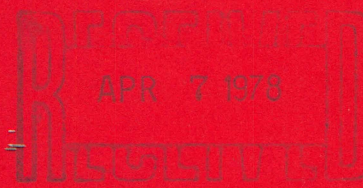


220VA564

SUPREME COURT OF VIRGINIA



RICHMOND, VIRGINIA

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IN THE  
**Supreme Court of Virginia**

AT RICHMOND

RECORD NO. 77-1518

THE FLINTKOTE COMPANY,  
*Appellant,*

v.

W.W. WILKINSON, INC.,  
RICHARD L.F. KIDWELL,  
t/a J. MAE CARPETING  
and  
WOODY DISTRIBUTORS, INC.,  
*Appellees.*

APPENDIX

Worth D. Banner  
WHITE, REYNOLDS, SMITH & WINTERS  
P.O. Box 3315  
Norfolk, Virginia 23514  
*Counsel for Appellant*

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VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

W. W. WILKINSON, INC.,  
Complainant,

vs.

LAW DOCKET NO. L-76-875

RICHARD L. F. KIDWELL t/a  
J. MAE CARPETING, et als  
Defendants.

GROUND OF DEFENSE TO  
AMENDED MOTION FOR JUDGMENT

NOW COMES the defendant, The Flintkote Company, erroneously referred to as Flintkote Building Products Group, and for its answer and grounds of defense to plaintiff's amended motion for judgment states as follows:

1. This defendant can neither affirm nor deny the allegations contained in paragraph 1 of plaintiff's amended motion for judgment.

2. This defendant can neither deny nor affirm the allegations contained in paragraph 2 of plaintiff's amended motion for judgment except it admits that plaintiff is a General Contractor.

3. This defendant can neither affirm nor deny the allegations contained in paragraph 3 of plaintiff's amended motion for judgment.

4. This defendant can neither deny nor affirm the allegations contained in paragraph 4 of plaintiff's amended motion for judgment.

5. This defendant admits to the manufacture of flooring tile products and the sale of such products to Woody Distributors, Inc.; however, calls for strict proof that its products are the subject of this litigation.

6. This defendant denies the allegations contained in paragraph 6 of plaintiff's amended motion for judgment.

7. This defendant denies the allegations contained in paragraph 7 of plaintiff's amended motion for judgment.

8. This defendant admits the allegations contained in paragraph 8 of plaintiff's amended motion for judgment.



GROUND OF DEFENSE TO COUNT TWO OF  
PLAINTIFF'S AMENDED MOTION FOR JUDGMENT

1. This defendant hereby incorporates by reference its answers set out above to paragraphs 1, 2, 3, 4, 5 and 8.

2. This defendant can neither deny nor affirm the allegations contained in paragraph 2 of Count Two of Plaintiff's Amended Motion for Judgment.

3. This defendant denies it is indebted to the plaintiff in the amount of \$23,000.00 or for any sum of money.

THE FLINKOTE COMPANY

By: 

Of Counsel

Harvey E. White, Jr.  
White, Reynolds, Smith, Winters & Lucas  
P. O. Box 3315  
Norfolk, Virginia 23514

I hereby certify that true copy of the foregoing grounds of defense to plaintiff's amended motion for judgment was mailed to all other counsel of record this <sup>27<sup>th</sup></sup> day of August, 1976.

  
Harvey E. White, Jr.

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

W. W. WILKINSON, INC.,	:	
Complainant,	:	
-V-	:	LAW DOCKET NO.
	:	I-76-875
RICHARD L. F. KIDWELL, t/a J. MAE	:	
CARPETING, et als,	:	
Defendants.	:	

ANSWER AND GROUNDS OF DEFENSE TO AMENDED  
MOTION FOR JUDGMENT

NOW COMES the defendant, Woody Distributors, Inc., and as its answer and grounds of defense to the amended motion for judgment filed herein alleges as follows:

1. Insofar as this defendant has knowledge, the allegations contained in paragraphs 1, 2 and 3 of said amended motion for judgment are admitted.

2. The allegations contained in paragraphs 4 and 5 of said amended motion for judgment are admitted.

3. It is admitted that the said defendant, Richard L. F. Kidwell, t/a J. Mae Carpeting installed said materials in the said building as alleged in paragraph 6 of the amended motion for judgment. The remaining allegations of paragraph 6, however, are denied.

4. The allegations contained in paragraphs 7 and 8 of said motion for judgment are denied.

ANSWER AND GROUNDS OF DEFENSE TO COUNT 2  
OF PLAINTIFF'S AMENDED MOTION FOR  
JUDGMENT

1. Defendant hereby incorporates by reference its answers set out above to paragraphs 1, 2, 3, 4, 5 and 8 of the amended motion for judgment.



2. This defendant can neither deny nor affirm the allegations contained in paragraph 2 of Count 2 of the amended motion for judgment.

3. Defendant denies that it is indebted to the plaintiff in the amount of \$23,000.00 or for any sum of money.

AND IN FURTHER ANSWERING, defendant alleges as follows:

4. Defendant denies that it breached any implied warranty of merchantability and fitness or any other warranty made to plaintiff or any other duty owed by this defendant to the plaintiff.

WOODY DISTRIBUTORS, INC.

BY Charles F. Linder  
Of Counsel

Vandeventer, Black, Meredith & Martin  
2050 Virginia National Bank Building  
Norfolk, Virginia 23510  
Counsel for Defendant

Certificate of Service  
8/30/76  
I certify that on 8/30/76  
I mailed or delivered to the plaintiff  
pleading(s) to Court Case No. 76-1000  
Charles F. Linder

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

W.W. WILKINSON, INC.

Complainant,

v.

RICHARD L.F. KIDWELL t/a  
J. MAE CARPETING

WOODY DISTRIBUTORS, INC.

and

FLINTKOTE BUILDING PRODUCTS GROUP,

Defendants.

AMENDED MOTION FOR JUDGMENT

Now comes the plaintiff, W.W. Wilkinson, Inc., by counsel, and respectfully moves this Court for judgment against the defendants in the amount of \$23,000.00, plus reasonable attorney's fees, plus interest at the rate of 8% per annum from April 1, 1976, and costs of this proceeding, for this, to-wit:

1. The plaintiff is a Virginia corporation, doing business in the City of Norfolk.

2. The plaintiff, as a general contractor contracted with the Corp of Engineers of the United States Government for renovation of buildings 56 and 82 located at Fort Monroe, Virginia.

3. As a part of it's Contract, plaintiff subcontracted certain flooring work to Richard L.F. Kidwell t/a J.Mae Carpeting.

4. That the said Richard L.F. Kidwell t/a J. Mae Carpeting contracted with Woody Distributors, Inc., whereby said Woody Distributors, Inc., sold to Richard L.F. Kidwell t/a J. Mae Carpeting certain materials.



5. That said materials were manufactured by Flintkote Building Products Group, and were sold by the said Flintkote Building Products Group to Woody Distributors, Inc.

6. That the said Richard L.F. Kidwell t/a J. Mae Carpeting installed said materials in said buildings, and it was subsequently determined by Inspectors of the Corp of Engineers, as well as others, that said materials were defective, and as a result, the Corp of Engineers required the plaintiff to do a complete overlay on said floor, which necessitated the plaintiff in purchasing new materials, expending sums of money for labor and materials to correct the floor and otherwise install said new materials, all of which resulted in the plaintiff being unable to complete it's Contract on time, whereby it was assessed liquidated damages by the United States Government.

7. That as a result of the aforesaid, the said defendants have breached their implied warranties of merchantability and fitness for a particular purpose, and as a result, are liable in damages to the plaintiff as aforesaid.

8. That said plaintiff has made demands on the defendants to reimburse it for the costs of the materials, labor, damage, and the sums of money that it was assessed by way of liquidated damages, which all of them have refused to do.

#### COUNT TWO

1. That Paragraphs No. 1, 2, 3, 4, 5, and 8 are incorporated by reference herein as if fully set forth.

2. That the said Richard L.F. Kidwell t/a J. Mae Carpeting negligently installed said materials in

said buildings, and as a result of said negligence, the Corp of Engineers Inspectors required the plaintiff to do a complete overlay on said floor, which necessitated the plaintiff purchasing new materials, expending sums of money for labor and materials to correct the floor and otherwise install said new materials, all of which resulted in the plaintiff being unable to complete its Contract on time, whereby it was assessed liquidated damages by the United States Government.

Wherefore, plaintiff prays for judgment against the defendants in the amount of \$23,000.00, together with reasonable attorney's fees, interest at 8% per annum from April 1, 1976, plus court costs.

W. W. WILKINSON, INC.

By

  
\_\_\_\_\_  
Of Counsel

William F. Burnside  
958 Laskin Road  
Virginia Beach, Virginia

I hereby certify that a copy of the foregoing Amended Motion for Judgment was mailed to Harvey E. White, P.O. Box 3315, Norfolk, Virginia, David H. Adams, First & Merchants Bank Building, P.O. Box 3434, Norfolk, Virginia and Charlie Tucker, VANDEVENTER, BLACK, MEREDITH & MARTIN, 2050 Virginia National Bank Building, Norfolk, Virginia, this <sup>14</sup> day of August, 1976.



W. W. WILKINSON, INC.,

Complainant,

vs.

LAW DOCKET NO. L-76-875

RICHARD L. F. KIDWELL, t/a  
J. MAE CARPETING, et als

Defendants.

ANSWER AND GROUNDS OF DEFENSE  
TO AMENDED MOTION FOR JUDGMENT

COMES NOW the Defendant, Richard L. F. Kidwell, trading as J. Mae Carpeting, by counsel, and as and for its Answer to the Amended Motion For Judgment filed herein by W. W. Wilkinson, Inc., Plaintiff, states as follows:

COUNT ONE

1. That this Defendant is without sufficient knowledge as to the allegations contained in paragraphs 1 and 2 of the Amended Motion for Judgment and is therefore unable to answer same.
2. That the allegations contained in paragraph 3, 4 and 5 of the Amended Motion for Judgment are admitted.
3. That the allegations contained in paragraph 6 of the Amended Motion for Judgment are admitted insofar as the installation of materials by this Defendant, and this Defendant states further that it denies any knowledge that the materials supplied by the other defendants were defective until after installation had been almost completed.
4. The allegations contained in paragraphs 7 and 8 of the Amended Motion for Judgment are denied and this Defendant demands strict proof thereof.

COUNT TWO

1. That this Defendant hereby incorporates by reference its Answers set out above to paragraphs 1, 2, 3, 4, 5 and 8 of the Amended Motion for Judgment that the allegations contained in paragraph 2 of Count Two of the Amended Motion for Judgment are denied and this Defendant demands strict proof thereof.

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2. That this Defendant denies that it is indebted to the Plaintiff herein in any amount.

3. The Plaintiff is barred from recovery against this Defendant for the reason that no enforceable contract between the parties exists.

4. Along with the other defenses set out, this Defendant will rely on any other defense which may become known to it up to and including the trial.



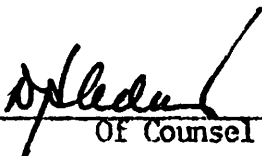
CROSS CLAIM

COMES NOW the Defendant, Richard L. F. Kidwell, trading as J. Mae Carpeting, by counsel, and for its Cross Claim against Woody Distributors, Inc. and Flintkote Building Products Group, states:

1. That the allegations contained in paragraphs 1, 2, 3, 4 and 5 of this Defendant's original Answer to the original Motion for Judgment are incorporated by reference herein.

WHEREFORE, Defendant and Cross-Claimant, Richard L. F. Kidwell, trading as J. Mae Carpeting, moves that the Motion for Judgment filed by W. W. Wilkinson, Inc. against it be dismissed with its costs expended in this behalf, and further moves, that if in the event any judgment is rendered against this Defendant, for a judgment against Woody Distributors, Inc. and Flintkote Building Products Group, jointly and severally, for any and all sums awarded against this Defendant in favor of W. W. Wilkinson, Inc., or any alternative for that part of said sum due by way of contribution or indemnity, plus its costs in this behalf expended and attorney fees; and further, that this Defendant be awarded a judgment against Woody Distributors, Inc. and/or Flintkote Building Products Group, jointly and severally, in the amount of \$10,000.00, plus costs and attorneys fees.

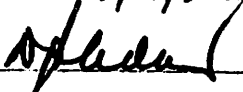
RICHARD L. F. KIDWELL  
Trading as J. Mae Carpeting

  
\_\_\_\_\_  
Of Counsel

David H. Adams  
Taylor, Walker, Bernard & Adams  
P. O. Box 3434  
Norfolk, Virginia 23514

TAYLOR, WALKER,  
BERNARD & ADAMS  
NORFOLK, VIRGINIA  
23514

I certify that a copy of the foregoing  
pleading was mailed to each counsel  
of record on 8/31/56

  
\_\_\_\_\_

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

W. W. WILKINSON, INC.,

Complainant,

-V-

RICHARD L. F. KIDWELL, t/a J. MAE  
CARPETING, et als,

Defendants.

LAW DOCKET NO.

L-76-875

SECOND CROSS CLAIM

NOW COMES the defendant, Woody Distributors, Inc., and as its second cross claim against the Flintkote Company, erroneously referred to herein as Flintkote Building Products Group and Richard L. F. Kidwell, t/a J. Mae Carpeting, alleges as follows:

1. That W. W. Wilkinson, Inc. has filed an Amended Motion for Judgment against Woody Distributors, Inc. alleging a breach of warranties of merchantability and fitness for a particular purpose in the sale and furnishing of certain flooring materials as a result of which the said plaintiff allegedly sustained damages in the total amount of \$23,000.00.

2. That although the said defendant, Woody Distributors, Inc. denies any liability to the plaintiff for the matters alleged in the amended motion for judgment, if any liability is found against the said defendant, Woody Distributors, Inc., the defendants, the Flintkote Company and/or Richard L.F. Kidwell, t/a J. Mae Carpeting are liable for same to Woody Distributors, Inc. by way of indemnity or contribution for all or any part of any judgment rendered against Woody Distributors, Inc.

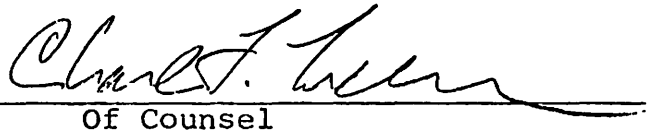
3. That the said Woody Distributors, Inc. breached no warranties, either expressed or implied or any other duty owed to the plaintiff herein.

4. That if the said plaintiff sustained any damages as a result of the furnishing of said flooring materials, the same were caused by the negligent manufacture of said materials by the Flintkote Company and/or the negligent inspection and installation of the said flooring materials by the said Richard L. F. Kidwell, t/a J. Mae Carpeting, thereby constituting a breach of its duty of workmanlike services.

WHEREFORE, the defendant, Woody Distributors, Inc. prays that in the event judgment is rendered against it, that it will be granted judgment over against the defendant, the Flintkote Company and/or Richard L. F. Kidwell, t/a J. Mae Carpeting, for any and all sums awarded plaintiff against defendant, Woody Distributors, Inc., together with its costs and attorneys fees expended in defense of this matter and further that it will be granted its further and additional relief as may be meet.

WOODY DISTRIBUTORS, INC.

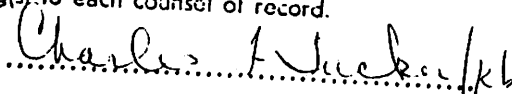
BY

  
Of Counsel

Vandeventer, Black, Meredith & Martin  
2050 Virginia National Bank Building  
Norfolk, Virginia 23510  
Counsel for Defendant, Woody Distributors, Inc.

Certificate of Service

I certify that on 9-1-76  
I mailed or delivered a true copy of the foregoing  
pleading(s) to each counsel of record.

  
.....

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

W. W. WILKINSON, INC.,

Complainant,

-V-

RICHARD L. F. KIDWELL, t/a J. MAE  
CARPETING, et als,

Defendants.

LAW DOCKET NO.

L-76-875

ANSWER TO SECOND CROSS CLAIM

NOW COMES the defendant, Woody Distributors, Inc., and as its answer to the second cross claim filed herein by Richard L. F. Kidwell, t/a J. Mae Carpeting alleges as follows:

1. Defendant, Woody Distributors, Inc. incorporates herein as if set out at length its answers to the allegations contained in paragraphs 1, 2, 3, 4 and 5 of the first cross claim filed herein by Richard L. F. Kidwell, t/a J. Mae Carpeting.

2. WHEREFORE, defendant, Woody Distributors, Inc., prays that the second cross claim filed herein will be dismissed and that it will be granted its reasonable costs expended.

WOODY DISTRIBUTORS, INC.

BY

Charles F. Tucker  
Of Counsel

Vandeventer, Black, Meredith & Martin  
2050 Virginia National Bank Building  
Norfolk, Virginia 23510  
Counsel for Defendant, Woody Distributors, Inc.

Certificate of Service

I certify that on 9-1-76  
I mailed or delivered a true copy of the foregoing  
pleading(s) to each counsel of record.

Charles F. Tucker/k6

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK  
W. W. WILKINSON, INC.,

Plaintiff,

vs.

RICHARD L. F. KIDWELL, t/a  
J. MAE CARPETING, et al.,

Defendants. ANSWER TO CROSS-CLAIM OF  
RICHARD L. F. KIDWELL  
t/a J. MAE CARPETING

NOW COMES the defendant, The Flintkote Company, erroneously referred to as Flintokote Building Products Group, and for its answer to the cross-claim filed herein by Richard L. F. Kidwell, t/a J. Mae Carpeting, on August 31, 1976 states as follows:

1. This defendant denies each and every material allegation of the herein cross-claim.
2. This defendant denies it breached any implied warranty of merchantability or fitness or any other warranty made to the plaintiff or any other parties.
3. This defendant denies that it was guilty of any negligence or <sup>BREACHED</sup> any legal duty owed plaintiff or the other parties.
4. This defendant denies it is indebted to the plaintiff or to any of the other parties for any sum of money by way of damages or by way of contribution or indemnity.

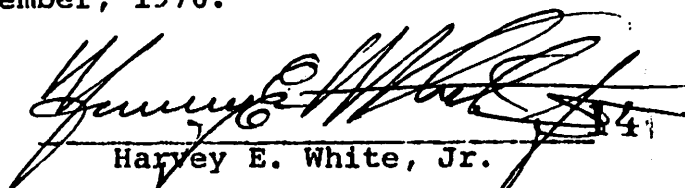
THE FLINTKOTE COMPANY

By: 

Of Counsel

Harvey E. White, Jr., p.d.  
White, Reynolds, Smith, Winters & Lucas  
P. O. Box 3315  
Norfolk, Virginia 23514

I certify that true copy of the foregoing was mailed to all counsel of record this 1st day of September, 1976.

  
Harvey E. White, Jr.

VIRGINIA: 'IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

W. W. WILKINSON, INC.,  
Complainant,

vs.

LAW DOCKET NO. L-76-875

RICHARD L. F. KIDWELL, c/a  
J. MAE CARPETING, et als,  
Defendants.

ANSWER TO SECOND CROSS CLAIM

NOW COMES The Flintkote Company and for its answer to the second cross claim of Woolly Distributors, Inc., filed herein on September 1, 1976 states as follows:

1. This defendant denies each and every material allegation of the herein cross claim.

2. This defendant denies it breached any implied warranty of merchantability or fitness or any other warranty made to the plaintiff or any other parties.

3. This defendant denies it was guilty of any negligence or breached any legal duty owed plaintiff or the other parties.

4. This defendant denies it is indebted to the plaintiff or to any of the other parties for any sum of money by way of damages or by way of contribution or indemnity.

5. This defendant denies the allegations of negligent manufacture.

THE FLINTKOTE COMPANY

By: 

of Counsel

I certify that true copy of the foregoing answer was mailed to all counsel of record this 7th day of September, 1976.

Harvey E. White, Jr.  
White, Reynolds, Smith, Winters & Lucas  
P. O. Box 3315  
Norfolk, Virginia 23514

  
Harvey E. White, Jr.



VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK

W. W. WILKINSON, INC.,

Complainant,

vs.

RICHARD L. F. KIDWELL, t/a

J. Mae Carpeting, et als.

Defendants.

LAW DOCKET NO.

L-76-875

ANSWER OF RICHARD L. F. KIDWELL,  
t/a J. MAE CARPETING TO  
SECOND CROSS CLAIM FILED BY  
WOODY DISTRIBUTORS, INC.

COMES NOW the Defendant, Richard L. F. Kidwell, trading as J. Mae Carpeting, and as and for his answer to the second cross claim filed herein by Woody Distributors, Inc. states as follows:

1. That the allegations contained in paragraph 1 of the said second cross claim are admitted except no liability to the Plaintiff is admitted and no damages as alleged by the Plaintiff are admitted.
2. That the allegations contained in paragraph 2 of the said second cross claim are denied insofar as they pertain to this Defendant.
3. The allegations contained in paragraph 3 of said second cross claim are denied.
4. That the allegations contained in paragraph 4 of the said second cross claim insofar as they apply to this Defendant are denied.

WHEREFORE, the Defendant, Richard L. F. Kidwell, trading as J. Mae Carpeting, prays that the said second cross claim filed herein by Woody Distributors, Inc. be dismissed and that he be granted his reasonable costs expended.

RICHARD L. F. KIDWELL, trading as  
J. Mae Carpeting

By

David H. Adams  
Of Counsel

David H. Adams  
Taylor, Walker, Bernard & Adams  
P. O. Box 3434  
Norfolk, Virginia 23514

I certify that a copy of the foregoing  
pleading was mailed to each counsel  
of record on 9.7.76

/

INSTRUCTION

The Jury are the sole judges of the weight of the evidence and of the credibility of the witnesses, and the jury has the right to discard or accept the testimony or any part thereof of any witness which the jury regards proper to discard or accept, when considered in connection with the whole evidence in the case, but the Jury has no right arbitrarily to disregard the credible testimony of a witness. And in ascertaining the preponderance of the evidence and the credibility of witnesses, the Jury may take into consideration the demeanor of the witness on the witness stand; his apparent candor or fairness; his bias, if any; his intelligence; his interest, or lack of it, in the outcome of the case; his opportunity, or lack of it, for knowing the truth and for having observed the facts to which he testifies; any prior inconsistent statements by the witness if proven by the evidence; and from all these and taking into consideration all the facts and circumstances of the case, the Jury are to determine the credibility of the witnesses and the preponderance of the evidence.

*of*  
*Franklin*  
*W. Page*

2  
INSTRUCTION

The term "preponderance of the evidence" does not necessarily mean the greater number of witnesses, but means the greater weight of all the evidence. It is that evidence which is most convincing and satisfactory to the minds of the Jury. The testimony of one witness in whom the Jury has confidence may constitute a preponderance.

*Frank*  
*W. R. G.*

INSTRUCTION NO. 3

The Court instructs the jury that if you believe from a preponderance of the evidence that the defendant Kidwell breached his contract with the plaintiff and that such breach proximately caused the damages sustained by the plaintiff, then you shall return your verdict against defendant Kidwell.

*Handwritten:*  
a. *Handwritten:*  
No. 2 Page 1

INSTRUCTION NO. 4

The Court instructs the Jury that the law provides that a manufacturer, distributor, or installer of products make an implied warranty of merchantability of the product sold, that is, fit for the ordinary purposes for which such product is made, and if you believe from a preponderance of the evidence that the product sold to the plaintiff was not merchantable, and that such proximately caused the damages of the plaintiff then you shall return a verdict in favor of the plaintiff against defendants.

*W. R. S.*

5

INSTRUCTION

*you believe*  
 If, <sup>from a preponderance of the evidence,</sup> ~~you have~~ *The plaintiff*  
~~is entitled to recover~~  
~~concluded that the defendant breached the implied warranty~~  
~~of fitness for use,~~ then in awarding damages, you may consider  
 the difference between the cost to the plaintiff to complete  
 the Contract and the Contract price, ~~together with any inci-~~  
~~dental or consequential damages,~~ which include any ~~consequential~~  
 reasonable charges, and expenses in connection with the plain-  
 tiff effecting a completion of the Contract, and any other  
 reasonable expenses incident to the delay ~~on the part of the~~ *if*  
*proven by a preponderance of the evidence.*

*Daunted*  
*W. R. R.*



INSTRUCTION NO. 6

The court instructs the jury that the term "proximate cause" of an event is a cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the event, and without which the event would not have occurred; it is an act or omission occurring or concurring with another act, where had it not happened, the event would not have occurred.

*cy [unclear]*  
*W. Page X*

7

INSTRUCTION

A verdict must not be based in whole or in part upon surmise, conjecture or sympathy for ~~either~~<sup>any</sup> of the parties, but must be based solely upon the evidence and the instruction of the Court.

*Handwritten signature*  
*AMBS*

FILED

INSTRUCTION NO. 8

The Court instructs the jury that if you believe, from a preponderance of the evidence, that under the contract between the plaintiff and the defendant, Kidwell, it was the duty of the plaintiff to properly prepare the subflooring prior to the installation of the tile floor by Kidwell and you further believe from a preponderance of the evidence that the plaintiff breached the contract in failing to prepare such subflooring and such <sup>breach</sup> ~~negligence~~ was a proximate cause of the damages of which the plaintiff complains, then the plaintiff is barred from recovery and you shall return your verdict in favor of the defendants.

*Handwritten signature*  
*W. Rose*

INSTRUCTION NO. 9

DAMAGED

Damages are not presumed nor may they be based upon speculation, but must be proven; and the burden is upon the plaintiff to prove by a preponderance of the evidence or with reasonable certainty any item or element of damage claimed and that it is properly attributable to the <sup>ACT OF THE DEFENDANTS</sup> ~~accident~~; and unless such item or element of damage is thus proven by a preponderance of the evidence or with reasonable certainty, then the plaintiff cannot recover for such item or element.

And if you believe from the evidence that a particular damage complained of by the plaintiff may have resulted from either of two causes, for one of which a defendant might have been responsible and for the other of which he was not, and if the jury are unable to determine which of the two causes occasioned the damage complained of, then the plaintiff cannot recover therefor.

*Sawley*  
*11/25/20* x

INSTRUCTION NO. 10

The Court instructs the jury that the product that was manufactured by the defendant, Flintkote, in this case carried with it under the law an implied warranty that it was of merchantable quality. This means that the manufacturer warranted to the public generally that the product was properly made for the general purpose for which it was intended. If you find that the product was in fact not properly made, according to its own specifications, then the implied warranty of merchantability has been breached; and if you find that said breach was <sup>the</sup> ~~a~~ proximate cause of the plaintiff's damages, then you should find your verdict in favor of the plaintiff, against the defendant, Flintkote.

*granted*  
*Wolfe x*

//

The Court instructs the jury that one basis of <sup>for breach of contract</sup> this action is a claim by the plaintiff ~~on the part of the defendant~~ on the part of the defendant, Richard L. F. Kidwell t/a J. Mae Carpeting, in installing the flooring in question, and if you believe from a preponderance of the evidence in this case that said defendant <sup>breached the contract</sup> ~~was thus negligent~~, and that the plaintiff in no way caused or contributed to cause the damage complained of, or that the other parties did not breach any <sup>warranties</sup> ~~warranties, express or implied~~, you should find your verdict in favor of the plaintiff only against the said defendant, Richard L. F. Kidwell t/a J. Mae Carpeting.

*Handled  
UnPage 8*



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The Court instructs the jury that one basis of this action is a claim by the plaintiff of a breach of implied warranty on the part of the defendants, and in such an action the burden is upon the plaintiff to prove by a preponderance of the evidence ~~that the plaintiff was~~ ~~conceded by the warranty,~~ that the warranty was breached, and that the damages claimed proximately resulted therefrom; that is, the burden is on the plaintiff to prove that the damage alleged proximately resulted because of ~~latent~~ defects in material ~~or workmanship~~ which existed <sup>left the manufacturer's hands</sup> at the time the flooring materials ~~were purchased~~. And if the jury believe that it is just as probable that such defects did not exist or that the replacement of the floor was not proximately caused thereby, then the plaintiff has failed to carry this burden of proof and cannot recover for any alleged breach of warranty against the defendants.

*by [unclear]  
WRG*

INSTRUCTION NO. ~~14~~ 13

The Court instructs the jury that if you believe from a preponderance of the evidence that the damage claimed by the plaintiff was <sup>Solely</sup> ~~entirely~~ caused by the manufacture of the tiles by Flintkote and you further believe that the failure to properly manufacture the tiles caused damage to the defendant, Kidwell, you shall find your verdict in favor of the defendant Kidwell and assess his damages as proved by the evidence.

*Granted*  
*W. R. Page*

11480

D1

The Court instructs the jury that under the law in Virginia, the parties to a contract may limit the seller's liability for breach of warranty. If you find that the plaintiff and the defendants, The Flintkote Company and Woody Distributors, Inc., contracted to limit the defendant's liability, upon any breach, to the replacement of its products or, at its option, a refund of the purchase price, then you shall find for the plaintiff in an amount not to exceed the purchase price of the defendant's products.

Refused  
W. B. S. x



FOURTH JUDICIAL CIRCUIT OF VIRGINIA  
CIRCUIT COURT OF THE CITY OF NORFOLK

WALTER A. PAGE  
JUDGE

100 ST. PAUL'S BOULEVARD  
NORFOLK, VIRGINIA 23510

April 27, 1977

William F. Burnside, Esquire  
P. O. Box 1062  
Virginia Beach, Virginia 23451

David H. Adams, Esquire  
Taylor, Walker, Bernard & Adams  
P. O. Box 3434  
Norfolk, Virginia 23514

Charles F. Tucker, Esquire  
Vandeventer, Black, Meredith & Martin  
2050 Virginia National Bank Building  
Norfolk, Virginia 23510

Harvey E. White, Jr., Esquire  
White, Reynolds, Smith, Winters & Lucas  
P. O. Box 3315  
Norfolk, Virginia 23514

Re: W. W. Wilkinson, Inc. v. Richard L. F.  
Kidwell, T/A J. Mae Carpeting; Woody  
Distributors, Inc. and Flintkote Building  
Products Group. At Law No. L-76-875

---

Gentlemen:

The Court has considered the evidence, Memoranda of counsel and authorities cited with reference to the defendant Flintkote Building Products Group (Flintkote)'s motion to set aside the verdict of the jury on the grounds that it was contrary to the law and evidence and to grant a new trial on all issues; or, in the alternative, to put the plaintiff and the defendant, Richard L. F. Kidwell, T/A J. Mae Carpentry (Kidwell) on terms to limit damages to the replacement costs of the material; and to strike the evidence of Kidwell and Woody Distributors, Inc. (Woody) on their respective cross claims against Flintkote because of insufficient proof as a matter of law and is of the opinion that said motion should be overruled.

Provision is made by statute that the merchantability of goods is implied in a contract of sale (§8.2-314); that unless excluded

William F. Burnside, Esquire  
David H. Adams, Esquire  
Charles F. Tucker, Esquire  
Harvey E. White, Jr., Esquire  
Page 2  
April 27, 1977

or modified other implied warranties may arise (§8.2-316); that there is an implied warranty of fitness for a particular purpose under certain circumstances (§8.2-315); and that remedies for breach of warranty can be limited (§8.2-316) (in accordance with the provisions of §§8.2-718 and 8.2-719).

