CAUSE NO. 08-2-66865-C

Frost National Bank as Guardian of the Estate of Melann Tinning and Guardian of the Estates of Michael Tinning and Andrea Tinning, Minors,	§	VICTORIA COUNTY, TEXAS
Plaintiff,	§	
v.	§	267th JUDICIAL DISTRICT
Hunter Industries, Ltd., The State of Texas Department of Transportation, United Rentals Highway Technologies, LP, And Highway Technologies, Inc.,	§	
Defendants.	§	JURY REQUESTED

PLAINTIFF'S SPECIAL MOTION IN LIMINE TO PROHIBIT TESTIMONY AT VARIANCE WITH UNAMBIGUOUS CONTRACT PROVISIONS

TO THE HONORABLE STATE DISTRICT JUDGE:

As required by statute and as authorized under the Court's inherent power, the Plaintiff respectfully submits this motion for construction of the contractual obligations found in the contract signed and agreed to by TxDOT and Hunter. In addition, the Plaintiff requests that the Court render an *in limine* order pertaining to the contract's clear and unambiguous terms. In the text below, we will discuss *first* the rules of contract interpretation, and *second* the contract's specific requirements and why attempts to vary the contract's terms are impermissible.

SUMMARY OF ARGUMENT

In this lawsuit brought by the Guardian of a quadriplegic, the Plaintiff alleges that TxDOT and its contractor, Hunter Industries, violated specific provisions of a highway construction contract. The Contract was violated in at least five areas: (1) no timely backfilling was done of pavement edge drop-offs; (2) no edge line channelizing devices were placed as required; (3) warning signs were incorrectly spaced; (4) required pavement markings were not present; and (5) the highway design was improperly altered. Hunter may not be held liable if it was in compliance ßwith these Contract provisions. TEX. CIV. PRAC. & REM. CODE § 97.002. Therefore, specific provisions of the Contract play a part in determining the final outcome of the case, and the jury may be called on to decide compliance with the Contract documents. It is for the Court, however, to determine whether the Contract is unambiguous and its legal meaning.

The language of this Contract is undisputed. Moreover, it is undisputed that the Contract was not amended or altered in any way with respect to the provisions at issue. The undisputed evidence further is that under the Contract, the failure of TxDOT or its employees to enforce the Contract does not relieve Hunter of its contractual performance obligations. Further, there is no pleading or evidence that (1) the Contract's language is ambiguous, or (2) the violations of the Contract were legally excused or waived. Accordingly, Defendants should be precluded from offering any evidence tending to show or claim amendment, waiver, or other excuse for their violation of the Contract's unambiguous terms.

I. <u>The Law</u>: Contracts Must Be Construed As Written, Giving Effect to the Language Agreed to in the Contract.

> This Court's objective in construing written language is to give effect to the intent expressed in that language by the person or persons who wrote it or who agreed to be bound by it. That is true of constitutional provisions, statutes, agency rules and regulations, deeds, contracts, and wills, and other such writings . . . . When we construe a contract or deed, we say what the parties intended by the language they agreed to . . . . The chosen words may not be clear, or their application in the present context may not have been anticipated or fully appreciated when they were written. A court must be careful not to substitute its own view of what should have been intended for what *was* intended.

Lane Bank Equip. Co. v. Smith Southern Equip., Inc., 10 S.W.3d 308, 321 (Tex. 2000) (Hecht, J. concurring). The Court's consistent focus is the language; in fact, the Contract's language is the best evidence, and the only permissible evidence, of what the parties intended by their agreement.

In the discussion that follows, we turn to well-known rules for construing the words of a contract. Next, we examine how changes to *this* Contract could be made, again by looking at the words on the pages of the Contract documents. Finally, we discuss impermissible means, such as parol evidence, for varying a contract's language and meaning. No amount of after-the-fact wiggling by TxDOT or Hunter can change the meaning of the words agreed to in the Contract. "When a court concludes that contract language can be given a certain or definite meaning, then the language is not ambiguous, and the court is obligated to interpret the contract as a matter of law." *DeWitt County Elec. Co-op, Inc. v. Parks*, 1 S.W.3d 96,100 (Tex. 1999).

A. Courts should give effect to all contract provisions.

"The primary concern of a court in construing a written contract is to ascertain the true intent of the parties as expressed in the instrument." *National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995); *accord Seagull Energy E&P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 345 (Tex. 2006); *Gulf Ins. Co. v. Burns Motors, Inc.*, 22 S.W.3d 417, 423 (Tex. 2000). "To achieve this objective, courts should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless." *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005). "Contract terms are given their plain, ordinary, and generally accepted meanings unless the contract itself shows them to be used in a technical or different sense." *Id.* The court "presume[s] that the parties to a contract intend every clause to have some effect." *Heritage Resources, Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). Consequently, the court "give[s] effect to all the contract's provisions so that none are rendered meaningless." *Stine v. Stewart*, 80 S.W.3d 586, 589 (Tex. 2002).

