know that there's a project, because
19 I read that part of his transcript, if that's
20 the right wording for it, where he had to
21 remediate some building pads.

22 Q And do you know when that started, when
23 that project started?

24 A I don't.

25 Q Is it your recollection -- let me just

SHELTON - O'SAKO (DIRECT EXAMINATION)

rephrase that. Your basis for believing it's the first project he was engaged with is through his deposition transcript. Is that correct?

A Correct.

Q Okay. And if I see something that helps elaborate on that, later on I'll bring it to your attention.

A Okay.

Q Let me hand you what's going to be marked as Exhibit Number 3.

(Whereupon, Plaintiff's Exhibit Number 3 was marked for identification.)

THE WITNESS: Yeah. Okay. Question?

BY MR. SHELTON:

Q Do you recognize this?

A Yes.

Q What does it appear to be to you?

A Appears to be a bid from Kenneth Scott Builders to -- to remove unsuitable material and replace with structural fill.

Q And do you know where within Cypress Ridge this project was located?

A Phase 7.

SHELTON - O'SAKO (DIRECT EXAMINATION)

Q Where is Phase 7 in general?

A It's between the Mill Creek entrance and the Cypress Ridge entrance.

Q How many phases total were there to Cypress Ridge and/or Mill Creek?

A 20.

Q And they're all completed now, correct? We talked about that earlier.

A There's one other phase. Phase 20 is not completed. It's a commercial area that we're dealing with the town of Bluffton on, getting permission to complete it.

Q What was Phase 7?

A Town homes.

Q So I see handwritten notes, "common area dig out old borrow pit filled in with unsuitables." That's Bates stamp 407.

A Yes.

Q "Under lob." What is L-o -- is that lob? Am I reading that correctly?

A "Under the lots."

Q I see. Lots. Thank you. Is that your underwriting?

A It is.

SHELTON - O'SAKO (DIRECT EXAMINATION)

Q And is this your handwriting down below?

A It is.

Q Can you describe for me the scope of the work that was involved in this bid?

A The scope of the work would be: on site hauling only. Material to be excavated from the RV lot and hauled to Phase 7B building pads. Unsuitable material hauled from the 7 Phase B to the rear side of the RV lot.

Q And then below, it says "Alternates." And we're just reading from this page Bates stamped 408, which is part of Exhibit Number 3.

What are the alternates? What does that indicate? What does that mean?

A Alternates are different options.

Q And why would they be included in a bid?

A Because there's more than one way to fix a problem.

Q And these alternates, it says "Add \$5.50 per" looks like "cubic yard for quantities above proposal. These quantities are measured by GHD."

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A Yes.

3 Q What is GHD?

4 A That is the soils testing group.

5 Q And what does it mean? What is GHD
6 specifically? What does that acronym stand for?

7 A I don't know.

8 Q And you say soils testing group. Are
9 there different levels of testing within soil --
10 or not within soil but --

11 A I don't know.

12 Q Did you learn about that as an
13 engineer?

14 A I did.

15 Q So what does "quantities are measured
16 by GHD" mean?

17 A It means if you -- an area was
18 excavated the size of this room, GHD measured it
19 and gave us the quantity.

20 Q Okay.

21 A It means the quantities are measured.
22 Literally, those words mean what they -- there's
23 nothing hidden in that message there for you.

24 Q Okay. Quantity, not quality. I
25 thought you said quality earlier, so that's why

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 I was confused.

3 MR. CRAWFORD: And, Ben, just for
4 clarification I think there may be some
5 confusion. GHD isn't a measurement acronym.
6 It's the sub -- it's the classification of
7 soil company that he was talking about.

8 THE WITNESS: That's correct.

9 MR. CRAWFORD: That's just a company
10 name, GHD. It changed and --

11 MR. SHELTON: Okay, I see. That's it.

12 MR. CRAWFORD: He testified to that
13 earlier.

14 MR. SHELTON: Yeah, yeah, yeah. Now
15 that's syncing.

16 THE WITNESS: Yeah. It was
17 C-R-A-H-S-A, and now it's GHD or GHD
18 something.

19 BY MR. SHELTON:

20 Q So GHD is a soil management company,
21 right?

22 A They're the engineers. They're the
23 civil engineers.

24 Q Okay, thank you.

25 So then it says, number 2, "When supply

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 of suitable material is exhausted in RV park,
3 suitable material will be hauled in from Hampton
4 Lake at \$210 per truck load. These rates are
5 subject to change."

6 A Yes.

7 Q Where was Hampton Lake?

8 A It is still in the same spot it's
9 always been. It's a neighborhood of Hampton
10 Lake.

11 Q And was that a D.R. Horton development?

12 A It's not.

13 Q And do you know whether there was a
14 dirt mine in Hampton Lake?

15 A Yes, there was a dirt pit there.

16 Q And do you know whether it was
17 permitted?

18 A It wasn't -- we weren't in charge of
19 it. No, I don't know.

20 Q Do you know whether this bid, the
21 August 18, 2017 bid in Exhibit Number 3, was
22 accepted?

23 A Some version of this bid was accepted.
24 I believe that this would be it, but, I mean, I
25 can't just sit here and tell you that this is

SHELTON - O'SAKO (DIRECT EXAMINATION)

the actual bid that was accepted.

Q And on page Bates stamped 408, which is the last page of this exhibit --

A Why are they different?

Q That's what I'm asking. I was going to ask to see if you see anything. There's two pages here, and they're consecutive, and I wanted to see if there's any -- anything different between those two pages. It doesn't appear to me to be.

A Did you print it twice? I don't know.

Q No.

A Did somebody scan it twice? I don't know. It looks the same.

Q It may have been scanned twice, but it looks like it's the same. That's fair enough.

A It looks the same to me.

Q So on the bottom of 407 and 408, identical pages, it says "pay 50 percent equals \$64,047.50. Billed to TB" --

A "7B."

Q 7B. What is the number after "7B," and what does that mean?

A That's your project code.

SHELTON - O'SAKO (DIRECT EXAMINATION)

Q And what does -- is that "cover from"?

A Correct.

Q What does that mean?

A That means if there was not enough money under that code, you cover from 29999.

Q And same for the second entry there, 50 percent?

A It doesn't say cover from, no, I don't see where it says that.

Q So seeing that --

Is that your handwriting?

A It is.

Q Seeing that it says "Pay 50 percent equals \$64,047.50" --

A Right.

Q -- does it appear that this bid was accepted?

A It appears that it was accepted, yeah.

Q Do you know whether you, as your role as the project manager, received any other bids for this project?

A I'm sure I did.

Q If you did, would you have any record of them anywhere?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A If you don't have it, then I don't have
3 it, because they put me through all the
4 searching and researching.

5 Q And you say that you're sure that you
6 would. Why would you be sure that you would
7 have multiple bids for this project?

8 A I know at the time the contractors that
9 were in the area on the site, stuff like that.
10 And, typically, I try and get three bids for
11 every job.

12 Q You don't know whether you received
13 other bids for the previous projects in Exhibit
14 Number 1 and Exhibit Number 2; is that correct?

15 A No. A test pit, it doesn't -- that's
16 whoever has a piece of equipment available. You
17 just call around until -- you say, "Can you go
18 Thursday? Can you go Thursday? Can you go
19 Thursday?"

20 Finally, someone says "Yes." You say
21 "Thanks."

22 Q Okay. And then was this a larger scope
23 of project --

24 A Yes.

25 Q -- "this" being Exhibit Number 3?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A Yes.

3 Q So what would go in to factoring
4 whether or not to engage Kenneth Scott Builders
5 for this specific project, the proposal which is
6 Exhibit Number 3?

7 A Meeting and sit here and talk about the
8 project, what's going on; look at what the
9 engineers are recommending for a solution to the
10 issue; and asking him how he would go about
11 fixing the issue; see what kind of schedule he
12 would have, you know, time period that it would
13 take him and when he could start, when it would
14 finish.

15 Q Would pricing be a factor as well?

16 A Yeah, pricing and time is always a
17 factor.

18 Q So, specifically with this project, it
19 says "common area dig out old borrow pit filled
20 in with unsuitables." You described it briefly
21 before, but what was the common area dig out?
22 What did that involve?

23 A "Common area dig out," so it
24 involved there was an old pond, apparently.
25 This was prior to my working here at D.R.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Horton, but there was a pond there that was
3 filled in with unsuitables and then covered up
4 with material, sand, dirt. And Ken had to
5 remove the unsuitables and replace the
6 unsuitables with suitable material.

7 Q Was this in preparation to build over
8 the top of it?

9 A In some areas, yes, sir.

10 Q Do you know where the unsuitable
11 material went?

12 A Yeah. Unsuitable material was hauled
13 from 7B to the rear side of the RV lot, if you
14 look at number 3.

15 Q And what's located at the rear side of
16 the RV lot?

17 A Nothing.

18 Q Was there a pit there?

19 A There's a -- there is not a pit there,
20 no, sir.

21 Q How big is this area that was dug out,
22 this what you believe to be a old pond?

23 A And that's a -- I can't answer that.

24 Q Is it bigger than this room?

25 A Yeah, I would guess it would be bigger

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 than this room.

3 Q You have engineering background. Can
4 you give me an estimate as far as how large it
5 might be?

6 A I just don't recall. I would say the
7 size of a quarter acre lot that could stretch
8 out when they ran pipe one direction or another.
9 I don't know exactly the limits of where they
10 went and what they had to do, because sometimes
11 you wouldn't have to do anything because a house
12 was not on it. You would leave it there.

13 Q And do you know, the rear side of the
14 RV lot, is there a mound there or is there some
15 time of berm there?

16 A I think there's a berm there.

17 Q Do you know whether all of the
18 unsuitable material was hauled to there, or do
19 you know whether some of the -- some unsuitable
20 material could have ended up off site?

21 A Number 1 says "Onsite hauling only," if
22 you look at that. And then number 3 says,
23 "Unsuitable material hauled from 7B to the rear
24 side of the RV lot," and that was included in
25 his price. So, no, we didn't get any additional

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 charges for him to haul anything off site.

3 Q And that's what the alternates are
4 referencing; there would have been additional
5 charges, you believe, if he engaged in any of
6 that alternate activity?

7 A That's correct.

8 Q Do you know whether he would have
9 engaged in that activity and just not billed you
10 for it?

11 A Kenneth Scott Builders is a business.
12 He's not my friend. I mean, no, we've never had
13 anybody do stuff for free.

14 Q Are you aware of dirt being moved off
15 of D.R. Horton property at Cypress Ridge and
16 brought offsite by Kenneth Scott Builders at any
17 time?

18 A One of his bids did say export of
19 unsuitable -- it said "bad materials."

20 Q And do you know where that would have
21 been brought?

22 A It would have had to go to, most
23 likely, the -- I think it's, like, Bellinger
24 Hill. You have to pay to dispose of material
25 that's typically of that classification. It's a

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 land -- it's a dump.

3 Q So unsuitable dirt is supposed to be
4 brought to a dump; is that accurate?

5 A No.

6 Q No?

7 A No.

8 Q Okay. Unsuitable dirt, so correct
9 where I'm wrong in that question or that . . .

10 A Unsuitable dirt is -- okay, so the
11 unsuitables in this case had possibly had
12 contaminants in them regarding pieces of plastic
13 pipe, organic debris, maybe roots, maybe a piece
14 of concrete pipe that was in the area. So you
15 wouldn't use that in your back yard, right?

16 Q Right.

17 A So we can't use that in the back yard.

18 But unsuitables, if they're -- in
19 general, if we dig them out of a pond and
20 there's no contaminants in them as far as
21 debris, then it's okay to use them. We use them
22 on the site. We use the topsoil around the
23 outside of where you're going to build your
24 house.

25 Q And is it appropriate for the

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 unsuitable to be brought off of your property?

3 A Only if we can't use it on our
4 property. We are always trying to balance the
5 site. We never want to truck any -- truck
6 anything in. We never want to truck anything
7 out. So we always try and adjust the set of
8 civil plans to balance the earthwork.

9 Q So best case scenario, you don't have
10 to haul in any dirt --

11 A Right.

12 Q -- and you don't have to haul out any
13 dirt?

14 A That's correct.

15 So in that case, if he's hauling stuff
16 out, it's got to be contaminated or else we
17 would end up being -- it would be a berm, to
18 your point earlier when you asked about the back
19 of the RV. And that's what we're doing; we're
20 finding places on site, that you can keep those
21 trucks from burning fuel and burning time, which
22 equals money. Keep them on site, don't let them
23 leave.

24 Q Would it be a problem -- and let me --
25 would there be any problem with a contractor

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 taking unsuitable material on site -- excuse me,
3 taking unsuitable material from on site and
4 bringing it to another job site?

5 A That's how -- if that's how he bid it.
6 But that would have to show in his bid, that
7 material was coming in or coming out.

8 Q And how about suitable material, would
9 it be appropriate for a contractor, within your
10 role, to your knowledge, taking dirt from D.R.
11 Horton land and then bringing it to other
12 projects that are not D.R. Horton projects?

13 A There's -- that's the problem with this
14 project. That's why this project exists. We
15 needed all the material we could get because
16 there was bad material previously put in an area
17 that needed suitable material. And so there
18 would be -- no one would be allowed to take
19 suitable material off of this site, no.

20 Q Are you aware that dirt was moved off
21 of D.R. Horton property at Cypress Ridge and
22 brought off site by Kenneth Scott Builders?

23 A What kind of dirt?

24 Q Any dirt.

25 A It says in his bid that he removed the

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 unsuitables.

3 Q Are you aware of whether other dirt was
4 brought off the property?

5 A No.

6 Q As part of your deposition preparation
7 today, you did review at least portions of the
8 deposition given by Kenneth Scott and Tosky?

9 A Correct.

10 Q Are you aware that Kenneth Tosky
11 testified that D.R. Horton paid Kenneth Scott
12 Builders to remove dirt off of D.R. Horton's job
13 site?

14 A I know it's in his bid. That's what I
15 just said, he had to haul unsuitable materials
16 off site.

17 (Whereupon, Plaintiff's Exhibit
18 Number 4 was marked for
19 identification.)

20 BY MR. SHELTON:

21 Q And this is KDC's Bates numbering
22 starting on 73. And I'll submit to you that I'm
23 not positive that these pages are supposed to go
24 together. I'm taking them from what's been
25 produced to me, and that's why I'm asking you

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2 questions about them. But it appears that this
3 whole set was a set organized. So if you don't
4 mind looking at it and then telling me -- if
5 that's correct, let me know, and if it's
6 incorrect, please let me know.

7 A Well, one thing I notice is that Tim
8 Stone is now on here, and Sean O'Toole is no
9 longer on here.

10 Are you asking me if all this goes
11 together?

12 Q Yeah.

13 A I don't know about that.

14 Q I don't know. I'm asking you.

15 A It appears to be missing some, because
16 this has a second page, it looks like.

17 This sheet matches this sheet.
18 Apparently, it looks, at a glance -- oh, it's
19 not . . .

20 Q What Bates stamp are you referencing
21 down here? 75?

22 A It appears 75 matches 79. I'm not
23 exactly sure. We could do that at a later time,
24 we could match it up, but . . .

25 Q Yeah.

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2 A But then 79 continues to 80, but the
3 last item here is 30. And then it picks up 31
4 through 60 on 80. And you don't have 31 through
5 60 on this first set.

6 Q Okay.

7 A I mean, I don't know. And it could
8 be -- I don't know how that is, to be honest
9 with you.

10 Q If you don't mind putting them back in
11 Bates stamp order, if you can, and I'm going to
12 ask you some general questions about them.

13 A Okay.

14 Q So if you look at, beginning with the
15 first page of this exhibit, which is Bates
16 stamped 73, it's the one with the sticker on
17 it --

18 A Okay.

19 Q -- at the bottom, it has a file path --
20 do you see that: L land department 3-owned
21 Hilton Head Mill Creek at Cypress Ridge?

22 A Yes.

23 Q Is that a typical file path that you
24 would use in your job or a file path process?

25 A This -- that file path -- that file

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path came from the accounting department.

That's -- that's not -- I don't use that, no, sir.

Q So do you have any personal knowledge of the accounting department's maintenance of material? And when I say "maintenance of material," I just mean how they hold it and how they store it.

A I don't know.

Q Okay. So do you have -- do you know, then, whether you have access to this folder? Is this some type of server from D.R. Horton, is this --

A I have access to the first section, the land department drive.

This "3-owned" I don't recognize.

Q That's my next question. You don't know what that refers to?

A I don't.

Q Okay. So with the land department drive, do you have folders and sub folders per project?

A Yes.

Q And is that a shared drive for the

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 entire office?

3 A No. It's a shared drive between
4 myself, Sean O'Toole at the time or Tim Stone at
5 this period, and the accounting team.

6 Q Do you know of -- any document
7 retention policy that you're aware of, and I'm
8 not asking as a representative of D.R. Horton
9 but that you're aware of regarding files in that
10 shared file drive?

11 A I don't.

12 Q Do you know whether D.R. Horton has
13 one, your personal knowledge?

14 A I don't know the details of it, no,
15 sir.

16 Q Do you have some similar type of file
17 where you would have stored material relating to
18 7B, for example?

19 A Yes.

20 Q And have you given all of that material
21 to your attorneys?

22 A Yes.

23 Q Do you know of any other folders that
24 may exist similar to that folder that other
25 employees may maintain?

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A No.

Q And do you have -- that is a shared -- again, a shared server file drive; is that correct?

A Correct.

Q Do you have separate folders on the computer that's not within the server, that would be stored on the hard drive?

A No.

Q Do you know of any other system that D.R. Horton uses besides this file management system? I don't want to say "file management system" but in this filing system.

A I don't.

Q What software systems did you use and do you still use with D.R. Horton? For example, do you use Microsoft Outlook?

A Yes.

Q And do you use One Drive or . . .

A I have access to it. I don't use it.

Q What do you use?

A I use this, the land department drive.

Q And would you -- would that drive contain all, if they existed, any bids that

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2 would have been proposed contemporaneously, for
3 example, bid number three here?

4 A Can you ask that question differently?

5 Q Yeah. So would this file drive, the
6 file drive that you would maintain that's
7 similar to this where it says "Land Department,"
8 and then you have some type of back slashes, to
9 a 7B file; is that true?

10 A Correct.

11 Q So would that file then contain any
12 other bids if bids were made relative to this
13 construction proposal in Plaintiff's Exhibit 3?

14 A It would.

15 Q Do you ever delete bids?

16 A No.

17 Q So if a bid was made, is it fair to say
18 that it will be within that file drive?

19 A No.

20 Q Then where would it go?

21 A It may not get filed.

22 Q It may not get filed at all?

23 A No.

24 Q Would it be in an email?

25 A It could be. It could be a hand

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2 delivered package.

3 Q Where do the hand delivered packages
4 go?

5 A They are supposed to get scanned and go
6 in this drive. But oftentimes, the drive is
7 hard to keep up with the daily activity. And I
8 think at -- and I think at that time, they could
9 have had maybe -- I don't know. This drive is
10 where -- this drive is where the bids are
11 supposed to be.

12 Q And who was responsible for scanning
13 hand delivered bids, if anyone?

14 A No one.

15 Q So who would -- who would scan them
16 then? Who would . . .

17 A It would either be myself; in this
18 case, Tim Stone or Sean O'Toole.

19 Q Can you provide your attorney's office,
20 subject to their advice, obviously, but I don't
21 see any reason -- whatever file path that is and
22 make sure they have the entire contents, if you
23 haven't already?

24 A Sure. Can you send it to me in an
25 email?

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2 Q They'll take care of that.

3 And so this Mill Creek, do you have a
4 similar file that is Mill Creek/Cypress Ridge?

5 A Yeah. I have the same file. I just
6 don't recognize the "3-owned."

7 So I have L Land Drive Hilton Head.
8 I'll have something that goes down to 7B. It
9 may not -- it's not going to match up exactly,
10 but I'll have something that we use.

11 Q And did you create the file folders
12 yourself, or does corporate do that, and then
13 someone else in corporate. . .

14 A No. We would create them. Our team
15 would create them ourselves.

16 Q And do you have any system for creating
17 them relative to the names of contractors or the
18 names of projects?

19 A A system?

20 Q Yeah.

21 A You just would do the -- you would just
22 do the project and then the phase.

23 Q And then, for example, this has Kenneth
24 Scott pay app. Did you have a name for Kenneth
25 Scott that you would enter in to your system if

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it were related to Kenneth Scott? Would it be KSB or Kenneth Scott or . . .

A I don't know.

Q You don't know?

A Oh, I said no. I don't have a -- a secret name for Kenneth Scott. Just Kenneth Scott.

Q And did you have a separate folder for each phase of the project, for example, from 7B?

A Correct.

Q There's a 7A, I'm assuming?

A We're both assuming.

Q Okay. But --

A Yeah, there's Phase 1. The next folder is Phase 2. And I don't know if there's really a Phase 1, that's way before me, but there's multiple folders in there from the phases that I've been involved with.

Q What's your email address with D.R. Horton?

A J-R-O-S-A-K-O at D.R. Horton dot com.

Q And that's the same one you had in this time period, being 2016 to 2018; correct?

A That's correct. That's correct.

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2 MR. SHELTON: Off the record.

3 (Whereupon, a break was
4 taken from approximately
5 12:10-12:25 p.m.)

6 MR. SHELTON: Back on the record.

7 BY MR. SHELTON:

8 Q So, Mr. O'Sako, looking at Exhibit
9 Number 4, we were talking about the file path.
10 I'm going to turn now to the actual exhibit
11 itself. I understand that the sequence of this
12 document or whether it's a document or whatnot
13 may not be how it's maintained within your
14 office. I'm giving it to you in the sequence
15 that it was produced to us, starting with Bates
16 stamp 73.

17 And what does the first page of this
18 appear to be?

19 A The Cypress Ridge Phase 7B breakdown of
20 the six main categories for site development.

21 Q For, I'm sorry, site development?

22 A Site development.

23 Q And those six main categories are rough
24 grade, erosion control, sewer system, storm
25 drain, water system, paving; is that correct?

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2 A Correct.

3 Q And is this a document that you see as
4 within your role at the time with D.R. Horton,
5 or is this something that's purely accounting?

6 A I see a version of this.

7 Q So would this -- would this be in your
8 file, I guess is a better way to ask about it?

9 A Maybe not this exact document, but it
10 will be -- all this information would be in
11 there in some form or another.

12 Q Okay. So going to the next page, Bates
13 stamped 74, Exhibit Number 4, do you see a
14 document like this in your file? Is this
15 something that you would have within your file?

16 A Yeah. I think some of these are just
17 re-typed the bid. I believe accounting has
18 probably re-typed the bid because there's cost
19 codes in there we don't have. Well, we -- we
20 could get it, but anyway, yes, we would have a
21 version of this in our file.

22 Q But maybe not this exact document?

23 A Correct.

24 Q And the cost code underneath line
25 item -- do you mind if I point -- second column,

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 what does that represent, or what is that?

3 A That cost code is the category for
4 these nine items. So paving, 24050, everything
5 with a 24050 has to do with paving. If you add
6 those -- it would be six up -- you would get
7 this total here.

8 Q So everything -- 20080 has to do with
9 rough grade?

10 A Correct.

11 Q So at item 55, it says "Haul in select
12 material."

13 A Correct.

14 Q And that is a grade of dirt, for lack
15 of a better term; is that -- is that fair to
16 say?

17 A For lack of a better term.

18 Q Is there a better term to use?

19 A There would be.

20 Q What would your term be?

21 A A type.

22 Q Okay. And for line item 53, "Haul off
23 suitable material," do you know why that line
24 item 53 would be there, "Haul off suitable
25 material"?

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2 A Well, this bid is broken into two
3 sections, so -- as seen previously at 50 percent
4 on a common budget and 50 percent on a 7B direct
5 budget. So if he had to move dirt from the
6 common area to under the building pads, he would
7 have to haul it off 7 -- he would have to haul
8 off 7 common in to 7B.

9 Q So you said this project -- so let me
10 back up. So was there a separate bid and
11 separate project relative to the common area and
12 then a separate bid and separate project but
13 related project on the pad area? Is that . . .

14 A There is not.

15 Q Okay.

16 A It's all one bid. They're all one
17 project. But for coding and for -- yeah,
18 basically for coding. You could see on the
19 previous one where you asked if that was my
20 handwriting and I said yes, it's broken into
21 50 percent, 50 percent.

22 Q Okay. So is this the same -- when I
23 say "this," this document, Exhibit Number 4, is
24 it generally referencing the same project that
25 is in the proposal which is Exhibit Number 3? I

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mean --

A Let's look at it. Oh, no.

Q Yeah. That's why I'm asking. And when I say "that," it's because looking at the price. Correct?

A Well, you're looking at the line item there. He's only doing -- this -- this bid, he was doing -- he's doing water, sewer, paving.

This, he's only doing, what was this, earthwork.

There's no pipe in this bid.

There's pipe in this bid.

Q Okay. So does it appear to you, then, that this document, Exhibit Number 4, it is related to a different construction proposal than Exhibit Number 3?

A Correct.

Q Okay. For example, look at the total paid column on one of these pages.

A Okay.

Q Okay. You can see that the total paid is -- if you go to page 2 of 3, which is KDC 74, you can see that that amount is \$420,000 at that point.

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2 A Yes.

3 Q Okay. Do you know where, under this
4 bid, Kenneth Tosky was to haul off suitable
5 material?

6 A Well, you would have to -- he would
7 haul off of the 7B common onto 7B.

8 Q What's the difference between 7B common
9 and 7B?

10 A 7B common would be an area that's not
11 directly within the boundaries of the town home
12 residence. It would be an area, say, that there
13 was a dog park or a lagoon, something that --
14 lagoons typically aren't standalone. The Phase
15 4 might run through the Phase 5 lagoon treatment
16 system. You might need Phase 5's storage
17 capacity in order to meet the requirements for
18 the rest of the neighborhood, a different area.
19 So they typically go to a common. So a common
20 cost would be something that could be shared by
21 more than one neighborhood.

22 Q And on the line item 54, which is "Haul
23 in select material," would you know where that
24 material is coming from?

25 A He doesn't give us a quantity in cubic

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2 yards to be able to determine the pricing. But
3 we can look at this, and we know the pricing
4 from the Hampton pit, Hampton Lake pit, was \$210
5 a truckload.

6 Q And this is Exhibit 3. I'm just saying
7 it for the record.

8 A Okay, in Exhibit 3.

9 So it's just not clear what's going on
10 with that. It could be him hauling into the pad
11 area from the seven -- from the 7B common area.
12 I don't know.

13 Q And if you look at Bates stamp 75,
14 which I think you have in front of you there, if
15 you look at line item 23, this is a different
16 cost code; is that correct? It says "20080A."

17 A Yes.

18 Q So looking back to 73, do you know why
19 there two different cost codes here? There's
20 20080A and then 20080.

21 A I don't. I don't recognize -- I don't
22 know of anything in the system where you put an
23 "A" behind it to distinguish it as something.
24 It looks like something from accounting.

25 Q And do you know the people that were in

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the accounting that would have been managing
this account at that time?

A It looked like her name was Ashley
Huddleston, from right here.

Q Okay. Does she still work with D.R.
Horton, to your knowledge?

A She doesn't.

Q Do you know where she is, by chance?

A I don't.

(Off the record.)

BY MR. SHELTON:

Q And then going to Bates stamp 76 --

A Okay, so -- so looking at this again,
you have a PO --

Looking at Exhibit 4, sheet 73, you
have the common PO, "200159." So the bottom
half of sheet 73 where it had that "A" showed
your common, so this is the bid for common. The
PO up here is the bid for 7B.

Q Got it. So that may answer the
question.

And so when you -- "you" being within
your role with D.R. Horton, as to your
knowledge, when you bid this out, there is a

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2 scope of work within common, a scope of work
3 within Phase 7B, and they're related, but
4 they're two different scopes of work under two
5 different accounting umbrellas, to a certain
6 extent?

7 A Correct.

8 Q Now, this letter from Thomas and Hutton
9 that's on Bates stamp 76, is this a typical
10 letter that you would receive from them after
11 they reviewed a bid request?

