

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS

Joseph M. Strickland, Master-in-Equity Judge

Appellate Case No. 2018-001156

RECEIVED

FEB 19 2019

SC Court of Appeals

Quality Lawn Care and Landscaping, Inc. d/b/a Design South Landscape Co.....Appellant,

v.

Coogler Construction Company, Inc.,.....Respondent.

RECORD ON APPEAL

VOLUME I

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STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Civil Action No. 2016-CP-40-00642

Quality Lawn Care and Landscaping, Inc.,)
d/b/a Design South Landscape Co.,)

Plaintiff,)

vs.)

Coogler Construction Company, Inc.,)

Defendant.)

CONSENT
ORDER TO REFER THE MATTER
TO THE MASTER-IN-EQUITY

JEANETTE W. MCBRIDE
C.D. 2 G.S.

2016 MAY 11 AM 10:36

RICHLAND COUNTY
FILED

The Parties, by and through their undersigned counsel, have moved this Court to refer the above-captioned matter to the Richland County Master-in-Equity, with appeal to the Court of Appeals.

It appearing that the Parties are in agreement, and that good cause exists, the matter should be referred to the Richland County Master-in-Equity.

ACCORDINGLY, IT IS ORDERED that the above matter is hereby referred to the Master-in-Equity with direct appeal to the Court of Appeals.

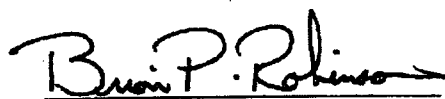
AND IT IS SO ORDERED.

May 4, 2016


Alison Renee Lee
Chief Administrative Judge
Fifth Judicial Circuit

WE SO MOVE AND CONSENT:


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5/2/16

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP4000642

Quality Lawn Care and Landscaping Inc et al
PLAINTIFF(S)

Coogler Construction Company Inc
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Order To Restore

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/25/2018 .

Design South Landscape Co
Quality Lawn Care and Landscaping Inc

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCF.



Richland Common Pleas

Case Caption: Quality Lawn Care and Landscaping Inc , plaintiff, et al vs Coogler
Construction Company Inc
Case Number: 2016CP4000642
Type: Order/Electronic Form 4

It is so Ordered

s/Joseph M. Strickland, 3055

Electronically signed on 2018-04-25 12:46:31 page 3 of 3

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2016 CP-40-0642

Quality Lawn Care and Landscaping, Inc. d/b/a Design South
Landscape Co.

Coogler Construction Company, Inc.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
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- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

April 25, 2018
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

T. Jeff Goodwyn, Jr., Esq.

2519 Devine Street, Suite A

Columbia SC 29205

ATTORNEY(S) FOR THE PLAINTIFF(S)

Brian P. Robinson, Esq.

P O Box 6110

Columbia SC 29260

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCp.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There is no handwriting or printed text on the paper.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	Civil Action No. 2016-CP-40-00642
	)	
Quality Lawn Care and Landscaping, Inc.,	)	
d/b/a Design South Landscape Co.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Coogler Construction Company, Inc.,	)	
	)	
Defendant.	)	
	)	

ORDER OF JUDGMENT

This matter was tried before me on October 30, 2017, October 31, 2017, and November 1, 2017. T. Jeff Goodwyn Jr., Esquire represented the plaintiff and Brian P. Robinson, Esquire, represented the defendant.

This controversy is over a retaining wall that Quality Lawn Care and Landscaping, Inc., d/b/a Design South Landscape Co. ("Quality") constructed as a subcontractor to Coogler Construction Company, Inc. ("Coogler") on the Killian Lakes apartment project located in Richland County, South Carolina. Coogler in turn was a subcontractor to Edward Rose Development Company, L.L.C. ("Rose"). Rose was also the owner of the apartment complex.

Quality constructed two retaining walls on the Killian Lakes complex for Coogler. Quality was paid for almost all of the first wall, but was never paid for the second wall. The second wall ("Wall H"), was torn down and rebuilt at Coogler's cost. Quality sued Coogler for the amount it claims it is owed under its subcontract with Coogler for construction of Wall H and the remaining payment on the first wall, as well as what it claims was extra work. Coogler counterclaimed for the amount of money it paid for removing and replacing Wall H over its budgeted amount for Wall H and for some trucking invoices.

This case revolves around the survey for Wall H from which Quality actually constructed the wall and on how far off the design alignment Wall H was when Quality completed the work it did on Wall H. Wall H is not designed as a straight line, but rather it has numerous turns and the top steps up and down as one moves along the wall. Likewise, the foundation also steps up and down to conform with the ground surface. To better facilitate understanding this Order, a discussion of the relevant surveying information is required.

EXPLANATION OF SURVEYING INFORMATION

The following explanation reflects the uncontradicted testimony of several witnesses.

When the surveyor establishes the reference points from which the contractor will measure to actually locate the wall on the ground, the surveyor installs hubs and stakes. Hubs are approximately 1-1/2" by 1-1/2" wooden pegs driven into the ground almost flush with the ground surface. The contractor will measure from the center of the hub to locate his work. Behind the hub, the surveyor will install a stake. The stake is located behind the hub, is approximately 3 feet long, is driven into the ground enough to keep it standing, and is located behind the hub. Written on the stake is the information the contractor will need: the "station number," the "offset" from the face of wall, the difference in elevation between the hub and the bottom of the wall and the difference in elevation between the hub and the top of the wall. Because the wall has thickness, the surveyor must tell the contractor where on the wall the offset references relates to. In this case, both parties agree that the stakes reference the face of the wall at the top of the wall facing the low side of the wall. Defendant's Exhibit 33 shows the face of the wall reference.

A "station" is the nomenclature given to a specific point on the wall alignment. Stations are the distance from a theoretical point of beginning. Stations are measured in increments of

100 feet. If a point on the wall alignment is 100 feet from the point of beginning, it will be Station 1+00.00. If another station is 120.5 feet from the point of beginning, it will be Station 1+20.5. Each point on the alignment of the wall has its own unique station number, corresponding to its distance from the point of beginning, measured along the line of the alignment.

The surveyor uses an AutoCAD file to determine where the hubs should be on the ground. The AutoCAD file is an electronic file that the design engineer made. In this case, the AutoCAD file was made by the civil site design engineer. The AutoCAD file is a master file that includes all of the structures on the apartment complex. It governs the relationship between any structure on the project and any other structure on the project. The AutoCAD file has coordinates from which any point on any structure on the project can be located on the ground. The surveyor downloads the AutoCAD file into his field instrument. The surveyor has a pole with a "black box" on top, which communicates with a hand-held device. When the surveyor sets the pole down at any given place, the readout on the "black box" tells him where to move to a preselected point so that he can locate that point accurately on the ground. The accuracy is about 1/4 inch.

In this case, besides the AutoCAD file, there is a design drawing. The design drawing shows both a "plan view" (which is a "birds-eye view") and an elevation (which is looking at the wall from the side). The design drawing shows the details of the wall, including its height, the foundation, steps in the foundation and in the top of the wall, and the number of blocks in the wall at any given point on the wall. Like the AutoCAD file, the design drawing shows the stations where the wall turns. Unlike the AutoCAD file, the design drawing does not have any

coordinates, and therefore it cannot be used to determine the actual location of the wall on the ground.

There is also an "as-built" drawing. The "as-built" drawing shows where Wall H was actually constructed in relationship to where it should be, as determined by the AutoCAD file. The surveyor used his pole and hand-held box to determine where the wall that Quality built actually was by coordinate, then had the computer determine how far off the alignment set by the AutoCAD file Wall H was. The surveyor then printed an "as-built" drawing, and had the computer mark some of the differences on the drawing. One can determine how far Wall H is from the theoretical alignment (the AutoCAD alignment) by looking at the "as-built" drawing.

DISCUSSION OF A SEGMENTAL RETAINING WALL

To facilitate understanding of this Order, some description of a segmental retaining wall is needed. The following is taken from uncontroverted testimony.

Wall H is a segmental retaining wall. That means that Wall H is made from blocks rather than from cast-in-place concrete. The blocks are supposed to be 8 inches high, 18 inches long, and 12 inches deep. Retaining walls are installed to allow an abrupt change in elevation, with a "high side" and a "low side." The earth behind the wall is on the "high side" and the area in front of the wall (the face) is the "low side." When placing one block on top of another, the face of the top block will be recessed, or setback, 1 inch from the face of the bottom block (likewise the back of the blocks). This makes the wall "lean" away from the side facing the low area, and "lean" toward the side facing the high area. As an example, if the wall is seven blocks high, the face of the top block will be 6 inches further towards the high side than the face of the bottom block, because there are 6 blocks set one inch back from the one below. As detailed on the design drawing, there are layers of geotechnical fabric that are laid on top of a row of blocks and

then backfilled on the high side of the wall. Backfilling is the process of spreading dirt and then compacting the dirt behind the wall. The fabric helps hold the wall from being pushed into the area on the low side of the wall because it cannot easily be pulled through the backfill. Immediately behind the wall is a two-foot wide section of rock, and then the balance of the area is filled with backfill. The backfill is dirt. Defendants Exhibits 6 and 33 show the general geometry of a segmental retaining wall, although not the specific wall in question here.

When a contractor builds a segmental retaining wall, he first constructs the foundation. He then determines how many blocks high the wall will be at the point where he is working, and determines how many inches the face of the wall will be from the bottom of the wall. He subtracts that number from the offset written on the stake, measures the resulting dimension from the center of the hub, and sets the first block on the foundation at that distance. As an example, if the wall is 7 blocks high and the offset is 5 feet to the face of the wall, the contractor will measure 4 feet 6 inches (5 feet minus 6 inches) from the center of the hub and place his first block at that point.

It should be noted that the survey hubs and stakes must be set before the contractor can begin construction of the wall.

FINDING OF FACTS:

Based upon the testimony and exhibits at trial, I find the following facts:

1. Rose was the general contractor on the Killian Lakes project.
2. Rose was also the owner of the Killian Lakes project.
3. Coogler was a subcontractor to Rose. (Def. Ex. 37)
4. Coogler was require by its subcontract to construct retaining walls, among other things, on the Killian Lakes project.
5. There were five or six retaining walls on the Killian Lakes project.

6. Coogler does not construct retaining wall with its own forces. Instead, Coogler subcontracts the construction of retaining walls to others.
7. Coogler subcontracted the retaining walls to Quality on the Killian Lakes project.
8. Quality was to provide all the labor and equipment to construct the segmental retaining walls, and Coogler was to provide all the permanent material. (Def. Ex. 1)
9. Quality had constructed segmental retaining walls for Coogler on numerous projects for five or six years prior to the Killian Lakes project.
10. On one project at a marina, Quality constructed a segmental retaining wall in the wrong place.
11. That wall varied from where it was supposed to be by anywhere from 6 inches to about 3 feet.
12. Quality had to tear down that entire wall at the marina project and reconstruct it where it belonged.
13. Quality admitted that it had to tear down the marina wall and reconstruct it because Quality had constructed it in the wrong place.
14. Quality was paid only for the marina wall once it was in the correct place.
15. There were only one or two "critical" places on the marina wall, the balance of the area on the high side of the wall was open space.
16. A "critical" place, as used herein, is a place where the top of the wall is adjacent to some other structure.
17. Quality knew, or should have known, at the time it constructed Wall H that a wall that was misplaced by between 6 inches and 3 feet may have to be removed and reconstructed.

18. The surveyor established the hubs from which Quality would determine where to build the wall.

19. The surveyor was hired by Rose.

20. Coogler did not have any requirement in its subcontract to provide a surveyor or to establish any hubs on the project.

21. Quality used the hubs established by the surveyor when it determined where to construct the wall.

22. It was Quality's responsibility to build the wall in accordance with the hubs and information on the stakes provided by the surveyor.

23. The surveyor wrote the station on every stake. (Def. Ex. 21 A-C)

24. The stations where the wall changes direction on the design drawing are not exactly the same as the stations where the wall changes direction on the AutoCAD file.

25. Because the AutoCAD file was used both to establish where the hubs went and to compare where the wall was actually constructed, the difference between the design drawing stations and the AutoCAD stations is not relevant.

26. At any place where there were two hubs with the same station, Quality assumed those hubs denoted an angle and used them without reference to the design drawing.

27. The surveyor installed two hubs with the same station at every point where there was an angle in the wall.

28. Because Quality used the surveyor's hubs with the same station to determine where the angles in the wall were, and because the surveyor set two hubs with the same station at each angle, it follows that Quality did not use the stations on the design drawing and the

difference between the stations on the design drawing and the stations in the AutoCAD file are irrelevant.

29. The Wall H that Quality built had the correct number of angles, even though some of the angles where Quality built the wall were in the wrong place on the ground.

30. The surveyor wrote "5' O/S FACE WALL" on every stake. (Def. Ex. 21 A-C)

31. Quality, the surveyor, and Coogler all agreed that the writing on the stake means that, measured from the center of the hub, the top outside face of the wall was to be 5 feet from the center of the hub in horizontal measurement.

32. The top outside face of the wall is shown in Defendant's Exhibit 33.

33. Quality was supposed to determine where to start any part of the wall by counting how many blocks high that particular section of the wall was, as shown on the design drawing, and then determining how many inches the wall leaned at that point. Quality was supposed to then subtract that number of inches from 5 feet and set the first block on the foundation.

34. Each block is offset toward the high side by 1 inch from the block below it. (Def. Ex. 3, first page)

35. While there may be some variation in the blocks, Quality was responsible for making the wall conform to the information on the stakes.

36. For any wall higher than one block, any measurement from the hub to the face of the wall at ground level must be less than 5 feet.

37. The lowest point on Wall H was three blocks high. (Def. Ex. 7, Drawing 4)

38. After the wall was found to be in the wrong place, but before any demolition work was done, Coogler and Quality searched for the hubs and found six hubs.

39. It is not unusual for hubs to be displaced or even lost during construction because of equipment or construction operations, which explains why only six of the hubs were found.

40. Quality measured from the center of those hubs to the face of the wall at ground level.

41. Quality took photographs of the six measurements from the face of the wall to the center of the hub at ground level. (Def. Ex. 8 A, C, D, E, G, I)

42. Half of the measurement were 5 feet or greater.

43. One measurement was 5 feet, one was 5 feet and 9 inches, and one was 6 feet and 11 inches. (Def. Ex. 8 A-J)

44. It is impossible for Quality to have set the bottom block in the correct place and have the measurement to the face of the wall at ground level be equal to or greater than 5 feet.

45. Quality made some mistakes in locating where it built Wall H.

46. Quality's mistakes resulted in Wall H being in the wrong place.

47. The high section of the wall is 23 blocks high. (Def. Ex. 7, Drawing 4)

48. That means the bottom of the wall is 22 inches closer to the hub than the top of the wall.

49. The wall is 23 blocks high between Station 11+40 and Station 12+20. (Def. Ex. 7, Drawing 4)

50. There was a hub at Station 11+74.22, which is in the high section of the wall. (Der. Ex. 21 A)

51. The measurement from the center of the hub at Station 11+74.22 should be 3 feet 2 inches.

52. There is no place on the wall where there are more than 3 blocks below ground level except as set forth below.

53. The measurement from the center of the hub to the face of the wall at ground level in the high section of the wall should not be more than 3 feet 4 inches

54. The measurement from the center of the hub at Station 11+74.22 to the face of the wall at ground level at that area is 4 feet 7 inches, allowing 2 inches for three blocks below ground level. (Def. Ex. 8 E & F)

55. Wall H is located too far from the hubs in at least 4 of the 6 positions that Quality and Coogler measured. It is not possible to determine if Wall H is the correct distance from the other two hubs because the location of those hubs cannot now be determined.

56. The design of the wall is with sharp angles, but Quality made rounded corners.

57. No one objected to the rounded corners.

58. One portion of the wall failed when about 7 courses of block leaned toward the high side. (Def Ex. 30 A & B)

59. Rose demanded that the wall be removed and reinstalled.

60. Quality proposed a fix of removing 7 courses and rebuilding the wall from that point up.

61. Coogler argued with Rose on behalf of Quality.

62. Coogler convinced Rose to let Quality repair the wall.

63. Coogler gave Quality notice on several occasions to begin repair, but Quality did not do so.

64. Finally, when pressed by Rose to do so, Coogler began to remove the 7 courses with its own forces.

65. While the removal of the 7 courses was being done, it was discovered that Wall H was not in the correct place.

66. Rose hired its surveyor to make an "as-built" drawing of Wall H.

67. The surveyor made an "as-built" drawing by first determining where Wall H actually was, and then comparing that to where Wall H should be, both based upon the AutoCAD file.

68. The "as-built" drawing was Defendant's Exhibit 36.

69. The "as-built" drawing shows the wall to be 2.9 feet too close to the parking area at the start of the wall, Station 10+00.00; nearly where it should be, but slightly too close at the first turn; 2.4 feet too close at the second turn; nearly where it is supposed to be at the next turn, but the turn is in the wrong place making the wall too close by 2.1 feet as it makes the turn; 3.8 feet too close at the next turn; nearly where it is supposed to be at the next turn but again the turn is in the wrong place and the wall is 2.5 feet too close just beyond the turn; 2.1 feet too close at the last turn; and 1.3 feet too close at the end of the wall.

70. Rose demanded that Coogler remove and reconstruct Wall H or Rose would do so itself and back charge Coogler.

71. A back charge is a deduction from the amount of money otherwise owed.

72. Coogler knew it would cost more to let Rose remove and replace Wall H than it would cost Coogler to do that work, so Coogler told Rose it would do so.

73. Coogler demanded that Quality remove and replace Wall H, but Quality refused to do so.

74. Left with no choice, Coogler removed the Wall H that Quality built.

75. Quality and its expert testified that there was no reason to remove all of Wall H because, even though it was not in the correct place, part of it was adjacent to "green space."

76. However, neither Quality nor its expert could tell the court what Rose eventually intended to use the "green space" for.

77. Coogler testified that there is a requirement for a certain amount of "green space" on the project, but Coogler did not know what that requirement is.

78. One cannot leave small pieces of a segmental retaining wall in place and remove the rest of the wall because the geogrid ties the wall together from side to side as one moves along the wall.

79. Further, as shown in the case of the marina wall, even when the wall is adjacent to open space, when it is in the wrong place it must be removed and replaced.

80. Coogler removed Wall H with its own forces.

81. Coogler subcontracted the reconstruction of Wall H to Brock Landscaping Company. (Def. Ex. 28)

82. Brock was to provide all the labor, equipment, and permanent material to reconstruct Wall H.

83. Coogler and Rose measured Wall H.

84. Coogler and Rose determined that the total square feet of Wall H was 4,160.95 square feet, including an allowance of 2 blocks below the ground surface.

85. Coogler and Rose agreed upon 2 blocks below the ground surface as an allowance because some portions of the wall have 3 blocks below grade and some portions only 1 block, and the distribution is approximately equal.

86. Quality billed Coogler for 5,610 square feet for Wall H. (Def. Ex. 14)

87. Quality based its square footage on its daily count of blocks installed.

88. Quality did not provide any documents to substantiate its count.

89. Coogler provided documentary evidence of the actual square footage of Wall H in the form of both an invoice and an e-mail (Def. Ex. 25; Def. Ex. 26), as well as testimony from James Huggins who helped measure Wall H with Rose.

90. Huggins testified that he and a Rose representative counted the blocks, added 2 blocks below grade, and calculated the square footage by using 1 square foot per block.

91. Quality and Coogler agree that each block is 1 square foot in area measured on the face of the wall.

92. Coogler also paid Brock Landscaping for the square footage that Huggins and Rose measured.

93. Using 4,160.95 square feet, Coogler calculated that it would have paid Quality \$34,702.32 had Quality constructed Wall H where it was supposed to be. (Def. Ex. 22)

94. Coogler paid Brock Landscaping \$72,816.63 for reconstructing Wall H. (Def. Ex. 22)

95. Coogler spent \$7,841.25 in labor removing Wall H. (Def. Ex. 22; Def. Ex. 27)

96. Coogler spent \$10,741.25 in equipment cost in removing Wall H. (Def. Ex. 22; Def. Ex. 27)

97. The difference between what Coogler should have paid for Wall H and what Coogler actually paid for Wall H is \$56,696.81 (Def. Ex. 22).

98. Coogler provided some trucking for Quality on an unrelated job, amounting to \$5,416.00. (Def. Ex. 22; Def. Ex. 29)

99. Quality agrees that it owes Coogler \$5,416.00 for the trucking work.

100. Coogler sought to show that the amount it paid Brock Landscaping was reasonable.

101. Coogler presented its material costs in Defendants Exhibit 27.

102. According to Coogler, it spent \$35,575 in material cost on Wall H.

103. Quality challenged Coogler's actual expenses for the material to build Wall H by pointing out that some of the material was purchased before the date Quality started work on Wall H. (Def. Ex. 1)

104. Quality started work on Wall H on November 20, 2014 and its last day on the job was December 15, 2014.

105. Three of Coogler's invoices were dated before November 20, 2017. (Def. Ex. 34, last three pages)

106. Those invoices totaled \$1,722.78. (Def. Ex. 34, last three pages)

107. While this stone may have been for Wall H, there is evidence that Quality may have been working on the first wall during that time period.

108. The deduction of those three invoices meant that Coogler spent \$33,852.22 in material on the Wall H that Quality constructed.

109. Coogler would have paid Quality \$34,702.32 for Wall H had Wall H been constructed correctly.

110. Coogler's total cost for Wall H would have been \$68,554.54.

111. The difference between what Coogler paid Brock Landscaping and what it would have incurred had Wall H been constructed correctly is less than 6%.

112. Quality filed a mechanic's lien on the project. (Def. Ex. 23)

113. Coogler was required by its contract with Rose to keep the job free from liens.

114. Coogler bonded off the mechanic's lien. (Def. Ex. 23)

115. Coogler paid \$2,146.00 for the bond it provided to remove the mechanic's lien Quality filed on the project. (Def. Ex. 22)

116. Quality did not sue to foreclose on the mechanic's lien.

117. Had Quality been correct in its demand, and had Quality sued to foreclose its mechanic's lien, it could have recovered its attorney's fees. Had Quality sued to foreclose its mechanic's lien and been wrong, Coogler could have recovered its attorney's fees.

118. December 16, 2014 is the day after Quality completed its work on Wall H.

119. On December 16, 2014, Quality originally billed Coogler for \$47,955.00, the sum of \$46,787.40 and \$1,167.60. (Def. Ex. 14)

120. In the December 16, 2014 invoice, Quality demanded payment for 5,610 square feet, which equals a payment of \$46,787.40. (Def. Ex. 14)

121. Quality also demanded payment for 140 square feet of caps installed on the first wall it constructed, for which there is no dispute. The 140 square feet of caps equals payment of \$1,167.60. (Def. Ex. 14)

122. Coogler overpaid Quality for the square feet of the first wall. (Def. Ex. 22)

123. Coogler overpaid Quality by 451 square feet for the first wall because it relied upon Quality's measurement, but when the wall was actually measured, it was found to be 451 square feet less in area. (Def. Ex. 25)

124. The overpayment of 451 square feet was an overpayment of \$3,761.34

125. Michael Young of Quality sent an e-mail to Joey Coogler and James Huggins, owners of Coogler Construction, Inc., dated February 19, 2015. (Def. Ex. 17)

126. Michael Young was the Quality representative at the trial of the case, was the only manager from Quality who was on the Killian Lakes project, and was the person who managed the job and billing for Quality.

127. Michael Young ("Young") is the person with Quality who has authority to speak for Quality.

128. In the e-mail of February 19, 2015, Quality told Coogler that it had performed some work "out of goodwill."

129. Young conceded that he did not intend to get paid for the work he outlined in the February 19, 2015 e-mail at the time the work was done.

130. Young stated that he did not intend for Quality to be paid until after he discovered that Quality would not be paid for the work it did on Wall H.

131. Young prepared Defendant's Exhibit 18, which is undated and based upon Defendant's Exhibit 17 except that now dollar amounts and some further information is included.

132. Young testified that he supplied the dollar amounts after suit was filed; that is, after January 29, 2016.

133. January 29, 2016 is more than a year after the work Quality outlines in Defendant's Exhibit 18.

134. Young testified that he did not produce any records to substantiate the costs he alleges Quality incurred on Defendant's Exhibit 18.

135. In Defendant's Exhibit 18, Quality set forth its hourly cost (including profit) for its crew.

136. In Defendant's Exhibit 18, Quality set forth its hourly cost for equipment.

137. In Defendant's Exhibit 19, Coogler presented an analysis of the number of crew hours that Quality would have had to expend to have justified the extra costs it said it originally provided "out of goodwill."

138. Defendant's Exhibit 19 indicates that Quality would have spent 166.7 crew hours to have performed the extra work at the cost indicated on Defendant's Exhibit 18.

139. Quality agreed that it spent only 16 days on the job.

140. Defendant's Exhibit 19 shows that if Quality worked 10-hour days, it would have worked 16.7 days to have spent 166.7 crew hours.

141. If Quality were awarded the money it claims it is owed for extra work, it would recoup all the money it spent on the entire Wall H work, resulting in no money being allocated to construction of Wall H itself.

142. Defendant's Exhibit 19 deals only with Quality's Wall H alleged extra work, and does not include any of the extra work Quality claims for the first wall.

143. Quality's demand for extra work on Wall H, not backed up with any documents, amounts to payment for more than the total of all Quality crew hours Quality spent on the entire Wall H work.

144. Coogler disputed the extra work Quality claimed it performed on Wall H.

145. Coogler presented a photograph and testimony which tends to show that the backfill Quality claimed as extra work is vastly overstated. (Def. Ex. 24)

146. Coogler also disputed the extra work Quality claimed on the first wall.

147. Coogler conceded that the subgrade may have been too high on the first wall.

148. Coogler disputed that the wall backfill zone on the first wall was not cut back far enough, because Coogler says it cut the slope back to the limits of clearing.

149. The limits of clearing on the first wall are as far as Coogler was allowed under its contract to disturb the natural ground.

150. Uncontradicted testimony was that Quality cut the bank back further for its own reasons, and that it knocked down three or four trees in the process.

151. Quality originally claimed that it was entitled to an additional \$6,000 for putting in 2 feet of stone behind Wall H, but abandoned that claim at trial.

152. Quality claims it should be paid for Wall H because it actually built the wall.

153. Quality claims that Coogler undercut the footing in the first 250 feet of Wall H.

154. Undercut is excavation below the bottom of the footing required by the Owner because the soil in that area was not sufficient to hold up the wall.

155. Quality claims it could not fill the excavation with stone as contemplated, so it used 7 courses of block to build up to the bottom of the wall.

156. Quality admitted that it did not take those 7 courses into account when it built the wall, resulting in Wall H being an additional 6 inches out of alignment in that area.

157. Wall H in the area Quality claims was undercut in the wrong place was out of place by between 1.3 feet and 3.8 feet, depending upon which place one measures. (Def. Ex. 36)

158. There is no evidence that the original undercut was actually in the wrong place, because the wall that Quality built was not in the correct place.

159. Because Quality mis-measured from the hubs when it constructed Wall H, it is inferable that Quality also mis-measured from the hubs when it began to construct the footing for Wall H, which in turn led Quality to believe the excavation was in the wrong place.

160. 7 courses of block over 250 feet of wall is 1,750 square feet, because each block is one square foot.

161. This explains almost all of the discrepancy between the quantify Quality billed for (5,960 square feet) and the quantity Coogler and Rose measured (4,160.95 square feet)

162. The seven courses of block Quality installed in the wrong place had to be removed by Block Landscaping, the contractor who constructed Wall H the second time, because Quality admitted they were in the wrong place.

CONCLUSIONS OF LAW:

1. Coogler and Quality entered into a subcontract agreement with terms set forth in Defendant's Exhibit 1
2. There is no provision in the subcontract between Coogler and Quality regarding extra work or regarding the tolerances to which Wall H should be constructed by Quality.
3. General breach of contract law governs this dispute because the complaint and the counterclaims are for breach of contract only.
4. Quality held itself out as specially qualified to construct segmental retaining walls.
5. Quality had a contractual duty to construct Wall H in a workmanlike manner. (Hill v. Polar Pantries, 219 SC 263, 64 SE 2d 885 (1951); Carolina Winds Owners' Ass'n v. Joe Harden Builder, Inc., 297 S.C. 74 374 S.E.2d 897 (1988)).
6. The evidence regarding the marina wall establishes that a segmental retaining wall that is between 6 inches and 3 feet out of place is not constructed in a workmanlike manner.
7. Quality did not construct Wall H in a workmanlike manner.

8. For Quality to recover from Coogler on its breach of contract claim, it must show a contract, a breach of that contract, and damages. (Allegro, Inc. v. Scully, 418 S.C. 24, 791 S.E.2d 140 (2016)).

9. For a contractor to claim a breach of contract because it was not paid, it must show that its work was performed in accordance with the contract or that it was acceptable to the other party if it was not in accordance with the contract, i.e., that it did not breach its contract.

10. Quality cannot show that its work on Wall H was in accordance with the contract.

11. Quality cannot show that its work on Wall H was acceptable to Coogler.

12. Had Quality sued to foreclose its mechanic's lien, and had Quality prevailed to the extent required by the Mechanic's Lien Statute, Quality could have recovered its attorney's fees.

13. Because Quality did not sue to foreclose its mechanic's lien, it is inferable that Quality had serious doubts about the amount, if any, that it was owed.

14. Quality can show that its work on the cap of the first wall was in accordance with the contract.

15. Quality claims extra work over and above the requirements of the contract.

16. There is no change order incorporating that extra work into the contract.

17. However, Coogler acknowledged that it agreed that Quality could use Coogler's equipment and preform the excavation of the soil that was too high on the first wall.

18. Written contracts can be modified by oral agreements. ESA Servs., LLC v. S.C. Dep't of Revenue, 392 S.C. 11, 707 S.E.2d 431 (Ct.App. 2011)

19. It is inferable that Coogler and Quality intended that Quality would be paid a reasonable sum for extra work Coogler approved.

20. Because the total of extra work Quality claims to have performed is equal to more than the acknowledged total time Quality was working on Wall H, either its hourly costs or the actual time spent are highly suspect.

21. However, because Quality presented some evidence of its costs, Quality is entitled to recover \$1,400.00 for the excavation of the too-high subgrade.

22. Coogler also acknowledged that it approved Quality excavating old brick, pipe and debris on Wall H.

23. Because the Wall H footing had to be in place for both the Quality Wall H and the replacement Wall H, there was benefit to Coogler for this excavation.

24. Because Quality presented some evidence of the cost of the work of excavation of brick, pipe and debris, it is entitled to recover \$700.00.

25. However, Coogler did not acknowledge that it agreed with Quality for any of the other extra work Quality claims it performed.

26. An oral change to a contract requires a meeting of the minds. ESA Servs., LLC v. S.C. Dep't of Revenue, 392 S.C. 11, 707 S.E.2d 431 (Ct.App. 2011)

27. There was no meeting of the minds regarding the balance of the extra work claimed by Quality.

28. Quality must therefore ground its claims on a quantum meruit claim.

29. Quality did not sue in quantum meruit.

30. Quality waived any claim under quantum meruit when it did not include a claim for quantum meruit in its complaint. Phillips Refrigeration Co. v. Commercial Credit Co., 256 S.C. 500, 183 S.E.2d 330 (1971).

31. Quality did not pursue quantum meruit at trial; that claim was not tried by agreement.

32. Even if Quality had included a quantum meruit claim, it could not prevail on the balance of what it claims is extra work.

33. Quality must show that its extra work had a benefit for Coogler.

34. If Quality can show that its extra work had a benefit for Coogler, it must show what the reasonable value of its work was to Coogler.

35. Quality has not shown what that benefit was to Coogler. Instead, Quality has presented some evidence of what its own lost time may have been worth.

36. Quality also stated that what it now claims as extra work was done "out of goodwill" and that it did not intend to be paid for that work at the time it performed the work.

37. Because the evidence is that Coogler did not request the "extra work" and Quality did not expect payment for the "extra work," it would be unequitable to now require Coogler to pay Quality for that "extra work."

38. Coogler provided documentary evidence and testimony that the total square footage of Wall H was 4,160.95 square feet.

39. Because Quality evidently measured the first wall incorrectly, and because Quality did not provide any documentary evidence of its measurement of Wall H, even though it claimed to have such evidence, it is more probable than not that the Coogler quantity is the correct quantity.

40. Quality did not construct Wall H in the correct place.

41. Wall H was more than 6 inches out of place, and in some places was more than 3 feet out of place.

42. Wall H had to be removed and replaced because it was constructed more than 6 inches out of place, as evidenced by the marina wall removal and replacement.

43. In a construction dispute, the non-breaching party is entitled to recover the cost of correction. (Kincaid v. Landing Dev. Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct.App. 1986).

44. Coogler is entitled to recover its cost of correction.

45. The amount Coogler paid to Brock Landscaping was reasonable, based upon the cost Coogler would have paid when Quality built Wall H.

46. The amount Coogler paid to dismantle the Wall H that Quality built was not disputed.

47. The amount Coogler paid to bond off the mechanic's lien that Quality filed is not disputed.

48. The requirement that Coogler bond off the mechanic's lien is not disputed.

49. The overpayment by Coogler on the first wall is not disputed.

50. The amount of the trucking work Coogler provided to Quality is not disputed.

51. Coogler is entitled to recover:

- a. \$7,841.25 for labor used to remove Wall H;
- b. \$10,741.25 for equipment used to remove Wall H;
- c. \$72,816.63 for reconstruction of Wall H by Brock Landscaping
- d. \$2,146.00 for the cost of bonds to bond off Quality's mechanic's lien
- e. \$3,761.34 for the overpayment on the first wall; and
- f. \$5,416.00 for the trucking work Coogler provided on another Quality job.

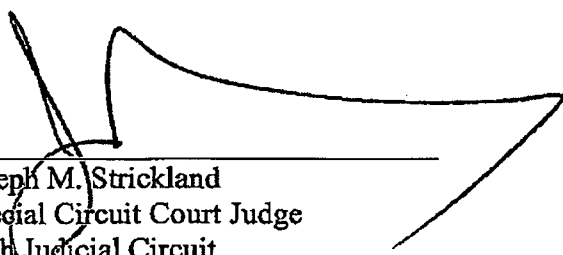
52. Coogler is entitled to reimbursement of \$102,722.47.

53. Coogler would have paid Quality \$34,702.32 for constructing Wall H.

54. Coogler's cost of correction is \$68,020.15.
55. Quality is entitled to recover:
 - a. \$1,167.60 for installation of the caps on the first wall;
 - b. \$1,400.00 for excavation on the first wall; and
 - c. \$700.00 for excavation of brick, pipe and debris on Wall H.
56. Quality is entitled to recover a total of \$3,267.60.
57. Coogler is entitled to Judgment Against Quality in the Amount of \$64,752.55.

IT IS THEREFORE ORDERED that Coogler Construction, Inc. have, and it hereby has, judgment against Quality Lawn Care and Landscaping, Inc., d/b/a Design South-Landscape Co., in the amount of \$64,752.55.

AND IT IS SO ORDERED.



Joseph M. Strickland
Special Circuit Court Judge
Fifth Judicial Circuit

Columbia, South Carolina

April 25, 2018
2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	Civil Action No. 2016-CP-40-00642
Quality Lawn Care and Landscaping, Inc.,	)	
d/b/a Design South Landscape Co.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER DENYING
	)	RECONSIDERATION
Coogler Construction Company, Inc.,	)	
	)	
Defendant.	)	

Following the trial of the case and an order in favor of the defendant, Plaintiff timely moved the Court for reconsideration. The matter came before me on June 5, 2018. Plaintiff was represented by T. Jeff Goodwyn Jr., and Defendant was represented by Brian P. Robinson, both of the Richland County Bar.

Plaintiff argued that:

1. There were no tolerances set forth in the contract documents, so that Plaintiff should not have been required to remove the wall;
2. Having the wall 2, 3, or 4 feet out of place was not sufficient to mandate removal;
3. The surveyor had a hub set at 3.5 feet instead of 5 feet, causing the offset in the wall at that point;
4. There was no clause in the contract regarding what would happen if the wall were mislocated;
5. It was a long wall and only 10% of it was in the wrong place;
6. The general contractor had an ulterior motive in requiring the wall to be removed and located in the correct place;
7. Just because part of the wall was in the wrong place did not justify removing the entire wall;
8. The defendant did not bring the CAD file to trial; and
9. It is inequitable to not pay the plaintiff when the plaintiff built the wall.

Items 1 through 8 above were raised at trial. Most of them were addressed in the subsequent Order of Judgment. Those issues not specifically addressed in the Order of Judgment are hereby found to be unavailing. This Court finds that the issues raised at the hearing were

correctly decided and are properly reflected in the Order of Judgment, and declines to make any changes to that Order. Because this was a case founded on breach of contract only, equitable considerations are outside the pleadings and the Court is not swayed by those considerations.

FOR THE FOREGOING REASONS, THE MOTION IS DENIED.

AND IT IS SO ORDERED.

Joseph M. Strickland
Special Circuit Court Judge
Fifth Judicial Circuit

Columbia, South Carolina

_____, 2018.



Richland Common Pleas

Case Caption: Quality Lawn Care and Landscaping Inc , plaintiff, et al vs Coogler
Construction Company Inc
Case Number: 2016CP4000642
Type: Order/Other

It is so Ordered

s/Joseph M. Strickland, 3055

Electronically signed on 2018-06-12 13:56:27 page 3 of 3

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Quality Lawn Care and Landscaping, Inc.,
d/b/a Design South Landscape Co.,

Plaintiff,

vs.

Coogler Construction Company, Inc.,

Defendant.

IN THE COURT OF COMMON PLEAS

C/A No. 2016-CP-40-_____

COMPLAINT

(NON-JURY)

RICHLAND COUNTY
FILED
2016 JAN 28 PM 12:22
JEANETTE M. McBRIDE
C.C.P. & G.S.

The Plaintiff, complaining of the Defendant herein, would respectfully show

1. Plaintiff is a business organization domiciled in South Carolina, and conducts business in Richland County, South Carolina. Plaintiff is engaged in the enterprise of, *inter alia*, landscaping and landscape construction activities on commercial projects.

2. Defendant is a business organization domiciled in South Carolina, and conducts business in Richland County, South Carolina. Defendant is a licensed general contractor for commercial projects.

3. Defendant was the site contractor for the construction of the "Killian Lakes" apartment project in Richland County, South Carolina.

4. On or about August 1, 2014, Plaintiff entered into an agreement with Defendant for the construction/installation of two retaining walls at "Killian Lakes."

5. The agreement provided that Plaintiff was to construct the retaining walls with information provided by the owner of "Killian Lakes" or the Defendant, and that payment was due from Defendant upon receipt of invoices submitted by Plaintiff.

6. Plaintiff constructed the first retaining wall in its entirety and substantially completed construction of the second retaining wall, and all in compliance with the information provided and with the agreement, per the stakes set by the surveyor retained by the owner of "Killian Lakes," and per professional standards. The retaining walls passed all compaction tests.

7. Subsequent to substantial completion of construction of the second retaining wall, it was claimed that the second retaining wall was not constructed properly and was to be torn

down. Defendant informed Plaintiff that Plaintiff would not be paid in any sum by Defendant for any of the work performed in construction of the second retaining wall.

8. Notwithstanding repeated requests by Plaintiff, Plaintiff was not paid for any of the work performed on the second retaining wall and was not paid in full for the work performed on the first retaining wall.

9. This honorable Court has jurisdiction over this controversy, and venue is proper.

10. An offer was made for the construction of the retaining walls with specific terms, the offer was accepted, and the Plaintiff tendered valuable consideration in agreed services properly performed. A contract was formed between Plaintiff and Defendant.

11. Defendant was thus obligated to pay Plaintiff in full pursuant to the terms of the contract.

12. Defendant willfully and intentionally breached the contract with Plaintiff in refusing to pay for the agreed upon work.

13. That as a direct and proximate result of the willful breach of the contract by Defendant, Plaintiff has suffered damages in that the contract bargained for has not been honored by Defendant. Plaintiff has also suffered other consequential and special losses.

WHEREFORE, Plaintiff prays for a judgment of actual damages for actual and punitive damages, for pre-judgment interest, for the costs of this action, for attorney fees, and for such other and further relief as the Court may deem just and proper.



Rowland P. Alston III
THE SULLIVAN FIRM, LLC
907 Calhoun Street
Columbia, SC 29201
(803) 252-3663
Attorney for Plaintiff

January 28, 2016

IN THE COURT OF COMMON PLEAS
Civil Action No. 2016-CP-40-00642

Plaintiff,

VS.

Defendant.

ANSWER AND COUNTERCLAIMS

FOR A FIRST DEFENSE

1. Coogler denies all allegations of the complaint unless otherwise admitted, qualified, or explained.
2. Coogler admits, upon information and belief, the allegations of Paragraph 1 of the Complaint.
3. Coogler admits the allegations of Paragraphs 2, 3, 4, 7, 9, and 10 of the Complaint.
4. Coogler denies the allegations of Paragraphs 5, 6, 8, 11, 12, and 13 of the Complaint.

FOR A SECOND DEFENSE AND A FIRST COUNTERCLAIM
(Breach of Contract)

5. Plaintiff ("DSL") entered into a contract with Coogler to install a certain retaining wall.
6. DSL breached the contract when it constructed the wall in the wrong place.

7. DSL breached the contract when it failed and refused to repair the wall by removing it and rebuilding it in the correct place.

8. DSL's breach of contract caused Coogler lost time, extra expense, and lost revenue because Coogler had to tear down the wall and rebuild it in the correct place.

9. As a direct and proximate result of DSL's breach of the contract, Coogler suffered damages in the amount of at least \$52,546.44.

FOR A THIRD DEFENSE
(Prior Breach)

10. Coogler repeats and realleges the foregoing to the extent required by, but not in contradiction of, the following allegations.

11. DSL breached the contract before Coogler owed it any money that Coogler did not pay.

12. DSL's breach of contract prior to any breach by Coogler, which Coogler breach is denied, precludes and prevents DSL from recovering any money from Coogler for any "breach" Coogler may have committed.

FOR A FOURTH DEFENSE
(Laches)

13. Coogler repeats and realleges the foregoing to the extent required by, but not in contradiction of, the following allegations.

14. DSL filed a mechanic's lien on May 8, 2015 over this controversy.

15. DSL knew at the time it filed its mechanic's lien that, if its version of the facts was correct, it had a claim against Coogler.

16. DSL also knew that the onsite superintendent with the general contractor, Edward Rose Development Company, LLC, who was most knowledgeable regarding the facts of the misplaced retaining wall would be leaving the state.

17. DSL delayed filing this lawsuit until the onsite superintendent, the very person most knowledgeable, and more importantly, without personal interest in the controversy, had left the state, reportedly to take employment in Atlanta, Georgia.

18. F&ME was the inspection agency on the retaining wall.

19. DSL waited until the person most knowledgeable regarding the wall in question had left S&ME and taken employment in Florida before it filed this lawsuit.

20. DSL's delay in filing this action has caused prejudice to Coogler because those persons most knowledgeable who are uninterested in the controversy have moved from South Carolina and are no longer subject to a subpoena to testify at the trial of the case.

21. The prejudice against Coogler caused by DSL's laches is sufficient to warrant dismissal of the claim.

FOR A FIFTH DEFENSE
(Payment)

22. Coogler repeats and realleges the foregoing to the extent required by, but not in contradiction of, the following allegations.

23. DSL has not earned any money on its contract because its work was rejected by the general contractor.

24. Coogler asserts payment in full as a complete defense.

FOR A SIXTH DEFENSE
(Setoff)

25. Coogler repeats and realleges the foregoing to the extent required by, but not in contradiction of, the following allegations.

26. Coogler is owed money by DSL for the work Coogler performed in completing DSL's work.

27. Coogler asserts setoff as a defense to any claim DSL has against Coogler.

FOR A SEVENTH DEFENSE
(Punitive Damages Not Allowed)

28. Coogler repeats and realleges the foregoing to the extent required by, but not in contradiction of, the following allegations.

29. Punitive damages are not recoverable on a breach of contract claim.

30. Coogler pleads common law principals as a complete defense against punitive damages.

FOR AN EIGHTH DEFENSE
(Punitive Damages Violate the Constitution)

31. Coogler realleges the foregoing responses to the extent they are consistent with the following responses.

32. Coogler would show that DSL's claim for punitive damages violates the 5th, 6th, 7th, and 14th Amendments to the Constitution of the United States in the following particulars:

i. DSL's claim for punitive damages violates the 5th Amendment for the following reasons:

a) The double jeopardy clause is violated because multiple awards of punitive damages can be imposed upon the defendants for the same act or omission;

- b) The self incrimination clause is violated because the defendants can be compelled to give testimony against themselves; and,
- c) Plaintiff can receive double recovery for the same wrong because punitive damages can serve a compensatory function.

ii. DSL's claim for punitive damages violates the 6th and 14th Amendments because such damages may be imposed based upon the burden of proof applicable in civil cases whereas punitive damages are a fine or penalty and are quasi-criminal or punitive in nature;

iii. DSL's claim for punitive damages violates Coogler's right to access to the courts guaranteed by the 7th and 14th Amendments because the threat of an award of unliquidated punitive damages chills this Defendant's exercise of that right; and,

iv. DSL's claims for punitive damages violate the due process and equal protection clauses of the 14th Amendment for the following reasons:

- a. The standard or test for determining the requisite mental state of the defendants for imposition of punitive damages is void for vagueness;
- b. There is a lack of objective guidelines on which a finder of fact might base its award and further, the guidelines which do exist are arbitrary and void for vagueness;
- c. Insofar as punitive damages are not measured against actual injury to the plaintiff and are left to the discretion of the jury, there is no objective standard that limits the amount of such damages that may be awarded, and the amount of punitive damages that may be

awarded is indeterminate at the time of Coogler's alleged, but denied egregious conduct;

- d. In cases involving more than one defendant, the evidence of the net worth of each is admissible, and the jury is permitted to award punitive damages in differing amounts based upon the affluence of a given defendant;
- e. The tests or standards for the imposition of punitive damages differ from state to state, such that a specific act or omission of a given defendant may or may not result in the imposition of punitive damages, or may result in differing amounts of punitive damages, depending upon the state in which it suit is filed such that the defendants are denied equal protection of law;
- f. Punitive damages may be imposed without a requisite showing of hatred, spite, ill will, or wrongful motive;
- g. There is no reasonable standard by which the issue of punitive damages and any award thereof can be measured; and,
- h. The scope of appellate review of punitive damages is limited.

FOR A NINTH DEFENSE

(Punitive Damages Violate the South Carolina Constitution)

33. Coogler repeats and realleges the foregoing allegations to the extent that they are consistent with the following allegations and responses.

34. Any award of punitive damages against Coogler would violate rights guaranteed to it by the Constitution of the State of South Carolina for the following reasons:

a. Any excessive award of punitive damages violates the prohibition against excessive fines found in Article 1, §15 of the Constitution of the State of South Carolina;

b. Any award of punitive damages violates the guarantee of due process found in Article 1, §3 of the Constitution of the State of South Carolina because of the lack of objective guidelines on which a finder of fact might base its award and further, that the guidelines which do exist are arbitrary and void for vagueness; and,

c. Any award for punitive damages violates the guarantee of due process found in Article 1, §3 of the Constitution of the State of South Carolina for the reasons set forth above.

35. Coogler pleads the South Carolina Constitution as a complete defense against punitive damages.

FOR A SECOND COUNTERCLAIM
(Unpaid Invoices)

36. Coogler is, among other things, engaged in providing trucking services to the construction industry.

37. DSL hired Coogler to provide miscellaneous trucking in January 2015 and March 2015.

38. Coogler provided the trucking DSL arranged for.

39. Coogler's trucking work was satisfactory to DSL in every manner.

40. Coogler invoiced DSL for its work in the amount of \$5,416.00.

41. DSL has failed and refused to pay Coogler the \$5,416.00 it owes.

42. DSL breached its contract with Coogler when it failed to pay the \$5,416.00 in a timely manner or in any manner at all.

43. DSL's breach of contract has damaged Coogler in the amount of \$5,416.00.

44. Coogler is entitled to recover its damages from DSL plus interest at the prejudgment rate since March 2015.

WHEREFORE, having fully answered, Coogler prays for judgment in its favor, for judgment on its compulsory counterclaim in the amount of \$52,546.44, for judgment on the non-compulsory counterclaim in the amount of \$5,416.00 plus prejudgment interest from March 2015, for costs, and for such other and further relief as this court finds just and fair.

BRUNER POWELL WALL & MULLINS, LLC

By: Brian P. Robinson

Brian P Robinson S.C. Bar No. 8814

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*Attorneys for Defendant Coogler Construction
Company, Inc..*

February 29, 2016.

Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Quality Lawn Care and Landscaping, Inc.,
d/b/a Design South Landscape Co.,

Plaintiff,

vs.

Coogler Construction Company, Inc.,

Defendant.

IN THE COURT OF COMMON PLEAS

C/A No. 2016-CP-40-0642

REPLY

RICHLAND COUNTY
FILED
2016 MAR 11 AM 11:23
JENNIFER M. MORRIS
C.C.P. & G.S.

The Plaintiff, in reply to the Defendant's Answer and Counterclaims, and pursuant to Rule 10 (c), *S.C.R. Civ.P.*, hereby re-alleges and incorporates by reference the allegations set forth in all of the Complaint in this action as fully as if said allegations were set forth herein verbatim, and would respectfully allege as follows:

FOR A FIRST DEFENSE

1. Except as is hereinafter specifically admitted, each and every allegation contained in the Defendant's Answer and Counterclaims is denied.

FOR A SECOND DEFENSE

2. Upon information and belief, Paragraphs 1 through 4 do not require a response from Plaintiff. However, should it be interpreted that said paragraphs assert disputed allegations against Plaintiff, said allegations are denied.

3. Plaintiff admits the allegations of Paragraph 5 of the Answer and Counterclaims.

4. Plaintiff denies the allegations of Paragraphs 6 through 9 of the Answer and Counterclaims.

5. With respect to Paragraph 10 of Defendant's Answer and Counterclaims, Plaintiff re-alleges and incorporates by reference the preceding paragraphs as if set forth herein verbatim.

6. Plaintiff denies the allegations of Paragraphs 11 and 12 of Defendant's Answer and Counterclaims.

7. With respect to Paragraph 13 of Defendant's Answer and Counterclaims, Plaintiff re-alleges and incorporates by reference the preceding paragraphs as if set forth herein verbatim.

8. Plaintiff admits the allegations of Paragraph 14 and 15 of Defendant's Answer and Counterclaims.

9. Plaintiff denies the allegations of Paragraphs 16 and 17 of Defendant's Answer and Counterclaims.

10. Plaintiff denies the allegations of Paragraph 18 of Defendant's Answer and Counterclaims. The name of the said agency was "S&ME."

11. Plaintiff denies the allegations of Paragraphs 19 through 21 of Defendant's Answer and Counterclaims.

12. With respect to Paragraph 22 of Defendant's Answer and Counterclaims, Plaintiff re-alleges and incorporates by reference the preceding paragraphs as if set forth herein verbatim.

13. Plaintiff denies the allegations of Paragraph 23 of Defendant's Answer and Counterclaims.

14. With respect to the allegations of Paragraph 24 of Defendant's Answer and Counterclaims, Plaintiff denies Defendant is entitled to payment as a defense.

15. With respect to Paragraph 25 of Defendant's Answer and Counterclaims, Plaintiff re-alleges and incorporates by reference the preceding paragraphs as if set forth herein verbatim.

16. Plaintiff denies the allegations of Paragraph 26 of Defendant's Answer and Counterclaims.

17. With respect to the allegations of Paragraph 27 of Defendant's Answer and Counterclaims, Plaintiff denies Defendant is entitled to set-off as a defense.

18. With respect to Paragraph 28 of Defendant's Answer and Counterclaims, Plaintiff re-alleges and incorporates by reference the preceding paragraphs as if set forth herein verbatim.

19. Plaintiff denies the allegations of Paragraphs 29 of Defendant's Answer and Counterclaims.

20. With respect to Paragraph 30 of Defendant's Answer and Counterclaims, Plaintiff denies that common law principals are a complete defense against punitive damages.

21. With respect to Paragraph 31 of Defendant's Answer and Counterclaims, Plaintiff re-alleges and incorporates by reference the preceding paragraphs as if set forth herein verbatim.

22. Plaintiff denies the allegations of Paragraph 32, including all subparts, of Defendant's Answer and Counterclaims.

23. With respect to Paragraph 33 of Defendant's Answer and Counterclaims, Plaintiff re-alleges and incorporates by reference the preceding paragraphs as if set forth herein verbatim.

24. Plaintiff denies the allegations of Paragraph 34, including all subparts, of Defendant's Answer and Counterclaims.

25. With respect to Paragraph 35 of the Answer and Counterclaims, Plaintiff denies that the South Carolina Constitution is a complete defense against punitive damages.

26. With respect to Paragraph 36 of Defendant's Answer and Counterclaims, Plaintiff re-alleges and incorporates by reference the preceding paragraphs as if set forth herein verbatim.

27. With respect to the allegations of Paragraphs 37 of Defendant's Answer and Counterclaims, Plaintiff admits requesting Defendant to perform trucking work, but denies that it "hired" Defendant in the context of any employee/employer or master/servant relationship.

28. Plaintiff admits the allegations of Paragraphs 38 through 40 of Defendant's Answer and Counterclaims.

29. With respect to Paragraph 41 of Defendant's Answer and Counterclaims, Plaintiff admits it has not paid the amount invoiced, but denies it owes the amount invoiced given that Defendant has not paid Plaintiff for the work that is the subject of the Complaint.

30. Plaintiff denies the allegations of Paragraphs 42 through 44 of Defendant's Answer and Counterclaims.

FOR A THIRD DEFENSE

31. Plaintiff re-alleges and incorporates by reference the allegations of all of the Defenses outlined above as if fully set forth herein.

32. That the Answer and Counterclaims fails to state facts sufficient to constitute a cause of action against Plaintiff, and therefore should be dismissed.

FOR A FOURTH DEFENSE

33. Plaintiff re-alleges and incorporates by reference the allegations of all of the Defenses outlined above as if fully set forth herein.

34. That the Defendant comes into Court with unclean hands, and Plaintiff pleads unclean hands as an affirmative defense.

FOR A FIFTH DEFENSE

35. Plaintiff re-alleges and incorporates by reference the allegations of all of the Defenses outlined above as if fully set forth herein.

36. That the Defendant's Counterclaims are barred by waiver and/or estoppel.

FOR A SIXTH DEFENSE

37. Plaintiff re-alleges and incorporate by reference the allegations of all of the Defenses outlined above as if fully set forth herein.

38. That any injuries and damages sustained by the Defendant resulted solely, upon information and believe, from the acts and omissions of a third party or parties, which sole acts or omissions or intervening acts of omissions were the proximate cause of any injuries and damages sustained by the Defendant.

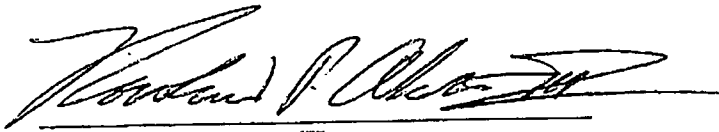
FOR A SEVENTH DEFENSE

39. Plaintiff re-alleges and incorporates by reference the allegations of all of the Defenses outlined above as if fully set forth herein.

40. Plaintiff reserves and does not waive any additional or further defenses as may be revealed by additional information that may be acquired in discovery or otherwise.

WHEREFORE, having fully replied to Defendant's Answer and Counterclaims, Plaintiff demands that the Counterclaims of Defendant be dismissed, with costs and for all attorney's fees, and expenses incurred by and/or on behalf of Plaintiff as a result of this litigation; and for such other and further relief as this Court deems just and proper.

Respectfully submitted,



Rowland P. Alston III
The Sullivan Firm LLC
907 Calhoun Street
Columbia, South Carolina 29201
(803) 252-3663
Attorney for Plaintiff

March 11, 2016

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2016-CP-40-00642

Quality Lawn Care and landscaping, Inc.
d/b/a Design South Landscape Co.,

Plaintiff,

vs.

Coogler Construction Company, Inc.,

Defendant.

MOTION TO RECONSIDER

COMES NOW, Plaintiff, by and through his undersigned attorney, Pursuant to Rule 59, S.C.R.C.P. and moves the court to reconsider the Court's Order of the bench trial held October 30 – November 1, 2018 and Filed April 25, 2018 and shows the Court the following.

The core issues in this case are whether retaining wall "H" was built in the location within the tolerances agreed to by the parties and if Plaintiff is responsible for portions of the wall not being properly located, is the remedy of tearing down the entire wall appropriate when a partial reconstruction could have remedied the problem. Based on the follow facts presented at trial, Plaintiff asks the court to reconsider its ruling.

As was well established at trial and agreed to by both parties, Plaintiff was not responsible for staking the location of the wall. The developer hired a surveyor, Henry Walker, to stake the location of the wall. The parties also agreed that Plaintiff should not be held to be responsible for any locations errors caused by an improper staking of the layout of the way caused by the surveyor. Mr. Walker testified that he used an AutoCAD file with coordinates different than the plans given to Plaintiff. Interestingly, neither Defendant nor Mr. Walker brought this AutoCAD file to trial. Plaintiff was able to demonstrate at trial how these difference cause location differences compared to the plans Plaintiff was provided.

In addition, the evidence showed that the surveyor had a 5 foot set off in the critical corner where the parking lot was being built where there should have been a 3½ foot set off. This 1½ foot difference

caused by the surveyor is the difference between the wall allegedly being too close at this critical area and Plaintiff should not be held responsible for this mistake.

Evidence and testimony from both parties in the case showed that it was common practice for the exact location of these types of segmented retaining walls to often be sacrificed in non-critical areas at the expense of aesthetics to better please the owner. The minor variations of the location of the wall in the non-critical areas in this case were reasonable and expected for these types of segmented retaining walls.

Even if the wall was not exactly where it was laid out to be by the surveyor and one believes that Plaintiff was responsible for the deviations, there were no tolerances for location provided for in the Contract that would allow a fact finder to hold Plaintiff in breach (See Trial Exhibit 1). Testimony by both Michael Young and Joey Coogler confirmed that due to the variations in the size of the stones used to build the walls, reasonable deviations as to location were common for this type of segmented retaining wall to ensure proper aesthetics. Because the Contract specified no tolerances, Plaintiff had no way to know that the inches Defendant was claiming the wall deviated in the critical area near the parking lot corner would lead to a demand to tear the entire wall down and rebuild it.

Even if the wall did not meet expected tolerances, there was nothing in the contract to let Plaintiff know that tearing down the entire wall, even in the areas properly located, would be the remedy. If there is one area of the wall that is too close to the parking and Plaintiff's work is determined to be the cause, a partial tear down and re-build would be the appropriate remedy. Plaintiff testified that he offered this multiple times, but due to an internal dispute with the developer, the developer insisted that that entire wall, even the portions properly located, be torn down and re-built. It is unfair to hold Plaintiff to a standard that he is not told about in advance and then require Plaintiff to not only not get paid for his work, but to have him pay to rebuild the entire wall, even the sections that were properly located.

Based on the above arguments, Plaintiff respectfully asks that the Court reconsider its ruling in this case and substitute the proposed order submitted with this motion for the order filed April 25, 2018.

GOODWYN LAW FIRM, LLC

/T. Jeff Goodwyn, Jr.

T. Jeff Goodwyn, Jr.

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Columbia, SC 29205

(803) 251-4517

JGoodwyn@Goodwynlaw.com

Attorney for Plaintiff

May 7, 2018
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Civil Action No.: 2016-CP-40-00642

Quality Lawn Care and landscaping, Inc.
d/b/a Design South Landscape Co.,

Plaintiff,

vs.

Coogler Construction Company, Inc.,

Defendant.

ORDER

This matter came before the Court for a bench trial from October 30 - November 1, 2017 upon Plaintiff's Complaint for Breach of Contract and Defendant's Counterclaim for Breach of Contract involving a dispute involving work Plaintiff performed constructing a retaining wall. Plaintiff and Defendant both stipulated that the proposal Plaintiff provided Defendant (Exhibit 1) was accepted by Defendant and that this is the contract between the parties. Testimony and evidence were presented by both parties over three days and after carefully considering all of the evidence, the court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Edward Rose Development Company, LLC ("Rose") is the general contractor for the project involved in this case.
2. Defendant, Coogler Construction Company, Inc. ("Coogler") was subcontracted by Rose to construct retaining wall "H" ("Wall H") that is the subject of this suit.
3. Coogler subcontracted certain responsibilities of the construction of Wall H to Plaintiff Quality Lawn Care and landscaping, Inc. d/b/a Design South Landscape Co. ("Quality") as outlined in the proposal and contract between the parties (Exhibit 1).

4. The proposal Plaintiff provided Defendant and that Defendant accepted (Exhibit 1) has been stipulated to be the contract between the parties (the "Contract"). The Court finds that the Contract meets all of the requirements of a construction contract in South Carolina.
5. In reviewing the Contract, the court finds nothing in the Contract specifying any tolerances for the location of Wall H.
6. The Court also finds no terms in the Contract specifying what the remedy is if certain tolerances were not adhered to.
7. While there was testimony of other issues concerning the wall, Defendant plead in its Counterclaim that the only reason the wall was torn down and re-built was its alleged improper location.
8. The evidence and testimony from both parties in the case showed that it was common practice by both parties that the exact location of these types of segmented retaining walls was often sacrificed in non-critical areas at the expense of aesthetics to better please the owner. I find that the minor variations of the location of the wall in the non-critical areas in this case were reasonable and expected for these types of walls.
9. As to Defendant's Counterclaim, while there is ample evidence that Plaintiff was not responsible for the improper location of the wall, since there are no tolerances specified in the contract between the parties and no remedy specified if any tolerances are not adhered to, I find that there is insufficient evidence to hold Plaintiff in breach of the Contract even if Plaintiff was responsible for the improper location of the wall.
10. I find that pursuant to the contract and the testimony of both parties that the surveying and laying out of the stakes and hubs were not the responsibility of the Plaintiff and that any error in laying out of the wall that caused the wall to be different than the design location

is not the responsibility of Plaintiff and would not be a valid reason to find Plaintiff in breach of its contract with Coogler.

