

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

R. Knox McMahon, Circuit Court Judge

Case No. 2008-CP-32-04362

RECEIVED

DEC 20 2012

SC Court of Appeals

Westside Meshekoff Family Limited Partnership Appellant,

v.

South Carolina Department of Transportation; DW Properties, LLC;
Danwood LLC; Robert W. Denton; and Alpine of SC, Inc., ... Defendants
Of whom South Carolina Department of Transportation is the Respondent.

RECORD ON APPEAL – VOLUME I

Edwin Russell Jeter
JETER & WILLIAMS, P.A.
Post Office Box 7425
Columbia, South Carolina 29201
(803) 765-0600

Charles H. McDonald
ROBINSON, MCFADDEN & MOORE, PC
Post Office Box 944
Columbia, South Carolina 29202
(803) 779-8900

Attorneys for Appellant

Patrick J. Frawley
DAVIS, FRAWLEY, ANDERSON,
MCCAULEY, AYER, FISHER
& SMITH, LLC
Post Office Box 489
Lexington, South Carolina 29071
(803) 359-2512

Attorneys for Respondent

INDEX

Index	i

Orders/Judgments/Decrees/Decisions

Consent Order for Change of Venue (Oct. 17, 2008).....	1
Order (Jun. 14, 2011).....	9
Amended Order (Sept. 12, 2011).....	27
Order (Sept. 12, 2011)	46

Pleadings

Complaint (Jun. 9, 2008)	48
Answer of SCDOT (Nov. 12, 2008).....	58

Transcripts

Transcript of Dee Reeves Deposition (April 5, 2011)

Transcript Caption	76
Examination by Mr. Frawley	77

Transcript of Hearing (April 18-21, 2011)

Transcript of Record Caption	95
Calling of Case and Appearance by Counsel	96
Opening Statement by Mr. Jeter	97
Opening Statement by Mr. Frawley.....	98
Opening Statement by Mr. Quinn.....	116
Matthew Meshekoff – Direct Examination by Mr. Jeter.....	118
Matthew Meshekoff – Cross Examination by Mr. Frawley	155
Matthew Meshekoff – Cross Examination by Ms. Clayton	198
Colloquy with Court	213
Matthew Meshekoff – Cross Examination by Mr. Booth.....	217
Matthew Meshekoff – Cross Examination by Mr. Quinn	237
Matthew Meshekoff – Redirect Examination by Mr. Jeter	267
Matthew Meshekoff – Recross Examination by Mr. Frawley.....	277
Colloquy with Court	278
Timothy Richardson – Introduction to Witness.....	285
Timothy Richardson – Direct Examination by Mr. Jeter	286
Timothy Richardson – Cross Examination by Mr. Frawley.....	320
Timothy Richardson – Redirect by Mr. Jeter	340
Timothy Richardson – Recross by Ms. Clayton.....	341
Timothy Richardson – Recross by Mr. Quinn.....	341
Clarence Blakely – Direct by Mr. Jeter	342
Clarence Blakely – Cross Examination by Mr. Frawley	349

Clarence Blakely – Cross Examination by Mr. Quinn	354
Clarence Blakely – Redirect Examination by Mr. Jeter	356
Clarence Blakely – Recross Examination by Mr. Frawley	357
Michael Lambrecht – Direct Examination by Mr. McDonald	358
Michael Lambrecht – Cross Examination by Mr. Frawley	426
Michael Lambrecht – Redirect Examination by Mr. McDonald	453
Michael Lambrecht – Recross Examination by Mr. Frawley	479
Colloquy with Court	486
Portion of DOT argument on motions	489
Portion of Plaintiff’s argument on motions	506
Colloquy with Court	511
Ronald Swinson – Direct Examination by Ms. Clayton	523
Ronald Swinson – Cross Examination by Mr. Jeter	529
Ronald Swinson – Cross Examination by Mr. Frawley	538

Charges/Exhibits and Other Materials or Documents

Trial Exhibits

1	540
2	545
3	546
4	553
7	559
8	560
13	564
17	567
18	572
19	575
21	577
22	582
23	583
24	584
25a.....	585
25b	586
39	587
40	588
40a.....	589
40b	593
40c.....	596
40d	600
40e.....	602
40f.....	604
40g	607
40h	611

40i	613
40j	615
40k	619
40l	621
40m	623
40n	626
40o	629
41	632
42	634
43	639
44	640
83	645
85	646

Motions

Plaintiff's Rule 59(e) Motion (July 1, 2011)	647
Defendant SCDOT's Rule 59(e) Motion (Jul. 7, 2011).....	652

Briefs

Defendant SCDOT's Post Trial Brief and Summation.....	654
Plaintiff's Post Trial Brief	674

Certificate by Appellant	698

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Westside Meshekoﬀ Family Limited Partnership,
Plaintiff,

vs.

The South Carolina Department of Transportation, APAM, Inc., Kimbrell's Investment Company, Inc., R1 CS2, LLC, DW Properties, LLC, Danwood, LLC, Boom, Inc., Robert W. Denton, and Alpine of S.C., Inc.,

Defendants.

Docket No. 2008-CP-40-4088

CONSENT ORDER FOR
CHANGE OF VENUE

RICHLAND COUNTY
FILED
2008 OCT 17 AM 9:44
BARBARA A. SCOTT
C.C.C. & G.S.

It appearing that the captioned matter involves an action in which one of the Defendants, the South Carolina Department of Transportation, is an agency of the State of South Carolina subject to suit pursuant to the South Carolina Tort Claims Act, codified at S.C. Code Ann. § 15-78-10 through -200 (1986 as amended); and

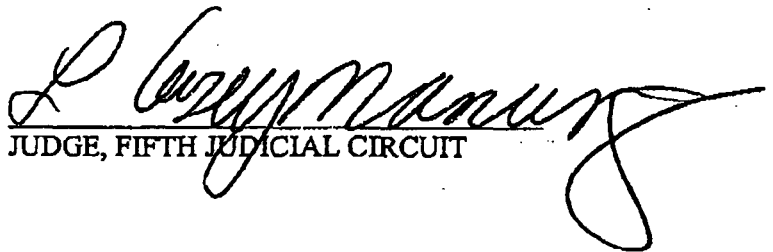
It further appearing that, although this matter has been filed in the County of Richland, the act or omission complained of occurred in Lexington County, and, pursuant to S.C. Code Ann. § 15-78-100(b), jurisdiction and venue for this matter are properly in the Court of Common Pleas for the County of Lexington, State of South Carolina, in the Eleventh Judicial Circuit;

NOW, THEREFORE, on motion of Patrick J. Frawley, the attorney for the Defendant, SCDOT, by and with the consent of the attorneys who have appeared for the remaining parties, Plaintiff and Defendants, as evidenced by their respective signature pages attached hereto;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that venue for the captioned matter be, and it hereby is transferred from the County of Richland to the County of

Lexington, and that the Clerk of Court for the County of Richland be, and she hereby is, ordered to forward the case file for the captioned matter to the Clerk of Court for the County of Lexington, and that the Clerk of Court for the County of Lexington be, and she hereby is, ordered to add the captioned matter to the Common Pleas docket of cases for the County of Lexington.

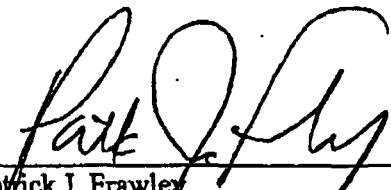
IT IS SO ORDERED.

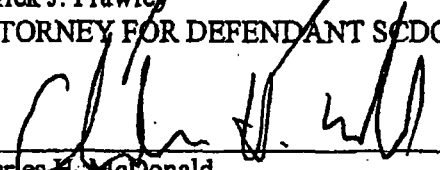

JUDGE, FIFTH JUDICIAL CIRCUIT

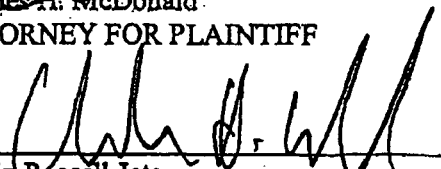
Columbia, South Carolina

10-16, 2008

WE SO MOVE AND CONSENT:

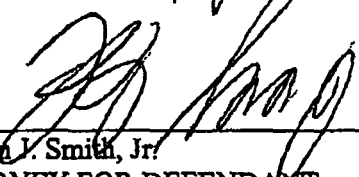

Patrick J. Frawley
ATTORNEY FOR DEFENDANT SCDOT


Charles H. McDonald
ATTORNEY FOR PLAINTIFF

for 
Edwin Russell Jeter
ATTORNEY FOR PLAINTIFF

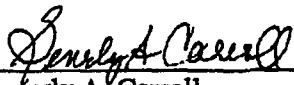
ADDITIONAL CONSENTS APPEAR ON THE FOLLOWING SIX PAGES

I Consent. for change of venue



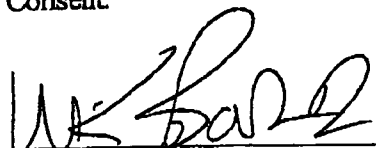
Franklin J. Smith, Jr.
ATTORNEY FOR DEFENDANT
KIMBRELL'S INVESTMENT COMPANY, INC.

I Consent.



Beverly A. Carroll
ATTORNEY FOR DEFENDANT R1 CS2, LLC

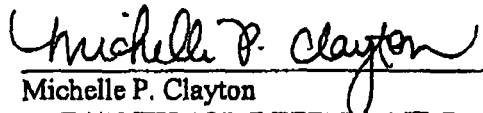
I Consent.

 10/2/08

William E. Booth, III
ATTORNEY FOR DEFENDANT DW PROPERTIES, LLC

Consent Order
Change of Venue

I Consent.



Michelle P. Clayton

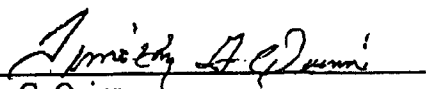
ATTORNEY FOR DEFENDANT DANWOOD, LLC

I Consent.

A handwritten signature in dark ink, appearing to read 'JES', is written over a horizontal line.

James E. Scott, IV
ATTORNEY FOR DEFENDANT BOOM, INC.

I Consent.



Timothy G. Quinn
ATTORNEY FOR DEFENDANTS ROBERT
DENTON AND ALPINE OF S.C., INC.

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Westside Meshekoff Family Limited
Partnership,

Plaintiff,

vs.

South Carolina Department of
Transportation; DW
Properties, LLC;
Danwood, LLC; Robert W. Denton;
and Alpine Of SC, Inc.,

Defendants.

CIVIL ACTION NO.: 2008-CP-32-04362

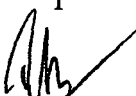
ORDER

FILED
JUN 14 P 2:00
BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

This case came before the Court on April 25, 2011 and a bench trial was conducted. The Plaintiff Westside Meshekoff Family Limited Partnership ("Westside") was represented at trial by Edwin Russell Jeter, Esquire and Charles McDonald, Esquire. The Defendant South Carolina Department of Transportation ("SCDOT") was represented by Patrick Frawley, Esquire. Defendant Danwood, LLC was represented by Michelle Clayton, Esquire. Defendant DW Properties, LLC was represented by William Booth, III, Esquire. Defendants Robert W. Denton and Alpine of SC, Inc. was represented by Timothy Quinn, Esquire.

Procedural History

Plaintiff's Complaint was filed in Lexington County on October 21, 2008 alleging four causes of action against all defendants in this case. However, at trial, the only remaining cause of action was the first cause of action in the complaint for "Equitable Apportionment of Maintenance Costs of Westside Storm Water System." Alternatively, the Plaintiff claims that the defendant landowners, excluding SCDOT, should bear their equitable allocation of the costs of

1


maintenance and repair of the Westside drainage system, if shown that the landowners are third-party beneficiaries of the SCDOT encroachment permit or are de facto assignees. At trial, the Plaintiff dropped its claim against the defendant landowners based upon the theory the defendants were de facto assignees, thereby leaving its claim against the defendant landowners based solely upon a showing that the defendants were third-party beneficiaries. After hearing the Plaintiff's case, and upon motion of all Defendants, this Court directed a verdict for Defendants DW Properties, LLC, Robert W. Denton and Alpine of SC, Inc., and denied the motions of Danwood, LLC and SCDOT. Therefore, the remaining defendants are SCDOT and Danwood, LLC.

Standard of Review

The decision to grant equitable relief is in the discretion of the trial judge. *Straight v. Goss*, 383 S.C. 180, 191-192, 678 S.E.2d 443, 449 (Ct.App. 2009). "On appeal in equitable action tried by judge alone without a reference, appellate court can correct errors of law and can find facts in accordance with its view of the evidence." *Smothers v. Richland Memorial Hospital*, 493 S.E.2d 107 (Ct.App. 1997). However, an appellate court is "not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." *Straight*, 383 S.C. at 192, 678 S.E.2d at 449.

Facts

The Plaintiff, Westside Meshekoff Family Limited Partnership, LP, owns the property known as the West Side Plaza Shopping Center. The property was acquired by its current owner in 1997 and was previously owned by the Meshekoff family since 1990. It was first owned by Holmes Dreher and at that time was undeveloped. In 1986, Holmes Dreher sold the property to Dayton & Associates, who developed the property. Weldon Wyatt was the managing agent of the

general partner of Dayton & Associates. The subject of this lawsuit is the storm water drainage system located on the West Side Plaza property. Prior to the development of the property by Dayton & Associates, water from U.S. Highway # 1 ("Hwy. 1") and the upstream landowners flowed into a SCDOT catch basin on Hwy 1 and discharged onto the undeveloped Dreher Property, according to testimony at trial. Dayton & Associates applied for an encroachment permit with SCDOT in 1986 requesting permission to construct driveways connecting its property to Hwy. 1 and Dreher Road and permission to connect to the SCDOT catch basin. SCDOT granted Dayton & Associates the encroachment permit in 1987.

The storm water drainage system on the Westside property includes five lines, three of which emptied into a detention pond located on the property. The drainage line that is the subject of this lawsuit is referred to as Line "E," is connected to a manhole off of Hwy. 1, and runs parallel to the highway for several hundred feet then turns toward the detention pond on the Westside property. Line E is the line that would receive the storm water from Hwy. 1 and the other upstream property owners. The Encroachment Permit stated that Dayton & Associates would use reinforced metal pipe; however, the pipe used for the construction of the drainage system on the Westside property was corrugated metal pipe. Problems arose with the drainage system around July of 2005 when a sinkhole was found at Line E near the driveway to Hwy. 1. Dee Reeves is the property manager for the Westside property and first discovered the sinkhole. Tim Richardson was contacted to repair the problem and decided that the corrugated metal pipe needed to be replaced with reinforced concrete pipe. The necessary repairs were completed in August, 2005. Additional sinkholes developed in 2006 in the middle of the Westside parking lot and Tim Richardson also worked on those sinkholes and requested assistance from civil engineer Michael Lambrecht. Lambrecht made recommendations to improve the entire system by

replacing some of the pipes and correcting aspects of the pipes such as negative slopes. Repairs to Lines B, E, and the detention pond were completed in December 2006 by Tim Richardson. Additionally in 2008, more sinkholes were found in the parking lot of the Westside property resulting in Richardson inspecting and replacing the original pipe at Line E with reinforced concrete pipe. The Plaintiff's costs due to the repairs of Line E, as outlined above, came to a total of \$325,240.39. The Plaintiff seeks 81.48% of the costs against the Defendants, since it claims that Plaintiff contributes 18.52% of the storm water flowing into Line "E." After prior settlements with former parties to this action, the Plaintiff now seeks \$184,821 against the remaining Defendants, SCDOT and Danwood.

Issues

The issues before the Court are (1) whether SCDOT should bear maintenance costs of the Westside storm water drainage system as a dominant estate, or (2) in the alternative, whether the Defendant landowners as third-party beneficiaries of the SCDOT encroachment permit should bear their equitable allocation of the costs of maintenance and repair of the Westside storm water drainage system.

Discussion

I. Cause of Action for Equitable Apportionment of Maintenance Costs Against SCDOT

The Plaintiff's claim against SCDOT is based on the equitable theory of recovery established in *Hayes v. Tompkins*, 287 S.C. 289, 337 S.E.2d 888 (Ct.App.1985). In *Hayes*, the Court of Appeals found that Hayes, the dominant landowner of an easement of right-of-way over a gravel road, was ordered in equity to pay one-third of the annual maintenance costs of the road to the Tompkinses, the servient landowners. The adjoining landowners each have land that was part of

4


a larger tract and subsequently divided into three separate tracts. The Court of Appeals found that an implied easement of necessity existed and the trial court's apportionment of maintenance cost was equitable. After establishing that Hayes in fact owns an easement over the Tompkins' gravel road, the court provides: "[i]n absence of an agreement, the Tompkinses, as owners of the servient tenement, are under no duty to maintain and repair the easement represented by the gravel road for the benefit of the dominant tenement owned by Hayes." *Hayes*, 287 S.C. at 294, 337 S.E.2d at 891 (citing *Richardson v. Jennings*, 184 N.C. 559, 114 S.E. 821 (1922); *Carson v. Jackson Land & Mining Co.*, 90 W.Va. 781, 111 S.E. 846 (1922)). The Court of Appeals held that since both the Hayes and Tompkinses use the road to access their properties, even though the Tompkinses use the road more often than Hayes, that the apportionment by the trial judge that Hayes is to pay one-third of the maintenance costs of the easement is equitable. In reaching its decision, the Court of appeals considered the burden of the easement of right-of-way on the Tompkinses' property, Hayes' duty to keep it in repair, and the benefit that Hayes' derives from its use. *Id.* at 294, 337 S.E.2d at 891 (citing *Bina v. Bina*, 213 Iowa 432, 239 N.W. 68, 78 A.L.R. 1216 (1931); *Harris v. Ferguson*, 18 S.C.L. (2 Bail.) 397 (1831)).

The Plaintiff ("Westside") seeks to extend the equitable apportionment theory of recovery from *Hayes* to the facts of this case against the remaining Defendants, SCDOT and Danwood, LLC. The Plaintiff asserts that to prevail on such a claim it must prove three things: 1) the existence of an easement, 2) the costs of maintaining and repairing the easement, and 3) evidence by which the Court can apportion those costs based upon some equitable method of determining use. In essence, the Plaintiff asserts that the Court may find for the Plaintiff in equity and order maintenance and repair costs to be paid by SCDOT and Danwood, LLC, if there is an easement, and some way to apportion cost of maintenance.

The facts of this case are easily distinguished from the facts in *Hayes*. The shopping center that is the subject of the lawsuit was completed by Dayton & Associates, predecessor to the Meshekoff Family Limited Partnership, in 1988. Before the encroachment permit, SCDOT was discharging storm water on the Dreher property. At trial, the Plaintiff and SCDOT agreed that an easement existed prior to 1987 that allowed SCDOT to release storm water run-off from its catch basin onto the undeveloped property of Holmes Dreher, which later came to be the Plaintiff's property. There was no specific evidence on whether or not the easement was adverse or under a claim of right of SCDOT. However, the existence of an easement to discharge storm water onto the property is not in dispute. The encroachment permit sought to change the location of the outflow in order to develop the shopping center, which in effect limited the easement, which once allowed the unfettered flow of water onto the Dreher property. The permit changed not only the location of the easement but also established an agreement between the SCDOT and Dayton & Associates as to future maintenance costs of the easement. In *Hayes*, there was no agreement as to the maintenance and repair costs of the easement, since it was an implied easement of necessity. Here, prior to the encroachment permit applied for by the predecessor of the Plaintiff, Dayton & Associates, there was no agreement between SCDOT and Dayton & Associates to govern future costs of the easement.

According to the testimony at trial, Dayton & Associates requested the encroachment permit to redirect the location of the flow of the water from the SCDOT pipe in order to develop Westside shopping center. SCDOT and Dayton & Associates entered into the encroachment permit on August 26, 1987. The "Application for Encroachment Permit," dated July 15, 1987 requested permission from SCDOT to construct driveway entrances onto Dreher Road and driveway entrances along U.S. Hwy. No. 1. The application also requested "permission to

6


connect onto an existing catch basin along U.S. Hwy. No. 1 with a new 48" R.C.P. [reinforced concrete pipe]. The 98 C.F.S.[cubic feet per second] from the existing 48" R.C.P. [reinforced concrete pipe] will be carried around the shopping center site in a 48" R.C.P. [reinforced concrete pipe] to the detention pond." Plaintiff's Exh. 1. In August, SCDOT authorized Dayton & Associates to construct the driveways and connect to the SCDOT catch basin. Plaintiff's Exh.

1. The Encroachment Permit was signed by a representative of Dayton & Associates on August 26, 1987 and above such signature, the following statement was provided:

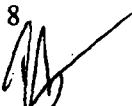
I (We) do hereby agree, and bind my (our) heirs, successors and assigns, to assume any and all liability this Department might otherwise have in connection with accidents or injuries to persons, or damage to property, including the highway, that may be caused by the construction, maintenance, use moving or removing of the encroachment contemplated herein and agree to indemnify this Department for any liability incurred or injury or damage sustained by reason of the past, present, or future existence of said encroachment.

Plaintiff's Exh. 1. Although Matthew Meshekoff testified he was unaware of this Encroachment Permit and the agreement therein, there was evidence presented at trial that would show that he should have or could have known of the permit, and therefore is bound by its terms. The permit was not recorded in the Lexington County Register of Deeds; however, when the property was acquired by the Meshekoff family in 1990, Weldon Wyatt, a prior owner of the property was still involved in the management of the property when owned by the Meshekoffs. Furthermore, South Carolina law requires a permit for any driveway connecting private property to state-maintained highways; therefore, the Meshekoffs should be aware of this requirement in light of their property's connection to Hwy # 1, a state-maintained highway. Additionally, evidence was submitted that Weldon Wyatt was a principal in Dayton & Associates and West Side Associates. Dayton & Associates developed Westside Plaza and conveyed the property to West Side Associates in 1988. Then, West Side Associates conveyed the property to Edward and Helen



Meshekoff in 1990; however, Mr. Wyatt owned Wyatt Development Company, which included a property management division and would manage the shopping center for the Meshekoffs. Also, until 2008, evidence was submitted that Weldon Wyatt was involved or owned both companies which managed the Westside property. Therefore, since Mr. Wyatt was involved in the ownership or management of the property since it was owned by Dayton & Associates, this connection to the Plaintiff's predecessors in title is also evidence that Plaintiff should have known of the encroachment permit. Lastly, the mere existence of the connection of the catch basin to the Westside Shopping Center's storm water drainage system would put Mr. Meshekoff on notice that SCDOT had some right to use the system and therefore could be considered to have constructive notice of the existence of some permit or easement. (See *Adams v. Willis*, 225 S.C. 518, 83 S.E.2d 171 (1954), "[a] purchaser of real property is charged with actual notice of conditions on the property.") Therefore, Mr. Meshekoff's lack of knowledge of the permit does not serve to render the permit inapplicable to the parties in this case. The permit then governs the maintenance of the easement to discharge storm water on the Westside property.

The Plaintiff asserts that once an easement is established, the Plaintiff must then only show a method by which the Court can equitably apportion costs of maintenance. However, the recovery sought by the Plaintiff and the method by which the Plaintiff determined percentages of responsibility of each Defendant is not a proper basis for this Court to award maintenance costs, if this Court found that the Plaintiff was owed such costs. Line "E" is the connection between the SCDOT catch basin and the storm water drainage system at Westside. The Plaintiff established at trial the cost of repairing Line "E" and the detention pond, which were in need of repair after certain failures in the system. The total amount of cost for repairs was shown to be \$325,240.39. The Plaintiff is seeking approximately 80% of those costs, since it claims to contribute 18.52%

8


of the storm water flowing through Line "E." The Plaintiff provides alternate theories of recovery based on the apportioned percentage of storm water produced by SCDOT and Danwood, LLC. The Plaintiff seeks recovery from SCDOT only for all uncollected costs, or, alternatively seeks 22.62% of the costs from Danwood, LLC and the remaining amount from SCDOT. The percentages attributed to each defendant were determined by the proportion of usage of the system by each of the landowners and by SCDOT.¹ Unlike *Hayes*, where the amount each landowner used the road was easily determined for purposes of dividing cost of the road's maintenance, this method to apportion costs among the Defendants is speculative. Many other factors must be taken into consideration in addition to the rate of flow from each defendant into the Westside drainage system. No evidence was submitted at trial that connected the rate of flow from the storm water attributed to SCDOT and the storm water attributed to Danwood, LLC, and the problems that caused the failure of Line "E" and the costs to Westside that are the subject of this lawsuit. Therefore, even if this court found that the Defendants owed costs to the Plaintiff based on a duty to maintain the easement; this system of allocating costs is not a reasonable extension of the *Hayes*' equitable theory of recovery.

As stated earlier, no evidence at trial showed how the rate of flow from each property caused the costs to the drainage system. It remains unclear what the causes of the problem to Westside's drainage system were. This causes too much speculation as to whether the problem was a defect

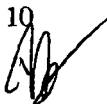
¹ Michael Lambrecht, a civil engineer, testified at trial that his calculations were based on peak flow rates based on a ten-year storm event, and that such calculations were considered a standard engineering benchmark for flow rate calculations. Lambrecht assigned peak flow rates to each property. SCDOT's storm water flow rate was deemed to be 12.0 cubic feet per second and Danwood, LLC's storm water flow rate was deemed to be 24.30 cubic feet per second. Using these numbers, Lambrecht then calculated the pro rata contributions of storm water from the Defendants entering the SCDOT catch basin and then flowing into the Westside storm water drainage system. The contributions from each defendant was determined to be each property's percentage of use and the basis for the amount of the costs each Defendant was alleged to be responsible for paying to the Plaintiff. Lambrecht determined that 81.48% of the storm water flowing into Line "E" of the Westside storm water drainage system, was from water flowing from the DOT catch basin. Additionally, he calculated that 22.62% of storm water entering the catch basin and flowing into Line "E" came from Danwood's property.

9


in installation, negligence in the maintenance of the system, or some other problem not yet identified. Despite the testimony from Michael Lambrecht as to the rate of flow from each defendant, it is uncertain whether the rate of flow actually caused the failure of the system.

According to the Encroachment Permit, Dayton & Associates agreed to use reinforced concrete pipe, but actually installed corrugated metal pipes. At trial, several witnesses testified that the installation of the corrugated metal pipes could have caused the problems that led to the repairs that are the subject of this lawsuit. Testimony at trial from Tim Richardson stated that corrugated metal pipe is usually considered a lesser alternative.² Richardson testified that Line "E" had a joint failure, which could possibly be caused by the pipe not being properly sealed to the junction box. Richardson testified that the corrugated metal pipe was not embedded in stone which was necessary to give that type of pipe the similar structure of the reinforced concrete pipe that makes the reinforced concrete superior to the corrugated metal. Additionally, Richardson sought the help of Michael Lambrecht to determine the cause of the failures at the Westside system. Exh. 33. Lambrecht stated that the cause was a joint failure, yet did not state that the amount of water flowing through the system was excessive and caused the joint failure. Nor did Lambrecht state that if the water from SCDOT and the other upstream landowners had been treated or slowed down in any way, that it would have prevented the failure to Line "E," as the Plaintiff alleged in its pleadings and at trial. Further testimony was elicited that there could be several reasons that would lead to this failure in addition to the type of pipe used and the fact it was not embedded in stone. Therefore, the only evidence presented before the court established only the failure of the system and did not connect that failure to the use of the easement to discharge storm water from the catch basin into the Westside drainage system.

² Clarence Blakely from SCDOT testified that SCDOT does not necessarily require reinforced metal pipe in every instance, and that the use of corrugated metal pipe is generally allowed if the landowner requests it.

10


Defendant SCDOT also asserts the application of the Common Enemy Rule as a defense to the Plaintiff's claim. The Common Enemy Rule provides that a landowner can treat surface water, waters naturally flowing across land, as a common enemy and dispose of it as the landowner sees fit. *Lucas v. Rawl Family Ltd. Partnership*, 359 S.C. 505, 509, 598 S.E.2d 712, 714 (2004). The two exceptions to the rule are first, "an individual may not obstruct or alter the flow of water to create a nuisance per se," and second, (except by contractual or prescriptive right, an upper landowner may not, by means of a ditch, impoundment or other artificial structure, collect surface water on his own land and cast it in a concentrated form upon lower adjoining land." *Id.* (citing *Johnson v. Phillips*, 315 S.C. 407, 414, 433 S.E.2d 895, 899 (Ct.App.1993); *Baltzegeer v. Carolina Midland Ry. Co.*, 54 S.C. 242, 247, 32 S.E.358, 359-60 (1899)). Whether or not the common enemy rule applies in this case can be answered by the fact that the Plaintiff's claim is solely in equity. In a case that involved the interpretation of a contract and the common enemy rule, the Supreme Court of South Carolina has stated:

The common enemy rule does not bear on this case as it currently stands before this Court. While its theories are instructive, the rule itself need not be analyzed to determine the instant issue. The common enemy rule does not define what surface water is, but rather prescribes how landowners may deal with the surface water on their lands. See William T. Toal, *Surface Water in South Carolina*, 23 S.C. L.Rev. 82, 88 (1971) (explaining surface water law in South Carolina). The common enemy rule addresses potential *tort* liability for obstructing and diverting the flow of surface water.

M and M Corp. of South Carolina v. Auto-Owners Ins. Co., 390 S.C. 255, 260, 701 S.E.2d 33, 35 n.1 (2010) (emphasis added). Therefore, since the Plaintiff's claim rests only in equity, the common enemy rule will not determine whether or not the Plaintiff is entitled to equitable recovery. However, as the Supreme Court of South Carolina stated, the rule's theories are instructive. In fact, the Plaintiff asserts that the Defendant SCDOT was discharging water without easement onto the property of the Plaintiff and its predecessors in title, and was

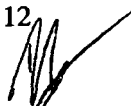
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artificially diverting the water which brings it under an exception to the common enemy rule. However, for purposes of establishing responsibility of SCDOT on the theory of equitable apportionment of maintenance costs, Plaintiff seeks to prove that the Defendant did have an easement which allowed it to connect to the Plaintiff's storm water drainage system. Therefore, since the Plaintiff agrees, and actually sought to prove, the right by easement or prescription of SCDOT to connect to the Westside storm water drainage system, they cannot later submit to this court that for purposes of application of the common enemy rule, that there was no right to divert the surface water off of Hwy # 1 into the system. If the common enemy rule had applied, and in consideration of fairness under equity, SCDOT was in compliance with the rule in that it discharged the surface water into the Westside system pursuant to an easement giving them a right to do so.

In conclusion, the Plaintiff dismissed all legal claims originally in its complaint and pursued a claim in equity against the Defendants. This Court declines to extend the equitable theory of recovery in *Hayes* to the facts of this case, and finds that based on the evidence and testimony submitted at trial, equity does not require the Defendants to pay costs to the Plaintiff for repairs to the Plaintiff's storm water drainage system.

II. Alternative Theory of Recovery Against Danwood, LLC As Third-Party Beneficiary

As to the Plaintiff's theory of recovery against Danwood, LLC, the Plaintiff must establish that Danwood is a third-party beneficiary of the encroachment permit given to Westside by SCDOT. However, the Plaintiff's Complaint only refers to the cause of action as to all defendants for equitable apportionment of maintenance costs based on the fact that the defendants benefit from the use of the drainage system. Recovery is requested based on the pro

12


rata contributions of the Defendants. The Complaint does not seek any recovery based on Danwood, LLC's status as a third-party beneficiary to the encroachment permit between SCDOT and the predecessor of the Plaintiff, Dayton & Associates. It is well known that "a judgment or decree, whether in law or equity, must accord with and be warranted by the pleadings and proof of the party in whose favor it is rendered." *Wingard v. Lee*, 287 S.C. 57, 336 S.E.2d 498 (Ct.App. 1985) (citing *Parker Peanut Co. v. Felder*, 207 S.C. 63, 34 S.E.2d 488 (1945)). Therefore, since the pleadings of the Plaintiff do not claim any basis of recovery against Danwood as a third-party beneficiary, such a claim is null and void. Notwithstanding the fact that the claim does not conform to the pleadings of the Plaintiff, there was no evidence or testimony submitted at trial supporting the claim that Danwood, LLC was a third-party beneficiary of the encroachment permit. The status of third-party beneficiary arises when contracting parties intend to directly benefit a third-party. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). At trial, no evidence was presented to show that the benefit to Danwood, LLC was intended by Dayton & Associates and SCDOT at the time Dayton applied for the encroachment permit.³ Therefore, Danwood, LLC is not required in equity to pay any maintenance or repair costs, as sought by the Plaintiff, for the repairs done to the Westside storm water drainage system.

III. Equitable Defenses

This Court denies the Plaintiff's claim for equitable apportionment of maintenance costs against the remaining defendants SCDOT and Danwood, LLC. However, if this Court found that the Plaintiff is entitled to equitable recovery under the theory it asserted, the Defendants pled

³ Plaintiff argued that since the Encroachment Permit referred to the 98 c.f.s.(cubic feet per second) capacity, which was more capacity than what SCDOT needed to drain its surface water, that the permit shows that must have been for the benefit of the upstream landowners. This court considered Plaintiff's argument and finds that it does not prove that SCDOT and Dayton & Associates intended to benefit Danwood, LLC, for purposes of establishing Danwood as a third-party beneficiary.

several defenses.

A. Case in Law not Equity

As stated earlier, “a judgment or decree, whether in law or equity, must accord with and be warranted by the pleadings and proof of the party in whose favor it is rendered.” *Wingard v. Lee*, 287 S.C. 57, 336 S.E.2d 498 (Ct.App. 1985) (citing *Parker Peanut Co. v. Felder*, 207 S.C. 63, 34 S.E.2d 488 (1945)). This Court only has before it the Plaintiff’s claim based in equity under the theory established in *Hayes*. This order must conform to the pleadings of the Plaintiff and it is not for the consideration of this Court whether the Plaintiff’s claim is more appropriate for law and not equity. Whether or not the Plaintiff’s claim is time-barred under the S.C. Tort Claims Act is not before this Court.

B. Laches

The defendants assert the equitable defense of laches. Laches bars any recovery to the plaintiff and “arises upon the failure to assert a known right.” *Emery v. Smith*, 261 S.C. 207, 215, 603 S.E.2d 598 602 (Ct.App.2004). To establish laches, a party must show (1) unreasonable delay and (2) prejudice. *Terry v. Lee*, 314 S.C. 420, 424, 445 S.E.2d 435, 437 (1994). The complaint against SCDOT and Danwood, LLC, along with the prior defendants, was first filed on June 9, 2008. There was evidence submitted at trial that problems arose in July of 2005 at the shopping center and Tim Richardson was contacted to correct those problems. Richardson found that there was a cave-in at Line E. Richardson corrected the problem at Line E, shortly after it was detected, by replacing the corrugated metal pipe with reinforced concrete pipe. In 2006, Michael Lambrecht was contacted to determine the cause of problems due to other sinkholes that had developed at the shopping center. Additionally in 2008, additional problems arose at Line E to an area that was not corrected during 2005.

However, the Plaintiff's theory of recovery is based in equity for an allocation of costs of repairing and maintaining the storm water line and detention pond that was shown to be used by the Defendants. Although the Plaintiff seeks costs of only the repairs to Line E and the detention pond and not costs of the maintenance of the entire drainage system, the theory of recovery is based on the Defendants' use of the drainage system and since they received a benefit from that use, they should in equity pay maintenance costs. Therefore, in consideration of whether or not there was an unreasonable delay and prejudice resulting to the Defendants, this Court views the proper time period as from the time the Plaintiff knew or should have known that the Defendants were utilizing the storm water drainage system, not when the Plaintiff knew or should have known of the problems to the system. The Encroachment Permit was issued by SCDOT on August 27, 1987. The Meshekoff family purchased West Side Plaza in 1990 from one of Weldon Wyatt's companies. The Plaintiff acquired the shopping center in 1997. However, between 1990 and 1997, the shopping center was transferred between entities owned by the Meshekoffs. Even in 1997 when the Plaintiff acquired the shopping center, the Plaintiff would have actual notice and constructive notice, or a duty to inquire, of the conditions on his property. See *Adams v. Willis*, 225 S.C. 518, 83 S.E.2d 171 (1954). It is possible that the Plaintiff had knowledge of the connection of its storm water drainage system to the SCDOT catch basin as early as 1990, when the property came under the Meshekoff family ownership. Therefore, the Plaintiff waited approximately eleven (11) years to assert a claim against the Defendants for maintenance costs of their system. This Court finds that such a length of time constitutes an unreasonable delay. The problems arose in the system and the costs to fix such problems are the costs sought against the defendants in this action. It is clear that prejudice resulted to the Defendants by the delay of the Plaintiff in asserting its claim that the Defendants must pay their part of the maintenance of

the Westside drainage system, as is shown by the extensive problems that arose with the system and the amount of costs sought against the Defendants due to those problems. Accordingly, the factors required for laches have been established by the Defendants.

If this Court had found that the Plaintiff was entitled to recovery in equity based upon its theory of equitable apportionment of maintenance costs, the defense of laches would then bar any recovery from the plaintiff in this action.

C. Unclean Hands

The Defendants assert the equitable defense of unclean hands as a bar to recovery of the Plaintiff. The doctrine of unclean hands prevents a plaintiff from recovering in equity "if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *Ingram v. Kasey's Associates*, 340 S.C. 98, 107, 531 S.E.2d 287, 292 n.2 (2000) (citing *First Union Nat. Bank of South Carolina v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct.App.1998)). The Defendants assert that the Plaintiff's predecessor in title, Dayton & Associates, used a lesser quality pipe instead of the pipe it stated it would use in the Encroachment Permit, and also improperly installed the pipes. Despite the evidence submitted as to Dayton & Associate's failure to properly install the pipes and failure to install reinforced metal pipes, such failures by the Plaintiff's predecessor in title will not be imputed to the Plaintiff for purposes of asserting the doctrine of unclean hands. There was no evidence that the Plaintiff behaved unfairly or in bad faith; therefore, this Court does not find that the doctrine of unclean hands would apply to bar recovery of the Plaintiff.

D. Equitable Estoppel

Additionally, the doctrine of equitable estoppel has been asserted by the Defendants. The Defendants must establish the following elements of equitable estoppel:

[A]s to the party estopped, (1) conduct by the party estopped amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. As to the party claiming the estoppel, the elements include: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; and (2) reliance upon the conduct of the party estopped.

Ingram, 340 S.C. at 107, 531 S.E.2d at 292, n.2 (citing *Maher v. Tietex Corp.*, 331 S.C. 371, 500 S.E.2d 204 (Ct.App. 1998)). There was no evidence presented that the Plaintiff made a false representation or concealed a material fact while having knowledge of the true facts. Although the Defendant claims that the Plaintiff's predecessor in title failed to install the storm water pipes properly and did not adhere to the Encroachment Permit term of using reinforced metal pipe, this conduct will not be imputed to the Plaintiff for purpose of application of this equitable doctrine. Therefore, if this Court had found that the Plaintiff was entitled to recovery, the defense of equitable estoppel does not apply to bar the Plaintiff from recovery on that basis.

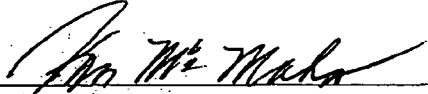
IV. Conclusion

In conclusion, a court of equity is to consider general principles of equity and must "balance the equities" between the parties in determining whether recovery should be granted. *Foreman v. Foreman*, 280 S.C. 461, 464-465, 313 S.E.2d 312, 314 (Ct.App. 1984). "In applying the doctrines of equity, the equities of both sides are to be considered, and each case must be decided on its own particular facts." *Carroll v. Page*, 264 S.C. 345, 349, 215 S.E.2d 203, 205 (1975) (citing 30 C.J.S. *Equity* § 89, p. 976). "Equity looks at the entire matter and grants or denies relief as good conscience dictates. In the exercise of a sound discretion, equity may refuse relief because of the difficulty of enforcing its decree." 27A Am.Jur.2d *Equity* § 74 (citing *In re Estate of Moukalled*, 269 Mich. App. 708, 714 N.W.2d 400, 59 U.C.C. Rep. Serv. 2d 301 (2006);

Queens Plaza Amusements v. Queens Bridge Realty Corp., 265 A.D. 1057, 39 N.Y.S.2d 463 (2d Dep't 1943)). Upon consideration of the pleadings, the evidence presented at trial, and a general consideration of the principles of equity, this Court finds that equity favors the Defendants and the Plaintiff is not entitled to recovery in equity based on the facts and circumstances presented in this case.

IT IS THEREFORE ORDERED that this court declines to grant equitable recovery to the Plaintiff Westside Meshekoff Family Limited Partnership.

AND IT IS SO ORDERED.


R. Knox McMahon
Presiding Judge,
Eleventh Judicial Circuit

Lexington, South Carolina
June 10th, 2011

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Westside Meshekoff Family Limited
Partnership,

CIVIL ACTION NO.: 2008-CP-32-04362

Plaintiff,

vs.

South Carolina Department of
Transportation; DW
Properties, LLC;
Danwood, LLC; Robert W. Denton;
and Alpine Of SC, Inc.,

Defendants.

AMENDED ORDER

BETH A. CARRIGS
CLERK OF COURT
LEXINGTON SC

2011 SEP 12 P 2:38

FILED

This case came before the Court on April 25, 2011 and a bench trial was conducted. The Plaintiff Westside Meshekoff Family Limited Partnership ("Westside") was represented at trial by Edwin Russell Jeter, Esquire and Charles McDonald, Esquire. The Defendant South Carolina Department of Transportation ("SCDOT") was represented by Patrick Frawley, Esquire. Defendant Danwood, LLC was represented by Michelle Clayton, Esquire. Defendant DW Properties, LLC was represented by William Booth, III, Esquire. Defendants Robert W. Denton and Alpine of SC, Inc. was represented by Timothy Quinn, Esquire.

Procedural History

Plaintiff's Complaint was filed in Lexington County on October 21, 2008 alleging four causes of action against all defendants in this case. However, at trial, the only remaining cause of action was the first cause of action in the complaint for "Equitable Apportionment of Maintenance Costs of Westside Storm Water System." Alternatively, the Plaintiff claims that the defendant landowners, excluding SCDOT, should bear their equitable allocation of the costs of

1

maintenance and repair of the Westside drainage system, if shown that the landowners are third-party beneficiaries of the SCDOT encroachment permit or are de facto assignees. At trial, the Plaintiff dropped its claim against the defendant landowners based upon the theory the defendants were de facto assignees, thereby leaving its claim against the defendant landowners based solely upon a showing that the defendants were third-party beneficiaries. After hearing the Plaintiff's case, and upon motion of all Defendants, this Court directed a verdict for Defendants DW Properties, LLC, Robert W. Denton and Alpine of SC, Inc., and denied the motions of Danwood, LLC and SCDOT. Therefore, the remaining defendants are SCDOT and Danwood, LLC.¹

Standard of Review

The decision to grant equitable relief is in the discretion of the trial judge. *Straight v. Goss*, 383 S.C. 180, 191-192, 678 S.E.2d 443, 449 (Ct.App. 2009). "On appeal in equitable action tried by judge alone without a reference, appellate court can correct errors of law and can find facts in accordance with its view of the evidence." *Smothers v. Richland Memorial Hospital*, 493 S.E.2d 107 (Ct.App. 1997). However, an appellate court is "not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." *Straight*, 383 S.C. at 192, 678 S.E.2d at 449.

Facts

The Plaintiff, Westside Meshekoff Family Limited Partnership, LP, owns the property known as the West Side Plaza Shopping Center. The property was acquired by its current owner

¹ Although the language used was "Directed Verdict," the court granted and decided this matter based on the law and the merits under Rule 41(b), SCRCP. As footnote one of *Fickling v. City of Charleston*, 643 S.E.2d 110 (S.C. Ct. App. 2007) notes, "Rule 41(b), SCRCP, permits a defendant, when an action is tried, as here, by the court without a jury, to 'move for a dismissal.' If granted, the dismissal...will operate as an adjudication upon the merits unless the court in its order 'otherwise specifies.'" Plaintiff Westside Meshekoff Family Limited Partnership noted these circumstances in their Post-Trial Brief and did not object to the use of these terms.

2


in 1997 and was previously owned by the Meshekoff family since 1990. It was first owned by Holmes Dreher and at that time was undeveloped. In 1986, Holmes Dreher sold the property to Dayton & Associates, who developed the property. Weldon Wyatt was the managing agent of the general partner of Dayton & Associates. The subject of this lawsuit is the storm water drainage system located on the West Side Plaza property. Prior to the development of the property by Dayton & Associates, water from U.S. Highway # 1 ("Hwy. 1") and the upstream landowners flowed into a SCDOT catch basin on Hwy 1 and discharged onto the undeveloped Dreher Property, according to testimony at trial. Dayton & Associates applied for an encroachment permit with SCDOT in 1986 requesting permission to construct driveways connecting its property to Hwy. 1 and Dreher Road and permission to connect to the SCDOT catch basin. SCDOT granted Dayton & Associates the encroachment permit in 1987.

The storm water drainage system on the Westside property includes five lines, three of which emptied into a detention pond located on the property. The drainage line that is the subject of this lawsuit is referred to as Line "E," is connected to a manhole off of Hwy. 1, and runs parallel to the highway for several hundred feet then turns toward the detention pond on the Westside property. Line E is the line that would receive the storm water from Hwy. 1 and the other upstream property owners. The Encroachment Permit stated that Dayton & Associates would use reinforced concrete pipe; however, the pipe used for the construction of the drainage system on the Westside property was corrugated metal pipe. Problems arose with the drainage system around July of 2005 when a sinkhole was found at Line E near the driveway to Hwy. 1. Dee Reeves is the property manager for the Westside property and first discovered the sinkhole. Tim Richardson was contacted to repair the problem and decided that the corrugated metal pipe needed to be replaced with reinforced concrete pipe. The necessary repairs were completed in

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August, 2005. Additional sinkholes developed in 2006 in the middle of the Westside parking lot and Tim Richardson also worked on those sinkholes and requested assistance from civil engineer Michael Lambrecht. Lambrecht made recommendations to improve the entire system by replacing some of the pipes and correcting aspects of the pipes such as negative slopes. Repairs to Lines B, E, and the detention pond were completed in December 2006 by Tim Richardson. Additionally in 2008, more sinkholes were found in the parking lot of the Westside property resulting in Richardson inspecting and replacing the original pipe at Line E with reinforced concrete pipe. The Plaintiff's costs due to the repairs of Line E, as outlined above, came to a total of \$322,240.39 once the exclusion of \$3,000 in costs is applied.² The Plaintiff seeks 81.48% of the costs against the Defendants, since it claims that Plaintiff contributes 18.52% of the storm water flowing into Line "E." After prior settlements with former parties to this action, the Plaintiff now seeks \$184,821³ against the remaining Defendants, SCDOT and Danwood. The Plaintiff seeks this amount by either (a) allocating to SCDOT the entire cost of maintenance and repair, totaling \$184, 821; or (b) reducing SCDOT's responsibility to account for Danwood's equitable contribution determined based on Danwood's 22.62% share of all costs of maintenance and repair, \$59,391 ($.2262 \times \$262,561$), resulting in SCDOT's responsibility for the remaining amount of \$125,430 ($\$184,821 - \$59,391$).

Issues

The issues before the Court are (1) whether SCDOT should bear maintenance costs of the Westside storm water drainage system as a dominant estate, or (2) in the alternative, whether the

² Plaintiff's costs due to the repairs of Line E came to a total of \$325,240.39 before the court reduced the amount by \$3,000.

³³ This amount is derived from reducing the total costs of \$322,240 by the amount of Westside's responsibility for maintenance and repair ($\$322,240 \times .1852 = \$59,679$), resulting in a total of \$262,561 ($\$322,240 - \$59,679$), and then further reducing the amount by the \$77,740 Plaintiff has already collected in settlements with former parties to this action, ($\$262,561 - \$77,740 = \$184,821$).



Defendant landowners as third-party beneficiaries of the SCDOT encroachment permit should bear their equitable allocation of the costs of maintenance and repair of the Westside storm water drainage system.

Discussion

I. Cause of Action for Equitable Apportionment of Maintenance Costs Against SCDOT

The Plaintiff's claim against SCDOT is based on the equitable theory of recovery established in *Hayes v. Tompkins*, 287 S.C. 289, 337 S.E.2d 888 (Ct.App.1985). In *Hayes*, the Court of Appeals found that Hayes, the dominant landowner of an easement of right-of-way over a gravel road, was ordered in equity to pay one-third of the annual maintenance costs of the road to the Tompkinses, the servient landowners. The adjoining landowners each have land that was part of a larger tract and subsequently divided into three separate tracts. The Court of Appeals found that an implied easement of necessity existed and the trial court's apportionment of maintenance cost was equitable. After establishing that Hayes in fact owns an easement over the Tompkins' gravel road, the court provides: "[i]n absence of an agreement, the Tompkinses, as owners of the servient tenement, are under no duty to maintain and repair the easement represented by the gravel road for the benefit of the dominant tenement owned by Hayes." *Hayes*, 287 S.C. at 294, 337 S.E.2d at 891 (citing *Richardson v. Jennings*, 184 N.C. 559, 114 S.E. 821 (1922); *Carson v. Jackson Land & Mining Co.*, 90 W.Va. 781, 111 S.E. 846 (1922)). The Court of Appeals held that since both the Hayes and Tompkinses use the road to access their properties, even though the Tompkinses use the road more often than Hayes, that the apportionment by the trial judge that Hayes is to pay one-third of the maintenance costs of the easement is equitable. In reaching its decision, the Court of appeals considered the burden of the easement of right-of-way on the

Tompkin's property, Hayes' duty to keep it in repair, and the benefit that Hayes' derives from its use. *Id.* at 294, 337 S.E.2d at 891 (citing *Bina v. Bina*, 213 Iowa 432, 239 N.W. 68, 78 A.L.R. 1216 (1931); *Harris v. Ferguson*, 18 S.C.L. (2 Bail.) 397 (1831)).

The Plaintiff ("Westside") seeks to extend the equitable apportionment theory of recovery from *Hayes* to the facts of this case against the remaining Defendants, SCDOT and Danwood, LLC. The Plaintiff asserts that to prevail on such a claim it must prove three things: 1) the existence of an easement, 2) the costs of maintaining and repairing the easement, and 3) evidence by which the Court can apportion those costs based upon some equitable method of determining use. In essence, the Plaintiff asserts that the Court may find for the Plaintiff in equity and order maintenance and repair costs to be paid by SCDOT and Danwood, LLC, if there is an easement, and some way to apportion cost of maintenance.

The facts of this case are easily distinguished from the facts in *Hayes*. The shopping center that is the subject of the lawsuit was completed by Dayton & Associates, predecessor to the Meshekoff Family Limited Partnership, in 1988. Before the encroachment permit, SCDOT was discharging storm water on the Dreher property. At trial, the Plaintiff and SCDOT agreed that an easement existed prior to 1987 that allowed SCDOT to release storm water run-off from its catch basin onto the undeveloped property of Holmes Dreher, which later came to be the Plaintiff's property. There was no specific evidence on whether or not the easement was adverse or under a claim of right of SCDOT. However, the existence of an easement to discharge storm water onto the property is not in dispute. The encroachment permit sought to change the location of the outflow in order to develop the shopping center, which in effect limited the easement, which once allowed the unfettered flow of water onto the Dreher property. The permit changed not only the location of the easement but also established an agreement between the SCDOT and Dayton

& Associates as to future maintenance costs of the easement. In *Hayes*, there was no agreement as to the maintenance and repair costs of the easement, since it was an implied easement of necessity. Here, prior to the encroachment permit applied for by the predecessor of the Plaintiff, Dayton & Associates, there was no agreement between SCDOT and Dayton & Associates to govern future costs of the easement.

According to the testimony at trial, Dayton & Associates requested the encroachment permit to redirect the location of the flow of the water from the SCDOT pipe in order to develop Westside shopping center. SCDOT and Dayton & Associates entered into the encroachment permit on August 26, 1987. The "Application for Encroachment Permit," dated July 15, 1987 requested permission from SCDOT to construct driveway entrances onto Dreher Road and driveway entrances along U.S. Hwy. No. 1. The application also requested "permission to connect onto an existing catch basin along U.S. Hwy. No. 1 with a new 48" R.C.P. [reinforced concrete pipe]. The 98 C.F.S.[cubic feet per second] from the existing 48" R.C.P. [reinforced concrete pipe] will be carried around the shopping center site in a 48" R.C.P. [reinforced concrete pipe] to the detention pond." Plaintiff's Exh. 1. In August, SCDOT authorized Dayton & Associates to construct the driveways and connect to the SCDOT catch basin. Plaintiff's Exh. 1. The Encroachment Permit was signed by a representative of Dayton & Associates on August 26, 1987 and above such signature, the following statement was provided:

I (We) do hereby agree, and bind my (our) heirs, successors and assigns, to assume any and all liability this Department might otherwise have in connection with accidents or injuries to persons, or damage to property, including the highway, that may be caused by the construction, maintenance, use moving or removing of the encroachment contemplated herein and agree to indemnify this Department for any liability incurred or injury or damage sustained by reason of the past, present, or future existence of said encroachment.

Plaintiff's Exh. 1. Although Matthew Meshekoff testified he was unaware of this Encroachment

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Permit and the agreement therein, there was evidence presented at trial that would show that he should have or could have known of the permit, and therefore is bound by its terms. The permit was not recorded in the Lexington County Register of Deeds; however, when the property was acquired by the Meshekoff family in 1990, Weldon Wyatt, a prior owner of the property was still involved in the management of the property when owned by the Meshekoffs. Furthermore, South Carolina law requires a permit for any driveway connecting private property to state-maintained highways; therefore, the Meshekoffs should be aware of this requirement in light of their property's connection to Hwy # 1, a state-maintained highway. Additionally, evidence was submitted that Weldon Wyatt was a principal in Dayton & Associates and West Side Associates. Dayton & Associates developed Westside Plaza and conveyed the property to West Side Associates in 1988. Then, West Side Associates conveyed the property to Edward and Helen Meshekoff in 1990; however, Mr. Wyatt owned Wyatt Development Company, which included a property management division and would manage the shopping center for the Meshekoffs. Also, until 2008, evidence was submitted that Weldon Wyatt was involved or owned both companies which managed the Westside property. Therefore, since Mr. Wyatt was involved in the ownership or management of the property since it was owned by Dayton & Associates, this connection to the Plaintiff's predecessors in title is also evidence that Plaintiff should have known of the encroachment permit. Lastly, the mere existence of the connection of the catch basin to the Westside Shopping Center's storm water drainage system would put Mr. Meshekoff on notice that SCDOT had some right to use the system and therefore could be considered to have constructive notice of the existence of some permit or easement. (See *Adams v. Willis*, 225 S.C. 518, 83 S.E.2d 171 (1954), "[a] purchaser of real property is charged with actual notice of conditions on the property.") Therefore, Mr. Meshekoff's lack of knowledge of the permit does

not serve to render the permit inapplicable to the parties in this case. The permit then governs the maintenance of the easement to discharge storm water on the Westside property.

The Plaintiff asserts that once an easement is established, the Plaintiff must then only show a method by which the Court can equitably apportion costs of maintenance. However, the recovery sought by the Plaintiff and the method by which the Plaintiff determined percentages of responsibility of each Defendant is not a proper basis for this Court to award maintenance costs, if this Court found that the Plaintiff was owed such costs. Line "E" is the connection between the SCDOT catch basin and the storm water drainage system at Westside. The Plaintiff established at trial the cost of repairing Line "E" and the detention pond, which were in need of repair after certain failures in the system. The total amount of cost for repairs was shown to be \$325,240.39. The Plaintiff is seeking approximately 80% of those costs, since it claims to contribute 18.52% of the storm water flowing through Line "E." The Plaintiff provides alternate theories of recovery based on the apportioned percentage of storm water produced by SCDOT and Danwood, LLC. The Plaintiff seeks recovery from SCDOT only for all uncollected costs, or, alternatively seeks 22.62% of the costs from Danwood, LLC and the remaining amount from SCDOT. The percentages attributed to each defendant were determined by the proportion of usage of the system by each of the landowners and by SCDOT.⁴ Unlike *Hayes*, where the amount each landowner used the road was easily determined for purposes of dividing cost of the

⁴ Michael Lambrecht, a civil engineer, testified at trial that his calculations were based on peak flow rates based on a ten-year storm event, and that such calculations were considered a standard engineering benchmark for flow rate calculations. Lambrecht assigned peak flow rates to each property. SCDOT's storm water flow rate was deemed to be 12.0 cubic feet per second and Danwood, LLC's storm water flow rate was deemed to be 24.30 cubic feet per second. Using these numbers, Lambrecht then calculated the pro rata contributions of storm water from the Defendants entering the SCDOT catch basin and then flowing into the Westside storm water drainage system. The contributions from each defendant was determined to be each property's percentage of use and the basis for the amount of the costs each Defendant was alleged to be responsible for paying to the Plaintiff. Lambrecht determined that 81.48% of the storm water flowing into Line "E" of the Westside storm water drainage system, was from water flowing from the DOT catch basin. Additionally, he calculated that 22.62% of storm water entering the catch basin and flowing into Line "E" came from Danwood's property.

road's maintenance, this method to apportion costs among the Defendants is speculative. Many other factors must be taken into consideration in addition to the rate of flow from each defendant into the Westside drainage system. No evidence was submitted at trial that connected the rate of flow from the storm water attributed to SCDOT and the storm water attributed to Danwood, LLC, and the problems that caused the failure of Line "E" and the costs to Westside that are the subject of this lawsuit. Therefore, even if this court found that the Defendants owed costs to the Plaintiff based on a duty to maintain the easement; this system of allocating costs is not a reasonable extension of the *Hayes*' equitable theory of recovery.

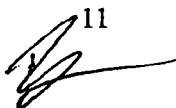
As stated earlier, no evidence at trial showed how the rate of flow from each property caused the costs to the drainage system. It remains unclear what the causes of the problem to Westside's drainage system were. This causes too much speculation as to whether the problem was a defect in installation, negligence in the maintenance of the system, or some other problem not yet identified. Despite the testimony from Michael Lambrecht as to the rate of flow from each defendant, it is uncertain whether the rate of flow actually caused the failure of the system. According to the Encroachment Permit, Dayton & Associates agreed to use reinforced concrete pipe, but actually installed corrugated metal pipes. At trial, several witnesses testified that the installation of the corrugated metal pipes could have caused the problems that led to the repairs that are the subject of this lawsuit. Testimony at trial from Tim Richardson stated that corrugated metal pipe is usually considered a lesser alternative.⁵ Richardson testified that Line "E" had a joint failure, which could possibly be caused by the pipe not being properly sealed to the junction box. Richardson testified that the corrugated metal pipe was not embedded in stone which was necessary to give that type of pipe the similar structure of the reinforced concrete pipe that makes

⁵ Clarence Blakely from SCDOT testified that SCDOT does not necessarily require reinforced concrete pipe in every instance, and that the use of corrugated metal pipe is generally allowed if the landowner requests it.



the reinforced concrete superior to the corrugated metal. Additionally, Richardson sought the help of Michael Lambrecht to determine the cause of the failures at the Westside system. Exh. 33. Lambrecht stated that the cause was a joint failure, yet did not state that the amount of water flowing through the system was excessive and caused the joint failure. Nor did Lambrecht state that if the water from SCDOT and the other upstream landowners had been treated or slowed down in any way, that it would have prevented the failure to Line "E," as the Plaintiff alleged in its pleadings and at trial. Further testimony was elicited that there could be several reasons that would lead to this failure in addition to the type of pipe used and the fact it was not embedded in stone. Therefore, the only evidence presented before the court established only the failure of the system and did not connect that failure to the use of the easement to discharge storm water from the catch basin into the Westside drainage system.

Defendant SCDOT also asserts the application of the Common Enemy Rule as a defense to the Plaintiff's claim. The Common Enemy Rule provides that a landowner can treat surface water, waters naturally flowing across land, as a common enemy and dispose of it as the landowner sees fit. *Lucas v. Rawl Family Ltd. Partnership*, 359 S.C. 505, 509, 598 S.E.2d 712, 714 (2004). The two exceptions to the rule are first, "an individual may not obstruct or alter the flow of water to create a nuisance per se," and second, (except by contractual or prescriptive right, an upper landowner may not, by means of a ditch, impoundment or other artificial structure, collect surface water on his own land and cast it in a concentrated form upon lower adjoining land." *Id.* (citing *Johnson v. Phillips*, 315 S.C. 407, 414, 433 S.E.2d 895, 899 (Ct.App.1993); *Baltzeger v. Carolina Midland Ry. Co.*, 54 S.C. 242, 247, 32 S.E.358, 359-60 (1899)). Whether or not the common enemy rule applies in this case can be answered by the fact that the Plaintiff's claim is solely in equity. In a case that involved the interpretation of a contract

11


and the common enemy rule, the Supreme Court of South Carolina has stated:

The common enemy rule does not bear on this case as it currently stands before this Court. While its theories are instructive, the rule itself need not be analyzed to determine the instant issue. The common enemy rule does not define what surface water is, but rather prescribes how landowners may deal with the surface water on their lands. See William T. Toal, *Surface Water in South Carolina*, 23 S.C. L.Rev. 82, 88 (1971) (explaining surface water law in South Carolina). The common enemy rule addresses potential *tort* liability for obstructing and diverting the flow of surface water.

M and M Corp. of South Carolina v. Auto-Owners Ins. Co., 390 S.C. 255, 260, 701 S.E.2d 33, 35 n.1 (2010) (emphasis added). Therefore, since the Plaintiff's claim rests only in equity, the common enemy rule will not determine whether or not the Plaintiff is entitled to equitable recovery. However, as the Supreme Court of South Carolina stated, the rule's theories are instructive. In fact, the Plaintiff asserts that the Defendant SCDOT was discharging water without easement onto the property of the Plaintiff and its predecessors in title, and was artificially diverting the water which brings it under an exception to the common enemy rule. However, for purposes of establishing responsibility of SCDOT on the theory of equitable apportionment of maintenance costs, Plaintiff seeks to prove that the Defendant did have an easement which allowed it to connect to the Plaintiff's storm water drainage system. Therefore, since the Plaintiff agrees, and actually sought to prove, the right by easement or prescription of SCDOT to connect to the Westside storm water drainage system, they cannot later submit to this court that for purposes of application of the common enemy rule, that there was no right to divert the surface water off of Hwy # 1 into the system. If the common enemy rule had applied, and in consideration of fairness under equity, SCDOT was in compliance with the rule in that it discharged the surface water into the Westside system pursuant to an easement giving them a right to do so.

In conclusion, the Plaintiff dismissed all legal claims originally in its complaint and

pursued a claim in equity against the Defendants. This Court declines to extend the equitable theory of recovery in *Hayes* to the facts of this case, and finds that based on the evidence and testimony submitted at trial, equity does not require the Defendants to pay costs to the Plaintiff for repairs to the Plaintiff's storm water drainage system.

II. Alternative Theory of Recovery Against Danwood, LLC As Third-Party Beneficiary

As to the Plaintiff's theory of recovery against Danwood, LLC, the Plaintiff must establish that Danwood is a third-party beneficiary of the encroachment permit given to Westside by SCDOT. However, the Plaintiff's Complaint only refers to the cause of action as to all defendants for equitable apportionment of maintenance costs based on the fact that the defendants benefit from the use of the drainage system. Recovery is requested based on the pro rata contributions of the Defendants. The Complaint does not seek any recovery based on Danwood, LLC's status as a third-party beneficiary to the encroachment permit between SCDOT and the predecessor of the Plaintiff, Dayton & Associates. It is well known that "a judgment or decree, whether in law or equity, must accord with and be warranted by the pleadings and proof of the party in whose favor it is rendered." *Wingard v. Lee*, 287 S.C. 57, 336 S.E.2d 498 (Ct.App. 1985) (citing *Parker Peanut Co. v. Felder*, 207 S.C. 63, 34 S.E.2d 488 (1945)). Therefore, since the pleadings of the Plaintiff do not claim any basis of recovery against Danwood as a third-party beneficiary, such a claim is null and void. Notwithstanding the fact that the claim does not conform to the pleadings of the Plaintiff, there was no evidence or testimony submitted at trial supporting the claim that Danwood, LLC was a third-party beneficiary of the encroachment permit. The status of third-party beneficiary arises when contracting parties intend to directly benefit a third-party. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485,

488 (2005). At trial, no evidence was presented to show that the benefit to Danwood, LLC was intended by Dayton & Associates and SCDOT at the time Dayton applied for the encroachment permit.⁶ Therefore, Danwood, LLC is not required in equity to pay any maintenance or repair costs, as sought by the Plaintiff, for the repairs done to the Westside storm water drainage system.

III. Equitable Defenses

This Court denies the Plaintiff's claim for equitable apportionment of maintenance costs against the remaining defendants SCDOT and Danwood, LLC. However, if this Court found that the Plaintiff is entitled to equitable recovery under the theory it asserted, the Defendants pled several defenses.

A. Case in Law not Equity

As stated earlier, "a judgment or decree, whether in law or equity, must accord with and be warranted by the pleadings and proof of the party in whose favor it is rendered." *Wingard v. Lee*, 287 S.C. 57, 336 S.E.2d 498 (Ct.App. 1985) (citing *Parker Peanut Co. v. Felder*, 207 S.C. 63, 34 S.E.2d 488 (1945)). This Court only has before it the Plaintiff's claim based in equity under the theory established in *Hayes*. This order must conform to the pleadings of the Plaintiff and it is not for the consideration of this Court whether the Plaintiff's claim is more appropriate for law and not equity. Whether or not the Plaintiff's claim is time-barred under the S.C. Tort Claims Act is not before this Court.