12 A Correct.

13 Q I see that Tim Stone is cc'd on this,
14 Michael Hughes is cc'd on this, and Brian Allen,
15 P.E., is cc'd on this. The letter is directed
16 to you, correct?

17 A Correct.

18 Q Who is Michael Hughes?

19 A The engineer of record.

20 Q And who is Brian Allen?

21 A Another engineer that worked on this
22 project with us.

23 Q And they're with Thomas Hutton?

24 A Brian is deceased --

25 Q I'm sorry to hear that.

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2 A -- but they are both with Thomas and
3 Hutton.

4 Q Why were bids sent to Thomas and Hutton
5 before being approved for payment by Tim Stone
6 or yourself?

7 A The bids were sent to Thomas and Hutton
8 so that they could verify that the quantities
9 being billed for and that the plan set that was
10 given and the contract they're supposed to be
11 following, that that work is in accordance with
12 the plans and specs, and the quantities they're
13 billing us for match the field work that's been
14 completed.

15 Q So is it fair to say that you want to
16 make sure the work is done; is that -- is that
17 correct?

18 A Correct.

19 Q And that it's done within the scope of
20 what you asked them to do?

21 A Correct.

22 Q And that it's completed before you pay
23 for it?

24 A Correct.

25 Q And on Bates stamp 77, an interim

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waiver and release, do you receive these every -- "you" being within your role in D.R. Horton, do you receive these as a condition of payment every time you make a payment under one of these projects?

A Yeah.

Q Are there -- what would be a circumstance where you wouldn't request an interim waiver?

A I'm not sure.

Q And is this a lien waiver? Does it appear to be a lien waiver? Are you familiar with a lien waiver? Let me ask you that first.

A No.

Q Okay. Then if you -- if that's not really -- if don't know what a --

Do you know what a lien waiver is? Let me ask you that.

A No.

Q Okay.

A I mean, I could guess by the title, but I'm not familiar with them.

Q Bates stamp 78, are you familiar with this document, the form itself?

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2 A Yes.

3 Q And do you have any or did you have any
4 part in issuing these -- or receiving these
5 applications for payment from contractors?

6 A Do I have a part in receiving this?

7 Q Yes.

8 A They emailed it to me.

9 Q Who is "they"?

10 A If you go back to page 76, you could
11 see who emailed it and who they sent it to.

12 Q I see it's a letter. This letter would
13 have been emailed to you?

14 A Correct. This came as a package.

15 Q Would Thomas and Hutton receive this
16 application and certification for payment, or
17 would D.R. Horton receive it and forward it to
18 Thomas and Hutton?

19 A Thomas and Hutton would receive it.

20 Q And then the next page is 79, and do
21 you recognize Bates stamps 79 and 80?

22 A Yes.

23 Q I know they look very similar, but
24 they're slightly different from the previous.
25 What are these documents?

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2 A These documents are just another
3 version of -- they're the exact same, I would
4 guess. I mean, I haven't gone through in
5 detail, who prepared them, but these are the
6 individual line items for the common section and
7 then the 7B area.

8 Q And how can you tell the difference
9 between the common section and the 7B areas? By
10 the name at the very top there, is that how?

11 A Yes. Number 1 and number 31.

12 Q Okay. Is this the version of the
13 document that you would have on your computer,
14 what you were referencing, or no?

15 A No.

16 I -- I would have this because they
17 sent it to us, and Tim Stone approved it,
18 according to 76, and then he probably saved it
19 on the L drive, on the land drive. But this is
20 made by the contractor, this document.

21 Q 79 and 80?

22 A Correct. 78, 79, 80.

23 77, the lien waiver, which we don't
24 always require lien waivers, but because we had
25 a new relationship with Ken, it looks like we

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 did require a lien waiver.

3 Q And why would you require a lien waiver
4 from him, given your new relationship?

5 A Because it's a new relationship, and we
6 don't have an established history, a working
7 partnership.

8 Q Just not that familiar with him yet, is
9 that fair to say?

10 A This is the first project he did for
11 us, yes.

12 Q And then Bates 81 -- Bates 81, are you
13 familiar with this, or is this outside of your
14 wheelhouse?

15 A Ken's paycheck.

16 Q Do you make payment here or do you
17 authorize payment for this?

18 A This was authorized by Tim Stone on
19 page 76.

20 Q So this is the pay stub that's actually
21 sent to Ken Tosky?

22 A Correct. Although that doesn't match
23 the dollar amount, does it, because T&H approved
24 126. This is only \$78,000. Or wait -- oh,
25 there's another page. Because there's this one,

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 this one. Are these . . .

3 Q Only one check number here, but this
4 may be -- this may be a situation where there's
5 a carryover in the Bates numbering, and that's
6 one of the reasons I'm asking you questions
7 about it, to understand what's what.

8 A Yeah. This could have been the
9 previous pay app. Maybe this matches pay app
10 number 3, this dollar amount, I don't know, but
11 the dollar amount doesn't match.

12 Yeah, so this came on March 20th. This
13 check came out on March 22nd. I don't know,
14 it's pretty -- it would be very unusual to get
15 paid in two days. So it appears this check
16 doesn't come from this.

17 Q Okay. And then if you go to Bates
18 stamp 82, do you see -- do you recognize this,
19 first of all?

20 A No.

21 Q Does this appear to be something that's
22 produced by accounting or . . .

23 A This was done by the vertical team.
24 Jonathan Leblang was the vertical construction
25 manager at the time.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Q Okay.

3 A So evidently, Jonathan asked Kenneth
4 Scott Builders to do something for him, and they
5 did it, and Jonathan paid them.

6 Q Where do you see Jonathan's name? Oh,
7 right there, the big "approved" stamp.

8 A Yeah.

9 Q Okay. And it says "Grade/Dirt
10 Movement." Do you know anything about the scope
11 of this job?

12 A It's not on here. I don't know
13 where -- I don't -- it looks like he graded the
14 -- probably the house pad, it says. I don't
15 know, but that's all Jonathan really deals with,
16 is house pads, because anything other than
17 grading is -- comes back to us.

18 Q And then look at the final page on 83,
19 Bates stamped 83. This is all Exhibit Number 4
20 still. This is an invoice number 538, and it
21 says "Final Lot Muck and Fill."

22 Do you know whether this is something
23 that you, within your role, engaged Kenneth
24 Scott Builders to do, or is this related to this
25 previous paving where it's approved by Ryan

SHELTON - O'SAKO (DIRECT EXAMINATION)

Leblang?

A Jonathan Leblang?

Q Jonathan, sorry.

A No, Jonathan had \$800 worth of work done. This is \$77,783 worth of work done.

Q So if we look, then, back at Bates stamped 81, which is the check, so final lot muck and fill, \$77,000, and then Jonathan's total of \$800, you get 78,583.15.

A Yes.

Q Do you know what this final lot muck and fill was regarding? And this is Bates stamped 83 on Exhibit Number 4.

A I'm assuming it's what we've been talking about for two hours.

Q Okay. Which is?

A Work performed by Kenneth Scott.

Q Right. But which work? Is this a different lot muck and fill, or is . . .

A It says "Cypress Ridge Phase ..." So the only thing that you could do is probably try and match this with a proposal on the -- that you -- on one of these exhibits, maybe.

Q So it looks like the check date was

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 March 22nd. And if we look at the first page,
3 73, on exhibit number -- it's Bates stamped 73
4 of Exhibit Number 4, we have an entry there, but
5 it still doesn't match. So could this be a
6 separate project or job, the lot muck and fill?

7 A No.

8 Q No?

9 A No. That's the -- well, it says right
10 there "Mill Creek Common." He's billing you for
11 the Mill Creek common, \$77,783, or that she paid
12 him \$77,783. Well, Tim has here on the
13 invoice -- I don't know how they got from --
14 there's a retainage deal held out. This is the
15 common, because A was on -- was it on this -- A,
16 common A -- there it is.

17 I don't know, I don't know the
18 discrepancy, but you can see that -- I'm not
19 sure of the difference of \$1,000.

20 The accounting team probably could
21 answer it.

22 Q Okay.

23 A But the difference, the weird part is,
24 Tim Stone's dollar amount and the dollar
25 amount -- oh, because Tim Scott's dollar amount

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 -- okay, because this matches with Jonathan's
3 800 bucks. But why Tim Stone did this -- where
4 is the approval letter? 7B -- okay, this is 7B.
5 But I'm wondering where the 7B common -- oh, is
6 this -- yeah, it's like we don't have -- it's
7 like you don't have -- if this 126 is
8 approved -- do these add up to 126? Yeah.

9 Okay. So T&H sent this. So you're
10 just missing the other -- you're missing the
11 other -- this is final lot muck and fill.

12 This was for the common, because you
13 can see the common.

14 So we're missing the 7B invoice from
15 Kenneth Scott Builders.

16 Q So there's a 7B invoice somewhere?

17 A There's a 7B invoice somewhere.

18 Q And it may be --

19 A Obviously, he didn't bill it -- he
20 didn't bill it, but he just --

21 All right. T&H says: You can pay him.

22 He hasn't billed it, as far as we can
23 tell from this paperwork that you provided. At
24 this point in time, he didn't bill, but it's
25 approved for payment.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Q So let's put that back together real
3 fast. You can hand it to me.

4 A Okay.

5 Q I'm going to hand you the next exhibit
6 while I'm doing that.

7 A On that lien waiver, what's the dollar
8 amount on that lien waiver?

9 Q Oh, one second and I'll hand you this
10 packet again once I get it back in order.

11 Let's put this sticker on the first
12 page of that Exhibit Number 5.

13 And your question is, what is the
14 amount of the lien waiver contained in Exhibit
15 Number 4.

16 A Correct.

17 Q And that number is \$126,713.

18 A Which matches the Thomas and Hutton
19 approval number?

20 Q Correct, I believe so -- yes, that it
21 matches the approval letter.

22 A Okay.

23 (Whereupon, Plaintiff's Exhibit
24 Number 5 was marked for
25 identification.)

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 BY MR. SHELTON:

3 Q Okay. So is this a similar packet but
4 for a different payment request?

5 A It appears to be payment -- pay
6 application number 5 for the same project.

7 Q In addition to Thomas and Hutton's
8 review of the matter, what, if anything, did you
9 do or anyone under your direct supervision? And
10 I don't mean "your" supervision, I'm not saying
11 you're supervising the project, but, within D.R.
12 Horton, your supervision do to verify work is
13 completed before this payment is made?

14 A My team members would have a general
15 idea of progress, but they would not have the
16 detailed tracking that Thomas and Hutton's field
17 representative, Jay Coombe, does. He tracks
18 every pipe that goes in the ground with a
19 highlighter, a different color for the different
20 types of pipes. So, in general, Tim knew the
21 correct status, had no reason to disagree with
22 Jay Coombe, who is out there on observations
23 done at times appropriate to stages of
24 construction and whose job it is to track it.

25 But so Tim -- Tim took the

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 authorization from our engineers and approved it
3 for payment.

4 Q Does Tim still work with you at D.R.
5 Horton?

6 A He does.

7 Q And what's his role now?

8 A Land development project manager.

9 Q So he has your former title?

10 A Correct.

11 Q If you'd go to Bates stamp 54 on this.

12 One second, I'm sorry. On a previous
13 exhibit there's a Bates stamp 80. Sorry about.
14 Here. I missed a question. On line item number
15 54, there's "Imported Dirt Fill for Sewer."
16 Where would that dirt be imported from?

17 A Most likely, it would be imported -- I
18 don't know. I would only be speculating. I
19 don't know where it was imported from.

20 Q Could it be off site?

21 A It could be on site or off site.

22 Q So this process would be the same as
23 far as Exhibit Number 5 and how it's reviewed,
24 within your knowledge, and paid out; you get the
25 letter from Thomas and Hutton, Tim is on site

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 and helps also verify that everything is done,
3 and then payment is made. Is that a fair way to
4 characterize it?

5 A Tim doesn't verify that everything is
6 done, but Tim's on site and has a general
7 knowledge of the project and trusts the
8 engineer's rep on his tracking of the -- more
9 detailed tracking of the project.

10 Q If dirt was hauled out of -- if Kenneth
11 Scott hauled dirt off of Cypress Ridge and to
12 other locations, do you know where it went?

13 A What type of dirt?

14 Q First, unsuitable material.

15 A I wouldn't know. Again, I know where
16 we always send it, but I don't know where his
17 truck went. I don't know.

18 Q And what about if he hauled off
19 suitable material off of Cypress Ridge
20 development to another location, do you know
21 where it would have gone?

22 A He's not allowed to haul suitable
23 material off of Cypress Ridge.

24 Q Does anyone oversee or otherwise
25 monitor his activity to see that that doesn't

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 happen?

3 A Myself, Tim, and the engineers are
4 there at different times. But the removal of
5 suitable material when we're struggling to find
6 suitable material would be theft, and he would
7 be fired. So he -- there was -- yeah, there
8 would be no removal of suitable material from
9 this project.

10 Q To your knowledge in the building
11 industry and of the building industry, is it
12 normal industry practice to have excess topsoil
13 removed from one site and brought to another
14 construction site?

15 A No. In general, you try and balance
16 your sites, and that's what we work hard to do.
17 So any time a truck enters your site bringing
18 material or leaves your site taking material,
19 it's going to increase your development costs,
20 and it's typically not necessary.

21 Q Did you as the land development project
22 manager have any processes in place to see that
23 suitable material was not removed from your
24 site?

25 A Yeah. The processes are the

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 observation.

3 You also have GHD who were quantifying
4 the material in these holes that are billed from
5 this previous exhibit, and they're measuring
6 them, and that's how we have to pay for the
7 suitable material to backfill into these holes.
8 It would 100 percent be theft. He would be
9 fired. If I allowed it, I would be fired. If
10 Tim allowed it, he would be fired. It would be
11 theft.

12 We were working very hard with the
13 engineers to solve a big problem of unsuitables.
14 And you have to fill that unsuitable hole with
15 suitables.

16 Q Who was responsible for obtaining the
17 required permits for the 7B project and that pit
18 project you were describing?

19 A Thomas and Hutton.

20 Q And do you know what permits were in
21 effect on or about March 13th, 2018?

22 A I don't.

23 Q Would the permits be in your project
24 file?

25 A No. We don't get copied on all the

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 permits.

3 Q Thomas and Hutton should have those?

4 A They would have obtained them. I don't
5 know if they have them still or not.

6 Q But as the landowner, to your
7 knowledge, do you know whether D.R. Horton would
8 have possession of the permits for the site on
9 site?

10 A Ask me that a different way.

11 Q In your experience, would you have
12 all required permits at the location that was
13 affected by the permits, where the work that the
14 permits allowed was to be done?

15 A No, sir, that's not required.

16 Q Okay. So you wouldn't necessarily have
17 the permits on site?

18 A No.

19 Q Would it be fair to say you had access
20 to the permits at the time?

21 A By calling the state agency?

22 Q Correct.

23 A If I wanted to, I guess I could call.
24 I'm not sure of the response.

25 Q But Thomas and Hutton may have a copy

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 of the permits?

3 A Correct.

4 Q Do you know whether any permits or
5 licenses were held by Kenneth Scott Builders
6 related to its work for D.R. Horton in March of
7 2018?

8 A No. But I know that the subcontractor
9 agreement, the contractor agreement that he
10 signed, states that he has all legal
11 requirements met.

12 Q And when -- when was he required to
13 sign that agreement, do you know?

14 A Prior to doing work with us.

15 Q Do you ever revisit that agreement over
16 the course of your work with them, with the
17 contractor?

18 A That agreement is updated, correct,
19 from time to time.

20 Q And do you know whether Kenneth Tosky's
21 agreement was updated at all after his initial
22 agreement?

23 A I don't know.

24 Q If it were, you would probably have
25 that in your file; is that fair to say?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A No, I would not have it in my file. I
3 don't -- those agreements are sent off to
4 corporate.

5 Q So corporate would have them if there
6 was another agreement, under your understanding?

7 A Under my understanding, yeah.

8 Q Yeah, or -- that's a terrible way of
9 putting it, but it is your understanding that
10 corporate would have it; is that fair to say?

11 A Yes. Correct.

12 Q Okay. Do you know whether any permits
13 were required to excavate the dirt that was
14 being excavated and moved within Cypress Ridge
15 during this Phase 7B or for any of the work that
16 Kenneth Scott did?

17 A Yes.

18 Q What type of permits, do you know?

19 A A land disturbance permit.

20 Q And, obviously, it goes without saying,
21 that permit would need to be in place before the
22 dirt was allowed to be moved?

23 A Well, that area could be covered under
24 a different permit as well, so it doesn't have
25 to have that title. That area was shown -- I'll

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 just leave it at that. That area was shown as
3 many different things in the past. It could
4 easily be covered under a different permit for
5 that location.

6 Q Do you know what other type of permit
7 you're referencing?

8 A I'm not referencing a different type of
9 permit.

10 Q A different permit in general, like
11 you --

12 A Correct.

13 Q So what different permit would it still
14 be covered under?

15 A I don't know that information.

16 Q Do you know whether a permit is
17 required to allow dirt to be removed from D.R.
18 Horton's Cypress Ridge location to another site
19 off of D.R. Horton property?

20 A Permits -- permits -- that's a really
21 broad question. I mean, you get -- I can haul
22 one load of dirt to a house and -- and not have
23 to have a permit. I could haul 1,000 loads or
24 10,000 loads, which is very possible, to a
25 different site, and then you're going to have to

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stock pile, and you're going to have to have a permit. So the quantity definitely affects the answer to your question.

Q Do you know what the threshold quantity is?

A I don't.

(Whereupon, Plaintiff's Exhibit Number 6 was marked for identification.)

BY MR. SHELTON:

Q This is Exhibit Number 6. And you'll see, I'll submit to you, this is very similar to the last -- one of the previous exhibits.

A Okay.

Q This one references Cypress Ridge commercial site. Is this a different project or the same project, or is there any distinguishing characteristics between the work that's within this packet than exhibit number, I believe it -- I believe it was Exhibit Number 4?

A Cypress Ridge commercial site is actually the commercial site.

Q So is this a completely different project?

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A It's a different phase within the same project.

Q I see, for example, if you look at Exhibit Number 4, the purchase order numbers are slightly different. So do you know whether Kenneth Scott Builders bid for this project?

A If they what?

Q Bid for this project.

A Absolutely.

Q And would it be -- do you know whether there were any other bids for this project the commercial site project, received by D.R. Horton, to your knowledge?

A I can't recall.

Q And, the same as before, you wouldn't be sure whether that would be in a file somewhere or not if you did receive another bid? No, I can't -- I don't -- I can't tell you if it's in the file or not, no.

Q Can you look in your filing system to see if there's any other bids, and share them with your attorneys if you have any?

A Sure.

Q What was this work relating to?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A A commercial site at Cypress Ridge.

3 Q And what is the commercial site?

4 A The commercial site is the area where
5 our office building is.

6 Q Is this for the new office building,
7 the one you're in now, or the previous office
8 building?

9 A The new office building.

10 Q And do you know when this work started?

11 A I don't.

12 Q Do you know when it ended?

13 A I don't.

14 Q What was Kenneth Scott doing at the
15 commercial location? Does it speak for itself,
16 is it the same thing, was he just prepping the
17 site for a commercial development?

18 A Right.

19 Q And what all is there now?

20 A There is paving. There's a water
21 system. There's a drainage system. There's a
22 sewer system.

23 Q And what vertical construction has been
24 completed, if any, there now?

25 A An office building.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Q Is D.R. Horton the only tenant or the
3 only occupant of the office building? Or are
4 there other businesses in the office building
5 besides D.R. Horton? I'll just ask it that way.

6 A There are other groups that are within
7 D.R. Horton. They're called something else
8 but -- DHI Mortgage.

9 Q I see that this one is approved by
10 payment by J.H. Hiers -- approved for payment by
11 J.H. Hiers, rather, on the first page. Do you
12 see that?

13 A Yes.

14 Q Is that another engineering firm that
15 you use, or is that a different firm?

16 A No. That's a mistake.

17 Q That's just a mistake?

18 A Yes. Can I look at the previous
19 exhibit?

20 Q Which one?

21 A Exhibit 5, where she did the same
22 thing.

23 So payment by Kenneth Scott.

24 J.H. Hiers is a different contractor.

25 Q Right.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A So she has the wrong contractor typed
3 in that line.

4 Q Is that a common occurrence --

5 MR. CRAWFORD: I object to the form.

6 MR. SHELTON: -- for having a different
7 contractor in the lines?

8 BY MR. SHELTON:

9 Q I mean, obviously, J.H. Hiers --

10 So Kenneth Scott Builders did not
11 approve payment for Kenneth Scott Builders,
12 correct, in Exhibit Number 4?

13 A This exhibit that you have is from
14 Ashley Huddleston, who is no longer with us, and
15 this is how she did her system. This is not a
16 D.R. Horton way. I've never seen it.

17 Q Okay. So this is Ashley Huddleston's
18 system of compiling this, not necessarily D.R.
19 Horton's.

20 A Yes.

21 So I think she was trying to say, "do I
22 have the contractor?" Which this one she has it
23 wrong, because Kenneth Scott did the work, not
24 J.H. Hiers.

25 She said, "did I have Tim Stone's

SHELTON - O'SAKO (DIRECT EXAMINATION)

approval," and she said, "attached."

And then she said, "I have my own approval."

Q Okay.

A Pretty creative.

Q Do you remember this project, the commercial project?

A Yes.

Q And do you remember whether it required any hauling off of material?

A No material in . . .

Material for Phase 7B -- material for the commercial site was very valuable.

If any material that was structural, it would go from the commercial site to 7B.

But no, I don't remember any material --

It just depends, because there's actually a boat RV park here, a boat RV park here - they're similar size - commercial area here, Phase 7B condos, town homes here. This is literally touching each other. This has a 75-foot right-of-way between them.

So this is a dirt ridge, a hill.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 There's a pond here -- there's a pond
3 in front, a pond in back, a pond in back, a pond
4 in the front.

5 The order -- there's a pond dug in the
6 back here.

7 There was a pit here that we dug on the
8 commercial site and took to 7B.

9 Any material you could get, if it's not
10 that this is the building or the parking lot,
11 had to remain structural.

12 If you went out here and this is a big
13 landscape area, which it is, we removed the good
14 material here and hauled it to here.

15 We removed the good material from here
16 and hauled it to here.

17 So as far as the question of did we
18 haul any material off 7B, we did -- or off of
19 the commercial, we did. Any material you could
20 get out of these two, if it was extra, would go
21 to right here.

22 Q You don't have personal knowledge of
23 any material being hauled off site other than
24 what was specified in the previous contract that
25 we showed?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A No, sir.

3 Q And if that was done of suitable
4 material, you're saying that would be theft?

5 A Yes.

6 I noticed on line 53, it says: "Haul
7 Off Suitable Material, Quantity - Zero," for
8 this exhibit, whatever you handed me, this last
9 exhibit, Exhibit 6.

10 Q Right.

11 A But that still is just 7B, so I don't
12 know that all this actually goes -- those two
13 don't really go with this, because this is only
14 for your commercial site, so you'd only have
15 page 42. So you have -- that's correct. So
16 sheet 43 goes with 42 and goes with -- 41, 42,
17 43 go together. 44 goes together, 45, six,
18 seven.

19 And then this, I don't know how you got
20 -- 48, 49, and 50 is all 7B, which we went
21 through prior. Is that not correct?

22 Q I'll just submit to you these were
23 produced to me by your lawyers and these Bates
24 stamps, so that's one of the reasons I want you
25 to review it with me.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A Okay.

3 Q I'm sorry it's so painstaking, but that
4 allows me to understand what's what.

5 A Okay. I mean, I don't know that that
6 was penciled on our last one. I can't remember
7 if that pencil mark was there, but, I mean, it
8 appears that this is something that we already
9 went through with the -- you can double-check it
10 real quick.

11 Q Right. And the Bates stamp is --

12 A -- is different?

13 Q -- is 48 or 49. Let's see. I think
14 the Bates stamp is 48, and this starts at 451.
15 See?

16 A Okay. Can you open it and see if this
17 is different that Ashley did here? This says
18 "7B."

19 Q I think that's Exhibit Number 4 you're
20 referencing. See, this is Bates stamped 73.

21 A Okay. Oh, it just looks the same,
22 doesn't it? Okay. I don't understand. I guess
23 this doesn't really go with this package,
24 though.

25 Q You're stating that, for the record, so

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 we're clear when we look back at this and
3 understand it, so we can understand it, Bates
4 stamp 48, 49, and 50 does not necessarily --

5 A They don't go with the approval letter
6 of 43, Bates stamp 43.

7 Q -- or the remaining of Plaintiff's
8 Exhibit Number 6.

9 A That's correct.

10 MR. CRAWFORD: And, Ben, for my
11 edification, you put these in the package,
12 right? These are just sequential numbers.

13 MR. SHELTON: Sequential numbers.

14 MR. CRAWFORD: So it's not assumed that
15 48, 49, 50 actually goes with Plaintiff's 6,
16 it's just that it was --

17 MR. SHELTON: It's just that it was in
18 sequential order with the Bates numbering.

19 MR. CRAWFORD: Perfect.

20 MR. SHELTON: So -- and if he sees that
21 they appear to go with it or sees that
22 something can be removed from it, I want to
23 keep the exhibit the same, but we can have
24 the record reflect what Bates numbering is
25 what.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 MR. CRAWFORD: Understood. Thank you.

3 THE WITNESS: Okay. All right.

4 BY MR. SHELTON:

5 Q So, to be clear, other than Bates stamp
6 number 48, 49, and 50, does the rest of the
7 package, for lack of -- you know, we'll call it
8 a package, with Exhibit 6, appear to go
9 together?

10 A It appears to me that all the --
11 regarding the commercial site.

12 Q And we don't necessarily know whether
13 that was the entire --

14 A Package.

15 Q -- package related to that draw,
16 but . . .

17 A I don't know. Yeah, that -- where --
18 that approval letter, T&H approved 106,143,
19 which matches up with this line item, work
20 completed this period, 106,143.

21 So it appears that that would be
22 complete, but I don't know.

23 Q Okay. I want to keep them all in the
24 same exhibit. That way we've got it on the
25 record.

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THE WITNESS: I'm going to have to stop
for lunch.

(Whereupon, a break was
taken from approximately
1:30-2:15 p.m.)

(Whereupon, Defendant's Exhibit
Number 7 was marked for
identification.)

BY MR. SHELTON:

Q So I have to ask, other than, you know,
talk to the guy behind the counter at Jersey
Mike's, have you had any conversations about the
case with anyone?

A No.

Q Okay. So this is Exhibit Number 7.
And for identification, I'd like to hand this to
you, and just tell me if you know what it is.
And again, these may be documents that are not
necessarily meant to go with each other, but I'm
trying to figure that out myself.

A Okay.

Q It begins on Bates stamp 229. That's
KDC Bates stamp 229.

A Okay. Okay.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Q So on the Bates stamp that's 231, the
3 last page of this Exhibit Number 7, it says, Tim
4 Stone's writing to Ashley, it looks like you're
5 cc'd on it: "See attached. I wanted to do
6 Kenneth Scott's stuff manually because it has a
7 quicker turn around and we need to get this man
8 paid."

9 Can you elaborate on what that means
10 and what the context is and why Tim would write
11 to Ashley in that regard?

12 A No. I'm really not that familiar with
13 the actual accounting system, so I don't know.
14 I guess this obviously doesn't look like the
15 same ones as those. I -- I really don't know.
16 He's just telling her, whatever we can do to pay
17 him. I don't -- I don't really know the deal or
18 I don't remember anything on it.

19 Q You don't necessarily know the
20 background of what led Tim to ask for this, is
21 it fair to say, expedited payment request?

22 A Yeah. I have no idea. It could -- it
23 could be Tim's opinion of Ashley's work.

24 Q And what's the difference between doing
25 it manually, if you know, as opposed to whatever

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 the other method is?

3 A Well, I think -- I think Tim -- I think
4 Tim does this sheet. This is the old sheet.

5 Q You're pointing at Bates stamp 229?

6 A 229. And I think Tim would fill this
7 out, and that's it. Yeah, "See request for Tim
8 Stone." So I think Tim could do this. This is
9 how it used to be. You used to be able to do
10 this, do that -- boom, done.