11. The surveyor, Henry Walker, was hired by Rose to stake out the location of Wall H.
12. Mr. Walker did not dispute that the location of the stakes and hubs that Plaintiff used to locate the wall were not consistent with the plans Plaintiff was given for the project.
13. The fact that the location of the stakes as laid out by Henry Walker was different than the design location as given to Plaintiff caused the final location of Wall H to be significantly different than the design location.
14. Henry Walker explained that the reason the stakes marked the wall off in a location different than the plans provided Plaintiff was because he used a second set of set of design plans contained in an AutoCAD file that showed different stake locations for the wall. Despite the obvious importance of establishing why the stakes were in a different location than Plaintiff's design plans, no such AutoCAD file or corresponding hard copy of these AutoCAD drawings were offered into evidence at trial.
15. An email from Joey Coogler to Michael Young in evidence shows that the location of the silt fence caused the offset in the critical area of the wall where the corner is closest to the parking lot should have been $3\frac{1}{2}$ feet instead of the 5 feet shown on the corresponding stake. Neither Joey Coogler or Henry Walker could provide any explanation that would refute the testimony of Michael Young that this was an error marking the stakes on the part of Mr. Walker that caused the wall to be $1\frac{1}{2}$ feet closer to the parking lot than designed.
16. Despite any errors in laying out the wall, Henry Walker testified that Wall H was only 6 inches closer to the parking lot curb than laid out at the critical area in the corner of the wall next to the parking lot.

17. Both Michael Young and Joey Coogler testified that for these types of segmented retaining walls, due to the inconsistency in the stones, the precise location of the wall is customarily sacrificed for aesthetics in the areas of the wall where location is not critical.
18. While the wall was approximately 3 feet from the designed location in the area where there was approximately 35 feet from the wall to the closest curb, I find that this deviation is not a substantial breach and within the normal deviations contemplated for these types of walls. In addition, no substantial harm caused by this variance was articulated by Defendants.
19. For the above-stated reasons, I find that Plaintiff substantially complied with the terms of the contract between the parties and is entitled to payment for the work he performed constructing Wall H which is \$46,787.40 as shown on the corresponding invoice (Exhibit 14).
20. There was no dispute that Plaintiff was entitled to payment for caps for the previously constructed wall as billed for in Exhibit 14 and find that Plaintiff is entitled to this amount of \$1,167.60.
21. Plaintiff does not dispute that it owes Coogler for trucking that Coogler performed for Plaintiff on an unrelated job for \$5,416.00.
22. I find that Coogler is not entitled to any award based on money spent posting a bond to remove the mechanic's lien Plaintiff filed.

CONCLUSIONS OF LAW

1. Quality and Coogler entered into a contract meeting all necessary requirements under the law the terms of which are set forth in Exhibit 1.
2. As to Defendant's Counterclaim for breach of contract, I find for the Plaintiff for the following reasons:

- a. The Contract specifies no tolerances for the location of the retaining wall,
 - b. The Contract specified no remedies if certain tolerances are not met,
 - c. The stakes as laid out by the surveyor were not in the location as set out in the design plans given to Plaintiff causing significant difference between the design and as-built locations of the wall,
 - d. There was no explanation offered to explain the text where the surveyor appeared to have admitted that the off-set written on the stake was supposed to be 3½ feet because of the silt fence causing the wall to be 1½ feet closer at the critical point near the parking lot curb,
 - e. Despite any layout errors, according to Defense witnesses, the wall was only 6 inches closer to the curb than the design drawings called for at the critical area,
 - f. The larger variances in the non-critical/greenspace areas are normal variances for these types of walls that are contemplated and expected by the parties and no substantial harm caused by these variances was articulated by the Defendant,
 - g. While other reasons for the wall not being accepted were raised at trial, no reason for the wall to not be accepted other than the incorrect location of the wall was plead.
3. As to Plaintiff's breach of contract claim, I find for the Plaintiff based on the reasons stated in paragraphs 2 a-f above and for the following additional reasons:
- a. Defendant asserts that it did not pay Plaintiff for the wall because the owner, Rose, did not accept the wall and did not pay Defendant.
 - b. Plaintiff constructed Wall H in the location as staked out by the surveyor,

- c. The differences in the location of the stakes caused by the surveyor are not the responsibility of Plaintiff. Since the owner, Rose, hired the surveyor directly, Rose's recourse would be against the surveyor,
 - d. Rose also had taken issue with the designing engineer of the wall, someone who Rose had recently fired. Not knowing this, Coogler hired this same designing engineer for this wall,
 - e. Despite any wrongdoing by Rose either blaming Plaintiff for mistakes in locating the wall made by its own surveyor or refusing the wall because of the issue related to the designing engineer, Defendant Coogler still had an obligation to pay Plaintiff for the wall that was substantially constructed pursuant to its contract with Plaintiff. The proper remedy for Coogler is not to deny payment to Quality, but to pay Quality and sue Rose for non-payment under its contract with Rose.
- 4. Defendant is entitled to an offset against the amount owed Plaintiff for \$5,416.00 for the amount owed Coogler for prior trucking work.
 - 5. Defendant is not entitled to any amounts incurred in posting bond to remove the mechanic's lien.

IT IS THEREFORE ORDERED, for the reasons stated above, that Quality Lawn Care and landscaping, Inc. d/b/a Design South Landscape Co. has judgment against Coogler Construction, Inc. in the amount of \$45,539.00.

AND IT IS SO ORDERED.

Joseph M. Strickland
Special Circuit Court Judge
Fifth Judicial Circuit

Columbia, South Carolina

_____, 20____.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	Civil Action No. 2016-CP-40-00642
Quality Lawn Care and Landscaping, Inc.,	)	
d/b/a Design South Landscape Co.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	COOGLER CONSTRUCTION
	)	COMPANY, INC.'S REPLY
Coogler Construction Company, Inc.,	)	TO MOTION TO RECONSIDER
	)	
Defendant.	)	

Quality Lawn Care and landscaping, Inc. argues essentially four issues:

ARGUMENT

1. Quality was not responsible for staking so Quality should not be liable for the mislocation.
2. It is common practice for non-critical parts of the wall to be in the wrong place to accommodate owner aesthetics.
3. No tolerances were included in the Contract, so Quality could put the wall in the general location.
4. Quality does not believe the entire wall had to be removed and reconstructed.

The short answer is that these are factual questions which the Court considered and found against Quality. However, we will address the specifics of each issue.

1. Quality was not responsible for staking.

While it is true that Quality was not responsible for staking, there was ample evidence, from Quality's own mouth, that Quality was responsible for setting the face of wall from the control stakes the surveyor set. Because Quality placed the wall in the wrong place, as shown in

Quality's own photographs of the stakes with tape measurements to the wall (Def Ex. 8, A-I), it was evident that Quality did not establish the face of the wall correctly from the survey stakes, and the Court so found. (Because the AutoCAD file is a file in a computer program, it could not be brought to trial. However, the as-built drawing made from the AutoCAD file was brought to trial as Def. Ex. 36.)

2. Non-critical parts of the wall can be out of place somewhat.

While it is true that non-critical parts of the wall can be out of place somewhat, it is also true the critical parts must be where they belong. Quality's expert conceded that there were critical parts of the wall that were not where they belonged. Testimony established that Quality knew or should have known that a wall which was not where it belonged may have to be entirely replaced. Coogler so testified and the Court so found.

3. There are no tolerances, so the exact placement does not matter.

This argument is really an extension of the second argument, it just applies that argument to the entire wall. However, contractors have to perform the contract as written, not just any old way they please. Coogler testified that Quality knew that a wall that was from 6" to 3 feet out of place may be removed in its entirety. Quality argues that "the inches Defendant was claiming" should not have caused the wall to be rejected. This wall was 2.9 feet too close in one critical area and 3.8 feet too close in another, and was out of place in numerous other areas in excess of 2 feet. Coogler and Walker testified that it is evident from the plans that the wall had to be where it was designed in order to make the other parts of the project work, and the Court so found.

4. Quality does not believe the entire wall had to be reconstructed.

Quality asserts that Coogler should have done something to keep part of the wall in place. However, Quality did not bring any evidence that such a plan would work. Quality had the

burden of proof if it wanted to show that part of the wall could remain, but Quality failed to carry that burden. Coogler testified that the entire wall had to come down to place it where it belonged. Coogler presented an as-built drawing (Def. Ex. 36) showing where the wall was substantially out of place in numerous places, and testified that the only way to fix the problem was to tear the wall down and build it where it belonged. Further, there is nothing unfair about building the wall where Quality knew it belonged. Aside from those considerations, the testimony was that the geogrid tied the wall together and leaving small parts of the wall in place would not work. The Court decided those questions of fact in Coogler's favor.

CONCLUSION

In conclusion, the arguments Quality advance amount to a request for the Court to revisit the evidence and find facts in Quality's favor. The evidence heavily weighted in Coogler's favor and is far more than just a preponderance. This motion should be denied.

BRUNER POWELL WALL & MULLINS, LLC

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*Attorneys for Defendant Coogler Construction
 Company, Inc.*

Columbia, South Carolina
 May 10, 2018

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
COUNTY OF RICHLAND) C/A No. 2016-CP-40-00642

Quality Lawn Care and Landscaping, Inc.,)
d/b/a Design South Landscape Co.,)

Plaintiff,)

v.)

Coogler Construction Company, Inc.,)

Defendant.)

HEARING

COPY

Monday, October 30, 2017
11:35 a.m. - 4:05 p.m.

AND

Tuesday, October 31, 2017
9:42 a.m. - 4:00 p.m.

AND

Wednesday, November 1, 2017
9:45 a.m. - 5:01 p.m.

The hearing before the Honorable Joseph M. Strickland, Master-In-Equity for Richland County, was taken at 1701 Main Street, Suite 212, Columbia, South Carolina on the 30th and 31st day of October, and the 1st of November, 2017 before M. Sean Cary, Court Reporter and Notary Public in and for the State of South Carolina.



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

APPEARANCES

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 Attorney for the Defendant

INDEXPAGEDay One - Monday, October 30, 2017CALL TO ORDER:

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CREEL COURT REPORTING, INC.
 1230 Richland Street / Columbia, SC 29201
 (803) 252-3445 / (800) 822-0896

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RULING OF THE COURT:

THE COURT 637
Certificate 640

EXHIBITS

(Defendant's Exhibits were marked prior to the hearing and introduced as follows:)

Plaintiff's Exhibit Number One 60
(Contract between Design South Landscape Co. and Coogler Construction Co.)



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / (800) 822-0896

Plaintiff's Exhibit Number Two	68
(Book with enumerated differences between actual & design)	
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(Photograph)	
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Plaintiff's Exhibit Number Six	293
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(Letter dated July 1st, 2015)	
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Plaintiff's Exhibit Number Eleven	483
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Plaintiff's Exhibit Number Fifteen	568
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Defendant's Exhibit Number Two	146
(Document From LLR)	
Defendant's Exhibit Number Three	146
(Document From LLR Concerning Licencing)	
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(E-mail between Mr. Young and Mr. Whitfield)	
Defendant's Exhibit Number Five	158
(E-mail dated February 27th, 2015)	
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(Photo of wall with setbacks)	
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(Cost to rebuild wall)	
Defendant's Exhibit Number Thirty-four	607
(Delivery Tickets)	
Defendant's Exhibit Number Twenty-Nine	109
(Invoices)	
Defendant's Exhibit Number Thirty-Three	502
(Drawing of how the manufacturer expects grid to be)	
Defendant's Exhibit Number Thirty-Six	64
(As-built versus Design Drawings)	
(All Exhibits were retained by The Court.)	



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STIPULATIONS

It is stipulated and agreed that this deposition is being taken pursuant to the Federal Rules of Civil Procedure.



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1 (Defendant's Exhibits were marked prior to the
2 hearing.)

3 CALL TO ORDER:

4 THE COURT: This is Civil Action Number 2016-CP-40-
5 642, Quality Lawn Care and Landscaping
6 Incorporated and others against Coogler
7 Construction Company Incorporated. Y'all on
8 the same page?

9 MR. GOODWYN: Yes, Your Honor.

10 THE COURT: All right. We can proceed with opening
11 statements.

12 PLAINTIFF'S OPENING STATEMENT:

13 MR. GOODWYN: Thank you, Your Honor. Now as we
14 discussed briefly back in chambers, this is a
15 construction case involving a retaining wall in
16 a project Coogler Construction had been hired
17 to do on behalf of Edward Rose Corporation.
18 The Plaintiff constructed the wall. He wasn't,
19 under his contract, required to -- he laid a
20 wall out. I think it may help to -- these are
21 the original designs for the wall. I think you
22 have a copy of that. Did you provide him a
23 copy of this layout.

24 MR. ROBINSON: I think you've got that copy.

25 MR. GOODWYN: Oh, I thought you said he had a copy



1 in his notebook.

2 MR. ROBINSON: No, he does not have a copy. Here
3 is, Your Honor, the drawings four and five,
4 which are the layout drawings for H Wall, or
5 the design drawings for H Wall.

6 THE COURT: Hold on, I forgot something. Sean, do
7 you have everybody's name?

8 COURT REPORTER: No, sir, but I can get them.

9 MR. GOODWYN: I'm Jeff Goodwyn, Your Honor, and I
10 represent the Plaintiff.

11 THE COURT: No, I understand. He needs to know
12 them.

13 MR. GOODWYN: I know, that's why I'm saying it, so
14 he can get it.

15 THE COURT: I'm sorry to interrupt; please proceed.

16 MR. GOODWYN: Thank you. So anyway, the project was
17 laid out, this is wall H of this project. This
18 is a parking lot. There's a building over here
19 (indicating). A wall essentially surrounds
20 this (indicating) parking lot. And then if you
21 turn the page, then it extends all the way out
22 here (indicating). My client was not
23 responsible for drawing this design, wasn't
24 responsible for laying out the wall. When I
25 say laying out, there are stakes, these are the



1 stakes, that were staked out. His job was to
2 go to these stakes -- and there's a little,
3 it's called hub, it's just a piece of wood in
4 the ground that's right next to these stakes --
5 and measure off whatever the surveyor says the
6 distance is from the stake -- or essentially
7 from the hub to where the wall was starting.
8 You can see these stakes, and I'll represent --
9 will show this is five cents -- excuse me, five
10 feet offset from the face of the wall is what
11 that is there. This -- these numbers are going
12 to be important too because you can see these
13 numbers, it's our position, are supposed to
14 correspond to the numbers in the design
15 drawing. You can see it starts at 10 plus 00,
16 that's the beginning. Here, this is 11 plus
17 50, this represents 150 feet worth of wall.
18 And anyway, the station numbers go on around.
19 However, the station numbers that are marked on
20 the stakes are different than what's actually
21 marked on the design drawing. And the effect
22 of which, which our expert will show you, is
23 that it actually brings the as-built wall
24 closer than -- closer to the curb area, further
25 in, than the design shows.



1 THE COURT: I don't want to interrupt you, but who
2 did the plans?

3 MR. GOODWYN: These plans, Geo-Systems Design and
4 Testing, Inc. prepared these. And there's
5 also, and this is going to be an important
6 diagram also, this is the as-built versus
7 design. This is something that Henry Walker
8 produced after this incident to show what he
9 believed was the design location and then the
10 as-built location. The thicker line here
11 (indicating) is the as-built. And you can see
12 that it's very close to the design and off by
13 these (indicating) dimensions in these areas.
14 It's our position in the case that Mr. Young
15 and his team, they put the wall where the
16 surveyor told them to put the wall, actually
17 further away from the curb than the surveyor to
18 put the wall in most incidences. You can see
19 all of these stakes (indicating) say five feet
20 offset from the face of the wall.

21 THE COURT: And those dimensions were put on by the
22 surveyor?

23 MR. GOODWYN: The surveyor created the stakes, put
24 those in the ground. His (indicating) job was
25 just to come back and find the stakes and



1 follow the directions basically. Just wherever
2 the stake is, he looks at it, okay, there's the
3 hub, if he says five feet, he's supposed to go
4 five feet to the face of the wall.

5 THE COURT: And who was the surveyor?

6 MR. YOUNG: Walker Surveying.

7 MR. GOODWYN: I apologize, Henry Walker. That's the
8 same guy that did the drawing.

9 THE COURT: Okay.

10 MR. GOODWYN: There's a couple of other issues.
11 There's a number of other reasons that this
12 wall is not exactly where it should be. And
13 you can see the as-built versus design of the
14 wall, you can see it's very close. And we can
15 measure exactly how close, and that's what part
16 of the experts will be doing. You need to
17 understand how these walls are built and
18 designed. Let me first talk about this issue
19 of where he's supposed to put the wall. You
20 can see on the stakes they say five feet offset
21 to the face of the wall. The testimony is
22 going to be that Mr. Walker admitted to him, to
23 my client, that it should have been five feet
24 to the centerline of the wall. You know, you
25 have the front face, a back face and a



1 centerline, and the wall is twelve inches
2 thick, so that's a six inch difference if
3 that's ---

4 MR. ROBINSON: I'm going to object, Your Honor, to
5 hearsay from whatever Mr. Walker supposedly
6 said.

7 MR. GOODWYN: He's here to testify.

8 MR. ROBINSON: You can talk to him when he
9 testifies.

10 MR. GOODWYN: I think he can testify -- I mean the
11 witness is here.

12 THE COURT: Well, he's saying what the evidence is
13 going to show, so it's -- I think it's
14 appropriate for an opening statement. So, you
15 may proceed, Mr. Goodwyn.

16 MR. GOODWYN: So if that's true, if that's a
17 mistake, that's essentially a six-inch mistake.
18 It puts the as-built wall six inches closer --
19 six inches further in to the curb and the rest
20 of the parking lot than the design. Again,
21 that would not be my client's responsibility or
22 fault in this case. Another significant issue
23 -- and let me preface this by letting you know
24 what some of the key points of contention are
25 and key points of dispute. There's this



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1 (indicating) area out by here. This
2 (indicating) is the wall, there's green space
3 here (indicating), and by my measurements it's
4 about seventeen to eighteen feet worth of green
5 space between the carport parking spaces and
6 the wall. And you can see on the as-built
7 drawing, it looks like at its biggest point,
8 it's about 3.8 feet difference from where it
9 was designed to be built from where it ended
10 up. First, it's our position in the case that
11 this is not a critical dimension. There's --
12 if the wall's a few feet off there, if they
13 have a few feet less green space then they had
14 wanted, that's not reason to tear the wall down
15 and rebuild it. And we have reasons why it is
16 off where it is that aren't my client's fault,
17 but even if all that was my client's fault
18 that's not justification to tear down the
19 entire wall and rebuild the whole wall.

20 **THE COURT:** Is that what happened, the wall was torn
21 down?

22 **MR. GOODWYN:** The wall was torn down and rebuilt, at
23 request of not the Defendant but the owner of
24 the property, the developer. Which is
25 interesting, we expect the evidence to show



1 that the Defendant was actually advocating for
2 the wall to stay. Now the other point of --
3 that is more critical is the parking lot. If
4 the wall is too close to the parking lot, the
5 parking lot can't be built, that's a more
6 significant issue. Again, we've got the issue
7 of the six-inch offset between the face of the
8 wall and the centerline of the wall. There's
9 also going to be testimony and evidence in the
10 case that the surveyor made a mistake in -- on
11 the -- in putting on these stakes -- it says a
12 five foot offset -- in that area around a
13 corner here (indicating) that should have been
14 a three and a half foot offset. Because the
15 silt fence was a little closer in that area.
16 They couldn't get the stake five feet away, and
17 so -- that this (indicating) was a mistake. It
18 should have been three and a half feet, that's
19 what he was told. There's some communications
20 via text that you'll see, show that that was a
21 mistake, putting the wall and this (indicating)
22 corner a foot and a half closer. Another key
23 issue in the case, and I think there's going to
24 be a lot of talk -- I think Mr. Robinson was
25 wanting to get into this some in chambers, and



1 I know he'll get into it in his opening, is
2 this business about the stations. You can see
3 on the design here Wall H station number, and
4 it's got station numbers. You'll see it. Of
5 course I've already showed you the stakes --
6 the numbers on the stakes don't correspond to
7 the numbers on the design, which what we
8 contend caused the wall to be closer in than it
9 should have been. And that's a little more
10 complicated and I think we'll let the experts
11 try to explain to you exactly what that means
12 and why that is. I think it's a little too
13 complicated for me to try to get into it right
14 here. But I think what's of critical
15 importance here is the difference between the
16 design and the as-built. If you look at this
17 critical point here (indicating) on the curve,
18 the design, if you measure it and scale it out,
19 the inside face of the wall to the curb is
20 three -- is designed to be 3.75 feet apart if
21 you measure that out. If you look at the as-
22 built and measure that at that same point, this
23 is the same scale drawing, it's very, very
24 close to that. And what we measured, you know,
25 it's like 3.2 feet away. So to look at it,



1 even despite all the mistakes by the surveyor,
2 Mr. Young still got the wall within a foot of
3 the design. And I think what's also very
4 important in the case is the testimony from
5 Coogler will be that if the wall had been three
6 feet or more away from the curb, they could
7 have worked with that; they wouldn't have had
8 to tear it down. And their own surveyor
9 surveyed the as-built more than three feet away
10 from the wall, so we don't understand why it
11 had to come down. Another important fact in
12 the case I think if you -- when you're looking
13 at these stakes, looking at what my client in
14 particular did, is kind of further evidence
15 that he not only built the wall as he was
16 instructed to, he actually built it a little
17 further out than he was instructed. These
18 stakes say five feet on the outside face of the
19 wall -- or offset from the face of the wall.
20 You'll see pictures where they went back when
21 all this was coming to a head, they got a tape
22 measure out and went to the stakes and measured
23 the distance between the stake and the wall --
24 from the face of the wall. Almost all of them
25 are less than five feet, indicating, if



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1 anything, the wall is further out than he was
2 told to put it. And the only place I think
3 that's not true is going to be in this area
4 down here (indicating). And there are some
5 other issues relating to the soil, the wall
6 having to start deeper in the ground, there's
7 more courses, and so it ended up being a little
8 further in because of that.

9 THE COURT: Let me make sure that I have the facts
10 straight.

11 MR. GOODWYN: Sure.

12 THE COURT: The wall was torn down.

13 MR. GOODWYN: Yes.

14 THE COURT: Was it rebuilt?

15 MR. GOODWYN: Yes.

16 THE COURT: Who built it?

17 MR. GOODWYN: It was rebuilt -- what's the name.

18 MR. MY: Coogler Construction.

19 MR. GOODWYN: It was rebuilt -- Coogler paid to have
20 it rebuilt by a different contractor, not him
21 (indicating). And that's part of their
22 damages. Of course they're going to say that
23 my client owes them for the rebuild. We're
24 saying it's not our fault if it was in the
25 wrong place, which we don't think it is. Their



1 own drawing says it's workable, it's within a
2 foot of where you said it should be. It
3 shouldn't have had to got -- been torn down.
4 But if you're going to tear it down, that's on
5 somebody else. You either need to eat that,
6 charge the surveyor for it, somebody else; but
7 my client did the work as he was supposed to
8 do, as he was contracted to do. They've
9 breached the contract, they need to pay my
10 client. So, that is -- that's the episode --
11 there's a little -- you know, there's some
12 details about the wall itself -- I think this
13 is an important detail that's going to come out
14 in the trial. These bricks -- these walls are
15 not stacked with one brick exactly on top of
16 the next brick; there's a slight offset. So
17 it's an inch per row -- they call them courses
18 when they build these, but an inch per row.
19 There's a good diagram in your book their that
20 will show you this. Let's see if I can find it
21 right off, not sure if I can. But that's
22 important because what we -- what the design
23 does not show -- here it is. It's tab 33 of
24 your book.

25 THE COURT: Yes, sir.



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1 MR. GOODWYN: Do you have that diagram?

2 THE COURT: Yes, sir.

3 MR. GOODWYN: You can see on the -- over here, the
4 face of the wall actually angles back in a
5 little bit. That's because -- that's just how
6 the walls are designed. For whatever reason it
7 makes it more secure. But that's how the wall
8 is designed. However, the design plans
9 themselves don't mention anything about that.
10 And when you look at this drawing, all it shows
11 is what appears to be the top of the wall. It
12 doesn't reflect that there's an angle to the
13 wall. None of that's taken into account. So
14 that's confusing, misleading perhaps to the
15 surveyor, but at the end of the day the
16 surveyor lays out the wall, my client simply
17 goes in, finds the stakes and measures and puts
18 the wall where he says to put the wall. If it
19 ends up being in the wrong place, it's not my
20 client's fault. And in fact the wall should
21 have been further away than designed, because
22 he will testify he understood there was a
23 parking lot and he understood the wall had to
24 be far enough away and he tried to take that
25 into account and move -- actually move the wall



1 back a little bit. Which, I think, at the end
2 of the day, explains why despite the surveyor's
3 errors, the as-built wall in this area is still
4 very, very close to the design dimension. This
5 distance here (indicating) is very, very close
6 to this distance here (indicating); it's only,
7 again, less than a foot off. So at the end of
8 the day there was no reason that the wall
9 should have been torn down. If you think it
10 should have been torn down for whatever reason,
11 it's not my client's responsibility. Somebody
12 else is responsible for those types of errors.
13 As a result, we think Coogler breached the
14 contract, owes him for the wall. There are
15 some other back-charges that are associated
16 with this that we'll get into. He had some
17 extra work that had to be done on the job,
18 which will explain why that's also part of the
19 -- part of the case. And you'll hear some
20 evidence about that that's not direct- --
21 related to the location of the wall, but just
22 some extra work that had to be done that he's
23 entitled to charge for. And that's the essence
24 of the case, Your Honor.

25 THE COURT: Okay. Mr. Robinson?



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DEFENDANT'S OPENING STATEMENT:

1
2 MR. ROBINSON: Thank you, Your Honor. In the movie
3 My Cousin Vinny, Vinny gets up and says, what
4 he said. Well what I say is, nothing what he
5 said. First of all, I want to talk about
6 stations. And if you look at this drawing you
7 were looking at a moment ago, you'll see it
8 says ten plus zero zero, and over here
9 (indicating) it says eleven plus fifty plus
10 zero zero, right here (indicating) where it
11 says S-T-A-R-T, start wall. Stations are a way
12 of keeping track of where you are on a
13 centerline or on a layout line or on a roadway.
14 What they do is they start from mythical zero
15 point, and every hundred feet is a station. So
16 if I were a hundred feet down from the mythical
17 zero point I would be at station one plus zero
18 zero. If I were a hundred and fifty feet down
19 I'd be at station one plus fifty. If I were a
20 thousand feet down I'd be at station ten plus
21 zero zero, because there's ten hundreds in a
22 thousand. So if you know where you are on a
23 wall -- on a line, if you know what the station
24 is you can always figure out where you are to
25 the next point because you can simply subtract



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1 or add between the station numbers. So you're
2 going to hear a lot about stations, and they're
3 a key part of this case. And the reason
4 they're a key part of this case is because when
5 the surveyor lays out the wall, he doesn't
6 necessarily -- in fact he almost never, puts a
7 hub at the station shown on the drawing. What
8 the surveyor's job is, is to give the builder
9 enough information that the builder can then
10 lay out the building and build it or whatever
11 it happens to be, in this case a wall, so he
12 can build it where it's supposed to be. We're
13 going to show, Your Honor, that that's exactly
14 what the surveyor did. We'd like you to keep
15 in mind by the way that two points make a line.
16 And so if one were to have two points along
17 that (indicating) section of wall, one would
18 know where the line was. And if one knew where
19 the station was, one could compute where the
20 corner was by simply subtracting whatever
21 station you had from twelve plus fifty if
22 that's the corner, or eleven plus fifty if
23 that's the corner, and you'd know how far up
24 the line you had to go to get to the corner.
25 That's one thing. Number two, there were some

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1 hubs, two of them, that were laid out three and
2 a half feet from the line. Now what the
3 surveyor does is he doesn't lay out this wall
4 on the line where the wall goes. Because if he
5 did that, as soon as they start building the
6 wall all the stakes are gone and no one knows
7 where they're supposed to be. So he puts in
8 what he calls offsets. And that is to say, if
9 the line is supposed to be here (indicating),
10 he'll put his hubs over here (indicating) some
11 known distance. So the contractor can measure
12 over to where he's supposed to build. And
13 that's why it says five OS, offset. And Mr.
14 Young knows that. There won't be any
15 controversy over that. And two points, there
16 were offsets of three and a half feet. The
17 rest of the wall was laid out at five feet.
18 We'll find out from testimony that those two
19 points that were three and a half feet off are
20 not any of the stakes that they brought here
21 nor are they in any of the photographs that we
22 have. Those didn't get copied, but they were
23 marked three feet offset. The wall's what's
24 called a segmental retaining wall. It's not a
25 concrete wall reinforced with steel. What it



1 is are blocks that are eighteen inches long,
2 twelve inches wide and eight inches high. And
3 on the back of each block is a little turn-down
4 piece that's exactly one inch. So if I stack
5 two blocks on top of each other, that little
6 curve that hangs down makes this (indicating)
7 top block one inch back from the face of the
8 wall; and if I stack another one it's an inch
9 back, and another -- so every block high is one
10 inch back. And that's important. Because what
11 the surveyor laid out, as it says there, is the
12 face of the wall. And there doesn't seem to be
13 any controversy over what that means. That is
14 the top face of the wall. The drawing, as you
15 can see here, shows you the number of -- you
16 can count 'em, the number of blocks high any
17 particular spot on the wall. And if you count
18 those you know how far it is from the face of
19 the wall to the bottom of the wall. So if I
20 lay it out five feet and I've got ten -- let's
21 say twelve to make this easy, twelve blocks
22 high, I know I've got twelve inches. So
23 instead of measuring over five feet to the base
24 of the wall I could measure four, subtract
25 twelve inches from where the face of the wall's

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1 supposed to be up on high. A very simple,
2 straight-forward way to do things. The
3 surveyor doesn't figure out where the bottom of
4 the wall is, he figures out the -- because he
5 only has design information on the top of the
6 wall, so that's what he lays out, the face of
7 the wall. And the surveyor will talk about
8 that. And as far as the wall itself, the
9 construction of the wall itself goes, there
10 were several things that were problems with the
11 wall. First is, a portion of the wall failed.
12 Half way up -- well, not exactly half way up,
13 but some way up, the wall tipped over. But it
14 didn't tip over away from the high side, it
15 tipped over toward the high side as one would
16 not expect. One would expect if the wall's
17 going to fail it would fail from the high
18 pressure pushing it out. That's not what
19 happened. And we'll give you some expert
20 testimony on why that happened that way.

21 MR. GOODWYN: I'm going to object to anything about
22 that issue. The only thing in their
23 counterclaim relates to the location of the
24 wall.

25 THE COURT: Mr. Robinson, any response?



1 MR. ROBINSON: Yes, Your Honor. They're claiming
2 that there wall should never have come down,
3 they should have been paid for it. There were
4 several reasons why it came out. Not the least
5 of which was that the wall started to fail.

6 MR. GOODWYN: That's not in the counterclaim. The
7 counterclaim says the wall had to come out
8 because it was in the wrong place.

9 MR. ROBINSON: Well, I can ---

10 MR. GOODWYN: That's all it says.

11 THE COURT: Well, if he's telling what the evidence
12 is going to show and it wasn't even - it wasn't
13 pled is what you're saying?

14 MR. GOODWYN: It wasn't pled.

15 THE COURT: Okay. Mr. Robinson, how do you handle
16 that?

17 MR. ROBINSON: Your Honor, their claim is that the
18 wall had to come out and they don't know why.
19 They think it was perfectly fine where it was.
20 The owner determined that the wall had to come
21 out. Part of the problem, what you're going to
22 hear testimony about, is that the wall failed.
23 A substantial section of that wall failed and
24 the owner said -- no, excuse me, the Plaintiff
25 said, well let us take part of that wall out



1 and then we'll build it back like it's supposed
2 to be.

3 MR. GOODWYN: Anyway, that's not ---

4 MR. ROBINSON: At that point in time, Your Honor,
5 the two engineers looking at the thing would
6 not approve that after it had been taken down,
7 and they found out that the wall was in the
8 wrong place and the owner told my client you
9 have to take that wall down or we're going to
10 take it down for you. And my client turned to
11 his subcontractor and said, you've got to take
12 the wall out or we're going to take it down for
13 you. And the Plaintiff said, I'm not taking it
14 down.

15 THE COURT: Who's the owner of the property?

16 MR. ROBINSON: The owner of the property is Edward
17 Rose and Sons Development, LLC. They were also
18 the general contractor. My client's a
19 subcontractor to the general, did the dirt
20 work, and he subbed out these walls, all right,
21 to Quality doing business as Southern
22 Landscaping. So you'll see Southern
23 Landscaping here, that's what's that's about.

24 THE COURT: And you're going to have a copy of the
25 contract?



1 MR. ROBINSON: Oh, absolutely. There's a copy of
2 Southern Landscape's contract with my client,
3 and a copy of my client with Edward Rose's, so
4 you can chain the whole thing together if that
5 becomes an issue.

6 THE COURT: I want y'all to address this at the time
7 you start calling witnesses, but did the
8 contract have any provision for what happens if
9 the wall wasn't built according to
10 specifications?

11 MR. ROBINSON: No, Your Honor. The contractor
12 contemplates they're going to do it right, not
13 wrong.

14 THE COURT: But it didn't say what happens if in
15 fact they ---

16 MR. ROBINSON: No.

17 THE COURT: --- do it wrong and have to tear it
18 down? Does that mean ---

19 MR. ROBINSON: Not at all.

20 THE COURT: --- you don't have to pay him?

21 MR. ROBINSON: Whether it's accepted or not is up to
22 the owner. If you're not in spec then the
23 owner can accept or reject, and that's exactly
24 what happened here, the owner rejected. So
25 we're going to show you that. We'll put up



1 testimony to that. One thing that I think is
2 important is this: the owner rejected the wall.
3 The wall was not in specification, wasn't built
4 where it was supposed to be, was performing
5 like it was supposed to perform, the owner
6 rejected the wall. My client, Coogler, the
7 subcontractor, went to bat for his
8 subcontractor more than once and tried to get
9 the owner to accept the wall. The owner
10 rejected the wall. At that point in time my
11 client can't accept the wall, it's not his
12 wall. It's the owner's wall, he's rejected it,
13 it doesn't meet the specifications. For
14 whatever reason that it's rejected, as long as
15 it's not within spec, that's the owner's
16 prerogative and that's what he did.

17 **THE COURT:** Who tore it down?

18 **MR. ROBINSON:** Coogler Construction tore it down
19 because the guy who built it refused to tear it
20 down. Coogler built it back because the guy
21 who built it the first time refused to build it
22 back. We're going to show you that the cost of
23 that was immanently reasonable.

24 **THE COURT:** The cost of tearing it down?

25 **MR. ROBINSON:** The cost of building it back up



1 again.

2 **THE COURT:** Or building it back up?

3 **MR. ROBINSON:** Yeah, the cost of building it back up
4 was immanently reasonable. We can tell that
5 because, as we'll show the Court, the cost of
6 what the labor was and the cost of what the
7 materials were are almost exactly what Coogler
8 paid to put it back up again. So at the end of
9 the day where are we? We have this: we have
10 Coogler can't get paid for the wall because
11 it's been rejected, Coogler tells his
12 subcontractor I can't pay you for the wall
13 because it's been rejected, take it down and
14 put it back up again. The subcontractor says
15 no, I'm not going do that. The owner says to
16 Coogler, you either take the wall down or put
17 it back it back up again or we'll get someone
18 else to fo it at your cost. Well ---

19 **THE COURT:** Is that in writing?

20 **MR. ROBINSON:** I don't know if that's -- I don't
21 have that in writing, no. But anyway, Coogler
22 takes the wall down and has it built back up
23 again. Coogler, therefore, is entitled to get
24 from his subcontractor the difference between
25 what he would have paid the subcontractor and



1 what he ended up paying to have the wall taken
2 down and put back up. Because his contractual
3 damages are what he paid over and above what
4 his budget should have been. It's form-book
5 law, so. So that's what his damages are with
6 respect to that, There is another claim in
7 here. My client did some trucking for Quality
8 previous to this contract which they never got
9 paid for, so we're suing for that too. It's
10 not a compulsory counterclaim but it's a
11 permissible counterclaim. So, we've got that.
12 And you'll see invoices for that work and
13 Coogler can talk about what they did and why
14 they did it and what have you, and they didn't
15 get paid. So where we are at the end of the
16 day is we want our contractual damages and we
17 want our trucking damages. And that wall came
18 down because it's not in the right place, and
19 we'll show you why it's not in the right place
20 and why it should have been in the right place.
21 There's nothing wrong with the surveying at
22 all. The six inch bust that they were talking
23 about actually happened to be on a different
24 wall and not this one. So that's where we are.
25 THE COURT: All right. Mr. Goodwyn, call your first



1 witness, please.

2 MR. GOODWYN: I call Michael Young.

3 MR. ROBINSON: Can we move this stuff so I can
4 actually see.

5 MR. GOODWYN: Yeah.

6 COURT REPORTER: Please raise your right hand.

7 MR. YOUNG: (Witness complies.)

8 COURT REPORTER: Do you solemnly swear or affirm
9 that the testimony you give in this case will
10 be the truth, the whole truth and nothing but
11 the truth so help you God?

12 MR. YOUNG: I do.

13 COURT REPORTER: Thank you, sir.

14 MICHAEL YOUNG, having been duly sworn, testifies as
15 follows:

16 MR. YOUNG - DIRECT EXAMINATION BY MR. GOODWYN:

17 Q: Mr. Young, do you go by Michael or Mike?

18 A: Michael.

19 Q: How old are you?

20 A: I am forty years old.

21 Q: All right. Are you married?

22 A: I am.

23 Q: Do you have any kids?

24 A: I have six.

25 Q: Six; How old are they?



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- 1 A: Fourteen, twelve, nine, six, four and three.
- 2 Q: So you've got a lot of mouths to feed it sounds
- 3 like.
- 4 A: Yeah.
- 5 Q: Did not getting paid on this job set you back?
- 6 A: It did. We went without paychecks for a while.
- 7 Caused a lot of stress at home. Whenever
- 8 you're self-employed, you know when you don't
- 9 get paid on a job, you got employees that get
- 10 paid every week, and equipment, bank notes that
- 11 have to be paid weekly. And, you know, when
- 12 you work on a job for several months and you
- 13 don't get paid it hurts a lot.
- 14 Q: I understand. How far did you go in school?
- 15 A: Four year degree from Clemson.
- 16 Q: What was the degree in?
- 17 A: Ornamental horticulture.
- 18 Q: Okay. Any education after that?
- 19 A: No.
- 20 Q: Okay. Tell the Judge about your work history,
- 21 what'd you do after you graduated Clemson?
- 22 A: My father started a business in 1987 mostly
- 23 doing lawn care, and when I got out of Clemson
- 24 I wanted to do more complex projects so we
- 25 started doing landscaping and retaining walls,



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1 pavers, fountains, grading, ballfield
2 construction, laser grading, irrigation
3 drainage, that kind of stuff.

4 Q: Okay. And, you know, the caption of this cse,
5 the name of your company is Quality Lawn Care
6 and Landscaping d/b/a Design South Landscape
7 Company. I think you just explained that the
8 company started as a lawn care and landscaping
9 company and you evolved into the retaining
10 walls ---

11 A: Yes.

12 Q: --- from there?

13 A: Yeah. My dad started -- originally, it was
14 Quality Lawn Care. And that's when he got his
15 corporation name. As we got -- I got out of
16 school, you know, I wanted to do more
17 landscaping so that's how the and Landscaping
18 was added. And then I hated the name Quality
19 Lawn Care and Landscaping so we changed the
20 name to Design South.

21 Q: Okay. But you kept the corporate name, you
22 just used Design South, Landscape Company as a
23 d/b/a?

24 A: Yeah.

25 Q: Okay. All right. About how many years have



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1 you been building retaining walls?

2 A: We started building retaining walls back in
3 2002 somewhere around there.

4 Q: Okay. Working on about 15 years now.

5 A: Right.

6 Q: The events in this case were at the end of
7 2014, beginning of 2015, correct?

8 A: Yes.

9 Q: Okay. So as of then you had been building
10 retaining walls for, what, looks like about 12
11 years?

12 A: Yes.

13 Q: Okay. And how long had you been -- at the time
14 you worked on this wall, this project, how long
15 had you been building retaining walls for
16 Coogler Construction?

17 A: I'm not a hundred percent sure of the day
18 without looking it up, but I'm -- if I had to
19 guess I would say somewhere between four and
20 five years, and probably built 250,000 square
21 feet.

22 Q: Okay. Of total wall?

23 A: Total square footage of walls.

24 Q: About how many different projects would you
25 estimate that represents?



1 A: Probably somewhere between twelve and fifteen.

2 Q: Okay. Were they all this same type of
3 retaining wall as it was in this case?

4 A: Yes.

5 Q: Had you always built the walls in those prior
6 projects in the same fashion that you did in
7 this case?

8 A: Yes.

9 Q: You ever had any complaints from Coogler or
10 anybody else as to the prior retaining walls
11 that you've built for Coogler?

12 A: No.

13 Q: All right. Let's talk about these retaining
14 walls generally. We have the design plans for
15 this wall up here. Can you see it okay? Do
16 you need me to bring it ---

17 A: I can see it.

18 THE COURT: Now I said earlier before we started
19 you're going to have to teach me a lot. What
20 is a retaining wall?

21 Q: All right. Explain to the Judge what a
22 retaining wall is.

23 A: A retaining wall is basically where we can take
24 unusable ground -- in this situation it slopes
25 down to a wetland, a Federally protected



1 wetland. In order to build flat plateau on top
2 you have to retain the soil. So you build this
3 retaining wall up and backfill it with soil so
4 you make it flat -- a flat area.

5 Q: Just to ---

6 A: It gives the owner more usable acreage to build
7 on. Segmental retaining walls are a useful
8 tool because they're exponential [sic] cheaper
9 than concrete retaining walls.

10 Q: Can you explain to him what is a segmental
11 retaining wall and the concrete, what's the
12 difference?

13 A: A segmental retaining wall is where it's built
14 with retaining wall blocks. Where a block --
15 the weight of it's probably 80, 80 pounds. The
16 face of the block, which is what you see, is
17 roughly one square foot in area. And you stack
18 those blocks -- you'll start out and you'll
19 have a gravel -- roughly six inches of gravel
20 that we'll level out, and you'll put a course
21 of block just like you're laying brick. You
22 know, out for a certain length in that -- that
23 area -- that course is leveled front and back
24 and side to side. And then once you get that
25 level you can go up and stack the next course



1 and a running bind, which you take the middle
2 of this (indicating) block and then the next
3 block is here (indicating) and you stack the
4 next one in the center point of that. And then
5 you have what they call Geogrid reinforcement.
6 Geogrid is a -- I don't know what the material
7 would be made of, maybe a -- it's a type of
8 polymer fabric that you lay down on the course
9 below it and stack the block on top of it. And
10 that course goes back into the ground. And
11 then that's what actually keeps the wall from
12 falling over. That's the re- -- that's the
13 part of the retaining part that retains the
14 soil. The weight of the soil, the friction, is
15 what keeps the wall from falling out.

16 Q: All right. Trying to find a good picture of a
17 retaining wall ---

18 MR. ROBINSON: Why don't you look at Exhibit Thirty-
19 Three, Jeff. That might help you.

20 MR. GOODWYN: Of your book?

21 MR. ROBINSON: Yeah.

22 MR. GOODWYN: All right. Thought I had a better
23 one. Yeah, I think that's a -- Exhibit Thirty-
24 Three is the diagram of what we sh- -- of the
25 wall from a cross section. Where are all those



1 photos? We'll find another one here in a
2 minute.

3 Q: And I guess you can look at Exhibit Thirty in
4 your book there. It shows a little wall, and
5 you can see it's a -- I'll show you. Yeah,
6 Exhibit Thirty-B, there you go, Thirty-C, and
7 D as well. Those are -- all give you a better
8 idea what it looks like in reality. Now the
9 wall -- if you look at Thirty-B, the second
10 picture there, this is the wall but are there
11 caps that go on top of those bricks if it were
12 finished?

13 A: Yes. The caps are the -- actually covers the
14 -- each block has a core, holes in it, so it's
15 filled with stone; filled with stone to help
16 hold the wall up.

17 Q: Okay. The finished wall, the cap does not have
18 holes, it's flat?

19 A: No, the cap is a solid concrete ---

20 Q: Yeah, that's what I meant.

21 A: --- concrete rectangle basically, four inches
22 think.

23 Q: Okay. All right. So in building these walls
24 -- well first, let's do this. Let me show you
25 the contract between you and Coogler



1 Construction. Is this a copy of that contract?

2 A: Yes.

3 Q: All right. And I ---

4 MR. ROBINSON: May I see that?

5 MR. GOODWYN: That's your Exhibit One.

6 MR. ROBINSON: Oh, okay. No problem.

7 MR. GOODWYN: And I'm just going to go ahead and ask

8 that this be moved into evidence as Plaintiff's

9 Exhibit One?

10 THE COURT: Okay. Mr. Robinson?

11 MR. ROBINSON: It's my exhibit, Judge, no objection.

12 THE COURT: All right.

13 MR. GOODWYN: And I think we are going to work in

14 large part ---

15 THE COURT: Hold on a second. He has to do ---

16 MR. GOODWYN: Yeah, go ahead.

17 THE COURT: Give him a second.

18 MR. ROBINSON: It's marked already. Let me do this,

19 Jeff.

20 MR. GOODWYN: Is that your book?

21 MR. ROBINSON: This is the witness copy book. It

22 has original stickers on it. You may want to

23 go ahead and do it.

24 MR. GOODWYN: That's fine. There's some exhibits in

25 there that I'll have objections to, but the



1 one's that I don't, we'll just work off of this
2 book then. That'll make it easier for us.

3 **THE COURT:** Now you have it pre-marked for
4 identification. Are you going to go ahead and
5 leave it marked as an exhibit ---

6 **MR. ROBINSON:** I have that marked with the original
7 blue markers. Those are originals in that
8 book. Your book, my book, Jeff's book have
9 photocopies. Some of them are white. The ones
10 that are in color of course are blue, but those
11 originals there are stuck on there.

12 **THE COURT:** All right. But my question is, do you
13 need the court reporter to mark each exhibit
14 again?

15 **MR. ROBINSON:** I don't need it marked, but if he
16 wants to put his initial on it or mark on it or
17 something like that that's fine, but I'm going
18 to introduce that entire book subject to
19 objections.

20 **THE COURT:** Okay. All right. Please proceed, Mr.
21 Goodwyn.

22 **Q:** All right. And again, I'm kind of talking
23 generally here. Is this contract substantially
24 different than the contracts that you had with
25 Coogler in the past?



1 A: No.

2 Q: Okay. And there's some key provisions I want
3 to talk about. Under the contract, what are
4 qualities or Design South's responsibilities
5 with regard to construction of the wall?

6 A: The kind of situation that Joey and I have
7 evolved into working together, we were on a
8 mutual job working at USC on some intermural
9 ballfields with another general contractor.

10 MR. ROBINSON: Objection, Your Honor.

11 THE COURT: What grounds?

12 MR. ROBINSON: What they did on some other job I
13 don't think is relevant here.

14 MR. GOODWYN: He's trying to explain ---

15 THE COURT: Hold up.

16 MR. ROBINSON: The question's what's the contract
17 require.

18 THE COURT: Mr. Goodwyn?

19 MR. GOODWYN: I asked him generally what are your
20 duties under this contract, and he's trying to
21 give a little background to explain what his
22 duties under the contract are.

23 THE COURT: Mr. Robinson?

24 MR. ROBINSON: Your Honor, the contract is the
25 contract. The background doesn't have anything



1 to do with it.

2 THE COURT: Objection overruled.

3 THE WITNESS: So that means continue on?

4 THE COURT: You can answer the question.

5 A: Okay. Just, we met on that job and we talked
6 about the possibility of bids on some retaining
7 walls with him. You know, I mentioned to him
8 that I felt like that if your company and my
9 company were to work together -- I don't have
10 the large equipment to backfill large retaining
11 walls, and I said you obviously can move dirt
12 cheaper than I can. So we came up with the
13 idea that I would just charge him ---

14 MR. ROBINSON: Your Honor. I'm going to object here
15 to parol evidence to attempt to modify the
16 contract.

17 MR. GOODWYN: Nobody's trying to modify the
18 contract. He's just giving a basis for the --
19 a background and basis for the terms of the
20 contract.

21 THE COURT: Objection overruled.

22 A: So we basically came up with an idea that I
23 would charge him on a per square foot basis to
24 build these retaining walls. What that means
25 is, is that he would buy the material, the



1 block, the stone, the grid, the cap glue, any
2 kind of materials that I needed: perforated
3 pipe behind the wall. He would purchase all
4 that and we would just give him a labor price.
5 We would provide our own equipment to place the
6 stone, move the block in place, tack it;
7 basically, just a labor-only rate. That's the
8 way we worked for pretty much all the way up
9 until this job.

10 Q: All right. Well explain to the Judge about
11 this particular contract. Is this any
12 different than the prior work, and if so, how?

13 A: In this job here, Joey did not have the
14 manpower to run the equipment on this job. So
15 he asked me to go back and provide him a price
16 to place the dirt behind it and the labor to
17 build the wall. He was still going to buy the
18 material, the block, stone, cap glue,
19 perforated pipe, any material that we needed,
20 the grid; and we were still providing the labor
21 to stack it plus the backfill. So that was a
22 major difference in this one than any other
23 jobs that we've worked on.

24 Q: All right. Well let's talk about this --
25 specifically about the location of the wall



1 since that's a core issue in this case. Did
2 your company have any responsibility for laying
3 out the wall, designing the wall or determining
4 the precise location of the wall?

5 A: No, we don't -- we're not the surveyor so we
6 don't -- we're not in charge of the layout of
7 the wall. We have whoever we're working for,
8 normally it's Coogler Construction, and they
9 have -- either they mark it out their self or
10 they have an outside surveyor lay out the wall
11 for us.

12 Q: Is that what happened in this case, was an
13 outside surveyor hired?

14 A: Yes.

15 Q: Who was hired to lay out the wall?

16 A: Mr. Walker.

17 Q: Did you have any communications with Mr. Walker
18 regarding where he was going to lay the wall
19 out?

20 A: The only conversation we had is when he came
21 out to mark off the first time. I asked him --
22 we were talking about a critical dimension, and
23 that's the area where the wall's closest to the
24 curb.

25 Q: And is that the -- make sure everybody's on the



1 same page. Is that this area here
2 (indicating)?

3 A: Yes.

4 Q: Okay.

5 A: Where the wall comes in closest to any critical
6 point such as the curb. I asked him verbally
7 how far to the back of the wall to the back of
8 the curb, and what he told me was around six
9 feet.

10 Q: Okay.

11 A: The -- I didn't go any further to check behind
12 him, just figured he's a surveyor and I'm not.

13 Q: Okay. And yeah, I want to ask you about that
14 because -- let's kind of get into that. So
15 you're to start the job building this wall on
16 a particular day. When you get out to the job
17 site, what is already out there to tell you
18 where to put the wall?

19 A: When we get to the job site, there's going to
20 be those stakes in the ground.

21 Q: And you're talking about these stakes here
22 (indicating)?

23 A: Yes.

24 MR. GOODWYN: Your Honor, I don't -- we have
25 pictures of these stakes that the -- in the



1 book. I don't necessarily need to mark these
2 but we can use these as demonstrative exhibits
3 today.

4 Q: Do you remember how many there are?

5 A: I don't remember.

6 Q: About 15 to 20? But anyway, we can go through
7 them later but -- but anyway, these -- you see
8 these stakes are on the job site, correct?

9 A: Yes.

10 Q: All right. And I know there's something called
11 hub that's right next to the stakes?

12 A: Yes.

13 Q: Describe for the judge what is a hub, what's
14 its purpose?

15 A: Basically like a -- I think you said earlier,
16 he can't stake off exactly where the wall's
17 going because as soon as you excavate the
18 footer you'd lose your stakes. So what he does
19 is he transposes that retaining wall line a
20 certain distance away. Or I guess he
21 transposes the wall line a certain amount of
22 footage away so that way we can -- basically
23 taking this tangent line, transposing it over
24 here (indicating), and that's going to be where
25 the wall is. Basically we have to start a



1 wall. The station numbers that coincide, you
2 know, let's us know where the wall starts and
3 stops. It also is important because it gives
4 us different grid lengths because the taller
5 the wall is the longer the grid is, the
6 reinforcement links are.

7 Q: And I think this is important for my sake. It
8 took me awhile to figure out what a grid was.
9 Can you -- I don't know if this shows it right
10 -- we probably have a picture somewhere. I'm
11 going to try to get you to explain to the judge
12 what a grid is and what its purpose is.

13 A: The grid is a geotextile fabric that when you
14 lay -- say this is the top of a -- top of the
15 retaining wall block here (indicating), and
16 this is the face (indicating), we lay that grid
17 here (indicating) and then this soil goes back
18 a certain known footage. This grid lays back
19 and it's -- basically it's open, it's not a
20 solid sheet of fiber or anything, it's open
21 where -- and then the next course is stacked
22 on top of it. So that sandwiches that grid in-
23 between them. Well then that grid goes back in
24 -- in this case I think the longest one is
25 twelve feet. The soil goes on top of that and



1 it's compacted 95 percent. So that friction
2 between the two grids, it works together to
3 keep the retaining wall from falling out.

4 Q: Okay. I'm looking now at a photograph that's
5 the second page of Exhibit Six. The first page
6 is the cross-section drawing. Go ahead and
7 turn to your Exhibit Six and make sure it's the
8 same. Okay. So in looking at the photograph,
9 kind of show the judge where the grids would
10 be.

11 A: This course right here (indicating), this is
12 the top of the wall. If we were going to go up
13 any taller that grid would be laid down on top
14 of that course and then it would extend back
15 into the back.

16 Q: About how far?

17 A: It differs based on the station number and
18 height of the wall, but the longest section in
19 here I believe is twelve feet I believe.

20 Q: Okay. It's designed to grab the dirt and if
21 the wall wants to fall it'll be -- kind of pull
22 dirt with it?

23 A: It's just a reinforcement. You create tension
24 on that grid back into the soil when you
25 backfill it. The weight of that soil also --



1 the grid is open -- has open squares in it so
2 the soil works with the soil above it and the
3 soil below it. And that cohesion basically
4 keeps it from -- and the friction and the
5 weight of that soil keeps the wall from -- the
6 force wants to push the wall out but that grid
7 pulls it and it's pulling it back into the
8 retaining soil.

9 MR. GOODWYN: Does that make sense?

10 THE COURT: Yes.

11 MR. GOODWYN: Okay. It took me a long time to
12 figure that out.

13 THE COURT: Especially looking at the picture helps
14 too.

15 MR. GOODWYN: Okay. I'd like to go ahead and move
16 to admit this exhibit. It's marked as Exhibit
17 Six. I know it's not sequential but it might
18 be easier to just keep them in the order it's
19 so marked. Are you okay with that?

20 MR. ROBINSON: Oh absolutely.

21 THE COURT: Any objection?

22 MR. ROBINSON: No objection, Judge.

23 THE COURT: All right. Your motion's granted, Mr.
24 Goodwyn.

25 MR. GOODWYN: Thank you.



1 (Defendant's Exhibit Number Six was introduced into
2 the record at this time.)

3 Q: All right. So you go out to the job site, you
4 find these stakes, correct?

5 A: Yes.

6 Q: And next to the stake is another little piece
7 of wood driven in to the ground that's called
8 a hub.

9 A: (Nods head.)

10 Q: And how do you know where to build the wall
11 based on the stake and the hub?

12 A: On the front of the stake -- and this
13 (indicating) being the ground. And then the
14 front of it gonna be another roughly inch and
15 a half by inch and a half stake will be driven
16 in the ground down -- most of the time flush
17 with ground level. And then there'll be a --
18 sometimes there'll be a pin or a nail in the
19 center of that, or we just take to the center
20 of that hub. And then by this (indicating)
21 stake it says five foot offset facing the wall,
22 so we would come to the hub -- this distance
23 between stake and the hub is irrelevant. This
24 is just marking where the hub is. So we take
25 a tape measurer and measure it from the hub



1 center point to the face of the wall, which is
2 five feet. And that's where the wall is
3 constructed.

4 Q: All right. Let me ask you a couple of
5 questions here. Are there situations when
6 there are two stakes and two hubs very near
7 each other?

8 A: Yes. Typically when you have turning points in
9 a wall, at the inside or outside corners. If
10 you're looking at a birds-eye view looking down
11 ---

12 Q: Would it help to use the diagram?

13 A: Yeah. See these (indicating) outside --
14 basically this is the wall right here
15 (indicating). And this is the soil that's
16 being retained back here (indicating). Out
17 here (indicating) is the wetlands. So that's
18 lower, this (indicating) area is higher. These
19 turning points, what you'll have -- at each
20 turning point you'll have two stakes. And as
21 long as those two stakes have the same station
22 number, that ---

23 Q: Let me see that ---

24 A: --- that station number ---

25 Q: I think this is it. Yeah, these two, right



1 here (indicating), have the same number, eleven
2 plus seventy-four plus twenty-two?

3 A: Yeah.

4 Q: Okay.

5 A: If you look on that drawing there it says
6 eleven plus seventy-five point five. That's to
7 let me know where this corner is. If there's
8 two stakes that have the exact same station
9 number on it, what that tells me is I've got to
10 pull from those hubs a known dimension, which
11 he says five foot offset, to a point. And then
12 once that point is found that's where the wall
13 construction begins. If those station numbers
14 were different then you wouldn't pull to a
15 point, you would just have those lines, those
16 tangent lines, keep going til they come to a
17 point. But because you have two stakes with
18 the exact same station numbers -- because you
19 can't -- that's the only way to identify that
20 corner inside or outside.

21 Q: Okay. So for these two ---

22 THE COURT: I'm sorry, let me stop you to make sure
23 I understand.

24 MR. GOODWYN: Sure.

25 THE COURT: Please forgive me and thank you for your



1 patience. The bottom of the stake, you said
2 the numbers are identical in these two stakes?

3 **THE WITNESS:** The station numbers.

4 **THE COURT:** Okay. Let's back up again. Which ones
5 are the station numbers?

6 **THE WITNESS:** These numbers right here (indicating)
7 are the station numbers.

8 **THE COURT:** Where it says eleven plus ---

9 **THE WITNESS:** Eleven plus seventy-four point two
10 two.

11 **THE COURT:** Okay. And the station numbers are
12 identical in both those stakes.

13 **THE WITNESS:** Right.

14 **THE COURT:** All right. Now what's the next number?
15 It says top wall, bottom wall.

16 **THE WITNESS:** That's letting me know the elevation
17 of where I am. That tells me how -- that says,
18 F sixteen point one two.

19 **THE COURT:** Okay. And the bottom wall is point four
20 six?

21 **THE WITNESS:** Yeah, point four six. What that tells
22 me is, is that it's fill. So to get to the top
23 of the wall, basically it's going to be sixteen
24 point one two feet higher than you are on that
25 hub.



1 THE COURT: But the numbers on those ---

2 THE WITNESS: A bit different, right, because the
3 hubs aren't set at a certain elevation, they're
4 just -- you know, they just hammered into the
5 ground based on that line.

6 THE COURT: Okay.

7 THE WITNESS: And then they take a reading on top of
8 that. And elevation reading and that's how
9 they come up with these (indicating) numbers.

10 THE COURT: All right.

11 THE WITNESS: These numbers here (indicating), in
12 this particular case, and they may agree, are
13 kind of irrelevant, the fill numbers.

14 THE COURT: All right.

15 THE WITNESS: The biggest thing is the five foot
16 offset face of wall and these station numbers.
17 When you have two station numbers, they're the
18 same number -- let's just take for instance
19 this outside corner. If you put one stake
20 right at the corner and said five foot offset,
21 well you don't know which plane that's in. You
22 might pull a tape this (indicating) direction,
23 this (indicating) direction; so you might not
24 be on the same plane. So they set two stakes
25 here and here (indicating). And if they have



1 the same station number, that means they're
2 representing the same -- it's two different
3 offsets for the same point. So what that does,
4 it allows me to take a tape measurer and pull
5 from this hub (indicating) and this hub
6 (indicating) to get one point. So that let's
7 me know I'm in the right plane. So that's --
8 this stake here (indicating) is the one that --
9 where the wall is off the most, and it's
10 supposedly too close to the curb. And that's
11 the -- this is the stake that I think you said
12 earlier that we didn't have and it's right
13 here.

14 Q: Well let's talk about this. I think there was
15 some discussion, at least in Opening, about
16 these numbers not corresponding to what's on
17 the design. The design says eleven plus
18 seventy-five point five, this stake -- both
19 these stakes say eleven plus seventy-four point
20 twenty-two, which is point seven eight feet
21 different than the design. Now just from your
22 experience, you've been as of -- at least as of
23 the date of this project, been building
24 retaining walls for twelve years. If you see
25 a stake and it says five feet -- five foot



1 offset from the face of the wall from where
2 these stakes are, is that where you put the
3 wall or do you do some mathematical
4 calculations to get you back to what the design
5 says of seventy-five point five?

6 A: No. When there's two stakes like that and
7 they're identical, they're marking a turning
8 point. And so there's no math to do to figure
9 out distance back either direction. When those
10 two have the same -- it's a tangent point that
11 come together at five feet and that's where the
12 wall goes. There's no magic behind that, it's
13 just straight and simple.

14 Q: All right. Have you -- who taught you how to
15 build these walls?

16 A: Kind of self-taught. We started out doing
17 small retaining walls. And I worked with
18 Keystone originally and they helped me along
19 through the way. We hired a guy that came and
20 worked with us whose background was in large
21 commercial construction, and he taught me a lot
22 involved in it. And the first large commercial
23 job we did was actually here in Columbia, it
24 was about 55,000 square feet. So it was almost
25 over an acre of retaining wall.