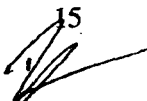
B. Laches

The defendants assert the equitable defense of laches. Laches bars any recovery to the

⁶ Plaintiff argued that since the Encroachment Permit referred to the 98 c.f.s.(cubic feet per second) capacity, which was more capacity than what SCDOT needed to drain its surface water, that the permit shows that must have been for the benefit of the upstream landowners. This court considered Plaintiff's argument and finds that it does not prove that SCDOT and Dayton & Associates intended to benefit Danwood, LLC, for purposes of establishing Danwood as a third-party beneficiary.

plaintiff and “arises upon the failure to assert a known right.” *Emery v. Smith*, 261 S.C. 207, 215, 603 S.E.2d 598 602 (Ct.App.2004). To establish laches, a party must show (1) unreasonable delay and (2) prejudice. *Terry v. Lee*, 314 S.C. 420, 424, 445 S.E.2d 435, 437 (1994). The complaint against SCDOT and Danwood, LLC, along with the prior defendants, was first filed on June 9, 2008. There was evidence submitted at trial that problems arose in July of 2005 at the shopping center and Tim Richardson was contacted to correct those problems. Richardson found that there was a cave-in at Line E. Richardson corrected the problem at Line E, shortly after it was detected, by replacing the corrugated metal pipe with reinforced concrete pipe. In 2006, Michael Lambrecht was contacted to determine the cause of problems due to other sinkholes that had developed at the shopping center. Additionally in 2008, additional problems arose at Line E to an area that was not corrected during 2005.

However, the Plaintiff’s theory of recovery is based in equity for an allocation of costs of repairing and maintaining the storm water line and detention pond that was shown to be used by the Defendants. Although the Plaintiff seeks costs of only the repairs to Line E and the detention pond and not costs of the maintenance of the entire drainage system, the theory of recovery is based on the Defendants’ use of the drainage system and since they received a benefit from that use, they should in equity pay maintenance costs. Therefore, in consideration of whether or not there was an unreasonable delay and prejudice resulting to the Defendants, this Court views the proper time period as from the time the Plaintiff knew or should have known that the Defendants were utilizing the storm water drainage system, not when the Plaintiff knew or should have known of the problems to the system. The Encroachment Permit was issued by SCDOT on August 27, 1987. The Meshekoff family purchased West Side Plaza in 1990 from one of Weldon Wyatt’s companies. The Plaintiff acquired the shopping center in 1997. However, between 1990

15


and 1997, the shopping center was transferred between entities owned by the Meshekoffs. Even in 1997 when the Plaintiff acquired the shopping center, the Plaintiff would have actual notice and constructive notice, or a duty to inquire, of the conditions on his property. See *Adams v. Willis*, 225 S.C. 518, 83 S.E.2d 171 (1954). It is possible that the Plaintiff had knowledge of the connection of its storm water drainage system to the SCDOT catch basin as early as 1990, when the property came under the Meshekoff family ownership. Therefore, the Plaintiff waited approximately eleven (11) years to assert a claim against the Defendants for maintenance costs of their system. This Court finds that such a length of time constitutes an unreasonable delay. The problems arose in the system and the costs to fix such problems are the costs sought against the defendants in this action. It is clear that prejudice resulted to the Defendants by the delay of the Plaintiff in asserting its claim that the Defendants must pay their part of the maintenance of the Westside drainage system, as is shown by the extensive problems that arose with the system and the amount of costs sought against the Defendants due to those problems. Accordingly, the factors required for laches have been established by the Defendants.

If this Court had found that the Plaintiff was entitled to recovery in equity based upon its theory of equitable apportionment of maintenance costs, the defense of laches would then bar any recovery from the plaintiff in this action.

C. Unclean Hands

The Defendants assert the equitable defense of unclean hands as a bar to recovery of the Plaintiff. The doctrine of unclean hands prevents a plaintiff from recovering in equity "if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *Ingram v. Kasey's Associates*, 340 S.C. 98, 107, 531 S.E.2d 287, 292 n.2 (2000) (citing *First Union Nat. Bank of South Carolina v. Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct.App.1998)). The

Defendants assert that the Plaintiff's predecessor in title, Dayton & Associates, used a lesser quality pipe instead of the pipe it stated it would use in the Encroachment Permit, and also improperly installed the pipes. Despite the evidence submitted as to Dayton & Associate's failure to properly install the pipes and failure to install reinforced metal pipes, such failures by the Plaintiff's predecessor in title will not be imputed to the Plaintiff for purposes of asserting the doctrine of unclean hands. There was no evidence that the Plaintiff behaved unfairly or in bad faith; therefore, this Court does not find that the doctrine of unclean hands would apply to bar recovery of the Plaintiff.

D. Equitable Estoppel

Additionally, the doctrine of equitable estoppel has been asserted by the Defendants.

The Defendants must establish the following elements of equitable estoppel:

[A]s to the party estopped, (1) conduct by the party estopped amounts to a false representation or concealment of material facts; (2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts. As to the party claiming the estoppel, the elements include: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; and (2) reliance upon the conduct of the party estopped.

Ingram, 340 S.C. at 107, 531 S.E.2d at 292, n.2 (citing *Maier v. Tietex Corp.*, 331 S.C. 371, 500 S.E.2d 204 (Ct.App. 1998)). There was no evidence presented that the Plaintiff made a false representation or concealed a material fact while having knowledge of the true facts. Although the Defendant claims that the Plaintiff's predecessor in title failed to install the storm water pipes properly and did not adhere to the Encroachment Permit term of using reinforced metal pipe, this conduct will not be imputed to the Plaintiff for purpose of application of this equitable doctrine. Therefore, if this Court had found that the Plaintiff was entitled to recovery, the defense of equitable estoppel does not apply to bar the Plaintiff from recovery on that basis.

IV. Conclusion

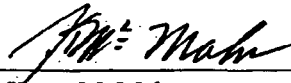
In conclusion, a court of equity is to consider general principles of equity and must “balance the equities” between the parties in determining whether recovery should be granted. *Foreman v. Foreman*, 280 S.C. 461, 464-465, 313 S.E.2d 312, 314 (Ct.App. 1984). “In applying the doctrines of equity, the equities of both sides are to be considered, and each case must be decided on its own particular facts.” *Carroll v. Page*, 264 S.C. 345, 349, 215 S.E.2d 203, 205 (1975) (citing 30 C.J.S. *Equity* § 89, p. 976). “Equity looks at the entire matter and grants or denies relief as good conscience dictates. In the exercise of a sound discretion, equity may refuse relief because of the difficulty of enforcing its decree.” 27A Am.Jur.2d *Equity* § 74 (citing *In re Estate of Moukalled*, 269 Mich. App. 708, 714 N.W.2d 400, 59 U.C.C. Rep. Serv. 2d 301 (2006); *Queens Plaza Amusements v. Queens Bridge Realty Corp.*, 265 A.D. 1057, 39 N.Y.S.2d 463 (2d Dep’t 1943)). Upon consideration of the pleadings, the evidence presented at trial, and a general consideration of the principles of equity, this Court finds that equity favors the Defendants and the Plaintiff is not entitled to recovery in equity based on the facts and circumstances presented in this case.

IT IS THEREFORE ORDERED that this court declines to grant equitable recovery to the Plaintiff Westside Meshckoff Family Limited Partnership.

AND IT IS SO ORDERED.



18



R. Knox McMahon
Presiding Judge,
Eleventh Judicial Circuit

Lexington, South Carolina
September 9th, 2011

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

COPY
IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Westside Meshekoff Family Limited
Partnership,)

CIVIL ACTION NO.: 2008-CP-32-04362

Plaintiff,)

vs.)

ORDER

South Carolina Department of)
Transportation; DW)
Properties, LLC;)
Danwood, LLC; Robert W. Denton;)
and Alpine Of SC, Inc.,)

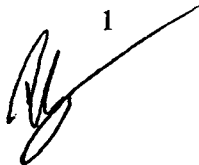
Defendants.)

FILED
2011 SEP 12 P 2:39
BETH A. CARRIGS
CLERK OF COURT
LEXINGTON SC

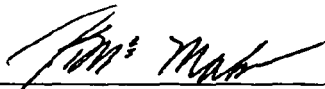
This matter came before the Court through the Defendant Danwood, LLC on a Motion under Rule 59(e) and Rule 60(a), SCRCP and through the Plaintiff Westside Meshekoff Family Limited Partnership on a Motion under Rule 59(e), SCRCP for an order revising, altering, or amending the Judgment and Order entered on June 14, 2011. Rule 59(e) allows the trial court to reconsider any previously raised and decided issue encompassed in the judgment. Rule 60(a) permits the trial court to correct clerical errors in judgments, orders, or other parts of the record. *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1993).

As to Defendant Danwood's Rule 60(a) and Rule 59(e) Motion, the motion is hereby granted as to paragraphs one and three. Defendant Danwood's motion is hereby denied as to paragraphs two and four.

As to Plaintiff Westside's Rule 59(e) Motion, the motion is hereby granted as to paragraph V.27. Plaintiff Westside's motion is hereby denied as to all other paragraphs.

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AND IT IS SO ORDERED.



R. Knox McMahon
Presiding Judge,
Eleventh Judicial Circuit

Lexington, South Carolina
September 27, 2011

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Westside Meshekoff Family Limited
Partnership,

Plaintiff,

v.

South Carolina Department of
Transportation, APAM, Inc.,
Kimbrell's Investment Company,
Inc., RI CS2, LLC, DW Properties,
LLC, Danwood, LLC, Boom, Inc.,
Robert W. Denton, and Alpine of
S.C., Inc.,

Defendants.

)
) IN THE COURT OF COMMON PLEAS
)

) Case No.: 2008-CP-40-
)
)

COMPLAINT

2008 JUN -9 AM 10:47
BARBARA A. SCOTT
C.C.C. & G.S.

Now comes the Plaintiff, Westside Meshekoff Family Limited Partnership (hereafter referred to as "Westside"), who, by and through the undersigned counsel, does allege the following:

PARTIES AND JURISDICTION

1. Westside Meshekoff Family Limited Partnership (hereafter "Westside") is a Delaware limited partnership which owns the Westside Plaza Shopping Center located on U.S. Highway 1 in West Columbia, South Carolina (hereafter referred to as "the Property").
2. The South Carolina Department of Transportation (hereafter "SCDOT") is a public body of the State of South Carolina which maintains its headquarters in Richland County, South Carolina. SCDOT is also the owner of the right of way containing U.S. Highway 1 which runs adjacent to the Property.

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3. APAM, Inc. is a South Carolina corporation which maintains its principal office in Richland County, South Carolina and which is the owner of certain real property located on or near U.S. Highway 1 in West Columbia, South Carolina bearing tax map number 004534-06-001 (hereafter "the APAM parcel").

4. Kimbrell's Investment Company, Inc. is a North Carolina corporation which is the owner of certain real property located on or near U.S. Highway 1 in West Columbia, South Carolina bearing tax map number 004637-03-005 (hereafter "the Kimbrell's Parcel").

5. RI CS2, LLC is a Delaware corporation which is the owner of certain real property located on or near U.S. Highway 1 in West Columbia, South Carolina bearing tax map number 004637-03-006 (hereafter "the RI CS2 parcel").

6. DW Properties, LLC is a South Carolina limited liability company which is the owner of certain real property located on or near U.S. Highway 1 in West Columbia, South Carolina bearing tax map number 004637-03-016 (hereafter the DW Properties parcel").

7. Danwood, LLC is a South Carolina corporation which maintains its principal office in Richland County, South Carolina and which is the owner of certain real property located on or near U.S. Highway 1 in West Columbia, South Carolina bearing tax map number 004637-004-010 (hereafter "the Danwood parcel").

8. Boom, Inc. is a South Carolina corporation which maintains its principal office in Richland County, South Carolina and which is the owner of certain real property located on or near U.S. Highway 1 in West Columbia, South Carolina bearing tax map number 004637-004-011 (hereafter "the Boom parcel").

9. Robert W. Denton is the owner of certain real property located on or near U.S. Highway 1 in West Columbia, South Carolina bearing tax map number 004637-004-012 (hereafter "the Denton parcel").

10. Alpine of S.C., Inc. is the owner of certain real property located on or near U.S. Highway 1 in West Columbia, South Carolina bearing tax map number 004637-004-013 (hereafter "the Alpine parcel").

11. As the owners of real property located within the State of South Carolina, the parties are all subject to the general jurisdiction of this Court and venue is proper in this forum as one or more of the Defendants reside in Richland County, South Carolina.

FACTS

12. Westside purchased the real property containing the Westside Plaza shopping center from Dayton & Associates XVII, the party who constructed the buildings, parking lots and other common areas known as Westside Plaza.

13. Westside currently leases commercial retail space to tenants in the Westside Plaza Shopping Center.

14. On or about August 21, 1987, the SCDOT issued an Encroachment Permit to Dayton & Associates XVII, authorizing Dayton to, among other things, connect a planned 48" storm drainage pipe to an existing storm drainage catch basin along U.S. Highway 1 in order to accept and channel the storm water from this catch basin around the planned construction and to discharge the storm water into the detention pond to be constructed at the rear of the Property. The Encroachment Permit allows a discharge of up to 98 cubic feet per second of storm water into the Westside Plaza storm drainage system.

15. The Encroachment Permit was not recorded in the public record and Westside purchased the Property without notice of the Encroachment Permit.

16. The storm water which is handled and collected in the SCDOT catch basin referenced in the Encroachment Permit currently discharges into the storm drainage system owned by Westside.

17. The improvements constructed on the APAM parcel, the Kimbrell's parcel, The RI CS2 parcel, the DW Properties parcel, the Danwood parcel, the Boom parcel, the Denton parcel, and the Alpine parcel have resulted in storm water runoff from these parcels being discharged, either directly or through the SCDOT storm drainage system serving U.S. Highway 1, into the existing storm water system owned and maintained by Westside. No easements have been recorded providing any of these properties with the right to discharge storm water into the system owned and maintained by Westside.

18. Westside is informed and believes that the storm water flow rates that enter the Westside storm drainage system from the other properties identified in Paragraphs 16 and 17 are as follows:

a.	U.S. 1 Right of Way:	12.0 Cubic Feet Per Second
b.	APAM parcel:	12.0 Cubic Feet Per Second
c.	Kimbrell's parcel:	12.6 Cubic Feet Per Second
d.	RI CS2 parcel:	2.60 Cubic Feet Per Second
e.	DW Properties parcel:	5.20 Cubic Feet Per Second
f.	Danwood parcel:	24.30 Cubic Feet Per Second
g.	Boom parcel:	3.70 Cubic Feet Per Second
h.	Denton parcel:	1.60 Cubic Feet Per Second
i.	Alpine parcel:	8.90 Cubic Feet Per Second

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19. The storm water flow from that portion of the Westside Property which enters the same storm drain line which handles the above flows is 19.9 Cubic Feet Per Second.

20. Westside has incurred, and will continue to incur, substantial upkeep and maintenance costs associated with that part of its storm drainage system which receives and handles the storm water from U.S. Highway 1 and the properties identified in Paragraph 17. Westside is currently in the process of replacing these portions of its storm drainage system at a cost which is expected to exceed \$400,000.00. Additionally, Westside has had to replace other portions of its storm drainage system at great expense, which, upon, information and belief, may have been damaged or adversely impacted by the use of the Westside system by the parties and properties identified in Paragraphs 16 and 17 above.

21. Certain of the parcels identified in Paragraph 17 above are also discharging the following harmful elements into the storm water system owned and maintained by Westside:

- a. Excessive silt;
- b. Motor oil;
- c. Harmful detergents and chemicals;
- d. Harmful pollutants; and
- e. Other trash and debris.

22. By and through the existing storm drainage system serving U.S. Highway 1, the SCDOT is likewise discharging the following harmful elements into the storm water system owned and maintained by Westside:

- a. Excessive silt;
- b. Motor oil;

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- c. Harmful detergents and chemicals;
- d. Harmful pollutants, and
- e. Other trash and debris.

23. By virtue of the above stated unauthorized and unlawful discharge of said silt, oil, detergents, chemicals, pollutants, trash and debris into the Westside Plaza storm drainage system, the Westside storm drainage system has been damaged and irreparably harmed.

FOR A FIRST CAUSE OF ACTION AS TO ALL DEFENDANTS
(Equitable Apportionment of Maintenance Costs of Westside Storm Water System)

24. The allegations of Paragraphs 1 through 23 above are incorporated and re-alleged herein.

25. The past and continued use of the Westside Plaza storm drainage system by the properties identified herein gives rise to an obligation and duty on the part of the owners of such properties to equitably contribute to the maintenance, repair and upkeep of the Westside Plaza storm drainage system.

26. Westside is entitled to equitable relief in the form of a financial contribution from each of the properties that benefit from the use of the Westside storm drainage system. Such contribution should be equitably apportioned in accordance with the percentage of use of the system used by the various properties; which, using the flow rates identified in Paragraph 18, would result in the following pro rata contributions from the Defendants toward costs of maintenance, repair and upkeep:

- a. SCDOT: 11.67%
- b. APAM: 11.67%
- c. Kimbrell's: 12.25%

- d. RI CS2 parcel: 2.52%
- e. DW Properties parcel: 5.05%
- f. Danwood parcel: 23.63%
- g. Boom parcel: 3.59%
- h. Denton parcel: 1.55%
- i. Alpine parcel: 8.65%

27. Alternatively, by virtue of its apparent agreement to accept and handle the storm water runoff from the above properties, SCDOT is responsible for an equitable contribution toward the costs of maintenance, repair and upkeep of the relevant portions of Westside storm drainage system which serves the above properties in the sum total of the above percentages.

FOR A SECOND CAUSE OF ACTION AS TO ALL DEFENDANTS
(Trespass)

28. The allegations of Paragraphs 1 through 23 above are incorporated and re-alleged herein.

29. Storm water from the properties owned or controlled by the Defendants is channeled and discharged in a concentrated form onto Westside's property.

30. This discharge of storm water by the Defendants was done with the actual or constructive knowledge that such storm water would be channeled to and discharged upon Westside's property.

31. Westside has not granted permission, by easement or otherwise, for any of the Defendants to discharge storm water into the Westside system.

32. As a result of this unlawful trespass, Westside is entitled to recover actual damages against the Defendants in an amount to be established at trial.

FOR A THIRD CAUSE OF ACTION AS TO ALL DEFENDANTS
(Injunctive Relief)

33. The allegations of Paragraphs 1 through 23 and 29 through 31 above are incorporated and re-alleged herein.

34. Based on the unauthorized use and discharge of storm water into Westside's existing storm drainage system, the Defendants should be permanently enjoined from discharging any storm water into Westside's system.

35. Alternatively, based upon the unlawful and improper discharge of silt, pollutants, trash and other contaminants into Westside's existing storm drainage system, the Defendants should be permanently enjoined from discharging anything into Westside's existing storm drainage system which is not permitted by all applicable federal, state, and/or local statutes, regulations, ordinances, codes, standards and other like measures.

FOR A FOURTH CAUSE OF ACTION AS TO ALL DEFENDANTS
(Negligence *per se*)

36. The allegations of Paragraphs 1 through 23 are incorporated and re-alleged herein.

37. The Defendants owed Westside a duty to exercise proper care and caution in the treatment and discharge of storm water run-off from their property.

38. The Defendants have breached their duty to Westside in the following particulars, among others:

a. By failing to prevent excessive silt from entering Westside's storm drainage system;

b. By failing to prevent motor oil from entering Westside's storm drainage system;

c. By failing to prevent harmful detergents and chemicals from entering Westside's storm drainage system;

d. By failing to prevent harmful pollutants from entering Westside's storm drainage system;

e. By failing to prevent trash and other debris from entering Westside's storm drainage system; and

f. By failing to handle, treat and discharge storm water run-off from their respective properties as required by federal, state and local statutes, regulations, ordinances, codes, standards and the like.

39. As a direct and proximate cause of the negligence of the Defendants, Westside has been harmed and is entitled to recover damages from the Defendants in an amount to be established at trial.

40. Upon information and belief, certain Defendants have been willful, wanton and reckless with respect to allowing the above described harmful elements to enter the Westside storm drainage system. With respect to such Defendants, Westside is entitled to an award of punitive damages.

WHEREFORE, having stated its Complaint against these Defendants, Plaintiff prays for the following:

1. An equitable apportionment of the maintenance, repair and upkeep costs of the Westside Plaza storm drainage system;

2. As alternative relief, actual damages against the Defendants for the unlawful trespass upon Plaintiff's property and actual and punitive damages for their negligence in discharging harmful pollutants, contaminants and other improper matters into Plaintiff's storm drainage system; and, additionally, a permanent injunction enjoining Defendants from further discharge of such harmful pollutants, contaminants, and other improper matters into Plaintiff's storm drainage system.

3. As further alternative relief, a permanent injunction enjoining the Defendants from discharging storm water onto Plaintiff's property.

Plaintiff further prays that it be awarded the costs of this action, reasonable attorney's fees, interest as may be provided for by law, and such further relief as the Court deems just and proper.

Edwin Russell Jeter by CHM

Edwin Russell Jeter
JETER & WILLIAMS, P.A.
Post Office Box 7425
Columbia, SC 29202
(803) 765-0800

Charles H. McDonald

Charles H. McDonald
ROBINSON, McFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

Counsel for Plaintiff

June 9, 2008

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

FILED

2008 NOV 12 A 9:10

Westside Meshekoff Family Limited)
Partnership,)
Plaintiff,)

Docket No. 2008-CP-32-04362

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

vs.)

The South Carolina Department of)
Transportation, APAM, Inc., Kimbrell's)
Investment Company, Inc., R1 CS2, LLC,)
DW Properties, LLC, Danwood, LLC,)
Boom, Inc., Robert W. Denton, and)
Alpine of S.C., Inc.,)
Defendants.)

ANSWER OF THE DEFENDANT SCDOT

The Defendant South Carolina Department of Transportation (hereinafter referred to as "SCDOT"), answering the Complaint of the Plaintiff, alleges as follows:

FOR A FIRST DEFENSE

1. This Defendant is informed and believes that the Plaintiff's claims against this Defendant are time-barred by the appropriate statute of limitations, and this Defendant does plead the statute of limitations as an affirmative defense and complete bar to recovery.

FOR A SECOND DEFENSE

2. The allegations of Paragraph 1 of the First Defense are reasserted and re-alleged as fully as if set forth verbatim herein, insofar as they are not inconsistent with this Second and affirmative Defense.

3. The Complaint fails to state facts sufficient to constitute a cause of action against this Defendant upon which relief can be granted, and should be dismissed.

*15#1613
RMR*

FOR A THIRD DEFENSE

4. The allegations of Paragraphs 1 through 3 of the First and Second Defenses are reasserted and re-alleged as fully as if set forth verbatim herein, insofar as they are not inconsistent with this Third and affirmative Defense.

5. Each and every allegation of the Complaint against this Defendant not specifically admitted, qualified, nor otherwise explained, is denied.

6. This Defendant admits so much of Paragraph 2 of the Complaint as alleges or infers that this Defendant is an agency of the State of South Carolina, subject to suit under the terms, conditions, and limitations of the South Carolina Tort Claims Act, codified at *S.C. Code Ann.* §§ 15-78-10, through -200 (1986 as amended), and empowered by statute and regulation with authority, duties, and responsibilities set forth by such statute and regulation, relating to public ways within the State of South Carolina, which public ways include, but are not limited to U. S. Highway #1, and this Defendant does crave reference to such statutes and regulation for an accurate enumeration of this Defendant's duties and responsibilities. The remaining allegations of Paragraph 2 of the Complaint are denied.

7. This Defendant admits so much of Paragraph 11 of the Complaint as alleges that jurisdiction of this action is properly before the Court of Common Pleas, but affirmatively alleges that venue—and jurisdiction—are properly before the Court of Common Pleas for the Eleventh Judicial Circuit in the County of Lexington.

8. This Defendant admits, on information and belief, so much of Paragraph 12 of the Complaint as alleges that the Plaintiffs purchased the subject real property from Dayton & Associates XVII on or about June 3, 1988, less than eleven months after Dayton & Associates had *applied for permission* to connect the drainage system to the existing catch basin and

*P#2 of B
RIP*

construct five driveways connecting the parking lot of the subject real property to public ways maintained by this Defendant, and less than ten months after such permission was granted by this Defendant through the issuance of the August 21, 1987 Encroachment Permit, thereby enhancing the value of the subject property.

9. This Defendant admits so much of Paragraph 14 of the Complaint as alleges that, on or about August 21, 1987, the South Carolina Department of Highways and Public Transportation issued an Encroachment Permit to Dayton & Associates XVII, the Plaintiff's predecessor in title, upon the application of Dayton & Associates XVII, authorizing the construction of two drives on road S-32-275, three drives along U.S. Highway #1, and connection of a then-existing catch basin along U. S. Highway #1 with a new 48" Reinforced Concrete Pipe as shown on the July 15, 1987 Dayton & Associates Application, which application stated that surface water would be "carried around the shopping center site in a 48" R.C.P. to the detention pond." The remaining allegations of Paragraph 14 are denied, and this Defendant craves reference to the Encroachment Permit itself, a copy of which is attached hereto as Appendix "A" and incorporated by reference, and the July 15, 1987 Application for Encroachment Permit submitted by the Plaintiff's predecessor in title, a copy of which is attached hereto as Appendix "B" and incorporated by reference, for an accurate enumeration of the terms and conditions of the Application and the Permit.

10. This Defendant admits so much of Paragraph 15 of the Complaint as alleges that the August 21, 1987 Encroachment Permit was not recorded at the Office of the Register of Mesne Conveyances for the County of Lexington, but denies that the Encroachment Permit was not available to the Plaintiff as a public record, had the Plaintiff been appropriately diligent in researching the property prior to purchasing it. This Defendant affirmatively alleges that the

B#3 of 13
PDP

catch basin at US #1, the subject drainage pipes and system, the detention pond, and the watershed about which the Plaintiff now complains, were all openly and obviously apparent for the Plaintiff to inspect and analyze prior to deciding to purchase the property, had they exercised due diligence prior to the purchase. This Defendant further affirmatively alleges that, with the Dayton & Associates Application and the issuance of the Encroachment Permit having taken place less than eleven and ten months, respectively, prior to the date of Plaintiff's deed, and presumably even less remote in time for the period when the Plaintiff was—or should have been—inquiring into and researching the property, the Plaintiff cannot possibly now maintain that it was not fully aware of the benefits gleaned by the property through the five driveway connections to public ways maintained by this Defendant, in addition to the connection to the subject catch basin granted by the Encroachment Permit.

11. This Defendant admits the allegations of Paragraph 16 of the Complaint, and affirmatively alleges that the discharge of storm water from that catch basin into the Plaintiff's storm drainage system was contemplated by the Plaintiff's predecessor in title Dayton & Associates XVII, when it submitted its July 15, 1987 Application for Encroachment Permit to this Defendant, *seeking permission* to connect to the catch basin and to construct five driveway entrances from the subject property onto public ways maintained by this Defendant, thereby benefitting the Plaintiff's predecessor in title and enhancing the value of the property. This Defendant further alleges that storm water was discharged from that catch basin onto and through the subject property, pursuant to the natural, pre-development slope of the watershed, long before the shopping center and drainage system were ever constructed.

PS #4 of 13
SPR

12. This Defendant lacks sufficient information to admit or deny the allegations of Paragraphs 1, 3, 4, 5, 6, 7, 8, 9, 10, 13, 17, 18, 19, 20, 21, and 22 of the Complaint, and therefore denies the same and demands strict proof thereof.

13. This Defendant denies the allegations of Paragraph 29 and 30 of the Complaint, and affirmatively alleges that the catch basin subject of this action had discharged storm water onto and through the subject property *prior to* development of the Plaintiff's property, which pre-development flow was altered by construction of the shopping center by the Plaintiff's predecessor in title. This Defendant further affirmatively alleges that that the Plaintiff's predecessor in title *applied to this Defendant for permission* to connect to the exiting catch basin, in its July 15, 1987 Application for Encroachment Permit, and further, the Plaintiff and its predecessor in title have benefitted immeasurably from the five driveway connections which were also applied for and granted, connecting the subject property to public ways maintained by this Defendant.

14. This Defendant denies the allegations of Paragraph 31 of the Complaint, and affirmatively alleges that the Plaintiff's predecessor in title *applied to this Defendant for permission* to connect its storm drainage system to the existing catch basin at US Highway #1, in addition to seeking permission to construct five driveways connecting the property subject of this action to public ways maintained by this Defendant, which permission was granted by this Defendant's August 21, 1987 Encroachment Permit.

15. This Defendant denies the allegations of Paragraphs 23, 25, 26, 27, 32, 34, 35, 37, 38, 39, and 40 of the Complaint.

B#5 of 13
Rd

16. The allegations of Paragraphs 24, 28, 33, and 36 of the Complaint require no response, but to the extent that they may be deemed to make allegations against this Defendant, such allegations are denied.

FOR A FOURTH DEFENSE

17. The allegations of Paragraphs 1 through 16 of the First, Second, Third Defenses are reasserted and re-alleged as fully as if set forth verbatim herein, insofar as they are not inconsistent with this Fourth and affirmative Defense.

18. This Defendant is informed and believes that it is not liable for a loss resulting from adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to any charter, provision, ordinance, resolution, rule, regulation or written policies as provided for in *S.C. Code Ann. § 15-78-60(4)*; and this Defendant does plead such immunity as an affirmative defense and complete bar to recovery.

FOR A FIFTH DEFENSE

19. The allegations of Paragraphs 1 through 18 of the First, Second, Third, and Fourth, Defenses are reasserted and re-alleged as fully as if set forth verbatim herein, insofar as they are not inconsistent with this Fifth and affirmative Defense.

20. This Defendant is informed and believes that any act or omission of this Defendant or its agents, while acting within the scope of their employment, complained of by the Plaintiff was a conscious choice made after carefully weighing competing alternatives, and as such, was an exercise of discretion. This Defendant is further informed and believes that it is not liable for a loss resulting from this Defendant's exercise of judgment or discretion pursuant to *S.C. Code Ann. § 15-*

P# 6 of 13
RR

78-60(5); and this Defendant does plead such discretionary immunity as an affirmative defense and complete bar to recovery.

FOR A SIXTH DEFENSE

21. The allegations of Paragraphs 1 through 20 of the First, Second, Third, Fourth, and Fifth Defenses are reasserted and re-alleged as fully as if set forth verbatim herein, insofar as they are not inconsistent with this Sixth and affirmative Defense.

22. This Defendant is informed and believes that it is not liable for a loss resulting from design of highways and public ways; and this Defendant does plead such design immunity as afforded by *S.C. Code Ann.* § 15-78-60(15) as an affirmative defense and complete bar to recovery.

FOR A SEVENTH DEFENSE

23. The allegations of Paragraphs 1 through 22 of the First, Second, Third, Fourth, Fifth, and Sixth Defenses are reasserted and re-alleged as fully as if set forth verbatim herein, insofar as they are not inconsistent with this Seventh and affirmative Defense.

24. This Defendant is informed and believes that it is not liable for a loss arising out of a defect or condition in, on, under, or overhanging a highway, road, street, or other public way caused by a third party unless the defect or condition is not corrected by the particular governmental entity responsible for the maintenance within a reasonable time after actual or constructive notice; and this Defendant does plead such immunity as afforded by *S.C. Code Ann.* § 15-78-60(15) as an affirmative defense and complete bar to recovery.

FOR AN EIGHTH DEFENSE

25. The allegations of Paragraphs 1 through 24 of the First, Second, Third, Fourth, Fifth, Sixth, and Seventh Defenses are reasserted and re-alleged as fully as if set forth verbatim herein, insofar as they are not inconsistent with this Eighth and affirmative Defense.

PS# 7 of 13
RR

26. This Defendant is informed and believes that any injuries or damages complained of by the Plaintiff were proximately caused by acts or omissions of a person other than an agent or employee of this Defendant; and this Defendant is informed and believes it is entitled to immunity for such acts or omissions of persons other than employees of this Defendant, including criminal acts, pursuant to *S.C. Code Ann. § 15-78-60(20)*; and this Defendant does plead such immunity as an affirmative defense and complete bar to recovery.

FOR A NINTH DEFENSE

27. The allegations of Paragraphs 1 through 26 of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Defenses are reasserted and re-alleged as fully as if set forth verbatim herein, insofar as they are not inconsistent with this Ninth and affirmative Defense.

28. With regard to the Plaintiff's Second Cause of Action alleging trespass, this Defendant is informed and believes that the Plaintiff's predecessor in title *applied* to this Defendant *for permission to connect* its storm drainage system to the existing catch basin at US Highway #1, and that, in addition to being granted that permission, along with the concomitant acceptance of storm water flow from that catch basin, the Plaintiff's predecessor in title also received permission to construct and connect five driveways to public ways maintained by this Defendant, which driveways and access to public ways have benefitted the Plaintiff's predecessor in title, and the Plaintiffs, immeasurably, and have enhanced the value of the subject property.

29. This Defendant is informed and believes that, not only did the Plaintiff grant permission to accept the discharge from the existing catch basin onto and through its property, through the July 15, 1987 Application for Encroachment Permit submitted by the Plaintiff's predecessor in title, the Plaintiff and its predecessor in title *sought permission to grant permission* in applying to connect to the catch basin.

FOR A TENTH DEFENSE

30. The allegations of Paragraphs 1 through 29 of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Defenses are reasserted and re-alleged as fully as if set forth verbatim herein, insofar as they are not inconsistent with this Tenth and affirmative Defense.

31. Even if this Defendant, through its agents and employees, was, in any way culpable for the injury and damage claimed by the Plaintiff in its Complaint, which this Defendant denies, any such injury or damage claimed by the Plaintiff was proximately caused by the Plaintiff's own acts or omissions, which were negligent, grossly negligent, willful, wanton, and reckless, in the following particulars:

- A) In failing to properly maintain the drainage system;
- B) In failing to properly maintain and clean out the detention pond;
- C) In failing to notice that its predecessor in title had constructed the storm drainage system with a 48 inch corrugated metal pipe, rather than the 48 inch reinforced concrete pipe that was in the specifications submitted to this Defendant with the July 15, 1987 Application for Encroachment Permit, and correcting that deficiency;
- D) In failing to take appropriate and prudent measures to recognize developing problems with its storm drainage system and correct those problems before the damage reached the point at which serious repairs were required;

All of which acts and/or omissions were negligent, grossly negligent, willful, wanton, and reckless to a greater degree than any negligence on the part of this Defendant, and were the more direct and proximate cause of any injury or damage complained of; and this Defendant does plead such comparatively greater negligence on the part of the Plaintiff as an affirmative defense and complete bar to recovery; or, in the alternative, as a factor for the Court to consider in discounting any recovery the Plaintiff may be awarded.

PS#9 of 13
RR

FOR A ELEVENTH DEFENSE

32. The allegations of Paragraphs 1 through 31 of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Defenses are reasserted and re-alleged as fully as if set forth verbatim herein, insofar as they are not inconsistent with this Eleventh and affirmative Defense.

33. This Defendant is informed and believes that storm water and discharge from the catch basin on US Highway #1 has flowed into the storm water drainage system subject of this action for a period in excess of twenty years, and had emptied into and through the natural, pre-development contours of the real property for years before development of the property, creating an easement either by prescription, or impliedly through the Plaintiff's predecessor in title agreeing to connect storm water drainage system to the then existing catch basin in exchange for five driveways entering the public ways maintained by this Defendant, connecting the subject property to the public thoroughfares over which customers have travelled to patronize the various stores and shops from which the Plaintiffs have collected substantial rental income over the past twenty years.

34. This Defendant does plead such easement by prescription or otherwise as an affirmative defense and complete bar to recovery.

FOR A TWELFTH DEFENSE

35. The allegations of Paragraphs 1 through 34 of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Defenses are reasserted and re-alleged as fully as if set forth verbatim herein, insofar as they are not inconsistent with this Twelfth and affirmative Defense.

36. This Defendant has neither created a nuisance, nor artificially diverted the natural flow of surface water and released it in concentrated form on the Plaintiff's property within the

Page 10 of 12
RR

applicable statute of limitations period, and this Defendant does plead the Common Enemy Rule as an affirmative defense and complete bar to recovery.

FOR A THIRTEENTH DEFENSE

37. The allegations of Paragraphs 1 through 36 of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and Twelfth Defenses are reasserted and re-alleged as fully as if set forth verbatim herein, insofar as they are not inconsistent with this Thirteenth and affirmative Defense.

38. This Defendant is informed and believes that the Plaintiff's predecessor in title applied for an Encroachment Permit, exchanging five driveways connecting to public ways maintained by this Defendant, which have benefitted the Plaintiff over the past twenty years, for a connection of its storm water drainage system to the then-existing catch basin adjacent to US Highway #1, and for twenty years the Plaintiff has reaped the financial benefit of patrons of the Westside Shopping Center shops and stores, from which the Plaintiff has collected rental income, having access to such shops and stores over the public thoroughfares maintained by this Defendant, and through such driveways, without repudiating such exchange, until now.

39. This Defendant is informed and believes that the Plaintiff has long ago waived any objection to accepting storm water drainage into its system from the catch basin adjacent to US Highway #1, and should be estopped from seeking financial contribution from this Defendant for damage claimed to its storm water drainage system; and this Defendant does plead waiver and estoppel as an affirmative defense and complete bar to recovery.

FOR A FOURTEENTH DEFENSE

40. The allegations of Paragraphs 1 through 39 of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, and Thirteenth Defenses are reasserted and

Page 11 of 13
BR

re-alleged as fully as if set forth verbatim herein, insofar as they are not inconsistent with this Fourteenth and affirmative Defense.

41. This Defendant is informed and believes that the injury and damage complained of by the Plaintiff was proximately caused by acts and/or omissions of the Plaintiff's predecessor in title, Dayton & Associates XVII, which acts and/or omissions were negligent, grossly negligent, willful, wanton, and reckless, in failing to properly construct the storm water drainage system, in failing to install 48 inch reinforced concrete pipe in the system, as had been called for in the specifications submitted to this Defendant with Dayton's July 15, 1987 Application for Encroachment Permit, and in failing to properly maintain the system prior to conveying the property to the Plaintiffs; and this Defendant does plead such negligence, gross negligence, willfulness, wantonness, and recklessness on the part of the Plaintiff's predecessor in title as an affirmative defense and complete bar to recovery.

FOR A FIFTEENTH DEFENSE

42. The allegations of Paragraphs 1 through 41 of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, and Fourteenth Defenses are reasserted and re-alleged as fully as if set forth verbatim herein, insofar as they are not inconsistent with this Fifteenth and affirmative Defense.

43. This Defendant is informed and believes that the July 15, 1987 Application for Encroachment Permit submitted by the Plaintiff's predecessor in title, and the August 21, 1987 Encroachment Permit issued by this Defendant, amounted to a contract between the property owner and this Defendant, whereby the property owner agreed to connect its storm water drainage system to the then-existing catch basin adjacent to US Highway #1 and accept storm water drainage and out flow from that catch basin, in consideration for this Defendant permitting the construction and

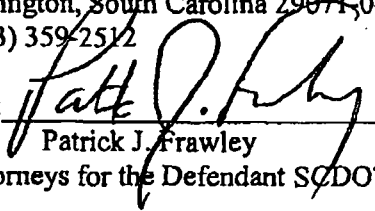
Page 12 of 13
RR

connection of five driveways connecting the parking lot and shopping center on the property to the public thoroughfares maintained by this Defendant, over which thoroughfares the patrons of the shops and stores generating rental income for the property owner would travel. This Defendant is further informed and believes that the contract was supported by valuable consideration.

44. This Defendant is further informed and believes that the Plaintiff, since taking ownership of the property subject of this action in June, 1988, has accepted the financial benefits of the contract, has ratified the contract, and is now bound by the contract. This Defendant does plead such contract as an affirmative defense and complete bar to recovery.

WHEREFORE, The Defendant SCDOT, having fully answered the Complaint of the Plaintiff, prays that the same be dismissed, with costs assessed to the Plaintiff, and for such other and further relief as the Court may deem appropriate.

NICHOLSON, DAVIS, FRAWLEY,
ANDERSON & AYER, LLC
140 East Main Street, P.O. Box 489
Lexington, South Carolina 29071-0489
(803) 359-2512

BY: 

Patrick J. Frawley

Attorneys for the Defendant SCDOT

Lexington, South Carolina

November 11, 2008.

PS #13 of 13
PR

APPENDIX "A"

August 21, 1987

SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS
AND PUBLIC TRANSPORTATION
COLUMBIA
FORM 638 Rev. 11-77

ENCROACHMENT PERMIT

No. D-32-4172

To Dayton & Associates XVII

County Lexington
Route U.S. Hwy. #1
Road S-32-275

In compliance with your request and pursuant to statutory authority and subject to all the provisions, terms, conditions, and restrictions written herein, including General Provisions contained on the other side of this sheet, YOU ARE HEREBY AUTHORIZED AND PERMITTED TO:

Construct two drives on road S-32-275, three drives along U.S. Hwy. #1, and to connect existing catchbasin along U.S. Hwy. #1 with a new 48" RCP as shown on application dated July 15, 1987, a copy of which is attached hereto and made a part of this permit.

SPECIAL PROVISIONS

(In case of conflict between Special Provisions and General Provisions, Special Provisions shall govern.)

There shall be no excavation of soil nearer than two feet of any public utility line or appurtenant facility except with the consent of the owner thereof, or except upon special permission of this Department after an opportunity to be heard is given the owner of such line or appurtenant facility.

All excavated material shall be placed on the side of the trench away from the traveled roadway.

All jacking or boring shall be done in such a way as not to disturb the highway surfacing.

The permittee shall make the installation under the supervision of the Department, shall not block traffic at any time, and shall provide proper warning signs and lights.

Where pavement is cut in the traveled way of this road or route, the work shall be done in clear weather when traffic is lightest. There shall be no trench left open in the traveled way during rush hour traffic or during the hours of darkness.

This permit shall not become operative until a written acceptance of same by permittee shall have been received by this Department and further shall become null and void unless the work contemplated herein shall have been completed prior to February 1, 1988.

SOUTH CAROLINA DEPARTMENT
OF HIGHWAYS AND PUBLIC TRANSPORTATION

By

☐ State Highway Engineer
☒ District Engineer.

I (We) accept the permit herein granted and agree to comply with all the provisions, terms, conditions, and restrictions set out herein. I (We) do hereby agree, and bind my (our) heirs, successors and assigns, to assume any and all liability this Department might otherwise have in connection with accidents or injuries to persons, or damage to property, including the highway, that may be caused by the construction, maintenance, use moving or removing of the encroachment contemplated herein and agree to indemnify this Department for any liability incurred or injury or damage sustained by reason of the past, present, or future existence of said encroachment.

Date

Signed

APPENDIX "B"

SOUTH CAROLINA
DEPARTMENT OF HIGHWAYS
AND PUBLIC TRANSPORTATION
COLUMBIA
FORM 742 (REV. 1-78)

Application for Encroachment Permit

Date 7/15/87

Name of Applicant:
Dayton & Associates XVII
Post Office Box 1519
Aiken, South Carolina 29802

County Lexington
Route U.S. Hwy. No. 1
Road S-32-275

Gray Engineering Consultants, Inc.; Fran Creel - 803-297-3027

The undersigned applicant hereby applies to the South Carolina Department of Highways and Public Transportation for permit for encroachment on State Highway Right-of-Way as shown by sketch plan below.

SKETCH PLAN

Applicant requests permission to construct two driveway entrances onto Dreher Road S-32-275, as shown on the attached sketch. The entrances will serve a new 195,972 S.F. shopping center.

Applicant requests permission to construct three driveway entrances along U.S. Hwy. No. 1 as shown on the attached sketch. These entrances will also serve the shopping center.

Applicant requests permission to connect onto an existing catch basin along U.S. Hwy. No. 1 with a new 48" R.C.P. The 98 C.F.S. from the existing 48" R.C.P. will be carried around the shopping center site in a 48" R.C.P. to the detention pond.

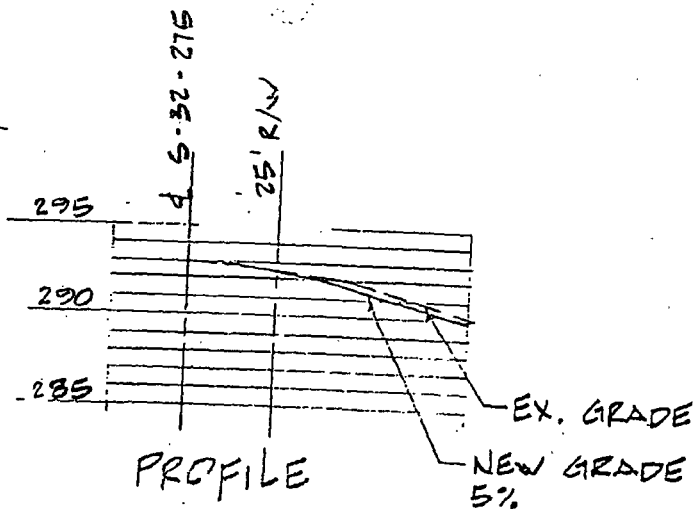
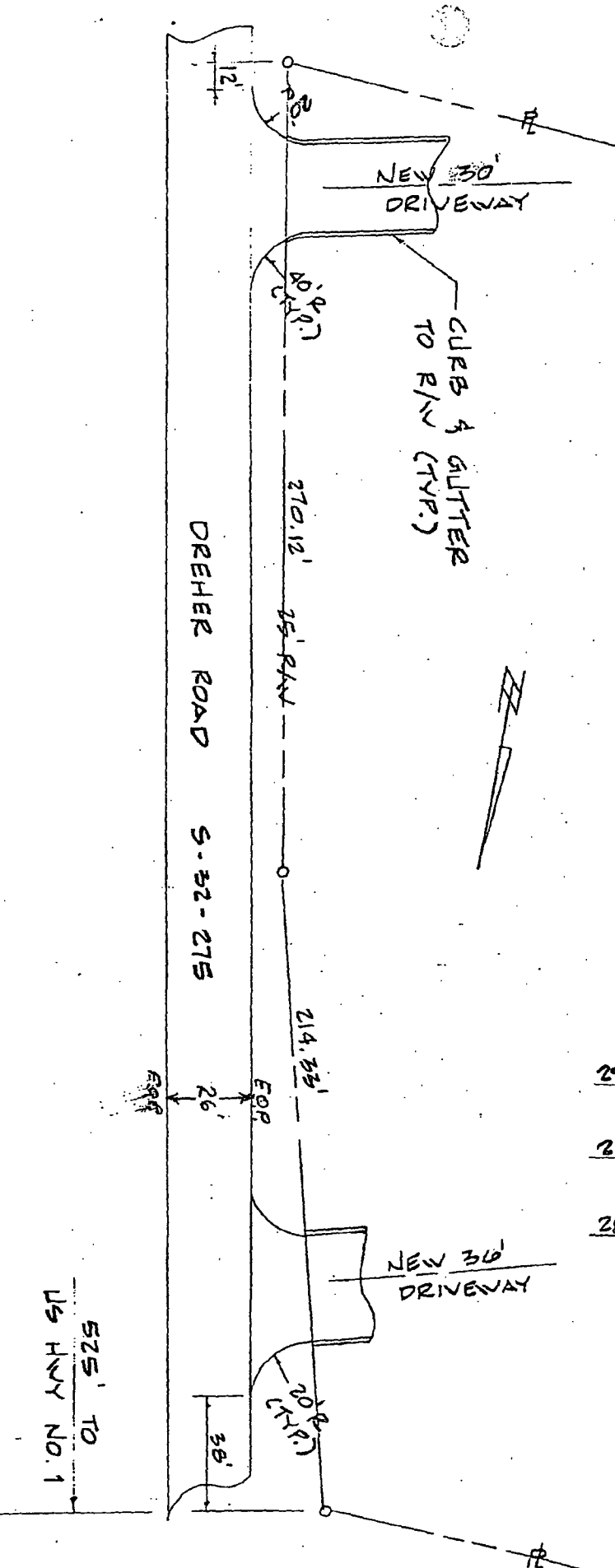
~~The~~ permittee shall be responsible at any time in the future for any and all damages to Hwy. facilities that occurs as a direct result of this installation.

The Permittee shall be responsible for maintaining proper erosion control during and after construction for a period of 1 year.

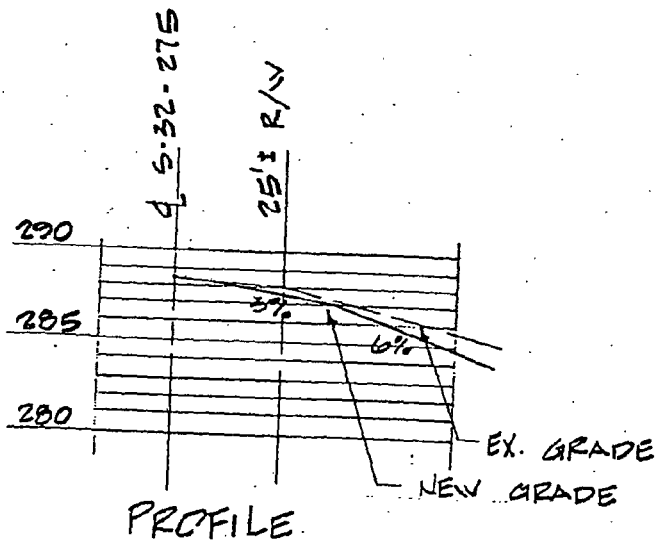
THE ENTIRE DISTURBED AREA SHALL BE
TOPSOILED WITH 3" OF SELECT MATERIAL
AND REGRASSED TO SCDHPT SPECS.

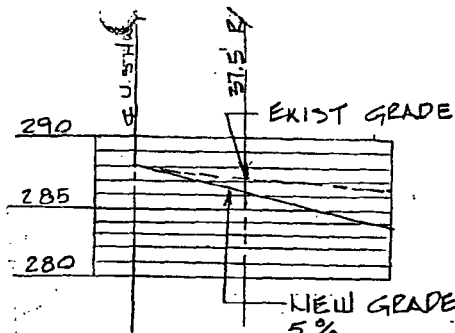
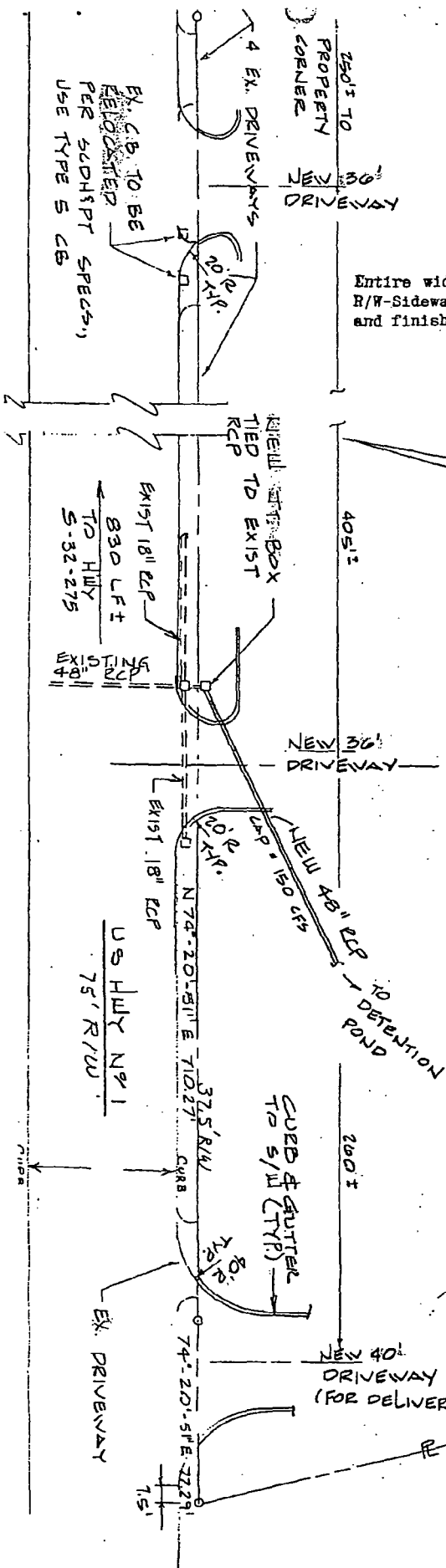
Date received by Res. Maint. AUG 07 1987
Engr. or Maint. Supt. AUG 07 1987
Date forwarded by Res. Maint. _____
Engr. or Maint. Supt. _____
Date received by Dist. Engr. _____
Date forwarded by Dist. Engr. _____

Signed: W L S C
Applicant Dayton & Assoc. Date 7/15/87
Recommended: ED BY
M.
Dist. Engr. _____ Date _____
Res. Maint. Engr. _____



Driveway to consist of a min. 4" stabilized Aggregate Base or 6" Sand Clay Base and resurfaced with 2" of Asphalt concrete.



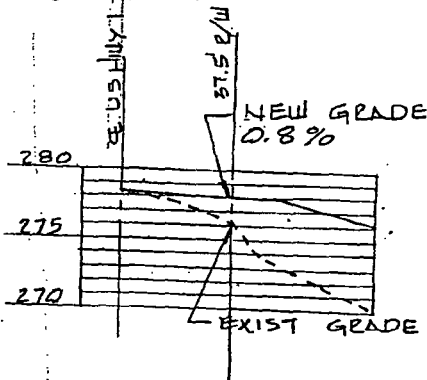


Entire width of sidewalk to be removed and disposed of off R/W-Sidewalk to be replaced using Class "B" concrete, 4" thick, and finished to S.C.H.D. Specifications.

NOTES:

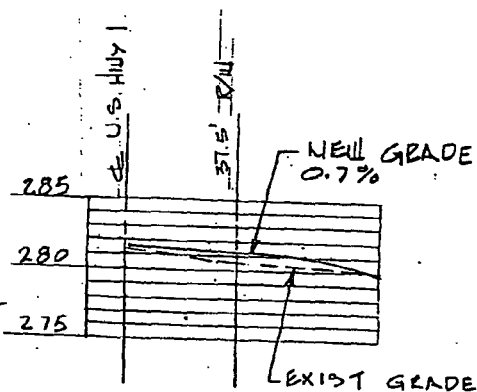
1. ALL EX. DRIVEWAYS (S) TO BE CLOSED. SIDEWALK & CURB & GUTTER TO BE INSTALLED IN OPENINGS PER SCDHPT SPECS.

2. 5' HANDICAP RAMPS TO BE INSTALLED IN SIDEWALK AT NEW DRIVES.



Driveways to be constructed of S.C.H.D. Class "B" concrete, 6" thick, and in accordance with details for street intersections and driveways - S.C.H.D. Dwg. No. CC40-B.

Pipe used in this installation to be re-inforced and meet current S. C. H. D. specifications.



COPY

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON) FOR THE 11TH JUDICIAL CIRCUIT

Westside Meshekoff Family) Dkt# 2008-CP-32-04362
Limited Partnership,)

Plaintiff,)

-vs-)

DEPOSITION OF

DEE REEVES

South Carolina Department of)
Transportation; DW)
Properties, LLC; Danwood, LLC;)
Robert W. Denton;)
and Alpine Of SC, Inc.,)

Defendants.)

Deposition of **DEE REEVES**, taken before
Faye A. Grainger, Certified Court Reporter and Notary
Public in and for the State of South Carolina, at the Law
Offices of Busbee, Hunter & Griffith, 147 Newberry
Street, NW, Aiken, South Carolina, on Tuesday, April 5,
2011, commencing at the hour of 9:42 o'clock, A.M.,
pursuant to Notice of Taking Deposition and/or agreement
of counsel.

FAYE A. GRAINGER, d/b/a
GRAINGER REPORTING SERVICE
Post Office Box 532
Irmo, South Carolina 29063
(803) 798-2679 fayegrainger@bellsouth.net

1 EXAMINATION BY

2 MR. FRAWLEY:

3 Q Ms. Reeves, will you state your name and current
4 address for the record, please?

5 A It's Diane Reeves, 806 Valley View Street, Aiken,
6 South Carolina.

7 Q And how long have you lived on Valley View Street,
8 806 Valley View Street?

9 A Thirty-five years.

10 Q Okay, we spoke real briefly earlier, and I asked if
11 you'd been deposed before and you said you have been
12 through one, but let me go over some guidelines.

13 My name is Pat Frawley; I'm an attorney with
14 the Davis Law Firm in Lexington, and I'm defending
15 the South Carolina Department of Transportation in
16 this case. The attorneys around the table, to your
17 immediate left is Mr. Russ Jeter; he represents the
18 Plaintiff, Westside Meshekoff Family Limited
19 Partnership in this case. To his left is Ms.
20 Michelle Clayton, and I believe she represents
21 Danwood, LLC. To Ms. Clayton's left is Tim Quinn;
22 he's an attorney from Columbia, and Mr. Quinn
23 represents Robert W. Denton and Alpine of South
24 Carolina, Inc. And then to my right is Mr. Bill
25 Booth, and Mr. Booth represents DW Properties, LLC.

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1 and we'll take a break. I tend to work fast; we've
2 got several attorneys here, though; so if you need
3 to take a break, you need to let us know.

4 You've given me your name and address; where
5 are you working now, ma'am?

6 A I'm not.

7 Q You're not?

8 A I'm not working now.

9 Q I heard something about you taking care of your
10 grandbaby?

11 A Right.

12 Q And that constitutes working sometimes.

13 A Yes; correct.

14 Q How old is your grandchild?

15 A Two.

16 Q Okay, when did you last work outside the home?

17 A July of 2010.

18 Q Okay, and for whom did you work then?

19 A I worked for JSSR Investments.

20 Q And what type business was that?

21 A A real estate development, property management.

22 Q And who was your supervisor there?

23 A Steven Rainer.

24 Q Can you spell that last name for me, please?

25 A R-a-i-n-e-r.

- 1 Q And where is that located?
- 2 A Currently, it's in Mt. Pleasant.
- 3 Q Where was it when you worked for them?
- 4 A Here in Aiken.
- 5 Q Did they relocate to Mt. Pleasant?
- 6 A Yes.
- 7 Q And what was your job title with them?
- 8 A Property manager.
- 9 Q And what were your duties?
- 10 A Oversaw the daily running of the shopping centers,
- 11 collecting rent, interfacing with tenants.
- 12 Q Okay, how many shopping centers did you manage for
- 13 them?
- 14 A For them, approximately six.
- 15 Q Okay.
- 16 A Actual centers.
- 17 Q And where were they located? I don't necessarily
- 18 need a street address for each one; were they
- 19 located typically in ---
- 20 A South Carolina and North Carolina. I don't
- 21 think we had any except in South Carolina and
- 22 North Carolina.
- 23 Q When did you start with JSSR Investments?
- 24 A I was there approximately two years.
- 25 Q Two years; okay, so at some time in 2008? I don't

- 1 necessarily need a month.
- 2 A Right.
- 3 Q Where had you worked before that?
- 4 A WRS Realty.
- 5 Q And how long had you been with WRS?
- 6 A Approximately five years.
- 7 Q When did you leave WRS?
- 8 A When I started with JSSR.
- 9 Q And why did you leave with WRS?
- 10 A Change in ownership.
- 11 Q And when they changed ownership, were you terminated
- 12 or did they relocate the business?
- 13 A The business split; the ownership of some of the
- 14 shopping centers split.
- 15 Q Okay.
- 16 A Two of the three owners started their company in Mt.
- 17 Pleasant, and the one that I stayed with stayed in
- 18 Aiken.
- 19 Q Okay.
- 20 A Up until he moved to Mt. Pleasant.
- 21 Q And would that be Mr. Rainer?
- 22 A Right.
- 23 Q So Mr. Rainer, he was the R in WRS?
- 24 A No.
- 25 Q What does WRS stand for?

- 1 A Yes.
- 2 Q And what's your husband's name?
- 3 A Herman A. Reeves, Herman Andrew Reeves.
- 4 Q When were you and Mr. Reeves married?
- 5 A '68.
- 6 Q Okay, first marriage for both, actually?
- 7 A Excuse me; December of '67.
- 8 Q Well, that's close to '68. We won't publish that.
- 9 A Okay.
- 10 Q First marriage for both?
- 11 A Yes.
- 12 Q And how many children did you and Mr. Reeves have?
- 13 A Two.
- 14 Q When you started with WRS, that would have been at
- 15 some time in 2003?
- 16 A I believe.
- 17 Q And what was your entry level position with them?
- 18 A Director of Property Management.
- 19 Q Had you worked in property management before you
- 20 went with WRS?
- 21 A Yes.
- 22 Q Okay, the job you had immediately before WRS, who
- 23 was that with?
- 24 A Wvatt Development.
- 25 Q And what's Mr. Wyatt's full name?

- 1 A Weldon Wyatt.
- 2 Q How long had you been with Weldon Wyatt or Wyatt
- 3 Development?
- 4 A I think it was since '85.
- 5 Q And what were your job duties; what was your job
- 6 title with Mr. Wyatt?
- 7 A Initially, I was bookkeeper and then property
- 8 manager.
- 9 Q Okay, in the period, say, around '86 to '88, what
- 10 was your position with Weldon Wyatt?
- 11 A Property manager.
- 12 Q And as property manager back then, what kind of
- 13 properties did you manage?
- 14 A Commercial retail shopping, strip centers.
- 15 Q Did Mr. Wyatt, was he -- his company, not
- 16 necessarily him, but the Wyatt Development that you
- 17 worked for, did that company develop shopping
- 18 centers?
- 19 A Yes.
- 20 Q In 1986, '87, '88, did they develop the Westside
- 21 Shopping Center on U.S. #1 in West Columbia, South
- 22 Carolina?
- 23 A To the best of my recollection, Westside Plaza was
- 24 already built when I started working there.
- 25 Q And you started with Wyatt Development in 1985?

1 A I believe so.

2 Q When were you first aware of Westside Shopping
3 Center; what was your first contact with Westside
4 Shopping Center? And I don't necessarily need a
5 year, but sitting here, do you have an independent
6 recollection of your first contact with Westside
7 Shopping Center as an employee with Wyatt
8 Development?

9 A More than likely, it would've been when I was in the
10 bookkeeping department.

11 Q Okay, do you remember when you became a property
12 manager for them?

13 A I don't remember exactly when.

14 Q All right, when you became a property manager for
15 them, how many properties did you initially manage?

16 A I don't know.

17 Q When you began as a property manager for Wyatt
18 Development, did you begin managing shopping center
19 properties?

20 A Uh-huh (affirmative response).

21 Q Yes?

22 A Yes.

23 Q And with Wyatt Development, when you would manage
24 shopping center properties, what were your duties;
25 what did you do as a property manager for the

1 shopping centers that you managed?

2 A I oversaw the daily runnings of the shopping center,
3 interfaced with tenants, collect rents.

4 Q Okay, when you say oversaw the daily operations of
5 the shopping center, what did that entail; what did
6 that involve?

7 A Working with any contractors, seeing that the
8 shopping center was clean, lights were working. any
9 type of maintenance, any dealings with tenant
10 relations.

11 Q Okay, and you collected rent?

12 A Yes.

13 Q Did you deal with governmental entities that were
14 like municipalities in which the shopping centers
15 were located, or highway departments?

16 A I do not recall dealing with any.

17 Q The properties that you managed, were they just in
18 South Carolina, or were they in other southeastern
19 states?

20 A They were throughout the southeast.

21 Q Throughout the southeast?

22 A Yes.

23 Q With Wyatt Development, it would be South Carolina;
24 what other states?

25 A South Carolina, North Carolina, Georgia, Tennessee.

- 1 We had Maryland.
- 2 Q Pretty much throughout the southeast?
- 3 A Pretty much throughout the southeast; yes.
- 4 Q You would agree with me that it would be a fair
- 5 statement to say that when you managed these
- 6 properties, you frequently, if not most of the time,
- 7 managed them remotely?
- 8 A Yes.
- 9 Q And not on site?
- 10 A Not on site on a daily basis, no.
- 11 Q And where was your office typically?
- 12 A In Aiken.
- 13 Q When you came to work on Mondays through Fridays,
- 14 you typically came to work in Aiken?
- 15 A Yes.
- 16 Q All right, in those properties that you managed,
- 17 would you have an on site assistant property manager
- 18 or someone on site through whom you would manage
- 19 these properties?
- 20 A No.
- 21 Q Tell me about the type of maintenance that you would
- 22 take care of for these shopping centers throughout
- 23 the southeast when you were property manager with
- 24 Wyatt Development?
- 25 A Any maintenance relating to the exterior of the

1 go to Maryland this week and Virginia next week; how
2 did that work?
3 A It varied.
4 Q You were with Mr. Wyatt's firm since 1985, in that
5 neighborhood, '85, '86?
6 A Yes.
7 Q Through 2003?
8 A Approximately.
9 Q And then at some time in the neighborhood of 2003,
10 that's when you began working for WRS Realty,
11 correct?
12 A (Nods head affirmatively).
13 Q The answer to that is yes?
14 A Yes.
15 Q Why did you leave Wyatt Development?
16 A Mr. Wyatt sold his company to the WRS owners.
17 Q So while you left under the auspices of Wyatt
18 Development, you no longer are wearing a Wyatt
19 Development hat, you are now wearing a WRS hat, but
20 essentially, you're working for what amounts to the
21 same company; correct?
22 A Correct, just different owners.
23 Q Different owners, and then when WRS split up, you
24 still worked for Mr. Rainer, and you still continued
25 for basically the same company, although it was

- 1 A Originally when I started with Wyatt Development,
2 there were two property managers; Georgia Hughes and
3 Gail Lofgren.
- 4 Q Lofgren?
- 5 A Yes.
- 6 Q Could you attempt to spell that for us, please?
- 7 A L-o-f-g-r-e-n or g-r-i-n, I believe.
- 8 Q Okay, so when you first started with Wyatt
9 Development, there were two property managers, Ms.
10 Hughes and Ms. Lofgren?
- 11 A Yes.
- 12 Q And at some point, you became a property manager?
- 13 A Yes.
- 14 Q Did that mean that there were three property
15 managers with Wyatt Development?
- 16 A There were others before me.
- 17 Q Do you recall when you first became the property
18 manager for Westside Plaza, were you still working
19 for Wyatt Development, or had you begun working for
20 WRS?
- 21 A I was working for Wyatt Development.
- 22 Q How long before Wyatt Development was no longer
23 Wyatt Development did you manage the Westside Plaza?
24 In other words, how long did you manage as Wyatt
25 Development versus WRS?

