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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM DORCHESTER COUNTY
COURT OF COMMON PLEAS

THE HONORABLE DIANE S. GOODSTEIN
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2015-002198
CIVIL ACTION NO. 2012-CP-18-2001

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SC Court of Appeals

R. H. Moore Company, Inc.,

versus

RESPONDENT,

Knight's Precast, Inc.; Tobias & West, LLC;
Eric W. Tobias, P.E.; Dorchester County Water
and Sewer Department; Underground Solutions, Inc.;
B.P. Barber and Associates, Inc. n/k/a URS Corporation;
and Utility Services Authority, LLC;

DEFENDANTS,

Of which Underground Solutions, Inc. is the

APPELLANT.

RECORD ON APPEAL
VOLUME I OF II (pp. 1-435)

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R.H. MOORE COMPANY, INC. V. UNDERGROUND SOLUTIONS, INC.

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STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

) IN THE COURT OF COMMON PLEAS
) FIRST JUDICIAL CIRCUIT
) CASE NO.: 2012-CP-18-2001

R. H. Moore Company, Inc.

Plaintiff,

v.

Knight's Precast Inc., Tobias & West, LLC,
Eric W. Tobias, P.E., Dorchester County
Water and Sewer Department, Underground
Solutions, Inc., B.P. Barber and Associates,
Inc. n/k/a URS Corporation, and Utility
Services Authority, LLC,

Defendants.

**ORDER ON MOTIONS FOR SUMMARY
JUDGMENT**

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CLERK OF COURT
DORCHESTER COUNTY
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Currently pending before the Court are four (4) motions for summary judgment filed by various parties pursuant to Rule 56, SCRPC. The motions are more particularly described as follows: (1) Plaintiff R.H. Moore Company, Inc.'s ("Plaintiff") Motion for Summary Judgment as to Defendant Underground Solutions, Inc. ("Supplier"); (2) Plaintiff's Motion for Summary Judgment as to Defendant Utility Services Authority, LLC ("Installer"); (3) Supplier's Motion for Summary Judgment as to Plaintiff; and (4) Installer's Motion for Summary Judgment as to Plaintiff.¹ On April 17, 2015, counsel for the parties to this action appeared before me for a hearing on the motions identified above. After hearing the arguments of counsel and carefully considering the record in this matter, I find as follows:

¹ At the time of the hearing on the motions identified there were two other motions pending that were filed by Defendant B.P. Barber and Associates, Inc. n/k/a URS Corporation. Since the time of the hearing, Defendant B.P. Barber and Associates, Inc. n/k/a URS Corporation has settled its interest in this matter, and, as such, those motions are now moot.

Standard of Review

“The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). “[S]ummary judgment is proper when ‘there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.’ ” Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 114-15, 410 S.E.2d 537, 545 (1991). In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party. *Id.* at 115, 410 S.E.2d at 545.

Undisputed Facts

I find that there is no genuine issue in dispute as to the following material facts:

- (1) The present action arises out of a public works project known as “The Waste Water System Improvements of Dorchester County Water and Sewer Department, for the Pump Station 67 upgrade and a new 20 inch force main” (“Project”).
- (2) With regard to the present motions, a portion of the Project required the drilling of what is known a Fusible PVC pipe (“FPVC”) under the ground and beneath the Ashley River. Ex. A to the Affidavit of Henry Moore.
- (3) Supplier is in the business of selling FPVC pipe. 30(b)(6) Deposition of Supplier (King), pp. 28-29.
- (4) Supplier sold its FPVC pipe to Plaintiff specifically for use on the Project. 30(b)(6) Deposition of Supplier (Sheppard), pp. 14-19; 30(b)(6) Deposition of Supplier (Sheppard), pp. 22-28.
- (5) Installer contracted with Plaintiff for the installation of the FPVC pipe for the Project, but did not supply the FPVC pipe pursuant to its contract. Ex. C to the Affidavit of Henry Moore.

- (6) Prior to the Project, Supplier was contacted by the engineer in furtherance of the creation of plans and specifications for the Project. Representatives from Supplier then visited the site of the Project and assessed the location for the FPVC pipe to be installed, including the fact the FPVC pipe would be drilled under the Ashley River. Subsequent to the visiting the site, Supplier recommended to the engineer that its FPVC pipe was suitable for the Project. 30(b)(6) Deposition of Supplier (Sheppard), pp. 14-19.
- (7) At the time of recommending its FPVC pipe to the engineer, Supplier was aware that the FPVC pipe would need to meet pressure testing. 30(b)(6) Deposition of Supplier (Sheppard), p. 20.
- (8) Supplier was informed that its FPVC pipe was selected by the engineer for the Project and received a complete set of specifications at that time. 30(b)(6) Deposition of Supplier (Sheppard), pp. 22-25.
- (9) Included in the specifications was a test pressure performance specification mandating that the FPVC pipe must meet or exceed certain test pressures after it was completely installed. 30(b)(6) Deposition of Supplier (Sheppard), pp. 27-28; Ex. A to the Affidavit of Henry Moore.
- (10) Supplier had actual knowledge that the testing would be performed and that its FPVC pipe would need to meet the performance specification. 30(b)(6) Deposition of Supplier (King), pp. 28-29.
- (11) Supplier, through its regional sales representative, then directly contacted Plaintiff in an effort to sell its product for use at the Project and represented that its FPVC pipe would meet the test pressure performance specification. Supplier expected Plaintiff to rely on its representation that the FPVC pipe would pass the test pressure performance specification testing. 30(b)(6) Deposition of Supplier (Sheppard), pp. 27-28.

- (12) Supplier then sold its FPVC pipe to Plaintiff for a price of \$640,925.72. 30(b)(6) Deposition of Supplier (King), pp. 28-29; Ex. 9 to the 30(b)(6) Deposition of Supplier (Sheppard).
- (13) Subsequent to installation, the FPVC pipe sold by Supplier failed to meet the pressure test performance specification. 30(b)(6) Deposition of Supplier (King), p 22.
- (14) Supplier does not know why its FPVC pipe failed to meet the test pressure performance specification, however it admits that its pipe failed to withstand the required pressure. 30(b)(6) Deposition of Supplier (King), p. 22, p. 50, p. 52.
- (15) The FPVC Pipe could not be pressure tested until it was fully drilled and installed in the ground and under the Ashely River. Ex. A to the Affidavit of Henry Moore.
- (16) Supplier has no evidence of misuse by Plaintiff or Installer. 30(b)(6) Deposition of Supplier (King), p. 58.
- (17) Subsequent to the failure, Supplier concluded that the only way to address the failure and ensure that its FPVC pipe met the test pressure performance specification was to supply new FPVC pipe and redrill the FPVC pipe under the Ashley River. 30(b)(6) Deposition of Supplier (Sheppard), pp. 44-46.
- (18) Supplier in fact provided the replacement FPVC pipe and performed the associated fusion of the pipe and did not expect anyone to pay for it. 30(b)(6) Deposition of Supplier (Sheppard), pp. 57-60.
- (19) Supplier refused to pay for the redrill costs of the replacement FPVC pipe. 30(b)(6) Deposition of Plaintiff (Thornton), pp. 63-65.
- (20) The only evidence in the record as to the cost of the replacement redrill was provided by the Plaintiff in the amount of \$454,958.00. Ex. 19 to the 30(b)(6) Deposition of Plaintiff (Thornton).

Law

In its Third Amended Complaint, Plaintiff alleges causes of action against Supplier and Installer as well as other Defendants. Plaintiff alleges as to Supplier causes of action for breach of express warranty, breach of contract, common law and statutory strict liability, breach of implied warranty of merchantability, and breach of the implied warranty of fitness for a particular purpose. Plaintiff alleges causes of action as to Installer for breach of contract and breach of implied warranty of workmanlike service. Finally, Supplier has asserted two counterclaims against Plaintiff. The first is for unjust enrichment and the second is for recoupment/reconvention².

I. Plaintiff's claims for breach of contract and breach of warranties against Supplier

Plaintiff has alleged causes of action against Supplier for breach of contract, breach of express warranty, breach of implied warranty of fitness for a particular purpose and breach of implied warranty of merchantability. I find that there are genuine issues of material fact which preclude summary judgment as to these causes of action. With regard to the breach of contract claim, there is a material factual dispute between the parties related to the contract or contracts between the Supplier and Plaintiff. See 30(b)(6) Deposition of Supplier (Sheppard), pp. 24-34; 30(b)(6) Deposition of Plaintiff (Thornton), pp. 20-27; 54-56. With regards to the breach of express warranty claim, likewise there is a material factual dispute as to any express warranty provided by Supplier. With regard to the breach of implied warranty claims, Supplier raises two issues: (1) first it takes the position that it is necessary to prove a defect in order to establish a claim for breach of implied warranty of fitness for a particular purpose and breach of implied warranty of merchantability, and the Plaintiff has failed to prove a defect, and, (2) second, it

² Though Supplier has pled recoupment as a counterclaim, a claim for recoupment or reconvention is actually in the nature of an affirmative defense. See Tuloka Affiliates, Inc. v. Moore, 275 S.C. 199, 268 S.E.2d 293 (1980).

takes the position that it disclaimed the implied warranties pursuant to S.C. Code Section 36-2-316(2). Supplier's Memorandum in Support of its Motion for Summary Judgment, pp. 8-9. It is unnecessary to address the first argument³ at this stage because the Court's ruling on the second argument makes summary judgment improper.

The Plaintiff disputes that the implied warranties were properly disclaimed taking the position that the disclaimer was ineffective because it was not conspicuous. The disclaimer in question is allegedly found by navigating to a website address located on Supplier's Order Summary. The Supplier's Order Summary does not contain any disclaimer itself. The Order Summary does not mention implied warranties at all. It merely states that the Order Summary is subject to Terms and Conditions found at a website address listed on the document. I find that there are numerous issues of material fact related to whether or not the implied warranties were properly disclaimed. As this is the threshold issue on the applicability of the implied warranties in the present action, summary judgment is improper.

As such, I find that neither the Plaintiff nor the Supplier is entitled to summary judgment as to the breach of contract and breach of implied warranties causes of action by Plaintiff against Supplier.

II. Counterclaims of Supplier against Plaintiff.

Supplier alleged in its Answer certain counterclaims against Plaintiff. Specifically, Supplier alleged as follows:

"Based upon discussions between the parties for Underground Solutions [Supplier] and R.H. Moore, Underground Solutions provided services and R.H. Moore received the benefit of those services with the expectation that R.H. Moore would pay Underground Solutions for those services."

³ Supplier has presented no authority to this Court in support of its position that a plaintiff is required in a UCC breach of implied warranty case to prove a defect. The Plaintiff has presented the Indiana case captioned AAA Exteriors, Inc., v. Don Mahurin Chevrolet & Oldsmobile, Inc., 429 N.E.2d 975, 33 UCC Rep.Serv. 252 (1981) which holds that it is not necessary to prove a specific defect in a product for a breach of implied warranty of merchantability or fitness for a particular purpose.

Supplier's Answer and Counterclaim to Plaintiff's Third Amended Complaint, ¶ 55.

Notwithstanding the allegation in the counterclaim, Supplier testified in its 30(b)(6) deposition that Supplier had no intention of being paid for any replacement pipe that it sent for the redrill and that it only sent the pipe and performed the services because it wanted to break into the Dorchester County market. 30(b)(6) Deposition of Supplier (Sheppard), pp. 57-60. There is therefore no evidence that Supplier had the expectation of being paid. The only evidence is that they undertook to send the pipe and services for their own benefit. The foregoing testimony shall preclude any recovery under Supplier's counterclaim for unjust enrichment and preclude any recovery for its affirmative defense/counterclaim of recoupment. As such, I find that Plaintiff is entitled to summary judgment on the counterclaims of the Supplier.

III. Plaintiff's claim for statutory and common law strict liability against Supplier

Plaintiff has alleged a cause of action for common law and strict liability against Supplier. Under the common law and under the South Carolina Defective Products Act, a strict product liability claim, as distinguished from a warranty claim under the Uniform Commercial Code, requires a showing that the product was in a defective state. S.C. Code Ann. Section 15-73-10; Kennedy v. Custom Ice Equipment Co., Inc., 271 S.C. 171, 246 S.E.2d 176 (1978).

In the present case, I find that the Plaintiff has not submitted any evidence of a specific defect in the design or manufacture of the product sold by the Supplier. As such, I find that Supplier is entitled to summary judgment on Plaintiff's claim for common law and statutory strict liability.

IV. Plaintiff's claims against Installer

Plaintiff has alleged causes of action against Installer for breach of contract and breach of the implied warranty of workmanlike service. To establish a claim for breach of an implied

warranty of workmanlike services, a plaintiff must show that the contractor failed to perform its work in a careful, diligent, and workmanlike manner. Smith v. Breedlove, 377 S.C. 415, 661 S.E.2d 67 (2008). The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach. Branche Builders, Inc. v. Coggins, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct.App.2009).

In the present case, I find that there is no evidence submitted that the Installer performed its work improperly or contributed in any way to the failure of the FPVC pipe. Further, it is undisputed that the Installer was not responsible for the provision or supply of the FPVC pipe pursuant to the terms of its contract. As such, I find that Installer is entitled to summary judgment on Plaintiff's claims against it.

CONCLUSION

For the foregoing reasons stated herein, I find as follows:

- (1) As to the Plaintiff's claims for breach of contract, Breach of express warranty, breach of implied warranty of merchantability, and breach of implied warranty of fitness for a particular purpose against Supplier, Plaintiff's motion for summary judgment and Supplier's motion for summary judgment are DENIED.
- (2) Plaintiff's motion for summary judgment as to the counterclaims of Supplier is hereby GRANTED, and, as such, Supplier's counterclaims are dismissed.
- (3) Supplier's motion for summary judgment as to Plaintiff's claim for common law and statutory strict liability is hereby GRANTED, and Plaintiff's motion for summary judgment on its claim for common law and statutory strict liability is DENIED. As such, Plaintiff's claim for common law and statutory strict liability against Supplier is dismissed.

(4) Installer's motion for summary judgment as to the claims of the Plaintiff against it is hereby GRANTED, and Plaintiff's motion for summary judgment against Installer is DENIED. As such, Plaintiff's claims against Installer are dismissed.

AND IT IS SO ORDERED!



The Honorable Diane S. Goodstein
First Judicial Circuit

St. George, South Carolina

9-22, 2015

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

R. H. Moore Company, Inc.

Plaintiff,

v.

Knight's Precast Inc., Tobias & West, LLC
and Eric W. Tobias, P.E.

Defendant.

) IN THE COURT OF COMMON PLEAS
) FIRST JUDICIAL CIRCUIT
) CASE NO.: 2012-CP-18-2001COMPLAINT
(Jury Trial Demanded)CLERK OF COURT
DORCHESTER COUNTY

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Plaintiff, R.H. Moore Company, Inc., (hereinafter "Plaintiff") complaining of Knight's Precast, Inc., Tobias & West, LLC, and Eric W. Tobias, P.E., (hereinafter "Defendants") would allege and show as follows:

1. That this honorable court has subject matter jurisdiction of the within dispute and that the proper venue for this matter is Dorchester County, South Carolina.
2. That Plaintiff, R.H. Moore Company, Inc., is a duly organized South Carolina Corporation owning property and doing business in Horry County, South Carolina. It is duly licensed and engaged in the construction industry as a utilities contractor.
3. That Defendant, Knights Precast, Inc., is, upon information and belief, a duly organized South Carolina Corporation with its physical place of business in Dorchester County, South Carolina, where it owns property and does business providing, among other things, precast structures which are purchased in the ordinary course of business by utility contractors including, but not limited to, Plaintiff.
4. That Defendant, Tobias & West, LLC, is upon information and belief a limited liability corporation organized and existing pursuant to the laws of the state of South Carolina and owns

property and does business in the county of Charleston in the state of South Carolina and at all times relevant hereto provided, designed, stamped or signed engineering plans and/or specifications and shop drawings for the Precast structure referenced herein.

5. That Defendant, Eric W. Tobias, P.E., is upon information and belief a member of Defendant, Tobias & West, LLC, and resides in Charleston County, South Carolina; however does business in Dorchester County. That Defendant, Eric W. Tobias, P.E., is a licensed professional engineer in the State of South Carolina and upon information and belief was the individual that designed and stamped the plans and shop drawings for the Precast structure referenced herein.

6. That heretofore Dorchester County Water and Sewer Department, an agency of Dorchester County, a political subdivision of the state of South Carolina, (hereinafter referred to as "Owner"), invited bids for a public works project entitled, "The Waste Water System Improvements of Dorchester County Water and Sewer Department, for the pump station 67 upgrade and a new 20 inch force main", (hereinafter referred to as "The Project"). The plans and specifications for this project were prepared by Owners' engineer, BP Barber, (hereinafter referred to as "Project Engineer"). That the bid documents required *inter alia*, the construction and installation of a precast concrete wet well as indicated on the plans and specifications, in section O3410 entitled Precast Concrete Wet Well and as shown on sheet C41 and C42 of said bid documents. The entire set of plans and specifications for the project hereinabove and hereinafter referenced are hereby incorporated herein as if fully set forth verbatim.

7. That on the specified date to wit, June 14 2011; Plaintiff submitted its bid for the Project to Owner. That earlier on June 14, 2011, Plaintiff received two quotes for the sanitary sewer structures, including, but not limited to, the wet well structure, one of which was submitted by

Defendant, Knights Precast, a copy of which is attached hereto and incorporated herein as if fully set forth verbatim as **Exhibit A**.

8. That on July 13, 2011 Plaintiff entered into a contract with Owner to "commence and complete the construction described as follows; pump station number 67 upgrade and new 20 inch force main." A copy of the executed contract is attached hereto and incorporated herein as **Exhibit B** as if set forth verbatim herein. Thereafter on July 20, 2011, Plaintiff issued its purchase order to Defendant, Knights Precast, a copy of which is attached hereinto and incorporated as if set forth verbatim herein as **Exhibit C**. This purchase order required *inter alia* that the Defendant provide the 10 ft. x 20 ft. wet well referenced above and as described in the plans and specifications. The design, construction and adequacy of said wet well is the subject of this litigation.

9. That thereafter on or about November 15, 2011, Plaintiff placed the wet well referenced herein, which had been designed, supplied and fabricated by Defendants. That thereafter in March of 2012, cracks, spalding & other structural damages were discovered in the lower walls of the north side of said wet well and along the bottom two riser section joints on the south side of the structure. Following an investigation by Plaintiff of the cause of the failure of the structure, it was determined in fact that the wet well had been improperly designed and constructed by Defendants, its agents and servants and that as a direct and proximate result thereof the structure had failed, was defective and as such was rejected by Owner and project engineer.

10. That subsequent to determining the cause of the failure, demand was made upon Defendants to cure the defects in the structure and implement whatever corrective measures were necessary. Defendants have failed and refused to repair the defective wet well structure and as a

direct and proximate result thereof Plaintiff has been damaged in an amount to be determined for the repair, replacement and correction of said structure and in addition thereto has sustained and will sustain direct, actual, incidental, consequential and special damages in an amount to be determined, including, but not limited to, loss of profits, delay, damages and other losses, all in an amount to be determined.

FIRST CAUSE OF ACTION

(Breach of contract against Defendant, Knights Precast)

11. Plaintiff repeats and re-alleges each and every allegation as if set forth verbatim herein.
12. That Defendant, Knights Precast, materially breached its contract with Plaintiff as aforesaid and that as a direct and approximate result Plaintiff has been damaged in an amount to be determined as aforesaid.

SECOND CAUSE OF ACTION

(Breach of implied warranty of workmanlike service against Defendant, Knights Precast)

13. Plaintiff repeats and re-alleges each and every allegation as if set forth verbatim herein.
14. That Defendant, Knights Precast, holds itself out to the general public as qualified to provide the design services and perform the construction work it agreed to perform herein and therefore impliedly warranted as a matter of law that any work Defendant, Knights Precast, undertook and any material supplied to Plaintiff would be supplied and performed in a careful, diligent and workmanlike manner in accordance with industry standards and the applicable building codes and in conformity with the plans and specifications for the project as aforesaid.
15. That Defendant, Knights Precast, has breached the aforesaid implied warranty of good and workmanlike work as is set forth above herein and as a direct and proximate result Plaintiff has been damaged in an amount to be determined as aforesaid.

THIRD CAUSE OF ACTION

(Common law and statutory strict liability against Defendant, Knights Precast)

16. Plaintiff repeats and re-alleges each and every allegation as if set forth verbatim herein.
17. That Defendant, Knights Precast, has engaged and continues, at the time of the filing of this action, to be engaged in providing the design and in manufacturing Precast products as outlined herein above.
18. That Defendant, Knights Precast, expects said Precast products to reach the end user or consumer without substantial change in the condition in which said products were sold. Defendant sold the products in a manner contemplated by South Carolina Code Annotated section 15-73-10.
19. That the wet well sold by Defendant, Knights Precast, was unreasonably dangerous to the expected end user considering its characteristics and propensity for leading to significant property damage and physical harm if defective.
20. As a direct and proximate result of Defendant's defective design and manufacture of the product herein Plaintiff has sustained actual, direct, consequential, incidental and special damages in an amount to be determined at trial and Defendant is strictly liable therefore.

FOURTH CAUSE OF ACTION

(Breach of implied warranty of Merchantability under
South Carolina codes section 36-2-314 against Defendant, Knights Precast)

21. Plaintiff repeats and re-alleges each and every allegation as if set forth verbatim herein.
22. That Defendant, Knights Precast, contracted to sell the wet well installed on the project.
23. That Defendant, Knights Precast, was a merchant with respect to goods of that kind and therefore by virtue of the sale of the wet well, there existed an implied warranty of

merchantability with respect to said wet well, which was not excluded or modified pursuant to South Carolina law.

24. That Plaintiff is now aware and has informed the Defendants that the wet well did not pass without objection in the trade, it is not of fair or average quality within the description required, and is not fit for the ordinary purpose for which it was sold and as such and as such has breached the implied warranty of merchantability provided as a matter of law by Defendant, Knights Precast, to Plaintiff.

25. As a direct and proximate result of said breach of implied warranty of merchantability, Plaintiff has suffered actual direct consequential, incidental and special damages in an amount to be determined.

FIFTH CAUSE OF ACTION

(Breach of implied warranty of fitness for particular purpose under South Carolina Code Section 36-2-315 against Defendant, Knights Precast)

26. Plaintiff repeats and re-alleges each and every allegation as if set forth verbatim herein.

27. Defendant contracted to design, manufacture and sell the wet well installed on the project.

28. Defendant was a merchant with respect to goods of that kind and held itself out to the general public as qualified to sell such goods.

29. That at the time of the sale of the wet well, Defendant knew of the particular purpose for which the wet well was required as was outlined in the plans and specifications.

30. That Plaintiff relied on the skill and judgment of Defendant to design and manufacture suitable goods and at the time of sale, an implied warranty of fitness for a particular purpose arose in favor of Plaintiff.

31. Plaintiffs are now aware that the wet well supplied is, and was not, fit for its intended purpose.

32. As a direct and proximate cause of the breach of implied warranty of fitness for particular purpose Plaintiff has suffered actual, direct, consequential, incidental and special damages as aforesaid all in an amount to be shown at trial.

SIXTH CAUSE OF ACTION

(Professional negligence and gross negligence against Defendants, Tobias & West, LLC
and Eric W. Tobias, P.E.)

33. Plaintiff repeats and re-alleges each and every allegation as if set forth verbatim herein.

34. That Defendants, Tobias & West, LLC and Eric W. Tobias, P.E., owed a duty to Plaintiff and breached the same because they were negligent, careless, reckless, willful and wanton in one or more of the following particulars to wit:

- a) in failing to exercise due care in the design of the wet well referenced herein;
- b) in failing to design the wet well to insure that it was free of design defects;
- c) in making assumptions in their design that were incorrect and inconsistent with the principles of structural engineering mechanics;
- c) in misusing a competent engineering design guide "Rectangular Concrete Tanks, Fifth Edition, published by the Portland Cement Association" by applying incorrect boundary conditions;
- d) in producing a structural design that was significantly flawed;

35. That each of the foregoing constitutes a breach in the professional standard of care due and owing Plaintiff by Defendants, Tobias & West, LLC and Eric W. Tobias, P.E. (A copy of an Affidavit alleging an act of professional negligence against Defendants, Tobias & West, LLC

and Eric W. Tobias, P.E. is attached hereto as **Exhibit D** and incorporated herein by reference as if fully set forth verbatim herein).

36. The said failures above described proximately damaged Plaintiff in an amount of actual incidental, special and consequential damages. In addition thereto by virtue of the gross negligence of said Defendants, Tobias & West, LLC and Eric W. Tobias, P.E., Plaintiff is entitled to an award of punitive damages.

SEVENTH CAUSE OF ACTION

(Breach of express and implied warranty of fitness for intended use and plans and specifications as to Defendants, Tobias & West, LLC and Eric W. Tobias, P.E.)

37. Plaintiff repeats and re-alleges each and every allegation as if set forth verbatim herein.

38. That Defendants, Tobias & West, LLC and Eric W. Tobias, P.E., created certain express and implied warranties which arose as a matter of law by virtue of creating a design and stamping the design for the aforesaid wet well.

39. That the implied warranties include but are not limited to, the implied warranty of fitness for the purpose in view and the implied warranty of the adequacy of the plans and specifications.

40. That none of the expressed or implied warranties were properly disclaimed as a matter of law.

41. That in the performance of this work Defendants, Tobias & West, LLC and Eric W. Tobias, P.E., breached the aforesaid warranties in the design of the wet well, as is here and above more specifically set forth.

42. That as a direct and proximate result of Defendants, Tobias & West, LLC and Eric W. Tobias, P.E., breach of warranties stated herein Plaintiff has sustained actual, direct, consequential, incidental and special damages in an amount to be shown at trial.

WHEREFORE, the Plaintiff prays that this Court issue an Order granting judgment for the Plaintiff against the Defendant, for the following relief:

- (a) for actual and punitive damages in an amount to be proven at trial;
- (b) for prejudgment and post judgment interest on Plaintiff's damages;
- (c) for attorneys' fees and costs;
- (d) for such other relief as the Court deems just and proper.

SMITH, BUNDY, BYBEE & BARNETT, P.C.



W. H. Bundy, Jr., Esquire

M. Brent McDonald, Esquire

Post Office Box 1542

Mt. Pleasant, South Carolina 29465-1542

Telephone: (843) 881-1623

Attorneys for Plaintiff R. H. Moore Company, Inc.

Mt. Pleasant, South Carolina
August 20, 2012

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

) IN THE COURT OF COMMON PLEAS
) FIRST JUDICIAL CIRCUIT
) CASE NO.: 2012-CP-18-2001

R. H. Moore Company, Inc.

Plaintiff,

v.

Knight's Precast Inc.; Tobias & West, LLC; Eric
W. Tobias, P.E.; Dorchester County Water and
Sewer Department; Underground Solutions, Inc.;
B.P. Barber and Associates, Inc. n/k/a URS
Corporation; and Utility Services Authority, LLC

Defendant.

THIRD AMENDED COMPLAINT
(Jury Trial Demanded)

FILED
OCT 17 AM 10:09
CLERK OF COURT
DORCHESTER COUNTY
SOUTH CAROLINA

Plaintiff, R.H. Moore Company, Inc., (hereinafter "Plaintiff") complaining of Knight's Precast, Inc., Tobias & West, LLC, Eric W. Tobias, P.E., Dorchester County Water and Sewer Department, Underground Solutions, Inc., B.P. Barber and Associates, Inc. n/k/a URS Corporation; and Utility Services Authority, LLC, (hereinafter sometimes collectively referred to as "Defendants") would allege and show as follows:

JURISDICTION

1. That this honorable court has subject matter jurisdiction of the within dispute and that the proper venue for this matter is Dorchester County, South Carolina.

PARTIES

2. That Plaintiff, R.H. Moore Company, Inc., ("Plaintiff") is a duly organized South Carolina Corporation owning property and doing business in Horry County, South Carolina. It is duly licensed and engaged in the construction industry as a utilities contractor.

3. That Defendant, Knights Precast, Inc., ("Knights Precast") is, upon information and belief, a duly organized South Carolina Corporation with its principle place of business in Dorchester

County, South Carolina, where it owns property and does business providing, among other things, precast structures which are purchased in the ordinary course of business by utility contractors including, but not limited to, Plaintiff.

4. That Defendant, Tobias & West, LLC, is upon information and belief a limited liability corporation organized and existing pursuant to the laws of the state of South Carolina and owns property and does business in the county of Charleston in the state of South Carolina and at all times relevant hereto provided, designed, stamped or signed engineering plans and/or specifications and shop drawings for the Precast structure referenced herein.

5. That Defendant, Eric W. Tobias, P.E., is upon information and belief a member of Defendant, Tobias & West, LLC, and resides in Charleston County, South Carolina; however this Defendant does business in Dorchester County. That Defendant, Eric W. Tobias, P.E., is a licensed professional engineer in the State of South Carolina and upon information and belief was the individual that designed and stamped the plans and shop drawings for the Precast structure referenced herein.

6. Dorchester County Water and Sewer Department ("Owner"), is an agency of Dorchester County, a political subdivision of the state of South Carolina, and is a government agency of the State of South Carolina organized and existing under the laws of the State of South Carolina and conducting business in Dorchester County. At all times material hereto, the Owner entered into a contract with the Plaintiff for the project more particularly described below.

7. Defendant Underground Solutions, Inc. is upon information and belief a corporation organized and existing under the laws of California and conducting business in Dorchester County and/or supplying construction materials and goods for use in the project, more specifically described below, located in Dorchester County, South Carolina.

8. Defendant B.P. Barber and Associates, Inc. n/k/a URS Corporation ("Defendant B.P. Barber" or "Project Engineer") is upon information and belief a corporation organized and existing under the laws of the state of South Carolina and is/was conducting business in Dorchester County, South Carolina. More specifically, Defendant B.P. Barber was the engineer of record for the project, more specifically described below, located in Dorchester County, South Carolina.

9. Defendant Utility Services Authority, LLC ("Defendant Utility Services") is upon information and belief a limited liability company organized and existing under the laws of the state of Michigan and is/was conducting business in Dorchester County, South Carolina. More specifically, Defendant Utility Services performed the underground directional drilling for the project, more specifically described below, located in Dorchester County, South Carolina.

FACTUAL ALLEGATIONS

10. That heretofore the Owner, invited bids for a public works project entitled, "The Waste Water System Improvements of Dorchester County Water and Sewer Department, for the pump station 67 upgrade and a new 20 inch force main", (hereinafter referred to as "The Project"). The plans and specifications for this project were prepared by Owners' engineer, Defendant BP Barber.

That the bid documents required *inter alia*, the construction and installation of a precast concrete wet well as indicated on the plans and specifications, in section O3410 entitled Precast Concrete Wet Well and as shown on sheet C41 and C42 of said bid documents. The entire set of plans and specifications for the project hereinabove and hereinafter referenced are hereby incorporated herein as if fully set forth verbatim. Defendant BP Barber called for in the plans a 12" (in.) thick, precast segmented concrete wet well box 10' (ft.) by 20' (ft.) and 30' (ft.) deep.

11. That on the specified date to wit, June 14 2011; Plaintiff submitted its bid for the Project to Owner. That earlier on June 14, 2011, Plaintiff received two quotes for the sanitary sewer structures, including, but not limited to, the wet well structure, one of which was submitted by

Defendant, Knights Precast, a copy of which is attached hereto and incorporated herein as if fully set forth verbatim as **Exhibit A**.

12. That on July 13, 2011 Plaintiff entered into a contract with Owner to "commence and complete the construction described as follows; pump station number 67 upgrade and new 20 inch force main." A copy of the executed contract is attached hereto and incorporated herein as **Exhibit B** as if set forth verbatim herein. Thereafter on July 20, 2011, Plaintiff issued its purchase order to Defendant, Knights Precast, a copy of which is attached hereinto and incorporated as if set forth verbatim herein as **Exhibit C**. This purchase order required *inter alia* that the Defendant provide the wet well box referenced above and as described in the plans and specifications by Defendant BP Barber. The design, construction and adequacy of said wet well are the subject of this litigation.

13. On June 17, 2011, Plaintiff also entered into a purchase order contract to Defendant Underground Solutions, Inc. for the manufacture and supply of 20 inch DR 21, FPVC pipe, as well as component parts, materials, fusion machines, and tools, for use at the Project, a copy of which is attached hereinto and incorporated as if set forth verbatim herein as **Exhibit D**.

14. Plaintiff entered into subcontract agreement for the installation of the FPVC pipe with Defendant Utility Services.

15. That thereafter on or about November 15, 2011, Plaintiff placed the wet well referenced herein, which had been designed, supplied and fabricated by Defendants. That thereafter in March of 2012, cracks, spalding & other structural damages were discovered in the lower walls of the north side of said wet well and along the bottom two riser section joints on the south side of the structure. Following an investigation by Plaintiff of the cause of the failure of the structure, it was determined in fact that the wet well had been improperly designed and constructed by Defendants, its agents and servants and that as a direct and proximate result thereof the structure had failed, was defective and as such was rejected by Owner and project engineer.

16. At this time, an alternative remedy for the repair of the defective wet well was proposed to the Owner. Upon information and belief, the Owner unreasonably and in breach of its contract with the Plaintiff refused to accept the alternate repair.

17. That subsequent to determining the cause of the failure and the Owners demand of a specific solution, demand was made upon Defendants to cure the defects in the structure and implement whatever corrective measures were necessary and/or were demanded by the Owner. Defendants have failed and refused to repair the defective wet well structure and as a direct and proximate result thereof Plaintiff has been damaged in an amount to be determined for the repair, replacement and correction of said structure and in addition thereto has sustained and will sustain direct, actual, incidental, consequential and special damages in an amount to be determined, including, but not limited to, loss of profits, delay, damages and other losses, all in an amount to be determined.

18. Further, during the Project, the 20 inch FPVC piping manufactured and supplied by Defendant Underground Solutions, Inc. and installed by Defendant Utility Services failed due and owing to design and manufacturing defects or installation defects.

19. That subsequent to determining the cause of the pipe failure, demand was made upon Defendant Underground Solutions, Inc. to cure the defects in the pipe, remove the defective pipe, and implement whatever corrective measures were necessary. Defendant Underground Solutions, Inc. agreed with the Plaintiff to cure the defects in the pipe, remove the defective pipe, and implement whatever corrective measures were necessary. However, Defendant Underground Solutions, Inc. has failed and refused to repair the defective piping and as a direct and proximate result thereof Plaintiff has been damaged in an amount to be determined for the repair, replacement and correction of said piping and in addition thereto has sustained and will sustain direct, actual,

incidental, consequential and special damages in an amount to be determined, including, but not limited to, loss of profits, delay, damages and other losses, all in an amount to be determined.

20. Upon substantial completion of the Project, the Owner refused to pay the Plaintiff in accordance with the terms of the contract between the Owner and the Plaintiff. The Owner has also unreasonably and in breach of the terms of the contract with the Plaintiff refused to grant requested time extensions and contract sum increases, all in an amount to be shown at trial.

FIRST CAUSE OF ACTION

(Breach of contract against Defendants Knights Precast; Owner, Underground Solutions, Inc. and Utility Services)

19. Plaintiff repeats and re-alleges each and every allegation as if set forth verbatim herein.

20. Defendants Knights Precast, Owner, Utility Services, and Underground Solutions, Inc., have materially breached their valid and enforceable contracts with Plaintiff as aforesaid and that as a direct and proximate result Plaintiff has been damaged in an amount of actual, special, incidental, consequential and indirect damages to be determined at trial.

SECOND CAUSE OF ACTION

(Breach of implied warranty of workmanlike service against Defendant Knights Precast and Utility Services)

21. Plaintiff repeats and re-alleges each and every allegation as if set forth verbatim herein.

22. That Defendants, Knights Precast and Utility Services, hold themselves out to the general public as qualified to provide the design services and perform the construction work they agreed to perform herein and therefore impliedly warranted as a matter of law that any work undertook and any material supplied to Plaintiff would be supplied and performed in a careful, diligent and workmanlike manner in accordance with industry standards, manufacturers' specifications, and the applicable building codes and in conformity with the plans and specifications for the project as aforesaid.

23. That Defendants, Knights Precast and Utility Services, have breached the aforesaid implied warranty of good and workmanlike work as is set forth above herein and as a direct and proximate result Plaintiff has been damaged in an amount of actual, special, incidental, consequential and indirect damages to be determined as aforesaid.

THIRD CAUSE OF ACTION

(Common law and statutory strict liability against Defendants Knights Precast and Underground Solutions, Inc.)

24. Plaintiff repeats and re-alleges each and every allegation as if set forth verbatim herein.

25. That Defendant, Knights Precast, has engaged and continues, at the time of the filing of this action, to be engaged in providing the design and in manufacturing Precast products as outlined herein above.

26. Defendant Underground Solutions, Inc. has engaged and continues, at the time of the filing of this action, to be engaged in providing the design and in manufacturing of FPVC products as outlined herein above.

27. That Defendants, Knights Precast and Underground Solutions, expect said products to reach the end user or consumer without substantial change in the condition in which said products were manufactured and sold. Defendants sold the products in a manner contemplated by South Carolina Code Annotated section 15-73-10.

28. That the wet well sold by Defendant, Knights Precast, was unreasonably dangerous to the expected end user considering its characteristics and propensity for leading to significant property damage and physical harm if defective.

29. That the piping manufactured and sold by Defendant Underground Solutions was unreasonably dangerous to the expected end user considering its characteristics and propensity for leading to significant property damage and physical harm if defective.

30. As a direct and proximate result of Defendants' defective design and manufacture of the products herein, Plaintiff has sustained actual, indirect, consequential, incidental and special damages in an amount to be determined at trial and Defendants are strictly liable therefore.

FOURTH CAUSE OF ACTION

(Breach of implied warranty of Merchantability under
South Carolina codes section 36-2-314 against Defendants Knights Precast and Underground
Solutions, Inc.)

31. Plaintiff repeats and re-alleges each and every allegation as if set forth verbatim herein.

32. That Defendant, Knights Precast, contracted to sell the wet well installed on the project.

33. That Defendant, Underground Solutions, Inc., contracted to sell the FPVC pipe on the project.

34. That Defendants Knights Precast and Underground Solutions, Inc. were merchants with respect to goods of that kind and therefore by virtue of the sale of the wet well and FPVC piping, there existed an implied warranty of merchantability with respect to said wet well and FPVC piping, which was not excluded or modified pursuant to South Carolina law.

35. That Plaintiff is now aware and has informed the Defendants that the wet well and FPV piping did not pass without objection in the trade, they are not of fair or average quality within the description required, and they are not fit for the ordinary purpose for which they were sold, and, as such, the Defendants have breached the implied warranty of merchantability provided as a matter of law to Plaintiff.

36. As a direct and proximate result of said breaches of the implied warranty of merchantability, Plaintiff has suffered actual, indirect consequential, incidental and special damages in an amount to be determined.

FIFTH CAUSE OF ACTION

(Breach of implied warranty of fitness for particular purpose under
South Carolina Code Section 36-2-315 against Defendants Knights Precast and Underground
Solutions, Inc.)

37. Plaintiff repeats and re-alleges each and every allegation as if set forth verbatim herein.

38. Defendant Knights Precast contracted to design, manufacture and sell the wet well installed on the Project.

39. Defendant Underground Solutions, Inc. contracted to design, manufacture and sell the FPVC piping installed at the Project.

40. Defendants were merchants with respect to goods of that kind and held themselves out to the general public as qualified to sell such goods.

41. That at the time of the sale of the wet well, Defendant Knights Precast knew of the particular purpose for which the wet well was required as was outlined in the plans and specifications.

42. That at the time of the sale of the FPVC piping, Defendant Underground Solutions, Inc. knew of the particular purpose for which the FPVC piping was required as was outlined in the plans and specifications.

43. That Plaintiff relied on the skill and judgment of Defendants to design and manufacture suitable goods, and, at the time of sale, an implied warranty of fitness for a particular purpose arose in favor of Plaintiff.

44. Plaintiffs are now aware that the wet well and FPVC piping supplied are, and were not, fit for their intended purpose.

45. As a direct and proximate cause of the breaches of implied warranty of fitness for particular purpose Plaintiff has suffered actual, indirect, consequential, incidental and special damages as aforesaid all in an amount to be shown at trial.

SIXTH CAUSE OF ACTION

(Professional negligence and gross negligence against Defendants, Tobias & West, LLC
and Eric W. Tobias, P.E.)

46. Plaintiff repeats and re-alleges each and every allegation as if set forth verbatim herein.

47. That Defendants, Tobias & West, LLC and Eric W. Tobias, P.E., owed a duty to Plaintiff and breached the same because they were negligent, careless, reckless, willful and wanton in one or more of the following particulars to wit:

- a) in failing to exercise due care in the design of the wet well referenced herein;
- b) in failing to design the wet well to insure that it was free of design defects;
- c) in making assumptions in their design that were incorrect and inconsistent with the principles of structural engineering mechanics;
- c) in misusing a competent engineering design guide "Rectangular Concrete Tanks, Fifth Edition, published by the Portland Cement Association" by applying incorrect boundary conditions;
- d) in producing a structural design that was significantly flawed;

48. That each of the foregoing constitutes a breach in the professional standard of care due and owing Plaintiff by Defendants, Tobias & West, LLC and Eric W. Tobias, P.E. (A copy of an Affidavit alleging an act of professional negligence against Defendants, Tobias & West, LLC and Eric W. Tobias, P.E. is attached hereto as **Exhibit E** and incorporated herein by reference as if fully set forth verbatim herein).

49. The said failures above described proximately damaged Plaintiff in an amount of actual, indirect, incidental, special and consequential damages. In addition thereto by virtue of the gross negligence of said Defendants, Tobias & West, LLC and Eric W. Tobias, P.E., Plaintiff is entitled to an award of punitive damages.

SEVENTH CAUSE OF ACTION

(Breach of express and implied warranty of fitness for intended use and plans and specifications as to Defendants Tobias & West, LLC and Eric W. Tobias, P.E.)

50. Plaintiff repeats and re-alleges each and every allegation as if set forth verbatim herein.
51. That Defendants Tobias & West, LLC and Eric W. Tobias, P.E., created certain express and implied warranties which arose as a matter of law by virtue of creating and/or providing plans and specifications for a design and/or stamping the design for the aforesaid wet well.
52. That the implied warranties include but are not limited to, the implied warranty of fitness for the purpose in view and the implied warranty of the adequacy of the plans and specifications.
53. That none of the expressed or implied warranties were properly disclaimed as a matter of law.
54. Defendant Tobias & West, LLC and Eric W. Tobias, P.E., breached the aforesaid warranties, as is here and above more specifically set forth.
55. That as a direct and proximate result of Defendants Tobias & West, LLC and Eric W. Tobias, P.E., breach of warranties stated herein Plaintiff has sustained actual, indirect, consequential, incidental and special damages in an amount to be shown at trial.

EIGHTH CAUSE OF ACTION

(Breach of express and implied warranty of fitness for intended use and plans and specifications under U.S. v. Spearin and Robert E. Lee & Co. v. Comm'n of Public Works as to Defendant Owner)

56. Plaintiff repeats and re-alleges each and every allegation as if set forth verbatim herein.
57. The Defendant Owner provided the Plaintiff with a set of plans and specifications for the Project.
58. That in so providing the plans and specifications, the Owner represented and warranted to the Plaintiff that the plans and specifications were accurate, sufficient, constructible, given the actual site conditions and nature of the Project, and did not contain defects.

59. The Owner breached the aforesaid warranties by failing to provide plans and specifications that were accurate, sufficient, and constructible, given the actual site conditions and nature of the Project.

60. That as a direct and proximate result of Defendant Owner's breach of warranties stated herein Plaintiff has sustained actual, indirect, consequential, incidental and special damages in an amount to be shown at trial.

NINTH CAUSE OF ACTION

(Breach of express warranty as to Defendant Underground Solutions, Inc.)

61. Plaintiff repeats and re-alleges each and every allegation as if set forth verbatim herein.

62. Defendant Underground Solutions, Inc. in connection with the marketing, manufacture and sale of the FPVC piping, gave to the Plaintiff certain express warranties.

63. Defendant has breached the express warranties by manufacturing, designing and selling defective FPVC piping.

64. That as a direct and proximate result of Defendant Underground Solutions Inc.'s breach of warranties stated herein Plaintiff has sustained actual, indirect, consequential, incidental and special damages in an amount to be shown at trial.

TENTH CAUSE OF ACTION

(Professional negligence and gross negligence against Defendant B.P. Barber)

65. Plaintiff repeats and re-alleges each and every allegation as if set forth verbatim herein.

66. That Defendant B.P. Barber owed a duty to Plaintiff and breached the same because it was negligent, careless, reckless, willful and wanton in one or more of the following particulars to wit:

- a) in failing to exercise due care in the design of the wet well referenced herein;
- b) in failing to design the wet well to insure that it was free of design defects;
- c) in violating industry standards and good engineering practices in the design of the wet well box;

- c) in failing to specify a structure of sufficient thickness;
- d) in producing a structural design that was significantly flawed;

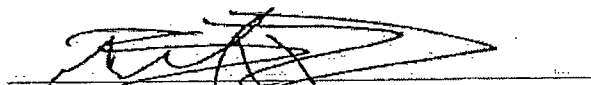
67. That each of the foregoing constitutes a breach in the professional standard of care due and owing Plaintiff by Defendant B.P. Barber (A copy of an Affidavit alleging an act of professional negligence against Defendant B.P. Barber is attached hereto as **Exhibit F** and incorporated herein by reference as if fully set forth verbatim herein).

68. The said failures above described proximately damaged Plaintiff in an amount of actual, indirect, incidental, special and consequential damages. In addition thereto by virtue of the gross negligence of said Defendant B.P. Barber, Plaintiff is entitled to an award of punitive damages.

WHEREFORE, the Plaintiff prays that this Court issue an Order granting judgment, jointly and severally, for the Plaintiff against the Defendants, for the following relief:

- (a) for actual, special, incidental, indirect, consequential and punitive damages in an amount to be proven at trial;
- (b) for prejudgment and post judgment interest on Plaintiff's damages;
- (c) for attorneys' fees and costs; and
- (d) for such other relief as the Court deems just and proper.

SMITH, BUNDY, BYBEE & BARNETT, P.C.



W. H. Bundy, Jr., Esquire
 M. Brent McDonald, Esquire
 Post Office Box 1542
 Mt. Pleasant, South Carolina 29465-1542
 Telephone: (843) 881-1623
 Attorneys for Plaintiff R. H. Moore Company, Inc.

Mt. Pleasant, South Carolina
 September 30, 2014

EXHIBIT A

RECEIVED

2014 OCT 17 AM 10:09

CLERK OF COURT
DORCHESTER COUNTY



P.O. Box 3467 Summerville SC 29484-3467 (843) 873-3011 Fax: (843) 873-8994

2014 OCT 17 AM 10:09
CLEAN & SECURE
UNCLERKED & SECURITY

Project Name: Pump Station 67 Upgrade & Force Main Revised 6/10/2011

Bld Date: 6/14/2011

County/State: Dorchester, SC

Engineering Firm: B P Barber & Asso.

Customer: All Bidders

Sanitary Sewer Structures

Quote No.: 12734

version...0

ARV Manholes:

48" Doghouse Sanitary Sewer Structure, 5" Walls, 0" Thick, Base Slab, Steps With a 48" joint sealant/wrap (12"); USF 924-US Hinged Ring & Cover w/ penthead camlock (18).

8/10' Cut 48" @ \$ 704.68 each \$ 12,684.24

Structure #s: 232+90, 179+35, 184+75, 192+12, 204+55, 223+35

Manholes:

48" Sanitary Sewer Structure, 5" Walls, 6" Thick Non-Extended Base Slab, Steps With a 48" joint sealant/wrap (12"); USF 924-US Hinged Ring & Cover w/ penthead camlock; 8" "Oversized" Precast Invert For 48" Dia.; 8" Kor-N-Seal Boots.

14/16' Cut 1 @ \$ 1,443.93 each \$ 1,443.93

Structure #s: MH-18

16/18' Cut 2 @ \$ 1,609.27 each \$ 3,218.54

Structure #s: MH-16, MH-17

18/20' Cut 2 @ \$ 1,718.51 each \$ 3,437.02

Structure #s: MH-14, MH-15

Manholes:

48" Sanitary Sewer Structure, 5" Walls, 6" Thick Non-Extended Base Slab, with steps. With a 48" joint sealant/wrap (12"); USF 924-US Hinged Ring & Cover w/ penthead camlock; 12" "Oversized" Precast Inverts for 48" dia.; 12" Kor N Seal Boots (2).

6/8' Cut 3 @ \$ 971.38 each \$ 2,914.14

Structure #s: MH-9, MH-10, MH-11

8/10' Cut 1 @ \$ 1,190.80 each \$ 1,190.80

Structure #s: MH-2

10/12' Cut 1 @ \$ 1,297.60 each \$ 1,297.60

Structure #s: MH-4

12/14' Cut 2 @ \$ 1,383.62 each \$ 2,767.24

Structure #s: MH-3, MH-12

12



P.O. Box 3467 Summerville SC 29484-3467 (843) 873-3011 Fax: (843) 873-8994

Quote No.: 12734 (cont.)

Manholes:

48" Sanitary Sewer Structure, 5" Walls, 6" Thick Non-Extended Base Slab, with steps. With a 48" joint sealant/wrap (12"); USF 924-US Hinged Ring & Cover w/ penthead camlock; 12" "Oversized" Precast Inverts for 48" dia.; 12" Kor N Seal Boots; 8" Kor-N-Seal Boots.

20/22' Cut 1 @ \$ 1,931.33 each \$ 1,931.33
Structure #s: MH-13

Manholes:

48" Sanitary Sewer Structure, 5" Walls, 6" Thick Non-Extended Base Slab, with steps. With a 48" joint sealant/wrap (12"); 24" Pamtight bolt down pressure tight ring and cover; 12" "Oversized" Precast Inverts for 48" dia.; 12" Kor N Seal Boots (2).

6/8' Cut 1 @ \$ 1,618.54 each \$ 1,618.54
Structure #s: MH-8

8/10' Cut 1 @ \$ 1,871.12 each \$ 1,871.12
Structure #s: MH-6

10/12' Cut 2 @ \$ 1,909.27 each \$ 3,818.54
Structure #s: MH-5, MH-7

Manholes:

60" Sanitary Sewer Structure, 6" Walls, 8" Thick Non-Extended Base Slab, with steps. With a 60" joint sealant/wrap (12"); USF 924-US Hinged Ring & Cover w/ penthead camlock; 24" "Oversized" Precast Invert for 60" Dia.; 24" Kor N Seal Boots (2); 10" Kor-N-Seal Boots.

10/12' Cut 1 @ \$ 1,997.39 each \$ 1,997.39
Structure #s: MH-1A

Manholes:

60" Sanitary Sewer Structure, 6" Walls, 8" Thick Non-Extended Base Slab, with steps. With a 60" joint sealant/wrap (12"); USF 924-US Hinged Ring & Cover w/ penthead camlock; 24" "Oversized" Precast Invert for 60" Dia.; 24" Kor N Seal Boots; 20" Kor N Seal Boots.

10/12' Cut 1 @ \$ 2,071.40 each \$ 2,071.40
Structure #s: 241+63 (MH-1)

Manholes:

60" Sanitary Sewer Structure, 6" Walls, 8" Thick Non-Extended Base Slab, with steps. With a 60" joint sealant/wrap (12"); USF 924-US Hinged Ring & Cover w/ penthead camlock; 24" "Oversized" Precast Invert for 60" Dia.; 24" Kor N Seal Boots; 20" Kor N Seal Boots; 12" Kor N Seal Boots.

0/12' Cut 1 @ \$ 2,127.40 each \$ 2,127.40
Structure #s: MH-1

Ave 2065?



P.O. Box 3467 Summerville SC 29484-3467 (843) 873-3011 Fax: (843) 873-8994

Quote No.: 12734 (cont.)

Pump Station

18" thick Base Slab with 18" extension on four sides; 12" thick walls with openings as required for pipe; 12" thick top slab. With a 16" Kor-N-Seal Boots. (ID and avg. depth below)

10 x 20 ID (avg. depth 29.5 vft) 1 @ \$ 47,911.65 each \$ 47,911.65

51.28 TONS Heavy Lift

No coatings or liners quoted. Top Slab, Hatch, & Hardware for pump station supplied by customer not quoted. Heavy Lift Base section Pump Station (10x20) 51.28 Tons. Wet well calcs. included in price.

Quotation based on current known specifications and requirements and is valid for 30 days from above bid date. Knight's Precast reserves the right to change, modify or withdraw this quotation if specifications or requirements are changed or altered. No engineering calculations included unless specified on quote. Contractor is responsible for supplying the most updated set of plans to Knights Precast. Any structures made as a result of not having the most up to date plans will be the Contractors responsibility.

Estimated Total **\$ 92,300.88 +Tax**
(F.O.B.: Jobsite, unloaded by others)

Thank you,

Jr. Jim Case

EXHIBIT B

2014 OCT 17 AM 10:09
CLERK OF COURT
DOCKETS IN CHARGE

SECTION 00500

CONTRACT

THIS AGREEMENT made this 13 day of July, 2011, by and between
Dorchester County Water & Sewer Department, hereinafter called "Owner", and R.H. Moore
Company, Inc., doing business as a corporation, with its principal office in the City of Murrells
Inlet, County of Horry, State of South Carolina, hereinafter called "Contractor".

WITNESSETH: That for and in consideration of the payments and agreements hereinafter mentioned, to be made and performed by the Owner, the Contractor hereby agrees with the Owner to commence and complete the construction described as follows: Pump Station No. 67 Upgrade and New 20" Force Main, hereinafter called the "Project", for the sum of Five Million Seven Hundred Sixty Four Thousand Five Hundred Eight Dollars Fifty Cents (\$5,764,508.50). Contractor further agrees to commence and complete any and all extra work in connection therewith, under the terms as stated in the General and Special Conditions of the Contract; and at his (its or their) own proper cost and expense to furnish all the materials, supplies, machinery, equipment, tools, superintendents, labor, insurance and other accessories and services necessary to complete the said project in accordance with the conditions and prices stated in the Proposal and the General Conditions, Supplemental General Conditions and Special Conditions of the Contract, the plans, including all maps, plats, blueprints, and other drawings and printed or written explanatory matters thereof, the specifications and contract documents therefore as prepared by BP Barber, herein entitled the "Engineer", and as enumerated in Paragraph 1 of the Supplemental General Conditions, all of which are made a part hereof and collectively evidence and constitute the Contract.

The Contractor hereby agrees to commence work under the Contract on or before a date to be specified in written Notice to Proceed from the Owner and to fully complete the project within 240 consecutive calendar days thereafter. The Contractor further agrees to pay as liquidated damages the amount of \$1,000.00 for each consecutive calendar day thereafter that the Contractor fails to complete the project, as hereinafter provided in Paragraph 19 of the General Conditions.

The Owner agrees to pay the Contractor in current funds for the performance of the Contract, subject to additions and deductions, as provided in the General Conditions of the Contract, and to make payments on account thereof as provided in Paragraph 25, "Payments to Contractor", of the General Conditions.

2014 OCT 17 AM 10:09
CLERK OF COURT
DORCHESTER COUNTY

CONTRACT
00500-1

-06394

IN WITNESS WHEREOF, the parties hereto have executed this contract in four (4) counterparts, each copy of which shall be deemed an original, in the year and day first above mentioned.

Dorchester County Water & Sewer Department
OWNER

(Seal)

By:

Title

:

Jason Ward
Jason Ward

County Administrator

ATTEST:

Ken G. Chapman
Witness

Witness

R.H. Moore Company, Inc.

CONTRACTOR

(Corporate Seal)

By:

Title

:

R. Henry Moore
R. Henry Moore
President

ATTEST:

R. Henry Moore
Its Secretary

Witness

CONTRACTOR'S ADDRESS:

PO Box 830

Murrells Inlet, SC 29576

CONTRACT
00500-2

06394

EXHIBIT C

CELESTINE

2014 OCT 17 AM 10:09

CLERK OF COURT
DORCHESTER COUNTY

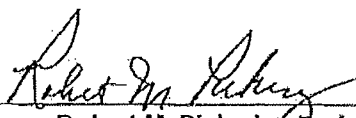
R. H. MOORE COMPANY, INC.
P. O. BOX 830 - 10601 S. C. HIGHWAY 707
MURRELLS INLET, S. C. 29576
PHONE: 843 - 650 - 2155 FAX: 843 - 650 - 0742

PURCHASE ORDER

TO: Knights Precast
Post Office Box 3467
Summerville South carolina 29484

P O. Number	965-2
Date:	20-Jul-11
Job Number:	965
Terms:	30 Days
Ship Via:	Best Way
Date Required	ASAP
Supplier Phone	843-873-3011
Attention:	Todd Phillips
Page 1 of 1	

SHIP TO:		Pump Station 67 Dorchester County		
QUANTITY	UNIT	ITEM DESCRIPTION	UNIT PRICE	TOTAL
18	EA	Air Release Manholes	\$ 704.68	\$ 12,684.24
1	EA	48" Diameter Manholes 8" Precast Inverts 14 - 16'	\$ 1,443.93	\$ 1,443.93
2	EA	48" Diameter Manholes 8" Precast Inverts 16 - 18'	\$ 1,609.27	\$ 3,218.54
2	EA	48" Diameter Manholes 8" Precast Inverts 18 - 20'	\$ 1,718.51	\$ 3,437.02
3	EA	48" Diameter Manhole 12" Precast Inverts 6-8'	\$ 971.38	\$ 2,914.14
1	EA	48" Diameter Manhole 12" Precast Inverts 8-10'	\$ 1,190.80	\$ 1,190.80
1	EA	48" Diameter Manhole 12" Precast Inverts 10-12'	\$ 1,297.60	\$ 1,297.60
2	EA	48" Diameter Manhole 12" Precast Inverts 12-14'	\$ 1,383.62	\$ 2,767.24
1	EA	48" Diameter Manhole 12" Precast Inverts 20-22'	\$ 1,931.33	\$ 1,931.33
1	EA	48" Diameter Manhole 12" Precast Inverts 6-8'	\$ 1,618.54	\$ 1,618.54
1	EA	48" Diameter Manhole 12" Precast Inverts 8-10'	\$ 1,871.12	\$ 1,871.12
2	EA	48" Diameter Manhole 12" Precast Inverts 10-12'	\$ 1,909.27	\$ 3,818.54
1	EA	60" Diameter Manhole 24" Precast Inverts 10-12'	\$ 1,997.39	\$ 1,997.39
1	EA	60" Diameter Manhole 24" Precast Inverts 10-12'	\$ 2,071.40	\$ 2,071.40
1	EA	60" Diameter Manhole 24" Precast Inverts 10-12'	\$ 2,127.40	\$ 2,127.40
1	EA	10' x 20' Wet Well	\$ 47,911.65	\$ 47,911.65
				\$ -
				\$ -
				\$ -
				\$ -
				\$ -
				\$ -
		All Purchase Orders are subject to engineer's		\$ -
		approval of Submittals		\$ -
				\$ -
Sub-Total			\$	92,300.88
7% Sales Tax			\$	6,461.06
Total			\$	98,761.94


Robert M. Pickering Project Manager

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EXHIBIT D

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DOMESTIC RELATIONS

Underground Solutions, Inc.

