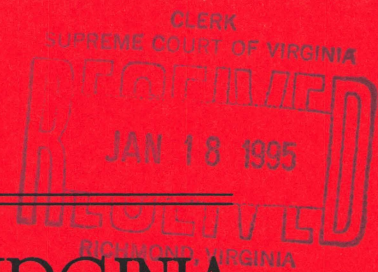


250 Va 161



SUPREME COURT OF VIRGINIA

RECORD NO. 941648

TARMAC MID-ATLANTIC, INC.,

Appellant,

v.

SMILEY BLOCK COMPANY

Appellee.

JOINT APPENDIX

William L. Thurston
BEALE, BALFOUR, DAVIDSON,
ETHERINGTON & PARKER, P.C.
701 E. Franklin St.
Suite 1200
Richmond, Virginia 23219
(804) 788-1500

Counsel for Appellant

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John R. Alford, Jr.
CASKIE & FROST
2306 Atherhold Rd.
P. O. Box 6360
Lynchburg, VA 24505
(804) 846-2731

Counsel for Appellee

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VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

SMILEY BLOCK COMPANY, INC.,
a Virginia Corporation,

Plaintiff,

v.

TARMAC MID-ATLANTIC CO., INC.,
a Delaware Corporation,

SERVE: Edward R. Parker
5511 Staples Mill Road
Richmond, Virginia 23228

Defendant.

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MOTION FOR JUDGMENT

COMES NOW the plaintiff, Smiley Block Company, Inc. (hereinafter "Smiley Block"), a Virginia corporation, and moves for judgment against the defendant, Tarmac Mid-Atlantic, Inc. (hereinafter "Tarmac"), a Delaware corporation, on the grounds and in the amounts set forth below:

1. Smiley Block is a Virginia corporation engaged in the manufacture and distribution of various forms of block and brick with its principal place of business located at 50 Madison Road, Madison Heights, Virginia, which is located in the City of Lynchburg, Virginia.

2. Tarmac is a Delaware corporation engaged in the sale and distribution of block and other concrete materials throughout Virginia with its principal place of business at 3011 Dock Street, Richmond, Virginia, which is located in the City of Richmond, Virginia.

3. Pursuant to an oral contract between Tarmac and Smiley Block, Tarmac agreed to purchase cupola slag from Smiley Block by the truck load, buying the cupola slag in volume (not weight) at a price of \$7.00 per cubic yard. Smiley Block likewise agreed to make the cupola slag available to Tarmac's carrier, J. S. Bryant Trucking of Concord, Virginia, and to invoice Tarmac for each truckload picked up from Smiley Block and delivered to Tarmac.

4. According to the records of Smiley-Block, Tarmac's last payment was received on May 10, 1993, and the last shipment of cupola slag from Smiley Block to Tarmac was picked up by J. S. Bryant Trucking on May 24, 1993.

5. Smiley Block has invoiced Tarmac for each shipment of Smiley Block slag that J.S. Bryant has picked up and then delivered to Tarmac. There is a present past due balance on the open account of \$33,082.00, all as more particularly set forth on the attached Account and Affidavit, which is incorporated herein.

6. Although Tarmac has admitted that it is indebted to Smiley Block in the amount of \$33,082.00, Tarmac has not paid any of this amount to Smiley Block nor has Tarmac returned any of the slag material to Smiley-Block.

WHEREFORE, plaintiff Smiley Block Company, Inc., demands judgment against defendant Tarmac Mid-Atlantic, Inc., in the sum of \$33,082.00 plus interest from May 10, 1993, and requests that this Court award Smiley Block Company, Inc., its costs and attorney's fees incurred in this action and that it have such other and further relief deemed appropriate by this Court.

SMILEY BLOCK COMPANY, INC.

By *John R. Alford*
Of Counsel

John R. Alford, Esquire
John R. Alford, Jr., Esquire
CASKIE & FROST
2306 Atherholt Road
P. O. Box 6360
Lynchburg, Virginia 24505
(804) 846-2731

Counsel for Smiley Block Company, Inc.

Filed in the LYNCHBURG CIRCUIT COURT Clerk's Office
the 28th day of October, 19 93.

Writ Tax \$ 5.00 Teste:

207 Law Lib. 4.00

Deposit 35.00

123 - 2.00

Total \$ 46.00

Raye Hawkins, Clerk
D. C.

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

SMILEY BLOCK COMPANY, INC.)

Plaintiff,)

v.)

Case No. 680CL93017617-00

TARMAC MID-ATLANTIC CO., INC.,)

Defendant)

GROUND OF DEFENSE AND COUNTERCLAIM

The defendant, Tarmac Mid-Atlantic, Inc. ("Tarmac"), by counsel, as and for its Grounds of Defense, states as follows:

1. Admitted.

2. It is admitted that Tarmac is a Delaware corporation; it is denied that Tarmac's principal place of business is in Richmond, Virginia, and it is averred that Tarmac's principal place of business is located in Norfolk, Virginia.

3. Admitted.

4. Admitted.

5. It is admitted that Smiley has invoiced Tarmac for slag delivered to Tarmac. It is denied that there is a balance due on the account or for any reason.

6. It is denied that Tarmac is indebted to Smiley in any amount or for any reason.

WHEREFORE, Tarmac respectfully requests that the plaintiff's motion for judgment be dismissed, that judgment be entered in favor of Tarmac, that Tarmac be awarded its costs, and that the Court enter such other and further relief as in the circumstances is proper.

COUNTERCLAIM

7. Paragraphs 1 through 6 hereof are incorporated herein by reference as though set forth in full.

8. Pursuant to the oral agreement between Tarmac and Smiley, Smiley was to provide to Tarmac cupola slag ("slag") for Tarmac's use in the course of its business for the purpose of producing concrete masonry block ("block").

9. In negotiating the oral agreement, Tarmac advised Smiley of the use for which the slag was intended.

10. In the course of its business, Smiley also uses slag for the purpose of producing block.

11. Slag is a lightweight aggregate with industry-recognized classifications, chemical composition and physical properties.

12. The term "cupola slag" therefore has a particular and specialized meaning in the industry, referring to a particular material, which has particular identifiable physical and chemical characteristics.

13. Prior to entering into an agreement, Smiley provided to Tarmac with the intention that Tarmac would rely upon it, a test report which reflected that the slag tested was in conformity with industry standards for slag intended for use in concrete masonry units. However, the slag actually provided and sold to Tarmac by Smiley did not meet such standards, and differed materially from the slag which was the subject of the materials report provided by Smiley.

14. The slag sold to Tarmac by Smiley was in fact used by Tarmac in the production of concrete block.

15. The block so produced has been sold to customers of Tarmac throughout central and eastern Virginia.

16. After the block produced by Tarmac was sold to Tarmac's customers, the block was used in a variety of buildings by those customers.

17. Subsequent to painting the block, pockets of incompletely oxidized magnesium compounds have caused "popouts" in the block, characterized by pieces of the surface of the block cracking and falling out of the side of the block.

18. Tarmac has been required by its customers to make repairs to the block by filling the popout areas and repainting walls constructed with the block, and has incurred considerable inconvenience and expense in doing so, has been damaged in its business and has been damaged in its reputation for the production of high-quality concrete block.

COUNT I - BREACH OF CONTRACT

19. Paragraphs 1 through 18 hereof are incorporated herein by reference as though set forth in full.

20. Smiley breached its contract with Tarmac in that the material sold by Smiley to Tarmac did not conform to industry standards for slag intended for use in concrete masonry units.

21. Tarmac used the material sold to it as cupola slag in the production of its concrete block, to its great damage and expense.

COUNT II - NEGLIGENCE

22. Paragraphs 1 through 18 hereof are incorporated herein by reference as though set forth in full.

23. Smiley negligently provided material to Tarmac as cupola slag.

24. Tarmac used the material sold to it as cupola slag in the production of its concrete block, to its great damage and expense.

COUNT III - BREACH OF WARRANTY

25. Paragraphs 1 through 18 hereof are incorporated herein by reference as though set forth in full.

26. Smiley warranted to Tarmac, expressly and/or impliedly, that the material sold to Tarmac was cupola slag and was fit for the purposes for which it was bought by Tarmac, which purposes were known to Smiley.

27. Tarmac used the material sold to it as and warranted to be cupola slag in the production of its concrete block, to its great damage and expense.

COUNT IV - FRAUD AND MISREPRESENTATION

28. Paragraphs 1 through 18 hereof are incorporated herein by reference as though set forth in full.

29. Smiley represented to Tarmac that the material sold to Tarmac was cupola slag, knowing the purposes for which it was being purchased by Tarmac.

30. Smiley intentionally misrepresented the nature of the material being sold to Tarmac, with the intent of misleading Tarmac in the transaction. Tarmac relied on the representations of Smiley, and as a result has been damaged thereby.

31. Alternatively, Smiley mistakenly misrepresented the nature of the material being sold to Tarmac, with the intent that Tarmac would rely on Smiley's representations in the

transaction. Tarmac relied on the representations of Smiley, and as a result has been damaged thereby.

WHEREFORE, Tarmac demands judgment against Smiley in the sum of Two Hundred Fifty Thousand (\$250,000.00) Dollars in compensatory damages, plus the sum of One Million (\$1,000,000.00) Dollars in punitive damages, and that it be awarded its costs in the matter.

TARMAC MID-ATLANTIC, INC.

By William L. Thurston
Counsel

William L. Thurston, Esquire
WRIGHT, ROBINSON, McCAMMON,
OSTHIMER & TATUM
411 East Franklin Street
Richmond, Virginia 23219
(804) 783-1100

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Answer and Counterclaim was mailed, postage prepaid, this 22 day of November, 1993, to John R. Alford, Esquire, CASKIE & FROST, 2306 Atherholt Road, P.O. Box 6360, Lynchburg, Virginia 24505.

William L. Thurston

Filed in the LYNCHBURG CIRCUIT COURT Clerk's Office
the 23rd day of November, 1993.
Writ Tax \$ 25.00 Testa:
207 Lew L15.
Deposit 100.00
Total Paid \$ 125.00 Larry Hawkins, Clerk
D. C.

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

SMILEY BLOCK COMPANY, INC.,
a Virginia corporation

Plaintiff,

v.

Case No. 680CL93017617

TARMAC MID-ATLANTIC CO., INC.
a Delaware Corporation,

Defendant.

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ANSWER TO DEFENDANT'S COUNTERCLAIM

Plaintiff, Smiley Block Company, Inc. ("Smiley Block"), by counsel, for its answer to the Counterclaim filed against Smiley Block by Tarmac Mid-Atlantic Co., Inc. ("Tarmac"), in the Circuit Court for the City of Lynchburg, Case No. 680CL93017617, states as follows:

1. Smiley Block admits the allegations in Paragraph 8 of the Counterclaim that Smiley Block was to provide cupola slag to Tarmac pursuant to an oral agreement between Smiley Block and Tarmac. Smiley Block denies the remaining allegations in Paragraph 8 and specifically denies that it knew how Tarmac intended to use the slag material.

2. Smiley Block denies the allegations in Paragraph 9 of the Counterclaim.

3. Smiley Block admits only the allegation in Paragraph 10 of the Counterclaim that it has used various types of slag as filler for some of its products.

4. Smiley Block is without sufficient information to admit

or deny the general allegations in Paragraph 11 of the Counterclaim and, accordingly, denies them.

5. Smiley Block is without information as to the allegations in Paragraph 12 of the Counterclaim and, accordingly denies them.

6. Smiley Block admits the allegation in Paragraph 13 of the Counterclaim that a test was conducted on material samples provided by Smiley Block. Smiley Block avers that it supplied only the material samples and that Tarmac conducted all tests on the materials to determine if the slag materials were suitable for its purposes. Smiley Block denies the remaining allegations in Paragraph 13.

7. Smiley Block is without information as to the allegations in Paragraphs 14, 15, 16, 17, and 18 of the Counterclaim, and accordingly denies them.

COUNT I - BREACH OF CONTRACT

8. Smiley Block incorporates its responses to Paragraphs 8-18 of the Counterclaim, inclusive.

9. Smiley Block denies the allegations in Paragraph 20 of the Counterclaim.

10. Smiley Block is without information as to the allegations in Paragraph 21 of the Counterclaim and accordingly denies them.

COUNT II - NEGLIGENCE

11. Smiley Block incorporates its responses to Paragraphs 8-18 of the Counterclaim, inclusive.

12. Smiley Block denies the allegations in Paragraph 23 of the Counterclaim.

13. Smiley Block is without information as to the allegations in Paragraph 24 of the Counterclaim and accordingly denies them.

COUNT III - BREACH OF WARRANTY

14. Smiley Block incorporates its responses to Paragraphs 7-18 of the Counterclaim, inclusive.

15. Smiley Block denies the allegations in Paragraph 26 of the Counterclaim. Smiley Block specifically denies that it made any warranty, either expressed or implied, to Tarmac or that it knew the specific purposes for which Tarmac bought the slag material.

16. Smiley Block is without information as to the allegations in Paragraph 27 of the Counterclaim and accordingly denies them.

COUNT IV - FRAUD AND MISREPRESENTATION

17. Smiley Block incorporates its responses to Paragraphs 8-18 of the Counterclaim, inclusive.

18. Smiley Block admits only that it made available slag material to be picked up by Tarmac's carrier J.S. Byrant Trucking of Concord, Virginia. Smiley Block denies the remaining allegations in Paragraph 29 of the Counterclaim. Smiley Block specifically denies that it made any representation to Tarmac or that it knew the specific purposes for which Tarmac bought the slag material.

19. Smiley Block denies the allegations in Paragraphs 30 and 31 of the Counterclaim.

WHEREFORE, Smiley Block respectfully requests this Court: (1) to dismiss Tarmac's Counterclaim; (2) to enter judgment in favor of Smiley Block; (3) to award Smiley Block its costs, including reasonable attorney's fees; and (4) to enter such further relief as the Court shall deem proper.

SMILEY BLOCK COMPANY, INC.

By: 
Of Counsel

John R. Alford, Esquire
John R. Alford, Jr., Esquire
CASKIE & FROST, P.C.
2306 Atherholt Road
P. O. Box 6360
Lynchburg, VA 24505
(804) 846-2731

CERTIFICATE

I hereby certify that a true copy of the foregoing Plaintiff's Answer to Counterclaim were mailed to William L. Thurston, WRIGHT, ROBINSON, McMCAMMON, OSTHIMER & TATUM, 411 East Franklin Street, Richmond, Virginia 23219, this 14th day of December, 1993.


John R. Alford, Jr.

12/14/93 11:00A
R. Hawkins
4

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

SMILEY BLOCK COMPANY, INC.

Plaintiff,

v.

TARMAC MID-ATLANTIC CO., INC.,

Defendant

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NOTICE

PLEASE TAKE NOTICE of a change in the firm name and address for the undersigned, counsel for the defendant in the above-styled matter. Effective Monday, January 17, 1994, the undersigned counsel has joined the firm of BEALE, BALFOUR, DAVIDSON, ETHERINGTON & PARKER, whose offices are located at 701 East Franklin Street, Suite 1200, Richmond, Virginia 23219.


Counsel

William L. Thurston, Esquire
Va. Bar No. 24775
BEALE, BALFOUR, DAVIDSON,
ETHERINGTON & PARKER
701 East Franklin Street, Suite 1200
Richmond, Virginia 23219
(804)788-1500

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Notice was mailed, postage prepaid, this 19th day of January, 1994, to John R. Alford, Esquire, CASKIE & FROST, 2306 Atherholt Road, P.O. Box 6360, Lynchburg, Virginia 24505.

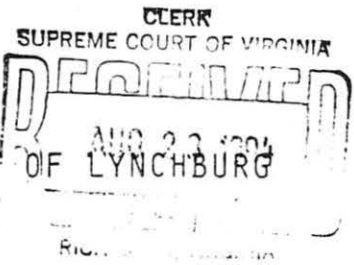
William T. Alford

906

FILED IN THE CLERK'S OFFICE OF THE CIRCUIT
COURT OF THE CITY OF LYNCHBURG
DATE JAN 24 1994 TIME 8:30 A.M.
FILED BY LARRY O. PALMER, CLERK
BY R.M. [Signature] Dep. Clerk

CL93017617

941648



1 VIRGINIA:

2 IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

3
4
5 SMILEY BLOCK COMPANY,

6 Plaintiff

7 -vs-

8 TARMAC MID-ATLANTIC, INC.

9 Defendant
10

11
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13 TRANSCRIPT OF CERTAIN PROCEEDINGS

14 June 23, 1994
15
16
17

18 FILED IN THE CLERK'S OFFICE OF THE CIRCUIT
19 COURT OF THE CITY OF LYNCHBURG
20 DATE 7-22-94 TIME 9:25 A.M.
21 TESTER: LARRY B. PALMER, CLERK
22 BY: Em Dep. Clerk

23 PRESIDING JUDGE: HON. RICHARD S. MILLER

24 FILED IN THE CLERK'S OFFICE OF THE CIRCUIT
25 COURT OF THE CITY OF LYNCHBURG
DATE 7-29-94 TIME 11:10 A.M.
TESTER: LARRY B. PALMER, CLERK
BY: Em Dep. Clerk

APPEARANCES:

JOHN R. ALFORD, ESQ.
 Caskie & Frost
 P.O. Box 6360
 Lynchburg, Virginia 24505
Counsel for the Plaintiff.

