

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

J.C. Nicholson, Jr., Active/Retired Circuit Court Judge

CONSOLIDATED Under Case No.: 2008-CP-10-2641
And Case No: 2009-CP-10-3441

Appellate Case No.: 2012209606

ZAN, LLC.....Appellant

v.

Ripley Cove LLC, W. H. Knight, Karl A. McMillan,
individually and as the principal of Karl A. McMillan, Inc.,
W.M. Belote, East Coast Trading Co., St. Andrews Title &
Abstract Agency, Inc., Chicago Title Ins. Co., and Charles A.
Funk & Lillian M. Funk,.....Defendants,

Of whom Ripley Cove, LLC, W.H. Knight, Karl A. McMillan,
individually and as the principal of Karl A. McMillan, Inc., W.M.
Belote, and East Coast Trading Co. are the.....Respondents.

Zan, LLC.....Plaintiff,

v.

East Coast Trading Co.....Defendant.

RECORD ON APPEAL VOLUME I

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COUNSEL FOR APPELLANT

RECEIVED

FEB 22 2013

SC COURT OF APPEALS

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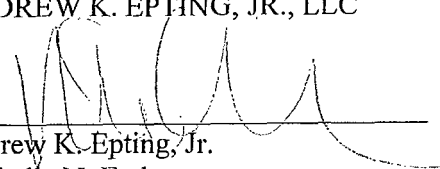
PROOF OF SERVICE

I certify that I have served the Record on Appeal on each Respondent who
has filed a brief by hand delivery addressed to their attorney of record as follows:

STAN BARNETT
1037 Chuck Dawley Blvd
Mt Pleasant, SC 29464

February 1, 2013

ANDREW K. EPTING, JR., LLC

By 

Andrew K. Epting, Jr.

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J.C. Nicholson, Jr., Active/Retired Circuit Court Judge

CONSOLIDATED Under Case No.: 2008-CP-10-2641
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ZAN, LLC.....Appellant

v.

Ripley Cove LLC, W. H. Knight, Karl A. McMillan
individually and as the principal of Karl A. McMillan, Inc.,
East Coast Trading Co., ... Respondents

NOTICE OF APPEAL

Plaintiff ZAN, LLC appeals the Final Judgment of the Honorable J.C. Nicholson, Jr., ending this case dated February 9, 2012 and filed on February 10, 2012 (Exhibit A). Appellants received written notice of entry of this Judgment on February 17, 2012.

March 14, 2012

ANDREW K. EPTING, JR., LLC

By 
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Attorneys For Appellant ZAN, LLC

EXHIBIT A

JULIE J. ARMSTRONG
CLERK OF COURT, C.P. & G.S.
100 BROAD STREET, SUITE 106
CHARLESTON, SC 29401-2268
RETURN SERVICE REQUESTED

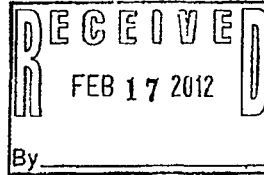


www3.charlestoncounty.org

15



ANDREW K. EPTING JR
ANDREW K. EPTING, LLC
3 STATE ST
CHARLESTON SC 29401-3008



NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRCF

Order/Final Order & Judgment

CASE NO: 2008CP1002641

Zan Llc VS East Coast Trading Co Inc Etc , defendant, et al

This judgment was entered on the 10th day of February, 2012, and a copy mailed first class on Tuesday, February 14, 2012, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at www3.charlestoncounty.org.

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS
WITH 2009-CP-10-3441

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2008 CP-10-2641 CONSOLIDATED

ZAN, LLC

RIPLEY COVE MARINA, LLC, W.C. KNIGHT,
KARL A. MCMILLAN, ST. ANDREWS TITLE &
ABSTRACT AGENCY, INC, CHICAGO TITLE
INSURANCE COMPANY, AND CHARLES A.
FUNKE AND LILIAN M. FUNK

ZAN, LLC
PLAINTIFF(S)

EAST COAST TRADING
DEFENDANT(S)

Submitted by: ANDREW K. EPTING, JR.

Attorney for : ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

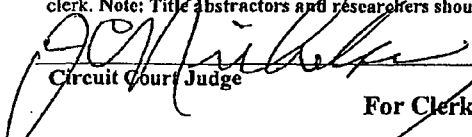
This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
PLAINTIFF, ZAN, LLC	DEFENDANTS, RIPLEY COVE, LLC, W.H. KNIGHT, EAST COAST TRADING CO., INC., W.M. BELOTE, AND KARL A. MCMILLAN, individually and as the principal of Karl A. McMillan,	\$10,000.00

	Inc.	
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


217
2/9/12
 Circuit Court Judge Judge Code Date
For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

 ATTORNEY(S) FOR THE PLAINTIFF(S)

 ATTORNEY(S) FOR THE DEFENDANT(S)

 CLERK OF COURT

Court Reporter:

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

ZAN, LLC,)

Plaintiff,)

vs.)

RIPLEY COVE, LLC, W. H. KNIGHT,)
KARL A. MCMILLAN Individually and as)
the principal of Karl A. McMillan, Inc.,)
ST. ANDREWS TITLE & ABSTRACT)
AGENCY, INC., CHICAGO TITLE INS.)
CO. and CHARLES A. FUNK & LILLIAN)
M. FUNK)

Defendants.)

ZAN, LLC)

Plaintiff,)

vs.)

EAST COAST TRADING CO.,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CONSOLIDATED UNDER
CASE No.: 2008-CP-10-2641
CASE No: 2009-CP-10-3441

ORDER

FILED
2012 FEB 10 PM 2:17
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

 This matter was tried before the Court on July 26-28, 2011.¹ Having considered the evidence presented by the parties, and based upon the following findings of fact and conclusions of law, it is hereby ordered that judgment be entered in favor of Plaintiff against Defendants Ripley Cove, LLC, W. H. Knight², East Coast Trading Co., Inc., W.M. Belote³ (collectively the "Sellers"), and Karl A. McMillan⁴ individually and as the principal of Karl A McMillan, Inc. (collectively "McMillan") in the amount of \$10,000.00, jointly and severally.

¹ In a separate Order filed October 27, 2011, this Court ruled in favor of Defendants Chicago Title Insurance Company and St. Andrews Title & Abstract Agency, Inc. on Plaintiff's claims.

² "An agent's liability for his own tortious acts is unaffected by the fact that he acted in his representative capacity." *Gilbert v. Mid-South Machinery Co., Inc.* 267 S.C. 211, 221, 227 S.E.2d 189, 193 (S.C. 1976).

³ *Id.*

⁴ *Id.*

I. FINDINGS OF FACT

1. Mr. Buck owns a boat, the *Rookie IV*, which has a beam of 19.6 feet and requires a 20-foot wide dock opening. Mr. Buck sought to purchase a slip wide enough for him to dock the *Rookie IV*.

2. Before the February 3, 2005 contract to purchase the property and slip at Ripley Cove was signed, Mr. Buck visited the property with his real estate agent, Lynn Carmody; Mr. Buck's daughter, Susanne Cantey; the managing member of Zan, LLC ("Zan"); and the Sellers' agent, Karl McMillan. McMillan was the Sellers' agent for purposes of soliciting, listing and showing the property to potential purchasers.⁵

3. Mr. Buck explained his need for 20-foot clearance to Mr. McMillan, and Mr. McMillan represented that Zan, LLC would be purchasing what is parcel SF-3, what became known as slips CS-B1 AND CS-B2, and that the slip would accommodate Mr. Buck's boat. Mr. Buck asked for a copy of a plat showing the boat slips and was told he would receive one shortly.

4. On February 3, 2005, Susanne Buck Cantey, for Zan, signed the contract to purchase the real property and boat slip at Ripley Cove for \$700,000.00.

5. Closing was scheduled for March 5, 2005. The day before the March 5, 2005 closing, Mr. Buck was given a copy of the plat showing the boat slips. After reviewing the plat, Mr. Buck discovered that he was actually only purchasing slip CS-B1, and that there was not sufficient clearance for his boat in slip CS-B1.

6. Because of this, Mr. Buck refused to close. The Sellers, hoping to salvage the sale, authorized their agent Karl McMillan, to negotiate with Mr. Buck.

⁵ See *E.A. Prince & Son, Inc. v. Selective Insurance Co. of the Southeast*, 818 F.Supp. 910 (D.S.C. 1993) (under South Carolina law, principal and agent are joint tort-feasors).

7. In order to conclude the sale, McMillan informed Mr. Buck that the Sellers also owned the adjoining property (slip CS-B2) and that it would be no problem to give Mr. Buck the 20-foot clearance he needed and place the pilings in slip CS-B2 (the adjoining slip).

8. McMillan further represented that he would reduce his commission and the Sellers would reduce the purchase price of the property as the slip was not the size originally represented if Zan would close on these terms. Zan agreed and a new closing date of April 5, 2005 was set.

9. McMillan stated clearly, and I accept this testimony, that a condition of the parties' agreement was that the boat must fit into the slip.

10. Despite the failure of the closing, on March 5, 2005, a deed⁶ was signed by the Sellers transferring title to the property to Zan.

11. On the way to the April 5, 2005 closing, Mr. Buck visited the property to see if the pilings had been placed and found they were not. Because of this, Mr. Buck again refused to close.

12. The closing attorney Dan David asked if Mr. Buck would close if he was given a letter memorializing the agreement and guaranteeing that the Sellers would locate the pilings as represented and install them within a reasonable length of time. The Bucks agreed, making clear that the promise to install the pilings as represented was a condition precedent to Zan closing on the property.

13. Mr. David then telephoned one of the Sellers, Doc Knight, to obtain his consent to the agreement. Mr. Knight was authorized by the Sellers to negotiate and enter into contracts on the Sellers' behalf.

⁶ The deed is irregular and incorrect on its face, inter alia, in that it states that Zan signed the deed on January 5, 2005, over a month before Zan even signed the contract to purchase the property.

14. Mr. David testified he received consent from Mr. Knight, and wrote the letter confirming the Sellers would place the two pilings.

15. Zan reasonably relied on Mr. David's letter, which confirmed the parties' agreement.

16. Up to and after the summer of 2006, Mr. Knight continued to represent that the pilings would be put in place. Mr. Buck received a letter as late as June 2006 from a contractor who had been hired by the Sellers to install the pilings.

17. In January of 2008, Mr. Buck discovered that the Sellers' had sold, over two years before, the adjoining slip and could not perform as agreed. Plaintiff then filed this action asserting claims against McMillan and the Sellers for rescission, fraud in the inducement, and negligent misrepresentation.

18. The *Rookie IV* does not fit in Slip CS-B1 and has never been docked in the slip.

II. CONCLUSIONS OF LAW

A. McMILLAN:



Plaintiff has sued Mr. McMillan and his company for negligent misrepresentation and fraud in the inducement. Mr. McMillan is the Sellers' agent and acted at the direction of the Sellers when he initially showed Plaintiff the property and when he contacted Mr. Buck after the failed closing to negotiate for the Sellers. As the Sellers specifically authorized Karl McMillan to negotiate with Mr. Buck in order to close the deal, the Sellers are bound by the representations made by Mr. McMillan. See *WDI Meredith & Co. v. American Telesis, Inc.*, 359 S.C. 474, 597 S.E.2d 885 (Ct. App. 2004), *supra*.

McMillan was personally served twice with this lawsuit; once on October 12, 2008 and again on June 16, 2009. By Order of the Honorable Deadra Jefferson dated March 5, 2009 (2008-CP-10-2641) and by the Order of the Honorable R. Markley Dennis, Jr. dated January 20,

2010 (2009-CP-10-3441), McMillan and his company were held in default after McMillan failed to file a response to Plaintiff's complaint in either action. Despite his failure to respond to Plaintiff's complaint, Mr. McMillan was present for the trial of this case and testified as a witness for the Sellers. Several days after the trial concluded, McMillan filed a motion for relief from default or in the alternative, to prevent a judgment against him for any damages related to the size of the boat slip. The motion was heard by this Court on August 29, 2011 and denied in its entirety.

B. THE SELLERS' DEFENSES TO BREACH OF CONTRACT:

en
i. Merger: The Sellers argue all representations made by them and McMillan were merged into the deed and extinguished. However, in this case, the deed was not the last document signed as it was signed by the Seller one month before the closing took place and before the agreement that induced Plaintiff to close – i.e. the agreement to place the pilings and give Mr. Buck the 20-foot clearance he required – was made. Accordingly, the deed does not represent the final bargain of the parties, as the parties never intended the contract, including the modification agreed to by McMillan, to merge into the deed. *Hughes v. Greenville Country Club*, 322 S.E.2d 827, 828 (Ct. App. 1984), "this deed is the last document signed by the appellant and is really the contract between the parties for interpretation") and *Wilson v. Landstrom*, 315 S.E. 2d 130, 132 (Ct. App. 1984) "the deed and mortgage delivered and accepted at closing, not the prior contract, represented the final bargain of the parties." (emphasis added).

Further, neither the parol evidence rule nor merger prevents one from proceeding on tort theories of negligent misrepresentation. *Slack v. James*, 364 S.C. 609, 616, 614 S.E.2d 636, 640 (S.C. 2005); *Redwend Limited Partnership v. Edwards*, 354 S.C. 459, 503, 581 S.E.2d 496, 472 (Ct. App. 2003).

ii. **Statute Of Frauds:** The Sellers argue that because the April 5, 2005 letter of Dan David memorializing the agreement to place the pilings is not signed by the Seller, the statute of frauds bars the agreement. First, Dan David represented the Sellers for purposes of authoring the letter agreement, and, as the Sellers' lawyer, was authorized to make the agreement on the Sellers' behalf. Mr. David testified that he had authority from the Seller, Mr. Knight, to write the letter and the letter was written to memorialize the parties' agreement. *See Smith v. McClam*, 289 S.C. 452, 346 S.E.2d 720 (S.C. 1986) (a writing prepared by a party's agent may constitute a memorandum sufficient to satisfy that Statute of Frauds, provided it is intended to evidence an agreement and its contents are disclosed for that purpose).

Second, a pleading admitting a parol agreement that is within the Statute of Frauds may constitute a sufficient writing so as to enable a court to enforce the contract. *Robert Harmon and Bore Inc. v. Jenkins*, 282 S.C. 189, 318 S.E.2d 371 (Ct. App 1984). As the Sellers concede the agreement in the pleadings filed with the Court, including the Sellers' Answer and the affidavit of Doc Knight, these pleadings constitute a writing sufficient to enforce the agreement.

Third, the agreement to locate the pilings as represented was twofold. In exchange for Mr. Buck agreeing to close on the property, the Sellers agreed to (1) reduce the purchase price and (2) place two pilings. Mr. Buck did close at the reduced purchase price of \$685,000.00; thus, the Statute of Frauds is satisfied by part performance.

Finally, only a party to an agreement can assert the Statute of Frauds as a defense. "It is well settled that the protection afforded by the Statute of Frauds is a personal privilege of the parties to the agreement (*Walker v. Preacher*, 188 S.C. 431, 199 S.E. 675), and a stranger to an oral contract cannot avail himself of the fact that the Statute of Frauds renders the contract

unenforceable." *Hatcher v. Harleysville Mut. Ins. Co.*, 266 S.C. 548, 553, 225 S.E.2d 181, 183 (S.C. 1976).

iii. **Impossibility:** The Sellers claim performing the agreement is impossible because they needed a permit to place the pilings. This defense is not available to the Sellers as the Sellers concede that it was foreseeable that OCRM and the Army Corp might refuse to issue the permits, and, despite this foreseeable risk, the Sellers' promise to put in the pilings was not conditioned on obtaining the permits. See AMJUR CONTRACTS § 659 (2011) citing *U.S. v. Winstar Corp.*, 518 U.S. 839, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (S. Ct. 1996) ("Where the event that causes the impossibility was or might have been foreseen or anticipated and provision made for it in the contract, an unqualified undertaking is to be construed as an absolute contract binding the promisor to perform, and the defense of impossibility is not allowed."). The Sellers knew a permit was required and made no effort to make the permit a condition to the contract.

Further, the Sellers cannot claim impossibility as they never applied for the permit to place the pilings. The Sellers cannot claim impossibility of performance due to denial of permits if they never requested a permit. See also *Green v. Camlin*, 229 S.C. 129, 134, 92 S.E.2d 125, 127 - 128 (S.C. 1956) (holding even where a contract became impossible through no fault of the Seller, Purchaser did not received that which he paid for and was entitled to rescind the agreement and be refunded his purchase money).

C. RESCISSION:

Pursuant to South Carolina law, a contract may be rescinded in the following circumstances: 1) When the mistake is mutual and is in reference to facts or supposed facts upon which the contract is based; 2) When the mistake is mutual and consists in the omission or insertion of some material element affecting the subject matter or the terms and stipulations of

the contract, inconsistent with the true agreement of the parties; and 3) When the mistake is unilateral and has been induced by a misrepresentation of the party opposed to rescission. *King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984).

As a general rule, a party induced to enter a contract by misrepresentation has a choice among causes of action and remedies and may choose to rescind the contract. *Baeza v. Robert E. Lee Chrysler, Plymouth, Dodge, Inc.*, 279 S.C. 468, 309 S.E.2d 763 (S.C.App.1983).

Further, to warrant rescission, the breach must be so fundamental and substantial to defeat the purpose of the contract. *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485 (S.C.App. 2004). This case presents a unique situation as there is no issue with the upland parcel the Bucks purchased with the slip. Ordinarily, if part of a contract can be performed, the damages can be fashioned so as to reflect the breach. However, in this case the Master Deed specifically forbids the separation of the upland parcel from boat slip, complicating this Court's task. The Court cannot order the return of the slip with Zan keeping the upland parcel about which there is no quarrel. Rescission is an equitable remedy which I choose not to grant. Rather, I award damages in the sum of \$10,000.00 for the breach of the contract and negligent misrepresentation.

D. PLAINTIFF'S TORT CLAIMS:

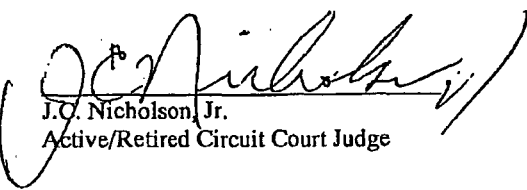
To establish liability for negligent misrepresentation, the plaintiff must show "(1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the representation; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation." *Sauner v. Public Service Authority of South Carolina*, 354 S.C. 397, 407, 581 S.E.2d 161, 166 (S.C. 2003).

Plaintiff has plead and proved that the Sellers are liable in tort for negligent misrepresentation. (See supra). The Sellers and McMillan had a pecuniary interest in the transaction and had a duty to communicate truthful information to the buyer and to not misrepresent the property. *See Cohen v. Blessing*, 259 S.C. 400, 404, 192 S.E.2d 204, 206 (S.C. 1972). Plaintiff's reliance was reasonable and as a consequence, Plaintiff was harmed. Zan sought rescission or alternatively damages. I decline to grant rescission.

The measure of damages for negligent misrepresentation is the difference between the value the plaintiff would have received if the facts had been as represented and the value the plaintiff actually received. *Fields v. Yarborough Ford, Inc.*, 307 S.C. 207, 414 S.E.2d 164 (S.C. 1992). The plaintiff is entitled to recover any consequential loss which is the natural and proximate result of the misrepresentation. *Id.* I find the Plaintiff is entitled to \$10,000.00 as a result of the Sellers' and McMillan's conduct.

III. CONCLUSION

For the reasons stated and based upon the testimony and evidence presented at trial, it is hereby ORDERED, ADJUDGED, AND DECREED that judgment in the amount of \$10,000 be entered in favor of Zan, LLC against the Sellers and McMillan who share joint and several liability as to Plaintiff's claims for negligent misrepresentation and fraud in the inducement.


J.C. Nicholson, Jr.
Active/Retired Circuit Court Judge

On this 9 day of Feb. 2012

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

NINTH JUDICIAL CIRCUIT
COURT OF COMMON PLEAS
08-CP-10-2641

ZAN, LLC,)
PLAINTIFF,)

VS.)

TRANSCRIPT OF RECORD

RIPLEY COVE, LLC, W.H. KNIGHT,))
KARL A. MCMILLAN, Individually))
And as the principal of KARL))
A. MCMILLAN INC., ST. ANDREWS))
TITLE & ABSTRACT AGENCY, INC.,))
AND CHICAGO TITLE INSURANCE))
CO., and EAST COAST TRADING CO))
DEFENDANTS.)

VOLUME I

July 26, 27, & 28, 2011
Charleston, South Carolina

B E F O R E:

THE HONORABLE J.C. NICHOLSON, JR., JUDGE

A P P E A R A N C E S:

ANDREW K. EPTING, JR., ESQ.
MICHELLE N. ENDEMANN, ESQ.
Attorneys for Plaintiff

STANLEY E. BARNETT, ESQ.
RICHARD S. DUKES, ESQ.
DAN M. DAVID, ESQ.
Attorneys for Defendants

BONNIE M. BRITT
Official Court Reporter

1		<u>I N D E X</u>			
2	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
3	(July 26, 2011)				
4	EDGAR BUCK				
5	Mr. Epting	5			
6	Mr. Barnett		94		
7	Mr. Dukes		114		
8	SUSANNE CANTEY				
9	Ms. Endemann	38			
10	Mr. Barnett		43		
11	Mr. Dukes		58		
12	LYNN CARMODY				
13	Ms. Endemann	66			
14	Mr. Barnett		70		
15	Mr. Dukes		87		
16	DAN DAVID				
17	Mr. Epting	116		202	
18	Mr. Dukes		142		
19	(July 27, 2011)				
20	Mr. Barnett		169		220
21	FRED MALLET				
22	Mr. Barnett	283			
23	COLLIN BRUNER				
24	Mr. Barnett	315			
25	Mr. Epting		328		

1		<u>I N D E X</u>			
2	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
3	KARL MCMILLAN				
4	Mr. Barnett	329		364	
5	Mr. Epting		345		366
6	(July 28, 2011)				
7	MIKE BELOTE				
8	Mr. Barnett	368			
9	Mr. Epting		391		
10	W.H. KNIGHT				
11	Mr. Barnett	396			
12	Mr. Epting		417		
13	DAN DAVID				
14	Mr. Barnett	422			
15	Mr. Epting		431		
16	THOMAS HARTNETT				
17	Mr. Dukes	433		444	
18	Mr. Epting		435		
19	BUSHNELL NIELSEN				
20	Mr. Dukes	445/451		474	
21	Mr. Epting		450		
22	EDGAR BUCK				
23	Mr. Epting	476			
24	Mr. Barnett		478		
25	CERTIFICATE OF REPORTER		492		

1	<u>E X H I B I T S</u>			
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVD.</u>
3	P-1	Rookie IV photo	4	4
4	P-2	Wappoo Cut photos	4	4
5	P-3	Agreement 2/4/05	4	4
6	P-4	Deed 3/5/05	4	4
7	P-5	Letter 4/5/04	4	4
8	P-6	Photos	4	4
9	P-7	Plat	4	4
10	P-8	Letter 6/21/06	4	4
11	P-9	Closing statement	4	4
12	P-10	Chicago Title email	4	4
13	P-11	Letter 9/13/05	4	4
14	P-12	Deed to Funkes	4	4
15	P-13	Master deed	4	4
16	P-14	Property tax receipts	4	4
17	P-15	OCRM documents	4	4
18	P-16	Affidavit - Mr. Knight	4	231
19	P-17	Damages summary	4	37
20	P-18	Newkirk Environmental	216	216
21	P-19	Permit	216	216
22	(WHEREUPON, there were no defendant's exhibit numbers 1-17)			
23	D-18	Deed	4	4
24	D-19	Deed	4	4
25	D-20	Deed	4	4

1		<u>E X H I B I T S</u>		
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVD.</u>
3	D-21	Plat	4	4
4	D-22	Contract amendment	4	4
5	D-23	Chart - Plat	4	4
6	D-24	Chart - Plat	4	4
7	D-25	Permit document	4	4
8	D-26	DHEC letter	4	4
9	D-27	Photos	4	4
10	D-28	Coast guard document	4	4
11	D-29	Annual meeting notice	4	4
12	D-30	Plat - enlarged	416	416
13	D-31	Portion of Corps' file	416	416
14	D-32	Photo	416	416
15				
16				
17				
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20				
21				
22				
23				
24				
25				

VOLUME I

1 (The following hearing was held on July 26-28th, 2011.)
2 THE COURT: All right. I've read your memos. After
3 reading your memos, I don't think we need any opening
4 statements. So you can call your first witness.
5 MR. EPTING: I would call Mr. Edgar A. Buck. Judge, I
6 have a copy of the exhibits. What I can say is in your
7 absence we have --
8 THE COURT: Does everybody agree to the exhibits?
9 MR. EPTING: We, plaintiff, Judge, except for my 16 and
10 17 on that list, all of mine are in. They're going to offer
11 Exhibits 18 through 29, and there's no objection to them,
12 and they've been marked with the court reporter.
13 THE COURT: Okay.
14 MR. EPTING: So we only have two exhibits that there's
15 any issue with. And here's a set of my Exhibits one through
16 17.
17 THE COURT: Okay. Which one do we have an issue with?
18 MR. EPTING: Sixteen is an affidavit of Mr. McKnight
19 and 17 is a damages summary.
20 THE COURT: All right. So there's no agreement as to
21 those two; is that correct?
22 MR. BARNETT: Yes, Your Honor. His name is Knight.
23 There's probably going to be a lot of that, but I've done
24 it, myself. It's Doc Knight is his name.
25 THE COURT: Okay. All right. So Plaintiff's Exhibit

1 one through 15 is admitted without objection. Is that
2 correct?

3 MR. BARNETT: That's correct, Your Honor.

4 MR. DUKES: Yes, sir.

5 THE COURT: All right. Thank you, very much.
6 (Plaintiff's Exhibit Numbers one through 15, marked for
7 identification and received in evidence.)

8 MR. EPTING: And, Judge, Defendant's Exhibits 18
9 through 29 are admitted without objection.

10 THE COURT: All right. Defendant's Exhibit 18 through
11 29 is admitted without objection. Does anybody have a copy
12 of those?

13 (Defendant's Exhibit Numbers 18 through 29, marked for
14 identification and received in evidence.)

15 MR. BARNETT: I believe they're marked up here. Would
16 you like us to hand those to you?

17 THE COURT: It doesn't matter, unless you've got copies
18 of them somewhere.

19 MR. BARNETT: We have. I think we have a copy of them.

20 THE COURT: If you all can give me a copy, I'd
21 appreciate it.

22 MR. BARNETT: Yes, sir.

23 THE COURT: I'd rather have a copy so I can write on it
24 if necessary. I don't want to write on the originals.

25 MR. BARNETT: Okay.

1 MR. EPTING: How about this, Judge? I'm not going to
2 be using those exhibits in my examination, and, maybe, we
3 can strike all that out.

4 THE COURT: Somebody give me a copy of those, because I
5 want something I can, maybe, write on. I want to be at
6 liberty to write on. I don't want to write on the
7 originals. Okay.

8 All right. Please, Clerk, swear Mr. Buck, please.

9 EDGAR BUCK, being first duly sworn,
10 testified as follows:

11 THE CLERK: Sir, for the record, if you would please
12 state your name, spelling your last name.

13 WITNESS: My name is Edgar A. Buck, B-u-c-k.

14 DIRECT EXAMINATION

15 BY MR. EPTING:

16 Q. Good morning, Mr. Buck. After many years, here we are.
17 How old a man are you?

18 A. Seventy years old.

19 Q. Are you married?

20 A. Yes, sir.

21 Q. Do you have children?

22 A. Yes, sir.

23 Q. Is one of your children Ms. Susanne Cantey, sitting
24 right here and very pregnant?

25 A. Yes, sir.

1 Q. All right. And is she, along with yourself, the two
2 owners of Zan, LLC?
3 A. She's the owner of Zan, LLC. Yes, sir.
4 Q. All right. What has been your life's work, Mr. Buck?
5 A. Well, I went to school and I went in the service. And I
6 came home to Charleston in 1965 with a wore out automobile
7 and my last paycheck which was 78 bucks.
8 Q. And what did you start doing?
9 A. I started doing construction work and then I interviewed
10 for a job and I went to work for Carolina National Mortgage
11 Investment Company from '65 to '71. It was purchased by C&S
12 Bank, and I went to work for C&S and ran their operations in
13 five states and 340 employees until 1975.
14 I bought a lumber company, my wife and I did in 1975.
15 We started in the lumber business and ventured out in real
16 estate holdings from convenient stores to self storages to
17 car washes, office buildings. I had a number of experiences
18 in real estate. I've, probably, owned over 150 to 200
19 pieces of property at one time.
20 Q. Who is your lawyer in much of the work that is done for
21 you, Mr. Buck?
22 A. Well, I have several. I have Drew Epting. I have Sid
23 Boone.
24 Q. Talk about the one you sleep with.
25 A. My wife.

1 Q. She does most of your day-to-day legal work?
2 A. That's correct.
3 Q. All right. You said you've closed several hundred
4 transactions, because I think your experience may be of some
5 big significance here, Mr. Buck. If we were to put a dollar
6 value on the real estate that you have bought and sold in
7 your life, in an LLC or your name personally, what would
8 that number be?
9 A. Probably, between six hundred million and a billion
10 dollars.
11 Q. All right, sir. In these transactions, these several
12 hundred transactions involving six hundred to a billion
13 dollars worth of transactions, Mr. Buck, are there problems
14 that crop up at closing?
15 A. Yes, there are.
16 Q. Is it uncommon?
17 A. No, it's not uncommon.
18 Q. And what do you do when you have a problem with closing?
19 A. Most of the time when I get to a closing if there's a
20 problem, the attorney advises me that there's a problem; and
21 we've got to correct it then or postpone the closing to
22 another time, then reset that closing.
23 Q. All right. And, ultimately, the things get worked out?
24 A. That's correct.
25 Q. Have you, in all of your dealings, Mr. Buck, had any

1 problem with a transaction because the -- any transactions
2 other than that one?

3 A. Not to my knowledge. This is the only one I've had a
4 problem with.

5 Q. Now, was your wife the lawyer for you as Zan in the
6 purchase of this piece of property?

7 A. No, sir. She was not.

8 Q. Who was?

9 A. It was Dan David.

10 Q. Had Dan David ever done any work for you before?

11 A. I don't think he had done any work for me, personally,
12 but I may have been involved in some partnerships that he
13 did some work for.

14 Q. Okay. Who has the authority -- first of all, Zan is an
15 entity that is owned by your daughter, Susanne?

16 A. Right.

17 Q. Who has the authority to act for Zan?

18 A. I do.

19 Q. Now, what does Zan own?

20 A. Zan, at the present time, owns a lot and boat slip at
21 Ripley and owns a lot on Daniel Island.

22 Q. All right. What I'm going to do, Mr. Buck, is I'm going
23 to walk over here. This plat is marked as an exhibit.

24 MR. EPTING: And, Your Honor, that would be Exhibit 7
25 -- 21, and part of it is Exhibit 7 as well. Judge, I don't

1 know -- and just to ask you, do you know where Ripley's
2 Pointe is?

3 THE COURT: I don't know. Somewhere off of the Ashley.

4 MR. EPTING: Well, it's California Dreaming is, sort
5 of, the mouth of it. And there are two hotels there and a
6 marina.

7 THE COURT: I know where California Dreaming is.

8 MR. EPTING: That's where this is.

9 BY MR. EPTING:

10 Q. Mr. Buck, referring to this plat, there are two very
11 large slips on this plat. Which one was the slip that went
12 with the lot that you bought?

13 A. This is it right here.

14 Q. All right. So your slip is this way?

15 A. Right.

16 Q. Where in relationship to the slip is the piece of
17 property that you bought with the slip?

18 A. It's, kind of, caddy cornered across the canal.

19 Q. All right. In this area?

20 A. Yes, sir.

21 Q. All right. How far away, physically, is it?

22 A. A couple hundred yards.

23 Q. All right. Why was this piece of property of interest
24 to Zan?

25 A. Well, for two reasons. My daughter, at the time, was

1 looking at a place on the water to, possibly, build a house
2 on, and I was looking for a boat slip to move my boat out of
3 the Coastal Waterway. I wanted to be located where -- it's
4 not in a wake zone, and my boat takes a pretty good beating
5 in the waterway, and I was looking for a place to move it,
6 particularly, during the transit season.

7 Q. And transit season, you mean the snow birds that pass
8 through every winter and every summer?

9 A. September through December and March through June.

10 Q. All right. For the judge's edification, this is Wappoo
11 Cut?

12 A. Right.

13 Q. How wide is Wappoo Cut where your house is, Mr. Buck?

14 A. I would say it's at least a hundred yards.

15 Q. All right. And unless you run out into the ocean, how's
16 the only way to get from Maine to Miami?

17 A. Through the Coastal Waterway.

18 Q. And that passes your house?

19 A. Correct.

20 Q. How many vessels in the season, do you think pass by
21 your house routinely?

22 A. In the season, probably, hundreds a day.

23 Q. And are these small boats, big boats?

24 A. All sizes. Mostly 35 foot up to 180 feet.

25 Q. Okay. How did you come to own your first boat,

1 Mr. Buck?

2 A. Well, I worked. That was one of the goals I had, for my
3 personal use, to own a boat. And I bought my first boat in,
4 I guess, 1966.

5 Q. And when did you get what was called Rookie I?

6 A. Rookie I was 1974.

7 Q. And what was the size of Rookie I?

8 A. Thirty-one foot.

9 Q. Thirty-one. And when did Rookie II come along?

10 A. 1976.

11 Q. And how big was Rookie II?

12 A. Well it was still called Rookie IV. All of them have
13 been called Rookie IV.

14 Q. Rookie IV. All right. The second Rookie IV was how
15 big?

16 A. Thirty-six foot.

17 Q. And the third Rookie IV?

18 A. Forty-two feet.

19 Q. And the now Rookie IV?

20 A. Sixty-one feet.

21 Q. All right. Would you turn with me, Mr. Buck, to Exhibit
22 One.

23 A. I do not have that.

24 Q. I've got it. And I want to ask you if that is the
25 Rookie IV?

1 A. Yes, it is.

2 Q. All right. Mr. Buck, if I can embarrass you a little
3 bit, how much does a boat like that cost today?

4 A. Five and a half to six million dollars.

5 Q. And what does it cost to paint it?

6 A. I don't know today. Two years ago I had to paint it.
7 Close to \$90,000.

8 Q. All right. Have you had problems with having to paint
9 this boat because of wakes?

10 A. Yes.

11 Q. Tell the judge a little bit, Mr. Buck, about the
12 problems that you've experienced in Wappoo Cut with your
13 boat and damage to your boat, and why you wanted to get this
14 boat out of Wappoo Cut.

15 A. Well, Your Honor, you said earlier there's a lot of
16 traffic in the Coastal Waterway. And there are a lot of
17 people who obey the rules, and there are other people who
18 don't know a thing about running a boat. And a lot of the
19 boats who come through are by hired captains who just move
20 the boat from up north to down south. They care nothing
21 about our coastline, environmental problems. They wakes,
22 tear up property.

23 And my boat is in a twenty-foot slip with protection on
24 each side with bumpers, and I've had them throw this boat -
25 it's a sixty-one foot boat -- up on the back end of the

1 dock.

2 In fact, we've got the highway department to close the Stono
3 River Limehouse Bridge; sent the Coastguard, arrested the
4 guy. And Judge Mendelsohn in the city court found him
5 guilty. It was about \$35,000 worth of damage that time.
6 We've had several other incidents where people were tearing
7 up personal property; not only mine, but other docks along
8 the way who had been arrested for doing that.

9 Q. Mr. Buck, have you, actually, chased violators out of
10 the South Carolina territorial waters as far as Florida?

11 A. Yes, sir, we have.

12 Q. All right. Let's refer to Exhibit 2, Mr. Buck, just to
13 give the judge an idea of the area that we're talking about.
14 In relationship to this picture 2-A, Mr. Buck, or 2-B, is
15 there a way for you to show the judge, approximately, where
16 your boat sits?

17 A. Yes, sir. Your Honor, if you would look at this
18 picture. The dock that stands out the farthest is my
19 neighbor's doc. And mine is right behind it. That's my
20 doc.

21 Q. And that dock is how wide, Mr. Buck?

22 A. The dock - the stationery dock is 20 by 20 and the
23 floating dock is 20 by 35 or 40, and then there are more
24 pilings that are 60 feet out.

25 Q. All right. Because this boat, the Rookie IV, is 60 feet

1 long?

2 A. Sixty-one.

3 Q. Sixty-one.

4 A. Excuse me. It measures 61 at the waterline, which I

5 think is how they document a boat. It's, actually, with the

6 stem is 63 foot. And it's called a Monterey 63.

7 Q. All right. Mr. Buck, let me show you one exhibit that

8 has been marked as an exhibit of the -- well, I'm going to

9 show you this. This is Coastguard vessel documentation, and

10 it is an exhibit. It shows your vessel at the hull is 17

11 feet in breadth.

12 A. That's correct.

13 Q. All right. Let's go to Exhibit one. Can you explain

14 why it is that the vessel is not a 17-foot vessel, but

15 rather a 20-foot vessel, and it takes a 20-foot slip?

16 A. Yes, sir. Because the Coastguard documents the boat

17 measured at the waterline. And boats have different sizes

18 and shapes. This boat comes up and flares out, and right

19 above the captain's pilothouse is 19 feet across at the top

20 of the boat.

21 Q. All right. And as we're looking at Exhibit one,

22 Mr. Buck, on this flared portion, could people, actually,

23 walk on either side of this boat?

24 A. Yes. Those two young men standing -- two young boys

25 standing there are right at the widest point of the boat.

1 Q. Now, how did you hear about this property, Mr. Buck?
2 A. A doctor here in town had told me he had purchased one
3 of the lots, and the lots came with a boat slip; and said
4 that I might be interested. He knew I was looking for
5 something off of the water. And he told me the realtor
6 company that handled it was Karl McMillan. And I went by
7 and got his name off the sign, and I called Karl McMillan
8 and told him that I had an interest in the lot.
9 Q. And was Mr. McMillan the agent for Ripley, the
10 owner/seller at least?
11 A. My understanding, yes, sir.
12 Q. All right. How did things progress with Mr. McMillan?
13 A. Well, we set an appointment. I told Mr. McMillan that
14 my real estate agent who represented me in my real estate
15 dealings was a lady named Lyn Carmody, who's sitting in the
16 back of the courtroom. And that we'd set an appointment and
17 meet him, and he could show us the property. We set an
18 appointment. We met Karl McMillan. He showed us the lot.
19 Before we looked at the slip, we looked at the lot. And he
20 said that there were three trees on the lot, and I was told
21 that the City had agreed that they could be cut down and
22 replaced to build a house on. He took me around - Lyn,
23 myself, and my daughter around to the slip, pointed to a
24 slip, which was from walkway to walkway. He said, This is
25 the slip. It's the biggest slip here. It's the longest

1 slip here, and it goes with that lot.

2 Q. Okay. Now, Mr. Buck, let's do this. Let's give the
3 judge a little time orientation here. You signed the
4 contract to purchase, or Zan did, in February of '05. When
5 are these meetings with Mr. McMillan occurring?

6 A. Sometime between that date and the date that the
7 contract was signed.

8 Q. Okay. All right. Now, Mr. Buck, just -- because it
9 might be important later on -- these are the two slips that
10 are involved in this trial. You have an office building for
11 one of your holding companies called Jupiter. Can you see
12 everything that goes on at these two slips from your office
13 building?

14 A. Yes, I can.

15 Q. All right. So you can watch the comings and goings of
16 what happens?

17 A. Yes, sir.

18 Q. Right out your office window?

19 A. Yes, sir.

20 Q. Let's refer to Exhibit 6, Mr. Buck. Now, we are looking
21 there, Mr. Buck, at the boat furthest to the right with
22 the bow pointed out. That is B-1. That is your slip.

23 A. Well.

24 Q. Not your boat.

25 A. Well, it's not my boat. And if that is B-1, it's a

1 whole slip from piling to piling was told to me.

2 Q. Right. And that's the point I want to go to. As you
3 look at the opening here, the boat is in what is platted now
4 as B-1. But then there is no piling on what would be the
5 left side of the boat, and it opens up to the next finger
6 pier?

7 A. That's correct.

8 Q. And the distance between those finger piers is,
9 approximately, how far, Mr. Buck?

10 A. I'm not positive. I think it's about 27 or 30 feet.
11 I'm not sure because you've got docks that stick out in it.
12 I don't know the exact measurement.

13 Q. All right.

14 MR. EPTING: And, Judge, if you were to look at the
15 plat, from centerline to finger pier to centerline to finger
16 pier, it would show the distance as 37 feet; but if you
17 measure the interior from the interior of the finger pier to
18 the other, it would come out at about 28, 29 feet.

19 BY MR. EPTING:

20 Q. All right. Mr. Buck, so you were -- and I wanted to use
21 that. When you met Mr. McMillan over about this slip, what
22 were you told with regard to the slip?

23 A. Well, we stood back down on that back bulkhead and he
24 pointed to it, and said, piling to piling, that is the slip
25 that goes with the lot I was purchasing in Ripley property.

1 Q. All right. Did you have any indication that
2 Mr. McMillan was lying to you about this being one slip as
3 opposed to two?
4 A. No, I did not.
5 Q. Now, all right. So on the basis of this being, or you
6 believing it's one slip, what happened next?
7 A. We signed a contract to purchase it.
8 Q. All right. And so, I guess, Mr. Buck, there was no plat
9 given to you of the slip on the day you met Mr. McMillan
10 down there?
11 A. No, sir.
12 Q. All right. So let's turn to Exhibit 3. And let me ask
13 you if that is the agreement that you signed?
14 A. Yes, sir.
15 Q. Who signed it on behalf of Ripley Pointe?
16 A. It looks like Mr. Knight.
17 Q. Okay. And the listing agent is listed as who?
18 A. Karl McMillan.
19 Q. All right. And I noticed that your daughter, Susanne
20 then Buck, signed for the buyer?
21 A. Correct.
22 Q. And the signatures are dated February 3rd and February 4th
23 of 2005?
24 A. That's correct.
25 Q. All right. And in this document the seller is listed as

1 Ripley Cove, LLC?

2 A. Correct.

3 Q. Was a closing date set, Mr. Buck?

4 A. Yes. It was set for, I think, March 5th.

5 Q. All right. Was there a closing on March 5th?

6 A. No, sir.

7 Q. Did you receive a plat, immediately, before the March 5th

8 closing that caused you concern?

9 A. Yes, sir.

10 Q. Would you tell the judge about what happened?

11 A. Karl McMillan had it delivered or he delivered a plat to

12 my office that shows this as being two slips and not one.

13 And closing, I think, was the following day. We went to the

14 closing, and I told him that's not what was told to us; that

15 it was one slip and not two, and that I would not close.

16 Q. Okay. Was there subsequent discussions as a result of

17 your not closing between you and Mr. McMillan?

18 A. Yes, sir, there were.

19 Q. And what did you tell him it would take for you to close

20 this property?

21 A. That I would need a 20-foot clearance with two pilings

22 installed in the slip.

23 Q. Okay. How about reducing the price?

24 A. And reduce the price. And I think he had offered that

25 to me.

1 Q. All right. So that may have been in concession even
2 before you told him this is what it would take. What did he
3 say?

4 A. He said he would talk to the owners and get back to me.
5 He called back and said, yes they would reduce the price
6 back 20, 25,000, and they would put in two pilings wherever
7 I wanted them to give me a 20-foot clearance.

8 Q. All right. Now, Mr. Buck, it seems to me that this is
9 platted as two pieces here. Did he tell you anything about
10 the ownership of the adjoining slip, B-2, as he was telling
11 you it would be no problem to move the piling and give you
12 20 feet?

13 A. Yes. My wife questioned that, and she said that how was
14 he going to do that? And McMillan told me that the owners
15 that I was buying a slip from on that property, that there
16 was no problem with them giving up the two feet or whatever
17 was needed to put the pilings in.

18 MR. EPTING: Judge, I would call your attention to
19 Exhibit -- I don't know which one shows it -- the property
20 at that time was still in the name of --

21 MR. DUKES: I object to Mr. Epting testifying, Your
22 Honor.

23 THE COURT: He's just trying to point out --

24 MR. DUKES: Is there a question here?

25 THE COURT: -- the exhibit. He's not testifying

1 Overruled. Which exhibit are we referring to, please?

2 MR. EPTING: Judge, if you can give me a second here.

3 It's one of their exhibits, Judge. We're looking for the

4 one that shows the transfer from Ripley -- I think it's

5 Exhibit 20 -- from Ripley to East Coast Trading Company.

6 THE COURT: So that's Defendant's number 20.

7 MR. EPTING: Yes, sir. Well, they're just exhibits one

8 through 20. All right, sir.