11 So at this point they're switching
12 systems from the manual in to some sort of
13 automated, obviously. I don't -- I don't really
14 know what the -- I don't know the current
15 process or whatever.

16 It just says "actual" at the top for
17 the work that he did, where they -- I'm assuming
18 GHD, based on the other emails, length, width,
19 depth, of what he dug out and moved.

20 Q So that's in reference to the width,
21 depth of each pad? Or is that in reference
22 to -- do you know? When I say "that," I'm
23 talking about Bates stamp 230.

24 A 230 is length, width, and depth, that's
25 correct, of how much he took out of each pad, I

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 guess. It looks like it.

3 Q And would that be feet, do you know?

4 A Yes, feet.

5 Q And there's a line item cost for
6 trucking here --

7 A Yes.

8 Q -- and per cubic yard?

9 A Yes.

10 Q Is it fair to say that most of the work
11 related to Cypress Ridge 7B required trucking to
12 move earth back and forth?

13 A Correct. Earthwork.

14 Q And that's in reference to dump trucks,
15 right? That would be a dump truck. Is that
16 correct?

17 A Yeah, that would be correct. You'd
18 have -- typically, though, you'd be handling --
19 typically, you'd be handling your on site stuff
20 with, yeah, dump trucks and different types of
21 dump trucks. You'd have those off road trucks
22 as well.

23 Q Did you ever see an off road truck
24 operated by Kenneth Scott Builders?

25 A I don't recall. I don't remember if he

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 was running off roads or not.

3 Q Do you recall any dump trucks being run
4 or driven by him?

5 A Yeah.

6 Q What do you recall about those trucks?

7 A Dump trucks. I don't know. I don't
8 know what -- there's nothing special about a
9 dump truck.

10 Q Do you know whether they were owned by
11 Kenneth Scott Builders or whether they were
12 owned by somebody else?

13 A I don't know who owned the dump trucks,
14 no.

15 Q Do you remember seeing one particular
16 dump truck on location, on site, more than
17 others?

18 A I remember seeing some -- some -- yeah,
19 I remember seeing -- yeah, there was a black
20 dump truck that I remember seeing.

21 Q And do you recall whether you ever --
22 I'll back up a little bit. When you go to your
23 office, did you go by the site at all, or was it
24 away from your office?

25 A Away.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Q And do you recall ever seeing or
3 hearing of one of the dump trucks Kenneth Scott
4 was operating to have broken down on site?

5 A No.

6 Q And do you recall whether that dump
7 truck would be kept at Cypress Ridge overnight
8 at times?

9 A Not to my knowledge.

10 Q Have you seen other emails requests
11 similar to this one that's Bates stamped 231,
12 Exhibit Number 7, where you or Tim Stone asked
13 for a contractor to be -- have things done
14 manually so that it gets a quicker turnaround
15 for payment?

16 A Yeah.

17 Q Can you give me an example?

18 A No, but, I mean, that's not -- well, an
19 example would be -- I can't give you a specific
20 example. But an example would be if you're
21 doing -- typically, the first payout is hard to
22 get. If -- if, for -- if, for example, the
23 sheet, the approval sheet from Thomas and
24 Hutton, so if the contractor were to bill us for
25 work done, say the beginning of March, and he

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 sends a bill and sends it to Thomas and Hutton,
3 the Thomas and Hutton inspector disagrees with
4 the amount of work performed and completed, then
5 the Thomas and Hutton inspector is not going to
6 write an approval letter. He'll hold that pay
7 up. And he can hold that pay up as long as he
8 wants to hold that pay up until that work is
9 completed.

10 And the contractor has two choices.
11 The contractor can redo your bill and reduce the
12 percent complete of that item that there's a
13 discrepancy over, or the contractor can wait
14 until they believe, like oftentimes I've seen,
15 they're like, "I can have that finished by
16 Friday so I'm not going to redo my pay app," and
17 maybe the weather, or something happens, they
18 don't finish by Friday. Then, you know, one
19 week turns in to two weeks, two weeks turns in
20 to three weeks maybe, before they can actually
21 get approval.

22 At this point in time, some smaller
23 guys can get -- would need us to get them paid,
24 once they completed that item, as soon as
25 possible.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Q And would Kenneth Tosky be one of the
3 smaller guys that you're referencing?

4 A Correct.

5 And I don't know that that's the case
6 here. I have no idea. But it appears that way.
7 I don't know exactly what Tim's basis for asking
8 that is, but it would be something similar to
9 that. Tim obviously is putting pressure. Or
10 maybe it took a long -- maybe it took Tim a long
11 time do all this, of getting all this stuff
12 measured.

13 Q Do you know whether this payment
14 request would have then been approved, this one
15 being Exhibit Number 7, would have been approved
16 by Thomas and Hutton before the payment was
17 made?

18 A I would assume, unless there was some
19 documentation that Tim had from GHD, the other
20 engineering group, that shows in their notes
21 these dimensions that Tim -- somehow, Tim had to
22 get -- Tim had to have something to verify or
23 someone's sign off, or he would have to have a
24 note. Like, typically, the accounting
25 department is going to ask -- I don't know.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 What's the question again?

3 Q The question was, do you know whether
4 Thomas and Hutton signed off on making that
5 payment?

6 A I don't know.

7 Q I might be paraphrasing that question,
8 but that was the gist of the question.

9 A Yeah. I don't know that.

10 (Whereupon, Plaintiff's Exhibit
11 Number 8 was marked for
12 identification.)

13 BY MR. SHELTON:

14 Q I think this is just a one pager, going
15 a little bit back in time here, but this appears
16 to be from November 12th, 2017. Do you see
17 that?

18 A Yes.

19 Q Are those your initials, or is that
20 someone else?

21 A That's someone else.

22 Q Okay. So do you know anything about
23 this invoice?

24 A No. I mean, these invoices come all
25 the time. I have no idea what this thing is.

SHELTON - O'SAKO (DIRECT EXAMINATION)

Q Do you see the line item, "Haul off bad material common"?

A Right.

Q Do you know what that would be referencing?

A Haul off bad material in the common area.

Q And what about "Mobilize common," what would that mean? Do you know?

A Yeah. Mobilize the common means Ken -- I don't think Ken had a lowboy. I think Ken had to pay another company to move his equipment, and that's the mobilization fee. So it would be to move his bulldozer or excavator.

Q And is that typical, or do, normally, horizontal land development contractors have their own means of mobilization?

A No. That's typical. Some do. Some don't. Some don't want to mess with it.

Q Okay. We can move on. The next exhibit is Number 9.

(Whereupon, Plaintiff's Exhibit Number 9 was marked for identification.)

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 BY MR. SHELTON:

3 Q Is this another example of a check
4 that's been tendered to Kenneth Tosky?

5 A Yes, looks like it.

6 Q And the date is 11/10/2016?

7 A Correct.

8 Q If you'd look at the second page, it
9 says "Lagoon expansion for a commercial building
10 project"?

11 A Correct.

12 Q Is that the same or a different project
13 from any of the ones that we've discussed so far
14 today?

15 A Same.

16 Q Which one would that have been?

17 A It would be -- the lagoon expansion for
18 a commercial building project is tied to the
19 need for suitable building material, so it's
20 tied to 7B. The lagoon expansion -- the lagoon
21 is in front of the commercial building, but the
22 material is needed. The reason we expanded it
23 is because we needed all the dirt we could get
24 over to build the town homes.

25 Q Do you know whether there was a bid

SHELTON - O'SAKO (DIRECT EXAMINATION)

process for this project?

A I don't see any evidence of it. I can't recall.

Q Is that your signature on Bates stamp 199?

A No.

Q Do you know whose signature that is?

A I don't know. I was trying to read that. It doesn't look -- I mean -- Sean O'Toole. I think that's O'Toole.

Q Okay. Yeah, I saw the "O" and the dash, so I wasn't sure that's who --

A Maybe, yeah. I think O'Toole is there. I don't see how that made "S" for Sean, but I guess that's how he wrote it.

Q I mean, if you don't know his signature, that's fine. I just was wondering if you did.

A I don't. Look, there's only me, Sean, Tim. Obviously, these three or the three of us are involved at this point in time in these different areas.

Q Okay. So from this timeframe relative to this invoice, which is September, I believe,

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 of 2016, I believe, is that correct, looking at
3 it here -- yes, September 1st, 2016 --

4 A Yes.

5 Q -- through to August 2018, are there
6 any other horizontal development projects going
7 on within Cypress Ridge other than the ones that
8 Kenneth Scott Builders was working on?

9 A I can't -- I wouldn't be able to answer
10 that without -- I don't know if there's
11 something going on. I don't know. I just don't
12 know. I don't know. Could be.

13 Q Are you aware of any other phase of
14 development besides the 7B and the commercial
15 phase and the pit dig out that you were
16 referencing previously, any other phases of
17 development that were occurring during that
18 timeframe other than those?

19 A Well, that's what I'm saying. I don't
20 know if -- let's say Phase 8, 9, 10. I don't
21 know. I don't know how this correlates with
22 what was going on elsewhere, if this was the
23 only thing we had going on.

24 I was trying to think if Phase 6 is
25 done, because the lagoons are in place.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Phase 7, Ken's doing.

3 For some reason I don't recall Phase 8.

4 But there's 9, 10, 11. I don't know
5 who's in the back. I don't know.

6 Q And do you know whether any other
7 horizontal development contractors were being
8 used for seven other than Kenneth Scott
9 Builders?

10 A Not once he got in there.

11 I think phase 7 was started by a
12 different contractor, and then -- we -- we -- we
13 don't put two contractors on the same phase, to
14 answer your question. I'd be very surprised if
15 -- there shouldn't be anybody else there.

16 Q Sorry, I'm skipping ahead here.

17 That's all for Exhibit Number 9.

18 (Whereupon, Plaintiff's Exhibit
19 Number 10 was marked for
20 identification.)

21 BY MR. SHELTON:

22 Q Exhibit Number 10 is a little more --
23 it's a little beefier. I'll submit Exhibit 10,
24 just kind of as a reference, is a series -- it
25 appears to me to be a series of check draws,

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 purchase orders, and invoices. And it goes all
3 the way through from October 2016 through
4 February of 2017 on the dates here.

5 A Okay.

6 Q This first one appears to be a check
7 that was cut on October 6th, 2016, for
8 \$62,430.49.

9 A Right.

10 Q Do you know, can you tell me which
11 development and what work this was related to?

12 A Looks like, from the lot address above
13 the detail, it says "Phase 6A through 6E
14 development, Phase 7 town home development, and
15 then Hilton Head division." I don't know
16 that -- I don't know what that one is, but I'm
17 pretty sure that you're going to find -- you're
18 going to find out that it would be that maybe
19 the common phase 7. Common? I don't know.

20 Q And then moving on to the next page,
21 you have a purchase order or a PO?

22 A He did the mailbox kiosk. Okay.

23 Q Okay. And then does that appear to be
24 in line with what that check was written for?

25 A Yes, it looks like a match with that.

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Q And then 9/23, the same thing on the next page, "Mailbox kiosk for phase 7A and 7B"?

A Oh, okay, yeah.

Q And then Bates stamp 207, this is related to the commercial building?

A That's right.

Q Is this a separate project from anything that we've previously discussed, or is this part of the ongoing commercial, that site prep that we were discussing earlier?

A Boat RV, commercial --

Q Okay.

A -- Phase 7, all the same.

Q And if it's okay, I'd like the record to reflect that you're kind of -- you've got, from left to right, putting your hand down, boat and RV, and then commercial, and then phase 7 to the furthest right, in line with each other.

A Correct. They're -- they're back to back to back in line from it's only, I don't know, maybe five or six football fields long. I don't know.

Q And then the next page is Bates stamped 208, and this just says "Payment App 001."

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A Yes, it says "Payment App 001."

3 Q And that appears to be the total amount
4 due that was on the previous approved
5 spreadsheet. Do you see that?

6 A That dollar amount, 53,223.50, matches
7 sheet 207.

8 Q Okay. Does Payment Ap 1, do you
9 think that's the first payment application he
10 made or . . .

11 A It would probably be the first payment
12 application made under the Cypress Ridge
13 commercial building contract.

14 Q Okay. And I'm just going to -- the
15 next is a certification that we've seen before.
16 And then the next page is a description of work
17 similar to what we've seen before. Is that fair
18 to say?

19 A Yes.

20 Q Have you discussed this same pond
21 excavation before during this deposition, or is
22 this a different pond excavation that's
23 referenced on KDC 210? It's line item 2.

24 A Could be another expansion. I'm not
25 sure what -- I wonder, does the commercial -- I

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don't remember if the commercial area -- does the boat RV park have its own contract? I'm not sure. I don't know. We could find out. I'm sure it's in that stack.

Q Okay.

A But there -- there's only -- there's only so many ponds right there, so I'm not sure whether he's . . .

There's a pond dug in the back of the boat and RV. And then he improved or expanded these other ponds. We tried to get as much dirt as we could from anywhere we could.

So pond excavation, it's not labeled. Usually, they have pond one, pond two, pond three, pond four. So I don't know. I don't see any designation for which pond that's for.

Q Is this something that Ken Tosky would have put together and presented to you, or is this something created in house, Bates stamped 210?

A Which one?

Q 210, and I'll show it to you. This one, this spreadsheet.

A Ken -- Ken made this.

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Q Would you normally see it with more detail of what the pond excavation work would actually be, or is this typical?

A That's typical. Because at that time, you would know what the guy's doing on your site.

And if it's -- I'm sure that there is more detail somewhere, as far as -- if you looked at the -- if you put this with the set of plans, whatever the set of plans that matches this from Thomas and Hutton.

It's not like you're sitting here looking at this, you're like, "I don't know what that is." You open up a set of plans, you say, "Oh, I know exactly what that is."

Q Okay. And then the next page is another waiver, lien waiver. And then the following page is something that's a little bit different than what we looked at, which is Bates stamped 212.

A Wow. Okay.

Q Can you read that? It's pretty small.

A Yeah, I can read it.

Q Are you familiar with a report like

SHELTON - O'SAKO (DIRECT EXAMINATION)

this? It's Bates stamped 212 through 214.

A No.

Q Have you ever seen this report before?

A No.

Q What does it appear to be, based on your experience?

A It appears to be some sort of accounting.

Q Is it related to Kenneth Scott Builders?

A Kenneth Scott Builders is -- is the vendor name on the sheet.

Q Do you have any idea whose handwriting that is on Bates stamp 212?

A I don't. It's someone in the accounting department. We -- we don't have this -- we don't do this, whatever this is. These spreadsheets come from someone in accounting.

Q Do you see a grand total of \$2,375,223.14?

A I do.

Q And this is a selected date of 8/1/2016 through January 1st, 2020. It says "Vendor

SHELTON - O'SAKO (DIRECT EXAMINATION)

Spend Report." Do you see that?

A What number are you on?

Q All of them except for the final Bates stamp have, I'll show you, on 212 at the top.

A Oh, okay. Oh, selected dates 8/1 through 1/1. Is that what you're saying?

Q Yeah, correct.

A Oh. Okay. Okay, I think that what this is, "Vendor Spend Reports," so is this how much we paid Ken over the -- that time period?

Q I mean, that's what it appears to be to me, but I'm asking if you have knowledge of that.

A I don't know. That's what it appears to be to me, but I'm -- I'm not in that department.

Q And someone in accounting would know better?

A I would hope. I would -- I would think so.

Q As to this, with your -- I want to know from your personal knowledge, what was the last project that Kenneth Tosky was involved with at Cypress Ridge? Do you know that?

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A As far as large projects, not -- you're not asking for him to haul a load of dirt to the vertical guys, right?

Q Well, let's start with large projects first, yeah.

A Large projects was -- this is the only -- I think this is the only project Ken has ever done, the boat and RV, the commercial, and 7B. They did all three of those. I don't think he did anything in the back.

Q And what about hauling a load of dirt like you referenced a minute ago?

A We have -- that's the only time I've ever seen anything. You had something from Jonathan Leblang where he hauled it was like two loads. Was it 400 bucks or 800 bucks?

Q And when did the 7B project finish, to the best of your recollection?

A The last pay update would be the date that it finished.

Q Okay. Was there additional horizontal development done at Cypress Ridge after this project was -- after the 7B project was complete?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A Yes.

3 Q And is there a reason that y'all
4 didn't -- or I should say you, as the project
5 manager, didn't engage Kenneth Scott for any
6 additional work?

7 A He could have been -- we had three
8 contractors working back there at the same time.
9 And Ken, probably it's going to be the pace. We
10 probably picked up pace, I would imagine, with
11 COVID working through, because that's when we
12 really turned it up. We put multiple
13 contractors in the back. So Ken -- the projects
14 are probably larger than Ken could handle. I
15 don't know. Ken may have been -- Ken may have
16 been up there still doing this when we started
17 this. I don't know. You'd have to look at
18 dates.

19 (Whereupon, Plaintiff's Exhibit
20 Number 11 was marked for
21 identification.)

22 BY MR. SHELTON:

23 Q This will be Exhibit 11, if you would
24 take a look at it.

25 Okay. Do you recognize that dump truck

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 in either of those pictures?

3 A I don't.

4 Q Do you know whether that was a dump
5 truck that worked with Ken Tosky?

6 A I don't.

7 Q Have you ever heard of Jacob AU
8 Trucking, LLC?

9 A I haven't.

10 Q And what about Jacob Uriostegui or
11 Stegwee?

12 A No, sir.

13 Q Are you saying that you don't recall
14 ever seeing this truck, or are you saying
15 affirmatively that you don't -- have never seen
16 this truck before?

17 A I'm saying Bluffton is a small town.
18 It could have passed me at some point. But no,
19 I don't remember seeing this truck. I don't
20 think I've seen this truck.

21 Q Do you recall ever seeing it at the --
22 at Cypress Ridge?

23 A I do not.

24 Q Do you know who Pamela Stamford is?
25 She's referenced in one of these exhibits, and

SHELTON - O'SAKO (DIRECT EXAMINATION)

I'm just trying to -- I think she may have been in accounting.

A Yeah. It's Pam Sanford.

Q Sanford?

A No "T."

Q Okay. What was her job?

A She -- yeah, she does the -- well, she -- she processes -- yeah, she's in charge of all of the --

She processes all the checks, so all the people that -- all the vendors that send in their bills and all, she -- she processes them for payment.

Q So I understand, there's an email where she writes to Tim and says that there's an attached invoice billed to Kenneth Scott. We need an invoice from Kenneth Scott. The attached invoice is from Malphrus Utilities, billed to Kenneth Scott.

So is it -- when a contractor hires a subcontractor and the subcontractor bills the contractor, you expect those bills to flow through the contractor and not be provided -- you don't want a bill from the subcontractor?

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A Correct.

Q Is it standard protocol to, though, include the subcontractor or the vendor's invoice along with your bill, if you're the contractor, to verify?

A No.

Q Do you know why --

A Ken did that?

Q Yeah, why Ken would do that in certain instances.

A I guess Ken's showing us that he only put a little bit on it. I don't know. Trying to get more work?

Q What do you mean "a little bit on it?"

A So if that bill -- I guess what -- does it show what that guy billed Ken and what Ken billed us?

Q Yeah. And I was trying to shorten this up.

A So if Ken put something reasonable instead of marking it up 50 percent, Ken marked it up 20 percent, whatever. He's showing us the mark-up, evidently.

Maybe there was something where --

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 maybe there was something -- I don't know. I'll
3 just -- I'll just leave it at that.

4 Q Do you know whether it could be that he
5 just didn't have the funds to pay the sub, and
6 he was just trying to get you to pay it
7 directly?

8 A No, I don't know. I don't ever recall
9 Ken -- being in that situation with Ken ever.

10 Q What is structural fill? Is that . . .

11 A Structural fill is just -- is the fill
12 that's placed beneath homes or beneath the road.

13 Q And why would a contractor need to
14 remove and replace structural fill?

15 A Because there is too much in one area
16 but you could use it in a different area. We
17 could cut it from one, remove and replace it
18 over there.

19 Q Did you ever personally meet Ken Tosky
20 at a job site, at one of his job sites?

21 A Sure.

22 Q How often would you do that?

23 A No set -- no set schedule.

24 Q Did you know of anyone else that was
25 working at his job sites besides himself?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A His daughter, and he had a couple guys.

3 Q And what would you do when you went to
4 see him at -- him or his daughter or those guys
5 that you referenced at the job site? What would
6 be the reason for you going there?

7 A To make sure they showed up, make sure
8 they didn't leave early, make sure that the
9 engineers are showing up out there, the soils
10 guys are showing up out there. In general, just
11 work.

12 I usually -- probably, 90 percent of
13 the time, I'm not getting out of my truck, and
14 it's just literally to drive through there
15 because it's next to my office. I had to go a
16 little bit out of my way but not a whole lot.

17 Q And how far is a little bit out of your
18 way?

19 A From -- less than a tenth of a mile.

20 Q And would you do that on a daily basis?

21 A I would say generally every other day,
22 maybe every day, maybe sometimes once a week. I
23 don't know. There's no set. I had teammates,
24 too, that would help make sure people . . .

25 And, in general, Ken -- Ken operated by

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 the book. I never really had to watch Ken.
3 Every time that Ken said he was doing something,
4 we went and checked, and that's what Ken was
5 doing. I mean, he didn't -- he didn't
6 exaggerate with his schedules and things like
7 that.

8 Q Did you ever observe anyone on site
9 with Kenneth Scott Builders that was in charge
10 of their safety program?

11 A I wouldn't know. I don't know who
12 those guys were.

13 Q Do you know whether he had anyone in
14 charge of the safety program?

15 A I wouldn't know.

16 Q Do you know whether he had a safety
17 program?

18 A I wouldn't know.

19 Q Would you expect him to have a safety
20 program?

21 A I wouldn't know what's standard. I
22 don't know.

23 Q Did you ever verify whether Kenneth
24 Scott Builders had a competent job person at the
25 site at all times in charge of its safety

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2 program?

3 MR. CRAWFORD: I object to the form.

4 You can answer.

5 THE WITNESS: That Kenneth Scott had a
6 competent person on site at all times? I
7 don't think there was someone on his site at
8 all times. There definitely would be times
9 I would be over there and there was nobody
10 there.

11 BY MR. SHELTON:

12 Q So when work was being done, did you
13 verify or did anyone that you know with D.R.
14 Horton verify that there was a person on site in
15 charge of Kenneth Scott Builders' safety
16 program?

17 A I don't recall.

18 Q As the project manager, what do you
19 expect a person who would be in charge of a
20 safety program, what would you expect their
21 qualifications to be?

22 A I have no idea what a safety person's
23 qualifications need to be.

24 Q Do you know what a safety program is?

25 A Keeping people safe.

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 Q Anything else?

3 A You'd have to comply with, I guess,
4 OSHA regulations.

5 Q And do you know whether Kenneth Scott
6 Builders had anyone on site to see that people
7 were being kept safe or complying with OSHA
8 regulations?

9 A I don't know how he did that, no, I
10 don't.

11 Q Is Kenneth Scott Builders working on
12 any other D.R. Horton projects, to your
13 knowledge?

14 A At this time?

15 Q Correct.

16 A No.

17 Q You reviewed Kenneth Scott -- Kenneth
18 Tosky's deposition transcript, at least parts of
19 it. Is there any part that you reviewed that
20 you dispute or disagree with?

21 A No, there's nothing that -- I can't
22 recall, you know. Well, I guess the only thing
23 that I would dispute or disagree with was where
24 he said -- he said that dump truck could be
25 coming from Hampton Lake or our job site. And

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 it can not be coming from our job site to haul
3 material to 1123, what's the name of that road,
4 Highway 46 in Bluffton.

5 Q Why do you say that?

6 A Because it would be coming from the
7 sand pit. He's not taking sand off of our
8 project.

9 Q Do you know that for a fact, he didn't
10 take sand off your project?

11 A I'm not there on Sundays. I'm not
12 there at night. I'm not there 24-seven to watch
13 him. But I know the type of person Ken is. I
14 know all the people that -- the different
15 engineering groups that monitor, like this GHD,
16 like Thomas and Hutton, the guys I work with.
17 To the best of my knowledge, information, and
18 belief, as I said, that would be stealing, and I
19 would definitely not think that Ken would steal
20 anything from us.

21 (Whereupon, Plaintiff's Exhibit
22 Number 12 was marked for
23 identification.)

24 BY MR. SHELTON:

25 Q Exhibit Number 12, this is an excerpt

SHELTON - O'SAKO (DIRECT EXAMINATION)

of Ken Tosky's deposition. It's a condensed version of his deposition transcript. It begins on page, of his transcript, number 106.

A All right. Questions?

Q So if you take some time and read through this, if you'll go to the top of 107, I'll submit that we're reviewing invoices from the dump truck operator himself, Mr. Uriostegui:

"On 261 at the bottom, it says: Top soil to HHP." And I asked him, "Do you have any idea where he would have gotten that topsoil from?"

"It could have been any job site where we were working on. Usually when you strip a site you have excess topsoil that has to be hauled off, and common practice is if we have a place we can take it to, that is what we do."

And then I asked, "Do you pay the existing site for the topsoil that you are removing from it?"

"Usually you have it figured in to your proposal, your bid numbers. If you have a haul off on a site, there is an item given for a haul off. If there is a haul in, or if there is a

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2 grade site or what have you, that is usually all
3 dictated. You are going to have sites that you
4 have that have overages. You are going to have
5 sites that you have to haul in. It just
6 depends."

7 And then question: "And did D.R.
8 Horton, did you ever pay D.R. Horton for dirt
9 that you hauled off?"

10 And his answer was: "It was included
11 in our bid price."

12 And the question on line 8 on page 108:
13 "And they are paying you to haul off the dirt,
14 is that fair to say?"

15 "In some situations, yes."

16 Okay. Is there anything in that that
17 you dispute?

18 A Yeah, the part where he says -- it
19 says -- 21, 107, it says: "And did D.R. Horton,
20 did you ever pay D.R. Horton for dirt that you
21 hauled off."

22 I've never seen a credit shown on this.
23 There's a project that Ken built for us or bid
24 on, oh -- let me look at my phone -- Coffee
25 Bluff.

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2 Q Okay.

3 A In the Coffee Bluff bid, there was good
4 material, suitable material, that had to be
5 hauled off.

6 And the contractors, to Ken's point
7 here, we made them -- since there was a haul off
8 of good material, we wanted to see the value
9 that each contractor assigned to that.

10 Also, that allows us, our team, the
11 D.R. Horton team, to know that we're getting --
12 that that is getting recognized and we're
13 getting a value back for that material.

14 So where Ken says he paid us, I've seen
15 no evidence of that in anything you've shown me
16 through all of these exhibits today. And I
17 don't recall ever seeing it on anything from Ken
18 Tosky at Cypress Ridge.

19 We can find bids for Coffee Bluff,
20 Coffee Point, it is known as, same project,
21 where multiple bidders including Ken Tosky have
22 a line item that says suitable material, it's
23 theirs to have, this is the value.

24 Ultimately, you get -- let's say the
25 project is a million bucks: Contractor A, B,

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2 and C, he can assign a value. So Ken says, "I'm
3 going to deduct 100,000 because I know I can
4 sell it for 120" or whatever.

5 So there is a line item on some but not
6 -- not on anything to do with Cypress Ridge from
7 Ken Tosky.

8 Q Do you think it's possible that he
9 credited it in his mind, if that makes sense?

10 MR. CRAWFORD: I object to the form.

11 THE WITNESS: I don't think there was
12 anything to credit on.

13 I think that what he's saying is, did
14 you ever get paid to haul dirt off.

15 And that is included in all those bids.
16 It's up there over and over again. D.R.
17 Horton paid him to haul dirt off, which was
18 the unsuitables, the material on his bid
19 that says bad material. Literally, he wrote
20 it "bad material."

21 So he hauled material off. But it was
22 bad material that, based on all of the
23 observation from all of the different
24 agencies, engineering agencies and people
25 involved, it is not -- you're not able to

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2 have that placed on your job site. There's
3 no value in it. There's no use in it. He
4 certainly wouldn't be trucking it ten miles
5 to another job site, I wouldn't think.