In the instant case there was an implied warranty of merchantability of the floor tiles. Even the language of the express warranty relied upon by the defendant Flintkote, if applicable, warranted "its products described in the specifications are of merchantable quality." Although there was an exclusion of the warranty of fitness "for any particular use," there was evidence that the government specifications for the products to be used in the instant case were submitted to the manufacturer through its distributor who advised the type of tile to supply; and that the tiles were out of square. The aforementioned condition was not ascertainable on inspection but became apparent when the laying of the tiles resulted in drifting. Further, there was no evidence of an agreement of the parties to limit the remedies for a breach of warranty; nor does the effort by the defendant Flintkote to do so meet the requirements of the law. Citing Lacks v. Bottle Gas Corp., 215 Va. 94. The Court is, therefore, of the opinion that the case was properly submitted to the jury under the instructions granted.

The Court reserved the issue of whether the defendants Kidwell and Woody were entitled to recover attorneys' fees incurred in defending this action. The Court is of the opinion that they are. 22 Am. Jur. 2d, Damages, § 166. This matter should be set down for determination by a jury or the Court, after which time a final order may be presented, preserving exceptions.

Sincerely yours,

  
Walter A. Page  
Judge

WAP:meg

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF NORFOLK  
on the 18th day of July, 1977.

W. W. WILKINSON, INC., :

Plaintiff, :

v. :

DOCKET NO. L76-875

RICHARD L. F. KIDWELL :

t/a J. MAE CARPETING, INC., :

et al., :

Defendants. :

O R D E R

THIS DAY came the parties, by counsel, on the motions of defendant, The Flintkote Company, to set aside the verdict of the jury, rendered in this cause on December 1, 1976, on the grounds that it was contrary to the law and the evidence and to grant a new trial on all issues, or in the alternative, to put the plaintiff, W. W. Wilkinson, Inc., and the defendant, Richard L. F. Kidwell t/a J. Mae Carpeting, Inc., on terms to limit damages to the replacement costs of the material, and to strike the evidence of the aforesaid defendant, Kidwell, and that of Woody Distributors, Inc. on their respective cross-claims against Flintkote on account of insufficient proof as a matter of law, and was argued by counsel.

AND the Court having considered the evidence, memoranda of counsel, and authorities cited, and the Court being of the opinion that there was an implied warranty of merchantability with respect to the tiles in question in this case pursuant to §8.2-314 of the Code of Virginia of 1950, as amended, which warranty was breached by defendant, The Flintkote Company, as to the plaintiff and other defendants in this cause, and that said breach occasioned consequential damages recoverable by plaintiff and defendant, Richard L. F. Kidwell t/a J. Mae Carpeting, Inc., pursuant to the provision of §8.2-714 and 8.2-715 of the Code of Virginia of 1950, as amended, and that there was no effective agreement as between defendant Flintkote and the other parties to this cause limiting the

remedy for breach of said warranty, citing Lacks v. Bottle Gas Corporation, 215 Va. 94 (1974), it is hereby ADJUDGED, ORDERED and DECREED that said motions are overruled, to which rulings the defendant, The Flintkote Company, notes its exceptions, and it is further ADJUDGED, ORDERED, and DECREED that the plaintiff recover of the defendant, The Flintkote Company, the sum of Ten Thousand Seven Hundred Eighty-four and Eighty-two Hundredths Dollars (\$10,784.82), as well as its costs, and that the defendant, Richard L. F. Kidwell t/a J. Mae Carpeting, Inc., recover the sum of One Thousand Six Hundred Thirty-one and Forty-two Hundredths Dollars (\$1,631.42) in accordance with the award of the jury herein, with interest from date.

AND the Court being of further opinion that the defendants, Richard L. F. Kidwell t/a J. Mae Carpeting, Inc., and Woody Distributors, Inc., are entitled to recover, in common law indemnity, the cost of their attorneys' fees incurred in defending this action it is ADJUDGED, ORDERED and DECREED, that the defendant, Richard L. F. Kidwell t/a J. Mae Carpeting, Inc., recover the sum of Two Thousand Five Hundred Eighty-two Dollars (\$2,582.00) and that the defendant, Woody Distributors, Inc., recover the sum of Two Thousand Seven Hundred Twenty-one Dollars (\$2,721.00) from defendant, The Flintkote Company, for their respective attorneys' fees, to which ruling the defendant, The Flintkote Company, excepts on the grounds that the evidence of the amount of said attorneys' fees was untimely presented, and that the award of same was contrary to the law and the evidence.

AND it is further ORDERED that the transcript of the proceedings of this cause become part of the record for purposes of any appeal from this order.

Walter A. Page  
Judge

A COPY, TESTE: HUGH L. STOVALL, CLERK  
BY:       , D. C.



We ask for this:

\_\_\_\_\_, p.q.

\_\_\_\_\_, p.d.  
Of Counsel: RICHARD L. F. KIDWELL  
t/a J. MAE CARPETING, INC.

\_\_\_\_\_, p.d.  
Of Counsel: WOODY DISTRIBUTORS, INC.

Seen and objected to:

\_\_\_\_\_, p.d.  
Of Counsel: THE FLINTKOTE COMPANY

IN THE SUPREME COURT OF VIRGINIA

FLINTKOTE BUILDING PRODUCTS GROUP,

Appellant

v.

W. W. WILKINSON, INC.,

RICHARD L. F. KIDWELL t/a  
J. MAE CARPETING,

RECORD NO. \_\_\_\_\_

and

WOODY DISTRIBUTORS, INC.,

Appellees

ASSIGNMENTS OF ERROR

Now comes the Appellant, defendant below, the Flintkote Company, by counsel, and makes its assignments of error to the judgment below:

1. The Court erred in failing to exclude, upon defendant's motion, evidence of damages beyond the replacement cost of the tile in question.

2. The Court erred in failing to grant a requested instruction to the effect that if the jury found that the limitation of remedy for breach of the implied warranty of merchantability became a part of the agreement between the parties, then any damages awarded for such breach must conform to the terms of said limitation of remedy.

3. The Court erred in overruling defendant's motions to strike the plaintiff's evidence and to set aside the jury verdict and grant a new trial.

4. The Court erred in entering judgment for codefendants on their cross-claims for attorneys fees without having allowed the jury to consider the amount or reasonableness of such attorneys fees.

5. The Court erred in instructing the jury that they could consider consequential damages on a finding of liability against defendant Flintkote and in favor of plaintiff Wilkinson and codefendant Kidwell.

SECTION 9E

RESILIENT FLOORING Judge

1. APPLICABLE PUBLICATIONS: The following publications of the issues listed below, but referred to thereafter by basic designation only, form a part of this specification to the extent indicated by references thereto:

1.1 Federal Specifications:

P-F-00430A (GSA-FSS) & Am 2	Finish Floor, Water Emulsion (For Use on Light Colored Floors).
P-W-155B	Wax, Floor, Water-Emulsion.
SS-T-312A Am 1	Tile, Floor; Asphalt, Rubber, Vinyl, Vinyl-Asbestos.
SS-W-40A (GSA-FSS)	Wall Base; Rubber, and Vinyl Plastic.
MMM-A-110A	Adhesive, Asphalt, Cut-Back Type (for Asphalt and Vinyl-Asbestos Tiles).
MMM-A-115A	Adhesive, Asphalt, Water Emulsion Type, (for Asphalt and Vinyl-Asbestos Tile).

2. SUBMITTALS:

2.1 Samples: The following samples of flooring materials in the colors indicated shall be submitted for approval before the work is started:

- (1) Field tiles - three of each type.
- (2) Base - three 9-inch lengths of each type.
- (3) Edging strips - three 9-inch lengths of each type.

2.2 Manufacturer's Installation Procedures: Submit in triplicate, current copies of the flooring manufacturer's recommended standard installation procedure for each type of flooring material for approval before work is started.

PLANNED

**2.3 Certified Laboratory Test Reports:** Before delivery of materials, submit for approval, in accordance with the special provisions, certified copies of the reports of all tests required in referenced publications. The testing shall have been performed by an approved independent laboratory, within one year of submittal of reports for approval. Test reports on a previously tested material shall be accompanied by notarized certificates from the manufacturer certifying that the previously tested material is of the same type, quality, manufacturer, and make as that proposed for this project.

**2.4 Manufacturer's Maintenance Data and Instructions:** Submit in triplicate, upon completion and prior to acceptance of the work, current copies of the flooring manufacturer's printed recommendations on maintenance methods and products for each type of flooring material.

**3. DELIVERY AND STORAGE:** Materials shall be delivered to the job in the manufacturers' original unopened containers, with the brands and names clearly marked thereon. All materials shall be carefully handled and shall be stored in their original containers at not less than 70 degrees F for at least 48 hours before work is started. Containers shall not be opened until inspected and accepted.

**4. ENVIRONMENTAL CONDITIONS:** Spaces in which flooring work is to be performed shall be maintained between 70 degrees F and 90 degrees F at the floor level for at least 48 hours prior to starting the work, during the time work is performed, and for at least 48 hours after the work is completed. A minimum temperature of 55 degrees F shall be maintained thereafter. Adequate ventilation shall be provided to remove moisture and fumes from the area.

**5. EXTRA STOCK:** Upon completion of work, deliver additional tile and base to the Government for use in repairs and maintenance. Additional materials of each color shall be from the same lot as the materials installed. Furnished tile and base in original boxes, properly marked, in quantities listed below, and with colors in approximately the same proportions as installed materials:

(1) Vinyl-asbestos tile: 1 carton.

(2) Wall base: 45 lineal feet.

**6. MATERIALS:**

**6.1 General:** Flooring, base, and edging strips shall be provided in colors as selected by the Contracting Officer. Accessories shall be the approved standard products

FILMED

of the manufacturer of the flooring. The color and pattern of tile shall be uniformly distributed throughout the thickness of the tile. Variation in shades and off pattern matches between containers will not be acceptable. Flooring in any one continuous area or that used in replacement of damaged flooring, in a continuous area, shall be from the same lot and have the same shade and pattern. All materials specified to be of a type as recommended by the manufacturer shall be subject to approval.

✓ 6.2 Vinyl-Asbestos Tile: Specification SS-T-312, type IV, and shall be 12 by 12 inches by 1/8 inch thick.

6.3 Wall Base: Specification SS-W-40, type I or type II, style B. Base shall be 4 inches high, 0.125 inch thick, in color indicated. Base shall be sufficiently flexible to conform to irregularities in walls, partitions, and floors. Premolded corners in matching size, shape, and color shall be provided for all right-angle external and internal corners.

6.4 Underlayment: Latex type MIL-D-3134F(5).

6.5 Adhesives:

6.5.1 Adhesive for vinyl-asbestos tile: Specifications MMM-A-110 and MMM-A-115.

232 asphalt.  
cut back

6.6 Crack Filler:

6.6.1 Crack filler for Concrete Floor Surfaces: Nonshrinking cement mortar.

6.6.2 Crack Filler for Walls: Type as recommended by the wall base manufacturer.

6.6.3 Polish: Specifications P-W-155 or P-F-430.

6.7 Edging Strips: Beveled vinyl plastic, as approved.

7. CONDITION OF SURFACES: Floor surfaces that are to receive flooring shall be clean, thoroughly dry, smooth, firm, and sound; and they shall be free from springiness, oil, paint, wax, dirt, curing compounds or any other damaging material.

7.1 Preparation of Surfaces:

→ 7.1.1 Concrete Floor Surfaces: All ridges or other uneven surfaces

shall be ground smooth. Cracks 1/16-inch or wider shall be cut out and filled with a crack filler as specified for this application. Latex underlayment shall be provided to fill the remaining holes, cracks, and depressions, and for smoothing, leveling, or feather edging the concrete. Chalky or dusty surfaces shall be primed with an approved primer, recommended by the flooring manufacturer after cleaning and removal of all loose particles.

**7.2 Moisture Test for Concrete Floors:** After concrete floor surfaces have been cleaned, small patches of adhesive to be used shall be spread in several locations in each room and allowed to dry or "set" overnight. If the "set" adhesive can be peeled easily from the floor surfaces, the floor is not sufficiently dry. The test shall be repeated until the adhesive adheres properly. When the adhesive adheres tightly to the floor surface, the tile shall be applied. If concrete floors are in contact with the ground or over unventilated crawl spaces, small patches of primer shall be used in lieu of adhesive to test for moisture.

## **8. APPLICATION:**

**8.1 General:** Installation shall be deferred until all other work that might cause damage to the flooring has been completed. Flooring and accessories shall be applied in accordance with the approved installation procedure. Work shall be performed by workmen thoroughly experienced in the application of such flooring. Adhesives shall be as specified for the specific application. Adhesives shall be applied in accordance with the adhesive manufacturer's printed directions, unless specified or directed otherwise. Flooring shall be applied in the patterns indicated, starting in the center of the room or area, and working from the center towards the edges. Tile lines and joints shall be kept square, symmetrical, tight, and even; and each floor shall be in a true, level plane, except where indicated as sloped. Edge width shall vary as necessary to maintain full-size tiles in the field, but no edge tile shall be less than one-half the field tile size, except where irregular shaped rooms make it impossible. Flooring shall be cut to, and fitted around, all permanent fixtures, built-in furniture and cabinets, pipes, and outlets. Edges shall be cut, fitted, and scribed to walls and partitions after field flooring has been applied. Edging strips shall be provided where flooring terminates at points higher than the contiguous finished flooring, except at doorways where thresholds are provided. Plastic strips shall be secured with adhesive.

**8.2 Application of Vinyl-Asbestos Tile:** Emulsion-type adhesives shall be applied to underlayment surfaces. Tile shall be carefully laid in the pattern indicated and fitted so that each tile is in contact with the ad-

joining tiles, and all joints are tight and in alignment.

8.3 Application of Rubber and Vinyl Wall Base: Wall base shall be applied after flooring has been completed, and the wall surface to which the base is to be applied is thoroughly dry. All cracks and voids in the wall shall be filled with a crack filler as specified for this application. Irregular surfaces shall be brought to a smooth finish with a satisfactory smoothing compound. Special base adhesive shall be applied to the back of the base with a notched trowel, leaving approximately 1/4-inch bare space along the top edge of base. The base shall immediately be pressed firmly against the wall and moved gently into place, making sure that the toe is in contact with the floor surface and the wall. The entire surface of the base shall be rolled with a hand roller, and then the toe of the base shall be pressed firmly against the wall with a straight piece of wood. Internal and external corners shall be formed with base materials as specified herein.

9. CLEANING: Immediately upon completion of the installation in a room or an area, flooring and adjacent surfaces shall be dry-cleaned with an approved cleaner to remove surplus adhesive. No sooner than 5 days after installation, flooring shall be washed with an approved nonalkaline cleaning solution, rinsed thoroughly with clear cold water, and given two coats of polish. After each polish coat, floors shall be buffed to an even luster with an electric polishing machine. Bases shall be cleaned but not polished.

10. PROTECTION: From the time of laying until acceptance, flooring shall be protected from damage. Defects which develop, such as damaged, loose, broken, or curled tiles, shall be removed and replaced prior to final inspection.

---o0o---

9E - 5



FIN MEL

# J MAE CARPETING

PHONE

857-4344

## Carpet and Vinyl Floor Coverings

1568 NORVIEW AVE - NORFOLK VA - 23502

5300 Virginia Beach Boulevard - Norfolk, Virginia, 23502

DATE 11/23/75

P U R C H A S E R S A D D R E S S	NAME W W Wilkinson plumbing Co		NAME	
	ADDRESS 7830 SCRIVAN AVE		ADDRESS	
	CITY NORFOLK VA	PHONE NUMBER 852-3980	CITY	PHONE NUMBER

SOLD BY	DELIVERY DATE	PICK UP DATE	INSTALLED BY	PURCHASE ORDER NO
---------	---------------	--------------	--------------	-------------------

DESCRIPTION OF WORK	AMOUNT
Bid proposal To FURNISH AND install approximately 7,000 Sq Ft. 1/8 inch Vinyl Asbestos Tile AND approximately 900 linear ft 4 inch Cove Base in Bldg 82 AND 56 in Fort FOSTAS Virginia To prepare floor where Quarry Tile Exist AND minor repair on existing floors in SPECIFIED Designated Areas. All work and material To Be Completed IN ACCORDANCE TO Government Specifications.	
Total Completed Bid proposal	3,700.00

WALL TO WALL ☐ DELIVER ONLY ☐ STAIR RUNNER ☐  
 STAIR UPHOLSTERY ☐ LAY RUGS ☐ PICK UP ☐ LAY-A-WAY ☐  
 SPECIAL INSTRUCTIONS Odell Newnam can be reached at most all times at 461-2625

WORK COMPLETED SATISFACTORILY ☒ X

The goods described above are to remain in the possession of the purchaser at his or her address as above, from which place the purchaser hereby agrees not to remove the same without first having obtained permission from the seller to do; that in the event of the change of the purchaser's residence, written notice thereof containing the new place of abode is to be given the seller by the purchaser within forty-eight hours immediately preceding the date of removal. The merchandise is a special order and not cancellable.

WITNESS THE FOLLOWING SIGNATURES AND SEALS THIS 23 DAY  
 Of November 19 75

J MAE CARPETING

BY Richard H. F. [Signature] (SEAL)  
 WITNESS H. Odell Newnam

CARPET	
LABOR	
4% SALES TAX	
TOTAL	
DEPOSIT	
BALANCE	
C. O. D.	
MASTER CHARGE	
BANK AMERICARD	
BANK PLAN	
ACCOUNTING	

BY 43 (SEAL)  
 BY (SEAL)

**U. S. ARMY ENGINEER DISTRICT, NORFOLK  
NOTICE OF DEFICIENCY**

TO (Contractor) <i>W. W. Wilkinson Two</i>	DATE & TIME <i>JAN 27 1976 3:00 PM</i>
CONTRACT NO. <i>1031</i>	LOCATION AND FEATURE OF WORK <i>Blk 82 Tile</i>

Your Attention is Directed to the following —

☒ MATERIALS/WORKMANSHIP DEFICIENCY

☐ SAFETY VIOLATION

SPEC REF: *9E-3.6.3, 9E-3.7*

EM 385-1-1 REF:

PLAN REF: *9E-4.8, 9E-4.8.2, 9E-5.8.3*

*Place Tile and ROVE BASE<sup>IS</sup> NOT INSTALLED according to specification.*

Prompt Correction and/or Compliance with Contract Specifications Is Directed.

RECEIPT ACKNOWLEDGED:

*[Signature]*  
(Inspector)

*W. R. Giff*  
(Contractor Representative)

*1/27/76*  
Date

*1500*  
Time

ACTION TAKEN

DISTRIBUTION: Original to Contractor; pink copy to Area Engineer; yellow copy retained by inspector for follow-up action and notation as to "ACTION TAKEN", then send to Area Office.

PRIMED  
**Woody**

**DISTRIBUTORS, INC.**  
*Wholesale Floor Covering and Supplies*

AIRPORT INDUSTRIAL PARK - 5740 E. BAYSIDE ROAD  
AREA CODE 804/460-1177 - P. O. BOX 14025 - VIRGINIA BEACH, VIRGINIA 23518

February 3, 1976

W. W. Wilkinson Co., Inc.  
7830 Jernigan Avenue  
Norfolk, Virginia 23518

Attention: Mr. Wilkinson

Dear Mr. Wilkinson:

We have reordered the Flintkote Tile Classic 41-614-18 (CL-12) for Building 82, Ft. Monroe, Virginia to replace the defective Flintkote Tile.

After examining and checking this tile, we have found it to be out of square.

We would hope to have this tile replaced within two weeks.

We do regret this inconvenience to you and thank you for your patience in this matter.

Best regards,

  
Stuart Earley  
Manager

WOODY DISTRIBUTORS, INC.

SE/ak

Exhibit No. P4  
I hereby  
acknowledge  
W. Page  
Judge

March 5, 1976

Mr. Donald W. Dow, Jr.  
Area Engineer Southern Virginia Area  
Norfolk District Corp of Engineers  
P. O. Box 626  
Fort Eustis, Virginia 23604

Re: Alteration of Administrative Space  
Building 56 & 82  
Fort Monroe, Virginia  
DACA65-76-C-0081  
Your Letter 2 March 1976

Dear Sir:

Reference your letter of March 2, 1976, the  
surface-mounted lighting fixtures for Building  
82, Phase I, will be completely installed by  
March 12, 1976.

We have now corrected the faulty tile material  
used in Building 82, Phase I, by sanding and  
grinding the previous floor tile and completely  
overlaying all of the floor area that was to  
receive new vinyl asbestos tile.

Very truly yours,

W. W. Wilkinson, Inc.

Ms. D. R. Santini

P5  
Judge

000T

000T

45.00+

5.00+

30.002+

55.00+

15.001+

155.21T

000T

**southern tile distributors, inc.**

p.o. box 12209-norfolk, virginia 23502

**3411 Inventors Road  
Norfolk, Virginia 23502  
804 — 855-8041**

4815 Bethlehem Road  
Richmond, Virginia 23230  
804 - 353-5511

Date 1-13-76

Sold To J MAE CARPETING 5 Shipped To  
3846 WAKE CIRCLE  
NORFOLK, VA. 23513

Shipped To

**23513**

[illegible]

6047

**CUSTOMER COPY**

## CASH SALES RECEIPT



southern file distributors inc.

p.o. box 12209 - norfolk, virginia 23502

3411 Inventors Road  
Norfolk, Virginia 23502  
804 - 855-8041

4815 Bethlehem Road  
Richmond, Virginia 23230  
804 - 353-5511

Date 1-12-76

Sold To J. MAE CARPETING 5 Shipped To \_\_\_\_\_  
3846 WAKE CIRCLE  
NORFOLK, VA. 23513

CUSTOMER ORDER NO.		CASH	C. O. D. <input checked="" type="checkbox"/>	SHIP VIA <u>P.U.</u>	SALEMAN <u>S</u>	
ORDERED	DESCRIPTION	SHIPPED	UNIT PRICE	AMOUNT		
2 gte	Resolene Henry 244	2	3.50	7.00		
			<u>Less</u>	<u>35</u>		
<i>Paul Cook</i> <i>M. H. M.</i>				Total	6.65	
				Tax	—	
				Total	6.65	

6041

CUSTOMER COPY



## CASH SALES RECEIPT

southern tile distributors inc.

p.o. box 12209 · norfolk, virginia 23502

3411 Inventors Road  
Norfolk, Virginia 23502  
804 - 855-8041

4815 Bethlehem Road  
Richmond, Virginia 23230  
804 - 353-5511

Date 1-12-74

Sold To J MAE CARPETING  
3846 WAKE CIRCLE  
NORFOLK, VA.

5 Shipped To \_\_\_\_\_  
23513

CUSTOMER ORDER NO.		CASH	C. O. D.	SHIP VIA	SALEMAN
			<input checked="" type="checkbox"/>	<u>pu</u>	<u>5</u>
ORDERED	DESCRIPTION	SHIPPED	UNIT PRICE	AMOUNT	
4 units	Latex Under Layment	4 units	7.90	31	60
		2.5%		1	58
<i>PAID 497 M.R.M.</i>					
Total				30	02
Tax					
Total				30	02

6040

CUSTOMER COPY



## CASH SALES RECEIPT



southern tile distributors inc

p.o. box 12209 - norfolk, virginia 23502

 3411 Inventors Road  
 Norfolk, Virginia 23502  
 804 - 855-8041

 4815 Bethlehem Road  
 Richmond, Virginia 23230  
 804 - 353-5511
Date 1-9-76
 Sold To J MAE CARPETING 5 Shipped To \_\_\_\_\_  
3846 WAKE CIRCLE  
NORFOLK, VA. 23513

CUSTOMER ORDER NO.	CASH	C. O. D. <input checked="" type="checkbox"/>	SHIP VIA <u>P.U.</u>	SALEMAN <u>5</u>
ORDERED	DESCRIPTION	SHIPPED	UNIT PRICE	AMOUNT
8 units	Latic Underlayment	SENITE	7.90	63 20
1 gal	140 - Tenny	1 Gal		4 50
				67 70
			Less 5%	<del>3 76</del>
				3 39
Paid ck 489 m.p.m.				600 04
				64.31
				2.57
				66.88
				Total <del>63 20</del>
				Tax <u>2 40</u>
				Total <del>62 44</del>

6033

CUSTOMER COPY



# Purchase Order

Priority Rating

D O C 2

**WILKINSON & COMPANY**~~General Contractor~~7830 JERNIGAN AVENUE  
NORFOLK, VIRGINIA 23513

PHONE 853-3980

JOB NAME Alteration of Administrative SpaceLOCATION Building 56 & 82, Ft. Monroe, Va.DATE November 28, 1975J. Mae Carpeting  
1568 Norview Ave.  
Norfolk, Virginia 23502

We accept your proposal of November 23, 1975 in the amount of \$ 3,700.00 to furnish and install vinyl asbestos tile and cove base in Buildings 56 & 82, Fort Monroe. All work to be performed and materials furnished shall be in accordance with plans and specifications, Division 9E and General Provisions.

All work specified in your division shall be performed in conjunction with other trades to prevent delays.

Phase 1. Building 82  
Rooms 101 thru 112, 214, 217, and 320Phase 2. Building 82  
Rooms 113, 114, 115, and 116Phase 3. Building 56  
Rooms 110 and 112

Payment on acceptance by Government.

Method of Payment, Billed by 15th of month

Payment by approximately 15th of following Month.

Accepted:

J. Mae Carpeting

By:

*Richard L. F. Kiser*

	3700.00
12/31/75	1034.00
	2666.00
1/14/76	500.00
1/15/76	500.00
	1666.00

Please sign and return original for our files

EX-111

111

Judge

W. W. WILKINSON &amp; COMPANY

53

**FILMED**

Exhibit No. D-11  
Initialed for  
Identification  
W. R. Gage  
Judge

RESILIENT FLOORING  
9 p reinforced vinyl tile

# ARCHITECT'S GUIDE SPECIFICATIONS FOR FLINTKOTE FLOORS

OUR REPRESENTATIVE IS:



VINYL POLYMER TILE

REINFORCED VINYL TILE

GREASEPROOF TILE

THE FLINTKOTE COMPANY •

480 CENTRAL AVENUE, EAST RUTHERFORD, N. J. 07073

# ARCHITECT'S GUIDE SPECIFICATIONS FOR FLINTKOTE FLOORS

## General

The General Conditions of the Contract of The American Institute of Architects shall be part of this specification.

This specification, schedules and the following drawings dated ....., define and illustrate the extent of the work included in that contract and shall together with the General Conditions constitute the contract documents. (Include layout drawings illustrating designs, inserts, numerals, letters, feature strips, borders, etc.)

### 1.0 Work Included

This section of the specification shall include all labor and material required for furnishing and installing all resilient floor tile, enumerated here or indicated on the contract drawings or schedules, subject to the requirements listed hereafter.

### 2.0 Related Work

- 2.1 Steel troweled cement finish described in Concrete Work and Cement Finishes.  
(See "Subfloor Requirements, Concrete," Section 5)
- 2.2 Dividing strips where resilient floor tile abut terrazzo, cement, concrete, ceramic tile and the like, are specified in other sections covering those materials.
- 2.3 Wood subfloor repairs and preparation where needed may be in separate section of specification.  
(See "Subfloor Requirements, Wood," Section 6)

### 3.0 Preparatory Work

Resilient floor tile contractor as part of this contract shall carefully examine all subfloors over which resilient floor tile is to be installed. He shall report to the general contractor and architect in writing any and all conditions which in his opinion will affect the satisfactory execution of his work or endanger its permanency. The work as specified in this section of the specification shall not begin until the resilient floor tile contractor is satisfied that the surface to be covered will permit the satisfactory completion of this work. It shall be the responsibility of the general contractor to provide subfloors that will be satisfactory.

*For satisfactory performance, subfloors must be smooth, sound, hard and free from springiness. Resilient floor tile will, in time, show imperfections or unevenness in the subfloor.*

### 4.0 General Requirements

All resilient floor tile and adhesives plus the room where the floor tile is to be installed shall be maintained at a minimum temperature of 70° F. for at least 48 hours before tile is installed and shall be maintained at this temperature during the installation of the tile and for 48 hours after the installation is completed.

## 5.0 Concrete Subfloor Preparation

- 5.1 All concrete subfloors whether suspended on grade, or below grade shall be steel troweled to a smooth level surface and shall be free of all foreign material and brushed clean.
- 5.2 They shall be dry and protected from moisture infiltration.
- 5.3 All previous floor coverings shall be removed. Paint shall be removed from floors in direct contact with the earth.
- 5.4 Subfloors shall be of the proper strength and density to withstand the type and weight of traffic to which the finished resilient floors are to be subjected.

*When concrete Curing Compounds or Jolt-up Parting Compounds are being considered, your Flintkote Flooring & Adhesive Sales Representative shall be consulted to determine whether there will be any danger to the acceptable installation of the Flintkote resilient floor tile. Some such compounds can cause adhesion difficulties and other problems.*

- 5.5 On concrete subfloors that contain expansion joints, score marks, pock marks or are so rough and uneven that they are unsuitable for direct application of tile, FLINTKOTE® Latex Underlayment shall be applied to provide a smooth level subsurface.

*Include such floor tile subfloor preparation work in the resilient floor tile specification and indicate that it shall be performed by the resilient floor tile contractor.*

*Do not install Flintkote Floor Tile on magnesite in contact with the ground.*

## 6.0 Wood Subfloor Preparation

*Applicable work on wood subfloor preparation may be in separate carpentry section of specification.*

- 6.1 All wood subfloors must be firm, smooth and have no springiness. They should be of sufficient strength to carry the intended loads without deflection. When wood subfloors are directly over earth or concrete which is in contact with the ground, as in crawl spaces or in homes without basements, they should be a minimum of two feet above grade and must have good ventilation in all four directions under them to prevent buckling, rotting or other difficulties.

### 6.2 DOUBLE WOOD FLOORS

**Lower Layer** — The lower layer should be dry and seasoned shiplap lumber 1" nominal thickness, not wider than 8". Boards should be nailed diagonally over the joists, securely nailed at each end and at each joist.

**Top Layer** — Replace all badly worn boards and re-nail loose boards. Use FLINTKOTE Latex Underlayment to smooth joints and feather edge, or sand to make surface smooth. When this preparation is completed and if the surface boards are tongue and groove and not over 3¼" wide, cement down 15 pound asphalt saturated Underlayment Felt with linoleum paste. Butt edges tightly. Use recommended adhesives to cement tile to the felt. If top layer is too rough or too badly worn for laying tile, or top boards are over 3¼" wide, the whole area should be covered with ¼" or heavier plywood or approved underlayment board. Rough, but sound double wooden floors having top boards not over 3¼" wide can be leveled and smoothed with FLINTKOTE Latex Underlayment.