- 1 A I'd say perhaps three or four years.
- 2 Q Okay.
- 3 A I don't really remember exactly.
- 4 Q Do you know who the property manager was before you
- 5 for Wyatt Development?
- 6 A That's what I was trying to remember. I do not
- 7 remember. For some reason, I want to think that it
- 8 could have been Mary Lloyd Hatcher.
- 9 Q Okay.
- 10 A But I don't know that.
- 11 Q Okay, have you ever served in the military?
- 12 A No.
- 13 Q Have you ever been involved in a lawsuit as a
- 14 plaintiff or defendant?
- 15 A No.
- 16 Q When you first became involved with the Westside
- 17 Meshekoff Family Limited Partnership or their
- 18 predecessor, which I think may have been Mr. and
- 19 Mrs. Meshekoff at some point, do you remember when
- 20 you first became involved with them?
- 21 A (No verbal response).
- 22 Q Let's do it this way; do you remember if you worked
- 23 for Wyatt Development or WRS when you first became
- 24 involved with them?
- 25 A Wyatt Development, to the best of my knowledge.

- 1 Q All right, and when you first became involved with
2 the Meshekoff family, who was the managing partner
3 of whatever partnership format they had then?
- 4 A Mr. and Mrs. Meshekoff.
- 5 Q Mr. and Mrs. Meshekoff, and they were out of New
6 York?
- 7 A Yes.
- 8 Q At what point do you recall them backing away from
9 management of the Westside Meshekoff Limited Family
10 Partnership and someone other than them taking over?
- 11 A I was with WRS.
- 12 Q Okay.
- 13 A At that point.
- 14 Q Okay.
- 15 A I don't remember what year.
- 16 Q That's fine. At some point ---
- 17 A It was probably not long before some of this
18 began.
- 19 Q So at some time between 2003 and 2005?
- 20 A I would say that.
- 21 Q And the person who took over for Mr. and Mrs.
22 Meshekoff in managing that company, was that Matthew
23 Meshekoff?
- 24 A Yes.
- 25 Q Anybody other than Matthew from the time that he

1 took over until the time that you stopped managing
2 the Westside Plaza? In other words, was Matthew
3 always the guy you dealt with managing the Westside
4 Meshekoff Family Limited Partnership?

5 A Yes.

6 Q Let me clear up that question I just asked. After
7 Mr. and Mrs. Meshekoff backed out, and Matthew took
8 over, Matthew was always the guy through whom you
9 dealt with as the managing partner of the
10 partnership; correct?

11 A Yes.

12 Q All right, and where did Matthew reside when you
13 were dealing with him?

14 A California.

15 Q California; Los Angeles?

16 A I'm not sure.

17 Q Somewhere out west?

18 A California.

19 Q All right, did you ever manage any other properties
20 for the Westside Meshekoff Family Limited
21 Partnership other than Westside Plaza?

22 A No.

23 Q Okay, when Matthew Meshekoff was the managing
24 partner of the partnership through whom you dealt,
25 was he an attentive owner? In other words, if you

- 1 Q Taxes you would have paid to Lexington County?
- 2 A Right.
- 3 Q Did you pay any state taxes?
- 4 A Not to my knowledge.
- 5 Q Okay. Did you ever get a bill from the highway
- 6 department for maintenance of U.S. #1 or Dreher
- 7 Road?
- 8 A Not that I recollect.
- 9 Q So you are not aware of any billing that you would
- 10 have received as property manager for Westside Plaza
- 11 that was paid out of the Westside Meshekoff Family
- 12 Partnership specifically earmarked for repair or
- 13 maintenance of the public roads that led up to the
- 14 four driveways into your shopping center?
- 15 A None that I could ever recall.
- 16 Q Okay, at some point this sinkhole developed; how did
- 17 you find out about the sinkhole?
- 18 A To the best of my knowledge, one of our tenants
- 19 advised me.
- 20 Q Okay. Where were you when you found out about it?
- 21 A To the best of my knowledge, I was in the office.
- 22 Q Probably in Aiken, correct?
- 23 A Yes.
- 24 Q And when you heard about the sinkhole from the
- 25 tenant or whatever source called you to let you

- 1 know, what if anything did you do?
- 2 A I immediately called a contractor to get out there
- 3 and secure the premises.
- 4 Q And the contractor you ultimately called was Ideal
- 5 Construction, correct?
- 6 A Yes.
- 7 Q A fellow named Tim Richardson?
- 8 A Yes.
- 9 Q They do pretty good work, don't they?
- 10 A Yes, sir, to the best of my knowledge.
- 11 Q Had they ever done any work for you as property
- 12 manager before this sinkhole incident?
- 13 A No.
- 14 Q How did you come about finding their name?
- 15 A I had called another contractor that I had used
- 16 previously for some work and they referred me to
- 17 Ideal.
- 18 Q Okay. When you called Ideal, did you know how many
- 19 storm drain lines there were in your storm drain
- 20 system at Westside Plaza?
- 21 A No.
- 22 Q Had no idea. All you knew is your tenant had called
- 23 and said there is a sinkhole in the parking lot
- 24 leading to the driveway and that was a concern?
- 25 A (Nods head affirmatively).

- 1 Q And did he look at it?
- 2 A Yes.
- 3 Q And what did he tell you?
- 4 A He found additional problems.
- 5 Q All right.
- 6 A With the drain line in the back.
- 7 Q And when you found out from Mr. Richardson that
- 8 there were additional problems in the drain line in
- 9 the back, what if anything did you do?
- 10 A I contacted Matthew Meshekoff immediately.
- 11 Q Okay. Would it be an accurate statement to say that
- 12 you and Mr. Meshekoff had good lines of
- 13 communication with regard to what was going on in
- 14 this Westside Plaza?
- 15 A Yes. And Mr. Matthew had direct contact with
- 16 Matthew.
- 17 Q Mr. Richardson had direct contact?
- 18 A I mean Mr. Richardson. I'm sorry.
- 19 Q But whenever anything came up with regard to
- 20 Westside Plaza, you as property manager, were able
- 21 to get in touch with Mr. Meshekoff right away,
- 22 weren't you?
- 23 A Yes.
- 24 Q In fact, you did; didn't you?
- 25 A Yes.

- 1 Q Pretty much any time something came up, your line of
2 communication with the managing partner of Westside
3 Meshekoff Family Limited Partnership was very good
4 and was timely; correct?
- 5 A Yes.
- 6 Q Now, at some point there was some work done on that
7 back line where the depression had shown up;
8 correct?
- 9 A Yes.
- 10 Q And you got Ideal Construction to do that as well?
- 11 A Yes.
- 12 Q Did you ever talk to Mr. Richardson about what type
13 of pipe had originally been installed in that storm
14 drain line?
- 15 A Yes.
- 16 Q And what was your discussion with him; what did you
17 find out with regard to what type of pipe was
18 installed?
- 19 A It was corrugated metal.
- 20 Q And what was your understanding of the quality of
21 the installation of that pipe when it was originally
22 installed back in 1987; did Richardson ever talk to
23 you about that?
- 24 A I don't remember.
- 25 Q Okay, what if anything do you remember him telling

1 STATE OF SOUTH CAROLINA
2 COUNTY OF LEXINGTON

IN THE CIVIL COURT

3
4 WESTSIDE MESHEKOFF FAMILY)
LIMITED PARTNERSHIP,)

5)
6 Plaintiff,)
-vs-)

TRANSCRIPT OF RECORD

08-CP-32-4362

7)
8 SOUTH CAROLINA)
DEPARTMENT OF TRANSPORTATION,)
ET AL,)

9)
10 Defendants.)

11 April 18-21, 2011
12 Lexington, South Carolina

13 B E F O R E:

HONORABLE R. KNOX MCMAHON, Judge.

14
15 A P P E A R A N C E S:

16 EDWIN R. JETER, JR., Esquire
17 CHARLES H. McDONALD, Esquire
Attorneys for the Plaintiff

18 PATRICK J. FRAWLEY, Esquire
19 Attorney for the Defendant S.C.D.O.T.

20 WILLIAM E. BOOTH, III, Esquire
Attorney for the Defendant D.W. Properties

21 MICHELLE P. CLAYTON, Esquire
22 Attorney for the Defendant Danwood

23 MICHAEL H. QUINN, Esquire
24 Attorney for the Defendant Alpine

25 L. COCONUT PANTSARI, R.P.R.
Circuit Court Reporter

1 (The following proceedings are reported on
2 April 18, 2011.)

3 THE COURT: This is 2008-CP-32-4362, Westside
4 Meshekoff Family Limited Partnership, plaintiff, versus
5 South Carolina Department of Transportation; D.W.
6 Properties, L.L.C.; Danwood, L.L.C.; Robert W. Denton
7 and Alpine of S.C., Inc.

8 THE COURT: Would you please identify
9 yourselves and state your appearances. Mr. Jeter.

10 MR. JETER: Yes, Your Honor. Russell Jeter of
11 Columbia, along with Charles "Chuck" McDonald of
12 Columbia for the plaintiff.

13 MR. McDONALD: Good morning, Your Honor.

14 THE COURT: Good morning.

15 MR. FRAWLEY: May it please the Court. My
16 name is Patrick Frawley with the Davis law firm here in
17 Lexington. I'm here for the South Carolina Department
18 of Transportation.

19 MS. CLAYTON: May it please the Court. Good
20 morning. My name is Michelle Clayton with Turner
21 Padget. I am here on behalf of Danwood, L.L.C.

22 MR. QUINN: Good morning, Your Honor. I'm Tim
23 Quinn. I represent R.W. Denton and Alpine, Inc.

24 MR. BOOTH: May it please the Court. I'm
25 William Booth. I represent one of the defendants, D.W.

1 Properties, L.L.C. who is my client.

2 THE COURT: The other named defendants are
3 out; is that correct?

4 MR. JETER: That is correct, Your Honor.

5 THE COURT: Mr. Jeter or Mr. McDonald, would
6 either of you care to make an opening statement?

7 OPENING STATEMENT

8 MR. JETER: Thank you, Your Honor. Your
9 Honor, this is an equity case. It is a case seeking an
10 equitable allocation of the costs of maintaining and
11 repairing a storm drain line that my client spent
12 \$325,000 -- in rounds numbers -- repairing and
13 maintaining.

14 The line is primarily for the benefit of the
15 defendants. My client -- once again in round numbers --
16 uses about 20 percent of the line's capacity. The
17 defendants use 80 percent.

18 There is a South Carolina case on point, Hayes
19 versus Tompkins, that makes this a very simple case.
20 That's a Court of Appeals decision. It asks two
21 questions.

22 One, is there an easement? And if there is,
23 what is the percentage of use of that easement? Those
24 are the two questions that determine whether they have
25 to contribute to repair and maintenance costs. The case

1 THE COURT: Thank you. Thank you very much,
2 Mr. Jeter.

3 Mr. Frawley, for the Department of
4 Transportation.

5 OPENING STATEMENT

6 MR. FRAWLEY: May it please the Court. Your
7 Honor, Mr. Jeter keeps referring to damages. The only
8 cause of action in this case -- there were originally
9 four causes of action. They alleged negligence per se.
10 There is a cause of action for nuisance. I've frankly
11 forgotten the other causes of action.

12 They have dropped all three of their legal
13 causes of actions, and the only cause of action
14 remaining -- the other one was for injunctive relief --
15 the only remaining cause of action is for equitable
16 apportionment of maintenance costs. That's what this is
17 about. This is not a damages case. It's an equitable
18 apportionment of maintenance costs' case.

19 S.C.D.O.T. has released storm water from the
20 catch basin which connected to this shopping center in
21 or after 1987. S.C.D.O.T. has released water into this
22 property from that catch basin since 1970.

23 They started doing it in 1970 because that's
24 when U.S. Number 1 was expanded from two lanes to four
25 lanes, and the catch basin that had been adjacent to the

1 two lanes of U.S. Number 1 was moved approximately
2 20 feet over.

3 Prior to that time, prior to 1970, S.C.D.O.T.
4 had released water from U.S. Number 1 in a southerly
5 direction through Mr. -- at that time Holmes Dreher's
6 lot -- for years.

7 We don't know how far back. I don't have
8 anybody with D.O.T. who stills work here who can say
9 when that water was first released. U.S.1 has been
10 there for years.

11 That water was released into a natural
12 drainage swale which flowed in a southerly direction
13 away from U.S. Number 1 in a southerly and then
14 southwesterly direction.

15 That's from -- we don't know how far back. We
16 know at least since 1970 because we have some plans.
17 This particular catch basin to which they connected
18 their storm drain system was built, it would have been
19 around 1970. We have some plans, two sheets of plans,
20 from 1970 that we will put in.

21 During that period of time, S.C.D.O.T.'s
22 capacity for releasing the water from that storm drain,
23 that catch basin, was unfettered. There were no 48-inch
24 pipes or 36-inch pipes with limited capacity.

25 We released it from the catch basin into this

1 drainage swale, and it followed downhill, just as water
2 from the north side of U.S.1 flowed in our system
3 downhill.

4 There is a watershed there, and they will have
5 a fellow, Michael Lambert, who will testify to a
6 drainage study that he did about this watershed where
7 the water flows to D.O.T. and where it flows from
8 D.O.T.'s catch basin.

9 Prior to 1987 when they entered into this
10 encroachment permit and they built their shopping
11 center, this water was released from D.O.T.'s catch
12 basin into this drainage swale unfettered.

13 So the remark that D.O.T. didn't need that
14 much, D.O.T. had all it needed without limitation. The
15 only limitation that was put in was when the plaintiff
16 put in its catch basin, its storm drain system.

17 In 1986 the plaintiff's predecessor in title
18 took deed to this property from Holmes Dreher and from
19 the Hook family. There are actually two sets of deeds.
20 We will put those into evidence.

21 That predecessor in title was a company known
22 as Dayton and Associates. One of the managing partners
23 there was a South Carolina limited partnership named
24 Seven Oaks, and the managing partner of Seven Oaks was a
25 fellow named Weldon Wyatt, who was an Aiken County

1 developer.

2 Dayton and Associates entered into a 1987
3 encroachment permit. In that encroachment permit, which
4 is going to be Plaintiff's Exhibit Number 1, a D.O.T.
5 encroachment permit -- and we have agreed that the
6 encroachment permits are going in. That would be
7 Plaintiff's Number 1.

8 That encroachment permit was applied for by
9 Dayton and Associates on July 15, 1987. Dayton and
10 Associates applied for it. In their application they
11 indicated that they requested permission to construct
12 two driveway entrances onto Dreher Road and three
13 driveway entrances onto U.S. Highway 1, a total of five
14 driveways, from public ways into the parking lot.

15 They also requested permission to connect onto
16 an existing catch basin along U.S. Highway Number 1.
17 That's the catch basin we are going to be talking about
18 for the next day or so with a new 48-inch R.C.P.,
19 reinforced concrete pipe. That's what they applied for,
20 and that's what they said they were going to do.

21 The 98 C.F.S., cubic feet per second, which
22 they are agreeing in here to accept from S.C.D.O.T. from
23 that existing catch basin, from the existing 48-inch
24 reinforced concrete pipe, will be carried around the
25 shopping center site in a 48-inch reinforced concrete

1 pipe to the detention pond.

2 Three times they have mentioned 48-inch R.C.P.
3 in their application on July 15, 1987. That application
4 is approved August 21, 1987. In the approval, which
5 appears on the front page of Plaintiff's Exhibit 1, the
6 special provisions are that it will be built in
7 accordance with the application.

8 It also says in the top part: Construction
9 drives on Road S-32-275; which is Dreher Road, three
10 drives along U.S.1, and to connect existing catch basin
11 along U.S. Highway 1 with a new 48-inch R.C.P. as shown
12 on application dated July 15, 1987.

13 The application is attached to Plaintiff's
14 Exhibit Number 1. At the bottom -- at the bottom -- of
15 the front page where Dayton and Associates, the
16 predecessor in title, signs to accept the permit, that
17 signature block is by someone whose name I can't
18 recognize, but it's for Dayton and Associates, I. Wyatt
19 Development Company. That's Weldon Wyatt's development
20 company.

21 It says, "We accept the permit herein granted
22 and agree to comply with all the provisions, terms,
23 conditions, and restrictions set out herein. We do
24 hereby agree and bind our heirs, successors, and assigns
25 to assume any and all liability this Department might

1 otherwise have in connection with accidents or injuries
2 to persons or damage to property, including the highway,
3 that may be caused by the construction, maintenance,
4 use, moving or removing of the encroachment contemplated
5 herein and agree to indemnify this Department for any
6 liability incurred or injury or damage sustained by
7 reason of the past, present, or future existence of said
8 encroachment permit."

9 That is signed by Dayton and Associates by
10 Wyatt Development Company on August 26, 1987, when they
11 accepted this permit. In 1988 Dayton and Associates
12 conveyed the property to Westside Plaza Associates.
13 Weldon Wyatt was one of the signatories as a general
14 partner for Dayton and Associates conveying the property
15 to Westside Plaza Associates.

16 Weldon Wyatt is also a general partner for
17 Westside Plaza Associates. In 1990 Westside Plaza
18 Associates conveyed the property to Helen and Edward
19 Meshekoff, and Mr. Wyatt was there to sign off on that
20 deed as well.

21 On the front of the deed, as Your Honor knows,
22 you record a deed with the R.M.C. Office or the Register
23 of Deeds, whatever they are known as now. You put the
24 grantee's address on there so they can mail the original
25 deed to the grantee.

1 On the 1990 Westside Associates deed, it says,
2 "Grantee's address is given as Mr. and Ms. Meshekoff,
3 care of Wyatt Developers." Weldon Wyatt has his hand in
4 there as well.

5 Now, there are a series of deeds, and we will
6 have Deborah Chaney to testify to the chain of title in
7 this. There's a series of deeds thereafter between
8 Helen and Edward Meshekoff and their respective
9 irrevocable trusts.

10 They deed it to the Fourm -- that's
11 F-O-U-R-M -- Meshekoff Family Limited Partnership, I
12 think in 1996. Then in 1997 the Fourm Meshekoff Family
13 Limited Partnership deeded it to the current owner, the
14 Westside Meshekoff Family Limited Partnership.

15 So there are several deeds between 1990 and
16 1997, which we will have in the chain of title that
17 Ms. Chaney will briefly go over, pursuant to which this
18 property went between and among the Meshekoffs.

19 In each of those they had counsel. In each of
20 those they had people who were checking titles for them.
21 And while an encroachment permit was not of record,
22 clearly Mr. Wyatt, who was still around as the owner of
23 the property management company which was managing this
24 shopping center during that period of time, was
25 certainly there to say, "Yeah, back in 1988 we entered

1 into this encroachment permit."

2 So for Mr. Meshekoff, the current general
3 partner or managing partner of Westside Meshekoff, to
4 say, "I never saw this encroachment permit," clearly
5 there was ample opportunity for him to have gotten that
6 in any of these conveyances.

7 The language that Dayton and Associates, their
8 predecessor in title, the plaintiff's predecessor in
9 title, signed off on accepting this permit indicates
10 that they are binding their successors.

11 Now, in July 2005 the first problem that shows
12 up with this drainage system occurred. Dee Reeves, who
13 was the property manager with -- at that time W.R.S.,
14 Inc., which was a successor to Wyatt Development, --
15 which was the property manager from at least 1997
16 through 2003 -- Dee Reeves received a report from one of
17 the tenants at the shopping center or from someone that
18 there was a sinkhole that was developing at one of the
19 entrances.

20 If Your Honor looks at the exhibit that
21 Mr. Jeter had handed up, this would be at the
22 westernmost driveway toward the intersection -- it's the
23 westernmost entranceway to the shopping center behind
24 U.S. Highway 1.

25 That is also the connection between the

1 existing catch basin and line E, which is the storm
2 drain line that runs from the catch basin westward and
3 then southward toward the detention pond.

4 There will be discussion today and tomorrow of
5 this storm drain system. It consists basically of five
6 lines. There is a line A, which is at the southernmost
7 property line -- which isn't affected here at all --
8 that runs from Dreher Road and drains into the
9 southernmost corner of the detention pond.

10 Then there are lines B, C, and D which collect
11 water in the parking lot itself and flow -- that carry
12 water in a westerly direction and empty into the middle
13 of the detention pond in the southwest corner of the
14 lot.

15 Then there is line E which connects the catch
16 basin, the D.O.T. catch basin, runs westward for a bit
17 and then southward toward the corner of that detention
18 pond.

19 The only real line that is relevant to this
20 case is line E, although there will be testimony about
21 lines B, C, and D, which were the lines in the middle of
22 the parking lot, where they failed, how they failed,
23 what Mr. Lambrecht, who is their engineer, and what
24 Mr. Richardson, with Ideal Construction, found when they
25 excavated those pipes and the way they were installed.

1 That's in July of 2005. There will be a
2 proposal, a letter, proposing repair to this sinkhole
3 from Tim Richardson of Ideal Construction that is dated
4 July 26, 2005. That's to Dee Reeves. Ms. Reeves is the
5 property manager, was the property manager for this
6 shopping center back then.

7 Ms. Reeves signs off on it. The repair is
8 done quickly. Mr. Richardson -- I don't know if he is
9 here today -- but he will be here. Mr. Richardson's
10 company was called by Ms. Reeves, and he immediately
11 responds.

12 He immediately did something to arrest the
13 problems, and within a week they fixed this problem.
14 They fixed it by putting in reinforced concrete pipe, as
15 should have been done back in 1987 and '88. He was paid
16 for that on August 10, 2005. So within two weeks from
17 when the problem was discovered, it's fixed and
18 Mr. Richardson's company has already been paid.

19 What they found out there was that there is a
20 problem with line E. They found out that it's not
21 reinforced concrete pipe in the ground. It's corrugated
22 metal pipe. The corrugated metal pipe had deteriorated
23 in the less than 20-year period from 1987 when Dayton
24 and Associates said they were going to put reinforced
25 correct pipe in the ground.

1 So as of July 26, 2005, Ms. Reeves, who is the
2 property manager for Mr. Meshekoff's company -- and
3 Mr. Meshekoff will indicate Ms. Reeves was his eyes and
4 ears in South Carolina -- Ms. Reeves knew that there was
5 a potential problem with line E.

6 They could have extended it further and looked
7 down it. They could have sent video down there, which
8 they did do a couple of years later, to find out if
9 there's problems with that pipe. They didn't do it in
10 2005, but that's when they found out about the problem.

11 There was no verified damages claim filed by
12 Westside Meshekoff, either with S.C.D.O.T. or with the
13 State Budget and Control Board pursuant to the Tort
14 Claims Act.

15 Now, subsequent repairs to other lines, to
16 lines B, C, and D, were done in 2006. When they did
17 that, they found out that it's all corrugated metal
18 pipe. There is no reinforced concrete pipe in the whole
19 system.

20 What they found out, Mr. Lambrecht will
21 testify in letters that he sent to Mr. Meshekoff. "We
22 found out that this corrugated metal pipe had
23 deteriorated to the point that the bottom of it wasn't
24 even there anymore. It was rusted out." Dirt was
25 coming into it and silt was flowing through that pipe

1 and being emptied into this detention pond.

2 There was suck-holes. They were seams for
3 this corrugated metal pipe -- which is supposed to have
4 a sleeve on it that extends at least a foot to each side
5 of the seam and is tightened down -- and those were
6 improperly installed. Some of them didn't even have the
7 seams on them. They had tarpaper covering them, which
8 was manifestly wrong.

9 There will be testimony from both
10 Mr. Richardson and Mr. Lambrecht that the installation
11 not only wasn't reinforced concrete pipe, which the
12 predecessor in title said they were going to put in in
13 1987, inducing D.O.T. to grant them this permit, but it
14 was corrugated metal pipe that was improperly installed
15 and therefore made that corrugated metal pipe storm
16 drain system last much shorter than it otherwise would
17 have.

18 Now, Mr. Lambrecht was commissioned to do a
19 drainage study of the watershed in this area. That's
20 how they got all the defendants in this case and the
21 respective percentages of the watershed that each of the
22 defendants have that they will put in.

23 Mr. Lambrecht will have a letter that we will
24 put in from May 7, 2008, where Mr. Lambrecht -- without
25 having done the calculations yet and basically in

1 fairness to him, he hasn't had a chance to do the
2 calculations -- suggests to Mr. Meshekoff that he has
3 reviewed the encroachment permits, not only for D.O.T.
4 but for all the other companies on the north side of
5 U.S.1 in the watershed.

6 And in reviewing those, it appears to him that
7 the rate of flow entering the system is greater than the
8 98 cubic feet per second that had originally been agreed
9 to in the encroachment permit.

10 Later on when Mr. Lambrecht actually does the
11 calculations with a 10-year, 24-hour storm, he finds out
12 that the amount of water entering that system is only
13 65 cubic feet per second, less than the 98 cubic per
14 second that had been originally agreed to.

15 Now, there were no demands for payment.
16 Evidence will not show any demands for payment of
17 construction costs, sharing maintenance costs at all,
18 from the 1987 encroachment permit up until the filing
19 of this lawsuit with S.C.D.O.T. The encroachment
20 permit itself is silent as to how maintenance costs are
21 to be apportioned. It doesn't even mention maintenance
22 costs.

23 Had the plaintiff's predecessor in title
24 installed proper reinforced concrete pipe, according to
25 Mr. Richardson's testimony, if you put reinforced

1 concrete pipe in properly, the only maintenance required
2 should be periodic dredging of the silt from the
3 detention pond because he will say the pipe is not an
4 issue. That's with reinforced concrete pipe, which they
5 said they were going to do in 1987.

6 With corrugated metal pipe, there's all sorts
7 of other issues. One of the things they have said is
8 that oil-base pollutants come in off the road. Well,
9 U.S. Number 1 was paved in 1970 as well. It was paved
10 before that.

11 So any oil-base pollutants from the cars
12 driving up and down there would have been coming in that
13 catch basin as of 1970. They shouldn't be any different
14 now. There is trash and so forth.

15 This is a shopping center, which formerly had
16 a Walmart, has a Bi-Lo with people who go out of those
17 driveways and supposedly throw their Little Debbie
18 papers out the window. I don't know where it comes
19 from. D.O.T. doesn't do it but it does come in our
20 roads.

21 They said that D.O.T. has enjoyed the benefit.
22 D.O.T. has to provide roads. We have to provide public
23 ways, which we do. The benefit we got was to allow
24 these people to put five driveways into our road system.

25 If anybody derived a benefit from that, it

1 would be the Meshekoff partnership because this shopping
2 center now has patrons coming over our public roads,
3 entering these five driveways, spending money at these
4 retail establishments, from which the Meshekoffs derive
5 income.

6 The plaintiffs have not paid any money to --
7 as far as I know because it hasn't come up -- to
8 downstream property owners where the outlet pipe
9 releases water from the southwest corner of that
10 detention pond and goes on somebody's property after
11 that. It's not clear to me if they paid any money to
12 those guys to defray their maintenance costs.

13 They are going to rely on Hayes versus
14 Tompkins. Mr. Jeter says that's right on point. I
15 respectfully disagree with that. Hayes versus Tompkins
16 is a road case, a road easement case. It's a way of
17 necessity case.

18 The other cases he cites in the trial brief
19 that he has handed up to Your Honor are also road cases.
20 This is not a road case. It's a surface water case.
21 Surface water in South Carolina is still handled under
22 the common enemy rule.

23 The Irwin versus Michelin case from 1986 is a
24 South Carolina Supreme Court case in which my law firm
25 tried to get the State of South Carolina to change the

1 common enemy rule and adopt some kind of negligence
2 standard.

3 The Supreme Court told us at that point
4 respectfully, "Thanks but go back to Lexington. We are
5 going to stay with what we have got." That has not been
6 changed yet. That's the case that common enemy -- that
7 surface water is a common enemy that a property owner
8 can ward off for any purpose, with two exceptions.

9 You can't dam it up and you can't artificially
10 divert it in concentrated form to release it on your
11 downstream neighbor. The release we have from this
12 existing catch basin, which existed when they built it,
13 built their shopping center in '87, is still within what
14 they agreed to accept.

15 This is a novel cause of action, and it has
16 been -- apart from the fact that it's a lawsuit -- has
17 been kind of fun to deal with. These guys have done a
18 good job on it. It is a novel cause of action where
19 they are trying to extend the law.

20 They are trying to extend the Hayes versus
21 Tompkins case. Hayes versus Tompkins is 287 S.C. 289,
22 337 S.E.2d 888, a South Carolina Court of Appeals from
23 1985. They are trying to extend that case to encompass
24 equitable apportionment of maintenance costs in a storm
25 drain system.

1 What would the effect of that be? If the
2 Court deems, "Yeah, that sounds good to us. D.O.T., you
3 are going to have to share in that 80 percent." We have
4 catch basins that empty surface water off of our roads
5 statewide.

6 We have a statutory mandate to maintain safe
7 roads. A big part of that is keeping the water off our
8 roads so we don't have hydroplaning accidents all over
9 the place. We have to put the water in catch basins.

10 We did here. And up until 1987, we had
11 unfettered use of that. For them to come in now and
12 say, "We want to build this shopping center, and we are
13 going to put reinforced concrete pipe in the ground to
14 take this water off," and then not do that and put in a
15 lesser pipe that deteriorates well within the tolerances
16 that that reinforced concrete pipe would have done and
17 then say, "D.O.T., you need to pay 300-some-odd thousand
18 dollars to defray the costs here," when they have made
19 no demands of us over the last 24 years, 22 years is not
20 equitable.

21 They have come in here. They are asking for
22 equity. They have to do equity. They said -- their
23 predecessor in title said -- "We are going to put
24 reinforced concrete pipe in the ground." Had they done
25 that, that system would still be working, and it

1 wouldn't have been the \$325,000 worth of costs.

2 For Mr. Meshekoff to come in and say, "I'm in
3 California. I didn't know anything about any
4 encroachment permit," just isn't going to fly because
5 there was more than enough mechanism for him to have
6 done that, not only because D.O.T. keeps it there, but
7 through a F.O.I.A. request, they are able to get these
8 documents.

9 They could have gotten them. They are able to
10 get these documents. They could have gotten them back
11 in 1990 and 1995 at any time. It's no secret that that
12 catch basin is a D.O.T. catch basin.

13 So we would ask Your Honor to listen to all
14 the evidence, weigh the equities which are going to come
15 up -- and they are on both sides in this case -- and
16 make your decision based on the equity. Thank you, Your
17 Honor.

18 THE COURT: Thank you. Thank you very much,
19 Mr. Frawley. D.W. Properties, L.L.C., is that
20 Mr. Booth? Is that correct?

21 MR. BOOTH: That's correct. Your Honor, I
22 request that I go after the other two parties.

23 THE COURT: I usually go by the order on the
24 cause of action in the caption, but that doesn't offend
25 me either way.

1 that. I'm going to tell you exactly about that, but
2 that's what it does. Danwood was trying to develop this
3 site for a shopping center -- excuse me, not Danwood --
4 but Westside.

5 Under the Weldon Wyatt matters and Dayton and
6 Associates, they went in and somebody got the Highway
7 Department to agree to let them change the drainage for
8 that.

9 The Highway Department said, "You can do it
10 but you have got to use reinforced concrete pipe.
11 You've got to do this. You've got to do this. You've
12 got to build a retention pond over on the back side, and
13 you've got to maintain all these things."

14 Well, at a point in time, we are going to ask
15 the Court to put the property in evidence. We will ask
16 the Court to go out and look at it. Specifically look
17 at this -- and you will see photographs of the
18 corrugated metal pipe that was used as a crush, but you
19 will see photographs also of the retention pond that is
20 on Westside.

21 Also, while we are putting the property into
22 evidence, I will ask the Court to notice that the
23 Westside water from their retention pond flows into the
24 Walmart drainage system, which is right adjacent to it.
25 The Walmart drainage system goes down to the creek,

1 flows into Mr. Hite's ponds, and feed those ponds
2 further on down.

3 Now, Mr. Frawley said they are trying to
4 extend the law. And how far is this law going to be
5 extended? It's going to entitle Mr. Hite to damages?
6 He was talking about his tilapia dying as of yesterday
7 because the water got too hot.

8 But how far is it going to go? Now, keep in
9 mind one other thing. The only one that benefited by
10 this change in the system was the Westside Shopping
11 Center.

12 Secondly, my client, Alpine of South Carolina,
13 Inc. and Mr. Robert W. Denton, they got tapped in. When
14 they bought the property, they tapped into the existing
15 drainage system that Danwood's predecessor had. That
16 existing drainage system went into the Highway
17 Department's catch basin.

18 We have no control as to what the Highway
19 Department does after it leaves its catch basin. We
20 have no control who the Highway Department is going to
21 allow to attach onto that.

22 We have no control as to who the Highway
23 Department is going to grant an encroachment permit to,
24 yet we are getting blamed for that. We have no control
25 over it. So as I said originally, Your Honor, I don't

1 MR. FRAWLEY: Your Honor, I have my exhibits
2 as well.

3 (Hands to Court.)

4 MATTHEW MESHEKOFF, being
5 first duly sworn, testifies as follows:

6 CLERK: Have a seat and state your name for
7 the Court.

8 THE WITNESS: Good morning, Your Honor.

9 THE COURT: Good morning.

10 THE WITNESS: My name is Matthew,
11 M-A-T-T-H-E-W. The last name is Meshekoff,
12 M-E-S-H-E-K-O-F-F.

13 DIRECT EXAMINATION

14 BY MR. JETER:

15 Q Mr. Meshekoff, where do you reside?

16 A I reside at 8251 Sky Line Drive, Los Angeles,
17 California, 90046.

18 Q And what is your job? What do you do for a living?

19 A I'm managing partner of the Meshekoff Family
20 Limited Partnerships.

21 Q And do those partnerships own various shopping
22 centers?

23 A Yes, they do.

24 Q And approximately how many do you own?

25 A At this point we own four shopping centers, and we

1 are partnered with people in some of them.

2 THE COURT: Mr. Jeter, would you excuse me
3 just a moment. I apologize. I had a T.R.O. scheduled
4 before I knew this was a day certain. I will not break
5 and listen to it. These are the two lawyers here. I
6 would like to talk to them quickly so I can reschedule
7 it. Will that be all right?

8 MR. JETER: Yes, sir.

9 THE COURT: Thank you very much. Let me step
10 out a moment.

11 (Whereupon there is a recess.)

12 THE COURT: Thank you, Mr. Jeter. You may
13 proceed.

14 MR. JETER: Thank you, Your Honor.

15 BY MR. JETER:

16 Q Mr. Meshekoff, where are the four centers that you
17 manage?

18 A Columbia, South Carolina; Martinsville, Virginia;
19 Jacksonville, North Carolina; and Auburn, Alabama.

20 Q When did you become the official managing partner
21 of the partnerships?

22 A In December of 2005.

23 Q And prior to that time for a year or two, did you
24 effectively manage them before becoming the
25 official managing partner?

1 A Yes, I did.

2 Q Okay.

3 A Due to the diminished capacity of my mother and
4 father officially.

5 Q All right. If you would turn in your exhibit book
6 to Exhibit 25-A and B. I will just be interested
7 in the first two pictures.

8 MR. JETER: Your Honor, I don't know whether I
9 gave you the originals. You have got the color photos.
10 I put black and white in the notebook.

11 THE COURT: Which one do you want your witness
12 to have?

13 MR. JETER: Black and white is fine.

14 BY MR. JETER:

15 Q All right, sir. Mr. Meshekoff, do you recognize in
16 Exhibit 25-A that that is Westside Plaza in that
17 photograph?

18 A Yes, I do.

19 Q Would you look at 25-B. Is that -- is Westside
20 Plaza in an L-shape?

21 A The actual structure of the shopping center, the
22 retail establishments, is an L-shape.

23 Q The first pictures shows one side of the L; is that
24 correct? The 25-A?

25 A Yes, that's correct.

1 Q And does 25-B show the other side of the L.?

2 A Yes, it does.

3 Q And in looking at 25-B, we are going to be
4 discussing a storm drain line here today. Did that
5 line run behind those buildings in 25-B?

6 A To the right of those buildings, to the extreme
7 right outer frame.

8 Q Now, if you would turn to Exhibit 1 --

9 MR. JETER: Your Honor, I would move the
10 admission of 25-A and B.

11 MR. FRAWLEY: Without objection.

12 (Plaintiff's Exhibits Number 25-A and 25-B are
13 received into evidence.)

14 MR. JETER: Your Honor, Exhibits 1 through 5,
15 which are the applicable encroachment permits, are in
16 without objection as well, I believe.

17 MS. CLAYTON: Actually, I have an objection to
18 the letter that is attached to the encroachment permit
19 which is included in Exhibit 4.

20 MR. JETER: Your Honor, we got these from the
21 D.O.T., and that letter -- from their official
22 records -- and that letter was attached.

23 MS. CLAYTON: Your Honor, I have no problem
24 with admitting the other portions of Exhibit 4. The
25 letter, I think, would be inadmissible hearsay, and it's

1 irrelevant.

2 The letter was from 1985. We don't have
3 anyone to testify about whether the parties did what
4 they said or what they purported to say in that letter,
5 and we don't think it will make the existence of any
6 fact more or less probable. So it should be excluded as
7 irrelevant hearsay and under Rule 403.

8 MR. JETER: Your Honor, it's not hearsay.
9 It's part of a public record that is filed with the
10 public records of the D.O.T. and was produced by the
11 D.O.T. It's also over 20 years old, which makes it an
12 ancient document, and those are presumed to be accurate
13 under the hearsay rules.

14 So under both those exceptions -- and the
15 reason it is relevant is it shows that her client
16 anticipated using our system for the drainage of their
17 storm water.

18 That's why they would not like it to be
19 before you, but it's very relevant, and it came to us
20 as part of the encroachment permit for her predecessor
21 in title.

22 MS. CLAYTON: Your Honor, I will have to
23 respectfully disagree with Mr. Jeter. My client did
24 not purchase Danwood Shopping Center until 2003.
25 This document is 1985. It's not within the chain of

1 title.

2 We do not know anything about the contents of
3 this letter and whether either of the parties did
4 anything that they said or purported to say in this
5 particular letter.

6 THE COURT: There would have to be foundation.
7 A foundation would have to be laid that this was part of
8 the public record. I don't question you at all,
9 Mr. Jeter -- I don't mean it like that whatsoever -- but
10 some custodian will have to testify as to that fact.

11 So I will mark it Plaintiff's 4-A for
12 identification purposes only at this time.

13 (Plaintiff's Exhibit Number 4-A is marked for
14 identification).

15 MR. JETER: Your Honor, I wonder, Mr. Blakely,
16 their records custodian, is here.

17 THE COURT: Yes, sir.

18 MR. JETER: I was going to ask to take him out
19 of order and just get that taken care of, but there
20 might be other questions, and we will deal with him
21 later.

22 THE COURT: You may continue. Exhibits 1
23 through 5 are in evidence without objection. The
24 two-page letter dated 4 October 1985, 4-A, is for
25 identification purposes only.

1 (Plaintiff's Exhibits Number 1-5 are received
2 into evidence.)

3 MR. JETER: Thank you, Your Honor.

4 BY MR. JETER:

5 Q Mr. Meshekoff, Look at Exhibit 1.

6 A I see it.

7 Q Do you recognize that as the encroachment permit
8 that applies to what is now Westside Shopping
9 Center?

10 A Yes, as the document identifies. Yes, sir.

11 Q When did you first become aware of this
12 encroachment permit?

13 A When I approached you and Mr. McDonald regarding
14 the source of the water that was entering into our
15 systems.

16 Q Is this after you had problems on that line --

17 A Yes.

18 Q -- that we are here litigating today?

19 A That is correct.

20 Q Do you recall that we made an F.O.I A. request of
21 the Department of Transportation?

22 A Yes, I do.

23 Q And got these documents from that request?

24 A Yes, I do.

25 THE COURT: Just so I am tracking, that would

1 have been '05?

2 MR. JETER: '08, Your Honor.

3 THE COURT: '08?

4 MR. JETER: Yes, sir.

5 THE COURT: Thank you.

6 BY MR. JETER:

7 Q Until you saw this encroachment permit, what
8 awareness did you have of handling water for these
9 businesses on the upside of Highway 1 and for the
10 Department of Transportation?

11 A I didn't. My father, in his declining years, had
12 always mentioned something about --

13 MR. FRAWLEY: I object to whatever his father
14 said, Your Honor. It's hearsay.

15 BY MR. JETER:

16 Q Just what you know of your own knowledge.

17 THE COURT: Sustained.

18 A I did not know until I was -- till the damage of
19 the system, to when the system failed.

20 Q 2008?

21 A Yes, sir.

22 Q What did you first learn in 2008 about problems
23 with this back line, line E?

24 A We learned about the failure of the pipe, but I was
25 also informed by --

1 Q Excuse me, Matthew. I worded that question
2 terribly. What was your first knowledge of any
3 problems in 2008 with that back lot?

4 A The collapse, the sinkhole.

5 Q Okay.

6 A In the front, yeah.

7 Q And in what year was that sinkhole in the front?

8 A I'm not sure if that was 2008 or prior to that.
9 That was possibly 2006 when we first had the
10 sinkhole under the driveway.

11 Q Look at Exhibit 19. Look at the second page. Do
12 you see an invoice from Ideal Construction?

13 A Yes, I do.

14 Q For \$31,000?

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

16 Q What is the date? Do you see August 10, 2005, as
17 the invoice date down beneath the --

18 A Yes, I do, August 10, '05.

19 Q Do you see the first line item in the description
20 of work done, Westside Plaza, Bi-Lo storm drain?

21 A Yes, I do.

22 Q And would you tell the Court what this work related
23 to.

24 A Yes. This work related to the collapse of the
25 entranceway, I believe, and the drain line that

1 extended back along the right side of the property.

2 Q Now, would you look at Exhibit 7 and point out to
3 the Court where on Exhibit 7 --

4 MR. JETER: That's that thing I handed up to
5 you, Your Honor. In fact, if I could use that, that
6 would speed it up.

7 THE COURT: Yes, sir.

8 BY MR. JETER:

9 Q Would you point out to the Court where on Exhibit 7
10 this first incident occurred.

11 A Directly here (indicating), and this (indicating)
12 is the line that extends up.

13 Q This is U.S. 1 here (indicating)?

14 A That's correct.

15 Q You call this the main entrance to the center?

16 A One of them, right, correct. We have these two
17 here (indicating).

18 Q It's the middle of the three entrances along U.S.1?

19 THE WITNESS: Should I hold it up?

20 THE COURT: Hold it where the lawyers can see.

21 BY MR. JETER:

22 Q Point it out to everybody.

23 A This is the first failure. It was in this
24 entranceway here (indicating) on the driveway.

25 Q All right.

1 A Followed by this section here (indicating) and this
2 section here (indicating).

3 THE COURT: Let me get my bearings. This
4 (indicating) is the Bi-Lo grocery store. Somewhere down
5 here (indicating) at Wings and Ale?

6 THE WITNESS: That's correct. Carolina Wings
7 is here (indicating).

8 MR. FRAWLEY: For the purposes of the record,
9 Your Honor, when he was indicating, "This section here
10 (indicating) and this section here (indicating)," he
11 appeared to be indicating the green line running
12 westward from the catch basin and then running
13 southwestward.

14 BY MR. JETER:

15 Q That's the line that's in question?

16 A That's correct.

17 THE COURT: This (indicating) being west?

18 MR. JETER: Yes, sir.

19 MR. FRAWLEY: West to the right and south to
20 the top.

21 MR. BOOTH: Your Honor, may I have a moment to
22 look at Exhibit 19?

23 THE COURT: Exhibit 19?

24 MR. JETER: We have given it to you, Bill.

25 MR. BOOTH: I know. I just need to see which

1 one you ended up with. We are fine.

2 THE COURT: Is 19 in evidence without
3 objection?

4 MR. JETER: Your Honor, we would move the
5 admission of 19. I think that is without objection.

6 THE COURT: It's the invoice from '05?

7 MR. McDONALD: That was actually 7.

8 MR. FRAWLEY: No objection.

9 THE COURT: This is 7.

10 MR. JETER: I would also move the introduction
11 of Exhibit 7, Your Honor, the as-built drawings.

12 MR. FRAWLEY: No objection from S.C.D.O.T.,
13 Your Honor.

14 MR. JETER: The one in evidence in the book
15 does not have the red and green lines on it. That was
16 demonstrative for your use.

17 MR. FRAWLEY: D.O.T. has no objection to that,
18 Your Honor.

19 THE COURT: Thank you.

20 (Plaintiff's Exhibits Number 7 and 19 are
21 received into evidence.)

22 BY MR. JETER:

23 Q Did you have Ideal Construction come in and conduct
24 repairs to that sinkhole up by the middle entrance
25 to the center?

1 A Yes, we did, immediately.

2 Q And did you pay them for that work, the 31,000?

3 A Yes, we did, immediately.

4 Q Now, in 2006 did you have some problems in the
5 middle of the parking lot with those red lines that
6 are not in issue here today?

7 A Yes.

8 Q Were there sinkholes in the middle of the lot as
9 well?

10 A Yes.

11 Q Did you bring Ideal Construction in to deal with
12 those?

13 A Yes, we did.

14 Q And those only serviced your center? They did not
15 service U.S.1 or the properties across the street;
16 is that correct?

17 A That is correct.

18 MR. FRAWLEY: Your Honor, I will object to him
19 testifying unless he establishes a foundation as to how
20 he knows where those lines serve.

21 THE COURT: Well, when I look at Plaintiff's
22 7, it's marked.

23 MR. FRAWLEY: I withdraw that objection. It's
24 not a relevant objection.

25 THE COURT: All right.

1 BY MR. JETER:

2 Q And you are not seeking any money from these
3 defendants for any of the work done on those red
4 lines; are you?

5 A No, sir.

6 Q Now, in 2008 -- if you will look at Exhibit 18 --
7 you mentioned that there was some sinkholes that
8 appeared over on the green line, line E, over
9 towards the new Walmart; correct?

10 A That is correct.

11 Q And what did you do once you were informed of the
12 existence of those sinkholes?

13 A I had Tim Richardson investigate and go over there
14 and determine the extent of the needed repairs or
15 replacement.

16 Q Did you make any decisions based upon what Tim
17 Richardson reported back to you?

18 A Yes, we did.

19 Q Tell us what he reported to you that affected your
20 decisions.

21 A He reported that we needed to replace the line due
22 to its age. There was significant movement of the
23 electrical service that was on top of the pipe that
24 had to be moved over to accomplish this.

25 He reported a great deal of garbage, debris,

1 in the manhole that was automotive, oil cans and
2 things like this, that were coming from further in
3 the other direction.

4 Q Did he tell you whether or not this was an
5 emergency situation or one that could wait?

6 A No, this was a critical situation, as was the
7 sinkhole that would affect the vehicles and
8 persons. It was a danger to both persons and
9 property.

10 Q And as a result did you commission Ideal
11 Construction to make repairs?

12 A Yes, I did.

13 Q Did they take out the existing junction boxes and
14 catch basins or did they leave those in?

15 A I believe the junction boxes had to be cleaned out,
16 and the connection points had to be redone, but I
17 believe the manholes, as they were, are fine. They
18 did not need to be replaced.

19 Q And what about the detention pond? Did they
20 replace the detention pond?

21 A No. The detention pond, the inlets had to be
22 reconfigured, and he made an additional
23 modification to catch debris and silt, additional
24 silt, that was coming in, I believe, by
25 constructing an additional box at the inlet.

1 Q So he left the existing system in, but he took out
2 the pipe; is that correct?

3 A Yes, to the best of my knowledge. This is what I
4 understand.

5 Q He replaced the pipe?

6 A Correct.

7 Q Did you understand you were getting R.C.P. pipe
8 instead of corrugated metal pipe?

9 A Yes, sir. We investigated other methods, but that
10 was the best method.

11 Q Do you understand that there was any cost
12 differential between the reinforced concrete pipe
13 and what he would do to put the corrugated metal
14 pipe in?

15 A You mean to replace the corrugated metal pipe?

16 Q Right.

17 A I don't recall. I believe that it was slightly
18 more, but I don't recall specifically.

19 Q All right.

20 A We asked him to do the best thing for the problem.

21 Q Now, at this point when you are first being alerted
22 to the problem, do you know who is using the line?

23 A No, sir.

24 Q And you commissioned your attorneys to make an
25 F.O.I.A. request?

1 A That's correct.

2 Q Then you got that back. Did you commission
3 Mr. Michael Lambrecht, a civil engineer, to
4 investigate the drainage into your system?

5 A Yes, I did.

6 Q And look at Exhibit 6.

7 MR. JETER: Your Honor, this will be for I.D.
8 I think there is an objection to Exhibit 6, and we would
9 offer Exhibit 18, I think, without objection.

10 MR. FRAWLEY: Without objection from D.O.T.,
11 Your Honor.

12 MR. BOOTH: Yes, I object to Exhibit 6.

13 THE COURT: Any objection to 18?

14 MS. CLAYTON: No, Your Honor.

15 MR. BOOTH: No, 18 is fine.

16 (Plaintiff's Exhibit Number 18 is received
17 into evidence.)

18 THE COURT: And you object to 6, Mr. Booth?

19 MS. CLAYTON: And I object as well.

20 MR. JETER: Your Honor, this is not the
21 witness I would offer it through. I will have the
22 engineer here. I simply want him to identify it and say
23 he got it.

24 THE COURT: All right.

25 MR. BOOTH: So that's all you are going to ask

1 him about that? For identification is fine. That
2 number is still going to be 6; right?

3 MR. JETER: That's Exhibit 6.

4 (Plaintiff's Exhibit Number 6 is marked for
5 identification).

6 BY MR. JETER:

7 Q Mr. Meshekoff, did you get Exhibit 6?

8 A Prior to trial?

9 Q Yes.

10 A Oh, yes, I have seen it.

11 Q And do you understand that to be a calculation by
12 your engineer of who is draining what into your
13 system?

14 A That's correct.

15 MR. BOOTH: Your Honor, that is a leading
16 question about a document that he has already identified
17 as receiving. I think that's as far as the
18 understanding can go.

19 THE COURT: I sustain the objection.

20 MR. BOOTH: It was very leading.

21 THE COURT: I sustain the objection.

22 MR. BOOTH: I'm sorry. I didn't hear you,
23 Judge.

24 THE COURT: Plaintiff's 6 is just for
25 identification purposes.

1 BY MR. JETER:

2 Q As a result of receiving this, did you take any
3 action, Mr. Meshekoff, or instruct your attorneys
4 to take any action?

5 A Yes, I did. I requested -- yes.

6 Q What was that?

7 A I asked that my attorneys figure out where the
8 water was coming from, why it was coming from,
9 responsibility to, and especially I had concerns as
10 to the debris and the sludge that was talked about,
11 an oily sludge, and any material coming in because
12 that was of concern both with regards to E.P.A.
13 and --

14 THE COURT: I think that may be getting a
15 little bit into hearsay. He gets this report. As a
16 result of that, he takes action to follow up on it, and
17 I think that's -- I understand that. I think that's as
18 far as you can go.

19 Do you have an objection, Mr. Booth?

20 MR. BOOTH: The same objection.

21 THE COURT: I'm not fussing at you. I am just
22 keeping the record straight in that regard. Thank you.

23 BY MR. JETER:

24 Q Mr. Meshekoff, look at Exhibit 20. I want to ask
25 you if you paid --

1 A I'm sorry. Exhibit what?

2 Q Twenty. I want to ask you if you paid Ideal
3 Engineering and Mr. Lambrecht for the report that
4 is Exhibit 6?

5 A Yes, I did.

6 Q That was \$3,000 you were charged for that?

7 A As indicated I don't specifically recall, but I
8 remember paying it.

9 Q You did pay it?

10 A Yes.

11 Q You paid it in full?

12 A Yes, sir.

13 THE COURT: Any objections to 20?

14 MS. CLAYTON: Yes, Your Honor.

15 THE COURT: Yes, Ms. Clayton. What is the
16 objection?

17 MS. CLAYTON: Your Honor, Exhibit 20 is the
18 \$3,000 cost for the drainage report that was prepared to
19 identify who would be sued. I believe that is a cost of
20 litigation and should not be considered as an element or
21 component of what the plaintiffs think they are entitled
22 to recover.

23 MR. FRAWLEY: S.C.D.O.T. joins in that
24 objection.

25 THE COURT: What is the purpose of 20 then,

1 Mr. Jeter?

2 MR. JETER: Your Honor, Exhibit 20 was
3 necessary in order to determine who contributed to this
4 system. It is part and parcel -- it's a cost we had to
5 undergo because of the failure of the system, directly
6 related to the failure of the system. There would have
7 been no reason to do it otherwise.

8 MS. CLAYTON: Your Honor, the --

9 THE COURT: I would sustain the objection.
10 You may ask your next question.

11 COURT REPORTER: Judge, do you want me to mark
12 it for identification?

13 THE COURT: Yes, that would be Plaintiff's 20
14 for identification purposes only.

15 (Plaintiff's Exhibit Number 20 is marked for
16 identification).

17 BY MR. JETER:

18 Q Mr. Meshekoff, if you would now go back to Exhibit
19 18 which is in evidence. Is that work that was
20 done on line E, the line in question?

21 MR. BOOTH: Again, Your Honor, that is
22 leading. The witness has to identify it.

23 MR. JETER: He has already identified it.
24 It's in evidence, Your Honor. I am simply restating
25 what I think he has already said.

1 MR. BOOTH: Even though it's in evidence, he
2 cannot lead the witness.

3 THE COURT: I understand that, Mr. Booth. I
4 understand leading questions. It's not like it's
5 leading a jury anywhere. I will give it the weight and
6 value it would deserve.

7 MR. BOOTH: Yes, sir.

8 THE COURT: If that responds to your
9 objection.

10 MR. BOOTH: Yes, your ruling is understood.

11 MR. FRAWLEY: The only thing I would say about
12 this, Your Honor, is Mr. Meshekoff may not be the person
13 better able to testify to whether this is line E or not,
14 but I think they will have Mr. Richardson -- who
15 received payment for that, Mr. Richardson -- is probably
16 the better witness to do that.

17 I think Mr. Meshekoff can say, "This is the
18 invoice we got. This is the check we paid." But there
19 is no indication on either one of these documents as to
20 what line this is actually for. It's kind of a
21 technical thing because Mr. Richardson is going to
22 testify.

23 THE COURT: I thought Mr. Meshekoff has
24 already testified to the collapse, which would have been
25 the expense of \$31,000, Plaintiff's 19. Then

1 Plaintiff's 18 is where he identified the line that runs
2 in a southwesterly direction, which is the green line on
3 Plaintiff's 7.

4 So I think he has made those connections, and
5 he has further testified that the red lines, which he
6 got invoices for, he has excluded any expenses in that
7 regard. So I think --

8 MR. FRAWLEY: May I be heard just for a second
9 on that?

10 THE COURT: Excuse me?

11 MR. FRAWLEY: May I be heard for a second?

12 THE COURT: Yes, sir, Mr. Frawley.

13 MR. FRAWLEY: The point that I am trying to
14 make is that there is an invoice for 700 feet of
15 reinforced concrete pipe at some point.

16 There is an invoice for Ideal Construction
17 actually putting that pipe in the ground, which we are
18 going to see later on which is a six-figure number. The
19 point I am making is that these exhibits don't indicate
20 what that is for. I object based on that. Your Honor
21 is fixing to rule on that.

22 THE COURT: I overrule that objection. I
23 think it goes to the weight.

24 MR. FRAWLEY: Thank you, Your Honor.

25 THE COURT: You may continue.

1 MR. JETER: Yes, sir.

2 BY MR. JETER:

3 Q Mr. Meshekoff, was any work -- what work was going
4 on in 2008?

5 A The only work that was going on in 2008 was the
6 work to that line -- I believe we call it line E --
7 and from the manhole over and extending to the
8 detention pond.

9 Q All right, sir. If you would look at Exhibit 17.
10 Did you get another invoice in 2008 from Ideal
11 Construction?

12 A Yes.

13 Q Did you pay that invoice --

14 A Yes, we did.

15 Q -- in full. That's \$235,635.35?

16 A Yes, sir.

17 Q Was that for work on the same line?

18 A Specifically, yes, it was.

19 MR. JETER: Your Honor, I believe 17 is in
20 without objection.

21 MR. FRAWLEY: Without objection.

22 MR. BOOTH: No objection.

23 MR. QUINN: No objection.

24 THE COURT: Number 17 is in evidence without
25 objection.

1 (Plaintiff's Exhibit Number 17 is received
2 into evidence.)

3 BY MR. JETER:

4 Q I will jump back a second. In 2006 you have
5 already testified there were problems in the center
6 of your shopping center that are not in issue here
7 today?

8 A Correct.

9 Q But in 2006 did you also have some work done on
10 your detention pond?

11 A Yes, we did.

12 Q If you would look at Exhibit 21. If you would look
13 at the last page of Exhibit 21, the proposal.

14 A I have it.

15 Q All right, sir. Does that proposal -- is the
16 project name in the upper right-hand corner,
17 retention pond?

18 A Yes, it is.

19 Q Then does it have a description of the work to be
20 done in the middle of the document?

21 A Yes, it does.

22 Q And is that the work that you did have done on the
23 detention pond in 2006?

24 A Yes, it is.

25 Q And looking down at the lower left part of the

1 proposal, does it give a total price of \$45,528 for
2 that work?

3 A Yes, it does. I don't know if this is the only
4 work that was done, but per this invoice that's
5 correct.

6 Q And then turning to the next page towards the
7 front, that's application. Have you seen this
8 document before, application and certificate for
9 payment, Number 2?

10 A Yes, I have.

11 Q And that's on the \$45,528 contract; correct?

12 A That is correct.

13 Q And at the bottom does it show that all the work
14 has been completed and nothing is left to be done?

15 A On the bottom? Architect's certificate. I'm
16 sorry. I don't know exactly --

17 Q What does it show in line 9 as the balance?

18 A Yes, it does. I apologize. Yes, a zero balance.

19 Q So there is no work left to be done as of the time
20 of that certificate?

21 A That is correct.

22 Q Then turning forward to the first page of
23 Exhibit 21, does that \$45,528 contract appear in
24 the check -- as part of the check -- you wrote to
25 Ideal Construction?

1 A Yes, it does.

2 Q And that's the first line on the check stub at the
3 top?

4 A Yes, marked number 1-SE.

5 Q It shows 45,528?

6 A That's correct.

7 Q So you paid for all that work in 2006 on the
8 detention pond; correct?

9 A Yes, that's correct.

10 Q Now, can you state your position with respect to
11 what percentage of the work on the detention pond
12 are you seeking against the D.O.T. and these other
13 parties in this litigation?

14 MR. QUINN: Your Honor, I will object to that
15 unless he can show some basis for making any calculation
16 whatsoever.

17 MR. JETER: Well, it's equity, Your Honor. He
18 has made an estimate of what he thinks.

19 THE COURT: I will allow it.

20 BY MR. JETER:

21 Q First, how many pipes come into the pond,
22 Mr. Meshekoff?

23 A A total of three pipes into the pond: One from the
24 center of the parking lot, one from the
25 perimeter -- that would be the southern perimeter,

1 I believe -- and the other on the westerly
2 perimeter, a short portion on the northerly
3 perimeter.

4 Q What percentage of the total detention pond costs
5 are you requesting in this litigation?

6 A We determined that we are using 20 percent. We are
7 determining a request for 80, I believe.

8 Q I am talking about the costs on the detention pond
9 itself, not the costs for the pipeline where they
10 use 80 percent of it.

11 A Right.

12 Q But the cost on the detention pond.

13 A I believe it was one-third.

14 Q One-third?

15 A Yes.

16 MR. JETER: Your Honor, I would move the
17 admission of Exhibit 21.

18 THE COURT: Any objection?

19 MR. FRAWLEY: No objection from D.O.T., Your
20 Honor.

21 MR. BOOTH: None.

22 MS. CLAYTON: No.

23 MR. QUINN: No, sir.

24 THE COURT: Twenty-one is in evidence without
25 objection.

1 (Plaintiff's Exhibit Number 21 is received
2 into evidence.)

3 BY MR. JETER:

4 Q Mr. Meshekoff, I want you to look at Exhibit 22, an
5 invoice from American Engineering.

6 A I have it.

7 Q Dated October 17, 2006. Did you receive and pay
8 this invoice?

9 A Yes, I have -- or authorized the payment, either
10 one.

11 Q Through your property manager?

12 A That's correct.

13 Q What was your property manager, the name of the
14 company and the name of the individual?

15 A It was W.R.S. through Ms. Dee Reeves was my
16 contact.

17 Q And does this invoice, the title of it, mention the
18 detention system?

19 A Yes, storm water collection and detention system.

20 Q Now, I ask you to look over --

21 MR. JETER: Your Honor, I would move the
22 admission of Exhibit 22.

23 MS. CLAYTON: Your Honor, I actually object to
24 this exhibit. This was for the entire detention system
25 at Westside Plaza, which would also include lines A, B,

1 C, D, E, and the detention pond.

2 I don't think those amounts would be -- none
3 of the amounts are applicable to the defendant, but in
4 any event, those amounts certainly would not be
5 applicable to the defendants.

6 THE COURT: Yes, Mr. Jeter.

7 MR. JETER: Your Honor, this is another
8 invoice. I was going to get to this in a second where
9 we are seeking one-third of it.

10 THE COURT: With that caveat do you still
11 object? I understand you object that your client would
12 have no responsibility whatsoever, but do you object
13 under that caveat of one-third?

14 MS. CLAYTON: I think the one-third would also
15 just be arbitrary, and I'm not sure that it would -- it
16 would be speculative. I'm not sure that meets the
17 required certainty requirement, but I would have that
18 objection. I know that Mr. Jeter is probably moving on
19 to 23 and 24 also, and I would note the same objections,
20 Your Honor.

21 THE COURT: I will allow those subject ---
22 yes, Mr. Frawley.

23 MR. FRAWLEY: We would just join in that
24 objection, Your Honor. I think for purposes of videoing
25 pipe, it depends more on the linear feet of the pipe

1 involved, rather than whether it's one or three lines
2 that feed the detention pond. So we would join in the
3 objection based on that.

4 THE COURT: I will allow it subject to the
5 objections. That holds for 22, 23, 24, and 25?

6 MR. JETER: Just through 24, Your Honor, 22,
7 23, and 24.

8 THE COURT: Same objection?

9 MS. CLAYTON: Yes, Your Honor.

10 MR. FRAWLEY: Yes, sir.

11 THE COURT: I will allow those in subject to
12 objection.

13 MR. JETER: Thank you, Your Honor.

14 (Plaintiff's Exhibits Number 22-24 are
15 received into evidence.)

16 BY MR. JETER:

17 Q Did you pay each of these invoices, 22, 23, and 24,
18 Mr. Meshekoff?

19 A Let me take a look. (Pause.) Yes, we did.

20 Q Now, Mr. Meshekoff, after you found out the names
21 of the involved parties upstream from you, did you
22 request that they contribute to the repair costs?

23 A Yes.

24 Q Did you get anything other than a negative response
25 from each of them?

1 A Yes, that's correct.

2 Q And with respect to the repair costs on the
3 detention pond, you have already testified you are
4 seeking one-third?

5 A Yes.

6 Q With respect to the repair costs on the pipeline
7 leading to the detention pond, are you seeking the
8 applicable percentage that your engineer found?

9 A Yes, I am, on the use of that line.

10 Q You recognize that your shopping center uses
11 approximately 20 percent of that line; correct?

12 A That's correct.

13 Q And you are not seeking that 20 percent?

14 A No.

15 Q But you are seeking whatever he found that the
16 non-Westside parties are using?

17 MR. BOOTH: Your Honor, his characterization
18 of what this engineer is going to say, that's
19 inaccurate. It has not been put into evidence as to
20 what the engineer is going to say. I know what the
21 engineer said. I got his report. I have read his
22 report.

23 THE COURT: Yes, sir.

24 MR. BOOTH: The engineer is not telling him
25 what people should be charged for any of this work.

1 Clearly his report doesn't say that. So I object to
2 that characterization of his supposed testimony that
3 will come later.

4 MR. JETER: I will accept that and amend it if
5 it's okay, Your Honor.

6 THE COURT: I take it -- well, then I can
7 sustain your objection it sounds like, Mr. Booth. I
8 take it that Mr. Meshekoff's testimony in that regard,
9 "I am claiming whatever the engineer's report says,"
10 assuming that is admissible also; correct?

11 MR. BOOTH: Right.

12 THE COURT: That's kind of your objection.

13 MR. BOOTH: Yes. There is no question the way
14 he calculated each person's contribution is based upon
15 the engineer's report, but I think there is a real
16 difficult causation or relationship to that.

17 So I don't mind him saying what he is -- his
18 complaint says what he wants to charge each party, my
19 client for example. It's in his complaint. He can put
20 in that number and say he considered this, that, and the
21 other, but to say that the engineer said that, that's
22 what I have the objection to. I think Mr. Jeter agrees.

23 MR. JETER: That's not exactly what -- if I
24 can reask it.

25 THE COURT: Certainly.

1 BY MR. JETER:

2 Q Are seeking contribution from these parties based
3 upon their use of your drain line?

4 A Yes, I am. I further asked Mr. Richardson to come
5 up with some measures so that the thrash that would
6 come in would not invade the system too -- or trash
7 in the form of solid or chemical.

8 Q Now, you mentioned you have a property manager,
9 W.R.S. Did their name change towards the end of
10 their time as property manager?

11 A Yes, it has.

12 Q What is the name of the current property manager
13 you use?

14 A Southern Real Estate Management.

15 Q And the person who did the property management work
16 for you at Westside was named Dee Reeves? Did you
17 say that?

18 A That's correct.

19 Q Did she make recommendations to you on maintenance
20 and repairs and upkeep concerning the detention
21 pond or this line?

22 A Yes, she did.

23 Q What did you do with her recommendations?

24 A I always fulfilled whatever she needed with regard
25 to any kind of maintenance or not.

1 Q And with what kind of promptness did you act?

2 A Immediately. There is no question of holding back
3 or milking the property, aside from the fact of the
4 obligation to the lender.

5 Q And was she the one who advised you week to week,
6 month to month, or whatever?

7 A That's correct.

8 Q And is that what you were relying on for your
9 actions?

10 A Always.

11 Q Now, her company, W.R.S., I think moved to
12 Charlotte and changed their name? Is that your
13 understanding?

14 A Yes, that's correct.

15 Q Have you asked Tim Richardson to maintain -- what
16 have you asked Tim Richardson to do with regard to
17 ongoing maintenance in the future?

18 A I've asked Tim Richardson to maintain on a regular
19 basis the retention pond, just to make sure it's
20 operating on maximum efficiency and advise me if
21 there is to be any other repair. In the future he
22 did assemble another box to catch garbage that was
23 coming through, but that's what I agreed to with
24 him.