WILLIAM L. THURSTON, ESQ.
 Beale, Balfour, Davidson,
 Etherington & Parker
 Suite 1200, Seventh and Franklin Bldg.
 701 East Franklin Street
 Richmond, Virginia 23219
Counsel for Defendant.

I N D E XWITNESS:PAGEJAMES RITTER

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AUGUST THIEME

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1 THE COURT: Is the defendant ready to
2 proceed?

3 MR. THURSTON: Yes, Your Honor, we are.

4 THE COURT: Call your first witness?

5
6
7
8
9 JAMES RITTER, the witness, and after having been
10 first duly sworn, was examined and testified on his oath
11 as follows:

12
13 DIRECT EXAMINATION

14
15 BY MR. THURSTON:

16 Q Mr. Ritter, will you tell the jury your
17 name, please?

18 A James E. Ritter.

19 Q And you are employed, are you not?

20 A Yes, sir.

21 Q By who are you employed?

22 A Tarmac Mid-Atlantic.

23 Q And what is your position with Tarmac?

24 A I'm Operations Manager of Richmond Block,
25 Tarmac Richmond Block.

1 Q And where is that plant located?

2 A 1700 Darbeytown Road, Richmond.

3 Q How long have you been manager of that
4 plant?

5 A Since May of '93.

6 Q Before that, how were you employed?

7 A I was Operations Manager of Tarmac's
8 Richmond Plant.

9 Q Same plant?

10 A No, another location.

11 Q Okay; tell the jury what your
12 responsibilities are now, the position you have now?

13 A I'm responsible for production of our block
14 and the distribution of these blocks, shipping.

15 Q And I think you said that's since May of
16 '93?

17 A Yes, sir.

18 Q Tell the jury a little bit more about your
19 experience; how long have you been involved with the
20 production of concrete block?

21 A I have been involved in this industry in
22 one form or another for 25 years.

23 Q Who did you work for before you went to
24 work for Tarmac?

25 A I worked for Allied Corporation in Suffolk;

1 I worked for Williams Brothers in Atlanta; I worked for
2 Solite Corporation at various locations.

3 Q What did you do at Allied?

4 A I was Production Manager.

5 Q And was that for concrete block?

6 A Yes, sir.

7 Q Okay, how about for Williams Brothers?

8 A I was Production Manager of the Block Plant
9 in Atlanta.

10 Q And for Solite?

11 A For Solite, I worked as a service
12 representative, working in various plants assisting
13 other people with the manufacturing of block, as a sales
14 representative and as a general manager of the block
15 company.

16 Q Now, in the course of your work, did you at
17 some point have occasion to talk with Henry Smiley about
18 lightweight aggregates?

19 A Yes, sir.

20 Q Maybe I ought to stop there. Would you
21 tell the jury what we mean when we talk about
22 lightweight aggregates?

23 A A lightweight aggregate is a product used
24 in the manufacturing of block or any concrete products.
25 You use this in place of maybe gravel or stone in it,

and it makes the concrete lighter, easier to handle.

Q And tell the jury what some of the examples of a lightweight aggregate would be?

A It could be slag or pumice, solite is one of the better known products; that is a Virginia product, stalite, livlite, these are all manufactured products from the East Coast.

Q I think you said you did have contact at some point with Mr. Henry Smiley about lightweight aggregate; do you recall when that occurred?

A The Fall of '91.

Q And what was the nature of that contact, how did the contact start?

A It was a sales call by Mr. Henry Smiley in my office in Richmond.

Q Okay; which plant were you at then?

A I was at the old Tarmac Plant on Ellen Road.

Q On Ellen Road. And did Mr. Smiley when he made that call on you bring anything with him?

A Yes, he did.

Q What did he bring?

A He brought an A.S.T.M. certification, a block and some material.

Q Let me ask you to look at Defendant's

1 Exhibit No. 1, which I think is in front of you; do you
2 have that?

3 A Yes, sir.

4 Q Can you identify that?

5 A Yes, sir.

6 Q What is it?

7 A This is a document that Mr. Smiley left in
8 my office.

9 Q All right, and you said he also brought you
10 a sample; tell the jury what that looked like, what kind
11 of sample?

12 A Well, it was a bag, 25 or 30 pounds of the
13 aggregate.

14 Q What does the aggregate look like?

15 A Run from the size of a pencil eraser down
16 to dust, the slag, and most of it is very sharp and
17 granular.

18 Q So it's sort of like a small gravel or
19 something?

20 A Yes.

21 Q And you said he also brought you a piece of
22 block?

23 A Yes, sir.

24 Q Let me show you this. We want to introduce
25 this, Your Honor. But let me just show you what, for

1 the record, is about a 6x6x2 inch piece of concrete; can
2 you identify that?

3 A Yes.

4 Q What is it?

5 A It's a block that Mr. Smiley left in my
6 office.

7 Q And have you had that block continually
8 since he brought it to you?

9 A Yes, I have.

10 Q Okay, now tell the jury what kind of
11 conversation you had with Mr. Smiley when he brought you
12 these things?

13 A Mr. Smiley told me that he represented the
14 Smiley Block, that they did sell slag used in the
15 manufacture of concrete block, and he gave me names of
16 other people that were using it.

17 Q And did you buy any slag from him then?

18 A Not at that time.

19 Q Did you buy slag from him later?

20 A Yes.

21 Q Okay, tell me what company it was that
22 bought slag from him when you first got it?

23 A Tarmac Mid-Atlantic.

24 Q And approximately when are we talking
25 about?

1 A It was May of '92.

2 Q Had there been any contact between Mr.
3 Smiley and you between the Fall of '91 and May of '92?

4 A Yes.

5 Q What kind of contact?

6 A Mr. Smiley called me on several occasions
7 asking me if I were interested in the material and
8 indicating that he had other people that were
9 interested.

10 Q Now, Tarmac currently runs the block plant
11 on Darbeytown Road?

12 A Yes, sir.

13 Q When did Tarmac take that over?

14 A It was May of 1992.

15 Q The exhibit which is the test report, which
16 is Defense Exhibit 1 there, had that been in your file
17 during that period of time?

18 A Yes, it has been.

19 Q Okay; did there come a time when you asked
20 for an up-dated report?

21 A Yes, sir.

22 Q When, approximately did that happen?

23 A I'm trying to think, it was late '92.

24 Q Let me show you what we have labeled for
25 identification as Defense Exhibit 3, can you identify

1 that?

2 A Yes.

3 Q What is it?

4 A This looks like the second certification
5 that I asked for.

6 Q Okay, that's the one you just talked about
7 in the Fall of '92?

8 A Yes, sir.

9 Q Okay; and did you maintain this in your
10 file?

11 A Yes, sir.

12 Q Why do you do that?

A We have to certify to our customers our
14 block meet certain specifications. Part of that
15 certification says that the materials used will meet
16 A.S.T.M. certifications. Every year we ask our material
17 suppliers for up-dated certificates. Most of your
18 commercial jobs ask for a certification.

19 Q. What is A.S.T.M.?

20 A American Standards of Testing of Materials.

21 Q Okay, and they publish something that tests
22 are run by?

23 A Yes, sir.

24 Q Okay; and so what shows on Exhibit 3 as
25 applicable standard A.S.T.M. C-331, is that one of their

standards?

A Yes, sir, that is a standard for
lightweight aggregate.

Q Is this certification the kind that you
keep in your file and then give to a customer who needs
a certification?

A Yes, sir.

MR. THURSTON: Your Honor, we move
introduction of Defense 3.

MR. ALFORD: Could I ask him one or two
questions on it?

THE COURT: You can voir dire him.

MR. ALFORD: Yes, sir.

BY MR. ALFORD:

Q Who is the client of that?

A Tarmac.

Q And Tarmac what?

A It says Tarmac Cellostone.

Q And it doesn't indicate that Smiley got it
or did anything with it, does it?

A No, it does not.

1 MR. ALFORD: No further questions on it.

2 THE COURT: Any objection.

3 MR. ALFORD: No objection.

4 THE COURT: All right, it's admitted.

5 MR. THURSTON: Your Honor, I ask the copy
6 be passed to the jury.

7 MR. ALFORD: Judge, I respectfully submit
8 that rather than have them confused with all of
9 those copies, that they ought to see the
10 document is there and --

11 THE COURT: He's got a copy for everybody;
12 it just saves time for everybody to have one
13 rather than passing --

14 MR. ALFORD: All right, okay, but at the
15 conclusion, I would respectfully ask, of his
16 examination, that he pick those up, rather than
17 have all of those cluttered --

18 THE COURT: After the jury has had an
19 ample opportunity to look at what the exhibit
20 is, then we'll take them back.

BY MR. THURSTON contd:

Q Mr. Ritter, how was the slag that you were buying from Mr. Smiley, how was that to get from Mr. Smiley's yard to your yard?

A By contract hauler.

Q By contract hauler?

A Yes, sir, by trucker.

Q And in this case, how did the slag get from Smiley's yard to your yard?

A Most of it was delivered by J. S. Bryant Trucking Company.

Q And how did you happen to decide on J. S. Bryant as the trucking company?

A I was familiar with J.S. Bryant and knew they were located in the area and I talked with Mike and he indicated that they did do some hauling out of his facility.

Q How did J.S. Bryant know when to bring loads of slag and how much to bring and that kind of thing?

A We talked with them several times a week, a lot of times daily, coordinating deliveries.

Q And you would talk with J.S. Bryant directly?

A Bryant, and I talked with Mike making sure

1 we could get trucks loaded when we needed them.

2 Q Okay; well, now, we've got the slag that's
3 come to your yard, tell the jury a little bit about how
4 concrete blocks are made?

5 A We use several different materials, and
6 these materials come in; they are dumped in either
7 ground storage bins or into a hopper, which runs them up
8 into bins over a machine. They are then dumped into a
9 weight hopper, they are weighed, they go into a mixer,
10 they're mixed, then they go into the block machine and
11 the block machine makes these block. It will form and
12 make 3 eight inch block about every 8 and a half or 9
13 seconds.

14 Q Once it comes out of that forming machine,
15 where do the block go?

16 A Then they go into a curing room and they
17 are cured at about 105 degrees for approximately 20
18 hours; and then we bring them out, cube them, put them
19 on our yard, and then they set there for 28 days and
20 they are ready for delivery.

21 Q Why do they sit there for 28 days?

22 A This is the original, I guess the original
23 hydration period of concrete. It takes that long to
24 reach its design strengths.

25 Q And what does the plant do when you get an

3
1 order for block?

2 A We print a load sheet, it goes up on the
3 yard and it's loaded on trucks; when the truck comes
4 back down, it's checked and a delivery ticket is made.

5 Q Now, when you had your discussions with Mr.
6 Smiley, did you have any discussion about whether the
7 slag that you buy would be the same as the sample that
8 he brought in?

9 A Not in those terms, no.

10 Q What kind of terms?

11 A We were given an A.S.T.M. certification
12 that the material met.

13 Q Now, you have described how you use an
14 A.S.T.M. certification with your customers. Is an
15 A.S.T.M. certification something that is important to
16 you ?

17 A Yes, they are.

18 Q Why is that?

19 A You can't do certain jobs if you don't
20 certify your block.

21 Q And do your customers rely on the A.S.T.M.
22 certification?

23 A Yes, sir.

24 Q Do you rely on the A.S.T.M. certification?

25 A Yes, sir. We rely on it from our suppliers

1 for their material, and then in turn we certify our
2 block.

3 Q Now, I think you said that you started
4 receiving the shipments of slag from Smiley in, what was
5 it, May or June of '92?

6 A Yes, sir.

7 Q And did you use the slag in the production
8 of block then?

9 A Yes, sir.

10 Q Did you use any other lightweight
11 aggregates at the same time?

12 A Yes, sir.

13 Q What else were you using?

14 A We used pumice.

15 Q What's pumice?

16 A Pumice is a natural light weight material;
17 it's volcanic rock; it's lava from a volcano. Tarmac is
18 the distributor for pumice in the United States; we
19 bring it in by ships and distribute it.

20 Q During the Spring and the early summer of
21 1993, were you using the slag that you bought from
22 Smiley and also using pumice?

23 A Yes, sir.

24 Q And then you use cement in the mix?

25 A Yes, sir.

1 Q Where do you get your cement?

2 A Roanoke Cement Company.

3 Q What other of these ingredients, you
4 mentioned that there were a variety of ingredients, what
5 other ingredients do you put into the concrete mix?

6 A We use natural sand, we use granite
7 screenings, we use water, and we use some add mixes,
8 which are chemicals that are plastisizers that allow the
9 block to strip out of the forms real easy.

10 Q Was any of the block that you made using
11 the slag, was that sold to any of your customers?

12 A Yes, sir.

13 Q And during the spring of 1993, did you get
14 any complaints from customers about the performance of
15 the block?

16 A Yes, sir.

17 Q Tell the jury what kind of complaints you
18 got?

19 A Well, we started getting complaints from
20 several jobs that they were having some spalling--

21

22 MR. ALFORD: Judge, he can say what he
23 saw, but what people told him, I respectfully
24 submit, is hearsay.

25

1 BY MR. THURSTON contd:

2 Q Yeah, that's right, just say what you saw?

3 A I was asked to visit some jobs. I went to
4 these jobs and I saw spalling, some of the block had
5 been painted, some of them had not and they had
6 pop-outs, small chunks that popped out of the face of
7 the block.

8 Q So you actually went to see what the
9 complaint was about?

10 A Yes, sir.

11 Q I'm going to show you a couple of
12 photographs, the first one has been labeled Defense
13 Exhibit 14. Can you identify that, please?

14 A That is a picture of a pop-out; it looks
15 like two pretty good sized and one real small on one
16 block.

17 Q Now, does that picture accurately show what
18 you saw when you went out there?

19 A Yes, sir.

20 Q Could you recall what project that was
21 from?

22 A No, sir.

23 Q I show you what has been labeled Defense
24 Exhibit 15, I ask if you can identify that?

25 A That's a pop-out; that's a larger one.

1 Q And does that picture accurately portray
2 what you saw when you went out to look at these
3 problems?

4 A Yes, sir.

5 Q I show you Defense Exhibit 16, same
6 question, whether you can identify that?

7 A It's a picture of a wall with some pop-outs
8 present.

9 Q And does that accurately depict what you
10 saw when you went to look?

11 A Yes, sir.

12 Q Exhibit 17?

13 A Again, this is a picture of pop-outs, more
14 of them.

15 Q Again, does that accurately show what you
16 saw when you went?

17 A Yes, sir.

18 Q Three more, 18?

19 A Yes, sir, this is what I saw.

20 Q Again, a picture of a wall on one of these
21 projects?

22 A Yes, sir.

23 Q Defense 19?

24 A Yes, this is a picture of a small one on an
25 unpainted wall. They don't show up as well on a

1 unpainted wall.

2 Q Okay; these are unpainted block?

3 A This one is.

4 Q 19 and 20?

5 A Yes, this is a unpainted wall.

6 Q Now, the first ones that I showed you,
7 14-18, are those all painted walls?

8 A Yes, sir.

9
10 MR. THURSTON: Your Honor, we move the
11 admission of Defense 14-20.

12 THE COURT: Any objection?

13 MR. ALFORD: No, I don't have any
14 objection, if Your Honor pleases.

15 MR. THURSTON: May I pass those to the
16 jury, Your Honor.

17

18 BY MR. THURSTON contd:

19 Q Mr. Ritter, after you responded to these
20 complaints by going out and looking at the situation,
21 did you have any contact with Smiley Block?

22 A Yes, sir.

23 Q What was the nature of your first contact,
24 how did you make contact?

25 A I called Smiley Block and talked to Mr.

1 Mike Smiley.

2 Q And can you tell the jury what kind of
3 conversation you had with him?

4 A I told him we were having this problem and
5 I asked if he had any information that could help us. I
6 followed it up with a letter.

7 Q I show you what we have labeled as Defense
8 Exhibit 4 and I will ask you if you can identify that?

9 A Yes, this is a letter that I wrote Mr.
10 Smiley.

11 Q And did you send that letter to him on or
12 about June 11 of 1993?

13 A Yes, sir.
14

15 MR. THURSTON: Your Honor, I would move
16 the admission of Defense 4.

17 MR. ALFORD: No objection.

18 THE COURT: It's admitted.

19 MR. THURSTON: And I have a copy of the
20 jury, if I may.
21

22 BY MR. THURSTON contd:

23 Q Now, in response to your contact with Mr.
24 Smiley, did he say that Smiley Block would or would not
25 do anything about this?

