

STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WILLIAM KARWACKI and
KATHRYN KARWACKI,

Plaintiff,

-v-

Case No. 10- 20-MD
Hon. Paula J. M. Manderfield

STATE OF MICHIGAN, MICHIGAN
MICHIGAN DEPARTMENT OF
TRANSPORTATION,

Defendant.

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PLAINTIFFS' SECOND AMENDED COMPLAINT

NOW COME Plaintiffs, WILLIAM KARWACKI and KATHRYN KARWACKI, by and through their attorneys, LAW OFFICES OF LAWRENCE S. KATKOWSKY, P.C., and complain against the Defendant herein, and for cause of action show unto the Honorable Court as follows:

1. That at all times herein mentioned Plaintiffs are residents of the Township of Oakland, County of Oakland, State of Michigan.
2. That at all times herein mentioned Defendant State of Michigan, through its Department of Transportation (hereinafter "MDOT") had ownership and jurisdiction of —36, Livingston County, Michigan.
3. William Kirk Karwacki was the rider and Kathryn Ann Karwacki was the passenger on M-36, That on or about August 29, 2009, Plaintiff, William Kirk Karwacki, was the operator of, and Plaintiff Kathryn Karwacki was a passenger on a 2007 Harley Davidson motorcycle being operated eastbound on —36 approximately .15 miles east of Kathryn, Unadilla Township, Livingston, County, Michigan, and when proceeding around a curve at the above time and place, said

motorcycle encountered pavement liberally covered with crack filler which covered approximately 75% of the northbound lane (towards Pinckney) and also had excessive rutting of the pavement surface, at which time the motorcycle, which was leaned over to the right in negotiating the curve, slipped on the crack filler and/or rutting and fell, and slid over into the oncoming lane, coming into contact with another vehicle coming the other way, causing serious personal injuries to both Plaintiffs.

4. That Defendant was negligent and failed to in its duty to maintain the aforementioned highway in reasonable repair so that it was reasonably safe and convenient for public travel including motorcycles, pursuant to MCL §691.1402(1) in failing to maintain the improved portion of the highway including, but not limited to the eastbound lane of M-36 at the aforementioned place as follows:

- A. That Defendant knew, or in the exercise of reasonable care should have known, that crack filler is a much slipperier surface than asphalt paving and is a distinct hazard and very dangerous for motorcycles to traverse, especially around a curve under the circumstances of this incident.
- B. That Defendant MDOT and/or contractors working under their supervision and control, applied far too much crack filler than is reasonable and proper for the cracks that were in the highway at the place where the accident occurred.
matter.
- C. That Defendant knew, or in the exercise of reasonable care should have known that the rutting present on the road surface was excessive and presented a distinctly hazardous condition for motorcycles to traverse, especially around a curve under the circumstances of this incident.
- D. That Defendant MDOT and/or contractors working under their supervision and control, allowed the rutting to exist at a depth over and above that which is reasonable and proper in the surface of the highway at the place where the accident occurred.

E. That Defendant MDOT had a duty to repave the surface of the highway rather than to saturate most of its surface with crack filler as it did and to repair the rutting present in the road surface at the time of the accident.

5. That Defendant knew of the aforementioned conditions with enough time to remedy same since. Further, that said defects as set forth above existed at least thirty (30) or more days prior to the date of injury of the Plaintiffs.

6. That a Notice of Intent To File Claim pursuant to MCL §691.1404(1) was served upon the Michigan Court of Claims, in triplicate, by Certified Mail, return receipt requested, on or about December 4, 2009.

7. That as a proximate cause of Defendant Road Commission's failure to maintain the aforementioned road, Plaintiff William Kirk Karwacki suffered serious injuries to his left hand, right shoulder, as well as injuries to other portions of his body. Further, that said Plaintiff has endured much pain, suffering, torment, and mental anguish, and will continue to suffer further of same for an indefinite period into the future and permanently.

8. That as a proximate cause of Defendant Road Commission's failure to maintain the aforementioned road, Plaintiff, Kathryn Karwacki suffered a broken right leg and right hand, and injuries to other portions of her body. Further, that said Plaintiff has endured much pain, suffering, torment, and mental anguish, and will continue to suffer further of same for an indefinite period into the future and permanently.

9. That as a proximate cause of Defendant's failure to maintain the aforementioned road, Plaintiffs William Kirk Karwacki and Kathryn Karwacki suffered disfiguring scars and other disfigurements, permanently, and has been caused to suffer embarrassment, humiliation, and mental anguish therefor.

10. That as a proximate cause of Defendant's failure to maintain the aforementioned road, Plaintiffs William Kirk Karwacki and Kathryn Karwacki each suffered the loss of wages and earnings, and fringe benefits including but not limited to medical insurance, property damage to the motorcycle and clothing, and also have each incurred and became indebted for large sums of money as and for the hospital and medical care and treatment of their injuries and for non-related medical


conditions.

11. That as a proximate cause of Defendant's failure to maintain the aforementioned road, each plaintiff has suffered the loss of pleasures and enjoyments and may be caused to suffer further loss of same for an indefinite period into the future.

12. That as a proximate cause of Defendant's failure to maintain the aforementioned road, each plaintiff has suffered the loss of the care, society, companionship, and consortium of their respective spouse, and may be caused to suffer further loss of same for an indefinite period into the future and permanently.

WHEREFORE, each Plaintiff respectfully seeks judgment in their respective favor and against the Defendant in a sum in excess of Twenty Five Thousand (\$25,000.00) Dollars which the trier of fact finds that each has sustained, together with costs, interest, and attorney fees.

Law Offices of
Lawrence S. Katkowsky, P.C.


Lawrence S. Katkowsky
Attorney for Plaintiffs

Dated: January 24, 2011

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of records herein at their respective addresses as disclosed on the pleadings on 2-25-11

By: ☒ U.S. Mail ☐ Fax
☐ Hand Delivery ☐ Overnight Delivery
☐ Certified Mail ☐ Other: _____

Signature: 

ALL-STATE-LEGAL 800-222-0510 EDI-1C RECYCLED

1 *STATE OF MICHIGAN*
2 *IN THE COURT OF CLAIMS*

3 WILLIAM KARWACKI and
4 KATHRYN KARWACKI,

5 Plaintiffs,

6 v

Case No. 10-20-MD

Hon. Paula J.M. Manderfield

7 MICHIGAN DEPARTMENT
8 OF TRANSPORTATION,

9 Defendant.

10 *MOTION FOR SUMMARY DISPOSITION*

11 *BEFORE THE HON. PAULA J.M. MANDERFIELD, CIRCUIT JUDGE*

12 *Ingham County, Michigan - Wednesday, February 15, 2012*

13
14 **APPEARANCES:**

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19 For the Defendant: PHILIP L. BLADEN (P56443)
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24 REPORTED BY: Melinda I. Dexter, RPR, CSR-4629
25 Official Court Reporter
 313 W. Kalamazoo
 Post Office Box 40771
 Lansing, MI 48901-7971

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None

None

1 Ingham County, Michigan
 2 Wednesday, February 23, 2010 - At 2:23 p.m.
 3 THE COURT: Okay. Are the parties here on
 4 Karwacki versus Department of Transportation?
 5 MR. BLADEN: Yes, your Honor.
 6 THE COURT: Okay. Who's here for Plaintiff?
 7 MR. VESPRINI: Good afternoon, your Honor.
 8 Dondi Vesprini appearing on behalf of the Plaintiff.
 9 THE COURT: Okay. And, Mr. Bladen, you're here
 10 on behalf of the Department of Transportation?
 11 MR. BLADEN: Yes, your Honor.
 12 THE COURT: Okay. This is your motion, I
 13 believe.
 14 MR. BLADEN: Yes, your Honor.
 15 THE COURT: Okay. Go ahead.
 16 MR. BLADEN: Thank you, your Honor.
 17 Your Honor, may it please the Court, the
 18 Michigan Department of Transportation brought this motion
 19 under MCR 2.116(C)(7), governmental immunity, also
 20 (C)(10), (C)(8), but, under (C)(7), we're entitled to
 21 attach supporting documents, including affidavits or
 22 deposition testimony.
 23 And the central issues for this motion are two
 24 things: One, whether or not under MCL 691.1404 the
 25 Karwackis listed all of the witnesses known to them at

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1 the time with respect to their claim that a defect in
 2 M-36 caused their motorcycle to wipe out and injure both
 3 of them.
 4 The second issue is whether or not a claim
 5 that, in fact, it was possible that rutting in the
 6 roadway was a cause of their accident, which was added by
 7 amendment granted by this Court well after the notice
 8 period and was not noted in their notice, can be
 9 maintained under the highway exception and under the
 10 notice provision.
 11 As the Court knows, I'll sort of short summary
 12 the facts of the case: The Karwackis were attending a
 13 motorcycle event in Lansing, Michigan, Labor Day weekend
 14 in August of 2009. And on the twenty-ninth of August,
 15 the Karwackis, who were riding on the same motorcycle
 16 together, Mr. Karawacki was driving it, and a number of
 17 their friends and acquaintances, including the four
 18 witnesses that they didn't name in their notice, took off
 19 or left from Lansing around noontime -- it's not exactly
 20 clear exactly when they left -- in order to make an
 21 excursion down to Hell, Michigan.
 22 And during the course of their ride on M-36
 23 heading towards Hell, Michigan, they were rounding a
 24 curve and the Karwackis lost control of their motorcycle
 25 and went down and struck an oncoming vehicle that was

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1 approaching the opposite lane.
 2 At the time of the accident and in their notice
 3 of intent and, in fact, even in their original complaint,
 4 which was filed almost a year after the accident, I
 5 believe their argument or their belief that excessive
 6 crack fill or crack sealant that was placed on the road
 7 by the Road -- er, by MDOT contributed to their accident
 8 or caused it by causing a loss of friction on the roadway
 9 and causing their motorcycle to slip and fall. There was
 10 no mention of any road defect, such as rutting, potholes,
 11 gravel, any other kind.
 12 The four witnesses that were present at the
 13 scene or riding with them were Jim and Vicki Dinverno,
 14 who were riding in the -- on the motorcycle together that
 15 was riding parallel to the Karwackis most of that day,
 16 sometimes ahead, sometimes behind depending on the flow
 17 of the travel, but, nevertheless, fairly close to the
 18 Karwackis. And Doug Smith, who was the lead motorcycle
 19 in the chain of about eight or nine bikes. And next to
 20 Mr. Smith was Dan Dryer, who was ahead of the Dinvernos
 21 in the chain of bicycles in the line.
 22 THE COURT: He was ahead --
 23 MR. BLADEN: He was ahead.
 24 THE COURT: -- of Plaintiff?
 25 MR. BLADEN: That's correct, your Honor.

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1 THE COURT: Okay.
 2 MR. BLADEN: Immediately after the -- when the
 3 accident took place, both Mr. Smith and Mr. Dryer
 4 indicated that -- in Mr. Dryer's case he actually saw the
 5 Karwacki bike going up in the air after it had struck the
 6 bike. Both of them indicated they heard something going
 7 on behind them, immediately turned around and went back
 8 to the scene.
 9 The same thing for the Dinvernos; they heard
 10 something, turned around and went back to the scene.
 11 They were there literally within seconds. What did they
 12 see at the scene? They could provide and did provide
 13 testimony about the condition of the road, whether there
 14 were tar strips on the road, whether there were ruts in
 15 the road, whether there was potholes, or whether there
 16 was gravel on the road.
 17 Two of the witnesses, Mr. Dryer and I believe
 18 Mr. Smith, testified about the condition, the medical
 19 condition --
 20 THE COURT: Were they listed?
 21 MR. BLADEN: No.
 22 THE COURT: Okay.
 23 MR. BLADEN: -- the physical condition of
 24 Mr. and Mrs. Karwacki. One -- they both also -- the
 25 witnesses could also testify about what Mr. and

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<p>1 Mrs. Karwacki were saying immediately after the accident. 2 Mr. Karwacki was telling people, "I don't know what 3 happened." They were able to testify about the weather 4 conditions. 5 That's an important point because whether or 6 not the tar strips contributed to the accident is 7 conditioned upon – is important to know what the 8 temperature of – of – the ambient temperature of the 9 road was at the time of the accident because if it's 10 warmer, the tar strips are tackier, and they – and they 11 increase friction. And if it's cold out, they're 12 slippery. And if it's wet, it's slippery. So if they 13 can testify about it being sunny and relatively warm in 14 the 70s, that might indicate that it's not slippery. 15 In addition, Mr. Karwacki in his deposition 16 testified that the only reason he knew how fast he was 17 going – I think he testified something around 37 miles 18 per hour, but whatever the number, he got that 19 information from Mr. Dinverno. Of course, the speed of 20 the motorcycle at the time of the accident happened is a 21 crucial factor. That's necessary if you're going to do a 22 reconstruction of how the accident took place. 23 And, again, Mr. Dinverno was the one who was 24 able to pace and tell Mr. Karwacki how fast they were 25 going because for most of the ride, he was traveling next</p> <p style="text-align: center;">7</p>	<p>1 THE COURT: And that was filed in time. There 2 Is no argument there, correct? 3 MR. BLADEN: We're not – we're not disputing 4 that the notice that they did file was within the 5 120 days. But the proposition is – but what they have 6 to do is provide the information within 120 days. 7 The <i>Burise</i> case that we cited in our brief, 8 your Honor, stands for the proposition that you can amend 9 your notice and supplement it and update it as many times 10 as you want within 120 days. You're not limited to the 11 first one you filed. But once it's past that 120-day 12 deadline, you can't go back and fix the notice. 13 And that's what they tried to do with the 14 rutting claim and also – and they never actually fixed 15 the notice with respect to the witnesses except to the 16 extent that they testified about them in their 17 depositions well after this case had commenced. 18 The statutory provision at issue states that in 19 the notice, the claimant has to provide the exact 20 location and nature – specify the exact location and 21 nature of the defect and the witnesses known to the 22 claimant at the time. It doesn't specify what witnesses 23 means, doesn't specify what "at the time" means, and 24 doesn't specify what "known to the claimant" means. I'm 25 going to explain what all that means here today so that</p> <p style="text-align: center;">9</p>
<p>1 to the Karwacki bike or just ahead or just behind. 2 All of these individuals were known to the 3 Karwackis at the time not only of the accident but at the 4 time they filed their notice of intent. These are not 5 anonymous bystanders or random people that may have come 6 by after the accident occurred. They were friends and 7 acquaintances of the Karwackis, many of whom they had 8 known for a long period of time. 9 The Dinvernos, in fact, followed the 10 ambulance to the hospital. They certainly discuss – 11 had discussions at the scene with these witnesses. 12 Mrs. Dinverno, in fact, took photographs of the 13 accident scene within literally minutes of the accident 14 occurring. They could testify about where the 15 motorcycles were located, who moved the motorcycle, if 16 anyone. So, in other words, they had tremendous amount 17 of information that was valuable, and the Karwackis knew 18 them and knew of – knew that they knew something. They 19 may not have known all of the details of what they knew 20 but they knew that they must have known something. It 21 strains credibility to believe that they didn't. 22 Now, as the Court knows, MCL 691.1404 requires 23 that a claimant to file an action – in order to preserve 24 an action under the highway exception to governmental 25 immunity has to file a notice of intent. And that –</p> <p style="text-align: center;">8</p>	<p>1 the Court can rule on the motion. 2 I'll dispense with the easy one first: "At the 3 time." It could mean one of two things: Either, at the 4 time of the accident. Or, at the time that the notice 5 was filed. That's not really a relevant question for us 6 here because they knew about all of these witnesses at 7 the time of the accident and at the time that the notice 8 was filed. So it doesn't matter how that is interpreted. 9 The question is – central to this motion is 10 before I get to the rutting claim, is what is meant by 11 witnesses. The Plaintiffs' argument is that the 12 definition here must be witnesses to the accident itself. 13 Witnesses, who, in their words, observed – in their 14 affidavits, observed the accident or observed the bike 15 going down, but that cannot be – that cannot be the 16 definition because as I pointed out in our reply brief, 17 your Honor – well, for two reasons: Number one, under 18 subsection (2) of MCL 691.1404, the legislature gave MDOT 19 or the authority the power to investigate the claim. 20 As we've cited many times in our brief, 21 your Honor, and under the <i>Plunkett</i> decision, two of the 22 main purposes of the notice provision is to give the road 23 authority an opportunity to go out and fix the problem 24 and an opportunity to investigate while the claim is 25 still fresh.</p> <p style="text-align: center;">10</p>

<p>1 In order to do that, the legislature gave them</p> <p>2 Investigative tools, one of which was the ability to call</p> <p>3 the claimants' witnesses and put them under oath and ask</p> <p>4 them about the claim, the extent their -- the amount</p> <p>5 thereof, and the nature of their injuries.</p> <p>6 If the definition that they're proposing today</p> <p>7 is to the accident alone, witnesses to the accident, the</p> <p>8 investigative purpose of that provision to allow the</p> <p>9 state in this case to call their witnesses to testify</p> <p>10 about the claim, the amount thereof, and the extent of</p> <p>11 their injuries would be written out of the statute</p> <p>12 because how would we even know about those other</p> <p>13 potential witnesses, for example, to testify about the</p> <p>14 extent of their injuries? The only way we would know</p> <p>15 about it is if they told us, and that's what the purpose</p> <p>16 of the notice provision is.</p> <p>17 But aside from that, your Honor, there is</p> <p>18 another strong clue that tells us exactly what the</p> <p>19 legislature intended. In our supplemental -- In our</p> <p>20 reply brief, your Honor, I'd point this out: In the</p> <p>21 highway exception provision itself, MCL 691.1402, the</p> <p>22 legislature which passed that provision in 1964 included</p> <p>23 the following language. It's on page 4 of my</p> <p>24 supplemental brief, your Honor -- er, excuse me, let me</p> <p>25 rephrase that. That's on page 3 of my supplemental brief</p> <p style="text-align: center;">11</p>	<p>1 occurred, the known extent of the</p> <p>2 injury, the names of any</p> <p>3 witnesses to the accident, and</p> <p>4 that the person receiving the</p> <p>5 injury intends to hold the county</p> <p>6 liable for damages.</p> <p>7 There is the language that the Plaintiffs want</p> <p>8 to apply to this case. The problem is, even though the</p> <p>9 legislature knew about that language "to the accident,"</p> <p>10 it did not include it in section 1404 of the GTLA. It</p> <p>11 took the words "to the accident" out.</p> <p>12 Now, I want to make one correction, your Honor.</p> <p>13 In my brief, I point out that that language was in the --</p> <p>14 the language I cited from MCR -- MCL 224.21 was in that</p> <p>15 statute since 1909. Actually, after doing some further</p> <p>16 research, that appears to be incorrect. It actually --</p> <p>17 the very similar language, and I'll explain this all in a</p> <p>18 minute, goes back to at least 1948 where the prior</p> <p>19 iteration of the statute said "witnesses to said</p> <p>20 accident." Not much of a difference.</p> <p>21 In 1996, the legislature amended MCR 2 --</p> <p>22 excuse me, MCR [sic] 224.21 subsection (3) to read "to</p> <p>23 the accident." Pretty much the same meaning.</p> <p>24 In any case, what it tells us is that the</p> <p>25 legislature knew and could have put into section 1404</p> <p style="text-align: center;">13</p>
<p>1 in the second paragraph.</p> <p>2 I'll continue whenever you're ready,</p> <p>3 your Honor.</p> <p>4 THE COURT: Go on.</p> <p>5 MR. BLADEN: Okay. In that provision about</p> <p>6 midway through the paragraph of subsection (1) of MCL</p> <p>7 691.1402, the legislature stated that:</p> <p>8 The liability, procedure, and</p> <p>9 remedy as to county roads under</p> <p>10 the jurisdiction of a county road</p> <p>11 commission shall be provided</p> <p>12 in...MCL 224.21.</p> <p>13 In other words, the procedures and policies and</p> <p>14 liabilities with respect to county road commissions are</p> <p>15 to be determined by MCL 224.21. If you review that</p> <p>16 particular statute, it actually has a notice provision</p> <p>17 contained within it similar to but not identical to the</p> <p>18 one at issue here today.</p> <p>19 And in subsection (3) of MCL 224.21, the court</p> <p>20 -- the legislature said the notice that should be</p> <p>21 provided to the road commissions, quote:</p> <p>22 The notice shall set forth</p> <p>23 substantially the time when and</p> <p>24 place where the injury took</p> <p>25 place, the manner in which it</p> <p style="text-align: center;">12</p>	<p>1 language specifying that the witnesses that the claimants</p> <p>2 had to provide names of or identify were witnesses to the</p> <p>3 accident or to said accident. The legislature explicitly</p> <p>4 specifically did not do that.</p> <p>5 And we know they were aware of this statute,</p> <p>6 number one. We have to presume the legislature is aware</p> <p>7 of existing statute language as a matter of law. I cite</p> <p>8 the authority for that in our reply, your Honor.</p> <p>9 And, number two, they referenced it directly in</p> <p>10 section 1402 of the Governmental Tort Liability Act.</p> <p>11 They knew about the statute. They knew -- must have</p> <p>12 known what the language was.</p> <p>13 So if you read subsection (2) of MCL 691.1404,</p> <p>14 which gives the investigative powers to the authority --</p> <p>15 road authority to call the claimants' witnesses and to</p> <p>16 testify under oath about the claim, the amount thereof,</p> <p>17 and the extent of their injuries, along with the obvious</p> <p>18 decision of the legislature not to include the language</p> <p>19 "to the accident" in section 1404(1), the only logical</p> <p>20 conclusion is that that is -- that their -- that</p> <p>21 Plaintiffs' construction of the statute is wrong. And,</p> <p>22 frankly, there isn't any case law that supports their</p> <p>23 argument either.</p> <p>24 The closest thing they can get is the <i>Rule</i> case</p> <p>25 as far as a published opinion. And that case merely</p> <p style="text-align: center;">14</p>

1 stands for the proposition that just because you're at
2 the scene of an accident for purposes of notice doesn't
3 necessarily make you a witness. And I pointed out the
4 way that the court ruled on that was, the daughter who
5 was sitting in the car when her mother fell down on the
6 sidewalk near the car, apparently her actual testimony
7 about what she knew, what she saw, what information she
8 had was never provided to the Court, was never
9 determined. So the court said, "We don't know what she
10 knew. Therefore, you can't conclude that she was a,
11 quote, witness." Doesn't say anything about being a
12 witness to the accident itself.

13 And case law now is clear that if you don't
14 name the witnesses, your claim is out, if you don't name
15 a known witness.

16 Now, let's look at the Karwackis' affidavit.
17 Their testimony in their affidavit, which is almost
18 identical; there are slight differences for allowing for
19 the fact that Mr. Karwacki was driving. Their testimony
20 is that the only people they knew about that observed the
21 accident were the Battaglias, Michelle and Jerome
22 Battaglia. They didn't anywhere in their affidavit say,
23 "Our understanding was that we only had to provide the
24 names of witnesses who observed the accident or witnesses
25 to the accident." They simply say, "The only ones we

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1 knew of who saw the accident occur were the Battaglias.
2 But if you look at the notice itself, it's
3 Exhibit C to our original brief, your Honor, and they
4 also attach a copy, they list not just the Battaglias.
5 They list the investigating officers, Russell and
6 Treakle, from the Unadilla Township Police Department;
7 Jesse Howard Mowry; Kenneth Johnson; and Brian Lorian.

8 Although they say, "There may have been
9 others," that actually we know that, of course, they knew
10 about others. But none of those other people, according
11 to their own testimony, observed the accident or at least
12 they didn't know that they observed the accident.

13 In fact, the police officers arrived well after
14 the accident occurred to conduct an investigation. If
15 their interpretation is correct that they didn't think
16 they needed to add the witnesses of people who didn't see
17 the accident actually take place, why would they add all
18 those other people? I think the answer is, those people
19 were listed in the police report and so they were being
20 over-inclusive because they wanted to make sure they
21 listed all possible witnesses, even ones who didn't see
22 the accident actually take place. So why didn't they
23 list those other four people? As I pointed out, they may
24 provide some difficulty for the Karwackis.

25 One of the witnesses testified that

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1 Mr. Karwacki was at the scene immediately after it
2 happened saying, "I don't know what happened. I don't
3 know what happened." Later on, of course, Mr. Karwacki
4 is very descriptive of what happened in his deposition
5 well after this took place. MDOT could use that to
6 cross-examine Mr. Karwacki and ask him, "Well, didn't you
7 say at the scene you didn't know what happened?"

8 Again, we're not trying to create a question of
9 credibility or fact here on whether he did or didn't know
10 what happened. The point is, this is a material witness
11 that MDOT should have been notified about.

12 The same is true for Mr. Dinverno.

13 Mr. Karwacki said, "The only reason I know how fast --" I
14 mean, I'm paraphrasing his testimony, but "I knew how
15 fast I was going is because Mr. Dinverno told me," or "I
16 learned it from Mr. Dinverno." Mr. Dinverno testified he
17 was able to pass it. That's critical information.
18 Mr. Karwacki is not a direct witness to that because he
19 doesn't remember it. He has got it from his friend,

20 Mr. Dinverno. Is MDOT entitled to know about that
21 witness? Yes.

22 THE COURT: You need to wrap up.

23 MR. BLADEN: All right. With respect to the
24 rutting, your Honor, with respect to the rutting,
25 your Honor, their own expert witness, Mr. Valenta, in

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1 their affidavit said, "The only way you could possibly
2 know about this is if you're a trained highway engineer."
3 And, in fact, the tar strips or the crack fill
4 camouflaged them."

5 Now, the idea that MDOT would be put on notice
6 of the alleged rutting, which, by the way, falls within
7 the AASHTO standards for depth, according to
8 Mr. Valenta's own analysis of it. And according to the
9 *Plunkett* case, there is no way MDOT would have been on
10 notice or even found it.

11 In fact, Mr. Geib, the head of the TSC -- and
12 he's Exhibit No. K attached to our original brief,
13 your Honor -- said that when he heard about the accident,
14 he sent out an associate engineer to go out and measure
15 the amount of crack fill that was on the roadway to get
16 an average width and total surface area, nothing with
17 respect to the rutting because he wasn't aware of any
18 claim for rutting.

19 That is a clearcut case where there is no
20 possible way MDOT could have been put on notice of
21 rutting. And it wasn't added until after the complaint
22 was amended by the Court or permitted to be amended by
23 the Court. So that claim should be dismissed. I'll be
24 happy to answer any questions, your Honor, and I reserve
25 some time for rebuttal.

18

<p>1 THE COURT: Okay.</p> <p>2 MR. BLADEN: Thank you.</p> <p>3 THE COURT: Thank you.</p> <p>4 Okay. Response?</p> <p>5 MR. VESPRINI: Good afternoon.</p> <p>6 THE COURT: Good afternoon.</p> <p>7 MR. VESPRINI: Dondi Vesprini appearing on</p> <p>8 behalf of the Plaintiff. Addressing the Defense</p> <p>9 allegations regarding listing of witnesses on my clients'</p> <p>10 notice of intent –</p> <p>11 THE COURT: Yes.</p> <p>12 MR. VESPRINI: – Defendant cites to</p> <p>13 MCL 691.1404(2), which gives the governmental agency the</p> <p>14 right to compel the claimant and his or her witnesses to</p> <p>15 testify regarding the claim regarding the amount thereof</p> <p>16 and the extent of the injury and argues that the language</p> <p>17 of this statute dictates that the term witnesses means</p> <p>18 any and all persons that have absolutely any information</p> <p>19 whatsoever to do with the claim.</p> <p>20 To the contrary, I argued the statute simply</p> <p>21 says what it does. If the governmental agency based on</p> <p>22 the notice of intent wants to compel the claimants to</p> <p>23 testify and any witnesses that they know of, they can do</p> <p>24 that, but that statute doesn't provide any insight on</p> <p>25 what the term witnesses means or who that encompasses.</p> <p>19</p>	<p>1 for purposes of the notice statute.</p> <p>2 In the <i>Rule</i> case, the plaintiff tripped on a</p> <p>3 piece of pipe that was sticking out of the sidewalk, and</p> <p>4 she did that in front of her vehicle. She tripped in</p> <p>5 front of her vehicle. The plaintiff's daughter was in</p> <p>6 the front seat of the car and saw the fall. It's</p> <p>7 undisputed, if you read that opinion, your Honor, that</p> <p>8 she saw the fall, but she did not see what caused the</p> <p>9 fall.</p> <p>10 In that case, the court found that the evidence</p> <p>11 was inadequate to determine whether or not the daughter</p> <p>12 was a witness for purposes of the notice statute implying</p> <p>13 that a witness needs to actually see the accident itself</p> <p>14 and possibly what caused it as well. That was a 1968</p> <p>15 case.</p> <p>16 The implication in <i>Rule</i> was actually made</p> <p>17 concrete in the concurring opinion of Judge Davis in a</p> <p>18 case that I attached to my brief, <i>Ketchum v City of Grand</i></p> <p>19 <i>Rapids</i>, which is a 2009 Court of Appeals case, where he</p> <p>20 stated, and I quote:</p> <p>21 I finally note the defendant</p> <p>22 contends that plaintiff's notice</p> <p>23 is also defective because it</p> <p>24 fails to list any witnesses.</p> <p>25 However, plaintiff was only</p> <p>21</p>
<p>1 Defense also cites to the language of the</p> <p>2 notice provision of MCL 224.21, which as he stated is the</p> <p>3 statute regarding notice to be given a county road</p> <p>4 commission for defective county roads. Your Honor, that</p> <p>5 statute has absolutely no applicability in this case as</p> <p>6 this statute involves the Michigan Department of</p> <p>7 Transportation regarding the defective highway under its</p> <p>8 jurisdiction.</p> <p>9 My definition, as counsel alluded to as to what</p> <p>10 the term witnesses means and the statute applies in this</p> <p>11 case, isn't something I created. Case law that</p> <p>12 specifically interprets the statute at issue, which is</p> <p>13 691.1404(1), has addressed what it means to be a witness</p> <p>14 for purposes of the notice of intent.</p> <p>15 The <i>Burise v City of Pontiac</i> case, which is a</p> <p>16 Michigan Court of Appeals case from 2009, gave some</p> <p>17 guidance when it said that a notice of intent may not be</p> <p>18 found to be defective for a failure to name witnesses of</p> <p>19 whom the claimant was unaware.</p> <p>20 The other case which adds significant light on</p> <p>21 this is the <i>Rule v Bay City</i> case, which was a 1968 case,</p> <p>22 that was interpreting a notice provision prior to the one</p> <p>23 at issue, but the language was substantially the same.</p> <p>24 And as counsel has admitted, the mere presence of a</p> <p>25 person at the scene does not make that person a witness</p> <p>20</p>	<p>1 required to list witnesses of</p> <p>2 which she was actually aware.</p> <p>3 This is an important provision here.</p> <p>4 Furthermore, a person is not</p> <p>5 necessarily a witness just</p> <p>6 because he or she is present at</p> <p>7 or near the scene of an accident</p> <p>8 unless he or she actually</p> <p>9 observed or was involved in the</p> <p>10 accident.</p> <p>11 And Judge Davis actually referred back to the</p> <p>12 <i>Rule</i> case as authority for that proposition. In the</p> <p>13 <i>Ketchum</i> case, Judge Davis continued:</p> <p>14 The evidence here showed that a</p> <p>15 number of individuals observed</p> <p>16 the defect and observed plaintiff</p> <p>17 immediately after her fall, and</p> <p>18 plaintiff was certainly aware of</p> <p>19 those individuals, but none of</p> <p>20 them actually observed</p> <p>21 plaintiff's fall. I agree with</p> <p>22 the trial court that none of</p> <p>23 those individuals were witnesses</p> <p>24 of the kind that plaintiff was</p> <p>25 required to disclose in her</p> <p>22</p>

<p>1 notice to defendant.</p> <p>2 In the case at bar, your Honor, in the Karwacki</p> <p>3 matter, the only persons who actually observed and/or</p> <p>4 were involved in Mr. Karwacki's accident were Jerry and</p> <p>5 Michelle Battaglia, who were riding immediately behind</p> <p>6 Mr. Karwacki as they went through the curve at issue.</p> <p>7 Michelle testified that she was only two to three bike</p> <p>8 lengths behind Mr. Karwacki as they went into the curve.</p> <p>9 She actually observed Mr. Karwacki's back tire slide due</p> <p>10 to some type of a slide maneuver on the tar strips that</p> <p>11 were on the roadway. She saw his bike go down, impact</p> <p>12 the on-coming car that he slid into in the other lane of</p> <p>13 traffic, and Mr. Karwacki's bike came back and hit</p> <p>14 Michelle. So she was actually involved in the accident,</p> <p>15 not only observed it.</p> <p>16 Jerry Battaglia was right behind his wife,</p> <p>17 50 feet behind Mr. Karwacki. He testified that he saw</p> <p>18 Mr. Karwacki's bike sideways -- in the sideways position</p> <p>19 across the centerline. He saw, actually observed</p> <p>20 Mr. Karwacki's bike make contact with that on-coming car,</p> <p>21 and, unfortunately for Mr. Battaglia, observed</p> <p>22 Mr. Karwacki's bike then run into his wife's motorcycle</p> <p>23 and take her down.</p> <p>24 As the Battaglias were the only two people who</p> <p>25 saw or were involved in the accident, these were the only</p> <p style="text-align: center;">23</p>	<p>1 The second reason that the Defense argument is</p> <p>2 flawed, your Honor, is because the persons that he</p> <p>3 alleges should have been named, these other people who</p> <p>4 were riding, the evidence is clear that they did not see</p> <p>5 the accident. And I'd just refer to Defendant's brief</p> <p>6 where he summarizes their testimony. Everything they saw</p> <p>7 took place after the accident. They didn't see the</p> <p>8 accident happen.</p> <p>9 Many of the people that counsel references were</p> <p>10 actually in front of the Karwackis. And they admitted</p> <p>11 that they heard a crash, looked back, and by the time</p> <p>12 they looked back, the accident had occurred. None of</p> <p>13 them saw the accident, nor were any of these people</p> <p>14 actually involved in the accident. They got through --</p> <p>15 made it through the curve unscathed.</p> <p>16 As Jerry and Michelle Battaglia were the only</p> <p>17 witnesses known to the Plaintiffs within the notice --</p> <p>18 the 120-day notice period and were, in fact, named on the</p> <p>19 notice of intent, the notice of intent was compliant with</p> <p>20 the notice statute.</p> <p>21 Briefly, your Honor, with regards to the</p> <p>22 rutting issue, I'm not arguing that the notice of intent</p> <p>23 did not mention the words rutting. There was no specific</p> <p>24 mention of rutting in my clients' notice of intent that</p> <p>25 was filed.</p> <p style="text-align: center;">25</p>
<p>1 witnesses required to be named under the notice provision</p> <p>2 at issue in this case, your Honor. Defendant's argument</p> <p>3 that Plaintiff was required to name the multitude of</p> <p>4 other people who were -- happened to be riding in the</p> <p>5 group that afternoon is flawed for two reasons:</p> <p>6 The statute -- first, the statute is clear that</p> <p>7 the Karwackis were only required to name those witnesses</p> <p>8 actually known at the time. While Defense has argued a</p> <p>9 bunch of times that the Karwackis knew of other people,</p> <p>10 there is no evidence to that effect, your Honor.</p> <p>11 I submitted an affidavit from Mr. and</p> <p>12 Mrs. Karwacki that said that the only two witnesses they</p> <p>13 knew of who saw the bike go down and saw the accident</p> <p>14 occur were the Battaglias. Thus, even if there were</p> <p>15 other actual witnesses to the accident, the only two that</p> <p>16 my clients were aware of at the time of the notice --</p> <p>17 that the notice provision was in effect were the</p> <p>18 Battaglias, and they were named.</p> <p>19 Defense counsel has mentioned that there were</p> <p>20 some other people that were named in the notice of</p> <p>21 intent. Your Honor, I can tell you as an officer of the</p> <p>22 court those were provided by my office counsel because</p> <p>23 those were names on the witness list -- er, on the police</p> <p>24 report, so those were added. They didn't have to be, but</p> <p>25 they were added because they were on the police report.</p> <p style="text-align: center;">24</p>	<p>1 However, your Honor, the notice of intent per</p> <p>2 case law that I've stated relying heavily on the <i>Plunkett</i></p> <p>3 case, which is the Court of Appeals case that was decided</p> <p>4 in 2009, makes clear that so long as the notice of intent</p> <p>5 reasonably apprises the governmental agency of the nature</p> <p>6 of the claim and if the notice of intent taken as a whole</p> <p>7 substantially complies with the notice statute, then your</p> <p>8 notice of intent is a good notice, your Honor.</p> <p>9 The <i>Plunkett</i> case, I think part of it -- part</p> <p>10 of the <i>Plunkett</i> case's value is that it demonstrates the</p> <p>11 type of notice of intent that courts will find to</p> <p>12 reasonably apprise the governmental agency of the nature</p> <p>13 of the defect. In the <i>Plunkett</i> case, the notice of</p> <p>14 intent -- and I should point out this was a case against</p> <p>15 MDOT as well, so MDOT is very familiar with this case.</p> <p>16 The notice of intent in the <i>Plunkett</i> matter stated that</p> <p>17 the claim arose when Ms. Plunkett, quote, struck</p> <p>18 standing/pooled water on the roadway surface while</p> <p>19 driving, which then caused her vehicle to hydroplane out</p> <p>20 of control and strike a tree on the west side of the</p> <p>21 roadway.</p> <p>22 The complaint that Ms. Plunkett's estate filed</p> <p>23 argued that MDOT was negligent in altering the super-</p> <p>24 elevation of the roadway, and the surface of the highway</p> <p>25 was defective due to excessive rutting, which is exactly</p> <p style="text-align: center;">26</p>

1 what we allege in our complaint.

2 As is the case at bar, defense counsel argued
3 In the *Plunkett* case that since the notice of intent did
4 not specifically use the word super-elevation or rutting,
5 the complaint that based negligence on these grounds was
6 barred. The court disagreed with defendant then and said
7 that taken as a whole, the notice reasonably apprised
8 MDOT of the nature of the defect.

9 The court stated that although it did not use
10 the words rutting or super-elevation, it adequately
11 described the location and nature of the defect to the
12 extent that it reasonably apprised MDOT of the *Plunkett*'s
13 claims.

14 In this case, your Honor, the notice of intent
15 that was filed admittedly did not use the word rutting,
16 similar to the notice of intent in the *Plunkett* case.
17 However, your Honor, it's Plaintiffs' position that the
18 language of the notice of intent, when taken as a whole,
19 adequately described the location and nature of the
20 defect to the extent that it reasonably apprised
21 Defendant of Plaintiffs' claims.

22 It's very specific to location. In fact,
23 Defendant is not arguing that they weren't aware of the
24 location of the defect. It's also very specific not only
25 describing the crack fill, but the language of the notice

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1 of intent specifically alleges a failure on the part of
2 the Defendant to "repave the surface of the highway."

3 Given the specificity of the location, the
4 specificity of speaking of the crack fill defect,
5 certainly this would -- gave Defendant enough important
6 facts to send somebody out, investigate the cracking, and
7 investigate the need to repave the roadway and would have
8 discovered potential issues with rutting of the road
9 surface.