25 Q On the repairs have you followed the

1 recommendations of your engineering contractor?

2 A Of course.

3 Q Okay.

4 MR. JETER: If I could have one moment, Your
5 Honor.

6 (Attorneys confer.)

7 MR. JETER: Your Honor, we would move Exhibit
8 13, which is the deed into my client in 1997, into
9 evidence without objection.

10 MR. FRAWLEY: No objection from D.O.T., Your
11 Honor.

12 MS. CLAYTON: No objection.

13 MR. BOOTH: No objection.

14 THE COURT: Plaintiff's 13 is in evidence
15 without objection.

16 (Plaintiff's Exhibit Number 13 is received
17 into evidence.)

18 (Attorneys confer).

19 MR. JETER: Your Honor, unless I am corrected,
20 I believe Exhibits 8 through 11, which are answers to
21 interrogatories, are admitted without objection.

22 THE COURT: Correct, Mr. Frawley?

23 MR. FRAWLEY: That's correct, Your Honor, no
24 objection.

25 MS. CLAYTON: No objection from Danwood.

1 THE COURT: Mr. Booth, Mr. Quinn?

2 MR. BOOTH: D.W. is Number 9 on his list. So
3 Exhibit 9 for my client's interrogatories, I have no
4 objection to that coming in.

5 THE COURT: All right.

6 MR. BOOTH: Did I get that right? Is it
7 Number 9?

8 MR. JETER: You did.

9 THE COURT: So that's 8, 9, 10, and 11.

10 MR. JETER: Yes, Your Honor.

11 THE COURT: In evidence without objection.

12 (Plaintiff's Exhibits Number 8-11 are received
13 into evidence.)

14 MR. JETER: Your Honor, that's all I have of
15 Mr. Meshekoff.

16 THE COURT: Thank you. Mr. Frawley.

17 MR. FRAWLEY: May it please the Court. Your
18 Honor, in the package we have given you, I have two
19 exhibits that are folded in the last two envelopes.
20 They are actually Danwood's Exhibits 85 and 85-A.

21 THE COURT: All right.

22 MR. FRAWLEY: If I could have a moment to set
23 up.

24 THE COURT: I am going to take 15 minutes
25 while you get all that set up.

1 (Whereupon there is a recess.)

2 THE COURT: Mr. Frawley.

3 MR. FRAWLEY: May it please the Court.

4 THE COURT: Yes, sir.

5 CROSS EXAMINATION

6 BY MR. FRAWLEY:

7 Q Mr. Meshekoff, you testified that you were unaware
8 of the encroachment permit when Westside Meshekoff
9 Family Limited Partnership was deeded the property
10 subject to this action; correct?

11 A When we purchased the center, correct.

12 Q You are the managing partner now; correct?

13 A Correct.

14 Q When did you become the managing partner of
15 Westside Meshekoff Family Limited Partnership?

16 A Officially, I believe, December of 2005. However,
17 I was acting in certain capacities relative to that
18 position prior to that due to the diminishing
19 capacity of my mom and dad.

20 Q Let me ask you about that. Your mother and father
21 are Helen and Edward Meshekoff; correct?

22 A Yes, my father is deceased.

23 Q Your father is deceased?

24 A Yes.

25 Q I'm sorry to hear that. How old is your mom?

1 A In her middle 90s.

2 Q Does she also have diminished capacity?

3 A At this point it's complete dementia.

4 THE COURT: When you say middle 90s, 95?

5 THE WITNESS: Ninety-four. She was born
6 April 29, 1919. I don't know about the math.

7 BY MR. FRAWLEY:

8 Q So you took over officially as managing partner of
9 the Westside Meshekoff Family Limited Partnership
10 in December of 2005; correct?

11 A That's correct.

12 Q And the plaintiff in this case, the Westside
13 Meshekoff Family Limited Partnership, took
14 ownership of this property in 1997; is that
15 correct?

16 A Yes, to the best of my knowledge.

17 Q Who was the managing partner then?

18 A The managing partners -- they were general
19 partners -- would have been my mom and father, and
20 I don't know -- I heard you earlier mention
21 Mr. Wyatt, I guess.

22 Q Weldon Wyatt?

23 A Yes, but I don't know of any of that.

24 Q I may have misspoke. I'm not maintaining he has
25 any interest in your partnership.

- 1 A I see.
- 2 Q But Mr. Wyatt's management company was the company
3 for which Dee Reeves worked as property manager for
4 your company, your property; is that correct?
- 5 A Yes, correct.
- 6 Q How many siblings do you have?
- 7 A I have one sibling.
- 8 Q Who is that, a male, female?
- 9 A Yes, her name is Louisa Meshekoff.
- 10 Q And how old is Louisa?
- 11 A Seven years younger. She is almost 50, I believe.
- 12 Q So you and Louisa and your mother are the three
13 remaining members of the Westside Meshekoff Family
14 Limited Partnership?
- 15 A Yes, by the estate of my father, but, yes.
- 16 Q When did your dad pass?
- 17 A 8/9/10.
- 18 Q What role, if any, did you have in the deeding of
19 the property or receiving of the deed of the
20 property in 1997?
- 21 A None whatsoever.
- 22 Q Did you attend the closing?
- 23 A No.
- 24 Q Did your mother attend the closing?
- 25 A That I don't know.

- 1 Q How about your father?
- 2 A I don't know.
- 3 Q How about your sister Louisa?
- 4 A No.
- 5 Q No, she did not?
- 6 A I know she did not.
- 7 Q Was anyone attending the closing when the plaintiff
- 8 in this case was deeded the property in 1997 to
- 9 review any documentation at that closing?
- 10 A That I don't know. I believe they relied on
- 11 counsel for that.
- 12 Q Y'all had local attorneys; didn't you?
- 13 A I don't know for sure, but I would hope so.
- 14 Q You had to close the purchase of a property in
- 15 South Carolina. You would have to have a South
- 16 Carolina attorney for that; correct?
- 17 A I assume so, yes.
- 18 Q And y'all would have done that; correct?
- 19 A Sure. They would have done whatever was required
- 20 under the law to effect the closing, certainly with
- 21 what was required to by the lender.
- 22 Q But actually the Westside Meshekoff Family Limited
- 23 Partnership was taking this property by deed from
- 24 the former Meshekoff Family Limited Partnership;
- 25 correct?

1 A That I didn't know. I don't know what the chain of
2 transfer was.

3 Q Do you recognize the name Fourm, F-O-U-R-M,
4 Meshekoff Family Limited Partnership?

5 A Yes, I do. It's still alive today and is with
6 regard to the other properties.

7 Q Did you have a partnership interest in the Fourm
8 Meshekoff Family Limited Partnership?

9 A At what point?

10 Q At any point in -- in 1997 when this property was
11 conveyed.

12 A I don't believe in 1997 I did, not from the best of
13 my knowledge.

14 Q Did you have an interest in it in 1996 when it
15 received this property from someone?

16 A I don't know. I don't believe we did. I believe
17 that the interest to my sister and myself were done
18 as a matter of the succession plan and were done at
19 various times, but I don't know the dates or
20 amounts that were done.

21 Q Did you at any point in your lifetime have an
22 interest in the Fourm Meshekoff Family Limited
23 Partnership?

24 A Up to today you are saying?

25 Q Any time.

- 1 A Yes, I presently have a percentage.
- 2 Q But in 1997 you did not?
- 3 A That I'm not sure. I don't know.
- 4 Q So you may have?
- 5 A I may have.
- 6 Q So you may have had an ownership interest in this
- 7 shopping center when it was conveyed to the
- 8 Westside Meshekoff Family Limited Partnership in
- 9 1997?
- 10 A If I can correct something. I am recalling
- 11 something that was from approximately 2000. I
- 12 believe that my mother and father were the sole
- 13 owners of the Meshekoff Family -- of the Fourm
- 14 partnership -- because that was a 10-31 trade from
- 15 a property in New York, which we were not partners
- 16 in, and I believe that any partnership was derived
- 17 at some point afterwards.
- 18 Q In any event you do have an interest in the current
- 19 partnership that's the owner of the shopping center
- 20 now; correct?
- 21 A Yes, I do.
- 22 Q And you may not have had an interest in the grantor
- 23 of this property, the Fourm Limited Partnership?
- 24 You may not have had an interest in that?
- 25 A Yes.

- 1 Q But your mother and father did?
- 2 A That's correct.
- 3 Q All right. And your mother and father acquired
- 4 this property from Westside Plaza Associates in
- 5 1990; didn't they?
- 6 A That I don't know. I don't know.
- 7 Q Well, don't take my word --
- 8 A I don't know the dates of that.
- 9 Q Do you know that your mother and father had
- 10 ownership interest in this shopping center before
- 11 the Fourm Meshekoff Family Limited Partnership had
- 12 interest in it?
- 13 A That I don't know either.
- 14 Q But you would agree with me that your mother and
- 15 father were predecessors in title for this shopping
- 16 center to the current owner of the shopping center?
- 17 They owned it before you owned it?
- 18 A That's correct.
- 19 Q And you do know that Westside Plaza Associates was
- 20 also in your chain of title? They also owned it
- 21 before you owned it; correct?
- 22 A Or before my parents owned it.
- 23 Q Sure.
- 24 A Yes, I understand there were developers from what I
- 25 know.

- 1 Q And you recognize the name Dayton and Associates?
2 That was the original developer; wasn't it?
- 3 A Yes, I did. I don't know if he was the original
4 developer, but I certainly recognize the name.
- 5 Q And you recognize the name because they signed off
6 on Plaintiff's Exhibit 1? If you could look in
7 your booklet there, please, the very first exhibit.
- 8 A Okay.
- 9 Q Have you got it?
- 10 A Yes, I do.
- 11 Q This is the encroachment permit from Dayton and
12 Associates that was issued by S.C.D.O.T.? Is that
13 your understanding?
- 14 A I see encroachment permit to Dayton and Associates,
15 17.
- 16 Q That's dated in the upper right-hand corner
17 August 21, 1987; isn't it?
- 18 A That's correct.
- 19 Q And in the lower right-hand corner, it's signed
20 by -- and I can't read that signature -- but below
21 that it says for Dayton and Associates by Wyatt
22 Development Company. Do you see that?
- 23 A Yes, I do.
- 24 Q You have looked this over; haven't you?
- 25 A Yes.

1 Q And you agree with me that Dayton and Associates is
2 in your chain of title? It is a predecessor in
3 title to Westside Meshekoff Family Limited
4 Partnership in ownership of this Westside Plaza
5 Shopping Center; correct?

6 A Yes, I have seen their name. I don't understand
7 necessarily the owner, but I have seen their name
8 associated prior to Westside Meshekoff Family
9 Limited Partnership.

10 Q In 1997 when y'all acquired this shopping center,
11 you do know or you don't know that you had a local
12 lawyer who did the closing for you?

13 A I don't know at that time. I have heard of a local
14 lawyer that was associated with my parents at
15 certain times, but I don't know if he represented
16 my parents or what his function was at that time.
17 I had nothing to do with their business at that
18 time.

19 Q You individually maybe didn't, but your partnership
20 did; didn't it?

21 A My partnership?

22 Q The partnership that we are here for.

23 A Yes.

24 Q The plaintiff, that entity, had an interest in
25 1997; didn't they?

1 A Yes.

2 Q They had an interest in getting a clean closing and
3 acquiring this shopping center; correct?

4 A Yes.

5 Q And you maybe weren't the managing partner then,
6 but whoever was running the store then, they had an
7 interest in getting a proper conveyance of this
8 property; correct?

9 A Correct.

10 Q All right. Now, Plaintiff's Exhibit Number 1, this
11 encroachment permit, while you may not have known
12 about it in 1997, you didn't have any difficulty
13 getting a copy of it when you asked Mr. Jeter to
14 make a Freedom of Information Act request of
15 S.C.D.O.T.; did you?

16 A No.

17 Q You got one right away then; didn't you?

18 A I don't know the length of time it took to obtain
19 one.

20 Q But you had a lawyer this time. That lawyer was
21 able to acquire a copy of this encroachment permit
22 signed by your partnership's predecessor in title,
23 Dayton and Associates; correct?

24 A That's correct.

25 Q If you look at the bottom of Exhibit 1, you see the

1 very bottom part, right above the Dayton and
2 Associates signature, the preprinted language
3 there?

4 A The "I will accept"?

5 Q Yes.

6 A Yes, I do.

7 Q That says, "I accept the permit herein granted and
8 agree to comply with all the provisions, terms,
9 conditions, and restrictions set out herein."
10 That's what it says; correct?

11 A That's correct.

12 Q In the first sentence?

13 A Uh-huh. (Indicating affirmative response.)

14 Q The second sentence says, "I do hereby agree and
15 bind my heirs, successors, assigns to assume any
16 and all liability this Department might otherwise
17 have."

18 MR. JETER: Your Honor, I would object at this
19 point. This is an unrecorded document. It was not
20 freely available to the public in the public records.
21 It had to be F.O.I.A.'ed. You might or might not know
22 it even existed to ask for it. So "binding on my heirs,
23 successors, and assigns," has no effect on this
24 unrecorded document.

25 THE COURT: Well, the only issue there though,

1 of course, is Plaintiff's 1 is already in evidence
2 without objection. So that language is in evidence
3 whether Mr. Frawley reads it or not.

4 MR. JETER: Yes, sir.

5 THE COURT: That doesn't necessarily mean it's
6 binding on Mr. Meshekoff.

7 MR. JETER: And that, of course, is a legal
8 issue that he would have knowledge of.

9 THE COURT: As I took what Mr. Frawley was
10 doing, he is just publishing the language in the record.

11 MR. JETER: I have no objection to publishing
12 it, Your Honor.

13 MR. FRAWLEY: We will argue the Fuller and
14 Arants case later on as to what constitutes notice
15 whether it's recorded or not.

16 THE COURT: All right. Thank you. You may
17 continue.

18 MR. FRAWLEY: Thank you, Your Honor.

19 BY MR. FRAWLEY:

20 Q So going back to where we left off, the language we
21 just read, the person who signs this on the bottom
22 purports to bind their successors, heirs, and
23 assigns; don't they?

24 A Yes, that's the language.

25 Q And they also purport, "To assume any and all

1 liability this Department might otherwise have in
2 connection with accidents or injuries to persons or
3 damage to property, including the highway, that may
4 be caused by the construction, maintenance, use,
5 moving or removing of the encroachment contemplated
6 herein and agree to indemnify this Department for
7 any liability incurred or injury or damage
8 sustained by reason of the past, present, or future
9 existence of said encroachment." That's what it
10 says; correct?

11 A Yes, it is.

12 Q It's signed by your predecessor, your partnership's
13 predecessor in title; correct? Dayton and
14 Associates?

15 A Yes. But, again, I don't know how to establish
16 partnership predecessor. Somebody obviously, along
17 the chain of title, I guess of the partnership --
18 of the property.

19 Q Okay.

20 A The legal language I don't understand.

21 Q Now, the property manager for this shopping center
22 in 1997 was Dee Reeves of Wyatt Development at that
23 time; correct?

24 A I don't know in 1997 it was Dee Reeves. That's was
25 before my tenure.

1 Q But Wyatt Development was the property manager?

2 A That, again, is unknown to me. I understand Wyatt
3 Development was the developer. I don't know
4 specifically if they were -- if they had other
5 people doing the actual management or not.

6 Q But you would agree with me that Wyatt Development
7 or Weldon Wyatt or someone working for him has been
8 the property manager for your shopping center, your
9 partnership shopping center, for years? Wouldn't
10 you agree with that?

11 A If that is W.R.S. The most I know is that W.R.S.
12 is the property manager that I have known. I have
13 not known specifically that Wyatt Weldon -- that
14 Weldon Wyatt -- I think that's right -- was the
15 manager, was the actual manager of the property.
16 That's just beyond the scope of my knowledge.

17 Q And part of that reason is that you have only
18 actually been the managing partner officially since
19 December of 2005; correct?

20 A No. The reason -- I have known about W.R.S. for
21 much longer than 2005, but I just don't know that
22 that reaches back to 1997 as you asked.

23 Q Dee Reeves was your property manager; correct? You
24 remember that?

25 A Yes, I do to my knowledge.

1 Q And you remember Dee Reeves worked for W.R.S.? You
2 remember that?

3 A W.R.S., correct.

4 Q And you don't know if Dee Reeves, before she worked
5 for W.R.S., had worked for Wyatt Development? You
6 don't know that; do you?

7 A Exactly. Or if W.R.S. is, in fact, Wyatt
8 Development.

9 Q Okay. Maybe Ms. Reeves can testify to that. Have
10 you, at any time prior to July of 2005 when you
11 first found out about the sinkhole in the driveway,
12 ever reviewed the plans for this shopping center?

13 A Yes.

14 Q When did you first review the plans for this
15 shopping center?

16 A You know, sometime during the course of my
17 upbringing with my parents. They might have shown
18 me something. I remember we came down when they
19 first acquired it to pick up trash out of the
20 parking lot. But, I mean, I just saw plans of it.
21 I didn't review them with a knowledgeable eye or
22 with intent of looking at anything specific.

23 Q So you would have come down shortly after your
24 parents acquired it. They acquired in 1990; didn't
25 they?

1 A I'm not sure the exact date, but I recall that we
2 took a family trip to see this property that they
3 had acquired -- excuse me for a second.

4 Q Would you like some water? There is water up there
5 as well.

6 A Thank you.

7 Q Are you good?

8 A Go ahead, yes. Sorry.

9 Q And this would have been sometime in the early
10 '90s? Whether it's 1990 or whatever, it's early in
11 the '90s; wasn't it?

12 A I don't recall when it was.

13 Q You recall picking up trash in the parking lot
14 then?

15 A I remember being very young. I remember that my
16 parents -- we stopped by to see it, and they pulled
17 in the parking lot to see it and to show it to us
18 as children. At some point my mother took off --
19 showed us the way to pick up paper cups and stuff
20 in the parking lot. That's just a memory that I
21 have of it.

22 Q As far as the paper cups in the parking lot, this
23 shopping center has retail establishments there;
24 doesn't it?

25 A That's correct.

- 1 Q And it originally had a Walmart there; didn't it?
- 2 A That's correct.
- 3 Q Walmart sells drinks and paper cups and popcorn and
- 4 other material; isn't that correct?
- 5 A That's correct.
- 6 Q They have Walmart out in California where you live?
- 7 A Walmart?
- 8 Q Yes.
- 9 A Oh, yes.
- 10 Q They've got Walmarts in New York where your folks
- 11 are from?
- 12 A Yes.
- 13 Q Walmart pretty much has a lot of paper that they
- 14 sell; correct?
- 15 A Yes.
- 16 Q They also have a Chinese restaurant there too;
- 17 didn't they?
- 18 A Yes, there is one there.
- 19 Q And a Bi-Lo?
- 20 A Correct.
- 21 Q So around that time you said you may have reviewed
- 22 some plans, but it sounds to me like you were
- 23 pretty young then; correct?
- 24 A I was. I remember my parents opening a large sheet
- 25 and saying, you know, this is -- some part of that

1 came back to memory later on when I looked on
2 Google.

3 Q During the time that you took over as managing
4 partner, you are not living in the South Carolina
5 area? You are actually out in California; aren't
6 you?

7 A Yes, that was true.

8 Q And that's why you were relying on W.R.S. and Dee
9 Reeves? They are your on-site eyes and ears for
10 your property; aren't they?

11 A That is correct.

12 Q Ms. Reeves had some level of discretion that you
13 had delegated to her; didn't you?

14 A Discretion? There are normally applied things that
15 she takes care of on a monthly basis without any
16 sort of notice to me or authorization or needed
17 authorization to pay or repair.

18 Q Right. She collects rents from the tenants;
19 doesn't she?

20 A That is correct.

21 Q If one of the tenants has a problem or concern, she
22 has face-to-face time with those tenants; correct?

23 A That is correct.

24 Q And if there is a problem, she will pick up the
25 phone and call you?

1 A That's correct.

2 Q If there is routine maintenance to be done, she
3 takes care of that; doesn't she?

4 A That's correct.

5 Q As far as the routine maintenance that was to be
6 done to this storm drain system, was she supposed
7 to be taking care of that for you?

8 A Yes.

9 Q And do you know what that consisted of?

10 A Sure. It's a request -- consists of care for the
11 detention pond, and that's pretty much it, you
12 know, to make sure the detention pond -- you really
13 don't know unless you were to go into the places
14 what other routine maintenance there would be until
15 there's a problem.

16 Q Well, at some point you paid to have a camera stuck
17 down there and look at the pipelines from inside?
18 You did that; didn't you?

19 A After the failure.

20 Q After the failure. The first failure was in
21 July of 2005; wasn't it?

22 A That was the failure, yes, over the entranceway.

23 Q We have Exhibit 7, an as-built survey, with the red
24 and green lines on it. Let's hold it up for His
25 Honor. Where the first failure took place was down

1 here (indicating) where that driveway is; correct?

2 A That's correct.

3 Q When that happened you were told about the failure
4 by Dee Reeves calling you; weren't you?

5 A Yes.

6 Q And you weren't actually here to look at it, but
7 she called and she reported to you that, "We've got
8 a sinkhole in the driveway, and we need to do
9 something about it"?

10 A I believe I saw pictures of it right away because
11 Tim Richardson, the contractor, had to immediately
12 bring over steel plate to cover the area.

13 Q Right. And he came down and put steel plates over
14 it and immediately responded; didn't he?

15 A Yes, he did.

16 Q And I think the original proposal that y'all got
17 from Mr. Richardson was dated July 26, 2005; wasn't
18 it?

19 A That I don't know.

20 Q Let me show you S.C.D.O.T.'s document Number 31.

21 MR. FRAWLEY: Your Honor, we have handed that
22 up to Your Honor.

23 BY MR. FRAWLEY:

24 Q Do you see that?

25 A (Pause.) Yes, sir, I see this.

1 Q That's not actually to you. That's actually to
2 Ms. Reeves; isn't it?

3 A I don't see who it's actually addressed to.

4 Q Look in the lower right-hand corner. There are two
5 signature blocks at the bottom; aren't there?

6 A Tim Richardson.

7 Q And the one on the right-hand side is Dee Reeves'
8 signature; isn't it?

9 A I don't recognize Dee Reeves' signature.

10 Q She is your property manager, and you don't
11 recognize her signature?

12 A No.

13 Q How about the upper right-hand corner? There is a
14 stamp there. Do you see that?

15 A Approved, yes.

16 Q Approved. And is Dee Reeves indicated in there?

17 A I see a D. I couldn't testify as to that being Dee
18 Reeves' initials or signature.

19 MR. FRAWLEY: This is just for identification
20 purposes at this point, Your Honor.

21 MR. JETER: We don't object.

22 MR. FRAWLEY: Then Defendant's 31 is in
23 evidence then.

24 THE COURT: There is no objection to 31?

25 MS. CLAYTON: No objection.

1 MR. BOOTH: No objection.

2 (Defendant's Exhibit Number 31 is received
3 into evidence.)

4 BY MR. FRAWLEY:

5 Q At some point Mr. Richardson put the metal plates
6 in place to protect it and then gave y'all a quote.
7 Ms. Reeves called you, you approved it, the work
8 was done, and it got paid within about two weeks of
9 finding out about the problem; correct?

10 A That's correct.

11 Q And this was July 26, 2005, and it was paid
12 August 10, 2005; wasn't it?

13 A I guess. Do we have -- yes, we do have it. Yes,
14 we looked at that invoice. Yes, that's correct.

15 Q Thank you. Other than the time in the early '90s
16 when you mentioned that you and your family visited
17 the property, when did you next visit the property?

18 A I made a trip to visit the property. I don't
19 remember or I don't recall the year. I have
20 certainly been there to visit because I was to see
21 Russ Jeter because of separate litigation on behalf
22 of my mother and father. I don't recall the exact
23 year.

24 Q That's a poor question on my part. Let me back it
25 up. After the July 26, 2005, sinkhole incident,

1 when did you next visit the property?

2 A I don't recall the date, but I believe it was just
3 on -- I had to come down to see another property,
4 to tend to another property, and I made an effort
5 to come by to see Westside.

6 Q Was that visit before the 2006 renovations or
7 digging up of the pipeline?

8 A I believe so, yes.

9 Q So sometime between July of 2005 and 2006 when the
10 parking lot pipes were dug up, you visited the
11 property?

12 A To the best of my recollection. I'm not sure. I
13 have a difficult time with dates. I have type 2
14 diabetes. Sometimes it's difficult for me to place
15 dates. I can place pictures very easily but not
16 dates.

17 Q Mr. Meshekoff, what do you do for a living? I know
18 you are the managing partner for the partnership.
19 What is your vocation?

20 A Prior to this I was a sculptor, and then I was a
21 film director for 25 years.

22 Q You were also a writer at some point; weren't you?

23 A That's correct.

24 Q For television?

25 A I did some work in commercials and I had a hand in

1 what was called the "Script Doctor." It was called
2 that.

3 Q When you found out about the July 26th sinkhole,
4 you understood that that sinkhole was adjacent to a
5 catch basin right next to the highway; didn't you?

6 A Yes.

7 Q You saw pictures of that then; didn't you?

8 A Yes, absolutely.

9 Q You also knew that that catch basin connected to
10 line E, the line that goes to the west and then up
11 southward toward the detention pond? You knew
12 that; correct?

13 A That's correct.

14 Q So you found out from Dee Reeves that there was a
15 problem with that catch basin next to D.O.T.
16 involving line E, and you knew that as of July 26,
17 2005?

18 A That's correct. I did not know anything beyond
19 really what the -- first with the driveway. I
20 understood there was a problem with the driveway,
21 but I had no idea at that point which way anything
22 went.

23 Q Well, you knew there was a catch basin there?

24 A When you say a catch basin, you mean the retention
25 pond? The manhole?

- 1 Q I mean the manhole.
- 2 A The manhole. I knew there was a manhole there
- 3 because that's where they found other debris.
- 4 Q And that's also where water from the road entered
- 5 the system; isn't that correct?
- 6 A That I did not know. I assume somehow at this
- 7 point, but I did not know then.
- 8 Q In July of 2005, you had Ideal Construction Company
- 9 and Tim Richardson there to do the work; correct?
- 10 A Yes.
- 11 Q And they work on storm drains?
- 12 A Correct.
- 13 Q And they are pretty good on working on storm
- 14 drains; weren't they?
- 15 A Yes.
- 16 Q So you had the mechanism then for someone to tell
- 17 you what a catch basin was?
- 18 A At that point what I did was ask Mr. Reeves [sic].
- 19 When he said there was material in there, I didn't
- 20 know. My first assumption was that this was a
- 21 perimeter pipe of our property that all of the
- 22 storm water came in and followed around the edges.
- 23 Then I asked him to investigate the source of the
- 24 water coming into there and the trash that he
- 25 found, and I was informed that it came off site.

1 Q It came off site?

2 A It came -- it was delivered to us, and it was not
3 of the center's.

4 Q From D.O.T.'s road, from Highway 1; correct?

5 A I don't believe at that point we knew exactly where
6 it came from.

7 Q Do you know from Mr. Richardson, your construction
8 fellow, that that water and trash came in that
9 catch basin adjacent to the driveway that had
10 collapsed?

11 A We knew there was water and trash in there. I
12 don't believe he knew the source of that water at
13 that point. I don't know that he knew it came from
14 the road or from D.O.T. or from the properties
15 across the street. I don't recall him saying any
16 of that.

17 Q Okay. Where did you think the water was coming
18 when it's entering into a catch basin adjacent to
19 the state highway?

20 A When I saw that the manhole is on the property --
21 it's not in the street -- I assumed that there was
22 a perimeter drain, as there is on the back here,
23 that had the gradings on it; so that it would run
24 off and would all go down and follow around, as you
25 would on a house, similar to a gutter.

1 Q You are indicating, "as it does in back of the
2 lot." You are indicating line A at the very top of
3 Exhibit 7; correct?

4 A That's correct.

5 Q And that's one of the red lines, which doesn't
6 really apply to this instance?

7 A It was just done from -- I was putting it together
8 in my head at the time.

9 Q Well, you are a writer and I'm a lawyer. If we
10 want to know where a catch basin and drain line go,
11 we are probably better advised to talk to a
12 professional in the area; aren't we?

13 A Yes, we are.

14 Q And you had a guy right there, Mr. Richardson, who
15 was a professional; correct?

16 A He is a professional, yes.

17 Q Did you ever look at a predevelopment topographical
18 map of your shopping center to see where the water
19 flowed before your shopping center was developed?

20 A I don't recall seeing a specific topographical map;
21 vaguely, but I can't testify. I'm sure it was for
22 this center. I have seen topographical maps
23 though.

24 Q Now, your shopping center has retail establishments
25 there; correct?

1 A Yes, sir.

2 Q And you have got -- I don't know what is there
3 now -- but it used to be a Walmart; correct?

4 A Correct.

5 Q You've got a Bi-Lo there?

6 A Yes.

7 Q You used to have a Caravel years and year ago, but
8 that is maybe gone now. You have got restaurants
9 there; don't you?

10 A Yes, we do.

11 Q And all of those businesses derive their income
12 from customers coming to your shopping center;
13 correct?

14 A That's correct.

15 Q And they get to your shopping center through the
16 five driveways that connect your parking lot to the
17 public roads; don't they?

18 MR. JETER: Your Honor, the point he is trying
19 to make -- the center benefits from the public
20 highways -- is irrelevant to this case. It's just a
21 question of whether they have an easement and what
22 percentage of their use it was.

23 MR. FRAWLEY: Your Honor, this is an
24 equitable -- he originally had legal claims, which he
25 has dropped, so we are in equity here. If we are going

1 to look at the benefit that he is maintaining D.O.T.
2 derives by connecting storm water to this storm drain
3 system, the other side of that coin, equity-wise, is the
4 benefit that this shopping center derives from being
5 able to use the public roads. Are they going to pay
6 maintenance fees for the public roads?

7 MR. JETER: Your Honor, number one, they have
8 no right not to grant encroachment permits. That's
9 nothing they gave us. We had a right to that from the
10 General Assembly.

11 Secondly, -- I lost my train of thought. Hold
12 on just a second. The cases, when they are talking
13 about equitable allocation, do not look at this factor.
14 The cases look at percentage of use.

15 So, yes, this is equity. I understand that.
16 But that doesn't mean everything is relevant to the
17 cases which decide this equity issue. The only thing
18 the cases look at is percentage of use.

19 MR. FRAWLEY: And the cases he is referring to
20 are all road cases. They are surface water cases.

21 THE COURT: I am wondering if any way though
22 the volume of customers and all that goes into -- I
23 think I called it Wings and Ale. Mr. Meshekoff or
24 somebody corrected me -- it's Carolina Wings or
25 something like that.

1 THE WITNESS: That was it.

2 THE COURT: It seems like to me that that
3 could be part and parcel of the percentage that Westside
4 would be using. In other words, the higher volume of
5 customers in the restaurants and such like that may
6 cause a higher volume in there. But you may ask the
7 question, Mr. Frawley. You may continue.

8 BY MR. FRAWLEY:

9 Q My question again, Mr. Meshekoff, is that the
10 patrons of the retail establishments in your
11 shopping center get to your shopping center, get
12 to those retail establishments, by coming across
13 state-maintained roads and into your parking lot;
14 isn't that correct?

15 A That's correct.

16 Q Unless they helicopter in, which may happen, but it
17 doesn't happen often. When they are there, they
18 pay money to your retail establishments; correct?

19 A Yes, that's correct.

20 Q And from the money that is paid to those retail
21 establishments, those individual tenants pay rent
22 to Dee Reeves, who collects it and then passes it
23 on to your partnership; correct?

24 A Yes.

25 Q So y'all benefit from that transaction; don't you?

1 A Yes, we do.

2 Q Let me ask you this: At some point -- let's look
3 at this. This is Defendant's Exhibit Number 85.
4 You hired Michael Lambrecht, who is an engineer, to
5 do some work, to do a drainage study, and to do
6 some drawings for you; correct?

7 A Yes.

8 Q We will go over some letters that he sent and
9 connect them to Defendant's 85, but he drew -- kind
10 of a before and after -- set of plans for you
11 showing the damage and the contours of the
12 detention pond before it was dredged out.

13 Then he gave another set of plans right after
14 that showing what Richardson, Mr. Richardson and
15 Ideal Construction, had done to fix that problem.
16 Do you remember getting that?

17 A Not specifically.

18 Q Well, Defendant's Number 85, have you seen this
19 before?

20 A I have seen versions of that, but I don't recall
21 specifically seeing -- I have seen -- I remember
22 the center there, that 45 in the middle.

23 Q This right here (indicating)?

24 A Yes, that area there. I have seen that, but I
25 can't identify for sure that that is the same

- 1 drawing I have seen.
- 2 Q We will get you to come down and look at it in a
3 second. Let's look at Plaintiff's 7. Plaintiff's
4 7 shows the detention pond in the upper right-hand
5 corner. Do you recognize that?
- 6 A Yes, I do.
- 7 Q You have been out to see that detention pond;
8 haven't you?
- 9 A Yes, I have.
- 10 Q And you have been out to see it before this lawsuit
11 was brought; correct?
- 12 A Yes, I have.
- 13 Q There is an outflow pipe out of that detention pond
14 right here (indicating); correct?
- 15 A That's correct.
- 16 Q And you have seen that outflow pipe?
- 17 A I don't know that I can specifically identify the
18 outflow pipe.
- 19 Q Do you know what an outflow pipe is?
- 20 A Yes, I do.
- 21 Q Explain for the Court your understanding --
- 22 A My understanding of an outflow pipe?
- 23 Q Yes, sir.
- 24 A My understanding is that after the detention pond
25 fills to a certain point, the outflow pipe

- 1 discharges the water within the detention pond
2 further downstream or it's the exit for it after
3 you have slowed it down and collected the silt from
4 any water that is entering your system.
- 5 Q Okay.
- 6 A So it's supposed to provide water at slower flow
7 for erosion and with less sediment.
- 8 Q So you have got three pipes that feed your
9 detention pond; correct?
- 10 A Correct.
- 11 Q From line A at the top, lines B, C, and D, which go
12 underneath the Chinese restaurant in the middle?
- 13 A That's correct.
- 14 Q And then from line E, which is the one we are here
15 about, from the north; correct?
- 16 A Yes.
- 17 Q Then the water comes into your detention pond,
18 deposits as silt, and then the outflow is through
19 that outflow pipe?
- 20 A That's correct.
- 21 Q When the water leaves your outflow pipe, where does
22 the water go?
- 23 A From what I have read and what I understand of
24 water, especially in this area, is that it follows
25 whatever a natural stream was, given the lay of the

1 land before, and untouched by man.

2 Q Which is what D.O.T.'s outflow would have done
3 prior to the building of your shopping center in
4 1987; correct?

5 A I can't answer that, that I don't know.

6 Q Well, water still flowed downhill in 1987; didn't
7 it?

8 A Yes, but I recall the discussions of a swale.

9 Q Yes, sir.

10 A And that this was, in fact, where the swale was,
11 but I can't speak to that.

12 Q When the water leaves your detention pond and goes
13 somewhere by natural drainage, there are people who
14 own property downstream from you; don't they?

15 A Yes, I imagine so.

16 Q And how much do you pay those people to help them
17 maintain their storm drain systems?

18 A That's unknown. I don't believe we do pay them. I
19 believe that we deliver to them just the water that
20 we have taken in our detention pond and hand that
21 to them.

22 Q Well, let me ask you this: Is it your
23 understanding that in the encroachment permit that
24 your predecessor in title entered into, that your
25 predecessor in title agreed to accept 98 cubic feet

1 per second of storm water through that existing
2 catch basin with D.O.T.? Is that your
3 understanding?

4 A No. I understand that the diameter of the pipe
5 was able to accept -- the 60-inch diameter of the
6 pipe -- would be able to accept that
7 98-point-something cubic centimeters -- or what was
8 it? Cubic inches?

9 Q Cubic feet.

10 A Cubic feet per second of pipe.

11 Q You have got Exhibit 1 right in front of you there?

12 A Uh-huh. (Indicating affirmative response.)

13 Q Do you see this top portion in here (indicating)?

14 A Right from here (indicating), this section here
15 (indicating)?

16 Q Yes.

17 A Yes.

18 Q Read that part where it says 48-inch reinforced
19 concrete pipe.

20 A This section here says: "Construct two drives on
21 road SS-32-275, three drives along U.S. Highway
22 Number 1, and to connect exiting catch basin along
23 U.S. Highway Number 1 with new 48-inch R.C.P. as
24 shown on application dated July 15, 1987, a copy of
25 which is hereto annexed -- is annexed hereto -- and

1 made a part of this permit."

2 Q Go to the second page. The second page on Exhibit
3 1, the very top says, "Application for encroachment
4 permit"; doesn't it?

5 A Yes, it does.

6 Q And where it says sketch plan, do you see that?

7 A Yes, I do.

8 Q And there is a third paragraph down there where it
9 begins, "Applicant requests permission." Do you
10 see that?

11 A Yes, I do.

12 Q And that says, "Applicant requests permission to
13 connect onto an existing catch basin along U.S.
14 Highway Number 1 with a new 48-inch R.C.P." And
15 you understand that R.C.P. means reinforced
16 concrete pipe?

17 A That's correct.

18 Q "The 98 C.S.F. from the existing 48-inch R.C.P.
19 will be carried around the shopping center site,
20 and a 48-inch R.C.P. to the detention pond." Do
21 you see that?

22 A Yes, I do.

23 Q What they are saying there is that the 98 cubic
24 feet per second that your predecessor in title
25 anticipates receiving from the 48-inch reinforced

1 concrete pipe will be carried around the shopping
2 center site in a 48-inch reinforced concrete pipe
3 to the detention pond. Isn't that what it says?

4 A That's what it says.

5 Q So your predecessor in title has applied to D.O.T.
6 saying, "We agree to accept 98 cubic feet per
7 second of storm water runoff." Isn't that what
8 they are saying?

9 A Okay. Yes, I guess so.

10 Q You had Michael Lambrecht do -- let me ask you
11 this: Do you know if the storm water runoff from
12 that catch basin is less than, equal to, or greater
13 than 98 cubic feet per second?

14 A That I don't know.

15 Q You don't know that?

16 A No, I don't.

17 Q Have you had somebody look into that?

18 A To the flow? I recall asking how they could do
19 that without a storm.

20 Q Okay.

21 A And I don't recall.

22 Q But you can't sit here and testify today that the
23 storm water runoff your storm drain system receives
24 from the D.O.T. catch basin is equal to or greater
25 than 98 cubic feet per second; can you?

- 1 A That's correct.
- 2 Q Have you personally, as managing partner of the
3 partnership, Westside Meshekoff Family Limited
4 Partnership, have you ever demanded S.C.D.O.T. --
5 that D.O.T. make any contribution towards
6 maintenance, outside the context of this lawsuit?
- 7 A Prior to the discovery of the required maintenance,
8 no, I have not.
- 9 Q How about Dee Reeves on your behalf? Do you know
10 if she has ever made any demand of S.C.D.O.T. that
11 it contribute to maintenance costs of the detention
12 pond?
- 13 A That I don't know.
- 14 Q Do you have any idea how frequently this detention
15 pond and your storm drain system has been
16 maintained by the detention pond being graded prior
17 to the sinkhole that you found in July of 2005?
- 18 A Dee Reeves made mention of it. I don't recall. So
19 you are not asking now? You are asking prior to
20 that?
- 21 Q Prior to that.
- 22 A That I wouldn't know.
- 23 Q You are maintaining it regularly now. You have got
24 Mr. Richardson to keep an eye on it; correct?
- 25 A It was also -- I remember discussions of some sort

1 coming up that it was part of the normal
2 maintenance of the center prior to that also.
3 Because there was a change.

4 They had to dredge it before, and there has
5 been a change as to whether the material that comes
6 out of it is considered hazardous waste or not. At
7 that time it wasn't, and currently now it is
8 considered to be.

9 Q Mr. Meshekoff, did you receive a couple of letters
10 from Michael Lambrecht in between September and
11 December of 2006?

12 A I don't recall specifically. I have no reason to
13 doubt it though. If you would show me what they
14 are, I would be happy to identify it.

15 MR. FRAWLEY: We will mark this letter Exhibit
16 Number 34.

17 THE WITNESS: May I take a minute to look at
18 this?

19 THE COURT: Yes, sir.

20 (Defendant's Exhibit Number 34 is marked for
21 identification).

22 BY MR. FRAWLEY:

23 Q If you look that letter over, do you remember
24 having received that letter from Michael Lambrecht?

25 A Not specifically this letter. The language or

1 form, I don't. To say I remember this, no, I
2 don't.

3 Q When you would receive a letter from someone
4 regarding your property here in South Carolina,
5 would you typically have read that letter and paid
6 attention to it?

7 A Oh, yes, absolutely.

8 MR. FRAWLEY: Your Honor, it is marked for
9 identification as Exhibit 34. Since he has not been
10 able to authenticate it, I will move on.

11 MR. JETER: Your Honor, we have no objection.
12 It can come in.

13 THE COURT: Any other objections?

14 MR. BOOTH: None, Your Honor.

15 THE COURT: Defendant's 34 is in evidence
16 without objection.

17 (Defendant's Exhibit Number 34 is received
18 into evidence.)

19 BY MR. FRAWLEY:

20 Q Mr. Meshekoff, since you don't remember the
21 contents of that letter, I will not go into it with
22 you, but I will show you another letter, which we
23 have marked as Defendant's 35 dated December 5,
24 2006, addressed to you. Will you look that over
25 briefly and tell me if you recall having received

1 that.

2 A (Pause.) I remember references to the content of
3 the letter, not the specific letter. Once again,
4 often what I would do is when I received a letter
5 such as this, I would get the person on the phone
6 and rather than -- and sort of cut to the chase as
7 it were.

8 Q So you would have gotten that letter -- if you
9 received that letter, you would have received it,
10 maybe not reviewed it in detail, but you would have
11 then picked up the phone and called Michael
12 Lambrecht?

13 A Or there would have been arranged for a conference
14 call or some sort of discussion, yeah. First, it
15 might have happened with my counsel and then to
16 include the necessary vender as required.

17 Q But you do recall having received correspondence
18 from Michael Lambrecht?

19 A Yes, I do, maybe not directly, but I remember
20 correspondence coming in that were to Mr. Jeter and
21 were forwarded to me.

22 Q Your address in December of 2006 was Fourm,
23 F-O-U-R-M, 3940 Laurel Canyon Boulevard,
24 Number 612, Westside Plaza, Studio City,
25 California?

1 A That is the mail drop.

2 MR. JETER: Your Honor, we have no objection.
3 He doesn't have to go into all this foundation.

4 MR. FRAWLEY: That's Defendant's 35 in
5 evidence, Your Honor.

6 THE COURT: Defendant's 35 is in evidence
7 without objection.

8 (Defendant's Exhibit Number 35 is received
9 into evidence.)

10 BY MR. FRAWLEY:

11 Q In May of 2008, did you have an e-mail address in
12 California?

13 A Yes, I did.

14 Q Was it corp@4mprop.com?

15 A Yes.

16 THE COURT: What about 36, Mr. Jeter?

17 MR. JETER: Thirty-six, I just saw that one
18 this morning. If I can one moment, Your Honor.

19 (Pause.)

20 MR. JETER: No objection, Your Honor.

21 THE COURT: Is that the one you were referring
22 to then, Mr. Frawley?

23 MR. FRAWLEY: Yes, it was.

24 THE COURT: Thirty-six is in evidence.
25 Without objection?

1 MR. BOOTH: No objection.

2 (Defendant's Exhibit Number 36 is received
3 into evidence.)

4 BY MR. FRAWLEY:

5 Q Mr. Meshekoff, I am handing you Defendant's Exhibit
6 Number 36. Do you recognize that as an e-mail from
7 Michael Lambrecht to you?

8 A (Pause.) Again, I don't recall it specifically.

9 Q You can't deny that you received it? You just have
10 no recollection of it?

11 A Exactly.

12 Q As to the blowups we have got, these plans, you
13 have no specific recollection of them, although as
14 to Exhibit 85, you do seem to recall this -- you
15 referred to it as a 45? You're talking about the
16 45-degree angle?

17 A That I remember specifically, yes.

18 Q What do you remember about this 45-degree angle
19 area in Exhibit 85, if anything?

20 A It's the little cloud things that were drawn around
21 it, the scallops. There was a piece of the pipe,
22 if I remember, that needed to be replaced. It was
23 of smaller diameter to the ones on the perimeter.

24 Q This area is in the middle of the parking lot and
25 not line E that we are here about; correct?

1 A That is correct.

2 Q But you do remember having seen that? You do
3 remember having spoken with Mr. Lambrecht about
4 that?

5 A That's correct.

6 Q Exhibit 85?

7 A Mr. Lambrecht or Mr. Richardson. On things like
8 that, I would speak directly with Mr. Richardson.

9 Q But Mr. Richardson didn't draft these plans; did
10 he?

11 A I don't know. That I don't know.

12 Q Mr. Meshekoff, I appreciate your patience. Thank
13 you, sir.

14 THE COURT: Ms. Clayton.

15 CROSS EXAMINATION

16 BY MS. CLAYTON:

17 Q Mr. Meshekoff, let me move these so you can see me.
18 If I understand your testimony correctly,
19 Mr. Meshekoff, I understand that Westside Meshekoff
20 Family Limited Partnership acquired title in 1997,
21 but Westside Plaza has actually been in your family
22 for quite a few years before that; is that correct?

23 A That I don't know. I believe that -- prior to
24 1997? I honestly don't know. I know that there
25 was the mortgage that was up. Seriously, I was

1 trying to count back ten years from that, but I
2 can't tell you that. I don't know.

3 Q But your parents owned Westside Plaza in their
4 names individually at some point prior to the
5 property being titled in the Westside Meshekoff
6 Family Limited Partnership?

7 A As I was informed before and the Fourm partnership,
8 but once again I don't know.

9 Q Sir, if you would please turn with me in the
10 notebook to Exhibit 93.

11 A You say 93?

12 Q Ninety-three.

13 A I'm sorry. I have a hearing difficulty, and your
14 voice just happens to be at a frequency that is
15 hard for me to hear.

16 Q It is a little bit higher. I will do my best to
17 speak up for you.

18 A Ninety-three, 9-3; right?

19 Q Nine-three.

20 A Thank you.

21 Q Are you there?

22 A Yes, I'm here.

23 Q If you will look at Number 12, which is on the next
24 page.

25 A I see it.

1 Q During the course of this lawsuit, we sent what are
2 called interrogatories. They are just questions.
3 In Number 12 we asked you to identify any and all
4 actions taken by the plaintiff to investigate the
5 storm drainage system on the property.

6 Through your lawyers didn't you answer that
7 the plaintiff did not do any type of analysis of
8 the storm water drainage system at Westside
9 Plaza?

10 A Through my knowledge of the business, certainly
11 any time you acquire a mortgage -- I don't know
12 about taking title to a property -- but the
13 environmental study is required certainly by the
14 mortgager.

15 That's taken very seriously and is a large
16 part of the due diligence prior to any -- I believe
17 obtaining the title -- or certainly in obtaining a
18 new loan. So the environmental study would
19 encompass, I would imagine, the storm water runoff.

20 Q Didn't you say here that they did not do anything
21 prior to purchase?

22 A With regard to any investigation of the storm
23 drainage system, specifically as far as I know,
24 there was nothing specific. But recently I have
25 found out that certainly the environmental study

1 that is required would encompass that.

2 Q And have you produced any type of environmental
3 study during the course of this litigation?

4 A Nothing. The last environmental study I produced
5 was when I obtained the most recent mortgage from
6 Goldman Sachs, and that was an environmental report
7 that was required to obtain that mortgage.

8 Q You also answered in response to this question that
9 you relied upon retained counsel to conduct due
10 diligence surrounding the property. Would you
11 agree that that due diligence might include a
12 search of the public records for the property?

13 A I'm sorry. I don't see which number you are
14 looking at.

15 Q Number 12, still the same one.

16 A Okay. It's unknown to me what would constitute
17 that due diligence, whether that would be a search
18 for liens or something of that. I don't -- that
19 goes beyond the scope of my knowledge.

20 Q Well, you would hope your lawyer would go and look
21 at public records for the property; would you not?

22 A I don't know what would be custom to that process.
23 I can't answer that.

24 Q Would you expect your lawyer to look at deeds in
25 the chain of your title?

1 A Again, I don't know if that would be customary to
2 his responsibility. That's beyond the scope of my
3 knowledge.

4 Q It wouldn't be unreasonable, would it?

5 A Oh, no, certainly not.

6 Q It would be reasonable to look at the records that
7 are a matter of public record for the property?

8 A Yes. I don't know how far or what depth that
9 search entitles, but, yes, that is reasonable.

10 Q And I believe you have Plaintiff's Exhibit 7 with
11 you?

12 A What was that?

13 Q Plaintiff's Exhibit 7.

14 A Yes.

15 Q Plaintiff's Exhibit 7 is actually an as-built
16 survey for the Westside Plaza; isn't it?

17 A Yes, it is.

18 Q If you will look at the top right-hand corner,
19 there is a filed stamp, at the very top.

20 A At the top right-hand corner. We put in the
21 detention pond in that top right.

22 Q Right. You can see the detention pond, and if you
23 look past the detention pond, you see the word
24 filed?

25 A That's correct.

1 Q And that shows that it was filed July 28, 1988;
2 doesn't it?

3 A Yes, it does.

4 Q This is a document that was on file with Lexington
5 County before Westside -- before the plaintiff
6 acquired the property; correct?

7 A Yes, I imagine so.

8 Q And this document clearly shows the detention pond
9 as you have just pointed out?

10 A Yes.

11 Q It does?

12 A Yes.

13 Q It also shows all of the drainage lines throughout
14 the property; does it not?

15 A That I don't know what is from the original. If
16 you can assure me that this document with these
17 lines in it is part of the original filing, yes,
18 that I can speak to.

19 Q And I think your counsel, Mr. Jeter, would concede
20 that this is the originally filed document but for
21 the colored section that he has added.

22 THE WITNESS: Is that?

23 MR. JETER: Yes.

24 THE COURT: Thank you, Mr. Jeter.

25 MR. JETER: We stipulate as to the

1 authenticity of the document, yes, sir.

2 THE WITNESS: And that it included the storm
3 drain lines indicated inside?

4 MR. JETER: Yes, anything on that we are
5 stipulating to.

6 THE WITNESS: Thank you.

7 BY MS. CLAYTON:

8 Q So in 1988 this document was filed and it clearly
9 shows line E leaving the detention pond; doesn't
10 it?

11 A Yes.

12 Q And it also shows line E picking up at Highway 1;
13 does it not?

14 A Yes.

15 Q So when Westside came into the ownership of the
16 Meshekoffs, whether it's your parents who acquired
17 it before the Westside Meshekoff Family Limited
18 Partnership or in 1997, someone could have gone to
19 Lexington County, where we are today, and looked at
20 this very as-built survey?

21 A That's correct. However, I don't know that this
22 as-built survey indicates prior to that catch basin
23 where any water is coming in.

24 Q Well, it ends at Highway 1; does it not?

25 A Yes, but I don't know that that is the connection

1 point. Forgive me for answering more than...

2 Q You can see storm sewer manholes identified on the
3 as-built survey?

4 A Okay.

5 Q I show you Exhibit 83, which you do not have. This
6 is a Class-A land title survey for Westside Plaza.

7 MR. BOOTH: Your Honor, we only have the large
8 exhibit that Mr. Meshekoff is looking at.

9 MR. JETER: May I step up behind the witness,
10 Your Honor?

11 THE COURT: Certainly.

12 BY MS. CLAYTON:

13 Q Mr. Meshekoff, you would agree that this land title
14 survey is dated December 30, 1996; is that correct?

15 A Where are you looking at the date from? I don't
16 see the date. Here I am looking at it.

17 Q You agree that it's December 30, 1996 (indicating)?

18 A Yes, I see that now.

19 Q So that is right before the Westside Meshekoff
20 Family Limited Partnership acquired Westside Plaza?

21 A It says -- or the date I see here is also revised
22 on 1997.

23 Q Okay. So we see two dates on Exhibit 83, a 1996
24 date, as well as a 1997 date; is that correct, sir?

25 A That is correct.

- 1 Q And that is right before the property was
2 transferred to Westside Meshekoff Family Limited
3 Partnership; correct?
- 4 A That I don't know. If that's correct I will go
5 with it, but I don't know that.
- 6 Q Well, we looked at a deed, and we can look at it
7 again for the date. Did not the Westside Meshekoff
8 Family Limited Partnership acquire Westside Plaza
9 in 1997?
- 10 A I don't know if we saw that as a transaction as a
11 deed yet or not. I don't recall.
- 12 Q Let me help you out.
- 13 A Sure.
- 14 Q If you will flip to 13, Exhibit 13.
- 15 A Exhibit 13.
- 16 Q Yes, sir. You are looking at Exhibit 13 now.
- 17 A Uh-huh. (Indicating affirmative response.)
- 18 Q That's a deed transferring Westside Plaza from the
19 Fourm Meshekoff to Westside Meshekoff Family
20 Limited Partnership?
- 21 A Okay. Should I be looking at an attachment,
22 attached Exhibit A or not?
- 23 Q If you will just look at Exhibit 13 and confirm
24 that the Westside Meshekoff Family Limited
25 Partnership acquired Westside Plaza in 1997.

1 A I see that and I accept it.

2 Q So you agree 1997 is the magic date?

3 A Yes, I do.

4 Q Okay. If we look back at Exhibit 83 that we were
5 just looking at, and we were talking about the
6 date, there is a 1996 date and a 1997 date. You
7 would agree that this document was prepared right
8 before the property was transferred to Westside
9 Meshekoff Family Limited Partnership?

10 A February 11, 1997. That's 1/23. Well, actually I
11 might be wrong. It says here that this was
12 1/23/97, and this is February 11, '97 that's
13 stamped.

14 Q So Exhibit 83 was prepared before Warren Meshekoff
15 transferred the Westside Plaza to Westside
16 Meshekoff Family Limited Partnership?

17 A Correct.

18 Q And Exhibit 83 is a title survey for the Westside
19 Plaza.

20 MS. CLAYTON: Your Honor, we would move to
21 introduce Exhibit 83.

22 MR. JETER: Your Honor, I am just noticing
23 that is only a partial plat of the center. The center
24 is made up of two tracts. Apparently, for the title
25 search, they must have divvied it up into two tracts.

1 Just so the Court is aware, that is not the entire
2 center. That is one of the tracts.

3 THE COURT: All right.

4 MS. CLAYTON: Your Honor, it is the relevant
5 tract.

6 THE COURT: When you say the relevant tract,
7 it's the tract that has the line that the lawsuit is
8 about?

9 MS. CLAYTON: Yes, Your Honor, line E.

10 THE COURT: I will allow that. Defendant's 83
11 is in evidence.

12 (Defendant's Exhibit Number 83 is received
13 into evidence.)

14 BY MS. CLAYTON:

15 Q Mr. Meshekoff, looking at Defendant's Exhibit 83,
16 this also was recorded in Lexington County like the
17 document that we looked at previously. Can you see
18 in this survey the detention pond?

19 A Yes, I do.

20 Q And you can also see Highway 1?

21 A Yes, I do.

22 Q And if you start at the detention pond and work
23 your way back to Highway 1, can you do so following
24 line E?

25 A Or what would be in a sense line E. I don't see it

1 indicated here specifically. Possibly this
2 (indicating) is it.

3 Q But that's the line that we have been referring to
4 throughout today's trial; correct?

5 A That's correct. Yes, this is line E. I don't mean
6 to be argumentative at all, but it seems to me that
7 this line goes back and forth. It doesn't seem to
8 follow the same line E as indicated to there. You
9 see how it comes out of here?

10 Q Okay. So if we follow line E, it's a faint line
11 that goes to Highway 1. Would you agree that this
12 document identifies line E by C.M.P.?

13 A Yes, I do.

14 Q And do you know that C.M.P. stands for corrugated
15 metal pipe?

16 A Yes, I do.

17 Q So in 1997 this was prepared when Fourm Meshekoff
18 was the record title owner before Westside Plaza
19 was transferred to the Westside Meshekoff Family
20 Limited Partnership?

21 A Uh-huh. (Indicating affirmative response.)

22 Q There was a document in the public records that
23 told and described that the pipe in the Westside
24 Plaza drainage system was corrugated metal pipe?

25 A That's correct.

1 Q We talked about the fact that there wasn't any type
2 of analysis performed or any investigation into the
3 storm water drainage system at Westside Plaza when
4 Westside Meshekoff Family Limited Partnership
5 acquired it.

6 In the same vein, there wasn't any research
7 done or you didn't look downstream to see where the
8 water might be going to -- did you -- when it
9 leaves the detention pond?

10 A Not to my knowledge. May I ask if it's possible to
11 use the microphone? It's hard for me to hear.

12 Q I can stand closer.

13 A That would be great. I would like that a lot.
14 Thank you.

15 Q Mr. Frawley went through the repairs in 2005, and
16 you looked at an invoice. The repairs in 2005 were
17 to the entrance at Westside Plaza; is that correct?

18 A That's correct.

19 Q And you knew then that there were problems with
20 line E that we have been talking about?

21 A 2005? I knew there were problems with that
22 section. I did not know there were problems with
23 the line specifically. I thought -- at that point
24 I didn't know if it was just to truck traffic over
25 the driveway.

- 1 Q And you knew about the problem at the driveway
2 because Dee Reeves told you?
- 3 A That's correct.
- 4 Q And she's a good property manager when she was
5 managing the property; would you agree?
- 6 A To the best of my knowledge, yeah.
- 7 Q And she kept you well informed about everything
8 going on at the property?
- 9 A Yes.
- 10 Q So she told you that there was a problem at the
11 driveway in 2005?
- 12 A That's correct.
- 13 Q At that time you didn't contact anyone from Danwood
14 about that problem; did you?
- 15 A No. She would have been my contact also to -- oh,
16 from Danwood? No, no, I didn't. I didn't know of
17 the existence of Danwood at that time.
- 18 Q And in 2006 there was some additional work done at
19 the Westside Plaza; correct?
- 20 A That's correct.
- 21 Q And that was in the middle of the shopping center?
- 22 A That's correct.
- 23 Q And also at the detention pond?
- 24 A Yes.
- 25 Q And you didn't contact anyone at Danwood about that

1 work either?

2 A No.

3 Q Westside Meshekoff Family Limited Partnership
4 hasn't tried to collect any of the money that it's
5 trying to collect today from the seller of Westside
6 Plaza; have they?

7 A No.

8 Q And you haven't tried to collect anything from the
9 company that installed the storm water drainage
10 system at Westside Plaza; have you?

11 A No, we have not.

12 Q And you are not paying anyone downstream for the
13 water that's released from the detention pond?

14 A No, we are not.

15 MS. CLAYTON: That's all I have at the moment,
16 Your Honor.

17 THE COURT: Thank you. Thank you very much.
18 My preference now would be to break for lunch depending
19 on how long you think you would be, Mr. Quinn or
20 Mr. Booth.

21 MR. BOOTH: I will be a little while.

22 THE COURT: I have a hearing I had set for
23 11:00 o'clock that I will hear it at 2:00. We will take
24 a recess until about 2:30 as far as this case is
25 concerned.

1 Just for your planning purposes, I have a
2 sentencing I have to do at 9:30 in the morning on a case
3 I tried last week. That may take about an hour in the
4 morning in this same courtroom. Just keep that in mind.
5 Anything further before we take our recess?

6 MR. JETER: Nothing, Your Honor.

7 (Whereupon there is a luncheon recess.).

8 MR. JETER: Your Honor, we worked a little bit
9 over the lunch break on one matter hanging out there.
10 That was 4-A. That was the two-page letter on the
11 encroachment permit.

12 THE COURT: Yes, sir.

13 MR. JETER: We have made some progress but
14 haven't finally resolved it. We have agreed that we
15 can stipulate that the custodian of documents for the
16 D.O.T. would testify that that two-page letter was part
17 of the encroachment permit. With that as a stipulated
18 fact by Ms. Clayton, I would move its admission in its
19 entirety.

20 THE COURT: Ms. Clayton?

21 MS. CLAYTON: Your Honor, I still have my same
22 objections as earlier. I think that the fact that the
23 letter is part of the D.O.T.'s file doesn't make it
24 admissible on its own.

25 The letter is from 1985. We have no clue

1 whether the parties to this particular letter did what
2 they said they were going to do in this letter or
3 whether they didn't. Who is to say that they did and
4 who is to say that they didn't?

5 It's irrelevant on the issue before Your
6 Honor. This was not in the chain of title for my
7 client. It doesn't make the existence of any fact more
8 or less probable or likely.

9 We just -- there is no way to corroborate or
10 to authenticate what this letter says; therefore, it's
11 not admissible. It's more likely to create confusion or
12 undue prejudice. So it would be inadmissible under
13 Rule 403 as well.

14 THE COURT: I am going to allow 4-A into
15 evidence subject to Danwood's objections. Danwood is
16 who you represent; correct?

17 MS. CLAYTON: Yes, Your Honor.

18 MR. JETER: Thank you, Your Honor.

19 (Plaintiff's Exhibit Number 4-A is received
20 into evidence.)

21 THE COURT: I believe it's Mr. Booth.

22 MR. BOOTH: Yes, sir, thank you. For purpose
23 of introducing some more exhibits, I would like at this
24 time to introduce into evidence Defendant's Exhibit 40.
25 It has deeds and plats and everything I am going to ask

1 him about.

2 THE COURT: Any objections to 40?

3 MR. JETER: That's, as I understand it, the
4 title, chain of title?

5 MR. BOOTH: Right.

6 THE COURT: On Westside?

7 MR. BOOTH: Yes.

8 MR. JETER: I have no objection, Your Honor.

9 MR. FRAWLEY: Your Honor, we have a coversheet
10 there to guide Your Honor with the order of the
11 conveyances, and we have got copies of each of those
12 items attached, as I believe it's A through O.

13 THE COURT: Wait just one second, please.
14 Yes, sir, Mr. Frawley.

15 MR. FRAWLEY: Exhibit 40 is an exhibit that
16 was actually generated by D.O.T. We got an abstract to
17 go through and search the title. She has got a short
18 memorandum on the front page which kind of summarizes
19 the chain of title going back there.

20 Then we have attached copies of the documents
21 to which she refers, which are deeds, and then some
22 affidavits laid in it. There's a couple of corrective
23 deeds where there are some acreage issues with the
24 conveyances from the Hooks and from Holmes Dreher. That
25 is basically the chain of title.

1 The front page is what she would testify to,
2 had we brought her, and I believe Mr. Jeter has been
3 kind enough to go ahead and stipulate to that being the
4 chain of title.

5 THE COURT: Thank you.

6 MR. FRAWLEY: Which will free up one witness.
7 We will not be calling her now.

8 MR. BOOTH: Just a few others exhibits. On my
9 exhibit list my number that I would like to introduce at
10 this time would be 66, which is an aerial photo, Exhibit
11 67-A through K are 11 photographs.

12 MR. JETER: Your Honor, I am okay with 66, no
13 objection, and no objection to 67-A through K.

14 THE COURT: So now we have 40, 66, and 67-A
15 through K in evidence without objection.

16 MR. BOOTH: I just have one more and I will be
17 ready to go. It's Exhibit 64. Did I mention that
18 earlier, 64?

19 THE COURT: I don't recall that.

20 MR. BOOTH: I don't think I did. So now
21 Exhibit 64 will complete what I needed to get
22 introduced.

23 MR. JETER: No objection, Your Honor.

24 THE COURT: Sixty-four is in evidence without
25 objection.

1 (Defendant's Exhibits Number 40, 64, 66, and
2 67-A through K are received into evidence.)

3 CROSS EXAMINATION

4 BY MR. BOOTH:

5 Q Mr. Meshekoff, let me introduce myself again. I'm
6 Bill Booth and I represent Dan Ward and his company
7 called D.W. Properties. Dan, of course, is in the
8 courtroom, and I think earlier you saw them when
9 they stood up.

10 A Uh-huh. (Indicating affirmative response.)

11 Q And, again, just for bringing you back up, can you
12 hear me okay?

13 A Yes, I can. Thank you.

14 Q He owns a business called Zaxby's restaurant, which
15 I recall from your deposition you didn't have those
16 in California?

17 A No, I don't believe so.

18 Q Right. Again, it's a very, very good restaurant by
19 the way. Definitely while you are in town, try it.

20 A We welcome it to California.

21 Q Again, just two facts about you I want to make sure
22 I understand. I know you mentioned your age but
23 your date of birth?

24 A December 13, 1955.

25 Q And your primary residence address one more time?

1 A 8251 Sky Line -- two words -- Drive, Los Angeles
2 California.

3 MR. JETER: Your Honor, I know Mr. Booth is
4 thorough, but we are bogging down as far as the two days
5 we represented to the Court it would take. If we can
6 have some --

7 THE COURT: Did y'all represent two days to
8 me? That must have been to Judge Keesley.

9 MR. BOOTH: That's why he gave it to you.
10 Don't worry, Russ. Those are the only two
11 preliminaries. Everything else is brand new.

12 MR. JETER: As long as it's brand new.

13 BY MR. BOOTH:

14 Q Now, let me get on to some new stuff now that I am
15 better acquainted with. I appreciate that. Why
16 did you wait almost three years to notify Mr. Ward
17 that his Zaxby's restaurant was, in fact, on your
18 hit list as far as storm water?

19 MR. JETER: Objection, argumentative, Your
20 Honor.

21 THE COURT: You can rephrase the question as
22 far as the hit list.

23 MR. BOOTH: Yes, sir. Hit list is not good.

24 BY MR. BOOTH:

25 Q Why did you wait almost three years before you

1 notified Mr. Ward and his company and his
2 restaurant that you knew or had objection to his
3 drainage coming down to your line E and, of course,
4 detention pond?

5 A It was as soon as Mr. Jeter was aware of where the
6 water was coming from. It wasn't a matter of time.
7 It was a matter of: Are we sure this is what is
8 happening to the system and why?

9 And notifying -- not out to hurt anybody --
10 just notifying everybody that was responsible for
11 the addition of water to the system that I was
12 maintaining and am maintaining on my own.