Under these rules, it would be impermissible for Hunter or TxDOT to slice and dice the Contract provisions into pieces. All provisions must be given effect, and the whole contract and all its provisions must have their commonly understood meaning.

B. Lack of clarity does not render an agreement unenforceable.

Lack of clarity does not create an ambiguity nor does it negate the court's responsibility to interpret the parties' agreement. *Universal Health Servs., Inc. v. Renaissance Women's Group, P.A.*, 121 S.W.3d 742, 746 (Tex. 2003); *XCO Prod. Co. v. Jamison*, 194 S.W.3d 622, 627 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). Moreover, "a court should construe a contract from a utilitarian standpoint, bearing in mind the particular business activity sought to be served." *Frost Nat'l Bank v. L&F Distrib., Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005); *Lenape Resources Corp. v. Tennessee Gas Pipeline Co.*, 925 S.W.2d 565, 574 (Tex. 1996). Thus, even a claimed lack of clarity is unimportant if the contract's terms are clear and unambiguous.

"Absent fraud, misrepresentation, or deceit, a party is bound by the terms of the contract he signed, regardless of whether he read it or thought it has different terms." *In re McKinney*, 167 S.W.3d 833, 835 (Tex. 2005). *See also UBS Financial Servs., Inc. v. Branton*, 241 S.W.3d 179, 189 (Tex. App.—Fort Worth 2007, no pet.) ("By signing a contract, a party is presumed to have read and understood its contents."); *Sparks v. Booth*, 232 S.W.3d 853, 867 (Tex. App.—Dallas 2007, no pet.) ("As a general rule, every person having the capacity to enter into contracts, in the absence of fraud, misrepresentation, or concealment, must be held to have known what words were used in the contract and to have known their meaning, and he must also be held to have known and fully comprehend the legal

effect of the contract."); *In re Border Steel, Inc.*, 229 S.W.3d 825, 834 (Tex. App.—El Paso 2007, orig. proceeding) ("One who signs a contract is legally held to have known what words were used in the contract, to have understood their meaning, and to have comprehended the legal effect of the contract.").

C. Parol evidence cannot be used to vary or contradict the meaning of a contract's terms.

A party's subjective contract interpretation—such as Mr. Bena's after-the-fact interpretation of the Contract—is irrelevant. Indeed, this parol evidence concept is even reflected in TxDOT's own contract administration handbook, which states that "[t]he contract requirements prevail even though the contractor may claim that the other methods will result in equally good or better results." *Construction Contract Administration Manual* (Oct. 2007) at 5-2. The Court may not consider extrinsic evidence to contradict or to vary the meaning of unambiguous language in a written contract in order to create an ambiguity. *See Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 747 (Tex. 2006). Of course, here the Contract itself is unambiguous, and it prohibits oral changes to the documents, as we discuss below in section II.

The parol evidence rule "is particularly applicable when the written contract contains a recital that it contains the entire agreement between the parties or a similarly-worded merger provision." *Baroid Equip., Inc. v. Odeco Drilling, Inc.*, 184 S.W.3d 1, 13 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). The TxDOT/Hunter contract includes a merger provision which states:

> It is acknowledged and agreed by the parties hereto that this contract is the full and complete contract for the performance of the work called for and described herein.

Contract No. 03073219 at Hunter 309. The Court should give effect to this provision and prohibit belated attempts by Hunter or TxDOT to vary the contract's terms by parol evidence. Examples of such possible variations are in section II.

D. This very contract has rules about changes that prohibit *ex post facto* amendments to the Contract.

The Contract requires that any changes to its provisions be recorded in writing. Changes can be made by change order. (It is undisputed that the one change order made to this Contract is not material to this case.) Otherwise, the Contract requires the Contractor to "obtain approval before deviating from the plans and approved working drawings." (Contract Standard Specifications § 5.3, page 33) Direction or approval is ordinarily to be issued in writing; if issued verbally, verbal direction or approval must be documented in writing. *See Construction Contract Administration Manual,* Chapter 5 – Control of the Work, Section 1 – Project Authority, page 5.2. In response to discovery, both TxDOT and Hunter have denied any verbal instructions on the contract provisions involved in this dispute and have denied any written documentation of any such instructions. *See* TxDOT/Hunter's responses to Plaintiff Michael Tinning's Third Set of Written Interrogatories and First Set of Requests for Production and Requests for Admission, Interrogatory 1, Request for Production 1.