1 A He indicated he had never had any
2 experience and never seen anything like this.

3 Q And did it go any further after that?

4 A No.

5 Q Now, did you also do some further
6 investigation to see what the cause of this pop-out
7 situation was?

8 A Yes, we did.

9 Q What did you do?

10 A We submitted samples of our materials to
11 two different testing labs to have analyses run on them.

12 Q Who were the testing labs?

13 A I think it was R. J. Lee and Froehling and
14 Robertson.

15 Q And did you get reports back from them?

16 A Yes, sir.

17
18 MR. ALFORD: Judge, I respectfully submit
19 that anything that they got back would be
20 hearsay, unless you have got the people here, and
21 I know you got Mr. August Thieme here, but you
22 don't have anybody else here. I also --

23 THE COURT: Any response?

24 MR. THURSTON: Your Honor, I agree, I'm
25 only going to have Mr. Ritter identify the report

1 that he got back. I won't have him go into the
2 details. Mr. Thieme will be here to talk about
3 the details.

4 THE COURT: It's not to be submitted as an
5 exhibit at this point?

6 MR. THURSTON: Not at this point, no.

7 THE COURT: The witness is not going to
8 refer to anything in the report?

9 MR. THURSTON: No.

10 THE COURT: Okay.

11 MR. THURSTON: I just want to establish
12 that this is the report they received.

13
14 BY MR. THURSTON contd:

15 Q Mr. Ritter, showing you Defense Exhibit 5
16 for identification, can you identify that?

17 A Yes, this is a copy of the report that we
18 got from F & R, Froehling and Robertson.

19 Q All right, now, I noticed you looking
20 through the pages. Did you receive all of those pages?

21 A Yes, sir.

22 Q Did you have involvement with, any dealing
23 with Tarmac customers after that point, or was that Mr.
24 Davidson, who did that?

25 A I was involved in visiting the projects and

1 talking to your customers.

2 Q Okay, and are you aware of repair efforts
3 that have made on the projects that you have seen?

4 A Yes, sir.

5 Q Tell the jury generally what kind of repair
6 efforts were required?

7 A We went into these different jobs and these
8 pop-outs were cleaned out, filled with a grout and
9 repainted. Some of the walls, the whole wall had to be
10 repainted.

11 Q Are you aware of any situations in which
12 you had to go back the second time?

13 A Yes, sir.

14 Q Are you aware of any situations that remain
15 unrepaired even right now?

16 A Yes, sir.

17 Q What kind of situations are those?

18 A We have two schools that I am aware of that
19 were being used and we couldn't go in while classes were
20 being held. School is over-- they finished in Richmond
21 last week, so we will be in in the next couple of weeks
22 finishing up these repairs.

23

24 MR. THURSTON: Thank you. I have no
25 further questions of Mr. Ritter.

CROSS EXAMINATION

BY MR. ALFORD:

Q Mr. Ritter, who is Richard Wright?

A Richard Wright is Production Manager at our Darbytown Road Plant.

Q And you are well aware of the fact that Richard Wright bought slag from Smiley Block as early as 1991, April?

A I am now.

Q And you were well aware of that at the time you and Mr. Wright ordered more slag in May of '92, in April of '92, weren't you? He told you that?

A He might have; I am not sure whether he did or not.

Q The point I am getting, Mr. Ritter, is that you did not rely on any report from Smiley or anything else, you relied on Richard Wright to buy the slag from Smiley Block, didn't you?

A No, sir.

Q Well, he was your employee and your plant manager, isn't that correct?

A That is correct.

Q And he had previously bought some 2,000 cubic yards of the slag and used it without any problems

1 at the Darbytown Road Plant, had he not?

2 A Not from Tarmac.

3 Q Had he not done that prior to Tarmac taking
4 the company over?

5 A Yes, he had.

6 Q And you continued him on as the general
7 manager, didn't you?

8 A As a plant manager.

9 Q Yes, sir. And he is the one responsible
10 for making up the mix and making the blocks, isn't he?

11 A No, sir.

12 Q Who is responsible for that?

13 A I am.

14 Q And you watch every mix and he doesn't do
15 anything as far as watching them?

16 A I go over the mixes with him; we decide on
17 what we should be running.

18 Q I understand that, but you don't stand
19 there and watch and see how it's mixed, he does that?
20 That's his job, isn't it?

21 A Yes, sir.

22 Q And you did not have any report from Mr.
23 Smiley prior to July 19, 1991, did you?

24 A No.

25 Q You couldn't have, could you?

1 A Yes, I did, I'm not sure of the dates, but
2 in 1991---

3 Q Yes, sir.

4 A ---- Mr. Smiley visited me and brought me a
5 report.

6 Q Prior to July 19, 1991?

7 A Uh huh.

8 Q He brought you a report?

9 A He brought me a report. I am not saying
10 prior; it was late in '91 that Mr. Smiley brought me--
11 late that year, I think it was the Fall of '91, Mr.
12 Smiley brought me a report.

13 Q Well, did Mr. Smiley bring you what has
14 been marked and introduced as Defendant's Exhibit No. 1?

15 A Yes, he did.

16 Q And he brought that prior to when?

17 A Prior to 1992.

18 Q Okay, and you knew at that time that he had
19 sold some 2,000 cubic yards of slag to Richard Wright,
20 who is now your plant manager?

21 A No, I did not.

22 Q Well, let me ask you this: Did you rely on
23 the report to buy the slag or did you rely on Richard
24 Wright to buy the slag?

25 A I relied on this report that the material

met specifications; we ran mixes and they looked good.

Q Now, would you look at that report, the same copy, which is now Plaintiff's Exhibit No. 1, and tell me who the client is in that report?

A It says Southern Brick and Block.

Q It's not Smiley Block Company, is it?

A No, sir.

Q And would you look at Exhibit No. 3 and tell me who the client is on Exhibit No. 3 for the defendant?

A It says Tarmac Cellostone.

Q All right, did you rely on that before?

A Yes, sir.

Q And who had it done?

A We submitted it.

Q Okay, and who submitted the sample?

A I did, or Richard Wright, I'm not real sure --

Q And Smiley had nothing to do with submitting those samples?

A He was well aware of it; I discussed it with Mike Smiley before it was taken; I did it at his direction.

Q Who furnished the sample?

A It came from our plant.

5
1 Q Sure. And who furnished the sample for the
2 1991 report?

3 A I have no idea.

4 Q You don't know that Smiley did, do you?

5 A No, sir.

6 Q And you knew that Richard Wright had had no
7 experience or any problems when used the slag in 1991,
8 that is April, May, June of '91 when some one million
9 blocks were made, and he had no problems of any kind
10 using the slag, you knew that?

11 A I was not familiar with our production
12 then. I had nothing to do with the production --

13 Q You mean you all bought a plant that you
14 did not have any familiarity with the production in?

15 A I didn't know anything about what they had
16 been running.

17 Q Well, you kept him on as the manager,
18 didn't you?

19 A Yes.

20 Q And he still is the manager today?

21 A He sure is.

22 Q And he is not here today to testify, is he?

23 A No.

24 Q Well, do you know what he relied on when he
25 bought the slag?

1 A I would think he relied on the test report.

2 Q Have you ever seen a test report that was
3 given to him?

4 A No, I have not.

5 Q Do you know whether Mr. Smiley visited him
6 the same day he visited you?

7 A I do not.

8 Q Never asked him that question?

9 A No, I did not.

10 Q And you have known about this lawsuit now
11 for almost a year and you have never asked Wright about
12 whether Smiley ever delivered a report to him?

13 A I don't think I have.

14 Q You were in our office the day we took his
15 deposition, weren't you?

16 A Yes, sir, I was.

17 Q And you heard him say that he got the slag
18 and he used it in the block and he had no problems,
19 didn't you?

20 A I did.

21 Q And that they made about a million blocks
22 using the slag and had no problem?

23 A Yes, sir.

24 Q Now, pop-outs, do they affect the strength
25 of the block?

5
1 A Usually they are just --

2 Q Cosmetic, right?

3 A Cosmetic.

4 Q And they can happen from a seed being in
5 the block, couldn't they?

6 A Yes, sir.

7 Q Could happen from any kind organic material
8 in the block, couldn't it?

9 A I don't know about that; they could happen
10 from anything that expands.

11 Q Yes.

12 A And I guess certain organic materials would
13 expand.

14 Q And if you put pumice in it and the pumice
15 was contaminated, it could pop-out, couldn't it?

16 A Anything contaminated would pop out, if it
17 were expansive material.

18 Q Now, have you ever known of any other
19 client, and I am sure you have done research on this,
20 that Smiley has sold aggregate to that suffered from
21 pop-out? Do you have any history of that?

22 A No, sir.

23 Q Including the company that you took over,
24 Concrete Structures, you don't have any knowledge that
25 they ever had any problem with pop-outs, do you?

1 A No, I don't.

2 Q And Mr. Thurston gave you a bunch of
3 pictures there, and they would represent about how many
4 pop-outs, a hundred?

5 A No, not there, in those pictures, 20 or 30.

6 Q How many blocks did Tarmac, Concrete
7 Structures, or did Darbytown, whatever you want to call
8 the plant where you use the slag, how many blocks did
9 you all make there using some slag, six million, eight
10 million, nine million, ten million?

11 A Let me count up here; I'm going to guess a
12 million and a half, maybe 2 million.

13 Q All right, in your answers to
14 Interrogatories you listed several projects; if I name
15 the projects for you, can you tell me the number of
16 blocks that were used in each or sold them each?

17 A No, I could not.

18 Q When we took your deposition, I thought we
19 did that?

20 A I think maybe somebody in sales did that, I
21 believe.

22 Q Somebody in sales, I believe that was
23 right. Would you be surprised it was between 6 and 8
24 million?

25 A In those projects.

5
1 Q And you've got pop-outs, about a hundred?

2 A I don't know.

3 Q You want to count them?

4 A No, sir.

5 Q I want to know what Henry Smiley told you
6 that you relied on?

7 A Mr. Smiley came to see me, he had a
8 certification, he had a bag of material, he indicated
9 that he had used this material at his own plants, he had
10 other block plants were using it.

11 Q And what warranties or anything did he make
12 to you?

13 A He indicated he was making a good block; he
14 left me a sample of a block.

15 Q What warranties did he make to you?

16 A They were it.

17 Q That's it?

18 A Yes, sir.

19 Q Never told you that he would guarantee it
20 would make good block, that it would not have any
21 problems, anything else, he just told you his
22 experience, is that right?

23 A Yes, sir.

24 Q And you had been in the business yourself
25 for 25 years?

1 A Yes, sir.

2 Q And you have been experienced with a
3 company that has how many plants? How many plants does
4 Tarmac have?

5 A I really don't know that.

6 Q Numerous, right?

7 A We have two in Virginia, two block plants
8 in Virginia.

9 Q Two block plants in Virginia?

10 A Yes, sir.

11 Q Also in the concrete business?

12 A Yes, sir.

13 Q In the pumice business?

14 A Yes, sir.

15 Q And as a matter of fact, they pretty much
16 supply all of the cement that's used in block in the
17 whole State of Virginia, don't they, out of their own
18 (inaudible), Tarmac does?

19 A No, there are other cement suppliers in the
20 State, several others.

21 Q But that's where you get your cement?

22 A Yes, sir.

23 Q So in your block plant in Richmond, you get
24 your cement from Tarmac, you get your pumice from
25 Tarmac, you get, I presume, your granite screens from

1 Tarmac, and you get the natural sands from Tarmac?

2 A The natural sands come from another
3 supplier.

4 Q They do?

5 A Yes, sir.

6 Q Whether there is any organic material,
7 seeds or so forth in the natural sands, you don't know?

8 A We get certificates on it saying it meets
9 specifications.

10 Q Where is it that says on the certificates
11 that there are no organic materials in it? You
12 acknowledge that seeds could cause a pop-out. Do you
13 have anything on any certificate that says that on
14 organic material?

15 A There is an organic color plat.

16 Q Other than that, that's it?

17 A Yes, sir.

18 Q Do you know what that means?

19 A If something shows up there and it doesn't
20 meet specs, we wouldn't use the material.

21 Q All right, and is that in a block that is
22 already made that these tests are made on?

23 A This test is made on the material itself.

24 Q On the material itself?

25 A Yes, sir.

1 Q All right, if it's made on the material
2 itself, how could you test for a pop-out and it wasn't
3 made on a block?

4 A I'm not sure that I'm qualified to answer
5 that question. They are tests, part of A.S.T.M. for
6 pop-outs; I'm not sure how they run all of these tests.

7 Q But you are sure that these tests that you
8 have before you were made on the material and not on the
9 block?

10 A Yes, sir.

11 Q And you don't know how you could test the
12 material to determine whether you would have a pop-out
13 in the block?

14 A I know there are tests for testing pop-outs
15 in materials.

16 Q Now, you consider Mr. Wright to be a good
17 employee and a knowledgeable employee, don't you?

18 A I do.

19 Q And you consider him to be a loyal
20 employee?

21 A I do.

22 Q And he never told you at any time that
23 there was any problem with this slag in the making of
24 blocks in concrete structures?

25 A No.

5
1 Q And, as a matter of fact, when you were
2 talking about buying some more slag in April and May of
3 '92, he was very much encouraging that you get it, that
4 it worked well for him, wasn't he?

5 A He indicated that it worked well.

6 Q And you did not get --

7
8 BY THE COURT:

9 Q When was that?

10
11 MR. ALFORD: That was in May of '92.

12
13 BY THE COURT:

14 Q Let him --

15 A May of 1992--

16 Q May of '92.

17 A Late May or early June was when we started
18 getting--

19 Q Mr. Wright told you that?

20 A No, we were discussing materials to be used
21 and he told me he had used some and he didn't have any
22 problems.

23
24 BY MR. ALFORD contd:

25 Q And at that time, you didn't have this June

1 of '92 test that is Defendant's Exhibit 3, did you?

2 A No, sir.

3 Q And as a matter of fact, you had delivered
4 to you probably 5,000 cubic yards of the slag before you
5 even got this test of June of '92?

6 A Very likely.

7 Q You didn't depend on this test to buy the
8 slag, did you, you bought the slag based on your
9 previous knowledge and Mr. Wright's assertion to you?

10 A Yes, sir.

11 Q As a matter of fact, this report wasn't
12 done until October 13, 1992, was it?

13 A The date received was June 10, the --

14
15 THE COURT: Anytime you refer to an
16 exhibit, call it by number.

17
18
19 BY MR. ALFORD contd:

20 Q The sample was received 6/10/92, but the
21 report is dated October 13, 1992?

22 A That's when the report was typed.

23 Q Right. So you could not have gotten a copy
24 of this report until after October 13, 1992, could you?

25 A That's correct.

5
6
1 Q So any slag that you bought between April
2 of '92 and October 13 of '92, surely wasn't bought in
3 reliance on this report?

4 A It was bought in reliance on my original
5 report.

6 Q On your original report that was made out
7 to what company?

8 A It was made out to nobody, the one he gave
9 me.

10 Q What's the one there in front of you that
11 shows who the client was and you went to Froehling and
12 Robertson last week they told you that was their client?

13 A That's Southern Brick and Block.

14 Q And Froehling and Robertson last week for
15 the first time told you that was their client, did they
16 not?

17 A They told somebody, not me.

18 Q You didn't know that that was their client?

19 A No, sir.

20 Q And we didn't know that was their client,
21 because we asked you about it, didn't we?

22

23 MR. THURSTON: Objection; I don't know how
24 he can say what they do.

25

1 BY MR. ALFORD contd:

2 Q Well, let me ask you this question: We
3 asked you about it, didn't we?

4 A You did.

5 Q And we asked you if you knew who the client
6 was?

7 A You did.

8 Q And you told me you thought the client was
9 Mr. Smiley?

10 A Yes, sir.

11 Q And then we went to Froehling and Robertson
12 and found out that the client was not Mr. Smiley, but
13 was that company listed there, didn't we?

14 A I found that out today.

15 Q Tarmac guidelines, according to your
16 testimony earlier, was that you got to have those
17 reports every year?

18 A We need them every year.

19 Q All right, now the report that you have
20 there that you say Mr. Smiley gave to you was dated July
21 of '91, is that right, July 19th, that's the date of
22 that?

23 A Yes, sir.

24 Q And yet you didn't get another report until
25 October of '92, some four or five months later--

6
1 A Uh huh.

2 Q And you bought a substantial amount of slag
3 in that period of time?

4 A Yes, sir.

5 Q So you weren't buying slag depending on the
6 report, you were buying slag and got your report so you
7 would cover your rear end, weren't you?

8 A No, sir, I got the report when I could.

9 Q Why did you wait so long to get it, you
10 know it takes four months to do it?

11

12 MR. THURSTON: Objection; he didn't testify
13 to that.

14

15 BY MR. ALFORD contd:

16 Q All right, let me ask you then this
17 question: Look at the report dated July, 1991,
18 when was that sample submitted?

19 A January 17th, 1991.

20 Q And doesn't it say that they got 28 days
21 and a hundred days on each of them?

22 A Yes, sir.

23 Q Well, you know it's going to take that
24 long, so you didn't get it as soon as you could, did
25 you?

1 A Didn't get it as soon as I should have,
2 apparently.

3 Q And you couldn't have relied on them if you
4 didn't have it?

5 A I relied on the one I had.

6 Q And Mr. Smiley said he didn't give it to
7 you?

8 A That's what he said.

9 Q That's what he said and the client for
10 Froehling and Robertson is not Mr. Smiley, is it?

11 A No, sir.

12

13 MR. ALFORD: That's all; thank you.

14 THE COURT: Anything else of the witness?

15 MR. THURSTON: Yes, sir.

16

17 REDIRECT EXAMINATION

18

19 BY MR. THURSTON:

20 Q Mr. Ritter, on Defense Exhibit 1, which is
21 the test report, that doesn't have the client set in,
22 you see that?