13 Q But Ms. Reeves and Mr. Richardson knew in July of
14 '05, that fact -- that fact being water was coming
15 into your property from water that was at one time
16 on other people's property?

17 A Thirty-one thousand dollar repair and a half a
18 million dollar repair. The \$31,000 repair just
19 made it crucial for me to find out where it was
20 coming from. We could absorb that and we did, but
21 with the amount of the other repair, that was -- it
22 was a huge hit.

23 Q I understand. Now, let me just show you
24 information that you talked about and is in this
25 report. What I have tried to do here is outline

1 the names of the title holders to Westside Plaza.

2 Can you read that slide and those names?

3 A Yes, I can.

4 Q All I'm going to do is just direct your attention
5 to a couple of places on there.

6 A Okay.

7 Q The first place is July 15, 1988, and it looks like
8 your mom and dad's trust first got title to
9 Westside Plaza. Again, your mother's name was
10 Helen and your father's name was Edward; correct?

11 A That is correct.

12 Q That was 1988. Then we already discussed in
13 January of '97, the deed comes into the family
14 limited partnership?

15 A Okay.

16 Q So from July of 1988 until now, the Meshekoff
17 name has been involved in this Westside Plaza;
18 correct?

19 A Yes, that's correct.

20 MR. JETER: Your Honor, we need to check one
21 thing. There's some dates that are off on there. My
22 understanding -- if we can have one moment.

23 MR. BOOTH: I will point out to counsel,
24 Judge, if you will let me direct this to them, for some
25 reason the date of the deed versus the date of reporting

1 is a fairly large gap. These are dates on the deed.

2 THE COURT: Which deed are you referring to?

3 MR. BOOTH: A couple of them in that chain,
4 and that may be what Mr. Jeter is referring to. We will
5 stand corrected. We aren't trying to get exact dates
6 though. We are just trying to show the flow of title,
7 which is inside this report.

8 MR. JETER: I believe he is wrong, Your Honor.
9 It is 1990 on the date of the deed.

10 MR. BOOTH: Are you sure that's not the
11 recording date? Well, I will stand corrected. 1990 is
12 fine, Judge.

13 MR. JETER: Westside Plaza Associates to Helen
14 and Edward Meshekoff is 1990, not 1988.

15 MR. BOOTH: We will stand corrected on that.
16 I will move on. I didn't mean to --

17 MR. FRAWLEY: It's G. to Exhibit 40, Your
18 Honor.

19 BY MR. BOOTH:

20 Q Again, Mr. Meshekoff, your family -- mother and
21 father primarily -- I believe you indicated during
22 the last few years, I guess leading up to 2005,
23 your mom and dad's health was deteriorating;
24 correct?

25 A Yes. Specifically when they were -- or should take

1 a mortgage in 2004, that was a bad mortgage, and
2 they would have realized that prior to accepting
3 that mortgage, yes.

4 Q So you personally, other than picking up trash when
5 you were a young person, had nothing more to do
6 with the property other than when basically you
7 became managing partner in roughly 2005?

8 A On this property during -- I mean, I went down
9 every day after high school and knocked down walls
10 on properties that we had in New York City and was
11 there for the 10-31. I was the on-site building
12 manager and fire safety director during the early
13 years.

14 It was only -- or assistant to the fire safety
15 director -- but it was only once we traded the
16 10-31 for the building in New York City and for the
17 New York City properties.

18 Q Right.

19 A I had little to do with it until after I went into
20 the film business and came back.

21 Q But the point I am going to make now is during the
22 time period your mother and dad owned the property,
23 do you know for a fact whether or not they knew
24 about the S.C.D.O.T. pipe?

25 A I don't know.

1 Q Right. You don't know?

2 A I do not know.

3 Q You testified earlier that you found out about the
4 pipe roughly in July of '05, when you had that
5 first sinkhole?

6 A When I asked the -- I guess it was '05 -- when I
7 was informed that there was debris inside of that
8 one manhole that borders on U.S.1, and we tried to
9 figured out the source of that debris because it
10 was from other than our center.

11 Q We are having a little trouble on the date, but
12 these gentlemen are here and maybe Ms. Reeves can
13 pin that down. You keep flipping back to another
14 date. That's a comment and not a question.

15 A I understand.

16 Q We normally can't do that, but we won't worry about
17 that too much. It's in the record.

18 A Okay.

19 MR. JETER: Your Honor, since he made that
20 comment, I was not going to object, but I will object.
21 I think he testified that 2008 is when he learned. So I
22 would object to his suggesting and leading question that
23 it was 2005.

24 MR. BOOTH: Well, he said he paid an invoice
25 in July of '05.

1 THE WITNESS: I paid that. I don't think we
2 investigated -- we would have to go back.

3 MR. BOOTH: He just said he wasn't sure back
4 in '05.

5 MR. JETER: I think he testified there was an
6 investigation closer to 2008.

7 THE COURT: All right, sir.

8 MR. BOOTH: Again, Judge, we have other
9 witnesses that can pinpoint that.

10 THE COURT: Certainly.

11 BY MR. BOOTH:

12 Q Now, Mr. Meshekoff, just a few more questions. I
13 have got an aerial photo that I obtained from
14 Google Earth on the internet. You are familiar
15 with those?

16 A Oh, yes.

17 Q And that photograph, of course, shows your shopping
18 center; correct?

19 A Uh-huh. (Indicating affirmative response.)

20 Q In this case -- in case you didn't know it -- right
21 there (indicating) is Zaxby's restaurant.

22 A Uh-huh. (Indicating affirmative response.)

23 Q And down here is your detention --

24 THE COURT: Answer yes or no, please.

25 THE WITNESS: Yes. I apologize.

1 THE COURT: It's all right.

2 MR. BOOTH: Thank you, Judge.

3 BY MR. BOOTH:

4 Q Down here (indicating) is your detention pond;
5 correct?

6 A That's correct.

7 Q Now, are you familiar with how the pipe runs from
8 Zaxby's to get to about right in here (indicating)
9 where it intersects?

10 A No, I'm not.

11 Q You are not familiar with that route?

12 A No, except I have an inkling from what you showed
13 earlier, from your earlier slides, which I have
14 never seen before.

15 Q I will put a line there on the same map where I
16 believe the evidence will show the line is located
17 approximately.

18 A Would you mind going back for one second so I can
19 get a reference on this. I see where you are now.
20 Okay. Go ahead.

21 Q Does that help?

22 A Yes, sir, it does.

23 Q Going back to that slide, it's a little closer in.

24 A Right.

25 Q But the point I am trying to make is right in here

- 1 (indicating) is where I am showing the line comes
2 across -- or underneath is a better word --
3 underneath U.S. 1 and Augusta Road. I know that's
4 your property, but you do recognize that that is
5 your property?
- 6 A Yes, I do.
- 7 Q Then, of course, the line goes in that direction
8 (indicating) in order to eventually go to the
9 detention pond?
- 10 A Yes.
- 11 Q How often did you visit this area, either walking
12 up and down the sidewalk or that entranceway? How
13 many times have you been up in that area?
- 14 A Including yesterday?
- 15 Q Yes. I know it's very few times.
- 16 A A few times, maybe a total of five times, I would
17 say.
- 18 Q You, of course, had Dee Reeves, for example, in
19 charge of checking things out on a regular basis?
- 20 A That's correct.
- 21 Q Now, do you know today that this is where the first
22 sinkhole was right there (indicating) in front of
23 that driveway entrance?
- 24 A That's correct, right on our side.
- 25 Q Yes, sir. I am trying to make it on your side. So

1 there was a sinkhole there, and you made a comment
2 during your direct that the sinkhole was in a
3 driveway where you said something like trucks would
4 run over?

5 A I meant vehicular traffic. I don't know if it was
6 a combination of trucks. Certainly I am always
7 more concerned about trucks because of their
8 weight.

9 Q Right. The only reason I asked you to clarify that
10 is, of course, we do have a Bi-Lo store near that
11 entrance. I assume you know, like I do, that Bi-Lo
12 has big trucks coming in quite often?

13 A Right. And as long as they continue to, I will be
14 happy.

15 Q I think you are safe. So we've got that. Now, let
16 me go to the other slides. I want to direct your
17 attention to -- do you recognize where that picture
18 is taken from?

19 A Yeah, that would be -- the Bi-Lo is off there to
20 the right.

21 Q Very good.

22 A That's the entrance, U.S.1 that you are standing in
23 or somebody is standing in.

24 Q Right.

25 A I don't know exactly where the manhole is in

1 relation to that.

2 Q You can barely see it right over there
3 (indicating). There is a manhole right there
4 (indicating).

5 A Okay.

6 Q Which, again, is where what happens at that manhole
7 that you know now? What happens at that manhole
8 location?

9 A You mean the sinkhole?

10 Q No, no, just the interconnection with D.O.T. pipes.

11 A That's the connection with the other water that is
12 coming in, the other storm water.

13 Q Which you didn't know about until maybe about 2008?

14 A That's correct.

15 Q I am going back to, I believe it's Exhibit 7 or 1.

16 This is the as-built --

17 MR. JETER: Number 7.

18 BY MR. BOOTH:

19 Q This is your Exhibit 7. You don't need to pull it
20 out. I am just going to put it up here and show
21 you part of it in sort of a highlighted form. You
22 are welcome to grab it and look at it. I am just
23 going to take part of that as-built or that survey
24 and blow up where the S.C.D.O.T. pipe comes onto
25 your property. Agree or disagree?

1 A I agree.

2 Q Go ahead. You can add more.

3 A Just saying okay. I'm with you.

4 Q So that area right there, there (indicating) is the
5 pipe coming in, and there (indicating) is that
6 entranceway or that driveway; correct?

7 A Right.

8 Q Now, this is, of course, another view of that same
9 area looking from across the street; correct?

10 A Uh-huh. (Indicating affirmative response.)

11 Q Good.

12 THE COURT: Again, if you could answer yes or
13 no.

14 BY MR. BOOTH:

15 Q You have got to say the actual word yes.

16 A Yes. I apologize. Yes.

17 Q One more. Again, this picture shows -- and, again,
18 this is a little bit, not quite -- but I think the
19 pipe again was along here (indicating). This new
20 pavement was your major work that you did on line
21 E. Is that a correct picture?

22 A Yes.

23 Q Now, just a couple more questions.

24 A Okay.

25 Q Again, I am through with the PowerPoint. I've just

1 got three or four more questions. Mr. Meshekoff,
2 you are suing S.C.D.O.T. in this case; correct?

3 A That's correct.

4 Q And as far as I can tell, you want the Court to say
5 that S.C.D.O.T. needs to pay you the remaining
6 money that you have spent; correct?

7 A The portion that we have -- the amount that we have
8 apportioned to outside costs, yes.

9 Q Now, as far as D.W. Properties is concerned, do you
10 have any evidence that D.W. Properties caused any
11 damage to your pipes within your shopping center,
12 mainly line E?

13 A If they contribute a portion of the storm water and
14 the storm drain material that comes over into the
15 property from what I understand, then that is
16 damage that is causing the storm water that is
17 causing, either by silt or by extra use, to the
18 system, yes, that everybody has.

19 Q Do you know the time period that Zaxby's opened
20 compared to when you found that first sinkhole in
21 that driveway entrance?

22 A Are you saying the period that --

23 Q The time period, the number of months, let's say,
24 from the time Zaxby's opened until you found the
25 first sinkhole.

- 1 A Zaxby's is the restaurant?
- 2 Q Yes, sir.
- 3 A Tell me the name of the restaurant again so I don't
- 4 forget.
- 5 Q Z-A-X-B-Y's, Zaxby's.
- 6 A Zaxby's. Do I know that period? No, I do not.
- 7 Q So will you accept for discussion purposes that the
- 8 title went into D.W. Properties August 25, 2004,
- 9 and that's exhibit --
- 10 A Tell me one more time again. I'm sorry.
- 11 Q Exhibit 64 has a copy of the deed. I will give you
- 12 the names: Kimbrell's Investment Company to D.W.
- 13 Properties, L.L.C., which again is Mr. Ward's
- 14 company.
- 15 A Right.
- 16 Q The date of that deed is August 25, 2004?
- 17 A I see.
- 18 Q And assume that it took them a few months to build
- 19 the restaurant and they opened in January of 2005?
- 20 A Uh-huh. (Indicating affirmative response.) Yes,
- 21 I'm sorry.
- 22 Q Are you with me now?
- 23 A Yes, I am.
- 24 Q And we know when that first sinkhole occurred at
- 25 that driveway in July of 2005.

1 A Okay.

2 Q So from the date title was transferred, we have
3 about a year?

4 A Uh-huh. (Indicating affirmative response.)

5 Q Of the date he opened for business, we have about
6 seven months -- twelve months or seven months. So,
7 again, you are the owner of Westside Plaza. You
8 are asking Dan Ward to contribute to a maintenance
9 charge or a repair charge.

10 Again, considering how long he was open for
11 business, which meant that storm water flowed down
12 that road that we just looked at, you still believe
13 Mr. Ward should contribute based on that short use
14 of your storm water system?

15 A Yes, because that's what I have been told by my
16 engineering staff and by counsel. I would also add
17 that this is nothing that is going to stop here.
18 There is going to be continuing use of that storm
19 water system, as well as very possibly extremely
20 relevant changes to the disposition of storm water
21 in South Carolina.

22 Exactly what happens to this is a huge issue
23 now. So this is something that I think that
24 everybody who uses this should bear some degree of
25 burden besides just myself.

1 Q But Dan Ward was just like you said you were like,
2 he had no idea where his storm water was going.
3 You had no idea that you were getting other
4 people's storm water; correct?

5 A Right. I had no idea that it was going to be a
6 huge repair, that this thing would happen
7 vis-a-vis. But once it does, I am responsible as
8 well as anybody to try to remedy the situation that
9 happens. This was not a planned situation by
10 anybody.

11 Q As far as D.W. Properties is concerned, considering
12 the short time they were in operation, they didn't
13 cause any damage?

14 A I don't know that to be the case. I would have to
15 leave that to counsel or to an engineer who would
16 be able to tell that.

17 MR. JETER: Your Honor, I will object to
18 relevance. Cause of damages is not an issue under the
19 cases. It is: Do you have an easement or are you a
20 third party beneficiary of an easement? And what is
21 your percentage of use? So I think this line of
22 questioning is irrelevant.

23 THE COURT: I would sustain that objection,
24 Mr. Booth.

25 BY MR. BOOTH:

1 Q So we are not going to talk about damage or costs
2 anymore.

3 A Okay.

4 Q So the only reason you are asking Dan Ward to pay
5 is for one single reason; correct? And that single
6 reason is that at the time the repairs were needed,
7 at that time, 2005, 2008, his water -- basically he
8 was just in operation, and that's what makes him
9 pay; correct?

10 A When you said the reason I'm expecting Dan Ward to
11 pay is because I see what I didn't understand or
12 was unknown before is what happens in the storm
13 water runoff and the amount or the degree of
14 maintenance because of silt caried and degree of
15 everything else that goes along with accepting
16 storm water from my place, from my center, as well
17 as everybody else.

18 It carries a cost of maintenance to it that
19 changes, and it changes significantly, seeing that
20 I was just told that now the material in the
21 detention pond can no longer be taken away simply
22 with a dump truck. It has to be taken away in a
23 manner consistent with the E.P.A. regulations and
24 is considered to be hazardous waste.

25 Q If Dan Ward was not connected and nobody else was

1 connected, you would have had to deal with that
2 just so you can have your shopping center?

3 A If I had had no -- if that was set up at that
4 manhole and it was all me, and there was only my
5 storm water, that's the answer, yes.

6 Q Right. The same circumstances?

7 A The same circumstances. I wasn't accepting water
8 from any place else, and it was all my water and
9 all my debris and all my material, then it's my
10 responsibility, yes.

11 Q Let's talk just for a minute about the expense you
12 had for lines -- I want to say A, B, C, D. We are
13 line E. I think it was A through D. You, of
14 course, dealt with that too; didn't you?

15 A Yes, I did.

16 Q And you paid 100 percent of that?

17 A Yes, we did as a matter of fact.

18 Q In other words, nobody -- no outside users or
19 outside sources of drain water contributed to any
20 of that expense; correct?

21 A Not to the extent that I was comfortable enough and
22 sure enough that damage was caused by outside uses
23 so that I would attempt to have anybody else pay
24 for that.

25 Q Now, your lawyer said damage wasn't an issue.

1 A It's not. But it's also a matter of when I looked
2 at that, there were scenarios that I could have
3 considered to add to that, but I decided that we
4 weren't sure enough, and I would never venture to
5 try to get something from anybody for nothing.

6 Q But you had worse sinkholes in the middle of the
7 parking lot; didn't you?

8 A I don't know if they were worse. That would be a
9 judgment for the engineer to tell me whether they
10 were worse or not.

11 Q But you did determine for lines A through D, you
12 did determine there were outside users; did you
13 not?

14 A On lines A through -- for the interior lines?

15 Q Yes, sir, we will call it the interior parking lot
16 lines. There are other users off site?

17 A Not that I know of. I mean, there will be for the
18 center of the parking lot. If the center of the
19 parking lot collapsed or any of those storm drains
20 and there is nothing connected to the outside, then
21 those come from my storm water. There is nothing
22 else from outside.

23 What I was initially referring to was the
24 possibility that because of extra silt that came
25 into the system, it blocked the system and

1 prevented maybe some of the inside drainage to be
2 put -- to continue in the correct direction, and
3 it maybe made a back flow.

4 That was based on logic and observation and
5 not any kind of engineering conclusion. That was
6 not part of anything we were requesting or delving
7 into.

8 MR. BOOTH: That's all, Judge.

9 THE COURT: Thank you very much, Mr. Booth.
10 Mr. Quinn.

11 MR. QUINN: Yes, sir. May it please the
12 Court.

13 THE COURT: Yes, sir.

14 CROSS EXAMINATION

15 BY MR. QUINN:

16 Q Mr. Meshekoff, I am just confused about a very few
17 things you just said.

18 A Okay.

19 Q One is you made the statement that this is going to
20 be a huge issue now and will continue. What did
21 you mean by that?

22 A I did a fair amount of research as to what the
23 future of storm water is, especially in reading a
24 lot about in South Carolina in this area --

25 Q So what did you read in South Carolina?

1 MR. JETER: Your Honor, I would ask that he
2 not cut the witness off.

3 THE COURT: All right.

4 A Just in determining -- whenever a case, a new
5 subject like this -- and this is storm water -- I
6 do as much research as I can. So I looked at
7 things having to do on the internet with E.P.A. and
8 having to do with legislation that could be coming
9 up in South Carolina and a general concern for
10 ground water and pollutants.

11 The entire face of storm water and ground
12 water is going to be changing over the next 10 to
13 15 years. The pollutants that we put into the
14 ground that are seeping and becoming part of the
15 water table are being --

16 MR. FRAWLEY: Your Honor, I will object to his
17 testifying to the overlooking status of surface water in
18 the future. I think that is beyond his expertise. He
19 has done some internet research, and I respect him for
20 that, but I think he is getting beyond the scope of his
21 knowledge.

22 MR. JETER: Your Honor, counsel opened the
23 door. He asked a wide-open question: What did you mean
24 by that? He is simply giving his explanation to
25 counsel's wide-open question.

1 MR. FRAWLEY: I didn't open the door and I
2 object.

3 THE COURT: So there's so many counsel there
4 is different ones trying to open the door. Actually, it
5 was in response to a question of Mr. Booth. Mr. Quinn
6 is just trying to flesh out what he meant by this.

7 I don't take it as being part of being an
8 expert witness or anything. It's just his
9 understanding. I will give it the weight and value I
10 think it deserves.

11 MR. FRAWLEY: Thank you, Your Honor.

12 BY MR. QUINN:

13 Q Please continue.

14 A So in doing this, it's just -- I don't mean to pose
15 myself as an expert. It's just when I try to
16 understand there could be future costs to my center
17 or to generally to what is --

18 Q I'm sorry. Future costs to your what?

19 A To the shopping center.

20 Q Okay.

21 A Like future maintenance costs we have. One of the
22 reasons I did not want to make this simply a closed
23 payment for what we were going through for the
24 maintenance was that if in the future -- I came up
25 with the scenario that they all of a sudden

1 required that the treatment of storm water has to
2 be handled in a very different manner than we are
3 now.

4 Possibly maybe it has to be filtered or it has
5 to be treated before it continues downstream. This
6 is not something that I should want to be burdened
7 with just myself either if we are all sharing in
8 the same outlet.

9 Q So if that should happen, then you expect all of
10 your upstream users -- not your users but the
11 Department users -- to contribute to that?

12 A No, the same proportion that people are
13 contributing to it as a result of this action that
14 we have now. If things change and we have to deal
15 with storm water together differently, yes, I would
16 think that it would be something we all have to
17 bear the burden of.

18 Q If you continue to fail to maintain your pipe and
19 your drainage system over there, you expect the
20 defendants in this case to contribute to that?

21 MR. JETER: Your Honor, I object --

22 THE WITNESS: You said if I fail to maintain.

23 MR. JETER: -- that's argumentative and beyond
24 the evidence.

25 THE COURT: He was asking him, he said if it

1 gets to that point, does he expect -- and I think you
2 are referring to the defendants. Well, you maybe are
3 referring to D.O.T. also. I'm not sure.

4 MR. QUINN: No, I am just referring to this
5 plaintiff right here and the defendants, meaning all of
6 the defendants that are in this case.

7 THE COURT: All right. I will allow him to
8 answer that.

9 A I don't think that we failed to maintain our
10 system, first of all. What was the second part of
11 it?

12 Q Do you expect -- my question was -- and you cleared
13 it up, you don't intend to fail. I understand
14 that -- but the question was if you continue to
15 fail maintaining your system, do you expect all of
16 the defendants here today to contribute to your
17 maintenance costs?

18 A I don't think -- the term bothers me, "continue to
19 fail." So leaving that out, if there were changes
20 in maintenance because of either state-enacted
21 regulations or something else unforeseen, I would
22 expect them, yes, to contribute to the maintenance
23 costs of the storm water being directed only
24 through this line, yes.

25 Q And the question to you was you went out there

1 yesterday and viewed your drainage system; did you
2 not?

3 A I didn't view the entire drainage system. I went
4 out for a short period of time to see the overall
5 care of the center. I wanted to see whether it was
6 kept clean, and there was one other small repair I
7 had to look at.

8 Q What storm repair was that?

9 A It wasn't storm repair. It was unrelated to storm
10 repair. It was an automobile impact with a column,
11 apparent automobile impact.

12 Q And did you view your detention pond yesterday?

13 A Yes, I did.

14 Q And tell us what you saw.

15 A I saw that the ground was somewhat manicured. No
16 doubt you are talking about a bush that was growing
17 in the middle of it?

18 Q Actually I'm not. I'm talking about the trees that
19 are growing in the middle of it.

20 A It wasn't a tree. From what I could see from the
21 fence, the area was kept neat. The grass was cut
22 low around the edges. I couldn't see farther over
23 into the actual area that is the pond. But I do
24 have -- we have continued maintenance on that, and
25 maintenance will continue on that.

- 1 Q When is the last time you dredged that pond?
- 2 A I'm not sure of the date. It wasn't -- I believe
- 3 one of them was with the repair that was done, I
- 4 believe, in 2008.
- 5 Q Was that done or to be done?
- 6 A That was done. As far as I know, the dredging
- 7 was -- the material was removed, yes.
- 8 Q I understand. When you were viewing, among other
- 9 things this detention pond, did you notice where
- 10 your outflow went?
- 11 A No, I didn't see the outflow. I saw a box, the
- 12 concrete box in the middle of the pond, that I
- 13 couldn't identify, but I didn't see the outflow,
- 14 no.
- 15 Q Do you know where that concrete box is?
- 16 A On the drawing?
- 17 Q No, on your pond, in your pond.
- 18 A Yes, I know where it is.
- 19 Q What is it?
- 20 A Oh, I don't know what it is. I thought you said
- 21 where it is.
- 22 Q No, what is it?
- 23 A I don't know what it is.
- 24 Q I understand. So you don't know really very much
- 25 about real estate; do you?

1 A Oh, I think I know a lot about real estate. I
2 might not know as much about detention ponds as you
3 might like, but real estate I think I do.

4 Q Are you aware that your detention pond flows
5 through a ditch into the Walmart drainage system
6 where it then flows into a stream which goes
7 downstream, to among others Mr. Hite's pond?

8 MR. JETER: Your Honor, I think that misstates
9 it. He has not established the facts he asked in his
10 question. We don't agree it flows into the Walmart
11 system.

12 THE COURT: He can ask the question if he has
13 got a reasonable basis for asking it.

14 MR. JETER: I'm not aware he is going to put
15 up any evidence like that.

16 THE COURT: A lawyer only has to have a
17 reasonable basis for asking the question. He can ask
18 the question. The evidence is his response, not his
19 question. I'm not going to swear Mr. Quinn, although he
20 may be asking better leading questions than some of the
21 other lawyers.

22 MR. QUINN: Well, it's cross, Your Honor.

23 THE COURT: I understand.

24 A I don't know who Mr. Hite is, and I don't know for
25 sure what happens to the water afterwards. So the

1 last that I was informed at all was that the water
2 that leaves our pond goes into a natural stream,
3 and this was also in everything I was trying to
4 understand about the flow of storm water.

5 Q That's what I understood you to answer to my
6 question earlier, that you thought it went into a
7 natural stream or a natural roll of the lay of the
8 land --

9 A Right.

10 Q -- or something of that nature. Do you know where
11 that goes?

12 A No, I don't.

13 Q Do you have any concern about where that goes?

14 A Well, as much as I am concerned about what happens
15 to anything in the world, yes.

16 Q What is that concern?

17 A That I'm not hurting children. I'm not hurting
18 vulnerable adults. That's mostly what my concerns
19 are.

20 Q I understand that. So are you concerned about it
21 damaging someone's property downstream?

22 A Yes, I would be concerned of that.

23 Q So have you made any attempt to determine where
24 your water goes?

25 A No, I have made no attempts to find out where my

1 water goes.

2 Q Is it your contention that your liability for your
3 water ends at your detention pond?

4 A Our water? No, it doesn't end at my detention
5 pond.

6 Q So where does it end?

7 A In the ocean, I imagine.

8 Q Your liability extends to the ocean, Mr. Meshekoff?

9 A No. Liability? My liability -- if I was informed
10 by somebody further down the line that there was a
11 problem, I would respond to that, but I have
12 received nothing from any other user or person down
13 the line saying that they have indicated any kind
14 of a problem from the water that is discharged from
15 my detention pond.

16 Q I understand that. So you would expect someone to
17 contact you and say, "I'm having a problem"?

18 A Correct.

19 Q You didn't do that to these defendants; did you?

20 A Yes, we did.

21 Q When?

22 A When we contacted the defendants saying that this
23 is where the water is coming from.

24 Q When is the question?

25 A I don't know the exact date. You would have to

- 1 please ask Mr. Jeter.
- 2 Q Twenty-eight years after you bought the property?
- 3 A When it became apparent to me.
- 4 Q When did your pipeline actually fail,
- 5 Mr. Meshekoff?
- 6 A I would imagine it was either somewhere between
- 7 2005 and 2008.
- 8 Q Well, let me rephrase that. That was the -- 2005
- 9 was actually the date that you saw visible evidence
- 10 of the failure of your drain line; right?
- 11 A 2008 was when I was informed of a failure of my
- 12 drain line and I reacted to that, correct.
- 13 Q And when did your drain line start deteriorating?
- 14 Do you have any idea?
- 15 A That I don't know.
- 16 Q And on your shopping center, you have heard it
- 17 today and your lawyers basically stated this in
- 18 some of the pleadings, I believe, but you asked --
- 19 your predecessor in title asked the Highway
- 20 Department to let them tap on, to encroach on, to
- 21 the highway's catch basin; correct?
- 22 A I will accept that, yes.
- 23 Q Well, you have heard that; haven't you? You have
- 24 been told that?
- 25 A Yes, they asked to -- I didn't realize and I'm not

1 sure which way it went, whether the highway asked
2 us or we asked the highway. I have been confused
3 about that, but I am certainly willing to go with
4 you. There is a connection between that catch
5 basin -- or as I call it, manhole -- and our line E
6 as we have called it.

7 Q Okay. And at that time do you know why your
8 predecessor in title asked the Highway Department
9 to do that for them?

10 A No.

11 Q Are you aware of the fact that there was a natural
12 flow of water through what is now the shopping
13 center site?

14 A I was aware of something referred to as a culvert
15 that is more or less very much in the same position
16 as that line E is along the edge of the shopping
17 center and is in more or less the same position as
18 the line E.

19 Q Are you aware for the development of what is
20 presently your shopping center site, the Highway
21 Department line had to actually be moved over, and
22 that's when Dayton and Associates wanted it to be
23 piped at their request?

24 A When you say moved over, do you mean the culvert or
25 do you mean the actual catch basin?

- 1 Q No, not the catch basin, the piping.
- 2 A From what I am to understand, prior to that there
- 3 was just a culvert. There was no piping on my
- 4 property.
- 5 Q Do you know?
- 6 A Pardon me?
- 7 Q Do you know?
- 8 A Do I know that?
- 9 Q Yes.
- 10 A That's what I was told.
- 11 Q Who told you that?
- 12 A Engineers, I believe. I'm not sure which engineer
- 13 it was, but it was one of the people, I believe
- 14 that --
- 15 Q And I asked you a moment ago --
- 16 A -- that's my recollection.
- 17 Q I'm sorry for interrupting. So you are not aware
- 18 of the fact that Dayton and Associates asked that
- 19 the pipeline -- where your drain line is now --
- 20 asked that it actually be moved over so the site
- 21 could be fully developed?
- 22 A I'm not sure I understand. When you say the
- 23 pipeline, do you mean the pipeline, the S.C.D.O.T.
- 24 pipeline?
- 25 Q No, they didn't have one. They had a natural flow

1 there. They had a natural ditch that ran down
2 there that ultimately ran into a stream. Dayton
3 and Associates asked the Highway Department, "Let
4 us pipe this for you. Let us move it over a little
5 bit. Let us fill in this natural flow so we can
6 make a lot of money by developing this shopping
7 center site."

8 MR. JETER: I object, argumentative, Your
9 Honor.

10 MR. QUINN: I agree with that.

11 THE COURT: That's the best ruling I have made
12 all day. . You can rephrase your question.

13 BY MR. QUINN:

14 Q Do you know the answer?

15 A No, sir, I don't.

16 Q My question to you a moment ago was: When your
17 water reaches your detention pond --

18 A Yes, sir.

19 Q -- is that when you consider your liability to be
20 ended?

21 A So long as I'm being responsible about the
22 discharge and the quality of that water being
23 discharged, yes.

24 Q And when Alpine of South Carolina and Robert W.
25 Denton put their water into the Highway

- 1 Department's catch basin, should their liability
2 end there?
- 3 A I don't know which catch basin you are speaking of.
4 Are you speaking about the catch basin on my
5 property?
- 6 Q No, the one on the Highway Department property.
- 7 A Okay. You are saying the one on the other side or
8 the one on this side?
- 9 Q I don't know. I would say it was this way
10 (indicating).
- 11 A This side?
- 12 Q On the north side.
- 13 A What I would just say is I would consider them to
14 have responsibility to make sure that the water
15 that they are furthering down the line is of an
16 accepted quality and flow so as not to damage the
17 next person, which would be me.
- 18 Q Mr. Meshekoff, you said "they." Who is they?
- 19 A They would be the defendants.
- 20 Q Everybody?
- 21 A Everybody.
- 22 Q Everybody?
- 23 A Yes, sir.
- 24 Q So their liability never ends but yours does at
25 your detention pond?

1 A No, their liability -- so long as they are putting
2 in water that is of acceptable quality and flow and
3 delivering that to me and I am accepting it, then I
4 would say there is not a problem.

5 Q Okay. So there is no problem so long as Alpine of
6 South Carolina and the other defendants are putting
7 less than 98 cubic feet per second in the Highway
8 Department's catch basin? There is no problem; is
9 that correct?

10 A I don't know.

11 Q Tell me again because that's what you said. I
12 apologize.

13 A What I'm saying is that I know we receive a
14 tremendous amount of silt from all those other
15 properties and users of the line --

16 Q I understand that. I'm not interrupting you --
17 actually I am -- but all of that has been stricken
18 from your lawsuit: Silt, cups, cans, oil.
19 Everything has been stricken from your lawsuit.

20 MR. JETER: Your Honor, that is not true. We
21 have not sought to prove pollution in the sense of
22 chemicals and things like that. Silt has caused us
23 expense, both in the line and down at the detention
24 pond. It's clearly part of this lawsuit. So is trash
25 that ends up in the detention pond.

1 THE COURT: Does that answer your question,
2 Mr. Quinn?

3 MR. QUINN: Actually, it's an incorrect
4 answer, but I can go forward.

5 BY MR. QUINN:

6 Q So silt and what else, Mr. Meshekoff?

7 A Silt and there were auto parts in there.

8 Q Auto parts?

9 A Auto parts.

10 Q What kind of auto parts?

11 A When I was looking at Google Earth that we referred
12 to before, I investigated it and there was an auto
13 repair shop that is just --

14 Q No. My question to you was: What kind of auto
15 parts?

16 A Oh, it was oil filters, oil cans, air filters, and
17 various other items. I don't remember.

18 Q Did you save any of them?

19 A I believe we have photographs of some of them.

20 Q Did you bring any to court?

21 A I didn't.

22 Q I asked you a moment ago when we were talking about
23 your detention pond flowing into the property that
24 is now owned by Walmart or leased by Walmart, which
25 will be on the west side of your detention pond.

- 1 Did you notice a little stream that is right there?
- 2 A I don't know, number one, that it does go into the
- 3 Walmart. If you are sure of that and tell me, I
- 4 will believe you, but I have never seen on the
- 5 other side of the pond.
- 6 Q Did you ever look over there?
- 7 A No, I did not.
- 8 Q Have you ever ridden on the Walmart side?
- 9 A No, I haven't.
- 10 Q Have you ever ridden around back of Walmart and
- 11 seen the Walmart detention pond which is a
- 12 maintained pond and is well manicured and is well
- 13 drained and is acceptable and well maintained?
- 14 Have you ever seen that?
- 15 A No, sir, I haven't seen that.
- 16 Q Have you ever compared it to your pond that you
- 17 just told this Court that was maintained?
- 18 A If I haven't seen it, I have no opportunity to make
- 19 a comparison.
- 20 Q So what did you make your comparison for to make a
- 21 determination and a statement under oath that your
- 22 detention pond was maintained?
- 23 A At a time when I have seen that it was overgrown, I
- 24 thought, and when it was manicured again back. I
- 25 have heard from people saying, "Oh, we need to

1 manicure the pond. We need to remove -- we need to
2 address the pond." That's when we set up a
3 contract -- not a contract -- but a regular
4 maintenance agreement on the pond.

5 Q Who does your maintenance on the pond?

6 A Tim does, over there.

7 Q Tim Richardson?

8 A Tim Richardson.

9 Q Tim Richardson maintains your pond?

10 A Yes, he does.

11 Q He has a landscaping company?

12 A No, he has a construction company. I wouldn't call
13 it exactly landscaping.

14 Q And you lease out space in your shopping center to
15 tenants; do you not?

16 A Pardon me?

17 Q You have tenants in your shopping center; do you
18 not?

19 A Yes, we do.

20 Q You have the grocery store. You have a Chinese
21 place. You have Carolina Wings. You have other
22 things in there that I can't recall; correct?

23 A Yes, sir.

24 Q Do those tenants have to pay a common area
25 maintenance fee?

1 A Yes, they do.

2 Q And why do they have to pay that?

3 A Because there is parking lot sweeping that goes on.
4 There is landscape maintenance that goes on. There
5 is County taxes. All these are acceptable and
6 known quantities, known costs of operating a
7 shopping center.

8 Q I understand that. And those are costs that would
9 otherwise be borne by the shopping center; correct?

10 A The C.A.M.s, the C.A.M. costs?

11 Q Yes.

12 A That's correct. I mean, they are informed, yes.
13 They are informed of those contributions to the
14 C.A.M.

15 Q And do your tenants have to pay the C.A.M. fees
16 because they are required to by the terms of the
17 lease agreement, which is their contract whereby
18 they are there; correct?

19 A That is correct.

20 Q Do you have any lease agreement or anything else
21 with any of the defendants in this case?

22 A No, we don't.

23 Q Do you have any contracts with anyone, except for
24 an encroachment permit?

25 A No, we don't.

1 Q And are you doing anything now in your
2 reconstruction or your construction -- whatever it
3 is -- other than to bring your drainage system up
4 to what it was supposed to be when Dayton and
5 Associates got an encroachment permit?

6 A Well, no, but there are a few additions to it that
7 I heard as far as -- for instance, the box that is
8 to catch the trash that comes in. That was an
9 addition and other things I don't know of.

10 Q So all of your costs are simply to bring it up to
11 what you told the Department of Transportation you
12 were going to do in 1988?

13 MR. JETER: Honor, I object. He didn't tell
14 the Department of Transportation anything.

15 THE COURT: His predecessor.

16 MR. QUINN: His predecessor in title did.

17 MR. JETER: Also, the Department of
18 Transportation -- he knows the evidence -- does not
19 consider that to be material.

20 THE COURT: I believe someone mentioned
21 earlier, perhaps you in your reopening, about corrugated
22 pipe.

23 MR. JETER: That's correct.

24 MR. FRAWLEY: And I don't know that is
25 entirely true. He has got the excerpts that will go,

1 but corrugated metal and reinforced concrete pipe are
2 not the same thing.

3 THE COURT: I took it they weren't the same
4 thing, but I do recall that on his reopening.

5 MR. FRAWLEY: His opening statement.

6 BY MR. QUINN:

7 Q And now you are coming back with reinforced
8 concrete pipe; are you not?

9 A We did upgrade to reinforced concrete pipe.

10 Q Before you did any construction there, did you
11 contract -- or contact the Department of
12 Transportation?

13 A That I don't know.

14 Q Did you -- my question is --

15 A No, I did not.

16 Q Did you contact Alpine of S.C. and/or Robert W.
17 Denton?

18 A No, I did not.

19 Q So you chose in your behalf and behalf of your
20 family partnership to just do what you thought you
21 should do based on the advice of your engineers and
22 your contractors; correct?

23 A No. What I did was protect persons and property
24 and to adhere to the terms on the mortgage.

25 Q Are you saying to this Court that your mortgage

1 company required you to put a new drain line in
2 there?

3 A My mortgage company requires that I keep the center
4 up, that I repair anything that requires repair,
5 certainly that I protect public and property from
6 grievous injury or death.

7 Q It says that in your mortgage document? Is that
8 what you are testifying to?

9 A Every commercial mortgage or every commercial lease
10 certainly says -- that I have ever seen --
11 instructs the party to maintain the property and to
12 keep the property up, yes.

13 Q Well, we are only talking about your mortgage, not
14 your lease, not anybody's lease, your mortgage on
15 this property. First of all, do you have a
16 mortgage on this property?

17 A Yes, most definitely.

18 Q Who is that mortgage with?

19 A It was originally procured from Goldman Sachs.

20 Q And who is it with now?

21 A I'm not sure who the servicer is at this point.
22 For some reason Wells Fargo sticks out. I'm not
23 sure. But there is certainly -- I can guarantee
24 you -- that there is a clause in that mortgage --

25 Q No, I don't want you to tell me about it. I want

- 1 you to show it to me if you have it.
- 2 A I don't have it.
- 3 Q And also you have four shopping centers that you
- 4 manage as a managing partner of the family
- 5 partnership; correct?
- 6 A I do not manage those shopping centers.
- 7 Q You do not?
- 8 A No.
- 9 Q Do you manage any of them?
- 10 A We have management companies for those shopping
- 11 centers, but there are items that come up that are
- 12 beyond the scope of the responsibility or what can
- 13 be allowed simply by a management company.
- 14 Q Well, let me rephrase that. You are the general
- 15 manager of the family partnership; correct?
- 16 A The managing partner.
- 17 Q As managing partner there are four shopping
- 18 centers?
- 19 A Yes. But there are two centers of which we are not
- 20 managing partners of because they are partnered
- 21 with other individuals, and the operating
- 22 agreements call for those individuals to be the
- 23 managers and managing partners with all the
- 24 requirements.
- 25 Q So did all of the properties that are in the family

1 limited partnership come from mom and dad?

2 A Yes, they did or originally from trades from other
3 properties in New York.

4 Q I understand.

5 A But it was all by their efforts, yes.

6 Q And in that regard you never did any due diligence
7 on any of this property; did you?

8 A What do you mean? I don't understand. Due
9 diligence with regard to that?

10 Q I am asking: Do you know what due diligence is?

11 A What I had as an obligation? To perform properly?

12 Q No. Do you know what due diligence is?

13 A I was asking you. Is that definition acceptable?

14 Q No.

15 A Then I would like to hear what that is.

16 Q Do you know what due diligence is?

17 A It was the definition I gave you, which I thought
18 it was, but if it wasn't, then I would like to hear
19 it.

20 Q Tell me again what you said.

21 A I said that it's my responsibility to perform in a
22 manner that complies with requirements, either
23 under a contract or by form, to operate and do
24 something in a correct manner.

25 Q Okay. Did you inspect any of these properties

1 before you took them?

2 A Before I took them?

3 Q Yes.

4 A What do you mean, I took them?

5 Q Well, they ended up in the family general
6 partnership.

7 A Oh, they were accepted before my time.

8 Q And have you ever --

9 A Is that acceptable due diligence? I'm just
10 curious. I'm sorry. I don't mean to...

11 Q If you don't that's fine. Did you ever ask the
12 Department of Transportation to take you out of the
13 drainage system?

14 A No, I did not.

15 Q Could you have done that?

16 A Should I have done that?

17 Q No. My question is: Could you have done that?

18 A I don't know. I wouldn't imagine that I could just
19 shut off everybody's access to elimination of storm
20 water.

21 Q Let me remind you now. We talked about this. We
22 didn't -- none of these uphill property owners
23 needed you until you came in there and asked to be
24 tapped on there because nobody needed you.

25 MR. JETER: Your Honor --

1 THE WITNESS: They are all using me though.

2 THE COURT: Just a minute, Mr. Meshekoff.

3 MR. JETER: He is testifying at great lengths
4 about facts that are not in evidence. I think he has
5 misstated a lot of facts inadvertently but along the
6 way.

7 I know you have given him some leeway, but I
8 would ask that you restrain him a little more. He is
9 putting in a case with no evidence. Even when the
10 witness denies it, he is still trying to make an
11 impression.

12 THE COURT: He didn't ask for anything.
13 Again, it's the predecessor in title. He just became
14 the managing partner of the family trust. You have to
15 correct me on the date, 2005, somewhere in that time
16 frame. Rephrase your question, please.

17 MR. QUINN: Yes, sir.

18 THE COURT: Just move along.

19 BY MR. QUINN:

20 Q Do you know what your cubic fluid per second
21 capacity is in your existing drain line now?

22 A What the maximum is or what it is right now?

23 Q Do you know what it is capable of doing right now?

24 A Ninety-eight point-something cubic feet of water
25 per second.

1 Q Do you know what the difference in carrying
2 capacity of corrugated metal pipe is versus
3 reinforced concrete pipe?

4 A That I do not know.

5 Q Now, Mr. Meshekoff, you did enter -- at least your
6 family partnership -- were you aware of this,
7 entered into a transaction with Blockbuster, which
8 is on your property, for Blockbuster to get an
9 easement through your property and use your drain
10 field for storm water?

11 A No, I was not. I was aware of a request for an
12 easement from -- I think the telephone company and
13 the electricity company, but I was not aware of an
14 easement from Blockbuster or requested by
15 Blockbuster.

16 Q Do you know anything about it?

17 A About the easement?

18 Q Yes.

19 A No, I don't. From Blockbuster or by Blockbuster?

20 Q No, from you to Blockbuster.

21 A No, I know nothing about that.

22 Q Do you know where the Blockbuster storm water goes?

23 A Only from what we were shown today on slides.

24 Q You don't know from a visual inspection of your
25 property where the Blockbuster storm water goes?

- 1 A No, sir, I don't.
- 2 Q You don't know anything about a \$30,000 payment by
- 3 Blockbuster?
- 4 A No, I don't.
- 5 Q Mr. Meshekoff, are you and your sister the only
- 6 members of the Meshekoff Family Partnership now?
- 7 A No, my mother and my father's estate also.
- 8 Q And the heirs of your father's estate would be who,
- 9 other than your mother, your sister, and yourself?
- 10 A I don't know, as a matter of fact, because I
- 11 haven't seen the trust.
- 12 Q Can you speculate as to who else it might be?
- 13 A Not really. Due to certain family situations, now
- 14 I can't.
- 15 Q And when did your dad die?
- 16 A 8/9/10.
- 17 Q A year ago?
- 18 A Yes, sir.
- 19 Q Roughly a year.
- 20 A Yes, sir.
- 21 Q I'm sorry to hear that. What does your sister do?
- 22 A She is a dancer.
- 23 Q And your vocation now is -- I understood that you
- 24 were a sculptor and you were a writer, and you
- 25 wrote scripts and things like that?

- 1 A I was a director.
- 2 Q I'm sorry?
- 3 A I was a director.
- 4 Q Director, yes. Sorry.
- 5 A And I also did real estate construction, rehab and
- 6 investment, and most importantly I was a single
- 7 father of three kids.
- 8 Q What are you doing now?
- 9 A I'm the managing partner of the Meshekoff Family
- 10 Partnerships. I'm dealing with the real estate.
- 11 I'm trying to help my mother. I'm still raising
- 12 three children and I'm here.
- 13 Q And each of your real estate ventures, does that
- 14 have a property manager?
- 15 A Yes, each real estate venture does have a property
- 16 manager.
- 17 Q And you rely on that property manager quite much;
- 18 do you not?
- 19 A For certain things.
- 20 Q Yes, sir. And how often do you visit your various
- 21 sites?
- 22 A I'm on my way there after this. The last time I
- 23 visited was a few years ago, but those are
- 24 partnered with other people. I have not been
- 25 recently due to items -- because of other

1 litigation.

2 Q Yes, sir. Thank you very much, Mr. Meshekoff.

3 A Thank you, sir.

4 THE COURT: Redirect?

5 MR. JETER: Thank you, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. JETER:

8 Q Mr. Meshekoff, you referred to upgrading the
9 current system. Did you put in a new detention
10 pond when you made the repairs in 2008?

11 A No.

12 Q Did you put in new junction boxes?

13 A No, we did not.

14 Q Did you put in new catch basins?

15 A No, we did not.

16 Q Did you have any understanding of what the costs of
17 using corrugated metal pipe embedded in rock and
18 all the labor that takes would be as compared to
19 the cost of using reinforced concrete pipe?

20 A No, I did not.

21 Q Now, you were asked about common area maintenance.
22 Have you charged the \$325,000 of maintenance costs
23 on line E and the detention pond to the tenants of
24 your shopping center?

25 A No, we have not.

1 Q Has anyone from the D.O.T. come in and sought to
2 maintain the detention pond under their status as
3 the owner of an easement?

4 A No, they have not.

5 Q Has anybody from the D.O.T. come in and sought to
6 maintain the pipeline under their status as owner
7 of an easement?

8 A No, they have not.

9 MR. BOOTH: Your Honor, he is using that
10 phrase "easement." As I mentioned in my opening, I'm an
11 expert in easements. That has not been put into
12 evidence, other than just an argument.

13 So he is making the question as if it's an
14 established fact that there is an easement that exists.
15 If you put the word alleged in front of it, claimed
16 easement.

17 You are claiming the easement. Nobody else
18 is. So I think that is an improper question, especially
19 with his own witness, talking about pursuant to an
20 easement.

21 MR. QUINN: Your Honor, in support of
22 Mr. Booth's objection, I would also object. The
23 pleadings don't even say anything about an easement.
24 They don't allege an easement. He's bringing something
25 in here that is not even pled.

1 MR. BOOTH: I agree with that too.

2 MS. CLAYTON: Your Honor, I would join in the
3 objection. There has been no evidence of the
4 encroachment permit. It is an easement.

5 MR. JETER: Your Honor, the D.O.T. alleged the
6 encroachment permit was an easement. They put that in
7 there --

8 MR. BOOTH: They did not.

9 MR. JETER: They did.

10 MR. BOOTH: No, they didn't.

11 THE COURT: Y'all can direct to it me.

12 MR. BOOTH: I apologize. Judge, I disagree.

13 THE COURT: I notice you disagree.

14 MR. FRAWLEY: We ask Your Honor to review our
15 pleadings. Our pleadings mention an easement by
16 prescription, and we refer to the encroachment permit as
17 a contract.

18 THE COURT: Rephrase the question. I do not
19 take it that just because he asked the question in that
20 regard, that that is a fact. But if you would phrase
21 your question in terms of the guidance of the alleged
22 easement or something of that nature.

23 MR. FRAWLEY: Your Honor, we do not object to
24 the question. I feel Your Honor knows what is or is not
25 an easement. I have no objection to him asking that

1 question. But Your Honor knows what is and is not an
2 easement, and I don't need to object.

3 THE COURT: Again, I don't take the questions
4 as testimony and evidence. I take the responses. It's
5 the framework by which he asked it. So even if he said,
6 "Yeah, I thought we had an easement," that doesn't mean
7 there is an easement obviously. You can rephrase the
8 question.

9 MR. JETER: All right, Your Honor.

10 BY MR. JETER:

11 Q Mr. Meshekoff, has anyone from the D.O.T. or any of
12 these landowners sought to come in and perform
13 maintenance on the pipeline that was required in
14 2008?

15 A No, Mr. Jeter.

16 Q At any time prior to 2008, have they come in and
17 tried to do maintenance?

18 A No, not to my knowledge.

19 Q Did they try come in and try to do maintenance on
20 the detention pond?

21 A No, sir.

22 MR. JETER: Your Honor, I would note that
23 there is in evidence the D.O.T.'s answer to
24 interrogatory number -- it's Exhibit 8, interrogatory
25 response to number 16.

1 It states: "Do you contend you have a legal
2 or equitable right to have storm water from your
3 property discharged onto the Westside Plaza property
4 owned by the plaintiffs?" The response is yes.

5 "If so, set forth all facts known to you which
6 support your contention." They say by prescription, and
7 they give their reasons for prescription. Then they say
8 also, "By agreement of plaintiff's predecessor in title,
9 which agreed to accept storm water from U.S. Highway 1
10 and the culvert, which it existed prior to the
11 development of property in the encroachment permit..."

12 Then it goes on from that. So they are saying
13 they have a legal or equitable right based on the
14 encroachment to have storm water from their property
15 discharged into our system pursuant to the encroachment
16 permit. That is an easement.

17 MR. FRAWLEY: No, it's an encroachment permit,
18 which their guy signed, his predecessor in title signed,
19 signing the application as an inducement to get the
20 encroachment permit issued.

21 MR. JETER: An encroachment permit, Your
22 Honor, is us encroaching onto their right-of-way. It
23 doesn't give them a right to have water discharged.

24 THE COURT: Quite frankly, I think we are
25 bogging down.

1 MR. FRAWLEY: I didn't object to his question
2 and I understand.

3 THE COURT: I don't want you to have to phrase
4 your question, "As to the defendant D.O.T. but not as to
5 the defendant D.W. Properties, Danwood, Mr. Denton and
6 Alpine." I think we have bogged down on that particular
7 issue. I understand it.

8 MR. JETER: I will move on.

9 THE COURT: Thank you, Mr. Jeter. Thank you,
10 Mr. Frawley.

11 BY MR. JETER:

12 Q You were asked by the D.O.T., Mr. Meshekoff, if you
13 had ever notified them and asked them to contribute
14 to the costs of maintaining the pond and the
15 pipeline.

16 MR. JETER: I don't have a copy of this
17 letter, Your Honor. I would like to mark it and then go
18 make a copy and bring it in tomorrow if I could as a
19 formal exhibit.

20 MR. FRAWLEY: It's addressed to an assistant
21 chief counsel for D.O.T. I have no objection.

22 COURT REPORTER: Do you have any idea what
23 number it would be?

24 MR. JETER: It would be our next number, which
25 should be -- our final one is 25. So this would be 26.

1 THE WITNESS: Your Honor, may I step down to
2 get my medication.

3 THE COURT: Yes. Court will be in recess ten
4 minutes. You may not discuss your testimony. We will
5 take a short break.

6 (Whereupon there is a recess.)

7 THE COURT: All right, Mr. Jeter.

8 MR. JETER: Thank you.

9 BY MR. JETER:

10 Q Mr. Meshekoff, we are going to mark this May 20,
11 2008, letter as Exhibit 26. Are you shown as a
12 copy holder of this letter which is written to the
13 D.O.T.?

14 A Yes.

15 Q In 2008?

16 A Correct.

17 Q And did you instruct me to write the D.O.T. and
18 attempt to get some contributions from them on the
19 costs involved with the line and the detention
20 pond?

21 A Yes, I did.

22 Q All right.

23 MR. JETER: Your Honor, I would move that into
24 evidence subject to me getting the Court copies in the
25 morning.

1 THE COURT: Objections?

2 MR. FRAWLEY: No objection, Your Honor.

3 MR. BOOTH: None, Your Honor.

4 MS. CLAYTON: No, Your Honor.

5 MR. QUINN: May I view the letter, Your Honor?

6 THE COURT: Certainly.

7 BY MR. JETER:

8 Q Now, Mr. Meshekoff, you were asked about the
9 benefit your center gets from having a highway
10 close by where people come in and shop at your
11 center?

12 A Yes, sir.

13 Q If these parties were handling their storm water on
14 their own property and you didn't have to provide
15 storm water, is that going to affect who visits
16 your center at all?

17 A No, sir.

18 Q So does storm water -- how that gets handled --
19 have any bearing on who visits your center?

20 A No.

21 Q All right, sir. Now, there have been some
22 questions about your experience in business. Would
23 you explain to the Court briefly what the director
24 of an advertisement or of a film does in terms of
25 budgets and solving problems and business aspects

1 in that industry?

2 A As a director ultimately I am responsible for
3 completing the budget. On the show "Wiseguy," I
4 had 140 people, 40 tractor trailers, and various
5 other -- virtually an army of people working at
6 \$600 a day and then triple time.

7 My responsibility was to get the show done on
8 time and completed but within the budget. It's all
9 just a matter of if there is a problem, if there is
10 a task, you see that task and you move to complete
11 that task inside the box, outside the box, however
12 you can, and to the best of your ability.

13 I have been responsible for the sale of a
14 shopping center, Coral Bay, to the Town of Atlantic
15 Beach. After researching that -- and the Town of
16 Atlantic Beach thanked me for putting it into a
17 bond measure because it was for the best of the
18 citizens of the area, as opposed to selling it for
19 the same amount of money to a developer, who I
20 found out had a sewage treatment plant, who wanted
21 to develop the entire island. So I just do the
22 best that I can. I do it with the best conscience
23 I can for the people. That's all.

24 Q How long have you been involved in construction,
25 Mr. Meshekoff?

1 A Pretty much all my life. From the time I was in
2 high school, I used to go down and knock down
3 walls. We owned the first skyscraper that was
4 built in New York City next to the Flatiron
5 Building. So it has been a family business.

6 Every day after work, I had the
7 responsibility -- after school -- I had the
8 responsibility to go down and work with my family
9 on the construction. We also renovated a Con
10 Edison substation.

11 Q Just as a matter of human interest -- and it
12 doesn't tend to prove the facts in controversy --
13 were you the writer and producer of the fake
14 commercials on "Saturday Night Live" that fooled me
15 and millions of other people?

16 A Yes, I was the director and producer. I was there
17 from the first year of the show.

18 MR. QUINN: I wasn't fooled.

19 MR. JETER: Your Honor, that's all I have of
20 Mr. Meshekoff.

21 THE COURT: Recross, Mr. Frawley?

22 MR. FRAWLEY: Nothing from D.O.T., Your Honor.

23 THE COURT: Ms. Clayton?

24 MS. CLAYTON: Your Honor, just one question.

25 THE COURT: Yes, ma'am.

RECROSS EXAMINATION

BY MR. FRAWLEY:

Q Mr. Meshekoff?

A Yes.

Q You didn't contact Danwood and ask them what type of pipe they wanted installed in your property; did you?

A No, I did not.

Q And Danwood can't tell you what to do with your property; can they?

A No, I imagine they can't.

MS. CLAYTON: No further questions.

THE COURT: Mr. Booth?

MR. BOOTH: Nothing, Your Honor.

MR. QUINN: Nothing further, Your Honor.

THE COURT: Thank you. Thank you very much, Mr. Meshekoff. You may step down.

THE WITNESS: Thank you, Your Honor.

MR. QUINN: I would object to this letter.

MR. JETER: Your Honor, one party has objected to my proposed letter. It does make a lot of arguments in it.

THE COURT: Kind of like Mr. Quinn's questions?

MR. JETER: Well, it doesn't compare to that

1 now, Your Honor. I was simply putting that in to
2 respond to the point that D.O.T. made that we have not
3 contacted them. If we can stipulate that we did contact
4 them to make an effort to get contribution to costs,
5 that's enough.

6 MR. FRAWLEY: Just to point out that it's a
7 May 20, 2008, letter approximately two to three weeks
8 before the lawsuit was filed, kind of a demand letter.
9 I guess I'm okay with that. This is the first time I
10 have seen this. It's not that he didn't produce it. My
11 own client didn't produce it to me.

12 MR. JETER: With that stipulation I don't need
13 to enter Exhibit 26.

14 THE COURT: Thank you. Do you have a short
15 witness? I prefer not to start on Mr. Richardson if we
16 are not going to finish with him. That would be my
17 preference.

18 MR. JETER: Your Honor, we were intending to
19 offer the D.O.T. 30(b)(6) transcript portions, very
20 select portions of it as an exhibit. There has been
21 some objection about that, which I guess means we need
22 to publish it.

23 If the Court will take it as an exhibit, we
24 will put it in that way, but if we need to publish it,
25 we can do that now. I think Bill had an objection to

1 that.

2 MR. BOOTH: No, I don't have any problem with
3 that. Again, if he wants it as an exhibit, I don't mind
4 the testimony going in but because they are not going to
5 read it, I don't know whether it should be an exhibit or
6 not. I don't really care one way or the other.

7 THE COURT: Can it be a Court's exhibit and I
8 will read it?

9 MR. BOOTH: That's perfect.

10 MR. FRAWLEY: It's a 30(b)(6) deposition,
11 which they are entitled to enter or at least the
12 excerpts of the deposition. They have given me timely
13 notice of it.

14 MR. BOOTH: So that would be fine, Judge.

15 MR. JETER: Your Honor, that is Exhibit 12
16 that will be a Court's exhibit. I would like to publish
17 a few short portions of it, Your Honor.

18 THE COURT: All right.

19 MR. JETER: This is the 30(b)(6) deposition
20 taken on November 5, 2009, of the South Carolina D.O.T.
21 This is on page 9, line 3: "So the storm water of
22 A.P.A.M., Kimbrell's Investment Company, R1 CS2, D.W.
23 Properties, Danwood, L.L.C.; Boom, Inc. --

24 Your Honor, I apologize. Our court reporter
25 is worn out. I would be happy to give her a document,

1 and she can take this down at her leisure if that's okay
2 with the Court.

3 MR. FRAWLEY: No objection from D.O.T. on
4 that.

5 THE COURT: That's fine with me.

6 MR. JETER: I will just pronounce what
7 sections I am going to read so she will have that. I am
8 going to read page 9, line 3, through page 9, line 16:
9 "Boom, Inc.; Robert W. Denton and Alpine of South
10 Carolina, assume those are the names of the property
11 owners we have named in this suit. All of their storm
12 water that they discharged into your system, you
13 discharge into the Westside system; is that correct?"

14 "Answer: That's correct."

15 "Question: Now, does D.O.T. retain any of
16 that water to slow down the flow?"

17 "No, sir, we don't. We've got cross-line pipe
18 across U.S.1, and there is no detention within our
19 rights of way."

20 THE COURT: All right.

21 MR. JETER: Then going to page 10, line 1,
22 through page 10, line 21. I will skip the objections.
23 "One purpose of detention ponds is to slow the flow of
24 water down so that the flow matches a predevelopment
25 rate or some other rate that is specified. There is no

1 attempt by South Carolina D.O.T. to do that; is that
2 correct?"

3 "No, sir."

4 "Okay. That is correct? You do not do that?"

5 "Answer: We do not detain."

6 "Question: Does D.O.T. do anything with the
7 water it receives from these property owners to slow it
8 down so that impurities can settle out of the water
9 before it's discharged into the Westside system?"

10 "Answer: No."

11 "Question: You would agree, I take it, that
12 D.O.T. does not discharge crystal clear water into the
13 Westside system?"

14 "Answer: I would agree with that statement,
15 yes."

16 This is page 27, line 5 through 27, line 21.
17 "Now, the owners of the Westside property were entitled
18 to get access to U.S.1 from their property; correct?"

19 "Answer: Yes."

20 "So the encroachment permit, in giving them
21 driveway cuts, didn't give them anything beyond what
22 they were already entitled; is that correct?" Then
23 there is an objection.

24 "Ask it again, please."

25 "I said, as far as benefit to the landowner,

1 the encroachment permit provided the owners of the
2 Westside property with nothing other than what they were
3 entitled to have; correct?"

4 "Answer: That's true."

5 Page 28, lines 14 through 20. "Has D.O.T.
6 charged any landowner any fees to pay for the
7 maintenance of the Westside system?"

8 "Answer: No, sir."

9 "Okay. Did D.O.T. -- did D.O.T. pay the
10 owners of Westside anything to help maintain the
11 systems?"

12 "No."

13 Page 30, line 9 through page 31, line 19.
14 "Does D.O.T. to your knowledge own and operate -- excuse
15 me. That's wrong -- Now, is corrugated metal pipe an
16 approved material for other D.O.T. regs for uses as
17 culverts and heavy traffic to travel across?"

18 "Certain corrugated metal pipes are."

19 "Okay. And do you have any information that
20 the corrugated metal pipes put into the Westside system
21 were or were not of a type approved by D.O.T. regs?"

22 "Answer: We have no knowledge of that."

23 "Question: One way or another?"

24 "Answer: One way or another."

25 "Question: So D.O.T. cannot say there is

1 anything improper about the materials used in the
2 Westside storm water system?"

3 "Answer: No, sir."

4 "Question: You cannot say that?"

5 "Answer: I cannot, no."

6 "Question: Okay. Now, does D.O.T. seek to
7 control what type of material is used by a landowner in
8 consultation with their own engineer to transport storm
9 water on their own property?"

10 "Answer: No."

11 "Okay. This permit, Exhibit 1, has a plan
12 from the owner's engineer at the time that contemplated
13 reinforced concrete pipe to carry D.O.T.'s water to the
14 detention. Are you aware of that?"

15 "Answer: Yes."

16 "Question: All right. If, in consultation
17 with its engineers the owner decided to change that to
18 corrugated metal pipe, that would not be anything that
19 D.O.T. would consider to be a violation of its permit;
20 would it?"

21 "Answer: No, sir."

22 Page 32, line 4 through 10. "Did D.O.T.
23 record the Westside encroachment permit at either
24 Lexington County R.M.C.'s office or the Clerk of Court's
25 Office of Lexington County?"

1 "Answer: The permit itself?"

2 "Question: Yes."

3 "Answer: No, sir."

4 Page 42, line 18 through 22. "Are the
5 encroachment permits available to members of the
6 public to come and view at your office?"

7 "Answer: No. If they were, they would
8 have had access through our Freedom of Information
9 Office."

10 Your Honor, I skipped a few things but those
11 were the main points I wanted the Court to have.

12 THE COURT: All right. Thank you. You can
13 have that marked as a Court's exhibit.

14 MR. JETER: Yes, sir.

15 (Court's Exhibit Number 1 is marked for
16 purposes of the record.)

17 MR. JETER: Frankly, Your Honor, at this point
18 I think it's as good a breaking point from our point of
19 view as far as ending the afternoon. We would put -- if
20 you wish to go forward, we would Mr. Richardson up and
21 get him started.

22 THE COURT: I would prefer not to do that.
23 Anything further from D.O.T.?

24 MR. FRAWLEY: Nothing from D.O.T. at this
25 point, Your Honor.

1 cover that. If they don't call Ms. Reeves, I don't want
2 to rely on Mr. Booth having to call Ms. Reeves. I will
3 call Ms. Reeves.

4 THE COURT: Somebody is going to call
5 Ms. Reeves. So we have got Mr. Blakely, Mr. Richardson,
6 and Ms. Reeves for sure.

7 MR. BOOTH: Of course, Dan Ward.

8 THE COURT: Mr. Ward.

9 MS. CLAYTON: And Mr. Swinson on behalf of
10 Danwood, L.L.C.

11 THE COURT: All right.

12 MR. QUINN: Your Honor, we will call
13 Dr. Denton and maybe recall Mr. Meshekoff.

14 THE COURT: All right. Thank you. Thank you
15 very much. We will press on.

16 MR. JETER: Thank you, Your Honor. We call
17 Tim Richardson.

18 THE COURT: Mr. Richardson, if you would come
19 around and be sworn, please.

20 TIMOTHY KNOWLTON RICHARDSON,
21 being first duly sworn, testifies as follows:

22 CLERK: Take a seat and state your name for
23 the Court.

24 THE WITNESS: Good morning. My name is
25 Timothy Knowlton Richardson.

1 DIRECT EXAMINATION

2 BY MR. JETER:

3 Q Mr. Richardson, where do you reside?

4 A 1079 West Shady Grove Road in Irmo, South Carolina.

5 Q What business are you in?

6 A General contracting, utilities.

7 Q Utilities. How long have you been working in
8 construction?9 A Full-time since 1985. I have actually been in the
10 trenches since I was ten years old.11 Q Before 1985, what did you do immediately before
12 1985?