The Contract contains further specific requirements for changes to the Traffic Control Plan (the "TCP"), also requiring that they be recorded in writing. *See* Contract No. 03073219 at Hunter 169 ("The Contractor may propose changes to the TCP that are signed and sealed by a licensed professional engineer for approval. The Engineer may develop, sign and seal Contractor proposed changes."); Standard Specifications for Construction and Maintenance of Highways, Streets, and Bridges at § 7.9 ("The Engineer may authorize or direct in writing the removal or relocation of project limit advance warning signs."). This writing requirement is confirmed by the manual. "Document changes to the TCP shown in the plans prior to or immediately after implementing the changes. Document changes that alter the original TCP or make changes that increase or decrease sign or design traffic control requirements." *Construction Contract Administration Manual* (Oct. 2007) at 4-6.

The Traffic Control Plan was described as a "critical" part of the Contract's requirements, and it could not be altered without review by a District committee and written approval:

> The Contractor is fully responsible for traffic control and TxDOT's role will be to ensure the Traffic Control Plan is properly implemented. This is a vital phase of the contract. Strict compliance will be enforced under the terms of the contract, and the Contractor must correct deficiencies as soon as possible.

* * * * *

> All changes to the established traffic control plan must be reviewed by the District Safety Review Team and

> will be evaluated to assure proper traffic handling and for conformance with the TMUTCD.

Preconstruction Meeting Records, May 4, 2007, p. 19.

Hunter never made any request to change, modify, or waive any provision of the TCP, and there is no evidence that any such written change was ever recorded. *See* Bena Depo. (3/09/09) at 17 (Q: "Now I know that the contractor has the right to request that the traffic control plan be changed or modified or provisions of it might be waived in some cases. Did they ever make any such a request that came to you?" A: "No, sir.").

A contractor is obligated to "ensure the safety and convenience of the public and property . . . ." Standard Specifications for Construction and Maintenance of Highways, Streets, and Bridges at § 7.9. All three of the contract rules described above—the Court interprets the agreement, parol evidence is excluded, and changes to the TCP must be in writing—serve the same purpose. A party should not be allowed to create a *post hoc* justification for its negligence by simply redefining the contract or creating a phantom, unwritten contract term. Testimony or evidence to that effect is inadmissible and should be excluded.

II. <u>The Facts:</u> Specific Contract Requirements Cannot Be Changed During Trial by a Defendant's Testimony.

This case revolves around Ms. Tinning's encounter with a "pavement edge drop-off" created by Hunter during its work repaving the highway. The process of repaving the highway involves installing several layers of asphalt pavement totaling about three inches in thickness. The process results in leaving a drop-off

along the pavement edge which is well-known in the industry to be potentially dangerous to motorists if a vehicle wheel drops off the pavement.

A. The Contract's Backfilling Requirements Are Unambiguous, But Hunter Failed to Comply.

1. The Contract requires backfilling of pavement edges on the same day resurfacing is performed.

The Contract specifically required Hunter to eliminate the drop-off. The pertinent contract language, provided in specification item 134, is as follows:

> *BACKFILL, PROCESS (INCLUDING SPRINKLING), GRADE AND COMPACT THE PAVEMENT EDGES ON THE SAME DAY THAT THE ACP IS PLACED (SURFACE OR LEVEL-UP COURSES)*. PLACE CHANNELIZING DEVICES IN ACCORDANCE WITH THE BARRICADE AND CONSTRUCTIONS STANDARDS IF THE BACKFILL MATERIAL IS NOT IN PLACE BY THE END OF THE DAY. PLACE PAVEMENT DROP-OFF SIGNS AT INTERVALS NOT TO EXCEED TWO MILES OR AS DIRECTED.

Contract at Hunter 120 (emphasis added). The term "ACP" refers to "*A*sphaltic *C*oncrete *P*avement." The "level-up course" of pavement refers to a roughly one-inch-thick layer of pavement which was laid at this location in approximately June, 2007. The reference to the "surface course" refers to the final layer of pavement, which was laid on September 27.

This paragraph provides two coordinated directives. The first requirement is that Hunter backfill the area to eliminate the dangerous edge condition. But this did not happen. It is undisputed that Hunter did not backfill the pavement edges

after placing the level-up course; Hunter left the level-up pavement edges without backfill for the several months until September 27. It is undisputed that Hunter did not backfill after placing the surface course either. After laying the surface course, Hunter also did nothing to backfill the pavement edge until October 10 (after the crash on October 7), when it "dumped" backfill material in the locality. The backfill material was not actually compacted, leveled and finally installed until October 23, 2007.