6 But as far as being able to pay -- did
7 he pay D.R. Horton for dirt that he hauled
8 off? I don't see that line item on a Mill
9 Creek bid, but yes, he does have it on a
10 Coffee Point bid.

11 BY MR. SHELTON:

12 Q So what is the Coffee Point bid? When
13 was that made, and is that still ongoing?

14 A The Coffee Point bid is the same time
15 period as this. The project has been completed
16 for years. It was small, maybe 40 lots.

17 Q And do you know whether he was ever
18 hauling dirt from Coffee Point to Cypress?

19 A He didn't get awarded the Coffee Point
20 job.

21 Q Okay. But that was in his bid for the
22 Coffee Point job?

23 A Correct.

24 Q Why didn't he get awarded the Coffee
25 Point job?

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2 A I don't recall.

3 Q When you pulled up your phone just now,
4 was that an email that you were looking into, or
5 was that something on your filing system?

6 A Google Maps.

7 Q Okay. You were just finding Coffee
8 Point?

9 A Finding Coffee Point, yeah. I can't
10 remember the name of the place.

11 Q Would you sometimes have purchase
12 orders that you would sign that are kind of
13 one-offs? It's a smaller job, and someone would
14 present something to you, and you'd sign it and
15 authorize it?

16 A Yes.

17 Q Would those purchase orders always be
18 placed into the same file, the vendors' file in
19 your system?

20 A Yes. Or at least they would be
21 submitted to the same accounting people, and
22 they'd be filed the same way.

23 Whether our team hit "file save as" and
24 saved it in an appropriate file that day, I
25 can't speak to. But, typically, the process is

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2 the same. Whether it was actually saved that
3 day, I don't know.

4 Q Is there a specific kind of threshold
5 for what you can do with a purchase order and
6 approve a purchase order like that within your
7 authority as the project manager, or is there --
8 is that kind of left to your discretion; or is
9 there a certain amount of money or a certain
10 amount of time and scope that changes the
11 equation, where you have to go through more of a
12 corporate process?

13 A The process is the same on all of them,
14 but I would say that -- that value has changed
15 depending on who's in charge, who is our city
16 manager.

17 Q And that would be D.R. Horton's city
18 manager that you referenced earlier?

19 A Yeah.

20 Q So you're explaining the haul off
21 suitable materials, your believing that that's
22 referencing hauling it off from one part of
23 stage 7 to another part of stage 7 and not off
24 site.

25 A I believe that the majority of that

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haul off came from the boating and RV park area, because we -- we essentially dug a pond in that area or excavated -- we excavated that area, got the good material. We over excavated some of the lagoons and made them larger, got that good material. And by "good material," I mean suitable material. We hauled everything we could from this side of the street to this side of the street and placed it where the phase 7B town homes are currently sitting, because at that point in time, the phase 7B town home area was -- had a lot of unsuitables that were not allowed -- not classified as structural material, so we could not build a home on them.

Q Do you know how deep Kenneth Scott Builders dug at any one point in any of its excavations on Cypress Ridge?

A I'll guess 20 feet. I think there's documentation of him going, we could look back through, but that length, width, height. I think it was roughly 15, but that's where it's documented. I don't know. 15, 20 feet. I don't know. Pretty deep.

Q The soil techs or the soil engineers,

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2 do they keep records, and do they maintain their
3 records, in your experience?

4 A Yes.

5 Q Do think provide you with a copy of
6 their records, or do they keep those only in
7 house?

8 A No, I don't get a copy of their field
9 notes and things like that. They usually just
10 issue a summary that says, "Hey, we tested patch
11 1 through X, and these are the results, pass,
12 pass, fail, fail, pass, fail. So we just get a
13 summary.

14 Q And, again, I think you testified to
15 this earlier, D.R. Horton, it's your
16 understanding, employs and engages -- let's say
17 engages the field techs?

18 A Engages?

19 Q Let's say hires. I don't want to
20 say -- I'm not trying to imply that they're your
21 employees or they're D.R. Horton's employees.
22 But they're the ones that contract with the,
23 actually, field techs, the soil techs; is that
24 correct?

25 A So we -- we only have one contact. So

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2 we call GHD. There's two, two people over
3 there, Sean McCubbins and -- anyway, there are
4 two people over there that we call. They send
5 out whoever works for them, which you're calling
6 soil techs.

7 Q You call them?

8 A Call them soil techs.

9 Q Okay.

10 A But those -- those are the guys coming
11 out here, men and women, whatever.

12 And, yeah, I mean, I don't call any of
13 the soil techs. I don't know all of them. I
14 don't have any of their numbers. I just call
15 the main guy over there, the main engineers.

16 Q Where do you personally reside?

17 A Rincon, Georgia.

18 Q And do you have any family in Jasper
19 County?

20 A I don't.

21 Q Does D.R. Horton have any ongoing
22 projects in Jasper County?

23 A We just started one.

24 Q Where is that?

25 A Ridgeland.

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2 Q Do you know the name of it?

3 A Bees Creek.

4 Q What stage is it in, do you know?

5 A I think they're just doing silt fence.
6 They really haven't started it. They're getting
7 set up to clear it for -- it's brand new. Our
8 first Ridgeland project, so that's good.

9 Q How big is it going to be, do you know?

10 A 85 lots.

11 We do have -- I was trying to think --
12 Jasper County -- the actual county? Within the
13 county limits?

14 Q You know, Hardeeville, Ridgeland,
15 Jasper, any --

16 A We have Hardeeville. Hardeeville --
17 East Argent is Hardeeville. We have a project
18 named Jamestown, which is Hardeeville.

19 The one at Bees Creek is the first -- I
20 think that's the city of Ridgeland, though. I
21 think that's the first one that -- time we'll be
22 up there.

23 Q And what stage is East Argent in?

24 A East Argent is -- it's called the
25 Retreat at East Argent, and it is -- we have

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homeowners there, but we have multiple phases. We probably still have another 350 homes to build -- probably, yeah, another 350, 400 homes to build. It is -- it's wide open out there with site development, earthwork.

Q And what about Jamestown?

A Jamestown is finished lots, which East Argent is also finished lots, so, actually, I need to correct myself, I guess. East Argent, we're not -- we're just buying finished lots from another group, and so those site contractors are not sending any invoices to me for that project.

Q Okay.

A Jamestown is finished lots, but we were having to do some building pad improvements, and they're just starting the homes.

Q And do you have an IT guy that works in house at your office.

A We don't.

Q Do you have someone with IT that you -- that you call upon when you need help with something with your computer systems.

A Yes.

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Q Is that in house with D.R. Horton?

A Yes.

Q Do you know who that person's name is?

A David Nutter.

Q Do you know where he works out of?

A Charleston.

Q Do you know what his job description is?

A IT guy.

Q And are there any other office systems that you use besides what we've already talked about? You use Microsoft, I'm assuming?

A Yes.

Q You testified you use Outlet as email.

A Yes.

Q And do you have any other type of management system, whether it's a management system that you plug your dates into and it triggers calendaring, or whether it triggers that you have invoices that haven't been paid or that you kind of log in to? Law firms have that, for example. Some of them do, some of them don't. Doctors' offices have them, sometimes contractors have them, but it would be

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like an operations system of some sort.

A I don't know.

Q You don't have it?

A I don't have it.

Q And that server, do you know where the server of the material that we were discussing earlier is stored? Do you know where that server is maintained? Is it . . .

A I have no idea.

Q Okay. But the IT guy, David Nutter, might know those answers?

A He might.

Q I've already asked you, you're not aware of any document retention policy that D.R. Horton has?

A I don't know the policy. I know that there's a policy. I don't know the dates. And different departments. I know that there was different numbers, and David would send something out, like "Hey, this is what -- y'all need to clean up this" or --

I think our computers actually do it themselves. I don't know.

Q Do you know whether things get

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2 automatically erased after a certain amount of
3 time?

4 A I don't know.

5 Q Do you know whether there's any type of
6 safety protocol or -- or handbook or anything
7 along those lines that generally is used for
8 D.R. Horton work sites?

9 A Pertaining to my section, I don't -- I
10 don't know.

11 Q You don't know?

12 A No.

13 Q If it existed, do you think you would
14 know about it?

15 A I'm not sure.

16 Q Okay. And what about any type of
17 mechanism or protocols about who comes on or off
18 of job sites? Is there any sign-on protocol?
19 Is there any oversight of that?

20 A There's not.

21 Q That might be all the questions I have
22 for you. Let me just take a second to kind of
23 look through these exhibits I tossed to the side
24 and make sure there's nothing that we need to go
25 over right now.

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Sorry, a couple more questions. I apologize.

So you're not a member of any associations in Jasper County?

A No.

Q Are you a member of any type of builders' guild associations?

A No.

Q Are you a member of any associations in Beaufort County?

A No.

Q Any builders' associations of any sort?

A Nope.

Q Engineering associations?

A Nope.

MR. SHELTON: Let's take a little break, and that might be it.

(Off the record.)

(Whereupon, Plaintiff's Exhibit Number 13 was marked for identification.)

BY MR. SHELTON:

Q Back on the record. So I'm going to have you look at this briefly. It's Exhibit

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Number 13.

A Okay.

Q Whose handwriting is that on the first page, on page Bates stamped 84, do you know?

A I'm assuming that's Pam Sanford's.

Q And on Bates stamp 85, Pam writes to Tim --

Looks like you were cc'd on this.

-- "Pam, please do not process."

This is from Ashley Huddleston.

"Tim, we can not pay a \$77,000 invoice the day after the PO is cut. Audit will not accept this as sufficient time to complete the PO'd work. Can you please review and confirm that this work can be completed in one day turnaround time?"

Can you explain a little context about this email conversation?

A I'm not really sure. March 20th -- looks like Tim and Pam or Tim and Ashley were enjoying a good afternoon. I don't know. I don't know the details on that.

Q Do you see this draw, it's referencing something was done on or about March 20th, 2018;

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2 does that look correct?

3 A Well, rephrase your question.

4 Q When was this email chain?

5 A The email chain was done March 20th,
6 2018.

7 Q And do you know when the invoice was
8 approved?

9 MR. CRAWFORD: I object to the form.

10 THE WITNESS: There's no copy of the
11 approved invoice on here. I don't know when
12 it was approved.

13 BY MR. SHELTON:

14 Q Do you know whether it would have been
15 close in time to March 20th, 2018?

16 A I wouldn't know.

17 Q Can you make that assumption based on
18 the character of the email?

19 MR. CRAWFORD: I object to the form.

20 THE WITNESS: I would think that -- I
21 would think that -- you know, that they were
22 having a conversation. I think Tim was
23 asking her.

24 It doesn't say. It doesn't say what
25 that -- what -- this email doesn't say that,

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 but I would think that's the topic of
3 question, discussion. Tim's probably asking
4 if they can pay this invoice.

5 BY MR. SHELTON:

6 Q Do you have any knowledge as to why
7 there was such a hurry or -- I don't want to say
8 it that way -- have any knowledge as to why
9 there was a hurry to pay this invoice?

10 MR. CRAWFORD: I object to the form.

11 THE WITNESS: I don't know.

12 BY MR. SHELTON:

13 Q Do you know when the wreck that
14 occurred that's the subject of this litigation,
15 do you know -- do you know when it occurred?

16 A I don't.

17 Q Does March 13th, 2018 sound familiar,
18 or would you not know?

19 A I would not know.

20 Q Do you have any other vendors or
21 contractors that work out of their truck that
22 y'all paid over \$2 million to in over less than
23 two years?

24 MR. CRAWFORD: I object to the form.

25 THE WITNESS: Can you repeat the

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question?

BY MR. SHELTON:

Q Do you have any other -- to your knowledge, do you have any other contractors other than Kenneth Tosky that work out of their truck that you paid over \$2 million to, and "you" being -- I mean that D.R. Horton paid over \$2 million to, to your personal knowledge, in roughly two years?

MR. CRAWFORD: Same objection.

THE WITNESS: Yeah. We have another contractor that, as far as I know, they just work out of their truck too, and they have million dollar projects. Yes.

BY MR. SHELTON:

Q Who is that?

A Let me look at my phone for the Google street. It's River Sand, Daryl Hutcheson, but I don't know what his -- what the company name is.

Q Daryl Hutcheson, is he in horizontal development?

A Yes.

Q You don't know what his company name is?

1 SHELTON - O'SAKO (DIRECT EXAMINATION)

2 A I can look it up on an email real
3 quick, if you want me to.

4 Q That would be great.

5 A I think it's Ogeechee River Sand, but
6 hang on. It's opening it up, the pay ap:
7 Ogeechee River Sand, LLC. This -- this project
8 is \$2,691,000. And he's also doing another one,
9 I suspect there's more, but he's doing that for
10 a third party, the developer, and we're buying
11 just the lots, but we put the -- we put it all
12 together, kind of put the deal together.

13 But, yeah, you don't have to have a --
14 you do not have to have a --

15 Eagle Site Prep, a big company, they
16 don't have a place, to my knowledge, where they
17 keep the equipment. They just lease it. They
18 take it from my job to the next job, from that
19 job to my job. Literally, they just -- and they
20 don't have anybody to -- they don't have a
21 lowboy. They call Sapp's Trucking. They'll
22 come get it, no hassles, 900 bucks. They'll
23 move your dozer for you. So, yeah, it's pretty
24 standard. At least possible.

25 MR. SHELTON: Okay. Those are all the

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questions I have. Thanks.

(The witness reserved the
right to read and sign the
deposition transcript.)

(Whereupon, the deposition
was concluded at
3:37 p.m.)

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C E R T I F I C A T E

STATE OF SOUTH CAROLINA:

BEAUFORT COUNTY:

I, Theresa D. Saxon, Court Reporter and
Notary Public in and for the above county and
state, do hereby certify that this is a true and
correct transcript of the proceedings in this
matter taken by me stenographically at the time
herein-before set forth.

I am not of counsel to any party, nor
interested in the event of this cause.

Theresa D. Saxon

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October 18, 2024

Via Electronic Filing

Clerk of Court for the Fourteenth Judicial Circuit
Post Office Drawer 1128
Beaufort, South Carolina 29901

***Re: Mark W. McGilton vs. D.R. Horton, Inc., et al. | Civil Action No. 2021-CP-27-00069 |
Filing of Letter***

Dear Madame Clerk,

Please find enclosed, a letter dated June 29, 2024, which the undersigned referenced during oral argument that took place during the hearing held on October 17, 2024 before Honorable Maite Murphy in the above referenced matter. This letter is being filed to ensure the letter is included as a part of the court's record.

With regards, I am

Respectfully yours,

/s/Benjamin T. Shelton

Benjamin T. Shelton, S.C. Bar No. 77207
Attorney at Law

Encl.: Rule 11 Letter dated June 29, 2024



June 29, 2024

Via Email Only -- jimhoff@conlaw.com

Mr. Jason Imhoff
Kenson, Dudley & Crawford, LLC
704 East McBee Avenue
Greenville, SC 29601

Re: Reply to June 27, 2024 Correspondence

Dear Jason,

Thank you for your letter dated June 27, 2024. I want to focus on the disputes and concerns at issue in effort to resolve the matter short of seeking court intervention.

Supplemental Discovery

As background, as you may imagine, we are preparing for Rule 30(b)(6) depositions of your client. I accept D.R. Horton's position that it has provided all documents relating to its hiring practices. My June 24, 2024 letter contained a request that you describe and identify the previous production. To be clearer, this request is made so that we understand what we are reviewing short of asking a Rule 30(b)(6) witness about the nature of every document D.R. Horton produced. For reference, this is the extent that D.R. Horton's discovery responses identify the tranche of material produced on December 6, 2023:

A) Phase 7 Documents: KDC_000660 – KDC_0001205.

The response contains no other identifying information. We are asking you to supplement your responses by identifying and describing them so that we can better understand the context of the production in our preparation for upcoming depositions.

Letter to Jason Imhoff - June 28, 2024

We recommended either a table of contents or an outline identifying the documents by category and context.

For example, in our production, we provided documents in folders by category. We also included a table of contents identifying providers in our medical record production. Our discovery requests ask that your client describe the production, and we believe that this is a very simple request requiring very little effort by your firm or your client. It will also make subsequent depositions and proceedings more efficient for all parties.

Experts

Next, thank you for confirming that you will not accept service for subpoenas for your expert's file. I did not want to risk sending a subpoena to a represented party. Given the short timeline between now and the end of the discovery period (and everyone's summer plans) timeliness of responses is important. We asked three times without a response and included it as a line item in the letter for that purpose. Thanks also for the information regarding Stephanie. I hope she is okay and understand to copy Cara moving forward.

For deposition dates, I previously sent Stephanie my availability for August and September, where I have very broad availability after August 8th at this time. I have limited availability in July other than dates that we had already discussed (July 16-18), however, given the importance of the case, I will do whatever is feasible to make myself available at a time convenient to you and your experts (or any other witness) as necessary, and via Zoom if needed.

PREVIOUS DISCOVERY VIOLATIONS AND PERSONAL COMMENTS

In response to the personal allegations in your letter, no one set you or your firm up. Your client failed to answer discovery for nearly a year and partially did so only after a motion to compel was calendared. Your client failed to provide relevant documents before Mr. O'Sako's deposition, and then failed to supplement thereafter. It took filing another motion to compel to obtain any additional discovery, and documents were only provided on the eve of the second motion to compel hearing. Then, even after being held in contempt of court and sanctioned for its discovery abuse, and after agreeing to a scheduling order, DR Horton again failed to follow the court's order by failing to identify experts within the deadlines that it had agreed with. D.R. Horton is solely responsible for any contempt findings and sanctions related to this case.

Letter to Jason Imhoff - June 28, 2024

FAILURE TO OUTLINE EXPERT OPINIONS

Now, despite an order stating that D.R. Horton will provide a “detailed outline” of its experts’ opinions, it fails to provide an outline of the expert’s opinions, and particularly a detailed outline. It has also identified damage experts after repeatedly representing to the court that it was generally not disputing my client’s damages. Indeed, we furnished expert reports from our damage experts. We furnished written diagrams, videos, and summaries of our accident reconstructionist. Nothing in DR Horton’s production describes anything close to what we have produced and does not constitute a “detailed outline” of its expert opinions as required by the Court’s order dated June 13, 2024.

VIOLATION OF ADR RULES

This is the second time that you have referenced a comment out of context that I made during a mediation settlement conference, outside of the mediation. We say lots of things at mediation—sometimes in jest and sometimes as gamesmanship—knowing that the confidentiality of such statements is sacrosanct. The first time you took this statement out of context and used it out of the context of mediation was during a virtual hearing in open court, where it was used in furtherance of your substantive argument—a blatant violation of SCADR, Rules 6 and 8. Please cease any further use of mediation material or comments or discussions made during the course of mediation in violation of SCADR rules.

RULE 11 CONSULTATION

Please know that I do not enjoy and do everything I can to avoid drafting Rule 11 letters and motions to compel to force an opposing party to comply with court rules and prior orders of the court. It is not fun. It is exhausting. I would prefer to focus on the substantive issues of a case and not be dragged into a discovery dispute. Unfortunately, as reflected in Judge Goodstein’s Order, but for those efforts to compel your client to comply with the South Carolian Rules of Civil Procedure, my client would have no discovery from D.R. Horton in this case.

Despite our disputes, I have enjoyed getting to know you and John during this litigation. I look forward to working with you in a professional manner and to avoid frivolous disputes and bickering and personal attacks. The June 24, 2024, Rule 11 letter was written for that purpose. So is this correspondence.

Letter to Jason Imhoff - June 28, 2024

We have provided multiple deposition dates for our experts and have noticed the deposition of a witness that you wished to depose. I look forward to receiving dates for D.R. Horton's 30(b)(6) depositions. Please identify or describe the December 6, 2023 production so that we can prepare for and streamline depositions. Please provide a detailed outline of the expected testimony of the experts that you have identified. Given the time deadlines involved with this case, please satisfy these requests and furnish the material or dates requested on or before Tuesday, July 9, 2024.

With kind regards, I am

Most Sincerely Yours,

SHELTON LAW FIRM, LLC

s/Benjamin T. Shelton

Attorney at Law
SC Bar No. 77207

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER	FOURTEENTH JUDICIAL CIRCUIT
MARK W. MCGILTON,	CIVIL ACTION NO. 2021-CP-27-00069
Plaintiff,	
vs.	
1223 MAY RIVER ROAD, LLC, D.R. HORTON, INC., AND LOTTY TRUCKING, LLC F/K/A RAMOS TRUCKING, LLC,	D.R. HORTON, INC.'S RESPONSE AND OBJECTIONS TO PLAINTIFF'S PROPOSED ORDER ON RULE TO SHOW CAUSE, TO STRIKE PLEADINGS AND FOR CONTEMPT
Defendants.	
1223 MAY RIVER ROAD, LLC,	
Third-Party Plaintiffs,	
vs.	
KENNETH SCOTT BUILDERS, LLC,	
Third-Party Defendants.	

Counsel for D.R. Horton has reviewed the proposed Order related to Plaintiff McGilton's, Motion for Rule to Show Cause, to Strike Pleadings and for Contempt and provides the following comments/observations. As an initial matter and as more detailed in this response, D.R. Horton disagrees and objects to any ruling that finds it engaged in willful disobedience as well as gross indifference to the prior orders of this Court. As a practical matter, to revise the Order to provide for all of the factual items that have been left out and/or misrepresented would essentially entail re-writing the Order in total. Accordingly, D.R. Horton identifies the areas where it believes Plaintiff's proposed Order is deficient or is a misrepresentation of the underlying facts.

In that vein, D.R. Horton would note that the proposed Order is devoid of all evidence as further explained below, related to agreements on the production of discovery that were all presented at the hearing and supported by affidavit. These facts would certainly be relevant to any determination that D.R. Horton willfully disregarded prior Court Orders. More importantly, the Plaintiff has not in this proposed Order nor at the hearing disputed the existence of the agreements between counsel and contrary to representations made at the hearing, the underlying agreement was not raised in the prior hearing before Judge Goodstein.

The following comments track the provisions of the proposed Order:

DISCUSSION

The Plaintiff cites only the case law that supports a granting of sanctions and does not include the analysis and the competing items that the Court must consider when evaluating a motion for sanctions. For example, the Order fails to cite to any of following relevant cases listed below:

- When the court orders a sanction that itself results in default or dismissal, the end result is harsh medicine that should not be administered lightly. *Orlando v. Boyd*, 320 S.C. 509, 466 S.E.2d 353 (1996). *Griffin Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 511 S.E.2d 716 (Ct. App. 1999).
- When deciding the severity of sanction for failure to disclose evidence during the discovery process, the trial court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice. *Samples v. Mitchell*, 329 S.C. 105, 112, 495 S.E.2d 213, 216 (Ct. App. 1997).

- "An 'abuse of discretion' may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law." Dunn v. Dunn, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989)
- Where there is no evidence of willfulness on the part of the allegedly non-compliant party, our appellate courts have reversed sanctions orders issued by trial courts. See, e.g. *Rickerson v. Karl*, 412 S.C. 215, 770 S.E.2d 767 (Ct. App. 2015) (holding that there was no evidence of willfulness in failing to meet a court-ordered deadline); *Orlando v. Boyd*, 320 S.C. 509, 511-12, 466 S.E.2d 353, 355 (1996) (sanction of dismissal reversed when the violation was not “intentional”). See also, *Baughman*, supra
- The Court erred in exclusion of a witness that had the effect of granting judgement by default or dismissal. “Where the effect will be the same as granting judgment by default or dismissal, a preclusion order may be made only if there is some showing of willful disobedience or gross indifference to the rights of the adverse party.” *Baughman v. AT&T*, 305 S.C. 101, 410 S.E.2d 537 (1991). In *Baughman*, the trial court’s sanction was reversed when the opposing party “took lengthy depositions regarding his claims and was clearly not prejudiced by the failure to receive formal answers to interrogatories.” *Baughman*, 378 S.E.2d at 601. Here, the Plaintiff received all of the 1,205 documents that the parties had agreed upon in their discussions¹. The documents that the Plaintiff allegedly obtained from FOIA requests,(i.e., building permits for vertical construction that are wholly unrelated to the work performed by the Defendant truck driver who worked only on horizontal

¹ Since the hearing, D.R. Horton has provided the land development documents for the remaining phases of the agreement, bringing the total documents produced to date to 4,603.

construction), were irrelevant to the issues in this case and thus not discoverable under SCRCp 26(b)(1) (“parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . .”). In addition, the Plaintiff in this case took a lengthy of D.R. Horton’s employee Jared O’Sako for specific purposes of identifying documents and the manner in which D.R. Horton maintained its land development records. Plaintiff has not shown that its tenuous case has been prejudiced in any way by D.R. Horton’s alleged failure to produce documents that are irrelevant to his case.

A. Plaintiff’s Rule to Show Cause

1. Agreement related to production of discovery.

As referenced above, the timeline of events referenced by Plaintiff fails to identify and address any of the agreements between counsel related to the production of discovery in the matter. These written agreements, which were supported by a detailed timeline and affidavits submitted in the record, include but are not limited to: the agreed deposition of Jared O’Sako to provide an understanding of how documents are kept in their ordinary course; the agreement related to the production of documents identified at the O’Sako deposition; Plaintiff’s failure to request additional documents after its initial review as agreed; and Plaintiff’s failure to identify or raise in any subsequent Rule 11 letters issues related to the alleged failure of D.R. Horton to comply with its agreement for the production of discovery.

2. Alfredo Uriostegui Deposition.

Plaintiff incorrectly cites to portions of Mr. Uriostegui deposition that were referenced in Plaintiff’s motion but are not supported in the record by deposition excerpts or affidavit.

Accordingly, these improperly cited excerpts may not be considered by the Court and may not be cited in any Order on the Motion.

3. Findings related to D.R. Horton as the general contractor for the subject property.

Page 7 of the Order is replete with proposed findings and conclusions related to D.R. Horton's position as a general contractor and not merely the owner of the project; D.R. Horton's alleged breach of its duty as a general contractor; and that D.R. Horton concealed certain facts from the Plaintiff. As Plaintiff's counsel raised at the hearing, the motion before the court was for sanctions and not a motion for summary judgment. Therefore, any findings related to D.R. Horton's role, duties and alleged breaches thereof would be inappropriate at this juncture.

In addition, the driver of the dump truck at issue was working on the site work infrastructure of the Cypress Ridge Development (also known as horizontal construction). D.R. Horton does not hold the requisite license to perform this type of work and could not act as the general contractor for the scope of work at issue. This position is supported by the affidavit of Jared O'Sako which was submitted in response to the Plaintiff's Motion. Moreover, the Plaintiff has submitted no evidence in the record contrary to this position. The facts alleged by Plaintiff in the proposed Order are irrelevant to its theory of liability. This is not a construction case regarding the entirety of the Cypress Ridge project. This is a motor vehicle accident case where Plaintiff allege that the at-fault driver who was hired as a subcontractor by the general contractor Kenneth Scott Builders at some point performed work on the site development owned by D.R. Horton (but admittedly not at the time immediately preceding the accident) and that D.R. Horton somehow should be responsible for the actions of the dump truck owner/operator who is three degrees removed from D.R. Horton. There is no "gotcha" on the permit provided by Plaintiff. It is uncontested that D.R. Horton performed vertical construction of the homes in the development

and the sales center, which it is licensed to perform. The permit was related to that work. D.R. Horton is not licensed to perform the horizontal construction and therefore as the owner of the property, entered into an agreement with Kenneth Scott Builders to perform that scope of work. As such, the Plaintiff's tenuous theories of recovery, cannot support discovery requests like the ones the Plaintiff claims D.R. Horton did not properly respond to. Findings

As previously referenced herein, D.R. Horton objects to any ruling that it "engaged in willful disobedience as well as gross indifference to the prior orders of this Court...", and that any actions or inactions between the parties support the disfavored and severe sanction of striking D.R. Horton's pleadings. Further, D.R. Horton would object to Plaintiff's newly requested relief that D.R. Horton be placed in default. This relief was not contained within Plaintiff's motions and/or supporting memorandum of law.