13 A I worked in the trenches while I was in school.

14 Q Were you in the military?

15 A I was.

16 Q What branch?

17 A 1982 to 1985, Marines.

18 Q And then you came out after the Marines, and you
19 started working in utility construction?

20 A Right back into what I left, utility construction.

21 Q What is the name of the company you do business
22 with?

23 A Shady Grove Construction.

24 Q Are you the owner of that?

25 A Not at all. My wife owns it.

1 Q And did you do some work on the Westside Plaza
2 under the name Ideal Construction?

3 A Yes, sir, I did.

4 Q How were you involved with Ideal Construction?

5 A I owned Ideal Construction at the time.

6 Q Did it do utility work?

7 A Absolutely.

8 Q What was your first involvement with the Westside
9 Plaza Shopping Center if you recall?

10 A I received a phone call late afternoon -- I don't
11 remember the day without looking -- from Ms. Dee
12 Reeves, which is the property manager with, I think
13 it was W.P.M. -- not W.P.M., W.R.S.

14 She said she had a problem that she needed
15 help with. I automatically asked, "How did you get
16 my number?" She said, "I think I called the City
17 of Columbia and they told me to call you."

18 I met -- I didn't meet her. I told her I
19 would go over there immediately and look at the
20 situation, which I did. There was a big hole in
21 the driveway.

22 From that moment for the next few hours, it
23 was focused on public safety. I made it safe. I
24 got the lowboy loaded, the track hoe, went over and
25 plated it, barreled it off, coned it off. I

1 immediately called S.C.D.O.T.

2 Any time we do a repair and it encroaches in
3 the right-of-way, I always respect S.C.D.O.T.
4 enough to at least give them a call and tell them
5 we are in the right-of-way.

6 I made it safe. At that time I called
7 Ms. Reeves and said, "Everything is safe. It's
8 okay." I went home for the day until further
9 directions were given from the owner.

10 Q All right. And did you get subsequent directions?

11 A Immediately. Fix it.

12 Q What did you do to fix it?

13 A The next morning we had to do some investigative
14 work to find out exactly what we were going to be
15 fixing because it was fairly deep. We had to bring
16 out the confined space stuff and the gas nippers
17 to go --

18 COURT REPORTER: Can you slow down a little
19 bit.

20 A For the confined space, you have to bring the
21 A-frame out, hoist, gas nippers. You don't just go
22 into a storm drain system by an active highway
23 without being prepared.

24 Q So before you go in a storm drain center, the risks
25 or perils you are worried about are what?

- 1 Cave-ins?
- 2 A You have got methane, sulfide, cave-ins, all of the
3 above. It's a hazardous environment.
- 4 Q Do you have any poisonous snakes sometimes?
- 5 A Oh, yeah.
- 6 Q How about rodents?
- 7 A Uh-huh. (Indicating affirmative response.)
8 Possums, raccoons, foxes. There's a lot of foxes
9 in the storm drain system.
- 10 Q Do you have an actual certification --
- 11 A Absolutely.
- 12 Q -- that allows you to go into the storm drain
13 systems?
- 14 A All of my guys are certified, not just me.
15 Everybody is.
- 16 Q What kind of certification do you have to get?
- 17 A Confined space.
- 18 Q Is that with the E.P.A. or what?
- 19 A Well, no. It's required. It's an O.S.H.A.
20 required course for entering a hazardous area.
- 21 Q Okay.
- 22 A We also recommend -- we also enforce our guys to do
23 a 40-hour O.S.H.A. certification.
- 24 Q All right. Now, after investigating what did you
25 determine? What did you do to fix the cave-in up

1 there?

2 A We first determined the problem was a pipe
3 collapse. At that time we gave Ms. Reeves a price
4 to fix it. She communicated with Matthew and he
5 approved it. We repaired it and I think we were
6 there maybe two days.

7 Q I want you to look at Exhibit 19 and see if that's
8 the invoice for that work you are talking about.
9 That will help give you the date, I think.

10 A It is. I recall \$31,000. That's correct.

11 Q It shows you deposited a check for 31,000 on
12 August 10, 2005?

13 A Correct.

14 Q And so that was about the time you did the work?

15 A It is.

16 Q Okay. Now, in 2006 were you involved with some
17 storm drain issues in the center of the parking lot
18 at Westside?

19 A Yes, sir.

20 Q I'm going to leave those because that's not
21 involved here. But during the same time frame, I
22 want to ask you if you did not work on the
23 detention pond?

24 A We did shortly thereafter. Again, I can't recall
25 that date. But we did go in because the pond was

1 full of silt and the lines were surcharged. We had
2 to clean the pond out to get the water out of our
3 pipes where we could work, to proceed.

4 Q So you cleaned sand out of the pond?

5 A We had to.

6 Q Was this sand that was in there after the collapse?
7 Well, let me go back. You said you went out in
8 2006 to do some work in the center of the parking
9 lot?

10 A Right.

11 Q What kind of problems were you facing?

12 A The corrugated metal pipe failed, similar to what
13 happened at the driveway.

14 Q Were there sinkholes there?

15 A There were. It seemed like everything happened at
16 once. It all came at one time.

17 Q Were most of the failures -- where were most of the
18 failures with respect to junction boxes?

19 A Most of the failures in the parking lot were where
20 the corrugated pipe met the junction box or at the
21 catch basin. It was just the joints were bad
22 there.

23 Q And when you have that kind of failure, does that
24 cause a sudden movement of a lot of sand --

25 A Oh, yeah.

1 Q -- in the pipe system?

2 A It does.

3 Q If a heavy rainstorm comes along, where does that
4 sand go?

5 A It carries it to the pond to a certain extent.

6 Q With those kind of failures, you are going to find
7 a lot of sand in the pond?

8 A Of course. It's got to go somewhere.

9 Q So you had to clean the pond out after you did
10 whatever you did in the center?

11 A Like I say, we were fighting water because all the
12 water was back to -- surcharged up into the lines.

13 Q And did you rebuild the pond at that time?

14 A We completely cleaned the pond to the original pan,
15 to the original profile. We brought it back to its
16 original state.

17 MR. FRAWLEY: Your Honor, I would object just
18 generally to the leading. I would like to move this
19 along and I don't want to impede his ability to do it,
20 but a lot of his questions are leading. I ask that he
21 lead less than what he has been doing.

22 THE COURT: My ruling is you lead less. Thank
23 you.

24 MR. JETER: Yes, Your Honor.

25 THE COURT: Thank you.

1 BY MR. JETER:

2 Q Would you look at Exhibit 21, Mr. Richardson. I
3 want you to look at the last page of Exhibit 21.
4 Can you identify that for us?

5 A That's when we cleaned the pan out on the pond,
6 preparing the outfall structure and the piping.
7 That was the piping going from the outfall
8 structure to the ditch right adjacent to the
9 Walmart property, which was only 60 feet of
10 60-inch.

11 Q What kind of price did you quote for that work?

12 A This is 45,528.

13 Q If you look at the first page of Exhibit 21. Did
14 you get a check for 97,368?

15 A Yes, sir.

16 Q And did that include the amount on that proposal --

17 A Yes, sir.

18 Q -- for the pond?

19 A It did.

20 Q And the third and fourth pages of the exhibit, what
21 are those?

22 A That's just a typical pay request.

23 Q For the pond?

24 A An A.I.A. document request.

25 Q Is that for the pond work?

1 A It is.

2 Q And were you paid for that work?

3 A Yes, sir, we were paid for everything.

4 Q The second page of that exhibit shows what?

5 A That's retention pond work also. I am looking to
6 see the back of it.

7 Q I am talking about the deposit slip on the second
8 page.

9 A Yes, that was for that work.

10 Q And you deposited that on October 31, 2006?

11 A Yes, sir.

12 Q Which was soon after you did the work?

13 A Uh-huh. (Indicating affirmative response.)

14 Q I really didn't discuss what kind of utility work
15 you do. Give the Court some of your background in
16 utility work and pipelines and that kind of thing.

17 A We do anything associated with civil, to include
18 storm drain, sewer, water. I'm also a licensed
19 asbestos abatement contractor. I do carry a deep
20 water diving certification. I'm also licensed in
21 sewer water plants. We do a lot of sewer water
22 plant work. We do a lot of highway work. We do a
23 lot of work in the S.C.D.O.T. right-of-way.

24 Q Now, you mentioned the hard pan of this detention
25 pond. Is this detention pond typical of those that

1 were built or not typical of those that were built
2 in the 1980s?

3 A Pretty typical, pretty typical.

4 Q There was some mention yesterday made of the
5 Walmart detention pond. Do you know about when the
6 Walmart detention pond was built?

7 A I do not. I do not know.

8 Q It was fairly recently though; wasn't it?

9 A Most of the Walmart ponds have a lot of storage.
10 That's why you don't see cattails growing in them
11 and trees.

12 Q So they are a lot deeper?

13 A Yes, they have actually got fish in them.

14 Q To get deep do you have to take up more land too?

15 A That's a question for an engineer. Vertically you
16 do but I don't know what -- I don't get into that
17 aspect. We just put it in per the profile.

18 Q As far as detention ponds from the era like
19 Westside's, how do they compare as far as storage
20 capacity to the Walmart?

21 A They don't have any holding capacity. They hold to
22 the height of the weirs on your invert out, which
23 is your pond structure. That filters your water
24 out at a slower rate. They are designed to hold
25 capacity, but that capacity drains out over a

- 1 period of time, typically hours.
- 2 Q Okay. As far as typical maintenance of those kind
- 3 of ponds, what has been your experience with that?
- 4 A They require a whole lot more maintenance because
- 5 you've got to clean the pan out.
- 6 Q So sand builds up quicker in those?
- 7 A Yes, they have no storage. Sand builds up and it's
- 8 very quick.
- 9 Q In 2008 now did you get another call about
- 10 Westside?
- 11 A On the back side, I believe it was, toward the
- 12 Walmart side.
- 13 Q Okay.
- 14 A There was three cave-ins back there.
- 15 Q All right.
- 16 A Every one was adjacent to a catch basin, a curb
- 17 inlet.
- 18 Q Okay. Was this a situation that did or did not
- 19 require immediate attention?
- 20 A Oh, it did. It was in a truck traffic area.
- 21 Q So would you characterize it as an emergency
- 22 situation?
- 23 A Life safety because the holes were open, and they
- 24 were ten feet deep in most cases.
- 25 Q Before I show you any of the documents, do recall

1 the time period of this?

2 A I do not.

3 Q I will get you the documents.

4 A Just keep in mind, we do multiple of these every
5 day, and sometimes I have got three and four going
6 on at one time.

7 Q I understand.

8 A And it all runs together.

9 Q I will show you the documents in a second. Tell
10 the Court what you confronted when you went out
11 there.

12 A I went out there and there was another issue, a
13 life safety. The holes were open. I simply went
14 out and made it safe, called Dee Reeves and said,
15 "Here is what we have. I made it safe. Tell me
16 what to do from here." Within 24 hours Matthew had
17 made a decision to get in and fix it.

18 Q And then did you investigate and determine what you
19 needed to do?

20 A We did. We went in at that time. We went ahead
21 and went in since I had a crew there. The failures
22 were at the connections of the joints, both at the
23 box and at the joint of the pipe.

24 Q Okay.

25 A At that time I called Ms. Dee. I always told her,

1 "Always get you another price. Don't focus on me.
2 I'm not the only person that does this." She was
3 at liberty to do just that. That's it. We were
4 instructed within 24 hours to fix it. I think it
5 was repair number three.

6 Q I'm not sure whether you said this or not. Did you
7 shut down the driveway back there as a result of
8 these sinkholes?

9 A We did not at that time. We barreled off the curb
10 because the cave-ins were behind the curb.

11 Q Right.

12 A Once we started excavating, we found the driveway
13 to be 24 inches above subgrade. There were trucks
14 coming over it, and it was bridged by eight inches
15 of asphalt. At that time we shut the driveway
16 down.

17 Q You had some failed pipe. Did you remove the
18 failed pipe and replace it?

19 A We removed all of it.

20 Q Okay.

21 A All the way back to the driveway repair.

22 Q Did you remove the catch basin?

23 A We did not remove the structures. The structures
24 were sound. We just cored them out and reconnected
25 to existing structures.

- 1 Q And you didn't remove the detention pond?
- 2 A We did not. We did nothing to the retention pond.
- 3 Q But you did remove the connective pipe between the
- 4 structures?
- 5 A Absolutely.
- 6 Q Okay.
- 7 A Because it had failed also.
- 8 Q All right. And that connective pipe was what kind
- 9 of pipe?
- 10 A Corrugated. Everything was corrugated metal.
- 11 Q And you replaced it with what?
- 12 A Concrete R.C.P. tongue and groove.
- 13 Q What is your practice with respect to installing
- 14 corrugated metal pipe as far as bedding and all?
- 15 What do you do?
- 16 A There is nothing wrong with corrugated metal pipe
- 17 if it's properly installed, and everybody has got
- 18 their own opinion of what is properly installed.
- 19 But typically when we do install corrugated metal,
- 20 we bed it in stone where you don't get that egg
- 21 affect. It keeps a true, round, full barrel. But
- 22 until you spend that time and money, it's just as
- 23 cheap to use concrete. We focus on reinforced
- 24 concrete pipe.
- 25 Q You didn't think it was any more expensive to put

1 R.C.P. in --

2 MR. FRAWLEY: Objection to leading, Your
3 Honor.

4 MR. JETER: He has already said that, I
5 thought, Your Honor.

6 THE COURT: Just restate your question.

7 BY MR. JETER:

8 Q What was your reason for recommending R.C.P. rather
9 than C.M.P.?

10 A Because I have dug up too much corrugated metal
11 pipe over the years to trust it.

12 Q How about as far as pricing though?

13 A It's just as cheap for me to lay concrete.

14 Q And did the owner agree to put R.C.P. in?

15 A He did. That's what I quoted him was R.C.P.

16 Q If you look at Exhibit 18.

17 A Okay.

18 Q And if you can turn to the third page and identify
19 what that is.

20 A It's changing out 118 feet of R.C.P., but I
21 cannot -- I'm not going to be able to recall what
22 that 118 feet was, the exact location.

23 Q Were you doing any work out at Westside in 2008,
24 other than on that line along the Walmart, new
25 Walmart?

1 A No.

2 Q So this was for that line?

3 A Right.

4 MR. BOOTH: Your Honor?

5 THE COURT: Yes, sir.

6 MR. BOOTH: The witness testified he did not
7 know where that pipe was.

8 THE WITNESS: I do not know without looking --

9 MR. BOOTH: Counsel, by leading, had him
10 repeat the question and gave a different answer.

11 THE COURT: I don't think that's a leading
12 question: "Were you doing any other work except in the
13 area at Westside?" I think that's circumstantial
14 evidence myself.

15 THE WITNESS: I think this 118 feet --

16 MR. BOOTH: I will withdraw that.

17 THE COURT: Really whether or not he did the
18 work or not ultimately won't answer your issue anyway,
19 Mr. Booth, I don't think.

20 MR. BOOTH: Right. You are right again. I
21 was listening and looking at the invoice, and I heard
22 him say, "I don't know where that pipe went." I felt
23 like --

24 THE WITNESS: Not without looking.

25 MR. BOOTH: He can certainly explain. I felt

1 like his question was putting words in his mouth by
2 saying it was back there in the back. That's why I made
3 the comment but I understand. I agree with you, Judge.

4 THE COURT: Thank you.

5 MR. BOOTH: If it makes any difference.

6 THE COURT: It doesn't happen often.

7 BY MR. JETER:

8 Q As you are looking at Exhibit 7, Mr. Richardson --

9 A Seven?

10 Q That's what you have in front of you. Does that
11 help you be a little more specific for the Court as
12 to where you take it that that 118 feet went?

13 A This is not showing a size. It's got 118 feet but
14 it doesn't show a pipe size.

15 Q This is an as-built drawing.

16 A The 118 feet is against the road between that tree
17 and that first manhole.

18 Q Okay. And you got paid for that invoice?

19 A Absolutely.

20 Q Would you look at Exhibit 17 and look at the last
21 two pages of your invoice and tell us what that was
22 for.

23 A This was replacing that big line, the last section
24 we did all the way to the pond. It's got 739 feet
25 of 54-inch reinforced concrete.

- 1 Q All right, sir.
- 2 A That was the next to the last job. We've been over
3 there in the last six months to do a repair. This
4 was the last main line going into the pond from the
5 road.
- 6 Q And was this done in 2008 or at some other time?
- 7 A 2008.
- 8 Q And if you look the second page of that exhibit,
9 does that show your deposit?
- 10 A Yes, sir.
- 11 Q And that's on June 30, 2008?
- 12 A Yes, sir.
- 13 Q So you were paid for that work as well?
- 14 A Yes, sir.
- 15 Q Now, I want to go back and discuss with you a
16 moment corrugated metal pipe. Was corrugated metal
17 pipe -- how has it been used? This was in the
18 1980s.
- 19 A It still has its place today. In the '80s it was
20 used a lot of places and it's still used today.
- 21 Q In the 1980s was it used -- did you see it used as
22 storm water pipe?
- 23 A Absolutely.
- 24 Q And was it used in shopping centers for storm water
25 pipes?

1 A Absolutely, very common.

2 Q Were there any specific requirements for how it was
3 to be embedded?

4 A Back then not per se.

5 Q Okay.

6 A As long as it can make compaction to 95 percent.

7 Q So you bed yours in rock, but that's your personal
8 approach?

9 A That's just our personal approach.

10 Q There was no requirements that it be bedded in
11 rock?

12 MR. FRAWLEY: Objection, Your Honor --

13 THE WITNESS: We include the rock in our
14 price.

15 THE COURT: Wait just a minute.

16 THE WITNESS: We include the rock in our
17 price.

18 THE COURT: I'm sorry. I missed that.

19 MR. FRAWLEY: The question was: There were no
20 requirements that it be bedded in rock? I object to
21 that.

22 THE COURT: Would you rephrase the question.

23 BY MR. JETER:

24 Q Were there any requirements --

25 A Not to my knowledge.

1 Q Were there any requirements that it be embedded in
2 rock in the 1980s?

3 A Not to my knowledge but some engineers did require
4 it.

5 Q That would be a design issue then; correct?

6 A Yes.

7 Q It could be designed with rock or without rock in
8 your experience?

9 A Absolutely.

10 Q Now, in your experience and knowledge, how long
11 does corrugated metal pipe last?

12 MR. BOOTH: Your Honor, he's asking for an
13 opinion. He has not been qualified as an expert on
14 length of time for C.M.P. pipe. He can state on his own
15 experience. That's fine. But I think he made it more
16 like an opinion..

17 THE WITNESS: I can state facts on that.

18 MR. BOOTH: That's fine.

19 THE COURT: Let me rule on the question.

20 Mr. Jeter, if you would rephrase the question
21 then.

22 MR. JETER: Yes, sir.

23 THE COURT: Mr. Booth is correct. He has not
24 been qualified as an expert. If you could rephrase the
25 question.

1 MR. JETER: All right, sir.

2 BY MR. JETER:

3 Q In your experience how long does corrugated metal
4 pipe last?

5 A Ten to 35 years is what several D.O.T.s have gotten
6 together in the states and determined, at 10 to 35
7 years.

8 MR. FRAWLEY: Objection to the hearsay, Your
9 Honor.

10 THE COURT: Again, the question,
11 Mr. Richardson, is within your experience. You have
12 been doing it since you said you were ten years old, and
13 you got out of the Marines in 1985. That's 26 years at
14 least.

15 THE WITNESS: I dug up a job that was 40 years
16 old.

17 BY MR. JETER:

18 Q So that's the longest it has lasted?

19 A That's the longest I have ever seen it.

20 Q Have you seen them last shorter?

21 A Oh, yeah.

22 Q Have you had experience with Departments of
23 Transportation or State agencies as far as what
24 they expect the life to be on jobs you have worked
25 on?

1 A I don't think I have ever laid corrugated metal
2 pipe in a S.C.D.O.T. right-of-way.

3 Q But it is a S.C.D.O.T. approved material; isn't it?
4 Do you know?

5 A I don't think I have ever seen it approved in an
6 S.C.D.O.T. right-of-way, corrugated metal.

7 Q Okay.

8 A Corrugated metal.

9 Q We have got another witness who testified on that.
10 In your experience if the corrugated metal pipe at
11 Westside lasted 17 to 20 years, does that indicate
12 to you that it was too short a period?

13 MR. BOOTH: Again, opinion.

14 THE COURT: He did qualify -- I agree with you
15 if it's for an expert, but he qualified it in his
16 experience. Do you still have the objection?

17 MR. BOOTH: Yes, because he asked him with
18 respect to Westside. I thought he was asking for an
19 opinion about that particular pipe, but if he wants to
20 rephrase it, that's what I heard, more of an opinion
21 rather than -- because obviously he became aware of the
22 pipe in 2005. That was his first time off-site. So
23 that's why I was --

24 MR. JETER: Your Honor, I think these are
25 awfully long speaking objections.

1 THE COURT: I agree if we were in front of a
2 jury. That may be a little bit of difference in that
3 regard. Sometime it goes over my head, and I like for
4 them to focus it, as to what the real crux of his
5 objection is. You can rephrase the question or you can
6 attempt to qualify Mr. Richardson as an expert.

7 MR. JETER: All right, sir.

8 BY MR. JETER:

9 Q Mr. Richardson, how many years have you been laying
10 utility pipe, storm drain pipe?

11 A Thirty years.

12 Q All right. Are you a licensed contractor in
13 utilities?

14 A Yes, sir.

15 Q Have you had experience with corrugated metal pipe?

16 A Yes, sir.

17 Q Have you had experience with reinforced concrete
18 pipe?

19 A Yes, sir.

20 Q Have you learned in the course of your time as a
21 contractor about the lengths of life expectancy
22 about corrugated metal pipe?

23 A Yes, sir.

24 MR. JETER: Your Honor, I would offer him as
25 an expert.

1 MR. FRAWLEY: No objection from S.C.D.O.T.,
2 Your Honor.

3 MR. BOOTH: In what area?

4 MR. JETER: In the area of corrugated metal
5 pipe and life expectancy.

6 MR. FRAWLEY: And reinforced concrete pipe?

7 MR. JETER: And reinforced concrete pipe.

8 MR. FRAWLEY: No objection from D.O.T.

9 MR. BOOTH: Just note my objection for the
10 record. I don't think he has been qualified.

11 MS. CLAYTON: No objection, Your Honor.

12 MR. QUINN: Your Honor, I will go along with
13 the crowd.

14 THE COURT: You will go along with two out of
15 three?

16 MR. QUINN: I will go with the majority.

17 THE COURT: I think under the cases that he
18 would be qualified in that regard. Even under Watson a
19 utility contractor can have expertise in both C.M.P. and
20 R.C.P. in that regard. Even under Watson -- I haven't
21 gone into all the details. So you may ask your next
22 question.

23 Your objection is noted for the record.

24 MR. BOOTH: Yes, sir.

25 THE COURT: Thank you.

1 BY MR. JETER:

2 Q Mr. Richardson, in your opinion state whether or
3 not you think the corrugated metal pipe at Westside
4 lasted for a reasonable life expectancy?

5 A It did, 17 years.

6 Q All right, sir. Now, in your work out there, did
7 you find some installation issues with the original
8 corrugated metal pipe?

9 A Yes, we did.

10 Q And you have mentioned the joints at the various
11 boxes; correct?

12 A Yes, sir.

13 Q Were there also some negative slopes --

14 MR. FRAWLEY: Again, I will object to the
15 leading. I have no problem with being an expert.

16 THE COURT: Ask him what he found.

17 Yes, sir. I sustain the objection,
18 Mr. Frawley.

19 Just ask him what he found. He is an expert
20 now and not only that, he is on site.

21 BY MR. JETER:

22 Q Just tell us in order of what you considered more
23 important first, what you found out there that was
24 defective in the installation.

25 A You had mostly your joint failure. Your joints

1 weren't sealed. Even where the joint required an
2 overlapping band, in some cases those bands weren't
3 even installed.

4 Q All right.

5 A But you couldn't see that until you excavated
6 because you couldn't see it from the inside.

7 Q And then what else? How about bedding? What did
8 you find as a result of that?

9 A There was absolutely no type bedding. They used
10 the native soil to bed.

11 Q Was that an improper installation?

12 A At the time, no. No.

13 Q Could you tell, walking on the inside of the pipe,
14 whether or not it was bedded?

15 A Absolutely not.

16 Q What else did you find out there that you didn't
17 like about it?

18 A A lot of misalignment. You had a lot of vertical
19 and horizontal misalignment with the pipe that was
20 laid.

21 Q Now, despite these installation defects that you
22 saw, you felt it lasted a reasonable period of
23 time?

24 A I'm surprised it lasted what it did.

25 Q All right, sir. Now, with respect to the

1 reinforced concrete pipe that you put in, what
2 would be -- I'm talking about the pipe, not the
3 pond -- what would be the expected maintenance
4 going forward on the reinforced concrete pipe that
5 has been installed?

6 A Typically no maintenance. If your grades are
7 correct and you maintain your pond, there is no
8 maintenance.

9 Q All right. Now, with respect to the -- and look at
10 that Exhibit 7 in front of you. With respect to
11 the three lines that are emptying into the
12 detention pond -- that is this plat (indicating)
13 that you have got there -- with respect to the
14 three lines that are emptying into the detention
15 pond, which line carries the most water into the
16 detention pond?

17 A The line on the bottom right corner.

18 Q Is that the green line?

19 A The green line.

20 Q Which line carries the least water into the
21 detention pond?

22 A The line on the rear, the red line on the top.

23 Q The one that goes along the south border of the
24 property?

25 A The back side of what used to be Walmart.

1 MR. BOOTH: Mr. Jeter, there's line numbers on
2 that plat.

3 THE WITNESS: I don't see them.

4 MR. BOOTH: That's what I was asking. It
5 would help me. I think I understand his answer, but he
6 just says lines.

7 BY MR. JETER:

8 Q It's the line that runs behind the Walmart?

9 A The old Walmart.

10 Q The old Walmart. From over towards Dreher Road
11 towards the detention pond; is that right?

12 MR. BOOTH: So his exhibit doesn't have those
13 line numbers on it?

14 MR. JETER: Bill, I don't know --

15 MR. FRAWLEY: S.C.D.O.T. will stipulate that
16 that line along the northern property line is line A.
17 The middle three are lines B, C, and D. The line that
18 we are here about is line E.

19 BY MR. JETER:

20 Q Let's look at Exhibit 85.

21 THE COURT: Just a minute. Does anybody want
22 any of that on the record? It may not be on the record
23 because you had four people talking.

24 COURT REPORTER: Judge, I didn't get any of
25 their discussion. I just got Mr. Frawley.

1 THE COURT: Did you want any of that on the
2 record, Mr. Booth?

3 MR. BOOTH: No. I just ask if we could do it
4 by line number. That's all I wanted.

5 THE COURT: I just wanted to make sure it
6 wasn't something you wanted on the record that didn't
7 get there.

8 MR. BOOTH: No, sir.

9 THE COURT: All right.

10 BY MR. JETER:

11 Q Would you look at Exhibit 85 -- that's the one I am
12 holding in my hand here -- and give the designation
13 of the line that you are talking about that carries
14 the least amount of water?

15 A The least amount of water is line A.

16 Q A for Alfred?

17 A A for alpha.

18 Q Okay.

19 MR. BOOTH: The one with the most water, which
20 line number is that?

21 THE WITNESS: That would be E for echo.

22 MR. BOOTH: Thank you.

23 BY MR. JETER:

24 Q Now, with respect to the pond as it sits out there
25 today, have you been keeping the pond trimmed along

1 the banks?

2 A Yes, I have. But our obligation to that pond is
3 from what he call the bench, which would be the
4 subgrade around it and from the hinge point to the
5 total slope.

6 Q All right.

7 A Our commitment stops at the total slope.

8 Q Have you recommended to Mr. -- what have you
9 recommended to Mr. Meshekoff as far as the cleaning
10 of the bottom of the pond?

11 A We profiled the pond. We went in and shot grades
12 on the pond, maybe six, eight months ago. It's
13 probably 20 loads in it that needs to come out that
14 is above the existing as-built drawing that came
15 from somewhere. I don't know where, but it does
16 need to be cleaned at this time.

17 Q What has he told you he is going to do?

18 A Clean it.

19 Q In your opinion, Mr. Richardson, what percentage of
20 the flow into the pond do you think line E accounts
21 for? Would it account for as much as one-third?

22 MR. FRAWLEY: Your Honor, I will ask that
23 there be some kind of -- I will object that there is no
24 foundation laid as to whether he has done any flow
25 measurements. I will object based on that.

1 MS. CLAYTON: Same objection, Your Honor.

2 THE COURT: If you would lay a foundation,
3 Mr. Jeter.

4 BY MR. JETER:

5 Q Are you aware of what areas the pipeline E serves?
6 What areas drain into pipeline E?

7 A Pipe E, yes.

8 Q How do they compare in size to the areas that come
9 on line A?

10 MR. FRAWLEY: Again, Your Honor, no foundation
11 as to whether he has done a study as to the watershed.
12 We will object based on that.

13 MS. CLAYTON: Same objection, Your Honor.

14 THE COURT: I'm not sure how I connect those
15 dots of how they compare in size. I'm not sure I
16 understand the question. He might. I don't.

17 MR. JETER: All right. Let me go into a
18 little more detail there.

19 BY MR. JETER:

20 Q When you are looking at flow, storm water flow,
21 what factors affect how much storm water flow you
22 get?

23 MS. CLAYTON: Your Honor, I am going to
24 object. This witness has not been qualified to testify
25 in this area.

1 MR. JETER: That's common sense.

2 THE COURT: I don't know that it is common
3 sense. I don't know that it's something -- it's not
4 common to my sense at least if I am the fact finder.
5 I'm not sure that it would be to a jury.

6 MR. FRAWLEY: Your Honor, D.O.T. will join in
7 the objection. The basis for our objection just is that
8 there has been no foundation laid, first, whether he has
9 expertise in that. He may. I don't know that he
10 doesn't.

11 But, second, there has been -- Mr. Richardson
12 has not conducted a drainage study with regard to
13 acreage of the watershed emptying into any of these
14 essentially three lines. Based on that I object.

15 MS. CLAYTON: Your Honor, I would simply add
16 also that there is no evidence that Mr. Richardson has
17 conducted any type of flow study. We think that any
18 study of that nature would be irrelevant for today's
19 purpose in any event.

20 THE COURT: I think he can certainly give his
21 opinion or the basis for his opinion as to why line E
22 carries the most water and line A carries the least
23 because he has been qualified as an expert.

24 So he can give the basis of why he holds that
25 opinion. That's in evidence now without objection,

1 except for Mr. Booth, as to his expertise. You may ask
2 your next question.

3 BY MR. JETER:

4 Q Let me ask it this way, Mr. Richardson. If you
5 have a larger parking lot -- I'm just going to use
6 arbitrary numbers -- twice as big as a smaller
7 parking lot, both paved, so that they are
8 impervious, which one of those lots will provide
9 more storm water into a system?

10 A Okay. That's a loaded question because I can't
11 assume that that parking lot is the only water
12 going in that system.

13 Q Just within the facts I gave you.

14 A The big parking lot.

15 Q Without any other complications, the bigger the
16 parking lot the more flow; is that correct?

17 A Correct.

18 Q All right, sir. So if we look at the size of the
19 area that those lines serve in the center of
20 Westside Plaza, as opposed to the size of the area
21 served across U.S.1 and compare those sizes, would
22 that give one a good indication?

23 MR. FRAWLEY: Again, I will object. There is
24 no indication that he has looked at the respective
25 watershed; so I don't know if he has the ability. Maybe

1 he does, but I am objecting based on no foundation.

2 MS. CLAYTON: I would join in D.O.T.'s
3 objection, Your Honor.

4 MR. JETER: It doesn't require him to have
5 conducted it. I just asked him to assume.

6 THE COURT: Well, I think you have made your
7 point. A bigger parking lot, more water flows from a
8 bigger parking lot than a smaller parking lot, depending
9 on the slope, I would take it.

10 BY MR. JETER:

11 Q Mr. Richardson, in looking at the sand in the
12 detention pond, do you have an opinion as to -- in
13 2008, for instance -- where that sand, most of the
14 sand came from?

15 A Well, it's pretty obvious that most of that sand
16 came from the cave-ins because we had some pretty
17 extensive cave-ins.

18 Q Can you tell from the trash that you find in there?
19 Does that give you any indication where it's coming
20 from?

21 A In some cases you have to identify the trash, what
22 you have.

23 Q And did you do that in reaching any conclusions?

24 A To a certain extent, we did.

25 Q What were your conclusions?

1 A When you've got a cup from Sonic and a cup from
2 other parties across the road, I mean, they could
3 have bought it there and eat it at Walmart and
4 threw it in the Walmart catch basin. I'm not one
5 to judge that.

6 Q Based on the lay of the sand in that pond in 2006,
7 could you tell where most of that sand came from?

8 A Most all of the sand came out of the line from
9 the -- was it A? It was E. Most all of the sand
10 was directed --

11 Q Where the cave-ins were?

12 A It was.

13 Q Then in 2008 it was from line E?

14 A Correct.

15 MR. JETER: That's all for now, Your Honor.

16 THE COURT: Thank you, Mr. Jeter.

17 Mr. Frawley.

18 MR. FRAWLEY: May it please the Court.

19 CROSS EXAMINATION

20 BY MR. FRAWLEY:

21 Q Mr. Richardson, I have got some questions that were
22 raised by Mr. Jeter's questions. Let me get those
23 first. When you first received a call in this
24 case, it was in, I think, 2005. You don't remember
25 the date but you remember the call; right?

1 A Yes, sir.

2 Q And I think Mr. Jeter was able to go over, through
3 the invoice that was paid, the approximate date.
4 I'm showing you Defendant's Exhibit 31. It's a
5 copy. The judge has the original. That appears to
6 be a quote on Ideal Construction stationery. Do
7 you recognize that?

8 A Yes, sir. I do.

9 Q Is that the quote that you provided Dee Richardson
10 [sic] with regard to the work that you felt needed
11 to be done at the sinkhole in the parking lot?

12 A Dee Reeves, yes, sir.

13 Q That is dated what from you?

14 A 7/26/05.

15 Q And you signed it in the lower left-hand corner;
16 correct?

17 A Yes, sir, I did.

18 Q Then on the right-hand corner, the lower right-hand
19 corner, there is a signature where Ms. Reeves
20 had -- it appears Ms. Reeves had approved it?

21 A Correct.

22 MR. FRAWLEY: Your Honor, I would like to
23 introduce Exhibit 31 into evidence.

24 MR. JETER: No objection.

25 MS. CLAYTON: No objection.

1 that same amount of silt or some incrementally
2 smaller amount would have been there in July and
3 August of 2005? You can't say that; can you?

4 A No.

5 Q Because you didn't look in 2005?

6 A No.

7 Q As far as you could tell, what you removed in 2006,
8 may have been there for years prior to and
9 including late July and early August of 2005?

10 A That's not for me to determine.

11 Q You mentioned that driveway was -- you didn't use
12 the term undermined -- but where you said line E
13 when you went in there and got under there and
14 started excavating, you saw -- and I think you held
15 your hands about two feet apart?

16 A About 18 to 24 inches.

17 Q That was the distance between the bottom of the
18 eight inches of asphalt and the top of the earth
19 underneath it; correct?

20 A Correct.

21 Q So that had been undermined?

22 A Correct.

23 Q And it had been undermined in part because there
24 were gaps between the seams of the pipe that was
25 installed and from the pipe to the junction boxes;

1 correct?

2 A Correct.

3 Q Which is why then at that point, you shut that
4 driveway down?

5 A Correct.

6 Q You don't want trucks driving over it. Just eight
7 inches of asphalt and then air; correct?

8 A That's correct.

9 Q You mentioned when you were talking about R.C.P.
10 versus C.M.P. that the joints for R.C.P, reinforced
11 concrete pipe, are tongue and groove. What that is
12 is one section of pipe will have an enhanced part
13 into which the other section of pipe has a lower
14 part that will fit into that comfortably; correct?

15 A Also referred to as bell and spigot.

16 Q Okay. Bell and spigot. But what you have got is
17 one section of pipe in which another section of
18 pipe conveniently fits into there. So the seams
19 are pretty well done at that point; correct?

20 A Correct.

21 Q And your people also do some kind of sealant around
22 there; don't they?

23 A Conseal and Mac Wrap.

24 Q But corrugated metal pipe, when you reach seams on
25 that, you have a sleeve you have to put around it;

1 indulgence. I have a script. Some of the things I have
2 already covered. I want to make sure I don't recover
3 them.

4 (Pause.)

5 BY MR. FRAWLEY:

6 Q Mr. Richardson, in 2005 when you were called out
7 there to do the work on the driveway with line E,
8 the one that had collapsed, at some point -- maybe
9 not the same day -- but at some point Dee Reeves
10 came out there so you could show her where the
11 damage was; correct?

12 A Correct.

13 Q And when that happened you were able to take
14 Ms. Reeves up to a manhole and show her where it
15 was. She actually came down the manhole; didn't
16 she?

17 A Yes, she did.

18 Q Did that surprise you that a lady was willing to go
19 down into a manhole into a storm drain system?

20 A Not with her. She's pretty tough.

21 Q She went down in that manhole, and you showed her
22 where the damage was in July or August of 2005;
23 correct?

24 A Correct.

25 Q And when you did that, when you were down in the

- 1 manhole -- and, again, I haven't been in the
2 manhole. I wouldn't have Ms. Reeves' courage in
3 doing that -- but when you get down in that
4 manhole, the manhole is actually in the D.O.T.
5 catch basin; isn't that correct?
- 6 A Not the one I took her into.
- 7 Q Okay.
- 8 A That one was too deep.
- 9 Q Let's look at Exhibit 85. I will let you man this
10 thing. Just push the button and point.
- 11 A Which one she went in?
- 12 Q Yes, sir. Is it shown on Exhibit 85 or if you need
13 to come down here and indicate with your finger,
14 you can do it that way.
- 15 A I showed her that one (indicating) and that one
16 (indicating).
- 17 Q All right. So the first one you showed is the dark
18 one here (indicating) over on the left on line E?
- 19 A Correct. It's several hundred feet from the D.O.T.
20 tie-in.
- 21 Q I like your words. That manhole is several hundred
22 feet from the D.O.T. tie-in?
- 23 A I would say 250.
- 24 Q Two hundred fifty feet.
- 25 A About 250 feet.

- 1 Q How many feet is it from the entranceway of the
2 outlet into the detention pond?
- 3 A I think that entire line is 700 and some change.
- 4 Q So you are maybe a third of the way into it at that
5 detention pond --
- 6 A Yes, sir.
- 7 Q -- or that manhole. So between September and
8 August of 2005, Dee Reeves went down into a manhole
9 250 feet into line E and approximately 500 feet
10 from the terminis of line E; correct?
- 11 A Correct.
- 12 Q And she looked at it?
- 13 A Correct. She did look at that one also, but I
14 would not let her go in it because it was way too
15 deep.
- 16 Q So when you say that one, that is the manhole up by
17 where the collapse was?
- 18 A Correct.
- 19 Q And you weren't going to let her in there?
- 20 A No, sir, it was too unsafe at the time.
- 21 Q All right. Now, all the concerns you had about
22 line E you conveyed to Ms. Reeves between --
23 whatever concerns you knew about line E as of July
24 and early August of 2010 -- of 2005 -- you told
25 Ms. Reeves at that time; correct?

- 1 A Correct.
- 2 Q You didn't have any hold cards you were holding
- 3 back; did you?
- 4 A She knew everything.
- 5 Q Okay. It's your understanding that whatever you
- 6 told Ms. Reeves was getting passed on to
- 7 Mr. Meshekoff?
- 8 A Yes, sir.
- 9 Q And when you were up here (indicating) where the
- 10 collapse was, up near the S.C.D.O.T. catch basin,
- 11 did you make clear -- let me ask you this: Could
- 12 you tell where the water that was entering line E
- 13 was coming from?
- 14 A That was immediate, yes.
- 15 Q And the immediate source was it was coming from the
- 16 pipe that came under U.S. Number 1; correct?
- 17 A Yes, sir, with the curve in it.
- 18 Q In the S.C.D.O.T. --
- 19 A Right-of-way.
- 20 Q -- right-of-way?
- 21 A Yes, sir.
- 22 Q This catch basin here (indicating), do you
- 23 recognize the term Florida-type catch basin or
- 24 type 9 catch basin?
- 25 A Type 9.

1 Q A type 9 catch basin is a catch basin typically
2 used by S.C.D.O.T.; correct?

3 A Correct.

4 Q And they have those --

5 A Throughout.

6 Q -- probably a million of those statewide adjacent
7 to their roads; correct?

8 A Correct.

9 Q So you would have made clear to Ms. Reeves at that
10 time, between July and August of 2005, that the
11 water entering line E where the driveway is
12 collapsed from a pipe that goes under S.C.D.O.T.?

13 A Correct.

14 Q And when she climbed down into that manhole
15 250 feet down line E, you showed her that there
16 were problems with that line at that time between
17 July and August of 2005; correct?

18 A Correct.

19 Q When you went back out there in 2008 and did the
20 work on line E, were the problems to line E
21 appreciably greater than there were in 2005?

22 A Much greater.

23 Q Much greater. But had they developed beyond what
24 they had been like there? In other words, in 2005
25 was it evident from an inspection of line E that

1 there were problems with line E?

2 A No. I noticed joints, bad joints. I didn't notice
3 much infiltration. Again, I couldn't see outside.
4 I was just looking in the barrel.

5 Q Would a greater inspection in 2005 have revealed
6 that there were more problems that were developing?

7 A A greater inspection requiring excavation, yes.

8 Q How about a greater inspection requiring one of
9 your employees duck walking further down line E
10 with a camera?

11 A I did that.

12 Q Did you send him down there or were you not going
13 to send him down there because --

14 A I did it personally.

15 Q You went all the way down in 2005?

16 A Yes, sir.

17 Q Okay.

18 A I duck walked the pipe all the way to the pond.

19 Q Do you have an employee named David?

20 A David Noto (phonetic) is a superintendent on that
21 job.

22 Q Do you recall testifying on deposition that you
23 refused to send David Noto down there because the
24 pipe was so confined?

25 A Yes, I did. That's why I did it myself.

- 1 Q You did it yourself?
- 2 A Uh-huh. (Indicating affirmative response.)
- 3 Q So you did go down into line E in 2005 yourself
- 4 with a camera to view the entire problem as it
- 5 existed at that time?
- 6 A Yes, sir.
- 7 Q And whatever problem did exist as of 2005 in line E
- 8 you told Dee Reeves about?
- 9 A What I could see.
- 10 Q What you could see. But it was enough for Dee
- 11 Reeves to at least be on inquiry that there was a
- 12 problem with line E? Would you agree that?
- 13 A No. I mean, it was an installation issue. I
- 14 wasn't aware that the infiltration was what it was
- 15 until it came to the surface.
- 16 Q When you had her climb down in that manhole, did
- 17 you have her climb down to show her how good line E
- 18 is or to show her that there was a potential
- 19 problem with line E?
- 20 A I just showed her there was a potential problem
- 21 that could arise.
- 22 Q Okay. Thank you. Now, all the pipe that you dug
- 23 up along line E was corrugated metal pipe; is that
- 24 correct?
- 25 A Yes, sir.

- 1 Q And the installation of that corrugated metal pipe,
2 after you were able to dug it up, you found there
3 were insulation problems with it; didn't you?
- 4 A Yes, sir.
- 5 Q It was improperly installed?
- 6 A Yes, sir.
- 7 Q It was not set in stone. We have discussed that
8 already. You also found that some of the seams
9 were not connected?
- 10 A Yes, sir.
- 11 Q And we have talked about that. The way you
12 suggested that the seams should have been with
13 corrugated metal pipe is some kind of sleeve that
14 comes around and then you tighten it with two
15 five-eighths-inch bolts?
- 16 A What they call a band strap. It's hinged on one
17 side, and it's got two swing bolts on the other
18 side that you put a nut and a washer on to tighten
19 it up.
- 20 Q How wide is that band strap?
- 21 A Typically 12 inches.
- 22 Q Twelve inches. It would be six inches on each
23 length of pipe; correct?
- 24 A Typically.
- 25 Q You didn't find any of those or did you find some

- 1 of those?
- 2 A We did.
- 3 Q You also found seams where there was no band strap;
- 4 correct?
- 5 A Correct.
- 6 Q And you also found seams that had tarpaper in lieu
- 7 of a band strap?
- 8 A Correct.
- 9 Q How does tarpaper hold corrugated metal pipe strips
- 10 together?
- 11 A I haven't figured that out yet.
- 12 Q You just kind of put it over and hope the water
- 13 doesn't flow into it; correct?
- 14 A Yes.
- 15 Q That's not a practice you follow with your company;
- 16 is it?
- 17 A Absolutely not.
- 18 Q Now, in your experience it's not unusual for silt
- 19 to accumulate in a storm drain system; is it?
- 20 A Not at all.
- 21 Q And you don't want it to get great amounts of it,
- 22 but it's not unusual for storm water to carry silt
- 23 with it and at some point leave some of that silt
- 24 within the pipes?
- 25 A Correct.

1 A That's the inlet to line E.

2 Q The inlet or the outlet?

3 A The outlet.

4 Q That's where line E empties into the detention
5 pond. Again, we are looking at Exhibit 85 at that
6 point where I am shining the light; correct?

7 A Yes, correct.

8 Q That's what it looked like when your people went
9 out there to do the repairs in 2008?

10 A Correct.

11 MR. FRAWLEY: Your Honor, we would like to
12 move Exhibit 43 into evidence, please.

13 THE COURT: Any objection?

14 MR. JETER: No objection.

15 MR. BOOTH: None, Your Honor?

16 MS. CLAYTON: None.

17 MR. QUINN: No, sir.

18 THE COURT: Forty-three is in evidence without
19 objection.

20 (Defendant's Exhibit Number 43 is received
21 into evidence.)

22 BY MR. FRAWLEY:

23 Q Now, I am showing you Exhibit 44, which again is, I
24 believe, five photographs. Could you look at
25 those, please.

1 A (Pause.) Okay.

2 Q As far as being able to identify those photographs,
3 can you identify those photographs as being line E
4 or the inside of any other corrugated metal pipe
5 you have looked at? The reason I am asking that
6 question, the inside of one pipe may look like the
7 inside of another pipe when you do as many as you
8 do. Can you identify these photographs as
9 photographs taken by your company of line E before
10 it was excavated by your company?

11 A I can identify these photographs because I took
12 them, and I remember where they -- I recall where
13 they are.

14 Q Good.

15 A But I couldn't look at these had I not been in the
16 hole and tell you where they came from. I wouldn't
17 have a clue.

18 Q But you were in the hole; correct?

19 A I took them.

20 Q So you can identify those as line E?

21 A Yes, sir.

22 Q Could you hang onto those for just a second.

23 MR. FRAWLEY: Your Honor, we would like to
24 move Exhibit 44 into evidence, please.

25 MR. JETER: No objection.

1 MS. CLAYTON: No objection.

2 MR. QUINN: No objection.

3 MR. BOOTH: None.

4 THE COURT: Forty-four is in evidence without
5 objection.

6 (Defendant's Exhibit Number 44 is received
7 into evidence.)

8 BY MR. FRAWLEY:

9 Q With regard to where the photographs taken in 44
10 were taken, they were taken in line E; correct?

11 A Correct.

12 Q This is what the inside of line E looked like in
13 2008 when you went down there; correct?

14 A Correct.

15 Q That's pretty much what it looked like -- well, let
16 me ask you this: You went down in that manhole 250
17 feet down line E in 2005. Do those photographs
18 look appreciably different from what line E looked
19 like in 2005?

20 A The inside is pretty much the same.

21 Q Go ahead and give those to the judge, please.

22 A (Witness complies.)

23 Q Did you find that some of the corrugated metal pipe
24 was rusted and deteriorated?

25 A Very much so.

1 Q Corrugated metal pipe will rust?

2 A Yes.

3 Q It certainly did on this occasion; correct?

4 A Yes.

5 Q Reinforced concrete pipe doesn't rust; does it?

6 A No.

7 Q Would it be reasonable or unreasonable to
8 anticipate that storm water coming off of a state
9 maintained road, which is surfaced with an
10 oil-based component over which gasoline-powered
11 vehicles drive with tires, rubber tires, would it
12 be reasonable or unreasonable to anticipate that
13 storm water coming off of that road into a storm
14 drainage system would have materials such as
15 oil-based corrosives, rubber-based corrosives, and
16 other type material such as that?

17 A That's reasonable.

18 Q That's kind of a no-brainer; isn't it?

19 A (Witness nods.) (Indicating affirmative response.)

20 Q The answer to that is yes?

21 A Yes.

22 Q You don't have to be an expert to understand that;
23 do you?

24 A No.

25 Q Those corrosives would more quickly diminish pipes

1 this witness because his question went to Westside and
2 how long the Westside system would last.. That's not
3 what's he asked him. He asked a general conceptual
4 question in the deposition.

5 THE COURT: All right.

6 MR. FRAWLEY: Your Honor, the question again
7 is: If a system -- if this system -- had been properly
8 installed, how long should it have lasted? We were
9 between 10, 35, 40 years. That's the question.

10 THE COURT: Well, Mr. Jeter is objecting to
11 the fact that -- Mr. Jeter is saying you are not
12 impeaching him because you didn't ask him the question
13 in the deposition as to the system that was installed at
14 Westside, I think. I think that's what I heard.

15 MR. FRAWLEY: I will try to clear that up.

16 THE COURT: All right. Thank you.

17 BY MR. FRAWLEY:

18 Q I may have confused you because I am asking apples
19 and oranges. If I did I apologize. The question
20 that was asked there was if you have a general -- a
21 conceptual -- corrugated metal pipe storm drain
22 system that is properly installed, stone bedded --
23 and that's my wording, proper installation and
24 stone bedded -- that system should last, you said,
25 up to 40 years at that time, not Westside's, but a

1 system with corrugated metal pipe properly
2 installed should last up to 40 years?

3 A I stand beside that, yes.

4 Q Sure.

5 A Sure.

6 Q So that's one question. The next question is --
7 and maybe I misunderstood the question that
8 elicited your answer earlier -- this particular
9 system, this particular corrugated metal pipe drain
10 system, when he asked you how long it should last,
11 I think at one point you answered, "I was surprised
12 it lasted as long as it did." Do you remember
13 saying that?

14 A Absolutely.

15 Q Part of the reason for that is because what you
16 were able to see -- when you looked at it -- it was
17 improperly installed; correct?

18 A That, along with I know what is being dumped in it.
19 I know what comes off of a highway.

20 Q Well, what comes off of a highway in 2005 to 2008
21 is essentially the same thing that comes off a
22 highway in 1987; isn't it?

23 A Daily.

24 Q I mean, have tires appreciably changed where the
25 wear that comes off a road into a storm drain is

1 any different in 2008 than it was in 1987?

2 A Same components.

3 Q A reinforced concrete pipe system would last
4 virtually forever if it has been properly
5 installed?

6 A I've never seen one fail.

7 Q And, in fact, you don't install corrugated metal
8 pipe; do you?

9 A Yes, we do.

10 Q You do but when you have a chance to recommend
11 it -- as you did here -- you recommended reinforced
12 concrete pipe; correct?

13 A Absolutely.

14 Q Mr. Richardson, I appreciate your patience. I am
15 done. Thank you.

16 THE COURT: We have only got 30 more minutes
17 before our lunch recess. Why don't we go on -- yes,
18 Mr. Booth.

19 MR. BOOTH: I can complete mine in 15 minutes.

20 COURT REPORTER: I don't mind working later,
21 but I just need a break right now, please.

22 MS. CLAYTON: I'm going to follow Mr. Booth,
23 and I think it will go fairly quickly.

24 THE COURT: All right. We will take a few
25 minutes.

1 REDIRECT EXAMINATION

2 BY MR. JETER:

3 Q Mr. Richardson, Mr. Frawley asked you about
4 corrosives coming off U.S. Highway 1 into the
5 system. Do corrosives also come off of parking
6 lots into the system?

7 A Absolutely.

8 Q So, for example, the Danwood parking lot, which I
9 will characterize as a fairly large parking lot,
10 that will contain corrosives that get put into the
11 Westside system; is that correct?

12 A With car parts it leaks oil.

13 Q Now, when you remove silt from a pond in which
14 corrosives are being injected because of the storm
15 water, do you have to treat that silt when you
16 dispose of it? Do you have to treat it in a
17 special way as far as disposing of it?

18 A You have to haul it to a certified landfill.

19 Q Is it considered contaminated?

20 A Not necessarily contaminated but you have to
21 dispose of it properly in a licensed landfill.

22 Q That's all. Thank you, Mr. Richardson.

23 THE COURT: Mr. Frawley, recross?

24 MR. FRAWLEY: No recross, Your Honor.

25 MR. BOOTH: No, Your Honor.

1 THE COURT: Ms. Clayton?

2 MS. CLAYTON: One question, Your Honor.

3 RECROSS EXAMINATION

4 BY MS. CLAYTON:

5 Q Mr. Richardson, you haven't undertaken any type of
6 analysis to determine whether there are any
7 corrosives coming from any of the defendants'
8 properties; have you?

9 A We did not.

10 Q Thank you.

11 THE COURT: Anything further, Mr. Quinn?

12 MR. QUINN: Yes, sir.

13 RECROSS EXAMINATION

14 BY MR. QUINN:

15 Q So when you dispose of property that you dig out of
16 the detention pond -- and you indicated you had to
17 put it in a landfill; is that correct?

18 A Correct.

19 Q Is that a secure landfill or is that just a
20 landfill that you have to put it in?

21 A That's a designated landfill to accept what you are
22 hauling. It's classified.

23 Q Do you have to put it in a hazardous waste
24 landfill?

25 A No, sir.

1 Mr. Richardson under subpoena, and we release him from
2 that subpoena.

3 THE COURT: Is that true for the other
4 defendants?

5 MR. BOOTH: It doesn't apply. We don't have a
6 subpoena. He can leave as far as I'm concerned.

7 THE COURT: Thank you for being with us today.
8 Mr. Jeter, you may call your next witness.

9 MR. JETER: We call Mr. Clarence Blakely.

10 THE COURT: Mr. Blakely, if you would come
11 around for us, please, and be sworn.

12 CLARENCE BLAKELY, being
13 first duly sworn, testifies as follows:

14 CLERK: Take a seat and state your name for
15 the Court.

16 THE WITNESS: My name is Clarence Blakely,
17 B-L-A-K-E-L-Y.

18 DIRECT EXAMINATION

19 BY MR. JETER:

20 Q Good afternoon, Mr. Blakely. We have met before.
21 I'm Russ Jeter.

22 A Yes, sir.

23 Q And I represent the plaintiff. Mr. Blakely, who do
24 you work for?

25 A South Carolina Department of Transportation.

- 1 Q And what is your position?
- 2 A Chief geodetic technician.
- 3 Q Do you oversee people who issue encroachment
- 4 permits?
- 5 A Yes.
- 6 Q And how long have you worked in that Department?
- 7 A I'm in my 22nd year.
- 8 Q So 1989?
- 9 A That's right.
- 10 Q Now, you are familiar with the Westside property;
- 11 is that correct?
- 12 A Yes.
- 13 Q The encroachment permit?
- 14 A Yes.
- 15 Q You are familiar with the encroachment permits for
- 16 the properties across the street from -- across
- 17 U.S. Highway Number 1 from Westside?
- 18 A Yes.
- 19 Q And you are aware that at one time there was a pipe
- 20 that collected the water from the properties across
- 21 U.S.1 and off of U.S.1 and dumped it or discharged
- 22 it into a swale on the Westside property? Are you
- 23 aware of that?
- 24 A Yes.
- 25 Q In 1987 the Department of Transportation issued an

1 encroachment permit and abandoned that dumping into
2 the swale; did it not?

3 A We issued the encroachment permit as a request from
4 the Westside property owners of that property at
5 that time to divert the stream through a piping
6 system.

7 Q You no longer then discharged into the swale; did
8 you?

9 A No, sir.

10 Q After 1987; correct?

11 A That's correct.

12 Q The earliest time you are aware of that you can
13 show -- you were not with the Department -- but you
14 have, I think, a plan that shows a pipe draining
15 into it in 1970; is that correct?

16 A That's correct.

17 Q You have nothing earlier than that; do you?

18 A Well, to be honest with you, since then I have
19 found a plan when U.S.1 was two lanes.

20 MR. JETER: Your Honor, this is new. It has
21 not been produced. So before he gets into it, I think I
22 need to cut it off.

23 MR. FRAWLEY: We are not offering it. Water
24 was flowing downhill before 1987. That's the only
25 position we have got.

1 MR. JETER: Yes. But this concentration of
2 the water into one spot is what I'm talking about.

3 MR. FRAWLEY: We are not putting anything in
4 before 1970.

5 THE COURT: Then just move along, Mr. Jeter.

6 MR. JETER: Yes, sir.

7 BY MR. JETER:

8 Q That was 1970. So 17 years later you switched to a
9 pipeline system -- correct -- with the encroachment
10 permit?

11 A The stream was converted by the property owner to a
12 pipe system.

13 Q And the property owner then filled in that ditch or
14 stream or whatever and paved it over; correct?

15 A Yes.

16 Q Since 1987 you have never used that ditch or that
17 swale again; have you?

18 A No, we haven't.

19 Q Now, since 1987 does the D.O.T. take the position
20 that it is entitled to discharge water onto
21 Westside property pursuant to the encroachment
22 permit?

23 A Yes.

24 Q And if the property is sold to another owner, does
25 D.O.T. continue to take the position that it is

1 entitled to discharge water onto the property of
2 the new owner pursuant to that permit?

3 A Yes.

4 Q And you would take that position from 1987 up to
5 the present; correct?

6 A That's correct.

7 Q And if my client or some previous owner were to try
8 to cut off D.O.T.'s access to discharge storm water
9 into that pipeline, you would report that to your
10 superiors as a serious concern; would you not?

11 A Yes.

12 Q And you would ask them to take action to undo that
13 action by my client or their predecessor?

14 A Yes.

15 Q Now, the Department of Transportation has been
16 using Westside's pipeline to dispose of its
17 concentrated and collected water, both off U.S.1
18 and off of the upstream properties, since 1987 onto
19 Westside; correct?

20 A Yes.

21 Q Now, the Department of Transportation also issued
22 encroachment permits to upstream landowners;
23 correct?

24 A Yes.

25 Q And with respect to the landowners on the upstream

1 side of U.S.1, the Department of Transportation in
2 those encroachment permits allowed them to
3 discharge water from their land onto D.O.T.'s land
4 through its pipes; correct?

5 A Yes.

6 Q So they were encroaching on your land with your
7 water; were they not?

8 A Yes.

9 Q And they needed an encroachment permit?

10 A Yes.

11 Q But when it comes to Westside, the situation is
12 reversed; is it not? The D.O.T. is discharging its
13 water onto Westside's land; correct?

14 A Yes.

15 Q And Westside is not seeking to discharge any water
16 or encroach on -- as far as water is concerned --
17 onto the D.O.T.; are they?

18 A No.

19 Q So really while there may be some physical presence
20 on the right-of-way, as far as the disposal of
21 water, it's not really an encroachment permit?
22 It's the opposite of a encroachment permit; isn't
23 it?

24 A Rephrase that, please.

25 Q Well, I am just pointing out that you are

1 discharging water onto somebody else's land. They
2 don't need an encroachment permit to accept your
3 water. They need an encroachment permit when they
4 send water onto your land; is that right?

5 MR. FRAWLEY: Your Honor, that's more of a
6 legal argument and I think a legal conclusion. I don't
7 think he is qualified to answer that. That's why we are
8 here. I would object based on that.

9 THE COURT: I would sustain the objection.
10 You may ask your next question, Mr. Jeter.

11 BY MR. JETER:

12 Q Do you have any knowledge that the D.O.T. has
13 sought to condemn the land on Westside to dispose
14 of its storm water?

15 MR. FRAWLEY: We will stipulate that we have
16 brought no condemnation action against Westside or any
17 of the prior owners of Westside.

18 MR. QUINN: Your Honor, I would ask the Court
19 also, the pleadings do not ask for an inverse
20 condemnation action in this case. That would be
21 inappropriate as well, and I also object.

22 THE COURT: I don't think Mr. Frawley
23 objected. I think he stipulated that they have not
24 tried to condemn any property ever on Westside's.

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

1 MR. QUINN: I still object.

2 THE COURT: I just wanted to make sure that
3 you weren't joining in his stipulation.

4 MR. QUINN: No, no.

5 THE COURT: I understand.

6 BY MR. JETER:

7 Q But you agree, Mr. Blakely, that the D.O.T. is
8 using Westside's land to dispose of its storm water
9 that it has collected; right?

10 A Yes.

11 Q Thank you.

12 MR. JETER: Nothing further, Your Honor.

13 THE COURT: Mr. Frawley.

14 MR. FRAWLEY: May it please the Court.

15 CROSS EXAMINATION

16 BY MR. FRAWLEY:

17 Q Mr. Blakely, you have gone over your position and
18 your duties with D.O.T. How long have you been
19 with D.O.T?

20 A I'm in my 22nd year.

21 Q Twenty-seventh year?

22 A Twenty-second.

23 Q Twenty-second?

24 A Right.

25 Q I'm sorry. I'm old and I don't hear as well as I

1 used to. Your duties and responsibilities include
2 being the record's custodian for our local
3 Lexington maintenance shed for S.C.D.O.T.; correct?

4 A Yes.

5 Q And in that capacity as record's custodian, if a
6 Freedom of Informant Act requests comes in for
7 encroachment permits, you are the guy that it's
8 directed to; correct?

9 A Yes.

10 Q Then you find those encroachment permits and you
11 produce those in accordance with the law; don't
12 you?

13 A Yes.

14 Q How are the encroachment permits cataloged with
15 S.C.D.O.T.? In other words, if a Freedom of
16 Information Act requests comes in and I want a
17 certain encroachment permit for a certain piece of
18 property, what information would I have to give you
19 so that you would be able to find that encroachment
20 permit and produce it to me?

21 A We would like to have the owner or the developer's
22 name and, if possible, the year.

23 Q Okay.

24 A Our permits are filed. We will take that
25 information, along with the permit number which is

1. in the upper right-hand corner.
- 2 Q Okay.
- 3 A And with that information we do our research to
- 4 find the permits, necessary permits, that are
- 5 requested.
- 6 Q I will hand you a copy of the document that is in
- 7 evidence as Plaintiff's Exhibit 1. This is the
- 8 Dayton and Associates 1987 encroachment permit.
- 9 The reference number you just referred to is in the
- 10 upper right-hand corner of that?
- 11 A That's correct.
- 12 Q That's the D-32-4172?
- 13 A Yes.
- 14 Q What does the D. designation stand for, if
- 15 anything?
- 16 A At that time that was the designation for
- 17 commercial driveways, connections.
- 18 Q The 32 designation, that's our County designation
- 19 for Lexington County; isn't it?
- 20 A That's correct.
- 21 Q Then the 4172, that's just 4172 --
- 22 A File number.
- 23 Q File number?
- 24 A Yes.
- 25 Q Now, when you receive a Freedom of Information Act

1 BY MR. FRAWLEY:

2 Q With regard to any requests for additional
3 fortification of any pipe, we would have no reason
4 to make that request if they said in their
5 application for encroachment permit that they are
6 going to put in reinforced concrete pipe; would
7 we?

8 A No, we wouldn't.

9 Q Now, Mr. Jeter referred to some work that was done
10 on U.S. Highway 1 in 1970. Is it your
11 understanding that U.S. Highway 1 was basically two
12 lanes as it past in front of the then Dreher
13 property prior to 1970? Is that your
14 understanding?

15 A Yes.

16 Q And in 1970 S.C.D.O.T. embarked upon a project to
17 widen U.S. Number 1 to four lanes; didn't it?

18 A Yes.

19 Q Mr. Blakely, I will show you what I have marked as
20 Defendant's Exhibit Number 41 -- which His Honor
21 has in our documents that we submitted -- this is a
22 reduced page of two pages of plans, sheets 22 and
23 23 of project number A-554 for file number 32.554.
24 If you could look at the two sheets of that exhibit
25 and tell me what you recognize those as being.

1 Q So with a two-lane road, we are typically going to
2 have a type 9 catch basin adjacent to the road on
3 the outside curb; correct?

4 A Correct.

5 Q And if we expand that two-lane road to a four-lane
6 road, we have got to move that catch basin at
7 least, what, 15 to 20 feet further away from the
8 center line; correct?

9 A That's correct.

10 Q So if S.C.D.O.T.'s U.S. Number 1 was expanded in
11 1970 as these plans indicate that it was, the
12 existing catch basin would have to be moved to
13 where it would accommodate a four-lane road?

14 A That's correct.

15 Q U.S. Number 1, is it four lanes now, five lanes?

16 A It's four lanes. Well, it's five lanes including
17 certain turn lanes.

18 Q But the catch basin that is now there and that was
19 there in 1987, that catch basin has been there at
20 least since 1970; correct?

21 A Yes.

22 MR. FRAWLEY: Your Honor, I would like to
23 introduce this as Defendant's Exhibit Number 41.

24 MR. JETER: No objection, Your Honor.

25 MS. CLAYTON: No objection.

1 Dee Reeves, Tim Richardson, Michael Lambrecht, do
2 you recall anybody connected with the Westside
3 Plaza center coming to you at D.O.T. and
4 complaining?

5 A No, sir.

6 Q That's all, Mr. Blakely. Thank you for your time.
7 Thank you for your time the other day too.

8 THE COURT: Thank you, Mr. Booth. Mr. Quinn.

9 MR. QUINN: Yes, sir. May it please the
10 Court.

11 **CROSS EXAMINATION**

12 BY MR. QUINN:

13 Q Mr. Blakely, in 1987 or prior thereto, how did the
14 water discharge -- how did the Department discharge
15 its water from this particular site we are talking
16 about?

17 A It left our cross line pipe, which is across U.S.1,
18 and entered a small stream across the property,
19 which is now Westside.

20 Q A natural stream; correct?

21 A Yes, sir.

22 Q So the water followed the natural water line,
23 watershed, down to a stream?

24 A Yes, sir.

25 Q No problem with that; correct?

1 A No, sir.

2 Q And how long had the Department done that?

3 A Prior to 1970.

4 Q If Westside Plaza had not come along, through
5 Dayton and Associates in 1987, the Highway
6 Department could still do that; could they not?

7 MR. JETER: Your Honor, that calls for a legal
8 conclusion and speculation.

9 THE COURT: Well, he may be asking it from a
10 factual basis, if they could still do if the shopping
11 center wasn't still there. I don't know if he's asking
12 for a legal conclusion.