2. Hunter could have backfilled on the same day, but it chose not to do so until later.

Roland Nuñez, Hunter's project director, testified that Hunter could have placed the backfill at the end of the day on September 25:

> Q. Now on September 25, at the end of the day, Hunter, under the contract, **could** have put the backfill material in place. Correct?
>
> A. That is correct.
>
> Q. And, in fact, the contract says grade and compact the pavement edges on the same day that the ACP is placed, correct?
>
> A. That's correct.
>
> Q. Hunter **chose** not to do that, correct?
>
> A. Correct.

Nuñez Depo. (8/7/2008) at 80 (emphasis added).

Hunter may attempt to offer testimony that the State Highway Department somehow accepted their channelizing in lieu of backfill. But this testimony is irrelevant and inadmissible. The Court, and not Hunter or Mr. Bena, is the arbiter

of the meaning of specification 134. Specification 134's directive—to backfill immediately—is not ambiguous, and there is no need for parol evidence to "explain" the contract.

Moreover, Hunter's proposed interpretation of the contract would render the requirement to backfill "on the same day" irrelevant. The Court should examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless." *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005). "The court "presume[s] that the parties to a contract intend every clause to have some effect." *Heritage Resources, Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). Consequently, the court interprets the contract so as to "give effect to all the contract's provisions so that none are rendered meaningless." *Stine v. Stewart*, 80 S.W.3d 586, 589 (Tex. 2002).

B. The placement of "Channelizing Devices" is precisely specified in the Contract, but Hunter failed to comply with the Contract.

Hunter may offer testimony that its conduct was somehow approved or accepted by TXDOT, despite the fact that its work did not comply with the terms of its contract and despite the fact that there is no written documentation to support its claim that contract deviations were approved. This testimony should be excluded before it misleads the jury and violates the Court's prerogative to interpret the Contract.

1. The written requirements say that "Channelizing Devices" must be placed along the pavement's edge, near the drop-off.

The second sentence of the backfill requirements reads, in specific terms:

> PLACE CHANNELIZING DEVICES IN ACCORDANCE WITH THE BARRICADE & CONSTRUCTION STANDARDS IF THE BACKFILL MATERIAL IS NOT IN PLACE BY THE END OF THE DAY.

Contract Specification Item 134, SHEET 10.

Various documents allow the use of any one of three types of "channelizing devices": drums, vertical panels, or "edgeline channelizing devices" (ECD). It is undisputed that Hunter elected to use Edgeline Channelizing Devices. These ECDs are to be used in one specific way, which is called out on Sheet 73 of the Contract, a part of the Barricade & Construction Standards, which in turn is a part of the Traffic Control Plan:

> This device is intended only for use in place of a vertical panel to channelize traffic by indicating the edge of the travel lane.

The clear meaning of this plain language means that the device must be placed so as to indicate the edge of the travel lane. This understanding is reinforced by other documents, including the *Roadway Design Manual*, Appendix B, incorporated by reference in the Contract, which specifically deals with drop-offs, and includes a diagram showing a "warning device" placed on the pavement between the edgeline and the drop-off. Further, the *Texas Manual on Uniform Traffic Control Devices* (TMUTCD), also incorporated by reference in the Contract, similarly

provides in section 6F.67A: "This device is intended to channelize traffic by indicating the edge of the travel way. . . . They are also used to channelize vehicular traffic away from . . . pavement drop-offs."

2. Hunter and TxDOT failed to comply with the written terms of their Contract.

Consider a typical roadway. On the left hand side of the left lane, there is a lane line marker which shows drivers the edge of the travel lane:

When the roadway is under construction, this painted line may not be present. During construction, the parties' contract mandates the use of an edge channelizing device in lieu of the painted line.