1 Q: Have you ever had anybody tell you that if you
2 get a stake and the number -- the station
3 number on the stake is different than the
4 station number on the plans, that you needed to
5 do math to figure out where the actual corner
6 was as opposed to just working straight from
7 the hub and the stake?

8 A: No. They're all marked out the same. They're
9 ha- -- two station numbers tha- -- two stakes
10 that have just like that, that have the same
11 station number, and it's you pull the tape
12 measure and it says five foot offset, you pull
13 five foot -- to where those two tape measures
14 meet is where the wall ends.

15 Q: Okay. All right.

16 A: Likewise on that, you know, my understanding it
17 said that those stakes were supposed to be
18 three and a half foot offsets.

19 Q: Yeah, let's talk about that for a second. All
20 the stakes, and I think they'll concede to
21 this, all of these stakes, all the stakes we
22 have photographs of, say five foot offset,
23 correct?

24 A: Yes.

25 Q: Okay. And did you -- was there some discussion



1 with you and Mr. Coogler about the offset in
2 that corner where the wall was near the parking
3 lot?

4 A: I'm sorry, what was the question again?

5 Q: Did you have any discussions with Mr. Coogler
6 about the proper offset in that corner area?

7 A: Yes, sir. When I was sending pictures of the
8 stakes -- because when James first called me he
9 said that the wall was three foot -- or the
10 curb -- the wall was three feet inside the curb
11 meaning the wall was actually would have been
12 eight feet further away than it was supposed to
13 be. And I told Joey, I said, there's no way --
14 there's no way possible for it to be in the
15 wrong place that far. And anyway, I asked him,
16 you know, he wanted to have a meeting on-site.
17 And I think John Goff is his name, John Goff
18 was Joey's surveyor, the guy that worked for
19 him at the time. And I think John had told
20 Joey that it was eight feet ---

21 MR. ROBINSON: Objection, Your Honor.

22 THE COURT: Sustained.

23 Q: He's saying you can't say he told you this,
24 that kind of thing. Well I tell you what, let
25 me just back up. Let me show you this.



- 1 MR. GOODWYN: This is a text chain letter.
- 2 MR. ROBINSON: Not a problem.
- 3 MR. GOODWYN: All right.
- 4 MR. ROBINSON: No objection, Your Honor.
- 5 THE COURT: Okay.
- 6 MR. GOODWYN: Just for numbering purposes. Now you
- 7 have yours numbered One through Thirty-Seven?
- 8 MR. ROBINSON: Yeah. Well just make that
- 9 Plaintiff's One.
- 10 MR. GOODWYN: Plaintiff's, yeah, okay.
- 11 Q: Is this a text chain that you were involved in?
- 12 A: Yes.
- 13 Q: All right. Who is that a text chain between,
- 14 you and who?
- 15 A: Me and Joey.
- 16 Q: All right. Joey Coogler?
- 17 A: Yes.
- 18 MR. GOODWYN: Okay. I'd like to move to have this
- 19 marked as Plaintiff's Exhibit One.
- 20 MR. ROBINSON: No objection.
- 21 THE COURT: All right.
- 22 (Plaintiff's Exhibit Number One was marked for
- 23 identification purposes.)
- 24 Q: All right.
- 25 MR. GOODWYN: I have a copy for the Court as well.



1 Q: All right. Can you walk us through this text
2 chain first? You've got the approximate date.

3 A: Approximate date of March 16th, 2015.

4 Q: All right. Does it say that at the bottom of
5 page one there?

6 A: Yes.

7 Q: Okay. And what's the nature of this text?

8 A: This is in -- we were in discussion about they
9 were going to take the wall down. They -- and
10 then I sent him a picture of -- there was some
11 discussion about whether the stake said ten
12 foot offset, five foot offset, five foot offset
13 center line of wall, ten foot offset center
14 line of wall. And I sent him a copy of the
15 picture showing all the stakes that I had that
16 had five foot offset.

17 Q: All right. Is that the picture that's kind of
18 cut off at the bottom of page one but you have
19 fully on page two?

20 A: Yes.

21 Q: Okay. And that's just -- is that a -- not all
22 of these stakes that we have today but a
23 portion of them?

24 A: Yes.

25 Q: Okay. All right. And then tell me this, the



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1 text, and I know the copies that the Court has,
2 Mr. Robinson has, are not color, but there's a
3 green portion and then there's responses over
4 here (indicating) that are in white. Is the
5 green you?

6 A: Yes.

7 Q: Okay. All right. All right. Let's -- all
8 right. On page two there, what are you saying?

9 A: I just said, you know, basically in that
10 conversation I just said that the stakes that
11 Mr. Walker used, these were the stakes that he
12 used for wall layout. And I said it seems
13 pretty clear that he says face of the wall.
14 And Joel responded back, yes, it does.

15 Q: All right. How do you -- what's your next
16 communication?

17 A: Next communication was on March 17th, the next
18 day. I asked him did the surveyor make it out
19 there yet. He responded back later that day,
20 yes, he said that those stakes are three and a
21 half foot offsets because of silt fence.

22 Q: Okay. That's on page three there?

23 A: Yes.

24 Q: Okay. So is that where you get the information
25 from that you believe the -- the corner there



1 near the parking lot should have been three and
2 a half foot offsets?

3 A: Yes. He was saying that those stakes there
4 said three and a half foot offset opposed to
5 five.

6 Q: Okay. But in fact say five?

7 A: Yes.

8 Q: Okay. Had they been three and a half feet,
9 would the wall -- would that have put the wall
10 a foot and a half foot further out?

11 A: Yes.

12 Q: Okay. All right. Let me ---

13 A: There's also the issue of the station number on
14 that hub.

15 Q: All right. Let's not -- before you get into
16 that, before I forget.

17 MR. GOODWYN: Let me go ahead and move to admit the
18 large drawings as exhibits as they're marked?
19 Exhibit Three, and it's a two-page exhibit with
20 both Four and Five. I think that's how you
21 have it marked. Oh, I'm sorry, it's Exhibit
22 Seven.

23 MR. ROBINSON: Exhibit Seven. It's drawing number
24 four and drawing number five. Exhibit Seven.
25 No objection of course.



1 (Defendant's Exhibit Number Seven was introduced into
2 the record at this time.)

3 MR. GOODWYN: And I'd like to go ahead and have
4 what's been marked as Defendant's Thirty-Six
5 admitted as the as-built versus design
6 drawings.

7 MR. ROBINSON: No objections.

8 THE COURT: Okay.

9 (Defendant's Exhibit Number Thirty-Six was introduced
10 into the record at this time.)

11 MR. GOODWYN: I've got it here. I'm just going to
12 leave mine on the board.

13 Q: All right. So what were you saying about the
14 station number?

15 A: I was just saying if you look on the drawing --
16 -

17 Q: The design drawing?

18 A: Yeah, the design drawing where that -- right
19 here (indicating) where it says station eleven
20 plus seventy-five point five ---

21 Q: Right.

22 A: --- that indicates that corner there
23 (indicating) that's facing these stamped
24 drawings by the geotechnical engineer, shows
25 that corner to be placed at eleven plus



1 seventy-five point five exactly. And you can
2 see on the stakes it says eleven plus seventy-
3 four point two -- point two two maybe.

4 Q: Okay.

5 A: And so that is obviously not eleven plus
6 seventy-five point five. It's in the wrong
7 place.

8 Q: Now how does that affect the location -- the
9 final location of the wall? It might have been
10 easier to work off the as-d- -- the built
11 versus as-design.

12 A: When you -- when the wall's station number is
13 wrong, basically that corner's not going to be
14 in the right spot. Because if you have two
15 false numbers. And then you're basing it off
16 five foot offsets and it's supposed to be a
17 three and a half foot offset but the stake
18 doesn't say that, and then the station number's
19 wrong, you can't physically put the wall where
20 it's supposed to go. You just -- the
21 information that you have, it's -- you can't
22 physically put the wall there.

23 Q: All right. And your corner appears to be here
24 (indicating).

25 A: Yes.



1 Q: As opposed to out here (indicating).

2 A: Right.

3 Q: Does where you actually put that corner of the
4 wall correspond to the station number that was
5 on the stake?

6 A: Yes.

7 Q: Okay. And I understand after these issues
8 started coming to light that there were some
9 accusations that you -- the wall was not in the
10 right place, did you go and try to take some
11 measurements?

12 A: Yeah, that same -- that same time frame from
13 when they called me and said the wall was
14 inside the curb, I think -- I think myself,
15 Joey and Johnny Goff met at the site the next
16 morning I believe.

17 Q: Okay. And where the stakes still in the ground
18 or ---

19 A: No, the stakes that we have, we take those up
20 after construction and then I keep those for
21 reasons like this. Because if you don't have
22 the stakes then it's basically a he said, she
23 said, you know, you put the wall in the wrong
24 place, no, I didn't. If I have the stakes than
25 I have proof of them -- that them saying five



1 foot and it say three and a half. When we got
2 there we were able to locate six of the old
3 hubs that were still in the ground.

4 Q: Okay. Tell ya what, before we talk about those
5 hubs, I want to ask you did you make a
6 comparison of the design drawing as to where
7 these stations should be versus what the
8 stations as listed on -- where the stakes
9 actually were?

10 A: Yes. When Joey told me that the wall was in
11 the wrong place I started going into to
12 overdrive trying to figure out, you know, what
13 could have happened, what could have caused the
14 wall to be in the wrong place, because in the
15 critical dimension areas, you know, I'm pretty
16 -- pretty thorough about checking to make sure
17 that I'm not going to have that happen. So I
18 went back and based on the stakes that I had,
19 I tool the, basically the station numbers on
20 the drawings and put those in a column and then
21 actually the stake that was staked out in the
22 field, I wrote down what the actual layout
23 stake said, and basically came up with the
24 difference in footage on how far off it was.

25 Q: Is this the list that you made?



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1 A: Yes.

2 Q: Okay.

3 MR. GOODWYN: I think it's in your book, but I ---

4 MR. ROBINSON: That's not in my book but I don't
5 object to that. That's going to be Defendant's
6 Two?

7 MR. GOODWYN: Plaintiff's Two.

8 MR. ROBINSON: Excuse me, Plaintiff's Two.

9 MR. GOODWYN: Yeah.

10 (Plaintiff's Exhibit Number Two was marked for
11 identification purposes.)

12 Q: Okay. All right. So if you could, just read
13 what are the differences that you measured
14 between the actual and the design.

15 A: This was something that kind of revealed
16 something to me that -- that started me looking
17 in the right direction. But there was -- there
18 was approximately ten stakes that were in the
19 wrong place: ten station numbers. And they
20 ranged anywhere from point five three feet,
21 roughly six inches, all the way up to almost
22 two point three feet in the wrong place. You
23 know, they go from two point one seven, point
24 six eight, point five three, one point three
25 five, point seven nine, one point two eight,



1 and two point two seven.

2 Q: All right. And when you go back and look at
3 what the actual station numbers were and look
4 at your as-built layout, looking at -- did you
5 for the -- is the wall, the corners of the
6 wall, where the stakes actually were?

7 A: Yes. You can look at it and the corners are
8 based on these stakes being in the wrong place
9 -- or the wrong station number. With the wrong
10 station number, when you put the corner in the
11 wrong place, the wall physically can't be where
12 it's supposed to be.

13 Q: Okay. All right. These -- this photograph
14 here, is that a picture of the stakes? And
15 there's a couple of pictures here. There's
16 fifteen stakes in this set.

17 MR. GOODWYN: It's on nine of this one. There may
18 be some overlap between the two.

19 THE COURT: Okay.

20 Q: Do these two photographs have all the stakes
21 that you collected?

22 A: Yes.

23 Q: Okay. And is this where you got the
24 information for your summary page?

25 A: Yes.



1 Q: Okay.

2 MR. GOODWYN: I'd like to move these two photographs
3 collectively as Plaintiff's Three.

4 MR. ROBINSON: May I see those? Are they the same
5 as the ones I have?

6 MR. GOODWYN: Probably.

7 MR. ROBINSON: No objection, Your Honor.

8 (Plaintiff's Exhibit Number Three was marked for
9 identification purposes.)

10 THE COURT: At this point let's break for lunch.
11 Stand in recess until 2:00 p.m. this afternoon.

12 (Off the Record from 12:58 p.m. until 2:07 p.m.)

13 Q: Mr. Young, we'll pick up kind of where we left
14 off. We were talking about the stakes and some
15 measurements that you had made after the
16 accusations that the wall's in the wrong place
17 and had come up. If you turn to tab eight of
18 your book here. If you look at these pictures,
19 just look -- looks like about 8, 10, 12
20 pictures maybe, are these pictures showing the
21 distances to the hubs that you were able to
22 find?

23 A: Yes.

24 Q: Okay. And just for the Court's sake let's just
25 -- looking at the very front, the first



1 picture, labeled 8A, this square peg or piece
2 of wood that's in the ground, is that a hub?

3 A: Yes.

4 Q: Okay. All right. And if you can, why don't we
5 just roll through these, and can you just tell
6 the Court how far away these measurements show?

7 A: This one right here (indicating) is roughly 83
8 inches, which is 6 feet 11 inches to the hub
9 from the wall there.

10 Q: You know where that one was?

11 A: That was somewhere in this (indicating) section
12 down through here in this large green space
13 area.

14 Q: Okay.

15 MR. ROBINSON: Where is it now?

16 THE WITNESS: I was just saying I thought it was
17 somewhere right along in here (indicating).

18 Q: Okay.

19 MR. ROBINSON: All right.

20 Q: What about the next one?

21 A: The next one is roughly five foot eight and a
22 half, somewhere in there.

23 Q: Okay.

24 A: The next one is five foot. The next one is
25 four foot six. And that one's just showing a



1 further away picture of the last measurement.

2 Q: Okay.

3 A: Next one is four foot two. And then showing
4 where that measurement is.

5 Q: Okay.

6 A: The last -- let's see, 8-E, 8-F, 8-G, 8-H, H-I
7 [sic], and I believe H-J [sic] are in what I
8 would consider that critical part of the
9 retaining wall.

10 Q: That's the corner of the parking lot, is that
11 what you're saying?

12 A: Yes.

13 Q: Okay. All right. And what are the set-offs
14 that you measured in those photos?

15 A: One is three foot eight. One is four foot two.
16 One is four foot six. I think that's it.

17 Q: Okay. Are all those less than five -- the five
18 feet specified on the stakes?

19 A: Yes.

20 Q: Is that why -- part of the reason why you
21 believe that if the wall's in the wrong place
22 or too close to the curb it's not your
23 responsibility?

24 A: Right. These hubs that we found, these are the
25 ones that were found after construction was



1 built. The same day that Joey and myself and
2 John Goff met out there, we were able to find
3 these hubs in the ground.

4 Q: Okay. Were you able to find all the hubs?

5 A: No.

6 Q: Okay. And are the hubs removed by anybody or
7 do they just get driven in the ground so far
8 you can't find them?

9 A: Most of the time they just get covered up in
10 construction stuff. I think there's 17, 19, 20
11 hubs in the job. We found six that were still
12 there.

13 Q: Okay. Let's talk about this area out here
14 (indicating) where the wall as built is, at
15 least it's shown in this survey, 3.8 feet be
16 different. I think one of those hubs that you
17 saw showed it about between six and seven feet
18 away from the hub?

19 A: Yes.

20 Q: Okay. Can you explain to the Court why this
21 (indicating) particular session was a little
22 further away there?

23 A: This retaining wall is down next to a wetland.
24 And being down next to a wetland you have to
25 have a certain bearing capacity for a retaining



1 wall to sit on. I -- as well as I remember I
2 believe it's around 2500 pounds per square foot
3 I believe was the bearing pressure that it had
4 to take. And Joey and I had some text
5 conversations about getting them to check the
6 bearing before we got out there. And I think
7 they had S&ME check it. And they made a
8 recommendation to undercut five feet and build
9 back up with suitable soil. When we got out
10 there and started digging on the wall, the
11 undercut five foot section was in the wrong
12 place. It was too far in. It was -- we never
13 did find it but it was too far in.

14 Q: Okay.

15 A: And so at that point I called Joey and asked
16 him what did he want us to do, and I think he
17 said to just use his trackhoe and dig it down
18 and we'll build it back up with stone because
19 he didn't have the manpower to backfill and
20 compact it.

21 Q: Is that what you did?

22 A: Well, we went to dig it out but his trucks
23 couldn't haul enough stone to fill back in a
24 five foot hole. And so I asked him what did he
25 want us to do, whether we can build it up with



1 stone but we'll be sitting here, or I can start
2 and build it up with block. And he said go
3 ahead and just build it up with block.

4 Q: Okay. And how did building up with block as
5 opposed to filling it with stone affect the
6 location of the wall, or the offset as we're
7 talking about?

8 A: When you start building a wall, you know,
9 you're counting the steps back. And when you
10 start -- you're thinking that you're startin at
11 a certain elevation and then you undercut seven
12 courses down, it was my mistake that I forgot
13 to account for courses below grade like that.
14 And so I started seven inches further in than
15 I should.

16 Q: So, at the -- but at the time -- okay. So,
17 when you started digging you should've -- you
18 say you should've started digging seven inches
19 further out?

20 A: Well, it was a -- whatever that trackhoe Volvo
21 bucket was -- is that 42 wide or?

22 THE COURT: He can't answer that.

23 A: Sorry.

24 THE COURT: If you don't know, you don't know.

25 A: Forty-two inches -- fort- -- I don't know,



1 forty-eight inches wide was the depth. So it
2 wasn't a question of diggin it in the right
3 place, it was just where we started the
4 placement of the wall. Because you've got a
5 stake up here (indicating) and you're five feet
6 down. So when you pull a tape measure and a
7 plumb bob down, I started the wall as if I'm up
8 here (indicating). I didn't calculate the
9 negative seven courses down.

10 Q: Okay. So each course is an inch further in so
11 it threw you off by seven inches?

12 A: Yes.

13 Q: Okay. And in this area that we're talking
14 about out here (indicating), I think by my
15 rough calculations there's about 17 or 18 feet
16 of green space between the wall and the curb.
17 Does that sound about right?

18 A: I don't know for sure but it ...

19 Q: Okay.

20 A: Somewhere in there.

21 Q: Okay. More than 10 though?

22 A: Yeah.

23 Q: Okay. Does -- an extra couple of feet, does
24 that have any significant impact on the project
25 itself?



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1 MR. ROBINSON: Objection, Your Honor. Absolutely no
2 foundation for the answer to that question.

3 THE COURT: What was the question?

4 MR. ROBINSON: He has no idea what the parameters of
5 that project are.

6 THE COURT: Hold on. What was the question again,
7 Mr. Goodwyn?

8 MR. GOODWYN: I asked him if the wall is three feet
9 further in than designed, does that have any
10 significant impact on the project.

11 THE COURT: Objection's overruled. You can answer.

12 A: Keeping in mind that we're next to that
13 wetland, in that area, you know, in my
14 experience with doing retaining walls I always
15 consult with whoever the superintendent is or
16 whoever is doing the layout to find out where
17 -- where is it critical, where do I need to
18 make sure that I'm, you know, on top of where
19 I am when I get to the top of the wall. And in
20 this (indicating) area it's just a large green
21 space. With the mistake that I made with the
22 negative courses below grade, with a retaining
23 wall you got to -- a lot of different issues
24 that you gotta deal with and one of 'em is
25 aesthetics; you know, how well the retaining



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1 wall looks. If you build a wall that's
2 structurally sound but if it has a bow in it or
3 a crook in it, an owner will reject that faster
4 than anything because they can see it. And so
5 in this area where we're talking about from the
6 start of the wall to the green space, our
7 opinion was that we were erring more on the
8 side of aesthetics more so than placement. I
9 didn't want to end up with a -- in a position
10 where me working for Joey, DHEC comes out and
11 says, you know, according to our permit you're
12 two foot across on Federally protected wetland.
13 And so, in my mind, I was making a decision to
14 err on the side of caution and bring it in two
15 feet further in that section there because it
16 was no -- all of it was green space, there was
17 no parking lot, it was just a landscaped area.

18 Q: And is that the kind of thing that you can do
19 in a critical area like the corner or you have
20 to be more rigid in the corner?

21 A: No, you have to -- you know, you don't have to
22 -- you don't -- you're not worried as much
23 about aesthetics because you're more interested
24 about where the wall placement is.

25 Q: Okay. In your past experiences working for Mr.



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1 Coogler, have you applied those same principals
2 of being concerned more about aesthetics and
3 the wetland issue in where exactly where the
4 wall's placed?

5 MR. ROBINSON: Objection Your Honor.

6 THE COURT: Overruled.

7 A: Yes, we have. Despite all this, you know, I
8 feel like Joey and I've had a pretty good
9 relationship for the five years that we've
10 worked together. You know, I get along well
11 with his brother. The -- and I always felt
12 like, you know, we didn't have -- it wasn't all
13 roses, I mean there was disagreements along the
14 way, but I always felt like that we were able
15 to, you know, work together to try to figure it
16 out to fix it.

17 Q: Has any deviation similar to this on prior
18 walls working for Mr. Coogler, has that led to
19 the wall being torn down?

20 MR. ROBINSON: Object to the form, Your Honor.

21 THE COURT: Overruled.

22 A: I can't think of any specific case where we had
23 to take a wall down for being in the wrong
24 place. We've had to take some walls down
25 because of aesthetics where, you know, there's



1 a place in the wall that doesn't look right and
2 we take it down and fix it.

3 Q: Okay. Do you take the entire wall down or just
4 the portion that's not looking good?

5 A: Just the portion that doesn't look right.

6 Q: Okay. In your mind was this deviation in this
7 area next to the green space, is that, in your
8 mind, a legitimate reason to call for the
9 entire wall to be torn down?

10 A: No.

11 Q: All right.

12 A: I would dare to say that 99 percent of all
13 retaining walls are probably never exactly
14 where they're supposed to be because of that
15 reason because, you know, you're looking at
16 aesthetics and the -- the back lip on these
17 retaining walls differ. You know, they might
18 differ a quarter of an inch. The thickness of
19 the block might differ from eleven and a half
20 inches to twelve and a half inches. And so
21 that throws the -- you know, might through the
22 alignment off, or you step back an inch and a
23 half as opposed to one inch. And so it's never
24 -- that's why they're, you know -- they're
25 cheaper than a concrete wall because they're



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1 flex- -- the flexibility that you have in 'em.

2 Q: Okay. Tell me this, we've talked about the
3 contract between you and Design South and
4 Coogler, and it lays out with the terms of the
5 agreement between you and Coogler, correct?

6 A: Yes.

7 Q: All right. Did you have -- at that the time
8 you were constructing the wall, did you have a
9 copy of the contract between Coogler and Edward
10 Rose Construction?

11 A: No.

12 Q: Okay. If there were any specifications or
13 other parameters related to the wall in that
14 contract, would you have known about that?

15 A: No.

16 Q: All right. This -- the argument, at least that
17 we've heard from Coogler in this case, is that
18 the wall didn't meet specifications therefore
19 had to be torn down. Where in the contract
20 with you and Coogler are those specifications?

21 A: There's not any.

22 Q: There's not any specifications in there is
23 there? It doesn't have anything in there that
24 says if the wall's more than a foot or two feet
25 away from the design location then it's gonna



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1 be torn down, is it?

2 A: No.

3 Q: Okay. As far as that goes, as far as meeting
4 specifications, doing what you're supposed to
5 do, are you relying on the surveyor?

6 A: Yes.

7 Q: Are you relying on your past dealings with
8 Coogler as we just discussed relating to the
9 liberties you take with aesthetics versus the
10 exact location?

11 A: Yes.

12 Q: Okay. Did you feel like you met the
13 specifications that's laid out in your contract
14 and through your history?

15 A: Yes.

16 Q: All right. And then in looking at the --
17 particular with this parking lot issue, do you
18 feel that the foot or so difference between the
19 design distance and the as-built distance, do
20 you think that's close enough to specifications
21 to not merit the wall being torn down?

22 MR. ROBINSON: Objection, Your Honor. No
23 foundation.

24 THE COURT: Overruled.

25 A: Yeah, I believe that, you know, to me, I feel



1 like there's a couple underlying reasons on why
2 the wall had to come down or they wanted it to
3 come down. There was ---

4 MR. ROBINSON: Objection, Your Honor. This sounds
5 like speculation.

6 THE COURT: Well, what was your question, sir?

7 MR. GOODWYN: I was asking about the distance
8 between the as-built and the curb versus the
9 design of the curb. He was answering a
10 different question which I was gonna ask later.
11 But why don't I just ask the ---

12 THE COURT: Okay.

13 MR. GOODWYN: --- question that I think he was going
14 to object to.

15 THE COURT: All right.

16 Q: Who is the designer of the wall?

17 A: Joe Smith.

18 Q: Okay. Did Joe Smith and Edward Rose
19 Construction have a falling out?

20 A: Yes.

21 Q: All right. Was Joe -- was Joe Smith fired by
22 Edward Rose Construction before this job?

23 MR. ROBINSON: Objection, Your Honor.

24 THE COURT: On What grounds?

25 MR. ROBINSON: Again, no foundation.



1 **THE COURT:** Overruled.

2 **A:** Yes. Joe Smith was hired by Edward Rose to do
3 the original civil contracting on the -- civil
4 engineering on the job. And it was brought to
5 my attention that they were fired prior to --
6 I think it was even prior to Joey getting on
7 the job.

8 **Q:** How did Joe Smith then end up being the one who
9 designed this wall if Edward Rose had fired
10 him?

11 **A:** Joey -- there again, the way that we do our
12 work with Joey is that he would pay for the
13 engineering through his company and he hired
14 Joe Smith to do the retaining wall drawings.

15 **Q:** All right. Do you believe there was some push
16 back from Edward Rose when they found out the
17 guy he just fired was hired by one of his
18 subcontractors to do design work on this job?

19 **MR. ROBINSON:** Objection, Your Honor. That calls
20 for speculation: do you believe.

21 **THE COURT:** That's kind of leading too. Why don't
22 you rephrase the question, Mr. Goodwyn.

23 **Q:** Let me ask you this, what do you think the real
24 reason is Edward Rose wanted this wall to come
25 down?



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1 A: Edward Rose gave me a bunch of hoops I had to
2 jump through to keep the wall in place. I feel
3 like that I was able to meet all of those
4 hoops. And I can say that Joey did everything
5 he could to help keep the wall there. You
6 know, he -- I couldn't have asked for any --
7 you know, he was behind the eight ball with
8 basically, you know, Edward Rose, you know,
9 puttin his hand behind his back. And I feel
10 like that, you know, even though we had stamped
11 drawings that were sent in for approval to
12 Edward Rose, that it slipped through the cracks
13 that Joe Smith was hired by Joey to do the wall
14 engineering. And then after the fact the
15 powers-that-be and Edward Rose found out that
16 Joe Smith was the engineering of record and it
17 was like, wow, you know, we just fired this guy
18 off our job, we don't want him -- we don't
19 trust anything he's doing. And so, they
20 basically told Joey that they didn't want --
21 they didn't want him to be the engineer of
22 record because they didn't trust his design.
23 At that point, that's when they started talking
24 to S&ME about redesigning the remaining walls
25 on site including this one. And I think at



1 that time S&ME gave Joey a change order. It
2 was \$25,000 dollars to ---

3 **MR. ROBINSON:** Objection, Your Honor. There's no
4 foundation for anything -- he knows what
5 happened between the general contractor and the
6 subcontractor.

7 **THE COURT:** All right. Sustained.

8 **Q:** In short, do you think the suggestion that the
9 wall was in the pro- -- improper location was
10 just a pretext to these bigger issues?

11 **A:** Yeah, I think they were using -- they kept
12 giving these hoops to jump through, and every
13 time I would get something else approved or
14 jump through that hoop, basically they came
15 back and said, you know, if the wall's in the
16 wrong place we want it taken down. They would
17 say the compaction is an issue; the compaction
18 was resolved. They said the wall failed; well,
19 we were gonna fix that part and fix it back,
20 and we got the engineers to agree to sign off
21 on it. And then they came back at the last
22 straw and said, well, the wall's in the wrong
23 place; it doesn't matter, we want the wall --
24 the whole entire wall taken down.

25 **Q:** All right. So the end of the day, what was the



1 reason you were given for the wall needing to
2 come down?

3 A: Ultimately I was told the wall was in the wrong
4 place.

5 Q: All right. Now we've gone through it. Do you
6 believe the wall was in the wrong place after
7 everything we've talked about?

8 A: Yes, based on the stake in the wall is in the
9 wrong place.

10 Q: Okay. Do you think it was in the wrong place
11 because of anything you did?

12 A: No.

13 Q: Do you think the fact that the wall is slightly
14 off as shown by the as-built versus design
15 diagram, do you think that was enough to merit
16 the wall being torn down and rebuilt?

17 A: No. I do feel like that had this been settled
18 between Joey and myself that we wouldn't be
19 here today. I do feel like that -- when the
20 wall fell backwards, Ron, with Edward Rose,
21 contacted S&ME to come out and take pictures.
22 Well, this intern copied everybody in Edward
23 Roses' company and so it alerted everybody up
24 the chain. And Ron told me and Joey had that
25 not happened that this would've been dealt with



1 between us three and wouldn't of gone any
2 further but because it went up the chain he
3 couldn't stop it.

4 Q: Okay. All right. I'm gonna show you some
5 invoices that you submitted to Coogler. We'll
6 talk about these invoices and what they
7 represent. First, let me ask you about ...

8 MR. GOODWYN: While we're looking, I'm going to go
9 ahead and move to admit those photographs that
10 we were referring to regarding -- relating to
11 the measurements; that was Defendant's Exhibit
12 Eight. We move to admit those. Any objections
13 to those photographs -- your photographs ---

14 MR. ROBINSON: Excuse me?

15 MR. GOODWYN: I would move to admit the photographs
16 and the Exhibit Eight of your -- Defendant's
17 Exhibit Eight ---

18 MR. ROBINSON: No objection.

19 THE COURT: Okay.

20 (Defendant's Exhibit Number Eight was marked for
21 identification purposes.)

22 Q: Okay. If you will turn in your book to tab 14.
23 You there? Okay. Now this is what appears to
24 be an invoice to Coogler.

25 A: (Nods head.)



- 1 Q: Is that correct?
- 2 A: Yes.
- 3 Q: All right. What is this invoice for?
- 4 A: This invoice is for the retaining wall blocks
5 installed and backfilled on Wall H.
- 6 Q: Okay.
- 7 A: And then also, I don't remember what the wall
8 number was, but the prior wall that we had
9 done, it was a caps that we installed in that
10 wall.
- 11 Q: Okay. That's that \$11,067.66 amount, that's
12 for the caps from the prior wall?
- 13 A: Yes.
- 14 Q: Okay. And have you been paid for those caps?
- 15 A: No.
- 16 Q: Are you asking to be paid for those caps in
17 this case?
- 18 A: Yes.
- 19 Q: Okay. All right. And then the wall, Wall H,
20 this 47,787.40 figure. It says quantity 5610,
21 was that -- is that square footage? What is
22 that?
- 23 A: Yeah, that's square footage.
- 24 Q: How did you compute that?
- 25 A: I kept a daily log of how many block [sic] I



- 1 installed everyday on the job site.
- 2 Q: Okay.
- 3 A: And kept up with the square footage.
- 4 Q: All right. And that's the total of the square
- 5 footage there?
- 6 A: Yes.
- 7 Q: That 8.34 amount for the unit price, is that in
- 8 the contract?
- 9 A: Yes.
- 10 Q: All right. And has Coogler made any effort to
- 11 pay for the amounts shown in Exhibit Fourteen?
- 12 A: No.
- 13 Q: All right. And you're asking for that today?
- 14 A: Yes.
- 15 Q: All right. Let's turn the page to Exhibit
- 16 Fifteen. This is another invoice to Coogler?
- 17 A: Yes.
- 18 Q: Okay. It looks like you've got the same charge
- 19 there for the wall, 147 -- or excuse me,
- 20 46787.40 figure, correct?
- 21 A: Yes.
- 22 Q: And the same fee for the caps from the first
- 23 wall.
- 24 A: (Nods head.)
- 25 Q: Is that a yes?



1 A: Yes.

2 Q: Okay. And then you've got some new charges
3 down there. Undercutting bad soil below the
4 wall for \$3500 dollars ---

5 MR. ROBINSON: Your Honor, I'd like to get this
6 trial done as quickly as we can but could we
7 not lead too much?

8 MR. GOODWYN: I'm just reading the invoice.

9 THE COURT: Do you stipulate that the invoices are -
10 --

11 MR. ROBINSON: The invoices are correct. Well, the
12 invoices are authentic, let me put it that way.

13 THE COURT: All right.

14 MR. GOODWYN: I mean, I'm trying to get through it
15 quickly. I can have him read it, I can read.
16 It's gonna get read.

17 THE COURT: Well I don't mind how long you take.

18 MR. GOODWYN: I know, I know.

19 THE COURT: I have to be here. It's my job.

20 Q: All right. Well, then I'll let you read it
21 then. The two new items are what?

22 A: Undercutting the bad soil below the wall. The
23 reason we put that charge on there was is that
24 Joey was being paid for undercutting bad soils
25 and so he was gonna be paid for that. And when



1 we got there, you know, I was there with two
2 pieces of equipment and couldn't work and had
3 to take the time to undercut that and bring
4 stone all the way from the top all the way to
5 the bottom to try to fill it in enough to start
6 laying block.

7 Q: All right. Does the contract provide for you
8 to assess back charges and these type of
9 charges?

10 A: Pardon me?

11 Q: Does the contract between the two of you allow
12 for you to access these types of charges?

13 A: Yes.

14 Q: Okay. Where is that?

15 A: On page two of Defendant's Exhibit One, number
16 five, just excavation or fill as needed, Design
17 South reserves the right to back-charge.

18 Q: Okay. All right. Now what's the next item on
19 that invoice, Defendant's Exhibit Fifteen?

20 A: Backfilling the soils outside of the grid
21 areas.

22 Q: All right. Explain to the Court what that
23 charge is for.

24 A: When you have a retaining wall that we're
25 retaining soil, in our contract we're only



1 required to backfill on top of the grid. So if
2 the grid is 12 feet long, then we're just
3 backfilling the 12 feet on top of the grid.
4 Well in those areas some of those areas were
5 five times that 'cause you're building up a
6 whole -- a low area. And so that -- all that
7 area had to be backfilled to come up with the
8 wall because you can't -- you're retaining
9 soil, you can't just have a column of dirt back
10 here without it being retained. So you got to
11 build it up as you come up. So we were
12 backfilling all that area, which from our
13 standpoint normally is something that Joey's
14 doing anyway because he's always doing the
15 backfilling. And so we brought that area up --
16 -

17 Q: Okay.

18 A: --- as we're building the wall.

19 Q: It was -- okay. All right. Let's turn to the
20 next invoice labeled Defendant's Exhibit
21 Sixteen. Again, looks like the same charge for
22 the wall as for the first item, right?

23 A: Yes.

24 Q: And the same cap figure, correct?

25 A: Yes.



1 Q: And this next figure, it says back charge
2 32,525. What is that figure? Does that
3 include the prior ones or is that new items?
4 What is that?

5 A: That includes some of the prior and some
6 additional ones.

7 Q: All right. Let me show you an e-mail. I kind
8 of think summarizes all this. Is this an e-
9 mail that you sent to Coogler Construction to
10 Joey Coogler?

11 A: Yes.

12 Q: All right. And if I remember right from your
13 deposition, I think when you sent this e-mail
14 the dollar figures weren't in here. You added
15 those later?

16 A: Right.

17 Q: Okay.

18 MR. GOODWYN: I'd like to move to admit this as
19 Plaintiff's Exhibit Four.

20 MR. ROBINSON: No objection. It's also Defense
21 Exhibit Eighteen.

22 MR. GOODWYN: Okay. I didn't see it in there. I'm
23 sorry. Well if it's already a Defense Exhibit,
24 let's just leave it as Defense Exhibit
25 Eighteen.



1 Q: Okay. Well, lets go through this so we can
2 explain to the Court where you got this \$32,000
3 dollar figure from. The first paragraph is
4 titled -- it says first wall 1. What is that
5 one?

6 A: I don't know the exactal (ph) which wall number
7 that is. I don't know whether that was J -- or
8 it's a wall prior to the one that we did, the
9 one in question now.

10 Q: Okay. Go ahead.

11 A: Number one is basically when we got there --
12 when we try to get a wall, in our contract it
13 says plus or minus two tenths. I understand
14 that, you know, things happen that's not gonna
15 always be right, and always felt like that we
16 would be willing to work with Joey to try to
17 overcome stuff. So a lot of times he would
18 say, you know -- I'd tell him the sub-grade is
19 too high. What that means is, is that where
20 our wall starts is supposed to be plus or minus
21 two tenths. You know, so it's supposed to be
22 roughly between two and three inches. The --
23 when you get there and it's 24 inches, all that
24 dirt has to be cut out before you can start
25 building the wall. Or it might be fill 18 or



1 24 inches where you gotta fill in 18 or 24
2 inches of dirt before you can start building a
3 wall. Since we're getting paid by the square
4 foot, any work that we're doing in that we're
5 not getting paid for because it has nothing to
6 do with the wall. We can't start laying block
7 'til we get that issue remedied. And so the
8 first wall that we did, when we got there we
9 started checkin it and the sub-grade was too
10 high. So we had to take the time and undercut
11 a little over half of that wall. The wall I
12 believe was 400 -- 400 feet long, something
13 like that. And then number two is the wall
14 backfill, where the geogrid goes back into the
15 bank. It was not cut out. So the bank where
16 we were to retain was even with the wall so we
17 had to cut back eight feet in order to get the
18 geogrid in. You gotta take the soil out, put
19 the grid in and put the soil back. And so we
20 had to do the final roughly 40 percent of the
21 wall.

22 Q: Okay. Did you lay out the calculations of how
23 you get these dollar figures in the e-mail
24 here?

25 A: Yes.



1 Q: All right. What about this first one that
2 says, wall sub-grade was too high. What -- how
3 did you arrive at that \$1400 figure?

4 A: We charge \$140 an hour for three laborers and
5 one supervisor for 10 hours.

6 Q: Okay. Is that how long it took and how many
7 laborers it took?

8 A: Yes.

9 Q: All right. What about number two? It says,
10 wall backfill zone was not cut back far enough
11 to allow for grid.

12 A: That one was \$140 dollars an hour for three
13 laborers and one supervisor for 12 hours for
14 \$1680.

15 Q: Okay. Item three, it said I pushed over three
16 to four large trees that were overhanging the
17 backfill area. Where did you get that \$750
18 figure?

19 A: That was where the -- when we cut back to get
20 the soil back for the retaining wall, these
21 trees -- we're cuttin over half the roots off
22 and the trees were leanin towards the wall and
23 so I didn't feel safe. And so I talked to Joey
24 and he said just get the excavator and go down
25 there and do what you gotta do to get 'em out.



1 And so we went -- we took the excavator down
2 there and, you know, got all those trees up.

3 Q: Okay. All right. The next item, I think is
4 labeled number one again but it's the next
5 item, the undercutting that was done by Juan
6 was in the wrong place. First, who's Juan?

7 A: Juan was Joey's superintendent on the job.

8 Q: Okay. So one of Coogler's employees?

9 A: Yes.

10 Q: All right. So what happened here?

11 A: This was where the fi- -- we had to undercut
12 the five feet for roughly 250 feet at the start
13 of that wall where ---

14 Q: Okay.

15 A: In order to get the bearing capacity for the
16 retaining wall.

17 Q: Okay. Let's see here. You said you've got a
18 \$4350 figure for that item?

19 A: Yep.

20 Q: Where'd that come from?

21 A: That was \$140 an hour plus the skid-steer, \$150
22 an hour, to move stone to that area.

23 Q: All right. The paragraph five you mentioned
24 from the contract indicates \$150 per hour. Or
25 what is -- maybe I meant to ask, where'd you



1 get the \$140 an hour figure?

2 A: It was -- I can't -- it was the per hourly rate
3 for three laborers and one supervisor.

4 Q: Okay. Is that customary for you?

5 A: Yeah.

6 Q: Is that customary in the industry that you know
7 of?

8 A: Yep.

9 Q: On the next item, labeled number two but on the
10 next page, backfilled entire area outside of
11 grid, the lower portion of the wall. Explain
12 to the Court what that is.

13 A: This is the area in the start of the wall where
14 it was in the green space area that wasn't in
15 the critical areas. It was -- it was abo- --
16 the grid lengths range from six to ten feet and
17 the backfill was around three times that. So
18 we just had to backfill that as we were comin
19 up.

20 Q: All right. You don't have a dollar figure
21 there. Do you know why?

22 A: That dollar figure was included in the number
23 three below that.

24 Q: Okay. Okay. So number three, backfilled
25 entire area outside of grid on upper section of



1 wall until the last four feet of backfill.
2 That item?

3 A: Yes.

4 Q: Okay. So, explain to the Court what you had to
5 do there.

6 A: In the critical area where the parking lot is,
7 that area was so much bigger. It was five
8 times the grid lengths. So roughly, you know,
9 60 to 80 feet of area had to be backfilled from
10 the bottom all the way, you know, roughly to
11 the top. And so that's where I came up with
12 that volume of dirt.

13 Q: Okay. It looks like -- you said something
14 about, second line, taking off \$5000 for the
15 use of Coogler's equipment. What are you --
16 what do you mean?

17 A: Yeah. When we started talking about doing the
18 retaining wall for Joey about the -- you know,
19 the labor, and he wanted us to do the backfill,
20 I told him that I -- I did- -- it wasn't worth
21 me to try to bring my equipment down there when
22 his equipment was sitting there. And so I
23 asked him, I said can we work out where I just
24 pay you by the hour for the use of your
25 equipment and backfill with that since the



1 equipment's there, you just don't have the men
2 to run it? And I said, I can do that. And so
3 that's what [sic] the \$5000 was taken off.

4 Q: Okay. And that -- the total amount for number
5 three, I think which you said included number
6 two, is that the 17,645 figure?

7 A: Yes.

8 Q: All right. Is that the same 17,465 figure in
9 Exhibit Fifteen?

10 A: Yes.

11 Q: Okay. And then -- all right. The next item,
12 item four, grid layers in the bottom courses
13 were worked out to save at least one layer of
14 grid over entire length of wall. It says no
15 charge there -- it says N/C, is that no charge?

16 A: Yes.

17 Q: Okay. Why didn't you charge him for that?

18 A: I just, to me, it's something I always try to
19 do for Joey. You know, with him -- with us
20 working together like that, you know, I always
21 try to save money where I could to help him
22 because if he's making money on retaining walls
23 then he would use me on the next one.

24 Q: Okay. Has Coogler Construction used you since
25 this job?



1 A: No.

2 Q: All right. Item five, I'll just read it if
3 that's okay. My price only included one foot
4 of stone behind the wall, and installed two
5 feet because you said you couldn't afford to
6 pay me extra because you didn't have it in your
7 bid. And you have \$6000 there. Now is that
8 something you're asking for now?

9 A: No. The 6000, in the original contract, in the
10 original pricing we always put one foot of
11 stone, so my price includes the labor to put
12 one foot. After we gave him the price to put
13 in -- to do the backfill, Joey came back and
14 said Edward Rose wants two foot of stone. And
15 it's something that I'd forgotten about but I
16 agreed to do. And went back and put that in
17 the contract that it included two foot of
18 stone. So, that charge is not right.

19 Q: All right. So then when we're looking at this
20 Exhibit Sixteen that includes the 32,525 in
21 back charges, the correct amount should be that
22 amount less \$6000 because of that mistake?

23 A: That's right.

24 Q: Okay. All right. And the last item, number
25 six, section of wall that had old brick, pipe



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1 and debris in the footer was cut out and
2 backfilled by us. Explain to the Court what
3 that was.

4 A: This was the area down in the critical areas
5 next to the curb. It was some -- it used to be
6 some kind of old dump site there. There was a
7 bunch of old brick and concrete pipe. And Ron
8 came down to the site to look at it and he said
9 yeah, he said it needs to be undercut, just get
10 with Joey and keep up with the volume and tell
11 him to submit it as a change order.

12 Q: Okay. And what was the total for that?

13 A: \$700.

14 Q: All right. Now some of these items, are they
15 items that you always charge for or just
16 sometimes charge for?

17 A: Sometimes.

18 Q: And why do you only charge sometimes?

19 A: To me I feel like, you know, the relationship
20 that Joey and I had going back as long as it
21 has -- you know, the first job Joey ever came
22 on when Chris and I worked together, his
23 brother, when it came time to backfill I jumped
24 on the dozer and started pushin dirt and Joey
25 would say, you know, Chris, what's he doing?



1 And Chris would tell him that, you know,
2 Michael just wants to help, wants to get the
3 job done. So if he needed to run a dozer to
4 help it go faster then he'll do that. And
5 that's kind of the attitude I had towards it,
6 that whatever it took to get the job done
7 faster, the faster we get it done the more
8 money he makes. The faster I do it the more
9 money I make. It's a win-win situation.

10 Q: Okay. But do you feel like you have the right
11 under the contract to be charging for all of
12 these items?

13 A: Yes.

14 Q: All right. And in this particular case, are
15 you asking that you be paid for -- for of all
16 of this -- this backfilling and all the other
17 jobs that we talked about except for that one
18 that you said was incorrect?

19 A: Yes, I do. I feel like that, you know, when
20 you're not paid for the retaining wall that you
21 done, the work that I did I feel like Coogler
22 directly benefitted from it because they didn't
23 have to go back and redo it.

24 Q: Okay.

25 A: Such as the undercutting, the backfill,



1 etcetera.

2 Q: Right. Let me ask you about the -- the charge
3 for the wall, I meant to ask you about this
4 before, it's 5610 square feet of wall, soiled
5 and backfilled, \$46,787.40, that's the charge
6 you have on there. What -- I have some
7 confusion about this and I wanted to make this
8 clear for the Court in case there was some
9 confusion there too. Did that -- or the wall
10 as you left it, it did not have the caps on it
11 yet did it?

12 A: No.

13 Q: Okay. Does the charge that you list in the
14 invoices, does that include the caps or had you
15 put the caps would that have been a separate
16 charge?

17 A: That would've been a separate charge.

18 Q: Okay. All right, let me turn -- I'll tell you
19 what, while we're here, I'd like to go ahead
20 and move to admit Defense Exhibits' Fifteen --
21 or excuse me, Fourteen, Fifteen, Sixteen and
22 Eighteen.

23 THE COURT: Any objection to those?

24 MR. ROBINSON: No objection.

25 THE COURT: Motion's granted.



1 (Defendant's Exhibits Numbers Fourteen, Fifteen,
2 Sixteen and Eighteen were introduced into the record
3 at this time.)

4 Q: All right, if you would turn to tab 29 of your
5 binder.

6 MR. ROBINSON: Which one are you on?

7 MR. GOODWYN: Twenty-nine.

8 Q: This appears to be an invoice from Coogler to
9 you. Is that correct?

10 A: Yes.

11 Q: What is this for?

12 A: This is another retaining wall job that we were
13 doing ind- -- without Joey working with it. I
14 got him to haul stone for that retaining wall
15 for me.

16 Q: All right. And did he bill you for that?

17 A: Yes.

18 Q: Is this that bill?

19 A: Yes.

20 Q: What's that, forty -- \$4491?

21 A: Yes.

22 Q: All right. Do you dispute that this is owed?

23 A: No.

24 Q: Okay. And why haven't you paid this invoice?

25 A: This retaining wall we were doing right when



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1 this came up about the retaining wall failing,
2 and, you know, I was waitin until I got paid to
3 pay him, which would have been in the end of
4 February, and I was asking that we be paid and
5 I would glad- -- I couldn't afford to pay him
6 this because I just didn't have the money.

7 Q: Okay. All right. And if you would, turn a
8 little bit further in, Exhibit Twenty-Nine.
9 The page that I'm looking at is Bates labeled
10 at least Coogler 000344, it's at the very
11 bottom.

12 A: Yes.

13 Q: You see that one?

14 A: Yes.

15 Q: This appears to be another invoice from Coogler
16 to Quality -- or Design South rather. What is
17 this invoice for?

18 A: It's a load of mulch he hauled for me.

19 Q: Okay. And I know you've looked at this, on the
20 next page appears to be a little receipt or
21 delivery receipt. Is that your signature on
22 it?

23 A: Yes.

24 Q: Okay. Do you contest that you owe the \$600?

25 A: Yes.



1 Q: You do contest it or you don't?

2 A: No, I agree I owe it.

3 Q: Okay. All right. All right. Turn two pages
4 to the next invoice for \$325. You see that
5 one?

6 A: Yes.

7 Q: All right. That's a hauling sand clay to
8 Design South shop.

9 A: Yes.

10 Q: Is this -- do you dispute that this money on
11 this invoice for the hauling of sand is owed?

12 A: No, I owe that.

13 Q: And again, why didn't pay this invoice and the
14 prior \$600 invoice?

15 A: I just couldn't afford to pay him, didn't have
16 the money.

17 Q: All right. Was that because you didn't get
18 paid on the wall job?

19 A: Yes.

20 MR. ROBINSON: Are you going to admit those?

21 MR. GOODWYN: Pardon?

22 MR. ROBINSON: Are you going to admit those?

23 MR. GOODWYN: I will go ahead and move to admit
24 Exhibit Twenty-Nine. It's multiple pages, but
25 what's been marked as Defendant's Exhibit



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1 Twenty-Nine.

2 MR. ROBINSON: No objection.

3 (Defendant's Exhibit Number Twenty-Nine was
4 introduced into the record at this time.)

5 Q: All right. So, by my math, looking at the
6 invoice from Exhibit Sixteen, the total amount
7 was \$80,480 that you had invoiced Coogler for,
8 correct?

9 A: I believe that's right.

10 Q: All right. And we're gonna subtract out the
11 \$6000 for the extra foot of stone that you said
12 was incorrect? Is that right?

13 A: Yes.

14 Q: All right. Then backing out, the 4491, the
15 \$600 and the 325, by my math that leaves
16 \$67,064 that you're claiming Coogler owes you.
17 Does that sound right?

18 A: Yes.

19 Q: Okay. Give me just a minute; getting close.
20 I did want to ask you about the area out here
21 where this green space is, and the walls a
22 little closer and cut out some green space.
23 Did you ever receive any explanation from
24 Coogler or Edward Rose Construction as to why
25 the extra few feet was so important to the



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1 project?

2 A: The only thing that was ever stated to me was,
3 is that at the time I thought it was 40 feet of
4 green space, and my argument was, I said, you
5 know, we're two feet in so you only have 38
6 feet of green space. And their argument on
7 moving the wall was that we paid for 40 foot of
8 green space, we want 40 feet of green space.

9 Q: Okay. And that's all you ever heard?

10 A: Yeah.

11 Q: Again, is there anything in your contract with
12 Coogler that says two foot variation from the
13 design to the actual wall location was grounds
14 to have it torn down?

15 A: No.

16 Q: All right. At some point Coogler just told you
17 the wall's coming down, right? There was no
18 more negotiations it sounds like. Is that
19 correct?

20 A: Yes.

21 Q: All right. At that point did you try to work
22 with Coogler at all?

23 A: Yeah. I talked to Joey a couple times during
24 that process tryin to work through it. And
25 Joey would tell me, he said, Michael, you know,



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1 this isn't me. He said, this is Edward Rose
2 forcing my hand that's, you know, making the
3 wall come down. He said I think you know that
4 I've gone to bat and voiced my opinion about
5 the wall not needing to come down, that
6 everything could fit within the footprint of
7 the wall as is. And he said, but ultimately
8 Edward Rose writes my check and they're telling
9 me they're not paying me until the wall comes
10 down.

11 Q: All right. So did you offer to rebuild the
12 wall or rebuild a section of the wall that they
13 found objectionable or?

14 A: There was a section of the wall where he was
15 talking about earlier that bent back towards
16 the field. When we left the wall sometime
17 around Christmas time, we ran out of block so
18 we had to leave for a period of time, and
19 during that period of time there was several
20 large rains that came through. One, it was
21 about a six inch rain. And a retaining wall,
22 storm water getting to a wall is the death of
23 it. They can withstand a lot of things but
24 storm water is not one of 'em. And in that
25 rain, storm water ran to the face of the wall



1 and ran down between the grid and the stone.
2 When that water's running it's taking sediment
3 with it. There's some pictures showing where
4 this wetlands ---

5 MR. ROBINSON: Objection, Your Honor. I don't think
6 the witness has an engineering degree or
7 hydrological degree or anything else that would
8 enable him to opine as to what happens when
9 water runs through soil.

10 THE COURT: In this case he's just saying what he
11 observed at the time of the rain.

12 MR. ROBINSON: He can, Your Honor, but he can't see
13 through the dirt.

14 THE COURT: Objection overruled.

15 A: There's pictures showing the silt that came
16 from behind the wall, through the stone,
17 through the face of the wall out into the
18 wetland. So, that soil was displaced by the
19 water. When a backfill area is designed for
20 certain surcharge loads or when you're
21 retaining soil, when the backfill has a
22 surcharge on it that's ---

23 MR. ROBINSON: Your Honor, objection. He's also not
24 a designer.

25 THE COURT: Objection overruled.



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1 A: When a surcharge is placed on that wall above
2 and beyond the engineer's specifications it can
3 cause failure. In this case the backfill --
4 the backfill behind the wall -- we weren't able
5 to keep up with the backfill so the grid
6 lengths were turned down at 15 degrees off of
7 perpendicular. When that backfill saturated
8 with the storm water, that pulled, that pulled
9 the wall back. And that's why the wall looked
10 like it just broke. It was like this
11 (indicating) and then it pulled back to right
12 there (indicating). We agreed -- we agree we
13 had to get both engineers, Joe Smith and S&ME
14 agreed that they would evaluate the design and
15 that we could rebuild the wall from that point
16 up, that the wall could stay in place. And we
17 got both Joe Smith and S&ME to say that the
18 wall could stay, we just had to build the wall
19 back up. And we agreed to build it back up
20 from that point, which was seven courses I
21 believe.

22 Q: At no extra charge?

23 A: No extra charge.

24 Q: Okay. Did they accept that offer?

25 A: No.



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1 Q: Did you offer to rebuild the entire wall once
2 they decided the entire wall had to come down?

3 A: I don't think so.

4 Q: Okay. All right. I think that's all I have,
5 Your Honor.

6 THE COURT: Let's stand in recess until about 3:15
7 and we'll start cross-examinations.

8 (Off the Record from 3:05 p.m. until 3:15 p.m.)

9 THE COURT: Mr. Robinson, you may proceed.

10 MR. ROBINSON: Thank you, Your Honor, if it pleases
11 the court.

12 THE COURT: Yes, sir.

13 MR. YOUNG - CROSS-EXAMINATION BY MR. ROBINSON:

14 Q: Mr. Young, who owns Quality?

15 A: My father.

16 Q: Your father, is he still alive?

17 A: Yes.

18 Q: Okay.

19 THE COURT: I'm sorry, who owns what?

20 MR. ROBINSON: Quality Landscaping.

21 THE COURT: Okay. All right. Thank you. Please
22 proceed.

23 MR. ROBINSON: Because I heard he was self-employed.

24 Q: Are you employed by Quality Landscaping?

25 A: Well, we're a family owned business so he's --



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1 I guess technically he's not in the picture
2 anymore. My mother is actually the owner.

3 Q: Okay. And who's the license holder?

4 A: Ritchie Wheeler.

5 Q: Okay. Did Mr. Wheeler ever come down to the
6 job site?

7 A: No, sir.

8 Q: He did not. Okay. Did you have the drawings
9 before you did this job?

10 A: Yes. I had the -- it wasn't the full set --
11 not the engineer drawings, it was just the, I
12 think, what's the name, Jonathan Whitehead who
13 was in his place before. He e-mailed me the
14 individual sheet drawings showing -- I can't
15 remember, it might of been just the square
16 footage. I don't remember.

17 Q: Well, your contract says you're gonna put two
18 feet of stone behind the wall, right?

19 A: Correct.

20 Q: And if we look at Exhibit Number Seven, look on
21 page five, there's a note that says all walls
22 shall have two foot wide stone drainage layer
23 along interior face of block. You see that?

24 A: Uh-huh.

25 Q: So you wouldn't have known that if you didn't



1 have these drawings would you?

2 A: Correct.

3 Q: Okay. So will you agree with me that you had
4 the drawings when you did the job?

5 A: Not the stamped drawings.

6 Q: Did you have the same drawings but they weren't
7 stamped yet?

8 A: No. You won't have the engineer drawings until
9 after -- that's never done whenever you bid a
10 job it's always after.

11 Q: How did you know then to put in your proposal
12 that there was two feet of stone behind the
13 wall?

14 A: That was added. Originally I gave Joey a price
15 of 4.34 a square foot which was the wall, just
16 the labor only. When he went back after that
17 he wanted me to price out, provide the backfill
18 to, and that's when it was discussed about the
19 two foot of stone.

20 Q: All right. And how did you know how much to
21 include for the backfill if you didn't have the
22 drawings to know how far the geogrid was going
23 to extend?

24 A: We get a sheet from Anchor Engineering that
25 tells us the quantity of the backfill.



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1 Q: So Anchor -- you're telling me that Anchor
2 Engineering had the design drawings but you did
3 not?

4 A: Anchor does preliminary engineering. They give
5 us the preliminary engineering copies of the
6 square footage, the grid quantities in the
7 backfill. But we -- they're not aeste- -- a
8 licensed engineer so you're not -- that's what
9 you're pricing out. You're not pricing out the
10 stamped drawings.

11 Q: Mr. Young, I'm trying to -- first of all let me
12 ask you this question. Who put together the
13 proposal, is that you?

14 A: Yes.

15 Q: Okay. So, do I understand that you put
16 together a hard money proposal, a unit price
17 proposal, based on some third party's
18 expectation of what the design might look like?

19 A: No, we're charging by the square foot. So it
20 really doesn't matter whether it's 15,000
21 square feet of it's 130,000 square feet. Our
22 price is per square foot, so ...

23 Q: I understand that. But that price per square
24 foot includes not just the block, it includes
25 the rock behind the wall and it includes the



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1 geogr- -- placement of the geogrid and it
2 includes the backfill on top of the geogrid.

3 A: Uh-huh.

4 Q: And if the backfill of the geogrid is six feet
5 long, it's gonna be half as much backfill as if
6 it's 12 feet long. Correct?

7 A: Correct.

8 Q: All right. So my question was, how did you
9 price this thing without the drawings?

10 A: I didn't need the drawings I had all the
11 information I needed.

12 Q: All right. But you didn't know whether that
13 draw- -- information was going to be correct or
14 not did you?

15 A: I mean you're going off past experience. I
16 mean every job I've ever bid I've always bid it
17 the same way, through the block company, their
18 in-house engineering department. Because
19 they're -- you know, if I were to go into a job
20 and they underprice the square footage or
21 overprice it or vice versa, you know, they know
22 I wouldn't use them very long. And so, they're
23 fairly accurate.

24 Q: All right. Now you talked, near the end of
25 your discussion with Mr. Goodwyn, about



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1 retaining walls with surcharge on 'em, and you
2 said they would fail. They would fall to the
3 low side, correct?

4 A: Not necessarily.

5 Q: So you want me to -- let me make sure I
6 understand you now. If I have a retaining wall
7 and I have dirt here up to the top and I have
8 dirt down here down at the bottom, you think
9 this wall's gonna not fall this way
10 (indicating) it's gonna fall that way
11 (indicating)?

12 A: It depends. I mean, it can have different
13 effects.

14 Q: Which way is the force?

15 A: We did a wall at the White Rock exit there at
16 a Food Lion. We had a wall fell three times.
17 All three times the wall fell backwards.

18 Q: Who did the -- well, never mind. I don't care
19 about that other thing. You said you've done
20 other walls for Mr. Coogler. Were any of those
21 walls ever had an as-built survey made?

22 A: I'm not aware of it.

23 Q: So you don't know whether they were built where
24 they were supposed to be or not do you?

25 A: I can almost guarantee you that hardly any of



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1 them are ever where their supposed to be unless
2 it's a critical -- because when you're in
3 noncritical areas you're worried more about
4 aesthetics than you are the placement.

5 Q: You said that the faster you get finished the
6 more money you make and the more money Coogler
7 makes. Did I get that right? Coogler's paying
8 you an even price isn't he? So it doesn't make
9 any difference to him how fast you get finished
10 he still has to pay you the same amount of
11 money doesn't he?

12 A: Well, when he was doing the backfill, the
13 faster I get done, the faster he's getting
14 done. When he's doing the backfill -- whenever
15 I'm building wall his guys are sitting there
16 doing something else. The faster I can stack
17 block, the faster he can bring dirt behind the
18 wall, the faster everybody gets done.

19 Q: On that piece of the pro- -- on the job?

20 A: It wasn't on that particular job, but on jobs
21 in general. All the jobs except this one.

22 Q: All right. Would you look at Exhibit Eight
23 please in that book I put up there? Both of
24 those measurements are off the hubs right?

25 A: Yes.



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1 Q: And I think you said that, if I got that right,
2 E, F, G, H, I&J were on the critical part of
3 the wall. Did I get that correct?

4 A: Yeah, I believe so.

5 Q: Okay. And the critical part of the wall, if I
6 understood what you were saying, is this piece
7 of the wall here (indicating) as it goes past
8 the ---

9 A: No, it's that from station 12- 11- -- is that
10 11 plus 20? 12 plus 20. This is the critical
11 part here (indicating).

12 Q: All right.

13 A: Where it's in contact with the curb.

14 Q: Okay. You don't think it was critical up there
15 where it's close to the curb?

16 A: Yeah, I mean, that whole section -- it's in
17 here, everything from here (indicating) back is
18 noncritical.

19 Q: Okay. According to you?

20 A: That might make it easy.

21 Q: Right. And everything from there out to the
22 total end at 10 plus 00, is that critical?

23 A: Yes.

24 Q: Okay. And am I correct that the problem was
25 discovered here (indicating)?



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1 A: I don't know where it was discovered. When we
2 first had the meeting they said the curb was
3 inside the end and we were roughly at 12 plus
4 20.5.

5 Q: They said that you were over here (indicating)
6 next to the curb.

7 A: We were right ---

8 Q: You were too close there?

9 A: Right in there. It was two place, it was there
10 and at the end.

11 Q: And at the end?

12 A: Yes.

13 Q: Okay. None of those photographs in Exhibit
14 Eight that you say are in the critical point
15 are out at the end are they?