10 Given the specificity of the notice of intent
11 and in reliance on the *Plunkett* case, your Honor,
12 although the notice of intent in the case at bar did not
13 specifically use the word rutting, I argue that it was
14 sufficient to reasonably apprise Defendant of the claim.

15 In the alternative, your Honor -- and I'll be
16 brief on this one because the Court actually already
17 decided this issue. In the alternative, if this Court
18 were to find that the notice was good only as to the
19 crack fill, that it wasn't sufficient to include any
20 allegation of rutting, you may recall, your Honor,
21 sometime ago, probably eight or nine months ago, I came
22 before this Court when my expert, Jim Valenta, went out
23 in January of last year to investigate the roadway to do
24 some homework on the crack fill issue, and he found that
25 the rutting existed. It could have created an issue. It

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1 could have been a proximate cause of the accident. As
2 soon as I found that out, your Honor, I came to this
3 Court, and I asked this Court to allow me to file an
4 amended complaint, to amend the complaint to add
5 allegations of rutting. This Court granted that over the
6 argument of counsel, which was virtually an identical
7 argument as he made today; that the amendment should not
8 have been allowed because the rutting was not mentioned
9 in the notice of intent.

10 Your Honor, this -- the state of Michigan has a
11 very, very long line of juris prudence allowing liberal
12 amendments of complaints, liberal amendments of
13 pleadings. I cited many, many cases confirming that.
14 And, in fact, your Honor, Defendant has cited no
15 authority against the proposition that we couldn't amend
16 the complaint.

17 The reason that there is no authority out
18 there, your Honor, is because it would fly in the face of
19 Michigan's long-standing juris prudence regarding the
20 allowance of amendments of pleadings. That is what
21 discovery is for.

22 If -- if Defense counsel's position is correct
23 that the amendment should not have been allowed, then you
24 would never, ever, ever be able to amend a pleading to
25 add a count of negligence against a governmental agency.

29

1 This issue has been decided. The amendment was
2 granted, your Honor. In fact, when you granted the
3 order, you actually ordered that any investigation as to
4 the rutting be done by each side's expert at the same
5 time. Defendant is simply seeking a second bite at the
6 apple on this issue, your Honor.

7 And for all of the reasons that I've mentioned,
8 I would ask that Defendant's motion be denied in its
9 entirety. Thank you, Judge.

10 THE COURT: Okay. Five minutes for rebuttal,
11 Mr. Bladen.

12 MR. BLADEN: All right, your Honor. Briefly.
13 All right. With respect to the *Rule* case, I believe that
14 the facts of that case, there was no testimony from the
15 daughter herself about whether she saw the accident or
16 not. Whether she saw her mother fall was testimony from
17 her mother. And the court said, "Look, you can't base
18 the decision on whether she was a witness or not merely
19 on the hearsay testimony of her mother." You have to go
20 to the direct source, and that's the witness. And that's
21 what we did in this case. We got their depositions. And
22 we know exactly what they saw and what they didn't see.

23 Second, the *Ketchum* case, first and foremost,
24 your Honor, let me -- I apologize, your Honor. The
25 *Ketchum* case, number one, it's unpublished, not binding.

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1 Number two, Judge Davis's concurrence wasn't
2 even part of the majority opinion in *Ketchum* to the
3 extent that it even would be considered relevant. The
4 majority in *Ketchum* didn't even get to the issue of
5 whether or not the witnesses were properly named or
6 not. They said we -- in fact, on page 3 of the slip
7 opinion, which is Exhibit 8 attached to the Plaintiffs'
8 brief, that -- they list all the alternative arguments
9 that the defendant in that case made, and one of them was
10 the witnesses who helped Mrs. Ketchum get up and assisted
11 her after the accident were not listed in the notice.
12 They said, "We don't have to get to that point
13 because we've ruled that it wasn't precise as to the
14 nature of the defect." And so that's not even a holding
15 in that case. And I think as I pointed out, Judge Davis,
16 while I respect his opinion, is incorrect on the law
17 because if you look at the statute, and I pointed out the
18 statutory interpretation, there is no possible way that
19 that could be the intent of the legislature.

20 With respect to the amendment of the complaint
21 and the rutting, your Honor, your Honor specifically
22 asked me whether I was intending to file a motion for
23 summary disposition at some point, and I said we reserve
24 the right to do that, and you granted the amendment even
25 though we -- we stated that.

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1 We have the right to bring this amendment --
2 this motion. We're not questioning at this point the
3 amendment of the complaint. We're questioning at this
4 point the claim itself. We've actually had our
5 investigative people go out there and do the
6 investigation now. You know, we could bring a separate
7 motion strictly on whether or not this is even a defect
8 under the law. Under the *Plunkett* case, it doesn't even
9 meet the statutory -- it wouldn't even meet the AASHTO
10 definition of an unacceptable rut, even if they do exist.

11 Another problem we have is, we don't know if
12 the ruts were there on the date of the accident. The
13 earliest that you could say the ruts existed is when
14 Mr. Valenta went out there because MDOT certainly didn't
15 see any before then.

16 As I pointed out, Mr. Geib sent out an
17 associate engineer to go out there and measure the crack
18 fill. Nothing, nothing about any ruts. And the
19 discussion of crack fill is a completely different
20 alleged defect from a rut. It's like saying there was
21 ice on the road versus a pothole or there was a slippery
22 substance on the road versus a pothole, or there was
23 gravel on the road that caused me to slip and fall versus
24 a pothole.

25 Rutting is a physical depression in the road

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1 along the wheel tracks. The crack fill they alleged
2 messed up the friction coefficient for their tires, and
3 so they slipped and fell on it. Completely two different
4 claims. Two different alleged defects.

5 And this is not merely a situation where they
6 described in general terms, "My bike went down due to a
7 discontinuity in the road," and they didn't use the word
8 rutting. They gave a completely misleading notice that
9 did not apprise MDOT of any possibility that it was a
10 pavement defect. And the allegation that, "Well, you
11 didn't maintain the road," that goes to the fact that you
12 used too much crack fill to fill the cracks. It has
13 nothing to do with whether or not you fixed rutting. At
14 least that's the obvious intent of the notice. And
15 that's what was said, frankly, in their original
16 complaint.

17 Now, counsel engaged in a little bit of
18 hyperbole by saying, "Well, this would never allow -- if
19 the Court would throw it out, it would never allow an
20 amendment against the state of Michigan." That's not
21 true, first of all. What we're talking about here is a
22 notice of intent requirement. You have to provide notice
23 of this -- of the exact location and nature of the
24 defect. The Court -- Supreme Court in the *Rowland* case
25 said you have to enforce the statutory notice provision

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1 as written.

2 And, finally, while counsel, and I understand
3 why, relies on *Plunkett*, I pointed out in our reply
4 brief, your Honor, the recent Supreme Court case in
5 *Jakapovich* [phonetic] calls that seriously into question
6 because the Court of Appeals in *Jakapovich* relies heavily
7 on the very same language that counsel relies on today in
8 *Plunkett*.

9 In *Jakapovich*, the lady fell down on the
10 sidewalk in front of two houses. She gave the address of
11 one house but the defect was actually in front of the
12 other house or other address. They were right next to
13 each other. The trial court said, "Oh, that's not a --
14 that's substantial compliance. It's a technical defect,
15 and I'm denying the motion for summary disposition." The
16 Court of Appeals, relying on *Plunkett* using the same
17 language that counsel relied on said, "Oh, that's a
18 technical defect. You have to liberally construe the
19 notice provisions in favor of the claimant, etcetera."
20 They cited substantial compliance. Supreme Court said,
21 "Nope."

22 THE COURT: Your four or five minutes are up.

23 MR. BLADEN: The Supreme Court said, "No. The
24 claim should have been dismissed." Thank you,
25 your Honor.

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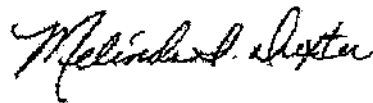
<p>1 THE COURT: Okay. And the Court notes that</p> <p>2 this motion was brought under 2.116(C)(7) for failure to</p> <p>3 properly plead in avoidance of governmental immunity.</p> <p>4 And the Court notes that this Plaintiffs' claim</p> <p>5 is brought under the highway exception to the</p> <p>6 Governmental Tort Liability Act, which is 691.1401. And</p> <p>7 pursuant to that exception, the Department of</p> <p>8 Transportation is required to keep a highway under its</p> <p>9 jurisdiction in reasonable repair and in a condition</p> <p>10 reasonably safe and fit for travel. And if not so</p> <p>11 maintained, a party may recover damages suffered by the</p> <p>12 governmental agency's lack of reasonable repair in</p> <p>13 maintaining the highway in a safe condition.</p> <p>14 However, there is a notice provision that the</p> <p>15 Plaintiff must provide to the governmental agency. And</p> <p>16 under the case law, the purpose is twofold, which has</p> <p>17 been discussed by counsel. One, to provide the</p> <p>18 governmental agency with an opportunity to investigate</p> <p>19 the claim while it's still fresh and also to give the</p> <p>20 agency an opportunity to remedy the defects before other</p> <p>21 persons are injured.</p> <p>22 Now, pursuant to section 1404(1), the notice</p> <p>23 must be filed within 120 days with the Court of Claims</p> <p>24 Clerk and shall serve notice on the agency of the</p> <p>25 occurrence of the injury and the defect. The notice</p> <p style="text-align: right;">35</p>	<p>1 nature of the defect, it's obviously a problem with the</p> <p>2 highway, the crack filler, the Department was put on</p> <p>3 notice that -- so they had the opportunity to go out</p> <p>4 immediately and investigate the claim. I'm sure there is</p> <p>5 pictures of the road that were taken by the engineer</p> <p>6 immediately after it happened.</p> <p>7 So I believe the purpose of the notice to give</p> <p>8 the governmental agency an opportunity to investigate the</p> <p>9 claim while it was still fresh was accomplished and also</p> <p>10 the opportunity to remedy the defect. So the Court</p> <p>11 denies Defendant's motion based on that argument.</p> <p>12 Now, their argument that Plaintiff has failed</p> <p>13 to provide witness -- names of the witnesses known at the</p> <p>14 time by the claimant, the Court is also denying that</p> <p>15 motion for the reason that there were several people</p> <p>16 riding motorcycles in a group. Plaintiff listed the two</p> <p>17 that were directly behind Plaintiffs' motorcycle in</p> <p>18 addition to several other witnesses who were listed in</p> <p>19 the police report.</p> <p>20 So the question is, who actually is a witness?</p> <p>21 Is it anybody in the vicinity who is a witness that's</p> <p>22 required to be named, or is it just people who actually</p> <p>23 witnessed the accident? And there is different cases</p> <p>24 that discuss the definition of a witness, but I believe</p> <p>25 the interpretation that a witness must actually see the</p> <p style="text-align: right;">37</p>
<p>1 shall specify the exact location, nature of the defect,</p> <p>2 the injuries sustained, and the names of the witnesses</p> <p>3 known at the time by the claimant.</p> <p>4 So Defendant's arguing that the case should be</p> <p>5 dismissed because Plaintiff has failed to comply with</p> <p>6 that notice provision, first, specifically, as to not</p> <p>7 including their theory that rutting may have been a cause</p> <p>8 of the accident.</p> <p>9 Plaintiffs' notice included excessive crack</p> <p>10 filler caught -- was one of the causes. Also they</p> <p>11 alleged failure to repave that area of the road rather</p> <p>12 than allowing the surface to become saturated with crack</p> <p>13 filler, and that was the condition or nature of the</p> <p>14 defect provided by Plaintiff in their notice, and rutting</p> <p>15 was not mentioned.</p> <p>16 However, the Court did grant Plaintiffs' motion</p> <p>17 to amend their complaint, and they added the defect of</p> <p>18 excessive rutting. And Defendant opposed that motion for</p> <p>19 the same argument that's made here today and has not</p> <p>20 appealed that decision or requested reconsideration.</p> <p>21 However, looking at the case law, I don't</p> <p>22 believe that there is a requirement that all possible</p> <p>23 legal theories be included in the notice of intent. It</p> <p>24 -- by providing the location of the defect, and that was</p> <p>25 specifically spelled out in the notice of intent, and the</p> <p style="text-align: right;">36</p>	<p>1 accident and possibly what caused it would be the</p> <p>2 witnesses to be named.</p> <p>3 There is, you know, scheduling orders and other</p> <p>4 requirements for witness lists being named later during</p> <p>5 the course of litigation. But the witnesses from the</p> <p>6 police report and the two people who were on motorcycles</p> <p>7 directly behind Plaintiff, I believe, was sufficient.</p> <p>8 They were present at the time of the accident, and they</p> <p>9 actually witnessed the accident. And they're the ones</p> <p>10 known to Plaintiff at the time, according to Plaintiffs'</p> <p>11 affidavit.</p> <p>12 So the Court is denying the motion regarding</p> <p>13 the notice of intent being defective due to Plaintiffs'</p> <p>14 failure to provide every and all possible witnesses in</p> <p>15 their notice of intent.</p> <p>16 Mr. Vesprini, if you'd submit an order, please.</p> <p>17 MR. VESPRINI: I will, your Honor. Thank you.</p> <p>18 MR. BLADEN: Actually, your Honor, I have a</p> <p>19 draft order that I'll shown Mr. Vesprini --</p> <p>20 THE COURT: Okay.</p> <p>21 MR. BLADEN: -- with your permission. If he's</p> <p>22 okay with it, we can submit that.</p> <p>23 THE COURT: Okay.</p> <p>24 (At 3:14 p.m., the matter is</p> <p>25 concluded.)</p> <p style="text-align: right;">38</p>

1 STATE OF MICHIGAN)
) SS.
2 COUNTY OF INGHAM)
3

4 CERTIFICATE OF REPORTER
5

6 I, Melinda I. Dexter, Certified Shorthand
7 Reporter, do hereby certify that the foregoing
8 38 pages comprise an accurate, true, and complete
9 transcript of the proceedings and testimony taken in the
10 case of William Karwacki and Kathryn Karwacki versus
11 Michigan Department of Transportation, Case No. 10-20-MD,
12 on Wednesday, February 15, 2012.

13 I further certify that this transcript of the
14 record of the proceedings and testimony truly and
15 correctly reflects the exhibits, if any, offered by the
16 respective parties. WITNESS my hand this the
17 twenty-eighth day of February, 2012.
18
19
20

21 
22

23 Melinda I. Dexter, RPR, CSR-4629
24 Official Court Reporter
25 313 West Kalamazoo
Post Office Box 40771
Lansing, Michigan 48901-7971

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Order

June 28, 2011

140955

REGINA OSBORNE
Plaintiff-Appellee,

v

CITY OF PONTIAC,
Defendant-Appellant.

Michigan Supreme Court
Lansing, Michigan

Robert P. Young, Jr.,
Chief Justice

Michael F. Cavanagh
Marilyn Kelly
Stephen J. Markman
Diane M. Hathaway
Mary Beth Kelly
Brian K. Zahra,
Justices

SC: 140955
COA: 289313
Oakland CC: 2007-086702-NO

On order of the Court, the application for leave to appeal the March 9, 2010 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

MARLYN KELLY and HATHAWAY, JJ., would grant leave to appeal.



h0620

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 28, 2011

Corbin R. Davis

Clerk

STATE OF MICHIGAN
COURT OF APPEALS

REGINA OSBORNE,

Plaintiff-Appellee,

v

CITY OF PONTIAC,

Defendant-Appellant.

UNPUBLISHED

March 9, 2010

No. 289313

Oakland Circuit Court

LC No. 2007-086702-NO

Before: Donofrio, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order denying its motion for summary disposition based on governmental immunity. See MCR 2.116(C)(7). We reverse and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On August 21, 2007, plaintiff was injured when she was riding her bicycle and hit a pothole on Carriage Circle in Pontiac. Plaintiff sued defendant under the highway exception to governmental immunity on October 19, 2007, but never sent a separate notice of the incident. At issue here is whether the complaint provided sufficient notice to defendant.

MCL 691.1404 provides, in relevant part:

(1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) [dealing with minors and persons incapable of giving notice] shall serve a notice on the governmental agency of the occurrence of the injury and the defect. *The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.*

(2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding [Emphasis added.]

The complaint identified the location of the defect as “on Carriage Circle” “at or near the intersection of Auburn Road” in the City of Pontiac. The nature of the defect was identified as “uneven/unlevel/crumbling concrete, and/or improperly patched repairs.” The injury sustained was well-described; this element is not at issue. No witnesses were identified at all, despite the fact that there were indeed known witnesses.

After 120 days had passed since the accident, defendant moved for summary disposition, arguing that notice must be given *before* the lawsuit is commenced; i.e., the complaint itself cannot serve as the notice required by MCL 691.1404. Defendant asserted that even if the complaint could serve as notice, plaintiff’s complaint did not contain all the necessary elements because she did not identify the exact location of the defect or name any witnesses known at the time. Plaintiff countered that neither the statute nor case law requires notice to be separate from the complaint or to be sent before the complaint is filed. She also asserted that she sufficiently described the location of the defect and that, although she did not name known witnesses, she substantially complied with the requirements of MCL 691.1404, and that was sufficient.

The trial court found that the complaint could serve as notice and that it was adequate despite not naming witnesses because “the motive behind the statute [is] to prevent future injuries, not as a precondition to a lawsuit or a potential Summary Disposition motion for defendant.”

We review de novo a trial court’s decision to grant or deny a motion for summary disposition. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Statutory interpretation is a question of law that we also consider de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

We agree with defendant that plaintiff’s complaint lacked required elements and therefore was not sufficient to provide the notice required by the statute. Plaintiff correctly notes that there is case law holding that, in general, substantial compliance may be sufficient to satisfy a statutory notice provision. See *Meredith v Melvindale*, 381 Mich 572, 579-580; 165 NW2d 7 (1969), and *Mullas v Secretary of State*, 32 Mich App 693, 697-698; 189 NW2d 141 (1971). Although these cases have not been expressly overruled, in 2007, our Supreme Court issued *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 200; 731 NW2d 41 (2007), in which it stated that, at least with regard to the highway exception to governmental immunity, there must be strict compliance with the conditions and restrictions of the statute. Since then, cases construing the highway exception have strictly adhered to the letter of the statute, and this Court remains bound by *Rowland*’s insistence on strict compliance with the statutory requirements. In *Burise v City of Pontiac*, 282 Mich App 646, 652; 766 NW2d 311 (2009), this Court held that the first notice sent by the plaintiff “*did not comply with the requirements set forth in MCL 691.1404(1) because plaintiff did not disclose the name of a known witness*” (emphasis added). Thus, the complaint in the present case also does not comply with the statutory requirements.¹

¹ Unlike in *Burise*, 282 Mich App at 652, plaintiff here did not cure the defect in notice within the 120-day notice period.

Moreover, the cases cited by plaintiff as allowing mere "substantial compliance" are distinguishable. Those cases involve facts where the plaintiff attempted to provide the required information but arguably did so inadequately, or where there was no evidence that the plaintiff knew of witnesses at the time. Here, plaintiff completely omitted one of the requirements for no apparent reason, despite the information being available to her well before the filing of the complaint. This makes her argument about "substantial compliance" weak, and considerably without case support, even if we were to find we could ignore the statutory requirement.²

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Patrick M. Meter
/s/ Christopher M. Murray

² Given our holding, it is unnecessary to address the issue regarding whether plaintiff was required to provide notice separately from her timely-filed complaint.

ALL THESE LIFES ARE EQUAL RECYCLED



Court of Appeals, State of Michigan

ORDER

James D. Wodtke v City of Howell

Docket No. 294322

LC No. 09-024257-NQ

Joel P. Moskwa
Presiding Judge

Mark J. Cavanagh

Stephen L. Beretto
Judges

The Court orders that the January 14, 2011 opinion is hereby AMENDED. The opinion contained the following clerical error: page 4, the sentence beginning on line 19 reads: "Thus, the statute requires notice to be given as directed, and notice is inadequate. . ." should read: "Thus, the statute requires notice to be given as directed, and notice is adequate. . ."

In all other respects, the January 14, 2011 opinion remains unchanged.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

FEB 03 2011

Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

JAMES D. WODTKE,

Plaintiff-Appellant/Cross-Appellee,

v

CITY OF HOWELL,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

January 18, 2011

No. 294322

Livingston Circuit Court

LC No. 09-024257-NO

Before: HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition to defendant under MCR 2.116(C)(7). Because we conclude that plaintiff failed to give notice in compliance with MCL 691.1404(1), we affirm.

I. BASIC FACTS

In the morning of July 11, 2008, plaintiff and Anne Goulah left their apartments to walk to a gas station at the intersection of West Road and Grand River Avenue in Howell. They walked on the sidewalk bordering West Street toward Grand River Avenue. Before they reached the driveway to the house at 114 West Road, they left the sidewalk to cross the road. Plaintiff looked down to see where his feet were going, looked up to cross the street, and then he fell into a hole. Plaintiff described the hole, which was near a storm drain, as one and a half feet wide and three to four feet deep. The hole, hidden by long grass and twigs, was not visible to the naked eye.

After plaintiff got himself out of the hole, he walked back to his apartment, where he called defendant's Department of Public Works (DPW) and reported the hole. Plaintiff's telephone call was memorialized by the DPW in a complaint report. According to the complaint report

Resident called because he fell into a sink hole, next to a manhole on West St. near the Bay Station. The hole is about 1 ft wide by 2 ft deep. He banged up his knee and elbow, and doesn't want anyone else to fall into it.

Erving Suida, defendant's "DPS Superintendant," and another city employee looked at the storm drain in front of 114 West Street the same day that the DPW received plaintiff's telephone call. According to Suida, there was no sink hole to the side of the storm drain. Suida did barricade the area, however, because the "grade" to the drain was steep. Within a week, employees of defendant added a "block" to the storm drain, which had the effect of raising the drain's lid six or seven inches.

Plaintiff sued defendant for maintaining a "defective highway."¹ Defendant moved for summary disposition. It argued that the hole in which plaintiff fell was located in a berm, which is not included in the statutory definition of a "highway," MCL 691.1401(e), that plaintiff could not prove that it knew of the hole's existence and had a reasonable time to repair it, as required by MCL 691.1403, and that plaintiff failed to give notice in compliance with MCL 691.1404(1). The trial court granted summary disposition to defendant on the basis that plaintiff's telephone call to the DPW did not satisfy the requirements of MCL 691.1404(1).

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(7) if the "[t]he claim is barred because of . . . immunity granted by law" In deciding a motion for summary disposition based on MCR 2.116(C)(7), we must accept as true the allegations in the complaint unless contradicted by documentary evidence submitted by the parties. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). "If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of those facts, then the question whether the claim is barred by governmental immunity is an issue of law." *Dybata v Wayne Co*, 287 Mich App 635, 637; ___ NW2d ___ (2010).

III. ANALYSIS

Plaintiff claims that the trial court erred in granting summary disposition to defendant based on his failure to provide proper notice because he is mentally incapable of giving notice. He asserts that because his disability is ongoing, he has until 180 days after a guardian is appointed to give notice to defendant. We disagree.

Plaintiff briefly raised this issue before the trial court at the hearing on defendant's motion for summary disposition. However, plaintiff never briefed the issue in writing, and he did not direct the trial court to any record support for his claim. Under the circumstances, we conclude that plaintiff failed to properly preserve the issue for appellate review. *Polkton Charter Twp v Pellegroni*, 265 Mich App 88, 95; 693 NW2d 170 (2005). We, therefore, need not address the issue. *Smith v Foerster-Bolser Const, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

¹ Plaintiff also claimed that the condition of West Street was a nuisance per se. The trial court granted summary disposition to defendant on the nuisance per se claim, and plaintiff does not appeal the grant of summary disposition on that claim.

However, because the Court may overlook preservation requirements, *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 377; 761 NW2d 353 (2008), we will address plaintiff's claim.

Pursuant to the governmental tort liability act, MCL 691.1401 *et seq.*, a governmental agency is generally immune from tort liability while engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). There are six statutory exceptions to governmental immunity, *Lash v Traverse City*, 479 Mich 180, 195, 195 n 33; 735 NW2d 628 (2007), including the highway exception, MCL 691.1402. Pursuant to the highway exception, a person who suffers injury caused by a governmental agency's failure to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him from the governmental agency. MCL 691.1402(1); *Burise v City of Pontiac*, 282 Mich App 646, 652; 766 NW2d 311 (2009).

However, to bring a claim under the highway exception, the injured person must provide notice to the governmental agency. MCL 691.1404(1); *Plunkett v Dep't of Transp*, 286 Mich App 168, 176; 779 NW2d 263 (2009). The purpose of the notice requirement is two-fold: "(1) to provide the governmental agency with an opportunity to investigate the claim while it is still fresh and (2) to remedy the defect before other persons are injured." *Plunkett*, 286 Mich App at 176-177.

The notice provision, MCL 691.1404, provides:

(1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

* * *

(3) If the injured person is under the age of 18 years at the time the injury occurred, he shall serve the notice required by subsection (1) not more than 180 days from the time the injury occurred, which notice may be filed by a parent, attorney, next friend or legally appointed guardian. If the injured person is physically or mentally incapable of giving notice, he shall serve the notice required by subsection (1) not more than 180 days after the termination of the disability. In all civil actions in which the physical or mental capability of the person is in dispute, that issue shall be determined by the trier of the facts. . . .

Plaintiff's deposition testimony establishes that plaintiff suffers from mental illness. He is "manic depressive, bipolar," and takes numerous medications each day. He receives services through Community Mental Health. However, there is no evidence that plaintiff's mental illness rendered him mentally incapable of providing the notice required by MCL 691.1404(1). Notably, there is no affidavit from any mental health professional stating that plaintiff was

mentally incapable of providing the required notice. There is not even an affidavit that details plaintiff's mental abilities. In addition, plaintiff lives independently, he telephoned the DPW within hours after the fall to report the hole, and within five months of the fall he retained an attorney. These facts rebut any suggestion that plaintiff was not mentally capable of providing notice. There is simply no evidence submitted by plaintiff that would justify a trier of fact in finding that he was mentally incapable of providing the required notice. Accordingly, we reject plaintiff's argument that, pursuant to MCL 691.1404(3), he has until 180 days after a guardian is appointed to provide notice to defendant. Plaintiff, being mentally capable of providing notice, was required to give notice to defendant within 120 days after the incident. MCL 691.1404(1).

Plaintiff asserts that his telephone call to the DPW was sufficient under MCL 691.1404(1) because defendant, based on the information he gave to the DPW, was able to, and actually did, investigate and remedy the defect. We disagree.

In *Rowland*, 477 Mich at 200, our Supreme Court held that MCL 691.1404(1) must be applied as written. In doing so, it overruled case law which held that an injured person's failure to comply with the notice provision did not bar a claim brought under the highway exception absent a showing of actual prejudice to the governmental agency. *Id.* The Supreme Court stated:

MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written. . . . Thus, the statute requires notice to be given as directed, and notice is inadequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e., it specifies the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant, no matter how much prejudice is *actually suffered*. Conversely, the notice provision is not satisfied if notice is served more than 120 days after the accident *even if there is no prejudice*. [*Id.* at 219 (emphasis in original).]

In *Burise*, 282 Mich App at 652, 655, this Court held that a notice which failed to provide the name of a known witness did not comply with MCL 691.1404(1). It reasoned:

MCL 691.1404(1) provides that a claimant "*shall* serve a notice" and "*shall* specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant." (Emphasis added.) The Legislature's repeated use of the word "*shall*" indicates a mandatory requirement. *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000). A purported notice that does not comply with the statute is insufficient. Because plaintiff did not include the name of a known witness in the initial notice, plaintiff's initial notice was defective. [*Id.* at 655.]

Plaintiff does not dispute that he failed to identify Goulah, a known witness to his fall, in his telephone call to the DPW.

We reject plaintiff's argument that because defendant did not suffer any prejudice from his failure to identify Goulah to the DPW, the information that he did provide to the DPW should be deemed sufficient notice. Our Supreme Court in *Rowland*, 477 Mich at 219, stated that MCL

691.1404(1) must be interpreted according to its plain language and that the amount of prejudice actually suffered by the governmental entity by the claimant's failure to comply with MCL 691.1404(1) is irrelevant. Plaintiff's telephone call to the DPW did not satisfy the requirements of MCL 691.1404(1), because plaintiff failed to identify Goulah, a known witness. *Burise*, 282 Mich App at 652, 655. Accordingly, plaintiff's failure to comply with the notice provision by identifying Goulah to the DPW bars his claim against defendant under the highway exception. *Rowland*, 477 Mich at 219. We affirm the trial court's order granting summary disposition to defendant.²

Affirmed.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Stephen L. Borrello

² We note that we are not penalizing plaintiff "for some technical defect." Plaintiff completely failed to inform the DPW of one of the statutorily-required pieces of information.

AL STATE LEGAL 909-222-0010 E0111C RECYCLED



STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WILLIAM KARWACKI and
KATHRYN KARWACKI,

Plaintiffs,

v

File No. 10-20-MD

HON. PAULA J.M. MANDERFIELD

STATE OF MICHIGAN, MICHIGAN
DEPARTMENT OF TRANSPORTATION,

Defendant.

DEPOSITION OF MARK GEIB

Taken by the Plaintiffs on the 15th day of August, 2011, at
10321 East Grand River, Brighton, Michigan, at 10:00 a.m.

APPEARANCES:

For the Plaintiffs:

MR. DONDI R. VESPRINI (P60390)
Law Offices of Lawrence S. Katkowsky, PC
30200 Telegraph Road, Suite 430
Bingham Farms, Michigan 48025
(248) 901-3400

For the Defendant:

MR. PHILIP L. BLADEN (P56443)
Assistant Attorney General
Michigan Department of Attorney

General

425 West Ottawa Street, Floor 1

Lansing, Michigan 48933
(517) 373-1470

Also Present:

Thomas Schafer

Network Reporting

1-800-632-2720

Page 2

1 RECORDED BY: Diane H. Draugelis, CER 2530
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 3 Network Reporting Corporation
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Page 4

1 Brighton, Michigan
 2 Monday, August 15, 2011 - 10:00 a.m.
 3 MR. VESPRINI: Let the record reflect this is the
 4 deposition of Mark Geib, taken pursuant to Notice, to be
 5 used for any and all purposes under the Michigan Court Rules
 6 and Michigan Rules of Evidence.
 7 As I introduced myself a few moments ago, my name
 8 is Dondi Vesprini. I represent Mr. and Mrs. Karwacki, who
 9 were involved in a motorcycle accident back on August 29,
 10 2009. I'm going to ask you some questions about some work
 11 that had been done in that area in the months preceding it,
 12 and what, if anything, you know about the accident and such.
 13 If you don't understand a question, just let me know and I'd
 14 be happy to repeat it or rephrase it. You may know where
 15 I'm going with 90 percent of the questions I'm going to ask
 16 you, but I'm just going to ask you to just wait to answer
 17 until after I finish the question.
 18 MR. GEIB: You're done.
 19 MR. VESPRINI: Just because when we talk on top of
 20 each other, while it happens in casual conversation, it's
 21 tough to get a good transcription of what's being said here
 22 today when we talk on top of each other, so --
 23 MR. GEIB: Right.
 24 MR. VESPRINI: And then, again, if you can just
 25 answer your questions orally as opposed to shaking your head

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25	(Photographs)

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1 for "no" or nodding your head for "yes," just so we can get
 2 everything on the record, I would appreciate that. Other
 3 than that, I think we can get started.
 4 REPORTER: Do you swear or affirm that the
 5 testimony you're about to give will be the truth?
 6 MR. GEIB: Yes.
 7 MARK GEIB
 8 Having been called by the Plaintiffs and sworn:
 9 EXAMINATION
 10 BY MR. VESPRINI:
 11 Q Can you spell your name for me?
 12 A Yeah. M-a-r-k G-e-i-b.
 13 Q And could I have your birth date?
 14 A 4-10-58.
 15 Q How old does that make you today, sir?
 16 A 53.
 17 Q And what's your current address?
 18 A Home address is 810 Partridge Court, Holly, Michigan 48442.
 19 Q Do you have any plans to move in the next year or so?
 20 A Yes.
 21 Q Do you have an address picked out?
 22 A No, I don't. It will be somewhere south of Lansing.
 23 Q Staying in Michigan?
 24 A That's correct. I will definitely be in Michigan.
 25 Q Are you married?

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2 (Pages 2 to 5)

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Page 6

1 A I am not.
 2 Q Do you have any children?
 3 A Yes.
 4 Q How many kids do you have?
 5 A Two.
 6 Q And can you tell me a little bit about your educational
 7 background? Start with high school, if you'd like.
 8 A Yeah. Well, I attended Carmel High School, in Indiana,
 9 graduated in 1976 and then went on to go to college,
 10 primarily two colleges, Purdue University and Tri-State
 11 University, and graduated in 1984 with my bachelor's degree
 12 in civil engineering. About five to six years later, I
 13 became a licensed professional engineer for the state of --
 14 the states of Indiana and Michigan.
 15 Q Which university did you get your BA from, was it Purdue or
 16 was it Tri-State?
 17 A From Tri-State.
 18 Q And prior to becoming licensed, did you work any type of
 19 engineering jobs?

20 A Yes. I was a project engineer for the Indiana Department of
 21 Transportation basically overseeing construction projects
 22 for the bulk of my five years I was there prior to becoming
 23 licensed.
 24 Q That was in Indiana?
 25 A Overseeing and -- yeah -- overseeing and administrating

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1 construction projects in Indiana, yeah.
 2 Q Have you ever been involved in any other type of a civil
 3 lawsuit other than the one we're here for today?
 4 A Yes.
 5 Q Can you tell me about the most recent?
 6 A It was about 16 years ago. How much detail would you like?
 7 Q What type of lawsuit was it?
 8 A It was a lawsuit brought against the Michigan Department of
 9 Transportation, State of Michigan, on an accident that had
 10 happened on the roadways of southwest Michigan.
 11 Q You worked for MDOT at the time?
 12 A That's correct.
 13 Q All right. And the lawsuit was filed against them then;
 14 correct?
 15 A Yes.
 16 Q What was the nature of -- well, actually, I should start
 17 where was the accident that was the basis of that lawsuit?
 18 A It occurred in Berrien County on a project in an area that
 19 was under active construction. I'm trying to think. It was
 20 US-31 and a county road. I don't remember the name of the
 21 county road that crossed US-31.
 22 Q And do you recall in that instance, I'm assuming the
 23 plaintiff was alleging some type of negligence on the part
 24 of MDOT?
 25 A That was what was alleged, yes.

Page 8

1 Q Do you remember what the nature of the claim was?
 2 A Yes. The plaintiff alleged that we had a bump in the road
 3 that caused an accident of their client, and they lost
 4 control and there was injury in the case.
 5 Q Do you remember if the vehicle, the involved vehicle, was a
 6 motor vehicle or a motorcycle?
 7 A It was a motor vehicle, not a motorcycle.
 8 Q Okay. Other than that lawsuit about 16 years ago on that
 9 with MDOT, have you ever been involved in any other type of
 10 a civil proceeding?
 11 A No.
 12 Q Sir, I ask you not to take offense to this question. This
 13 is a question that we ask every witness that we depose.
 14 Have you ever been convicted or pled guilty to any type of
 15 felony activity?
 16 A No.
 17 Q Have you ever been convicted or pled guilty of any type of
 18 crime involving theft, dishonesty, false statements,
 19 perjury, anything along those lines?

20 A No, I have not.
 21 Q Have you ever been convicted or pled guilty to any type of
 22 criminal activity?
 23 A I have not.
 24 MR. BLADEN: Objection.
 25 Q You're currently employed; correct?

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1 A That's correct.
 2 Q Who is your current employer?
 3 A Michigan Department of Transportation.
 4 Q And what's your current position with MDOT?
 5 A I am the engineer of operations for the Department.
 6 Q In some Interrogatory Answers that we received from MDOT
 7 they had listed you as the MDOT Brighton TSC manager.
 8 A That was correct.
 9 Q What does TSC stand for?
 10 A Transportation Service Center.
 11 Q Are those two positions the same thing, when you mention
 12 engineer of operations and --
 13 A No, they are not.
 14 Q They're two different positions?
 15 A That's correct.
 16 Q What are your duties as the engineer of operations?
 17 A I oversee a division in Lansing that is field support for
 18 the field offices statewide providing various services.
 19 Q What about -- are you still also the Brighton TSC manager?
 20 A Technically, no, but I am filling the position until there
 21 is a permanent TSC manager assigned to that position, so I'm
 22 basically sort of doing two jobs right now.
 23 Q How long have you been an engineer of operations with MDOT?
 24 A One week.
 25 Q Prior thereto were you the Brighton TSC manager?

Network Reporting

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3 (Pages 6 to 9)

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Page 10

1 A That's correct.
 2 Q And how long were you the Brighton TSC manager?
 3 A Approximately two and a half years.
 4 Q And what were your duties in that capacity?
 5 A As TSC manager I oversee all operations of the
 6 Transportation Service Center, which include designing roads
 7 and bridges, consultant oversight of design of roads and
 8 bridges, over administering construction contracts, issuing
 9 permits, and overseeing maintenance operations within our
 10 three county area and also overseeing the operations of two
 11 welcome centers in Monroe County.
 12 Q If we talk a little bit more specifically about overseeing
 13 maintenance operations, what were your duties in that
 14 regard?
 15 A Well, the -- well, we have a direct maintenance -- we have a
 16 maintenance garage here in Brighton down the road from this
 17 location that we employ roughly 20 to 22 employees. It
 18 varies a little bit by season, and I -- there's a supervisor
 19 that directly oversees the operations that reports directly
 20 to me -- that reported directly to me.
 21 Q Who is that direct supervisor?
 22 A Right now, it's Doug Lynch.
 23 Q Okay. How long has he been in that position?
 24 A About a year, maybe just a little bit over.
 25 Q If I were to advise you this accident that we're here for

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1 today happened back in August of '09, can you tell who it
 2 would have been back then?
 3 A Matt Pratt. And to complete my answer, we also do
 4 maintenance by -- we have contract counties and cities that
 5 do maintenance on our trunk line for us also, and so we
 6 oversee those contracts and manage them.
 7 Q What was your position, your official position with MDOT
 8 back in August of 2009?
 9 A I was the manager of the Transportation Service Center.
 10 Q And how long had you been in that capacity?
 11 A Since April of 2009.
 12 Q Did you hold any positions with MDOT prior to April of 2009?
 13 A Yes.
 14 Q What were you before that?
 15 A I was the manager of the Michigan Intelligent Transportation
 16 Center, in Detroit.
 17 Q And what did that job entail?
 18 A Overseeing a facility that helps to operate the roadways,
 19 working with first responders such as State Police,
 20 ambulance, fire, monitoring traffic on all of the major
 21 roadways within the Detroit metropolitan area, overseeing
 22 the freeway courtesy patrol that assists vehicles that are,
 23 you know, that have issues on the roadway and helping to
 24 manage incidents when there's either large accidents or
 25 smaller incidents that are congesting traffic or creating

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1 safety issues.
 2 Q In that position were you involved at all with maintenance
 3 operations and the roads of Detroit?
 4 A No, not in that position.
 5 Q How long did you serve in that position for MDOT?
 6 A About a year and a half.
 7 Q Prior to working in that position, did you work for MDOT in
 8 any other capacity?
 9 A Yes. I had about a -- well, 17 -- 16, 17 year career prior
 10 to that. I had actually left MDOT for a couple years, in
 11 the private sector, came back. But, yeah, I did. I've held
 12 numerous positions.
 13 Q What other positions over the years have you held at MDOT?
 14 A I've been a Transportation Service Center -- at two other
 15 Transportation Service Centers. I was also operations
 16 engineer. I was also a maintenance engineer, and I was also
 17 a resident engineer.
 18 Q When were you a maintenance engineer? Do you recall what
 19 years that would have been?
 20 A Yeah. About 1995 to 1997, to '98, right in that rough time
 21 period.
 22 Q And what type of work did that job consist of?
 23 A In a nine-county area in southwest Michigan I oversaw the
 24 operations of 14 maintenance facilities that did virtually
 25 the same -- exact same type of maintenance that our

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1 maintenance garage does here.
 2 Q Now, in some discovery that I've received from MDOT up to
 3 this point, as I understand it, MDOT did some work applying
 4 some crack fill to M-36 in the area between Pinckney and
 5 Gregory during the summer of 2009. Do you recall that?
 6 A I do.
 7 Q So you would have served -- during that time period or for
 8 that job would you have served as the TSC manager?
 9 A That's correct.
 10 Q If we talk specifically about that, that maintenance job at
 11 M-36, do you recall what your duties were with respect to
 12 that job?
 13 A Well, my duties were just the general oversight of all of
 14 the maintenance that's going on.
 15 Q What was that? Can you just -- just because I'm not that
 16 familiar with that type of a job position, what would that
 17 have entailed specifically when you say "overseeing the
 18 maintenance"?
 19 A Well, just generally speaking, the maintenance foreman or
 20 supervisor at the facility runs the day-to-day operations
 21 and makes 99 percent of the decision on where maintenance
 22 gets done on a daily basis.
 23 Q Who would that have been back in August of '09?
 24 A Matt Pratt.
 25 Q Matt Pratt?

