

1 STATE OF SOUTH CAROLINA IN THE COURT of COMMON PLEAS
2 COUNTY OF AIKEN CASE NO.2018-CP0202797

3
4 ELROY FISCHER, ET AL

5 Plaintiff,

6 -vs-

7 SC DEPARTMENT OF TRANSPORTATION

8 Defendant.

TRANSCRIPT OF RECORD

RECEIVED

May 13 2024

SC Court of Appeals

9
10 September 20, 2023

11 Aiken, SC

12 BEFORE:

13 The Honorable Courtney Clyburn-Pope, Judge.

14

15 APPEARANCES:

16 Tucker S. Player

17 Attorney for Plaintiff

18

19 Clarke W. McCants, III

20 Attorney for Defendant

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23 Emily H. Walker, CVR

24 Court Reporter

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1 Day 1 of Fischer v SC DOT

2 THE COURT: Good morning.

3 ALL: Good morning.

4 THE COURT: So we have case number
5 2018 CP 02-2797. That is Elroy Fischer versus the
6 Department of Transportation. All right. So
7 Mr. Player and Mr. McCants?

8 MR. PLAYER: Yes, ma'am.

9 MR. MCCANTS: Yes, ma'am. And you have got the
10 Fourth with you, too, also. He's technically counsel
11 of record. He's here with you today.

12 THE COURT: All right. Very good. All right,
13 gentlemen. So this is a non-jury matter. Mr. Player,
14 do we -- do you have any pretrial or any documents that
15 you want to present to me prior to us beginning?

16 MR. PLAYER: I mean, I think we've agreed on
17 exhibits. It's just going to be pictures. I think
18 Clarke might have one outstanding motion to be heard.
19 It's a motion for summary judgment based on the
20 release.

21 MR. MCCANTS: We're not going to pursue that, Your
22 Honor. Let's just take the evidence --

23 THE COURT: Okay.

24 MR. MCCANTS: -- and move on.

25 THE COURT: All right. Okay.

1 MR. PLAYER: I don't think that (unintelligible).

2 MR. MCCANTS: You may see from the file that
3 Mr. Jim Nance was previously on the file. There was a
4 motion for summary judgment filed (unintelligible) but
5 Judge Newman denied it. And I put that in that brief
6 that I believe I sent to you. I don't think we have to
7 move for summary judgment on those issues.

8 MR. PLAYER: I thought you did, but if you didn't
9 --

10 MR. MCCANTS: I don't think I did. But even if I
11 did, Your Honor, I'm sure I was able to see it was
12 non-jury and let you decide based on what you hear.

13 THE COURT: All right. Very good. All right. We
14 will proceed.

15 MR. PLAYER: And, Your Honor, I'll just, kind of,
16 hand you the exhibits. And the ones we have are
17 basically pictures that I printed out. I think -- I'm
18 not putting -- and just maybe a brief discussion about
19 the parameters of exactly what we are doing, and make
20 sure that Clarke and I are on the same page because he
21 handed me appraisals this morning. I printed out
22 appraisals but the damages are not an issue.

23 MR. MCCANTS: If you are talking about
24 Mr. Saunder's 2005 appraisal, I'm not asking him to
25 testify to its value, just what he incurred and the

1 other (inaudible). Is that what you're asking?

2 MR. PLAYER: So, oh, got you. All right.

3 MR. MCCANTS: I've got to be here.

4 MR. PLAYER: I wanted to make sure that's what
5 that was because I (inaudible). I wasn't going to
6 touch on any monetary values.

7 MR. MCCANTS: I agree.

8 MR. PLAYER: Okay. I think we're ready to go,
9 Your Honor. Do you want opening statements or do you
10 just want to get rolling?

11 THE COURT: You know, it's at your pleasure. If
12 you prepared opening statements we can go into that
13 but, you know, it's a little different when we're doing
14 without a jury. It's up to you though.

15 MR. PLAYER: I think it helps set the stage
16 because there will be some complicated engineering
17 testimony in this case. Basically, this case is the
18 inverse condemnation where we -- that the DOT has been
19 sending us too much water, too much water. But more
20 importantly at a speed, a damaging speed, that has been
21 steadily eroding our property for ten years.

22 I know when we get to (inaudible) we're going to
23 get into a lot of legal issues and I won't go into
24 those now, but we tried the case in front of a jury
25 six years ago. And in that case the DOT did not

1 request a bifurcation. We took the entire issue to the
2 jury, and the jury found that this outfall, that is
3 directly adjacent to my client's property, was a taking
4 3000 feet away.

5 And when you see the videos you'll understand. It
6 is a dangerous amount of water that is being directed
7 through a very narrow space of my client's, and it's
8 washing their land away. There's no better example of
9 a taking than that.

10 Now what Clarke's wanting me to do is blame the
11 construction of 520 so he can bring the release into
12 play to try to cut the legs out from under me. I'm
13 ready for that argument, but it is an issue that we'll
14 have to address from a legal standpoint. But my
15 client's testimony, and, I think, the pictures from
16 this appraiser will show there's been erosion on this
17 property. There's no question. And what we would
18 really like is for them to stop.

19 And we have asked, we have asked for the inverse
20 condemnation where we eventually get to a jury for
21 damages. But we've also asked for an injunction. Just
22 stop the water, especially at this one location,
23 because that's where we feel the source of the damages
24 are.

25 So we're going to put up the owners this morning.

1 I anticipate we end before noon and then come back and
2 put my engineer up first thing this afternoon. And I
3 think I'm turning the case over to Clarke by 3 o'clock
4 this afternoon.

5 We can either start his case today or do it
6 tomorrow. I'm not sure how long he thinks it will
7 take. I had a hearing on Friday which is now gone. So
8 if we're bleeding into Friday, I'm fine at this point.
9 But I think everybody would like to finish tomorrow.
10 And that will be all I have for opening statements.

11 THE COURT: All right. Mr. McCants.

12 MR. MCCANTS: Thank you, Judge. For purposes of
13 planning, I have no objection to Tucker's plan as far
14 as presentation of evidence. And I would note I have a
15 personal matter, a church meeting, at five today.
16 Although I told them I may not be able to make it if
17 anything new develops. (inaudible) I would appreciate
18 it. But I anticipate the layout just as he gave it to
19 you.

20 Judge, from the stand -- the standpoint of
21 background, I'm the lawyer for DOT. I'm sure you have
22 read my brief, but I'm trying to lay out the history of
23 this matter. And, in addition to this matter, history
24 of what's known as Palmetto Parkway, which I'm sure you
25 are familiar with. Many of us travel it on a regular

1 basis.

2 I have outlined for you how we got from that point
3 in the early 2000s to where we are today. Now I will
4 note up front, Mr. Player makes reference to a prior
5 case. I trust you understand that's not binding in any
6 regard for these parties, at least from -- the
7 Plaintiffs' standpoint is completely different. And
8 what you will learn is the facts in this case are very
9 different from what Mr. Player describes to you in
10 terms of the relationship between those two cases.

11 I'll start with the proposition that in the
12 mid-2000s, in conjunction with the construction of the
13 Palmetto Parkway, it was necessary for the DOT to
14 acquire some land from these landowners, which we did.
15 I should mention this is Bobby Usry. He's an engineer
16 with the DOT; he's with me today. We'll have some
17 testimony from him and some others from DOT.

18 But you'll see documents to the effect that the
19 State paid over a half million dollars to the
20 landowners, the owners of this property, back in 2006
21 for the acquisition. And probably one of the most
22 important things about that, and we'll have testimony
23 in this regards, is that the landowners at this point
24 were represented by Keith Badcock, a lawyer from
25 Columbia.

1 I don't know if you're familiar with him or his
2 firm, but he is a premier eminent domain condemnation
3 attorney, and he represented these folks zealously and
4 vigorously to the point where they received a very full
5 and adequate settlement for the land we acquired,
6 some-odd 25 acres back in the day, back when we were
7 building this project and whatnot.

8 So there's going to be an issue with regard to the
9 payment of that money, and whether or not these
10 landowners released all their claims to that point in
11 time, as well as any damages they may have sustained or
12 will sustain in the future, due to any issues related
13 to that construction of the Palmetto Parkway.

14 And that's important, Your Honor. Because I --
15 Mr. Player's already recognized, and I appreciate this.
16 That this area that we're going to be talking about in
17 this trial has been subject to intrusion of not only
18 water, but significant volumes and speed of water for a
19 long time. And, Judge, when I say a long time, I'm
20 going to tell you before, I think, many of us maybe
21 have even walked the earth, if you know what I mean.

22 I'm going to show this topo map as part of the
23 evidence in this case. And this is an old map from the
24 early fifties, which my experts and the DOT people will
25 tell you shows what they call a blue-line stream

1 running down this area into their property. And a
2 blue-line stream is often recognized, not only as a
3 stream or a path of water which is intermittent, but
4 also during heavy rainfalls and during rains does carry
5 significant amounts of water through the property.

6 Now our position in this case from an inverse
7 condemnation standpoint is that Mr. Player has got to
8 show those elements I outlined in my brief. He's got
9 to show this act on behalf of DOT, which constitutes
10 not a direct acquisition through a condemnation case
11 but an inverse acquisition, or taking. And that's the
12 key to this case.

13 And our position, we did nothing to this property
14 by virtue of the construction of the Parkway with
15 regard to the water that's coming onto that property
16 that has not existed forever. In other words, the
17 water has been flowing through there for a long, long
18 time.

19 To the point, Your Honor, you are going to hear
20 testimony that the landowners in the mid-'80s
21 undertook to develop this property, and we've got the
22 development plan we'll show you and whatnot. And one
23 of the keys of this case is these. These are
24 reinforced concrete pipes. They're 72 inches in
25 diameter. You are probably wondering what that stick

1 is in the culvert, or that pole. That's 72 inches.
2 I'm 6' 4". That's 72 inches, six feet. But somebody
3 invested a lot of effort and a lot of money in this
4 land to develop it, and most importantly, control the
5 water. This is mid-80s, Your Honor.

6 And the evidence is going to show that the plan
7 was developed but stalled. It stopped. And the reason
8 that it stopped, Your Honor, is because the facility
9 known as Charter Terminal. I don't know if you're
10 familiar with Charter Terminal, but as you travel
11 towards Augusta on I-20, if you look to your right,
12 there's these huge tanks sitting in a facility on the
13 side of the road. They contain fuel oil. And back in
14 the '80s, mid-'80s -- I know this, Judge, because I
15 was involved in the case when I first got to Aiken in
16 1990. Someone left a valve open about 3 o'clock in the
17 morning. And they didn't discover it until early the
18 next day when the sun came up. And it had spilled
19 significant amounts of fuel oil across I-20 onto this
20 property (inaudible). We'll talk about that also.
21 That stalled everything. They couldn't build until
22 they cleaned up that spill. So that's going to
23 explain, I think, why the property was not fully
24 developed.

25 In any event, to get to the point that the

1 Palmetto Parkway is built. I know I'm going on. I'm
2 going to try to --

3 THE COURT: No it's -- (inaudible) burden being
4 met.

5 MR. MCCANTS: All right. I'll keep going until
6 you say, Mr. McCants, I got my arms around it. But in
7 any event. The development stalled out, but we will
8 show there was a frame of mind that he had -- we had to
9 deal with the water that Mr. Player complains about and
10 says that has constituted an inverse taking of his
11 client's property.

12 In any event, we get to that 2000, mid-2000 year
13 when the acquisition occurred. We've got Krishjen
14 Auld, he's an expert engineer from Columbia who's going
15 to talk about, at least from our perspective, that any
16 construction activity undertaken by DOT with regards to
17 the construction of Palmetto Parkway did nothing to
18 increase the volume or the velocity of any water that
19 has been traveling through this property for years. I
20 mean, we're talking about before I-20 was built in the
21 early '60s. So from the standpoint of whether or not
22 we have done anything wrong-wise (sic), the evidence
23 just doesn't support it.

24 And you've got to get through that threshold
25 issue, Your Honor, as Mr. Player indicates, to

Franke - Direct by Mr. Player

1 determine whether or not there's been an inverse taking
2 before we get to the issue if that occurred, what
3 amount of compensation they are entitled to for that
4 acquisition. If that makes sense.

5 I think I've laid out our position, Your Honor.
6 We'll have some testimony on all those issues. And if
7 I can't answer your questions for you now, I look
8 forward to working with everyone on this case.

9 THE COURT: All right. Very good. Thank you
10 both, gentlemen.

11 MR. PLAYER: Thank you, Your Honor.

12 THE COURT: Mr. Player.

13 MR. PLAYER: Yes, Your Honor. The plaintiff would
14 call Billy Franke to the stand.

15 THE COURT: All right.

16 THE WITNESS: Is the stand here or --

17 MR. PLAYER: Up there where the microphone is.

18 THE COURT: You've got to go up here.

19 THE WITNESS: Okay.

20 THE COURT: Come here first. She's got to swear
21 you in.

22 THE WITNESS: Oh. I don't do this everyday.

23 THE COURT: It's okay.

24 CLERK: Please place your left hand on the Bible
25 and raise your right hand. Do you solemnly swear the

Franke - Direct by Mr. Player

1 testimony you shall give the Court in this case shall
2 be the truth, the whole truth, and nothing but the
3 truth, so help you God?

4 THE WITNESS: I do.

5 CLERK: Okay. Please take a seat in the witness
6 stand right here. And state your full name for the
7 Court reporter.

8 THE WITNESS: My name is William Frederick Franke,
9 III. I live at 165 Macklin (ph) Lane in North Augusta,
10 South Carolina.

11 COURT REPORTER: Spell your last name, please.

12 THE WITNESS: F-R-A-N-K-E.

13 WILLIAM FREDERICK FRANKE, being first duly sworn,
14 was examined and testified as follows:

15 DIRECT EXAMINATION

16 BY MR. PLAYER

17 Q. Billy, what do you do for a living?

18 A. I'm in the real estate business, is what I'm
19 currently doing. I've got a very well-traveled
20 career doing a lot of different things. All over
21 the state of South Carolina, Tennessee, born in
22 Augusta, educated in forestry management in
23 Alabama. But I'm a third-generation businessman
24 doing what I do. And I've had some of the best
25 teachers. And even though I'm professionally not

Franke - Direct by Mr. Player

1 qualified in many things, I know a lot about many
2 different issues that I've been taught over the
3 years, and I've seen and experienced.

4 Q. Why are you here? What's your relationship to the
5 property that we're discussing today in this case?

6 A. My father was a part of a company called Sherman
7 and Hemstreet, which still exists today, at the
8 time and when we bought this property. I don't
9 have my dates in front of me. I was around,
10 probably at school when this project started. But
11 I was very familiar with the property and the
12 location. And I followed it ever since then as
13 far as what has happened over the years with the
14 property.

15 We are getting a lot of water dumped on us.
16 It's kind of, like, you know, I even pulled a
17 mapping program a couple of nights ago because I
18 just got my curiosity, but the basin of this water
19 is probably in excess of 140 acres worth of water
20 on a very impervious surface out in the
21 interstate. It goes down to one, like,
22 (inaudible) traps and goes down to one pipe --

23 Q. Okay, okay. Let's --

24 A. I'm sorry.

25 Q. You are jumping ahead a little bit.

Franke - Direct by Mr. Player

1 A. Okay. Sorry, sir.

2 Q. Do you have an ownership interest in this
3 property?

4 A. Yes, I do.

5 Q. How did you obtain it?

6 A. I inherited it through my father.

7 Q. Okay. And do you recall the year that that
8 occurred?

9 A. October the 13th, 2007.

10 Q. 2007. What percentage of ownership do you have
11 personally in the property?

12 A. I do not have record of it here, but it's around,
13 me personally, maybe seven or eight percent.

14 Q. Okay. Did you go out to the property and observe
15 it when you obtained your ownership?

16 A. And before.

17 Q. And before. And what did you see when you went
18 out and inspected the property?

19 A. Well, early on it was all very wooded. The roads
20 had been cut in for our development at the time.
21 And, I mean, the history of it, learned the
22 history of the property which Mr. McCants kind of
23 stated some of the issues a little while ago. So
24 I was very well aware of what had happened over
25 the period of time before my ownership, leading up

Franke - Direct by Mr. Player

1 until today.

2 Q. Were you able to observe the area that
3 (inaudible). Let the judge see what we're talking
4 about. I think Clarke's got a much prettier
5 picture and bigger, but this is what we've got.
6 Can you look at that and tell me what that is?

7 A. That is a picture of our property showing the
8 location.

9 Q. What exactly does that show you is the boundaries
10 of your property? The highlighted portion?

11 A. The highlighted portion. Yes.

12 Q. Okay. What is the pin that says 520 outfall?

13 A. That's the location where the water is being
14 directed onto our property from the interchange.

15 Q. Okay. And we'll get to pictures and videos of
16 that.

17 MR. PLAYER: And this will be Plaintiffs' 1. If
18 you'll hand that to Her Honor.

19 THE COURT: Any objection?

20 MR. MCCANTS: No objection.

21 (Whereupon P-1 was entered into evidence.)

22 BY MR. PLAYER

23 Q. And you talked about development plans that were
24 in place, or at least in contemplation, when you
25 first gained your acquisition of the property.

Franke - Direct by Mr. Player

1 What were those plans for?

2 A. A residential subdivision.

3 Q. A residential subdivision. Now Clarke has shown
4 us a picture of pipes. And you've seen these
5 pipes, correct?

6 A. Yes, sir.

7 Q. How long have they been out there?

8 A. They have been out there since my first
9 familiarity with the property after the
10 development had started.

11 Q. Okay. Do you have any idea what they were for?

12 A. No, sir. I have no idea.

13 Q. Okay. Did you see any stormwater plans or
14 hydrology studies on this development when you
15 first got your interest in the property back in
16 2007?

17 A. No, sir. I don't know if there are any or ever
18 were any.

19 Q. So when did the -- there was a gas spill. When
20 did that occur?

21 A. I do have notes in my file folder there. I could
22 give you exact figures if you would like them from
23 that, but I certainly don't have it in memory.

24 Q. Just in general.

25 A. Early '80s.

Franke - Direct by Mr. Player

1 Q. Okay.

2 A. We bought the property, I believe, in '79 and
3 started development not too far after that.

4 Q. Okay. So in '07 what was the status of the
5 development plans for a residential subdivision?
6 Were they in operation? Did you have bids out?

7 A. Well, by that time, because of the spill, we
8 stopped the development on the property. The base
9 was put down on the roads so the roads were ready
10 to be paved. And that's just from the appearance
11 that I have today of what's there now.

12 And needless to say, I -- from what I
13 understand, we had a mortgage on the property.
14 And I think because of the contamination they
15 walked away from it. And we got the property
16 unencumbered. And I think in '96, I think, is
17 when we finally got the letter of no further
18 action from the EPD or DHEC, which at that point
19 we were free and clear. And by then the
20 development that we had started on, because of the
21 washing, and part of it is not related to this,
22 but just overall washing in the area and the
23 overgrowth of the trees, there really wasn't a
24 development anymore.

25 Q. Okay. At some point did you have an issue with

Franke - Direct by Mr. Player

1 the amount of water that you felt was being dumped
2 onto your property (inaudible)? When was the
3 first time that came up?

4 A. December 2010. My father, of course, was deceased
5 at that time. He died in '07. We met with the
6 gentleman that I mentioned to you earlier with
7 DOT, I believe at the property. Up on the down
8 ramp going from 520 on the Palmetto Parkway onto
9 I-20 East where the outlet is, and told him my
10 concerns about it. And this was in 2010. And --

11 Q. What did you tell him? What were your concerns?

12 A. My concerns were it was washing our property
13 pretty excessively.

14 Q. Okay.

15 A. Lots of water was coming through there and we were
16 concerned about it because it was hurting our
17 property.

18 Q. Okay. So you actually saw this area where the
19 outfall was dumping on the border of your
20 property?

21 A. Yes.

22 Q. In 2010?

23 A. Yes.

24 Q. Is there more or less of your property now than
25 there was in 2010?

Franke - Direct by Mr. Player

1 A. Oh, absolutely less.

2 Q. Okay. Why is that?

3 A. The washing of the water. The water has washed
4 away our ground, undermined our trees, and,
5 basically in my opinion, because of the full
6 disclosure that I'm required to make as far as a
7 real estate broker, it affects the property and it
8 has to be disclosed to anybody who wants to buy
9 it. So basically it's been unsellable.

10 Q. Have you tried to sell it?

11 A. Oh, yes.

12 Q. How long would you say, not maybe specifically on
13 the market, but how many years have you been
14 trying to sell the property?

15 A. Probably 15 or 16. And, of course, when I really
16 got started with it we were going through that bad
17 time in 2000-2008. And then, of course, the DOT
18 did their project and the water came on us, so
19 it's kind of affected us since 2007. I guess,
20 partly because of the economy, and then with the
21 situation with the stormwater.

22 Q. So what happened? What did DOT do when you voiced
23 your concerns in 2010?

24 A. At that meeting they said that they would -- I
25 believe the correct word -- I'm not an engineer,

Franke - Direct by Mr. Player

1 but they would put some kind of concrete weir
2 there. Like, they would put some rocks across the
3 front on their property right where their property
4 joins our property to -- at the time I thought it
5 was going to be like a retention pond, but I guess
6 it's strictly hindsight now, it's, basically, they
7 were putting it there to slow down the water --
8 the speed of the water. And, of course, within a
9 matter of a couple of storms it was so strong it
10 blew the rocks out and it's totally wide-open now.

11 Q. Okay. And according to your observations how long
12 has it been like that?

13 A. Since 2010.

14 Q. What did you do to investigate the stormwater
15 system over there at the 520 outfall?

16 A. I tried to -- too much information, but to make me
17 feel good about how I look at things I try to
18 check everything out very thoroughly to, kind of,
19 come up with my own opinion regardless of whether
20 an engineer or attorney or whoever tells me.
21 Because I like to get a feel for it myself. But I
22 tracked where all of those pipes went to, and the
23 model weir traps which -- where the water comes
24 from the ground into those pipes goes.

25 And in that area, the 130 acres or so,

Franke - Direct by Mr. Player

1 there's, like, 11 weir traps that at some point
2 all go into this one big pipe where, before we
3 sold our property to DOT, there was a 24-inch pipe
4 which came all the way from the other side of
5 I-20. I think it was called Laurel Lake Road
6 where the Charter Terminal is, which is the same
7 pipe that all the contamination went through. But
8 there was a 24-inch pipe. I don't think it picked
9 up any water from the interstate. It just
10 strictly diverted it from a ditch on the other
11 side of the interstate. And now we have a 24-inch
12 pipe and a 52-inch pipe.

13 And as Mr. McCants was talking about the size
14 of the pipes out there, the pipes they have got up
15 there now is a 24-inch and a 52-inch pipe. So if
16 you have got a 52-inch pipe, basically the size of
17 something you can walk through, common sense just
18 tells me that we've got an issue. Because all
19 these pipes are being geared toward that one
20 location and dumping this water in this one
21 direction.

22 Q. Look at that document that I put up on the board
23 and see if you can tell me what that is.

24 A. That's my drawings of -- approximate drawings,
25 un-engineered (sic) obviously, but my drawings

Franke - Direct by Mr. Player

1 based on aerial photograph, observations, and
2 tracing the pipes to see where these weir traps
3 are located, and where the directional water was
4 coming from before it gets to our property through
5 the interchange.

6 Q. And did you actually go in the pipes and do this?

7 A. I did.

8 Q. Okay. What is at the very top corner and -- we'll
9 do this -- sorry. We will offer this as
10 Plaintiffs' Exhibit 2, if I can talk.

11 THE COURT: (inaudible)?

12 MR. PLAYER: Yes, ma'am.

13 THE COURT: All right. Any objection,
14 Mr. McCants?

15 MR. MCCANTS: No objection.

16 THE COURT: All right.

17 (Whereupon P-2 was entered into evidence.)

18 BY MR. PLAYER

19 Q. What does the -- look at the building in the very
20 top left-hand corner. Is that Walmart?

21 A. That is a retention pond from Walmart, two
22 retention ponds. One on -- yes.

23 MR. PLAYER: Your Honor --

24 THE COURT: Walmart is where? I'm sorry.

25 MR. PLAYER: And I think he's -- he's looking at

Franke - Direct by Mr. Player

1 the green, and I'll point it out.

2 THE WITNESS: The white building is Walmart.

3 BY MR. PLAYER

4 Q. These are the ponds for that building in the
5 corner?

6 A. Yes.

7 Q. Okay. And you have pipes that seem to come from
8 the Walmart retention pond that eventually get to
9 the 520 outfall. Do you know what those are?

10 A. You're talking about the retention/detention ponds
11 or --

12 Q. Right. The pipes coming from the detention pond.

13 A. Yes, yes.

14 Q. What is that?

15 A. The pipe coming from the retention pond is a pipe.

16 Q. Do you know what those pipes are for?

17 A. To move water.

18 Q. And what has to occur before those pipes are
19 accessed by water? Do you know?

20 A. Those ponds have to fill up.

21 Q. They have to fill up. So when Walmart gets too
22 much water, DOT's design was to send it to you?

23 A. And, of course, concrete pipes are impervious
24 which means there's no opportunity for the water
25 to be slowed down, and it just picks up speed the

Franke - Direct by Mr. Player

1 further it goes through the pipes.

2 Q. Okay. And just look at the TV here, it's a little
3 bit easier. Do you know what this building is
4 right here where these pipes do this almost
5 90 degree angle?

6 A. Kauffman Tire. Or it used to be Kauffman Tire.

7 Q. Okay.

8 A. And you have all that impervious surface where
9 Charter Terminal is located, too.

10 Q. Okay. And all these are pipes, right? This is
11 not dirt that the water is traveling through. You
12 actually crawled through pipes, right?

13 A. I did not get all through, I did not go through
14 all those pipes. No, sir.

15 Q. But the ones that you did were concrete pipes?

16 A. Yes.

17 Q. Okay.

18 A. And to clarify, I didn't crawl, I walked.

19 Q. Okay. Were the pipes big enough for that?

20 A. Yes.

21 Q. Okay. How many times have you been out to --
22 we'll start with this. See if you recognize
23 what's in this video.

24 (WHEREUPON, a video was played for the
25 Court.)

Franke - Direct by Mr. Player

1 BY MR. PLAYER

2 Q. Do you know what that is?

3 A. Yes, sir.

4 Q. What is it?

5 A. It's the two outfall structures coming from the
6 Department of Transportation. Of course, it looks
7 like that now because all of the vegetation is
8 grown all over it now. Yes.

9 Q. Have you seen that much water come out of those
10 pipes before?

11 A. I've seen more.

12 Q. Now, see there in that picture, I'm going to pause
13 it. In the background of the video, what is that
14 treeline right there?

15 A. That's our property line, and that's where the
16 weir was placed by DOT.

17 Q. Are you saying weir?

18 A. I don't know if that -- it's a rock structure.
19 It's just loose rocks but I could not physically,
20 probably, lift any one of the rocks. So they are
21 very, very heavy rocks. And they were placed
22 across that, I assume, to slow the water down.

23 Q. And is this the same location?

24 A. Yes, sir.

25 Q. And, again, that treeline that comes in when the

Franke - Direct by Mr. Player

1 camera pans to the right is your property,
2 correct?

3 A. Yes, sir. If you go back to that treeline you can
4 see where the water is going down a big waterfall.
5 Right there.

6 Q. I see. Right here, correct?

7 A. Yep.

8 Q. All right.

9 A. And that was level property, I think, when DOT
10 finished. Or not level. It's got to, to go
11 downhill, but --

12 Q. I'm going to let y'all hear this one.

13 (WHEREUPON, a video was played for the
14 Court.)

15 MR. PLAYER: And you can laugh at the fat man that
16 fell down in the dirt. Here we go.

17 BY MR. PLAYER

18 Q. My question to you, Billy, is what is that right
19 there? Is that a fence?

20 A. That's the water going underneath the fence. Of
21 course, when the fence was put up it would have
22 been at ground level, you would think.

23 Q. This is the water going directly into your
24 property, right?

25 A. Yes, sir.

Franke - Direct by Mr. Player

1 Q. That fence is actually your property?

2 A. Yes.

3 THE COURT: Where's the fence? I'm sorry,
4 Mr. Player.

5 MR. PLAYER: Yes. For some reason you tell
6 everybody you're in trial for two days they decide to
7 call you while you're giving testimony. So my watch is
8 going nuts.

9 THE COURT: That is fine. My watch has gone nuts,
10 too.

11 THE WITNESS: There are the rocks, pretty heavy
12 rocks.

13 BY MR. PLAYER

14 Q. At the top corner, Your Honor, that wire fence
15 back in their property line, and we have various
16 videos we haven't entered into evidence yet. That
17 was in 2014, right?

18 A. Yes.

19 Q. Has something -- have you had a similar incident
20 of that in the last month?

21 A. Yes.

22 Q. Hang on. When did you take this video?

23 (WHEREUPON, a video was played for the
24 Court.)

25 BY MR. PLAYER

Franke - Direct by Mr. Player

1 Q. Where is that?

2 A. It's on my property.

3 Q. This is on the other side of the fence?

4 A. Yes.

5 Q. Okay. All right. Okay. Where is that?

6 A. It's on my property, probably 50, 75 feet below
7 that -- our property line.

8 Q. Was all of this earth eroded and gone when you
9 looked at it in 2010?

10 A. No. Not to that point, but --

11 Q. And the holes. What about the holes, holes there?

12 A. From watching, I don't really know. I hadn't -- I
13 didn't observe any --

14 (WHEREUPON, a video was played for the
15 Court.)