9 BY MR. EPTING:

10 Q. Now, was a second closing set?

11 A. Yes, sir. The second closing was set for, I believe,

12 April 5th or 6th.

13 Q. All right. And did you go to that closing?

14 A. Yes, I did. And on the way to that closing we had had

15 discussions about the slip, the pilings being put in between

16 March 5th and March 6th. I went by before the closing and the

17 pilings had not been put in.

18 Q. Okay. What did you do when you realized that after

19 making the agreement about the two slips -- the two pilings

20 being added at 20 feet, and they're not in; and you're

21 headed to the closing? What did you do?

22 A. I went to the closing. Sat at the closing and I told

23 Dan David that I was not going to close the loan, because

24 the pilings had not been installed.

25 Q. All right. What were the discussions, Mr. Buck? Just

1 tell the judge in your own words what happened after you
2 said, I'm not closing?

3 A. Karl McMillan said that he had had that approved by the
4 owners, that they would put the pilings in. There was not a
5 problem there. I told Dan David, the attorney, I had to
6 have certification before I would close that this would be
7 done, and I would be given title to the property with the
8 owner's insurance including those pilings and the 20-foot
9 clearance.

10 Q. All right. You said Karl McMillan said that, yes, we
11 had reached such a deal. You said you testified to Dan
12 David the pilings, 20 feet, and a title policy insuring --

13 MR. DUKES: Objection, Your Honor. Is there a question
14 in here somewhere?

15 WITNESS: Yes.

16 THE COURT: Hold on just a second. What's your legal
17 objection?

18 MR. DUKES: Leading, Your Honor.

19 THE COURT: Well, let him finish the question. Please,
20 rephrase your question.

21 MR. EPTING: I was just restating what the witness
22 said.

23 WITNESS: And then Dan David said that he had not been
24 told that, but he would call the owners on the telephone and
25 get their permission. He left the room. He left the

1 closing; went and made the telephone call as far as I know;
2 came back in, and said the owners had given him permission
3 to give us a letter stating that they would put in the two
4 pilings and the 20-foot clearance. And I said to him -- he
5 looked at me and he said, Will you close on that?
6 I said, if you give us a letter and you will do that, I
7 will close the loan.
8 Q. All right. When you say you will do "that," what did
9 you mean by "that"?
10 A. Put in the two pilings and the 20-foot clearance, just
11 like he was going to give us a letter.
12 Q. All right. And were there any discussions with regard
13 to what role title insurance would play in this change?
14 A. The only thing I had told Dan David was that I wanted
15 owner's title insurance, and it had to state what I was
16 purchasing.
17 Q. And by stating what you were purchasing --
18 A. Including the two pilings and the 20-foot clearance.
19 Q. What did Dan David say?
20 A. He said, No problem. He would get it done.
21 Q. All right. Let's refer, now, Mr. Buck, to Exhibit 5.
22 Is that the letter that was given to you by Dan David?
23 THE COURT: What number? I'm sorry.
24 MR. EPTING: Exhibit 5, Judge.
25 WITNESS: Yes. It was given to -- I think, it went

1 directly to Lyn Carmody, my agent.
2 BY MR. EPTING:
3 Q. All right. And was this given to you, or did you insist
4 on this before you would close?
5 A. I insisted that he would do this before we closed.
6 Q. All right. So you get this writing. You close.
7 A. Correct.
8 Q. When you walk out of there, Mr. Buck, are you given a
9 deed?
10 A. No, I was not given a deed. I was told by Dan David
11 that he would get the proper paperwork in line, get the
12 title issued and send it to me.
13 Q. And do you recall, and we'll come to that exhibit, how
14 long it took you to get the deed to the title policy?
15 A. Yes, sir. I think it was about five and a half, six
16 months.
17 Q. All right. Now, I want to go over, Mr. Buck - first,
18 let's go back and look at Exhibit 4. Okay. Do you
19 recognize this as the deed?
20 A. Yes, sir.
21 Q. All right. And it says that the purchase price is
22 \$700,000?
23 A. That's correct.
24 Q. All right. And was that accurate?
25 A. No, sir.

1 Q. The price had been reduced?
2 A. Correct.
3 Q. Let's go to the third page, Mr. Buck. At the top of the
4 page, what date does it say that the seller sold the
5 property?
6 A. The fifth day of March.
7 Q. Was there a closing on the fifth day of March?
8 A. No, sir.
9 Q. And is that Mr. Knight's signature there for East Coast
10 shown as member?
11 A. I read it as Knight. I can't verify that.
12 Q. All right. If we come on down the page, you see Dan
13 David certifying that one William Belote appeared before
14 him?
15 A. Yes, sir.
16 Q. All right. Does that look like Belote's signature up
17 above?
18 A. I can't answer that. I don't know.
19 Q. All right. Let's go over to the next page. If you go
20 down to the bottom of the page, Dan David signs saying that
21 Zan appeared before him to execute this document on January
22 5, 2005. Did this happen? Did Susanne sign this document
23 in January 2005?
24 A. No, sir.
25 Q. This was in April?

1 A. Yes, sir.

2 Q. All right. Let's go, Mr. Buck, to Exhibit 7.

3 MR. EPTING: And, Judge, with your permission, I would

4 like to have Mr. Buck come and stand in front of you.

5 THE COURT: That's fine.

6 (The attorney's confer.)

7 BY MR. EPTING:

8 Q. Mr. Buck, let me show you what has been marked as

9 Exhibit 7, and I'm going to approach you. I'm calling your

10 attention, Mr. Buck, to what appear to be some handwritten

11 boxes on B-1 -- on this piece, Judge, of this exhibit.

12 Can you tell the judge where -- if you would, Mr. Buck,

13 come with me. Referring right to this line here, does there

14 appear to be three boxes or scribbles?

15 A. Uh-huh.

16 Q. Can you tell the judge how those scribbles came to be;

17 who put them there; and who was with you?

18 A. After several calls to Dan David about when the pilings

19 were to be put in -- this was after the closing -- Dan had

20 Doc Knight to get in touch with me. And he called and asked

21 if I would meet him there at a certain time, and I think it

22 was eleven o'clock one morning. I know it was hot. And I

23 met Doc there. And he said, Show me exactly where you want

24 the pilings put.

25 And I said, I sure will. I said, I want one right here

1 and I want one here. And I measured, roughly, what this
2 distance was, and I said, No, I want it where this scribble
3 line is.

4 And he said, No problem. We're applying for the
5 permit, and I'll get it put in; and you'll have your 20-foot
6 clearance.

7 Q. All right. Okay. And if you would sit back down.

8 (The witness complies.)

9 BY MR. EPTING:

10 Q. And if you would, Mr. Buck, let's go back and get
11 Mr. David's letter for you. That, I think, is Exhibit 5.
12 Would you read those three lines, Mr. Buck, for the judge.

13 THE COURT: Which exhibit are you talking about?

14 MR. EPTING: Number five.

15 WITNESS: This is to confirm that two pilings will be
16 replaced in line with the existing pilings of the adjoining
17 boat slips as shown on the plat recorded in Plat Book EH at
18 Pages 172-174. There is sufficient money in escrow to pay
19 for the repairs to the docks and marina. With kindest
20 regards, Dan David.

21 BY MR. EPTING:

22 Q. All right. Now, I want Mr. Buck to concentrate on what
23 has become one of the bigger disputes in this case. It
24 says, "in line with the existing pilings." Now, let's look
25 at Exhibit 6. Is there a piling, Mr. Buck, on the rear of

1 that dock?

2 A. Not that I know of. No, sir.

3 Q. All right. Where are the two pilings with regard to

4 slip B-1?

5 A. I'm not positive, but it's about 20 foot off of the

6 walkway, and the other one's about 35 or 40 foot off the

7 walkway.

8 Q. All right. But are they the two concrete obelisks that

9 one sees to the right of your boat that is docked in B-1?

10 A. That's correct.

11 Q. And the plat that you showed the judge with the

12 markings, do the marks on that plat line up to place two

13 pilings in line with the two that are evident in Exhibit 6?

14 A. That's correct.

15 Q. And would they divide B-1 and B-2?

16 A. That's correct.

17 Q. If the furthestmost pile, Mr. Buck, is out 35 feet, which

18 is, essentially, at the end of the finger pier we're looking

19 at, is that navigable water where that finger pier is?

20 A. Yes, sir.

21 Q. All right. And there's a marina on the right side of

22 that?

23 A. That's correct.

24 Q. All right. Okay. So on the basis of these assurances,

25 Mr. Buck, you closed?

1 A. Yes, sir.

2 Q. Did you think what needed to be done, Mr. Buck, was
3 going to be difficult?

4 A. No, sir.

5 Q. Did you have any reason to suspect -- is there anything
6 that occurred with the people you were dealing with that
7 caused you to be in any way on guard?

8 A. Not at the closing, but after that I was put on guard.

9 Q. So there's a closing, Mr. Buck. And the closing is in
10 April of 2005. Tell the judge what happened after 2005.
11 And just relate the story, and I'll bring you back to some
12 of the exhibits that have been marked.

13 A. Well, after the closing, Your Honor, I continued to call
14 Dan David in reference to the pilings being installed. And
15 I was told that American Dock and Marine had the contract to
16 put the pilings in. And I said, fine. I know them.
17 They're a very reputable company. I had no problem.

18 Two of those pilings - and one day I was in my office
19 and I looked out and I saw Dock and Marine's barge and pile
20 driver over at Ripley's light working. So I, immediately,
21 went over, stopped the work force and asked them if they
22 were going to move up to my slip, B-1, and put in two
23 pilings. And I was told, no, they did not have a work order
24 to do that.

25 Q. Okay. Let me refer you, Mr. Buck, to Exhibit 8. Do you

1 recognize that document?

2 A. Yes, sir.

3 Q. Tell the judge about Exhibit 8.

4 A. Exhibit 8 is a letter dated June 21, 2006, addressed to
5 me and a carbon copy to Karl McMillan. And it says
6 Reference: Slips B-1 and B-2 Ripley Light Marina. It says
7 Dock and Marine has been contacted in regards to driving and
8 setting one concrete piling between the above referenced
9 slips. We will have this work done for you in the quickest
10 time-frame allowable and in accordance with the guidelines
11 set forth by OCRM. We will coordinate with Mike Belote and
12 Ripley Pointe, LLC any movement of any vessels docked in the
13 area that may need to be relocated while this work is
14 underway. I have attached to this letter a copy of the plat
15 showing your dock slips and ask to you to designate the site
16 where you would like these pilings to be set. I am trying
17 to coordinate with my production department a date for this
18 work to be accomplished, and should be able to give you more
19 accurate date in the very near future. If you have any
20 questions, please feel free to call me. And it's signed by
21 Patricia Crites, Office Manager; carbon copy to Karl
22 McMillan and Mike Belote.

23 Q. All right. Do you know who Mr. Belote is?

24 A. No, sir.

25 Q. All right. Now, Mr. Buck, we were talking about meeting

1 Doc McKnight out on the site. When in relationship was that
2 to this letter?

3 A. That was in April of 2006 to the best of my knowledge.

4 Q. You mean April 2005, the closing?

5 A. Two-o-five was the closing. I don't think -- yeah, 2005
6 was the closing. It was May or June that I met Doc Knight
7 there.

8 Q. All right. So this letter is coming, approximately, a
9 year after the meeting with Doc Knight and this plat?

10 A. Yes, sir.

11 Q. This letter mentions one piling. Did you have any
12 conversation with anyone about this?

13 A. Yes, I did. I did with Karl - not with Karl, but with
14 American Dock and Marina. I told them it was supposed to be
15 two pilings. They said, I'll get with Karl McMillan and be
16 back with you.

17 Q. Did anybody get back with you?

18 A. No, sir.

19 Q. What did you do from then, Mr. Buck, and let's just call
20 it September of 2006 until when you came to see me early
21 2008?

22 A. Well, I kept believing that I was going to get these
23 pilings put in. They were going through the process of
24 getting it done. In fact, it got to the point that I didn't
25 believe it was going to get done, and I called to see if a

1 request for a permit had been applied for; and I was told,
2 no.

3 Q. Okay. Mr. Buck, have you, yourself, built docks?

4 A. Yes, sir.

5 Q. Are you fairly familiar with the paperwork and the
6 bureaucracy and the timing?

7 A. It changes, but, yes, sir, as far as I know.

8 Q. Did you hold any illusion that this was going to happen
9 in a month, or it might take a year, a year and a half to
10 get it done?

11 A. Well, I knew it wasn't going to happen in 30 days, but
12 if they applied for a permit, it probably within 90 days.

13 Q. All right, sir.

14 A. Unless there was a protest to it.

15 Q. All right. Let me refer you to Exhibit 10 and then to
16 Exhibit 12. And my question is pretty simple. Are these
17 the two dates, 2005 that you got the deed and the title
18 policy?

19 A. Yes, sir.

20 Q. All right. Mr. Buck, did you look, when you received
21 the deed and the title policy to see if, in fact, the deed
22 had been changed and the title policy reflected a 20-foot
23 slip?

24 A. No, sir. I did not.

25 Q. Why didn't you do that?

1 A. I never have checked any others because I had an
2 attorney and homeowners title insurance, and I really never
3 have been concerned about it.

4 Q. Okay. Mr. Buck, when you came to see me, what was your
5 -- well, first of all, who is Ralph Massenburg?

6 A. Ralph Massenburg is a contractor here or was a
7 contractor, and had a sport fishing vessel; and called me
8 and asked me if he could rent my slip at Ripley's Light.
9 And I told him, no, that I was not - I was told that I was
10 not allowed to lease it to anyone; that I had to use it,
11 personally. So he said, Fine.

12 And then the next thing I know, I see his boat tied up
13 in the slip. And I, immediately, you know, said, This is
14 not right. And I contacted you to represent me.

15 Q. All right. At the time that that happened, Mr. Buck--
16 and let's just say this was in January of '08 for frame
17 reference -- were you still wanting these two pilings and to
18 move forward?

19 A. Yes, sir.

20 Q. And if someone had put them in, would you have been
21 satisfied?

22 A. Yes, sir.

23 Q. What did you find out after you turned the matter over
24 to me, Mr. Buck, that made it impossible for you to fulfill
25 what it was you thought was the end of your dealing?

1 A. Well, I didn't have the pilings. There was another boat
2 in the slip. There was no way I could have gotten the boat
3 in the slip that was left after whoever -- I did not know
4 who Massenburg rented from, or who he paid, or whether he
5 paid or not. I have no knowledge of that. But he was there
6 over a year.

7 Q. All right. Let me ask the question this way, Mr. Buck.
8 Who told you that indeed you couldn't have 20 feet, because
9 slip B-2 had been sold?

10 A. You did.

11 Q. And that would have been some time in '08?

12 A. Correct.

13 Q. All right, sir. Did anybody, Mr. Buck, from 2005,
14 February the date of the contract, did anybody ever tell you
15 that they were selling this slip, B-2, and that it would be
16 impossible for them to perform?

17 A. No, sir.

18 Q. Mr. Buck, let's look at Exhibit 17 -- I'll tell you
19 what, let's first do this. Let's look at Exhibit 9. Do you
20 recognize that as the closing statement?

21 A. Yes, sir.

22 Q. I call your attention to, in the left-hand column, line
23 205 and 214.

24 A. Yes, sir.

25 Q. Those are two credits back to you off of the purchase

1 price, Mr. Buck. Why?

2 A. Because when they came back to me about it not being

3 that slip completely going with this lot, and I agreed if

4 they were to put in two pilings and give me 20 feet, they

5 would reduce the price to my knowledge.

6 Q. All right, sir. And let's go, Mr. Buck, to 14-A and

7 14-B. Are these the property tax bills that you paid at the

8 time you purchased it until the present?

9 A. That's correct.

10 Q. Let's go to Exhibit 17, Mr. Buck, and let me just ask

11 you if you can summarize what your damages are as a result

12 of having purchased this property? How much was paid as a

13 deposit at closing, Mr. Buck?

14 A. Five thousand dollars.

15 Q. How much total was paid at the closing?

16 A. Six hundred and eighty thousand, five hundred and eight-

17 nine dollars and seventy-eight cents.

18 Q. At a time that you thought you could build out there,

19 did you hire an architect?

20 A. I did.

21 Q. How much did you pay the architect?

22 A. Thirty-eight hundred dollars.

23 Q. How much in regime fees and dues did you pay?

24 A. Seven thousand, nine hundred and forty-three dollars and

25 forty-four cent.

1 Q. And I refer you to the date there. I notice that the
2 regime fees start -- stop on July -- on April 7, 2008. Can
3 you explain that?
4 A. I was instructed by you, after investigating it, to stop
5 paying it; and I did.
6 Q. All right. You had a note. And did you incur interest,
7 and if so, how much?
8 A. Yes, sir. I had a note on the property, and the
9 interest is \$237,365.33.
10 Q. All right. And the insurance was how much?
11 A. Five thousand, five hundred and forty dollars.
12 Q. And the real estate taxes?
13 A. Forty-three thousand, nine forty-nine, seventy-seven.
14 Q. All right. Now, Mr. Buck, let me ask you this.
15 Because, regrettably, lawyers don't ever know what judges
16 do. You've often sold property all of your life in and
17 around this area?
18 A. Yes, sir.
19 Q. Is your property, this property, B-1 on the market for
20 sale?
21 A. Yes, sir.
22 Q. And what are you marketing it at?
23 A. It's at \$800,000.
24 Q. Why did you put \$800,000 on it?
25 A. Well, I was trying to recover my losses, knowing very

1 well in this kind of real estate market that was not going
2 to be feasible. So I decided just to leave it there until I
3 got through with these proceedings going on.
4 Q. All right. Mr. Buck, what is that property worth to
5 sell today?
6 A. I would be surprised if it would bring \$400,000 for lot
7 and slip; maybe, in the range of 250 to 350, but I ought to
8 be happy to get 400 for it.
9 Q. All right, sir.
10 MR. EPTING: Judge, what I did -- we'd move Exhibit 17
11 in. The only other calculation other than the damages that
12 he's testified to falls in the middle column which is a pre-
13 judgment interest rate on money that he's been outstanding.
14 THE COURT: Okay.
15 MR. EPTING: All right, sir. And I would move this
16 exhibit into evidence as 17.
17 MR. BARNETT: No objection, Your Honor.
18 THE COURT: No objection?
19 MR. DUKES: No objection.
20 THE COURT: Okay. Seventeen is admitted into evidence
21 without objection.
22 (Plaintiff's Exhibit Number 17 admitted into evidence.)
23 MR. EPTING: Judge, I have no more questions of this
24 witness at this time. Could we approach the bench just for
25 two seconds?

1 THE COURT: Yes, sir.
2 (WHEREUPON, there was an off-the-record bench
3 conference.)
4 THE COURT: Mr. Buck, if you will step down, please,
5 sir. And for the record, Mr. Buck's going to step down, and
6 the plaintiff is going to call another witness; and then
7 Mr. Buck will come back on the witness stand for cross-
8 examination by agreement of the parties. Is that correct?
9 MR. EPTING: Right. And we're going --
10 THE COURT: Excuse me. Is that correct, Mr. Barnett?
11 MR. BARNETT: Yes, sir.
12 THE COURT: And, Mr. Dukes?
13 MR. DUKES: Yes, sir.
14 THE COURT: Thank you, very much.
15 (The witness leaves the stand.)
16 SUSANNE CANTEY, being duly sworn,
17 testified as follows:
18 THE COURT: Thank you. Please, be seated. State for
19 the record, please, state your name, spelling your last.
20 WITNESS: Susanne Cantey, C-a-n-t-e-y.
21 DIRECT EXAMINATION
22 BY MS. ENDEMANN:
23 Q. Would you please state your position in Zan, LLC?
24 A. I am the managing member of Zan, LLC.
25 Q. Okay. Thank you. And did you sign the contract to

1 purchase the slips and the parcel of property that we've
2 been talking about?

3 A. Yes. I signed the contract to purchase the slip and the
4 property.

5 Q. Okay. Were you given a plat of the property before you
6 signed?

7 A. We saw a plat of the property, but not of the slip.

8 Q. Okay. And when you signed the contract, what did you
9 know about the width of the slip you were purchasing since
10 you had not seen a plat?

11 A. We thought we were purchasing B-1, which was a 35-foot
12 slip to fit the Rookie IV which needs 20-foot clearance and
13 60 feet. We later learned that was two slips; not one.

14 Q. And why did you think you were going to get the entire
15 35 feet?

16 A. When we met with Karl McMillan, he pointed to the entire
17 slip from across the canal. So we were -- we thought we
18 were getting the entire slip.

19 Q. So you, actually, visited with Mr. McMillan?

20 A. Yes.

21 Q. And your father?

22 A. Yes.

23 Q. And Ms. Carmody?

24 A. Yes.

25 Q. Okay. And when did you first see a plat showing you

1 that there was, in fact, two slips?

2 A. We saw a plat prior to what was going to be the first
3 closing on March 5th that never took place.

4 Q. And why did it not take place on March 5th?

5 A. Because at that time, we realized it was two slips and
6 not one slip.

7 Q. And why was only having the one slip -- why was that not
8 going to work for your purposes in purchasing it?

9 A. Because the width is not large enough to accommodate the
10 20 foot that the Rookie IV needed.

11 Q. And you made clear to Mr. McMillan and the seller that
12 you needed the 20 feet?

13 A. We did.

14 Q. And how did the seller respond when you refused to close
15 on March 5th?

16 MR. DUKES: Objection to hearsay.

17 THE COURT: I'll sustain the objection.

18 BY MS. ENDEMANN:

19 Q. A new closing was scheduled?

20 A. A new closing was scheduled.

21 Q. And why was a new closing scheduled?

22 A. Because we were not going to receive what we thought we
23 were going to receive. It wasn't -- it was two slips. They
24 were telling us it was two slips, and we thought we were
25 getting one slip that was wide enough to accommodate the

1 boat.

2 Q. And you refused to close on the 5th based on that?

3 A. Yes.

4 Q. And why did you, then, agree to schedule a new closing?

5 A. Because they promised to put in two pilings, giving us

6 enough width for our boat.

7 Q. Okay. And did you attend the April 5th closing, the

8 second closing?

9 A. I did.

10 Q. Okay. And what happened at the April 5th closing?

11 A. I guess, prior to the closing, my father went by the

12 slip to make sure the pilings had been put in place. They

13 were not. So when we got there, he told Dan David that he

14 would not close because the pilings were not in place.

15 Q. Okay. And what did Mr. David say?

16 MR. DUKES: Objection. Hearsay.

17 THE COURT: What did who say? Mr. David?

18 MR. DUKES: I'm sorry, Your Honor? Hearsay.

19 THE COURT: All right. Do you want any arguments on

20 that before I make a decision?

21 MS. ENDEMANN: Yes. Mr. David was the agent, and he

22 was present at the closing. His statement should come in as

23 admissions against the witness.

24 THE COURT: I'll overrule the objection. Go ahead.

25 BY MS. ENDEMANN:

1 Q. And so what did Mr. David tell you?
2 A. I'm sorry. I got a little lost when everyone started
3 talking.
4 Q. Okay. You had said that there was a new agreement, and
5 that your father had stopped by and he saw before the
6 closing that the pilings had not been put in..
7 A. Yes. I'm sorry. We told Mr. David we would not close
8 because the two pilings were not in place. And he said,
9 What can we do to get this closed today? If I can get a
10 letter stating that we will put in the two pilings -- or the
11 seller will put in the two pilings, will you close?
12 And we said, Yes, if you will have that in writing, we
13 will close today.
14 Q. And did you get that put in writing?
15 A. We did.
16 Q. Was title insurance discussed at the closing?
17 A. Title insurance was discussed. My father was clear,
18 stating that we wanted title insurance, and that it would
19 cover the new footage, to be specific, I guess, where the
20 pilings were going -- the extra footage for the pilings.
21 Q. Okay. And when did you actually receive a copy of the
22 title policy?
23 A. Several months later. I think it was April, and
24 September before we received any documents.
25 Q. And the pilings were not in place when you received

1 those documents?

2 A. No.

3 Q. Did you think the pilings were going to be put in place

4 even after you received those documents?

5 A. Yes. I mean, I think - I'm from the school of if you

6 tell somebody you're going to do something, you follow

7 through.

8 MS. ENDEMANN: Thank you. No more questions.

9 THE COURT: Cross-examination?

10 MR. BARNETT: Yes, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. BARNETT:

13 Q. Hello, Ms. Cantey.

14 A. Hello.

15 Q. I'm Stan Barnett. I represent the sellers in this

16 lawsuit, East Coast Trading Company and Ripley, and Mr.

17 Belote and Mr. Knight. Have you ever met Mr. Knight sitting

18 here?

19 MR. BARNETT: Stand up, Mr. Knight.

20 BY MR. BARNETT:

21 Q. Have you ever met him?

22 A. He looks familiar, but I'm not sure.

23 Q. How about Mr. Belote, sitting next to him?

24 A. I don't think so.

25 Q. I didn't hear you say that you had, but I wanted to make

1 sure. You are the managing member of Zan, LLC; is that
2 right?
3 A. Yes.
4 Q. Okay. Are you the person, then, that receives the
5 monthly notices from the regime or any communication or any
6 comp from the Property Owner's Association?
7 A. My father and I, both, receive the information. And we
8 share a desk. So what he has on his desk, I see, and what I
9 have on my desk, he sees.
10 Q. Okay. And have you gotten monthly -- do they send out
11 monthly?
12 A. Yes.
13 Q. What part of contents are those messages from POA?
14 A. Mainly, they're just an invoice of what you owe, or a
15 notice of what's going on with the regime.
16 Q. Do you recall getting notice from the regime about
17 difficulty getting the maintenance originally done? Do you
18 remember that being discussed in their memos to you?
19 A. I don't recall.
20 Q. How about an application the regime made for a permit to
21 modify the marina to authorize some structures that were put
22 in by some slip owners that didn't have the authority; do
23 you remember getting that?
24 A. I don't recall.
25 Q. But my point is -- are you saying you didn't get it, or

1 you just don't remember?

2 A. I really -- I get the documents, but I don't recall.

3 This has all gone on since 2006. It's now 2011.

4 Q. Okay. Did you get a memo from them recently announcing

5 that they had gotten the permit this year?

6 A. I am not aware of that.

7 Q. All right. Have you got the book of exhibits in front

8 of you?

9 A. I do.

10 Q. Would you go to number three. It's the contract for

11 sale that you mentioned.

12 A. Let me, also, state that since -- you know, since we are

13 working with Mr. Epting, and he advised us not to pay the

14 regime, I haven't focused on the notices.

15 Q. Did they continue to send them to you, though, even

16 after you stopped paying the dues?

17 A. For a while. Yes.

18 Q. And then they quit at a certain point?

19 A. No. I think, I received one a couple of months ago.

20 Q. All right. So they've been continuous sending bills. I

21 got you. All right. Take a look at the contract here,

22 Exhibit Number 3. There is a tax map number for the

23 property that you were -- that Zan was contracting at the

24 purchase. It says that the address is lot three, and then

25 there's a TM number. Lot three was the upland lot; wasn't

1 it?

2 A. I'm sorry?

3 Q. Wasn't lot three the land -- the actual land where there

4 was going to be a house on?

5 A. Yes.

6 Q. Where is there mention in the contract of a boat slip?

7 A. Well, we were told that you couldn't purchase a slip or

8 a lot by itself; that they both went together. And you had

9 to buy a lot; you couldn't purchase just a boat slip.

10 Q. All right. But there's no boat slip specified in this

11 contract, or am I missing something?

12 A. I don't think it would be stated, because you couldn't

13 just buy one without the other.

14 Q. You've got number four which is the deed? Did you find

15 number four?

16 A. Yes.

17 Q. The deed, actually, mentions, does it not, a specific

18 boat slip? Isn't that right?

19 A. Well, we didn't receive the deed until five months

20 later.

21 Q. Did your -- I thought I heard your father testify -- you

22 don't have to agree with me -- I think I heard him testify

23 -- I'll put this in the form of a question. Didn't you sign

24 the deed on the date of closing, April 5th of 2005?

25 A. I don't see my signature on here -- oh, I do. I'm

1 I'm sorry.

2 Q. If you go to the fourth page.

3 A. Yes.

4 Q. Yes.

5 A. Well, I'm quite confused, because, yes, I did sign this;
6 however, it states at the bottom that this was signed on the
7 5th of January, prior to even us putting in a contract.

8 Q. But you didn't sign it on January 5th; right?

9 A. No. I hadn't even put in a contract on the property on
10 January 5th.

11 Q. Did you sign the deed on the date of closing at the
12 closing? Did you sign it then?

13 A. I assume it would have been signed at closing.

14 Q. Okay. Well, it's a pretty important question. I need
15 for you -- if you're sure -- if you don't remember, you
16 don't remember. But I'm asking you did you sign this
17 document on the date of closing?

18 A. Well, no, because we did not close on March 5th.

19 Q. April 5th -- on April 5th, the actual closing, did you
20 sign it on the date of closing?

21 A. But if you look at this deed, it is dated March 5th. We
22 did not have a closing on March 5th.

23 Q. I understand. But you were at the closing?

24 A. I was at the closing on April the 5th.

25 Q. And you signed this document?

1 A. I would assume that I signed it on April the 5th, but not
2 on March the 5th.
3 Q. So -- but you had the deed. You signed the deed on the
4 date of closing. You didn't get a copy of it until later.
5 I understand.
6 A. Correct.
7 Q. But you had it on April 5th and you signed it?
8 A. Well, I did sign it on April 5th, but I didn't receive a
9 copy until six months later.
10 Q. Okay. All right. And the statement that you were
11 signing -- you don't have to read it all into the record --
12 what were you, as the grantee, what were you signing to
13 acknowledge? What was the purpose of your signature?
14 A. Purchasing the lot and the slip.
15 Q. The slip designated in the deed?
16 A. What we thought was B-1 with the footage that they were
17 guaranteeing us.
18 Q. Now, you knew you were purchasing B-1; is that right?
19 A. Yes.
20 Q. And isn't it true, I believe you testified for
21 Mr. Epting, that you knew that B-1 was too narrow.
22 A. Right. With the guarantee that we were getting from the
23 seller the extra footage.
24 Q. Okay. My question was a little narrow. That's fine.
25 But you knew that B-1 was too narrow for the Rookie IV to

1 fill?

2 A. Right. And we would not have closed if we wouldn't have
3 been guaranteed the extra footage.

4 Q. Without the extra two feet, the slip was useless?

5 A. Useless.

6 Q. Because the only reason that you wanted it was so your
7 father's boat would fit?

8 A. Correct.

9 Q. Okay. So if you didn't get the extra width, if it
10 wasn't the 20-foot clearance --

11 A. Right.

12 Q. -- the pilings wouldn't have mattered; would they?

13 A. We wouldn't have closed.

14 Q. If somebody -- if they'd have said, All right. We'll
15 stick the pilings out here, but you didn't have a 20-foot
16 clearance, you wouldn't have needed the pilings; would you?

17 A. We needed the pilings to be placed where it would give
18 us 20-foot clearance.

19 Q. But you needed the slip -- you needed it to be wider?

20 A. Yes. We needed the slip to be wider.

21 Q. So you had to acquire that extra two feet from B-2?

22 A. We weren't acquiring. We thought that was what we had
23 been told we were going to receive.

24 Q. Okay. By whom?

25 A. By Karl McMillan and the seller.

1 Q. Who of the seller? What representative of the seller
2 told you?

3 A. I'm not sure. We were in -- we were there at the
4 closing. Dan David said, I don't know. I will need to talk
5 to the seller. He walked out, made a phone call. I'm not
6 sure who he called. I assume it would have been Mr. Knight.
7 And he came back and said, I have, you know, the go ahead to
8 give you a letter stating that we can, you know, add the
9 extra footage.

10 Q. Okay. So your testimony is your knowledge is that you
11 heard from Karl McMillan that the two extra feet would be
12 provided; is that right?

13 A. Well, when we met with Karl McMillan, originally, he
14 told us that it was 35 feet.

15 Q. Both slips?

16 A. What we thought was one slip.

17 Q. B-1 and B-2.

18 A. Yes. What we later learned was two slips.

19 Q. Okay. All right. So did Mr. McMillan ever tell you
20 later that after you knew that there were two slips that a
21 part of B-2 could be carved off and given to you as well?

22 A. Yes.

23 Q. And did Mr. Dan David tell you that?

24 A. Yes.

25 Q. Okay. Did Mr. Belote tell you that?

1 A. I don't know Mr. Belote.
2 Q. Directly, did he ever tell you that?
3 A. No. I don't know him.
4 Q. Mr. Knight? He never told you that, either; did he?
5 A. I think he spoke with my father and said that it would
6 be.
7 Q. I understand. Listen to my question. One witness at a
8 time. Did he tell you?
9 A. Not me, personally.
10 Q. Now, when you signed this acknowledgement on the day of
11 closing, weren't you acknowledging that you were going to be
12 subject to the master deed, all the terms and conditions of
13 the POA regime?
14 A. Yes.
15 Q. Did you ever look at the master deed?
16 A. No, I did not.
17 Q. So you've never looked at it until today?
18 A. No.
19 Q. Did anybody ever hand it to you and say, here's the
20 master deed?
21 A. No. I've not seen the master deed.
22 Q. Then it wouldn't surprise you to know the master deed
23 was recorded on August the 6th of 2004 in the county
24 courthouse?
25 A. Okay.

1 Q. Okay. And that with the master deed is that plat broken
2 up into pieces. So that had you looked at the master deed,
3 you would have known it wasn't one slip, there were two
4 slips. In other words, any day after August 6, 2004,
5 anybody that wanted to know, could have gone to the Register
6 and Conveyance Office and it would have shown two slips, not
7 one?

8 A. I understand that. But when I was dealing with the
9 seller and his agent, I assumed I would be getting the truth
10 and not have to go do research, myself, to find out that
11 that's not the truth.

12 Q. The contract you signed back in February 2005 provided a
13 due diligence period. If you look at the second page.

14 A. I'm sorry. What?

15 Q. If you look at Exhibit Number 3. Take a look at Number
16 3 and go to the second page of Exhibit Number 3.

17 A. Yes. I'm there.

18 Q. If you look at the second page, paragraph 13, it's typed
19 in here, this form. It's typed in Sale contingent upon - it
20 was 45 days, scratched out, 21 days due diligence period.

21 A. Yes.

22 Q. Well, what did that mean to you as the signer of this
23 contract? What was the due diligence for?

24 A. Well, I do not think the due diligence period is to go
25 back and have to do research that the seller does not have

1 the ability to sell to their client what they're trying to
2 sell you.

3 Q. You don't think so?

4 A. No.

5 Q. Okay. All right. What was it you were going to be
6 looking at? What was the due diligence that you did,
7 personally?

8 A. First of all, it's a piece a property. So I think that
9 changes things. It wasn't like it was a house, and I needed
10 to do an inspection or anything like that. It's a piece of
11 property with a slip.

12 Q. A slip that was too narrow to accommodate the Rookie IV;
13 is that right?

14 A. Yes.

15 Q. Okay. That's a pretty a significant fact; wouldn't you
16 agree with me?

17 A. Well, that's what I later found out. We were told that
18 it was what I found out to be B-1 and B-2.

19 Q. And even without looking at the master deed, before the
20 closing, you knew as the managing member of Zan, you knew
21 that what you were buying was slip B-1. That's what was in
22 the deed, and that B-1 was too narrow for the Rookie IV?

23 A. No. We thought B-1 was 35 feet wide.

24 Q. At the date of closing?

25 A. No.

1 Q. We got to get this right. So you've got to listen to my
2 questions. It's a little confusing. I know. Because
3 before closing, that's when you saw the plat that showed
4 that there was a B-1 and there was a B-2?
5 A. Correct. Yes.
6 Q. And so on the date of closing, you knew that B-1 was too
7 narrow for the Rookie IV?
8 A. Right.
9 Q. Okay. All right. And without an assurance that you
10 were going to be conveyed two extra feet, B-1 was --
11 A. We would not have closed.
12 Q. -- useless. It was useless?
13 A. Yes.
14 Q. All right. So the pilings is secondary as I understand
15 it from your testimony to the width? I know you wanted the
16 pilings, but, I mean, you had to have the width?
17 A. We had to have the pilings and the width.
18 Q. Okay. Have you ever had any discussions with anybody at
19 the regime about trying to resolve this problem, the POA,
20 the regime POA?
21 A. No.
22 Q. All right. Have you ever been involved in other real
23 estate transactions?
24 A. Yes.
25 Q. And where there was special requirements that the seller

1 was agreeing to meet to the buyer? For instance, like the
2 antique chandelier in the dining room, the seller agrees to
3 give that to the buyer?
4 A. Yes.
5 Q. In your experience, aren't those types of special
6 conditions always reduced to a contract amount or something?
7 A. Yes. And that's what we thought the letter would take
8 place of a addendum.
9 Q. And the letter is y'all's Exhibit Number 5; right?
10 A. Yes.
11 Q. Am I right if I remember correctly?
12 A. Yes.
13 Q. All right. A letter comes from Mr. David to --
14 A. Yes. Who is representing the buyer and the seller.
15 Q. So he was y'all's closing attorney?
16 A. Yes.
17 Q. And Ms. Carmody was y'all's realtor?
18 A. Yes.
19 Q. Where, in this letter, does he assure you that you're
20 going to get title to two feet of slip B-2?
21 A. Well, it states that this letter is to confirm two
22 pilings will be placed in line with the existing pilings.
23 If you lined them up, it would give the additional footage.
24 Q. It doesn't say where they're supposed to be; does it?
25 A. Not specifically. And I think that's something that

1 Mr. David should have included.

2 Q. I understand you have feelings about what Mr. David
3 should or shouldn't have done. But let me ask you about
4 what you should have done as the buyer. If that was
5 important to you, if it was vital that you get that two
6 extra feet, don't you think that you should have insisted on
7 a contract with whoever the owner of slip B-2 was?

8 A. I do think it should have been written down. But if I
9 tell somebody that I'm going to add two feet, I expected the
10 extra footage.

11 Q. But today, you were saying you heard that. My clients
12 haven't testified yet, but let's assume they testify, No, we
13 never heard that; we never said that; because we don't have
14 a written agreement. We don't know --

15 A. We do have a written agreement.

16 Q. Those of us who weren't in that room don't know, because
17 this letter doesn't say anything about two extra feet; does
18 it?

19 A. Well, it says, in line with the pilings. So if it was
20 in line with the existing pilings that would give you the
21 footage.

22 Q. Well, that doesn't tell you where the pilings are going
23 to be in between B-2 and B-1. It just tells you they're
24 going to be in line with the pilings. The pilings are going
25 to be out, right, further from the walkway? It just doesn't

1 tell you where they were going to be put; just that they
2 were going to be in line with the other pilings that
3 anchored the floating walkways. It could have been inside
4 the boundary of B-1. It could have been inside the boundary
5 of B-2. It could have been a square on the line. It
6 doesn't tell us that; does it? And that's why we're here
7 today. I'm just asking you to agree with the prompt.

8 A. It does not state that. It should state that. And I
9 think that goes back to our attorney should have been
10 looking out for our best interest.

11 Q. Should your realtor have done the same thing? Looked
12 out for your best interest?

13 A. She did. She did. But I think that's more of the
14 attorney's responsibility than the realtor's responsibility.

15 Q. In transactions where that buyer wants to get that
16 antique chandelier in the dining room of the seller's house,
17 isn't it usually the realtor that says, you know, we need to
18 make that an addendum to the contract? Isn't it the realtor
19 that normally does that?

20 A. The realtor would write that in. So Dan David should
21 have written that, specifically, in.

22 Q. He wasn't your broker, though; was he? He was your
23 closing attorney.

24 A. I'm saying that Dan David should have as my attorney,
25 should have written that in.

1 Q. Okay. I asked you whether Ms. Carmody should have done
2 it. You don't think she had any obligation to do that?
3 A. No. She was not representing the seller as well. She
4 had -- he's the only one that could get approval to do it.
5 Our realtor couldn't.
6 MR. BARNETT: I think that's all I have, but
7 Mr. Dukes --
8 THE COURT: Okay. Mr. Dukes, cross-examination?
9 CROSS-EXAMINATION
10 BY MR. DUKES:
11 Q. Ms. Cantey, look back into Exhibit 3, the contract of
12 which you agreed to purchase this property. Down at the
13 bottom -- well, at the top you'll see Prudential Carolina
14 Real Estate; right?
15 A. Correct.
16 Q. You see that? Prudential Carolina Real Estate?
17 A. Yes.
18 Q. At the bottom, the very bottom it gives an address, 628
19 Long Point Road. And that's Lynn Carmody; right? This is
20 Lynn Carmody's form; isn't it? Not Karl McMillan's form?
21 A. Right.
22 Q. It's your realtor's form; correct?
23 A. Correct.
24 Q. And the contingencies portion of that, there are none;
25 correct?

1 A. Correct.

2 Q. In your experience when you've wanted -- when you've

3 bought a house and like yours on the battery or the south

4 battery, if you want the antique chandelier, it goes in that

5 contingency?

6 A. Right.

7 Q. The antique chandelier must remain in the house. Or the

8 drapes must remain in the house; correct?

9 A. Correct.

10 Q. And there's no contingency in this?

11 A. The letter serves as the contingency.

12 Q. No, ma'am. In this contract you signed in February,

13 there is no contingency; correct?

14 A. No. Because at the time, we thought we were buying B-1

15 and B-2.

16 Q. And you found out before you signed your deed, your

17 company's deed, that there were two slips in that space;

18 right?

19 A. Yes.

20 Q. When did you get the master deed?

21 A. Six months after --

22 Q. The master deed for the regime for the slips at Ripley

23 Horizontal Property Regime?

24 A. I'm not sure.

25 Q. Was it before closing or after?

1 A. I'm not sure.

2 Q. Your title policy, which is Exhibit 10, has anyone --

3 you see where it has the property description, Schedule A,

4 five pages in?

5 A. I think I'm at the same place where you are.

6 Q. At the top it says Owner's form, Chicago Title

7 Insurance, Schedule A, date of policy, April 25th.

8 A. I'm not sure where you are. I'm in section ten.

9 MR. DUKES: May I approach, Your Honor?

10 THE COURT: Yes. Approach and show her where you're

11 talking about, please.

12 BY MR. DUKES:

13 Q. Do you see where the land, referred to in this policy --

14 do you see paragraph number three?

15 A. Yes.

16 Q. It's described as follows. And then it gives that sort

17 of lot, piece, or parcel of land. It gives a specific

18 description, and refers to the Horizontal Property Regime.

19 And you knew that this land - when you purchased this

20 property, you knew it was subject to covenants and

21 restrictions as described in the mast deed; right?

22 A. Yes.

23 Q. You knew that before you bought it; correct?

24 A. Yes.

25 Q. You knew that there was a property owner's association

1 that would tell you what you could and couldn't do with
2 something --
3 A. Yes.
4 Q. -- whether it's planting a bush or storing a boat on lot
5 or --
6 A. Yes.
7 Q. You knew that?
8 A. Yes.
9 Q. And in your policy it says Dock Unit CSB-1 and refers to
10 that plat that was before you; correct?
11 A. Yes. And we asked for --
12 Q. Ma'am. It's correct? The deed, the document you
13 received refers to Dock CSB-1 and refers you to that plat
14 which is a matter of public record down at the RMC's Office;
15 correct? That's what it says?
16 A. I didn't receive it until six months after the plat.
17 And we had asked, specifically, for title insurance to cover
18 the lot, the slip with the additional footage.
19 Q. All right. The policy you received describes Dock CSB-1
20 as drawn on the recorded plat; is that correct?
21 A. It is correct. However, I --
22 Q. That's what it says?
23 A. It says it covers B-1, but that's not with the
24 additional footage.
25 Q. But it covers CSB-1; right? And nobody has come to you

1 and said, You can't use CSB-1 at all, because I own it;
2 right? You own slip CSB-1; correct?

3 A. Well, CSB-1 with the additional footage.

4 Q. No, ma'am. That's not what I'm asking. You own slip
5 CSB-1; right?

6 THE COURT: She's answered. She said, Yes, with the
7 additional footage.

8 BY MR. DUKES:

9 Q. Your deed describes the property you own; right? You
10 have dealt with real estate enough to know that your deed
11 tells you what you own; right?

12 A. Yes.

13 Q. And the property description in your deed, which is in
14 Exhibit A --

15 A. Can you go back to what number that is?

16 THE COURT: It's Schedule A we were looking at.

17 BY MR. DUKES:

18 Q. It's Exhibit Number 4, Schedule A.

19 A. Yes.

20 Q. Describes the property you own; correct? And that's
21 your signature on the next page over?

22 A. Yes.

23 Q. And you know from your experience in dealing with real
24 Estate, that when you sign a deed, that's what you're
25 buying; right?