23 A Yes, sir.

24 Q That's the one, not Plaintiff's 1, but
25 Defense 1, that's the one that you were given by Mr.

1 Smiley?

2 A Yes, sir.

3 Q And what Mr. Alford asked you was whether
4 he had asked you earlier in depositions who you thought
5 the client was; I think you said you thought it was Mr.
6 Smiley.

7 MR. ALFORD: Your Honor, this is his
8 witness. I would ask that he ask him a question
9 and not lead him.

10 THE COURT: All right, you have to --

11 MR. THURSTON: I'm just trying to draw his
12 attention back to the kind of question Mr. Alford
13 asked.

14 THE COURT: All right, you still can't lead
15 him, though; so ask direct questions. You can't
16 suggest an answer.

17

18 BY MR. THURSTON contd:

19 Q Did you testify in depositions in answer to
20 the question Mr. Alford asked that you thought maybe
21 Smiley Block was the client on that?

22 A I would think I did.

23 Q Okay, if you did, why did you think that
24 Smiley Block was the client?

25 A Because Mr. Henry Smiley gave me the

1 certificate.

2 Q Now, that particular certificate, the July
3 19, 1991, Defense 1, shows a 28 day and a hundred day
4 time for that, right?

5 A Yes, sir.

6 Q Now, the one that you got in '92, did you
7 ask for 28 and a hundred that day; you see down at the
8 bottom, the 28 and a hundred day shrinkage?

9 A Yes, sir.

10 Q Okay, and when did you take the sample in?

11 A June 10, 1992 is the date received.

12 Q Has anybody ever told you that they found
13 any seeds in these pop-outs?

14 MR. ALFORD: Judge, I object to that.

15 THE COURT: Sustained.

16 MR. THURSTON: Your Honor, Mr. Alford
17 has given some kind of impression that there
18 might be seeds in there, and I think I have-- am
19 allowed to ask this witness about his knowledge
20 as to whether anything Mr. Alford brought up was
21 ever told to him.

22 THE COURT: What's the basis for your
23 objection?

24 MR. ALFORD: Well, the basis of my
25 objection is, if Your Honor pleases, that that's

6
1 hearsay.

2 THE COURT: I sustain the hearsay
3 objection.

4 MR. THURSTON: I won't ask him what he
5 said, just whether anybody has ever told him
6 anything about --

7 MR. ALFORD: His question suggests the
8 answer and I object to it, if Your Honor pleases.

9 THE COURT: All right, it still calls for
10 an implication that is hearsay, so I still
11 sustain it.

12 MR. THURSTON: Well, we'll call in the
13 plaintiff to show that there is something about
14 that.

15 That's all I have, thank you.

16 THE COURT: Anything else?

17 MR. ALFORD: No further questions.

18
19
20 THE WITNESS STANDS ASIDE.

21
22
23
24 THE COURT: How long will the next witness
25 for the defense take?

1 MR. THURSTON: There are two other
2 witnesses, and I would think either one of them
3 are going to take an hour.

4
5 (A recess was taken.)
6
7
8

9 MR. ALFORD: I make a motion in limine that
10 Thieme not be permitted to testify, because there
11 is no way showing through Thieme how he got the
12 material.

13 THE COURT: You are saying it would be no
14 foundation?

15 MR. ALFORD: No foundation, that is
16 correct.

17 THE COURT: And anything he would say about
18 where it came from would have to be hearsay?

19 MR. ALFORD: That is correct, sir.

20 THE COURT: Any other parts to your motion?

21 MR. ALFORD: No, sir.

22 THE COURT: Anything else, any response?

23 MR. THURSTON: Your Honor, I think he would
24 testify as to the receipt of it and we could, Mr.
25 Wright did that all under Mr. Ritter's

6
1 supervision and his direction; so we could supply
2 that if he wants the foundation.

3 THE COURT: What was that now; what was the
4 last part you said?

5 MR. THURSTON: That all Mr.-- everything
6 that Mr. Wright did was under Mr. Ritter's
7 supervision and his direction, and so he would be
8 able to testify as to exactly what was done, not
9 have him to say what was said, but testify as to
10 what was done. So we could supply that
11 foundation, if that's the problem.

12 THE COURT: You got to have a chain of
13 custody; you got to show what was done with the
14 stuff and where it came from.

15 MR. ALFORD: I just don't believe, Mr.
16 Ritter, based on the depositions and so forth
17 that we took in this case can show that at all,
18 and if Ritter is going to testify as to the chain
19 of custody, then, Bill, I'm badly surprised,
20 because he never did before.

21 MR. THURSTON: I don't know that you asked
22 him?

23 MR. ALFORD: Well, we asked through the
24 (inaudible).

25 MR. THURSTON: Have you got a transcript?

1 MR. ALFORD: No, do you?

2 MR. THURSTON: I don't. So your
3 representation as to it differs from what my
4 recollection was. You certainly had the
5 opportunity ---

6 THE COURT: Mr. Thurston, do you agree,
7 though, that there has to be connection between
8 your expert's testimony and the source of the
9 material in order for his testimony to be
10 admissible?

11 MR. THURSTON: I do. I don't think that
12 the level is the same as in a criminal chain of
13 custody kind of thing.

14 THE COURT: It may not be the same, but ---

15 MR. THURSTON: What we have to prove is by
16 a preponderance of the evidence, and the jury has
17 to be satisfied, and if Mr. Alford can make it
18 effective --

19 THE COURT: Yeah, but they have to be -- a
20 preponderance of the admissible evidence is the
21 true test, and so what I will do is, I don't know
22 what you intend to put on to try to connect it
23 up, but I will take the motion under advisement
24 before I let the testimony come in. But you need
25 to establish somehow how the expert -- how the

6
1 sample or whatever tested got to the-- you know,
2 where it came from. Isn't that basically what
3 you are saying, Mr. Alford?

4 MR. ALFORD: Yes, sir, and every report
5 that he did is made back to the attention of
6 Richard V. Wright, Richard Wright.

7 MR. THURSTON: Well, it's back to the
8 attention of him at Tarmac and Richard Wright
9 works under Mr. Ritter's supervision. So it's
10 not like Mr. Wright is the party and is the only
11 one that can testify as to the receipt of the
12 report. Mr. Ritter has already testified that
13 they received all of those reports.

14 MR. ALFORD: I'm not worried about the
15 receipt.

16 THE COURT: It goes to the question of
17 reliability, and that is the probative value of
18 the evidence, it looks like to me. I mean if he
19 doesn't know what he tested and where it came
20 from, then the whole probative value is the
21 question, is it not?

22 MR. THURSTON: I can see what you are
23 saying. Mr. Ritter would be able to supply--

24 THE COURT: Well, I'm saying that you
25 better be in a position to tie it all up and by

1 admissible evidence.

2 MR. THURSTON: Okay.

3 THE COURT: So who do you intend to call
4 first?

5 MR. THURSTON: I will call Mr. Ritter.

6 THE COURT: Okay, both sides ready to call
7 the jury back in. Let's call them back in.

8
9
10 (Whereupon the jury returned to the courtroom.)
11

12
13
14 JAMES RITTER, recalled, was examined and
15 testified on his oath as follows:
16

17 DIRECT EXAMINATION
18

19 BY MR. THURSTON:

20 Q Mr. Ritter, I'm going to show you again
21 what was labeled for identification as Defense Exhibit
22 5, you identified as the Froehling-Robertson, a letter
23 from Froehling- Robertson and a bunch of reports that
24 were attached to it. Let me ask you to look at, first
25 of all the second page, it's a report dated July 16,

6
1 1993, do you have that in front of you?

2 A Yes, sir.

3 Q Now, what the report says is that it's an
4 analysis of pop-out materials removed from a concrete
5 building unit. Do you see that, starting in the middle
6 of the page?

7 A Yes, sir.

8 Q Do you have personal knowledge as to where
9 that concrete building unit came from and how it got to
10 Froehling and Robertson?

11 A Yes, sir.

12 Q How did it -- where did it come from, first
13 of all?

14 A It came from our yard.

15 Q How do you know that?

16 A Because Mr. Wright and I went and picked it
17 out of the stock.

18 Q How did it get from your yard to Froehling
19 and Robertson?

20 A Mr. Wright delivered it.

21 Q Was that under your supervision?

22 A Yes, sir.

23 Q Okay. Let me ask you the next certificate
24 of analysis, dated July 29 of 1993, now this certificate
25 says, "Examination of slag aggregate." Do you know

1 where the sample of slag aggregate that was delivered to
2 Froehling and Robertson for this report came from?

3 A Yes, I do.

4 Q How do you know that?

5 A I was with Mr. Wright when he obtained the
6 sample.

7 Q Okay, tell the jury what he did in
8 obtaining this sample?

9 A We have a stock pile of material; Mr.
10 Wright and I went out to the stock pile with a shovel
11 and a bag and we probably got 35 or 40 pounds in a bag
12 and he put it in his truck and took it to F & R, to
13 Froehling and Robertson.

14 Q Okay, now which material was it that you
15 got this 30 or 40 pounds of?

16 A Of slag.

17 Q Of slag, and that was in your stock pile?

18 A Yes, sir.

19 Q Where had that slag come from?

20 A Come from Smiley Block in Lynchburg.

21 Q Was that part of the slag that had been
22 delivered by Bryant Trucking?

23 A Yes, sir.

24 Q And then, I'm sorry, what did you say that
25 Mr. Wright did with the slag after he had put it in the

1 bag?

2 A It was put in his truck and he delivered it
3 to Froehling and Robertson.

4 Q And was that done at your direction?

5 A Yes, it was.

6 Q If you would flip back a couple of pages to
7 where it says, " Certificate of analysis, dated
8 September 7, 1993", and it's, again, a test sample
9 selection and says, " From stock pile designated as
10 shown below." Do you know where the sample of that
11 material came from?

12 A Yes, I do.

13 Q Where?

14 A From our stock pile.

15 Q Okay, how do you know that?

16 A Because I collected the samples and
17 delivered them to F & R.

18 Q You did that personally?

19 A I did; that's on sample 2 and 3.

20 Q On 2 and 3. Did you also obtain sample 1?

21 A No, I did not; that is material that came
22 from South Carolina that we were having checked.

23 Q Do you know how it got to you?

24 A It was shipped to me UPS.

25 Q By who?

1 A By a South Carolina Plant Manager.

2 MR. ALFORD: Judge, that's all hearsay,
3 if Your Honor pleases, and that was the problem
4 I think we've got with the whole thing.

5 MR. THURSTON: That is not hearsay; he
6 didn't say what somebody said. He knows who he
7 received it from. Hearsay is an out-of-Court
8 statement that's offered to prove the truth of
9 the matter asserted. We haven't offered an
10 out-of-Court statement.

11 THE COURT: Where it came from, who it came
12 from.

13 MR. THURSTON: But he is testifying where
14 it came from from his personal knowledge.

15 MR. ALFORD: He doesn't have that personal
16 knowledge, if Your Honor pleases. The only way
17 he can have it is --

18 THE COURT: He obtained his knowledge from
19 looking at the address, I suppose.

20 MR. THURSTON: Sure, from whatever it was
21 that was sent there, the package it was sent in.
22 There is some presumption about receiving things
23 in that way that they're from who--

24 THE COURT: I will let you ask him the very
25 direct question about the conclusion, about what

1 it came back to as and how he identified it.

2
3 BY MR. THURSTON contd:

4 Q With sample No. 1, what exactly did you
5 receive?

6 A I received a sample of bottom ash from our
7 South Carolina plant.

8 Q Okay; and what kind of package did it come
9 in?

10 A It came UPS.

11 Q Without saying what the discussion was, had
12 there been any discussion about that package before you
13 got it?

14 A Yes, there was.

15 Q And you received that yourself?

16 A I did.

17 Q And you took that sample over to Froehling
18 Robertson yourself?

19 A Yes, I did.

20
21 MR. THURSTON: Thank you; that's all.

22 THE COURT: All right, any cross?
23
24
25

CROSS EXAMINATION

BY MR. ALFORD:

Q Mr. Ritter, can you tell me why all of these reports are made to the attention of Richard Wright?

A He is the Production Manager.

Q Well, it's because he took them there and made the arrangements with Froehling-Robertson to do the test, was it not?

A Not for these last two, he did not.

Q You don't know why then that they didn't make them-- return them to you if you took them there rather than Richard Wright?

A No, I don't.

Q And on the material that Wright took there, you didn't go with him to take them, did you?

A I did not.

Q And on the material from South Carolina, you weren't there when it was gathered?

A I was not.

Q And whether any contamination was done to the material during any of these periods of time when they were out of your possession, you don't know, do you?

1 A Sample 2 and 3 were not.

2 Q Well, where did they come from?

3 A They came from our stock pile in our yard.

4 Q And what did you put them in?

5 A Put them in a plastic sample bag.

6 Q And Richard put his in the box, didn't he?

7 A I believe it was a box.

8 Q You said a bag earlier?

9 A Maybe.

10 Q And did you ever come to Lynchburg and get
11 a sample directly from Smiley's and have that tested?

12 A No, I did not, I have never gotten a sample
13 directly from Smiley.

14 Q So the samples that you have had tested
15 that you have personal knowledge of that you carried
16 directly there had been hauled on a truck that was
17 Bryant's, is that right?

18 A That's correct.

19 Q Do you know what Bryant hauls in addition
20 to slag?

21 A That would be hearsay.

22 Q Do you know of your own knowledge?

23 A No.

24 Q So you didn't worry about that as far as
25 contamination was concerned?

1 A The trucks are cleaned before they are
2 loaded with other materials.

3 Q I thought you said you didn't know about
4 that?

5 A I don't know what he hauls; I think it
6 would be hearsay.

7 Q And you don't know that he cleans it?

8 A I haven't seen him clean it.

9 Q You have never seen him clean it?

10 A I've never seen him clean it.

11 Q So if he hauled fertilizer or if he hauled
12 lime, that would be a form of contamination, wouldn't
13 it?

14 A Yes, it would.

15 Q And then on the stockpile there where you
16 all there where you all have it, if dust and weed seeds
17 blew into it, the stock pile, you don't know whether
18 that happened or not?

19 A I don't know.

20 Q In other words, there has been no test that
21 you are aware of that came directly from Smiley's
22 storage yard over here that shows any kind of
23 contamination?

24 A I don't know of any tests that were run
25 that came directly from Mr. Smiley's stock pile.

7
1 Q All of the tests that were run, whether you
2 took the material, or whether Richard Wright took the
3 material or whether you gathered the material or whether
4 Richard Wright gathered the material, came from Tarmac's
5 exclusive control and possession?

6 A It came from our stock piles at our plant.

7 Q And you didn't consult any of the Smileys
8 about coming with you to get that material to take it
9 and have it tested?

10 A I wrote him a letter asking him for his
11 help and if he had any knowledge of the pop-outs, and I
12 never received any answer.

13 Q But you never asked him to come with you to
14 test anything, did you?

15 A No, sir.

16 Q Or to take any samples?

17 A No, sir.

18 Q And everything that's used in block, other
19 than the slag aggregate is gotten from another
20 subsidiary of Tarmac, other than possibly the sand?

21 A The sand and the additives.

22
23 MR. ALFORD: I don't have anything else,
24 Judge.

25 THE COURT: Anything else?

1 MR. THURSTON: Yes, sir.

2
3 REDIRECT EXAMINATION

4
5 BY MR. THURSTON:

6 Q Mr. Ritter, tell the jury how this slag is
7 stock piled on your yard?

8 A We have these open storage bins, they are
9 concrete walls; the trucks come and they dump the
10 material in there and the concrete walls keep it from
11 running over into other material. Most of it is put
12 like that; some of it is dumped directly into the
13 hoppers and goes right on up into our overhead bins and
14 into our plant.

15 Q And is it from that bin that the samples
16 that you saw taken were taken?

17 A The samples were taken from our ground
18 storage.

19
20 MR. THURSTON: Okay; that's all, Your Honor.

21 THE COURT: Any other questions?

22 MR. ALFORD: No, sir.

23
24 THE WITNESS STANDS ASIDE.

7
1 MR. THURSTON: We call August Thieme, Your
2 Honor.

3 MR. ALFORD: Judge, I would respectfully
4 like to renew my motion made.

5 THE COURT: We need to take this up out of
6 the presence of the jury. There is a matter to
7 take up out of your presence. So I ask for the
8 jury to go to the jury room for a few moments.

9
10 (Whereupon the jury retired to the jury room.)
11
12

13 THE COURT: Go ahead, Mr. Alford, with your
14 motion.

15 MR. ALFORD: Judge, I respectfully submit
16 that any type of expert's testimony has to be
17 based on material that is fairly obtained and
18 material that the party that is going to be
19 affected by it would have the right to
20 participate in or at least be able to ask the
21 questions about how it was gathered, how it got
22 there, what kind of a container it got there in,
23 and Mr. Ritter candidly enough said he now
24 remembered --

25 THE COURT: Are you saying that there's a

1 missing link in the chain, is that what you are
2 saying?