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4 (Pages 10 to 13)

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1 A Yeah.
 2 Q And he reports to you; correct?
 3 A That's correct.
 4 Q So what would you have -- what types of things would Mr.
 5 Pratt have been reporting to you on?
 6 A Him and I would work globally about what's going to get
 7 accomplished for the whole year as far as what our
 8 priorities are and where we need to spend, you know, spend
 9 out time and money to use it the most effectively, and so
 10 when issues that are out of the ordinary come up or if he
 11 needs advice on something, he will come to me. Otherwise,
 12 he makes -- after we have kind of the initial global here's
 13 what needs to get accomplished this year, it's on a spot
 14 basis. Sometimes we speak daily. Sometimes we don't speak.
 15 We'll actually interact every week or so, once, would be a
 16 typical snapshot.
 17 Q Okay.
 18 A So if some sort of an incident happens that's high profile
 19 or something, I would get involved with him, or if he wasn't
 20 sure what to do on something, then he would come to me for
 21 advice on how we're going to handle it.
 22 Q All right. Can you give me some kind of an idea as far as
 23 your workload goes how many other projects you would have
 24 been involved with? And I was just testing your memory. If
 25 you don't recall, that's fine, too. But can you give me an

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1 idea how many other projects you may have been involved
 2 with, other than the M-36 crack fill job, back in August of
 3 '09?
 4 A Typically we've got project -- typically project-wise we've
 5 got 25 ongoing construction projects going on
 6 simultaneously, and we have miscellaneous projects going on
 7 on a spot day-by-day basis, and some I get more involved
 8 with. Some I have little to none.
 9 Q Where would this project fall? Would you consider this, the
 10 crack fill on M-36, would you consider that a project or
 11 would you consider that more of a spot maintenance type?
 12 A That's more of a spot maintenance thing, definitely not a
 13 project.
 14 Q Who would you have reported to back in the summer of '09 as
 15 your supervisor?
 16 A Mark Chaput.
 17 Q How does he spell his last name?
 18 A C-h-a-p-u-t.
 19 Q And what's Mr. Chaput's title, at least back in --
 20 A His title then was the university region engineer.
 21 Q Now, other than yourself and Mr. Pratt, and possibly the
 22 work crew who would have been out there doing the work, is
 23 there anyone else that you can think of that would have had
 24 anything to do with the maintenance and repair of the crack
 25 fill job on M-36 back in the summer of '09?

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1 A Potentially Chuck Manor, but I'm uncertain that he was now
 2 retired -- he's now retired. He was a region
 3 superintendent, so he globally is a resource for all of the
 4 maintenance supervisors with our 10-county region.
 5 Q And how long ago did Mr. Manor retire?
 6 A Approximately Christmastime this past year.
 7 Q This past year? Okay. And if you would have had anything
 8 to do with this type of a -- or with that crack fill job,
 9 what would his responsibility have been?
 10 A If he would have, it would have been more on an advice level
 11 if there was questions needed or asked or they were looking
 12 for guidance.
 13 Q How is his position with respect to this project different
 14 than yours?
 15 A The supervisor ultimately responsible for the work reports
 16 direct to me -- directly to me. He did not. He reports to
 17 an individual in our region office. He is more of a global
 18 maintenance expert who people go to for background on stuff
 19 on sound maintenance practices, stuff like that to help get
 20 uniformity and to make sure, you know, we're doing what we
 21 can do the most efficiently and effectively as we can do it
 22 with what we have.
 23 Q In his work capacity is he someone that would actually
 24 report to job sites or did he have more of an office
 25 position?

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1 A He was out of the office more than in the office. He had an
 2 office position, but he was out a lot, you know, reviewing
 3 things randomly and interacting with maintenance folk within
 4 the whole region, so more of a field person.
 5 Q All right. Let's talk a little bit about -- a little bit
 6 more about Mr. Pratt.
 7 A Okay.
 8 Q Do you know how long he had been in his position as of the
 9 summer of '09?
 10 A Not precisely. I think for about three years prior to that,
 11 plus or minus. That's my best guess.
 12 Q And what would Mr. Pratt's responsibilities have been with
 13 respect to the crack fill project that we talked about?
 14 A Well, he's responsible for identifying when work is going to
 15 be done, how it's going to be done, which crew members will
 16 actually be doing the work, you know, and making sure that
 17 the crew has the training and the knowledge to, you know,
 18 use the right equipment to do the practices the correct way.
 19 So ultimately he schedules the work and prioritizes it and
 20 so, you know, he would have been -- you know, as far as when
 21 it got done, he likely was the one, unless one of the lead
 22 workers potentially could have said, you know, "This is --
 23 that we need to get on that and do that work," so it was in
 24 directing and training.
 25 Q When we talk about this, this crack fill job on M-36, do you

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5 (Pages 14 to 17)

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1 recall specifically what type of work it was?
 2 A It was just what you said. It was crack filling. We had a
 3 lot of -- there was a lot of cracks in the road and we have
 4 to keep the road sealed up or they disintegrate.
 5 Q And in some of the discovery that I've received I've seen
 6 some different I guess you call it characterizations of
 7 different type of work that is done on the road surface.
 8 One of the terms I came across was overband crack fill, and
 9 is that the type of crack fill job that was on this project?
 10 A I don't think this was really an overband, no, not to my
 11 knowledge. I'm not a hundred percent certain of that, but I
 12 don't think that would qualify exactly as that.
 13 Q What's your understanding of overband crack fill?
 14 A Well, I think it's a heavier application, and I'm not really
 15 sure of the differential in the materials, to be honest with
 16 you. Sometimes when we have the bigger, larger cracks, I
 17 think we do more overband.
 18 Q Okay. What would you characterize, if you recall, what type
 19 of crack fill this job was on M-36, if not overband?
 20 A Well, I mean it was a standard crack fill. We had -- this
 21 road had a lot of cracks, which you can see from the
 22 pictures and they needed -- you know, they needed to be
 23 sealed, so they used the product that we typically use for
 24 that, so --
 25 Q Do you know what product that is?

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1 A I believe Crafo is the manufacturer. It's a common one
 2 that we use for just our "M" routes and sealing the cracks
 3 back up.
 4 Q And what's the crack fill meant to accomplish?
 5 A Seal the road and keep water from getting into it so it
 6 doesn't -- so the road doesn't deteriorate, form potholes.
 7 Q Do you know who it was that made the decision to go out
 8 there and perform a crack fill job?
 9 A Probably Matt Pratt, because he was the supervisor.
 10 Q Did you have any part of the decision making process to
 11 order the work to be done out there on M-36?
 12 A Not directly, no.
 13 Q Do you recall being consulted about whether or not this job
 14 should be done, this crack fill should be applied?
 15 A At that location, no.
 16 Q Now, based on your experience when it comes to this type of
 17 a work, does MDOT utilize any type of manuals or guidelines
 18 that they refer to to instruct them on how to perform that
 19 type of a job?
 20 A Yeah. We have a maintenance manual that gives guidelines on
 21 what to do for all the situations.
 22 Q Do you recall the name of the maintenance manual?
 23 A I think it's just something like Maintenance Guidance
 24 Manual, or something to that effect. I don't remember the
 25 exact title.

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1 MR. VESPRINI: Could I have marked, please?
 2 (Deposition Exhibit I marked)
 3 Q We just marked as Exhibit Number I an excerpt of -- it
 4 appears to be an excerpt of the documents that I received as
 5 part of discovery in this case from MDOT. Down in the
 6 bottom right corner it says it's a "Service Maintenance
 7 Performance Guide, 10100, 10-2008." Do you recognize these
 8 papers?
 9 A Yeah. I'm familiar with this general format, yeah.
 10 Q Is this a portion of the Maintenance Guide that you've
 11 testified to?
 12 A It appears to be.
 13 Q And is this something that is prepared by MDOT?
 14 A Yes.
 15 Q As you flip through here it appears to list a few different
 16 activities. It lists -- well, it lists joint and crack
 17 filling is the activity that these pages are in regard to.
 18 A Uh-huh (affirmative).
 19 Q Would you expect that the crack fill work at M-36 would be
 20 done in compliance with the standards that are set forth in
 21 this exhibit?
 22 A My expectation would be that it would be, yeah.
 23 Q And would you agree with me that it's important to follow
 24 directions when applying crack fill?
 25 A I would agree.

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1 Q To whom is this manual given, if you know?
 2 A Well, the supervisor certainly would have access to it, and
 3 I am -- and our employees would, too. A lot of times
 4 though, I don't -- I will say that I'm not positive all
 5 employees look through this in detail because sometimes
 6 certain people will and then they train people to go out and
 7 do the work.
 8 Q When you say "employees," are you referring to the actual
 9 labor crew that would go out there and apply the crack fill?
 10 A Yeah. That's correct.
 11 Q Do you know whether or not a copy of this material is taken
 12 out to job sites when they're performing crack fill?
 13 A You mean that this is carried out to a job site?
 14 Q Right.
 15 A Probably occasionally, yeah. On a regular basis, my guess
 16 is no.
 17 Q Do you have any specific knowledge whether or not this guide
 18 was taken out to the scene with respect to M-36?
 19 A I don't have any knowledge of that.
 20 Q All right. Now, it appears if you look through here the
 21 general activity they're talking about on each of these
 22 pages is joint and crack filling, but they break it down by
 23 a few different methods on these pages. The methods that
 24 are listed are joint and crack filling.
 25 A Uh-huh (affirmative).

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6 (Pages 18 to 21)

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1 Q Crack fill-rubber sealant, and crack fill-hot poured joint
2 sealant.
3 A Uh-huh (affirmative).
4 Q Do you know which, if any, of these three methods were
5 employed in the M-36 job?
6 A Yeah. I believe it was a hot poured material, I believe.
7 I'm not even a hundred percent sure, but I think it was.
8 Q To your knowledge, would either of the first two methods
9 have applied, the joint crack filling or the crack
10 fill-rubber sealant?
11 A Crack fill-rubber and -- method is joint crack filling.
12 Well, maybe the first one. Not so sure about the second
13 one.
14 Q Okay. The following pages describe the methods a little bit
15 more in detail that will help out, if you want to take a
16 look through there, if that helps out at all.
17 A Well, it might. Yeah. I would say it wasn't the second
18 one, just reading the descriptions here. The first one is
19 potential and certainly I would say the last one. It's
20 probably the last one though, which would be the hot poured
21 joint sealant, the method, main crack and joint and crack
22 filling or do they all say that? Let me see, read this
23 here.
24 Q I don't know if it will help you out or not, just to kind of
25 maybe kind of give you a little additional information to

Page 23

1 see if it narrows it down at all, I mean these are some
2 pictures. I don't know if it's pictures of the actual
3 pictures taken at the scene. You can actually see what was
4 applied. It might help. And I also have an invoice that I
5 was provided that I'm assuming may apply to the project,
6 and you can see the invoice that was possibly ordered, if
7 this was the invoice for the project.
8 A Your last sheet here which doesn't have a page is probably
9 the best bet, but that's just my --
10 MR. BLADEN: Just as an aside, maybe we should go
11 into the work schedule documents which list the dates that
12 we went out there, and it lists the actual code number
13 10-100. It lists the equipment that was used and the
14 material that was used.
15 MR. VESPRINI: Yeah, whatever will help. I'm
16 just --
17 THE WITNESS: That information is probably the
18 best to know for sure since --
19 MR. VESPRINI: Okay. Let me get those for you.
20 THE WITNESS: Yeah. Based upon what I'm reading,
21 and they talk about the crack fill product here, too. This
22 is probably what was happening.
23 Q Here are the work schedules that Mr. Bladen mentioned.
24 A All right.
25 MR. VESPRINI: Can we mark that?

Page 24

1 A So is this the --
2 MR. VESPRINI: Let's just pop a quick sticker on
3 that before I forget to do that. Thank you.
4 (Deposition Exhibit 2 marked)
5 A We've got a different date for each one. Yeah. There's
6 reference to crack -- to the Crafcro right there. That
7 potentially could have been when it was done.
8 Q Does that help you out to identify in Exhibit Number 1 which
9 of those methods was used?
10 A Yeah. Once again, it was probably this one. Like I said,
11 since it was secondhand with me --
12 MR. BLADEN: What are you referring to?
13 THE WITNESS: I'm referring to the method hot pour
14 joint sealant. That is probably what they were doing.
15 Q Then if we look at the page from Exhibit Number 1, that kind
16 of goes into detail about that method, the hot pour joint
17 sealant. There's a material section that lists hot joint
18 sealant and it talks about Crafcro asphalt rubber type 2, an
19 approved alternative. Is that the type of -- when you refer
20 to where the Crafcro is used, is that the type of material
21 you're referring to?
22 A That would probably be the type, yeah.
23 Q And then it also mentions as material, "backer rod." Do you
24 know what a backer rod is?
25 A I think that's the application thing, but I'm not a hundred

Page 25

1 percent sure. Where is reference to that?
2 MR. BLADEN: It's here.
3 A Yeah. That's -- I believe that that's a terminology for the
4 application, the thing that they apply the material with.
5 Again, I'm not a hundred percent sure.
6 Q And then down in the bottom section of the sheet where it
7 talks about recommended work method it mentions cracks
8 3/8ths of an inch wide or less may be routed to provide a
9 sealant reservoir. Do you know if any routing was necessary
10 on the M-36 job?
11 A I don't know if they did or not.
12 Q And then step number five talks about installing the hot
13 backer rod. Do you know if that's -- the backer rod is what
14 they use to apply it or if that's actually a tool that goes
15 into the crack?
16 A No. There's no tool that's going into the cracks, so it's
17 probably what they're applying it with.
18 Q And then down at the bottom starred area it says, "Contact
19 Andy Bennett at C&T for an approved alternative." Do you
20 know who Andy Bennett is?
21 A Yeah. It's one of our experts in the Construction and
22 Technology who knows a lot about, you know, the specificity
23 of router maintenance methods. So he would be a -- he's a
24 source that people can use should they feel they need to.
25 Q Do you know whether or not he was consulted on this M-36

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7 (Pages 22 to 25)

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1 job?
 2 A I don't know.
 3 (Deposition Exhibit 3 marked)
 4 Q I hand you what we've just marked as Exhibit Number 3, which
 5 is another set of documents that I received from MDOT
 6 through discovery. I would just ask if you can look through
 7 there and kind of --
 8 A Just get familiar with it?
 9 Q Yeah, get familiar with it, and I'll just ask you a few
 10 questions.
 11 A Okay.
 12 Q Can you identify what this document is?
 13 A Well, according to what it says at the top, "Performance
 14 Guide for Maintenance Management System."
 15 Q Are you familiar with this Performance Guide?
 16 A I have seen it before.
 17 Q And how does this different from Exhibit Number 1 that we
 18 saw just moments ago?
 19 A Well, I mean the format is laid out a little differently,
 20 but it also has some descriptions on recommended work
 21 method, so I guess they're similar in that they both have
 22 things where they tell you what equipment, what materials
 23 and what method for doing this activity I01.
 24 Q Okay. This Exhibit Number 3, this is something that's
 25 prepared by -- is this something prepared by MDOT?

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1 A This would be MDOT, too; yeah. It looks like a little -- an
 2 older -- this is our old symbol, so this is something maybe
 3 from a later date. In fact, it says '96 at the bottom, and
 4 this one is dated '08, 2008, so this is probably the
 5 older -- an older version of the same thing.
 6 Q Got you.
 7 A That is what it looks like.
 8 Q In here they talk about a couple different activities, one
 9 being, if you look at page two, is that page two the
 10 activities are described as joint and crack filling, and
 11 then the following page is described as joint and crack
 12 filling hot poured rubber. As far as the M-36 job goes,
 13 would either of these apply to that job?
 14 A I would guess it was the hot poured rubber one, two of
 15 three.
 16 (Deposition Exhibit 4 marked)
 17 Q All right. I'm going to hand you what we just marked
 18 Exhibit Number 4. It appears to be some Crafcro instructions
 19 and data sheet in regard to their product. Is this
 20 Crafcro -- the Crafcro material that's mentioned in the
 21 installation instructions and the product data sheet -- is
 22 this with respect to the Crafcro product that was used on the
 23 M-36 project?
 24 A My guess is yes. I can't verify that, you know, that -- I
 25 didn't go out and look at what they had, but I'm guessing it

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1 is.
 2 MR. BLADEN: Don't guess.
 3 THE WITNESS: Well, okay.
 4 MR. BLADEN: If you don't know, then don't guess.
 5 THE WITNESS: I don't know for sure. I don't know
 6 for sure.
 7 Q If we assume for sake of argument that these were provided
 8 with discovery that allege that these were the
 9 manufacturer's instructions that were followed with respect
 10 to the M-36 project, do you know if we look at the
 11 installation instructions, there are -- it appears to say or
 12 be in regard to hot applied road saver PolyFlex parking lot
 13 and asphalt rubber products. Do you know which would have
 14 been used at the M-36 project?
 15 A I don't know for sure. My understanding it was a hot mix,
 16 so something that was hot.
 17 Q If we look at the RoadSaver 515 product data sheet, which is
 18 the last page of the three pages, in the general description
 19 in the first line it states that, "Crafcro RoadSaver 515 is a
 20 hot applied asphalt-based product used to seal and fill
 21 cracks and joints in asphalt and portland concrete pavements
 22 in moderate to cold climates." Is this type of material
 23 consistent with your recollection of what was used on M-36?
 24 A It would be consistent with; yeah.
 25 Q All right. Now, wouldn't you expect that, if for sake of

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1 argument, if this was the product that was used, would you
 2 expect that it would be applied consistent with the
 3 installation instructions?
 4 A Yeah; within reason.
 5 Q What do you mean "within reason"?
 6 A Well, because a lot of times when doing this kind of work
 7 the cracking is so random and so abundant that I know
 8 sometimes there has to be a little more, you know, liberal
 9 application to make sure everything is getting covered,
 10 because literally, if you follow every single small little
 11 micro crack, it would take you amazingly longer to be able
 12 to get the work done in a reasonable period of time.
 13 Q So --
 14 A So there's some leeway I guess is what I'm saying.
 15 Q So is the leeway with respect to -- when you talk about
 16 leeway with respect to the application, what type of
 17 instruction are you referring to as far as veering from?
 18 Are you talking about the amount to be applied, the length
 19 to be --
 20 A Well, the amount and like the width and stuff.
 21 Q All right. Who would receive a copy of installation
 22 instructions? I'm assuming they come with the product; is
 23 that correct?
 24 A I think so.
 25 Q Do you know who would receive a copy of installation

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8 (Pages 26 to 29)

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1 instructions?

2 A Well, they would typically come to where the product being

3 delivered, you know, being shipped to.

4 Q How does it work with crack fill? Does the crack fill get

5 delivered to the job site or is it delivered to a location

6 and then transferred?

7 A It would be to the location, to the garage, the maintenance

8 garage facility itself.

9 Q The maintenance garage? Which maintenance garage facility?

10 A Brighton maintenance garage.

11 Q That has responsibility for M-36?

12 A That's correct.

13 Q And do you know who would the installation instructions be

14 given to?

15 A Whoever is there when it shows up, so it's variable.

16 Q Do you know whether the installation instructions would find

17 their way to the maintenance supervisor?

18 A They probably would.

19 Q Do you know whether or not the labor crew is given a copy of

20 the installation instructions?

21 A I don't know for sure.

22 Q Do you know whether or not a copy of the installation

23 instructions are taken -- or were taken to the scene with

24 respect to the M-36 job?

25 A That I don't know.

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1 Q Would you agree that it's important to follow the

2 installation instructions as best as can be expected under

3 the circumstances?

4 A Within reason, yes. They're a guideline.

5 Q Now, we talked about some material that applies to a crack

6 fill job. Do you know whether or not MDOT keeps any manuals

7 or guidelines similarly to instruct them with respect to

8 repairing or maintaining any rutting in a road surface?

9 A I am not certain of that for rutting.

10 Q Are you familiar with a manual called the "MDOT Capital

11 Preventive Maintenance Manual"? Are you familiar with that?

12 A Yes, I'm vaguely familiar with that, yeah.

13 Q What's your understanding of that manual?

14 A Capital Preventive Maintenance, that manual -- or it would

15 have the types of fixes and methods that we use in sort of

16 how to manage within the funding group. We have a capital

17 preventative maintenance fund which is separate which

18 typically is -- preventative maintenance is maintenance that

19 we do to extend the roadway or the life of a roadway as much

20 as possible before a more permanent, more expensive fix can

21 be done.

22 Q Okay.

23 A And so it has a specific application to roads that, you

24 know, based on our budgetary needs being very difficult

25 these days, we have to extend things as far as we can until

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1 the funding is available to be able to do the ideal fixes.

2 Q Is crack fill a preventative maintenance procedure?

3 A That would be a preventative maintenance procedure, yes.

4 Q All right. To whom is the capital preventative maintenance

5 manual given?

6 A Design engineers would have that and maintenance folk would

7 have it also, maintenance employees, or more in the

8 leadership or supervisory positions.

9 Q Do you know if Mr. Pratt would be --

10 A He could have. I don't know that for a fact.

11 Q Do you know if the manual makes its way down to the actual

12 labor crew?

13 A It may be available to them, but I'm uncertain of that. I

14 mean it probably is because if people ask for something, we

15 share most material.

16 Q In your experience from time to time does MDOT issue

17 construction advisories?

18 A Yes, they do.

19 Q Just in a general sense, what is a construction advisory?

20 A Usually when a method or a heads up needs to be out there as

21 far as alteration, if -- you know, just giving people

22 general guidance and the correct way to do things.

23 Q In your experience, do those come from the Construction

24 Technology Division?

25 A Yes.

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1 Q And what's your understanding -- again, just in general

2 terms -- what do they do? What is the Construction

3 Technology mission?

4 A Well, they're sort of field support for all construction and

5 maintenance statewide, probably more so construction, but

6 there's some overlap between construction and maintenance

7 and the types of activities that happen.

8 Q Are you familiar with a Brenda O'Brien?

9 A Yes.

10 Q Who is she? What's her position?

11 A She's the division administrator of the Construction and

12 Technology Division.

13 Q And what does she do?

14 A She oversees all operations. Everybody ultimately reports

15 to her.

16 Q And when you say "she oversees all operations," are you

17 referring statewide?

18 A Well, for that division and that division has statewide

19 responsibilities because it is field support for all of the

20 field offices and, you know, a lot of times the maintenance

21 garage is statewide.

22 Q Are you familiar with a gentleman named Kevin Kennedy?

23 A Yes, I am. I believe he works out of that area.

24 Q Out of the same office?

25 A I believe so, yeah.

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9 (Pages 30 to 33)

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1 Q In your experience, when a construction advisory is issued
2 occasionally do these provide direction to field personnel
3 regarding various jobs they're working on?
4 A Yes.
5 Q And is it expected that these directions would be followed?
6 A Yes.
7 Q When a construction advisory is issued in the grand scope of
8 things, who gets it? Who gets the advisory?
9 A They're made available really to all employees because they
10 typically get posted on-line, and they're usually sent
11 out - they used to be sent out hard copy. I'm not sure if
12 they always are now. They usually come out via e-mail to
13 division heads and sometimes at the supervisory levels. I'm
14 not sure of all the distribution lists, but the intent is to
15 give it out to everybody in the field.
16 Q Do you know how they would find their way - if they find
17 their way to the actual laborers on a particular job?
18 A It would be via e-mail through their - and/or through their
19 supervisor.

20 Q As we sit here today - and again, it's testing your
21 memory - but as we sit here today, do you recall if any
22 construction advisories were issued in 2009 regarding the
23 application of crack fill?
24 A No, I don't.
25 Q Jumping to the other issue, are you aware of any rutting in

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1 the road surface of M-36 in the area of this accident in the
2 year before the accident?
3 MR. BLADEN: Objection; relevance. Go ahead.
4 A I'm not.
5 Q Do you know did MDOT perform - are you aware of any work
6 that MDOT did regarding any repair or maintenance concerning
7 rutting in the road surface of M-36 in the year before the
8 accident?
9 A I don't know.
10 MR. BLADEN: Objection. I'm just going to make a
11 continuous objection concerning all questions regarding
12 rutting.
13 MR. VESPRINI: I'll give you a standing - sure.
14 A I'm not aware.
15 (Deposition Exhibit 5 marked)
16 Q I've just handed what we've marked as Exhibit Number 5.
17 A Yeah.
18 Q It appears to be an invoice from the National Highway
19 Maintenance System. This was a document that was provided
20 from MDOT in some discovery earlier on in the suit. Do you
21 know if this invoice has anything to do with the crack fill
22 project that we've been talking about in the summer of 2009?
23 A I don't; no.
24 Q If you take a look at the top where it's the Proposal 2 to
25 have MDOT write attention Terri, do you know who Terri may

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1 be?
2 A If it's coming to Brighton and Terri, it would be Terri
3 that's outside this door, who is our administrative
4 assistant.
5 Q And then in the "Remarks" section it mentions the 2009 NHMS
6 program. Do you know what that means?
7 A National Highway Maintenance System Program probably. I'm
8 not sure what, when they refer to program, that might just
9 be - I don't know what it is.
10 Q And then listed in number one it says "34544 poly-fiber
11 sealant," and it mentions "Price includes use of the Crafc
12 Super Shot 125 DC with air compressor and training." Do you
13 know if this is consistent with the Crafc product that
14 we've talked about earlier?
15 A I don't know if it is or not for certain.
16 Q Does that poly-fiber sealant, does that have any - is that
17 consistent with the hot applied sealant that you mentioned
18 may have been used in the M-36 project, if you know?
19 A I don't know for sure or I can't say.

20 Q And then under number two they have 34515 Federal SHRP-H-106
21 test bracket, plus 34250 fiber sealant. Does that have any
22 significance to you?
23 A It does not, no.
24 Q If you take a look at the Crafc exhibit that I handed you
25 earlier, the installation instructions -

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1 A This one here?
2 Q Yes. If you flip to the product data sheet on the last page
3 it appears to list part number 34515. Do you know if that's
4 what they're referring to when they talk about 34515 on that
5 invoice that I gave you? Do you know if that's the
6 significance of that number or not?
7 A I don't know for sure, but it's the same number.
8 Q All right. The third page of the NHMS exhibit, up at the
9 top, this proposal is to MDOT Brighton, Attention: Matt
10 Pratt. That's the maintenance supervisor we've discussed;
11 correct?
12 A That's correct.
13 Q And then the remarks are "Detack 34681." Do you have any
14 idea what that refers to?
15 A No.
16 Q Now, in answers to other discovery MDOT has advised me that
17 crack filling on M-36 took place from June 29, 2009 to
18 August 25th of 2009. We've had marked earlier on the work
19 schedules, and the work schedules that are in that packet
20 are dated from June 29 of '09 through August 26 of 2009. If
21 you take a look at those work schedules - let me grab my
22 copy real quick - they all appear to have an equipment
23 number list, an operation list and the location.
24 A Uh-huh (affirmative).
25 Q If we take a look at June 29, 2009, which apparently would

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10 (Pages 34 to 37)

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1 have been the start date of the work for location M-36, we
 2 have an operation number of 10100. Do you know what that
 3 corresponds to, what that means?
 4 A Well, that number is a joint and surface crack filling
 5 activity.
 6 Q And right before the deposition started you guys were kind
 7 enough to provide a maintenance activities and
 8 accomplishment table.
 9 A Uh-huh (affirmative).
 10 Q Is that a good resource we can use to try to figure out what
 11 those operation numbers correspond to?
 12 A Yeah. This is what we use, so it should be adequate.
 13 MR. BLADEN: If you want to mark that, go ahead.
 14 MR. VESPRINI: Yeah.
 15 (Deposition Exhibit 6 marked)
 16 Q We've marked that as Exhibit Number 6. So on Exhibit Number
 17 6 on the table it appears what operation 10100 corresponds
 18 to in the top left in the service maintenance table, joint
 19 crack filling?

20 A Yes.
 21 Q Is that correct? Okay. And the equipment in the equipment
 22 column on the work schedule for June 29, Cra fco is listed.
 23 That's consistent with what you -- what your understanding
 24 is the product that was used on that project; correct?
 25 A Crafcro does; yeah.

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1 Q Now, as we flip through it it appears that that operation
 2 number is assigned to a location of M-36 on June 29, 2009,
 3 June 30, 2009, July 8, 2009, July 14, 2009, July 27, 2009,
 4 August 4, 2009, August 11, 2009. We have one page that's
 5 undated, and then August 13, 2009, August 25, 2009, and
 6 that's it in this packet. Are you able to tell --
 7 MR. BLADEN: For the record, actually I think I
 8 have one for August 7th -- July 7th, '09.
 9 MR. VESPRINI: July 7, '09?
 10 MR. BLADEN: Yeah. I don't know whether or not
 11 you got any of this.
 12 MR. VESPRINI: No, I don't have that one. Okay.
 13 July 7, 2009 as well?
 14 MR. BLADEN: Yeah.
 15 Q All right. Now, when we look at these is there any way that
 16 you can tell specifically on M-36 where the crack fill
 17 operation was going on on any of these given dates?
 18 A I can't because the only designation is 36.
 19 Q Do you have an understanding the span of M-36 that crack
 20 fill was applied to during the pendency of this project?
 21 A I don't know the exact myself, no.
 22 Q Are you familiar with the actual physical application of
 23 crack fill, the way they did it on M-36, how you do it, how
 24 you actually do the job?
 25 A I'm not intimately familiar.

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1 Q Have you in the course of your work history ever performed a
 2 crack fill job yourself?
 3 A No.
 4 Q Now, do you have any familiarity with the texture of tar
 5 strips as far as, you know, whether or not they change when
 6 it's hot or whether they change when it's cold? Do you have
 7 any familiarity in your job experience with that aspect of
 8 crack fill?
 9 MR. BLADEN: Objection to the form of the
 10 question.
 11 Q I'm just trying to find out if you have any knowledge
 12 between the cold and hot.
 13 A All I --
 14 Q The temperature. Do you have any experience?
 15 A Yeah. I have some experience, yes.
 16 Q Would you have any understanding if, based on the work
 17 schedules that we have, if the last work was done on M-36 on
 18 August 25th of 2009 and I were to advise you that this
 19 accident happened on August 29th of 2009, just four days
 20 later, based on your experience -- and if you can't answer
 21 the question, that's fine. This is a discovery deposition.
 22 I'm just trying to find out what you know. Do you have any
 23 knowledge as to what the condition of the tar strips would
 24 have been four days later?
 25 A No. I really don't.

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1 MR. BLADEN: Objection to foundation.
 2 A No specific; yeah.
 3 Q That's what I'm trying to find out.
 4 A Yeah. I really don't know. I couldn't know that.
 5 Q Do you have any knowledge whether or not tar strips, the
 6 condition of a tar strip changes given any temperature
 7 changes? Do you have any knowledge in that area?
 8 A I'm not an expert in it.
 9 Q Do you have any --
 10 A I have some general knowledge, yeah.
 11 Q Okay. What's your general understanding?
 12 A Well, when it's hot it's in a liquid form and when it's cold
 13 it's in a solid form, you know, and then there's in between
 14 temperature ranges, but that's where I'm not expert, so --
 15 Q All right. Fair enough. At some point did you become
 16 aware -- at some point prior to today did you become aware
 17 that an accident had occurred on M-36 involving a right
 18 curve stretch near Kathryn Court back on August 29, 2009?
 19 A Yes.
 20 Q You didn't see the accident; correct?
 21 A That's correct.
 22 Q Are you aware of anyone at MDOT that actually observed the
 23 accident?
 24 A I'm not aware of anybody, no.
 25 Q How did you -- when did you first become aware that this

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11 (Pages 38 to 41)

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1 accident happened?

2 A It was -- I don't know the date. It was -- I believe it

3 just corresponded to when we found out there was potential

4 litigation.

5 Q My office as part of the lawsuit had to file a Notice of

6 Intent. Do you recall seeing that?

7 A I don't specifically, no.

8 Q Did you, yourself, perform any type of investigation

9 regarding the accident, do anything to follow up to see why

10 the accident may have happened?

11 A I did do some followup. I didn't try to determine why it

12 happened.

13 Q What type of followup work did you do?

14 A Other than know the location, wanted to assure that, you

15 know, when we were working we had our signage up. I didn't

16 know any details of the accident. I did have an engineer

17 measure how much was out there as far as how much was

18 covered in surface area to get a feel for it.

19 Q That was something -- there was some testing apparently that

20 was done back in November of 2010 and December of 2010. Is

21 that the testing you were referring to?

22 A I had somebody physically measure what was out there, and I

23 was aware of the testing and I looked at the results of the

24 testing, too. That was a separate event.

25 Q So the testing that you were talking about is something

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1 different than the testing in November and December of 2010?

2 A Yeah.

3 Q Do you recall when your testing took place?

4 A I don't remember the date, no. I'd have to go back and

5 look.

6 Q If we say this accident happened in August of '09 can you

7 narrow it down at all for me?

8 A Sometime last year, probably mid summer-ish.

9 Q And you ordered that testing be done?

10 A Uh-huh (affirmative).

11 Q Do you recall who performed it?

12 A Yes.

13 Q Who was that?

14 A John Belcher.

15 Q And is Mr. Belcher an employee of MDOT?

16 A Yes, he is.

17 Q And what's his position, at least back then?

18 A He was temporarily working out of this office to assist in

19 construction.

20 Q What was his title back then?

21 A An assistant engineer. I don't know of what specificity he

22 was.

23 Q And what was it that you had him do?

24 A He actually -- well, he measured how much road surface had

25 tar on it in the area of the accident and calculated

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1 percentage of area covered.

2 Q Did he test anything else other than percentage of road

3 surface that was covered in tar?

4 A He did not.

5 Q Did you ask him to do anything else other than that?

6 A I didn't.

7 Q And did he report his findings to you?

8 A He did.

9 Q Do you recall what they were?

10 A Not exactly, but it was roughly in the area of seven percent

11 of pavement area had sealant covering it.

12 Q And do you know when you say "seven percent of the pavement

13 area," what were we looking at as far as the pavement that

14 was tested? Was it the entire stretch of M-36? Was it --

15 A It was literally a percentage of the area covered? No. It

16 was not. It was an area -- it was in the area where the

17 accident was, yeah, so -- and I believe he did a 100 foot

18 stretch and tried to approximate right in that area so we

19 knew what our -- what the actual coverage was just to have a

20 feel for it.

21 Q So just so I understand, your understanding was he took a

22 100 foot stretch in the area where you determined the

23 accident happened?

24 A Yes.

25 Q Do you know -- my understanding of M-36 where the accident

Page 45

1 happened is a two lane road. Do you know if his

2 measurements included both lanes or just the way of the

3 accident, if you know?

4 A I don't know or I don't recall.

5 Q Okay. Other than Mr. Belcher, have you had any discussions

6 with any other employees at MDOT regarding this accident?

7 A Yes.

8 Q Who else have you spoken with?

9 A Matt Pratt, Chuck Manor and Doug Lynch.

10 Q And what was Mr. -- I can't remember if I've asked you this

11 or not. What was Mr. Lynch's position in the company back

12 in summer of 2009?

13 A He was a lead worker in the Brighton maintenance garage.

14 Q Did he perform -- to your knowledge, did he perform any of

15 the work at M-36?

16 A I don't know.

17 Q Do you recall what you discussed with Mr. Pratt?

18 A Not everything; just generally what happened and stood back

19 and looked at, you know, the operation to see if the fellow

20 was reasonable.

21 Q And what was Mr. Pratt's portion of the conversation? What

22 did he tell you?

23 A Just explained to me, you know, how the operation did, how

24 he ordered the work and things along those lines.

25 Q You mentioned that you were trying to decide whether or not

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12 (Pages 42 to 45)

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1 the work that was done out there was reasonable. Do you
2 recall what you guys concluded?

3 A We felt it was for the condition of the roadway.

4 Q Okay. And do you recall specifically what aspect of the
5 work you guys looked at to decide if it was reasonable?

6 A The amount of crack fill that was put down out there and how
7 it corresponded to how many cracks were out there and how
8 that corresponded to if there was no action taken how fast
9 the road would have deteriorated and created even a worse
10 road. It was that type of discussion.

11 Q So you were looking at the reasonableness of the necessity
12 of the job?

13 A Yes.

14 Q What about Mr. Manor? Do you recall your --

15 A Roughly the same conversations.

16 Q And how about Mr. Lynch?

17 A Roughly the same conversations.

18 (Deposition Exhibit 7 marked)

19 Q I hand you a set of pictures that we marked as Exhibit
20 Number 7, and I can tell you that these photographs are
21 photographs that were taken at the scene of the accident.

22 MR. VESPRINE: What's the top sheet on that one?

23 MR. BLADEN: Ambulance, or the fire truck or
24 whatever.

25 MR. VESPRINE: I think there's a page missing from

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1 that one. Can we get a new exhibit? Same number. Make a
2 new Exhibit Number 7.

3 (Deposition Exhibit 7 re-marked)

4 (Off the record)

5 Q So we have a new Exhibit Number 7. As you flip through
6 those if you'd like there -- maybe if you look at the second
7 page of the packet might be one of the best views of the
8 curve section that we've been talking about. Had you ever
9 been out to the scene of the accident at any time either
10 while the tar work was going on or after?