Based on the observations and comments provided herein, D.R. Horton would respectfully request that Plaintiff's Order not be entered by the Court and further that the Court not grant the severe relief of striking D.R. Horton's pleadings or contempt.

KENISON, DUDLEY & CRAWFORD, LLC

s/ John T. Crawford

John T. Crawford, Jr. (SC Bar # 69682)

Kimila L. Wooten (SC Bar # 64516)

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Counsel for Defendant D.R. Horton, Inc.

December 23, 2024
Greenville, South Carolina

STATE OF SOUTH CAROLINA	)	
COUNTY OF JASPER	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
MARK W. MCGILTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 2021-CP-27-00069
	)	
1223 MAY RIVER ROAD, LLC, D.R.	)	
HORTON, INC., AND LOTTY	)	
TRUCKING, LLC F/K/A RAMOS	)	Mark W. McGilton’s Reply to D.R. Horton’s
TRUCKING, LLC,	)	“Response”
	)	
Defendants.	)	
1223 MAY RIVER ROAD, LLC,	)	
	)	
Third-Party Plaintiffs,	)	
	)	
v.	)	
	)	
KENNETH SCOTT BUILDERS, Inc.,	)	
Third-Party Defendants.	)	
	)	

I find that DR Horton willfully failed to follow a previous order of the court on at least two occasions, and willfully failed to comply with its discovery obligations. It is clear that but for the filing of the motions to compel, the motions for sanctions, and but for the motions to compel hearings being scheduled, that D.R. Horton would have produced no discovery in this case. D.R. Horton’s willful disregard for its discovery obligations burdens the court system, and it burdens the ability of both a plaintiff and a defendant to obtain appropriate and efficient resolution of cases.

Order of Judge Goodstein Granting Pl.’s Mot. to Compel, for Sanctions and Holding D.R. Horton in Contempt, p. 6, ¶ 2 (March 5, 2024).

Introduction

As a general matter, D.R. Horton's "Response" to the Proposed Order is improperly filed, and is in reality a premature, Motion for Reconsideration of a Court Order for a decision which has been rendered but not yet filed. It is presented to the Court in an attempt to reverse the well-reasoned decision by the Court to grant the Plaintiff's Rule to Show Cause as to why D.R. Horton should not be held in contempt, again, and have its Answer struck so as to render it in default.

Substantively, D.R. Horton's Response to the Proposed Order contains facially incorrect statements and allegations which are easily rebutted by the record.

- I. D.R. Horton falsely argues that the Plaintiff's proposed Order omits references to cases which are instead referenced and cited in the Proposed Order.

In its "Response" filed with the Court on December 23, 2024 and accepted by the Jasper County Clerk of Court on December 27, 2024, D.R. Horton states that the Plaintiff fails to cite *Griffin Grading and Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 511 S.E. 2d 716 (Ct. App. 1999) and *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997). This is patently false. Plaintiff cited to language from *Griffin Grading and Clearing* twice in the Proposed Order. See p. 3. Plaintiff quoted *Samples v. Mitchell* extensively on page 2 of the Proposed Order. D.R. Horton alleges that the Plaintiff omits the axiom relating to the severity of striking a pleading constituting "harsh medicine." However, this very language and consideration is cited on page 4 of the Proposed Order, citing *McNair v. Fairfield Cnty*, 379 S.C. 462, 665 S.E. 2d 830 (Ct. App. 2008). While these points may seem pedantic, D.R. Horton's patently rebuttable misstatements as to these simple points undermine its entire "Response" to the Proposed Order Plaintiff submitted for the Court's consideration.

- II. D.R. Horton Again Attempts to Reargue the Matters which were before the Court at the December 7, 2023 Sanctions Motion, and attempts to modify the prior Decision

Judge Goodstein Rendered in the Order Granting Pl.'s Mot. to Compel, for Sanctions and Holding D.R. Horton in Contempt (March 3, 2024)

In its oral argument and filings presented to the Court at the October 17, 2024 Rule to Show Cause hearing, D.R. Horton attempted to rehash the issues presented before the Court during the prior argument at the hearing on December 7, 2023, of the second Sanction's Motion Plaintiff filed in this case. Now, in its "Response," D.R. Horton again attempts to re-litigate the issues that the Court considered at the December 7, 2023 Sanctions hearing, and to modify the decision the Court rendered in the March 5, 2024 written Order that sanctioned D.R. Horton for discovery abuse and held it in Contempt (to be purged by no further discovery abuse). Specifically, D.R. Horton attempts to again use alleged agreements between counsel as an excuse for failing to comply with prior court orders and for failing to produce relevant discovery responses. Ironically, D.R. Horton's failure to fulfill its agreements with the Plaintiff concerning discovery production led to D.R. Horton being sanctioned and held in contempt by Order dated March 5, 2024. See Pl.'s Mot. to Compel (Oct. 17, 2023), 2-3 (filed because, *inter alia*, D.R. Horton failed to produce agreed upon documents which were previously undisclosed but discovered during a deposition, despite being served with Rule 11, SCRCP, letters concerning the agreed upon discovery and despite having a Motion to Compel filed against it to Compel the production of documents which it had agreed to produce).

In its March 5, 2024 Order holding D.R. Horton in Contempt, the Court thoroughly sets forth the facts concerning Plaintiff's attempts to coordinate with the Defendant over search-terms, discovery depositions, and then D.R. Horton's agreement to produce relevant material, and its failure to do the same. Order Granting Pl.'s Mot. to Compel, for Sanctions and Holding D.R. Horton in Contempt (March 5, 2024) (pp. 3-4, 6-7). D.R. Horton did not file a Motion to Reconsider the March 5, 2024 Order, and did not appeal the March 5, 2024 Sanctions Order holding it in Contempt.

In the March 5, 2024 Order, the Court ruled that D.R. Horton shall "fully and timely answer and respond to discovery requests. It shall cooperate fully with Plaintiff in scheduling and producing witnesses for depositions. It shall otherwise strictly comply with this court's

September 22, 2022 Order and with this Order.” *Id.* p. 7, ¶ 3. Further, the Court ruled that D.R. Horton may purge its contempt by “1. Fulfilling all of its discovery obligations from this point forward, and by avoiding any actions that warrant further Motions to Compel or Rule to Show Cause being filed by the Plaintiff; 2. By strict compliance with all discovery deadlines and answering any existing or supplemental discovery requests.” *Id.* p. 8.

- a. D.R. Horton admits in its “Response” that it had withheld thousands of pages of relevant material at the time of the Rule to Show Cause Hearing

In its “Response” filed on December 23, 2024, in footnote 1, D.R. Horton admits that it produced thousands of additional pages of land development documents for the remaining phases of the construction only after the Rule to Show Cause hearing was held. In addition, on December 23, 2024, counsel for D.R. Horton sent a letter to the Plaintiff’s counsel, stating that it was in the process of preparing an additional supplemental production, and, *in addition*, that its client had collected approximately 46,000 emails that D.R. Horton’s attorneys were preparing to receive. (Ex. 1). This is after the Plaintiff consented to another scheduling Order which requires Plaintiff to produce expert written reports by January 17, 2025 (filed December 13, 2024). In other words, three years and five months after being served with Plaintiff’s discovery responses, D.R. Horton still has not produced thousands of pages of discovery, despite being held in Contempt and strictly warned to fulfill all outstanding discovery obligations nearly 10 months ago, and attending the very hearing from which this Court’s order derives.

The Court should not take seriously any argument that the Plaintiff and the court system has not been prejudiced by such deleterious and willful conduct. Judge Goodstein warned D.R. Horton, and its blatant disregard of the Court and that warning obviates any consideration of prejudice.

- III. In its Response, D.R. Horton Continues to Maintain that a Building Permit Showing it to be the General Contractor for its Regional Headquarters Building at the same time and on the same Plat where the Unmaintained and Uninsured Dump Truck was Performing Work at the Time of the Accident is Irrelevant

D.R. Horton continues to maintain that it has no obligation to disclose to the Plaintiff (or to the Court) that it was the General Contractor for its own regional headquarters within the commercial phase of Cypress Ridge development contemporaneously with and on the same plat where the Dump Truck Operator performed work on a daily basis. It claims that such “vertical work” is wholly separate and unrelated to the “horizontal work” of development. Therefore, D.R. Horton maintains, they were not required to disclose the material. This is nonsensical. The withheld material was directly responsive to pending discovery requests. The appropriate way to challenge a discovery request is to object, or file a motion for a protective order, not to unilaterally decide not to respond or produce the material.

Further, D.R. Horton ignores the fact the Plaintiff’s Rule to Show Cause was based on additional grounds, including the failure to disclose additional relevant material, such as correspondence and emails directly between it and regulatory agencies (specifically, the Town of Bluffton) concerning the development, plans, and regulatory citations it received directly by D.R. Horton during the course of the project that relate to phases of development upon which the Dump Truck Operator was operating. These documents, collectively, tend to show that D.R. Horton was the general contractor of record for the very phase of work which was being completed by the Dump Truck Operator. The material, viewed together, is evidence that D.R. Horton was acting as the General Contractor over the Dump Truck Operator at the time of the collision at issue in this litigation. D.R. Horton contends its word should govern over the facts and inferences established by the material it withheld. The Court should reject this approach.

Finally, Plaintiff’s Memorandum in Support also sets forth D.R. Horton’s abusive conduct during depositions and the frivolous nature of its own retaliatory sanction’s motion, filed in response to the Plaintiff’s Rule to Show Cause.

D.R. Horton would have been free to argue, tenuously, that it was not the general contractor overseeing the phase and project in question after D.R. Horton fully disclosed all relevant material to the Plaintiff. However, the permit showing D.R. Horton as the general contractor for construction of its regional headquarters within the commercial phase of

development contemporaneous with the Dump Truck Operator performing work, and contemporaneous with the time of the collision is material which the Plaintiff (and the Court) is absolutely entitled to know of and receive. The untenable proposition that the Plaintiff is not entitled to know this material is additional evidence of willful non-compliance with prior sanction orders.

IV. The Plaintiff Made Pin-Point Citations to Alfredo Uriostegui's Deposition Testimony and Provided Partial Excerpts of the Transcript in his Memorandum in Support of the Rule to Show Cause

The Plaintiff included pinpoint citations to Alfredo Uriostegui's deposition testimony within his Memorandum in Support of his Rule to Show Cause, preserving the same for the record. Pl.s Memo. in Supp. p. 24 (Oct. 14, 2024). The Memorandum in Support included partial deposition excerpts relating to the same as Exhibits for identification purposes (See Ex. 11 to Pl.'s Memo. in Supp.). The substance of the content of the deposition excerpts was not disputed.

D.R. Horton's contention that Plaintiff had to support excerpts from Mr. Uriostegui's sworn deposition testimony with an affidavit or filed deposition excerpts is preposterous. D.R. Horton does not contest the accuracy of the excerpted testimony, nor does it cite to any authority supporting its contention. The Court should reject this specious argument. Alternatively, at the Court's direction, Plaintiff will file Mr. Uriostequi's entire deposition so that the Court may compare the excerpted portions.

V. The Defendant Cited and Filed Several Rule 11 Letters Sent by the Plaintiff's Counsel, but Omitted the Final Letter Plaintiff Served upon D.R. Horton

The most recent Rule 11 Letter Plaintiff served upon D.R. Horton in this matter was referenced by the Plaintiff's counsel at oral argument and filed by the Plaintiff on October 18, 2024, and is available for the Court's review. Parties are under an ongoing duty to keep discovery responses updated and complete. *See* Rule 26(e), SCRCP ("requests for discovery under Rules 31, 33, 34, and 36 shall be deemed to continue from the time of service until the

time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers have been submitted, shall be promptly transmitted to the other party”); Rule 33(b), SCRCP (“The interrogatories shall be deemed to continue from the time of service, until the time of trial of the action so that information sought, which comes to the knowledge of a party, or his representative or attorney, after original answers to interrogatories have been submitted, shall be promptly transmitted to the other party”). The premise that D.R. Horton did not have a continuing duty to produce relevant, responsive discovery material in the case, even after being held in contempt for its discovery abuse, unless, if, and until Plaintiff somehow specifically discovered the material independently or after Plaintiff conveyed a reason to believe it was missing is not worthy of further response.

VI. The Result of Striking the D.R. Horton’s Pleadings is a Default Judgment

When a party fails to obey an order relating to discovery, the trial court may strike that party’s pleadings and enter a default judgment. *Griffin*, 334 S.C. at 198, 511 S.E.2d at 718 (citing Rule 37(b)(2)(c), SCRCP); *See, also Karppi v. Greenville Tarrazzo Co., Inc.*, 327 S.C. 538, 542, 489 S.E.2d 679, 682 (Ct. App. 1997) (explaining that Rule 37, SCRCP, expressly grants trial court power to order judgment by default for either the violation of a court order or, upon motion, for party’s failure to respond to certain discovery requests; Court observed “when the court orders default or dismissal, *or the sanction itself results in default or dismissal*, the end result is nevertheless harsh medicine that should not be administered lightly”) (emphasis added).

In its Motion for a Rule to Show Cause, the Plaintiff moved for D.R. Horton to explain why its pleading should not be stricken, and for any and all other relief the Court deems reasonable and appropriate. Pursuant to Rule 37, SCRCP, the result of striking D.R. Horton’s answer results in default, leaving only the determination of damages for the Court to enter a judgment thereby.

Summary

After sharing its decision Granting Plaintiff's Rule to Show Cause with counsel for the parties, the Court instructed the Plaintiff to file a Proposed Order granting the Rule to Show Cause within 10 days, as is customary of the prevailing party. The Plaintiff followed those instructions and prepared and filed his Proposed Order on December 16, 2024 for the Court's consideration. The Court graciously granted D.R. Horton seven days to present its objections to the Plaintiff's Proposed Order upon its request. Instead of submitting its objections *in camera*, D.R. Horton used the opportunity to publicly file a "Response" to the Proposed Order. This is essentially a Motion for Reconsideration of a decision rendered, which has not yet been published in the public index. Since the hearing on the Rule to Show Cause, D.R. Horton has produced thousands of pages of additional documents and, on December 23, 2024, informed Plaintiff's counsel that tens of thousands of additional documents may be forthcoming. D. R. Horton was served with discovery requests in this matter on July 21, 2021, over three years and five months ago. *It is clear that but for the Rule to Show Cause being heard and the Court advising of its decision in this case, that D.R. Horton would never have disclosed or produced these documents in this matter.*

The Plaintiff trusts the Court to render a just and well-reasoned Order granting the Plaintiff's Rule to Show Cause, and respectfully submits his Proposed Order, originally filed on December 16, 2024, as well as the material contained within this correspondence for the Court's consideration.

Respectfully submitted,

SHELTON LAW FIRM, LLC

/s/Benjamin T. Shelton

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Attorneys for Plaintiff McGilton

Hilton Head Island, South Carolina
January 1, 2025

EXHIBIT 1

John T. Crawford, Jr.
Managing Member
Licensed in SC
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Greenville, SC 29601
864.242.4899
crawford@conlaw.com

December 23, 2024

Via Email Only

SHELTON LAW FIRM, LLC
Benjamin T. Shelton, Esq.
ben@sheltonlawsc.com

Re: *Mark W. McGilton v. D.R. Horton, Inc., et al.*
CA No.: 2021-CP-27-00069

Dear Ben,

We have received additional materials from our client that we have been reviewing for confidentiality and privilege. We are in the process of preparing a supplemental production that we expect to have ready soon.

The client has also collected additional documents—approximately 46,000 emails—that we are preparing to receive. After our review, we can proceed with producing responsive, non-privileged documents.

However, in light of Judge Murphy's indication that she will grant your Motion for Rule to Show Cause, we are conferring to see if you still wish to receive these documents. If so, we are willing to move forward with our planned productions.

Please let me know how you would like to proceed.

Sincerely,



John T. Crawford, Jr.

ELECTRONICALLY FILED - 2025 Jan 01 2:04 PM - JASPER - COMMON PLEAS - CASE#2021CP2700069



SHELTON LAW FIRM

January 15, 2025

The Honorable Keith Horton, Clerk of Court
Jasper County Clerk's Office
265 Russell St.
Ridgeland, SC 29936

Re: C/A No. 2021CP2700069 – Order Filed Holding D.R. Horton, Inc. in
Default, Notice to File Entry of Default

Dear Mr. Horton,

I represent the Plaintiff, Mr. Mark W. McGilton in the above referenced matter. Today, on January 15, 2025, the Honorable Maité Murphy, filed an Order striking the Answer of Defendant D.R. Horton, Inc., and declaring D.R. Horton, Inc. in default.

Therefore, please enter D.R. Horton, Inc.'s default upon the calendar, pursuant to Rule 55(a), SCRPC. ("When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit *or otherwise*, the clerk shall enter his default upon the calendar.") (emphasis added).

{SIGNATURE PAGE FOLLOWS}

BENJAMIN T. SHELTON
SHELTON LAW FIRM, LLC, a South Carolina limited liability company
PO BOX 21069
HILTON HEAD ISLAND, SC 29925

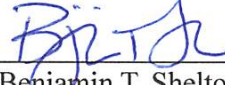
ben@sheltonlawsc.com
(843) 802-0087
(843) 459-7908 (f)

LETTER RE ENTRY OF DEFAULT – 2021CP2700069

With regards, I am

Most Respectfully Yours,

SHELTON LAW FIRM, LLC



Benjamin T. Shelton, S.C. Bar No. 77207

P.O. Box 21069

Hilton Head Island, South Carolina 29926

(843) 802-0087

ben@sheltonlawsc.com

cc: Counsel of Record (*via e-filing service and electronic mail*)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER	)	C.A. NO.: 2021-CP-27-00069
	)	
Mark W. McGilton,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
1223 May River Road, LLC;	)	
D.R. Horton, Inc.; and Lotty Trucking,	)	
LLC f/k/a Ramos Trucking, LLC,	)	
	)	DEFENDANT D.R. HORTON, INC.'S
Defendants.	)	MOTION TO RECONSIDER, ALTER
	)	OR AMEND THE ORDER GRANTING
1223 May River Road, LLC,	)	PLAINTIFF'S MOTION FOR RULE TO
	)	SHOW CAUSE, TO STRIKE AND FOR
Third-Party Plaintiff,	)	CONTEMPT
	)	
v.	)	
	)	
Kenneth Scott Builders, Inc.,	)	
	)	
Third-Party Defendant.	)	

TO: PLAINTIFF MARK W. MCGILTON AND HIS ATTORNEY, BENJAMIN T. SHELTON, ESQUIRE:

Pursuant to Rule 59(e), SCRCP, and the Court's inherent authority, Defendant D.R. Horton, Inc. ("D.R. Horton"), by and through the undersigned counsel, hereby submits this Motion to Reconsider, Alter or Amend the Court's Order (the "Order"), filed January 15, 2025, granting Plaintiff's Motion for Rule to Show Cause ("Plaintiff's Motion") and striking D.R. Horton's Answer.

INTRODUCTION

D.R. Horton respectfully submits that the Court erred because Plaintiff's counsel did not accurately recount the facts of this case to the Court, including D.R. Horton's lack of

involvement in the underlying car wreck; the Order does not reflect a complete procedural history of Plaintiff's claims, including settlement of a previously filed lawsuit; and Plaintiff overstated the nature and significance of the discovery dispute at issue. Additionally, the Order drafted by Plaintiff's counsel misstates and overlooks significant, relevant law. For example, the Order is devoid of a prejudice analysis, which is required before the Court imposes a discovery sanction as severe as striking an answer. The effect of the Court's Order is to grant Plaintiff a multi-million-dollar windfall against a defendant that had no role in the underlying car accident, is not liable, and was mousetrapped by Plaintiff's counsel distorting what has occurred during discovery, when Plaintiff has already settled a previous lawsuit against the general contractor that hired the at-fault driver for a million dollars. (*See* Letter from John L. McCants, Rogers Lewis, to John T. Crawford, Jr., at 2 (Nov. 4, 2022) (discussing the previous settlement and the insurer's refusal to provide a defense for D.R. Horton in this matter), attached as **Exhibit A.**) For these reasons, and as discussed more fully below, D.R. Horton asks the Court to reconsider its present Order and enter an order denying Plaintiff's Motion for Rule to Show Cause in its entirety.¹

FACTUAL BACKGROUND & PROCEDURAL HISTORY

Lost amid the present contrived accusations concerning discovery is the fact that this is a car wreck case, and D.R. Horton was not involved in the wreck. As discussed below, the argument that D.R. Horton owed any duty to Plaintiff is not supported by the facts or law. Meanwhile, any failure by D.R. Horton to produce documents was—*at worst*—inadvertent and

¹ In addition to the arguments herein, D.R. Horton fully incorporates the arguments in its previously filed Motion for Sanctions and Memorandum in Support; Memorandum in Opposition to Plaintiff's Motion; exhibits to D.R. Horton's motion and memoranda in support; D.R. Horton's Response and Objections to Plaintiff's Proposed Order on Rule to Show Cause; and affidavits of John T. Crawford, Jr. and Jason M. Imhoff.

caused by a misunderstanding between the parties about the relevance of certain documents. Moreover, the documents on which Plaintiff and the Court focused—a permit and planning documents—were always easily and equally available to Plaintiff or any other member of the public from the Town of Bluffton.² Plaintiff could have asked for permits and planning documents at any time, following up with D.R. Horton for additional documents if the permits or planning documents led Plaintiff to believe other documents were relevant to the case and properly within the scope of discovery. However, Plaintiff did not request the documents until years after initiating litigation.

Nonetheless, as discussed more fully below, these permit and planning documents are not even relevant to this car wreck case. Plaintiff was injured by a driver performing a specific role, for a specific contractor, during a specific phase of development. Plaintiff’s counsel has failed to understand that and has led the Court to the same factual and legal misunderstanding. Permits and planning documents for phases of development other than the specific land development activities underway at the time of Plaintiff’s injury are not relevant, nor, as explained below, are permits related to vertical construction. D.R. Horton would have had no reason to think they were. Therefore, striking D.R. Horton’s answer for failing to provide irrelevant documents provides Plaintiff with a massive and unjustifiable windfall.³

² Instead, Plaintiff’s counsel engaged in a FOIA request to make it seem as though it had to use an extraordinary remedy to obtain documents, which it did not. Permits and planning documents are available without the need for a FOIA request by simply asking for them. *See* Town of Bluffton, Citizen Self Service Portal, <https://townofblufftonsc-energovweb.tylerhost.net/apps/selfservice> (last accessed Jan. 27, 2025) (providing a way for the public to, among other things, “[s]earch for existing permits, plans, inspections, code cases, requests and licenses”). Moreover, if a review of those documents caused Plaintiff’s counsel to believe the scope of discovery should be broader, it should have pursued that with D.R. Horton.

³ In fact, the Order goes *beyond* the relief sought in Plaintiff’s Motion by not only striking D.R. Horton’s Answer but also declaring D.R. Horton in default. (*Compare* Pl.’s Mot. Rule Show Cause at 3, Aug. 19, 2024 (seeking “a hearing on a Rule to Show Cause as to why D.R. Horton’s

By way of background, Plaintiff originally filed suit in Beaufort County against Alfredo Uriostegui (“Uriostegui”) and Jacob-AU Trucking LLC (“Jacob-AU”)—the driver and owner, respectively, of the dump truck that collided with Plaintiff. (Summons & Compl., No. 2018-CP-07-00607, Mar. 20, 2018, attached as **Exhibit B**.) D.R. Horton was not named because it had nothing to do with the wreck. Plaintiff filed an amended complaint listing Kenneth Scott Builders (“KSB”), the general contractor that hired Jacob-AU, as an additional defendant. (Am. Summons & Compl., No. 2018-CP-07-00607, Apr. 12, 2018, attached as **Exhibit C**.) D.R. Horton was still not named. Plaintiff eventually settled with KSB for \$1 million and dismissed his claims. (See Stipulation Dismissal Kenneth Scott Builders, LLC, Feb. 24, 2022, attached as **Exhibit D**; Am. Stipulation Dismissal, Feb. 10, 2023, attached as **Exhibit E**; Letter from John L. McCants to John T. Crawford, Jr., *supra*, at 2.)

Almost three years after filing the Beaufort County action, Plaintiff filed the present action in Jasper County against 1223 May River Road, LLC (“May River”)—the owner of the development where Uriostegui was working at the time of the collision with Plaintiff; Lotty Trucking, LLC—the company responsible for maintenance of the dump truck that Uriostegui was driving; and, as a last gasp effort to find a solvent, deep-pocketed defendant, D.R. Horton. (Compl., No. 2021-CP-27-00069, Feb. 17, 2021, attached as **Exhibit F**.) May River filed a third-party complaint against KSB, who Plaintiff did not include in this action. (May River’s Am. Answer & Third-Party Compl., Apr. 15, 2021, attached as **Exhibit G**.) Plaintiff, May River, and KSB settled their claims against one another, and the Court dismissed May River. (Mot. Order Dismissal 1223 May River Road, LLC & Kenneth Scott Builders, LLC, Apr. 26, 2022,

pleadings should not be stricken”), *with* Order at 10 (striking D.R. Horton’s Answer *and* declaring D.R. Horton in default).)

attached as **Exhibit H**; Order Dismissal 1223 May River Road, LLC, Oct. 26, 2022, attached as **Exhibit I**.) D.R. Horton then filed an amended answer and third-party complaint to bring claims against KSB. (D.R. Horton’s Summons, Am. Answer & Third-Party Compl., Oct. 26, 2022, attached as **Exhibit J**.)

It is undisputed that D.R. Horton did not own and was not driving the vehicle that collided with Plaintiff. Rather, Plaintiff alleges that Uriostegui worked on a site development owned by D.R. Horton known as Cypress Ridge. (Compl., Feb. 17, 2021, *supra*, ¶¶ 5, 8.) Contrary to Plaintiff’s claims, D.R. Horton did not “control[], operate[], manage[], engage[] and/or utilize[]” Uriostegui or Jacob-AU for anything. (*Id.* ¶ 13.) D.R. Horton selected KSB as its general contractor for sitework, such as clearing, grading, and installing water and sewage. (See S.C. Indep. Contractor Agreement, KDC_000255, attached as **Exhibit K**; Scope of Work, KDC_000269, attached as **Exhibit L**.) This is known as “horizontal construction.” May River also separately contracted with KSB for work at its nearby property. In its role as general contractor for horizontal construction, KSB subcontracted with Jacob-AU to haul dirt. Uriostegui was operating the dump truck for Jacob-AU in that capacity when the truck collided with Plaintiff. D.R. Horton had nothing to do with this series of events.

D.R. Horton only obtained permits for vertical construction, which is different than horizontal construction. “Vertical construction” refers to the construction of buildings and houses. Plaintiff has produced a permit listing D.R. Horton as the general contractor for a project at Cypress Ridge, (Building Permit & Applications, CNEW-11-17-12846, attached as **Exhibit M**; see Pl.’s Mot. Rule Show Cause, *supra* note 3, Ex. 2), which Plaintiff claims is proof that D.R. Horton withheld documents and disobeyed court orders. However, the permit at issue is for the *vertical construction* of an office building. It is *not* for hauling dirt. Aside from spatial

proximity, the vertical portion of that project which pertains to the permit is entirely separate from and has nothing to do with the site work that was being performed by KSB, Jacob-AU, and Uriostegui. In short, D.R. Horton did not produce the permit and related documents earlier because *they are not relevant* and *Plaintiff did not ask for them*. Moreover, as discussed in detail below, the document would not have been contained in the scope of discovery that was agreed to between the parties.

LEGAL ERRORS

The Order does not identify any prejudice suffered by Plaintiff, nor does it attempt to tailor a remedy to the facts of this case. Sanctions are an extraordinary remedy that should not be administered lightly. *See Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1996) (noting that sanctions should be shaped to protect a party's discovery rights). "In determining the appropriateness of a sanction, the court should consider such factors as the precise nature of the discovery and the discovery posture of the case, willfulness, and *degree of prejudice*." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 82, 716 S.E.2d 877, 885 (2011) (emphasis added) (citation omitted). A trial court's failure to consider and weigh these factors constitutes an abuse of discretion. *Richardson ex rel. 15th Circuit Drug Enforcement Unit v. Twenty-one Thousand & No/100 Dollars (\$21,000.00) U.S. Currency & Various Jewelry*, 430 S.C. 594, 600, 846 S.E.2d 14, 17 (Ct. App. 2020).