16 A: No, we couldn't find the hub.

17 Q: You bill in Exhibit Sixteen for -- and Fourteen
18 and Fifteen for caps done on the wall, right?

19 A: On the previous wall.

20 Q: On the previous wall? That wall was also
21 designed by Joe Smith wasn't it?

22 A: Yes.

23 Q: Okay. And as far as you know, Edward Rose
24 didn't have problem with that one did they?

25 A: No.



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1 Q: Even though it was designed by Joe Smith?

2 A: Well, it was never brought to their attention
3 to who the engineer was so they didn't know to
4 have a problem.

5 Q: How do you know that?

6 A: Because conversation I had with Joey whenever
7 he said that the powers to be found out that
8 Joe Smith was the engineer of record, it hit
9 the fan.

10 Q: Do you know whether or not he was speaking
11 about the home office back in Milwaukee or
12 wherever those people are, or was he talking
13 about the job site or do you know?

14 A: I was pretty sure he told me that he was doing
15 the site work on the job site there at
16 Blythewood.

17 Q: You were talking about some undercut, five foot
18 undercut. And in the middle of that discourse
19 you said, I never found it. What did you mean?

20 A: If this dimension here (indicating) is five
21 feet, well four feet, the retaining wall
22 supposed to be right here (indicating) based on
23 the offsets. The undercutting was supposed to
24 be underneath the wall. Okay? When we went to
25 dig down to find it, you know, we were -- we



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1 came over at the wall and came over five feet
2 and started digging down and it was all soft
3 soils. So we were assuming that that undercut
4 was probably ten foot behind -- five foot, an
5 additional five feet from the wall.

6 Q: Did you ask why?

7 A: I called Joey about it and said we -- the
8 backfills -- I mean the undercut isn't here, I
9 mean it's not -- I mean I can't explain where
10 it was. It just wasn't there.

11 Q: Wasn't Juan on the job? Juan was the
12 supervisor on the job right?

13 A: He was.

14 Q: Okay. Did you ask Juan where the undercut was?

15 A: I don't remember. He wasn't there everyday.

16 Q: You did have the drawings, Exhibit Number
17 Seven, when you were building this wall,
18 correct?

19 A: Yes.

20 Q: Okay. All right. You'll agree with me that if
21 there's something that's important to your job
22 and you're not sure about the fact, you should
23 ask somebody who knows?

24 MR. GOODWYN: Object to the form. It's vague.

25 THE COURT: Sustained.



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1 Q: Well let me ask you this, Mr. Young? If you
2 get a hub with a station marker that you think
3 is in the wrong place, should you ask somebody
4 about that?

5 A: I shouldn't second guess a professional. I
6 mean, that's his job.

7 Q: I didn't ask you to second guess anybody. I
8 asked you if you knew something was in the
9 wrong place should you ask somebody about it?

10 A: If you don't know it's in the wrong place how
11 do you know? I mean, I don't ...

12 Q: Well, you testified here that these stakes were
13 all in the wrong place.

14 A: I didn't find that until when they started
15 saying the wall was in the wrong place.

16 Q: Well, wait a minute now. You had the drawings,
17 right?

18 A: Uh-huh.

19 Q: And your testimony is that the station on the
20 drawing is where he should've put the hub,
21 right?

22 A: Uh-huh.

23 Q: And you're telling the Court that he didn't put
24 the hub there he put it somewhere else.
25 Correct?



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1 A: Correct.

2 Q: And are you telling the court now that even
3 though it's clear that the station on the hub
4 -- on the stake is not the station on the
5 drawing, you didn't ask anybody?

6 A: It's not something that you normally would
7 catch.

8 Q: Excuse me?

9 A: It's not something that you would normally
10 catch because you're not checking behind a
11 surveyor whenever they come to lay it out. You
12 know, long as it's in a general shape, you
13 know, I'm not policing. You know, that's like
14 telling a doctor in heart surgery he's not
15 sewing the right artery up.

16 Q: Well, I disagree with that. But let me ask you
17 this question. The stake by the hub has the
18 station number on it, right?

19 A: (Nods head.)

20 Q: And to know how high the wall is, how many
21 inches different you need to have on the wall,
22 you gotta know how many block there are right?
23 And to do that you gotta count the block on the
24 wall, don't you? And you do that off the
25 drawing, correct?



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1 A: The way I actually do it is, is I -- you know,
2 I count it off the drawing, I do the math off
3 of there. But then whenever I get up close to
4 the -- you know, four. five feet from the top
5 of the wall, I always would get Joey's man to
6 -- I need spot elevation so I know how many
7 more courses. 'Cause last thing I wanna do is,
8 is stack it too high or not enough. And you
9 also gotta work out the grid before you get to
10 the top because, like the curb, you don't wanna
11 have the grid on the top layer and the curb and
12 gutters got to be cut down and it cuts the
13 grid.

14 Q: Let's talk about that for a minute. We have a
15 drawing here, part of the contract drawings,
16 right?

17 A: (Nods head.)

18 Q: Okay. Which you had a copy of, correct? By
19 the way, when you read on this stake five foot
20 offset face of wall, where on the wall do you
21 think that refers to?

22 A: The face of it.

23 Q: The top of the wall on the outside edge?

24 A: It's not clear in what it says. I can assume
25 what it says.



1 Q: Well, what did you assume when you were
2 building the wall?

3 A: I assume it's the top of the wall.

4 Q: All right. Thank you. Now, this drawing not
5 only shows you each individual block it also
6 shows you exactly where the geogrid is supposed
7 to go, doesn't it?

8 A: Uh-huh.

9 Q: So you don't have to do any figuring to know
10 where the geogrid is. All you have to do is
11 count the block, right? I mean, it's pretty
12 straightforward isn't it?

13 A: Count the block, what do you mean? You talking
14 about the height of the wall?

15 Q: Let's look at this drawing together, shall we?
16 We're on Exhibit Seven, drawing number four.
17 This is the plan view of the wall, right?

18 A: Right.

19 Q: And it gives you sta- -- this is right here
20 (indicating), and it gives you stations and all
21 that other good stuff. All right. And this is
22 the side view of the dra- -- wall, isn't it?

23 A: Right.

24 Q: It shows you the footing and then it shows you
25 each individual block going up whatever station



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1 you happen to be at, doesn't it?

2 A: (Nods head.)

3 Q: And it shows you where the grid is supposed to
4 be in relation to the block, right?

5 A: Right.

6 Q: Okay. So, without respect to the height or
7 fill to the top or bottom of the wall, if you
8 know what station you're on you could look at
9 that drawing and count the number of block and
10 know what to do can't you?

11 A: In some parts of the wall. Yes, some parts ---

12 Q: Is there some part where you can't?

13 A: The 250 feet that we undercut is deeper than
14 that shows.

15 Q: Okay. But you know how to handle that. You
16 told the court you did. You just forgot to do
17 it, right?

18 A: (Nods head.)

19 Q: So with that set of drawings and your hub and
20 your stake, that's all you need to lay out the
21 wall and build it correctly. Is that right?

22 A: As long as the information's accurate.

23 Q: Long as the information's accurate. So if the
24 hubs are where they're supposed to be the wall
25 should be where it's supposed to be, right?



1 A: Yes.

2 Q: And you calculate that by counting the number
3 of blocks on the drawing, adding up the number
4 of blocks, taking that many inches off five
5 feet and that's where you lay your first block.
6 Is that correct?

7 A: Yes.

8 Q: Okay. So if the hub's in the right place then
9 it should never be more than five feet to your
10 face of the wall should it, down wherever that
11 hub is?

12 A: It -- depend on whether it's a cut or a fill
13 wall. And I will say that on a fill wall it's
14 the opposite. I mean, it's not always
15 straightforward. It's always the top of the
16 wall.

17 Q: On this wall there were no fills to the bottom
18 of the wall were there?

19 A: No.

20 Q: Okay.

21 A: The previous wall before we did that is the
22 opposite.

23 Q: That may be true. We're not here about that
24 wall. We're here about Wall 'H, right?

25 A: Uh-huh.



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1 Q: Okay. And on Wall H you can measure over five
2 feet, count the number of blocks, subtract that
3 many inches, and lay your first block, correct?

4 A: Uh-huh.

5 Q: And as you go down the line you can do that the
6 whole wall anyway, right?

7 A: It's not as simple as you make it out to be,
8 but -- when you have a wall at the bottom of
9 the -- when you have a wall with the bottom
10 course steps up as steep as this one does,
11 stakes every twenty-five feet, it gets more
12 difficult. Because like I said, you can -- you
13 can calculate and say all right, you got five
14 courses -- use around five courses. So we can
15 say, all right, the next stake we should be
16 five inches in. All right. The difference
17 comes in is, is what happens if, you know, the
18 block is thicker in that row.

19 Q: We're talking about the face of the block not
20 the back of the block.

21 A: Doesn't matter, you're aligning off the back of
22 the block because that's the only straight edge
23 you have.

24 Q: Excuse me. As you go up, the block sets
25 itself, correct? It may be off a little bit,



1 I'll grant you that.

2 A: But what I'm saying is, you can try to pull a
3 string all you want to, but then you're going
4 to get to a point where if that -- if you have
5 five successive courses and four of them are
6 one inch batters, one of them's an inch and a
7 half, that measurement that you took on the
8 next stake is no longer valid.

9 Q: And that's something that as the builder,
10 that's your responsibility to make that work
11 out, isn't it?

12 A: To some extent. In the area that is critical
13 it's more important to have the dimensions. In
14 the areas that's non-critical, it's more
15 important to have that visual alignment of the
16 wall.

17 Q: Okay. I'll buy that. But you don't know which
18 blocks you're going to be laying in the wall,
19 do you?

20 A: Huh-uh.

21 Q: Okay. So what you have to do is you have to
22 start that wall where it's supposed to be
23 started, right?

24 A: Yes.

25 Q: Okay. And if you start that wall where it's



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1 supposed to be started, when you get to the top
2 it's going to be pretty close to where it's
3 supposed to be. It may be off a half inch,
4 depending on how your blocks fall, but it's
5 going to be up there close to where it's
6 supposed to be isn't it?

7 A: I mean, a twenty-four course tall wall is going
8 to be more than an inch. It doesn't matter
9 what you do. The block is out that
10 (indicating) much.

11 Q: Okay. It's not going to be off a foot though,
12 is it?

13 A: It can be.

14 Q: It's not going to be off twenty-four inches?

15 A: No. I would say it could be off a foot.

16 Q: So you're telling me that you're going to get
17 in twenty-four inches -- every block has to be
18 a half-inch wide -- half inch too big?

19 A: Uh-huh.

20 Q: Half inch too far?

21 A: I don't know the best way to explain it, put it
22 in laymen's terms, when you have inside and
23 outside radiuses ---

24 Q: Wait a minute. I'm not there yet. We'll get
25 to the radius.



1 A: Well, I mean, that's what you're pulling these
2 straight edge points off of, inside and outside
3 radiuses. So you've got -- you got ---

4 Q: Well, let me stop you right there for a minute.
5 We don't have any radiuses in this design do
6 we? These are straight lines and angles,
7 aren't they?

8 A: Yes.

9 Q: No radiuses, right?

10 A: No.

11 Q: No curves?

12 A: No.

13 Q: Okay. Just inflection points, right?

14 A: Yeah.

15 Q: Okay. So, if I look at the photographs I see
16 that there actually are curves in this wall,
17 right?

18 A: Uh-huh.

19 Q: They're not angles, they're rounded.

20 A: Yep.

21 Q: You figured out how to round those?

22 A: No, we take and find the point in the wall and
23 then we start to round it visually.

24 Q: You did that though?

25 A: Uh-huh.



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- 1 Q: The surveyor didn't do that?
- 2 A: No.
- 3 Q: Okay. And Coogler didn't do that?
- 4 A: No.
- 5 Q: And even Edward Rose didn't do that?
- 6 A: No.
- 7 Q: Okay. That's something you did. So if you
- 8 make the curve and it doesn't come out where
- 9 it's supposed to be, that's your problem, not
- 10 somebody else's problem, right?
- 11 A: No. When you come out of the curve you know
- 12 the line that you're running straight in.
- 13 Q: Okay.
- 14 A: You're just blending the curve.
- 15 Q: And you should run into that line, shouldn't
- 16 you?
- 17 A: You should run into that line?
- 18 Q: Yeah, you said the line you're gonna run into.
- 19 You should be running into that line, right?
- 20 A: Yeah, you know the planes that walls are coming
- 21 in at, you're just connecting the point to
- 22 round that curve off.
- 23 Q: Okay. Now, we have three photographs that show
- 24 dimensions from the hub to the wall that are
- 25 greater than five feet. If you put the wall



1 where it's supposed to be based on the hub it
2 has to be less than five feet, doesn't it?

3 A: Yes.

4 Q: Okay. So that area can't possibly have been
5 because of the layout because the layout
6 clearly shows all those stakes you have are
7 five feet aren't they?

8 A: Well, I will ask you this. Those stakes right
9 there said five foot offset but he said it was
10 supposed to be three and a half.

11 Q: Well, we'll get to that when we got somebody in
12 here who can testify about it, okay? But for
13 right now -- and by the way, whether that's
14 supposed to be three and a half feet or five
15 feet, it's not supposed to be seven feet, is
16 it?

17 A: I mean, he said that those are supposed to mean
18 three and a half but he wrote five feet, could
19 ---

20 Q: I don't know who he is ---

21 A: --- the other ones mean seven feet?

22 Q: --- and I don't know what hearsay you're trying
23 to bring in here. We'll get the surveyor to
24 tell us what stations were supposed to be 3.5
25 feet off. And I will tell you now they're not



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1 both stations, but we'll -- but forget that for
2 a minute and let's talk about just building the
3 wall. And if you're going to just build a wall
4 and you have a hub and make it relevant to the
5 face of the wall at the elevation where the hub
6 is and it's less than -- it's more than five
7 feet that wall is in the wrong place, isn't it?
8 It has to be. Because the top is supposed to
9 be five feet over and that wall slopes back
10 towards the hub, doesn't it?

11 A: Yes.

12 Q: Okay. So at least with those three points, we
13 know something happened down in the field that
14 made that wall be in the wrong place and it
15 wasn't the survey was it?

16 A: Can't say that. The station numbers are wrong.
17 When the station numbers are wrong it takes the
18 inside or outside raises and moves them.

19 Q: Mr. Young, if you measure from the hub over to
20 the actual physical wall that you built and
21 it's greater than five feet, that means you did
22 something wrong, doesn't it?

23 A: Based on what? The ---

24 Q: Based on the hub and the five foot offset, sir.
25 Let me ask the question this way.



1 THE COURT: No, let him finish. Are you going to
2 answer it?

3 MR. ROBINSON: Oh, I didn't hear his answer; go
4 ahead.

5 A: What I'm saying is, is that you're sitting here
6 saying that a wall's based on a hub that we
7 found in the field, okay. Was that hub right?
8 Can you answer that?

9 THE COURT: Oh no, that's not how it works. He asks
10 the questions, you have to answer. And your
11 lawyer can help you on redirect if he so -- if
12 he wants to.

13 Q: Now, let's assume for a moment that the hub is
14 wrong, okay? The hub got put in the wrong
15 place. The surveyor busted his survey, all
16 right? But the stake says Quality, measure
17 five feet off of this hub and that's where the
18 top of the wall's supposed to be. Right?

19 A: Right.

20 Q: And that's what you're supposed to do, isn't
21 it?

22 A: Right.

23 Q: In fact, that's what you've been telling the
24 Court here all along, I just go off of stakes,
25 right?



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1 A: Right.

2 Q: Okay. So if I measure from that hub over to
3 the wall and it's more than five feet, I know
4 ipso facto that wall's in the wrong place based
5 on the survey, don't I?

6 A: Yes.

7 Q: Okay. Thank you. Now your contract, Exhibit
8 Number One, that says there's supposed to be
9 two feet of rock behind the wall, correct?

10 A: Yes.

11 Q: All right. So if you want to charge for two
12 feet of rock behind a wall, that was in your
13 contract to start with, wasn't it?

14 A: (Nods head.)

15 Q: Would you look at Exhibit Number Three, please.
16 And I'm going to ask questions from back here
17 because I can't hold this book and ask
18 questions at the same time.

19 A: All right.

20 Q: And that's an Anchor Block publication, isn't
21 it?

22 A: Yes.

23 Q: All right. And if I go to -- the installation
24 instructions here tell you how to manufacture
25 once a wall installed [sic] don't they?



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1 A: I'm sorry?

2 Q: The installation instructions on Exhibit Three,
3 they tell you how Anchor wants the wall
4 installed, don't they?

5 A: I guess.

6 Q: Well did you ever read them?

7 A: I mean I'm sure I have back in the past but,
8 you know.

9 Q: You don't re--read them every time you get a
10 new contract to make sure they haven't changed
11 something?

12 A: No, because ---

13 Q: Okay.

14 A: --- this is the manufacturer's specifications
15 not the owner's. It's ...

16 Q: Now if we look at -- if I can find the number
17 here. If you look at the third page of Exhibit
18 Forty-Three, and I hope yours looks like this
19 (indicating), there's a section on geotextile
20 reinforcement, right? Right in the middle of
21 the page. Do you see that? Try the next page.

22 A: Yeah, fourth page.

23 Q: And that says pull the reinforcement tauter and
24 pin the back edge in place with stakes or
25 staples, right?



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- 1 A: Yes.
- 2 Q: Did you do that?
- 3 A: No.
- 4 Q: Why not?
- 5 A: It's not needed.
- 6 Q: Well, apparently the manufacturer thinks it is.
- 7 Go to the next page if you would. It says
- 8 Coogler 000212. And this shows the
- 9 geosynthetic reinforcement coming straight out
- 10 from a wall, right?
- 11 A: Yes.
- 12 Q: That's geosynthetic, it's also called the
- 13 geogrid is it not?
- 14 A: Right.
- 15 Q: Okay. And the manufacturer, because he tells
- 16 you to pull it taut and pin it and also shows
- 17 it -- matter of fact he wants it to come out
- 18 flat from the wall, doesn't he?
- 19 A: Yes.
- 20 Q: Straight out.
- 21 A: There are exceptions to that rule.
- 22 Q: And on page 000213, that shows the geogrid
- 23 coming straight out from a wall, doesn't it?
- 24 A: Yes.
- 25 Q: Okay. So, there was some difficulty arose with



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1 Wall H, in fact we talked about the wall
2 failed, right? A section of the wall failed,
3 not the whole wall. And ultimately Edward Rose
4 told Coogler to tell you the wall had to come
5 down, right?

6 A: Yes

7 Q: Okay. Now at one point in time you wanted to
8 float the suggestion that they take off certain
9 number of blocks and fix the -- whatever the
10 problem was with the wall and put it back up
11 again, right?

12 A: Yes.

13 Q: Did somebody take those courses down?

14 A: I think Joey took five -- five courses off I
15 think.

16 Q: Coogler took them down didn't they? You didn't
17 do that, why not?

18 A: The original agreement was is that Coogler was
19 gonna take 'em down and we would put them back
20 up and it wouldn't -- it would be a wash.

21 Q: Why would Coogler have to take them down?
22 Coogler didn't put it up.

23 A: Well, because in our contract it's not -- we're
24 not responsible for storm water. Joe Smith and
25 S&ME both said that water was a catalyst ---



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1 MR. ROBINSON: Objection. Stop right there.

2 THE COURT: Hold on. Let him finish his answer.

3 MR. ROBINSON: Your Honor, I didn't ask him what
4 somebody else said.

5 THE COURT: I understand. Let me hear what he says.
6 We're making a record.

7 MR. ROBINSON: All right. What ---

8 THE COURT: So, repeat the question and ---

9 MR. ROBINSON: Go ahead.

10 THE COURT: --- and let him finish his answer.

11 MR. ROBINSON: Read the question back if you would,
12 Mr. Court Reporter.

13 COURT REPORTER: Why would Coogler have to take it
14 down?

15 Q: Why would Coogler have to take it down?

16 A: Because S&ME and Joe Smith both said that storm
17 water was a catalyst that started the wall
18 failure. In our contract we're not responsible
19 for storm water. And I told -- talked to Joey
20 about it and I said, like I said earlier, we've
21 done it on more than one job where he and I
22 come to a compromise or some kind of agreement
23 that it's not all one sided. And that might be
24 him taking the wall down and the I'll put the
25 wall back up. It's a lot easier to take the



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1 wall down then it is to put the wall back up.
2 Lot less work.

3 Q: All right. Move to admit Exhibit Number Three
4 and Number Two.

5 MR. GOODWYN: No objection to number Three.

6 A: Can I say one thing about the geogrid?

7 MR. GOODWYN: Hang on, let me finish this.

8 THE COURT: He'll give you a chance. Once defense
9 is crossing -- redirecting.

10 MR. ROBINSON: I haven't asked about Two have I?

11 MR. GOODWYN: Yeah, I'll object to Two there's not a
12 foundation for that.

13 Q: Before we go there let's go to Exhibit Number
14 Two.

15 THE COURT: Which ones admitted? Three and Four?

16 MR. ROBINSON: I wanted Two and Three ---

17 THE COURT: Two and Three?

18 MR. ROBINSON: --- but we haven't talked about Two
19 so I'm gonna talk about Two and get it admitted
20 so I don't lose track of what I'm supposed to
21 do.

22 THE COURT: Okay. Please proceed.

23 Q: So, let's talk about number Two. Flip over to
24 number Two if you would. Is this the -- excuse
25 me the LLR record of licensing for Design South



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1 Landscape Company?

2 A: I guess. I'm not ...

3 Q: Is Richard E. Wheeler the fourth, is he the
4 license holder?

5 A: Yes.

6 Q: Okay. Move to admit Number Two.

7 MR. GOODWYN: Objection on no foundation. He says
8 he doesn't -- he's not familiar with the
9 document. He doesn't know if it's authentic,
10 hasn't been authenticated otherwise.

11 THE COURT: What are you looking at, Mr. Robinson?

12 MR. ROBINSON: I am looking at Exhibit Number Two.

13 THE COURT: Which is?

14 MR. ROBINSON: Which is a print out from the -- as
15 you can tell from the bottom of the page, from
16 the LLR, which shows the -- from the Board of
17 Commercial Contractors which shows the record
18 information on Design South Landscape Company
19 located at 824 Grain Bin Road, Clinton, South
20 Carolina, with a phone number 864-833-2885.

21 THE COURT: Where did you get this document?

22 MR. ROBINSON: Down at the bottom, Your Honor, it
23 shows you it came from the LLR offline.

24 THE COURT: You got it off the internet?

25 MR. ROBINSON: Yes, sir.



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1 THE COURT: Now, can anybody get this document?

2 MR. ROBINSON: Absolutely.

3 THE COURT: It's a matter of public record?

4 MR. ROBINSON: Matter of public record.

5 THE COURT: All right. Now your objection again,
6 Mr. Goodwyn?

7 MR. GOODWYN: I haven't seen it but if he represents
8 he got it off their website. And, you know, I
9 think he's already testified the information is
10 accurate.

11 THE COURT: All right. It's just a general
12 contractors license.

13 MR. ROBINSON: Correct.

14 THE COURT: Okay.

15 MR. GOODWYN: No objection.

16 THE COURT: Yeah, overruled. You'll withdraw the
17 objection?

18 MR. GOODWYN: Yeah, I'll withdraw the objection.

19 (Defendant's Exhibits Numbers Two and Three were
20 introduced into the record at this time.)

21 THE COURT: Please proceed, Mr. Robinson.

22 MR. ROBINSON: Thank you, Your Honor.

23 Q: We were back talking about taking this section
24 of the wall down and you were gonna say
25 something.



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1 A: I was just gonna talk about the grid placement
2 when you said that the grid is always
3 perpendicular to the wall. You also ---

4 Q: I don't think I said that but go ahead.

5 A: You can also read in the specifications where
6 a grid placement can be placed at plus or minus
7 15 degrees off plane, due to whatever kind of
8 construction extremes that come up, and the
9 wall still function.

10 Q: What they want you to do, however, is keep that
11 grid flat; whether it's horizontal or off at an
12 angle one or the way it's supposed to be flat
13 isn't it? It's supposed to make a plane right
14 ---

15 A: Uh-huh.

16 Q: --- coming out of the wall. Okay. All right.
17 Look with me at Exhibit Number Four. That is
18 a e-mail exchange between you and somebody
19 named Andrew Whitfield at S&ME right?

20 A: Right.

21 Q: Okay. And if we look at this thing it says on
22 the second page, that's Coogler 000111 at the
23 top, the paragraph there says S&ME position is
24 that based on our observations, the wall
25 construction did not closely follow NCMA



1 guidelines. You see that?

2 A: Uh-huh.

3 Q: You saw that didn't you?

4 A: Yep.

5 Q: Okay. You sent parts of this e-mail to Coogler
6 didn't you?

7 A: Uh-huh.

8 Q: Well, let's look at Exhibit Number Five. By
9 the way, I look to admit Exhibit Four, Your
10 Honor.

11 MR. GOODWYN: No objection.

12 THE COURT: All right. Motion's granted.

13 (Defendant's Exhibit Number Four was introduced into
14 the record at this time.)

15 Q: And in this e-mail to Coogler you don't tell
16 him that your wall doesn't meet the NCMA
17 guidelines do you?

18 A: No.

19 Q: And you don't have any good explanation for why
20 you didn't tell him that do you?

21 A: I mean, I didn't think it was important because
22 of his and my conversation that we had.

23 Q: You didn't think it was important that your
24 work didn't meet the guidelines?

25 A: No, our conversation that we had was basically



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1 different than what he's doing in this letter
2 because I can never get him to put in writing
3 what he would talk to me about.

4 Q: All right, well then I don't want to hear it
5 'cause it's hearsay.

6 A: And the conversation was between Andrew,
7 myself, and Joey on site.

8 Q: The conversation was between you and Andrew.

9 A: And Joey on site.

10 Q: And Joey on site? Well, I'm not asking you
11 about that conversation. Maybe your lawyer
12 might ask you about that later but I don't want
13 to know about that right now. All I wanna know
14 is, you didn't tell him in here that the
15 engineer - the second engineer said you didn't
16 meet the guidelines.

17 A: I was trying to answer why I didn't put that in
18 there because of what he said. You said you
19 don't wanna hear it.

20 Q: I don't wanna hear it.

21 A: All right.

22 Q: 'Cause it's hearsay.

23 MR. GOODWYN: I think he's allowed to answer the
24 question fully.

25 THE COURT: I was gonna say, I kind of want to hear



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1 it. Like to hear the whole story.

2 MR. ROBINSON: You're the judge. I object to it but
3 you're the judge.

4 THE COURT: But let him please answer, that's all.
5 You can go ahead, sir.

6 A: What he's referring to is the geogrid.
7 Whenever we dug down behind the grid, there
8 were some depressions at the back of the stone.
9 And that's what he's talking about the NCMA
10 guidelines. The conversation that we had on
11 site was he said that it's no secret that
12 Edward Rose wants the wall to come down. He
13 said what I found on the wall had no bearing on
14 what happened to the wall at all. He said but
15 we all know that Edward Rose is on a witch hunt
16 to take the wall down. So that's why I didn't
17 put it in there because -- I couldn't --
18 Andrew, he's walking a slippery slope because
19 he's working for the owner as a testing outfit.
20 So he doesn't want to say anything that damns
21 Edward Rose in a document. But he'll have a
22 conversation with you that says one thing.

23 Q: Now this e-mail, Number Five, that's dated
24 February 27th, 2015, right?

25 A: Yep.



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1 Q: And you finished that wall back in December,
2 correct? And by February 27th ---

3 THE COURT: I'm sorry, sir. December of what year?

4 MR. ROBINSON: 2014

5 THE COURT: All right. Thank you.

6 Q: And by February 27th of 2015, Edward Rose had
7 already told Coogler to take that wall down
8 hadn't he?

9 A: Well, they originally -- when the wall fell
10 they said they wanted the wall to come down.
11 And then Joey persuaded them to let us get an
12 eng- -- wall engineer to look at it to see if
13 they -- if the wall can be salvaged because the
14 wall had only affected the top seven courses.
15 It hasn't affected the wall below that and the
16 rest of the wall even though it had a titanic
17 water wash come to it, it didn't move. And so
18 in an effort to try to save the wall, we said
19 can we get the engineer of record, Joe Smith,
20 to say that the wall can stay? Okay? Well he
21 had questions because the classifications or
22 the proctor that S&ME used and the compaction
23 ---

24 Q: That is not an answer to my question.

25 THE COURT: Let him finish saying what he's gonna



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1 say.

2 Q: Go ahead.

3 A: S&ME used the wrong proctor on the testing for
4 the compaction issue and so Joe Smith wouldn't
5 certify the wall until S&ME certified the
6 compaction. Well, S&ME because they were in
7 charge of compaction, we've got 47 compaction
8 tests where they tested every lift from the
9 bottom up that tested above 97 percent
10 compaction. They tried to say that we didn't
11 have compaction. Whenever they found out they
12 were in charge of compaction test, that problem
13 went away. They said there was no longer issue
14 with compaction. S&ME would stand behind the
15 compaction test at that point.

16 Q: And in fact, since we're on the subject of
17 compaction, the compaction that you give in the
18 fill dirt depends on the compacted effort you
19 put into it right?

20 A: Yes.

21 Q: That is to say the number of times you run over
22 it with whatever you're doing will compact it

23 ---

24 A: Yeah.

25 Q: --- correct? And to compact soil you either,



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1 in this kind of soil you have a vibrating
2 roller or you have a willy wheel roller or
3 there's some other kind of rollers that you use
4 to compact with right? Okay. And the more you
5 run over things the tighter that soil gets
6 compressed correct?

7 A: Correct.

8 Q: And it is certain that they test it without
9 going into the testing modalities, the certain
10 testing tells 'em are you 50 percent of the
11 possible compaction? Are you 90 percent of the
12 possible compaction? Are you 95 percent of the
13 possible compaction, right? And you're looking
14 for 95, correct?

15 A: Yes.

16 Q: And what they test, they don't test every
17 square feet do they?

18 A: Behind every lift they test in two different
19 places.

20 Q: In two different places. And if the lift is
21 200 feet long they've got two spots and 200
22 feet of lift, right?

23 A: Well, we weren't working on the whole wall at
24 the same time so we were only working on half
25 the wall so it'd be 100 feet.



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1 Q: Okay. That wall is 400 and some odd feet long,
2 right? It starts at 10 plus 00 and goes to ---

3 A: 1440

4 Q: 14 plus 50 so it's 450 feet long, right?

5 A: Right. But at any one time because of each
6 side stepping up or stepping down we're only
7 working on probably 150 feet of wall at a time.

8 Q: Okay. So, even if it's only 150 feet, there's
9 two test to take. Which leaves a whole lot of
10 area that's not tested, right?

11 A: I mean, that's not my call or my guideline.

12 Q: I'm just trying to get facts in front of the
13 judge so he knows what we're talking about.
14 Okay. I'm not saying you're the testing guy.
15 I know you're not the testing guy. Well what
16 they do is, they come and they make a test here
17 (indicating) and they go up there (indicating)
18 80 feet or whatever it is and they make another
19 test, right? And that's to cover the settled
20 250 or 200 or 150, whatever it is, that you're
21 compacting, right?

22 A: Right.

23 Q: And they also -- it's however wide you're
24 compacting, right?

25 A: No, it's usually right behind the wall.



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1 Q: But your compaction is however wide the geotech
2 fiber is, right?

3 A: Correct.

4 Q: Okay. So, the width might be from me to you,
5 and length might be 150 feet, and they'd put
6 something down there (indicating) and they'd
7 put something down there and check it. They
8 put something down there and check so it's all
9 checked again, right? Okay. So, back to my
10 question. Was -- February 27, Rose has told --
11 has told Coogler and Coogler has told you the
12 wall's coming out, right?

13 A: Right. That's whenever we started talking
14 about ways to try to salvage the wall. About
15 getting all these people to sign off on it.
16 And that was, you know, they said the wall has
17 to come down unless you can get Joe Smith to
18 sign off on it. Well, I got Joe Smith to sign
19 off on it. And then they said well, the wall
20 has to come down unless you can get S&ME to
21 agree to redesign it from here (indicating) up.
22 So I had to contact S&ME and offer to pay them
23 to redesign the last seven courses up. And
24 they agreed to do that. I presented that -- I
25 wanna say that I told James about that, and



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1 then James went to the owner and the owner said
2 -- that was -- there was a little bit of time
3 frame in the- -- time lapse and that's when
4 they came back and said the walls gotta come
5 down, it's in the wrong place.

6 Q: Actually your e-mails between you and S&ME
7 indicate that S&ME said they got a big job and
8 they didn't have the time or the resources to
9 do that redesign. Isn't that true? It's not
10 in there. Do you recall that?

11 A: I think there's an e-mail missing in here.

12 Q: I haven't included all the e-mails. I just
13 included the e-mails that I thought would be
14 relevant and you've told me now that S&ME said
15 they would redesign the wall and my question to
16 you is isn't it true that S&ME said they got a
17 big job and they didn't have the resources to
18 do that?

19 A: No. I think he said I'm sorry I hadn't called
20 you back because I've been on a large job. But
21 I don't think he said ...

22 Q: All right. Well, maybe we'll be able to look
23 at that tomorrow morning.

24 THE COURT: Now, Mr. Robinson, that having been
25 said, I was looking at the clock to figure out



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1 a good time for us to break for the evening.

2 MR. ROBINSON: I have a lot of cross-examination,
3 Judge.

4 THE COURT: That's understandable. Does anyone
5 object to breaking now and reconvening at 9:30
6 in the morning?

7 MR. ROBINSON: I'm wondering if we'll get done by
8 tomorrow night. What do we do if we don't get
9 done by tomorrow night?

10 THE COURT: Well, that's the beauty of having a case
11 before the Master in Equity. We can continue
12 to the next day or we can reschedule and come
13 back another day.

14 MR. ROBINSON: Okay.

15 THE COURT: I have to ---

16 MR. ROBINSON: I have no problem going the next day.

17 THE COURT: Okay. We'll have to see though because
18 we have another trial scheduled for Wednesday.
19 That's supposed to take all day. I don't see
20 how it can, it might take an hour in the
21 morning or something like that. But that's
22 only assuming we don't finish tomorrow.

23 MR. ROBINSON: Yes, well, I'm thinking we're not
24 gonna finish tomorrow but.

25 THE COURT: Okay.



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1 MR. ROBINSON: Well, I might be able to go a little
2 faster, who knows.

3 THE COURT: Oh no, no. Again I have to be here so.

4 MR. ROBINSON: I understand.

5 THE COURT: And that's again, I'm flexible and I
6 have control of the schedule, so. So, if we
7 need to postpone Lindsey's case to finish this
8 one up we'll have to do that.

9 MR. ROBINSON: Well then if you wanna to quit now
10 that's fine with me.

11 THE COURT: All right. Do you object to that, Mr.
12 Goodwyn?

13 MR. GOODWYN: I don't object to it.

14 MR. ROBINSON: Before we -- did I move Five into
15 evidence? I'd like to move Five into evidence,
16 Judge.

17 MR. GOODWYN: No objection.

18 THE COURT: All right.

19 (Defendant's Exhibit Number Five was introduced into
20 the record at this time.)

21 THE COURT: We'll stand in recess until 9:30 in the
22 morning.

23 (Whereupon, the hearing adjourned at 4:05 p.m. and
24 was reconvened on Tuesday, October 31, 2017 at 9:42
25 a.m.)



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1 CALL TO ORDER:

2 THE COURT: Mr. Robinson?

3 MR. YOUNG - CROSS-EXAMINATION BY MR. ROBINSON

4 (CONT.):

5 Q: Mr. Young, when we left here yesterday, did you
6 talk to your lawyer about this case?

7 A: No.

8 Q: Okay. We were talking about measurements. We
9 determined yesterday that if the measurement
10 from the hub to the face of the wall at ground
11 level was five feet or greater then that wall
12 was in the wrong place. Is that correct?

13 A: Compared to the drawings, yes.

14 Q: Okay. And you were talking about the block
15 size and you said, the block size -- the offset
16 sometimes varies. It's supposed to be one
17 inch, you said it could be up to a half inch
18 off?

19 A: Well, what it is, it's not -- what -- the
20 thickness of the block. So you're aligning off
21 the backside. When you're using a straight
22 faced product like this, it's a what they call
23 a stone-cut straight face. So the only
24 straight edge you have in the block is on the
25 back side of the wall. So, you're aligning off



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1 the back side. Because that's the only
2 straight edge you can pull a string on. What
3 happens is, is sometimes those blocks --
4 because it's a split face. They're taking two
5 blocks and making them back to back and then
6 they take a machine and split it. All right?
7 Sometimes that machine splits it not even. And
8 so what that does is, it throws a thickness of
9 one every other brick a different thick depth.
10 And so when you're using a strength face block,
11 it goes into aesthetics parts, so you're going
12 to disengage the tail and move some blocks
13 forward because you got to maintain a visual
14 appearance too.

15 Q: So if the -- if the block were off a half inch
16 and you didn't do that, you'd have to move it
17 forward to match the other blocks, correct?

18 A: No, you would move it back.

19 Q: You'd move the fat block back?

20 A: Yeah.

21 Q: Okay. So if the block was too fat it would be
22 moved back to compensate for that. It wouldn't
23 affect where the top of the wall goes at any
24 rate, would it?

25 A: Yeah, it could. That's why it's -- to say that



1 every course is a one inch set back, one inch
2 is a minimal set back.

3 Q: One inch is fixed in the block, is it not?

4 A: Yeah, the one inch set back is fixed, but what
5 I'm saying is that when you have the visual
6 alignment on the face, you've got to maintain
7 that visual in front. You can't have a
8 straight wall and all of the sudden have a
9 block come out.

10 Q: Exactly right.

11 A: So you push it back ---

12 Q: So it ---

13 A: --- you push it back, it sets the wall back
14 further..

15 Q: Uh-huh. And on this wall, how many of these
16 blocks did you push back?

17 A: No way to remember that.

18 Q: All right.

19 A: The other thing that can drive the wall back
20 further is -- is an inside radius.

21 Q: Time out. Let's -- let's talk about that for
22 a minute, okay? This design doesn't have any
23 radiuses in it, does it?

24 A: No, it doesn't.

25 Q: In fact it has corners, right?



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1 A: Yeah.

2 Q: And you determine the radius, is that right?

3 A: It's a standard industry practice to do that.

4 Q: Well, that may be, but that's not what this
5 design shows, is it?

6 A: The ba- --, the wall that was rebuilt by Harold
7 Brock was put up the exact same way I put it
8 with radius as well.

9 Q: That wall sort of belongs. My question was
10 that drawing doesn't show radiuses, does it?

11 A: His drawing didn't show radiuses either.

12 Q: Okay. Now, you decided to put radiuses in, is
13 that right?

14 A: It's an industry standard to put radiuses.

15 Q: Who built the walls, Mr. Young?

16 A: I did.

17 Q: Okay. Did you decide to put radiuses in?

18 A: Yes.

19 Q: All right. Thank you.

20 THE COURT: All right. Let's stop for a second.
21 What is a radius?

22 Q: A radius, Your Honor -- I'll let Mr. Young
23 explain it.

24 A: A radius if you take in the corner where you
25 have an outside -- this (indicating) is the



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1 outside face in the block -- when you have a
2 corner like that or a turn in the wall ---

3 Q: Let me -- let me hold those for you because
4 you're gonna run out of hands there in a
5 minute. So we got -- we got -- put it right
6 there so the judge can see it.

7 A: When you have this ---

8 Q: This way (indicating). Now the judge can see
9 it, okay.

10 A: When this is like an outside 45 degree angle,
11 what happens is in order to maintain that
12 you're gonna have to bend both of the block and
13 you're gonna have to miter 45 all the way to
14 the top. So, you're gonna have a joint right
15 there (indicating).

16 Q: Now what do you mean by miter?

17 A: You -- basically if you're gonna take a block,
18 you've got to cut it on a 45.

19 Q: Yes, sir.

20 A: So that way the points match that point there.

21 Q: Like this (indicating)..

22 A: Right. So what's gonna have to be is, that
23 joint's gonna be weaker. Because you have that
24 joint in a retaining wall all the way to the
25 top. So you're gonna lose the ability of the



1 walls to work together by having a running bond
2 pattern where the tail interl- -- comes in
3 contact with the block below it. When you have
4 that miter it's -- it's -- it's a weak point in
5 the wall. So it's an industry standard instead
6 of having that there, we round -- you round
7 this (indicating) -- this corner off so that
8 way you don't cut any block and it's a stronger
9 bon- -- a stronger joint.

10 Q: And when we say radius, we mean rounded joint?

11 A: Yeah, it's rounded.

12 Q: There's some radius that ---

13 A: It's just a visual. I mean, you got your
14 straight line running this way and a straight
15 line going the other way. And then you just
16 visually match up that radius, which adds for
17 a stronger wall.

18 Q: Okay. So back to my question was, the drawings
19 don't show a radius but you built it with a
20 radius?

21 A: Yes.

22 Q: And that was your decision?

23 A: Yes.

24 Q: Nobody complained about that, did they?

25 A: No.



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1 Q: Okay. And we also decided that your work did
2 not meet the NCMA guidelines, correct?

3 A: That's kind of a matter of opinion.

4 Q: Well, that's what the engineer said isn't it?

5 A: That's what soil testing guy said.

6 THE COURT: These are an acronym, or initials?

7 Q: Yes, sir. NCMA, the National something or
8 other Masonry Guidelines. I can't remember
9 what that C stands for.

10 A: National Concrete and Masonry Association.

11 Q: Thank you.

12 THE COURT: All right.

13 Q: All right. And you also told us that you --
14 when there were -- when there were two stakes
15 with the same station on them, that indicated
16 to you that there was a corner on there.
17 Correct?

18 A: Yes.

19 Q: And you measured off those two stakes to find
20 your corner point?

21 A: Yes.

22 Q: Is that right? Okay. Now as far as you know,
23 Edward Rose Development Company required
24 Coogler to take down Wall H, is that right?

25 A: Yes.



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1 Q: And you're not sure why they made him take it
2 down. Is that right?

3 A: Well, it was -- it was a various of [sic]
4 different reasons. The very first conversation
5 we had, I got a picture from I think it was
6 from Joey that showed a Pro-Rod behind the wall
7 that was sunk all the way four feet. And so
8 there was an issue they were questioning about
9 compaction. That was the original reason they
10 said the wall had to come down, because the
11 compaction was not there.

12 Q: I think you -- you talked about it yesterday,
13 they resolved that question, is that right?

14 A: Right. I'm just going through the time line of
15 all the reasons they said the wall had to come
16 down. There was more than one.

17 Q: Right. And ---

18 A: At first ---

19 Q: --- that reason went away. Is that right?

20 A: Well, I'll get to that.

21 Q: All right. Go ahead.

22 A: There was the issue of the compaction, so S&ME
23 provided to the owner, showing them that 48
24 compaction tests passed with 99.7 percent
25 compaction rate. In a retaining wall, when you



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1 get compaction over the top of the grid, when
2 they come to the testing it's either a pass or
3 a fail. If you're over 95 percent, you pass
4 and you can keep going up with the wall. If
5 you don't have 95 percent, you have to stop
6 until you get to 95 percent. And so S&ME, who
7 was hired by Edward Rose, passed us on every
8 compaction test out there. And so that was the
9 original reason they said the wall had to come
10 down. Well then -- so I got S&ME to say the
11 compaction issue was not an issue because we
12 provided the compaction tests. So then they
13 went to -- to say the next issue was they
14 didn't trust Joe Smith's design. And so it
15 went from that to I had to get Joe Smith to
16 sign off on the wall from the -- from the turn
17 back portion down. I got him to agree to that.
18 Well then they said, well, you've got to get
19 S&ME to sign off on it now. Well, I got S&ME
20 to agree to me that I could pay them to -- to
21 redesign the wall from what we'd taken down up
22 out of my pocket to pay them, to sign off on
23 that; and I got them to agree to that.

24 Q: Now just -- just a moment. You didn't take the
25 wall down, Coogler took the wall down, right?



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- 1 A: Yeah.
- 2 Q: All right.
- 3 A: Yes.
- 4 Q: All right. Go ahead. You were paying S&ME to
- 5 finish the wall.
- 6 A: Yeah, S&ME agreed to -- to -- to redesign the
- 7 wall from that point, and I got them to agree
- 8 to that, and then James called me back the next
- 9 week and said that there was no point in
- 10 getting that letter from S&ME, the wall's in
- 11 the wrong place. They want it to come down.
- 12 And so in point making [sic] that is, is that
- 13 everyone of these obstacles they said the wall
- 14 had to come down, they said that you've got to
- 15 do this. And when I did that, they still said
- 16 the wall came down -- had to come down. And to
- 17 go back -- in Joey's defense, every issue that
- 18 I brought to him he went to bat for us, too.
- 19 I mean ---
- 20 Q: He got them all -- he got them all off that,
- 21 didn't he?
- 22 A: Yeah. And ---
- 23 Q: Or the two of you together did?
- 24 A: Right, he ---
- 25 Q: So, the problem is ---



1 A: --- did everything he could ---

2 Q: --- they got the ---

3 A: --- he could to help us.

4 Q: They got the ---

5 THE COURT: Hold on.

6 Q: They got the ---

7 THE COURT: Let him finish his -- his answer.

8 Q: All right. I thought he was done. Go ahead.

9 A: He did everything he could to help us to keep
10 the wall in place. And I thanked him for that.
11 You know, I know it was out of his control.
12 One thing that was brought to my attention is
13 whether it was in -- in early January. And so
14 this -- this is roughly, you know, two, maybe
15 three weeks after the wall had failed and the
16 -- had the storm water come to it. I dealt
17 with other block manufacturers as well. I
18 dealt a lot with Keystone. And in talking with
19 the Keystone rep about another job, a ---

20 MR. ROBINSON: I'm -- I'm gonna object to this as
21 hearsay.

22 A: I mean it's a conversation---

23 THE COURT: Hold on. Hold on a second. What was
24 your testimony, sir?

25 MR. ROBINSON: He was -- he was talking about a



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1 conversation he had with a different block
2 manufacturer and it's not relevant to this case
3 and it's hearsay. So, I'm objecting.

4 Q: It's relevant and I -- I will get to that. But
5 ---

6 THE COURT: If it's hearsay -- you know the
7 definition of hearsay? Out of Court statement
8 offered to prove the truth of the matter
9 asserted. So why -- why do you think you need
10 to talk about this conversation?

11 A: The conversation proves that -- that it was --
12 it was a mute [sic] point for us to say that
13 the wall had to come down because of compaction
14 or the wall had to come down because of being
15 in the wrong place. It's -- it will show why
16 -- why the -- it shows the true reason why the
17 owner wanted the wall to come down.

18 Q: No, so somebody who's not associated with this
19 project is gonna tell you why the owner who he
20 also doesn't know ---

21 THE COURT: Mr. Robinson, I'm sorry. I didn't rule
22 on your objection yet.

23 Q: --- or is associated with. That's my
24 objection.

25 THE COURT: Okay. Sustained.



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1 MR. ROBINSON: Thank you.

2 THE COURT: All right.

3 Q: All right. That means you can't talk about it.

4 A: Okay. Richard Corbin, who's the salesperson
5 that I normally deal with at Keystone, told me
6 through conversation that ---

7 Q: I will object to that also as hearsay.

8 THE COURT: Sir, I guess if that -- both of you are
9 very well prepared, and you want to say stuff,
10 sometimes he doesn't ask the question -- you
11 know, you're answering questions that weren't
12 asked sometimes because you want to tell your
13 side of the story. And I hope I'm letting you
14 do that, but Mr. Robinson is correct in that
15 certain types of testimony are not allowed in
16 cross-examination. And one of them, if you're
17 talking about other conversations with people
18 that aren't here and -- and you -- and as you
19 said, you want to talk about that to prove
20 something that will help your case, it would
21 probably be unpermitted hearsay.

22 THE WITNESS: Okay.

23 THE COURT: So try to go by what you know and -- and
24 he's gonna ask you a lot of yes, no questions.
25 That's a cross-examination -- that's a



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1 technique you're allowed to use.

2 MR. ROBINSON: Well, I asked a yes or no question
3 and I got a dissertation.

4 THE COURT: Well, I'm saying -- but also, Mr.
5 Robinson is very well prepared. He wants to
6 make sure his whole side of the story gets out.
7 And I -- I agree with that. However, you have
8 to be careful that you're not talking about
9 hearsay and -- and things that I won't
10 consider. You know.

11 THE WITNESS: Okay.

12 THE COURT: It's hearsay. So, Mr. Robinson, you
13 asked the question, let him finish the answer,
14 and then we can go on from there.

15 Q: All right. So when Coogler told you the wall
16 had to come down, you didn't go out and take it
17 down, did you?

18 A: No.

19 Q: All right. In fact, Coogler had to take the
20 wall down himself, didn't he?

21 A: Yes.

22 Q: All right. You had not completed the wall when
23 you stopped work on it. Is that right?

24 A: WE lacked the caps.

25 Q: And there's been some talk, I think you talked



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1 about this in your deposition, that the wall in
2 some places was higher than it was supposed to
3 be. Is that right?

4 A: Yeah. We were given a ---

5 Q: It's a yes or no question.

6 MR. GOODWYN: He -- he said ---

7 MR. ROBINSON: I just want to know if it was higher
8 or not.

9 THE COURT: He said yes. He has to explain the
10 answer ---

11 MR. ROBINSON: All right.

12 THE COURT: --- in this case.

13 Q: Go ahead.

14 THE COURT: Go ahead, sir.

15 A: We were given a benchmark, to work off of with
16 -- which was the next building pattern. We had
17 originally asked for a benchmark close to the
18 wall. And we were told the nearest benchmark,
19 which gives us our starting elevation, was the
20 building pad next to us.

21 Q: Okay. Now before we go any further on that,
22 I'll let you finish that. David Rose gave you
23 the benchmark, is that right? It wasn't
24 Coogler?

25 A: I really don't remember who -- I just asked for



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1 a benchmark and I really just don't remember.

2 Q: You know Coogler wasn't doing the surveying,
3 right?

4 A: Right. But, you know, asking for a benchmark
5 wouldn't be something uncommon that I wouldn't
6 ask.

7 Q: Okay. I just want to make sure that the Court
8 understood that Coogler didn't set the
9 benchmark, somebody else did.

10 A: Well, the benchmark was set by the drawings.
11 So, Coogler didn't do the drawings. I'm just
12 saying I would have asked where could I get a
13 benchmark reading from.

14 Q: Okay. Now let's tell the Judge what a
15 benchmark is.

16 A: A benchmark is a known elevation. If I say
17 that this -- this right here (indicating) is a
18 benchmark and it has a circle there and writes
19 an elevation. Say that elevation is 100. I
20 can take my instrument and I can transfer that
21 elevation to anywhere in this room. If I say
22 it that this is elevation of 100 and the top of
23 those stakes is an elevation 101, that means
24 that that's one foot taller than this
25 (indicating). It's just a way to transfer



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1 elevations on a job site. We were told that --
2 that top of that concrete slab was a benchmark.
3 And they showed me the drawings, it said top
4 of the concrete was -- was the known elevation.
5 So that's the elevation that we used to build
6 our wall. When we were there the last day, Ron
7 said, you need to check your wall because I
8 think you're too tall. And I got my instrument
9 out and I went to the benchmark, check- -- I
10 mean showed him that I had to go -- I was at
11 the right elevation, I just lacked one cap,
12 which is four inches. And he said, well, let
13 me go and I've got to check something and I'll
14 call you back. So he went to his office and he
15 came back out there. And he said the benchmark
16 -- or the elevation on this plan that says top
17 of concrete, doesn't really mean top of
18 concrete. That elevation is bottom of
19 concrete. And so basically that put my wall 12
20 inches too tall.

21 Q: Okay, so the wall was higher than it was
22 supposed to be?

23 A: Yes.

24 Q: All right.

25 A: But Ron agreed to leave the wall as it was. He



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1 said since that was wrong and our fault, he
2 said your, you know, you can leave the wall
3 there.

4 Q: Oh, that was nice of him. Did he tell you he
5 was gonna pay you for it?

6 A: It was a unit price contract, so, I mean, I
7 guess Joey was paying for it, so.

8 Q: He didn't say; that, did he? You -- you didn't
9 ask the surveyor, Mr. Walker, to help you
10 actually lay out the wall did you? You did the
11 layout yourself?

12 A: He had the layout stakes in place.

13 Q: I'm sorry. Let me rephrase my question. You
14 didn't ask Mr. Walker to help you put the mark
15 on the ground where you were gonna put the
16 first block, did you?

17 A: No.

18 Q: He just put the hubs in -- we talked about hubs
19 yesterday, right?

20 A: Right.

21 Q: He put the hubs and the stakes in. You took it
22 from there, right?

23 A: Right. And you didn't ask Coogler to help you
24 transfer those points over either?

25 A: The only thing I got Coogler to do is when a



1 wall, the bottom elevation steps up fairly
2 steady, meaning -- when I say the bottom of the
3 wall, when the wall steps up.

4 Q: You're talking about something like this where
5 the wall's down here (indicating) and the
6 bottom steps up and steps up and steps up and
7 steps up.

8 A: Right.

9 Q: Right?

10 A: Keep in mind every one of those courses is
11 recessed in back, every course. And so when
12 you have that kind of step, it's really hard to
13 keep alignment when you have stakes, the
14 original stakes like at every turning point.
15 So I had John Goff come back and they put -- I
16 think he put a stake in between every one of --
17 every one of the surveyor stakes.

18 Q: Did you hire John Goff to come do that?

19 A: No.

20 Q: Okay. If you look at the Exhibit Six, this wall
21 steps back -- and, by the way, the face of the
22 wall will be the top of that cap, right? Not
23 the top of the last block, correct?

24 A: Correct.

25 Q: Okay. And if -- and if we look at this thing,



1 you've got a foundation down here at the
2 bottom, that's the thing that sticks out from
3 the wall, right?

4 A: Yes.

5 Q: And then we have some blocks going up, correct?

6 A: Yes.

7 Q: All right. And then we have some stone behind
8 it and we have some geogrid coming out. Right?

9 A: Yes.

10 Q: And each one of these blocks steps back one
11 inch, correct?

12 A: On the picture it does.

13 Q: Okay. So -- so if we have and -- and right --
14 if I could approach, Your Honor?

15 THE COURT: Yes, sir.

16 MR. ROBINSON: I'm gonna show you something that's
17 impossible to figure out if I don't show it to
18 you.

19 THE COURT: Okay.

20 MR. ROBINSON: We're on Exhibit Six.

21 MR. GOODWYN: Which exhibit are you looking at?

22 MR. ROBINSON: Six. Wow, your book is different
23 than my book. You're missing six?

24 THE COURT: If we're looking not on the same page,
25 so to speak, that's a problem.



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1 MR. ROBINSON: Looking at Exhibit 6.

2 THE COURT: Except it's Exhibit B I'm looking at.

3 MR. GOODWYN: You're missing this diagram? Is that
4 what you're missing?

5 MR. ROBINSON: Apparently we're missing the diagram.

6 MR. GOODWYN: You can use it.

7 MR. ROBINSON: Thank you. This is supposed to be
8 here, but -- that would probably make a whole
9 lot more sense.

10 THE COURT: Okay.

11 Q: According to the document, that's
12 (indicating) the foundation. There's (indicating)
13 the block. That's (indicating) the rock behind
14 the wall. There's (indicating) the geogrid.

15 THE COURT: Okay. All right.

16 MR. ROBINSON: I'm sorry -- I -- I don't know how I
17 gave you a book without the right pieces in it.

18 THE COURT: That's all right.

19 Q: So the height of the wall determines how far
20 back the wall -- the top of the wall is with
21 respect to the front of the wall at the bottom,
22 right?

23 A: Right.

24 Q: Okay. And as we step up, according to this
25 drawing, the steps are on -- are multiples of



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1 blocks, right?

2 A: Yes, sir.

3 Q: So even though I step up, the blocks should
4 still be in alignment, shouldn't they?

5 A: Yes, sir.

6 Q: All right. And if you look at Six-B, that's
7 the photograph. You see Six-B? That's a
8 photograph of the wall?

9 A: Yes, sir.

10 Q: And that is before you make the big turn and go
11 the long distance down the wall, right? That's
12 this part right here (indicating)? You're
13 looking at this part right here (indicating),
14 correct?

15 A: Station 1262.5 is right ---

16 Q: Yeah. Okay. And we can see that the wall's
17 not vertical, it leans back a little bit, as
18 we've been talking about. Okay? Let's put
19 that in there so it'd be easy for everybody to
20 understand what's going on here. Now, we
21 talked about the geogrid yesterday. Right?

22 A: Yes, sir.

23 Q: And in Six-A, the geo-grid's coming straight
24 out from the wall, isn't it? It's a plane,
25 it's coming straight out from the wall. It's



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1 not skipped anywhere.

2 A: This picture here, you mean?

3 Q: No, sir, Six-A. Go back one page. There you
4 go.

5 A: Yes, sir.

6 Q: All right. All right. Now, we talked about
7 radiuses. You were gonna radius the wall
8 because it's very [sic] possible to make those
9 corners and it might make the wall -- you said
10 might make the wall weaker, I don't know. But
11 at any rate, those corners you made, those
12 radiuses you -- you determined where those were
13 gonna be? Is that correct?

14 A: The -- the stakes dictated where the radiuses
15 were.

16 Q: Well, the stake dictated where the corner was
17 supposed to be, correct?

18 A: Correct.

19 Q: You dictated how you were gonna build out the
20 radius, correct?

21 A: It's dictated by the stakes.

22 Q: Well, you ---

23 A: When you -- when you pull ---

24 Q: You could have -- you could have --

25 THE COURT: Hold on a second, Mr. Robinson. Let him



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1 -- let him finish his question -- his answer.

2 A: When you have two stakes that mark the same
3 station number, you pull it and you put a -- we
4 put a jet-stake there ---

5 Q: All right.

6 A: --- a stake in the ground. And we've got a
7 wall that we're already putting in coming this
8 (indicating) direction, so we've got that
9 alignment there. And then you're gonna go to
10 the next stake and you get the alignment there.
11 So you pull string from both directions to that
12 point there.

13 Q: And they should cross right at the point,
14 shouldn't they?

15 A: Right.

16 Q: Okay.

17 A: All right. Then you're taking -- you know, you
18 take a block and you stack it as long as you
19 can straight, both directions. And then you
20 just take these block and you turn 'em.

21 Q: And you decided where to start that turn,
22 right?

23 A: Yes, sir.

24 Q: Okay. And that means you decided how sharp the
25 curve was gonna be, correct?



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1 A: You put it -- you start out as sharp as
2 possible.

3 Q: And if you -- if you got that -- now, you said
4 that you were building the wall, there's a line
5 going this way and a line going that way,
6 correct?

7 A: Yes.

8 Q: Okay. How did you get that line? How did you
9 know where that line was?

10 A: You going off the grade stakes.

11 Q: So you take the hub, right? And you measure
12 over to the corner, correct? And then you were
13 down to the other and you moved over to the
14 next corner, right? That correct?

15 A: Well, there's math that you got to do in there
16 because, like I said, the bottom of the wall --
17 in a perfect word, if the bottom of the wall is
18 flat, then the way you're talking about is the
19 way you would do it.

20 Q: Okay. At any rate, whether the wall is flat or
21 not, the hub tells you how far to go over to
22 the top of the wall, correct?

23 A: Yes.

24 Q: And you can figure out by looking at the
25 drawing how many inches that is and you can



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1 move back the correct inches and that is
2 basically where your block needs to go,
3 correct? And you can put a -- and you can put
4 a pin or a block or whatever you put in there,
5 right?

6 A: Yes.

7 Q: And then you do the same thing over here with
8 this one, correct? And then you would pull a
9 string through there, right?

10 A: Yes.

11 Q: All right. Is that how you establish the face
12 of your wall that you're gonna run this radius
13 around to?

14 A: Yes.

15 Q: Okay. And so if you measured incorrectly for
16 one of these two places, that wall is going to
17 be off, isn't it?

18 A: Comparatively to the way it was staked out it
19 would be wrong.

20 Q: Okay. Now if you look at drawing Seven --
21 Exhibit Seven, which is these -- these two --
22 this is Exhibit Seven here. This drawing on
23 the bottom part shows theoretically all the
24 blocks that are supposed to be in the wall, is
25 that right?



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- 1 A: Yes.
- 2 Q: Okay. And you can go anywhere on there if you
- 3 know the station, you can count the number of
- 4 blocks up, right?
- 5 A: Yes.
- 6 Q: Okay. And the maximum number of blocks, you
- 7 tell me if this right, that I counted is 23.
- 8 A: That sounds about right.
- 9 Q: And over at one end there were three and at the
- 10 other end there was seven.
- 11 A: I guess so.
- 12 Q: One -- one end was three blocks. Right here.
- 13 One, two, three blocks.
- 14 A: Right.
- 15 Q: And the other end, we're at station 10+00,
- 16 there's seven blocks.
- 17 A: On the drawing ---
- 18 Q: On the drawing.
- 19 A: --- but there's actually 14 courses there.
- 20 Q: Excuse me?
- 21 A: On the drawing it shows seven courses, but on
- 22 -- in actuality there's 14 there.
- 23 Q: Why are there 14?
- 24 A: Because there's 7 courses below ground.
- 25 Q: Is there where you said you over-excavated and



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1 had to throw a block in?

2 A: That's where we had to undercut ---

3 Q: Under cut.

4 A: --- the unsuitable soils and Joey told me to
5 build up with block as opposed to stone.

6 Q: And -- and your testimony -- let me be sure I
7 get this testimony right. Your testimony's
8 that Joey told you to build it with block?

9 A: Yes.

10 Q: Okay. So if it were built in accordance with
11 the drawing -- and by the way, I think you
12 already told us that the seven courses down
13 below you forgot to take that into account. So
14 that wouldn't account for seven inches of the
15 wall not being where it was supposed to be,
16 right?