11 A I didn't. I had not been myself, no.

12 Q Do you recognize this stretch of M-36?

13 A Yes, I do.

14 Q In your experience working for MDOT, would you agree with me
15 that the amount of cracks that are -- that were present that
16 were addressed with the crack filler is higher than what you
17 usually find in roads of that nature?

18 A The amount of cracks is -- yeah, it's above average. There
19 are more cracks than the average.

20 Q Now, just in doing some of the discovery work that we've
21 done in this case, are you familiar with the term transverse
22 crack?

23 A Yes.

24 Q What does transverse crack mean?

25 A That would be going 90 degrees to the flow of traffic.

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1 Q Okay. So --

2 A So if traffic is in the centerline of the roadway, it would
3 be straight 90 degrees to the centerline of the roadway.

4 Q So if the roadway is a straight north/south road, are we
5 talking about cracks that run east/west?

6 A Yes.

7 Q And then I've also seen the term longitudinal crack. Are
8 you familiar with that term?

9 A Uh-huh (affirmative).

10 Q What is longitudinal crack?

11 A That would be following the direction of traffic. It's the
12 long way of the road.

13 Q In looking at the photographs of the curve we've been
14 talking about, are there both transverse cracks and
15 longitudinal cracks in the roadway?

16 A Yes.

17 Q And do you know -- and, again, if you know -- do you know
18 whether or not the transverse cracks were treated any way
19 differently than the longitudinal cracks were?

20 A I don't know for a fact. The pictures, the application
21 looks somewhat consistent in both types.

22 Q In your experience have you ever heard the term secondary
23 cracking?

24 A Yes.

25 Q What does secondary mean to you?

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1 A It's cracking that propagates from a primary crack.

2 Q So just in laymen's terms, what does that mean?

3 A You get a primary crack and then it's running in a
4 direction, but cracking doesn't always go straight. It
5 meanders, and then from that crack there are smaller cracks
6 coming from that crack going out at different directions,
7 which also are typically random.

8 Q Do you know from the pattern in the crack fill that we see
9 in the pictures, do you know if there were any secondary, if
10 there was any secondary cracking on M-36 that we can see in
11 the pictures?

12 A I can't tell by these pictures, no.

13 Q Now, if we take a look at the second picture of the packet I
14 guess would be the best --

15 MR. BLADEN: Maybe this --

16 THE WITNESS: It's still not very good resolution.

17 MR. BLADEN: Okay.

18 Q If you take a look at the second page of the packet, at the
19 top and the bottom picture there appear to be corrugations
20 on the centerline of the roadway; would you agree with that?

21 A Yes; yes, I would.

22 Q Corrugations, in layman's terms, what is a corrugation?

23 A It's a depression in the roadway that is ground in
24 intentionally to create a noise and slight vibration on a
25 vehicle when they get either too far under the centerline or

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13 (Pages 46 to 49)

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1 too far off the edge of the road.
 2 Q And sometimes I've heard these termed as rumble strips.
 3 A That's correct.
 4 Q Is that what we're talking about?
 5 A That's a common -- that's the most common term for them is
 6 rumble strips.
 7 Q Do you know in your experience whether or not the
 8 application or applying tar strips or crack fill near
 9 corrugations have different instructions than those that are
 10 not near or touching the corrugations?
 11 A That I don't know.
 12 Q I believe you testified earlier that it was -- that Matt
 13 Pratt would have the discretion whether or not to perform
 14 this crack fill job; is that correct?
 15 A Uh-huh (affirmative).
 16 Q Do you know whose, if anyone else, other than Mr. Pratt's
 17 decision it was to lay tar strips as a maintenance measure
 18 for M-36?
 19 A No. He in working with his two lead workers would have made
 20 that decision. He was a supervisor, so he would get final
 21 say.
 22 Q Do you know who his two lead workers would have been?
 23 A Doug Lynch and John Toth.
 24 Q Are you familiar with the term or the process of HMA
 25 overlay?

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1 A Yes.
 2 Q What is that?
 3 A HMA stands for hot mix asphalt and that's an actual repaving
 4 of the roadway with a hot mix asphalt product.
 5 Q In your experience, are you aware, has MDOT performed that
 6 type of a procedure in the past?
 7 A Yes.
 8 Q Do you have any idea in either talking with this Mr. Pratt
 9 or other knowledge you've obtained why crack fill is opted
 10 for as a maintenance measure on this stretch of M-36 as
 11 opposed to overlay?
 12 A Because overlay would typically not be done in a maintenance
 13 capacity, it would be done in a construction capacity
 14 because it's hundreds of times more expensive to do the hot
 15 mix overlay. It's considerably more expensive.
 16 Q Do you know whether or not -- if I understand you right, you
 17 said it would be done in construction capacity. That
 18 would not be a procedure that would be done by the
 19 maintenance crew; is that what I'm to understand?
 20 A Yeah. Very rarely; only in little small instances they
 21 might do a small area for a spot repair type thing.
 22 Q So if this stretch of M-36 hypothetically were discussed to
 23 be -- to be done by an overlay stretch of road, given the
 24 length of it, wouldn't be done by maintenance?
 25 A Would not be done by maintenance.

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1 Q All right. Do you know whether or not the idea of possibly
 2 doing an overlay was discussed with anyone at MDOT as
 3 opposed to the crack fill procedure that was done?
 4 A Out of our region office they globally plan all -- for all
 5 10 counties working with each of the three TSC's. This is
 6 one of the three. They have a strategy for how we're going
 7 to spend what dollars we have, and what roads and what kind
 8 of fixes happen, and so there's a global strategy that's put
 9 into place, where all of the roads are driven at least once
 10 a year by every -- by all of the people that make the
 11 planning decisions, and then we look at what we have. We
 12 weigh in the existing condition, the amount of traffic on
 13 the road, in other words, the average daily volume, and then
 14 make global decisions on where the larger amounts of money
 15 for the higher caliber fixes and repairs are going to
 16 happen.
 17 Q Okay.
 18 A So as far as here's what's going to happen here, typically
 19 that body of decision makers will decide when there's going
 20 to be a better repair going knowing that this is in this
 21 condition, but also knowing that maintenance can come in and
 22 extend the life of it by sealing up the cracks and getting
 23 the life further.
 24 Q Okay.
 25 A So it happens by a lot of planning, and a lot of individuals

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1 are actually involved, both out of the region office in
 2 Jackson and some of the planning individuals that work out
 3 of this office.
 4 Q And do you know how often those decisions are made?
 5 A Every year we reset what we're going to do. We go out and
 6 re-look at the condition of everything, rate the conditions
 7 of everything and make decisions on where we're going to go,
 8 and then as money changes, and lately it's been getting
 9 worse and worse, we have to change our strategy. And, you
 10 know, we have the general same strategy, but then we have to
 11 reallocate funds depending on what changes have happened and
 12 what -- you know, because not all things deteriorate at the
 13 same rate and it depends on a lot of variables. And then
 14 things change over time, too, where you think you want to do
 15 one plan and 10 percent of it you won't actually do it
 16 because you have to change gears and then change it again
 17 the next year.
 18 Q Are these typically held the same time of year every year?
 19 A Yeah; typically. Typically the roads get -- I'm trying to
 20 think. It actually varies from time to time, but usually
 21 spring or fall, and sometimes both because we -- you know, a
 22 little bit of it is ongoing. But typically they actually do
 23 a van ride where people all get in a very large van and --
 24 of all the disciplines, construction, design and
 25 maintenance, and we go around and look at everything and

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14 (Pages 50 to 53)

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1 have discussions and then stand back and look at all the
 2 thousands of miles of roadway and decide where we're going
 3 to allocate funds and what kind of repairs we're going to
 4 do.
 5 Q Are you familiar with the procedure of surface milling?
 6 A Yes.
 7 Q What does that entail? What does that mean?
 8 A That's just a large mill that actually takes off a portion
 9 of the roadway like a consistent depth. You come in and you
 10 can mill two inches of a roadway off, and you basically
 11 grind it into a gravel-like material and haul it away.
 12 Q Would that generally, in your experience, a surface milling
 13 kind of a procedure that's done in preparation for another
 14 procedure?
 15 A Yes.
 16 Q What type of procedures tend to follow surface mills?
 17 A A resurfacing, the HMA resurfacing that you just prior
 18 referred to.
 19 Q So the surface milling is kind of a step towards an overlay?

20 A Yes. 99.9 percent of the time that's what's going to happen
 21 after a surface milling.
 22 Q What about the technique of a chip seal? Are you familiar
 23 with a chip seal?
 24 A Yes, I am.
 25 Q What is a chip seal?

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1 A A chip seal is where a liquid asphalt material is placed on
 2 the road that covers 100 percent of the roadway and then
 3 you -- and that is to fill the cracks in roadway
 4 essentially, and then you go back over it with loose chips
 5 that are very angular and you apply that to the roadway, so
 6 all that tar that you just put down doesn't stick all over
 7 the cars and stuff. And so it's basically to -- yeah, so
 8 to -- you know, and it does provide some friction, too.
 9 That's why you put the chips down. Two reasons; one, so it
 10 doesn't track all over the place, and number two, to provide
 11 a little bit of traction, because if you cover a hundred
 12 percent of the roadway in a tar, then there's going to be
 13 some diminished friction of the roadway.
 14 Q Now, if a chip seal or a surface mill were called to be done
 15 on a road somewhere in Michigan, is that something that
 16 typically would be done by the construction department as
 17 opposed to the maintenance department?
 18 A Usually, yes. Yeah, almost all the time.
 19 Q And then similar to what I asked about the overlay, are you
 20 aware of whether or not either of those options were
 21 discussed with respect to the cracks that were on M-36 prior
 22 to the crack fill?
 23 A I'm not specifically.
 24 Q Have you ever or are you aware of anyone who has taken any
 25 measurements regarding the width of the tar strips on M-36

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1 in the area of the accident?
 2 A Prior to the accident? Is that what you said?
 3 Q Since the accident.
 4 A Oh, since?
 5 Q Well, actually before or after. Are you aware of anything
 6 that's gone on measuring the width of the tar strips?
 7 A The individual I sent out there to calculate how much actual
 8 area roadway was covered by the tar strips, yes, that person
 9 did measure the widths.
 10 Q He measured the widths of the tar strips as well?
 11 A Yes. That was the only way to calculate the area.
 12 Q Did he report his findings regarding the width of the tar
 13 strips to you; do you recall?
 14 A I just saw the final product. I didn't drill down into the
 15 specificity of his calculations.
 16 Q Understood. What about are you aware of anyone that did any
 17 measurements of the depths of the cracks that the crack fill
 18 was applied to on M-36?
 19 A I'm not aware of that myself.

20 Q Do you know based on your experience does the depth of a
 21 crack -- is that a factor at all in deciding whether or not
 22 crack fill is an appropriate maintenance?
 23 A Yes, that certainly can be.
 24 Q Okay. How does that play into that decision?
 25 A Well, it could be a different type of fix if the cracks are

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1 deep and wide and such that you may need to use a different
 2 type of material.
 3 Q What type of other materials have you seen used if the
 4 cracks run deeper?
 5 A I don't have enough knowledge about the specificity of the
 6 product names and stuff, so that's not directly in my area
 7 of expertise.
 8 Q Understood.
 9 MR. BLADEN: Objection to lack of foundation
 10 anyway.
 11 Q Maybe Matt Pratt might be a better source for that.
 12 A Probably.
 13 Q Again, I'm just seeing what you know. If you don't know,
 14 that's fine. Do you have any knowledge based on your job
 15 experience regarding potential friction issues or loss of
 16 traction regarding motorcycles traversing tar strips?
 17 A I don't have any specific knowledge, no.
 18 Q Do you have any knowledge regarding potential dangers
 19 associated with motorcycles traversing a curve with rutting
 20 in a road surface?
 21 A I don't have specific knowledge, no.
 22 Q Does MDOT have any practice of -- any practice or policy
 23 regarding going out and inspecting road surfaces?
 24 A We do. I don't know a lot of the specifics of that, but we
 25 do.

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15 (Pages 54 to 57)

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1 Q Do you know if MDOT keeps any records of the inspections
2 that they perform?
3 A That I don't have specific knowledge of; probably do.
4 Q If they did keep records, do you have any idea where those
5 records would be kept?
6 A Probably the C&T facility, Construction and Technology, in
7 Lansing.
8 Q Have you seen any records regarding inspections of M-36 in
9 the area of the accident?
10 A I have not.
11 Q I've been advised in Answers to Interrogatories that the
12 only maintenance work that's gone on on the stretch of M-36
13 we've been talking about since the accident has been gravel
14 shoulder maintenance and winter maintenance. Is it fair to
15 say that that type -- that those two types of maintenance
16 wouldn't have anything to do with the tar strips; is that
17 correct?
18 A No, not -- certainly not directly. They're separate
19 operations.

20 Q And shoulder maintenance and winter maintenance, is it fair
21 to say that work wouldn't have anything to do with any
22 potential rutting in the road surface?
23 A It shouldn't.
24 Q Would anyone from anywhere other than MDOT's Brighton
25 maintenance garage have performed any maintenance on M-36

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1 since the accident?
2 A Not to my knowledge.
3 Q Is there any other division of MDOT that has concurrent
4 jurisdiction, if you want to call it maybe for lack of a
5 better word, to go out and take care of any problems on
6 M-36?
7 A Nobody else has concurrent jurisdiction, no.
8 Q We talked a little bit earlier, I had mentioned that I was
9 advised that Brighton's TSC staff and the Lansing
10 Construction Technology staff went out and took some
11 measurements of the sealant on the road, and they did a
12 friction test done in November of 2010 and December of 2010.
13 Did you have anything to do with those tests?
14 A I reviewed the results.
15 Q And what do you recall the results being that you reviewed?
16 A The friction values were above and in a safe area, generally
17 speaking.
18 Q What about did you recall reviewing anything regarding or
19 what the results were with respect to the amount of crack
20 sealant on the road, that portion of the testing?
21 A Only just seeing what the percentage was that was covering
22 the pavement, just to get a feel for it.
23 Q Do you recall what the percentage was on that test?
24 A For the amount feeling -- it was in the neighborhood of
25 seven-ish percent.

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1 Q Similar to Mr. Belcher's findings?
2 A Well, that's the only one that I'm aware of, yeah. I'm
3 referring to his findings. I was not aware that there was
4 somebody else did it.
5 Q Okay. Fair enough.
6 A Or if I was told, I forgot; whatever.
7 Q Understood. It's been awhile. Are you aware of any testing
8 performed on M-36 regarding measuring any rutting in the
9 road surface?
10 A I'm not specifically aware of that.
11 MR. BLADEN: Continuing objection to rutting.
12 MR. VESPRINE: Sure.
13 Q Are you aware of any complaints made by anyone to MDOT
14 regarding the condition of M-36 in the year before the
15 accident we're here for today?
16 A I'm not aware of any, no.
17 Q Are you aware of any other claims for damages made against
18 MDOT for injuries received on M-36 in the year before the
19 accident?

20 A I am not.
21 Q Did you or anyone else that you know of from MDOT write out
22 any statements regarding this accident, other than possibly
23 for your attorney or MDOT's attorney?
24 A I didn't decipher that, no. I didn't.
25 Q What about anyone else from MDOT? Are you aware of anyone

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1 else from MDOT who may have?
2 A Unh-unh; no.
3 Q That's a "no"?
4 A That's a -- I'm sorry. That is a "no." I am not aware.
5 Q What about recorded statements? Have you provided -- again,
6 I don't want to know anything about what you may have done
7 for MDOT's attorney, but other than that have you --
8 A I have not made any recorded statements.
9 Q Are you aware of anyone from MDOT who has?
10 A I am not.
11 Q Have you read any statements about the accident from anyone?
12 A Outside of the parameters of what you said, no.
13 Q The parameters being with your --
14 A We were talking with our attorney.
15 MR. VESPRINE: Okay. Let me just double-check
16 something real quick, and I think I'm all done. Yes, I am
17 all done. Thank you very much for your time. I appreciate
18 it.
19 THE WITNESS: You're welcome.
20 MR. BLADEN: I have a few questions I wanted to
21 follow up with you on.
22 EXAMINATION
23 BY MR. BLADEN:
24 Q Looking at Exhibit Number 2, the work schedule, you were
25 asked a question about whether any of these particular

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16 (Pages 58 to 61)

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1 listing of work that was done on M-36 may have pointed to a
 2 more specific location than just generally M-36. Do you
 3 recall that set of questions?
 4 A Yeah.
 5 Q And you said you didn't think that was the case; correct?
 6 A Uh-huh (affirmative).
 7 Q I'm going to ask you about work that was done August 11,
 8 2009. It lists M-36 at Howlett Road.
 9 A Okay.
 10 Q Does that change your evaluation of your statement or
 11 testimony earlier? Is that more specific?
 12 A Well, based on that, that location is more specific. That's
 13 not the -- I know it's not the exact location of the
 14 accident, but I know it's not too far down the road.
 15 Q Okay. How far --
 16 A But it's still --
 17 Q How far from the --
 18 A I believe that's an 1/8th to 1/4 of a mile from the accident
 19 location.

20 Q It says "at Howlett Road." Would that just be specifically
 21 at the intersection of M-36 and Howlett or would it
 22 encompass an area greater than that?
 23 A Well, I would interpret just what I'm reading, at the
 24 intersection, so it's the intersection, the way they wrote
 25 that.

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1 Q And that's the following day it looks like. Well, it
 2 doesn't give a date, but there's another listing of M-36 at
 3 Howlett Road.
 4 A It also says "at Howlett Road."
 5 Q Yeah.
 6 A Same thing. I mean at reading that it looks like they're
 7 working in the intersection.
 8 Q Will they do multiple days all in one intersection?
 9 A It's possible, because it could have ended. They could have
 10 got to the -- it's hard to know. They could have got to the
 11 intersection and power was off the end of the day and they
 12 were out of time and then they had to come back and hit it
 13 again the next -- on a different date, but we can't see the
 14 date, so --
 15 Q All right.
 16 A But like I said, there was a little bit of a lack of
 17 information for me to pin that down based on what I'm
 18 reading.
 19 Q Now, looking at -- let me see where we are? -- Exhibit
 20 Number 1. Exhibit Number 1, this is the maintenance
 21 Performance Guide 10100 from -- created in October of 2008
 22 as far as you know?
 23 A Yeah.
 24 Q Now, why is it called a performance guide as opposed to --
 25 A Because that gives you general guidelines of how to do

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1 something. It doesn't -- it's not giving you a dictatorial
 2 got to be this way. A guide is a guide.
 3 Q So these aren't rules -- are these rules that the
 4 maintenance crew must follow or are they, as you said, a
 5 guide?
 6 A They're encouraged to follow it because it's good
 7 maintenance practice, but then again, everything isn't black
 8 and white, and so that's why it's a guideline that, here is
 9 how you do it, but you can certainly go outside a guideline
 10 if you deem it's appropriate.
 11 Q And it says "Activity Number 10100." Would that correspond
 12 to the operation number on the work schedule?
 13 A Yes.
 14 Q So that's where they get that number 10100?
 15 A Yeah; yeah. That's the same number, yeah.
 16 Q Looking at Exhibit 1, I think you testified earlier that you
 17 believe this is hot poured joint sealant that was done on
 18 M-36?
 19 A Yeah.

20 Q Based upon your reading of the guidelines?
 21 A Yes.
 22 Q Underneath it says "recommended work method." Why does it
 23 say "recommended work method"?
 24 A Because that's what it means. It's what they recommend they
 25 do, but it doesn't tie them down to it absolutely has to be

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1 that. If it said "required work method," you'd have to do
 2 it right to the letter, but it's a recommended.
 3 Q All right. Under "crack filling" there's a number five
 4 under activity 10100 in the Surface Maintenance Performance
 5 Guide, under "hot poured joint sealant." It says, "Install
 6 hot backer rod size 25 percent larger than the width of the
 7 crack in cracks 3/8ths of an inch or wider -- or larger."
 8 What do you interpret that to mean?
 9 A Well, the way I'm looking at this -- and this isn't my area
 10 of expertise -- but it's saying 25 percent larger than the
 11 crack that's 3/8ths or bigger, so cracks can be a lot bigger
 12 than 3/8ths, and this still has to be 25 percent bigger than
 13 the biggest crack you're going to get because if they're
 14 doing one operation they've got to get something that will
 15 cover their worst case scenario, because then they're dead
 16 in the water if they come up to something that's bigger and
 17 they don't have that.
 18 Q And I think you testified earlier that the cracks can be
 19 variable in width; correct?
 20 A And they are variable in width, yeah; right.
 21 Q Is this recommended work method, are they required or
 22 recommended to remeasure the width of the sealant or the
 23 backer rod every time there's a change in the width of a
 24 crack?
 25 A No. They don't have time for that. I mean that's not a

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17 (Pages 62 to 65)

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1 standard practice.
 2 Q What would occur if they were required to change the width
 3 every time they encountered a change in the width?
 4 A They couldn't do the job because there's so much variability
 5 out there there would be no way to effectively -- the whole
 6 reason this type of maintenance is done is so you can
 7 quickly address very large elongated areas of a lot of
 8 cracking to make sure you seal it up and water doesn't get
 9 in it so the road doesn't deteriorate, and the production
 10 rate would be cut down tremendously if they had to do that.
 11 Q What would be, in your opinion, a reasonable -- or your
 12 experience -- a reasonable way of accommodating the crack
 13 width in practice?
 14 A Kind of how they're doing it. You kind of take your worst
 15 case for the largest and then you hit everything you have
 16 with it, because there's a lot of secondary cracking with a
 17 lot of this, too, and so partially they just want to make
 18 sure they get everything sealed up, because if you leave
 19 parts unsealed, that's going to be the next area to start

20 going bad.
 21 Q What happens if you leave the cracks unsealed?
 22 A The road is going to deteriorate very fast because the water
 23 gets in there. It starts getting hit with tires and trucks
 24 and it will start to deteriorate. The water gets
 25 underneath, and what it ultimately does is it saturates the

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1 surface under the roadway because it gets down through the
 2 crack. Then you have an unstable base and then you get pot
 3 holes.
 4 Q What's the significance of pot holes?
 5 A Pot holes are extremely unsafe. They do severe damage to
 6 cars. They can cause vehicles to crash, and they also cause
 7 people to swerve to miss them which causes other problems,
 8 because if people are caught off guard and they swerve they
 9 can, you know, go off the road or they can go into oncoming
 10 traffic or whatever, so we need -- that's a high priority to
 11 address pot holes both proactively and reactively. We try
 12 our very best to do it proactively, and that's what this is
 13 all about. Reactively is our worst case scenario because we
 14 do not want the public subjected and vehicles subjected to
 15 pot holes because they're very dangerous.
 16 Q Okay. When you make a determination as to what type of
 17 maintenance is performed, do you take into consideration the
 18 safety of a particular type of -- the safety for the driving
 19 public that a particular type of maintenance that you chose
 20 to perform, its impact on the safety of the driving public
 21 versus what happens if you don't do the particular type of
 22 maintenance?
 23 A Safety of the -- our number one impact is safety of the
 24 traveling -- our number one priority is safety of the
 25 traveling public period. In fact, it's our strategic plan,

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1 one of the seven goals and objectives, so it's paramount,
 2 and so we put -- that's why our operations where when even
 3 when we do this we put out the signs, we put out flaggers as
 4 appropriate. We do everything to make sure it's safe for
 5 the traveling public. So we put -- that's our top emphasis.
 6 Secondly, it's, you know, fixing it and so it doesn't
 7 become a worse problem and become even more dangerous.
 8 Q And do you have to weigh the relative safety aspects of
 9 doing particular type of maintenance versus letting it go
 10 and having pot holes?
 11 A Oh, yes. We have to weigh that ongoing.
 12 Q Now, how many miles of roadway does the Brighton TSC cover
 13 in its maintenance operations?
 14 A Well, I don't know the exact number. Many hundreds.
 15 Q Many hundreds?
 16 A Yes.
 17 Q In the scheme of things, what priority level is given to
 18 M-36? And if it's -- if there's different priority levels
 19 for different parts of M-36 can you break that down?

20 A Well, M-36 is going to be a little -- in this location it's
 21 very remote, and so this is one of our lower priority
 22 because there's less traffic on it, so there's less
 23 potential to have safety hazards. Our highest priorities
 24 are our interstates with extremely high volumes of trucks,
 25 and also higher speeds. Speeds are lower out here. You

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1 know, we allow 70 miles an hour on the interstates and here
 2 it's, you know, variable from curve speeds to 20 miles an
 3 hour up to 55 miles an hour, so there's a greater chance of
 4 catastrophic and safety issues to happen on the heavier
 5 volume roads.
 6 Q What are the heaviest volume roads that Brighton TSC has
 7 responsibility for maintaining?
 8 A Well, the two big ones are I-96 and US-23.
 9 Q Okay. How many miles of I-96 are you required to cover?
 10 A The whole county, Livingston County, from county line to
 11 county line.
 12 Q Do you know how many miles that would be?
 13 A It's, you know, three lanes in both directions, so six
 14 lanes, plus ramps for -- what? -- 30 miles. I'm not sure of
 15 the exact mileage. 30-ish.
 16 Q How much of US-23 are you required to cover?
 17 A County line to county line, north to south.
 18 Q Do you know how many miles that would be?
 19 A It's probably roughly the same.
 20 Q So roughly 30 miles in both directions of I-96?
 21 A Uh-huh (affirmative).
 22 Q And roughly 30 miles in both directions for US-23?
 23 A Right. And one of them is four total lanes and the other
 24 one is six total lanes. M-36 is two total lanes.
 25 Q And I think you said the traffic volume for this particular

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18 (Pages 66 to 69)

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1 location where this accident is alleged to have occurred or
 2 did occur is you said lower than --
 3 A A lot lower, yeah. They're not even in the same ballpark.
 4 Q And what about the mix of type of traffic that travels on
 5 the road. Is it different than it is on I-96 or US-23?
 6 A There's more commercial traffic, meaning trucks, heavy
 7 trucks, on the heavy traveled routes. Some of the other
 8 stuff, you know, is probably similar. I mean we get
 9 motorcycle traffic on all our roads pretty heavily. It
 10 varies. M-36 for an "M" route probably gets a little more
 11 because I know there's a presence in some of the adjacent
 12 villages and cities. But we get a lot on the interstates; a
 13 lot. Very heavy out there.
 14 Q Now, do you participate in any of those -- I think you
 15 testified earlier that there's a meeting either once or
 16 twice a year for planning of what work gets done in the
 17 region; correct?
 18 A Uh-huh (affirmative).
 19 Q Do you participate or did you participate in any of those
 20 meetings prior to this accident?
 21 A I do, but not all of the time. We have a development
 22 engineer, design engineer, who always participates in that,
 23 and I do a little more peripheral. I usually go on the van
 24 rides and look at the roads and make sure that people are
 25 looking at things to my satisfaction, too but I don't -- a

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1 lot of it is delegated to others.
 2 Q Do the folks in the region determine the amount of money
 3 that's going to be spent --
 4 A Yeah.
 5 Q -- or are they just given a number and have to figure out
 6 how to spend the money?
 7 A They're given a number and then they determine how it gets
 8 divvied up between three transportation service centers and
 9 their jurisdictional areas.
 10 Q From your knowledge and experience, who determines how much
 11 money is given to each region and to MDOT in general, if you
 12 know?
 13 A It's through the legislature and it varies. Yeah, that's a
 14 whole very complicated issue.
 15 Q So if you participated in this process -- you said not all
 16 the time, but sometimes you've been in these meetings?
 17 A Uh-huh (affirmative).
 18 Q Okay. Would you be able to tell us about the process they
 19 go through as far as making a prioritization of what
 20 projects get done with the money that is available to them?
 21 A Yeah. I mean it's a lot of give and take between a lot of
 22 individuals, but we prioritize our heaviest traveled routes
 23 that have the largest volumes because that would impact
 24 mobility and it would impact safety the most because there's
 25 the largest number of people.

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1 Q Is it fair to say that whatever work is determined to be
 2 necessary on the heaviest traveled routes gets first
 3 priority?
 4 A Yes.
 5 Q And whatever money is leftover then is allocated however you
 6 want to divvy it up to the remaining roads within the area?
 7 A That's more or less how it's done, yeah.
 8 Q What priority is generally given to M-36?
 9 A It's lower in priority because it's a rural and it doesn't
 10 have the traffic volumes. The traffic volumes are much
 11 lower than the bulk of our other roadways.
 12 Q I think you've testified earlier that an overlay of the
 13 road, a resurfacing of the road, is hundreds of times more
 14 expensive than the crack fill procedure that was followed
 15 here.
 16 A I don't know the exact number, but that's obtainable, a
 17 range is obtainable, but it's a gigantic difference.
 18 Q If the budget was available to do an overlay, would that
 19 have been a strongly considered procedure for maintenance or
 20 construction on M-36?
 21 A Not for maintenance, but for construction, yes, it would
 22 have been.
 23 Q Okay. So by process of elimination, the fact that an
 24 overlay wasn't done, would that mean that the money was not
 25 available to do that project?

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1 A That's correct; yeah.
 2 Q What about chip sealing? How expensive is that relative to
 3 the crack filling that was done?
 4 A I don't know precisely. It's quite a bit more expensive
 5 than doing this because there's a lot more material and a
 6 lot more equipment involved.
 7 Q And the same question with respect to crack sealing that I
 8 asked you before on overlay resurfacing. If the money was
 9 available to do a chip seal, would that have been something
 10 that was strongly considered done on M-36? And if not, why
 11 not?
 12 A That I'm not sure. One of the -- it may -- it might have
 13 been tossed around. Whether it would have happened or not
 14 there would have been some objection because there is a
 15 downfall to chip seal, which is when you apply the gravel
 16 over the tar you have loose gravel on the road for a long
 17 time. We broom it off, but you can't get it all off because
 18 it's a very less expensive fix, and so it's a -- there's a
 19 hazard of much less friction until the time a few months
 20 down the road that the bulk of it's been worked in or gotten
 21 off the roadway, and so, you know, for like motorcycles,
 22 stuff like that, it would be a tough surface. It would be a
 23 little more dangerous until it stabilized itself, so you
 24 would be exposed for a few months.
 25 Q Was the safety concern of motorcyclists taken into

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19 (Pages 70 to 73)

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1 consideration in deciding whether to do chip sealing or
2 doing this crack fill procedure?
3 A Well, it likely was because we're available -- motorcycles
4 only have two tires and a car has four, so a motorcycle will
5 upset where a car will slide. But that's not very good
6 either, but it's not as bad than dropping down on the
7 pavement.
8 Q And I think you've testified earlier that you considered
9 that gravel on the surface might be a specific hazard for
10 motorcycles?
11 A That can be, too, yeah. Especially loose gravel is not a
12 good thing on the roadway because it breaks the bond and the
13 friction.
14 Q Okay. Would that be also true around -- especially around
15 curves?
16 A Oh, yeah.
17 Q And is that true for not just motorcyclists, but for people
18 in four-wheeled vehicles?
19 A It's going to be -- yeah, it can cause more issues. Yeah,
20 loose gravel is not a good thing on roadways. Aside from
21 the friction thing, loose gravel shoots up and gets shot
22 around, which also causes other issues. It can hit people
23 and it hits --
24 Q Projectile?
25 A Yeah. Projectile; hit people or hit windshields and cars

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1 and, you know, either do damage or be a pretty large
2 distraction, too.
3 Q Based upon your knowledge of the traffic volumes and the
4 procedures that were followed here, do you believe that the
5 procedure for crack fill followed in this particular case
6 was the most reasonable method followed?
7 A With all things considered, I do.
8 Q And you were asked earlier about whether or not you took
9 into consideration the reasonableness of the necessity of
10 doing crack fill versus some other methodology. Do you
11 recall that?
12 A Yeah, I remember being questioned about it.
13 Q That then opened the question of whether or not the crack
14 fill procedure that was followed was in itself reasonably
15 done. Based upon your viewing of the photographs and your
16 viewing of the guidance documents, do you believe that it
17 was reasonably done?
18 A For as many cracks as was in this road, I do believe it was.
19 Q And why do you say that?
20 A Well, because the -- all the cracks have to be filled and
21 there was a lot of variability in the cracking out here, and
22 there was a lot of secondary cracking from what I was told
23 secondhand, and if that's the case, then this was an
24 appropriate way to hit it and make sure they can do this and
25 get reasonable production and address the roadway as best as

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1 possible for the tools and, you know, materials and the
2 funding that we had.
3 Q And so we were talking earlier about setting the width of
4 the material spray, I guess you would call it, and you
5 testified earlier that you have to use the worst case for
6 the cracks because otherwise you wouldn't be able to get the
7 work done.
8 A Right.
9 Q Do you believe that that was appropriate method and
10 reasonable method under the circumstance?
11 A I think it was.
12 Q With respect to the manufacturer's installation
13 instructions, do you have any knowledge or experience in
14 translating the manufacturer's installation instructions to
15 guidance documents and how to apply it?
16 A I've never done that myself.
17 Q Okay. And who would be the person or persons, if you know,
18 or division at MDOT that would be the parties that we should
19 ask that question to?
20 A Probably our maintenance division in Lansing. It
21 potentially -- it was either the Construction and Technology
22 or the Maintenance Division in Lansing, one of those two
23 would have had people involved in putting this together, and
24 it could have in part been done by a team of people, too,
25 utilizing individuals such as Chuck Manor, the

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1 superintendent, who have broad field experience over a large
2 period of time.
3 Q All right. Are you familiar with equipment numbers that are
4 listed here on the work schedule in Exhibit 2? Do you know
5 what those correspond to?
6 A I think a lot of them are trucks or vehicles, but I'm not a
7 hundred percent sure because I don't deal with the equipment
8 numbers. I can find them, but there are a lot of times it's
9 just like the trucks that they're using.
10 Q So we'd have to ask the maintenance folks if they could
11 correspond the type of vehicle to the equipment that's
12 listed?
13 A Yeah. And they would know, yeah.
14 Q And presumably if they're following the guidance documents,
15 the equipment used would --
16 A More or less match up. I mean it's a guideline.
17 Q Right.
18 A But it would more or less match up what it takes to
19 reasonably get this work operation done.
20 Q And another question. This NHMS, the National Highway
21 Maintenance System Limited, you said that you were -- you
22 didn't know what the federal SHRP test project was.
23 A Yeah. I'm not familiar with exactly what that is.
24 Q There's the implication there, it says "Federal SHRP." Is
25 that some kind of federally funded project?

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20 (Pages 74 to 77)

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1 A It could be federally -- it's possible it's federally funded
 2 or something, maybe if it's an experimental project, but I'm
 3 only guessing, which you don't want me to do.
 4 Q That NHMS program, that implies, you know, it says "National
 5 Highway Maintenance System Limited" --
 6 A Uh-huh (affirmative).
 7 Q -- but then NHMS program, is this kind of a -- I'm not sure
 8 what the correspondence is there.
 9 A And I'm not sure. It may just be nomenclature or trying to
 10 jibe it with the name of the company and this is their
 11 program. They have their own recommended little program and
 12 then they sell their products and market it or whatever.
 13 Q And somebody from NHMS -- there's somebody named Michael
 14 Leahy. It's on page two of Exhibit --
 15 A Yeah; that's what it looks like.
 16 Q And on page three of Exhibit 5, proposal to "MDOT Brighton,
 17 Attention: Matt Pratt"?
 18 A Uh-huh (affirmative).
 19 Q So we would have to ask Matt Pratt about this particular --

20 A Yes, and he would have -- my guess is he would have intimate
 21 knowledge of this since it was made to him.
 22 Q Or at least more knowledge than you do?
 23 A Yeah; right.
 24 MR. BLADEN: I don't have any further questions.
 25 MR. VESPRINI: I have just a real quick followup.

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1 I just want to touch on something.
 2 EXAMINATION
 3 BY MR. VESPRINI:
 4 Q If I understood some of the questioning from Mr. Bladen, is
 5 it your understanding that the manufacturer's installation
 6 instructions get translated into the guide that MDOT
 7 prepares? I just want to make sure I understand that right.
 8 A That's my understanding.
 9 Q So the guide that it gets translated into, are those guides
 10 some of the exhibits we had marked earlier? I understand
 11 there was some excerpts from them, but I believe it was
 12 called the -- let's see here -- Maintenance Performance
 13 Guide? I think we marked it as Exhibit Number 1.
 14 A Yes.
 15 Q Is that the guide that the installation instructions would
 16 get translated into?
 17 A That's correct.
 18 MR. VESPRINI: Okay. I just wanted to make sure I
 19 understand that point. Thank you.
 20 MR. BLADEN: Just a followup on that.
 21 EXAMINATION
 22 BY MR. BLADEN:
 23 Q Do you know for sure, for certain, that they are actually
 24 translated to or is that part of the consideration by MDOT?
 25 A That would be part of the consideration because that could

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1 be -- there are other manufacturers of other products, and
 2 even all of the products don't match up exactly, too, and so
 3 there are similarities and there's dissimilarities if you
 4 were to really start digging into it.
 5 Q Would MDOT's actual experience using the product itself over
 6 years be factored into how it is used?
 7 A Oh, yes; yes.
 8 Q And so the manufacturer's guideline or recommendations may
 9 not necessarily track with MDOT's experience --
 10 A That's correct.
 11 Q -- in applying the product?
 12 A That's correct.
 13 MR. BLADEN: No further questions.
 14 MR. VESPRINI: All set.
 15 (Deposition concluded at 11:56 a.m.)
 16
 17 -0-0-
 18
 19

Network Reporting

1-800-532-2720

21 (Pages 78 to 80)

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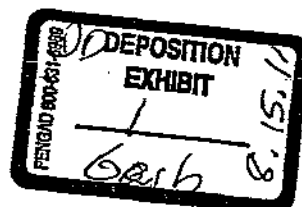
Activity Name: Joint and Crack Filling**Activity #: 10100**

Beginning in fiscal year 2009, report Joint and Crack Filling using the methods listed below to PCA 10100.

Methods: Joint and Crack Filling
 Crackfill - Rubber Sealant
 Crackfill - Hot Poured Joint Sealant

Work may be performed using any of the above methods. All work performed using any of these methods should be reported to activity number 10100. Performance guides for all of these methods are provided on the following page(s).

Note: Beginning in fiscal year 2009, Pavement Spot Seal Patching (Kettle and Pavement Repair Machine methods) should be reported to PCA 10400 Pavement Spall & Pot Hole Repair.



Activity Name: Joint and Crack Filling**Activity #: 10100****Method: Joint and Crack Filling**

Description/Purpose: Cleaning and filling of joints, random open cracks, and edge joint sealing with liquid sealant to prevent passage of water to the base or sub-grade and permit pavement joints to contract and expand properly.