13 MR. QUINN: I'm not asking for a legal
14 conclusion.

15 MR. JETER: I don't know if he means by
16 physics. They didn't have an easement by prescription
17 because they only used that outfall pipe for 17 years.
18 So at any point the landowner could have put a stop to
19 that. That's my point that I don't want to assume...

20 THE COURT: All right.

21 MR. FRAWLEY: Your Honor, I believe that would
22 violate the common enemy rule under two exceptions,
23 someone damming up surface water. So I disagree with
24 him as to that.

25 THE COURT: If you will ask your question

1 Department documents -- but if Danwood chose to sue
2 the Highway Department because Westside is suing
3 them, this says that the Highway Department is
4 going to be indemnified; doesn't it?

5 MR. JETER: Your Honor, I think that is beyond
6 his expertise. It's a legal conclusion.

7 THE COURT: Well, it says what it says.

8 BY MR. QUINN:

9 Q Is that the purpose of it, Mr. Blakely?

10 MR. JETER: Well, that is then, Your Honor.

11 THE COURT: I think that is more the purpose.
12 I have read it. It has been read in the record several
13 times by a witness with Mr. Frawley, I believe, with
14 Mr. Meshekoff.

15 BY MR. QUINN:

16 Q Mr. Blakely, thank you very much.

17 THE COURT: Thank you. Redirect?

18 MR. JETER: Very briefly, Your Honor.

19 REDIRECT EXAMINATION

20 BY MR. JETER:

21 Q Mr. Blakely, you are not aware of any liability,
22 injury, or damage that has been sustained by the
23 D.O.T. at this point because of the pipe that is
24 underneath your highway; are you?

25 A No, sir.

1 Q And then you made -- and I think you may have
2 slightly misspoke, unintentionally. I just want to
3 clarify a point. With respect to Mr. Quinn, you
4 said that in 1987, there was a request to divert
5 the natural flow of the water to a pipeline. Do
6 you recall that?

7 A Yes.

8 Q In actual fact by 1987, the water wasn't flowing
9 naturally downhill. It was being collected and
10 concentrated in a pipe and discharged at one point;
11 wasn't it?

12 A Yes.

13 Q Thank you.

14 THE COURT: Mr. Frawley?

15 RECROSS EXAMINATION

16 BY MR. FRAWLEY:

17 Q With regard to the natural flow, I believe
18 Mr. Quinn's question was directed to the natural
19 flow of water after it leaves the D.O.T. pipe.
20 From the point it left the D.O.T. pipe and went
21 into this drainage swale, that was the natural flow
22 of surface water; wasn't it?

23 A It was before the piping, yes, sir.

24 Q Water did go through D.O.T.'s pipe from 1970
25 forward, but once it left the pipe, it went into a

1 available, and I release Pat of that.

2 THE COURT: All right. Thank you again,
3 Mr. Blakely. You are released. Why don't we take about
4 a 15-minute recess.

5 (Whereupon there was a recess.)

6 THE COURT: If you could call your next
7 witness.

8 MR. McDONALD: Michael Lambrecht, Your Honor.

9 THE COURT: Mr. Lambrecht, if you would come
10 forward and be sworn, please.

11 MICHAEL LAMBRECHT, being
12 first duly sworn, testifies as follows:

13 CLERK: Take a seat and state your name for
14 the Court.

15 THE WITNESS: Michael Lambrecht. The last
16 name is L-A-M-B-R-E-C-H-T.

17 DIRECT EXAMINATION

18 BY MR. McDONALD:

19 Q Michael, before we get started with some questions,
20 just a little ground rules for the court reporter's
21 benefit. If you will wait until I finish my
22 question before you answer it so we don't talk over
23 each.

24 I'm from Hartsville so I don't talk too fast.
25 You are from Orangeburg and you talk slower. I

1 don't think we are going to have a problem. I just
2 want to make sure we don't for consideration of the
3 court reporter.

4 How about tell Judge McMahon a little bit
5 about yourself, Michael, where you grew and where
6 you went to school, that type of thing.

7 A I grew up in Orangeburg, South Carolina, went to
8 Orangeburg Prep, graduated, went to the Citadel in
9 1990, graduated in 1995, moved to Florida,
10 Jacksonville, Florida.

11 Q Let me stop you right there. You graduated from
12 the Citadel in '95. What is your degree in, sir?

13 A Civil engineering, B.S. in civil engineering.

14 Q After you got out of the Citadel in '95, you were
15 saying you went down to Florida. What for?

16 A For work. I went down to Jacksonville, Florida. I
17 worked for, two years, two and a half years
18 basically in an engineering firm where we did golf
19 course drainage, subdivisions, commercial
20 development, really anything that kind of came
21 along. Florida was booming with building large
22 subdivisions. I worked on several 1500-acre
23 projects down there with the storm drainage.
24 Q Your duties were engineering related; is that
25 right?

- 1 A Yes, sir.
- 2 Q Other than the real estate bust in Florida, was
- 3 there anything else that brought you back home?
- 4 A I got married. My wife is from Orangeburg as well
- 5 and a little homesickness brought us back to
- 6 Lexington where I have been the last 13 years, ever
- 7 since '97.
- 8 Q So you live here in Lexington now?
- 9 A I do.
- 10 Q With your family?
- 11 A Family, three kids, two girls and a little
- 12 11-month-old boy.
- 13 Q You are getting ready to go to the beach with that
- 14 crew. Good luck.
- 15 A Tomorrow afternoon.
- 16 Q That will be fun. Who did you work for when you
- 17 came back here to South Carolina?
- 18 A In '97 I started with B.P. Barber.
- 19 Q What does B.P. Barber do?
- 20 A B.P. Barber does a lot of water, sewer, site
- 21 development, industrial park type design. I worked
- 22 there for five years, mainly in industrial park and
- 23 commercial development type projects, big
- 24 industrial parks ranging from 150 acres to 4- or
- 25 500 acres, down to individual smaller projects,

1 half acre of size.

2 Q How long did you work at B.P. Barber?

3 A Five years.

4 Q Where did go after B.P. Barber?

5 A I got my P.E. while I was there --

6 Q The Court probably knows but that is your
7 professional engineering license?

8 A Professional engineering license. You have to be
9 an accredited degree engineer working in the field
10 for four years prior to getting your license. I
11 left B.P. Barber and went to work for American
12 Engineering.

13 Q That is Representative Bingham's company; is that
14 right?

15 A That's correct, over in Cayce, and worked them for
16 about five years, worked for Lexington County
17 developing roads, civil site development of all
18 types, subdivisions, water, and sewer design as
19 well.

20 Q As we have seen in this case, there was a time
21 where you no longer worked for American Engineering
22 and went to work for Tim Richardson at Ideal
23 Construction; is that right?

24 A That's correct.

25 Q What were you doing at Ideal Construction?

1 A I managed the engineering division of Ideal
2 Construction. Mainly while I was there, we did a
3 lot of construction management, more on the
4 construction side of things versus the engineering
5 design, but also I ran the engineering department.
6 The economy was heading south. That work was
7 slowing down. So more work was pushed towards the
8 construction side.

9 Q And were you part of the formation of Ideal
10 Engineering?

11 A I was. I had several contracts that I just carried
12 with me. Instead of that carrying to another firm,
13 I opened my own firm, which would have been 2008,
14 April of 2008.

15 I was open with that for about eight months
16 through the economy, but made it through it and
17 decided to come back and work for a larger
18 engineering company.

19 Q Who are you currently employed with?

20 A Florence and Hutcheson.

21 Q That's the larger engineering company you referred
22 to?

23 A That's correct.

24 Q Tell the Court just a little bit about Florence and
25 Hutcheson and what you do there.

1 A Florence and Hutcheson is in Columbia just across
2 the river, right off of Huger Street. We do a lot
3 of D.O.T. road design. About 60 percent of our
4 work is D.O.T. road design.

5 I manage the civil side, as well as the water
6 and sewer department at Florence and Hutcheson; so
7 anything to do with civil sites. I've got about
8 four or five projects going on right now.

9 Q Civil site, does that include storm water?

10 A Including storm water, water and sewer, any kind of
11 small or large commercial development that would
12 require basically a grading plan, storm water
13 design, and water and sewer, gas to serve the
14 facility.

15 Q So as I understood -- if I may summarize your
16 statement of your work experience. You have been
17 involved in civil engineering site design since
18 graduating from the Citadel in '95 until today?

19 A Correct.

20 Q And what are some of the things that you do as a
21 civil site engineer in terms of preparing plans,
22 doing studies, doing analyses, things like that?

23 A We would basically walk a client through a project,
24 starting with getting zoning permits, through the
25 construction process. If somebody wanted to

1 develop a site, we would kind of go over what was
2 needed.

3 Of course, the first thing would be surveying
4 the site. Then you would basically prepare a plan
5 of what they want to make sure it meets any kind of
6 zoning criteria and then following that through
7 construction. You would basically be looking at
8 your existing drainage, your proposed drainage.

9 Q What do you mean by looking at your existing
10 drainage?

11 A E.P.A. in certain MS4's, which is basically the
12 review agency for storm water or land disturbance
13 permits in South Carolina, they would require a
14 land disturbance permit.

15 What we do is we would have to look at the
16 existing conditions of drainage to make sure that
17 we are not discharging any excess storm water in
18 the proposed condition.

19 Q Do you look at, as part of your duties now, do you
20 have to investigate, if you are dealing with a
21 particular site of land, do you have to investigate
22 where water is coming from elsewhere onto that
23 particular property?

24 A Yes, sir. We have to basically know what is coming
25 to us, know what is leaving us. Possibly in the

1 last five years, we have started to look at
2 downstream analysis of where things are going as
3 well.

4 Q You said, "We have to know what is coming to us."
5 Does that mean that you regularly investigate the
6 sources of drainage for storm water onto the
7 properties that you are working on?

8 A Yes, sir.

9 Q And have you been doing that extensively throughout
10 your career?

11 A Yes, sir.

12 Q And when did you get your professional engineer's
13 license?

14 A 2001.

15 Q You have been practicing as a P.E. in this State
16 since that time?

17 A Yes, sir.

18 MR. McDONALD: Your Honor, we would offer
19 Mr. Lambrecht as an expert witness to the extent
20 necessary for the rest of his testimony in the area of
21 civil site design, to include storm water drainage and
22 detention/retention pond, based on that statement of his
23 qualifications and experience.

24 MR. BOOTH: I have no objection, Your Honor,
25 if you are looking around.

1 MR. FRAWLEY: No objection from the D.O.T.

2 THE COURT: I was looking for you a minute
3 ago, Mr. Booth. I found you.

4 MR. BOOTH: I have no objection to him being
5 qualified.

6 MS. CLAYTON: Your Honor, I actually do
7 object.

8 THE COURT: Do you have any voir dire in this
9 regard?

10 MS. CLAYTON: Actually I don't think that an
11 expert is necessary to aid the Court as the trier of
12 fact.

13 MR. McDONALD: Maybe we should let the
14 questions be the judge of that, Your Honor.

15 THE COURT: Well, she has got her objection.
16 She can state it into the record.

17 MR. McDONALD: Yes, sir.

18 THE COURT: You may continue.

19 MS. CLAYTON: Your Honor, under Rule 702
20 expert testimony is admissible if it is in the form to
21 assist the trier of fact to understand the evidence or
22 to determine a fact in issue.

23 Your Honor, you, of course, are the trier of
24 fact and any testimony by Mr. Lambrecht as to storm
25 water drainage in his expert opinion would be

1 unnecessary to Your Honor.

2 We have already heard a wealth of evidence
3 today that talks about the D.O.T. system, the water
4 being discharged from the system. There is nothing that
5 Mr. Lambrecht can add to that that would assist Your
6 Honor's understanding of the evidence.

7 THE COURT: Mr. Quinn?

8 MR. QUINN: I have no objection.

9 THE COURT: Well, as I recall, there were some
10 objections previously -- I'm not saying by you,
11 Ms. Clayton. I don't recall specifically who it was
12 by -- both during Mr. Meshekoff's testimony -- if I
13 pronounced that correctly. Once I get it in my mind
14 one way, I never change -- or either maybe
15 Mr. Richardson's testimony concerning flow and volume
16 and such as that.

17 There may be areas within civil site -- I
18 can't read my writing -- civil site design and
19 engineering, storm water drainage, and detention ponds
20 that would aid the trier of facts. So your objection is
21 noted for the record.

22 MS. CLAYTON: Thank you, Your Honor.

23 THE COURT: Yes, ma'am. You may continue,
24 Mr. McDonald.

25 MR. McDONALD: Thank you, Judge.

1 BY MR. McDONALD:

2 Q Mr. Lambrecht, you weren't here this morning, and I
3 had planned on maybe going over a little of the
4 basics, but Mr. Frawley did a very good job with
5 Mr. Richardson on some things. So I may see if I
6 can't save us a little time.

7 Just some basic concepts. When you were
8 talking about storm water and storm water drainage,
9 that does not mean any others things? Such as
10 sanitary sewer would not be part of that; would it,
11 Mr. Lambrecht?

12 A No, sir.

13 Q That is completely separate, handled separate in
14 site design?

15 A That's correct. Storm water is more water coming
16 from rainwater that hits the site and runs off the
17 site. That is storm water. It has nothing to do
18 with flushing the toilet. That is a whole separate
19 ball game.

20 Q Nothing to do with what may be generated in terms
21 of sanitary waste from a restaurant, for instance?

22 A No, sir.

23 Q Nobody is supposed to dump grease or other things
24 in a storm drainage; are they?

25 A No, sir.

- 1 Q It happens?
- 2 A Yes, sir.
- 3 Q You are not supposed to change your motor oil in a
4 cash wash, but it happens?
- 5 A That's correct.
- 6 Q Just for the Court's benefit, when you are looking
7 at storm drainage design and site design, what is
8 really the number one criteria in terms of how you
9 are going to design the storm drainage system?
- 10 A Number one, where the water is flowing and the
11 existing condition. What water is coming to you is
12 probably number one. Then your pond would
13 definitely have to go in the low point for the most
14 economical solution to that. Basically from a
15 permitting standpoint, you have to think about
16 storm water ponds as a way to reduce the rate of
17 the discharge from a site.
- 18 Q Let me ask you this: Does the potential size of
19 the development you are working on, does that play
20 a significant role in your design?
- 21 A Absolutely.
- 22 Q Does the potential size of the parking lot play a
23 key role in your design?
- 24 A Yes, sir.
- 25 Q Does the amount of water that may be coming onto

1 your property from other properties play a key role
2 in your design?

3 A Yes, sir.

4 Q Does the fact that that water may be coming from
5 impervious areas, such as parking lots, onto the
6 property you are working on play a key role in your
7 design?

8 A Yes, sir.

9 Q Now, you have been practicing as a P.E. since 2001.
10 So you would been somewhere in high school in
11 '87ish, that time?

12 A Yes, sir.

13 Q So obviously when this center was built, you were
14 learning to be an engineer and not an engineer;
15 correct?

16 A Probably not in high school but looking towards
17 that, yes, sir.

18 Q I'm afraid that I was well beyond high school then.
19 So let's take a minute now to talk about what you
20 are dealing with in the current environment and
21 perhaps maybe a hypothetical may help.

22 I was riding into court this morning on 378
23 and saw signs for sale. This 8-acres, 2.5-acres
24 and assume I am fortunate enough to have the money
25 to pay those prices and buy it, and I come to you

1 and say, "I bought this 8 acres on 373,
2 Mr. Lambrecht. I would like for you to help me do
3 a site design."

4 Can you tell the Court in today's environment
5 what things you would have to do for me to build on
6 that property?

7 A Yes, sir. We would first look at the zoning of the
8 specific site to make sure whatever the developer
9 was going to develop on that site would fit into
10 the zoning criteria of the local municipality. In
11 this case if it was in Lexington, it would be the
12 Town of Lexington or Lexington County.

13 Once that met that criteria, we would
14 basically -- and hypothetically if it was in
15 Lexington County -- Lexington County has a zoning
16 review. We would turn our drawing into the County
17 showing that zoning review and also look at
18 landscaping, as they have just acquired a
19 landscaping plan.

20 The next step, once the zoning was approved,
21 is we would go and get a land disturbance permit
22 and any other encroachment permits that would be
23 required. If you were tying into Highway 378 at
24 the D.O.T. road, you would have to get an
25 encroachment permit.

1 Part of the land disturbance permit, which
2 Lexington County is MS4, which again is a storm
3 water review agency, they would give you a land
4 disturbance permit based on your storm water design
5 and design of facilities.

6 That storm water permit would be, I guess,
7 contingent on creating a storm water design that
8 would safely take away any excess runoff from the
9 site.

10 If the site is wooded or grass, it is going to
11 have more of a tendency -- I have heard the word
12 previously of pervious area versus impervious. If
13 you put any kind of building, sidewalk, parking
14 lot, that's an impervious surface, which is going
15 to cause water to run off more quickly.

16 Q Let me stop you right there. Do you have to do a
17 calculation to determine what the predevelopment --
18 the flow off that land in its undisturbed state is?

19 A Yes, sir. You look at a lot of different storms.
20 Basically you would have to run the 2-year, 5-year,
21 10-year, 25-year, 50-year and a 100-year, 24-hour
22 storm on an existing site to see what you are
23 discharging in an existing state versus the
24 proposed site.

25 You would have to run the same number and

1 compare the two, making sure that your
2 predevelopment flow rates from the site is equal to
3 or less than the post development.

4 Q So do I understand you correctly, in today's
5 environment a property owner cannot discharge more
6 storm water from his property in its undeveloped
7 state after it has been commercially developed?

8 A That's correct, yes, sir.

9 Q What measures would you take today to make that
10 happen? What things do you have to do?

11 A You would have to -- in most cases if it's a pond,
12 you have several options with a pond. It can be
13 underground detention, which is using pipes to
14 basically act as a pond.

15 You have to have some kind of storage facility
16 for that water, just because an impervious area is
17 going to run off more water than a pervious area.
18 So you would have to have a storage facility, which
19 is typically a pond, detention pond or retention
20 pond or underground detention.

21 Q I recognize, for instance, the Danwood Shopping
22 Center -- you are familiar with that property?

23 A Yes, sir.

24 Q You are familiar how it drains into Westside?

25 A Yes, sir.

1 Q Just taking that, for example, if they were to
2 develop that today, am I understanding you
3 correctly, they would not able to discharge water
4 from that at a greater rate than the predevelopment
5 discharge?

6 MR. FRAWLEY: Your Honor, this is all
7 intriguing to me really because I like this area, but we
8 are talking about what is required now in 2011. What
9 happened with this property was 24 years ago. It was in
10 1987. I'm not sure that --

11 THE COURT: You are saying it's not relevant?

12 MR. FRAWLEY: I'm not sure what is required
13 now is relevant to what occurred in 1987. Based on that
14 I would object.

15 MS. CLAYTON: I would have the same objection,
16 Your Honor, as not relevant.

17 MR. BOOTH: Same objection.

18 MR. McDONALD: Your Honor, I have got one more
19 question. I am about to be done. If I can be humored,
20 I promise I won't be much longer on this.

21 THE COURT: Yes, sir.

22 BY MR. McDONALD:

23 Q Let me just ask you this: You were asked -- were
24 you asked to look at -- there is a new development
25 across Dreher Road with the Chick-Fil-A and other

1 commercial properties in it. Are you familiar with
2 that?

3 A Yes, sir.

4 Q Were you asked to look into that site to see if it
5 discharged into the Westside system?

6 A Yes, sir.

7 THE COURT: That's southeast?

8 MR. McDONALD: Yes, sir. It's right across
9 Dreher Road on the same side as we are.

10 THE COURT: South?

11 THE WITNESS: Towards the Blockbuster, towards
12 Columbia.

13 BY MR. McDONALD:

14 Q Right up here (indicating)?

15 A Yes, sir. There is a Chick-Fil-A and a strip mall
16 that goes in there. They actually have an
17 underground detention system that basically takes
18 the place of a pond.

19 So if you were to drive by the site, you would
20 not see the pond. It's basically made up of
21 underground pipes that collect the storm water,
22 again, much like an above-ground pond, other than
23 it's underground.

24 Q Now, this case -- and the judge has certainly heard
25 a lot about it -- but just so we can hear it from

1 an engineer, what is the purpose of a detention
2 pond such as what is located on Westside Plaza
3 Center?

4 A A detention pond is basically a dry pond. It's
5 supposed to be dry at all times. I wish I had
6 heard the explanation this morning. Retention has
7 more of a tendency of holding water in place.

8 The purpose of the pond is to slow down the
9 flow rates so that you can meet a predevelopment
10 flow rate, as well as a pond is used to drop out
11 sediment that was collected internally of the
12 system, whether that flow is off site, on site.
13 Basically it's a place to stop sediment from going
14 downstream to the next property owner.

15 Q How does that sediment -- where does it come from
16 that gets into the pond?

17 A It can come from a lot of different places. During
18 construction is where a lot of the sediment comes
19 from. Before you have anything grassed, you have
20 runoff that has a tendency to run across that
21 ground and put sediment into your system. Sediment
22 can come from parking lots, highways, anywhere.
23 You can walk across any parking lot and can see
24 sediment, dirt, trash, what have you.

25 Q We know, looking at what we have got here, the

1 Westside system, we -- assuming there is no new
2 construction, which we haven't heard anything
3 about, where would be the likely source of silt
4 coming through line E into the detention pond into
5 the Westside system?

6 MR. BOOTH: Your Honor, again, maybe I am just
7 catching up. The map that Mr. McDonald is looking at,
8 has that been introduced into evidence? The one you
9 just shown there, has that been introduced?

10 MR. McDONALD: No. Let me ask the witness a
11 question about it.

12 BY MR. McDONALD:

13 Q You are familiar with the area as you said on
14 U.S.1 --

15 MR. BOOTH: I think he said no.

16 MR. McDONALD: I said no. I am asking this
17 witness a question.

18 MR. BOOTH: That's fine.

19 BY MR. McDONALD:

20 Q You are familiar with the area on U.S.1 where the
21 Westside Center is located?

22 A Yes, sir.

23 Q As part of your job, do you examine aerial photos
24 of properties throughout Lexington County?

25 A Yes, sir. Lexington County has a website that has

1 topographic information, property information, and
2 everything on it. I am very familiar with that
3 site and use it, if not daily, on a weekly basis.

4 Q As part of your duties for Westside in this case,
5 did you prepare certain aerial -- did you pull
6 those aerial maps off the system into your computer
7 system?

8 A Yes, sir.

9 Q And then did you search the Lexington County
10 property records for the metes and bounds of
11 particular properties on U.S.1?

12 A Yes, sir. All that is on one site at the Lexington
13 County website.

14 Q And did you input that data into your computer, the
15 property boundaries?

16 A Yes, sir, I did.

17 Q And then did your computer generate a drawing that
18 shows those property boundaries?

19 A Yes, sir.

20 Q Is this a blowup of what we were talking about that
21 you prepared from your examination of the Lexington
22 County records and the property records?

23 A Yes, sir.

24 MR. McDONALD: Your Honor, at this time --
25 what would be our next exhibit? We would offer this

1 as...

2 MR. JETER: I think it's 26.

3 MR. McDONALD: I think we have 26.

4 MR. JETER: I mentioned 26 and withdrew it
5 because we had a stipulation.

6 MR. McDONALD: We offer this map that has been
7 prepared by Mr. Lambrecht as part of his engineering
8 duties as 27.

9 THE COURT: Any objection?

10 MR. FRAWLEY: None from S.C.D.O.T.

11 MR. QUINN: None, Your Honor.

12 THE COURT: Mr. Booth?

13 MR. BOOTH: I just need to look at it for a
14 second.

15 MS. CLAYTON: Your Honor, I would note that I
16 have no objection, but what is darkened as Westside
17 Plaza actually does not encompass all of the property
18 that belongs to the plaintiff.

19 THE COURT: All the property that belongs to
20 who?

21 MS. CLAYTON: The plaintiff. This that is
22 darkened --

23 MR. McDONALD: I am going to ask him questions
24 about it. You can certainly cross examine him. But,
25 yes, this is not the entire Westside Center. It goes on

1 over here (indicating) and covers this whole parking lot
2 here (indicating).

3 THE COURT: With that caveat, so to speak,
4 Ms. Clayton?

5 MS. CLAYTON: Yes, Your Honor.

6 MR. BOOTH: The only thing I ask is there are
7 some dark lines outlining certain areas.

8 THE COURT: Would you prefer it be in red,
9 Mr. Booth?

10 MR. BOOTH: No objection, Your Honor. I lost
11 this one.

12 THE COURT: Thank you, Mr. Booth. Plaintiff's
13 27 is in evidence without objection.

14 (Plaintiff's Exhibit Number 27 is received
15 into evidence.)

16 MR. McDONALD: I have lost my train of
17 thought. I apologize, Your Honor.

18 BY MR. McDONALD:

19 Q I think I was asking you about detention ponds if I
20 understood correctly and silt. For instance, this
21 picture of Danwood parking lot, which is over here
22 (indicating), if that water flows, as I believe we
23 heard into D.O.T. and ultimately in Westside, in
24 your opinion is it contributing silt into the
25 detention pond at Westside?

1 MS. CLAYTON: Objection.

2 THE COURT: I sustain the objection at this
3 point. Get me oriented to the map, Mr. McDonald.

4 MR. McDONALD: Yes, sir.

5 BY MR. McDONALD:

6 Q This (indicating) is U.S. Number 1; correct,
7 Mr. Lambrecht?

8 A Yes, sir.

9 Q Written with S.C.D.O.T. on it?

10 A Yes, sir.

11 Q This (indicating) is Westside Plaza; correct?

12 A Yes, sir.

13 Q And the line E that we have heard a lot about runs
14 around here (indicating), behind this building, and
15 down to the detention pond; is that right?

16 A Yes, sir..

17 THE COURT: And the detention pond is not on
18 27?

19 MR. McDONALD: It's unfortunately not shown on
20 there, Your Honor.

21 THE COURT: Show me where Danwood is.

22 MR. McDONALD: It's across the street in this
23 large area (indicating).

24 BY MR. McDONALD:

25 Q That is where Danwood Center is located,

1 Mr. Lambrecht?

2 A Yes, sir.

3 THE COURT: And show me the Zaxby's.

4 MR. McDONALD: The Zaxby's is marked as D.W.
5 Properties. Kimbrell's (indicating), who is no longer a
6 party to the case. R.I. -- R1CS2 is no longer a party.
7 Alpine (indicating), which is this gentleman here. Boom
8 is no longer in the case. A.P.A.M. is no longer in the
9 case.

10 BY MR. McDONALD:

11 Q And you have also identified certain streets, such
12 as Wade Street; correct, Mr. Lambrecht?

13 A Yes, sir.

14 Q This street over here (indicating), on this it's
15 called Danwood?

16 A Yes, sir.

17 Q And they would drain into U.S.1; is that right?

18 A Yes, sir.

19 Q So I will revisit the question. Based on your
20 engineering knowledge, any silt that is located in
21 the Danwood parking lot would likely flow into
22 their storm drainage system and eventually make its
23 way through line E to the Westside detention pond?

24 MS. CLAYTON: Objection, Your Honor. I think
25 it calls for speculation. No foundation has been laid

1 as to whether Mr. Lambrecht has conducted any type of
2 analysis or study to determine whether silt is entering
3 the system from any of the properties, much less
4 Danwood.

5 THE COURT: I guess that is kind of the cart
6 before the horse so to speak. You have to determine
7 whether there is silt in the system.

8 MS. CLAYTON: Yes, Your Honor.

9 THE COURT: Before you can determine where it
10 came from.

11 MS. CLAYTON: Exactly, yes, Your Honor.

12 THE COURT: Lay the foundation.

13 MR. McDONALD: I will be to happy to go on
14 with more foundation.

15 THE COURT: The objection is sustained.

16 BY MR. McDONALD:

17 Q Have you observed silt in the Westside detention
18 pond?

19 A Yes, sir.

20 Q Have you observed silt, which in your opinion, came
21 into the pond through line E?

22 A Yes, sir.

23 Q Isn't it true that in storm water there is silt?

24 A Yes, sir.

25 Q Almost every drop of storm water likely coming off

1 of an impervious area like a parking lot would
2 carry something? Is that true?

3 A Yes, sir. Typically when we are doing a design
4 from scratch, we have to calculate to make sure we
5 are removing 80 percent of the silt that is being
6 transported through the drainage system on site and
7 prove that that pond will take care of that silt.

8 That kind of leaves the door open for the 20
9 percent of silt to get into the system, and that's
10 pretty much all the time. Any time you are
11 draining a site, no matter if it be a parking lot
12 or a park, you have the potential for silt to be
13 coming from that.

14 Q So as I understand you correctly, as part of your
15 engineering design of a detention pond, you are
16 calculating that silt will come through a storm
17 drainage system into that pond?

18 A Yes, sir.

19 Q And do you also have to account for, at least in
20 today's environment with what you do, silt that
21 might come into the system on your property from
22 other properties?

23 A Yes, sir.

24 Q So based on that -- and you have done an analysis
25 of the watershed going in the Westside pond; have

1 you not?

2 A Yes, sir.

3 Q Let's talk about that for a minute. Tell the Court
4 what you did with respect to analyzing the
5 watershed coming into the Westside pond.

6 A I've been involved with Westside since 2006, 2005,
7 2006 -- 2006. It was after the first sinkhole that
8 is up near the entrance by Bi-Lo. I was not part
9 of that which happened in 2005, but in 2006 there
10 was a sinkhole in the corner of the building.

11 Q That's right here (indicating); right?

12 A Correct.

13 Q That's when you first got involved?

14 A Yes, sir.

15 MR. FRAWLEY: For the record that is on
16 Exhibit 85.

17 MR. McDONALD: Exhibit 85, line B.

18 BY MR. McDONALD:

19 Q Go ahead, Mr. Lambrecht.

20 A Mr. Richardson had called me. I was working with
21 American Engineering at the time, and he had called
22 me to look at a sinkhole beside the building that
23 appeared to be going up underneath the building and
24 needed some suggestions of what to do to make the
25 public safe.

1 In other words, there was a sinkhole there and
2 we needed to get it filled back in, but we needed
3 to understand what was causing that sinkhole. So
4 that's kind of where I started. What was your
5 exact question?

6 Q My exact question -- I understand that. You may be
7 asked questions about that later -- but my question
8 to you is the watershed analysis.

9 A Yes.

10 Q Were you asked on behalf of Westside Meshekoff
11 Family Limited Partnership to do a study and to
12 determine what water was coming into this system
13 from other sources and how much?

14 A Yes, sir.

15 Q And did you do that?

16 A I was tasked to look at who was draining to the
17 system and where that was coming from. Typically
18 the best way to do that is to get a survey and go
19 on the individual properties.

20 But with the lack of access to all the
21 individual properties, we went on the Lexington
22 County website, did some just visual reconnaissance
23 type things, driving by, seeing where the water was
24 draining from.

25 I was asked to prepare a report showing, first

1 off, who was draining to the site and then to
2 perform a calculation of how much water was coming
3 to the site from those properties.

4 Q And you did that?

5 A Yes, sir.

6 Q How did you go about doing that?

7 A Again, looking at the topo maps that are on the
8 Lexington County website, seeing -- looking at
9 existing topographic maps, in other words,
10 topoquads, seeing where the storm water came from,
11 primarily before the development and then
12 researching those properties on line, identifying
13 them, and pulling the acreages online.

14 Q Did you utilize your standard methodology and your
15 engineering practices to do that?

16 A Yes, sir. I just, again, assumed that a 10-year
17 storm, a lot of times D.O.T., when you are talking
18 about the D.O.T. right-of-way on cross lines --
19 which a cross line is a line coming across the
20 highway to you -- they use a 25-year storm,
21 sometimes a 50-year storm, but in a closed
22 system -- which a closed system is more with catch
23 basins where we are collecting a lot of water -- a
24 typical design standard is a 10-year storm, and
25 that's what I ran on it.

1 Q Let me stop you there. You used a 10-year storm
2 and that means -- you know what that means all day
3 long -- but for the benefit of some of us here,
4 describe to the Court what the engineering
5 definition of a 10-year storm is.

6 A Each county in South Carolina has rainfall data
7 that is collected on an annual basis. I'm not sure
8 when they update that, but it's a published list of
9 the amount of rain that -- a 10-year storm has a
10 10 percent chance of occurring at least once in an
11 annual period I think is the definition.

12 It's 5.3 inches of rain in Lexington County.
13 Again, you could have multiple 10-year storms in
14 any given period. It's not speculation of how much
15 God wants to rain on us. It's more of an average
16 rain that you can see.

17 But five inches of rain is relatively large
18 rain in any 24-hour period. In a 24-hour period
19 means that that rain occurs in 24 hours, not
20 necessarily coming down in five minutes but over
21 the whole 24-hour period getting five inches of
22 rain.

23 Q And you say that is a standard basis that you use
24 in an engineering practice from which to calculate
25 storm water flows?

1 A Typically on any civil site job, no matter how
2 small or large it is, either D.H.E.C. or the
3 county who has the authority to review it, will
4 require you to run a 2-year, 5-year, 10-year, 25,
5 50, and 100 just to see all the storms, but your
6 10-year storm is an average storm or a typical
7 design standard.

8 Q Nobody suggested you to use any methodology that
9 would result in numbers that you felt were
10 inaccurate?

11 A No, sir.

12 Q And the encroachment permit that we see in this
13 case, it references 98 cubic feet per second of
14 flow from the D.O.T. pipe into the Westside system.
15 Are you familiar with that?

16 A Yes, sir.

17 Q But it doesn't say how that 98 cubic feet per
18 second was determined; does it, Mr. Lambrecht?

19 A No, sir.

20 Q You weren't able to find anything upon which you
21 could rely on whether that 98 cubic feet per second
22 was a 10-year storm, a 25-year storm, or a 50-year
23 storm?

24 A No, sir.

25 Q Would it be reasonable to presume that a 10-year

1 storm would have been a reasonable basis to
2 calculate that?

3 A It would have been reasonable that it would have
4 been one of those three that you mentioned, the 10,
5 25, or 50.

6 Q Let's assume you use the 25-year storm or the
7 50-year storm or even a 2-year storm, would that
8 have materially changed the results in terms of how
9 much water is coming from respective properties?

10 A No, sir. Storm water is not a linear calculation,
11 but the similarities on this site is most all the
12 sites were commercial and business districts. That
13 criteria, again, is listed on Lexington County
14 website under soil's information. In other words,
15 it assumes that most of this property is an
16 85 percent impervious area.

17 Q Let's take Westside. I don't think anybody would
18 object to me talking about our own property for a
19 minute. It's almost entirely impervious?

20 A That's correct.

21 Q Because it's all paved and all buildings?

22 A That's correct. That's how I ran the drainage
23 calculations with basically an 85 impervious or
24 commercial and business district. So really the
25 only criteria that would have changed is the actual

1 size of the lot because all the soil conditions
2 were in theory the same.

3 Q Now, it's sort of common sense, is it not, that
4 more water -- if you are talking about impervious
5 areas, a big parking lot versus a smaller parking
6 lot -- is it true that more water is going to come
7 from the big parking lot?

8 A Yes, sir.

9 Q So while you did an engineering analysis, if you
10 had not been asked to do that, could you have
11 looked at the areas of drainage here and come up
12 with a reasonable approximation of how much water
13 is coming?

14 A Since the land area is roughly the same, yes, sir.
15 We were dealing with a grassed area versus a
16 commercial area. It would be a lot different. In
17 this case all the areas draining were in theory the
18 same, at least 85 impervious.

19 Q Now, based on your engineering review and
20 calculations, did you determine how much water is
21 coming into the Westside system from the D.O.T.
22 line?

23 MR. BOOTH: Your Honor, the question was how
24 much water is coming --

25 MR. McDONALD: How much storm water.

1 MR. BOOTH: Right. I know you meant storm
2 water, but I understood the witness to say that he did a
3 design review looking at quantities of water that would
4 come in just very infrequently, just when you have the
5 large rainfall at various times.

6 So the question of how much water versus what
7 would you design a pipe, as far as size, to take into
8 consideration that 10-year or 24-year flood, he is
9 qualified to talk about that, but the question wasn't
10 that in my opinion, how much water.

11 MR. McDONALD: I will withdraw that question
12 and move on. I don't understand the objection, but I
13 will withdraw that question and move on with some
14 additional questions.

15 THE COURT: Thank you, Mr. McDonald.

16 BY MR. McDONALD:

17 Q To determine the flow of water into any system --
18 let's see if I get this straight -- you have to
19 pick some baseline to come up with a flow rate;
20 correct?

21 A You have to pick a storm event. Again, typically
22 the D.O.T. would request a 10- and a 25-year storm.

23 Q Originally you were asked to determine more than 98
24 cubic feet a second of water could potentially be
25 entering into the Westside system; is that right?

- 1 A Yes, sir.
- 2 Q So to do that, to calculate -- cubic feet per
3 second is a flow rate. That is water moving down a
4 pipe; correct?
- 5 A That's correct.
- 6 Q It's not volume? It's not gallons of water;
7 correct.
- 8 A That's correct.
- 9 Q But because that encroachment permit used the
10 criteria -- for whatever reason we don't know
11 today, 98 cubic feet a second -- did you believe
12 that was the appropriate basis on which to analyze
13 the water coming into the Westside system?
- 14 A Again, in engineering design standard, we typically
15 look at rates. So, yes, sir. A flow rate is how
16 much water is coming off of a site.
- 17 Q So in the civil site engineering world, the flow
18 rate is the typical criteria? Is that what you are
19 saying?
- 20 A Yes, sir.
- 21 Q Such as 98 cubic feet per second?
- 22 A Yes, sir.
- 23 Q And to calculate 98 cubic feet per second or
24 whatever, you have to use certain formulas;
25 correct?

- 1 A That's correct.
- 2 Q You have to -- since you weren't out there in a
3 raincoat measuring rain, you have to assume certain
4 conditions to make that calculation; correct?
- 5 A Yes, sir.
- 6 Q So that's what you did in this instance; is that
7 right?
- 8 A Yes, sir.
- 9 Q Do you believe the assumptions you made are sound
10 engineering assumptions? Do you believe that?
- 11 A Yes, sir.
- 12 Q Are they assumptions that you use in designing
13 sites throughout Lexington County?
- 14 A Yes, sir.
- 15 Q For D.O.T. projects?
- 16 A Yes, sir.
- 17 Q Did you determine, using criteria that you just
18 described, the flow rates from Highway 1, the flow
19 rate from Highway 1 into the Westside system?
- 20 A Yes, sir.
- 21 Q And did you also determine the flow rates from
22 these respective properties into the D.O.T. system?
- 23 A Yes, sir.
- 24 Q How much water is coming into the Westside system,
25 based on your flow rate calculations of a 10-year

1 storm event, how much water is coming into line E
2 from the D.O.T.?

3 MR. FRAWLEY: You mean the rate of flow of the
4 water?

5 MR. McDONALD: The rate of flow. I'm sorry.

6 MR. BOOTH: And that takes care of my problem.

7 THE COURT: Thank you.

8 A The rate of flow on the 10-year storm at that
9 point, I think in my calculations was 65 C.F.S.,
10 cubic feet per second. Now, can I expand on that?

11 Q You may.

12 A What I tried to do is come up with the peak flow
13 rate from each site individually. That was the
14 calculation that I did. Basically each site -- and
15 not knowing the pipes that it connected to once we
16 went beyond the S.C.D.O.T. right-of-way -- we just
17 took those peak flows and dumped it, in theory,
18 into a pond at that point.

19 When you do drainage calculations, you have
20 something called time of travel, and you also have
21 time of concentration. The time of concentration
22 is already factored into that calculation because
23 that's the amount of time it takes for water to
24 come from one side of the site to the other.

25 That is based off of slopes, land, land

1 surface, whatever you have on there, whether it's
2 asphalt. You also have a timing issue of that
3 water going through those pipes.

4 Not having a true survey and not knowing those
5 pipes, we arbitrarily dumped that all in at one
6 time. The calculation I did, it came up with a
7 peak flow from each individual site.

8 I arbitrarily modeled that through the D.O.T.
9 pipe. But, again, you have to factor in a lot of
10 timing issues on that. One site, a smaller site,
11 is going to peak a lot faster than a larger site.

12 Q So to revisit, you were asked by Westside to tell
13 them where the water was coming from?

14 A That's right.

15 Q And you were asked by Westside to tell them what
16 respective properties on U.S.1 were draining into
17 the D.O.T. system which came into Westside; is that
18 right?

19 A That's correct.

20 Q And you did that?

21 A Yes, sir.

22 Q And did you do that using what you believed to be
23 sound engineering principles?

24 A Yes, sir.

25 Q And are you comfortable with the analysis you did,

1 in terms of its engineering soundness?

2 A Yes, sir.

3 Q And do you believe that your findings are an
4 accurate representation, using the criteria of a
5 10-year storm, how much flow is coming into the
6 Westside system from these properties?

7 A Yes, sir.

8 Q Now, let's talk about Westside first. You were
9 asked to calculate how much water comes from the
10 Westside Plaza system or center itself into line E;
11 correct?

12 A Yes, sir.

13 Q And did you do that calculation?

14 A Yes, sir.

15 Q And how much, using the 10-year storm criteria,
16 what is the flow rate that you determined comes
17 into line E from Westside Plaza?

18 MS. CLAYTON: Objection, Your Honor.

19 THE COURT: Yes, ma'am.

20 MS. CLAYTON: The testimony and the path that
21 we are going on down the road here now is that the
22 plaintiff is going to elicit these flow rates from
23 Mr. Lambrecht.

24 The flow rates are completely irrelevant to
25 the case at hand, Your Honor. We object to any

1 information regarding flow rates from any of the
2 properties being admitted into evidence.

3 The plaintiff, what they have done, is they
4 have taken those flow rates and they have arbitrarily
5 decided that that is the amount that each defendant
6 should have to pay.

7 There is no correlation between the work that
8 was done and the rate of flow from each property as to
9 that being the amount that a defendant should have to
10 pay. None of this testimony will be relevant.

11 MR. McDONALD: Your Honor, it's entirely
12 relevant. I understand -- I'm sorry. I thought you
13 were finished.

14 THE COURT: Did you finish?

15 MS. CLAYTON: Your Honor, it makes no
16 difference how much the defendants used of the pipe.
17 It's the D.O.T. water discharging into the Westside
18 Plaza system.

19 THE COURT: Isn't there a theory that it makes
20 an equitable difference? Isn't that the theory of the
21 plaintiff? That if the flow rate is X. or whatever -- I
22 don't know what the engineer may testify to -- I see
23 where you are saying they are not connecting that dot
24 back. They are arbitrarily putting a dot there. I
25 understand that. But still that is their theory on

1 equity that you have to assume certain things. Perhaps
2 I'm missing your theory.

3 MS. CLAYTON: Your Honor, I might agree with
4 missing the plaintiff's theory. It seems to be somewhat
5 of a moving target throughout the age of this case.
6 Even looking at equity, what we were talking about, the
7 flow coming from any of the defendants' property is
8 entirely irrelevant.

9 There is no correlation between flow and the
10 work that was done, at either line E, line B, work that
11 is being done there now, the work that was done at the
12 detention pond. There is absolutely no correlation. So
13 the rate of flow from each property is entirely
14 irrelevant.

15 THE COURT: Thank you, Ms. Clayton.
16 Mr. McDonald.

17 MR. BOOTH: I was going to add just one
18 additional ground.

19 THE COURT: I apologize. I didn't see you,
20 Mr. Booth.

21 MR. BOOTH: I agree with the relevancy
22 argument. Also, I would add another reason to not be
23 able to ask this witness about flow rate on these
24 various properties.

25 I think, based on just what he said so far, it

1 has entered into conjecture and speculation as to what
2 the flow is from these properties. He himself said he
3 didn't do surveys.

4 He himself said he only looked at information
5 online. He himself said normally you would have a
6 survey done on the site itself, in this case our
7 property, for example.

8 So I think to say that the flow rate -- I
9 think he called it storm. I tried to write it down,
10 storm event flow rate, something like that -- again,
11 based on what he said, so far would be very speculative
12 as if that is actually going into the Westside system.
13 So I just add that as a grounds, in addition to
14 relevancy.

15 THE COURT: Mr. McDonald.

16 MR. McDONALD: Yes. Thank you, Your Honor.
17 Certainly the Court understands our theory. It's
18 entirely relevant because you have to have some basis to
19 determine how much this is being used. It goes back to
20 Hayes versus Tompkins.

21 With all due respect to Ms. Clayton, she would
22 have argued in that case, "You can't figure out how much
23 each party uses the road." In that case the Court
24 understood it might not be perfect, but in equity we
25 have got to figure out a way.

1 We have done what we believe is a very fair
2 and proper way. We have hired an engineer. He has
3 talked at length about he uses this methodology all the
4 time. We didn't tell him what to use it. That's how he
5 used it, and he calculated these flow rates.

6 I understand they don't want it because they
7 don't -- you know, that would cut our case off at the
8 knees. We have to come to the Court and demonstrate
9 usage by the D.O.T. and others, and there is only -- you
10 will get your chance.

11 THE COURT: I'm sorry?

12 MR. McDONALD: She was standing up and I
13 wasn't finished.

14 THE COURT: I will take care of running court.

15 MR. McDONALD: Thank you. Yes, sir. I'm
16 sorry. So it is entirely relevant to our theory of
17 equity of apportioning cost based on usage, which is
18 consistent with the law of the State in Hayes versus
19 Tompkins..

20 So we have to demonstrate how much water is
21 coming in here, and we hired an engineer who has
22 determined what the best way to do that would be in his
23 opinion.

24 They can certainly cross examine him on his
25 methodology and the way he did it. But, Your Honor, we

1 certainly believe we are entitled to introduce that
2 evidence.

3 THE COURT: Thank you. Thank you,
4 Mr. McDonald. Ms. Clayton.

5 MS. CLAYTON: If I could respond, Your Honor.

6 THE COURT: Certainly.

7 MS. CLAYTON: Mr. McDonald reference the Hayes
8 versus Tompkins case. At the beginning of this trial,
9 that case was also brought up. That case is entirely
10 different than what we are dealing with here.

11 In Hayes versus Tompkins, they were dealing
12 with a road, and they were taking about the maintenance
13 and repair of the road. Implicit in that is the fact
14 that the maintenance and repair was necessary because of
15 the use.

16 That is not the case here, Your Honor. There
17 has been no testimony that the use by the defendants is
18 what caused the problems at line E. It surely didn't
19 cause the problems at line B.

20 It hasn't caused the problems that they are
21 having to deal with today at Westside Plaza. It didn't
22 cause the problems with the detention pond. So use by
23 the defendant has absolutely nothing to do with any of
24 the work that was done in 2005, 2006, or 2008. There is
25 no correlation and it's irrelevant.

1 THE COURT: To take that argument to its
2 logical conclusion, if line E had never been used by
3 anybody, it would never have deteriorated at all. It
4 would have just been a structure that was underground.

5 MS. CLAYTON: That might be the case, Your
6 Honor, if line E had been installed properly.

7 THE COURT: I understand that.

8 MS. CLAYTON: But it's the installation
9 problems that caused the premature failure of line E,
10 not any use.

11 THE COURT: I understand that argument also.
12 You are saying well even if -- that's a different
13 argument -- even if there is use, the reason it failed
14 wasn't because of whatever -- I think he said 60 or 68.

15 MR. FRAWLEY: Sixty-five.

16 THE COURT: Sixty-five. I was close to my age
17 at least. But if you just take that volume, of course,
18 I think where he's headed is actually what you objected
19 to. He is going to apportion that out in some
20 engineering mathematical calculation and is going to
21 give an opinion and a basis for his opinion.

22 But still your next argument is: Well, it was
23 installed improperly. That caused the failure. That
24 may be absolutely correct. I mean, I don't know. I
25 haven't heard all the evidence and testimony yet in

1 regards to the plaintiff.

2 That still doesn't go back to the fact of the
3 use itself caused it to deteriorate, regardless of who
4 was using it, regardless of who. It may be that it's
5 going to fail, even if they were up to 90 or 95 or 98,
6 because of the improper installation, if it was
7 installed improperly if that's what I find.

8 MS. CLAYTON: Well, Your Honor, also, there
9 aren't allegations that the pipe was overflowing or that
10 the pipe doesn't have enough capacity to handle the
11 flow. So why does it matter how much flow there is? It
12 doesn't.

13 THE COURT: I am going to overrule your
14 objection on relevancy. I think there is some relevancy
15 to it. And if you want to put anything additional in
16 the record, Ms. Clayton, please do so.

17 MR. FRAWLEY: Your Honor, when we get a
18 chance, I would like to address it.

19 THE COURT: Sure. I'm not trying to cut you
20 off or Mr. Frawley or Mr. Booth, for several reasons.
21 Number one, I probably wouldn't be successful. I don't
22 cut people off. I let them put in the record what they
23 want to put in the record.

24 As to Mr. Booth adding on the objection on the
25 flow rate on conjecture and speculation, as this

1 testimony developed, as I took it, the initial question
2 was not objected to. The initial question was objected
3 to, but this went to the watershed analysis.

4 Mr. Lambrecht testified that the best way to
5 do it would be surveys. He didn't conduct surveys. He
6 did visual recons. He did ride-bys, who drained from
7 the site, how much water. He looked at topographic
8 maps, existing topographic maps, topographic quads.

9 He did research online. He got information on
10 the acreage. He made certain assumptions which was
11 within a reasonable degree of engineering certainty, as
12 I understand it, on the 10-year storm.

13 I think that goes more to the weight as
14 opposed to its admissibility. It might not be perfect,
15 but it's not required perfection. You know the
16 standard. I don't have to tell you the standard for any
17 of you, as far as the standard expert testimony should
18 meet.

19 Now, with that being said, if you want to add
20 anymore, Ms. Clayton, please do.

21 MS. CLAYTON: Your Honor, I would just add one
22 thing. The fact of the rate of flow from the properties
23 might would be relevant if there was some issue
24 regarding overflow or capacity.

25 Mr. Lambrecht has testified that the

1 encroachment permit was 98 cubic feet per second, but
2 the water entering the system from the D.O.T. pipe is 65
3 cubic feet per second. So there is clearly no issue as
4 to whether it's overflow or capacity.

5 THE COURT: All right. Thank you.

6 MS. CLAYTON: Thank you.

7 THE COURT: Mr. Frawley.

8 MR. FRAWLEY: Your Honor, just to note for the
9 record and dispel the possibility that by my silence I
10 am agreeing, we disagree that Hayes versus Tompkins in
11 and of itself applies.

12 I frankly like the 65 cubic feet per second
13 that is entering -- that is within the 98. We don't
14 object to the testimony, but I would just like to note
15 for the record that we disagree that Hayes versus
16 Tompkins is a case that is on point.

17 THE COURT: That goes back to Ms. Clayton's, a
18 road is not a pipe, not a water line.

19 Mr. Booth, you were standing also a moment
20 ago.

21 MR. BOOTH: You were looking at me. I just
22 stood up in courtesy. It's hard for me down here to see
23 you.

24 THE COURT: Thank you.

25 MR. BOOTH: I was trying to get more of a

1 visual. I'm fine. Thank you very much. Thank you for
2 asking.

3 THE COURT: We haven't heard from Mr. Quinn.

4 MR. QUINN: Your Honor, I would join in all
5 the other objections. At a point in time that
6 Mr. Lambrecht is going to start talking about empirical
7 calculations, we object in advance. Thank you.

8 THE COURT: Thank you, Mr. Quinn. Do you
9 remember your last question?

10 MR. McDONALD: Your Honor, I am certainly
11 cognizant that you run this courtroom. I'm sorry. I
12 didn't mean to cut anybody off.

13 THE WITNESS: Am I okay to answer that?

14 MR. McDONALD: I think I have got a question
15 that was close. We certainly, I think, have dealt with
16 the issues that would be raised by this question.

17 BY MR. McDONALD:

18 Q Just to go back and get me started again, you did
19 perform calculations to determine the cubic feet
20 per second flow rate from these various properties
21 in the D.O.T. and then from the D.O.T. storm drain
22 into Westside; is that right?

23 A Yes, sir.

24 Q Based on your calculations, what did you
25 determine -- now I remember my question -- what did

- 1 you determine came into line E from the Westside
2 Plaza system?
- 3 A Nineteen point nine C.F.S.
- 4 Q Nineteen point nine C.F.S. What did you determine
5 came from U.S. Highway 1 itself?
- 6 A Twelve C.F.S.
- 7 Q Twelve C.F.S. What did you determine came from
8 A.P.A.M.? Where there is a motel there; correct?
- 9 A Yes, sir, 12 C.F.S.
- 10 Q Now, it's hard to read. It says Danwood Drive up
11 here (indicating). What did you determine that
12 contributes or comes down from Danwood Drive?
- 13 A Two point one C.F.S.
- 14 Q Two point one C.F.S. The Boom is the Sonic;
15 correct?
- 16 A Yes, sir.
- 17 Q What did you determine comes from the Boom,
18 Incorporated property?
- 19 A Three point seven C.F.S.
- 20 Q Three point seven C.F.S. Danwood, L.L.C., what did
21 you determine comes from Danwood, L.L.C.?
- 22 A Twenty-four point three C.F.S.
- 23 Q Twenty-four point three C.F.S. Up here
24 (indicating) where it says Denton, which is owned
25 by Dr. Denton, what did you determine comes from

- 1 that property?
- 2 A One point six C.F.S.
- 3 Q One point six C.F.S. And the property owned by
- 4 Alpine, Inc., what did you determine?
- 5 A Eight point nine C.F.S.
- 6 Q Eight point nine C.F.S. Wade Street?
- 7 A Two point five C.F.S.
- 8 Q Two point five C.F.S. Where the Zaxby's is, D.W.
- 9 Properties?
- 10 A Five point two C.F.S.
- 11 Q While we are here on Zaxby's, they actually drain
- 12 into the Kimbrell system; correct?
- 13 A They drain down into the catch basin at the bottom
- 14 of the site. Everything is flowing towards
- 15 Westside Plaza.
- 16 Q Thank you. And Kimbrell's?
- 17 A Twelve point six C.F.S.
- 18 Q And this R1 CS2 is a Kangaroo Circle K. convenience
- 19 store.
- 20 A Two point six C.F.S.
- 21 Q Two point six. Now, you prepared a nice document
- 22 with the numbers on it that I just wrote on here;
- 23 is that right?
- 24 A Yes, sir.
- 25 Q Is this the document that you prepared?

1 A Yes, sir, it is.

2 MR. McDONALD: Your Honor, we would offer this
3 document which is part of Exhibit 6 which was marked as
4 I.D. only. I can offer it as a separate exhibit at this
5 time. It's the aerial photo with all the properties
6 with the flow rates that Mr. Lambrecht has just
7 addressed.

8 THE COURT: Subject to previous objection?

9 MR. BOOTH: Yes, same objections.

10 THE COURT: Same objections --

11 MR. BOOTH: That we made earlier.

12 THE COURT: On 27?

13 MR. BOOTH: Right. Yes, sir.

14 MR. FRAWLEY: Your Honor, I was an English
15 major so I'm not that keen on math, but --

16 THE COURT: I didn't do the math either.

17 MR. FRAWLEY: -- these all seem to add up to
18 more than 65 cubic feet per second.

19 MR. BOOTH: They add up to over a hundred.

20 MR. McDONALD: I'm getting ready to cover
21 that.

22 MR. FRAWLEY: As long as it's under 98. I
23 like the number 65, but I have a problem with that.

24 MS. CLAYTON: If my same objection can be
25 noted --

1 THE COURT: Yes, ma'am.

2 MS. CLAYTON: -- for this entire examination.

3 Thank you.

4 MR. McDONALD: I understand subject to those
5 objections, the Court is allowing 28.

6 (Plaintiff's Exhibit Number 28 is received
7 into evidence.)

8 COURT REPORTER: Judge, I need a break if we
9 could.

10 THE COURT: Okay. Mr. Lambrecht, you may step
11 down. You may not discuss your testimony.

12 (Whereupon there is a recess.)

13 THE COURT: We are back on the record. We are
14 going to finish the direct this evening, about 15 more
15 minutes or so, and then we will adjourn for the evening.
16 Mr. McDonald.

17 MR. McDONALD: Thank you, Your Honor. May it
18 please the Court.

19 DIRECT EXAMINATION

20 BY MR. McDONALD:

21 Q Mr. Lambrecht, I am handing you what is Exhibit 28,
22 which you testified earlier is a prepared document
23 with certain flow rates. I will hand you a
24 calculator. And would you add up -- I don't think
25 I need to make you add them up. You would

- 1 acknowledge if you add all these numbers up, they
2 total more than 65 --
- 3 A One hundred seven point four.
- 4 Q One hundred seven point four. You testified
5 earlier, if I understood you correctly, that you
6 determined that coming from the D.O.T. pipe, there
7 wasn't more than 98 cubic feet a second. In other
8 words, they weren't exceeding the permit criteria
9 based on your 10-year storm criteria; is that
10 right?
- 11 A Yes, sir. Again, it also has the 19.9 from
12 Westside, which does not go into that pipe as well.
- 13 Q So you got the number you said you got --
- 14 A One hundred seven is all those numbers added up.
- 15 Q And it doesn't include the 19.9?
- 16 A It does.
- 17 Q It does?
- 18 A It does.
- 19 Q You tell me.
- 20 A The 87.5 does not include the 19.9.
- 21 Q So if you add all these numbers up, not including
22 the 19.9 C.S.F., you get what?
- 23 A Eighty-seven point five.
- 24 Q Eighty-seven point five. Explain to these
25 lawyers -- who are no doubt eager to hear -- why

1 that number is different when you add all these up
2 versus the 65 C.F.S.?

3 A In storm water design, we look at peak flow rates.
4 If you add the 87 number, which is the peak flow
5 rate of all the properties draining to us, it is a
6 moment in time.

7 It is, again I said earlier, a 10-year,
8 24-hour event. That happens over a 24-hour period.
9 The bulk of that storm water flow is between hour
10 eight or nine. This is typical for all storm
11 water, but typically around eight or nine up until
12 about hour 14.

13 I also testified earlier that the smaller site
14 is going to peak faster. That flow rate is what is
15 going to run off the site at that moment in time.
16 Those peaks may not hit at the exact same time,
17 maybe hour 10, maybe hour 11, maybe hour 12.

18 The peak, if you dump all those properties
19 into one -- for instance, if you dump all that
20 into a jar, to put it in simple terms, at one point
21 most of that would be the 65 number that I said
22 earlier.

23 Q So you picked a moment in time based on flow rates
24 from all these properties and determined it was
25 about 65 C.F.S. coming into the Westside system; is

1 that right?

2 A That's correct.

3 Q But if I understand you correctly, using your
4 analysis here of peak rates, in other words, a
5 smaller property would peak sooner than a larger
6 property?

7 A That's correct.

8 Q So you can't, based on your engineering
9 methodology, you cannot add up all these numbers
10 based on different periods of time and compare it
11 to the moment in time when you figured out under
12 your criteria that you use how much water is coming
13 into the Westside system?

14 A You lost me there.

15 Q I lost myself.

16 A Sorry.

17 Q You determined that at a moment in time, all these
18 properties drained into S.C.D.O.T. and drained into
19 Westside at 65 cubic feet per second?

20 A That's correct.

21 Q But that moment in time is different than what you
22 used to calculate all of these flow rates?

23 A Calculating it individually at the peak moment, the
24 peak flow off of that individual site at that peak
25 time, the peak times could vary from site to site

1 if that answers your question.

2 Q Okay. So that's why you can't add up all -- you
3 add up all these numbers and they are greater than
4 65 because these are all representative of peak
5 flow rates from the property?

6 A That's correct.

7 Q And those don't all happen at the same time?

8 A That's correct.

9 Q But when you calculated the 65 C.F.S., you had to
10 figure flow from these points at the same time?

11 A Correct.

12 Q Thank you.

13 A Can I expound?

14 Q You may, please.

15 A Rainfall is a curve. It's not a linear-type line.
16 So the rainfall is going to curve. That is going
17 to vary from site to site based on how much -- that
18 C.F.S. is going to vary from site to site because
19 it's going to peak at different time frames.

20 The 89 C.F.S. that is coming in there still
21 meets the criteria under the 96. So in theory we
22 are close to that number again. I am only
23 speculating where the 96 or 98 came from because
24 there is no reference to that on the permit.

25 Turning a new permit in today, D.O.T. is very

1 strict about what flow is coming from what storm.
2 So on an encroachment permit, we would list that
3 out, of what -- back in the '80s before urban
4 sprawl, it might not have been -- but as the area
5 developed basically.

6 Q Thank you, Mr. Lambrecht. Now, wrapping up here
7 based on your analysis, do you believe -- do you
8 have an opinion as to how much -- whether line E
9 would be a significant contributor of storm water
10 into the detention pond?

11 A It would be. As you look at that site, you see
12 there's three inlet pipes coming into the pond.

13 Q You've got A down here, which is, what, a 36-inch
14 pipe?

15 A I think that's a 36, and the other two are 48s.

16 Q This says 48-inch on line B and 48 on line E.

17 A So in theory you have got three inlets coming into
18 that pipe. Line E, of course, from an engineering
19 standpoint carries a lot more storm water.

20 Q Why is that?

21 A Because it's draining a lot more area.

22 Q It's draining the area all up here (indicating)?

23 A Correct. Thus the size of the pipes. Your size of
24 the pipe is based on how much water it is carrying.
25 Line A, which is the bottom line, which is the

1 36-inch line, is smaller.

2 Q Based on your engineering opinion, if you see silt
3 building up in the area near line E, do you have an
4 opinion which storm drain line would have brought
5 that stuff into the Westside system?

6 A Yes, sir, it's going to accumulate right in front
7 of the end of the line.

8 Q What line is that?

9 A Again, line E, what we were talking about. The
10 sediment in theory is going to end up at whatever
11 pipe is discharging into the pond or detention
12 base.

13 Q Now, the last little series of questions. There
14 has been a lot of discussion in this lawsuit about
15 corrugated metal pipe versus reinforced concrete
16 pipe. You have heard some of that; correct?

17 A Yes, sir.

18 Q You as an engineer, I take it your preference would
19 be to use reinforced concrete pipe?

20 A Yes, sir.

21 Q Is that a fool-proof product to use in storm
22 drainage systems?

23 A I don't think anything is fool-proof. It is all
24 dependent on how the contractor installs it and
25 what is occurring in that pipe. I had a similar

1 project in a subdivision in the lower part of the
2 State, actually in Kiawah, where they had concrete
3 pipe throughout the subdivision and was
4 experiencing sinkholes, much like we saw the
5 sinkholes here. Again, it's a joint failure
6 problem that caused that to occur, and it occurs in
7 concrete as well as C.M.P.

8 Q Thank you, Mr. Lambrecht. Based on our agreement
9 in chambers, I think we are done for the day. You
10 will have to come back tomorrow for these gentlemen
11 and lady to ask you questions.

12 THE COURT: Thank you. Thank you very much,
13 Mr. McDonald.

14 MR. McDONALD: Thank you, Your Honor.

15 THE COURT: Just one further matter, when I
16 spoke with y'all in chambers, Mr. Quinn is going to put
17 the scene in evidence and just asked me to go down there
18 and look and look at the detention pond. Nobody has any
19 objections to that; is that correct?

20 MR. FRAWLEY: D.O.T. has no objection, Your
21 Honor.

22 MR. QUINN: No objection.

23 MS. CLAYTON: No objection.

24 MR. BOOTH: No objection.

25 MR. JETER: None from the plaintiff.

1 THE COURT: Thank you very much. Court will
2 be in recess until 9:30 in the morning. You may not
3 discuss your testimony with anyone.

4 (Whereupon the proceedings are concluded for
5 April 19, 2011.)

6 (The following proceedings are reported on
7 April 20, 2011.)

8 THE COURT: All right. Let's see. We were on
9 cross examination.

10 MR. McDONALD: Your Honor, I realized in
11 looking over my notes, there were a few things I meant
12 to ask him and I forgot. I will be very brief.

13 MR. FRAWLEY: I have no objection to that,
14 Your Honor.

15 THE COURT: Thank you. You may continue,
16 Mr. McDonald.

17 MR. McDONALD: Thank you, Your Honor.

18 DIRECT EXAMINATION

19 BY MR. McDONALD:

20 Q Good morning, Mr. Lambrecht.

21 A Good morning.

22 Q I realized in looking over my notes yesterday
23 evening that I maybe rushed a few things I meant to
24 ask you and I didn't. I will cover those and then
25 I will sit down.

1 We have heard a lot about encroachment permits
2 in this case and the encroachment permit here, but
3 I would like you to tell the Court: Do you
4 routinely deal with encroachment permits and
5 encroachment permits related to the D.O.T.
6 right-of-way?

7 A Yes, sir.

8 Q And from your prospective as an engineer, what is
9 the purpose of an encroachment permit from the
10 D.O.T.?

11 A You have encroachment permits --

12 MR. FRAWLEY: Your Honor, I will object to his
13 testifying to D.O.T.'s purpose in their --

14 MR. McDONALD: I am asking from his
15 engineering standpoint.

16 MR. FRAWLEY: Okay. Then I will withdraw that
17 objection.

18 THE COURT: Thank you.

19 A On any project that is adjacent to a D.O.T.
20 right-of-way and/or a county right-of-way, you have
21 to look at getting an encroachment permit. That
22 permit will allow the property owner to access the
23 D.O.T. or county right-of-way from a drainage
24 prospective and/or a roadway access prospective.

25 So any work that is done off of an individual

1 client's property onto someone else's property is
2 what an encroachment permit does. It gives access
3 to that property that is not theirs.

4 Q Have you in your engineering duties represented
5 clients in working with the D.O.T. to get
6 encroachment permits?

7 A Yes, sir.

8 Q Would that be fairly frequently?

9 A Every project just about that I have done, you are
10 going to tie into a county road or a D.O.T. road or
11 a private road. Private roads don't tend to have
12 encroachment permits, but there's not a lot of
13 private roads out there. So just about every
14 project you deal with encroachment permits.

15 Q In your experience in working with getting an
16 encroachment permit from the Department of
17 Transportation, has the Department of
18 Transportation ever attempted to exercise control
19 or regulation over what is put on the private
20 property in terms of pipe or storm drainage?