"The sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case. The sanction should be aimed at the specific misconduct of the party sanctioned." *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 543, 489 S.E.2d 679, 682 (Ct. App. 1997) (citation omitted); *see also Downey v. Dixon*, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct. App. 1987) (noting that "whatever sanction is

imposed should serve to protect the rights of discovery provided by the Rules [of Civil Procedure]”). “[W]hen the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is . . . harsh medicine that should not be administered lightly.” *Karppi*, 327 S.C. at 542–43, 489 S.E.2d at 682. Accordingly, before imposing such a severe sanction, the Court must find a heightened level of misconduct: “some element of *bad faith*, *willfulness*, or *gross indifference* to the rights of other litigants.” *Id.* at 543, 489 S.E.2d at 682 (emphasis added).

The Order contains no discussion of prejudice to Plaintiff because there is none. Plaintiff can show neither bad faith nor prejudice where, as discussed in more detail below, (1) Plaintiff deposed a D.R. Horton employee to gain an understanding of what documents D.R. Horton possessed; (2) Plaintiff received all documents the parties, after multiple discussions, specifically agreed upon; and (3) the vast majority of the FOIA documents Plaintiff received do not relate to the portions of development that the parties agreed would be provided and therefore are irrelevant. Even if the Court thinks the documents are relevant at this point in the litigation, Plaintiff *has* the documents and therefore cannot show any prejudice. *See CFRE, LLC*, 395 S.C. at 83–84, 716 S.E.2d at 886 (noting that a party was not prejudiced where it “ultimately received all pertinent and material information” and there was nothing more “of any consequence” that could have been produced). Under these facts, it is improper for the Court to impose any sanction, especially one as severe as striking D.R. Horton’s answer and “foreclos[ing] a decision on the merits.” *Karppi*, 327 S.C. at 543, 489 S.E.2d at 682; *see Orlando*, 320 S.C. at 512, 466 S.E.2d at 355 (concluding that “the trial judge abused his discretion in excluding [an expert witness] and effectively dismissing the case” where the court acknowledged that there was no willful violation of discovery rules); *Karppi*, 327 S.C. at 545, 489 S.E.2d at 683 (reversing the

trial court for striking an answer where “any number of lesser, more narrowly tailored sanctions would have sufficed”).

Moreover, the case is not up for trial, depositions either remain to be taken or have been left open, and discovery remains open, further obviating any alleged prejudice to Plaintiff. *Cf. Downey*, 294 S.C. at 44, 46 n.4, 362 S.E.2d at 318, 319 n.4 (reversing and remanding for a new trial where the trial court merely imposed a \$50 fine on a defendant who failed to appear for a deposition or respond to interrogatories, but noting it did not necessarily justify striking the defendant’s answer because “[i]t may very well be that [the plaintiff] can have her interrogatories answered and be given the opportunity to take the deposition of [the defendant] before the new trial takes place”). Striking D.R. Horton’s answer without showing prejudice to Plaintiff is an abuse of discretion and provides Plaintiff an unwarranted windfall. The Order fails to address these issues and should therefore be revised to reverse the striking of D.R. Horton’s Answer and finding of D.R. Horton in default.

FACTUAL INACCURACIES AND OMISSIONS

The Order concludes that “D.R. Horton has engaged in willful disobedience” and “gross indifference.” (Order at 8.) This finding is not supported by the facts. D.R. Horton presented ample evidence of its negotiations with Plaintiff regarding the scope of discovery and its efforts to ensure it was complying with prior orders and agreements. To date, D.R. Horton has produced more than 4,600 documents. (D.R. Horton’s Resp. & Objections Pl.’s Proposed Order Rule Show Cause at 3 n.1, attached as **Exhibit N.**) Rather than communicate, so that D.R. Horton could explain *why* it had not produced certain documents, Plaintiff filed this Motion, misusing Judge Goodstein’s previous order as a sword to accomplish what he could not achieve with arguments on the merits. The Court’s failure to take this into consideration while finding that

“D.R. Horton has engaged in willful disobedience as well as gross indifference to the prior orders of this Court,” (Order at 8), constitutes an abuse of discretion. *See Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) (“An ‘abuse of discretion’ may be found by this Court where the appellant shows that the conclusion reached by the lower court was without reasonable factual support, resulted in prejudice to the right of appellant, and, therefore, amounted to an error of law.”).

What Plaintiff’s counsel did was lay a trap. A party seeking information should be clear and specific; it is not up to a litigant to read the mind of an opposing party. As reflected in the Order, Plaintiff’s initial discovery requests were incredibly broad, essentially asking for “all documents” related to Cypress Ridge or this case. (*See* Order at 4–5.) Cypress Ridge is a mixed-use development spanning 1,412 acres that was constructed in 19 phases over 15 years. (D.R. Horton’s Mem. Opp’n Pl.’s Mot. Rule Show Cause at 2 n.1, Oct. 16, 2024.) D.R. Horton did not believe that *all* documents related to this sprawling development, created over a decade and a half, were relevant in a car wreck case where Plaintiff already knows the name of (1) the other driver, (2) the other driver’s company, and (3) the company that contracted for the work the driver was performing at the time of the collision. This led to extensive negotiations between the parties about the proper scope of discovery, many of which are reflected in the following timeline that D.R. Horton provided in its opposition to Plaintiff’s Motion:

April 4, 2023	Following a consent order resolving Plaintiff’s First Motion to Compel, Parties attend conference call to discuss entering agreement to narrow discovery to relevant documents related to Cypress Ridge.
August 11, 2023	D.R. Horton provides a breakdown of the contents of the Cypress Ridge Phase 7 land development file to confirm the contents would provide what Plaintiff was seeking.
December 6, 2023	D.R. Horton provides Cypress Ridge Phase 7 land development file as agreed.
....	

June 14, 2024	D.R. Horton sends supplemental discovery responses, including expert disclosures.
June 24, 2024	Plaintiff sends Rule 11 letter requesting index of production.
....	
June 27, 2024	D.R. Horton sends letter in response to Plaintiff's Rule 11 letter.
....	
July 17, 2024	D.R. Horton provides categorized and indexed production.
....	
August 19, 2024	Plaintiff supplements production with partial FOIA response from Town of Bluffton.
August [19], 2024	Plaintiff files [the present] Motion for Rule to Show Cause.
....	
September 4, 2024	After repeated follow ups, Plaintiff supplements production with remaining FOIA response documents.

(*Id.* at 4–5.) In addition, Plaintiff deposed D.R. Horton employee Jared O’Sako so that Plaintiff could have a better understanding of how D.R. Horton stored documents and could tailor his discovery requests accordingly. (*See* Crawford Aff. ¶ 7 & Ex. C, attached as **Exhibit O**.)

After O’Sako’s deposition, the parties reached an agreement about D.R. Horton supplementing its discovery responses. (*Id.* ¶ 8 & Ex. D.) Over the next several months, the parties continued negotiations, and D.R. Horton updated its responses accordingly. (*See id.* ¶¶ 9–11 & Exs. E–G.) For six months, Plaintiff raised no further issues with D.R. Horton’s production until sending a Rule 11 letter on June 24, 2024, which D.R. Horton promptly agreed to address. (*Id.* ¶¶ 12–13 & Exs. H–I.) Plaintiff made no further effort to consult with D.R. Horton before filing the present Motion. (Mem. Opp’n Pl.’s Mot. Rule Show Cause, *supra*, at 6.)

In fact, after the hearing with Judge Goodstein, Plaintiff’s counsel sent an email on January 3, 2024, addressing discovery material D.R. Horton provided on December 6, 2023, and stating that he would “reach out with any issues, concerns or questions regarding it separately.” (Email from Benjamin Shelton to Kim Wooten, Jan. 3, 2024, attached as **Exhibit P**.) No such follow-up occurred, leading D.R. Horton to believe that the production was sufficient and

consistent with the parties' agreed scope of discovery. While Plaintiff has attempted to paint a picture of D.R. Horton as the problem, Plaintiff's counsel failed to identify any issues with the production, as this email demonstrates. As a result, D.R. Horton had no notice that Plaintiff believed D.R. Horton's production was deficient.

Indeed, the only *specific* request the Order cites is a request for permits associated with "210 Hulston Landing Rd., Bluffton, SC 29909." (Order at 4.) The permit Plaintiff cites to show D.R. Horton's bad faith is for construction of a building at 30 Silver Lake Rd. (Building Permit & Applications, *supra*.) On its face this document is not even responsive to Plaintiff's requests. The Court did not address or consider this context in the Order, which counsels against its finding that D.R. Horton acted in bad faith. Therefore, its decision to sanction D.R. Horton was an abuse of discretion. *Cf. Dunn*, 298 S.C. at 502–03, 381 S.E.2d at 735–36 (reversing the trial court after concluding that there was no evidence to support the trial court's finding that a party's actions were unjustified where the trial court made no findings as to a relevant agreement between the parties' attorneys). Regardless, Plaintiff has the permit in his possession (and could have obtained the permit from the Town of Bluffton by simply asking for it at any time, even before Plaintiff filed the Beaufort County action in March 2018). There can be no prejudice where Plaintiff has the documents about which he complains, for a trial that is not yet even scheduled.

The Order continues by viewing the evidence in the light most favorable to Plaintiff, accepting Plaintiff's theory of the case, and turning a motion for sanctions into a motion for summary judgment. In doing so, it did the exact opposite of what the law requires, which is to view the evidence in a light most favorable to the non-moving party on a motion for summary judgment.

Moreover, the Order disregards all evidence and the law disproving Plaintiff's theory. "To establish joint venture or enterprise liability" in the motor vehicle context, "there must be a common purpose or community of interest," as well as "an equal right to control the direction and management of the vehicle." *Pruitt v. Bowers*, 330 S.C. 483, 487, 499 S.E.2d 250, 252 (Ct. App. 1998) (per curiam). Plaintiff's Motion and the Court's Order granting a default results in an end run around this well-settled South Carolina law. *See, e.g., Cherry v. Myers Timber Co.*, 404 S.C. 596, 603–04, 745 S.E.2d 405, 409 (Ct. App. 2013) (affirming the grant of summary judgment in favor of a timber company because there was no evidence it controlled the logging company it hired to transport timber where, *inter alia*, it could not fire the contractor's employees and the contractor owned all its own equipment); *Richitelli v. Motiva Enters., LLC*, 389 S.C. 184, 189, 697 S.E.2d 667, 670 (Ct. App. 2010) (stating that an oil company and a distributor could not be held liable for the negligent driving of an employee of a franchisee unless there was "evidence of a master-servant relationship between the wrongdoer and the person sought to be charged for the result for the wrong *at the time and in respect to the very transaction out of which the injury arose*" (emphasis in original) (citation and internal quotations marks omitted)).

D.R. Horton presented ample evidence that it was not even—indeed, *could not have been*—the general contractor for the site development work at issue in this case because D.R. Horton is not licensed to perform that type and scope of work. (*See* Mem. Opp'n Pl.'s Mot. Rule Show Cause, *supra*, Ex. A., O'Sako Aff. ¶¶ 9–10.) The "smoking gun" documents Plaintiffs rely on are in fact irrelevant, as they relate to a project outside of the agreed scope of discovery. (*See id.* ¶ 12.) D.R. Horton acted as the general contractor for *vertical* construction at Cypress Ridge. (*Id.* ¶ 10.) The permit that Plaintiff cites relates to that work. (*Id.* ¶ 12.) D.R. Horton was not

and *could not* be the general contractor for the *horizontal* site work, including the hauling of dirt, that is at issue in this case. (*Id.* ¶¶ 10–11.) D.R. Horton’s failure to produce documents related to its status as the general contractor for a *different* project involving a *different* scope of work does not support Plaintiff’s request for sanctions, and certainly not a sanction as severe as default.⁴

Finally, the trial court erred by citing deposition testimony that is not part of the record. Mimicking Plaintiff’s Memorandum in Support of its Motion, the Order cites Uriostegui’s deposition. (*See* Order at 5; Pl.’s Mem. Supp. Mot. Rule Show Cause & Mem. Opp’n D.R. Horton’s Mot. Costs & Sanctions at 24, Oct. 14, 2024.) Plaintiff cites two multi-page ranges of Uriostegui’s deposition testimony: 184:23-185:3 and 235:14-237:23. (Pl.’s Mem. Supp. Mot. Rule Show Cause at 24.) However, Plaintiff did not attach the entirety of the deposition excerpts as exhibits to its memorandum. Rather, Plaintiff included only pages 184 and 235 in its submissions to the Court. (*Id.*, Ex. 11 at 2–3.) Therefore, the Court erred by citing and relying upon testimony that is not properly part of the record.

CONCLUSION

For the reasons discussed above, D.R. Horton respectfully submits that the Court misapprehended relevant facts and law, and requests the Court revise its prior Order, reverse the striking of D.R. Horton’s Answer, and deny Plaintiff’s Motion.

[signature on following page]

⁴ Had Plaintiff properly requested discovery of tens of thousands of documents related to phases and years of development unconnected to the car wreck at issue in this case, D.R. Horton would have been allowed to object that such discovery was overbroad and seek relief from the Court if the parties could not reach an agreement as to scope. The Order short circuits that process by assuming the documents are relevant and then viewing them in a light most favorable to a party that is essentially arguing a motion for summary judgment.

KENISON, DUDLEY & CRAWFORD, LLC

s/ W. Jacob Henerey

John T. Crawford, Jr. (SC Bar # 69682)

Kimila L. Wooten (SC Bar # 64516)

Amelia M. Farmer (SC Bar #105750)

W. Jacob Henerey (SC Bar #102268)

325 West McBee Avenue, Suite 301

Greenville, South Carolina 29601

Telephone: (864) 242-4899

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crawford@conlaw.com

wooten@conlaw.com

farmer@conlaw.com

henerey@conlaw.com

Counsel for Defendant D.R. Horton, Inc.

January 27, 2025

Greenville, South Carolina

EXHIBIT A

ROGERS LEWIS

ATTORNEYS AT LAW

John L. McCants, Esq.
Direct: (803) 978-2834
jmccants@rogerslewis.com

November 4, 2022

VIA E-Mail and U.S. Mail

D.R. Horton, Inc.
c/o John T. Crawford, Jr., Esq.
Kenison, Dudley & Crawford, LLC
704 McBee Ave.
Greenville, SC 29601

Re: Mark W. McGilton v. 1223 May River Road, LLC, D.R. Horton, Inc., and Lotty Trucking, LLC f/k/a Ramos Trucking, LLC and D.R. Horton, Inc. v. Kenneth Scott Builders, LLC - Civil Action No. 2021-CP-27-00069 (Jasper County, South Carolina).

Builders Mutual Claim No. CPP001045350

Builders Mutual Insurance Company commercial general liability insurance policy issued to the named insured Kenneth Scott Builders, Inc.

Policy Number:

Policy Period:

CPP 0048066 06

05/13/2017 to 05/13/2018

Dear Mr. Crawford:

I am writing on behalf of Builders Mutual Insurance Company ("BMICO") concerning Civil Action No. 2021-CP-27-00069, which is pending before the Court of Common Pleas, Jasper County, South Carolina (the "Jasper Civil Action").

1901 Main Street, Suite 1200, Columbia, SC 29201 • P.O. Box 11803 (29211)
Office: (803) 978-2834 • Fax: (803) 252-3653 • www.rogerslewis.com

This letter is in response to your letter written on behalf of Defendant D.R. Horton, Inc. ("D.R. Horton") seeking insurance coverage as an additional insured and for contractual indemnity. In the following, it is not BMICO's intention or should it be concluded that BMICO is commenting on the merits of the Jasper Civil Action or that BMICO is suggesting that D.R. Horton is or may be liable to Plaintiff Mark W. McGilton ("McGilton").

This letter is to inform D.R. Horton that BMICO will not provide a defense for D. R. Horton in the Jasper Civil Action. Accordingly, at its own expense, D.R. Horton will need to retain counsel to continue to defend itself in the Jasper Civil Action. Further, as discussed below, BMICO will not indemnify D.R. Horton for the damages sought or recovered by McGilton in the Jasper Civil Action or for those sought against the named insured against Kenneth Scott Builders, Inc. ("Kenneth Scott Builders") by D.R. Horton.

You will recall that McGilton commenced Civil Action 2018-CP-07-00607 (Beaufort County, SC) ("Beaufort County Action") against Kenneth Scott Builders. BMICO paid the policy limits, for an occurrence, in the amount of \$1,000,000.00, to McGilton to settle. BMICO contacted Jason Imhoff concerning the settlement that includes a negotiated \$1,000,000.00 setoff in favor of D.R. Horton. McGilton executed a release in favor of Kenneth Scott Builders and agreed to consent to a dismissal of Kenneth Scott Builders in the Beaufort County Action and the Jasper Civil Action. McGilton is not seeking any relief against Kenneth Scott Builders in the Jasper Civil Action. In the Jasper Civil Action, Defendant 1223 May River Road, LLC filed a Third-Party Complaint against Kenneth Scott Builders but agreed to dismiss Kenneth Scott Builders from the Jasper Civil Action.

In the Jasper Civil Action, D.R. Horton moved to amend its Answer to McGilton's Complaint to plead causes of action or seek monetary relief against Kenneth Scott Builders. On October 26, 2022, D.R. Horton filed a Third-Party Complaint against Kenneth Scott Builders for contractual indemnity, breach of contract, negligence/gross negligence/recklessness allegedly arising out of the vehicle collision that occurred on March 13, 2018 on May River Road in Bluffton, South Carolina.

The BMICO policy includes the following additional insured endorsements: 1) CG 20 10 04 13 (ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS –

SCHEDULED PERSON OR ORGANIZATION); 2) CG 70 24 03 09 (Contractor's Blanket Additional Insured Endorsement Products - Completed Operations-A) and 3) CG 70 34 07 09 (ADDITIONAL INSURED ENDORSEMENT). The three Endorsements are reprinted in the Appendix. You will see in the Endorsements that the Limits of Insurance, discussed below, control, or cap the amount of insurance available under the Policy.

The Policy provides in part for the following in the Commercial General Liability Coverage Form on page 1 of 16 - CG 00 01 04 13:

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section III – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

(Commercial General Liability Coverage Form – CG 00 01 04 13, pg. 1 of 16) (emphasis above added).¹

The Limits of Insurance appear on page 5 of 12 of the Policy and is reprinted below. See also Appendix.

GENERAL LIABILITY DECLARATIONS		
LIMITS OF INSURANCE		
General Aggregate Limit (Other than Products-Completed Operations)	\$	2,000,000
Products - Completed Operations Aggregate Limit	\$	2,000,000
Each Occurrence Limit	\$	1,000,000
Personal and Advertising Injury Limit	\$	1,000,000
Medical Expense Limit, any one person	\$	5,000
Fire Damage Limit, any one fire	\$	100,000
Limited Care Custody/Control (Each Loss)	\$	
Limited Care Custody/Control (Policy Aggregate)	\$	
Employee Benefits Liability (Each Claim)	\$	
Employee Benefits Liability (Aggregate)	\$	
Hired and Non-Owned Auto Liability (Each Occurrence)	\$	
DEDUCTIBLES	PER CLAIM	PER OCCURRENCE
Premop BI		\$
Products BI		\$
Premop PD		\$
Product PD		\$
Premop BI/PD		\$
Product BI/PD		\$

See also Section III on page 10 and 11 of 16 of the Commercial General Liability Coverage Form - CG 00 01 04 13. Section III provides in part as follows:

SECTION III – LIMITS OF INSURANCE

¹ There is an Appendix with this letter with parts of the Policy including the Commercial General Liability Coverage Form and Endorsements discussed herein.

5

1. *The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:*

- a. Insureds;*
- b. Claims made or "suits" brought; or*
- c. Persons or organizations making claims or bringing "suits".*

2. *The General Aggregate Limit is the most we will pay for the sum of:*

- a. Medical expenses under Coverage C;*
- b. Damages under Coverage A, except damages because of "bodily injury" or "property damage" included in the "products- completed operations hazard"; and*
- c. Damages under Coverage B.*

3. *The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".*

....

5. *Subject to Paragraph 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:*

- a. Damages under Coverage A; and*
- b. Medical expenses under Coverage C*

because of all "bodily injury" and "property damage" arising out of any one "occurrence".

....

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of

the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

(Commercial General Liability Coverage Form – CG 00 01 04 13 pg. 10 and 11 of 16)

BMICO paid the applicable Limits of Insurance, which is \$1,000,000.00 each occurrence, for the vehicle accident that took place on March 13, 2018. Payments under **Supplementary Payments – Coverages A and B** are controlled by the Limits of Insurance. See Commercial General Liability Coverage Form, CG 00 01 04 13 (Pgs. 8 and 9 of 16). Liability for damages assumed in a contract or agreement that is an “insured contract” is likewise controlled by the Limits of Insurance. The Policy states that, “[BMICO’s] right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.” CG 00 01 04 13, pg. 1 of 16. Accordingly, BMICO will not defend or indemnify D.R. Horton in the Jasper County Action.

Conclusions

It is BMICO’s position that the Policy does not require a defense or indemnity for D.R. Horton for the Jasper Civil Action. BMICO has no duty to defend or indemnify D.R. Horton for the damages being sought, or that may be awarded, in favor of McGilton against D.R. Horton or in favor of D.R. Horton against Kenneth Scott Builders. This letter is to advise you that BMICO will not provide a defense to D.R. Horton for the Jasper Civil Action. D.R. Horton should retain legal counsel, at D.R. Horton’s own expense, to defend D.R. Horton. Further, BMICO will not indemnify D.R. Horton for any damages recovered by McGilton against D.R. Horton in the Jasper Civil Action. This means that D. R. Horton itself, not BMICO, will be legally obligated to pay any settlement with McGilton or verdict or judgment entered in favor of McGilton. Further, BMICO will not pay any indemnity on behalf of Kenneth Scott Builders for any amounts recovered, if any, by D.R. Horton against Kenneth Scott Builders.

The determination that there is no duty to defend or indemnify D.R. Horton is based upon the Policy and information provided to date. If there is any additional information you believe to be relevant to the question(s) of insurance coverage, please advise and forward

any additional information for review to the undersigned. If you disagree with the conclusions discussed in this letter or BMICO's position, please contact the undersigned immediately.

BMICO reserves the right to commence a declaratory judgment civil action to have a court determine its rights and obligations under the Policy.

All rights, terms, conditions, and exclusions in the Policy are in full force and effect and are completely reserved. No action by any employee, agent, attorney, or other person on behalf of BMICO shall waive or be construed as having waived any right, term, condition, exclusion, or any other provision of the Policy.

Should you have any questions or concerns, please feel free to contact the undersigned.

Sincerely,

John L. McCants

John L. McCants

EXHIBIT B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO. 2018-CP-07-
MARK W. McGILTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	SUMMONS
	)	
ALFREDO URIOSTEGUI and	)	
JACOB-AU TRUCKING LLC,	)	
	)	
Defendants.	)	

TO: THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Complaint on the subscriber at his office, 1251 May River Road, Post Office Box 769, Bluffton, South Carolina 29910, within thirty (30) days after service thereof, exclusive of the day of such service, and if you fail to appear and defend against the said action then judgment by default will be rendered against you for the relief demanded in the Complaint.

VAUX MARSCHER BERGLIND, P.A.

By: S/ROBERTS "TABOR" VAUX, JR.

Attorney for the Plaintiff
Roberts "Tabor" Vaux, Jr., SC Bar No. 77421
Post Office Box 769
Bluffton, South Carolina 29910
Telephone 843-757-2888
Facsimile 843-757-2889

March 20, 2018
Bluffton, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO. 2018-CP-07-
MARK W. McGILTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	COMPLAINT
	)	(jury trial demanded)
ALFREDO URIOSTEGUI and	)	
JACOB-AU TRUCKING LLC,	)	
	)	
Defendants.	)	

The Plaintiff alleges:

1. Plaintiff is a citizen and resident of Beaufort County, South Carolina.
2. Defendant Alfredo Uriostegui (hereinafter “Defendant Driver”) is, upon information and belief, a citizen and resident of the State of South Carolina and was at all times mentioned herein, an agent and/or employee of Defendant Jacob-AU Trucking LLC (hereinafter “Defendant Company”) and was acting in the course and scope of his agency and/or employment with Defendant Company.
3. Defendant Company is, upon information and belief, a corporation organized and existing under the laws of the State of South Carolina.
4. Defendant Company was, at all relevant times, doing business hauling materials and/or transporting earth, site, or building material by and through its volunteers, agents, contractors and employees, who were at all relevant times acting within the scope and course of their agency, service, and/or employment with Defendant Company and within the scope of their official duties; therefore Defendant Company is liable for the acts and omissions of its volunteers, agents, contractors and employees under the theory of *respondeat superior*.
5. Jurisdiction and venue are proper in this Court.

6. On or about March 13, 2018, Plaintiff was operating his vehicle on May River Road in Bluffton, Beaufort County, South Carolina; Defendant Driver was operating a dump truck, owned by Defendant Company, and traveling in the opposite direction on May River Road. Said dump truck crossed the centerline and collided with Plaintiff in a head-on collision.

7. That Defendants owed Plaintiff a statutory and common law duty of care.

8. That Defendants breached said duties as outlined herein.

9. That as a result of the collision, Plaintiff suffered severe physical harm and injuries and damage to his property; these injuries have caused and will in the future cause Plaintiff to endure great physical pain, suffering, mental anguish, emotional distress, and impairment of health and bodily efficiency; have caused Plaintiff to spend money for medical services; have caused Plaintiff to suffer a loss of income and opportunity; and have caused permanent disability.

10. That Defendants were negligent, careless, reckless, grossly negligent, willful and wanton at the time and place above mentioned in the following particulars:

- a. in operating a motor vehicle, a dangerous instrumentality, in an unsafe manner;
- b. in traveling too fast for conditions;
- c. in operating a dump truck with multiple safety violations;
- d. in operating a dump truck with inadequate brakes;
- e. in failing to properly maintain the dump truck;
- f. in failing to properly inspect the dump truck;
- g. in failing to keep the dump truck under proper control;
- h. in making an unsafe maneuver;
- i. in failing to use the degree of care and caution that a reasonable and prudent person would have exercised under the same or similar circumstances; and

j. in such other and further particulars as the evidence in trial may show;
all of which combined and concurred as a direct and proximate cause of the injuries and damages
suffered by Plaintiff herein, said acts being in violation of the statute and common laws of the
State of South Carolina.

WHEREFORE, Plaintiff prays for an award against the Defendants for actual and
punitive damages, costs and attorney's fees.

VAUX MARSCHER BERGLIND, P.A.

s/ ROBERTS "TABOR" VAUX, JR. - SC Bar No. 77421

Attorney for the Plaintiff
Post Office Box 769
Bluffton, South Carolina 29910
Telephone 843-757-2888
Facsimile 843-757-2889

March 20, 2018
Bluffton, South Carolina

EXHIBIT C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO. 2018-CP-07-00607
MARK W. McGILTON,	)	
	)	
Plaintiff,	)	
	)	AMENDED
v.	)	SUMMONS
	)	
ALFREDO URIOSTEGUI and	)	
JACOB-AU TRUCKING LLC, and	)	
KENNETH SCOTT BUILDERS INC.	)	
Defendants.	)	

TO: THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Amended Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Amended Complaint on the subscriber at his office, 1251 May River Road, Post Office Box 769, Bluffton, South Carolina 29910, within thirty (30) days after service thereof, exclusive of the day of such service, and if you fail to appear and defend against the said action then judgment by default will be rendered against you for the relief demanded in the Amended Complaint.

VAUX MARSCHER BERGLIND, P.A.

By: S/ROBERTS "TABOR" VAUX, JR.