3 MR. ALFORD: There's a missing link in the
4 chain, that's number 1, but the other thing is
5 that there is so many other means of
6 contamination from Lynchburg to the plant to the
7 block and our people, if there is going to be a
8 fair test that's applicable to them, it should
9 have been gotten from the Lynchburg Plant before
10 it got any other opportunity for contamination.
11 And no tests of any kind were made and no
12 suggestion of any test was ever made to Smiley,
13 as evidenced by Mr. Ritter, coming up here and
14 getting a sample.

15 Now, I say that fundamental fairness
16 dictates that that had to be done before some
17 expert can come in here and poke the finger and
18 say that the slag is the cause of these pop-outs.

19 THE COURT: In order for it to be
20 admissible or--

21 MR. ALFORD: Yes, sir, in order for it to
22 be admissible.

23 THE COURT: Well, in many respects, I agree
24 with you. The jury can -- and it's before the
25 jury that almost anything can contaminate the

7
1 substance, isn't that true, Mr. Thurston?

2 MR. THURSTON: Yes, sir.

3 THE COURT: And your claim is based on the
4 fact that it was caused by something that was
5 inherent in the product that Smiley sent?

6 MR. THURSTON: Yes, sir.

7 THE COURT: How then can you cover the time
8 when the time it left Smiley to the time it was
9 tested?

8
10 MR. THURSTON: See, that's exactly the
11 point. That's a fact question. Mr. Alford has
12 had the opportunity, because they own the darn
13 place to go out and take a test, and to have the
14 test samples brought in here if they disagree.
15 If they want to show that there is some other
16 form of contamination, some other possible source
17 of contamination, they could have tested. They
18 haven't done that.

19 Now, secondly, admissibility has nothing to
20 do with whether they are invited to go along on a
21 test or not. What we have got now is simply a
22 fact question. This is the fact between the two
23 parties is whether the contamination came from
24 the slag itself or whether the -- and there was
25 some kind of contamination from some other

1 source. Now, that's a fact question. That
2 doesn't make --

3 THE COURT: Well, if it's a fact question,
4 the burden of carrying that fact is on the
5 defendant on the counterclaim, right?

6 MR. ALFORD: That's correct.

7 MR. THURSTON: Yes, sir, and I think we've
8 made a prima facie case that we have got, which
9 is all we have to do to have it go to a jury,
10 that we got the stuff from Smiley, they have all
11 testified that it was brought by Bryant, it was
12 put on the yard, it was put in its own bin to be
13 stored, it was sampled from that bin, it was
14 taken to Froehling and Robertson to do the
15 testing. Now, that's all we have to do is show
16 that's at least a prima facie case. And from
17 that point, it becomes a jury question. If the
18 jury is satisfied from whatever Mr. Alford can do
19 that the contamination may have come somewhere
20 else and that we have not carried our burden
21 showing by a preponderance that it's part of the
22 slag---

23 THE COURT: Well, why wouldn't it almost be
24 as a matter of law at this point where clearly
25 anything could contaminate it and it was open to

8
1 those things on the back of a truck. Why
2 wouldn't it be as just a matter of law as opposed
3 to a matter of fact to the jury?

4 MR. THURSTON: Because--

5 THE COURT: It would cause them to
6 speculate that the only thing in there was the
7 substance, right?

8 MR. THURSTON: Right, but it won't be
9 speculation, because the expert will say that the
10 particular kind of stuff that caused these
11 pop-outs can't be transported in an open
12 container. It's got to come from ---No. 1 and
13 No. 2 it could not have been, even if there was
14 some of it left in the truck, there wouldn't have
15 been a sufficient amount of it to be able to
16 cause the problem they found. The element that
17 they found is magnesium, and magnesium comes from
18 lime, from limestone. Now, you can use lime for
19 fertilizer, for example, but it's in a stable
20 state, that's what the expert will say, that it's
21 in a stable state. And even if they transported
22 millions of tons of lime, it would not cause the
23 problem that happened here. So--

24 THE COURT: I tell you what I'll do, any
25 response?

1 MR. ALFORD: Yes, sir. Let me say one
2 other thing. I think this is highlighted and
3 pointed out very very realistically by those two
4 tests that were done and are already into
5 evidence about no pop-outs. Now, that was
6 material that was tested that came allegedly from
7 Smiley's, and there are no pop-outs there. Now,
8 we get tests that we don't have any chance at all
9 to participate in and they come up with the
10 pop-outs.

11 THE COURT: I tell you what I'm going to
12 do; I'm going to let the expert go on and
13 testify, subject to later objection as to all of
14 the evidence.

15 MR. ALFORD: All right, sir.

16 THE COURT: And I will carry your motion
17 basically under advisement to the conclusion of
18 the evidence.

19 MR. ALFORD: All right, sir.

20 THE COURT: I want to hear what he has to
21 say..

22 MR. ALFORD: All right, sir.

23 THE COURT: How many witnesses do you have?

24 MR. THURSTON: I have two witnesses, one
25 expert.

THE COURT: One expert.

MR. ALFORD: Judge, if you don't get past the expert, you don't get to the next witness, that's the damage witness.

MR. THURSTON: Well, it would be (inaudible) to take it away from the jury when they have a fact question. This is definitely a fact question. When they say there are other sources, but it's up to the jury to decide whether the evidence shows that it is from slag or it's from other sources, not matter of law.

MR. ALFORD: The burden of proof is on you.

THE COURT: You need to be reminded that it's ultimately up to the Court to decide whether it should go to the jury too.

MR. THURSTON: Yes, sir, I understand.

THE COURT: The fact question.

MR. THURSTON: I do understand.

THE COURT: You may be right or you may not be, because the essence of your case is that Smiley, there was something in the material in Smiley's possession that was delivered to you that nothing else caused?

MR. THURSTON: Right.

MR. ALFORD: Then the other thing is, the

1 question of any warranty test (inaudible). You
2 have got all of those questions, but that comes
3 in at the conclusion of this case.

4 THE COURT: Let's go ahead and if all of
5 the members of the jury are ready to come in and
6 nobody is in the bathroom, tell them to come in.
7

8 (Whereupon the jury returned to the courtroom.)
9

10
11
12 AUGUST THIEME, the witness, and after having been
13 first duly sworn, was examined and testified on his oath
14 as follows:
15

16 DIRECT EXAMINATION
17

18 BY MR. THURSTON:

19 Q Mr. Thieme, will you tell the jury
20 your name, please?

21 A August A. Thieme.

22 Q And what is your occupation?

23 A A Chemist.

24 Q How are you employed now?

25 A I was employed full time with Froehling

8
1 Robertson for 39 years, and I retired and I work in
2 part-time for now for the last two years.

3 Q Okay, what has your position been at
4 Froehling Robertson?

5 A I retired as chief chemist.

6 Q Let me show you what I have labeled as
7 Defense 13 and I will ask you if you will tell the jury
8 what that is?

9 A This is my background education; did you
10 want me to read it?

11 Q Your resume, no, but is a current copy of
12 your resume?

13 A Yes, it's a current copy as of May 24 of
14 this year.

15 Q Okay; will you tell the jury what organic
16 chemistry is?

17 A Organic chemistry is that part of science
18 which deals primarily with mineral materials.

19 Q And how about analytic chemistry, what is
20 that?

21 A Analytical chemistry is that part of
22 chemistry that deals primarily with the separation and
23 identification of separated materials.

24 Q Have you testified before as an expert?

25 A Yes.

1 Q In civil cases?

2 A Yes.

3 Q In criminal cases?

4 A Yes.

5 Q In State courts?

6 A Yes.

7 Q In any federal courts?

8 A Yes.

9 Q Tell the jury generally about your work
10 during that nearly 40 years with Froehling Robertson as
11 chemist?

12 A My initial work with Froehling Robertson
13 involved fuel analysis, coal and heavy fuel oils,
14 asphaltive materials. Later, I got into limestone
15 products. I did limestone analyses for a number of the
16 lime producing firms up and down the Shenandoah Valley
17 and west along New River into West Virginia. I did
18 extensive work with a lime company in Stevens City, in
19 Middletown, Virginia. I conducted their control work
20 during the time their chemist had passed away suddenly.
21 I indoctrinated and trained their chemist who had took
22 over. I continued to do work with them, involving
23 exploration for future expansion of the quarry and
24 operations. I have run cement analyses for the old
25 Richmond Petersburg Turnpike Authority, which later

8
1 became Interstate 95. I have run cement analyses on a
2 large amount of imported cements from San Salvador. I
3 have run cements for a number of projects in and around
4 Virginia, highway projects, and building projects,
5 bridges and so on. I have been involved extensively in
6 chloride ion migration into concrete and subsequent
7 deterioration of the concrete reinforcing bars. You may
8 have noticed in some areas where you see concrete chips
9 breaking off, a lot of times this is associated with the
10 use of snow melting, ice melting chemicals.

11 Q Let me interrupt you to ask you about
12 something specific on your resume. On the second page,
13 one of the things that you said you did while employed
14 at Froehling and Robertson was chemical analysis of
15 soils and aggregates.

16 A On the analysis of aggregates, this was for
17 arrearance, for purchasing stone for (inaudible -
18 balance) purposes. We have continued to run large
19 quantities of stone to determine potential alkali
20 reaction. We run stones for various contaminants;
21 sometimes there is a concern about iron staining or it
22 may be a possibility of chloride ion contamination of
23 this stone.

24 Q You also mention that you've done lime
25 evaluation, what is that?

1 A The lime evaluations was to determine
2 whether or not a given lime could be used for a specific
3 purpose. We assisted in the development of a lime
4 product for making glass and refer to it as glass sand.

5 MR. THURSTON: Okay; Your Honor, we are
6 offering Mr. Thieme as an expert in inorganic
7 chemistry and an expert in analytical chemistry.
8 I would move the admission of Defense Exhibit 13.

9 THE COURT: Any questions?
10

11 BY MR. ALFORD:

12 Q You just have a B.S. Degree and that's it?

13 A That's right, sir.

14 Q And have you ever done an analysis of slag
15 prior to this time?

16 A Yes.

17 Q And where did the slag come from and what
18 was it?

19 A I had no idea where the slag came from; it
20 was submitted to us by a plant for a routine chemical
21 analysis.

22 Q And other than that, you have never done
23 any work on slag?

24 A No, sir.

25 Q I also note that this --

1 MR. ALFORD: Oh, excuse me; I didn't know
2 that this was -- I have no objection to that 13
3 coming in.

4 MR. THURSTON: Okay.

5 MR. ALFORD: It's just for the stipulation
6 that he has a B. S. Degree, no doctorate, no
7 Masters?

8 WITNESS: That's right, sir.

9 THE COURT: All right, 13 is admitted.

10 MR. THURSTON: Your Honor, may I circulate
11 those to the jury so they will see what we have
12 been talking about?

13 THE COURT: Okay, give each member a copy.
14

15 BY MR. THURSTON contd:

16 Q Now, Mr. Thieme, in the course of your work
17 for Froehling and Robertson, and drawing your attention
18 to the last year, did you have occasion to sample or to
19 test various samples of materials and block that were
20 brought to Froehling and Robertson by Tarmac?

21 A I tested a block sample and several samples
22 of material labeled as slag aggregate.

23 Q And after testing those, did you prepare
24 reports that report on what you found?

25 A I did.

1 Q I'm going to show you what we have labeled
2 as Defense Exhibit 5 and I will ask you if you can
3 identify that?

4 A This consisted of the first sample on the
5 second page. The first sample was pop-out material,
6 which was removed from the base of a pit on submitted
7 block.

8 Q Is this the second page?

9 A This is the second --

10 Q Yes, one is dated July 16, 1993?

11 A That's right.

12 Q Is that a report that you prepared of the
13 testing that you did?

14 A Yes.

15 Q The next page is a certificate that's the
16 report dated July 29, 1993, is that a report that you
17 prepared about a test that you performed?

18 A Yes.

19 Q And skipping back two pages to the one
20 that's the certificate dated September 7, 1993, is that
21 a report that you prepared on testing that you
22 performed?

23 A Yes.

24 Q And finally, the cover page is a letter
25 dated October 1, 1993, and it's addressed to Tarmac,

1 attention Mr. Richard Wright, is that a letter that you
2 prepared?

3 A Yes.

4
5 MR. THURSTON: Your Honor, I move the
6 admission of Defense Exhibit 5.

7 MR. ALFORD: May I question him, if Your
8 Honor pleases.

9
10 BY MR. ALFORD:

11 Q Going to certificate of analysis No. 1, the
12 report dated July 16, 1993, who delivered the material
13 to you there?

14 A The material was delivered to the
15 laboratory; it was not received by me. I cannot tell
16 you who actually delivered it, because I did not receive
17 the material from the individual.

18 Q You don't know who received it at the
19 laboratory?

20 A I believe one of the individuals in the
21 concrete lab received it from Tarmac or he took it from
22 the project himself. I cannot verify, because I do not
23 know.

24 Q All right, go on the next page to July
25 29th, do you know who delivered the slag aggregate

1 there?

2 A Mr. Ritter from Tarmac delivered that
3 sample.

4 Q All right and do you know where it stayed,
5 was it delivered to you or --

6 A It was delivered to me personally; I
7 received it.

8 Q All right, going to No. 3, the September 7,
9 '93?

10 A Those samples were delivered to me
11 personally by a messenger from Mr. Ritter.

12 Q It wasn't Mr. Ritter?

13 A No.

14 Q All right, now, sample designated 1-ABC
15 down at the bottom, do you know what that was?

16 A They submitted three samples and I believe
17 they were numbered 1, 2 and 3. I took three portions
18 out of each one and analyzed those.

19 Q All right, and one, is that bottom ash?

20 A The material was labeled as slag aggregate.

21 Q Well, if Mr. Ritter testified that it was
22 bottom ash that came from South Carolina, that wouldn't
23 be correct?

24 A The samples, when I received them, were
25 shown as No. 1, 2 and 3. I had no other description of

1 the sample.

2 Q And shown as slag aggregate?

3 A That was my understanding.

4 Q Not bottom ash?

5 A My understanding was that it was slag
6 aggregate; I was not told anything else.

7

8 MR. ALFORD: I have no further questions.

9

10 BY MR. THURSTON contd:

11 Q Mr. Thieme, does the laboratory at
12 Froehling and Robertson have a protocol for when a
13 sample is received from a client as to what to do with
14 the sample?

15 A Yes, they do.

16 Q What is that?

17 A The protocol is that when the sample is
18 received, it is logged in, the person submitting the
19 sample is shown and the date and time that it's received
20 and by whom, by the person receiving it.

21 Q Okay, what happens to the sample after
22 that, sir?

23 A The sample is then logged into the system
24 and then it is given to the person who will be
25 responsible for its analysis.

1 Q Is that how it gets to you then?

2 A Normally, that's how it does.

3 Q And does Froehling Robertson maintain
4 records as to those checking in of samples?

5 A Yes.

6

7 MR. THIEME: Thank you; again, I move
8 the admission of exhibit --

9

10 BY MR. ALFORD:

11 Q You don't have any of those records here,
12 do you?

13 A No, sir.

14

15 THE COURT: What was that question?

16 MR. ALFORD: I asked him if he had any
17 of those records about the log, how it was done,
18 how it is kept and so forth, and he said no, sir.

19 WITNESS: No, sir, I do not have them.

20

21 BY MR. ALFORD:

22 Q You have no indication that you ever
23 analyzed bottom ash?

24 A Like I said before, the samples were
25 numbered 1,2,3. This is common when submitting samples

1 to laboratories, we do not often know the source of the
2 sample or even how the material is designated.

3 Q But you were not aware of the fact that you
4 were examining bottom ash from a South Carolina plant
5 that belonged to Tarmac?

6 A No, sir.

7 MR. ALFORD: That's all.

8 MR. THURSTON: Again, I move the admission
9 of Defense 5.

10 THE COURT: I'm sorry?

11 MR. THURSTON: I would move the admission
12 of Defense 5.

13 MR. ALFORD: Judge, I object for the
14 reasons stated, and further for the reasons that
15 Mr. Ritter testified that he took bottom ash
16 there and he got it from South Carolina and took
17 it over there. This gentleman doesn't know
18 anything about it. I saw the whole report --

19 MR. THURSTON: That doesn't make the
20 document inadmissible; that allows Mr. Alford to
21 cross examine on that point, but it doesn't make
22 it inadmissible.

23 ~~MR. ALFORD: I respectfully submit it does.~~
24 It has surely been compromised.

25 MR. THURSTON: The fact issue that involves

1 the document submitted, that does not make the
2 document inadmissible as evidence. It gives the
3 other party the opportunity to cross examine.

4 THE COURT: All right, I tell you what I
5 will do, I will take it, like I say, under
6 advisement and we'll see how we stand at the end
7 of all of the evidence.

8 MR. THURSTON: Is the document admitted
9 then, Your Honor?

10 THE COURT: Admitted into evidence subject
11 to what I just said.

12 MR. THURSTON: May I pass the document to
13 the jury?

14 THE COURT: Let's wait until the conclusion
15 of all of the evidence before the jury looks at
16 it. You can go ahead and continue on with your
17 examination of the witness, though.