16 Q. And the trees. You see the trees that have fallen
17 into the gap or are leaning?

18 A. Right.

19 Q. Did you do anything to knock those trees down?

20 A. No, sir. That's from the washing.

21 Q. When you observed it, was there any soil in that
22 root structures?

23 A. Back in 2010, yes.

24 Q. But not now?

25 A. Right.

Franke - Direct by Mr. Player

1 Q. Okay. Well --

2 MR. PLAYER: Clarke?

3 MR. MCCANTS: Yes.

4 MR. PLAYER: I'm going to submit this, too.

5 MR. MCCANTS: No objection.

6 BY MR. PLAYER

7 Q. Will you tell me what this picture is?

8 A. That's a picture of our property.

9 Q. Okay.

10 A. This is downstream from the outfall, about
11 150 feet probably.

12 Q. My main question is on this, these, what appears
13 to be walls. Is this, like, down in that ditch,
14 this picture?

15 A. Yeah. It's like a mini Grand Canyon.

16 Q. And has that gotten progressively worse?

17 A. Absolutely.

18 Q. Okay.

19 THE COURT: All right. This is Plaintiffs' 3?

20 MR. PLAYER: Yes, ma'am.

21 THE COURT: Any objection?

22 MR. MCCANTS: No objection, Your Honor.

23 (Whereupon P-3 was entered into evidence.)

24 MR. PLAYER: Pass that picture to the judge. I'm
25 going to have you look at this one.

Franke - Direct by Mr. Player

1 THE WITNESS: Exhibit 4?

2 MR. PLAYER: Yes.

3 THE WITNESS: Exhibit 4.

4 THE COURT: Objection to 4?

5 MR. MCCANTS: No objection.

6 (Whereupon P-4 was entered into evidence.)

7 MR. PLAYER: All right. In this one I'm going to
8 point out -- May I approach, Your Honor?

9 THE COURT: Yes.

10 BY MR. PLAYER

11 Q. This right here. What is -- and it's evidence,
12 Your Honor, everybody. This is this tree right
13 here. I'm asking him about the root structure of
14 that tree and what it looks like today. Is that
15 an accurate picture of what the root structure of
16 that rather large tree looks like today?

17 A. I believe it is the same tree. You can tell from
18 the leaves on the ground that this was at least a
19 year ago or further.

20 Q. Okay. And there's no soil in that root system.

21 A. No. There's no leaves on the ground. There's no
22 foliage on the ground. It's all dirt.

23 Q. That has just been washed away by water.

24 A. No. There's no foliage on the ground anywhere.

25 Q. Okay.

Franke - Direct by Mr. Player

1 MR. PLAYER: That's 4. This will be next. Hand
2 that to the Judge.

3 THE COURT: This is 5?

4 THE WITNESS: Yes.

5 MR. PLAYER: Yes.

6 THE COURT: Any objection?

7 MR. MCCANTS: No objection.

8 (Whereupon P-5 was entered into evidence.)

9 BY MR. PLAYER

10 Q. You see the tree and it's kind of crossing
11 everything?

12 A. Yes.

13 Q. Do trees normally grow sideways?

14 A. I'm in -- my background is in forestry management,
15 and I can tell you from a professional standpoint
16 that they do not.

17 Q. So why is that tree on its side?

18 A. It's lost, it's lost its base. It's been washed
19 out. It's been eroded.

20 Q. Okay. And you see the path, it looks to be like a
21 stream. Where does that lead to? Back to the
22 outfall?

23 A. Yes.

24 Q. Okay. Do you know how far away from the outfall
25 that is?

Franke - Direct by Mr. Player

1 A. I would say that's probably seven, eight
2 hundred feet.

3 Q. Okay. So 700 feet from the border of your
4 property and it's still washing trees over?

5 A. Yes.

6 Q. Okay. You got your ownership interest in 2007. I
7 just lost the question. We'll come back to it.
8 How have -- well, in 2007 didn't y'all have these
9 types of water issues on the property?

10 A. No, sir.

11 Q. And you said the first time you addressed DOT was
12 in 2010. That's the same year they finished 520,
13 correct?

14 A. I'm not sure exactly when it was opened for
15 operation, but I know we met in December of 2010
16 and it was there then.

17 Q. Okay. Well, in your opinion as the landowner, why
18 are you getting -- what is the cause of all this
19 water?

20 MR. MCCANTS: Your Honor, for the record, I
21 object. Just -- that's asking him for an opinion that
22 I think is reserved for an expert in this type of case.

23 MR. PLAYER: But I think since he owns the
24 property he can give those opinions because it will not
25 carry any emphasis of special training or expertise.

Franke - Direct by Mr. Player

1 But I think there was observations when he walked
2 through the pipes. I think he can have an opinion
3 about, you know, where the water is coming from. I
4 think the video is pretty obvious.

5 THE COURT: All right. Mr. McCants, your
6 objection is noted for the record. I am going to allow
7 this testimony, but I'll also note for the record that
8 Mr. Franke is not an expert -- an engineering expert,
9 but I will allow his opinion.

10 MR. PLAYER: I will make it less expertise.

11 BY MR. PLAYER

12 Q. From your observation, the water that's doing
13 damage to your property is coming from where?

14 A. If I can back up and say that I've got a lot of
15 experience. I'm not a professional engineer. I'm
16 not a professional attorney, but I've been in the
17 development business for a lot of years and been
18 around it. And I'm very familiar with a lot of
19 regulations that are in effect, even though I
20 couldn't cite the exact regulation or where you
21 would find it. But this is due to an increase in
22 impervious surface, and this speed of the size of
23 the pipes and the volume of water.

24 It's kind of like a 140-acre swimming pool
25 that has got one little outlet in it, and it's

Franke - Direct by Mr. Player

1 going right out that outlet. So, you know, a
2 swimming pool, if you can imagine something that
3 hard and that big taking in that kind of water and
4 then releasing it, that's going to cause this.

5 Q. Okay. Is that saying it's the DOT's water?

6 A. It's God's water until it lands on DOT's land.

7 Q. Okay. How has this water problem affected your
8 ability to use the property to its fullest in
9 investing?

10 A. This -- our property has got a very good zoning,
11 which I'm not sure was picked up on in any of the
12 appraisals, early appraisals. But it's got a high
13 density residential, commercial zoning, which
14 means it affects the use of the property as far as
15 what you can do with it.

16 And at this point, the use that's in mind for
17 this property is not attainable because this water
18 cuts through our property from the northwest
19 corner all the way through to, pretty much, the
20 southeast corner of our property. It transverses
21 it. It doesn't run parallel. Doesn't cross it at
22 one spot. It goes like a slant straight -- an
23 angle through our property.

24 Basically, it's like if you have to cross a
25 river to get to two-thirds of your property in the

Franke - Direct by Mr. Player

1 back, it would be very costly to deal with the
2 water and be able to develop the back two-thirds
3 of the property because of this situation. So
4 that affects the usage. And as a real estate
5 broker, like I said, anybody that comes along
6 that's interested in this property, I'm inclined
7 to have to disclose it to them.

8 Q. Okay. Let's look at the video from 2019. Do you
9 know what the area in that video is showing?

10 A. Yes, sir.

11 Q. What is that channel?

12 A. That's the water coming from the outfall right as
13 it comes into our property.

14 Q. And there appears to be a lot of riprap there. Do
15 you know how that got there?

16 A. There was always riprap through that basin, but
17 after our meeting with DOT, and at some point they
18 added a bunch of rock. And you can actually tell
19 the size of those rocks are much larger than
20 what's in the basin before you get to that rock
21 area that you're looking at.

22 So those rocks were placed in there, based
23 upon my opinion, I'm not an engineer, but
24 considering a lot of those rocks are probably 50,
25 60, 70 pounds, I don't know -- they're too heavy

Franke - Cross by Mr. McCants

1 for me to lift, were installed to slow the water
2 down. And as you can see, the water has actually
3 broken through those rocks and pushed the rocks
4 downstream.

5 Q. And just one last thing. This right here. This
6 bush (inaudible) fence to your property?

7 A. I can't really tell but --

8 Q. Okay.

9 A. That's an approximate location of where it would
10 be, yes.

11 Q. Okay. And you mentioned -- you know where that
12 picture is taken?

13 A. Yes, sir. That's just in our property. Those
14 rocks came from that, that outfall structure.

15 Q. So did you put these bricks of concrete and rock
16 on your property where water is coming out?

17 A. No, sir.

18 Q. The water flowed there.

19 A. Right. The property has been untouched as far as
20 we are concerned since that oil spill clean --
21 after the oil spill was cleaned up. There's been
22 nothing in there to disturb the ground or do
23 anything to that property. It's woods. And woods
24 actually create a natural way of slowing water
25 down as well, but when you don't have trees just,

Franke - Cross by Mr. McCants

1 like, impervious surface at the interchange it's
2 going to cause the volume and speed of it to
3 increase.

4 Q. Okay. What -- I think I'm done with him, Judge.
5 Answer any questions Clarke has for you.

6 THE COURT: Cross?

7 MR. MCCANTS: Thank you, Your Honor.

8 CROSS EXAMINATION

9 BY MR. MCCANTS

10 Q. Good morning, Mr. Franke.

11 A. Good morning, sir.

12 Q. Nice to see you again.

13 A. Likewise.

14 Q. Thank you. I need your help, and perhaps the
15 judge needs some assistance from us to, kind of,
16 outline who the parties are in this case. So I
17 want to talk about the plaintiffs, so to speak.
18 Before I do that, I listened, of course, to your
19 testimony. You don't disagree that some amount of
20 water in varying amounts and speed have flowed
21 across your property for years? You don't
22 disagree with --

23 A. I disagree with that.

24 Q. You do disagree?

25 A. No, no. I went out there two weeks ago, Saturday

Franke - Cross by Mr. McCants

1 morning I believe. And there was no movement of
2 any water in that area between the outfall and my
3 property. There was some water there because it
4 had rained the previous night. There was no
5 movement of water in there. I came back at 3 or 4
6 in the afternoon and very similar to some of these
7 videos you saw. So they may call it an
8 intermittent stream, but a stream to me is defined
9 as a continuous flow of water. And intermediate
10 (sic) means it's not.

11 And this intermediate stream, I believe, at
12 one point went all up through DOT. And I'm pretty
13 sure that you had to get permits before you change
14 or alter an intermediate stream, or are supposed
15 to get permits from the Corps of Engineers before
16 you increase the water flow and speed, as well.
17 And I don't know if any of that was done, but that
18 ditch was dry on Saturday morning and it was like
19 that on Saturday afternoon. Not dry, no moving
20 water.

21 Q. Let me rephrase my question. I was looking more
22 in general terms and an abstract concept
23 historically. And I appreciate the fact -- how
24 old are you now, Mr. Franke?

25 A. I am 63.

Franke - Cross by Mr. McCants

1 Q. You and I are about the same age or whatnot.
2 Bless our hearts. But in any event -- and your
3 daddy owned the property. We'll talk about that a
4 little bit. But you, you have listened to this
5 case. You're obviously very intelligent and vast
6 background and whatnot. I'm asking historically,
7 is there any question in your mind, not
8 necessarily from an intermittent standpoint, but
9 that it has -- water in some degree, in some
10 volume traveled through this property for many,
11 many years?

12 A. I have never seen it travel through the property
13 at all. I probably relate it to the storm events
14 and the fact it's woods. It -- although the water
15 is going to collect there, and some will come down
16 this area, but any volume there would be very,
17 very minimal, almost negligible. Just like
18 looking at the (inaudible) on these pictures. I
19 mean, there would be leaves. There was never any
20 indication of water movement.

21 Q. Fair enough. And that's based upon your personal
22 knowledge?

23 A. And observation.

24 Q. You've seen it?

25 A. And observation. Yes, sir.

Franke - Cross by Mr. McCants

1 Q. All right. With that in mind, when was the first
2 time you set foot on this property, walked it and
3 inspected it? And let's look at the age issue
4 here, okay? Because you and I are about the same
5 age. Your father passed in 2007. You testified
6 that's when he and others acquired the property.
7 But when was the first time that William Franklin,
8 III walked this property?

9 A. Probably around 2000.

10 Q. 2000. Certainly before your father passed away?

11 A. Yes.

12 Q. And what would have been the reason you walked
13 this property in 2000?

14 A. Because he told me this was something that we
15 owned and that I should look at and be familiar
16 with it. And I did so. And I could certainly see
17 where the old undeveloped, uncompleted development
18 was. And this was before DOT did their project.

19 Q. I understand. And an additional question, DOT
20 began the process of condemnation and construction
21 mid-2000s. So your testimony is, I walked the
22 property. My father owned it. He said it was
23 something we owned so naturally you went and took
24 a look at it, correct? You have to say yes.

25 A. Yes, sir.

Franke - Cross by Mr. McCants

1 Q. You're doing fine. All right. I'm going to
2 (inaudible). I do want to talk about the parties
3 but I want to ask this question --

4 A. Okay.

5 Q. -- while it's fresh on my mind. All right. And
6 you have seen, of course, the pleadings in this
7 case. You and Mr. Player, I imagine, have worked
8 very close together in arranging and putting this
9 case together. One of the landowners, or
10 plaintiffs in this case is C D and F Interest,
11 LLC, a Limited Liability Corporation --

12 A. Yes, sir.

13 Q. -- in South Carolina, is that correct?

14 A. Yes, sir.

15 Q. Are you part of that LLC?

16 A. Yes, sir.

17 Q. Did you inherit your father's share?

18 A. Yes. And my sister.

19 Q. Who is your sister?

20 A. Catherine Franke Smith.

21 Q. And who else is a member of C D and F Interest,
22 LLC?

23 A. D. Hugh Conley. He passed away probably nine or
24 ten months ago. And his son David Conley, Junior
25 is now in charge of his estate.

Franke - Cross by Mr. McCants

1 Q. All right. Which is pending?

2 A. Yes.

3 Q. Well, for the record we may have -- that's an LLC
4 interest, correct?

5 MR. PLAYER: Yes.

6 MR. MCCANTS: All right. So that's not
7 (inaudible).

8 MR. PLAYER: And if you want me -- we can just go
9 ahead and concede that C D and F are bound by that
10 release, I will.

11 MR. MCCANTS: Okay. And I appreciate that but I'm
12 more interested in who the players, if I can use that
13 term --

14 MR. PLAYER: Yes.

15 MR. MCCANTS: -- or members of the LLC.

16 THE WITNESS: The estate at this point has not
17 replaced Mr. Conley in the LLC. My sister and I have.
18 BY MR. MCCANTS

19 Q. Understood. Any other members of the LLC have an
20 interest in C D and F Interest, LLC?

21 A. William Lane Dozier. And he's probably around 90,
22 lives in Blythe, Georgia. He would have been here
23 but he's got failing health.

24 Q. Very sorry. (inaudible) so he's not here today.

25 A. Right.

Franke - Cross by Mr. McCants

1 Q. And anybody else with C D and F?

2 A. No.

3 Q. And Roy Fischer, Elroy D. Fischer, Jr. Should
4 have led with him first, and I apologize. Is he
5 with us today?

6 A. Yes.

7 Q. That's Mr. Fischer. Good morning, Mr. Fischer.

8 MR. FISCHER: Good morning.

9 BY MR. MCCANTS

10 Q. Okay. Howard Lumber Company. They are a
11 plaintiff in the case. Howard Lumber Company.
12 Explain that to Judge Pope.

13 A. I never mean to give too much information but it's
14 always been a learning process for me.

15 Q. If you don't know that's fine. I'm asking because
16 you seem to be a spokesperson.

17 A. One of our, one of our original partners, a guy
18 named Robert Leaver -- and I don't know the
19 details of his situation, but at some point we had
20 tax liens filed against us. And he had liens with
21 the lumber company and with the lighting company.
22 And the lumber company and lighting company
23 foreclosed on his interest about the time that the
24 condemnation was taking place.

25 It didn't go to condemnation but -- and they

Franke - Cross by Mr. McCants

1 ended up going through foreclosure. And what I
2 found interesting is the fact that even though I'm
3 not the one in default, the other owners are part
4 of the foreclosure proceedings. So we went over
5 there and sat in the courtroom, I believe with
6 Judge Early, as that was going on years ago. And
7 that was one of the first instances we had with
8 the property.

9 Q. All right. Just a second. Not to interrupt you.
10 You mentioned that, and we're going to put
11 documents in, but before Judge Early was involved,
12 and I believe that was part of the condemnation
13 process issuing an order approving it, there was
14 also an issue with regard to interests foreclosed
15 that was handled by the late Judge Bob Smoak. I'm
16 asking do you remember that at all?

17 A. I don't remember that name, no.

18 Q. All right. Clearly we're diving too deep into
19 that. And finally Mr. Robert E. Pentecost Trust.

20 A. That's the lighting company that foreclosed on
21 their interest due to default liens, default
22 payments.

23 Q. We've got a lot of documents in this case. I got
24 at least two or three boxes, most of which are not
25 here. I imagine you've got a lot of documents,

Franke - Cross by Mr. McCants

1 too. Is that fair?

2 A. I don't have enough.

3 Q. All right. Based upon your review and
4 investigation of the facts of this case and
5 preparing for trial, have you reviewed what we
6 call the condemnation package following the
7 acquisition, the condemnation in 2006? Have you
8 reviewed that at all?

9 A. I'm sure I've seen it before, yes.

10 Q. How familiar are you with eminent domain and
11 condemnation? Given your experience with land,
12 you've been involved in instances where the
13 government needed to acquire land for a public
14 purpose?

15 A. Yes.

16 Q. So when you and I talk about that, you feel like
17 you --

18 A. If there's something I can't answer, I'll let you
19 know.

20 Q. Fair enough. You are aware, of course, that the
21 DOT, on behalf of the state, filed a condemnation
22 case in 2006 against certain individuals who owned
23 this land, and it was settled. Do you agree with
24 that?

25 A. Yes.

Franke - Cross by Mr. McCants

1 Q. Did you know Keith Badcock, the attorney I
2 referred to earlier?

3 A. No, sir.

4 Q. You have never spoken with him or anything?

5 A. Not that I'm aware of, no.

6 Q. Are you aware he represented the landowners in the
7 condemnation action in 2006?

8 A. No, sir.

9 Q. So you're not aware of any investigation or
10 discovery he and others undertook as part of that
11 condemnation action. Is that fair?

12 A. That's fair. Yes, sir.

13 Q. You're not aware of any --

14 A. I'm not aware of any. All I know is we had an
15 outside appraiser that came in to help us with it.
16 Marshall Vann, MAI appraiser, that helped us with
17 it.

18 Q. Do you remember the initial amount that was, what
19 we call, tendered into the Court as part of the
20 condemnation case?

21 A. I don't know if we were going to discuss dollar
22 amounts at this point, but it was very low in my
23 opinion.

24 Q. But you kind of anticipated my question. Bear
25 with me. I thought I had that condemnation

Franke - Cross by Mr. McCants

1 package in front of me, Your Honor.

2 MR. PLAYER: Are you talking about the release?

3 MR. MCCANTS: Not the release. Well, yeah the
4 release includes like (inaudible).

5 MR. PLAYER: Okay.

6 MR. MCCANTS: Thank you, Judge.

7 BY MR. MCCANTS

8 Q. I forgot. As part of the documents, we're going
9 to look at the original condemnation action which
10 was filed, and the parties are listed there, was
11 for 25.238 acres. We may talk about that more,
12 but from the standpoint of compensation,
13 initially, the number I see, Mr. Franke, that was
14 tendered into the court by DOT to acquire a
15 portion of y'all's property was \$378,570. Does
16 that ring a bell at all?

17 A. No, sir.

18 Q. All right. You characterized that as low. I
19 appreciate that.

20 A. Well, if I'm able to say something. Is that okay?

21 Q. Yes.

22 A. Okay. I looked at the appraisal information that
23 Tucker handed me a minute ago. And I've got a
24 question as far as what was the use of those
25 properties that were used as comparables to come

Franke - Cross by Mr. McCants

1 up with that appraisal. I could not see that
2 anywhere in the appraisal.

3 And typically an appraisal, a full-blown
4 appraisal will show the comparables, where they
5 are located, pictures, how much they sold for, the
6 dates they sold for and there's none of that in
7 there.

8 Q. Fair. And for your information I may have made
9 reference to this, Steward Saunders, who is an
10 appraiser, he's from the Charleston/Mount Pleasant
11 area. He will testify as part of this case. I
12 will tell you he did the appraisal for DOT back in
13 the mid-2000s before the condemnation was filed.

14 A. Right.

15 Q. He walked the property.

16 A. Okay.

17 Q. So those are his numbers, to help you understand
18 that. But my point is that's the amount, the
19 \$378,000 I referenced, which was tendered into the
20 court by DOT as part of the condemnation case.

21 A. And I can't go back in time and question that, so
22 it is what it is.

23 Q. My good friend, the Court's good friend, Jim
24 Bailey, handled that for DOT at the time.

25 A. Is he a MAI appraiser?

Franke - Cross by Mr. McCants

1 Q. No. He's an attorney.

2 A. Okay. Thank you.

3 Q. He represented DOT.

4 A. No, the appraiser that did this. Is he an MAI
5 appraiser?

6 Q. Mr. Saunders? Yes.

7 A. He is an MAI?

8 Q. I believe so.

9 A. And he's from outside, he's from outside the area.

10 Q. He's from South Carolina, and I believe he's a
11 certified appraiser with all the credentials
12 necessary.

13 A. Okay.

14 Q. But, you know, you raised the issue. And this is
15 what I want to talk about. You don't dispute,
16 eventually, the condemnation case was settled and
17 fully resolved for the sum of \$504,560?

18 A. I don't disagree.

19 Q. All right. So between what was placed in the
20 court and what it was settled for was a good bit
21 different, but you understand that that was a
22 product of Mr. Badcock representing the
23 landowners, negotiating and investigating to get
24 up to that higher amount?

25 A. Yes. That's the way the process works.

Franke - Cross by Mr. McCants

1 Q. All right. And then, of course, we know it was
2 settled. Now let's talk about that if we can.
3 Now I have -- all right. You are finished with
4 this? This will be Defendant's Exhibit Number 1,
5 Your Honor.

6 THE COURT: Without objection.

7 MR. MCCANTS: It would help to staple the
8 document. Someone scan and whatnot. Perhaps Charlie
9 can put a staple in that for me.

10 THE COURT: Sure. You'll have to check with my
11 clerk in my courtroom.

12 MR. MCCANTS: This is Defendant's Exhibit
13 Number 1. And I will leave it up to you as to how to
14 fix the pages, secure it so they don't get mixed up.
15 But I'll put a clip on it for you. All right. Can we
16 mark that? I want the Judge to look at that, and I've
17 got extra copies. Mr. Franke, let me give you a copy.
18 May I approach, Your Honor?

19 (Whereupon, D-1 was marked for
20 identification.)

21 THE COURT: Yes.

22 BY MR. MCCANTS

23 Q. All right. Mr. Franke, if you would look at
24 Exhibit Number 1.

25 A. Okay. I have looked at it.

Franke - Cross by Mr. McCants

1 Q. As much of the pages as you can. I'm going to
2 walk you through it, too, by the way. Have you
3 looked at that?

4 A. I've seen it before, yes. But not today. So what
5 kind of questions do you have?

6 Q. I'll be there shortly. Bear with me one moment.
7 Can you hand this to the judge? All right. Let's
8 walk through this package, if we can. We will
9 walk through the names again, and I just want to
10 understand from your perspective who they are. Of
11 course, the first page of the document is titled
12 Release, is that correct?

13 A. Yes, sir.

14 Q. Page two, or three, if you will look at that at
15 the bottom, the release. In the third full
16 paragraph where it says, now for know all mean by
17 these present -- I want you to look at the last
18 portion of that paragraph and I'm going to read
19 most of it, but basically paraphrasing the first
20 portion of the paragraph it says, DOT is going to
21 pay the sum of \$504,560 to the undersigned. And
22 we're going to walk through the undersigned in a
23 second. But you see towards the bottom of that
24 paragraph it says, and particularly the SC DOT
25 from any and all claims, demands, damages,

Franke - Cross by Mr. McCants

1 actions, causes of actions -- cause of actions,
2 suits at law, or in equity of whatsoever kind or
3 nature arisen, arising or to rise from, or because
4 of any matter relating to the construction of the
5 Palmetto Parkway, Bobby Jones Expressway, in Aiken
6 County, South Carolina. See that?

7 A. Yes, sir.

8 Q. And that's the plain language where you agree that
9 serves as a release by the landowners against DOT
10 as I described for the sum of \$504,560. Do you
11 agree with that?

12 MR. PLAYER: Objection. Calls for a legal
13 conclusion.

14 THE COURT: All right. I'll sustain that
15 objection.

16 MR. MCCANTS: I'm sorry?

17 THE COURT: You want to give him your objection
18 again?

19 MR. PLAYER: The objection was you're asking him
20 for a legal conclusion.

21 MR. MCCANTS: I'm asking him for his lay
22 interpretation of the plain language based upon his
23 experience as a businessman, land developer and other
24 things over time.

25 THE COURT: All right. If you will just sort of

Franke - Cross by Mr. McCants

1 rephrase your question to include why you're asking him
2 that Mr. McCants.

3 MR. MCCANTS: Sure.

4 BY MR. MCCANTS

5 Q. Mr. Franke, as part of your experience as a
6 businessman and otherwise, have you been involved
7 in claims, lawsuits, instances where someone may
8 have given another person money, and they have
9 been required to execute a release? Are you
10 familiar with that concept?

11 A. I've got some property where River Watch Parkway
12 was built, and part of the agreement was that they
13 could not have access to River Watch Parkway in
14 the future, so I'm very aware from that
15 standpoint. From this standpoint the, you know,
16 in the future, I mean, I don't really have an
17 opinion or know exactly how the law works. I'm
18 not an attorney.

19 Q. Will you agree that the plain language of that
20 document indicates, though, that an exchange of
21 over half a million dollars to these landowners in
22 the condemnation action were releasing claims as I
23 read to you? Will you agree to that?

24 A. I don't think you get released from future claims
25 where things change and things happen.

Franke - Cross by Mr. McCants

1 Q. Fair enough. And I think that's for the Court to
2 decide based on evidence in the case, okay. Thank
3 you. Turn the page if you would. Let's walk
4 through the names, if we can. Page three of three
5 of the release, which up at the top, was executed
6 January 31, 2007. Mary Leaver signed that page,
7 correct?

8 A. Yes.

9 Q. And these releases are signed in various parts on
10 separate places. And again Mary Leaver was the
11 personal representative of Claude Leaver, and
12 served to release Mr. Leaver's interest in the
13 condemnation funds. Is that fair?

14 A. Yes.

15 Q. Next page. Page three of three, you are going to
16 have to help me a little bit with this one. I see
17 where C D and F Interest, LLC landowner on behalf
18 or through certain individuals executed, or fixed,
19 their signatures. Who is the first signature
20 there if you can tell me? Looks like Connelly
21 or -- do you recognize that name?

22 A. Somebody signed on C D and F's interest?

23 Q. Excuse me, Page 3 of 3. This page right here.
24 And you see right underneath C D and F Interest?

25 A. That looks like Robert D Leaver.

Franke - Cross by Mr. McCants

1 Q. What is the first?

2 THE COURT: There are several three of threes --
3 pages marked three of three.

4 MR. MCCANTS: It's marked three of three at the
5 bottom.

6 THE COURT: Right. There's several and that's
7 what's confusing.

8 MR. MCCANTS: Oh, I -- I'm having one of those
9 early mornings.

10 THE COURT: That's okay. So, in the presence of
11 Angela Holloway. Is that the page that you are
12 referencing?

13 MR. MCCANTS: Yes. I'm sorry, Judge. I apologize
14 on the numbering of these pages. May I approach
15 Mr. Franke?

16 THE COURT: Yes.

17 BY MR. MCCANTS

18 Q. I need help with those signatures that are
19 highlighted on that page?

20 A. That's my father, William Dozier, and Hugh
21 Connelly. My father and Mr. Dozier are both
22 deceased. Angela Holloway was a lady who worked
23 for Sherman Hemstreet at the time.

24 Q. Fair enough. That's your father's signature on
25 there?

Franke - Cross by Mr. McCants

1 A. Yes, it is.

2 Q. And to your knowledge are those all the
3 representatives or members of C D and F Interest,
4 LLC?

5 A. That's the members, but I can't swear that that's
6 their signatures.

7 Q. Fair enough. You don't have any reason to doubt
8 that those are their signatures when they executed
9 this agreement, do you?

10 A. Well, considering we got paid for the land, I
11 would hope that's their signatures.

12 Q. All right. The next page. And, again, at the
13 bottom, three of three, but there's a signature
14 above Robert D. Leaver. That's where he signed
15 it, correct?

16 A. Yes.

17 Q. And, again, explain his interest in the land back
18 in the mid-2000s at the time of the condemnation
19 action.

20 A. My memory is a little fuzzy but at some point --
21 okay, okay. It's coming back to me. Mary Leaver
22 is Robert's mother. And to prevent -- it's too
23 much information, but I think in order for them,
24 the lighting company and the lumber company, to be
25 able to foreclose, he took out a loan with his

Franke - Cross by Mr. McCants

1 mother so she would have the first position on the
2 lien to where they could not approach her.

3 So she had to sign off even though it had
4 been past, I think, 25 years, which is the statute
5 of limitations on mortgages. Even though that had
6 passed, I guess, just to make sure everything was
7 acceptable and up to date, that they had her sign
8 off on it as well.

9 Q. Thank you. Turn the page if you would. The next
10 page is another document with the caption of the
11 condemnation case. But as you will see it
12 includes a lot of folks down at the bottom
13 including Howard Lumber Company and Lighting
14 Galleries. You talked about that. But the first
15 page of that release appears to me to be
16 handwritten and dated the 11th day of June, 2007.
17 Do you see that?