## **Wood Subfloor Preparation, cont'd**

### **6.3 SINGLE WOOD FLOORS**

Single wood floors are not suitable for installing floor tile unless the single layer is plywood,  $\frac{5}{8}$ " or heavier for FLINTKOTE Reinforced Vinyl Tile, over joists having 16" maximum spacing between centers with solid blocking under the plywood joints which are perpendicular to the joists.

Other single wood floors should be covered with plywood,  $\frac{3}{8}$ " or heavier. If subfloor is sound, tongue and groove boards under 4" in width,  $\frac{1}{4}$ " or heavier plywood or approved underlayment boards may be used. Joist spacing should be 16" maximum between centers.

### **6.4 PLYWOOD**

Plywood should be interior underlayment grade or any sanded grade of exterior type. All panels shall be identified with the trade mark of the Douglas Fir Plywood Association (DFPA). Use exterior type plywood in bathroom or other areas where the possibility of dampness exists.

$\frac{1}{4}$ " plywood is not rigid enough to bridge and hide cracks and worn or rough spots in wooden subfloors except under very light traffic.

### **6.5 UNDERLAYMENT BOARD**

Underlayment board should be hardboard (untempered). PARTICLE BOARD IS NOT SATISFACTORY.

Underlayment board is not rigid enough to bridge and hide cracks and worn or rough spots in wooden subfloors except for a short period of time under very light traffic.

## **Wood Subfloor Preparation, cont'd**

### **6.6 NAILING PLYWOOD AND UNDERLAYMENT BOARD**

Install boards smooth side up. Nail with flat head, ringed or screw type nails  $1\frac{1}{4}$ " or longer, 3" apart along joists, 6" apart in each direction elsewhere. Nail heads should be flush or counter sunk no more than  $1/32$ ". Boards should be laid at right angles to the underfloor with joints staggered. Joints between boards should be level and smooth. If necessary sand to remove irregularities or use FLINTKOTE Latex Underlayment to fill cracks.

### **6.7 FELT**

Underlayment Felt is not required over plywood or underlayment board. It is required over stripflooring. (See "Double Wood Floors".)

### **6.8 ADHESIVES FOR WOOD SUBFLOORS**

For installing tile on plywood, underlayment board, or felt, use regularly specified adhesives for FLINTKOTE Tile being used. When GF-8® Adhesive is used over felt, care must be exercised to allow adequate drying time to prevent the solvent in GF-8 Adhesive from being trapped under the tile. Asphalt saturated felt tends to retain solvent. CLEAR-SET™, FAST-SET™ and BONDCOTE® Adhesives must also be allowed sufficient drying time to let the water escape before tile is laid.

When installing FLINTKOTE Vinyl Polymer, Reinforced Vinyl or Greaseproof Floor Tiles on plywood or underlayment board, CLEAR-SET and FAST-SET are the preferred adhesives. FAST-SET, CLEAR-SET, GF-8 or BONDCOTE Adhesives, when spread directly on plywood or underlayment board, should be allowed adequate time to dry before the tile is laid. If tile is laid before these adhesives are dry, the adhesive can be absorbed into the underlayment board causing loss of bond.

For  $1/16$ " FLINTKOTE Reinforced Vinyl Tile, use a trowel with fine notches to prevent trowel marks showing through. Notches not over  $1/16$ " wide and  $1/32$ " deep are recommended. CLEAR-SET or FAST-SET Adhesives may also be applied with a roller or brush.

## 7.0 Material

Extra cartons of your specified tile is available with the adhesive already on the back. Custom **Peel and Stick** tile is from the same run as the regular order, insuring the best possible color match when used later for repairs or alterations. This tile can be laid without disrupting normal routine. For example, installation around a desk can be done during a coffee break. There is no fire hazard, no offensive odor and no messy clean up.

Any 12" x 12" tile in the regular FLINTKOTE reinforced vinyl and vinyl polymer tile lines in 1/8" and 3/32" thicknesses can be obtained with this feature on special order of 20 cartons or more of the same color and thickness.

Floor Tile shall be:

### 7.1 VINYL POLYMER FLOOR TILE

**as manufactured by The Flintkote Company**

7.1.1 VINCOR™ or Travertine Deluxe styles. These translucent through-chip tiles carry a slight premium over regular vinyl asbestos tile.

*The veining and color go through the full thickness of the tile and will not wear off in heavy traffic areas.*

*Excellent for schools, offices, commercial, industrial and residential areas. Easy and economical to maintain. Use on, above or below grade over concrete or on suspended wood or steel subfloors.*

7.1.2 Standard Size — 12 x 12 inches.

7.1.3 Thickness — 1/8" and 3/32" in VINCOR and Travertine Deluxe styles.

7.1.4 Formulated to meet requirements of Federal Specification SS-T-312, Type IV for vinyl asbestos floor tile as well as Type III for vinyl floor tile with the exception of flexibility.

7.1.5 Fire Ratings — Flame spread rating is less than 75 (ASTM E84) Interior Finish Class B (26

## Material, cont'd

to 75). Flame Spread Rating: Maximum 2.0  
UL Chamber Test 992.

7.1.6 Adhesives shall be CLEAR-SET, FAST-SET or GF-8. CLEAR-SET is the preferred adhesive. No primer is needed except on extremely dusty concrete.

7.1.7 Select colors from Flintkote samples or literature.

### 7.2 REINFORCED VINYL FLOOR TILE

as manufactured by The Flintkote Company

7.2.1	CLASSIC™	STONE CHIP™
	CLASSIC ELITE™	TYRNO™
	CLASSIC PREMIER™	HEARTHSTONE™
	FLEXACHROME <sup>®</sup>	ALMIERA™
	Marbleized	TAZA™
	*DESIGNER	WINSTEAD™
	SOLIDS™	DAMASCAN™
	*FLEX-SLATE <sup>®</sup>	PARQUETTE™
	*COLONIAL	MICROFLEX™
	STONE™	CALAVERAS™
	**Travertine	MADISON BRICK™
	*ADRIANI™	DAVENTRY™
	*Brick	CIRELLE™
	PIEDRA™	PLANK™
	RENDEZVOUS™	

\*Premium price

\*\*Premium price except in 1/16" thickness

*Classic, Classic Elite, Classic Premier and Flexachrome Marbleized styles have the decoration through the full thickness of the tile and can be used in heavy traffic areas without concern about the decoration wearing off.*

*Excellent for schools, offices, commercial, industrial, residential areas. Easy and economical to maintain. Use on, above or below grade over concrete or on suspended wood or steel subfloors.*

## Material, cont'd

*Embossed tile -- such as Alex-Slate, Colonial Stone, Stone Chips, Rendezvous, Tyrno, Taja, Winstead, Brick, Parquette, Adriani, Hearthstone, Damascan, Davenport, Cirelle and Travertine -- may show changes in the embossed surface as it begins to wear. Travertine has more flat surfaces and deeper embossing, in 1/8" and 3/32" thicknesses, than most embossed designs. This is characteristic of embossed designs and cannot be considered unsatisfactory performance. In areas where traffic is heavy, and this change of appearance may be undesirable, use one of the through-veining styles mentioned earlier or on the following pages.*

7.2.2 Standard Size — As a general rule all Reinforced Vinyl styles are 12" x 12". FLEX-SLATE tile is 12" x 12" in cartons of single colors or in multi-size, multi-color Design Packs containing 6" x 6", 6" x 12" and 12" x 12".

7.2.3 Thickness — 1/8" in CLASSIC ELITE, CLASSIC, CLASSIC PREMIER, FLEXACHROME Marbleized, FLEX-SLATE, DESIGNER SOLIDS and Travertine only. 3/32" in CLASSIC ELITE, CLASSIC, CLASSIC PREMIER, Travertine, Brick, ADRIANI, COLONIAL STONE, and DESIGNER SOLIDS, 1/16" in all tile styles except CLASSIC ELITE, CLASSIC, CLASSIC PREMIER, FLEXACHROME Marbleized, Brick, ADRIANI, and COLONIAL STONE.

7.2.4 Formulated to meet requirements of Federal Specification SS-T-312, Type IV.

## Material, cont'd

7.2.5 Fire Ratings — Flame spread rating is less than 75 (ASTM E84) Interior Finish Class B (26 to 75). Flame Spread Rating: Maximum 2.0 UL Chamber Test 992.

7.2.6 Adhesives shall be GF-8, CLEAR-SET or FAST-SET for all Reinforced Vinyl tile products. No primer is needed except on extremely dusty concrete.

7.2.7 Select colors from Flintkote samples or literature.

### 7.3 VINYL CRAFT® CUSTOM-DESIGN FLOOR TILE as manufactured by The Flintkote Company

7.3.1 ABBEY STONE™, LaCROIX™, WOOD-BINE™, CORDALA™, VINYL QUARRY™ and VINYL BRICK™ styles.

Because of the 1/8" gauge the embossing is deeper and longer wearing. Nevertheless there may be a change in appearance under traffic, first in the slate texturing in large areas in some patterns and then in the mortar lines. This is characteristic of embossed designs and cannot be considered unsatisfactory performance. In areas where traffic is heavy and this change may be considered undesirable, use one of the smooth surface, through veined styles described earlier.

7.3.2 RUTHERFORD BRICK, PRINCETON BRICK, TULAGA and DOVER SLATE styles.

The pattern is provided by actual tile pieces of different colors and shapes fused right into the tile itself resulting in greater durability than embossed designs in other tile styles which depend

## Material, cont'd

on colored ink. This process and the 1/8" thickness also allow for a more deeply textured look with grout lines that are part of the tile itself and will not wear off.

7.3.3 Standard Size — 12 x 12 inches.

7.3.4 Thickness — 1/8 inch.

7.3.5 Formulated to meet Federal Specification SS-T-312, Type IV.

7.3.6 Fire Ratings — Flame spread rating is less than 75 (ASTM E84) Interior Finish Class B (26 to 75). Flame Spread Rating: Maximum 2.0 UL Chamber Test 992.

7.3.7 Adhesives shall be GF-8, CLEAR-SET or FAST-SET. No primer is needed except on extremely dusty concrete.

7.3.8 Select colors and designs from Flintkote samples or literature.

## 7.4 GREASEPROOF FLOOR TILE as manufactured by The Flintkote Company

7.4.1 Super TUFF-TEX®

7.4.2 Standard Size — 12 x 12 inches

7.4.3 Thickness — 1/8" and 3/16"

7.4.4. Formulated to meet requirements of Federal Specification SS-T-307, both Class I and II.

*Takes grease, oil and an amazing amount of truck abuse. Can be installed on, above or below grade over suspended wood or concrete.*

7.4.5 Fire Ratings — Flame spread rating is less than 75 (ASTM E84) Interior Finish Class B (26 to 75). Flame Spread Rating: Maximum 2.0 UL Chamber Test 992.

7.4.6 Adhesives for installing Super TUFF-TEX tile shall be GF-8, CLEAR-SET or FAST-SET.

## Material, cont'd

### 7.5 VINYL COVE BASE

Finish all jobs with Vinyl Cove Base. Available in 48" lengths, 4" high, .080 gauge in walnut, teak, pecan, brown, black, bayberry, white, russet, cream, dark brown or beige. 2-1/2" and 6" Base available in some colors and in some locations. Form corners on the job. Formulated to meet requirements of Federal Specification SS-W-40a, Type II.

7.5.1 Install with FLINTKOTE Cove Base Adhesive.

*Flintkote Vinyl Cove Base, because of its flexibility and thermoplasticity, permits forming corners right on the job eliminating mismatches.*

### 7.6 ACCENT STRIP

7.7.1 Reinforced Vinyl Accent Strip is available in same colors as DESIGNER SOLIDS Tile:

Black	Orange
Yellow	Blue
White	Gold
Bronze	Chocolate Brown
Green	Brown
Red	

Available in 24" lengths in 1/2", 1" and 2" widths, 1/16", 3/32" and 1/8" thicknesses.

*These colorful strips can be used with or without Designer Solids Tile for striking designs and effects.*

### 7.7 VINYL REDUCING STRIP

Use to finish off at the end of an area to protect tile edges. Can also be used where two different thicknesses meet. Available in 1" width in Black only.

Thickness — 1/8", 1/16" and 3/16", each to zero.



## **8.0 Tile Installation**

- 8.1 Do not start work until the work of other trades including painting has been completed.
- 8.2 All rooms, subfloors, tiles and adhesives shall be maintained at a minimum temperature of 70° F. for at least 48 hours before, during and 48 hours after the installation.
- 8.3 Use only Flintkote Adhesives with Flintkote Floor Tile.
- 8.4 Flintkote Tile Adhesives shall be applied in a uniform film with a notched steel trowel having notches of the proper size to obtain correct coverage.
  - 8.4.1 For GF-8, CLEAR-SET, FAST-SET, BOND-COTE Adhesives with tile 1/8 inch or heavier — use trowel with notches 1/16" deep on 1/4" centers.
  - 8.4.2 For 1/16 inch tile use trowel with 1/32" notches 1/16" wide on 5/32" centers. Allow sufficient time before laying tile for adhesive to become touch dry.
  - 8.4.3 CLEAR-SET or FAST-SET Adhesives may also be applied with roller or brush.
  - 8.4.4 FLINTKOTE Cove Base Adhesive should be applied with trowel having 1/8" notches to back of the base and press the base firmly against the wall immediately for good bond. Can also be applied with special FLINTKOTE Cove Base Adhesive Gun.
- 8.5 Tile shall be laid starting at the center of the room working toward the walls. Start first line of tile in such a position that tiles next to walls are at least half tile width. Small pieces along edges should be avoided.
- 8.6 Legs of radiators shall never rest directly on the tile but shall be set on small pieces of metal or ball bearings having the same thickness of the tile and inserted after the tile has been heated with blow torch and holes punched or cut out.

## **9.0 Cleaning, Waxing and Protection**

When the flooring contractor believes enough time has elapsed for the tile to seat itself properly, (usually 24 to 48 hours) he should clean the tile with FLINTKOTE Cleaner or another neutral cleaner and then apply two coats of FLINTKOTE Vinyl Floor Finish or a good grade approved water emulsion wax.

The tile floor shall then be protected by the general contractor either with building paper or by keeping traffic off the floor until building is ready for occupancy.

## **10.0 Maintenance**

After building has been occupied, the NO-WAX MAINTENANCE system is recommended for regular maintenance. It provides safe, sanitary and smooth floors with an attractive gloss. A NO-WAX MAINTENANCE program can result in real savings in time and money over conventional methods. The procedure recommended by the Resilient Tile Institute has been found in many buildings to be efficient and economical. It is particularly effective on Vinyl Polymer tile. NO-WAX MAINTENANCE is recommended for all Flintkote floors. Detail procedures can be obtained from Flintkote Flooring Representatives.

If such a program is not followed, waxing or finishing with the proper materials described above are recommended, especially on dark colors, to act as a barrier against grit particles picked up out-of-doors and scuff marks.

## **11. Prevention of Indentation**

All metal domes should be removed from legs of furniture and equipment. Suitable protective devices as recommended by the Resilient Tile Institute shall be used on furniture or equipment to protect against indentation.

## **WARRANTY**

The following warranty extends only to products of The Flintkote Company, and Flintkote makes no representation regarding the specifications appearing herein or their suitability for particular installations.

Flintkote as manufacturer warrants that its products described in the specifications are of merchantable quality **BUT DOES NOT WARRANT THEIR FITNESS FOR ANY PARTICULAR USE OR MAKE ANY OTHER WARRANTY, EXPRESS OR IMPLIED.** This warranty may not be enlarged or extended by our sales representatives, written sales information or drawings.

Liability of Flintkote under this warranty is limited to replacement of its products found to be defective or, at its option, a refund of the purchase price.

All advice given and specifications supplied by Flintkote shall be used at the sole risk of those receiving the same, and Flintkote assumes no responsibility for the design or construction of any structure in which its products are used. Any review or inspection of plans, buildings or product applications by Flintkote representatives is not to be construed as approval thereof by Flintkote.



FLINTKOTE

# PRODUCT DATA SHEET

THE FLINTKOTE COMPANY

## FLOORING PRODUCTS DIVISION

East Rutherford, N. J. 07073

Number: LP-100A

Issued September 1970  
(Replaces all previous Data Sheets on this product.)

Exhibit No. D3 Flintkote (a)  
Initialed for  
Identification only - Refused X  
Judge



### Basis of Mix

1 gallon Liquid and 1 bag Powder. (1-gal. can of Liquid pictured, Liquid also comes in 5-gal. container.)



## GENERAL INFORMATION

FLINTKOTE® Underlayment is a two component latex base underlayment composed of a mixture of liquid latex and dry, cementitious mix, containing a properly proportioned setting powder and mineral aggregate.

When combined, these two components provide a smooth working, easily troweled plastic material having the many desirable characteristics required for underlayment work over concrete, double construction wood, metal, plywood and quarry tile floors in the preparation of sub-floors for FLINTKOTE flooring products and other resilient floor coverings.

Unlike mortar and mastic mixtures, FLINTKOTE Latex Underlayment is so designed to have no appreciable shrinkage upon setting. It is tough, non-brittle and crack resistant thus assuring sufficient flexibility to resist expansion and contraction in the base and a certain amount of deflection found in wood floor construction.

Large areas of FLINTKOTE Latex Underlayment may be laid without joints of any kind. The materials, properly mixed and troweled in place, after a short curing period acquire non-shattering hardness and resistance to indentation. These unique properties plus fine trowel finishing characteristics make FLINTKOTE Latex Underlayment one of the most highly recommended underlayment products in the floor covering field.

## CONTAINER UNITS

FLINTKOTE Latex Underlayment Products are supplied as follows:

<u>Metal Cans</u>	<u>Approx. Shipping Wt.</u>
5 gal. pail Latex Liquid	48 lbs.
1 gal. can Latex Liquid	10 lbs.
<u>Multi-Wall Paper Bag with Polyethylene liner</u>	
Latex Underlayment Powder	40 lbs.

On the basis of the pre-proportioned mix, one unit is considered to be 1 gal. of liquid and 1 bag of powder. This batch covers approximately 40 sq. ft. in 1/8 inch thickness.

## PREPARATION OF SUB-FLOOR

Over wood floors, be sure all loose boards or sheets are tightly nailed. Due to the resilient nature of Latex Underlayment, it will resist the springing action of wood without damage, but it must be remembered that a tile floor is to be laid over the underlayment. All sub-floors, hardboard, plywood, masonite, etc., must meet standard requirements for installation of tile over wood. Where FLINTKOTE Underlayment is used, it is not necessary to sand the floors, nor is felt required. Floors should be broom clean.

Concrete floors, must be sufficiently cured and cleaned thoroughly of grease, dust and other foreign matter. The use of FLINTKOTE Latex Underlayment over a concrete floor which is subject to excessive moisture does not necessarily serve as a correction for the moisture condition.

For best results porous, dusty concrete sub-floors should be dampened with water to reduce suction. In addition soft wood floors, including plywood, should be first coated with latex binder liquid with no more than 25% water dilution and allowed to dry before underlayment mix is applied.

## MIXING FLINTKOTE LATEX UNDERLAYMENT

Liquid and powder are easily mixed in a pan with trowel, in a metal mortar box with hoe, or for larger work, in a mechanical mixer designed for plaster mixes.

It is recommended, until the user is thoroughly familiar with the product and has determined by experience the mix consistency best suited for his work, that small batches be used: i.e., 1 gallon of liquid and 1 bag of powder. The consistency should be such that when a trowelful is picked up, the mix will slide readily off the trowel as a mass when tilted. If, after thorough mixing, FLINTKOTE Underlayment sticks to the trowel a few ounces of Latex Liquid will give the desired consistency. DO NOT ADJUST THE MIX CONSISTENCY WITH WATER.

**CAUTION:** The excessive use of Latex Liquid will result in a soft and spongy underlayment which is not suitable to receive resilient floor covering.

Only such quantities of FLINTKOTE Latex Underlayment Liquid and Powder, or batches, should be mixed at one time as can be placed and troweled within 35 to 40 minutes after mixing. Thus batch sizes depend entirely on the job conditions.

**NEVER ATTEMPT TO RE-TEMPER THE MIX AFTER SETTING ACTION HAS TAKEN PLACE.** Material that has begun to harden must be thrown away.

## FORMULA MIXES

(1) The following is a recommended formula for underlayment of a thickness from featheredge to 3/8 inch:

1 gal. Latex Liquid  
1 bag Latex Underlayment Powder (40 lbs.)

The above quantity will cover approximately 40 sq. ft. at 1/8 inch thickness.

This formula is for a single trowel application not exceeding 3/8-inch thickness. Any thickness greater than 3/8 inch must be applied in two coats.

Drying time allowance should be at least 24 hours for thickness of less than 1/4 inch and at least 48 hours for coats over 1/4 inch. (This applies to both one coat or two coats - dry between work.)

(2) The following is a recommended formula for underlayments from 3/8-inch to 3/4-inch thickness.

1 gal. Latex Liquid  
1 bag Latex Underlayment Powder (40 lbs.)  
40 lbs. graded sand all passing 10 mesh and retained on 35 mesh sieve.

The above quantity will cover approximately 40 sq. ft. at 1/4-inch thickness.

This formula may be applied in one application up to 3/4-inch thickness.

**NOTE:** Where desired on thick fills, 20 lbs. of clean, crushed aggregate, 1/4-inch maximum size, may be added to the above mix with such slight additional Latex Liquid as is required for proper workable consistency.

## TROWELING AND FINISHING

If the following troweling instructions are followed, the mixture will have a strong bond to wood and concrete and will present a very satisfactory surface to receive the floor covering.

After the material has been deposited from the mixing container in the area to be covered, it is important that the mixture be scratched to the sub-floor so that the base is uniformly wetted to insure adhesion and proper bond. This is best accomplished by tilting the trowel at an approximate 45 degree angle and vigorously working the mix over the sub-floor with the edge of the trowel.

The finish steel troweling with the face of the trowel should proceed immediately to complete the surface finish because, unlike concrete or asphalt mastic, the mechanic cannot continue to go back over the underlayment to smooth it since the material has little or no fluid excess rising to the top. A skin develops rapidly on the surface, which when retroweled gives a "pulled" appearance, leaving an unsightly, rough-textured, open surface. Dipping the trowel in water occasionally will prevent sticking and aid in getting a smooth finish.

WHEN FLINTKOTE LATEX UNDERLAYMENT IS LAID OVER STRIP WOOD SUB-FLOORS, A MINIMUM THICKNESS OF 1/8 INCH IS NECESSARY IN ORDER THAT JOINTS OR CUPPED BOARDS WILL NOT SHOW THROUGH TILE.

## PRECAUTIONS - CURING - DRYING TIME

In no event should FLINTKOTE Underlayment be laid on any surface which is below freezing in temperature, or which has been exposed to direct sun so that it is excessively hot.

Normal room temperatures are best for the application. FLINTKOTE Underlayment should never be laid at a temperature below 40° F., or where exposed to the direct rays of hot sun or rain. If these conditions are adhered to, no special covering or protection is required. Caution must be exercised however, if the application is subjected to hot wind or elevated temperature that accelerates normal drying rate.

Prior to application of all FLINTKOTE Flooring Products, FLINTKOTE Underlayment in thicknesses of 1/4-inch or more shall be allowed to dry for at least 24 to 48 hours under normal temperature and humidity conditions. Thicknesses of 1/8-inch to 1/4-inch will normally take at least 24 hours. Skim coat will take from three to five hours to dry.

All standard types of tile adhesives, cut-backs, emulsions, FAST-SET™, CLEAR-SET™ and FLINTKOTE Multi-Purpose Adhesive, may be used over properly cured, dry FLINTKOTE Latex Underlayment.

## HANDLING

Store Latex Underlayment bags in a dry place. The Liquid Latex must be protected from freezing.

## CARE OF TOOLS

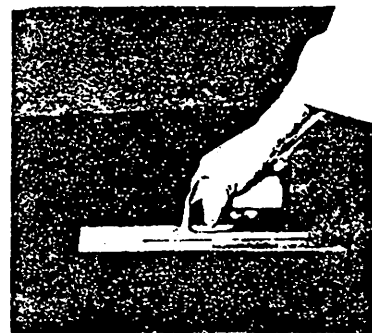
FLINTKOTE Underlayment mixtures should not be allowed to dry on tools and equipment as it is difficult to remove. When tools are not in use, and occasionally during use, they should be washed or wiped with a wet cloth to prevent any accumulation of the material.



FLINTKOTE Latex Underlayment mixes easily in small or large batches.



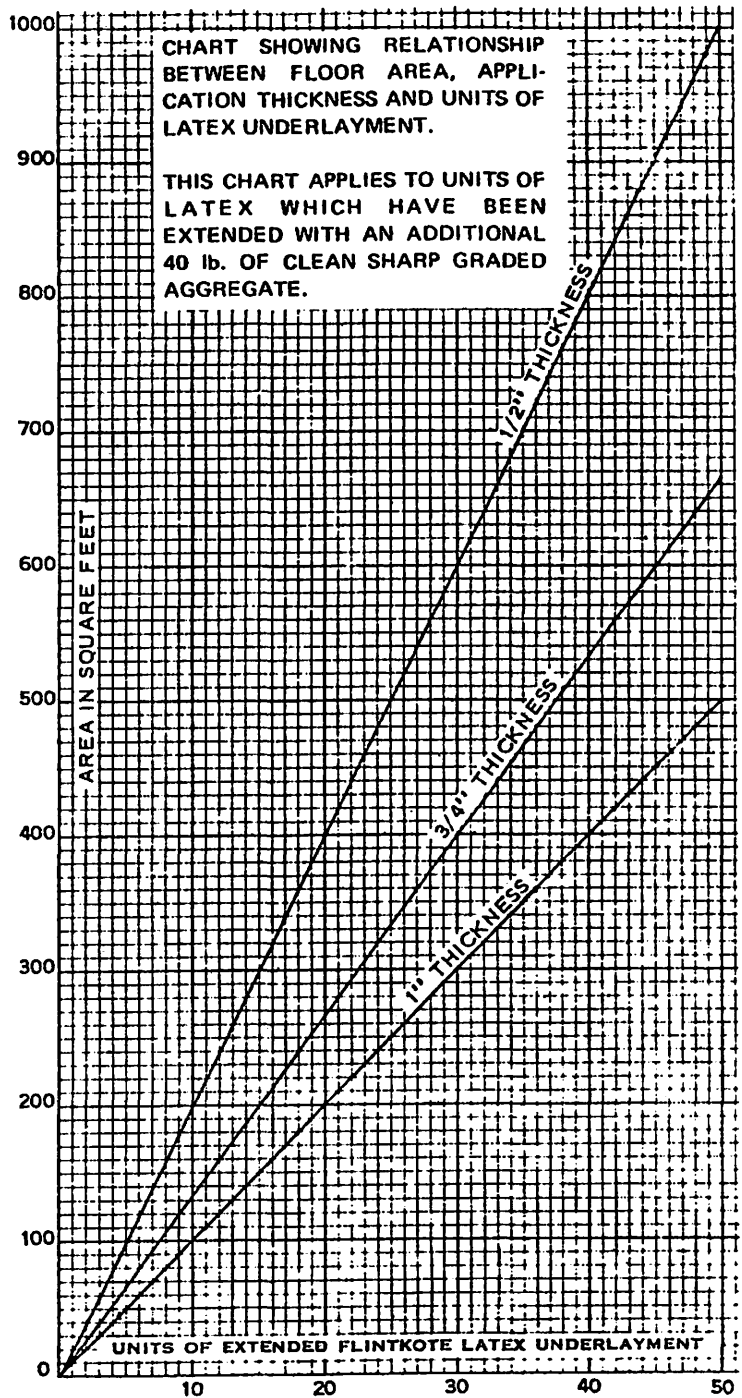
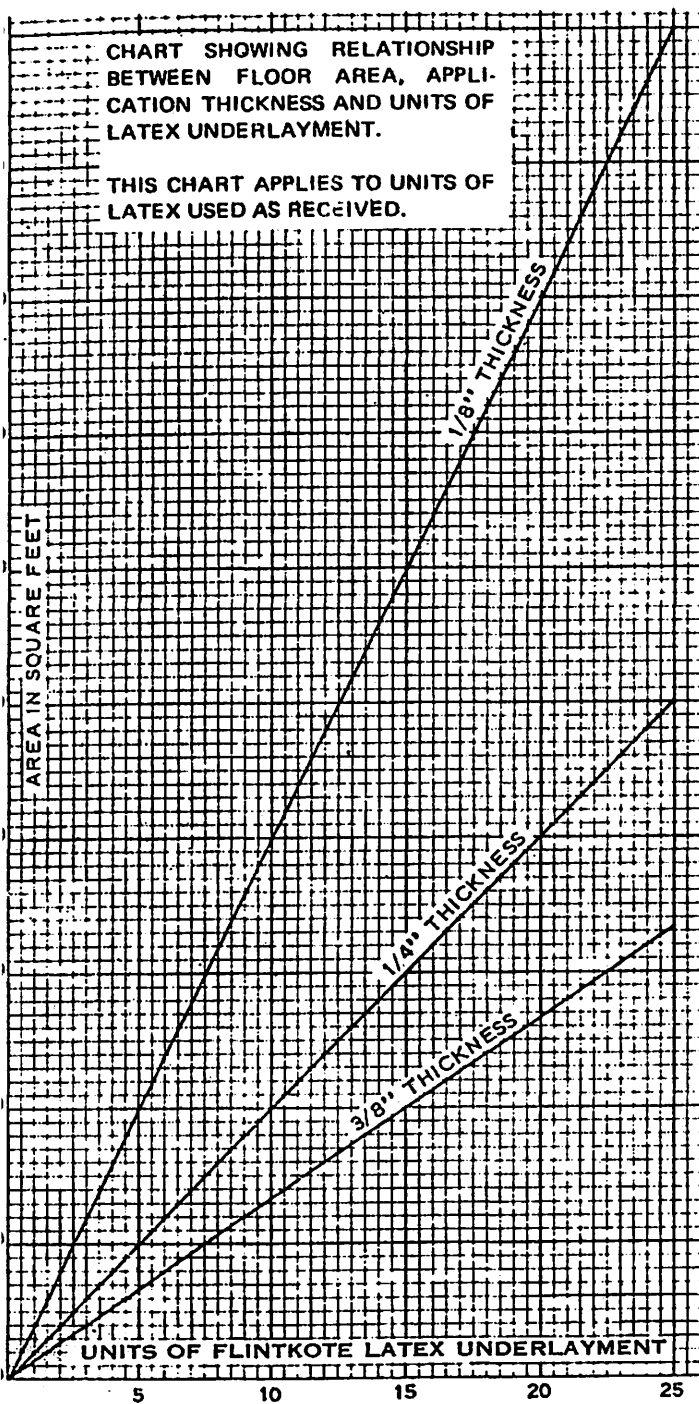
Applied over wood flooring Latex Underlayment provides an ideal base for resilient floor tile.



Smoothing up concrete sub-floors for resilient floor tile is quickly done with Latex Underlayment.