1 A. Yes.

2 Q. That's what you're accepting? And on the date of

3 closing, irrespective of when you received the deed, when

4 you closed on that property, you owned it; right?

5 A. Yes. With a letter stating the additional footage we

6 would receive.

7 Q. Mr. Barnett's already covered that. There's no mention

8 of additional footage in that letter; right? It just says,

9 We'll put two pilings in.

10 A. In line, which will give us additional footage.

11 Q. I want you to --

12 A. Which I -- I mean, you're referring back to the deed.

13 And the deed already has the January 5th date which confuses

14 everything.

15 Q. I don't see why, but I'm not going to argue with you on

16 that. Let me ask you, ma'am, if you will turn to the master

17 deed of the regime which is in Exhibit 13 in your book. And

18 if you look at -- and you understand that this master deed

19 governs your property at Ripley Cove? And if you look over

20 on page three, paragraph F where it says, common elements --

21 do you see where it says, fixtures, docks, pilings, ramp,

22 bulkhead, and --

23 A. I'm sorry. I'm on page three, but I don't see --

24 Q. Paragraph F, page number -- the numbered page three.

25 A. Okay.

1 Q. Paragraph F, common elements. Do you see where it says,
2 fixtures, docks, pilings, etcetera --
3 A. Yes.
4 Q. -- are part of the common elements?
5 A. Yes.
6 Q. You know what common elements are; don't you?
7 A. Can you define that for me?
8 Q. Well, it defines in this. It means that that property
9 belongs to the property owner's association or to the
10 regime, and you don't own the pilings or the docks. You own
11 an undivided interest in those.
12 A. Okay.
13 Q. That belongs to the POA. That's what it says.
14 A. Okay.
15 Q. Ms. Cantey, who does Zan owe money on a note to?
16 A. Wacchovia.
17 Q. Wacchovia. When did you mortgage your property?
18 A. I don't know the specific day.
19 Q. How long after closing?
20 A. I don't know.
21 MR. DUKES: I think that's all I have for you. If you
22 just give me one moment.
23 THE COURT: Thank you very much.
24 MR. DUKES: That's all I have.
25 THE COURT: Any redirect?

1 I'm sorry, Mr. David. Do you have any questions of the
2 witness?
3 MR. DAVID: That's all right. No, I do not.
4 THE COURT: Any redirect?
5 MS. ENDEMANN: No, Your Honor.
6 THE COURT: Okay. You may step down, Ms. Cantey, but
7 be careful stepping down.
8 WITNESS: Thank you.
9 (The witness leaves the stand.)
10 MR. EPTING: Your Honor, may she be excused?
11 THE COURT: Any objections of her being excused?
12 MR. BARNETT: No objection, Your Honor.
13 MR. DUKES: No objection, Your Honor.
14 THE COURT: Ms. Cantey, you're welcome to stay, but you
15 may be excused if you so choose.
16 All right. It's five after 1:00. We're going to
17 recess, and I will try my best to be back at 2:30, probably
18 be more like quarter 'til 3:00. So why don't we just recess
19 until 2:45. I don't want you all sitting here waiting on
20 me. We're in recess until 2:45.
21 (WHEREUPON, there was a lunch recess.)
22 THE COURT: Mr. Buck?
23 MR. EPTING: My colleagues have been kind enough -- we
24 have another witness who needs to make an appointment, but
25 she's a five-minute witness for us.

1 THE COURT: Okay. That's fine.
2 LYNN CARMODY, being first duly sworn,
3 testified as follows:
4 THE CLERK: Thank you. Please be seated. If you will
5 please state your name, spelling your last name for the
6 record.
7 WITNESS: All right. It's Linda Carmody, but I go by
8 Lynn.
9 THE CLERK: Spell your last name, please.
10 WITNESS: C-a-r-m-o-d-y.
11 DIRECT EXAMINATION
12 BY MS. ENDEMANN:
13 Q. Okay. Ms. Carmody?
14 A. Yes?
15 Q. What's your profession?
16 A. I'm a real estate realtor.
17 Q. And how long have you been in real estate?
18 A. Going on 32 years.
19 Q. Okay. And you were the agent for Zan at the closing at
20 Ripley?
21 A. I was the subagent to Karl and the agent to Eddie and
22 Susanne Buck. Yes.
23 Q. Okay. Did you visit the property with the Bucks before
24 the contract was signed?
25 A. Oh, yes.

1 Q. And who visited the property with you?
2 A. I believe, Susanne and Eddie and Karl and myself.
3 Q. Did Karl McMillan make any representations about the
4 width of the slip when you met with him?
5 MR. DUKES: Objection. Hearsay.
6 THE COURT: Overruled. Go ahead.
7 MS. ENDEMANN: Thank you.
8 BY MS. ENDEMANN:
9 Q. You may answer it.
10 A. Well, we asked him to show us the property and the
11 setbacks and just where the house could be situated. And
12 then -- of course, that's what Susanne was buying. And then
13 Eddie was going to buy the slip for his boat. And so that
14 was important to him.
15 We walked down there to the dock, and Karl showed us
16 where the lot lines were so to speak, where he said the slip
17 lineage was.
18 Q. And what did he say about the lines as he referred to
19 them for the slip?
20 MR. DUKES: Objection. Hearsay.
21 THE COURT: He's a party. Overruled. Okay. Go ahead.
22 Please proceed.
23 MS. ENDEMANN: Thank you.
24 WITNESS: Well, he just showed us where slip B-1 was,
25 and indicated that it was indeed big enough for Eddie's

1 boat.

2 BY MS. ENDEMANN:

3 Q. Did you know there were two slips when you looked --

4 A. I had no idea.

5 Q. -- at it with Karl?

6 A. No, I did not.

7 Q. So Mr. McMillan represented that the entire slip there,

8 the 35 feet was one slip?

9 A. Yes.

10 Q. Okay. And could you turn to Exhibit 3 in the book

11 there? And is this the contract to purchase? And this is

12 written on your company form?

13 A. Well, this is a realtor's form. As you can see up above

14 it says, Realtor and Equal Housing Opportunity. This is a

15 standard form that our Board of Realtors uses.

16 Q. And what date does the contract call for the closing?

17 A. This one is revised, so give me a minute. March 30th.

18 Q. Okay. But a closing didn't happen on that date; is that

19 right?

20 A. No, it did not.

21 Q. And why not?

22 A. Because the plat - Eddie called me and said the plat did

23 not indicate - or there was some indication that he had

24 seen, did not indicate what he thought he was buying as far

25 as the size of the slip goes. The property, itself, was

1 fine. It was just the slip.

2 Q. But a new closing was scheduled?

3 A. Yes, indeed.

4 Q. And why was a new closing scheduled? What happened

5 after the failed closing?

6 A. Well, the buyer and the seller and the real estate agent

7 and the attorney got together and made amends. And they

8 came to a compromise, and we were able to close it.

9 Q. And what was that compromise?

10 A. That the additional -- that the lot was more delineated

11 from the seller to the buyer that it would, indeed,

12 encompass enough room for the boat.

13 Q. Okay. Did you attend the April closing?

14 A. Yes, I did.

15 Q. And what happened at the April closing when the Bucks

16 arrived?

17 A. Well, we went into the closing table. And, again, Eddie

18 said, We are not going to close this until we have further

19 proof that what we had contracted for is, indeed, what we

20 will receive. And that's when Attorney David said that if

21 he could have the seller sign something agreeing to satisfy

22 Eddie's needs as far as the boat space goes, then he would,

23 indeed, close.

24 Q. Okay. And can you turn to Exhibit 5 in the book,

25 please? And is this the letter that was written by

1 Mr. David at the closing?
2 A. Yes.
3 Q. And it's addressed to you as agent for the Bucks?
4 A. Yes.
5 Q. Was title insurance mentioned at the closing?
6 A. Oh, very definitely. I've done a few closings with the
7 Bucks. And Margaret Buck is an attorney. And Eddie knows
8 you don't buy a piece of property without title insurance.
9 So that was a definite.
10 Q. And what, specifically, was discussed about title
11 insurance?
12 A. Just that when it comes to final agreement.
13 Q. And the final agreement being?
14 A. Being the extra footage needed for the slip.
15 MS. ENDEMANN: Okay. Thank you. No more questions.
16 THE COURT: Cross-examination?
17 MR. BARNETT: Yes, sir.
18 CROSS-EXAMINATION
19 BY MR. BARNETT:
20 Q. Ms. Carmody, good afternoon.
21 A. Thank you.
22 Q. I'm Stan Barnett. I represent the sellers that were
23 called. Do you have the book of exhibits there --
24 A. I do.
25 Q. -- in front of you? Look at Exhibit 3, please. That's

1 the contract. You just looked at it a second ago.

2 A. Yes.

3 Q. All right. Am I missing something, or is it true that

4 the contract, itself, does not specify the boat slip?

5 A. I'm sorry. The contract does not what?

6 Q. Doesn't specify a particular boat slip; does it?

7 A. No.

8 Q. Okay. At what point -- you were the Bucks'-- and the

9 then Ms. Buck's realtor?

10 A. I was the sales agent.

11 Q. All right. Well, at what point -- well, let me ask you

12 this: Did you assist them in trying to specify which boat

13 slip they were buying?

14 A. We were not buying the boat slip per se. We were buying

15 the lot. And I was the subagent to Karl. And Karl had

16 shown us exactly what was included in along with the land

17 that a boat slip went with it, and so -- as, indeed every

18 other one did. It did not need to be specified.

19 Q. The boat slip's a separate piece of property, though?

20 A. It was agreed. I guess, all that property was agreed

21 that when you bought the land you also bought a slip.

22 Q. Where would I see that in writing? How would I know

23 that? If I wanted to find that document -- are you familiar

24 with any document that says that?

1 A. Not documents, but the word of a professional realtor,
2 yes.
3 Q. Got you. Realtor. Now, when somebody is spending
4 \$700,000 or thereabouts for real property, isn't it
5 customary to say the least that there would be a written
6 contract that specifies exactly what is being purchased for
7 that \$700,000?
8 A. Very definitely.
9 Q. But your testimony is in this instance, there was not
10 such a written contract? You were going on what you say was
11 a verbal representation of another realtor?
12 A. Exactly.
13 Q. Okay. So your testimony is this contract was part
14 written, this document and part oral or verbal?
15 A. No. There was nothing verbal.
16 Q. You just told me it --
17 A. It was a package. And the package was the land with the
18 slip included.
19 Q. Where is a writing that shows me the package?
20 A. This is what developers do when they are selling
21 property. And it was a given that if you're going to buy
22 the land, you also receive a slip.
23 Q. But a slip is not specified?
24 A. It doesn't need to be.
25 Q. But there were many slips in this marina. This is a

1 plat. Are you familiar with the marina plat?
2 A. Yes.
3 Q. There are lots of them?
4 A. Yes.
5 Q. Well, how are we to know or anyone to know from this
6 contract what slip Mr. Buck was getting?
7 A. Because we have a tax map number identifying the
8 property, and the slip was a part and parcel of that
9 property.
10 Q. Well, take a look at Number 4, Exhibit Number 4. You
11 were at the closing; were you not?
12 A. I was.
13 Q. Okay. This is the deed that was executed prior to the
14 closing, and it was delivered to Ms. Buck -- then Ms. Buck,
15 now Mrs. Cantey -- to sign; isn't that correct?
16 A. I believe so.
17 Q. Okay. Were you present when, now Mrs. Cantey, signed
18 the deed?
19 A. I was -- a realtor's part in a closing is to sit back
20 and let the professional attorney conduct it. If that was
21 part of the documents that he wanted Susanne to sign, then,
22 yes, indeed, this is it.
23 Q. Okay. Well, go to the second page of Exhibit Number 4.
24 Right above the grantee's address line, there are two TMS
25 numbers; aren't there?

1 A. I see.

2 Q. And their legal description which is - it's two pages
3 past that. There are two separate legal descriptions. One
4 for the upland lot and one for the dock slip. Well, the
5 upland lot is described as lot number three, SF 3. And the
6 dock slip has got a whole separate designation, lot B-1;
7 right?

8 A. I'm seeing it here. Yes.

9 Q. What I'm trying to understand is how we got from three
10 to four. Do you have any idea? If you don't know, you
11 don't know. How do we get from a contract that only says
12 lot three is being purchased to one that says lot three and
13 boat slip B-1 is being purchased?

14 A. Yes.

15 Q. Do you know how we got there?

16 A. May I?

17 Q. Yes.

18 A. Because, as I had stated before, it was a package.

19 Q. Okay.

20 A. If you bought -- the land was the uppermost package, and
21 the slip went with the land.

22 Q. So there was never -- the answer is, I take it -- tell
23 me if I'm wrong -- to the question that there was never
24 anything in writing that specified that lot -- that slip lot
25 B-1 was going to be the slip lot that came with lot three?

1 There was never anything in writing?
2 A. If you're talking about a listing, a listing paper
3 identifying everything that we did not have --
4 Q. No. I'm talking about a contract. A contract for the
5 sale of real property at a price of \$700,000.
6 A. As a subagent to Karl, this is the way it was written.
7 Q. Well, let me ask you this: Would you agree with me,
8 then, that upon executing the contract, Number 3 -- upon
9 executing this contract, that Mr. Buck -- Mr. Buck and his
10 daughter, then Ms. Buck, were not entitled to any particular
11 lot? There was no contractual obligation to convey them a
12 specific slip lot?
13 A. If you will go back to Exhibit 3.
14 Q. Yes.
15 A. And you will see the tax map number there.
16 Q. Correct.
17 A. 421-11-00-075.
18 Q. Uh-huh.
19 A. The slip B-1 is part and parcel of this contract.
20 Q. Your testimony is that that TMS number describes --
21 A. Describes the land.
22 Q. -- the upland lot.
23 A. Describes the land. And the slip was the package that
24 went with it.
25 Q. Have you checked that out? Have you gone to the RMC

1 website or anything? Have you seen anything that says that?
2 A. I saw it when Karl showed me this is what the land
3 included.
4 Q. So the broker representation?
5 A. Yes.
6 Q. From Mr. McMillan?
7 A. Yes.
8 Q. So you had not verified what that TMS number is; have
9 you?
10 A. I verified that, indeed, it included the land. Yes.
11 Q. Okay. But so far as you know, the deed accurately
12 reflects the legal description of lot three, the upland lot,
13 and lot B-1, the slip lot, as far as you know? The legal
14 description in the deed, in Exhibit 4?
15 A. It looks like it. Yes.
16 Q. Okay. Pull out Exhibit 6, if you would. There is a
17 couple of pages to it, but, I guess, 6-A is what I want you
18 to look at now, if you would; and Exhibit Number 5, the
19 letter from Mr. David which is addressed to you.
20 A. Uh-huh.
21 Q. Okay. Now, when you received this letter -- did you get
22 this letter from Mr. David at the closing?
23 A. I never received the letter.
24 Q. You never got this letter?
25 A. It was given to Eddie and given to Susanne, and

1 Mr. David had a copy. And Eddie looked at it. And I said,
2 Does it look fine, Eddie?
3 And he said, Yes, I think it is.
4 Q. Did you see the letter at that time?
5 A. No, I did not.
6 Q. All right. Have you looked at it before today?
7 A. Not until right now.
8 Q. That's the first time you've ever seen it?
9 A. Uh-huh.
10 Q. Okay. At the closing, what was your understanding of
11 what this letter was supposed to be?
12 A. That it granted additional room for Eddie's boat. And
13 it clarified the situation, and we were all satisfied.
14 Q. By clarifying the situation, do you mean clarifying that
15 Zan, LLC were receiving a wider boat slip?
16 A. They were receiving what they were first indicated that
17 they would receive.
18 Q. Which was what?
19 A. Which was a 60-foot slip, a width that would encompass a
20 boat of Eddie's size.
21 Q. Were there no specifics about it? Just that he was
22 going to get a slip that was wide enough to accommodate his
23 boat? Wouldn't there have to be a little more specifics in
24 order to have a real estate transaction, like, the width?
25 A. I'm sure it was discussed between the buyer and the

1 seller. I was not a party to it.
2 Q. Your understanding --
3 A. Or the seller's representative.
4 Q. But the width of the slip was the concern as you
5 understood it?
6 A. Very definitely.
7 Q. So is it your testimony, you weren't clear how wide the
8 slip had to be, it just had to be wide enough to accommodate
9 his boat?
10 A. Yes.
11 Q. Okay. Now, is there anything in this letter which is
12 addressed to you -- I'm hearing it for the first time that
13 you've never seen it before today. Is there anything in
14 this letter that's addressed to you, that tells you how wide
15 the slip was going to be?
16 A. We didn't feel there needed to be, because it was,
17 clearly, indicated what the situation was and the
18 rectification of it. And the seller agreed to it, and the
19 buyer agreed to it. And the representative, our attorney,
20 and their attorney drew this up, and we felt it was adequate
21 for our needs.
22 Q. All right. Did you hear Mr. Buck and Mrs. Cantey
23 testify this morning?
24 A. Yes, I did.
25 Q. Do you remember them testifying that the slip needed to

1 be wider than the slip that was shown on the plat by which
2 they were purchasing?
3 A. We never received the plat.
4 Q. You never saw a plat?
5 A. We never received a plat until after the closing..
6 Q. You didn't hear -- did they not testify that they saw a
7 plat before the closing, and that's why they made a big deal
8 about the slip being wide enough? You don't remember that
9 testimony?
10 A. Excuse me. I never received a plat. Excuse me.
11 Q. Okay. All right. So their need at the closing was to
12 get assurance that they were going to be deeded a boat slip
13 that was two feet wider than the one shown on the plat that
14 described CSB -- lot -- excuse me, lot B-1, slip lot; isn't
15 that right?
16 A. Say it again, please.
17 Q. Didn't they testify they needed to get a slip, a boat
18 slip that was two feet wider than the one shown on the plat
19 describing lot B-1?
20 A. They, in all our discussions -- "they" being everyone
21 involved -- realized that B-1 needed to be wide enough for
22 Eddie's boat.
23 Q. Okay.
24 A. Did that answer your question?
25 Q. No. Did you not hear them testify this morning that the

1 slip had to be two feet wider than what was shown on the
2 plat that described lot B-1 which was the slip lot that they
3 were buying? Did you not hear them testify to that? Let's
4 take it one step at a time.
5 A. Please do. I'm getting a little confused.
6 Q. Well, you might not have heard it. You were sitting
7 here in the back; right?
8 A. I was sitting there.
9 Q. Let me put it this way: Do you remember at the closing
10 what it was exactly they wanted? Do you have any
11 recollection at all what it was that they wanted?
12 A. I have repeatedly told you.
13 Q. A slip that was wide enough to accommodate the Rookie
14 IV; right?
15 A. Right.
16 Q. Okay. But you don't remember how wide it needed to be?
17 A. Do I, personally, know the footage of the boat and how
18 wide --
19 Q. No.
20 A. -- the slip needed be? Is that what you're asking me?
21 Q. That's not what I'm asking. I apologize for asking a
22 bad question. I can do that in a skinny minute. What I'm
23 asking you, Ms. Carmody, this is a blow-up of the plat. I
24 would suggest to you --
25 A. Now, is that the slip or is that the land?

1 Q. This is the slip.
2 A. Okay.
3 Q. B-1, that's what's called out in the deed. This is the
4 plat that your clients, the Bucks, testified they saw before
5 the closing that gave them such great concern.
6 A. Indeed, it did.
7 Q. Okay. So my question to you is: Do you remember if
8 this slip wasn't big enough, wasn't wide enough, how much
9 wider did it need to be, if you remember?
10 A. Not exactly, no.
11 Q. But you testified that you believe there was some
12 agreement made?
13 A. Definitely.
14 Q. Okay. But you don't know what that agreement was?
15 A. Yes, I do.
16 Q. What was the agreement?
17 A. The agreement was that the additional piling would be
18 put in to the point where the Rookie IV would fit into the
19 slip --
20 Q. Now, what --
21 A. -- B-1.
22 Q. I'm sorry. What does a piling have to do?
23 A. Well, the piling is going to encompass the boat. It's
24 going to give parameters to how wide a boat could be to slip
25 into that slip.

1 Q. Well, if the pilings were placed here inside slip B-1 --
2 if the pilings were placed there, would that have given the
3 Rookie IV enough width to pass in and out if the pilings
4 were inside the pier?
5 A. Of course not.
6 Q. Okay.
7 A. Of course not.
8 Q. So the pilings had to be on the other side of this black
9 line; is that correct?
10 A. Wherever they would need to be is where they needed to
11 be to get the size slip for Eddie's boat.
12 Q. Okay. But you seem to be certain when I said they
13 couldn't be inside the pier that that wouldn't be wide
14 enough; that they couldn't be inside?
15 A. Well, I can see where the footage is right here, 20
16 feet.
17 Q. Twenty feet. Right. So the piling would have to be on
18 the other side of this line, inside lot B-2?
19 A. Yes.
20 Q. Okay.
21 A. And that's what we felt this letter told us.
22 Q. Now, tell me what there is in this letter that tells you
23 that?
24 A. That Eddie gets the pilings.
25 Q. Where -- show me the specific words that say pilings

1 will be placed inside lot B-2, which was not the lot being
2 purchased? Where does it say that in that letter in your
3 mind?

4 A. I think you need to ask Mr. David. He's the one who
5 drew it up.

6 Q. Mr. David will probably be up here later. I'm asking
7 you. Do you know where in this letter it gives assurance
8 that that was going to be done?

9 A. It does to me, because it's talking about the two
10 pilings.

11 Q. It says two pilings.

12 A. Right.

13 Q. But it doesn't say where they were going to be putting
14 them?

15 A. Well, not exactly.

16 Q. No. It doesn't at all, other than they're going to be
17 in line with the existing pilings; right?

18 A. The agreement was drawn up between the buyer and seller
19 and attorney, and the intent was to leave enough room in B-1
20 for Eddie's boat.

21 Q. But I'm asking you about what was, actually, produced in
22 this letter, which is the only document that we have that
23 reflects any agreement; isn't it? There's nothing else that
24 we haven't found, yet; is there, that you know about?

25 A. We have an agreement with two professionals as to what

1 the product was, and that's what was bought.

2 Q. Okay. But that letter doesn't say anything about those

3 pilings being placed inside lot B-2; does it?

4 A. Not per se.

5 Q. And it sure could have; couldn't it? But that was the

6 deal. It would have been easy enough to stick in a letter,

7 the pilings are going to be inside lot B-2?

8 A. I think you need to ask Mr. David.

9 Q. No. I'm asking you.

10 A. Well, I'm not an attorney.

11 Q. But you could --

12 A. I wasn't asked to draw this up.

13 Q. But you've been a realtor for how long?

14 A. Thirty-three years, now.

15 Q. And how big a deal is it in the business of being a real

16 estate broker, to make sure, to make sure that the documents

17 that describe a real estate transaction are precise; that

18 they say exactly what somebody's agreeing to buy; and then

19 at the closing, exactly what they are receiving? That's a

20 pretty important part of the whole deal; isn't it?

21 A. That's an extremely important part. I felt like my part

22 was to bring buyer and seller together for a mutual

23 agreement, which I felt I did, in a professional manner.

24 And then other professionals have to take over.

25 Q. Have you ever reviewed the master deed for the

1 condominium regime out there?

2 A. No.

3 Q. Have you ever seen them at all?

4 A. No.

5 Q. Did you ever talk to Mr. Buck or, then, Ms. Buck about

6 that due diligence period? What it was they were going to

7 do to assure themselves that what they were getting was what

8 they wanted?

9 A. No. They tell me about the due diligence period as

10 their agent. I am assured of putting it in the contract so

11 they do, indeed, have time to do what they'd like to do.

12 Q. Did you know there was a master deed that governed this

13 property, the condominium regime?

14 A. I felt there, probably, was.

15 Q. Did you think that, maybe, it would have been a good

16 idea for them to go look at it? Go down to the courthouse

17 and look at it, or, maybe, ask Mr. David for a copy?

18 A. I felt if they wanted to do that, they, certainly,

19 could.

20 Q. Because what if the master deed had said, in slip B-1,

21 you can't have a boat that's more than 55 feet long? If it,

22 clearly, said that, that would be a problem; wouldn't it?

23 A. Karl told differently. When we first went out, he very

24 assuredly told us what was encompassed in the package with

25 the land and the slip. We keep going back over and over on

1 this. And I felt confident. He's had a very good
2 reputation in real estate. And as his subagent, I felt he
3 knew his business.

4 Q. But his responsibility --

5 A. That along with the letter from Attorney David.

6 Q. His responsibility would be the same as yours; would it
7 not? To bring a buyer to --

8 A. I'm the sales agent. I was the listing agent.

9 Q. So you just don't think it was that important that
10 somebody tell the Bucks they ought to go down there and look
11 at the master deed, or ask Mr. David for a copy of the
12 master deed?

13 A. I told them if they'd like to do it, they could do it.

14 Q. Okay. If the pilings had been put in the canal where
15 Mr. Buck wanted them put in, who would have owned them?

16 A. If the pilings had been put in, who would have owned
17 them?

18 Q. Right.

19 A. That's a good question.

20 Q. Okay. Well, if they weren't going to be owned by
21 Mr. Buck, if they were going to be owned by somebody else,
22 that somebody else could just take them out; right?

23 A. They just show a measurement. They show the size of the
24 slip.

25 Q. Okay. All right. So once again, the main thrust of

1 what Mr. Buck wanted is he just wanted a wider slip than
2 what was shown on that plat?
3 A. Absolutely.
4 MR. BARNETT: Okay. That's all I have, Your Honor.
5 Mr. Dukes may have --
6 THE COURT: Thank you. Mr. Dukes, cross-examination?
7 CROSS-EXAMINATION
8 BY MR. DUKES:
9 Q. Ms. Carmody, I'm Mr. Dukes. You consider yourself to be
10 a careful realtor?
11 A. I do.
12 Q. You make it your practice to do your best for your
13 clients?
14 A. That's my fiduciary responsibility.
15 Q. Oh, so you agree you have a fiduciary responsibility to
16 your clients?
17 A. Very definitely.
18 Q. You have to put their interests ahead of your own?
19 A. Very definitely. It's in our code of ethics as a
20 realtor.
21 Q. And you're subject to license and requirements; aren't
22 you?
23 A. Very definitely.
24 Q. You prepared this contract that is Exhibit 3; didn't
25 you?

1 A. I did.

2 Q. And it's your handwriting other than the initials at the
3 bottom of each page?

4 A. It's my typing, yes.

5 Q. Okay. So you typed it?

6 A. Uh-huh.

7 Q. And where such as the date of closing on March 30th, is
8 that your handwriting or someone else's?

9 A. That doesn't look like my "three," but it's been
10 initialed on so it was ratified.

11 Q. And you typed in sale contingent upon however many days
12 --

13 A. I did.

14 Q. -- buyer due diligence period.

15 A. I did.

16 Q. And contingencies are frequent in real estate contracts;
17 aren't they?

18 A. Yes.

19 Q. I mean, when I bought houses, I put in a contingency
20 that you get a clean CL100, clean termite inspection, or
21 subject to an inspection that is acceptable to me as the
22 buyer.

23 A. Buyer's satisfaction, yes.

24 Q. In your responsibility as the realtor, if there is any
25 contingency that the buyer -- that your client want, it's

1 your job to put that contingency in the contract; isn't it?
2 A. Yes, it is.
3 Q. And part of that is if that contingency fails, it means
4 the buyer can walk away from the deal and get his earnest
5 money back; doesn't it?
6 A. What do you mean fail?
7 Q. If I'm buying the house through you and you're
8 representing me in the purchase of a house, and we put a
9 contingency in that there has to be a satisfactory CL100
10 termite inspection; and it comes out -- comes back when we
11 get the report from Terminix, there's some evidence of old
12 termite damage, but it's a dirty CL100. In your experience,
13 the buyer can either accept the condition of the property
14 and move on if they really like the house, or they can walk
15 away; can't they?
16 A. That's not a very good example. Because many many
17 houses in South Carolina come back with an unsatisfactory
18 initial termite letter which is corrected by the seller
19 before date of closing.
20 Q. Okay. Well, how about the contingency for a
21 satisfactory inspection?
22 A. Okay.
23 Q. An inspection that is satisfactory to the buyer?
24 A. Uh-huh.
25 Q. And it comes back and the wiring is bad throughout the

1 house.

2 A. Under the terms of the contract, that is not a cosmetic
3 item. That is a structural item.

4 Q. Right.

5 A. And the seller may correct the situation.

6 Q. Or if the inspection results are unacceptable to the
7 buyer, then they can cancel the contract; can't they?

8 A. Well, in certain circumstances, yes.

9 Q. Well, if the contingency is an inspection that is
10 acceptable to the buyer and the buyer says this inspection
11 is unacceptable, then the contingency fails and the contract
12 is void?

13 A. That has been put to the test many a time.

14 Q. Okay.

15 A. And at certain circumstances that's not normal.

16 Q. Oh, I know. Well, let me ask you this: If a
17 contingency is important to your buyer, your client, you put
18 it in the contract; don't you?

19 A. I do.

20 Q. Every time?

21 A. I am a buyer's agent. If that buyer wants to put a
22 contingency in, I put it in.

23 Q. And so when Mr. Buck says the purchase was subject to
24 the slip being wide enough for his boat, why is it not in
25 the contract?

1 A. Because --
2 Q. Because you didn't put it in there; did you?
3 A. We were told it was wide enough for his boat.
4 Q. Then why didn't you put it in the contract? Why did you
5 just trust somebody? This is an enforceable contract to
6 purchase real estate. If a contingency was important to
7 your client, why didn't you put it in the contract?
8 A. It wasn't a contingency. It was a given.
9 Q. Oh, so you're telling me now, that the sale of the lot
10 and boat slip was not contingent on the boat being able to
11 fit into the slip?
12 A. I'm not telling you that. No.
13 Q. Either it was or it wasn't, Ms. Carmody.
14 A. No. No. The way you worded it. It was not a
15 contingency as we wrote this contract up. That's --
16 Q. Did you listen to their testimony this morning?
17 THE COURT: Mr. Dukes, whoa now. Hold on. Just calm
18 down. Don't interrupt the lady. Give her a chance to
19 complete her answer. Then, you can fire another question.
20 Okay?
21 MR. DUKES: Yes, Your Honor.
22 THE COURT: Please finish your answer, please, ma'am.
23 MR. DUKES: I'm sorry, Ms. Carmody.
24 WITNESS: When we wrote the contract up, Susanne and
25 Eddie and myself, we went under the good faith of our

1 professional listing agent, and wrote it up as presented.
2 We were told that the B-1 slip would adequately take care of
3 Eddie's boat and the land would adequately be big enough for
4 Susanne to build. So no contingencies had to be in the
5 contract.
6 BY MR. DUKES:
7 Q. They testified this morning, Ms. Carmody, that,
8 essentially, if the slip couldn't accommodate Mr. Buck's
9 boat, they didn't want it. It was useless to them. I
10 believe they used that exact term.
11 A. We found that out after we had written the contract that
12 --
13 Q. But you knew --
14 A. -- that what --
15 Q. But you knew --
16 THE COURT: Mr. Dukes, please don't interrupt her.
17 Okay?
18 MR. DUKES: I'm sorry.
19 WITNESS: Thank you. That what was represented to us
20 was not, indeed, the case. This was after the contract was
21 written.
22 BY MR. DUKES:
23 Q. Have conditions ever changed in any real estate
24 transaction that you've ever dealt with where you wrote a
25 new contract?

1 A. In 33 years of real estate practice, this is the first
2 time I've sat where I'm sitting today.

3 Q. How many times have you represented a buyer where all
4 the important details were oral representations, nothing was
5 in writing?

6 A. That's too nebulous to answer.

7 Q. I'm sorry?

8 A. That's too nebulous to answer. The individual cases,
9 I'll be happy to explain.

10 Q. Ms. Buck or Mrs. Cantey signed the deed prior to your --
11 to Mr. David drafting this letter; correct?

12 A. If it was in the sheet of papers that she was supposed
13 to sign at closing that Attorney David had given to her,
14 then, yes. I, personally, did not see that deed.

15 Q. Okay. But if it was in the stack of closing papers --
16 and you've attended, what, thousands of closings?

17 A. I'd like to think a thousand.

18 Q. And, typically, in a closing, the closing attorney
19 brings in stacks of documents that you have to sign?

20 A. Very true.

21 Q. And did all of those documents get signed before
22 Mr. David drafted the letter regarding the pilings?

23 A. I do not recall that.

24 MR. DUKES: That's all I have. Thank you.

25 THE COURT: Thank you very much. Mr. David, any

1 cross-examination?

2 MR. DAVID: None, Your Honor. Thank you.

3 THE COURT: Okay. Any redirect?

4 MS. ENDEMANN: No, Your Honor. Thank you.

5 THE COURT: Okay. Ms. Carmody, you may step down.

6 Thank you so very much.

7 (The witness leaves the stand.)

8 MR. EPTING: Judge, may she be excused?

9 THE COURT: Any objection to her being excused?

10 MR. BARNETT: No objection.

11 MR. DUKES: No objection.

12 THE COURT: Ms. Carmody, you're welcome stay;

13 otherwise, you may be excused. Thank you very much.

14 WITNESS: Thank you.

15 THE COURT: If you'd call your next witness, please.

16 MR. EPTING: I think we'll put Mr. Buck up, Your Honor.

17 THE COURT: Put Mr. Buck back on the stand for cross.

18 Okay.

19 Mr. Buck, if you'll come around, please, sir.

20 CROSS-EXAMINATION

21 BY MR. BARNETT:

22 Q. Okay, Mr. Buck. You testified, I believe, that you

23 discovered at some point before closing that the slip B-1

24 that was shown on the plat -- and you have a blow up of that

25 part of the plat in front of you -- was too narrow to

1 accommodate the Rookie IV; is that correct?

2 A. When I was first showed the slip by Karl McMillan, it
3 was pointed out to me that it didn't have any name or title
4 to it. He said, That is the slip that goes with lot three.

5 I said, Fine. My boat will be able to stay in that
6 slip without any problem. And that was, I guess, maybe,
7 about the week or so before we signed the contract. And we
8 were told -- I did not see the master deed. We were told
9 with lot three went with that slip. It was not designated
10 B-1 or B-2 or B-15. It was told that was our slip.

11 I asked for a copy of the survey of the lot, which Mr.
12 McMillan said he would furnish. And I asked for a copy of
13 the survey plat of the boat slip. And we received a copy,
14 immediately, of the lot. We did not receive it of the boat
15 slip. And I told Mr. McMillan that I had to have it before
16 I would close.

17 So when I received the plat, I noticed that there was a
18 lot line there. It was not one slip as he had identified to
19 us. It was two slips. That's when I told him I was not
20 going to close.

21 Q. Well, I'm trying to get -- because I don't remember
22 frankly -- is exactly when that happened? When did you,
23 actually, see the plat? Do you remember?

24 A. I saw the plat -- I think, I got it one or two days
25 before the closing was scheduled.

1 Q. Okay. So was that, as far as you were concerned, you
2 were doing part of your due diligence to make sure what you
3 were buying was what you wanted?
4 A. Yes.
5 Q. All right. You all have put into evidence what's in
6 evidence as Exhibit 13, I believe, is the master deed. The
7 copy y'all put in has a recordation date of August 6, 2004.
8 So the master deed was down in the old courthouse if you
9 wanted to go look at it. But all that matters is you saw
10 the plat before you closed; right?
11 A. Yes.
12 Q. Okay.
13 A. I saw the plat. I did not see the master deed.
14 Q. Well, I understand. I understand. I mean, that's what
15 mattered to you in your due diligence to see whether the
16 slip B-1 was what you wanted to buy?
17 A. Right.
18 Q. But this plat told you whether it was what you wanted to
19 buy and your personal observations?
20 A. That's the reason we cancelled the closing.
21 Q. I'm with you. Okay. Now, you said the plat gave you
22 concern. And I beg -- apologize if I'm asking you to repeat
23 yourself. Please, use this and tell me what about this plat
24 told you that this slip -- as is, as is shown here --
25 A. Let me back up before that. I stood right here with

1 Karl McMillan, my daughter, and the agent. And Mr. McMillan
2 pointed between here and here, he said, is your slip.
3 I said, Fine. My boat will sit there.
4 Q. Now, is this before you --
5 A. Before I had a plat.
6 Q. I got you.
7 A. When I got the plat, the first thing I do is call my
8 agent and tell them to tell Karl McMillan I was not closing.
9 Karl called me, immediately, and said, What's the problem?
10 I said, My boat will not fit in that slip that you
11 designate on the plat that you gave me is not what you told
12 me I was buying. So I am not closing.
13 He said, Give me time to work out something. What do
14 you need?
15 I said, I need 20 feet and I need two pilings.
16 He said, Okay. He came back to me. He said, I have
17 talked to the owners, and we can give you the two feet
18 because we own the slip next door. We can give you the two
19 feet, and we can give you 20-foot clearance. Will you
20 close?
21 And I said, Yes, I would. And I went to the closing,
22 and was under the impression that that was going to be done
23 immediately, which I didn't see how it could be done knowing
24 the OCRM, but that was not my job. I went by the slip
25 before the closing, they were not in. I got to the

1 closing, told Dan David and Karl McMillan I was not closing.
2 Dan David asked me - asked me that he'd call the owners
3 and get it worked out.
4 I said, Fine. If you can work it out, I have no
5 problem with it. And you keep asking me about deeds and
6 all. I've bought thousands of pieces of property, and I'm
7 going to be honest with you, I have never been to the
8 courthouse.
9 Q. All right. I'm going to ask you about that in a minute,
10 Mr. Buck. But I'm going to ask you to, please, listen to my
11 question and answer the question. You testified --
12 A. Well, you tried to turn me around. You're asking --
13 Q. I'm sorry.
14 THE COURT: Mr. Buck, both of you, if you stop being
15 responsive, call it to my attention. I'll deal with it.
16 Don't argue with the witness.
17 MR. BARNETT: All right.
18 THE COURT: Mr. Buck, will you listen to me for a
19 minute, please, sir.
20 WITNESS: Yes, sir, Your Honor.
21 THE COURT: Okay. Calm down. Okay. Just take it
22 easy. Do you want some water? Do we need to take a break?
23 But calm down. Listen to the question, please, sir. Okay.
24 When he asks you a question, you can say, Yes, No, I don't
25 know, or I don't understand. Listen to me sir.

1 WITNESS: Yes, sir.
2 THE COURT: And then you may give an explanation.
3 Don't argue with the attorney. Do you understand?
4 WITNESS: Yes, sir.
5 THE COURT: Can you do that?
6 WITNESS: Yes, sir.
7 THE COURT: Will you do that?
8 WITNESS: Yes, sir.
9 THE COURT: Okay. Listen to his question and answer
10 it. I won't let him interrupt you. I will let you give a
11 chance to give whatever explanation you want to give. We're
12 not going to have this badgering back and forth between you
13 and the lawyer; do you understand?
14 WITNESS: Yes, sir.
15 THE COURT: It's called not being responsive to the
16 question. Do you understand?
17 WITNESS: Yes, sir.
18 THE COURT: Do you have any question about the process?
19 WITNESS: No, sir.
20 THE COURT: Okay. Please, proceed.
21 BY MR. BARNETT:
22 Q. All right, sir. What I'm asking you is a little more
23 specific. Which is what was there about the plat that gave
24 you concern that your boat wasn't going to be able to fit
25 into this slip?

1 A. Because I did not have the clearance.
2 Q. And the clearance would have to be, you said 20 feet?
3 A. Yes, sir.
4 Q. And let me just ask you this, Mr. Buck: This is a
5 walkway; right?
6 A. Correct.
7 Q. That's a floating walkway?
8 A. That's correct.
9 Q. And is that intrusion into this B-1 the way it's bounded
10 off here, this rectangular line -- is it that intrusion that
11 took away the width that you needed?
12 A. Well, that intrusion stopped me from having 20-foot
13 clearance.
14 Q. In other words, if that was gone or somehow that could
15 just go away -- okay. So that's the thing that keeps you?
16 A. Right.
17 Q. So, now, I believe, I heard you testify that you wanted
18 two pilings put in to keep the boat that might be over here
19 in CSB-2 from banging into your boat when it was coming and
20 going?
21 A. Yes, sir.
22 Q. And were those pilings going to have to be on the, I
23 guess, north side -- this is the north arrow -- of this line
24 dividing B-1 and B-2? In order for you to have 20-feet
25 clearance?

1 A. Yes.

2 Q. So had you concluded that two more feet - in other
3 words, if you got two feet of B-2, that would give you
4 sufficient width and have a place to put the pilings that
5 you wanted?

6 A. If it gave me 20 feet, it's according to where they
7 located the piling. Yes, sir.

8 Q. All right. I want to be clear. You took the position,
9 at the point that you studied this plat, that you were going
10 to have to have a wider property line? The property line
11 for B-1 was going to have to be pushed further to the north?

12 A. Yes, sir. That's what I was told would happen.

13 Q. If you couldn't get that dock, in your mind at that
14 time, before closing in April of '05 -- if you couldn't have
15 gotten that two extra feet of width for the slip you
16 required, would you agree with me that those pilings would
17 have been no use to you? You couldn't have pilings put
18 there so that you didn't have 20 feet width?

19 A. It wouldn't be any good.

20 Q. All right. So where ever the pilings went, you were
21 going to have to have 20 feet?

22 A. Right.

23 Q. And you're measuring the 20 feet from wherever the
24 pilings are to where that walkway is?

25 A. Yes, sir.

1 Q. Okay. You testified you've been in a lot of real
2 estate closings. I think you said somewhere between several
3 hundred million and a billion dollars worth of real estate
4 closings?
5 A. Yes, sir.
6 Q. Would you agree with me, Mr. Buck, it is typical,
7 particularly where a lot of money is involved, for
8 agreements about the very details of what's being purchased
9 to be put down in writing?
10 A. No, sir. I don't think it's necessary. I've done a lot
11 of deals that wasn't put down in writing.
12 Q. So --
13 A. In fact, I've done a lot of deals which I've never had a
14 contract for.
15 Q. All right.
16 A. I've got a building here in town I did 90 million with
17 him with a handshake, and he doesn't me owe anything; and I
18 don't owe him anything.
19 Q. I'm going to congratulate you.
20 A. You can't do that today, though.
21 Q. Yes. With what I've done for a living, I, certainly,
22 have to congratulate you for that. But would you agree with
23 me, however, that it is not just typical but necessary that
24 when a deed is conveyed and the deed is delivered from the
25 seller to the buyer, that deed has got to describe exactly

1 what's being purchased?

2 A. Yes, sir. I understand that. But that's not what

3 happened in this case. I was told by Dan David, who was

4 also representing me and the seller, that he would take care

5 of it, and send me the packet when he had the deed and the

6 title insurance in hand. And I received that six months

7 later.

8 Q. You received a deed to lot three and boat slip B-1 as

9 it's described on this plat. But isn't that what you got,

10 indeed?

11 A. I did.

12 Q. Okay. But you say that wasn't enough? That wasn't --

13 A. That was not what the attorney told me I was getting.

14 Q. So the deed that your daughter signed at the closing

15 that was then recorded and you got a copy of it several

16 months later, that deed did not convey to you what you said

17 you needed; is that correct?

18 A. You are correct. But I got it six months later, not

19 several months later.

20 Q. Well, I got you. Six months later. I mean, but the

21 deed was prepared? It was, physically, there at the

22 closing, because your daughter signed it?

23 A. I think it was there before the closing before I even

24 signed the contract.

25 Q. Well, it was executed by the seller?

1 A. Yes, sir.

2 Q. Okay. Now, would you agree with me the deed has got to
3 reflect what is actually purchased?

4 A. Yes, sir.

5 Q. Your testimony is that your deed did not give you what
6 you say you needed?

7 A. Right. Because it was after the fact when I received
8 the deed. The attorney told me he would take care of it.
9 And I relied on him like I have every other attorney that he
10 would do what he said he would do; and I did not receive
11 that. I got it six months later. I didn't even look at it
12 when it came six months later, because I was in negotiations
13 with Dan David, Karl McMillan, and Doc Knight about putting
14 in the pilings. I didn't think there was any question about
15 it. And they were trying to comply to that request.

16 Q. They were trying to get the pilings put in?

17 A. Yes, sir.

18 Q. All right. As it turns out, unsuccessfully? But they
19 were trying to get them in; right?

20 A. Well, they've been unsuccessful so far. I haven't seen
21 them, yet.

22 Q. I'm not trying -- I swear I'm not trying to belabor
23 this, Mr. Buck. Did you expect to get another deed other
24 than the one that your daughter signed at the date of
25 closing?

1 A. I expected to get a deed showing exactly what I was
2 buying which gave me 20-foot clearance in the slip and two
3 pilings is what I was expecting. At what time -- Dan David
4 just told us after the closing he would take care of it and
5 get us the complete package. I walked out of Dan's office
6 with no papers in my hand, sir.