Order Summary - HDD Pipe

underground
SOLUTIONS™

Date Prepared: 6/16/2011
 Bid Date: 6/14/2011
 Prepared For: RH Moore Co, Inc

Project Reference: PS No. 67 Upgrade & New 20" Force Main
 Proposal No.: PD9-0441
 Project Site: Dorchester County, SC

PRODUCTS AND SERVICES:

Bid Item	Pipe Description	Pipe Size	DR	Type	Color	Qty., ft	Unit Cost, \$/ft	Total Cost, \$
7	20" DR 21 FPVC*	20"	21	DIPS	Green	6,404	\$105.00	\$672,420
Freight to Project Site								Included
Fusion Services - Labor & Equipment (Qualified Fusion Technician & Fusion Machine)								Included
Purchase Price								\$672,420
Lump Sum Deduct if Contingent Order is Signed within 72 hours of Bid Opening								(\$38,424)
Purchase Price with Deduct								\$633,996

SCOPE OF WORK:

Equipment/Services Provided by Underground Solutions, Inc., d/b/a UGSI, Inc. in California ("UGSI" or "Seller"):

- 1 Pipe Supply and Freight to project site.
- 2 Fusion Services for a maximum of 20 10-hour work days. One additional day will be provided for intermediate fusion, if required.
- 3 One mobilization/demobilization event to the site.
- 4 Fusion machine with inserts.

Equipment/Services Provided by Buyer:

- 1 All labor, equipment, and material required to unload and stage pipe and fusion equipment at site (and restage as necessary).
- 2 All labor, equipment, and materials for loading and unloading pipe onto the fusion machine, positioning fused pipe, pipe reconnections, pipe ballasting, pipe handling, pipe debanding (if required), required testing, and pipe installation.
- 3 Any additional labor, equipment, and materials required to fuse based on actual weather conditions (contact UGSI for guidance).
- 4 Pipe rollers required for installation and any intermediate fusion (contact UGSI for guidance).
- 5 All excavation, traffic control, permits, bonds, repairs, etc.
- 6 All utilities at the job site including power and diesel fuel for UGSI's equipment (~15 gal/machine/day).
- 7 All temporary bypass piping.
- 8 Installation hardware and equipment for fittings, valves or additional accessories not identified in UGSI Scope of Work.

PULL-HEAD TERMS:

A pull-head is available for rental from UGSI, subject to prior execution of a Pull-Head Rental Agreement (available on the UGSI website at: <http://www.underground-solutions.com/PDFs/PH-Rental.pdf>). Freight costs will be added to the final pull-head rental invoice following return of the pull-head to UGSI. Refer to the Pull-Head Rental Agreement for specific terms and conditions of rental and purchase option.

	Pre-Rental Value	Initial Rental Fee	Weekly Rental Rate (After 1st Week)	Estimated Freight (each way)
20" Pull-head	\$4,613	\$492	\$79	\$400

PAYMENT TERMS:

95% of purchase price on pipe delivery, net 30 days. Full amount is due and payable no later than 30 days from final completion of fusion services.

SHIPPING TERMS:

F.O.B. Shipping Point with full freight allowed to the job site.

PROPOSAL VALIDITY:

UGSI Purchase Price is valid for up to 10 days from bid opening. We will extend the bid validity to 60 days from bid opening or 10 days from the Notice to Proceed, whichever comes first, if a signed contingent order is received within 72 hours of bid opening.

DELIVERY SCHEDULE:

To be negotiated. UGSI will take reasonable action to meet Buyer's installation schedule. Buyer must provide 10 business days notice to UGSI prior to the start date for fusion services (see Section 4 of Supplemental Terms and Conditions Fusion Services).

ADDITIONAL FUSION:

Additional fusion days will be charged at \$1,250 per day (see Section 3 of Supplemental Terms and Conditions Fusion Services).

REMOBILIZATION TERMS:

Additional machine mobilization events will be charged at \$4,500 each and additional fusion technician mobilizations will be charged at \$1,250 each (see Section 4 of the Supplemental Terms and Conditions Fusion Services).

TAXES:

The Purchase Price does not include any sales or similar taxes, which are the Buyer's responsibility (see Section 3 of Terms and Conditions of Sale).

This Proposal is subject to the Terms and Conditions at www.UndergroundSolutions.com/TS&Cs/Pipe-and-Fusion-Terms-05.18.11.pdf, which form an integral part of this Proposal. Such Terms and Conditions will govern any transaction resulting from this Proposal. Any contract resulting from this Proposal is made subject to prior acceptance by UGSI at its offices in Poway, California. All orders are subject to prior credit approval. Buyer undertakes to provide the following notice to each subsequent purchaser of the Products: The test frequency set forth in Section 5.1.12 of AWWA/ANSI C900-07 and C905-10, respectively, has been modified pursuant to Section 5.1.14 of the respective standard.

This order is contingent solely on the execution of a contract between the project Owner and the below signed Contractor for the above referenced project. If the Contractor does not enter into a contract with the owner, there is no liability. Order value is fixed in the amount noted above. Immediately upon the execution of such contract, this order will automatically end without further action on either party's part become effective on the terms set forth in this proposal. Contractor will promptly notify UGSI of execution of the contract and will confirm it to UGSI in writing. To ensure UGSI can meet contractor's schedule requirements, UGSI requires advance notice of pipe supply (and fusion services if applicable) following the date of this executed contingent order and contractor's Notice to Proceed.

Buyer's signature indicates acceptance of the UGSI Order Summary and Terms and Conditions.

Buyer's Authorized Signature

Print Name & Title

☐ Tax Exempt (must provide Tax Exempt Certificate with order)

Date

Print Company Name

☐ Taxable

☐ State Registered Wholesaler

EXHIBIT E

CERTIFIED
2014 OCT 17 AM 10:10
Cheryl A. Smith
CLERK OF COURT
DORCHESTER COUNTY

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

R. H. Moore Company, Inc.

Plaintiff,

v.

Knight's Precast Inc., Tobias & West, LLC
and Eric W. Tobias, P.E

Defendant.

) IN THE COURT OF COMMON PLEAS
) FIRST JUDICIAL CIRCUIT
) CASE NO.: 2012-CP-12-_____AFFIDAVIT OF THEODORE
PADGETT, PE

2014 OCT 17 AM 10:40
CLERK OF COURT
DORCHESTER COUNTY

PERSONALLY appeared before me, Theodore Padgett, PE, who, after being duly sworn, deposes, and says:

My name is Theodore Padgett, and my address is 4865 Highlander Lane, Hollywood, SC 29449. I have been licensed as a Professional Engineer in the State of South Carolina since 1980. I received my Bachelor of Science in Civil Engineering from the University of South Carolina in 1974, and a Master of Engineering, Structures and Mechanics from the University of South Carolina in 1975.

I am currently a member of the American Society of Civil Engineers (ASCE), Charleston Branch, and was an Officer from 1984 to 1987.

I have been a member of the Technical Council of Forensic Engineering since 1991, where I sat on the Forensic Practice Committee and held the office of Chairman of the Committee from 1991 to 2001.

I am also a member of the Structural Engineers Association of South Carolina and a member of RCI, Inc.

I have been retained by R. H. Moore Company, Inc., a corporation organized and existing under the laws of South Carolina, to render opinions regarding defects in the construction of a concrete wet well structure. This wet well was a portion of an upgrade to Pump Station Number 67 in Dorchester County, South Carolina.

R. H. Moore Company, Inc. as the General Contractor retained the services of Knights' Precast to furnish and install this concrete structure.

Knights' Precast hired the engineering firm of Tobias & West, LLC to provide Structural

Engineering services for the design of the concrete structure. Tobias & West provided engineering calculations and details. The work of Tobias & West was sealed by Eric W. Tobias, PE.

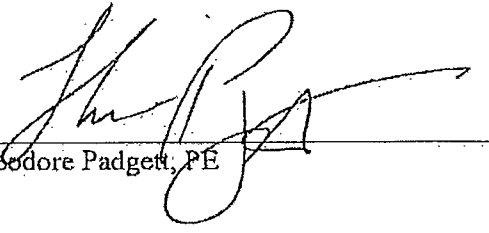
Subsequent to the installation and backfilling of the concrete wet well, large lateral movements and cracks were observed.

I have inspected the wet well and reviewed the work of Tobias. In my opinion Tobias deviated from the standard of care of an engineer and was negligent in the following manner:

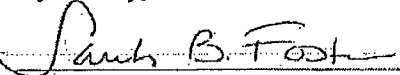
1. In making assumptions that were incorrect and inconsistent with the principles of structural engineering mechanics.
2. In misusing a competent engineering design guide (*Rectangular Concrete Tanks, Fifth Edition* published by the Portland Cement Association) by applying incorrect boundary conditions.
3. In producing a structural design that was significantly flawed.

As a result, the concrete wet well structure has failed and will require significant repairs. My report dated April 21, 2012 is attached.

FURTHER AFFIANT SAYETH NOT.


Theodore Padgett, PE

SWORN TO before me this 30th
day of July, 2012.

 (SEAL)

Notary Public for South Carolina

My Commission Expires: 3/5/14

EXHIBIT F

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DORCHESTER COUNTY

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

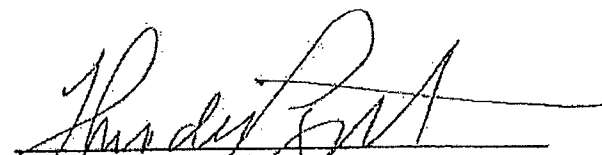
AFFIDAVIT OF THEODORE PADGETT, PE

PERSONALLY appeared before me, THEODORE PADGETT, PE, who having been duly sworn, deposes and states as follows:

1. That I am a structural engineer in the State of South Carolina with my principal place of business in Charleston County, South Carolina.
2. That I have practiced engineering for 36 years and have experience in the design of concrete retaining structures.
3. That I reviewed engineering plans for the construction of a precast concrete retaining structure at Pump Station 67 which is a part of a Civil Engineering Project Titled "Wastewater System Improvements for Dorchester County Water and Sewer Department" located in Dorchester County, SC.
4. Based upon the information that is available to me at this time, I have been informed and believe that BP Barber acted as the Engineer of Record for the project.
5. That in reviewing the engineering plans, I noted violations of industry standards and good engineering practices. Specifically, the plans call for a 12" thick, precast segmented concrete box 10' by 20' in plan and 30' deep.
6. Based on calculations, I noted that a 12" wall thickness is inadequate from the structural engineering design standpoint for a segmental concrete structure of the size and shape shown.

7. That as a result of my review of the retaining structure at Pump station, it is my opinion that BP Barber was negligent by failing to specify a structure of sufficient thickness.

FURTHER AFFIANT SAYETH NOT.


THEODORE PADGETT, PE

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 27th DAY OF MARCH, 2014.


NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 11-26-23

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

R. H. Moore Company, Inc.,

CERTIFIED COPY

2014 OCT 31 PM 1:04

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Civil Action No.: 2012-CP-18-2001

Plaintiff,

Cheryl Anderson
CLERK OF COURT
DORCHESTER COUNTY

vs.

Knight's Precast, Inc., Tobias & West,
LLC, Eric W. Tobias, P.E., Dorchester
County Water and Sewer Department and
Underground Solutions, Inc., and B.P.
Barber and Associates, Inc. n/k/a URS
Corporation, and Utility Services Authority,
LLC**ANSWER AND COUNTERCLAIM OF
UNDERGROUND SOLUTIONS, INC. TO
THE THIRD AMENDED COMPLAINT**

Defendants.

The Defendant, Underground Solutions, Inc., answers the Third Amended Complaint and asserts a counterclaim as follows:

FOR A FIRST DEFENSE

1. It denies each and every allegation not specifically admitted.
2. It neither admits nor denies paragraph 1 and reserves its rights regarding venue for this matter.
3. It admits paragraphs 2 through 6 and 8 and 9 upon information and belief.
4. Regarding paragraph 7, it admits that Underground Solutions is a California corporation and that it supplied materials for use on the project in Dorchester County and craves to the contract documents and denies any allegations inconsistent with the contract documents.
5. Regarding paragraphs 10 through 12, it craves reference to the bid documents and contracts and denies any allegations inconsistent with the bid documents and contracts.

6. Regarding paragraph 13, it craves reference to the contract documents and denies any allegations inconsistent with the contract documents.

7. Regarding paragraph 14, it admits upon information and belief.

8. Regarding paragraphs 15 through 17, it is without sufficient information to form a belief regarding these allegations and neither admits nor denies these allegations. Further, these allegations are irrelevant and unrelated to the materials supplied by Underground Solutions.

9. Regarding paragraph 18, it admits only that it supplied 20" FPVC pipe for the project and denies that the pipe was defective in any way.

10. Regarding paragraph 19, it acknowledges that it was notified of an alleged pipe failure in a 1900 foot section of the project. It admits that the Plaintiff requested Underground Solutions to correct the defective installation; however, Defendant Underground Solutions denies that it was responsible in any way for the alleged defects in the installed pipe. Underground Solutions solely as a settlement offer, offered to assist the Plaintiff in repairing the defective pipe. Additionally, a 300 foot section of pipe installed by the Plaintiff failed a pressure test. At Plaintiff's request, Underground Solutions paid for the removal and replacement of this pipe and determined that the cause of the pipe failure was a bullet hole. Underground Solutions denies that its pipe and its fusing services were defective in any way and were not the cause of the defects in any of the pipes installed by the Plaintiff. It denies all allegations of paragraph 19 that contend Underground Solutions is responsible in any way for the defective installation.

11. Regarding paragraph 20, it is without sufficient information to form a belief and neither admits nor denies these allegations.

12. Regarding paragraph 19 (2nd No. 19), it realleges the above paragraphs as if repeated verbatim.

13. It denies paragraph 20 (2nd No. 20) as it relates to Underground Solutions.

14. Regarding paragraph 21, it realleges the above paragraphs as if repeated verbatim.

15. Paragraphs 22 and 23 do not relate to Underground Solutions and it neither admits nor denies these allegations.

16. Regarding paragraph 24, it realleges the above paragraphs as if repeated verbatim.

17. Regarding paragraph 25, it neither admits nor denies these allegations as they are not related to Underground Solutions.

18. Regarding paragraph 26, Underground Solutions admits that it continues to sell FPVC products.

19. Regarding paragraph 27, Underground Solutions acknowledges that its products are expected to reach the end user or consumer without substantial change. However, it denies that its products are subject to South Carolina's strict liability statute in that these are not inherently dangerous products.

20. Regarding paragraph 28, it neither admits nor denies these allegations as they are not related to Underground Solutions.

21. Regarding paragraph 29, it denies that its products were unreasonably dangerous and denies that any aspect of the product was defective.

22. It denies paragraph 30 as it relates to Underground Solutions.

23. Regarding paragraph 31, it realleges the above paragraphs as if repeated verbatim.

24. It neither admits nor denies paragraph 32 as it is not related to Underground Solutions.

25. Regarding paragraph 33, Underground Solutions admits that it sold products and fusion services to the Plaintiff and craves reference to the contract documents regarding such materials and services.

26. Regarding paragraph 34, this paragraph states legal conclusions and Underground Solutions neither admits nor denies these allegations.

27. Regarding paragraph 35, it denies any allegations relating to alleged defects in the products or services provided by Underground Solutions.

28. It denies paragraph 36 as it relates to Underground Solutions.

29. Regarding paragraph 37, it realleges the above paragraphs as if repeated verbatim.

30. Regarding paragraph 38, it neither admits nor denies these allegations as they are unrelated to Underground Solutions.

31. Regarding paragraph 39, Underground Solutions craves reference to the contract documents regarding its products and services and denies any allegations inconsistent with the documents.

32. Regarding paragraph 40, this allegation is a legal conclusion and Underground Solutions neither admits nor denies these allegations.

33. Regarding paragraph 41, these allegations do not relate to Underground Solutions and it neither admits nor denies them.

34. Regarding paragraph 42, Underground Solutions craves reference to the contract documents for the sale of the products and fusion services and denies any allegations inconsistent with the documents.

35. Regarding paragraphs 43 and 44, Underground Solutions is without information to form a belief regarding these allegations and denies same.

36. It denies paragraph 45 as it relates to Underground Solutions.

37. Regarding paragraph 46, it realleges the above paragraphs as if repeated verbatim.

38. Paragraphs 47 through 60 relate to other Defendants and Underground Solutions neither admits nor denies these allegations.

39. Regarding paragraph 61, it realleges the above paragraphs as if repeated verbatim.

40. Regarding paragraph 62, Underground Solutions craves reference to the contract documents and denies any allegations inconsistent with the documents.

41. It denies paragraphs 63 and 64.

42. Regarding paragraph 65, it realleges the above paragraphs as if repeated verbatim.

43. Paragraphs 66 through 68 relate to other Defendants and Underground Solutions neither admits nor denies these allegations.

FOR A SECOND DEFENSE

44. The Plaintiff's Third Amended Complaint fails to state sufficient facts to constitute a cause of action against Underground Solutions.

FOR A THIRD DEFENSE

45. Underground Solutions asserts the statute of limitations as a complete defense.

FOR A FOURTH DEFENSE

46. Underground Solutions asserts failure to mitigate as a complete defense to all causes of action.

FOR A FIFTH DEFENSE

47. Underground Solutions asserts the economic loss doctrine as a complete defense to the Plaintiff's Third Amended Complaint.

FOR A SIXTH DEFENSE

48. The Plaintiff failed to give adequate notice as required by the contract documents and Underground Solutions pleads lack of notice as a complete defense.

FOR A SEVENTH DEFENSE

49. The contract between Underground Solutions and the Plaintiff provided for limitation of remedies and damages and Underground Solutions asserts the limitation of remedies and damages as a defense to the Plaintiff's Third Amended Complaint.

FOR AN EIGHTH DEFENSE

50. The Plaintiff was negligent in that it failed to adhere to Underground Solutions' specifications and instructions regarding handling and installation of the products and failed to follow industry and construction standards in installing the product. Underground Solutions pleads comparative negligence as a complete defense to the Plaintiff's Third Amended Complaint.

FOR A NINTH DEFENSE

51. The Plaintiff's damages, if any, were caused by the acts of other third parties and Plaintiff's damages were not caused by any acts or omissions of Underground Solutions. Underground Solutions pleads intervening act of others as a complete defense to the Plaintiff's Third Amended Complaint.

FOR A TENTH DEFENSE

52. Underground Solutions pleads waiver, estoppel, and laches as a complete defense to the Plaintiff's Third Amended Complaint.

FOR AN ELEVENTH DEFENSE AND BY WAY OF COUNTERCLAIM

53. Underground Solutions realleges the above paragraphs as if repeated verbatim.

54. Underground Solutions incurred costs in repairing the 300 foot section of pipe that failed due to pipe damage which occurred after the products were received by the Plaintiff. Underground Solutions also incurred costs in investigating and assisting R.H. Moore in investigating the defective installation of the 1900 foot section of pipe on the subject project. Underground Solutions provided pipe and fusion services for the replacement of the 1900 foot section of pipe. None of the pipe failures were caused by Underground Solutions' product or fusion services. Underground Solutions incurred costs due to the Plaintiff's request to investigate and/or repair failures which were the responsibility of R.H. Moore.

55. Based on discussions between parties for Underground Solutions and R.H. Moore, Underground Solutions provided services and R.H. Moore received the benefit of those services with the expectation that R.H. Moore would pay Underground Solutions for those services.

56. R.H. Moore would be unjustly enriched if it were allowed to accept the services without reimbursing Underground Solutions.

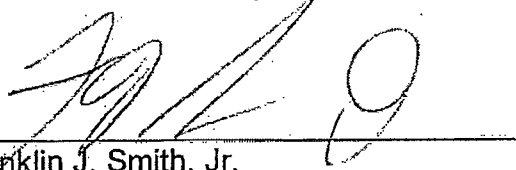
57. Based on theories of quantum meruit and unjust enrichment, Underground Solutions is entitled to recover from the Plaintiff the value of services it provided in investigating and repairing the pipe installation defects that were not the responsibility of Underground Solutions.

FOR A TWELTH DEFENSE AND BY WAY OF COUNTERCLAIM

58. Underground Solutions realleges the above paragraphs as if repeated verbatim.

59. To the extent that Underground Solutions is found liable for damages relating to the replacement of the 1900' section of pipe, which it denies, Underground Solutions asserts all costs it incurred in repairing and replacing the pipe section failures as recoupment against any damages it is found liable for in the repair of the 1900' section of pipe.

WHEREFORE, having fully answered the Plaintiff's Third Amended Complaint and asserted a counterclaim, the Defendant Underground Solutions prays that the Third Amended Complaint be dismissed with costs and that it be granted judgment on its counterclaim and for such other and further relief as the court deems just and proper.



Franklin J. Smith, Jr.
 Richardson Plowden & Robinson, P.A.
 P.O. Drawer 7788
 Columbia, SC 29202
 Phone: (803) 771-4400
 Fax: (803) 779-0016
fsmith@richardsonplowden.com
Attorney for Underground Solutions, Inc.

October 21, 2014
 Columbia, South Carolina

6. Plaintiff denies paragraphs 59.

7. To the extent any response is required from the Plaintiff to the Defendant's WHEREFORE Clause, the allegations made and the relief requested therein is denied.

FOR A FIRST AFFIRMATIVE DEFENSE
(Failure to State a Claim)

8. Plaintiff re-alleges the allegations of the preceding paragraphs as though fully restated herein.

9. Plaintiff alleges that this counterclaim should be dismissed against it pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, for failure to state facts sufficient to constitute a claim upon which relief may be granted.

FOR A SECOND AFFIRMATIVE DEFENSE
(No right to a claim)

10. Plaintiff re-alleges the allegations of the preceding paragraphs as though fully restated herein.

11. Plaintiff alleges there is no right to quantum meruit or unjust enrichment from Plaintiff, and, as such, this cause of action should be dismissed.

FOR A THIRD AFFIRMATIVE DEFENSE
(Unclean Hands)

12. Plaintiff re-alleges the allegations of the preceding paragraphs as though fully restated herein.

13. Plaintiff alleges that any the counterclaims made by the Defendant are equitable in nature and they are barred by the doctrine of unclean hands by the Defendant.

FOR A FOURTH AFFIRMATIVE DEFENSE
(Waiver and Estoppel)

14. Plaintiff re-alleges the allegations of the preceding paragraphs as though fully restated herein.

15. The Counterclaims of the Defendant are barred due and owing to the doctrines of waiver and estoppel.

FOR A FIFTH AFFIRMATIVE DEFENSE
(Prior Breach)

16. Plaintiff re-alleges the allegations of the preceding paragraphs as though fully restated herein.

17. The Counterclaims of the Defendant are denied due and owing to the doctrine of prior breach or failure of a condition precedent.

FOR A SIXTH AFFIRMATIVE DEFENSE
(Sole Negligence)

18. The Counterclaim is barred due and owing to the fact that Defendant's sole negligence, or the sole negligence of another Defendant or individual or entity, or the breach of contract by Defendant caused the injuries alleged by the Defendant.

FOR A SEVENTH AFFIRMATIVE DEFENSE
(Contributory Fault of Defendant)

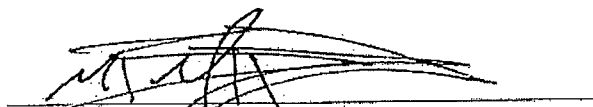
19. Any damages sustained by the Defendant as alleged in the Counterclaims, which are strictly denied, were due to and caused by the actions, inactions, breach, negligence, and/or recklessness of the Defendant or its agents and representatives, and, therefore, Defendant is barred from recovery herein, or in the alternative, any recovery should be reduced proportionately because of their contributory fault.

FOR AN EIGHTH AFFIRMATIVE DEFENSE
(Contributory Fault of Others)

20. The Defendant's claims are barred or limited by the contributing, concurring, intervening, superseding or insulating fault and/or breach of persons or entities other than the Plaintiff. Any fault or breach by the Plaintiff, the existence of which is denied, was passive and secondary in light of the primary and active fault or breach of others.

Therefore, having fully answered all the allegations of Defendant Underground Solutions, Inc.'s counterclaims against Plaintiff, Plaintiff would pray that the counterclaims of Defendant be dismissed with all cost to be borne by Defendant Underground Solutions, Inc., and for such other and further relief as the Court may deem just and proper.

SMITH, BUNDY, BYBEE & BARNETT, P.C.



W. H. Bundy, Jr., Esquire
M. Brent McDonald, Esquire
Post Office Box 1542
Mt. Pleasant, South Carolina 29465-1542
Telephone: (843) 881-1623
Attorneys for Plaintiff R. H. Moore Company, Inc.

Mt. Pleasant, South Carolina
November 12, 2014

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

R. H. Moore Company, Inc.

Plaintiff,

v.

Knight's Precast Inc., Tobias & West, LLC
 Eric W. Tobias, P.E., Dorchester County
 Water and Sewer Department, Underground
 Solutions, Inc., B.P. Barber and Associates,
 Inc. n/k/a URS Corporation, and Utility
 Services Authority, LLC,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIRST JUDICIAL CIRCUIT
) CASE NO.: 2012-CP-18-2001

**PLAINTIFF'S
 NOTICE OF MOTION AND
 MOTION FOR SUMMARY JUDGMENT
 AS TO DEFENDANT UNDERGROUND
 SOLUTIONS, INC.**

TO: ALL COUNSEL OF RECORD

PLEASE TAKE NOTICE that counsel for Plaintiff will move for an order of Summary Judgment pursuant to Rule 56 of the S.C. Rules of Civil Procedure in the above named matter in its favor as to liability and damages against Defendant Underground Solutions, Inc. as alleged in Plaintiffs' Third Amended Complaint. The basis for this motion is as follows: No material issue of fact exists and judgment should be entered as a matter of law in favor of Plaintiff against Defendant Underground Solutions, Inc. on all the causes of action as to liability and damages.

In support of its motion, Plaintiff will rely upon the pleadings, the South Carolina Rules of Civil Procedure, the law of South Carolina, any memoranda filed by the parties, deposition testimony, affidavits, discovery responses and any oral arguments the Court wishes to consider,

PLEASE BE PRESENT TO DEFEND IF SO MINDED.

SMITH, BUNDY, BYBEE & BARNETT, P.C.



W. H. Bundy, Jr., Esquire

M. Brent McDonald, Esquire

Post Office Box 1542

Mt. Pleasant, South Carolina 29465-1542

Telephone: (843) 881-1623

Attorneys for Plaintiff R. H. Moore Company, Inc.

Mt. Pleasant, South Carolina
March 20, 2015

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

R. H. Moore Company, Inc.,

Plaintiff,

vs.

Knight's Precast, Inc., Tobias & West, LLC,
Eric W. Tobias, P.E., Dorchester County Water
and Sewer Department and
Underground Solutions, Inc., and B.P. Barber
and Associates, Inc. n/k/a URS Corporation,

Defendants.

2015 MAR 23 Civil Action No.: 2012-CP-18-2001

CLERK OF COURT
DORCHESTER COUNTY

UNDERGROUND SOLUTIONS, INC.'S
MOTION FOR SUMMARY JUDGMENT

Pursuant to S.C.R.C.P. 56, Defendant Underground Solutions, Inc. moves for summary judgment on all of Plaintiff's claims against Underground Solutions, Inc. The grounds for this motion are that there are no material facts in dispute and the Plaintiff does not have any admissible evidence to create a genuine issue of fact or any causes of action asserted in this matter. Additionally, Plaintiff's remedies against Underground Solutions are limited by contract and Underground Solutions has already provided the limited contractual remedies. Therefore, it is entitled to summary judgment even if Plaintiff were able to prove a defect in Underground Solutions' product.

This motion will be based on pleadings, discovery responses, South Carolina case law, and any other evidence that may be received by the court.

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March 19, 2015
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF DORCHESTER

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

R. H. Moore Company, Inc.,
^ Plaintiff,

Civil Action No.: 2012-CP-18-2001

vs.

Knight's Precast, Inc., Tobias & West, LLC,
Eric W. Tobias, P.E., Dorchester County Water
and Sewer Department and
Underground Solutions, Inc., and B.P. Barber
and Associates, Inc. n/k/a URS Corporation,
Defendants.

**MEMORANDUM IN SUPPORT OF
DEFENDANT UNDERGROUND
SOLUTIONS, INC.'S MOTION FOR
SUMMARY JUDGMENT**

**TO: W. H. BUNDY, JR., ESQ., AND M. BRENT MCDONALD, ESQ., ATTORNEYS FOR
PLAINTIFF**

Defendant Underground Solutions, Inc. ("Underground Solutions"), by and through its undersigned counsel, respectfully submits this Memorandum in Support of its Motion for Summary Judgment (the "Motion"), as to all causes of action alleged by Plaintiff R. H. Moore Company, Inc. ("R. H. Moore") against it.

Based upon this memorandum, the pleadings, applicable statutory and case law, and any other documents filed or to be filed with this Court, Defendant Underground Solutions respectfully requests that this Court grant its Motion, brought pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, because: (1) no material facts are in dispute and Plaintiff R. H. Moore has no evidence to create a genuine issue of fact on any of the causes of action asserted against Defendant Underground Solutions and (2) Plaintiff R. H. Moore's remedies against Defendant Underground Solutions are limited by contract and Underground Solutions has already provided such limited contractual remedies.

FACTS

The instant action arises out of a public works project entitled, “The Waste Water System Improvements of Dorchester County Water and Sewer Department, for the pump station 67 upgrade and a new 20 inch force main” (the “Project”). (Third Am. Compl. (the “Complaint”) ¶ 10.) On this Project, Defendant Dorchester County Water and Sewer Department was the owner (Compl. ¶ 6); Defendant B.P. Barber and Associates, Inc. n/k/a URS Corporation was the project engineer (Compl. ¶ 8); Plaintiff R. H. Moore was the general contractor (see Compl. ¶ 1); Defendant Underground Solutions was the supplier of “20 inch DR 21, [fusible] PVC pipe” (the “FPVC Pipe”) used on a portion of the Project (Compl. ¶ 13); and Defendant Utility Services Authority, LLC was the subcontractor with whom Plaintiff contracted to install the FPVC Pipe (Compl. ¶ 14). The remaining defendants were involved in the design, manufacture, and installation of a wet well (the “Wet Well”) on the Project (see Compl. ¶¶ 3, 4, and 5); Defendant Underground Solutions was not involved in the Wet Well portion of the Project (see Compl. ¶12), and, therefore, Defendant Underground Solutions’ Motion and this memorandum do not address the Wet Well. Instead, Defendant Underground Solutions’ Motion and this memorandum relate solely to the FPVC Pipe—the only issue on which Plaintiff R. H. Moore has based its causes of action against Underground Solutions.

On June 17, 2011, Plaintiff R. H. Moore accepted Defendant Underground Solutions’ bid, dated June 14, 2011 and prepared June 16, 2011 (the “Purchase Order”), for the provision of the FPVC Pipe and the fusion services used on the Project. (See Compl. ¶ 13 and Compl. Ex. D.) This Purchase Order expressly referenced and integrated Underground Solutions’ “Terms and Conditions of Sale” and its “Supplemental Terms and Conditions: Fusion Services” (see Compl. Ex. D), copies of which are attached hereto as Exhibit A and are incorporated herein by reference (collectively, the “Terms and Conditions”). As a part of these Terms and Conditions, Defendant Underground Solutions agreed to

provide Plaintiff R. H. Moore with FPVC Pipe replacement and joint fusion repair as Plaintiff's "sole remedies" for any defective FPVC Pipe or failed fusion joint. (See Ex. A, Terms and Conditions of Sale, § 6; Supplemental Terms and Conditions: Fusion Services, § 7.)

Subsequent to the installation of the FPVC Pipe, a 1900 ft. section of the FPVC Pipe was pressure tested; however, that section failed to pass the pressure test. (See Ex. B, Palermo Dep. 7:6–15, Oct. 14, 2014.) Thereafter, it was determined that the FPVC Pipe had cracked, the cause of which has not been identified and remains unknown. (See *id.*, 12:15–13:2.) Likewise, the initiation point of the crack also remains unknown. (See *id.* 13:8–11.) Moreover, the cause of the failed pressure test has also not been determined. (See *id.* 15:6–16:12.)

Importantly, with respect to the failure of the FPVC Pipe, Plaintiff R. H. Moore's only FPVC Pipe expert, Dr. Eugene Palermo, testified¹ that he did not have an opinion as to the cause of ultimate failure of the pipe. (See *id.* 16:9–12.) Instead, Dr. Palermo could only speculate as to some of the numerous potential causes of the FPVC Pipe failure. (See *id.* 15:6–22; 20:6–16.) Specifically, Dr. Palermo testified:

Question: Are you rendering an opinion as to whether any one of those possibilities did exist, or is more likely to exist, or any other possibility did exist or slightly exist, or are you just not rendering an opinion on that other than there are many—many possible reasons that the pipe failed?

Answer: Okay. That's a long question. I think the answer to that—to all those series of questions would be that my opinion is that the pipeline itself did not pass the leak pressure test. It failed to meet the requirements of the leak pressure test as required by the standards. **Why the pipe failed, I enumerated a variety of reasons. It could be any one of those. I don't have an opinion as to which one of those was the cause, the actual cause of the failure.**

(*Id.* 15:23–16:12 (emphasis added).) Additionally, when asked whether the FPVC Pipe was defective, Dr. Palermo testified:

¹ Dr. Palermo's deposition transcript is attached hereto as Exhibit B and incorporated herein by reference.

Question: Okay. You started an answer by saying that you've got no evidence the pipe itself was improperly manufactured. Is that still your testimony?

Answer: I have seen **no concrete evidence** definitively saying there is a **defect in this pipe or it was improperly manufactured**.

(Id. 18:5–10 (emphasis added).)

Due to the location of the FPVC Pipe, it was not feasible to remove the pipe and attempt to identify the initiation point of the crack, determine the cause of the pipe failure, and repair the FPVC pipe. (See id. 16:13–17:13.) As a result, the parties agreed to install new, replacement pipe (see id. 19:3–11; Compl. ¶ 19), which Defendant Underground Solutions supplied and fused solely as a settlement offer. (Answer & Countercl. of Underground Solutions to Third Am. Compl. (the “Answer”) ¶¶ 10, 54.)

In the instant action, Plaintiff R. H. Moore has brought the following causes of action against Defendant Underground Solutions: (1) Breach of Contract; (2) Common Law & Statutory Strict Liability; (3) Breach of Implied Warranty of Merchantability; (4) Breach of Implied Warranty of Fitness for Particular Purpose; and (5) Breach of Express Warranty—all of which require Plaintiff to prove that the FPVC Pipe was defective. (See Compl.)

LEGAL STANDARD

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Rule 56(c), SCRPC. Summary judgment is, therefore, appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), SCRPC; Wachovia Bank, N.A. v. Coffey, 404 S.C. 421, 425, 746 S.E.2d 35, 37–38 (2013). “The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.”

Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003) (quoting George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

Under Rule 56(c), the movant “has the initial responsibility of demonstrating the absence of a genuine issue of material fact.” Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322–324 (1986)). “With respect to an issue upon which the nonmoving party bears the burden of proof, this initial responsibility ‘may be discharged by showing . . . that there is an absence of evidence to support the nonmoving party’s case.’” Id. (quoting Celotex, 477 U.S. at 325) (internal quotation marks omitted).

More specifically,

the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an *element essential* to the party’s case, and on which that party will bear the burden of proof at trial. In such a situation, *there can be no genuine issue as to any material fact*, since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily *renders all other facts immaterial*.

Id. at 116, 410 S.E.2d at 545–46 (emphasis added) (quoting Celotex, 477 U.S. at 322–23) (internal quotation marks omitted). Additionally, “[t]he moving party need not ‘support its motion with affidavits or other similar materials *negating* the opponent’s claim.’” Id. at 115, 410 S.E.2d at 545 (emphasis in original) (quoting Celotex, 477 U.S. at 323).

Once the movant carries this initial burden, the nonmoving party must “‘do more than simply show that there is some metaphysical doubt as to the material facts’ but ‘must come forward with specific facts showing that there is a *genuine issue for trial*.’” Id. (emphasis in original) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986)). In fact, “Rule 56(e) [of the South Carolina Rules of Civil Procedure] *specifically prohibits the nonmoving party from resting upon the mere allegations or denials of its pleadings*.” Id. (emphasis added); see also Singleton v. Sherer, 377 S.C. 185, 197–98, 659 S.E.2d 196, 203 (Ct. App. 2008) (“Once the party moving for

summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings.”).

LAW/ANALYSIS

- I. Defendant Underground Solutions is entitled to summary judgment, as there is no genuine issue as to any material fact because Plaintiff R. H. Moore has failed to establish the existence of a defect in the FPVC Pipe—an essential element on all of its causes of action against Underground Solutions.**

In South Carolina, “[a] products liability case may be brought under several theories, including negligence, strict liability, and warranty.” Bragg v. Hi-Ranger, Inc., 319 S.C. 531, 538, 462 S.E.2d 321, 325 (Ct. App. 1995). When pursuing a products liability action under any theory, “a plaintiff must establish three things: (1) he was injured by the product; (2) the product was in essentially the same condition at the time of the accident as it was when it left the hands of the defendant[.] and (3) the injury occurred because the product ‘was in a *defective condition* unreasonably dangerous to the user.’” Graves v. CAS Med. Sys., Inc., 401 S.C. 63, 79, 735 S.E.2d 650, 658 (2012) (emphasis added) (quoting Madden v. Cox, 284 S.C. 574, 579, 328 S.E.2d 108, 112 (Ct. App. 1985)).

Pursuant to South Carolina law, “[t]he mere fact a product malfunctions does not demonstrate the manufacturer’s negligence *nor tend to establish the product was defective.*” Sunvillas Homeowners Ass’n v. Square D Co., 301 S.C. 330, 333, 391 S.E.2d 868, 870 (Ct. App. 1990) (emphasis added) (citing Campbell v. Robbins Tire & Rubber Co., 256 S.C. 230, 234, 182 S.E.2d 73, 75 (1971)). Instead, “the plaintiff must offer some evidence beyond the product’s failure itself to prove that it is [defective and] unreasonably dangerous.” Graves, 401 S.C. at 80, 735 S.E.2d at 658–59; see also Sunvillas, 301 S.C. at 333–34, 391 S.E.2d at 870 (finding that expert’s testimony—stating that “[t]here is no evidence that I have that they manufactured [a circuit breaker] wrong except for the fact that it didn’t work as intended”—was insufficient and that directed verdict, granted in favor of the defendant, was proper).

In Byrd Motor Lines, Inc. v. Dunlop Tire & Rubber Corp., 304 S.E.2d 773 (N.C. Ct. App. 1983), the North Carolina Court of Appeals applied South Carolina law to a products liability claim arising in South Carolina and found that summary judgment was properly granted in favor of the defendant. Id. at 779–80. The Court held that because (1) the allegedly defective product could not be produced; (2) there was no expert testimony or other evidence that the product was defective; and (3) there was no examination of the product by one who could make a meaningful evaluation, the plaintiff failed to make a legally sufficient showing of a defective condition or unreasonable danger as required under South Carolina law. Id. at 780.

Here, Plaintiff R. H. Moore has failed to offer any evidence, beyond the FPVC Pipe's failure itself, to prove that the FPVC Pipe was defective and unreasonably dangerous. See Graves, 401 S.C. at 80, 735 S.E.2d at 658–59. Instead, Plaintiff R. H. Moore's sole FPVC Pipe expert, Dr. Palermo, was only able to opine that the FPVC Pipe failed. (See Ex. B, Palermo Dep. 7:6–15, Oct. 14, 2014.) Similar to the expert in Sunvillas, Dr. Palermo was unable to opine as to the cause of the FPVC Pipe failure (see id. 16:9–12), and, most importantly, Dr. Palermo was unable to opine as to whether the FPVC Pipe was even defective.² (Id. 18:5–10.) As such, like in Byrd Motor Lines, Plaintiff R. H. Moore has no evidence to prove that the FPVC Pipe was defective: (1) the allegedly defective FPVC Pipe has not been and cannot be produced; (2) there is no expert testimony or other evidence that the FPVC Pipe was defective; and (3) there has been no examination of the product by one who could make a meaningful and complete evaluation of the FPVC Pipe.

Because the mere fact that the FPVC Pipe failed does not “tend to establish the product was defective,” Sunvillas, 301 S.C. at 333, 391 S.E.2d at 870, and because Plaintiff R. H. Moore has failed

² Defendant Underground Solutions is informed and believes that, in this case, the lack of *expert testimony* indicating that the FPVC Pipe was defective is fatal to all of its claims against Underground Solutions, regardless of any other direct or circumstantial evidence that Plaintiff R. H. Moore could have theoretically offered. See, e.g., Babb v. Lee Co. Landfill SC, LLC, 405 S.C. 129, 153, 747 S.E.2d 468, 481 (2013) (“The general rule in South Carolina is that where a subject is beyond the common knowledge of the jury, expert testimony is required.”); Watson v. Ford Motor Co., 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010) (“[E]xpert testimony is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge.”).

to produce any other evidence (especially expert testimony) tending to show that the FPVC Pipe was defective, Plaintiff R. H. Moore has failed to make a sufficient showing as to an essential element of its entire case against Underground Solutions—a defect.³ See Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 115–16, 410 S.E.2d 537, 545–46 (1991) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322–324 (1986)).

As a result, there is no genuine issue as to any material fact, because “a complete failure of proof concerning [a defect in the FPVC Pipe] necessarily renders all other facts immaterial.” Id. at 116, 410 S.E.2d at 545–46 (quoting Celotex, 477 U.S. at 322–23). Therefore, Defendant Underground Solutions is entitled to summary judgment, as a matter of law, as Plaintiff R. H. Moore “cannot simply rest on mere allegations . . . contained in [its Complaint].” Singleton v. Sherer, 377 S.C. 185, 197–98, 659 S.E.2d 196, 203 (Ct. App. 2008).

II. Moreover, even assuming, *arguendo*, that the FPVC Pipe was defective, Defendant Underground Solutions is entitled to judgment as a matter of law because Plaintiff R. H. Moore’s remedies against Underground Solutions were limited by contract and Underground Solutions has already provided such limited contractual remedies.

In South Carolina, a sole or limited remedy set forth in a contract will be enforced so long as the limitation is reasonable under the circumstances. See, e.g., Bannon v. Knauss, 282 S.C. 589, 592, 320 S.E.2d 470, 472 (Ct. App. 1984) (“If such a limitation is reasonable in the circumstances, the courts will enforce it.”); see also S.C. Code Ann. § 36-2-719 (contract may limit remedies to replacement of goods).⁴

³ In addition to being an essential element of the various product liability theories that Plaintiff R. H. Moore has alleged, a “defect” is also an essential element of its breach of contract action against Defendant Underground Solutions. Based upon its allegations included in the Complaint, Plaintiff R. H. Moore can only satisfy the “breach” element of the action by showing that the FPVC Pipe was defective.

⁴ Section 15 of the Terms and Conditions, attached hereto as Exhibit A, states that the “Agreement will be governed by the laws of the State of Delaware.” However, like South Carolina, Delaware enforces sole or limited contractual remedies. See Smith v. Berwin Builders, Inc., 287 A.2d 693, 695 (Del. Super. Ct. 1972) (“Parties to a contract may assent to an exclusive remedy which shall be binding upon them in the event of breach of contract.”); see also Del. Code Ann. tit. 6, § 2-719 (contract may limit remedies to replacement of goods). As such, a choice-of-law analysis is unnecessary for purposes of Defendant Underground Solutions’ Motion and this memorandum.

Here, the contract between Plaintiff R. H. Moore and Defendant Underground Solutions expressly provides that, as R. H. Moore's *sole remedy* and after Underground Solutions' verification, Underground Solutions will replace any defective FPVC Pipe and will repair any failed fusion joint. (See Ex. A, Terms and Conditions of Sale, § 6; Supplemental Terms and Conditions: Fusion Services, § 7 (emphasis added).)

After the FPVC Pipe failed, the parties agreed to install new, replacement pipe (see Ex. B, Palermo Dep. 19:3–11, Oct. 14, 2014; Compl. ¶ 19), which Defendant Underground Solutions supplied and fused solely as a settlement offer. (See Answer ¶¶ 10, 54.) Due to the location of the FPVC Pipe, it was not feasible to remove the pipe, determine the cause of the pipe failure, and/or repair the FPVC pipe. (See Ex. B, Palermo Dep. 16:13–17:13.)

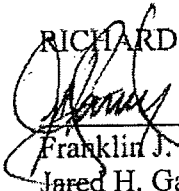
Because Defendant Underground Solutions has supplied and fused replacement pipe for Plaintiff R. H. Moore, Defendant Underground Solutions is entitled to judgement as a matter of law, as it has already provided the exclusive contractual remedy under its contract with Plaintiff R. H. Moore.

CONCLUSION

For the foregoing reasons, Defendant Underground Solutions respectfully requests that the Court grant its Motion for Summary Judgment, as to all causes of action alleged by Plaintiff R. H. Moore against Underground Solutions.

Respectfully submitted,

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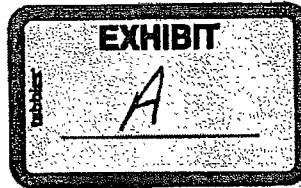
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April 15, 2015
Columbia, South Carolina



TERMS AND CONDITIONS OF SALE

1. Applicable Terms. These terms and conditions govern the purchase and sale of the products (collectively, "Products") referred to in the Order Summary included in Seller's proposal (the "Order Summary"). All terms and conditions contained in any other oral or written communication, including Buyer's request for proposal(s) or purchase order, which are different from or in addition to the terms and conditions herein are hereby rejected and will not be binding on Seller, whether or not they would materially alter this document, and Seller hereby objects thereto. All prior proposals, negotiations and representations, if any, are merged herein. These terms and conditions, together with the Order Summary, comprise the complete and exclusive statement of the agreement between the parties (the "Agreement") with respect to the sale of the Products and supersede any terms contained in Buyer's documents (including any technical specifications) unless any such Buyer document is separately signed by an authorized officer of Seller. If Seller is providing fusion services to Buyer, such services will be provided pursuant to Seller's Supplemental Terms and Conditions Fusion Services referred to in Section 12 below, which will constitute a part of this Agreement. This Agreement does not supersede or modify the terms of any license agreement between Seller and Buyer.
 2. Payment. Buyer agrees to pay for the Products according to the payment terms set forth in the Order Summary. The portion of the purchase price not invoiced upon pipe delivery will be invoiced ratably to Buyer monthly in arrears as fusion services are performed. Invoices are due and payable 30 days from the date of the invoice. In the event Buyer fails to make any payment to Seller when due, Buyer's entire account(s) with Seller will become immediately due and payable without notice or demand. Buyer will be charged 1½% interest per month, compounded monthly, on all amounts not received by the due date. Buyer hereby grants Seller a purchase money security interest in the Products until such time as Seller is fully paid. Buyer will assist Seller in taking action to perfect and protect Seller's security interest.
 3. Taxes. The amount of any sales, excise or other taxes, duties or governmental charges (collectively, "Taxes"), if any, applicable to the sale of the Products will be added to the purchase price and will be paid by Buyer unless Buyer provides Seller with an exemption certificate acceptable to the Taxing authorities. Any Taxes which Seller may be required to pay or collect under any existing or future law upon or with respect to the sale, purchase, delivery, storage, processing, use or consumption of any of the Products will be for the account of the Buyer, who will promptly pay the amount thereof to Seller upon demand.
 4. Delivery. All delivery dates are estimated and are dependent in part upon prompt receipt of all necessary information from Buyer. Seller will make a good faith effort to complete delivery of the Products on the date and to the location specified in the Order Summary, but Seller assumes no responsibility or liability and will accept no backcharge for loss or damage due to delay or inability to deliver, whether or not such loss or damage was made known to Seller. Seller reserves the right to ship Products in advance of the scheduled delivery date unless Buyer specifically requests in writing that shipments not be made prior to the scheduled date. Unless the Order Summary provides otherwise, delivery terms are F.O.B. shipping point. The cost of any special packing or special handling caused by Buyer's requirements or requests will be added to the purchase price. If Buyer causes or requests a shipment delay, or if Seller ships or delivers the Products erroneously as a result of inaccurate, incomplete or misleading information supplied by Buyer or its agents or representatives, storage and all other additional costs and risks will be borne solely by Buyer. Any claims for Products damaged or lost in transit ("Transit Losses") must be made by Buyer to the carrier and reported to Seller within one business day following delivery to Buyer.
 5. Returns. Upon Seller's prior written approval, which may be withheld in Seller's sole discretion, Buyer may return Products purchased under this Agreement. Any authorized return will be subject to payment of a restocking charge and will be allowed only if the subject Product: (i) is in new condition, suitable for resale, and (ii) has not been used, installed, modified, altered or damaged. The restocking charge for authorized returns will be no less than (x) 25% of the purchase price, net of any freight charges included in the purchase price, plus (y) 100% of freight costs incurred by Seller. Buyer is responsible for the payment or reimbursement of return freight charges. Returns will be shipped F.O.B. Seller's location. Seller may, but will not be obligated to, treat any cancellation of an accepted order as an authorized return.
 6. Warranty. Seller warrants for a period of one year from the date of shipment that the Products are free from defects in material and workmanship. This warranty applies only when the Products are handled, stored, fused, and installed in accordance with Seller's written guidelines. This warranty does not cover, and Seller will not be liable for, any defect or failure caused by faulty installation, unusual pressure surges or pulsation, water hammer, temperature shocking, misapplication, misalignment, abrasion, vibration, incompatible lubricants, solvents, or sealants, U.V. degradation, accident or tampering. This warranty is conditioned upon Seller's verification of the claimed defect. If the claimed defect is verified, then, as Buyer's sole remedy for the defect, Seller will replace the defective Product free of charge F.O.B. jobsite. Seller is not responsible for any costs incurred in connection with the removal or reinstallation of Products. This warranty is conditioned on Buyer giving Seller written notice of any claimed warranty defect within a reasonable time after the discovery of such defect and, in any event, within 14 months after the date of shipment.
- THE WARRANTY SET FORTH IN THIS SECTION IS SELLER'S SOLE AND EXCLUSIVE WARRANTY AND IS SUBJECT TO SECTION 8 BELOW. SELLER MAKES NO OTHER WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR PURPOSE.
7. Force Majeure. Seller will have no liability for any breach caused by extreme weather or other act of God, strike or other labor shortage or disturbance, fire, accident, war or civil disturbance, delay of carriers, failure of normal sources of supply, act of government, or any other cause beyond Seller's reasonable control.

8. LIMITATION OF LIABILITY. NOTWITHSTANDING ANYTHING ELSE TO THE CONTRARY, SELLER WILL NOT BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, SPECIAL, PUNITIVE OR OTHER INDIRECT DAMAGES, AND SELLER'S TOTAL LIABILITY ARISING AT ANY TIME FROM THE SALE OR USE OF THE PRODUCTS WILL NOT EXCEED THE PURCHASE PRICE PAID FOR THE PRODUCTS AND RELATED FUSION SERVICES, IF ANY. THESE LIMITATIONS APPLY WHETHER THE LIABILITY IS BASED ON CONTRACT, TORT, STRICT LIABILITY OR ANY OTHER THEORY. THE REMEDIES SET FORTH IN THIS AGREEMENT ARE INTENDED TO CONSTITUTE A COMPLETE ALLOCATION OF THE RISKS BETWEEN THE PARTIES, AND BUYER ACKNOWLEDGES THAT IT IS KNOWINGLY LIMITING THE REMEDIES THAT MIGHT OTHERWISE BE AVAILABLE TO BUYER. BECAUSE THIS AGREEMENT AND THE PRICE PAID REFLECT SUCH ALLOCATION, THE REMEDIES PROVIDED TO BUYER HEREUNDER WILL NOT HAVE FAILED OF THEIR ESSENTIAL PURPOSE EVEN IF THEY OPERATE TO BAR RECOVERY FOR CERTAIN DAMAGES THAT BUYER MAY INCUR.

9. Inspection and Acceptance. Buyer will have seven days from the date Buyer receives any Products to inspect such Products for defects and nonconformance which are not due to Transit Losses, and to notify Seller, in writing, of any defects, nonconformance or rejection of such Products. After such seven-day period, Buyer will be deemed to have irrevocably accepted the Products, if not previously accepted. After such acceptance, Buyer will have no right to reject the Products for any reason or to revoke acceptance.

10. Set-off and Backcharges. Buyer will not be entitled to set-off any amounts due to Buyer against any amount due to Seller from Buyer. Seller will not be responsible for any backcharges unless approved in writing in advance by an authorized representative of Seller.

11. Remedies of Seller. Any of the following will constitute an event of default which will enable Seller, at its option and without liability to Buyer, to cancel any unexecuted portion of this order and to exercise any other right or remedy expressed herein or otherwise available at law or in equity: (i) the failure of Buyer to make any payment required hereunder when due ("Payment Default") or to perform any other term or condition contained herein; (ii) the insolvency of Buyer or its failure to pay its debts as they mature, an assignment by Buyer for the benefit of its creditors, the appointment of a receiver for Buyer or for the materials covered by this order, or the filing of any petition to adjudicate Buyer bankrupt; (iii) a failure by Buyer to provide adequate assurance of performance within ten days after a justified demand by Seller; or (iv) if Seller, in good faith, believes that Buyer's prospect of performance under this Agreement is impaired. Seller's obligations under Section 6 hereof and under Section 7 of the Supplemental Terms and Conditions Fusion Services, if applicable, will be suspended during the pendency of any Payment Default. No such suspension will extend Seller's obligations under such sections beyond the period provided therein. All rights and remedies of Seller herein are in addition to, and will not exclude, any rights or remedies that Seller may have at law or in equity. Seller's election of any remedy or remedies in the event of a default by Buyer will not preclude Seller from exercising any other remedy or remedies available to Seller for the same or any other default. In the event it becomes necessary to incur any expense for collection of any overdue account, Seller's collection charges, including attorneys' fees and expenses, will be added to the balance due and Buyer will pay all such charges together with interest thereon from the date incurred in accordance with Section 2.

12. Fusion Services. If Seller is providing fusion services to Buyer, such services will be provided pursuant to Seller's Supplemental Terms and Conditions Fusion Services available at <http://www.undergroundssolutions.com/Ts&Cs/Pipe-and-Fusion-Terms-05.18.11.pdf>. Seller is not responsible for any defect or failure in fused joints that are fused by any person other than Seller's employees.

13. Patented Technology. Buyer acknowledges that any fusible polyvinyl chloride pipe included in the Products can be fused only by Seller or by a licensee in good standing of Seller's fusion technology covered by patents issued and pending (U.S. Pat. No. 6,982,051 and U.S. Pat. App. No. 11/244,123). Buyer warrants that: (i) if it is the end-user of the Products, it will not fuse the Products nor have the Products fused except by Seller or by a licensee in good standing of Seller's patented fusion technology; and (ii) if it resells the Products, it will (x) inform the purchaser of such Products of the licensing requirements described above; and (y) provide Seller upon request with the name, address, and telephone number of any purchaser purchasing the Products from Buyer, the Products purchased, and the quantity purchased. Upon request, Seller will confirm to Buyer or Buyer's purchaser whether the fusion provider to be utilized by Buyer or Buyer's purchaser is a licensee in good standing of Seller's patented fusion technology.

14. Equal Employment Opportunity. To the extent applicable to Seller's activities under this Agreement, Seller shall comply with the following laws and regulations: Executive Order 11246 (and its implementing regulations at 41 C.F.R. part 60); the Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended (and its implementing regulations at 41 C.F.R. 60-250); and Section 503 of the Rehabilitation Act of 1973, as amended (and its implementing regulations at 41 C.F.R. 60-741); and the equal employment opportunity clauses within each of the above regulations, as applicable, are included by reference in this Agreement.

15. Miscellaneous. No part of this Agreement may be changed or cancelled except by a written document signed by Seller and Buyer. As used in this Agreement, "including" and its variants mean "including without limitation" and its variants. No course of dealing or performance, usage of trade or failure to enforce any term will be used to modify the Agreement. If any of these terms is unenforceable, such term will be limited only to the extent necessary to make it enforceable, and all other terms will remain in full force and effect. Buyer may not assign this Agreement without Seller's prior written consent. This Agreement will be governed by the laws of the State of Delaware without regard to its conflict of laws provisions.

SUPPLEMENTAL TERMS AND CONDITIONS
FUSION SERVICES

1. **Applicable Terms.** These Supplemental Terms and Conditions Fusion Services (the "Supplemental Terms") apply to pipe fusion services provided by Seller (the "Services") to Buyer, as referred to in the Order Summary. These Supplemental Terms supplement and amend Seller's Terms and Conditions of Sale (the "Standard Terms"), and are to be read, interpreted, and enforced in concert therewith as if these Supplemental Terms were set forth in full therein. All references to "Products" in the Standard Terms will be interpreted to include the Services, as appropriate; provided, however, that the warranty set forth in Section 6 of the Standard Terms will be applicable only to the Products, and the warranty set forth in Section 7 of these Supplemental Terms will be applicable only to the Services. Capitalized terms used in these Supplemental Terms and not otherwise defined herein will have the meaning assigned to them in the Standard Terms.