Recommended Crew Size
7 (2 traffic regulators included)

Material
HFRS-2
HFRS-2M
2 NS Sand or sawdust
Bituminous only: 3/8" stone

Average Daily Production
1 - 2 lane miles, manual
5 - 6 lane miles, mechanical

Equipment

<u>Qty</u>	<u>Code</u>	<u>Description</u>
1	02/03	Pickup
3	04	Trucks, dump
1	12	Flashing arrow
1	19	Compressor
1	36	Kettle
<u>Optional</u>		
1	12	Flashing arrow
1	04	Shadow vehicle and attenuator

Alternate Equipment:
Mechanical Squeegee Machine

1	02/03	Pickup
3	04	Trucks, dump
1	12	Flashing arrow

Optional for Alternate:

1	04	Shadow vehicle and attenuator
1	04	Truck, dump (stone)
1	02/03	Broom truck
1	12	Flashing arrow

Recommended Work Method

1. Review environmental, training, and safety precautions.
2. Best results are achieved when joints and cracks are sealed when the pavement is contracted and the average temperature is not over 50°F.
3. **BEFORE FILLING, CLEAN CRACKS WITH FORCED AIR.**
4. Apply sealant heated to the manufacturer's specified application temperature.
5. Fill cracks to within 1/4" of the top of the surface to allow for slab expansion. Squeegee excess sealant, if necessary.
6. **Bituminous only: 3/8" stone may be used in wide cracks. DO NOT USE STONE WHEN SEALING CRACKS ON CONCRETE.**
7. Sand or other approved materials may be sprinkled lightly on top to prevent tracking.

Note: Do not fill joints having neoprene filler material.

Criteria: Only cracks greater than 1/4" (diameter of a pencil) will be filled. Fill joints only when joint filler is broken, brittle or missing and allows dirt and water to enter.

Activity Name: Joint and Crack Filling**Activity #: 10100****Method: Rubber Sealant – BITUMINOUS SURFACE ONLY**

Description/Purpose: Cleaning and filling of random open cracks with rubber sealant. This is done to prevent passage of water to the base or sub-grade and permit pavement joints to contract and expand properly. Can be used to seal traffic signal loops.

Recommended Crew Size
6 (2 traffic regulators included)

Material
Rubber sealant (e.g. Prizmo)

Average Daily Production
1 - 2 lane miles

Equipment

<u>Qty</u>	<u>Code</u>	<u>Description</u>
1	02/03	Dump truck
2	04	Heavy trucks
1	12	Flashing arrow
1	19	Portable compressor
1	36	Rubber sealant machine (e.g. Prizmo)
<u>Optional</u>		
1	12	Flashing arrow
1	04	Shadow vehicle and attenuator

Recommended Work Method

1. Review environmental, training, and safety precautions.
2. Best results are achieved when cracks are sealed when the average temperature is below 50°F.
3. Before filling, clean cracks with a hot air lance. Use caution to avoid overheating concrete surfaces, which will cause spalling.
4. Apply sealant heated to the specified application temperature, using the applicator before the crack cools.
5. Allow material to set before opening to traffic.

Activity Name: Joint and Crack Filling**Activity #: 10100****Method: Hot Poured Joint Sealant**

Description/Purpose: Cleaning and filling of joints and random open cracks with hot poured joint sealant. This is done to prevent the passage of water to the sub-grade and permit pavement joints to expand and contract properly by not allowing non-compressing material, such as sand and stone, into the joint.

Recommended Crew Size
6 (2 traffic regulators included)

Material
Hot Joint Sealant (Crafco Asphalt Rubber, Type II, or an approved alternative*)
Backer Rod (type used for hot materials)

Average Daily Production
1 - 2 lane miles**Equipment**

<u>Qty</u>	<u>Code</u>	<u>Description</u>
1	02/03	Pickup
2	04	Heavy trucks
1	12	Flashing arrow
1	19	Portable compressor
1	53	Sandblaster
1	36	Hot poured rubber machine
1	33	Router <u>or</u>
1	54	Random crack saw
1	67	Trailer
<u>Optional</u>		
1	04	Shadow vehicle and attenuator
1	12	Flashing arrow

Recommended Work Method

Note: To maintain the quality of the product, avoid heating sealant for prolonged periods of time or reheating more than once without adding new material.

CRACK FILLING

1. Review environmental, training, and safety precautions.
2. Pavement must be clean, dry, and at an air temperature of 45°F or above.
3. Optional: Cracks 3/8" wide or less may be routed to provide a sealant reservoir. Rout to expose sound material. Generally rout to approximately 1/2" wide by 3/4" deep. Rout only what will be sealed for this project.
4. Crack or routed area should be cleaned by sandblasting and then blown out with compressed air.
5. Install hot backer rod, sized 25% larger than the width of the crack, in cracks 3/8" wide or larger.
6. Fill crack flush with pavement surface. Pour sealant at 380°-400°F, or per sealant specification.

*Contact Andy Bennett at C&T (517/322-5043) for approved alternative.

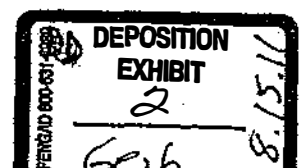
Work Method, continued <

Recommended Work Method, continued**JOINT FILLING**

1. Review environmental, training, and safety precautions.
2. Pavement must be clean, dry, and at an air temperature of 45°F or above.
3. Re-saw joint if necessary to remove old joint material.
4. Clean joint out by sandblasting and then blowing out with compressed air.
5. For expansion joints and all joints constructed with neoprene seals, place backer rod to a depth that would form a nearly square reservoir. For other contraction joints use a bond breaker.
6. Fill joint with hot poured joint sealant level with pavement surface to 1/8" below pavement surface.

Work Schedule

Weather:		Temperature: °	Date: 6-29-09
EMPLOYEE	EQUIPMENT #	OPERATION	LOCATION
ANDERSON, BILL	03-4515	13900	Take Concrete Saw to Williamston
LOGAN, JIM	03-1126	10100	M-36
LYBRINK, JUSTIN	Craftco		
MASON, JEFF	03-2106		
DANFORTH, GERRY	12-2535		
BROWN, BRIAN	03-2085		
OWEN, RODNEY	19-0809		
	03-0006		
	12-2548		
LYNCH, DOUG	03-1167	10200	Pick up Lane closure US-23
GOLIP, MIKE	67-0337		Put away concrete stuff
	04-1309		
	68-0010		
LOVE, MARK	04-0370	16000	Livingston / Washtenaw
DODD, TIM	10-0256		Help Doug with lane closure
	19-0670		
SOKOL, DAN	05-0488	11200	Washtenaw
	04-1565		
	67-0391		
WALLACE, ROBERT	05-1630	12810	US-23
HOFFMAN, DON	03-2014		
DENNISON, SEAN	04-3024	17200	Monroe
SCHULTHEIS, GARY			Working in Lansing Region
NICOLS, JIM			
BOWMAN, ERNIE	10 ANLV		
TOTH, JOHN			
Supervisor's Signature:		Date:	



Work Schedule

B 1042

Weather:		Temperature: °	Date: 6-30
EMPLOYEE	EQUIPMENT #	OPERATION	LOCATION
LOGAN, JIM	03-1167	10100	M-36
LYBRINK, JUSTIN	Craftco ✓		
MASON, JEFF	03-2106 ✓		
DANFORTH, GERRY	12-2535 ✓		
BROWN, BRIAN	03-2085 ✓		
OWEN, RODNEY	19-0809 ✓		
ANDERSON, BILL	03-0006		
	12-2548		
LOVE, MARK	04-0370	16000	Livingston / Washtenaw
DODD, TIM	10-0256		
	19-0670		
SOKOL, DAN	05-0488	11200	Washtenaw
	04-1565		Scuffer
	67-0391		
WALLACE, ROBERT	05-1630	12810	US-23
HOFFMAN, DON	03-2014		Clean out edge drains
DENNISON, SEAN	04-3024	17200	Monroe
SCHULTHEIS, GARY			Working in Lansing Region with concrete crew
NICOLS, JIM			
LYNCH, DOUG			
GOLIP, MIKE			Take 04-1579 to the Lansing A&E, then go to the
HODGE, JIM			Mason A&E to pick up fuel card to scupper
BOWMAN, ERNIE	10 ANLV		
TOTH, JOHN			
Supervisor's Signature:		Date:	

Work Schedule

[illegible]

Work Schedule

Weather:		Temperature: °	Date : 7-9-09
EMPLOYEE	EQUIPMENT #	OPERATION	LOCATION
SCHULTHEIS, GARY	03-2085	10200	Drill Holes
BROWN, BRIAN	Rental Compressor		
LOGAN, JIM	03-2106		
GOLIP, MIKE	03-2014	10200	lane closure US-23 White LK Road
MASON, JEFF	12-2535		Barrels and rings
OWEN, RODNEY	04-1309		
LYBRINK, JUSTIN	68-0010		
	03-1167		
	67-0337		
LYNCH, DOUG	04-1565		Take Loaders up to White Lake Road
	67-0391		
LOVE, MARK	04-0370	16000	Livingston / Washtenaw
DODD, TIM	10-0256		
	19-0670		
SOKOL, DAN	05-0488	11200	Washtenaw
ANDERSON, BILL	03-4515	13200	M-36
DENNISON, SEAN			
TOTH, JOHN	10 ANLV		
HOFFMAN, DON	10 SKLV		
NICOLS, JIM	10 ANLV		
BOWMAN, ERNIE	10 ANLV		
WALLACE, ROBERT	6 CMPU / 4 ANLV		
DANFORTH, GERRY	10 ANLV		
Supervisor's Signature:			Date:

Work Schedule

Weather: Partly Sunny		Temperature: 80s °	Date : 7-14-09
EMPLOYEE	EQUIPMENT #	OPERATION	LOCATION
LOGAN, JIM	03-1167	10100	M-36
LYBRINK, JUSTIN	Craftco		
TOTH, JOHN	03-2106		
BROWN, BRIAN	12-2535		
NICOLS, JIM	03-2085		
ANDERSON, BILL	19-0809		
	03-0006		
	12-2548		
SOKOL, DAN	05-0488	11200	Washtenaw
	03-Mason 4/76		
LOVE, MARK	04-0370	16000	Livingston / Washtenaw
DODD, TIM	10-0256		
	19-0670		
SCHULTHEIS, GARY	04-1565	13900	I-96 & County Garage
GOLIP, MIKE	05-0063		
	67-0443		
DENNISON, SEAN	04-3022	17200	Spray Bridge decks
OWEN, RODNEY			
MASON, JEFF	10 SKLV		
DANFORTH, GERRY	10 ANLV		
HOFFMAN, DON	10 SKLV		
WALLACE, ROBERT	10 ANLV		
Supervisor's Signature:			Date:

Work Schedule

Weather:		Temperature: °	Date: 7-27-09
EMPLOYEE	EQUIPMENT #	OPERATION	LOCATION
PRATT, MATT		19600	JSC
ANDERSON, BILL	03-2085	13900	Take Arrow Board back to K-Z00
LYNCH, DOUG	03-2062	13000	? Take Down Gardrail 1-96 ?
WALLACE, ROBERT	03-0006		Shoulder Closure
SOKOL, DAN	03-1126		
SCHULTHEIS, GARY	04-1309		
NICOLS, JIM	69-0010		
	67-0311		
	67-0337		
GOLIP, MIKE	03-1167	10100	m-36
BROWN, BRIAN	03-2106		
LYBRINK, JUSTIN	03		
MASON, JEFF	12-2535		
DANFORTH, GERRY	19-0809		
HOFFMAN, DON			
LOVE, MARK	04-0370	16000	Livingston / Washtenaw
DODD, TIM	10-0256		
	19-0670		
DENNISON, SEAN	04-3022	17200	Spray Bridge decks 1-75 Monroe
OWEN, RODNEY			
LOGAN, JIM	10 sick		
TOTH, JOHN	10 ANLV		
Supervisor's Signature:			Date:

Work Schedule

Weather:		Temperature: °	Date : 7-28-09
EMPLOYEE	EQUIPMENT #	OPERATION	LOCATION
SCHULTHEIS, GARY	03-2014	11400	96&County garage
NICOLS, JIM	12		Lane Closure
WALLACE, ROBERT	04-1309		
	68-0010		
LOVE, MARK	04-0370	16000	Livingston / Washtenaw
DODD, TIM	10-0256		
	19-0670		
DENNISON, SEAN	04-3022	17200	Spray Bridge decks I-75 Monroe
OWEN, RODNEY			
GOLIP, MIKE	03-1167	13000	I-96 & M-36
SOKOL, DAN	67-0311		
DANFORTH, GERRY	03-2106		
LYBRINK, JUSTIN	12-2535		
HOFFMAN, DON	03-1126	10300	M-59& I-96
LOGAN, JIM	04-1463		
ANDERSON, BILL	68-0506		
	36-0455		
Mason	03-4515	13200	59 & 36
Love	4 Set AM in @ 10:00 AM		
Brown	10 Set		
TOTH, JOHN	10 ANLV		
Supervisor's Signature:			Date:

Work Schedule

Weather:		Temperature: °	Date: 8-4-09
EMPLOYEE	EQUIPMENT #	OPERATION	LOCATION
LYNCH, DOUG	03-0006	10200	Unload 2014
TOTH, JOHN	67-0337		Move barrels up to next location I-96 EB
ANDERSON, BILL	04-1371		Pick up barrels on WB I-96
SOKOL, DAN	68-0010		
WALLACE, ROBERT	03-2014		Take off Cont Rak
SOKOL, DAN			
LOGAN, JIM	03-1167	10100	M-36
DANFORTH, GERRY	Craf-co		
DODD, TIM	03-2085		
HOFFMAN, DON	19-0809		
SCHULTHEIS, GARY	03-2106		
LOVE, MARK	12-2535		
BROWN, BRIAN	04-1309		
	68-0010		
OWEN, RODNEY	04-3024	17200	
DENNISON, SEAN	60-1228		
LYBRINK, JUSTIN	03-4170		Grand Ledge
NICOLS, JIM	Rental Compressor		
	04-1331		
	05-0063		
	67-0391		
Logan	10 Sick		
GOLIP, MIKE	10 ANLV		
MASON, JEFF	10 CMPU		
Supervisor's Signature:			Date:

Work Schedule

Weather: Showers- Humid		Temperature: 80s °	Date : 8-10-09
EMPLOYEE	EQUIPMENT #	OPERATION	LOCATION
LOGAN, JIM	04-0270	19600	Sky Genie
BROWN, BRIAN			
LYBRINK, JUSTIN			
LOVE, MARK	04-0370	16000	Livingston / Washtenaw
GOLIP, MIKE	10-0256		
WALLACE, ROBERT	19-0670		
	04-1371		
	68-0012		
OWEN, RODNEY	03-0006	17200	Rinse Jugs
	300 gal sprayer		
HOFFMAN, DON	03-2014	12400	23
MASON, JEFF			
SCHULTHEIS, GARY	03-1167	12400	96
NICOLS, JIM			
ANDERSON, BILL	03-4515	13200	M-36
SOKOL, DAN	03-4170	79900	Accident Reports
PRATT, MATT		79900	50042G00
LYNCH, DOUG	03-2062		
TOTH, JOHN			
BOWMAN, ERNIE		20700	
DANFORTH, GERRY	10 Sick		
DENNISON, SEAN	10 Flex		
DODD, TIM	10 ANLV		
HODGE, JIM	10 ANLV		
Supervisor's Signature:			Date: 8-10-09

Work Schedule

Weather: Sunny		Temperature: 80 s °	Date: 8-11-09
EMPLOYEE	EQUIPMENT #	OPERATION	LOCATION
LOGAN, JIM		19600	TMW EXAM
LYBRINK, JUSTIN			
BROWN, BRIAN			
SOKOL, DAN	03-1167 ✓	10100	M-36 @ Howellet Road
DANFORTH, GERRY	Craf-co ✓		
WALLACE, ROBERT	03-2085 ✓		
HOFFMAN, DON	19-0809 ✓		
MASON, JEFF	03-2106 ✓		
NICOLS, JIM	12-2535 ✓		
	04-1309		
	68-0040		
	034170		
LOVE, MARK	04-0370	16000	Livingston / Washtenaw
GOLIP, MIKE	10-0256		
	19-0670		
LYNCH, DOUG	04-1565	12810	96 County garage
SCHULTHEIS, GARY	67-0391		
TOTH, JOHN	05-1630		
	03-2062		
OWEN, RODNEY	03-2014	17200	Phagmities M-59 East
ANDERSON, BILL			
DENNISON, SEAN	04-3024	17200	M-59 fall roadside
	60-1228		
BOWMAN, ERNIE			BUCKET SCALES 9:00-10:00 AM
DODD, TIM	10 ANLV		
HODGE, JIM	10 ANLV		
Supervisor's Signature:			Date: 8-11-09

Work Schedule

Weather:		Temperature: °	Date:
EMPLOYEE	EQUIPMENT #	OPERATION	LOCATION
OWEN, RODNEY	03-2014	17200	Phagmites M-59 East
ANDERSON, BILL			
DENNISON, SEAN	04-3024	17200	M-59 fall roadside
LOGAN, JIM	03-1167	10100	M-36 @ Howellet Road
NICOLS, JIM	Craf-co		
MASON, JEFF	03-2085		
DANFORTH, GERRY	19-0809		
LYBRINK, JUSTIN	03-2106		
SCHULTHEIS, GARY	12-2535		
BROWN, BRIAN	03-2106		
Hoffman, Don	03-2106		
WALLACE, ROBERT	05-1630	12810	US-23 Clean out culvert ends
SOKOL, DAN	03-2005 4170		
GOLIP, MIKE		25100	Bam Person
HOFFMAN, DON	03-1170	13000	Catch basins M-59
NICOLS	10 Sick		
LOVE, MARK	10 ANLV		
DODD, TIM	10 ANLV		
GOLIP, MIKE	4 ANLV PM		
HODGE, JIM	10 ANLV		
Supervisor's Signature:			Date:

Work Schedule

Weather: Sunny		Temperature: 80s °	Date : 8-13-09
EMPLOYEE	EQUIPMENT #	OPERATION	LOCATION
LOGAN, JIM	03-1167	10100	M-36
NICOLS, JIM	Craf-co		
MASON, JEFF	03-2085		
DANFORTH, JERRY	19-0809		
LYBRINK, JUSTIN	03-2106		
SCHULTHEIS, GARY	12-2535		
BROWN, BRIAN			
WALLACE, ROBERT	05-1630	12810	US-23 Clean out culvert ends
SOKOL, DAN	03-4170		Load up backhoe at end of day
HOFFMAN, DON	03-4615	19000	M-59 Catch Basins
LOVE, MARK	04-0370	16000	Livingston / Washtenaw
DODD, TIM	10-0256		
	19-0670		
OWEN, RODNEY	03-2014	17200	Phagmities M-59 East
ANDERSON, BILL			
PRATT, MATT		79900	50042G00
LYNCH, DOUG	03-2062		
TOTH, JOHN			
BOWMAN, ERNIE		20700	
GOLIP, MIKE	10 ANLV		
Supervisor's Signature:			Date: 8-13-09

Work Schedule

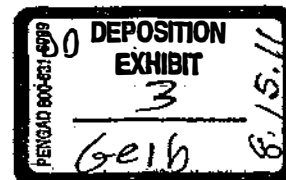
Weather: Partly Sunny		Temperature: 80s °	Date : 8-25-09
EMPLOYEE	EQUIPMENT #	OPERATION	LOCATION
TOTH, JOHN	03-0006	12000	94-Ann Arbor Saline Rd
NICOLS, JIM	67-0337		
GOLIP, MIKE	38-0129		
	03-2085		
	17-0550		
DANFORTH, GERRY	03-4170	15900	94-Zeeb Road
SOKOL, DAN			
DENNISON, SEAN	04-3024	17200	See Matt in the morning 1st thing
LOVE, MARK	04-0370	16000	Livingston / Washtenaw
DODD, TIM	10-0256		
	19-0670		
LOGAN, JIM	03-1167	10100	M-36
OWEN, RODNEY	Craf-co		
HOFFMAN, DON	03-2014		
LYBRINK, JUSTIN	19-0809		
MASON, JEFF	03-2106		
BROWN, BRIAN	12-2535		
WALLACE, ROBERT			
ANDERSON, BILL	03-4515	13200	M-59
LYNCH, DOUG	03-1126		
SCHULTHEIS, GARY	59-0368		
PRATT, MATT	03-3157	79900	50042G00
BOWMAN, ERNIE	03-4157	20700	
Supervisor's Signature:		Date: 8-25-09	

Work Schedule

Weather: Partly Cloudy		Temperature: 70s °	Date : 8-26-09
EMPLOYEE	EQUIPMENT #	OPERATION	LOCATION
TOTH, JOHN	03-0006	12000	94-Ann Arbor Saline Rd
LOGAN, JIM	67-0337		
LYBRINK, JUSTIN	38-0129		
	03-2085		
	17-0550		
DENNISON, SEAN	04-3024	17200	Fall Road side
LOVE, MARK	04-0370	16000	Livingston / Washtenaw
DODD, TIM	10-0256		
	19-0670		
DANFORTH, GERRY	03-4170	15900	94-Zeeb Road
SOKOL, DAN			
OWEN, RODNEY	03-1126	17200	Phagmities
HOFFMAN, DON			
WALLACE, ROBERT	04-1591	11200	M-36 West End
SCHULTHEIS, GARY	04-1565		
ANDERSON, BILL	03-4515	13200	Approches / 11200
BROWN, BRIAN	03-1167	12400	N-23
MASON, JEFF			
PRATT, MATT	03-3157	79900	50042G00
LYNCH, DOUG	03-2062		
BOWMAN, ERNIE		20700	
NICOLS, JIM	10 ANLV		
GOLIP, MIKE	10 ANLV		
Supervisor's Signature:		Date: 8-26-09	

PERFORMANCE GUIDES

<u>Activity</u>	<u>MDOT</u> <u>Activity No.</u>	<u>Date</u>
Joint and Surface Crack Filling	101	4/96
Remove and Replace Pavement (Concrete)	102	4/96
Remove and Replace Pavement (Bituminous)	102	4/96
Patrol Patching	103	4/96
Asphalt-Aggregate Surface Treatment	104	4/96
Bituminous Patching	105	4/96
Bituminous Leveling	106	4/96
Sawing Pavement	107	4/96
Bump Removal	108	4/96
 <u>Shoulder</u>		
Routine Blading	110	4/96
Shoulder Rehabilitation	111	4/96
Patch Gravel Shoulder	112	4/96
Claying	113	4/96
Seal Patching	114	4/96
Shoulder Bituminous Patching	115	4/96
Bituminous Leveling	116	4/96
Windrow Removal	117	4/96
Shoulder Seal Coating	118	4/96
 <u>Roadside</u>		
Tree Removal	120	4/96
Stump Removal	121	4/96
Catch Basin Cleanout	122	4/96
Ditch Cleanout	123	4/96
Litter Pickup	124	4/96
Patrol Litter Pickup	125	4/96
Area Mowing	126	4/96
Brush Control	127	4/96
Culvert and Underdrain Maintenance	128	4/94
Non-Motorized Trials	129	7/91
 <u>General</u>		
Repair Steel Beam Guardrail	130	4/96
Repair Cable Guardrail	131	4/96
Approach Sweeping	132	7/91
Tourist Facility Maintenance	133	4/94
Curb Sweeping	136	4/96
Right-of-Way Fence Repair	137	4/96
Other Routine Maintenance	139	4/94
 <u>Winter</u>		
Winter Operations	141	4/96
Blading/Plowing, Spot Salting/Blading, Sanding/Blading, Salting/Blading		
Winter Road Patrol	144	4/96
Other Winter Maintenance	149	7/94
Sign Maintenance	160	4/96
Delineator Maintenance	164	4/96
Impact Attenuator Maintenance	165	4/96





PERFORMANCE MAINTENANCE GUIDE MANAGEMENT SYSTEM

ACTIVITY: JOINT AND CRACK FILLING

NO: 101

DESCRIPTION & PURPOSE: Cleaning and filling of joints and random open cracks with liquid sealant to prevent passage of water to the base or sub-grade and permit pavement joints to contract and expand properly. (See application temperatures for bituminous materials on Page 3 of TABLES section).

RECOMMENDED CREW SIZE

7 - (2 flagmen included)

TYPE OF ACTIVITY

Special Authorization

MATERIALS

HFRS-2
HFRS2-M
2 NS Sand or sawdust
Ohio #9, H-1 (or other cover
material approved by M & T)

EQUIPMENT

Oty	Group	Description
1	02	Pickup
3	04	Trucks, Dump
1	12	Flashing Arrow
1	19	Compressor
1	36	Kettle

AVERAGE DAILY PRODUCTION

568-946 L (150-250 Gal) manual
946-2271 L (240-600 Gal) mechan-
ical

Alternate
Mechanical (Squeegee Machine)

1	02	Pickup
3	04	Trucks, Dump
1	12	Flashing Arrow

RECOMMENDED WORK METHOD

1. Seal joints and cracks when the pavement is contracted and the average temperature is not over 10°C (50°F).
 2. Before filling, clean cracks with forced air.
 3. Apply sealant heated to the specified application temperature. (See TABLES - 3).
 4. Fill cracks to within 6mm(1/4") of the top of the surface to allow for slab expansion. Squeegee off excess sealant if necessary.
 5. 10mm(3/8") stone may be used in wide cracks on bituminous surfaces.
 6. Do not use 10mm(3/8") stone when filling cracks on concrete surfaces.
 7. Sand or sawdust may be sprinkled lightly on top to minimize tracking.
- NOTE: Do not fill joints havinf neoprene filler material.
CRITERIA: ONLY CRACKS GREATER THAN 6mm(1/4"), (DIAMETER OF A PENCIL), WILL BE FILLED. FILL JOINTS ONLY WHEN JOINT FILLER IS BROKEN, BRITTLE OR MISSING AND ALLOWS DIRT AND WATER TO ENTER.

DATE: 1996

1 OF 3 PAGE(S)



PERFORMANCE MAINTENANCE GUIDE MANAGEMENT SYSTEM

ACTIVITY: JOINT AND CRACK FILLING (Hot Poured Rubber)

NO: 101

DESCRIPTION & PURPOSE: Cleaning and filling of joints and random open cracks with hot poured rubber. This is done to prevent the passage of water to the subgrade and permit pavement joint to expand and contract properly by not allowing incompressible, such as sand and stone, into the joint.

RECOMMENDED CREW SIZE

6 - (2 flagmen included)

TYPE OF ACTIVITY

Special Authorization (Blue)

MATERIAL

Hot Rubber Sealant

AVERAGE DAILY PRODUCTION

114-189 L (30-50 Gal. of sealant)
equivalent to 5-10 pails or 122-189
kg(270-450 lbs.)

EQUIPMENT

Qty	Group	Description
1	02	Pickup
2	04	Trucks
2	12	Flashing Arrow
1	19	Compressor
1	53	Sandblaster
1	36	Hot Rubber Kettle
1	33	Router <u>or</u>
1	54	Random Crack Saw
1	67	Trailer

RECOMMENDED WORK METHOD

Note: To maintain the quality of the product, avoid heating sealant for prolonged periods of time or reheating more than once without adding new material.

CRACK FILLING

1. Pavement must be clean, dry, and at a temperature of 7°C(45°F) or above.
2. Cracks 10mm (3/8") wide or less should be routed to provide a sealant reservoir.
 - A. If routing is necessary, schedule separately and crack fill at a later date.
 - B. Route to expose sound material. Generally rout to approximately 13mm (1/2") by 19mm (3/4") deep.
3. Crack or routed area should be cleaned by sandblasting and then blow out with compressed air.
4. Install backer rod in cracks 10mm (3/8") wide or larger.
5. Fill crack flush with pavement surface. Pour sealant at 380-400°C or per sealant specification.

DATE: 1996

2 OF 3 PAGE(S)

JOINT FILLING

1. Pavement must be clean, dry, and at a temperature of 7°C (45°F) or above.
2. Re-saw joint if necessary to remove.
3. Clean joint out by sandblasting and then blowing out with compressed air.
4. For expansion joints and all joints constructed with neoprene seals, place backer rod to a depth that would form a nearly square reservoir. For other contraction joints use a bond breaker.
5. Fill joint with hot rubber sealant level with pavement surface to 3mm (1/8") below pavement surface.



420 N. Roosevelt Ave. • Chandler AZ 85226
1-800-528-8242 • (602) 276-0406 • FAX (480) 961-0513
www.crafco.com

INSTALLATION INSTRUCTIONS

HOT-APPLIED ROADSAVER, POLYFLEX, PARKING LOT AND ASPHALT RUBBER PRODUCTS

JANUARY 2008

READ BEFORE USING THIS PRODUCT

GENERAL: These products are hot-applied, single component polymer/rubber modified asphalts supplied in solid form used to seal or fill cracks or joints in asphalt concrete or Portland cement concrete pavements. These products are not fuel resistant, and should not be used in fuel or oil spill prone areas. To use, product is removed from the package, heated in a melter and applied to the pavement. Details on product specifications, climate and usage suitability, and product selection are contained in Product Data Sheets.

MELTING AND APPLICATION: These products must be melted in jacketed double boiler melters with effective agitation that meet requirements of Appendix X1.1 of ASTM D6690. Crafco Supershot, EZ Series 2, and EZ Pour melters are recommended. Do not use direct fired or air heated machines. Heat transfer oil should not exceed 525°F (274°C). The melter must be capable of safely heating product to 400°F (204°C). **CAUTION:** Stop agitation when adding product to prevent splashing. Product is heated to between the minimum application temperature and the maximum heating temperature which are shown on product containers and Product Data Sheets. These products are most effectively applied with pressure feed wand systems. RoadSaver, PolyFlex and Parking Lot products can also be applied using gravity feed pour pots (Part No. 40200 and 40201).

APPLICATION LIFE: Application life when heated to application temperature is approximately 12 to 15 hours and may be extended by adding fresh product as quantity in the melter decreases. Product shall be agitated during installation. Product may be reheated once to application temperature, after initial heat up. When application life has been exceeded, RoadSaver and Parking Lot products will thicken, become "stringy" and may then gel. If this occurs, product should immediately be removed from the melter and discarded. Asphalt Rubber and PolyFlex products will soften when overheated or heated for too long.

PAVEMENT TEMPERATURES: Apply product when pavement temperature exceeds 40°F (4°C). Lower temperatures may result in reduced adhesion due to presence of moisture or ice. If pavement temperature is lower than 40°F (4°C), it may be warmed using a heat lance (Part No. 45650) that puts no direct flame on the pavement. If installing at lower pavement temperature than 40°F (4°C), extreme care should be used to insure that cracks or joints are dry and free from ice and other contaminants. Product temperature should be maintained at the maximum heating temperature. If installing product at night, assure that dew is not forming on the pavement surface. Applied product should be checked by qualified personnel to assure that adhesion is adequate.

TRAFFIC CONTROLS: Place traffic controls in accordance with Part 6, Temporary Controls, of the FHWA Manual on Uniform Traffic Control devices (MUTCD) to protect the work site for the duration of the repairs.

CRACK / JOINT CLEANING: For appropriate adhesion, cracks or joints must be thoroughly clean and dry immediately prior to product installation. After widening or debris removal, and just prior to product installation, final cleaning shall use high pressure 90 psi (620kpa) minimum, dry, oil free compressed air to remove any remaining dust. Both sides of the crack or joint shall be cleaned. Surfaces should be inspected to assure adequate cleanliness and dryness.

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ASPHALT PAVEMENT CRACK SEALING: Crack sealing consists of installing extensible sealants into routed reservoirs in working cracks in pavements in good condition.

Reservoir Cutting: Based on the 98% LTPPBIND temperature range (difference from high to low), cracks are to be routed as follows:

Temperature Grade Range	Reservoir Width	Reservoir Depth
80°C or less	¼" (12 mm)	¾" (19 mm)
86°C	¾" (19 mm)	¾" (19 mm)
92°C	1 1/8" (28 mm)	½" (12 mm)
98° or greater	1 ½" (38 mm)	½" (12 mm)

Reservoir width should not exceed 1 ½" (38 mm). Cutting should remove at least 1/8" (3 mm) from each side and produce vertical, intact surfaces with no loosely bonded aggregate. The pavement should be sound enough to resist significant spalling during cutting. Final reservoir width should not exceed twice the cutter width or 1 ½" (38 mm) maximum.

Installation and Finishing: After cleaning, sealant at the required temperature is installed in the reservoir. Sealant can be installed with up to a 3/8" (10 mm) underfill, flush fill, or with an overband cap that does not exceed 1/16" (1.5 mm) above the pavement surface, and not greater than a 2" (50 mm) width beyond crack edges, depending on project specifications. These configurations are achieved using appropriate wand tips, shoes or squeegees. To reduce surface tack, Crafco DeTack or other approved material may be applied.

ASPHALT PAVEMENT CRACK FILLING: Crack filling consists of installing flexible, traffic resistant product into prepared, cleaned, non-working pavement cracks. Filler can be installed in routed or unrouted cracks or in surface overbands.

Routed Reservoir – Routed reservoirs are recommended for longest life. Guidelines for determining reservoir use are:

1. Crack density should not exceed approximately 20% (linear feet of cracks per square feet of pavement area).
2. Pavement should be sound enough to resist significant spalling during cutting. (Final reservoir width should not exceed double the cutter width, or 1 ½" (38 mm) maximum)

Reservoir Dimensions – Determined as follows:

1. The cut should remove at least 1/8" (3mm) from each side of the crack and cut back to sound pavement.
2. Minimum width is ½" (12 mm), maximum is 1 ½" (38 mm).
3. Recommended cut depth is ¾" (19 mm).
4. Reservoirs are then cleaned with compressed air.

Cleaned Unrouted Cracks – Cracks may be cleaned and filled without reservoirs, but longer life is achieved with reservoirs. Cleaning consists of using high-pressure dry, clean compressed air, brushing, or vacuum techniques to remove debris.

Surface Overbands – Product can be applied in overbands after crack cleaning with compressed air. Overbands should not exceed 1/16" (1.5 mm) high above the pavement surface and not extend greater than 2" (50 mm) beyond each crack edge.

Filler Installation and Finishing – Same as sealant installation and finishing.

PORTLAND CEMENT CONCRETE PAVEMENT JOINT SEALING AND RESEALING: Joint sealing and resealing consist of



installing extensible sealants into sawn and cleaned joint reservoirs in PCC pavements.

Reservoir Sawing—New concrete should be cured for at least 7 days prior to sawing the joint reservoir. Joint spacing should be at the design dimension, generally from approximately 12 to 20 ft. (3.7 to 6.2m). Joints shall be at least 1/8" (6mm) wide, and should not exceed 1 1/2" (38mm). For new pavements designed with narrow joints using the initial narrow saw cut as the reservoir, spaced at 15 ft (5m) maximum, and when using low modulus type sealants, joint width may be as narrow as 1/8 inch (3mm). Contact Crafcro for more details. Reservoir depth should allow a sealant depth to width ratio of 1:1 to 2:1, sufficient depth for backer rod, and the specified surface recess. Reservoirs shall be cut no deeper than required. When resealing, old sealant can be removed by knives, plows or sawing. Sawing shall slightly widen the joint by 1/8 to 1/4 inch (3-6mm) to remove all traces of old sealant and produce clean, intact vertical surfaces. Maximum joint width is 1 1/2 inch (38mm).

Reservoir Cleaning—After sawing, joints shall be flushed with water to remove sawing slurry and allowed to dry. Just prior to installing sealant, both joint surfaces shall be cleaned using sandblasting, brushing or other means to remove any remaining of sawing residue. Final cleaning is then done with high-pressure (minimum 90 psi, 62N/cm²) clean, dry, oil free compressed air the same day that sealant is installed. Moisture and oil traps are required on the compressor. Joints must be inspected to assure cleanliness by rubbing a finger along each face to spot dust or other contaminants. If found, recleaning should occur until joints are completely clean and dry. The objective of sawing and cleaning is to provide vertical, intact, clean concrete bonding surfaces free from all contaminants and are dry.

Backer Rod—After cleaning, heat resistant backer rod (ASTM D5249, Type I) approx. 25% larger than the joint width shall be installed to the required depth without damage or punctures. Punctures or damage to backer rod may cause sealant bubbling.

Sealant Installation—Concrete should be cured at least 7 days prior to installing sealant. Sealant heated to required temperature is installed per project specifications. Typical installations include a recess up to 1/4 inch (6mm), flush, or with a surface overband (maximum 1/16" (1.5mm) above the surface, and 2" (50 mm) maximum beyond each joint edge).

INSTALLATION PRECAUTIONS: In certain situations, additional consideration needs to be given to product selection and application geometries.

Parking lots and other areas subjected to slow moving traffic and pedestrians: Product used must be stiff enough at hot summer temperatures to resist pick up and should not be applied on top of the pavement surface. Product should have a high temperature grade at least one step above the LTPPBIND grade for the climate. For even better pick-up resistance, increase by two grades.

Pavement to receive an Overlay, Surface Treatment, or Seal Coat: Product will be subjected to overlay heat effects and carriers for surface treatments and seal coats. If product is applied on top of the pavement, and an overlay is then placed, bumps may occur during compaction. Refer to "Bump Formation & Prevention in Asphalt Concrete Overlays Which Have Been Crack Sealed" (www.crafcro.com) for more information. Solvents or other carriers in surface treatments may soften product. Prior to placing a surface treatment or seal coat, a test strip should be placed to verify compatibility of the product and treatment.

High Severity Cracked Areas: Highly cracked areas (fatigue cracks in wheel paths) should not be treated by covering cracks because pavement friction may be affected. These cracks can be filled if followed by a surface treatment or overlay to restore friction.

Fuel or Oil Spill Areas: These products should not be used in fuel or oil spill areas due to softening of the sealant that may occur. Sealant will

not adhere to asphalt or concrete pavements surfaces that are contaminated with oil spills.

Crack Sealing or Filling in Pavements with Surface Treatments: When crack sealing or filling pavements with chip seals, slurry seals, and open graded friction courses, routing should be deep enough to extend through the surface treatment layer into the underlying asphalt concrete. This anchors product into solid pavement for better bonding.

CLEAN OUT: If melters used require clean out, follow manufacturer's instructions. If solvent is used, insure it does not contaminate product because dilution and flash problems may occur.

STORAGE: Pallets of product are protected with a weather resistant covering. During storage, this covering must be intact to prevent boxes from getting wet. If wet, boxes may lose strength and crush. Rips in the pallet covering should be repaired to maintain packaging integrity. Pallets should be stored on a dry, level surface with good drainage. Pallets should not be stacked because crushing of bottom boxes may occur. Product properties are not affected by packaging deterioration.

SAFETY PRECAUTIONS: Since these products are heated to elevated temperatures, it is essential that operations be conducted safely. All personnel need to be aware of hazards of using hot applied materials and safety precautions. Before use, the crew should read and understand product use and safety information on the box and the product MSDS. User should check D.O.T. requirements for transportation of product at elevated temperatures above 212°F (100°C).

HAZARDS ASSOCIATED WITH HOT-APPLIED MATERIALS: Skin contact with hot materials causes burns. Over exposure to fumes may cause respiratory tract irritation, nausea, or headaches. Precautions are to be taken to prevent contact with hot material and to avoid inhalation of fumes for everyone in the vicinity. Safety precautions should include:

1. Protective clothing to prevent skin contact with hot material.
1. Care when adding product to melters to reduce splashing.
3. Careful operation of wands or pour pots that apply product.
4. Traffic and pedestrian control measures which meet or exceed MUTCD requirements to prevent access to work areas while product is in a molten state.
5. Avoidance of material fumes.
6. Proper application configurations with a minimum amount of material excess.
7. Appropriate clean up of excessive applications or product spills.