7 Q. All right. The money changed hands, though?

8 A. Yes, sir. I left the money.

9 Q. There wasn't any money in escrow?

10 A. No, sir.

11 Q. You took a credit of -- I believe, the closing statement
12 shows twelve five from the seller and five thousand from --

13 A. That's correct.

14 Q. What was the decrease in price for?

15 A. It was an offer that Karl McMillan and the sellers
16 offered for me to close the loan. If they would give me the
17 20 feet, put in the two pilings, and reduce the price to
18 that amount.

19 Q. You said, Close the loan. You mean, close the sale?

20 A. Sale. Yes, sir.

21 Q. There's no loan.

22 A. I understand.

23 Q. People have been saying that throughout this case, too.
24 I don't know why. That's just the way it is. Now, would
25 you -- you've got the book of exhibits up there that your

1 lawyer put together?

2 A. Yes, sir.

3 Q. If you could take a look at Exhibit Number 5 with me,

4 please.

5 A. Yes, sir.

6 Q. And did you look at this letter at the closing? The one

7 that is addressed to Ms. Carmody -- I guess, she said she

8 didn't read it until today. Did you read this letter at the

9 closing?

10 A. Mr. Barnett, to be honest with you, I don't remember.

11 But I remember Dan David calling and saying that he would do

12 the letter and give it to us. My problem is I went on

13 trust, and I just didn't get it.

14 Q. Well, would you agree with me, though, that this letter

15 does not say where those two pilings were going to be

16 placed?

17 A. It does not say -- and when I met with Doc Knight, he

18 asked me where I wanted the two pilings. And he and I met;

19 I showed him where I wanted them. He told me no problem, he

20 would get it done; and I could be assured that it would be

21 done.

22 Q. All right. But it wasn't just the pilings. You had to

23 have the right to use two feet of slip BS-2?

24 A. Well, they -- I didn't have the right. They told me

25 that they owned it; that it would be no problem to giving me

1 that 20 feet to put the two pilings in. And, you know, I
2 said, how much -- do you normally -- we can do that; that's
3 fine.

4 Q. Who told you that -- who is the "they?"

5 A. Karl McMillan told me - he was the agent representing
6 the seller - that they had agreed to reduce the price; give
7 me the 20 feet; and put in the two pilings that I requested
8 if I would close the loan.

9 Q. The seller was East Coast Trading Company. Did
10 Mr. McMillan say East Coast Trading Company owns BS-2, slip
11 B-2?

12 A. I don't remember that.

13 Q. Okay. He was just using a lot of pronouns. It was your
14 understanding that Mr. McMillan's principle owned that slip;
15 is that correct?

16 A. All I knew is that Karl McMillan was representing the
17 property owner. That's all I knew.

18 Q. Did you have any discussions with Mr. David about who
19 owned slip B-2 on the date of closing?

20 A. No, sir. I didn't have discussions, because I was told
21 by Mr. McMillan --

22 Q. By Karl McMillan?

23 A. Yes, sir.

24 Q. Okay. But Dan David didn't tell you East Coast Trading
25 Company owned that slip?

1 A. I presume he knew, because Dan asked me to represent
2 himself doing all the closings, everything about his
3 property regime. You know, it's very complicated, but I
4 know what's involved.

5 Q. And, Mr. Buck, I'm going to shift with you a little bit.
6 You understood, did you not, at the time, from your own
7 personal experience with permitting things in navigable
8 waters; and that those pilings were going to have to be
9 approved by the Army Corps of Engineers and DHEC, the OCRM
10 branch of DHEC?

11 A. I would have presumed that, but not knowing the regime
12 and who owns docks and what they had gotten permission for
13 before that -- they may have already had permission and not
14 installed. I do not know that.

15 Q. But you knew they had to be approved in some fashion by
16 those two entities?

17 A. Right. Well, I had presumed they had been approved the
18 way they agreed to do it that they could put them in.

19 Q. Because you, actually, had -- you have a rather
20 substantial dock at your property?

21 A. Yes, sir.

22 Q. I believe -- tell me if I'm wrong -- there was a
23 substantial dock there, and you bought that property?

24 A. That's correct.

25 Q. But then you had it, sort of, enlarged in 1984?

1 A. Yes, sir.

2 Q. And then it was damaged substantially by Hurricane Hugo
3 in 1989?

4 A. Yes, sir.

5 Q. And then you had it modified again in the mid '90s?

6 A. Yes, sir.

7 Q. So you've been through the old Corps, OCRM square dance
8 three times?

9 A. Well, I haven't, personally, been through it.. American
10 Dock and Marine did all the permitting for me. I have never
11 been to the OCRM.

12 Q. Okay. The deed that was executed and then signed by
13 your daughter at the closing, actually, talks about how the
14 Army Corps of Engineers and the state in navigable waters;
15 doesn't it?

16 A. I couldn't even answer that. I never read the deed.

17 Q. Okay. All right. Well, that's fine. You just didn't
18 read the deed?

19 A. No, sir.

20 Q. All right. I mean, but it's in evidence. Okay. You
21 don't dispute the Army Corps and the state has very
22 significant power over all the structures in that canal,
23 sir?

24 A. No, sir.

25 Q. Okay. How about the master deed? That time that you

1 were deciding to finally close on this purchase, did you
2 look at the master deed, or ask anybody who was going to be
3 the owner of these pilings when they were stuck in the
4 canal?

5 A. I did not ask that.

6 Q. Okay. Did it matter to you whether you would be the
7 owner of those pilings or whether some --

8 A. It didn't matter to me.

9 Q. Okay. I'm not being argumentative, but let me ask you
10 this: Would you agree with me that if someone else owned
11 those pilings that were put in the canal, that other person
12 could take them out?

13 A. I understand that. But the regime owned it, and I
14 figured the pilings were part of the contract and deed to
15 put them in; the pilings would stay there.

16 Q. But if you weren't the owner of them, you were not going
17 to have any control over that, except as one member of the
18 POA?

19 A. I didn't ask to be a member.

20 Q. My point is, Mr. Buck, even if those pilings had been
21 put in, you were not going to have any assurance that they
22 were going to stay there?

23 A. Well, I can just say this: If those pilings were put in
24 and they were removed, I can assure you that I would have
25 started some type of legal action to protect my interest in

1 that slip.

2 Q. Against the person or entity that removed them, I

3 assume?

4 A. Yes, sir.

5 Q. If I told you that the master deed provides that the

6 regime was going to have to be the owner of those pilings,

7 would you disagree with me?

8 A. Would you repeat that?

9 Q. If I told you that the master deed was going to provide

10 any piling, dock, dock extension, anything like that, any

11 structure in that canal that was part of this marina was

12 going to belong as the common elements to the regime?

13 A. I would believe that. Yes.

14 Q. When your daughter testified earlier, did you hear her

15 testify that the memos, notices -- I'm not sure what they're

16 called -- that come from the Property Owner's Association

17 that they came to you and her?

18 A. That's correct

19 Q. They came about once a month?

20 A. Yes, sir.

21 Q. Okay. Did you read them when they came?

22 A. I just saw what the amounts were, but I didn't read

23 them.

24 Q. Okay. You just looked at the dues? So you don't really

25 know what the substance -- what they were reporting was

1 going on.

2 A. No, sir. All I knew was my monthly charge.

3 Q. Have you ever asked the regime to go to the Corps and

4 the OCRM and request permission to put pilings in?

5 A. No, sir.

6 Q. In fact, it would be -- they would have to -- those

7 pilings would still have to be put in somebody else's boat

8 slip; wouldn't it?

9 A. I believe he said Mr. Knight owned it; it would be in

10 the control of the regime at the time.

11 Q. Mr. McMillan?

12 A. Yes. No. No. I was told that Doc Knight owned the

13 slip and controlled the regime at the time that I bought the

14 slip. Now, what that meant, I do not know.

15 Q. Have you ever had any discussions with Mr. Belote?

16 A. No. No. I met him the first time today.

17 Q. All right, sir. I want to be clear that I understand

18 what you're saying about my clients, Mr. Belote, Mr. Knight,

19 East Coast Trading Company. You believe that they promised

20 you that they would convey to you two feet in slip B-2 and

21 put two pilings in what was part of slip B-2, even though

22 this was never put in any written form?

23 A. No, sir.

24 Q. And this was going to be something that was going to --

25 A. The only written form was the letter Mr. David gave

1 Ms. Carmody.
2 Q. Yes, sir, which we looked at. He did say that we'll put
3 two pilings in line, but it doesn't say where. And it
4 doesn't say anything about conveying two feet of slip B-2.
5 A. No, sir.
6 Q. So this was going to be something that they were going
7 to do in the future, in other words, after the closing?
8 A. No. I was, originally, told that it would be done
9 before closing.
10 Q. I know, but it wasn't; was it?
11 A. Right.
12 Q. So the only reason you closed is because you believe
13 they're telling you they were going to do it after the
14 closing?
15 A. Yes, sir.
16 MR. BARNETT: That's all the questions I have for you,
17 Mr. Buck. Mr. Dukes may have some questions.
18 THE COURT: Mr. Dukes, cross-examination, please, sir?
19 MR. EPTING: Judge, can I ask a question or have you
20 inquire if the witness needs to take a break?
21 WITNESS: Yes, I would like to, Your Honor.
22 THE COURT: Pardon?
23 WITNESS: Your Honor, could I have five minutes to take
24 my medication?
25 THE COURT: Yes. We'll take about five or ten minutes.

1 Okay. You may step down. Thank you very much.

2 (WHEREUPON, there was a brief recess.)

3 THE COURT: All right. Cross-examination, Mr. Dukes?

4 CROSS-EXAMINATION

5 BY MR. DUKES:

6 Q. Mr. Buck, you've never put your boat into this slip;
7 have you?

8 A. No, sir.

9 Q. How much water does your boat draw?

10 A. Four and a half feet.

11 Q. Four and a half. And slip CSB-1, you've rented out to
12 the owner of the Lady Gala in the past; right?

13 A. That's correct.

14 Q. And so they were able to dock their boat in that slip;
15 right?

16 A. Yes, sir.

17 Q. And that boat is larger than yours isn't it?

18 A. Yes, sir.

19 Q. I don't know how much water the Lady Gala draws; do you?

20 A. No, sir.

21 Q. So no one has ever come to you and said, you may not use
22 slip B-1 because somebody else owns it?

23 A. I was, originally, told that I could not rent the slip
24 out.

25 Q. I mean just use it as to moor a boat?

1 A. There's been plenty of boats that have been moored there
2 at the dock. I don't know who they belong to or where they
3 came from.
4 Q. I understand that. But with the Lady Gala, the Lady
5 Gala docked in your boat slip with your permission.
6 A. That's correct.
7 Q. And no one has come to you to say, you don't own slip
8 B-1, because I own it or someone else owns it? Has anyone
9 ever done that?
10 A. No, sir.
11 MR. DUKES: That's all I have for you. Thank you.
12 THE COURT: Thank you very much.
13 Mr. David, any cross-examination?
14 MR. DAVID: I'm sorry, Your Honor?
15 THE COURT: Any cross-examination?
16 MR. DAVID: No, sir.
17 THE COURT: Okay. Any redirect?
18 MR. EPTING: None, Your Honor.
19 THE COURT: All right. Mr. Buck, you may step down.
20 Thank you so very much.
21 WITNESS: Thank you, sir.
22 (The witness leaves the stand.)
23 THE COURT: Call your next witness.
24 MR. EPTING: I call Dan David to the stand, Judge.
25

1 DAN DAVID, being first duly sworn,
2 testified as follows:
3 THE CLERK: Thank you. Please, be seated. Sir, for
4 the record if you would please state your name, spelling
5 your last name.
6 WITNESS: Okay. Dan, D-a-v-i-d, David.
7 DIRECT EXAMINATION
8 BY MR. EPTING:
9 Q. So, Dan, you're not individually a defendant in this
10 action, but your title company is, St. Andrews; is that
11 right?
12 A. That's my understanding, yes.
13 Q. And you have been a lawyer since 1973?
14 A. Seventy, I think.
15 Q. Nineteen seventy. And you've owned a or been involved
16 in a substantial real estate practice for most of those
17 years?
18 A. Yes.
19 Q. St. Andrews is a title company?
20 A. It is. It's an agent for Chicago Title.
21 Q. All right. And St. Andrews is authorized to write title
22 insurance insuring owners of property for the property that
23 they've contracted to purchase?
24 A. That is correct. Up to a certain amount, and then after
25 that, we have to get a letter of authority.

1 Q. And St. Andrews performed the service that I just - my
2 last question concerned for Chicago Title in this particular
3 transaction?
4 A. It did.
5 Q. All right. Can owners issue a title policy, believe and
6 rely on what St. Andrews does and tells the owner in
7 performing the work?
8 A. They can, certainly, rely on what's written in the
9 document. I don't know of any time that I've ever told
10 anybody anything other than what was in the documents.
11 Q. Well, for example, in this case, you wrote a letter.
12 A. I did.
13 Q. All right. So that might not be telling somebody
14 something, but that's what I meant. Can an owner who gets a
15 letter like that from you rely on that letter for purposes
16 of trusting what is being told by St. Andrews Title?
17 A. No.
18 Q. All right.
19 A. I would not think so.
20 Q. All right. And so the letter that you wrote in this
21 case, you would not think that the owner was entitled to
22 rely on it?
23 A. No. That's not what you asked me. I'm sorry. I do
24 think the owner was entitled to rely on what was in that
25 letter and what I told them. And the reason for the letter

1 was -- do you want me to go into that?

2 Q. I'm just trying to get this right. When you wrote this
3 letter, whose authority were you seeking to write this?
4 From whom did you seek authority to write this letter?

5 A. What happened was when Eddie and those came to close,
6 his daughter and, I think, Margaret, his wife was there; and
7 Ms. Carmody was there. They were talking about these
8 pilings. And I was, really, unclear about that. I mean,
9 there was nothing in the contract. I don't recall anybody
10 having told me about the pilings earlier. And so it had
11 been my practice, if there was something that someone had
12 agreed to that would cost money or that somebody would want
13 a reliance on - in this instance, Eddie was looking to the
14 seller to make sure these pilings were paid for.

15 So I said, Well, let me go - let's make sure what
16 everybody was talking about. So I went and called, and I
17 believe that I talked to Doc Knight, but it may have been
18 Mr. Belote. My recollection is it was Doc. And that he
19 said, that's fine. Apparently, it had been something that
20 had been discussed. So I, simply, wrote a two sentence
21 letter. Lynn Carmody asked me about the dredging. I told
22 her there was money in dredging for that and there was
23 another thing she asked about. So I wrote that letter to
24 insure Mr. Buck that the seller was willing to pay for the
25 installation of those pilings..

1 Q. Okay. We're going to come to all that. I didn't want
2 to interrupt you after the judge's admonition. My question
3 was pretty simple.
4 A. All right.
5 Q. Who did you seek authority from to write that letter?
6 Did I understand you it was either Doc Knight or Michael
7 Belote?
8 A. That's correct.
9 Q. All right. Now, Dan, when you write a letter such as
10 that, Dan, do the people that you write the letter for and
11 to, are they able to rely on you? Do you intend them to
12 rely on what it is you tell them?
13 A. Absolutely. Absolutely.
14 Q. Okay. Now, if I understand this right, Dan, East Coast
15 Trading Company is owned by Mr. Belote?
16 A. That's my understanding. Yes.
17 Q. And you have represented both East Coast Trading Company
18 and Mr. Belote?
19 A. I don't know that I've represented him, personally, but
20 I've, certainly, represented East Coast Trading.
21 Q. Now, Pavilion was another owner of Ripley along with
22 East Coast Trading Company, or was Mr. McNair the owner of
23 Pavilion the owner of Ripley?
24 A. No. There were two corporate entities that owned an
25 interest in Ripley. One was Pavilion and the other one was

1 East Coast.

2 Q. All right. So we have in this case, Ripley, which is
3 the party who entered into this contract to sell this
4 property to Zan. And that entity, Ripley, is owned by two
5 other entities, one, Pavilion and the other East Coast
6 Trading?

7 A. Correct.

8 Q. And East Coast Trading is owned by Mr. Belote? And
9 Pavilion is owned by Mr. McNair?

10 A. He has an interest in Pavilion.

11 Q. All right. And you have represented Pavilion and
12 Mr. McNair along with East Coast Trading Company and
13 Mr. Belote over the years?

14 A. I don't know that I've -- I have. But when I first
15 started representing them, it had to do with this particular
16 marina project. After that time, in, I guess, the last
17 three or four years, I've represented Mr. McNair and
18 Pavilion more so than I have Mr. Belote.

19 Q. Now, W.H. Knight, as I understand it, he executed some
20 of the documents that we've been concerned with the contract
21 of deeds. He had a company as well involved in this
22 transaction; did he not?

23 A. I'm not aware if he did. I think that he was involved
24 with Mr. Belote as a -- he had a power of attorney to sign
25 documents. He did a lot of the meeting with the appropriate

1 government authorities in order to get plats and other
2 documents approved. But I don't believe he had an ownership
3 position. I think your wrong about that.

4 Q. Well, if he didn't have an -- didn't he have his own
5 separate company like Real One or something like that?

6 A. No. That was somebody else.

7 Q. Somebody else. But in any event, you had been
8 associated with these individuals and or entities that I've
9 been asking you about for the last three or four minutes
10 since the beginning of this project, meaning the whole
11 Ripley's project?

12 A. Yes.

13 Q. And you were involved, for example, you're the agent for
14 service of process of many of these companies and some of
15 the regimes that operate the marinas?

16 A. Correct.

17 Q. So you've been involved in this transaction from its
18 inception to now. So how many years would that be?

19 A. Oh, gosh. I'm not sure. Probably, about seven.

20 Q. All right. And in this transaction, you represented the
21 seller to ensure that the documents you prepared, the deed,
22 the plats, etcetera conveyed what the seller was contracting
23 to sell?

24 A. Okay. I, certainly, prepared the deed pursuant to the
25 terms of the contract, but I don't believe that I had

1 anything to do with the plat.
2 Q. Why don't you open up your deposition here, Dan.
3 A. Okay.
4 MR. EPTING: Madam Court Reporter, it's my practice to
5 make them -
6 MR. DUKES: Your Honor?
7 MR. EPTING: -- Court Exhibit A.
8 THE COURT: I'm sorry. What's your legal objection?
9 MR. DUKES: He has not satisfied the prerequisites of
10 Rule 32, using a deposition at trial. Mr. David's not a
11 party to this lawsuit.
12 MR. EPTING: I'm getting ready to impeach him.
13 THE COURT: Okay. Please proceed.
14 WITNESS: Do you have any scissors?
15 MR. EPTING: Doc might say he has a knife, but not
16 here.
17 WITNESS: I got it. Okay.
18 BY MR. EPTING:
19 Q. Could you turn with me -- and turn to page 26.
20 A. Okay.
21 Q. All right. I ask you on line 12, page 26, who did you
22 believe your client was in this transaction? And your
23 answer was what?
24 A. That is always an interesting question. The Supremes
25 have been a little vague on some of that. I guess a couple

1 of facets to it in doing what I just said in the handling of
2 the transaction to make sure there were no liens,
3 encumbrances, and making sure that if there was a mortgage
4 on the property, that all of that was taken care of, and if
5 there was a mortgage in the name of the seller, that all of
6 the satisfactions, you know, the satisfaction was recorded,
7 those sorts of things.

8 From the standpoint of the seller, to ensure the
9 documents are prepared according to the plat and the other
10 legal documents that show that they would convey what they
11 had and what the contract called for. So, I guess, to that
12 extent, there was a dual situation there, which happens in
13 most closings.

14 Q. So I asked you the question to prepare the documents,
15 the plats, the legal documents so that they could form to
16 what the contract called for --

17 A. I'm sorry, Drew. I must have misunderstood you. I
18 thought that you had asked me about preparing the plat.

19 Q. Right.

20 A. But, yes, the documents are definitely -- the recorded
21 plat in almost all situations nowadays is the controlling
22 instrument that describes the property. It used to be that
23 sometimes it would be recorded by metes and bounds and
24 courses of distances and those kinds of things, very long
25 cumbersome. Nowadays, you, simply -- not simply, but you

1 will have a plat that is recorded, and you will identify
2 that plat as being recorded in the RMC office and you convey
3 the lot pursuant to that plat. So that's what I did. I'm
4 sorry. I misunderstood you.

5 Q. And we'll come to that. But what I wanted to ask you
6 was from the standpoint of the seller in this transaction,
7 in the representation of the seller, your job was to prepare
8 the documents according to the plat and other documents that
9 showed they would convey what had been contracted for?

10 A. That's correct.

11 Q. All right, sir. And you represented Zan to make sure
12 that Zan got good and marketable title?

13 A. Correct.

14 Q. All right. Now, Dan, in this case, if you will refer to
15 the Exhibit 3. That's the contract that we're concerned
16 with; right?

17 A. That is my understanding. Yes.

18 Q. All right. And the seller at this time is shown as
19 Ripley?

20 A. That is correct.

21 Q. Now, what we know, Dan, is that some time after the date
22 of this contract, February '03 -- '05 that a transfer of B-1
23 and B-2 were made out of Ripley's to East Coast then one to
24 Pavilion. Can you tell the judge why that was done and what
25 happened?

1 A. My understanding is that most of all the property had
2 been sold. The Home Owners Association had been turned
3 over. And rather than waiting to sell the other lots as it
4 will be, I think, East Coast took this particular lot and
5 boat slip and Pavilion took -- it may have been three other
6 lots and boat slips. I don't remember the number. But they
7 did take B-2 was one of the ones that they got and there
8 were a couple of others.

9 Q. All right. Just to -- because I know the judge is
10 taking in a lot of information, and I'm not going to worry
11 about the lots. What we know is after the contract of the
12 sale in February and before the deed was executed in April,
13 B-2 was transferred out of Ripley's to East Coast -- excuse
14 me, B-1 was transferred from Ripley to East Coast and B-2 to
15 Pavilion?

16 A. That's correct.

17 Q. All right. So that -- do you know, Dan, when the deed
18 to Mr. McNair on B-2 was, actually, recorded without regard
19 to when it was executed?

20 A. I really do not. I think that all of this was done some
21 time -- I want to say March, but I could be wrong about
22 that.

23 Q. All right. The deed, indeed, to B-2 was executed in
24 March, but it was not recorded, I think, for some five or
25 six later. But I'll get the deed and we'll deal with that

1 tomorrow. Okay. Now, are you familiar as the closing came
2 forward by Zan for this property that there was a closing
3 scheduled for March 5th, the first one, that did not go
4 forward?
5 A. I don't, specifically, recall all that, but I do know
6 that that is correct.
7 Q. All right. And what we know, Dan, is that the actual
8 deed, which is Exhibit 4, was signed by East Coast, by
9 Mr. Knight on March the 5th. Is that what it says?
10 A. That is what it says.
11 Q. All right. And I noticed below you say that Mr. Belote
12 is a member of East Coast Trading Company, and you certified
13 that?
14 A. Correct.
15 Q. But this document is being executed on behalf of
16 Mr. Belote by Mr. Knight?
17 A. Yes. Under power of attorney.
18 Q. And is there any question in your mind that Mr. Knight
19 had any authority to bind Mr. Belote?
20 A. None whatsoever.
21 Q. All right. Now, let's turn the next page. You state at
22 the bottom, Dan, that the foregoing instrument by Susanne
23 Buck was executed on the fifth day of January. That didn't
24 happen; right?
25 A. That did not happen. That was a scrivener's error.

1 Q. Do you recall when Ms. Buck executed this document?
2 A. The day of the closing.
3 Q. All right. The day of the closing. All right. So we
4 think that's April 5th?
5 A. I believe that is correct.
6 Q. All right. Dan, if you would, turn with me to Exhibit
7 10. And I want you to refer to the second page of Exhibit
8 10. And do you see the owner's coverage statement?
9 A. Which paragraph?
10 Q. It's the first paragraph in the left-hand column, page
11 two of Exhibit 10.
12 A. Paragraph two?
13 Q. It says the policy insures you against actual loss. The
14 first paragraph.
15 A. Okay.
16 Q. All right. You see in that paragraph it says that it is
17 issued for a one-to-four family residence, and that the
18 buyer is a natural person?
19 A. I want to make sure I'm on the right page. Owner's
20 coverage statement?
21 Q. Right.
22 A. Yes. It does say that.
23 Q. In this case, you knew when you issued this policy that,
24 one, this is not a natural person; and, two, that there was
25 no residence?

1 A. That's correct.

2 Q. And it was, actually, issued, in fact, to Zan, a -- not
3 a natural person?

4 A. That's correct.

5 Q. Why is it that the title policy would not accurately
6 describe the buyer?

7 A. Because they give us what they call generic jackets or
8 printed documents that each of them have a number which you
9 have to account for. Whenever you, initially, called that
10 to my attention, I was, actually, a little shocked. And I
11 called Chicago Title, and they said, no, that's an
12 appropriate form.

13 Q. All right. So that's not any impairment here to Zan
14 being insured by Chicago Title?

15 A. None that I'm aware of, nor that I ever heard of.

16 Q. Now, let's go to this closing on April the 5th. It
17 occurred at your office?

18 A. It did.

19 Q. Do you remember who was there?

20 A. Well, my recollection is that Eddie, his wife, Margaret,
21 were there, because we chatted for a good while, and his
22 daughter, Susanne, who I don't think I've ever met before,
23 and Ms. Carmody was there.

24 Q. Now, can you tell us, Dan, the circumstances under which
25 Exhibit 5 was written? And this is what you began talking

1 about when we began the letter?

2 A. The letter.

3 Q. All right.

4 A. Okay.

5 Q. Well, let me ask you just a few preliminary questions.

6 A. Okay.

7 Q. Would you have called and talked to either Mr. Knight or

8 Mr. Belote before you ever issued this letter?

9 A. Yes, I would have.

10 Q. All right.

11 A. But at about the same time. The reason I did that was

12 to make sure that everybody understood what they were

13 supposed to do for Eddie. And I think that Lynn asked for

14 that as well.

15 Q. And when this authorization was received by you, while

16 it says Ripley Cove, of course, the actual seller by now is

17 East Coast Trading Company; right?

18 A. That's right.

19 Q. But you understood, clearly, in the conversation that

20 you had with either Mr. Belote or Mr. Knight that you were

21 being given authority whether it was for Ripley to sign or

22 for East Coast, you could make that representation on behalf

23 of both of those entities?

24 A. Absolutely.

25 Q. All right. Now, can I assume, Dan, that you wrote this

1 letter using the words you used for a deliberate reason?
2 A. Certainly, for the -- yes.
3 Q. All right. I mean, where you say in here that two
4 pilings will be placed in line with the existing pilings of
5 the adjoining boat slips, that those just don't seem like
6 make-up words?
7 A. They are not. And we talked about this. And my initial
8 recollection is still what I understood from the gist of the
9 conversation was that Eddie wanted two pilings in the front
10 of his boat so that he could tie up on the front, because
11 this was a short finger pier that you walked on. And I've
12 tied a much smaller boat up there. Where I was there was a
13 piling a little further up that was difficult to tie up.
14 But I have heard everybody's explanation about that
15 they thought that the two pilings were on the side. I,
16 actually, went out -- I've gone out several times, and
17 looked at where the pilings were and where they're in line.
18 Maybe, that's what he understood. And I, certainly -- in my
19 mind, it does not make any difference. There's two pilings
20 that he was supposed to receive. I still think that if the
21 OCRM or whoever authorizes the pilings that Doc Knight and
22 Mike Belote will put them in.
23 Q. And can they put them in to slip B-2?
24 A. They cannot put them in to slip B-2, but they can put
25 them on the boundary lines.

1 Q. Now, let me ask you this question, Dan, I had asked you
2 do you think you used the words deliberately in this letter?
3 A. To the best of my knowledge, there was some meaning
4 there. I don't think that -- there's, certainly, a certain
5 amount of mistakes in any marina. And if you go out and
6 look, most all of those pilings where there are pilings are
7 in line, looking down north in front, I guess, B-1 down to
8 whatever the last one is before you get to the real wide
9 ones -- excuse me, the real long ones.
10 Q. Do you remember me asking you, Dan, about -- I asked you
11 if you used those words deliberately in your deposition, and
12 you said "yes."
13 A. Okay.
14 Q. Do you remember that?
15 A. I do. I think that I -- I hope that I said "yes."
16 Q. And you agree with me, do you not, that if these pilings
17 were out in front of Mr. Buck's boat, they wouldn't line up
18 with any other pilings, because there were no pilings behind
19 Mr. Buck's boat; correct?
20 A. That's true, but if they were out in front, there are
21 some pilings that are lined up. And what I'm talking --
22 what I see when I look at them is that even if they're on
23 the side where Eddie says that he wanted them to be, they
24 would line up with the other pilings down the way.
25 Q. If you would, Dan, look at Exhibit 6A. Now, the judge

1 will hear a lot tomorrow about getting into navigable
2 waters.
3 A. Okay.
4 Q. You see the boat to the right? It appears in front of
5 the dry stack?
6 A. Two of them.
7 Q. All right. And you see those two pilings?
8 A. That is correct.
9 Q. And you understand that those are the two pilings that
10 Mr. Buck has the plat showing where his two pilings line up
11 with those two?
12 A. On the -- which would be on the left side of his boat.
13 Q. Right.
14 A. Okay.
15 Q. All right. Now, if you put a piling out in front of
16 that float, are you in navigable waters?
17 A. You could well be, yes.
18 Q. All right. And putting pilings in navigable waters,
19 Dan, is an entirely different issue than putting a couple of
20 pilings within some finger piers; is it not?
21 A. It is.
22 Q. All right, sir. And indeed, one of the -- or perhaps
23 you don't know this. One of the things that's being
24 contended here is they were prevented from putting these
25 pilings in because it was in navigable waters. Are you

1 aware?

2 A. I'm not aware of that being the case. I'm aware of a
3 situation that occurred further down the marina.

4 Q. Right. But I'm asking are you aware in this case that
5 the seller defendants take the position that putting the
6 pilings in would have been in navigable waters and that's
7 why they would refuse?

8 A. Well, if they were -- I have heard that. But what I'm
9 trying to say is that if you look at the piling on the right
10 side of the boat. That if you would put another piling in
11 front of that, depending on where you put it, it may not be
12 in navigable waters. But, certainly, if you put it on the
13 left side of the boat, it would not be in navigable waters.
14 It would be on the property line between B-1 and B-2, or
15 could be.

16 Q. And if you put the second piling in behind the foremost
17 piling, it wouldn't be in navigable waters, either? Would
18 it be even further back to the stern of the boat?

19 A. Certainly. And you can see the two pilings. You see
20 two pilings on the left of the boat -- excuse me, the right
21 of the boat. And you see two pilings over on the other
22 finger pier which is on the left of the boat. So if you
23 would say that they're going to line up with that, then they
24 would line up with those four pilings.

25 Q. All right. Now, let me ask you a pretty important

1 question, Dan. I think you said that you understood pretty
2 clearly that Mr. Buck didn't like having his boat over in
3 Wappoo Cut?

4 A. That was the conversation that was had, yes.

5 Q. All right. And you've lived around these parts for a
6 long time. There is no more traffic an area from the North
7 Carolina to the Georgia line than Wappoo cut; is there?

8 A. It's pretty heavy with traffic, yes.

9 Q. And you've heard Mr. Buck give you the approximate value
10 of the boat? It's not a cheap boat.

11 A. Eddie's never had a cheap boat.

12 Q. All right. And you knew that Mr. Buck's reason for
13 buying this was to move his boat from where it was moored in
14 Wappoo to here?

15 A. I'm not sure that I really understood the reason behind
16 it. He, certainly, indicated that he wanted to do that.
17 But he, also, talked about his daughter, Susanne, and
18 wanting to provide -- I kind of thought -- I got the
19 impression it was a dual purpose, while she was going to
20 live in the house, he was going to put his boat there.

21 Q. All right. Well, I think that is accurate. But you
22 understood what Mr. Buck was doing with the slip? He was
23 buying this property in part to get his boat out of Wappoo?

24 A. He did want to do that, yes.

25 Q. All right. And you would understand, would you not,

1 Dan, that you cannot take a twenty foot boat and put it into
2 a fifteen foot slip with pilings on both sides; can you?
3 A. That would seem to be obvious, yes.
4 Q. All right. And in this case, Dan, you're more of a real
5 estate lawyer than anybody here. And Mr. Barnett has asked
6 quite a few questions about needing two feet. You see B-1
7 here?
8 A. Can I look at this a little?
9 Q. Yes, please do.
10 A. Thank you.
11 Q. You see B-1 there?
12 A. I do.
13 Q. The 20.37 feet on the right-hand line commences at some
14 place in-between B-1 and B-2; right?
15 A. Yes.
16 Q. All right. But the twenty feet includes to the center
17 line of the finger pier, this line?
18 A. Well, I'm not sure if it's the center line, but it does
19 -- the 20.37 feet from the black line to the black line -- I
20 say "black," the heavy line.
21 Q. All right. And do you know -- and we can scale it. Do
22 you know what the width of that pier -- you understand
23 that's where the dry stack on the other side of that pier is
24 where the dry stack drops and raises boats?
25 A. That is true.

1 Q. Do you know what the width of that pier is between B-1
2 and the marina?
3 A. The times that I've looked at it, it looks like it's
4 about a foot and a half to two feet.
5 Q. All right.
6 MR. EPTING: Well, Judge, one of the things we may need
7 to do --
8 BY MR. EPTING:
9 Q. Do this, Dan. Look at Exhibit 6A.
10 A. All right.
11 Q. That finger pier is ten feet wide, Dan?
12 A. Yes. I think that -- I don't think all of that is --
13 with Eddie's property, as I understand it, is from the
14 inside of those pilings. I don't think the twenty feet
15 includes all of this -- the floating dock. I could be
16 wrong.
17 Q. Let me get back to this.
18 A. Okay.
19 Q. You're representing Eddie Buck or Zan to ensure that
20 they get what it is they want?
21 A. Correct. Whatever the plat says.
22 Q. And you know that Eddie Buck to put his boat there,
23 needs to put his boat there?
24 A. I know that's what he wanted to do, yes.
25 Q. And did you, when he said, I need two pilings, did you

1 say anything, like, there's not twenty feet there?

2 A. No, because I wasn't sure how much space he needed.

3 Q. So you closed this transaction on the basis that two

4 pilings needed to be put in, but without knowing exactly

5 where they were to be put in; and figured that's something

6 that had been worked out between Eddie and Karl or Eddie and

7 Doc?

8 A. I closed it based on -- yes, I did. Based on the fact

9 that whatever the plat and whatever the deed called for that

10 was what my understanding is is what he was buying. And the

11 two pilings were supplemental to that. He needed something

12 to tie his boat to.

13 Q. Right. Have you ever had any other dealings with

14 Mr. Buck or Susanne Buck, now Susanne Cantey, Lynn Carmody?

15 A. I don't think I've had any dealings with any of those,

16 except Eddie and Ms. Carmody.

17 Q. Okay. You sat here today during the testimony?

18 A. Right.

19 Q. They testified quite clearly with the subject of the

20 twenty feet and getting title insurance came up in the

21 closing?

22 A. Looking at this plat and listening to what they said, I

23 don't think there's any question about that. The title

24 insurance insured the twenty feet, whatever the dimensions

25 of that lot is. That is what they insured. When they start

1 talking about an additional two feet, that was not --
2 Q. Let me ask you, Dan, if you would, please turn in your
3 deposition to page 69, line 22.
4 A. What page?
5 Q. Page 69, line 22. And we, Dan, are going to read
6 through page 71, line 20. And I'll read the question and
7 you read the answer.
8 MR. DUKES: Judge, he's not impeaching Mr. David on
9 this. He hasn't satisfied Rule 32(a)'s requirements. I
10 object to reading in deposition excerpts.
11 THE COURT: Well, I don't know what's on page 69. I
12 assume he's phrasing the question as if he's going to
13 impeach him based upon what he just said about why they
14 wanted the title insurance policy. I don't know what it
15 says. I assume that's what he's doing.
16 MR. EPTING: That's exactly what I'm doing.
17 THE COURT: Okay. He can use it for impeachment
18 purposes. I assume he's going to impeach him because of
19 something different in the deposition about why the
20 plaintiff wanted title insurance. I don't know. I haven't
21 seen it. If you want to give me the deposition, I'll read
22 it and see if that's what he's doing or not doing. I don't
23 know what it says, but I assume that's what he's doing. And
24 he can impeach him with it.
25 Do you disagree it's impeachment?

1 MR. DUKES: I disagree that he's testified --
2 THE COURT: He's not offering it under Rule 32.
3 MR. DUKES: Rule 32 allows him to introduce it for
4 impeachment, but I don't think this is impeachment.
5 (WHEREUPON, the Court reads the deposition.)
6 THE COURT: I'll read it. It's not impeachment on
7 anything that I've heard up to this point in time. Okay.
8 Now, do you all want to argue about Rule 32? I'll get my
9 rule book out.
10 MR. EPTING: Well, Judge, I think I can handle this,
11 maybe, a different way.
12 THE COURT: You may ask him the same questions, and if
13 he changes his answer, whatever you're going to do. I mean,
14 there's other ways of doing it. But I'm not going to let
15 you read the deposition. I agree with Mr. Dukes. That what
16 portion you're offering is not impeachment as to what he's
17 said up to this point in time.
18 MR. EPTING: All right, sir.
19 BY MR. EPTING:
20 Q. Dan, would you agree with me that the title insurance is
21 determined by what is in the contract?
22 A. No. I think the title insurance is what's in the deed
23 and what is in the title insurance policy, itself.
24 Q. Would you please, if you would, now, turn to page 69,
25 line 22?

1 A. Okay.

2 Q. I ask you the question on 22, you read the answer. All
3 right?

4 A. But the title company would have some responsibility to
5 provide what was called -- what was called for in the
6 contract.

7 Q. All right. So --

8 A. But I am assuming that your contract provides for A, B,
9 C and D.

10 Q. And, question, right. And so really if I can reduce
11 this down to a simple formulation, I am not suggesting this
12 is the issue, but just for purposes of this deposition.

13 A. Okay.

14 Q. Then in your scenario, what this turns on, the question
15 of the title company's obligation, is a question of what is
16 platted and conveyed. And in this case, the question is
17 what was agreed to be conveyed?

18 A. Are we talking in terms of title insurance company now?

19 Q. Question: No, I'm just talking --

20 A. In general?

21 Q. Right?

22 A. The controlling, as I understand it, and I certainly
23 stand to be corrected, there are a number of exceptions, as
24 we all know, that take it outside of the written word. But
25 generally speaking, the contract of the sale is the

1 controlling document. Nowadays, they are so specific about,
2 you know, the warranties and so on and so forth, that are
3 going with the property.
4 Q. Can I?
5 A. Yes.
6 Q. Because I will lose this thought. A lot of questions
7 about what the contract of sale said and doesn't say,
8 ultimately, as I understand it, really, once there is a deed
9 issued, the contract for sale is just, sort of, gone and is
10 merged into the deed? Isn't that --
11 A. Answer: In most instances. Sometimes, and I don't know
12 about this, they will take -- the contract will say that it
13 survives the closing.
14 Q. Question: Absent that?
15 A. Absent that, it kind of merges into the deed and
16 whatever was called for in that written document should have
17 been conveyed.
18 Q. All right. The reason that I stopped you was you said
19 something like it is ultimately a question of the deed. It
20 is the deed. And your answer was?
21 A. A question of the contract.
22 Q. All right, sir. Thank you, sir.
23 MR. EPTING: Judge, I have no more questions at this
24 time.
25 THE COURT: Cross-examination, Mr. Barnett? Unless you

1 all want Mr. Dukes go first for a change? Whatever you all
2 want to do. I mean, it doesn't matter to me. Just whatever
3 you want to do.

4 MR. BARNETT: I like that.

5 MR. DUKES: Judge, we had a race to this end of the
6 table.

7 THE COURT: Oh, okay.

8 MR. DUKES: I distracted Mr. Barnett while we ran and
9 grabbed the end seats.

10 CROSS-EXAMINATION

11 BY MR. DUKES:

12 Q. Dan, let's pull out your agency agreement which is
13 marked as Exhibit 22.

14 A. Where would I find that?

15 Q. You understand that as a title agent, your authority to
16 do things is limited?

17 A. Correct.

18 Q. And you're authorized by the company to underwrite title
19 insurance?

20 MR. EPTING: Your Honor, I want to make a fine
21 distinction here. I think there may be instances in which
22 he can lead Mr. David because he wore multiple hats. But
23 when it comes to this agency bringing his relationship with
24 Chicago Title, he's their agent; and I don't think the
25 examination can be conducted by a leading question.

1 THE COURT: Why don't you think it can be conducted by
2 leading questions? He's on cross. You called him. He's
3 your witness. Tell me what rule you're referring to that he
4 can't cross this party. I understand he's his agent, but I
5 don't think that prevents him from asking leading questions.

6 MR. EPTING: Well, --

7 THE COURT: Refer me to some law, and I'll listen to
8 you.

9 MR. EPTING: Well, Judge, I don't know how far law will
10 get us, but for example --

11 THE COURT: I'm sorry. What?

12 MR. EPTING: I said I'm not so certain how far the law
13 will get us. But let me just ask you this: Let's say this
14 is a wreck case and there are two drivers. And I call the
15 adverse driver to the stand in order to --

16 THE COURT: And you can cross him.

17 MR. EPTING: Right. But when the other side stands up
18 to conduct their examination of their own party, even though
19 I called him as an adverse witness, I don't believe that the
20 lawyer representing the witness is able to conduct that
21 examination of I cross to a leading question.

22 MR. DUKES: I don't represent the two of us.

23 THE COURT: For his hypothetical, what's your argument?
24 I understand you don't represent him. And there's a
25 distinction between his hypothetical. According to his

1 hypothetical, what's your argument? Do you think you can do
2 it under the scenario?

3 MR. DUKES: If I represented --

4 THE COURT: Mr. Epting gave you, do you think you could
5 cross?

6 MR. DUKES: -- the driver that he called as his
7 witness?

8 THE COURT: Right.

9 MR. DUKES: I couldn't cross my client.

10 THE COURT: Right.

11 MR. DUKES: I couldn't lead him.

12 THE COURT: Right.

13 MR. DUKES: I would agree with that.

14 THE COURT: But this is not his client. I mean, that's
15 why I don't understand your --

16 MR. EPTING: Doesn't he?

17 THE COURT: I mean, it may be a parallel, but he
18 doesn't represent him. I understand he may be Chicago's
19 agent, but he doesn't represent him.

20 MR. EPTING: Judge, it's my job to say I think he
21 should not be allowed to lead his general agent, and if you
22 disagree with me --

23 THE COURT: Well, I don't disagree. I'm trying to
24 understand the argument before I make a decision.

25 MR. EPTING: Well, I think that's it, Judge. Whether

1 in my example it is tort in its master servant that we could
2 have just the same examination in the same example in which
3 its principal agent and I call his principal to the stand as
4 an adverse witness. I don't think he can cross his
5 principal. Ditto if he calls the agent of that principal, I
6 don't think he can cross-examine that agent just because I
7 put him on the stand.

8 THE COURT: Mr. Dukes, anything you want to say?

9 MR. DUKES: Your Honor, Chicago Title and Mr. David are
10 potentially adverse to one another.

11 THE COURT: I understand. Now, what I'm going to do --
12 I guess, I'm going to try to split the baby a little bit.
13 I'm not going to let you lead this witness as far as the
14 principal and agent relationship. Anything outside of that,
15 you can lead. Okay?

16 MR. DUKES: Yes, sir.

17 THE COURT: Do you understand what I'm saying?

18 MR. DUKES: I do.

19 THE COURT: All right. Please proceed.

20 BY MR. DUKES:

21 Q. Dan, what is your understanding of what you can do as a
22 title insurer?

23 A. Well, first of all, you have to certify the title, have
24 somebody examine it. And once you do that, if it's under
25 \$500,000 I can write the company for whatever they are.

1 There are a lot of general exceptions that take exception to
2 the plat, unrecorded liens. I think all of those are pretty
3 much left in the final policy. Then you send it in - send
4 the premium. You send those to -- well, I say, we send
5 copies of every one. Make sure that all documents are
6 recorded. And, I guess, they do an audit once a year.