WARRANTY: These data sheets are for information purposes only. FLINTKOTE warrants this product to be of merchantable quality and suitable for the general purpose for which it is intended. FLINTKOTE DOES NOT WARRANT THIS PRODUCT TO BE SUITABLE FOR ANY PARTICULAR USE OR PURPOSE OTHER THAN FOR WHICH IT IS INTENDED. Liability under this warranty is limited to replacement of the product, or, at its option, to a refund of the purchase price therefor. THERE ARE NO OTHER WARRANTIES, EITHER EXPRESS OR IMPLIED.

# USE THESE CHARTS FOR ESTIMATING QUANTITY OF MATERIALS REQUIRED



## THE FLINTKOTE COMPANY, FLOORING PRODUCTS DIVISION

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THE COURT: Suppose we take about ten minutes.

(A recess was taken.)

THE FOLLOWING OCCURRED OUT  
OF THE PRESENCE AND HEARING OF THE JURY:

MR. WHITE: Let the record show that prior to the start of this case counsel for the Flintkote Company moved the Court to exclude any reference in the opening statement - or opening statement of the parties - to the fact that Plaintiff was seeking consequential damages from the Flintkote Company.

There is no privity between the Flintkote Company and the Wilkinson Company. The Flintkote Company had nothing to do with this particular contract. And the pleadings will show that Kidwell, trading as J. Mae Carpeting, was aware of the limited warranty, namely, that Flintkote warrants this product to be merchantable and suitable for the general purpose for which it is intended. Flintkote does not warrant this product to be suitable for any purpose or use other than that for which it is intended. Liability under this warranty is limited to supplying new material without charge, or at Flintkote's option to a refund of the purchase price, in the event of claim under this warranty. Notice must be given to Flintkote in writing at the address shown hereon. This



1 limited warranty is issued and accepted in lieu of all other  
2 express warranties and expressly excludes liability for conse-  
3 quential damages.

4 Now, this case is going to the jury on the  
5 question of consequential damages. It is going to the jury on  
6 the question of the negligence of all of the defendants in  
7 spite of the posture of the pleadings and the known facts.

8 The point raised by counsel for Flintkote Company  
9 is that the issues should be narrowed prior to the start of this  
10 case and that it is prejudicial to the position of Flintkote  
11 Company to have to defend a case in which consequential damages  
12 should not be allowable under the state of these facts and that  
13 the case cannot rise any higher than the pleadings.

14 The pleadings state the Flintkote Company  
15 negligently installed these materials in question. Counsel for  
16 Flintkote Company would cite in support of the general  
17 proposition of law the cases of Logan versus Montgomery Ward,  
18 216 Virginia 425; General Bronze Corporation versus Kostopulos,  
19 203 Virginia 66; and Marshall versus Murray Oldsmobile Company,  
20 207 Virginia 972.

21 The exclusionary language previously mentioned  
22 is not invalid and contrary to public policy because this is a  
23 case involving property damage and is in the commercial field.

24 Finally, there is no allegation that the material  
25 possessed a latent defect. Any such defect would have been open

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1 relates to the Flintkote Company. The only thing that I know  
2 that we have here - and this is our position - that the case  
3 goes to the jury on the question of the express liability or  
4 rather the express warranty of Flintkote Company.

5 THE COURT: I don't think there is any allegation  
6 of express warranty. The allegation is implied warranty.

7 MR. WHITE: There is no allegation of express  
8 warranty.

9 THE COURT: Let me look at it again. I don't  
10 think so.

11 MR. WHITE: Well, Your Honor, we have got a lot  
12 of claims and counterclaims. But the point that I want to try  
13 to make clear is --

14 THE COURT: It says in paragraph seven -- without  
15 cutting you off - "... as a result of the aforesaid, the said  
16 defendants have breached their implied warranties of  
17 merchantability and fitness for a particular purpose, and as a  
18 result, are liable in damages to the Plaintiff as aforesaid."

19 That's why I was reviewing the pleadings. There  
20 is no allegation of express warranty. He is relying upon  
21 implied warranty.

22 MR. BURNSIDE: Our position is if they have got  
23 some express warranty it was never given to this man.

24 MR. WHITE: Our position is the only thing we  
25 gave was an express warranty, that it is not against the public

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1 exterior utility work - just general renovation.

2 Q In that regard, did you have an occasion to  
3 submit a bid for a renovation of certain buildings at Fort  
4 Monroe, Virginia?

5 A Yes. In about June last year there was two  
6 buildings, building 56 and 82, that we submitted a bidding on.

7 Q Was this bid accepted by the United States  
8 Government?

9 A Yes. They accepted our bid and they awarded us  
10 the contract.

11 Q Now, generally what were you to provide to the  
12 government by your contract with the government?

13 THE COURT: I don't want to stop you, but  
14 I think we are only concerned here with one aspect  
15 of this contract, unless it becomes important.

16 MR. BURNSIDE: It is no need to go into --

17 THE COURT: At this juncture I think we ought  
18 to try to stay with what we are dealing with.

19 MR. BURNSIDE: Yes, sir.

20  
21 BY MR. BURNSIDE:

22 Q Specifically in your contract with the government,  
23 was there any provision dealing with floors, flooring or what  
24 have you?

25 A Yes. I was to install vinyl asbestos floor tile

1 in both buildings.

2 Q Now, did you make an inspection of the buildings  
3 prior to performing any part of your contract?

4 A Yes, prior to bidding it and prior to working,  
5 also.

6 Q What was the condition of these floors at that  
7 time?

8 A They were six-by-six quarry tile, which is used  
9 in areas where they scrub the floors down. It is non-absorbant.  
10 The area that we were renovating was a partially  
11 -- of the contract was a kitchen area where this quarry tile  
12 was at.

13 Q Was there quarry tile over all the floors that  
14 you were to install a new vinyl asbestos?

15 A Yes. That entire -- all of phase one in  
16 building 82 quarry tile was everywhere.

17 Q Now, as a part of a government contract, do they  
18 provide you with specifications as to the work to be performed?

19 A Oh, yes. All work is to be performed according  
20 to the plans and specifications.

21 Q Were you provided with a set of specifications  
22 concerning the floor?

23 A Oh, yes, every division.

24 Q Do you have a copy of those specifications  
25 with you?

1 A Yes.

2 MR. WHITE: Let's approach the bench just for  
3 a second.

4  
5 (There was a conference at the  
6 bench, out of the hearing of  
7 the reporter and the jury.)

8 BY MR. BURNSIDE:

9 Q Now, Mr. Wilkinson, merely for identification  
10 I hand you a document and ask you what that is?

11 A This is a section 9E, resilient floor tile,  
12 that was taken from the main book of specifications.

13 Q And these specifications were provided to you  
14 by whom?

15 A By the government.

16 THE COURT: Before you leave that, does all  
17 of that apply to floors, or does it apply to something  
18 else?

19 THE WITNESS: This one particular division,  
20 Your Honor, 9E, is resilient floor tile.

21 THE COURT: Would you kind of take your pen,  
22 if you will - put a little mark on there. Put  
23 where it stops and --

24 MR. BURNSIDE: Judge, this is what I am  
25 going to do. I am going to rip that off.

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1 Q Whose signatures are upon that document?

2 A Richard Kidwell.

3 MR. BURNSIDE: All right, sir.

4 THE COURT: Plaintiff's Exhibit No. 2.

5 (The document referred to was  
6 marked and received in evidence  
7 as Plaintiff's Exhibit No. 2.)  
8

9 BY MR. BURNSIDE:

10 Q Now, specifically, Mr. Wilkinson, will you read  
11 the content of this document which deals with what Mr. Kidwell  
12 stated he would do for you.

13 A You mean the body?

14 Q Yes, sir.

15 A This come to us at November the 23rd, 1975,  
16 bid proposal to furnish and install approximately 7,000 square  
17 foot of eight-inch vinyl asbestos tile and approximately  
18 900 lineal foot of four-inch cove base in building 82 and 56  
19 in Fort Monroe, Virginia; to prepare floor where quarry tile  
20 exists; and minor repairs on existing floors; and specified  
21 designated areas; all work and material to be supplied in  
22 accordance with the government specifications; total contract  
23 price \$3,700.

24 Q All right, sir. Now --

25 THE COURT: Put those over there so the jury

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1 BY MR. BURNSIDE:

2 Q Is a man engaged in the flooring business as  
3 Mr. Kidwell is -- what is his job in getting the tile on the  
4 floor?

5 A Making necessary preparations to -- making the  
6 necessary preparations to make sure that there is no indentations  
7 beneath it.

8 Q Why must he do that?

9 A Well, over a period of time these indentations  
10 would come through. They would show -- irregularities.  
11 The floor would be -- well, you could see things come up through  
12 the tile because it is only an eighth of an inch thick and the  
13 tile is always being walked on by people, a hundred, two hundred  
14 pounds, and over a period of time these indentations will show  
15 through. And so you have to make, you know, the proper  
16 preparation of the floor.

17 Q All right. Now, as a part of government  
18 specifications, when they want a particular -- or specify  
19 a type of floor, is there anything required by the subcontractor,  
20 Kidwell or the general contractor, Wilkinson, in the form of  
21 submitting the material to the government prior to the actual  
22 installation, itself?

23 A Yes. The government uses a submittal register  
24 that you -- contains your specifications down to divisions,  
25 and each division has a paragraph in it that will indicate

1 what particular item is to be submitted and whether a sample  
2 is needed; where a color, the color selection. And prior to  
3 buying any material you find your supplier and your source of  
4 where this comes from. You get whatever brochures they have  
5 and you select out of the brochure whatever pages that are  
6 applicable to what you are doing.

7 If you are dealing with a subcontractor, he  
8 provides you with the submittal information that he plans on  
9 using.

10 Q All right. Was there any -- did you take any  
11 action in the form of obtaining submittal information or  
12 samples?

13 A Yes.

14 Q What did you do?

15 A What I normally do is --

16 Q Not what you normally do --

17 What did you do in this particular instance?

18 A I went to Woody Distributors. They were just  
19 moving into a new building. Their office seemed to be  
20 established. They had a secretary and they had a manager there.

21 And I went in there and I asked them if they  
22 had any brochures that would match this specification. And  
23 the woman there said that they were in a turmoil and they  
24 were just getting their paper work out.

25 And I said, "Well, I have been told that you



1 people are the largest around and you can supply all of this  
2 material."

3 And she said, "Are you a tile contractor?"

4 I said, "No. I am a general contractor."

5 She said, "Well, we cannot sell the material to  
6 you."

7 I said, "Well, I am not after purchasing it;  
8 I just want to make sure that whatever subcontractor I get  
9 does buy the right material."

10 And she looked around and she found one brochure.

11 I said, "Well, I am going to need six brochures."

12 She said, "I am sorry. I can't help you no  
13 further."

14 And that was my -- the only thing I had was one  
15 brochure which I did not use. I just took it back, but I did  
16 not use it.

17 Q Did you ever get a sample?

18 A Yes. When we awarded the contract to  
19 J. Mae Carpet, I told him he had to come up with three samples  
20 of tile - color selection, dimensions, quality - for submittal  
21 to the government.

22 Q All right. Now, what did you ultimately give  
23 the government on the submittal?

24 A I give them the three samples of tile and one  
25 page out of the brochure that was indicating that particular

1 grade of tile.

2 Q Now, you say one page out of the brochure.

3 Did you get a whole brochure from Woody's or just one page?

4 A No. I didn't get it from Woody. Mr. Kidwell  
5 got it.

6 Q All you saw was just one page?

7 A Someone had reproduced one page that would  
8 indicate the tile that was to be used, which is customary.

9 Q On that page was any express limitation of  
10 warranty provided by the manufacturer?

11 A No. The submittal only indicated what it was,  
12 its size, its thickness, its component, and that it would  
13 reach the Federal Specification.

14 Q And did you ultimately submit those samples to  
15 the government?

16 A Yes, went to the Corps of Engineers and they  
17 selected the color and approved the vinyl asbestos.

18 Q Now, what --

19 Who manufactured this tile that was ultimately  
20 approved by the government?

21 A It was Flintkote Manufactured.

22 Q Do you know who the distributor was?

23 A Woody's Distributing.

24 Q And, now, after the approval did you -- what  
25 date did Kidwell then man the job; in other words, go to the

1 job site and start to perform his work?

2 A My purchase order to J. Mae Carpet was November  
3 the 28th, 1975.

4 Q All right, sir.

5 A Between the time of the purchase order and him  
6 actually manning the job he was to prepare his submittal  
7 information, insurance certificates and the other necessary  
8 stuff to get on the government job and which he did between  
9 November the 28th and the time he went to work.

10 And the time he did go to work was -- the first  
11 payrolls indicate January the 2nd, 1976.

12 Q Do you know the last date that he performed any  
13 work on the project?

14 A Yeah. The payrolls indicate January the 23rd,  
15 1976. He was on the job approximately 21 days.

16 Q All right. Now, were you ever on the job site  
17 at all?

18 A Yes, I would say maybe every other day or maybe  
19 every other third day. I checked the job pretty close.

20 Q During the time that Kidwell was performing his  
21 work, or shortly after he terminated his work, what, if anything,  
22 did you notice about the work that he performed?

23 A Well, it didn't look too bad to me. The --  
24 in some areas there was a lot to desire, but I think overall  
25 general view of what I saw him putting in, it wasn't too bad.

1 Q What about the material?

2 A Well, the material is --

3 You are speaking of the tile?

4 Q Yes, sir.

5 A The tile is very hard to determine by a whole  
6 stack of it. You know, if a man has 15 or 20 boxes and he's  
7 got it open and he has a whole stack of it, you can't determine  
8 tile like that. The only way you can really determine whether  
9 you have a good tile job is the finished product.

10 And that's like this room - this job is a  
11 straight job.

12 But he got about -- he done a lot of smaller  
13 rooms, and that work appeared to be okay to me. Of course,  
14 the government didn't think so.

15 But in the main body of the room you could  
16 definitely tell that something wasn't quite right. And after  
17 very close examination you could see where the tile was  
18 definitely leaning towards being out of square.

19 Q What -- if you had taken this jury to that  
20 location when you made the inspection, what would the rows of  
21 tile look like to the jury?

22 A They were drifting -- and drifting, and they were  
23 irregular.

24 Q Is that an acceptable condition?

25 A Well, it wasn't to the Corps of Engineers.

1 They had other complaints, also, but --

2 Q All right. Now, as a result of these conditions  
3 what action did you take?

4 A Well, they give me a -- if they find anything  
5 wrong with a job, the Corps of Engineers gives you a  
6 discrepancy -- they give you a discrepancy notice. And this  
7 notice will --

8 I thought I had it.

9 This discrepancy notice will indicate to your  
10 job superintendent and to the subcontractor that's involved  
11 what the problem is.

12 And I'll find it in a minute.

13 The discrepancy was against the floor tile.

14 Q All right.

15 A To -- do you have it?

16 Q Uh-huh.

17 A They do -- before --

18 MR. BURNSIDE: Just to identify --

19 MR. WHITE: I would object.

20 MR. BURNSIDE: I am going to submit it.

21 MR. WHITE: That's not what I am talking  
22 about. I object to his saying what the Army Corps  
23 of Engineers man would say.

24 THE COURT: I don't know that he is going to.

25 Go ahead and answer the question.

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1 THE WITNESS: It was -- Leon Bare was the  
2 job inspector and Mr. George Rowell was his immediate  
3 boss and Mr. Dow, which is the area engineer.

4 THE COURT: Are any of those gentlemen  
5 here today?

6 THE WITNESS: Yes, sir.

7 THE COURT: They are here?

8 THE WITNESS: Yes, sir. Mr. Rowell and  
9 Mr. Bare are here. I saw them in the hall.

10 THE COURT: When did this take place? Do  
11 you know, approximately?

12 THE WITNESS: Oh, I'd say the latter part  
13 of January, the first of February.

14 THE COURT: All right.

15

16 BY MR. BURNSIDE:

17 Q What were you required to do, sir?

18 A They informed me that the government would  
19 accept a total overlay rather than extracting the whole floor.

20 Q What does an overlay mean?

21 A Overlay means to grind the surface up of the  
22 existing floor, knock the glaze off, get down to where you  
23 can get into the stock of the material so your adhesive will  
24 adhere and then reinstall, you know, square tile.

25 Q Now, as a result of what the government found,

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1 in their mind that this tile had to come up or overlay.

2 So when I found out that there wasn't any other  
3 course to go, then I had the job superintendent pick up --

4 I said, "You pull six or eight tiles out of a  
5 bad area or random area" and -- which he did and he brought them  
6 in the office. And I examined these tiles just as close as I  
7 could. And those tiles were definitely out of square.  
8 And they had not been cut.

9 Q All right, sir. Did you advise Woody or  
10 Flintkote of this?

11 A Yes. I called Woody Distributors and I spoke  
12 to, I think, Mr. Early and also one of his people. I forget  
13 his name.

14 He came by my office. And we talked about the  
15 tiles. And he went over to the job. I think I went over there  
16 twice.

17 And their conclusion was that the tile was  
18 definitely out of shape. And this letter indicates it.

19 Q What is this letter, sir?

20 A This letter is from Woody Distributors to my  
21 company, explaining the condition of the tile.

22 THE COURT: That will be Plaintiff's

23 Exhibit No. 4.  
24  
25

(The letter referred to was marked  
and received in evidence as  
Plaintiff's Exhibit No. 4.)

MR. BURNSIDE: Excuse me one moment, Your Honor.  
They have requested a copy of that. I don't know that I  
have one.

I do.

THE COURT: All right.

MR. BURNSIDE: Thank you, Your Honor.

BY MR. BURNSIDE:

Q If you would, Mr. Wilkinson, would you read --

THE COURT: It is in evidence. It is  
Plaintiff's Exhibit No. 4. The jury can read it  
if you just pass it to them.

MR. BURNSIDE: Your Honor, I would just like  
to take a moment for them to have the opportunity --

THE COURT: That's all right.

MR. BURNSIDE: I'll move along, Your Honor.

THE COURT: All right, sir.

BY MR. BURNSIDE:

Q Mr. Wilkinson, at the date of that letter of  
February 3rd of 1976 sent to you by Woody Distributors, did



1 the gentleman who signed that letter have in his possession the  
2 tile to which is referred to in the letter?

3 A Yes.

4 Q All right, sir. To your knowledge, prior to him  
5 writing that letter, did he personally inspect the tile in your  
6 presence?

7 A His representative did.

8 Q Do you recall the name of that individual?

9 A No. He's a short, black-headed fellow. I don't  
10 remember his name -- Lamons, Lamont.

11 Q Now, reference is made in the letter of -- "We  
12 would hope to have this tile replaced within two weeks."

13 Was, in fact, that tile provided to you by Woody  
14 Distributors, Inc.?

15 A I'm sorry. I don't understand that.

16 Q I will direct your attention to this sentence.

17 A "We would hope to have this tile replaced in two  
18 weeks."

19 No. They did not replace it.

20 Q Did they ever at any time?

21 A No.

22 Q All right. Now, would Mr. Kidwell -- or, did  
23 Mr. Kidwell make any effort to correct the conditions after  
24 February 3rd of '76?

25 A My last payroll indicates January the 23rd.

1 Q All right. Now, as a result of Mr. Kidwell not  
2 doing anything, of Woody not supplying the new tile to you,  
3 what action did you take to correct the condition?

4 A I made arrangements with Associated Tile Carpet  
5 Company to finalize the job for me or to perform certain  
6 sections because it had mushroomed into quite a thing and the  
7 Corps of Engineers had pressure on me.

8 Q All right. In order to correct this condition,  
9 was it necessary for you to use any of your employees?

10 A Yes. We -- when you bump into a situation like  
11 this, it is very difficult to get another subcontractor to come  
12 in. They don't want to get involved in the legal technicalities  
13 that follow because it is non-profitable and they prefer not to  
14 do it.

15 And Associated Tile was -- Mr. Hare - I made  
16 contact with him through IGM Tile Company. And he finally come  
17 forward and done the majority of the job for me.

18 Q All right. As to Mr. Hare of Associated Carpet --

19 A Associated Tile and Carpet --

20 Q -- Tile and Carpet - what work was performed  
21 by that business?

22 A He done the actual laying of the tile for me.

23 Q All right. Now, did he lay the same tile that  
24 had been ordered by Kidwell from Woody?

25 A Well, you see, my time was getting away from me.

1 I was on a liquidated course, liquidated damages. The  
2 government was demanding: "Let's get on with it." And the  
3 only supplier around that had the material approved was Woody.

4 But my demands on Associated Tile was he was not  
5 to use the same batch of tile or the same run of tile. And  
6 I was later told that they had -- they run a new batch of tile  
7 for this job.

8 Q All right -- which Associated Tile and Carpet  
9 utilized?

10 A Yes, which Associated Tile bought from Woody.

11 Q All right. How much was the charge by Associated  
12 Tile and Carpet to you for the work they performed?

13 A Associated Tile charged me \$4,375.

14 Q Did you pay that amount in full?

15 A Yes.

16 Q Were you reimbursed by the government for that  
17 amount you had to expend?

18 A No.

19 Q Before Mr. Hare could do his job, was there  
20 anything that had to be done by your employees to prepare the  
21 way?

22 A Yes. J. Mae did not prepare certain areas in  
23 certain rooms correctly. The Corps of Engineers come forward  
24 and said that there were certain areas in some rooms that the  
25 tile had to come up. The floor appeared to be elevated maybe

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1 you wouldn't come in and put it over too much of this glaze.  
2 You'd come in and go over it two or three times to get it ground  
3 down, one with a rough coat and one with a little bit finer  
4 coat.

5 Q Is there a machine utilized to do this?

6 A Yes. We got the machine from Mr. Hare.

7 Q Did you have to pay any expense for the use of  
8 the machine?

9 A Yes. Well, that was in with the \$4,375 that I  
10 paid him.

11 Q All right, sir. Now, how large is this machine?

12 A I don't know. I guess it's maybe three feet  
13 tall and, you know, got a disc on the bottm. It is something  
14 similar to a hardwood floor sanding machine.

15 Q How many square feet had to be ground down so  
16 that the tile could be laid by Mr. Hare?

17 A It was a good five thousand.

18 Q All right. Now, who operated this machine?  
19 Your employees or Mr. Hare's employees?

20 A Well, he instructed my people, but the majority  
21 was done by my people.

22 Q What was the cost of you to pay your employees  
23 to perform the work of leveling small portions of the floor  
24 as well as grinding that tile?

25 A I've got it took approximately six weeks to

1 prepare the discrepancies under the tile and to prepare the  
2 existing surface for the new tile. I've got 4,984 dollars and  
3 56 cents. Included in this \$4,900 is \$650 worth of insurance.  
4 That is necessary to pay.

5 Q What kind of insurance?

6 A Workmen's Comp.

7 MR. WHITE: I would object to that, Your Honor.

8 THE COURT: It has nothing to do with this.

9 MR. BURNSIDE: All right.

10  
11 BY MR. BURNSIDE:

12 Q Now, why was not the tile laid by Mr. Kidwell  
13 torn up and then have Mr. Hare put in new tile?

14 A Well, when Associated Tile and Carpet come out  
15 there, in order for them to strip everything out, including  
16 the cove base and do the entire job from scratch, he wanted  
17 \$15,000.

18 And it -- at that point in time I just felt like  
19 that was exorbitant. I just said, "Well, there is no way that  
20 this much money -- there is no way that \$15,000 can be paid  
21 to fix this floor."

22 Q Which was the cheaper method, then, of getting  
23 the job done?

24 A Well, I wish I had given him the fifteen thousand.

25 Q What ultimately ended up --

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1 alignment and a combination of the concrete - they turned that  
2 down.

3 Q Now, beyond the damages which you have related  
4 to the jury that you sustained whereby you had to pay Mr. Hare,  
5 you had to use your own employees to grind this out-of-square  
6 tile, what other damages did you sustain?

7 A Job operation of -- well, I sustained liquidated  
8 damage time. I have got --

9 Q You state -- state how that took place.

10 MR. WHITE: Your Honor, I would note my  
11 objection based on -- as far as any liquidated  
12 damages.

13 THE COURT: I understand.

14 All right. Go ahead.

15 THE WITNESS: Liquidated damages are time  
16 that is used past the contract time. If you exceed  
17 the contract time that the government gives you, then  
18 they apply X amount of dollars a day against the  
19 contract.

20  
21 BY MR. BURNSIDE:

22 Q When was Mr. Kidwell to have -- assuming every-  
23 thing had gone properly, when was Mr. Kidwell to have completed  
24 his contract?

25 A Well, he would have completed that phase within

1 30 days.

2 Q Which would have made it what date?

3 A I'm sure that it would have been the 2nd. I am  
4 sure it probably would have been the 1st of February.

5 Q All right. In fact, how long --

6 Or, what was the date that the government accepted  
7 the new tile installed by Mr. Hare?

8 A I'd say the latter part of April. It was one of  
9 the last items that was accepted.

10 Q Can you identify what that document is?

11 A Yes. This is -- I was indicating to the --

12 Q First, just say to whom it is addressed.

13 A To the Corps of Engineers, Mr. Dow.

14 A That's the United States Government?

15 A Yes. It was sent to Mr. Donald W. Dow, Area  
16 Engineer, Norfolk District, Corps of Engineers, Fort Eustis,  
17 Virginia.

18 Q And was that letter from you, sir?

19 A Yes.

20 THE COURT: Plaintiff's Exhibit No. 5.

21 MR. BURNSIDE: Yes, sir.

22

23 (The document referred to was

24 marked and received in evidence

25 as Plaintiff's Exhibit 5.)

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1 Q Was there a punch list issued in this case?

2 A Not to my knowledge, not on that particular item.

3 Q Do you know what date the government accepted  
4 the work?

5 A I think it was the latter part of April.

6 I believe there was a minor punch list. I think their cove  
7 base -- there was a question of the thickness of the cove base  
8 and we resolved that without too much difficulty.

9 Q All right. Now, so how many days, as a result  
10 of delay of getting the floor proper, were you assessed for  
11 liquidated damages?

12 A Seventy-five calendar days.

13 Q And at what rate?

14 A Fifty dollars per day.

15 Q Now, are there any other items of damage that  
16 you have?

17 A Yes. My liquidated damages totaled \$3,750.

18 Any job operating expense such as telephone, tunnel, trucks and  
19 equipment is \$25 a day. That was \$1,875.

20 My job superintendent was 75 calendar days at  
21 fifty-nine twenty-eight, was \$4,476 -- \$4,446.

22 Q Now, your job superintendent - who is he, by  
23 name?

24 A He is Mr. Neff, Duane Neff.

25 Q Is he here today to testify?



1 A Yes.

2 MR. WHITE: Your Honor, I have a continuing  
3 objection to this testimony.

4 THE COURT: All right.

5

6 BY MR. BURNSIDE:

7 Q Now, you stated 75 days. During these 75 days  
8 what were Mr. Neff's duties as your job superintendent?

9 A Well, you know, I had him mainly concentrating  
10 on getting the floor done.

11 Q All right, sir. What was his rate of pay per  
12 day?

13 A Fifty-nine twenty-eight per day.

14 Q At any time during the course of this entire  
15 transaction, Mr. Wilkinson, did you ever receive a limitation of  
16 warranty from either of the defendants in this case?

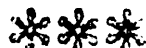
17 A No. My -- I expressed my terms and conditions  
18 in the purchase orders that I give subcontractors that they are  
19 to perform according to the planned specifications and general  
20 provisions. And the warranty --

21 MR. WHITE: Your Honor, I think the warranty  
22 speaks for itself.

23 So, anyway I make my objection.

24 THE COURT: I think it does.

25 MR. BURNSIDE: He doesn't even know the



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1 A He's one of our -- one of my superintendents.  
2 I mean, he is here.

3 Q What's his name?

4 THE COURT: What's his name?

5 THE WITNESS: Joe Simonds.  
6

7 BY MR. ADAMS:

8 Q What?

9 A Joe Simonds.

10 Q And, if you know, do you know where he got the  
11 tile? Were you there?

12 A No. I physically did not see him take it up.

13 Q Okay. But he, as I understood your testimony,  
14 he brought it back to you?

15 A Yes.

16 Q And you examined it.

17 Did you measure it or make any test on it at  
18 that time yourself?

19 A Yes.

20 Q What were the results of those tests?

21 A I used a square, a framing square, which is  
22 accurate as you can get.

23 Q All right. What was the result of that?

24 A I'd say the pieces that I had were as much as  
25 an eighth of an inch to a quarter of an inch out.

1 Q I believe you indicated in your direct testimony  
2 that this tile had not been cut.

3 A I could see no indication on that tile where it  
4 had been cut. I looked at it very closely because I wanted  
5 to make sure that we were dealing with a bad batch of tile  
6 rather than this man go out there and cutting it. I wanted to  
7 be absolutely sure.

8 Q Were you satisfied that it was not cut?

9 A Yes. I mean, I saw no indications of it being  
10 cut.

11 Q All right. And then, as I understand it, you  
12 took these six or eight squares - or had them taken, if you  
13 didn't do it directly yourself -- and had them delivered to  
14 Woody Distributors?

15 A Well, I tell you, that's a little cloudy with  
16 me. I am not quite sure whether my job superintendent took  
17 them to Woody or Woody's man come to our office. I am not  
18 really sure.

19 Q I am not worried about that.

20 But, ultimately those six or eight tiles got  
21 into Woody Distributors' hands; is that correct?

22 A Yes, sir.

23 Q When those tiles were in your possession and  
24 you had examined them and checked them with a framing square  
25 and they appeared to be out, did you make any cuts or any --

1 handle the tile other than just to look at them and check it for  
2 the squareness?

3 A They never left my desk.

4 Q So, to the best of your knowledge, when they  
5 were put in the possession of someone from Woody Distributors,  
6 they were in the same condition they were when they were  
7 removed from the floor?

8 A To the best of my knowledge.

9 Q All right. And I note that you testified that  
10 you got a discrepancy notice or deficiency notice from the  
11 Corps of Engineers during the course of this work. What had  
12 taken place as far as you, individually, at that point as  
13 far as the floor?

14 In other words, had you viewed it then in its  
15 partially laid condition or what was the circumstance?

16 A Well, when you go out on a job, you know, I  
17 think you just take a general view. You -- I don't look for  
18 trouble. I let the government bring it to me.

19 I, myself, didn't feel like -- I just didn't  
20 feel like a complete overlay was necessary. It showed drifting.  
21 It showed irregularities. But I felt like under the conditions  
22 that the government could have accepted it. But they did not.  
23 They elected to correct it underneath in some areas and then  
24 overlay the entire floor.

25 Q Now, so that I'm understanding your frame of

1 reference, when you are talking about irregularities, drifting,  
2 out of square, are we talking about in all the rooms in  
3 building 82 or predominantly in one room or where are your  
4 remarks generally directed?

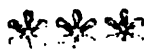
5 A I don't think there was a room untouched. I  
6 think we had gone in every room in phase one, which was close  
7 to 5,000 square feet, and corrected the underlayment underneath  
8 and also overlay.