The TxDOT *Roadway Design Manual* specifies that the device be placed between the drop-off and the traffic. In a high speed area, the goal is to place the device two feet from the drop-off so that there is no risk that drivers actually come into contact with the dangerous road edge:

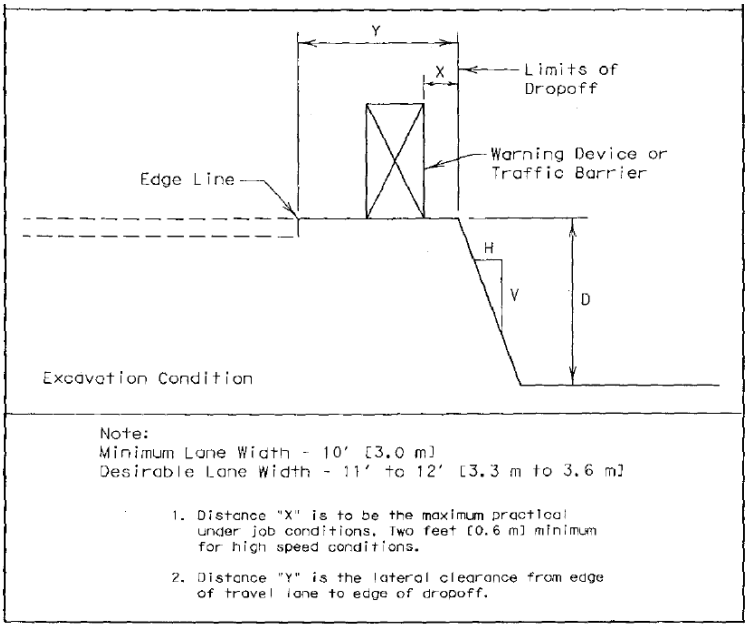


Figure B-1. Definition of Terms.

Roadway Design Manual at Figure B-1. So what would this look like in practice?

Here is a computer-generated depiction of a properly installed ECD:

A driver would know to stay inside the cones, far away from the road's edge. Unfortunately, Hunter did not follow the contractual mandates. Instead, Hunter put up an edgeline channelizing device that looked like this:

The cones are beyond the roadside edge in direct violation of the TxDOT/Hunter contract. This is akin to putting a sign at the bottom of a gorge that says "don't jump off the cliff." By the time you're at the bottom of the gorge, it is just a bit too late for the warning.

Hunter may attempt to offer testimony from TxDOT or Hunter employees that its deficient work was accepted by the State. But this testimony should be excluded. There is no basis for varying the plain language of the TxDOT/Hunter agreement, which provides that channelizing devices must be inside the dangerous slope, not outside on the grass. Moreover, there is no written change to the Traffic Control Plan to back up the claim of State approval—and the TCP cannot be

modified without written documentation. Finally, TxDOT's Randy Bena acknowledged that Hunter's edgeline placement is not supported by the contract:

> Q: "[T]his device is intended to be used to channelize traffic by indicating the edge of the travel way. Did I read that correctly?
>
> A. Yes.
>
> Q. And the edge of the travel way would be the edge of the lane your're traveling, correct?
>
> A. Yes.
>
> * * * *
>
> Q. Where is it stated or written that the location of an edge line channelizing device used to indicate a drop-off, as you've stated it, is to be place outside the edge of the drop-off?
>
> A. I don't think it shows that or states that anywhere.

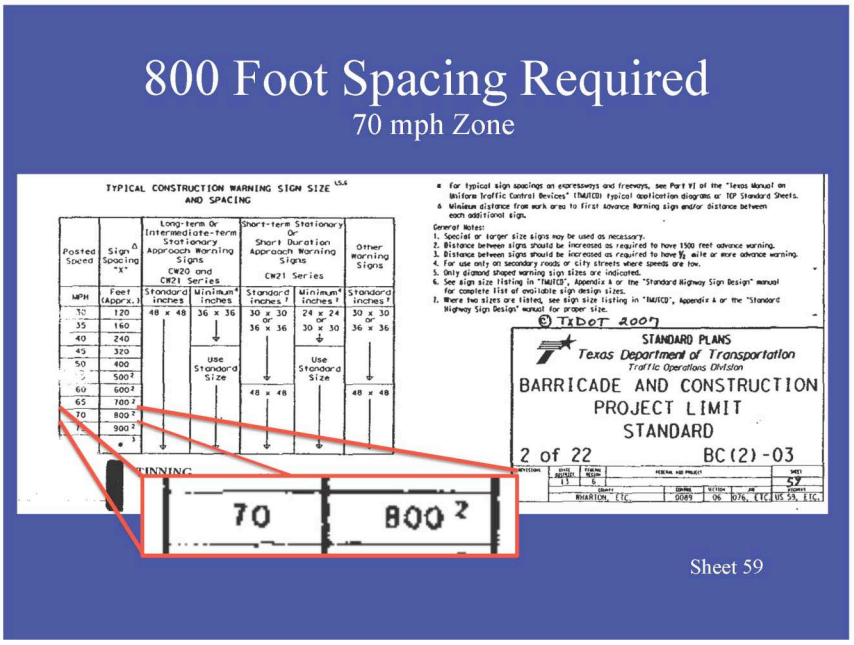
Bena Depo. (8/18/08) at 48-49.