7 Q. And certification of title, what exactly is that?

8 A. Certification of a title -- I used to check a lot of
9 titles when I was in law school. I used to clerk for Judge
10 Bristo and the people he worked with. So whenever I hung
11 out my own shingle, I still did a lot of that. Certifying
12 titles which, basically, means you go to the courthouse, you
13 look at the plat and any and all recorded documents that may
14 pertain to that particular piece of property; and make sure
15 there are no encumbrances or any liens, any tax liens, any
16 of those kinds of things that would exist on the property.
17 And if there are, you take exception to them, make sure
18 they're satisfied. So that the person buying the property
19 has a good and clear title subject to whatever exceptions
20 there may be. There are always exceptions to unpaid taxes
21 for the current year, and that changes depending on what
22 month you're closing; such as November you try to collect
23 those funds. As I said, any of the unrecorded documents,
24 mechanics liens, those kinds of things. We put that into a
25 written document at some point in time.

1 Q. And is that a legal opinion of a status of title?

2 A. Basically, yes. But it has to do with mostly the RMC
3 Office -- I mean, here it's done. Some places it's the
4 clerk of court. But you would look at the plat to make sure
5 that the property's being conveyed by the plat.

6 As I was saying, in some years past they did it by
7 metes and bounds and caused distances which was a nightmare
8 to make sure you had all the degrees and minutes correct.
9 And so in the last five or ten years it's primarily been by
10 plat because it all has to be recorded and approved by the
11 governmental authority whether it's the county or the city.

12 Q. And, I guess, the metes and bounds search was a
13 nightmare when you had an irregular piece of property out in
14 the woods?

15 A. Yes.

16 Q. What else do you have to do as part of your agency for
17 Chicago Title?

18 A. Make sure whatever policy that you're issuing conforms
19 to the whatever is in the record, whether it's some prior
20 deed or whether it's some changed plat. So you got to make
21 sure that plat is recorded. And it used to be times 25 or
22 30 years ago, when you'd cross a piece a property and say
23 such and such a plat, dated and prepared by -- it wasn't
24 recorded. And so that would create a problem in which you
25 would have to go back and correct. I don't remember having

1 seen that in five or six years. But you're always trying --
2 the policy of the two issues has to conform to whatever is
3 of record.

4 Q. Do you have to make a determination as Chicago Title's
5 agent whether the interest in land was insurable?

6 A. Sure. I mean, when you say "interest in land," you --
7 for example, heirs property, sometimes there is a one sixty-
8 fourth interest in whatever piece of property there may be
9 that Chicago Title would insure. In some instances you have
10 wetlands are things that nobody can own unless you go back
11 to the King and Queen. So the insurable interest has to be
12 some -- either a lease only interest or a determinate period
13 of time and a fee simple title is in the property subject,
14 of course, to whatever is recorded. But to answer your
15 question, yes.

16 Q. Let's turn to this boat slip and buildable lot.

17 A. Okay.

18 Q. You were involved in preparing the documental documents?

19 A. I would like to be able to take credit for the majority
20 of it, but I think John Romanoski did most of the heavy
21 lifting so to speak, and did a very fine job.

22 Q. But you recorded the condominium regime that established
23 this?

24 A. I did. John and I worked pretty closely. It was a
25 joint effort. Dealing with the city was interesting to say

1 the least, their requirements. What they wanted done.
2 Q. Well, tell us about that. Tell the Court about that.
3 What did the City of Charleston require as part of the
4 approval for this conversion of a marina to real property
5 that can be conveyed?
6 A. I think that this was the third, maybe, the second --
7 could have been. I think that a guy I used to work for, I
8 worked with years ago, Mike Burkette who, actually, was very
9 instrumental in Horizontal Property Regime development. We
10 worked at HR for a long time. But a friend of mine by the
11 name of Eddie Marteen, (ph)-- Doc and those and I think Eddie
12 and a partner of his were going to buy a number of these
13 boat slips. And all of this was kind of in the inceptions
14 phase. And with East Coast entering into a contract with a
15 guy -- I don't remember Mr. Collins' first name, but he was,
16 probably, known as --
17 Q. Was that Fred Collins the video poker guy?
18 A. Fred. Yes. Yes, it was. So they entered into a
19 contract with him to buy this marina. And the marina
20 consisted of a dry stack storage that was pretty visible.
21 THE COURT: Freddy Collins.
22 MR. DUKE: Yes, sir.
23 THE COURT: Not Fred Collins, Freddy Collins.
24 WITNESS: Right. Who has an interesting personality.
25 THE COURT: Yes, it was.

1 WITNESS: And so the dry stack storage, then there were
2 the wet slips; and there was a piece over that consisted of
3 12 individual single family lots as they were named. And I
4 want to say 31 or 32 townhouses, and then there was a multi-
5 family area all, I guess, between the connector and water at
6 Ripley. So whenever we got ready to close, there had been a
7 good bit going on. There was a guy by the name of Bill
8 Basher. He was a home tech and he kind of got involved in
9 the layout if you will. And Susan Smyth represented the dry
10 stack purchasers. There was someone else, but the
11 principle was Jerry Miller.

12 And so because all of this was being done with a pretty
13 tight time-frame, Susan prepared a number of documents all
14 of which we went over -- pretty time intensive. There were
15 some things that were going to be done when dredging was
16 going to be done, real estate agreements. And so all those
17 things took place. We closed. Sold the property and paid
18 off Mr. Collins, and then proceeded to get approval from the
19 City.

20 And to get approval from the City, you have to have a
21 survey of each particular wet slip, which is, basically, for
22 all intents and purposes it's a drawing around water.
23 There's nothing there other than water. In order to meet
24 the requirements of the Horizontal Property Regime, it had
25 to be attached to the land. And so, I think, wet slip lot

1 seven was primarily where the majority of the boat slips
2 were or are. And then you have an area back around where, I
3 think, boat slips A were located. And so once all of that
4 was drawn and once all of the particular lots were drawn and
5 the road was drawn in, all the infrastructure was laid out.
6 I think, Doc Knight, himself, and the architects spent
7 numeral days with the city planners. And they would have a
8 meeting there with somebody from traffic or somebody with
9 the drainage. So there was a whole gamut of meeting with a
10 lot of different people in order to get the City to approve
11 what was being done.
12 BY MR. DUKES:
13 Q. And let me ask you, Dan, when you said you've got
14 everything drawn out by the surveyor, that's this; right?
15 A. That is correct.
16 Q. That's this plat?
17 A. Yes.
18 Q. And this plat got recorded at the RMC's Office?
19 A. Correct. There was another plat that shows the dry
20 stack storage, and -- well, I guess, was prior to these
21 being recorded.
22 Q. All of those plats are incorporated into and made part
23 of the master deed covenants of the regime?
24 A. These three plats are.
25 Q. Okay.

1 A. Because they, even though you have single-family lots,
2 there have to be certain common areas that affected the
3 marina slips. And so there had to be certain common areas
4 that would allow a lot owner to walk to the slip at the
5 marina and vice versa. So all that had to be taken into
6 consideration.

7 Parking was probably the biggest hurdle that we had to
8 overcome. And I forgot the total number of parks that we
9 had to have, but when we were finally able to get the city
10 to agree -- and the city's attorney then, somebody at
11 Clawson and Staubes, and I've forgotten his name -- that if
12 you bought one of the -- a piece of the real property, the
13 twelve single-family units of 32 townhouses, that you got a
14 boat slip with it. You could not subdivide the property --
15 the real property from a boat slip, because that would then
16 create -- you would have had to have a park for the boat
17 slip, because if it was attached to real property then there
18 was parking on the property, itself.

19 Q. And that's what Mr. Buck bought or Zan?

20 A. Exactly. He bought -- Zan bought, you know, one of the
21 premier lots with one of the nicer boat slips.

22 Q. And the city requirement which was incorporated in the
23 master deed and in all the deeds that you prepared conveying
24 these boat slips?

25 A. It was. And this was probably John Romanoski's idea

1 more so than mine. It was, certainly, a very good one.
2 Because, if you think about it, if somebody mortgages a
3 piece of property -- if the property's foreclosed, the
4 bank's looking to get their money back. There was a
5 particular provision that the city had written in. That you
6 cannot -- even a mortgagee could not subdivide that
7 property. So to make sure that there was no question about
8 that if anybody, I think, that whatever the section is, I
9 want to say 10 or even 10.6, whatever --
10 Q. Ten point two?
11 A. Okay. Close enough, 10.2 in the master deed had all
12 that language in it. So we, basically, just copied that
13 into each property description. And I think that there is
14 another place in the deed that I saw that the initial mark
15 that the grantee, the person buying the property, where they
16 signed the agreeing to be bound by all the terms and
17 conditions; I think the last sentence in that
18 indemnification is that you understand this can't subdivide
19 the property. It says it a little differently, but that's
20 what it means.
21 Q. And was it your understanding that once you recorded
22 that plat describing the dock slips that you couldn't change
23 the dimensions of the slips?
24 A. That's not just that plat, but it's any plat. I mean,
25 once it's a recorded document, unless you're going to do a

1 new plat and have it rerecorded after it's approved, you
2 couldn't change the dimension. But it was even more
3 complicated because of the city's requirement. The city
4 would have had to approve any changes.

5 Q. And in order to change the dimensions of any of these
6 boat slips, what else do you have to -- you have to get the
7 city approval; you have to get a new survey; right? And a
8 new plat drawn up?

9 A. My opinion as to how you would have to go about that is
10 that you would have to have a new plat prepared showing
11 whatever changes there were, then you would have to submit
12 it to -- and I say "you" -- usually, that's done by the
13 surveyor. The surveyor would have to submit it to the, in
14 this case, the city planning. They would have to sign off
15 on it. But because it's a condo, everybody bought pursuant
16 to those recorded documents and to that master deed. You
17 would have to have everybody sign agreeing to that change.

18 Q. And so all these folks down the way toward California
19 Dreaming, they'd all have to sign off on it?

20 A. Well, you've got two more sheets of boat slips. They
21 would have to sign off on it.

22 Q. So it's a bunch of people?

23 A. A bunch of people.

24 Q. And no easy project?

25 A. It would be pretty difficult. Especially, to get

1 something back by the city. I will say that we, had -- let
2 me see. There were a number of units -- we'll say units,
3 boat slips, that were not attached to a piece of realty that
4 was sold within several days. I think John represented the
5 people who were buying. But I think that Doc and those
6 bought them back or a number of them, and sold them to the
7 person who was going to do multi-family units.

8 And we were able to get the city to approve that which,
9 you know, along with everybody else, to approve it because
10 it reduced the amount of parking because it was going to be
11 attached to some of the multi-family units. I don't
12 remember how many there are. There was an amendment to the
13 master deed, itself, that set all of that out. It seems
14 like there were 10 or 12, maybe, 15. I just don't remember
15 the number, but I remember the process. And because they
16 were reducing the number of parks that were required, the
17 city was in favor.

18 Q. Now, was this plat ever amended?

19 A. Not that I'm aware of. I didn't have anything to do
20 with it if it was.

21 Q. And were you aware of anybody talking about changing
22 dimensions of slip CSB-1?

23 A. I was not.

24 Q. No?

25 A. No, I was not.

1 Q. Did you make a determination or did you issue a
2 certification of title for Mr. Buck or Zan's slip CSB-1 as
3 it is drawn on the recorded plat?
4 A. I did.
5 Q. And does Mr. Buck and his company, Zan, hold fee simple
6 title to slip CSB-1?
7 A. Whenever I transferred -- whenever it was transferred, I
8 think, I heard something about a mortgage note, but short of
9 that, I don't know of anything encumbering the title other
10 than the master deed.
11 Q. And did you make a determination whether Zan's interest
12 in slip CSB-1 was insurable for title?
13 A. I think it is under the Horizontal Property Regime Act.
14 The act was amended ten years ago, or however long it was,
15 that it would provide for both condominiums.
16 Q. And feel free to look if you need to. Does the property
17 description in Mr. -- in Zan's deed which is Exhibit four
18 and the property description for the Chicago Title policy,
19 are they exactly the same?
20 A. No, sir. What is the deed, eight?
21 Q. The deed is four?
22 A. That's correct.
23 Q. And the title policy is ten.
24 A. Can I take the sheet out of this? It does -- the
25 property descriptions appear to be identical. In the deed

1 there is what we call a variation clause which says where
2 the property came from.

3 Q. And so I'm going to throw a term of art out there.
4 Would it be your opinion that Zan, LLC is vested and titled
5 as insured?

6 A. Yes.

7 Q. Does the Chicago Title policy covers slip CSB-1 as it
8 appears in the public records?

9 A. Yes.

10 Q. Now, let's talk about -- we've heard a lot of talk about
11 the expanded slip 2-B whatever it would take taken out of
12 CSB-2 and given to Zan. Heard a lot of talk about that
13 today. Would you have written a title policy on that
14 expanded slip CSB-1?

15 A. No, I wouldn't.

16 COURT REPORTER: I'm sorry. What?

17 WITNESS: No, I would not have. Matter of fact, I
18 wouldn't have closed it.

19 BY MR. DUKES:

20 Q. Why not?

21 A. Because I've known Eddie Buck too long. I don't think
22 that anybody would be willing to do that. I mean, there is
23 no way you can convey it to them without going through the
24 process that I said. And I just would not have done that.

25 Q. And if you would take a look at -- it's loose up there,

1 but Exhibit Number 18 which is a certified copy of a deed
2 from Ripley LLC to Pavilion Development. What date did that
3 conveyance from Ripley Cove, LLC to Pavilion Development
4 take place?
5 A. March 23rd.
6 Q. March 23rd just --
7 A. I'm sorry, 2005.
8 Q. Okay. And the conveyance from East Coast Trading to Zan
9 of CSB-1 -- and this conveyance from Ripley to Pavilion
10 included CSB-2, the next door slip; right?
11 A. Yes, CSB-2.
12 Q. So when Mr. Buck and Susanne Buck appeared at your
13 office to close the second time in April of 2005, Ripley
14 Cove had already conveyed CSB-2 to someone else?
15 A. That's correct.
16 Q. And East Coast didn't have any title in anything in
17 CSB-2 conveyed any part parcel or all of CSB-2?
18 A. They did not. And Drew asked me that question at some
19 point in time, and I, actually, do not remember the
20 distribution of the different property; but I went back and
21 looked, and I had conveyance.
22 Q. East Coast Trading, the seller into Zan didn't own any
23 of CSB-2 and couldn't convey any part?
24 A. Right. They did not.
25 Q. And Mr. Buck and Zan could not have had fee simple title

1 to be expanded CSB-2 -- or CBS-1?
2 A. I don't think they could have had fee simple title to it
3 even if the title was in their name.
4 Q. So had --
5 A. To answer your question -- I'm sorry. The answer to
6 your question is no. They could not have conveyed fee
7 simple title because they didn't own it.
8 Q. And you couldn't have issued a title policy?
9 A. I could not have and would not have.
10 Q. Just one moment, Mr. David. I believe I'm about done.
11 Oh, I forgot about the pilings.
12 A. I'm sorry?
13 Q. I forgot about the pilings.
14 A. Okay..
15 Q. Under the master deed that you and Mr. Romanoski
16 prepared, who owns any pilings?
17 A. I think all of the pilings, walkways, docks, all of
18 those are common elements. And there some instances where
19 they're a limited common element, but they are common
20 elements.
21 Q. So the owner of the slip doesn't own the pilings?
22 A. No. The only thing the owner of the slip owns is the
23 water in which he parks his boat within inside the
24 dimensions of whatever the slip is.
25 Q. And let me ask you this: The installation of pilings

1 had been -- or that were to occur either in between B-1 and
2 B-2 or the bow end of B-1 wherever, that's to be done some
3 time in the future; right?

4 A. My recollection of the conversation was that I wanted to
5 make sure that Doc was going to pay for it and that that was
6 going to be done. I knew that there was a lot of ongoing
7 work being done, for the dredging to be taken care of.
8 There was a barge that was coming in to do some work on the
9 marina. And I think everybody anticipated that that's where
10 the pilings would be put in. I believe that's what I told
11 them.

12 Q. After the dredging had been finished?

13 A. No. Before the dredging was going to be done. A barge
14 was coming in. I think they had to -- you can't see it on
15 that plat, but there was a -- where the lots are back up on
16 the end and where the A docks start. There was a little
17 piece of marsh. And whenever I say a little piece of marsh,
18 it could not have been much bigger than where we're seated
19 here, that had to be filled in order for -- as part of lot
20 12 or lot one, I'm sorry. And there was also a walkway, a
21 pedestrian walkway that was a common element that led to the
22 lots to the boat slips. And that -- gosh, that was just a
23 monumental undertaking for whatever reason that that barge
24 was coming in to do that to, I believe, fill that. And I
25 think that Doc and those and Eddie and those had

1 anticipated that whenever that barge came in there that that
2 would be taken care of.

3 Q. So at some point down the road after the closing, after
4 the title policy had become effective in April of 2005,
5 somebody was going to install two pilings?

6 A. That's correct. That was my understanding.

7 Q. Does title insurance insure what happens in the future?

8 A. Well, if it has something to do with the ownership of
9 the property, it probably does if somebody's making a claim
10 against it. But if your question is related to the pilings,
11 no, it would not have insured that under any circumstances
12 as I understand it.

13 Q. And title insurance insures what was before the date of
14 policy? I mean, if somebody had claimed an interest in the
15 policy a hundred years ago or whatever --

16 A. That's right.

17 Q. -- it doesn't insure against future?

18 A. Once that deed -- once the document has been recorded,
19 title policy does not insure anything forward of that,
20 unless it had -- for example, if there were a lis pendens on
21 the property and then somebody filed a lawsuit after you
22 recorded your deed, and the lis pendens was a record, you
23 were on notice that there was possibility of a suit. So it
24 would be subject to the suit that were filed after that.

25 But the short of some type of notice, the lis pendens,

1 something to that effect, it would not insure anything in
2 the future.

3 Q. So the Chicago Title policy that you issued could not
4 have insured ownership in any pair of pilings; could it?

5 A. No, for a lot of reasons. But to answer your question,
6 no.

7 MR. DUKES: That's all I have for you. Thank you, Dan.

8 MR. BARNETT: Thank you, Your Honor.

9 THE COURT: How long do you think you will be? It's
10 six o'clock, now. Any reason we can't do it in the morning?

11 MR. BARNETT: No, sir. Between 30 and 45 minutes.

12 THE COURT: Well, we're going to do it in the morning.
13 Mr. David, I just want to ask you a few questions --

14 WITNESS: Yes, sir.

15 THE COURT: -- if I may? Were you aware the plaintiff
16 needed an additional two feet for his boat? Were you aware
17 of that at the time of closing?

18 WITNESS: No, sir.

19 THE COURT: Pardon?

20 WITNESS: No, sir, I was not. I was not aware that he
21 needed any additional space.

22 THE COURT: All right. I assume that when you're
23 talking about moving these pilings, you're talking about
24 moving along this plat line between CSB-1 and CSB-2; is that
25 correct?

1 WITNESS: Whenever you --
2 THE COURT: Moving it out. Here's the head of the
3 dock, you're moving it out toward the channel; is that
4 correct?
5 WITNESS: Yes, sir. Along the bottom.
6 THE COURT: Along this survey line?
7 WITNESS: That's correct.
8 THE COURT: Not in the CSB-2? Along this line where
9 the pilings are already stationed; is that what you're...
10 WITNESS: There were no pilings there, Your Honor. And
11 it was my understanding that the --
12 THE COURT: Well, how can the -- the letter says -- I
13 believe your letter -- I don't want to misquote it, but I
14 believe your letter says -- let me find it. Two piling will
15 be placed in line with the existing piling of the adjoining
16 boat slips.
17 I really don't understand what you're trying -- come up
18 here and show me what you're talking about.
19 WITNESS: I believe this exhibit --
20 THE COURT: Just come and show me on this what you're
21 talking about. This is exhibit -- what number is this?
22 MR. DUKES: Well, there's two sevens.
23 THE COURT: Pardon? I'm not using the one where the
24 docks are marked. All right. If you look at Exhibit 6-A,
25 where are you talking about moving pilings? Because along

1 this line there are no pilings; is that correct?
2 WITNESS: That is correct. There are no pilings there.
3 THE COURT: There are pilings along this dock, but not
4 here. And some pilings on this dock and out from there. So
5 where are you talking about "in line"?
6 WITNESS: Turning this way, Your Honor, and if you look
7 at this 6-A, over here there are two pilings.
8 THE COURT: Okay.
9 WITNESS: Over here there are two pilings. And so in
10 line would be with the two pilings here and the two pilings
11 here which would be along this line right here.
12 THE COURT: So the pilings would be in the water
13 between B-1 and B-2?
14 WITNESS: That is correct.
15 THE COURT: Along that survey line?
16 WITNESS: Yes, sir.
17 THE COURT: Okay. I just didn't realize where --
18 WITNESS: They weren't moved. It wasn't that they were
19 going to move the pilings.
20 THE COURT: They were going to place pilings. There's
21 no pilings there, now?
22 WITNESS: Correct.
23 THE COURT: They were going to place pilings.
24 WITNESS: That is correct.
25 THE COURT: Okay. All right. Very briefly, do you

1 have any direct of this witness on the questions I just
2 asked? And I'll let Mr. Dukes ask any cross very limited on
3 the questions I just asked.

4 MR. EPTING: I don't have any questions.

5 THE COURT: Okay. Mr. Dukes, do you have any cross on
6 the questions I just asked? I just didn't understand what
7 he was referring to. I thought I understood, and I was
8 correct what I thought. He affirmed it.

9 MR. DUKES: Well, I think I do have to ask some
10 questions.

11 FURTHER CROSS-EXAMINATION

12 BY MR. DUKES:

13 Q. Dan, I thought that the in line with the adjacent boat
14 slips meant pilings on the end of these -- the big slips
15 down the middle or these slips on the end where Mr. Chivers
16 and Mr. Rhoads installed pilings out on the channel end of
17 the slips.

18 A. Well, I said when Drew was asking me about this was that
19 it was my understanding from talking with Eddie in a very
20 general conversation about these pilings that hearing him
21 talk about wanting to tie his boat up, I was under the
22 impression that these pilings were going to be from the
23 boundary lines on the left and right side of his boat slip.
24 So there would be one piling on each side.

25 Q. And that would be on the bow end of the boat slip?

1 A. That's correct.

2 Q. So here and here where on the plat and the blow up that
3 His Honor has, it would be on either side of where it has
4 the designation 21.42 feet?

5 A. That is correct. But Drew had asked me if it were
6 possible that they would be in line with the other pilings.
7 And I said, and I think we referred to Exhibit 6-A, that
8 shows those four pilings, that if you were to put them in
9 between lot B-1 and B-2 that they would be in line with
10 those others. But it could also be in line with the -- on
11 the front. Drew asked about the navigable water. That is
12 certainly an issue. The truth of the matter is nobody ever
13 showed me any document of any kind with any type of drawing
14 on it to where they wanted the plats. They, simply, wanted
15 two pilings. And I said "in line." So as long as it's
16 within the boundaries or on the boundary line of B-1, I'm
17 not sure that it really makes any difference how ever
18 Mr. Buck wanted those pilings to tie up his boat.

19 Q. And in any event, he wouldn't own them?

20 A. No. He wouldn't own them. It would be part of the
21 common elements.

22 THE COURT: All right. Thank you very much. We'll
23 adjourn until 9:30 in the morning.

24 MR. EPTING: Judge, I have a question and ask your
25 guidance.

1 THE COURT: I'm sorry. Go ahead.
2 (WHEREUPON, there were scheduling matters.)
3 (WHEREUPON, the following was held on July 27, 2011.)
4 THE COURT: All right. Let me see. Where were we?
5 MR. EPTING: Actually, Judge, I am ready. And if
6 Mr. Barnett would waive his cross-examination of Dan David,
7 I'll call my next witness.
8 THE COURT: Okay.
9 MR. BARNETT: No.
10 THE COURT: All right. Mr. Buck, if you'll come
11 around.
12 MR. BARNETT: I promise I won't be unnecessarily long.
13 THE COURT: I'm sorry. Mr. David, if you'll come
14 around. I'm sorry. I said Mr. Buck. Excuse me.
15 MR. EPTING: I would interpose my same remark
16 yesterday. I think that to the extent that Dan is an
17 adverse party or an agent of someone else that Stan can lead
18 him to the extent he's eliciting testimony on behalf of his
19 own client. So I think he has to take him on direct.
20 THE COURT: I'm going to disallow that motion. I
21 understand Mr. Barnett represents Ripley and Knight and, let
22 me see, Ripley, East Coast, Knight and Belote; is that
23 correct?
24 MR. BARNETT: Yes, sir.
25 THE COURT: And I don't think he has -- through that

1 has any relationship with Mr. David, necessarily. I only
2 think he's their agent. He may be. I don't know. He may
3 be the agent as for the purpose of closing, but I'm not
4 going to limit him to that. Okay.

5 MR. EPTING: I understand.

6 THE COURT: The motion is denied.

7 Please proceed, Mr. Barnett.

8 WITNESS: Your Honor, just for the record, Mr. Grady
9 Query has been here representing me.

10 THE COURT: Who's representing you?

11 WITNESS: Grady Query. Just for issue over my
12 conflict.

13 THE COURT: Okay. He's been sitting here.

14 WITNESS: Yes, he has. But he is stuck on Folly Beach
15 and can't get out of his drive because of the waters.

16 THE COURT: Do you want me to wait until he gets here?

17 WITNESS: No, sir. I want to let's go forward.

18 THE COURT: Are you sure? I mean, if you want him
19 present, I'll be happy for him to be here, because he's been
20 here most of the time.

21 WITNESS: I know. The only issue that could have
22 arisen that I felt was some conflict. And so I think that
23 all of that has been waived now and we need to finish this.
24 Thank you, Judge. I just wanted to put that on the record.

25 THE COURT: Okay. When does he say he could be here?

1 WITNESS: Well, it's been raining outside. So I
2 guess...

3 MR. DUKES: When the tide goes out.

4 WITNESS: Yes, probably. But that's okay.

5 THE COURT: Well, that's like saying when they dredge
6 the harbor deeper it's going to help the rainfall in
7 Charleston.

8 All right. Please proceed.

9 MR. BARNETT: I was about to ask him who he represented
10 to clear all that up some.

11 CROSS-EXAMINATION

12 BY MR. BARNETT:

13 Q. Dan, if I -- don't answer the question -- are you
14 concerned if I asked you who all you represented --

15 THE COURT: Let me say this: If we get into an area
16 that you feel uncomfortable about conflicts, we'll hold
17 those questions until your attorney can get here. Okay?

18 WITNESS: That will be great, Your Honor.

19 THE COURT: And if you'll just say, hey - I'm not
20 saying take the fifth amendment, but if you want to say,
21 hey, I got a problem; I need my lawyer here, we'll postpone
22 those questions until we get your lawyer here. Okay?

23 WITNESS: Thank you, Your Honor.

24 THE COURT: All right. Please proceed.

25 MR. BARNETT: Thank you.

1 BY MR. BARNETT:
2 Q. Mr. David, I want to follow up, I think, it was the last
3 question that Judge Nicholson asked you yesterday afternoon.
4 If you would - do you have that book of exhibits in front of
5 you that the plaintiff put together?
6 A. Yes.
7 Q. If you would go to your letter of April 5th which is
8 Exhibit Number 5 in that book.
9 A. Okay.
10 Q. And I would like you to also take a look at Exhibit
11 Number 6.
12 A. Okay.
13 Q. Now, when you said in your letter "this is to confirm
14 the two pilings will be replaced," I think you meant placed,
15 did you not instead of replaced?
16 A. I did.
17 Q. Okay. "In line with the existing pilings of the
18 adjoining boat slips." What did you mean by that? What was
19 your meaning by that?
20 A. Let me try to explain this again.
21 Q. Well, and in Exhibit 7 which is a blow up of the slip
22 plat, did you need that to explain? Please make it as clear
23 as you can.
24 A. Wait one second please.
25 WITNESS: Judge, perhaps did I leave that Exhibit 7 on

1 your desk? I'm not sure.
2 MR. DUKE: I think it's, actually, Exhibit 30.
3 THE COURT: It's 30.
4 WITNESS: There should be another one of those.
5 THE COURT: Is that 7?
6 COURT REPORTER: It was 7 and it got changed to 30,
7 Judge.
8 THE COURT: That's the same thing.
9 WITNESS: Yes, sir. Thank you.
10 MR. EPTING: Judge, there is definitely some confusion.
11 That is not Exhibit 7.
12 WITNESS: This is not?
13 MR. EPTING: No.
14 THE COURT: That's not 7. Okay. Seven is paper.
15 Here, show him 7. Here's 7.
16 WITNESS: I'm sorry.
17 THE COURT: That board is not 7.
18 WITNESS: All right. Thank you, Your Honor. I'm
19 sorry.
20 THE COURT: Yesterday when I asked you the question, we
21 were looking at Defendant's Exhibit 30.
22 WITNESS: Okay. All right.
23 THE COURT: If there wasn't confusion, I wouldn't be
24 here. Okay?
25 MR. BARNETT: That's correct.

1 BY MR. BARNETT:
2 Q. Now, what did you mean by "in line with existing
3 pilings"? What existing pilings?
4 A. Whenever I wrote the letter --
5 Q. Yes.
6 A. When I wrote the letter, there had been some
7 conversation with Eddie and, I guess, myself and people
8 sitting around the table that what I understood -- and this
9 is only me -- that because I had a boat there perhaps it was
10 my knowledge of that it was difficult to tie up -- I mean,
11 my boat is only 27 feet. So with Eddie's boat being 50
12 something, to tie the bow up, it sometimes was a problem.
13 And so in my mind when we were talking about putting in two
14 pilings, I was under the impression that he wanted those out
15 into the front, and that they were going to be in line with
16 the other pilings down the dock or the pier, you know,
17 wherever they ended up. I mean, whatever he wanted out
18 there. To make sure that was what he wanted.
19 In listening to all of the different conversations and
20 even the depositions and this type of stuff, it now seems
21 reasonable to me that Eddie wanted something in between his
22 boat and the other boat to tie to -- that would be in line
23 with the pilings that are already there. There are pilings
24 in those little finger piers as you know that control the
25 pier so they won't float off. And so that was my

1 understanding and my take on what that he wanted. It's now,
2 I've been told, that is not what he wanted. And so in my
3 mind, it doesn't make a lot of difference. It's going to be
4 on the corners of his property or it's going to be on the
5 side of his property. The idea was that he wanted two
6 pilings.

7 Q. All right, sir. When was the first time when you became
8 aware that Mr. Buck wanted two pilings placed inside slip
9 B-2?

10 A. The first time that there was a talk about two feet?

11 Q. Yes, sir.

12 A. The second day of his deposition.

13 Q. Was that in October of last year?

14 A. Whenever his deposition was. I think that's about
15 right.

16 Q. So at no time prior to the closing did Mr. Buck or
17 Ms. Buck or Ms. Carmody ever say to you, Mr. Buck needs to
18 get title to part of slip B-2?

19 A. No. No one ever said to me, We need two feet of slip
20 B-2, because I would have explained to them the situation.
21 And I hope that I explained that they couldn't subdivide it
22 and the typical things that I did in this closing. To take
23 two feet of somebody else's slip, I just would not have done
24 that.

25 Q. Were you in a position to know on April 5th who the

1 owners of slip B-2 were?

2 A. It, certainly, was public record. I could have had
3 somebody gone back and checked that, but, you know, you
4 don't do that in a closing. You're only checking to make
5 sure whatever the property is that you're conveying that
6 there are no encumbrances, encroachments and those kinds of
7 things.

8 Q. Let me show you -- this is my copy of what's been
9 admitted as Exhibit Number 18. Take a look at that. Do you
10 recognize that?

11 A. Well, I recognize that it is a deed, and looking on the
12 back of it, my office recorded it. And it says we prepared
13 it.

14 THE COURT: Is that Defendant's 18 you're referring to?

15 MR. BARNETT: The consolidated list, Your Honor. It is
16 a defense exhibit, but we have a continuous numbering.

17 THE COURT: Well, what we did -- I'm not -- you all
18 have them numbered. They are not numbered continuously; are
19 they? What have we admitted? Let me see what we admitted.
20 We're going by what we admitted earlier. Okay?

21 MR. BARNETT: Yes, sir.

22 THE COURT: Let me see where it is so there's no
23 misunderstanding when we're talking about exhibits.

24 MR. EPTING: One through 29 is admitted. The only
25 exhibit that is not now admitted, Judge, is Exhibit 16

1 because we --

2 THE COURT: That's the plaintiff. I'm talking about
3 the defendant's exhibits. Eighteen through 29 is what we
4 admitted for the defendant.

5 MR. BARNETT: That's correct.

6 THE COURT: Let's just keep referring to them that way,
7 18 through 29.

8 MR. BARNETT: Yes, sir.

9 THE COURT: Otherwise, plaintiff one through -- what
10 did you say, Mr. Epting?

11 MR. EPTING: Seventeen, Judge.

12 THE COURT: One through 17. Okay?

13 MR. BARNETT: Yes, sir.

14 THE COURT: Rather than changing them out, because
15 that's in the record when we first started.

16 MR. BARNETT: Okay. Well, it is a defense exhibit, but
17 it has been admitted --

18 THE COURT: Right.

19 MR. BARNETT: -- as Number 18.

20 THE COURT: Right. Number 18. Defendant's Exhibit 18.

21 BY MR. BARNETT:

22 Q. Did you do this closing, Mr. David?

23 A. Well, it wasn't -- I did this. Okay. I had my office
24 prepare this deed just as I did, as I said, there were about
25 three of them. If you look at the first page of the deed,

1 and I think that I said that it was a disbursement of, for
2 lack of a better term, dividends. They had sold pretty much
3 everything except for, maybe, four lots. And I stand to be
4 corrected. It could have been five. I'm not sure.

5 If you look at the consideration it was five dollars,
6 so that's not really a closing. They are simply -- they own
7 it, and they are taking title to this one particular lot or
8 whatever they had. If you look over to the affidavit which
9 makes sure that you're paying deed stamps, which is the last
10 page. There's an exemption number eight, and you have
11 certain exemptions as to why you pay or do not pay deed
12 stamps. And if you are accepting -- if it is -- I can't
13 quote number eight, but, basically, it means that if you
14 have an interest in the corporation and you are taking
15 property for your interest in that corporation, then you
16 don't have to pay 370 -- I guess, it's still 370 per
17 thousand for deed stamps. They make some exemptions. And
18 it's like a gift between family members or various other
19 situations where you may inherit property. So these
20 particular principles of Ripley Cove, East Coast Trading
21 which is Mr. Belote, Pavilion Development, I think that they
22 were, simply, taking the property as part of a disbursement
23 of funds.

24 Q. Did Mr. Belote have any interest in Pavilion
25 Development?

1 A. No.

2 Q. Did Ripley Cove Development have any interest in

3 Pavilion Development?

4 A. No. None that I'm aware of.

5 Q. On April 5th when you did the closing for Mr. Buck where

6 East Coast Trading Company conveyed title to Zan, LLC, did

7 you know that Pavilion Development owned slot B-2?

8 A. Did I have a recollection at the moment the day that we

9 were transferring the property that Zan was buying it that

10 Pavilion owned number two, no. I have no recollection of

11 thinking, Wow, Pavilion owns that. Not at all.

12 Q. Well, nobody asked you about it?

13 A. Nobody asked me about it.

14 Q. How long after -- well, when was this closing? When did

15 this transfer take place?

16 A. I think, probably, what happened is that they called me,

17 and said that's what they wanted to know. I say "they."

18 The principals of Ripley. So we would prepare it at some

19 point in time. Let me see, what's the date?

20 Q. I was going to ask you what's the date of this deed?

21 A. The date of the deed is the 23rd of March. So it would

22 have, probably, been sometime around the end of February the

23 first of March. It certainly would not have been the 23rd.

24 And then the next time that Mike was in town or however they

25 wanted to do it, he would have come by the office.

1 Q. So this deed was executed on March 23rd?
2 A. Yes.
3 Q. And the Zan, LLC closing was on April 5th?
4 A. Yes.
5 Q. Which is about how many days?
6 A. Well, let's see, seven -- probably, about 12 or 13.
7 Q. A little less than two weeks later?
8 A. Yes.
9 Q. Yesterday, Mr. Epting asked you some questions about
10 navigable waters referring to waters in the canal. Let me
11 ask you this: Take a look at the deed, Exhibit Number 4,
12 the deed of Zan, LLC. On the first page, special condition
13 number five.
14 A. I see it.
15 Q. Did you find it?
16 A. Yes, sir.
17 Q. It says navigable servitude of the U.S. Government and
18 the State of South Carolina or any political division
19 thereof and rights of the public to the use of any navigable
20 waters covering any land included in the description of the
21 insured premises. Does that tell us where navigable waters
22 were in that canal?
23 A. Not in that.
24 Q. Well, take a look at the rest. Essentially, doesn't
25 that paragraph tell you later where the extent of navigable

1 waters were?

2 A. Yes.

3 Q. Where is it?

4 A. It's from the bulkhead to the critical line whichever

5 would cause the navigable servitude to be larger.

6 Q. Where is the critical line?

7 A. The critical line is from the either the center of the

8 channel or to the low water marker. I don't see the

9 critical line over here.

10 Q. That's all right. The deed, however, tells us that

11 everything --

12 A. It's my understanding that OCRM and Coastal Council have

13 control over everything from high water on.

14 Q. To the mean high water?

15 A. To the mean high watermark, unless you have King's

16 Grant, and there's some issues about that. You may own it,

17 but you can't do a lot with it.

18 Q. Does the King's Grant change the navigable nature of the

19 flow?

20 A. No. That's not the point.

21 Q. So are navigable waters everything from the mean high

22 watermark work?

23 A. Yes.

24 Q. So from that canal to the mean high watermark -- the

25 mean high watermark it's all navigable waters?

1 A. That is my understanding.

2 Q. And that's what the deed that you prepared for Zan, LLC
3 actually says; doesn't it?

4 A. Well, it identifies, specifically, just the boat slip.
5 It identifies the boat slip pursuant to that plat, but it
6 makes it subject to OCRM and the Corps of Engineers and, I
7 guess, any other governmental -- now, the City of Charleston
8 thinks they have some interest in navigable waters.

9 Q. Look at number six. Publish number six, special
10 condition number six. Read it, please.

11 A. Rights and jurisdiction vested in South Carolina
12 Department of Health and Environmental Control, Offices of
13 Coastal Resources Management by law, including the power of
14 said agency to mandate the removal or modification of any
15 docking facility constructed in accordance with its
16 permitting authority.

17 Q. So the deed that went to Zan, LLC, specifically, alerts
18 Zan to the fact that the state could require the removal of
19 any part of that marine structure; didn't it?

20 A. The language that we're looking at and all of the
21 exceptions that we have in this deed are not particular to
22 Zan, LLC. It is in every deed that was issued on this
23 property, or at least those that I had anything to do with,
24 because that was an exception that the property was in the
25 permanent to the marina. And, basically, the government was

1 saying that, Okay, we've given you a permit, but if you
2 don't like the things are and we need to change something,
3 then you've got to move it.
4 Q. All right.
5 A. As I understand it.
6 Q. That's why we call it a "permit," don't we? It's
7 permission?
8 A. Yes.
9 Q. But regardless of the fact, you testified that everybody
10 got a deed so far as you know, to any of these slips, had
11 the same language. But, specifically, this language with
12 respect to this transfer was telling this grantee, Zan, LLC,
13 that the government could require the removal of any
14 physical structure in that canal; right?
15 A. Yes. That's my understanding.
16 Q. So if the pilings had been put in, pursuant to your
17 letter, the government could have required that they be
18 removed; correct?
19 A. Yes.
20 Q. Even if they had been given a permit, that's what the
21 deed, itself, says?
22 A. There is an exception to that.
23 Q. I believe you testified yesterday as to what -- who
24 would have owned the pilings, but I want you to tell me
25 again, if the pilings had been put in.

1 A. Condominium law is a wonderful creation.

2 Q. Who would have owned the pilings?

3 A. The Home Owners Association would have. They own the

4 limited common elements. And the reason for that is that

5 everybody pays a -- the situation was originally quarterly

6 home owner dues. I want to say it was about \$400 a quarter,

7 I believe, to take care of the maintenance and the garbage

8 and those kind of things. And so in order for the Home

9 Owners Association to be in control of making sure of

10 whatever needed to be done was in fact done, they had to

11 have control of those docks, pilings. I remember there was

12 some issue about the oyster shells on the pilings. Who

13 thinks about oyster shells on pilings? But at least twice a

14 year they have to go in with a crew and shovels and scrape

15 them off. And so they had to make sure that those limited

16 common elements or common elements were under control of the

17 Home Owners Association. So to answer your question -- I'm

18 sorry. To answer your question, all of that was owned by

19 the Home Owners Association pursuant to the master deed.

20 Q. I'm going to ask you to take a look at the master deed

21 which is Exhibit 13. On page two, section 2.1.

22 A. Okay.

23 Q. Look at subparagraph (a).

24 A. All right.

25 Q. Does that tell you that the pilings would have become

1 part of the common area owned by the regime?
2 A. Yes.
3 Q. Okay. Look at subparagraph (f) on page three at the
4 bottom. Does that tell you the same thing?
5 A. Would you ask me the question again? The question was
6 does it tell who ones it?
7 Q. Yes.
8 A. It does. It does.
9 Q. How about on page five?
10 A. Yes.
11 Q. At any time prior to the closing, did Ms. Carmody ask to
12 see a copy of the master deed?
13 A. No. I think that, actually, what was going on at the
14 time, excuse me, there was some type of little booklet that
15 had the master deed and the plat and it was given to them so
16 they could understand what they were purchasing once they
17 signed the contract. But the answer to your question is no.
18 Nobody inquired of me on that. My understanding it was
19 given to them prior to closing.
20 Q. Was the master deed -- had the master deed been
21 recorded?
22 A. Yes.
23 Q. At the time of closing?
24 A. That was recorded almost a year prior.
25 Q. At any time prior to closing, did either Mr. Buck or his

1 daughter ask to see the master deed -- ask you to see the
2 master deed?

3 A. No.

4 Q. Did you have a copy if you had been asked?

5 A. I think that we had copies of it, and like I said,
6 because my understanding they had received copies of
7 documents prior to the closing.

8 Q. Now, in spite of the language in the master deed and the
9 deed about who had the right to put pilings in the canal,
10 the need to have governmental approval to put anything down,
11 were there slip owners that put things in that canal after
12 they bought slips without permission from the government?

13 A. Yes.

14 Q. How did you come to be aware of that?

15 A. Oh, gosh. Well, like I said, I had a boat there for a
16 while. That was about if you went down the gang plank of
17 those two-wide -- it wasn't very far from that. And they
18 had put two pilings out further out -- actually, I think, it
19 was in the -- almost closer to the center of the channel
20 depending on whose definition of the channel you use. And
21 they brought the barge in. One of the guys -- I can't
22 remember his name, but I think he had something to do with
23 salvaging in the local area. Then he brought a barge and a
24 crane, and put them in; and extended his finger pier, which
25 actually was -- never mind.

1 Q. You don't remember the names of these individuals?
2 A. I want to say Mr. Chivers and it started with a B. I do
3 not remember.
4 Q. Was it Anthony Rhodes?
5 A. What?
6 Q. Was it Anthony Rhodes?
7 COURT REPORTER: Can you say that name one more time?
8 MR. BARNETT: Anthony Rhodes R-h-o-d-e-s.
9 WITNESS: I think it was Mr. Rhodes.
10 BY MR. BARNETT:
11 Q. I want to show you what's been marked as part of Exhibit
12 31.
13 THE COURT: Whose exhibit, I'm sorry?
14 MR. BARNETT: Defendant's Exhibit.
15 THE COURT: Thirty-one?
16 MR. BARNETT: Thirty-one. It should be at the back of
17 your originals.
18 THE COURT: Thank you, sir.
19 BY MR. BARNETT:
20 Q. Ask you if you remember seeing this letter from the
21 Corps of Engineers, and who is it addressed to?
22 A. Mr. Parades.
23 Q. What is the date?
24 A. July 25th.
25 Q. What did the Corps say about the pilings and other

1 structures that have been placed in the canal without their
2 permission?
3 A. They said that they needed to be moved.
4 Q. I beg your pardon?
5 A. They said they needed to be moved.
6 Q. Did this letter cause a big problem, small problem, no
7 problem at all?
8 A. It caused a rather large problem if this is the one I'm
9 thinking about. I think they gave them seven days to remove
10 it. And the two vessels that were there, and they were
11 threatening to pull the permit.
12 Q. To, actually, pull the marina permit?
13 A. I believe that was what she suggested. Yeah. Because I
14 know there was a lot being said about it.
15 Q. Did Mr. Rhodes and Mr. Chivers go out right away and
16 yank those pilings out?
17 A. I don't think that they went out in the time that was
18 required by the Corps, but there was enough pressure brought
19 to bear that it was being moved.
20 Q. Did Mr. Rhodes and Mr. Chivers ever remove those
21 pilings?
22 A. I'm not sure who removed them, but I know they were
23 removed.
24 Q. Didn't Ripley Cove remove them?
25 A. I think that they had to pay to do that.