9 Q So that we again understand, when Mr. Kidwell  
10 ultimately refused to go any further with the job, tile had  
11 been laid in all the rooms in building 82 where it should have  
12 been?

13 A To the best of my knowledge I think he was  
14 about 95 percent complete. His money -- I think I had paid  
15 him for his materials and I had paid him for some of his  
16 payroll. I had paid him for work he had performed, and  
17 unaccepted work, incidentally.

18 Q As the government determined it.  
19 But isn't it a fact that you had advanced him  
20 approximately \$1500 for material?

21 A I have got here that at the first of January he  
22 come to me and he told me that he needed a little over a  
23 thousand dollars for materials to get started, and which I give  
24 him. I give him \$1,000 to get him started in material and  
25 then I advanced him \$500 a week because he said he needed some



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1 Q Well, now, prior to the discrepancy - and I know  
2 it is not in evidence; it's been identified - I am not sure of  
3 the exact date of it, I believe it was in February --

4 A What? the discrepancy?

5 Q Yes, sir.

6 A It was the latter part of January.

7 Q All right. Prior to that had you any personal  
8 knowledge of difficulty with the laying of this tile at that  
9 job?

10 A I personally, no.

11 Q When you got the deficiency and then went out --  
12 I assume personally went out to look at the job and see what  
13 happened, is that when you first noticed it being out of --

14 A I, myself, yes.

15 Q -- out of line or in a drift situation?

16 Had you had that condition reported to you  
17 prior to that time?

18 A No.

19 Q Had not Mr. Kidwell talked to you in connection  
20 with the difficulty or -- to you individually?

21 A No. I had very little contact with Mr. Kidwell  
22 while the job was going on.

23 Mr. Kidwell, I don't think, was on the job too  
24 much. I think he had some people that was representing him  
25 do the work. I think he's more of a supervisor than actually

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1 government as to the date liquidated damages started and  
2 stopped?

3 A No. The government doesn't work that way. They  
4 give you X amount of days to do a contract.

5 If it exceeds five, ten, fifteen, twenty, a  
6 hundred or two hundred days -- it makes no difference in the  
7 contract where it came from. It is up to the prime contractor  
8 to make a decision as to what sub is liable and what sub is  
9 delinquent.

10 Q I understand that. But what was the deadline  
11 date of the contract as far as the government was concerned?

12 A I don't know. I really don't know. I'd have  
13 to -- I don't have the contract.

14 Q You don't have the contract here?

15 A I don't have the contract with me, no. I don't  
16 know what the completion date was.

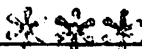
17 But it was -- let's see. I believe -- I would  
18 say in December or January. I'd say probably the 1st of  
19 January, thereabouts.

20 Q First of January of what year?

21 A '76.

22 Q Was the completion date of the contract?

23 A I think so. You see, during the process of the  
24 job if you have just cause for a time extension, if they give  
25 you modifications to give you additional time like if you wish



fact, engaged Mr. Kidwell to do this job?

A Yes.

Q What is the date of that?

A November the 28th.

Q Of what year?

A 1975.

Q All right, sir. So that was the date that you told him to go ahead with the contract?

A Yes.

MR. ADAMS: All right, sir.

I'd like to offer this as whichever defendant's exhibit - 1.

THE COURT: I will just mark this Defendant Kidwell's Exhibit 1.

(The document referred to was marked and received in evidence as Defendant Kidwell's Exhibit 1.)

MR. ADAMS: That would be as far as -- if you want to break --

MR. BURNSIDE: Your Honor, since he's breaking his cross at this point, it's become obvious with the number of witnesses in this case that it is going to be a two-day trial. Perhaps for the jury's benefit there might be a determination for their benefit at





1 division of the specifications that he has to abide by. You  
2 give him a set of plans that he has to install by. If he wants  
3 to submit on certain materials and the government accepts these  
4 materials, if it's anything other than what the sub and the  
5 prime talked about, the additional money the sub keeps.

6 He, in fact, in a roundabout way, does have a  
7 contract with the government. It is his responsibility to do  
8 this work according to that division and those plans.

9 Q All right.

10 A The coordinating of the work, the payment  
11 schedule of the sub, is handled by the prime contractor.

12 Q All right, sir. You indicated, I believe before  
13 the lunch break, that -- the contract deadline was approximately  
14 the 1st of January of '76; is that correct?

15 A No. I do not know. I --

16 Q Roughly in that area?

17 A I don't know. I believe it was sometime in  
18 February.

19 Q All right. In connection with that in your  
20 contract, then, there was a specified time limitation; is that  
21 correct?

22 A Oh, yeah. Sure.

23 Q All right. I hand you for your review  
24 Plaintiff's Exhibit 2 and Defendant Kidwell's Exhibit 1, which  
25 we've indicated besides the additional material such as samples,

1 and so forth, the documentation for the contract between  
2 W. W. Wilkinson and J. Mae Carpeting and ask you is there on  
3 either document a time limitation on Mr. Kidwell?

4 A There's only one way I could answer that.

5 Q If you will, look at the documents and answer:  
6 Is there a time limitation stated in either document as far as  
7 Mr. Kidwell's performance in a specified time?

8 A On these two pieces of paper there is nothing.

9 Q All right. Thank you, sir.

10 A But --

11 THE COURT: You can explain your answer.

12 THE WITNESS: I can?

13 Upon awarding a contract to J. Mae Carpet,  
14 he was in my office with the estimator. And we asked  
15 him of his time, his procedure and when he could man  
16 the job. And his answer to us, installation time was  
17 approximately ten days and material was approximately  
18 two weeks.

19  
20 BY MR. ADAMS:

21 Q And that was --

22 A And that was only in phase one.

23 Q If I understand you, you say it took two weeks  
24 to get the material and ten days to put it in?

25 A I would interpret that to be two weeks overall.

1 Q Total?

2 A Fourteen calendar days.

3 Q All right, sir. And, in fact, by the document  
4 I believe Plaintiff's -- the Plaintiff's Exhibit -- I guess  
5 it's Defendant's Exhibit No. 1, you, in fact, didn't advise him  
6 that you accepted his proposal until your letter of the 28th of  
7 November, 1975; is that correct?

8 A Well, the job was discussed orally before, but  
9 we did accept it November the 28th.

10 Q All right, sir. Now, based upon your estimate  
11 that it would take 14 calendar days to do the entire job of  
12 which we are talking about today, did that depend upon local  
13 availability of the tile material in your estimate of 14 days?

14 A I believe this -- most of this tile was on hand.

15 Q You don't know that for sure?

16 A No. I don't know that for a fact.

17 Q All right. Are you aware, Mr. Wilkinson, that  
18 under a United States Government contract that if, in fact,  
19 supplies or material is not available locally that that is  
20 grounds for an extension time under a contract?

21 A Well, this contract has been almost finalized  
22 along liquidated damage lines and the government has extended  
23 no liquidated damages toward this contract. It's all been  
24 applied. They have give none back.

25 Q I don't believe that answers my question.

1 Are you aware that if materials are not locally  
2 readily available that that's grounds for extension under a  
3 government contract?

4 A Sometimes it is and sometimes it isn't.

5 Q All right, sir. Did you apply for any extensions  
6 in connection with this contract?

7 A Yes, sir.

8 Q At what point in time?

9 A I have applied on several occasions. I have had  
10 meetings with them. I have tried to get the liquidated time  
11 back and to this date the government has extended no time to me  
12 on this contract.

13 Q All right. Around January 23rd or before the end  
14 of January did you make any request for an extension of time?

15 A Yes. I have had several meetings with the  
16 government, trying to get liquidated time back, but they will  
17 not get off of any time on this contract.

18 Q Do you know the dates of those meetings?

19 A No, not right offhand. But it's been several.

20 Q Several meetings?

21 A Yes, sir.

22 Q All right, sir. Mr. Wilkinson, were there other  
23 difficulties with this job, this total contract that you had  
24 with the United States Government other than that which we are  
25 discussing with the flooring?

1 A Normal contract problems.

2 Q Well, what were they?

3 A Well, I mean, you'd have to ask me a particular  
4 item.

5 Q Well, other than in the renovation, you had --  
6 as we know, you had to redo the floor. What else did you have  
7 to do?

8 A Well, we had to redo some sheet metal and we had  
9 to do some painting.

10 Q When was the sheet metal work completed?

11 A I don't know.

12 Q Could we have your best estimate as to when it was  
13 done?

14 A No. I couldn't actually -- you could probably get  
15 that from the job superintendent.

16 Q Did you have difficulties with the sheet metal  
17 work?

18 A Yeah, in some areas.

19 Q All right. Did you have difficulties with the  
20 painter?

21 A Some punch list items - preparation, maybe  
22 painting over something that should have been prepared a little  
23 bit more properly before painting.

24 Q I see. When was the painting completed, if you  
25 recall?

1 A I couldn't tell you.

2 Q When, in fact, did you complete the contract and  
3 get final acceptance of it?

4 A I couldn't tell you.

5 Q Could you give a month?

6 A I think phase -- I think phase one was accepted  
7 probably I'd say the latter part of April.

8 Q All right. And what about phase two?

9 A Phase two was completed about 28, 30 days after  
10 that.

11 Q Phase three?

12 A We are in phase three now.

13 Q I see. Was there a time limitation as to phase  
14 two?

15 A Yes, 30 calendar days.

16 Q From when did that 30 calendar days begin?

17 A Phase two was to be started within ten days  
18 after the acceptance of phase one.

19 Q I see. And phase three was to be accepted --  
20 I mean, to be started within ten days after phase two? It was  
21 a step procedure?

22 All right, sir. Now, you indicated that phase  
23 one which involved the flooring was accepted in the latter part  
24 of April, 1976; is that correct?

25 A I believe so.

1 Q Then now do you account for the fact that by  
2 Plaintiff's Exhibit No. 5 you wrote a letter dated March 5th,  
3 1976 which states that the floor -- the problem with the material,  
4 the floor, had been rectified and the floor was complete?  
5 Was the time different? What accounts for the time difference  
6 from March 5, 1976 to the end of April, 1976?

7 A Well, that was the -- they wanted to try to  
8 occupy certain areas as soon as they could. The rooms that was  
9 having the major problems with was a very large room, probably  
10 as large as this. And as soon as I got, I think, two or three  
11 rooms completed, we told them we had completely made the overlay  
12 and they could occupy them.

13 But we did continue to work on the other work  
14 while they were -- you know, after this letter had been sent  
15 to them.

16 Q But your letter of March 5 indicates: We have  
17 now corrected the faulty tile material used in building 82  
18 by sanding and grinding the previous floor tile and completely  
19 overlaying the floor area that was to receive new vinyl  
20 asbestos tile.

21 Does that not indicate that the flooring portion  
22 of this was finished by March 5th?

23 A According to that paper, yes; however, I say  
24 we were working in other areas after that letter was sent.

25 Q At that time were you working on other than just

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1 period you paid your foreman some \$4400 -- and \$46. Had he  
2 not been at this job would he have been working elsewhere for  
3 you?

4 A Well, the job has to be manned eight hours every  
5 day that it -- by a qualified superintendent, period.

6 Q Mr. Wilkinson, I asked: Is he on your payroll  
7 during --

8 A No. He is hired especially for that job.

9 Q All right. And when that job is complete you  
10 wouldn't have work for him anymore?

11 A If he has no place to go, then he shuts down.

12 Q If he has other jobs he would still be working?

13 A If there is a job for him to go to, he would  
14 still be working.

15 Q All right. I'm not -- I want to clarify.

16 Did you indicate that your position is that  
17 the government would not allow anything less than a complete  
18 overlay of the floor due to the drifting and out of square  
19 of the tiles?

20 A I could not convince them to go any other way.

21 Q I believe you've -- you stated that that was  
22 because of the situation of the aesthetic look of the floor;  
23 is that right?

24 A That's what I would say.

25 Q You indicated that you had other bids for the



1 flooring phase of this project. And you mentioned one of  
2 \$4,000. What would comprise that bid? In other words,  
3 what was that bid for?

4 A Well, it would be according to that particular  
5 section and according to the plans.

6 Q These are labor and material bids, aren't they?

7 A Well, it is labor, material, overhead and  
8 profit, whatever the subcontractor can do.

9 Q Does anywhere -- strike that.

10 I have nothing further, Your Honor.

11 THE COURT: All right. Mr. Tucker?

12 CROSS-EXAMINATION (Cont'd.)

13  
14 BY MR. TUCKER:

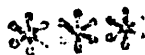
15 Q Mr. Wilkinson, I believe you testified that  
16 Mr. Kidwell was on the job from January the 2nd until January  
17 the 23rd; is that correct?

18 A Yes, January -- payrolls indicate January the  
19 2nd to January the 23rd.

20 Q And during that period of time I believe you  
21 stated that you would go to the job every day or every other  
22 day to make a general inspection; is that correct?

23 A Yes. I would try my best to get out there.

24 Q And included in that general inspection would  
25 obviously be to look at the work that Mr. Kidwell was doing; isn't



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1 problems he was having and the work he was doing you would have  
2 expected your job superintendent to relate those to you, would  
3 you not?

4 A Yes, if they were of a major capacity.

5 Q And you don't recall, Mr. Wilkinson, during that  
6 period of 21 days any complaints or any problems being related  
7 to you either by your job superintendent, Mr. Simonds, or by  
8 Mr. Kidwell, do you?

9 A No. I really can't.

10 Q You had no reason to think there was any problem  
11 at all with that job until you got the deficiency report from  
12 the Army Engineers?

13 A That's a fact.

14 Q That's when you called Mr. Early at Woody to  
15 advise him; isn't that correct?

16 A Yes.

17 Q All right, sir. Did Mr. Early indicate to you  
18 at that time that he was aware of any problems on the flooring  
19 job?

20 A What was that again, sir?

21 Q Did Mr. Early indicate to you when you talked  
22 to him on the telephone the end of January and advised him of  
23 the deficiency report of the Army Engineers, did Mr. Early  
24 indicate to you that he had any knowledge of the problems with  
25 the job?

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1 correct?

2 A I believe that's what happened. I don't think  
3 we delivered them. I believe someone come by from his office  
4 and picked them up at my office.

5 Q And then he took them back or took them away  
6 with him; is that correct?

7 A Yes.

8 Q Okay. Now -- and it was after that time, was  
9 it not -- it was subsequent to his picking up those tiles that  
10 you received the letter from Mr. Early dated February 3rd which  
11 is marked Plaintiff's Exhibit 4?

12 A You mean he picked the tiles up first, right?

13 Q Yes, sir.

14 A Right. I mean, it would have to be.

15 Q And then you received this letter --

16 A Yes.

17 Q -- shortly after that?

18 All right. Did you have any discussion with  
19 Mr. Early subsequent to your telephone conversation and before  
20 receipt of that letter, to your knowledge?

21 A I don't think I did.

22 Q All right, sir. Now, after you received that  
23 letter did you not receive a call from Mr. McBride of Flintkote  
24 Company?

25 A Yes. I think I spoke with Mr. McBride to set up

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1 A Oh, yes.

2 Q It was?

3 A Sure.

4 Q And did it appear to you that that would take  
5 up some time and effort on the part of either your company or  
6 Kidwell to make sure that the undersurface was level?

7 A That was part of the subcontractor's responsibility.

8 Q Did you ever discuss with him the fact that that  
9 was his responsibility - to make sure that it was level?

10 A It was in his proposal to me.

11 Q I just asked you whether you ever discussed it  
12 with him.

13 A Oh, yeah, sure.

14 Q All right.

15 A Sure.

16 Q All right. Now, you were there on the job as  
17 often as you could -- I believe you have told us like every  
18 other day or when you could be there. You tried to get there  
19 to see that the work was going along satisfactorily; is that  
20 correct?

21 A Uh-huh.

22 Q And in the course of that, when you lay this  
23 tile, if it drifts you can look right at it and tell whether  
24 it is drifting, can't you?

25 As you add one square to it, it magnifies the

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1 forgetting about the vinyl tile whether it was lined up right  
2 or not? How much time and area are we dealing with that had  
3 to be corrected?

4 A That's a difficult question, you know.

5 Q I'd like to know, though. I really would.

6 A You mean the repair under the tile?

7 Q Yeah. I'd like to know how much improper  
8 preparation work where there were irregularities popping up from  
9 the tile that had to be corrected.

10 A I'd say between ten and fifteen percent.

11 Q Ten and fifteen percent.

12 So you would have had to have done ten to  
13 fifteen percent of this repair work regardless of what --  
14 whether the tile was lined up right or not; is that correct?

15 A Yes.

16 Q You would have had to have done that much.

17 And if you had to have done ten to fifteen  
18 percent of that work when you tore it up, the Army Corps of  
19 Engineers was dissatisfied with the discoloration because even  
20 though it was level and lined up right, you'd have a patch job  
21 here and a patch job there, and that was why they were  
22 rejecting it, because of the aesthetic appearance of it; is  
23 that correct?

24 A No.

25 Q It isn't?

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1 Q Have they said they are going to assess you?

2 A Absolutely. They have my money.

3 Q Have they said they are going to assess you for  
4 this vinyl tile or other things?

5 A They do not tell you.

6 Q You don't know whether it is the vinyl tile or  
7 something else?

8 A There is no question about where it is, my  
9 friend.

10 Q Well, the lighting fixtures - maybe that's  
11 phase one - weren't completed until March -- reference your  
12 letter of March 2nd -- "Surface mounted lighting fixture will  
13 be completed, installed by March the 12th."

14 So you had --

15 A That was a punch list item.

16 Q Well --

17 A If they can occupy an area they will give you  
18 beneficial occupancy. But if they cannot get in an area, they  
19 will not give it to you.

20 Q You turned me aside. I am asking you whether  
21 -- you still had work to do on that job - lighting fixtures -  
22 by March the 12th?

23 A Punch list items.

24 Q You get penalized whether it is vinyl tile or  
25 lighting fixtures, or what have you, if you haven't done the

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1 see them put it down.

2 Q We were talking about the architect's guide  
3 specifications. Did you get one of these as to how you put  
4 Flintkote products down?

5 A No, sir. I don't think I got one of these.  
6 In fact, I think it is the first time I have seen one.

7 Q Well, have you ever used Flintkote products  
8 before?

9 A I am sure I have in the past.

10 Q You said you have been 20 years in the business.

11 A I am sure I have.

12 Q Fine.

13 A This -- it appears like these are copies.

14 Q Well, they are copies.

15 THE COURT: Are they all the same thing,  
16 Mr. White?

17 MR. WHITE: Yes, they are all the same.

18 No. This is not. This is the specification  
19 that Mr. Adams has put in evidence or in the pleadings.

20 THE WITNESS: I don't remember ever seeing  
21 anything like that. I think I saw one piece of paper  
22 come through.

23

24 BY MR. WHITE:

25 Q All right. Let's see here.

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1 Q Staggered?

2 A Uh-huh. And when you look down them you wouldn't  
3 see a true line.

4 These appear to be probably 95 percent. I imagine  
5 that in this floor somewhere at least five percent is out of  
6 line. And that certainly is within tolerance. Five percent out  
7 of a room this big - they would have a hard time disapproving  
8 this floor.

9 Q All right, sir. Now, as to -- Mr. White has been  
10 asking you about whether you contacted anybody at Flintkote.

11 Do you know whether or not either of your job  
12 superintendents would have contacted anybody from Flintkote?

13 A I think about the only way you could answer that  
14 would be Mr. McBride was probably the only connection between  
15 Flintkote and my company.

16 A All right. But Mr. McBride's contact was with  
17 one of your job superintendents?

18 A Yes. I think I spoke with him one time, I  
19 believe.

20 Q All right, sir. Now, this, evidently - the  
21 Woody's Defendant's Exhibit 1 - does it not state in here that,  
22 in fact, that Flintkote received -- the date of inspection, two  
23 twenty-six, evidently, and when the complaint was received was  
24 January of '76?

25 A Yes. That's what it says.



1 Q All right, sir. So, evidently, someone --  
2 MR. WHITE: If Your Honor please, he is  
3 testifying.

4 THE COURT: It is your witness.

5

6 BY MR. BURNSIDE:

7 Q Is there a complaint date stated on there?

8 A Looks like two six, two six seventy-six.

9 Is that it right there?

10 Q You examine it. Is there any column on here that  
11 says --

12 A Date inspection -- would that be good enough?

13 THE COURT: Just answer the question without  
14 asking him, if you don't mind.

15 THE WITNESS: I see one here.

16

17 BY MR. BURNSIDE:

18 Q What does this column say?

19 THE COURT: It is in evidence, Mr. Burnside.  
20 The jury can read it.

21 MR. BURNSIDE: I want to highlight it.

22 Mr. White tried to make it sound like they had never  
23 seen it.

24 THE WITNESS: Date of inspection, 2/26/76.

25 Evidently that must be when they inspected the tile.

1 BY MR. BURNSIDE:

2 Q All right, sir.

3 A I couldn't believe that report.

4 Q All right. Now, further, so the jury has had the  
5 opportunity to review it, if you will look on that document, is  
6 there any allegations there that a Mr. Joe Simonds made a  
7 telephone call to Mr. McBride of Flintkote?

8 A Says that "The complaint was registered to me by  
9 Mr. Joseph Simonds --"

10 Q And Mr. Joseph Simonds was an employee of yours  
11 at that time?

12 A Yes, sir.

13 "-- by phone at which time I asked that he pick up the  
14 samples."

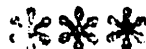
15 Q All right. So, moving on, now, there was a great  
16 deal of questions about underlayment.

17 I show you -- I ask you if you can identify these  
18 documents?

19 A Yes. This material was sold to J. Mae Carpet by  
20 Southern Tile Distributor and the contents is four units of  
21 latex underlayment.

22 MR. BURNSIDE: I am going to enter these,  
23 Your Honor.

24 MR. ADAMS: If Your Honor please, I would  
25 like to note an objection to those documents in



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1 that?

2 A They were working on the floor all the way up to  
3 April.

4 Here are work reports that can be read, and by  
5 reading them they will indicate the -- that we were preparing  
6 and working on the floor in April.

7 Q All right, sir.

8 A There's also some checks.

9 THE COURT: If you will just wait until they  
10 ask you something.

11 THE WITNESS: Okay.

12

13 BY MR. BURNSIDE:

14 Q Now, Mr. Wilkinson, since they have had an  
15 opportunity to review them, now, who were these documents  
16 prepared by?

17 A The job superintendent, Mr. Neff, prepared those.

18 Q Are these weekly, monthly or daily reports that  
19 must be submitted by him?

20 A Daily.

21 MR. BURNSIDE: All right, sir.

22 THE COURT: Mark them all as one exhibit?

23 MR. BURNSIDE: Yes, sir.

24 THE COURT: Plaintiff's Exhibit No. 7.

25

(The documents referred to were  
marked and received in evidence  
as Plaintiff's Exhibit 7.)

BY MR. BURNSIDE:

Q Now, Mr. Wilkinson, with regard to this question  
of liquidated damage on phase one, in fact, how many days did  
the government assess you in liquidated damages for phase one?

A I think it was 130 days.

Q A hundred thirty days?

A Right.

Q Now, when they assessed you the 130 days, did  
they allocate any one day towards any particular subcontractor's  
work?

A No.

Q All right. Who is responsible to allocate out  
the days as it pertains to a subcontractor?

A The prime contractor.

MR. BURNSIDE: That's all I have, Your Honor.

THE COURT: Anything further?

Mr. Adams?

RECROSS-EXAMINATION

BY MR. ADAMS:

Q Mr. Wilkinson, to whom do you attribute the

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1 reports that had been put in evidence. And I am going to hand  
2 you -- excuse me.

3 Do you gentlemen --

4 THE COURT: I don't recall any progress reports.

5 MR. WHITE: Well, whatever --

6 MR. ADAMS: Exhibit 7, Your Honor.

7 MR. WHITE: Wherever Exhibit 7 is --

8 THE COURT: Seven is right here. I don't  
9 know whether that is what that is or not.

10 MR. WHITE: Do you have any objections to this?

11 MR. BURNSIDE: No.

12

13 BY MR. WHITE:

14 Q Mr. Wilkinson, I'm looking at Exhibit No. P-7.

15 They were the previous ones put in evidence concerning what I  
16 call a progress report. But, anyway, this shows an inspection.

17 All of these dealt with phase two, didn't they?

18 They didn't deal with phase one -- or essentially with phase two?

19 A No.

20 Q They didn't?

21 A No.

22 Q All right. What does that say - continue to paint  
23 phase number two? Is that word there "number two"? Were you  
24 doing both of them at the same time?

25 You had earlier said you couldn't do one until

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1 delay was caused with the problems of the tiles we are discussing  
2 and how much was caused by the problem of the cove base; isn't  
3 that correct?

4 A I imagine the only way you could probably  
5 summarize it, that it took an estimated 75 days to solve the  
6 tile problem and that included the cove base.

7 Q We are not involved with this cove base in this  
8 trial today, Mr. Wilkinson. You understand?

9 A Well, it is associated.

10 MR. TUCKER: Thank you. That's all, Your Honor.

11 THE COURT: All right.

12 Stand down.

13 (The witness was excused.)

14  
15 THE COURT: Who did you have next, Mr. Burnside?

16 MR. BURNSIDE: Call Mr. Kidwell as an adverse  
17 witness.

18 MR. WHITE: We have a government man. I think  
19 he is going to be in Washington, D. C. and won't be back.

20 MR. BURNSIDE: I don't have any objection.

21 THE COURT: Did you subpoena him?

22 MR. WHITE: Yes, sir.

23 MR. BURNSIDE: I have no objection to taking  
24 him out of line.

25 THE COURT: I think it might be well if he is

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1 being laid?

2 A At different times, yes, I was; not all of the  
3 time, but I had entered the project.

4 Q Did you observe anything about the way the  
5 adhesive was applied, anything of that sort?

6 A When the cove base was applied, yes, I noticed  
7 that.

8 Q Tell us about that.

9 A I noticed when the cove base was being applied  
10 it wasn't being applied with a tool. The tool required is to  
11 be -- the glue is to be applied with a trowel which has  
12 quarter-inch depressions in it so it gets a suction effect  
13 when the dove base, itself, is put on.

14 And, of course, they were not using the trowel.

15 Q What were they using?

16 A They were using a piece of cardboard from the  
17 tile box.

18 Q Was that these two laborers that you were  
19 telling us about?

20 A Yes. It was the two laborers. I am not sure  
21 if it was the same people, but it was the subcontractor.

22 Q You have told us about the kitchen.

23 What about other areas in which you observed  
24 any irregularities, or tell us about what you observed in other  
25 parts.

1           A           Yes. There was other rooms involved. Another  
2 office space that had to be corrected also which --

3           Q           What was the reason for that?

4           A           Same purpose. But the office space that we  
5 noticed - it seemed to be -- again, when they applied the floor  
6 level, it again had the washboard effect, and, of course, it  
7 was very uneven.

8           Q           How about -- was there a hallway or hall  
9 somewhere?

10          A           Yes. There was a corridor.

11          Q           Tell the jury about that area.

12          A           That seemed to be acceptable. We didn't have  
13 any beef. It was acceptable.

14          Q           What was the situation underneath the flooring,  
15 if you know, underneath in this hallway? Did you observe any  
16 protrusions or irregularities coming up?

17          A           Not to any great extent, not that we required to  
18 be reworked.

19          Q           Now, did you go on this job, so to speak, right  
20 straight on through, through all of the phases?

21          A           Yes, up to now; yes.

22          Q           All right. And did the Army Corps of Engineers  
23 assess any late time or liquidated damage time, per diem,  
24 because of the lateness of this job?

25          A           We did assess some money, but it wasn't really



1 related to, so to speak, the tile.

2 Q I see. What was it related to?

3 A I would say mostly the plaster work of the  
4 contract.

5 Q And if I understood you, that this delay was not  
6 related to the tile work --

7 A Not really, even though it was part of the  
8 contract. Mainly I think the delay of the job was the plaster  
9 work.

10 Q I see. All right.

11 Now, let me ask you about the decision that was  
12 made to put another layer of tile over the existing tile.

13 Whose idea was that?

14 A Well, that was the contractor's idea.

15 Q Was that the Army Corps of Engineers'?

16 A No. All we needed was the tile -- to try to get  
17 the tile in an acceptable way.

18 Whether they were to tear it up -- but, I think  
19 it was easier to place the tile over the existing tile.

20 Q If you know, was the same kind of tile ordered  
21 from the same company for this second lay of tile?

22 A Yes. As far as I know, yes.

23 MR. WHITE: All right. That's all I have  
24 of this witness.

25 THE COURT: All right. Mr. Burnside?

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1 tiles not being in square existed throughout all the rooms,  
2 hallways and kitchens in the building?

3 A Yes. They weren't uniform. Let's put it that  
4 way.

5 Q All right, sir. In each room, if we take  
6 Plaintiff's Exhibit No. 8, in each of the rooms in which the  
7 tile was to be installed there was some evidence that the tiles  
8 were not uniform; is that correct?

9 A That's correct.

10 Q All right, sir. Now, taking the subflooring  
11 work that you required to be done to eliminate the, as you call  
12 it, the washboard effect -- all right. Even after that problem  
13 would be eliminated, you had squares of tile that would not be  
14 uniform; is that correct?

15 A That's correct.

16 Q All right, sir. Now, you have already stated  
17 that when the squares are not uniform that that is not an  
18 acceptable condition to the Corps; correct?

19 A That's correct.

20 Q And so when the subsurface or subflooring is  
21 corrected and you still don't have squares that are uniform,  
22 it is still not going to be acceptable to you; is that  
23 correct?

24 A That's correct.

25 Q All right, sir. So, consequently, with the

1 squares not being correct or out of square or un-uniform,  
2 however you want to call it, new tile is going to have to be put  
3 in?

4 A Yes; that's right.

5 Q All right, sir. Consequently, was there not  
6 a confrontation or consultation, shall we say, between the  
7 general contractor and the Corps of Engineers concerning the  
8 un-uniformity of these tile squares?

9 A That's right; yes.

10 Q And did not the government want the general  
11 contractor to come up with a plan to eliminate the un-uniformity  
12 of the squares -- square tiles?

13 A We don't care how he does it, just so it is  
14 according to specifications and it is a workmanship manner and  
15 it is acceptable.

16 Q All right. So we know, though, that the tile  
17 laid by J. Mac Carpeting were not uniform and was not  
18 acceptable.

19 A That's right.

20 Q And, assuming that there is no way to correct  
21 those out-of-square tiles, it becomes obvious that new tiles  
22 have to be placed in; correct?

23 A That's right.

24 Q And that could be by way of overlay; correct?

25 A That's right.

1           Q           Now, is it not true that, in fact, the overlay  
2 became required because of the lack of uniformity of the tile  
3 squares?

4           A           That's one way the correction could be made;  
5 yes.

6           Q           I am saying, the overlay was necessitated by  
7 the fact that the tiles installed by Kidwell were not in square;  
8 in other words, not uniform?