2. **Payment and Labor Rates.** Buyer agrees to pay for the Services according to the payment terms set forth in the Order Summary and the Standard Terms. Unless expressly otherwise stated in the Order Summary, the purchase price set forth in the Order Summary is based on Seller's wage rates as currently in effect. If Seller is required to pay prevailing wages to its employees providing the Services, any additional payroll expense incurred by Seller will be added to the purchase price set forth in the Order Summary.

3. **Schedule.** The schedule for performance of the Services will be mutually agreed upon with the objective of coordinating such schedule, to the extent practicable, with Buyer's installation schedule; provided that Services can not be commenced on fewer than ten business days' advance notice unless otherwise stated in the Order Summary. Unless otherwise stated in the Order Summary, the purchase price set forth therein is based upon the Seller being on-site and prepared to provide fusion services for the maximum number of consecutive 10-hour working days as set forth in the Order Summary. If the Seller is required to be on-site in excess of the specified maximum number of days for any reason other than Seller's breach of this Agreement, Buyer will pay the Seller an additional amount as specified in the Order Summary for each additional day, or portion thereof, that Seller is required to be on-site.

4. **Mobilization and Remobilization.** Unless otherwise stated in the Order Summary, the purchase price set forth in the Order Summary is based on one mobilization and demobilization event to and from the jobsite. Each additional mobilization event undertaken for any reason other than Seller's breach of this Agreement will be charged to Buyer at the rate set forth in the Order Summary. If Seller is, or is reasonably expected to be, delayed in the performance of the Services by events outside the control of Seller for a period in excess of two consecutive working days following site mobilization, Seller may withdraw its employees from the jobsite. In such event, Seller reserves the right to also remove its equipment from the jobsite. Unless otherwise stated in the Order Summary, Seller must be provided a minimum of ten business days' notice in advance of initial mobilization and each subsequent mobilization. Seller's demobilization will not excuse any obligation of Buyer under this Agreement.

5. **Seller's Responsibilities.** Seller will perform the Services in accordance with the Order Summary. Seller will purchase and maintain liability insurance to protect it from claims under workers' compensation acts and other employee benefit acts, claims for damage because of bodily injury, including death, and from claims for damages to property, other than to the work itself, which may arise out of or result from Seller's performance of the Services. Seller will provide a certificate of insurance to Buyer upon request. Seller will cause its employees to abide by the safety precautions established by Buyer in connection with the work and communicated to Seller by Buyer.

6. **Buyer's Responsibilities.** Buyer will be responsible for all safety precautions in connection with the performance of the work including providing traffic control and required safety barricades. Buyer will be responsible for acquiring and providing access to the jobsite and all other areas reasonably required for the proper performance of the Services, including all requisite rights-of-way, storage, and staging areas. Buyer will prepare the jobsite as required to enable Seller to properly perform the Services. Buyer will acquire and pay for all permits, approvals and/or licenses from all local, state or national government authorities or public service undertakings where the work site is located, including those required for the performance by both Seller and Buyer of their respective obligations under the Order Summary. Buyer will be responsible for the timely procurement of all equipment, supplies and work identified as Buyer's responsibility in the Order Summary. All costs and expenses involved in the performance of the obligations under this Section 6 will be the responsibility of Buyer.

7. **Warranty for Services.** Seller warrants that the Services will be performed by properly trained and qualified fusion technicians, using due care and diligence, and each fused joint will be free of defects in workmanship. Such warranty will continue for a period of one year from the date of the Services. (This warranty applies only to the Services and is in addition to, and not in lieu of, the Product warranty contained in the Standard Terms, which applies only to the Products.) This warranty is conditioned upon Seller's verification of the claimed breach. At Seller's request, Buyer will remove and return the affected joint to Seller for such verification. Buyer's sole remedy under this warranty is as set forth below.

Seller will repair at its own expense any fusion joint that fails as a result of a breach of this warranty upon receipt of written notice from Buyer given to Seller within a reasonable time after the discovery of such failure but in no event later than 14 months from the date of the Services. Alternatively, with Seller's prior approval, Buyer or Buyer's customer may elect to repair the subject joint itself within a reasonable time after the discovery of such failure but in no event later than 14 months from the date of the Services. Provided that Seller verifies the breach and subject to the limitation on Seller's

liability set forth below, Seller will pay or reimburse to Buyer or Buyer's customer (subject to presentation of supporting documentation) expenses reasonably incurred to excavate, remove and repair the subject joint and to rehabilitate the surface to its condition existing immediately prior to such excavation: (i) costs for materials (including freight to ship replacement Products to the jobsite, if required); (ii) costs for services and equipment supplied by third party vendors; (iii) ordinary straight-time wages (exclusive of benefits and employer-paid payroll taxes) payable to employees of Buyer or its customer for the period of time such employees are directly engaged in such excavation, removal, repair, or rehabilitation; and (iv) costs incurred to return the affected joint to Seller. UNLESS OTHERWISE SPECIFIED IN THE ORDER SUMMARY, IN CASES WHERE SELLER PERMITS BUYER OR BUYER'S CUSTOMER TO EFFECT A REPAIR, SELLER'S MAXIMUM OUT-OF-POCKET OBLIGATION IN RESPECT OF ANY SINGLE DEFECTIVE JOINT WILL NOT EXCEED U.S. \$2,500. All claims for reimbursement must be submitted to Seller in writing in reasonable detail within 30 days following completion of repair of any defective joint. Under no circumstances will Seller be responsible to pay for any other costs in connection with such breach, including, depreciation or rental charges for the owned equipment of Buyer or its customer used in connection with the excavation, repair or replacement of the affected joint or the rehabilitation of the surface following such repair; administrative, employee benefits, or any other overhead expenses of Buyer or Buyer's customer; repair or damage arising from use of the subject Product or the failure of any joint; or inefficiency, loss of use, or delay or disruption costs.

THE WARRANTY SET FORTH IN THIS SECTION IS SELLER'S SOLE AND EXCLUSIVE WARRANTY FOR THE SERVICES AND IS SUBJECT TO THE LIMITATIONS SET FORTH IN SELLER'S STANDARD TERMS. SELLER MAKES NO OTHER WARRANTIES OF ANY KIND WITH RESPECT TO THE SERVICES, EXPRESS OR IMPLIED, INCLUDING, ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR PURPOSE.

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STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF DORCHESTER 2012CP1802001

R. H. MOORE COMPANY, INC.) TRANSCRIPT OF RECORD

VS.)

KNIGHT'S PRECAST, INC., ET) APRIL 17, 2015
AL.) ST. GEORGE, SC

B E F O R E:

HONORABLE DIANE S. GOODSTEIN

A P P E A R A N C E S:

WALTER HENRY BUNDY, JR., ESQUIRE
MICHAEL BRENT MCDONALD, ESQUIRE
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Services Authority, LLC

DEREK MICHAEL NEWBERRY, ESQUIRE
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and Associates, Inc., URS Corporation

JARED H. GARRAUX, ESQUIRE
Attorney for Defendant Underground
Solutions, Inc.

JOHN G. FRAMPTON, ESQUIRE
Attorney for Defendant Dorchester
County Water and Sewer Department

ROBIN GRAHAM, ESQUIRE
Attorney for Defendants Eric W.
Tobias and Tobias & West, LLC

Ruth L. Mott, RPR, CRR
Official Court Reporter

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I N D E X

CERTIFICATE OF REPORTER 72

E X H I B I T S

NO.	DESCRIPTION	ID	EVD
C-1	DEPOSITION TRANSCRIPTS	71	

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1 THE COURT: Next is R. H. Moore Company versus Knight's
2 Precast, Inc., motion for summary judgment as to Utility
3 Services Authority and -- and the rest of them, motion to
4 amend answer, motion for summary judgment for Underground
5 Solutions, Inc., motion for summary judgment for URS
6 Corporation and Utility Services Authority, LLC. All right.
7 Got it.

8 Now, let me just ask this question, unless you all have
9 an agreement as to the order that these matters will be
10 heard, I'll hear them in the order in which they were filed.

11 MR. BUNDY: Your Honor, I would prefer to hear them --
12 well, actually, my preference would be I filed mine first,
13 but I have another one at the end, so it may be easier for me
14 to do all mine at one time, but it's up to you. It doesn't
15 really matter to me.

16 THE COURT: Doesn't matter to me either.

17 MR. WALKER: Your Honor, I think it's going to be a lot
18 easier for the Court to just let everything be lumped
19 together because it's going to be the same issues over and
20 over if you try to hear them separately, and they may have a
21 different view but --

22 THE COURT: In other words, does everybody have the same
23 basic motion for summary judgment?

24 MR. NEWBERRY: At least from the defendants'
25 perspectives, Your Honor. I'm Derek Newberry. I represent

1 URS. The only thing I would say is we have a motion to amend
2 and a motion for summary judgment. The motion to amend
3 really is unnecessary if the Court grants summary judgment,
4 so I would say that would be at the end.

5 THE COURT: Okay.

6 MR. BUNDY: I think everybody consents to the motion to
7 amend, so I don't think that's a problem.

8 THE COURT: So that would be a winner if it's needed.

9 MR. WALKER: That will be argued if it's needed.

10 THE COURT: That will be argued if it's needed.

11 MR. WALKER: I'll be the model of brevity.

12 MR. BUNDY: Your Honor, if I may, I think if I could
13 explain, since I'm the plaintiff, I feel like maybe if I
14 could give you an overview of my entire case, try to explain
15 how these defendants are interwoven within this case.

16 THE COURT: Okay.

17 MR. BUNDY: And then make my motion thereafter. It may
18 be one way to do it. I'm not sure there's any way quicker
19 than the other, but one's as good as the other, I think.

20 THE COURT: All right. Go for it.

21 MR. BUNDY: Your Honor, for the record, my name's Bill
22 Bundy. I represent R. H. Moore Company. R. H. Moore is a
23 utility contractor. They install commercial water lines and
24 sewer lines. They entered into a contract with Dorchester
25 County to perform services, building wet wells, installing

1 sewer lines, etc., etc.

2 The part of this dispute that is before you today
3 relates to a -- what they call a drill, and this particular
4 drill went under the Ashley River. I'm sure you've seen on
5 the side of the highway, as you ride down the road, these
6 machines, and they're pushing a plastic pipe through the
7 ground, and it comes up on the other side of the road or down
8 the sidewalk. In this case you're not talking about one of
9 those little machines. You're talking about a pipe this big
10 around (indicating) that went 1900 feet underneath the Ashley
11 River. Obviously you can't stop the flow of the Ashley
12 River. You've got to go underneath it.

13 In the industry there are two basic pipes that are used.
14 One is called fusible PVC, FPVC, and what makes fusible PVC
15 different from other pipe you and I might have been familiar
16 with with the bell on the end, stick one piece of pipe, etc.,
17 they can take this pipe -- and by they I mean the defendant,
18 which in this case is Underground Solutions out of
19 California -- they take this pipe, and it looks the same at
20 both ends, and they bring a machine in, and they meld it at
21 that point, so it's one continuous piece of pipe. Obviously
22 it's not delivered that way. It's delivered in 20 foot --

23 THE COURT: Sections.

24 MR. BUNDY: -- 20 foot lengths. And what they do is
25 deliver it on the job. They lay it out on the ground. They

1 come by with their machine, and they literally make a 1900,
2 2000 foot long pipe. They then have a machine that bores
3 under the river, puts a line in, and then they pull it back
4 through, for lack -- I mean, that's not exactly how it's
5 done, but it's close enough. The competitor or a
6 manufacturing competitor of this kind of pipe is an HDPE
7 pipe. It's a different kind of pipe, and it's a different
8 process, and that's all that really is relevant to this
9 discussion. Different pipe, different process.

10 There is at least the potential with this fusible PVC
11 pipe, if it cracks, if a crack starts in the PVC pipe,
12 fusible PVC pipe, unlike a bell pipe, one with a bell on one
13 end and a joint on the other, that crack can propagate all
14 the way from one end of it to the other, which is the down
15 side of this pipe, okay, because with other pipe it only
16 cracks to the next joint. This may go the whole way. That's
17 the -- and that really -- we thought it was an issue in this
18 case. We thought rapid crack propagation, which is what it's
19 referred to, was going to be an issue in this case; but, in
20 fact, as it turns out after two years of discovery, no one
21 can testify to a reasonable degree of certainty why this pipe
22 failed.

23 We know it failed because what happens is, when you put
24 it in under the specifications -- and this is a performance
25 specification, in other words, like if you buy a Ferrari, go

1 down there, I want this car to go 140 miles an hour, okay,
2 that's what I'm paying for. This particular pipe had to meet
3 a certain pressure before it would be accepted. The pipe in
4 this instance was supplied by Underground Solutions. Now,
5 the way the process worked is that the original -- the
6 engineer on this project who designed the project, selected
7 the materials, drafted the specifications, drew up the
8 contract documents and handled the bid process was BP Barber.
9 They have since been purchased at least twice, and now we
10 have the current successor entity to BP Barber which is
11 responsible for the liabilities of BP Barber.. There's no
12 dispute about that.

13 THE COURT: And that is?

14 MR. NEWBERRY: AECOM is actually the name now.

15 THE COURT: Say again.

16 MR. NEWBERRY: AECOM, but the named defendant is still
17 URS Corporation at this point.

18 MR. BUNDY: Hopefully it won't change before I leave the
19 courtroom today, but that's the one we'll be using. At any
20 rate, the way the process works, Your Honor -- and I'm sure
21 you're familiar with this, but for the record I think we
22 probably need to go into it a little bit -- Dorchester County
23 goes, they hire BP Barber, BP Barber goes out, and they
24 create a set of plans and specifications which says that we
25 want to use this fusible PVC pipe as our base -- as your base

1 bid pipe. We want you to assume you're going to use fusible
2 PVC.

3 Now, based on the deposition yesterday we took -- we
4 took the 30(b)(6) deposition yesterday of Underground
5 Solutions, and we learned -- and I don't have the transcript
6 because we took it yesterday. I tried to take it a month
7 ago, but it didn't work out; but I think we've all agreed
8 before coming in here today that to the extent we need to
9 supplement this record with actual transcript of that
10 deposition, nobody's going to object to that. I believe that
11 to be the agreement between counsel.

12 Yesterday we learned that the engineer, which I'll refer
13 to them as the engineer, contacted and got in touch with
14 Underground Solutions and asked them to assist them in trying
15 to determine the appropriate pipe to use, the specifications
16 that should be attached to the contract documents. And, of
17 course, as Your Honor's fully aware, when these engineers go
18 out and they want to put in a certain kind of air
19 conditioner, they don't redraft specifications and the
20 manufacturers recommendations. They rely on those people,
21 and they make it part of the specifications.

22 And of course, you know, Underground Solutions, being
23 any good material seller, said of course, our product's the
24 greatest thing since sliced bread, and it will do the job,
25 and it will meet the 150-PSI pressure so you can run your

1 water or sewer through that pipe underneath this river. And
2 they were aware of the job requirements. They were aware it
3 was going under the river. They were aware it was in
4 Dorchester County. They were aware that these specifications
5 were going to be put in these contracts. Now, Dorchester
6 County also saw fit to put an alternate in and asked the
7 contractors to bid this other type of pipe, HDPE pipe; but
8 the base bid, the one that they were going to use, or at
9 least for purposes of the bid, was the Underground Solutions
10 fusible PVC pipe. The specifications are clear what the pipe
11 is to -- how the pipe is to perform.

12 Now, the -- and we can get into the details of what --
13 the fine details. Let's look at a rough, 30,000 flyover
14 picture first. My client, Moore, was awarded the contract.
15 They sent a purchase order to the pipe supplier. They're the
16 pipe supplier. They're the vendor of the pipe, but as it
17 turns out yesterday, they don't even make it. They buy it
18 from some other factory, but that's irrelevant. They don't
19 make it, but they're the supplier. Under the UCC they are a
20 merchant selling those goods, okay. And the day that my
21 client sent the purchase order for the pipe, fusible PVC
22 pipe, to California, I think in the amount of 6 or 700,000
23 bucks, whatever it was, they also signed a contract with what
24 I'll refer to as USA. USA was the subcontractor to R. H.
25 Moore whose job was to install the pipe. They provided the

1 drill equipment, and they installed the pipe.

2 What happened was, as you would expect, the pipe gets
3 delivered. It's unloaded off the truck. Underground
4 Solutions provides and uses and implements the machine that
5 fuses the pipe, and they put it all together. So the end
6 product that was manufactured, supplied and assembled in the
7 field was Underground Solutions', and that's the product they
8 sold to my client.

9 USA then takes over and runs the drill. They're in
10 total charge of it, and they had -- and they were required
11 under the contract documents to install the pipe so that it
12 would perform as specified, and they will have the same
13 obligations by virtue of the language in the subcontract to
14 my client that my client had to the general contractor. Your
15 Honor's familiar with these concepts I know. So the owner
16 says to general contractor, you did something wrong. We can
17 turn to the subcontractor and say, we hired you to do all of
18 that; so if we're responsible, you took that risk, not us, at
19 least vis-a-vis us, and we took the risk vis-a-vis the owner.

20 Pipe gets installed. The way the procedure goes -- and
21 Mr. Thornton, one of my client's employees is here to
22 observe. But as I understand it, the way the procedure goes
23 is they have to fill that pipe up with water or put water in
24 it to push the air out because you want to put so much
25 pressure, and you do it in stages because you don't want to

1 just put 150 pounds of pressure on this pipe. Who knows
2 what's going to happen. What did happen was this: They put
3 some water in it, and they started running the pressure test.
4 And they do it in segments. They might start at 60 pounds
5 per square inch and then move up to 80, and then they finally
6 get to the test pressure required by the engineer and the
7 contract documents, as warranted and guaranteed by the
8 manufacturer, supplier of the pipe.

9 At 80 pounds, something a little more than half of the
10 required test pressure, it blows on both -- on one end, and
11 my client gets a call from some lady where the pipe started
12 in her yard on one side of the river and says, it ain't good
13 over here, okay. So then what happens is that my client
14 calls the pipe people, they say, we'll send someone out. USA
15 knows what's going on, and they try to put a camera down
16 there to try to figure out where this pipe broke or exploded,
17 or whatever it did; and because of the water in the river
18 they can't go but 3 or 400 feet down in it from either side,
19 as near as I can tell. You can see the crack. Nobody knows
20 where it started. Nobody knows where it ended. A lot of
21 it's under the river.

22 And we had an expert who, when this case started, who we
23 believed was going to testify that the product -- that he
24 could point to a specific defect, this is why this product
25 cracked, okay. We've been unable to do that, and the reason

1 we've been unable to do it is because you can't get the pipe
2 out of the river. That was one thing Underground Solutions
3 tried to do, they -- they came out and, well they didn't come
4 out, from California they tried to figure out a way to
5 extract the pipe because if you can extract the pipe, you can
6 put new pipe in in the same hole. Couldn't do that. It was
7 impossible. Could not be done.

8 So what happened was that Underground Solutions
9 voluntarily -- well, what happened was my client, Mr.
10 Thornton, calls up Underground Solutions in California and
11 said, this thing failed; you all need to redo the drill.
12 Now, redo the drill means all of it. Put it together, drill
13 it, put it underneath. You all are responsible for this
14 drill. That's what happened. Underground Solutions then
15 proceeds in response to that demand to send 1900 feet of
16 pipe. My client did not send them a purchase order. They
17 never sent an invoice when they sent the pipe. They fused
18 the pipe, okay, and they told Mr. Thornton they were going to
19 redo the drill.

20 Well, since at the time, and I think still today from a
21 standpoint of whether or not USA, the installer, did anything
22 wrong like in negligence or something like that, nobody at
23 that time believed that USA had done anything wrong. Just a
24 pipe problem. It blew up at 80 pounds per square foot (sic).
25 So we -- when US, you know, UGI, Underground Solutions

1 approved -- or we went ahead and rehired USA, you know,
2 because they got prices from everybody. It was too expensive
3 to pull it out, you know, so we hired USA under the -- with
4 the understanding that, when their bill came in, Underground
5 Solutions was going to pay it, okay. It's like Mr. Thornton
6 said in his deposition, he said, you know -- he told this
7 fellow from California, he said, you know, where I live, when
8 you invite somebody to lunch, you pay for it, okay. So they
9 invited Mr. Thornton to lunch. They sent him free pipe.
10 Never sent him an invoice.

11 So anyway, USA puts the pipe in. They send us a bill
12 for 3, \$400,000, whatever the cost of the pipe was. We send
13 the bill to Underground Solutions, and they say, well, we
14 ain't paying that. We'll pay you 250, and Mr. Henry Moore
15 goes, no, you sent free -- you sent the pipe, you -- you
16 know, you led us to believe you were going to pay for all of
17 this. We're not taking 250. We want the money. We don't
18 want to make any money off of you, but we're not eating this
19 loss. We never assumed the risk of this situation. We
20 found, and then -- okay, so that's the bird's eye view.

21 Now, the engineer is also in this thing, and they were
22 the one who specified the pipe. They were the one who
23 approved the initial profile of the pipe because now you have
24 Underground Solutions saying, well, you put it too deep; but
25 they can't say to a reasonable degree of certainty they did

1 anything. They just say you put it too deep. Well, I've got
2 expert testimony from Ted Padgett that says in this location
3 in the world under the Ashley River, the Cooper River marl is
4 like concrete, you go through there and bore a hole, it puts
5 no extra pressure on this pipe like it might in California or
6 the Arizona desert or something. So it's got nothing to do
7 with anything. They're making up excuses to try to figure
8 out a way to avoid doing it.

9 So anyway, we take a position, and Padgett's testimony
10 as to the engineers in this particular situation is simply
11 this: If they approved putting it too deep, didn't contact
12 the manufacturer, okay, and that's the cause, then they're
13 responsible, okay; but if it's not the cause, clearly they
14 can't be responsible even if -- there can't be negligence in
15 the air. There's got to be some causal relationship, and we
16 don't see it; but out of an abundance of caution you've got
17 to try to cover all your bases. I don't know where this is
18 going to end up.

19 So they won't pay what they owe us, so we sue them, and
20 guess what they did, they counterclaimed for the cost of the
21 pipe. This is a company that sends \$200,000 worth of pipe
22 across the United States of America, never sends a bill,
23 never got -- never sent an invoice, never got a purchase
24 order, and doesn't ask for payment until after they got sued,
25 which I always thought was very strange. But then we took

1 the deposition yesterday of the 30(b)(6) deponent,
2 specifically saying we want to get some information about why
3 did you do that. His response was, well, we were new to the
4 area. We had an engineer who does a lot of work down here,
5 working for a county government, all of them do sewer work,
6 we've got Henry Moore's company that does a lot of sewer
7 work, and we've got a subcontractor that does lot of sewer
8 work, and we had a pipe that blew up, okay, and we thought
9 the best thing to do to generate good will, to make sure we
10 got -- these people knew we were tops and we did the right
11 thing is to give them some pipe. Did you expect to get paid?
12 No, that was never discussed. Okay. And then we asked
13 another few questions to find out they settled a case in New
14 Jersey not long ago exactly on these terms. They gave them
15 new pipe, and they paid to put the pipe in.

16 So that's where we are today. Now, I certainly can hand
17 up all the documents to you, but I think if I could just sort
18 of broad-brush it a little bit more, as it relates to USA,
19 which is -- well, let's do it this way, let me reverse it.
20 Let's talk about the Underground Solutions people first. My
21 first specific motion is that their counterclaim should fail
22 as a matter of law because they are asking to be paid for
23 something that their own 30(b)(6) representative, in other
24 words, them, they, the company, the defendant has said, we
25 did not send it with the intention of getting paid. Also in

1 the face of evidence from my client who said we expect you to
2 fix the drill and they agreed. We also have the \$250,000,
3 trying to back up on what their situation is, and that's a
4 breach of contract if nothing else, so I don't think they
5 have a counterclaim.

6 So if they don't have a counterclaim, what do they have?
7 Nothing. Because they owe us for the cost that we spent to
8 have USA reinstall this pipe, and because it's a UCC claim
9 and, Your Honor, just -- and I'm sure you're going to hear a
10 lot of talk about, well, we have to prove a defect and all
11 that sort of stuff. No we don't, not under a warranty case
12 under the UCC. It's just not the law. It's not why the UCC
13 was passed. And I would -- may I approach, Your Honor.

14 THE COURT: You may.

15 MR. BUNDY: Your Honor, this is a case out of Indiana,
16 AAA Exteriors, Inc. versus Chevrolet and Oldsmobile, and it
17 very succinctly sets forth the basic principles that we're
18 faced with here today. And if I could direct your attention
19 to page 4, footnote 3, or item 3 I guess it is. Are you with
20 me, Your Honor?

21 THE COURT: I am.

22 MR. BUNDY: Three, certain basic propositions are
23 established by the authorities in regards to claims of breach
24 of warranty under the UCC. First, it is not necessary to
25 prove the specific defect in the product.

1 Your Honor, if you and I go down to Lowe's and buy a hot
2 water heater, and they warrant it for a year, and after six
3 months it doesn't make hot water, I don't have to prove why
4 it doesn't make hot water. I don't have to prove anything
5 other than, turn it on and cold water come out. These people
6 warranted expressly, by virtue of their specifications in
7 this contract, that this pipe would meet 150 PSI when it was
8 pressure tested. It did not, and they have not one single
9 shred of evidence of misuse or anything else that they have
10 offered, no other alternative things.

11 No. 4, this is the second basic proposition, breach of
12 implied warranty of merchantability may be established by
13 circumstantial evidence. We've got a breach of express
14 warranty here, and we also have a breach of warranty for
15 fitness for a particular purpose because they absolutely knew
16 what this pipe was going to be used for. In fact, they
17 recommended it and said it was the greatest thing going.

18 Third, a malfunction itself in the absence of abnormal
19 use and reasonable secondary causes may be sufficient
20 evidence of a defect to make the existence of a defect a
21 question for the jury. Okay. In addition to asking for
22 summary judgment, I'm also defending summary judgment
23 motions, and so I want to put a few what I call chinchillas
24 in here to make sure that doesn't happen. So what we've got
25 is a pipe manufacturer whose pipe failed to meet the

1 specifications, the performance specifications, and there's
2 no evidence in the record that either USA or my client
3 misused the product in any form or fashion. We also have
4 pipe that was offered for free in the replacement.

5 Now, as it relates to USA -- and this is where this is
6 going to get a little fun because if I'm not entitled to
7 summary judgment against Underground Solutions on the
8 counterclaim, and I'm not entitled to summary judgment
9 against Underground Solutions on the UCC claim, I'm entitled
10 to a slam dunk breach of contract against the guy that
11 installed it because he warranted and expressly warranted
12 that he was going to install the pipe and it was going to
13 meet 150 PSI. I don't have to prove under a breach of
14 contract case why he didn't perform his contract. He just
15 didn't. So the subcontractor's good to go if the Underground
16 Solutions people are responsible for this deal. If not, then
17 the subcontractor is not only responsible to me for what we
18 had to pay him to reinstall it, he's responsible to me to all
19 that pipe we got sent to us, if in fact Underground Solutions
20 is entitled to their claim.

21 So that's sort of where we are. I think at a minimum --
22 and I don't want to go through all this with you. I've got
23 cites and UCC and all that sort of stuff, but I think you
24 understand the general principles, of course. I guess my
25 point is that one thing's for sure, this case is not a

1 summary judgment case against the plaintiff, that's for sure
2 I believe, okay. So the question becomes what real issues
3 are there for trial. Is it really an issue for trial that
4 Underground Solutions should be paid for materials they
5 delivered which they have testified under oath were sent with
6 the intention of no payment. There's not one single shred of
7 evidence they ever asked for payment until we sued them and
8 they counterclaimed because they didn't like being sued.

9 And I think that's pretty much it, isn't it? Anything
10 else?

11 Thank you, Your Honor.

12 THE COURT: Thank you so much, Mr. Bundy. Underground
13 Solutions, you will be first.

14 MR. GARRAUX: Thank you, Your Honor. Jared Garraux on
15 behalf of Underground Solutions, Inc.

16 THE COURT: Yes, sir.

17 MR. GARRAUX: First off, I'd like to point out one
18 important fact, and that is Underground Solutions, Inc., had
19 no responsibility whatsoever for the installation of that
20 pipe. We were purely a product supplier. We supplied the
21 pipe. We fused it together, and at that point, Your Honor,
22 we were done. We turned it over to R. H. Moore, the general
23 contractor on the site, and their subcontractor, USA, to
24 install the pipe. At that point we're off site, and whatever
25 happens during the installation process is not our

1 responsibility. Your Honor, we believe this case is pretty
2 simple; and I understand Mr. Bundy's position about the UCC
3 and citing the case from Indiana, but we believe the case law
4 here in South Carolina with regards to products liability is
5 very clear.

6 And I submitted a brief yesterday and filed it with the
7 Court. I don't know if you've had an opportunity to review
8 that brief or not, but Sunvillas Homeowners Association
9 versus Square D Company, it's a Supreme Court case, and it
10 basically states, a products liability case may be brought
11 under several theories, including negligence, warranty and
12 strict liability, and those are the causes of action against
13 Underground Solutions in this case. In each theory the
14 plaintiff must establish the product was in a defective
15 condition, and Mr. Bundy has already stated during his
16 arguments that no one knows why the product failed. No one
17 knows. Their expert cannot identify a defect in the
18 manufacturing process. He cannot identify a defect in the
19 design of the pipe. He has no idea. During his deposition
20 he said there are a multitude of causes that could have
21 caused this failure, including problems with the
22 installation.

23 Your Honor, there's another section of pipe, 300 feet,
24 that failed during testing, and that's not at issue in this
25 case. Turns out someone had come on site and put a bullet

1 hole through that pipe and shot the pipe, vandalized, and
2 there was another vandalism that had taken place on the
3 project. Now, plaintiffs will tell you that when that
4 particular pipe went under the pressure test, it immediately
5 exploded -- it immediately failed. And so with the 1900 foot
6 of pipe that failed they're saying, well, it couldn't have
7 been a bullet because obviously it would have failed
8 immediately, and a 1900-foot section of pipe passed the test,
9 passed the test, and then as the pressure increased, it then
10 failed, so they say there's no way that could happen.
11 However, that's assuming that there was a direct bullet into
12 the pipe. Somebody could have taken a bad shot and grazed
13 the top of the pipe, thereby compromising the integrity of
14 the wall of the pipe, and that could have led to a failure
15 after increased pressure. And so their expert basically
16 said, I don't know what caused it.

17 Another thing, R. H. Moore -- once the pipe is fused, it
18 is dragged across the ground, and this -- there's testimony
19 that this pipe was dragged through a culvert by the
20 contractor. That could have led to compromise in the wall of
21 the pipe. Again, I'm laying these out because there are a
22 multitude of reasons why this pipe failed.

23 THE COURT: Now, who provided the drill? I thought Mr.
24 Bundy told me that your company provided the drill.

25 MR. GARRAUX: The subcontractor USA provided the drill

1 and did all the work. Once we fused the pipe, we turned it
2 over to the contractor team, including R. H. Moore, the
3 plaintiff.

4 THE COURT: You're just a pipe dude, and you fused the
5 pipe.

6 MR. GARRAUX: We are a product supplier, correct, Your
7 Honor.

8 THE COURT: And USA provided the drill.

9 MR. GARRAUX: That's correct.

10 THE COURT: Got it. Okay. And is there any testimony
11 from experts provided by your company regarding whether or
12 not this bullet hole did anything?

13 MR. GARRAUX: Well, Your Honor, and I'm not even saying
14 there was a bullet hole in the 1900 foot of pipe. I'm just
15 saying that that is another plausible explanation for why
16 this pipe failed. And their expert agrees, again, that there
17 are multitude of reasons why it failed, handling issues -- he
18 has no idea why it failed. And so, you know, we talk about
19 the core issue here of an issue of fact for the jury to
20 decide. You know, there's a fact that we entered into a
21 contract to supply that pipe. No one disputes that. There
22 is a fact that we indeed supplied that pipe. It was fused.
23 No one disputes that. There is the fact that R. H. Moore and
24 its subcontractor took that pipe from us and installed it
25 into the ground. No one disputes that. And the most

1 important fact that's not in dispute is the fact that no one
2 knows why it failed, and I think that is critical to the
3 analysis, and it's fatal to plaintiff's claim against us, the
4 product supplier.

5 The expert for plaintiff, when asked about the different
6 possibilities of why it failed, this is his answer: Why the
7 pipe failed, I enumerated a variety of reasons. It could be
8 any one of those. I don't have an opinion as to which one of
9 those was the cause, the actual cause of the failure. When
10 we asked whether the pipe was defective, his response was: I
11 have seen no concrete evidence definitively saying that there
12 is a defect in the pipe or that it was improperly
13 manufactured.

14 So what we're left with, Your Honor, is everybody
15 agreeing that we supplied the pipe and the pipe was installed
16 and ultimately it failed. We all agree to that. So the only
17 thing that can go to the jury is why the pipe failed or what
18 caused it to fail, and no one knows. So you're leaving
19 conjecture, speculation to the jury to decide what happened
20 with that pipe and why it failed, and the Court is clear that
21 you cannot leave that up to the jury. In Watson versus Ford
22 Motor Company they state, in the absence of any admissible
23 evidence in the record to support their products liability
24 claim, the jury impermissibly speculated as to the cause of
25 the accident. And that's what's going to happen in this case

1 if we go to trial because they don't have an expert that can
2 identify a defect in that pipe.

3 Essentially what plaintiffs are arguing is a *res ipsa*
4 argument. It failed, so it must have been the people who
5 supplied it. And our position is it could have been a defect
6 in the manufacturing process; it could have been a defect in
7 the design of the pipe; it could have been errors in
8 installation, which is not the responsibility of us; it could
9 have been vandalism on the property, a multitude of reasons,
10 and their expert cannot rule out any of them. And so for
11 purposes of summary judgment, we think the case law in South
12 Carolina governs and is the authority on this claim, and
13 therefore we should be granted summary judgment as a matter
14 of law.

15 One final thing, this is not an issue where their expert
16 is going to say X caused it, and our expert is going to say Y
17 caused it. Both of our experts are in agreement. We have no
18 idea what caused the failure.

19 THE COURT: What about express warranty, what about
20 that?

21 MR. GARRAUX: I think the warranty issue, again, you
22 have to prove a defect. You have to prove a defect. The
23 case -- the Sunvillas case from Supreme Court, the theory of
24 warranty, for each theory you have to establish that the
25 product was defective. And, again, they just do not have

1 evidence that the product was defective.

2 And, you know, getting back to Underground Solutions
3 providing this pipe, you know, no good deed goes unpunished.
4 Underground Solutions immediately responded, provided that
5 pipe and installed the pipe or -- they didn't install the
6 pipe, but they provided that pipe, fused it together, and
7 then it was installed. And as to whether they said that they
8 would pay for the installation of that, I'm not sure of the
9 content of those conversations, but this was purely
10 Underground Solutions attempting to do right by the client,
11 even though there was no evidence whatsoever that they did
12 anything wrong, that the manufacturing process was wrong,
13 that the design process was wrong or that the fusion process
14 was wrong. They were just trying to do right by the client,
15 and they've been sued.

16 THE COURT: Is it true that in the 30(b)(6) that your
17 principal said that at the time that the pipe was provided
18 that there was no intention to charge for the pipe?

19 MR. GARRAUX: I don't know that he said there was no
20 intention to charge for the pipe, but he absolutely said, we
21 supplied the pipe out of a good faith effort to the client.
22 I can't remember whether he said they absolutely were not,
23 but he certainly said that the purpose of providing that was
24 because they were in a new market and they were wanting to --
25 basically a customer has a complaint. They want to respond

1 to that complaint in good faith.

2 THE COURT: And if he in fact said, with no intention to
3 charge for the pipe, what of the motion for summary judgment
4 to dismiss the counterclaim, assuming he said that.

5 MR. GARRAUX: Right, assuming he said that, you know,
6 again when there is a claim made and a complaint made, and
7 we're in good faith effort trying to provide a product to
8 them, you know, I can tell you that, had we not been sued,
9 there would have never been a counterclaim or never been a
10 complaint against them. I think you kind of chalk that up
11 under a gentleman's settlement agreement handshake to say,
12 hey, we provided this in a good faith effort to get this
13 resolved; and, you know, now you've sued us. Well, obviously
14 you didn't accept what we provided you as enough, so here you
15 go, we're going to claim back against you.

16 THE COURT: On what basis?

17 MR. GARRAUX: I'm not sure what -- I'll have to look at
18 our counterclaim, Your Honor.

19 THE COURT: Okay.

20 MR. GARRAUX: The first counterclaim appears to be an
21 unjust enrichment claim. Essentially, we provided them a
22 benefit, and they have taken that benefit because the new
23 1900 foot of pipe is in place, and it's working properly and
24 all of that good stuff. And then the other one is a
25 recoupment argument regarding repairing and replacing the

1 pipe section failures as recoupment against any damages it
2 was found liable for in the repair of the 1900 foot section
3 of pipe.

4 THE COURT: Okay.

5 MR. GARRAUX: So but in closing, Your Honor, I would
6 just submit that we do have clear case law in South Carolina
7 with regards to warranty claims and negligence claims and
8 strict liability claims, and according to the case law you
9 absolutely do have to show a defect. You can't just leave it
10 to the jury to speculate as to the cause, and so for that
11 reason, Your Honor, I think summary judgment is appropriate
12 as to Underground Solutions, Inc.

13 THE COURT: All right. Thank you.

14 MR. GARRAUX: Thank you.

15 THE COURT: Mr. Bundy.

16 MR. BUNDY: Thank you, Your Honor. The case that was --
17 that is being relied on is a condominium case, and the
18 warranty that the Court is talking about are common law
19 warranties like, you know, whatever -- this is a UCC case,
20 and Your Honor hit the nail on the head, what about the
21 express warranty. Under his theory -- the problem is the
22 word warranty is a legal term. It's not a general term.
23 There are different kinds of legal warranties. Uniform
24 commercial code set up an entire scheme for merchants to deal
25 with each other so there wouldn't be the battle of the forms

1 and all the stuff we went through in law school. There are
2 rules. There are things that commercial people have to do.
3 They didn't do them. They gave us an express warranty. They
4 gave us a warranty for particular purpose. We do not have to
5 prove why their product did not meet the specifications. I
6 firmly believe that under the UCC. If I was suing him in
7 negligence, wouldn't have a case because I haven't got any
8 proof of negligence. Don't have any.

9 THE COURT: Or products liability.

10 MR. BUNDY: Or products liability. Products liability
11 does not encompass the UCC. Products liability is, you know,
12 all the other stuff. It's a product, okay, but it's governed
13 by the UCC so anyway, I think it's -- from my standpoint it's
14 not complicated. Thank you, Your Honor.

15 THE COURT: Hold on one second for me.

16 Let me ask you this question, and it's a pretty
17 exquisite question that I have. It only has to do with
18 express warranty, just express warranty. First of all, I've
19 got to tell you, I have not looked at the language of the
20 express warranty. Tell me, if you will, or show me if you
21 would prefer, what is the express warranty that was provided
22 by your client specifically.

23 MR. GARRAUX: Are you all going to take an issue as to
24 the contract and what was included in the contract and the
25 terms and conditions?

1 MR. BUNDY: Your Honor, if I may if you don't mind, why
2 don't we put this affidavit in. This is Mr. Henry Moore's
3 affidavit. It has all these documents attached to it.

4 MR. GARRAUX: Attached to our memo was the terms and
5 conditions of the sale of this pipe, and I'm assuming the
6 warranty's included in that. Your Honor, if I may --

7 THE COURT: Sure.

8 MR. GARRAUX: Our first grounds for summary judgment was
9 simply, there is no issue of material fact to submit to a
10 jury. We also had a second ground that I forgot to mention,
11 and that goes to the contract; and, essentially, even
12 assuming or assuming that the Court were to find or the jury
13 were to find that there was a defect, they were able to prove
14 that, which we don't think that they can.

15 THE COURT: Yes.

16 MR. GARRAUX: We had a contract, and their exclusive
17 remedy under that contract was the supply of replacement
18 pipe, fused and -- and we did that, and so that is their
19 exclusive remedy under the contract. And I think that kind
20 of answers your warranty question. That's their remedy, and
21 they've received that and so, you know, based on that we
22 would think --

23 THE COURT: So even if it is a breach of warranty claim
24 that they do not have to show a defect, even assuming that
25 for the moment, just for the moment, not agreeing, you're not

1 agreeing to that, but you're just assuming that for the
2 moment, if it is in fact a situation where summary judgment
3 is appropriate with regards to breach of express warranty,
4 then they have already received -- then the R. H. Moore has
5 already received the remedy, and that is they've got the
6 pipe, end of discussion, and it's appropriate that then that
7 the counterclaim be dismissed, game every over, everybody
8 goes home.

9 MR. GARRAUX: Absolutely, as to Underground Solutions,
10 Inc.

11 THE COURT: Exactly.

12 MR. GARRAUX: And, admittedly, I have not looked at the
13 warranty -- the UCC warranty languages, but I -- if my memory
14 serves me correctly, that would be their remedy under the UCC
15 as well, the cost of the replacement product. And I could be
16 wrong on that, but I just wanted to point that out.

17 THE COURT: Gotcha. All right.

18 MR. BUNDY: May I, Your Honor?

19 THE COURT: Sure, absolutely.

20 MR. BUNDY: If I may hand up the affidavit of Henry
21 Moore, it contains exhibits. This is my client. This
22 affidavit has previously been provided to counsel.

23 THE COURT: Everybody has what I have?

24 MR. BUNDY: I'm not going to refer to that right now,
25 but I need to put it into the record to make sure you had it.

1 I don't want to waste your time going through it. I'm going
2 to tell you what's in there generally without reading it to
3 you. Your Honor can certainly read it yourself. But I would
4 like to hand up, if I might, the text of the UCC, 36-2-313.
5 Now, Your Honor, the affidavit I handed up has portions of
6 the specifications in which the pipe specifications are
7 referred to which were provided by the Underground Solutions.

8 THE COURT: Okay.

9 MR. BUNDY: 36-2-313, express warranties by affirmation,
10 promise, description, sample. One, express warranties by the
11 seller are created as follows: Any affirmation of fact or
12 promise, including those on containers or labels, made by the
13 seller to the buyer, whether directly or indirectly, which
14 relates to the goods and becomes part of the basis of the
15 bargain creates an express warranty that the goods conform to
16 the affirmation or promise. Okay. They made that
17 affirmation. Now, in addition to that, I would refer Your
18 Honor to UCC Section 36-2-316. Exclusion or modification of
19 warranties. One, if the agreement creates an express
20 warranty, words disclaiming it are inoperative.

21 Now, under the UCC there are definitions of
22 consequential and incidental damage, and you are able to get
23 those damages in certain situations, and under certain
24 situations you're able to exclude them if you do it properly
25 with the proper disclaimer conspicuous, etc.

1 THE COURT: Look at No. 4.

2 MR. BUNDY: Right, implied. Remedies for the breach can
3 be limited in accordance with the provisions of this chapter
4 on liquidation or limitation of damages and on contractual
5 modifications or remedy. That's correct. They didn't do
6 that in this case because it wasn't conspicuous but we're
7 talking -- that's a different document. In this case what
8 they did was they referred us to an Internet site for their
9 exclusion of warranties. It wasn't attached to the contract.
10 And the exclusion of warranty provision says it has to be in
11 writing. Internet's not a writing. They didn't comply with
12 the exclusion provision strictly under UCC. Now, you might
13 think I'm being overly technical but in South Carolina our
14 Supreme Court --

15 THE COURT: I don't. I'm being nonplussed. Where does
16 that say for -- I'm nonplussed. So for the exclusion and the
17 limitations it says go to our website?

18 MR. BUNDY: Go to our website and do this and dial in
19 this number, dial in HTP USGA we're going to keep your money
20 dot com.

21 THE COURT: And that's in the contract?

22 MR. BUNDY: Yes, ma'am.

23 THE COURT: That's remarkable. That's a first for me.

24 MR. BUNDY: Well, exactly because it doesn't apply.

25 Might work in California because, as we all know, everything

1 works in California, just doesn't work out here, okay. UCC
2 requires that the documents, the exclusions be in writing,
3 etc., etc. Well, it's not in writing. It's on the Internet.
4 And my point is that, as an example of how strict our Court
5 is in statutory interpretation, Uniform Arbitration Act
6 requires that if you're going to arbitrate under South
7 Carolina Arbitration Act, it has to be typed on the front
8 page. South Carolina Supreme Court has ruled that a laser
9 printer that printed that same language does not meet the
10 statute because it was not typed, it was printed by a laser
11 printer. That's a case in South Carolina, okay. And so my
12 point is that they did not properly modify or exclude the
13 warranty.

14 But here's the bigger problem they have, Judge:
15 Replacing the pipe is a direct damage. It's not a
16 consequential or incidental damage. They sold the system.
17 Their own testimony is you can't replace this pipe. Their
18 warranty fails of it's essential purpose if we want to go
19 down that road because they gave a warranty that doesn't
20 correct the problem. It's all part of the same thing. If
21 you read incidental and consequential damage, it relates to
22 damages that are a consequence of the breach or incidental to
23 the breach. These are damages directly caused by the breach.

24 THE COURT: Let me ask you this question, and I ask it
25 because you have given me the case from --

1 MR. BUNDY: Indiana.

2 THE COURT: Indiana. And I gather that you've given me
3 the case from Indiana because it is so clear.

4 MR. BUNDY: No.

5 THE COURT: Did you give me the case in Indiana because
6 in South Carolina we do not have a case that is isolated
7 simply on that issue?

8 MR. BUNDY: Yes, ma'am. And the reason we don't have it
9 is because it never comes up. When somebody brings an
10 express warranty claim and says, my hot water heater's going
11 to work for a year, nobody walks into Court and says, you've
12 got to prove why it failed, they just buy them a new hot
13 water heater, or they claim that you hooked the hot water
14 heater up wrong. They at least come into Court with some
15 evidence of misuse. This is a very unique defense in my
16 opinion, and I was surprised to get it.

17 THE COURT: That's a little bit different, though,
18 because in that instance probably, probably, with your
19 example you're dealing with, you're not going to harken to
20 the UCC because you're probably dealing with a consumer as
21 opposed to corporate entity.

22 MR. BUNDY: Well, suppose an industrial facility bought
23 a hot water heater. Suppose it's Ferrari. Ferrari's
24 actually a better example. I want to buy a Ferrari.

25 THE COURT: Me too.

1 MR. BUNDY: And I want it to go 150 miles an hour, and I
2 pay for that 150 miles an hour. I'm going to have to pay for
3 the speeding ticket, but I'm glad to pay for that if I get to
4 go 150. But you put it on the road and it goes 120. I don't
5 have to go prove why it doesn't go 150, do I? I don't
6 believe so.

7 THE COURT: Got it. I've got that argument. Let me ask
8 this question, and I know you want to share with me about the
9 limitation. Yes.

10 MR. GARRAUX: I do.

11 THE COURT: Yes, I'm listening.

12 MR. GARRAUX: May I approach and hand you the contract
13 that he's referring to?

14 THE COURT: Please, yes.

15 MR. GARRAUX: This is the purchase order contract that
16 he's referring to, and it's all in small print.

17 THE COURT: I'm so sorry that you have an old judge but
18 hold on.

19 MR. GARRAUX: The relevant portion is down here, and
20 it's all in the same -- essentially the same font, so it's
21 all small print, even the terms of the sale of the product.

22 MR. BUNDY: Conspicuous by definition, Your Honor.

23 MR. GARRAUX: Your Honor, what that does is it says that
24 this order is subject to the terms and conditions which you,
25 buyer, can refer to on our website in PDF format. I'm not

1 aware of any cases in South Carolina that discusses PDF's on
2 an Internet site are not written documentation. I'm not
3 aware of those cases. I'm not aware of that authority or
4 line of cases. But the 30(b)(6), and I can't recall whether
5 Mr. Thornton was the 30(b)(6) rep for plaintiff or not, but
6 Mr. Steve Thornton was testifying, and he basically
7 acknowledged that he could have read that and he could have
8 gone to the site and he could have pulled those terms and
9 conditions but he didn't for whatever reason. He just
10 decided not to. But within those terms and conditions of
11 sale, Your Honor, I have attached those as Exhibit A to our
12 brief.

13 THE COURT: Great.

14 MR. GARRAUX: And they do include --

15 THE COURT: Stop right now. Let me get that in front of
16 me because we've talked about it now twice and I need it. I
17 have it.

18 MR. GARRAUX: On Exhibit A, the first page, No. 6 is the
19 warranty.

20 THE COURT: Got it.

21 MR. GARRAUX: And, you know, one of the things that a
22 warranty says is, this warranty is conditioned upon seller's
23 verification of the claimed defect. Again, there's no
24 claimed defect other than the product failed, and that is not
25 establishing a defect. Again, there's numerous reasons why

1 that pipe failed. The warranty goes on to state, if the
2 claim defect is verified, then as buyer's sole remedy for the
3 defect seller will replace the defective product free of
4 charge FOB job site. Seller is not responsible for any cost
5 incurred in connection with the removal or reinstallation of
6 products. And then in big print it says, the warranty set
7 forth in this section is seller's sole and exclusive warranty
8 and is subject to Section 8 below. So our position is that
9 they are bound to those terms and conditions of the contract
10 and they're bound to that warranty. And we, despite having
11 not been provided with evidence of the exact defect, we still
12 honored that provision. We still gave them pipe free of
13 charge and so that's -- that's how I would address the
14 warranty claims, notwithstanding the fact that I still
15 believe that there is South Carolina law on warranty with
16 regards to having to prove a defect; but as to the UCC
17 warranty issue, I would certainly say we have an express
18 warranty and we upheld our bargain under that warranty.

19 THE COURT: Got it. Hold on one second. And I'll hear
20 back from you, Mr. Bundy.

21 Let me ask you this question, and I guess a little bit
22 of what I'm doing is poking around on this idea of putting a
23 portion of the terms and conditions on a website. Let's say
24 that I buy a product today, and I'm told for the terms and
25 conditions, I gather part of which is the disclaimer or the

1 limitation of remedies and a portion is a disclaimer of a
2 warranty, and I'm told to go to the website. And I want to
3 go -- maybe I go to it at the point in time and take a look
4 when I enter into the contract but I'm fine for a while, and
5 then all of a sudden I have a problem, and then I go to the
6 website. I didn't print them off because I didn't print them
7 off. How do I know a year from now that what is on the
8 website are the terms and conditions of my contract?

9 MR. GARRAUX: Your Honor, if you look at Exhibit A on
10 our brief at the bottom of the page, there is a rev. number,
11 and that rev. number is rev. 6, dated May 18, 2011,
12 approximately one month before that contract was entered
13 into. And so that is the governing terms and conditions for
14 this particular contract, and if you want to find out, go
15 back further, you could simply ask the company, hey, we had a
16 contract X date. What were the terms and conditions in
17 effect at that time.

18 THE COURT: I gotcha.

19 MR. GARRAUX: It's kind of like the building code where
20 every three or four years there's a new building code, but a
21 lot of these construction defect cases we are dealing with
22 1999 construction and 2002 construction, and they're
23 different, so you have to go back and pull that information.

24 THE COURT: So just so I'm clear, I have constructed a
25 thing, and I used your product; and six months after I have

1 it in use, it fails for whatever reason. And I'm pondering
2 whether or not there's any limitation to my warranty, and I
3 go back to the website to see the disclaimers of the warranty
4 or the limitation on damages, the limitations on the
5 warranty, and it's changed because I happen to be in that
6 cusp when there was a change. So at that point I need to
7 call the company to say, okay, my contract is now six months
8 old. Are these my terms and conditions, and then the company
9 would then refer me to the prior terms and conditions.

10 MR. GARRAUX: Absolutely, Your Honor. The terms and
11 conditions in effect at the time the contract was executed
12 are the ones that are going to govern. And if you'll pull
13 your magnifying glass back out.

14 THE COURT: I've got it.

15 MR. GARRAUX: If I'm not mistaken, the particular link
16 to the terms and conditions actually does cite the May 18,
17 2011, terms and conditions.

18 THE COURT: Got it. Okay. All right.

19 MR. BUNDY: I'll begin by saying that this pipe doesn't
20 feel like it's free in the face of a counterclaim, but be
21 that as it may, there's a couple things I'd like to point out
22 for the Court. There are two express warranties in this
23 case. There's an independent express warranty that the pipe
24 would meet the pressure of 150 PSI. It did not do it, okay,
25 so that's one warranty. That's an express warranty, cannot

1 be disclaimed under the UCC, and there's no limitation of --
2 there's no limitation as it relates to that warranty. That
3 warranty is different from the warranty that's in this
4 document which says, seller warrants for a period of one
5 year, etc., free from defects in material and workmanship but
6 not in performance. The performance warranty was contained
7 in the specifications. This warranty applies only when the
8 products are handled, stored, fused and installed in
9 accordance with the seller's written guidelines. Now, they
10 fused it, so I assume they're not complaining about their own
11 fusing. They have no evidence about any of these other
12 things, and they sent us free pipes. They must not have had
13 any at the time they sent it. This warranty does not cover
14 or liable for any defect or failure caused by faulty
15 installation, usual pressure surges or pulsations, unusual
16 pressure surges, solvents, etc., etc. And then they go on to
17 say that, you know, that your sole remedy is FOB. Well, you
18 can't have it both ways. You can't sue somebody for the pipe
19 and then have the temerity to come in here now and say, well,
20 we gave you free pipe. No, you didn't. Not now you didn't.
21 It's got to be one or the other. They can take alternative
22 legal positions. They can't take different factual
23 positions. They've got to stick with a position, and they're
24 now saying in open court that they gave us free pipe. That's
25 not what they said in the pleadings. That's what they said

1 yesterday.

2 There's another issue -- this is why I tried to blow
3 over this issue. You can get way down in the weeds in this
4 case, and let's get in the weeds a minute. Yesterday we took
5 the deposition of their 30(b)(6) representative, and we
6 discovered that this purchase order that was sent by them was
7 never accepted. They reduced the price after that. This
8 isn't the contract. The contract we got with them is a
9 purchase order we sent them for a \$35,000 deduct because what
10 happened was when they thought we were going to get this job
11 and we were the low bidder, remember the people who sold the
12 HDPE pipe, they're back in this picture now. They called my
13 client and said, hey, guess what, we'll lower our price by
14 \$35,000 if you'll use the HDPE pipe not the PVC pipe. People
15 in California go, wait a minute, we need to get in this
16 market. We need to get in this market. So they reduced the
17 price \$35,000, but they never did the right paperwork. It's
18 sort of like all they've really got is our purchase order
19 which reflects a \$35,000 deduct. That purchase order doesn't
20 incorporate any of these documents. None of them, okay. So
21 they've got another problem down in the weeds, but I don't
22 think we really need to get there because what we've got is
23 an express warranty, pipe failed, they gave us free pipe.
24 Now they want to be paid for it, and that ain't right either.
25 That's sort of where we are.

1 THE COURT: Okay. I've got it. Yes, sir I'm going to
2 let you respond.

3 MR. GARRAUX: One very quick response. Again, there
4 would be no counterclaim, there would be no affirmative
5 claim, if not for us being sued by them after we in good
6 faith effort provided them pipe when according to the
7 warranty terms we didn't have to because no defect has been
8 proven. It's interesting that plaintiffs want to take the
9 position now that we don't know what the contract is. The
10 purchase order that he's referring to in R. H. Moore's own
11 language stated deduct change order, and we've all been
12 involved in construction for a long, long time, and everyone
13 knows that change orders are a part of an existing contract.
14 A change order is not a new contract and just disregards the
15 underlying contract. We had a contract, they issued a deduct
16 change order in the amount of \$35,000, and we accepted that
17 deduct change order. Plaintiff's third amended complaint,
18 paragraph 13: On June 17, 2011, plaintiff also entered into
19 a purchase order contract to Defendant Underground Solutions,
20 Inc., for the manufacture and supply of 20-inch DR 21 FPVC
21 pipe, and it goes on, a copy of which is attached hereinto
22 and incorporated as is set forth verbatim herein as Exhibit
23 D. And, Your Honor, I handed you Exhibit D just a few
24 minutes ago. Plaintiff's own admission, complaint, stating
25 what the contract is, and we agree with them 100 percent.

1 THE COURT: Okay. All right. Got that. Now, here's
2 what we're going to do, everybody, we're going to take like a
3 ten-minute comfort break. And then we'll be back, and when
4 we are back, you all figure out who's going next.

5 (Recess held.)

6 MR. WALKER: Your Honor, my name is Clay Walker. My
7 client is USA, and we're the people who pull the pipe.
8 Plaintiff's expert in this case has testified that, based on
9 the documents I've read, it appears that the pipe was
10 installed properly. That's in our motion. After we filed
11 our motion, we got our transcript of the 30(b)(6) deposition
12 of plaintiff's witness who, in response to the question, do
13 you have anything to point to an error by USA at any time,
14 said no. My client has done nothing wrong, and they admit
15 it. So I've got the same arguments about causation that
16 Underground Solutions has, but there's no proof I did
17 anything wrong to begin with, so I think negligence is out.
18 The UCC does not apply to my client. Our contract, we sell
19 only a service, and here I just read to you the evidence that
20 all our services were provided properly. So whether it's
21 negligence, breach of contract, warranty, our work is
22 unquestionably correct.

23 THE COURT: Okay.

24 MR. WALKER: We've done nothing wrong in this case. We
25 don't even have to get to causation because we didn't do

1 anything to begin with, so whatever theory you've got, our
2 contract clearly is solely to provide a service. That's all.
3 And we stand behind that. Our service was properly provided.
4 We were paid -- paid by the plaintiff for laying the pipe
5 that eventually failed. We were paid again to redo that job
6 after the first failure. And you heard plaintiff's counsel
7 say, we thought they were going to get reimbursed by somebody
8 else. So plaintiff concedes over and over we've done nothing
9 wrong, and we've moved for summary judgment, and we should be
10 dismissed from this case.

11 THE COURT: Got it. Okay. Yes, sir.

12 MR. BUNDY: Yes, ma'am. Thank you very much, Your
13 Honor. The affidavit that I handed up, if I could refer you
14 to Exhibit C.