1 Q. Because in order to get the dredging done those pilings
2 had to come out; didn't they?

3 A. Well, you know, the Corps of Engineers they have a
4 unique way of getting things done. And I think that was
5 kind of what they said. If you want a dredging permit, you
6 better do what I tell you to do.

7 Q. Was the dredging a big deal or a little deal?

8 A. No. I mean, a big deal, a monumental task? That
9 everybody seemed to fight?

10 Q. How important was it?

11 A. Well, you can't have a marina if you can't dredge.

12 Q. How bad and silted in was the canal?

13 A. Bad. It had been partially dredged by a guy -- I can't
14 remember his name. Half of it had been dredged prior to the
15 time that East Coast purchased it. So there was some
16 silting in or slothing in whatever they call it where the
17 mud runs to the deepest point. So we thought that was
18 pretty good, and it did happen. But then -- do you want me
19 to explain what happened with the dredging?

20 Q. Actually, I'm about to walk you into that. You said --
21 we've established that the government, the OCRM and the
22 Corps of Engineers according to the deed, had to authorize
23 the placement of the structures in any water of the canal.
24 Was a permit needed to get the dredging done?

25 A. Yes.

1 Q. Who had to issue that permit?
2 A. OCRM and Corps of Engineers.
3 Q. The same outfit?
4 A. Same outfit. They have control of all of the navigable
5 waters in the State of South Carolina.
6 Q. You heard Mr. Buck testify that typically permits from
7 those agencies take about 90 days to get processed?
8 A. It depends on what kind of permit you're talking about.
9 Q. Is this a 90-day effort to get dredging going?
10 A. A dredging permit?
11 Q. Yes, sir.
12 A. No.
13 Q. How long would it take? How long would it take?
14 A. Well, from what standing point? Do you want it from the
15 time it was purchased? They immediately start working on
16 the dredging and that -- and trying to get that done.
17 Because the people on the other side --
18 Q. What year are you talking about?
19 A. When did they buy this? In '03, '02? In '04 it
20 appears.
21 Q. Who started in '04 to try to get the dredging
22 accomplished?
23 A. It's, actually -- it was Ripley Cove and myself.
24 Q. Who was dealing with the agencies, the Corps and the
25 state?

1 A. Well, I guess, I had called and talked to the various
2 people at the OCRM because I knew we had to get through that
3 hoop. We had a Corps of Engineer permit that, I think, went
4 through '08 or '09. I've forgotten the dates on it. So it
5 initially started -- we had to have a sounding. That's
6 where engineers go out and I guess, through some electronic
7 process they determine how deep or how shallow the water is,
8 I guess. And then determine how much mud is going to have
9 to be taken out to get to a six-foot level. I think the
10 permit provided a six-foot depth.

11 Q. Did that need to be done before the dredging?

12 A. Oh, that has to be submitted so they know what area is
13 going to be dredged, how deep it's going to be dredged, and
14 then, of course, where you're going to put the spoil.

15 And so there had been a survey of the bottom. And I
16 don't remember the name of the engineering firm, but because
17 there was some issues -- Stuart Langdon? Anyway, whoever
18 the prior owner was. And that had been a problem because he
19 supposedly had a contract and closed on it, and Judge Norton
20 in Federal Court quashed his contract, through it out. He
21 appealed it. And so the reason I remember all of that is
22 because John Romanowski and I had a real issue getting title
23 insurance to override that appeal process to be able to
24 close in time to meet Mr. Collins' requirements.

25 Q. Did that have anything to do with delaying getting the

1 dredging done?

2 A. No. Once we bought it, we moved on. And then -

3 Q. So you said you started in '04, and you finally got the

4 permit to get the dredging done in '08. What took you so

5 long?

6 A. Let me back up. It impeded the dredging because the

7 engineering firm that had done the depth survey would not

8 give it to us. They said, no, that they thought there was

9 some conflict. So we said - and I say "we." I think Doc

10 and I did most of this as with the architect. Said, Okay,

11 we'll buy our own. Just go do it.

12 And they said, Okay. We'll do that. Then he called

13 back about two or three days later and said, No, we think

14 there's a conflict of interest.

15 I suspect there was some other things going on. But be

16 that as it may, they would not do it. And so it took a

17 while to get a company that would actually go out and do the

18 survey so that we could present that to the OCRM. And I say

19 a while. It took several months.

20 Q. All right. Was it General Engineering Laboratories?

21 A. I think that is correct, but I wouldn't swear to that.

22 I think that whoever it was, they were the only people in

23 town who did that, that had the sonar equipment that would

24 accomplish that.

25 Q. All right, sir. Other than the survey, what was another

1 requirement to get the dredging done?

2 A. The major obstacle was the spoil site.

3 Q. Okay. What does that mean?

4 A. The spoil site is where they're going to pump the silt

5 that comes out of the marina. When the marina was initially

6 constructed, there was a site behind the property where

7 California Dreaming and the hotel and all that the James

8 Island Connector crosses. And I think, actually, the drain

9 pipe was in the water and still remains there today allowed

10 that to happen. So what had replaced that was a spoil site

11 at the Citadel. And we met with -- I say "we," Doc and I. I

12 think Ms. Carmody, Doc and I met with the colonel over there

13 and their attorney who was in the courtroom yesterday, Mark.

14 Q. Brandenburg?

15 A. Brandenburg. And it took a while to get all that worked

16 out as to, you know, what they were going to charge, and how

17 many cubic yards were going to be pumped in there; and what

18 they had to do to the spoil site, itself. But he finally,

19 sent a letter, I think, saying it was going to be \$60 a

20 cubic yard, and that we would enter into a formal contract.

21 But we felt really good once we got that letter.

22 Then, I don't know, within 30 days I had a call from

23 Mark saying that somebody had contested the issuance of the

24 agreement to use the spoil site, because it did not meet the

25 South Carolina Procurement Act. So that was like a major

1 blow. But anyway, kept working, and finally had it worked
2 out. I thought that the city marina and Charleston had
3 objected to it, but I later found out that it was the
4 neighbor across the way that was trying to slow up the
5 dredging. But all that got worked out.

6 Q. All right, sir. So when was the dredging finally
7 completed; do you recall?

8 A. Sometime in 2008. I want to say early summer, maybe,
9 like, May -- April, May something like that. It took about
10 - it's a 60 or 90 day process. And there are certain time-
11 frames, like, from November, maybe, March that you can't get
12 dredge because of migrating fish.

13 Q. All right. How many lawsuits were filed because of the
14 late dredging?

15 A. None that I'm aware of.

16 Q. Do you remember the case MDRL vs. Ripley Cove, et al?

17 A. I do.

18 Q. Did that have the allegation that the dredging had not
19 been done?

20 A. I think that case had more to do with dredging had not
21 been done as they wanted it done underneath a particular
22 dock.

23 Q. When the case was filed, the dredging hadn't, actually,
24 been done at all; had it?

25 A. I don't think so.

1 Q. Okay. How about --
2 A. Oh, you mean when the case was initially filed?
3 Q. Yes.
4 A. Yes. Okay. You're right. It did have to do with
5 dredging because they were alleging that the concrete place
6 where they tie up their boat, because there was some mud, it
7 had a certain torque to it and it had cracked the concrete.
8 Q. Okay. Was there a case filed by Mr. Rhodes and
9 Mr. Chivers?
10 A. You know, I believe, there was, but thank goodness I
11 wasn't involved in that one.
12 Q. All right. Involved in the dredging?
13 A. Yes.
14 Q. Among other things. Now --
15 A. I don't remember the dredging being a main part of that
16 lawsuit be that as it may.
17 Q. All right. Were you present when the property owner's
18 association for the slips at Ripley took over control of the
19 marina?
20 A. I was.
21 Q. I'm going to show you what's been introduced as
22 Defendant's Exhibit 29.
23 A. Okay.
24 Q. Were you at this meeting?
25 A. Yes.

1 Q. Does this, so far as you know, accurately reflect what
2 happened at the meeting?

3 A. It was. And I don't think that I was there the whole
4 time, because the meeting took place all morning. And I was
5 in there with Doc for a while. And I took -- I think I gave
6 some explanation as to what was going on with the dredging.

7 Q. All right.

8 A. And I'm not so sure, but, I believe, at that time that
9 we had a letter from the Citadel about the dredging.

10 Q. All right. So the Zan, LLC closing took place on April
11 5th, and then 21 days later the POA regime took over control
12 of the marina? Am I right about that?

13 A. Yes.

14 Q. At this point, as of April 26, 2005, who in terms of the
15 marina, what entity or person had the ability to -- well,
16 who held permit at this point?

17 A. I think the Home Owners Association. The owners of the
18 -- the Home Owners Association or the owners of the
19 property.

20 Q. So at this point did East Coast Trading Company have any
21 ability to ask to modify the marina?

22 A. I see.

23 Q. By sticking in two pilings?

24 A. No. They didn't own the property.

25 Q. What entity was the only entity that could do that?

1 A. It would have been one -- at what point in time? I'm
2 sorry.

3 Q. As of April 26th of 2005?

4 A. It would have been the Home Owners Association, I
5 believe.

6 Q. And, finally, would you take a look in Plaintiff's
7 Exhibit Number 11, please. Take a look at it. We don't
8 need to read the whole thing, but what were you telling Zan
9 in this letter?

10 A. Enclosed -- it's a pretty standard letter. It just
11 says, Enclosed is your deed that you purchased from East
12 Coast. Also is your title insurance policy. The deed was
13 properly executed, witnessed, and recorded April 25th and
14 whatever book and page. And based on the records, you are
15 the owner, in record fee simple property described on the
16 deed; and your ownership is subject only to the restrictions
17 and easements of record.

18 Q. The deed that you sent to Zan, LLC was that the same as
19 Exhibit Number 4? The deed that was at the closing on April
20 5th?

21 A. Yes. I mean, I didn't look at Exhibit 4, but there's
22 only one deed. Yes.

23 Q. Did you hear after this letter, at any time, from
24 Mr. Buck that he didn't think he had gotten what he
25 purchased?

1 A. No. I did hear from him from time to time about the
2 pilings.
3 Q. Okay. What did he tell you about the pilings?
4 A. He wanted to know when they were going to be in. And I
5 told him that I didn't know, that I would call. I would
6 call Doc and said he wanted to know when his pilings were
7 going to go in. Sometimes I would call Eddie back, and
8 sometimes, I think, Doc would.
9 Q. Do you have any reason to believe that Doc, Mr. Belote,
10 East Coast Trading Company were not attempting to get those
11 pilings authorized?
12 A. I know they -- well, I said I know -- no. I don't think
13 that. I think they genuinely wanted to do that. I think
14 they, actually -- there's a guy, Ken Smith, may be American
15 Dock and Marine, but he had done a good bit of work for Doc
16 and those in there. And I think that's who they were --
17 they had asked to do the work. And if that's who I'm
18 thinking about, there's a letter -- I think it was sent to
19 Eddie about trying to get that done.
20 Q. All right. Now, I believe you testified about this on
21 some points, somewhat different questions to Mr. Dukes
22 yesterday. But I'm going to ask you from a slightly
23 different perspective. If that closing on 2005, if at that
24 closing Mr. Buck and Ms. Buck had said to you, I need to get
25 fee title to a part of slip B-2, what would have had to have

1 happened for that to occur.

2 A. I mean, you've got --

3 Q. Give me the laundry list.

4 WITNESS: Your Honor, we're here today and we talk
5 about this like it's in some kind of vacuum. It's not.
6 This is not some guy that walked in off the street that I've
7 never seen before in my life. I had dinner with him at the
8 country club on a number of occasions. I've played golf
9 with him. I've gone fishing with him. I considered him
10 more as a friend. I helped him years ago run for County
11 Council. Spent time and money because I believed in the
12 man. And, you know, for -- I'm sorry. I apologize, Your
13 Honor.

14 THE COURT: I think he explained yesterday, if I
15 remember, you're going to have to get all the property
16 owners to sign, number one for it to be modified. He went
17 through that in great detail yesterday.

18 MR. BARNETT: Yes, sir.

19 BY MR. BARNETT:

20 Q. I'm not so much interested, Mr. David -- I'll be more
21 specific -- not what the master deed would require or the
22 county requirements, just from a simple matter of real
23 estate transactions, what would have had to be generated for
24 that to occur?

25 A. Even if this were not a master deed or controlled by

1 Horizontal Property Regime which is, in my mind, very
2 strictly construed. And there's so many facets to it. If
3 it were just a simple transaction, you'd still have to have
4 a plat. You'd have to have a corrected plat showing what
5 the boundary lines were for each new piece of property. And
6 that happens from time to time, you know, maybe, somebody --
7 the surveyor makes a mistake and he puts it too far over on
8 somebody's house. And the two people get together and say,
9 okay, well, we need a five-foot clearance here so we've got
10 to move this line a little bit. So the surveyor would show
11 what the new boundary line is.

12 But for Eddie and those -- I see the man from time to
13 time. I've known he and his wife for ever since I've been
14 practicing law. To do something I knew was wrong on his
15 behalf, I just wouldn't have done that. I have to see him
16 from time to time and look him in the face and say, How are
17 you doing and how are your kids? So to let him think that
18 I'm handling something for him and he's anticipating getting
19 two feet out of somebody else's lot, that at some point in
20 time as we all know now, that that's impossible, but he's
21 looking at me. I mean, just as he said, you know, you were
22 my attorney in there, and how come I don't have those two
23 feet?

24 Well, I didn't know anything about two feet. I don't
25 know who he talked to about two feet. I know about 20 feet

1 Because I've seen it on the plat. But I just don't know
2 what else to say. I did not know anything about Eddie
3 expecting to get two feet out of lot B-1 because I would not
4 have closed that loan for him or anybody else for that
5 matter under any circumstances, because it will not work,
6 unless you can make it work. If you go through and you got
7 a new plat -- if you went through the city which God bless
8 him, I don't know that Joe might have to have a little
9 patience to get through some of the things that govern the
10 water. But be that as it may, you would have had to done
11 that. Then, you would have had to have got all of the
12 people who had purchased property subject to the plats that
13 were recorded. They would have to sign off on it. So it's
14 not just like in a house situation where there are two
15 property owners are going to make that change.

16 Q. How much did you get paid for the closing of the Zan
17 transaction?

18 A. You know, I don't really remember. I think, maybe, \$500
19 plus a percentage of the title insurance.

20 Q. Which would have been how much?

21 A. I'm trying to remember, four or \$500 and, maybe, I got a
22 \$1,000.

23 Q. A thousand bucks?

24 A. Something like that.

25 Q. Were you paid anything by East Coast Trading Company as

1 part of your work on the closing?

2 A. I think that I was paid for the preparation of the deed.

3 Q. Which would have been how much?

4 A. A hundred and fifty to two hundred dollars.

5 Q. Did you have any interest -- any personal interest in

6 what East Coast Trading Company was paid at the closing?

7 A. Did I get some kind of kick back?

8 Q. Correct.

9 A. No.

10 Q. Were you asked by East Coast Trading Company to do

11 anything or not to do anything associated with this closing?

12 A. I don't, specifically, remember them asking me anything.

13 I think that, actually, Eddie or either Karl McMillan faxed

14 me the contract, and, I think, Karl asked me if I would

15 close it. I talked to Eddie, and told him I'd be more than

16 happy to.

17 Q. Did you lie?

18 A. What?

19 Q. Did you lie to Mr. Buck or Ms. Buck, then Ms. Buck, at

20 the closing?

21 A. About what?

22 Q. Anything.

23 A. Do you mean did I lie to them about this closing or

24 anything about this plat?

25 Q. Anything associated with this closing?

1 A. No.

2 Q. Did you ever assure them that they were going to get
3 title to part of B-2?

4 A. No. But I assured them that they were going to get
5 title insurance to lot B-1 and to lot three, but nobody's
6 concerned about that.

7 Q. And they got that?

8 A. They did, yes. You know --

9 Q. Mr. David, you've been a lawyer for how long?

10 A. Too long.

11 Q. You have universal agreement in the room for all our
12 sakes. But what would be at stake for you as an attorney if
13 you had done the things that you have been accused of doing
14 in this case?

15 A. I don't know that anybody's accused me of anything that
16 I'm aware of, but, certainly, there's a grievance process in
17 Columbia that you can file. And, I guess, you can be sued
18 like St. Andrews Title is being sued. Those kind of things.
19 But it's not that, I mean, that has to do with, I guess,
20 money and answering some things, but I don't know that I've
21 ever intentionally hurt anybody. If you were to
22 intentionally lead Eddie to believe to buy this property he
23 was getting a portion of B-1, that would be an out and out
24 lie.

25 Q. Did you mean to say B-2?

1 A. I'm sorry. B-2. And it would be difficult to see him
2 and be around him.

3 MR. BARNETT: That's all I have for you.

4 THE COURT: Any redirect?

5 MR. EPTING: Yes, Judge.

6 THE COURT: Redirect.

7 REDIRECT EXAMINATION

8 BY MR. EPTING:

9 Q. Mr. David?

10 A. Yes, sir?

11 Q. Here's where we are.

12 A. Okay.

13 Q. You know that the sellers have agreed to put in two
14 pilings to accommodate the Rookie IV?

15 A. No question about it.

16 Q. No question?

17 A. Made sure of it. I thought that I was doing what a
18 closing attorney would do. He said that he was entitled to
19 two pilings. I went and verified there were two pilings,
20 and I wrote a letter to make sure everybody understood.

21 Q. And there's no question that the seller understood --

22 A. Absolutely not.

23 Q. -- that the two pilings were to go in some place that
24 was not quite clear to you that was to tie up the Rookie IV?

25 A. That's correct.

1 Q. So the seller intended that the Rookie IV be in this
2 space that they were selling, or be in a space?
3 A. Well, I don't know that they -- well, to answer your
4 question, yes. They were intending that Eddie was going to
5 buy that property to put a boat in there. To say that they
6 knew Rookie IV, I don't recall ever telling them that. I
7 knew Rookie IV because we kind of were mutual friends, and
8 we fished together.
9 Q. I think, Dan, in your earlier testimony you told me that
10 they knew that Eddie was buying this slip to take his boat,
11 the Rookie IV, out of the inter coastal waterway, Wappoo,
12 and put it here.
13 A. I don't know that they did. But I think that, maybe,
14 Karl knew that from some conversations he had with Eddie.
15 Q. Karl was the agent for the seller?
16 A. He's the real estate agent. Yes.
17 Q. For the seller?
18 A. Right.
19 Q. All right. Now, my question is this boat is 20 feet
20 wide. It just is.
21 A. Okay. I don't know that. I don't know how --
22 Q. It's 20 feet wide.
23 A. It's a beautiful boat.
24 Q. And they're going to put two pilings in here to
25 accommodate that boat. Do you think that Eddie Buck didn't

1 know that his boat was 20 feet wide?
2 A. Knowing Eddie, I would think that he knew.
3 Q. Do you think he shows up, Mr. David, and buys a slip
4 that his boat won't fit into?
5 A. I would not think that Eddie would do that.
6 Q. All right. And we need to get this straight for the
7 judge, Dan. Would you get Exhibit 30?
8 THE COURT: Here's Exhibit 30.
9 MR. EPTING: Keep your 30, Judge. I've got mine.
10 BY MR. EPTING:
11 Q. We keep talking in this case, Dan. And if we have to,
12 I'll commission somebody to go out and measure it. Let's
13 look at slip B-1.
14 A. Wait a minute. Is this 30?
15 Q. Yeah, that's it.
16 A. Is this seven?
17 Q. That's seven. Either one of them will do. The
18 measurements are on there.
19 A. Okay.
20 Q. All right. Now, do you see B-1 as it exists in the
21 channel?
22 A. I see what's on this plat, yes.
23 Q. All right. And do you see -- it says 21 feet 42 inches?
24 A. Yes.
25 Q. And then, do you see that that line runs down and

1 intersects the middle of that finger pier?
2 A. Well, it's shown what is here, but let me --
3 Q. Let me just ask you the question, Dan.
4 A. Okay.
5 Q. Does the measurement run from the center line of the
6 finger pier?
7 A. No.
8 Q. All right. Well, explain it to me then.
9 A. What I'm looking at here, if you look at the broken line
10 on the left side of the dark line that's called a match
11 line. Do you see that?
12 Q. I see a broken line.
13 WITNESS: May I walk down here?
14 THE COURT: Yes.
15 MR. EPTING: Judge, can you see it?
16 THE COURT: I don't -- what? Are you talking about on
17 that plat? I don't see a broken line on seven or 30.
18 WITNESS: And this is only because I've been out and
19 looked at it. This dark line right here is part of the pier
20 of that finger pier that is on the inside of the property.
21 Okay. And that, in my opinion, I think as I told yesterday,
22 is about two feet, maybe, on the inside of these pilings.
23 There is probably from this boundary line here back onto the
24 wet slip property there's, probably, four or five feet
25 there.

1 BY MR. EPTING:
2 Q. All right. Let me just ask this question.
3 A. Okay.
4 Q. I think we agree on this. Do you agree that this black
5 line that I'm pointing to here --
6 A. Right.
7 Q. -- is intersecting the full --
8 THE COURT: That would be the southern line of the
9 property that B-1; is that correct?
10 WITNESS: That's my understanding.
11 THE COURT: The southern line on the property and B-1
12 on the plat; is that correct?
13 WITNESS: Yes, sir.
14 THE COURT: Okay.
15 WITNESS: But this broken line here indicates, as I
16 understand surveying -- I stand to be corrected on that --
17 that that broken line indicates that that's not the exact
18 measurement of whatever that is to the north side of that
19 dark line. So that's why I say that when you asked me if it
20 intersects at the middle, I don't believe it intersects at
21 the middle, certainly, not from what I've seen on the
22 ground. And I don't think that that's the way that's drawn.
23 BY MR. EPTING:
24 Q. Well --
25 A. But to answer your question, that is on the inside of

1 the property line. That is a common area that he walks on
2 to get to his boat or whoever has a boat.
3 Q. There's not -- well, let's go back and stay on my point.
4 A. Okay.
5 Q. Dan, if I'm just asking you to accept that this
6 measurement of this finger pier to the left on the marina
7 side to the finger pier, the water's edge of the finger pier
8 on Mr. Buck's property is ten feet; that the total width of
9 those two finger piers is ten feet.
10 A. Okay. I don't know that.
11 Q. I'm just asking you to assume that.
12 A. Okay. I'm assuming that.
13 Q. If that is the case, the distance that is actually clear
14 is not 20 feet 37, it is 15 feet 37.
15 MR. DUKES: I object, Your Honor. The hypothetical is
16 his testimony.
17 THE COURT: Overruled.
18 WITNESS: I can answer that. Under your hypothetical,
19 you give me the assumption that this walkway is ten feet and
20 it's being divided by the property line.
21 BY MR. EPTING:
22 Q. Right.
23 A. The way it exists on the ground, that's not the way it
24 is. If that entire distance is ten feet, then there's only
25 about, as I said, a foot and a half to two feet from the

1 property line of the floating dock inside Mr. Buck's slip
2 B-1.
3 Q. All right.
4 A. It's not half of that slip. Because the majority of it
5 is over where they're putting the boats in.
6 Q. All right. So we're going to call that two feet?
7 A. Something like that.
8 Q. All right. Now, where are we going to put the 18 inch
9 pilings as shown on Exhibit 7? Those are going to go on
10 Mr. Buck's property, because you've said you can't get into
11 B-2; right?
12 A. Right. You cannot. They would go on the boundary line.
13 Q. Right.
14 A. But whenever you say 18 inch pilings, are you talking
15 about the concrete pilings?
16 Q. I'm talking about the two that Mr. Buck testified and
17 has located here on this plat seven.
18 A. There are two different pilings in there. The ones that
19 are in the finger piers are concrete.
20 Q. Okay.
21 A. But the other ones that I have seen put in more recently
22 and that are out, kind of, toward the front are, probably,
23 you know, they're creosol pole whatever you want to call
24 them; but I don't think they're 18 inches.
25 Q. So they might be a foot?

1 A. Something like that.

2 Q. So in the way you would explain it, this slip would be
3 with the pilings in place in line with the existing pilings
4 but would be no more than 17 feet clearance?

5 MR. DUKES: Again, Judge, I object. If Mr. Epting
6 wants to have a surveyor come in and testify to the specific
7 dimensions of this slip, he can do so.

8 WITNESS: It would probably be a little bit more than
9 that, but 18 somewhere in there.

10 BY MR. EPTING:

11 Q. All right. Thank you, sir.

12 A. And that would be at the waterline. Now, I don't know
13 what it would be up above.

14 Q. Now, the second line of questioning if you'd turn to
15 Exhibit 18.

16 MR. EPTING: More than anything, Judge, I want to make
17 sure we've got a complete set of Exhibit 18.

18 BY MR. EPTING:

19 Q. Would you turn to the last page of Exhibit 18?

20 THE COURT: All right. That's Defendant's Exhibit 18?

21 MR. EPTING: Yes, sir.

22 THE COURT: Okay.

23 WITNESS: All right.

24 BY MR. EPTING:

25 Q. All right. But Mr. Barnett asked you when was this

1 executed, and you said March 23rd; right?

2 A. I believe that's what's in the document.

3 Q. All right. Now, when is it, actually, recorded?

4 A. Well, the stamp that is recorded, July 20th, but you got

5 to remember that those guys at that point in time were a

6 couple of months behind.

7 Q. All right.

8 A. Maybe, a little longer.

9 Q. But it became recorded?

10 A. It's not necessarily recorded the day that I take it

11 down.

12 THE COURT: It was filed on July 20, 2005.

13 MR. EPTING: Right.

14 THE COURT: That's when it was filed with the RMC; is

15 that correct? It may not be recorded in the books, but it

16 was filed on July 20, 2006? That's what the stamp -- that's

17 when it was delivered to the RMC; is that correct or not

18 correct? I'm not saying that's the day it was put in the

19 computer or that's the day it was put in the books.

20 WITNESS: That's not necessarily the day that it was --

21 THE COURT: So you're telling me the RMC is running two

22 weeks behind on stamping items that come in?

23 WITNESS: Sometimes they're running a little farther

24 than that. They have what they call a day book.

25 THE COURT: Right.

1 WITNESS: And so --
2 THE COURT: The day book shows when it was, actually,
3 handed to RMC Office.
4 WITNESS: That's correct.
5 THE COURT: And you don't think that's July 20th?
6 WITNESS: It may not have been.
7 THE COURT: Okay.
8 WITNESS: Only because there were some real issues
9 about certifying the title.
10 THE COURT: Because you have your guy look at the day
11 book to bring it up to date before filed the mortgage. I
12 understand that. I've done my share of real estate in the
13 past. Okay.
14 WITNESS: Yes, sir. That may be the actual date that
15 it was put into the book, but I don't know that.
16 BY MR. EPTING:
17 Q. Now, Mr. Barnett asked you -- this was a transfer to
18 Pavilion; right?
19 A. Correct.
20 Q. And he asked you did Pavilion have any interest in East
21 Coast or East Coast in Pavilion and you said, no.
22 A. They do not.
23 Q. Right. And Mr. Belote had no interest in Pavilion?
24 A. No.
25 Q. But Mr. McNair, the owner of Pavilion, who is receiving

1 this lot is Mr. Belote's partner in Ripley; right?
2 A. Yes, there are -- yes, he's one of them.
3 Q. And Ripley is the party that made the contract here?
4 Ripley?
5 A. Yes.
6 Q. All right. Now, Mr. Barnett asked you about Exhibit 29.
7 A. What is that?
8 Q. Defendant's Exhibit 29, if you'll pick it up.
9 A. Is that this?
10 Q. Yes. Dan, we're going to get to the bride brush here.
11 A. Okay.
12 Q. And I'm really not quite sure, and we're not going to
13 know until I get -
14 THE COURT: What exhibit are you looking at?
15 MR. EPTING: Yes, sir. It's Exhibit 29.
16 BY MR. EPTING:
17 Q. Now, do you know under what mechanism in the master deed
18 controlled of the board and pass?
19 A. Say that -- oh, oh, yes. How did the board get from
20 Mr. --
21 Q. Right.
22 A. It was either -- and I stand to be corrected -- but it
23 was either --
24 Q. Well, let me help you, because I know.
25 A. Okay.

1 Q. It was either one year after the sale of the first
2 property.
3 A. Okay.
4 Q. Or it was within 60 days of when all the dock units are
5 sold. All right. Look at the last paragraph.
6 A. Oh, I'm sorry. I'm looking at the wrong thing.
7 Q. Look at 29.
8 THE COURT: Annual meeting dated April 26.
9 WITNESS: I got it. Excuse me.
10 THE COURT: Home owners didn't take it over until the
11 end of May according to these minutes.
12 MR. EPTING: Right.
13 THE COURT: Of '05. And there's been testimony at the
14 time of the closing in April that they did not -- the
15 homeowners owned it, which according to these minutes is
16 incorrect.
17 BY MR. EPTING:
18 Q. Now, Dan?
19 A. Yes.
20 Q. If you're the lawyer for East Coast Trading and Ripley
21 and you've made a commitment to put in two pilings, and you
22 know you need a permit to do that; right?
23 A. Right.
24 Q. Do you give away your right to do that?
25 A. No. I don't think that Doc and those -- actually, I

1 think that Doc and those had tried to get that done.
2 Q. Right.
3 A. And they're still working on it, actually.
4 Q. Right. Not only that, Dan -- so, in fact, they had the
5 ability to get the permit because they controlled the regime
6 two months after this closing; right? From April the 5th
7 until the end of May?
8 A. Yeah, I think the date is correct.
9 Q. Yes. And not only that, in this case, there was no
10 restriction on Ripley and crowd getting permits to do work;
11 was there?
12 A. None that I'm aware of.
13 Q. Because, in fact, what they did --
14 (Attorneys confer.)
15 MR. EPTING: Judge, excuse me. I'm trying to find an
16 exhibit here.
17 BY MR. EPTING:
18 Q. Mr. David, let me show you two documents, and I'm trying
19 to find copies of them that are out of the Corps' file.
20 A. The what file?
21 Q. The Corps' file.
22 A. Oh, the Corps of Engineers.
23 Q. You, of course, know that Mr. Riggs, Duncan Newkirk's
24 company did work for Ripley and helping them with the
25 permits?

1 A. Yes, I believe they did.
2 Q. Right.
3 A. After Mr. Barnett got involved.
4 Q. Let me show you this document dated March 28, 2005, and
5 ask you to --
6 MR. DUKES: May I see that?
7 MR. EPTING: If we gave you guys documents when we
8 exchanged exhibits on Friday, and regrettably, I don't have
9 other copies. I have plenty of copies of this which is the
10 actual permit.
11 MR. DUKES: Is that what you just handed him?
12 MR. EPTING: No. I handed him a letter that predates
13 that .
14 Judge, should we take a break here. It appears that I
15 only have one copy of this letter, and I can make a few
16 copies.
17 THE COURT: Are you going to be offering it into
18 evidence?
19 MR. EPTING: I have some questions, but I think I will,
20 yes.
21 THE COURT: Okay. Give it to this lady, and she'll go
22 make you some copies. We'll take a short break. How many
23 copies do you want?
24 MR. EPTING: Four.
25 THE COURT: Can you make us four copies? We'll take a

1 short break.

2 (WHEREUPON, there was brief recess.)

3 MR. EPTING: Plaintiff's 18 and 19.

4 MR. DUKES: Mr. Epting, are you offering these into
5 evidence?

6 MR. EPTING: I'm getting ready to.

7 MR. DUKES: Okay.

8 (Plaintiff's Exhibit Numbers 18 and 19 marked for
9 identification and received in evidence.)

10 MR. EPTING: Sorry about all the confusion to make a
11 simple point.

12 BY MR. EPTING:

13 Q. What we know is that Ripley is applying for permits in
14 March of 2005 and, actually, gets the permit in August of
15 2005; right?

16 A. I got you.

17 Q. Right?

18 A. Let me see.

19 Q. May I refer you to Exhibit 19?

20 A. That initial was 2005.

21 Q. And how long is that permit good for? Five years?

22 A. Five years.

23 Q. Now, if you would, could you pick up Defendant's Exhibit
24 31?

25 A. Where is that?

1 Q. I'll see if I can help you. I want you to refer down to
2 the third line. But, first, list --
3 A. What are you talking about? The first page?
4 Q. Thirty-one. You don't have 31.
5 A. Yes, I do.
6 Q. Okay.
7 THE COURT: Here's 31. There's a whole bunch of
8 papers.
9 MR. EPTING: I'm sorry, Judge. The letter July 25,
10 2006. I marked that as 31. What exhibit is that?
11 THE COURT: I think it's at the very end of the whole
12 packet of information. And that letter is in 31. Okay.
13 MR. EPTING: All right, sir.
14 BY MR. EPTING:
15 Q. If you would, Dan, find the letter in Exhibit 31 dated
16 July 25, 2006. This is being written by the Corps; correct?
17 A. I'm sorry, Drew. I just don't see it. Give me one
18 second.
19 THE COURT: I think it's toward the back, Mr. David.
20 WITNESS: Okay.
21 MR. DUKES: Judge, if it's not directed to Mr. David or
22 from Mr. David it's hearsay, and he's not the appropriate
23 witness to testify to it. So I would object.
24 THE COURT: He can testify to what he knows about it.
25 It's already in evidence.

1 WITNESS: Is this the July 25th letter?
2 BY MR. EPTING:
3 Q. Yes.
4 A. Okay.
5 Q. Now, Mr. David, you had been involved with Ripley prior
6 to this date with some of the problems that Ripley was
7 having with this marina and dredging and the various Corps
8 and OCRM bureaus had you not?
9 A. I had been.
10 Q. And they were --
11 A. Not all of them, but some of them.
12 Q. And the issues they had -- Ripley's, not the homeowners,
13 Ripley's with OCRM and the Corps were not insubstantial?
14 A. That's very true. It's not so much that Ripley was
15 having those problems with those other entities, it was
16 because of the conflict as to the people on the other side
17 of the creek. And I never can remember their name or their
18 identity. They had a permit. And I think it finally came
19 down to the two parties getting together with the government
20 and getting it worked out. But it wasn't so much that
21 Ripley was having problems, it was problems being caused by
22 the other side.
23 Q. Now, so this letter is written by the Corps in July of
24 2006; right?
25 A. Yes. It might have been a little earlier.

1 Q. All right. And the fourth line of that letter reads,
2 The majority of the pilings are outside of the navigation
3 channel and are permitted. Right?
4 A. It does say that.
5 Q. Right. And the navigation channel, Mr. David, is not
6 where Mr. Buck wanted to put his pilings; was it?
7 A. That was not my understanding.
8 Q. All right, sir. Thank you, sir. And the other pilings
9 that are back in the slips where the boats are, this
10 person's telling the recipient, Mr. Parades, essentially,
11 who's the manager of this project, that it's okay. Those
12 pilings are okay. Right?
13 A. Let me answer your question this way.
14 THE COURT: Just answer the question. If you don't
15 know the answer that's fine, please, sir.
16 WITNESS: I'm sorry. Yes. Whatever the other pilings
17 were, they were not in the navigable waterway that had been
18 there for a while.
19 MR. EPTING: All right. Thank you, sir.
20 MR. BARNETT: Your Honor, may I have some recross?
21 THE COURT: Recross?
22 MR. BARNETT: Yes, sir.
23 THE COURT: Yes, sir. Recross.
24 Mr. Dukes, you were first. Do you want to do recross
25 also?

1 MR. DUKES: I don't have anything, Your Honor. Thank
2 you.

3 RECROSS-EXAMINATION

4 BY MR. BARNETT:

5 Q. I'm not sure what the numbers are. It's Plaintiff's 18,
6 I think, 18 and 19. These two documents. One from Newkirk
7 and one from OCRM. Here, the court reporter's got them.

8 A. Okay.

9 Q. Now, these are -- the letter's related to a request to
10 get a dredging permit; isn't that right?

11 A. That's what it says. Yes.

12 Q. And then Number 19 is the actual dredging permit,
13 itself; is that right?

14 A. Yes.

15 Q. Okay. Ripley wasn't asking to alter any of the
16 structures in the marina; was it? In this request?

17 A. Eighteen and 19?

18 Q. Yes.

19 A. Not that I'm aware of.

20 Q. Okay. All right. And Ripley Cove, you testified, I
21 believe, had the obligation to get the initial maintenance
22 dredging done; is that right?

23 A. Yes.

24 Q. Okay. Now, in the letter, Ms. Hadden's letter -- I've
25 parted with my copy of the letter. Do you have Exhibit

1 Number 30?

2 A. I have 31.

3 Q. Thirty-one. I'm sorry. I'm sorry. Mr. Epting asked

4 you about her statement to the regime manager about pilings;

5 is that right?

6 A. He did ask me about that.

7 Q. Okay. Now, in the earlier part, Exhibit Number 30,

8 seven pages in, there's a document called Violation

9 Analysis. Would you go to that?

10 A. Exhibit 30?

11 Q. Uh-huh.

12 A. Well, there's one called Violation Analysis on the third

13 page.

14 Q. Okay.

15 A. And on the seventh page --

16 Q. Well, let's go to the first one, whichever one you come

17 to first. Violation Analysis. I believe, there's one for

18 Mr. Rhodes and one for Mr. Chivers. The page looks like

19 this.

20 A. May I see it?

21 Q. Okay.

22 A. Is that it?

23 Q. Yes. It says, description of the violation. What did

24 the Corps consider to be Mr. Chivers' violation? Based on a

25 report that they said they received in June of 2005?

1 A. It appears that he added about 23 feet to the existing
2 dock, making each finger dock -- excuse me, approximately 43
3 feet long with new marina pilings located at the end of each
4 finger dock.

5 Q. All right. Were those extensions of the finger docks
6 after 43 feet, would that be into the navigation channel?

7 A. I don't think so.

8 Q. Okay. And yet the Corps still considered that to be a
9 violation?

10 A. That's what they say. Yes.

11 Q. Okay. And isn't it true the reason they consider that
12 to be a violation or that would be a violation is because
13 anything put in that canal just as in the deed that you
14 prepared for Zan, anything placed in that canal, any
15 structure is required to be approved by the Corps of
16 Engineers and the state?

17 A. Yes. In the letter from the Corps to Mr. Parades it
18 says that pilings UB2 or UB5 -- I guess, that's the drawing
19 -- obviously, in the navigation channel, must be removed.
20 Then it refers to pilings one, two and three are not
21 permitted, but may be outside the navigational channel.
22 Surveying must be conducted upon -- in other words they got
23 to turn in a survey. So apparently they were concerned
24 about all that.

25 Q. So is it true to say that if it's a structure inside

1 that canal in between mean high watermark on one side and
2 mean high watermark on the other side? It had to be
3 permitted by the Corps of Engineers?

4 A. Yes. Somebody has to do the drawing. I think that all
5 of that -- even when Mr. Parades was trying to get the
6 pilings that had been put in by, I guess, Mr. Chivers and
7 Mr. Rhodes, trying to get those permitted, the Corps said,
8 No, you can't do these, but, maybe, you can do these if you
9 will give me that.

10 Q. Maybe, you can do these related to whether the thing was
11 going to be inside the navigation channel?

12 A. That's not the way I read the letter. I think they
13 wanted to take a look at -- the answer your question is yes.
14 If it was in the navigational channel, there wasn't any way
15 they were going to do it. But depending on where it was,
16 they would take a look at it and make a determination.

17 Q. Okay. And they were so concerned about it in July of
18 2006 that they threatened to pull the whole marina permit?

19 A. Yes. They were concerned about people taking it upon
20 themselves to do whatever they wanted.

21 MR. BARNETT: Thank you.

22 THE COURT: Any -- well, we're through. We've had
23 redirect and recross. You may step down. Thank you very
24 much.

25 (The witness leaves the stand.)

1 THE COURT: Mr. Epting, do you have any other
2 witnesses?

3 MR. EPTING: Judge, I want to publish the two
4 paragraphs of the pleadings of East Coast and Belote and the
5 pleading of Ripley and Knight.

6 THE COURT: You want to publish two paragraphs?

7 MR. EPTING: Yes, sir.

8 THE COURT: Okay. That's from the answer; is that
9 correct?

10 MR. EPTING: Yes, sir.

11 THE COURT: What paragraphs?

12 MR. EPTING: The paragraphs are 31 and 32 of the answer
13 of Ripley and Knight filed on June 20th of 2009.

14 THE COURT: Okay. That's the only ones? Those two
15 paragraphs?

16 MR. EPTING: From the answer of Ripley, yes.

17 THE COURT: Okay. All right.

18 MR. EPTING: Paragraph 31: Subsequent to the
19 conveyance of the property of the plaintiff these defendants
20 attempted to secure approval to relocate the pilings from
21 the United States Corps of Engineers. The agency vested
22 with authority to permit piling placement in the waters of
23 the canal pursuant to the Rivers and Harbors Act of 1899,
24 section 10-33 U.S.C. section 403.

25 The Army Corps of Engineers -- paragraph 32. The Army

1 Corps of Engineers refused to approve relocation of the
2 pilings upon information and belief on its position that all
3 structures permitted in the original permit were part of
4 that permit, and that only the holder of that permit would
5 be allowed to seek approval to alter any and said
6 structures.

7 Paragraph 33, upon information and belief that the
8 marina property owners association, holder of the marina
9 permit, sought approval from the Army Corps of Engineers and
10 from the state pursuant to the South Carolina Coastal Zone
11 Management Act, South Carolina Code Section 48-39-10 ed.
12 Sec. to relocate said pilings approval would have been
13 granted by both agencies.

14 Now, Judge, I can shorten this by saying in the answer
15 of East Coast and Belote the exact same language appears and
16 rather than reading it, I would propose just to say in that
17 answer it's paragraphs 27, 28, 29.

18 THE COURT: Okay.

19 MR. EPTING: And then, finally, Judge, paragraph 30
20 from the answer of East Coast Trading, only upon granting of
21 approval by the above described government agencies would
22 these defendants been able to relocate said pilings. A tax
23 they have been ready, willing, and able to perform since
24 plaintiff took title to the property. Not because they
25 admit any legal obligation to do so, which they specifically

1 deny, but as a matter of what they regard as good faith.

2 Judge, at this time, I would like to offer the
3 affidavit of W. H. Knight. And there's an objection to
4 that. And perhaps I should let the objection be stated and
5 then I'll make a proffer.

6 MR. BARNETT: Your Honor, I think it's appropriate to
7 cross-examine Mr. Knight when he testifies with his
8 affidavit if there was some reason to do so --

9 THE COURT: Wait. Mr. Knight's here.

10 MR. BARNETT: Yes, sir.

11 THE COURT: I mean, he's here. Why should we submit an
12 affidavit where they don't have the right to cross-examine
13 the affidavit. You can call and ask him a question if you
14 want, but I don't see any reason to -- I think they're
15 entitled, if you're going to call him, to ask him questions.
16 So I'm not going to allow the affidavit be admitted into
17 evidence since he's here and he's available to be called by
18 you or whoever.

19 MR. EPTING: All right. Judge, you always --

20 THE COURT: I'm not saying -- you can impeach him with
21 the affidavit. Okay.

22 MR. EPTING: You know, you always and every time I've
23 told you this when I've tried a case, you are a fair guy. I
24 think, maybe, you're going to at least give me 15 seconds to
25 tell you why I think this affidavit in this case is

1 admissible.

2 THE COURT: Okay. All right. I'll be glad to hear
3 from you.

4 MR. EPTING: In this case, Judge, while I've got four
5 or five other reasons for why on the statute of frauds does
6 not apply. And they've alleged the statute of frauds.
7 Anything takes.

8 THE COURT: Anything what? I'm sorry.

9 MR. EPTING: Any writing takes an issue out of the
10 statute of frauds. A pleading such as I just read.
11 Mr. Knight's affidavit acknowledging the obligation takes it
12 out of the statute of frauds. And so I am offering this
13 affidavit for the sole purpose of establishing in writing
14 they have admitted that they undertook to placing these two
15 pilings.

16 Now, the alternative you've given me, Judge -- and I
17 may call him anyway -- but the alternative you give me is to
18 make me put a hostile witness on the stand who I've never
19 examined. And rather than being able to listen to the
20 testimony on direct, because he is going to testify, and to
21 weigh what he says on direct, I'm just going to have to wade
22 in with him when I only want to make this limited point. I
23 think --

24 THE COURT: All right. Let me reconsider my granting
25 the motion. Let me hear from defense counsel. He wants to

1 offer it for the limited purpose of taking it out of the
2 statute of frauds, and there was a memorandum of the
3 agreement between the parties. We haven't heard the
4 arguments on the statutes of frauds. That's the purpose
5 he's offering it. I misunderstood why he was offering it
6 until he had an opportunity to explain. I should have given
7 him that opportunity before I ruled.