18 A. Yes.

19 Q. All right. Maybe I can get back to using page
20 numbers, Your Honor. That is not a page number
21 but the next page has a two down at the bottom.
22 Do you see that? And then I want you to turn to
23 the next page to the three, if you would. And
24 there are signatures for Robert Pentecost on
25 behalf of Lighting Galleries, Inc. and Mr. Badger

Franke - Cross by Mr. McCants

1 who is with us today, I believe, on --

2 A. It's Mr. Badger's father.

3 Q. Excuse me. Excuse me. That's his father.

4 A. Yes.

5 Q. Will Badger's father signing for Howard Lumber
6 Company, is that correct?

7 A. Yes.

8 Q. All right. And I think you had explained to the
9 Court who is who and what their interest is. And
10 we're going to talk about that in just a second.
11 And I will tell you, I don't think we need to go
12 into the rest of these documents yet.

13 MR. MCCANTS: But I will tell the Court that for
14 purposes of completeness I've enclosed all of the
15 documents that serve as a release and a final order as
16 to that original 2006 condemnation case where
17 Mr. Bailey represented the DOT. You will see an order
18 from Judge Early. I even included the form sheet for
19 Your Honor's information and benefit. If you look at
20 the last few pages, and I do want to ask you about
21 this, Mr. Franke, if I could.

22 BY MR. MCCANTS

23 Q. The last two pages that start on pieces of paper
24 where the documents are to the side or, not --
25 they are rotated, Mr. Franke. If you would try to

Franke - Cross by Mr. McCants

1 go to those documents. They would have been the
2 last 1, 2 --

3 A. There's quite a few pages that are turned
4 sideways, landscape instead of --

5 Q. -- 3, 4, 5, 6. You see these documents here,
6 though?

7 A. Come show me where they are please, or either let
8 me look at your exhibit.

9 Q. That page right there.

10 A. Yes, sir.

11 MR. MCCANTS: Your Honor, I know what happens
12 sometimes with trials, especially non-jury, we often
13 approach witnesses without asking the Court. I want
14 you to know I'm aware that I should ask you but I trust
15 you'll --

16 THE COURT: That's okay. He asked you to approach
17 and that's fine.

18 MR. MCCANTS: Thank you, Judge.

19 BY MR. MCCANTS

20 Q. All right. Mr. Franke, you see that document.

21 The most important thing about that document, see
22 in the middle where the handwritten word amended
23 appears. Do you see that? Right there below the
24 typed words, condemnation notice, and tender
25 payment jury trial --

Franke - Cross by Mr. McCants

1 A. Amended, yes. Yes.

2 Q. All right. And if you look up above where it says
3 amount of determination. There's that
4 number \$504,560, which was paid to the landowners.
5 Do you see that?

6 A. Yes.

7 MR. MCCANTS: All right. Judge, for your
8 information, whenever we have these condemnation cases
9 and over time, maybe, the parties shift a little bit.
10 There are issues with regard to payment and release.
11 We have to go back and amend the original condemnation
12 notice. So that's why that's there. And that's
13 Defendant's Exhibit Number 1. And I understand there's
14 no objection. Is that correct, Turner? And I move
15 that into evidence, Your Honor.

16 THE COURT: So moved.

17 (Whereupon D-1 was entered into evidence.)

18 BY MR. MCCANTS

19 Q. All right. We were going to talk about this
20 later. Mr. Franke, but the fact is the owners of
21 this property, even back in the mid-2000s, as part
22 of the condemnation case, were not one intact
23 group. There were various entities, various
24 people that had various interests in this real
25 property. Is that fair?

Franke - Cross by Mr. McCants

1 A. Yes, sir.

2 Q. And that would have been in 2007 when they
3 executed that release. If I were to ask you back
4 then if you knew, and of course your father passed
5 in what year, in 2007?

6 A. Yes.

7 Q. Wasn't it in 2007?

8 A. Yes.

9 Q. What month though?

10 A. October.

11 Q. All right. So this was executed by him the
12 previous June, is that correct?

13 A. Yes.

14 Q. And were you familiar with all these individuals
15 as far as the LLC back during that time?

16 A. You talking about the C D and F, LLC members?

17 Q. Yeah. Or any of the other landowners that we just
18 walked through.

19 A. I was familiar, I was familiar with all --

20 Q. Sir?

21 A. I was familiar with everybody.

22 Q. All right. So were y'all meeting together to
23 discuss developing this property, or were you
24 meeting to discuss --

25 A. No. I was, I was not part of the development or

Franke - Cross by Mr. McCants

1 the discussions of the development. I came in
2 after the development was shut down because of the
3 spill.

4 Q. Now as far as this case, I understand you contend
5 that the actions of DOT with the water that you
6 described as what, kind of, rendered unmarketable?
7 This property that we're talking about today, or
8 to some degree, or to what degree have we
9 destroyed the property from your standpoint?

10 A. Well, marketability is somewhat based on opinion
11 as far as the highest and best use of the
12 property.

13 Q. Would you explain that term to Judge Pope because
14 that's a technical term that tells me you
15 understand it. What does that mean if you would?
16 High and best use.

17 A. Highest and best use is what would allow it to
18 be -- if you are building a 100' high skyscraper
19 in New York City, and it's a piece of property
20 that's by itself, sitting in the middle of the
21 city, and you certainly wouldn't grow corn on it.
22 You would build a tall skyscraper building on it.
23 And in our case the highest and best use of our
24 property, after this development started the
25 zoning was changed. I don't know exactly the date

Franke - Cross by Mr. McCants

1 and time it was changed, but it was changed to a
2 commercial, high density, residential. I believe
3 25 units per acre, which is pretty strong. That
4 means that you can have more people living there,
5 more people using it, more revenue being generated
6 from it based on a commercial designation. You
7 could put professional buildings there if you want
8 to. A wide gamut of different uses that would all
9 generate a lot of income. And because it would
10 generate a lot of income, it would mean it would
11 be a higher value of the property based on what
12 you can do with it.

13 Q. And highest and best use is dependent upon a
14 number of factors with regard to what -- I'll say
15 it this way, the county, the city, or even federal
16 government allow you to do with it. It's affected
17 by zoning. It's affected by land use regulations.
18 And, for example, if zoning doesn't allow a gas
19 station in a residential subdivision, someone
20 appraising property in that subdivision couldn't
21 say the highest and best use is a gas station. Is
22 that fair?

23 A. Yes, sir, correct. And you can't appraise a
24 property based on future use or what you expect of
25 it. It needs to be based on what the current use

Franke - Cross by Mr. McCants

1 is -- or not current use, the current potential
2 use, meaning it already has everything there to be
3 developed, and that would be how it would be
4 appraised and the valuation would be done.

5 Q. Fair enough. And you heard us earlier talking to
6 the judge. We're really not here to talk about
7 value. But we're exploring that concept because
8 of what had happened on that land in years past.
9 Okay? You with me on that?

10 A. Yes.

11 Q. So that tells me you understand the appraisal
12 process, which, to a large degree, which helps me.
13 Let's talk about the development of this property
14 back in the mid-'80s, as you talked about it.
15 And of course your father was involved in that,
16 and the other folks that owned the property,
17 correct?

18 A. Yes, sir.

19 Q. All right. When was -- all right. You already
20 told me that. The first time you actually walked
21 the property would have been about the
22 2000-timeframe, is that correct?

23 A. Yes.

24 Q. But you gained a lot of information and knowledge
25 about this based upon your research and

Franke - Cross by Mr. McCants

1 investigation and, of course, talking with your
2 father. Is that fair?

3 A. More so personal than my father.

4 Q. I understand.

5 A. I knew the history of the property before actually
6 ever setting foot on it.

7 Q. Excellent. You have seen, for example, the
8 document that's affixed to this poster board on
9 the easel, is that correct?

10 A. Yes.

11 Q. Because you produced it to me. Do you recall
12 that?

13 A. Yes.

14 Q. Through Tucker, through Mr. Player.

15 A. Yes.

16 MR. MCCANTS: That's going to be Defendant's
17 Exhibit Number 2, Your Honor. Can I go ahead and mark
18 it? What was Number 1? Have I lost track already?

19 COURT REPORTER: The release was Number 1.

20 MR. MCCANTS: The release package is Number 1, I
21 thought.

22 THE COURT: The release is Number 1.

23 MR. MCCANTS: Have I put something else in?

24 COURT REPORTER: You did.

25 MR. PLAYER: I think he put 1 in twice.

Franke - Cross by Mr. McCants

1 MR. MCCANTS: I may have done it twice. It's
2 still morning. Defendant's Exhibit 1 is what I'm
3 calling the release package. And I moved it into
4 evidence. And this would be Defendant's Exhibit
5 Number 2. Is it correct you don't have any objection
6 to it?

7 MR. PLAYER: Well, I do but not a legal one.

8 THE COURT: So that will be Defendant's 2.

9 MR. MCCANTS: Yes, ma'am.

10 THE COURT: Madam Court Reporter, I believe he
11 submitted one and then one from an exhibit. They're
12 the same documents. This will be Defendant's 2 without
13 objection.

14 (Whereupon D-2 was entered into evidence.)

15 MR. MCCANTS: I did it twice. Let's put a sticker
16 on that. Judge, I appreciate I'm putting a rather
17 large object into evidence. I know Charlee's (ph)
18 thrilled that she may have to store this at the end of
19 the trial. If someone will help me remember, I can
20 substitute smaller versions of that exhibit for your
21 benefit.

22 THE COURT: Very well.

23 BY MR. MCCANTS

24 Q. Mr. Franke, let's talk about the development. The
25 development was called Chadwick, is that correct?

Franke - Cross by Mr. McCants

1 A. Yes, sir.

2 Q. And you are aware, of course, this development was
3 undertaken back in the mid-1980s?

4 A. Yeah. Early '80s I believe.

5 Q. This, this Chadwick development plan for example,
6 it has the revisions listed there and we're
7 talking about a 1986 timeframe, correct?

8 A. Okay, okay.

9 Q. And the gentlemen, Dudley and Associates, they
10 were engineers and consultants in Aiken and
11 Augusta who drew up this development plan for your
12 father and the other property owners, is that
13 correct?

14 A. Yes.

15 Q. Do you know that group?

16 A. No, I do not.

17 Q. Heard anything bad about them?

18 A. No, sir.

19 Q. Obviously your father trusted them and whatnot,
20 correct?

21 A. Yes.

22 Q. You being in land development, you don't just get
23 a plan like this immediately. It takes some time
24 to do it and also a lot of expense. Do you agree
25 with that?

Franke - Cross by Mr. McCants

1 A. It has to be approved before you start
2 construction.

3 Q. Fair. And I'm going to ask you about, too,
4 because I'm particularly interested in your
5 knowledge of what was required for approval and
6 everything. But in any event, that was the
7 development plan on Exhibit Number 1, what they
8 were going to do with the property involved in
9 this case, correct?

10 A. Yes.

11 Q. In fact, if you look at arrows, or look at the
12 documents I showed you, it has a somewhat
13 irregular shape to it, as you can tell. All
14 right. It's not a rectangle or a square. Do you
15 agree with that?

16 A. Yes, sir.

17 Q. Now let's talk about the oil spill for a second.
18 The Charter Terminal spill as everyone around here
19 knows it. Tell Judge Pope what Charter Terminal
20 is.

21 A. Without too many details, there's a pipeline which
22 runs across the United States which belongs to, I
23 think Southern Pipeline. Is that correct,
24 Mr. McCants?

25 Q. It could very well be. I don't know.

Franke - Cross by Mr. McCants

1 A. Colonial, Colonial Pipeline was the name of it.
2 And the Boardman family, who were very active in
3 Augusta and, well, still are, but are not in the
4 petroleum business anymore, owned an interest in
5 it, the Charter Terminal. And it's where gas
6 could get piped from oil refineries all the way
7 across the East Coast. Some of the ones they were
8 trying to get done recently between Canada and our
9 country, I don't know the details. It was shut
10 down. But anyway, it managed -- allows fuel to go
11 across the country at a cheaper and safer way.

12 And along that pipeline they will have
13 locations where they will store the gas, petroleum
14 products in the large tanks. And trucks come in
15 and out of the facility to fill up and deliver it
16 to the gas stations. And what happened -- I do
17 have details in my folder --

18 Q. Pause just one second.

19 A. Yes.

20 Q. And I commend you. I like that description.

21 That's just what I would say. These are storage
22 tanks for fuel oil pumped around the country,
23 where it is stored and where the big tanker trucks
24 that we see on the interstate can go to get the
25 gas, and take it to Parkers, and take it to the

Franke - Cross by Mr. McCants

1 BPs and other stores. Is that correct?

2 A. Yes.

3 Q. If you've got that exhibit (inaudible) could you
4 call that up for me, if you would?

5 MR. PLAYER: Yeah.

6 MR. MCCANTS: And it had Charter Terminal on it.

7 MR. PLAYER: Yeah, it did. And it's 2.

8 MR. MCCANTS: I appreciate you may know all of
9 this. I'm just trying to get -- to put it on the
10 record.

11 THE COURT: I know a bit from my work with the
12 city.

13 THE WITNESS: Judge, would it be acceptable for me
14 to get my file folder so I can give some details? And
15 look at my notes?

16 MR. MCCANTS: I'm fine with that.

17 MR. PLAYER: That's fine with me.

18 THE COURT: No objection. We'll allow you to.

19 THE WITNESS: Can I step down and get it?

20 THE COURT: Yes. Please watch your step right
21 here.

22 THE WITNESS: Yes, ma'am. I cut my grass
23 yesterday so I'm a little sore.

24 THE COURT: We've had a tremendous amount of falls
25 right there so we always caution people.

Franke - Cross by Mr. McCants

1 THE WITNESS: Tucker, if you want to admit this
2 you are more than welcome to. It's up to you. I don't
3 know. You may not want it. It's just my notes.

4 MR. PLAYER: Yes. It is that one.

5 MR. MCCANTS: Yes. Very good. Thank you.

6 MR. PLAYER: Yeah. It's just his, it's his
7 analysis of the ownership.

8 MR. MCCANTS: Okay. That may be helpful. We can
9 look at it at the break and then put them up with
10 Judge Pope's help.

11 MR. PLAYER: Yeah.

12 BY MR. MCCANTS

13 Q. All right. We've got Plaintiffs' Exhibit Number 1
14 on the screen, Mr. Franke. We're talking about
15 Charter Terminal and where it's located. Charter
16 Terminal exists through, for that piece of
17 property with those round objects in it, correct?
18 And those are huge, massive, fuel oil storage
19 tanks. Is that correct?

20 A. Yes.

21 Q. A lot of gas, a lot of diesel fuel is stored on
22 that property, correct?

23 A. Yes, sir.

24 Q. And it joins I-20, and I alluded to it earlier,
25 correct?

Franke - Cross by Mr. McCants

1 A. Yes.

2 Q. Y'all's property is down here, as you discussed.

3 A. Yes.

4 Q. Down where that yellow line is.

5 MR. MCCANTS: And for the record, Judge, I'm
6 pointing at the arrows, but it's the lowest part of the
7 document that is before you. Charter Terminal is --
8 that's the property where all the round objects appear
9 on the photograph from above.

10 BY MR. MCCANTS

11 Q. And you agree those are storage tanks of fuel oil?
12 Now what happened -- I remember this in some
13 degree. But correct me if I'm wrong based on your
14 knowledge. But there was an issue with a valve
15 left open in the early morning at Charter
16 Terminal. But the end result was a lot of gas, a
17 lot of fuel flowed from that storage facility
18 across the interstate, either on the asphalt or
19 through whatever pipes were buried, and it flowed
20 onto y'all's property. Is that correct?

21 A. Yes.

22 Q. Seriously contaminating it, correct?

23 A. It contaminated enough to warrant the EPD to get
24 involved with it. Now whether you consider it
25 serious or not that's a matter of opinion, what

Franke - Cross by Mr. McCants

1 level you are talking about. And I have no idea
2 exactly how much it was contaminated, how deep it
3 was, the area that was covered, the area that was
4 dug out. I was not aware of any of that.

5 Q. You mentioned digging out some soil and whatnot.
6 I've done research. It was on the EPA Superfund
7 site for a long time, wasn't it?

8 A. Yes. I believe so.

9 Q. Yeah. And what do you understand the EPA
10 Superfund --

11 A. I know it never was a brown field.

12 Q. Never was a what?

13 A. Never was a brown field.

14 Q. Okay. Explain that.

15 A. I believe a brown field is where it's permanently
16 put on a list to help people be able to borrow
17 money on the property and redevelopment it so that
18 it's, like, it can never really ever be 100%
19 resolved. But it's accepted and it's protected by
20 the pennies that come out of the gallon of gas
21 that you buy, and the fund that is used to help
22 support that, I believe.

23 Q. Excellent. Thank you for that because you've
24 educated me a little bit. I knew of the concept.
25 It's temporarily affected versus permanent. They

Franke - Cross by Mr. McCants

1 cleaned this property up for y'all, correct?
2 Charter Terminal?

3 A. The owners of Charter Terminal did, yes.

4 Q. Was there an exchange of money between Charter
5 Terminal and the landowners to the best of your
6 knowledge, Mr. Franke? Because I cannot find any
7 lawsuit documents.

8 A. I don't think there was any money involved. I
9 think they just came on the property and cleaned
10 it up.

11 Q. You're not familiar with a lawsuit that was filed
12 in federal court regarding damages against Charter
13 Terminal?

14 A. No.

15 Q. You're not familiar with that at all?

16 A. No. Not at all.

17 Q. Fair enough. Let's move on then. But the
18 development, Chadwick, was delayed because of this
19 oil spill, is that correct?

20 A. Permanently delayed, yes.

21 Q. Yeah. Otherwise what you're seeing, Defendant's
22 Exhibit Number 2, this plan would be there today,
23 correct? But for the oil spill.

24 A. Well, whether it would be there or not is
25 irrelevant because it wasn't and there's no way to

Franke - Cross by Mr. McCants

1 know whether it would of or not.

2 Q. Well, a lot of money was put into the development
3 of Chadwick. Do you agree?

4 A. Well, I'm sorry, but, again, it depends upon what
5 a lot of money is, and I don't know the -- it was
6 not completed. So a lot was not put into it at
7 that point.

8 Q. Well, and we all agree it wasn't completed because
9 it's not out there today, but you agree with me
10 that it was stalled back in --

11 A. That's correct.

12 Q. -- the mid-1980s because of the Charter Terminal
13 oil spill?

14 A. That's correct.

15 Q. And the spill occurred, of course, after this plan
16 was put together that's Exhibit Number 2, correct?

17 A. Yes.

18 Q. All right. And would you mind coming down with me
19 and let's --

20 MR. MCCANTS: Is that okay with you, Your Honor?

21 THE COURT: Yes.

22 MR. MCCANTS: I hate for you to have to identify
23 things from a distance, Mr. Franke. Can you come down
24 and point to some of these areas for me? Is this all
25 right, Your Honor?

Franke - Cross by Mr. McCants

1 THE COURT: Yes.

2 BY MR. MCCANTS

3 Q. All right. Let's look at the development plan for
4 Chadwick. We get Chadwick out of this because
5 it's labeled Chadwick in the lower right-hand
6 corner. We've highlighted the letter and numbers
7 I-20 along the right side of this plan. That
8 would be Interstate 20, correct? You have to say
9 yes for the Court reporter.

10 A. Yes.

11 Q. And that tells us that y'all's property borders
12 I-20, correct?

13 A. That is correct.

14 Q. You see up here where the words drainage easement
15 from I-20 are printed --

16 A. Yes, sir.

17 Q. -- on the plan that was prepared for your father
18 and others --

19 A. Yes.

20 Q. -- correct?

21 A. Yes.

22 Q. And Mr. Auld here, he's going to testify. He's an
23 engineer that will testify on our behalf. He's
24 highlighted that easement as it crosses your
25 property and your dad's property, and it talks

Franke - Cross by Mr. McCants

1 about a county easement there. But in any event,
2 will you agree with me that the highlighted lines
3 on Exhibit Number 2 were recognized by the fellas
4 that put together this development plan as a
5 drainage easement? Do you agree with that?

6 A. Yes, sir.

7 Q. All right. Now, down below on this document, we
8 haven't highlighted this, but it talks about
9 notes, D-13 and some other ones. But I'm
10 particularly interested in D-13 down here at the
11 bottom, Mr. Franke. And it says, handwritten D-13
12 note, and below it says, D-13 is an RCP culvert
13 72 inches deep. Do you see that?

14 A. Yeah.

15 Q. Based on your experience, what does that mean?

16 A. I guess RCP is reinforced concrete pipe, is a
17 guess.

18 Q. I agree with you. And we'll have testimony
19 establishing that, but that's what I understand it
20 to be. But it talks about 72-inch concrete pipes.
21 Do you agree?

22 A. Yes.

23 Q. All right. And you told Judge Pope you have
24 walked this property and you have seen those pipes
25 --

Franke - Cross by Mr. McCants

1 A. Yes, sir.

2 Q. -- correct?

3 A. Yes, sir.

4 Q. And in fact, we have got pictures of them here.

5 MR. MCCANTS: Your Honor, we will mark these 3, 4
6 and 5, I believe.

7 THE COURT: Without objection?

8 MR. PLAYER: Without objection, Your Honor.

9 THE COURT: All right.

10 (Whereupon D-3 was entered into evidence.)

11 (Whereupon D-4 was entered into evidence.)

12 (Whereupon D-5 was entered into evidence.)

13 BY MR. MCCANTS

14 Q. All right. Mr. Franke, we've marked these
15 photographs as Exhibits 3, 4 and 5.

16 A. Do you want me to hold them?

17 Q. I got it. All right. You don't disagree that
18 these are enlarged photographs of the 72-inch
19 reinforced concrete pipe that were identified on
20 Exhibit Number 2 of the development plan? Is that
21 fair?

22 A. There's no way I can necessarily tie those into
23 what's supposed to be on the plan and put into
24 place, no.

25 Q. We agree --

Franke - Cross by Mr. McCants

1 A. I don't know where those pipes came from.

2 Q. -- all right. Fair enough. We'll talk about
3 that. Are they still out there?

4 A. Yes.

5 Q. All the pipes that are depicted on Exhibits 3, 4
6 and 5?

7 A. Yes, sir.

8 Q. And the photographs speak for themselves. But
9 would you agree with me that these are big
10 concrete pipes?

11 A. Yes.

12 Q. And if they're 72 inches, somebody even put some
13 graffiti in that one. See there? Maybe
14 somebody's been sleeping in the pipe. That's a
15 lot of pipe, don't you agree? Anyway, what I
16 tried to do for perspective in this case, Judge,
17 this is a wood pole that I've got, and I measured
18 it. Do you have any reason to disagree with me,
19 Mr. Franke, that that is 72 inches?

20 A. No, sir. I remember.

21 Q. I'm six-four. It's about four inches below me.
22 But those are big pipes, correct?

23 A. They are.

24 Q. They carry a lot of water.

25 A. Yes, sir.

Franke - Cross by Mr. McCants

1 Q. And someone bought these pipes back in the
2 mid-'80s intending to use them as part of this
3 Chadwick Development plan. Do you agree with
4 that?

5 A. I don't know for sure. No, sir.

6 Q. Is it reasonable to trust that?

7 A. I believe it's an assumption, but to know that
8 they were bought to use on this project, I have no
9 idea.

10 Q. Would you believe --

11 A. Of course, it's on the plan so you would tend to
12 believe it was to be used for that property.

13 Q. The plan certainly makes reference to concrete
14 pipes being installed in Chadwick that had this
15 diameter marked by the height of this pole,
16 correct?

17 A. Yes. But you don't know how deep of a ditch it
18 was going in. Or how much dirt was going to be
19 put over the top of it. It may have been cheaper
20 to have a higher pipe based on where it was going
21 and the elevation of the road. I don't know. So
22 it may not be related to volume, it may be
23 economics.

24 Q. Based on your experience as a land developer
25 though, do you agree that that size pipe that's

Franke - Cross by Mr. McCants

1 laying out there even today is designed to carry a
2 lot of water somewhere.

3 A. Just like the one that's up from the DOT.

4 Q. Well, that one up at DOT is --

5 A. It's a lot newer and it's installed.

6 Q. And that's the 54-inch that you talked about?

7 A. Yes.

8 Q. And we certainly will have some testimony on that
9 from an engineering standpoint, but I'm really
10 asking, Mr. Franke -- and if you want to take a
11 seat, that's fine.

12 A. All right.

13 Q. I don't mean to make you stand up that long. I'll
14 move on. But the point I'm making from a lay
15 standpoint is someone back in the day in the
16 mid-1980s recognized, as part of this
17 development plan for Chadwick, that there was an
18 easement up at the top from I-20. And whether or
19 not it was a state or local easement, that
20 easement traveled through, traveled down the path
21 through Chadwick to this point here. Do you agree
22 with that?

23 A. Yes. With some comments, if you don't mind.

24 Q. Absolutely.

25 A. Okay. First of all, that's a plan that was

Franke - Cross by Mr. McCants

1 approved, but it's not a recorded plat so it never
2 was, in fact, put in place and it's not, in fact,
3 an easement. That's my opinion. Also, it's my
4 opinion, too, that engineering styles and all
5 could have been different back in that timeframe.
6 I would like to have -- I'm not an engineer, I'd
7 need an engineer to ask, but hydrology studies, to
8 see what the volume of water was going through
9 there before. Normally, these days, I'm thinking
10 you turn one in when you do a development. One
11 was not turned in there.

12 That might have been a less expensive pipe to
13 buy because it was available and they put it in
14 there because engineering and development was done
15 a little differently then than it was today.

16 Q. And to a large degree we are speculating all that
17 because you --

18 A. We're speculating it all, yes.

19 Q. -- all right. You weren't around back in the day,
20 the mid-80s, doing this project, correct? Your
21 dad was.

22 A. But I'm familiar with how engineering has changed
23 over the years. And what may have been done then
24 is not necessarily done now.

25 Q. Got it.

Franke - Cross by Mr. McCants

1 A. And what's required now is tenfold what was
2 required back in that time.

3 Q. All right.

4 MR. MCCANTS: Well, Your Honor, I -- that is
5 entering into the opinion area that I discussed early,
6 so I respectfully move to strike that answer.

7 BY MR. MCCANTS

8 Q. I'm focusing on what you can say from the
9 standpoint of your personal experience in
10 developing the land. And you develop residential
11 and commercial property?

12 A. I've never, ever developed anything personally,
13 myself, where I was actually involved in the doing
14 of it. But I've been around it having been
15 involved in projects that were built from the
16 planning stage on up to the completion.

17 Q. All right. And down at the bottom of this yellow
18 line on the Chadwick Development proposal, it
19 makes reference to another note D-11. And if you
20 look up in the top left-hand portion of this
21 development plan you will see reference to a
22 riser. It is a 24-inch vertical riser. Do you
23 understand what a vertical riser is?

24 A. Yes.

25 Q. What is a vertical riser, for the Court's benefit?

Franke - Cross by Mr. McCants

1 A. It's a pipe that comes up from the bottom to the
2 top, I guess, to form some sort of retention pond,
3 I believe, but I'm not really sure the definition.

4 Q. What it is, is it sits in a retention or a
5 detention pond. I don't think it -- I don't know
6 if it applies to both of them because there's a
7 difference between retention and detention, but it
8 serves as a spillway type apparatus. In other
9 words, where water fills up in the pond and then
10 it falls into the riser to be distributed
11 elsewhere. Is that your basic understanding?

12 A. Yes.

13 Q. And what it's designed to do more than anything
14 else, would you agree, is to allow water to flow
15 into a basin or a pond. And that riser allows
16 that water to sit there and, ultimately, slows it
17 down to be deposited elsewhere. That's what that
18 riser is for. Is that fair?

19 A. Yes.

20 Q. And that's a 24-inch riser, correct?

21 A. Yes.

22 Q. All right. And finally, with regard to the plans,
23 have you seen the label for the emergency
24 spillway?

25 A. No, sir.

Franke - Cross by Mr. McCants

1 Q. Well, it's on there. From a lay standpoint, based
2 upon your experience in developing property,
3 what's an emergency spillway?

4 A. I have no idea other than a runaround on a dam for
5 a pond in the country maybe. If the water got too
6 deep it would allow it to cross the dam, I guess.
7 I don't know.

8 Q. Your lay understanding and mine is the same. It's
9 designed to become operable in the case of an
10 emergency. And that's when a lot of water flows
11 into a pond and needs to be distributed. Would
12 you agree with my lay characterization of that?

13 A. Yes.

14 Q. Why would the county or the state require an
15 emergency spillway, a riser and all this
16 stormwater equipment installed? Why would the
17 developer go to that expense, Mr. Franke?

18 A. That's, that's a very good question. And to
19 answer it, something that just crossed my mind.
20 If -- and this project has not been developed, and
21 never was completed, if it would have been fully
22 developed, you would have had rooftops, you would
23 have had concrete driveways, basketball facilities
24 in front of somebody's house, walkways going up to
25 the house, all sorts of impervious service (sic),

Franke - Cross by Mr. McCants

1 which would increase the water flow if it was
2 developed. And that's why you need to have these
3 structures in place to protect from future water.
4 Not current water, but future water once -- and
5 I'll say this again, once it is developed. It was
6 not developed. It's not there. Do you agree?

7 Q. Yeah. Everybody agrees with that.

8 A. Okay.

9 Q. The only thing that's left of Chadwick is those
10 concrete pipes out there on your property.

11 A. Well, there are base material on the roads that
12 are still there. Have you walked the property?

13 Q. Excuse me. Yes, I have.

14 A. Okay.

15 Q. I'm glad you point that out. I mean, enough was
16 invested in this property that roads were built.
17 And that's one of the first things you do in a
18 development, correct?

19 A. Yes. And that water has washed out strong base
20 material in those former roads, too. I mean, it's
21 so strong it dug down to 12 inches of rock.

22 Q. All right. But, again, the developer, engineer,
23 whomever recognized the easement at the top-off of
24 I-20 going down through the middle of Chadwick to
25 be deposited in a pond, which had a riser and an

Franke - Cross by Mr. McCants

1 emergency spillway. Will you agree with that
2 shown on these plans?