17 A: Right.

18 Q: But the wall's actually at that point 2.9 feet
19 out from where it's supposed to be, isn't it?

20 A: Other corner.

21 Q: I'm sorry. 1.3 feet out, right?

22 A: Right.

23 Q: One point three feet, that's one foot four
24 inches, right? One foot five inches, excuse
25 me. So seven of it was block you forgot to



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1 take into account. Where's the other seven
2 come from? Well, let's skip that for a minute.
3 Three block, seven block. So, three blocks,
4 you've got two one inch offsets, so the maximum
5 measurement should be four foot ten. Correct?

6 A: Okay. Say that again?

7 Q: You have three blocks, so there's a one foot --
8 one inch offset for each block, correct? So
9 that's gonna be two inches from the front of
10 this one to the front of that one.

11 A: The one inch is -- is a minimum.

12 Q: You told us you don't know how many of these
13 rogue blocks you had, right?

14 A: Right..

15 Q: Okay.

16 A: If you go back to look at the Exhibit Six-B,
17 the -- the picture there ---

18 Q: Uh-huh.

19 A: --- you can see that those setbacks on those
20 blocks are all -- every single course is
21 greater than one inch.

22 Q: And you can see that?

23 A: Yes, sir.

24 Q: How can you see that, sir? There's no ruler,
25 there's no scale, there's no nothing on here.



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1 Besides which, it's not a very good picture.

2 A: I mean, I guess when you do it so much you can
3 see it.

4 Q: Uh-huh.

5 A: And you can also -- you can look at the edge of
6 that wall and see where that battery is. You
7 know, and see that it's battered more -- more
8 back or further back than eight degrees.

9 Q: Mr. Young, I gotta tell you, my eyes are not
10 calibrated to -- to measure photographs in
11 degrees. I'm having difficulty with that
12 statement. How do you know that that's more
13 than -- than eight degrees.

14 A: I mean, it's like a person that does dirt work
15 their whole life, they look -- they can look at
16 a grade and tell what the water is run that
17 direction because they done it their whole
18 life.

19 Q: Did you measure that wall?

20 A: I did not.

21 Q: Okay. All right. Let's look at Exhibit Eight.
22 So -- so Seven's in. I move Exhibit Six in if
23 it's not in already. It think it is, but I'm
24 not sure.

25 THE COURT: Six-A and Six-B?



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1 MR. ROBINSON: Excuse me?

2 MR. GOODWYN: You want Exhibit Six-A and Exhibit Six-
3 B?

4 MR. ROBINSON: Six-A and Six-B, yes.

5 MR. GOODWYN: No objection.

6 THE COURT: All right. Motion's granted.

7 (Defendant's Exhibit Number Six-A and Six-B were
8 introduced into the record at this time.)

9 Q: All right. Now, Exhibit Seven -- I'm sorry,
10 Exhibit Eight. Let's look at Exhibit Eight.
11 Exhibit Eight are photographs of measurements
12 from hubs to the wall, right?

13 A: Yes.

14 Q: We went over these yesterday. You went over
15 these yesterday with your lawyer, correct?

16 A: Yes, sir.

17 Q: And you said that, if I remember correctly,
18 four -- excuse me. Eight-E, Eight-F, Eight-G,
19 Eight-H, Eight-I and Eight-J. You said those
20 were -- you told me. You said the critical
21 point?

22 A: Yes.

23 Q: All right. How do you know that?

24 A: Because it's critical where the wall ends up at
25 the top.



1 Q: And wasn't -- I'm sorry. I didn't phrase that
2 well. How do you know that those photographs
3 are at the critical point?

4 A: Because I was the one that took the
5 photographs.

6 Q: Okay. And do you know where the other
7 photographs were?

8 A: Yes.

9 Q: You didn't when I took your deposition.

10 A: I mean, I know that it's outside of the
11 critical area, from there down.

12 Q: You don't know where they are, you just know
13 they're outside the critical area. Is that
14 what you're telling me?

15 A: Yes.

16 Q: And you know those are inside the critical
17 areas why? You just know that?

18 A: Because I took the picture.

19 Q: Uh-huh.

20 A: I can see from this area right here
21 (indicating), you can look at the ---

22 Q: At the wall.

23 A: I mean this is -- this (indicating) is the
24 outside corner ---

25 Q: Which ---



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- 1 A: --- which would be ---
- 2 Q: --- which -- which photograph are you on?
- 3 A: Eight-B.
- 4 Q: Okay. We can all look at the same photograph
- 5 at the same time. Eight-B, all right.
- 6 A: Eight-B would be station 1262.5.
- 7 Q: All right. Why do you think that?
- 8 A: Because it's the only outside radius in a non-
- 9 critical part.
- 10 Q: Well, there's an outside radius there
- 11 (indicating). There's an outside radius there
- 12 (indicating). There's an outside radius there
- 13 (indicating). And if I turn the page, excuse
- 14 me, there's an outside radius there
- 15 (indicating). So just looking at this
- 16 photograph there's no way to tell where that is
- 17 on the wall, is there?
- 18 A: I'm the one that took the picture.
- 19 Q: Okay. And you don't know where the other ones
- 20 are but you know where that one is?
- 21 A: I just said I know where Eight
- 22 Q: Where's Eight-D take you?
- 23 A: Eight-B is the same picture ---
- 24 Q: Eight-D.
- 25 A: --- as Eight Eight [sic].



1 Q: Eight-D, D as in dog?

2 A: D?

3 Q: Yeah.

4 A: Eight-D was -- is in that somewhere in the
5 noncritical area below 1262.5.

6 Q: That's a long distance, isn't it?

7 A: What's that?

8 Q: That's a long distance, isn't it? That's two
9 hundred and something feet, right?

10 A: Right. But I'd classify that entire area as a
11 noncritical area.

12 Q: All right. So -- your testimony, if I get this
13 right is, is you think those photographs are in
14 the quote unquote, critical area because you
15 took them, and you think the other photographs
16 are in the quote unquote, noncritical area
17 because you took them, but you can't tell us
18 where they are. Is that right?

19 A: I can tell you exactly where they are. You can
20 look at a photograph Eight-H and you can see
21 the tight radius that that is.

22 Q: Uh-huh.

23 A: The only place in the wall with that tight a
24 radius is in the wall is in 11+50 or 11+75.

25 Q: So that's two different places, right?



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1 A: Right.

2 Q: And, in fact, this angle here at 12+60.5 is
3 almost the same as that angle there, isn't it?

4 A: No.

5 Q: No? It looked pretty close to me. You know
6 what those angles are?

7 A: No idea.

8 Q: Okay. Well, a minute ago you were gonna tell
9 us ---

10 A: Those are gonna be 45 degrees, and that's gonna
11 be, well, I guess that would be considered 135
12 degree. That's gonna be greater than 135.

13 A: This (indicating) is gonna be 45 you say. And
14 that's gonna be 45 you say. What's that one?
15 If I bring this line straight up I got about 45
16 degrees there, don't I?

17 Q: I don't have a protractor but I can tell you
18 it's a more obtuse angle than 45 degrees.

19 THE COURT: Mr. Robinson, what Exhibit are you
20 looking at?

21 MR. ROBINSON: We're looking at Exhibit number
22 Seven, I believe. We're looking at drawing 4
23 in Exhibit Seven.

24 THE COURT: Now, let me tell everybody, a lot of my
25 questions are for clarity of the record because



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1 at some point, depending on how I rule, there
2 will be staff attorneys and law clerks in the
3 Court of Appeal and Supreme Court trying to
4 understand what we're talking about. And if
5 you point to something then everybody here
6 knows what we're talking about but the people
7 reading the transcript can't tell, so, that's
8 why -- that's why ---

9 MR. ROBINSON: All right. Thank you for that,
10 Judge. I understood what you were doing when
11 you were asking me that question. That was my
12 fault.

13 THE COURT: I understand. I just want to make the
14 record clear.

15 Q: All right.

16 A: Also, I had pictures that aren't in here of --
17 of looking up, looking down on the hub.

18 Q: Well they're not in evidence, are they?

19 A: Yes, they are.

20 Q: They're not here in the courtroom.

21 A: Wait a minute. I'm sorry.

22 Q: Today and ---

23 THE COURT: Let me ask. You said they're not here.
24 Your attorney has them somewhere but not --
25 didn't bring them to Court?



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1 THE WITNESS: Yeah, I mean, they're in our pictures.
2 They're just not in the evidence book.

3 THE COURT: Okay. Oh. I see what you're saying.
4 Okay.

5 Q: And you have -- your attorney didn't introduce
6 them either, did he?

7 A: They're in the pictures that were introduced.

8 Q: What pictures?

9 A: The picture of me standing on top of the wall
10 and you can see John Goff holding a rod on top
11 -- on stop of the stake.

12 MR. GOODWYN: I don't think it's been introduced.

13 MR. ROBINSON: Do you understand which Exhibit he's
14 talking about?

15 MR. GOODWYN: I don't think it's been introduced
16 yet.

17 MR. ROBINSON: Well, it's not going to get
18 introduced. It's not going to get introduced
19 on redirect, I'll tell you that.

20 Q: All right. So you think there's another
21 photograph.

22 MR. ROBINSON: The Eight -- Exhibit Eight-A through
23 I -- excuse me, J -- sorry, N, move to admit
24 Exhibit Eight. Now, any objections to that?

25 THE COURT: Any objections?



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1 MR. GOODWYN: No, Your Honor.

2 THE COURT: Okay.

3 (Defendant's Exhibit Number Eight was introduced into
4 the record at this time.)

5 Q: Now, Exhibit Eight has six photographs, right?
6 Excuse me. There are six measurements shown in
7 Exhibit Eight, correct?

8 A: There's ten photographs.

9 Q: Yeah, but there's only six that are measured.

10 A: Yeah, that was the only six hubs that we found.

11 Q: Right. And those measurements I think you
12 testified yesterday were six foot eleven -- and
13 this is the difference -- this is the distance
14 off the hub to the face of the wall at the
15 ground level, correct?

16 A: Yes.

17 Q: All right. Six foot eleven, five foot nine,
18 five foot zero, four foot seven, four foot two,
19 and three foot eight; right? I think you
20 testified to that yesterday.

21 A: If that's what I said. I just -- that's fine.

22 Q: All right. So 50 percent of the measurements
23 are incorrect, aren't they?

24 A: Yes.

25 Q: You didn't ask Coogler to inspect your work as



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1 you went along, did you?

2 A: No.

3 Q: Okay. And you testified yesterday that you'd
4 built several walls -- many walls for Coogler
5 previously, correct?

6 A: Yes.

7 Q: Coogler didn't inspect your walls there either,
8 did he?

9 A: Yes. They have a full time super that did it.
10 I all the time have -- their superintendent
11 named Rodney or his brother, Chris, they have
12 a GPS wand and I'll -- as we're going up I get
13 them to mark elevation as I'm going up so any
14 critical areas I'm ---

15 Q: So elevation-wise they're giving you some help.
16 Is that what you're telling me?

17 A: Yes.

18 Q: Okay. But they're not giving you help
19 horizontally, are they?

20 A: There's certain instances where they would help
21 me.

22 Q: Did you ask for that help?

23 A: Yes.

24 Q: Okay. Did you ask for any help on this wall?

25 A: Yes.



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1 Q: Who'd you ask for?

2 A: I asked for somebody with a wand.

3 Q: Excuse me?

4 A: I asked for somebody with a wand that could
5 help me check elevations.

6 Q: All right. Did somebody do that?

7 A: No.

8 Q: Okay. So -- but that's your responsibility, is
9 it?

10 A: Yes.

11 Q: Okay. So back to my point, on the previous
12 walls ---

13 A: Let me -- let me preface that by saying ---

14 **THE COURT:** Hold -- hold on a second. Let him
15 finish his question and then you can answer.
16 I'm sure your attorney on redirect ought to
17 give you a chance to give equal answer. Go
18 ahead, Mr. Robinson.

19 Q: Back my point. On all the other walls you
20 built for Coogler, Coogler did not and we did
21 not ask to check your alignment, did he?

22 A: There is some instances where I needed Coogler
23 to help check the line.

24 Q: Were they off?

25 A: No.



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1 Q: Okay.

2 THE COURT: And, sir, you want to say something
3 else? What were you about to say?

4 THE WITNESS: It's ...

5 THE COURT: Okay, move on?

6 THE WITNESS: Yes.

7 THE COURT: All right. Please proceed, Mr. Robinson.

8 Q: And you don't need -- you don't need Coogler to
9 babysit you doing your work, do you?

10 A: No, sir.

11 Q: Now the wall had geogrip reinforcement on it,
12 correct?

13 A: Yes.

14 Q: All right. Let's look at Exhibit Nine.
15 Exhibit Nine is -- and what -- let's look at
16 Exhibits Nine, Ten and Eleven, okay? And I'll
17 -- and Twelve -- Nine, Ten, Eleven and Twelve.
18 Those are all photographs of the in-place wall
19 with the in-place geogrid in it, right?

20 A: Yes.

21 Q: Okay. And the geogrid doesn't have a plane
22 surface from the wall, does it?

23 A: No, sir.

24 Q: Okay. And there was some angst over that,
25 wasn't there? At the job site.



1 A: During a conversation with myself and Joey and
2 Andy Whitfield, the guy with S&ME, he said that
3 the grid was not a big deal.

4 Q: The first problem was they made you uncover the
5 grid, that's why these photographs exist.
6 Isn't that true?

7 A: Because they wanted to what made them want to
8 uncover the grid was the picture, Seven --
9 Seven-B?

10 Q: Okay. No, Seven is -- Exhibit Seven is the
11 drawings.

12 A: This picture here (indicating) is in Seven.

13 Q: No, it's in front of Seven, it's behind Six.

14 A: Okay, Six-B.

15 Q: Six-B. All right. You say Six-B made them
16 want to uncover the grid. What does Six-B show
17 that made them want to uncover the grid?

18 A: At the end of the grid, because of that slope,
19 you carry the grid all the way out to the end.
20 So it's common for that grid to slope down at
21 the end.

22 Q: Why does Six-B make them want to uncover the
23 grid?

24 A: Because they're looking at this from the end
25 and they're saying the grid is turned out.



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1 Q: I don't see any grid in this photograph. I can
2 show you right here. There's (indicating) a
3 course grid, there's a course (indicating), and
4 there's one (indicating). See that grid how
5 it's ---

6 Q: I see something. I'll take your word for it
7 that that's a grid. All right. So you're
8 saying when they went out there and looked, it
9 wasn't the photograph that made them look, they
10 were in the field, right?

11 A: Yeah, they were looking at that area.

12 Q: And they saw some grid and they said, what's
13 this?

14 A: Right.

15 Q: Basically.

16 A: And they said we want to uncover the grid to
17 see if there's any problems with the wall where
18 the wall had come back in.

19 Q: Okay. So, the grid wasn't like the
20 manufacturer required it to be, was it?

21 A: Not exactly.

22 Q: Okay. Now you testified yesterday that the
23 grid is what holds the wall in place?

24 A: Yes.

25 Q: And then you also testified yesterday that you



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1 didn't put as many layers of grid in as the
2 drawing requires. Remember that?

3 A: No. I didn't ---

4 Q: You said you saved a layer of grid.

5 A: Right.

6 Q: That means you didn't put in one, right?

7 A: No. What that means is you work the elevations
8 out where you're going every three courses.
9 And so when you have step-ups that are below
10 ground, you're not retaining something that's
11 below ground.

12 Q: So you didn't put in the grid that's shown on
13 the drawing. Is that right?

14 A: No, we put the grid courses in where they're
15 supposed to be. What you do is you -- where
16 the -- where the wall extends below ground --
17 because this drawing is based on a hypothetical
18 elevation that's based on a simple drawing that
19 -- that's some kind of tope- -- topographical
20 map. Okay? So what they're showing is,
21 they're showing the outside elevation at one
22 elevation. Well, the outside elevation more
23 than likely doesn't match that. As actuality
24 probably never -- always matched it. And so
25 when you have a block that carries out that



1 goes below grade, you don't put grid below
2 ground.

3 Q: So, my question was, you didn't put the grid in
4 the wall that's shown in the drawing. Is that
5 correct?

6 A: I'm saying the grid ---

7 Q: Isn't that what you just said?

8 A: The grid is where it's supposed to be.

9 Q: Where you think it is supposed to be. Not
10 where the design engineer thinks it's supposed
11 to be. Right?

12 A: That's a loaded question, but okay.

13 Q: All right. I move to -- into evidence,
14 Exhibits Nine, Ten, Eleven and Twelve.

15 THE COURT: Okay. Mr. Goodwyn?

16 MR. GOODWYN: No objection.

17 (Defendant's Exhibit Numbers Nine, Ten, Eleven and
18 Twelve were introduced into the record at this time.)

19 A: I'll also point out that the pictures that we
20 -- that were taken is where the large amount of
21 storm water ran into the wall. The stone that
22 we put in place was completely silted over from
23 the amount of water that got to the wall. So
24 my question was that nobody could answer me is,
25 when you have, you know, a 20 foot wide column



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1 of water and your backfilled with mostly sand
2 clay, but the water goes down behind the wall,
3 sand goes with it, as evidenced by the picture
4 that shows the silt in the wetlands. Did this
5 ---

6 Q: Now ---

7 A: --- did this ---

8 Q: What photograph ---

9 A: --- get displayed because the soil's being
10 eroded away?

11 Q: What photograph is that, that shows the sand in
12 the wetlands?

13 A: I don't know which one.

14 Q: It's not in there. We didn't look at that
15 yesterday, did we?

16 A: I mean I could look it all ---

17 Q: We didn't look at that yesterday, did we? No,
18 we didn't.

19 THE COURT: Hang on. Mr. Robinson, you can't answer
20 the sentence. I know what you're driving at
21 but you be careful. We have to have a clear
22 record. So, that's not -- that's not Mr.
23 Young's answer as well.

24 MR. ROBINSON: I understand.

25 THE COURT: All right.



1 A: Based on your Defendant's Exhibit, it's not --
2 that picture's not in here.

3 Q: Okay.

4 A: We didn't go over it.

5 Q: All right. Let's look at Exhibit Thirteen for
6 a minute. I think we talked about this
7 yesterday. That's a drawing of how the grid --
8 the manufacturer expects the grid to be in
9 place, is that right?

10 A: Yes.

11 Q: Okay. Move Exhibit Thirteen into evidence,
12 Your Honor.

13 THE COURT: Mr. Goodwyn?

14 MR. GOODWYN: No objection.

15 THE COURT: So moved.

16 (Defendant's Exhibit Number Thirteen was introduced
17 into the record at this time.)

18 Q: All right. You're claiming that Coogler owes
19 you money for what you said is extra work. Is
20 that right?

21 A: Yes.

22 Q: Let's look at Exhibit Fourteen. Exhibit
23 Fourteen is an invoice dated 12/16/14 it's to
24 Coogler and it's for 5,610 feet -- square feet
25 of wall and it goes at .34¢ a square foot.



1 Plus 140, it says, square feet of caps
2 installed on the first wall. Correct?

3 A: Yes.

4 Q: All right. And then -- and then that's
5 extended out. And that date is 12/16/14,
6 right?

7 A: Right.

8 Q: And 12/16/14, that's the last day you worked on
9 the job, wasn't it?

10 A: I can't remember.

11 Q: Okay. Actually, I'm wrong. Let me hand you --
12 I'm going to refresh your memory. This is an
13 email you sent to -- you recognize that. Is
14 that -- okay. And down here where I've
15 highlighted, what's that say?

16 A: The last day we were there was on Monday,
17 December 15th.

18 Q: And there's a ---

19 MR. GOODWYN: Let me see the document.

20 MR. ROBINSON: Sure.

21 A: What year? December ----

22 Q: 2014. And here's a calendar for 2014. That
23 was a Monday. The 15th was a Monday, wasn't
24 it?

25 A: (Nods head.)



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1 Q: Okay. While we're doing that, let's see if we
2 can figure out when the work started. Here's
3 a set of --- I don't know if you put these in
4 yesterday or not, but here's a set of text
5 messages back and forth, right? And that's you
6 and -- and -- and Joey texting each other?

7 A: That's James.

8 Q: James. Okay. That's good. And there's a text
9 on November the 12th and it says -- read that
10 for us, please.

11 A: Should I wait until they test before I come?
12 If they test and it fails then I can't do
13 anything until it's resolved.

14 Q: Okay. And the answer was?

15 A: Come to the job. Should not take too long to
16 get resolved if there are any problems.

17 Q: All right. And then you said?

18 A: Okay. I'm just not in financial shape to sit
19 with men not doing anything.

20 Q: And on the 20th, November the 20th, you said?

21 A: Can y'all bring a set of drawings to Killian
22 Lakes this morning?

23 Q: Okay. So you told us yesterday -- that's the
24 20th of November, right?

25 A: (Nods head.)



1 Q: You told us yesterday you had the drawings when
2 you started, correct?

3 A: That was the day I started was the 20th.

4 Q: Okay. So, November the 20th was a Thursday,
5 right?

6 A: Yes.

7 Q: All right. And if we can't -- you didn't work
8 on Thanksgiving Day?

9 A: No.

10 Q: You didn't work the Friday after Thanksgiving
11 Day?

12 A: I can look back through my notes and probably
13 figure that out.

14 Q: Well, do you think you did?

15 A: I mean, if you'll allow me to look on my phone
16 I can tell you.

17 THE COURT: That's fine. I mean, to refresh the
18 recollection he can ---

19 Q: Fine, go ahead.

20 THE COURT: Yeah, I mean that's -- it sounds funny
21 but it is perfectly okay.

22 A: What was the date after Thanksgiving?

23 Q: The day after Thanksgiving would be the 28th.

24 THE COURT: 2014.

25 Q: 2014?



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1 A: You said November 28th?

2 Q: Yes.

3 A: We did not work that day.

4 Q: Okay. So, let's count the number of days you
5 did work. Assuming -- did you guys work four
6 tens or did you work five eights or how'd you
7 do that?

8 A: We worked five days.

9 Q: Okay. So, let's count this together. The
10 twentieth was the first day. Second, third,
11 fourth, fifth, that gets us to Thanksgiving,
12 right? And then -- and then Thanksgiving,
13 Saturday and Sunday. You worked Friday,
14 Saturday, and Sunday, so the next working day
15 was Monday, December the 1st, 2014, right?

16 A: Yes.

17 Q: Six, seven, eight, nine, ten, eleven, twelve,
18 thirteen, fourteen, fifteen, the 15th of
19 December was the 16th working day, correct?

20 A: Yes.

21 Q: All right.

22 A: I don't -- I don't necessarily say that we
23 worked, you know, four tens or five eight hour
24 days. I mean we go til whenever. I mean,
25 there's no -- you know, I get to a stopping



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1 point with the wall, I don't go by time. I
2 just ---

3 Q: Okay. It's like trial, huh? You pick a
4 stopping point to stop, right? Go home for the
5 day, come back. Okay. I understand. So, back
6 on this -- on this bill for the 16th, that was
7 the day after the last day you worked, correct?

8 A: Yes.

9 Q: Okay. And -- and you would have billed for
10 everything you were owed, wouldn't you?

11 A: At that point, that was my opinion of what I
12 was owed.

13 Q: Okay. So, you were done with the job as far as
14 you were gonna go. You may not have known it
15 right then, but that's where you stopped, and
16 you billed for everything that you had done.
17 Correct?

18 A: To that date.

19 Q: Okay. So I think we moved Fourteen in
20 yesterday. Let's look at Fifteen. Now on
21 Fifteen you've got the same 56,110 square feet
22 block, right?

23 A: Yes.

24 Q: And that is for Wall H, is it not?

25 A: If that's the wall that we're talking about.



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- 1 Q: Wall H is the wall we're talking about.
- 2 A: No -- yes. Wall H is for the square footage
- 3 and the other wall is for the caps.
- 4 Q: And the other one's for -- the 140 feet was for
- 5 the preceding wall which you had not yet billed
- 6 for the caps on?
- 7 A: No, I billed for it, they just hadn't paid it.
- 8 Q: Okay. So there's a bill someplace I haven't
- 9 seen for these 140 feet of caps.
- 10 A: Yeah, I ---
- 11 Q: All right.
- 12 A: --- think they short paid it is right.
- 13 Q: Okay.
- 14 A: If I remember right.
- 15 Q: And then on Six- -- on Exhibit Fifteen there's
- 16 one undercutting bad soil below wall for \$3500m
- 17 and one back flowing soil outside of the grid
- 18 area for \$17,645, right?
- 19 A: Yes.
- 20 Q: All right. This 4600 - excuse me 5610 square
- 21 feet, that's a unit price -- that's a quantity
- 22 that you're going to apply a price to, correct?
- 23 A: Yes.
- 24 Q: If the quantity is wrong then the total amount
- 25 you're asking for is wrong also, isn't it?



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1 A: I mean, the total -- total block that I put in
2 was based on a daily count.

3 Q: My question was, if the quantity is wrong, then
4 the total amount you're asking for is
5 incorrect, right?

6 A: Yes.

7 Q: All right. Now backfilling -- that \$17,000 in
8 backfilling, that's -- that's work you said you
9 were doing behind the wall?

10 A: Yes.

11 Q: Wall H, right?

12 A: Yes.

13 Q: Okay. And you have -- we've looked at several
14 texts back and forth between you and Joey and
15 you and James, correct? There's a pile of
16 them, isn't there?

17 A: Yes.

18 Q: None of them -- not a single one of them
19 mentions that backfilling, does it?

20 A: No. So you did \$17,645 worth of backfilling
21 and you never once sent a text to Joey or James
22 saying hey I'm doing all this work, you guys
23 have to pay me for this, right?

24 Q: At the time I was anticipating getting paid
25 \$50,000 for the work that we'd done. Like I



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1 said yesterday, it's not uncommon for me to do
2 work to benefit the job as a whole.

3 A: Well we're gonna hit that. We're gonna get
4 there. But my question was, there's not the
5 first text going to Joey or James at Coogler
6 saying hey, I'm doing this extra work I might
7 want to get paid for it, is there?

8 A: No.

9 Q: All right.

10 A: The undercutting part, you know, they told me
11 to keep up with my time. That was a verbal
12 conversation. The undercutting down here
13 (indicating) in the critical area ----

14 Q: Uh-huh.

15 A: --- and another where Brian told me to
16 undercut, keep up with it and to get the
17 quantity to Joe.

18 Q: Okay. You didn't keep up with your time, did
19 you?

20 A: Yes.

21 Q: You don't have it written down anywhere, do
22 you?

23 A: We have it in our log book.

24 Q: Well, when we took your deposition, you
25 remember I asked you for any documents you



1 might have that substantiated the time?

2 A: Yes.

3 Q: I said give that to your lawyer so he could
4 give it to me?

5 A: Yes.

6 Q: You didn't give it to him, did you?

7 A: I forgot about it.

8 Q: Okay. As we sit here today, there's no
9 document that shows that you kept up with your
10 time, is there?

11 A: Well, obviously, there would probably be a
12 record from Joey's billing to Edward Rose that
13 he billed for it. He didn't do the work. I'm
14 just ---

15 Q: As we sit here today, there's no document that
16 says you kept up with your time, is there?

17 A: Not here.

18 Q: All right. Now, this Exhibit Fifteen, this was
19 not sent on 12/16/14, was it?

20 A: No.

21 Q: It was sent sometime in mid-2015, right?

22 A: I don't know the exact date.

23 Q: Okay. All right. Well, let's look at -- move
24 -- Exhibit, I think Fifteen's in already, but
25 if it's not we move to have it entered into



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1 evidence.

2 MR. GOODWYN: It's already in.

3 MR. ROBINSON: Okay.

4 MR. GOODWYN: I moved yesterday.

5 MR. ROBINSON: Is Sixteen in also?

6 COURT REPORTER: Yeah. Fourteen, Fifteen and
7 Sixteen.

8 Q: All right. Good. Let's look at Sixteen for a
9 minute, okay? Exhibit Sixteen. And that's
10 also dated 12/16/14, right?

11 A: Yes.

12 Q: But it's not what you sent on 12/16/14, is it?

13 A: No. Our Excel spreadsheets, whenever you --
14 you have to physically -- it doesn't change the
15 date automatically after you go and modify it
16 in a document. It keeps the original date.

17 Q: Okay. I just wanted to make sure that this
18 wasn't sent back in December, this was sent
19 sometime in 2015. Okay? And this one you've
20 got the same billing for the wall and the same
21 billing for the cap on this first wall, right?

22 A: Yes.

23 Q: All right. And then you have this \$32,525 back
24 charge. Correct?

25 A: Yes.



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1 Q: And this invoice -- the invoice doesn't say
2 what the back charge is, does it?

3 A: No.

4 Q: Okay. And you never gave Coogler any -- any
5 breakdown of what that \$32,525 back charge was
6 until long after this lawsuit was filed, did
7 you?

8 A: I don't remember.

9 Q: Can -- well, we'll get to that. Okay. You
10 don't contend that Coogler ever authorized you
11 to perform that extra work, do you?

12 A: I mean, yes, he did.

13 Q: He did?

14 A: Yes.

15 Q: Is there some text someplace or a letter or
16 fax, email, anything like that?

17 A: The only thing I have is just verbal
18 conversations and -- and dealing with the first
19 wall. I can't remember whether it was
20 discussed in a text or not.

21 Q: Okay. And in fact you didn't bill him for that
22 in December of 2014 did you?

23 A: No.

24 Q: And you didn't bill him for all that and
25 whatever it was you sent in Exhibit Number



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1 Fifteen did you?

2 A: No.

3 Q: Okay. So we're just adding the stuff on as we
4 go along here, aren't we?

5 A: Like I said earlier, it's not uncommon for me
6 to do jobs -- do things for the job that I had
7 no intention of billing for as long as we're
8 getting paid what we're supposed to get paid.

9 Q: All right.

10 A: And when they tell me we're not paying you
11 \$50,000 and we're gonna back charge you \$75,000
12 to take the wall down, you know, then I feel
13 like that we should have been paid for that
14 extra work because regardless of whether the
15 wall comes down, Coogler indirectly benefitted
16 from that work that was not taken out and will
17 pay for it by Edward Rose.

18 Q: All right. Let's look at Exhibit Seventeen.
19 Exhibit -- are you looking at Seventeen? All
20 right. Seventeen. That's an email that you
21 sent to Mr. -- to Joey Coogler and to James on
22 February 19th, 2015, correct?

23 A: Yes.

24 Q: All right. And this says, I just wanted to
25 take a minute to tell you all the things that



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1 I did for Coogler Construction out of good will
2 to get the job done and to make you money,
3 right?

4 A: Yes.

5 Q: Good will, that means you were doing it out of
6 the kindness out of your heart doesn't it?

7 A: Yes.

8 Q: And it means you didn't expect to get paid for
9 it, doesn't it?

10 A: Prior to me not getting paid the \$50,000, that
11 was at good will.

12 Q: At the time you did that work, you did not
13 expect to get paid for it, did you?

14 A: All right. Let me premise that by saying when
15 doing the backfill for the wall, I agreed with
16 Joey for back -- to keep up with the hours on
17 his equipment and pay him rental rates to
18 backfill our grid. I didn't expect to get back
19 charged for equipment to backfill outside of
20 the grid. Okay, so that never was discussed
21 but was brought up at the end that they were
22 gonna back charge me the hours to backfill that
23 whole area behind the grid.

24 Q: Now, they never back charged you, did they?
25 And, in fact, if you look at the -- at the



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1 Complaint -- the Answer to the Complaint and
2 the -- and the backup for the Counterclaim in
3 this case, there's no charge for that, is
4 there?

5 A: I don't know. I haven't looked at it.

6 Q: Okay. But my point was, at the time you did
7 the work, you didn't expect to get paid for it,
8 did you?

9 A: No.

10 Q: Okay. And, in fact, you didn't -- there is no
11 record that you told anybody at Coogler hey,
12 I'm getting ready to spend your money, is
13 there?

14 A: I don't know if there's a text message talking
15 about the undercut or not.

16 Q: We haven't seen one, have we?

17 A: I just can't remember it.

18 Q: Today or yesterday we haven't seen one, have
19 we?

20 A: I'm saying I can't remember. I mean I'm not --
21 I'm not looking at it in your book because
22 you're not gonna put it in there, but ---

23 Q: Do you remember yesterday? Remember your
24 testimony yesterday?

25 A: Yes.



1 Q: We didn't see one yesterday, did we?

2 A: No.

3 Q: Okay. And you said down here that you had to
4 cut the grade down. Right? We're talking
5 about the first wall.

6 A: Yes.

7 Q: And you said you had to excavate because there
8 wasn't enough room to get the grid in, correct?

9 A: Yes.

10 Q: And then you said you had to push over three or
11 four large trees.

12 A: Yes.

13 Q: All right. Well, was it three or was it four?

14 A: I just said between three and four.

15 Q: You don't know, correct?

16 A: I think it was three large trees and one small
17 tree.

18 Q: You don't know, do you?

19 A: But I put three to four.

20 MR. GOODWYN: Objection, Your Honor. He just
21 answered. He says he knows, he answered.

22 Q: No, he didn't. He said he thought. I want to
23 know -- but you don't know, do you?

24 THE COURT: Mr. Robinson, you -- you've made your
25 point, I think. Please proceed.



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1 Q: Nothing stopped you from having Coogler come
2 over and take those trees out, did it?

3 A: Yeah, he didn't have any men on site to do the
4 work.

5 Q: He didn't have any men on site? You were the
6 only one there?

7 A: Yep, my crew.

8 Q: His people wasn't working?

9 A: Not that I can remember because I remember
10 asking him, I need you to come over and finish
11 cutting this out. And he said, Michael, I
12 don't have the manpower there to do it.

13 Q: All right. So your testimony is Coogler didn't
14 have the manpower to go -- to go take care of
15 business, is that right?

16 A: As well as I remember. I remember calling and
17 asking. And that's he said take my Volvo
18 excavator. I will actually bring it over there
19 so you can use that to cut that dirt out.

20 Q: Well, I'm talking about trees right now.

21 A: Okay. The first part of the wall we started
22 on, you started in the lower elevation first.

23 Q: This is the first wall, not the second one?

24 A: The first wall. So, we start in this lower
25 part. That's the one that the first half of the



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1 wall had to be cut 18 and 24 inches down in
2 order to get the first blocks in, first layer of
3 grid. Okay? As you're going along, the wall
4 steps up. So, we haven't yet got to the trees
5 yet. Okay? When we got halfway I called him
6 and said, from your face of your wall, whatever
7 the grid lengths is, say it's seven feet, okay?
8 We got to have, from the face of wall, roughly
9 nine feet back just cut out so you can work
10 behind the wall and get the grid links in and
11 get equipment in there, get turned perpendicular
12 to the wall. At that point -- and I told him,
13 I said they brought Juan out and he started
14 digging the -- digging that dirt out for the
15 rest of that day if I remember right, and he
16 didn't finish. And I guess in Joey's thinking
17 he was want- -- trying to get in front of us
18 caught up, where we could keep working. So we
19 were able to would work a little bit more. And
20 then we caught up with him and I said we've got
21 the rest of this wall that is not -- you've got
22 a cut -- a bank here. None of that dirt was cut
23 out all the way to the face of the wall so 100
24 percent of the dirt that had to be retained had
25 to be taken out. And basically that se- -- that



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1 second half of the wall was pretty much was
2 whenever I started using his equipment.

3 Q: All right. Now, if I understood what you said,
4 you did some excavation in the beginning ---

5 A: Yes.

6 Q: --- correct? And you billed for that, right?
7 In this -- in this extra work bill?

8 A: Yes.

9 Q: Okay. And then you took out some trees over
10 here, correct?

11 A: Yes.

12 Q: And you billed for that in this bill?

13 A: Yes.

14 Q: There's nothing in this billing about scooping
15 up the side of the hill is there?

16 A: Yeah, number two.

17 Q: Number two. Backfill entire area of grid for
18 the lower portion of the wall approximately 30
19 feet. Backfilled entire area outside the grid,
20 12 feet.

21 A: You're in the wrong place.

22 Q: And then number two -- excuse me. I'm in the
23 wrong log. Wall backfill zone was not cut back
24 enough to allow for grid. Juan did the first 60
25 percent of the wall, I cut the last 40; the last



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1 50 feet was not cut at all. 100 percent had to
2 be taken out. Okay? So according to you --
3 according to you you're down \$1,680, right?

4 A: I ...

5 Q: Look at Exhibit Eighteen. I'll help you out.

6 A: Yes.

7 Q: Okay. All right. So, that's work you did out
8 of the goodness of your heart that you didn't
9 expect to get paid for, correct?

10 A: Correct.

11 Q: Okay. To keep your job going, right?

12 A: Yes.

13 Q: All right. And you say that's 'cause Coogler
14 didn't have enough men to put on that piece of
15 equipment?

16 A: Yes.

17 Q: All right.

18 A: That was the whole reason that he wanted me to
19 do the backfill of the wall. Only because he
20 didn't have the manpower to -- to be in the
21 tractor seat to do it.

22 Q: Which backfill of the wall are we speaking of?

23 A: I think it's on both walls.

24 Q: Both walls?

25 A: If I remember right.



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1 Q: Okay. Outside the grid area or on top of the
2 grid area? Or both?

3 A: Well, this wall was different because the cut
4 wall. So, on this wall, I would expect backfill
5 from the back of the wall to the cut face. You
6 can't do one without the other.

7 Q: Right. Okay. So ---

8 A: Can I get some water?

9 Q: Absolutely.

10 (Off the Record from 10:52 a.m. until 11:16 a.m.)

11 THE COURT: All right, Mr. Robinson, you may proceed.

12 MR. ROBINSON: Thank you, Your Honor.

13 Q: We were talking, Mr. Young, about the extra work
14 that you're claiming you should get paid for.
15 And you were saying that you weren't supposed to
16 do that work, Coogler was. Why didn't you just
17 call up Coogler and say I'm going home 'til you
18 get your job done? You could have done that,
19 right?

20 A: If you go back and look through the text
21 messages, you can see from -- from this job and
22 past job that I try to head off any problems
23 before I get there because whenever you -- you
24 know, I don't have, you know, 100 employees, you
25 know. It's just me and three or four guys. And



1 so whenever you get work lined up to work in a
2 certain job for whether it be 20 days or 30
3 days, I don't line up another job until that job
4 is done. And so when I show up to a job, you
5 know, I may be working on that job because if I
6 -- I don't have the materials or whatever lined
7 up for the next job because I don't need them
8 yet. And if you're short on cash flow, you
9 don't -- you don't have materials on hand for
10 the job that you're gonna start whenever I
11 finish this job. And so I try to head off as
12 much as I can before I would get there to keep
13 from having these problems, but once I'm there,
14 you know, this job was an hour and fifteen
15 minute drive for us. And so to drive an hour
16 and fifteen minutes, pulling equipment and --
17 and men with me, you know, I didn't come that
18 far just to turn around.

19 Q: Okay. So, what you're telling me is that
20 because of the way you order or your business
21 and the way you schedule your business, and the
22 way you finance your business, it was more
23 advantageous to you not to wait for Coogler to
24 do it, but to do it yourself. Is that fair?

25 A: Okay. Then if that's the case, then Coogler's



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1 responsible to pay me for lost time as far as
2 the lost revenue I would be losing from another
3 job instead of wasting time to come to that job?
4

5 Q: You didn't have any job lined up, did you?

6 A: I could have if I had known.

7 Q: Mr. Young, you didn't have another job lined up,
8 did you?

9 A: I had work. I didn't have it lined up to start
10 that soon.

11 Q: All right. And your pricing for this extra work
12 in Wall H, that pricing is based on your memory,
13 right?

14 A: No.

15 Q: No? You have some documents for that work, too?

16 A: Yes.

17 Q: Okay. Where are they?

18 A: Not here.

19 Q: All right. You didn't get around to telling
20 Coogler about doing this extra work at least in
21 writing until February the 19th, right?

22 A: I don't remember the date.

23 Q: That's your -- that's Exhibit Number Seventeen,
24 I believe. And that date of February the 19th?

25 A: Yes.



1 Q: Okay. And so it was too late for Coogler to do
2 anything about it, wasn't it?

3 A: No.

4 Q: And not only that, but you told them you were
5 doing it out of the goodness of your heart,
6 right?

7 A: Yes.

8 Q: Now on what page -- you said there was some
9 undercutting because the wall was not in the
10 correct place. Is that correct?

11 A: No. It's because of the undercutting that Juan
12 did was in the wrong place.

13 Q: That's what I said. Because it was in the wrong
14 place.

15 A: You said the wall was in the wrong place.

16 Q: I'm sorry. Let me rephrase that. Okay? You
17 said there's undercutting that had to be done.
18 And the undercutting had to be done because Juan
19 undercut in the wrong place. Did I get that
20 right?

21 A: Yes.

22 Q: All right. Thank you. And that was at the end
23 of the wall, right?

24 A: Start of the wall.

25 Q: Start of the wall? Okay. Which part was that?



1 Was that down here at 14+ ...

2 A: Yeah, second page.

3 Q: Fourteen plus fifty?

4 A: Yes.

5 Q: Okay. 14+50, have I got this right, is it the
6 wall's 2.9 feet from where it's supposed to be?

7 A: You're looking at ---

8 Q: Well, wait a minute now.

9 THE COURT: What Exhibit are you ---

10 Q: I'm on -- I'm on Exhibit -- I'm on the as-built,
11 which ---

12 THE COURT: Has not been marked?

13 MR. ROBINSON: Well, I think we marked it. Let me
14 see. I'm not using that particular one.
15 Thirty-six. It's Thirty-six-M. You may have it
16 up there, I'm not sure. Exhibit Thirty-Six.
17 All right. So when we were talking a minute ago
18 about how far off the wall was at the high end,
19 it's off 2.9 feet, right? Not 1. -- not 1.3
20 feet, is that correct?

21 A: Yes.

22 Q: Okay. So, you got confused because it's a
23 little topsy turvy. There's no stations on that
24 drawing ---

25 A: No.



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1 Q: --- on Exhibit Thirty-Six. But -- but Exhibit
2 Thirty-Six says that the -- that the wall where
3 you undercut -- you say that Juan undercut in
4 the wrong place, that wall you built is 1.3 feet
5 off where it's supposed to be, isn't it?

6 A: Yes.

7 Q: And if you did the same -- whatever it was that
8 caused it to be 1.3 feet off there, if you
9 measure the foundation, that would have been 1.
10 -- you would have thought that would was 1.3
11 feet off also, wouldn't you?

12 A: I'm sorry. Say that again?

13 Q: Yeah. The wall itself is 1.3 feet from where
14 it's supposed to be, correct?

15 A: According to this it is.

16 Q: Okay. And if whatever caused it to be that way,
17 if -- if whatever measurement was that got
18 started possibly, if you were measuring for the
19 foundation and you made whatever that same
20 mistake was, you'd think the undercut was off by
21 1.3 feet also, right?

22 A: Now, you're talking about the -- the -- you
23 know, a four foot wide bucket and, you know, a
24 twelve inch depth block, so long as you follow
25 in that four feet you'd be under the undercut.



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1 Q: Mr. Young, Juan went in there and undercut,
2 correct?:

3 A: Yes.

4 Q: According to what I'm reading here. And you
5 think this undercut was not in the right place,
6 correct?

7 A: Yes.

8 Q: Okay. How wide was the undercut that he made?

9 A: As well as I remember, seemed like they said a
10 five foot wide section.

11 Q: A five foot wide section. And you have to get
12 -- and that's because that was the width of his
13 bucket?

14 A: I don't remember where the five foot number came
15 from.

16 Q: Whatever the width actually was, was that
17 because of the width of the bucket?

18 A: I don't think they have a five foot wide bucket,
19 so the five foot had to come from ---

20 Q: You don't know?

21 A: Yeah, I don't know. I imagine it came from S&ME
22 because I remember a text from Joey that said
23 that we need to go whatever it is that S&ME
24 recommends.

25 Q: And the answer is you don't know. Is that



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1 correct?

2 MR. GOODWYN: Objection, Your Honor. I object.

3 THE COURT: All right. Sustained.

4 Q: Do you know why the cut is five feet wide?

5 A: Through hearsay from Joey it was from SME --
6 S&ME recommendations.

7 Q: Is it your testimony that S&ME told Joey to make
8 a five foot wide cut or do you know?

9 A: I could look back through my notes and find it,
10 but I mean I -- I'm testifying that through the
11 conversation or text message with Joey that the
12 number five foot wide undercut comes to mind.

13 Q: Okay. Other than that, you don't know why it's
14 five feet?

15 A: No.

16 Q: All right. Thank you. So do you know where the
17 edge of that five foot undercut was in respect
18 to the wall?

19 A: No.

20 Q: All right. Okay. You talked about moving some
21 old brick pipe and debris, right?

22 A: Yes.

23 Q: In fact, in your own words you made it clear
24 that you'd never told Coogler about any of this
25 extra work and you never intended to charge



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1 Coogler. Isn't that true?

2 A: Well, when I called Joey about the -- the
3 material he told me to get Ron and bring Ron
4 there and show Ron and let Ron look at it first
5 because in order for Joey to get paid for any
6 undercutting, it had to be approved through him
7 first. And so Ron came down, looked at it and
8 said yes, it needs to be undercut, just keep up
9 with the quantity to give to Joey.

10 Q: Did you keep up with the quantity and give it to
11 Joey?

12 A: Yes.

13 Q: Why is it an extra cut -- in here an extra cut
14 in here, an extra work and you don't know what
15 the quantity is?

16 A: It would have been a verbal quantity that I gave
17 to him from notes. He was billing to get paid
18 for it. I was not billing to get paid for it.
19 I was using his equipment to undercut it. We
20 provided the labor to undercut. I just wanted
21 to build a retaining wall. That's what I wanted
22 to do.

23 Q: Okay. And you think you told Joey what the
24 measurements were or the quantity was, but you
25 don't remember what that is when you got ready



1 to figure out what your price was gonna be,
2 right? Or your back charge.

3 A: I mean, I had to have it. I just don't remember
4 two and a half years ago.

5 Q: You're not authorized to spend Coogler's money,
6 are you?

7 A: No.

8 Q: So if you're not authorized to spend Coogler's
9 money, and if Coogler did not authorize you to
10 do the extra work and you didn't intend to bill
11 Coogler, why are you asking to get paid now?

12 A: Because I didn't get paid for any of the wall.

13 Q: Okay. But you're asking to get paid for the
14 wall, too. Right? You want it all. Correct?

15 A: Yes.

16 Q: Oh, well, let's talk about your back charges.
17 Let's look at your -- at Exhibit Eighteen. And
18 would move Exhibit Seventeen into evidence if I
19 haven't already done that.

20 THE COURT: Mr. Goodwyn?

21 MR. GOODWYN: No objection.

22 (Defendant's Exhibit Number Seventeen was introduced
23 into the record at this time.)

24 Q: Exhibit Eighteen. That is a copy of Exhibit
25 Seventeen without the header on it. There's



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1 something that's been blanked off, I don't know
2 what that was. And then -- and then you've got
3 the same thing that was Exhibit Seventeen, but
4 now you've got numbers on it, right? Dollar
5 amounts. Correct?

6 A: Yes.

7 Q: Okay. And that information came out of your
8 head, didn't it?

9 A: No.

10 Q: No? Where'd it come from?

11 A: It came from our -- we keep a daily log.

12 Q: None of which you turned over, right?

13 A: I forgot.

14 Q: On the first wall, you say you undercut 18 to 24
15 inches the whole length of the wall, right? But
16 you don't calculate your cost on that. You
17 calculate your cost on your crew for 10 hours,
18 right?

19 A: (Nods head.)

20 Q: You ---

21 A: Yes.

22 Q: --- have to say yes or no.

23 A: Yes.

24 Q: Okay. So the quantity that you were talking
25 about a minute ago isn't what you based your



- 1 billing on, is it?
- 2 A: On which wall?
- 3 Q: I'm talking about number one -- item number one,
4 18 to 24 inch cut length the whole wall.
- 5 A: So, what are you asking me? I don't ---
- 6 Q: You said that you gave Coogler the quantity
7 information.
- 8 A: No.
- 9 Q: But now you're billing on time.
- 10 A: This is for the undercut of Wall H.
- 11 Q: Okay.
- 12 A: We gave it quantities.
- 13 Q: What is this one?
- 14 A: What's that?
- 15 Q: What's this first one? First Wall. One, wall
16 subgrade too high. \$140 an hour for three
17 layperson, one supervisor. Ten hours, \$1400.
18 Right?
- 19 A: One through three is for the wall that we're not
20 talking about today.
- 21 Q: Okay. And this ten hours, where'd that number
22 come from?
- 23 A: It comes from the logbook.
- 24 Q: You say you had the logbook when you made this
25 out and you looked in it and you saw an entry in



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1 the logbook that said we -- we sat around for 10
2 hours or we did undercut for 10 hours. Is that
3 what you're saying?

4 A: Yes.

5 Q: You don't have that here anywhere.

6 A: No.

7 Q: You were asked for it, right?

8 A: Yes.

9 Q: And if it was something that showed what you
10 were doing, you would have supplied that,
11 correct?

12 A: All right.

13 Q: So we wouldn't have this conversation.

14 A: All I want to do is stack block because I get
15 paid by the square foot. We get paid \$8.34 for
16 every block I stack. I don't get paid to
17 undercut dirt. That's why I try to head off any
18 problems so whenever I get there I can start
19 stacking block. Because billable hours for this
20 first day was zero for me. Zero. I didn't
21 stack the first block so I can't bill for
22 anything. So who pays for my time in that?

23 Q: Well, let's talk about that for a minute. That
24 first day you're there, you're supposed to lay
25 out the foundation, right?



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1 A: Yes.

2 Q: And put the rock in for the foundation, right?

3 A: Yes.

4 Q: That's not block. You can't bill for that, can
5 you?

6 A: I think Joey can attest whenever I start laying
7 the foundation I start laying the block right
8 after that.

9 Q: My question was, when you put the foundation in,
10 you can't bill for that, correct?

11 A: No, but I can stack blocks as soon as I put the
12 foundation in.

13 Q: It's in your unit price for block, right?

14 A: Yes.

15 Q: Okay. And you got to get the foundation in
16 before you can stack blocks, right?

17 A: Yes.

18 Q: So what you're saying is for this first day you
19 did some stuff, we're not sure how much it was,
20 you didn't stack any block. Therefore, all that
21 time must be charged to Joey. Is that right?

22 A: According to our contract, workable grades of
23 the wall before we get there has to be plus or
24 minus two tenths. Plus or minus 18 or 24
25 inches, I can't stack block. I can't start



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1 working on the footer. I have to dig that dirt
2 out before I can start digging the footer.

3 Q: Excuse me just a minute.

4 A: Exhibit One, page 2 Coogler 000005. Middle of
5 page. Number 5. It's plus or minus three
6 inches.

7 Q: Plus or minus three inches, right?

8 A: So I was wrong in saying two tenths.

9 Q: Not two inches. That's what I was looking for.
10 Thank you. All right. So, three inches. You
11 have to go construct the foundation before you
12 can lay -- start laying the block. Right?

13 A: Yes, sir.

14 Q: And what you're telling the Court is I didn't
15 lay any block that day, so Coogler has to pick
16 up my entire cost. That's what you're telling
17 the Court, right?

18 A: Yes.

19 Q: Forget the fact that you're putting the
20 foundation in.

21 A: I didn't put a foundation in.

22 Q: You didn't lay the block. You know that?

23 A: Yes.

24 Q: You remember that?

25 A: Yes.



1 Q: You know how many times you told me, I can't
2 remember, it was too long ago when I took your
3 deposition?

4 MR. GOODWYN: Object to form. Argumentative.

5 THE COURT: Overruled.

6 MR. GOODWYN: And he's trying to impeach him with
7 deposition testimony without the deposition.
8 Does he have a count on how many times it is?
9 If -- I think he needs to show the deposition if
10 he's gonna try to pre-change his deposition.

11 THE COURT: Would you rephrase the question, please

12 Q: My question was ---

13 THE COURT: The objection is overruled.

14 Q: Do you remember that you told me 26 times I
15 can't remember when I took your deposition?

16 A: No.

17 Q: Okay.

18 A: I don't remember.

19 Q: Do you -- do you remember telling -- good
20 answer. You do you remember telling me you
21 couldn't remember, right?

22 A: Yes.

23 Q: And you remember telling me it was too long ago
24 you couldn't remember, right?

25 A: Yes.



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1 Q: Okay. But today you could remember?

2 A: On certain things I can remember.

3 Q: I see. Okay. Aside from your testimony,
4 there's no way for us to tell whether you
5 undercut all day long or half a day or seven
6 hours or whatever, right?

7 A: I don't know if it would be recorded in text
8 message or not. I don't know.

9 Q: All right. The \$750 for the three or four
10 trees. Where'd that number come from?

11 A: It was a base on a time -- time it took me. You
12 know, how much time -- 'cause we got there, I
13 kept -- you know somebody details I don't
14 remember because they get jumbled up. When it
15 comes to losing money I usually remember that.
16 But when you -- the trees, as well as I
17 remember, I kept waiting for Joey to -- to see
18 if he could bring -- get Juan out there to
19 undercut the end of the wall. And then whenever
20 I undercut the wall, these trees, you're cutting
21 off one half the root and I think I called -- I
22 don't remember whether I called Joey or whether
23 I called James and told him, these trees, I said
24 it doesn't feel safe working up behind a wall
25 because if the wind blows in that direction



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1 there's no roots to hold the tree there. And,
2 you know, that's when he said just take my Volvo
3 excavator and push them over.

4 Q: Were you using Coogler's excavator at the time?

5 A: Yes.

6 Q: Okay. So, you wanted Coogler to send someone
7 out to sit in the excavator that you were using
8 at no cost to take the trees down?

9 A: No, this is whenever they were doing the
10 undercutting.

11 Q: Uh-huh.

12 A: My job is to stack block. I didn't want to dig.
13 I didn't want to place more dirt than I had to.
14 I didn't want to have to dig out. Because when
15 I'm doing that, my guys are just sitting there.
16 They're sitting there doing nothing.

17 Q: Well ---

18 A: My equipment's sitting there not -- not -- you
19 know, two bob cats and an excavator. .

20 Q: Who is running the back -- who is running the
21 excavator that Coogler was letting you use?

22 A: I was.

23 Q: Okay. What were your guys doing? Were they not
24 stacking blocks?

25 A: No.



1 Q: They were standing around looking?

2 A: Yeah.

3 Q: Ah. Okay.

4 A: They were standing around looking and I stacked
5 the block. If they're not stacking block, I'm
6 not making any money.

7 Q: Okay. So down at the other end of the wall they
8 were all done? When you were pushing these
9 trees out of the way.

10 A: When you build a wall, you have to start from
11 one end and go to the other end. Remember we
12 talked about the alignment, you have to pull a
13 string from one end to the other?

14 Q: Well, you didn't do Wall H that way?

15 A: You couldn't because it steps up further than
16 this one.

17 A: This one that we're talking about now is a long,
18 straight wall.

19 Q: Okay.

20 A: No curves, no bends, nothing.

21 Q: All right. Did it have steps in it?

22 A: On the top. I think the bottom of the wall
23 stepped three times.

24 Q: So, it did have steps in it?

25 A: Relatively speaking, yes.



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1 Q: All right.

2 A: Okay, so you're pulling a string. When you're
3 -- when you start and stop a wall, if you -- if
4 you -- a long, straight wall, when you're --
5 when you're building a straight wall, you can't
6 just say I'm gonna -- and I know this from
7 experience, you can't build half a wall all the
8 way up and backfill it and then come back and
9 add the next section of wall, because a wall
10 rotates forward. As it gets backfilled, loads
11 on top of it, it rotates forward. And no matter
12 what you do, you can't mimic that in that seam.
13 So there's going to be a turning point in that
14 wall. And it's gonna make the wall look like an
15 s-shape.

16 Q: When you finished that wall, did that wall have
17 a little wow in it?

18 A: Not that I remember.

19 Q: Not that you remember. Okay. Did Joey ---

20 A: I have pictures ---

21 Q: --- have to go to bat for you to get that wall
22 bought by the owner?

23 A: No.

24 Q: You don't remember?

25 A: Not that I remember that.



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1 Q: Okay. All right. Well, let's talk about Wall
2 H. Okay? That's the one we're gonna talk about
3 today, right?

4 A: I mean, do you want me to finish answering your
5 question?

6 Q: Oh, I thought you were done. Go ahead.

7 A: So, what you have to do is you -- when you get
8 a certain height, you can't go any higher here
9 (indicating) until you finish out to here
10 (indicating).

11 Q: Uh-huh.

12 A: Okay. So, in order to keep the wall a straight
13 appearance, you need to go from this end to this
14 end (indicating). So by me having my guys work
15 ahead, even though they could be stacking block,
16 it makes the end product worse. So, you're
17 better off to not stack block in that essence
18 and wait til we can take the base course further
19 out.

20 Q: Okay, so you got a long, straight wall.
21 Correct? And part of the excavation has been
22 done and part of it has not, right?

23 A: Right.

24 Q: And you're stacking block here (indicating).

25 A: Well, the whole wall the excavation had not been



- 1 done. We had to do the excavation for the
2 entire wall.
- 3 Q: For the entire wall?
- 4 A: Eighteen to twenty-four inches down.
- 5 Q: I thought you told me that part of the thing was
6 in the wrong place. Did I misunderstand that?
7 Which indicates to me that part of it was done.
- 8 A: Wrong wall. That was the Wall H. I don't
9 remember saying there was a wall -- anything was
10 in the wrong place.
- 11 Q: All right. My mistake. The wall -- subgrade
12 you said was too high.
- 13 A: Yes.
- 14 Q: Right? So, did they excavate but they got the
15 wrong place or they're just not doing the
16 excavation.
- 17 A: They just didn't do the excavation.
- 18 Q: Okay. So when you came in to do this excavation
19 you didn't take it all the way to the end?
- 20 A: No, I went to the first step up ---
- 21 Q: Uh-huh.
- 22 A: --- where the footer starts the steps, so I
23 don't know -- I don't know the exact footage
24 right off the top of my head without looking at
25 a set of drawings with me. But we excavated and



1 went to that first stake and then stopped and
2 started stacking block because, there again, if
3 I'm not stacking block I'm not getting paid for
4 anything for that day.

5 Q: Okay. And you got three men. Does it take four
6 men to stack block?

7 A: Yes.

8 Q: Three men could stack block themselves, couldn't
9 they?

10 A: Yes.

11 Q: Okay. So, the fact that the excavation wasn't
12 made was visible to you, wasn't it?

13 A: Yes.

14 Q: All right. So, instead of having three men
15 stacking block and you working on the excavator
16 you got for free, to excavate out in front of
17 them, you just helped them stack block and then
18 when you ran out of things to do you went and
19 excavated some more. Is that the way that
20 worked?

21 A: Okay. In my contract, I'm not -- I don't want
22 to excavate dirt. At the time I was not
23 planning on charging anybody. Not planning on
24 charging anybody for excavating because I only
25 get paid for stacking block. Okay? So why do



1 I want to jump on the excavator and just keep
2 digging whenever I'm trying to get Juan to come
3 over there, Joey's superintendent, to dig it out
4 for me when that's what he's supposed to provide
5 for me.

6 Q: You had his excavator, right?

7 A: Yes.

8 Q: All right. Let's talk about Wall H. You said
9 you undercut five feet wide for 250 feet of
10 wall. What you didn't say was how deep it was
11 or if it was all the same depth. So, somehow or
12 other you figured out to charge them 15 hours
13 but you don't know what you did. Am I correct
14 in that?

15 A: There again, that volume amount would be given
16 to Joey because it would have been a change
17 order to him not to me.

18 Q: So ---

19 A: I wasn't making a court case at the time. I was
20 excavating to get -- so I could start stacking
21 block. I gave Joey the amount so he could bill
22 Edward Rose for the undercut. So he could
23 benefit from that, not me.

24 Q: All right. So your testimony is that you gave
25 Joey that information?



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1 A: Yes.

2 Q: Okay. Did you put that in writing somewhere?

3 A: No. It would have been a verbal conversation.

4 Q: All right. In your -- and -- and I'll pull the
5 deposition out if I need to. In your
6 deposition, you told me that your excavation was
7 125 feet. Do you remember that?

8 A: No.

9 MR. ROBINSON: Here's the deposition, Your Honor.

10 THE COURT: Give me two seconds to make a note on
11 this.

12 MR. ROBINSON: Certainly.

13 Q: Mr. Young, I'm going to hand you your deposition
14 from February 17, 2017. Do you remember giving
15 your deposition in February of this year?

16 A: Yes.

17 Q: Would you look on page 36, please.

18 A: Okay.

19 Q: And would you look at lines 11 through 17?
20 What's that -- what -- read that for us.

21 A: Eleven through Seventeen?

22 Q: Yes, sir.

23 A: The question was, so you built -- you didn't
24 fill the five feet with block, you just started
25 building the block wall lower than it called for



1 in the drawing, is that what I understand? Is
2 that what you're telling me?

3 Q: And what's your answer?

4 A: Yes.

5 Q: May I see that, please.

6 A: It says yeah..

7 Q: All right. Let me see this. I've got the wrong
8 records, I'll find it in a second. Let's look
9 at page 35, start on 9 and read through
10 thirteen, okay?

11 A: Okay, so let me see if I get this right. You
12 undercut how far? It was five foot wide
13 section. I don't know. Remember the total
14 length, maybe 125 feet.

15 Q: Okay. So that's 125 feet, not 250 feet, right?

16 A: I think I said -- I said -- first thing I said
17 is I don't know, rem- -- I don't remember the
18 total length, maybe 125 feet.

19 Q: So, the point is you don't know, right?

20 A: No.

21 Q: But you told me in that deposition 125 feet?

22 A: Maybe.

23 Q: So the fact of the matter is you don't know if
24 it was 150 feet, 125 feet, 250 feet; You don't
25 know what it was, do you?



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1 A: I would say this was written closer to the time,
2 so it would be more accurate.

3 Q: Well, we were looking at this when we took your
4 deposition, right?

5 A: I was what?

6 Q: We were looking at this when we took your
7 deposition, correct?

8 A: I don't remember looking at this document.

9 Q: All right. And you weren't sure how many you
10 had there at the time there, either, were you?
11 When we took your deposition?