18 MR. THURSTON: Okay, thank you.

19
20 BY MR. THURSTON:

21 Q Let me ask you first to turn to the second
22 page, Mr. Thieme, the one where the certificate is dated
23 July 16th, '93. Tell the jury what it was that you were
24 doing with the testing that is reported on here?

25 A The samples consisted of a block in which

9
1 there were areas in which part of the surface had been
2 removed. There was a small deposit at the base. I
3 attempted to extract this material and conduct an
4 analysis on it.

5 Q What did the material look like?

6 A The material was a white to off-white
7 powdery material.

8 Q Okay, and how did you go about testing that
9 material?

10 A The material was analyzed by methods in
11 A.S.T.M. , American Society of Testing Materials C-25,
12 this is a gravimetric wet method of analysis.

13 Q And without explaining the whole test
14 method, what are you trying to do with the test?

15 A I ran it through that; it's a determination
16 to determine total silica, total iron, total aluminum,
17 calcium and magnesium.

18 Q And why do you want to determine those
19 things?

20 A To get some idea as to what the material,
21 what its basic composition is.

22 Q After you ran that test on this powdery
23 stuff that you took out of the block, what did you find;
24 you may refer to your report, if you need to?

25 A We found silica, about 5 1/2 percent; you

1 want to read the numbers; aluminum oxide, plus iron
2 oxide 2.36 percent, calcium at, it should be Ca.03, not
3 C-2, Ca. C03-17.73, magnesium (inaudible), magnesium
4 carbonate, 57.3 and that general is a balance.

5 Q All right, when you say 17.73 for calcium,
6 that's 17.73 percent?

7 A Right.

8 Q Of the sample by weight--

9 A By weight of the sample taken.

10 Q Was calcium?

11 A Yes.

12 Q This 57.3 percent of the sample by weight,
13 was this magnesium carbonate?

14 A Yes, it was magnesium expressed as
15 carbonate.

16 Q What do you mean by that?

17 A In a situation like this, experience would
18 tell you the magnesium is probably present as a
19 magnesium oxide, magnesium carbonate and magnesium
20 hydroxide. I cannot differentiate between the 3. So
21 you determine total magnesium and you express it in
22 terms of magnesium carbonate.

23 Q Okay, now did the finding that there was
24 57.3 by weight magnesium in this sample, did that lead
25 you to conclude anything about the sample?

9
1 A It leads me to the conclusion that the
2 presence of fairly large amounts of magnesium is
3 suggestive of the possibility of expansive materials.

4 Q Of expansive materials?

5 A Yes.

6 Q Tell the jury why that is with magnesium?

7 A When magnesium is burned or I should say
8 when limestone is burned, the magnesium is burned at a
9 lower temperature. In other words, it gives its carbon
10 dioxide quicker than calcium. In order to get a good
11 burn on the calcium, the magnesium is frequently over
12 burned. When this material is then subsequently
13 hydrated, in other words, when water is added to it, the
14 calcium will hydrate at a fairly rapid rate. The
15 magnesium will hydrate at a delayed or slower rate. And
16 as it hydrates, you get an increase in volume; in other
17 words, you get a volume change reaction.

18 Q When you are dealing with magnesium in
19 those forms, are you dealing with stable and unstable
20 material?

21 A Magnesium oxide would in my opinion be
22 considered as an unstable material since it's attempting
23 to reabsorb carbon dioxide from the atmosphere and
24 moisture also. It's trying to revert back to the
25 magnesium carbonate.

1 Q Okay. When that happens, when magnesium
2 oxide starts to go through that hydration process, what
3 happens in terms of the size of it?

4 A As it reabsorbs moisture and carbon
5 dioxide, you get a volume change reaction. This volume
6 change course tends to exert pressure if it is a
7 confined material, will exert pressure around until you
8 can get a (service-scalia?) or what.

9 Q Okay, now from having done this first step,
10 were you able to form any conclusions as to why this
11 indentation was inside of the block?

12 A It was our feeling that the magnesium was
13 the culprit that was responsible for the pop-out.

14 Q Okay; let's go on to the next page, which
15 is --

16
17 MR. ALFORD: May we take each of these
18 reports and cross on each one of them as we
19 go along, so we can --

20 May we cross on each of these reports
21 as we go along?

22 THE COURT: Sure.

23 MR. THURSTON: Your Honor, that sort of
24 breaks up all of his testimony.

25 THE COURT: Well, you talking about the

admissibility, I will give you an opportunity at the end. That would probably be the better way.

MR. ALFORD: All right, sir.

THE COURT: It interrupts his direct examination. It's probably better to do it the other way.

MR. ALFORD: I think there is one very pertinent question though with respect to this and I don't believe he knows.

MR. THURSTON: That's cross examination; I should be allowed to do a direct examination of the witness and Mr. Alford has his chance.

MR. ALFORD: Well, he has read everything on the page and I think that, okay -- I don't have any problem with that; thank you.

THE COURT: I think we ought to do it the other way.

MR. ALFORD: I will.

THE COURT: Continue your direct.

MR. THURSTON: Thank you, Your Honor.

BY MR. THURSTON contd:

Q Mr. Thieme, let me get the next certificate, which is dated July 29th, it says that

1 it has to do with your examination of slag aggregate.
2 Now, would you tell the jury about the sample that you
3 got and what you did with it?

4 A We received the sample material and this is
5 not an analysis of the gross material, since the
6 question was is it possible that this material may be
7 contaminated, is it possible that this material may have
8 material in it that should not be there. So instead of
9 conducting an outright analysis on the entire material,
10 I took a small amount of it, dried it and examined it
11 under magnification to look for anything that appeared
12 different.

13 Q Did you find anything?

14 A I found-- these particles that I found or
15 these pieces that I found were then separated and then
16 analyzed.

17 Q Okay, tell the jury what you did to analyze
18 those pieces?

19 A The test conducted was essentially the same
20 as conducted on the other material. Basically, as a
21 gravimetric procedure based on A.S.T.M. C-25, which are
22 standard methods.

23 Q And this one shows magnesium as being 40.2
24 percent, is that by weight of the sample?

25 A That's by weight of the sample.

1 Q And you also found calcium at about 30 and
2 a half percent?

3 A Right.

4 Q And then there are some other things that
5 are small percentages?

6 A Right.

7 Q What, if anything, did you conclude about
8 your finding of the magnesium in the pieces that you
9 tested?

10 A This material, of course, being rich in
11 magnesium, again, it was suggested the possibility that
12 the material has been over-burned to the point that it
13 is slow to rehydrate and it would have expansive
14 properties.

15 Q Okay, and the over-burning is what you
16 described before?

17 A Yes.

18 Q Now, on the second page of that one report,
19 you talk about the lime burning of dolomite. What is
20 dolomite?

21 A Dolomite is defined in the A.S.T.M. as a
22 limestone that contains between 35 and 46 percent
23 magnesium carbonate.

24 Q What is your understanding as to the type
25 of limestone that was used in the Griffin Pipe Plant?

1 MR. ALFORD: Judge, unless he knows, I
2 respectfully submit that he can't take hearsay or
3 what his understanding is. I don't know if this
4 man has ever been up here and seen or examined
5 anything. And unless he does know of what it is,
6 I don't think he can take an understanding; we
7 got to know that he didn't get it from hearsay.

8 MR. THURSTON: That is not true of an
9 expert. An expert can rely on information that
10 is brought to him from any source.

11 THE COURT: He can't testify to hearsay,
12 though.

13 MR. THURSTON: I'm not asking him to
14 testify to hearsay. I am asking him what his
15 understanding is as the effect of lime burning.

16 THE COURT: No understanding. You can ask
17 his opinion, if he has one.

18 MR. THURSTON: About that?

19 THE COURT: Sir?

20 MR. THURSTON: About that?

21 THE COURT: Yes, sir, if he has an opinion.
22 He cannot testify to hearsay. I can't think of
23 the case now, but there is one case supporting
24 that, McMont vs. Tate is one of them.
25

10
1 BY MR. THURSTON contd:

2 Q Do you have an opinion from whatever
3 information you received about the type of limestone
4 used in the Griffin Pipe operation?

5 A I could not say that that material is
6 dolomitic stone, because I have no idea; it is a-- it
7 appears to be a magnesium containing stone, but I can't
8 say that it's dolomitic, because I don't know that it's
9 got 35 plus percent of magnesium carbonate.

10 Q Okay, in order to say whether it's
11 dolomitic limestone or not, you need to know exactly how
12 much of this magnesium is in it?

13 A In order for me to say it was dolomitic
14 stone, I would like to either have conducted an analysis
15 on the material, that is on the limestone itself or been
16 provided with an analysis by someone else.

17 Q Okay. On the second page, when you talk
18 about what typically happens in the lime burning of
19 dolomite, what were you basing your statement on?

20 A This is basically text book.

21 Q Why did you bring up the lime burning of
22 dolomite in this report?

23 A Since most of the literature used the
24 reference dolomite, I used that likewise. I probably
25 should have said a dolomite like or a dolomitic type

1 stone would have been better.

2 Q Would a dolomitic like stone have magnesium
3 in it?

4 A Yes.

5 Q Now, you also express an opinion in that
6 report that the delay in hydration of magnesium and
7 oxide may be related, or is related to the formation of
8 pop-out. Would you explain that to the jury?

9 A Again, the material had probably been
10 subjected to overburning, and as the material tends to
11 rehydrate, you get a volume change reaction, and you get
12 pressure being exerted by the increasing volume of the
13 material.

14 Q Let me ask you to turn to the third report,
15 which is September 7th of '93. What was the test that
16 you were performing here and why were you performing it?

17 A This was a repeat basically of what had
18 been done before, except on different samples.

19 Q Okay, and on these samples, whatever they
20 were, you said you had a finding of magnesium compounds
21 suggestive of the presence of unhydrated oxide?

22 A Right.

23 Q Those are the ones that are unstable?

24 A Yes, the magnesium compounds.

25 Q Now, let's go the letter that's the first

1 page of your report. I want to ask you about the second
2 to the last paragraph where you are talking about block
3 manufacture. Do you have-- from your testing, from what
4 you saw of the block that you tested and from what you
5 saw in the various samples that you tested, do you have
6 an opinion as to whether the material that was in the
7 block was in an unstable state in the block?

8 A It would be my opinion that it was.

9 Q And why is that?

10 A Because of subsequent expansion and
11 propelling of the surface from the block and the
12 analysis indicated the presence of magnesium compounds
13 there.

14 Q If the magnesium were in a stable state,
15 would it expand the way you saw?

16 A If the magnesium were there as magnesium
17 carbonate, there would have been no pressure exerted of
18 any change.

19 Q So it would have had to have been in an
20 unstable state in order to pop anything off?

21 A Yes.

22 Q In the finding, when you sampled in the
23 block and you found a fairly high percentage of
24 magnesium, did that have any significance to you?

25 A Based on past experience, the presence of

1 magnesium carbonate-- I'm sorry, of magnesium compounds
2 would tend to raise a red flag, so to speak, that there
3 is a possibility of pop-out material, since magnesium is
4 frequently related to it.

5 Q Have you considered whether there is a way
6 to come to a conclusion as to the source of the
7 magnesium, based on what you know about the ingredients
8 in the block?

9 A Based on what we have -- the test that we
10 conducted and the findings of those tests and data that
11 was supplied to me, it would be my opinion that the slag
12 was the source of the magnesium.

13 Q Okay, did you consider whether the cement
14 that's in the block might be the source?

15 A Had the cement been, say, partially
16 hydrated and that the masses of the cement would through
17 mixing process would be disintegrated, when the samples
18 were taken and analyzed, you would have gotten test
19 results similar to that that you would get from a
20 partially hydrated cement.

21 Q And would they be similar to the tests that
22 you got?

23 A No, they would be different.

24 Q Okay; how about the contents of the sample
25 that came out of the block where you found 57.3

10
1 magnesium, 17.73 percent calcium and 2.63 percent
2 aluminum oxide and 5.4 percent silica; how does that
3 compare to a finding of similar materials in cement?

4 A On cement, your silica, your total silica
5 would have been somewhere in the neighborhood of 20 or
6 21 percent, your iron and aluminum oxide would have
7 probably been somewhere between 5 and 6 percent. Your
8 calcium would be expressed as cal. calcium oxide, which
9 would be about 63, 64 percent; and if you multiply that
10 by 1.784, that will give you the equivalent for that in
11 calcium carbonate, which would be well over 100 percent.
12 With the magnesium, I believe there's a limitation of 5
13 percent on cement, I can't remember the exact number,
14 but finding a value in excess of that would tend to rule
15 out a (inaudible) cement as far as I'm concerned.

16 Q Would hydration, if there is a little
17 putter, I think it's sort of like having a cake mix and
18 you get a lump in it that's dry because the water hasn't
19 dissolved it, would the hydration process with cement, a
20 lump of cement like that, would that cause expansion?

21 A All right, on a lump of cement material
22 like that, if you would run a loss of ignition, the
23 maximum loss on corporate cement is a couple of percent.
24 Here again, I don't have the specifications in front of
25 me and it's been a long time since I have had to know

1 these specs, but you would get an increase in your loss
2 of ignition. That increase, of course, would be the
3 loss of water and possible carbonation that that cement
4 had been subjected to.

5 Q Okay, well, to try to boil that down into
6 non-scientific language, would a lump of cement dust
7 expand the way a lump of magnesium that you found would
8 expand?

9 A No.

10 Q Do you have an opinion or not as an
11 analytical chemist whether the cement can be safely
12 eliminated as a possible source of this little pocket of
13 material?

14 A I found nothing that would suggest to me
15 that the material consisted of a mass of cement. In my
16 opinion, it was not cement.

17 Q Now, have you considered in looking at all
18 of this, whether contamination from other sources, say
19 during transportation or storage, might have been the
20 source of this little pocket you found?

21 A We tried to theorize on contamination. A
22 material to be a contaminant in this case would almost
23 have to be a burned lime of some sort. Since a burned
24 lime is unstable in the environment or stored open, the
25 tendency for it would be to revert back to its

1 respective carbonate. Also, it was my understanding
2 that there was a number of shipments over an extended
3 period of time. I don't know how a transporting vehicle
4 or vehicles would all be contaminated.

5 Q Does somebody actually make burned lime on
6 purpose?

7 A Yes.

8 Q Okay, what do they use that for?

9 A Burned lime, one of the things that it's
10 used for, of course, is waste water treatment; the
11 material is slack and then fed in as a coagulating
12 agent.

13 Q How is that transported, do you know?

14 A It's transported in closed railroad cargers
15 and individual sealed containers, any type container
16 that would protect it from air and moisture, but your
17 bulk shipments are typically in the type trucks that you
18 probably see on the highway carrying cement, it would be
19 on a truck very similar to that. On a railroad, it
20 would be these air slide covered hoppers.

21 Q Okay. Is that in your experience and from
22 your knowledge, is that stuff hauled around in an open
23 dump truck?

24 A I have never heard of it being done.

25 Q Okay, now if say a lime fertilizer were

1 hauled around in an open dump truck and then slag were
2 hauled in the same dump truck, do you have an opinion as
3 to whether that fertilizer could have caused the kind of
4 pop-out material that you found?

5 A If agricultural lime, which, of course, is
6 ground limestone, when it's ground material, it is still
7 calcium carbonate and if it is a magnesium bearing
8 stone, it's also magnesium carbonate. This material
9 would not be effected by climactic conditions. And if it
10 were incorporated into an aggregate material, since
11 crushed limestone is frequently used as aggregates
12 anyway, it would have no difference, other than it would
13 be an increase in fines.

14 Q Okay; so the kind of lime that would be
15 used for agriculture would be in a stable state as
16 opposed to an unstable state?

17 A Yes, a stable state.

18 Q And if it went into the block, then it
19 would not have the expansion that you found?

20 A No, it would be no expansion.

21 Q In any of the samples that you took, have
22 you found any kind of evidence of organic matter, like
23 seeds?

24 A No.

25 Q Any other kind of organics?

11
1 A I saw nothing, but I made no attempt to
2 determine any ignition loss on material.

3 Q Did you find dust or dirt?

4 A That would be depending on how you want to
5 define dust and dirt. The material is damp in
6 practically all cases that I can recall; so there would
7 be little or no so-called dirt. In other words, soil,
8 it's possible that if some were there, I would not have
9 seen it.

10 Q Let me ask it this way, how about where you
11 actually took the sample out of the block, did you find
12 any materials other than what you have listed here?

13 A No, the material was essentially clean.

14 Q Do you have an opinion-- Well, first of
15 all, is it typical for somebody in your field, when you
16 are looking for the source of this, is it typical to
17 consider whether it might have been a source of
18 contamination from the means of transportation?

19 A I think anytime you run material like this,
20 you always consider the manner in which the material was
21 handled or as far as sampling, the manner in which it
22 was sampled, how it was sampled and so on.

23 Q So transportation is one way that you would
24 look at?

25 A Transportation, storage, how the material

1 was handled, loaded, unloaded and all of that, of
2 course, could play into it.

3 Q Okay, now do you have an opinion as to
4 whether some of the material, any of the material which
5 might have been hauled in the same trucks that the slag
6 was hauled in would be the source of the magnesium
7 compounds that you found in that pit in the block?