9           A           Oh, that's right.

10          Q           Now, to eliminate the condition of the lack of  
11 uniformity of the tile squares, essentially there are  
12 two methods to do that. One would be to take out all the tile  
13 installed by Kidwell and then put in complete new tile.  
14 That would be one; correct, sir?

15          A           That's right.

16          Q           The second would be to take what is on the  
17 floor installed by Kidwell, grind it down and then put new  
18 tile on top of it?

19          A           That's right.

20          Q           Other than that, there would be no other methods  
21 by which to correct --

22          A           Not that I know of.

23          Q           All right, sir. One other area, Mr. Bare. The  
24 determination of -- or, who is the individual at the Corps of  
25 Engineers who actually makes the decision as to whether to

1 assess the general contractor liquidated damages?

2 A The contracting officer.

3 Q And who would that be, sir?

4 A I think on this job it is Lt. Col. Routh.

5 Q All right, sir. Now, in assessing liquidated  
6 damages by the Corps, it is based on time; correct, sir?

7 A Yes; usually, yes.

8 Q In other words, the contractor is given a date  
9 by which a certain portion of the work must be performed;  
10 correct?

11 A That's correct.

12 Q And if it is not done by that date, then he  
13 starts to be assessed liquidated damages for each day that he  
14 delays?

15 A That's right.

16 Q All right. Now, when you assess liquidated  
17 damages, you do not take a form and write down and state this  
18 day is assessed because the floor wasn't prepared or this day  
19 was assessed because you didn't have the wall ready; isn't that  
20 correct?

21 A Well, if there is an extension or if the  
22 contract is not completed, we do have to state reasons why the  
23 job is not complete.

24 Q Well, you state reasons, but that's generally.  
25 You are submitting a report that the general contractor has

1 not completed because of the following reasons; right?

2 A Yes; right.

3 Q But you are not making out those reasons as to  
4 allocating them as to how many days it took for a subcontractor  
5 to complete his portion?

6 A Depends on if it is a big item, we would break  
7 it down.

8 Q Well, did you do it in this case?

9 A No, sir.

10 Q So you cannot say with any certainty how many  
11 days Wilkinson was assessed liquidated damages because of the  
12 floor?

13 A No, I cannot.

14 Q All right. As a matter of fact, the general  
15 contractor's records would probably be more accurate about that;  
16 isn't that true?

17 A Probably so.

18 MR. BURNSIDE: That's all I have.

19 THE COURT: Mr. Adams?

20  
21 BY MR. ADAMS:

22 Q Mr. Bare, a couple of questions, if we might.

23 I think you indicated in direct examination that  
24 Mr. Kidwell or J. Mae people began this project in February of  
25 '76.

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1 Q Do you know what it is?

2 A I think the laborers' rate was four twenty-eight  
3 and possibly the tile setter was six, seven dollars, somewhere  
4 like that.

5 Q Now, in the exhibit which is the floor plan,  
6 did - oh, you have a copy - was there a necessity when -- as  
7 we get further in the contract to overlay the flooring that  
8 had been originally put in?

9 A Yes. It was overlaid.

10 Q Yes. Okay.

11 Were all the rooms overlaid -- or, let me --  
12 okay. Well, answer that.

13 A Yes. I think the contractor went ahead and  
14 completed just about the entire area.

15 Q So he redid the old kitchen, the other rooms,  
16 the hall, everything?

17 A That's right.

18 Q Now, did you have any direct dealings or  
19 conversations with Mr. Kidwell that you recall?

20 A Not really direct, not that I remember. I  
21 probably talked to the guy, but I don't remember, not really  
22 any --

23 Q When, if you recall - without, you know, your  
24 voluminous files in front of you - was this contract to be  
25 completed?

1           A           I think they had close to a year to complete the  
2 job.

3                       Well, no. Pardon me. I am sorry.

4                       The first phase, I think, was 90 days, I believe.  
5 I don't know. It is hard for me to remember that.

6           Q           Okay. One thing I am interested in: In other  
7 words, there was a time frame set for each phase?

8           A           That's right.

9           Q           And to the best of your recollection phase one  
10 was 90 days?

11          A           I believe so.

12          Q           And I believe you testified that the contract  
13 for phase one was begun in September?

14          A           That's right.

15          Q           So, basically, from whatever - and I am not sure  
16 I have the specific date you gave if you gave a date in  
17 September; I think you just said began in September - 90 days  
18 thereafter was when that was to be completed?

19          A           Phase one.

20          Q           Yes, sir.

21                       And phase one is what we are talking about which  
22 involved the flooring?

23          A           That's right.

24          Q           Now, I believe in addition you indicated that  
25 you saw underlaying or washboarding effect of the floor?

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1 A Right.

2 Q In your capacity with the Corps of Engineers,  
3 would you be aware of any request for extensions under this  
4 project?

5 A Yes, I would.

6 Q Under phase one of this project were there any  
7 requests for extension of time that you are aware of?

8 A Yes. There was a request of time.

9 Q When was that made?

10 A Well, I think it's been requested several times  
11 throughout the contract, and -- but I cannot pinpoint a time.  
12 We have the letters in file - different times, you know, there  
13 have been requests. There's been different opinions on the  
14 part of the contractor and the government during this time for  
15 phase one. And there's been so many different decisions made  
16 I could not pinpoint a certain, you know --

17 Q Do these requests of extensions have to be  
18 pretty specific as to why they are requesting an extension?

19 A Oh, yes; yes.

20 Q Were these requests based upon the plastering  
21 work?

22 A Yes, ones that I am aware of were based upon the  
23 plastering work.

24 MR. ADAMS: I have nothing further.

25 THE COURT: Mr. Tucker, any questions?

1 MR. TUCKER: Just one or two, Your Honor.

2

3 BY MR. TUCKER:

4 Q Mr. Bare, do you recall approximately what  
5 period of time the flooring contract extended over?

6 A You -- are you speaking from Mr. Kidwell --

7 Q Yes, Mr. Kidwell's work on the job.

8 A Just Mr. Kidwell's?

9 Probably -- well, if the work started in  
10 January or February, I guess a month. Again, I am guessing.

11 Q And I believe you testified earlier that when  
12 you first noticed the deficiency the problem was toward the  
13 end of the job, that is, toward the end of Mr. Kidwell's  
14 participation; is that correct?

15 A Yes, I believe so; yes.

16 Q And you had been --

17 Had you been inspecting the job on a daily  
18 basis?

19 A Yes. I am there on a daily basis; yes.

20 Q So you had been inspecting it over a period of  
21 approximately several weeks toward the end of the month before  
22 you really noticed this problem?

23 A Yes; yes.

24 Q And it was at that point you made the deficiency  
25 report, I believe; is that correct?

1 A That's correct.

2 Q If that were dated on the 28th -- 27th, I think,  
3 of January that would be about the time that you discovered this  
4 problem?

5 A That's right.

6 Q Okay. Now, one other question.

7 You testified that in answer to direct  
8 examination that one of the problems was a washboard effect --

9 A That's right.

10 Q -- which you noticed. I assume you are talking  
11 about a sort of a wavering or rimming effect on the floor,  
12 itself?

13 A That's correct.

14 Q And this would have been caused, in your opinion,  
15 by improper preparation of the surface; is that correct?

16 A That's right.

17 Q All right. Now, would not, Mr. Bare, that have  
18 an effect on the way the tile sets up, that is, whether the tile  
19 is going to set up as it should point to point; isn't that  
20 correct?

21 A It would have --

22 MR. BURNSIDE: I object. He is not a flooring  
23 expert.

24 THE COURT: He is your witness. I am going  
25 to let him answer the question.

1 THE WITNESS: Yes. It would have an effect.

2

3 BY MR. TUCKER:

4 Q It would have an effect on the way that tile  
5 is set up and it would indicate or make it so that it wouldn't  
6 set up as it should. Isn't that correct?

7 A That's correct.

8 THE COURT: Mr. White?

9

REDIRECT EXAMINATION

10

11 BY MR. WHITE:

12 Q How long would it take for the overlay, that is,  
13 after Mr. Kidwell left and you got this floor there and a  
14 decision was made to put an overlay - how long did that take?  
15 Do you recall?

16 MR. BURNSIDE: Object. That was never  
17 covered by any of the attorneys in examination.

18 THE COURT: He is entitled to ask him how  
19 long it took.

20 THE WITNESS: How long did it take?

21

22 BY MR. WHITE:

23 Q Yes. How long did it take for the new contractor  
24 and Mr. Wilkinson working together to complete that work?

25 A Well, I think the work was probably extended

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1 put back down again after the subflooring was corrected?

2 A It could have been, yes.

3 Q Yes, sir.

4 And after all this subflooring work had been  
5 done you still noticed throughout the building that there was  
6 an un-uniformity or out of square of tile; isn't that true?

7 A That's true.

8 Q All right. So, in fact, the overlay was needed  
9 by the fact that the tiles were out of square?

10 A That's right.

11 Q Now, on the question of when the first phase was  
12 to be done, you stated 90 days. But in order to establish for  
13 the jury, isn't it true - and we will assume for a moment it is  
14 90 days - that that 90 days does not begin to run until the  
15 contractor gets a notice to proceed from the Corps of Engineers?

16 A That's right.

17 Q And, in fact, was not the Wilkinson Corporation  
18 assessed liquidated damages on phase one?

19 A Yes, sir; yes, sir.

20 THE COURT: I think he's already answered  
21 that question.

22

23 BY MR. BURNSIDE:

24 Q What was the rate of liquidated damage per day?

25 A I think it is 50, 75 dollars a day, I believe

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1           A           Well, literally sand the floor, sand the  
2 existing overlay, removing any debris or wax.

3                   I believe this tile comes with some kind of  
4 a factory wax already applied to it. All that had to be  
5 removed and then we had to acid edge it, and before we --- and  
6 have it approved and inspected before we applied the new  
7 mastic and applied the new tile.

8           Q           All right, sir. To your knowledge, as to the  
9 scuffing, as you call it, the tile that had been laid by  
10 Kidwell - did a subcontractor perform that work or did employees  
11 of the Wilkinson Corporation perform that work?

12           A           Employees of the Wilkinson Corporation did that  
13 work under my direction.

14           Q           All right, sir. After that work was performed  
15 do you know if a subcontractor was retained to place the  
16 overlay on it?

17           A           Yes, sir.

18           Q           Who was that?

19           A           Frank Hare.

20           Q           And, now, at the time that you noticed the tiles  
21 being out of square as revealed in these photographs, in part,  
22 did you make any complaint about the condition of the tile to  
23 anybody?

24           A           Yes, sir, I did. Of course, I instructed  
25 Mr. Wilkinson -- was my first step.

1                   The second step was -- the Corps of Engineers,  
2 of course, had an inspector, Mr. Bare, and I showed all of that  
3 to them --

4                   Q           Right.

5                   A           -- what Mr. Neff and myself had found - the tiles  
6 being out of square - and also Mr. Kidwell. Mr. Tom McBride  
7 also was informed of it, and I believe Woody Distributors got  
8 into it.

9                   Q           Specifically as to a Mr. Tom McBride, did you  
10 notify him personally?

11                  A           No, sir.

12                  Q           Pardon me?

13                  A           No, sir, not that I remember. I don't know  
14 if I can remember that exactly right how he was informed.  
15 He is a Flintkote representative, and I think -- the way it  
16 happened was I contacted Woody Distributors and they more or  
17 less shrugged their shoulders at it - "Well, no big deal."

18                               I'm not too exactly sure how he got in on that.

19                  Q           Well, did there -- was there ever an occasion  
20 where you and Mr. McBride confronted each other face-to-face?

21                  A           Yes, sir. He visited the job site.

22                  Q           Now, before he came to the job site did you at  
23 any time remove a portion of the tiles installed by Kidwell?

24                  A           Yes, sir.

25                  Q           As to the tiles you removed, did you deliver

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## CROSS-EXAMINATION

BY MR. ADAMS:

Q Mr. Simonds, in your direct testimony you indicated that when you were polishing the floor you noticed some grouting coming up between the tiles; is that correct?

A Yes. This is mastic, not grouting.

Q Mastic - a name for it; is that right?

A Yes, sir.

Q All right. Could that have been due to the fact that the tiles were out of square?

A No, sir.

Q Why do you say that?

A Because on one of my visits between building 27 and 82, actual installation by Mr. Kidwell personnel -- was their method of installation is not consistent with the way tile would normally be put down.

Q But that mastic, whatever that was spilled out, was basically cleaned up, was it not?

A Yes, sir, except for leaving a brown stain in the tile, which was not accepted by the Corps of Engineers.

Q And you indicated that in direct that you had a problem with the tile not put down square, is the way I wrote it down. Is that what you meant when in referring to the pictures the tiles do not prove to be square?



1           A           I don't quite understand that. I think it was  
2 two questions there.

3           Q           You made the comment that the tiles were not put  
4 down square.

5                       MR. WHITE: He didn't say that.

6                       THE WITNESS: I didn't say that.

7

8 BY MR. ADAMS:

9           Q           You didn't say that?

10          A           No, sir.

11          Q           Did you say that the tiles were out of square?

12          A           Yes, sir.

13          Q           Did you remove some tiles yourself that were  
14 later given --

15          A           Myself and Duane Neff.

16          Q           And you indicated you didn't tamper with them.

17          A           No, sir.

18          Q           And you gave them to your company?

19          A           Yes, sir.

20          Q           All right. Did you examine those tiles at that  
21 time?

22          A           Yes, sir.

23          Q           Do you agree with Mr. Wilkinson's statement that  
24 they had not been cut?

25          A           Yes, sir. The fractions that we were talking

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1 Q Okay. The first occasion that you had of any  
2 problem with the flooring job done by Mr. Kidwell was towards  
3 the end of his work, towards the end of January; isn't that  
4 right?

5 A Yes. You have got to realize that you have got  
6 to look at this thing as an overall picture.

7 Q It is not until you see the entire, completed  
8 job that you can tell there is some problem?

9 A Yes, sir.

10 Q And that would have been around the 29th of  
11 January, which was the date of this letter that you wrote to  
12 Mr. McBride; is that correct?

13 A Yes, sir.

14 Q Would it have been on the 29th that you first  
15 noticed the problem?

16 A No, sir. I don't recollect exactly what day  
17 it was.

18 Q Well, if not the 29th, it would have been only  
19 maybe one or two days before that?

20 A I'm not exactly sure. I can't remember exactly  
21 when it was.

22 Q All right, sir. Well, you had had no complaints  
23 or no conversations with Mr. Kidwell prior to that time that  
24 he was having any problem with the work, had you?

25 A I don't remember exactly when I had talked to

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1 Q Well, I mean, you saw that yourself: That there  
2 were areas in the room - 105 - the main area that showed that  
3 there was a necessity for leveling off the high spots?

4 A Yes, sir. That was a contract requirement of  
5 Kidwell.

6 Q All right. But that was a problem that had to be  
7 rectified?

8 A Yes, sir.

9 Q And it was evident to Wilkinson Company, as well  
10 as to J. Mae Carpeting? You discussed it with them?

11 Did you ever discuss with them --

12 A Oh, yes.

13 Q -- this question?

14 All right. And the Army Corps of Engineers, in  
15 the course of making their inspection, insisted that this  
16 subflooring be leveled.

17 And, of course, that meant that this tile had  
18 to be taken up in order to smooth it out; is that correct?

19 A That was -- you are talking about the second  
20 installation?

21 Q No. I am talking about the first.

22 A There was no tile removal in the first  
23 installation.

24 Q There was no tile removed in the first  
25 installation?

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1 THE COURT: Yes, sir.

2

3 BY MR. TUCKER:

4 Q Mr. Simonds, it is true, is it not, it was at  
5 Mr. McBride's request that you picked up the eight tiles so that  
6 they could take a look at them?

7 A I believe that was Woody Distributors' requirement  
8 for the replacement, for them to authorize the expending of the  
9 new materials.

10 Q It is your testimony that that was the request  
11 of Woody Distributors that you pick up the eight tiles so they  
12 could take a look at them?

13 A Right. And before they would authorize the  
14 reissuance of more materials.

15 Q Okay. Could you tell us where those tiles came  
16 from? Did they come from the interior of the room or did some  
17 of them come from along the wall?

18 A No, sir. I believe two -- we like spot-checked  
19 them. And I think two of the tiles came from 105. And I can't  
20 remember -- if I may look at the plans I will remember which  
21 rooms they came from.

22 They came from corridor 109, room 104, 105 -  
23 I think two came out of 105 - 110. I think we got another one  
24 over here at the back end of the corridor, also.

25 Q So that was a total of eight?

1 A I believe so.

2 Q So they all did come from the floor, then?

3 A Oh, yes.

4 Q I understood you earlier to say you had taken  
5 four out of a carton that had not been used.

6 A No. We had compared.

7 To select the one, we would find a square, level  
8 area. Then we would pull that tile out.

9 Q But the total of eight came from the floor and  
10 actually had been put down on the floor?

11 A The floor installation.

12 Q Were some of those -- did some of those come  
13 alongside the wall or out of the center of the room?

14 A Out of the center.

15 Q None came from the side of the wall?

16 A No, sir.

17 Q One question: The overlayment that was done -  
18 can you tell us what period of time was required or would have  
19 been required to have done that work, to overlay the floor?

20 A Oh, good God. It took us a good six to eight  
21 weeks before we got the job even moving to, you know, getting it  
22 down to completion.

23 Q Took you a total of six to eight weeks to do that?

24 A My -- best of my recollection, somewhere around  
25 there, maybe more.

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1 on the job and checking materials and see if it's in good shape,  
2 you know, and all that.

3 Q All right. Now, as a superintendent, specifically  
4 during January, February and March of this year, what project  
5 were you assigned to?

6 A I was in building 82 at Fort Monroe.

7 Q All right, sir. Now, during that period of  
8 time, was there an occasion when a subcontractor appeared on  
9 the job for the purpose of doing flooring work?

10 A Yes, sir.

11 Q Who was that?

12 A Jayen Construction Company.

13 No. I forget --

14 Q Is the gentleman present in this room?

15 A Yes, sir.

16 Q All right. Can you point him out, sir?

17 A The one on the end over there.

18 Q All right, sir. Now, during the course of his  
19 work, did there ever come a time when you actually noticed or  
20 otherwise inspected his work?

21 A Yes, sir.

22 Q All right. Now, as a result of your various  
23 inspections, did you come to any conclusions with regard to his  
24 work?

25 A Well, his workmanship seemed to be all right,

1 you know -- preparing of the floors, and this and that, you know,  
2 the proper -- you know, the regular procedures that you go  
3 through for laying the floor.

4 But when they went to laying the floor they had  
5 problems of keeping your tile straight on the floor. In other  
6 words, it appeared to be out of square on that.

7 So he had problems laying the floor.

8 Q All right. Now, when you first noticed that the  
9 floor was out of square, do you recall approximately how much  
10 of the tile he had laid in that building?

11 A I imagine in this one particular room I imagine  
12 about five or six hundred square feet of floor tile.

T12

13 Q How about in the other rooms?

14 A And then there's one room that was approximately  
15 12 feet by 50 feet long in there. So whatever --

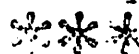
16 Q Had he laid that floor completely?

17 A Yes. That floor he laid completely.

18 Q Now, you have used a term "out of square".

19 In order that I, the jury and the other people in this  
20 courtroom can understand that, would you explain what you mean  
21 by using that term.

22 A Well, laying a floor, whenever you -- normally  
23 you start in the center of the room to get the center of the  
24 room. Then you lay -- start your floor tile down through  
25 the center of the room, and then you start running your tile



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1 In other words, they were supposed to measure 12 inches, and  
2 some of them wouldn't measure 12 inches. It would be 11 and  
3 seven-eighths.

4 And I'd say they vary because some of them would  
5 be off an eighth of an inch, some of them may be a sixteenth  
6 of an inch. And as you keep laying tile like that, well, you  
7 are going to get off a long ways as you go across the room.

8 Q All right. Looking at those photographs, how  
9 much are they out, that is, the tiles out?

10 A It is a good quarter of an inch according to  
11 the rule.

12 THE COURT: Which exhibit are you looking at?

13

14 BY MR. BURNSIDE:

15 Q That would have been Plaintiff's Exhibit 12.

16 And how about Plaintiff's Exhibit 11?

17 A As close as I can see, it would be a little over  
18 a quarter of an inch that that tile is out.

19 Q Now, did this condition exist throughout the  
20 building?

21 A Yes, sir. We had trouble with it throughout  
22 the building.

23 Q Is it normal for tile to be in that condition?

24 A No, sir, not the experience I have had with  
25 tile. Didn't have that much problems.



1 Q Now, as a result of this condition occurring,  
2 was there any work that had to be performed?

3 A We had -- after the floor -- we inspected --  
4 the Corps inspected and, of course, they wouldn't have the --  
5 it was out of square and it was a little bit out of alignment  
6 and, of course, they wouldn't accept it. They are pretty  
7 strict on their rules and your application and all that.

8 Q Well, what did you have to do as a result of  
9 that?

10 A We had to take these tiles up and try to go  
11 ahead and get the thing straightened out in a straight line.  
12 But with the tile that we had we couldn't do it.

13 Q All right. Then what did you do after that?

14 A Only thing we could do then is go over the top  
15 of this floor with another complete floor.

16 Q How long do you think it took for that to be  
17 completed once it was determined an overlay was needed?

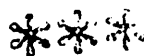
18 A The preparations and everything - it took us  
19 over three weeks, I know. We had three or four men getting  
20 things, you know, ready.

21 Q These three or four men - who were they employed  
22 by?

23 A W. W. Wilkinson.

24 Q Who supervised the work of these men?

25 A I did.



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1 A In that one area.

2 Q All right. Now, when you did that patchwork,  
3 did the Army Corps of Engineers approve that? Could you tell  
4 where they had been lifted up and worked on?

5 A In some areas you couldn't tell it. Maybe in  
6 other areas we had to replace some others, you know, that had  
7 a little bit of mastic or something on it, you know, discolored  
8 a little.

9 Q Had a little trouble with that, didn't you?

10 A Just a little bit.

11 Q Did any of this grouting ooze up between the  
12 squares and cause any stain that you observed?

13 A In small -- maybe an eight- or ten-tile --

14 Q You had to replace those?

15 A Yes, sir.

16 Q All right. Now, let me ask you this: What was  
17 the square footage involved in this contract? How much in the  
18 way of square footage are we dealing with?

19 A I am just going to say approximately 5,000  
20 feet, give or take some. It's close, I believe.

21 Q That would be 5,000 pieces of tile that would  
22 be put down, if it was 5,000 square feet, wouldn't it?

23 A Yes, sir.

24 Q And you picked up how many that you saw that  
25 were irregular out of that 5,000 that would have --

1                   How many, by the way, were laid? Not all of  
2                   them were laid, were they, before Kidwell left?

3           A           The biggest part of them were laid.

4           Q           About two-thirds?

5           A           Probably over two-thirds; yes, sir.

6           Q           So that would be over 3,000 squares of tile that  
7                   would be laid if it was 5,000 square foot --

8           A           Yes, sir.

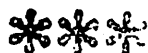
9           Q           -- involved?

10                   Well, how many of those 3,000 did you see that  
11                   didn't look square of the 3,000 that were laid down?

12           A           Well, I didn't look that far. After you find  
13                   some of them is out you go along and check where it starts  
14                   running out and check a few of them and see that they are out.  
15                   You go measure them and see that they are out. There's no use  
16                   of looking any farther because you have done so much damage  
17                   on the other floor that would run straight.

18           Q           All right. Now, did the Army Corps of Engineers  
19                   approve any rooms with the tile laid down, one coat, that is,  
20                   one layer of tile? Did they approve any rooms?

21           A           You kind of putting me on the spot. Whether  
22                   they approved of it or not is really not approved of until it  
23                   goes through the office, through my office up there. They can  
24                   say one thing on the job. Until it is really approved of,  
25                   accepted, and it has to go through my office --



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1 A 604 Edwards Road, Annapolis, Maryland.

2 Q How long have you worked for the Flintkote  
3 Company?

4 A Twelve years.

5 Q In what capacity?

6 A Territorial Sales Manager.

7 Q Have you had flooring experience other than with  
8 Flintkote?

9 A No, sir.

10 Q All right. Now, during your employ with  
11 Flintkote, did you have occasion to receive a telephone call  
12 from a representative of Wilkinson Corporation concerning tile  
13 manufactured by Flintkote and utilized at the Fort Monroe  
14 project?

15 A Yes, I did.

16 Q What was the date that you received that telephone  
17 call?

18 A The last week of January prior to the 29th.

19 Q All right. And at that time were you notified  
20 of a complaint concerning the Flintkote tiles?

21 A Yes, I was.

22 MR. BURNSIDE: All right, sir.

23 That's all I have, Your Honor.

24 THE COURT: Any questions at this time?

25 Any questions at this time, Mr. White?

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1 bid goes.<sup>o</sup> This is our acceptance, approval. We have it.  
2 This is what we are going to need to comply with the bid and  
3 these are the requirements you will have in order to be able  
4 to comply with that bid. I will leave it to you to give me  
5 the material I need to submit that will be acceptable under  
6 those requirements."

7 Q And did you subsequently receive materials from  
8 them?

9 A We received materials and we also received their  
10 manufacturer's booklets stating what government specification  
11 code numbers complied with the material they were giving me  
12 that they were manufacturing.

13 Q All right. In connection with materials  
14 received, who did you get all these materials from?

15 A Well, actually it started off with Bill Morgan  
16 and after a bit of a delay he admitted that he wasn't familiar  
17 with that type of work and that we would have to move to his  
18 store manager, office manager, Mr. Stu Earley.

19 And at that time then the balance of the  
20 information came from him.

21 Q All right. As a result of receiving materials,  
22 by that I mean tile samples and literature, did you receive  
23 this document?

24 A We received this document, and I think  
25 quantity of eight plus whatever additional information it took

1 to cover all the specifications we had.

2 Q What did you do with that document and the other  
3 documentation you received?

4 A Well, it was my understanding from the general  
5 contractor that we had to make this up into packages of three.  
6 Each one of these documents we had plus each one of the samples  
7 we had to be submitted to either he and two other parties  
8 belonging to the government or three parties belonging to the  
9 government from those packages. Then we would select.

10 Q And you did prepare such packages for approval  
11 of the material for use in this job?

12 A That's correct.

13 Q In fact, could you have gone to work prior to  
14 that time?

15 A No. We can't even go on the job until after  
16 we have an acceptance of those materials.

17 Q And you did indicate this was one of the  
18 documents you received?

19 A That's true.

20 Q And to whom did you deliver these packets  
21 including that document?

22 A They would have gone to the general contractor  
23 because he is in control of his own job and handles all  
24 submittals himself.

25 Q Did you review any of these documents and the --

1 with the general and any of his representatives?

2 A I would say as far as making sure that we were  
3 both understanding what's involved, what we are submitting,  
4 and that it complies, I would say a review was conducted.

5 Now, when or exactly how in detail it was, I  
6 couldn't say for sure.

7 MR. ADAMS: If Your Honor please, I would --

8 THE COURT: The other defendants have seen it?

9 MR. ADAMS: Yes. They have seen it.

10 THE COURT: Marked D-2, Kidwell.

11 (The document referred to was  
12 marked and received in evidence  
13 as Defendant Kidwell Exhibit 2.)  
14

15 BY MR. ADAMS:

16 Q Did you, in connection with that document, have  
17 any conversations or discussions in connection with Section 3  
18 with any one of the general contractors, W. W. Wilkinson,  
19 Inc.?

20 A Well, Mr. Wilkinson said that it would be  
21 imperative for me to go over there and observe the location  
22 which we were going to work in. And we didn't probably look  
23 as closely as we should have.

24 We didn't make a real close inspection.

25 The section 3 deals with responsibilities of

1 parties. And it would have been my understanding that the  
2 grout line that I mentioned before was repair work or floor  
3 repair that we would have been dealing with. I don't believe  
4 anything was mentioned of any other repairs at all.

5 Q What does the last sentence say?

6 A "It shall be the responsibility of the general  
7 contractor to provide subfloors that will be satisfactory."

8 Q All right. Other than the work that you --  
9 was indicated to you to be done, was any other work ever  
10 requested of you as to the subflooring?

11 A Not at the time we started the work; no.

12 Q All right. And as a result of getting the bid,  
13 did you immediately place your order for the tile material?

14 A Well, as soon as they said they could fill it.

15 Q When was that?

16 I note that your acceptance was the 29th, I  
17 believe, of November.

18 A Let me see if I understand you correctly. When  
19 did they say they could fill the order, or when did the order  
20 arrive to be picked up?

21 Q When did you place the order?

22 A Approximately two weeks before it arrived,  
23 before we could pick it up.

24 Q So the tiles involved, the tiles in question,  
25 were not on hand at the Woody warehouse?



1 A No.

2 Q And when did you first receive any of the tiles?

3 A I believe our first pickup was about the 26th or  
4 27th of December.

5 Q When did you begin the preparation or the  
6 process necessary to begin installing the tile?

7 A That same day.

8 Q And what then transpired as you prepared? Did  
9 you first prepare the grout line?

10 A Yes, we did.

11 Q All right. And then what did you do?

12 A Well, you have a drying time. If you want to  
13 spread an adhesive over top of floor patch you have to give it  
14 enough time to dry out or else the notches on the trowel you  
15 use to put the adhesive on will dig the patches back up,  
16 especially if it is in a thin coat.

17 So I think we gave it approximately six hours  
18 to dry and came back and proceeded to find the center of the  
19 room which involves dropping two chalk lines approximately  
20 center or making the center mark of the room and then spreading  
21 glue in the first one-quarter of the center of that room.

22 Q All right. Then tell the jury what happend as  
23 you began that process.

24 A Well, it is not exactly an easy process. The  
25 government requires you to wait 12 hours after the glue is

1 spread for it to become tacky enough to set the block without  
2 getting on the block or without coming up through the seams of  
3 the block.

4 So we did that also. So about 12:30 that night  
5 we began to lay the block.

6 We went approximately 18 feet, five rows wide  
7 and ran into a problem with the block not quite lining up.

8 So at that point we went back to the beginning  
9 point and dropped another chalk line to see if it was a matter  
10 of getting off the line, because it is staying on the line  
11 that makes you straight in the initial blocks.

12 And we couldn't see any evidence of being off  
13 the line. So we carry a nine-foot straight edge. And it is  
14 very reliable as far as you keeping it straight -- laid it on  
15 the leading edge of the first row of blocks to determine  
16 whether those blocks were out in any way.

17 On that leading edge none of the blocks were out.  
18 By the time we went five over and eighteen feet down, we were  
19 out sixteenth of an inch on all five rows of block.

20 Q When you began laying the block, was the  
21 subfloor prepared as far as your work done for the acceptance  
22 of the block?

23 A Yeah.

24 Well, at that particular part of the floor we  
25 started the grout, in that particular part of the floor was

1 relatively high. And so there wasn't a lot of floor patch  
2 needed to make that floor level.

3 And because of that we didn't have any question  
4 about the floor, itself, throwing the block off. We assumed  
5 or presumed the block itself was out.