ADDITIONAL INFORMATION: Additional information regarding these products is available by contacting your distributor or Crafcro, Inc. This information includes:

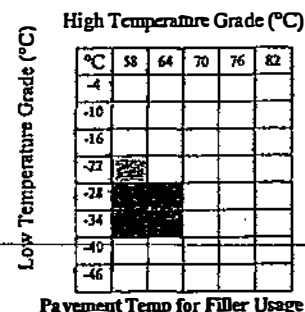
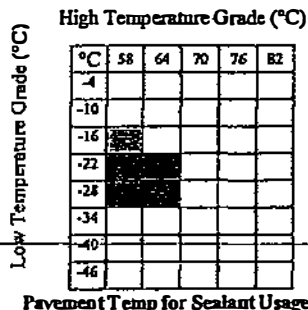
1. Product Data Sheets
2. Material Safety Data Sheet,
3. Safety Manual
4. Sealing Cracks and Joints in Parking and Pedestrian Areas
5. "Bump Formation & Prevention In Asphalt Concrete Overlays Which Have Been Crack Sealed"
6. Sealant Selection Guide

READ BEFORE USING THIS PRODUCT

GENERAL Crafcro RoadSaver 515 is a hot-applied asphalt based product used to seal and fill cracks and joints in asphalt and portland cement concrete pavements in moderate to cold climates. RoadSaver 515 is supplied in solid form which when melted and properly applied forms a highly adhesive and flexible compound that resists cracking in the winter and resists flow in the summer. RoadSaver 515 is used in highway, street, and airfield pavements and is applied to pavement cracks and joints using either pressure feed melter applicators or pour pots. At application temperature, RoadSaver 515 is a free flowing, self-leveling product. The unique formulation of RoadSaver 515 reduces stress buildup during extension at low temperatures which improves long term performance. RoadSaver 515 has been a top performing quality Crafcro product for over 20 years and has achieved the **CERTIFIED PERFORMANCE** designation. VOC = 0 g/l

USAGE GUIDELINES RoadSaver 515 pavement temperature performance limits are 64-28 for crack sealing and 64-34 for crack filling. Usage recommendations are shown in Crafcro pavement temperature grade charts shown at the right. Refer to Crafcro Product Selection Procedures to determine sealant or filler use and pavement temperature grades.

	Suited for Use
	Recommended
	Performance Limits
	Not Recommended

**SPECIFICATION CONFORMANCE**

RoadSaver 515 meets requirements of state modified AASHTO M173 specifications, and exceeds requirements of ASTM D6690 (AASHTO M324), Type I (formerly ASTM D1190, AASHTO M173), and Federal Specification SS-S-164.

Test

Cone Penetration, 77°F (25°C)
Flow, 140°F (60°C)
Softening Point
Resilience, 77°F (25°C)
Ductility, 77°F (25°C) (ASTM D113)
Bond, 0°F (-18°C), 100% ext. ½" (12.7mm) thick specimen
Impact, 0°F (-18°C)
Compression Recovery
Minimum Application Temperature
Maximum Heating Temperature

Modified AASHTO M173 Limits

50-90
0.5 cm max.
176°F (80°C) min.
25-60%
30 cm min.
Pass 5 cycles
Pass
0.40 min.
380°F (193°C)
400°F (204°C)

INSTALLATION

The unit weight of RoadSaver 515 is 9.9 lbs. per gallon (1.19 kg/L) at 60°F (15.5°C). Prior to use, the user must read and follow Installation Instructions for Hot-Applied RoadSaver, PolyFlex, Parking Lot and Asphalt Rubber Products (January 2008) to verify proper product selection, heating methods, pavement preparation procedures, application geometry, usage precautions and safety procedures. These instructions are provided with each pallet of product.

PACKAGING

Packaging consists of individual boxes of product which are palletized into shipping units. Boxes contain a non-adherent film which permits easy removal of the product. Each pallet contains 72 boxes which are stacked in six layers of 12 boxes per layer. The weight of product in each box does not exceed 40 lbs. (18kg) and pallet weights do not exceed 2,880 lbs. (1310kg). Pallets of product are weighed and product is sold by the net weight of product. Product boxes are manufactured from double wall kraft board producing a minimum bursting test certification of 350 psi (241 N/cm²) and using water resistant adhesives. Boxes use tape closure and do not contain any staples. Boxes are labeled with the product name, part number, lot number, specification conformance, application temperatures and safety instructions. Palletized units are protected from the weather using a three mil thick plastic bag, a weather and moisture resistant cap sheet and a minimum of two layers of six month u.v. protected stretch wrap. Pallets are labeled with the product part number, lot number and net weight. Installation Instructions are provided with each pallet in a weather resistant enclosure.

WARRANTY

CRAFCO, Inc. warrants that CRAFCO products meet applicable ASTM, AASHTO, Federal or State specifications at time of shipment. Techniques used for the preparation of the cracks and joints prior to sealing or filling are beyond our control as are the use and application of the products; therefore, Crafcro shall not be responsible for improperly applied or misused products. Remedies against Crafcro, Inc., as agreed to by Crafcro, are limited to replacing nonconforming product or refund (full or partial) of purchase price from Crafcro, Inc. All claims for breach of this warranty must be made within three (3) months of the date of use or twelve (12) months from the date of delivery by Crafcro, Inc. whichever is earlier. There shall be no other warranties expressed or implied. For optimum performance, follow Crafcro recommendations for product installation.

NHMS

National Highway Maintenance System Ltd., L.L.C.

P.O. Box 5315
Akron, OH 44334

Toll Free: 888-922-3630

In Ohio 330-922-3649

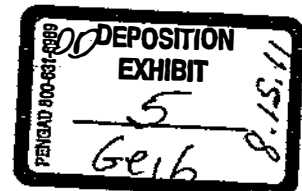
FAX: 330-922-8070

PROPOSAL TO:

MDOT-Brighton
Attn: Terri
10102 E. Grand River Ave.
Brighton, MI 48116
Fax: 810-227-7929

Remarks:	<p>2009 NHMS Program</p> <p>1. 34544 Polyfiber Sealant Price includes use of a Crafcro SuperShot 125DC w/Air Compressor and training. Yield coverage extended approximately 23% more than standard rubber sealants.</p> <p>2. 34515 Federal SHRP H-106 Test Project + 34250 Fiber Sealant: Contains no ground cured rubber scrap. Price includes use of a Crafcro SuperShot 125DC Melter w/Air Compressor and training. NOTE: USED IN PAST PROGRAMS</p> <p>***NO DAILY RENTAL</p> <p>***No Minimum Order Required***</p>
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Quote:	<p>1. 34544 Polyfiber Sealant Program Price includes use of a Crafcro SuperShot 125DC Melter w/ Compressor.</p> <p>2. 34515 + 34250 Fiber Crack Sealant Program Price includes use of a Crafcro SuperShot 125DC Melter w/Compressor.</p> <p>NOTE: MIXED SEALANT ORDERS CAN BE SHIPPED ON ONE TRUCK</p>	<p>\$1.07/#</p> <p>\$1.07/#</p>
Delivery of Melter & Sealant		\$1850.00
<p>Dollars (\$)</p> <p>*Quote must be signed and returned by Authorized Company Representative Acknowledging Payment Terms Prior to Shipment.</p> <p>*Payment terms: Net 30. Interest of 8% charged monthly on overdue accounts.</p> <p>Delivery Address: _____</p> <p>_____</p> <p>All material is guaranteed to be as specified. Lessee agrees to indemnify the Lessor from any and all loss or damage to the equipment leased hereunder from any cause whatsoever, and also agrees to indemnify the Lessor from any and all claims, demands or cause of action or any liability whatsoever arising out of the operation or transportation of the equipment, or its use while in the possession of the Lessee, including damages or personal injuries to workers, third parties or property damage to any party. Lessee further agrees to reimburse at its own expense, insurance of the equipment against all risks and in such amounts as Lessor shall reasonably require. Such insurance shall be payable to the Lessor and the Lessee as their interest may appear. Lessee shall provide proof of such insurance to</p>		



include Lessor as Loss Payee and Additional Insured. Lessee shall further maintain general liability insurance in an amount no less than one million dollars per occurrence.

NOTE: This proposal may be withdrawn by NHMS at any time.

Authorized NHMS Signature: Michael T. Leahy

DATE: July 1, 2009

Acceptance of Proposal – The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

(Printed Name & Title)

(Signature)

(Telephone and Fax Number)

(Date of Acceptance)

NHMS

National Highway Maintenance System Ltd., L.L.C.

P.O. Box 5315
Akron, OH 44334

Toll Free: 888-922-3630

In Ohio 330-922-8649

FAX: 330-922-8070

PROPOSAL TO:

MDOT Brighton
Attn: Matt Pratt
810-229-7295 FAX
810-229-4250 PHONE

Remarks: Detack 34681

Quote: Detack 34681

\$10.15/gallon

*Price does not include delivery

Dollars (\$ _____)

(Payment terms: Net 30)

Delivery Address: _____

All material is guaranteed to be as specified. All work to be completed in a workmanlike manner according to standard practices. Any alteration or deviation from above specifications involving extra costs will be executed only upon written orders, and will become an extra charge over and above the estimate. Customer to carry fire, theft, tornado and other necessary insurance. Our workers are fully covered by Workmen's Compensation Insurance.

Authorized NHMS Representative: Michael T. Leahy

DATE: July 1, 2009

Note: Prices subject to change at any time.

Acceptance of Proposal - The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above.

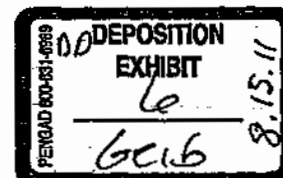
(Printed Name, Title)

(Signature)

(Telephone and Fax Number)

(Date of Acceptance)

SURFACE MAINTENANCE			SIGN / SIGNAL MAINTENANCE			
PCA NUMBER	PCA DESCRIPTION	GRANT	DESCRIPTION	GRANT	FE	ACCOMPLISHMENT UNIT
			aintenance	Route #	County #	Each Unit
10100	Joint & Crack Filling	Route #	Standard	Route #	County #	Square Feet
10200	Remove & Replace Pavement	Route #	Non-Standard	Route #	County #	Square Feet
10300	Patrol Patching	Route #		Route #	County #	Hours
10400	Pavement Spall & Pot Hole Repair	Route #		Route #	County #	Each Unit
10500	Bituminous Maintenance & Repair	Route #	aintenance	Route #	County #	Each
10800	Bump Removal	Route #	or Maintenance	Route #	County #	Hours
SHOULDER MAINTENANCE			ffic Control	Route #	County #	Hours
11000	Routine Blading	Route #	aintenance	Route #	County #	Each Unit
11200	Gravel Shoulder Maintenance	Route #	onning of Anchor Bolts	Route #	County #	Structures
11400	Paved Shoulder Maintenance	Route #	aintenance- Hours	Route #	County #	Hours
ROADSIDE MAINTENANCE			g Fabrication	Route #	County #	Hours
12000	Tree Removal	Route #	FACILITIES, AUTOMOTIVE & EQUIPMENT			
12100	Stump Removal	Route #		Equipment Group #	99	N/A
12200	Catch Basin Cleanout	Route #		Equipment Group #	99	Hours
12300	Ditch Cleanout	Route #		Equipment Group #	99	Hours
12400	Litter Pickup	Route #	ir Administration	Equipment Group #	99	Hours
12600	Area Mowing	Route #	ipment Renovation	Equipment Group #	99	Hours
12700	Brush Control	Route #	ns	Facility #	00	Hours
12800	Culvert, Underdrain & Edge Drain Cleaning	Route #	ADMINISTRATIVE			
12810	Culvert, Underdrain & Edge Drain Maintenance	Route #		Route #	77	N/A
17100	Tree Trimming	Route #		Route #	County #	Hours
17200	Vegetation Control	Route #		Route #	County #	Hours
17420	Plant Trees	Route #	ight of Maintenance	Route #	County #	Hours
17900	Forestry Hours	Route #	enance)	Facility #	00	Hours
For additional activity codes, consult the full list of MARS Maintenance activity page			Coding)	Facility #	00	Hours
			t Related)	Project #		Hours
			Program	Not Required	Not Required	Hours
			ay plies only)	Not Required	Not Required	N/A
				Not Required	Not Required	Hours

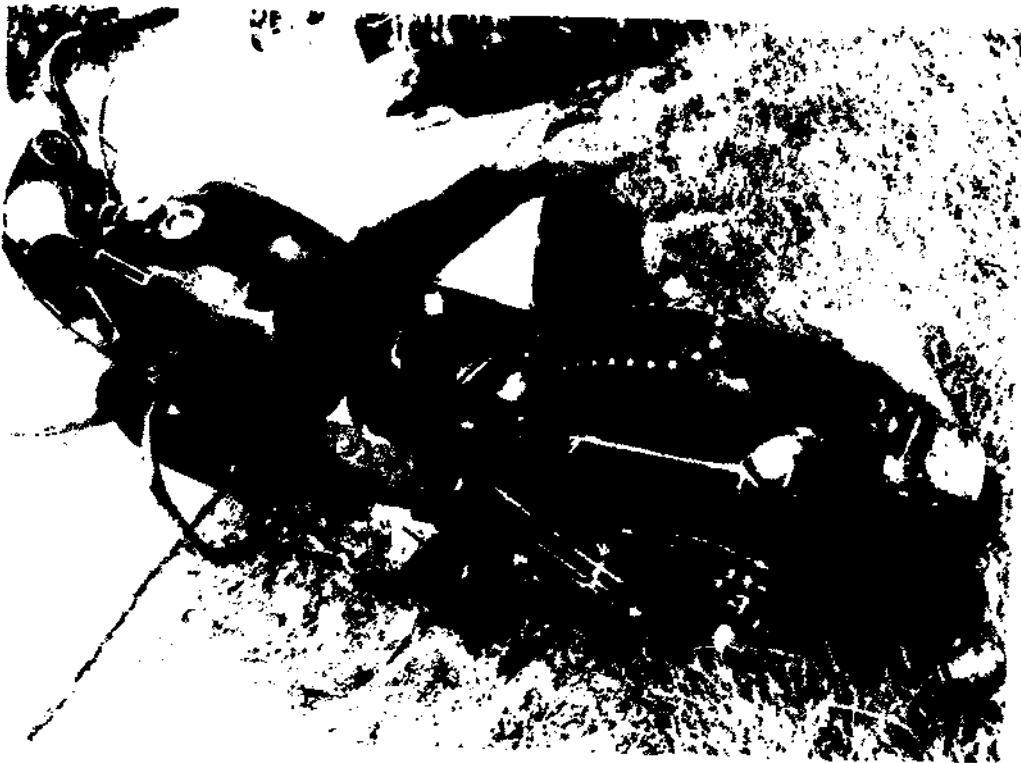
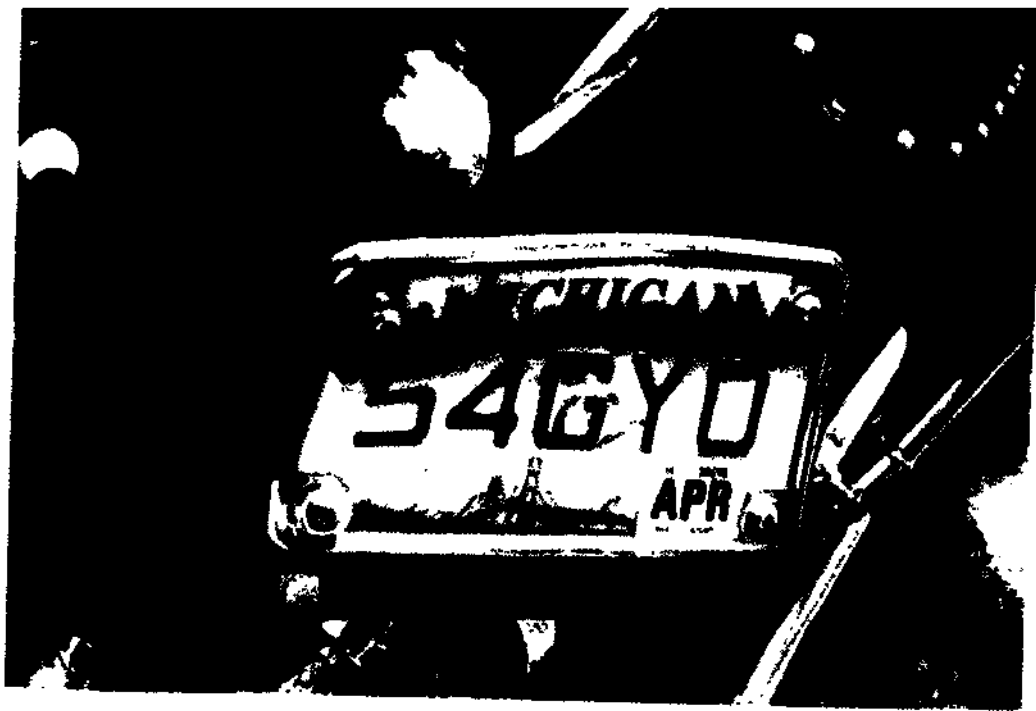




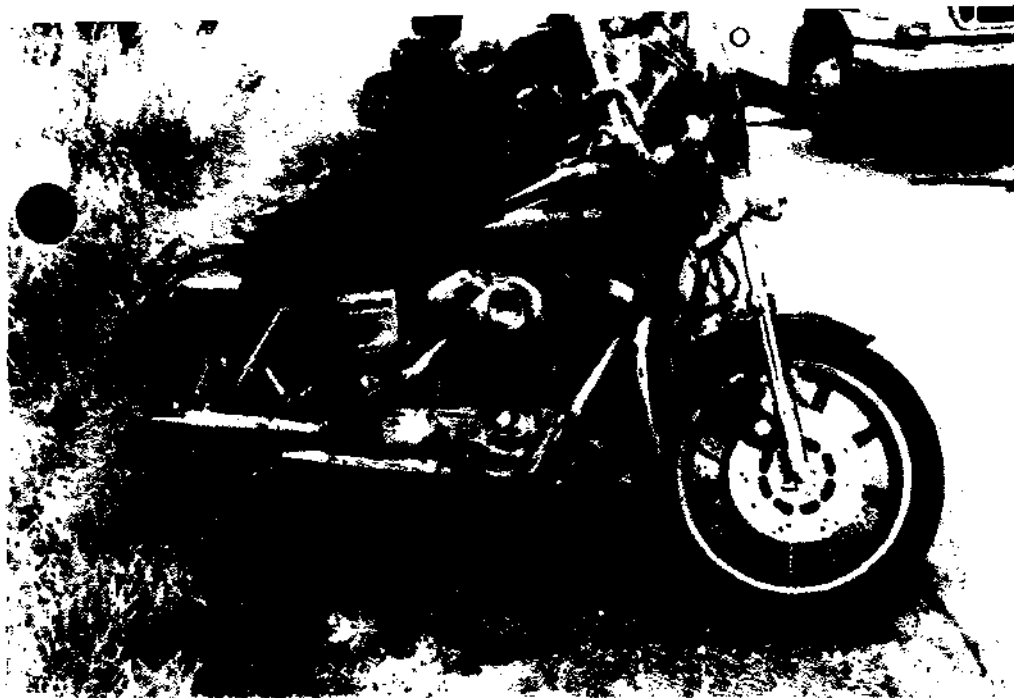




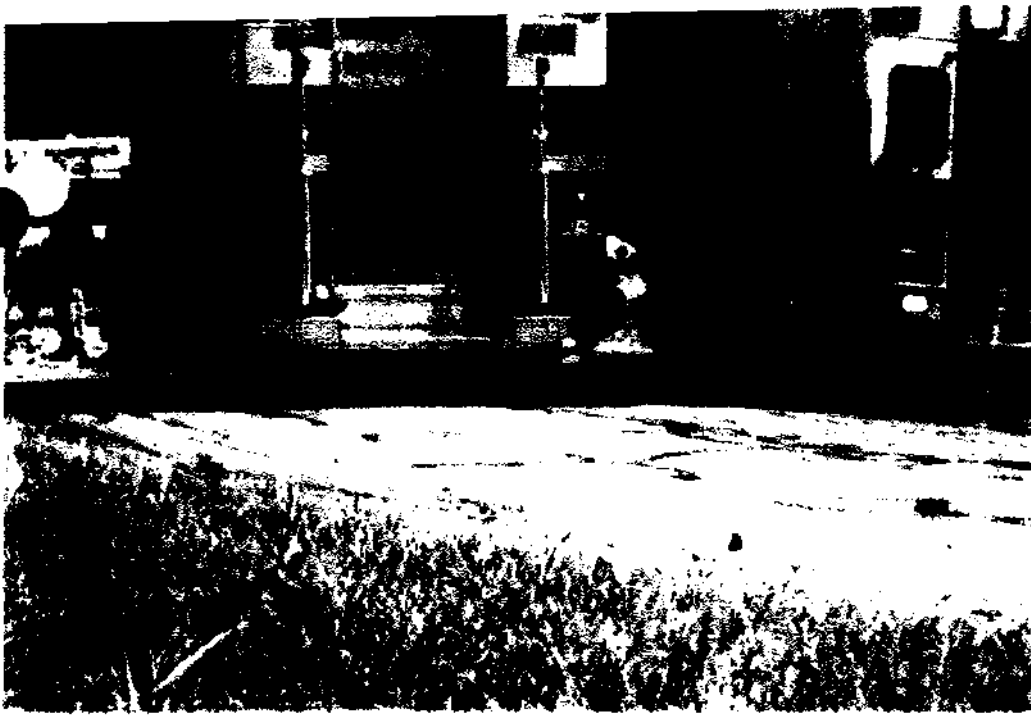




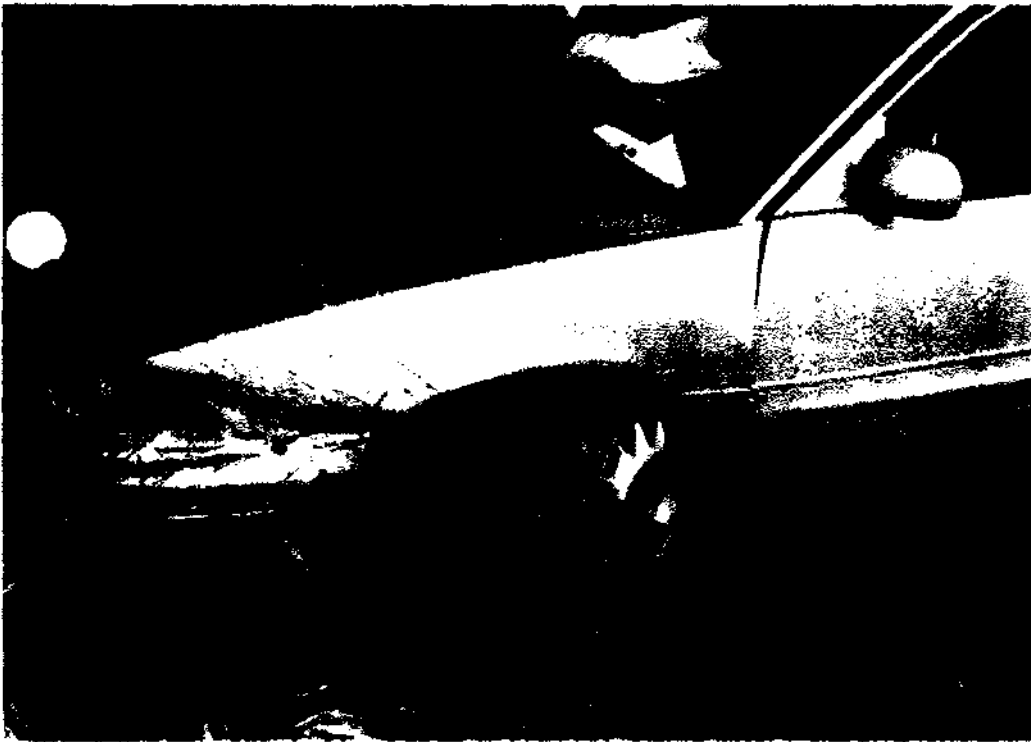




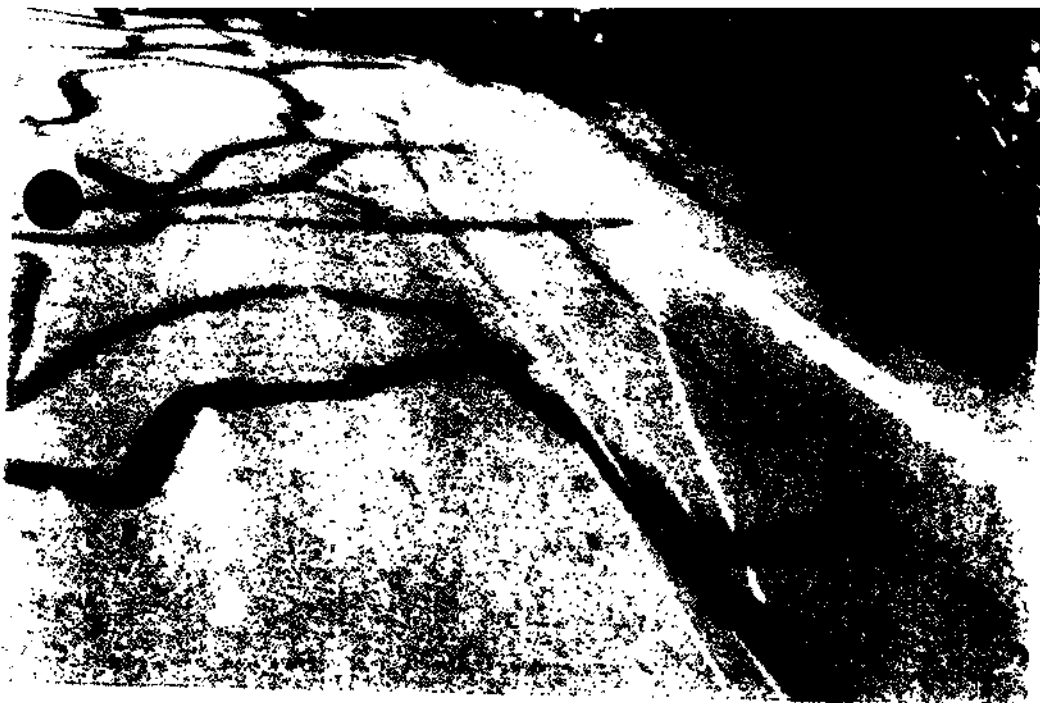




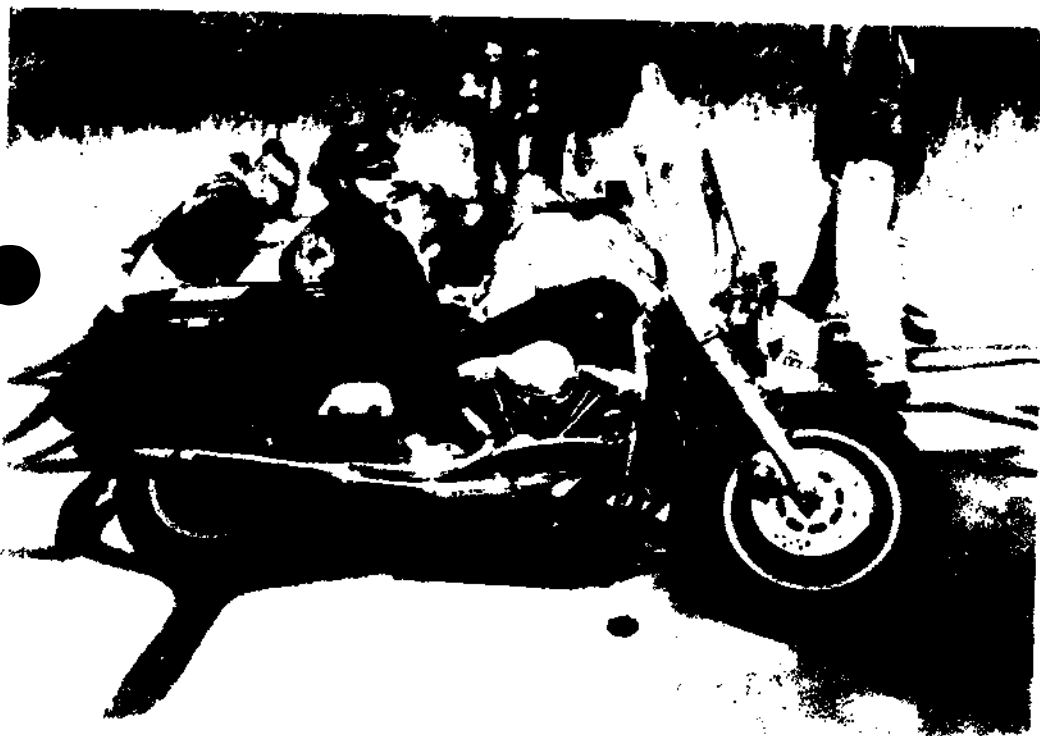
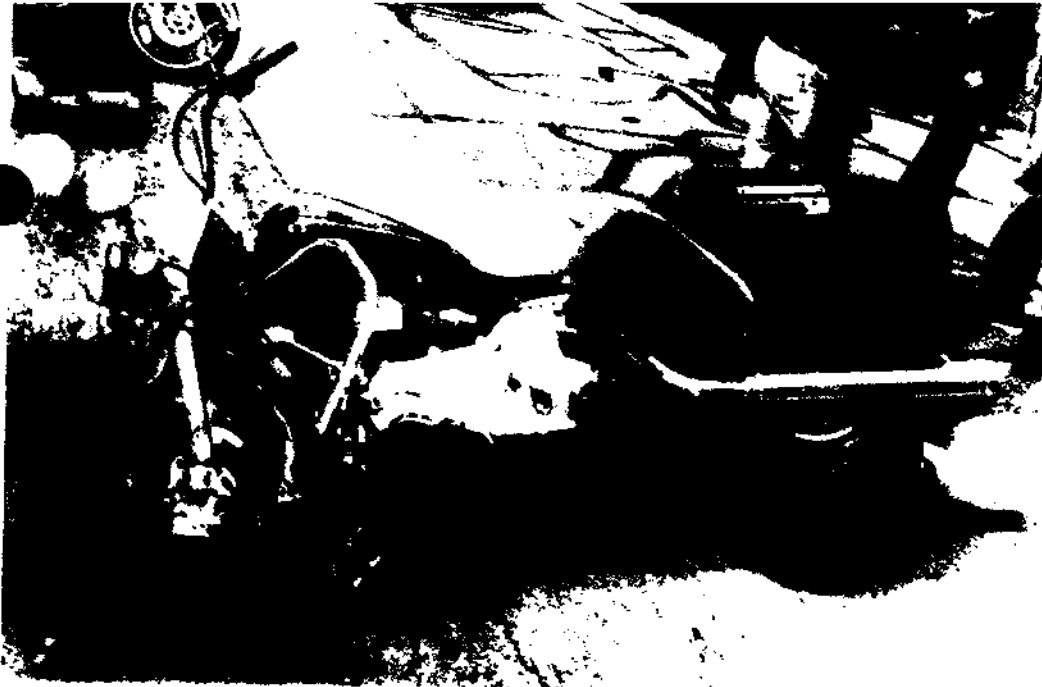


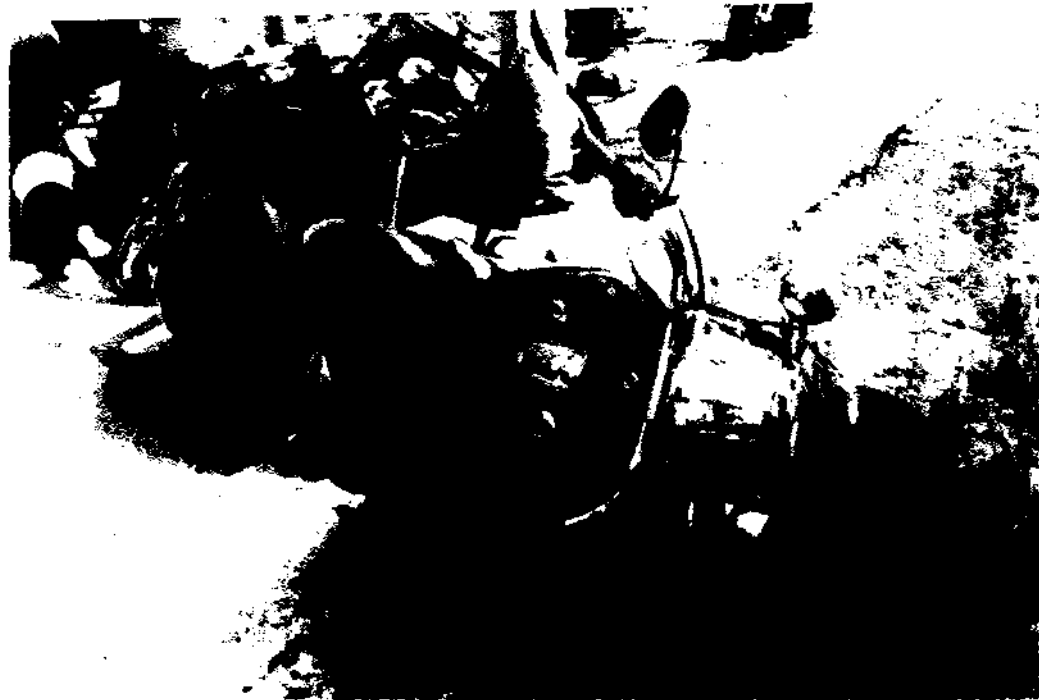




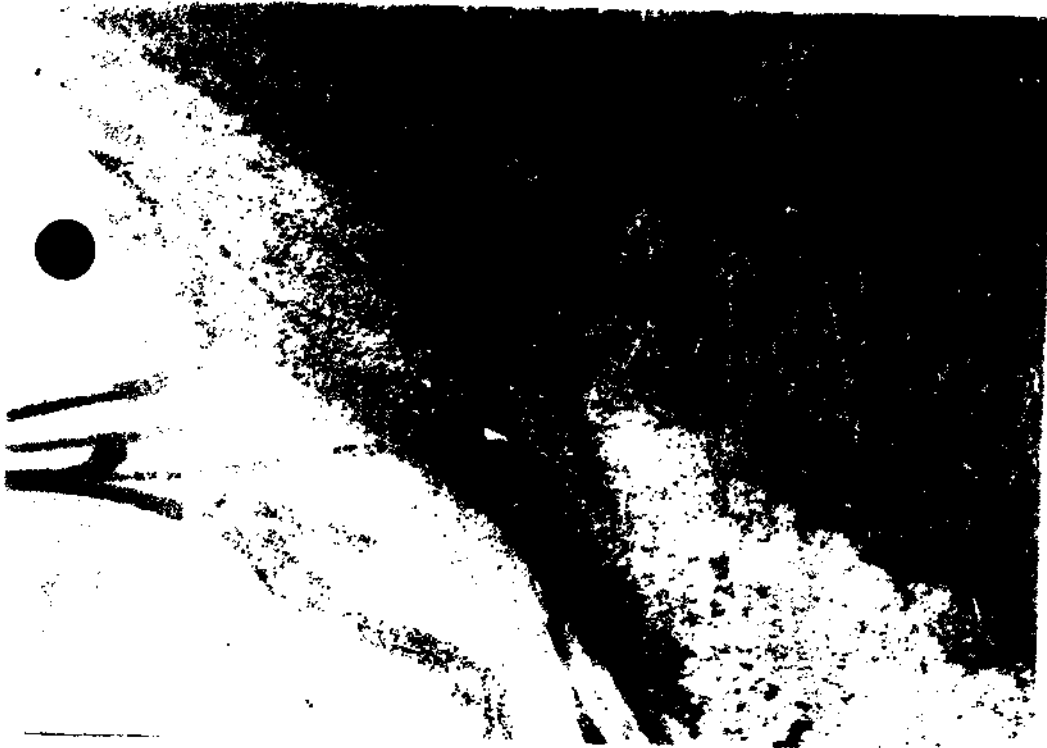


















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STATE OF MICHIGAN
IN THE COURT OF CLAIMS

WILLIAM KARWACKI and
KATHRYN KARWACKI,

Plaintiffs,

v

File No. 10-20-MD

STATE OF MICHIGAN, MICHIGAN
DEPARTMENT OF TRANSPORTATION,

HON. PAULA J. M. MANDERFIELD

Defendants.

/

DEPOSITION OF ANDREW BENNETT

Taken by the Plaintiffs on the 17th day of August, 2011, at
425 West Ottawa, Floor 1, Lansing, Michigan, at 1:00 p.m.

APPEARANCES:

For the Plaintiffs:

MR. DONDI R. VESPRINI (P60390)
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30200 Telegraph Road, Suite 430
Bingham Farms, Michigan 48025
(248) 901-3401

For the Defendant:

MR. PHILIP L. BLADEN (P56443)
Assistant Attorney General
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Also Present:

Thomas Schafer

RECORDED BY:

Melynda C. Jardine, CER 7536
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answer, just because we have the court reporter, and it's tough for her to keep track of two people talking at the same time. I'll allow you the same courtesy when you're answering. I'll try not to cut off an answer with a new question. As we go through it, if you can just give your answers orally, as opposed to, you know, shaking your head for "no," just so we understand what it means when we get the transcript back. It's a lot easier if you're giving an oral answer. Other than that, I think we're good to go.

REPORTER: Do you solemnly swear or affirm that the testimony you're about to give will be the whole truth?

MR. BENNETT: I do.

ANDREW BENNETT

having been called by the Plaintiffs and sworn:

EXAMINATION

BY MR. VESPRINI:

Q Can you spell your name for us?

A Andrew, A-n-d-r-e-w, Bennett, B-e-n-n-e-t-t.

Q Okay. And are you currently taking any medication or under any medical condition that would make it difficult for you to participate in the deposition today?

A No.

Q All right. Could I have your birth date, sir?

A June 18, 1959.

Q And how old does that make you today?

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Lansing, Michigan

Wednesday, August 17, 2011 - 2:04 p.m.

MR. VESPRINI: Let the record reflect this is the deposition of Andrew Bennett, taken pursuant to Notice to be used for any allowable purposes under the Michigan Court Rules and the Michigan Rules of Evidence. Mr. Bennett, as I introduced myself briefly before we got started here, my name's Dondi Vesprini. I represent Mr. and Mrs. Karwacki who were involved in a motorcycle accident out on M-36 back on August 29, 2009.

We had requested your deposition because you're listed as a witness on MDOT's witness list regarding this case, so I'm going to ask you a little bit about what you know regarding the accident, a little bit about your employment background, and see what we can find out. If I ask a question you don't understand, please tell me to repeat it or rephrase it, and I'll do that.

MR. BENNETT: Okay.

MR. VESPRINI: I'd be more than happy to do that for you. I've been told that I talk too fast. That's probably the biggest knock that I get at depositions. So if I'm doing that, just let me know.

MR. BENNETT: All right.

MR. VESPRINI: I'm going to ask that you wait until I'm done asking the question before you give your

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A 52.

Q And could I have your address?

A 143 Wedgewood Drive, Charlotte, Michigan, 48813.