8 A If you want to assume that there was
9 contamination, then this would cover one shipment, would
10 it not, or how would it be distributed through shipments
11 over an extended period of time? I don't see how it
12 could effect to me.

13 Q Okay, are you saying that in order to be a
14 contaminant in the way that you found it, you would have
15 to constantly have this in the truck?

16
17 MR. ALFORD: Now, if Your Honor please,
18 he's leading the witness. I think he's gone
19 about as far as I can tolerate, and I object.

20 THE COURT: You are suggesting the answer
21 to the last couple of questions.

22
23 BY MR. THURSTON:

24 Q Do you have an opinion as to whether you
25 would have had to have a constant source of

11
1 contamination in order to lead to this?

2 A I would find it would be fairly unlikely.

3 Q Now, there is a sample that was sent to an
4 outfit called R. J. Lee and they prepared a report. Are
5 you familiar with that report?

6 A Yes.

7 Q They found that a larger proportion of
8 calcium----

9
10 MR. ALFORD: Judge, I respectfully submit
11 this report is surely not in evidence, nor has
12 it-- is there any way that he can get this report
13 into evidence, even though it may be helpful to
14 us, I respectfully submit he can't ask this man
15 about a piece of hearsay that he can't get into
16 evidence.

17 MR. THURSTON: I think he can rely on their
18 reports, but I will withdraw the question.
19

20 BY MR. THURSTON contd:

21 Q Mr. Thieme, having examined all of the
22 evidence that you have described to the jury, have you
23 been able to reach an opinion to a reasonable degree of
24 certainty as to the source of the magnesium compounds
25 that you found in that pit in the block?

1 A The tests that I conducted show the
2 presence of magnesium compounds. We have tried to go
3 back and rationalize and theorize any way in which
4 contamination could have been in all of that material.
5 I could not come up with any other source and in my
6 opinion, it's almost got to be from the slag material.

7 Q Now, is the slag material the only material
8 that appears here anywhere that was subject to the kind
9 of burning that you talk about?

10 A I am not sure I understand that question.

11 Q Let me try again: There is cement and
12 there is sand and there is water and additives and
13 slag--

14

15 MR. ALFORD: Gypsum, put all of the
16 contents of the block in there.

17 MR. THURSTON: If I'm missing any, I
18 apologize.

19 MR. ALFORD: Well, the gypsum-- not the
20 gypsum, but the pumice is in there.

21 MR. THURSTON: Okay, and pumice.

22 MR. ALFORD: And other additives that Mr.--

23 THE COURT: Ask the question; go ahead and
24 ask the question.

25

11
1 BY MR. THURSTON contd:

2 Q Considering the material, the additives and
3 the water and the cement, pumice, slag, sand, which of
4 those materials would have been subject to the kind of
5 burning and over-burning that you are talking about?

6 A I would say the slag is the only one of
7 those products that I know of that would normally be
8 burned. Pumice, my understanding, is a product of
9 volcanic or earth heat action; however, I did not
10 analyze any of the pumice.

11 Q Do you have an opinion as to whether pumice
12 has any unstable compounds in it?

13 A I ran no test on that material.
14

15 MR. THURSTON: That's all, Your Honor.
16

17 CROSS EXAMINATION
18

19 BY MR. ALFORD:

20 Q Mr. Thieme, you don't have any personal
21 knowledge that the concrete block contained aggregate,
22 do you, the slag from up here at the foundry?

23 A No, I don't, no, sir.

24 Q You don't have any personal knowledge of
25 that at all?

1 A No, I was not there when the block was
2 formed.

3 Q And you didn't run an test, so if it
4 contained pumice, whether pumice can cause the problem,
5 you don't know?

6 A I ran no test on the pumice.

7 Q And to be sure that you were getting the
8 slag from the foundry in its condition that it left
9 here, would it have been better to come either to the
10 foundry or to Smiley Block Company's lot and get the
11 slag and test it from there?

12 A If I had had the choice, I would have
13 procured samples myself. Unfortunately, I'm not in a
14 position, if you bring me a sample, as a commercial
15 laboratory, I have to accept it from you, even though I
16 may say, well, you know, I wish you would let me take
17 the sample; I can't do that.

18 Q But the preferred way--

19 A Yes, sir.

20 Q ----would have been to come to Lynchburg to
21 Smiley Block Company and gotten a sample of the slag?

22 A Yes, sir.

23 Q Or gone to the foundry and gotten a sample
24 of the slag, but preferably from Smiley Block's yard?

25 A Yes, sir.

11
1 Q And that way then you can be sure that
2 there is no contamination from Smiley's to Richmond and
3 from Richmond to the block and so forth and so on?

4 A Well, if I had taken the sample, then I
5 could tell you that I was at the site, I took the
6 sample, and how I sampled it.

7 Q Exactly. But you weren't there on any of
8 these --

9 A I wasn't there, sir.

10 Q You weren't there when the block was made?

11 A No, sir.

12 Q You don't know whether any slag was put in
13 the block?

14 A I can't answer that question.

15
16 MR. ALFORD: That's all, Judge, thank you.

17
18 REDIRECT EXAMINATION

19
20 BY MR. THURSTON:

21 Q Is there any material of the ingredients
22 that go into the block, is there any material that goes
23 into the block that would yield magnesium pockets like
24 you found other than the slag?

25 A Not to my knowledge, based on what I

1 tested.

2
3 MR. THURSTON: Thank you; that's all.

4
5 THE WITNESS STANDS ASIDE.

6
7 MR. THURSTON: We call as our next witness,
8 Allen Davis.

9
10 (A recess was taken.)

11
12 (Whereupon the jury retired to the jury room.)

13
14
15 MR. ALFORD: May the lawyers take up
16 something with you momentarily?

17 THE COURT: Sure.

18 MR. ALFORD: Is your next witness, Bill,
19 only as to damages?

20 MR. THURSTON: Yes.

21 MR. ALFORD: Well, if that witness is only
22 as to damages, Judge, I think we could consider
23 the question now of whether there is any basis at
24 all for this counterclaim to go forward.

25 THE COURT: All right, I'll let you argue

11
[]
1 that now.

2 MR. ALFORD: And I respectfully submit
3 that under the law, you've got to show that there
4 was a warranty. Now, the allegations in the
5 counterclaim are this: Fraud and
6 misrepresentation. Well, the testimony is
7 absolutely and completely devoid of any fraud or
8 misrepresentation on the part of Smiley Block.

9 THE COURT: Do you concede that, Mr.
10 Thurston?

11 MR. THURSTON: I thought that was out of
12 this.

13 THE COURT: Well, I never heard it
14 expressly; I don't know what the two of you are
15 talking about, so as to fraud and
16 misrepresentation, there is no evidence of that.

17 MR. ALFORD: All right, then the next is
18 negligence.

19 THE COURT: Should have done type evidence?

20 MR. ALFORD: I presume.

21 THE COURT: Is that still before the Court,
22 is that a factual issue, you think, negligence;
23 you haven't tendered any instruction about
24 negligence?

25 MR. THURSTON: No, I think negligence--

1 THE COURT: Negligence is gone too.

2 MR. ALFORD: All right.

3 THE COURT: So basically it comes down to
4 warranty and if it's that and whether or not it's
5 expressed or implied or both?

6 MR. ALFORD: Right, sir, and I respectfully
7 submit that even if you say that Smiley's
8 assertion that this is a good aggregate to use as
9 a blending material in block is accepted, that
10 scenario of their testimony, those people,
11 including Mr. Ritter, are surely on equal par and
12 probably much more versed an expert in this field
13 than Smiley's, any of them will ever be, and you
14 have got to show some reliance and that there was
15 warranty made and that there is some reliance on
16 it. Surely, these people are equally competent
17 in the field with Smiley. I don't see how you
18 can get past that under the evidence that is
19 before the Court in this case.

20 THE COURT: What evidence do you think
21 there is, if any, of reliance on the part of the
22 defendant on anything that Smiley said or did?

23 MR. ALFORD: Well, Ritter says that he
24 relied on that one test that came into evidence.

25 THE COURT: That one test.

11
1 MR. ALFORD: Henry says he didn't give it
2 to him--

3 THE COURT: Well, that could be a factual
4 issue.

5 MR. ALFORD: But that's a factual issue.
6 But I say that he bought tons and tons of it
7 prior to ever having it tested or anything, by
8 his own admission, relying on Wright's assertion
9 that it was good in the block, because he didn't
10 get it until October. And from May until
11 October, they got tons and tons of it. So I
12 don't see how there can be anything that you
13 could base a recovery on a warranty.

14 THE COURT: All right, is your motion more
15 expansive than that or do you want to stop there
16 and then move along?

17 MR. ALFORD: Well, I just want to strike the
18 evidence with respect to the counterclaim.

19 THE COURT: All right, sir, what I'm asking
20 you just on that basis, is that the sum total of
21 your motion?

22 MR. ALFORD: And the fact that they have
23 not proven anything at all in this.

24 THE COURT: Well, let's go to the question
25 of the point that you've raised about any kind of

2 1 warranty and any reliance; go ahead and respond
2 to that. Where is there a factual issue as to
3 that?

4 MR. THURSTON: Your Honor, the U.C.C.,
5 which applies here, says that a party acting in
6 commerce as a merchant of a particular product
7 either puts out a sample of that or a description
8 of it, and says this is what I want to sell you,
9 that that's a warranty. You don't have to say, I
10 warrant something, but that is a warranty under
11 the U.C.C. Now, the only question here is a fact
12 question and that is whether Mr. Ritter got the
13 certification from Mr. Smiley when he said he did
14 and that the Defense 1--

15 THE COURT: Well, there is a factual
16 question whether or not he got that exhibit,
17 there is a question of fact as to that.

18 MR. THURSTON: Right.

19 THE COURT: The question is what does that
20 mean and does that create any further factual
21 issues as to liability.

22 MR. THURSTON: Let's say for the moment that
23 the jury can decide that he did get that from Mr.
24 Smiley.

25 THE COURT: Okay.

1 MR. THURSTON: That's the description of
2 the product that creates the warranty under one
3 section of the U.C.C. If you got a sample of it,
4 that sample creates a warranty under another
5 section of the U.C.C. So what we are saying is
6 that the jury could decide that Mr. Ritter got
7 those things, Mr. Ritter has said that he relied
8 on those things, and that they made the deal as a
9 result. That would create liability on the part
10 of Smiley if what was eventually sold to Tarmac
11 was different from what was described in the
12 description or what was there in the sample.
13 Now, that gets to the factual question, and the
14 factual question is did these magnesium compounds
15 that Mr. Thieme said caused the expansion that
16 broke those things, did those magnesium compounds
17 come from the slag or from somewhere else. Now,
18 the reports all talk about pop-outs, and the
19 report that Mr. Ritter said that he got from Mr.
20 Smiley showed no pop-outs. The report that he
21 got in '92 showed no pop-outs. Now, the problem
22 is that when you sample something like this,
23 these are sold in big dump truck loads, and
24 sometimes you are going to catch it and sometimes
25 you are not, but where the thing, where the

2 1 problem comes in is that when the hydration
2 process has been completed, when it has been long
3 enough, after the stuff has come out of the mill,
4 then the hydration process has been completed and
5 you don't have any problem. But if stuff comes
6 out of the mill before that is completed and is
7 sent out, see that is where the possibility comes
8 that what you are getting is not what was
9 described to you. And so that's how the
10 liability goes down through the fact that
11 representation was made in the sense the
12 description was given, the sample was given, and
13 then what was delivered is not the same as the
14 sample, because there are pop-outs.

15 Now, whether there could be contamination
16 from another source is also a fact question. Mr.
17 Alford questioned Mr. Thieme about it--

18 THE COURT: Well, I know you think that. I
19 am not sure that it is and I'm still struggling
20 with that issue as to whether or not it is fair,
21 based on the essence of your claim, to allow this
22 expert to make an issue of fact as to whether or
23 not what he examined there was in fact what left,
24 the type of thing left from Smiley.

25 MR. THURSTON: Right.

1 THE COURT: He clearly said he would have
2 rather had it from Smiley, wonder why he would
3 have liked to have gone to Smiley's to get it,
4 why did he make that statement?

5 MR. THURSTON: Well, because as a scientist
6 he controls and he can personally tell you how to
7 sample and when, but what he also said was even
8 without him having done that, the only source of
9 the magnesium in all of these ingredients is the
10 slag. That's the only place magnesium could have
11 come from, No. 1, and No. 2, that's the only
12 place that unstable magnesium could have come
13 from. And so what he is saying is that as a
14 chemist with his experience, you won't have it
15 come from some other source, some other
16 contamination in the truck or in the yard or
17 whatever, unless-- he didn't think that was
18 possible, because it's so unstable it will
19 hydrate and it won't contaminate the stuff. So
20 what he is saying and what makes it a fact issue
21 is that in his opinion as a chemist for 42 years,
22 the only source of this magnesium, which is
23 clearly the cause of the pop-outs, the only
24 source for that magnesium has to be the slag.

25 MR. ALFORD: Judge, the gentleman was very

2 1 candid; he didn't even know the slag was in the
2 block that he examined; that's No. 1. Then you
3 get down to the No. 3 sample, and Mr. Ritter
4 testifies that he delivered to him material that
5 was shipped from South Carolina, what did he call
6 it, I wrote it on a piece of paper here, bottom
7 ash, and he didn't even know that he was
8 examining bottom ash from South Carolina, and he
9 found the magnesium in it. And I just say that
10 based on the chain, the material, where it was
11 gotten from, the fact that he didn't come to the
12 source, and the various other factors that are
13 not proven, that report is totally and completely
14 unreliable and surely does not carry the burden
15 of proof that the counterclaim has to carry that
16 this material--

17 THE COURT: Do you all remember a case that
18 came out, I think it was Mary Washington, anyway,
19 it involved a defective sidewalk injury, and
20 there was an interval of time in between the time
21 the expert examined it or something. And the
22 Supreme Court threw that out, said there were too
23 many variables, or words to that effect, to make
24 the expert's testimony probative. This is sort
25 of analogous to that and it gives me great

1 concern that the very thing that you are saying
2 that is that Smiley calls this is open to
3 speculation almost, because the substance that
4 was delivered, there is a question as to how it
5 arrived, and what happened to it in the interval.
6 Your own expert is saying that he would have
7 preferred to have come up here and gotten it at
8 Smiley, and that is obvious why he would have
9 preferred that, because the test itself would
10 have been much more reliable.

11 MR. THURSTON: I would have to agree with
12 you if he had the opinion that the magnesium
13 could have come from anywhere else, but his
14 opinion is that it could not have come from
15 anywhere else. That's different from the
16 sidewalk case, where there is all kinds of
17 causes.

18 THE COURT: On direct he said he didn't see
19 how, and then on cross, he said something else.

20 Any further statement?

21 MR. ALFORD: No, sir, I mean I think that
22 you've summed it up, Judge, exactly the way that
23 we see it.

24 THE COURT: I don't like to take it away
25 from the jury, but I think in this case, because

1 of the nature of the claim that fundamental
2 fairness dictates that you have got to show a
3 better chain than that. So I am going to sustain
4 the motion.

5 MR. ALFORD: Thank you.

6 MR. THURSTON: We take exception, Your
7 Honor, respectfully.
8
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25

1 I, Brenda E. Tharpe, Registered Professional
2 Reporter, do hereby certify that the foregoing is a true
3 and accurate transcript of the tapes of the Lynchburg
4 Circuit Court of the defense testimony and motions made
5 taken from the captioned case during the presentation of
6 the defense testimony, transcribed by me from said tapes
7 to the best of my ability.

8
9 Given under my hand this 21st day of July, 1994

10
11
12 BE Tharpe

1 THE COURT: What about -- how do we stand on the evidence
2 now; are we to the instructions now?
3 What instructions then are you tendering,
4 Mr. Alford?
5
6 MR. ALFORD: If that's the case, the only instructions we
7 need is that if the material was delivered and
8 not paid for.
9
10 THE COURT: Instruction No. 1?
11
12 MR. ALFORD: Yes, sir, I don't think there's any question
13 about the material being delivered and the
14 amount.
15
16 THE COURT: I will give that and what I would add in
17 Paragraph 2 is a comma after due, rather than a
18 period, or in any other manner Tarmac breached
19 the contract by failure to pay Smiley Block
20 invoices when due or by any manner.
21
22 MR. ALFORD: Judge, I would move that you strike the defendant's
23 evidence as to the counterclaim and by doing
24 so, to enter up a verdict for the plaintiff.
25
26 THE COURT: Well, he has no evidence then; that's the
27 effect of it. I mean ---
28
29 MR. ALFORD: There is no evidence that we didn't bill
30 him and we didn't deliver it; and that the
31 bargain was in existence.
32
33 THE COURT: The only other evidence you would have,
34 Mr. Thurston, would be evidence of damages.
35
36 MR. THURSTON: Yes, sir.
37
38 THE COURT: You want to be heard any further before I (inaudible)
39 It's almost inevitable I have I have to do it
40 based on the ruling.
41
42
43
44



1 MR. THURSTON: It seems like that; I don't have any evidence
2 to--
3 THE COURT: I sustain the motion to strike the evidence
4 on the counterclaim.
5 All right, I will give the instruction
6 now and what else ar you asking for?
7 MR. ALFORD: I just ask you to instruct the jury that
8 we're entitled to a judgment for the \$33,082.
9 THE COURT: I'm going to let them decide-- I'm going
10 to let them---
11 MR. THURSTON: I don't think there is any reason to even give
12 it to them if you're directing --
13 THE COURT: Do you agree it shoudl be sustained?
14 MR.,THURSTON: Yes, if you are going to tell them they've
15 got to enter a verdict for \$33,080, it's no
16 reason to send them back there.
17 THE COURT: All right, just call them back then.