6 Q All right. And you laid the five rows wide and  
7 about 18 feet long.

8 What did you do when you saw it was out a  
9 sixteenth?

10 A Well, we really didn't know how particular they  
11 were going to be about that drift. It's 12:30 at night and  
12 we have got four guys staying there and saying, "Well, what  
13 do you think?"

14 So the conclusion we came to was: Proceed.

15 So we continued laying the block all the way  
16 across the floor and finished out that section that we had  
17 glued.

18 And I think it was the next day or day after  
19 that when we ran into Mr. Neff and told him that we were having  
20 a drift in the block; and how was that going to affect the  
21 end result?

22 And he said he wasn't sure; that he'd have to  
23 check with the inspector.

24 So during this time, then, we proceeded. Two  
25 men were patching the floor. One man was spreading glue and

1 one laying block.

2 By the time we got an inspector out to look,  
3 we had another two rooms of the job done and half of that room  
4 105 was completed.

5 And it was at that point he said he felt like  
6 the block or the installation wasn't going to be acceptable.

7 Q All right. And what comments did he make about  
8 the floor at that point, if any?

9 A Well, I think what he was attempting to say --  
10 that we weren't going about the installation correctly or else  
11 it would work out right.

12 And I said, "I don't agree with you. I believe  
13 that the laying -- if you are talking about the difficulty in  
14 the block, all you have to do is start right. If you start  
15 right, then it is going to work out right."

16 And that's what we were really talking about -  
17 was the block itself not being in square. And there was nothing  
18 we could do about that.

19 He said, "Isn't there anything you could do?  
20 Couldn't you cut it?"

21 I said, "No, because once we cut any, then we  
22 are throwing the floor out ourselves the rest of the way."

23 Besides that, we have estimated that job based  
24 on putting it down once right and to go back and do any cutting  
25 is to back up. We would start losing money before we could get

1 halfway through the job.

2 Q Did you cut any of the block you were laying at  
3 this point?

4 A Only the wall trim blocks. This particular  
5 section we was laying was like in the shape of an L. We  
6 finished that section out. You had the wall trim blocks on the  
7 wall all the way around that shape. So that would be approximately  
8 oh, I'd say, 120, 150 blocks that were cut to be fill block on  
9 the wall.

10 Q But that is standard practice in the industry to  
11 cut blocks?

12 A Well, yeah, because if you were dealing with a  
13 one-foot block square, rarely would you ever find a room that  
14 worked out 12 feet. It would be eleven-ten, eleven-six or  
15 something like that. And the blocks put down correctly starting  
16 in the center of the room would work out so wherever you got to  
17 the wall you would be dealing with part of a block and would  
18 have to be cut.

19 Q That's standard in the industry?

20 A Oh, sure.

21 Q All right. When you saw a drift in the blocks,  
22 as indicated, did you take any effort, make any effort, to  
23 try and correct that drift?

24 A Yeah. We had gone the five rows the entire 40  
25 feet or 41 feet across the room. Then the last 20 blocks, the

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1 case, called Roger Mapes with Woody in Roanoke, which is their  
2 main office, and I said, "It is my understanding that you are  
3 the person that handles all commercial jobs dealing with your  
4 product. I got a problem of the block being out of square.  
5 I got a problem getting the block. When I am ready to get  
6 block there is no block there. I got a problem with just  
7 everything on this job -- has been going unfair.

8 "Now, we have had our problems. We have taken  
9 our lumps. And I think we have got the bulk of our problems  
10 straightened out.

11 "I would like at this point to have you tell me  
12 from now on my entire order will be setting there at Woody  
13 Distributors in Virginia Beach. I will be ready to pick it up.  
14 If we have any problem with any of the blocks being out of  
15 square, that we will get replacement blocks for those and I  
16 won't be forced to buy additional blocks needed to do this."

17 I calmly and deliberately and exactly or  
18 particularly told him everything that had gone wrong on that  
19 job; where I felt they were at fault, both as distributor and  
20 from the manufacturing end.

21 And I asked that "Isn't there some way we can  
22 work this out so I can finish this job and get out of there  
23 suffering as mild setback, or whatever time loss, or as much  
24 discomfort to the general contractor as I could."

25 His answer to me then was: --

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1 MR. TUCKER: I have to object to the

2 conversation he had with someone on the telephone  
3 in Roanoke. I don't think that's proper evidence by  
4 this witness.

5 MR. ADAMS: If Your Honor please, he has  
6 indicated this was a representative of the  
7 defendant Woody, an officer of Woody.

8 THE COURT: That was my understanding.

9 Who was this man?

10 THE WITNESS: Roger Mapes, M-a-p-e-s, I  
11 believe.

12  
13 BY MR. ADAMS:

14 Q By whom is he employed?

15 A Woody.

16 THE COURT: If that's correct, he indicated  
17 it was an agent of your company, I believe he would  
18 be entitled to testify to it.

19 THE WITNESS: At any rate, what it amounted  
20 to was at that moment he told me that everything would  
21 be taken care of; that nobody dealing with an order  
22 that size deserved more attention than what we had  
23 gotten. If we had any trouble from Virginia Beach -  
24 they were getting set up; little bit disordered -  
25 and because the bulk of the order had been coming from

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1 virtue of cutting anything but wall blocks.

2 "Now, we have got to straighten this up."

3 And from then on it was like I couldn't get him  
4 when I called him or he ho-hummed through the conversation.

5 So I went back to Mr. Wilkinson. I said,  
6 "If I can't get any help from these people I am buying it from,  
7 and I can't get block to put down that will work, I don't see  
8 how we can go on about the job."

9 Q So then --

10 A He said he would talk to them. I said, "I don't  
11 think it is going to do you any good because you don't have  
12 anything to do with the purchase. I am the one that bought it.  
13 If you go talk to them, they are not going to listen to you  
14 because you don't have anything to do with the block."

15 I think he did anyway. But from then on I  
16 referred to Mr. Neff. Mr. Neff referred to Mr. Wilkinson.  
17 And as far as I know, he attempted to get some kind of results  
18 from either Woody or Flintkote.

19 Q Did you ever direct your complaints directly  
20 to Mr. Earley of Woody here in Tidewater?

21 A Just once. And on that one occasion I felt like  
22 we were dealing in an area he wasn't familiar with -- commercial  
23 contracting.

24 Q I hand you Plaintiff's Exhibit No. 4 - is a  
25 letter from Mr. Earley to the plaintiff - indicating that, in

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1 counsel out of the hearing  
2 of the reporter and the jury.)  
3

4 MR. WHITE: I would note my objection to the  
5 Court's ruling about these checks.

6 THE COURT: Defendant's 3 and 4, Kidwell.

7 (The checks referred to were  
8 marked and received in evidence  
9 as Defendant Kidwell's Exhibits  
10 3 and 4, respectively.)  
11

12 BY MR. ADAMS:

13 Q I hand you what has been marked as Defendant's  
14 Exhibit No. 3, Kidwell, and ask you what those checks relate  
15 to and the total.

16 A Well, basically I think we are dealing with  
17 expenses for the job. There's only a few wage checks in here.  
18 The rest of them would be supplies, gas, stuff like that.

19 Q What is the total of those checks?

20 A I beg your pardon?

21 Two thousand, two hundred sixty-four dollars  
22 two cents.

23 Q And do all those checks relate to payments made  
24 in connection with the sub job at Fort Monroe?

25 A No. One here for Southern Tile that doesn't.

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1 you a packet of checks which, I believe, you indicated the  
2 total \$2,264.02 from which you had removed four checks totaling  
3 \$490.02. Is that correct?

4 A Uh-huh. That's correct.

5 Q Can you give me a new figure on that packet?

6 A Sure. \$1,774.

7 Q All right, sir. And you indicated that you  
8 received \$1534 towards this job?

9 A That's correct.

10 Q From whom did you receive that?

11 A Mr. Wilkinson.

12 Q What did you do with those funds?

13 A Well, in most cases we cashed the check he gave  
14 us, deposited it to our account, so we'd have a check on our  
15 account to prove what the money was used for.

16 Q What did you use those funds for?

17 A Well, to my knowledge I don't think we used any  
18 of them for wage, although on the second \$500 check I explained  
19 to him at the time that we wanted that money to cover wages.  
20 But I don't believe it was used for wages because we were more  
21 in need of materials than we were in need of wage money.  
22 So we reverted it and used it for materials, also.

23 Q So you are indicating that you spent all \$1534  
24 for materials from Woody Distributors?

25 A That and then some.

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1 Q All right, sir. And isn't that section 9-E  
2 there, sir?

3 A Yeah. But it depends on your interpretation.

4 Q I asked you -- all I asked you is that section  
5 9-E correct?

6 A Sure.

7 Q All right. Now, you just stated that you were  
8 paid \$1500 -- \$1534.

9 A I prefer not to call that pay. I call that  
10 pay -- it was used for material.

11 Q Advance. All right, sir.

12 Give you an opportunity to recount that.

13 Isn't it correct that it was \$2,034?

14 If you compare check numbers you will see that it was, in fact,  
15 that amount.

16 A It could be.

17 Okay. I would agree with that.

18 MR. BURNSIDE: All right, sir. I offer  
19 that, Your Honor.

20 THE COURT: I don't believe they have seen it.

21 MR. BURNSIDE: I will give them the opportunity.

22 THE COURT: Plaintiff's Exhibit No. 16. I'll  
23 mark this one exhibit.

24 MR. BURNSIDE: Yes, sir. That will be  
25 fine.

(The documents referred to  
were marked and received in  
evidence as Plaintiff's  
Exhibit 16.)

BY MR. BURNSIDE:

Q All right. Now, Mr. Kidwell, how many tiles  
or squares of tiles, however they are called, come to one box  
or --

A Forty-five.

Q Forty-five, sir?

Now, how many boxes did you order?

A Hundred fifty-six.

Q Now, by just roughing it, the approximate --  
that would equal out to approximately 7,000 square feet; is  
that correct?

A I think so.

Q All right. Now, how many boxes did you actually  
use?

A Well, I don't know with what we took up and put  
back again and all; I don't know. We have tickets to say.  
I don't know. We have got a ticket to show what we picked up,  
of the count, if it is important to know exactly.

Q Would it be 96 boxes?

A I really don't know.

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1 you actually made a selection or someone made a selection of  
2 what's to be used, did Woody acknowledge this in writing at all?

3 A That they could fill the order?

4 Q That's right.

5 A Yeah, I would say so, from my understanding.

6 Q Would Woody have a copy of that?

7 MR. TUCKER: This is a copy of the purchase  
8 order, if that's what you are talking about.

9 MR. BURNSIDE: Yes, sir.  
10

11 BY MR. BURNSIDE:

12 Q Would this document -- could you review that  
13 document and determine whether or not you, in fact, received  
14 that document?

15 A Well, it looks like the order that we had  
16 originally submitted. I don't know that I have ever seen it.

17 THE COURT: If he can't identify it, he  
18 can't identify it.  
19

20 BY MR. BURNSIDE:

21 Q Are you certain you can't identify it?

22 A I don't believe I have ever seen it. But, I mean,  
23 you are talking about some time ago.

24 Q All right, sir. Is this the only document that  
25 you recall having been picked up from Woody Distributors?

1           A           It seemed like to me it was two. If my memory  
2 serves me correctly, the other one was colored and the color  
3 of it is green and white.

4           Q           All right. Now, as to this document, on the  
5 very front of it what does it purport to be?

6           A           Well, an architect's guide for specifications  
7 for Flintkote floors.

8           Q           And the front of that document doesn't state on  
9 there -- doesn't give you a notice that Flintkote is trying to  
10 limit their warranty at all, does it?

11          A           I hope not. I mean, it doesn't; no.

12          Q           Right.

13                   In other words, it doesn't put you on notice in  
14 any way that on the back they tried to --

15                   THE COURT: It will speak for itself.

16                   MR. WHITE: It sounds good --

17                   THE WITNESS: The question was on the face  
18 of it.

19                   THE COURT: You answered that question.

20                   MR. BURNSIDE: All right, sir.

21

22 BY MR. BURNSIDE:

23           Q           As a matter of fact, at the bottom of this last  
24 page it doesn't indicate, "Turn over," at all, "for limitation  
25 of warranty," does it?

1 A I am not sure I follow that.

2 Q Is there any notice on here --

3 MR. WHITE: What that says says whatever it  
4 does.

5 THE COURT: I think the document speaks for  
6 itself. I sustain that.

7 The jury can read it.

8 MR. BURNSIDE: All right, sir.

9

10 BY MR. BURNSIDE:

11 Q Now, Mr. Kidwell, do you really have any  
12 exact recollection of the fact that you and Mr. Wilkinson sat  
13 down and reviewed this document?

14 A How do you mean? That we went over it bit by  
15 bit in its entirety?

16 Q Right.

17 A I wouldn't say that we did that; no.

18 Q All right. So, isn't it true that the only  
19 reason why this document was necessary was because the  
20 government wanted an architect's guide for specifications?

21 A That was my understanding.

22 Q Right. In other words, all you did was ask for  
23 the architect's guide and you were to use this to submit it  
24 to the government?

25 A No. I asked for a brochure that would -- that

1 I could submit to the government that would fulfill their  
2 requirements. That's the one I got.

3 Q Right. Okay.

4 So the sole purpose of getting this was merely  
5 as a submittal to the government?

6 A Sure.

7 Q Now, did you get this -- when did you get this  
8 document in point of reference as to when you ordered the tile?

9 A About the middle of November, I would expect.

10 Q At that time you had not entered into any contract  
11 to order any product from Woody at that time; correct?

12 A No. That's true. You can't until you have  
13 acceptance.

14 Q All right, sir. Now, how often, once your men  
15 went to the job site to start performing under your contract  
16 with the Wilkinson Corporation - how many days were you on the  
17 job?

18 A I can't recall that. But we have time records  
19 to indicate.

20 In other words, we had to comply with the  
21 government rules to fill a time day-by-day record of, you know,  
22 appearance, attendance on the job. We submitted those to  
23 Mr. Wilkinson. Those would indicate how often I was there.

24 Q All right. What would be your best estimate?

25 A Well, I'd say --

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1 A Oh, yeah.

2 Q Now, what gave you the impetus to continue  
3 laying the block after the first 600 square feet?

4 A Not having an inspector there, no one to say  
5 that they wouldn't accept it.

6 Q Did you feel like -- in other words, you felt  
7 like that all of you were under time pressure at the time?

8 A We most certainly were; yes.

9 Q And at that point you didn't know whether it  
10 would be accepted or not?

11 A Well, we had no way of knowing without somebody  
12 there to tell us they weren't going to buy it.

13 Now, we could see what we were talking about.  
14 I know what the specifications were. I looked at them. I  
15 could see if they were going to be particular they could be  
16 particular about this.

17 But at the same token, we are looking at my  
18 estimate of roughly two weeks. Well, you can't stop and wait  
19 to see. You keep going. You have got a contract to live up  
20 to. If you say two weeks, you have got to do it.

21 So you just do the best you can. We kept going  
22 until we could find out. I think it was a day, day and a half  
23 later until the inspector said we had trouble.

24 Q When you had laid the first 600 square feet,  
25 it was a very small tolerance at that point of being out of

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1 11 and 11/16ths measurement, and measured from here to here,  
2 and we wouldn't have come out with 11 and 11/16ths measurement,  
3 necessarily. We would have come out with 12 inches here and  
4 11 and 11 here and 11 and 7/8ths here or 11 and 11/16ths here.

5 When we start getting out of line, we weren't  
6 just a little short on one edge. We were short like two ways.  
7 Maybe the center would have been shallow and either end would  
8 have measured 12 inches and here not; or the center would have  
9 been concave or convex, in other words.

10 In making the joint, fitting one block into the  
11 next one, that the corner here touched but the space throughout  
12 the middle didn't, or maybe this next block had to come down  
13 to catch it here but the corner up here was sticking out on this  
14 one but short on this one.

15 In other words, out of square like no four sides  
16 are the same.

17 Q This out of square is not acceptable in the  
18 industry?

19 A Well, it is not going to run straight across any  
20 size room.

21 Q All right. And that, generally, is not  
22 acceptable in your business?

23 A Well, no. If you put that block down, like the  
24 particular material we used in installing that -- if the  
25 block was cut back -- adhesive is black. It is not the only

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1 was an installer and somebody asked me I would say that.

2 I don't know what the government said. They might have said,

3 "You have to do that that way."

4 If they called me and said, "We have to do this  
5 job, from your experience which way would you do it, take it all  
6 out or attempt to go over top what we have?" I would never  
7 take it out. I would always go over top.

8 Q Now, while you were there during those two weeks,  
9 I think it was covered before, but I didn't hear your answer --  
10 while you were there did the government inspector ever tell you  
11 that the subflooring was not level?

12 A No.

13 Q When you walked over the tile during that  
14 two weeks, did you ever find a condition yourself where the  
15 subflooring was not level?

16 A You mean of what we had laid?

17 Q That's right.

18 A No.

19 Q Now, if, in fact, Mr. Wilkinson after you left  
20 was required to tear up some small portions of tiles because  
21 the subflooring was not level, if it was leveled out, could you  
22 reinstall the same tile again?

23 A The block that was taken up?

24 Q Yes, sir.

25 A I wouldn't think so.

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1 THE COURT: I am afraid I don't understand  
2 that question.

3 I sustain the objection.  
4

5 BY MR. BURNSIDE:

6 Q If you order 12-by-12 tiles, what do you expect  
7 to get from the manufacturer?

8 A Twelve-by-twelve.

9 Q Do you expect it to be tile that will produce a  
10 drift or be out of square?

11 MR. WHITE: Your Honor, that's for the jury  
12 to decide.

13 THE COURT: I think he can answer that.  
14

15 BY MR. BURNSIDE:

16 Q That's a matter of custom and trade and usage.

17 A I don't see how I could fill any contracts if  
18 I didn't have it that way.

19 Q All right, sir. Now, when your company commenced  
20 installation of this tile, I believe you stated you started  
21 first in one room; is that correct?

22 A Yes.

23 Q Which room was that by number? Do you know?

24 A I'm not sure offhand. It's the largest room.  
25 I can look at that and tell you.

1 Q All right. On the floor plan are you able to  
2 find the room?

3 A Yes; 105.

4 Q 105?

5 A Uh-huh.

6 Q Was that the largest room?

7 A Yes, it was.

8 Q All right. Now, in laying tile in all the other  
9 rooms, were you able to determine that it was out of square  
10 after you laid a small portion, or did you have to wait until  
11 the entire room had been laid with your tile?

12 A Well, you have to see a good portion of the floor  
13 down to determine how much effect that out of alignment is  
14 going to be. As you go along, if the corners don't line up  
15 exactly as you lay a block, you know it is out.

16 But whether or not it is noticeable, you have  
17 to see a good portion of the floor installed.

18 Q Was that true in this case?

19 A I would say so.

20 Q In other words, it was no method by which to  
21 determine how far or whether the out of square is going to be  
22 such that it will be unacceptable until you have laid most of  
23 the floor?

24 A Yeah; that's true.

25 MR. BURNSIDE: That's all I have, Your Honor.



1                                   I said, when I put the order in I expected the  
2 order to be filled with so many cartons all at one time, all  
3 the patch, all the cove base, all at one time to be separated  
4 and set on the floor at one place so it couldn't be confused  
5 with, like boxes of anyone else's order.

6                                   He said he didn't know where the balance of the  
7 boxes was but as they came in he would group them on the floor  
8 for me.

9                                   But to my knowledge that was never done.

10                   Q            So that was a conversation you had with the  
11 warehouse foreman when you made the first pickup?

12                   A            Right.

13                   Q            Then you later made six more pickups?

14                   A            Uh-huh.

15                   Q            Did you ever say anything to anybody at Woody's  
16 Warehouse in Virginia Beach about any problems you were having  
17 with the tile when you came to make the pickups?

18                   A            To tell you the truth, if I had it on my mind  
19 I don't think I would have said anything to anybody other than  
20 Dave, assuming he wouldn't have had any responsibility.

21                   Q            So your answer is, then, that during the month  
22 of January during the periods that you made the pickups as  
23 reflected in this invoice, you made no complaints or statements  
24 to anybody at Woody's Warehouse or office concerning any  
25 problems with the tile being out of square?

1           A           I thought you were talking about the Virginia  
2 Beach office.

3                       Right about the second, third pickup, something  
4 like that, I did call Roger Mapes.

5           Q           I am talking about when you made the pickups at  
6 the Virginia Beach office - you made no statements or complaints  
7 to anyone there as to any problems you were having with the  
8 tiles being out of square?

9           A           At the Virginia Beach location?

10          Q           That's correct.

11          A           Not that I recall.

12          Q           You knew Mr. Earley and Mr. Morgan were the two  
13 men you had dealt with in ordering this tile?

14          A           That's correct.

15          Q           They were in the Virginia Beach office?

16          A           Yes.

17                       Now, at this time Mr. Morgan came to my store  
18 and asked me how it was going. And that's when I first said  
19 something to him about having difficulty with the block. And  
20 he said I would have to carry it to somebody else.

21          Q           When was this?

22          A           Probably about three days before I actually  
23 called Roger Mapes.

24          Q           All right. Right. Well, let me get into that  
25 just a minute, now, as to when you called Roger Mapes.

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1 the Army Engineers rejected the job and that's when he had the  
2 discussion with you?

3 A Yeah. But he said something about the 28th.  
4 And we weren't there the 28th.

5 Q He said the 29th was the day it was actually  
6 rejected, but it was around that time it first came to his  
7 attention; wasn't that his testimony?

8 A Yeah. But I would think that probably he was a  
9 little short on memory of the actual dates because we weren't  
10 even there.

11 Q When did you leave the job?

12 A I would expect somewhere in the third week of  
13 January.

14 Q Which would then be the 21st, 22nd or along in  
15 there?

16 A Uh-huh.

17 Q And you had started the job on the 2nd?

18 A Uh-huh.

19 Q And you had laid, I believe you said, approximately  
20 60 cartons of this tile before you contacted Woody; isn't that  
21 correct?

22 A Yeah. I would expect in that neighborhood.

23 Q So you had laid over half of the cartons which  
24 you ultimately picked up before you made your call to Woody's  
25 man in Roanoke; isn't that so?



1           A           Yeah, but, see, you are not talking about all  
2 those cartons being in one location.

3                   In other words, it is not like we had the whole  
4 room done and could see the room. We didn't have 60 cartons  
5 installed in one room.

6           Q           You had 60 installed over the whole job?

7           A           Yeah. And that one room only went 15 cartons  
8 before it was obvious that we were out of square or out of line.

9           Q           When was that, after you had, say, laid the  
10 15 and you felt it was out of --

11          A           It would be the first week of January.

12          Q           About the first week in January?

13          A           Uh-huh.

14          Q           You didn't start until the 2nd, would you say,  
15 the 9th or 10th?

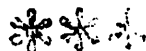
16          A           I'd say between the 5th and the 8th would be  
17 more accurate.

18          Q           And you had laid, then, how many cartons, would  
19 you estimate?

20          A           A good portion of the 60 or so that we would have  
21 had by then.

22          Q           You had laid -- in the first week you had laid  
23 a good part of that 60?

24          A           You are talking about 156 cartons. And we are  
25 saying we can get them down in two weeks. We wouldn't have



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1 confuse you.

2 A I don't recognize this cover.

3 Q Did you get a thing with a lithograph cover  
4 on there?

5 A I had no color flooring in any of the samples I  
6 submitted -- I mean, brochure.

7 Q All right. You didn't get a brochure like this?

8 A No, sir.

9 Q The answer is you didn't get a brochure.

10 All right. Now, how about a product data sheet  
11 showing the latex underlayment and the -- these bags of powder  
12 that you order. Did you get one of those telling you about  
13 what it will do?

14 A Product data sheet - but I couldn't say for  
15 sure if it was the one I got. It looks like it.

16 Q Looks like it?

17 A Uh-huh.

18 Q You would have had to have had something like  
19 that to give to the government; is that right?

20 A Oh, yeah.

21 MR. BURNSIDE: Mr. White, is this only  
22 pertaining to the underlayment? This data sheet?

23 MR. WHITE: No. It is a whole package  
24 dealing with the formula, mixes and care of tools  
25 and water resistance.

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1 MR. BURNSIDE: Until Woody testifies about the  
2 purchase order.

3 THE COURT: All right. You may want to look at  
4 this in the meantime, D-4, Flintkote.

5 (The document referred to was  
6 marked and received in evidence  
7 as Defendant Flintkote Exhibit D-4.)  
8

9 BY MR. WHITE:

10 Q Now, Mr. Kidwell, when this case started just  
11 before Thanksgiving, Mr. Leon Bare took the stand and talked  
12 about a washboard effect.

13 Did you see any such washboard effect when you  
14 would stand and look at that floor?

15 A No.

16 Q You didn't?

17 A No.

18 Q You heard him say that?

19 A I heard him say it.

20 Q All right, sir. But you didn't see any washboard  
21 effect?

22 A I can't imagine where he was talking about.

23 Q All right, sir. Now, let me ask you this:  
24 This building is 40 or 50 years old?

25 A I wouldn't have any way of knowing.

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1 another room? You are saying that you would have all these  
2 rooms at about the same stage of completion?

3 A No. It would be more based on how you spread  
4 the glue. And we had to leave an area at the wall at least  
5 wide enough to get the trowel down to put the last area of glue  
6 to trim out the area.

7 If you broke the room down in four parts like  
8 we normally do, the first quarter or first half of that room  
9 would have been put in when the glue was down.

10 Q Let me ask you this: Did you hear Mr. Leon  
11 Bare take the stand about a piece of cardboard was being used to  
12 spread this adhesive? Did you notice whether your workmen were  
13 using a 16th-inch notch in the steel trowel or mainly a steel  
14 trowel?

15 A They had trowels with 16th-inch notches and they  
16 also had the cove base applicator with 16th-inch notches. I  
17 don't know why they would have used cardboard if they did.

18 Q You don't know anything about spreading it that  
19 way?

20 A (The witness shook his head negatively.)

21 Q You had a couple of laborers on the job doing  
22 tile setters' work?

23 A Possibly a little, now, to get the higher wage,  
24 I would expect. I don't think they did knowing they were  
25 in some sort of violation. I think they did it in an attempt to

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1 Q And did Mr. Neff ever tell you during that  
2 two-week interval that unequivocally the government had said  
3 they would not accept it?

4 A Well, yeah. The eighth-inch fill we put in  
5 that had to come out, and that section behind it had to come  
6 out.

7 Q But as to all the floor tile that you laid, they  
8 didn't say that all that tile is out of square and you will have  
9 to take it all up, did they?

10 A No.

11 Q They never did it as you laid a portion?

12 A They were in the same boat: They wanted to  
13 see. They had to have the room done to see.

14 Q To determine whether it would be within  
15 tolerance?

16 A They have a scale, whatever it is I am not sure,  
17 that says what's acceptable and what's not.

18 Q They don't make that determination until you  
19 had done the entire job?

20 A Uh-huh.

21 Q Your contract was in three phases; correct?

22 A That's correct.

23 Q And you, in fact, only worked on phase one of  
24 that contract?

25 A That's right.

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(The document referred to was  
marked and received in evidence  
as Plaintiff's Exhibit 18.)

BY MR. BURNSIDE:

Q All right. Now, who would have prepared this  
document, Mr. Earley?

A I wrote this.

Q You wrote that?

A Yes.

Q Do you know what date you wrote that?

A 12/10.

Q Of 1975, sir?

A Right.

Q All right. Now, after you wrote that, did you  
mail that to Mr. Kidwell, or was that hand-delivered to him?

A He was in my office when this was written.

Q On that date?

A Yes, sir.

Q I presume on that date this was the only  
document provided to him?

A Right.

Q All right. Now, on the purchase order this is  
the basis of a contract whereby you agree to sell to Mr. Kidwell  
the items listed on the purchase order?

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1 remember the exact date; no.

2 Q All right, sir. So, evidently, Mr. Wilkinson  
3 told you of the urgency of the situation since you replied by  
4 February 3rd.

5 A I went up and I told him I would answer him  
6 as soon as I got back from the Richmond sales meeting; yes.

7 Q All right. So, in other words, at the time he  
8 made the complaint you knew he was pressed to get this issue  
9 resolved?

10 A He so stated he was pressed for the time element  
11 in the thing.

12 Q All right. Now, in other words, he had a job to  
13 get completed with the government.

14 THE COURT: I realize it is cross-examination,  
15 but I think you ought to keep it down to the issues.

16

17 BY MR. BURNSIDE:

18 Q What did he actually say to you in terms of  
19 being under pressure?

20 A He just said that he had to have the tile.  
21 And I told him that we'd have to have it through a dealer.  
22 We had the tile. I told him when he reordered the tile, or  
23 had reordered the tile in the letter, that it would be  
24 available in ten days, I believe I said in that letter.  
25 And I think it came in in about that length of time.

1 Q All right. Now, in fact, he had to end up  
2 paying for that tile; correct, sir?

3 A That's right.

4 Q All right. Now, Mr. Earley, is your office  
5 actually located where your warehouse is in the City of Virginia  
6 Beach?

7 A Office and warehouse in the same building; yes.

8 Q Do you have an individual who is in charge of  
9 the warehouse as opposed to you?

10 A Yes, I do.

11 Q And that is the individual responsible for  
12 accepting shipments from Flintkote?

13 A Right.

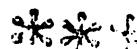
14 Q All right. Now, on your various -- on these  
15 various delivery tickets that were provided to J. Mae Carpets,  
16 first of all, there are no warrantics on these documents,  
17 are there, sir?

18 A No, sir.

19 Q All right. Secondly, as to these documents,  
20 as it pertains to the tile on there, did you write down or  
21 did whoever was in charge of writing these up for Woody  
22 Distributors indicate the lot number on there?

23 A No. No lot number.

24 Q Sir, do you happen to have any documents with  
25 you which would reveal a delivery ticket from Flintkote to





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1 heard from Mr. Wilkinson.

2 Q And that was, I believe you testified, about  
3 January 27th or 28th?

4 A Somewhere in that date, yes.

5 Q All right, sir. How many cartons of this  
6 total 156 were picked up by Mr. Kidwell?

7 A Ninety-six.

8 Q Where are the remaining 60 cartons?

9 A In our warehouse.

10 Q Are they still in your warehouse?

11 A Fifty-six of them are.

12 Q Where are the other four?

13 A Right over there.

14 Q Have those cartons been opened?

15 A Only a couple of them where Mr. McBride looked  
16 at them when he was down to see if they was out of square.

17 Q All right, sir. Now, you testified that the  
18 first knowledge that you had of any problem that Mr. Kidwell  
19 was experiencing with this tile was when Mr. Wilkinson called  
20 you around January 27th or 28th.

21 A Right.

22 Q All right, sir. And at that time what,  
23 specifically, did Mr. Wilkinson tell you, if you recall?

24 A Said that they were having trouble with the tile;  
25 the tile was out of square. He was pushed on time as far as

1 being penalized by the day for every day that they had to wait  
2 for the tile.