3 A. I will agree it was proposed. But it was never
4 put in, so it would be irrelevant.

5 Q. You have mentioned that these plans were never
6 stamped approved by the county. What was your
7 understanding of whether or not that was required
8 back in the mid-'80s? Do you know? Aiken
9 County, or the city of North Augusta?

10 A. I don't know for sure in the '80s.

11 Q. How about DHEC? Did DHEC have to get involved and
12 approve anything to your knowledge?

13 A. No, I don't -- I do not know.

14 Q. Now you produced Exhibit Number 2, the document,
15 to us after I asked Tucker if he had it. Tucker
16 Player. Do you have any other documents dealing
17 with any DHEC or county approval of the company,
18 any plans or ideas for the development?

19 A. I don't have any studies, anything done related to
20 that project other than what you -- something
21 somebody let you have there.

22 Q. Let's shift gears, move along. I read your
23 deposition, and Mr. Nance took it. And Mr. Nance
24 is with us this morning. He wanted to come over
25 and say hello or whatnot.

Franke - Cross by Mr. McCants

1 He talked to you about a timber cutting on
2 this property. Did I understand your deposition
3 testimony to be, Mr. Franke, that the timber was
4 cut on the area that DOT acquired for the Parkway,
5 DOT had it cut before the condemnation case?

6 A. I'm not aware of telling him that. My memory is
7 bad and I don't really have any knowledge --

8 Q. That's okay.

9 A. -- of what happened to the money and what timber
10 was cut where. I've never seen anything
11 specifically related to that.

12 Q. All right. We've got some old documents dealing
13 with the timber cut. What I can tell you is that
14 I believe those documents say that before the
15 condemnation case was filed, or maybe after it was
16 filed but before it was settled, the landowners
17 wanted to remove timber off that property. And it
18 was removed before we began construction.

19 A. Okay.

20 Q. Does that sound reasonable?

21 A. That I can't say, that it sounds reasonable or
22 not, but it sounds like anybody, typically, would
23 do that. You would try to get everything you can
24 for it --

25 Q. Absolutely --

Franke - Cross by Mr. McCants

1 A. -- right?

2 Q. -- you want to get as much timber off that
3 property as you can before the acquisition because
4 you sold -- somebody sold the timber, correct?

5 A. Yes.

6 Q. For money, obviously.

7 A. Based on what you're telling me, yes.

8 Q. And I'm happy to share those documents with you.
9 We can look at that a little bit later. Well,
10 based on your experience, you agree with me that
11 the removal of the trees would affect how water
12 flows and how water is absorbed into land as
13 stormwater occurs, the rainfall occurs. Do you
14 agree?

15 A. It's going to affect it somewhat. To what degree,
16 it's really hard to say. It would pretty much be
17 negligible because a lot of the limbs and that
18 kind of thing would be left behind. And any kind
19 of major land disturbing -- disturbance would
20 require a silt fence and a permit to do that, so
21 if the land is not disturbed, it shouldn't really
22 overly cause more issues. But there's got a good
23 canopy out there now, and covered with foliage all
24 over the ground. So you are getting very little
25 runoff into this basin.

Franke - Cross by Mr. McCants

1 Q. Fair enough.

2 MR. MCCANTS: I'm getting close, Your Honor. I
3 know we're moving along in the morning.

4 BY MR. MCCANTS

5 Q. Then let's talk about present day. As you
6 testified Chadwick was never developed. This plan
7 for this resident community was never completed,
8 correct?

9 A. Yes.

10 Q. What have you folks done as landowners, what have
11 y'all done to try and develop the property since
12 then? I think I know the answer but I have got to
13 ask you.

14 A. Not a thing.

15 Q. Why?

16 A. Well, our direction changed as far as the
17 partnerships were concerned from then to now. So
18 our interest was pretty much to sell instead of
19 completing the development. Had the spill on it
20 that involved it and put it on hold for a while.
21 My father and one of his partners are both
22 deceased now. My father's estate has been
23 completed. One of the partner's deceased estate
24 has not been completed yet. It's still in his
25 estate. Just a lot of different, varying reasons

Franke - Cross by Mr. McCants

1 why it changed. But contamination and then DOT
2 coming through and condemning part of it certainly
3 changed the complexity of it.

4 And then you have the stormwater coming
5 through there which, based on the current highest
6 and best use, we would not do a residential
7 subdivision there at this point. I don't know
8 when that would have changed or the dates it would
9 have changed. But we were not interested in
10 developing it.

11 Q. I think you answered what I believe, and I want to
12 summarize it. When I asked you why Chadwick was
13 not developed, number 1 it was stalled for a
14 significant period of time after the Charter
15 Terminal oil spill. You agree with that, correct?

16 A. Yes, sir.

17 Q. By the time that property was cleaned up your
18 father, respectfully, he had passed on and -- or
19 shortly before, but the main point is and this is
20 why I want to talk about the landowners. All the
21 landowners, the people that own this property,
22 kind of took a different direction.

23 A. They got older.

24 Q. Right. All of us do. And maybe the group that
25 had started Chadwick, because of the oil spill,

Franke - Cross by Mr. McCants

1 because of the delay, said we're not going to put
2 any more money into a residential development
3 there. Is that fair?

4 A. Yes.

5 Q. And that's before 2006, before DOT had to acquire
6 this land for the Palmetto Parkway. Do you agree?
7 You want me --

8 A. Yes.

9 Q. -- to state the question another way?

10 A. Yes, I agree.

11 Q. You agree with that?

12 A. Yes.

13 Q. So the decision not to develop Chadwick because of
14 the reasons you discussed occurred before DOT ever
15 touched that 25 acres to acquire it for purposes
16 of improving the interstate. Do you agree?

17 A. Yes.

18 Q. All right. Kind of the technical way lawyers look
19 at that and whatnot, Mr. Nance asked you these
20 questions in the deposition. You, you folks have
21 done nothing, respectfully, done nothing to
22 mitigate what you believe were your damages since
23 DOT did what it did to improve Palmetto Parkway.
24 Is that fair?

25 A. No.

Franke - Cross by Mr. McCants

1 Q. It's not true?

2 A. No.

3 Q. What have you done to mitigate your damages?

4 A. We had a mitigation hearing at some point, but DOT
5 offered us a figure --

6 Q. Hold on. Understand my, my question. Not
7 mediate, mitigate. The term mitigate, you
8 understand what I mean?

9 A. You mean fix the problem ourselves.

10 Q. Well, try to fix it. Try to do something to
11 lessen your damages. And I won't, I won't keep
12 you up there too long, but when Mr. Nance asked
13 you what have you done to mitigate your damages if
14 anything, your answer was nothing. Do you
15 remember that?

16 A. Well, I do not remember that. But if you are
17 referring to the fact could I build a brick wall
18 and try to keep the water from coming on my
19 property, I think that's illegal to do that and
20 it's wrong. It's unethical for us to do that to
21 keep the water from washing on us like it's doing.

22 Q. I think --

23 A. It would be a nice alternative, but it's just not
24 feasible.

25 MR. MCCANTS: May I approach, Your Honor?

Franke - Cross by Mr. McCants

1 THE COURT: Yes.

2 BY MR. MCCANTS

3 Q. Let me focus on my question. At your deposition,
4 Mr. Nance said, and I'll show it to you, I marked
5 it. Question at Line 13, if you would,
6 Mr. Franke. Would you read Mr. Nance's question
7 for the Court?

8 A. Yeah. I mean, that's what you have here, yes.

9 Q. Read it for the Court though. That's what I need
10 you to do.

11 A. What have you done to mitigate your damages, if
12 anything? Nothing, was my reply.

13 Q. That was your testimony --

14 A. Yes.

15 Q. -- at that time, is that correct?

16 A. Yes.

17 Q. All right. You're not planning to use those pipes
18 at some point? They're still good. I'm serious.
19 They are just sitting out there. The reinforced
20 concrete pipes. Nobody's carried them off. You
21 folks planning on developing this property?

22 A. No.

23 Q. Using those pipes?

24 A. No.

25 Q. Why are the pipes still there?

Franke - Redirect by Mr. Player

1 A. The pipes were still there because the contractor
2 that brought them in there that was doing the work
3 abandoned them, and left them there, and never
4 completed the job. He never completed the job
5 because of the spill that was done on the
6 property. And the houses were never built, too,
7 which would create more water flow needing those
8 pipes.

9 Q. And all this is in light of the fact that back in
10 2006 and 7, you don't disagree that the owners of
11 that property received over a half million dollars
12 for the 25 acres that the state acquired to build
13 and improve the Palmetto Parkway? You don't
14 disagree with that?

15 A. No, I don't.

16 Q. All right. Thank you, Mr. Franke. I appreciate
17 your patience with me.

18 MR. MCCANTS: Can I have one second, Your Honor?

19 THE COURT: All right. Any redirect?

20 MR. PLAYER: Yes, Your Honor. Briefly.

21 THE COURT: All right, Mr. Player.

22 REDIRECT EXAMINATION

23 BY MR. PLAYER

24 Q. We'll go back with Defendant's Exhibit 1. If this
25 is the condemnation where they -- it's right here.

Franke - Redirect by Mr. Player

1 The condemnation where they bought 25 acres from
2 you, correct?

3 A. Yes.

4 Q. Did they give you anything for the land that you
5 continued to own?

6 A. No.

7 Q. Did you tell them, you can dump all the water in
8 the world you want to on us, in that document?

9 A. No.

10 Q. Does it make sense that they only pay for the
11 25 acres and you agree to allow them to destroy
12 the other 140, or other however many it was?

13 A. No. And if they did so that would basically be
14 condemnation. They are using my property and have
15 the ability to use it, and I'm not getting paid
16 for it.

17 Q. But my main question is, was the, other than the
18 25 acres that they filed the action and brought
19 into the jurisdiction of the Court, was there ever
20 anything relating to the rest of the property that
21 you maintain ownership (inaudible)?

22 A. No.

23 Q. I'm with you. I have no idea what they think you
24 can do to mitigate these problems, but I have a
25 very simple question for you as a realtor.

Franke - Redirect by Mr. Player

1 THE COURT: Mr. Player, that TV has automatically
2 --

3 MR. PLAYER: Yeah, I guess I'll go over here
4 somewhere.

5 (WHEREUPON, a video was played for the
6 Court.)

7 BY MR. PLAYER

8 Q. Can you sell property that is owned by somebody
9 when you know that amount of water is flowing in
10 an area where a (inaudible) would be deficient.

11 A. I could, but I could possibly have further
12 litigation against me for not being honest and
13 truthful about the situation that's going on. It
14 would cost me actions against me in the future for
15 not letting them know about it.

16 Q. Would you try and cross that waterway with that
17 amount of flow?

18 A. No.

19 Q. And then we got to this picture. That is actually
20 your property line. Is there any doubt in your
21 mind whether or not that water is causing damage
22 to your property at that location?

23 A. No.

24 Q. And this is 2014.

25 A. Do you have the information from two weeks ago,

Franke - Redirect by Mr. Player

1 the --

2 Q. That's where we're going.

3 A. -- okay.

4 Q. Now you look what happened in '14 and what you
5 have now. Has DOT done anything to mitigate your
6 damages?

7 A. Unh-uh.

8 Q. All right. I think you made the point and I'll
9 make it again with David. What is there now where
10 all of that development is in that plan?

11 A. It's woods and very, very --

12 Q. Dense foliage?

13 A. -- it's pretty heavy. I mean if it was cut over
14 you would never know it today.

15 Q. So if this plan was to be implemented what would
16 be there? How -- would it be the same dirt and
17 trees to absorb the water. Or would it be covered
18 with impervious surfaces like you said?

19 MR. MCCANTS: Your Honor, I object to that.
20 That's speculative given his prior testimony. And he's
21 talking about what may happen in the future, which was
22 any issue attached to the water. That's speculative.
23 I think that's getting into that opinion we talked
24 about earlier, also. Now I --

25 THE WITNESS: Can I say something?

Franke - Redirect by Mr. Player

1 MR. MCCANTS: Hold on.

2 BY MR. PLAYER

3 Q. My question is, if that property is developed,
4 correct?

5 A. No.

6 Q. If that plan --

7 A. Oh, if it was developed, yes.

8 Q. And there would be roads, right?

9 A. Yes.

10 Q. And so those roads would be covered by asphalt,
11 right?

12 A. Yes.

13 Q. Well, water doesn't go into asphalt does it?

14 A. No.

15 Q. And these are house lots, right?

16 A. Yes.

17 Q. House lots. You don't develop property and not
18 build houses, right?

19 A. Right.

20 Q. Does the water go through the roof when it hits
21 the roof?

22 A. No.

23 Q. So as a person in real estate, what do the owners
24 do when they disturb the land and eliminate
25 pervious surfaces?

Franke - Redirect by Mr. Player

1 A. You have got to account for the water.

2 Q. You have to account for it, and do what else?

3 A. Slow it down, retain it. Not dump -- you are not
4 allowed to dump water on anybody else more so --
5 how do I word this?

6 Q. Well, you shouldn't --

7 A. You cannot, you cannot increase the amount of
8 water going on your neighbor more afterwards than
9 what you had before the development was put in
10 place.

11 Q. -- so --

12 A. When the water gets released onto my property from
13 a neighbor who has developed his, it cannot
14 increase whatsoever the flow or the velocity from
15 what it was like before the development was put
16 in.

17 Q. -- okay. And my -- here's the simple question.
18 Do you deny that water has flowed along that same
19 basic line that they call a blue-line stream since
20 20 years ago? Are we denying that -- are we
21 saying that we never got water?

22 A. No.

23 Q. What do we say? What do we think happened? Our
24 water increased or decreased?

25 A. No, the water increased.

Franke - Redirect by Mr. Player

1 Q. Okay. So in this situation it would be an entire
2 development of the property. It would not be
3 (inaudible), right? So that would do what to the
4 water that you're producing as the owner of that
5 property -- of that development?

6 A. It would increase, and then it would have made me
7 obligated to try to control it when it goes off my
8 property onto my neighbor's.

9 Q. You might have to get bigger pipes, right?
10 Because now you don't have to deal just with DOT
11 water, you have to deal with all the increased
12 water you created in the development, correct?

13 A. Yes.

14 MR. MCCANTS: Objection, Your Honor. Based on
15 what I said before. That's speculation. That is
16 definitely in need of an expert in hydrology.

17 THE COURT: All right. Let me address your first
18 objection, which I did not. That -- your first
19 objection was sustained. However, Mr. Player did
20 rephrase his question to my satisfaction, and so we
21 heard testimony in a different way.

22 With regards to this objection, I am going to
23 sustain that, Mr. Player, with regards to the question
24 on the basis of the size of the pipes and --

25 MR. PLAYER: Okay.

Franke - Redirect by Mr. Player

1 THE COURT: -- so we've sustained both of those
2 objections.

3 MR. PLAYER: Thank you, Your Honor.

4 BY MR. PLAYER

5 Q. You want to talk about this for another minute?

6 MR. MCCANTS: Can I see it?

7 (Whereupon, an off the record discussion was
8 held between attorneys.)

9 BY MR. PLAYER

10 Q. Is there anything else you want to say?

11 MR. MCCANTS: Your Honor, that's kind of open
12 ended. I -- we usually try to have a question.

13 MR. PLAYER: What was the basis?

14 THE COURT: That is very open ended.

15 THE WITNESS: Can I tell you what to ask me?

16 MR. PLAYER: Sure.

17 THE WITNESS: Let me think a minute.

18 MR. PLAYER: No. No, I mean.

19 BY MR. PLAYER

20 Q. All right. My question is that the question about
21 mitigation, can you think of any way that you
22 could have stopped the damage that this water was
23 causing to your property that would be legal?

24 A. It could be mitigated, yes.

25 Q. How?

Franke - Redirect by Mr. Player

- 1 A. By me putting in a very large retention facility
2 or some kind of thing on my property to take care
3 of somebody else's problem. I was talking a
4 little out of line when I talked about putting a
5 wall at the property. I mean that's a little
6 facetious but from an engineering standpoint you
7 could put in facilities -- that's really an
8 engineering question. But I -- with the amount of
9 water, I don't see how any facility is going to be
10 able to handle all that water. I really don't in
11 my history. I don't see how it can be handled. I
12 don't think it can be mitigated. (inaudible).
- 13 Q. We were talking about --
- 14 A. I mean the area that this water is coming off of
15 impervious surface, being directed at one point
16 like a gun to somebody's head, right at that one
17 point.
- 18 Q. -- all right. We'll go back to (inaudible). This
19 is the overhead with your drawing of the pipes,
20 right?
- 21 A. Yes.
- 22 Q. We talked about where the oil people are, right?
- 23 A. Right.
- 24 Q. And one night they left the valve open and caused
25 you so many problems that you had to shut down

Franke - Redirect by Mr. Player

1 development. But I want you to explain to the
2 Court what these orange lines are. Is that DOT
3 pipe? Is it?

4 A. Are you talking about the yellow lines?

5 Q. Right. The big lines --

6 A. Okay. Well.

7 Q. -- from the front of the (inaudible).

8 A. Okay. The yellow line running parallel from
9 Charter, that's a ditch.

10 Q. Right.

11 A. I don't think it's pipe. That's a ditch.
12 Everything else is piped.

13 Q. All right. So --

14 A. But that ditch goes in -- from Charter goes into
15 that point which is where the 24-inch pipe that
16 just went from that ditch across I-20 to our
17 property, not any weir traps anywhere along the
18 way, that's where that petroleum went down and
19 flowed onto our property through that 24-inch
20 pipe.

21 Q. And if tomorrow there is a spill here and it goes
22 in the ditch, where is it going? To your
23 property, right?

24 A. Yeah.

25 Q. Well --

Franke - Recross by Mr. McCants

1 MR. MCCANTS: Again, Your Honor, that's
2 speculative, what they have in the future. You're
3 getting into spilled oil and where it's going to go.

4 THE WITNESS: I appreciate that point.

5 MR. PLAYER: It's a hypo. I mean if this is where
6 you send your stormwater, there's an oil leak, it's
7 going to be in the stormwater.

8 MR. MCCANTS: But you asked a question what if
9 Charter Terminal has another big spill, where is the
10 oil going. He doesn't know. Calls for speculation.

11 THE COURT: All right.

12 MR. PLAYER: Well, if oil is on the ground and
13 rains comes, it's going to wash it into the stormwater
14 system.

15 THE COURT: So I think that -- I think to address
16 Mr. McCants' objection, I think that is speculative. I
17 want to sustain that and just strike the answer.

18 MR. PLAYER: Okay. I think I'm done with him.

19 MR. MCCANTS: Recross, Your Honor.

20 THE COURT: Yes, recross.

21 MR. MCCANTS: Leave that on the screen for just a
22 second.

23 RE-CROSS EXAMINATION

24 BY MR. MCCANTS

25 Q. Mr. Franke, you told Judge Pope the first time you

Franke - Recross by Mr. McCants

1 walked the property was in 2000, correct?

2 A. Approximately.

3 Q. Approximately. So it's fair to say that you can't
4 tell her with any degree of reliability or
5 certainty what type of water volume/velocity
6 flowed through your property prior to 2000, is
7 that correct?

8 A. I had walked that whole drainage basin before.
9 There was no evidence of any erosion or any
10 problems before y'all condemned the property.

11 Q. Prior to 2000?

12 A. After 2000. Between 2000 and the condemnation --
13 I went in there on 2000 and there was no evidence
14 of any washing or anything going on on our
15 property in that location.

16 Q. All right. Between -- and this is going to be an
17 important date. We're going to bring this out.
18 Between 2000 and 2005, that's when Mr. Saunders
19 walked the property to do his appraisals for the
20 condemnation. Are you saying all that happened
21 between 2000 and 2005 or when the construction
22 occurred? Is that what you're saying?

23 A. What happened between those dates?

24 Q. All the damage due to the water.

25 A. No, I never said that.

Franke - Recross by Mr. McCants

1 Q. Well, follow with me for a second. Before 2000
2 you never walked the property, correct?

3 A. There was no sign of --

4 Q. Hold on. Hold on. That's a simple question.
5 Before 2000 you never inspected, walked the
6 property, correct?

7 A. Correct.

8 Q. You did so in 2000. Your testimony is you saw no
9 evidence of water erosion or anything of that
10 nature. Is that what you're telling us?

11 A. Yes, sir.

12 Q. All right. Well, I know I'm on recross when I
13 lose focus. Mr. Saunders is going to come in the
14 courtroom and take an oath at some point and --

15 MR. MCCANTS: Can I go and mark these, Your Honor?

16 I told you I was going to be brief and I'm sorry.

17 We've kind of opened back up here.

18 MR. PLAYER: No objection.

19 THE WITNESS: Can I say something?

20 THE COURT: Without objection.

21 THE WITNESS: Could I say something with where
22 you're possibly heading with this?

23 MR. MCCANTS: Hold one second. Let the court
24 reporter mark these exhibits if you would.

25 BY MR. MCCANTS

Franke - Recross by Mr. McCants

1 Q. All right. Mr. Franke, again, the timeframe I
2 want to focus on, you first walked the property in
3 2000. You agree you don't know what kind of water
4 flowed through there in size and volume before
5 2000, correct? You just don't know.

6 A. Down that drainage basin, yes, I do know. Well, I
7 mean not before 2000.

8 Q. Not before 2000.

9 A. Right.

10 Q. But your testimony is when you saw it in 2000
11 there was no erosion in the lands in that area, is
12 that correct?

13 A. Yes, there were.

14 Q. There was?

15 A. Yes.

16 Q. How much erosion was it? Because I understood you
17 to say there wasn't any damage due to water.

18 A. I've been talking the whole time about the basin
19 where the water is coming from DOT --

20 Q. Yes, sir.

21 A. -- the roadways from where we did the development,
22 there was some washing and erosion going on with
23 those but it had stopped. It's not occurring now
24 but it's already there. It's history and it has
25 got foliage and trees back over it again.

Franke - Recross by Mr. McCants

1 Q. And what I can tell you is, I think the testimony
2 is going to be that these photographs that I'm
3 getting ready to show you were taken in 2005, five
4 years after you first walked the property. And
5 they were taken by Stuart Saunders, the appraiser.

6 MR. MCCANTS: And they are in without objection,
7 is that correct?

8 MR. PLAYER: Hmm?

9 MR. MCCANTS: They are in without objection, these
10 boards?

11 MR. PLAYER: Yes, sir.

12 BY MR. MCCANTS

13 Q. This is a photograph of your property. It's
14 marked Number 6. And again, what I'm going to
15 tell the Court is that Mr. Saunders, I believe,
16 will testify that these were taken in 2005. Do
17 you see that?

18 A. Yes.

19 Q. Do you see that erosion?

20 A. Yes. I don't know when that was taken, or I don't
21 know who --

22 Q. Let me again tell you, I think the testimony will
23 be that this photograph was taken in 2005, five
24 years after you first walked the property,
25 correct?

Franke - Recross by Mr. McCants

1 A. Yes.

2 Q. All right. Will you agree with me, Bill, that
3 this shows significant erosion to the property?

4 A. Past erosion, yes. But you've got foliage growing
5 all in those ditches right now.

6 Q. Fair.

7 A. In that picture you have foliage growing
8 everywhere. It looks like whatever had caused
9 that event or was there --

10 Q. Do you agree with me --

11 A. -- was historical. It's not current.

12 Q. -- do you agree with me this photograph marked as
13 Exhibit Number 6 shows significant erosion to your
14 property?

15 A. I don't know if it's my property or somebody
16 else's property.

17 Q. Mr. Saunders --

18 A. I can't actually identify where it is. I wasn't
19 there with Mr. Saunders. I have no idea. But
20 looking at it now there is a lot of foliage that
21 has grown in those areas indicating --

22 Q. -- and the question I have is do you agree this
23 photograph shows significant erosion to whatever
24 property this picture depicts?

25 A. -- past historical erosion, yes.

Franke - Recross by Mr. McCants

1 Q. Past, but significant erosion at the time the
2 photograph was taken, correct?

3 A. Significant past erosion at the time the
4 photograph was taken.

5 Q. Another photograph, Number 7. Would you agree
6 with me this photograph, we're not going to get
7 into whose property it is because I've got
8 testimony on that.

9 A. I know whose property that is. I know right where
10 that is.

11 Q. Whose is this?

12 A. That is our property and it's where one of the
13 roadways was built. There's a steep hill going up
14 on one of the roads, and naturally it's going to
15 erode if it was left undeveloped and unattended
16 for years.

17 Q. Trees falling, water erosion, moving dirt, et
18 cetera. You agree with that?

19 A. Yeah, because it was unstable because the road had
20 been graded, and we put base material in there.
21 It was unstable.

22 Q. The same thing with Number 8.

23 A. That's -- yeah, that's where the road used to be
24 --

25 Q. Number 8, that photograph.

Franke - Recross by Mr. McCants

1 A. -- until it got paved.

2 Q. Well, if it's --

3 A. It's got nothing to do with the basin that DOT
4 water is coming through. And this problem is
5 stopped. It's not there. It's not ongoing. It
6 hasn't been ongoing for years.

7 Q. -- well, Mr. Franke, those photographs were taken
8 before DOT did any work. These photographs -- if
9 they were taken in 2005 you would agree with me
10 that's before DOT touched the dirt out there to
11 build the Palmetto Parkway? Do you agree?

12 A. Yes, but what you don't understand is the fact
13 that DOT is undermining it as we're speaking
14 today, and has been since they put in the roadway.
15 This has ceased because natural foliage has grown
16 over and there's no more issues going on to cause
17 it to keep continue. And it's because there was a
18 roadway where it was disturbed. Our road -- that
19 basin was undisturbed. In fact, foliage had grown
20 back from the spill and everything. There is no
21 way in the world that that should have been washed
22 out.

23 Q. But the developer back in '86 anticipated a lot of
24 water coming through that property along that blue
25 line that starts at I-20, and that's why they

Franke - Recross by Mr. McCants

1 bought those pipes. Do you agree with that?

2 A. They bought the pipes for future development when
3 it was built to handle the impervious surfaces and
4 the excessive water that would be caused by that.
5 That's why the pipes were there. Not because of
6 anticipation of DOT. Until you show me hydrology
7 reports and information to indicate otherwise, I
8 don't, I don't go with that.

9 Q. Well, and but, but really that's speculation on
10 your part. I'm not --

11 A. Well --

12 Q. -- and that's just what you believe?

13 A. I'm sorry. When we were developing this did we
14 know the DOT was going to build an interchange?
15 No. We had no idea they were going to be buying
16 property from us and building an interchange, so
17 what would we even worry about that?

18 Q. Well, you say they, you weren't involved in that.
19 Do you agree?

20 A. I've got a little common sense.

21 Q. And I --

22 A. I've got a lot of common sense.

23 Q. It appears to me you do and I appreciate that.
24 But the fact is you were not involved with the
25 development of Chadwick back in the mid-'80s, do

Franke - Recross by Mr. McCants

1 you agree?

2 A. I agree.

3 Q. You didn't work with the engineer or the planners.
4 Do you agree?

5 A. Right. I agree.

6 Q. And this Court, who has judicial and common sense
7 too, can conclude from this plat that somebody
8 spent a lot of money anticipating a lot of water
9 was coming through Chadwick, in whatever form,
10 houses, trees, but water that was going to flow
11 from I-20. Do you agree?

12 (inaudible crosstalk).

13 THE WITNESS: You use the word --

14 MR. MCCANTS: You have got to stop just a second.
15 Let him --

16 THE COURT: I didn't hear an objection.

17 MR. PLAYER: Objection. Calls for speculation.

18 MR. MCCANTS: I'll withdraw the question, Your
19 Honor.

20 THE COURT: Thank you.

21 BY MR. MCCANTS

22 Q. Mr. Franke, one more question. When I asked you
23 before you indicated you hadn't done anything to
24 mitigate any damage that you and the other
25 landowners had sustained. Now you are saying you

Franke - Recross by Mr. McCants

1 could do some things to mitigate it, correct? Do
2 you agree with me that was your testimony in
3 response to Mr. Player's questions? That's yes or
4 no.

5 A. Anything is possible.

6 Q. All right. But you haven't done anything to
7 mitigate anything, any damages to date. Do you
8 agree with that?

9 A. No.

10 Q. All right. That's your testimony?

11 A. No.

12 Q. Have not done anything?

13 A. Have not done anything to mitigate damages.

14 MR. MCCANTS: All right. Thank you, again. I
15 appreciate your patience. Thank you, Your Honor.

16 THE COURT: All right. Redirect.

17 MR. PLAYER: Your Honor, just one thing just to
18 clarify specifically what he just discussed with
19 Mr. Franke. Just to make sure you understand where
20 those pictures are and where our claims lie.

21 THE COURT: All right.

22 MR. PLAYER: If you'll just give me leeway.

23 THE COURT: Hold on. Mr. McCants, is there any
24 objection to sort of a third direct?

25 MR. MCCANTS: I beg your pardon. I was texting my

Franke - Re-Redirect by Mr. Player

1 expert a question, Your Honor.

2 MR. PLAYER: I just wanted him to be able to say
3 where these are in relation to the property because I
4 think that's where --

5 MR. MCCANTS: Sure. That will be very helpful.

6 MR. PLAYER: Okay. All right. We'll do this in a
7 twofold. All right.

8 THE WITNESS: Can I talk to my counsel a second?

9 MR. PLAYER: No. It's against the rules.

10 THE COURT: Unfortunately, no.

11 THE WITNESS: I don't know the rules. I'm sorry.

12 RE-REDIRECT EXAMINATION

13 BY MR. PLAYER

14 Q. All right. This is the outfall -- and for some
15 reason (inaudible). All right. On this you see
16 this purple/blue line? Do you recognize what that
17 blue line is on the picture?

18 A. That's where the water is crossing our property.

19 Q. Okay. So we go to Number 3, the interior view.
20 Where is this and where is this erosion running?

21 A. If you look at the area to the right about middle
22 of the property you see a little yellowish
23 white-ish -- go down. No, no, no, down -- oh, oh,
24 oh. Go up to the right. Right there.