Q Okay. And are you married, sir?

A Yes.

Q All right. Do you have any children?

A Yes.

Q Okay. How many kids do you have?

A Three.

Q All right. Let's talk a little bit about your educational background. Are you high school graduate?

A Yes, I am.

Q All right. Where'd you go to high school?

A Friendship Central High, New York State.

Q Okay. And what year did you graduate?

A 1977.

Q Okay. And do you have any formal post high school education?

A Yes.

Q Okay. Tell me a little bit about that.

A State University of New York at Alford. I have an associate's degree in agricultural business, 1980 graduation.

Q Okay. Any formal education past that?

A No.

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2 (Pages 2 to 5)

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1 Q Okay. All right. Besides the lawsuit that we're here for
 2 today, have you ever been involved, either in a personal
 3 capacity or as a representative of MDOT, in any other type
 4 of a civil lawsuit?
 5 A Not as a representative of MDOT.
 6 Q Okay. What type of civil lawsuit have you been involved in,
 7 if any, in the past?
 8 A I did give a deposition when I worked for Eaton County, at
 9 the engineering department of Eaton County. I have to
 10 recall the date. 1986 or '87, I believe.
 11 Q Okay. And were you employed by Eaton County?
 12 A Yes, I was.
 13 Q Okay. From when to when did you work for those guys?
 14 A 1985 through 1988.
 15 Q And in what capacity were you giving a deposition?
 16 A I was an engineering technician for Eaton County Road
 17 Commission.
 18 Q And what were your duties back then?
 19 A I was involved in inspection of State and Federally funded
 20 projects; did material testing, various other duties,
 21 surveying, drafting.
 22 Q Okay. What type of projects would you inspect?
 23 A Subdivision projects, inspect the road.
 24 Q Did you have any other -- any duties that did not involve
 25 subdivision projects while you worked for Eaton County?

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1 A Yes.
 2 Q What other type of work did you do, projects?
 3 A Like I said, it was a variety of things that I did there. I
 4 worked as a weigh master part-time. I did sign surveys. It
 5 was really whatever was needed in the engineering
 6 department.
 7 Q Okay. Were you involved at all with any roadway maintenance
 8 projects while you were at Eaton County?
 9 A Not so much maintenance projects.
 10 Q Okay. What type of a claim was the lawsuit that you
 11 testified for?
 12 A You're testing my memory. It had to do with inadequate
 13 density under the roadway. I think there was some roadway
 14 failure, and it was -- had to do with the contractor that
 15 did that work.
 16 Q Okay. Do you happen to remember where the roadway was?
 17 A It was north of Canal -- I'm sorry -- it was on Canal, north
 18 of Saginaw, and it was a subdivision that was on the east
 19 side of Canal Road. I don't remember the name of the
 20 subdivision.
 21 Q In that case, Eaton County Road Commission was the
 22 defendant?
 23 A Yes.
 24 Q Was there any other defendants in that lawsuit?
 25 A I do not know.

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1 Q Okay. Do you remember if you were qualified as an expert in
 2 that case?
 3 A I was not.
 4 Q Okay. What was the scope of your testimony? Do you recall
 5 what specific aspect of the case that you were told --
 6 A I only recall that it had to do with the construction, the
 7 way the roadway -- the road bed was backfilled, and it had
 8 to do with the density under that roadway.
 9 Q Okay. Any other lawsuits besides that one?
 10 A No.
 11 Q Okay. I'm going to ask you not to take offense to this
 12 question. This is a question that we ask every witness that
 13 we take a deposition of, just for background purposes. Have
 14 you ever been convicted or pled guilty to any type of felony
 15 activity?
 16 A No.
 17 Q All right. Have you ever been convicted or pled guilty of
 18 any type of crime involving theft, fraud, dishonesty, false
 19 statements, perjury, anything along those lines?
 20 A No.
 21 Q All right. Have you even been convicted or pled guilty of
 22 any type of criminal activity?
 23 A No.
 24 MR. BLADEN: Objection.
 25 Q You're currently employed by MDOT; correct?

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1 A Yes.
 2 Q All right. And what's your current title?
 3 A I'm the capital preventive maintenance scoping specialist.
 4 Q Okay. And how long have you been in that capacity?
 5 A Three years, I believe.
 6 Q Going back sometime in '08?
 7 A Yeah, I don't remember exactly when the date was that I got
 8 that title.
 9 Q Okay. And what are your duties in your current position?
 10 A I have a variety of duties, but I assist our regions and
 11 TSC's with selection of maintenance fixes through our
 12 capital preventive maintenance program. I also work
 13 part-time in research, working with the Michigan
 14 universities, Michigan Tech, U of M, and MSU research
 15 projects. I get involved with concrete pavements. I work
 16 on some national committees having to do with concrete
 17 overlays.
 18 Q Okay. That's what you do?
 19 A Yeah, there are other things as well.
 20 Q All right. How about prior to 2008? Did you -- how long --
 21 I guess I should ask you, how long have you been working for
 22 MDOT?
 23 A 23 years.
 24 Q All right. And if we go backwards in time prior to serving
 25 in your present capacity, what did you do for MDOT?

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3 (Pages 6 to 9)

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1 A I've worked my whole career in the materials area, and so I
 2 have been in that area that's -- the scoping specialist is a
 3 position that's -- I was always working -- well, I had been
 4 working with the capital preventive maintenance program
 5 since it initiated in the early '90's, working with
 6 specification writing, and as it relates to materials. I've
 7 been involved with it for the entire -- my entire career, so
 8 I've really been in the same area for the whole 23 years.
 9 Q Okay. Prior to working for MDOT, where were you employed?
 10 A Eaton County Road Commission.
 11 Q Okay. How about before Eaton County?
 12 A I worked for soil and material engineers. That was an
 13 consulting -- engineering consulting firm out of Lansing. I
 14 worked for a consultant in New York, United States Testing
 15 Company, prior to that, and prior to that, there was a
 16 company in Texas, National Soil Services in Texas, doing
 17 engineering technician work, all three of those positions.
 18 Q Okay. All right. If I were to advise you that the accident
 19 we're here for today happened back on August 29th of '09, at
 20 that time you would have been working as a capital
 21 preventive maintenance scoping specialist?
 22 A Yes.
 23 Q All right. All right. Now, as I understand it from some
 24 discovery, it appears that MDOT applied some crack fill on
 25 M-36 between Pinckney and Gregory during the summer of 2009.

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1 Were you familiar with that project?
 2 A I was not.
 3 Q All right. Did you have any involvement at all with that
 4 project?
 5 A No.
 6 Q All right. Back at that time, in the summer of 2009, who
 7 did you report to as your supervisor?
 8 A Tim Stallard, I believe.
 9 Q Okay. All right. And my understanding is there's a
 10 division within MDOT -- let's see here --
 11 MR. BLADEN: C&T.
 12 MR. VESPRINE: -- yeah.
 13 Q Are you part of that?
 14 A Yes.
 15 Q You're part of that division?
 16 A Yes, construction and technology.
 17 Q Okay. What does that division -- just kind of in a
 18 nutshell -- what does that division do?
 19 A It's changed over the years. Initially it was involved with
 20 research and testing of various things that MDOT uses in
 21 projects, and it's kind of evolved over the year -- I
 22 think -- over the years. Construction, they kind of merged
 23 with construction. As we've downsized -- that department's
 24 downsized -- that division has changed. And I don't even
 25 know if they have division status now, or if they're

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1 actually called a support area. I think it's the
 2 construction and technology support area.
 3 Q Okay. Now, with respect to a crack fill job, my
 4 understanding is a crack fill job, that would be done by
 5 MDOT's maintenance division as opposed to the construction
 6 division. Is that your understanding?
 7 A No.
 8 Q Okay. Who, in your -- to your understanding, who is
 9 responsible for maintenance jobs on roads like M-36?
 10 A It would vary depending on whether it was done under
 11 contract with Federal funds. So we do several crack fill,
 12 crack seal and crack fill jobs through using Federal funds
 13 through the capital preventive maintenance program.
 14 Q Gotcha.
 15 A We also have a routine maintenance that is done by our
 16 maintenance forces that would be crack fill and crack sealed
 17 projects.
 18 Q If it's a project that falls under the capital preventive
 19 maintenance program, is that done by the construction
 20 division, or does it -- is that -- could be done by either?
 21 A Well, it would be under contract, yes, so it would be
 22 administered by construction.
 23 Q Okay. Based on your experience, are you aware of any
 24 standards or any guides that MDOT maintenance crews are to
 25 follow as guides when they're performing a job, or the crack

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1 fill jobs such as on M-36?
 2 A No, I'm not aware.
 3 Q All right. Are you aware of a manual entitled the MDOT
 4 Capital Preventive Maintenance Manual?
 5 A Yes.
 6 Q All right. Did you have anything to do with the creation of
 7 that manual?
 8 A Yes.
 9 Q All right. What was your involvement with creating that
 10 manual?
 11 A I was involved since the mid '90's from the material end of
 12 things, helping with specifications. I did the partnering.
 13 We partnered with the industry in putting that manual
 14 together, and so I was on those committees and involved.
 15 Q Okay. All right. Did you have a hand in creating the
 16 specifications that are found in that manual?
 17 A Yes.
 18 Q All right. The specifications that you were involved with,
 19 were they strictly as to material needed for various
 20 projects, or what type of specs were you involved with?
 21 A I was involved with, from the material aspect, the crack
 22 sealing and filling, anything to do with concrete repair and
 23 maintenance, joint resealing and concrete.
 24 Q Okay. How about -- and in reviewing the manual, I know
 25 there are some specs in there that apply to -- it seems to

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4 (Pages 10 to 13)

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1 be instructing on how a job's to be done, or under what
 2 circumstances the job's to be done. Did you have anything
 3 to do with those specs?
 4 A I had something to do with the -- with those specifications.
 5 I don't know specifically. It was by committee, so --
 6 MR. BLADEN: If you have something specific, maybe
 7 you should show it to him and ask him about it.
 8 MR. VESPRINI: Yeah. All right.
 9 Q Now, what's the purpose of the manual? Why was the manual
 10 created?
 11 A To give guidance for the work to be done in the -- through
 12 the capital preventive maintenance program.
 13 Q Do you know whether or not the work that was done on M-36
 14 back in August of 2009 fell under the capital preventive
 15 maintenance program?
 16 A Only from discussion, as it was routine maintenance through
 17 our maintenance division, not -- it did not fall under in
 18 the capital preventive maintenance program.
 19 Q Okay. How would you -- how would we know? I mean, just a
 20 layperson coming in from the outside, how would one know
 21 whether or not a project fell under that program, or whether
 22 it fell under routine maintenance? How would we know that?
 23 A That would be difficult to know.
 24 Q Okay. Would we have to look at the funding for the project?
 25 A Yeah, you'd have to go to -- each region has their network

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1 Q Right. I kind of switched gears for a minute here. I'm
 2 talking about rutting now.
 3 A Yeah. There are preventive maintenance treatments that we
 4 use where there are rutted pavements, and there are
 5 guidelines on the amount of rutting and what fixes may be
 6 appropriate when there is rutting.
 7 Q Okay. Are those found within the preventive maintenance
 8 manual?
 9 A Yes. I'm thinking specifically as in regard to chip seals
 10 or micro surfaces, and how it relates to warranty, what we
 11 warranty and what's covered under the warranty.
 12 Q Okay. Now, just like you said, if it falls under routine
 13 maintenance, the maintenance department have their own
 14 separate guidelines. Is that the case with rutting as well?
 15 A I do not know.
 16 Q Okay. Is there any difference between -- I mean, if we have
 17 a crack fill job, such as the one on M-36, depending on the
 18 funding and depending on some of the factors that you
 19 maintained, that crack fill job may fall under the
 20 preventive maintenance manual, or it may fall under routine
 21 maintenance, for which they have their own instructions;
 22 correct?
 23 A Yes.
 24 Q All right. Would you expect that the -- if we keep all
 25 things equal with respect to the project, the crack fill

Page 15

1 that they have to manage, and some of that is done under
 2 contract, and some has to be done with our routine
 3 maintenance forces. So you would have to ask, I guess, the
 4 local office in order to know.
 5 Q Well, I guess, because what I'm trying to find out -- part
 6 of what I'm getting at is I understand in the manual there
 7 are some sections that have some specifications, like you
 8 said, dealing with crack fill and joint sealant. What I'm
 9 trying to find out is would you expect that the work to be
 10 done on M-36 in the summer of 2009, would you expect that
 11 work to be done in compliance with the manual?
 12 A Not necessarily.
 13 Q Okay. What would it depend on?
 14 A It would depend on maintenance, if it was done on a routine
 15 maintenance, what their -- their guidelines. They have
 16 their own set of guidelines.
 17 Q Okay. How does it differ, if you know?
 18 A I do not know.
 19 Q All right. Okay. Do you know if MDOT has any type of
 20 manual or guidelines that help instruct on repairing any
 21 type of rutting in a road surface?
 22 MR. BLADEN: Objection regarding rutting, and a
 23 continuing objection related to any rutting questions. Go
 24 ahead.
 25 A So you're asking me in regards to rutting? Well, then --

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1 project, would you expect that the specifications on how to
 2 do a job would differ in any way between the two, between
 3 the preventive maintenance manual and the maintenance
 4 department's own instructions?
 5 A I don't know.
 6 Q Would you expect it to be any different based on your own
 7 experience?
 8 MR. BLADEN: I'm going to object on lack of
 9 foundation. You're asking him to speculate.
 10 Q You can go ahead.
 11 MR. BLADEN: Go ahead.
 12 THE WITNESS: So you're saying that you want me to
 13 speculate, or what?
 14 MR. BLADEN: If you know. He's asking your
 15 expectation. If you don't have one, then --
 16 A I only get called in on maintenance projects. If they call,
 17 and I will assist them. It's usually in regards to
 18 material, and so I don't know what guidelines they use when
 19 they select -- it could be different than what is select --
 20 say a project that we would select in the CPM program.
 21 Q Okay. All right. So do you have any -- does any of your
 22 work apply to -- besides giving direction once in a while --
 23 you said sometimes they call for direction. Do you have
 24 anything -- is your job basically entailing the capital
 25 preventive maintenance program?

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1 A No, I do several other things. And if I do get called for
 2 assistance from maintenance, I will help them as well.
 3 Q Okay. What types of things have you done to help
 4 maintenance in the past?
 5 A Most recently in regard to crack sealers and crack fillers,
 6 it's been material. It's been giving some advice on what
 7 might be an equivalent material for bidding, so the State
 8 can get the best price on the materials that are equivalent
 9 with increased competition.
 10 Q Okay. Have you ever given any advice on the actual
 11 performance of the job on how to fill a crack, so to speak?
 12 A I have not with maintenance.
 13 Q All right. Have you done that with construction?
 14 A Yes.
 15 Q Okay. When it comes to the construction jobs, construction
 16 jobs filling crack that you've been involved with, have you
 17 ever had occasion to give instruction on what factors to
 18 consider in considering that as a treatment --
 19 A Yes.
 20 Q -- as opposed to an overlay or a chip seal, things like
 21 that?
 22 A Yes.
 23 Q All right. In those circumstances, what type of advice do
 24 you -- I guess what I'm asking is, under what circumstances
 25 is crack fill opted for in general as opposed to one of the

Page 19

1 more expensive overlay treatments or chip seal treatments?
 2 What considerations are taken into account when you make
 3 that decision?
 4 A It would be the width of the crack, whether it's a working
 5 crack or a non-working crack, the -- maybe associated
 6 distress along the crack.
 7 Q Does the depth of the crack have anything to do with it?
 8 A No, that's not really a factor.
 9 Q Anything else? Any other factors that you tend to consider?
 10 A No, I would say those are the main factors.
 11 Q Okay. Is it safe for me to assume that the wider the crack
 12 is, the closer you're getting to possibly suggesting
 13 something other than crack fill as a treatment?
 14 A Yes.
 15 Q All right. And is it safe for me to assume that the more
 16 distress there is, the closer you're moving towards
 17 suggesting something other than a crack fill as a treatment?
 18 MR. BLADEN: Objection; lack of foundation. What
 19 do you mean by "distress"?
 20 Q What did you mean by "distress"? I guess we should ask you.
 21 You actually --
 22 A Associated distress would be cracking or spalling along side
 23 the crack. And some cracks are good candidates for crack
 24 sealing, which means you prepare a reservoir and you use a
 25 higher quality material that will take more movement,

Page 20

1 because, you know, the wider cracks, you're going to get
 2 more thermal movements in those cracks. But there comes a
 3 point where you have associated distress along that crack
 4 where you can't really prepare a reservoir, and so you may
 5 decide to crack fill in that circumstance instead of crack
 6 seal.
 7 Q Okay. What about just the pure number of cracks in a
 8 stretch of roadway? Is that a factor?
 9 A Yes, it is.
 10 Q All right. How is that a factor?
 11 A Usually the more crack, they're narrower cracks, and so
 12 there isn't as much movement, and so they would be more
 13 appropriate to use a crack fill.
 14 Q Okay. All right. Do you know whether or not a copy of the
 15 capital preventive maintenance manual is supplied to the
 16 individual maintenance departments?
 17 A I do not know.
 18 Q Okay. From time to time, does the C&T division issue
 19 construction advisories to assist personnel, field personnel
 20 with various jobs they're going to be working on?
 21 A Yes.
 22 Q All right. And when those are issued, is it expected that
 23 if they give direction, the directions will be followed?
 24 A (Nodding head in affirmative)
 25 Q That's the expectation?

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1 A Yes.
 2 Q All right. Are you familiar with any construction
 3 advisories that the C&T division has issued with respect to
 4 crack fill?
 5 A I am not.
 6 Q Do you know a Brenda O'Brien?
 7 A Yes, I do.
 8 Q Who is Ms. O'Brien?
 9 A She is the director of C&T.
 10 Q Okay. And how about Kevin Kennedy?
 11 A Kevin Kennedy is the capital preventive maintenance
 12 engineer.
 13 Q Is there only one such engineer?
 14 A Yes.
 15 Q Okay. Do you know, once an advisory is issued, do you know
 16 how it's disseminated down to a work crew, if it applies to
 17 a particular job that's going on?
 18 A I do not.
 19 Q This is only if you know. Are you aware of any rutting
 20 issues in the road surface of M-36 sometime between August
 21 of '08 and August of '09?
 22 MR. BLADEN: Continuing objection. Go ahead.
 23 A I'm not.
 24 Q I may have asked you this, and I apologize if I did: Do you
 25 recall specifically being consulted at all for this M-36 job

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6 (Pages 18 to 21)

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1 for advice on any issues going on at the job site?
 2 A No.
 3 Q Have you done any type of your own investigation regarding
 4 this accident?
 5 A No.
 6 Q One quick question. I'm just trying to understand this
 7 differentiation between jobs that fall under the program and
 8 jobs that fall under routine maintenance. Who ultimately
 9 makes that decision?
 10 A I can't answer that.
 11 Q Is it a decision they make up in C&T?
 12 A No. I think that that happens in the region. The region
 13 looks at their -- their -- all of their pavements, and
 14 they -- then they look at the budgets, and what they -- what
 15 can be done under -- what can be programmed. I know that
 16 they program their reconstruction quite a few years ahead,
 17 and their preventive maintenance, they would also be
 18 programming, projecting those into the future. And I would
 19 say that if those jobs aren't on the radar for either one of
 20 those, then they would fall into the routine maintenance
 21 category.
 22 Q Okay. So ultimately it would be the individual region,
 23 someone in the individual regions, that would -- when they
 24 have a job come up --
 25 A Yes.

Page 23

1 Q -- they have to make that decision?
 2 A Yes.
 3 Q As to which it falls under?
 4 A (Nodding head in affirmative)
 5 Q Are there ever any -- and I'm just not that familiar with
 6 it -- are there ever any circumstances that could fall under
 7 both at the same time, or is that not possible?
 8 A It's not normal.
 9 Q Okay. And the funding is different between the two;
 10 correct?
 11 A Yes; yes.
 12 Q And that's probably why usually they don't have one that
 13 falls under both?
 14 A Right. And CPM includes the Federal funding, and the
 15 routine maintenance is all Michigan funds.
 16 Q Gotcha. Okay. That makes sense. Now, when it comes to
 17 jobs that fall under the program, you said from time to
 18 time, you assist in making decisions on what type of
 19 treatment under the manual is appropriate?
 20 A Yes.
 21 Q That's correct? I'm going to show you some pictures. This
 22 was marked as Exhibit Number 7 from the Geib deposition from
 23 a couple days ago. I can represent to you that these
 24 photographs are photographs that were taken by law
 25 enforcement on the day of the accident. I want you to

Page 24

1 assume that I've been advised -- and you may or may not
 2 know -- apparently the work that was done by MDOT was done
 3 on M-36 on a stretch in between Pinckney and Gregory, and
 4 the dates of work encompassed from June 29, 2009 to August
 5 25th, 2009. Were you aware of that? Aware of any of that?
 6 A Yes.
 7 Q Okay. I want you to assume as well that we've had some
 8 testimony from various MDOT representatives -- at least one
 9 MDOT representative that the cracking that you see in these
 10 pictures were fairly consistent as far as the amount of
 11 cracking in that entire stretch of roadway, and there are a
 12 few different pictures that capture it. If you want to flip
 13 there, and kind of get an idea of what we're talking about?
 14 A Okay.
 15 (Witness reviews exhibit)
 16 Q Now, some are the vehicles, and those were not that
 17 important, but --
 18 (Witness reviews exhibit)
 19 Q Okay. Hypothetically speaking, if this were a project --
 20 because I know it's -- the regions have to make that call --
 21 but hypothetically speaking, if this were a project that
 22 fell under the program and your advice was sought as to the
 23 type of treatment you would recommend for that stretch of a
 24 roadway, is a crack fill job the type of job you'd have
 25 recommended?

Page 25

1 MR. BLADEN: Objection; form of the question. It
 2 presupposes that it would fall under the program.
 3 MR. VESPRINE: Sure. Right. Understood.
 4 MR. BLADEN: Go ahead.
 5 A The cracks are definitely something that I would recommend
 6 for crack filling, because there are multiple cracks, a lot
 7 of those are longitudinal in nature, and so they would be
 8 not taking a lot of movement, and so I would say they would
 9 be appropriate. I'm not seeing a lot of associated distress
 10 along the crack on some of the close-ups that I've seen.
 11 But it would be appropriate to crack fill. But as far as my
 12 recommendation, I may also recommend a chip seal.
 13 Q Okay. What's a chip seal?
 14 A A chip seal would be a surface treatment over this entire
 15 surface that you would seal the cracks prior to, and then
 16 put an emulsion, so it's an asphalt water combination down,
 17 and then you would put stone down, and roll the stone into
 18 that surface.
 19 Q Okay. Now, if, again, if I ask you to assume that the way
 20 those cracks are depicted that they -- it was fairly
 21 consistent as far as the amount of the cracks, the entire
 22 stretch of M-36 between Pinckney and Gregory, the chip seal
 23 that you're talking about, is the chip seal something that
 24 could be applied to that entire stretch? I mean, I'm just
 25 not that familiar with how long a stretch that is.

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7 (Pages 22 to 25)

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1 A Yes.

2 Q Okay. And is that what you'd recommend for that entire

3 stretch, given my assumptions?

4 A Yeah. I'd say -- I would have to take a closer look at the

5 project, but it would be either just the crack fill, or the

6 crack fill with the combination of the -- of a chip seal.

7 Q Okay. And in this particular case, why a chip seal?

8 A Oh, the number of cracks.

9 Q Okay. Based on your experience consulting on other -- on

10 projects that fell within the program, is that an unusual --

11 an unusually large amount of cracks compared to what you've

12 seen in other roads similar to M-36 for that large of a

13 stretch?

14 A No.

15 Q It's not unusual?

16 A It's not unusual.

17 Q Okay. What other roads, just thinking, are -- have you seen

18 like that?

19 A I look at so many roads, I would say the majority of M-

20 routes that have HMA pavement on them at different stages in

21 their life will show that type of cracking.

22 Q That amount of cracking as well?

23 A Yes.

24 Q All right. And in those particular cases, have you

25 recommended chip seals?

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1 MR. BLADEN: Objection to relevance. Go ahead.

2 Lack of foundation too, but go ahead, by the way. Go ahead.

3 A I don't recall. I do go on van tours in the regions, and we

4 look at so many jobs, and I don't recall all those, but

5 that's -- it would come up in discussion as either a crack

6 fill or chip seal, or possibly a micro surface.

7 Q And what's a micro surface?

8 A A micro surface is, again, just a surface treatment that

9 generally we do the crack seal prior to that, and then it's

10 a, say, it's a stiffer surface, more durable, but it doesn't

11 do as well with reflective cracks, so the cracks would come

12 back through, but they would be sealed underneath.

13 Q Okay. Now, do you have any experience or any knowledge

14 regarding consistency of tar strips, you know, post

15 installation as far as, you know, after a job is done? I

16 mean, is there a time period that they become -- that they

17 harden up or do they stay hard right after it's -- the job's

18 finished? Do you have any knowledge in that regard as far

19 as crack --

20 A Crack filling material?

21 Q -- crack filling material?

22 A Yes.

23 Q Okay. If I ask you to assume that this particular crack

24 fill job on M-36 was completed, per the records, four days

25 before the accident, and looking at the pictures and

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1 seeing -- and I know pictures only go so far -- but in

2 looking at the pictures as far as they go, do you have any

3 expectation as to what the condition of the consistency of

4 the crack fill, it would have been, four days after its

5 installation?

6 A The newer the crack filler material, the more pliable it

7 will be. Asphalt has a tendency to oxidize over time and

8 stiffen over time. And so the fresh or the newer the

9 project, that would play a role in its consistency. Also

10 temperature would play a role. If it were colder, then it's

11 going to be a stiffer consistency. If it's hotter, it'll be

12 a little more pliable.

13 Q When you talk about hotter being a little more pliable, did

14 you have some type of temperature range in your head that

15 you were thinking about that it may become more pliable

16 under?

17 A Well, our pavement temperatures will range from minus 20 to

18 130 degrees. Obviously at 130, it's going to be pretty

19 pliable. But, yeah, I would say 90 degrees, you're going

20 to -- it's going to be softer. The hotter it is, the

21 spongier it'll be.

22 Q And you brought up a good point. When you're talking about

23 90 degrees, are you talking about road temperature, or are

24 you talking about like weather temperature?

25 A I'm talking road temperature.

Page 29

1 Q Okay. Is there any way of knowing -- do you have any

2 experience, you know, for a pavement to heat up to 90

3 degrees what the outdoor temperature would tend to be?

4 A Yes, I have a lot of experience. I install temperature

5 sensors, and I monitor the pavement temperatures, and when I

6 do evaluation of cracks, fillers, and crack sealers.

7 Q Okay. What generally are you finding? What temperature

8 range are you looking at to generate a -- the heat at the

9 pavement to be in the upwards of 90 degrees?

10 A Well, to take another factor, is the solar radiation, which

11 is a big factor with a black asphalt surface. It absorbs

12 more heat, so the -- if you have full sunshine, then at 70

13 degrees, you can easily have a 90-degree pavement

14 temperature.

15 Q Okay. And what about if we go to the -- if we drop down? I

16 think you testified that if the pavement gets colder, you

17 would expect it be harder?

18 A Yes.

19 Q If I ask you the same types of questions regarding that, I

20 mean, is there some type of pavement temperature?

21 A Freezing, at 32 degrees, I think it becomes pretty stiff.

22 Q Okay. And does that work the same way? Based on your

23 experience, can the weather temperature affect -- is there

24 some type of correlation between the weather temperature and

25 when pavement temperatures reach those types of degrees?

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8. (Pages 26 to 29)

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1 A Yes, there's correlation. The colder it is outside, the
2 colder the pavement temperature will be.
3 Q All right. And based on your experience, if you have a
4 pliable -- I'll scratch that. What about if we move away
5 from temperatures, per se, and move into things like wetness
6 or dampness? Do you have any experience with how the
7 wetness or dampness of a crack fill, how that can affect the
8 consistency or the traction of a crack fill?
9 A Yes.
10 Q Okay. Can you tell me a little bit about that?
11 A I would say that wetness is the biggest factor for -- that
12 would create a friction or a traction issue with that type
13 of material.
14 Q All right. All right. Have you ever been asked in this
15 case by MDOT to perform any type of investigation or
16 analysis regarding the crack fill out on M-36 and how, if at
17 all, it may have contributed to this accident?
18 A No.
19 Q Okay. Are you aware of any testing -- obviously not by
20 yourself -- but any testing that was done, I mean, other
21 than yourself, regarding the crack fill or possibly rutting
22 of the roadway on M-36?
23 A No.
24 Q If we talk specifically about potential friction issues or
25 loss of traction with respect to crack fill and motorcycles,

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1 do you have any knowledge in that area?
2 A I know of -- I know there have been issues with that, that
3 that has been something that we discussed in committee when
4 we were coming up with the capital preventive maintenance
5 specifications.
6 Q Okay. And I believe you mentioned that this program,
7 specifications, they started sometime in the early '90's,
8 give or take?
9 A Yeah. I'd say -- well, I would give mid '90's when I got
10 involved.
11 Q All right. And this conversation that you recall, was that
12 sometime -- I'm just trying to put a -- get a time line
13 here -- was that sometime when you became involved with
14 the --
15 A Yes.
16 Q So it would have been sometime mid '90's?
17 A Yeah, between '95 and '97 probably.
18 Q Okay. And what types of issues do you recall being
19 discussed as it may affect specifications in the manual?
20 A We knew that there were an issue with some of the motorcycle
21 clubs related to crack sealing material in New York. I
22 consulted with them, and they had had some issues, and had
23 pulled back on their program.
24 Q Did you talk with the New York Department of Transportation?
25 A Yes. It was New York DOT.

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1 Q All right. And what was the issue? Do you recall what the
2 issue was?
3 A Density. It was the density of the crack sealing that they
4 were doing.
5 Q Okay. How did that conversation with New York's Department
6 of Transportation affect what you guys did here?
7 A It made us cautious about our -- the band width and
8 specifically where we had multiple cracks that were -- and
9 they gave guidance not to, you know, completely seal an
10 area, so you had big, wide swaths of this material.
11 Q Okay. Do you recall what your group eventually decided upon
12 as a specification for recommended band width?
13 A Yes, and this has been ongoing discussion with the industry.
14 Like I said, we do partner with industry on these
15 specifications. 4 inches is what we came up with.
16 Q And do you recall when that 4 inches was instituted as the
17 spec?
18 A My recollection is of right -- almost from the beginning of
19 putting the specification together, mid '90's.
20 Q Okay. And has that -- to date, has that remained the spec?
21 A It has.
22 Q All right. You mentioned that you partner with industry.
23 What types of industry do you consult with from time to time
24 regarding the issue?
25 A This would be the Michigan Road Preservation Association, is

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1 the industry group for -- that we partner with for capital
2 preventive maintenance.
3 Q Okay. All right. Okay. Besides a recommended band width,
4 was there any other considerations that were made regarding
5 the crack fill specs of the manual as it pertains to
6 motorcycle issues?
7 A No, not specifically as it pertains to motorcycle issues.
8 Q Okay. What about just other potential friction issues,
9 maybe if not for motorcycles, possibly with, you know,
10 two-track vehicles? Was there anything that went into that?
11 A Well, the issue would be greater for a motorcyclist than it
12 would be for -- or two-tracks. So, I mean, considering
13 motorcycles, I think, is, you know -- it would be less of an
14 issue with two-track.
15 Q Okay. Are you aware of any studies that were done or relied
16 upon by the C&T division in coming to an agreement on that
17 4-inch band width?
18 A No studies.
19 Q Okay. Were there any testing of any Michigan roadways that
20 went into reaching that conclusion of a proper band width?
21 A Yes; yes.
22 Q Okay. What do you recall about that test?
23 A We did friction testing on an area of, I believe, I-96.
24 Q Okay. Were there any other roads that were tested, if you
25 recall?

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9 (Pages 30 to 33)

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1 A No, I don't recall.

2 Q Okay. Based on your experience in addition to the band

3 width, when it comes to friction issues with motorcycles,

4 does the consistency of the crack fill have anything to do

5 with that; by that, I mean, whether it's softer or harder?

6 A I can't answer, because the way we do our friction testing

7 is with a wet -- it's always done wet with a tire. And so I

8 have never seen much friction data from crack seal that

9 would indicate, you know, it would be more of a problem,

10 whether it's tacky or, say, when it's colder, it's a little

11 stiffer. I don't know.

12 Q Okay. Fair enough. Fair enough. Does your department

13 conduct any random friction testing from -- as a standard

14 practice to test the sufficiency of the 4-inch band width

15 recommendation?

16 A No. It's difficult. The tires are wider obviously, and so

17 we -- and I have to go back. That was not a 4-inch width

18 that we tested on I-96. It was where it was put down much

19 wider. This would have been done prior to putting the

20 specifications together.

21 Q Okay. Do you have any knowledge regarding possible friction

22 issues with -- if we just assume dry -- dry crack filling?

23 A I don't know of any.

24 Q And if I just shift gears a little bit, and ask you similar

25 questions regarding any knowledge that you may have

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1 individual regions?

2 A I do some inspections when I can, mainly related to

3 performance. I'm looking at specifically crack sealers and

4 fillers, how they're performing.

5 Q Okay. Do you recall doing any such inspections on M-36?

6 A I did not.

7 Q Okay. Anything subsequent to this accident happening?

8 A No.

9 Q Okay. What types of roadways -- just to kind of give me a

10 flavor -- do you recall doing some of those filler

11 inspections on?

12 A It's through our capital -- the ones that are done through

13 capital preventive maintenance. I get those lists from our

14 preventive maintenance engineer, and those are ones that I'm

15 usually out doing inspections on.

16 Q Are those roads that you've inspected, are those made

17 pursuant to a specific request, or is that just the general

18 policy of your department that you go out on these

19 inspections from time to time?

20 A It's not the policy of the department. It's just more that

21 I feel is part of my job to try to evaluate performance.

22 Q Okay. And you're looking -- some of the performance issues

23 you're looking at are with respect to crack fill and crack

24 sealant; is that correct?

25 A Yes.

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1 regarding a potential propensity of rutting in a road

2 surface to be a potentially hazardous condition for a

3 motorcycle to traverse, do you have any knowledge in that

4 area?

5 A I don't.

6 Q Okay. At anytime since you've been with MDOT, are you

7 aware of MDOT receiving any communication from the Federal

8 Highway Administration regarding a potential danger of crack

9 fill as opposed to the potential danger to motorcyclists?

10 A I don't recall.

11 Q Do you recall any communication from any motorcycle safety

12 organizations or motorcycle safety groups, for instance, the

13 Motorcycle Safety Foundation, the American Motorcycle

14 Association, ABATE of Michigan, anything from any of those

15 types of organizations that discussed any potential hazards

16 that crack fill presents to motorcyclists?

17 A I am not aware.

18 Q Okay. If I ask you the same questions, any communications

19 from any of those organizations regarding any potential

20 issues that rutting in a road surface presents? Same?

21 A Same answer.

22 Q Same answer.

23 MR. BLADEN: Same objection.

24 Q Does your department make it a point to conduct any routine

25 inspections of road surfaces, or is that left up to the

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1 Q Have you seen anything -- have any seen anything in any of

2 your inspections or any of the testing that you've done

3 that's led you to believe that maybe 4 inches is an

4 inappropriate band width?

5 A No.

6 Q Are you familiar with Crafcro?

7 A Yes.

8 Q Okay. My understanding is it was a couple of Crafcro

9 products that were utilized as crack fill on the M3-6

10 project. I'm going to hand you what we've marked as Geib

11 Exhibit Number 4. And then while you're at it as well, this

12 was marked as Pratt Exhibit Number 1.

13 A Okay.

14 Q And you can just thumb through those, and I'll just ask you

15 a couple questions about those.

16 A Okay.

17 Q The testimony was that the MDOT -- or I'm sorry -- the

18 Crafcro products that were used were Crafcro 544 and Crafcro

19 515. Do those numbers have any significance to you?

20 A Yes. I'm familiar with 515, and actually I do know

21 something about 544 as well.

22 Q Okay. 515 is the Road Saver product?

23 A Uh-huh (affirmative).

24 Q All right. Now, have you ever seen any of the these

25 documents I've handed you before? Have you seen any of

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10 (Pages 34 to 37)

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1 these documents before today?
 2 A Yes.
 3 Q All right. Have you seen these documents outside the
 4 context of this litigation?
 5 A Yes.
 6 Q All right. Are these documents that you utilize in your job
 7 duties --
 8 A Yes.
 9 Q -- when you're evaluating various product? When you take a
 10 look at the installation instructions, what specifically are
 11 you looking for as it pertains to your job duties?
 12 A (Nonverbal response)
 13 Q I guess what would be a better question is why are you --
 14 why do you utilize these from time to time in your --
 15 A I mainly review these documents from a material standpoint,
 16 and I look at the specifications and the tests that are run
 17 on it, and I would look at their appropriateness for certain
 18 applications.
 19 Q Okay. Okay. And -- I'm sorry.
 20 A Crafcro does a really good job with their temperature chart
 21 as it relates to PG grading and asphalt binders, so, you
 22 know, for certain areas of the country or even, say, certain
 23 regions of the state, the more -- the one sealant might be
 24 more appropriate.
 25 Q Okay. Now, with respect to these -- to each of these --

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1 each of these products, you review -- you've -- as part of
 2 your job, you review not only the data sheet, but
 3 installation instructions?
 4 A I have looked at installation instructions before, but, like
 5 I said, mainly it's the material specifications.
 6 Q Sure. Now, assuming if we have a project, a Crafcro project,
 7 that falls under the program, and it's set to use these
 8 couple different -- these products, would you expect that
 9 these installation instructions would be followed in the
 10 application of the product?
 11 MR. BLADEN: Objection; lack of foundation. Go
 12 ahead and answer the question, if you know.
 13 A Which program are we --
 14 Q Under the capital preventive maintenance program. If we
 15 have the crack fill job that -- hypothetically speaking, if
 16 we have a crack fill job that falls under that program, and
 17 it's to utilize both of these materials, the 515 and the
 18 544, would you expect that when that job is actually
 19 performed, that the job would be performed in compliance
 20 with the installation instructions that go with each of
 21 those materials?
 22 A Yes.
 23 MR. BLADEN: Objection; lack of foundation. It
 24 hasn't been established that this particular project was a
 25 capital preventive maintenance project. Go ahead.