3 Q All right, sir. Now, did you at that point  
4 contact the Flintkote Company?

5 A I got in touch with Mr. McBride, yes.

6 Q Mr. McBride is this gentleman sitting over  
7 here?

8 A Right.

9 Q He is with the Flintkote Company?

10 A He is our representative for Flintkote that  
11 calls on us.

12 Q You contacted him by telephone?

13 A Yes, I did.

14 Q What was the result of that conversation or  
15 what request did he make to you?

16 A Well, it was not convenient for him to get to  
17 that particular site at the time; told him I'd have some tiles  
18 picked up from the job. I would take them up to Richmond and  
19 have Mr. Osborne and Mr. Heffernan look at these tiles; and  
20 that he said, "If the tiles are out of square, we will take  
21 care of it."

22 Q That was Mr. McBride's statement?

23 A Right.

24 Q Was it at Mr. McBride's suggestion that you had  
25 the tiles picked up from Mr. Wilkinson?

1 A Right.

2 Q All right, sir. After he made that suggestion  
3 to you, did you then contact Mr. Wilkinson?

4 A Yes, I did. I called him and -- now, I don't  
5 know if I called him or he called me back. But I said,  
6 "You are picking up some tiles, picking up some tiles on the  
7 job. I will take them to Richmond because I am not qualified  
8 to tell you if they are out of square. I will take them up  
9 to our Richmond operation. We are having a meeting up there.  
10 I will have Mr. Osborne and Mr. Heffernan look at these tiles,  
11 and myself."

12 What I saw, the tiles were out of square.

13 Q Okay. Now, after you had called Mr. McBride  
14 and he suggested that you have Mr. Wilkinson pick the tiles up,  
15 did you actually go to the job site to pick them up or did you  
16 send somebody?

17 A No, sir. I sent Mr. Lamont by himself, manager  
18 there, went and picked them up.

19 Q To Mr. Wilkinson's office?

20 A I believe he picked them up at his office.  
21 I don't believe he went to the job.

22 Q He picked them up at Wilkinson's office as far  
23 as you know?

24 A Right.

25 Q Did you ever go to the job site before this time,

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1           A           So he could see the tiles that had been pulled  
2 up.

3           Q           What date was this that you delivered them to  
4 him? Do you recall?

5           A           It was the following week.

6           Q           Was it after you had written?

7           A           I had written the letter at that time, yes.

8           Q           Did you write the letter upon your return from  
9 Richmond?

10          A           Upon my return from Richmond -- I believe if  
11 you look up that date it will be a Firday or Monday. We had  
12 a sales meeting up there.

13          Q           So this was just after you --

14          A           Just as soon as I came back from the Richmond  
15 meeting; yes.

16          Q           All right, sir. And it was the week following  
17 that that you delivered those to Mr. McBride?

18          A           Sometime during that week.

19          Q           And that was in Roanoke?

20          A           I believe it was Roanoke.

21          Q           And the purpose of that was so that he could  
22 take a look at them?

23          A           And make his own determination; so he could  
24 take a look at them. And then he went to the job.

25          Q           All right, sir. After you delivered the tiles

1 to Mr. McBride, have you ever seen those again?

2 A No, sir.

3 Q They have never been in your possession since  
4 that time?

5 A They have not; no, sir.

6 Q Now, I show you Defendant's Woody Exhibit 1,  
7 Mr. Earley. Have you seen that document previously?

8 A Yes, sir.

9 Q All right. That would state on the top,  
10 "Flintkote Company Complaint Form"?

11 A Yes, sir.

12 Q Was a copy of this sent to you?

13 A Mr. McBride, I believe, sent me a copy of that  
14 or I may have a copy of the one you have got there. But I do  
15 have a copy of it.

16 Q So, as well as you recall, Mr. McBride sent it  
17 to you?

18 A Right.

19 Q Let me ask you: After you delivered the tiles  
20 to Mr. McBride, did you receive any word from him by -- in  
21 writing or by telephone before receipt of this complaint form  
22 that you recall?

23 A I don't remember any.

24 Q But you did receive this complaint form?

25 A Yes, sir.

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1 BY MR. WHITE:

2 Q Now, Mr. Earley, I notice there's some sort of  
3 markings on the side of these cartons. Can you read it from  
4 there? It's right far away.

5 I notice there is -- says "Classic CL-12."

6 Could you tell us what that means?

7 A That is the pattern number and the style of  
8 the material.

9 Q Then we have another one here which says, "N-19E."

10 A That would be the dye lot, I believe.

11 MR. WHITE: All right, sir. Now, Your Honor,  
12 with the Court's permission, I would like to take them  
13 out and put them -- so that the jury could see them.

14 I don't know whether I could ask this witness  
15 to do it in that way.

16

17 BY MR. WHITE:

18 Q I wonder if you would come down here, Mr. Earley,  
19 if you would, please.

20 Now, let me ask you this: In your earlier  
21 testimony you said something about that when Mr. McBride got  
22 down here to the Norfolk area --

23 Did you open up any of these cartons, any of  
24 them whatsoever?

25 A The ones that I had in the warehouse?

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1 Q Do you deny he talked to them?

2 A I can't deny what I don't know.

3 MR. ADAMS: All right. I have nothing further.

4 THE COURT: All right. Mr. Burnside?

5

## RE CROSS-EXAMINATION

6

7 BY MR. BURNSIDE:

8 Q Mr. Earley, how are these cartons shipped?

9 A Shipped by tractor-trailer over pallet.

10 Q Pardon me?

11 A Tractor-trailer on a pallet.

12 Q On a pallet. And they are unloaded by people other  
13 than you at your warehouse?

14 A Right.

15 Q All right, sir. On these particular boxes,  
16 themselves, I note there is no identification that says these  
17 were consigned to you or sold to you for Kidwell.

18 A No. I am sure they would not mark boxes that way.

19 Q Well, they are not; correct?

20 A No.

21 Q All right.

22 Now, also in examining this box, I note there are  
23 no warranties printed on the box; correct?

24 A I don't know of any on there.

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1 Fort Eustis, Langley and Fort Monroe.

2 We have resident inspectors at most of the bases.  
3 We don't have one at Langley.

4 But it was my job to supervise those people and  
5 as Assistant Chief of Quality Assurance.

6 Q And Mr. Leon Bare would have been one of the men  
7 at the Army Corps of Engineers under you?

8 A Yes, sir.

9 Q All right. Now, would you tell this jury  
10 whether or not you visited the job site and if so with what  
11 frequency?

12 A When the resident inspector was on site, and  
13 at times he was not for various reasons - leave, schooling,  
14 places he had to be - I usually -- a little better than once a  
15 week. Very seldom I didn't attend the job at least once a  
16 week, sometimes twice.

17 Q All right, sir. Now, did the Army Corps of  
18 Engineers give some sort of notice of deficiency in January  
19 of 1976?

20 A Yes, sir.

21 Q What --

22 A I suppose you are referring to the floor tile.  
23 There was several notices of deficiencies.  
24 There was one the 27th.

25 Q All right. Tell us about them.



1 MR. BURNSIDE: Your Honor, I am going to object.

2 MR. WHITE: Your Honor, they are claiming all  
3 kinds of delay. I think the whole picture -- we are  
4 entitled to bring it in.

5 THE COURT: As it would relate to any delay.

6 MR. BURNSIDE: The problem is the best evidence.

7 THE COURT: Maybe you should ask that question  
8 first.

9 MR. BURNSIDE: The best evidence rule would  
10 apply. If it is a written notice we should have the  
11 written notice.

12 THE COURT: I think he can testify what he  
13 advised.

14 But I think you should maybe lay the ground-  
15 work because it would relate only to that element.

16

17 BY MR. WHITE:

18 Q You gave a notice of deficiency. Around what  
19 time was that? Do you recall?

20 A I looked at one deficiency notice. This pertained  
21 to floors issued on the 27th of January and the notice of  
22 deficiency stated the floor tile did not comply with the  
23 specifications. That's essentially what it said.

24 Q Would you tell this jury what your inspection  
25 revealed, specifically what you found there following your

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1 talking about.

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2 Q I guess I'm asking you to try to maybe describe  
3 it a little bit more in detail. Was it widespread or in  
4 certain areas, or just how would you describe it?

5 A If I had to put a percentage figure, I'd say --  
6 there again, you may have one tile in four that would be  
7 irregular, or something like that. But it was widespread over  
8 the kitchen area.

9 I don't mean that the whole floor was irregular,  
10 but you may have a ridge running across one section of it that  
11 would run ten, twelve foot where some had been patched, or  
12 something back there and there would be a ridge through that.

13 Q Now, was that the tile or the underflooring?

14 MR. ADAMS: If Your Honor please, I would  
15 ask that counsel not lead the witness.

16  
17 BY MR. WHITE:

18 Q I am asking where it was.

19 A It was the tile irregular, but the tile is a  
20 certain thickness so it would have to follow what it was laid  
21 on, --

22 Q All right.

23 A -- the floor preparation before the tile was  
24 laid.

25 Q I see. All right.

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1 job, another contract.

2 Q But my question would be: His duty would be  
3 a daily inspection of these jobs?

4 A Yes, sir. He was on the job all the time.

5 Q On the job all the time?

6 A Well, maybe I better clarify this: Either on  
7 the job or in his office when he was working.

8 Q As best you can recollect, during the month of  
9 January, how much time do you think he would have spent on the  
10 job site at building 82?

11 A Well, other than leave or if he had a school -  
12 which I do not recall now whether he had or not; we send our  
13 inspectors to school sometimes for a week at a time - he would  
14 have been there all the time. He had no other duties except  
15 Fort Monroe.

16 Q So, obviously, in terms of your knowledge as  
17 compared to him, he would have more detailed and personal  
18 knowledge concerning the floor, the conditions of the floor,  
19 and what remedies were taken to rectify any deficiencies?

20 A Yes, sir; what was going on on the job, sure  
21 would.

22 Q All right. Now, by your testimony you stated  
23 that in all probability you would visit the job site once a  
24 week; is that correct?

25 A At least once a week, sometimes twice.

1 Q Say from January 2nd to January 27th, do you  
2 have your appointment book or any records which would indicate  
3 how often you were in building 82 during that course of time?

4 A No, sir.

5 Q In trying to recall our recollection, how often  
6 do you think you were there during that period of time?

7 A The only thing I could do is go back and say  
8 what my normal practice was.

9 Q Well, I am asking you -- in other words, you  
10 think you were probably there two to three times?

11 A Once or twice a week. If Mr. Bare was gone,  
12 I tried to be there about every other day.

13 Q Now, during that particular period of time which  
14 I referred to, when you did go did you go at the request of  
15 Mr. Bare?

16 A Not necessarily. I did come at his request if  
17 he called me. Naturally I went to see --

18 Q Well, from what you have stated in response to  
19 Mr. White's questions, apparently you went to the job site on  
20 one occasion because Mr. Bare had advised you that there were  
21 some difficulties with the floor.

22 A I don't think when I first noticed the  
23 difficulties with the floor I was called there specifically.  
24 It was basically a routine inspection. I don't remember that  
25 to be exact.

1 Q All right. How many times do you think you  
2 inspected the floor during that period of time?

3 A I can't say that. I just don't know. Normally  
4 we go through the whole building looking at everything in  
5 general. That was just a normal deficiency or a deficiency that  
6 we had.

7 Q All right. Would this be correct, sir: Mr.  
8 Bare's duties were to make a detailed inspection of the floor;  
9 correct?

10 A Yes, sir.

11 Q You, after receiving a complaint by Mr. Bare,  
12 would merely try to confirm his inspection; is that correct?

13 A This is essentially correct; yes, sir.

14 Q So his inspection of the floor would have, of  
15 course, been more detailed than your inspection?

16 A Yes, sir. He observed the actual installation  
17 of the floor, too.

18 Q All right. So, in other words, if he has made  
19 various statements in this court concerning the condition of the  
20 floor during his routine, daily inspections, in all probability  
21 his would probably be more accurate?

22 MR. WHITE: Your Honor, I think that would  
23 be for the jury to decide: Whether this man's testimony  
24 is better than Mr. Bare's.

25 THE COURT: I agree. I sustain the objection.

1 MR. BURNSIDE: All right, sir.

2

3 BY MR. BURNSIDE:

4 Q All right. Now, from -- after you first noticed  
5 the deficiencies with the floor, do you happen to first recall  
6 the date of that?

7 A No, sir. I'd say it would have been prior to the  
8 deficiency report because I am almost sure that I did tell him  
9 to go ahead and issue the deficiency on it. So I'd say maybe  
10 two or three days prior to that.

11 Q All right. Which would be approximately  
12 January 24th or 25th?

13 A Somewhere along in there.

14 Q That would have been when the oral deficiency  
15 had been provided to the general contractor?

16 A I can't say when he gave the oral deficiency.

17 Q Well, it would have been about that time?

18 A I would say so; right.

19 Q After you issued that deficiency notice, when  
20 was the next time that you returned to building 82 to make an  
21 inspection of the floor?

22 A As I said before, I returned to building 82 on  
23 a regular frequency. The floor was essentially the same the  
24 next time. Immediate action was not taken. By that I mean  
25 within very -- amount of days.

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THE COURT: Mr. Tucker?

BY MR. TUCKER:

Q Mr. Rowell, you stated that Mr. Wilkinson had completed phases one and two but not phase three; is that correct?

A Yes, sir.

Q Is he still on the job working on phase three?

A No, sir. He's not on the job. I think he is still under contract.

Q But he is not on the job?

A He wasn't the last I was there.

Q You don't know the reason for that?

A Not really, no, sir. Not that I could testify to.

Q As to the deficiency report issued by your office on January 27th, what, specifically, was the reason for the report being issued?

A It was two reasons: The tile being out of alignment and the irregularities in the floor surface.

Q And so the report was issued for both of those reasons?

A Yes, sir.

Q All right, sir. In your opinion, Mr. Rowell, wouldn't the irregularities of the subflooring have an effect

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1 I don't know whether it was overlaid or pulled up.

2 Q I guess what I am asking you is whether or not  
3 Mr. Kidwell or Mr. Wilkinson overlaid everything following your  
4 notice of deficiency or just certain rooms?

5 A They did not overlay everything.

6 Q They did not overlay everything. All right.  
7 Tell us what they didn't overlay.

8 A I couldn't. I know of one room on the second  
9 floor that was pulled up twice.

10 Q Pulled up twice?

11 A At least twice.

12 Q Because of the subflooring?

13 A Irregularities. I wouldn't say it was subflooring,  
14 but it was irregularities in the surface of the floor.

15 Q All right, sir. You told us about that deficiency  
16 in January. Were there other deficiencies given Mr. Wilkinson?

17 A Yes, sir. There was other deficiencies. I  
18 haven't done any real amount of research on how many, but there  
19 were other deficiencies; yes, sir.

20 Q Well, a half a dozen or what? Dozen?

21 A I'd say a half a dozen if I had to pick a figure.

22 Q Other matters there on the job?

23 A Yes, sir. Some of these deficiencies, of course,  
24 were corrected immediately, and things like that -- be routine.

25 Q Duct work?

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1 A Yes. It is one of our factories.

2 Q All right, sir. This shipment, if you know by  
3 reason of your investigation, firsthand knowledge - where this  
4 shipment came from New Orleans, how many cartons were there?

5 A It was part of a truckload shipped to Woody  
6 Distributors. There were 156 cases shipped out of run number  
7 N-19.

8 Q All right. These four boxes - where did you  
9 get those four boxes?

10 A They were taken from Woody's warehouse.

11 Q Can you identify them as being part of this  
12 shipment?

13 A Yes, I can, sir, by the markings on them.

14 Q All right. Now, did there come a time when you  
15 were asked to check into certain pieces of tile that came from  
16 this shipment?

17 A Yes, I was.

18 Q All right. Tell the jury in your own words what  
19 you did upon notice of this.

20 A Well, I arrived home on the 28th of January.  
21 The reason I arrived at that date, it's the date prior to a  
22 letter that Mr. Simonds wrote to Woody Distributors, copy to  
23 me.

24 I returned his call upon arrival on the 28th.  
25 He explained to me that he was having problems at building 82

1 at the Corps of Engineers. He went on to say he was under  
2 pressure from the Corps, that he had been paying a penalty of  
3 \$100 a day and that something had to be resolved.

4 Now, before I go any further, it is company  
5 policy that no samples are ever removed from a job unless it is  
6 felt by the inspector, myself, that the tile would be defective,  
7 whether it be size, color, what have you.

8 I explained to him that I would have to check  
9 my schedule to see if I could make it the following day, being  
10 in Annapolis, which I did.

11 I called him the following day. I told him that  
12 I could not make it down and that although it is not company  
13 policy, if he felt as though the tiles were defective to pick  
14 them up and make arrangements to bring them to Woody Distributors.

15 Q Was that done?

16 A Pardon?

17 Q Was that done? Was that done?

18 A Yes, it was.

19 I called Woody Distributors and made them  
20 aware that he had my approval to go and remove samples.

21 I don't know whether it was that day or the day  
22 after I called and talked with Mr. Lamont at Woody Distributors.  
23 And I simply asked him: "Do the tiles meet point-to-point?"

24 He stated, "No."

25 I said, "All right. Under the circumstances,

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Q All right, sir. Now, you said when you got to the job all the trim block was in.

A When I inspected it on the 26th, yes, it was in.

Q And everything was covered, I think you said, but one area in the kitchen?

A There was one area in the kitchen that had been torn up.

Q Do you know who put in the trim block?

A Do I know?

Q Do you know of your own knowledge?

A I would have --

Q Do you know?

A No; no.

Q So that as to the tile, of your own knowledge, the tile that you were looking at, you don't know who put it in?

A Other than I was told that J. Mae installed it.

Q You don't know of your own knowledge?

A I had never been on the job site until that day.

Q The question was: Did you know of your own knowledge?

What is the tolerance in this cutting blade or this cutting material, cutting machine, that you say you only cut twelve by twelve?

A The federal specifications is T-312 Type 4,

1 which was pointed out earlier allows for a tolerance of  
2 16 thousandths of an inch.

3 Q Do you know what the tolerance of the machine  
4 cutting these tiles was?

5 A They would have to comply with the specifications.  
6 No, I don't know.

7 Q Do you know of your own knowledge that they  
8 complied?

9 A Yes. As a matter of fact, after we received  
10 letter from Wilkinson Company - this was after the fact -  
11 and it looked as though we were going to come to court on this,  
12 my company requested I send some samples to them.

13 These samples I got out of Woody's warehouse  
14 out of one of these boxes that still remains at Woody's. And  
15 they did a double check on it to make sure they did fall within  
16 government standards, which they did.

17 Q My question was: You don't know at the time  
18 that these 2,000 cartons of 19N -- N-19F were cut - you don't  
19 know what the tolerance on that cutting blade was at that time?

20 A The blade itself, no, sir.

21 Q And the tiles that you did remove were out of  
22 boxes back at Woody's and sent to your company. You didn't  
23 take the ones off the floor, did you?

24 A No, sir.

25 Q And what I'm confused at is, you were notified,

1 as I believe, approximately the 29th of January: is that  
2 right?

3 A 28th.

4 Q 28th of January. Why did it take you until the  
5 26th of February to inspect when you knew, as you indicated,  
6 that Mr. Wilkinson was under the gun, running at liquidated  
7 damage per day?

8 A Well, I stated, sir, that when I received the  
9 call from Mr. Simonds he stated that he was under penalty of  
10 \$100 a day.

11 I am in Annapolis, Maryland. I had a commitment  
12 the following day. And that's when I got back.

13 I said, "It is not company policy, but to save  
14 time and you money, why don't you remove samples that you feel  
15 aren't correct and drop them at Woody Distributors?"

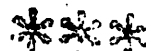
16 I was doing this as a courtesy.

17 Q You didn't come down here until almost a month  
18 later?

19 A No. I had left instructions for the samples to  
20 be mailed off to me.

21 Q Do you know where the tiles came from that were  
22 actually put back on this job, the overlay tiles?

23 A The overlay tiles came from the 156 that were  
24 shipped in. I believe they were shipped out of Chicago Heights,  
25 Illinois, if I am not mistaken. I'd have to check.



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1 of Woody Distributors?

2 A That's correct, sir.

3 Q And asked him if the tiles he had received from  
4 Mr. Wilkinson met point to point?

5 A That's correct.

6 Q And he said they did not?

7 A Right, sir.

8 Q And that was the gist of your discussion with  
9 Mr. Lamont, was it not?

10 A Right, sir.

11 Q And when he said that to you, you then asked  
12 him, I believe, to go ahead and make arrangements to reorder the  
13 shipment; is that correct?

14 A Yes, sir.

15 Q In other words, reorder the 156 boxes so they  
16 could complete the job?

17 A Yes, sir.

18 Q And it was upon that basis, was it not, that  
19 Mr. Earley wrote the letter to Mr. Wilkinson which has been  
20 referred to?

21 A I would think so.

22 Q You are familiar with that letter?

23 A I have seen it; yes, I have.

24 Q So it was a result of your conversation with  
25 Woody Distributors to reorder that Mr. Earley then wrote the

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1 A The commercial tolerance?

2 Q As opposed to federal tolerance?

3 A That I couldn't answer, sir.

4 Q Of your own knowledge do you know if it's  
5 different?

6 A No. As I say, we manufacture to meet  
7 government specifications.

8 Q Well, whatever specifications are provided to you,  
9 be it by the federal government or city government or just a  
10 private contractor --

11 A It is 16 thousandths of an inch.

12 MR. BURNSIDE: That's all I have, Your Honor,  
13 of that witness.

14 THE COURT: All right. You may stand down.

15 (The witness was excused.)  
16

17 MR. WHITE: That's all.

18 MR. BURNSIDE: All right. Call Mr. Wilkinson.  
19 That will be my last witness, Your Honor.

20 THE COURT: All right.

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W. W. WILKINSON,

recalled as a witness in rebuttal, having been  
previously duly sworn, was examined and testified  
as follows:

DIRECT EXAMINATION

BY MR. BURNSIDE:

Q Mr. Wilkinson, I show you Defendant Kidwell's  
Exhibit No. 2 and ask if you have ever received that document,  
sir?

A No.

Q All right, sir. Now, as to your employee,  
Mr. Joe Simonds, did you have knowledge of the fact that he met  
with Mr. McBride for the purpose of an inspection at the  
Fort Monroe site?

A Yes.

Q Subsequent to that inspection, could you tell us  
if Mr. Simonds returned and made any comments to you about his  
-- the results of his inspection with Mr. McBride?

MR. WHITE: Now, Your Honor, I would object  
to anything that Mr. Simonds told him. The best  
evidence would be what Mr. Simonds said from the  
stand when he took the stand the first day of the  
case. There is no way that we can cross-examine  
Mr. Simonds as to what he says, and it is self-serving.

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1 Q All right, sir. But of these damages, how much  
2 would you allocate to repair of subflooring?

3 A I would say out of approximately 6,000 square  
4 feet of tile that repairing of the underlayment would probably  
5 be ten percent.

6 Q All right, sir. Now, did you have -- before the  
7 problem ever arose, did you and Mr. Kidwell ever have a  
8 discussion concerning the availability of the material from  
9 Woody?

10 A Yes. He seemed to think he could get out of  
11 phase one within fourteen days.

12 Q Well, was there any discussion with reference  
13 to whether all the material was located at Woody at one time?

14 A Woody didn't have all the material at one time.  
15 It come in in pieces.

16 Q Who told you that, sir?

17 A Mr. Kidwell and also I called Woody when he  
18 didn't have the material to work with.

19 MR. BURNSIDE: Answer any of the questions  
20 of the gentlemen.

21 THE COURT: Any further questions, gentlemen?

22 MR. TUCKER: No, sir.

23 THE COURT: All right. You may stand down.

24  
25 (The witness was excused.)

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1 delivered or picked up by Kidwell and in turn given to Mr.  
2 Wilkinson shows that he did have knowledge of what this product  
3 was and what was to be used in conjunction with it. And he  
4 claims, on the contrary, that he's not privy to this contract,  
5 and yet wants to claim benefit of a warranty.

6 So, anyway, I feel --

7 THE COURT: You plan to argue from this that your  
8 company's limited to what it can pay?

9 MR. WHITE: I sure do.

10 THE COURT: I think there's ample evidence on the  
11 one issue of the trowel. There is testimony as to the type of  
12 trowel used and the necessity for making the ridges so it will  
13 bind. And I think this would be misleading. I don't think  
14 there is any evidence before this jury that there is any limitation.  
15 insofar as the responsibility under the warranty is concerned  
16 as to the tiles. And the tiles are the sole issue insofar  
17 as your client is concerned. So I am going to mark these  
18 for identification only and in effect, refused.

19 MR. WHITE: I am going to note my objection and  
20 also state, Your Honor, that if I am not mistaken, the  
21 architect's plans are in evidence and there is a limitation of  
22 liability in this case.

23 THE COURT: Where is that? You will have to get  
24 it for me.

25 MR. TUCKER: It is on the back -- that's an exhibit.

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1 to the document itself that says there is a warranty in there  
2 giving the buyer a warning.

3 MR. WHITE: Now, Your Honor, let me answer that  
4 by stating that Kidwell acknowledged on the stand receipt of  
5 this Architect's Guide Specifications.

6 I would also like to call to the Court's  
7 attention the Textbook of Uniform Commercial Code, White & Summers'  
8 book, dealing with economic loss, loss of bargain and profits.  
9 And it gets into the realm of whether we go beyond direct damages,  
10 namely, the replacement of the product itself.

11 And the text says this:

12 "The courts are split on whether a  
13 plaintiff may recover economic loss, loss of  
14 bargain and loss of profits, from a seller with  
15 whom he did not deal and who made no express  
16 warranties to him. The majority deny  
17 recovery in these circumstances, but a healthy  
18 minority permits recovery. Dean Prosser has  
19 argued that plaintiffs should not recover their  
20 losses on bargains from remote sellers, but he  
21 apparently believes they should recover loss of  
22 profits from such persons. We believe Dean  
23 Prosser's distinction is imperfect. We would  
24 distinguish between those cases in which the  
25 defect is attributable to a remote party - for

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1 THE COURT: Let's just deal with the exhibit he  
2 just offered which I marked for identification only.

3 First off, he did indicate that he would like to  
4 present this later to the Court.

5 MR. WHITE: That's correct.

6 THE COURT: You did take the position that he put  
7 on no evidence; if it was a matter of a claim it should be  
8 submitted to the jury. The Court did not rule on the matter.  
9 I reserved that. I told Mr. Tucker he could put this into  
10 evidence for identification at a later date after the verdict.  
11 I would hear you, but that I wanted to make it clear that I was  
12 not saying by that I was not indicating that I was overruling  
13 your motion that no evidence having been introduced he wasn't  
14 entitled to prove anything. In other words, I reserved all of  
15 it - the point you raised whether or not he should have put on  
16 evidence, for example, on these things is still an open question  
17 as far as the Court is concerned. In other words, I haven't  
18 ruled on that. I have simply reserved it at this juncture.  
19 And you are fully protected as far as I am concerned.

20 If you were talking about the other situation,  
21 and he did have a cross-claim against you, the other matters  
22 and the manner in which it is going to the jury, which we have  
23 attempted to simplify it for the jury, if that's your objection  
24 I didn't understand you to have one. But if you have got one,  
25 say so and put it in the record and it is perfectly all right

1 with the Court.

2 MR. WHITE: The position of Flintkote is, Your  
3 Honor, that in effect the Court can't defer a ruling as far as  
4 the cross-claim of Woody Distributors. They either put in  
5 evidence of any claim that they have got for expenses - and  
6 put their point in that there's been no representations of  
7 warranty other than those spelled out in the warranty given by  
8 Flintkote.

9 I would also submit to the Court that either  
10 there's a warranty in this case or there isn't. If there is a  
11 warranty then it's got to have some meaning. And that's what I  
12 have been talking about for the last four days. I feel that the  
13 warranty was given to the subcontractor. It means what it says  
14 and that there should have been a limitation of damages given  
15 to this jury.

16 And I realize that the Court has struggled with  
17 it, as have all counsel, and I know that it's a difficult thing.  
18 But at the same time that this defendant has been prejudiced  
19 initially and throughout the course of the trial because  
20 evidence has come in. And I also feel that the motion of, I  
21 believe, counsel for Kidwell that the claims be severed because  
22 there was a misjoinder points up the difficulty that we have had.

23 So, anyway, all I wanted to do is note my  
24 objection to the fact that this jury was instructed on limita-  
25 tion of damages as it relates to this defendant. And I also

1 feel that any claim for damages by Woody Distributors against  
2 Flintkote should have come in in the course of this four-day  
3 trial at the same time as the claim for damages was asserted  
4 by Kidwell, the subcontractor, against us as the manufacturer.

5 THE COURT: I don't want to have any misstatement  
6 in the record. I understand that you took a different view from  
7 the Court insofar as your responsibility to Woody was concerned.  
8 The Court took the view that Woody was still in the case; was  
9 not going to sustain a motion to strike. The warranty passed,  
10 if they conclude there is a warranty, from the manufacturer to  
11 the distributor to the person who applied the tiles to the final  
12 person who got the benefit. But the Court did take the view  
13 if, in fact, there was a judgment, for example, against Woody,  
14 that Woody under this case law and the facts would have the  
15 right for indemnity over against your client which you objected  
16 to. And I just want to make it clear I wasn't attempting to say  
17 that you didn't object. And I think you have preserved all  
18 that.

19 MR. TUCKER: That was my understanding - you  
20 have ruled as a matter of law on the question of law on the  
21 cross-claim.

22 THE COURT: I feel the Court could handle that,  
23 hopefully, if it is in a form we can deal with.

24 MR. WHITE: I don't feel as a matter of law Woody  
25 Distributors has a claim over against Flintkote.

1 THE COURT: I understand that. I have tried to  
2 state that for you.

3 MR. ADAMS: If it please the Court, under the  
4 same circumstances I have the copy of my time cards. I learned  
5 also from Mr. Tucker - although his discussion was between  
6 Mr. Tucker and Mr. White as to the situation of the attorney's  
7 fees and I did not feel it would be appropriate before this  
8 jury to put in attorney's fees evidence and time card evidence,  
9 and I therefore submit these to the Court under the same basis  
10 which Mr. Tucker has done so.

11 THE COURT: Did you claim attorney's fees in your  
12 cross-claim?

13 MR. WHITE: Now, Your Honor, I would have the  
14 same objection to any submission by counsel for Kidwell. In  
15 effect the cross-claim would have to be split; the jury would  
16 have to come in with some element and then at some later date  
17 the Court would have to determine this fragment of the evidence.

18 I would also submit, Your Honor, that for the sake  
19 of argument, even assuming that as a matter of law there might  
20 be some vouching in, nevertheless this defendant would be  
21 entitled to have a jury pass on any reasonable expenses.

22 THE COURT: Okay. The Court's going to mark it as  
23 D, capital A, brackets Kidwell, for identification only, and  
24 date it this date. And the Court reserves its ruling on your  
25 various motions until some other day - I expect we will take

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