25 Q. That?

Franke - Re-Redirect by Mr. Player

1 A. That's the roadway that was cut in. It's away
2 from that drainage basin and that's where the
3 erosion is happening.

4 Q. That light area is actually this area of dirt
5 that's in the picture.

6 A. Yes.

7 Q. And the channel doesn't run back here right? It
8 runs back toward I-20, correct?

9 A. It runs from I-20 towards us.

10 Q. Okay.

11 A. But it does not connect with that area at all.

12 Q. This water is not coming from this outfall.

13 A. No.

14 MR. MCCANTS: Your Honor, I just don't think he
15 knows. There's no accommodation for it unless he's
16 been out there and he's seen the water coming from the
17 sky. If he's suggesting that it's not coming from a
18 roadway, wants to say it's coming from the sky directly
19 down and causing that degree of erosion, that's pure
20 speculation. He doesn't have the personal knowledge to
21 testify (inaudible).

22 THE WITNESS: I do.

23 MR. PLAYER: It, it the line goes -- you can see
24 the line on the picture. All I'm trying to establish
25 is this erosion is -- because I've been there. I know

Franke - Re-Redirect by Mr. Player

1 where this is.

2 MR. MCCANTS: I still have an objection to him
3 saying that photograph depicts property somewhere on
4 what's on the screen, Judge.

5 THE COURT: His objection is to the source of the
6 erosion.

7 MR. MCCANTS: That's right.

8 BY MR. PLAYER

9 Q. Okay. Well, where does the channel of erosion
10 lead back to from your personal observations?

11 A. It comes from my property, across my property from
12 rainfall down an old road which you can see from
13 the development plan. And I can point out exactly
14 where it is because I know exactly where it is
15 because I've looked at it thousands of times. I
16 can tell you exactly where it is on that map right
17 there because you can tell by the topo lines where
18 the grade starts going uphill, and you can tell
19 exactly that's where it's going uphill. And you
20 can tell exactly, it's not in that basin.

21 Q. Okay. Maybe this is easier. You see how the
22 channel is running kind of this way on the
23 picture. Where is the outfall we're complaining
24 about? Is it here or here? Or is it here, is it
25 to the sides?

Franke - Re-Redirect by Mr. Player

1 A. It's way up above your left shoulder, your right
2 shoulder.

3 Q. Over here?

4 A. Yeah.

5 Q. Does it connect to this channel?

6 A. No.

7 Q. Okay. And again, this is ten thousand years of
8 erosion. Well, you said from the beginning of
9 time some water has been flowing through there,
10 so.

11 MR. MCCANTS: Objection. That's not his
12 testimony.

13 THE COURT: And I'll sustain. We'll move on.

14 BY MR. PLAYER

15 Q. Do you know where these are in relation?

16 A. That's another, that's another picture from that
17 same area.

18 Q. Okay. The same area as the one that --

19 A. Yes. Yes.

20 Q. Exhibit 8.

21 A. Yes.

22 THE COURT: Six?

23 BY MR. PLAYER

24 Q. This picture.

25 A. I'm really not sure where that is.

Franke - Re-Redirect by Mr. Player

1 Q. Do you know if this -- do you recognize this as
2 anywhere close to the outfall?

3 MR. MCCANTS: Your Honor, he's already said he
4 doesn't know.

5 THE WITNESS: I really don't know for sure where
6 that is.

7 MR. PLAYER: Okay.

8 THE COURT: It's asked and answered.

9 MR. PLAYER: Okay.

10 THE WITNESS: I know where the first two are
11 beyond a shadow of a doubt. No question.

12 BY MR. PLAYER

13 Q. And they are over here, right?

14 A. Yes.

15 MR. PLAYER: Okay. No further questions, Your
16 Honor.

17 THE COURT: All right, very good. Thank you
18 gentlemen.

19 MR. MCCANTS: One more?

20 THE COURT: I'll allow a follow-up.

21 BY MR. MCCANTS

22 Q. All right. You don't know where Number 6 is.

23 That's the property. Is that correct, Mr. Franke?

24 A. I don't know where on our property that would be,
25 no, sir.

Franke - Re-Redirect by Mr. Player

1 Q. But you agree with me that looks like a mini Grand
2 Canyon? Don't you agree? That's the time to use
3 one of the phrases you used?

4 A. That would -- let me rephrase it. It's a mini,
5 mini, mini, mini Grand Canyon compared to the mini
6 Grand Canyon of the outfall.

7 Q. That wasn't my question.

8 A. Well, I'm just answering it. No, it's not a mini
9 Grand Canyon.

10 Q. It's not?

11 A. No.

12 Q. Do you agree with me that Number 6 is serious
13 erosion to land?

14 A. Not currently, no.

15 Q. I didn't ask that.

16 A. No.

17 Q. Does the picture depict serious erosion?

18 A. No.

19 Q. You don't think that's -- that does?

20 A. No. It's not happening, so no. It's not ongoing.

21 Q. I didn't ask that question. I'm just asking the
22 moment in time when someone took a camera and
23 captured this image on Number 6, will you agree
24 with me it shows significant erosion at that
25 point?

Franke - Re-Redirect by Mr. Player

1 A. Yes.

2 MR. MCCANTS: All right. That's all I have, Your
3 Honor.

4 THE WITNESS: Can you tell me where --
5 I'm sorry.

6 MR. MCCANTS: I don't know. We'll have to wait on
7 Mr. Saunders.

8 THE COURT: All right. All right.

9 MR. MCCANTS: Thank you, Your Honor, for your
10 patience.

11 THE COURT: No, thank you. Mr. Franke, at this
12 time -- it is Franke for Frank?

13 THE WITNESS: Franke, yes, ma'am.

14 THE COURT: Mr. Franke, you are excused at this
15 time. Again, please watch your step going down right
16 here.

17 THE WITNESS: All right. Thank you, Your Honor.

18 THE COURT: Thank you, sir.

19 MR. PLAYER: So much for my plan.

20 THE COURT: So you have how many more? May I have
21 a number?

22 MR. PLAYER: I have three witnesses. Two will be
23 relatively short. They're just going to be, kind of,
24 establishing a foundation for pictures and their
25 observations when they first came on the property.

Franke - Re-Redirect by Mr. Player

1 THE COURT: All right.

2 MR. PLAYER: And then I'll finish with Mr. Simono
3 who I expect direct to be an hour, hour and a half.
4 And then if Clarke will shut up we might be able to
5 finish (inaudible).

6 THE COURT: Okay, (inaudible) the record.

7 MR. MCCANTS: He can put it on there if he wants
8 to.

9 THE COURT: All right. And so what we'll do right
10 now is break for, for a lunch break and give you all a
11 chance to recuperate and rejuvenate. We'll reconvene
12 at --

13 MR. PLAYER: You want -- since you have got to go
14 early, why don't we just do Plaintiff today, put the
15 motions up, let you take them under consideration
16 overnight and we start tomorrow. That's kind of the
17 easiest way to --

18 THE COURT: That's probably what's going to end up
19 happening time-wise anyway.

20 MR. PLAYER: I think so.

21 THE COURT: So we'll start back at 1:15 and we'll
22 see -- does that give you all enough time?

23 MR. PLAYER: Certainly.

24 THE COURT: All right. We'll see how the day goes
25 from there.

1 MR. PLAYER: Okay.

2 MR. MCCANTS: And, Your Honor, it's not mandatory
3 I make that meeting at 5:00. But if planning and
4 whatnot would allow it I would like to be able to go,
5 but it's not a mandatory.

6 THE COURT: Yes. Well, we'll see how, we'll see
7 how it pans out --

8 MR. MCCANTS: Okay.

9 THE COURT: -- Mr. McCants.

10 MR. MCCANTS: I just don't want to get in trouble
11 with the great almighty, if you know what I mean.

12 THE COURT: No. I think He knows your heart. And
13 so, but we'll see how -- I have some, some things right
14 after. So we'll see how the day pans.

15 MR. PLAYER: Okay.

16 THE COURT: All right.

17 MR. PLAYER: Thank you, Your Honor.

18 THE COURT: All right. We are adjourned until
19 1:15.

20 (WHEREUPON, the Court took a recess.)

21 THE COURT: All right, gentlemen. We do have, you
22 have two more -- three more witnesses.

23 MR. PLAYER: Three more witnesses.

24 THE COURT: Okay.

25 MR. PLAYER: Two should be brief, and then

1 Mr. Simono will be a little lengthy, but hopefully not
2 as long as the first one was.

3 THE COURT: All right. And so we'll see how it
4 proceeds, again. All right. Sir, if you are ready to
5 get started we'll go back into it.

6 MR. PLAYER: Yes, ma'am. Plaintiff calls William
7 Badger to the stand.

8 CLERK: Sir, come forward and be sworn. Put your
9 left hand on the Bible and raise your right hand. Do
10 you solemnly swear the testimony you should give the
11 Court in this case shall be the truth, the whole truth,
12 and nothing but the truth, so help you God?

13 THE WITNESS: I do.

14 CLERK: Please have a seat. State your full name
15 for the Court.

16 MR. PLAYER: Do you want me to do the next five.
17 I think they (inaudible) without objection.

18 THE COURT: Excuse me. Before we get started. I
19 do have Plaintiffs' 1-5 here. They are not marked but
20 I did a post-it note.

21 MR. PLAYER: I think you had the marked copies.
22 Those are just yours.

23 THE COURT: These are just my copies?

24 MR. PLAYER: Yes, ma'am.

25 THE COURT: Okay. Thank you.

1 MR. PLAYER: 6 through 10.

2 THE COURT: 6 through 10. Without objection,
3 Mr. McCants?

4 MR. MCCANTS: No objection.

5 (Whereupon P-6 through P-10 was entered into
6 evidence.)

7 WILLIAM BADGER, being first duly
8 sworn, was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. PLAYER

11 Q. Will, introduce yourself to everyone.

12 A. Hi. My name is William Franklin Badger. I'm Will
13 Badger and I'm here on behalf of Howard Lumber
14 Company.

15 COURT REPORTER: Spell your last name for me,
16 please.

17 THE WITNESS: Badger, B-A-D-G-E-R.

18 THE COURT: Mr. Badger, what company please?

19 THE WITNESS: Howard Lumber Company.

20 THE COURT: All right. Thank you.

21 BY MR. PLAYER

22 Q. What do you do at Howard Lumber?

23 A. I'm the president of Howard Lumber Company.

24 MR. PLAYER: You can take a break now while we
25 mark these.

Badger - Direct by Mr. Player

1 THE COURT: All right. These are marked. Very
2 good.

3 MR. PLAYER: I wrote them down at the bottom.

4 THE COURT: Yes, I'm ready.

5 BY MR. PLAYER

6 Q. How did you get involved in this property
7 that's -- we're talking about today?

8 A. Howard Lumber Company came to own a portion of
9 this property based on a builder that owed us
10 money. We sell lumber and building supplies, much
11 of it on credit, and Mr. Leaver failed to pay us.
12 We sued him and ended up, through lots of legal
13 maneuvering, owning some portion.

14 Q. Okay. When did you first became aware of any
15 water issues out on this property?

16 A. I think -- I came to Howard Lumber Company in
17 2012, and I probably didn't learn of it until
18 several years later. And then it was just before
19 the time that we hired you. About a year before
20 we hired you, so I think that's 2015, 2016-ish
21 that I first became aware of the problems.

22 Q. And what, what introduced you to me? What made
23 you aware of me?

24 A. Billy Franke --

25 Q. Okay.

Badger - Direct by Mr. Player

1 A. -- who was the previous witness.

2 Q. Did you ever go out to the property and witness
3 this and the condition of (inaudible) for
4 yourself?

5 A. I did, quite a few times.

6 Q. Okay. And did you take pictures while you were
7 out there?

8 A. I did.

9 Q. And if you will look at Exhibits 6-10, which I
10 believe are admitted without objection. And I'll
11 put them up here on the screen. The first one.
12 That one that matches Number 6.

13 A. Yes.

14 Q. Can you tell us what the picture in Number 6 is?

15 A. The picture of Number 6 is where the water is
16 entering our property from the 520/I-20
17 interchange. And you can see some of the rock and
18 debris and erosion that it has caused.

19 Q. Okay. And down here, these big blocks, what are
20 those down there?

21 A. I believe they are some sort of, like, concrete
22 and type aggregate. I mean, big chunks of large
23 concrete that was dumped there or placed there for
24 some other reason.

25 Q. Did -- are you aware of anybody in an ownership

Badger - Direct by Mr. Player

1 role add that (inaudible).

2 A. No.

3 Q. Okay. Any idea how it got there?

4 A. Only, only from the testimony about the rock weir
5 that DOT placed at some point.

6 Q. Okay. And over here on the far right side, you
7 see this large tree with the exposed roots.

8 A. Yes.

9 Q. Have you been able to observe that over time in
10 the last five years since you have been going out
11 to the property?

12 A. Yes. And the amount of erosion has increased
13 significantly.

14 Q. So from your personal observation of the last
15 five years erosion has definitely taken a good bit
16 of the property, especially at this point where
17 the outfall is?

18 A. Yes, absolutely. I mean it can take noticeable
19 amounts of dirt in a large storm.

20 Q. Okay. When you first -- you weren't there in 2010
21 when Billy had the meeting about the weir, right?

22 A. Correct, I was not there.

23 Q. And you haven't been involved in any discussions
24 with DOT about the water issues?

25 A. I have not.

Badger - Direct by Mr. Player

1 Q. Okay.

2 A. I mean other than related to this case.

3 Q. Sure.

4 A. But nothing other than that.

5 Q. The defense has made some arguments with regards
6 to mitigating the damages. In your own words, how
7 is this damaging your property other than just
8 simply washing away. What else is it doing?

9 A. Well, the washing away is like physically removing
10 dirt, but it makes it basically unable, unable to
11 develop it. It can't be sold to, to a developer
12 to build a subdivision which would be a typical
13 use. And you certainly couldn't build a shopping
14 center or anything there because there's massive
15 erosion and a huge amount of water during any
16 significant rainfall event. So it's -- I think
17 there's a high ground piece that could be used but
18 you couldn't really access it due to this water
19 issue.

20 Q. Okay. And it looks from this photograph that
21 there are a fair amount of trees that have fallen
22 in the area of the outfall. Is that accurate?

23 A. Yes, absolutely. And it's -- and you can tell
24 that the trees, in my opinion it's not creek
25 that's been there forever. You can tell that

Badger - Direct by Mr. Player

1 these pine trees grew up and then have been being
2 washed away, you know, in the last ten years.

3 Q. Okay. And this is Number 7. I think this is just
4 a different angle of the same place. If you could
5 describe, kind of, what that hard ridge is right
6 there on the right side of the screen.

7 A. Yeah. Well, you can see a bunch of trees fallen
8 in, and then on the left you can see, you know,
9 several feet of erosion. The picture doesn't do
10 it full justice. I mean, I went and stood down in
11 the, in the canyon, or in the eroded area, and it
12 was well above my head.

13 Q. So this, this ditch that is forming right here at
14 the outfall, would you say it's at least eight
15 feet tall?

16 A. Oh, yes, absolutely. And then in -- sometimes
17 fills in during large storm events, filled with
18 water. And when there's no storm events,
19 virtually no water in it.

20 Q. Now at one point when you were out there, did you
21 consider getting actually in the water and taking
22 a picture?

23 A. No. Well -- no.

24 Q. Okay. Why?

25 A. Because I didn't want to drown.

Badger - Direct by Mr. Player

1 Q. Okay. It's that much water?

2 A. Absolutely. And at the outfall -- so the outfall
3 is where it's very deep and very forceful, or
4 rushing water. Towards the bottom there's -- it
5 sort of braids out and then comes back together.
6 And there's places that you can walk across. But
7 at the top it's massively deep and would not be
8 safe to get in the water.

9 Q. When you're saying the top, are you talking about
10 at the outflow that's on DOT property or right
11 there at your property line?

12 A. I'm not talking right at the -- well, both. I
13 mean, I wouldn't get in it. There's maybe 50 feet
14 from the actual outflow of the pipe to the fence
15 line, and by 50 feet it could be a hundred or I
16 don't know how far. But it's quite deep there,
17 too. And then right at the property line it falls
18 off dramatically and speeds up the water, and it's
19 faster and very deep there.

20 Q. So when it gets to that precipice and just starts
21 falling, the water is speeding up?

22 A. Yes, and you can see how it's been eroding and
23 deepening that portion (inaudible).

24 Q. Okay. Is there anything that you can think of
25 that you could have done to stop this water

Badger - Direct by Mr. Player

1 problem at the outfall?

2 A. Well, I mean, either -- Mr. Franke alluded to, you
3 could build a retention pond. And I'm sure the
4 engineers could tell us how big of a retention
5 pond would need to be built. And I suppose it's
6 possible for us to build a retention pond to
7 prevent DOT's problem. But it wouldn't make
8 economic sense.

9 Q. Right. So, I mean, at this property line the
10 water that's hitting in this area is only coming
11 from the outfall at that point, correct?

12 A. Absolutely.

13 MR. MCCANTS: Objection, Your Honor. That's
14 getting into this opinion testimony that we talked
15 about. He's not out there on a daily basis watching
16 this water.

17 MR. PLAYER: I'll change my question, Your Honor.

18 BY MR. PLAYER

19 Q. Your observation of the erosion, is any of it
20 coming from any direction but at that point?

21 A. No. And I've, on a number of occasions, I've
22 pulled off on the side of the exit ramp from 520
23 to I-20, and you can walk right down to the two
24 large pipes and see the water coming out of it.
25 And I've been and I've walked -- I've watched that

Badger - Direct by Mr. Player

1 happen, and I've walked down to the fence line and
2 looked down at the waterfall and taken photographs
3 and videos and whatnot.

4 Q. Okay. And I believe this is 8. Double-check
5 that.

6 A. Yes, this is 8.

7 Q. Okay. And what does that picture show?

8 A. It shows a lot of water. It shows downed limbs
9 and it does show, I mean, again, the perspective
10 is hard to see the depth there. But yeah, it
11 shows erosion and downed limbs and water.

12 Q. But the trees that have fallen within the path of
13 the water, are those new or old trees?

14 A. Well, they are not hundred-year-old pine trees.
15 They're, they're 20 -- they're ten-year-old pine
16 trees or 15-year-old pine trees, smaller pine
17 trees.

18 Q. So and -- from your observations, could you tell
19 why they had fallen?

20 A. Because they -- the roots had been washed away.
21 It appears to me that a pine tree is not going to
22 grow in a creek bed. Like a regular creek bed
23 will not allow pine trees to grow. So they grew,
24 and then when this problem started they began
25 being eroded and the root structures were

Badger - Direct by Mr. Player

1 basically getting washed, and eventually they
2 would topple over. It's kind of interesting. You
3 can, you can really see the root structures of the
4 tree for the first several feet below what's
5 normal grade, which is an unusual thing to see.

6 Q. Right. I don't have that one up on the screen.
7 What is that picture?

8 A. This is looking down at the -- well, actually, I
9 think looking down in the ravine and up towards
10 the top of the, the top of the property which is
11 closest to the outfall. I call that the top
12 because it's one of the higher elevations where
13 it's the top of the, it's the top of the water
14 flow that's created. And you can see how deep it
15 is and you can see the recent erosion. And again,
16 the perspective is a little weird but I think that
17 one is, like, 6, 8 feet or more from the bottom of
18 the creek bed to the, to the natural grade.

19 Q. Okay. And how far from your property line at the
20 520 outfall does that ravine, kind of, runs where
21 it's a significant slope on either side of the
22 water (inaudible)?

23 A. Oh, quite a ways. I mean, I really hesitate to
24 put a number, but, I mean, it's a couple
25 hundred -- several hundred feet. And then it goes

Badger - Direct by Mr. Player

1 from very deep to it moderates as it goes through.
2 And as the water slows down it's, kind of, dug its
3 own pool. You know, it's gotten deeper and wider
4 towards the top of the water flow.

5 Q. Okay. Let's move to 10. Tell me what 10 is.

6 A. This picture, I believe that fence is the property
7 line and I believe where I took this photograph
8 I'm standing in the DOT right-of-way looking down
9 into the ravine. And it's, you know, it's hard to
10 see the drop in the photograph but this water
11 level to this water level, it's certainly 8 feet
12 and it could be 15 feet when it goes -- I mean,
13 you are looking straight down. It's a pretty
14 impressive waterfall. And then the amount of
15 water in this photograph is somewhat significant,
16 but I have seen it much, much higher than this,
17 feet higher than this.

18 Q. Okay. And the videos that we showed earlier, were
19 you able to see them from where you were sitting?

20 A. Sort of. I was sort of looking over at your
21 laptop but I've reviewed -- I'd seen them
22 previously and I'd taken other videos that showed
23 the same amount of water and rapids and
24 waterfalls. And literally water falling straight
25 down, you know, 6, 8, 10 feet, and it bouncing off

Badger - Cross by Mr. McCants

1 the rocks and debris and continuing to erode.

2 Q. Okay.

3 MR. PLAYER: I think that's all I have,
4 Mr. Badger.

5 THE WITNESS: Thank you, sir. Shall I keep these
6 or --

7 MR. PLAYER: Answer any questions that Mr. McCants
8 has. He may ask you about the pictures, but when you
9 are done if you will hand them to the lady in front
10 (inaudible).

11 THE WITNESS: Yes, sir.

12 THE COURT: Cross-examine.

13 MR. MCCANTS: Thank you, Your Honor.

14 CROSS EXAMINATION

15 BY MR. MCCANTS

16 Q. Afternoon, Mr. Badger.

17 A. Good afternoon, sir.

18 Q. I can't remember if we have met. It may have been
19 outside. I'm Clarke McCants. I represent DOT in
20 this case. My partner, Mr. Jim Nance, had
21 previously been involved in this case and I think
22 he took your deposition.

23 A. I believe so. Many years ago.

24 Q. Have you had a chance to look at your deposition?

25 A. Not recently. I don't recall if I read it after

Badger - Cross by Mr. McCants

1 we did it or not.

2 Q. That's fine. We'll walk through that. At least
3 in the deposition, I think, you said it today to
4 Judge Pope, you weren't familiar with anything
5 that happened on this property, erosion or
6 otherwise, prior to 2018. Is that correct?

7 A. I don't have any direct knowledge, but I have
8 spoken to many of these older gentlemen who have
9 told me things.

10 Q. Absolutely. But you had not been on there and
11 walked it before that period of time, 2018-ish, if
12 I can use that phrase.

13 A. I think so. I may have gone in 2017 or
14 roundabouts there, but I think that's generally
15 accurate.

16 Q. All right. Now, are you Will Badger that signed
17 the releasing documents?

18 A. No, sir. That would be my father.

19 Q. That's your father.

20 A. He's William John Badger. I'm William Franklin
21 Badger.

22 Q. Got you. So your father owned the Howard Lumber
23 Company?

24 A. Yes, sir. I bought it from him about six years
25 ago.

Badger - Cross by Mr. McCants

1 Q. Excellent, congratulations.

2 A. Thank you.

3 Q. Have you read the releasing documents that your
4 father signed?

5 A. I read them for the first time today, yes.

6 Q. Had not seen them before?

7 A. That's correct.

8 Q. And there's no question that's your father's
9 signature on the document whereby in exchange of
10 payment of \$504,000 and change he released claims
11 of Howard Lumber with regard to the condemnation
12 and the terms of the release that the Judge has,
13 sir. Is that correct?

14 A. Well, that's kind of a multipart question. And
15 I'll take it in turn.

16 Q. I'm sorry. No question that's his signature on
17 the bottom?

18 A. I did not examine the signature.

19 Q. Let me let you look at it just to make sure.

20 A. Sure. I only examined the language of the
21 release.

22 Q. Sir?

23 A. I just examined the language of the release and --

24 Q. Okay.

25 A. I was interested in how the money was paid to the

Badger - Cross by Mr. McCants

1 master in equity and whatnot.

2 Q. Yeah. And that's going to be one of my questions.

3 MR. MCCANTS: Bear with me. Your Honor, I trust
4 it's okay to approach?

5 THE COURT: Yes.

6 BY MR. MCCANTS

7 Q. On Page 3 of one of the releases highlighted down
8 below, is that your father?

9 A. I believe that's his signature.

10 Q. Okay. Do you know how much Howard Lumber received
11 from the settlement of the condemnation case?

12 A. I do not. But based on the documents you can see
13 the amount they gave to the master of equity of
14 Howard Lumber Company and Mr. Pentecost's Lighting
15 Gallery. We had a very -- we were both suing
16 Mr. Leaver. And so we shared that third in an
17 unusual percentage. I mean, I think it nets out
18 to a 13 and-a-fraction percent or something like
19 that.

20 Q. At what point were you are aware of the Chadwick
21 Development being put together?

22 A. Sometime after we began the lawsuit I saw a
23 version of this plot, or I guess it's not really a
24 plat if it wasn't recorded, but I saw some version
25 of that document.

Badger - Cross by Mr. McCants

1 Q. We'll call it a development plan because that's
2 how it's labeled --

3 A. Okay.

4 Q. -- for Chadwick. Did you do any work within the
5 land development or anything like that?

6 A. I mean, I don't develop subdivisions.

7 Q. What do you develop, if anything?

8 A. Well, we own and operate a lumber and building
9 supply operation. And any development stuff that
10 we do is just related to expanding our operations.

11 Q. All right. But you've never been involved in the
12 actual planning and construction of a residential
13 or commercial development, is that what you're
14 indicating?

15 A. Yeah. Yes, sir. That's correct.

16 Q. Okay. Well, we'll look at it from the standpoint
17 of perhaps lay evidence or testimony because,
18 having not been involved, you really can't offer,
19 at least in my mind, an opinion as to certain
20 things.

21 A. Sure. But I'm familiar with this type of stuff as
22 in -- most -- I have lots of customers that are
23 developers.

24 Q. Got you. And you've seen and heard the testimony
25 with regards to the large reinforced concrete

Badger - Cross by Mr. McCants

1 pipes that not only, we believe, are referenced in
2 the Chadwick Development plans but are still
3 located on your property?

4 A. I've seen it, yes.

5 Q. And they're big, aren't they?

6 A. Yes, sir.

7 Q. Do you disagree -- hand me my pole, Stuart.

8 A. I've seen the stick, sir. I agree.

9 Q. It's not a stick, it's a pole. Sticks are small.

10 A. Poles are round.

11 Q. That's the diameter of these pipes. That's a lot
12 of pipe, isn't it?

13 A. It is.

14 Q. Why do you install a lot of pipe in a development
15 of this type?

16 A. Well, I -- typically to move water.

17 Q. And these would be buried, wouldn't they?

18 A. Yes, typically.

19 Q. That's not showing them in their final stage, that
20 is, sitting on top of the ground. The plan was --
21 do you believe the plan was to dig trenches and
22 whatnot and bury these pipes for purposes of
23 controlling the flow of water across your
24 property?

25 A. Well, that's possible. It's possible they were

Badger - Cross by Mr. McCants

1 illegally dumped, too.

2 Q. Well, have you read the plan?

3 A. Not in detail. I have never seen a version that
4 detailed. I've only seen, like, a smaller PDF, so
5 I'm not (inaudible).

6 Q. Well, did you hear, did you hear my discussion
7 with Mr. Franke with regard to the labels on the
8 developer's plans?

9 A. I did.

10 Q. And how I talked about Note 13, I believe it talks
11 about 72-inch RCP, which we all agree is
12 reinforced concrete pipe?

13 A. I, I don't dispute any of that.

14 Q. You don't really believe someone illegally dumped
15 those huge concrete pipes on your property, do
16 you?

17 A. I mean, I've seen a lot of illegal dumping of pipe
18 in my day.

19 Q. Fair enough. Fair enough.

20 A. We deal with that stuff --

21 Q. You being in the building supply company, can you
22 offer to the Court any thoughts with regard to how
23 much those pipes cost?

24 A. I don't know but they're expensive, and they're
25 real hard to move.

Badger - Cross by Mr. McCants

1 Q. How much?

2 A. I mean, I can't give an accurate number without a
3 quote.

4 Q. Rough idea. Say I want to buy some pipe from you,
5 72 inches, reinforced concrete that I'm going to
6 use in a development to control water. How much
7 am I looking to pay for one of those pipes?

8 A. I mean, I can't give you a firm answer. If you
9 would like to --

10 Q. Thousands?

11 A. -- perhaps, absolutely. I mean, I could
12 absolutely call my guy that does pipe every day
13 and get you a real number.

14 Q. I don't think we need to do that. And you made
15 the comment, I mean they, they're hard to move.

16 A. Absolutely. You need a loader. Like one of those
17 big bulldozers, the big one.

18 Q. All right. They weren't dumped there were they
19 Mr. Badger?

20 A. I have no idea. I was in middle school at the
21 time.

22 Q. I didn't think you signed that release. I wasn't
23 sure but I needed to ask that question. But let's
24 look at it from the standpoint of common sense and
25 just being in business and everything. If you own

Badger - Cross by Mr. McCants

1 these reinforced concrete pipes you wouldn't carry
2 them out there with a front-end loader and just
3 dump them in the woods after you invested in them,
4 would you?

5 A. You can't -- it would be more expensive to take
6 them to the dump, you know, and if -- and we
7 deliver pipe like that. I'm not sure we ever
8 delivered pipe that large, but that's not enough
9 pipe to move water very far. And typically, if
10 somebody's building a subdivision, they're going
11 to take multiple tractor-trailer loads of pipe at
12 the same time because they're going to need
13 several hundred of them.

14 And to move the water, you know, each joint
15 of pipe -- and I haven't measured these, but in
16 standard building, each joint of pipe is eight
17 feet long. So to move water 800 feet you need a
18 hundred of them. And that's maybe --

19 Q. Well, how many sections of pipe are out there?
20 Can you give the judge a number?

21 A. I believe it's fewer than 10.

22 Q. All right. You don't disagree though that the
23 development plan calls for the installation of
24 72-inch RCP, reinforced concrete --

25 A. I can't speak to that. I only know of that is

Badger - Cross by Mr. McCants

1 what you said here today.