15 THE COURT: Yes.

16 MR. BUNDY: This is the signed subcontract agreement.

17 THE COURT: Okay.

18 MR. BUNDY: The first page of Exhibit C is transmittal
19 letter from USA.

20 THE COURT: Yes.

21 MR. BUNDY: Three sides' subcontract agreements,
22 subcontract agreements attached, paragraph 1, the project.
23 The subcontractor agrees to perform all work as described in
24 accordance with the terms of this agreement so as to fully
25 comply with the general conditions of the general contract,

1 the drawings, specifications and addendum prepared by the
2 architect or the engineer assigned to the project, all of
3 which are hereby incorporated herein as part of this
4 subcontract and made available to the subcontractor.

5 Part of those specifications which are also attached as
6 an exhibit are the required performance specifications that
7 the pipe withstand 150 PSI. It did not. Page 3, 9,
8 obligations of subcontractor, paragraph A, subcontractor
9 shall be bound to Moore by the terms of the contract
10 documents in this agreement and assume toward Moore all the
11 obligations and responsibilities that Moore by these
12 documents assumes toward the owner as applicable to the
13 subcontract and shall not unlawfully discriminate, etc.

14 H, subcontractor shall guarantee his work against all
15 defects of materials and/or workmanship as called for in the
16 plans. If no guarantee is called for, then for a period of
17 one year from the dates of partial or total acceptance of the
18 subcontractor's work by the owner. So payment is irrelevant
19 as it relates to the first payment.

20 The second payment, before we paid the second payment,
21 we wrote, my client wrote at my behest, a letter to the
22 subcontractors to say, please acknowledge that the payment of
23 this claim for the second drill, we are not waiving our
24 rights against you should it turn up that you were
25 responsible, okay. They wrote us back and said, like any

1 good lawyer would, we ain't doing that, okay, and if you
2 don't pay us, we're going to file a claim against your
3 payment bond. I didn't have any defense to that because we
4 asked them to do it. All you can do is put them on notice
5 that by accepting this money, because waiver is a
6 relinquishment, a known relinquishment of a right, which we
7 told them we were not waiving.

8 And so, Your Honor, and I agree, the UCC doesn't apply
9 to this subcontract agreement as it relates to this
10 particular subcontractor because they were only providing
11 services, okay. But they guaranteed that, when they provided
12 those services, what they installed would perform, one. Two,
13 and I don't have any evidence in negligence that they did
14 anything wrong. This is a UCC case against the pipe
15 supplier, okay. This is a breach of contract case against
16 our subcontractor. This is a negligence case against the
17 engineer as it relates to this. Now, with regard to the
18 negligence case against the engineer, our evidence against
19 him is merely this: The testimony of a certified engineer, a
20 licensed professional engineer, Ted Padgett, who testified,
21 as I told you earlier, that if it turns out that the cause of
22 this pipe failure was the engineer allowing the pipe to go
23 below the recommended depth, then the engineer was negligent
24 by allowing the pipe to be installed below the depth without
25 first contacting the pipe supplier to determine if in these

1 sets of circumstances that was appropriate. We established
2 yesterday the engineer did not do that. Now, if Your
3 Honor --

4 THE COURT: Did it go below the --

5 MR. BUNDY: Yes, on the first drill, the one that failed
6 they did go -- it was supposed to be a 35-foot profile, and
7 they went down 50-some odd feet.

8 THE COURT: Okay. I didn't know that.

9 MR. BUNDY: But the subcontractor, as did R. H. Moore,
10 had approval of the engineer for that profile. The engineer
11 approved that deviation from the manufacturer's
12 specifications.

13 THE COURT: All right. Say that again.

14 MR. BUNDY: The manufacturer's -- when the engineer
15 initially contacted USG to discuss this pipe, they sent the
16 engineer a profile -- the engineer sent the pipe manufacturer
17 a profile and said, this is how we intend to do it; and they
18 apparently all agreed that 35 feet was the depth, was the
19 lowest depth you could go, okay. That depth was exceeded in
20 one area, okay. Originally at one point the pipe people
21 opined without any causation or any evidence from an engineer
22 or expert that that was -- had anything to do with the cause,
23 okay. So our concern was that we'd get to trial and they'd
24 lay it all on the engineer or they'd lay it on us and we
25 wouldn't have brought the engineer in because the engineer

1 approved the actual profile, which was 53 feet in one
2 location because they had to go under a water pipe. They
3 weren't quite sure where another pipe was. So Padgett's
4 testimony is pretty simple. If you, as an engineer, allow
5 something to be installed contrary to what the manufacturer
6 says, if it's wrong, unless you got their approval, it's on
7 you. But as pointed out by Mr. Padgett, he's seen no
8 evidence that anybody's produced that in fact it was a cause.
9 Furthermore, he opined that since this is the Cooper River
10 marl and the concern with 35 feet has to do with the bridging
11 of soils --

12 THE COURT: The Cooper River marl, not the Ashley River
13 marl?

14 MR. BUNDY: Well, Cooper River marl is the name of the
15 strata, regardless of where it appears in the Lowcountry.

16 THE COURT: I understand.

17 MR. BUNDY: What Cooper River marl is, it's a
18 cementitious type material made up of shale and all these
19 things, and it's basically bedrock hard. And, in fact, I
20 tried a case 30 years ago where these engineers came down
21 from New Jersey, and they were very concerned about the piles
22 on the Trident Technical building because they couldn't
23 figure out how they stayed in place. Of course, after
24 charging us \$200,000, they finally went and asked a
25 geotechnical engineer. He said, well, you never heard of the

1 Cooper River marl. It's a friction pile. And of course they
2 said, no, we didn't, and we were wrong all the time. So
3 unless you're from this area of the world, you have no
4 knowledge -- this is a unique geological situation here. Mr.
5 Padgett, who is also a geotechnical engineer and an expert in
6 earthquakes, testified that once you're in the Cooper River
7 marl, it's like running that pipe through concrete. There is
8 no soil bridging necessary, okay. So it couldn't practically
9 be a problem, okay.

10 But really what I want to bring to the Court's attention
11 is that if you rule that the engineer, based on the evidence
12 before you, was not negligent, then the law of this case will
13 be that that is not a defense that anybody could put in. I
14 don't want to have you -- I would respectfully request that
15 you not let the engineer out and then allow USG to come in
16 here and say, well, it could have been the profile. Because
17 once they're out, the person that's responsible for that
18 profile is out. You with me? So unless it's going to be out
19 of this case entirely -- which suits me just fine. I'm not
20 looking for people to sue. I just want to make sure I've
21 sued them all, and then we'll figure out who's responsible.
22 So that's where I am as it relates to the engineer.

23 THE COURT: Okay. Now I'm back to USA.

24 MR. BUNDY: Right.

25 THE COURT: So with regards to USA, your theory of

1 liability is because USA also accepts, by incorporation, the
2 terms and specifications. And who acquired the pipe?

3 MR. BUNDY: We did.

4 THE COURT: Moore acquired the pipe, not the sub.

5 MR. BUNDY: We did. But we were required in our overall
6 contract with the owner, Dorchester County, to provide and
7 install a pipe that met the pressure.

8 THE COURT: Got it.

9 MR. BUNDY: And they installed it, they were part of it
10 just, you know, it's the same thing -- I don't know what
11 caused it, but I don't care because you agreed to do it.
12 Same thing. This is a breach of contract. I guess you could
13 consider it a warranty. It's a guarantee basically is what
14 it is, a guarantee of performance. Just like I guaranteed,
15 my client guaranteed to Dorchester this would be the case,
16 they guaranteed to us that they would take care of us in that
17 area, okay. If you think about it, all of this is who should
18 fairly bear the risk of this. Moore did nothing but buy the
19 pipe and pay them to install it. County didn't do anything
20 wrong, and Moore didn't do anything wrong. Who should fairly
21 bear the risk? Would it be fair for Moore to bear any of
22 this? It may not be fair for USA to bear any of it. The
23 fair thing may be for the pipe supplier to bear all of it
24 because they provided the defective pipe. And I've got no
25 problem with that as long as I get my client X amount of

1 dollars, matters not where it comes from. I hope it comes
2 from the party who's responsible. Thank you, Your Honor.

3 THE COURT: Okay.

4 MR. WALKER: Your Honor, I'll be real brief.

5 THE COURT: Sure.

6 MR. WALKER: Our scope of work is labor only, and in
7 terms of who should be responsible, he wants me to warrant
8 the work of others, not my own. My own work he admits, his
9 expert admits, is perfect. I'll take his water heater
10 argument. He's talked about a water heater blows up; I
11 shouldn't have to argue with anybody. Well, if he hired us
12 to install it, and we put Mr. Garraux's water heater in and
13 the water heater fails and the water heater, it's leaking
14 water, it blew up. I installed it perfectly. They admit I
15 installed it perfectly, and it's absolutely unfair to even
16 think about asking my client to pay for a new water heater
17 because we installed it correctly, and they admit that in
18 this case and still want to assert a claim against us. Our
19 obligation under the contract was to provide labor to pull a
20 pipe. If you look at Exhibit A to that subcontract that he's
21 waving around here, it says we're going to install -- we have
22 labor and equipment to install by directional drilling this
23 pipe. That's our scope of work is labor.

24 THE COURT: Let me ask you this question -- that's not
25 how he's got you in. The way that Mr. Bundy alleges that you

1 are in is because of the position of Moore that you also --

2 MR. WALKER: We warrant our work, not Mr. Garraux's
3 product.

4 THE COURT: Well, you understand that his position is
5 that you hopped up on the rocket with all of it.

6 MR. WALKER: I understand that, but with all due
7 respect, my scope of work under my contract is to install
8 something, that's it.

9 MR. BUNDY: Your Honor, may I bring two points to your
10 attention?

11 THE COURT: Of course.

12 MR. BUNDY: Thank you. First point is this: This pipe
13 cannot be tested until after it's been installed. That's
14 one. So there's no way for anyone to know -- part of --
15 their work is workmanship, but at the conclusion of their
16 workmanship their work was not adequate because the pipe they
17 installed did not function as guaranteed.

18 More importantly, a subcontractor, when he decides to
19 use a material or work over someone else's work, accepts the
20 substrate. If I'm a plasterer, or if I'm a painter, let's
21 say, and I go into somebody's house and they've put plaster
22 in, and I check the plaster, or I don't check it and I paint
23 on wet plaster, I bought the wet plaster because I had the
24 absolute right to say, I'm not putting my work on this
25 inferior work. The bullet hole theory and all these theories

1 are on the subcontractor because he had the pipe and he put
2 it in if there was something wrong with it.

3 THE COURT: But here's the problem: The problem is
4 general conditions No. D. I think there is an argument that
5 that sends you back to, in that there's no affirmative
6 evidence, as I understand it, of a failure of appropriate
7 installation, look at general condition No. 9 because they
8 don't play with the pipe. You've got to do the pipe. It
9 says crossing designs must be reflective of industry
10 standards, and then it says please refer to whatever
11 guidelines, two, including geometry, pipe thickness and
12 integrity, ground contours, etc.

13 MR. BUNDY: But they placed it on -- well, okay, I
14 gotcha, but they didn't follow the manufacturer's
15 recommendation on the contour, although they had the
16 engineer's approval, so that puts us back on the engineer.

17 THE COURT: It seems to me that D says, and maybe there
18 is some ambiguity in these documents, but it seems to me that
19 D says, you've got to give us good pipe. You've got to give
20 us good pipe. The pipe isn't good -- and which is
21 interesting because the pipe people say if the installation
22 isn't any good, then they're out.

23 MR. BUNDY: And the pipe people say the pipe is good.

24 THE COURT: Pipe people say that the pipe is -- no, they
25 don't necessarily say that. They say if the pipe is bad, it

1 isn't their fault. It got shot up.

2 MR. BUNDY: Right, but then who put the bad pipe in? In
3 other words --

4 THE COURT: I'm with you.

5 MR. BUNDY: I don't know how they blame each other and
6 then they both get off. Seems like to me we're all in the
7 swimming pool together. I don't think anybody's going to be
8 dry.

9 THE COURT: Okay.

10 MR. GARRAUX: Your Honor, if I may.

11 THE COURT: Yes.

12 MR. GARRAUX: Jared Garraux on behalf of Underground
13 Solutions. I think that the big issue here is that
14 plaintiffs have the burden of proof, and there's absolutely
15 no proof that it was Underground Solutions' problems with
16 manufacturing or fusing of the pipe or an installation issue.
17 I don't think any possibility has been ruled out other than
18 the depth issue, which the plaintiffs say, well, I don't
19 think the depth issue, you know, caused the problem. And so
20 it's just -- I think that's the core issue here is plaintiffs
21 have the burden of proof, and they cannot satisfy that burden
22 of proof with any competent evidence whatsoever, and that's
23 why you have a lot of -- we're not pointing at the
24 installation. We're saying we don't know. And the
25 installation isn't pointing at the manufacturing or design

1 defect because they don't know. And plaintiffs -- it's just
2 pointing at everybody and saying *res ipsa*, wasn't our fault.
3 And I think that's the core issue.

4 MR. BUNDY: *Res ipsa* is a negligence concept. It's got
5 nothing to do with contract at UCC. This isn't a burn down
6 the house case. This is a putting the pipe in the ground
7 case. Thank you, Your Honor.

8 THE COURT: Okay. I got you.

9 MR. WALKER: Thank you, Judge.

10 THE COURT: Yes. Yes, sir, Mr. Architect.

11 MR. NEWBERRY: Yes, Your Honor. Engineer actually.
12 Derek Newberry. I represent URS. They were BP Barber, now
13 they're AECOM, and I think Mr. Bundy made most of my argument
14 for me today. My argument's very simple. Plaintiff has
15 asserted only a professional negligence claim against my
16 client. Plaintiff's expert, Ted Padgett, the only criticism
17 he has of my client is the depth of the pipe. Plaintiff's
18 two experts, expert Palermo and expert Padgett, both
19 testified they don't think the depth of the pipe caused the
20 damage because of the Cooper marl. The manufacturer was
21 actually deposed yesterday. They have no reason to dispute
22 what plaintiff's expert said. You know, the depth is an
23 issue, as Mr. Garraux just indicated, that has essentially
24 been ruled out, and that's the only issue that can be
25 attributed to my client related to the piping. So with those

1 facts, Your Honor, we move for summary judgment. And it's
2 partial summary judgment. Just by way of background, there's
3 a wet well issue. We'll still be in the case but just not on
4 the piping issue. Thank you, Your Honor.

5 MR. BUNDY: One housekeeping matter, Your Honor, I'd
6 like to put in three depositions if that's okay.

7 THE COURT: Sure.

8 MR. BUNDY: So we have a complete record.

9 THE COURT: Who, who and who?

10 MR. BUNDY: For the record, this is the deposition
11 transcript of R. H. Moore, Steve Thornton and Theodore
12 Padgett.

13 MR. NEWBERRY: To the extent we're wrapping up, I still
14 have the motion to amend on the docket as well.

15 THE COURT: Yes, you do.

16 MR. BUNDY: I consent to that.

17 THE COURT: Okay. All right. I need to hear about the
18 motion to amend.

19 MR. NEWBERRY: The motion to amend, Your Honor, USA was
20 brought into this case and appeared, I think in December of
21 2014. The contract between USA and R. H. Moore contains a
22 contractual indemnity provision, and that provision says that
23 USA will indemnify URS as well as the engineer.

24 THE COURT: I hate to do this to you. My mind was -- I
25 was actually putting something else together in my head, and

1 that's rude to you. Start over for me.

2 MR. NEWBERRY: No problem. USA appeared in this matter
3 after plaintiff's third amended complaint, and they appeared
4 in essentially December of 2014.

5 THE COURT: Okay. USA.

6 MR. NEWBERRY: USA, the installer, yes, Your Honor.
7 USA's contract with plaintiff contains a contractual
8 indemnity provision. That indemnity provision requires USA
9 to indemnify the engineer for the project as well. So what
10 we did is, after they appeared, and they've actually got an
11 arbitration provision in their contract.

12 THE COURT: I saw that, yes.

13 MR. NEWBERRY: And so, after they appeared, we weren't
14 real sure whether they were going to demand arbitration or
15 not until relatively recently. Once we learned that they
16 were not going to demand arbitration, we moved to amend to
17 assert an indemnity claim against USA based on the piping
18 issue, basically to the extent, you know, we're being held
19 liable for your installation, that you have to indemnify us,
20 so that's why we move to amend. Of course, it's negated if
21 our motion for summary judgment is granted on the piping
22 issue.

23 THE COURT: Now I get why you said it needs to be
24 argued. I'm with you completely. Yes, sir.

25 MR. WALKER: Your Honor, we are the latecomer to the

1 party, but I'm going to hand up to the Court a complete copy
2 of this indemnity provision because what they put in their
3 motion omits -- you know, kind of guts the key language.
4 This indemnity provision is to protect the people sitting at
5 that table, Moore. This is our agreement with Moore, the
6 general contractor, and it says we're going to indemnify
7 Moore, and then it lists some other people, which definitely
8 includes Mr. Newberry's client, and then it says any other
9 person that might get connected to Moore. Any other person.
10 So this is a list of people that might get entangled with
11 Moore, and this is designed simply to say, if Moore gets sued
12 as a result of any of these other connections and we caused
13 it, then Moore can come after us. This is a carefully
14 tailored -- the key word is any other. If that wasn't in
15 there, I wouldn't be standing here. But this is designed to
16 protect Moore and Moore only from suits by other people
17 because of what we did, and if any of those people sued Moore
18 and Moore came to me and said, you've got to indemnify us
19 because you screwed up, then I've got exposure under that
20 agreement; but that is only designed to protect Moore, and
21 it's designed to pass through claims of others who might
22 assert claims against Moore. That's it. So to claim that
23 it's a blanket indemnity that I'm going to defend these other
24 people is not what it says. It lists examples of people who
25 might sue Moore, and in this case Mr. Newberry's client

1 hasn't sued Mr. Moore, and there's no claim under that
2 indemnity agreement.

3 The second thing, Mr. Newberry's client's been sued
4 because the allegation is they screwed up. They're not in
5 this action based on an allegation that I caused a problem.
6 They've been sued on the basis of an allegation they caused a
7 problem. So the indemnity agreement would not apply in this
8 case.

9 MR. BUNDY: Your Honor, I think out of full disclosure I
10 need to disclose that in our breach of contract claim --

11 THE COURT: Yes.

12 MR. BUNDY: They breached their indemnity agreement.
13 That's also part of our breach of contract claim, but I have
14 not pursued it until we find out whether or not the
15 Underground Solutions counterclaim is going to live or not
16 get knocked out because the indemnity would require USA to
17 indemnify Moore for these counterclaims from the pipe people.
18 But until such time as there's a ruling on the pipe summary
19 judgment counterclaim, that indemnity has not arisen yet; but
20 it will arise, once we lose the motion, and I don't want to
21 leave anybody thinking that we don't contend we have an
22 indemnity claim. It would be covered, obviously, under a
23 breach of contract. Yet another reason to get rid of the
24 counterclaim. I assume you would agree with me on that.

25 MR. WALKER: Yes.

1 THE COURT: Yes, sir.

2 MR. NEWBERRY: Yes, Your Honor. Mr. Walker, his
3 arguments really are arguments that should be made once the
4 claim is in the case and once a motion for summary judgment
5 or something of that nature is filed. We've got a dispute as
6 to our competing interpretations of the indemnity provision.
7 That's something that should -- it's a reason why the claim
8 should be admitted.

9 THE COURT: I understand. I'm with you completely. As
10 an aside, have you all mediated this case? I bet you have.

11 MR. WALKER: We have not, and I think we have a date,
12 the 29th.

13 MR. FRAMPTON: 29th of April.

14 THE COURT: Who's the mediator?

15 MR. FRAMPTON: Marvin Infinger.

16 THE COURT: Good. Let me just tell you, the rules
17 indicate that you have to be allowed to amend, and I'm not
18 going to keep you from amending. You have a terrific defense
19 to it, oh, by the way; but I would not keep you from
20 amending, but there clearly is a defense to it. But I would
21 certainly allow the answer to be amended. Now, let me ask
22 you this question, I suppose I should ask it this way, in
23 that it's professional negligence, I gather Mr. Padgett
24 appeared in the affidavit with regards to the negligence.

25 MR. BUNDY: Yes, Your Honor.

1 THE COURT: *Ab initio*.

2 MR. BUNDY: What he was trying to do was establish for
3 the Court and the jury the standard of care that would be
4 expected out of a -- an engineer. He did not opine as to
5 causation because none has been proved yet. The purpose of
6 his testimony is so the Court would have the benefit of the
7 standard of care. Standard of care is -- I don't think
8 there's really going to be much dispute about that -- that an
9 engineer, if he's going to deviate from the product
10 specifications, does so at his own risk, unless he contacts
11 the manufacturer. But you still get back to causation, and
12 that's what Mr. Padgett could not address because nobody,
13 once again, knows why it failed.

14 THE COURT: Gotcha. And as I understand it at this
15 point there is no expert in this case, and I would expect it
16 to really be from the pipe manufacturer, that there was a
17 deviation from the accepted standard of care by the engineer
18 in failing to obtain permission and that that was the cause
19 of the failure because that's not the position of the pipe
20 manufacturer, right?

21 MR. GARRAUX: That's correct, there has been no
22 determination of that.

23 THE COURT: Okay. There are no cross-claims that have
24 been filed by the pipe manufacturer, right?

25 MR. GARRAUX: That's correct, Your Honor.

1 THE COURT: Okay. I've really got one issue that I'm
2 down to, and here it is: I am down to the express warranty
3 as to performance because, as I understand it, it is the pipe
4 manufacturer's position that they limited -- the pipe
5 manufacturer has two positions, number one, that the
6 plaintiff has the responsibility of proving a defect even to
7 activate, if you will, the warranty. And, secondly, that
8 even if there is a breach of the express warranty vis-à-vis
9 performance, that there is a limitation, and that limitation
10 is only to the replacement of pipe and does not exist for
11 consequential or incidental damages. I mean, isn't that your
12 position?

13 MR. GARRAUX: That's correct, Your Honor, just that we
14 would be warranting the cost of the replacement pipe and
15 that's what the express warranty states.

16 THE COURT: On the website.

17 MR. GARRAUX: Right, the terms and conditions, correct.

18 MR. BUNDY: And of course there's also our cause of
19 action for the breach of the contract when they said they
20 would take care of the drill outside of the UCC claim because
21 when my client called them and said the pipe has failed, they
22 said they would take care of the drill, and in response they
23 sent pipe, and my client assumed, rightfully so, they were
24 going to pay for the drill because that's what they said they
25 were going to do.

1 THE COURT: Now was that an oral contract or a written
2 contract?

3 MR. BUNDY: It was an oral contract partially performed
4 because they sent the pipe, and so they sent the pipe, and
5 then the only reason they balked was because it cost more
6 than they thought it was going to cost to install the pipe
7 because they offered \$250,000 in cash after they sent the
8 pipe, in addition to the pipe, to satisfy that agreement; and
9 my client said, no, the agreement we had was you were going
10 to pay for all of it, so there's that. That's outside the
11 UCC. That's outside all of it. This is what happened after
12 the breach. This is what happened after the breach of
13 warranty. And the best example that in fact, based upon what
14 they've done in the past in New Jersey is, when one of these
15 pipes fails like this, they previously in another case
16 provided pipe and labor. So that also is an indication of
17 custom and course of dealing the way they deal with their
18 clients. And how would my client know, if he voluntarily got
19 sent pipe, when they now come in and sue him later in a
20 counterclaim and deny there's any warranty at all or that
21 there was any breach, how would he reasonably know they
22 weren't going to honor the performance warranty to which
23 there are no limitations on an Internet as Your Honor points
24 out that's probably not any good anyway. There are a lot of
25 issues like that. My main goal here today was to get rid of

1 the counterclaim once I heard -- because I never had an
2 explanation until yesterday, how in the world can you
3 counterclaim by sending me this pipe, and I think we've heard
4 even from counsel that they would not have counterclaimed if
5 we hadn't sued them. How does that make them -- that's like
6 asking somebody out to dinner, I guess, and if you aren't
7 happy with the dinner, making them pay for half of it. I've
8 got no idea what that's about.

9 MR. GARRAUX: Your Honor, if I may respond to that.

10 THE COURT: Sure.

11 MR. GARRAUX: And I feel like I'm beating a dead horse,
12 but there is an express warranty there, and it's in the terms
13 and conditions of the contract that they stated in their
14 complaint was the contract with all terms and conditions.
15 That is their contract. They are bound to that warranty, and
16 we, despite the fact that there's never been a defect proved,
17 we provided them replacement pipe. I'm not sure of the
18 conversations that he's alleging took place regarding
19 drilling of the pipe, but the express warranty clearly says,
20 we'll give you replacement pipe, but we're not giving you any
21 kind of replacement costs or anything like that. Now, if
22 they offered money as a show of good faith, then they may
23 have done that, but none of this came up in the 30(b)(6)
24 deposition yesterday; and, in fact, when they asked him, they
25 said, no, no, no, no, no, we weren't going to drill it. We

1 were going to give you the replacement pipe, which is what we
2 did. And, you know, we're sitting here in a position of a
3 seller trying to make good by the customer, and we're the
4 only entity in this that has paid something to the plaintiff,
5 despite the fact that we really weren't obligated to under
6 the contract. It was a good faith effort to resolve the
7 case, to resolve the issues at hand. We gave them the
8 replacement pipe. I'm not sure about the offered money. I
9 can only assume that he's representing that correctly. And
10 then they turned around and sued us, and so obviously our
11 offer was rejected, so that was the basis of our
12 counterclaims. They said, okay, well, if that wasn't good,
13 then we're going to counterclaim and battle it out, but I
14 still believe the express warranty holds and that's what
15 they're bound to, and we gave them what the express warranty
16 said we would give them.

17 THE COURT: Well, there's a little bit of a difference
18 between what your calling the express warranty in terms of
19 the provision of the pipe, that's actually a limitation of
20 the express warranty. In other words, it's a remedy. That's
21 the remedy for violation of the express warranty.

22 MR. GARRAUX: Correct.

23 THE COURT: Okay. Got it. Got it all around. I have
24 it. I need proposed orders. Delighted that you are
25 mediating. Think you've got a great mediator. But let me

1 tell you where I'm focused. Let me just let you see the
2 sausage being made: I think you have a problem. I think
3 that the pipe manufacturer has a problem. I think that -- I
4 do not know that I agree with the argument that, when there
5 is an express warranty under the UCC, that there is an
6 obligation to show defect. I think that to show failure is
7 sufficient perhaps, but I'm reserving. I'm not ruling at
8 this point in time. I'm just telling you where I would like
9 you to focus on your proposed orders because I'm concerned
10 about that. I am very concerned about the limitation of that
11 express warranty appearing as it does. I'm concerned about
12 that. I'll leave it at that. That's sufficient.

13 Just for informational purposes, with regards to --
14 we've actually focused so much on express warranty, I don't
15 know if there was anything else in terms of the liability
16 with regards to any other cause of action such as products
17 liability and the like. I'm pretty concerned about that
18 because of the causation issue, but I'm not so sure that
19 defect has to be shown with regards to express warranty. It
20 did fail. So that's to give you my ideas of that. And, as I
21 say, I'm concerned about the limitation on that express
22 warranty. And I think that's where -- from my mind, that's
23 where this case lies. I think that the counterclaim
24 obviously is gone if that's where I end up. That's where --
25 it's gone because if it is an express warranty case, and if

1 there is responsibilities that are the basis for express
2 warranty, then the question shifts to whether or not the
3 provision of the pipe is the sufficient remedy because of the
4 limitation on the express warranty and, or is it incidental
5 damages, and the counterclaim necessarily goes away at that
6 point. With regards to -- and if that's where I'm leaning,
7 obviously that's happy news for everybody else, but with
8 regards to the indemnification, if the counterclaim goes
9 away, I gather the plaintiff concedes then the
10 indemnification, as it relates to USA, goes away. Yes?

11 MR. BUNDY: Well, there would still be -- no, it would
12 go away because that claim against me that created that
13 indemnification would go away, correct. Now, my claim
14 against them for breach of contract for the cost that I had
15 to pay them to reinstall it would not go away. The breach of
16 contract claim would still be there, but the indemnification
17 claim would go away, yes, Your Honor. But of course if the
18 Underground Solutions is responsible for all of it, of course
19 it all goes away, like you said. I'm good with that too.
20 I'll take California money.

21 THE COURT: Okay. Architect, I gather you've got a well
22 problem, but your pipe problem's looking pretty good; but to
23 allow a motion to your amendment, I'm going to allow it if
24 you stay in. But the indemnity is not on the well, it is
25 just on the pipe, so if you go away on the pipe, then the

1 request to amend also goes away.

2 MR. NEWBERRY: Correct, Your Honor.

3 THE COURT: Got it, and got it, and got it. Guess what,
4 I'm not going to give you all a decision until after the
5 29th, so I sure do want to hear from you all what happens on
6 the 29th. Don't keep it to yourself.

7 MR. GARRAUX: Your Honor, if I may, after the mediation
8 on the 29th, would the Court be interested in getting briefs
9 on the express warranty UCC issue because I certainly
10 understand what you're saying.

11 THE COURT: Submit a proposed order. It's got to be
12 strong because we don't have any case law in South Carolina
13 with regards to express warranty as opposed to between --
14 between merchants, if you will, and whether or not there is a
15 requirement to show defect, so go ahead and throw it in your
16 proposed order.

17 MR. GARRAUX: We will do that. Thank you, Your Honor.

18 THE COURT: Now, if you want to do a proposed order but
19 separate that issue out in a memo, that's cool too.

20 MR. GARRAUX: I probably will, just reason being the
21 express warranty is a unique product in that we provided
22 product and then someone else takes it and installs it, so to
23 hold us accountable for those installation issues we have no
24 part in, that's what I want to look at with the case law.

25 THE COURT: The problem is there's no evidence that

1 there was a defective installation. That's your problem.

2 MR. GARRAUX: Yes. Okay.

3 THE COURT: That's why I asked are there any
4 cross-claims, see what I'm saying?

5 MR. GARRAUX: Fair enough. Thank you, Your Honor.

6 THE COURT: Yes. Is everybody clear? Anybody have any
7 questions?

8 MR. WALKER: Thanks for your time, Judge.

9 MR. BUNDY: Assuming the mediation's not successful, and
10 I hope it is, when would you like your proposed orders
11 following the mediation?

12 THE COURT: You all tell me. Would you do me a big, big
13 favor, just take a moment and meet and confer. You're all
14 busy. I know how busy you are. I know you want to get this
15 done. I know you want to get it to trial, but you know what
16 your lives are, and I used to be there, and it was like, you
17 want me to do it when? So you all figure it out and let me
18 just say, if something comes up in your world and you need
19 longer, you all just meet and confer. I don't care. I'm
20 happy to get them whenever. Two weeks is insane. Forget
21 that. Why don't we say you guys do your 29th, and you can
22 play with it before the 29th if you have extra time, which
23 you won't. You guys are pretty high on the roster; yes,
24 Becky?

25 CLERK Of COURT: Right now they're on the 5/25 roster.

1 THE COURT: See, what I don't want you to do is I don't
2 want to keep you from that date but I'm going to --

3 MR. WALKER: Your Honor, so the Court's fully informed,
4 we've approached the Administrative Judge on several
5 occasions because, given there's seven lawyers in this case,
6 and everybody pretty much agrees it's going to take more than
7 five days to try, so we're reaching out to the Administrative
8 Judge to try to make some arrangements for a date certain and
9 a two-week term.

10 MR. NEWBERRY: And, Your Honor, Mike Wilkes has a
11 conflict with 5/25, which Becky's aware of.

12 THE CLERK: The protection hasn't been granted yet that
13 I know of.

14 MR. BUNDY: If we get rid of this part of it, it won't
15 take two weeks.

16 THE COURT: And I hate to put you in the position of
17 doing the memo and -- let me do this, do I have your
18 permission to have my law clerk contact Judge Murphy's law
19 clerk for the purpose of asking to put you beyond the 25th of
20 May?

21 MR. WALKER: Would be grateful.

22 MR. BUNDY: Yes.

23 MR. GARRAUX: Absolutely.

24 MR. NEWBERRY: Yes, Your Honor.

25 MR. FRAMPTON: My blessing.

1 MR. WALKER: Yes.

2 THE COURT: I can sort of put it on my need to have this
3 work done, and with the -- with not a promise but a
4 consideration that it might lessen the work that the trial
5 judge will have, so with that I probably -- that will be met
6 with an okay, so with your permission I will do that.

7 MR. BUNDY: Thank you.

8 THE COURT: And then I'll ask you then for your --
9 you'll mediate on the 29th. Is it appropriate then to ask
10 you for memos within 30 days after that date? Is that okay?
11 And then if somebody, I don't know, if somebody wins the
12 lottery and you're dancing too much to work on your memo,
13 then just call everybody else, and we'll revisit that issue
14 at the time. So I will look for them, if necessary, within
15 30 days after the mediation on the 29th. So let's say that
16 the clock will start ticking on the 30th of April. Is that
17 reasonable for everybody? And you all don't mind me just
18 contacting and getting you put off for the 25th, and I'll put
19 it on me. Thank you all so much.

20 MR. BUNDY: Thank you, Your Honor.

21 MR. WALKER: Thank you for your time.

22 MR. NEWBERRY: Thank you, Your Honor.

23 MR. GARRAUX: Thank you, Your Honor.

24 (The Court's Exhibit 1 marked for identification.)

25 --- END OF TRANSCRIPT OF RECORD ---

1 CERTIFICATE OF REPORTER

2 STATE OF SOUTH CAROLINA

3 COUNTY OF DORCHESTER

4

5 I, the undersigned Ruth L. Mott, Official Court Reporter
6 for the State of South Carolina, do hereby certify that the
7 foregoing is a true, accurate and complete transcript of
8 record of all the proceedings had and evidence introduced in
9 the matter of the above-captioned case, relative to appeal,
10 in the 1st Judicial Circuit Court for Dorchester County,
11 South Carolina, on the 17th of April, 2015.

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

15 May 14, 2015

16

17 *Ruth L. Mott*

18 Official Court Reporter

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Reported by: Douglas K. Liperote
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ALSO PRESENT: Steve Thornton
Steve Stanczak

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Gene Palermo

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EXAMINATION

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By Mr. Abeles

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By Mr. Winton

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By Mr. Newberry

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Gene Palermo

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1 DR. GENE PALERMO, having been first
2 duly sworn, testified as hereinafter set forth.

3 DIRECT EXAMINATION

4 BY MR. ABELES:

5 Q. Good morning, Dr. Palermo.

6 A. Good morning.

7 Q. You've had your deposition taken before, I
8 take it?

9 A. Yes, I have.

10 Q. All right. Can you tell us approximately
11 how many times?

12 A. Approximately 15.

13 Q. So you understand that the oath you've just
14 been given is the same as if you were sitting in a
15 court of law?

16 A. Yes.

17 Q. Do you need me to explain to you all the
18 rules of a deposition, or are you sufficiently
19 comfortable that we can proceed?

20 A. I'm comfortable we can proceed.

21 Q. All right. When were you retained in this
22 case?

23 A. Oh, approximately a year and a half ago,
24 roughly, a couple years.

25 Q. Do you have any records that show when you

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1 were retained?

2 A. They would be in my E-mail, the first
3 correspondence I had.

4 Q. Was the first correspondence that you had
5 an E-mail that you sent or that you received?

6 A. That I received. It was either from Mr.
7 Moore or it might have been from Steve Thornton. I
8 don't remember.

9 Q. Did you bring any documents with you for
10 today's deposition?

11 A. I did.

12 Q. Can you tell us what they are, please?

13 A. These are various documents related to
14 the -- to the case. My deposition request, a paper
15 that I wrote, various hard copies that I made of the
16 electronic documents that were sent to me, a copy of
17 the complaint for this case, and my invoices.

18 Q. Do your invoices indicate when you were
19 first retained?

20 A. The oldest invoice I have is November 7,
21 2012.

22 Q. Is that the date of the invoice or the
23 work?

24 A. This was a conference call that we had, so
25 it was for the work done. So I was retained slightly

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1 before that date.

2 Q. Have you reached any opinions that you
3 intend to give at trial in this case?

4 A. Yes.

5 Q. What are those opinions?

6 A. My opinion is that this particular plastic
7 pipeline was subjected to a standard leak pressure
8 test. When the pressure was increased to the desired
9 pressure, it failed to reach that pressure. It instead
10 had a crack that initiated for whatever reason, and
11 propagated several hundred feet. My opinion,
12 therefore, is that this pipeline system that was
13 installed failed to meet the leak pressure test and,
14 therefore, failed to meet the requirements of the AWWA
15 standards for a pressure pipe.

16 Q. Any other opinions that you've reached?

17 A. That would be the key opinion. As we
18 discuss or have discussions during the deposition,
19 perhaps others will come up, but that's the key opinion
20 specifically related to this case.

21 Q. Okay. And what information did you gather
22 to support that opinion?

23 A. The information provided to me by counsel;
24 Mr. Bundy, and his client, which indicated that the
25 pipeline system was subjected to a leak pressure test.

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1 It had held pressure for a few days. About -- I have
2 the numbers recorded. I don't remember for sure, but
3 something around 80 PSIG. It was then -- the pressure
4 was increased. I believe they were trying to get to
5 150 PSIG. And the information that I received is that
6 when the pressure reached approximately 130 PSIG, there
7 was an explosion and a long-running crack.

8 Q. So was that information provided to you
9 verbally?

10 A. Initially, verbally, and I believe some of
11 the information may have been in the documents that
12 were provided to me.

13 Q. Do you have all the documents that you were
14 provided in front of you right now?

15 A. No.

16 Q. Do you have other documents that you did
17 not bring with you?

18 A. I have electronic documents that were
19 provided to me. My understanding is that those
20 documents were also provided to somebody -- one of the
21 attorneys on your side. So the same documents that
22 were sent to you, those were the documents that were
23 sent to me.

24 Q. Did you -- other than the documents that
25 you were provided -- I take it those were provided by

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1 Mr. Moore or by counsel?

2 A. They were provided by counsel.

3 Q. Okay. And other than those documents and
4 the discussion that you had with Mr. Moore and counsel
5 that you've described, did you gather information from
6 any other source prior to reaching your conclusion,
7 your opinion?

8 A. The specific information related to the
9 2,000 foot pipeline of PVC pipe, and the details of the
10 leak pressure test were provided to me by counsel. The
11 general information about AWWA standards, et cetera,
12 that's my own knowledge that I know after being
13 involved in the plastic piping industry for several
14 years.

15 Q. I'm trying to find out if there's any
16 information that you've gathered outside of what you
17 were specifically provided in order to form your
18 conclusion?

19 A. No. Those would be the two primary
20 sources.

21 Q. Did you ask for any information that you've
22 not been provided?

23 A. No, just the documents that were sent to
24 me. Uh-huh.

25 Q. So, is it your belief that you have

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1 adequate information, based on the information you've
2 been provided, that is sufficient for you to draw a
3 conclusion that you've stated here today?

4 A. Yes. I feel -- with the information
5 provided to me, I feel comfortable with the opinion
6 that the pipeline that was subjected to leak pressure
7 test failed at a pressure less than the leak pressure
8 test, and, therefore, it did not pass the leak pressure
9 test. I feel comfortable with that information that
10 was provided to me.

11 Q. How long did the crack -- or first of all,
12 there were several pipelines that were installed on
13 this -- on the Dorchester County project, correct?

14 A. I believe, totally, that it was around
15 6,000 or 7,000 feet, and this particular pipeline of
16 interest for this case I believe was approximately
17 2,000 feet.

18 Q. Okay. Are you rendering any opinions about
19 any of the other fusible PVC pipeline installed at
20 Dorchester County?

21 A. No.

22 Q. Are you aware that there was a 300 foot
23 pipeline that was dug up and found to have a bullet
24 hole in it?

25 A. Yes.

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1 Q. And you're rendering no opinions about that
2 pipeline, is that correct?

3 A. I am not offering any opinions about that
4 particular pipe or the bullet hole that was found in
5 the pipe.

6 Q. How long was the crack in the pipeline that
7 you're talking about, the 2,000 foot pipeline that
8 you're talking about?

9 A. My understanding is nobody really knows the
10 correct answer to that question. Based on video
11 surveillance, I believe the video went into the pipe
12 approximately 450 feet. I forget the details of why
13 they couldn't go any farther, but they were not able to
14 go any farther. So the crack went at least greater
15 than 450 feet. No one has been able to dig up the pipe
16 or to video any further, so it's not known at this
17 point whether it went 500 feet or perhaps the whole
18 2,000 feet. It's somewhere greater than 450 is all
19 that we can say.

20 Q. Did you inspect the pipeline at all before
21 and after the incident?

22 A. I did not do a personal inspection, no.

23 Q. Have you ever been out to the site to see
24 the site?

25 A. No, I have not.

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1 Q. So when you say that it could have cracked
2 the entire length, do you have any information that
3 suggests that the crack was seen at both ends of the
4 pipe?

5 A. I don't have any information one way or the
6 other.

7 Q. Do you have any information that it cracked
8 at any one end of the pipe?

9 A. It cracked on one end, and that's where
10 they inserted the video equipment, and the video
11 equipment went down a little over 400 feet, as far as
12 they could go. And the pipe that was inspected showed
13 that it had cracked at least that far, and then they
14 weren't able to go any farther with the video.

15 Q. What caused the crack?

16 A. I don't believe that anyone really knows
17 for sure at this time what the -- the cause of the
18 initiation of the crack was. It propagated, as is the
19 case with PVC pipe, or plastic pipe in general, once
20 the crack initiated. But what actually caused the
21 crack to initiate, to the best of my understanding and
22 from reviewing several documents, I've not seen any
23 indication of what the actual cause of the initiation
24 was.

25 Q. And so the cause of the initiation is not

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1 part of your expert testimony, correct?

2 A. I can't testify to it because I don't know.

3 Q. How much have you billed today for the work
4 you performed in this case?

5 A. \$4,875 plus \$3,750, plus \$375.

6 Q. \$8,000?

7 A. If that's what that adds up to, yeah.

8 Q. Can you tell us where the crack initiated?

9 A. To the best of my understanding from
10 reviewing the documents, I don't believe anyone knows
11 where the crack actually initiated.

12 Q. Do you intend to undertake any further work
13 in connection with your investigation of this
14 particular incident, or have you done the full scope of
15 what you've been retained to do?

16 A. I have done what I've been retained to do
17 to this point. If I am asked to do anything else by
18 counsel, I will certainly do that.

19 Q. Among the documents that you reviewed, was
20 one of them an ESI report? Let me just clarify.

21 The documents that you reviewed in
22 connection with this particular incident, did you
23 review a report from ESI?

24 A. Yes.

25 Q. And have you reviewed that recently, not

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1 that you're conversing in what the report said?

2 A. I reviewed it within the last couple
3 months, so I can try to remember what I can about it.

4 Q. And do you recall that ESI essentially came
5 to the same conclusion that you did, that it is not
6 possible to determine the length of the crack, the
7 initiation point of the crack, or the cause of the
8 initiation?

9 A. Yes, their conclusions are consistent with
10 what I said.

11 MR. ABELES: Can we just take a
12 couple minute break?

13 (Whereupon, a short recess
14 was taken.)

15 BY MR. ABELES:

16 Q. Dr. Palermo, as part of your opinion you
17 said that the pipe itself did not meet AWWA standards.
18 What do you mean by that?

19 A. In the -- one of the AWWA standards there's
20 a requirement to do a leak test. The requirement is
21 that the pressure for the leak test has to be 1.5 times
22 the operating pressure, but not to exceed the maximum
23 allowable operating pressure as determined by the HDB
24 or hydrostatic design basis and the SDR of the pipe.

25 Q. What was the operating pressure for this

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1 pipe?

2 A. I believe the intended operating pressure
3 was approximately 100 PSIG and, therefore, the desired
4 leak test pressure would have been approximately 150
5 PSIG.

6 Q. So are you saying that the pipe itself
7 failed that -- what exactly are you saying as far as
8 non-compliance with AWWA standards? It wasn't
9 manufactured right? The pipe wasn't installed right?

10 A. Well, what I'm saying is that the pipeline
11 itself failed to pass the leak pressure test. Why it
12 failed in this manner with the explosion and the
13 long-running crack could have been a pipe defect, it
14 could have been a defective joint, it could have been
15 something in the installation, although based on the
16 documents I've read, it appears that the pipe was
17 installed properly.

18 Q. So you're saying it could have been a
19 defect, it could have been a joint, it could have been
20 damage to the pipe before --

21 A. It could have been damage to the pipe prior
22 to installation, yes.

23 Q. Are you rendering an opinion as to whether
24 any one of those possibilities did exist, or is more
25 likely to exist, or any other possibility did exist or

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1 slightly exist, or are you just not rendering an
2 opinion on that other than there are many -- many
3 possible reasons that the pipe failed?

4 A. Okay. That's a long question. I think the
5 answer to that -- to all those series of questions
6 would be that my opinion is that the pipeline itself
7 did not pass the leak pressure test. It failed to meet
8 the requirements of the leak pressure test as required
9 by the standards. Why the pipe failed, I enumerated a
10 variety of reasons. It could be any one of those. I
11 don't have an opinion as to which one of those was the
12 cause, the actual cause of the failure.

13 Q. Is there any testing that you believe can
14 or should be done in order to determine the cause of
15 the failure?

16 A. Probably the best method of analysis to
17 determine the cause of failure would be to, number one,
18 locate the initiation point, and number two, examine
19 forensically the initiation in order to determine the
20 cause of the failure.

21 Q. And is that something that you've
22 recommended be done in this case?

23 A. I have not recommended it because it has
24 been stated to me that it was attempted and it's
25 impossible to get to that location.

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1 Q. Is there any --

2 A. Excuse me. Let me correct that. I can't
3 say it's impossible. It's not feasible. I would be
4 very, very difficult in order to get to that particular
5 location.

6 Q. So other than digging up pipe to the point
7 of initiation, is there any other testing that can be
8 done to determine the cause of this particular failure?

9 A. Not that I'm aware of. If you can't look
10 at the initiation point, then it would be extremely
11 difficult to try to determine the actual cause of the
12 initiation of the crack that subsequently ran several
13 hundred feet.

14 Q. Are you rendering an opinion that the pipe
15 itself was not manufactured to AWWA standards?

16 A. I'm not rendering an opinion one way or
17 another. A manufacturing defect is a possible reason
18 for the failure that occurred. I have no evidence to
19 indicate that the pipe was improperly manufactured,
20 other than some documents I read where there was
21 discussions within UGSI E-mails that talked about the
22 record sheets and some problems with the manufacturing
23 at the time. And questions were asked, Is it possible
24 that some of this pipe may have been shipped
25 accidentally? It's possible that could have happened.

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1 That was a question that UGSI had in one of the E-mails
2 that I read.

3 Q. In connection with this matter?

4 A. Yes.

5 Q. Okay. You started an answer by saying that
6 you've got no evidence the pipe itself was improperly
7 manufactured. Is that still your testimony?

8 A. I have seen no concrete evidence
9 definitively saying there is a defect in this pipe or
10 it was improperly manufactured.

11 Q. Okay. And you're not rendering an opinion
12 that the pipe itself was defectively manufactured, is
13 that correct?

14 A. I'm rendering an opinion that a improperly
15 manufactured pipe or a defect in the pipe is a one of a
16 number of possibilities that could have been the cause
17 of the failure.

18 Q. Okay. We have discussed, I believe, three
19 possibilities. One is that the pipe itself was
20 defectively manufactured?

21 A. Yes.

22 Q. One is that the fusion was not --

23 A. Properly done.

24 Q. Not properly done. And one is that the
25 pipe itself was damaged before installation. Is

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1 another possible triggering event or cause for this
2 failure improper installation of the pipe?

3 A. Yes, and I did mention that as one of the
4 possibilities. And I followed that up with, based on
5 my review of the documents, I have not seen any
6 evidence that it was improperly installed. In fact, my
7 understanding is that the company that was hired to
8 install it was also asked to install the replacement
9 pipe. So if anybody thought they installed it
10 improperly in the first place, they wouldn't have asked
11 them to install it a second time.

12 Q. Okay. And is it fair to say that you have
13 not seen any evidence that the pipe itself was
14 improperly fused?

15 A. I have not seen any evidence because we
16 don't know what the initiation point was. No one has
17 been able to see the initiation, and, therefore, it's
18 impossible to say, Was it improperly fused? You can't
19 say that.

20 Q. And is it fair to say that you've not seen
21 any evidence one way or the other whether the pipe
22 itself was damaged prior to installation?

23 A. The only damage that I'm aware of is the
24 damage -- the bullet hole in the other 300 foot section
25 which has nothing to do with this particular section.

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1 I've not seen any other documents to indicate any
2 damage during shipment or transportation that could
3 have acted as an initiation.

4 Q. What other possible reasons -- I guess, let
5 me ask that a different way:

6 What other possible causes for this
7 failure can you imagine?

8 A. I think we've listed the primary ones.
9 There's always something else that may have happened,
10 but, you know, a defect in the pipe, a defect in the
11 fusion, a gouge or damage that was done during
12 installation. Whenever you have a long-running crack
13 in plastic pipe, there always has to be an initiation.
14 And the initiation can be any one of these defects or
15 notches that I mentioned, and once the crack initiates,
16 then the crack can run.

17 Q. What documents regarding the installation
18 of the pipe did you review?

19 A. Oh, there were numerous documents which
20 were provided to Underground Solutions. Underground
21 Solutions did their analysis. There were several
22 diagrams. There were several calculations;
23 calculations of loads, et cetera, engineering
24 calculations that were done by Moore and company and
25 also by Underground Solutions to determine the actual

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1 installation of the pipe.

2 Q. Was it your understanding that the pipe was
3 actually installed at a greater depth than it was
4 designed for?

5 A. I did see a document showing the overall
6 installation of the pipe, and there was one section
7 where I believe the actual depth was approximately 50
8 feet, which is a -- greater than what the -- the
9 recommended depth I believe for that pipe is
10 approximately 30 feet.

11 Q. And by having a pipe buried deeper than
12 designed, that causes increased load on top of the
13 pipe, load on the pipe?

14 A. Normally, that would be the case. In this
15 particular case, that particular installation at 50
16 feet, it was buried in -- I know what it was called. I
17 don't know how you pronounce it in South Carolina.
18 Something like marl. It's some kind of rock that you
19 have in this area. Because of that, it's very unlikely
20 that in this particular case, that particular depth
21 caused any increase in load on the pipe.

22 Q. Are you rendering an opinion on that based
23 on geology or science of some sort, or are you just
24 saying that in your -- it's your suspicion that load
25 did not play a role in the cause of this failure?

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1 A. Well, basically, logic says that when you
2 have a hunk of rock that the pipe is buried under, it's
3 not like earth, which is mobile and can surround the
4 pipe and exert a load on it. The rock is very
5 stationary. And, therefore, if the pipe is buried
6 underneath it, it's not possible for it to exert the
7 type of loads that can cause ovality and things like --
8 of that nature in the pipe.

9 Q. So you're saying that the extra 20 feet of
10 rock on top of a length of pipe played no -- caused no
11 additional load on that pipe?

12 A. Yes, because the pipe is buried within the
13 anular space, and so it's in free space there, so it
14 can't exert a load on it.

15 Q. Have you reviewed any documents regarding
16 the manufacturing?

17 A. Yes. There were documents that I read
18 where they identified the lot number of the pipe.
19 There were documents that I reviewed indicating a
20 review of the quality assurance tests that were
21 conducted. There were some questions about some of the
22 testing. I'm trying to remember which one. It might
23 have been the acetone test, which has to do with
24 investigating the integrity of the fusion of the PVC
25 pipe.

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1 But, in general, the overall conclusion
2 is that based on the tests that were done, that the
3 pipe met the requirements.

4 Q. Did you review any documents related to the
5 fusion of the pipe?

6 A. I'm sorry. When you say fusion, are you
7 referring to the butt fusion?

8 Q. Enfield fusion.

9 A. The Enfield fusion. Yes, I reviewed some
10 documents, and the conclusion that was made was that,
11 based on the evidence that was available, it appeared
12 that the fusions were properly made.

13 Q. Have you asked that any remnants of the
14 pipe that failed be tested by any outside lab?

15 A. No.

16 Q. Have you suggested that those remnants be
17 tested by anyone?

18 A. No.

19 Q. And I take it you, yourself -- you don't
20 test pipe, so you have not conducted any tests on any
21 fragments of the pipe, is that correct?

22 A. That's correct.

23 Q. Have you prepared a written report that
24 summarizes your findings in this case?

25 A. No.

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1 Q. Have you been asked to prepare a report?

2 A. No.

3 Q. Are you still under contract with
4 Performance Pipe Company?

5 A. No.

6 Q. When did that contract end?

7 A. Approximately two years ago.

8 Q. You've indicated that you have one of your
9 papers in the documents in front of us. Could you
10 please identify what that paper is, the paper you
11 wrote?

12 A. Yes. It's a paper titled "Correlating
13 Plastic Pipe RCP Field Failures With RCP Critical
14 Pressure For Water Pipe Applications."

15 Q. And what is the date of that paper?

16 A. There's no date on it.

17 Q. When was it prepared?

18 A. It's a work in progress. I believe I
19 initially prepared it about, the best recollection,
20 maybe four or five years ago, and as I get additional
21 information I continue to revise it.

22 Q. Has it ever been published in part or in
23 whole? And --

24 A. It was --

25 Q. -- by published, I mean available on your

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1 Website, passed out at a seminar, passed out at AWWA
2 meetings, distributed through third parties or anything
3 like that?

4 A. I keep a copy on my Website, and I've
5 presented this paper at various industry meetings.

6 Q. And is it safe to say that one of the
7 purposes of the paper, either this version or any of
8 the prior versions, is to influence purchasing
9 decisions by third parties?

10 A. No.

11 Q. You do not intend that people use your
12 paper in order to decide whether or not to purchase
13 fusible PVC pipe or to purchase polyethylene pipe?

14 A. Well, that could be part of the purchasing
15 decision. The main -- my main purpose in writing this
16 paper was more for the engineers of a project to
17 understand the phenomenon of rapid crack propagation,
18 what can cause it, and what a design engineer can do in
19 a pipeline project in order to prevent it.

20 Q. Okay. So is it safe to say that one of the
21 purposes for this paper or prior versions is to
22 influence specification decisions by engineers?

23 A. Well, it would be to guide the engineer of
24 a project and on how to design the pipeline in order to
25 prevent rapid crack propagation failures from

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1 occurring.

2 Q. By providing guidance --

3 A. Uh-huh.

4 Q. -- you want them to adopt your
5 recommendations as part of their specification process,
6 correct?

7 A. Well, that's their decision. I mean, all
8 I'm doing is providing them information. It's up to
9 them whether they decide to or how they use that
10 information. Usually purchasing people or engineers
11 gather information from a variety of sources, and then
12 they put all the information together and then make a
13 final decision.

14 Q. Why did your contract with Performance Pipe
15 end?

16 A. Uh, it basically expired, and --

17 Q. After a certain length of time?

18 A. Yeah, uh-huh.

19 Q. How long was that time period?

20 A. Oh, I think it was an annual one.

21 Q. Was it renewed more than once?

22 A. Well, I believe it was renewed one or two
23 times.

24 Q. And did you decide not to seek a renewal or
25 did Performance Pipe seek it?

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1 A. Performance Pipe did.

2 Q. Did they tell you why?

3 A. Basically, they felt that rather than
4 Performance Pipe as an individual company sponsoring my
5 research efforts, that it should be done by the
6 industry.

7 Q. Have you signed a new contract with the
8 industry -- I presume you're talking about PPI?

9 A. No.

10 Q. Have you signed a new contract with any
11 member of the industry?

12 A. I don't have a contract.

13 Q. Do you engage in consulting services for
14 PPI?

15 A. No.

16 Q. Who do you engage in consulting services
17 for in connection with the polyethylene industry?

18 A. With the P.E. Alliance.

19 Q. And how long have you been providing
20 services to the P.E. Alliance?

21 A. For about two years.

22 Q. And Performance Pipe is a contributor to
23 the P.E. Alliance; they're a member -- paying member?

24 A. Yes, uh-huh.

25 Q. Do you know the other members?

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1 A. Several members of the polyethylene
2 industry; resin manufacturers and pipe manufacturers,
3 et cetera.

4 Q. And how much does the P.E. Alliance pay you
5 for your services in connection with writing, speaking,
6 disseminating information about fusible PVC pipe and
7 polyethylene pipe?

8 A. In calendar year 2014, the total amount has
9 been zero. In calendar year 2013, I believe it was
10 about \$3,000.

11 Q. You say it's zero, is it because you've not
12 performed services, or they just haven't gotten around
13 to paying you yet?

14 A. I have not performed any services for the
15 P.E. Alliance this year.

16 Q. All right. Do you ask or propose to them
17 services that you can provide, or do you just wait for
18 them to tell you what to do?

19 A. It can be either way, yeah. If one of
20 their -- one of their members has a request, they can
21 go to the Alliance to a -- to ask me to give a
22 presentation at an industry meeting or something like
23 that, and there have been no requests for that this
24 year.

25 Q. Who first reached out to whom in connection

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1 with your engagement in this case? You talked about an
2 E-mail that you received, but who first reached out to
3 the other side?

4 A. To the other side?

5 Q. Well, did you reach out to R.H. Moore or to
6 somebody affiliated with R.H. Moore, or did they reach
7 out to you as part of your first contact in connection
8 with this matter?

9 A. They reached out to me.

10 Q. And do you know why they reached out to
11 you?

12 A. No, you'd have to ask them.

13 Q. Did you have any discussions with anybody
14 at Performance Pipe about this particular incident?

15 A. I learned about this particular incident
16 from Wes Long. That was the first time I had heard
17 about it.

18 Q. And do you -- do you know if Wes Long
19 contacted R.H. Moore and suggested they contact you?

20 A. That, I don't know.

21 Q. Did you advise R.H. Moore about your
22 history with Underground Solutions?

23 A. Did I advise them -- you mean did I tell
24 them or -- yeah. Certainly, I've been very open with
25 the R.H. Moore Company with my previous experience.

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1 Q. What is it that you told R.H. Moore about
2 your previous experience with Underground Solutions?

3 A. Well, I believe I told them that my one
4 experience with Underground Solutions was the lawsuit
5 between P&F Distributors and UGSI.

6 Q. Did you advise R.H. Moore that there was an
7 effort to have you held in contempt in that case for
8 violating a protective order?