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1 A Yes.
 2 Q Okay. I think I've asked you this probably twice before. I
 3 apologize if I have. I'm just kind of getting caught up
 4 with my notes. You performed no testing on M-36; correct?
 5 A No.
 6 Q Are you aware of any testing that MDOT -- anyone from MDOT
 7 has done on M-36?
 8 A No.
 9 Q All right. I've been advised by MDOT that on -- in November
 10 of 2010 and in December of 2010, the Brighton TSC and MDOT's
 11 Brighton TSC staff and Lansing construction and technology
 12 staff went to the location and took measurements of the
 13 amount of crack sealant on the road, and also did a friction
 14 test. Were you aware that either of those tests had been
 15 done?
 16 A No.
 17 Q You weren't consulted on either of those tests?
 18 A No.
 19 Q See, and I believe when I leave these depositions, when I
 20 walk out the door, I think of that one more question I
 21 wanted to ask you, so I'm just taking a minute here to see
 22 if I can find it before I leave. Let's see here.
 23 (Counsel reviews notes)
 24 Q Are you aware of any complaints that were made by anyone to
 25 MDOT regarding the condition of M-36 prior to August of '09,

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1 either be it complaints regarding cracking in the road, or
 2 complaints regarding rutting in the road?
 3 A No.
 4 Q Okay. Are you aware of any other claim for damages made
 5 against MDOT other than this lawsuit for injuries received
 6 on M-36 in the year before the accident?
 7 A No.
 8 Q Other than possibly for MDOT's counsel, have you written out
 9 any statements at all regarding anything regarding this
 10 accident?
 11 A No.
 12 Q Okay. Not counting anything you may have done for MDOT's
 13 counsel, have you given any recorded statements to anyone
 14 regarding anything having to do with this accident?
 15 A No.
 16 Q Okay. And I thought of that question. If you take a look
 17 at Exhibit Number 1?
 18 (Witness reviews exhibit)
 19 A Okay.
 20 Q Okay. If you look at the second to last page -- I guess I
 21 should ask you first. This appears to be a -- it's labeled
 22 of the maintenance performance guide. Do you know what this
 23 is, what these documents are, or where they are from?
 24 A I've known of them. I didn't know specifically about this
 25 particular one.

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11 (Pages 38 to 41)

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1 Q Okay. The question I had for you is, if you take a look at
 2 the second from last page, it appears to address hot poured
 3 joint sealant in the context of joint and crack filling.
 4 And down at the bottom, towards the bottom of the
 5 "recommended work method" box, I noticed an asterisk,
 6 "contact Andy Bennett at C&T for approved alternative."
 7 A Yes.
 8 Q Do you know in what context? An alternative to what, what
 9 they're referring to?
 10 A It would be a material alternative.
 11 Q Okay. It would be --
 12 A Yes.
 13 Q Okay.
 14 A So they are listing here "hot joint seal and Crafcro rubber,
 15 type 2, or an approved alternative," and then the asterisk,
 16 so I would be recommending alternatives to that sealant.
 17 Q An alternate material?
 18 A Yes.
 19 Q Not an alternate, "Hey, this is how you do this job?"
 20 A Right.
 21 Q I gotcha. Okay.
 22 MR. VESPRINI: Thank you very much.
 23 THE WITNESS: You're welcome.
 24 MR. VESPRINI: I appreciate your time.
 25 MR. BLADEN: Okay. Andrew, I have a few follow-up

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1 new jobs. The one at the county, I think, was based on the
 2 experience that I had with consultants in the material
 3 areas, and I did a lot of soil work still there, aggregates.
 4 I got into concrete, and I started testing concrete as well
 5 back in '79. So there's just -- it all seems to fit
 6 together.
 7 Q Okay. How long have you been involved in testing and
 8 evaluating road materials as a career, I should say?
 9 A 23 years, my entire career with MDOT.
 10 Q Okay. And is there any -- how about with Eaton County Road
 11 Commission?
 12 A Not so much in the evaluation. It was more the testing of
 13 the materials.
 14 Q Okay. So you were involved in testing of material, road
 15 materials with Eaton County Road Commission?
 16 A Yes.
 17 Q And then when you began with MDOT, you started, you know,
 18 I'll say, evaluating. You're talking about evaluating the
 19 technical aspects of the material?
 20 A Yes, from a laboratory standpoint, material properties, and
 21 from a construction standpoint, the performance.
 22 Q Okay. That would include reviewing literature, and
 23 published studies, and things like that?
 24 A Yes.
 25 Q Would it involve participating in conferences and expert

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1 questions.
 2 EXAMINATION
 3 BY MR. BLADEN:
 4 Q Looking at Exhibit Number 7, if you're given a range of
 5 describing the severity of the cracking on this particular
 6 roadway from low to medium to high, what would you classify
 7 it as, based upon your experience?
 8 A Medium.
 9 Q Okay. And as a follow-up on your experience, you said you
 10 got a degree in -- was it? -- agricultural --
 11 A Business.
 12 Q -- business at State University of New York --
 13 A Alford.
 14 Q Okay. And how did you get into the field of materials for
 15 MDOT -- or for roadway materials, and how did you develop
 16 your expertise?
 17 A Well, it came in -- some of my class work was in soils and
 18 as it relates to agriculture, but I had a friend that was
 19 working in Texas for an engineering firm down there that
 20 they were doing soil work, construction-related soil work,
 21 and that's really how I -- 1979, I took my first job down
 22 there, and I just stayed in the field since then.
 23 Q Okay. And how did you get involved from moving from soil
 24 work to actual road materials?
 25 A It's all material related. I took that experience to get

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1 panels of that nature?
 2 A Yes.
 3 Q At both the State and Federal level?
 4 A Yes.
 5 Q Have you participated in any kind of expert panels yourself
 6 as a contributing member?
 7 A I have.
 8 Q And what kind of panels have you contributed to?
 9 A I've been part of the national committee for concrete
 10 overlays, and been involved in putting that document
 11 together through Iowa State University.
 12 Q Okay. And when you say the "national committee," is that
 13 through AASHTO, or what --
 14 A It's funded through Federal Highway Administration, but the
 15 work was being -- the principal investigators were the Iowa
 16 State --
 17 Q University?
 18 A -- it's called the NC², National Concrete Consortium.
 19 Q Okay. Have you had any involvement with any asphalt
 20 evaluation panels or studies?
 21 A I have been involved with some with crack fillers and crack
 22 sealers. I'm currently on a research -- pooled fund
 23 research project, through University of Illinois on coming
 24 up with testing that better indicates field performance for
 25 crack sealers and crack fillers.

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12 (Pages 42 to 45)

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1 Q Okay. Are you familiar with any -- well, let me see -- are
 2 you familiar with -- you know what the Federal SHRP is? Is
 3 that term familiar with you?
 4 A Yes.
 5 Q What is that?
 6 A Strategic Highway Research Program.
 7 Q Okay. And what is that program?
 8 A That's a Federal program that's done to evaluate various
 9 pavement types and they have had projects on sealants too,
 10 an evaluation of sealants.
 11 Q Okay. And you said earlier that you're familiar with
 12 specific -- especially the Crafcro project (sic) 515. Do you
 13 recall testifying about that?
 14 A Yes.
 15 Q Okay. And do you know whether or not it's part of the
 16 Federal SHRP test project, or is that a test material?
 17 A It has been, yes. I think those projects are wrapped up
 18 now. I don't know if they're still being evaluated, but,
 19 yes, they were.
 20 Q Okay. Do you know when those projects "wrapped up"? Were
 21 they still being tested in '09?
 22 A I don't, because that particular sealant has been used in
 23 more than one -- I know in more than one test deck. I know
 24 there was a big study done out of Ontario as well, and I
 25 don't know if that was part of the SHRP program that

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1 A It was based on a committee that we had together, writing
 2 the specifications that included industry representatives as
 3 well as MDOT representatives. And we looked at equipment
 4 types, and their -- the contractors' advice was that the
 5 4-inch band width would give good coverage of the crack, and
 6 also help protect that area adjacent to the crack.
 7 Q Okay. But, so why 4 inches and not, say, 6 inches or 8
 8 inches?
 9 A The issue that we discussed with motorcycles, and we knew
 10 there were some issues in New York, we knew that, and we had
 11 also -- MDOT had applied some wider areas where friction
 12 became an issue. And we just decided that we didn't want --
 13 at least during the initial application -- for that to be
 14 over 4 inches.
 15 Q Okay. I think you testified earlier that the fresher the
 16 coat -- or fresher application is more pliable; correct?
 17 A Yes.
 18 Q If traffic travels over that within the first few days of
 19 its application, would it have any impact on the band width
 20 of any of the application?
 21 A Yes.
 22 Q What kind of impact would it have?
 23 A Well, there's certain thickness requirement as well, and so
 24 the more pliable -- the tires would probably have a tendency
 25 to flatten that material out on the road surface.

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1 evaluated the Crafcro. And I know that the SHRP did, but I
 2 can't give you the years. They're close.
 3 Q Okay. You don't know whether or not that program was still
 4 in force with respect to the Crafcro product in 2009?
 5 A I cannot tell you that.
 6 Q Okay. Would there be a way to find that out?
 7 A Yes.
 8 Q Okay. Do you have any involvement in putting together the
 9 maintenance -- the routine maintenance guidance documents?
 10 A No, unless I'm consulted.
 11 Q Okay. Do you recall whether or not -- or were you ever
 12 consulted in putting together the joint and crack filling
 13 maintenance program guide for routine maintenance?
 14 A I was not.
 15 Q Okay. Do you know who would have been consulted in putting
 16 that together, or who would be the individuals that would --
 17 who would have had that responsibility?
 18 A No.
 19 Q And your responsibilities would be involving the capital
 20 preventive maintenance, correct?
 21 A Yes.
 22 Q All right. If you recall, how was it determined that a
 23 4-inch band width for a crack sealant or crack fill material
 24 like Crafcro applied to cracks, it would be the appropriate
 25 width to use?

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1 Q Okay. Would it make it -- would it widen or narrow the
 2 width?
 3 A It could. It wouldn't narrow, unless there were abrasion of
 4 the material. It would have a tendency to make it a little
 5 bit wider.
 6 Q Okay. So if somebody went out and measured a material
 7 several months after it's been applied and found that there
 8 was portions of it that were, say, 5 inches, would that be
 9 at all inconsistent with your understanding of how motor
 10 vehicle accidents interact with this type of material after
 11 it's been applied?
 12 A No. I can't say specifically the width, but no. You know,
 13 based on what we discussed, it -- the material would flatten
 14 out, so I'm not sure how wide it would get.
 15 Q Okay. All right. But that would be something that you
 16 would expect as kind of a not unusual or within the realm of
 17 expected?
 18 A Yes.
 19 Q Okay. Understanding, again, these are photographs and you
 20 did not personally inspect and review this, and you were
 21 asked about whether you might occasionally recommend -- or
 22 on occasion recommend so-called chip sealing. Do you
 23 remember that --
 24 A Yes.
 25 Q -- series of questions? Based on these photos, if you can

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1 tell, is this the type of roadway where you would have
 2 recommended chip sealing as opposed to -- okay -- let me
 3 ask -- chip sealing as opposed to what was done here?
 4 Understanding the limitations of the photographs, and you --
 5 A Yes, I would say that I have recommended chip sealing in the
 6 past on roadways like this.
 7 Q Okay. Is what was done here something that you don't think
 8 would be -- would you think that this is superior, inferior
 9 to, or have no opinion about whether or not chip sealing
 10 should have been done here versus what was done?
 11 A I don't have an opinion.
 12 Q Okay. Is this, what was done here, appropriate for the
 13 roadway as you understand it based upon, I understand,
 14 limited information of the photographs?
 15 A Yes.
 16 Q Okay. Now, I think you testified earlier it seemed to be
 17 that you -- there -- you made a distinction between crack
 18 filling and crack sealing. Is there a distinction between
 19 the two?
 20 A Yes.
 21 Q What's a crack seal versus a crack fill?
 22 A As I was explaining that a crack sealer, there's a, you
 23 know, national understanding that it's -- it involves more
 24 effort, where you prepare a reservoir, so you're routing a
 25 reservoir, and you're placing a -- what I call a higher

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1 Q What is a working crack or a non-working crack?
 2 A A working crack is generally a transverse crack that,
 3 because you have a thermal coefficient of expansion in the
 4 HMA material or the asphalt material itself, so depending on
 5 the space of the cracks transversely, that thermal movement
 6 though will open and close throughout the year. So that
 7 would be considered a non-working crack. Generally
 8 longitudinal cracks are narrower, and they don't take as
 9 much movement, and so you don't need a material that's a low
 10 modulus material that takes all that movement. So these
 11 crack fillers, as I say, are a little bit not as flexible,
 12 but you need something that's going to then hold up to
 13 traffic and car tires.
 14 Q So what would be more appropriate for a longitudinal crack?
 15 A A crack filler or a crack sealant procedure?
 16 A Usually crack filling.
 17 Q Okay. And for a transverse crack?
 18 A That, again, the working and non-working is the first thing
 19 to consider. Then it's associated distress. You look at do
 20 you have multiple cracks? Do you have any spalling that
 21 would prevent you from routing a nice reservoir in that --
 22 along that crack?
 23 Q Okay. Routing -- or spalling would be -- what? -- loose
 24 material?
 25 A Spalling is actually pieces of material coming out.

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1 quality sealant, or it's a low modulus sealant, so it has
 2 the ability to take more movement. And that installation is
 3 different as well. We call for that to be flush to
 4 one-eighth of an inch below the surface. That's a material
 5 you don't want to get too much of it up on the surface,
 6 because tires can grab that material, and it can ball up on
 7 the tire. So the installation is different.
 8 Q Is this, what's shown in the photograph here (indicating),
 9 would you consider that crack fill or crack seal?
 10 A That's crack filling.
 11 Q Okay. Well, why don't you tell what the difference is in
 12 crack fill?
 13 A Okay. This would be -- not require as much pre work, so
 14 usually in preparation of this, they just use a compressed
 15 air, just to blow the crack out, and then just apply it in a
 16 simple Band-Aid, to they're not doing anything to the crack
 17 to prepare a reservoir or anything. And so this is a -- not
 18 as low a modulus material, and so this isn't something that
 19 is going to be a problem picking up on tires as traffic hits
 20 it. So it's got different material characteristics.
 21 Q Okay. I'm going to show you some photographs here more
 22 close up. Maybe you can tell me whether you think -- how do
 23 you determine whether to do crack seal versus crack fill?
 24 A It has to do with the cracks. The first thing, is it a
 25 working crack or a non-working crack?

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1 Q Okay. As far as you can tell, can you see any -- you know,
 2 determine whether in looking at these photos whether there
 3 are working or non-working cracks that were filled here?
 4 A Most of those appear to be non-working cracks.
 5 Q Okay. If you have a road surface where you have a
 6 combination of some non-working and working cracks, and
 7 longitudinal and transverse cracks, is it appropriate to use
 8 a crack fill material in that circumstance, or should you
 9 use crack sealant?
 10 A You can use a stand-alone crack fill. You will not get the
 11 performance with those working cracks that you would with
 12 the crack sealing material. In the CPM program, we usually
 13 use a -- do a combination. We have a warranty specification
 14 that calls for sealing of the transverse working cracks, and
 15 filling of the non-working cracks.
 16 Q And, of course, the working cracks, as you said, have a
 17 history -- a greater tendency to be pulled out by the -- by
 18 traffic?
 19 A Well, no, not necessarily. The crack filling material
 20 withstands traffic. The crack sealing material has to be
 21 installed such that it is not raised in the pavement. You
 22 want it flush to just below. You want it, the traffic
 23 tires, to hit it actually. It keeps the material alive. I
 24 talked about oxidation of asphalt materials over time. And
 25 if you can keep it -- you can get it from something called

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1 steric hardening, or oxidation, if you have it in -- up
 2 where the tires can work it.
 3 Q Okay. All right. Does MDOT ever -- are you aware of
 4 getting Federal funding for the SHRP test project materials
 5 to apply or use the materials?
 6 A We get our normal Federal match. And I can't say whether
 7 it's more or less than a typical job. I think we just agree
 8 to participate. And the only experience I have is in trying
 9 to come up with money to fix some of the test actions.
 10 There doesn't seem to be any money in that program for that
 11 after we agree to do it.
 12 Q Are you aware of any Federal regulations or guidelines
 13 regarding the obligations of MDOT, if they take or use a
 14 material that's approved under the Federal testing
 15 program -- materials testing program?
 16 A No.
 17 Q It doesn't mean that there aren't any, you just aren't aware
 18 of them?
 19 A I'm not aware.
 20 Q All right. Are you aware of studies with respect to chip
 21 sealing that were done where any motorcycle groups or
 22 anybody else said, "Hey, this chip sealing procedure's
 23 causing gravel or material, or loose material in the roads.
 24 We don't like that stuff either?"
 25 A I'm not aware of any.

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1 Q Okay. Was that taken -- is that at all a concern when
 2 you're doing a chip seal project of gravel or loose material
 3 on the road?
 4 A Yes. That's the biggest challenge with the chip seal is a
 5 loss of surface aggregate.
 6 Q Okay. Is it fair to say that that might be one of the
 7 biggest reasons why you don't do a chip seal in a particular
 8 circumstance?
 9 A I would say it's --
 10 Q -- other than -- aside from funding perhaps?
 11 A It's one of the biggest reasons some of our offices don't
 12 select it, that, and the initial damage claims to
 13 windshields, breaking windshields.
 14 Q Okay. Now, looking at this road surface on the
 15 photograph -- understanding, again, these are photographs
 16 and you weren't there at the time -- but does it appear that
 17 the pavement is wet or damp in any way?
 18 A No.
 19 Q Does it appear that the crack fill material is wet or damp
 20 or, you know, beading water or anything in any way?
 21 A No.
 22 Q And, of course, you wouldn't be able to tell what the
 23 ambient temperature is or this road surface temperature
 24 based on the photos?
 25 A No.

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1 Q That would have to have been made at the time of the
 2 accident --
 3 A Yes.
 4 Q -- to determine that; correct?
 5 A Yes.
 6 Q Allright.
 7 MR. BLADEN: No further questions.
 8 MR. VESPRINI: A quick follow-up, Mr. Bennett.
 9 EXAMINATION
 10 BY MR. VESPRINI:
 11 Q You were asked about this concept of newly applied crack
 12 fill surface possibly expanding a little bit when traffic
 13 runs over it. Can you give any kind of ballpark in your
 14 experience, what you've seen the variation in the width of
 15 the crack fill in that situation?
 16 A I've never gone out to measure it, but I -- if you're just
 17 asking for what I think, I don't think that I've seen it
 18 over 5 inches. I don't think it could expand more than an
 19 inch.
 20 Q Okay. All right. And then I wanted to ask you -- I'm just
 21 kind of jumping around, because there's a few quick points I
 22 wanted to hit, and then we can get you out of here. On this
 23 Geib Exhibit Number 5 you were shown, if we assume that that
 24 invoice or that proposal has something to do with the M-36
 25 project we're talking about, is there anything from the face

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1 of that document that would let you decide whether or not
 2 this particular job fell under the -- what do we call it? --
 3 under the capital preventive maintenance program? Is there
 4 anything from that -- I mean, I know you said it's up to the
 5 region ultimately, but is there anything from that document
 6 that gives you any clues?
 7 A Yeah, this would give me a clue that it was not under the
 8 capital preventive maintenance program, because I can see.
 9 Q Okay. What other document are you looking at that --
 10 A I'm looking at the price per pound, and the inclusion of the
 11 melter with the sealant, which is only done through our
 12 maintenance. Our contractors would bid this by road bid
 13 mile, and a contract situation.
 14 Q Okay. Thank you. Okay. And finally you were talking a
 15 little bit about the considerations that went into
 16 determining -- coming up with that 4-inch wide band width
 17 number as part of the manual. Is it fair to say that part
 18 of the consideration was you want to keep as little of the
 19 crack fill material on the pavement as possible?
 20 A Yes.
 21 Q All right. Would you agree with me then the more crack fill
 22 you have on the surface of the pavement, there's going to be
 23 correlation with the amount of crack fill on the surface and
 24 the amount of -- or the propensity of a friction issue on
 25 that stretch of pavement?

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- 1 A Yes.
- 2 Q Okay. Is that consideration part of the reason why you said
- 3 based on those pictures, you would have recommended a chip
- 4 seal as an alternative treatment method?
- 5 A The density of cracks. Like I said, without being there and
- 6 really knowing what's the cause of the crack too, I mean,
- 7 because there's more things that go into that recommendation
- 8 on what to use.
- 9 Q Okay. Was that part of the consideration or part of why you
- 10 reached that conclusion?
- 11 A Density of cracks is the only thing I can see visually there
- 12 as one of the reasons that I would possibly have recommended
- 13 a chip seal.
- 14 Q Okay.
- 15 MR. VESPRINI: Thank you very much.
- 16 THE WITNESS: You're welcome.
- 17 MR. BLADEN: One follow-up question.
- 18 MR. VESPRINI: It never ends.
- 19 MR. BLADEN: One follow-up question.
- 20 EXAMINATION
- 21 BY MR. BLADEN:
- 22 Q If you recommended a chip seal, would it still be up to the
- 23 TSC to determine or the region to determine whether or not
- 24 they follow your recommendation?
- 25 A Yes.

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- 1 Q And if they determine that they felt that it was more
- 2 appropriate to do this methodology for whatever reason, it
- 3 would be perfectly appropriate to do that methodology?
- 4 A Yes.
- 5 Q Okay. And if they made an engineering judgment that they
- 6 would prefer to do this particular methodology versus what
- 7 you recommended, would you consider that to be a mistake or
- 8 negligent in any way?
- 9 A No.
- 10 MR. VESPRINI: Object to the form. Go ahead.
- 11 Q Would you consider that to be not professionally
- 12 inappropriate under the standards that you're aware of?
- 13 A No.
- 14 Q Okay.
- 15 MR. BLADEN: No further questions.
- 16 MR. VESPRINI: All done.
- 17 (Deposition concluded at 3:31 p.m.)

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STATE OF MICHIGAN
COURT OF APPEALS

KIMETA JAKUPOVIC, also known as KIIMETA
JAKUPOVIC,

UNPUBLISHED
December 7, 2010

Plaintiff-Appellee,

v

CITY OF HAMTRAMCK,

No. 293715
Wayne Circuit Court
LC No. 08-019096-NO

Defendant-Appellant.

Before: OWENS, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

Defendant, City of Hamtramck (City), appeals as of right from the trial court order denying its motion for summary disposition, which was premised on governmental immunity. Plaintiff, Kimeta Jakupovic, filed suit against the City, pursuant to MCL 691.1402(1), after tripping over a damaged sidewalk and suffering numerous injuries. The City moved for summary disposition pursuant to MCR 2.116(C)(7), (8), and (10). The trial court denied the motion. We affirm.

I. BASIC FACTS

Jakupovic is a resident of the City of Hamtramck. On September 16, 2008, at 11:30 a.m., she was walking home from the bank. She took an unfamiliar route home and ended up on Mitchell Street in Hamtramck. She was not carrying anything and was looking straight ahead. Her left foot got caught on the sidewalk, and she tripped and fell forward, first landing on her knees, then on her arms. After lying on the sidewalk for at least 10 minutes, she got up and continued walking.

Jakupovic recognized that she was one block away from her doctor's office and so went there for treatment. Her doctor immediately took x-rays of her left arm, treated her injured knees, and called an ambulance. The ambulance took Jakupovic to Detroit Receiving Hospital where doctors determined that her left arm had multiple fractures. The day after the accident, surgeons repaired the arm. Jakupovic has since received painful physical therapy and has a constant numbness and tingling in her arm. Her surgeon advised her that the tingling sensations would remain indefinitely, that her hand would not be as it was before the accident, and that the surgically implanted metal would also remain indefinitely.

Three days after the accident, Jakupovic's son and husband took a series of photographs allegedly depicting the sidewalk where she fell. Jakupovic did not go with them to identify the location, but testified that the location was correct. These photographs were admitted for the trial court's consideration during Jakupovic's deposition on May 12, 2009. The images show a large crack in the sidewalk that was approximately three-inches deep. Jakupovic's husband and son used a tape measure in the pictures to show the depth of the crack. In her deposition, Jakupovic marked an "X" on the crack in the pictures to identify it as the place she fell. The sidewalk in the images is located just north of the driveway for 9465 Mitchell Street, but is still within the property lines of the residence.

The parties disputed the location of the defective area in relation to the neighboring properties. 9465 Mitchell is next door to 9477 Mitchell. Jakupovic alleged that the actual defect in the sidewalk was significantly closer to the front door of 9477 Mitchell than the front door of 9465 Mitchell. She also alleged that the defect was only ten feet and four inches away from the actual property line of 9477 Mitchell. Because of the alleged close proximity to both properties, Jakupovic claimed that she could not determine the exact property line that contained the defective part of the sidewalk. She also claimed that there were no other defects on the sidewalk by either property. The City disputed that this was the only defect in the area. The City also alleged that the defect was clearly on the 9564 Mitchell property and that there should have been no confusion with it being at 9477 Mitchell.

On September 26, 2008, ten days after the accident, Jakupovic's attorney served a written, pre-suit notice on the City's Clerk. It stated:

Please be advised that Kimeta Jakupovic tripped and fell and injured herself on September 16, 2008, at approximately 1:30 p.m., on defective city sidewalk located adjacent to the aforesaid address of 9477 Mitchell, Hamtramck, Michigan. This notice is being made pursuant to the applicable ordinances and statutes with regards to defect and injury caused therein.

After receiving Jakupovic's notice, the City sent the letter to its insurance provider, a private insurance company. The insurer hired a private investigator to contact Jakupovic's attorney and request an interview with Jakupovic. The private investigator conducted the interview on December 4, 2008. Jakupovic alleges that neither the City nor its insurance company had a representative at the interview. She also alleged that the investigator took copious notes. However, no record of the interview has surfaced. During the interview, she provided the investigator with names, addresses, and phone numbers of her husband and son. She also claims to have given the investigator copies of all related medical records, including the surgical report.

On at least two occasions during the year prior to Jakupovic's injury, the owner of 9465 Mitchell Street, Miroslaw Lesinski, called the City to advise it of the damaged sidewalk in front of his home. The City did not respond after Lesinski's initial call, and on his second call advised him that he would personally have to contact and pay a contractor to fix the sidewalk. Six days after the accident, the owner of 9477 Mitchell, Kazimierz Dzieglewicz, obtained a permit to repair the damaged sidewalk. He obtained the permit as a favor to Lesinski, since they were neighbors. After receiving the permit, and without knowing about Jakupovic's accident,

Lesinski called a contractor who repaired the sidewalk in approximately October or November 2008. Lesinski's deposition indicates he thought the repair was "November or end of September." His native language was not English, but there was never any attempt to clarify whether he actually meant to say "November or end of October"—although this could be the case. Dzieglewicz supervised the entire repair.

Jakupovic filed a formal complaint against the City on December 22, 2008. The City received the complaint on January 2, 2009. It stated in relevant part:

Defendant, City of Hamtramck, had jurisdiction in front of aforesaid address of 9477 Mitchell [T]he Plaintiff was caused to have tripped and fell upon the defective condition of the sidewalk, namely broken and raised pieces of cement which caused the sidewalk to become in disrepair and unsafe for public travel, thereby causing her to stumble and be thrown to the ground with great force and violence, and thereby causing her to have suffered severe bodily injuries. . . .

* * *

Plaintiff was then and there injured about the head, body, and limbs, as well as causing injuries both externally and internally, and causing the Plaintiff herein to suffer with bodily pain, disability and mental anguish . . . as well as causing the Plaintiff to suffer significant injury to her neck and back, as well as a fracture of her left radius and left ulna, all of which required surgery, and that further, said injuries are permanent and progressive in nature.

In filing her claim, Jakupovic asserted the highway exception to governmental immunity under MCL 691.1402. The City argued that Jakupovic's claim was precluded because she did not give proper notice under MCL 691.1404(1). In denying the City's motion for summary disposition, the trial court stated that Jakupovic gave adequate notice. The City appeals as of right pursuant to MCR 7.202(6)(a)(v).

II. ADEQUATE NOTICE

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). This Court's review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Innovative Adult Foster Care, Inc v Ragin*, 285 Mich App 466, 476; 776 NW2d 398 (2009). This Court reviews de novo the determination of the applicability of the highway exception as a question of law. *Plunkett v Dep't of Transp*, 286 Mich App 168, 180; 779 NW2d 263 (2009).

B. THRESHOLD FOR THE HIGHWAY EXCEPTION

In general, government agencies are granted broad immunity when they are engaged in a governmental function. *Id.* at 181. There are, however, a number of exceptions to governmental immunity, including the highway exception. MCL 691.1402(1); *Lash v Traverse City*, 479 Mich

180, 195 n 33; 735 NW2d 628 (2007). A municipality has no duty to repair or maintain, and is not liable for injuries arising from, a portion of a county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, unless, at least 30 days before the injury, the municipality knew or, in the exercise of reasonable diligence, should have known of a defect in the sidewalk, and the defect was a proximate cause of the injury. MCL 691.1402a(1); *Robinson v City of Lansing*, 486 Mich 1, 10-11; 782 NW2d 171 (2010).

In the case at bar, Lesinski notified the City that the sidewalk was in disrepair on two different occasions. Lesinski first called the City in approximately January 2008. This was nine months prior to Jakupovic's fall. Lesinski made his second call to the City around August or September 2008. In his calls, he indicated that there was a metal pipe sticking out of the sidewalk in front of his house. Consequently, the City knew or should have known of the alleged defect at least 30 days prior to Jakupovic's injury. *Robinson*, 486 Mich at 10-11.

Because Jakupovic's claims contain the threshold requirements of the highway exception, the central issue is whether Jakupovic gave adequate notice to the City of the defect under MCL 691.1404(1).

C. THE NOTICE REQUIREMENT

An injured person must notify the governmental agency having jurisdiction over the roadway of the occurrence of the injury, the injury sustained, the nature of the defect, and the names of known witnesses, within 120 days from the time the injury occurred. MCL 691.1404(1); *Rowland v Washtenaw Co Rd Comm'n*, 477 Mich 197, 200, 203-204, 219; 731 NW2d 41 (2007). The purposes of requiring notice are to provide the governmental agency with an opportunity to investigate the claim while it is fresh and to remedy the defect before another person is injured. *Plunkett*, 286 Mich App at 176-177. The notice need not be provided in a particular form. *Burise v City of Pontiac*, 282 Mich App 646, 654; 766 NW2d 311 (2009). It is sufficient if it is timely and contains the requisite information. *Id.*

Jakupovic's initial notice was dated September 26, 2008, ten days after her accident, and stated that she "tripped and fell and injured herself . . . on defective city sidewalk located adjacent to the aforesaid address of 9477 Mitchell." We hold that this written notice failed to meet the MCL 691.1404(1) standard. In *Rowland*, the Supreme Court held:

MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written. . . . Thus, the statute requires notice to be given as directed, and notice is adequate if it is served within 120 days and otherwise complies with the requirements of the statute, i.e., it specifies the *exact* location and nature of the defect, the injury sustained, and the names of witnesses known at the time by the claimant, no matter how much prejudice is actually suffered. [*Rowland*, 477 Mich at 219 (emphasis added).]

Jakupovic's September 26th notice failed to specify the nature of her injuries or the exact nature of the defect. It merely stated that she "injured herself" and that the sidewalk was "defective." Summary disposition would have been appropriate if the notice inquiry ended here.

However, a plaintiff's attempt to give adequate notice is not limited to her first effort. *Burise*, 282 Mich App at 654. Rather, the requirement of MCL 691.1404(1) is satisfied so long as a plaintiff's notice is within 120 days of the injury and contains the identified information. *Id.* at 654.

In *Burise*, this Court found that the plaintiff's initial notice failed to identify the name and address of a known witness. But this Court held that the plaintiff effectively cured this defect by providing the relevant information on a claim form that the defendant sent to her. The defendant in *Burise* received this "new" information on the 120th day after the injury occurred. In affirming the trial court's denial of the defendant's motion for summary disposition, this Court held:

A purported notice that does not comply with the statute is insufficient. Because plaintiff did not include the name of a known witness in the initial notice, plaintiff's initial notice was defective. But because plaintiff did, in fact, properly serve a legally sufficient notice within 120 days of the injury, plaintiff was in compliance with MCL 691.1404(1). [*Id.* at 655.]

Here, as in *Burise*, Jakupovic initially failed to provide adequate notice. However, she remedied this in her complaint that she served on the City on January 2, 2009. This was 108 days after the injury occurred. Jakupovic's complaint alleged:

Defendant, City of Hamtramck, had jurisdiction in front of aforesaid address of 9477 Mitchell. . . . [T]he Plaintiff was caused to have tripped and fell upon the defective condition of the sidewalk, namely broken and raised pieces of cement which caused the sidewalk to become in disrepair and unsafe for public travel, thereby causing her to stumble and be thrown to the ground with great force and violence, and thereby causing her to have suffered severe bodily injuries. . . .

* * *

Plaintiff was then and there injured about the head, body, and limbs, as well as causing injuries both externally and internally, and causing the Plaintiff herein to suffer with bodily pain, disability and mental anguish . . . as well as causing the Plaintiff to suffer significant injury to her neck and back, as well as a fracture of her left radius and left ulna, all of which required surgery, and that further, said injuries are permanent and progressive in nature.

We note that although MCL 691.1404 is casually referred to as a pre-suit notice statute, there is nothing in its language requiring that adequate notice be a condition precedent to filing a lawsuit. Rather, it states:

As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and

the names of the witnesses known at the time by the claimant. [MCL 691.1404(1) (emphasis added).]

By contrast, we note that the language of the notice statute for medical malpractice claims, provides that “a person *shall not commence* an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.” MCL 600.2912b(1) (emphasis added).

Jakupovic’s complaint sufficiently stated the exact nature of her injuries, as well as the nature of the defect. Therefore, she remedied the elements of the defective September 26th notice within 120 days of her accident. Further, Jakupovic testified that the only possible witness to her injury was someone she thought she saw getting out of a car, but who never came to help her. Therefore, she had no known witnesses about whom she was obligated to notify the City.

The City argues that Jakupovic’s husband and son should have been listed as witnesses in her initial notice. However, the City does not provide any case law to support this contention. Further, there is little reason to conclude that the plain meaning of “witnesses known at the time,” under MCL 691.1404(1), refers to those persons who go to the scene of an accident several days after it occurred in order to investigate.

Alternatively, the City contends that Jakupovic should have listed the owners of 9477 and 9465 Mitchell Street (Lesinski and Dzieglewicz) as witnesses. Again, there is nothing in the plain meaning of MCL 691.1404(1) that indicates a plaintiff is to conduct her own investigation of the accident scene to determine if any witnesses unknown to her at the time of the accident would be willing to come forward. On the contrary, a plaintiff only has to provide names of “witnesses known at the time.” Here, based on Jakupovic’s account of the incident, there were no such witnesses. Consequently, she was not required to provide this information to the City in her notice.

The only question remaining with regard to Jakupovic’s notice is whether she adequately specified the location of the defect. MCL 691.1404(1). In her September notice, she stated that the defect was “adjacent to aforesaid address of 9477 Mitchell Street, Hamtramck, Michigan.” Her January complaint again stated the defect was “adjacent to the address of 9477 Mitchell, in the City of Hamtramck, County of Wayne, State of Michigan.” It also stated, “in front of aforesaid address of 9477 Mitchell.” In fact, the alleged defect was in front of 9465 Mitchell Street, which was immediately next to 9477 Mitchell.

“[W]hen notice is required of an average citizen for the benefit of a governmental entity, it need only be understandable and sufficient to bring the important facts to the governmental entity’s attention.” *Plunkett*, 286 Mich App at 176. “[A] liberal construction of the notice requirements is favored to avoid penalizing an inexperienced layman for some technical defect.” *Id.* A notice that is in substantial compliance with the law should not be held ineffective. *Id.* at 177. A plaintiff’s description substantially complies with the statute when coupled with the specific description of the location, time, and nature of the injuries. *Id.*

Finding Jakupovic's notice defective simply because she gave the address of the property immediately next to the correct one would penalize her for "some technical defect." *Id.* at 176. She would have had to make an inquiry with the property owners in the area as to the ownership of the parcel with the defective sidewalk. Moreover, her assertion that the defect was "adjacent to" 9477 Mitchell Street, Hamtramck, Michigan, does not frustrate the twin aims of MCL 691.1404(1), which are to provide the governmental agency with an opportunity to investigate the claim while it is fresh and to remedy the defect before another person is injured. *Id.* at 176-177.

Further, with Jakupovic's description in hand, "men of common understanding and intelligence . . . by exercise of reasonable diligence and without other information from the plaintiff [could have found] the exact place where it is claimed the damage was received." *Berribeau v City of Detroit*, 147 Mich 119, 125; 110 NW 512 (1907). In doing so, the City would have had an opportunity to investigate the claim and remedy the defect.

The City cites an unpublished case from this Court, *Mawri v City of Dearborn*, unpublished opinion per curiam of the Court of Appeals, released August 6, 2009 (Docket No. 283893), to support its contention that Jakupovic never gave the "exact" address of the defect, and therefore her notice fails. In *Mawri*, the plaintiff's notice, as well as his later complaint, stated he fell "in the area of 5034 Middlesex, Dearborn Michigan." *Id.* The actual site of plaintiff's fall was 5026 Middlesex, the property next door to 5034. This Court held that MCL 691.1404(1) requires the "exact" location of the defect and therefore the plaintiff's notice and complaint both failed to meet the statutory requirements. *Id.* However, the Court went on to say, "Even if the address was 'close enough,' the letter to defendant does not describe the 'nature of the defect' as required by [the statute]." *Id.*

The City's reliance on *Mawri* is misguided for three reasons. First, *Mawri* is an unpublished opinion, and we are not bound by it. MCR 7.215(C)(1). Second, this Court left open the possibility that even if the description of the location is somewhat imprecise and merely "close enough," this flaw may not be fatal when the notice meets the rest of the requirements of MCL 691.1404(1). Finally, this Court's published analysis in *Burise* runs counter to the City's argument.

In *Burise*, the plaintiff's notice indicated that the location of the defective roadway was "between Bo's Brewery, 51 North Saginaw, and the Pontiac Osteopathic Hospital Building at 64 North Saginaw." *Burise*, 282 Mich App at 648. This was a relatively broad swath of roadway in an urban area with the potential for the presence of multiple road defects. Yet, this Court found that the plaintiff's description met the "exact" location requirement of MCL 691.1404(1). *Id.* at 654. Here, Jakupovic's description that the sidewalk defect was "adjacent to 9465 Mitchell

Street” falls within the range that this Court found acceptable in *Burise* because the area was far less broad.¹

The City also argues that when Lesinski repaired the sidewalk within weeks after the accident, this effectively stymied the underlying policy aims of MCL 691.1404. Since the defect was gone, the City argues it could not protect itself from a lawsuit by conducting an investigation. However, even though the other portions of Jakupovic’s September 26th notice were defective, her initial notice gave the City enough information about the location to allow it the opportunity to at least conduct a basic inspection. While the record does not indicate the exact time between the September 26th notice and the sidewalk repair, it does show there was a reasonable window of opportunity for the City to make an inquiry.

Further, based on Lesinski’s testimony, the City had been on notice that there was a defect in front of 9465 Mitchell Street for several months. Yet, it elected not to act on Lesinski’s warnings and instead told him he was responsible for the repair.

The City’s final argument on appeal is that Jakupovic’s oral interview with an investigator hired by the City’s insurance company cannot adequately cure her initially defective notice. But because we find that her January complaint gave the City adequate notice and was timely filed under MCL 691.1404(1), we need not address this issue.

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood

¹ Because we hold that Jakupovic’s notice met all of the requirements of MCL 691.1404(1), we need not to address whether Jakupovic met the substantial compliance standard set forth in *Plunkett*, 286 Mich App at 177.