2 Q. Well, I don't want it to be based on what I say.

3 MR. MCCANTS: Can I approach, Your Honor?

4 THE COURT: Yes.

5 BY MR. MCCANTS

6 Q. All right. Have you reviewed development plans
7 before, Will?

8 A. I have.

9 Q. So you are familiar with what engineers and
10 planners do, don't you?

11 A. I am.

12 Q. All right. Let's, let's look over some of the
13 notes then. See, for example, here is D-13 note,
14 and I'm a failed engineer so I don't know
15 everything, but I know that that note would refer
16 to somewhere in this area. There's D-11, D-9.

17 A. There's you D -- it's a CD-13.

18 Q. There you go. Yeah, that's D-13. And if you can,
19 based on your understanding of these things, read
20 D-13 note for Judge Pope.

21 A. 6/10/1986, D-13 is an RCP culvert, 72 inches D. I
22 assume that means diameter. At .5 percent, drain
23 area 82 acres. There's a S that I don't know what
24 it means. It says 3.2 percent average. There's
25 an L, I don't know what that means. 2500C.

Badger - Cross by Mr. McCants

1 There's a C that I don't know what that means.
2 Point four. There's TC 30 minute plus for
3 100-year flows. And below that is 100 over 30
4 equals 5.5 inches per hour. And then there's a Q
5 equals $C \times L \times A$ equals 180 CFS, is what this
6 document you presented me says.

7 Q. What does that mean?

8 A. I don't know, but I believe we have several
9 engineers this afternoon that can tell us.

10 Q. Fair enough. But you do know what RCP culvert
11 72 inches means, don't you?

12 A. I mean, I think it's reinforced concrete pipe, as
13 you suggested.

14 Q. It's a culvert with a 72-inch pipe having to be
15 buried down here at the end of this easement,
16 correct?

17 A. I think that's a fair reading, yeah.

18 Q. So it's fair to assume that whoever was developing
19 is going to put 72-inch RCP along most, if not
20 all, of that easement. Is that correct?

21 A. That's what this drawing appears to show.

22 Q. Well -- and this is y'all's drawing and it was
23 your father's -- excuse me. Maybe he wasn't
24 involved in it.

25 A. He wasn't involved in. I believe that Howard

Badger - Cross by Mr. McCants

1 Lumber Company came to own it in -- right around
2 the condemnation time. I don't even think we
3 actually owned it. That's why they gave it to the
4 master of equity in those documents you put into
5 evidence earlier.

6 Q. Gotcha. Gotcha. And it was one other part.

7 A. But I do think it's worth pointing out that the
8 amount of pipe there -- if you're going to do it,
9 you're going to do it in one shot, and you're
10 going to take all the pipe within a matter of
11 two weeks. You're going to order it all. You're
12 not going to order one truck or two trucks.

13 Q. All right.

14 A. It's an all or nothing deal.

15 Q. Well, we don't know that exactly because we don't
16 have the people here available to talk about what
17 this plan is for, so the Court's required, I
18 think, to glean or infer from these drawings and
19 the notes what was actually going on. And my
20 question to you is, it's unreasonable for the
21 Court to believe that somebody, when they
22 developed this area, wanted to take account of
23 this drainage from I-20 south of your property
24 through Chadwick down to that area. They were at
25 least going to try and deal with significant water

Badger - Cross by Mr. McCants

1 flow and drainage. Do you agree with that?

2 A. Well, I think that's fair. In any development you
3 have to deal with stormwater. Whether it's
4 created by the roofs of the house and the
5 driveways, or whether it's coming from somewhere
6 else. And developers are going to try and buy a
7 creek and put in a pipe any time the, the
8 government will let them.

9 Q. Sure. And do you know what a riser is?

10 A. I do. And you know there's other types of risers
11 other than the ones that were discussed. I mean,
12 there's risers for manholes and risers for drain
13 grates and (inaudible) we call them structures.

14 Q. This one is kind of cool. We've got a drawing of
15 it.

16 A. Yep.

17 Q. We know what kind of riser it is. (inaudible) you
18 see that?

19 A. Okay. I do.

20 Q. Twenty-four-inch riser.

21 A. Your finger is in the way.

22 Q. Oh, sorry.

23 A. Oh, yeah. It says 24-inch riser. It does say
24 that.

25 Q. And you heard Bill Franke talking about the

Badger - Cross by Mr. McCants

1 purpose of a riser. He has some familiarity with
2 that. A riser is put in some type of
3 detention/retention mechanism pond or whatever.
4 And when the water gets up to a certain level it
5 starts to flow out of the depression, the pond.

6 A. I'm, I'm familiar with that, and they do those in
7 the ponds they have for looks as well as retention
8 and detention ponds. So I've seen them before.

9 Q. You see the note with regard to an emergency
10 spillway?

11 A. I do not.

12 Q. Let me see if I can find it for you and I'll
13 highlight some of these things.

14 A. I mean, I will concede that an emergency spillway
15 --

16 Q. Here you go.

17 A. -- was part of the design plan on most ponds. I
18 see where it says that --

19 Q. Yeah.

20 A. -- on the document, yes.

21 Q. Why do you think they call it emergency?

22 A. Well, I just think that means it, you know, it's
23 overflowing.

24 Q. It's a spillway, which we all know is the
25 (inaudible) or depression or pond, what have you

Badger - Cross by Mr. McCants

1 where the water reaches up and spills over, right?

2 A. Yes, sir. Absolutely.

3 Q. An emergency spillway to me -- tell me if this is
4 a reasonable interpretation, is there in the event
5 of a water emergency.

6 A. I believe that all the terms they use on there are
7 terms of art for the engineers. And that's a
8 better question for the engineers.

9 Q. You are not making a (inaudible) are you, Will?

10 A. They have got definitions in big books and, you
11 know, I feel like you have got to go check before
12 you assume what it means.

13 Q. Okay. Well, just a lay term to me that says in
14 the event of water emergencies that that device,
15 that equipment is used to make sure that water has
16 somewhere to go except running on the homes that
17 would be built out there. Is that a reasonable
18 interpretation?

19 A. I think they have emergency spillways so the dams
20 don't wash out, or wash out the whole pond, not so
21 it doesn't back up. But like you said, we have
22 got our own opinion.

23 Q. Either way it makes sure that water, which we all
24 agree is a powerful force, it has to go somewhere.

25 A. That's the exact problem we're here for. Yes,

Badger - Cross by Mr. McCants

1 sir.

2 Q. It has to go somewhere unless it evaporates.
3 We've got to deal with it and somebody putting
4 that plan together said we want some emergency
5 safeguards for that development. Do you agree
6 with that?

7 A. I don't have an opinion of that. I'm not
8 disputing it.

9 Q. I am asking from your background and experience in
10 business and lumber, building supplies and things
11 like that.

12 A. I can't speculate on what people decided in the
13 '80s.

14 Q. Right. And this was in the mid-'80s. A long time
15 ago.

16 A. Yeah.

17 Q. Do you know anything about the Charter Terminal
18 oil spill and how, according to Mr. Franke, it
19 stalled the development of Chadwick?

20 A. Well, I've learned about -- this whole fact
21 pattern that got us here today is quite
22 fascinating. Make a law school exam for you. So
23 I, I've learned a bit about it over time. Yes,
24 sir.

25 Q. All right. DOT didn't stop the development of

Badger - Cross by Mr. McCants

1 Chadwick is my point. Charter Terminal stalled
2 it. Do you agree?

3 A. I have no knowledge of that. You know I was in
4 middle school in the '80s and Howard Lumber
5 Company had no ownership at that time.

6 Q. Fair enough. You don't disagree that all of the
7 water -- you call it DOT water, but all of this
8 water is coming basically from the northeast
9 section, that is, is -- do I have my compass
10 bearing correct?

11 A. We have to -- I need to look at one of the maps to
12 be sure, but I'm not going to dispute that.

13 Q. Here's a compass bearing. That would be north.
14 That's I-20, that's north.

15 A. Well, just to point out though that this plat, or
16 this plan that we're calling --

17 Q. Let's call it a plan.

18 A. -- it includes the 25 acres that were taken by DOT
19 in the regular condemnation --

20 Q. Sure.

21 A. -- not the inverse condemnation. So, so the top,
22 the top chunk on the top left, that northeast
23 chunk, is where the 520/I-20 interchange exists
24 today.

25 Q. Yeah. Let me make that clear, not to interrupt

Badger - Cross by Mr. McCants

1 you. That's absolutely true. That this area in
2 here was acquired by DOT for purposes of the
3 Palmetto Parkway, making sure it was constructed
4 in a safe manner, had enough space and whatnot for
5 cars. We don't want cars running off the road
6 into the woods, so they had to acquire space.
7 There's no question is there, in your mind, that
8 there was water flow through that area for years
9 and years? I don't know if for 10,000 years, but
10 a long time. You don't disagree with that?

11 A. Well, I mean, when it rains the water goes to the
12 low spots. I mean, I think that but I have no
13 knowledge to how much or when the water was coming
14 before. I just know that I have seen water after
15 rain events come down at a massive rate and force
16 and velocity, and dig and scour.

17 Q. All right. You have seen the photographs that we
18 put into evidence right before the lunch break.

19 A. I, I don't.

20 Q. Hold on a second. I'm going to show them to you.
21 And you remember these? Exhibits.

22 A. I did not get a good look at them.

23 Q. Good. All right. Well, let's look at them
24 together if we can, because I do have some
25 questions of you in light of your testimony in

Badger - Cross by Mr. McCants

1 response to Mr. Player's questions to you. Okay.
2 Let me get them straight. 6, 7 and 8. What I can
3 offer you, Mr. Badger, is that these are
4 photographs which were taken by a gentleman named
5 Stuart Saunders, who is now with us in the
6 courtroom, okay? Mr. Saunders, I believe the
7 evidence is going to show, was hired or retained
8 by SC DOT back in the mid-2000s to appraise your
9 property.

10 A. To appraise the existing property, or the portion
11 that they condemned?

12 Q. Well, you'll hear what he says. He's got to
13 appraise the entire, or look at the entire
14 property to set values for purposes of the area of
15 acquisition, as I call it, the 25 acres. I'm not
16 lecturing you, but I think the appraisers, they
17 don't just go to look at what's being acquired for
18 purposes of condemnation to improve a road. They
19 look at the entire tract owned by an owner, and
20 then using those numbers calculate what the area
21 of acquisition is worth. Does that make sense?

22 A. It does.

23 MR. MCCANTS: Is that how you do it, Steward?

24 Kind of?

25 (inaudible response).

Badger - Cross by Mr. McCants

1 MR. MCCANTS: Okay. In any event, I'm sorry about
2 that.

3 MR. PLAYER: We're real big on formalities, Your
4 Honor.

5 MR. MCCANTS: All right. Sorry about that.

6 MR. PLAYER: We'll get him, we'll get him in line.

7 MR. MCCANTS: He won't.

8 BY MR. MCCANTS

9 Q. I can tell you he's going to testify he walked the
10 whole property.

11 A. I trust what you say, sir.

12 Q. I mean he had to, I think, professionally, to be
13 qualified to appraise this property. They had
14 certain credentials. They had to meet certain
15 requirements they had to follow but, you know, one
16 of these photographs, Number 6, you see that?

17 A. I see some bushes and I see some -- pardon me in a
18 South Carolina court, but some Georgia red clay.

19 Q. What does that look like?

20 A. Georgia red clay.

21 Q. All right. Not surface clay.

22 A. I mean, yeah, it's on the surface all over the
23 place.

24 Q. I mean, is it a vertical -- it's a wall of clay.
25 That's, that's a gully, isn't it?

Badger - Cross by Mr. McCants

1 A. I can't tell that from that photograph.

2 Q. Take a good look at it. Is not that the wall of
3 the gully and that's the bed?

4 A. I see what you're pointing out, but it's really
5 hard to tell with that perspective. I mean, it's
6 like these -- it's hard to see how deep it is. I
7 was just there so I know. I wasn't there when he
8 took those photographs.

9 Q. That's all right. He will testify. I'm just
10 asking for a lay perspective since you interpreted
11 photographs for Judge Pope. I want you to help me
12 understand this photograph.

13 A. Well, I took these photographs so I have a lot
14 more knowledge about them. I didn't take that
15 photograph.

16 Q. All right. Well, be that as it may, you don't see
17 this to be what I would call a gully area?

18 A. There's nothing for scale.

19 Q. You don't believe that that's --

20 A. There's no person standing there. There's not a
21 ruler. There's, there's no big pipe. I just
22 can't -- I don't know. It's a photograph. The
23 judge can certainly evaluate it just as well as I
24 can.

25 Q. Well, we will have to bring Mr. Saunders to tell

Badger - Cross by Mr. McCants

1 us about this photograph and what he observed when
2 he clicked his camera.

3 A. I'm sure he will.

4 Q. Okay. I'm just asking you since you described
5 what you characterize as some serious erosion at
6 the hands of DOT due to water coming off the
7 Palmetto Parkway. So it's fair for me to show you
8 some photographs which we have taken which may not
9 exactly meet your testimony. That's why I'm doing
10 this.

11 A. Oh, that's absolutely, that's absolutely fair, but
12 these are photographs I took and I witnessed the
13 erosion. And that one's just hard to tell what it
14 shows.

15 Q. All right. Let's look at Number 7.

16 A. Yes, sir.

17 Q. Can you perhaps give your lay thoughts as to what
18 Exhibit Number 7 depicts?

19 A. Well, I, I'm not certain, but partly based on
20 Mr. Franke's testimony, and there a, there's an
21 area at the property that's distinct and looks
22 like that. And it's more -- if you look at the
23 drawing right now, the way it's situated it would
24 be in the bottom right. And it's a high point.
25 And there's like a hill where they built a road or

Badger - Cross by Mr. McCants

1 began building a road. And that's what I believe
2 that is.

3 Q. All right. Well, that's fair. But do you agree
4 with me that this photography shows significant
5 erosion of ground due to something?

6 A. Well, the erosion that is shown in that photograph
7 is extraordinarily small compared to the erosion
8 shown in these photographs.

9 Q. How about that? That's a gully. That's
10 significant erosion, don't you think?

11 A. Well, again, we've been over that photograph.

12 Q. If it is.

13 A. If it is, that's really the question, I mean.

14 Q. If that is a picture of a gully with walls of
15 Georgia red clay, as you called it. Do you agree
16 with me that that's significant erosion?

17 A. If. I don't know that I under -- I mean, so you
18 are asking me to ask a hypothetical question? I
19 don't --

20 Q. (inaudible).

21 A. Okay.

22 Q. You called this not serious.

23 A. Well, I call that -- I mean I see that kind of
24 erosion on job sites --

25 Q. Is this serious?

Badger - Cross by Mr. McCants

1 A. -- all the time. Well, I mean, you have got to
2 put your silt fence up or you are going to get in
3 trouble, but it's not going to derail a
4 development. That's manageable erosion.

5 Q. All right. Except the trees have fallen down.

6 A. Yeah, they look dead.

7 Q. Yeah. What happened to those trees? Any idea?

8 A. I have no idea.

9 Q. It is possible the water was flowing through there
10 to such degree they knocked over trees like you
11 testified, they knocked over trees there?

12 A. Well, so in that photograph where the trees are
13 fallen, it appears to be relatively flat. In
14 these photographs, it's nearly vertical.

15 Q. And that's not a vertical wall of Georgia red
16 clay?

17 A. There's no trees fallen in that picture.

18 Q. They're long gone, that's why. It takes time to
19 create a canyon like that, don't you agree?

20 A. I -- it depends on how fast the water is flowing,
21 how much.

22 Q. Do you hunt or go in the woods (inaudible)?

23 A. I go in the woods, but I'm not much of a hunter.
24 I do spend a bit of time in the woods.

25 Q. Looks to me like you were raised to traipse around

Badger - Cross by Mr. McCants

1 the woods like me, and you have been through rain
2 gullies. You have climbed and jumped over holes
3 and whatnot?

4 A. Oh, I have. I've said I'm familiar with creeks in
5 our Southern pine forests.

6 Q. And that looks like a classic example of a
7 (inaudible) that's had significant water flowing
8 through it over the years to create these beds and
9 these gullies and whatnot. Don't you think?

10 A. Yeah, I mean, it's, it's possible. But, again, I
11 can't really speak to that photograph.

12 Q. Finally Number 8. Can you see that one there or
13 do I need to bring it?

14 A. Yeah, if you can bring it closer. I think it's
15 that same road that, again -- I think it's worth
16 pointing out that when we're looking at the map to
17 see the topography lines that show the high points
18 versus the low points.

19 Q. I wasn't asking where it was. The question was
20 going to be is this significant water erosion in
21 Number 8?

22 A. Well, again, this one -- there's -- it's running
23 down a disturbed piece of land there as opposed to
24 running down through trees. And that's the type
25 of thing that I've seen on construction sites, and

Badger - Cross by Mr. McCants

1 they need to get their silt fence up and move
2 along to the grassing phase. I mean --

3 Q. Is this significant erosion?

4 A. I would say no. Not in a development. They
5 manage that. Pardon me?

6 Q. You don't think that's significant water erosion
7 as depicted in the photograph Number 8?

8 A. No. I have seen that type of erosion on
9 construction sites, and they are able to mitigate
10 it with just simple silt fence and move along with
11 the projects. It doesn't shut them down unless
12 the government shuts them down because they didn't
13 have their silt fence, is what I see in the
14 construction world.

15 Q. Did you hear the testimony these were taken around
16 2005?

17 A. I believe you. I don't doubt that.

18 Q. Can I borrow your pen, Madam Court Reporter? Look
19 at that right there. Pretend like you and I --
20 I'm looking over with you but I traipsed around
21 the woods.

22 A. That looks bigger than what's up front for sure.

23 Q. Sure. That looks like a wall of dirt.

24 A. Well, again there's nothing for perspective.

25 There's no person or vehicle or anything to give

Badger - Cross by Mr. McCants

1 you an idea of how big it is.

2 Q. Well, look at these pine trees. These are
3 seven loblolly pines, probably in their youth.
4 They're not sequoias, okay?

5 A. Sure.

6 Q. But we found that's what, 40, 50 feet?

7 A. Well, look I can't, I can't tell you without --
8 there's no perspective. And then again, you are
9 asking me to look at a photograph.

10 Q. I'm just asking these questions.

11 A. Sure.

12 Q. You spent a lot of time in detailing what you
13 observed when you took pictures, okay.

14 A. So those are photographs that I have personal
15 knowledge of.

16 Q. I'm going to put photographs up, too. And we'll
17 have the person who took them to talk about the
18 scale and whatnot.

19 A. Absolutely. I'm delighted to answer all your
20 questions, sir.

21 Q. Okay.

22 MR. MCCANTS: May I have one second, Your Honor?

23 THE COURT: Yes.

24 BY MR. MCCANTS

25 Q. Work with me a second. Those photographs, trust

Badger - Cross by Mr. McCants

1 me when I tell you they were taken about 2005,
2 okay?

3 A. I believe you.

4 Q. Your father signed a release for a portion of the
5 \$504,000 to settle the condemnation case some time
6 around 2006, maybe 2007. That's his signature I
7 had you look at earlier, okay. You're a business
8 man. I assume you sign documents, looked at them,
9 reviewed them before you sign them. Have you ever
10 signed a release of claims?

11 A. Oh, absolutely.

12 Q. Tell the judge what release of claims that you --

13 A. I've drafted two, so. The release at issue is
14 just standard boilerplate. It says you can't come
15 back on this deal. This deal's over. It doesn't
16 say you have got special rights to dump water on
17 us downstream forever. It's just a basic
18 boilerplate that says this condemnation was done
19 and closed.

20 Q. All right. That's your interpretation and I read
21 the language earlier. You see where it's talking
22 about releasing claims now and forever?

23 A. Those aren't future claim. Those aren't --

24 Q. Well, that --

25 A. You don't come back ever is what it means.

Badger - Cross by Mr. McCants

1 Q. Well, you know that's the Court's provenance to
2 decide what that language means.

3 A. Absolutely it is. It is a question of law not
4 fact.

5 Q. But here, here's my point. If your father signed
6 that release -- and I didn't know your father. It
7 sounds like he was a fine man.

8 A. Oh, he's still alive.

9 Q. He is?

10 A. He's still a fine man.

11 Q. Okay. I'm sorry. Sorry about that. All right.
12 He would have signed that release knowingly and
13 intelligently, correct?

14 A. Oh, absolutely. And I believe they had good
15 lawyers, and I believe they released the claim to
16 the 25 acres that they got paid for, not for the
17 remaining acres.

18 Q. Well, at the same time, if your father, making a
19 decision that he was receiving adequate
20 compensation for that acquisition of that 25
21 acres, he would have seen Mr. Saunder's appraisal
22 which had these photographs. Is that a fair
23 assumption?

24 A. No.

25 Q. Why not? Had a good lawyer representing him. I'm

Badger - Cross by Mr. McCants

1 sure the lawyer spread out the appraisals. Here's
2 what the State's got. Here's what we got.

3 A. I don't agree with that assumption.

4 (inaudible crosstalk)

5 THE WITNESS: -- a good lawyer say this is the
6 deal. You're done, sign it. And sometimes a client
7 does.

8 BY MR. MCCANTS

9 Q. All right. But if your father was aware of this
10 internal erosion issue on this property, then he
11 was aware, do you agree, of the problems that were
12 there before he took the money?

13 A. No, I don't agree with that. I -- and if you
14 would like for me to elaborate on what I think my
15 father's thinking was, I'd be delighted to do
16 that.

17 Q. I don't want to do that. If the judge wants you
18 to do that, it's fine. I'm just asking from your
19 standpoint, Number 1, being a businessman. And
20 more importantly, knowing your dad. But we can't
21 reach into somebody's head.

22 A. Well, so -- this -- we got into this situation as
23 a bad debt situation.

24 Q. You didn't want to be a part of this, did you?

25 A. The guy couldn't pay us and so we're taking his

Badger - Cross by Mr. McCants

1 land. That's not what we want to be doing. We
2 thought -- and we had a lien, or an action against
3 the property for many years. And I think my dad's
4 viewpoint was something along the lines of, at
5 least we're getting something for it, whatever and
6 signed away. Again, you know, I'm speculating.
7 But I don't think that he asked the lawyer to
8 review every page of any appraisal that may or,
9 may have been done or available.

10 Q. I think what you just told the Court, too, your
11 daddy took some property. It's turned out, at
12 least from his perspective, not to be the property
13 he should have taken to settle some claim over a
14 past due bill. Is that fair?

15 A. I mean, it was either that or nothing. So I
16 think, you know, something is better than nothing.

17 Q. Well, you are in court.

18 A. Usually a bad sign if you're sitting in this
19 chair.

20 Q. That wasn't a byproduct of the deal he thought he
21 had. And I'm not trying to be facetious, but
22 here's what (inaudible). What have you done to
23 participate in the development of this property,
24 like Mr. Franke and I talked about?

25 A. Well, the only thing that I've done is assist in

Badger - Cross by Mr. McCants

1 identifying that the property was substantially
2 not developable and, largely, I mean, Mr. Franke
3 gave me that opinion, and I went out and observed
4 it for myself. And then we came upon Mr. Tucker
5 who, who had the background in this specific case
6 that we can hopefully get DOT to fix the problem
7 so the property could be developable.

8 I mean, we've long been under the opinion,
9 and Mr. Franke was certainly under the opinion,
10 that if DOT properly controlled the water from the
11 interchange they built, that we would not have
12 this problem and the property could be developed.
13 And so our goal with this lawsuit was to get DOT
14 to control the water.

15 And, I mean, I think that we are all aware
16 that making DOT build an appropriate retention
17 pond is not something that we have the power to
18 do. And in our system you have got to sue them
19 for money. We can't sue them for building a
20 retaining pond. I mean, you can sue them for an
21 injunction, which we've done, which was asking the
22 Court to say, make them quit blasting water at us
23 every time it rains.

24 And we would be, I think we would be very
25 happy if the water stopped flowing every time it

Badger - Cross by Mr. McCants

1 rains, because there's an appropriate retention
2 pond.

3 Q. You, yourself, haven't taken any furthering steps
4 to develop the property though, is that fair?

5 A. Oh, that's correct. Yes.

6 Q. All right. In 1986, whoever put Chadwick together
7 spent a substantial amount of time and money
8 trying to do, as you call, control this water with
9 72-inch reinforced concrete pipes. Do you agree
10 with me that's a reasonable interpretation of the
11 efforts in this case?

12 A. Well, I agree they spent some money. But I have
13 no idea how much.

14 Q. Well, a lot. We have talked about just pipes
15 alone.

16 A. Well, a lot, all depends on, you know, how much
17 you start with kind of thing.

18 Q. A good bit of money. Don't you agree?

19 A. I can't. I don't know how much money they spent.

20 MR. MCCANTS: Mr. Badger, thank you. Thank you,
21 Judge.

22 THE WITNESS: Yes, sir. Thank you. Thank you,
23 Your Honor.

24 MR. PLAYER: Oh, oh, oh.

25 THE COURT: Excuse me. Recross.

Badger - Cross by Mr. McCants

1 THE WITNESS: (inaudible) anything else?

2 THE COURT: Yes. A couple more minutes to go.

3 BY MR. PLAYER

4 Q. All right. This is number 8. We talked about
5 this earlier. Mr. McCants asked if this was
6 significant erosion. I'm going to ask you a
7 different question. Have you seen more erosion
8 than what is designated on this picture from your
9 observations at the outfall since 2019?

10 A. Yes, dramatically more. By enormous magnitude.
11 Ten times more.

12 Q. The other question about this is, are you suing
13 DOT for that erosion?

14 A. No.

15 Q. Okay. And when it comes to developing -- and I
16 don't know if you recall when Billy talked
17 earlier, but after the spill they actually came
18 and soaked dirt -- dumped dirt on it, right?

19 A. Yes. And that, that little wall, as Mr. McCants
20 referred to it, could have been created by an
21 excavator, easily.

22 Q. Do you see any evidence in this picture that it
23 was created by water?

24 A. No, sir.

25 Q. And you have no idea where this is on the

Badger - Cross by Mr. McCants

1 property?

2 A. That's correct.

3 MR. PLAYER: No further questions.

4 THE COURT: Any recross?

5 MR. MCCANTS: No, ma'am.

6 THE COURT: All right. This witness is excused.

7 THE WITNESS: Thank you, ma'am.

8 THE COURT: Thank you, sir. The plaintiff will
9 call its next witness.

10 MR. PLAYER: Can we take a quick potty break?

11 THE COURT: Yes. Let's go down for about
12 ten minutes.

13 MR. PLAYER: Thank you, Your Honor.

14 (WHEREUPON, the Court took a recess.)

15 THE COURT: All right. Plaintiff can call its
16 next witness.

17 MR. PLAYER: Yes, Your Honor. Just one thing for
18 logistics. We're going to put Roy Fischer up, and
19 considering the time and Clarke's anticipated cross, we
20 think we will stop there. And we'll bring my expert
21 back in the morning and start him first thing. I was
22 hoping to start at 9 in the morning, or 9:30 is fine if
23 that's what people want to do. But my expert is
24 supposed to go out of town tomorrow, and he's hoping to
25 get out by lunch. I think if we start by nine or 9:30

Badger - Cross by Mr. McCants

1 he will be fine.

2 And we are not going to (inaudible). If it takes
3 longer than that he can (inaudible). Dave's going to
4 wait until he can go. But it does appear with David,
5 my last witness going in the morning, we're probably
6 going to bleed into Friday. I want to make sure that
7 wasn't an issue with the Court. I didn't know if
8 anything is scheduled Friday, or.

9 THE COURT: No. That should be fine. We'll see,
10 we'll see what we can get done. I hope not to bleed
11 into Friday. But my speaking engagement was tomorrow.
12 So we nixed that already, so we should be okay if we
13 do.

14 MR. PLAYER: Okay.

15 THE COURT: All right.

16 MR. PLAYER: Thank you.

17 THE COURT: All right.

18 MR. PLAYER: Plaintiff calls Roy Fischer.

19 CLERK: Place your left hand on the Bible and
20 raise your right hand. Do you solemnly swear the
21 information you give the Court in this case will be the
22 truth, the whole truth, and nothing but the truth, so
23 help you God?

24 THE WITNESS: I do.

25 CLERK: Please take a seat, and when you are

1 seated state your full name for the Court.

2 THE WITNESS: My name is Leroy John Fischer,
3 Junior.

4 LEROY FISCHER, being first duly sworn, was
5 examined and testified as follows:

6 DIRECT EXAMINATION

7 BY MR. PLAYER

8 Q. Mr. Fischer.

9 A. Yes, sir.

10 Q. How old are you?

11 A. Seventy-eight.

12 Q. What do you do for a living?

13 A. I was self-employed doing doors and windows.

14 Q. Okay. Do you have a TikTok franchise now where
15 you make videos for kids?

16 A. No.

17 Q. How long have you been involved with the ownership
18 of this property?

19 A. From the beginning, or very close. But I know
20 that I had to sign documents from Robert Leaver
21 when I bought into the property. I believe it was
22 July 17, 1986.

23 Q. So you have been there since the development plans
24 that Mr. McCants keeps pointing at and talking
25 about in this case, right? The ones for Chadwick?

Fischer - Direct by Mr. Player

1 A. Yes.

2 Q. Okay. What were the plans -- do you know who did
3 those plans?

4 A. I don't I think it's on the, it might be on that
5 (inaudible) or something.

6 Q. But did they do it at the behest of the owners of
7 the property?

8 A. It was done before I ever knew about them
9 acquiring somebody to do it or whatever. It was
10 done there from the beginning, that I know of.