12 A: I don't remember. I don't.

13 Q: We can look at it again if you want to argue
14 with me.

15 A: I mean, I'm saying I don't remember saying it in
16 deposition and I don't remember now how many men
17 I had there.

18 THE COURT: Mr. Robinson, you need to move on.
19 Unless you ---

20 MR. ROBINSON: All right.

21 THE COURT: Yeah. He says -- I mean -- all we ask
22 for is a truthful answer. So if he didn't know
23 something and that's the truth then you need to
24 move on.

25 Q: You've claimed you backfilled outside the grid



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1 over the entire wall, is that right?

2 A: Yes.

3 Q: And there's not the first indication in your
4 text or emails or anything else to Mr. Coogler
5 that you were doing that or that you intended to
6 get paid for it, is there?

7 A: No.

8 Q: And there's no indication that you ever actually
9 measured that work, is there?

10 A: I think the volume I figured off the plans.

11 Q: There is no indication that you measured what
12 that volume was that you did, is there?

13 A: No.

14 Q: Okay. In fact, the figures indicate that you
15 don't know how much you did because you say
16 approximately 30 feet and approximately 60 feet
17 and you say the lower part of the wall and the
18 upper section of the wall, right? It says that
19 in this Exhibit, correct?

20 A: Yes.

21 Q: And that could be -- that could vary quite a
22 bit, couldn't it?

23 A: Yeah, the soil does vary quite a bit.

24 Q: All right. You took a lot of photographs of the
25 job, didn't you? In fact, you took 84



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1 photographs that you produced during discovery,
2 correct?

3 A: If you say so. I mean, I don't know for sure.

4 Q: And some of those photographs were taken before
5 the Wall H work was complete, correct?

6 A: Yes.

7 Q: None of those photographs show the distance
8 between -- behind the wall, past the geogrid
9 that you claim you had to backfill, do they?

10 A: No.

11 Q: And you're asking for \$17,000 -- \$17,645.00 for
12 that work, but you don't have the first
13 photograph of it.

14 A: At the time I wasn't planning on charging for it
15 so I didn't know I was building a court case.

16 Q: And you don't have a calculation that shows how
17 you arrived at the 7,500 cubic yards, do you?

18 A: Not with me.

19 Q: You haven't produced one, have you?

20 A: No.

21 Q: Okay.

22 A: It's simple math, I mean.

23 Q: So, we're left with the -- your assertion that
24 you backfilled approximately 7,500 yards without
25 any backup, correct?



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1 A: Correct.

2 Q: And you're charging now almost 16 days for your
3 entire crew, do you know that?

4 A: No.

5 Q: Well, let's look at Exhibit Nineteen, okay.
6 According to your billing on Exhibit Eighteen,
7 three men and supervisor cost \$140 an hour,
8 right?

9 A: That's not the way I derived that cost.

10 Q: You're charging three men and a supervisor at
11 \$140 a day, correct, for the Exhibit Eighteen?

12 MR. GOODWYN: Object, I think he said \$140 a day.

13 MR. ROBINSON: Excuse me, \$140 an hour, I'm sorry.
14 Thank you.

15 A: It's \$140 an hour for three laborers and one
16 supervisor, and then \$150 a hour per skid steer.

17 Q: Right. So if there is a skid steer involved,
18 the total cost per hour is \$290 per hour, right?

19 A: Two skid steers on the job site.

20 Q: And then in your extra work you had undercutting
21 for \$4,350, right?

22 A: Yes.

23 Q: And that's at an hourly cost of 290 because you
24 had a skid steer involved, correct?

25 A: And an excavator.



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1 Q: And so ---

2 MR. GOODWYN: Your Honor, I'm gonna object to the
3 form to that last question. I think the
4 testimony was that there were two skid steers on
5 the job. He premised the question with there
6 being only skid steer on the job.

7 MR. ROBINSON: He charged at a hundred and ---

8 THE COURT: Okay. Mr. Robinson?

9 MR. ROBINSON: Excuse me.

10 THE COURT: Go ahead. Yes, sir.

11 Q: You charged at \$150 an hour for the skid steer,
12 correct?

13 A: It's just per skid steer.

14 Q: In Exhibit Eighteen, plus -- I'm looking at
15 number one, the bottom of the page, \$140 per
16 hour for three laborers and one supervisor, plus
17 skid steer \$150 an hour to move stones from
18 undercut area. Do you see that?

19 A: Two skid steers.

20 Q: That doesn't say two skid steers, does it?

21 A: It just says per skid steer.

22 Q: It doesn't say per at all, it says skid steer.

23 MR. GOODWYN: Object to the form, it's not a
24 question.

25 THE COURT: I don't ---



1 Q: Does it?

2 THE COURT: Mr. Robinson?

3 MR. GOODWYN: It's argumentative as well.

4 THE COURT: Ask him a question, let him answer it,
5 and then ask him the next question.

6 MR. ROBINSON: All right, Your Honor.

7 Q: On Exhibit Eighteen, bottom of the page, the
8 last full sentence says, \$140 per hour for three
9 laborers and one supervisor plus skid steer,
10 \$150 an hour, to move stones to undercut area.
11 Is that what that says?

12 A: Yes.

13 Q: Okay. And that would reveal the cost of \$290
14 per hour, wouldn't it?

15 A: If you consider one skid steer and three
16 laborers and one supervisor.

17 Q: Okay. And you charged \$4,350 for that work,
18 correct?

19 A: Yes.

20 Q: And then undercutting outside the grid you
21 charged \$17,645, right?

22 A: It was not undercutting outside, it was ---

23 Q: I'm sorry, I read two things together. My
24 mistake. Backfilling outside the grid,
25 \$17,645.00, right?



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1 A: Yes.

2 Q: And that you were using the excavator from
3 Coogler, correct?

4 A: No.

5 Q: What were you using?

6 A: Bulldozer.

7 Q: Bulldozer from Coogler, right?

8 A: (Nods head.)

9 Q: Okay. And then the extras ---

10 THE COURT: Is that a yes?

11 THE WITNESS: Yes.

12 THE COURT: Okay, I'm sorry. Go ahead, Mr.
13 Robinson.

14 Q: Then the extra foot of stone, \$6,000. You were
15 using your skid steer on that, right?

16 A: Yes.

17 Q: And then remove the brick and debris, \$700.
18 There was no equipment there, you just charged
19 for the hour, right?

20 A: It's lost time production.

21 Q: I understand that. And that all totals 166.72
22 hours, doesn't it?

23 A: There again it's based off one skid steer. I
24 had two skid steers and a mini excavator there.

25 Q: Okay. But you weren't charging for those. It



1 doesn't say anything about a mini excavator in
2 here, does it?

3 A: It's \$150 per hour per piece of equipment.

4 Q: Mr. Young, I'm just looking ---

5 A: Okay. If it's -- if it's in ---

6 Q: --- at what you read ---

7 THE COURT: I'm sorry, hold on a second. Let -- are
8 you finished your answer?

9 THE WITNESS: No, sir.

10 THE COURT: Okay. Let him finish his answer.

11 MR. ROBINSON: Yeah, go ahead.

12 A: If we're on a job and I'm getting paid a unit
13 price per square foot of block I stack, if I
14 can't stack block, I can't use my equipment to
15 stack block, then who pays me for the time that
16 I'm not stacking block when I'm -- it's not like
17 I'm getting paid a unit price to do the backfill
18 of the wall, paid for the material, everything,
19 because when I'm not stacking block I'm not
20 getting paid anything. If I go to a job site
21 and I stack two blocks, I go home with a \$20
22 bill and spend \$400 on labor that day. So if I
23 can't stack block, my equipment can't move block
24 to stack block, I can't excavate for a footer,
25 I can't do any of that, then I can't bill for



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1 anything that I've done.

2 Q: Okay. Did you -- are you the person who wrote
3 these numbers here on Exhibit Eighteen?

4 A: Yes.

5 Q: All right. And you're the person who calculated
6 the amount of money on Exhibit Eighteen,
7 correct?

8 A: Yes.

9 Q: All right. And you're the person who, at least
10 it appears as thought, attempted to articulate
11 how you were calculating that money, is that
12 right?

13 A: Yes.

14 Q: And it says here, skid steer \$150. It doesn't
15 say two skid steers 300 bucks. It doesn't say
16 per skid steer, it says skid steer, correct?

17 A: Yes.

18 Q: All right. And if we go to these other things,
19 we have the same sort of thing, don't we?

20 A: Yes

21 Q: All right. So, if we use your figures and your
22 description, it comes to 166.7 hours, crew
23 hours, on the job, as it says in Exhibit
24 Nineteen.

25 A: The extra foot of stone is not in question



1 anymore, we ---

2 Q: It was when you put this in to evidence, wasn't
3 it?

4 A: Yes.

5 Q: All right. Now -- because what you're saying,
6 as I understand it, Mr. Young, is that you
7 didn't contemplate putting in two feet of stone,
8 therefore you were slowed down by that amount of
9 time, correct, with that extra footing?

10 A: Say that again.

11 Q: Well, you wouldn't have charged \$6,000 to put an
12 extra foot of stone in, right?

13 A: Okay. That charge was told to Joey before we
14 started. He said, I can't pay that. I didn't
15 realize they had an extra foot of stone, because
16 the extra foot of stone didn't just cost me it
17 cost Joey too because he bid the job with one
18 foot of stone. There was ---

19 Q: You don't know what he bid the job with?

20 A: He told me what he bid.

21 Q: You don't know what he bid the job with, you
22 just know what he told you, correct?

23 A: Yes.

24 Q: All right. Now, your contract, Exhibit Number
25 One says two feet of stone, right?



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1 A: Yes.

2 Q: All right. But you wouldn't charge \$6,000 for
3 that extra foot of stone, correct?

4 A: It's a unit price. It was not a per hour basis.

5 Q: I understand that. But the unit price came as
6 a derivative of your cost, correct?

7 A: But you're backing out saying how many man hours
8 based on a unit price.

9 Q: That's right. The highest unit price which
10 gives you the lowest number of man hours,
11 correct? And, by the way, that's 20 man hours,
12 isn't it?

13 A: Figuring it your way, yes.

14 Q: Okay.

15 A: But it's not -- that's not ---

16 Q: Well, suppose we struck the 20 man hours out of
17 there. And they had 20.7, so you'd be at about
18 thirty -- 46 man hours, wouldn't you?

19 A: But you're still basing it off one skid steer.
20 I didn't derive the backfilling outside the grid
21 by man hours either, it was based on a unit
22 volume.

23 Q: Well it says undercutting was done by Juan, 140
24 hours for two laborers and one supervisor plus
25 skid steer. That was your unit -- that was your



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1 work up of your crew, right?

2 A: (No response.)

3 Q: Correct?

4 A: On Exhibit Eighteen, number three.

5 Q: Yes.

6 A: Backed that entire area outside of grid on upper
7 section wall to the last four foot of backfill,
8 approximately 60 feet. Grid length was 12 feet.
9 It's five times more, approximately 7,500 yards
10 of dirt placed and compacted at \$2.35 a yard is
11 17,645.

12 Q: Okay.

13 A: The original derivative for that came -- was
14 \$3.00 a yard placed.

15 Q: No. The \$2.34 per cubic yard ---

16 A: 2.35.

17 Q: 35 cents per cubic yard, excuse me, that's
18 supposed to reimburse you for your cost, is it
19 not?

20 A: Not following you.

21 Q: The \$2.35 per cubic yard is supposed to pay you
22 for what it cost you to put that in, correct?

23 A: Yes.

24 Q: I mean, that's what you're billing for, right?

25 A: Yes.



1 Q: And if that's your basic crew, then we can
2 figure out how many hours that was because we
3 can divide it by your basic price per hour,
4 can't we?

5 A: No, not when you're charging by the yard. If it
6 takes me -- I have 15 men out there and I'm
7 charging them \$3.00 a yard, I pay the
8 difference. If I have one man out there moving
9 for \$3.00 a yard, then I make the difference.
10 If I have 20 men out there, I lose the
11 difference.

12 Q: Mr. Young, you had a basic crew out there, did
13 you not?

14 A: Yes.

15 Q: And you've told us that it was three men and
16 your supervisor, correct?

17 A: Yes.

18 Q: Plus either one or more skid steers, correct?

19 A: Yes.

20 Q: All right. And when you were backfilling, were
21 you also not stacking block?

22 A: Yes.

23 Q: Okay. So, if we use the entire spread, i.e.
24 \$290 an hour and divide that total dollar you
25 want to get paid for by the total spread, we



1 come up with your total man hours -- crew hours,
2 let's say, that would have been spent on that
3 item that would have paid you plus your profit,
4 would it not?

5 A: No.

6 Q: All right. What would it have paid your for?

7 A: In a 10 hour workday, if I can stack 1,000
8 block, that's \$8,340. Do you think I would
9 rather make \$8,000 a day stacking a 1,000 block
10 or \$1,400 a day by your math? I mean, it's a
11 lose-lose proposition. I mean, the dirt placed
12 indirectly was benefitting Coogler because it
13 was being placed and compacted. He didn't have
14 to do that. He didn't have to spend the labor
15 to do that. When they tore the wall down, they
16 didn't take that dirt out. So he was paid by
17 Edward Rose to move X amount of dirt. When he
18 figures his cost on a bid to move dirt, he
19 charges by the yard. He doesn't charge by the
20 man hours when moving bulk dirt.

21 Q: How many crew hours did it take you to do the
22 backfill?

23 MR. GOODWYN: Objection, relevancy, Your Honor. He's
24 testified he billed by the yard. How many man
25 hours it took is irrelevant to what he billed.



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1 THE COURT: All right. Mr. Robinson, why is that
2 relevant?

3 MR. ROBINSON: Well, Your Honor, here's why it's
4 relevant. Because unit prices are derived from
5 your costs plus your markup.

6 MR. GOODWYN: There's no foundation for that.

7 MR. ROBINSON: His unit price -- excuse me, his
8 hourly cost for his crew plus his excavator has
9 built into it his profit ---

10 MR. GOODWYN: That's no foundation.

11 MR. ROBINSON: --- if he has to rent out that crew.

12 THE COURT: That's in general what happens?

13 MR. ROBINSON: That's in general what happens.

14 MR. GOODWYN: There's no foundation that that's how
15 he worked it though.

16 THE COURT: Well, let me ask ---

17 MR. ROBINSON: Judge asked me a question, I'm going
18 to answer it.

19 THE COURT: Mr. Young, is Mr. Robinson's explanation
20 of what a unit price is, is that accurate as far
21 as you can tell?

22 A: No. What I'm gonna use as an example here is
23 the Coogler's contract with Edward Rose where he
24 charged by the unit price, by the square foot,
25 for the retaining wall. He didn't charge by the



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1 hour. I mean, so why is it okay for him to
2 charge by unit price but me for not to be able
3 to.

4 MR. ROBINSON: Let's ---

5 THE COURT: I'll tell you what, this may be a good -
6 - I'm looking at their exhibits while we're
7 talking. And also, if you see me on the phone,
8 I'm not on the phone, I'm actually looking stuff
9 up.

10 MR. ROBINSON: That's all right, no problem.

11 THE COURT: You know, I can get cases and statutes
12 and everything on my phone now. I learned that
13 from an intern I had. But Exhibit One, Mr.
14 Robinson, you say is the contract.

15 MR. ROBINSON: Correct.

16 THE COURT: And again, I'm revealing my ignorance
17 about how people do business in construction
18 contracts, but this -- nowhere on this document
19 it says contract. It says Design South
20 Landscape Company bid and proposal for segmental
21 retaining wall system. I don't see any
22 signatures anywhere and, of course, Exhibit
23 Number Thirty-Seven, you have the contract
24 between Coogler and, what was the name of the
25 company, builder?



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1 MR. ROBINSON: Edward Rose.

2 THE COURT: The private contractor.

3 MR. ROBINSON: Yeah.

4 THE COURT: Okay. The title of that document says
5 contract. The top of this document it doesn't
6 say anything about a contract and I don't see
7 any signatures or anything else that would --
8 you know, traditionally, you can tell by that,
9 you can say this is the contract. And the
10 lawsuit -- our notes say it's a breach of
11 contract, is that accurate? Okay, is this in
12 the -- the way y'all do business in the
13 construction business, is this considered the
14 contract, your proposal -- your bid and
15 proposal?

16 MR. ROBINSON: I can clear that up in a couple of
17 questions, Judge, if you'll let me.

18 THE COURT: Okay, please proceed.

19 MR. ROBINSON: All right.

20 Q: Mr. Young, is Exhibit One the proposal you gave
21 to Coogler?

22 A: Yes.

23 Q: And is that also the proposal that you performed
24 the work under?

25 A: Yes.



1 Q: And did Coogler manifest an acceptance of that
2 proposal by paying you under that contract?

3 A: Yes.

4 Q: All right. And so as far as you're concerned,
5 that was the contract that was offered in this
6 case, is that correct?

7 A: Yes.

8 Q: All right.

9 MR. ROBINSON: And, Your Honor, I will stipulate to
10 the Court, that's also the contract that Coogler
11 believed that they had. So that's the contract.
12 We have an offer ---

13 MR. GOODWYN: I agree.

14 MR. ROBINSON: --- we have an acceptance, we have a
15 contract.

16 THE COURT: That's a stipulation then.

17 MR. ROBINSON: They didn't sign it, but they just
18 didn't sign it.

19 MR. GOODWYN: We would stipulate the same, Your
20 Honor.

21 THE COURT: Okay.

22 THE WITNESS: There was one signed.

23 THE COURT: Okay.

24 THE WITNESS: It was signed under the original price
25 per square foot of 4.34. That was the one that



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1 was signed, so we were originally gonna do the
2 work for \$4.34. Coogler was gonna do the
3 backfill. That one did not include but one foot
4 of stone. When Joey came back after the fact
5 and asked me about doing the backfills whenever
6 we went to the 8.34, this was sent back to them,
7 but, you know, through my fault of business, it
8 never was followed through to have that one
9 signed again.

10 **THE COURT:** All right. Is that unusual in the
11 construction business?

12 **THE WITNESS:** Joey and I have -- in working with
13 five years, and we have never signed a contract
14 together, you know. It was always just a mutual
15 gentleman's agreement that, you know, he always
16 did the right thing and I felt like I always did
17 the right thing.

18 **THE COURT:** All right. Please proceed, Mr. Robinson.

19 **MR. ROBINSON:** All right, thank you.

20 **Q:** So when you bid a job, Mr. Young, how do you
21 calculate your unit price for block?

22 **A:** A lot of it's market driven.

23 **Q:** Do you -- let me ask you a different question.
24 Do you sit down with a pencil and paper or a
25 computer, however you do it, and figure out what



1 your total cost is gonna be and then derive a
2 unit price from that, or do you just use market
3 driven numbers?

4 A: I use both.

5 Q: Do both, okay. And when you do the first one I
6 asked you about, that is to say figure out your
7 costs, you then derive a unit price from that,
8 don't you?

9 A: Yes.

10 Q: Okay. And the unit price, therefore, is based
11 on your cost, isn't it?

12 A: No. In a free market you can price things high
13 enough that the market will bear it.

14 Q: Yes. I agree with that. So your unit price --
15 but your unit price is not gonna be less than
16 your cost, is it?

17 A: No.

18 Q: Because if it's less than your cost you lose
19 money, don't you?

20 A: Right.

21 Q: And if the market is such that it's very
22 competitive, you'll strike your unit cost at
23 your pr- -- you'll strike your unit price at
24 your cost plus a little bit of profit, isn't
25 that true?



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1 A: My philosophy is I've never lost money on a job
2 I didn't get.

3 Q: I know what you meant, you might want to explain
4 that to the Court.

5 A: What that meant was that I don't need any more
6 practice at doing retaining walls. And so when
7 the market gets down so low like it has the last
8 three years, I basically just don't -- don't bid
9 on it because I don't want to get a job to lose
10 money on it. You know, if I can't make money on
11 the retaining wall, there's no point, you know,
12 equipment -- and Joey knows this. Equipment is
13 steadily going up, fuel's going -- everything's
14 going up and price of stone's going up. And
15 yet, you know, owners want more for less and,
16 you know, if they can find somebody that'll do
17 it, have at it. You know, I don't ...

18 Q: So, back to the original question, that is to
19 say the unit price, the unit price is calculated
20 on your cost plus a markup, correct?

21 A: Yes.

22 Q: All right. And sometimes that market is
23 substantial and sometimes it's not quite so
24 substantial, depending on the market, right?

25 A: Right.



1 Q: But at any rate, the unit cost will not be less
2 than your -- a unit price will not be less than
3 your actual cost, will it?

4 A: Not at a conscious effort, it wouldn't.

5 Q: Okay. You wouldn't do it that way on purpose?

6 A: No.

7 Q: Okay. And so your \$2.35 a cubic yard would not
8 be less than your unit -- your hourly cost of
9 doing business, would it?

10 A: Correct.

11 Q: Okay. So, if we take the total dollar amount
12 and divide by your cost of doing work -- excuse
13 me, let me ask another question. Your \$140 an
14 hour for the men and the supervisor, that's got
15 some profit built into it, doesn't it?

16 A: Some, not much.

17 Q: Not much, but some. And your \$150 an hour for
18 the skid steer, that's also got some profit
19 built into it, doesn't it?

20 A: Yes.

21 Q: Because you're not gonna rent it out at a loss,
22 are you?

23 A: No.

24 Q: And there's no sense doing business if you're
25 not making money?



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1 A: Right.

2 Q: Okay. So, At \$290 an hour, if there's a skid
3 steer involved with your crew, represents not
4 your cost, but your cost plus some profit,
5 right?

6 A: Yes.

7 Q: Okay. And your \$2.35 an hour represents not
8 your -- excuse me, a cubic yard, represents not
9 your cost but your cost plus a profit, right?

10 A: I'm sorry, say that again.

11 Q: Sure. The two thou- -- your \$2.35 a cubic yard
12 represents not just your cost but your cost plus
13 a profit to do that work, right?

14 A: Yes.

15 Q: Okay. So, if we assume that your profit is
16 substantially the same on that work, we can
17 divide the total cost by the total per hour cost
18 and get a measure, it might not be perfect, but
19 a measure of how many crew hours you would've
20 spent doing that work, correct?

21 A: No.

22 Q: Why not?

23 A: Because the -- the markup margin on that, it
24 wasn't -- you know, in the \$140 an hour and \$150
25 an hour, it's not -- that's not -- that's to



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1 recoup costs mostly. There's a little bit of
2 profit but not much. It's there to recoup
3 costs, it's not there to make money. You know,
4 I couldn't make a living with my overhead at
5 those rates there.

6 Q: Do you know what the profit is on that \$140 an
7 hour crew cost?

8 A: Not right off the top of my head.

9 Q: Okay. At any rate, if we take your total costs
10 and divide them by the appropriate hourly cost,
11 we get 166.7. If we subtract the 20.7 you get
12 140 crew hours, right?

13 A: If you figure it wrong, that's right.

14 Q: And at 140 crew hours, that would be 14 crew
15 days, right, if you're working 10 hours a day?
16 If you're working 8 hours a day, it'd be more
17 than that, wouldn't it?

18 A: If you figure it wrong, that's right.

19 Q: And you were only on the job for 16 days,
20 weren't you?

21 A: Yes.

22 Q: So in effect, you're telling the Court that your
23 extra work cost as much as the entire time you
24 were on the job and therefore the wall got built
25 for nothing?



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1 A: No.

2 Q: That's what these numbers say, isn't it?

3 A: That's what your numbers say.

4 Q: That's correct.

5 MR. ROBINSON: Move to admit Exhibit Nineteen, Your
6 Honor.

7 MR. GOODWYN: I would object, Your Honor. He's
8 basically said -- he refuted every single thing
9 in here personally. Nothing in this is what the
10 witness agreed to. This is all Brian Robinson's
11 numbers. And he can argue what he wants, but
12 this document is a summary of numbers that were
13 not verified at all.

14 THE COURT: Objection ---

15 MR. ROBINSON: Well, Your Honor ---

16 THE COURT: Go ahead.

17 MR. ROBINSON: I'm sorry, go ahead and rule.

18 THE COURT: I'd say objection's overruled. You know,
19 of course the record indicates, like you said,
20 they're his numbers not Mr. Young's numbers, so
21 that's fine, I mean, you know. That's stuff we
22 all have to consider when I make the decision.

23 (Defendant's Exhibit Number Nineteen was introduced
24 into the record at this time.)

25 THE WITNESS: I will say that if you figure the



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1 numbers the right way, the number of man hours
2 is substantially further down.

3 THE COURT: Okay. Maybe this is a good breaking
4 point for lunch. Could we be back at 1:15?

5 MR. ROBINSON: Sure.

6 MR. GOODWYN: Sure.

7 THE COURT: All right. Mr. Young, you can come down
8 for now.

9 (Off the Record from 12:14 p.m. until 1:29 p.m.)

10 THE COURT: Okay. Mr. Robinson?

11 MR. ROBINSON: Thanks, Your Honor.

12 THE COURT: Yes, sir.

13 Q: Mr. Young, would you look at Exhibit Thirty in
14 that book? There are several pictures here
15 Thirty-A, Thirty-B and Thirty-C, correct?

16 A: Yes.

17 Q: Okay. And those are pictures, Thirty-A is a
18 picture of the front of the wall where the wall
19 failed; is that right?

20 A: Yes.

21 Q: And in Thirty-B we can see the wall stepping
22 down and in the background we can see that
23 failure, correct?

24 A: Yes.

25 Q: And in Thirty-C looking from the other direction



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1 you see the failure also, right?

2 A: Yeah.

3 Q: Okay. And in the background on Thirty-C we can
4 see some erosion; do you see that?

5 A: Yes, sir.

6 Q: And if you turn over to Thirty-D we see the --
7 you lookin at Thirty-D?

8 A: Sorry.

9 Q: Wait a minute, my -- I'm sorry.

10 A: No worries.

11 Q: In Thirty-D you can see some erosion again?

12 A: Yes, sir.

13 Q: And you were talking about how the erosion you
14 thought caused the failure, right?

15 A: Yes.

16 Q: And we see in the background on Thirty-D, we see
17 a couple of trucks; do you see those?

18 A: Yes, sir.

19 Q: And we can see the step down this side of those
20 trucks; you see it steppin down there?

21 A: Yes, sir.

22 Q: So the failure's between the step-down and the
23 truck, isn't it?

24 A: And it goes around.

25 Q: Right. It's between the steps -- it's in the



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1 back part of the picture on the wall, right?

2 A: Right.

3 Q: Okay. And we can see the erosion channel
4 starting behind the wall but coming down to the
5 portion of the wall at the lower end of the
6 step-down; you see that?

7 A: Yes.

8 Q: And then you see it kind of goes around and then
9 goes into the wall.

10 A: Right.

11 Q: Right? So doesn't that mean that the erosion
12 was down below the failure area?

13 A: No, sir. Water got to the whole face of the
14 wall. There's a lot more came right here but it
15 was storm water that also got up there at the
16 top.

17 Q: Well, you took these photographs, right?

18 A: Yes, sir.

19 Q: And they depict the wall sometime after you
20 stopped working on December the 15th, correct?

21 A: Yes, sir.

22 Q: Okay. And you're claiming that this erosion
23 caused the wall to fail but you don't have any
24 photographs that show this erosion at the wall?

25 A: Yes, sir. I have a picture of the crack where



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1 it shows where it opened up and water running in
2 the crack.

3 Q: Well you have a picture of the crack but it
4 doesn't show anything besides the dirt in the
5 crack; is that right?

6 A: Yes.

7 Q: Okay. All right. I think we talked about this
8 the other day. Quality's a licensed general
9 contractor, correct?

10 A: Yes, sir.

11 Q: And Quality's general contractor's licensee took
12 the contractor's license exam, didn't they?

13 A: Yes, sir.

14 Q: And he's still -- the licensee still holds the
15 license for Quality?

16 A: Yes, sir.

17 Q: Okay. And you filed a mechanic's lien on this
18 job in May of 2015, correct?

19 A: Yes, sir.

20 Q: Would you look at Exhibit Twenty, please? Is
21 that a copy of your notice and certificate of
22 mechanic's lien?

23 A: I think so.

24 Q: And if we look back at -- I'll get there in a
25 minute -- the last page of Exhibit Twenty, it



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1 says your lien is for \$80,480, right?

2 A: Correct.

3 Q: And that's the amount you claim before you took
4 the \$6,000 off, isn't it?

5 A: Yes.

6 Q: So your mechanic's lien was for May of 2015, was
7 for everything that you're claiming here today
8 and it had that \$6,000 in it, right?

9 A: What was that again? I didn't follow.

10 Q: The \$80,000 has the \$6,000 in it?

11 A: Yes.

12 Q: Okay. Now who signs mechanic's liens? Let me
13 rephrase that. Who signed that -- who signed
14 the affidavit on the mechanic's lien?

15 A: Albert Pierce, Jr.

16 Q: No. Look on Coogler 000192.

17 A: Melanie Young.

18 Q: And who is Melanie Young?

19 A: My mother.

20 Q: Okay. And it wasn't Mr. Wheeler, was it?

21 A: No.

22 Q: Okay. And Mr. Wheeler, he's not the person who
23 typed the contract up between Quality and
24 Coogler, is he?

25 A: No.



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1 Q: And he's not the person who determined where
2 Quality was gonna the wall, was he?

3 A: No.

4 Q: And he's not the person that managed this
5 lawsuit for Quality, is he?

6 A: No.

7 Q: That's you, right?

8 A: Yes.

9 Q: Okay. Do you know how a mechanic's lien works?

10 A: I know the main gist of it.

11 Q: Do you know that when you show a mechanic's lien
12 your entitled to get your attorneys' fees?

13 A: I mean, I didn't know that, but ...

14 Q: Did you check with Mr. Wheeler?

15 A: No, sir.

16 Q: Okay. But you had a lawyer who filed the
17 mechanic's lien, didn't you?

18 A: Yes, sir.

19 Q: Okay. And was he the lawyer who answered the
20 Complaint from Coogler?

21 A: Answered the Complaint?

22 Q: Excuse me, is he the lawyer who filed the
23 Complaint on your behalf?

24 A: Who?

25 MR. GOODWYN: I think he needs to be ---



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1 Q: Mr. Albert R. Pierce, Jr.

2 MR. GOODWYN: I'm gonna object to the form. There's
3 two attorneys listed on there. Which attorney
4 is he referring to?

5 MR. ROBINSON: Either one.

6 Q: Were any one of those attorneys the one who
7 filed your Complaint?

8 A: Yes.

9 Q: Okay. So they didn't file the mechanic's lien
10 foreclosure action, did they?

11 A: I don't know. That's why I hired an attorney
12 for them to take care of it for me.

13 Q: Uh-huh.

14 A: I don't know the ins and outs of it.

15 Q: Uh-huh. So if you could get your attorneys'
16 fees under the mechanic's lien and they didn't
17 file a mechanic's lien, then file suit of a
18 mechanic's lien, then you're not real sure that
19 you're entitled to this money, are you?

20 A: I feel like I'm entitled to the money. I mean,
21 I did the work.

22 Q: I move to put Exhibit Twenty into evidence.

23 MR. GOODWYN: Your Honor, I would object to it being
24 into evidence as part of the record. It should
25 be part of the Clerk's file. I don't think this



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1 is appropriate to be an item marked as evidence.

2 THE COURT: Objection overruled. It doesn't matter
3 if public records record it ---

4 MR. GOODWYN: Sure.

5 THE COURT: --- in this building, so. All right.
6 Please proceed. Your motion's granted.

7 (Defendant's Exhibit Number Twenty was introduced
8 into the record at this time)

9 MR. ROBINSON: Is it in?

10 THE COURT: Yes.

11 MR. ROBINSON: Okay.

12 THE COURT: Yes. It's in evidence. I overruled the
13 objection.

14 A: I would like to point out that to do this job
15 you don't have to be a general contractor. They
16 didn't have to have a general contractor's
17 license to do this.

18 Q: All right.

19 A: It's the reason we had a general contractor's
20 license to begin with.

21 Q: Okay. Would you look at Exhibit Twenty-One,
22 please? Twenty-One is three pages, A, B, and C.
23 A and B are the same page except you can read B
24 a little better than you can read A. And A's
25 got Design South's Bates number on it and B does



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1 not; do you agree with that?

2 A: Yes.

3 Q: Okay. And then C is a photograph of some more
4 of the stakes. Y'all put some photographs into
5 evidence. I don't know what exhibit that is
6 because it's not marked.

7 MR. GOODWYN: It's right there behind you.

8 Q: All right. And you can actually read these,
9 this is Plaintiff's Exhibit Three. Which if you
10 take a look at Plaintiff's Exhibit Three and
11 tell me if that is substantially the same or the
12 same photographs as Defendant's Exhibit Twenty-
13 One -- Twenty-Two, excuse me -- Twenty-One.

14 A: Yeah, that's essentially the same.

15 Q: All right. Well let's look at those 'cause
16 they're easier to read. So we're looking at
17 Plaintiff's Exhibit Three now. These are
18 photographs that you took; is that right?

19 A: Yes.

20 Q: And you pulled these stakes out of the ground
21 and laid they down and took a picture of them?

22 A: Yes, sir.

23 Q: Are those all the stakes that were set?

24 A: I don't know if it's all of them because
25 sometimes my guys will use those as screed the



1 base course. And so these were the ones that I
2 found that I had.

3 Q: Okay. We're not sure those are all the ones or
4 not?

5 A: Right. I don't know.

6 Q: All right. Are those photos -- did they show
7 the stakes that go with the hubs that you think
8 were in the wrong place?

9 A: Pardon me again?

10 Q: Those photographs show the stakes that were set
11 next to the hubs that you think were in the
12 wrong place, they were three foot five from the
13 wall instead of five feet from the wall?

14 A: Are you sayin are those stakes in this?

15 Q: Yes, that's what I'm asking.

16 A: Yes.

17 Q: Okay. And which ones do you think those were?

18 A: It would be the fourth, fifth one, sixth one,
19 and seventh one.

20 Q: Would you give me the station numbers, please?

21 A: 11 plus 52.27 and 11 plus 74.22.

22 Q: Okay. And those are the ones you identified you
23 think that the hubs were supposed to be marked
24 as 3.5 feet but they're actually marked as -- on
25 the stakes as 5 feet; is that right?



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1 A: Right. The day we went out there to that
2 meeting when Joey and myself and John Goff, he
3 had his wand and we found the old hub and he put
4 it on there and we just discovered that's a foot
5 and a half off. Three and a half.

6 Q: All right. When you said a foot and a half off,
7 you mean it was a different station? I'm not
8 sure what you mean when you say three and a half
9 feet.

10 A: Where the hub was he should have been able to go
11 with his wand on top of it and be able to
12 calculate how far he is from the wall. And it
13 should have said five feet. It's -- where he
14 put it on top of the hub he was three and a half
15 feet from the wall ---

16 Q: Okay.

17 A: --- the intended lay out of the wall.

18 Q: All right. But when you laid the wall out you
19 measured five feet like the stakes said?

20 A: No.

21 Q: No? What did you do?

22 A: I made it less.

23 Q: Why? Ah. You would have measured five feet to
24 the top of the wall, correct?

25 A: No.



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1 Q: Then you subtract off the batter ---

2 MR. GOODWYN: Your Honor, he's like ---

3 MR. ROBINSON: --- or whatever you're supposed to do.

4 MR. GOODWYN: --- in the middle of an answer and

5 Brian keeps tryin to put words in this mouth.

6 Just let him finish the answer.

7 THE COURT: Well, yeah, both of them are well-

8 prepared. So, yeah. You know what he's gonna

9 say, counselor, I mean.

10 MR. GOODWYN: Or he thinks he does. I don't think

11 he does.

12 THE COURT: Okay. All right. Restate the question

13 ---

14 MR. ROBINSON: Sure.

15 THE COURT: --- and give Mr. Young a chance to

16 answer.

17 Q: On those hubs you think were set incorrectly,

18 did you measure over calculate the batter on

19 the wall and set your first block based on a

20 five foot offset?

21 A: Yes. Based on the five foot offset we started

22 with the five feet and then we backed off the

23 amount of courses closer to the hub.

24 Q: Okay. So you used the hub just like the stake

25 said to use it?



1 A: Yes.

2 Q: Okay. All right. I don't have any further
3 questions at this time.

4 THE COURT: You gonna redirect?

5 MR. GOODWYN: Yes, Your Honor.

6 THE COURT: All right. Please proceed.

7 MR. YOUNG - REDIRECT EXAMINATION BY MR. GOODWYN:

8 Q: All right. Mr. Young, you testified on cross
9 that the walls, they had these rounded corners.
10 There was probably some discussion about the
11 corners being rounded instead of angled like
12 their shown in the diagram, correct?

13 A: Yes.

14 Q: All right. Do these two photos actively show
15 what the condition of these rounded edges are?

16 A: Yes.

17 Q: All right. These are the sight lines.

18 MR. ROBINSON: I don't have a problem with it.

19 MR. GOODWYN: All right, we'll move to admit. These
20 two photographs -- it's just the next two
21 Plaintiff's Exhibits, Five and Six; Four and
22 Five?

23 (Plaintiff's Exhibits Numbers Four and Five were
24 marked for identification purposes.)

25 Q: All right. This rounded curves -- will there be



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1 testimony that you were building walls -- these
2 type of walls with rounded curves for 12 years
3 leading up to this wall?

4 A: Yes.

5 Q: Has anyone ever -- any of your upstream
6 contractors or developers ever criticize you
7 rounding the walls like that instead of building
8 them at the angles as the design says?

9 A: No. It's actually encouraged. Keystone and
10 Allied encouraged you to do those because they
11 know the difference between a weaker corners and
12 a structurally sound corner.

13 Q: Okay. Are the designs and the plans that you
14 have on walls, generally do they show angled
15 corners instead of round corners?

16 A: Yes.

17 Q: Okay. But yet you've always put in round
18 corners?

19 A: Yes. On an engineered drawing they can't put a
20 station number on a rounded corner. So they're
21 always gonna put the station number on a fixed
22 angular corner.

23 Q: Okay. Knowing that it's gonna be rounded
24 anyway?

25 A: Yes.



1 Q: Okay. And in this particular case did you ever
2 perceive criticism from Edward Rose or Joe
3 Coogler or anybody else with Coogler
4 Construction about the rounded nature of the
5 corners?

6 A: No.

7 Q: Have you seen the rebuilt wall?

8 A: Yes.

9 Q: This wall was torn down and rebuilt. Does the
10 new wall -- does the new wall have rounded
11 corners also?

12 A: Yes.

13 Q: Okay. To your knowledge was that wall accepted?

14 A: Yes.

15 Q: All right. Do you have any reason to believe
16 that these rounded corners have anything to do
17 with the wall being rejected?

18 A: No.

19 Q: Is there anything in your contract with Coogler
20 that says you can't have rounded corners or the
21 wall's gonna be rejected?

22 A: No.

23 Q: All right. All right. You testified on cross
24 that you had done some measurements and you had
25 somebody else doin some measurements of



1 elevations, I believe?

2 A: Yes.

3 Q: What is that a photograph of?

4 A: That's John Goff ---

5 THE COURT: Excuse me, one minute. I have a call I
6 need to take.

7 MR. GOODWYN: Sure.

8 (A break was taken from 1:45 p.m. until 1:46 p.m.)

9 THE COURT: Okay. I apologize. You can proceed,
10 Mr. Goodwyn.

11 MR. GOODWYN: Okay, Your Honor.

12 Q: All right. What is this photograph of?

13 A: That's showing a picture of the hub and that's
14 Johnny Goff who was a former employer --
15 employee of Joey.

16 Q: Okay. Would you remember which hub it is?

17 A: Yes. That's the hub -- it would be closes to
18 11+75.5.

19 Q: Okay. So the hub corresponding to this
20 (indicating) corner?

21 A: Yes.

22 Q: Okay. And what was Mr. Goff doing in this
23 picture?

24 A: The meeting that was called, Joey -- or James
25 called me and said that, you know, the wall was



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1 18 inches inside the curb. And I just told him,
2 I said, there was no way that that's possible.
3 So I went there the next morning to have a
4 meeting. That was the soonest that Joey and
5 Johnny could meet us there. And when we just
6 went out there and he had his GPS instrument set
7 up. We found that that hub was roughly a foot
8 and a half not where it was supposed to be based
9 on a five foot offset.

10 Q: Well, so explain that again? How did you know
11 it was a foot a half?

12 A: He has a GPS instrument that basically he can
13 set it on top of the hub. He can set that
14 instrument straight on top of there and then he
15 can see on his little monitor how far he is from
16 the wall. And so he can take that and say, all
17 right, this is supposed to be a five foot offset
18 but it's showin me that it's three and a half
19 feet from the fact of the intended wall
20 placement.

21 Q: Okay. Based on GPS coordination?

22 A: Yes.

23 Q: Okay. All right. Is -- I'd like to go ahead
24 and move to admit this photograph as Plaintiff's
25 Exhibit Six.



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- 1 MR. ROBINSON: No objection.
- 2 (Plaintiff's Exhibit Number Six was marked for
- 3 identification purposes.)
- 4 Q: All right.
- 5 A: That was also the day ---
- 6 Q: Hang on a second. Go ahead.
- 7 A: I was saying that was also when it was brought
- 8 to my attention about the wall that the intent
- 9 of the stakes was to say centerline of wall.
- 10 Q: Okay. How did you find that out?
- 11 A: Just from conversation with Joey.
- 12 Q: Okay. So -- 'cause, I think you might have made
- 13 this point earlier, but the stakes say five foot
- 14 offset to the face of the wall.
- 15 A: Yes.
- 16 Q: And did Joey told you it was supposed to be to
- 17 the center line? That was the stake by the
- 18 surveyor?
- 19 A: Yeah. He was supposed to stake centerline of
- 20 wall.
- 21 Q: Okay. That means you're off by how much? If
- 22 you're safety first, sorry.
- 23 A: Well, it's an assumed measurement because we
- 24 don't know what -- he considered the wall
- 25 thickness.



1 Q: Okay.

2 A: If you assume there's a block, it would be six
3 inches.

4 Q: Okay. All right. Did this -- when Joey Goff
5 measured that wall should have -- the hub was
6 actually should have had a three and a half foot
7 offset at this critical corner, is that why you
8 believe that the stakes in this corner were
9 erroneous by saying five feet instead of three
10 and a half feet?

11 A: Yes.

12 Q: Okay. And that puts the wall how much closer to
13 the curb than it should have been?

14 A: Roughly a foot and a half.

15 Q: All right.

16 A: It was also during that meeting where I think
17 the reasonable information when Joey called me,
18 or James called me, that John Goff was the one
19 that discovered the second wall was inside the
20 curb line. And once we got them sited and we
21 started at the -- at station 10+00 and found out
22 that the wall was like eighteen inches outside
23 the curb. And Joey got aggravated at John
24 because it wasn't what he said it was.

25 Q: He said it was -- the wall was actually inside



1 the curb and it wasn't?

2 A: Right.

3 Q: Okay. And I think we've seen from the as-built
4 drawings that it's substantially outside the
5 curb; is that correct?

6 A: Right.

7 Q: You were asked questions about a lot of
8 different items related to the location of the
9 wall and your communications early in this case
10 by Mr. Robinson. I want to show you a letter --
11 do you recognize this letter? Do you recognize
12 this letter?

13 A: Yes.

14 Q: Okay. What is this letter?

15 A: It's a letter that my initial attorney wrote --
16 Albert Pierce wrote to Mr. Robinson initially.

17 Q: Okay. Does it go into the reasons you think you
18 did right, that you put the wall in the right
19 place and that kind of outlines what the
20 surveyor's mistakes were?

21 A: Yes.

22 Q: All right. It addressed the three and a half
23 foot issue at those critical corners?

24 A: Yes.

25 Q: And does the fact that the stakes were not in



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1 the correct place?

2 A: Yes.

3 Q: All right. I'd like to move to introduce this
4 as Plaintiff's Exhibit Seven.

5 MR. ROBINSON: May we know the date of that letter?

6 MR. GOODWYN: July 1st, 2015.

7 THE COURT: Mr. Robinson?

8 MR. ROBINSON: No objection.

9 THE COURT: Okay.

10 (Plaintiff's Exhibit Number Seven was marked for
11 identification purposes.)

12 Q: You answered questions on cross about the wall
13 failure and the erosion, that big rain that you
14 believe caused some erosion on the outside of
15 the wall. That kind of, to me at least, begs
16 the question, all right, well, how do you keep
17 rainwater out from doing that on the finished
18 product?

19 MR. ROBINSON: Objection, Your Honor. I don't think
20 that's fair to redirect on the cross.

21 THE COURT: Okay, well why is it not fair? Is it
22 new matter?

23 MR. ROBINSON: I believe it's new matter, yes..

24 MR. GOODWYN: He asked him lots of questions about
25 that erosion.



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1 THE COURT: I was going to say -- objection
2 overruled.

3 Q: Go ahead.

4 A: The best way to protect it is you have a swale
5 behind it to keep the water away from the wall
6 because anytime water can get to the wall it's
7 settin up for a bad situation.

8 Q: So when you say a swale, do you mean if this
9 (indicating) is the top of the wall, this
10 (indicating) is the high side and this
11 (indicating) is the low side, to have a little
12 swale here so the water runs away from the wall?

13 A: Yeah. You always want the dirt sloped away from
14 the wall.

15 Q: All right.

16 A: Typically the back of that they -- you're gonna
17 have a ditch or an impression so the water runs
18 away from the wall and runs down away from it.

19 Q: All right. Now at this point during
20 construction, was there a swale or was the dirt
21 on the high side higher than the wall causing
22 the rain water to run towards it?

23 A: It was both. It was the dirt behind the wall
24 was higher than the backfill outside the grid
25 zone.



1 Q: Then ---

2 A: And then ---

3 Q: Go ahead, sorry.

4 A: And there was a swale depression on the back
5 side of that that ran down beside of the wall.

6 Q: Okay. Who's responsibility during the
7 construction is it to make sure that the level
8 of the dirt on the high side is lower than the
9 wall, so no water ---

10 MR. ROBINSON: Objection. Objection, Your Honor.

11 THE COURT: On what grounds?

12 MR. ROBINSON: First of all it's leading, and second
13 of all there's absolutely -- that has nothing to
14 do with any cross-examination I had.

15 MR. GOODWYN: You had a lot.

16 THE COURT: You have two objections. The fact that
17 it's a leading question is sustained. The fact
18 that it's again new matter is overruled.

19 MR. GOODWYN: All right. I'll try to rephrase the
20 question.

21 THE COURT: All right. As you know, leading
22 questions are yes, no questions. And it's
23 technique that's allowed on cross-examination
24 but not necessarily allowed on direct
25 examination.



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1 MR. GOODWYN: Okay. My question was who is
2 responsible for maintaining the height of that
3 during construction? That doesn't suggest an
4 answer.

5 THE COURT: Ask a direct question: who did it, or
6 who is responsible.

7 MR. ROBINSON: Your Honor, the original question he
8 asked stated some facts that are not in
9 evidence.

10 THE COURT: Okay.

11 MR. ROBINSON: Okay. I find that to be ---

12 MR. GOODWYN: Well I'll withdraw that previous
13 question and just go with this question.

14 THE COURT: You can just ask another question.
15 Okay.

16 Q: Now who is responsible for maintaining the
17 height of that dirt on the high side of the wall
18 during the construction of the wall.

19 A: As long as we're there we, you know, I have a
20 certain responsibility that I keep the dirt
21 higher than the backfill behind the wall as far
22 as protecting our work. What we do when we
23 leave the job as far as protection of the wall
24 would fall on the site contractor.

25 Q: All right. So who would be to blame, if



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1 anybody, for the rain water getting down in the
2 wall causing that erosion?

3 A: That would have been Coogler.

4 Q: Okay. All right. Because -- are you saying
5 they were responsible for maintaining that --
6 the level of that dirty?

7 A: Yeah. I took the initiative and cut the initial
8 swale. And there was continual backfill back
9 behind the wall. That's why on our back chart
10 it said to the last four feet. Because that
11 last little bit; his guy's back field.
12 Basically the ditch that we cut was filled in.
13 And so it's sittin next to a wetland so the
14 whole site's sloped down to that. So, you know,
15 a lot of that water was channeled down towards
16 the wall.

17 Q: All right. So if anybody's responsible for the
18 wall failing like it did, who are you saying is
19 responsible for that?

20 A: Coogler.

21 Q: Okay. And I understand, I mean, your testimony
22 has been that that portion of the wall that was
23 -- that failed, that was not given to you at
24 least as the reason for the failure of the wall?

25 A: Correct.



1 Q: And in this case -- you received a counterclaim
2 in this case, didn't you?

3 A: Yes.

4 Q: And was there anything in the counterclaim
5 suggesting that the -- that portion of the wall
6 failing had anything to do with the nature of
7 their counterclaim?

8 A: No.

9 Q: What was the only reason stated in their
10 counterclaim?

11 A: The wall was in the wrong location.

12 Q: All right. Does that -- is that what you came
13 to court today prepared to defend against?

14 A: Yes.

15 Q: Okay. All right. All right. You had some
16 questions asked during cross-examination related
17 to the compaction issue. I wanted to show you
18 this e-mail. Do you recognize this e-mail?

19 A: Yes.

20 Q: What's the date of the e-mail?

21 A: February 24th.

22 Q: Who is the sender?

23 A: I am.

24 Q: Who were the recipients?

25 A: James, Chris and Joey.



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1 Q: Okay. And what's the nature of the e-mail?
2 What are you trying to communicate to those
3 recipients?

4 A: Let me take second just to read it.

5 Q: Yeah, yeah.

6 A: This was just recounting the conversation that
7 we had ---

8 MR. ROBINSON: Before we go any further, Your Honor,
9 I would object to this. It is -- I had
10 requested -- this is a recap of conversations
11 that Mr. Young says he had with other people who
12 aren't here. This is hearsay on its face, and
13 I object to it for that purpose -- for that
14 reason.

15 THE COURT: Okay. Mr. Goodwyn?

16 MR. GOODWYN: I think both. It's an e-mails
17 communication between the two and it goes to
18 show what the nature of their discussions and
19 negotiations with -- was ---

20 THE COURT: Who are parties to the e-mail.

21 MR. GOODWYN: It's these two plus others.

22 MR. ROBINSON: What he's talking about in here ---

23 THE COURT: Yeah.

24 MR. ROBINSON: --- Your Honor, is he's making
25 statements for the truth of the matter asserted



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1 of a conversation that he had with Joe Smith,
2 the conversation that he had with the owner, not
3 a conversation he had with Mr. Coogler or Mr.
4 Huggins or anybody else who's in the courtroom
5 here today. I can't cross-examine this piece --
6 this document.

7 **THE COURT:** Mr. Goodwyn, why do you need to this,
8 what are you trying to prove?

9 **MR. GOODWYN:** It goes to show what the conversations
10 between the parties were. What he was
11 asserting; what they were asserting; what the
12 other parties were negotiating. This was kind
13 of what the ongoing negotiations were. What
14 they were had understanding between themselves.

15 **MR. ROBINSON:** Not the parties, Judge.

16 **MR. GOODWYN:** This is between the parties.

17 **MR. ROBINSON:** No, it's not between the parties.
18 This is a conversation he's recounting that he
19 had with other people.

20 **THE WITNESS:** It was the same guy that you brought
21 up about NRCM guidelines.

22 **MR. GOODWYN:** There was testimony about that. About

23 ---

24 **MR. ROBINSON:** There was no objection to that.

25 **THE COURT:** --- about those guidelines.



1 MR. GOODWYN: But he opened the door to this. I
2 mean, if he's gonna ask about the guidelines of
3 the communications between the guy -- this is
4 ...

5 MR. ROBINSON: Your Honor, opening the door is
6 opening the door to the subject. This is
7 hearsay on its face and ---

8 THE COURT: And I'm wracking my brain because, you
9 know, hearsay is excluded but there are like,
10 what, 24 -- how many exceptions are there?

11 MR. GOODWYN: A lot.

12 MR. ROBINSON: There are several exceptions to that
13 Judge. The problem is I don't think this fits
14 under any of them.

15 MR. GOODWYN: I'm not offering for the truth of the
16 matter, I'm saying this is what their
17 negotiations were. This is what their state of
18 mind was at that time.

19 THE COURT: Objection overruled.

20 Q: All right. What part -- what were you saying to
21 Joey at this time?

22 A: This letter was to James, and was just recapping
23 a conversation that I had with Andy Whitfield of
24 S&ME.

25 MR. ROBINSON: That's my objection, Your Honor.



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1 That's hearsay.

2 MR. GOODWYN: Raised and ruled.

3 THE COURT: Now hold on a second. What do the

4 letters stand for again?

5 MR. ROBINSON: That's S&ME.

6 MR. GOODWYN: It's the following engineer.

7 MR. ROBINSON: It's the engineer who came on later.

8 I guess they were ---

9 MR. GOODWYN: Compaction studies.

10 MR. ROBINSON: --- soil compaction inspection.

11 MR. GOODWYN: That's not the first time I've heard

12 about them in this case.

13 MR. ROBINSON: They're not our guy.

14 MR. GOODWYN: No. That's what I'm saying, he asked

15 a lot of questions about that. That's why I

16 wanted to get into all this.

17 MR. ROBINSON: Your Honor, I didn't any questions

18 about SM&E.

19 MR. GOODWYN: Though there's testimony. You elicited

20 some ---

21 MR. ROBINSON: The only think I asked about SM&E --

22 excuse me, that could be -- I didn't mention

23 SM&E, but the only thing I can -- was to where

24 they took the compaction test. That's it. I

25 didn't ask what their opinion was ---



1 THE COURT: Hold on a second.

2 MR. ROBINSON: --- didn't ask for any documentation
3 from him. And what I did ask was not objected
4 to. I'm objecting to this on the hearsay
5 grounds.

6 THE COURT: Objection overruled.

7 A: I was just recapping the conversation telling
8 him, you know, the owner had given Joey and
9 James certain criteria on reasoning why they
10 wanted the wall to come down. They first said
11 it was for the compaction issue, the soils and
12 the footers, that they still wanted the wall to
13 come down. SM&E agreed to sign off on the
14 footers, the compaction and the soil material
15 use. I offered to pay SM&E to redesign the wall
16 because they said they didn't trust Joe Smith's
17 design. In order for SM&E for me to pay him to
18 redesign the wall he said that the owner had to
19 turn down Joe Smith who was the original
20 engineer on his redesign first and then he would
21 get involved. I asked -- I went on to ask Andy,
22 I said, Andy, in your opinion what would make
23 the wall have to come down if you're employed to
24 do the redesign. He said if SM&E finds that the
25 wall design is absolutely wrong, then the wall



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1 would have to come down. If the wall is close
2 on design, he said we might have to add grid at
3 the top of the wall and it would not have to
4 come down. At that time I verified and asked
5 him three different times, if the design is
6 suitable, the wall can stay. The answer was
7 yes. If the design is questionable, then we
8 redesign from the current elevation upward and
9 the wall stays. If the wall design is totally
10 unacceptable then the wall has to come down.
11 Just to verify, nothing we did in the
12 construction would make the wall have to come
13 down. The answer was correct. I said it seems
14 to me that with this information the owner still
15 wants the wall to come down, that they should be
16 responsible for it. And I'm requesting from the
17 owner their reasoning behind their position of
18 the wall removal. And I said if the wall had --
19 they want the wall to be removed because they're
20 not comfortable with the wall engineer, then
21 that would be on the owner, that Coogler had
22 issued stamped drawings by Joe Smith and the
23 owner approved those drawings by that engineer.
24 Q: Okay. That's part of what they led you to
25 believe that it was really Edward Rose just not



1 liking Joe Smith on this one job?

2 MR. ROBINSON: Objection, Your Honor.

3 Q: And that's the real reason the wall was asked to
4 be torn down?

5 THE COURT: Hold on one second, please. What
6 grounds?

7 MR. ROBINSON: I withdraw the objection. Go ahead.

8 THE COURT: Okay. You can answer the question, Mr.
9 Young.

10 A: Yes. It made me believe by the repetitive
11 action that we would take to try to keep the
12 wall in place, they kept comin back and they'd
13 come up with a different reason. And there were
14 some other reasons but I'm guessin we'll get
15 into that.

16 Q: Well, that -- I think we've already gotten into
17 it in the direct testimony as to those other
18 issues.

19 Let me ask you -- what was the date of that e-
20 mail again?

21 A: February 24th.

22 Q: I'm gonna go ahead and move to admit this as
23 Plaintiff's Exhibit Seven -- Eight.

24 THE COURT: Mr. Robinson?

25 MR. ROBINSON: No objection -- I mean, I still



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1 object.

2 THE COURT: I understand. I understand.

3 MR. ROBINSON: Is that Eight or is that Seven?

4 MR. GOODWYN: Eight.

5 THE COURT: You want to note a continuing objections
6 so ---

7 MR. ROBINSON: Yeah.

8 THE COURT: I mean I'll -- I don't know if he's
9 gonna mention it again, but he ---

10 MR. GOODWYN: No.

11 THE COURT: Okay. You're not? Okay. Well, I was
12 gonna say you don't have to jump up every time
13 he mentions it.

14 MR. ROBINSON: Thank you..

15 (Plaintiff's Exhibit Number Eight was marked for
16 identification purposes.)

17 Q: All right. Again, you were asked a lot of
18 questions obviously about the wall that you --
19 why you thought it was right. Do you recognize
20 this letter?

21 A: Yes.

22 Q: What's the date of it -- or are you the author?

23 A: Yes.

24 Q: And who are you sending it to.

25 A: To James.



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- 1 Q: James Coogler?
- 2 A: James Huggins.
- 3 Q: Huggins. I'm sorry. All right. And what's the
- 4 date of the letter?
- 5 A: February 13th.
- 6 Q: 2015?
- 7 A: Yes.
- 8 Q: All right. What are you -- what's the gist of
- 9 this letter?
- 10 A: Just kind of pleadin my case with James, not per
- 11 se to plead my case with Coogler, but to give
- 12 him information to plea our case against Edward
- 13 Rose.
- 14 Q: Okay. And, I mean, you've testified and we can
- 15 see that that's in fact that they did, didn't
- 16 they?
- 17 A: Yes.
- 18 Q: Okay. Was it -- did -- was it your
- 19 understanding that Coogler agreed with your
- 20 position about the wall being able to stay and
- 21 being workable as is?
- 22 A: Yes.
- 23 Q: If Coogler had agreed with you to -- what was
- 24 the reason you were told as to why they didn't
- 25 pay you?



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1 A: They were -- they told me that the owner has not
2 payed them so therefore I would not get paid.

3 Q: Did you ask Coogler why they didn't -- why they
4 didn't just pay you and then go sue Edward Rose?

5 A: Yes.

6 Q: And what were you told?

7 A: I asked the question, you know, why can't we
8 just be paid and then you can sue Edward Rose.
9 And the response was that Edward Rose owes us
10 about \$800,000. And I can't -- they're gonna
11 hold that money ransom until this wall is fixed.

12 Q: Okay. All right. I don't think I have anything
13 else, Your Honor.

14 THE COURT: Any re-cross?

15 MR. ROBINSON: Just a little bit, Your Honor.

16 MR. YOUNG - RECROSS-EXAMINATION BY MR. ROBINSON:

17 Q: You mentioned something about the swath and
18 centerline of the wall instead of face of the
19 wall? That issue arose long after you were done
20 with the wall, right?

21 A: Yes.

22 Q: In Plaintiff's Exhibit Number Seven, your lawyer
23 only knows what he told you; is that right?

24 A: Yes.

25 Q: Okay.



1 MR. GOODWYN: I'm gonna object as to getting into
2 what he might have told his lawyer; that's
3 confidential.

4 MR. ROBINSON: Well, Your Honor, first of all he's
5 answered the question, but more importantly
6 that's an answer to his lawyer to me stating
7 certain facts. Lawyers don't pull the facts out
8 of the clouds, somebody has to tell them.

9 MR. GOODWYN: He may have had other sources.

10 THE COURT: Without telling me what he -- that he
11 said anything that may be privileged or
12 confidential, why do you need this information?
13 Why do you need that answered?

14 MR. ROBINSON: Well, because he put Exhibit Number
15 Seven in to try to bolster this notion that
16 somehow or other this -- the surveying was
17 incorrect. And he put that in to show that we
18 were told that. Well, we weren't told that
19 until July 17 and that that information came
20 from him. That's why.

21 THE COURT: Okay. Your question was, I think, you
22 only know what -- your lawyer only knows what
23 you've told him. And your question was, I
24 think, you only -- your lawyer only knows what
25 you've told him?



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1 MR. ROBINSON: Correct.

2 MR. GOODWYN: And that calls for speculation, too.

3 MR. ROBINSON: Well, let me rephrase the question.

4 MR. GOODWYN: How does he know his lawyer didn't
5 call somebody else or have him go up there?

6 THE COURT: Sustained. Sustained.

7 MR. ROBINSON: Let me rephrase my question.

8 Q: Exhibit Number Seven, Mr. Young, this letter
9 from your lawyer to me, are there any facts in
10 that letter that he sets forth?

11 A: Yes.

12 Q: Okay. And facts that he sets forth, those came
13 from you didn't they?

14 MR. GOODWYN: Objection. He's asking about
15 confidential communication between the attorney
16 and his client.

17 THE COURT: Maybe there's some confusion. Is the
18 letter from ---

19 MR. GOODWYN: It's from his attorney to Mr. Robinson.

20 MR. ROBINSON: Correct. Now let me ---

21 THE COURT: I understand why -- are you -- I mean,
22 he has the letter and it was written to him and
23 it talked about facts that had been -- I assume
24 had been also presented in the Plaintiff's case
25 here.



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1 MR. GOODWYN: They happened -- I think what he's
2 trying to say is that he only got the facts from
3 him. He's trying to get -- trying to find out
4 what he told his lawyer. Where the lawyer got
5 the facts of the letter, I don't think that's
6 relevant to this case at all. He got the facts
7 from somewhere, but he can't get into what they
8 talked about.

9 MR. ROBINSON: Actually, Your Honor, that's a
10 misstatement of the attorney-client privilege.
11 Attorney-client privilege applies to information
12 given to the lawyer or from the lawyer to the
13 client, that is confidential. Facts are not
14 confidential. Facts given to the lawyer by his
15 client are not protected by attorney-client
16 privilege and that's why I asked the question.