9 A. I don't recall if I discussed that with
10 R.H. Moore. I did review that with the law firm, their
11 counsel.

12 Q. Did you advise R.H. Moore that you had sued
13 Underground Solutions at one point?

14 A. I didn't advise R.H. Moore, but I advised
15 Mr. Bundy that Underground Solutions had initiated a
16 Website in my name, GenePalermo.com, and that I was
17 very upset about that. It was a Website that was
18 filled with HDPE failures. And because they initiated
19 that Website, that's why I had a lawsuit against them.
20 And all this information was provided to Mr. Bundy.

21 Q. Did you tell them that you had to pay
22 Underground Solutions' attorney's fees in that lawsuit
23 because it was -- ultimately, your efforts to obtain a
24 preliminary injunction failed?

25 A. Actually, that's not what happened. The

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1 judge vacated the claim, and the only attorney fees I
2 paid were for my own attorney.

3 Q. Did somebody pay attorneys fees on your
4 behalf?

5 A. No, I paid my own attorney fees.

6 Q. No, no. Are you aware that Underground
7 Solutions was paid attorneys fees by your law firm
8 purportedly on your behalf in order to resolve that
9 lawsuit?

10 A. Are you talking about the protective order
11 violation?

12 Q. No. I'm talking about the -- the lawsuit
13 that you filed against Underground Solutions in federal
14 Court in San Diego.

15 A. Oh, I'm sorry. I apologize. I thought you
16 were talking about the protective order, the one in --
17 that occurred in California.

18 Okay. With regard to the lawsuit that I
19 filed against Underground Solutions because they
20 created the Website, GenePalermo.com?

21 Q. That's correct.

22 A. Right.

23 Q. The one that we were talking about.

24 A. Okay. And your question is again?

25 Q. The question is, did you pay, or did

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1 somebody else pay on your behalf, the attorneys fees
2 that were owed to Underground Solutions for
3 successfully defending that lawsuit?

4 A. Okay. Those legal fees were paid by
5 someone else.

6 Q. Who paid those fees?

7 A. The P.E. Alliance..

8 Q. Did you ask them to do so?

9 A. No.

10 Q. They volunteered?

11 A. Yes.

12 Q. Who's paying your fees in this case?

13 A. In this case, my fees are paid by the Moore
14 Company, R.H. Moore, and my invoices are to R.H. Moore.

15 Q. Have you informed R.H. Moore -- did you
16 inform R.H. Moore that Underground Solutions is suing
17 you in Illinois for false advertising?

18 A. Again, I have disclosed all of that to Mr.
19 Bundy, and he is very much aware of that, and so also
20 is R.H. Moore Company.

21 Q. In connection with the litigation that you
22 filed against Underground Solutions in San Diego, did
23 the P.E. Alliance pay for your legal fees to prosecute
24 that case?

25 A. Okay. Let me make sure. This is the one

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1 with the -- not the protective order. This is the one
2 for the Website GenePalermo.com?

3 Q. Correct.

4 A. Okay. Yes, the P.E. Alliance paid my legal
5 fees for that.

6 Q. Who suggested that lawsuit be filed?

7 A. The P.E. Alliance.

8 Q. Why did you go along with that?

9 A. Because I was very upset that Underground
10 Solutions is using my name to create a Website,
11 GenePalermo.com, with the implication that I'm -- I'm
12 responsible for that Website when I'm not. Underground
13 Solutions created that Website, I felt illegally using
14 my name, and I didn't think that was right and proper.
15 And so when the P.E. Alliance asked me if I would
16 consider trying to have the Website taken down on my
17 behalf and they would support me for it, I agreed to
18 it.

19 Q. Is the P.E. Alliance paying for your
20 defense in the Illinois litigation?

21 A. No.

22 Q. You're paying that yourself or is someone
23 else paying them?

24 A. Well, I'm paying it -- it's being paid
25 through my insurance company. I'm insured.

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1 Q. Have you ever asked the P.E. Alliance to
2 provide you with a budget to do either speaking or
3 writing papers or anything else, or is it all on a
4 piecemeal basis?

5 A. It's on a piecemeal basis. And again, as I
6 mentioned, the total over the last two years has been
7 about \$3,000.

8 Q. Dr. Palermo, at the beginning of the
9 deposition you identified one of the bases -- bases for
10 your opinion is your familiarity with plastic pipe.
11 Can you tell us what specifically you were referring
12 to?

13 A. Well, I've had about a 40-year history in
14 plastic pipe. Specifically, for this case, I'm
15 referring to my familiarity with PVC pipe and the
16 industry standards for PVC pipe.

17 Q. Which standards are you referring to?

18 A. Primarily the AWWA standards. AWWA stands
19 for American Water Works Association.

20 Q. So when you say that the fusible PVC pipe
21 that failed here did not meet AWWA standards, which
22 standard are you referring to?

23 A. I don't recall the number, but I know that
24 within the AWWA standards there's a leak pressure test
25 requirement that has to be met.

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1 Q. And it's your opinion that that is the only
2 standard that you believe the pipe did not satisfy?

3 A. Yes. The pipe failed to meet the
4 requirements of the leak pressure test, the AWA -- the
5 AWWA standards require, that the pipeline pass the leak
6 pressure test, and this particular pipeline failed to
7 do so.

8 Q. Is your opinion in this case based in any
9 way on any of the writings you've -- or any of the
10 other incidents involving fusible PVC pipe that you've
11 written about, or is this just a stand-alone opinion?

12 A. For this particular case, this particular
13 pipe failed to meet the requirements of the leak
14 pressure test. It, therefore, did not meet the
15 requirements of the standard. I don't know if there
16 was a warranty between Underground Solutions and the
17 water company, Dorchester County. I don't know if it
18 was warranted to meet the requirements of the
19 standards, but it certainly in my opinion is that it
20 did not meet the requirements of the standards.

21 Q. My question was, you've written a lot about
22 other incidents. My question is, do those incidents
23 bear on your decision, your opinion in this case, or is
24 your opinion in this case based solely on the facts in
25 this case?

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1 A. My opinions for this case are based solely
2 on the facts for this case.

3 Q. Did you propose any discovery or any
4 information that you needed; did you ask R.H. Moore to
5 get that information from Underground Solutions or any
6 other party in this case?

7 A. Yes.

8 Q. Okay. What information did you ask for?

9 A. I -- in the early stages, I had reviewed
10 with Mr. Bundy that a number of other RCP failures had
11 occurred, and in an effort to try to get a better
12 understanding of this case, we asked for additional
13 information about the other RCP failures that had
14 occurred across the country numerous times with fusible
15 PVC.

16 Q. And is it your opinion now, as I understand
17 it, that those failures have no bearing on your opinion
18 in this case?

19 A. Well, this is one of a number of times that
20 fusible PVC has had a long-running crack. For this
21 particular case for this particular pipeline, this
22 pipeline failed to meet the requirements of the leak
23 pressure test, failed to meet the requirements of the
24 standards, and, therefore, it did not -- the product
25 failed to do what it was intended to do. It was not

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1 usable by the water company.

2 Q. So if a pipe in another case was installed
3 by a backhoe hitting it and that caused a crack, that
4 has no bearing on what initiated the crack in this
5 particular case, is that correct?

6 A. If the pipe hits a backhoe -- I mean, if
7 the backhoe hits a pipe a thousand feet away from here
8 in another company, that has no bearing on whether this
9 pipe failed to meet the leak pressure test.

10 Q. Well, that's what I'm trying to understand.

11 A. Yes.

12 Q. Are you saying that any of the other
13 incidents that you've identified, identified through
14 counsel, identified in your writing, are you saying
15 that any of those has a direct bearing on what happened
16 in this case, or are all those independent events
17 caused by different circumstances based on those
18 particular facts at those particular sites?

19 A. All of those other cases have a particular
20 reason why it occurred. There's a variety of reasons.
21 In this particular case, the pipe failed to meet the
22 leak pressure test. It had a long-running crack. We
23 don't know why. We don't know -- sometimes RCP
24 failures occur during a pigging operation. Sometimes
25 it occurs during a tapping operation. I don't believe

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1 that happened in this case.

2 Sometimes they failed at -- they initiate
3 at a fusion joint. Possibly that occurred here. Some
4 of the RCP failures have been found to be due to
5 improperly made pipe. Possibly that happened here.
6 So, in every instance there's -- sometimes it has been
7 determined what the cause of the failure was of the
8 long-running crack. In this particular case, we know
9 there was a long-running crack. We don't know what
10 caused the crack to initiate. We have not seen the
11 initiation site, so we don't know that.

12 Q. How would information about another
13 project -- you said you discussed with counsel. How
14 would that information help you to determine the
15 initiation in Dorchester County?

16 A. Just to get broader information about the
17 product itself.

18 Q. Were you trying to find that information
19 through discovery so you could use it in another
20 presentation unrelated to this case?

21 A. No. I was trying to get it for this
22 particular case.

23 Q. And have you seen any information -- you've
24 been studying fusible PVC pipe in one form or another
25 for several years, correct?

Gene Palermo

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1 A. Correct.

2 Q. And out of all of that studying that you've
3 done, have you seen any circumstance from any other
4 case that can provide light on why this particular
5 incident happened, what initiated this particular
6 incident?

7 A. At the time that I requested the
8 information of Mr. Bundy, this was in one of our early
9 conversations, I didn't have a lot of information. All
10 that we knew was there was an RCP incident. Subsequent
11 to my requesting that information of Mr. Bundy when we
12 were just trying to get information about this case
13 which we knew was an RCP failure, subsequent to that
14 request, I was provided with the documents for this
15 case. In reviewing the documents for this case, that's
16 how I determined that the actual initiation for this
17 particular long-running crack are not known.

18 Q. Is it true that if the crack ran 2 feet or
19 were 200 feet, that entire pipeline would still be
20 unusable?

21 A. If the crack ran 2 feet, it's very likely
22 they could have replaced it and the pipeline would be
23 very usable.

24 Q. Okay. Let's -- let's start if that crack,
25 that 2-foot crack was at the point of initiation, which

Gene Palermo

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1 we don't know, correct, because it was at least 450
2 feet away from one end?

3 A. Uh-huh.

4 Q. So, if there was a 2-foot crack there or a
5 200-foot crack at that point of initiation, that entire
6 pipeline would still be unusable, correct?

7 A. Not necessarily. The -- that would be a
8 decision on the water company as to would there be an
9 opportunity, would there be a way for that 2-foot
10 section to be repaired?

11 Q. Even if you don't know where the initiation
12 is, where it is. All right. You've got a 1,900 foot
13 length, or you said 2,000 feet -- 1,900 foot length of
14 pipe. Part of it is 50 feet below ground. There is a
15 crack in there. Let's say it's 2 feet, and it's --
16 unless it's at one end or the other end, you don't know
17 where it is. That pipeline is still unusable, isn't
18 it?

19 A. It's unusable until you can find where the
20 crack is and repair it. If the crack is 2 feet long,
21 there's a greater probability that perhaps that 2-foot
22 section could be found, and that 2-foot section could
23 be repaired. If the crack is 1,900 feet long, there's
24 very little probability that the pipeline can be used.

25 Q. And as far as the 2-foot crack or 4-foot

Gene Palermo

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1 crack or an 8-foot crack, it doesn't matter where it
2 is, or does it matter where it is if you're going to
3 repair it?

4 A. If you're going to repair it, it doesn't
5 matter where it is. You find out where the -- the
6 damaged section is and you repair the damaged section
7 and then you can use the pipeline.

8 Q. Are you familiar with repairing PVC pipe
9 that's already buried 50 feet down that may have a
10 crack 1,000 feet into a 2,000 foot line? Are you
11 familiar with what types of repairs could actually be
12 effected?

13 A. The 50-foot section was a very small --
14 very small part of that 2,000 feet.

15 Q. Okay. Well --

16 A. A very small isolated area.

17 Q. We don't know if here the initiating point
18 of the pipeline was 50 feet below the surface or 40
19 feet before or 30 feet before, right?

20 A. We don't know where it is, right.

21 Q. Okay. So, if it's 50 feet below and I'll
22 say it's 1,000 feet from either end and it's a
23 4-foot crack, are you familiar with any type of method
24 to actually repair cracked PVC pipe in that
25 circumstance?

Gene Palermo

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1 A. There are certainly methods to repair PVC
2 pipe. Again, as I said, if the water company wants to
3 repair the damaged section, first you have to find out
4 where the damaged section is. Once you find out where
5 the damaged section is, then you have to consider the
6 feasibility of repairing the damaged section. These
7 are all decisions that are made by the water company as
8 to whether or not they can repair that 2-foot section.
9 All that I'm saying is that if it's a 2-foot crack,
10 there's a higher probability that that section of pipe
11 can be repaired and the pipeline is usable as compared
12 to if the crack is 1,900 feet, then there's essentially
13 zero probability that the pipeline is usable.

14 Q. Have you represented to third parties that
15 the crack here is 1,900 feet long?

16 A. When I first learned about the crack when I
17 first had discussions with R.H. Moore and Mr. Bundy, we
18 talked about a 2,000-foot crack, because, initially, it
19 was thought that it went 2,000 feet. In certain
20 documents that I've read, the discussion has been a
21 1,900-foot failure. In subsequent discussions, after
22 reviewing more of the documents, now it's not really
23 known for sure how long the crack went. All we can say
24 is that it's at least about 450 feet and something
25 beyond that, but we don't know what the actual number

Gene Palermo

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1 is.

2 Q. Okay. Have you represented to third
3 parties, somebody outside this case, that the crack was
4 1,900 feet long?

5 A. I may have.

6 Q. And why did you do that if you didn't have
7 any information to support that statement?

8 A. The information that was provided to me was
9 that it was -- it was thought to be 1,900 feet. That
10 was the best information available at that particular
11 time.

12 Q. How soon after the failure were you
13 contacted?

14 A. I was contacted in the fall of 2012. When
15 did the failure occur?

16 Q. You have the documents in front of you,
17 sir.

18 A. I don't remember when the -- when it
19 occurred.

20 Q. Do you know if you were contacted before
21 new pipe had been installed?

22 A. I believe the new pipe was installed the
23 middle of 2012. I was contacted towards the end of
24 2012. So, it's possible I was contacted after the pipe
25 was installed, but I can't say for sure.

Gene Palermo

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1 Q. The paper that's in front of you that you
2 just referenced, does that have any information about
3 the Dorchester County failure?

4 A. Yes.

5 Q. Can you refer to that, please, and see if
6 you've made any representations in there about the
7 length of the crack?

8 A. What I state now, based on the updated
9 information, is I have 400 feet, because I know for
10 sure it went 400 feet.

11 Q. Okay. And there was a prior version of
12 that paper that said 1,900 feet?

13 A. I believe it may have said 2,000 because we
14 always talked a 2,000-foot crack. Uh-huh.

15 Q. And how many people did you give that prior
16 version of the paper to that said 2,000 feet was
17 cracked?

18 A. I personally have not given that -- copies
19 of that paper to anyone. It's available on my Website,
20 but I don't usually hand it out.

21 Q. And you just referred to a chart that has
22 several incidents, correct?

23 A. A chart -- you mean a table?

24 Q. A table.

25 A. Yes, uh-huh.

Gene Palermo

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1 Q. Okay. And that table appears not just in
2 this paper but in slide shows that you've presented,
3 correct?

4 A. Yes.

5 Q. Okay. And in some of those slide shows, do
6 the slide shows reference a 2,000-foot crack at
7 Dorchester County?

8 A. Very likely, yes.

9 Q. And how many people saw those slide shows?

10 A. I think last year I gave, I believe, one
11 presentation at an ASCE meeting. This year I've not
12 given any industry presentations. I can't say that for
13 sure.

14 Q. The ASCE, were there a couple hundred
15 people there?

16 A. No, it was more like 40 or 50. There was
17 also a presentation I gave at a Florida AWWA meeting.
18 I think that was the end of 2012, I believe.

19 Q. So that still included 2,000 feet?

20 A. I -- probably. I can't say for sure. I
21 don't know.

22 Q. For any of the incidents that are listed in
23 your table --

24 A. Uh-huh.

25 Q. -- did you conduct any personal

Gene Palermo

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1 investigation as to length of the crack, the initiation
2 of the crack or anything related to it?

3 A. Yes. For all of the incidents that I have
4 in my table, in many cases I have either reviewed
5 documents or I have spoken to the water company
6 involved, spoken to the contractors involved that were
7 on site that actually saw the failure, et cetera.

8 MR. ABELES: I was just handed a
9 note that we're approaching the end of the tape, so
10 this is a good time for a break.

11 THE WITNESS: Uh-huh.

12 (Whereupon, a short recess
13 was taken.)

14 BY MR. ABELES:

15 Q. Dr. Palermo, in connection with your
16 opinion that the pipe did not meet AWWA standards, is
17 it your position that if the pipe had been damaged
18 prior to or during installation and then failed during
19 the pressure test, that the pipe did not meet the
20 standards?

21 A. Yes. If the -- if the pipe fails to meet
22 the leak pressure test, then the water company cannot
23 use the pipe. They have to do something and -- either
24 repair it or do something until it passes the leak
25 pressure test.

Gene Palermo

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1 Q. So your opinion is not dependent on
2 anything inherently wrong with the pipe itself? For
3 example, if it was damaged during installation and
4 didn't meet the pressure test, you still believe that
5 that means it did not comply with AWWA standards, is
6 that correct?

7 A. It did not meet the -- the pipeline did not
8 meet the requirement that it pass the leak pressure
9 test.

10 Q. Okay. And if during the pressure testing
11 the land where the pipeline was installed was hit by a
12 meteor and did not, you know, pass the pressure test
13 because of that, would you still say that that
14 pipeline, based on your expert analysis, did not meet
15 AWWA standards?

16 A. Say again, when does the meteor hit?

17 Q. During the pressure test.

18 A. During the pressure test?

19 Q. It never hits the one and a half time
20 threshold head --

21 A. Uh-huh.

22 Q. -- that you set. The pipeline's
23 obliterated. Are you saying the pipeline did not meet
24 AWWA standards?

25 A. Well, obviously, if the pipeline is hit by

Gene Palermo

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1 a meteor, it doesn't meet the requirements of the leak
2 pressure test, so it doesn't meet that requirement of
3 the standard, correct.

4 MR. ABELES: I have nothing further
5 at this time, subject to, of course, if he changes his
6 opinion or prepares something else we'll be able to
7 continue the examination. I would like to mark as
8 Exhibit 1 the documents he provided here to the
9 deposition.

10 (Whereupon, Exhibit 1 was
11 marked for identification.)

12 BY MR. ABELES:

13 Q. Dr. Palermo, could you please read into
14 the record what each of those documents are so the
15 court reporter knows that he's got everything that
16 you've got?

17 A. Exhibit 1 is a paper titled "Correlating
18 Plastic Pipe RCP Field Failures With RCP Critical
19 Pressure For Water Pipe Applications."

20 Document Number 2 is a -- looks like
21 Answers to Interrogatories.

22 Q. By?

23 A. It's to Franklin Smith. So it's
24 Plaintiff's Answers to the First Set of Interrogatories
25 from Defendant, Underground Solutions.

Gene Palermo

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1 Q. Okay. We'll mark that as 2.

2 (Whereupon, Exhibit 2 was
3 marked for identification.)

4 A. The third document is Defendant Underground
5 Solutions Responses to Plaintiff's First Set of Request
6 for Admission. That's Document Number 3.

7 (Whereupon, Exhibit 3 was
8 marked for identification.)

9 A. Document Number 4 is a series of printouts
10 that I made on the -- from the three folders of
11 electronic documents that were sent to me by counsel.

12 Q. Just for clarification, are those all of
13 the documents that were in those three folders?

14 A. No, no. There were many documents in those
15 three electronic folders. These are simply individual
16 pages that I made printouts of.

17 Q. Why did you choose those pages and not the
18 others?

19 A. There was something I read there that I
20 thought might be of interest, so I just wanted to have
21 a hard copy of it.

22 Q. Okay.
23 (Whereupon, Exhibit 4 was
24 marked for identification.)

25 A. Exhibit 5 is a Second Amended Summons.

Gene Palermo

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1 (Whereupon, Exhibit 5 was
2 marked for identification.)

3 A. And then I have my three invoices.

4 Q. Okay. We'll mark those as Exhibit 6.

5 (Whereupon, Exhibit 6 was
6 marked for identification.)

7 A. And I have my National Car Rental
8 agreement.

9 Q. Did that play any role in the opinions that
10 you reached in this case?

11 A. No, it did not.

12 Q. Okay. Then we do not need that. What
13 about the other folder?

14 A. Okay. The other folder -- this has -- this
15 is a Underground Solutions Amended Notice of
16 Deposition, dated August 13.

17 Q. Exhibit 7?

18 (Whereupon, Exhibit 7 was
19 marked for identification.)

20 A. I think this is the same as the previous
21 one. That's the same as this one. So I don't need a
22 copy of that one.

23 This one is October 1, a Second Amended
24 Notice of Deposition.

25 Q. That's going to be Exhibit 8.

Gene Palermo

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1 (Whereupon, Exhibit 8 was
2 marked for identification.)

3 A. Okay. These were the -- Bill, Mr. Bundy,
4 these were the two documents that I was missing from
5 yesterday. Okay? I don't know what these documents
6 are. They're like a wet well replacement. I don't
7 need that.

8 MR. BUNDY: That's the -- that's the
9 file that came down from my paralegal.

10 A. Okay. All right. So the rest of these, I
11 don't need them. Those were the only -- these are the
12 only two documents that I was missing.

13 Q. So what are the rest of those? They're Mr.
14 Bundy's files?

15 A. Oh, that's Mr. Bundy's file, yeah. Those
16 are -- a lot of them are copies of what's in here or
17 they're documents that I don't need.

18 Q. I did not see an engagement agreement
19 between you and R.H. Moore or with counsel?

20 A. I don't believe there's anything in
21 writing.

22 Q. How is the engagement memorialized? Is it
23 in one of those E-mails?

24 A. Initially, it was contacted via E-mail by
25 Mr. Moore, and then there was an E-mail from Steve

Gene Palermo

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1 Thornton about a conference call, but it was basically
2 just an E-mail. So there's no official contract that I
3 have with the Moore Company.

4 Q. How do they know how much your hourly rate
5 is?

6 A. I told them.

7 Q. And how do they know what your payment
8 terms are? Is it on your invoices?

9 A. It's on my invoice.

10 Q. Okay.

11 MR. ABELES: Okay. I have nothing
12 further at this time subject, of course, to what I
13 mentioned before, if you change your opinion or do
14 additional analysis. Anyone else?

15 MR. WINTON: Sure, if we're just
16 going to go around the room.

17 CROSS-EXAMINATION

18 BY MR. WINTON:

19 Q. Good morning, sir.

20 A. Good morning.

21 Q. My name is Tyler Winton. I'm with the firm
22 of Carlock, Copeland & Stair here in Charleston.

23 A. Lovely city.

24 Q. I'm glad you're enjoying it.

25 I represent Tobias & West, LLC and Eric W.

Gene Palermo

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1 Tobias, P.E. Are you familiar with my client?

2 A. No.

3 Q. Okay. I assume since you're not familiar
4 with them that you've not been asked to render any
5 opinions regarding my client or their work and services
6 provided on the subject project?

7 A. I don't know what services they provide.

8 Q. Okay. I'd represent to you that they were
9 involved in engineering calculations and wet well
10 specifications, some of the shop drawings, and that
11 they were retained by Knights.

12 I assume you're not providing any
13 opinions relative to the wet well in this case?

14 A. That's correct. Mr. Bundy told me that
15 there are two items in this particular case; one, the
16 wet well, and then the other one, the PVC pipe. All of
17 my opinions are based on the pipe that failed, nothing
18 related to the wet well.

19 MR. WINTON: Thank you sir. As
20 expected, I don't have any further questions for you.
21 I appreciate your time this morning.

22 THE WITNESS: Thank you.

23 CROSS-EXAMINATION

24 BY MR. NEWBERRY:

25 Q. Good morning, Mr. Palermo.

Gene Palermo

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1 A. Good morning.

2 Q. My name is Derek Newberry. I'm with the
3 law firm -- the Wilkes Law Firm here in Charleston, and
4 I represent URS. They were the engineer for the
5 project.

6 Have you evaluated URS' design in
7 connection with the piping that failed?

8 A. I believe the documents that I reviewed
9 show various profiles for the horizontal directional
10 drill, which, of course, are part of the design. There
11 were a lot of engineering calculations that were made
12 that were part of the documents. I scanned through
13 them. But those particular documents were not
14 documents that I relied on for the opinions that I had.

15 Q. So you haven't formed any opinions relative
16 to the standard of care of the civil engineer in this
17 case and whether the civil engineer breached that
18 standard of care?

19 A. That's correct.

20 Q. I want to hand you one exhibit if I may.

21 (Whereupon, Exhibit 9 was
22 marked for identification.)

23 BY MR. NEWBERRY:

24 Q. Do you recognize what we've marked as
25 Exhibit 9?

Gene Palermo

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1 **A. Yes.**

2 **Q. All right. Is this a paper that you**
3 presented or drafted, dated October 1, 2010?

4 **A. Yes.**

5 **Q. Does this paper have any bearing on the**
6 opinions that you've offered in this case?

7 **A. No.**

8 **Q. You have not evaluated whether URS' design**
9 followed these guidelines or is in opposite to these
10 guidelines or anything of that nature, correct?

11 **A. That's correct.**

12 MR. NEWBERRY: Thank you.

13 That's all I have.

14

15

16

17

18 (The deposition was concluded at 11:32

19 a.m.)

20

21

22 (Signature waived)

23

24

25

Gene Palermo

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1 CERTIFICATE OF REPORTER

2

3 STATE OF SOUTH CAROLINA)

4 COUNTY OF CHARLESTON)

5 I, Douglas K. Liperote, the officer before
6 whom the foregoing deposition was taken, do hereby
7 certify that the witness whose testimony appears in the
8 foregoing deposition was duly sworn by me; that the
9 testimony of said witness was taken by me to the best
10 of my ability and thereafter reduced to typewriting
11 under my direction; that I am neither counsel for,
12 related to, nor employed by any of the parties to the
13 action in which this deposition was taken, and further
14 that I am not a relative or employee of any attorney or
15 counsel employed by the parties thereto, nor
16 financially or otherwise interested in the outcome of
17 the action.

18

19

Date

20

Douglas K. Liperote

21

Notary Public in and for the

22

County of Charleston

23

State of South Carolina

24

25 My commission expires August 15, 2015.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF DORCHESTER

R.H. MOORE COMPANY, INC.,)

)

Plaintiff,)

-versus-)

Case No.:

2012-CP-18-2001

KNIGHT'S PRECAST, INC.; TOBIAS)

& WEST, LLC; ERIC W. TOBIAS,)

P.E.; DORCHESTER COUNTY WATER)

& SEWER DEPARTMENT; UNDERGROUND)

SOLUTIONS, INC.; and B.P.)

BARBER & ASSOCIATES, INC.,)

n/k/a URS CORPORATION,)

Defendants.)

THE DEPOSITION OF STEVE THORNTON was taken as a witness on behalf of the Defendants, pursuant to South Carolina Rules of Civil Procedure, at 10:00 a.m. on Thursday, the 12th day of March 2015, at the offices of Smith, Bundy, Bybee & Barnett, P.C., 1037 Chuck Dawley Boulevard, Suite 100, in the Town of Mount Pleasant, State of South Carolina, before Janice O. Darby, Registered Professional Reporter and Notary Public in and for the State of South Carolina.

Janice Ohlendorf Darby, RPR
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Also present: MR. HENRY MOORE and MR. STEVE STANZAK

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FOR IDENTIFICATION	MARKED
No. 1 Notice of Deposition	6
No. 2 Projects which have FPVC	10
No. 3 Projects which have polyethylene	10
No. 4 6/16/11 Order Summary	22
No. 5 Terms & Conditions of Sale	22
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No. 7 6/6/12 email from Eric Davis	56
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STEVE THORNTON

having been first duly sworn, was called as a witness herein and was examined and testified as follows:

E X A M I N A T I O N

BY MR. SMITH:

Q Good morning, Mr. Thornton. I'm Frank Smith, and I represent Underground Solutions in this lawsuit that's been brought by R.H. Moore. And we're here today to take the 30(b)(6) deposition of R.H. Moore, and you have been designated as one of the witnesses that will respond to the questions related to R.H. Moore. Is that your understanding?

A Yes, sir.

Q Have you been deposed before?

A Yes, sir.

Q How many times?

A Once.

Q As I'm sure Mr. Bundy has explained to you, my job is just to ask you questions and find out what you know. If I ask you a question and you don't understand it, please ask me to rephrase it, and I'll be happy to do that.

If I ask a question and you answer it,

1 can we both assume that you've understood the
2 question and answer it as best as you can?

3 A Yes, sir.

4 Q If you would, just give me your
5 educational background, please.

6 A I graduated from high school. I went to
7 a two-year technical college, graduated from there.
8 And then in 1978, I graduated from college in civil
9 engineering.

10 Q Where did you go to high school?

11 A South Lenoir High School.

12 Q And where did you get your civil
13 engineering degree?

14 A I have an associate's degree in civil
15 engineering from Wake Tech in Raleigh and a
16 bachelor's degree in civil engineering from UNC
17 Charlotte.

18 Q And just give me your work experience
19 after you got out of UNC Charlotte.

20 A I started work for CFW Construction
21 Company in June of '78. I was there approximately
22 13 years. I worked the east coast from Washington,
23 D.C. down to Florida in utility work.

24 I left there and went to a company called
25 Rock & Lopez. They were in Greensboro, North

1 Carolina. I was with them approximately a year and
2 a half. They got purchased by a company called
3 Hobby Construction in Newberry. And I didn't want
4 to move to Newberry, so I went to work for Henry,
5 R.H. Moore.

6 Q About what year was that?

7 A I forget the exact date. '90, '91,
8 somewhere in there.

9 Q And I assume you've been there ever
10 since?

11 A Yes, sir.

12 Q What's your current position at R.H.
13 Moore?

14 A Project manager, estimator.

15 Q Is that basically the same position
16 you've held since you've been there?

17 A Pretty much.

18 (Exhibit No. 1 marked for
19 identification.)

20 BY MR. SMITH:

21 Q Mr. Thornton, I'm going to show you what
22 we've marked as Exhibit 1, which is the Notice of
23 30(b)(6) Deposition for today's deposition. And
24 basically, for my part anyway, there are 14 items
25 listed in the Notice of Deposition. And what I want

1 to do before we get started is just to find out
2 which items that you are going to be testifying on.
3 If it's all of them, that's fine, too. If there are
4 some that you're not going to testify on, just let
5 me know that and I won't bother going into them.

6 Have you looked at that notice before?

7 A Yes, sir.

8 Q Do you know which items you're going to
9 testify on?

10 THE WITNESS: You jump in if I say
11 something wrong.

12 A I'll do item one, item two, item three,
13 four, five, six, seven. And then I'll say -- Henry
14 is going to comment on some of these, and I don't
15 know which ones. Item eight. Item nine will
16 probably be between me and Henry.

17 BY MR. SMITH:

18 Q That's fine. If he's going to comment, I
19 don't want to ask him the same questions. So just
20 the ones that you're going to comment on is fine.

21 MR. BUNDY: If I could suggest
22 something in order to prevent problems later, while
23 it takes another 30 seconds to ask him the question,
24 I would prefer that you ask both of them all the
25 questions. So that way we won't have a problem at

1 trial if it comes up later. Are you with me?

2 MR. SMITH: That's fine.

3 BY MR. SMITH:

4 Q That will make it easier. We'll go back
5 to the beginning and we'll start.

6 The first item is prior and current
7 projects that R.H. Moore has had involving FPVC
8 pipe. So let me first ask you what projects that
9 you recall prior to this project that's the subject
10 of this litigation that R.H. Moore has performed
11 that involved FPVC pipe provided by Underground
12 Solutions?

13 A Are you asking me for projects before
14 this one or after?

15 Q Before this one.

16 A We had a large job on Johns Island that
17 had FPVC pipe. Bore-Tek was the driller, and he
18 furnished the pipe.

19 Q Who was the owner on that job?

20 A Johns Island.

21 Q That was about 2008, I think?

22 A It's been a while ago. Unless I had my
23 list, I'm lost.

24 Q Do you have a list somewhere written
25 down?

1 A Yes, sir.

2 MR. SMITH: Did you-all provide it?

3 I don't know if you did or not.

4 THE WITNESS: It's something I made
5 up.

6 MR. BUNDY: Is it something that I
7 asked you to do?

8 THE WITNESS: Yes, sir.

9 BY MR. SMITH:

10 Q Well, if it's just a list, if you can't
11 remember all of them today, I obviously would like
12 for you --

13 MR. BUNDY: Have you got the list?

14 THE WITNESS: Yes, sir.

15 MR. BUNDY: All right. If I give
16 you the list, will you agree with me that's not a
17 waiver of my work product, privilege. There are
18 certain things that I have asked him to do for me
19 which would contain mental impressions, strategy, et
20 cetera. There are other things that I've asked him
21 to do for me that, while I can make that argument, I
22 don't want to, but I don't want any waiver involved.

23 MR. SMITH: No problem with that.

24 MR. BUNDY: And everybody agrees to
25 that?

1 MR. NEWBERRY: Agreed.

2 MR. SMITH: Let's go ahead and get
3 that marked first, Steve, before you start talking
4 about it.

5 (Exhibit No. 2 marked for
6 identification.)

7 BY MR. SMITH:

8 Q We've marked as Exhibit 2 a two-page
9 document. Please tell us what that is.

10 A One of them is a list of fusible PVC
11 projects that we've worked on. The other one is a
12 list of polyethylene projects that we've worked on.

13 Q When you say polyethylene, is that the
14 HDPE?

15 A Yes, sir.

16 Q And what time period do those lists
17 cover?

18 A The one for fusible PVC covers from June
19 '07 until July '13. Yeah, July of 2013.

20 The polyethylene pipe covers from
21 November 13, '13, to April of '14.

22 MR. SMITH: Let's mark them both
23 separately.

24 (Exhibit No. 3 marked for
25 identification.)

1 BY MR. SMITH:

2 Q So we've marked as Exhibit 3 -- tell us
3 which that one is.

4 A This is a list of polyethylene products
5 or HDPE jobs we've had.

6 Q On both of these lists, Exhibits 2 and 3,
7 as far as you know, are these comprehensive lists of
8 all the projects that you've performed that involve
9 either FPVC or polyethylene?

10 A As far as I know.

11 Q Do you have a list of projects that you
12 have bid but did not -- were not the low bidder?

13 A No. That would be endless.

14 Q I understand it would be much larger. Is
15 it fair to say that you've also bid projects before
16 and after this project in which you were bidding
17 FPVC pipe that was manufactured by Underground
18 Solutions?

19 A Yes, sir.

20 Q Looking at the list of projects on
21 Exhibit 2, the FPVC projects, any of those, did you
22 have any problems with the FPVC pipe on any of those
23 projects?

24 A On the Johns Island project, the sub
25 Bore-Tek had a short drill that was either under a

1 tree or a canal -- I don't remember which -- that
2 the pipe exploded or it fractured into pieces. It
3 was a very short drill.

4 Q When you say short, do you know how long?
5 200 feet?

6 A 200 feet maybe. I'm not sure if it's
7 something he did, but it happened. They pulled it
8 in and went on. We weren't directly involved with
9 it.

10 Q But that occurred. He basically drilled
11 a new hole, pulled in a new pipe and went on about
12 his business?

13 A (Witness nodded).

14 Q You need to answer verbally.

15 A Yes.

16 Q Any kind of other problems of any sort
17 with the FPVC pipe on any of the other projects on
18 the list on Exhibit 2?

19 A Other than pump station 67, no.

20 Q Now, Exhibit 2, I didn't look at the
21 dates on those. Are any of those projects after
22 this project that's the subject of the litigation?

23 A Yes, sir.

24 Q Which ones?

25 A In Purrysburg for Beaufort-Jasper Water

1 Sewer Authority, we pulled in a 36-inch FPVC pipe.
2 Beaufort-Jasper bought the material. So we didn't
3 really buy the material. We just had to drill and
4 pull it.

5 Q Now, obviously, as a utility contractor,
6 I presume most of the jobs that you bid are
7 competitive bid for the public. Is that right?

8 A Yes.

9 Q And whenever FPVC is specified, is it
10 typical that HDPE is also allowed as an alternate,
11 or are they sometimes either one and you choose
12 which one you want to bid?

13 A All different combinations. Sometimes
14 it's HDPE only. Sometimes it's FPVC only.
15 Sometimes it's both, or sometimes one of them is an
16 alternate.

17 Q And I think this pump station 67 was
18 actually -- the HDPE was an alternate. Is that
19 right?

20 A Correct.

21 Q When FPVC is specified and then HDPE is
22 an alternate, does R.H. Moore typically bid both of
23 them, or do you only bid one, or what do you
24 normally do?

25 A It depends on the bid documents.

1 Q On this particular job, did you-all bid
2 the HDPE alternate?

3 A Yes. It was required to bid the
4 alternate.

5 Q If you have a choice where you're not
6 required to bid both, it's an option whether you can
7 bid one or both, what do you typically do?

8 A It depends on how desperate we are for
9 work. If you're desperate for work, you bid the low
10 product. If you don't care, we prefer to do HDPE.

11 Q And why is that?

12 A Safer.

13 Q When you say safer, what do you mean?

14 A It don't blow up.

15 Q You mentioned this job and the Johns
16 Island job. Have you had any other instances where
17 FPVC pipe fractured or caused a problem for you?

18 A No. R.H. Moore has not, no.

19 Q Is the FPVC pipe typically less expensive
20 than the HDPE pipe?

21 A Typically, yes.

22 Q Percentage-wise, do you know
23 approximately how much cheaper it typically is?

24 A It's hard to say. It depends on the
25 class of pipe. For example, fusible PVC is usually

1 a DR21, which is about that thin (indicating). And
2 HDPE, because of the way it's made, if they bid a
3 DR11, it's about that thick (indicating). And if
4 they bid a DR9, it's about that thick.

5 Engineers typically like to see the IDs
6 of the pipe equal to the force main pipe.

7 And on this particular job, they had a
8 20-inch force main pipe size. They quoted a 20-inch
9 fusible PVC pipe, because they have similar IDs on
10 the base bid.

11 Q When you say ID, that's inside diameter?

12 A Yeah. The flow area of the pipe.

13 The alternate for HDPE was a 24-inch DR11
14 pipe. And that pipe has a similar OD to both the
15 other pipes.

16 A regular 20-inch pipe has about a 19 and
17 a half ID.

18 Q So it required -- If you were going to
19 use the HDPE on this project, you would have had to
20 have a transition piece?

21 A Correct.

22 Q On Exhibit 2 when you list the FPVC size
23 of 24 inches, is that inside or outside diameter?
24 Which is it typically?

25 A I don't know. That's just what is on the

1 bid sheet.

2 Q You basically are provided a set of
3 specifications prepared by an engineer and you have
4 to bid those specs. Is that fair?

5 A Yes, sir.

6 Q So you don't really have a choice most
7 times when you're bidding a job on the pipe that you
8 use. That's going to be specified for you. Is that
9 fair?

10 A Yes, sir. We don't always think they
11 make the right choice, but that's what you have to
12 bid.

13 Q I've never known a contractor that has
14 always agreed with an engineer.

15 A I agree with that.

16 Q And your only choice is to bid it or not
17 bid it. Right?

18 A Yes, sir.

19 Q You don't have much chance of calling the
20 engineer and convincing him to change his
21 specifications, do you?

22 MR. NEWBERRY: Object to the form.

23 BY MR. SMITH:

24 Q You can go ahead and answer.

25 A Sometimes we call them up and tell them

1 if they will go a different route it will be a lot
2 more economical and give them a better job. Some of
3 them listen, and some of them don't.

4 Q On this particular job -- What do you
5 refer to it as? Pump station 67?

6 A Mm-hmm.

7 Q On this job, did you have any
8 conversations with the engineers prior to bidding
9 about the plans and specs?

10 A I don't think so.

11 Q Did you have any concerns when you bid
12 this job about the plans and specs and the use of
13 the FPVC pipe?

14 A You're always concerned, because there
15 are not many drillers that have a lot of experience
16 with it.

17 Q With the FPVC?

18 A Yes.

19 Q Is that because it's a relatively new
20 product?

21 A I don't know. I guess.

22 Q How did you -- I think your sub was
23 Utility Services Authority. How did you find them
24 when you were looking for subs for this job to do
25 the FPVC?

1 A I think they sent us a quote.

2 Q Had you used them before?

3 A No.

4 Q Who would you use -- Well, it may be on
5 that list there. I don't know. As far as your
6 subcontractors to install FPVC, are they listed on
7 that?

8 A Yes, sir.

9 Q And USA, that's Utility Services --

10 A Yes, sir.

11 Q Where is Bore-Tek from?

12 A That's Bore-Tek locally. They are out of
13 business.

14 Q How about Drill Tech?

15 A I'm not sure where they are from, but
16 it's up north. They are still in business.

17 Q Are there any local firms now that have
18 experience in installing FPVC?

19 A Probably smaller diameter pipes. Carroll
20 Enterprises, Tommy Carroll does fusible PVC.
21 There's another local outfit called Pinnacle. They
22 do smaller diameter bores or drills, and I don't
23 know if they would or not.

24 Q When you say smaller diameter, what's the
25 range on that that you're referring to?

1 A My definition of small diameter is
2 anything below 12 inches.

3 Q When was the last project that you recall
4 that you bid FPVC pipe?

5 A I don't remember. It hadn't been
6 recently.

7 Q Do you recall bidding it in 2014?

8 A Sure, yeah.

9 Q Have there been any projects that FPVC
10 was specified and you decided not to bid that
11 project solely because FPVC pipe was specified?

12 A I don't think so. Since this project,
13 we've pretty much -- If it is spec'd and we need the
14 work, we have to eat and feed our children and all,
15 if fusible PVC is on the job, we typically find a
16 driller that will buy the pipe and use it where we
17 don't have to mess with it.

18 Q Have you done that in any instances?

19 A Yes.

20 Q Which project did you do that on?

21 A Redtop force main.

22 Q Is that the only one where you've done
23 that?

24 A Yes, sir. It's the only one we've done
25 with fusible since then.

1 Q Are you saying that currently if you were
2 to bid an FPVC pipe job, that the only way you would
3 do it is with a driller buying the pipe and not you?

4 A No, I'm not saying that. I'm saying
5 that's our preference.

6 Q I just want to make sure --

7 A You're in business to try and make money.
8 You do what you have to do. Sometimes you do things
9 you don't want to do.

10 Q Well, you're in a risky business. Right?

11 A Correct.

12 (Exhibit No. 4 marked for
13 identification.)

14 BY MR. SMITH:

15 Q Mr. Thornton, I'm going to show you what
16 we've marked as Exhibit 4 and ask you if you can
17 identify that, please.

18 A This is an order summary from Underground
19 Solutions for pump station 67.

20 Q Is this your signature on the document?

21 A Yes, sir.

22 Q If you would look at the pages behind
23 that and tell me if you recognize those and what
24 those are.

25 A It says terms and conditions of sale.

1 Q Have you seen this before?

2 A I think so. I would have to pull my
3 copy, but I think I've seen it.

4 Q Exhibit 4, does that represent the
5 written contract between R.H. Moore and Underground
6 Solutions for the pump 67 project?

7 A We also give them a purchase order for
8 this amount. I don't know exactly what you mean.

9 (Exhibit No. 5 marked for
10 identification.)

11 BY MR. SMITH:

12 Q Let me show you what's been marked as
13 Exhibit 5. Identify that for me, if you would,
14 please.

15 A This is a purchase order from R.H. Moore
16 for the 20-inch fusible PVC on pump station 67.

17 Q And Exhibit 5 is dated July 28th, 2011.
18 Correct?

19 A Correct.

20 Q And Exhibit 4 is dated June 16, 2011.
21 Correct? I think it's in the upper left.

22 A Oh, yes, sir.

23 Q And I'm just trying to understand what
24 your understanding is..

25 Do these two exhibits, 4 and 5, do they

1 represent the written contract that you had with
2 Underground Solutions?

3 MR. BUNDY: Object to the form. You
4 can answer it if you can.

5 A As far as I know.

6 BY MR. SMITH:

7 Q Do you know of any other written
8 documents that you contend form part of your
9 contract with Underground Solutions?

10 A No.

11 MR. BUNDY: Can we go off the record
12 a second?

13 (Discussion off the record.)

14 (Exhibit Nos. 4 and 5 remarked
15 for identification.)

16 (Exhibit No. 6 marked for
17 identification.)

18 BY MR. SMITH:

19 Q Mr. Thornton, we've rearranged the
20 exhibits a little bit. Let's reidentify them.

21 Exhibit 4 is a one-page document now.
22 Tell me what that document is.

23 A It's the order summary for fusible PVC
24 for pump station 67.

25 Q And Exhibit 5, tell me what that is.

1 A That's terms and conditions of sale. I
2 guess for this agreement. And there is a fine print
3 note here that says it's available on-line. I guess
4 it wasn't attached to the original quote.

5 Q Did you understand that when you signed
6 Exhibit 4 that the terms and conditions were
7 available on-line?

8 A No, sir.

9 Q Did you read Exhibit 4?

10 A That's so small. I can't read it.

11 Q You signed it, but you didn't read it.
12 Is that what you're telling me?

13 MR. BUNDY: Object to the question.
14 Lack of foundation.

15 A Yes, sir.

16 BY MR. SMITH:

17 Q If we look at Exhibit 4, it says, "This
18 proposal is subject to the terms and conditions at
19 www.undergroundsolutions.com/Ts&Cs/pipe-and-fusion-
20 terms-05.18.11.pdf which form an integral part of
21 this proposal." Did you see that?

22 A I can see it, yes, sir. Barely.

23 Q It's legible and you can read it right
24 now, can't you?

25 A Yes, sir.

1 Q I need glasses. And you don't have any
2 on, but I'll be happy to supply them if you need
3 them.

4 A No, sir.

5 Q Do you recall whether you read that
6 sentence?

7 A I did not.

8 Q You could have read that sentence if you
9 so desired, could you not?

10 A Yes, sir.

11 Q Is this Exhibit 4 similar to the other
12 proposals and contract forms that were provided to
13 you by Underground Solutions on projects prior to
14 this one?

15 A We didn't buy the pipe prior to this one.

16 Q This is the first job where you ever
17 bought the pipe?

18 A Yes. On the Johns Island project, the
19 pipe was bought by Bore-Tek, the bore sub, drill
20 sub. And on Beaufort, the owner bought the pipe.

21 Q So this was the first time you had seen
22 these documents then?

23 A Yes, sir.

24 Q Since you had not seen them before, would
25 you normally read a document since you had not seen

1 it before?

2 A I normally don't read the fine print.
3 We'd like to think that we're dealing with people we
4 can trust that's not going to beat us to death with
5 fine print in a contract. We want to treat them
6 fair, and we expect to be treated fair.

7 Q Do you contend that Exhibit 5 is not a
8 part of your contract?

9 MR. BUNDY: Object to the form of
10 the question. Asks for a legal conclusion. Subject
11 to that, you can answer.

12 A I think that's up to my attorney.

13 BY MR. SMITH:

14 Q Well, do you agree that it was available
15 for you to review if you wanted to before you signed
16 the contract?

17 A Yes.

18 Q Other than Exhibits 4, 5 and 6, and
19 understanding you may -- With reservations about
20 whatever you may have testified to so far about
21 Exhibit 5, are there other written documents that
22 you contend make up the contract, other than
23 possibly these three?

24 A Not that I can think of.

25 Q Are you aware or do you contend that

1 there are any oral agreements with Underground.

2 Solutions that vary or add to your written contract?

3 A In what way?

4 Q In any way.

5 A I think you'd have to bring up a specific
6 subject. It's a broad term.

7 Q Let me ask it a different way then.

8 A I'll put it like this. If you read those
9 papers, it says if you keep the pulling head two
10 months, you owe two months rent. And if it runs
11 over, you owe us another month's rent.

12 And we have talked to people from
13 Underground Solutions and they said, well, let's do
14 two months, and we are not going to charge you for a
15 piece of a month.

16 There is those kind of agreements.

17 Q Other than agreements on charges for
18 equipment or other costs, if you will, are you aware
19 of any oral agreements with Underground Solutions?

20 A Pertaining to buying the pipe?

21 Q Pertaining to anything relating to this
22 project.

23 A We had an oral agreement with Eric Davis,
24 vice president of Underground Solutions, to repair
25 the broke grill.

1 Q I think we're going to get into that in a
2 little more detail as we go down our list. Any
3 other oral agreements that you're aware of?

4 A No, sir.

5 Q What is your understanding of the scope
6 of work for your contract with Underground
7 Solutions? What were they going to do?

8 Generally, I know they are going to
9 supply you pipe and they are going to fuse it.
10 Correct?

11 A Right.

12 Q Anything else from a major standpoint
13 that Underground Solutions was going to provide to
14 you?

15 A They were going to provide technical
16 assistance, questions. I guess support their
17 product.

18 Q When you say "support their product,"
19 what do you mean by that?

20 A They had technical people come around and
21 look at what we were doing to make sure we were
22 complying with whatever it takes, I guess.

23 Q When you say "we," are you referring to
24 your subcontractor Utility Services Authority?

25 A And R.H. Moore.

1 Q What was R.H. Moore's involvement in the
2 installation of the pipe? What specifically did you
3 do as opposed to your subcontractor?

4 A R.H. Moore unloaded the pipe. We strung
5 it out. We assisted Underground Solutions' fuser.
6 We handled the pipe for him while he fused it. And
7 we put the pipe in place before the driller pulled
8 it in, put it up on rollers.

9 Q Once the pipe was delivered to the site,
10 who was responsible for maintaining the pipe and
11 protecting it from damage, et cetera?

12 A I guess R.H. Moore.

13 Q When the pipe was delivered to the site,
14 did you unload it? Did R.H. Moore unload it?

15 A Yes, sir.

16 Q And you stored it in a certain place
17 until it was ready to be fused?

18 A Yes, sir.

19 Q What was the schedule in terms of
20 delivery of pipe, fusing, installation? I'm looking
21 in general terms of when it was fused and how long
22 before it would be put in the ground, that type of
23 stuff, if you recall.

24 A I don't recall the exact dates. We
25 had -- I'm trying to think of how many drills.

1 There were either nine or ten drills on the project.
2 There was one drill 1,700 feet. There was one drill
3 2,000 feet. The rest of them were very short --
4 300, 500.

5 So we moved in the pipe, unloaded it, and
6 your fuser come. And it don't take the driller very
7 long to pull it, a short run. So we tried to fuse
8 it and get ahead of the driller so we wouldn't hold
9 him up when he got there..

10 Q In a schedule situation, if things go as
11 planned, how long between fusing of the pipe and
12 installation of the pipe?

13 A It depends on the drill. If the drill is
14 300 feet, the driller can come in -- if it's fused,
15 he can punch a pilot hole one day and pull it back
16 the next day.

17 But if it's a 1,700 foot drill, it will
18 take him a week or so to punch the pilot bit through
19 and be ready to pull. So you're looking at about
20 two weeks. And it really just depends on how long
21 the drill is.

22 Q As I recall, the contract with
23 Underground Solutions was set up that they would
24 mobilize one time to fuse the pipe. Was that the
25 intent, to fuse all the pipe while they were there

1 with one mobilization?

2 A Yes.

3 Q Did that occur?

4 A I think they had to come back a couple of
5 times. I think at least one time they had to come
6 back after the fact.

7 Q So why did they not fuse all the pipe on
8 the first mobilization?

9 A I think they fused the original pipe.
10 There are several drills that change lengths,
11 particularly the one at the river changed. The
12 length of that changed. And he had to come back
13 and -- Well, no, that's on the re-drill.

14 Q Let's talk about the re-drill separately.
15 I'm talking about just the original work.

16 A The original work, I think they fused it
17 all. If he come back and forth, it was for his
18 convenience or ours. Either he had another job to
19 go to and the driller wasn't caught up. But I would
20 have to go back and hunt through a lot of paper to
21 tell you exactly that. If he left, it was a mutual
22 agreement for him to leave and come back.

23 Q Other than your contract with Utility
24 Services Authority to install the pipe, did R.H.
25 Moore contract with any other entity that had any

1 involvement in the installation of the pipe?

2 A No, sir.

3 Q So basically the entities involved with
4 the pipe would have been Underground Solutions,
5 Utility Services and R.H. Moore?

6 A Yes, sir.

7 Q Item two of Exhibit 1, I just want to
8 make sure that we're covering all the -- Is that it
9 right there (indicating)?

10 A Do you need it back?

11 Q No, I've got a copy of that.

12 Item two, we've talked about all the
13 agreements between Underground Solutions and R.H.
14 Moore. Is that correct?

15 A As far as I know.

16 Q Item three is agreements between R.H.
17 Moore and any other entity regarding the
18 installation or investigation of the pipe.

19 Now, I think we've talked about the
20 installation. The only other agreement would be
21 with Utility Services. Is that right?

22 A Correct.

23 Q As far as investigation of the pipe,
24 you've obviously had your expert Mr. Palermo
25 retained?

1 A Yes, sir.

2 Q Have you retained anyone else to conduct
3 any type of investigation into the pipe other than
4 Mr. Palermo?

5 A No, sir.

6 Q Do you know if you have any plans to
7 retain anybody else to look into anything relating
8 to the pipe other than Mr. Palermo?

9 A I don't know the answer to that. The
10 show ain't over yet.

11 Q I understand. You can only testify what
12 you know about.

13 A Yes, sir.

14 Q Item four are documents produced by R.H.
15 Moore relating to the FPVC pipe. Your lawyer has
16 produced the documents. Were you involved in the
17 production?

18 A No, sir. Somebody in the office put them
19 together and sent them to Mr. Bundy.

20 Q As far as you know, all the documents
21 related to this project have been produced?

22 A As far as I know.

23 Q Do you keep any personal records that you
24 haven't provided or anything like that?

25 A That's personal.

1 Q Well, personal to the project. Let me
2 ask it that way.

3 A I don't think so.

4 MR. BUNDY: I will say that -- and I
5 looked into this. He asked me about it before the
6 deposition. He kept a phone log. And it was
7 offered in production to everyone, and nobody asked
8 for a copy of it. So I don't know whether you-all
9 are interested in that or not. But it's there if
10 you-all want to look at it at some point.

11 BY MR. SMITH:

12 Q Let's go to item five now. Item five is
13 the basis for R.H. Moore's allegation that
14 Underground Solutions' FPVC pipe failed due to
15 design and manufacturing defects. Are you familiar
16 with this allegation?

17 A Yes, sir.

18 Q What is the basis for the allegation that
19 the pipe failed due to design and manufacturing
20 defects?

21 A The pipe exploded during the pressure
22 test.

23 Q Do you know why the pipe exploded?

24 A No, sir.

25 Q How do you know that it exploded because

1 of a design or a manufacturing defect?

2 A Why else would it explode?

3 Q You can't think of any other reasons?

4 A No, sir. We spent two or three weeks
5 investigating the pipe. I think you-all had an
6 expert come down and look at it.

7 I base my feelings on -- I look at the
8 way you shipped the pipe. In your agreement there
9 it says the pipe will be shipped in 40-foot lengths
10 on trucks. A fair amount of the pipe come in
11 20-foot joints. That tells me that either you were
12 cutting the pipe to test it, or maybe there was some
13 bad pipe and you cut it in two to save 20 feet.
14 That's just my personal opinion.

15 Q Other than just your personal opinion and
16 supposition on that, do you have any evidence to
17 suggest that Underground Solutions cut the pipe
18 because there were bad sections or they were testing
19 it or whatever?

20 A I looked at your QC reports, and there's
21 quite a bit of pipe on there that was scrapped. And
22 you're in business to make money, too.

23 So just you asked me my opinion, that's
24 my opinion.

25 Q I just want to understand what the basis

1 of your opinion is.

2 A Right.

3 Q So the basis of your opinion is the QC
4 reports?

5 A Yes, sir. That's part of it.

6 Q Anything else?

7 A I looked at your cutting procedure for
8 cutting the pipe. It's a good document. It plainly
9 says that when you fuse your material together and
10 you bend it, there is a lot of stress, tension or
11 stress in the pipe. If you don't cut it exactly
12 right, it's going to split.

13 So that tells me when you pull a pipe --
14 and every drill I seen you bend the pipe -- it's
15 full of stress. If something, a minuscule rock or
16 anything were to hit it, you can go out and tap it
17 with a backhoe, it's going to crack and split.

18 We think that if there was a sandy area
19 of soil and a hard area of soil, that maybe it
20 somehow overstressed it and it broke.

21 Q You recognize that there are stress
22 limitations on the pipe. Correct?

23 A You would have to clarify that a little
24 better.

25 Q Any piece of pipe has limitations about

1 how it can be bent or stretched. Correct?

2 A Yes, sir.

3 Q So as far as the limitations on bending
4 the FPVC pipe, there are limitations on that.
5 Correct?

6 A Yes, sir.

7 Q And those are the specifications, if you
8 will, of a pipe. HDPE has similar limitations, does
9 it not?

10 A Yes.

11 Q Would you agree that if the pipe is
12 handled within the specifications of its bending
13 limitations, that everything should be okay?

14 A It should be. And when we did -- Your
15 own people brought down a special machine to run up
16 in the pipe as far as we could get it. They
17 couldn't find where it had been overstressed. And
18 that leads me back to either a pipe defect or a well
19 defect. That's where it takes my thinking.

20 Q You have no physical evidence of that, do
21 you?

22 A No, sir.

23 Q You would agree with me that if the pipe
24 was somehow bent beyond its limitations, that that
25 could cause a problem?

1 A Yes, sir.

2 Q And you would agree with me, wouldn't
3 you, that if the pipe were installed within its
4 bending limitations and other structural limitations
5 and it was damaged somehow, that that could cause it
6 to fail?

7 A It could.

8 Q The 300-foot section is an example, is it
9 not, where there was a bullet hole in the pipe?

10 A Well, that's a little different. The
11 bullet hole in the pipe didn't explode and crack.
12 The bullet hole in the pipe just leaked.

13 Q I understand that. But do you understand
14 that damage to the pipe could also result in an
15 explosion failure like you experienced on the
16 2,000-foot section?