C. The Contract Requires Specific Warning-Sign Placement Locations, But Hunter Disregarded Those Requirements.

Plaintiffs also anticipate that Hunter will offer testimony from TxDOT personnel that the State accepted Hunter's deficient warning sign placement. But this testimony should be excluded as well because it varies from the Contract's clear and unambiguous terms.

When a vehicle is moving at 70 miles per hour, it takes time for the driver to appreciate and read warning signs. If signs are spaced too close together, they are not readable. *See* Bena Depo. (3/09/09) at 26, 41. This spacing requirement is

based on scientific studies, *id.* at 27, and has been a standard in the industry for "quite a few years." *Id.* at 42. Thus, the TxDOT/Hunter contract and Traffic Control Plan specify exactly how far apart signs should be placed on a highway:



Contract at Hunter 170. It is undisputed that Hunter did not did not comply. Instead of 800 feet, Hunter spaced its signs approximately 120 feet apart, making its sign placement distances 85% less than the Contract mandates.

Hunter took it upon itself to ignore the contract, the science, and the safety of the driving public without so much as consulting TxDOT, let alone obtaining a written variance of the Traffic Control Plan:

> Q. Would it be correct that the spacing of those signs did not comply with the requirements of the traffic control plan?
>
> A. The spacing . . . did not match what was on the barricade standard that we just looked at earlier in spacing of 800 feet between the signs. It didn't match that.
>
> Q. Okay. And there have been no contract change or no variance granted by you or your office, right?
>
> A. That's correct.
>
> * * * *
>
> Q. And they did that without prior checking and getting approval from TxDOT, right?

A. Yes.

Bena Depo. (03/09/09) at 30, 37,

Hunter's decision to space the signs 120 feet apart, rather than 800 feet apart, is a breach of the Traffic Control Plan. Hunter may argue that, regardless of any contract requirement, TxDOT accepted Hunter's defective sign spacing. But this argument and testimony are irrelevant. The contractual requirement of 800 feet is unambiguous. Parol evidence is neither necessary nor appropriate to explain this contractual requirement. And there is no written change of the Traffic Control Plan. Absent some written change to the TCP, accepted by both TxDOT and Hunter, the contract's terms and requirements control. Testimony to the contrary is inadmissible as contradicting the Contract's terms. Such contradictory testimony that deviates from the Contract should be excluded.

D. The Contract Requires Longitudinal Pavement Markings to Be Installed Before Opening to Traffic and Permanent Pavement Markings to Be Placed As Soon As Weather Permits, But Hunter Disregarded Those Requirements.

The Standard Specifications, "Work Zone Pavement Markings," Item 662.3, require:

> Install longitudinal markings [striping] on pavement surfaces before opening to traffic. . . .

The Contract itself, at note 5 on Sheet 90, includes the requirement that

> "Permanent pavement markings shall be placed as soon as weather permits."

Hunter disregarded these requirements. If followed, these provisions require the placement of a yellow edgeline marking the division between the main travel lane and the shoulder, and a broken white lane divider line marking the division between the two main travel lanes, as well as a white edgeline marking the division between the right hand travel lane and the shoulder. This was not done by Hunter after placement of the surface course of pavement. Instead, Hunter placed "short term" pavement markings consisting of white plasticized tabs grouped in groups of three one foot to the left of where the lane divider stripes would ultimately be installed; the short-term pavement markings did not include an edgeline to mark the left edge of the main travel lane and divide it from the shoulder. Plaintiff claims that the absence of longitudinal markings probably contributed to Ms. Tinning's vehicle dropping off the shoulder edge.

Plaintiff anticipates that Hunter will offer testimony from TxDOT personnel that the State was satisfied with Hunter's leaving the "short term" pavement markings in place from the date the surface course was installed on September 25, 2007, until the date permanent markings were installed on October 17, 2007, a period of 19 days. The TxDOT definition of "short term" is limited to 12 hours, not including nighttime. *See Roadway Design Manual,* Appendix B, page 1, and *Texas Uniform Manual on Traffic Control Devices*, § 6G.02. The Standard Specifications limit the use of short term markings in lieu of longitudinal markings to situations where standard markings *cannot* be placed before opening to traffic:

> Short term markings will be allowed when standard markings (removable or non-removable) cannot be placed before opening to traffic, if shown on the plans or directed.

Standard Specifications, Item 662.3. Even when short term markings are allowed temporarily, the Contract itself requires:

> Permanent pavement markings shall be placed as soon as weather permits.