17 MR. GOODWYN: But this is a letter that was sent to
18 you though.

19 MR. ROBINSON: Correct.

20 THE COURT: And now if it was privileged why would
21 you send it to the other side's lawyer?

22 MR. GOODWYN: I'm not saying that it's privileged --
23 I'm sayin what he's tryin to say is, all the
24 facts in there only came from you -- came from
25 you and you only. A, is speculation. He doesn't



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1 know that the lawyer didn't call other people to
2 find out other facts or have other documents or
3 other resources or maybe talk to an expert and
4 got some information to put in the letter.

5 THE COURT: Objection overruled.

6 Q: To you knowledge, S&ME was never the design
7 engineer on any of these walls, was it?

8 A: I don't know about the -- after I left.

9 Q: Okay. But for Wall H, S&ME was never the design
10 engineer was it?

11 A: No.

12 Q: So S&ME's take on the situation or their
13 thoughts about whether or not the wall should
14 come down really are irrelevant, aren't they?

15 A: No, they were the -- were consulted by Edward
16 Rose.

17 Q: Well they were consulted by you. I don't see
18 anything that says Edward Rose is consulting
19 them. Do you have something about that?

20 A: Who was the -- I mean, the first phone call that
21 was made when the wall failed was to S&ME, it
22 wasn't to me.

23 Q: How do you know that?

24 A: Ryan Gallagher.

25 Q: Someone told you that, right?



1 A: Yep, Ryan -- Ryan himself told me.

2 Q: Okay. All right. And you don't know what S&ME
3 knew, do you?

4 A: All I know is the conversation that we had.

5 Q: And in February of 2015, you didn't yet know
6 that the wall was in the wrong place, did you?

7 A: No.

8 Q: In fact, your letter doesn't mention that, does
9 it?

10 A: No.

11 Q: Okay. That's all I've got, Judge.

12 THE COURT: Okay.

13 MR. GOODWYN: Nothing further?

14 THE COURT: Okay. Mr. Young, sometimes in non-jury
15 cases the judge will ask questions. And I think
16 I made it clear yesterday that construction law
17 is not my strength. I'm not an engineer. I was
18 actually a history major, so. But I'm gonna
19 ask, and I've already told the lawyers I'm going
20 to probably ask for proposed orders, I'm not
21 going to rule from the bench tomorrow when we
22 finish, ask them to write a proposal. And it's
23 not going to be a brief, it's going to be an
24 order that if they had their druthers. I just
25 read and sign it and rule in favor for one side



1 or the other. However, I'm gonna ask for a
2 separate document, a brief on this issue whether
3 or not there actually was a contract. Because
4 I'm looking at the Complaint, and Mr. Young,
5 that's why I'm going to ask you some things
6 about the Complaint.

7 **MR. GOODWYN:** I think -- I thought we already
8 stipulated that it was a contract.

9 **THE COURT:** I know you did, but I mean that -- I may
10 not accept that depending on what the briefs
11 say.

12 **MR. ROBINSON:** Not a problem, Judge.

13 **THE COURT:** The reason I ask is because I'm looking
14 at what was handed up and marked Exhibit One,
15 the contract; and I'm looking at that and then
16 I turn to Exhibit Thirty-Seven, is the contract
17 between Rose and Coogler. And it looks
18 completely different. At the top of the page,
19 for example, in Defendant's Exhibit Thirty-Seven
20 says contract. At the top of the page in
21 Defendant's Exhibit Number One, it says bid and
22 proposal. And I need to know -- and also, I
23 know I have to go back and look at myself,
24 that's why I was looking at my phone on, what
25 constitutes a real estate contract -- or not a



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1 real estate, a construction contract in South
2 Carolina. And I was gonna ask you some
3 questions about the Complaint. It says in
4 paragraph 4 of the Complaint, and I'm not
5 badgering, I just want to make sure I have the
6 facts straight, and hopefully I'll have the law
7 straight by the time I can make a decision. It
8 says on or about August 1st, 2014, Plaintiff,
9 that's you, entered into an agreement with
10 Defendant, that's them, for the
11 construction/installation of two retaining walls
12 at Killian Lakes. Okay. That date, y'all had
13 an agreement.

14 A: Yes sir. So there's another document where we
15 -- the person that worked in James' position
16 before James, he signed that document. And that
17 was based on the original 434 square foot price.
18 After that -- after that ---

19 Q: And after that -- after that who is ---

20 MR. ROBINSON: He's testifying about it.

21 THE COURT: Which exhibit is it?

22 MR. GOODWYN: It hasn't been made yet. So this was
23 the original proposal, but I mean ---

24 THE COURT: Okay. Okay, you said you had another
25 doc- -- well, let me look at that. Let's see



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1 what it says. It's not in evidence but ---

2 MR. GOODWYN: We can put it in evidence.

3 THE COURT: This also says bid and proposal.

4 THE WITNESS: There's another one that has a
5 signature on it.

6 THE COURT: Okay. Well no, you don't have to, I
7 mean ---

8 THE WITNESS: Okay.

9 THE COURT: I'm not gonna rule, again, on the record
10 and I know rule from the bench. You can hold on
11 to this ---

12 THE WITNESS: Okay.

13 THE COURT: --- because it's not in evidence. But
14 it's a proposal, it doesn't say contract at the
15 top. And the question is what were the terms of
16 the agreement? Do you remember the terms or is
17 it written down somewhere that's not in
18 evidence? Because I see what the proposal was.

19 MR. GOODWYN: Maybe the question would be was the
20 bid and proposal accepted as is?

21 THE COURT: Well, no, that's not -- I want to see
22 something that everybody signed and agreed this
23 is what I'm gonna do, this is how much you're
24 gonna pay me, et cetera, et cetera. Mr.
25 Robinson?



1 MR. ROBINSON: May I try to shed some light on this?

2 THE COURT: Please. Please. If you can help.

3 MR. ROBINSON: I can get this testimony from client's
4 but this may be easier. In the construction
5 industry -- let me back up -- I spent 23 years
6 in the construction as to manage construction
7 work ---

8 THE COURT: Right.

9 MR. ROBINSON: --- so in the construction industry,
10 one of two things happens. Well, one of three
11 things happen. On bid day somebody calls up the
12 estimator for the contractor and says my price
13 for such and such a work is so and so.
14 Contractor writes it in his bid, turns it in,
15 gets the job, calls the sub back and says you've
16 got the job, go to work. That's one way it
17 happens. The other way it happens is the
18 subcontractor sends in a proposal and says this
19 is what I'll do the work for. Contractor gets
20 the job, calls the sub and says got your
21 proposal, go ahead and do the work. Third thing
22 that happens is, subcontractor sends in a
23 proposal with some signature lines on it. He's
24 already signed.

25 THE COURT: Uh-huh.



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1 MR. ROBINSON: Contractor signs it, sends it back to
2 him. Got it? What you're lookin for is a
3 signed contract. The fourth thing that happens
4 is the sub sends in his proposal, the contractor
5 says I don't like the terms of your proposal.
6 Here's my subcontract with the payment terms and
7 some other things in it, and the boilerplate
8 that I want, you sign this one, okay? Where we
9 are is in the second category. There's a
10 proposal -- written proposal sent in, it's never
11 been signed, but both parties have agreed that
12 that's the contract. Well, I'll write that up
13 in a brief for you and give you the law on it,
14 but that's where we are.

15 THE COURT: Well, maybe, again, please bear with me
16 because it's, you know, I don't know
17 construction, but ---

18 MR. ROBINSON: Construction is an esoteric subject to
19 somebody who doesn't do it.

20 MR. GOODWYN: And contracts don't have to be written.
21 They can be oral, or if there's a writing to
22 evidence as to meeting of the minds, then that's
23 the terms of the contract. I think that's what
24 they're saying here, is that that writing is the
25 meeting of the minds. Under South Carolina



1 State Law nobody requires certain terms to be in
2 construction contracts?

3 MR. ROBINSON: Yes, they do. And these terms are in
4 there.

5 THE COURT: Are in?

6 MR. ROBINSON: Are in that proposal.

7 THE COURT: Oh, in the bid and proposal?

8 MR. ROBINSON: Yeah.

9 THE COURT: Okay. So ---

10 MR. ROBINSON: And since the proposal was acted on
11 by both parties it became the contract. There's
12 no -- we don't ---

13 THE COURT: Okay.

14 MR. ROBINSON: --- the parties are not disputing that
15 that's the contract but will give you a ---

16 THE COURT: Is there a case that says that, or ---

17 MR. ROBINSON: Excuse me.

18 THE COURT: Has the Supreme Court ruled on that
19 issue or -- or everybody knows it?

20 MR. ROBINSON: I couldn't tell you the answer to
21 that.

22 THE COURT: Or it's just general common knowledge
23 according to the law.

24 MR. GOODWYN: I think it's common knowledge, I mean
25 ---



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1 MR. ROBINSON: I think it's more of a ---

2 MR. GOODWYN: --- we agreed, they agreed.

3 THE COURT: To have contract?

4 MR. GOODWYN: Exhibit One is the terms.

5 THE COURT: Okay.

6 MR. ROBINSON: I'll put this in the brief, Judge,
7 but Exhibit One is the offer, and by their
8 manifestation of paying and of letting him do
9 the work without any document going back to him
10 objecting to the terms or suggesting other
11 terms, they have accepted the terms that he's
12 proposed to them.

13 THE COURT: Okay.

14 MR. ROBINSON: So that's where we are, but I'll give
15 you a brief.

16 THE COURT: Yeah, but I -- Mr. Goodwyn, you too,
17 okay?

18 MR. GOODWYN: Well, I mean, I think my ---

19 THE COURT: We all can work together?

20 MR. GOODWYN: ---- brief will mimic his. I think
21 we're on the same page on that, so.

22 THE COURT: Okay. Okay. And let me be sure I have
23 the facts straight, there are two walls, right?

24 THE WITNESS:

25 THE COURT: The first wall was okay?



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1 THE WITNESS: Yes.

2 THE COURT: The second wall was not okay as far as
3 somebody was concerned?

4 THE WITNESS: Yes, sir.

5 THE COURT: And you were paid -- you're not paid for
6 the second wall?

7 THE WITNESS: No, sir.

8 THE COURT: And you weren't paid in full for the
9 first wall?

10 THE WITNESS: Correct.

11 THE COURT: All right. Now you testified earlier
12 when you first got on the stand that you've been
13 doing this 12 years, been building retaining
14 walls 12 years?

15 THE WITNESS: Yes, sir.

16 THE COURT: And you've had to tear them down before,
17 though; is that correct?

18 THE WITNESS: Pardon me?

19 THE COURT: You've had to tear down one you've
20 already built before?

21 THE WITNESS: Yes, sir.

22 THE COURT: All right. How often does that happen,
23 or did that happen? Well let me tell you why
24 I'm asking, I want to know when you had to tear
25 it down how'd you get paid? What happened after



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1 that?

2 **THE WITNESS:** I can speak for instances in dealing
3 with Joey, 'cause I've done more work, more
4 retaining walls for Joey than I have anybody
5 else. In certain instances where we all know
6 that employees can space out sometimes, and
7 sometimes employees on equipment will get too
8 close to a wall. And when you get too close to
9 a wall it'll push a wall out. It'll take it out
10 of alignment and bend it out. Almost every time
11 that we've done that, Joey would pay us to take
12 it down and put it back. I can think of another
13 instance where we had a wall wash out. Where
14 storm water got to the wall and we made the
15 offer for the general contractor to take the
16 wall down and we would put it back up. We did
17 that. The wall washed out a second time. We
18 offered if they took the wall down we would put
19 it back a second time. The wall washed out a
20 third time. At this point, we told them that
21 you can take the wall down but we want to be
22 paid to put the wall back up and they didn't
23 want to pay us and ended up gettin somebody else
24 to put the wall back up. So any time -- I can
25 think of one instance where we were doin a job



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1 near Joey's shop called Marina Bay, and I can't
2 remember his lay-out guy that was workin for
3 him, but it was around the edge of a marina.
4 And all stakes, in general, always are
5 consistent. Meaning if they start with a five
6 foot offset, it stays with a five foot offset.
7 In this particular case, the stakes went from a
8 five foot to a two and a half to a four and a
9 half to a five and a half. Reason being was
10 because trees were in the way of putting a five
11 foot offset and the wall was pretty long. In
12 that case, it was discovered that the wall was
13 in the wrong place. That was completely our
14 fault. There were stakes every ten feet.

15 THE COURT: Now, you're not talking about this case,
16 you're talking about ---

17 THE WITNESS: No, so this was another -- that's
18 another wall we did for Joey.

19 THE COURT: Okay. The record has to be clear on
20 that, so, okay, go ahead.

21 THE WITNESS: But basically we found out that it was
22 our fault because we misread the stakes and so
23 we told Joey, we took the wall down and put it
24 back up.

25 THE COURT: And then you got paid for that?



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1 THE WITNESS: Well we didn't get paid -- we got paid
2 for building the wall one time. We didn't get
3 paid to take the wall down and put it back up.
4 We just got paid the first time.

5 THE COURT: And please bear with me, I don't know
6 whether you said what I'm about to ask you
7 about, or whether one of the attorneys said it,
8 but I thought I heard at some point that you
9 refused to take down the wall in this case, the
10 second wall. Is that accurate or did I hear
11 something wrong or one of the attorneys said it
12 and not -- it didn't come over the witness
13 stand, it came from one of them?

14 THE WITNESS: Well, what we agreed to was is that I
15 was wantin Joey to take down -- there was seven
16 courses that were affected by the water. There
17 were seven courses, so we -- I said if -- the
18 way it was presented to me was you've got to be
19 here tomorrow to take the wall down or we're
20 gonna do it and we're gonna back charge you.
21 Well, I didn't agree with the wall havin to come
22 down at that point. I knew the seven courses
23 eventually had to come down but not to react
24 rash because we need to figure out what
25 happened.



1 THE COURT: Now this is the wall that partially
2 failed?

3 THE WITNESS: Yes. The seven courses that pulled
4 back.

5 THE COURT: You say seven courses?

6 THE WITNESS: Seven courses, from the top it was
7 seven rows of brick ---

8 THE COURT: Okay.

9 THE WITNESS: --- that basically, if you're lookin at
10 the wall, the seven courses, it's almost like
11 the wall broke.

12 THE COURT: Okay.

13 THE WITNESS: You know, it's just like a hinge
14 point.

15 THE COURT: But did I hear you say that or did I
16 hear the lawyers say that you refused to take it
17 down?

18 MR. GOODWYN: Mr. Robinson said that earlier.

19 THE COURT: Mr. Robinson?

20 MR. ROBINSON: I don't think it was testimony, that
21 was just ---

22 MR. GOODWYN: I believe, Your Honor, that there were
23 two questions, and he's answering one of them,
24 but it may not be the one you asked. The entire
25 wall was taken down and put back up. A portion



1 of the wall was taken down and never put back up
2 again because that's when they found out it was
3 in the wrong place. So I don't know which
4 question you're asking.

5 THE COURT: All right. Let me make sure I have the
6 facts straight. Which -- the first wall was
7 okay? The first retaining wall was okay?

8 THE WITNESS: Yes.

9 THE COURT: The second one was the one that was a
10 problem; is that the one where it had partially
11 failed?

12 THE WITNESS: Yes.

13 THE COURT: Okay.

14 THE WITNESS: On that wall they -- James called me
15 and said the owner wants the wall to come down.
16 You've gotta be here tomorrow to take the wall
17 down.

18 THE COURT: Yes, sir.

19 THE WITNESS: And at the time, you know, I went and
20 looked at it and determined that I felt like the
21 storm water, both Joe Smith and S&ME both said
22 storm water was the culprit. At that point I
23 went -- I don't remember whether I went back to
24 James or Joey, but I said if y'all take the wall
25 down seven courses just like I'd done on the



1 other part, I said if you take it down seven
2 courses I'll build it back up.

3 THE COURT: Uh-huh.

4 THE WITNESS: And then I think at that point they
5 wanted five more courses taken down, the owner.

6 THE COURT: Uh-huh.

7 THE WITNESS: And I think it was proposed to me, you
8 know, you need to be here tomorrow to take the
9 wall down and I said, you know, there again, if
10 y'all take the wall down the additional five
11 courses I'll build the 12 courses back up.

12 THE COURT: So you didn't refuse to take it down?

13 THE WITNESS: No, sir.

14 THE COURT: Okay.

15 MR. GOODWYN: Your Honor, make sure you get the
16 facts correct. When the whole wall came down,
17 did he refuse to take it down?

18 THE WITNESS: Yes, sir. When the whole wall came
19 down I refused to.

20 THE COURT: Uh-huh.

21 THE WITNESS: There was a last ditch effort that I
22 proposed with them because they were worried
23 about the wall being unsafe. I said at that
24 point, I said if they take the wall down to
25 eight, ten courses from the bottom, which is



1 basically over half the wall, I said I will
2 provide the labor and equipment and build the
3 wall back up from there to back to the top. And
4 at that point is when that offer was refused and
5 -- I can't remember the time line of when this
6 was going on compared to when we were -- I was
7 talking to Joe Smith about whether to walk or
8 stay or not. Basically, they came back and said
9 it doesn't matter anymore, the wall's in the
10 wrong place. It needs to come down.

11 THE COURT: This was the second wall?

12 THE WITNESS: Yes, sir.

13 THE COURT: Okay. Now you've been paid something
14 from them; is that correct? You've been paid
15 something for the first wall?

16 THE WITNESS: Yes, sir.

17 THE COURT: And your Complaint says you weren't paid
18 in full for the first wall?

19 THE WITNESS: Correct.

20 THE COURT: All right. Why was that? Was there any
21 special reason?

22 THE WITNESS: I'm not sure why -- it was work that
23 was completed on the first wall that we built
24 along with the bill for this wall.

25 THE COURT: Because one of their defenses was that



1 they've already paid you in full. They paid you
2 what they owe you is basically what they're
3 sayin. Is that accurate, Mr. Robinson?

4 MR. ROBINSON: Yes, Your Honor.

5 THE COURT: Yeah.

6 MR. ROBINSON: Because we were gonna counterclaim
7 that it exceeds whatever he was owed, so we paid
8 him what he was owed.

9 THE COURT: Okay. And I'll -- Exhibit One, which is
10 styled contract, I didn't have issues with. You
11 also give a warranty?

12 THE WITNESS: Yes, sir.

13 THE COURT: Okay. Did anybody claim breach of
14 warranty for the second wall having to come
15 down, or ...

16 THE WITNESS: No, sir. What that warranty is,
17 that's basically a warranty of materials.

18 THE COURT: I see.

19 THE WITNESS: The material -- it would be kind of a
20 -- be it kind of a gray area because in this
21 particular case Joey bought all the materials.

22 THE COURT: But it says Design South shall warranty
23 all workmanship for a period of one year from
24 the date of installation provided all
25 installation terms and exclusions are met above.



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1 Are we -- I think we're looking at the same
2 document and -- but there is a paragraph above
3 that that says it's a warranty of the materials.
4 But the warranty information ---

5 THE WITNESS: I follow where you are now.

6 THE COURT: Yeah, yeah. It says that -- it says
7 they have a warranty of all workmanship as well
8 as materials.

9 THE WITNESS: Also if you look at number three ---

10 THE COURT: Yes, sir.

11 THE WITNESS: --- it says that we not warranty
12 segmental retaining walls that are flood prone
13 area, where the could be inundated with water.

14 THE COURT: Okay. And this was -- so nobody claimed
15 breach of warranty and the wall had to be taken
16 down.

17 THE WITNESS: No.

18 THE COURT: And that explained why -- that would
19 explain why you weren't paid what you say you're
20 owed for the second wall? Okay. All right.
21 Now lawyers hate when I ask questions of the
22 witness because I don't follow the law, so.
23 Thank you, sir, you can come down.

24 THE WITNESS: All right.

25 THE COURT: Watch your step coming down.



1 THE WITNESS: I just leave this up here?

2 THE COURT: Yes, sir. All the Exhibits need to stay
3 up there. All right, Mr. Goodwyn?

4 MR. GOODWYN: Yeah, I call Glenn Stewart. He's out
5 in the hall.

6 THE COURT: Okay. Y'all want to take a break before
7 we start that witness?

8 MR. ROBINSON: I'm fine, Judge.

9 THE COURT: Well I -- just a short break. A five
10 minute break.

11 (Off the Record from 2:30 p.m. until 2:43 p.m.)

12 COURT REPORTER: Please raise your right hand. Do
13 you solemnly swear and affirm that the testimony
14 you're about to give in this case will be the
15 truth, the whole truth and nothing but the
16 truth, so help you God?

17 MR. STEWART: I do.

18 COURT REPORTER: Thank you, sir.

19 MR. STEWART - DIRECT EXAMINATION BY MR. GOODWYN:

20 Q: Mr. Stewart, how old are you?

21 A: 55 years old.

22 Q: All right. And where are currently employed?

23 A: With the Engineering Design and Testing
24 Corporation in Cayce, South Carolina.

25 Q: Okay. What's your job out there?



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1 A: I'm the engineering manager as well as a
2 consulting engineer.

3 Q: Okay. What kind of degrees do you have? I'm
4 sure that you've gotten through high school; is
5 that fair to say?

6 A: Yeah. I'm originally from North Carolina and
7 went to college at North Carolina State
8 University and received a degree in civil
9 engineering in 1985, and then received Master's
10 Degree in Civil Engineering from Clemson in
11 1993.

12 Q: Okay. And tell the Court what you've done as
13 far as your employment history leading up to
14 your current position?

15 A: Okay. When I was in college I was a co-op
16 student for the Charleston Naval Shipyard in
17 Charleston, South Carolina. Essentially worked
18 in the production department, nuclear
19 engineering compartment, and when I graduated in
20 1985 I started working there as well. And so we
21 -- essentially what I did was provide the plan
22 specifications for facilities that were used for
23 reviewing submarines. In 1993 I took a position
24 with Engineer and Designing Testing Corporation
25 and the primary focus of my practice since then



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1 has been evaluating existing buildings and
2 facilities and signs. It may be for evaluation
3 of the construction or developing repair plans,
4 that type of thing.

5 Q: Okay. Have you had an opportunity to evaluate
6 and do work as an expert witness or consultant
7 on retaining walls? This type of segment
8 retaining wall that we're dealing with in this
9 case?

10 A: Yes.

11 Q: About ---

12 A: Yeah. The -- I guess an example of one might be
13 -- at a -- there's a large retaining wall at the
14 Jim Hudson dealership on I-77. The had concern
15 about its construction so I did a post-
16 construction evaluation of the retaining wall.
17 And that's a segment retaining wall like this,
18 but there's -- I've been involved with -- for
19 slope stability issues relating to retaining
20 walls, evaluating their constructions, the soil
21 placement, the tolerance and just better
22 construction and those types of things.

23 Q: Okay. About how many retaining wall cases have
24 you -- do you think you've got to review over
25 the years?



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1 A: I made, you know, several dozen.

2 Q: Okay. Have you ever had an opinion that would
3 be disallowed by any court?

4 A: No.

5 Q: I'd like to offer Mr. Stewart as an expert
6 witness in the area of design engineering in the
7 construction of segmental retaining walls.

8 THE COURT: All right. Mr. Robinson?

9 MR. ROBINSON: Your Honor, I have a little voir dire
10 I'd like. Mr. Stewart, you're not going to
11 opine on the design of this wall are you?

12 THE WITNESS: I'm going to opine essentially in its
13 construction and its placement.

14 MR. ROBINSON: And you're not going to opine on the
15 actual construction wall, you're going to opine
16 on whether it should have been left in place; is
17 that correct?

18 THE WITNESS: That's not correct.

19 MR. ROBINSON: Okay. You're gonna -- you're gonna
20 offer an opinion with respect to how the wall
21 was constructed?

22 THE WITNESS: Yes.

23 MR. ROBINSON: Okay. Are you -- is it also your
24 intention to offer an opinion with respect to
25 the whether or not you think the wall should



1 have been rejected?

2 **THE WITNESS:** The -- essentially I guess the point of
3 contention here is where the wall was placed.
4 And so the -- I guess the -- my opinion would be
5 that the work conducted by Mr. Young's company
6 should not have been rejected.

7 **MR. ROBINSON:** Okay. Your Honor, I would object to
8 opinion from Mr. Stewart with respect to whether
9 or not the wall should have been able to remain
10 in place because there's no engineering
11 expertise required to draw an opinion along
12 those lines. That decision rides I believe
13 entirely with the owner who's buying the
14 product.

15 **MR. GOODWYN:** Your Honor, basically what he's saying
16 is that it doesn't matter how well it was built.
17 If the owner doesn't like it he can reject it
18 and he won't get paid for anything. I don't
19 think that's the case. I think there's gotta be
20 some fundamental foundation for the rejection --
21 -

22 **MR. ROBINSON:** Well, that is not all I said

23 **MR. GOODWYN:** --- some object for the objection.

24 **MR. ROBINSON:** What I said was that I object to Mr.
25 Stewart offering an opinion as to whether or not



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1 the wall should have been removed because that
2 is a decision that lies solely and only in the
3 purview of the owner. They didn't sue anyone.

4 MR. GOODWYN: Well that's -- Your Honor, it is their
5 position that the owner was the one that made
6 the decision to reject the wall. That's the
7 fundamental issue in this case. Was that a
8 justified decision?

9 MR. ROBINSON: And the answer to that, Your Honor, I
10 would submit to you is not an engineering
11 answer.

12 MR. GOODWYN: Well, we think it is.

13 MR. ROBINSON: The answer to that has to do with
14 whether or not the wall serves the owner's
15 purpose, and not what someone else might think
16 about it. So I would object to his opinion with
17 respect to whether the wall should have stayed.
18 If he wants to give an opinion on how the wall
19 was constructed, how it was laid out, any of
20 those things like that, I don't have a problem
21 with that. He's eminently qualified to talk
22 about those facts, Your Honor.

23 THE COURT: Objection overruled.

24 MR. GOODWYN: Thank you, Your Honor. May I proceed?

25 Q: Mr. Stewart, how did you first get involved in



1 this case?

2 A: I was contacted by Attorney Rollin Austin who
3 represented Mr. Young and he had indicated to me
4 that his client, Mr. Young, had had a
5 disagreement related to the construction of the
6 segmental retaining wall.

7 Q: All right. Mr. Austin was my predecessor in the
8 case, correct?

9 A: That's right.

10 Q: All right. And I understand that you've
11 reviewed some materials and that forms some
12 opinions in this case, correct?

13 A: That's correct.

14 Q: What -- generally, what have you reviewed in
15 this case to form your opinions?

16 A: Okay, generally, there's essentially some of the
17 construction-related documents, that's some of
18 the soil test, e-mails back and forth, those
19 types of things, as well as the contract between
20 Mr. Young's company and Coogler as far as a bid
21 proposal. I reviewed photographs that Mr. Young
22 took after the construction of the wall. The --
23 I've looked at some deposition testimony. I've
24 looked at some drawings or portions of the
25 drawing that date back to the original



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1 construction as well as drawings that have been
2 generated post-construction.

3 Q: Okay. Are these the drawings you're referring
4 to?

5 A: Some of those, yes.

6 Q: Okay. All right. And did you have any
7 conversations with the -- with Michael Young?

8 A: I did.

9 Q: Okay. Were you able to form any opinions as to
10 whether or not Quality Construction
11 substantially completed the construction of the
12 retaining wall?

13 A: I believe they did.

14 Q: Okay. Let's -- let me ask you some questions
15 about the basis for this opinion. As you know,
16 the issue in this case that was raised in the
17 counterclaim was allegation that the wall was in
18 the wrong place.

19 A: That's correct.

20 Q: Is that your understanding?

21 A: Yes.

22 Q: All right. And there's been a lot of talk in
23 this case about this particular area of the
24 wall, this corner where the wall is closest to
25 the parking lot.



1 A: Yeah, essentially I guess I've been calling it
2 the -- kind of the northwest corner of Wall H.

3 THE COURT: All right, which Exhibit?

4 MR. GOODWYN: This is Exhibit Seven, drawing number
5 4 of Exhibit Seven. And that's what we're
6 talking about and that's what I'm referring to
7 in this. So go ahead and ...

8 A: Yeah. So, yes, essentially those are -- the
9 wall in question is identified as Wall H. It's
10 design was generated by Geosystems and Design.
11 There was also a side work lay-out by a civil
12 engineering company as well. I haven't looked
13 at those complete plans but I've seen parts of
14 those plans.

15 Q: When you say side work lay-out are you talking
16 about this design versus the as-built lay-out?

17 A: No, that's ---

18 Q: Or are you talking about something else?

19 A: No, I'm talking about something else.

20 Q: Okay. In general, when you're looking at plans
21 and trying to measure dimensions off a plan is
22 it -- are you getting more accurate measurements
23 from the large full-scale drawings or the
24 smaller drawings?

25 A: Yeah, generally you want the drawing that is



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1 generate. I mean, most -- these are now
2 generated and done with computer software. I
3 don't know -- but the -- so generally you would
4 want to use the scales that match the drawing.
5 Otherwise you're -- a lot of times you're
6 reducing it, you don't have a lot of control
7 over the ratio of that reduction so you may be
8 off a little bit.

9 Q: Okay. So -- are you saying it's better to use
10 the larger original drawings?

11 A: Yes.

12 Q: All right. Has this been represented and this
13 is the -- at least an accurate copy of original
14 copy of the original drawing?

15 A: Yeah. I believe that's the one I got from Mr.
16 Robinson's office and he ended up -- he was nice
17 enough to make a copy of it and that's where it
18 came from.

19 Q: Okay. All right. Let's talk about -- let's
20 kind of go through this and you've made some
21 measurements and I'm gonna ask you to make some
22 measurements now if you would. Did you bring --
23 you brought your scale ruler?

24 A: Yes.

25 Q: And I brought a ruler as well if you need. All



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1 right, what I'm gonna ask you because there's
2 been so much talk about the location of the wall
3 in this point. How far is it from the inside
4 edge of the wall to the curb as drawn on the
5 design?

6 A: Okay. Essentially, what we have ---

7 Q: And I'm sorry -- before you get going, can --
8 and just explain to the Court how you compute
9 it?

10 A: Right. So there's essentially two drawings on
11 this drawing. There's the elevation view which
12 is the view sideways and the wall, then there's
13 a plan view. And so there's a -- in the plan
14 view it gives what the scale is and so
15 essentially for every 20 -- or for every inch on
16 this plan view drawing, it represents 20 feet in
17 the field.

18 Q: And what -- is that what it says right here?

19 A: Yes.

20 Q: Okay.

21 A: And so the -- this is a scale that -- there's a
22 couple of kinds of scale. This is, I guess,
23 referred to as an engineering scale, but
24 essentially it's a -- it's in where you have one
25 inch equals 20 feet or one inch equals one foot



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1 and they're broken down into tenths and -- so
2 anyway, so when you go to the 20 on the scale --
3 -

4 Q: Do what you gotta do. Sorry. I know that was
5 a big -- coming out and you can't take them.
6 Maybe it'd be easier -- yeah.

7 A: I can do it right here. This is fine.

8 Q: Okay.

9 A: Okay. It's a little less than four feet.

10 Q: Okay. If you measure with just a regular ruler
11 what do you get? Is it ---

12 A: On a regular ruler it's three sixteenths of an
13 inch.

14 Q: Is it ---

15 A: And so ---

16 Q: --- right at -- is it right at three sixteenths
17 of an inch?

18 A: It is.

19 Q: All right. And doing the math, I've got a
20 calculator. I can do it, but if you want to do
21 it you could probably fo it.

22 A: Yeah. It's a -- essentially it's three divided
23 by 16 times 20 is 3.75 feet.

24 Q: 3.75 feet. All right. And what is -- from
25 reading the deposition testimony on speaking



1 with Mr. Young, what is your understanding of
2 how close the wall can be to the curb for --
3 according to Coogler Construction to be able to
4 make it work?

5 A: I read the deposition testimony. It was -- it
6 went kind of back and forth a little bit, but I
7 read where it was three feet as well as five
8 feet.

9 Q: Okay. So you saw some -- and I'll -- all right,
10 and I gave you this deposition transcript ---

11 A: That's right.

12 Q: --- to read. I think I want to go ahead and
13 show him this original deposition transcript of
14 Mr. Coogler:

15 All right. If you could turn to page 178.

16 A: Okay.

17 Q: All right. What's Mr. Coogler's response to
18 line three?

19 A: Well, you need at least, in this situation, you
20 need at least three feet, or three-plus feet
21 between the curb and the wall.

22 Q: All right. This is 3.75 feet as designed,
23 correct?

24 A: That's correct.

25 Q: And Mr. Coogler's saying that you need at least



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1 three feet to make sure you can get in with the
2 equipment or whatever. So that leaves .75
3 tolerance. Less than one foot of tolerance
4 between the design and the final product, right?

5 A: Yes.

6 Q: Is there anything on the design that would tell
7 the builder that if you're .75 feet off, it's
8 gonna be too close?

9 A: No.

10 Q: Is there anything in the terms of the contract
11 between Coogler and Quality Construction that
12 would indicate if you're .75 feet off at these
13 critical points, it's gonna be considered too
14 close and you're not gonna get paid?

15 A: No.

16 Q: All right. Let's look at the as-built drawing
17 here that was completed by Henry Walker. Make
18 that same measurement at the closest point here
19 to the curb.

20 A: Okay. So on this one there's also one inch
21 equals 20 feet.

22 Q: So the same scale as the design?

23 A: Yes.

24 Q: Okay.

25 A: So on this one we have a design location, or



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1 there's two lines -- there's one that says Wall
2 H as-built location, Wall H design location.

3 Q: All right. And I'm asking you to measure from
4 the as-built location.

5 A: Okay. So that is right at three feet.

6 Q: Okay. All right. So as-built it's only .75
7 feet off from the design?

8 A: Yes.

9 Q: Is that, in your mind, within the reasonable
10 tolerance from your experience and expertise, is
11 that a reasonable tolerance for building these
12 types of walls?

13 A: Yes. Essentially what you have with a wall like
14 this, particularly if you're trying to control
15 the top, is these are essentially assembled --
16 well the actual structure itself consists of the
17 soil mass and the reenforced mesh behind it.
18 And so the face of the wall is essentially there
19 to protect that soil mass. And so that is
20 assembled of not with concrete forms or things
21 where you can control exact dimensions but it's
22 done by stacking blocks on top of one another so
23 there's less ability to control it down to, you
24 know, a couple of inches or a few inches.
25 There's more opportunity to have the wall being



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1 out some.

2 Q: Okay. Is it from your experience, is it
3 uncommon for these types of walls to end up in
4 a location that's -- being off from the design?

5 A: I guess it's more my experience where it's --
6 they're located in less critical areas. Now I,
7 you know, I, you know, essentially you're -- by
8 the fact that you're stacking these blocks in so
9 you may -- it's supposed to be one inch so you
10 may one that's seven-eighths of an inch, one
11 that's an inch and a half, as you're stacking
12 them up. So that will end up creating a
13 difference at the top.

14 Q: Is that part of the reason why you testified
15 that this .75 foot difference is within the
16 normal tolerance for the fact of the wall, as
17 far as the final location goes?

18 A: Yes.

19 Q: All right. Is there anything in the design of
20 the wall that you can see that accounts for the
21 slope of the wall?

22 A: No. I think it's important to note that what it
23 looks like -- that this drawing shows
24 essentially a cross-section of the wall block.
25 So what you ---



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1 Q: Are you talking about the bottom section here?

2 A: No, the -- at the top.

3 Q: The top part? Oh, that's the ---

4 A: So as you're lookin down on it.

5 Q: Aerial view.

6 A: An aerial view. So essentially that has -- in
7 three dimension is actually wider than that at
8 the base.

9 Q: Okay. So the design is actually inaccurate as
10 it shows the width of the wall?

11 A: It's not clear.

12 Q: Okay. What could they have done to make that
13 clearer?

14 A: The -- I think the -- it would have been to
15 identify that as the top of the wall.

16 Q: Okay. And it's not -- it doesn't show that on
17 your -- is that what you're saying?

18 A: Yes.

19 Q: Do you think would have -- could have helped Mr.
20 Young in locating the bottom part of the wall?

21 A: Yes. Well he -- yeah, I mean, he's -- yes.
22 Yes.

23 Q: All right. Just kind of going back to this
24 critical dimension idea, this area of the
25 parking lot, this is where the wall's at it's



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1 closest point to a structure. That -- do you
2 consider that to be a critical dimension, this
3 -- the .75 feet even if it's off that much, is
4 ---

5 A: I guess, you know, accepting of the three foot
6 is the minimum that it can move.

7 Q: Right. Right.

8 A: Then there's no identification of that critical
9 dimension. Given -- if the three feet is that
10 critical.

11 Q: Okay. In drawing five, which is the second part
12 of the wall, the space out here that's not next
13 to the parking lot, that's just next to green
14 space (indicating) is the actual location of the
15 wall that's critical?

16 A: The -- it -- the quick answer is no. It's not
17 as critical. You're essentially in an area
18 that's -- has I guess very -- you're not parking
19 or it's not a building entrance or it's not --
20 it's essentially green space. So you're either
21 draining some of the green space below the wall
22 versus some of the green space above the wall.

23 Q: Okay. Given the nature of these segmented
24 walls, the variations in the bricks, is it
25 uncommon for walls like in these non-critical



1 areas to be off a foot or two here or there?

2 A: Yeah. A lot of times what the contractor is --
3 I mean, there's some attractiveness to these
4 walls. I mean, that's part of the reason why
5 people like them. So some of it is, you know,
6 making the curbs have a nice appearance and
7 things like that, so ---

8 Q: Okay. So ---

9 A: --- so there may be some moving around in those
10 areas.

11 Q: Okay. All right. Okay. It sounds like you're
12 saying sometimes exact location's sacrificed for
13 esthetics?

14 A: Yes.

15 Q: In this non-critical areas?

16 A: Yes.

17 Q: Okay. All right. And lookin back at the, this
18 as-built drawing, looking out here in this,
19 again, what you described as a non-critical
20 area, the wall's -- the as-built wall's pretty
21 close to the design wall, from -- relatively
22 speaking; is that fair to say?

23 A: That's fair.

24 Q: All right. And is there anything about the
25 location of the as-built wall in this area that



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1 would suggest to you that it just needs to be
2 torn down and rebuilt?

3 MR. ROBINSON: Objection.

4 THE COURT: Overruled.

5 A: No.

6 Q: Why?

7 MR. ROBINSON: Objection.

8 THE COURT: Overruled. Is that another continuing
9 objection?

10 MR. ROBINSON: Yes, sir. Thank you.

11 THE COURT: Dually noted.

12 MR. ROBINSON: Thank you Your Honor.

13 A: So, essentially we're looking at a dimension
14 differences of 3.8 feet. Now this is an area
15 where it's a green space. And that's the area
16 we talked about. We were looking at the Geo-
17 Systems drawing so that's, so we're several feet
18 from any of the parking spaces or parking curbs,
19 that type of thing.

20 Q: Can you -- just for the record, did you measure
21 to see how far it is just from the design to the
22 parking lot in this area (indicating) from the
23 corner. Or can you lay it down a little bit?

24 A: I can do it. 40 feet, 42 feet.

25 Q: Okay. All right. If you measured it this way



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1 that might be closer but ---

2 A: Yeah, and that's 33 feet.

3 Q: Okay. So we're looking at a difference of --
4 I'm sorry, were you just measuring from the as-
5 built wall or from the design?

6 A: Let me make sure. From the as-built 33 feet.

7 Q: Okay. So there's 33 feet of green space in that
8 area instead of maybe 36 or seven feet? Is that
9 correct?

10 A: Thirty-five feet. Oh wait, wait, wait; sorry,.
11 It's 37 feet.

12 Q: Okay. And again is it uncommon in this business
13 of building retaining walls to have that kind of
14 variation when you're trying to focus on
15 aesthetics and other issues associated with the
16 construction of the wall?

17 MR. ROBINSON: Objection.

18 THE COURT: Overruled.

19 A: No, not -- and again we're talking the top
20 connection.

21 Q: Right. All right. Can it fairly be said then
22 that even if its shown that these stakes were
23 properly located by the surveyor that Mr. Young
24 still built the wall in a way that was
25 substantially compliant with the terms of the



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1 contract and the design?

2 A: Yes.

3 MR. ROBINSON: Objection.

4 THE COURT: Overruled.

5 Q: All right. Let's talk about mistakes in the
6 hubs. First let's -- let me ask you some
7 questions about this the issue of the ---

8 MR. ROBINSON: Your Honor, I wanna object to this.
9 I believe that Mr. Stewart told me in his
10 deposition that he was not going to * on the
11 surveying. So, if this is gonna be a question
12 about surveying then I object to it.

13 MR. GOODWYN: I'm gonna -- well, it's not
14 specifically about the surveying. It's really
15 an issue that we've already gone over with Mr.
16 Young but it's just about locating the wall.
17 It's not about surveying.

18 MR. ROBINSON: Proceed. I'll object ---

19 THE COURT: Do you have the deposition with you?
20 His deposition?

21 MR. ROBINSON: Yes, I do.

22 THE COURT: Do you remember what you asked him about
23 or what he said?

24 MR. ROBINSON: I asked if he had any -- if he was
25 going to make or have an opinion on the



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1 surveying and he told me no.

2 THE COURT: So you didn't ask any -- pursue that
3 line of questioning?

4 MR. ROBINSON: Didn't have to.

5 THE COURT: Okay.

6 Q: All right. Did you see any testimony in the
7 depositions that you read indicating that the
8 set off on the stakes in the critical area
9 around the parking lot that say five foot offset
10 should've said three and a half foot offset?

11 A: I've seen some text messages that identified
12 that.

13 Q: Okay. If in fact that's true, if in fact the
14 set offs in this area had been -- were supposed
15 to be three and a half foot offset instead of
16 five foot offsets, how would that've affected
17 the location of the wall?

18 A: Well, if the stakes were placed as if they were
19 to be three and a half foot offset but they were
20 actually, if they had written on it five foot
21 offset, then you're gonna end up at least a foot
22 and a half closer to the curb.

23 Q: Okay. And have you also seen some testimony in
24 the deposition that you've read, some other
25 materials, that the stakes indicate offset is to



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1 the face of the wall but they should have said
2 to the centerline of the wall?

3 A: I've heard that. I know what I've seen is on
4 the stakes or photographs and the stakes that
5 I've seen has five foot offset.

6 Q: Okay.

7 A: I'm mean -- I'm sorry. To the outside face of
8 the wall.

9 Q: Okay. But have you seen some testimony
10 indicating that that was wrong. It should've
11 been to the centerline of the wall?

12 A: I've heard that. I'm not sure if I've seen that
13 deposition.

14 Q: Okay. All right. And is that shown as believed
15 how would that affect the final location of the
16 wall?

17 A: Essentially, again assuming that it's we're
18 talking about the top of the wall, you're gonna
19 essentially be six inches closer.

20 Q: Okay. All right. So, despite the mistakes with
21 the writing on the stakes about the location of
22 the wall, the wall still ended up only being .75
23 feet off of the design location; correct?

24 A: Yes.

25 Q: All right.



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1 A: Assuming the as-built drawing's correct.

2 Q: Right. But do you have any reason to believe
3 that the as-built drawing is not correct?

4 A: I just, I don't know.

5 Q: Okay. All right. Yes, assuming that's correct.
6 All right. Let me ask you, the -- what do you
7 understand this number to be on the stakes?

8 A: That's a speciality station number.

9 Q: Okay. And from your experience, how is a
10 builder such as Mr. Young supposed locate the
11 wall using this ---

12 MR. ROBINSON: Objection Your Honor.

13 THE COURT: What grounds?

14 MR. ROBINSON: We're getting into surveying now.

15 MR. GOODWYN: This is not surveying. This is
16 construction of the wall. How does he use this
17 (indicating) to construct the wall? How does he
18 use it to locate the wall?

19 MR. ROBINSON: I think Mr. Young talked about that.

20 THE COURT: I was going to say.

21 MR. ROBINSON: I'm telling you that I think Mr.
22 Stewart is starting to get -- that question has
23 to do with surveying and I'm objecting to it.

24 MR. GOODWYN: The surveying is where the stakes.
25 I'm asking how to use the stakes to make the



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1 wall.

2 THE COURT: Objection overruled.

3 A: Yeah, essentially the -- it's a measurement down
4 the length of the road or a wall. So
5 essentially it's giving the location of the wall
6 or along the wall. So essentially when you look
7 at the Geo-system's design drawings, it
8 identifies the station numbers which are
9 essentially the length or certain lengths along
10 the wall of where these corners are.

11 Q: All right. And so, if Mr. Young is out in the
12 field and sees one of these stakes, how does --
13 what does he -- what information off of this
14 does he use to locate where the wall's gonna be?
15 Where he's gonna start putting the bricks at?

16 A: So essentially he's trying to locate the outside
17 face of the wall.

18 Q: Okay. I mean, does he ---

19 A: And so ---

20 Q: --- use these instructions?

21 A: So essentially the purpose of having something
22 offset like this is he's in the -- digging the
23 trench building the wall. So you need to
24 markers of where the wall should be identified
25 outside of that trench.



1 Q: Okay.

2 A: So it's offset five feet.

3 Q: All right. So in this case it's five -- is it
4 always five feet?

5 A: No.

6 Q: Doesn't have to be five feet. It just can't be
7 in the ditch itself; is that correct?

8 A: Well if, sometimes -- sometimes it ends up, but
9 the at the -- no ---

10 Q: It's not supposed to.

11 A: That's the whole purpose.

12 Q: Okay. All right. And these station numbers is
13 the builder supposed to do anything with these
14 station numbers? Is he supposed to modify 'em
15 or move the stakes? Or does he just go from
16 where the stake and hub are and measure?

17 A: Yeah, he does. I think what we have here we've
18 got two hubs per corner. So essentially he's
19 connecting or he's intersecting the two lines
20 from the two hubs and that generates that
21 location.

22 Q: Okay. So you use this five foot figure?

23 A: Yes.

24 Q: Okay. All right. If these stakes, this one for
25 example 117422. If that's around this corner



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1 that's not that 117550?

2 A: That's correct.

3 Q: Does that -- was that gonna put the wall in the
4 wrong place if the builder is just going from
5 where the hubs themselves are?

6 A: Yes.

7 Q: All right. And based -- you've looked at these
8 stakes -- you have?

9 A: Yeah, I've seen photographs of 'em, yes.

10 Q: Right. But you've gotten the numbers off these
11 stakes; correct?

12 A: Yes.

13 Q: All right. How did the numbers on the stakes
14 affect the placement of the wall?

15 A: So essentially you have your corners at
16 different -- or locations that are different
17 that is shown in the computer system's drawing.

18 Q: Okay. Does -- do the differences in the numbers
19 on the stakes as compared to the design
20 drawings, does that make the wall closer or
21 further away from the design?

22 A: At that same corner that we're talking about, by
23 making these wall being shorter it's gonna put
24 it closer to that corner.

25 Q: Okay. And looking at the as-built drawing, as-



1 built is the wall -- this is not the as-built,
2 I'm sorry. Is the wall built where the stakes
3 say they should be built?

4 A: The -- essentially the -- well, let me answer
5 that this way.

6 Q: Sure.

7 A: So, by the time I was involved in the project
8 the stakes were no longer there, the wall was no
9 longer there. So, essentially what I'm left
10 with was the cite documentation that Mr. Young
11 had made. So Mr. Young had gone out and was
12 able to locate some of the hubs and place a tape
13 measure between the hub and the outside face of
14 the wall, and so at all of the locations that I
15 looked at, except this location in this green
16 space here that we talked about before. Those
17 hubs were typically well less than five feet.
18 I think one was a little bit less than five
19 feet. And this one in this area was around
20 seven feet. And the -- there was a hub that was
21 located, essentially, at the corner of the wall
22 closest to the corner that we're talking about.
23 And that hub was located about 43 inches from
24 the wall.

25 Q: Do you have a photograph of that?



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1 A: I do.

2 Q: Was that an important part of your investigation
3 given the issues with the allegations that the
4 wall was too close to the parking lot?

5 A: Yes, and I want to -- first of all when you're
6 looking at this picture here ---

7 Q: I think, let's -- I think that's already in
8 evidence. Can I see it? I thought --

9 MR. ROBINSON: No, I don't think it is.

10 MR. GOODWYN: I think it is. I think this is just a
11 better version. Yeah. Or real similar to the
12 one that's in evidence.

13 Q: Okay. All right. I'd like to go ahead -- first
14 can you describe what this picture is? All
15 right. So we're looking at two pictures. One
16 of 'ems already in evidence as 8-J. The other
17 one is not. Do you have any objection to the
18 second one?

19 MR. ROBINSON: I don't have any objection to that.

20 Q: Go ahead and mark this as nine.

21 MR. ROBINSON: I think it's 10.

22 MR. GOODWYN: Is it nine or 10? He think's it's
23 nine.

24 MR. ROBINSON: Did the letter to James Huggins dated
25 2/13/17 come in as nine? Or did not come in?



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1 Okay. Then this is nine.

2 Q: All right. Okay. Are both of these photographs
3 measurements from the same hub or are they
4 different hubs?

5 A: Same hubs.

6 Q: Okay. And which -- it looks like it's over in
7 a corner. Is that * ---

8 A: Yeah, when I look at this picture I see a
9 straight view coming from, essentially what you
10 have is you have the stake and then there is a
11 wooden stake that's driven in the ground
12 probably about an inch of it sticking out of the
13 top of the ground. And so,
14 perpendicular to that tape measure is a length
15 of wall and then it curves. So when you look at
16 the drawing of the wall here's the length of the
17 wall would've been, here's the curb. And then
18 it flips back. So this is this corner that's
19 closest to the curb that we're talking about.

20 Q: Okay.

21 A: And so essentially, what we have here is it
22 would be one of the two hubs that were at this
23 corner. And so ultimately those -- or when the
24 wall was laid out those -- you would've had --
25 each would've offset five feet to the



1 essentially locate the outside wall. So we
2 don't know exactly where that is. This gives us
3 a general idea of what that * is.

4 Q: Okay.

5 A: Between that hub and the outside surface of the
6 wall.

7 Q: All right. What measurement did you get?

8 A: Yeah, so it's important to look at the picture
9 we have. The tall stake and then inboard
10 towards the wall is the smaller stake. So each
11 black mark identifies a foot. So we have one
12 foot, two foot, three foot, and then, so, at
13 about 43 inches is where the hub is located.

14 Q: All right. So less than four feet away?

15 A: Yes.

16 Q: All right. Is that appropriately staked off by
17 Mr. Young and his crew?

18 A: The, again we're not -- we weren't able to
19 exactly measure the location but this gives us
20 an idea that it's in the range of where we
21 expect it to be.

22 Q: Okay. Is that serviced in any reasonable
23 tolerance for a construction wall of this type?

24 A: Yeah, well, it's more of a -- it's more does it
25 make sense as far as the stakes say five foot



1 from the outside face. Where in that general --
2 we're a foot four inches or five inches from
3 that location at the bottom. So we would be in
4 approximate area of five feet at the top.

5 Q: All right. The fact that the -- let me preface
6 this by saying. You know in the design drawings
7 that angles are sharp angles at each of these
8 corners?

9 A: Yes.

10 Q: And it's pretty clear to see in these drawings
11 that the corners as the wall was built around.

12 A: Yes.

13 Q: Did that have any affect on the location -- the
14 final location of the wall?

15 A: The -- essentially when you're connecting these
16 points you're essentially gonna be outside the
17 wall where those two points intercept. So
18 you're gonna -- so by making a radius it brings
19 it at that radius closer to the parking lot.

20 Q: All right. Now, does the radius at this
21 critical corner have any affect on how close the
22 wall actually is to the parking lot or is it too
23 far away??

24 A: It's probably too far away assuming the as-built
25 is correct.



1 Q: Okay. From your experience with these type of
2 walls are the corners generally rounded or are
3 they sharp as shown in the Bunn?

4 A: Yeah with the particular wall that was specified
5 it needs to be rounded.

6 Q: And why does it need to be rounded? Why's that
7 important?

8 A: Because that's what the manufacture says.

9 Q: Okay.

10 A: It's a -- it's more of a your -- the --
11 essentially at these corners you end up with
12 stress concentrations. So you essentially makes
13 sure by rounding it that you're engaging the
14 Geo-grid behind it.

15 Q: Okay. Does it make the wall strong having them
16 round?

17 A: Yes.

18 Q: Okay. All right. I think that's all I have,
19 Your Honor.

20 THE COURT: Okay. Mr. Robinson?

21 MR. ROBINSON: Thank you, Your Honor.

22 MR. STEWART - CROSS-EXAMINATION BY MR. ROBINSON:

23 Q: You testified that, a minute ago, that the
24 manufacture recommend rounded corners.

25 A: Yes.



1 Q: Would you look in that book there in front of
2 you?

3 A: Yes.

4 Q: Look at Exhibit Three. Can you tell me, and
5 you'll find some readable stuff a little further
6 back. Can you tell me where it says that?

7 A: I can tell you from my research. I don't know
8 if I can read all this. These were diamond pro
9 anchor walls and I pulled it up online and it
10 gives a minimum radius.

11 Q: Okay. What's minimum radius?

12 A: Four feet.

13 Q: Four Feet? Have you looked at the photographs
14 here and decided whether or not the minimum
15 radius is met?

16 A: No.

17 Q: Okay. You never saw the wall; right?

18 A: That's correct.

19 Q: And you haven't received the overall project
20 design drawings have you?

21 A: No.

22 Q: And so you have no -- by the way you referred to
23 this area as the green space right here. Is
24 that the green space you're talking about? Is
25 that a green space? Which green -- what are you



1 talking about a green ---

2 A: No, the green space I was talking about was
3 essentially where it says contract to modify
4 ground.

5 Q: Here it is.

6 A: In this area.

7 Q: Okay. What makes you think that's the green
8 space?

9 A: I don't see any structures or anything in that
10 area.

11 Q: You don't know what the owner's gonna do with
12 that area later; do you?

13 A: No.

14 Q: He might put a gazebo in there; right?

15 A: He might.

16 Q: He might put a monument in there.

17 A: He might.

18 Q: He may be planning on doing all kinds of things
19 we can't tell from this drawing. Isn't that
20 true?

21 A: True.

22 Q: Okay. You said -- well, let me ask you this
23 question. When you go look at walls, you don't
24 go look at walls because they were built
25 correctly. You go look at walls because they



1 were built incorrectly. Isn't that true?

2 A: No, not necessarily.

3 Q: Well let me -- okay. Let me rephrase it. You
4 don't go look at wall 'cause everybody claims
5 they're right. You look at wall 'cause somebody
6 claims they're wrong. Isn't that true?

7 A: I would say not always. And I'll give you an
8 example. Was the -- I had inspected a
9 residential building lot in a development in
10 Rock Hill and essentially it had a large
11 retaining wall behind it that was concern about
12 the compaction of the soil in that area. So
13 part of that evaluation was evaluating the wall
14 because if anything was wrong with the wall.

15 Q: But the construction of the wall includes the
16 compaction of the backfill behind it. Does it
17 not?

18 A: Yeah, but the issue with compaction was not at
19 the wall it was at another location.

20 Q: So were you looking at the wall or were you
21 looking at the compaction?

22 A: Yes.

23 THE COURT: What was that question?

24 MR. ROBINSON: Were you looking at the wall or were
25 you looking at the compaction?



1 THE COURT: His answer was yes; right?

2 THE WITNESS: Yes, sir.

3 Q: Which were you looking at?

4 A: Both. The soil is part of the wall.

5 Q: That's what I asked you earlier.

6 A: Right.

7 Q: Okay. Thank you. You said the design's not
8 clear when you were talking about this double
9 line here.

10 A: Yes.

11 Q: Okay. You didn't have any problem figuring out
12 that that was the top of the wall did you?

13 A: I didn't -- I mean I -- you kind of -- I guess
14 you would assume. It would be nice to know for
15 sure if the dimensions critical that you're
16 gonna tear it down. It would be nice to know
17 that it was perfectly clear but that's what it
18 was.

19 Q: And your -- part of your testimony is based on
20 the supposition that the surveyor laid this wall
21 out by scaling off this drawing. Is that right?

22 A: No.

23 Q: No? How did he do that?

24 A: How'd he do what?

25 Q: How'd he lay out the wall?



1 A: I don't know. I would assume that he had,
2 there's an auto CAD drawings or some sort of
3 computer drawings that the designer generates.

4 Q: Okay.

5 A: That he would have access to that for laying the
6 wall out.

7 Q: And if there is an auto CAD drawing they used to
8 lay out the wall, and he laid it out in
9 accordance with the auto CAD drawing, would you
10 agree with me that they layout would then be
11 correct?

12 A: If he laid it out correctly in accordance with
13 the auto CAD drawing that generated that
14 drawing, then yes.

15 Q: Suppose the auto CAD drawing didn't generate
16 that drawing. But that that drawing was based
17 on the auto CAD drawing.

18 A: Okay. Well, they're all based on the same
19 thing. Right, am I missing something?

20 Q: I don't know the answer to that question.

21 A: Okay. Look, all I'm saying is that that's a --
22 you know, I'm old enough to generate drawings by
23 hand. So that's why it's generated by hand. So
24 it's a computer generated drawing. So somewhere
25 there's a computer file that has the XY



1 coordinates of those points.

2 Q: And if you ---

3 A: And it should match that drawing.

4 Q: It should match that drawing if that drawing is
5 derived from the auto CAD drawing; correct?

6 A: And I -- when you say, there's usually two
7 drawings. Or there maybe more but you
8 essentially have the site plans that would be
9 generated by an engineer. And then you would --
10 the -- that wall is typically, and I've seen
11 parts of the site drawing for this project, this
12 wall is shown on that. So you would expect
13 those to be the same. I don't have the computer
14 file of that or the site drawings, but if it's
15 critical area they both scale to the same
16 number.

17 Q: Suppose the Exhibit Seven drawing number 4 and
18 drawing number 5 were machine drawings or CAD
19 drawings, but they weren't -- they didn't derive
20 from the site plan file. There could be
21 differences couldn't there?

22 A: Yes, but that's a design issue not a
23 construction issue.

24 Q: Correct. And if the as-built drawing is
25 compared to the CAD file used to lay out the



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1 drawing -- the wall. Okay, you with me? The
2 surveyor uses some file to figure out where the
3 coordinates are.

4 A: Yes.

5 Q: And if he compares the wall itself where it was,
6 to that same coordinate system that'll give you
7 a true measure of where the wall is with respect
8 of where it should be based on the layout.

9 MR. GOODWYN: Your Honor, I would object to this
10 line of questioning. This is certainly beyond
11 the scope and direction -- he's already
12 stipulated he's not testifying about surveying.
13 He's asking questions, is the surveyor right?
14 Is the surveyor right? That's not his area of
15 expertise that's not why he's here.

16 THE COURT: Objection overruled. You can -- no new
17 matter on redirect but in cross you can talk
18 about any relevant matter.

19 MR. ROBINSON: Thank you, Your Honor.

20 MR. GOODWYN: Well, he's not -- well I would object
21 from the grounds of he's not offered as an
22 expert in that area. He's not a fact witness.
23 I think he can only question him about the areas
24 of expertise he's being offered for.

25 THE COURT: Okay Mr. Robinson, how do you respond to



1 that?

2 MR. ROBINSON: Well, he's qualified as an engineer
3 with expertise in the construction of these
4 walls. I'm asking about the -- that subject.

5 MR. GOODWYN: He's asking about the surveying of the
6 walls. He specifically made a point to say he
7 can't answer questions about surveying 'cause
8 he's not qualified.

9 MR. ROBINSON: I'm asking about the as-built, is what
10 I'm asking about. Which, by the way ---

11 MR. GOODWYN: Mo- -- not ---

12 THE COURT: Objection overruled.

13 Q: Let me try this again. If the as-built drawing
14 -- if the as-built wall itself on the drawing,
15 is compared to the same coordinates that were
16 used to lay out the wall, it would give a true
17 reflection of where the wall is in respect to
18 where it was supposed to be. Would you agree
19 with that?

20 A: Yes.

21 Q: Okay.

22 A: If the stakes are in the right place. But I
23 have to reiterate that at least how the drawing
24 is represented on a piece of paper after it's
25 printed that the critical dimension that I



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1 measured earlier on the left hand side of the
2 parking lot in that corner is the same for the
3 site plant as well as the wall design plan.

4 Q: Are there -- did you find tolerances in this
5 contract?

6 A: No, the -- no, you talking about the Design
7 South?

8 Q: When you were looking through the documents that
9 you were looking through to determine whatever
10 you determined about this controversy, did you
11 find some tolerances?

12 A: I found some in a contract between the property
13 owner and the -- between the property owner and
14 the Coogler Construction.

15 Q: Okay. And what tolerance did you find?

16 A: I found a -- what I read to be plus or minus a
17 foot.

18 Q: Okay. Is it still your opinion that that's plus
19 or minus a foot?

20 A: There's a dotted but an inch is pretty
21 substantial -- for this type of construction,
22 pretty substantial of tolerance.

23 Q: You mean give me a foot?

24 A: No. I said I found a -- or I see, I've since
25 looked at and there's a point before the one.



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- 1 Q: So it's point one feet?
- 2 A: Yeah.
- 3 Q: Okay.
- 4 A: They had around an inch.
- 5 Q: All right. Did you look at the photographs that
- 6 show, all the photographs that we have that show
- 7 the dimension from hub to the wall at the ground
- 8 surface?
- 9 A: Yes.
- 10 Q: Okay. And there were six of those; right?
- 11 A: I'm not sure how many there were.
- 12 Q: Okay. Well, indulge me and look at Exhibit
- 13 Number Eight.
- 14 A: Okay.
- 15 Q: And there are photographs in Exhibit Number
- 16 Eight that show measurement to the hub and then
- 17 there are photographs taken a little farther away
- 18 that sometimes show the wall itself. Okay?
- 19 Look through there, I think you'll find that
- 20 there are six photographs that show the distance
- 21 from the wall to the hub that you can actually
- 22 read.
- 23 A: I'm gonna have to count 'em.
- 24 Q: Okay.
- 25 A: There are 10 photographs.