17 A I don't exactly know the right words for
18 this, but I'll tell you the procedure we went
19 through to test it.

20 We put it in the ground. We tied it
21 together with the other force main. We pressure
22 tested the entire force main. We pumped water. We
23 filled it up. We bled the air out of all the pipe.
24 There is an air release on each end of the drill.
25 There are high points. We bled air there. We

1 pumped the entire line up to 60 psi. We let it sit
2 overnight. We bled the air. The next day we pumped
3 it up to 80 psi and we bled air.

4 In my opinion, if the pipe was damaged,
5 it wouldn't hold that if there was any previous
6 damage. And then the third day we pumped it up, the
7 test pressure was 110 psi. And somewhere between 90
8 and 100 the pipe blew.

9 I think if the pipe had been physically
10 damaged it wouldn't have held 80 pounds.

11 The pipe under the bullet drill never
12 held anything. It leaked from day one.

13 Q Understanding your scenario of the
14 increased pressure for the pipe, if you had a
15 situation where there was slight damage to the pipe
16 such that it was weakened but it was not totally
17 broken through, can you understand or do you agree
18 that logically the pipe could hold to a certain
19 pressure and then it gets to a greater pressure and
20 then it explodes?

21 A Anything is possible.

22 Q The bottom line in this particular case
23 apparently is that no one knows for sure because
24 nobody has been able to get the pipe out. Is that
25 fair?

1 A That's correct.

2 Q And so what I'm trying to understand is
3 what you physically -- what physical evidence you
4 base your opinion on that the pipe was defective, if
5 any?

6 A I base it on your QC reports. Is that
7 what you're talking about?

8 Q Mm-hmm.

9 A And I base it on the fact that you said
10 you were going to ship 40-foot joints and you ship
11 20s, and that's a red flag for us. We buy a lot of
12 pipe. We buy duct line that comes in a 20-foot
13 stick. When it comes in on the truck and it's 18
14 foot long, you say, well, why is it 18 foot long?
15 Oh, we were testing it.

16 PVC people do similar things. They cut
17 pipe short for testing.

18 Your product is extruded, I guess, out of
19 a machine. I've never seen it made, but I guess
20 that's how they make it.

21 Q I haven't either.

22 A They pour liquid in here and they push it
23 through something and it comes out a pipe. When you
24 start shipping 20s, there is some reason you're
25 shipping 20s. To me, logically it's because there

1 was something that flattened, wasn't right, so you
2 cut the piece to save that joint.

3 Q So other than the length of the pipe and
4 the QC reports, is there any other physical evidence
5 that you base your opinion on that the pipe was
6 defective?

7 A No.

8 MR. BUNDY: Object to the form of
9 the question.

10 BY MR. SMITH:

11 Q Do you acknowledge that there could be
12 other explanations for the cause of the pipe
13 explosion other than a manufacturing defect?

14 A There could be, but I don't know what it
15 would be.

16 Q For instance, if it just -- the pipe when
17 it was installed hit a sharp object that damaged it
18 slightly and that damage was not exposed until you
19 got up to 110 pressure?

20 A Anything is possible.

21 Q Do you consider yourself an expert on the
22 failure of these pipes and determining the cause of
23 it?

24 A No, sir. I've just been doing it for 37
25 years, and it's the first time I've ever had a pipe

1 blow up in the ground.

2 Q As far as determining the cause of the
3 failure, that's why you hired Mr. Palermo, isn't it?

4 A Well, we hired him to help us determine
5 the cause.

6 Q Before you hired him, did you know -- or
7 did you think that you were aware of the cause of
8 the failure?

9 A I had my suspicions.

10 Q Based on what?

11 A Just all the paperwork, going through the
12 process.

13 Q I'm sorry. What do you mean "paperwork,
14 going through the process"?

15 A Your QC reports. Of course, I didn't
16 have them then. But the 20 foot versus 40.

17 Q Did you ever raise a concern to anybody
18 that you were getting pipe in 20-foot lengths when
19 it was supposed to be 40?

20 A I called somebody. I dealt mostly with
21 Eric Davis and asked him why we were getting 20s,
22 and he said it's just some -- What did he say? He
23 said it was pipe made for open-cut installation.

24 You-all push using your product as a
25 restrained joint pipe in certain instances. And he

1 said it was some of that pipe they had left and they
2 shipped it from something.

3 Q Did you express to him your concern at
4 that point?

5 A Well, I told him it would take longer to
6 fuse it and we were both spending more time fusing
7 pipe than what we thought we were going to spend.

8 Q Other than that --

9 A My mind-set wasn't on the fact that it
10 might blow up because it's defective. At that time
11 my mind-set was on production.

12 Q Do you recall during the project that
13 they fused the pipe sufficiently in time to meet
14 your schedule?

15 A Yes, sir. There were some conversations
16 at one time. They had several breakdowns with their
17 equipment during the project, which is not uncommon.
18 And at one time it looked like they were going to be
19 behind, and we discussed with them about bringing in
20 another fuser. And I think their guy worked a
21 couple of weekends, and USA had some problems, so it
22 didn't work out that they had to bring another fuser
23 in.

24 Q I think I saw some e-mails to that
25 effect.

1 A Right.

2 Q Just to make sure I'm clear on No. 5 and
3 we'll move on, the QC reports and the 20-foot
4 lengths, those are the two physical things that you
5 base your opinion on that the pipe was defective?

6 MR. BUNDY: Object to the form of
7 the question.

8 A And the possible fusion problems.

9 BY MR. SMITH:

10 Q Possible fusion problems, what do you
11 mean?

12 A Well, if your fusing machine is not
13 working properly and it overheats the pipe, your
14 pipe is a brittle product anyway. The higher the
15 heat is probably not going to help it.

16 Q Is there any written evidence that the
17 fusion machine was overheating and overheating the
18 pipe?

19 A Not to my knowledge.

20 Q Why are you saying that then if there was
21 no evidence of it?

22 A That's a likely reason for it to blow up.

23 Q What I'm asking is, do you have any
24 evidence that that actually happened?

25 A No, sir.

1 Q So you have no evidence that there was
2 overheating of the fusion equipment?

3 A No, sir. I just know your equipment
4 broke down and they fixed it. I don't know -- I'm
5 not a fusion technician, and I don't know what to
6 look for and what not to.

7 Q When you say the QC reports, are those
8 relating to the fusion?

9 A No. That's related to the manufacturing
10 of the pipe.

11 Q I think there are also some documents
12 that are created on site during the fusion. Is that
13 correct?

14 A We never got those documents.

15 Q I could be wrong about that.

16 A Usually they have a data logger that
17 records all of that.

18 Q But you haven't seen any of that?

19 A No. Should ask for that.

20 Q I don't know if it exists or not. My
21 guess is there is some written documentation about
22 the fusion process.

23 MR. BUNDY: Could we get those
24 documents if you've got them?

25 MR. SMITH: Absolutely.

1 A It will tell you the time and temperature
2 and the pressures and all of that when it was fused.

3 BY MR. SMITH:

4 Q Let's go to No. 6. This is the facts and
5 circumstances surrounding the failure and
6 replacement of the two sections. Let's continue
7 talking about the 1,900-foot section first.

8 Did it happen May 15th? May 23rd?
9 Something like that? What was the date that it
10 occurred? Do you remember?

11 A The drill broke May 16th.

12 Q How long had that pipe been in the ground
13 before the pressure test was started?

14 A It don't tell me that. It was probably
15 put in in January.

16 MR. FRAMPTON: Can I ask this
17 question? This is what year? You said May 16th.
18 2012?

19 THE WITNESS: May 16, 2012.

20 BY MR. SMITH:

21 Q So you think this 1,900-foot drill was
22 done in January of 2012?

23 A January or February, I believe.

24 Q So it had been in the ground for a few
25 months before it got tested?

1 A Yes, sir.

2 Q But not unusual, I guess?

3 A No.

4 Q And you described a little bit earlier
5 the process for the pressure test. Was that the
6 normal pressure test where you tested at certain
7 levels and then continue to go up from there?

8 A Yes, sir, that's the way we do it.

9 Q Are there pressure testing specifications
10 on the project that sets out exactly how you do it?

11 A I don't think so. I think all they say
12 is you have to test it to 150 psi for two hours. It
13 generally shies away from means and methods.

14 Q Why do you typically do it on a graduated
15 basis where you test it at a certain pressure and
16 then raise it later?

17 A So they don't get air locked and blow up.

18 Q Could an air lock cause the pipe to
19 explode?

20 A It could, but not where this one
21 exploded. We bled air for three days. And it
22 exploded in the low point of the line, and it would
23 have always been full of water. If it had exploded
24 up at a high point, maybe.

25 Q Were you on site the day that the pipe

1 exploded?

2 A No, sir. I was in town. Not on site.

3 Q Did you go to the site once you heard
4 about it?

5 A Yes, sir.

6 Q Tell me what you did and what you did to
7 investigate it at that point.

8 A I was working on a bid in a hotel, and I
9 got a call from -- I think it was URS. And they
10 said a lady was mad because we had put mud and crap
11 in her yard that we had just sodded not long ago.
12 And I said where was it at, and they said, well,
13 it's at the Ashley River. And I said, well,
14 something is wrong there.

15 I got through with my -- Well, meanwhile,
16 I called the superintendent -- or about the same
17 time he called me, and he said we have a problem
18 here. He said bentonite shot out each end of the
19 drill and mud is everywhere, you know. I said,
20 well, let me get through with the bid and I'll come
21 out there.

22 So I did. Looked around. I immediately
23 started calling people. URS. I'm not sure if I
24 called Henry or not.

25 THE WITNESS: Were you in Alaska?

1 MR. MOORE: Oh, yeah.

2 A Him. I called Underground Solutions.

3 And I think I called USA.

4 BY MR. SMITH:

5 Q Do you remember who you called at

6 Underground Solutions?

7 A I don't. It was probably Eric Davis. He
8 is the main one that I talked to.

9 Q And who did you call at USA?

10 A Probably David Carpenter.

11 Q Do you recall when you called Eric Davis
12 what his response was?

13 A Not exactly, but he said he would send
14 somebody to check it out. And I think he sent -- Is
15 there an Eric somebody out of Atlanta? I think his
16 name was Eric, and I think he was from Atlanta. And
17 he showed up shortly after, the next day, day after.

18 Q What about David Carpenter? What was his
19 response when you called him?

20 A He said keep him advised. He is in
21 Florida.

22 Q Who was in charge of investigating the
23 pipe failure to determine what the cause was? Did
24 you take that over? Did you give it to somebody
25 else, or what?

1 A Do you mean who --

2 Q Once it happened, obviously you've got a
3 problem. You have to figure out what's going on.

4 Did you handle that in terms of deciding
5 what was going to be investigated, how you
6 investigated, who to call and that type stuff?

7 A I think that was kind of a joint opinion
8 of what we should do between us and Underground
9 Solutions.

10 Q And what was the joint opinion?

11 A The joint opinion was, number one, we had
12 to take the pipe apart from the force main,
13 disconnect it. We did that. And on the -- I'm
14 going to call it the west end of the drill there
15 seemed to be more water and slop coming out of the
16 ground there.

17 So we dug where we connected it to the
18 force main first and disconnected it, and then there
19 was water coming up, so they dug there. When they
20 dug it up there, the pipe was physically cut in two.

21 Q Where it had kind of totally broke in
22 two? I've seen some pictures of that.

23 A Yeah, the crack, according to the crack
24 master, your guy, he said it exploded somewhere down
25 toward the river and the crack ran up. And due

1 to some anomaly, it circled the pipe and cut the
2 pipe. He said that's where it ended. He said
3 that's not your problem. That's just where it
4 ended.

5 Q And who was telling you this? Do you
6 recall?

7 A We called him the crack master. He is a
8 nice guy. He was from your -- EJ something.

9 Q ESI?

10 A Yes.

11 Q So he came out later, didn't he?

12 A Yeah, he came out later. Probably a
13 week.

14 Q Was it their general agreement that the
15 initiation point of the crack could not be located
16 and everybody determined that it wasn't economically
17 feasible to find it?

18 A I think that was the determination after
19 about three weeks or so.

20 Q Did you agree with that?

21 A I knew we had spent about \$100,000
22 looking for it, and we could probably spend \$100,000
23 or \$200,000 more trying to get to it. And that
24 seemed to be the logical thing to do.

25 Q The crack master, did he tell you

1 anything on site when you talked to him in terms of
2 what he thought caused the problem?

3 A He said very little. He said he would
4 have to gather the information and go back and do
5 his report. And when he did, it was inconclusive.

6 Q Are you aware of anyone conducting an
7 investigation that has given a conclusive report as
8 to what was the cause of the crack?

9 A No.

10 Q Mr. Palermo investigated and his report
11 was also inconclusive as to the initiation of the
12 crack. Is that right?

13 A I don't remember reading his report.

14 Q I don't think he gave a written report.
15 Is that what you recall him advising based on his
16 investigation?

17 A I just don't remember.

18 Q That's fine. Obviously, you were
19 concerned about getting the job finished, so you had
20 to get that thing fixed. Right?

21 A Right.

22 Q What was your concern and what did you
23 recommend in terms of getting that problem solved?

24 A Well, after we had done all the
25 investigation work, I believe on June 6th or 5th,

1 Eric Davis called me up four minutes after 5:00 in
2 the afternoon and said, well, we don't know what's
3 wrong. We are going to replace the drill. And we
4 are going to do it using DR18 pipe. He said, I'll
5 check with drillers. He said, I sent an e-mail to
6 Eric King at B.P. Barber to ask him if we can use
7 the DR18 pipe, and I'll be getting back in touch.

8 Q So what's DR18 pipe?

9 A DR21 is a class of pipe. That's what was
10 spec'd on the project. DR18 is a thicker-wall pipe.
11 And I guess that's what he had in stock.

12 Q The DR21 was specified?

13 A Yes.

14 Q But Eric said he was going to replace it
15 with DR18?

16 A A heavier wall pipe.

17 Q Did he say that because that's what they
18 had in stock, or did he say why he was using DR18?

19 A I think he told me it's because that's
20 what they had in stock. And time was of the
21 essence. And there was a \$1,000 a day penalty on
22 this project for being late. It seems to me like he
23 was trying to do the right thing.

24 Q And you said he called you on June 6th?

25 A June 4th. I can look it up. But it's

1 somewhere around there.

2 Q And this was a call that he initiated?

3 A Yes.

4 Q Had you and he had discussions prior to
5 this about the failure?

6 A We talked not daily, but a lot about what
7 we were going to do next and what they found and
8 what they didn't find. Do you want to know the
9 exact day he called?

10 Q If you know it, yes.

11 THE WITNESS: Is it okay if I look?

12 MR. BUNDY: At your phone records?

13 Let's figure this out. He's got a book here that's
14 got documents in it that has been produced. But it
15 also contains attorney-client privilege information
16 with work product and lists I've asked him to
17 compile for me. It's all mixed up in there. So
18 it's not mixed up in the sense that it's all
19 separately tabbed. So he can go to tab 3, which is
20 documents that have been produced which I don't
21 claim are privileged and look in there, but he's
22 also got tab 2 which is not subject to disclosure.

23 MR. SMITH: I can make this easy. I
24 don't need to look at it. He can just look at it
25 and get the date.

1 MR. BUNDY: What I don't want him to
2 do is have him look at something and there be a
3 claim that I've waived the attorney-client
4 privilege.

5 MR. SMITH: I understand. Why don't
6 we take a break while he does that.

7 (Recess taken.)

8 BY MR. SMITH:

9 Q Mr. Thornton, when we took a break, I
10 think you were going to check some records to
11 determine the date that you spoke with Mr. Davis.
12 Is that correct?

13 A That's correct.

14 Q Did you determine the date that you
15 talked to him?

16 A Yes, sir. I talked to him on June 5th at
17 5:04. He said that nobody had found anything; that
18 they would replace the drill with DR18 pipe. He
19 said he called Eric King, who is an engineer with
20 URS, about changing the pipe class and said we could
21 close up the ends of the drill. He said I'm looking
22 for drillers and he would get back.

23 Q Now, did Mr. Davis tell you that
24 Underground Solutions was going to assume the costs
25 for all of this work?

1 A He didn't say I was going to pay for it.
2 He said they would replace the drill.

3 Q Well, he didn't specifically say
4 Underground Solutions is accepting responsibility
5 and we are going to pay for all of this, did he?

6 A He didn't put it in those words.

7 Q You took his statement that we will
8 replace the drill -- Is that what you're basing your
9 statement on that they agreed to replace the drill
10 and pay for it?

11 A Yes, sir. Where we live if you come to
12 me and say I'm going to take you to lunch, I'm going
13 to expect you to pay for it. It's just that simple.
14 In my world, somebody don't tell me they are going
15 to do something and expect me to pay for it. The
16 last thing we would do is let him find us a driller
17 to drill our drill and make us pay for it.

18 Q Do you agree that later on --

19 A He changed his mind, yes, sir.

20 Q I'm going to walk through a couple of
21 those things. Just to make sure that we're clear,
22 this is kind of part of No. 7 -- the allegation that
23 Underground Solutions agreed with R.H. Moore to cure
24 the defects in the pipe -- you're basing that on
25 your June 5th conversation with Mr. Davis. Is that

1 correct?

2 A Yes, sir, and I'm also basing it on
3 several e-mails he sent after that.

4 Q We're going to go through some e-mails.
5 If there are any others, let me know. I need to
6 understand what you are basing your position on.
7 That's all.

8 A Okay. Sure.

9 (Exhibit No. 7 marked for
10 identification.)

11 BY MR. SMITH:

12 Q Mr. Thornton, if you would look at what
13 we've marked as Exhibit 7. It is an e-mail with
14 some attachments. If you would take a look at that
15 and tell me if you recognize that document.

16 A One document is Underground Solutions'
17 quality control report. The first one is an e-mail
18 from Eric Davis, just a cover e-mail saying that
19 this is a quality control report that the URS
20 engineer had requested.

21 Q Now, Exhibit 7 is dated June 6, 2012.
22 Correct?

23 A Correct.

24 Q This indicates that URS was looking for
25 the QA/QC on the pipe. Is that right?

1 A Correct.

2 Q Had you reviewed the QA/QC documents
3 prior to this?

4 A I didn't have them.

5 Q Earlier you referenced some QA/QC
6 documents that you were basing your opinion on about
7 where some pipe had been rejected. Are these the
8 QA/QC documents that you were referring to?

9 A They don't look like --

10 Q This may not be all of them. I'm not
11 suggesting that it is.

12 A There's another version of them. Well,
13 it's got scrap, scrap, scrap. Yeah, I've got one
14 that I think -- Well, no. Rejected, rejected,
15 rejected. Yeah, this looks like it.

16 Q So that I'm clear on what you were
17 referring to, if you're looking at Exhibit 7 and
18 there is some -- the UGSI Quality Assurance Exhibit
19 D, page 3 of 5.

20 A Yes, sir.

21 Q It says scrap and then rejected,
22 rejected?

23 A Well, there are several pages. It's not
24 on every page. There are more than a few of those
25 entries.

1 Q I want to make sure I understand. You're
2 saying because the QA/QC reports indicate that some
3 of the pipe was rejected that that's the basis for
4 you thinking that the pipe that was in the ground
5 that failed was defective?

6 A Yes, sir. Anything a human being has
7 anything to do with, they can overlook something.

8 Q I think we can all agree on that.

9 Following I guess under your premises,
10 you think that during the QA/QC process some of the
11 pipe was defective that did not get rejected and got
12 shipped to your site?

13 A I think that's very possible. I think
14 it's very likely.

15 Q Well, why do you say that's likely?

16 A How else would you explain it?

17 Q How else would I explain what?

18 A The drill break.

19 Q Well, your expert talked about a lot of
20 other explanations for it. There are other
21 explanations. Correct?

22 A Yes, sir.

23 Q Going back to Exhibit 7, this is Eric
24 Davis's e-mail to you, and I think he indicates here
25 in the second paragraph where he is inquiring about

1 the possibilities of using the 20-inch DR18. It's
2 higher class pipe, would be suitable for the
3 application. Do you see that?

4 A Yes, sir.

5 Q And that's what you were talking about
6 earlier where he was asking to be able to use that
7 pipe instead of the 21?

8 A Yes, sir. My impression of it was that
9 that's what he had in stock and that's what he could
10 get there quickly so we could get the drill
11 replaced.

12 (Exhibit No. 8 marked for
13 identification.)

14 BY MR. SMITH:

15 Q Mr. Thornton, if you could look at what
16 we've marked as Exhibit 8, and I would ask if you
17 can identify this document, please.

18 A This is an e-mail from myself to Eric
19 Davis. It says that I received the e-mail from Eric
20 King. He was asking for some information.

21 Q Is that the other Eric you were trying to
22 think of earlier?

23 A No, sir. The other Eric works for you or
24 works for Underground Solutions in Atlanta.

25 Q Eric King is with URS?

1 A With URS, correct.

2 Q And in this e-mail from Eric King, he
3 notes in the first paragraph that he had also
4 mentioned that they had SDR18 in stock that could be
5 used for a replacement. That just kind of confirms
6 what you said earlier. Right?

7 A Yes, sir. That's the impression that I
8 got.

9 Q In your e-mail at the top to Eric Davis
10 on June 7th, you said, "We will send drill profile
11 and video." What was that for? Why was Eric Davis
12 asking for that?

13 A I think that was a video that we made
14 during the pipe and drill break investigation. Most
15 of the time we would -- The problem with the drill
16 is it was deep, and most conventional pumps won't
17 pump over 20 feet deep. So we had to get special
18 pumps and dewater the pipe as good as we could.
19 There was water and mud coming in.

20 When we got the water and mud down, we
21 would send a TV camera down the drill, and that's
22 what these videos were.

23 Q And you-all were never able to get to the
24 actual initiation point in the crack, were you?

25 A We got the video camera in, I believe,

1 470 feet and the drill was 1,950.

2 Q You also indicated to Mr. Davis, "We need
3 to discuss our plan of action and schedule." What
4 were you referring to there?

5 A When we were going to get the pipe and
6 the driller.

7 Q Did Mr. Davis indicate anything in
8 response to this as far as schedule, what they were
9 going to do?

10 A Not on this e-mail, it don't look like.

11 (Exhibit No. 9 marked for
12 identification.)

13 BY MR. SMITH:

14 Q Mr. Thornton, let me ask you to look at
15 what we've marked as Exhibit 9. This is an e-mail
16 from Eric Davis to you dated July 3, 2012. Do you
17 recall seeing this?

18 A Yes, sir.

19 Q We've kind of jumped ahead between
20 e-mails. The last one we talked about was in early
21 June. This is in early July. What happened in that
22 month in between in terms of what was being done?

23 A As far as us?

24 Q From your standpoint, what were you
25 doing?

1 A From our standpoint, we were waiting for
2 Eric Davis or Underground Solutions to find a
3 driller and get us some pipe.

4 You said I could look back at these
5 (indicating)?

6 Q Sure.

7 MR. NEWBERRY: Just for the record,
8 do those have comments on the substance of the
9 conversation, or are they just logged when the
10 communication occurred?

11 THE WITNESS: This has a date, a
12 time, where the information come from, whether it
13 was a phone log or an e-mail. And it's about 50/50.
14 And then it briefly describes what was in it.

15 MR. NEWBERRY: Thank you very much.

16 MR. BUNDY: And it was produced at
17 my request.

18 MR. NEWBERRY: Understood. So these
19 aren't the telephone logs you're talking about
20 producing?

21 MR. BUNDY: No, this is a summary of
22 notes. This is something he did for me.

23 THE WITNESS: I went through the
24 thousand pages of documents and picked out what I
25 thought was important things.

1 MR. NEWBERRY: I got you. I thought
2 you were talking about a phone log that you kept.

3 A He sent several e-mails to me. He said
4 he was going to ask drillers about extracting the
5 pipe. His thoughts were if they could extract the
6 pipe in the existing hole, to use the same hole and
7 pull the pipe back. And that would be a cheaper
8 route than redoing the drill. And he sent it, I
9 believe, to five or six different drillers.

10 He finally, before he reneged on his
11 deal, he had about settled with USA who did the
12 original drill, and everybody kind of told him that
13 he couldn't get the drill out.

14 And then he delivered the pipe. We were
15 fusing the pipe. The driller was supposed to show
16 up like in a week or so. And then he come up with
17 his July 3rd e-mail that they weren't going to help
18 anymore.

19 BY MR. SMITH:

20 Q I lost you there. You said a driller was
21 supposed to show up?

22 A Yes, sir.

23 Q Who was that?

24 A USA.

25 Q And they were supposed to show up when?

1 A Well, shortly after his July 3rd e-mail.
2 During this time he sent the pipe. He sent a fuser.
3 We helped fuse the pipe. The pipe was laying up on
4 the side of 17A, and we were waiting for a driller
5 to show up.

6 Q This is before the July 3rd e-mail that's
7 Exhibit 9?

8 A Correct. And then after that e-mail he
9 said it's your baby.

10 Q Did you have a discussion with him about
11 that?

12 A Oh, yeah, with him and Frank Christie
13 or Firsching -- What's his name?

14 Q It starts with an F. I know that.

15 The discussion that you had with him when
16 you learned that he was not going to pay for the
17 drill, did that occur before this July 3, 2012
18 e-mail?

19 A No. Until July 3rd at 3:02 in the
20 afternoon, we thought they were going to replace the
21 drill.

22 Q 3:02 in the afternoon is a phone call you
23 had with him?

24 A It might have been. Let's see. I had a
25 phone call with him and he also sent the e-mail.

1 Q The e-mail is dated 5/28.

2 A Yeah, so it was after a phone call.

3 Q So when you had the phone call with him
4 at 3:00 p.m. in the afternoon, you told him, hey, I
5 thought you were going to pay for this? Is that
6 right? And what was his reaction?

7 A I probably wasn't that nice.

8 Q What did you tell him? Do you recall?

9 A I don't recall exactly. I told him I
10 wasn't real happy and it was pretty chicken shit for
11 him to come up and tell us that he's going to fix
12 the drill, send us the pipe, line up a driller, he
13 sent the prices, and then he just reneges on his
14 deal. In our world, you don't do that.

15 Q The deal he had made with you was said in
16 that telephone conversation you-all had back on June
17 5th?

18 A Yes, sir.

19 Q So Exhibit 9 is the July 3, 2012 e-mail,
20 which I understand from you this is the first time
21 you understood that Underground was not going to pay
22 for everything?

23 A That's correct.

24 Q And in Exhibit 9 they offer to pay for
25 the pipe and the fusion and give you \$250,000. Is

1 that right?

2 A Yes, sir.

3 Q The documents that are attached to this
4 Exhibit 9, do you know what these are?

5 A These are quotes from drillers that Eric
6 talked to and the cost.

7 Q Why would he be providing you this
8 information if supposedly it had already been set up
9 that USA was going to do it?

10 A I don't have a clue.

11 Q So you think he just --

12 A I think he hung us out to dry.

13 Q Why do you say that?

14 A Do you think it's ethical or right,
15 anything, to tell somebody that you're going to do
16 something, and then you start the process for a
17 month, you go to all of this trouble, you send the
18 pipe, you send the fuser, and then you come up and
19 say, whoops, we've had dinner and I don't have any
20 money, you've got to pay for dinner. It's chicken
21 shit.

22 Q If he had agreed to do all of that and
23 then, agreed to use USA, why would he have asked
24 Mears Group to give a proposal on June 13, 2012?

25 A I don't know, unless he thought they

1 would be cheaper. All of this information showed up
2 when he sent the e-mail. I don't know who he talked
3 to or what he did from June 5th up until then, other
4 than the fact that he was looking for drillers and
5 he was asking for those to I guess price an equal
6 scope of work.

7 Q Were you familiar with any of these
8 entities that he gave you?

9 A Yes, sir.

10 Q Were they qualified drillers?

11 A Mears is very qualified. They are
12 probably the highest driller that you'll find
13 consistently.

14 I don't know this Pete Zeis guy.
15 Environmental Crossings, we've got quotes from them.
16 I don't know them. We've never worked with them.
17 Spring & Associates, I don't know them. Never
18 worked with them. And you don't have anything in
19 here from USA.

20 Q That reminds me. You indicated that you
21 used USA on this job because they had sent in a
22 proposal to you?

23 A At bid time, yes, sir.

24 Q At bid time, did you do any due diligence
25 investigation of USA before you decided to use them?

1 A No, sir. On bid day, you don't have a
2 lot of time to investigate.

3 Q Understand. So after you got this July
4 3, 2012 e-mail, what did you do?

5 A I talked to Henry, and I guess we got
6 together and --

7 THE WITNESS: Can you talk about
8 settlement, or no?

9 MR. BUNDY: You can talk about it if
10 you want to, sure.

11 A We made them a counteroffer.

12 MR. BUNDY: I don't think settlement
13 negotiations are inadmissible in a deposition. I
14 think it's at trial. But we've reserved all of
15 these objections.

16 A If I read my notes correctly, we told him
17 we would do that for \$350,000 and not \$250,000.

18 Q Your response to Underground Solutions'
19 settlement offer in Exhibit 9 was to respond back
20 that we'll do it if you give us \$350,000 instead of
21 \$250,000?

22 A Right.

23 Q Did they respond back to you on that?

24 A They did. Eric didn't. That's when
25 Frank Firsching started calling. And we had several

1 conversations with him for about a week or two. Not
2 fruitful conversations, but we did.

3 Q Were there any other offers made back and
4 forth?

5 A No, I don't think so.

6 (Exhibit No. 10 marked for
7 identification.)

8 BY MR. SMITH:

9 Q Let me show you what we've marked as
10 Exhibit 10 and ask you if you can identify that,
11 please.

12 A This is an e-mail from me to Eric Davis
13 that attaches our cost to complete the drill and
14 replace it. And this is an invoice for the
15 investigative work on the drill. And it also has an
16 estimated cost to complete replacing the drill along
17 with invoices.

18 MR. FRAMPTON: Could I have the date
19 please?

20 THE WITNESS: This e-mail is dated
21 July 17th, 2012.

22 BY MR. SMITH:

23 Q So this was your e-mail to Eric Davis and
24 you asked him to basically pay this?

25 A Correct.

1 Q And I'm sure they refused, did they not?

2 A Certainly.

3 Q The first invoice is for \$34,839. And
4 that was costs that had actually been incurred by
5 that time. Right?

6 A Correct.

7 Q The next document is estimated cost to
8 complete, which is \$365,947. Obviously, that had
9 not been incurred at that point?

10 A No, not at that time.

11 Q And that \$365,947, that just included the
12 cost of installation of the pipe. That did not
13 include the cost for the pipe and the fusion?

14 A No, sir. They had given that to us.

15 Q How soon did the pipe, the replacement
16 pipe, show up on site and get fused after the event
17 occurred?

18 A He sent a pulling head -- Do you know
19 what a pulling head is?

20 Q (Nodding).

21 A It showed up on June 8th. The first load
22 of pipe come in on June 25th.

23 Q How many loads were there?

24 A I don't know.. Probably two or three.

25 Q In terms of response time, did

1 Underground Solutions respond fairly quickly to get
2 the pipe out there?

3 A I think they did, yes.

4 Q When was the pipe fused?

5 A As soon as it got there. He called me on
6 June 25th and said the fuser will be there today --
7 I'm sorry. It would be there Tuesday, and whatever
8 day June 25th was. And he said USA will be there in
9 two weeks.

10 Q So they were there two weeks later to
11 fuse it?

12 A No. The fuser was there that day. And
13 he told me on June 25th that USA would be there in
14 two weeks to do the drill.

15 Q This was Eric Davis?

16 A Yes, sir.

17 Q How do you handle the pipe? It's fused
18 and you've basically got almost a 2,000-foot section
19 of fused pipe. You fuse it and then you lay it to
20 the side as it's fused? How does that work?

21 A I can draw you a picture. Is it okay to
22 write on this (indicating)?

23 Q Probably shouldn't. You might want to
24 use a clean sheet of paper.

25 A In this case, there's a road (drawing).

1 You've got the river. You have a road right-of-way.
2 This is a power line easement here. The pipe was
3 unloaded on this power line easement, and it was
4 packed up. Well, it was more like here
5 (indicating).

6 The fusion machine sits here. You take a
7 40-foot joint and stick it in this end, a 40-foot
8 joint and stick on that end. He makes the fuse.
9 You have a backhoe here that pulls it 39 feet out to
10 here. Then you put another 40-foot joint here, and
11 you keep on doing that until it's all fused. You
12 just pull it down the road.

13 Q Pull it back down the road.

14 A Yes, sir.

15 MR. SMITH: I'm not going to mark
16 that unless somebody else wants it.

17 THE WITNESS: I'll sign it and it
18 might be worth some money.

19 BY MR. SMITH:

20 Q Do you know what the actual costs were
21 for the installation? The \$365,947 was an estimate.
22 Do you know what the final cost was?

23 A That's probably pretty accurate except
24 for the -- On this one, it's got the drill cost at
25 \$137. That was their unit price. Instead of 2,210

1 feet, it wound up being 1,960 feet. And other than
2 that, I would say it's pretty accurate. If we can
3 get that close, we can get it settled.

4 Q Well, I'm looking at the sheet on Exhibit
5 10, and you've got the USA drill cost 2,210 for
6 \$302,770. And I think you said that was reduced.
7 Their pay application for change order No. 1 shows
8 the 1,959 fee at 137, which is \$268,333.

9 A Yes.

10 Q So that would be the actual cost. Right?

11 A Yes, sir.

12 Q All of these other costs that you have,
13 those are basically R.H. Moore costs?

14 A Right, to handle the pipe and tie in each
15 end.

16 Q Do you have documentation for those
17 actual costs? Because I understand this to be an
18 estimated cost.

19 A I guess I could pull payroll records and
20 submit those.

21 Q What I'm asking is, obviously we want to
22 know what the costs are that you are seeking and be
23 looking for documentation for that.

24 A If you tell me what you want, I'll be
25 glad to get it for you.

1 Q What I want is the documentation for the
2 actual costs for all the items that are listed on
3 the estimated cost to complete exclusive of the USA
4 drill costs.

5 A It will take a while to pull the invoices
6 and I'll find payroll reports. That's what you're
7 looking for?

8 Q That's what I'm looking for.

9 MR. BUNDY: You're not restricted to
10 what's in the estimate. If you find something
11 extra, you can put it in, too. He wants to know the
12 actual costs.

13 BY MR. SMITH:

14 Q When R.H. Moore was doing the work
15 relating to the re-drill, did you create a separate
16 cost code in your cost accounting system?

17 A I think on some items we did. There is
18 not enough items -- We are not building a house
19 where you have all different things. You have USA.
20 We know the fittings on each end and the MEGALUGs.
21 That's pretty much material costs, and everything
22 else is labor.

23 Q That's my point. I'm trying to find out.
24 When you provide me documentation, for example, on
25 your project manager, how am I going to tell what he

1 was doing for the re-drill versus his normal duties
2 of being out on the job?

3 A You're not going to be able to.

4 Q So for labor, there was not another cost
5 code created so that somebody could separate them?

6 A No. We are cost coded to that job, but
7 not to an activity on that job.

8 Q So then what you're doing is taking an
9 estimate of what you think their time was related to
10 the re-drill?

11 A Yes, sir.

12 Q I'm not going to be able to get an
13 accurate actual cost for this. It's going to be
14 your estimated cost of what time your people spent
15 related to this?

16 A That's correct, other than the fact that
17 you had a guy on site, Eric -- I wish I could think
18 of his last name. Your guy from Atlanta, Eric, was
19 there about the whole time for these costs.

20 Q Well, get those documents to Mr. Bundy
21 and he will get them on to us.

22 Item 8 in the deposition notice are the
23 damages that R.H. Moore is seeking. I presume we've
24 just covered the portion of the damages for the
25 re-drill. Is that right?

1 A Yes, sir.

2 Q As I understand it, you are also -- Well,
3 let me ask it this way. Are you seeking other
4 damages from Underground Solutions?

5 A I guess that depends on the outcome of
6 our ordeal here. The county has assessed us 200 and
7 some thousand dollars in liquidated damages -- or
8 actual costs. They didn't assess damages.

9 Q I'm sorry. They were liquidated damages?

10 A They were not. Liquidated damages on
11 this contract is \$1,000 a day.

12 What the county has done is they had
13 certain costs involved after the end of the
14 contract, and they have asked for that cost. Not
15 the \$1,000 a day.

16 Q Is it the \$229,486?

17 A Yes, sir. That's the figure.

18 Q Has that amount been deducted from your
19 contract and withheld by the county?

20 A Yes, sir.

21 Q Is the contract closed out but for that?

22 A But for that, yes.

23 Q So work has been completed?

24 A Yes.

25 Q The county is withholding the \$229,486?

1 A Correct.

2 MR. FRAMPTON: Can I correct that,
3 if you don't mind, because -- Just to speak up so
4 there's no confusion, the county is withholding
5 \$311,000 as liquidated damages.

6 THE WITNESS: I thought you released
7 some of it.

8 MR. FRAMPTON: We released
9 everything in excess of that, but we are withholding
10 \$311,000 in liquidated damages, just to clarify that
11 point.

12 THE WITNESS: Sorry. I hadn't
13 looked at it lately.

14 MR. FRAMPTON: I just didn't want
15 there to be any confusion.

16 BY MR. SMITH:

17 Q Mr. Thornton, of those liquidated
18 damages, which I assume now is up to \$311,000 rather
19 than \$229,000 --

20 MR. BUNDY: Object to the form of
21 the question.

22 BY MR. SMITH:

23 Q How much of the liquidated damages being
24 withheld by the county are you seeking to recover
25 from Underground Solutions?

1 A I guess we'll determine that here. We
2 want all we can get.

3 Q I understand that. What I'm trying to
4 find out is, have you done an analysis? Is there a
5 basis for apportioning the delay on the project to
6 various items?

7 A Other than the fact that the contract
8 completion date was June 12th. After we fixed the
9 drill, that was finished on October 10th, 2012. So
10 there are four months there that if everything had
11 gone perfect, we would expect four months of damages
12 from Underground Solutions. And that's subject to
13 whatever we can work out.

14 Q I understand. What was the status of the
15 wet well during the time that you were dealing with
16 the re-drill? I understand the wet well problems
17 were discovered in March of 2012.

18 A The wet well cracked March 15th.

19 Q 2012?

20 A Yes, sir. That's when we found it. The
21 repairs on the wet well was finished 11/6. And once
22 the repairs were finished on the wet well, we had to
23 finish the piping and the electrical and setting
24 pumps and asphalt and paving and that type thing.

25 Q So the wet well repairs were finished

1 November 6, 2012? Is that what you said?

2 A The actual wet well, yes, sir. And it
3 took until -- It depends on -- There again, this is
4 one of the things with the county.

5 The pump station startup and testing was
6 on February 14th. We think that is probably the
7 substantial completion date.

8 Q That was 2013?

9 A 2013. The county don't share that
10 opinion. They think the date is -- We've got on
11 here pump and haul as part of their damages they are
12 asking for was on 4/19/13.

13 Q So the county contends April 19, 2013,
14 was the substantial completion date?

15 A Somewhere around there.

16 Q And you contend that it would be February
17 14th, 2013?

18 A Yes, sir.

19 Q And the wet well repairs were done in
20 November. Then you had follow-up work to that in
21 order to be able to put the system in operation.
22 Correct?

23 A Correct.

24 Q From November 6th to February 14th, that
25 was putting in piping and other things, follow-along

1 work to the wet well?

2 A Once the wet well was completed, yeah.

3 Q I'm sorry. I think you may have
4 mentioned this earlier. When was the re-drill work
5 completed?

6 A The force main was tested October 15th,
7 2012.

8 Q And I take it everything passed on the
9 test?

10 A Yes.

11 Q Are you familiar with the failure on the
12 300-foot section of pipe?

13 A Yes, sir.

14 Q And it's my understanding that that
15 failure was caused by a bullet hole in the pipe?

16 A That's correct.

17 Q Do you agree that that was not the fault
18 of Underground Solutions?

19 A Yes, sir.

20 Q Do you agree that Underground Solutions
21 made that repair?

22 A Yes, sir. They helped make it.

23 Q They paid for the pipe and the fusion of
24 the pipe. Correct?

25 A There wasn't a pipe. We used what was

1 there.

2 Q So the pipe that was on site -- You had
3 extra pipe?

4 A We had a little bit. They cut out a
5 piece of pipe about this long (indicating).

6 MR. BUNDY: For the record, give us
7 how long that is.

8 THE WITNESS: Approximately six
9 feet.

10 A The bullet hole and there was cracks --
11 Have you seen the --

12 BY MR. SMITH:

13 Q I've seen the photographs.

14 A There was a crack -- I don't know --
15 about a foot long. And to make sure they got back
16 to good pipe -- Tommy Carroll is who did the work --
17 cut out about six feet. And we had a piece, so he
18 fused it and pulled it back.

19 Q So whatever fusion services were
20 involved, plus the amount that was paid to Carroll
21 Services, I think it was about \$33,000, have you
22 seen those?

23 A I've seen the bills, yeah.

24 Q Do you agree that Underground Solutions
25 is entitled to get that money back from R.H. Moore

1 for those repairs?

2 A It depends on what we settle on the other
3 one.

4 Q I understand you may see it as an offset.
5 But do you agree that R.H. Moore is responsible for
6 the cost of repairing the 300-foot section?

7 A No.

8 Q Why not?

9 A I will agree that we had a problem and
10 they fixed it. They never said they were going to
11 charge me anything. They never sent me a bill for
12 anything.

13 Q They didn't cause the problem, did they?

14 A No, sir.

15 Q Did they ever tell you that they were
16 going to fix it for free?

17 A Pretty much. They sent the people down
18 there and fixed it. They never said they were going
19 to charge me.

20 Q So you think they just did that out of
21 the goodness of their hearts?

22 A Yes, sir.

23 Q So you don't think that you owe them for
24 fixing that pipe, even though it wasn't their fault?

25 A I think we probably should pay them if

1 they would pay up on what they promised.

2 Q So if they owe you a bunch of money for
3 the 1,900-foot section, then you agree the 300-foot
4 section should be offset against that?

5 A Yes, sir.

6 Q Running through our list here, No. 9, I
7 think we've talked about all the factual bases to
8 support your causes of action against Underground
9 Solutions, unless you have anything else you want to
10 add to that particular item?

11 A No.

12 Q No. 10, communications between R.H. Moore
13 and Underground Solutions related to the failure and
14 placement of the pipe. We've talked about that a
15 good bit, obviously.

16 Other than Eric Davis, did you have
17 conversations with anyone at Underground Solutions
18 about them being responsible and agreeing to pay for
19 the 1,900-foot section?

20 A The only people I talked to about that
21 was Eric and then eventually -- I guess Frank is
22 higher up the pole. He started calling. And it was
23 pretty obvious we weren't going to see eye to eye.
24 So the conversations quit.

25 Q No. 11 relates to investigations and

1 testing of the pipe failure. Other than the
2 investigations done by your expert, Mr. Palermo, has
3 R.H. Moore conducted any other investigations on the
4 pipe failure?

5 A I don't think so.

6 Q Are you aware of anyone other than
7 Underground Solutions conducting any investigations
8 on the pipe failure?

9 A No, sir.

10 Q Has anyone from Utility Services
11 Authority conducted any investigations that you're
12 aware of?

13 A No, sir.

14 Q No. 12, we talked about the delays.
15 No. 13, this relates to the performance
16 of your driller, which would be Utility Services
17 Authority. Are you aware of any deficiencies in the
18 work performed by Utility Services Authority?

19 A No, sir.

20 Q Do you know they've been made a defendant
21 in the lawsuit?

22 A Yes, sir.

23 Q Do you know why they were made a
24 defendant in the lawsuit?

25 A No, sir, not really. I let the attorney

1 handle that.

2 Q No. 14 is the status of your contract
3 with the Dorchester County, which we've talked about
4 that.

5 MR. SMITH: Let's take a short break
6 and I'm probably about done.

7 (Discussion off the record.)

8 MR. BUNDY: Henry is going to
9 address the question that you asked that he couldn't
10 answer, which was why R.H. Moore has sued USA.

11 I think as to the rest of it he has
12 really nothing to add, because all of this is based
13 on his personal knowledge, and what Henry's
14 knowledge is would be based on what he told him.

15 (The deposition adjourned.)

16 E X A M I N A T I O N

17 BY MR. BLANKENSHIP:

18 Q My name is Reynolds Blankenship. We met
19 briefly on a break. I do represent Utility Services
20 Authority, and I am going to ask a few brief
21 questions.

22 I'm going to try not to make you repeat
23 yourself as much as possible. If there's any
24 overlap, I apologize.

25 Going back, there is an issue of the

1 drill bit being around 53 feet on this 1,900-foot
2 piece as opposed to, I believe, the originally
3 planned 30 feet. 30 to 32, I think, was the
4 original planned depth. Is that right?

5 A I think it's 36, but that's close.

6 Q Do you know why the depth change was
7 made?

8 A There was an existing water line in the
9 same right-of-way. Nobody knew where it was. We
10 spent several weeks -- or several people did. The
11 owner of the water line, USA, we helped them. It's
12 a PVC pipe, I believe, and it did not have a locator
13 wire on it, on part of it. And they found as close
14 as they could to where they thought it was.

15 And when you're drilling a pipe under the
16 river, the last thing you want to do is hit a water
17 line under the river. Not good.

18 If you look at the correspondence,
19 there's a lot of talk about liability. And the way
20 the law reads is you're supposed to have it located.
21 If you hit it -- If they don't mark it within three
22 feet of where it's at and you hit it, you're okay.
23 But you've still got a broke line under the river.

24 And after we got all of that settled,
25 Underground Solutions submitted a profile to work

1 around the water line. And that profile showed it
2 where it's at today or showed the first alignment.

3 That was submitted to URS and approved,
4 and they put the drill in, and they submitted their
5 as-builts and it was almost identical.

6 Q That's kind of what I was getting at.
7 Before the 53-foot drill was performed, it was
8 reviewed by the B.P. Barber engineer?

9 A Yeah, URS.

10 Q URS. Sorry. Who else would have been
11 involved in that decision and approval process?

12 A I guess Underground Solutions looked at
13 some of them.

14 Q It was not a unilateral decision by USA?

15 A No.

16 Q Have you reviewed the transcript of
17 Mr. Palermo's deposition?

18 A No.

19 Q Are you familiar with what he testified?

20 A I was here.

21 Q Do you recall him saying that he did not
22 think that the depth of the drill was causally
23 related to the failure of the pipe?

24 A Yes, sir, that's correct.

25 Q That's correct, that's what he said?

1 A Yes.

2 Q Do you have any reason to disagree with
3 that?

4 A No.

5 Q You mentioned that at some point the
6 fusion equipment broke down and started to overheat?

7 A No, no. I don't know why it broke down.

8 Q If we were to try to learn more about
9 that, do you remember who was on site when that
10 happened?

11 A No. We would have to get that
12 information from Underground Solutions.

13 Q I don't want to put words in your mouth,
14 but it seemed like you had some evidence you could
15 point to to say Underground Solutions made an error
16 of some sort at some point. Do you have anything to
17 point to an error by USA at any time?

18 A No.

19 Q You mentioned that you're in
20 negotiations -- or UGSI made a promise to pay for
21 correction of the drill, and at some point you said
22 USA didn't show up in early July as expected. Do
23 you remember saying that?

24 A No.

25 Q I think the deal with Underground

1 Solutions broke down, and then they were going to
2 hire a driller to redrill.

3 A You'll have to say that again now.

4 Q You were talking about Underground
5 Solutions was going to hire somebody to redrill
6 after this pipe failed.

7 A Correct.

8 Q And you thought they were going to hire
9 the driller. Correct?

10 A That's correct.

11 Q And you had originally hired USA
12 directly?

13 A To perform the first drill, correct.

14 Q And then when they -- you said backed out
15 of their promise to do that, you ended up having to
16 hire a driller yourself?

17 A Correct.

18 Q And you ended up hiring USA?

19 A Correct.

20 Q Did you review other bids from other
21 drillers?

22 A I did.

23 Q What made you decide to rehire USA to do
24 that second drill?

25 A They were dependable and they had the

1 lowest price.

2 Q Price carried the day? Was price the
3 ultimate reason?

4 A It means a lot when you're in business,
5 yes, sir.

6 Q Were there ever any problems with the
7 second drilling?

8 A Not that I'm aware of.

9 Q I'm going to show you -- Sorry for
10 jumping around. Here's an e-mail. I'm not sure
11 what exhibit number we are on.

12 (Exhibit No. 11 marked for
13 identification.)

14 BY MR. BLANKENSHIP:

15 Q Do you recognize that?

16 A It's an e-mail from me to John Weldon who
17 is an engineer with URS.

18 Q If you look at the first paragraph, last
19 sentence in the first paragraph, you said "they are
20 working out the terms now"?

21 A Mm-hmm.

22 Q Is that what you're talking about when
23 you say you thought Underground Solutions was
24 working on hiring a driller?

25 A Correct. It's dated June 20th.

1 Q And that deal fell apart in early July?

2 A July 3rd.

3 (Exhibit No. 12 marked for
4 identification.)

5 BY MR. BLANKENSHIP:

6 Q This will be the next exhibit. This is a
7 letter from you, I believe. Do you recognize that?

8 A Yes, sir.

9 Q There is a reference there at the bottom
10 where you instruct USA that they need to sign a
11 document acknowledging that any claims against them
12 are not released if you pay them for the second
13 drill. Do you see that?

14 A What paragraph?

15 Q I think it's at the very bottom.

16 A Yes, sir.

17 Q Did such a document ever get signed?

18 A Yes, sir.

19 Q And you paid USA in full for the second
20 drill?

21 A As far as I know.

22 Q And you paid them for the first drill?

23 A Yes, sir.

24 Q Except for a \$15,000 charge back of some
25 sort?

1 A That was not related to the first -- to
2 that drill. It was related to another drill.

3 Q That had nothing to do with this problem?

4 A No.

5 Q But other than that, you paid in full on
6 both contracts?

7 A As far as I know.

8 Q Do you know what damages you're seeking
9 against USA in this lawsuit?

10 A All we can get.

11 MR. BLANKENSHIP: I'm done, unless
12 Mr. Moore has something to add.

13 (Discussion off the record.)

14 E X A M I N A T I O N

15 BY MR. FRAMPTON:

16 Q Steve, you don't mind me calling you
17 Steve? Call me John.

18 With respect to the pipe and pipe
19 installation, is there anything the county did or
20 did not do which caused R.H. Moore any damages on
21 this project?

22 A The biggest thing that sticks out to me
23 is they allowed the pipe in the specifications. And
24 you probably did that based on the opinion of your
25 engineer.

1 Q So there's nothing the county did
2 directly or indirectly -- or directly, I should say,
3 that caused any damage to R.H. Moore? You've dealt
4 with this kind of pipe before. Correct?

5 A Yes, sir.

6 MR. BUNDY: Can we go off the record
7 for a second?

8 (Discussion off the record.)

9 BY MR. FRAMPTON:

10 Q When you received shipments of 20-foot
11 sections of pipe instead of 40-foot sections, why
12 did you not refuse those if they did not comply with
13 the specifications?

14 A I guess the main reason is I'm not on the
15 job full time, and a lot of times my crews -- I'll
16 say there will be a load of pipe. They'll unload
17 it. They won't call me. And I happened to ride
18 around the job and see it and say, why have we got
19 short pipe? And they said, well, that's what came
20 on the truck. So then I called and checked.

21 Q You indicated in your direct testimony
22 that substantial completion was to be accomplished
23 by June 12, 2012?

24 A Correct.

25 Q And I believe in your direct testimony

1 you believe, R.H. Moore does, that substantial
2 completion was on February 14th, 2013?

3 A Correct.

4 Q The county's position is that substantial
5 completion was April 19, 2013?

6 A That's when you stopped your pump and
7 haul.

8 Q And you've acknowledged that your
9 contract with the county had \$1,000 per day of
10 liquidated damages?

11 A Correct.

12 Q So it appears the dispute between the
13 county and R.H. Moore is roughly 60 days of
14 liquidated damages. Is that correct?

15 A That's incorrect.

16 Q Well, tell me what the correct answer is
17 for that.

18 A During the process of the entire project,
19 the county spec'd a particular name brand generator.
20 We bought that generator, because that's what
21 you-all spec'd.

22 I'm sorry. Not a generator. A bypass
23 pump.

24 It took -- I'm somewhat guessing -- nine
25 months to get the pump data approved. And R.H.

1 Moore doesn't approve submittals. Your engineer,
2 you had a SCADA expert, Frank -- What's his name?
3 And people at the county, and then somebody had an
4 electrical engineer looking at it. To get a
5 submittal approved on anything, nine months is way
6 excessive.

7 The generator process -- I'm sorry, the
8 bypass pump, we started the approval process on
9 August 2, 2011. The generator finally arrived on
10 site --

11 Q The pump?

12 A The pump, on February 19, 2013, is when
13 it arrived and was installed. And that's silly. We
14 think we're entitled to some extra time for that.
15 And that's not included in your assessment, or it
16 never was approved.

17 Q How much extra time were you requesting
18 for that?

19 A I was asking the contract completion date
20 to be extended to February 19th or so.

21 Q So the full time?

22 A Yes, sir.

23 Q Now, tell me why a bypass pump is
24 necessary to make the system operational.

25 A If your pump station goes down, you need

1 a bypass pump.

2 Q Or you can bring in a portable pump?

3 A Yes, sir.

4 Q So there's no reason that a bypass pump
5 is necessary to make the system operational from
6 DHEC's standpoint, because a portable pump can be
7 brought in to handle that if it were to shut down?

8 A I don't know about what DHEC requires.
9 But I know if -- Had we had no problems, the
10 contract would have to have been extended to
11 February 19th to complete the contract.

12 Q Well, to make the system substantially
13 complete, that's your opinion?

14 A Not really, not to make it substantial.

15 Q So when would substantial completion have
16 taken place? Assuming the bypass pump is not
17 necessary to make the system operational.

18 A I believe the date was February 14th.

19 There were other delays by the county in
20 obtaining an operations permit from DHEC. And I
21 don't know all the details, but URS had to have a
22 letter from the county to send to DHEC. And that
23 took a month or so.

24 Another thing we would like some
25 consideration on is the approval process of the

1 problems on the wet well.

2 And another thing that really is a big
3 sore spot is when we submitted the first design for
4 the wet well, the correction of the wet well, we had
5 been through this before. We submitted a design
6 approved by URS. They actually drew the drawings.
7 And the county didn't accept it. They wanted the
8 volume of wet well that they had, even though the
9 design we submitted would work.

10 URS approved it. We checked with the
11 pump suppliers. Most everybody involved. And it
12 would have cut the repair time probably in half.
13 And we think we should get some consideration for
14 that.

15 Q So the first solution was to basically
16 come in one foot on each side of the existing wet
17 well, changing the dimensions from 10 by 20 by 30 to
18 8 by 18 by 30. Is that correct?

19 A Correct.

20 Q And that loss of volume is 25 percent?

21 A It's actually 22 percent, but that's
22 close.

23 Q I'm pretty close?

24 A Yeah.

25 Q So we bargained for a wet well that would

1 be a certain size, and you are requesting that we
2 reduce that size by 22 percent. Is that correct?

3 A Correct.

4 Q That's like building a house of 2,000
5 square feet to roughly 1,500 square feet. Correct?

6 A Yes, sir, if the math is correct.

7 Q And that's acceptable? You think that's
8 something reasonable the county should have agreed
9 to?

10 A Well, we are not building a house. We're
11 pumping sewer.

12 Q Right, but it was designed to carry a
13 certain amount of sewer. Correct?

14 A Correct.

15 Q Did you calculate the cost of the county
16 of having pumps run more often because of the volume
17 contained in the wet well?

18 A Could you not raise the floats?

19 Q I'm asking the question if you did the
20 calculation.

21 A No, sir. Did not.

22 Q And did you calculate the cost to the
23 county should the pumps shut down and the wet well
24 be used basically as a septic tank and there be an
25 overflow?

1 A You have a bypass pump.

2 Q What if the bypass pump fails?

3 A You're going to flood either way.

4 Q There is more storage capacity. Correct?

5 A Yes, sir.

6 Q Did you discuss with anyone with the
7 county directly about the first fix; that is, the
8 insertion of the liner, so to speak?

9 A I think URS presented that to the county.

10 Q You did not discuss that directly with
11 the county?

12 A No.

13 Q Do you know what the county's response
14 was to that?

15 A No. We got an e-mail from Eric King
16 saying they rejected it and they wanted the original
17 volume area.

18 Q To your knowledge, are all punchlist
19 items completed? Are you-all finished with this
20 project totally? Everything been done?

21 A As far as I know.

22 I take that back. The flow meter quit
23 working. Your guy -- What's his name, the engineer
24 guy?

25 Q Jason Coffman?

1 A Jason Coffman called to us come replace
2 the flow meter. I went out. He wanted us to do
3 some additional work. We give him a price for that.
4 And that's been several months ago, and we have not
5 heard from him.

6 I've made a follow-up call probably three
7 weeks after we give him the price, and he said he's
8 trying to get the funds appropriated or something.

9 Q You've indicated that you think February
10 14, 2013, is the substantial completion date versus
11 April 19, 2013, which is the county's position. Why
12 do you believe February 14, 2013, is substantial
13 completion?

14 A That's when the pump station passed its
15 test. It could pump sewer then.

16 Q Do you have an opinion as to the number
17 of days this project was delayed as a result of the
18 pipe situation that's been discussed earlier?

19 A You mean the drill?

20 Q The drill, the failure of the pipe, et
21 cetera.

22 A I think there are overlapping problems,
23 and the pump station caused more of a delay than the
24 drill. That's my opinion.

25 Q So your opinion is the drill and the

1 replacement of the pipe under the river caused no
2 delay?

3 MS. GRAHAM: Object to the form.

4 MR. NEWBERRY: Object to the form.

5 You can still answer.

6 A Ask that again.

7 BY MR. FRAMPTON:

8 Q So your it's your opinion that the
9 failure of the pipe, replacement of the pipe caused
10 no delay in the project?

11 MR. NEWBERRY: Object to the form.

12 MS. GRAHAM: Same objection.

13 BY MR. FRAMPTON:

14 Q You can still answer it.

15 A I think the pipe obviously delayed the
16 project. I am not sure how it relates to how much
17 it affects damages between the pipe problem and the
18 wet well problem.