8-16-94
C. E. Tharpe
JRS

18
19
20
21 FILED IN THE CLERK'S OFFICE OF THE CIRCUIT
22 COURT OF THE CITY OF LYNCHBURG
23 DATE 8/5/94 TIME 2:40P M.
24 TESTED BY: [Signature] PALMER, CLERK
BY: [Signature] Dep. Clerk

BRENDA E. THARPE
REGISTERED PROFESSIONAL REPORTER
CULLEN, VIRGINIA 23934 131
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74



SINCE



FROEHLING & ROBERTSON, INC.

FULL SERVICE LABORATORIES • ENGINEERS & CHEMISTS
"OVER ONE HUNDRED YEARS OF SERVICE"

Richmond, Virginia
July 19, 1991

1881 RECORD NO.: R-53-2033
CONTROL NO.: 53-91-36330

TEST REPORT ON SLAG

CLIENT:
PROJECT:

DATE RECEIVED: 1-17-91

SAMPLED BY: client APPLICABLE STANDARD: ASTM C331

TEST RESULTS:

Unit Weight, Dry Loose, PCF
Popouts
Stain, C641
Friable Particles, C142
Organic Color Plate, C40
Shrinkage

49.9

None

Very Light

0.3%

0%

28 Days

100 Days

Avg.: 0.034

0.045

Loss on Ignition
Sieve Analysis, C136

0.56

ASTM C331 Specifications

70.0 Max.

0

2% Max.

12.0% Max.

Size

% Passing

3/8

100

100

#4

96.0

85-100

#8

77.0

.....

#16

40.0

40-80

#30

19.0

.....

#50

12.0

10-35

#100

8.0

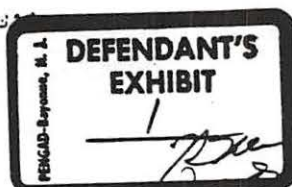
5-25

NOTE: The above results indicate that the material tested complied with the minimum requirements of ASTM C331.

Respectfully

July 19, 1991

C. F. Starnes
Manager, Concrete Services
FROEHLING & ROBERTSON, INC.



HEADQUARTERS: 3015 DUMBARTON ROAD • BOX 27524 • RICHMOND, VA, 23261 •
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132



CHARTER MEMBER



CHARTER MEMBER



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Richmond, Virginia
October 13, 1992

RECORD NO.: T-53-2208
CONTROL NO.: 53-92-42154

TEST REPORT ON LIGHTWEIGHT AGGREGATE

CLIENT: Tarmac Cellostone

PROJECT: Material Evaluation

SAMPLED BY: Client

DATE RECEIVED: 6-10-92

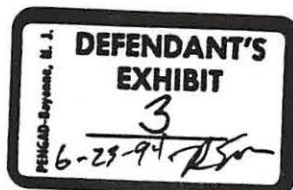
APPLICABLE STANDARD: ASTM C 331

TEST RESULTS:

Sieve Analysis (C136)

<u>Sieve Size</u>	<u>% Passing</u>	<u>ASTM C 331 Specification</u>
1/2	100
3/8	100	100
#4	99.3	85-100
#8	86.1
#16	45.6	40-80
#50	10.5	10-35
#100	5.8	5-25
Unit Weight (C29)		
Dry Loose, PCF	53.8	70 PCF Max.
Stain (C641)	No Stain	
Popouts (C151)	None	None
LOI, (C114)	0.36	12% Max.
Shrinkage (C157)		
28 Day, %	-0.08
100 Day, %	-0.083	0.10% Max.

(1) Specification for #4 to 0 size



Respectfully,

October 13, 1992

C. F. Starnes
Manager, Concrete Services
FROEHLING & ROBERTSON, INC.

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GREENVILLE, SC • RALEIGH, NC • ROANOKE, VA • STERLING, VA



Copy

Tarmac Mid-Atlantic, Inc.
P.O. Box 1685 • Ashland, VA 23005 • 804-343-7811
FAX: 804-798-1725

June 11, 1993

Mr. Knight Smiley
Smiley Block Co., Inc.
P. O. Box 466
Lynchburg, VA 24505

Gentlemen:

This is to confirm our recent telephone conversations regarding pop-outs that we are experiencing on several of our commercial block jobs. This is quite a serious problem because of being responsible for repairing block walls. It also casts some shadows on the integrity of our products. If you have any information relating to pop-outs or suggestions on how to eliminate them we would appreciate you sharing this information with us.

I thank you for your cooperation in this matter.

Best regards,

TARMAC MID-ATLANTIC, INC.

J. E. Ritter

J. E. Ritter, Manager
Richmond Block Plant

JER/jr //



SINCE



1881

FROEHLING & ROBERTSON, INC.

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"OVER ONE HUNDRED YEARS OF SERVICE"

October 1, 1993

Tarmac
P. O. Box 1747
Ashland, Virginia 23005
Attn: Mr. Richard Wright

Re: F&R Reports

- (1) 9307062 Dated July 16, 1993
- (2) 9307127 Dated July 29, 1993
- (3) 9307127A Dated Sept. 7, 1993

Dear Mr. Wright:

The samples represented by the above reports were found to contain varying amounts of magnesium compounds. For convenience in calculations they were expressed as magnesium carbonate. Actually they may exist as a mixture of oxide, carbonate and hydroxide.

The initial sample (our report 9307062) obtained from the base of a pop-out cavity, when tested, indicated a high level of magnesium compounds. These compounds are believed to be responsible for the pop-outs.

Three samples of coarse aggregate, labeled "slay aggregate" were submitted for tests. Visual examination indicated the presence of soft white masses varying in size to 3/8". Chemical analysis indicated the presence of magnesium compounds in the range 7.6 - 40.2%.

Apparently during block manufacture, these masses may not disintegrate and may remain mostly intact. Their presence appears to suggest that these masses of high magnesium compounds can continue to hydrate, undergo an increase in volume, and effect surface defects in the form of small cavity formation (pop-outs).

If we can be of further service please call. We appreciate this opportunity to serve you.

Sincerely,

August A. Thieme
Chief Chemist - Materials

AAT/dd

HEADQUARTERS: 3015 DUMBARTON ROAD • BOX 27524 • RICHMOND, VA 23261-7524
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CROZET, VA • FAYETTEVILLE, NC • FREDERICKSBURG, VA
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"OVER ONE HUNDRED YEARS OF SERVICE"

CERTIFICATE OF ANALYSIS

REPORT DATE: July 16, 1993
LAB #: 9307062
F & R CLIENT: Tarmac
P. O. Box 1747
Ashland, Va. 23005
Attn: Richard Wright

SAMPLE COLLECTOR: ----

LAB RECEIPT: DATE: 7-14-93

TIME: ----

PARAMETER	ANALYSIS DATE/TIME	METHOD	ANALYST
Identification of Pop out Material	7-14-93 1320	ASTM C25	AAT
Analysis of Material			

Re: Pop-out material removed from concrete building unit.

Results:

Appearance: Fine, White, Powder
Solubility: Mostly, in dilute hydrochloric acid

Silica + Acid Insoluble	5.48%
Aluminum Oxide + Iron Oxide as $Al_2O_3 + Fe_2O_3$	2.36%
Calcium as $CaCO_3$	17.73%
Magnesium as $MgCO_3$	57.30%
Not Determined	Balance

Note: When the sample was reacted with dilute hydrochloric acid
an odor typical of hydrogen sulfide was noted.

Respectfully,

Dan Abbott
Manager, Chemical Services

August A. Thieme
Chief Chemist - Materials

DA/AAT/dd

HEADQUARTERS: 3015 DUMFRIES ROAD • BOX 8784 • RICHMOND, VA 23281-7884
TELEPHONE (804) 284-8701 • FAX (804) 284-1232

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SINCE



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CERTIFICATE OF ANALYSIS

REPORT DATE: July 29, 1993
LAB #: 9307127
F & R CLIENT: Tarmac
P. O. Box 1747
Ashland, Va. 23005
Attn: Richard Wright

Examination of Slag Aggregate

Lab No.: 9307127-01
Marked: Slag Aggregate

Test Sample Selection:

A portion of the submitted sample was dried at 100°C and visually examined. Several pieces of a soft, easily crushed (by hand) material were separated. These pieces appeared white to off-white in color. They were mostly soluble in dilute (1-1) hydrochloric acid. The odor of hydrogen sulfide was evident.

Chemical Analysis:

Silica + Acid Insoluble Matter	2.44%
Aluminum Oxide + Iron Oxide as Al ₂ O ₃ + Fe ₂ O ₃	13.50%
Calcium as CaCO ₃	30.52%
Magnesium as MgCO ₃	40.20%
Not Determined	Balance %

Comments:

The findings of magnesium compounds is suggestive of the presence of unhydrated oxides. The magnesium compounds indicated are believed to have been in the form of magnesium hydroxide and oxide, the source may have been from a dolomitic lime.

HEADQUARTERS: 5015 DUMFRIES ROAD • BOX 27124 • RICHMOND, VA 23261-0224
TELEPHONE (804) 284-2701 • FAX (804) 284-1712

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Typically in the lime burning of dolomite ($\text{MgCO}_3 + \text{CaCO}_3$). The magnesium carbonate is decomposed into $\text{MgO} + \text{CO}_2$ long before the calcium carbonate is completely decomposed. Thus the MgO becomes overburned and its reactivity toward water is greatly reduced. Under these conditions only a small percentage of the MgO is hydrated.

It is our feeling that this delay in hydration of the MgO is related to the formation of pop out's in the masonry building units.

Respectfully,

Dan Abbott
Manager, Chemical Services

August A. Thieme
Chief Chemist - Materials

DA/AAT/dd



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CERTIFICATE OF ANALYSIS

REPORT DATE: September 7, 1993
LAB #: 9307127A (Supplement)
F & R CLIENT: Tarmac
P. O. Box 1747
Ashland, Va. 23005
Attn: Mr. Richard Wright

Marked: From Stock Pile, Designated as shown below.

TEST SAMPLE SELECTION:

The submitted slag aggregate consisted of 3 gross samples weighing about forty pounds each.

A portion of each sample was dried at 100°C and visually examined. Several specimens of a soft, easily crushed (by hand) material were selected from each sample. All pieces appeared white to off-white in color and were mostly soluble in dilute (1-1) hydrochloric acid. The odor of hydrogen sulfide was noted.

The samples were tested for the presence of magnesium compounds.

ANALYSIS:

Total magnesium expressed as magnesium carbonate:

SAMPLE DESIGNATED:

1	a	15.32%
	b	23.01%
	c	31.27%
2	a	33.19%
	b	7.61%
	c	14.87%
3	a	27.89%
	b	38.34%
	c	37.01%

HEADQUARTERS: 3015 DUMBARTON ROAD • BOX 27524 • RICHMOND, VA 23261-7524
TELEPHONE (804) 264-2701 • FAX (804) 264-1202

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COMMENT:

As noted in our previous report the finding of magnesium compounds is suggestive of the presence of unhydrated oxides.

Respectfully,

A handwritten signature in cursive script, appearing to read 'August A. Thieme'.

August A. Thieme
Chief Chemist - Materials

AAT/dd

SINCE



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Richmond, Virginia
July 19, 1991

Cupell #2

RSW
JS

1881 RECORD NO.: R-53-2033
CONTROL NO.: 53-91-36330

TEST REPORT ON SLAG

CLIENT: Southern Brick & Block, P.O. Box 6666, Richmond, VA 23230
PROJECT: Material Evaluation, PO#30-13330

DATE RECEIVED: 1-17-91

SAMPLED BY: client APPLICABLE STANDARD: ASTM C331

TEST RESULTS:

ASTM C331 Specifications

Unit Weight, Dry Loose, PCF	49.9	70.0 Max.
Popouts	None	0
Stain, C641	Very Light	
Friable Particles, C142	0.3%	2% Max.
Organic Color Plate, C40	0	
Shrinkage		
28 Days	100 Days	
Avg.: 0.034	0.045	
Loss on Ignition	0.56	12.0% Max.
Sieve Analysis, C136		
Size	% Passing	
3/8	100	100
#4	96.0	85-100
#8	77.0
#16	40.0	40-80
#30	19.0
#50	12.0	10-35
#100	8.0	5-25

NOTE: The above results indicate that the material tested complied with the minimum requirements of ASTM C331.

Respectfully,

July 18, 1991

G. F. Starnes
Manager, Concrete Services
FROEHLING & ROBERTSON, INC.



CHARTER MEMBER



CHARTER MEMBER



MEMBER SINCE 1904

HEADQUARTERS: 3015 DUMBARTON ROAD • BOX 27524 • RICHMOND, VA. 23281 •
TELEPHONE AREA CODE (804) 264-2701
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RALEIGH, NC • ROANOKE, VA • STERLING, VA • SALISBURY, MD

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF LYNCHBURG

SMILEY BLOCK COMPANY, INC., *
a Virginia corporation *

Plaintiff, *

v. *

TARMAC MID-ATLANTIC CO., INC. *
a Delaware Corporation, *

Defendant. *

Case No. 680CL93017617

FINAL ORDER

On June 23, 1994, came the plaintiff, Smiley Block Company, Inc., a Virginia corporation ("plaintiff"), represented by John R. Alford, Esq. and John R. Alford, Jr., Esq., and Tarmac Mid-Atlantic Co., Inc., a Delaware corporation, ("defendant") represented by William L. Thurston, Esq., upon a Motion for Judgment and Counterclaim and request for trial by jury.

The Court then impanelled thirteen qualified jurors.

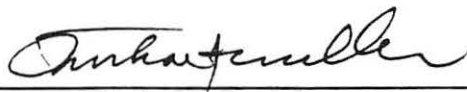
Whereupon the attorneys for the plaintiff and the attorney for the defendant each alternately exercised their rights to strike the names of three veniremen from the panel, as provided by law, and the remaining seven jurors, Dee Blackstock, Jr., James Tuggle, Constance Waller, Dan Pelletier, Celia Towles, Patricia Green and Sharon Ware, constituting the jury for the trial were duly sworn to well and truly try the issues joined and a true verdict give according to the law and the evidence.

After opening statements, the evidence was presented by the attorneys for the plaintiff and the attorney for the defendant.

After the conclusion of the plaintiff's evidence as to it's Motion for Judgment and the defendant's evidence as to it's Counterclaim, the plaintiff, by counsel, made a motion to strike the evidence of the defendant as to it's Counterclaim. The motion to strike the evidence was granted by the Court and said Counterclaim is hereby dismissed. The Court then inquired of the defendant whether or not it had any evidence to present as to the amount of the account tendered by the plaintiff in it's Motion for Judgment and the defendant replied that it did not and that it was not necessary to submit the matter to the jury.

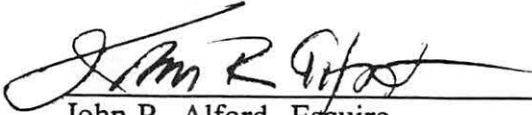
It is therefore ORDERED, ADJUDGED and DECREED that the plaintiff recover of the defendant and be given judgment for Thirty-three Thousand Eighty-two and No/100 Dollars (\$33,082.00), plus interest from May 10, 1993, to which action of the Court the defendant, by counsel, objected and excepted.

Entered this 30th day of June, 1994.



Judge

I ask for this:



John R. Alford, Esquire

CASKIE & FROST

2306 Atherholt Road

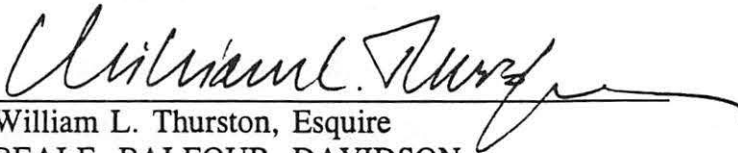
P.O. Box 6360

Lynchburg, Virginia 24505

(804) 846-2731

Counsel for the Plaintiff

Seen and objected to for the reasons stated to the Court in argument on the plaintiff's motion to strike the defendant's evidence in its counterclaim, that the basis for the plaintiff's motion was a factual issue going to the weight, not the admissibility, of the evidence, and that the issue should not have been taken from the jury.



William L. Thurston, Esquire

BEALE, BALFOUR, DAVIDSON,

ETHERINGTON & PARKER

701 East Franklin Street, Suite 1200

Richmond, Virginia 23219

(804)788-1500

Counsel for the Defendant

1-CC J.R.A.

JLD 77
Pg. 154

1-CC W.L.T.

ASSIGNMENTS OF ERROR

1. In granting Smiley's motion to strike, the trial court erred in failing to view the evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party, and in taking the case from the jury.