1 Q: Right. Six of them show the actual distance
2 from the hub to the wall don't they?

3 A: I guess I don't understand your -- all of them
4 have a tape measure in them.

5 Q: Yeah. Some of them you can read and some of
6 them you can't. Let me ask you this question.
7 You can check this if you'd like. The six that
8 you can read, or that I can read, show a
9 distance of three foot eight inches, four foot
10 two inches, four foot seven inches, five feet,
11 five foot nine inches, and six foot eleven
12 inches.

13 A: Okay.

14 Q: You going to live with this? There are the --
15 there are the distances that I found. But you
16 can see in Exhibit Eight.

17 A: I'm sorry, it's Exhibit Right?

18 Q: Yeah, just flip it over.

19 A: Okay. So I've got one that's six eleven to the
20 center.

21 Q: You can't read that so go to the next one.

22 A: This one is five eight.

23 Q: I got five nine. Within an inch it's five eight
24 five nine. Okay, go ahead. What's the next
25 one?



- 1 A: This is five.
- 2 Q: Five feet zero; right?
- 3 A: Yes.
- 4 Q: Okay. And the next one.
- 5 A: This is four foot six.
- 6 Q: Okay. The next one. I don't think you can read
- 7 that.
- 8 A: This is, yeah. It's around four and a half.
- 9 Four feet two.
- 10 Q: Okay.
- 11 A: This one's 43, 44.
- 12 Q: Three foot eight.
- 13 A: Yep, three seven.
- 14 Q: Okay. You were gonna go to the centerline of
- 15 the hub, right?.
- 16 A: Yeah. I mean it's -- it's to get a general idea
- 17 where it's located.
- 18 Q: Okay, now. The drawing, the wall design
- 19 drawing, excuse me let me rephrase that. The
- 20 stake that goes at the hub says five foot offset
- 21 to the top of the wall; right?
- 22 A: No.
- 23 Q: Offset to the face of the wall.
- 24 A: Yes.
- 25 Q: Okay. Everybody, I think, agrees that that's



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1 the outside face of the wall; right?

2 A: Yes.

3 Q: And if it's five foot to the outside face of the
4 wall any dimension five feet, equal to five feet
5 or greater is the wrong dimension from the hub.
6 You agree with that?

7 A: Yes. Now those that are -- yes. I know that
8 there's one that I saw that was seven feet and
9 that's -- yes.

10 Q: Well, that's one ---

11 A: That's outside -- that's definitely outside.

12 Q: There was on that was five feet. That's still
13 not the right place.

14 A: It's closer.

15 Q: I agree with that. If the walls not where it's
16 supposed to be, is the owner entitled to reject
17 the wall?

18 MR. GOODWYN: Objection. He just asked for a legal
19 conclusion about the of the owner entitlement or
20 right to reject.

21 THE COURT: Legal conclusion?

22 MR. GOODWYN: I mean, he's not here to testify as to
23 what the legalities are about the owners right
24 to reject it.

25 THE COURT: Mr. Robinson, how do you respond to that



1 objection?

2 **MR. ROBINSON:** Well, Your Honor, I'd say this, Mr.
3 Stewart has opined that the wall's off where
4 it's supposed to be on the computer but that
5 that's okay. And so I'm asking if the wall's
6 not where it's supposed to be is that okay?

7 **THE COURT:** I thought you asked what the owner had
8 the right to.

9 **MR. ROBINSON:** Does the owner have the right to
10 reject the wall if it's not where it belongs.

11 **THE COURT:** Objection overruled. You can answer the
12 question if you can, Mr. Stewart.

13 A: And I think I tried to say this in the
14 deposition. You know, I think there's --
15 anytime I've ever been involved in construction,
16 there are always variations. And so there is a
17 negotiation between the owner and the contractor
18 and the engineer in order to get a finished
19 product that serves the purpose that it was
20 intended to. And so that would be part of that
21 negotiation.

22 Q: All right. That's fair enough. I don't think
23 I have any further questions.

24 **THE COURT:** Any redirect?

25 **MR. GOODWYN:** Yeah, just something short here, Your



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1 Honor.

2 MR. STEWART - REDIRECT EXAMINATION BY MR. GOODWYN:

3 Q: Some questions about the green space and the
4 difference in the amount of green space, status
5 of being whatever it was, 35 feet, it's now 31
6 or two feet. Mr. Robinson suggested that maybe
7 the owner would put a gazebo or a monument or
8 something in that area in the future. This may
9 cut into that. If that were the plan is there
10 anything on the plans that Mr. Young had that
11 would indicate that the monument or gazebo was
12 going in that area and that dimension of the
13 wall was critical?

14 A: No.

15 Q: Would that be -- is that important for a wall
16 builder to know, those critical dimension?

17 A: Yes.

18 Q: I'm gonna show you this. This is a civil
19 drawing of that same section of the wall.

20 A: Right.

21 Q: With the green space. Is that -- can you tell
22 just by looking at this kind of matching it up
23 to the drawing? You see this? I don't know
24 what this is. What is that? Is that a carport
25 or is that a dumpster? That's where the



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1 dumpster is. I'm just asking. I want to be
2 able to refer to it properly so we don't all --
3 talking about something different. Anyways,
4 does this appear to be the same general area?

5 A: Yes. Essentially it's the parking places up to
6 here (indicating).

7 Q: Okay. This area between the parking lot and the
8 wall - are these topographical lines?

9 A: They are.

10 Q: What does that indicate? Does that indicate a
11 slop of some type?

12 A: It does.

13 Q: And can you tell from that drawing -- any idea
14 is that a steep slope is that a mild slope? Or
15 essentially is it -- is that slope gonna be
16 steep to really put gazebos and monuments on it?

17 A: It's not enough for me to tell. I don't know
18 where the contour lines are so it's ---

19 Q: It is sloped?

20 A: It's sloped.

21 Q: Okay. All right. That's all.

22 THE COURT: Do you need to cross?

23 MR. ROBINSON: Yes.

24 MR. GOODWYN: I tell ya, I'm sorry, go ahead and
25 move to admit this as the next Plaintiff's



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1 Exhibit, Plaintiff's Exhibit Ten.

2 THE COURT: Okay. Mr. Robinson?

3 (Plaintiff's Exhibit Number Ten was marked for
4 identification purposes.)

5 MR. STEWART - RECROSS-EXAMINATION BY MR. ROBINSON:

6 Q: All right. Two questions for you. Maybe one
7 more. It's bad engineering practice to leave
8 flat spots in your landscape isn't it?

9 A: Yes.

10 Q: And you referred to this wall being close to the
11 parking area as critical; right?

12 A: It was -- it's been identified to Mr. Young it's
13 critical.

14 Q: Okay.

15 A: And we have that in reason while the wall was
16 taken down.

17 Q: All right. And that's why your -- you used that
18 term?

19 A: Yes.

20 Q: Okay. So that's not your assessment that it's
21 critical, that's someone else's assessment?

22 A: Yes.

23 Q: Okay. You don't have an assessment as to what's
24 critical and what's not, do you?

25 A: I don't quite know how to answer the question.



1 You know, part of what I'm trying to do is
2 evaluate those issues that are identified to me
3 as being critical.

4 Q: Okay.

5 A: So that's -- I don't know.

6 Q: All right. Thank you. No further questions
7 Your Honor.

8 MR. GOODWYN: Nothing further.

9 THE COURT: All right. Thank you sir. All right,
10 Mr. Goodwyn.

11 MR. GOODWYN: Call Joey Coogler.

12 THE COURT: Now, we're gonna break in 10 minutes.
13 Do you wanna wait and start him in the morning?

14 MR. GOODWYN: Might be better.

15 THE COURT: Mr. Robinson, do you object to that?

16 MR. ROBINSON: I have no objection, Your Honor.

17 THE COURT: Mr. Coogler, is that okay with you?

18 MR. COOGLER: Yes, sir.

19 DAY TWO ADJOURNED:

20 THE COURT: All right. We'll reset for 9:30 in the
21 morning.

22 (Whereupon, the hearing adjourned at 4:00 p.m. and
23 was reconvened on Wednesday, November 1, 2017 at 9:45
24 a.m.)

25 CALL TO ORDER:



1 THE COURT: You may call your next witness. Mr.
2 Coogler, I think, is coming up.

3 MR. GOODWYN: Yeah, Coogler.

4 THE COURT: Okay.

5 COURT REPORTER: Do you solemnly swear or affirm that
6 the testimony you give in this case will be the
7 truth, the whole truth and nothing but the truth
8 so help you God?

9 MR. COOGLER: I will.

10 COURT REPORTER: Thank you, sir.

11 JOSEPH COOGLER, having been duly sworn, testifies as
12 follows:

13 MR. COOGLER - DIRECT EXAMINATION BY MR. GOODWYN:

14 Q: Mr. Coogler, if you will turn to page -- or
15 Exhibit One rather.

16 A: What Exhibit?

17 Q: Exhibit One. It's the bid and proposal that
18 we've been referring to as the contract in this
19 case.

20 A: Correct.

21 Q: Okay. Says, you know, I don't think this is a
22 good time to talk about it, it's just that the
23 Court has asked some questions about this. Can
24 you explain to the Court how the contract is
25 typically formed in your business, especially as



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1 it relates to retaining wall contractors.

2 A: Well, they're multiple ways, I believe Brian
3 explained it the other day. You can have a
4 contract agreement that is spelled out with
5 every nut and bolt to it or you can also have a
6 proposal like here that Michael has that has
7 been agreed on. And we -- I mean, a lot of
8 times we run without signed proposals or
9 contracts.

10 Q: Do you treat both of those situations the same?
11 Do you think both those are equally valid
12 contracts?

13 A: Yes, I do.

14 Q: Okay. In this particular case this -- the bid
15 and proposal that's labeled Exhibit One. You
16 received this from Michael Young before the job
17 started, correct?

18 A: Yes. To my knowledge, yes.

19 Q: And did you accept the terms of this bid and
20 proposal?

21 A: Yes, it was accepted.

22 Q: Did you operate throughout your relationship as
23 if this bid and proposal was the contract
24 between Coogler Construction and Quality?

25 A: I believe we did.



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- 1 Q: Okay. All right. Take a look at Exhibit
2 Thirty-Seven in the binder if you would. It's
3 the very last exhibit. What is this document?
- 4 A: That's a contract between us and Edward Rose.
- 5 Q: Okay. And that's for this project including the
6 retaining wall?
- 7 A: That's correct.
- 8 Q: Okay. Did you provide this contract to Michael
9 Young before he began his work on the retaining
10 wall in this case?
- 11 A: I personally have not done that, no.
- 12 Q: Okay. Do you know if anybody else provided ---
- 13 A: I do not.
- 14 Q: --- this contract to him? Okay. Are there any
15 -- or it looks like, page five of five relates
16 to a retaining wall. Is that correct?
- 17 A: Yes, it does.
- 18 Q: Okay. Are there any tolerances listed as far as
19 how many inches or feet the wall can be off the
20 design location and it still be acceptable?
- 21 A: No, I don't see anything. This doesn't seem to
22 be the specs.
- 23 Q: Okay. Where are the specs?
- 24 A: In the spec book.
- 25 Q: All right. Where's the spec book?



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1 A: I do not know.

2 Q: All right. Did Mr. Young have the spec book
3 when he was building this retaining wall?

4 A: I'm not aware if he did or didn't.

5 Q: Did you provide it to him?

6 A: Me personally? No.

7 Q: Do you know how -- if -- did anybody else with
8 Coogler Construction provide it to him?

9 A: I'm not aware if they did or didn't.

10 Q: Is that customary for somebody who's at Coogler
11 Construction to provide a wall sub-contractor a
12 copy of the spec book?

13 A: If they ask for it -- if there's a issue and
14 they ask for it, yes. We would give it to 'em.

15 Q: Did Mr. Young ask for it in this case?

16 A: I don't remember him asking for it.

17 Q: Okay. All right. And in Exhibit One, the
18 contract between you and Quality, are there any
19 other specifications in there indicating how
20 much tolerance you've allowed in as to the
21 location of the wall?

22 A: On page five here I do not see one.

23 Q: No, I'm talking about Exhibit One now, the
24 contract between Coogler and ---

25 A: Oh, without me reviewing all these pages I



1 couldn't answer it. But I don't know of one.

2 Q: Have you not reviewed the contract in
3 preparation for the trial today?

4 A: I do -- I have not -- I do not have it
5 memorized.

6 Q: I'm not asking if you have it memorized. But
7 did you -- in your ---

8 A: They're parts and pieces I may know but I can't
9 tell you if it's in there or not.

10 Q: Okay. Can you review it just take the time to
11 review it.

12 A: And you're looking for anything that had to do
13 with the tolerance on the wall?

14 Q: As to the location of the wall. And you're
15 looking through Exhibit Thirty-Seven, contract
16 between you, Coogler, and Edward Rose right now.

17 A: That's correct.

18 Q: Okay.

19 A: On page five of five, section two, it does look
20 like it's referring to the wall.

21 Q: Okay. What's it indicate there?

22 A: It says staking and elevation -- excavation to
23 within one tenth of a foot for the wall and is
24 to be performed by builder.

25 Q: Okay. Staking and excavation of the wall was --



1 let's, yeah -- the staking and the excavation of
2 the wall is to be performed by who according to
3 the contract between Coogler and Quality?

4 A: Well, the staking was performed by or is
5 responsible, Edward Rose.

6 Q: Okay. Well, it says ---

7 A: But I mean, what they're saying here is these --
8 these items are gonna -- you're responsible for
9 these being correct.

10 Q: Okay. All right. So, again, this contract and
11 these terms were not provided to Mr. Young,
12 correct?

13 A: I didn't personally give 'em to him, no.

14 Q: And you don't know of anybody else that did?

15 A: I mean, it's possible. There's other people in
16 the company that could have but I can't speak
17 for them.

18 Q: Okay. Have you asked anybody if they've -- the
19 other people in your company if they've provided
20 this contract to ---

21 A: I did not.

22 Q: All right. Is there -- let's turn to Exhibit
23 One now. All right. Is there anything in this
24 contract, the contract between Coogler and
25 Quality that indicates that there's any



1 tolerance requirement on the final location of
2 the wall?

3 A: I mean, I'd have to go through it.

4 Q: Well, take your time.

5 A: I don't see anything at this time. Unless you
6 go back to maybe, go back to the warranty and
7 say it doesn't meet the ---

8 Q: Warranty?

9 A: --- workmanship issues.

10 Q: Does the warranty say that the wall must be
11 within one foot, two feet, three feet of the
12 design location?

13 A: No, it doesn't list any failures with the
14 warranty. It says warranty -- warranty shall
15 represent all workmanship, period of one year.

16 Q: Okay.

17 A: Other words, it doesn't say if the wall's out of
18 place, it doesn't say if the wall has failures,
19 it doesn't say anything, so.

20 Q: Okay. All right. Is there any -- does it
21 specify any remedy if the wall is two feet off
22 or one foot off or three feet off, does it say
23 what the remedy is?

24 A: No, I do not see anything.

25 Q: It doesn't specify whether he tears down or



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1 replaces that section or the whole wall has to
2 come down. It doesn't specify does it?

3 A: I don't see anything.

4 Q: All right. I'm gonna ask you to look at -- this
5 is Coogler's answer and counterclaim in this
6 case. Can you read numbers five and six for us?

7 A: Plaintiff, DSL, entered into contract with
8 Coogler to install a certain retaining wall.
9 DSL breached the contract when it constructed
10 the wall at the wrong place.

11 Q: Okay. There any mention of any of the other
12 issues with the wall that had been discussed in
13 this case other than the allegation that it was
14 in the wrong place?

15 A: In those two paragraphs -- I mean those two
16 sentences, no.

17 Q: All right. What about in the rest of that
18 paragraph, seven, eight, and nine? Do you see
19 anything in there related to any other issues
20 with the wall other than location?

21 A: It says right here in seven, DSL breached the
22 contract when it failed to refuse to repair the
23 wall by removing it and rebuilding it to a
24 correct place. I mean, that could -- I mean, I
25 guess you could say that's part of the failure



1 in the first time. If you wanted to read it
2 that way.

3 Q: Okay. But other than location, I'm not asking
4 you ---

5 A: Well, it doesn't say anything about location in
6 seven, but.

7 Q: Okay. Does it mention anything about compaction
8 or the wall ---

9 A: No, it doesn't.

10 Q: --- failing? It just -- the reason for the wall
11 ---

12 A: Well, it says -- it says failed. When it failed
13 -- when they failed -- I'm sorry, when he failed
14 to refuse to repair the wall. I can't answer
15 that beyond that, what I just said.

16 Q: All right. At the end of the day, what was the
17 reason that -- let me back up for a second.
18 There were discussions about issues that Mr.
19 Rose was having with the wall. Is that fair to
20 say?

21 A: Correct.

22 Q: All right. And I believe your attorney's argued
23 and we agree that you were advocating to the
24 wall staying, that it was workable as is. Is
25 that fair?



1 A: With the first problem that we had?

2 Q: Or, well you tell me. So, was there a point
3 when you agreed with Mr. Rose that the wall was
4 in the wrong place and had to come down?

5 A: Yes.

6 Q: Okay.

7 A: At the end -- bef- yeah, when the wall came down
8 in the end it will not -- you do not have the
9 green space that they're required to have. I
10 can't argue that. It wasn't there.

11 Q: Okay. And you're talking about in -- if we're
12 looking at the as-is drawing ---

13 A: Between the curb and gutter and the black bo- --
14 -

15 Q: Hang on a second. Are you talking about in this
16 area (indicating)?

17 A: I'm talking about up in here (indicating).

18 Q: Okay. So the wall's a little closer here and
19 out here maybe a little bit closer here
20 (indicating)?

21 A: Yeah, I mean the -- I mean, it wouldn't
22 physically work here (indicating). So, after
23 that point, yeah all these areas that were wrong
24 were wrong. But that wasn't gonna work.

25 Q: Okay. Just -- in which area are you talking



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1 about?

2 A: Up here . This curb and gutter goes in.

3 Q: Okay. So you're sayin there's not enough space
4 between the wall and the curb ---

5 A: To get the structure. I mean, you can
6 physically get the structure in but you don't
7 have your grass area in between.

8 Q: Okay. And where in the contract does it say
9 there has to be a certain amount of grass area
10 between or the wall's gotta come down?

11 A: I doubt it even says that in my contract. They
12 expect you to build the plans -- they expect you
13 to build a job based on what the plan specs are.

14 Q: Okay. You just said Mr. Young didn't have the
15 specs, right?

16 A: He got plans.

17 Q: Well, in -- the plans, again, indicate at this
18 measurement we determined it was four feet and
19 the as-built indicates three feet.

20 A: Well, we believe that's inaccurate.

21 Q: You believe what's inaccurate?

22 A: That's not right. He didn't have three foot.
23 That's not right.

24 Q: You're surveyor's drawing says it's three feet.

25 A: I'm just -- my statement here is it was not --



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1 it wasn't off a foot. It was more than that.

2 Q: Okay. How much space did you need between the
3 curb and the wall to get it in?

4 A: I don't know exactly what their requirement --
5 based on their permit was, with the City of
6 Columbia, but I know that it was more than a
7 couple feet. They needed -- they need room --
8 they needed room is what I was told by Ron
9 Dilworth for if a car goes over the curb, that
10 it has a little bit of room to actually rest on
11 the wall instead of tumble down the backside.

12 Q: Okay.

13 A: Now, I don't make those -- I didn't make that
14 specification. I don't make those calls. And
15 I don't know the exact number.

16 Q: All right. This is your deposition. If you'll
17 look at page 178 for me.

18 A: What page?

19 Q: 178.

20 A: All right.

21 Q: Lines three -- start at line three. Can you
22 read it for us?

23 A: Line three, other words, the third sentence
24 down?

25 Q: Yeah, where it says Mr. Coogler, it says, well,



1 you need.

2 A: Well, you need at least, in this situation,
3 three-plus feet between the curb and the wall.

4 Q: Okay. All right. And have you made a
5 measurement of the design distance between the
6 curb and the wall here?

7 A: Right there, no. I don't remember doing that.

8 Q: Okay. Do you know how to measure and compute it
9 based on this scale?

10 A: Yeah.

11 Q: All right. If you would.

12 THE COURT: Now, what Exhibit is that?

13 MR. GOODWYN: This is Exhibit Seven, drawing four.

14 A: Hand me the scale over there, the civil.

15 Q: I will. I'm just saying the dimension doesn't
16 -- we did it before, it just doesn't fit exactly
17 ---

18 A: Right, but this -- you do understand that's not
19 how we do things in the field but we're gonna do
20 it in the courtroom this way.

21 Q: You don't do what in the field?

22 A: I don't lay it out with a scale. We lay it out
23 with a Cad file. We discussed that.

24 Q: All right.

25 A: So, this is ---



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1 THE COURT: Lay it out with the what?

2 A: The Cad file tells us where to put these points.

3 THE COURT: What's a Cad file. I don't know what
4 that means.

5 A: Well, the -- it's generated -- you gotta -- Your
6 Honor, I don't know as much as the guys that do
7 the computer work. I'm the guy that builds it.
8 The engineer that develops the Cad file which is
9 full of coordinates. These coordinates tell you
10 where to be. This here -- scaling this right
11 here (indicating) is not very accurate. When
12 you're talking about tenths and inches and feet
13 it's liable to be off.

14 Q: Is this drawing based -- this computerized
15 drawing is based on the Cad file, correct?

16 A: The thickness of your ink right there is what,
17 a foot? Just about isn't it? Yeah. So you can
18 be off very easily. This is not how we do this.

19 Q: All right. Would you agree with me, though,
20 that the distance from the outside edge of the
21 wall to the curb is three sixteenths of an inch?

22 A: I can tell you -- this is twenty scale right?

23 Q: Yeah.

24 A: It looks like from the back of the curb to the
25 back of the wall, if you look at it ---



- 1 Q: Which -- I'm sorry, which -- what are you saying
2 now?
- 3 A: The back of the wall from the back of the curb.
- 4 Q: All right.
- 5 A: All right. It looks like it's what?
- 6 Q: It's a little less than four.
- 7 A: Yeah. It looks like it's right at four foot.
8 I mean, you can debate that but this is the wall
9 I'm talking about anyway. The wall ---
- 10 Q: Okay. So that would be four feet?
- 11 A: Yes.
- 12 Q: Okay. And so that's acceptable it sounds like?
13 Four feet should be acceptable.
- 14 A: I -- my opinion is that that's what the designer
15 was wanting, four foot in that area.
- 16 Q: Okay. And based on -- tell me this, this is the
17 as-built versus design layout that you
18 commissioned, right? That Coogler commissioned
19 for this case.
- 20 A: Yeah, I assume, yes.
- 21 Q: Okay. How far is it at this closes point here
22 (indicating) to the curb based on the drawing?
23 Again, same scale, correct?
- 24 A: Well, we gonna check it first. To me it looks
25 like about two and a half feet. You see what



1 I'm sayin, it's hard to be accurate -- that
2 accurate without using the Cad.

3 Q: That's not right on three? You don't think
4 that's right on three?

5 A: Well, that's -- it's close, it's close to two
6 and a half.

7 Q: Okay.

8 A: And remember, this (indicating) is the area that
9 I noticed personally that was the critical area
10 that was out of range more than anything. Let's
11 scale this in.

12 Q: Okay. This end, again, has not been ---

13 THE COURT: Now we're not -- we're not on Exhibit
14 Seven now, we're on a different drawing that was
15 commissioned for the purposes of this case. Is
16 that accurate?

17 MR. GOODWYN: This is an Exhibit Number Thirty ---

18 MR. ROBINSON: Your Honor, if I might respond to
19 what you said.

20 THE COURT: Yes.

21 MR. ROBINSON: I think we're gonna find out that
22 it's not commissioned by Coogler, it was
23 commissioned by Edward Rose, and not for the
24 case but to figure out where the wall was. But
25 we'll have testimony on it.



1 THE COURT: Okay.

2 MR. GOODWYN: That's Exhibit Thirty-Six.

3 THE COURT: All right. Thank you so much.

4 Q: All right. And again, is there anything in
5 Exhibit One, the contract between Coogler and
6 Quality that says a foot off in that area will
7 cause the entire wall to be torn down?

8 A: I didn't see anything.

9 Q: Okay. Let me ask you this, if the reason the
10 wall is a foot off in that area -- or let's just
11 say, regardless how far it's off, if the reason
12 the wall is too close at any point is not the
13 responsibility of Michael Young but the
14 surveyor, for example, do you think Mr. Young
15 should still get paid under the contract?

16 A: If he followed the stakes exactly I would agree,
17 but that's not the case here.

18 Q: Okay. And if it's believed that the surveyor
19 meant for the offsets in this critical area of
20 a corner to be three and a half feet instead of
21 five feet, would you agree that would've pulled
22 the wall out another foot and a half and then it
23 would've been not too close.

24 A: Based on the information it was laid out with,
25 the five foot offset was at an angle. It was



1 supposed to be three and a half feet from the
2 wall. The point that he's supposed to set up
3 was five feet from there. That is correct. It
4 will be a three and a half foot offset once the
5 wall was laid out though because of the angle
6 that he came in.

7 Q: All right. And we'll get into that.

8 A: Other words, both are accurate.

9 Q: All right. If the de- -- if the surveyor
10 instead of putting face of the wall on these
11 stakes should've put center line of the wall and
12 that caused the wall to be off, would that be
13 the surveyor's responsibility or Mr. Young's
14 responsibility?

15 A: If the surveyor laid centerline of wall and it
16 was supposed to be face of wall, I agree that
17 would've been the surveyor.

18 Q: All right. And then what would your remedy then
19 have been? To just go and pay Mr. Young and
20 then go after the surveyor?

21 A: Well, if that would've happened, that would've
22 been up to Edward Rose.

23 Q: Okay. But I'm sayin from your point of view.
24 You had the contract with Mr. Young.

25 A: Right.



1 Q: Right. Would you've paid Mr. Young?

2 A: Well, if the survey would've messed it up then
3 he would've had to pay for the wall to come
4 down.

5 Q: Okay. Fine, but you still would've paid Mr.
6 Young.

7 A: Yeah, if he put the wall in the right place,
8 yeah.

9 Q: Okay. Have you ever had, in the past, retaining
10 walls that were off as shown in this as-built
11 drawing, just this minor amount shown here?

12 A: We've had retaining walls that've been off, yes.

13 Q: Okay. Have you had to tear 'em down because of
14 that? Those minor discrepancies?

15 A: Some of 'em, yes. Some of 'em, no. Depending
16 on what decision that the owner or the general
17 contractor make.

18 Q: Mr. Young's testifying about how sometimes he'll
19 sacrifice exact location for aesthetics just
20 because the bricks are not always uniform and it
21 throws the wall off a little bit. Do you agree
22 that that's sometimes a sacrifice that wall
23 builders have to make?

24 A: It probably has happened.

25 Q: Do you think that's reasonable of him to focus



1 on aesthetics rather than precise location
2 especially in these non-critical areas?

3 A: He's gonna have to sell the wall aesthetically,
4 that is true. But you've gotta do that, I agree
5 with Michael on that. But you can't make
6 adjustments like these where, you know, the
7 parking lot won't fit or the green area isn't
8 big enough.

9 Q: Okay. Not that there's any testimony that he
10 made those sacrifices in these critical areas.
11 I think he was saying out in these none critical
12 areas that's what's -- that's of more
13 importance. I think in the critical areas,
14 yeah, you have to be much more precise. But --
15 and when you're building a wall next to a
16 wetlands, like you were here, would you agree
17 that it's better to err on the side of caution
18 and be a little further from the wetland than
19 too close to the wetland?

20 A: Absolutely not.

21 Q: It's okay being in the wetland?

22 A: You're not gonna be in a wetland. You had a
23 registered surveyor lay it out where it goes.

24 Q: That -- apparently not very well.

25 A: If the wall -- well, that's not true either is



1 it? If the wall was laid out in the wetlands
2 and the surveyor laid it out then it wouldn't be
3 on Michael that it was in the wetlands.

4 Q: All right.

5 A: You can't -- I've never had a job where we're
6 like oh the wetlands, let's pull the job in
7 some. That's not the case.

8 Q: All right.

9 A: You put it where it goes.

10 Q: You're the general contractor on this job,
11 correct?

12 A: No, I'm actually ---

13 Q: Or you're

14 A: --- a sub-contractor.

15 Q: But maybe I should word it like this. You're
16 the general contractor at least of Michael
17 Young. You're his general contractor.

18 A: It's a little bit different situation. The
19 owner is the general contractor, and I'm
20 actually a sub. So, he's a sub under me.

21 Q: He's a sub of a sub. You're his upstream
22 contractor, maybe that's the best way ---

23 A: Correct.

24 Q: Okay. All right. And did you have a right and
25 the ability to supervise his construction of



1 this wall?

2 A: Did I have the right and ability?

3 Q: Yes.

4 A: Yes.

5 Q: Okay. So you -- if you found anything he was
6 doing wrong, you could've corrected him and made
7 him do it right?

8 A: I could've tried, yes.

9 Q: Okay. Did you?

10 A: Did I try to correct him?

11 Q: Did you supervise? Did you look to make sure
12 the wall was going in the right place?

13 A: No, sir. I did not babysit him.

14 Q: All right. But you could've.

15 A: Yes, sir. I could've.

16 Q: All right. You don't share any of the
17 responsibility for any issues with the wall do
18 you? Even though you -- it's ultimately your
19 responsibility to make sure the walls in the
20 right place, right?

21 A: Yes, because I hired Michael.

22 Q: So you don't take any responsibility for the
23 wall being in the wrong place? If you say it's
24 in the wrong place.

25 A: It is in the wrong place and no, I do not.



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1 Q: Okay. And you hired a surveyor to lay it out,
2 right?

3 A: No, I didn't.

4 Q: All right. Somebody other than Michael Young
5 hired ---

6 A: Edward Rose.

7 Q: Edward Rose hired a surveyor?

8 A: That's right.

9 Q: All right. And you would agree that the
10 surveyor -- if the court believes the surveyor
11 put some of the stakes or hubs in the wrong
12 place that's not Michael Young's fault.

13 A: That's correct.

14 Q: All right. If the wall's -- if the critical
15 points of the wall are off because of mistakes
16 the surveyor made, Michael Young should still
17 get paid. Do you agree with that?

18 A: If that was the case.

19 Q: Okay. That's what I'm saying, if the court
20 believes that ---

21 A: Yeah.

22 Q: --- that's the case. Okay. All right. Did you
23 -- all right. At what point was the wall taken
24 down? About what month?

25 A: Honestly, I'm not positive on the months. I



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- 1 believe it was March.
- 2 Q: Okay. So the wall was ---
- 3 A: I don't remember those dates.
- 4 Q: I think the testimony was his last day on the
- 5 job was Mid December of ---
- 6 A: Right.
- 7 Q: --- December 15th maybe.
- 8 A: I believe so.
- 9 Q: So, by March it had been torn down and rebuilt
- 10 or at least torn down?
- 11 A: I'm not sure what month it was.
- 12 Q: Was it before August?
- 13 A: Yeah, I'm pretty sure.
- 14 Q: Okay. This was -- this as-built versus design
- 15 was at least, it's dates August 2nd 2017. You
- 16 can't see it. Can you see it?
- 17 A: If that's the case then the wall wasn't torn
- 18 down then at that time.
- 19 Q: Right. So, what were Mr. Rose's complaints
- 20 about the location of the wall when the decision
- 21 was made to tear it down for it not being in the
- 22 right location?
- 23 A: It was -- simply to me it was the wall was not
- 24 in the location from plan design, we want the
- 25 wall taken down.



1 Q: Any -- well, some of the portion of the wall
2 are. This is real close. This is right on top
3 of the here, real close through here, right on
4 top of it here. You know, these are none
5 critical areas. What was he saying? Was he
6 talking specifically about the parking lot or
7 the, was this his big focus? Did he want -- did
8 he tell you he wanted to put a monument or a
9 gazebo out here?

10 A: They told me they wanted to take the entire wall
11 down because it was not in the right location.

12 Q: Okay. Did he say why that was important? Why
13 the location was so important to him?

14 A: No, they did not ---

15 Q: This is a retaining wall.

16 A: It's a retaining wall that holds up all their
17 parking lot.

18 Q: Right. Are you saying in this location it would
19 not have held up the parking lot?

20 A: Well, it wouldn't fit in.

21 Q: Well ---

22 A: Up there it wouldn't fit in.

23 Q: So you -- I mean, you couldn't have made it
24 work? Are you saying you couldn't have made it
25 work?



1 A: No, not to the planned design. I can't make it
2 work. It wouldn't physically fit.

3 Q: Even though it's clearly a few feet away.

4 A: It won't fit. It doesn't fit. It's not a four
5 foot gap.

6 Q: I don't -- okay, even though there's two feet
7 between the curb and the wall, are you saying
8 there needs to be two more feet?

9 A: Yes, the owner ---

10 Q: Why does there have to be two more feet?

11 A: Well, they explained something to me about a car
12 going over the top of the curb needed a place to
13 rest before it went over the curb- -- over the
14 whole wall.

15 Q: All right. And again, did Mr. Young ever know
16 that if it wasn't exactly four feet, that it was
17 gonna be -- that he'll have to tear down the
18 entire wall and wouldn't get paid?

19 A: I'm not familiar with those regulations, so is
20 he -- I do not know? I can't answer that.

21 Q: No, was he informed that by you and in the
22 contract or otherwise that if he's off this
23 (indicating) much that he's not getting paid and
24 the wall's coming down; and you're gonna ask him
25 to pay you \$50,000 to rebuild it.



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1 A: No, we didn't have that conversation that I'm
2 aware of.

3 Q: Okay. Was there ever any discussions or offer
4 to Mr. Young to tear down and rebuild the
5 portion of the wall that was deemed to be too
6 close to the parking lot?

7 A: No, I don't believe there was. I don't believe
8 he ever offered to do anything.

9 Q: Not what he offered, but you offered -- did you
10 offer that?

11 A: Offer for him to do something?

12 Q: Yeah.

13 A: Did I offer for Mr. Young to take the wall down?

14 Q: Yeah, I'm saying it just -- maybe I'm belated
15 here, but it seems like why do you have to tear
16 down all this wall if this (indicating) is just
17 the critical point and y'all are saying this
18 (indicating) is too close. Why not just tear
19 down this (indicating) part of the wall? Why do
20 you gotta tear down the whole thing

21 A: Well, at that point I'd already asked him to
22 take the wall down before and he never showed up
23 to do it.

24 Q: All right.

25 A: So, am I gonna ask him to do it again?



1 Q: Was a that possibility? I said -- you said okay
2 ---

3 A: It's not a possibility and he put -- and the
4 wall be where it's supposed to. Is it a
5 possibility to take down the other end of it and
6 fix one end of it, yes. Is it -- but that still
7 wouldn't fix where the wall's out down here
8 (indicating).

9 Q: Okay. And again, there's no issue with the
10 parking lot here correct?

11 A: Do what?

12 Q: Parking lot can fit down here right?

13 A: Yeah, it seems to be fitting.

14 Q: Okay. So the 35 feet of green space ---

15 A: But you do have to understand, yesterday when we
16 were talking, you mentioned there was a slope
17 there right?

18 Q: It appears ---

19 A: Right.

20 Q: --- from the civil design that there is.

21 A: But there's a slope there. You've got to have
22 -- that wall's got to be out a certain amount of
23 distance for that slope to tie into the parking
24 lot.

25 Q: You saying that it wouldn't have worked being



1 that close?

2 A: The further -- the closer you are to the parking
3 the steeper that slope is.

4 Q: Sure. Are you saying that ---

5 A: There's a requirement ---

6 Q: --- it wouldn't have worked being that extra
7 couple of feet in?

8 A: I'm not a civil engineer but it's very well
9 possible that it wouldn't have worked.

10 Q: Do you have -- that's pure speculation though,
11 correct?

12 A: Okay.

13 Q: Is it?

14 A: I'm just placed an opinion. I just said it was
15 an opinion. It may have not worked because of
16 the slope.

17 Q: Okay. But you don't have the evidence that
18 that's the case do you?

19 A: I do not.

20 Q: You've been involved in building these types of
21 segmented retaining walls for how many years?

22 A: Eight years, six years. Something like that.

23 Q: How many of these walls that you have had built,
24 built yourself or had built, actually have these
25 sharp corners as is in the design?



1 A: I've seen it both ways.

2 Q: On a percentage bases, how many would you say
3 have rounded corners and how many have straight
4 edge?

5 A: I'd say maybe 75 percent of 'em are probably
6 rounded and maybe 25 percent are angles.

7 Q: Have you ever had any taken any issue with a
8 wall that had rounded corners?

9 A: If it was on the plans it had no issues. If it
10 was on a job that had straights it was kind of
11 a gray area. A lot of owners were fine with it.
12 Some of 'em were not cool with it and, like I
13 said, some jobs were built as specked.

14 Q: All right. Was the fact that they were rounded
15 corners on these walls, did you have an issue
16 with that?

17 A: If the owner doesn't have any issues I don't.

18 Q: I'm asking you if you have any issue. Do you
19 think the wall's still properly constructed if
20 it has rounded corners instead of straight
21 corners?

22 A: No, I don't think it's -- I think it doesn't
23 meet design. But does it physically work, yeah.

24 Q: Do you think the walls are stronger with rounded
25 corners as apposed to those with straight



1 corners?

2 A: I'm not an engineer, but I personally feel like
3 there's not a lot of difference because even if
4 you cut the block, I mean, every block you gotta
5 remember within 18 inches you have a gap, you
6 have a cut, right. So, the difference in, as
7 long as you miter 'em and put 'em in the corner
8 properly like you're supposed to and the grid
9 overlaps. I don't know what the structure value
10 is. But I don't think it's a whole lot less.
11 But I can tell you that it's a whole lot easier
12 to build the wall with a curb then it is a
13 straight -- a straight corner.

14 Q: All right. Did Edward Rose threaten not to pay
15 you hundreds of thousands of dollars that they
16 owed you unless you agreed to tear down the wall
17 and rebuild it?

18 A: No, they told me -- I don't remember that
19 conversation. I'm not sayin it didn't happen.
20 But I know that the -- basically the threat was
21 either you take the wall down and get the wall
22 repaired right or we're going to do it and we're
23 gonna back charge you.

24 Q: Okay. They didn't say, and we're not gonna pay
25 this other large sum of money?



1 A: No, they didn't say -- I don't remember them
2 saying that.

3 Q: All right. At the time you were building this
4 project did you hope to get future work from
5 Edward Rose?

6 A: Honestly I don't know if we did or not.

7 Q: Why wouldn't you?

8 A: Well, they were a little difficult to work with.

9 Q: So, you'd already sworn off ---

10 A: They had management change and, you know, pay
11 apps and stuff where, you know, they would cut
12 my pay app or something like that. It was just
13 difficult.

14 Q: All right. So you you'd already decided you
15 were never gonna do another project for Edward
16 Rose?

17 A: No, at that time it wasn't decided.

18 Q: All right. Is it fair to say that if you had
19 sued Edward Rose for them making an unreasonable
20 decision to tear down this wall, that they
21 wouldn't of given you any future work?

22 A: I can't sue Edward Rose for that because the
23 wall is in the wrong place.

24 Q: But if Edward Rose surveyor is the reason it's
25 in the wrong place, you could've sued 'em.



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1 A: Right, but I don't think that was the case.

2 Q: Okay. But again, is it fair to say that if you
3 did sue 'em it would be highly unlikely that
4 you'd get any future work from them?

5 A: That -- yeah, you're probably right about that.

6 Q: All Right. All right. So you testified earlier
7 that you were advocating for Mr. Young's
8 position to leave the wall as is, make whatever
9 little small corrections you had to make.
10 Right? There was the compaction issue, there
11 was the issue with the wall falling over a
12 little bit after that big rain, and there was
13 some discussions about that, correct?

14 A: Correct.

15 Q: And you were advocating on Mr. Young's behalf
16 saying ---

17 A: Yes.

18 Q: --- we can work with this ---

19 A: We were trying to sell it.

20 Q: Say that again.

21 A: We were trying to sell what he was proposing.

22 Q: Okay. All right. At that point had you not
23 already looked at the location of the wall and
24 corner with the parking lot?

25 A: Obviously not.



1 Q: All right. So, when you looked at this location
2 of the curb and parking lot, in relation to the
3 wall, did you think you could find a way to make
4 it work?

5 A: When I found out that the wall was that far out?

6 Q: Right.

7 A: Did I feel like there was a way of making it
8 work?

9 Q: Yeah.

10 A: No, I didn't.

11 Q: It's impossible, you couldn't just move the
12 parking lot in ---

13 A: No. No, wasn't gonna happen.

14 Q: All right. And at that point had you looked at
15 the stakes to find out where the wall was staked
16 out?

17 A: Oh, I did.

18 Q: All right. Had you talked to the surveyor?

19 A: I did. My actual- -- my in-house guy is the guy
20 that brought the attention -- brought it to my
21 attention that the wall was off.

22 Q: Now ---

23 A: So I looked at it with him.

24 Q: Okay. Did you talk to the surveyor who laid out
25 the wall?



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1 A: Afterwards, yes.

2 Q: After what? After the decision to tear it down
3 was made?

4 A: No, after we noticed that the wall was off.

5 Q: Okay. And what kind of conversation did you
6 have? Who was that by the way?

7 A: Henry Walker.

8 Q: Okay. And that's the same Henry Walker that
9 compared the as-built versus design ---

10 A: I believe that is correct.

11 Q: --- drawing? Okay. And what was that
12 conversation? Did you have any discussions
13 about how he laid the wall out?

14 A: It was -- somehow we got on the discussion about
15 -- tryin to remember that conversation. Well,
16 all the stakes were missing so at that point I
17 was asking him, I believe, what his offsets
18 were.

19 Q: Okay.

20 A: I believe he was tellin me most of 'em are gonna
21 be five but if you pull straight across from the
22 corners your gonna see a three and a half.

23 Q: All right. Explain to the judge what you mean
24 by that. You talking about these (indicating)
25 corners?



1 A: No, I believe it's the inside corners. I'm not
2 positive on that.

3 Q: Right here (indicating)?

4 A: I believe it's that one, yeah.

5 Q: Okay. And so, what does that mean now? If he
6 says that the ---

7 A: Well, let me make this clear. When he -- me and
8 him talked on the phone, it was a brief
9 discussion about what the most of the offsets
10 were. Okay?

11 Q: Okay. And again, you hadn't seen the stakes?

12 A: No, I hadn't seen 'em at that time. I don't
13 believe I'd seen 'em. He had told me what the
14 -- most of 'em were off five foot, five foot
15 offsets. At that time that was the only
16 information he got. He didn't tell me where a
17 three and a half was or nothin like that.

18 Q: Okay.

19 A: And I believe at time Michael had showed up at
20 the job when were uncovering these hubs.

21 Q: Okay. All right. So there was a -- there was
22 supposed to be a three and a half foot offset at
23 some of the points?

24 A: He was mentioning it about it being -- pullin
25 three and a half foot, not that it would read



1 that on the stake, that you're gonna pull a
2 three and a half foot offset.

3 Q: Okay ---

4 A: But I honestly I -- it was a brief conversation,
5 I went strait to pullin all five foot offsets
6 and talking to Mike..

7 Q: All right. And let's talk about this. You say
8 pulling a three and a half foot offset even
9 though the stakes says five. This is my
10 understanding if, and correct me if I'm wrong,
11 if this (indicating) is the corner of the wall,
12 are you sayin there'd be two stakes here
13 (indicating) and then you would pull five feet
14 from each stake to find a point in the middle
15 that would be -- somehow be three and a half
16 feet?

17 A: I mean, I believe that's -- I believe it's the
18 inside corner but I think it'd be better that we
19 let a surveyor explain that than me 'cause I
20 wasn't out there when they were ---

21 Q: Okay.

22 A: --- laying it out. And I wasn't out there when
23 they -- I don't know which one exactly it is.

24 Q: Do you know how to build the retaining walls
25 like this?



- 1 A: Do I know how to build 'em?
- 2 Q: Yes.
- 3 A: I mean I've watched Michael.
- 4 Q: Do you think you could do it?
- 5 A: I believe I could.
- 6 Q: All right. Well, that would you do if they're
- 7 two stakes sitting here supposedly marking ---
- 8 A: And they had the same station?
- 9 Q: Yeah. Just like this.
- 10 A: I would pull ---
- 11 Q: Let me ---
- 12 A: I would assume that means I pull to a point.
- 13 Q: Okay. And that's where the corner of the wall
- 14 should be?
- 15 A: Yeah, that's what it says on the stations.
- 16 Q: All right. How do you explain the fact the
- 17 design calls for station number 1175.5 but the
- 18 actual stakes are something different, 1174.22?
- 19 A: Explain the difference between what it's sayin?
- 20 Q: Why doesn't it just say 1175.5?
- 21 A: I can't answer that without examining every one
- 22 of these stations and coming up with a theory of
- 23 all that. I mean, as far as I know he doesn't
- 24 have to have the same station as that as long as
- 25 his offsets are correct. You pull off of that



1 and you know which station you're at you can
2 measure over to a corner, you can measure over
3 to a radius, whatever you need.

4 Q: All right. Do you think the proper way to mark
5 the corner if you've got two stakes is just to
6 pull a string from both, five feet from each,
7 and some point in the middle?

8 A: That's one way to do it. There's multiple ways
9 to do it.

10 Q: Okay. So if Mr. Young -- Mr. Young testified
11 that's what he did -- if he did that, that would
12 be the right way to mark the location of the
13 wall. Correct?

14 A: If they're the same station, I think that's
15 correct.

16 Q: Right. Just like these two stakes, right?

17 A: Right.

18 Q: Okay. These two stakes would've been --

19 A: Can you show me where that station is on there?

20 Q: That's 1175.50, we're assuming this is 'cause
21 it's, you know, less than a foot difference than
22 that, it says 11.74.22, we're assuming that
23 these two stakes would've been marking this
24 corner. Does that make sense to you?

25 A: They both had the same sation right?



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1 Q: Right.

2 A: Yeah, I believe you're right.

3 Q: Okay. So if he followed these stakes, drew five
4 feet off and the wall's off, you can't blame
5 him. Is that fair to say?

6 A: Yeah, if he laid it out according to the stakes.

7 Q: All right. How big a job was this total for
8 you?

9 A: I'd have to go back through that Exhibit and
10 look, I don't know.

11 Q: Was it a multi million dollar job?

12 A: Several million, yeah.

13 Q: Okay. And what's -- generally, what kind of
14 percent profit do you ---

15 MR. ROBINSON: Objection Your Honor. That's not
16 relevant to anything and it's prejudicial.

17 MR. GOODWYN: I think it is relevant.

18 THE COURT: How is it relevant, Mr. Goodwyn?

19 MR. GOODWYN: We think at the end of the day he knew
20 this wall was in the right place and made a
21 business decision to not ruin his business with
22 Edward Rose and just to let him get sued. And
23 it was a lot cheaper to sue and pay for the wall
24 if he loses then he'll lose all of his business
25 with Edward Rose.



1 THE COURT: Now, you're just calling him the L word
2 I guess. That's now what he said. I mean, so
3 you're saying what he's -- the truth is
4 something different when he said it, is that
5 what you're saying?

6 MR. GOODWYN: I'm thinking -- I wanna find out how
7 much he's making 'cause from a business point of
8 view he is smart to just get sued and even if he
9 loses have to pay then to go lose all his
10 business with Edward Rose. But I'm trying to
11 find out how much is he making on this job, is
12 it -- I wanna be able to show, yes, it's a lot
13 more profitable for him to ---

14 THE COURT: You're saying he had an incentive ---

15 MR. GOODWYN: Yeah, huge financial incentive to not
16 pay my client instead of going after the real
17 bad guy, Edward Rose.

18 THE COURT: Okay. Mr. Robinson?

19 MR. ROBINSON: Your Honor, several things I think.
20 First of all, he has testified that they haven't
21 taken other jobs with Edward Rose and at this
22 point in time they were not inclined to take
23 another job with Edward Rose so, that's -- what
24 his profit was on the job is irrelevant. It's
25 also prejudicial because there's just no



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1 accounting for human nature -- or this is
2 accounting for human nature, and whether he
3 made a profit or a loss on this thing might
4 color the ultimate decision here. I'm trying to
5 guard against that.

6 MR. GOODWYN: I think the Court's wise enough not to
7 be colored by that.

8 MR. COOGLER: I can say one thing, they offered me
9 another job and I turned it down.

10 MR. GOODWYN: Okay.

11 MR. COOGLER: Phase three. I turned it down.

12 MR. GOODWYN: All right.

13 MR. COOGLER: We weren't pursuing that.

14 MR. ROBINSON: Your Honor, if I may ---

15 THE COURT: Go ahead. Mr. Robinson.

16 MR. ROBINSON: If I may. The statue of limitations
17 had run as vis-a-vis Coogler to Rose when this
18 lawsuit was filed. But he had already turned
19 the job down. So, again, his profit's
20 irrelevant.

21 THE COURT: Okay. Objection overruled.

22 A: We try to make 10 percent.

23 Q: Okay. So multi-million dollar job you would
24 make two or three hundred thousand dollars?

25 A: No, we try to make 10 percent.



- 1 Q: Okay. So, anyway, you try to make two to three
2 hundred thousand dollars on the job?
- 3 A: We try.
- 4 Q: And sometimes it doesn't always work out like
5 that.
- 6 A: Sometimes it's a negative.
- 7 Q: I gotcha. All right, lets go back for a second
8 to the three and a half foot offset. This is --
9 looking at Exhibit -- Plaintiff's Exhibit One.
10 E-mail chain between -- just e-mail chain
11 between you and Michael Young?
- 12 MR. ROBINSON: What's the date on that?
- 13 A: It says it is.
- 14 MR. GOODWYN: March 16th, 2015.
- 15 A: Uh-huh.
- 16 Q: Okay. So the green is Michael Young and the
17 white over here is you?
- 18 A: Yeah, I guess so.
- 19 Q: Okay. All right. Says, Mikey, I'm gonna send
20 you a picture of the stakes, correct?
- 21 A: (Nods head.)
- 22 Q: Is that a yes.
- 23 A: Yes.
- 24 Q: Okay. And what does he say here?
- 25 A: These stakes -- these are stakes that Walker



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1 used for the wall layout. Seems pretty clear
2 that they say face of wall.

3 Q: Okay. Was there a discussion or debate about
4 whether they said face of wall or centerline of
5 wall? Is that why he was sending this to you?

6 A: There may have been but I agree that they said
7 face of wall.

8 Q: Okay.

9 A: I mean it says right there, yes, that does.

10 Q: Right. What do you think they should've been?
11 I think there sounds like there were some
12 discussion.

13 A: I think prior there was a discussion about it
14 but I think it's been ironed out since then.

15 Q: Yeah, we know what they say. I'm just sayin do
16 you think they should've said centerline of the
17 wall. Was that the intent?

18 A: I didn't lay it out so I don't know what they --
19 I just know what it says on the stakes.

20 Q: All right. Okay, and then he's -- what's the
21 next?

22 A: Did your surveyor make it out there yet?

23 Q: Okay. Then when he said did surveyor make it
24 out there, who was he referring to? Was that
25 Henry Walker?



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1 A: I don't know if he was referring to my guy or
2 Henry.

3 Q: All right. Well, what's your response?

4 A: Yes, he said those stakes are three and a half
5 foot offset because of the silt fence.

6 Q: All right. Who is he that you refer to?

7 A: I don't remember at that time. And ---

8 Q: It was a surveyor ---

9 A: It may of been mine, it may of been Henry, I
10 don't remember.

11 Q: Okay. But a surveyor said ---

12 A: Yes.

13 Q: --- those stakes are three and a half foot
14 offset because of the silt fence?

15 A: Yes.

16 Q: Okay. What is that -- what does the silt fence
17 have to do with the three and a half foot
18 offset?

19 A: I don't really know. Maybe he didn't want to
20 put 'em behind it, I don't know.

21 Q: All right. Now you said that you've got these
22 two stakes and you draw five feet from 'em,
23 they'll end up three and a half feet. Is that
24 ---

25 A: No, what I'm sayin is, if you cross it. And I



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1 don't know about this corner. I just know if
2 you take two points and you put 'em out here,
3 you cross 'em the distance between that and the
4 wall is gonna be less.

5 Q: Okay.

6 A: You get what I'm sayin? Because that's a longer
7 distance.

8 Q: Right. But that wouldn't have any bearing on
9 the silt fence, would it? The silt fence
10 wouldn't affect that at all.

11 A: I don't understand what the silt fence has to do
12 with any of this.

13 Q: I'm asking you. This is your e-mail. This is
14 what you said. You said, he says those stakes
15 are three and a half foot offset because of the
16 silt fence. I'm asking you what you meant.

17 A: Well, sounds like I was repeatin what somebody
18 said.

19 Q: Okay. So you're saying that you didn't
20 understand what he meant?

21 A: Yeah, I wasn't standin there. I don't know what
22 he meant.

23 Q: All right. It doesn't sound like he's talking
24 -- that it should've said three and a half foot
25 on there because of the slit -- the location of



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1 the silt fence?

2 A: The understanding that I've got is once you lay
3 the wall out with the five foot offset, if you
4 pull straight to the wall, not at an angle, is
5 gonna be three and a half feet.

6 Q: All right. Or this could mean the silt fence
7 was too close, you couldn't have the stake five
8 feet away, you had to pull it in so it should've
9 said three and a half feet.

10 A: That's not my understanding but I'm not -- it's
11 taking information from one person and giving it
12 ---

13 Q: Why mention the silt fence if that's not the
14 explanation?

15 A: I don't know.

16 Q: Okay. From your experience -- let me back up.
17 Have you ever actually laid out a wall based on
18 stakes and hubs or you just always sub it out to
19 somebody else?

20 A: Always sub it out.

21 Q: Okay. All right. If you could turn to Exhibit
22 Fourteen in your little book. You there?

23 A: Yes, sir.

24 Q: All right. Looking at the top line here, is
25 this an invoice you received from Design South



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1 Quality Construction?

2 A: It does appear to be.

3 Q: All right. The price of the wall, the \$46787.40
4 figure, do you have any reason to dispute the
5 amount of that charge?

6 A: I don't believe so.

7 Q: Okay. If the Court believes you're responsible
8 for paying Mr. Young, that would be the amount
9 at least for the wall portion of the owed?

10 A: If these were the numbers that were agreed on by
11 Edward Rose. You gotta remember, I do not do
12 the accounting part, so.

13 Q: Okay. But you don't have any reason to dispute
14 that 46787.40 number?

15 A: If that's the number that we got paid for it,
16 no.

17 Q: The next item, this 140 square feet of caps for
18 the first wall. Do you agree that that's owed
19 or do you dispute that that amounts owed for
20 those caps on the first wall?

21 A: I believe they were installed correctly.

22 Q: Okay. Why weren't -- why hasn't that been paid?

23 A: I don't know. It's possible that at the time
24 that the billing was done maybe they weren't
25 installed then and Edward Rose cut our invoice.



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1 I don't know. I really don't have an answer for
2 ya.

3 Q: All right. So, if Edward Rose doesn't pay you,
4 you don't pay Mr. Young? Is that how it works?

5 A: Yeah. I pay him based on his invoice at the
6 time we turn -- we submit our invoice.

7 Q: What does whether Mr. Rose pays you have to do
8 with what you owe Mr. Young?

9 A: 'Cause I'm not a bank.

10 Q: I'm not saying you're a bank. You agree you owe
11 the money though?

12 A: Right.

13 Q: Even if Rose doesn't pay, you still owe him the
14 money, correct?

15 A: That's correct.

16 Q: All right. Let's look at these other charges.
17 First turn to Exhibit One, that's the contract
18 you agreed on. Turn to the second page of the
19 contract, paragraph five.

20 A: All right.

21 Q: That bold line, excavation or fill is needed
22 Design South reserves the right to back charge
23 \$150 per hour per machine and \$25 per hour per
24 man.

25 A: I see it.



1 Q: So you dispute that Design South Quality can
2 back charge Coogler for those types of items?

3 A: Based on their contract.

4 Q: All right. I think Mr. Young's testified that
5 there were times in y'all's relationship
6 building walls where you would exercise
7 discretion and not charge you for certain things
8 that he could have. Is that fair?

9 A: That's what he stated.

10 Q: I'm asking you. Is that ---

11 A: There's been times ---

12 Q: From your perspective ---

13 A: Yeah, there's been times we worked together and
14 I gave, he gave and we worked it out. There's
15 never been, that I'm aware of, a back charge
16 before.

17 Q: Do you think over the course of y'all's
18 relationship he's been more than fair as far as
19 that type of thing goes?

20 A: I think -- yeah, I think before we worked it out
21 pretty good.

22 Q: All right. If you would turn to Exhibit
23 Eighteen in your binder. All right. This is
24 some back charges that Mr. Young had billed
25 Coogler for. Have you reviewed this?



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1 A: I've seen it.

2 Q: All right. Do you have -- first, do you dispute
3 that Mr. Young is entitled to back charge
4 Coogler for these items?

5 A: Based on the fact that all this stuff come after
6 we were having issues not before, then yeah I do
7 dispute it.

8 Q: All right. Regardless of issues with this
9 project though, if there had not been any issues
10 with this project, do you dispute that Mr. Young
11 would have the ability to charge for these items
12 listed in Exhibit Eighteen?

13 A: Back charges are normally discussed before hand.
14 You're not usually -- just have a free will to,
15 you know, chalk up hours as you see fit and then
16 back charge somebody.

17 Q: Are you saying that's what Mr. Young did here?

18 A: Well, I believe we've discussed earlier that all
19 of it was, it was at good faith and it was part
20 of the project we were working together but all
21 of a sudden we have a back charge now. So, how
22 would it not be?

23 Q: All right. Do you dispute that he didn't do the
24 -- are you just saying he just didn't do the
25 work listed?



1 A: The things that are listed are, in my opinion,
2 are inflated and, I mean ---

3 Q: And we'll talk about the amounts in a minute.
4 I'm just saying did he do the work? Did he do
5 these -- the tasks laid out in here -- in the
6 items listed in Exhibit Eighteen?

7 A: Did he spend some time cutting down the wall?
8 I believe he did spend some time. Do we wanna
9 talk about that? Do we wanna talk about that?

10 Q: Let's just go through ---

11 A: I mean ---

12 Q: First ---

13 **THE COURT:** Let me ask you for a second. Mr.
14 Goodwyn, these are things that Mr. Young did not
15 charge Coogler for, is that correct?

16 **MR. GOODWYN:** No, these are things that he did --
17 that's the things on the invoices that he sent
18 to -- Exhibit Fourteen, Fifteen, Sixteen. Those
19 are the invoices showing that these items were
20 charged for.

21 **THE COURT:** Wait a minute, I'm confused. It says
22 Exhibit Eighteen, it says, Joey, just want to
23 take a minute tell you all the things that I did
24 for Coogler Construction out of good will to get
25 the job done and make you money. And then he



1 lists all these things. These are things that
2 he didn't expect to be paid for?

3 MR. GOODWYN: At the time he -- I think his
4 testimony was he'll do these types of things in
5 good will if he's gonna get paid for the job,
6 but if he's not gonna get paid for the job he's
7 gotta bill for 'em. So, he billed 'em.

8 THE COURT: Okay. Oh so -- okay. So he will
9 billing for them. He wasn't saying I did this
10 for free?

11 MR. GOODWYN: Right. I mean -- yeah. What's he --
12 I think the testimony was once he realized, hey,
13 these guys are gonna stiff me for the wall, they
14 owe me for all the other work I did too 'cause
15 they're -- even if the wall is wrong he's owed
16 this money. 'Cause they got the benefit from
17 all this work.

18 THE COURT: Okay. Mr. Robinson?

19 MR. ROBINSON: Your Honor, I think he -- I know he
20 testified on the stand that looking at Exhibit
21 Number Seventeen, at the time he did the work he
22 did not expect not intend to pay Coogler for it.
23 And that he didn't put any dollar amounts on
24 this until after the lawsuit was filed.

25 THE COURT: I think you misspoke. He didn't expect



1 to charge Coogler did he? You said he didn't
2 expect to pay Coogler.

3 MR. ROBINSON: I'm sorry if I misspoke. He didn't
4 expect to charge Coogler. That's why he says he
5 did it out of the goodness of his heart. And he
6 testified he didn't put any dollar amounts on
7 these things until after he sued Coogler. So,
8 and he didn't tell Coogler he was doing the
9 work. So Coogler had no way to have any
10 oversight over what he was doing or do it
11 themselves or anything else.

12 MR. GOODWYN: I don't think that's true, though. A
13 lot of this was discussed as they were going.

14 THE COURT: Okay. Well, this -- what he is
15 describing is accurate, that after it became
16 apparent that the relationship had broken down
17 then he listed all the things that he'd done and
18 so now he's charging for them but before he
19 didn't?

20 MR. GOODWYN: Right. I think he ---

21 MR. ROBINSON: After the lawsuit was filed.

22 MR. GOODWYN: Well, it was before the lawsuit was
23 filed but after it became clear he wasn't
24 getting paid for the wall.

25 THE COURT: Okay. I'm sorry, that clears it up.



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1 MR. GOODWYN: Yeah, this is February 19th, 2015. Is
2 -- well that's -- yeah well ---

3 MR. ROBINSON: No, it's not.

4 MR. GOODWYN: Yeah, that's the agreement.

5 Q: All right. Well, let's just go through these.
6 I want to ask you just a few questions about
7 each one. The wall sub-grade was too wide. The
8 first wall, says we had to cut down 18 to 24
9 inches to get the footer elevation the whole
10 length of the wall. Correct?

11 A: That's what it says right there, yeah.

12 Q: Did he do that?

13 A: The situation with that, I believe he was
14 already workin on the lower end and the
15 upperside was not cut down far enough. Okay, he
16 called me on the phone and says it's not cut
17 down far enough.

18 Q: First, who's responsibility is it to have it cut
19 down for him though?

20 A: We are.

21 Q: Okay.

22 A: Coogler is.

23 Q: All right.

24 A: All right. At that point I'm like what do you
25 want me to do about it, Michael? He's like,