19 Q I'm not concerned about the damages
20 issue. I'm concerned about the delay issues. That
21 is, did having to replace the pipe and redrill cause
22 a delay in the project?

23 A Yes.

24 Q Can you estimate the number of days it
25 caused in delay?

1 A In my opinion, it broke on May 16th,
2 2012, and it was replaced, and the system was tested
3 on October 15th. So however long that was.

4 Q Give me those start and end dates again,
5 please.

6 A May 17, 2012, and October 15, 2012.

7 MR. FRAMPTON: That's all I have.
8 Thank you.

9 (The deposition adjourned.)

10 E X A M I N A T I O N

11 BY MR. NEWBERRY:

12 Q Mr. Thornton, my name is Derek Newberry.
13 I represent B.P. Barber, now known as URS, in this
14 matter. I'm going to ask you some questions related
15 to the piping issue here before we go to lunch. And
16 then when we come back, I'm going to talk to you at
17 length about the wet well issue. Okay?

18 A Yes.

19 Q Earlier you said when the pipe first
20 exploded, that being the pipe underneath the Ashley
21 River, that you called someone from URS. Do you
22 remember who you called?

23 A Either John Weldon or Eric King probably.

24 Q Do you recall what they said?

25 A Find out what's wrong and let us know. I

1 told them I had talked to Underground Solutions and
2 they were sending a rep up, and they wanted to be
3 there when he was there..

4 Q Is there anything about the piping
5 failure under the Ashley River that you here as a
6 designee for R.H. Moore attribute to some act by
7 URS? Do you blame URS for the piping failure under
8 the river?

9 A I blame URS for spec'ing the pipe.

10 Q For spec'ing FPVC --

11 A Yes. We are not a big fan of the pipe
12 right now.

13 Q Understood. Do you recall what your --
14 With regard to whether URS met the standard of care
15 with respect to specifying FPVC pipe, would you
16 defer to your experts on that?

17 A I don't know enough to have an opinion.

18 Q So that's a yes, you would defer to your
19 experts?

20 A Probably.

21 Q I understand that the original pipe was a
22 DR21? Is that right?

23 A Correct.

24 Q And then during the repair and the second
25 drill underneath the Ashley River it was a DR18?

1 A That's incorrect. They found some DR21.

2 Q So tell me what was done differently or
3 what different materials were used during the second
4 installation as opposed to the original
5 installation.

6 A None.

7 Q Same materials?

8 A (Witness nodded).

9 Q Yes?

10 A Correct. Yes.

11 Q Same contractor, USA. Right?

12 A Correct.

13 Q Same GC, that being you?

14 A Correct.

15 Q Were the depths changed?

16 A Yes.

17 Q What was the difference between the
18 depths?

19 A On the first drill, to avoid the existing
20 water line, they went deeper. It probably averaged
21 40 feet. And I'm going by memory.

22 The second drill, and don't quote me, but
23 I think under the river it had to be 15 foot deep,
24 under the bottom of the river. And other than that,
25 I'm thinking it's about 20 foot deep, 25.

1 Q Other than the depth of the line, was
2 there any other difference from your perspective
3 between the first drill and the second drill under
4 the Ashley River?

5 A No. They did shift it to get away from
6 the first drill.

7 Q Did you follow the same specification
8 manual and same set of plans from URS for the second
9 drill as you did for the first, with the exception
10 of the shift in dimension or in location?

11 A Are you talking about the plans and
12 specs?

13 Q Yes.

14 A We used their spec. We changed the plan
15 obviously to get away from the drill.

16 Q But the same spec book that was used for
17 the original drill under the Ashley River was used
18 for the second drill under the Ashley River?

19 A Yes.

20 Q And you believe that you submitted both
21 FPVC and HDPE for this project. Is that right?

22 A I did what now?

23 Q When you bid for this project --

24 A I bid both pipes.

25 Q You bid both pipes?

1 A Yes.

2 Q Do you recall what the cost difference
3 was between HDPE and FPVC?

4 A I don't. I know it was more for HDPE.
5 It's a 24-inch pipe versus a 20-inch. It's DR11
6 versus DR21. And in their world, one is about that
7 thick, and one is about that thick (indicating).

8 Also, you had the price of the reducers.
9 Their four-one line has special lining in it with
10 MEGALUGs, and there was 20 of those.

11 Q It's a reducer which you were talking
12 about with Mr. Smith earlier to account for the
13 different size --

14 A Right. If you've got a 24-inch pipe, to
15 make it fit to a 20-inch force main, you've got to
16 put a reducer. And those are quite expensive.
17 Probably \$3,500 a piece.

18 So there's a \$70,000 disadvantage on
19 HDPE. And at bid time the prices we got were -- We
20 didn't put much thought into the alternate price,
21 because the fusible price was so much less.

22 Q What involvement, if any, outside of the
23 design documents did URS have with the drilling
24 under the Ashley River?

25 A I guess they did inspection.

1 Q When you say "they did inspection," were
2 they there keeping track of what the progress was,
3 or were they inspecting the actual work that was
4 done and the trajectory of the pipe and those sort
5 of things?

6 A Whatever your-all's inspectors do.

7 Q So you don't have any personal knowledge
8 sitting here today of what a URS rep was doing on
9 site on a daily basis related to the piping issue?

10 A No. I think he has probably several
11 projects, and he roams around and looks. I think if
12 there's something important going on, he probably
13 tries to be there to see what happens.

14 MR. NEWBERRY: That's all I have on
15 the piping issue. We'll talk later on today about
16 the wet well.

17 Mr. Moore, do you have anything to add to
18 that?

19 MR. MOORE: No.

20 MR. NEWBERRY: We'll just put on the
21 record that he has nothing to add to Mr. Thornton's
22 testimony on the pipe issue.

23 (Lunch recess taken.)

24 BY MR. NEWBERRY:

25 Q Mr. Thornton, again, I'm Derek Newberry.

1 I represent B.P. Barber, now known as URS in this
2 case. We just had lunch. We are back from the
3 break. Now we are going to dig into the wet well
4 stuff. You've been testifying this morning
5 primarily about the pipeline failure underneath the
6 Ashley River. So we're going to switch gears this
7 afternoon. Okay?

8 A Okay.

9 Q Same rules apply as what Mr. Smith told
10 you this morning. Of course, you're still here as a
11 30(b)(6) designee for R.H. Moore, so you're
12 testifying on behalf of the company. You understand
13 that. Right?

14 A Correct.

15 Q If at some point I ask you a question and
16 I want to know what you personally did as opposed to
17 what R.H. Moore did or something like that, I'll let
18 you know. Otherwise, assume that my questions are
19 asking for R.H. Moore's answer and opinion on
20 certain issues. Okay?

21 A Okay.

22 (Exhibit No. 13 marked for
23 identification.)

24 BY MR. NEWBERRY:

25 Q I'll hand you what I've marked as Exhibit

1 No. 13. This is the notice for your deposition. It
2 is a cross notice. What happened was Mr. Smith sent
3 a notice out with a bunch of categories related to
4 the piping, and then I cross noticed your deposition
5 with a bunch of categories related to the wet well.

6 Do you have some breakdown of what you
7 want to testify about in our cross notice and what
8 Mr. Thornton (sic) is going to testify about, or do
9 you want to handle it the same way we did the first
10 half of the deposition?

11 MR. McDONALD: This is Mr. Thornton
12 (indicating). That's Mr. Moore.

13 MR. NEWBERRY: Sorry. So we'll
14 handle it the way same way we handled it this
15 morning.

16 MR. McDONALD: Yes.

17 BY MR. NEWBERRY:

18 Q You testified earlier that you're a civil
19 engineer. Is that right? Or you have a civil
20 engineering degree?

21 A I have a civil engineering degree.

22 Q You're not a licensed civil engineer?

23 A No.

24 Q In the course of your training or
25 education as a civil engineer, did you take courses

1 in structural engineering?

2 A I did.

3 Q Do you possess enough structural
4 engineering knowledge to evaluate, say, the
5 calculations for the wet well in this case?

6 A No.

7 Q No?

8 A No.

9 Q Have you ever participated in the design
10 of a wet well similar to --

11 A No.

12 Q Just for the record, make sure you let me
13 finish my question instead of anticipating, so that
14 Janice can take down the record clearly. Okay?

15 A Okay.

16 Q So as far as testifying as to the
17 standard of care for a structural engineer or
18 another civil engineer in this case, are you going
19 to defer that testimony to your experts?

20 A Yes.

21 Q Tell me about your experience or R.H.
22 Moore's experience installing wet wells. How many
23 times have you guys done that over the years?

24 A Probably not over a thousand.

25 Q Not over a thousand. Okay. How many wet

1 wells has R.H. Moore installed that were of a
2 similar size to the wet well in this case?

3 A Probably three or four that I know of.

4 Q And were those three or four before or
5 after the wet well in this case?

6 A Probably before.

7 Q Where were those wet wells?

8 A Two of them were in Berkeley County. I
9 can't think of the other ones. But there are two
10 almost identical in Berkeley County.

11 Q What was the approximate size of the two
12 in Berkeley County? Were they the similar size as
13 this one?

14 A Similar. 10 by 20 inside, and they were
15 about 30 foot deep. The only difference is these
16 wet wells had baffled walls in them, where this one
17 did not.

18 Q Baffle?

19 A Baffled walls.

20 Q What is a baffled wall?

21 A I can draw you a picture. Think of a box
22 10 by 20, and these particular wet wells had two
23 sections of concrete in the middle. It had three
24 pumps. And there was an interior concrete wall that
25 supported the walls.

1 Q So a concrete wall running between two of
2 the walls on the inside?

3 A Yes.

4 Q And that was for the two in Berkeley
5 County?

6 A Yes, sir.

7 Q What about the third one that you
8 couldn't remember where it was?

9 A I don't remember.

10 Q What was the thickness of the walls for
11 the two in Berkeley County?

12 A I have the shop drawings if you want to
13 refer to them.

14 Q That's okay.

15 A I don't remember. I would have to
16 look -- I brought the shop drawings.

17 Q If you want to just take a quick look at
18 them.

19 A Bill has them.

20 Q I am not going to put them in or
21 anything. I just want to know whether they are 12
22 inches or thicker.

23 A I lied to you. They are in my car.

24 Q We won't worry about that then.

25 A Do you want me to guess?

1 Q Give me your best approximation.

2 A 12 inches.

3 Q And these were precast wet wells?

4 A Yes, sir.

5 Q Who was the precast supplier for them?

6 A Knight's Precast.

7 Q Of the other wet wells that you've done
8 that you did not identify as being of a similar size
9 to the wet well issue, what percentage of those
10 roughly were precast as opposed to cast in place?

11 A Probably 95 percent.

12 Q Precast?

13 A Yes.

14 Q Have you always used wet wells from
15 Knight's Precast, or were there other suppliers
16 that --

17 A Different suppliers depending on the area
18 that we're in.

19 Q What area does Knight's Precast handle
20 primarily?

21 A I would say they go from Savannah up to
22 Brunswick County in North Carolina, that big of an
23 area. But when they go that far, their prices are
24 not competitive because of shipping. So we usually
25 get them from someone else.

1 Q Do you have any -- We'll get to that in a
2 second.

3 Of these other precast wet wells that
4 you've purchased or installed from Knight's Precast,
5 what's the standard wall thickness of those wet
6 wells? Do you know?

7 A It varies on the size of the wet well.
8 Most structures we set are round structures and not
9 square.

10 Q I didn't ask you earlier, but the wet
11 wells that we're talking about earlier that were
12 similar, those were all square obviously. Right?

13 A Correct.

14 Q As to square wet wells that you've
15 installed in the past, can you give me an
16 approximate thickness or what the most prevalent
17 thickness was of those wet wells?

18 A It depends on the engineer. To precast
19 it, it has to be fairly thin walls or they can't
20 ship it. So 12 inch is kind of a standard if a
21 precaster makes it.

22 Q Have you had other projects with URS and
23 B.P. Barber other than this project?

24 A Yes.

25 Q Tell me about those projects. What type

1 of projects were they?

2 A Before or after this one?

3 Q Go with before first.

4 A We did a project with them in
5 Beaufort-Jasper. It was a force main project.
6 We've done so many.

7 We did a job, I think, at the Hanahan
8 water treatment plant with them. We did a project
9 in Ravenel that had two pump stations and some force
10 main and gravity sewer.

11 That's the ones that come to mind, but
12 we've done numerous projects.

13 Q Maybe I can narrow down the list a little
14 bit. Have you done other projects with B.P. Barber,
15 URS, either before or after this project that
16 involved the installation of wet wells?

17 A Before, yes. After, no.

18 Q And before, how many projects roughly do
19 you think you did with B.P. Barber that involved the
20 installation of wet wells?

21 A Probably at least half a dozen.

22 Q In this case it's my understanding that
23 the specifications required R.H. Moore to obtain and
24 then submit sealed structural calculations. Is that
25 accurate?

1 A For the wet well?

2 Q Correct.

3 A Correct.

4 Q On the other projects that R.H. Moore has
5 done or did with B.P. Barber before this project,
6 was there a similar requirement in the
7 specifications?

8 A I don't remember.

9 Q Have you ever worked with Tobias & West
10 on any other projects?

11 A No, sir.

12 Q Have you reviewed B.P. Barber's contract
13 with the county in this case?

14 A I have not.

15 Q When you were in the field, you
16 personally were in the field fairly often on this
17 project? Is that fair?

18 A Define "often."

19 Q I saw your name on most of the e-mails.
20 What was your exact title on this project?

21 A Project manager.

22 Q How often were you in the field?

23 A When we were doing this project, I
24 probably had four other projects, and I would
25 usually spend -- if I was lucky -- one day a week on

1 this project.

2 Q Was there a site superintendent who
3 oversaw the project on a day-to-day basis in the
4 field?

5 A Yes, sir.

6 Q Is that Mr. Bales?

7 A Balles, Joe Balles.

8 Q Does Mr. Balles still work with R.H.
9 Moore?

10 A Yes.

11 Q Did you confer with him in preparing for
12 this deposition?

13 A No.

14 Q Do you have any understanding or
15 testimony to offer concerning the nature of URS's
16 on-site involvement with regard to the wet well?

17 A Run that one by me again.

18 Q Do you have any testimony to offer
19 concerning URS's construction observation with
20 respect to the wet well?

21 A Are you asking me if it was good, bad,
22 indifferent?

23 Q I'm asking if you have any commentary one
24 way or the other.

25 A No.

1 Q Do you have any testimony to offer
2 about -- Did you have any personal observations of
3 any of the construction observation performed by
4 URS, specifically with regard to the wet well?

5 A Ross, that's their inspector, was out
6 there. Ross usually is in the field all the time.

7 John, Eric King, those guys don't come
8 out very often. And we'd go to a meeting and you'd
9 see them occasionally on the site, unless there was
10 a problem.

11 Q Mostly it was Ross that you would see out
12 on the site?

13 A Yes.

14 Q And you had no commentary as to the
15 thoroughness of Ross's construction observation or
16 anything like that?

17 A Ross is very thorough. He takes good
18 notes.

19 Q What was your understanding of what role
20 B.P. Barber had in selecting your means and methods,
21 if any? For instance, how the wet well was going to
22 be installed, how you were going to excavate, those
23 sort of things.

24 A You had to submit what you were going to
25 do to them and they had to approve it.

1 Q I'm going to get to this issue in more
2 depth later on. But the force main, for instance,
3 it's my understanding that R.H. Moore installed the
4 wet well, backfilled around it and then excavated to
5 install the force main, generally speaking. Is that
6 the phasing that you used?

7 A That's partially right, but your
8 terminology is wrong.

9 Q Correct my terminology, please.

10 A We set the wet well. We backfilled it.
11 We filled it with water so it wouldn't float.
12 That's kind of standard.

13 Q By float, you mean vertically?

14 A Yes. It's buoyant, believe it or not.
15 It will float.

16 We went away for some time doing other
17 things, and we come back I think it was a month or
18 two months later and we installed a gravity sewer
19 line between the new wet well and the existing pump
20 station 67.

21 Q Are you talking about a gravity line?

22 A A gravity line, yes, sir.

23 Q And I assume you pump the water out of
24 the wet well before you installed the gravity line?

25 A Well, we did partially. The gravity line

1 was installed -- I think it's seven feet off the
2 bottom of the wet well. And we pumped it out enough
3 to get a hole in the wet well and install the sewer.

4 Q So you let the water go down to six feet
5 or five feet or something like that?

6 A Yeah, right at the hole.

7 Q So that method of installing the gravity
8 line, was that something that R.H. Moore ever
9 conferred with URS about?

10 A No.

11 Q Were there other ways you could have
12 done -- For instance, just as a lay person, I'm
13 thinking wouldn't it be better to not backfill
14 around the wet well and install the gravity line
15 while the excavation is there and then backfill?
16 Were there other ways you could have done that
17 process?

18 A Possibly. Have you seen pictures of the
19 installation?

20 Q I have.

21 A You have sheeting around the structure.
22 And it's difficult to work around -- The holes are
23 so deep. This pipe, I think, was 20 foot deep. To
24 have the sheeting in place for the wet well, to have
25 another set of sheeting for this structure, you've

1 got an existing wet well that has to stay in
2 service, and your equipment don't have anywhere to
3 work. You've got to have an area big enough for a
4 huge backhoe to sit. And logistically it's just not
5 practical to do it that way. That's my opinion.

6 Q It wouldn't have been cost effective to
7 do it any way other than how you did it? Is that
8 what you're saying?

9 A That's what we think.

10 Q But there were other ways that you could
11 have done it, but they were cost prohibitive in your
12 view?

13 A Well, that's just not the way we did it.

14 Q Did you ever confer with Knight's Precast
15 or Tobias & West about your plan to backfill around
16 the wet well and then excavate and install the
17 gravity line?

18 A No.

19 (Exhibit No. 14 marked for
20 identification.)

21 BY MR. NEWBERRY:

22 Q I don't know if this will jog your memory
23 at all. I'm handing you what I've marked as Exhibit
24 14. It's from your file labeled R.H. Moore 834. Is
25 this a summary of the invoice history between

1 Knight's Precast and R.H. Moore?

2 A Yes, sir.

3 Q Does this jog your memory at all
4 regarding the number of wet wells that you had
5 purchased from Knight's?

6 A No, sir. The way I would have to
7 evaluate that is to go back through my bids and see
8 which jobs we did and what was on them.

9 We buy quite a few products from Knight's
10 that's not a wet well. We buy probably sewer
11 manholes more than anything. We buy air-release
12 manholes. We buy wet wells, storm drain structures.
13 There are a lot of things in these numbers other
14 than wet wells.

15 Q Prior to the wet well failure that we're
16 here about, has R.H. Moore ever had any other
17 situation in which a wet well has collapsed or had
18 some sort of structural problem similar --

19 A Yes, sir.

20 Q And tell me about that. How many times
21 and where were those events?

22 A The one that sticks out was on Daniel
23 Island. It was a job we were doing for Sanders
24 Brothers, a subdivision job. It had a wet well
25 structure. I believe it was a smaller square

1 structure -- round. It was round. It's been a long
2 time ago.

3 But anyway, we set the structure that was
4 purchased from Knight's and cracks started appearing
5 in the structure similar to this.

6 Q Was this after you backfilled around it?

7 A Yes, after we backfilled it.

8 To give you a little history, you can get
9 a wet well structure real quick. The pumps and the
10 wiring and the panels that go in the wet well takes
11 a long time. So we generally set the structure
12 first. We fill it with water. We wait for the
13 other equipment to come in, and then we finish the
14 wet well.

15 Q So it takes time to actually receive the
16 pumps? You're talking about receiving them and not
17 installing them?

18 A Both. Receiving them mainly. It takes
19 10 to 12 weeks usually if you're lucky.

20 But anyway, the other wet well, we set it
21 as we did this one. We filled it with water. We
22 pumped it out and it was cracked.

23 We contacted Knight's. Knight's went
24 back and looked at their drawings, and they had left
25 out some steel. And they come in and put an

1 interior wall, like we proposed on this one, and it
2 worked real well.

3 Q The cracking in this round wet well
4 you're talking about, did it occur before any
5 subsequent excavation? So you had the initial
6 excavation that you fill around the wall, and then
7 you noticed the cracks was the next step?

8 A I don't remember when. I think it was a
9 little bit later.

10 Q But it wasn't after some subsequent
11 excavation that you did?

12 A I don't remember. I don't think it was.
13 Typically, I think we set the wet wells on a
14 project. Then we go out and lay sewer. Generally,
15 the sewer starts at the wet well, because that's the
16 deepest point and it goes to the high point. But in
17 this case, I don't remember when.

18 Q Who was the engineer on that project? Do
19 you know?

20 A I do not. I forgot.

21 Q Have you had any other wet well failures
22 other than the one that you just mentioned and the
23 one that we're here about?

24 A I guess I should ask what's your
25 definition of a problem versus a failure?

1 Q Fair enough. What I'm interested in is
2 any other circumstances that R.H. Moore has had
3 where a wet well has cracked or collapsed or had a
4 significant structural problem.

5 A No. We've had a few that had liners in
6 them, a T-Lock liner that had voids in them, big
7 voids. The structure didn't actually fail, but we
8 had to go in and redo the walls to fix the voids.
9 We've had those kind of problems.

10 Q Is that all that's coming to your mind
11 based on the definition I gave you?

12 A Yes, sir.

13 Q I think you might have told me this. The
14 round wet well that failed, was that before the
15 failure at issue in this case?

16 A Yes.

17 Q Have you had any since this case?

18 A Not that I can recall.

19 Q As to R.H. Moore's team that worked on
20 this project, can you give me sort of the hierarchy
21 and everyone's responsibilities?

22 A Joe Balles was the superintendent. Billy
23 Lawson was a foreman.

24 Q Do you have just subs that handle all the
25 work under him?

1 A No. We have our own people.

2 Q Do you know the names of any of the
3 people employed by R.H. Moore who actually worked on
4 the wet well structure as opposed to piping or
5 something?

6 A I've got a list of all of them if you
7 want to see it.

8 Q Is it separated by -- Well, what we'll do
9 is I'll send you a discovery request if I want to
10 get that full information. It might be in your
11 discovery responses already.

12 MR. McDONALD: I'm pretty sure it
13 is.

14 THE WITNESS: Yeah, I think it is,
15 too.

16 BY MR. NEWBERRY:

17 Q Can you give me an idea of a 10,000-foot
18 view of this project, sort of what the big tasks
19 that you moved from? You started installing piping
20 in one area, then the wet well maybe, and then
21 piping in another area. Just a large overview so I
22 can get a sense for the scope of the whole project.

23 A The project value was \$5.7 million
24 approximately. It involved gravity sewer starting
25 at the far end of the project. There was a 20-inch

1 force main from the far end of the project, which is
2 going to be the north end, I guess, north or east
3 end, and it laid up through the swamp. It come up
4 Tupelo Road and stopped. The force main started at
5 that far end manhole, is where it dumped into their
6 system. And it was laid up the right-of-way up to
7 Tupelo Road. It turned and went down Dorchester
8 Road until -- it used to be called Summer Road.
9 Maybe that's what it is now. It turned down Summer
10 Road and went to the pump station. And then you had
11 the pump station itself.

12 And each one of those -- The force main
13 itself involved a lot of conventional bores, road
14 bores and drills.

15 Q Was the Ashley River on the other side of
16 the pump station?

17 A No. The Ashley River is between the pump
18 station and Dorchester Road. The force main come up
19 Dorchester to 17A. It bored under 17A behind the BP
20 Station, and got on 17A, and then it bored back
21 under 17A at the river, and then they drilled under
22 the river, and then on that side of the road it went
23 down Summer and turned down Summer Road to the pump
24 station.

25 Q So I'm assuming that throughout this

1 project you have different teams working in
2 different areas?

3 A Yes. I've got a set of plans if you
4 would like to look at them.

5 Q That's okay. I'm just trying to get a
6 sense of how your people moved around the project
7 from station to station. It sounds like you had --
8 Did you have two groups working at a time, or just
9 people scattered throughout the whole length of the
10 project?

11 A Two to three groups.

12 Q Who from R.H. Moore was responsible for
13 ensuring that the work complied with the plans? Do
14 you have a QC person on site?

15 A Generally the superintendent. And we had
16 another gentleman. I'm going to call him an
17 assistant superintendent. We are not big on titles.
18 But he does a lot of the legwork. He helps the
19 superintendent. He is kind of like a safety person
20 that helps. When the superintendent has got two or
21 three important things, he will step in and handle
22 one and the superintendent will do the other.

23 Q Who is the assistant superintendent?

24 A Chris Moody. And he wasn't here the
25 whole time, but he was -- There again, we had two or

1 three projects in town, and we kind of shifted our
2 help around as we need them.

3 Q So when you say he wasn't here, you mean
4 he wasn't working on the pump station project full
5 time?

6 A Full time, no.

7 Q Tell me about Mr. Balles's background.

8 A He was a football player at Clemson
9 University. I think his degree is in forestry.
10 He had plans to play pro ball, and he got hurt. So
11 he went to -- Did he do logging first? Pulp mill
12 logging stuff, and then he went to work for a pipe
13 company.

14 MR. MOORE: Disney World.

15 A Yeah, Disney World, Florida. And he
16 worked at the pipe business all of his life.

17 BY MR. NEWBERRY:

18 Q When you say he went to work for a pipe
19 company, you mean like a contractor?

20 A A contractor.

21 THE WITNESS: Was it Wilbur Smith?

22 MR. MOORE: Jackson, I think.

23 BY MR. NEWBERRY:

24 Q How old is he, roughly? I'm trying to
25 get a gauge how long he worked in the piping

1 industry.

2 MR. MOORE: Old as dirt.

3 BY MR. NEWBERRY:

4 Q So he's been doing it for a long time?

5 A A long time.

6 Q And what about Mr. Moody? What's his
7 background?

8 A I don't know as much about Chris. He's
9 been doing pipe business as long as I've been here.
10 He started out as an operator foreman. And he's
11 probably 55.

12 MR. MOORE: 53, 54.

13 BY MR. NEWBERRY:

14 Q Does he have a degree of some type in
15 construction sciences?

16 A I don't know.

17 MR. MOORE: Safety.

18 BY MR. NEWBERRY:

19 Q Did you use any subs for the wet well
20 installation and the excavation?

21 A Not in the excavation.

22 Q So the R.H. Moore people actually did the
23 digging?

24 A We dug the hole.

25 Q What about the backfilling?

1 A We did the backfilling.

2 Q What about setting the wet well?

3 A We set the wet well assisted by Knight's
4 people. Chuck was there. Bud Knight was there. A
5 couple other guys. And we rented a crane to set the
6 structure.

7 Q And what about installing the gravity
8 line and digging the hole for the gravity line? Was
9 that something that your people did?

10 A Our crew did that.

11 Q Did you guys rent trench boxes for the
12 wet well?

13 A We rented what's called a slide rail
14 system.

15 Q How does that work?

16 A I've got a picture of it if you want to
17 see it.

18 Q Just explain it to me.

19 A It might make it easier.

20 Q That's fine.

21 A These are pictures of the original
22 installation (indicating).

23 Q These aren't Bates stamped or anything,
24 but you guys have produced these?

25 A They are available if you want them.

1 This is a shoring system that's rented.
2 These are the guys leveling the stone. This is a
3 sliding beam that's put in for installation purposes
4 only. Once this sliding beam is in and we dig the
5 hole, you can't see it, but there's a steel beam
6 across the bottom of this structure to hold it --
7 keep it from collapsing.

8 These members here (indicating), the four
9 posts, we have to burn a beam in there to keep it
10 from coming in in the middle. And we're removing
11 this sliding beam right here. He's hooked to this
12 beam. It's got rollers and it rolls up. You take
13 it out, and then you have a clear opening to set
14 your structure.

15 It's an engineer -- something you rent.
16 You wouldn't want to buy it, I wouldn't think.

17 Q Who took these photographs?

18 A I did.

19 Q How many photographs do you think you
20 have of this project?

21 A Of setting the wet well?

22 Q Of just the project.

23 A A thousand.

24 MR. NEWBERRY: Have those been
25 produced, Brent?

1 MR. McDONALD: I know we've produced
2 some photographs. I would have to figure out --

3 A Most of the pictures I have are
4 pre-construction pictures. They wouldn't have
5 anything to do with -- We tried to give you all the
6 pictures associated with the wet well and the drill.
7 But there are tons of pictures of dead flowers and
8 cracked driveways, and you're welcome to have them,
9 too.

10 BY MR. NEWBERRY:

11 Q I definitely don't want those
12 photographs. Do you have photographs of the gravity
13 line installation?

14 A I was not there when they did it. You're
15 talking about between the two wet wells?

16 Q Right.

17 A I was not there.

18 MR. NEWBERRY: I don't need to mark
19 these. I'm happy to mark them if somebody else
20 would like me to.

21 MR. McDONALD: I'm pretty sure these
22 have been produced, these photographs.

23 THE WITNESS: They have.

24 MR. McDONALD: I just know we didn't
25 produce thousands of photographs.

1 BY MR. NEWBERRY:

2 Q What's the ownership structure of R.H.
3 Moore?

4 A What's the what structure?

5 Q Do you know the ownership structure? Who
6 owns R.H. Moore? Is there more than one
7 shareholder?

8 A There are several shareholders. Henry is
9 the major shareholder.

10 Q Controlling shareholder, I guess you
11 would say?

12 A Yes, that's what we say.

13 Q Tell me about the process that R.H. Moore
14 went through in bidding on this project.

15 A In what respect?

16 Q What information did you receive to
17 review before placing your bid?

18 A You have to order the plans and specs.

19 Q And who within R.H. Moore reviewed the
20 plans and specs prior to submitting the bid?

21 A Myself and Robert Pickering worked on the
22 bid.

23 Q What's Mr. Pickering's role with R.H.
24 Moore?

25 A He is a project manager/estimator.

1 Q I assume you reviewed URS's plans related
2 to the wet well as part of your bid?

3 A I did.

4 Q Did you have any questions about their
5 plans?

6 A No.

7 Q Did you ask for clarification about
8 anything?

9 A Not that I'm aware of. There was two or
10 three addenda issued. We had some questions, but I
11 think they answered most of the questions.

12 Q Did you typically submit those questions
13 via e-mail or in writing in some form?

14 A On this particular job, I don't remember.
15 I try to.

16 Q When you were going through and coming up
17 with your bid, was it important to know the
18 thickness of the wet well walls for purposes of
19 evaluating how much concrete you would need, how
20 expensive the wet well might be, those sort of
21 things?

22 A No. It's not important.

23 Q Not important at all?

24 A No.

25 Q Why not?

1 A It's precast. We expect our precaster
2 when he quotes a project to quote it according to
3 the specs.

4 Q Did you get a quote from Knight's Precast
5 before you actually bid?

6 A We have to, yeah.

7 Q Did you actually spend time studying --
8 Strike that.

9 Did you actually spend any time
10 considering the thickness of the wet well walls
11 during the bid process, or is that something you
12 just let Knight's Precast look at and bid on?

13 A No, we didn't. I guess we make an
14 assumption that URS knows what they are doing. And
15 we assume that the structure is okay when we bid the
16 project. And the fact that Knight's Precast quotes
17 it and they don't take any exceptions in their
18 quote, we have no reason to question anything.

19 Q Do you specifically recall seeing the 12
20 inch wall thickness in URS's plans when you were
21 reviewing the documents?

22 A Yes.

23 Q What do you recall thinking about it or
24 any conversations you had with anyone at R.H. Moore
25 about the thickness?

1 A Had no opinion on it. It's fairly
2 common.

3 Q The wall thickness is fairly common?

4 A Yes.

5 Q That was a bad question --

6 A For a precast structure, I should say.

7 Q Just to make sure we have a clear record,
8 when you saw the 12 inch wall thickness, you
9 believed that was a fairly common thickness for a
10 precast structure?

11 A I believe that URS wouldn't put it on
12 their drawings if they didn't think it would work.

13 Q Do you know or have you had any
14 conversations with Knight's Precast to learn of any
15 of the pre-construction communications that occurred
16 between URS and Knight's Precast?

17 A No.

18 Q Other than your recollection of seeing
19 the 12 inch thickness in the plans, you don't have
20 any testimony to offer about any actions you took as
21 a result of that thickness?

22 A No. If URS designed it and Knight said
23 they could build it and meet the specs, at bid time
24 that's all we are concerned with. We don't have
25 time to go through and reengineer the project, I

1 guess is a fair statement.

2 Q What about after the bid process once the
3 job has been awarded to you? Did you go back and
4 look at the wet well thickness for any reason, or do
5 you recall any internal communications at R.H. Moore
6 about the wall thickness?

7 A No.

8 Q You testified earlier or agreed with me
9 when I represented to you that the wet well
10 specifications required R.H. Moore to submit sealed
11 calculations from a structural engineer. Right?

12 A Yes, sir, that's what it says. I think
13 it says you have the option to cast it in place or
14 do a precast. But whatever you do, you've got to
15 submit drawings on.

16 Q What is the significance of submitting
17 sealed drawings? Do you know?

18 MR. McDONALD: Object to the form.
19 You can answer.

20 A To take the liability off of URS for the
21 design.

22 BY MR. NEWBERRY:

23 Q Explain to me what you mean by that.

24 MR. McDONALD: Same objection. You
25 can answer.

1 A If URS puts in their specs that they've
2 got to have a set of sealed drawings from a P.E., he
3 is liable for the design of the structure, not URS.

4 BY MR. NEWBERRY:

5 Q "He" being the P.E.?

6 A "He" being whoever they choose. In this
7 case, Tobias & West.

8 Q Do you know whether -- Well, did you ever
9 have any conversations with URS about the -- what I
10 call the delegated design portion of their wet well
11 design? Did you ever talk to URS about that?

12 MR. McDONALD: Object to the form.
13 You can answer.

14 A I have kidded with them in the past that
15 they are not engineers anymore. They are lawyers.
16 Because if you'll read their entire spec, a lot of
17 the riskier items are worded such that they have no
18 liability for them.

19 Q Do you know whether URS has a structural
20 engineer on staff?

21 A I don't know. I would assume they would.

22 Q Did URS ever represent to you, to R.H.
23 Moore, during this project that they had a
24 structural engineer on staff who worked on this
25 project for them?

1 A The only mention of a structural engineer
2 was after the failure. We went in. They had
3 Tobias & West's design then. And I asked them, I
4 said, Don't you-all review this stuff when we send
5 it to you? And kind of in a joking way. We know
6 them guys pretty good. I said, You don't look at
7 this stuff? You just stamp it and stick it in your
8 file.

9 Somebody made mention they had a
10 structural engineer. I think he's in Columbia, but
11 I vaguely remember that comment.

12 Q Who were you joking around with?

13 A It had to be either Weldon or Eric King.
14 Mike Beckman may have been there. I don't know.

15 Q Other than what you just testified about,
16 during this project that we're here to talk about,
17 did anyone from URS ever represent to R.H. Moore
18 that they had a structural engineer who was working
19 on the project on URS's behalf?

20 A No.

21 MR. NEWBERRY: You can clarify
22 whenever I ask you questions.

23 MR. MOORE: The structural engineer
24 in Columbia looked at that interior repair, if you
25 recall.

1 MR. NEWBERRY: Mr. Moore, you can
2 clean it up when I ask you questions.

3 MR. MOORE: Well, I may forget.

4 MR. NEWBERRY: Jot it down.

5 A Is Dan Huggins there a structural
6 engineer?

7 BY MR. NEWBERRY:

8 Q I think he is a civil engineer.

9 A I do, too. I wasn't sure. They refer to
10 him a lot, because I think he did a lot of the
11 design on this project.

12 Q It's fair to say your contract on this
13 project required you to comply with the
14 specifications. Right?

15 A Yes.

16 (Exhibit No. 15 marked for
17 identification.)

18 BY MR. NEWBERRY:

19 Q I'm going to hand you what I've marked as
20 Exhibit 15. This is the specification section 3410,
21 and it's actually not Bates stamped. Take a second
22 to look at that document and let me know once you've
23 had a chance to do so.

24 MR. McDONALD: I would just note
25 this is section 3410, but it appears to be section

1 3410 as included in addendum No. 2.

2 MR. NEWBERRY: Correct.

3 A I've reviewed it.

4 BY MR. NEWBERRY:

5 Q Exhibit 15, is it a copy of the
6 specification section for the wet well as amended
7 with addendum No. 2?

8 A That's what it appears to be. I would
9 have to go back and look through my notes to see if
10 it matches what I have.

11 Q We will assume that it does.

12 A It looks right.

13 Q Let me go back and ask you another
14 question about this portion of URS's design that
15 required R.H. Moore to submit sealed calculations
16 from a structural engineer.

17 Is there any other reason that you know
18 of that URS included this section other than to
19 shield itself from liability as you described it?

20 A No.

21 Q It's the only reason you can think of?

22 A Yes, sir.

23 Q If I didn't ask you before, I'll ask it
24 now. Did you ever talk to URS about this section of
25 the specifications?

1 A In what respect?

2 Q Before the failure of the wet well, did
3 you communicate with URS regarding what they meant
4 by this section or what the significance of this
5 section that required sealed calculations meant?

6 A No.

7 Q Just for record purposes, it says product
8 data, 1.3B. "Within 30 calendar days after the
9 contractor has received the owner's notice to
10 proceed, submit" -- And item one says, "Materials
11 list of items proposed to be provided under this
12 section." And two says, "Manufacturer's
13 specifications, calculations and other data needed
14 to prove compliance with the specified
15 requirements." Subsection A says, "Project specific
16 design calculations for all components showing
17 design loads at the depths indicated on the drawings
18 signed and sealed by a professional engineer
19 licensed to practice in the state of South
20 Carolina." Did I read that correctly?

21 A Yes, sir.

22 Q Did R.H. Moore have the obligation to
23 coordinate with its subcontractors and material
24 suppliers in order to gather the data that was
25 necessary for the submittal to URS?

1 A Yes.

2 Q Did R.H. Moore obtain signed and sealed
3 calculations for the wet well within 30 calendar
4 days after it being provided with notice to proceed
5 on the project?

6 A No.

7 Q Why not?

8 A We just didn't.

9 Q When was the first time that R.H. Moore
10 contacted Tobias & West or Knight's Precast and told
11 them that you needed signed, sealed calculations
12 from a structural engineer regarding the wet well?

13 A We submitted the shop drawings on -- I
14 think sometime in August. I'm not real clear. John
15 Weldon sent us an e-mail on 11/28 requesting the
16 stamped drawings, and we've requested them from
17 Knight's, and Knight's sent them to us on December
18 7th, and we sent them to URS that day.

19 Oh, I'm sorry. We submitted the wet well
20 drawings on July 25th.

21 Q Those were the drawings. Did those
22 include the calculations?

23 A No.

24 Q Do you agree with me that it's reasonable
25 for URS to expect and assume that its contractor is

1 complying with this element of the specifications
2 that required R.H. Moore to get signed and sealed
3 calculations?

4 MR. McDONALD: Object to the form.
5 You can answer.

6 A It's so complicated, I couldn't
7 understand it.

8 BY MR. NEWBERRY:

9 Q That's fine.

10 A Can you reword it?

11 Q Do you believe it was reasonable or that
12 it would be reasonable for URS to assume and believe
13 that R.H. Moore is going to obtain the calculations
14 as required in the submittal for the wet well?

15 MR. McDONALD: Object to the form.

16 A We are supposed to provide what they need
17 to do their job. I am of the opinion the
18 specifications are a guideline for everyone to
19 follow and do what we needed to do.

20 As far as do this in three days or do
21 this in four days, if we're not going to do the work
22 activity for three months, I don't think the time
23 issue plays a lot into it.

24 Quite frankly, we sent them the drawings.
25 I never thought about the calculations. And I don't

1 think URS did either until John says we don't have
2 them, send them. And we sent them.

3 BY MR. NEWBERRY:

4 Q Are you telling me that you didn't really
5 see this time deadline within 30 calendar days --

6 A No, sir, I did not.

7 Q Let me finish my question.

8 A I'm sorry.

9 Q That you didn't believe this time frame
10 of 30 calendar days was a significant deadline for
11 R.H. Moore to comply with?

12 A No, sir.

13 Q Did you ever talk to URS about the
14 significance of this time period listed in section
15 1.3 of the submittal?

16 A No, sir.

17 Q Do you recall whether you obtained signed
18 and sealed calculations from Tobias & West before or
19 after you installed the wet well?

20 A It was after.

21 Q There is no question that you, being R.H.
22 Moore, understood from your review of the
23 specifications during the bid process that you knew
24 you had to get signed and sealed calculations.
25 Right?

1 A Yes. It's in the specifications.

2 Q And you did not get those signed and
3 sealed calculations until after the wet well was
4 installed. Right?

5 A That's correct.

6 Q And then did you submit the calculations
7 to URS, or who within R.H. Moore?

8 A I did.

9 Q Did URS respond in any way at that point?

10 A No.

11 Q Were there any discussions between you
12 and URS about the time frame for the submission of
13 the calculations?

14 A No. We are not hard to live with. If
15 they wanted the calculations, all they had to do is
16 remind me to send them the calculations and I would
17 have done it. We are not trying to cover up
18 anything.

19 Q I understand. Do you expect the designer
20 to come around behind you and remind you to comply
21 with the specs, or can they rely on you to comply
22 with the specs?

23 A I think that's a two-way street. I think
24 we, as a contractor, have an obligation to build it
25 by the specs and work with the owner, the engineer,

1 whoever, to get the project built.

2 There again, if we're laying force main
3 and we don't plan on setting the wet well for four
4 months, I don't even -- I generally don't look at
5 that until before I get ready to do my work.

6 And in this case we sent the shop
7 drawings. Knight's didn't send us the design, which
8 they are obligated to do. We didn't catch it. We
9 sent it to -- We sent the shop drawings to URS. And
10 then when they reminded us, we sent them the design.

11 Q So you're telling me that when you got
12 the submittal package, the shop drawings from
13 Knight's, the calculations were missing. You didn't
14 catch that and sent it on to URS without the
15 calculations basically?

16 A That's correct.

17 Q Had you instructed Knight's Precast
18 before they provided you with the submittal to send
19 actual signed, sealed calculations from a structural
20 engineer?

21 A I did not say that specifically. They
22 know they have to meet specifications.

23 Q Who selected Tobias & West?

24 A I don't know.

25 Q Ultimately, after the wet well was

1 installed, URS came back to R.H. Moore and said,
2 Where are these calculations? We haven't seen the
3 calculations?

4 A Correct.

5 Q At that point in time were you under the
6 impression that actual calculations existed that
7 have just not been passed to you, or do you even
8 have any understanding as to whether any
9 calculations had been performed up to that point by
10 Tobias & West?

11 A I had no knowledge of it.

12 Q So when was the first time that R.H.
13 Moore knew that there were actual signed, sealed
14 calculations from a structural engineer?

15 A December 7th.

16 Q And that's 2012?

17 A 2011. We said it in November of '11.
18 November 15th, I think. November 15, 2011.

19 (Recess taken.)

20 BY MR. NEWBERRY:

21 Q I want to move on to talk about the
22 excavation in order to install the gravity line.
23 Tell me how R.H. Moore went about excavating for the
24 gravity line.

25 A Between the two wet wells?

1 Q Correct.

2 A We dug out -- Our foreman said he dug out
3 behind the wet well, the new wet well we set. We
4 dug a hole between the two structures big enough for
5 a manhole box. The dimensions of that box outside
6 are probably 12 by 12. We dug down to it -- it's in
7 the center of the wet well.

8 There was a hole already in the wet well.
9 Typically they fill it with styrofoam or some
10 product, and it's got a small skim of concrete over
11 it so it don't leak. We busted that out. We put
12 the pipe in, put a link seal in the cavity, if you
13 know what that is.

14 Q I'm not worried about that.

15 A I've got pictures if you want to see
16 them.

17 Q No, that's okay.

18 A We did not excavate the entire side of
19 the wet well.

20 Q Which side are you talking about?

21 A I can show you better --

22 Q I've got some pictures. Why don't I show
23 you some pictures.

24 A Or I can draw you a picture.

25 (Exhibit No. 16 marked for

1 identification.)

2 BY MR. NEWBERRY:

3 Q I'm going to hand you what I've marked as
4 Exhibit 16. This is B.P. Barber's field report
5 dated 12/15/11. It's B.P. Barber 2621 -- I'm sorry.
6 It's B.P. Barber 520 through 524. And I've also
7 included within Exhibit 16 a field report that's
8 photographs from December 15, 2011. And that Bates
9 range is 269 through 272.

10 A It's the same ones I was going to show
11 you.

12 Q Perfect. First of all, who from R.H.
13 Moore was on site directing this excavation work?

14 A I was not there. I would assume Joe
15 Balles was there some of the time and Billy Lawson
16 was there.

17 Q And you said that Mr. Lawson or
18 Mr. Balles, someone told you that they excavated
19 around the sides of the wet well?

20 A Not around the sides. Around the back.

21 Q So if you'll flip to what we've marked
22 Exhibit 16 and page 270 -- there you go
23 (indicating) -- there's a picture in the upper
24 right-hand corner, and it's got -- What do you call
25 that?

1 A A pile of dirt. A backhoe bucket.

2 Q A backhoe bucket hanging over the wet
3 well. In the bottom right-hand corner of that
4 photograph you can see the manhole box that has been
5 dug. Is that right?

6 A Yes, sir.

7 Q When you say that your super or someone
8 on site told you they excavated behind the box,
9 where are you talking about?

10 A Back in this area (indicating).

11 Q Right where that bucket is sitting?

12 A It's a rock box.

13 Q Right where the rock box is sitting?

14 A Yes, sir.

15 Q Are you able to tell from this photograph
16 or do you know how far down they excavated on the
17 back side of the box?

18 A You can't tell from this photograph.

19 Q Do you know from your communications with
20 your on-site folks how far they excavated on the
21 back side of the box?

22 A I don't remember. I would think eight or
23 nine feet.

24 Q Why would they go eight or nine feet down
25 on the back side of the box?

1 A It's relieving the ground pressure off of
2 the box -- off of the precast structure.

3 Q Were you, being R.H. Moore, aware of the
4 importance of having equal loads on all sides of a
5 structure like this that's in the ground?

6 MR. McDONALD: Object to the form.
7 You can answer.

8 A A structure this big, I don't
9 particularly think you have to have equal forces.

10 BY MR. NEWBERRY:

11 Q Why not?

12 A Well, this structure weighs 210 tons. If
13 a little bit of dirt is going to upset the
14 structure, it was not properly built.

15 We were not -- If you'll look, this
16 picture is about the best one you've got
17 (indicating). You can see this box is ten foot
18 inside.

19 Q You're pointing at what's marked as Bates
20 stamp 271 in Exhibit 16, and it's the box where the
21 man in the red jacket in the bottom right-hand
22 corner is down at the bottom of the box. Right?

23 A Correct. They are installing a pipe.

24 MR. McDONALD: I don't mean to
25 interrupt, but when you've got Bates stamps down

1 here and you're referring to the bottom right-hand
2 corner, it might be a little confusing. I'm just
3 saying. You can do what you want.

4 MR. NEWBERRY: How do you want to
5 define it, Brent? I'm good with however you want to
6 go.

7 MR. McDONALD: By the Bates stamps,
8 it looks like it reads like a letter. So that would
9 be the top right.

10 MR. NEWBERRY: We'll go top
11 right-hand corner.

12 BY MR. NEWBERRY:

13 Q Go ahead.

14 A Anyway, this box is about ten foot
15 inside. The structure outside is 22 feet long
16 approximately. So that means there's five or six
17 feet of dirt on either side of this structure.

18 Also, the structure -- I'll mess up my
19 sheet of paper.

20 Q Remember, this may be marked as an
21 exhibit, so do your best work here.

22 A I'll try and draw good.

23 The way the box is made is like this
24 (drawing). This is a one foot -- I call it a knee
25 wall, for lack of a better word. On this there are

1 four sections. This knee wall goes all the way
2 across. This is eight foot. And this may not be
3 perfect. This is eight foot. This is six foot.
4 And this is six and a half foot, I think. And it's
5 ten foot inside here.

6 The hole in this structure -- Well, this
7 base I think is 18 inches thick. That's one foot.
8 So from this joint to the bottom of the structure is
9 roughly ten feet. Are you following me?

10 A I do. We dug down to a hole right here
11 (indicating). So that means we dug out a 10 by
12 whatever hole. And this is dirt, dirt, dirt, dirt
13 dirt, dirt all the way around it. And we dug down
14 here. Assuming we did or we didn't. There is still
15 eight or nine feet of dirt supporting the base of
16 the structure when we dug this hole.

17 Q What about these three top sections of
18 the wet well that are not supported?

19 A I'm getting to that. They are not
20 supported. If the dirt on this side of the
21 structure pushed anything, it should have pushed
22 this one this way (indicating), that one that way,
23 that one that way.

24 Q You've drawn arrows indicating the
25 direction you thought --

1 A Right, the force of the dirt.

2 In looking at the pictures of the wet
3 well, it in fact shifted that way --

4 Q I'm going to give you my blue pen. You
5 show me which direction you believe the wet well
6 shifted using that blue pen.

7 A The wet well definitely shifted that way
8 (indicating). You look at the pictures and you
9 know.

10 Q Shifted toward the excavation?

11 A The hole, correct. The major damage --
12 What I don't understand is the major damage of the
13 structure was not up here (indicating). These walls
14 cracked. The major damage was right here in this
15 knee wall. And it should not have moved, because
16 there is equal dirt on each side.

17 If you go back and look at the pictures,
18 and I'm going to overexaggerate this, the knee wall
19 did this (indicating).

20 Q For the record, you've circled a blue
21 portion of your diagram which is the knee wall where
22 you think the damage was concentrated?

23 A Yes.

24 Q And now below that in blue you're drawing
25 a bent knee wall --

1 A Right. And this failed. That's a major
2 failure. The cracks in the wall, you could excavate
3 this and take off the risers and replace them.
4 That's a big deal, but it's not as big a deal as
5 this (indicating). You can't replace that.

6 Q Sitting here today, you have no
7 explanation for why this knee wall cracked?

8 A Other than the design. We've hired --

9 MR. BLANKENSHIP: Is that the knee
10 wall?

11 THE WITNESS: Yes, sir.

12 A We've hired two or three of the best
13 people we can find, and every one of them said the
14 structure was under designed. It don't have enough
15 steel in it.

16 BY MR. NEWBERRY:

17 Q What about the shifts that you originally
18 do in red, the direction you would expect it to
19 shift from soil loads --

20 A Correct.

21 Q -- and then you drew directly over that
22 two blue lines showing, yep, it did in fact shift
23 that direction. Right?

24 A Correct.

25 Q So do you believe the shift in the upper

1 risers was caused by unequal soil loads?

2 A I don't have an opinion. I'm just
3 telling you, what you're trying to say is that this
4 hole made the failure. And I disagree with you just
5 for the simple fact that the major failure in the
6 structure was not excavated.

7 It should have -- If we would have dug
8 down to this point down here and there was no dirt
9 holding this piece (indicating), it's a separate
10 piece, there should have been no shift here. Does
11 that make sense?

12 Q What about the two arrows that you drew
13 originally taken in isolation?

14 A There was no dirt up here to hold them.
15 So if you were expecting a shift, you would expect
16 it in the upper risers, is what they are called,
17 riser sections, and not in the bottom riser section.

18 Q And based on your observations, the upper
19 riser sections did in fact shift toward the
20 excavation for the gravity line?

21 A Yes, but we don't know when it did it.
22 It didn't shift when we were digging this hole. We
23 even had water here (indicating). I told somebody
24 before that when we excavate the structure, we fill
25 it with water to keep it from floating.

1 Q Correct. You told me that. How long was
2 the excavation open? Do you know?

3 A For this pipe?

4 Q Correct.

5 A To put in this first joint, probably a
6 day. Then we filled it with dirt, and we moved the
7 box up another section. And it's 60 feet between
8 the two structures. So this hole was open probably
9 a day, and then I would guess they backfill it up to
10 here (indicating).

11 Q Let's do that in blue so we know what
12 you're talking about. I'm going to mark this as an
13 exhibit. So you think it was open for a day?

14 A Backfill (drawing).

15 Q And then you would have backfilled up to
16 that line --

17 A Up to that line. And we would have moved
18 the box here and installed the next joint of pipes.
19 These joints are 20 feet long. So we put in a
20 joint. It's not a full joint, because it's a
21 10-foot box and we've got a 20-foot joint of pipe.
22 So you have a short joint, but then you do --

23 Q So on your paper if you could write "top"
24 up here.

25 A Sure (drawing).

1 Q On your paper what you're showing me is
2 that you've got the box up against the wet well when
3 you hook up the gravity line to the wet well. Then
4 you move the box left to right toward the old wet
5 well or old pump station and backfill behind you up
6 to this blue line that you drew. Right?

7 A Correct.

8 Q How long do you think --

9 A This is a better picture (indicating).

10 Q I've seen this picture. This is actually
11 a prior exhibit. I don't need to see this unless
12 you want to refer to it.

13 A It's just a better picture to give you a
14 better idea. There is not a gaping open hole there.
15 These are steel plates. There is dirt pushing on
16 them. It's pushing the box into the structure.
17 There is dirt on this side, dirt over here
18 (indicating). It's not like it was a big hole and
19 everything is going to go this way.

20 Q Did anybody from R.H. Moore run any sort
21 of calculations before implementing this means and
22 method issue, or is this all post-collapse analysis
23 that you've been describing?

24 That's a bad question. Let me rephrase
25 it.

1 This analysis that you've just shown me
2 as to why you don't think this excavation was a
3 problem, did you run a similar analysis before the
4 wet well failure, or did you develop this after the
5 failure?

6 A I haven't run any calculations on
7 anything.

8 Q What I'm trying to understand is, at the
9 time that the excavation was done, had R.H. Moore
10 decided in-house here's how we're going to do it,
11 and here's why we think it's going to cause a
12 problem? Was there any sort of group meeting or
13 discussion about that?

14 A No. We've been doing this for 40 years.
15 And in 40 years, I can't remember another structure
16 that shifted.

17 Q Do you always in 40 years do the process
18 we've described here where you backfill and then you
19 come back and excavate one side to install a line at
20 the bottom?

21 A Unless it's big enough -- Unless the hole
22 is big enough, you can sheet it and set the wet well
23 and lay the pipe and set a manhole all in the same
24 sheeting. And in this case we couldn't do that.

25 Q How many other structures do you think

1 you've done this same sort of installation with
2 originally backfilling and then excavating and then
3 rebackfilling?

4 MR. MOORE: Several hundred.

5 A Several hundred.

6 BY MR. NEWBERRY:

7 Q Would it surprise you if the excavation
8 was left open for four days?

9 A No.

10 Q Would that make a difference to you?

11 A It would surprise me if you're telling me
12 when they pulled this box they didn't backfill it
13 for four days. When they pull a box, they backfill
14 it immediately.

15 Q And how do you know that?

16 A That's the way we work.

17 Q Were you there? Did you see it?

18 A No.

19 Q How was the backfill to be -- What was
20 the process for backfilling around the wet well?
21 Were there layers of a certain depth?

22 A You put in dirt -- Are you speaking of
23 this excavation or the structure when we set the box
24 excavation?

25 Q I'm talking about the second excavation

1 to install the gravity line. When that was
2 backfilled, how was it backfilled?

3 A We take a backhoe. We dump the dirt in.
4 We pack it with a bucket and we bring it up in
5 lifts.

6 Q How deep are were the lifts?

7 A I don't know. I wasn't there. Usually a
8 foot, two feet.

9 Q Should they have compacted each two-foot
10 layer before applying another layer?

11 A Usually that's what they do.

12 Q Do you know if there would be any
13 potentially harmful effects to the wet well if it
14 wasn't compacted at all until it was completely
15 backfilled to the surface?

16 A I think if it was designed properly, it
17 wouldn't have been a problem.

18 Q Have you ever had a problem where a
19 structure has been damaged because there was no
20 compaction of the soil around it?

21 A No. We have had settlement of asphalt or
22 if there happened to be anything. That's pretty
23 much it.

24 (Exhibit No. 17 marked for
25 identification.)

1 BY MR. NEWBERRY:

2 Q Just confirm for the record that what
3 we've marked as Exhibit 17 is your drawing for the
4 wet well that we've been talking about for a few
5 minutes now.

6 A That is correct.

7 (Exhibit No. 18 marked for
8 identification.)

9 BY MR. NEWBERRY:

10 Q I'm handing you what we've marked as
11 Exhibit 18. It's actually an e-mail chain from John
12 Weldon to you, I believe. It's Bates stamped URS,
13 production 15811 through 15812.

14 What I want to ask you about is the
15 e-mail on the bottom of the first page going into
16 second page. Is that your e-mail address, the
17 Set13@earthlink.net?

18 A Yes, sir.

19 Q Do you recall this e-mail chain?

20 A You're talking about this one where he
21 sent it to me?

22 Q I'm talking about where John Weldon says
23 to you, "In addition, please note that the trench at
24 PS 67 was backfilled with select fill and zero
25 compaction. This is not acceptable and does not

1 meet specifications." Do you remember that?

2 A Yes.

3 Q Did you talk to anybody who was on site
4 when the backfilling around the wet well occurred
5 about whether they compacted the soil, and if so,
6 how?

7 A If it did not meet specifications, we
8 would have recompact it.

9 Q Do you recall recompacting or compacting
10 the soil around the excavation?

11 A Typically, in this area in a pump
12 station, above this sewer line we are going to have
13 to dig it up two to three more times to install more
14 pipe.

15 Q Did you have to do that in this case?

16 A Yes. Do you want to see the plans?

17 Q So you had to install pipe on the same
18 side of the gravity line, above the gravity line --

19 A There was a force main above this line.
20 The electrician has to dig up the ground around this
21 to put in his conduit. There is a bypass pump line
22 that goes directly above this sewer. So a lot of
23 the times we don't put a lot of compaction effort
24 into it, because it's going to have to be dug up
25 again.

1 If you put it in with a backhoe and tamp
2 it, I can about guarantee you it will be 90 percent.

3 Q Once URS has advised that there was zero
4 compaction at the pump station, do you know how that
5 condition was remedied? Did you just wait until the
6 next time you dug it up, or did you come out there
7 with some sort of compaction equipment immediately
8 and compact it?