11 Q. Okay. Were you ever involved in the negotiations
12 or trying to get that development up and running?

13 A. No. I mean I was aware of it and I knew that,
14 basically I think, there was 49 lots or something.
15 But actually there could have been 57, I think, up
16 front.

17 Q. Okay. And that initial footprint was used in that
18 plan that includes the 25 acres that the DOT
19 eventually condemned and paid for, correct?

20 A. Yes, sir.

21 Q. Okay. And since you were the only one there, do
22 you remember why Chadwick plans were abandoned?

23 A. Well, I believe it would have happened back in
24 January of '87 when the oil spill took place.

25 Q. Okay. And y'all had to go through certain

Fischer - Direct by Mr. Player

1 procedures and legal ramblings to --

2 A. Right. They had to put in monitor wells.

3 Q. Okay.

4 A. I think there were three monitor wells that they
5 had put in.

6 Q. And how long were those monitoring wells on the
7 property?

8 A. I am not real sure but someplace in the '90s I
9 believe.

10 Q. Okay. Someplace in the '90s they were removed?

11 A. No. They were capped.

12 Q. Okay.

13 A. They were still there. They put locks on them.

14 Q. But the capping occurred because they had -- what
15 did they tell you as to why they were capping
16 them?

17 A. That they didn't find no evidence of
18 contamination. That they give it a clean bill of
19 health.

20 Q. So this property has been given a clean bill of
21 health by the environmental authorities?

22 A. Yes.

23 Q. Okay. So after it gets a clean bill of health,
24 and the Chadwick plans were abandoned, what, what
25 happened? What were y'all doing with the property

Fischer - Direct by Mr. Player

1 say between the mid-'90s and the 2000s when DOT
2 started talking about (inaudible)?

3 A. I don't know exactly what all the issues that came
4 up, but I'm thinking once that fuel oil spill
5 occurred and the time lag between then and when we
6 got a clean bill of health, I'm thinking there
7 was -- different things were evolving and
8 everything. And doing -- due to the timeframe,
9 and I think it was, kind of, just put on the back
10 burner for whatever reasons. I guess due to the,
11 the situation.

12 Although they did have a clean bill of
13 health, but if they were selling property, I
14 believe, they would have to make it known to the
15 future buyers that there had been a contamination.

16 Q. Okay. When was the first time that you walked the
17 property, if you recall?

18 A. I don't know if I did in June of '86, but for sure
19 in June or July of '86.

20 Q. Okay.

21 A. Before they started doing any roadwork or
22 construction.

23 Q. Okay. And back then were there any large ravines
24 where water had carved a path through the property
25 that you were able to observe?

Fischer - Direct by Mr. Player

1 A. Absolutely not.

2 Q. Okay. So when you walked the property what was
3 it? Was it hilly? Was it flat?

4 A. Well, there is, there is a different elevation and
5 terrain, but from where the pathway for the water
6 coming from the north side of I-20, underneath
7 I-20 and onto our property, I mean, there was no
8 evidence of any dirt or anything. It was just
9 grassy, some weeds on the sides, but.

10 Q. Okay. And I'm going to turn my computer on. But
11 let's look at Defendant's Exhibit 1. Do you --
12 this was put in by Billy showing the highlighted
13 portion of the property. Is that accurate?

14 A. Yes.

15 Q. Okay. Now in '86, '87, when you went out there
16 the first time, was any of this roadway
17 construction and clearing of land there?

18 A. No.

19 Q. What was there?

20 A. It was just I-20 and the actual --

21 Q. And this is?

22 A. -- I-20 there.

23 Q. Right.

24 A. Yes.

25 Q. No. Wait a minute. I-20 is here at the top.

Fischer - Direct by Mr. Player

1 This is I-20. All of this was just trees,
2 grassland, correct?

3 A. Right.

4 Q. Okay. And during that time period there was a
5 natural course where you could see water drain
6 naturally through that area, wasn't there?

7 A. Yes. But I never really observed anything in the
8 rains. If there was a rain I didn't run over
9 there to look at the water because there wasn't
10 really a ditch there or anything. It was maybe a
11 detention in the ground area. You know like a --
12 but everything looked real natural.

13 Q. Okay. And when was the last time you were out at
14 the property in the last five years?

15 A. This year.

16 Q. Okay.

17 A. It was probably in spring. I don't know if it was
18 February or March or something. I went out there
19 a couple of times. One time with Billy and
20 observing the rainfall.

21 Q. Okay. And is there a difference in the condition
22 of the land now and the first time you saw it in
23 1987?

24 A. Yes. A lot in the area where the outfall 520
25 comes onto our property.

Fischer - Direct by Mr. Player

1 Q. Okay. And we're going to get pictures. Exhibit
2 Number 3. And ask if you recognize that.

3 A. I believe it's close to the outfall, but it's on
4 our property near the outfall.

5 Q. And these walls that seem to straddle -- and this
6 is Exhibit Number 3, Your Honor. Plaintiffs'
7 Exhibit 3. The walls that straddle it, were those
8 there in the '80s?

9 A. No, absolutely not.

10 Q. Okay. In your recollection, when did water issues
11 on the site become something to be concerned
12 about?

13 A. Well, I, I believe after the contamination and
14 then detour from the original plan of developing
15 the property. I didn't spend a lot of time out
16 there, but what I recollected was back in, like,
17 2010 or whatever, I think there was a meeting at
18 Hanson's property --

19 Q. Okay. Let's back up a little bit. And this gets
20 down into my next question. Mr. McCants talked
21 about what did you do to mitigate the property.
22 My question is, in your words what did you do to
23 try to stop this water from coming on your
24 property?

25 A. Well, if I went out there before we met at

Fischer - Direct by Mr. Player

1 Hanson's, you know, it might have been someplace
2 during the week or on a Saturday or something, if
3 I had time. And I used to live across the street
4 in Barclay Estates. And I'd just go over there
5 and observe because I'm kind of an outdoorsman.

6 Q. Okay.

7 A. And just observing, I never -- what I could see
8 where water has, you know, maybe cut a groove in
9 or something on the main road where they were
10 cutting in and everything.

11 Q. Okay. And you mentioned Hanson. Who are you
12 talking about when you say Hanson?

13 A. I'm believing it was the -- where the entrance to
14 Chadwick from Ascauga Lake Road. I believe he's
15 the homeowner on the right side of our property.

16 Q. Okay.

17 A. And we had met out there, I think it was Dozier
18 and Hugh Connelly. I'm not sure if Billy Franke
19 was there or not. I know a couple of them.

20 Q. Some members of C D F?

21 A. Yes, C D F and myself.

22 Q. And what did you meet at Hanson's property for?

23 A. They were -- had real concerns about the water
24 coming across our property by going across the
25 street and really interfering with the other

Fischer - Cross by Mr. McCants

1 homeowner's property.

2 Q. Okay. And was this just a meeting between the C D
3 F folks and Hanson, or was there anybody else
4 there?

5 A. There was a representative from the state of
6 South Carolina. I don't remember his name at the
7 time, he was there and we were trying to see about
8 doing something, or getting somebody involved to
9 rectify the problem. What would seem to be really
10 getting a lot of erosion.

11 Q. Okay.

12 A. Which I hadn't observed, you know, for years
13 because I hadn't been out there. Because I don't
14 remember exactly when, but it was 12 to 13 years
15 ago when I moved to the country.

16 Q. Okay. Were there any DOT reps at that meeting at
17 Hanson's house?

18 A. I don't recall.

19 Q. Okay. Do you recall any meetings with any reps
20 from DOT about the erosion and water issue?

21 A. I don't.

22 Q. Okay. So after that meeting at Hanson's house,
23 what happened next, anything?

24 A. Not a whole lot. I don't recall anything.

25 Q. Okay. But you have noticed a substantial amount

Fischer - Cross by Mr. McCants

1 of soil and other material from the property that
2 was there in '87 that's not there now, right?

3 A. Well, it's, it was, was not there. It's moved in
4 all other places and directions.

5 Q. Okay. So there is --

6 A. Soil is moving.

7 Q. -- excavation, right there, at the I-20 outfall?

8 A. Yes, sir.

9 MR. PLAYER: Okay. Beg one minute. I'm going to
10 turn you over to that shark, Clarke McCants. Please
11 answer any questions he has for you.

12 THE COURT: Cross.

13 CROSS EXAMINATION

14 BY MR. MCCANTS

15 Q. Afternoon, Mr. Fischer.

16 A. Good afternoon, sir.

17 Q. You were one of the original parties to the actual
18 condemnation of the 25-plus-or-minus acres up at
19 the top near the Palmetto Parkway on this
20 property, is that correct?

21 A. Yes.

22 Q. Do you remember an attorney named Keith Badcock?

23 A. I do not.

24 Q. Do you ever remember meeting with an attorney who
25 was representing all you folks as far as the

Fischer - Cross by Mr. McCants

1 original condemnation, that would have been
2 representing everybody?

3 A. I do not.

4 Q. All right. And you, you are listed as a party in
5 that case, a landowner with C D and F Interests,
6 LLC. Mr. Leaver, Robert Leaver --

7 A. Yes, sir.

8 Q. And Roy Fischer, that's you.

9 A. Yes, sir.

10 Q. You and I talked about it in the hall, it's Elroy
11 Fischer, isn't it?

12 A. Yes.

13 Q. I thank you for being here today, by the way,
14 Mr. Fischer.

15 A. You're welcome.

16 Q. And you had acquired your interest in this
17 property when exactly, if you could tell the
18 Court?

19 A. I believe I have a receipt from July 17, 1986,
20 from Robert Leaver for the amount of \$20,000.

21 Q. And what was the nature of the transaction between
22 you and Mr. Leaver?

23 A. I was just going to be an investor into getting
24 the development going, and then as he sold the
25 lots, to retrieve my amount of money that I had in

Fischer - Cross by Mr. McCants

1 there, and how much I was going to divide it, I'm
2 thinking, three ways as they sold the lots.

3 Q. You're talking about the Chadwick Development.

4 A. Yes.

5 Q. And you were in doors and windows at that time?
6 Is that what I understand?

7 A. I was. I was in doors and windows and
8 renovations, you know, remodeling, construction,
9 residential construction.

10 Q. I think I know what you mean when you say doors
11 and windows. But, kind of, expound on that.

12 A. Well, I --

13 Q. Selling doors and windows, installing or what?

14 A. -- I was doing, I was installing them but I wasn't
15 in the beginning. I was doing some before I got
16 to know Robert, I knew Robert's dad.

17 Q. Robert Leaver?

18 A. Yes. And I was working maintenance out at the
19 airport, Augusta. And Robert's dad worked out
20 there. And I was doing maintenance and I'd go
21 through buildings here and there and have to work
22 on some of the buildings. And then I got to know
23 Robert's dad or something, and that's how I got
24 involved with Robert, through his dad.

25 Q. I'm asking you these questions because I want to

Fischer - Cross by Mr. McCants

1 understand your background business-wise.

2 A. Right. And so after I was done working
3 maintenance out there, I kind of went back and I
4 started doing remodeling work. And putting in
5 some doors and windows in houses for the Window
6 Gallery. And I was doing -- before, before I got
7 into the doors and windows, I was doing housework.
8 You know, come in and build a deck on a new home
9 or do trim work. And trimming out houses. And
10 then I got into making, let's say, custom windows
11 for the Window Gallery. And they were selling
12 Anderson windows and I was building custom windows
13 for them.

14 Q. What was the name of your company?

15 A. It was Roy Fischer Constructors.

16 Q. Did you have a general contractor's license --

17 A. I did.

18 Q. -- for residential?

19 A. I did.

20 Q. All right. It just seems kind of a leap for me
21 from doors and windows-type business as I
22 understand it, and to participate in the
23 development --

24 A. Yeah, I --

25 Q. -- for residential purposes.

Fischer - Cross by Mr. McCants

1 A. I wasn't into, I wasn't into developing or
2 anything. I just went in there for, as an
3 investor. For Robert asked me -- for if I wanted
4 to invest in this project.

5 Q. That helps me understand your role there.

6 A. And that's -- yes.

7 Q. You knew the Leavers and they were going to
8 develop Chadwick --

9 A. Yes.

10 Q. -- and you saw a good opportunity.

11 A. I thought it was a good opportunity.

12 Q. How do you feel about that today, Mr. Fischer?

13 A. Well, this is like 35-plus years later. I'm still
14 here.

15 Q. Did you ever think -- you are doing great but you
16 didn't think you would be sitting there listening
17 to me ask you questions when you invested in
18 Chadwick, did you?

19 A. I sure did not.

20 Q. It's been a long journey, hasn't it?

21 A. It has been.

22 Q. All right. With that said, how involved were you
23 with planning and whatnot? What did you know
24 about Chadwick?

25 A. Only, I only knew the amount of lots that were

Fischer - Cross by Mr. McCants

1 there and the price that they were going to try to
2 sell the lots for, which I don't even recollect at
3 this time.

4 Q. You thought it was a good deal, obviously?

5 A. It did to me.

6 Q. You sound like a very good businessman. You know
7 what to stay near and what to stay away from.
8 This looked like a pretty deal, didn't it?

9 A. It did at the time.

10 Q. All right. This development plan for Chadwick,
11 did you ever see it before this particular case
12 came to be? In other words, back in the '80s,
13 did Mr. Leaver set it out in front of you and let
14 you look at it and tell you --

15 A. I did see that back in the '80s, that
16 development plan there, probably within months
17 after, or within a month or two after that I got
18 into it and told them I would invest.

19 Q. Gotcha. And at some point in the case you will
20 hear about and see what we call historical imagery
21 of this land, whether it be from Google Earth --
22 are you familiar with that, or other sources?

23 A. I -- a little bit.

24 Q. All right. Well, those satellites up in the air
25 and take pictures, and we're able to look back in

Fischer - Cross by Mr. McCants

1 time. It's fascinating to me but be that as it
2 may it went from bare land to the stages of the
3 development according to what we see from the sky
4 over time.

5 A. Yeah.

6 Q. So by the time you invested money in Chadwick, how
7 far along were they into the development, if you
8 could tell Judge Pope?

9 A. They had -- I was living right across the road in
10 Barclay Estates, and so I would go over there
11 periodically as soon as they got over there and
12 started cutting the roadways and cutting some
13 trees, and was watching the roadway progress. And
14 we were at the stage of everything was prepped.
15 They were getting ready to pave the streets and it
16 was winter time and this was in January when the
17 spill took place. And, I mean, we were right
18 there at it going to get in there with the paving
19 in early spring and the oil spill came and that
20 stopped it.

21 Q. Stopped everything.

22 A. Right then it did.

23 Q. And I was, was I correct that what happened at
24 Charter Terminal, maybe, it was early in the
25 morning? This is based on your knowledge.

Fischer - Cross by Mr. McCants

1 A. It was -- yes, very early in the morning. And I
2 can't really recollect if they said the valve was
3 accidentally left open or if the valve broke. I
4 was unclear that I ever got a true understanding
5 of that. I was thinking a valve broke but it
6 could have been left open, but it was, like, after
7 midnight. It was 1, 2, or 3 in the morning.
8 Something like that I believe.

9 Q. Well, I'm showing my age but I was involved in
10 that case way back when. And a couple of
11 employees lost their jobs over it.

12 A. Yeah.

13 Q. So I'm not saying they deliberately did anything.

14 A. Yeah, it wasn't intentional. Well, that's for
15 sure.

16 Q. Could have been --

17 A. I wouldn't think.

18 Q. -- failure to monitor the equipment or something,
19 but it was a bad spill wasn't it?

20 A. Yes.

21 Q. Nothing good about that.

22 A. No. It was 40,000 plus gallons --

23 Q. Yes, sir.

24 A. -- is the first estimate I got, and I'm thinking
25 it might have been higher. I don't know.

Fischer - Cross by Mr. McCants

1 Q. Do you remember being able to smell it and
2 everything today?

3 A. Not really.

4 Q. All right. Did you guys get any money from
5 Charter Terminal or their owners or whatnot as a
6 result of that spill?

7 A. There was monies but I don't ever recall -- I'm
8 thinking the lawyers were handling it. It was
9 Charles and Saleeby (ph) and I'm believing they
10 dealt with the Boardman's or whoever attorneys and
11 they were working out. And I'm thinking the only
12 monies we got is monies that we had put into it.

13 Q. But did Mr. Fischer receive any money?

14 A. I did not.

15 Q. Elroy Fischer.

16 A. No. If there was a check there it was for monies
17 that I had invested in. After -- at the bank when
18 the, when the oil spill occurred and the bank kind
19 of backed up a little bit, and they weren't going
20 to hold the note anymore or something, we were
21 having to pay payments.

22 Q. There was a mention of that. And so really
23 Chadwick was not completed maybe for two reasons:
24 The oil spill and any financing issues? Maybe the
25 bank got nervous and in light of what had

Fischer - Cross by Mr. McCants

1 happened. Is that accurate?

2 A. That is probably somewhat accurate. I'm believing
3 that it got worked out where the monies that, from
4 Charter Oil Terminal or whatever, was worked out
5 that they paid off the bank. That's to the best
6 of my recollection what happened. That they took
7 care of the note at the bank.

8 Q. Fair --

9 A. For the damages and we didn't have any mortgage
10 payment to pay.

11 Q. -- and you have heard the testimony that Chadwick
12 was well on its way, the oil spill came and a cold
13 night in January 1987 would stop the development.
14 But at one point the property was determined to be
15 clean.

16 A. Yes.

17 Q. And the monitoring wells that you referred to are
18 actually still out there today, aren't they?

19 A. I believe they are.

20 Q. And you know the last time anybody had to peek
21 inside of them to make sure everything was all
22 right, whether it be DHEC or the environmental
23 protection agency?

24 A. I don't have no dates, but every time that DHEC
25 went out there to take soil samples from the wells

Fischer - Cross by Mr. McCants

1 I was out there.

2 Q. And DHEC cleared it?

3 A. Yes. I think it was either two or three times
4 they went out there to take samples. And then
5 after, I don't remember how many years after the
6 last samples that they took, that we got the
7 letter of clear health.

8 Q. And, Mr. Fischer, I have not seen that but I
9 certainly believe you when you tell me the state
10 agencies cleared your property, okay.

11 A. Yes.

12 Q. I'm not challenging that at all. But one of the
13 points I want to address, at some point this
14 happened and the property is cleared, Charter
15 Terminal paid some monies. Did you have to
16 participate in that settlement negotiation and
17 ultimately sign any documents with respect to any
18 claims that were being made against Charter
19 Terminal; if you can recall?

20 A. I cannot recall. But I can recall that there was
21 a meeting, and I'm thinking they addressed the
22 payments to go through Saleeby's law firm to deal
23 with paying off the bank note and whatever monies
24 was assessed at that time.

25 Q. Is this the Saleeby firm in Florence, in that

Fischer - Cross by Mr. McCants

1 area? Do you know?

2 A. No. It was in Augusta, Saleeby.

3 Q. Nevermind. A different group. Okay.

4 A. No, I don't think so.

5 Q. Okay. Well, we don't know that.

6 A. There was a lot of different attorneys, I think,
7 through the years.

8 Q. And you are still not done with them, are you?

9 A. Yeah.

10 Q. All right. Now I want to make -- I heard a couple
11 things I'm not clear on with regard to when you
12 first walked the property, as we call it. Here
13 you are asked to invest in real property. Any
14 good businessman like you, before he does anything
15 is going to walk it, look at it, check the pins,
16 make sure that you're getting what you're buying,
17 okay?

18 A. Yes, sir.

19 Q. And you did that when you were first asked to
20 invest by Mr. Leaver.

21 A. I did.

22 Q. Is your testimony today, Mr. Fischer, that there
23 was no evidence of any water intrusion or erosion
24 on this property?

25 A. Yes, sir.

Fischer - Cross by Mr. McCants

1 Q. No evidence?

2 A. I didn't see evidence of where the spillway came
3 underneath I-20 from the north side coming down
4 the ditch from Charter Oil Terminal up that
5 direction, coming underneath. And where that
6 happened I seen it was grassy and there was some
7 weeds on the side but there was -- where it was
8 evident that there was a blue-line stream or
9 whatever, it was grass. There was no erosion.

10 Q. But there was evidence of a blue-line stream, as
11 you call it, which we have talked about?

12 A. I'm not -- now, now that I -- there was no
13 evidence of a blue-line stream. Now I'm not real
14 familiar with working with land and development.
15 But I'm thinking it was called an intermediate
16 (sic) stream. But there was no ditch, I mean,
17 there. Might have been a swell in the ground
18 where there was a ditch, but that there was no
19 ground showing. It was grass.

20 Q. All right. Well, that helps me understand your
21 testimony a little bit. Let's expound on it a
22 little bit, if I can. So there was evidence of
23 water traveling through the property when you
24 first looked at it. Can we agree on that?

25 A. Well, I can't -- there wasn't no evidence of the

Fischer - Cross by Mr. McCants

1 water because I didn't see it. And there was no
2 place where there was bare dirt showing in the
3 lowest portion from I-20 walking back to it. No
4 evidence of rushing water of any sort to erode the
5 grass system and allow bare dirt to show.

6 Q. Gotcha. Let me refine the question again. You
7 may not have seen any actual water flowing on the
8 property, that is, the liquid.

9 A. Right.

10 Q. But my question is, did you see any evidence that
11 water had come across that ground, that dirt?

12 A. No, sir.

13 Q. How about swell? You used the word swell. What
14 do you mean by that?

15 A. Yes, it was natural terrain there, I think that
16 was put there. It was just --

17 Q. All right. That's fine.

18 A. -- I mean it wouldn't have been I came there in
19 '86 and looked at the property and somebody just
20 put sod down. It was there for a long time and
21 there was no evidence of fresh dirt or any dirt
22 being moved. That's all I know about it.

23 Q. Well, you used the term intermittent blue-line
24 stream.

25 A. Well.

Fischer - Cross by Mr. McCants

1 Q. And you will hear engineers talk about that in
2 this case.

3 A. And that's the only, that's the only thing I know
4 about it is hearing other people talk about it. I
5 don't know anything about a --

6 Q. You're saying you saw a --

7 A. -- blue-line stream -- or a intermediate stream,
8 is what I hear mentioned, is something where water
9 only flows with the rainfall or something.

10 Q. But you're saying you saw no evidence of any
11 streambed, creek, or anything like what we've been
12 talking about, that is an intermittent blue-line
13 stream. Is that your testimony?

14 A. Yes. I have seen no evidence.

15 Q. All right. You have seen these pipes that we have
16 been talking about today?

17 A. Yes, sir.

18 Q. You see that Chadwick plan that I asked you about?

19 A. Yes, sir.

20 Q. Did you ask Mr. Leaver why we are paying for these
21 big pipes?

22 A. I did not.

23 Q. Why not?

24 A. I did not.

25 Q. Why not?

Fischer - Cross by Mr. McCants

1 A. Well, because they were building the roads and one
2 day the pipes were there. And it was on the
3 bottom of the hill.

4 Q. You saw them.

5 A. I saw them. I definitely saw them a lot of times.

6 Q. And they would have been brand new at the time,
7 correct?

8 A. Well, yes, sir.

9 Q. They don't look so brand-new anymore, do they?

10 A. No. They're still --

11 Q. People have been living in them. They have got
12 graffiti on them. I guess my point, you're a good
13 businessman who, I can tell, has been around and
14 understands things. You put money into something,
15 certainly, you and Mr. Leaver had some comments
16 about the nature of the terrain, what we're going
17 to do. And you see these huge, I characterize
18 them as huge reinforced concrete pipes that are
19 referenced on this plan and are there today.
20 Certainly you asked some questions about them.

21 A. I did not. I did not have questions for him. All
22 I know is the main -- what I call the main road
23 coming straight down from the north, I-20
24 direction, and coming down the hill down in the
25 bottom there was going to be a retention, or pond,

Fischer - Cross by Mr. McCants

1 down there. And I'm thinking they were going to
2 go under the road to the detention pond, or
3 retention pond.

4 Q. Why did you need a detention pond? Did you ask
5 that question?

6 A. Well, I'm -- most subdivisions have to have them.

7 Q. Why?

8 A. Well, to hold water.

9 Q. A lot of water in some cases, right?

10 A. Well, yes.

11 Q. I hope you understand I'm not beating on you, I'm
12 just -- if you're going to put money into a
13 development you want to maximize the economies of
14 the expenditures and whatnot. Don't waste money
15 and everything. But do you agree with me at least
16 whoever mapped Chadwick out anticipated the need
17 to put 72-inch reinforced concrete pipes down that
18 yellow line, the area of the easement? Do you
19 agree with me? You want to look at the plan
20 again?

21 A. I see, I see the plan. Not -- I don't necessarily
22 agree with you because there wasn't that amount of
23 pipe to go that distance.

24 Q. Well, we've heard testimony about this, but you've
25 heard me call that Note 13 which requires 72-inch

Fischer - Cross by Mr. McCants

1 reinforced concrete pipe at least down in that
2 area towards the bottom, correct?

3 A. I heard you talk about it, yes.

4 Q. Can I bring it up to you --

5 A. Yeah, you're fine --

6 Q. -- and let you look at it.

7 MR. MCCANTS: Your Honor, is it all right if I
8 come up and talk to him with this?

9 THE COURT: Yes.

10 BY MR. MCCANTS

11 Q. This is Exhibit Number 2, Mr. Fischer, that we've
12 marked. I believe it's Number 2. And I need your
13 pen, again, Madam Court Reporter. I keep leaving
14 my pen. Thank you, ma'am.

15 BY MR. MCCANTS

16 Q. And you said you saw this once before?

17 A. Yes.

18 Q. You don't dispute that? All right. And I'm going
19 to trust that if you looked at it you perhaps
20 looked at it enough, maybe, to try to understand.
21 Is that fair?

22 A. Yes.

23 Q. And that's I-20?

24 A. Yes.

25 Q. That's y'all's property. This is the area that we

Fischer - Cross by Mr. McCants

1 acquired for purposes of construction of the
2 Palmetto Parkway and whatnot. And you see that
3 says a drainage easement from I-20?

4 A. Yes, sir.

5 Q. And you see this yellow, it goes down through
6 Chadwick and it talks about an easement, talks
7 about the County whatnot. Then it talks about
8 drainage utility, correct?

9 A. Yes.

10 Q. Now any reasonable person understands that to mean
11 that that is designed to drain something which we
12 would believe to be water. Is that fair?

13 A. Yes.

14 Q. All right. And see how it ends down here and see
15 we've got these notes. It's D-11, D-14, Will
16 Badger helped me out, that is D-13, that note.
17 You with me?

18 A. Yep.

19 Q. D-12, if you look down here talks about D-13 is a
20 RCP culvert 70 inches in diameter --

21 A. 72.

22 Q. -- down here. D-13 --

23 A. Yes.

24 Q. -- D-13 note. D-13 is a RCP culvert 72-inch deep.

25 A. Yes.

Fischer - Cross by Mr. McCants

1 Q. So that tells me that 72-inch RCP, reinforced
2 concrete pipe, was to be installed in this area
3 down in here. Or perhaps even the entire length.
4 We don't know but it's enough pipe to recognize
5 that there is a lot of water coming in that area.
6 Don't you agree?

7 A. I don't.

8 Q. Why would you invest in those big pipes if you
9 didn't agree with your developer, whoever drafted
10 these plans, that there was a need for those
11 pipes?

12 A. How many pipes are there?

13 Q. Well, you tell me.

14 (inaudible crosstalk)

15 A. I'm thinking there was around six pipe. I
16 wasn't -- I didn't order the pipe or deliver the
17 pipe or --

18 Q. You paid for it.

19 A. -- well yes. It went, went on the bank's note but
20 it's --

21 Q. You paid for it, didn't you?

22 A. -- I understand that, yeah.

23 Q. You got it paid off through the Charter Terminal
24 spill but --

25 A. Yes, sir.

Fischer - Cross by Mr. McCants

1 Q. -- that was money out of your pocket initially,
2 all right?

3 A. I believe so.

4 Q. I'm not picking on you, I'm just asking. You
5 don't look to me to be the kind of man that's
6 going to spend money unless you have got a reason
7 to spend it. Is that a fair statement?

8 A. Yes, sir.

9 Q. So somebody invested heavily in protection against
10 water, Mr. Fischer. Will you, will you agree with
11 me on that?

12 A. Not necessarily. I'm still thinking it was to get
13 the water underneath the roadways. Because you
14 had a roadway here, and you have got a roadway
15 here to get to the -- probably had to get to the
16 detention pond.

17 Q. That's right. What water (inaudible),
18 Mr. Fischer?

19 A. Well, the land elevation between up here on the
20 hill and down here, there was a -- and so now you
21 have got all this flat area up in there which is
22 higher than the land down here. That had to go
23 someplace --

24 Q. All right.

25 A. -- when you build the lots and the roads.

Fischer - Cross by Mr. McCants

1 Q. And I think you and I can at least agree that
2 somebody had to deal with water, correct?

3 A. Exactly.

4 Q. You and I may disagree on the amount of water, but
5 whoever engineered this development, Chadwick, for
6 you guys who were investing a lot of money said
7 y'all have got to deal with water. Can we agree
8 on that?

9 A. Yes, sir.

10 Q. It's the amount of water I think you and I maybe
11 don't share the same perspective with regard to
12 that issue, that is the amount of water. But
13 wouldn't the amount of water perhaps,
14 Mr. Fischer -- isn't it true the amount of water
15 that's coming through that property is defined by
16 the size of those pipes?

17 MR. PLAYER: That calls for speculation of an
18 expert.

19 MR. MCCANTS: I'll rephrase.

20 THE COURT: All right.

21 BY MR. MCCANTS

22 Q. Mr. Fischer, we talked about your experience in
23 business, what you did, how you invested in
24 Chadwick. It looked like a good deal to you.
25 What you did was you looked at the plans and

Fischer - Cross by Mr. McCants

1 whatnot. You and I have reached the point in our
2 discussion where you agreed that the person who
3 put these plans together said, Chadwick and your
4 representatives, you have got to deal with water.
5 So you and I kind of don't share the same view
6 about how much water. And I'm asking you, isn't
7 it true that the amount of water that you had to
8 deal with can easily be defined by the investment
9 in those 72-inch pipes?