Attorney for the Plaintiff
Roberts "Tabor" Vaux, Jr., SC Bar No. 77421
Post Office Box 769
Bluffton, South Carolina 29910
Telephone 843-757-2888
Facsimile 843-757-2889

April 12, 2018
Bluffton, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO. 2018-CP-07-00607

MARK W. McGILTON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	AMENDED COMPLAINT
	)	(jury trial demanded)
ALFREDO URIOSTEGUI, JACOB-AU	)	
TRUCKING LLC, and KENNETH SCOTT	)	
BUILDERS INC.	)	
	)	
Defendants.	)	

The Plaintiff alleges:

1. Plaintiff is a citizen and resident of Beaufort County, South Carolina.
2. Defendant Alfredo Uriostegui (hereinafter “Defendant Driver”) is, upon information and belief, a citizen and resident of the State of South Carolina and was at all times mentioned herein, an agent, servant, and/or employee of Defendant Kenneth Scott Builders Inc. and was acting in the course and scope of his employment with Defendant Kenneth Scott Builders Inc.
3. Defendant Jacob-AU Trucking LLC is, upon information and belief, a limited liability company organized and existing under the laws of the State of South Carolina and owned in large part or exclusively by Defendant Driver.
4. Defendant Kenneth Scott Builders Inc. is, upon information and belief, a corporation organized and existing under the laws of the State of South Carolina.
5. Defendant Kenneth Scott Builders Inc. was, at all relevant times, doing business hauling materials, performing site work, and/or performing general contractor commercial construction by and through its volunteers, agents, contractors and employees, who were at all

relevant times acting within the scope and course of their agency, service, and/or employment with Defendant Kenneth Scott Builders Inc. and within the scope of their official duties; therefore Defendant Kenneth Scott Builders Inc. is liable for the acts and omissions of its volunteers, agents, contractors and employees under the theory of *respondeat superior*.

6. Jurisdiction and venue are proper in this Court.

7. On or about March 13, 2018, Plaintiff was operating his vehicle on May River Road in Bluffton, Beaufort County, South Carolina; Defendant Driver was operating a dump truck, owned by Defendant Jacob-AU Trucking LLC, and traveling in the opposite direction on May River Road. Said dump truck crossed the centerline and collided with Plaintiff in a head-on collision.

8. That Defendants owed Plaintiff a statutory and common law duty of care.

9. That Defendants breached said duties as outlined herein.

10. That as a result of the collision, Plaintiff suffered severe physical harm and injuries and damage to his property; these injuries have caused and will in the future cause Plaintiff to endure great physical pain, suffering, mental anguish, emotional distress, and impairment of health and bodily efficiency; have caused Plaintiff to spend money for medical services; have caused Plaintiff to suffer a loss of income and opportunity; and have caused permanent disability.

11. That Defendants were negligent, negligent per se, careless, reckless, grossly negligent, willful and wanton at the time and place above mentioned in the following particulars:

- a. in operating a motor vehicle, a dangerous instrumentality, in an unsafe manner;
- b. in traveling too fast for conditions;
- c. in failing to maintain the proper lane of travel;

- d. in failing to yield the right of way;
- e. in operating a dump truck with multiple safety violations;
- f. in operating a dump truck with inadequate brakes;
- g. in failing to properly maintain the dump truck;
- h. in failing to properly inspect the dump truck;
- i. in failing to keep the dump truck under proper control;
- j. in making an unsafe maneuver;
- k. in failing to use the degree of care and caution that a reasonable and prudent person would have exercised under the same or similar circumstances; and
- l. in such other and further particulars as the evidence in trial may show;

all of which combined and concurred as a direct and proximate cause of the injuries and damages suffered by Plaintiff herein, said acts being in violation of the statute and common laws of the State of South Carolina.

WHEREFORE, Plaintiff prays for an award against the Defendants for actual and punitive damages, costs and attorney's fees.

VAUX MARSCHER BERGLIND, P.A.

s/ ROBERTS "TABOR" VAUX, JR. - SC Bar No. 77421
Attorney for the Plaintiff
Post Office Box 769
Bluffton, South Carolina 29910
Telephone 843-757-2888
Facsimile 843-757-2889

April 12, 2018
Bluffton, South Carolina

EXHIBIT D

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	
	)	C.A. NO. 2018-CP-07-00607
MARK W. MCGILTON	)	
	)	
Plaintiff,	)	
	)	STIPULATION OF DISMISSAL AS TO
vs.	)	KENNETH SCOTT BUILDERS, LLC
	)	(with prejudice)
ALFREDO URIOSTEGUI; JACOB-AU	)	
TRUCKING, LLC; and KENNETH	)	Rule 41(a)(1)(B), SCRCP
SCOTT BUILDERS, LLC,	)	
	)	
Defendants.	)	
	)	

WHEREAS, the Plaintiff, Mark W. McGilton, and Defendant, Kenneth Scott Builders, LLC, have settled and compromised their differences as to the matter referenced above. Pursuant to Rule 41(a)(1)(B) of the South Carolina Rules of Civil Procedure, Mark W. McGilton hereby dismisses and ends the above-captioned action *with prejudice* as to all claims filed, or which could have been filed arising out of the subject matter of the within lawsuit against Kenneth Scott Builders, LLC, only.

This is with the consent of all parties who have appeared and remain in this action, as evidenced by their signatures, with each side to bear its own costs and attorney's fees.

This 24th Day of February 2022.

WE CONSENT:

CLEMENT RIVERS, LLP

/s/Stephen L. Brown

Stephen L. Brown (S.C. Bar No. 66468)
25 Calhoun Street, Ste. 400
(P.O. Box 993)
Charleston, SC 29401 (29402)
(843) 720-5488
sbrown@ycrlaw.com
Attorney for Kenneth Scott Builders, LLC

WE CONSENT:

SHELTON LAW FIRM, LLC

/s/Benjamin T. Shelton

Benjamin T. Shelton, (S.C. Bar No. 77207)
P.O. Box 21069
Hilton Head Island, SC 29925
(843) 802-0087
ben@sheltonlawsc.com
Attorney for Plaintiff

EXHIBIT E

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BEAUFORT	)	FOURTEENTH JUDICIAL CIRCUIT
	)	
MARK W. MCGILTON,	)	CASE NO. 2018-CP-07-00607
	)	
	)	
PLAINTIFFS,	)	
	)	
vs.	)	AMENDED STIPULATION OF
	)	DISMISSAL
	)	WITH PREJUDICE
ALFREDO URIOSTEGUI, JACOB-AU	)	
TRUCKING LLC AND KENNETH	)	
SCOTT BUILDERS INC.,	)	
	)	
DEFENDANTS.	)	

By and through their undersigned counsel, the Plaintiff, Mark W. McGilton, and Defendant, Kenneth Scott Builders, Inc., stipulate, pursuant to Rule 41(a)(1)(B) of the South Carolina Rules of Civil Procedure, that this matter is hereby voluntarily dismissed and forever ended, in its entirety, WITH PREJUDICE as to all claims filed, or which could have been filed arising out of the subject matter of the within lawsuit against Kenneth Scott Builders, Inc. only. The parties further agree to bear their own costs, expenses, and attorneys' fees.

WE STIPULATE:
SHELTON LAW FIRM, LLC

By: s/Benjamin T. Shelton
Benjamin T. Shelton, Esquire
P.O. Box 21069, Hilton Head Island, SC
29925
Telephone: (843) 802-0087
ben@sheltonlawsc.com
Attorney for Plaintiff

Date: February 10, 2023

WE STIPULATE:
CLEMENT RIVERS, LLP

By: s/Stephen L. Brown
Stephen L. Brown, Esquire
Stephen A. Griffith, Jr., Esquire
25 Calhoun Street, Suite 400, Charleston, SC
29401
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Telephone: (843) 720-5488
Email: sbrown@ycrlaw.com;
sgriffith@ycrlaw.com
Attorneys for Defendant Kenneth Scott
Builders, Inc.

Date: February 10, 2023

EXHIBIT F

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER) FOURTEENTH JUDICIAL CIRCUIT
CASE NO. 2021-CP-27-

MARK W. McGILTON,

Plaintiff,

v.

1223 MAY RIVER ROAD, LLC;
D.R. HORTON, INC.; and, LOTTY
TRUCKING LLC f/k/a RAMOS
TRUCKING, LLC,

Defendants.

SUMMONS

JURY TRIAL DEMANDED

TO: THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Complaint on the subscriber at his office, Post Office Box 21069, Hilton Head Island, South Carolina 29925, within thirty (30) days after service thereof, exclusive of the day of such service, and if you fail to appear and defend against the said action then judgment by default will be rendered against you for the relief demanded in the Complaint.

/s/Benjamin T. Shelton

SHELTON LAW FIRM, LLC

P.O. Box 21069

Hilton Head Island, SC 29925

(843) 802-0087

ben@sheltonlawsc.com

February 17, 2021

Hilton Head Island, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF JASPER	)	CASE NO. 2021-CP-27-
MARK W. McGILTON,	)	
	)	
Plaintiff,	)	
	)	COMPLAINT
v.	)	
	)	JURY TRIAL DEMANDED
1223 MAY RIVER ROAD, LLC,	)	
D.R. HORTON, INC., and, LOTTY	)	
TRUCKING, LLC f/k/a RAMOS	)	
TRUCKING, LLC,	)	
	)	
<u>Defendants.</u>	)	

The Plaintiff, by and through the undersigned attorney, comes now in a Complaint against the above referenced Defendants, to show:

PREAMBLE

On March 13, 2018, the Plaintiff, Mr. Mark W. McGilton, was lawfully operating his vehicle on May River Rd. in or about Bluffton, South Carolina. At no fault of the Plaintiff, a dump truck driver, operating unlawfully and engaged together with the Defendants for their mutual benefit and with a common purpose of hauling dirt from one project site to another, crossed the center line and caused a head-on collision resulting in devastating permanent injury and damages to the Plaintiff.

JURISDICTION AND VENUE

1. Plaintiff is a citizen and resident of Beaufort County, South Carolina.
2. Plaintiff incorporates the preamble as if repeated herein.

3. Defendant Lotty Trucking LLC f/k/a Ramos Trucking, LLC (herein, "**Ramos Trucking**") is a South Carolina limited liability company that at all relevant times maintained a principal place of business in Ridgeland, in Jasper County, South Carolina. Upon information and belief, Ramos Trucking garaged, kept, and/or maintained and did provide maintenance, parts, and labor to the maintenance of the dump truck operated by the dump truck driver before, at or around the time of the accident at issue in this matter. At all relevant times Ramos Trucking held a duty to third parties, including the Plaintiff, to reasonably perform services, provide reasonable parts for, and reasonably maintain the dump truck at issue in this matter.

4. Defendant 1223 May River Road, LLC (herein, "**1223 May River**") is a South Carolina limited liability company and is the owner and developer of a commercial real estate development located at 1223 May River Road, Bluffton, SC 29910, with its principal place of business in Beaufort County, South Carolina. 1223 May River held, shared, or assumed certain duties and obligations to third parties, including the Plaintiff, while carrying out its business at and development of 1223 May River Road.

5. D.R. Horton, Inc. (herein, "**D.R. Horton**") is a foreign corporation doing business throughout South Carolina. It is now and was at all relevant times herein the builder and developer of a community known as Cypress Ridge, located at 210 Hulston Landing Rd, Bluffton, SC 29909 (a project hereinafter referenced as, "**Cypress Ridge**"). D.R. Horton held, shared, or assumed certain duties and obligations to third parties,

including the Plaintiff, while carrying out its business at and development of Cypress Ridge.

6. Jurisdiction and venue are proper in this Court.

FACTS

7. At all relevant times herein, 1223 May River engaged with, and exercised control, responsibility and a shared a financial interest with Kenneth Scott Builders, Inc. (hereinafter, "Kenneth Scott") and Kenneth Scott's employee, servant and agent, Jacob-AU Trucking, LLC (herein, "Jacob-AU") and Alfredo Uriostegui (Kenneth Scott, Jacob-AU and Alfredo Uriostegui, hereinafter collectively referenced as the "Dump Truck Operator") in a relationship comprised of common interests for the common purpose of (among other things) the development and construction of 1223 May River Rd., and profited from the same.

8. At all relevant times, D.R. Horton engaged with, and exercised control, responsibility and a shared financial interest with the Dump Truck Operator in a relationship comprised of common interests for the common purpose of (among other things) the development and construction of Cypress Ridge, and profited from the same.

9. On or about March 13, 2018, Plaintiff was operating his vehicle on May River Road in Bluffton, Beaufort County, South Carolina. The Dump Truck Operator was traveling in the opposite direction on May River Road. Said dump truck, unable to stop with brakes, crossed the centerline in effort to avoid colliding with a vehicle in the dump

truck's lane of traffic, and collided with Plaintiff in a head-on collision. At approximately 45 miles per hour. The Plaintiff's vehicle was destroyed. The Plaintiff suffered millions of dollars of medical bills and painful permanent injuries as a result of the collision.

10. Shortly prior to the collision, the dump truck was being operated for the mutual benefit of the Dump Truck Operator, 1223 May River, and D.R. Horton, loading dirt at Cypress Ridge and hauling it to be dumped at 1223 May River.

11. Immediately before the collision, the dump truck was operated for the mutual benefit of the Dump Truck Operator, 1223 May River, and D.R. Horton, returning dumping dirt from Cypress Ridge at 1223 May River Rd., acting in furtherance of the common purpose.

12. At the time of the accident, the Dump Truck Operator was driving the dump truck from 1223 May River Rd. and returning to Cypress Ridge to load more fill dirt to be returned to, and dumped at, 1223 May River Rd., furthering the common purpose of hauling dirt shared by it, 1223 May River, and, D.R. Horton.

13. At the time of the collision, the dump truck at issue was controlled, operated, managed, engaged and/or utilized by D.R. Horton, 1223 May River, and the Dump Truck Operator for their shared, common interest and profit, for the common purpose of the development of 1223 May River and Cypress Ridge, and in hauling goods (i.e. dirt) for compensation over the public roadways of South Carolina, which was the very purpose that the respective relationships between them were established.

14. Defendants negligently owned, leased, supplied, entrusted, contracted, directed, operated, controlled, and/or maintained the dump truck, thereby causing the dump truck to strike Plaintiff's vehicle.

15. Defendants negligently hired, provided, supplied, trained, and/or instructed the dump truck driver in the safe use and operation of the dump truck.

16. At the time of the collision, the dump truck driven by the Dump Truck Operator had several maintenance violations, including those related to brakes, in violation of law.

17. The dump truck that collided with the Plaintiff failed to maintain certain mandatory contracts, in violation of law.

18. The dump truck involved in the accident with Plaintiff constituted an unlawful public safety hazard and/or a dangerous instrument.

19. D.R. Horton and 1223 May River each held certain responsibilities and duties to the Plaintiff to reasonably supervise and control work arising from premises they owned, their projects, jobsites, and/or premises over which they controlled.

20. D.R. Horton and 1223 May River each held certain responsibilities and duties to the Plaintiff to reasonably ensure that work done at their projects on premises that they owned or controlled was lawfully performed.

21. D.R. Horton and 1223 May River each held duties to the Plaintiff to reasonably supervise their projects and reasonably prevent unlawful public safety

hazards and/or dangerous instruments from performing work at locations they owned and/or at their projects.

22. Defendant Ramos Trucking held a duty to provide reasonable services, commercially reasonable parts, and maintenance to the dump truck operated by Dump Truck Operator. Defendant Ramos Trucking breached these duties. It was foreseeable that its breach of duties would cause serious injury to third parties operating vehicles on public highways, including the Plaintiff.

23. Additionally, the Defendants owed Plaintiff a statutory and common law duty of care.

24. That Defendants breached said duties as outlined herein.

FOR A FIRST CAUSE OF ACTION
(Negligent Maintenance – Garage Liability)
(As to Defendant Lotty Trucking, LLC)

25. The Plaintiff repeats all preceding paragraphs of this Complaint as if fully restated verbatim herein.

26. Defendant Lotty Trucking LLC f/k/a Ramos Trucking, LLC, (herein, “*Ramos Trucking*”) upon information and belief, garaged and/or stored the dump truck in question, and performed maintenance and/or supplied parts to the dump truck that collided with the Plaintiff.

27. Ramos Trucking’s principal place of business where the dump truck was stored and garaged was at all relevant times in Jasper County, South Carolina.

28. Upon information and belief, the dump truck driver paid or otherwise provided consideration to Ramos Trucking for the storage and maintenance of the dump truck.

29. Ramos Trucking owed all foreseeable third parties, including the Plaintiff, a duty to exercise reasonable care in the maintenance of the dump truck.

30. Ramos Trucking owed the Plaintiff a duty to exercise reasonable care in supplying parts to the dump truck.

31. Upon information and belief, Ramos Trucking breached these duties of care owed to the Plaintiff. The failure by Ramos Trucking to exercise reasonable care caused and/or contributed to the dump truck operating as a dangerous instrument and public safety hazard, thereby causing the collision and injuries to the Plaintiff.

32. Specifically, at the time of the accident, the dump truck had maintenance violations relating to brake performance, including but not limited to several loose and/or improperly connected slack adjusters, loose brake chamber, several kinked brake hoses, oil covered brake pads, a leaking brake seal, improper brake hose connections, unmaintained push rods, and loose bolts.

33. Upon information and belief, on or about March 13, 2018, the operator of the dump truck unlawfully swerved into oncoming traffic and head-on into the Plaintiff, when the over 25,000lb dump truck's brakes malfunctioned and/or knowing or believing

that the dump truck's brakes would malfunction, in effort to avoid colliding with a slowing or stopped vehicle in their lane of traffic.

34. In addition, upon information and belief, as stated above, the operator of the dump truck, Jacob-AU and Alfredo Uriostegui, and, Ramos Trucking shared a financial interest in the operator of the dump truck's hauling operations.

35. As a direct and proximate result of Ramos Trucking's acts or omissions, which were negligent, grossly negligent, reckless and wanton, the Plaintiff suffered injuries and damages in an amount to be shown at the trial of the matter.

36. The Plaintiff prays for a judgment against Ramos Trucking for actual and consequential damages, and for a reasonable amount of punitive damages in an amount to be determined by the jury at the trial of the matter.

FOR A SECOND CAUSE OF ACTION

(Gross Negligence/Negligence as to D.R. Horton and 1223 May River Road)
(Joint Enterprise Liability)

37. Plaintiff repeats the preceding paragraphs of this Complaint as if fully restated verbatim herein.

38. At all relevant times herein, Defendant D.R. Horton and 1223 May River Road were engaged in a joint enterprise with the Dump Truck Operator relative to the development of their respective projects and in the hauling of dirt from one project to the other.

39. The accident and injuries described herein were caused by the Dump Truck Operator while it acted in furtherance of the joint enterprise of D.R. Horton and the Dump Truck Operator of the development of the Cypress Ridge project, and, in while engaged in the joint enterprise of hauling dirt from Cypress Ridge project during the project's construction and development.

40. The accident and injuries described herein were caused by the Dump Truck Operator while it acted in furtherance of the joint enterprise of 1223 May River and the Dump Truck Operator of the development of the 1223 May River project, and while engaged in the joint enterprise of hauling dirt to the 1223 May River Rd. project during its construction and development.

41. While engaged in and in furtherance of its the joint enterprise with D.R. Horton, the Dump Truck Operator was negligent, grossly negligent, reckless and wanton in the operation and maintenance of the Dump Truck.

42. While engaged in and in furtherance of its joint enterprise with 1223 May River, the Dump Truck Operator was negligent, grossly negligent, reckless and wanton in the operation and maintenance of the Dump Truck.

43. The dump truck was operated in violation of law.

44. Upon information and belief, at all relevant times of their joint enterprise, Defendants were unlawfully operating as a motor carrier.

45. Defendant 1223 May River and D.R. Horton and the Dump Truck Operator are jointly and severally liable for all acts and/or omissions in furtherance of their joint enterprises.

46. That Defendants were negligent, negligent per se, careless, reckless, grossly negligent, willful, and wanton at the time and place above mentioned in the following particulars:

- a. in operating a motor vehicle, a dangerous instrumentality, in an unsafe manner;
- b. in traveling too fast for conditions;
- c. in failing to maintain the proper lane of travel;
- d. in failing to yield the right of way;
- e. in operating a dump truck with multiple safety violations;
- f. in operating a dump truck with inadequate brakes;
- g. in failing to properly maintain the dump truck;
- h. in failing to properly inspect the dump truck;
- i. in failing to keep the dump truck under proper control;
- j. in making an unsafe maneuver;
- k. in failing to supervise work done at premises they own, operate and/or managed;
- l. in failing to ensure work done at premises they owned, operated and or maintained was done lawfully;
- m. in allowing an illegal, dangerous instrument from performing work at their premises;
- n. in failing to supervise servants, agents, and/or employees;

- o. in failing to use the degree of care and caution that a reasonable and prudent person would have exercised under the same or similar circumstances; and
- p. in such other and further particulars as the evidence in trial may show;

all of which combined and concurred as a direct and proximate cause of the injuries and damages suffered by Plaintiff herein, said acts being in violation of the statute and common laws of the State of South Carolina.

47. The Plaintiff, in addition to actual and consequential damages, is entitled to a reasonable award of punitive damages in an amount to be determined by the jury at the trial of the case.

FOR A THIRD CAUSE OF ACTION
(Negligent Entrustment)
As to D.R. Horton and 1223 May River Rd.

48. The Plaintiff restates the preceding paragraphs of this Complaint as if fully repeated verbatim herein.

49. The Defendants D.R. Horton and 1223 May River Rd. held a duty to the Plaintiff to exercise reasonable care in entrusting the Dump Truck Operator to haul dirt to and/or from their respective projects.

50. The Defendants D.R. Horton and 1223 May River Rd. knew or reasonably should have known that the operations of the dump truck involve a danger to the public and require mandatory licenses, mandatory safety requirements, and/or other mandatory financial requirements.

51. Defendants D.R. Horton and 1223 May River Rd. knew, or should have known, that the Dump Truck Operator was operating in violation of law and was unfit to transport goods for hire within South Carolina.

52. By entrusting Dump Truck Operator with the dangerous loads and operations to and from their projects, the Defendants D.R. Horton and 1223 May River Rd. breached duties of care owed to the Plaintiff.

53. As a direct and proximate result, the Plaintiff suffered injuries and damages.

54. The acts and omissions by Defendants D.R. Horton and 1223 May River Rd. were grossly negligent, reckless and wanton, and the Plaintiff is entitled to an award of punitive damages in a reasonably amount to be determined by the jury at trial.

FOR A FOURTH CAUSE OF ACTION
(Vicarious Liability)
(as to D.R. Horton and 1223 May River Rd.)

55. The Plaintiff restates the preceding paragraphs of this Complaint as if fully repeated verbatim herein.

56. At all relevant times, the Dump Truck Operator was acting as an agent, servant, or employee of the Defendants at the direction and control of the Defendants within the scope of such agency, service and/or employment.

57. The Defendants D.R. Horton and 1223 May River Rd. are jointly and severally liable for the acts and omissions of their agent, servant, and/or employee.

58. As a direct and proximate result of the Dump Truck Operator's acts or omissions, the Plaintiff suffered injuries and damages.

59. The acts and omissions of the Defendants were negligent, grossly negligent, reckless and wanton, and the Plaintiff is entitled to an award of punitive damages in a reasonably amount to be determined by the jury at trial.

FOR A FIFTH CAUSE OF ACTION
(Negligent Selection)
(As to D.R. Horton and 1223 May River Rd.)

60. The Plaintiff repeats the preceding paragraphs of this Complaint as if fully restated verbatim herein.

61. D.R. Horton and 1223 May River Rd. held a duty to the Plaintiff to exercise reasonable care to engage and/or employ a competent and careful dump truck operator for its respective projects.

62. D.R. Horton and 1223 May River Rd. knew or should have known that the Dump Truck Operator operated unlawfully, failed to lawfully maintain its vehicle, failed to reasonably inspect its vehicle, and otherwise failed to comply with mandatory requirements of South Carolina law.

63. D.R. Horton and 1223 May River Rd. failed to exercise reasonable care in choosing, hiring, selecting, maintaining, engaging, and/or supervising the Dump Truck Operator relative to operations on or material hauled to and from their projects.

64. The Plaintiffs injuries would not have happened but for the Defendants' negligent selection of the Dump Truck Operator.

65. As a direct and proximate result of D.R. Horton and 1223 May River Rd. failing to exercise reasonable care in the selection of the Dump Truck Operator, the Plaintiff suffered injuries and damages. Further the Defendants acts were grossly

negligent, reckless and wanton and the Plaintiff is entitled to a reasonable award of punitive damages to be determined at the trial of the matter.

WHEREFORE, Plaintiff prays for an award against the Defendants for actual and punitive damages in an amount to be determined by the jury at the trial of the case, costs and attorney's fees.

SHELTON LAW FIRM, LLC

/s/ Benjamin T. Shelton

ATTORNEY FOR PLAINTIFF

SC Bar No. 77207

P.O. Box 21069

Hilton Head Island, SC 29925

(843) 802-0087

ben@sheltonlawsc.com

Hilton Head Island, South Carolina

February 17, 2021

EXHIBIT G

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

Mark W. McGilton,

Plaintiff,

v.

1223 May River Road, LLC, D.R. Horton,
Inc. and Lotty Trucking, LLC f/k/a Ramos
Trucking, LLC,

Defendant/Third-
Party Plaintiff

v.

Kenneth Scott Builders, LLC

Third-Party
Defendant

IN THE COURT OF COMMON PLEAS

Civil Action No. 2021-CP-27-00069

**AMENDED ANSWER OF 1223 MAY
RIVER ROAD, LLC, MOTION TO
DISMISS, AND THIRD PARTY
PLAINTIFF'S COMPLAINT AGAINST
KENNETH SCOTT BUILDERS
(Jury Trial Requested)**

Defendant 1223 May River Road, LLC, amends its Answer to Plaintiff's Complaint and asserts third-party claims as follows:

FOR A FIRST DEFENSE

1. Defendant denies any allegations pertaining to it in the PREAMBLE of the Plaintiff's Complaint.
2. Defendant lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 1 of the Plaintiff's Complaint.
3. Answering Paragraph 2 of the Plaintiff's Complaint, Defendant reiterates its responses to the allegations of the PREAMBLE and Paragraph 1 as if fully incorporated herein.

4. Defendant lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 3 of the Plaintiff's Complaint.

5. Defendant denies the allegations of Paragraph 4 of the Plaintiff's Complaint.

6. Defendant lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 5 of the Plaintiff's Complaint.

7. Defendant denies the allegations of Paragraph 6 of the Plaintiff's Complaint.

8. Defendant denies the allegations of Paragraphs 7 of the Plaintiff's Complaint.

9. Defendant lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 8 of the Plaintiff's Complaint.

10. Defendant lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 9 of the Plaintiff's Complaint, denies the same and demands strict proof thereof.

11. Defendant denies the allegations of Paragraphs 10, 11, 12, 13, 14, and 15 of the Plaintiff's Complaint.

12. Defendant lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraphs 16, 17, and 18 of the Plaintiff's Complaint, denies the same and demands strict proof thereof.

13. Defendant denies the allegations of Paragraphs 18, 19, 20, 21, 22, and 23 of the Plaintiff's Complaint.

14. Answering Paragraph 24 of the Plaintiff's Complaint, Defendant reiterates its responses to the allegations of Paragraph 1 through 23 as if fully incorporated herein.

15. The allegations of Paragraphs 25 through 36 do not pertain to this Defendant and hence require no response.

16. Answering Paragraph 37 of the Plaintiff's Complaint, Defendant reiterates its responses to the allegations of Paragraph 1 through 36 as if fully incorporated herein.

17. Defendant denies the allegations of Paragraphs 38, 39, 40, 41 and 42 of the Plaintiff's Complaint.

18. Defendant lacks knowledge or information sufficient to admit or deny the allegations contained in Paragraph 43 of the Plaintiff's Complaint, denies the same and demands strict proof thereof.

19. Defendant denies the allegations of Paragraphs 44, 45, 46 and 47 of the Plaintiff's Complaint.

20. Answering Paragraph 48 of the Plaintiff's Complaint, Defendant reiterates its responses to the allegations of Paragraph 1 through 47 as if fully incorporated herein.

21. Defendant denies the allegations of Paragraphs 49, 50, 51, 52, 53, and 54 of the Plaintiff's Complaint.

22. Answering Paragraph 55 of the Plaintiff's Complaint, Defendant reiterates its responses to the allegations of Paragraph 1 through 54 as if fully incorporated herein.