9 A I don't remember. Typically we will --
10 There again, the phrasing you've worded it, zero
11 compaction, you're making me see a picture of fluffy
12 dirt sitting there.

13 Q Well, that's what he said in the e-mail.
14 Right?

15 A Well, he said zero compaction. I think
16 what he should have said is there wasn't a compactor
17 there. If I take a 400 Komatsu and pack it with a
18 bucket, I guarantee you it's packed.

19 Q You're taking the bucket on the backhoe
20 and dropping it?

21 A We take the bucket on the backhoe and we
22 roll it like your picture -- This picture is similar
23 (indicating). And we take and pack the dirt with
24 the bottom of this bucket. And it will put
25 thousands of pounds of thrust on the dirt.

1 Q You're talking about the upper left-hand
2 photograph on URS/B.P. Barber 270?

3 A Correct. Along with that, we know the
4 pump package and the bypass pump is not going to be
5 in for months. And it will rain on this soil. And
6 that's the best compaction you can have.

7 Q So do you know if the compaction -- Well,
8 do you know if R.H. Moore came back and compacted
9 this soil again after receiving that e-mail from
10 John Weldon?

11 A In what period of time?

12 Q Immediately after receiving this e-mail.

13 A I don't know.

14 Q But you're telling me that it's likely
15 that R.H. Moore compacted the soil around this wet
16 well by dropping this backhoe?

17 A Yes, sir.

18 Q Is that something that you've done on
19 other projects?

20 A Every job.

21 Q Did you discuss that method at all with
22 URS?

23 A No.

24 Q Do you know whether the backfill that was
25 used -- Well, do you know with any degree of

1 certainty the size or depth of the backfill that was
2 used by R.H. Moore on the gravity line excavation?
3 Each layer's depth?

4 A No. I think it's usually one to two
5 feet. If you take a backhoe bucket full of dirt and
6 you dump it in a hole, it's going to be about a foot
7 to two feet. If you mash it, it's going to be less
8 than that. We don't sit and measure every scoop of
9 dirt we do.

10 Q So you think it would have been in excess
11 of eight inches of depth of backfill?

12 A It's possible.

13 Q You can't say with certainty sitting
14 here?

15 A No.

16 Q What were your guys on site instructed to
17 do as far as backfilling? What depth?

18 A I didn't give them any instructions.

19 Q Did they have a set of specifications
20 with them?

21 A Yes.

22 Q Have you talked to any of your site
23 people about how deep each layer of backfill was
24 around the wet well?

25 A Around this excavation or the other

1 excavation?

2 Q I'm sorry. Around the gravity line
3 excavation.

4 A They know that it has to be compacted
5 good enough that it won't settle. They also know
6 that we're going to dig it up again two or three
7 times.

8 What we try to achieve is at the end
9 of the -- when everybody gets through tearing up the
10 site three or four times, we do compaction tests
11 that's required, and those tests meet the
12 specifications, if that makes any sense.

13 If you dig a box full of dirt and you put
14 it in there and you know you're going to dig it up
15 three or four more times, why do we need to take a
16 test each time when we know we're going to dig it up
17 again.

18 What we're looking for is a final product
19 that meets the specifications, that meets the
20 testing. And this site was tested numerous times,
21 and all the tests were good. If they weren't good,
22 we made them good.

23 Q And you just don't know with any
24 certainty exactly what procedures were followed in
25 actually backfilling?

1 A No. I can just tell you what we've done
2 for 40 years.

3 Q Did you ever actually observe any
4 excavation on the back side of the wet well, or have
5 you just been told that someone did that?

6 A No, I did not see it.

7 Q Have you seen any pictures that show an
8 excavation on the back side of the wet well when the
9 gravity line was being installed?

10 A No. Just for the record, there is a pile
11 of dirt there. So I know there's a hole somewhere
12 near that pile of dirt. Does that make sense?

13 Q Do you know whether that dirt came from
14 the gravity line excavation?

15 A I can't tell you that. But it makes
16 sense to me that if there's a pile of dirt there,
17 somebody dug a hole.

18 Q We know there was a hole where the
19 gravity line was. Right?

20 A Yeah, but the backhoe can't reach that
21 far. The wet well is 10 foot across. The backhoe
22 can only reach about 18 feet.

23 Q How big is this stone or rock box that's
24 sitting right behind the wet well?

25 A We have different sizes. I'm going to

1 say it's five foot wide, three and a half foot high
2 and 15 foot long.

3 Q Can you tell where it is in relation to
4 the back side of the wet well in that photograph?

5 A No.

6 Q What is your understanding of why you've
7 sued URS? What are your complaints as to URS's
8 work?

9 MR. McDONALD: Object to the form.

10 You can answer.

11 BY MR. NEWBERRY:

12 Q My client has been sued. Why? What did
13 they do wrong?

14 MR. McDONALD: Same objection.

15 A I guess we don't know. You were
16 involved. Just like we hadn't figured out yet what
17 we did wrong on the drill or what we did wrong on
18 the wet well. I guess to figure out who is wrong --
19 Once we figure out who is wrong, we are all in the
20 show.

21 BY MR. NEWBERRY:

22 Q So sitting here today, you don't have any
23 specific thing that you can point to that you think
24 URS did wrong?

25 A No, I don't. I've been told that the

1 reason the wet well failed is because it did not
2 have enough rebar steel.

3 Q And who designed the wet well?

4 A Tobias & West. We do think that URS has
5 some obligation to look at the design rather than
6 say I've reviewed it and it's in my file.

7 Q When you say design, are you referring to
8 the calculations?

9 A I'm referring to Tobias & West's
10 calculations, yes.

11 Q But you didn't provide those to URS until
12 after the wet well was installed. Right?

13 A I agree, but you still have an obligation
14 to look at them.

15 I don't know how to word it, but if
16 you're working for a client and you're taking this
17 stuff and looking at it and putting it in a file,
18 you should be reviewing it to make sure it worked.

19 Q You've said that numerous times now.

20 A We could have -- and I'm playing "what
21 if." If you would have reviewed it and looked at it
22 and said this won't work, we could have maybe built
23 a baffle wall in it to make it work better.

24 Q Are you going to defer to your experts to
25 testify as to what URS's standard of care was when

1 it was reviewing the submittals?

2 A Yes.

3 Q You're not purporting to be an expert on
4 what URS could have or should have seen when it
5 looked at Tobias & West's calculations. Right?

6 A No.

7 (Discussion off the record.)

8 BY MR. NEWBERRY:

9 Q Would it surprise you to learn that the
10 reason URS requires R.H. Moore -- or required R.H.
11 Moore to submit structural calculations within 30
12 days of being awarded the contract was because they
13 didn't have a structural engineer on staff and
14 therefore the structural engineer needed to ensure
15 this was a structurally sound design?

16 MR. McDONALD: Object to the form.

17 BY MR. NEWBERRY:

18 Q Would that surprise you?

19 A It would surprise me very much, as large
20 a firm as URS is and they don't have a structural
21 engineer.

22 Q Well, you're in the business of trying to
23 do projects effectively and cost effectively.
24 Right? The construction business, that's what it's
25 about. Correct?

1 A Any business.

2 Q So when URS has in its design documents
3 that they need a structural engineer to review the
4 structural integrity of the structure and submit
5 sealed calculations, do you think they did that as
6 an extra layer of protection? Would that be
7 something that would be common in the construction
8 industry?

9 A Yes.

10 Q But you never asked them why that
11 requirement was in there?

12 A No.

13 Q But you assume that it was just some way
14 to deflect liability. Right?

15 A That's correct. And my second thought is
16 that if it was that important, why didn't somebody
17 ask me for it.

18 Q They should have followed up with you
19 sooner than they did --

20 A If it was that important and I was an
21 engineer, I believe I would be sending an e-mail
22 saying please send me this.

23 Q And they did. Right?

24 A Eventually. And we got it right to them.

25 Q They shouldn't have relied on you to

1 comply with that section of the specs?

2 A Correct.

3 (Recess taken.)

4 (Exhibit No. 19 marked for

5 identification.)

6 BY MR. NEWBERRY:

7 Q I'm going to hand you what I've marked as
8 Exhibit 19. This is actually your answers to
9 Utility Services' interrogatories. Flip over to the
10 answer to interrogatory No. 3. That's the one I'm
11 interested in where you break down the damages.

12 The wet well replacement costs of
13 \$629,485, do you know what's included in that number
14 and how to break it down?

15 A Somewhat.

16 MR. McDONALD: You can ask him about
17 it, if you need to look at something to refresh your
18 memory.

19 THE WITNESS: There is a cost
20 breakdown of the wet well in here.

21 BY MR. NEWBERRY:

22 Q Is this something you prepared for them?

23 A Everything in here is prepared for them.

24 Q Just look at it to refresh your memory.

25 MR. McDONALD: What interrogatory

1 were you asking him about?

2 MR. NEWBERRY: No. 5 is the one I'm
3 asking him about.

4 MR. McDONALD: And you're asking him
5 about the wet well replacement number which on this
6 document is \$629,485?

7 MR. NEWBERRY: Correct, which I
8 think is the most recent because it's your answers
9 to Utility Services' discovery.

10 A My number don't match yours exactly. We
11 had \$98,303 in labor and equipment.

12 BY MR. NEWBERRY:

13 Q Before we go on, who is the labor and
14 equipment? Does that include your subcontractor
15 Palmetto Gunitite, or is it just your people?

16 A No. Labor and equipment is only R.H.
17 Moore's labor and equipment.

18 Q Was that for everything? Digging the
19 trench, knocking out the concrete wall? What's
20 included in that labor and equipment?

21 A The demolition of the wet well, digging
22 the new hole -- Well, we had to dig a hole and sheet
23 it. And then we had to demolish the one end of the
24 concrete structure. And the subs did the work.
25 They poured the concrete, put the new wall in, the

1 extended wall. And then we backfilled it and
2 removed the sheeting.

3 Q The sub, was that Palmetto Gunitite, the
4 sub that you mentioned?

5 A He built the wall.

6 Q Were there other subs involved?

7 A There was AASAP installed the sheeting
8 along with our help.

9 Q What does that stand for? Did you say
10 AASAP?

11 A AASAP. I couldn't tell you.

12 Q So you had that price. What was the next
13 number?

14 A The next number is material and subs of
15 \$372,512.

16 Q So tell me the numbers again. You had
17 \$372,512. That's for your subs?

18 A Material and subs.

19 Q What was the first number?

20 A \$98,303.

21 Q That was for your labor and equipment?

22 A Labor and equipment.

23 Q What else are we missing here? The
24 profit?

25 A Overhead is 100 percent of labor.

1 \$98,303.

2 Q What sort of things do you wrap into your
3 overhead expense? Is it office personnel? Where
4 does that number come from?

5 A Office, insurances, anything other than
6 bare labor.

7 Q Is there anything project specific in
8 there, like a specific policy that you bought for
9 the repair, or is it just a spreading of the
10 overhead for R.H. Moore overall?

11 A It's the way we spread our overhead. We
12 charge -- We keep up with the overhead, and then we
13 prorate it by percentage of labor, and it typically
14 runs 100 percent of labor.

15 Q So that gets us up close. Is there
16 anything else that goes into your number?

17 A Well, my number had 15 percent markup,
18 which is \$85,367. And I don't know where the 629 --
19 That adds up to \$654,485. And you have \$629,485. I
20 don't know. Maybe that's a typo. I don't know.

21 Q So that last 15 percent is your profit?

22 A Yes, sir.

23 Q Explain to me why it is you think you're
24 entitled to recover additional profit on this work.

25 A Because we are in business to make money.

1 Do you do work for free?

2 Q Just asking.

3 MR. McDONALD: That's a no, by the
4 way.

5 BY MR. NEWBERRY:

6 Q I think you were asked a lot of questions
7 earlier today about -- Let me take one step back.
8 Do you have a bunch of documents somewhere to
9 support these numbers, such as pay receipts to your
10 employees and to your subcontractors and those sorts
11 of things?

12 A I have a fair amount of them, yes, sir.

13 Q The 372 number, I've got a contract price
14 for Palmetto Gunitite in July of 2012 for \$141,490.
15 Is that right?

16 A That sounds right.

17 Q What's the rest of that 372, the other
18 \$230,000? What are the big portions of it? I don't
19 need to know the pennies.

20 A I'm going to say a big chunk of it is the
21 sheeting rental.

22 Q How much is that?

23 A \$75,000. \$50,000 to \$75,000. You've got
24 dirt. You've got demolition. Cutting the wall
25 structure out, those subs.

1 Q So the 141, that just included installing
2 the new wall?

3 A That's only new concrete work. It's
4 nothing else.

5 Q And the 75, that's what you paid to AASAP
6 or whatever that other sub was that helped you with
7 the --

8 MR. MOORE: That was rental.

9 A The actual shoring system itself was
10 \$40,000 a month. I've got invoices. And we had it
11 for two months or better.

12 MR. MOORE: Some of it we couldn't
13 get out of the ground.

14 A Some of it we drove it into the marl and
15 some of the beams -- I've got pictures if you want
16 to see them. We couldn't get them out of the
17 ground, so we had to cut them off and then pay them
18 for the beams.

19 BY MR. NEWBERRY:

20 Q I'm writing a list over here. I've got
21 141 for Palmetto Gunite. I've got 75 for rentals.
22 And then what are the other major costs that add up
23 to this \$372,512?

24 A I'm not sure I've got a better breakdown
25 to tell you. The document I done for them was just

1 major categories. It don't have a breakdown with
2 it.

3 Q So the only major categories that you can
4 tell me about today that make up this 372 are either
5 the Palmetto Gunite contract and the rentals?

6 A Sheeting rental. You have to buy
7 backfill. You have to buy stone.

8 Q You have to buy backfill? You can't use
9 backfill on the site?

10 A Not with URS.

11 Q It's select backfill?

12 A Select backfill that you truck in, yes.
13 You have to haul off the dirt you dig out. We had
14 to cut up a structure.

15 Q So during the repair you couldn't use the
16 select backfill that you had used previously?

17 A It was contaminated. No.

18 Q Back to the damage that you observed on
19 the wet well, Exhibit 17, did you actually go out to
20 the site after the cracking was noticed in the wet
21 well and observe the damage?

22 A Yes. I took the pictures that you have.

23 Q And so describe for me -- You described
24 the significant area of damage was the knee wall
25 that you circled on Exhibit 17. Where was the other

1 cracking that you saw? Was it isolated or in
2 certain areas, or should it be concentrated in
3 certain areas?

4 A There was spalling and chunks of concrete
5 gone out of the joints on really both sides.

6 Q So you're pointing to the back side and
7 the excavation side?

8 A Correct, both sides. The cracking was
9 mainly on this side wall (indicating).

10 Q So the back of the wet well as we've been
11 talking about it, the opposite of the gravity line.
12 Is that right?

13 A The east side, yeah.

14 Q And then once you observed the damage you
15 contacted your attorney. Did you contact somebody
16 else before you contacted your attorney?

17 A We didn't contact our attorney. We
18 didn't have an attorney.

19 Q Who did you contact first?

20 A I called him first (indicating). I call
21 Knight's, and I called URS.

22 Q Did B.P. Barber ever make any statements
23 after the damage to the wet well which you
24 considered to be an admission of some type of fault
25 on B.P. Barber's behalf?

1 A We never discussed fault. We met several
2 times to get a corrective solution for the wet well.

3 Q And I believe earlier either you or
4 Mr. Moore talked about a solution that was initially
5 proposed by URS?

6 A Well, it was an agreed-to solution
7 between us, Knight's and URS.

8 Q And that was installing an additional
9 concrete structure inside of the wet well?

10 A Yeah. Do you want me to draw on 17?

11 Q No. I know what it looks like.

12 A You know what I'm talking about?

13 Q Yes, sir. And I thought you said it, but
14 maybe Mr. Moore said it, that URS actually drew this
15 solution? Somebody said something like URS actually
16 made the drawing?

17 A That's correct.

18 Q Did URS come up with that solution, or
19 was that a consensus solution between the three of
20 you-all?

21 A It was a joint solution. Time was of the
22 essence, and that was the quickest way to get the
23 owner a usable product that URS would approve.

24 Q At what point did Mr. Padgett get
25 involved?

1 A Almost immediately.

2 Q Did you contact Mr. Padgett?

3 A Yes.

4 Q And what was he asked to do?

5 A He was asked to evaluate their design and
6 see what the problem was and also to come up with a
7 solution.

8 Q Because he had in his report something
9 similar to what you've described as being a
10 consensus repair option. Do you remember that?

11 A No, not particularly.

12 Q Do you remember if he was involved in
13 developing that initial proposal?

14 A I think we got his opinion. I'm not sure
15 how much involvement he had as far as drawing it up.
16 He said it would work.

17 Q Did you ever communicate with Craig
18 Rogers with Rimkus Consulting?

19 A No.

20 Q You were asked about this earlier. You
21 gave a list of different ways that you thought this
22 project was delayed. We talked about the wet well.
23 Can you tell me exactly how long the project was
24 delayed due to the wet well? Do you have some
25 figure that you've calculated?

1 A I can look at the schedule real quick and
2 tell you. We found the problem in the wet well on
3 March 15, 2012. From that time period until
4 November 6th, it took that long to evaluate the wet
5 well, come up with a solution that the owner would
6 accept and correct the wet well to the point it was
7 back in March.

8 Q And I had in my notes that the new wet
9 well walls were completed October 3, 2012. But your
10 schedule shows a date in November?

11 A The walls may have been completed then,
12 but you have to remove the sheeting and backfill the
13 hole, redo the gravity sewer. You've got to do all
14 of that work. And the walls are just half the work.

15 Q When you redid the gravity sewer, did you
16 do it the same way you did it the first time?

17 A Yes, sir.

18 Q So you backfilled around the new wet well
19 wall and then you dug down again and installed a
20 gravity line?

21 A Yes, sir.

22 Q Same process as the first time?

23 A Same process. This one was designed
24 properly.

25 Q Did you tell Mr. Padgett that that's what

1 you intended to do when he was developing the design
2 drawings?

3 A He designed it.

4 Q When he was doing the design, did you
5 tell him how you were going to install the gravity
6 line?

7 A Yes.

8 Q And you didn't do that the first time
9 when the wet well was designed. Right?

10 A Talk to Mr. Padgett?

11 Q No. Tell URS or Tobias & West or
12 Knight's Precast how you intended to install the
13 gravity line.

14 A There's only one way to install it, is to
15 dig a hole and put it in the ground. They all had
16 plans. They knew what had to be done. It's not
17 like this is their first job.

18 Q We talked about it before. There are
19 other ways you could have done it. They just
20 weren't cost effective in your view. Right?

21 A Correct.

22 Q After October 3, 2012 -- excuse me. What
23 was the date you gave me for the completion of the
24 new wet well?

25 A November 6th, 2012.

1 Q For some reason my dates were a little
2 bit different. I had substantial completion of the
3 pump station at March 18th, but I understand that
4 you believe it reached substantial completion in
5 February. Right?

6 THE WITNESS: Well, March 18th is
7 your date. Right?

8 MR. FRAMPTON: Our date is April
9 19th. You said February 14th, both of year 2013.

10 THE WITNESS: Correct.

11 MR. FRAMPTON: We are talking about
12 wet well versus substantial completion of the
13 project. That's the distinction, I think, between
14 the dates.

15 BY MR. NEWBERRY:

16 Q So after you got the new wet well
17 installed, what delays, if any, occurred after that
18 point that pushed back the substantial completion
19 date even more?

20 A Well, when you change the piping
21 arrangement, the piping has to be adjusted, which
22 that's somewhat of a delay. All the piping is class
23 53 ductile iron. It's P41 line. It has a special
24 lining in it. And you can't go to Wal-Mart and buy
25 that. You have to figure out what you need exactly

1 to make it fit and order it special.

2 Q Was that installation not included in
3 your wet well completion date of November 6, 2012?

4 A No. That's the wet well. After that,
5 you do the piping.

6 Q Why didn't you order the piping a month
7 or two before whenever you were getting ready to --
8 once the drawings for the repair had been approved?

9 A Because this is not an exact thing. When
10 you build a house, it may say the room is 10 by 12.
11 The room may be 9 foot 11 by 11 foot 6, but they say
12 10 by 12.

13 Any time you build something in the
14 field, it's not going to be exact. So there are
15 minor adjustments that have to be made to it.

16 Q So you didn't order the piping that you
17 needed to complete the wet well and complete the
18 project until after the new wet well was installed?

19 A We already had a lot of it on site, and
20 we were trying to make the best use of what we had.

21 Do you want me to finish answering the
22 question?

23 Q Go for it.

24 A At the end of the project when everything
25 was tested out to actually -- After this pump

1 station was in service, part of our contract was to
2 convert the old pump station 67, divert the flow to
3 the new pump station, and there was another pump
4 station ARS that was at a high school several miles
5 away, was to divert the flow in that station.

6 To do that, there had to be some permits
7 acquired. And we don't do permits. I guess URS
8 does that and the owner. But anyway, it took quite
9 a while to get those permits so they could divert
10 the flow.

11 Q And while the wet well remediation was
12 going on, was R.H. Moore performing other work on
13 the project in other areas, or did the whole project
14 stop?

15 A No. We had a crew for the wet well, and
16 we had a crew for the rest of it.

17 Q So the other crew was installing pipe or
18 whatever they were doing in other areas?

19 A Yes.

20 Q Do you know why the permitting was
21 delayed?

22 A A big reason is we couldn't -- or URS
23 couldn't get a letter from the county.

24 Q Do you know why that was?

25 A No.

1 Q One of you two talked about taking nine
2 months to get a submittal approved for a bypass
3 pump. Tell me about that. When was that in this
4 timeline of events?

5 A Well, it started almost at the beginning
6 of the project. They had a pump specified, and we
7 bought that pump. We sent them submittals on August
8 2, 2011. We got them back approved on March 15th,
9 2012.

10 Q Do you know what happened in that time
11 period?

12 A There are so many people involved, I
13 wouldn't even dare try to -- But it was bounced
14 around between electricians and engineers. And it's
15 complicated by the fact that it has computerized
16 components to where it can be controlled from a
17 remote place and they know what the pump is doing,
18 the SCADA system. I couldn't tell you.

19 Q Am I right that there were several times
20 during this project that the substantial completion
21 date was extended for various reasons?

22 A Yes.

23 Q Do you know how many times it was
24 extended?

25 A Two or three.

1 Q The submittal for the bypass pump, was
2 that a justification for any of those extensions?

3 A I don't think so, because it was -- The
4 time for the pump was way beyond any extension that
5 we might have gotten. Once we got the submittals
6 back approved, the manufacturing process of the pump
7 was quite a while. And we finally got the pump and
8 installed it 2/19/2013, and we started it up on
9 2/20/2013.

10 Q Was R.H. Moore performing other work on
11 the project during the time that you were waiting to
12 receive the pump after you ordered it?

13 A Yes. It didn't hinder our work.

14 Q So you still had other things that you
15 had to do. That wasn't the only thing you were
16 waiting on to complete the project?

17 A It didn't hinder our work. It hindered
18 the completion of the job.

19 Q The job as a whole or the wet well?

20 A The job as a whole.

21 Q So even if you had gotten that pump on
22 time, you still had other things you needed to do to
23 finish up the job?

24 A It depended on when it come in.

25 Q Just so I'm clear, is your understanding

1 that -- Well, strike that.

2 When you reviewed URS's plans for the wet
3 well, you assumed that URS had already done some
4 sort of structural analysis for the 12 inch wall
5 thickness?

6 A Yes.

7 Q And that was based on what? Your
8 assumption, what was it based on?

9 A I assume when you have an engineer that
10 designs a project and bids a job, that he in fact
11 has engineered the project and what's on the plans
12 is what he expects to get. If somebody would have
13 told me that they took a peel-off and stuck on their
14 drawings and didn't design it and use it, I would
15 never believe it. But they had to have some idea of
16 what they were doing. I'm sure they've done lots of
17 these.

18 Q And you don't know if that 12 inch wall
19 thickness came from Knight's Precast or someone
20 else?

21 A I don't have a clue.

22 MR. NEWBERRY: I may have a few
23 follow-ups. I'm going to turn you over.

24 (Discussion off the record.)

25 E X A M I N A T I O N

1 BY MS. GRAHAM:

2 Q Mr. Thornton, my name is Robin Graham,
3 and I represent Eric Tobias and Tobias & West, LLC.

4 Mr. Newberry has covered a lot of the
5 material, so I'm going to go back through and
6 hopefully not jump around too much or repeat too
7 much what he has already asked.

8 As an initial matter, are you going to be
9 offering any opinions on whether or not Tobias &
10 West met the standard of care on this project?

11 A I'm not qualified.

12 Q You'll be deferring to your experts?

13 A Yes.

14 Q Do you know what damages you're
15 specifically seeking from Tobias & West?

16 A I guess the same amount we're seeking
17 from Knight's.

18 Q So you put them together in your mind?

19 A To us, our agreement was with Knight's.
20 However you and Knight's do it, we look at you as
21 one.

22 Q To clarify, you had no agreement with
23 Tobias & West?

24 A No.

25 Q When I say you, I mean R.H. Moore had no

1 agreement with Tobias & West?

2 A No.

3 Q Do you know if Tobias & West had provided
4 services for any of your wet wells on your earlier
5 projects?

6 A No.

7 Q Had you ever heard of Tobias & West
8 before this project?

9 A I think so.

10 Q Do you have any recollection of how you
11 knew of them or were aware of them?

12 A No.

13 Q Would it be fair to say your specific
14 recollection would be in association with this
15 project after the wet well failed?

16 A Say that again.

17 Q Would it be fair to say that the first
18 time you specifically remember being aware of
19 Tobias & West, that they existed or that they were
20 involved in this project, was after the wet well
21 failed?

22 A That's correct.

23 Q Did you see a copy or did you review a
24 copy of the Tobias & West calculations when they
25 came in?

1 A It was e-mailed to me from Knight's, and
2 I looked at it -- I printed it and put it in a file
3 and sent it to URS.

4 Q On any of your prior projects in which
5 you received a wet well from Knight's, did you get
6 signed and sealed calculations from an engineer?

7 A I'm sure I did. I just don't remember
8 which ones.

9 Q And I might get the number wrong. Tell
10 me how many wet wells you have installed or R.H.
11 Moore has installed over the years.

12 A I think I said before less than 1,000.

13 Q So do you have an idea in your mind for
14 how many of those wet wells signed and sealed
15 calculations are required?

16 A Not many.

17 Q Do you remember any projects on which
18 they were required?

19 A No.

20 Q The two, were they Dorchester County wet
21 wells that were similar? I'm sorry. This is
22 Dorchester.

23 The two Berkeley County wet wells which
24 were similar, did you have signed and sealed
25 calculations for those?

1 A I don't remember.

2 Q Do you know who the project engineer was?

3 A For?

4 Q The Berkeley County wet wells.

5 A Davis & Floyd was the engineer on both
6 projects.

7 Q Was there anything unusual about the
8 installation of this wet well?

9 A As far as?

10 Q The process of how it was installed, just
11 from beginning to end, was there anything unusual;
12 or when you came into the project, you said, hey,
13 this is our 1,000th wet well that is going in like
14 any other?

15 A We didn't see anything out of the
16 ordinary.

17 Q I think at some point you said you
18 usually start the piping at the wet well and this
19 time you didn't?

20 A Correct.

21 Q What does that mean?

22 A That means there's no gravity sewer
23 coming to this pump station.

24 There are really two pump station 67s.
25 They have an old station 67. It just so happens

1 that we set that old station and we laid the gravity
2 sewer out of that station ten years ago, whenever.

3 Q So is the old pump station still in
4 operation?

5 A No. This project involves setting a
6 bigger pump station beside it. And as part of our
7 work, when the big, newer pump station was in
8 service, we abandoned the old station and made it a
9 manhole. So the gravity sewer that we laid ten
10 years ago went to the new pump station which we
11 converted to a sewer manhole.

12 MR. FRAMPTON: To the old pump
13 station.

14 THE WITNESS: To the old pump
15 station, yeah. That's why we didn't start laying
16 gravity sewer line.

17 BY MS. GRAHAM:

18 Q If it were a brand-new project and you
19 didn't have an old pump station already there, you
20 would have installed the new wet well and run the
21 gravity line from there?

22 A Typically, yes.

23 Q But instead, because you had the old wet
24 well in which a gravity sewer was already
25 installed -- Explain to me how that happened so I'm

1 not messing up the terminology.

2 A All the gravity we had to lay was 60 feet
3 of pipe between the new wet well and the old wet
4 well. So we laid that 60 feet. That's all the
5 gravity we laid at that station.

6 This pump station stayed in service, the
7 old one, until the new one was on line working. We
8 had tested it. That was the February date, February
9 14th date. If they had a permit to operate, we
10 could go in and take the pumps and controls out of
11 the old 67 and let the flow go through the new pipe
12 to the new wet well.

13 Q And that was February 14th of what year?

14 A It could have happened. 2013.

15 Q And then after that happened is when the
16 old pump station was torn out -- It's still in the
17 ground? It's just been abandoned and it's been
18 converted to the manhole?

19 A Correct.

20 Q And this transfer of the gravity sewer,
21 that's when the excavation happened in December of
22 2012 that we spent so long talking about and you
23 drew the diagram? The diagram you drew, Exhibit 17,
24 and you showed where the tie-in was, that's the same
25 gravity sewer we're talking about?

1 A The old 67 is a round structure right
2 here (indicating). And there is a gravity sewer
3 coming into it. And this pipe eventually goes and
4 ties into it. And this sewer -- I'm pretty sure
5 it's a drop -- comes in here and then it goes down
6 this pipe to the new wet well (indicating).

7 Q So is there a pipe running through the
8 old wet well?

9 A No. It's open. It's an open hole. It
10 has a concrete trough that we call an invert.

11 MR. MOORE: A new invert.

12 A A new invert. We had to take the pumps
13 out, put a new invert in here to have a smooth flow
14 line, and then the sewer comes in the old system and
15 this is just made a manhole.

16 BY MS. GRAHAM:

17 Q Is there anything unique about this
18 process, having to work around the old wet well, or
19 is that something you do on a regular basis?

20 A Yes.

21 Q I'm probably going to jump around. I
22 apologize. I'm trying not to too much.

23 We talked about the shop drawings
24 earlier. It sounded like you said R.H. Moore
25 provided shop drawings to Knight's. Is that

1 correct?

2 A No.

3 Q Knight's provided the shop drawings to
4 R.H. Moore?

5 A Correct.

6 Q Did you provide a copy of the plans and
7 specifications to Knight's?

8 A I don't remember. Typically, Knight's
9 does this a lot, every day. And if there's a large
10 project, they'll pick up a set of plans and specs so
11 they can price it properly and prepare their quote.

12 I don't remember sending them a set of
13 plans, so I'm assuming they ordered a set of plans
14 before bid and they had a set of plans.

15 Q Is that how it typically happens, that
16 Knight's gets their own set?

17 A Yes.

18 Q Do you know if Tobias & West had copies
19 of the plans and specifications?

20 A No.

21 Q No, you don't know?

22 A I don't know.

23 Q On the excavation, and back to the
24 picture we were just talking about, on the back side
25 of the wet well you said you excavated down eight to

1 nine feet. Is that correct?

2 A That's what I was told.

3 Q If you're excavating down some 20 or 25
4 feet on the pipe side, why would you only excavate
5 eight to nine feet on the back side?

6 A Well, we excavated 20 feet on the other
7 side. We didn't excavate all the dirt around the
8 structure. Just enough to get our box in. And we
9 didn't do any calculations.

10 We've been doing this a long time. And
11 the structure should never have moved. This thing
12 weighs 210 tons. And I don't know how much dirt it
13 would take to move 210 tons. It would take a whole
14 lot of dirt.

15 Q At a certain point it's dirt and water?

16 A There is no water in the ground there.
17 You can look at our excavation. There is no water
18 there. I'm sorry. You can look at the pictures.
19 Very little groundwater in that area. It's in what
20 they call Charleston marl. It's not going to shift.
21 It's not going to move.

22 Q So very little water in the ground in
23 that location?

24 A Yes. If there is any water, it's up in
25 the top layers of the soil.

1 And I think there's a soils report here.
2 If you'll look, I think the marl is about 12 or 13
3 feet down. So that means the bottom half of the
4 structure is in the marl. The marl is not going to
5 shift.

6 Q Do you know if you provided a copy of the
7 soils report to Knight's?

8 A The what report?

9 Q The soils report.

10 A I provided them if they asked for them.
11 I don't know if I did or not.

12 Q Do you know if Tobias & West had a copy
13 of the soils report?

14 A I do not know, but I do know they were in
15 the specifications. And if they had the plans and
16 specs, they had the soils report.

17 Q Do you know if Tobias & West was informed
18 of the installation and backfill and excavation
19 procedures that R.H. Moore planned to use?

20 A I don't.

21 Q When the wet well failure was discovered
22 and you went out on site, did you speak to anyone
23 other than people from URS and Knight's? I know you
24 mentioned those two. Do you recall speaking to
25 anyone else?

1 A I think Mr. Tobias went out one time. He
2 went out a couple of times. The first time he went,
3 there was water in the bottom of the structure and
4 we couldn't see all the damage. And to pump water
5 30 feet deep, you have to have a special pump. So
6 we were getting the pump. And he went back a couple
7 of days later and looked at the structure inside and
8 saw the damage, and that's when he wrote the letter
9 that condemned the structure and said it was unsafe.

10 I spoke with our insurance company. This
11 is several weeks after we found the damage. And I
12 didn't meet him on site, but Joe did to show him the
13 structure.

14 And that's the only people I know.

15 We met Palmetto Gunite or Bill Snow and
16 Ted Padgett. I personally met them on site to look
17 at the damage to come up with a solution or a
18 repair. And that was shortly after it happened.

19 Q What did Mr. Tobias and you speak about?

20 A We didn't speak very much. It's look
21 here, look here, look here, what would have done it,
22 those type things. I don't remember carrying on a
23 conversation with him.

24 Q Did either of you express opinions on the
25 cause of the failure?

1 A I don't think so.

2 Q Do you remember a Kenny Johnson from Soil
3 Consultants being on site?

4 A I remember a Kenny Johnson probably went
5 there. I wasn't there when he was there, I don't
6 think.

7 Q Did you ever speak to Mr. Johnson?

8 A I don't remember. I don't think so. I
9 think somebody else called him. Who does he work
10 for?

11 Q I believe he is with Soil Consultants,
12 Inc.

13 A We had some tests run on the dirt, and
14 I'm not sure if it was him. We also had the
15 concrete structure cored for compressive strength on
16 the concrete. And they may have done that. So I
17 may have talked to him about that. I just don't
18 remember which testing lab I called.

19 Q I think you might be right. Do you
20 recall any other specific conversations with
21 Mr. Tobias?

22 A Other than in a meeting at Knight's, we
23 had a couple of meetings there, and I think he was
24 at them, about the cause and the correction. We did
25 a little finger pointing, too.

1 Q Did Mr. Tobias ever say anything that you
2 would consider an admission?

3 A Not that I can recall.

4 Q Going through the documents, it seems
5 like there was a pretty strong consensus from the
6 Knight's and Tobias' side of the room that it was
7 the unequal lateral forces that had caused the wet
8 well to fail. Did you ever consider that that might
9 be part of the problem?

10 A I've considered it. If we hadn't done
11 this so many times, I might believe it. But I did
12 consider it.

13 We've been doing this a long, long time.
14 And his theory has some merit, except for this is
15 the biggest point, it failed in the bottom of the
16 structure. You've got marl on both sides. The marl
17 don't shift. The dirt was never removed on the
18 bottom part. It should have never shifted or done
19 anything. The marl is up here -- I'm going to say
20 halfway to structure. There would be no pressure
21 from the marl on this structure.

22 Have you ever seen marl?

23 Q I have not. Or if I have, I didn't know
24 it.

25 A It's kind of hard to describe. It's like

1 concrete, except you can dig a hole in it. It's
2 very hard. It's very dense. If you dig a hole in
3 the marl, you can fill it up with water and it will
4 be there the rest of your life. It will never move.
5 It's pretty good stuff, actually, for contractors.

6 And any pressure is from the soils above
7 this marl line, wherever it falls. And there
8 shouldn't be that much pressure on this side of the
9 structure, simply because it's in the marl. And the
10 marl doesn't exert a lateral pressure.

11 I'm not a soils expert. But I know if
12 you dig a hole 30 foot deep, it will never collapse.

13 Q Is it marl all the way to the top?

14 A No.

15 Q It's marl until how high?

16 A I have a soils report. Would you like to
17 see it?

18 Q I know we've got the soils report.

19 A Check your soils report. There is one
20 core hole, and it's right in the middle of this
21 structure, and it shows marl down about 12 feet
22 deep.

23 Q That's about when the marl starts, about
24 12 feet down?

25 A Right, about 12 feet down.

1 Q Do you know what the cost of the original
2 wet well was?

3 A I don't.

4 Q You mentioned a couple of times that
5 you've been told that the structure needed more
6 rebar?

7 A Yes, from my experts.

8 Q Do you know how much it would cost to
9 add -- if we were to go back and the original
10 structure were to have more rebar added, say, double
11 the rebar, do you know what that would have done to
12 the cost of the wet well?

13 A Very little. Rebar is about 60 cents a
14 pound. You're talking \$5,000, \$8,000 maybe. I'm
15 guessing. It's not in the hundreds. It's not in
16 the tens of thousands.

17 Q We've talked a little bit about the first
18 repair solution that was proposed. That was jointly
19 with Knight's, URS and R.H. Moore. Is that correct?

20 A And Mr. Tobias offered a repair method
21 that was real similar, a sketch that was real
22 similar to what we proposed.

23 Q So Mr. Tobias was also involved in
24 formulating the first repair protocol?

25 A Well, he gave us his opinion what he

1 thought would work, and he sent a sketch. Everybody
2 should have the document. But he showed an interior
3 wall being put -- Where we proposed a wall going to
4 the top of the structure, his repair was a wall
5 going up about three-quarters with the structure.

6 Q When you were having your meeting with
7 Knight's and URS, you took that into consideration
8 and it was a similar --

9 A Sure. We all agreed that the repair for
10 this structure was an interior wall of some sort.

11 Q And that would have been a less expensive
12 fix?

13 A Yes.

14 Q It would have been a more efficient fix?

15 A It would have been quicker.

16 Q Do you know how much quicker it would
17 have been?

18 A Half the time.

19 Q Half the time in the field?

20 A Yes.

21 Q And how much time did you have in the
22 field on this actual repair?

23 A I think I just gave you of all that.

24 Q I did lose you some on the dates.

25 A We found the wet well crack on 3/15/12.

1 MR. FRAMPTON: November 6, 2012.

2 BY MS. GRAHAM:

3 Q But when did you start the repair work?

4 A The repair work --

5 Q The actual time in the field on the
6 repair work.

7 A We submitted the first repair method on
8 May 4th. It was rejected on May 21st. We submitted
9 the second repair method -- or we started working on
10 it May 22nd. It was conditionally approved on May
11 30th. We started getting the engineering drawings
12 and had to have everything stamped and signed and
13 sealed. That was done on July 18th. And then we
14 started the repair on July 19th.

15 Q So July 19th is when you started the
16 repair?

17 A Correct.

18 Q And then it took until November 6th to
19 finish?

20 A Correct.

21 Q So that's five months. Do you know how
22 long it would have taken to do the first repair?

23 A Three to four weeks. That's an estimate.
24 And that does not include changing -- We would have
25 had to change more of the pipe doing it the first

1 method. So that does not include the time for that.

2 Q How much time would that be,
3 approximately? Estimating.

4 A Three weeks.

5 Q So on the first repair proposal, it could
6 have been anywhere from six to seven weeks from when
7 you proposed it on May 4th?

8 A Or from when it was approved. You have
9 to allow them some time to look at it.

10 Q So if we gave them a couple weeks to look
11 at it, you could have been done by July or August?

12 A About half the time.

13 Q I didn't get your exact number for how
14 much the new wet well cost. Was it somewhere around
15 \$650,000?

16 A The number on this sheet says \$629,485.
17 The number I had was 653.

18 MR. McDONALD: 654.

19 BY MS. GRAHAM:

20 Q Do you know how much it would have
21 cost -- about how much it would have cost on the
22 first repair proposal?

23 A Probably half that.

24 Q I also saw some notes and correspondence
25 that what R.H. Moore, URS and Knight's was proposing

1 as the first solution would be more sound
2 structurally than what the county wanted to do with
3 Mr. Padgett's second proposal. Does that sound
4 familiar?

5 A More sound? You mean more solid?

6 Q More structurally sound.

7 A You would have a two foot concrete wall
8 instead of a one foot concrete wall. It makes
9 sense.

10 Q So the first repair proposal would have
11 been less expensive by half, more efficient
12 timewise by more than a quantity of half and more
13 structurally sound?

14 A Correct.

15 Q Mr. Moore already covered this earlier in
16 the morning, but any concerns with the volume of the
17 wet well could have been taken care of with the
18 piping configuration?

19 A No. They have variable speed pumps, and
20 they are made to pump a lot of sewer or a little
21 sewer. You can control how fast they turn. But the
22 pump manufacturer said it would have very little
23 effect.

24 Q I said pipe and I should have said
25 pumping.

1 A Oh, pumping, correct.

2 Q So the adjustments to the pumping would
3 have been minimal and the reduced volume would not
4 have affected the functioning of the wet well?

5 A According to the people we talked to.
6 Everybody has their own opinion.

7 Q Did you disagree with the county's
8 decision to reject the first repair proposal?

9 A Certainly. But they are the boss, and
10 you've got to do what they want.

11 Q Who else in the area does the kind of
12 work that R.H. Moore does, these kind of wet well
13 projects?

14 A Chandler Construction, D&B, Tideland,
15 Triad, Anson Construction.

16 Since you mention that, Tideland just had
17 a wet well fail from Knight's very similar to this.

18 Q Do you know where that wet well was
19 located?

20 A I believe Daniel Island. It was an eight
21 or ten foot diameter wet well.

22 MR. CLOSSER: A round wet well then?

23 A Yes.

24 BY MS. GRAHAM:

25 Q And all of those companies you just named

1 are in South Carolina installing wet wells?

2 A Yes.

3 Q We must have a lot of wet wells.

4 A We do.

5 MR. FRAMPTON: That's why it's
6 called the Lowcountry.

7 THE WITNESS: Yep. You've got a lot
8 of pumps.

9 BY MS. GRAHAM:

10 Q Just because I'm curious, what's the life
11 span on a wet well?

12 A It depends on how well it's maintained.
13 It depends on the gas in the sewer. Most of them
14 today have a lining in them, a Raven lining, that
15 helps protect it from sewer gas.

16 But that depends -- I'd say the biggest
17 thing that determines their life span is the gases
18 inside the wet well.

19 MS. GRAHAM: I think that's all the
20 questions I have for now. Thank you very much.

21 E X A M I N A T I O N

22 BY MR. FRAMPTON:

23 Q Steve, briefly, because we talked about
24 this before, I'm not going to rehash all of this
25 stuff. Let me just make sure of a couple of things.

1 The original wet well was 10 by 20 by 30?

2 A (Witness nodded).

3 Q The first fix would reduce the size of
4 that wet well to 8 by 18 by 30?

5 A Correct.

6 Q A decrease of volume of approximately 22
7 percent?

8 A Correct.

9 Q Ultimately, the fix was one end was
10 knocked out, so to speak?

11 A Correct.

12 Q And extended by two feet, I think?

13 A Two to three feet. Whatever we needed to
14 make your volume --

15 Q To make the volume what we bargained for.
16 Correct?

17 A Correct.

18 Q So we got what we paid for ultimately?

19 A Yes, sir.

20 Q You talked about the bypass pump, and I
21 think I heard you say on direct examination that you
22 were still working on the project when the bypass
23 pump was ultimately installed. You were working on
24 different parts of it?

25 A Correct.

1 Q So it wasn't completed yet?

2 A The wet well wasn't completed. It was
3 almost completed.

4 Q So if the bypass pump had come in three
5 or four months before, you would still have been
6 working on this project in February of 2013? I
7 mean, the bypass pump didn't stop you from
8 completing the project. It was other issues that
9 stopped you from completing the project timely?

10 A We were still working on the wet well
11 when the bypass pump come in. And we couldn't
12 finish the pump station until the bypass pump got
13 there.

14 Q But I think your testimony was you were
15 still working on other portions of this project when
16 the bypass pump was installed in February of 2013?

17 A I was speaking of the wet well.

18 Q Other issues in the wet well besides the
19 bypass pump?

20 A Not that I can remember.

21 Q So the only thing you were waiting on was
22 the bypass pump?

23 A And the completion of the wet well -- or
24 the completion of the pump station. The wet well --
25 What's a fair way to say this? The wet well is

1 typically the first thing you do before you do
2 anything else, before you pipe it. There is a
3 building there. There is a generator pad to pour.

4 Q All the SCADA stuff?

5 A All the SCADA stuff, all the electrical,
6 all the piping can't be done until the wet well is
7 set.

8 Q So the delay really was the wet well and
9 not the bypass pump?

10 MS. GRAHAM: Object to the form.

11 A The wet well is the biggest single delay,
12 yes.

13 BY MR. FRAMPTON:

14 Q Do you fault the county for wanting to
15 have the wet well volume the way it was designated
16 in the specifications?

17 A That's a hard question to answer.

18 Q Well, you've never operated a sewer
19 system, have you?

20 A No, sir.

21 Q So there is a reason perhaps that you're
22 not aware of as to why that volume calculation is
23 important?

24 A Well, I guess the problem I have with
25 that is other people that manufacture pumps, other

1 engineers has told us it would make no effect.

2 Q Well, to say it's no effect can mean
3 different things.

4 A True.

5 Q Operational costs, overflow costs, all
6 kind of costs could mean one thing to an operator
7 versus one thing to a pump manufacturer saying, oh,
8 it will work. It's like I can flush my toilet. It
9 will work. But it may not be the best design of a
10 flush toilet.

11 A Do you have an opinion of what the
12 additional cost would be?

13 Q I don't have an opinion on anything.

14 A Do you have facts?

15 Q That's not for me to decide, with all due
16 respect.

17 A Okay.

18 MR. FRAMPTON: That's all I've got.
19 Thank you.

20 EXAMINATION

21 BY MR. CLOSSER:

22 Q My name is Zach Closser. I represent
23 Knight's Precast.

24 You testified that Knight's help set the
25 wet well. Do you recall that?

1 A Yes, sir. They were on site. Chuck, the
2 guy that built the wet well, was on site to make
3 sure that I guess it was delivered properly, that we
4 hooked it up properly, and that -- If you look at
5 the pictures, they have a number on each one. I
6 think they are matched up front and back to make
7 sure all of that went together like they built it.
8 And Bud Knight was there. Jim Galvin was there.
9 They had a couple of guys there, but I didn't know
10 them.

11 Q And you're surmising as to what their
12 purpose was. Is that fair? You're speculating?

13 A Well, I personally talked to Chuck, and
14 he said I'm here to make sure it goes together
15 right. The rest of the guys were looking.

16 Q Everyone else was just watching?

17 A Everybody else was observing, yes.

18 Q Did Knight's actually perform any
19 installation work?

20 A As far as physical work, no.

21 Q So they were just there to observe and
22 report and make sure everything went in the way it
23 was supposed to go in?

24 A Yeah, that's what Chuck was there for.
25 And he would coordinate the pieces, the trucks

1 coming in. There was six or seven truck loads of
2 material. And as one got finished, the other one he
3 would call, and it would bring the next section.
4 You know, they are not that far away.

5 Q He was handling the sequence of parts?

6 A Yes, upon delivery.

7 Q What else was he doing?

8 A He was just checking to make sure that
9 the right pieces were put together.

10 Q Have we discussed everything Knight's was
11 doing during the installation of the wet well?

12 A As far as I know.

13 Q And Chuck was the only active individual
14 for Knight's?

15 A Other than the truck drivers, yeah.

16 (Discussion off the record.)

17 BY MR. CLOSSER:

18 Q I'm going to skip around a little bit,
19 because there's no reason to go through all of this
20 again.

21 You testified that you were told by your
22 experts that the wet well failed because it needed
23 more steel in it?

24 A That's correct.

25 Q Were you told anything else as to why the

1 wet well failed?

2 A Not that -- If they did their evaluation,
3 then the bottom line says there's not enough
4 steel -- I'm not smart enough to interpret what they
5 do. I just look at the bottom line. That's what
6 they all said.

7 Q Did they say why there wasn't enough
8 steel in the wet well?

9 A It could have been -- All of those
10 reports are several pages, and it might have said
11 something there, but I couldn't ...

12 Q Did they say that it was constructed or
13 fabricated improperly by Knight's in that they
14 ignored something on the design?

15 A I don't think so. I don't specifically
16 remember that.

17 Q Do you have any knowledge as to that?

18 A No.

19 Q Do you have any knowledge as to any
20 fabricating defects by Knight's?

21 A Other than lack of steel?

22 Q When I say fabricating defects, I guess
23 I'm assuming that -- Let me strike all of this and
24 start over.

25 In your mind, you testified that Knight's

1 and Tobias are kind of tied up together as one?

2 A The way I look at it.

3 Q And you understand or have an
4 understanding that Tobias designed and did the
5 calculations for the wet well. Correct?

6 A That's what I was told.

7 Q So my question is, do you have any reason
8 to believe that Knight's didn't fabricate the wet
9 well in accordance with Tobias's design and
10 calculation?

11 A I don't know. I wasn't there when they
12 had the conversations. I wasn't there when they
13 built the wet well.

14 Q Was there anything while on site that you
15 observed subsequent to its failure during its
16 install at any time that would lead you to believe
17 that Knight's didn't fabricate the wet well in
18 accordance with the design and calculations?

19 A The only thing I noticed was on the riser
20 sections, to stack them up, the rebar still was
21 showing in the bottom of the section, in some of the
22 sections. It's not supposed to be doing that.

23 Q The bottom of the section?

24 A Yes.

25 Q On the surface, on the wall surface?

1 A Not the wall surface. The sections go
2 together. I think it's a one foot wall, and the
3 rebar still -- You can see some of it on the very
4 bottom of the one foot piece. It's supposed to be
5 probably two inches from the bottom.

6 Q Did you bring that to anyone's attention?

7 A No.

8 Q Why not?

9 A Because we put RAM-NEK in the joint, and
10 the whole interior of the wet well is sprayed with a
11 Raven lining which should have prevented anything
12 from getting to that. The entire wet well is
13 sealed.

14 Q From the inside?

15 A From the inside, yes.

16 Q Kind of like a RedGard type product, if
17 you know what I mean?

18 A I don't know what that is.

19 Q What is Raven?

20 A Raven is an epoxy lining. I don't know.
21 It's eighth of an inch thick when they put it on.

22 Q It's sprayed on?

23 A Sprayed on, yes.

24 Q And you did not raise the fact that you
25 saw exposed rebar?

1 A No. I didn't see it until after the wet
2 well broke.

3 Q I see. But that's the only thing you saw
4 that would lead you to believe that there was some
5 fabricating error on Knight's part?

6 A Yes.

7 Q Where did you see it in the wet well?

8 A I don't remember specifically. We were
9 climbing on scaffolding, and you could see where it
10 slipped off. You could see some. And once we tore
11 it apart, you could see it.

12 Q When you were on scaffolding, you were
13 inside the wet well?

14 A Yes.

15 Q Could you tell whether or not the wet
16 well had broken away from the rebar and that's why
17 it was exposed, or that it was actually penetrating
18 through the finished section?

19 A What I saw, you could see a rust spot on
20 the concrete. So you know the rebar is there.

21 Q Is that what you saw, a rust spot, as
22 opposed to the actual rebar?

23 A Well, you could tell the rebar was there.

24 Q Did you actually see the rebar
25 penetrating through the section?

1 A I'm going to say, yes, I saw the end of
2 the rebar.

3 MR. MOORE: The stuff is still
4 laying out there in the grass.

5 A I think we still have it there on site if
6 you want to go look at it.

7 BY MR. CLOSSER:

8 Q It's on the section?

9 A No, it's on Murray Sand's yard not far
10 from the structure. They are off Highway 17A.

11 Q Why is it at Murray Sand?

12 A We had a lot there. And we do a lot of
13 business with them, and they said just keep it here.
14 They have plenty of room. We didn't know if we
15 would have to take it to court or not.

16 MR. FRAMPTON: Is it on the golf
17 course?

18 THE WITNESS: No. Where they have
19 the truck garage, it's right in there.

20 BY MR. CLOSSER:

21 Q When you were talking about the knee wall
22 breaking, you testified that everyone you spoke with
23 said that the wet well was under designed. Do you
24 recall that?

25 A Yes.

1 Q Who is everyone?

2 A Ted Padgett, this guy Rickborn, our
3 insurance company.. We turned it into insurance.
4 They looked at it and said it was under designed.
5 Those are the three.

6 Q When you had the concrete tested for
7 strength, did that yield any results that gave you a
8 concern?

9 A One of the concrete cores was low. I
10 think it was supposed to be 4,000 psi, and it came
11 out at 39 something. The rest of them were good.

12 Q How often do you end up having to core
13 precast materials like this?

14 A Never.

15 Q Is this the first time?

16 A Yeah, for me.

17 Q When the failure occurred and you had all
18 of these meetings with Knight's, Tobias or URS or
19 whomever it was, did Knight's ever make an admission
20 of fault to you?

21 A No..

22 Q As to any design deficiencies with the
23 box, the wet well, I believe you've testified you're
24 relying on your experts for that. Correct?

25 A Correct.

1 Q Do I understand your testimony correctly
2 that you have not discussed any sort of concern that
3 you may or may not have with regard to fabrication
4 deficiencies with any of your experts?

5 A No.

6 Q No, I understand that right; or, no, you
7 haven't?

8 A If you're asking me --

9 Q Have you discussed that with your
10 experts, the fabrication?

11 A That I told them that I thought it was
12 made wrong? No.

13 Q No, you haven't?

14 A We've basically asked them to come out
15 and look at the design that Tobias & West produced
16 and tell us if there's a problem with the design.

17 Q So no one has told you there's a problem
18 with the fabrication by Knight's?

19 A No. Ted Padgett -- Well, I think maybe
20 all of them went out and looked at it and they
21 didn't mention that. With the cracking and
22 spalling, they all said the same thing: Lack of
23 rebar.

24 Q So would you defer again to your experts
25 as to fabrication as well?

1 A Yes.

2 MR. CLOSSER: That's it for me.

3 E X A M I N A T I O N

4 BY MR. NEWBERRY:

5 Q I just want to ask a quick follow-up. Do
6 you know who Pete Johnson is?

7 A I do.

8 Q Who is Pete Johnson?

9 A He is a general manager from Knight's
10 Precast.

11 Q Do you know his background or experience?

12 A I do.

13 Q Tell me about that.

14 A Pete has been around several places. He
15 was with Knight's a long time ago. He left there,
16 and I believe he went to Hanson, who is now CPP, in
17 the same business, precast.

18 Q Is he an engineer or does have he an
19 engineering degree?

20 A I don't know.

21 Q Did you actually forward the submittals
22 from Knight's Precast on to URS personally?

23 A I did.

24 Q Did you endeavor in any respect to review
25 the calculations before you forwarded them on?

1 A I wouldn't understand what I was looking
2 at.

3 Q Well, you've explained to us various
4 loading conditions today by drawing diagrams, things
5 like that. But you didn't even attempt to look at
6 the calculations when they came from Knight's
7 Precast?

8 A I think you're talking about apples and
9 grapes.

10 Q Why is that?

11 A I am not qualified to look at a computer
12 printout on design and tell you anything about it.
13 If you want to go out in the field and dig a hole
14 and say there's more dirt on this side than that
15 side and it's going to make it do something, I'm
16 really qualified to do that.

17 Q So you don't think you're qualified to
18 evaluate structural calculations?

19 A No.

20 Q During the period in which a solution was
21 being developed for the wet well failure, do you
22 believe that URS responded to your questions and
23 acted reasonably and timely?

24 A Yes.

25 MR. NEWBERRY: That's all I've got.

1 And then we just need to switch over to Mr. Moore.

2 EXAMINATION

3 BY MS. GRAHAM:

4 Q One or two follow-ups. Did you have any
5 issues or problems with the wet well before the
6 excavation that you know of?

7 A No. Clarify that. Before the excavation
8 of the gravity sewer?

9 Q Correct.

10 A When we set the wet well and backfilled
11 the hole it was in, we filled it with water. You
12 couldn't tell if there was a problem anywhere;
13 because it was full of water.

14 When we pumped the structure down to lay
15 the gravity sewer, nobody noticed anything. We
16 never went inside the structure, other than to open
17 the hatch and throw a pump hose in it and pump it
18 down. So we weren't aware of any problem until we
19 went back sometime later to pump it down again to
20 start piping the wet well. That's when we found the
21 problem.

22 Q On March 15th?

23 A Yes.

24 Q Is it normal to leave the wet well for a
25 number of months between installing it and going

1 back to work on it again?

2 A Yes. It gets back to the -- You do your
3 piping and you have pumps and controls, and
4 typically it takes a long time for that material to
5 get there.

6 Q So with your thousand wet wells, it's
7 common to leave them sitting for a number of months?

8 A Yes.

9 MS. GRAHAM: That's it. Thanks.

10 E X A M I N A T I O N

11 BY MR. CLOSSER:

12 Q It's less than a thousand. Right?

13 A Yes, less than a thousand.

14 MR. CLOSSER: Thanks.

15 (End of deposition.)

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C E R T I F I C A T E

I do hereby certify that the witness whose attached deposition was taken before me in the aforementioned matter was, by me, first duly sworn to testify the truth, the whole truth, and nothing but the truth; that the testimony contained in said deposition was, by me, reduced to writing in the presence of said witness by means of computerized transcription. The said deposition is a true and accurate transcript of the whole of the testimony given by the said witness, as aforesaid.

I do further certify that I am not connected by blood or marriage with any of the parties or their attorneys or agents, and I am not an employee of either of them, nor interested directly or indirectly in the matter of controversy either as counsel, attorney, agent or otherwise.

Sworn to and subscribed before me this the

_____ day of _____, 2015.

Janice O. Darby, RPR
and Notary Public
My commission expires: 4/07/2019