21 A No, sir.

22 Q Now, let's talk about the Westside watershed for a
23 minute. We talked about that some yesterday. In
24 looking at what is marked at Exhibit 27 here, the
25 blowup, once upon a time this was all woods or

1 undeveloped property.

2 But just to make it clear, is the runoff,
3 storm water runoff, from these properties in its
4 developed state greater than what it would have
5 been in an undeveloped state?

6 A Yes, sir.

7 Q Why is that so, Mr. Lambrecht?

8 A Pervious material versus impervious material.
9 Impervious material, such as asphalt, concrete
10 building has a tendency to create more storm water
11 runoff, where grass or pervious material has a
12 tendency to soak it in, trees or whatnot. So
13 concrete or impervious material is going to be a
14 greater runoff than a pervious material.

15 Q That's just sort of common sense. If you pave a
16 parking lot, there is nowhere for the water to be
17 absorbed?

18 A That's correct.

19 Q So basically all the water is going to be funneled
20 into a storm drainage system and shot off site?

21 A Yes, sir.

22 Q Wrapping up, Mr. Lambrecht, you determined, as we
23 talked yesterday, the individual flow rates of
24 storm water from the respective properties;
25 correct?

1 A Yes, sir.

2 Q If you wanted to know with respect to line E how
3 much of the water that is going through line E
4 storm water is attributable to properties other
5 than Westside, how could we do that?

6 A Through the calculations that I did, which show how
7 much water is coming to us.

8 Q Would you just add all the numbers up and come up
9 with a total and then divide each respective
10 property by that total?

11 A Again, to get each individual property, what their
12 peak discharge rate is, yes, sir.

13 Q In your engineering opinion, would it be a
14 reasonable determination of how much water is going
15 into line E to add up these flow rates, including
16 the Westside flow rate, and then divide?

17 In other words, if that number is a hundred,
18 if you want to know Danwood, you divide 24.3 by a
19 hundred? Would that be in your engineering opinion
20 a reasonable way to determine how much of Danwood's
21 water is going through that pipe?

22 A Yes, sir.

23 Q So if you want to know how much is coming into the
24 pipe at the D.O.T. point of discharge, would it be
25 reasonable to add up all of those flow rates that

- 1 got into the D.O.T. system and into line E?
- 2 A Yes, sir.
- 3 Q And then would it be reasonable then just to divide
- 4 that number by the total of all flow rates,
- 5 including Westside?
- 6 A Yes, sir.
- 7 Q And let me hand a calculator or do you know
- 8 approximately what that is off the top your head,
- 9 how much --
- 10 A It was 87 without Westside and 107 with Westside.
- 11 Q Wouldn't you add Westside into that? Wouldn't you?
- 12 A Yes, sir.
- 13 Q So 87 plus 19.9 is what?
- 14 A One hundred seven point four.
- 15 Q So if you want to know how much water in your
- 16 engineering opinion is being -- in terms of usage
- 17 of line E is coming from the D.O.T., would you
- 18 divide 87.7 by the total number?
- 19 A Yes, sir. But, again, we are talking flow rates,
- 20 not --
- 21 Q Right. What would that be? If you would do that
- 22 for me, please.
- 23 A Do what?
- 24 Q If you divide 87.7 by the total or what --
- 25 A I'm with you, how much is coming from off site.

1 Q How much is coming from the D.O.T. line into this
2 point right here (indicating) at line E?

3 A Eighty-one point four.

4 THE COURT: Say that again.

5 THE WITNESS: Eighty-one point four.

6 BY MR. McDONALD:

7 Q And do you believe in your professional engineering
8 opinion that that is a reasonable determination of
9 how much line E serves for water coming off site?

10 MR. BOOTH: Your Honor, at this point I'd ask
11 him to ask the question in the form of a hypothetical.
12 This is an expert. He is not giving a hypothetical. He
13 is asking an opinion about almost one of the issues you
14 will be dealing with. I think he needs to present a
15 hypothetical so we can make sure the underlying data is
16 consistent with what he has testified to.

17 MR. McDONALD: Your Honor, I am asking the
18 expert an opinion which is proper from an expert. That
19 is the ultimate issue in the case, and certainly that is
20 something experts speak to routinely.

21 MR. BOOTH: I have got no problem with the
22 question. It's just that he needs to present it as a
23 hypothetical, Your Honor.

24 MR. McDONALD: He has done the calculations.

25 THE COURT: Well, it's based on his

1 calculations.

2 MR. McDONALD: Yes, sir.

3 THE COURT: I will allow that. Your objection
4 is noted, Mr. Booth.

5 MR. BOOTH: Yes, sir.

6 BY MR. McDONALD:

7 Q Do you understand the question, Mr. Lambrecht?

8 A Yes, sir, 80 percent, 81.4 percent would be
9 generated from off site.

10 Q Thank you, Mr. Lambrecht.

11 THE COURT: Mr. Frawley.

12 MR. FRAWLEY: Yes, sir.

13 CROSS EXAMINATION

14 BY MR. FRAWLEY:

15 Q Mr. Lambrecht, I'm a little confused. That's
16 probably apparent from the last couple of days.
17 But the last series of questions that were asked,
18 the question was: How much comes in? We talked
19 about 107 minus 19.9, and we get to 87 when you
20 deduct the 19.9. I didn't hear the number 65 today
21 at all, which has been in your report. You
22 mentioned peak flow rates from each of the
23 properties north of U.S. Number 1.

24 A Yes, sir.

25 Q And then you say you did the calculations and it

1 came up to 81.4. I didn't hear a unit. Toward the
2 end I heard you say it's approximately 80 percent.
3 So I am assuming that the 81.4 is a percentage of
4 the entire flow that goes into line E. Is that
5 what your testimony was?

6 A It's a percentage based on the peak flow rate from
7 each individual site, yes, sir.

8 Q But the peak flow rate from each individual site,
9 you indicated it doesn't all come at the same time.
10 For instance, the peak flow rate off a small piece
11 of property like D.W. Properties, that would -- in
12 units of time -- that peak flow rate would accrue
13 more quickly than the peak rate from, for instance,
14 Danwood Shopping Center, which has a bigger area;
15 correct?

16 A Correct.

17 Q So Danwood's peak flow rate is not going to reach
18 its peak at the same time that D.W. properties or
19 Zaxby's peak flow rate is going to reach; correct?

20 A Correct.

21 Q And when Mr. McDonald asked you how much gets in
22 the pipe -- and I think you tried to clear this
23 up -- he is not talking about volume or the mass of
24 water, he is talking about the rate of flow; isn't
25 he? Well, I don't know what he is talking about.

1 You are talking about the rate of flow; aren't you?

2 A Yes, sir. Every number I have said today is cubic
3 feet per second, which is a rate of flow, yes, sir.

4 Q That's how quickly that water moves from point A --
5 how quickly a certain volume, a given volume of
6 water, moves from point A to point B in units of
7 time; correct?

8 A Yes, sir. There are variables with that, as in
9 slope. Of course, land cover. There are a lot of
10 different variables with that, basically how fast
11 it runs across the site. The sites are different
12 sizes. You will have different timings on when
13 that peak occurs.

14 Q Some of the variables that are in your -- even your
15 determination as to the rates of flow from each of
16 these properties north of U.S. Number 1, I think
17 you would concede -- wouldn't you -- that there are
18 some assumptions you had to make, some limitations
19 to your calculations, based on the data you have
20 been able to accumulate to make those calculations?
21 Would you agree with me on that?

22 For instance -- let me clarify my question as
23 far as the slopes. The slopes, for purposes of
24 topography of an area, is how steeply the higher
25 ground dips down to the lower ground; correct?

1 A Yes, sir.

2 Q And a slope in real dirt, real ground isn't
3 necessarily a straight line from point A down to
4 point B; is it?

5 A No, sir.

6 Q The real ground, there will be dips and there will
7 be rises, and it will drop down. But you have to
8 look at it topographically. You have got high
9 ground, low ground, with some variance in the
10 middle; correct?

11 A Yes, sir.

12 Q When do you a topographical survey, you've got
13 somebody out there, a surveyor or a professional,
14 who you can look as those dips and slopes and give
15 you an accurate reading of how that slope is
16 configured; correct?

17 A Correct.

18 Q You weren't able to do a survey on the properties
19 north of U.S.1; were you?

20 A We don't enter property unless we have an easement
21 or a right of access to a property. So ethically
22 speaking, I would not go on a property and do a
23 survey unless I had that property owner's
24 permission.

25 Q And I appreciate that. I take that as a no, you

1 did not?

2 A No, sir, I did not.

3 Q And I'm not faulting you for that. Maybe there was
4 a mechanism through the lawsuit that it could have
5 been done, but unless you've got permission, you
6 are not going on somebody's property to survey it;
7 correct?

8 A Correct.

9 Q So you had to use an alternative method of
10 determining the topography, and the way you did
11 that was to go to our Lexington County website
12 where they have topographical maps; correct?

13 A Yes, sir.

14 Q Do you know John Fechtel?

15 A Yes, sir.

16 Q If you go see John Fechtel and you talk to John,
17 who is with Lexington County Planning and
18 Development, you say, "John, do you have overhead
19 maps?" And John will spend the next hour and a
20 half of your time showing you what he has got;
21 won't he?

22 A If not the whole day, yes, sir.

23 Q Because he is proud of that; correct?

24 A Yes, sir.

25 Q Notwithstanding that, the topographical maps that

1 to germinate and then come up to become grass;
2 correct?

3 A Correct.

4 Q So until it comes up and becomes grass in a
5 sufficient cover to slow the storm water, dirt is
6 getting picked up by the storm water and is going
7 downhill; correct?

8 A Correct.

9 Q You mentioned yesterday and in the report you have
10 done for the drainage study that the rate of flow
11 exiting the S.C.D.O.T. pipe and entering line E was
12 65 cubic feet per second. That's a different
13 figure from what you mentioning today as far as the
14 87. Can you explain the difference between the
15 two?

16 A Yes, sir. The 65 C.F.S. is a peak rate coming
17 through that pipe at a single point in time. As I
18 said yesterday, the different sites peak at
19 different times.

20 Q Right.

21 A Therefore the water going through that pipe
22 underneath Highway 1 would peak at a different
23 time. With all of them coming together, they are
24 all going to peak at that peak that I calculated
25 without using -- the time it travel through pipes.

1 Again, I didn't have the pipes that are going
2 through. It plays a little factor in there.

3 Q Maybe you just answered a question in my mind. The
4 87 number you have arrived at is by adding the peak
5 rates of flow of everything, including Westside,
6 then reducing Westside's, and you got to an 87
7 number at that point. But that is the peak rate of
8 flow for all of these properties north of
9 Highway 1, some of which reached their peak rate of
10 flow at different times?

11 A Yes, sir. Without having the pipes that connect
12 all that, basically you are taking all those
13 watersheds and dumping it into that pipe at a
14 specific time.

15 Q Okay.

16 A And that 65 is what that is without having all the
17 pipes that are interconnected and that time of
18 travel calculation in there. It is what it is.
19 It's the best we can do with the information we
20 have.

21 Q And your calculations and the engineering formulas,
22 the best practice you followed, and to a reasonable
23 degree of engineering certainty, the number that
24 comes out of that pipe that goes onto U.S. Number 1
25 and enters line E is 65 cubic feet per second,

- 1 accounting for the different peak times; correct?
- 2 A Yes, sir. Again, just to clarify that, that is a
- 3 10-year storm.
- 4 Q Yes, sir.
- 5 A That's the storm that we used.
- 6 Q A 10-year, 24-hour storm?
- 7 A That's correct, yes, sir.
- 8 Q All right. Now, you are not -- there was some
- 9 discussion and we have talked about it for two days
- 10 about comparing C.M.P. or corrugated metal pipe
- 11 with reinforced concrete pipe. As an engineer, you
- 12 are not saying that corrugated metal pipe is the
- 13 functional equivalent of reinforced concrete pipe;
- 14 are you?
- 15 A No, sir.
- 16 Q As between the two, reinforced concrete pipe is
- 17 preferable; correct?
- 18 A A lot less leniency on the contractor to put it in.
- 19 In other words, it's got the structural
- 20 capability -- or concrete pipe has structural
- 21 capability. C.M.P. does not.
- 22 Q Okay.
- 23 A There is a lot less -- the bedding is not as
- 24 important on a concrete pipe as opposed to the
- 25 C.M.P. pipe. We don't recommend either pipe for

1 any application.

2 Q Right. You can install C.M.P. and put it in a
3 stone bed, and it's going to still be pretty good;
4 correct?

5 A Yes, sir.

6 Q But as far as an installation, it's harder to screw
7 up the installation of a reinforced concrete pipe;
8 isn't it?

9 A Yes, sir.

10 Q Let's talk about what an encroachment is. You have
11 done some work with D.O.T. or in conjunction with
12 D.O.T., possibly even adverse to D.O.T. You
13 understand that D.O.T. has a duty to keep its roads
14 safe and to keep surface water off its roads;
15 correct?

16 A Yes, sir.

17 Q You understand the concept of hydroplaning with a
18 vehicle; don't you?

19 A Yes, sir.

20 Q And one of the things D.O.T. has to do with its
21 roads is keep the water off the road; correct?

22 A Yes, sir.

23 Q And there has been some testimony of catch basins
24 for D.O.T. on Number 1. One of them is the catch
25 basin that enters and is connected to line E;

- 1 correct?
- 2 A Yes, sir.
- 3 Q But there is another catch basin across U.S.
- 4 Number 1, right across from the catch basin on the
- 5 north side; isn't there?
- 6 A Yes, sir.
- 7 Q And the reason for that is that D.O.T.'s roads are
- 8 crowned; aren't they?
- 9 A Yes, sir.
- 10 Q A straight road is crowned. If it's curving we
- 11 have got superelevation, but this is a straight
- 12 road. So it's crowned in the middle; isn't it?
- 13 A Yes, sir.
- 14 Q So water that falls on that road, half of it should
- 15 go in a southerly direction to the catch basin
- 16 adjacent to Westside Plaza; correct?
- 17 A Yes, sir.
- 18 Q But the other side should go to the north side,
- 19 that catch basin; correct?
- 20 A Yes, sir.
- 21 Q Now, it goes down into the catch basin and goes
- 22 into the same pipe and ultimately gets to the same
- 23 place, but you would concede and agree with me that
- 24 D.O.T. has an obligation to keep the water off its
- 25 roads?

1 A Yes, sir.

2 Q The way it does that is it crowns its road and
3 sends the water to the catch basins? That is one
4 way?

5 A That's one way, yes, sir.

6 Q You have looked at the -- let me ask you this: In
7 your file -- we had gotten your file at one point.
8 Do you remember my paralegal and I coming to your
9 office?

10 A Yes, sir.

11 Q You were very gracious and made it available, and
12 we looked at it. Do you remember that?

13 A Yes, sir.

14 Q In your file you had lot of documents with regard
15 to Westside Plaza, and one of them was a stakeout
16 plan of Westside Plaza. Do you remember that?

17 A Not sure on your terminology but if you show it to
18 me.

19 Q Let me show you what we have got. Westside
20 Plaza --

21 MR. FRAWLEY: And I have marked this as
22 Exhibit Number 39, I believe. Yes, Number 39. Your
23 Honor, it's in your package. It's a blowup.

24 BY MR. FRAWLEY:

25 Q Look at this a second and tell me if you recognize

1 that as being a document you reviewed that was in
2 your file?

3 A Yes, sir.

4 Q That is a document that was in your file and you
5 have reviewed that document?

6 A Yes, sir. It's nothing I produced. This came from
7 previous -- as shown on the date, 1987 -- but, yes,
8 sir.

9 Q And that's not something you created or you
10 authored?

11 A No, sir.

12 Q But you did review that and you reviewed that in
13 the context of your having been hired in this case
14 as an engineer; correct? Not in this case but by
15 Westside and throughout the course of your
16 involvement with Westside, you have had some
17 occasion to review that?

18 A Yes, sir. I'm not sure if I got it prior to being
19 involved with this or when I was doing -- when I
20 first got on site in 2005.

21 MR. FRAWLEY: Your Honor, we would like to
22 introduce this, but let me ask a few other things about
23 it.

24 BY MR. FRAWLEY:

25 Q In the lower right-hand corner, it says stakeout

1 plan. Tell me what a stakeout plan is. You said a
2 minute ago that you didn't understand what that
3 term meant.

4 A No, sir, I understand what a stakeout plan is. I
5 was not sure about the drawing. A stakeout plan is
6 what an engineer provides to a contractor to lay
7 out a piece of property or the development for the
8 contractor.

9 Q The stakeout plan shows the predevelopment
10 topography of the area; doesn't it?

11 A Yes, sir. That would be the squiggly lines you can
12 barely see.

13 Q And then the stakeout plan would show the proposed
14 development or the outlying drawing of the proposed
15 development?

16 A Anything proposed on that facility, the storm
17 water, building, parking lot, yes, sir.

18 Q That stakeout plan, Exhibit Number 39, shows all
19 that; doesn't it?

20 A Yes, sir.

21 Q Okay.

22 A I don't see any storm drainage pipe on there right
23 offhand, but, yeah. With the parking spaces,
24 that's the dimensions here and basically the layout
25 of the whole parking lot.

1 Q It does not show the storm drainage system; does
2 it?

3 A No, sir.

4 Q It shows the area in the upper right-hand corner
5 which was intended or is intended or has been the
6 detention pond. It shows that; doesn't it?

7 A Yes, sir.

8 Q It also shows the then existing catch basin for
9 S.C.D.O.T. adjacent to the middle driveway --
10 correct -- in this area (indicating)?

11 A It would be right here (indicating) at the
12 entrance. That would be the catch basin. That's
13 one of them, and then that's one of them right
14 there (indicating). It shows the existing catch
15 basin and it shows several catch basins on the
16 site.

17 MR. FRAWLEY: Your Honor, we would like to
18 introduce this as Defendant's Exhibit Number 39.

19 MR. McDONALD: We have no objection, Your
20 Honor.

21 MS. CLAYTON: No objection.

22 MR. QUINN: No objection.

23 MR. BOOTH: No objection, Your Honor.

24 THE COURT: Thirty-nine is in evidence without
25 objection.

1 (Defendant's Exhibit Number 39 is received
2 into evidence.)

3 BY MR. FRAWLEY:

4 Q Mr. Lambrecht, you can fold that up. Keep it there
5 because we will ask questions about it in a moment.
6 Go ahead and get it out of your way. I notice how
7 you are folding that. You showed me how engineers
8 actually fold their plans, and I have been using it
9 all week. I appreciate that.

10 Mr. McDonald asked you a question in the times
11 that you have dealt with encroachment permits,
12 applications for encroachment permits with D.O.T.,
13 and he asked you what an encroachment was.

14 If D.O.T. has an obligation to keep water off
15 of its road and if it has been depositing surface
16 water off a road into an undeveloped piece of
17 property for several years and then someone
18 proposes developing that property, if their
19 proposal in developing that property were to block
20 the surface water from going out of that catch
21 basin, that surface water would back up onto the
22 highway; wouldn't it?

23 A Yes, sir.

24 Q And that surface water backing up on the highway,
25 that surface water would be an encroachment;

1 wouldn't it?

2 A The surface water backing up would be an
3 encroachment, yes, sir.

4 Q So when someone is going to develop formerly
5 undeveloped property and they apply for an
6 encroachment permit, they not only have to ask the
7 D.O.T. for the driveways that they want to put out
8 there, which are an encroachment, but also they
9 have to make some proposal as to how we are going
10 to get rid of this surface water so this surface
11 water itself doesn't encroach. Is that a
12 reasonable interpretation of an encroachment in
13 that context?

14 A Any water that's coming onto your site from an
15 engineering standpoint, you have to make an
16 assessment on. You don't blockade that. In other
17 words, that goes into your calculation. Whether
18 it's coming from D.O.T. or a private owner or what
19 have you.

20 Q Okay.

21 A Yes, sir. I'm not sure if that goes into the
22 encroachment permit; however, there is a connection
23 there. I don't know exactly the connection, but
24 there is a connection.

25 Q As an engineer, you understand the common enemy

1 rule; don't you? You know what I'm talking about
2 with the common enemy rule?

3 A Yes, sir.

4 Q When you develop property, you understand as an
5 engineer that you can do pretty much whatever you
6 need to do with surface water, but there are by law
7 right now anyway two exceptions. You can't dam the
8 property, you can't back the water up on somebody
9 else's property, and you can't artificially divert
10 the flow of surface water and release it in
11 concentrated form on a downstream neighbor? You
12 understand that?

13 A I understand that from an engineering standpoint,
14 yes, sir.

15 Q Whether it's in the law --

16 A The legal standpoint, I'm not --

17 Q The only expert we have on the law in this
18 courtroom is sitting to your left over there.

19 A Yes, sir.

20 Q But when you are an engineer, when you do plans,
21 you try to account for that; don't you?

22 A Yes, sir, you have to account for that.

23 Q As we have developed, as Lexington County has
24 become less rural and more urban -- and the term
25 urban sprawl comes up -- that is becoming more and

1 more of a consideration; isn't it?

2 A Absolutely.

3 Q It was less of a consideration in 1987; wasn't it?

4 A Yes, sir.

5 Q But even in 1987, at least in August of 1987, when
6 Dayton and Associates sent its application for
7 encroachment permit, it included in its application
8 some provisions with how they were going to deal
9 with storm runoff coming from that existing catch
10 basin? They included that in there; didn't they?

11 A Yes, sir.

12 Q In including that, they indicated they were going
13 to put in 48-inch reinforced concrete pipe
14 connected to that existing catch basin; didn't
15 they?

16 A Yes, sir.

17 Q Now, in your experience as an engineer dealing with
18 the S.C.D.O.T., have you filled out applications
19 for encroachment permits?

20 A Yes, sir.

21 Q And submitted them to S.C.D.O.T.?

22 A Yes, sir.

23 Q Have you had drainage, storm drainage, provisions
24 in your proposals, your applications for
25 encroachment permits to S.C.D.O.T.?

1 A Yes, sir, but for traffic and for storm water.

2 Q Right. You are as thorough as you can be when you
3 send that stuff in; correct?

4 A Absolutely.

5 Q And you are as accurate as you can be when you send
6 that in; correct?

7 A Absolutely.

8 Q Have you ever told, in any of your applications for
9 encroachment permit, that you were going to put in
10 reinforced concrete pipe and then not done so?

11 A No, sir.

12 Q Let's look at Exhibit 39 again briefly. I would
13 mount it over here, but some of the lines I am
14 going to ask you about are fairly faint. It would
15 probably be better to be close to you.

16 And this (indicating) is pretty much the
17 section I am going to ask you about. The area
18 where the catch basin, the existing catch basin,
19 is. Is that where I'm pointing?

20 A Yes, sir.

21 Q And at the bottom there it says, "Exist. 48-inch --
22 I don't know what that is -- R.C.P. stub-out. Is
23 that what it says?

24 A Yes, sir.

25 Q What is a stub-out?

1 A A stub-out is an extension of a pipe out of the
2 catch basin for future connection.

3 Q We have talked about a type 9 catch basin and a
4 Florida-type catch basin and an existing catch
5 basin. What a catch basin is is basically a
6 concrete box with a top on it, and there are some
7 eight to ten inches horizontally where water can
8 run into that box; correct?

9 A Six to eight inches, yes, sir. There's many
10 different tops, but its object is to collect storm
11 water.

12 Q There can be different kinds of tops, but the top
13 is basically a concrete slab; correct?

14 A Yes, sir.

15 Q There may or may not be a manhole in there where
16 the manhole cover can be removed, and we can go
17 down there and clean it out sometimes; correct?

18 A By standards anything more than four foot has got a
19 top on it, steps in it so you can get in.

20 Q And the purpose for getting in is to get in and
21 possibly clean it out?

22 A Yes, sir.

23 Q Okay. When there is a stub-out, we have got this
24 box. A stub-out is a pipe on one side of that box
25 with a pipe that comes out and just hangs there?

- 1 A Yes, sir, usually two to four foot of sticker pipe
2 so somebody can connect to it.
- 3 Q And the idea behind that stub-out is at some point
4 somebody is going to develop that property and
5 somebody is going to connect to that pipe; correct?
- 6 A Correct.
- 7 Q That is pretty standard; isn't it?
- 8 A Yes.
- 9 Q So at that time according to this entry, an
10 existing 48-inch -- and what is the circle with the
11 line to it? What does that mean?
- 12 A Typically diameter.
- 13 Q And so existing 48-inch diameter R.C.P. -- that is
14 reinforced concrete pipe; correct?
- 15 A Correct.
- 16 Q And then it says stub-out. That means that the
17 stub that is coming out is reinforced concrete
18 pipe?
- 19 A Yes, sir.
- 20 Q From there water that comes under the road, that
21 dotted line that is just below that entry there, it
22 says, "Exist, period, 42-inch R.C.P." Correct?
- 23 A Yes, sir.
- 24 Q That would be the pipe that runs under --
- 25 A Highway 1.

- 1 Q -- Highway 1 from the catch basin on the other
2 side, on the north side of Highway 1; doesn't it?
- 3 A Yes, sir.
- 4 Q And it feeds into that junction box; correct?
- 5 A Yes, sir.
- 6 Q And then we've got the 48-inch in-diameter stub-out
7 out of which the outflow comes; correct?
- 8 A Yes, sir.
- 9 Q And once that water comes out of that outflow in
10 the topo lines that are shown here -- admittedly
11 very faintly -- that water would empty into a
12 drainage swale; correct?
- 13 A Yes, sir.
- 14 Q It wasn't developed at that point; was it?
- 15 A The dashed lines would indicate it's not developed,
16 right. That is correct. It would enter into a
17 swale.
- 18 Q And that swale --
- 19 A Or creek or whatever.
- 20 Q What is the engineering term?
- 21 A I guess a swale is a manmade area, where a creek is
22 a God-made or land-made, however you want to call
23 it.
- 24 Q I have been using the wrong term. Someone else has
25 referred to it as a creek. We will use that. It

1 is a depression?

2 A A depression, that's correct.

3 Q So the water would come out of the 48-inch pipe and
4 come into this depression, and then as water has
5 done so since God created the world, it flows
6 downhill; correct?

7 A Yes, sir.

8 Q And the different contours in here, however faint
9 they may be, up in the grocery store, we can see
10 one that says 270. Next to that it says 268, 266,
11 262. That means basically from the produce section
12 of the planned Bi-Lo down to the checkout area,
13 it's going downhill; correct?

14 A I'm not sure where the produce is but, yes, sir,
15 it's going downhill.

16 Q And the water would flow basically in a -- assuming
17 that south is to the top of this drawing, Exhibit
18 39, and west is to the right, that depression or
19 low area would flow to the southwest area of this
20 property; correct?

21 A It's pretty much true south, but, yes, sir.

22 Q Well, true south.

23 A It's going through the building.

24 Q In the grocery store, the numbers look like 270,
25 268, 266, 262. If you go to the upper right-hand

1 corner at the very top, those show the elevations
2 as 274, 272, 270, 268; correct?

3 A Yes, sir.

4 Q And would you agree with me that the topographical
5 lines, however faint they may be on Exhibit 39,
6 they indicate how this property was configured
7 before Dayton and Associates developed it?

8 A Yes, sir.

9 Q Now, have you done any kind of drainage studies
10 of what kind of water, what kind of rate of flow
11 came off the properties north of U.S.1 before
12 development?

13 A No, sir.

14 Q Mr. Richardson had testified yesterday that if
15 corrugated metal pipe is properly installed, it
16 should last -- one time he said 35 years. Another
17 time it was 40 years in a storm drain system. Do
18 you agree with those numbers?

19 A I think the life span on corrugated metal pipe is
20 15 to 35 years; depending on -- there is a range.
21 They don't give a specific year of life.

22 Q Okay. However long it lasts is dependent in large
23 part on how well it's installed; correct?

24 A How well it's built, how well it's installed, how
25 well it's sealed. There are a lot of factors

1 there.

2 Q You had a chance to look at this particular
3 corrugated metal pipe storm drain system; didn't
4 you?

5 A Interior wise through the course of video. I'm not
6 O.S.H.A. certified; so I didn't climb down and look
7 at it.

8 Q But you got a pretty good look at how it was
9 installed; didn't you?

10 A From the inside out I guess you would say.

11 Q And you noticed problems with the seams; correct?

12 A Yes, sir.

13 Q In fact, in the lines B, C, and D, the ones that
14 feed -- referring to Exhibit 85 here -- the ones
15 that feed the middle outflow into the detention
16 pond, that line actually goes under buildings;
17 doesn't it?

18 A Under the very corner of the building, yes, sir.
19 That's where I first was introduced to the site
20 with Tim looking at that point where the sinkhole
21 was.

22 Q And when you looked into that, you found some areas
23 that were kind of caved out or washed out around
24 the pipe; didn't you?

25 A Yes, sir.

1 Q And you were charged with the job of having to
2 somehow fix that, and you tried to figure out a way
3 to do that without digging up the buildings; didn't
4 you?

5 A Yes, sir.

6 Q And you figured out a way to put some kind of
7 plastic or foam or something in there that did the
8 job; didn't it?

9 A Yes, sir.

10 Q But you would agree with me, based on what you were
11 able to see, that the installation of this
12 corrugated metal pipe system was not a good
13 installation?

14 A I wasn't there. It had been in the ground for 17
15 years. And from what I saw with the sinkholes,
16 they occurred beside a catch basin, which more
17 indicates joint failure as opposed to pipe failure.
18 But all that played a part in it. I wasn't aware
19 of the installations. I don't know if I can answer
20 that correctly.

21 Q Okay.

22 A I didn't see anything that would differ that
23 opinion, I guess you would say.

24 Q You didn't see anything that would differ the
25 opinion that it was improperly installed?

1 A Correct.

2 Q You saw negative slopes out there; didn't you?

3 A We shot the individual catch basins and the
4 elevations from catch basin to catch basin, yes,
5 sir. There was a few pipes that were negative in
6 slope.

7 Q In fact, one of the negative slopes was the outlet
8 of the detention pond; wasn't it?

9 A Yes, sir.

10 Q That's all I have got. Thank you, sir.

11 THE COURT: Thank you. Thank you very much,
12 Mr. Frawley.

13 MR. BOOTH: Your Honor, Ms. Clayton is going
14 to go next. After she finishes I request that we recess
15 so I can set up my PowerPoint and also remove these. I
16 think it will work out time wise pretty good.

17 THE COURT: I will do that.

18 MR. BOOTH: Thank you.

19 THE COURT: Yes, sir.

20 CROSS EXAMINATION

21 BY MS. CLAYTON:

22 Q Good morning, Mr. Lambrecht.

23 A Good morning.

24 Q I represent Danwood, L.L.C. who is owner of the
25 Danwood Shopping Center. Yesterday Mr. McDonald

REDIRECT EXAMINATION

1
2 BY MR. McDONALD:

3 Q Working backwards, the question Mr. Quinn just
4 asked about the pond maintenance, that's a recent
5 development in detention ponds; is that right,
6 Mr. Lambrecht?

7 A Yes, sir.

8 Q And that would not have applied to the Westside
9 pond?

10 A From an engineering standpoint, we probably started
11 doing maintenance plans on any pond, five, six
12 years ago. Again, it was E.P.A. regulations passed
13 on to D.H.E.C.

14 Q So as I understand your testimony, that applies to
15 new pond construction as of five or six years ago
16 moving forward?

17 A Yes, sir.

18 Q Mr. Quinn asked you a lot of questions about the
19 encroachment permit. You were in the courtroom
20 Monday afternoon?

21 A Yes, sir.

22 Q And you heard Mr. Jeter publish excerpts from the
23 South Carolina D.O.T. 30(b)(6) deposition?

24 A Yes, sir.

25 Q And as we represented to the Court, that is the

1 official statement and position of S.C.D.O.T. Did
2 you hear the D.O.T.'s response to that, that
3 putting in R.C.P. on this property would not
4 invalidate the permit, the encroachment permit?
5 Did you hear that?

6 A Yes, sir.

7 Q Is that consistent with your experience of the
8 D.O.T.'s jurisdiction on private property?

9 A Again, in my experience D.O.T. can require the
10 placement of R.C.P. within their right-of-way.
11 Once they go outside of that right-of-way, then
12 that is not a requirement. They don't have the
13 authority to mandate that.

14 Q That brings up the question. Mr. Booth asked you a
15 question. If you will turn to Exhibit 3, which is
16 the application for encroachment permit for Center
17 Concepts. If you will look at page 5 of 6.

18 A All right, sir.

19 Q That's it. Page 5 of 6. Right on the north
20 symbol, there is a box with C.B. Is that catch
21 basin?

22 A Yes, sir.

23 Q And then there is -- was that a storm drain line
24 running to a -- where is it running to?

25 A It's running into the D.O.T. system there.

1 Q So that storm drain line is actually tying into the
2 D.O.T. system; is that right?

3 A Yes, sir.

4 Q And that would be, within at least in part, the
5 D.O.T. right-of-way; is that correct?

6 A Yes, sir.

7 Q Let's talk about silt for a minute. I know we
8 talked a lot about it, but I'm afraid maybe it got
9 muddled a little bit. Is one of the purposes of a
10 detention pond to treat and catch and collect silt
11 from storm water?

12 A Yes, sir. That's one of the main purposes, along
13 with slowing down the water or slowing down that
14 rate of flow of discharge.

15 Q That's one of the main purposes of a detention
16 pond? Is that what you said?

17 A Yes, sir.

18 Q So am I understanding you correctly as an engineer,
19 you are anticipating that any storm water that
20 enters pipes is going to be carrying silt?

21 A Yes, sir.

22 Q And if it doesn't come from new construction, where
23 does it come from?

24 A It can come from grass clippings when you cut the
25 grass. It can come from tires off of a car. It

1 can come from somebody throwing trash out, a lot of
2 different sources.

3 Q Can it come from parking lots?

4 A Yes, sir.

5 Q Does it come from parking lots in your experience?

6 A Yes, sir.

7 Q Could it come in this case from the Danwood parking
8 lot?

9 A Yes, sir.

10 Q Is it in your engineering opinion likely that it is
11 coming, part of it, in the Westside pond from the
12 Danwood parking lot?

13 MS. CLAYTON: Objection.

14 THE COURT: Your objection, Ms. Clayton?

15 MS. CLAYTON: Your Honor, Mr. Lambrecht
16 testified in testimony in a question in response to
17 Mr. Quinn's question that they have done absolutely no
18 analysis to determine where any of the silt is coming
19 from. So it would be purely speculative for him to say
20 that any of this is coming from Danwood. That has not
21 been part of his analysis.

22 THE COURT: Mr. McDonald.

23 MR. McDONALD: I am asking his opinion. These
24 attorneys all asked him repeatedly about silt, where
25 silt comes from. So I'm asking him in his opinion does

1 he believe --

2 THE COURT: They did ask him if he had done
3 any silt analysis. He clearly said he did not.

4 MS. CLAYTON: Right. So the witness cannot
5 express any opinion as to where that silt is coming
6 from.

7 MR. McDONALD: Your Honor, he has not done an
8 analysis as to quantity. I will not ask him about
9 quantity. I just wanted to ask him his opinion.

10 THE COURT: What would be the basis of his
11 opinion? You have got to lay a foundation if he has
12 done an evaluation of the silt in the detention pond.

13 MR. McDONALD: I will be happy to do it in
14 that regard.

15 THE COURT: If you can lay a foundation.
16 Right now the objection is sustained.

17 BY MR. McDONALD:

18 Q Mr. Lambrecht, as part of your engineering duties
19 in designing storm water systems, do you have to
20 account for silt being in storm water?

21 A Yes, sir, we do. I think that is part of that
22 maintenance agreement on ponds. Part of that --
23 you can pull it off of the D.H.E.C. website -- but
24 it's maintaining silt out of the pond.

25 So it's regularly seen, as well as when you do

1 a development from scratch and design that pond,
2 you have to do a sediment calculation to show that
3 you are removing sediment from the system.

4 So sediment can be generated from any site,
5 whether it be construction or more. What I
6 testified earlier was the majority of sediment is
7 coming through the system while you are disturbing
8 earth. In other words, new construction is a
9 source of sediment.

10 Q Let me ask you about new construction. New
11 construction in today's world, can you discharge
12 silt off the site?

13 A I think we are regulated. You have to remove at
14 least 80 percent of silt off site. Whether it be a
15 natural drainage system or any system, it's hard to
16 100 percent remove system sediment out of a system.
17 The pond is built into the system to help do that.

18 Q If I am building a new construction site right now
19 on Highway 378, can I discharge silt off my site?

20 A In the calculation, again, you have to remove the
21 80 percent. You have to have an 80 percent
22 efficiency. So in essence they don't want you to
23 discharge sediment from your site. It's inevitable
24 that it catches up in storm water and gets down
25 there, but it's 80 percent of it.

1 Q Now, getting back to your -- is it standard
2 engineering practice in designing a storm water
3 system, such as Westside, and designing a detention
4 pond, is it standard engineering practice that you
5 are going to have to account for silt in the storm
6 water coming into that system?

7 A Yes, sir.

8 Q So when these systems are designed, do engineers
9 have to figure out and account for the fact that
10 within that storm water, there is going to be silt
11 and sediment?

12 A Yes, sir.

13 Q That's, as you told me, one of the purposes of a
14 detention pond; correct?

15 A Yes, sir.

16 Q So engineers understand, recognize, and in fact
17 design for silt --

18 MR. FRAWLEY: Objection to leading, Your
19 Honor.

20 BY MR. McDONALD:

21 Q Do engineers plan for and design for silt coming
22 into a detention pond?

23 A Yes, sir.

24 Q Excuse me?

25 A Yes, sir.

1 Q And what are some of the sources of where that silt
2 can come from?

3 A Again, new construction, turning over dirt, any
4 kind of impervious surface.

5 Q Any kind of impervious surface such as what?

6 A Roofs, parking lots. Most roofs are made out of
7 asphaltic materials that has silt that runs off of
8 that. So silt is considered any kind of trash and
9 anything coming off of there.

10 Q In fact, you said in response to a question a
11 minute ago that the C.M.P. is corrugated in order
12 to get the silt out of the water; correct?

13 A That's correct. It's also corrugated for
14 structural capabilities, but that churning is
15 really built to move sediment downstream.

16 Q Correct me if I'm wrong, engineers understand that
17 inherent in storm water drainage is dealing with
18 the silt; is that correct?

19 A Yes, sir.

20 MR. BOOTH: Your Honor, I would like to object
21 to this line of questioning. I have let it go on for a
22 little while. That's not part of their case.

23 MR. McDONALD: It is in terms of the
24 maintenance of the pond and accounting for silt removal
25 at the detention pond.

1 MR. BOOTH: That's not what they have asked
2 for in this case.

3 MR. McDONALD: Yes, sir, Mr. Booth, it's part
4 of --

5 THE COURT: Let me hear from you, Mr. Booth.
6 I thought we had been talking about silt for a while.

7 MR. BOOTH: Yes, sir. I don't disagree with
8 that. They are asking for payment for expenses that
9 have already been incurred. So I don't know whether he
10 is talking about -- I mean, that was a big pipe that was
11 put in the ground. We know that.

12 So I just don't know -- we are just talking
13 about being responsible for paying that expense. That's
14 a done expense so to speak. I just don't know why we
15 are talking about silt coming into that detention pond
16 in the future.

17 THE COURT: I guess what I'm hearing is that
18 you are saying if he can hook up that silt that came
19 from one of these defendants off site that went into the
20 system that caused the damages --

21 MR. BOOTH: But they are not asking for
22 damages in this case.

23 THE COURT: For the payment of the
24 maintenance.

25 MR. BOOTH: It was a one-time clean-out they

1 are asking for. They are not asking for future -- they
2 are not asking that this Court say that next week, for
3 example, my client has to pay a portion of whatever it
4 costs to remove silt. That's not part of their case.
5 That's my point.

6 THE COURT: Yes, sir.

7 MR. McDONALD: Your Honor, obviously we have
8 introduced evidence of the costs incurred to clean out
9 the pond, which is removing silt. One of these
10 attorneys asked Mr. Richardson at length about the pond
11 and the silt that had to be removed out. So that's --
12 part of our case is we have had to maintain that pond
13 and remove silt. So that's why I believe this is
14 relevant.

15 MR. BOOTH: I just thought his last few
16 questions were talking about this silt in general from
17 these sites and how it could be generated.

18 THE COURT: I think his last few questions
19 were talking about silt in general as to this witness --
20 how, an engineer, in designing the system, he deals with
21 that. I agree with that in that regard. I assume
22 Mr. McDonald is attempting to lay a foundation for
23 perhaps other questions. I don't know that.

24 MR. BOOTH: I am just trying to focus on what
25 they are asking for in this case, and I just feel like

1 that was going -- again, what is generally the
2 situation, certainly he can ask him those. I just
3 didn't know how it related to this case. That's why I
4 stood up.

5 THE COURT: Thank you, Mr. Booth. Mr. Quinn.

6 MR. QUINN: Yes, sir, I would object too, Your
7 Honor. What my concern is one of the lawyers has
8 already described the theory of this case as a moving
9 target.

10 I'm not sure what the plaintiffs are asking
11 for in this case, whether they are asking that a
12 continuing obligation to maintain their property rests
13 on anybody they is using it? I'm not sure that is not
14 what they are asking for. That concerns me. I think we
15 need to know that.

16 THE COURT: I thought initially they were
17 asking for equitable distribution of that portion of the
18 \$325,000 that has not been paid. That's an "I thought."

19 MR. QUINN: No, I thought so too, Your Honor.

20 THE COURT: That's what I heard. I'm not
21 saying that's right.

22 MR. QUINN: I think that target is moving.

23 MR. MCDONALD: That target has not moved an
24 inch, Your Honor.

25 THE COURT: That's what I thought they were

1 asking for, is wherever those figures are at right now.
2 It's less than the 325,000 because there were other
3 defendants. That's my understanding.

4 MR. McDONALD: That's correct.

5 MR. FRAWLEY: It has flowed incrementally,
6 Your Honor. It's not necessarily moving anymore, but it
7 has moved downstream.

8 MR. BOOTH: I have seen no amendment of the
9 claim. They talk about other parties paying and the
10 figure being less. I have just seen no amendments. I
11 have seen no numbers put in, other than the original
12 invoices which add up to over 300.

13 So that's the only reason I am making that
14 objection. I just don't see quite where we were going
15 with this silt question as far as the relevance to the
16 case.

17 MR. McDONALD: We can certainly introduce
18 evidence as to the other parties, but I don't believe
19 that would be appropriate. The Court could account for
20 that outside, but if Mr. Booth wants to hear evidence
21 about what the non-parties that are no longer here have
22 done, we can do that.

23 THE COURT: I think what I'm hearing at least
24 is the defendants are concerned that the target may not
25 be moving, but y'all may be shooting a higher caliber

1 ammunition is perhaps what they are saying. I'm not
2 exactly sure, but I still took it that it was the
3 request for the equitable distribution of costs of
4 repairs.

5 MR. JETER: Costs to date, Your Honor. We are
6 not asking for any future costs in this litigation.

7 THE COURT: That's what I took it as
8 Mr. Booth --

9 MR. BOOTH: Costs to date, right.

10 THE COURT: -- and anything beyond that, your
11 objection, of course, is sustained. Now, I will circle
12 back. I thought he was attempting to lay a foundation
13 to ask some other questions of our engineer.

14 I use the word "our" and "their." I mean the
15 witness, not my engineer. It's a generic term
16 concerning the upstream landowners. You may ask your
17 next question.

18 BY MR. McDONALD:

19 Q So before we had that discussion, Mr. Lambrecht,
20 you confirmed that engineers do, in fact, in
21 designing storm drain system have to account for
22 silt coming in that system; correct?

23 A Yes, sir.

24 Q And you were talking about where that silt could
25 come from, and you said potentially new

1 construction; is that right?

2 A Yes, sir.

3 Q And did you say that it could come from the road in
4 which cars travel?

5 A Yes, sir.

6 Q And did you say that it could come from parking
7 lots where cars park?

8 A Yes, sir.

9 Q And did you say that it could come potentially from
10 roofs on top of buildings that drain into systems?

11 A Yes, sir.

12 Q And we see here we have all those conditions in the
13 Westside watershed; don't we, Mr. Lambrecht?

14 A Yes, sir.

15 Q Are you aware of any new construction within the
16 last five years within this watershed?

17 A No, sir.

18 Q So would it be reasonable to conclude that if the
19 silt -- is silt coming into the detention pond at
20 Westside through line E?

21 A Yes, sir.

22 Q And in your opinion where are the sources of that
23 silt coming from?

24 MS. CLAYTON: Objection, Your Honor.

25 MR. BOOTH: Your Honor, I object to that too.

1 MS. CLAYTON: The witness still has not
2 testified that he has conducted any type of silt
3 analysis. Silt analysis is available, and the plaintiff
4 could have had that analysis performed, but they chose
5 not to.

6 This witness only conducted a storm water
7 drainage analysis on storm water.. He cannot testify as
8 to where any of this silt could have come from in the
9 pond because that analysis has not been performed.

10 MR. BOOTH: Same objection. She said the same
11 thing I was going to say.

12 THE COURT: Sustained.

13 MR. McDONALD: Your Honor, I will not ask him
14 how much. I am just asking him from where. Their
15 objections relate to how much. I think I have laid the
16 foundation.

17 He has certainly established silt is in storm
18 water. Silt is in line E. We know what drains into
19 line E. So I'm not asking him to apportion, and we
20 don't have that information. I am not going to ask him
21 that.

22 MS. CLAYTON: Your Honor, I object to any
23 apportionment, but I also object to any testimony as to
24 where it comes from because that is the very purpose of
25 silt analysis.

1 THE COURT: I sustain the objection.

2 MR. McDONALD: Thank you, Your Honor.

3 BY MR. McDONALD:

4 Q Without respect to where it's coming from, is it
5 your opinion there is silt in storm drain line E?

6 A Yes, sir.

7 Q We know that line E accepts water, storm water,
8 from the D.O.T.; correct?

9 A Yes, sir.

10 Q At the catch basin?

11 A Yes, sir.

12 Q And I believe we know from your prior testimony,
13 engineers know that inherent in storm water, it
14 carries silt; is that right?

15 A Yes, sir. Now, I don't know of a calculation that
16 you can pinpoint where the silt comes from. I
17 don't know of an analysis that you can do other
18 than sampling the water.

19 Q So once it gets in the pipe here, you can't tell
20 whether it came -- that dirt came from Danwood or
21 whether it came from Alpine or whether it came from
22 Zaxby's? That's what you are saying; right?

23 A That's correct.

24 MS. CLAYTON: Objection, Your Honor. He is
25 still going down the same line of questioning in a

1 different manner trying to get the witness to testify as
2 to where the silt has come from. There is absolutely no
3 evidence before the Court that a silt analysis has been
4 performed.

5 MR. BOOTH: Of course, and it's highly
6 circumstantial the way it is being brought forward
7 by counsel. It's very circumstantial. I just think
8 that that should not be allowed for determining the
9 costs that were incurred.

10 THE COURT: The last answer -- let me make
11 sure I understand his last answer. He said, "I can't
12 tell where the silt is coming from." That's his
13 answer.

14 MR. BOOTH: Right.

15 THE COURT: "The silt in the pond, I don't
16 know where it came from." So y'all have objection to
17 that?

18 MS. CLAYTON: No, Your Honor.

19 MR. BOOTH: No, but he asked him -- he has got
20 all these businesses and everything else. He is trying
21 to put words in his mouth.

22 MR. McDONALD: Let me ask my question,
23 Mr. Booth.

24 THE COURT: I think I understand. I think I
25 understand Mr. McDonald is trying to lay a foundation,

1 but the evidence in the record right now, as far as that
2 answer is, "I don't know where that silt came from." I
3 think that is the answer.

4 MR. McDONALD: Your Honor, I would just point
5 out that there has been ample testimony by way of cross
6 examination of silt in the pond and silt should be
7 removed from the pond.

8 There are certainly inferences that we
9 aren't -- should have done more to remove silt from the
10 pond. It seems a little inconsistent that we shouldn't
11 be able to show, at least for purposes of -- that it's
12 coming through line E, I think.

13 THE COURT: But an expert has to perform
14 analyses or tests or look at data. A lot of times they
15 will come up here -- and I hate to use these terms --
16 but dump data on the experts and say, "Did you review
17 all these records?"

18 "Yes."

19 "Based on these records, have you formed an
20 opinion?"

21 He is an expert civil engineer, but he has not
22 looked at that data. He has not performed those tests.
23 That's the objection of Danwood. That's the objection
24 of D.W. I sustain that objection.

25 MR. McDONALD: Yes, sir.

1 BY MR. McDONALD:

2 Q Mr. Lambrecht, have you -- you have been to the
3 detention pond at Westside; correct?

4 A Yes, sir.

5 Q And there was cross examination questions, I
6 believe from one of these lawyers, about you put in
7 a report that the detention pond had silt in it;
8 correct?

9 A Yes, sir.

10 Q So you personally observed silt in the Westside
11 Plaza detention pond?

12 A Yes, sir.

13 Q Did you personally observe silt in the vicinity of
14 the discharge of line E in the detention pond? Did
15 you personally observe any silt located in this
16 area here (indicating) in the detention pond?

17 A Yes, sir.

18 MR. BOOTH: Your Honor, is it all right if I
19 come forward?

20 THE COURT: Yes, sir.

21 MR. McDONALD: I am pointing in the discharge
22 of line E.

23 MR. BOOTH: I will sit up here so I can see.

24 MR. FRAWLEY: Referring to Exhibit 85?

25 MR. McDONALD: Referring to Exhibit 85.

1 BY MR. McDONALD:

2 Q You saw that, Mr. Lambrecht?

3 A Yes, sir.

4 Q Is it your opinion that that silt came out of --
5 without speculating where it entered -- but that it
6 came out of the discharge of this line E?

7 A Yes, sir. I have seen silt across the entire
8 detention basin, as well as in front of line E.

9 Q Is it your engineering opinion that silt has
10 entered this pond from the discharge point at line
11 E?

12 A Yes, sir.

13 Q And we know through your testimony yesterday that
14 at least part of that water, storm water, comes
15 from Westside; correct?

16 A Yes, sir.

17 Q And as you said, the rest of the storm water comes
18 upstream?

19 A Yes, sir.

20 Q Now, I think it might have been Mr. Quinn who was
21 asking you questions about the D.O.T. and rights of
22 way. Do you do any design work associated with
23 D.O.T. projects?

24 A Yes, sir.

25 Q And do you make recommendations to the D.O.T. of

1 what area they might need to acquire for the
2 roadway design?

3 A Yes, sir.

4 Q Do you make recommendations to the D.O.T. for what
5 area they might need to acquire for any storm drain
6 purposes?

7 MR. FRAWLEY: Your Honor, I will object to
8 this line of questioning. He was in high school in
9 1987. Whatever he does now has nothing to do with what
10 took place in 1987. I object on the grounds of
11 relevance.

12 THE COURT: I think they has come in both
13 ways, of course. What is done now is not relevant to
14 '87.

15 MR. McDONALD: I will move on from that, Your
16 Honor, in the interest of moving on.

17 BY MR. McDONALD:

18 Q Now, Mr. Booth asked you some questions about the
19 maps you used to perform your analysis?

20 A Yes, sir.

21 Q He referred to tax maps. But tell us where you
22 went to get these maps that you used.

23 A Again, I went to Lexington County website,
24 www.lex-co.com. They have several different
25 mapping programs on there. I think most of the

1 maps I printed out were maps where you can actually
2 zoom into a property.

3 You click on the property. It references the
4 deed and the tax map number and all that on there.
5 Some of them provide pictures, but mainly I printed
6 straight off that website.

7 Q Do those maps have topographical information on it?

8 A Yes, sir.

9 Q So you don't really know whether they came from the
10 Assessor's Office or not? You got them off the
11 computer?

12 A Yes, sir.

13 Q Is that information that you normally use in your
14 engineering functions?

15 A Every day in engineering, as well as personal life
16 as well too, yes, sir.

17 Q Engineers in civil site design rely on these types
18 of maps; is that right?

19 A Yes, sir.

20 Q They rely on them in performing design?

21 A In performing due diligence and performing design,
22 yes, sir.

23 Q You were asked by one of the lawyers -- I don't
24 remember -- if you knew where the water was going
25 once it left Westside. Do you remember that?

1 A Yes, sir.

2 Q You weren't sure whether it went into Walmart's
3 retention pond or not; right?

4 A That's correct.

5 Q Do you know whether or not this water flows into
6 this pond (indicating)? I think somebody mentioned
7 Hite's pond. Does it flow into that pond?

8 A Based on the contours, no, sir. That pond is
9 upstream. That pond discharges to the west and
10 then eventually to the south, where Westside Plaza
11 discharges to the south, as well as Walmart
12 discharges to the south.

13 Q If I am understanding, when it leaves here, the
14 pond that has been mentioned is up here
15 (indicating)?

16 A It's further down Dreher.

17 Q So would that be correct, it's upstream from the
18 discharge at Westside?

19 A Yes, sir.

20 Q Since you have been involved -- and I am just
21 asking your knowledge -- have you ever been alerted
22 to any complaints by any downstream properties
23 regarding the discharge from the Westside pond?

24 A No, sir.

25 Q I started out yesterday -- and I won't be long,

1 Your Honor, but I want to revisit briefly based on
2 some questions on cross -- you were asked or what
3 were you asked to do in terms of your analysis of
4 the flow into the Westside system?

5 A I was asked to do research and do drainage
6 calculations to see who was draining into Westside
7 Plaza, specifically line E.

8 Q Were you asked to determine, as best you could, how
9 much water was coming from these respective
10 properties?

11 A Yes, sir.

12 Q And did anybody define the criteria for you to use
13 in doing that analysis?

14 A No, sir.

15 Q You made those decisions based on your engineering
16 judgment?

17 A Yes, sir.

18 Q And do you believe those were sound decisions that
19 you made?

20 A Yes, sir.

21 Q Do you believe that the procedure that you followed
22 is an accurate, reasonably accurate, method of
23 answering the question put you to: Where is the
24 water coming from and how much?

25 A Yes, sir.

1 Q There is more than one way to skin a cat; isn't
2 there, Mr. Lambrecht?

3 A Yes, sir.

4 Q You could have used other criteria?

5 A Yes, sir.

6 Q But, again, do you believe that the way you did it
7 was a sound engineering method?

8 A Yes, sir. We were trying to get flow through a
9 pipe going into a pond. That's what I calculated,
10 what flows were coming off each property.

11 Q You were asked by one of the attorneys about the
12 useful life of corrugated metal pipe. Do you
13 remember that?

14 A Yes, sir.

15 Q You discussed some factors that might contribute to
16 that. Do you remember that?

17 A Yes, sir.

18 Q Would it matter to you what was coming into that
19 pipe. Would that factor into the life of the pipe?

20 A Yes, sir.

21 Q If, for instance, corrosive liquids were coming
22 into that pipe, could that shorten the useful life
23 of the pipe?

24 MR. BOOTH: I object mainly because that has
25 been deleted from their complaint, any discussion about

1 pollutants. That was taken out almost two years ago.
2 He is asking him to talk about pollutants within water
3 such that would it impact how he designs the pipe.

4 MR. McDONALD: I am asking an "in theory"
5 question here.

6 THE COURT: I thought there were questions
7 that came along earlier about oil in parking lots, cars,
8 and such like that. They were perhaps asked by one of
9 the attorneys for one of the defendants. I'm not
10 exactly sure --

11 MR. FRAWLEY: I did, Your Honor.

12 THE COURT: In that regard I think he can
13 follow-up on that, Mr. Booth. That was asked on cross.

14 MR. BOOTH: He was asking for an opinion
15 different from other -- is there oil on the parking
16 lot.

17 THE COURT: Rephrase your question.

18 BY MR. McDONALD:

19 Q My question was you testified in response -- and I
20 think Mr. Frawley volunteered -- about things that
21 could lead to the deterioration of the corrugated
22 metal pipe?

23 A Yes, sir.

24 Q And my question to you is could -- if corrosive
25 liquid was entering a corrugated metal pipe, could

1 that lead to the deterioration of the pipe?

2 A Yes, sir.

3 Q Could that lead to the rusting out of the pipe?

4 A Yes, sir.

5 MR. McDONALD: No further questions, Your
6 Honor.

7 THE COURT: How long will you be, Mr. Frawley?

8 MR. FRAWLEY: Briefly, Your Honor.

9 RECROSS EXAMINATION

10 BY MR. FRAWLEY:

11 Q Mr. Lambrecht, you testified that in your
12 experience, D.O.T. will come on site now. You
13 mentioned Mr. Blakely would come sometimes. That
14 is your experience now; correct?

15 A Yes, sir.

16 Q But, again, in 1987 you were in high school;
17 weren't you?

18 A Yes, sir.

19 Q So you don't know what D.O.T.'s practice was in
20 1987 after it received this encroachment permit
21 application that said reinforced concrete pipe was
22 going to be installed. You don't know that; do
23 you?

24 A No, sir.

25 Q One of the questions that Mr. McDonald asked you

1 toward the end of his redirect was he asked you a
2 "how much" question. How much is a question that
3 elicits a volume response; isn't it?

4 A Yes.

5 Q How much is volume; correct?

6 A Yes, sir.

7 Q You haven't testified to any volume of storm water;
8 have you?

9 A No, sir.

10 Q You are testifying to the rate of flow; correct?

11 A Yes, sir.

12 Q So when the questions were asked of you, "how
13 much," the responses you are giving are not the
14 volume of storm water, it's really the rate of flow
15 that you have testified to; correct?

16 A Yes, sir.

17 Q Now, with regard to D.O.T. visiting the site --
18 Mr. Blakely does know you said -- if Dayton and
19 Associates had told D.O.T. in its application for
20 permit in 1987 that it was going to put reinforced
21 concrete pipe in the ground, D.O.T. should have had
22 an ability to rely on what they told them they were
23 doing; correct?

24 MR. JETER: Your Honor, I think this is
25 contradicting.

1 THE COURT: If Mr. McDonald wants to make the
2 objection.

3 MR. McDONALD: Yes, sir, Your Honor. I
4 believe this is an attempt to contradict the testimony
5 of S.C.D.O.T. in the 30(b)(6) deposition.

6 MR. FRAWLEY: No, it isn't. In his 30(b)(6)
7 he --

8 THE COURT: He is not trying to impeach a
9 witness not on the stand. He is trying to ask --

10 MR. McDONALD: Maybe I misunderstood the
11 question.

12 THE COURT: Maybe I am too.

13 MR. McDONALD: I withdraw the objection.

14 BY MR. FRAWLEY:

15 Q If Dayton and Associates told the D.O.T. in its
16 application for encroachment permit in 1987, as
17 they did if you look at Exhibit 1, that they are
18 going to install reinforced concrete pipe in the
19 ground in this drain system, D.O.T. should have
20 been able to rely on them telling them that;
21 shouldn't they?

22 A Yes, sir.

23 Q Isn't that your practice? When you do an
24 encroachment permit application and you say in
25 there you are going to do reinforced concrete pipe,

1 you do what you say you are going to do; don't you?

2 A Well, sir, with the professional engineer behind my
3 name, if I say something, I have to say it under
4 that license, yes, sir. What I put on a piece of
5 paper that has a seal on it, absolutely.

6 Q You are not testifying that the only reason you
7 follow through truthfully with what you said you
8 were going to do is because you have got a P.E. at
9 the end of your name? You are not saying that; are
10 you?

11 A No, sir. It's an ethical organization. I have to
12 or I can lose my license. If I sign something
13 saying I am going to do something, yes, absolutely.

14 Q But D.O.T. should have been able to rely on -- when
15 someone represents to them that they are going to
16 do something, D.O.T. should have been able to rely
17 on that; shouldn't they?

18 A Absolutely.

19 Q One of the questions that Mr. McDonald asked you
20 is: Are you aware of any new construction that has
21 been done in the last five years, and you indicated
22 that you weren't; correct?

23 A Yes, sir. I was not talking about -- I was talking
24 about new construction in the sense of a new
25 project.

1 Q Right, talking about building something new when
2 there was nothing there before.

3 A Yes, sir.

4 Q You are not talking about digging up old reinforced
5 concrete pipe and replacing it with -- I'm sorry --
6 old corrugated metal pipe and replacing it with
7 reinforced concrete pipe?

8 A I was more referring to a new site, new in-place
9 site. Construction practices --- I think what you
10 are referring to is that silt comes from
11 construction practices; absolutely.

12 Q Sure. Silt could have come from line E, from the
13 repair to line E?

14 A Yes, sir.

15 Q I think you indicated -- for the record I am
16 purposefully speaking in a slower meter for the
17 court reporter.

18 COURT REPORTER: I cry fowl, Judge.

19 BY MR. FRAWLEY:

20 Q With regard to the detention pond, you visited the
21 detention pond recently; correct?

22 A Yes, sir.

23 Q And when you visited it, you saw a silt screen
24 there; didn't you?

25 A Yes, sir.

- 1 Q That silt screen is in front of the middle of the
2 three outflows into the detention pond; isn't it?
- 3 A Yes, sir.
- 4 Q Which is the outflow from line B, C, and D;
5 correct?
- 6 A Yes, sir.
- 7 Q Not line E?
- 8 A Yes, sir.
- 9 Q You didn't see a silt screen in front of line E;
10 did you?
- 11 A I did not. Again, I was not looking for that silt.
12 I think it was brought to my attention and shown
13 the location. But, yes, sir, that is in front of
14 lines B, C, and D.
- 15 Q But you as an engineer, you have been down in
16 detention ponds a bunch; haven't you?
- 17 A Yes, sir.
- 18 Q That's part of what you do; correct?
- 19 A Yes, sir.
- 20 Q And you know what a silt screen looks like?
- 21 A Absolutely.
- 22 Q And the only silt screen you saw in this detention
23 pond was in front of lines B, C, and D; correct?
- 24 A Yes, sir, actually up above the discharge of B, C,
25 and D on the hill.

1 Q The corrosive liquid that could have an adverse
2 effect on corrugated metal pipe, that wouldn't have
3 the same corrosive effect on reinforced concrete
4 pipe; would it?

5 A No, sir.

6 Q And I know you were in high school in 1987, but in
7 1987 would surface water coming off asphalt-based
8 shingles, asphalt-based parking lots, an
9 asphalt-based road and entering into an system,
10 would that have been corrosive in 1987, as it is
11 now in 2011?

12 A Yes, sir.

13 Q Thank you, sir.

14 MS. CLAYTON: No questions, Your Honor.

15 THE COURT: Thank you very much, Ms. Clayton.

16 MR. BOOTH: I have a couple of questions, Your
17 Honor.

18 RECROSS EXAMINATION.

19 BY MR. BOOTH:

20 Q The drainage analysis work that you did where you
21 mentioned you determined the peak rate of flow
22 coming underneath Highway 1, what was that number
23 one more time?

24 A Sixty-five.

25 Q Right. Now we know that line E, at least all but

1 MS. CLAYTON: That's fine.

2 THE COURT: Thank you very much for being with
3 us. I appreciate. We will take a luncheon recess until
4 about 2:30.

5 (Whereupon there is a luncheon recess.)

6 THE COURT: Before we begin this afternoon,
7 just a couple of things. I do need to quit at 5:00 p.m.
8 today. I have a commitment I have to attend to. So mid
9 sentence, mid word, I have got to quit at 5:00 o'clock
10 today for your planning purposes. Also -- where is
11 Mr. Quinn? I sensed somebody wasn't present.

12 (Pause.)

13 THE COURT: I was just telling them,
14 Mr. Quinn, that I need to adjourn court at 5:00 p.m.
15 today. I have a commitment this afternoon I have to
16 attend to.

17 Maybe you can give me some comp time for going
18 to Westside Plaza yesterday after court. It was about
19 an hour and 15 minutes. Sometime memory lane is a
20 little bumpy too.

21 That's the other thing I did want to put on
22 the record. I did go down there yesterday afternoon,
23 both Westside Plaza, across the street at Danwood, Wade,
24 Alpine, Zaxby's, all that general area. I didn't go
25 down Danwood. It has been a while since I have been

1 down Danwood Drive only because of the traffic.

2 With that being said, you may call your next
3 witness, Mr. Jeter.

4 MR. JETER: Your Honor, the last thing we need
5 to do in the plaintiff's case is I have a stipulation
6 that I would like to enter.

7 THE COURT: All right.

8 MR. JETER: It concerns letters that were sent
9 on May 21, 2008, to D.W. Properties, to Danwood. They
10 were also sent to Alpine and Denton at the correct
11 address, but Alpine and Denton do not recall receiving
12 them. They do acknowledge that were sent to the correct
13 address. The other two acknowledge receiving these
14 letters.

15 MR. QUINN: No, we don't acknowledge -- Alpine
16 and Denton don't acknowledge that they were sent to the
17 correct address. We acknowledge that the copy says that
18 we have seen today, and that's all we know.

19 MR. JETER: The letter stated that, "Our
20 client -- it was written by us to the clients. We
21 didn't know who their lawyers were at the time -- "Our
22 client has reason to believe you are discharging storm
23 water in the D.O.T. system, which then discharges into
24 the Westside Plaza system.

25 "Your discharge carries with it an obligation

1 to contribute to the maintenance of the Westside system.
2 Recently owner has undertaken a large maintenance
3 project to replace the line which serves the D.O.T.
4 system."

5 Your Honor, I'm not reading every word of
6 this. I am just going to give you the gist of what was
7 in the letter.

8 THE COURT: What is the date of it?

9 MR. JETER: May 21, 2008.

10 THE COURT: All right.

11 MR. JETER: "As mentioned earlier, repairs to
12 the system are currently underway. If you wish to have
13 an engineer or other representative observe the repairs
14 and evidence of problems, then you are invited to
15 contact Ms. Dana McCall of Ideal Construction -- at a
16 number. She will arrange access to the sight.

17 "My client would prefer to avoid litigation
18 and is willing to listen to any reasonable offer to
19 resolve this work or any responsible explanation of why
20 you are not responsible for any of the maintenance costs
21 for pollution of the system."

22 THE COURT: Thank you. Let me make sure I
23 understand. Danwood and D.W. agree that the letter was
24 received?

25 MR. BOOTH: Say, within five days of the date,