23. Defendant denies the allegations of Paragraphs 56, 57, 58, 59, and 59 of the Plaintiff's Complaint.

24. Answering Paragraph 60 of the Plaintiff's Complaint, Defendant reiterates its responses to the allegations of Paragraph 1 through 59 as if fully incorporated herein.

25. Defendant denies the allegations of Paragraphs 60, 61, 62, 63, 64, and 65 of the Plaintiff's Complaint. Further answering, Defendant denies it had any role in "selecting" the Dump Truck Operator.

FOR A SECOND DEFENSE

26. Plaintiff's Complaint fails to state a cause of action against the Defendant and should be dismissed pursuant to Rule 12(b)(6), SCRCF as this Defendant, as an owner of commercial real estate, had no role whatsoever in the selection and hiring of subcontractors or the entrustment of third parties' vehicles to subcontractors who transported fill dirt to Defendant's property. The truck in question was not owned by Defendant. Furthermore, this Defendant has no duty to Plaintiff as is alleged in the Plaintiff's Complaint.

FOR A THIRD DEFENSE

27. Plaintiff's damages, if any, are the sole and proximate result of the actions or omissions of another person or entity.

FOR A FOURTH DEFENSE

28. Plaintiff is barred from recovery by the doctrine of comparative negligence in that Plaintiff's negligence in causing the claimed damages, if any, was greater than fifty percent (50%). In the alternative, Plaintiff's recovery, if any, should be reduced by virtue of Plaintiff's own negligence.

FOR A FIFTH DEFENSE

29. Plaintiff has failed to mitigate his damages, if any.

FOR A SIXTH DEFENSE

30. Punitive damages are unconstitutional under the 5th, 8th and 14th Amendments of the United States Constitution and similar provisions of the South Carolina Constitution.

FOR A SEVENTH DEFENSE

31. Plaintiff's damages, if any, were the result of a sudden emergency.

FOR AN EIGHTH DEFENSE

32. Plaintiff's damages, if any, were the result of an unavoidable accident.

FOR A NINTH DEFENSE AND BY WAY OF A MOTION TO DISMISS

34. Plaintiff has failed to join other parties as is necessitated by Rule 19 of the South Carolina Rules of Civil Procedure and should be dismissed.

FOR A TENTH DEFENSE AND BY WAY OF A MOTION TO DISMISS

35. This case is pending in an improper venue and needs to be transferred to Beaufort County and further consolidated with another action that Plaintiff filed arising out of the same accident.

FOR AN ELEVENTH DEFENSE AND BY WAY OF A MOTION TO DISMISS

36. This matter should be dismissed under Rule 12(b)(8) of the South Carolina Rules of Civil Procedure because another action is pending in Beaufort County for the same accident.

FOR A THIRTEENTH DEFENSE

37. Defendant reserves and does not waive any additional further defenses that may be revealed by additional information that may be acquired in discovery or otherwise.

FURTHER ANSWERING PLAINTIFF'S COMPLAINT AND BY WAY OF THIRD-PARTY PLAINTIFF'S COMPLAINT AGAINST KENNETH SCOTT BUILDERS
(Equitable Indemnity)

Defendant and Third-Party Plaintiff 1223 May River Road, LLC (Defendant/Third-Party Plaintiff) asserts the following claims against Third-Party Defendant Kenneth Scott Builders, ("Kenneth Scott") as follows:

33. Defendant/Third-Party Plaintiff is an entity organized under the laws of South Carolina and conducts business in Beaufort County, South Carolina.

34. Upon information and belief, Kenneth Scott is an entity organized under the laws of South Carolina and conducts business in Beaufort County, South Carolina.

35. This court has jurisdiction over the third-party action, as well as all parties involved herein.

36. Prior to Plaintiff's incident alleged in the Plaintiff's Complaint, Defendant/Third-Party Plaintiff contracted with Kenneth Scott to provide various construction related services for the commercial development project at 1223 May River Road in Bluffton, South Carolina.

37. A special relationship exists between Defendant/Third-Party Plaintiff contracted with Kenneth Scott.

38. On March 13, 2018 Plaintiff was involved in a vehicular accident with a dump truck operated by one Alfredo Uriostegui who was employed by/an agent of Jacob-Au Trucking, LLC ("Dump Truck Operator").

39. As a result of this accident, Plaintiff initiated this lawsuit against Defendant/Third-Party Plaintiff alleging it and Kenneth Scott "engaged with, and exercised control, responsibility..." over the dump truck and the Dump Truck Operator. See Plaintiff's Complaint Paragraph 7 (attached as Exhibit A).

40. Defendant/Third-Party Plaintiff denies it ever engaged, retained, hired, or in any way interacted or has any relationship whatsoever with either the dump truck or the Dump Truck Owner as alleged in Plaintiff's Complaint.

41. The dump truck and the Dump Truck operator were in fact retained, hired, and engaged by Kenneth Scott.

42. In the event Defendant/Third-Party Plaintiff is found liable to Plaintiff for damages as alleged in the first-party claims, Defendant/Third-Party Plaintiff alleges it is without

fault and is entitled to judgment against Kenneth Scott for full and complete equitable indemnity against any such liability, plus costs, expenses and attorney's fees in defending this action.

FOR A SECOND CAUSE OF ACTION
(Contribution)

43. Defendant/Third-Party Plaintiff hereby repeats, re-alleges, and incorporates by reference the preceding Paragraphs as if fully set forth herein verbatim.

44. To the extent Defendant/Third-Party Plaintiff is ordered, or voluntarily agrees, to pay for a proportion of damages greater than its percentage of liability in causing those damages, Defendant/Third-Party Plaintiff is entitled to contribution from any and all joint tortfeasors, including Kenneth Scott.

WHEREFORE, having fully answered the Plaintiff's Complaint of the Plaintiff, Defendant Defendant/Third-Party Plaintiff, LLC prays the same be dismissed with costs; for judgment against Third-Party Defendant Kenneth Scott Builders, LLC; attorney's fees and costs associated with defense of the matter; and for such other and further relief as may be deemed just and proper.

HAYNSWORTH SINKLER BOYD, P.A.

s/ Roopal S. Ruparelia

Roopal S. Ruparelia (SC Bar No. 16003)

Joseph D. Spate (SC Bar No. 103734)

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April 15, 2021
Columbia, South Carolina

*Attorneys for Defendant/Third-Party Plaintiff,
1223 May River Road, LLC.*

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF JASPER	)	CASE NO. 2021-CP-27-
MARK W. McGILTON,	)	
	)	
Plaintiff,	)	
	)	SUMMONS
v.	)	
	)	JURY TRIAL DEMANDED
1223 MAY RIVER ROAD, LLC;	)	
D.R. HORTON, INC.; and, LOTTY	)	
TRUCKING LLC f/k/a RAMOS	)	
TRUCKING, LLC,	)	
	)	
Defendants.	)	

TO: THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED AND REQUIRED to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Complaint on the subscriber at his office, Post Office Box 21069, Hilton Head Island, South Carolina 29925, within thirty (30) days after service thereof, exclusive of the day of such service, and if you fail to appear and defend against the said action then judgment by default will be rendered against you for the relief demanded in the Complaint.

/s/Benjamin T. Shelton

SHELTON LAW FIRM, LLC

P.O. Box 21069

Hilton Head Island, SC 29925

(843) 802-0087

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February 17, 2021

Hilton Head Island, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF JASPER	)	CASE NO. 2021-CP-27-
MARK W. McGILTON,	)	
	)	
Plaintiff,	)	
	)	COMPLAINT
v.	)	
	)	JURY TRIAL DEMANDED
1223 MAY RIVER ROAD, LLC,	)	
D.R. HORTON, INC., and, LOTTY	)	
TRUCKING, LLC f/k/a RAMOS	)	
TRUCKING, LLC,	)	
	)	
<u>Defendants.</u>	)	

The Plaintiff, by and through the undersigned attorney, comes now in a Complaint against the above referenced Defendants, to show:

PREAMBLE

On March 13, 2018, the Plaintiff, Mr. Mark W. McGilton, was lawfully operating his vehicle on May River Rd. in or about Bluffton, South Carolina. At no fault of the Plaintiff, a dump truck driver, operating unlawfully and engaged together with the Defendants for their mutual benefit and with a common purpose of hauling dirt from one project site to another, crossed the center line and caused a head-on collision resulting in devastating permanent injury and damages to the Plaintiff.

JURISDICTION AND VENUE

1. Plaintiff is a citizen and resident of Beaufort County, South Carolina.
2. Plaintiff incorporates the preamble as if repeated herein.

3. Defendant Lotty Trucking LLC f/k/a Ramos Trucking, LLC (herein, "**Ramos Trucking**") is a South Carolina limited liability company that at all relevant times maintained a principal place of business in Ridgeland, in Jasper County, South Carolina. Upon information and belief, Ramos Trucking garaged, kept, and/or maintained and did provide maintenance, parts, and labor to the maintenance of the dump truck operated by the dump truck driver before, at or around the time of the accident at issue in this matter. At all relevant times Ramos Trucking held a duty to third parties, including the Plaintiff, to reasonably perform services, provide reasonable parts for, and reasonably maintain the dump truck at issue in this matter.

4. Defendant 1223 May River Road, LLC (herein, "**1223 May River**") is a South Carolina limited liability company and is the owner and developer of a commercial real estate development located at 1223 May River Road, Bluffton, SC 29910, with its principal place of business in Beaufort County, South Carolina. 1223 May River held, shared, or assumed certain duties and obligations to third parties, including the Plaintiff, while carrying out its business at and development of 1223 May River Road.

5. D.R. Horton, Inc. (herein, "**D.R. Horton**") is a foreign corporation doing business throughout South Carolina. It is now and was at all relevant times herein the builder and developer of a community known as Cypress Ridge, located at 210 Hulston Landing Rd, Bluffton, SC 29909 (a project hereinafter referenced as, "**Cypress Ridge**"). D.R. Horton held, shared, or assumed certain duties and obligations to third parties,

including the Plaintiff, while carrying out its business at and development of Cypress Ridge.

6. Jurisdiction and venue are proper in this Court.

FACTS

7. At all relevant times herein, 1223 May River engaged with, and exercised control, responsibility and a shared a financial interest with Kenneth Scott Builders, Inc. (hereinafter, "Kenneth Scott") and Kenneth Scott's employee, servant and agent, Jacob-AU Trucking, LLC (herein, "Jacob-AU") and Alfredo Uriostegui (Kenneth Scott, Jacob-AU and Alfredo Uriostegui, hereinafter collectively referenced as the "Dump Truck Operator") in a relationship comprised of common interests for the common purpose of (among other things) the development and construction of 1223 May River Rd., and profited from the same.

8. At all relevant times, D.R. Horton engaged with, and exercised control, responsibility and a shared financial interest with the Dump Truck Operator in a relationship comprised of common interests for the common purpose of (among other things) the development and construction of Cypress Ridge, and profited from the same.

9. On or about March 13, 2018, Plaintiff was operating his vehicle on May River Road in Bluffton, Beaufort County, South Carolina. The Dump Truck Operator was traveling in the opposite direction on May River Road. Said dump truck, unable to stop with brakes, crossed the centerline in effort to avoid colliding with a vehicle in the dump

truck's lane of traffic, and collided with Plaintiff in a head-on collision. At approximately 45 miles per hour. The Plaintiff's vehicle was destroyed. The Plaintiff suffered millions of dollars of medical bills and painful permanent injuries as a result of the collision.

10. Shortly prior to the collision, the dump truck was being operated for the mutual benefit of the Dump Truck Operator, 1223 May River, and D.R. Horton, loading dirt at Cypress Ridge and hauling it to be dumped at 1223 May River.

11. Immediately before the collision, the dump truck was operated for the mutual benefit of the Dump Truck Operator, 1223 May River, and D.R. Horton, returning dumping dirt from Cypress Ridge at 1223 May River Rd., acting in furtherance of the common purpose.

12. At the time of the accident, the Dump Truck Operator was driving the dump truck from 1223 May River Rd. and returning to Cypress Ridge to load more fill dirt to be returned to, and dumped at, 1223 May River Rd., furthering the common purpose of hauling dirt shared by it, 1223 May River, and, D.R. Horton.

13. At the time of the collision, the dump truck at issue was controlled, operated, managed, engaged and/or utilized by D.R. Horton, 1223 May River, and the Dump Truck Operator for their shared, common interest and profit, for the common purpose of the development of 1223 May River and Cypress Ridge, and in hauling goods (i.e. dirt) for compensation over the public roadways of South Carolina, which was the very purpose that the respective relationships between them were established.

14. Defendants negligently owned, leased, supplied, entrusted, contracted, directed, operated, controlled, and/or maintained the dump truck, thereby causing the dump truck to strike Plaintiff's vehicle.

15. Defendants negligently hired, provided, supplied, trained, and/or instructed the dump truck driver in the safe use and operation of the dump truck.

16. At the time of the collision, the dump truck driven by the Dump Truck Operator had several maintenance violations, including those related to brakes, in violation of law.

17. The dump truck that collided with the Plaintiff failed to maintain certain mandatory contracts, in violation of law.

18. The dump truck involved in the accident with Plaintiff constituted an unlawful public safety hazard and/or a dangerous instrument.

19. D.R. Horton and 1223 May River each held certain responsibilities and duties to the Plaintiff to reasonably supervise and control work arising from premises they owned, their projects, jobsites, and/or premises over which they controlled.

20. D.R. Horton and 1223 May River each held certain responsibilities and duties to the Plaintiff to reasonably ensure that work done at their projects on premises that they owned or controlled was lawfully performed.

21. D.R. Horton and 1223 May River each held duties to the Plaintiff to reasonably supervise their projects and reasonably prevent unlawful public safety

hazards and/or dangerous instruments from performing work at locations they owned and/or at their projects.

22. Defendant Ramos Trucking held a duty to provide reasonable services, commercially reasonable parts, and maintenance to the dump truck operated by Dump Truck Operator. Defendant Ramos Trucking breached these duties. It was foreseeable that its breach of duties would cause serious injury to third parties operating vehicles on public highways, including the Plaintiff.

23. Additionally, the Defendants owed Plaintiff a statutory and common law duty of care.

24. That Defendants breached said duties as outlined herein.

FOR A FIRST CAUSE OF ACTION
(Negligent Maintenance – Garage Liability)
(As to Defendant Lotty Trucking, LLC)

25. The Plaintiff repeats all preceding paragraphs of this Complaint as if fully restated verbatim herein.

26. Defendant Lotty Trucking LLC f/k/a Ramos Trucking, LLC, (herein, “*Ramos Trucking*”) upon information and belief, garaged and/or stored the dump truck in question, and performed maintenance and/or supplied parts to the dump truck that collided with the Plaintiff.

27. Ramos Trucking’s principal place of business where the dump truck was stored and garaged was at all relevant times in Jasper County, South Carolina.

28. Upon information and belief, the dump truck driver paid or otherwise provided consideration to Ramos Trucking for the storage and maintenance of the dump truck.

29. Ramos Trucking owed all foreseeable third parties, including the Plaintiff, a duty to exercise reasonable care in the maintenance of the dump truck.

30. Ramos Trucking owed the Plaintiff a duty to exercise reasonable care in supplying parts to the dump truck.

31. Upon information and belief, Ramos Trucking breached these duties of care owed to the Plaintiff. The failure by Ramos Trucking to exercise reasonable care caused and/or contributed to the dump truck operating as a dangerous instrument and public safety hazard, thereby causing the collision and injuries to the Plaintiff.

32. Specifically, at the time of the accident, the dump truck had maintenance violations relating to brake performance, including but not limited to several loose and/or improperly connected slack adjusters, loose brake chamber, several kinked brake hoses, oil covered brake pads, a leaking brake seal, improper brake hose connections, unmaintained push rods, and loose bolts.

33. Upon information and belief, on or about March 13, 2018, the operator of the dump truck unlawfully swerved into oncoming traffic and head-on into the Plaintiff, when the over 25,000lb dump truck's brakes malfunctioned and/or knowing or believing

that the dump truck's brakes would malfunction, in effort to avoid colliding with a slowing or stopped vehicle in their lane of traffic.

34. In addition, upon information and belief, as stated above, the operator of the dump truck, Jacob-AU and Alfredo Uriostegui, and, Ramos Trucking shared a financial interest in the operator of the dump truck's hauling operations.

35. As a direct and proximate result of Ramos Trucking's acts or omissions, which were negligent, grossly negligent, reckless and wanton, the Plaintiff suffered injuries and damages in an amount to be shown at the trial of the matter.

36. The Plaintiff prays for a judgment against Ramos Trucking for actual and consequential damages, and for a reasonable amount of punitive damages in an amount to be determined by the jury at the trial of the matter.

FOR A SECOND CAUSE OF ACTION

(Gross Negligence/Negligence as to D.R. Horton and 1223 May River Road)
(Joint Enterprise Liability)

37. Plaintiff repeats the preceding paragraphs of this Complaint as if fully restated verbatim herein.

38. At all relevant times herein, Defendant D.R. Horton and 1223 May River Road were engaged in a joint enterprise with the Dump Truck Operator relative to the development of their respective projects and in the hauling of dirt from one project to the other.

39. The accident and injuries described herein were caused by the Dump Truck Operator while it acted in furtherance of the joint enterprise of D.R. Horton and the Dump Truck Operator of the development of the Cypress Ridge project, and, in while engaged in the joint enterprise of hauling dirt from Cypress Ridge project during the project's construction and development.

40. The accident and injuries described herein were caused by the Dump Truck Operator while it acted in furtherance of the joint enterprise of 1223 May River and the Dump Truck Operator of the development of the 1223 May River project, and while engaged in the joint enterprise of hauling dirt to the 1223 May River Rd. project during its construction and development.

41. While engaged in and in furtherance of its the joint enterprise with D.R. Horton, the Dump Truck Operator was negligent, grossly negligent, reckless and wanton in the operation and maintenance of the Dump Truck.

42. While engaged in and in furtherance of its joint enterprise with 1223 May River, the Dump Truck Operator was negligent, grossly negligent, reckless and wanton in the operation and maintenance of the Dump Truck.

43. The dump truck was operated in violation of law.

44. Upon information and belief, at all relevant times of their joint enterprise, Defendants were unlawfully operating as a motor carrier.

45. Defendant 1223 May River and D.R. Horton and the Dump Truck Operator are jointly and severally liable for all acts and/or omissions in furtherance of their joint enterprises.

46. That Defendants were negligent, negligent per se, careless, reckless, grossly negligent, willful, and wanton at the time and place above mentioned in the following particulars:

- a. in operating a motor vehicle, a dangerous instrumentality, in an unsafe manner;
- b. in traveling too fast for conditions;
- c. in failing to maintain the proper lane of travel;
- d. in failing to yield the right of way;
- e. in operating a dump truck with multiple safety violations;
- f. in operating a dump truck with inadequate brakes;
- g. in failing to properly maintain the dump truck;
- h. in failing to properly inspect the dump truck;
- i. in failing to keep the dump truck under proper control;
- j. in making an unsafe maneuver;
- k. in failing to supervise work done at premises they own, operate and/or managed;
- l. in failing to ensure work done at premises they owned, operated and or maintained was done lawfully;
- m. in allowing an illegal, dangerous instrument from performing work at their premises;
- n. in failing to supervise servants, agents, and/or employees;

- o. in failing to use the degree of care and caution that a reasonable and prudent person would have exercised under the same or similar circumstances; and
- p. in such other and further particulars as the evidence in trial may show;

all of which combined and concurred as a direct and proximate cause of the injuries and damages suffered by Plaintiff herein, said acts being in violation of the statute and common laws of the State of South Carolina.

47. The Plaintiff, in addition to actual and consequential damages, is entitled to a reasonable award of punitive damages in an amount to be determined by the jury at the trial of the case.

FOR A THIRD CAUSE OF ACTION
(Negligent Entrustment)
As to D.R. Horton and 1223 May River Rd.

48. The Plaintiff restates the preceding paragraphs of this Complaint as if fully repeated verbatim herein.

49. The Defendants D.R. Horton and 1223 May River Rd. held a duty to the Plaintiff to exercise reasonable care in entrusting the Dump Truck Operator to haul dirt to and/or from their respective projects.

50. The Defendants D.R. Horton and 1223 May River Rd. knew or reasonably should have known that the operations of the dump truck involve a danger to the public and require mandatory licenses, mandatory safety requirements, and/or other mandatory financial requirements.

51. Defendants D.R. Horton and 1223 May River Rd. knew, or should have known, that the Dump Truck Operator was operating in violation of law and was unfit to transport goods for hire within South Carolina.

52. By entrusting Dump Truck Operator with the dangerous loads and operations to and from their projects, the Defendants D.R. Horton and 1223 May River Rd. breached duties of care owed to the Plaintiff.

53. As a direct and proximate result, the Plaintiff suffered injuries and damages.

54. The acts and omissions by Defendants D.R. Horton and 1223 May River Rd. were grossly negligent, reckless and wanton, and the Plaintiff is entitled to an award of punitive damages in a reasonably amount to be determined by the jury at trial.

FOR A FOURTH CAUSE OF ACTION
(Vicarious Liability)
(as to D.R. Horton and 1223 May River Rd.)

55. The Plaintiff restates the preceding paragraphs of this Complaint as if fully repeated verbatim herein.

56. At all relevant times, the Dump Truck Operator was acting as an agent, servant, or employee of the Defendants at the direction and control of the Defendants within the scope of such agency, service and/or employment.

57. The Defendants D.R. Horton and 1223 May River Rd. are jointly and severally liable for the acts and omissions of their agent, servant, and/or employee.

58. As a direct and proximate result of the Dump Truck Operator's acts or omissions, the Plaintiff suffered injuries and damages.

59. The acts and omissions of the Defendants were negligent, grossly negligent, reckless and wanton, and the Plaintiff is entitled to an award of punitive damages in a reasonably amount to be determined by the jury at trial.

FOR A FIFTH CAUSE OF ACTION

(Negligent Selection)

(As to D.R. Horton and 1223 May River Rd.)

60. The Plaintiff repeats the preceding paragraphs of this Complaint as if fully restated verbatim herein.

61. D.R. Horton and 1223 May River Rd. held a duty to the Plaintiff to exercise reasonable care to engage and/or employ a competent and careful dump truck operator for its respective projects.

62. D.R. Horton and 1223 May River Rd. knew or should have known that the Dump Truck Operator operated unlawfully, failed to lawfully maintain its vehicle, failed to reasonably inspect its vehicle, and otherwise failed to comply with mandatory requirements of South Carolina law.

63. D.R. Horton and 1223 May River Rd. failed to exercise reasonable care in choosing, hiring, selecting, maintaining, engaging, and/or supervising the Dump Truck Operator relative to operations on or material hauled to and from their projects.

64. The Plaintiffs injuries would not have happened but for the Defendants' negligent selection of the Dump Truck Operator.

65. As a direct and proximate result of D.R. Horton and 1223 May River Rd. failing to exercise reasonable care in the selection of the Dump Truck Operator, the Plaintiff suffered injuries and damages. Further the Defendants acts were grossly

negligent, reckless and wanton and the Plaintiff is entitled to a reasonable award of punitive damages to be determined at the trial of the matter.

WHEREFORE, Plaintiff prays for an award against the Defendants for actual and punitive damages in an amount to be determined by the jury at the trial of the case, costs and attorney's fees.

SHELTON LAW FIRM, LLC

/s/ Benjamin T. Shelton

ATTORNEY FOR PLAINTIFF

SC Bar No. 77207

P.O. Box 21069

Hilton Head Island, SC 29925

(843) 802-0087

ben@sheltonlawsc.com

Hilton Head Island, South Carolina

February 17, 2021

EXHIBIT H

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)
)
MARK W. MCGILTON)
)
)
Plaintiff,)
)
)
vs.)
)
1223 MAY RIVER ROAD, LLC, D.R.)
HORTON, INC., and LOTTY)
TRUCKING, LLC f/k/a RAMOS)
TRUCKING, LLC,)
)
Defendants.)
)
_____)
)
1223 MAY RIVER ROAD, LLC,)
)
Third-Party Plaintiff,)
)
vs.)
)
KENNETH SCOTTS BUILDERS, LLC,)
)
Third-Party Defendant.)
)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

C.A. NO. 2021-CP-27-00069

MOTION FOR ORDER OF
DISMISSAL OF 1223 MAY RIVER
ROAD, LLC AND KENNETH SCOTT
BUILDERS, LLC

RULE 41(a)(2), SCRCP

WHEREAS, the Plaintiff, Mark W. McGilton, and Defendants 1223 May River Road, LLC and Third-Party Defendant Kenneth Scott Builders, LLC (herein, “Settling Defendants”) have settled and compromised their differences as to the matter referenced above. Whereas, Plaintiff has attempted to obtain consent from all parties of record to voluntarily dismiss the Settling Defendants pursuant to Rule 41(a)(1) of the South Carolina Rules of Civil Procedure. However, Defendant D.R. Horton, Inc. has failed to respond to multiple inquiries and requests to obtain its consent to the voluntary dismissal. Further, D.R. Horton, Inc. has filed no claims against the Settling Defendants.

Therefore, because D.R. Horton, Inc. fails to respond to requests for consent for the voluntary dismissal of the Settling Parties, Plaintiff moves for an Order dismissing Defendant 1223

May River Road, LLC and Third-Party Defendant Kenneth Scott Builders, LLC from the above captioned action.

This 26th Day of April 2022.

ISO MOVE!

SHELTON LAW FIRM, LLC

/s/Benjamin T. Shelton

Benjamin T. Shelton, (S.C. Bar No. 77207)

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Attorney for Plaintiff

WE CONSENT:

HAYNSWORTH, SINKLER, BOYD, P.A.

/s/Roopal S. Ruparelia

Roopal S. Ruparelia, (S.C. Bar No. 16003)

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Attorney for 1223 May River Road, LLC

WE CONSENT:

CLEMENT RIVERS, LLP

/s/Stephen L. Brown

Stephen L. Brown (S.C. Bar No. 66468)

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Attorney for Kenneth Scott Builders, LLC

EXHIBIT I

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF JASPER	)	
	)	C.A. NO. 2021-CP-27-00069
MARK W. MCGILTON	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER OF DISMISSAL OF
	)	1223 MAY RIVER ROAD, LLC
1223 MAY RIVER ROAD, LLC, D.R.	)	
HORTON, INC., and LOTTY	)	
TRUCKING, LLC f/k/a RAMOS	)	
TRUCKING, LLC,	)	
	)	
Defendants.	)	
	)	
1223 MAY RIVER ROAD, LLC,	)	
	)	
Third-Party Plaintiff,	)	
vs.	)	
	)	
KENNETH SCOTTS BUILDERS, LLC,	)	
	)	
Third-Party Defendant.	)	
	)	

This matter is before me by way of Plaintiff's Motion for Order of Dismissal of 1223 May River Road, LLC and Kenneth Scott Builders, LLC. This motion appeared on the August 17, 2022, Jasper County Motions Roster and counsel for the parties appeared before me on that date. On the day of the motions hearing, counsel for the parties presented to this Court that the parties, except for Defendant D.R. Horton, Inc., consented to the dismissal of 1223 May River Road, LLC and Kenneth Scott Builders, LLC. At the hearing, D.R. Horton, Inc. did not object to the dismissal, and no crossclaims have been filed against 1223 May River Road, LLC.

Therefore, it is ordered that 1223 May River Road, LLC is dismissed from this action, and that all other parties remain as active defendants in the action.

IT IS SO ORDERED.

The Honorable Bentley Price



Jasper Common Pleas

Case Caption: Mark W. McGilton VS 1223 May River Road, Llc , defendant, et al
Case Number: 2021CP2700069
Type: Order/Dismissal

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2022-10-26 14:59:45 page 3 of 3

ELECTRONICALLY FILED - 2022 Oct 26 4:01 PM - JASPER - COMMON PLEAS - CASE#2021CP2700069
ELECTRONICALLY FILED - 2025 Jan 27 4:34 PM - JASPER - COMMON PLEAS - CASE#2021CP2700069