10 A. Not necessarily. Because you're talking how many
11 acres of land there, 69.3 acres of land and you're
12 paving these big roads going around there. And
13 all the lots and the driveways, and that's a hill
14 on one side of the property, and the other side of
15 the property the elevation is much lower. And so
16 the water is coming from the top side of the
17 property to the bottom side of the property.

18 Q. Have you seen the pipe, the concrete --

19 A. I have.

20 Q. -- at the outfall?

21 A. I have.

22 Q. How many inches in diameter is it?

23 A. I believe, according to Billy Franke -- I didn't
24 measure personally. I think he said one was
25 24 inches and one was 54 inches.

Fischer - Cross by Mr. McCants

1 Q. That's correct. That's 72 inches worth of pipe?

2 A. Yes.

3 Q. And 24-inch is less than half of that.

4 A. Yes.

5 Q. Correct?

6 A. Yes.

7 Q. My question to you, can we agree that we can
8 define the amount of water that a person is
9 dealing with based upon the diameter of the pipe
10 we're using?

11 MR. PLAYER: One, once again, this is calling for
12 expert testimony. Calls for speculation. He -- the
13 amount of water can't be defined by the size of the
14 pipe that was never used and just, apparently,
15 mentioned in a plan.

16 THE COURT: All right. Mr. McCants.

17 MR. MCCANTS: I'm not asking his opinion. This is
18 more based on his lay experience in getting involved.
19 And the simple question is whether or not the size of
20 the device, pipe, what have you, to use to control
21 something like water can be defined -- that can be
22 defined by the size of the device that you're using.
23 That doesn't really require expert testimony. It just
24 seems a common sense approach. The lesser amount of
25 water, the smaller the pipe. The more water, the

Fischer - Cross by Mr. McCants

1 larger the pipe. And that's all I'm asking Mr. Fischer
2 to perhaps agree with me with regard on that issue.

3 THE COURT: All right. I'll allow that question.

4 BY MR. MCCANTS

5 Q. Mr. Fischer, let me try again, okay?

6 A. Okay.

7 Q. Isn't it fair to define the amount of water you
8 need to control by the size of the device you need
9 to control -- that is the size of the pipe?
10 That's not unreasonable is it? Be fair with me,
11 Mr. Fischer.

12 A. There's, there's one thing if you're a land
13 developer and you have done subdivisions before,
14 you're not going to put a pipe in that's half the
15 size of what you need. You would rather go twice
16 the size so you would have room to grow.

17 Q. I'll make a deal with you. At least the fella
18 that y'all had hired to design Chadwick for you
19 thought you needed 72 inches of pipe. Will you
20 agree with that? That's true?

21 A. Not necessarily, because I'm thinking it could
22 have been a 24-inch pipe would have been
23 sufficient but he says, well, we -- let's get a
24 48-inch pipe. Well, they didn't have any so he
25 said, well, we better take the 72.

Fischer - Cross by Mr. McCants

1 Q. Oh, come on. We can find some 48-inch pipe
2 instead --

3 A. Well, I --

4 Q. -- of going up to 72-inch. That would be a waste.

5 A. -- well, when they came in there they came in with
6 the equipment and just --

7 Q. Y'all's engineer thought you needed 72-inch pipe,
8 didn't he?

9 A. -- well, I -- he might have. I don't know that
10 but I -- because I never really talked to him.

11 Q. Well, once you got building did you ever ask
12 Mr. Leaver why we paid for 72-inch pipe when we
13 could have used 42? Did you?

14 A. I did not.

15 Q. Okay. Let's leave that alone. Let's get down to
16 the condemnation. And I do want to talk to you
17 about that. We all know the condemnation case was
18 filed in 2005. Trust me on that. That's in the
19 paperwork that we have, okay?

20 A. Okay.

21 Q. And tell me again, did you actually -- y'all
22 retained a lawyer, Keith Badcock, of Columbia, you
23 as landowners. Are you aware of that?

24 A. I'm not sure of the law firm.

25 Q. All right. And you don't remember meeting with

Fischer - Cross by Mr. McCants

1 any attorneys to discuss the condemnation case,
2 the ins and outs of value and all that?

3 A. I don't recall, sir.

4 Q. Do you remember that the Department of
5 Transportation tendered into the court the
6 acquisition, that is we placed money into the
7 court to start the condemnation process? Do you
8 remember that at all?

9 A. I don't.

10 Q. Do you remember any amount that was tendered to
11 the court? Well, I'll tell you it was
12 approximately \$378,000, I believe. You don't
13 remember that?

14 A. I don't but I know it's on the paper.

15 Q. Yes, sir. Fair enough. You do remember, however,
16 that, ultimately, you as a landowner with the
17 other landowners agreed to settle the condemnation
18 case for the total sum of \$504,500 -- \$560. Do
19 you remember that?

20 A. Yes.

21 Q. That rings a bell, doesn't it?

22 A. Yes.

23 Q. How much did the attorney charge you out of that,
24 do you remember?

25 A. I don't.

Fischer - Cross by Mr. McCants

1 Q. You don't remember if he was on an hourly basis or
2 contingency?

3 A. I don't, sir.

4 Q. Tell me again, do you remember how much money you
5 actually received from the condemnation case?

6 A. I believe it was \$179,000 and change.

7 Q. That is went to Leroy Fischer personally?

8 A. Yes.

9 Q. Is that correct?

10 A. Yes.

11 Q. Did you reinvest that money into the Chadwick
12 concept?

13 A. I did not.

14 Q. May I ask why you did not?

15 A. Because I don't think it ever -- the subject never
16 came up.

17 Q. You have heard the testimony discussion by that
18 time all the original owners involved in Chadwick,
19 because of the spill and time, were kind of
20 dispersed, okay?

21 A. Yes.

22 Q. And you agree with me the current landowners, that
23 is you with Mr. Badger's interest, Mr. Franke's
24 interest, and the other interests, y'all aren't
25 interested in developing this property anymore,

Fischer - Cross by Mr. McCants

1 are you?

2 A. Nobody has brought that up to me, no.

3 Q. All right. But do you understand the law means
4 that you have got a duty to mitigate your damages
5 and to try and reduce what your claim is as part
6 of this case? Do you understand that?

7 A. Not really.

8 Q. All right. Well, let me help you. It's not a
9 complex term. When you claim that you have been
10 hurt by somebody the law says that you have to try
11 to reduce your damages, how you have been hurt.
12 Does that make sense?

13 A. Yes.

14 Q. But you haven't done any of that, have you?

15 A. I have not personally, no.

16 Q. All right. I'm going to trust, because you got
17 some money out of the Charter Terminal settlement,
18 that when Mr. Badcock or whoever was representing
19 you presented the papers to you to receive your
20 170,000 plus or minus funds -- how much was it?
21 How much did you get from the condemnation? Rough
22 idea.

23 A. Is that -- are you talking about the money from
24 Charter Oil Terminal?

25 Q. I'm going to pause. I'm moving too fast and I

Fischer - Cross by Mr. McCants

1 don't mean to do that. I want to take the time and
2 make sure you understand the question. You got
3 money as a result of the Charter Terminal oil
4 spill, correct?

5 A. No, sir.

6 Q. Well, it was reinvested in the bank situation?

7 A. Yeah. But the bank got it. I don't know what
8 the -- there was, there was several payments after
9 the oil spill that the bank wanted to keep the
10 account to have monies coming in to pay off the
11 note. And we were making some note payments.

12 Q. Gotcha.

13 A. Individually, Robert Leaver, Sherman Hemstreet,
14 LLC, and me myself.

15 Q. All right.

16 A. And we were making payments, and the settlement
17 from that condemnation, any settlement was only
18 for the payments that I was making on behalf of
19 trying to keep the note afloat.

20 Q. Well, again, how much did you receive out of the
21 condemnation settlement? Let me clarify this.
22 This is important. Out of the \$504,000 and change
23 that y'all, you fellas, received for the
24 condemnation case, how much did --

25 A. From Charter Oil Terminal?

Fischer - Cross by Mr. McCants

1 Q. -- no, sir. That's two different things. Follow
2 with me.

3 A. You are talking about the 25-acres?

4 Q. Let's pause a second. Charter Terminal happened
5 in '87.

6 A. Yes.

7 Q. Period of time, the property is clean. Charter
8 Terminal is settling for the damage. I think you
9 indicated to us whatever money came from Charter
10 Terminal went to pay the bank.

11 A. Exactly.

12 Q. Satisfy a mortgage.

13 A. That's right. To satisfy that mortgage and any
14 payments that we had made in a short period of
15 time, when the bank was requesting monies.

16 Q. Got it. Let's stop there. The condemnation
17 action was filed in 2006. It was settled, we
18 believe, within a year or year and a half. We
19 believe Mr. Badcock represented all the
20 landowners. Very capable eminent domain lawyer
21 from Columbia. And it was settled for a total of
22 \$504,920. I'm trying to keep the numbers
23 straight. My question to you, \$504,560, that's
24 the total amount that DOT paid you folks as
25 landowners for the acquisition of the 25 acres --

Fischer - Cross by Mr. McCants

1 A. Yes.

2 Q. -- at the top of the property. You agree with me
3 about that?

4 A. Yes.

5 Q. How much of that did Mr. Fischer, you, receive?

6 A. \$179,000 and I don't, I don't remember.

7 Q. Not an insignificant amount of money, do you
8 agree?

9 A. Yes, sir.

10 Q. All right. When we talked about having what you
11 did, you didn't reimbursement into Chadwick
12 because that (inaudible) fallen by the wayside.
13 All right. Well, in any (inaudible) y'all
14 received this money. Now I'm going to trust that
15 the lawyer sat down with you and said, here's your
16 check. As part of receiving that check you have
17 got to sign some documents, correct? Let me show
18 it to you. It's got your name misspelled because
19 they only called you Roy.

20 A. I know.

21 Q. Your full name is Leroy, but that is your
22 signature. Is that correct?

23 A. Yes, sir.

24 MR. MCCANTS: For the record this is Exhibit
25 Number 1, I think, Madam Court Reporter and --

Fischer - Cross by Mr. McCants

1 THE COURT: It is. Yes, sir.

2 MR. MCCANTS: It would have been on one of those
3 page three of threes that you pointed out earlier,
4 Judge. And it is the one --

5 MR. PLAYER: (inaudible).

6 BY MR. MCCANTS

7 Q. Thank you. 1, 2, 3, 4, 5, 6 pages, your
8 signature, Roy Fischer -- Leroy Fischer appears
9 there.

10 A. Yes, sir. Leroy.

11 Q. Mr. Fischer, I'm going to trust that before you
12 signed, you read this document. Is that a true
13 statement?

14 A. Yes, sir. Probably did. I would think I did.

15 Q. In business. Had signed at least one other claim
16 in the past. You want to make sure you know what
17 you're doing before you accept that money. Fair?
18 And did you have to ask any -- I know it's been a
19 while. I know it's been a while. But if you can
20 tell the Court, did you understand all of the
21 document that you signed and everything that was
22 written there?

23 A. I believe I did.

24 Q. You remember having to ask anybody about it, ask
25 any questions?

Fischer - Cross by Mr. McCants

1 A. I don't recall.

2 Q. Did anybody make you sign it?

3 A. No.

4 Q. All right, now. The plain language of the
5 agreement, and I read this before, says in
6 exchange for \$504,560 of which you received that
7 \$170-plus-change amount, you agreed to release the
8 state of South Carolina, the South Carolina
9 Department of Transportation from any and all
10 claims, demands, damages, actions and causes of
11 action, and suits at law or in equity of
12 whatsoever kind or nature arisen, arising or to
13 arise, from or because of any matter related to
14 the construction of Palmetto Parkway (Bobby Jones
15 Expressway) I-520 in Aiken, South Carolina. I'll
16 let you read that, but will you trust me that I've
17 read it accurately?

18 A. I trust you.

19 Q. There's a lot of legalese in there isn't it?

20 A. There is.

21 Q. What do you understand it to mean?

22 A. I understand it to mean that we're not going to
23 hold you liable for anything on the 25 acres that
24 we sold to DOT.

25 Q. All right.

Fischer - Cross by Mr. McCants

1 A. That was your land.

2 Q. Well, it doesn't say 25 acres in there. It says
3 anything arising or to arise because of any matter
4 relating to the construction of the Palmetto
5 Parkway in Aiken, South Carolina. I want you to
6 read that if you would. Because that doesn't talk
7 about 25-acres. It talks about an exchange worth
8 a half million dollars that you, when you signed
9 that document, said anything related to the
10 Palmetto Parkway is released.

11 A. All right. I see what you've got outlined there,
12 but you can't say that you paid me money -- I
13 received monies for 25 acres but you can come and
14 do anything you want on my property.

15 Q. I'm not suggesting that's what it says. I'm
16 suggesting that language in that release says in
17 exchange for \$504,000 you landowners are saying
18 whatever is related to construction of the
19 Palmetto Parkway is released.

20 A. Not on our property. On your property, yes.

21 Q. Well, when someone pays money, like Charter
22 Terminal, to the bank, granted because they caused
23 some damage or caused problems, don't you think
24 it's reasonable that person who is causing the
25 issue wants to be released from any claims from

Fischer - Cross by Mr. McCants

1 the person they are paying the money to? That's
2 not unreasonable, is it?

3 A. I don't believe so.

4 Q. All right. Here's the reason I want to get into
5 that. We are talking about what you saw on the
6 property before the condemnation case was filed.
7 Have you seen the pictures that I had shown
8 everybody else that were taken in 2005 when DOT
9 had the property appraised? Have you seen those?

10 A. I kind of -- you're talking about the three
11 photos?

12 Q. Yeah. Let me spend a little time with you on
13 those, if I can. And we just have some
14 differences in interpretation of those
15 photographs, I believe. Are you able to see these
16 photographs from here, Mr. Fischer? Or you want
17 to come up here?

18 A. I can see them if you hold them up, I think.

19 Q. Can you see that?

20 A. Yes, sir.

21 Q. All right. Let me ask you about Exhibit Number 6,
22 this photograph. And what I will tell you that
23 is, that is a photograph under the appraisal that
24 was done by a man named Steward Saunders in 2005
25 in order to calculate the value of the property

Fischer - Cross by Mr. McCants

1 that SC DOT was acquiring. That they went -- that
2 he went into your property and looked at it in
3 2005. I want you to trust me that that's true for
4 the time being. Okay, Mr. Fischer?

5 A. Okay.

6 Q. My question, does Exhibit Number 6, in your mind,
7 show significant erosion to the ground in the area
8 where this photograph was taken?

9 A. Can you, can you bring that photo over here?

10 Q. Take whatever time you want to to look at it.

11 A. It's kind of hard to determine exactly what's
12 going on there.

13 Q. Do you not believe that that is the bottom of some
14 area of the ground, and that is a wall of, as
15 Mr. Badger called it, Georgia red clay?

16 A. Yes.

17 Q. Does it look like, then, that there is some type
18 of bed down below that big wall of Georgia red
19 clay where water has run through that land?

20 A. The water looks like it is going from here over
21 there, and it don't look like it's touching
22 anything over here. Because if you dig out a
23 road, dig a roadway or something, a lot of times
24 they do have a, a side bank --

25 Q. Well, y'all didn't dig roads that deep, did you?

Fischer - Cross by Mr. McCants

1 A. -- and they just left it. No, we didn't. I don't
2 recall doing anything.

3 Q. Well, Mr. Saunders will testify. I'm just asking
4 you and giving you a chance --

5 A. I'm just.

6 Q. Do you not agree that photograph shows at least
7 erosion across the dirt area?

8 A. The dirt area is there but that looks like this
9 portion here, whether it's some sand or silt
10 going -- it's not even going over there.

11 Q. Okay. Then let's talk about Exhibit Number 8.
12 Does that show erosion to the ground due to the
13 flow of water?

14 A. It does.

15 Q. How would you characterize the degree of that
16 erosion?

17 A. I can't tell, but it looks like there's some -- a
18 ditch that formed a side of a -- and I believe
19 that's near the top of the hill, but maybe not all
20 the way to the top. And there's, so there's water
21 coming from the top of the hill down that side,
22 but that's from 1986 when they cut the roads in
23 there and they didn't do anything til what, 2005.

24 Q. Well, this picture was taken in 2005.

25 A. Yeah.

Fischer - Cross by Mr. McCants

1 Q. I haven't established that yet but (inaudible). I
2 believe that the evidence is going to show that,
3 but let's peer harder into these pictures and see.
4 Look at that photograph. You see these channels
5 where water is obviously --

6 A. Yes.

7 Q. -- eroded the ground. And you see it's going up
8 at an incline, but you see that area right in
9 there? Does that not look like water has eroded,
10 again, a significant bank of Georgia red clay?

11 A. It does --

12 (inaudible crosstalk).

13 Q. -- it's not going to move as quick as --

14 A. Right.

15 Q. -- topsoil or sand, correct?

16 A. Right. But you're talking about 20 years where
17 all the vegetation was removed and left off.

18 Q. That part is fine but the point is in 2005, is
19 that not evidence of severe water intrusion and
20 erosion across your property?

21 A. It's coming from the top of the hill and the water
22 has got to go to the lowest point.

23 Q. I understand that.

24 A. And then 20 years with no maintenance.

25 Q. I didn't ask where the water came from.

Fischer - Cross by Mr. McCants

1 A. Yeah.

2 Q. I'm asking is this not evidence of severe
3 erosion --

4 A. Well, it's evidence that, yeah, water has flowed
5 and caused damage for sure.

6 Q. Can you use the word severe?

7 A. In 20 years, not necessarily.

8 Q. How would you -- what level of degree would you
9 attach to that? Moderate, insignificant?

10 A. I would say moderate.

11 Q. Moderate. Not severe?

12 A. Not severe, not in 20 years.

13 Q. But enough water that it commands control of it,
14 correct? Do you agree with that?

15 A. Yes.

16 Q. Do you see that one? This is the last one,
17 Mr. Fischer. I promise you I'm getting close.

18 A. Okay.

19 Q. Number 7. That erosion is so bad it's knocked
20 down trees.

21 A. Bring it here.

22 Q. You agree?

23 A. There's, there are trees that are laying down.
24 There is.

25 Q. They don't look like they were cut.

Fischer - Cross by Mr. McCants

1 A. No.

2 Q. That ain't timber being cut is it?

3 A. No.

4 Q. Those are scrub pines that have been knocked over
5 somehow?

6 A. Yeah, scrub, yeah.

7 Q. You have walked through woods a lot in your life.
8 Do you hunt (inaudible)?

9 A. I do.

10 Q. You still hunting?

11 A. I am.

12 Q. What do you shoot these days, deer?

13 A. Yeah.

14 Q. You get out in the woods and hunt deer?

15 A. Yeah. I do.

16 Q. So you have seen what I'm talking about over the
17 years, haven't you?

18 A. Yes.

19 Q. And this looks like a typical interior woodland
20 area that had severe erosion by water over the
21 years from wherever the water is coming from.
22 Would you agree with me on that?

23 A. Not necessarily because you are talking about very
24 small trees and erosion can start when the, once
25 the vegetation is gone. That's when erosion

Fischer - Cross by Mr. McCants

1 starts. When it went from having structure to not
2 having anything.

3 Q. All right. I saw that's not as severe as some of
4 the other ones but I don't think that that's
5 slight. Let's you and I agree on a term to
6 characterize this degree of erosion. How would
7 you characterize this?

8 A. I would say it would be -- my term would be less
9 than moderate.

10 Q. All right. How many deer have you shot this year,
11 by the way?

12 A. It's too warm.

13 Q. All right. Let me ask you finally, if I can, at
14 the time you signed the release to receive the
15 money from the condemnation action and you got
16 \$170,000 and some change, you were familiar with
17 the interior condition of your property, weren't
18 you?

19 A. Yes.

20 Q. So you knew about all this?

21 A. Yes.

22 Q. And you accepted the money that the state paid you
23 knowing about the condition of the interior of
24 your property, is that fair?

25 A. Yes.

Fischer - Redirect by Mr. Player

1 Q. All right, sir. Do you recall, Mr. Fischer -- I
2 haven't asked about it just yet but I'm going to
3 ask you. Do you recall if the timber was cut off
4 the front end of that property before the
5 condemnation action was filed? Do you remember?

6 A. I'm thinking it could have been but I wasn't
7 directly involved with it. But I believe it could
8 have been.

9 Q. And I, I tell you, I'll tell you, Mr. Fischer,
10 we've got the documents --

11 A. Yeah.

12 Q. -- that we will share with, we'll share with the
13 Court. Y'all have seen them. You don't have any
14 reason to doubt that's clear-cutting timber at the
15 top of the property before the DOT acquired that
16 25-acre? You don't have any reason to dispute
17 that?

18 A. No, I don't have any reason to dispute that.

19 Q. All right. Because you guys wanted the value of
20 that timber before the construction, correct?

21 A. I believe, I believe it was brought to my
22 attention and that's what I remember. But I never
23 went out there seeing it clear-cut or anything.

24 Q. Based on your experience with traipsing through
25 the woods and hunting deer over the years, what

Fischer - Redirect by Mr. Player

1 does a clear-cut do to the remaining property for
2 purposes of erosion control?

3 A. It don't help it any in the beginning.

4 Q. That's exactly the term I would use. It doesn't
5 help anything, correct?

6 A. In the beginning.

7 Q. But if it grows back up, that's fine.

8 A. Yeah. Well, you will get weeds and all the
9 under-stuff coming up within a year.

10 Q. Takes a long time for that to happen though,
11 doesn't it?

12 A. Well, within a year or something. It really --
13 with the sun shining it --

14 Q. With sunshine. I gotcha. Hold on just one
15 second, Mr. Fischer.

16 MR. MCCANTS: Mr. Fischer, thank you for being
17 patient with me. That's all I have, Your Honor.

18 THE COURT: All right. Redirect?

19 MR. PLAYER: Yes, Your Honor.

20 REDIRECT EXAMINATION

21 BY MR. PLAYER

22 Q. Mr. Fischer?

23 A. Yes.

24 Q. The 25-acres they took, what did they put there?

25 A. I think --

Fischer - Redirect by Mr. Player

1 Q. An interstate, right?

2 A. Yes.

3 Q. Can trees grow on an interstate?

4 A. No.

5 Q. Okay. Another question. Do you know what an
6 easement is?

7 A. I believe I do.

8 Q. What do you believe an easement is?

9 A. An easement gives you the right to access
10 property -- land easement gives you the right to
11 access property that you don't have access to --

12 Q. All right.

13 A. -- if you need to. If you can't find no other --

14 Q. If you have an easement, you are there at the
15 pleasure of the owner, correct?

16 A. -- yes, sir.

17 Q. Does the owner build infrastructure to take care
18 of your water when you have an easement on the
19 property?

20 A. No. No.

21 Q. So is there any reason to believe that these
22 72-inch pipes you bought to take care of DOT's
23 water.

24 A. No.

25 Q. If they only need an easement to send something

Fischer - Redirect by Mr. Player

1 across your land, so all this water, if it's an
2 easement --

3 MR. MCCANTS: Your Honor.

4

5 BY MR. PLAYER

6 Q. -- it's DOT's water, right?

7 A. Yes.

8 THE COURT: What's the objection?

9 MR. MCCANTS: I try to hold back because I know
10 this is not a jury. And I know you want to move along,
11 but Mr. Player's testifying at this point, I believe,
12 in leading Mr. Fischer during redirect.

13 MR. PLAYER: Okay.

14 MR. MCCANTS: I try to be very --

15 MR. PLAYER: No. I, I completely agree. I'll
16 change my question.

17 THE COURT: All right. So if you will rephrase.

18 BY MR. PLAYER

19 Q. Have you ever been in a situation where you have
20 paid to maintain or construct an easement for
21 somebody that you're giving them an easement?

22 A. No.

23 Q. Okay. There was one more. And you talked about
24 down here at the bottom that there was going to be
25 a detention pond, right?

Fischer - Redirect by Mr. Player

1 A. Yes, sir.

2 Q. When they're -- we're getting into engineering
3 stuff. So I'll save it for later. You ready to
4 go home? Me, too. As long as he'll be quiet.

5 MR. PLAYER: No further questions, Your Honor.

6 THE COURT: Recross.

7 MR. MCCANTS: You'll be glad to hear, no further
8 questions.

9 THE COURT: All right. This witness can be
10 excused. Please watch your step, sir.

11 All right, Mr. Player, so you're going to call
12 your expert witness first thing in the morning?

13 MR. PLAYER: And that will be our final witness.

14 THE COURT: All right. So we will, we'll adjourn
15 for the evening. And I will -- we will reconvene at
16 9:30 and go ahead and get started into the expert
17 testimony.

18 MR. PLAYER: Yes, ma'am.

19 THE COURT: And then hear any motions if
20 necessary. And if necessary, we'll also hear
21 Defendant's case, okay?

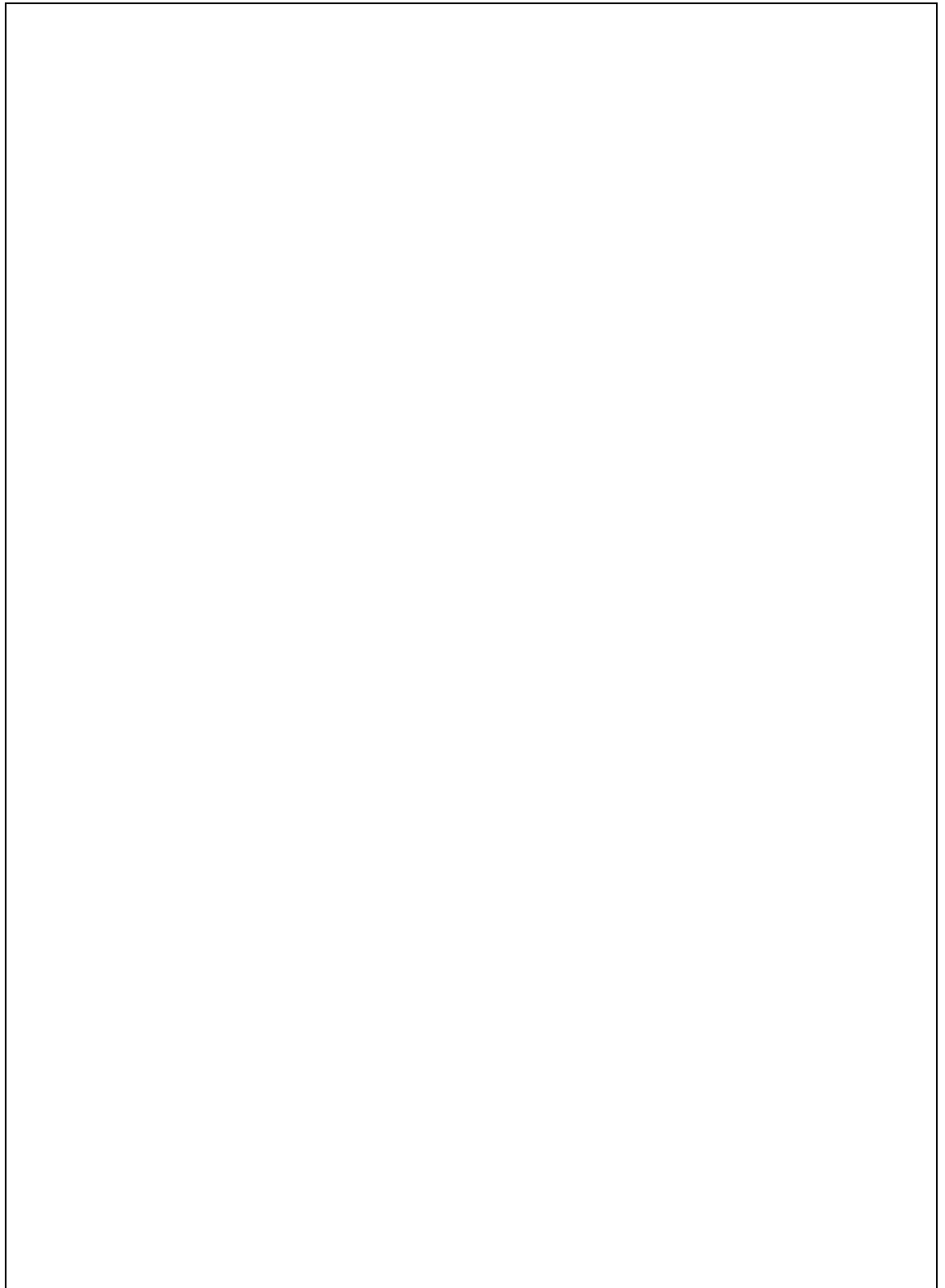
22 MR. MCCANTS: Thank you, Judge.

23 THE COURT: Okay. Y'all have a good rest of the
24 evening. See you tomorrow morning.

25 END OF DAY 1 OF TRANSCRIPT OF RECORD

Fischer - Redirect by Mr. Player

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Fischer - Redirect by Mr. Player

1 CERTIFICATE OF REPORTER

2

3 STATE OF SOUTH CAROLINA)

4 COUNTY OF AIKEN)

5 I, the undersigned Emily H. Walker,
6 official Court Reporter for the 2nd Judicial Circuit of
7 the State of South Carolina, do hereby certify that the
8 foregoing is a true, accurate, and complete transcript
9 of the record of all proceedings had and evidence
10 introduced in the hearing of the captioned case,
11 relative to appeal, in the Court of Common Pleas for
12 Aiken County, South Carolina, on the 20th of September,
13 2023.

14 I do further certify that I am
15 neither kin, counsel, nor interest to any party hereto.

16 In witness whereof, I have hereunto
17 subscribed my name, this 10th of May, 2024.

18

19

20

21 Emily H. Walker, CVR

22 Court Reporter

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