8 MR. BARNETT: There's really no question of the fact --
9 and I think Mr. Knight will have to speak for himself. But
10 there's no question that they attempted to put the pilings
11 there. It's a different question to say that they had some
12 legal obligation.

13 THE COURT: I thought application had already been made
14 by these parties. Because you all were taking the position
15 they didn't have the authority to do it. I thought that was
16 your position.

17 MR. BARNETT: He tried anyway.

18 THE COURT: When did they try?

19 MR. BARNETT: He's going to have to testify to that. I
20 believe the testimony will be right around the time the POA
21 took over. But he doesn't, specifically, remember, but the
22 testimony is going to be, I believe, that he was told by the
23 Corps -- they had discovered Mr. Chivers and Mr. Rhodes
24 illegal structures, and they were very angry about it.

25 MR. EPTING: Your Honor?

1 THE COURT: Hold on a second. Let him make his
2 argument. I'll listen to you.

3 MR. EPTING: I just want to make sure I'm not waiving
4 an objection to hearsay.

5 THE COURT: I understand. I'll listen to you before I
6 rule.

7 MR. EPTING: All right.

8 THE COURT: You can reply to anything he tells me.
9 Okay.

10 MR. BARNETT: What was in Exhibit 31 which was
11 admitted, and the timeline shows that this occurred at the
12 beginning of June of '05. Mr. Knight's testimony would be
13 by the time he visited the Corps, they talked to him -- they
14 knew about this. And they said you may as well not apply
15 for a permit, because until the illegal structures are
16 resolved, that legality is resolved one way or another,
17 we're just not going to consider any more additions to the
18 marina structures.

19 By the time all that colloquy was over, the end of May
20 had occurred and the POA had taken over. There is no
21 dispute that they attempted and continued -- and we'll talk
22 about what they continued to do. We don't dispute that.
23 I'm not sure I buy the argument that that takes us
24 completely out of the statute of frauds.

25 THE COURT: I don't know either. I was just saying

1 that's the reason he's offering it. Okay. I haven't read
2 it. I don't know what it says.

3 MR. BARNETT: It's something that memorialized the
4 agreement which postulated here by Mr. Buck and Ms. Buck is
5 quite different than just putting in two pilings.

6 THE COURT: I mean, the real problem is not necessarily
7 whether they intended to put pilings, the real problem is
8 where they were going to put them.

9 MR. BARNETT: Yes, sir. That's my point. They had
10 testified exclusively --

11 THE COURT: They were supposed to be in line with
12 something.

13 MR. BARNETT: Well, they were supposed to be in slip
14 B-2, in property that the seller did not control. There's
15 no written memorialization of that. I mean, that's the key
16 agreement. I believe the testimony was that without the
17 right as a matter of fee, to put those things in another
18 piece of property, the pilings were sort of irrelevant.

19 THE COURT: Anything else?

20 MR. BARNETT: No, sir.

21 THE COURT: You wanted to say something. Go ahead.

22 MR. EPTING: Judge, I just wanted to say it may be that
23 Mr. Knight has the right to say he talked to somebody and it
24 has something to do with why he did what he did, but I would
25 object to any of that testimony coming in to prove the truth

1 of the matter asserted. And so just for purposes of
2 preserving that argument and not waiving it, I just wanted
3 to state that.

4 THE COURT: All right. Well, let me read the affidavit
5 and see what it says before I make a decision since I have
6 not read it. The affidavit says he did try to apply, but he
7 applied after he was no longer holder to permit.

8 MR. EPTING: Yes, sir. But, you know, Judge --

9 THE COURT: And there was a short lapse between -- I
10 mean, April the 5th to the end of May if those minutes are
11 correct. I've got to assume they were. They weren't the
12 holder of permit until after, I guess, May 30, 2005. Well,
13 the affidavit says in the summer. I guess, you could
14 consider May 30th summer. I'm not sure. When's the first
15 day of summer? June sometime; isn't it?

16 MR. BARNETT: June 21st.

17 THE COURT: June 21st. Okay.

18 MR. DUKES: I know everybody who lives in Charleston
19 knows summer starts about April 15th.

20 MR. BARNETT: I will withdraw my objection.

21 THE COURT: I'm going to deny your motion. I'm going
22 to grant it for whatever limited purpose it would show.

23 MR. BARNETT: I'll withdraw my objection.

24 THE COURT: I'll allow it in on Plaintiff's Number 16.

25 MR. EPTING: Judge, the plaintiff rests.

1 THE COURT: The plaintiff rests. Okay. Are you all
2 ready to make arguments or do you need a short break?
3 MR. BARNETT: Can we have a short break? I anticipated
4 a couple of additional witnesses.
5 THE COURT: I'm sorry? What?
6 MR. BARNETT: Well, I had anticipated at least one more
7 additional witness from the plaintiff based on --
8 THE COURT: I mean, I don't mind giving a short break
9 to get your thoughts together because you've been
10 concentrating on cross etcetera, etcetera, so you got to
11 switch horses. I don't mind giving you some time to get off
12 one horse and get on another one.
13 MR. BARNETT: Yes, sir.
14 THE COURT: All right. We'll take about a 10 or 15
15 minute break.
16 MR. BARNETT: Thank you.
17 THE COURT: And while you're thinking about it,
18 Mr. Barnett and Mr. Dukes, when we hear these arguments on
19 directed verdict, I would like to take each one, because
20 there's still four causes of action, I understand, still
21 outstanding; is that correct? I would like to take each
22 cause of action as it is applicable to the respective
23 parties.
24 You still going on all four?
25 MR. EPTING: Yes, sir.

1 THE COURT: I know the Funkes are out and they were
2 only on the third cause of action. So you're moving forward
3 on the other four?
4 MR. EPTING: Right.
5 THE COURT: And I would like to take them -- the only
6 one against Chicago Title, really, is the fifth cause of
7 action.
8 MR. EPTING: Right.
9 THE COURT: Okay. And in the fourth cause of action is
10 only against St. Andrews. And in the second cause of action
11 and the first against, basically, Ripley and St. Andrews,
12 Knight, and McMillan; is that correct?
13 MR. EPTING: Yes, sir.
14 THE COURT: I'd like to take them in the order of
15 causes of action when you get ready. All right. We'll take
16 about a ten minute break.
17 (WHEREUPON, there was a brief recess.)
18 THE COURT: Are the parties ready?
19 MR. BARNETT: Yes, Your Honor.
20 THE COURT: Any motions on behalf of the plaintiff?
21 MR. EPTING: None at this time, Judge.
22 THE COURT: Any motions on behalf of the defendants?
23 MR. BARNETT: Yes, Your Honor. On behalf of the seller
24 defendants, Mike Belote, W.H. Knight, Ripley Cove, LLC and
25 East Cost Trading Company move for a directed verdict as to

1 each cause of action --

2 THE COURT: And that would be on cause of action -- let
3 me find my sheet. That would be cause of action one and
4 two; is that correct?

5 MR. BARNETT: Yes, sir. Cause of action number one in
6 the --

7 THE COURT: Breach of contract. And then second cause
8 of action negligent misrepresentation, fraud by inducement.
9 Is that correct?

10 MR. BARNETT: Yes. Well, constructive fraud.

11 THE COURT: Constructive fraud. Okay.

12 MR. BARNETT: I think it's untitled. It does sound a
13 lot more like fraud by inducement.

14 THE COURT: Well, that's what I thought it sounded
15 like.

16 MR. BARNETT: And that is also true -- there are,
17 actually, two complaints here.

18 THE COURT: I think the one I read was the amended
19 complaint.

20 MR. BARNETT: It was an amended complaint. There are,
21 actually, two separate lawsuits that have been joined
22 together.

23 THE COURT: Oh, okay.

24 MR. BARNETT: In 2641, which, I believe, is the first
25 one filed, the plaintiffs have sued East Coast Trading

1 Company and W.M. Belote, which is Mike Belote, for breach of
2 contract and for negligent misrepresentation.

3 THE COURT: Okay.

4 MR. BARNETT: And then the second lawsuit which is,
5 pardon me, 3441. By the time the amended complaint was
6 filed, it had been consolidated in 2641. The plaintiff has
7 sued Ripley Cove, LLC and W.H. Knight. Ripley Cove for
8 breach of contract and Ripley Cove and Mr. Knight for
9 negligent misrepresentation.

10 THE COURT: So 3441 just added Ripley and Knight? Is
11 that correct? Did they change their cause of actions?

12 MR. BARNETT: They're virtually identical.

13 THE COURT: Okay.

14 MR. BARNETT: Just two different parties.

15 THE COURT: Okay.

16 MR. BARNETT: The causes of action as to all four
17 parties still exists.

18 THE COURT: Okay. And you represent all of those
19 parties; is that correct?

20 MR. BARNETT: Yes, sir. Right.

21 THE COURT: Who represents St. Andrews Title?

22 MR. DAVID: I do, Your Honor.

23 THE COURT: Okay. Mr. David. Okay.

24 Be glad to hear you.

25 MR. BARNETT: As to the breach of contract cause of

1 action -- of course, the evidence presented by the plaintiff
2 relates, it seems to me, in the light most favorable to the
3 plaintiff, to two contracts. There was a contract with
4 Ripley Cove which was the written contract, Plaintiff's
5 Exhibit Number 3. And all that contract says is that a
6 upland lot would be conveyed - and there was testimony that
7 said that with that upland lot an unidentified slip lot, a
8 boat slip, was also to be conveyed. That's the only
9 contract that's in evidence that Ripley Cove ever had.

10 Ripley Cove complied with that contract. There is no
11 evidence that Ripley Cove did not do exactly what that
12 contract said, albeit, through its successor which was East
13 Coast Trading Company. It is East Coast Trading Company
14 that the plaintiff says had a different contract an
15 unwritten contract to convey a part of slip B-2. Mr. Buck
16 testified to that and his daughter, Ms. Cantey, testified to
17 that. I believe it's a fair reading of Ms. Carmody's
18 testimony that she didn't know what the agreement was. But
19 Mr. Buck and his daughter testified that they believed that
20 they had a verbal agreement from representatives of East
21 Coast Trading Company to convey to them a part of slip B-2.

22 The problem with that -

23 THE COURT: Let me interrupt you just a second --

24 MR. BARNETT: Yes, sir.

25 THE COURT: -- and ask you a question about your

1 analogy about Ripley and just the lot, piece of land, not
2 the horizontal dock. The contract, Plaintiff's Exhibit
3 Number 3, refers to tax map 421-11-00-073.

4 MR. BARNETT: Yes, sir. And it also calls out lot
5 number three.

6 THE COURT: And if you look at - I'm trying to find my
7 notes. If you look at the deed, it refers to tax map 421-
8 11-00-268 as to the single family lot three. And it refers
9 to tax map same 100 as to CSB-1 which is different from the
10 tax map of the contract. My question is: What does this
11 tax map 073 show?

12 MR. DUKES: I can answer that.

13 THE COURT: Because they're different numbers.

14 MR. DUKES: The tax map number on the front of the
15 contract of sale is the 11 million dollar purchase of the
16 whole property.

17 THE COURT: You're talking about 073?

18 MR. DUKES: Yes, sir.

19 THE COURT: The whole property which would encompass
20 the lot?

21 MR. DUKES: Correct.

22 THE COURT: Okay. That's what I thought, but I wasn't
23 sure.

24 MR. BARNETT: The only --

25 THE COURT: How can you stand there and argue that it

1 doesn't incorporate the dock?

2 MR. BARNETT: It does. There is no dispute. Their
3 testimony is they were supposed to get the dock also.

4 THE COURT: Okay.

5 MR. BARNETT: The contract just didn't specify which
6 one.

7 THE COURT: I understand that, but I'm sure the master
8 deed broke it down; didn't it?

9 MR. BARNETT: The master deed, actually, says that
10 there shall be for those lots - those particular upland
11 lots, that a lot of the slips are designated to go with
12 those house lots. It doesn't say which goes to which.

13 THE COURT: Who matched them up? The developers?

14 MR. BARNETT: The testimony is that the parties matched
15 them up. Mr. McMillan, the realtor, with the concurrence of
16 my client -- there's no dispute there -- matched them up
17 with B-1.

18 THE COURT: Okay.

19 MR. BARNETT: But that was, as of that time, it's
20 unclear from the testimony so far when that happened.
21 Ripley Cove was represented by Mr. McMillan as was East
22 Coast Trading Company.

23 THE COURT: Okay.

24 MR. BARNETT: But I don't think that's in dispute.
25 There was an agreement. The problem comes and the only

1 allegation of breach of contract or from the complaint the
2 alleged breach of contract is that Ripley Cove and East
3 Coast Trading Company didn't put the pilings in, these two
4 pilings. There is no mention in the complaint of what was
5 in the testimony, which was that these pilings had to be on
6 the other side of that line dividing B-1 and B-2. I think
7 it's painfully clear, both Mr. Buck's testimony and
8 Ms. Cantey's testimony.

9 THE COURT: But Mr. Buck's testimony will say they were
10 in line. And if you look at your Exhibit 30 that's on this
11 dock to the south on the south side of CSB-1, there's a
12 piling there that's marked and there's another piling
13 marked. In line could be to the north of those pilings.

14 MR. BARNETT: Yes, sir.

15 THE COURT: And that's the interpretation -- I think
16 that's what Mr. Brock was saying. Especially, when he
17 marked it on, I think, Plaintiff's Exhibit 6 or 7 -- excuse
18 me, 7 where he, actually, marked them almost in line with
19 those pilings that were on the floating dock. So if his
20 interpretation was that was to the north, and I'm still not
21 sure what Mr. David's interpretation was of his letter.

22 MR. BARNETT: Well, Mr. Buck's testimony, though, and
23 Ms. Cantey's testimony was that they had to get an interest
24 in part lot B-2. That is the crux of the whole --

25 THE COURT: Whose testimony now?

1 MR. BARNETT: Mr. Buck and Ms. Cantey.

2 THE COURT: I understand. But that's after the fact.

3 I mean, they discovered that since the closing. At the time

4 of the closing, I don't think anybody even discussed who

5 owned B-2. But my understanding of the testimony, McMillan

6 had insinuated that it was no problem. The owner's could

7 give you the extension. I believe that was Mr. Buck's

8 testimony; is that correct or not correct?

9 MR. BARNETT: That is their testimony. Mr. McMillan

10 represented to them.

11 THE COURT: That it's no problem. They could extend it

12 over two feet. And I understand he was an agent of your

13 client, sir.

14 MR. BARNETT: He was a broker, a real estate agent.

15 THE COURT: Well, he was their agent; wasn't he? He

16 was their selling agent? He represented them.

17 MR. BARNETT: As broker, he had certain limited

18 authority. I don't think he had the authority to offer

19 property that was without specific consent of the principle.

20 THE COURT: All right. Well, that's a factual dispute.

21 MR. BARNETT: Yes, sir.

22 THE COURT: Go ahead.

23 MR. BARNETT: But the allegation, the description by

24 Mr. Buck of his problem was he had to have a wider slip. He

25 had to have a bigger area. And that's what he expected to

1 get. He said he knew that before the closing, and he
2 believed that he had an agreement.

3 THE COURT: He thought he had B-1 and B-2, initially.

4 MR. BARNETT: Originally.

5 THE COURT: Right.

6 MR. BARNETT: And he learned two days before the
7 closing -- I think is what he said.

8 THE COURT: The day before.

9 MR. BARNETT: Or the day before, that that plat, the
10 platted boundaries of B-1 weren't wide enough. And, of
11 course, Mr. Epting examined Mr. David about that.
12 Everybody's talking about that it's been up there so far,
13 that it just wasn't wide enough. So while this is not in
14 his complaint, either one, his testimony that the whole
15 purchase was useless to him because he couldn't put the
16 Rookie IV in there unless he had a 20-foot clearance. And
17 he didn't think he could have a 20-foot clearance without
18 having part of lot B-2. That then becomes a verbal
19 agreement, because there's no writing expressing that
20 agreement.

21 THE COURT: Taking the evidence most favorable to the
22 plaintiff, why couldn't Mr. David's letter be a memorandum
23 of that oral agreement?

24 MR. BARNETT: It just talks about putting two pilings
25 in.

1 THE COURT: I understand that, but the question is in
2 which direction will his two pilings be placed and in line
3 with what? I mean, if you really look at the boundary line,
4 the northern boundary line between B-1 and B-2, there's no
5 pilings.

6 MR. BARNETT: No, sir.

7 THE COURT: There's no pilings. So how do you sit
8 there and say that the pilings are going to be placed along
9 that boundary line when there's no pilings to run them off
10 of from my understanding?

11 MR. BARNETT: Well, Your Honor, the letter just doesn't
12 say --

13 THE COURT: Do you understand what my question to you?

14 MR. BARNETT: I do understand.

15 THE COURT: I mean, if you take Mr. David's testimony,
16 he's saying the pilings ought to be along this line. Well,
17 there's nothing to run them in line with on that line.

18 MR. BARNETT: There's not.

19 THE COURT: The only pilings you can do in line is the
20 ones on the south side on the fixed dock over on B-2's dock.

21 MR. BARNETT: That's right.

22 THE COURT: Okay.

23 MR. BARNETT: That is a way to interpret the letter.

24 THE COURT: And I'm just saying that's another way --
25 I'm not saying that's the way I interpreted it, I'm saying

1 that's the way taking the evidence in most favorable to the
2 plaintiff, you can interpret it.

3 MR. BARNETT: Absolutely. But that doesn't get you --
4 I shouldn't say across the line, but it doesn't get you far
5 enough to say there's any memorialization -- an actual other
6 piece of property, B-2, platted subject to a deed to another
7 party. Some of that was supposed to be conveyed to
8 Mr. Buck. That's a whole different arrangement.

9 THE COURT: Yes, but all that knowledge came after the
10 closing, after the fact.

11 MR. BARNETT: No, sir. He knew. Well, he didn't know
12 that another party --

13 THE COURT: He didn't know another party owned it. He
14 thought the grantors could grant him the two feet.

15 MR. BARNETT: That's right.

16 THE COURT: And that's what Mr. McMillan either told
17 him or insinuated to him.

18 MR. BARNETT: But that's a verbal agreement. There's
19 no writing to memorialize that verbal agreement. It's just
20 a verbal agreement.

21 THE COURT: I understand. Okay.

22 MR. BARNETT: And I think that that puts it within the
23 statute of frauds. The most recent case, the Honterage -- I
24 think it's pronounced -- the nursing home case, talks about
25 the elements of a document to satisfy the statute of frauds.

1 It has to identify the subject matter of the contract;
2 sufficiently indicate the contract has been made between the
3 parties so that reasonable certainty, the essential terms,
4 of the contract.

5 What he is saying he had an agreement to do is
6 fundamental with respect to property. For him to get part
7 of another piece of property -- he was fully aware at the
8 closing that he knew he was supposed to get another piece of
9 property. For whatever reason, did not insist on another
10 contract, another written agreement, and took a letter from
11 Mr. David just, simply, does not have even a hint that
12 another piece of property was going to have to be conveyed.
13 I don't think that the writing, which is the only writing
14 there is which is the letter, satisfies the statute of
15 frauds.

16 I think there, also, is perhaps an even more
17 fundamental problem with the document merger. As, Your
18 Honor, knows better than I the South Carolina long followed
19 the document merger involving a case like this.

20 THE COURT: Well, that goes to the intent of the
21 parties whether the writing's of the survival, the agreement
22 survives the merger.

23 MR. BARNETT: Yes, sir.

24 THE COURT: And I think that's a factual issue that
25 needs to be determined; don't you?

1 MR. BARNETT: I believe --

2 THE COURT: In this particular case.

3 MR. BARNETT: The Hughes case says that says the party
4 who wants to defeat merger has to show by clear and
5 convincing evidence that there was an agreement that was
6 supposed to survive the closing.

7 THE COURT: Okay.

8 MR. BARNETT: And in this case, I think, we're far away
9 from that. You have a case that's very similar to the old
10 Dawkie vs. Lowdes case where one party says I was supposed
11 to get more land than what was in the deed. Well, since
12 there's no writing memorializing that, Mr. David put into
13 evidence by the plaintiff -- Mr. David, who did the closing,
14 absolutely rejects the notion that there was any such
15 agreement. So you have Mr. Buck and Ms. Cantey saying one
16 thing and Mr. David saying another. And Mr. David has
17 explained in considerable detail why it was, actually,
18 impossible at that point for East Coast Trading Company to
19 convey any form of lot B-2.

20 I think all the evidence just in the plaintiff's case
21 doesn't meet the clear and convincing evidence standard and
22 the document merger would apply.

23 THE COURT: Okay.

24 MR. BARNETT: It's not like that antique chandelier we
25 keep talking about. This is quite different. This is an

1 actual conveyance of part of another platted piece of
2 property that Mr. Buck is well aware of. It's also not like
3 the situation where you have a naive or someone who's just
4 not involved with real estate. He testified he had, maybe,
5 close to a million dollars of real estate transactions in
6 his life, and have a very successful building supply
7 business here in Charleston. He's been all about contracts
8 and about real estate transactions. He wasn't misled about
9 the nature of these type transactions.

10 Despite of all his knowledge about this, he took a deed
11 to a piece of property specifically, laid out. He accepted
12 that deed. And he complains that he didn't get a copy of
13 the deed mailed to him after it was recorded for a number of
14 months, but the deed was at the closing. And Ms. Cantey,
15 who is the managing member of Zan, LLC, signed, of course,
16 acknowledging that it was subject to --

17 THE COURT: The restrictions and covenants; right?

18 MR. BARNETT: Yes, sir. They took a deed to a piece of
19 property, and then claim they had a verbal agreement to get
20 more land; and have no written agreement to that effect. I
21 just don't think the law of the statute of frauds with
22 merger --

23 THE COURT: What about your client's affidavit?

24 MR. BARNETT: Well, my client's affidavit said --

25 THE COURT: I don't remember the number.

1 MR. BARNETT: -- he tried to put the pilings in. There
2 isn't any dispute about that. They went out and tried to
3 get the pilings in. They ran into some serious problems;
4 did not do it. After a certain point, they could not do it.
5 The May -- the end of May date, but that evidence is not in.
6 But that writing is just about putting the pilings in.
7 Mr. David testified the first time he ever heard that some
8 part of slip B-2 was wanted by Mr. Buck was last October
9 when Mr. Buck was deposed.
10 THE COURT: I assume from what I said earlier,
11 Mr. David, I assume, is coming off of this piling here which
12 is on the south side of B-1 and going straight across to the
13 north side of B-1 on that piling and then the same thing on
14 the second piling on the floating dock.
15 MR. BARNETT: Yes, sir.
16 THE COURT: The question is where does that stop?
17 MR. BARNETT: Absolutely. And --
18 THE COURT: But I would assume you'd have to get a
19 surveyor to, actually, locate that line on top of the water.
20 MR. BARNETT: On top of the water. Well, which can be
21 done.
22 THE COURT: Right.
23 MR. BARNETT: But that letter doesn't touch going into
24 another person's property.
25 THE COURT: Well, I understand. But we had two --

1 apparently, we had two misunderstandings. Mr. Buck thinking
2 one thing and Mr. David thinking something else.

3 MR. BARNETT: Yes, sir.

4 THE COURT: Okay.

5 MR. BARNETT: Yes, sir. I think that's why the statute
6 of frauds applies to real estate transactions, because they
7 are so important that they have to be in writing; because
8 then you wouldn't have a dispute.

9 THE COURT: Well, I would agree that Mr. David's letter
10 should have been in much greater detail. Okay. I would
11 agree with that, but it wasn't.

12 MR. BARNETT: Yes, sir.

13 THE COURT: So we're stuck with what we have.

14 MR. BARNETT: Yes, sir. We are, but I believe the
15 plaintiff is as well. And the plaintiff is stuck with the
16 document of merger.

17 THE COURT: Okay.

18 MR. BARNETT: If he believed he had an agreement prior
19 to the closing to get more land, he ought not to have closed
20 to get to pay for a piece of property that did not have the
21 width that he said he wanted. Nobody was forcing him to do
22 that. But he closed. And so the document of merger, I
23 think, provides the agreement that he says existed disputed
24 in the evidence in the light most favorable to him, would
25 indicate, okay, we'd have to assume that agreement existed,

1 then it merged into the deed, which he took willingly. And
2 he says he didn't read it. He says he didn't read the deed
3 when it was sent to him. And so --

4 THE COURT: Well, I understand. But how many people
5 read a deed?

6 MR. BARNETT: Well -- yes, sir. I believe, the law --

7 THE COURT: Normally, the lawyer says here's the deed,
8 and that deeds you the property.

9 MR. BARNETT: The law, I believe, in South Carolina is
10 you're supposed to read it.

11 THE COURT: I understand. We are obligated to read the
12 fine print.

13 MR. BARNETT: Mr. Buck was not a novelist at this.
14 He's someone that understood, after long years of
15 experience, the importance of those documents. And he
16 acknowledged that. He acknowledged that the letter does not
17 say --

18 THE COURT: Well, he was, probably, also, relying upon
19 the relationship between him and Mr. David, also.
20 Apparently, that's a long standing relationship of trust.

21 MR. BARNETT: Yes, sir. And I think those are -- long
22 relationships, when we all get them, how important they are,
23 but, they don't change the basic legal realities. He's sued
24 these people because he says he had a contract to get more
25 land. It's not in the deed. There's no written contract.

1 There's nothing to memorialize that which is why we're all
2 here. These are sometimes -- I don't know that they're
3 necessarily called harsh realities. He wasn't under a gun
4 to do this closing. He didn't have to buy the slip. He
5 bought it.

6 His complaint that Mr. McMillan is somehow supposed to
7 know that his boat can fit in there; Mr. David is supposed
8 to know if his boat can fit in there. They're not marine
9 surveyors. They didn't have that obligation. There is no
10 contractual obligation by the seller of land to give
11 somebody something which is perfectly going to meet their
12 needs. It's his obligation to figure that out. If it
13 wasn't going to meet his needs, he ought not to have bought
14 it; but he did buy it. His complaint now is that he was
15 supposed to get another deed and another plat for more land.
16 It's just not -- credibility aside, it doesn't get them past
17 the statute of frauds.

18 THE COURT: Thank you, sir. Are you through?

19 MR. BARNETT: With the contract issue.

20 THE COURT: Okay. Thank you so very much.

21 MR. BARNETT: I have one more cause of action. Do you
22 want me to do that one?

23 THE COURT: No. I want to hear from Mr. Epting on the
24 breach of contract.

25 MR. EPTING: Judge, part of performance takes a case

1 out of the statute of frauds. And here we know that a
2 commission was given back by the realtor and a credit was
3 given to my client to part perform the agreement that my
4 client testified occurred. So that gets us beyond the
5 statute of frauds.

6 Secondly, the statute of frauds, Judge, in this case,
7 who's asserting it? Is it Ripley? Because the statute of
8 frauds can only be asserted by a party to the agreement.
9 But what you really have here, Judge, is you have a contract
10 with Ripley, and the rights have been assigned to East
11 Coast. And so who is the stranger to the document? It
12 looks like, to me, East Coast has taken the contract from
13 Ripley subject to the obligations that Ripley has
14 undertaken. And so I ask you, because I'm not here to tell
15 you the answer, I'm just saying the purposes of the statute
16 of frauds, it is only a party to the agreement who can
17 assert it. East Coast, certainly, can't assert it for
18 Ripley. And Ripley can't assert it for East Coast. And it
19 may be in this case, Judge, since East Coast, in essence,
20 took some sort of assignment of the contract benefits from
21 Ripley, neither one of them can assert it. You've got
22 Mr. McMillan's affidavit.

23 THE COURT: Well, that's a different twist. You got
24 any cases that take that position on the statute of frauds
25 of an assignment issue?

1 MR. EPTING: Well, not so much on the assignment --

2 THE COURT: I'm talking about the assignment issue.

3 MR. EPTING: No, sir, Judge. Because it's hard to
4 figure out what happened here. There's no legal document
5 that said how we got from Ripley's to an East Coast Trading
6 Company to start with. But only one of them can assert a
7 statute of frauds. It's only the party to the agreement.

8 Now, I'm just saying it's not available to either one
9 of them. But it's not available, Judge. I think you
10 mentioned this on merger, and it's applicable to the statute
11 of frauds, too. There's all kinds of evidence here after
12 the fact that they undertook to do exactly what my client
13 said they agreed to do. And the statute of frauds is not
14 going to cut off the future performance of an obligation,
15 that there's evidence existing. So you've got letters --
16 and you perhaps don't recall, Judge. There's a letter in
17 here for Mr. Buck to go and meet somebody in September of
18 '06 for where these pilings go. Mr. Buck says he went and
19 he, actually, met --

20 THE COURT: That's the guy that was going to put the
21 pilings in?

22 MR. EPTING: -- actually, met two people -- Doc Knight.
23 And went over Exhibit 7 with him. And so you have all kinds
24 of evidence after the fact, Judge, that this contract is
25 going to be performed, and that, too, takes it out of the

1 statute of frauds.

2 Finally, Judge, the pleadings. The pleadings admit
3 that there's an agreement. Now, exactly -- and I think this
4 is your point -- what is the exact agreement? I don't know.
5 But one of the interpretations of that agreement is that my
6 client was to get 20 feet, the house, and the boat since
7 everybody knew that's why he was buying it in that pilings
8 were going to go in a place to allow the boat to be parked
9 there.

10 THE COURT: Thank you very much.

11 MR. EPTING: Yes, sir.

12 THE COURT: Anything, very briefly, in reply?

13 MR. BARNETT: Yes, sir, I will. The only -- the
14 contract that Ripley was a party to was performed. So I'm
15 glad that Mr. Epting has reminded us to separate the
16 parties. Ripley's on the contract. There's no evidence
17 that anybody associated with Ripley Cove promised a 20-foot
18 boat slip which would require part of B-2. The contract
19 that Ripley executed, Exhibit Number 3, was complied with.
20 Mr. Buck got lot number three and he got a boat slip. East
21 Coast Trading Company is the subject of the alleged
22 additional contract. The contract to give Mr. Buck some
23 feet of another --

24 THE COURT: Well, when did the property go from Ripley
25 to East Coast, or was it always an East Coast property?

1 MR. BARNETT: In December of 2004. So when that
2 contract --

3 THE COURT: So the contract should have been signed by
4 East Coast not Ripley.

5 MR. BARNETT: That is correct. That is correct.

6 THE COURT: All right.

7 MR. BARNETT: It was erroneously signed by Ripley Cove.
8 At that time, Mr. Belote was half owner of Ripley Cove.

9 THE COURT: Okay.

10 MR. BARNETT: But, nevertheless, Ripley Cove is a
11 separate party and has been sued separately by the
12 plaintiff. I don't think Ripley Cove needs to remain in
13 this case, nor do I think that Mr. Belote or Mr. Knight need
14 to remain in causes of action of contract. There is no
15 allegation of a contract of any kind between Doc Knight, who
16 was, simply, acting as a representative of Ripley Cove or
17 East Coast, or Mr. Belote, who is the principle of East
18 Coast and was the half owner of Ripley Cove. They're just
19 not parties to the contract.

20 THE COURT: All right. Thank you very much. I'm going
21 to take it under advisement until I hear the defendant's
22 case, okay, on your particular motion on the contract
23 action.

24 Okay. Let me hear you on the, I guess, second cause of
25 action, the negligent misrepresentation.

1 MR. BARNETT: The negligent misrepresentation.

2 THE COURT: And constructive fraud. I called it fraud
3 of inducement, but I don't know what it -- we'll have to
4 hear from Mr. Epting on that one.

5 MR. BARNETT: It sounds a lot like fraud of inducement.
6 As we set forth in our pre-trial brief, I'm not sure I can
7 add anything to that. The test for negligent
8 misrepresentation as well as fraud of inducement. They're
9 fairly well set out. There are many problems with this for
10 terms of directed verdict motion. I would focus only on one
11 which is alleged representation that was inaccurate or
12 negligent was to do a future act -- well, two future acts,
13 actually. The complaint only alleges the one future act,
14 putting in the pilings. The testimony is the other act that
15 you could get part of slip B-2.

16 To make either of those misrepresentations style cause
17 of actions stick, the law says that there has to be a --
18 proof that compliance with those promises to do those things
19 without the intent to ever do them, which is a pretty high
20 bar of proof, and it is, simply, not met by the plaintiff.
21 It's just not. Mr. Buck testified that he believed that
22 Mr. Knight did attempt, and for some time did attempt to get
23 approval for the pilings, and that they were going to put
24 them in.

25 I mean, it's fairly simple to me, perhaps too simple.

1 It's a future act. There are two future acts. And there's
2 no proof that these people did not -- even if you accept
3 their testimony, they did not intend to put these pilings in
4 with respect to the alleged promise to convey part of slip
5 B-2. I just think that that proof fails all the way around.
6 The testimony by Mr. David, put in by the plaintiff, was
7 that East Coast Trading Company, Mr. Belote nor Mr. Knight,
8 own slip B-2. It's just not possible for that to be done.
9 He'd never make such a representation.

10 That would be what I have to say about that.

11 THE COURT: Thank you very much.

12 Mr. Epting?

13 MR. EPTING: Well, Judge, they misrepresented the
14 width. They told Mr. Buck it would be 20 feet.

15 THE COURT: Who misrepresented the width?

16 MR. EPTING: Karl McMillan, who was the agent.

17 THE COURT: Now, was McMillan the agent of Ripley or
18 East Coast or everybody, and what's the relationship there?
19 That's really murky.

20 MR. EPTING: Well, Ripley, Judge - well, it's a good
21 point, Judge, in light of the question you just asked.
22 McMillan is listed as the real estate agent. And it appears
23 that way on the real estate contract signed in March.

24 THE COURT: Okay.

25 MR. EPTING: And so McMillan, at the time he meets with

1 Mr. Buck in terms of signing the contract, ultimately
2 represents that they're going to put in pilings so his boat
3 will fit and they're going to have 20 feet. But what we,
4 now, know, as the selling agent, he really wasn't
5 representing Ripley. He was representing East Coast Trading
6 Company because the lot had been owned by East Coast Trading
7 Company in December.

8 So he represented everybody in this transaction. And,
9 in fact, Mr. David, whom he called, for example, Judge,
10 about the pilings and where they were going to go. He said
11 that he had the authority to sign that document on behalf of
12 both Ripley and East Coast Trading Company.

13 THE COURT: Refresh my memory who owns what as far as
14 Ripley and East Coast.

15 MR. EPTING: All right.

16 THE COURT: I know you've covered it, but refresh my
17 memory.

18 MR. EPTING: Well, it's confusing, Judge. Ripley is or
19 was owned by two individuals by the name of Belote --
20 Mr. Belote is seated, I think, here -- and a fellow by the
21 name of McNair -- Larry McNair.

22 MR. BARNETT: And Lowell Frasier.

23 MR. EPTING: And Lowell Frasier.

24 THE COURT: Okay.

25 MR. EPTING: All right. Then, Mr. Belote, did his

1 business in East Coast Trading, and Mr. McNair did his
2 business in Pavilion. So it's the two individuals that own
3 Ripley's, McNair and Belote. And it is Mr. Belote who owns
4 East Coast Trading. And it is Mr. McNair that owns
5 Pavilion.

6 THE COURT: And Mr. McKnight, where does he fit into
7 it?

8 MR. EPTING: Mr. McKnight was -- signed all of these
9 documents for Ripley's and East Coast Trading Company as the
10 power of attorney for Mr. Belote.

11 THE COURT: He wasn't the owner? He just worked for
12 him?

13 MR. EPTING: Yes, sir. And documents are signed. And
14 Mr. David testified he had a power of attorney for
15 Mr. Belote, East Coast, and Ripley.

16 THE COURT: There wasn't any question about the power
17 of attorney?

18 MR. EPTING: No, sir.

19 THE COURT: Okay. All right. Go ahead. I didn't mean
20 to interrupt your argument. I just wanted --

21 MR. EPTING: Well, really, Judge, I just think the
22 representations are everywhere here. And if there's
23 anything in particular you want me to address.

24 THE COURT: Yes. I want, specifically, what do you
25 think they have done? Because we're talking about two --

1 negligent representation and constructive fraud and fraud
2 and inducement are, basically, three, pretty well, separate
3 causes of action of different elements. What do you want to
4 proceed on? I mean, at some point in time, you're going to
5 have to decide which one you want to proceed on.

6 MR. EPTING: And I think, Judge --

7 THE COURT: And I just threw in the fraud inducement,
8 because I don't know what you want to do.

9 MR. EPTING: Well, Judge, I'm not sure --

10 THE COURT: You're just throwing it all up and hoping
11 something's going to stick?

12 MR. EPTING: No. It seems, to me, for example, Judge,
13 the fraud and the inducement claim gets around -- there is
14 no defense for merger, statute of frauds to a fraud and
15 inducement. And so in my mind, I view the acts supporting
16 negligent misrepresentation and fraud and inducement is one
17 in the same.

18 THE COURT: Okay.

19 MR. EPTING: I really do. And I think it has to do
20 with the representations that what Mr. Buck was getting
21 which has been testified to by any number of people; but
22 those were the representations that were made by
23 Mr. McMillan as agent for East Coast and Ripley. They were
24 made by Doc McKnight as agent for Mr. Belote and East Coast
25 Trading Company and for Ripley.

1 THE COURT: Well, you know, the case has thrown those
2 terms around sort of very loosely, and it gets sort of
3 confusing on what when you start reading some of the cases
4 about negligent representation, fraud and inducement, almost
5 one in the same.

6 MR. EPTING: Yes, sir. And I do agree with that,
7 Judge, except, I think, for example, if I am going to prove
8 fraud act, I think, it's fraud inducement; then I'm going to
9 have to prove it by clear and convincing evidence. And so
10 there are some distinctions, but in terms of the evidence
11 that I rely on for what is the negligent misrepresentation
12 and what is the fraud and inducement, they're the same.

13 THE COURT: Okay.

14 MR. BARNETT: May I? Mr. Epting and witnesses
15 continually say that Karl McMillan represented the slip as
16 20 feet wide. The slip was platted. It had boundaries. It
17 exists.

18 THE COURT: Twenty point four seven on the eastern end.

19 MR. BARNETT: Yes, sir. Yes, sir. And Mr. Buck's
20 dispute -- his problem with it is you've got that floating
21 walkway. It sticks out a certain number of feet in the
22 middle over to one side. And nobody ever represented to
23 Mr. Buck -- I don't think there's anything in the testimony
24 for this -- you can put your boat in that slip. That would
25 not be a realtor's function. And Mr. Buck relied on Karl

1 McMillan that is not a marine surveyor -- there's already
2 testimony you've got to have special expertise in boating --
3 that he could put his boat in there. Well, that's
4 unreasonable, Your Honor. The mires have to figure that
5 out.

6 THE COURT: Well, Mr. Buck, I think, said the widest
7 beam where it was 20 feet and then it flared out some.

8 MR. BARNETT: Absolutely.

9 THE COURT: So he needed an additional two feet.

10 MR. BARNETT: Mr. Buck decided. He concluded --

11 THE COURT: But at the same time, Mr. Buck knew what it
12 took to get his boat in a slip.

13 MR. BARNETT: Yes, he did.

14 THE COURT: Why do you think he would buy a slip that
15 was too small?

16 MR. BARNETT: I don't know why he would do that. But
17 he concluded -- what matters here is he concluded that the
18 slip was too narrow for his boat.

19 THE COURT: That's why he wanted an additional two
20 feet.

21 MR. BARNETT: Well, the notion that he wants to tag
22 Mr. Knight here or Mr. Belote or East Coast Trading Company
23 or Mr. McMillan or anybody else for telling him that this
24 slip is going to be okay for this boat goes out the window.
25 He knew it wasn't wide enough. Now, so that leaves us with

1 he got told two pilings were going to be put in. Well,
2 that's a future act. And he testified, he admitted that
3 those people tried to get those pilings put in. Now, there
4 was a misunderstanding about where they were supposed to go.

5 The other alleged misrepresentation is that these
6 people were going to give him two feet of an entirely
7 different slip. That's just completely unreasonable that he
8 relied on a realtor, a broker telling him that somebody was
9 going to convey --

10 THE COURT: I think he relied on the broker as well as
11 Mr. David's letter.

12 MR. BARNETT: But the letter, again, says nothing about
13 getting title to a different piece of property.

14 THE COURT: I understand that.

15 MR. BARNETT: And he didn't ask --

16 THE COURT: We've gone through the various
17 interpretations of the letter and there's more than one
18 interpretation.

19 MR. BARNETT: Oh, that's for sure.

20 THE COURT: There may be more. There may be two or
21 three interpretations.

22 MR. BARNETT: I agree with that. But I don't think any
23 of them get him to where he needs to be in terms of getting
24 title to another whole piece of property. He didn't ask
25 about it. He didn't make any inquiry. The law requires

1 that people do more than just claim that somebody said,
2 Yeah, I'm going to give you title to another whole piece of
3 property.
4 THE COURT: Okay. All right. Thank you very much.
5 MR. BARNETT: Thank you.
6 THE COURT: Motion denied. All right. That gets us to
7 the fourth cause of action on St. Andrews. Mr. David?
8 MR. DAVID: Your Honor, it appears --
9 THE COURT: Let me ask you this: Can we do the fifth
10 cause of action on Chicago Title, first?
11 MR. DAVID: Yes, sir.
12 THE COURT: If you don't mind? I'll be glad to hear
13 from you, but I want to hear from Chicago Title.
14 MR. DUKES: Pass the threshold that was there on
15 Mr. David's testimony. You'll recall that Mr. David
16 testifies that when --
17 THE COURT: Hold on just a second. I want to find the
18 title insurance policy.
19 MR. DUKES: It is Exhibit 10.
20 THE COURT: Okay. Okay.
21 MR. DUKES: This will bear on Mr. David's testimony,
22 but through the complaint Zan asserts that an incorrect
23 policy jacket was issued to them. There was a policy that
24 applied to an individual and to a residence. Chicago Title
25 has never taken the position that there is no coverage, that

1 the policy --

2 THE COURT: I think he testified that he wanted the
3 piling issue put in the binder and the policy.

4 MR. DUKES: And the title agent said, You wouldn't own
5 it. I wouldn't put it in the policy, and you wouldn't cover
6 it.

7 THE COURT: Well, I'm not sure what he told him he
8 wanted in the policy. I mean, he said he wanted the piling
9 issue put in the policy.

10 MR. DUKES: In addition, as --

11 THE COURT: The problem is nobody knew where these
12 pilings were going.

13 MR. DUKES: It doesn't matter. Under the master deed,
14 he would not have owned those pilings; the property owner's
15 association would own them. On top of that, the pilings
16 didn't exist as of the date of the policy. And as Mr. David
17 testified, the title --

18 THE COURT: Well, I don't know if I agree that the
19 property owner's association would own them. The owners at
20 that time, had the right to put them in and make
21 application. Now, when they turned it over to the property
22 owner's association, they would own them then; but at the
23 time of this closing, I'm assuming that they would have
24 owned them.

25 MR. DUKES: No, sir.

1 THE COURT: Once they put them in and the property
2 owner's association would have owned them.
3 MR. DUKES: No, sir.
4 THE COURT: But since they weren't in, nobody owned
5 them. We're talking about something that wasn't in.
6 MR. DUKES: Right. Let me -- in a condominium regime --
7 THE COURT: Okay.
8 MR. DUKES: -- there is a period of time where the
9 developers, whoever the declarant of the master deed and
10 covenants is --
11 THE COURT: Right.
12 MR. DUKES: -- controls the property owner's
13 association.
14 THE COURT: Right. And they say what goes where, and
15 they could have said put this piling here and here. And
16 once they put them in, then the property owner's association
17 would have owned them.
18 MR. DUKES: The property owner's association would
19 always own -- whoever controlled it, the POA would own it.
20 THE COURT: Right. Right.
21 MR. DUKES: Not the developers.
22 THE COURT: I understand.
23 MR. DUKES: Okay.
24 THE COURT: I agree with that. I'm not arguing with
25 you on that.

1 MR. DUKES: Okay.

2 THE COURT: I'm just saying that the time we're talking
3 about, there weren't any pilings for anybody to own.

4 MR. DUKES: Exactly.

5 THE COURT: That's what I'm trying to say.

6 MR. DUKES: And title insurance looks backwards not
7 forwards. It looks at claimants against the title to the --
8 in this case, a cube of water. And Mr. buck admitted no one
9 has come to him and said you don't own slip B-1 as the
10 record indicates, all public filings indicate precisely what
11 slip CSB-1's box of space is. Thus, Zan has not identified
12 any defect in title which would fall under a covered risk
13 policy.

14 THE COURT: Well, let me ask you this. Look at your
15 covered risk. That's what I want to ask you since you
16 brought it up.