Contract, Note 5, Sheet 90.

Hunter's decision to delay the installation of longitudinal markings for 19 days when they could have been installed immediately is a simple breach of the Contract. As discussed in previous sections, whether or not TxDOT personnel enforced the Contract is not the issue. The contractual requirement to place the markings "before opening to traffic" or "as soon as weather permits" is clear and unambiguous. Testimony to the contrary should be excluded.

E. Hunter Improperly Added Additional Slope to the Transverse Profile, Detrimentally Failing to Comply With the Design of the Highway.

TxDOT and Hunter's witnesses have testified that when Hunter laid the northbound roadway it "cheated" or "pinched" the shoulder to reduce the amount of mix laid on the shoulder. (Lerma 26, 74; Svec 33-34). This was done by setting the paving machinery to lay the shoulder to a different transverse slope than the main travel lanes. TxDOT/Hunter's expert, Milburn, have issued a survey report finding the main travel lanes to have a slope at one location (for

example) of about 4.1% while the shoulder has a slope of 6%. This is not in conformity to the plans which require the main travel lanes and the shoulder to have one transverse plane. Contract, Sheet 7.

The Standard Specifications require the Contractor to:

> "furnish materials and perform work in reasonably close conformity with the lines, grades cross-sections, dimensions, details, gradations, physical and chemical characteristics of materials, and other requirements shown in the Contract . . . ."

"Reasonably close conformity" is defined in terms of allowable tolerances. Tolerances for the transverse profile are defined by Standard Specifications Item 585 which allows the transverse profile to vary no more than 1/8" when measured with a 10 ft. straight edge. The difference in slope measured and reported by the defense witnesses amounts to a deviation of over 9/10th in. to over 1.3 in. depending on the measurement technique. Either is far more than the allowable 1/8 in. tolerance.

Both TxDOT and Hunter answered discovery to the effect that TxDOT gave and Hunter received verbal instructions to reduce the thickness of the surface course, and that these verbal transaction are not documented. TxDOT/Hunter's Answers to Plaintiff Michael Tinning's Third Set of Written Interrogatories and First Set of Requests for Production and Requests for Admission, at Interrogatory Number 1(f); Request for Production Number 1(f)). Accordingly, there is no contract change or waiver.

The result of the thinning of the shoulder paving was to change the driving characteristics of the highway at the location in question. The left wheels of Ms. Tinning's vehicle dropped off the pavement edge at a curve on the highway. The pavement included in such curves is somewhat "banked," so that the centrifugal force involved in negotiating the curve will be offset by the force of gravity pulling the vehicle in the other direction; in this case, the force of gravity pulls the vehicle to the left, offsetting centrifugal force to the right. However, when Ms. Tinning's vehicle crossed onto the unmarked, paved shoulder, the thinner nature of the paved shoulder resulted in an increase in the slope of the pavement, which in turn increased the force of gravity, causing the vehicle to drift to its left and off the pavement.

TxDOT/Hunter's witnesses have offered testimony as to the reason for their action. That testimony does not reach the level of a lawful excuse. There is no documented change to the contract. There is no evidence of engineering analysis of the effect of the change or of approval of the change based on any engineering analysis.

Simply stated, the road contractor failed to comply with the design of the highway and failed to comply with its contract.

PRAYER

Plaintiff moves the Court, in advance of the beginning of trial, to consider this motion and to rule as follows:

1. To determine that the Contract provisions at issue are clear and unambiguous;

2. To construe and determine the meaning of each of the unambiguous Contract issues;

3. To exclude all evidence which would attempt to vary the Contract provisions by parol, or which would tend to infer that action contrary to the Contract was proper or authorized.

In accordance with these determinations and rulings, the Court should instruct all Defendants and Third-Party Defendants and their witnesses and attorneys not to refer to, interrogate regarding, or allude directly or indirectly to any of these matters without first advising the Court and all counsel of the basis of admissibility and without first obtaining a ruling by the Court outside the presence and hearing of the jury. Moreover, all counsel should be instructed to advise their witnesses of the contents of this motion so that no witness will inadvertently violate this Court's ruling. The Plaintiff prays for any other relief to which it is entitled on behalf of its wards.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Plaintiff's Motion In Limine To Prohibit Testimony At Variance With Unambiguous Contract Provisions* was forwarded to all attorneys of record by the method indicated below, on this the _____ day of July, 2009, as follows:

Counsel for Hunter Industries, Ltd. and The Texas Department of Transportation
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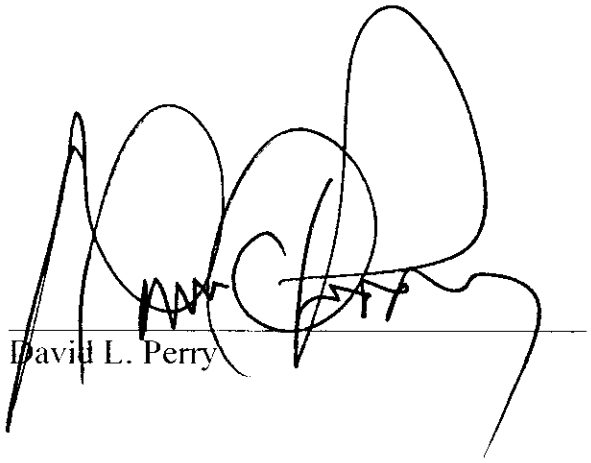

David L. Perry

CAUSE NO. 08-2-66865-C

Frost National Bank as Guardian of the Estate of Melann Tinning and Guardian of the Estates of Michael Tinning and Andrea Tinning, Minors,	§	VICTORIA COUNTY, TEXAS
Plaintiff,	§	
v.	§	267th JUDICIAL DISTRICT
Hunter Industries, Ltd., The State of Texas Department of Transportation, United Rentals Highway Technologies, LP, And Highway Technologies, Inc.,	§	
Defendants.	§	JURY REQUESTED

ORDER RESPECTING PLAINTIFF'S SPECIAL MOTION IN LIMINE TO PROHIBIT TESTIMONY AT VARIANCE WITH UNAMBIGUOUS CONTRACT PROVISIONS

On this day came on to be heard Plaintiff's Special Motion in Limine to Prohibit Testimony at Variance with Unambiguous Contract Provisions. After considering the motion, the evidence, and arguments of counsel, the Court makes the rulings indicated below; with respect to the portions GRANTED below,

THE COURT ORDERS AND INSTRUCTS Defendants and all counsel not to mention, refer to, interrogate concerning, nor attempt to convey to the jury in any manner, either directly or indirectly, any of the matters mentioned below without first obtaining permission of the Court outside the presence and hearing of the jury, and further INSTRUCTS AND ORDERS the Defendants and all counsel

to warn each and every one of their witnesses to strictly follow the same instructions.

IT IS ORDERED, ADJUDGED AND DECREED that:

(A) Backfilling Requirement.

_____ GRANTED. The Court is of the preliminary opinion that the Contract is clear and unambiguous and required Hunter to backfill the pavement edges on the same day that a surface course or level-up course of pavement was placed, and GRANTS the motion in limine to exclude any suggestion that conduct to the contrary was allowed under the Contract, or that failure to follow the Contract was excused.

_____ DENIED.

(B) Channelizing Devices.

_____ GRANTED. The Court is of the preliminary opinion that the edgeline channelizing devices were required to be placed on the pavement indicating the edge of the travel lane, and GRANTS the motion in limine to exclude any suggestion that conduct to the contrary was allowed under the Contract, or that failure to follow the Contract was excused.

_____ DENIED.

(C) Sign Spacing.

_____ GRANTED. The Court is of the preliminary opinion that sign spacing of 800 feet was required, and GRANTS the motion in limine to exclude any suggestion that conduct to the contrary was allowed under the Contract, or that failure to follow the Contract was excused.

_____ DENIED.

(D) Pavement Markings.

_____ GRANTED. The Court is of the preliminary opinion that longitudinal pavement markings were required to be installed before the roadway was opened to traffic and that permanent pavement markings were required to be installed as soon as weather permitted, and GRANTS the motion in limine to exclude any suggestion that conduct to the contrary was allowed under the Contract, or that failure to follow the Contract was excused.

_____ DENIED.

(E) Transverse Profile.

_____ GRANTED. The Court is of the preliminary opinion that the plans called for a uniform transverse profile across the main lanes and shoulder of Highway 77 at the location in question, and GRANTS the motion in limine to exclude any suggestion

that conduct to the contrary was allowed under the Contract, or that failure to follow the Contract was excused.

_____ DENIED.

(F) Other Contract Provisions

_____ GRANTED. The Court is of the preliminary opinion that the Contract prohibits any changes that are not subsequently reduced to writing and that the Traffic Control Plan could not be altered except by the District Safety Review Team. Therefore, the Court GRANTS the motion in limine to exclude any evidence that conduct at variance with Contract terms was authorized, or that failure to follow the Contract was excused.

_____ DENIED.

SIGNED this _____ day of July, 2009.

_____
Judge Presiding