17 MR. DUKES: Yes, sir.

18 THE COURT: The covered risk number two --

19 MR. DUKES: There's no evidence of that.

20 THE COURT: One, two, and five. Number one, if someone
21 else owns an interest in your title. Number two, if someone
22 else has rights affecting your title rising out of a lease,
23 contract or options. And number five, someone else has a
24 right to limit your use of your land. Assuming he's
25 correct, he was supposed to be deeded an additional two

1 feet.

2 MR. DUKES: Judge, the law in this state is clear that
3 in policy title insurance the property described in the
4 policy is what's insured; not what you wish you had; not
5 what you thought you got; not what you --

6 THE COURT: But you don't think you could -- what about
7 Mr. -- the agent's letter?

8 MR. DUKES: If you look at the stationery, that's David
9 and Schwartz, Attorneys at Law.

10 THE COURT: I know, but he's still your agent.

11 MR. DUKES: Not for all purposes.

12 THE COURT: Well...

13 MR. DUKES: No, sir.

14 THE COURT: I think the agent can bind you. What about
15 his letter as far as the ones I just addressed in your
16 covered risks?

17 MR. DUKES: The agent cannot bind Chicago Title to
18 insure property that is not owned by the insured, was not
19 conveyed as part of the transaction. Absolutely not. His
20 obligation and the agency agreement is in evidence. It's
21 Exhibit Number 22. He is to determine -- make a
22 determination on a title. He did that. He used a
23 certificate of title in September of 2005 when he returned
24 the deed and the title policy to Mr. Buck; that you have fee
25 simple title subject to the covenants and restrictions in

1 slip CSB-1, period. You are to determine the insurability
2 of the property. And I asked Mr. David would the expanded
3 slip be insurable? Absolutely not. I wouldn't have issued
4 a policy covering that.

5 There is no defect in the title. The property that
6 Zan, LLC owns, there's no defect in the title in the
7 property described in the policy of the insurance. And the
8 law is that the court can't go and torture the language of
9 the insurance policy to go beyond what the policy says. The
10 policy language, itself, says you have title to this piece
11 of property. The piece of property that appears on that
12 plat, they have fee simple title to that property. There's
13 no defect in the title to that property.

14 There's no evidence contrary to that. Mr. Buck even
15 admits that. What he complains about is I should have
16 gotten more. Well, more wasn't conveyed to him under the
17 deed. The public record, notice to all the world, says that
18 he owns slip CSB-1, refers to that plat. Title policy
19 refers to that plat. Everything refers to the description
20 and the deed in to Zan, and everything refers to that plat.

21 Chicago Title doesn't insure more than that; doesn't
22 insure what doesn't exist at the time the policy is issued.
23 Title insure doesn't insure promises to future events. It
24 insures what you own at the moment you accept the deed. And
25 that's what Mr. Buck got, what Zan got when Ms. Cantey

1 executed that deed. We don't insure what you want to use a
2 boat slip for. We don't insure that you could use it at
3 all. We insure that you own it. And he is vested and
4 titled as insured. So there's no breach of contract here.
5 And plaintiff's claim against Chicago Title has failed.

6 THE COURT: Anything else?

7 MR. DUKES: That's all. Thank you.

8 THE COURT: Thank you very much.

9 Mr. Epting?

10 MR. EPTING: Judge, general agent under the agreement
11 that's in evidence, three people testified that Mr. David
12 told them that he was going -- Mr. Buck, Zan was going to
13 get title insurance that covered a 20-foot space which would
14 have been part of B-2. He didn't get part of B-2 --

15 THE COURT: According to the plat, you got 20.47 feet.
16 On the -- 20.37 feet, excuse me, on the eastern end and 21.42
17 feet on the western end. So he got his 20 feet,
18 irrespective of whether the boat would fit or not.

19 MR. EPTING: Well, but the testimony, Judge, was by
20 three witnesses.

21 THE COURT: Plus, the floating dock, I believe, is
22 owned by the association.

23 MR. EPTING: The testimony from Mr. Buck, Ms. Cantey,
24 and from Ms. Carmody was that Mr. Buck waives the issue of
25 20-foot clearance --

1 THE COURT: I hate to cut you off, but let me just ask
2 you a question.

3 MR. EPTING: Yes, sir.

4 THE COURT: How can you expect Chicago Title to insure
5 a breach of contract between the parties and fraud or
6 negligent misrepresentation? How can you expect a title
7 insurance company to insure that? And what risk would be
8 applicable as to your causes of action? That's my
9 difficulty with your situation.

10 MR. EPTING: Here's what I'm saying, Judge, is that the
11 insurance policy that should have been issued through their
12 general agent --

13 THE COURT: But all you're arguing is that it should
14 have been a different size; it should have been a different
15 meets and bounds or a different plat is what you're arguing
16 -- conveyed. How can that dispute between -- that's a
17 dispute between the grantor and the grantee. How can you
18 expect a title insurance company to insure that?

19 MR. EPTING: Because B-2, Judge, is making a claim to
20 land.

21 THE COURT: Making a claim to what?

22 MR. EPTING: B-2 is making a claim to property that it
23 was agreed upon with Chicago Title's agent that we would
24 own. And that's the title defect is the two, three, four
25 feet of B-2 that the general agent --

1 THE COURT: Well, but you haven't closed it in title
2 defect language. I mean, you've drawn your lawsuit on a
3 breach of contract between the grantor and the grantee, or
4 the contract between the parties, and negligent
5 misrepresentation by the grantors. I mean, at some point in
6 time, we've got to -- but that's down the road about damages
7 and what you're going to proceed on, but that's what your
8 lawsuit's about.

9 MR. EPTING: Well, it is. But I think the claim,
10 Judge, of breach of contract is it's just a claim on the
11 title policy.

12 THE COURT: I understand.

13 MR. EPTING: As we say, the general agent committed to
14 issue it.

15 THE COURT: Show me what the risk is and what covered
16 risk is involved in fraud and contractual disputes?

17 MR. EPTING: I think, Judge, you read the ones --

18 THE COURT: I try to be most favorable to you, and
19 picked out one, four, and five. I can't imagine any of the
20 rest of them apply.

21 MR. EPTING: I agree, Judge. I think that the risk
22 that we're suing for on our contract, the title that was
23 issued to us is that somebody else -- B-2 is making a claim
24 to our title. And, indeed, Judge, if you looked at the
25 litigation that has been stayed --

1 THE COURT: Well, that was his rights defecting your
2 title arising out of leases, contracts or options.

3 MR. EPTING: Right. B-2 bought the land that was
4 supposed to be ours.

5 THE COURT: Or, five, someone else has the right to
6 limit your use of the land.

7 MR. EPTING: Right. And that's what's happening. And
8 in this case, Judge, while that case has been stayed, 40(J),
9 between the Funkes, B-2 and B-1.

10 THE COURT: All right. What's your allegation? I
11 haven't read your complaint. I don't have it in front of
12 me. What's your allegations against Chicago Title in your
13 cause of action for breach of contract, because that's what
14 you're suing him for?

15 I'm sorry. I found the contract. I'll read it real
16 quick and answer my own question. Incorporated paragraphs
17 one through 34, okay. Just sort of general conclusion.
18 What's your factual basis for your cause of action? I guess
19 I should ask it that way. The cause of action is just sort
20 of a factor of legal conclusions or conclusions not facts.

21 MR. EPTING: The factual basis, Judge, is that the
22 agent represented that we were going to have title insurance
23 that would cover --

24 THE COURT: The additional two feet.

25 MR. EPTING: That's it, Judge. And that somebody else

1 is making claim to property that should have been ours.

2 That's it.

3 THE COURT: Okay. All right. Anything, very briefly?

4 MR. DUKES: The deed controls.

5 THE COURT: I understand that -- the difficulty.

6 MR. DUKES: Two feet of slip B-2 was not conveyed to
7 Zan. There is, in fact, nobody owns -- there's no evidence
8 that anyone owns an interest in any property described in
9 Schedule A of the title policy. There's no evidence that
10 anyone has a right affecting Zan's title in the property
11 described in Schedule A of the policy. Nobody has an
12 easement over the property described in Schedule A. There's
13 no defect in Zan's title, the policy that is insured.

14 THE COURT: But if he had received the title that he
15 wanted for the additional two feet, you would be on the
16 hook. And the ownership of B-2 -- that would come under,
17 five, covered risks. If someone else has a right to limit
18 you the use of your land. In other words, if he had been
19 deeded -- if he'd got what he thought he was getting, an
20 additional two feet, B-2 would be encompassing that because
21 they own it.

22 MR. DUKES: No one conveyed any portion of B-2.

23 THE COURT: Well, I understand that. But if he had
24 gotten what he had wanted, it would have been conveyed -- or
25 what he thought he had bargained for, it would have been

1 conveyed, the additional two feet. That's what he thought
2 he bargained for. I don't think there's any argument with
3 that. I understand y'all disagree with that, but that's
4 what he thought he was bargaining for. I'm talking about
5 the plaintiff, Mr. Buck.

6 MR. DUKES: Again, Judge, title insurance doesn't
7 insure what you wanted. Title insurance --

8 THE COURT: But your agent wrote a letter that Mr. Buck
9 was satisfied with that encompassed the two feet, according
10 to Mr. Buck.

11 MR. DUKES: And that's post closing.

12 THE COURT: And he can bind you to that effect.

13 MR. DUKES: No, he can't.

14 THE COURT: Mr. Dukes, your argument on that?

15 MR. DUKES: Absolutely, he cannot.

16 THE COURT: Okay.

17 MR. DUKES: He cannot bind Chicago Title to cover
18 property that is not owned by the insured. Absolutely,
19 positively, not. Under no circumstances can a title
20 insurance agent bind a title insurance company to insure
21 property that the insured doesn't own.

22 THE COURT: I agree with that, but that's not what I
23 said to you. I said, if Mr. Buck had got what he thought he
24 was bargaining for, then the letter would bind you. That's
25 all I'm saying to you. Okay.

1 MR. DUKES: The deed --
2 THE COURT: And the deed would have included the
3 additional two feet.
4 MR. DUKES: If the deed would have included the
5 additional two feet --
6 THE COURT: And I think Mr. Buck even went a step
7 further saying, I want the title insurance policy in a
8 binder -- I don't know if he said "binder," but the title
9 insurance to include the -- I don't remember exactly what he
10 said, but what he intended the two additional two feet.
11 MR. DUKES: He accepted a deed that was less.
12 THE COURT: I understand that.
13 MR. DUKES: And nobody conveyed property to him with an
14 additional two feet out of CSB-2.
15 THE COURT: All right. I'm going to take it under
16 advisement until I hear the defense side. Okay.
17 MR. DUKES: Thank you, Your Honor.
18 THE COURT: All right. Mr. David?
19 MR. DAVID: I think since you've already made a ruling,
20 Your Honor, I would just reiterate --
21 THE COURT: I'm not ruling on your -- St. Andrews, yet.
22 MR. DAVID: Okay. Well, Your Honor, as far as their
23 contract, the first cause of action --
24 MR. DUKES: Judge, let me make it a formal stipulation
25 on behalf of Chicago Title that we're not -- Chicago Title

1 is not asserting that the policy is invalid because the
2 jacket describes an individual -- a real -- a natural person
3 or whatever --

4 THE COURT: You've made that perfectly clear.

5 MR. DUKES: I just want to make that stipulation.

6 THE COURT: You've made that perfectly clear. I think
7 that was his assumption when he started the lawsuit, but
8 that's not your interpretation.

9 MR. DUKES: No, Your Honor.

10 THE COURT: I understand.

11 MR. DAVID: Your Honor, as far as breach of contract is
12 concerned, the allegation in paragraph 14 is that we failed
13 to provide a valid owner's title policy. I think that,
14 based on the title policy that I've seen, it's valid. And
15 Chicago Title states that they are not making any claim that
16 there are any deficiencies in that. As far as the
17 misrepresentation, again, there's a future act involved.
18 We've, kind of, been through that. It says that St. Andrews
19 Title represented as part of the sales that the pilings
20 would be erected. I don't think St. Andrews Title ever
21 guaranteed there would be any pilings. The attorney for St.
22 Andrews, myself, simply, wrote a letter saying that the
23 owner was going to do that. Not taking it upon himself to
24 do that as relating that the person that was selling the
25 property was going to do that. So there couldn't be any

1 misrepresentations about the pilings. There had been
2 testimony that had been presented that they intended to do
3 that.

4 THE COURT: I think their claim against you is you
5 didn't include in the binder the additional two feet in the
6 binder.

7 MR. DAVID: There wasn't any way I could do that. I
8 wouldn't have done that.

9 THE COURT: I understand that's 20-20 hindsight.

10 MR. DAVID: No, sir. There's no hindsight about that,
11 at least from my standpoint, I'm very clear on that. And as
12 far as the pilings are concerned, that's permitted property
13 and would have nothing to do with the real estate.

14 THE COURT: Right.

15 MR. DAVID: And there's no way in the world it could
16 have been included in a title policy.

17 THE COURT: It's sort of hard to call water real
18 estate, too; isn't it?

19 MR. DAVID: Say that again, sir.

20 THE COURT: It's sort of hard to call water real
21 estate, but we've been doing it.

22 MR. DAVID: Well, I said that the Horizontal Property
23 Regime Act is a really good fiction, and created some
24 interesting issues.

25 THE COURT: Yes. And I'm sure it all hasn't been

1 litigated, yet, either.

2 MR. DAVID: I've got about two more, unfortunately,
3 that doesn't have to do with anything like this. But other
4 than a misrepresentation, his allegations are that it was
5 not a natural person and the policy would not insure. Those
6 are the only things that are in this allegation, the
7 negligent misrepresentation or negligence. And I think
8 Chicago Title has an abundance of evidence that those
9 jackets were what we used. Nobody's denying the claim. It
10 had nothing to do with the -- somebody making a claim
11 against the property. So I think that the certainty that,
12 actually, those two causes of action should fail. And
13 perhaps the judge wants to hear more evidence on the
14 contract, but I think that St. Andrews Title fulfilled its
15 terms of the contract. It made no negligent
16 misrepresentations or anything that was false. The reason
17 for the letter was to ensure that he was going to get two
18 pilings. The only question was where.

19 THE COURT: Thank you very much.

20 MR. DAVID: Thank you, Judge.

21 THE COURT: Mr. Epting?

22 MR. EPTING: Judge, I may have learned one thing. And
23 I was glad to hear you know something about real estate
24 because I know nothing.

25 THE COURT: Don't know a whole lot about it. That was

1 a long, long time.

2 MR. EPTING: The one thing I've learned is my side of
3 the house it is a lot easier to know who it is you represent
4 and make that clear. And I think, regrettably, for Dan in
5 this case, St. Andrews Title is a question of what role he
6 served in the end and who he's representing. I think that's
7 a factual issue, and he let this get closed. According to
8 Mr. Buck, he was promised by Dan David, his agent of St.
9 Andrews, that he was going to have additional feet, part of
10 which would be B-2, and there's evidence of that.

11 THE COURT: All right. Motion denied.

12 Let me do this, Mr. David. I'm going to take it under
13 advisement. Because I think your wagon is sort of hooked to
14 Chicago Title. Okay.

15 MR. DAVID: I don't think there's any question about
16 that.

17 THE COURT: I think your wagon is hooked to them so I'm
18 going to take yours under advisement. I want to hear the
19 defense side of this to all these issues.

20 MR. DAVID: Okay.

21 THE COURT: Okay.

22 MR. DAVID: Thank you.

23 MR. EPTING: Thanks, Judge.

24 THE COURT: All right. Anything else before we break
25 for lunch?

1 MR. BARNETT: No, Your Honor.

2 THE COURT: It's ten minutes after 1:00. Do you want
3 to start back at 2:30?

4 MR. EPTING: That would be great.

5 MR. DUKES: That's fine, Your Honor.

6 THE COURT: That's an hour and twenty minutes.

7 MR. EPTING: Judge, one thing -- and I don't want to
8 set off World War III, but you're very thoughtful and you
9 probably will take this and start thinking about it. So one
10 thing I did not say in trying to be brief, no need to put
11 into the hopper. Remember that Dan David testified that
12 title insurance follows the contract, not the deed.

13 MR. DUKES: That is absolutely incorrect. That is not
14 what the testimony was.

15 THE COURT: I think it follows the deed, legally.
16 Okay.

17 MR. EPTING: All right.

18 THE COURT: Unless there's some memorandum as to
19 agreements that would survive the merger. Okay. Now, the
20 issue is whether that letter he wrote survives -- didn't
21 merge.

22 MR. EPTING: Right.

23 THE COURT: That's the issue, and I think that applies
24 to him as well as well as Chicago. That's why I'm saying
25 his wagon is hooked to Chicago.

1 MR. EPTING: All right. I'm with you, Judge.
2 THE COURT: Okay.
3 MR. EPTING: I wouldn't call that -- I'm with you.
4 THE COURT: I don't think he -- I don't think that's
5 the law on contract as far as title insurance. Okay.
6 MR. DAVID: It's not, Your Honor.
7 THE COURT: It's what you own by fee simple deed, or,
8 maybe, they got a life estate. Do you all issue policy on
9 life estate, Chicago Title?
10 MR. DAVID: I don't think so, Judge. I never have done
11 one.
12 THE COURT: Never have done one?
13 MR. DAVID: No. Not on a life estate.
14 THE COURT: Just fee simple?
15 MR. DAVID: Just fee simple. I've done lease holding.
16 THE COURT: Lease holding?
17 MR. DAVID: Did a motel on one many years ago.
18 THE COURT: Anything else you want to put on the record
19 before we leave?
20 MR. EPTING: No, sir. At 2:30. Could I ask --
21 THE COURT: He may have said contract. I don't know if
22 he did or not, but it's immaterial.
23 MR. DAVID: Can I speak to that? I mean, I know it's
24 immaterial. I just don't want to leave the Court with not
25 thinking that I didn't know the difference. But when

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CERTIFICATE OF REPORTER

I, the undersigned BONNIE M. BRITT, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Family Court for Charleston County, South Carolina, on the 26th, 27th, 28th days of July 2011.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

July 19, 2012

Bonnie M. Britt
Official Court Reporter

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

NINTH JUDICIAL CIRCUIT
COURT OF COMMON PLEAS
08-CP-10-2641

ZAN, LLC,)
PLAINTIFF,)

VS.)

TRANSCRIPT OF RECORD

RIPLEY COVE, LLC, W.H. KNIGHT,)
KARL A. MCMILLAN, Individually)
And as the principal of KARL)
A. MCMILLAN INC., ST. ANDREWS)
TITLE & ABSTRACT AGENCY, INC.,)
AND CHICAGO TITLE INSURANCE)
CO., and EAST COAST TRADING CO)
DEFENDANTS.)

VOLUME II

July 26, 27, & 28, 2011
Charleston, South Carolina

B E F O R E:

THE HONORABLE J.C. NICHOLSON, JR., JUDGE

A P P E A R A N C E S:

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MICHELLE N. ENDEMANN, ESQ.
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DAN M. DAVID, ESQ.
Attorneys for Defendants

BONNIE M. BRITT
Official Court Reporter

1		<u>I N D E X</u>			
2	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
3	(July 26, 2011)				
4	EDGAR BUCK				
5	Mr. Epting	5			
6	Mr. Barnett		94		
7	Mr. Dukes		114		
8	SUSANNE CANTEY				
9	Ms. Endemann	38			
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12	LYNN CARMODY				
13	Ms. Endemann	66			
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15	Mr. Dukes		87		
16	DAN DAVID				
17	Mr. Epting	116		202	
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19	(July 27, 2011)				
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21	FRED MALLETT				
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24	Mr. Barnett	315			
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1		<u>I N D E X</u>			
2	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
3	KARL MCMILLAN				
4	Mr. Barnett	329		364	
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1		<u>E X H I B I T S</u>		
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVD.</u>
3	P-1	Rookie IV photo	4	4
4	P-2	Wappoo Cut photos	4	4
5	P-3	Agreement 2/4/05	4	4
6	P-4	Deed 3/5/05	4	4
7	P-5	Letter 4/5/04	4	4
8	P-6	Photos	4	4
9	P-7	Plat	4	4
10	P-8	Letter 6/21/06	4	4
11	P-9	Closing statement	4	4
12	P-10	Chicago Title email	4	4
13	P-11	Letter 9/13/05	4	4
14	P-12	Deed to Funkes	4	4
15	P-13	Master deed	4	4
16	P-14	Property tax receipts	4	4
17	P-15	OCRM documents	4	4
18	P-16	Affidavit - Mr. Knight	4	231
19	P-17	Damages summary	4	37
20	P-18	Newkirk Environmental	216	216
21	P-19	Permit	216	216
22	(WHEREUPON, there were no defendant's exhibit numbers 1-17)			
23	D-18	Deed	4	4
24	D-19	Deed	4	4
25	D-20	Deed	4	4

1		<u>E X H I B I T S</u>		
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVD.</u>
3	D-21	Plat	4	4
4	D-22	Contract amendment	4	4
5	D-23	Chart - Plat	4	4
6	D-24	Chart - Plat	4	4
7	D-25	Permit document	4	4
8	D-26	DHEC letter	4	4
9	D-27	Photos	4	4
10	D-28	Coast guard document	4	4
11	D-29	Annual meeting notice	4	4
12	D-30	Plat - enlarged	416	416
13	D-31	Portion of Corps' file	416	416
14	D-32	Photo	416	416
15				
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VOLUME II

1 Mr. Epting asked me that, I said under certain circumstances
2 that it would not merge. Because as I understand the law,
3 whatever was in that contract merges into the deed. The
4 deed pretty much controls everything unless you have some
5 reservation that I'm going to want this, and it will
6 continue past the deed is my understanding.

7 THE COURT: Basically, that's intent of the parties as
8 to what they intended.

9 MR. DAVID: That's my understanding.

10 THE COURT: That's my understanding in general terms.

11 MR. EPTING: Judge?

12 THE COURT: I'm sure Mr. Dukes understands a whole lot
13 better than I do.

14 MR. EPTING: For planning purposes, Judge, could I ask
15 my colleagues in advance to tell me who we are going to see
16 and so I can know whether to start --

17 THE COURT: We don't need this on the record.
18 (WHEREUPON, there were scheduling matters.)
19 (WHEREUPON, there was a lunch recess.)

20 THE COURT: Call your first witness.

21 MR. BARNETT: Yes, sir.

22 Your Honor, the defense, defendants call Fred Mallett
23 to the stand.

24 FRED MALLETT, being first duly sworn,
25 testified as follows:

1 THE CLERK: Thank you, please be seated. For the
2 record, will you please state your name spelling your last
3 name?

4 WITNESS: Fredrick Eugene Mallett, M-a-l-l-e-t-t.

5 DIRECT EXAMINATION

6 BY MR. BARNETT:

7 Q. Okay. Mr. Mallett, thank you for coming today. I want
8 to, just for logistical purposes, there are some exhibits
9 sitting here that I'll be calling your attention to. And
10 when I direct you to the notebook, they're tabbed with
11 numbers.

12 Mr. Mallett, who do you currently work for?

13 A. I work for the State of South Carolina and the
14 Department of Health and Environmental Control in the Office
15 of Ocean and Coastal Resource Management.

16 Q. All right. If you would, tell the Court just -- I know
17 that office does many things. If you would tell the Court
18 what that office does with respect to your current
19 responsibilities.

20 A. The office is a regulatory agency of state government.
21 And I am in the permitting, slash, wetland department. We
22 process incoming permit applications where alterations are
23 an impact to the title and scrivener area. We also assist
24 the enforcement section in their duties, and various and
25 sundry duties as well.

1 Q. How long have you worked for what the agency is now
2 known as OCRM?
3 A. For 26 years.
4 Q. For a time later you worked for, I think, it was known
5 as the Coastal Council?
6 A. Yes, sir. It was South Carolina Coastal Council.
7 Q. Have you always been involved in the regulatory end of
8 their business?
9 A. I have.
10 Q. So the issuance of denial of permits would be included
11 in that responsibility?
12 A. Yes, sir.
13 Q. Have you, then, also spent some time with the
14 enforcement in that business?
15 A. I have.
16 Q. And are you familiar with what are known as the critical
17 area regulations?
18 A. Yes, sir.
19 Q. Would you, again, with respect to -- you're familiar
20 with the canal at Ripley Cove that brings us here today?
21 There's a plat there that shows it.
22 A. I am.
23 Q. And tell the Court what critical area is if you would.
24 And where are the boundaries of the critical area with
25 respect to that canal?

1 A. Critical areas are defined as areas which are inundated
2 or guidely inundated by salient waters. And in this case,
3 the owners of the canal, there's an existing timber bulkhead
4 that waters may touch upon which would be the demarcation
5 point or if there's a landward bluff which the water comes
6 up to then that would be the demarcation point,
7 jurisdictional doctrine.

8 Q. Okay. And have you been involved in a permit
9 application related to the marina on the south back of that
10 marina?

11 A. Yes, sir.

12 Q. What parts of that marina structure are permitted with
13 respect to the critical area permitting responsibilities of
14 your office?

15 A. Any portion of the structure which extends beyond the
16 critical line is permitted by the state.

17 Q. So anything along that bulkhead?

18 A. Yes, sir.

19 Q. Would that be all the pilings that are in the canal that
20 are part of that marina?

21 A. If not grandfathered, yes, sir.

22 Q. How about the floating walkways that are in that canal
23 as part of the marina?

24 A. Yes.

1 Q. Take a look at -- in that notebook I showed you just a
2 second ago -- the exhibit which is marked tab 15-A.
3 A. I have it.
4 Q. All right, sir. Are you familiar with this document?
5 A. Yes, sir, I am.
6 Q. Tell the Court, if you would, what this is.
7 A. This is a joint public notice placed on review by the
8 Army Corps of Engineers and the Department of Health and
9 Environmental Control, OCRM.
10 Q. You say it's joint public notice by the two agencies.
11 Are y'all's jurisdictional interests the same?
12 A. A lot of that would depend on the location and the
13 activity itself.
14 Q. Okay. With respect to this marina, are they the same?
15 A. Yes, sir, somewhat.
16 Q. Okay. Well, tell me what is the purpose here. Why is
17 this document created, and what's done with it?
18 A. This application is created as a result of the proposal
19 by an applicant, and then generated by the agency, placed on
20 public notice to notify the immediate adjoining property
21 owners of interested parties and for public as well.
22 Q. All right, sir. And is there a date that shows when
23 this document was put out on public notice?
24 A. Yes, sir. It was placed on public notice June 13th of
25 2008.

1 Q. And were you involved in the processing of this permit
2 application?
3 A. I was not when it, initially, went on public notice. A
4 former employee, Mr. Josh Young, was the project manager.
5 Q. Did you have some involvement with it ultimately?
6 A. Yes, sir.
7 Q. In front of you there, there is an exhibit which is not
8 in the notebook which has a yellow sticker with Exhibit 26
9 written on it. Would you find that for me, please?
10 A. All right.
11 Q. And what is that document, Number 26? It's Defense
12 Exhibit Number 26.
13 A. This is a final action permit taken by the Department of
14 Ocean and Coastal Resources.
15 Q. Is the permit which is the final action, Number 26, is
16 it related to Plaintiff's Exhibit 15-A, the one in the
17 notebook we were just looking at?
18 A. It is.
19 Q. Okay. And when was the permit issued? The final
20 action?
21 A. The permit was issued on January 12, 2011.
22 Q. Okay. So about two and a half years later?
23 A. Yes, sir. Give or take.
24 Q. All right, sir. Now, what -- are you familiar with the
25 authorization for this marina, the original authorization?

1 A. Somewhat familiar with it.

2 Q. Okay. There should be there in front of you an Exhibit
3 Number 25. If you would find that.

4 A. I have it.

5 Q. Okay. Is this the original permit that authorized the
6 construction of that marina?

7 A. It appears to be.

8 Q. Okay. Now, what was being requested? What alterations
9 were being requested in the permit application that would
10 then be subsequently authorized by Defense Exhibit Number
11 26. What was being requested to be done?

12 A. We marked the applicant sought after-the-fact permit
13 application for existing modifications to the marina, and
14 change in use from a public -- I'm sorry -- change of use
15 from a public to a private marina.

16 Q. What were the existing alterations to the marina; do you
17 recall?

18 A. It's my understanding that there were some unauthorized
19 piling and, possibly, some unauthorized jet floats as well.

20 Q. Okay. Does permit, Exhibit Number 26, does that show
21 where these structures were?

22 A. There appears to be a ledger that shows that.

23 Q. Now, if the structures were in place, but they were not
24 authorized by your office, how would your agency
25 characterize those structures?

1 A. As unauthorized unpermitted activities.

2 Q. Would this permit action that you described that
3 resulted in the permit in January of this year, is that
4 known as after-the-fact permit?

5 A. It is because it was after the fact.

6 Q. Are there limitations under your regulations as to when
7 your agency can issue an after-the-fact permit?

8 A. There are.

9 Q. And tell the Court what those are, please.

10 A. The agency can only accept an application and or take a
11 final action on an application which legitimizes an
12 unpermitted or unauthorized activities.

13 Q. And is that what was done in this case?

14 A. Yes, sir.

15 Q. Are there regulations that relate to structures like
16 this in critical area of waters that you will apply in
17 making the decision of whether or not something can be
18 authorized or not?

19 A. Yes, sir.

20 Q. And what are -- just generally, what are the
21 considerations that your agency would look at?

22 A. The number of structures, the figuration of structures,
23 the counter extension of structures are some of the factors
24 taken in consideration.

25 Q. Do you look at navigation?

1 A. Yes, sir.

2 Q. How do you evaluate -- how do you apply navigation as a
3 consideration -- or did you apply navigation as a
4 consideration in evaluating this permit application?

5 A. The agency did take navigation into consideration.

6 Q. How did you go about taking it into consideration with
7 respect to this permit?

8 A. Well, in part there was an enforcement action which
9 required some structures to be removed because they created
10 an impediment to navigation.

11 Q. All right. So the structures then were permitted. Was
12 there a conclusion about whether or not they interfered with
13 navigation?

14 A. The agency concluded that the structures which were
15 permitted did not create an impediment to navigation.

16 Q. But they still needed a permit; is that correct?

17 A. Yes.

18 Q. Okay. Now, the structures that impeded navigation, do
19 you remember why your agency concluded that they impeded
20 navigation?

21 A. They may have been as a result of channel placement and
22 or being any unauthorized structures.

23 Q. All right, sir. And tell the Court what you mean by
24 "the channel" in this marina.

25 A. In this marina, any given title water line you have a

1 channel or a demarcation point which is, probably, the
2 deepest part or the most navigable part, the most used part
3 of a water course. And if that structure is placed too far
4 into that route, it could create an impediment to that
5 navigation.

6 Q. All right. Now, there are some drawings attached to
7 Exhibit 26, the permit that was issued. And I direct your
8 attention to what -- it looks like it's sheet three of
9 eight. Can you find that?

10 A. Yes, sir.

11 Q. It's got its own lettering here, channel boundary.
12 There seems to be a demarcation. Does this permit, then,
13 fix the channel in this canal? These would be what you were
14 just talking about.

15 A. Yes, sir.

16 Q. So do I understand you correctly that y'all would not
17 want any structure intruding onto that channel?

18 A. A structure may be able to encroach upon it, again, as
19 long as it does not create an impediment to navigation.

20 Q. Do you take those cases as they come to you on a case-
21 by-case basis?

22 A. Yes, sir. Each application is reviewed on a case-by-
23 case basis.

24 Q. Now, using your permit drawing, the one we were looking
25 at -- the one right there labeled sheet three of eight --

1 I'd like you to look here on the right hand side, and there
2 is some lettering, B-1, B-2, B-3, B-4 and so forth. Did you
3 find those?
4 A. Yes.
5 Q. All right. And this is white structures -- this long,
6 rectangular white structure here at the bottom. You see
7 where I'm pointing here. What is this? Do you recall?
8 A. That's either a fixed pier or, possibly, a floating
9 structure.
10 Q. And then just above that, the shorter version of that,
11 what is that?
12 A. That's, probably, a floating structure.
13 Q. Okay. If -- well, let me ask you this: Based on the
14 policies that you have described when you apply to
15 considering permit applications, Mr. Mallett, if somebody
16 asked permission, someone with -- the appropriate person
17 asked permission to put two pilings between those two
18 structures but no further out than the end of that longer
19 pier, would that, in your mind, be contrary to any of the
20 policies that you all apply?
21 A. That may not be contrary to the policies.
22 Q. If a permit application were to be made to your agency
23 to authorize two pilings -- and I'm not giving you a
24 specific location, but in between those two piers, floating
25 piers, tell the Court what, generally, what is the process?

1 What happens with the permit application? In other words,
2 how do get an application all the way to this final action?
3 A. Once the request has been made for the proposal, it is
4 entertained by a, based on public notice and action upon the
5 -- in accordance with the regulations.
6 Q. And what is the public notice doing?
7 A. The public notice notifies the adjoining property
8 owners, any of the adjoining property owners of the
9 proposal, the general public and other interested parties.
10 Q. Do y'all take comments from people?
11 A. Yes, sir.
12 Q. Do you consider whatever comments you get?
13 A. Yes, sir.
14 Q. Okay. Now, this Exhibit Number 26, the permit that was
15 issued, was issued to whom?
16 A. This permit was issued to Ripley Light Marina Property
17 Owners Association.
18 Q. Was it the Ripley Light Marina Property Owners
19 Association who made the application for the permit
20 modification?
21 A. Yes, sir.
22 Q. Is there any other entity that you all would allow to
23 make permit application to you, like, for changes to that
24 marina?
25 A. If someone has clear ownership of upland property, and

1 if those property boundaries extend out into the water
2 course, then by law, the agency can entertain application.
3 Q. What about changes to this actual marina? Changes to
4 the structure that will be part of this marina?
5 A. Any modification or amendment to this permit would have
6 to be made by the permittee.
7 Q. The holder of the permit?
8 A. Yes, sir.
9 Q. Y'all use the term "permittee"?
10 A. Correct.
11 Q. Let me ask you this: Based on your regulations, if you
12 have a permittee, somebody who holds the permit, and they
13 make an application to make some physical changes to a
14 marina -- they got the permit for a marina -- and y'all are
15 doing your thing. You're going out on public notice.
16 You're doing all those things you talked about, reviewing
17 comments and regulations. And while you're doing that, but
18 before you make a decision, the permit is transferred to
19 another person. What happens to your process of the permit
20 application?
21 A. The pending amendment would either have to be withdrawn
22 or possibly re-noticed because they were new owners.
23 Q. So if I understand you correctly, so you all want to see
24 any permit action relating to a marina only in the name of
25 the holder of the permit; is that correct?

1 A. If that's the one who the permit was issued, yes.

2 Q. Now, y'all have issued - it took two and a half years of
3 processing, and you issued this permit for these changes,
4 Number 26. Is the Ripley Light Marina Property Owners
5 Association, are they free to come back, say, tomorrow and
6 ask for more changes to the marina?

7 A. They can come in and submit an amendment.

8 Q. Okay. So there's no limit. They don't stop -- you get
9 one every five years or so?

10 A. There is not.

11 Q. So they can come in at any point and ask, from today on,
12 and ask y'all for permission, for instance, to put two
13 pilings in between those two floating walkways?

14 A. As long as it is a valid permit, and as long as there is
15 not a special condition permit that would prohibit so.

16 MR. BARNETT: Okay. Mr. Mallett, those are all the
17 questions I have for you. These other gentlemen or the
18 Court may have some questions.

19 THE COURT: Let me make sure I understood or heard you
20 correctly. Did you say anyone with a Horizontal Property
21 Regime Ownership could ask for a permit if it's in their
22 hard file regime of ownership? Did you say that or did I
23 misunderstand you?

24 WITNESS: I think you heard it correct, Your Honor. In
25 part, if the applicant has adjacent upland property --

1 THE COURT: Right.

2 WITNESS: -- and if his or her property lines extend
3 out to the water course, then they could, possibly, apply
4 for permit.

5 THE COURT: For permit. Okay. I just wanted to make
6 sure I heard you correctly.

7 MR. DUKES: Nothing from me, Your Honor.

8 MR. DAVID: Nothing from me, Your Honor.

9 MR. EPTING: No questions, Judge.

10 THE COURT: No questions?

11 Okay. You may step down. Thank you very much.

12 MR. BARNETT: May I follow up on your question?

13 THE COURT: Pardon?

14 MR. BARNETT: May I just follow up just on your
15 question?

16 THE COURT: No. I just wanted to make sure I heard him
17 correctly.

18 MR. BARNETT: Right.

19 THE COURT: I didn't mean to pose it as a question. I
20 just wanted to make sure I heard what he said.

21 MR. BARNETT: That's true.

22 THE COURT: I mean, he said it, but I wasn't sure what
23 I heard. I wanted to make sure I heard him. But if you
24 want to ask him a question, feel free to do that. I don't
25 want to prohibit you from doing that. But I didn't mean to

1 phrase it as a question. Okay.

2 FURTHER EXAMINATION

3 BY MR. BARNETT:

4 Q. If there's a holder of a marina permit, is it possible

5 for anybody else to ask for permission to modify the

6 structures that are in that marina or subject to that

7 permit?

8 A. Not subject to that permit.

9 MR. BARNETT: Okay. Thank you.

10 THE COURT: Anybody have any further questions?

11 MR. DUKES: No, thank you, Your Honor.

12 THE COURT: Mr. Mallett, thank you so very much for

13 being here. Have a safe trip back to Columbia. Is that

14 where you reside?

15 WITNESS: Actually, I'm from Charleston.

16 THE COURT: Charleston. Okay. I'm sorry. Have a safe

17 trip back to your office or home. Thank you very much.

18 (The witness leaves the stand.)

19 THE COURT: Call your next witness.

20 MR. BARNETT: The defense calls Robert Riggs.

21 ROBERT RIGGS, being first duly sworn,

22 testified as follows:

23 THE CLERK: Thank you. Please be seated. Sir, for the

24 record, if you'll please state your name, spelling your last

25 name.

1 WITNESS: Robert H. Riggs, R-i-g-g-s.

2 DIRECT EXAMINATION

3 BY MR. BARNETT:

4 Q. All right. Mr. Riggs, who do you currently work for?

5 A. I currently work or employed by the Newkirk
6 Environmental Incorporation.

7 Q. And what do they do?

8 A. We do environmental consulting work in a range of
9 environmental fields, primary focus on federal and state
10 permitting and facilitating or assisting people who are
11 trying to obtain permits through that process.

12 Q. All right, sir. And what did you do for a living before
13 that?

14 A. I was with the U.S. Army Corps of Engineers for 37
15 years.

16 Q. Where did you work for the Corps for those 37 years?

17 A. I worked in both the Savannah district and the
18 Charleston district.

19 Q. After you came to the Charleston district, what did you
20 do?

21 A. I came to the Charleston district and worked in the
22 surveying and navigation branch for about five years. Then,
23 I moved to the regulatory division for 37 years -- 35 years
24 -- 30 years, just slightly over 30 years in the regulatory
25 program.

1 Q. When you left the Corps after those 37 years, what
2 position did you hold in the Charleston district?
3 A. I was the Chief of the regulatory division for ten years
4 before I retired.
5 Q. Tell the Court what that entailed.
6 A. The regulatory division of the Corps of Engineers is the
7 body who administers various federal laws for work affecting
8 waters of the United States. In essence, they review
9 actions that impact on waters of the United States, and
10 either issue or deny permits for that work.
11 Q. All right, sir. Now, are you familiar with canal -- you
12 just heard Mr. Mallett testify; right?
13 A. Yes, I am.
14 Q. The canal out there at Ripley Cove?
15 A. Yes.
16 Q. What has been your personal involvement with respect to
17 that canal?
18 A. I was employed with the Army Corps of Engineers when the
19 first permit was issued to Ms. Spann for a marina. I later
20 was involved with Mr. Belote in the permitting on the
21 private side -- I had left the Corps -- attempting to get a
22 permit for dredging, and for permitting a small field in the
23 back of the cove.
24 Q. All right. Did you have any other involvement with
25 respect to the canal?

1 A. None that I recall.

2 Q. Okay. Did you have any involvement with respect to
3 dredging?

4 A. Well, I helped Mr. Belote attempt to get a permit to do
5 some dredging in the canal on the side -- I guess, it would
6 be the east side of the canal where his facilities existed
7 or the facilities he was responsible for existed. It was a
8 lengthy process. Dredging activities in and of themselves
9 are not typically controversial but for a couple of issues.
10 One, being the contaminants that may be in the sediment if
11 there are contaminants. And the second part is the disposal
12 of the material. What do you do with the mud that you take
13 out of the area that you're going to dredge?

14 Q. And for some time now, has the finding of the disposal
15 area been a problem in many dredging operations like this?

16 A. Yes. For private activities, they have to provide their
17 own disposal facility or their own disposal area. You can't
18 use a marsh area for disposal. You just will not get a
19 permit to fill in marsh for disposal of dredging material.
20 It's just not a water dependent activity, and there are a
21 number of reasons to go into that. So while the Corps may
22 entertain an application, the bottom line at the end of the
23 day is you won't get a permit for that. So you have to find
24 uplands for that disposal. Typically, the cost associated
25 with protecting the uplands or finding an upland that

1 someone's willing to sell of sufficient capacity or size to
2 hold the capacity of the material, just difficult to do.

3 Q. All right. Now, are you familiar with the extent of
4 Corps jurisdiction under the statutes that you used to be
5 responsible for administering in this canal?

6 A. Yes.

7 Q. Tell the Court what the extent of that jurisdiction.

8 A. The Corps' jurisdiction is general and overall is really
9 founded on several federal statutes. One is section 10 of
10 the Rivers and Harbors Act; portions of section 9 of the
11 Rivers and Harbors Act; and section 404 of the Clean Water
12 Act. The jurisdiction for regulating these areas is founded
13 in those laws.

14 Q. All right, sir. And with respect to this canal that
15 we've been hearing testimony about today, just tell the
16 Court where the Corps' jurisdiction reaches.

17 A. The Corps' jurisdiction in regard to this particular
18 action is navigable waters in the United States which is
19 defined as those areas -- title areas. Those areas on mean
20 high water.

21 Q. All right, sir. And this canal has two banks; right?

22 A. It does have two banks.

23 Q. All right. So you're talking about the mean high
24 watermark on both banks?

25 A. On each bank. It's, kind of like, if you look at the

1 high water. The jurisdiction of the Corps is not just the
2 water, itself, but it's laterally to the mean high water on
3 each side of that watermark.

4 Q. Now, within those boundaries, from that mean high
5 watermark to that mean high watermark, what activities would
6 require a permit from the Corps of Engineers?

7 A. According to the regulation the way it's stated, is any
8 activity that will affect the Corps' location, condition, or
9 capacity of that navigable water requires a permit.

10 Q. All right, sir. And would that include any pilings,
11 physical piling structure?

12 A. Any piling; any removal of material; any bulkhead that
13 would be below the mean high watermark; any structure that
14 would extend beyond the mean high watermark.

15 Q. Are you also familiar with the Corps' policy on
16 enforcement of unauthorized activity?

17 A. Yes, I am.

18 Q. Were you in charge of that part of the regulatory
19 functions of the Corps?

20 A. Yes. As the Chief of the regulatory division, I was
21 responsible for the entire program, both enforcement and
22 permits.

23 Q. How long were you, actually, the Chief?

24 A. Ten years.

25 Q. What year did you leave?

1 A. I left in August of 2003.

2 Q. There are some exhibits up there. I believe one has
3 Exhibit sticker 31 on it.

4 A. Yes.

5 Q. All right. Have you had a chance to review this?

6 A. Yes, I have.

7 Q. Okay. Tell the Court what this -- we don't need to read
8 it all. Just tell the Court what these various documents
9 are in terms of the programs that you used to administer.

10 A. From the first document or just generally?

11 Q. Yes, sir. What are they?

12 A. From the first document?

13 Q. Yes.

14 A. The first document that I'm looking at is a tele-con
15 with Jerry Chivers. It's nothing more than a memo; it looks
16 like prepared by Robin Sosha who I happen to know and is
17 employed by the Corps of Engineers. It's just documenting a
18 telephone conversation she had with Mr. Chivers.

19 The second document is the same thing, except it's
20 documenting a conversation with Mr. Rhodes. The following
21 document is signed by three of the folks here. It is a
22 violation analysis report. It's an internal document to the
23 Corps that goes through and looks at a violation and comes
24 to some conclusions over the seriousness of the violation,
25 the flagrancy of the violation; a number of factors that

1 they use and factor in to, ultimately, deciding how to
2 handle a particular violation, at least what remedy may be
3 best.

4 Q. Yes, sir.

5 A. Moving on, this is another memo from Ms. Sosha where she
6 talked with Mr. Chivers. Another violation analysis -- and
7 I didn't look at the name, but there are two. One is from
8 Mr. Rhodes and one is from Mr. Chivers. Then there's a
9 letter from Mr. Rhodes to Ms. Hadden who is the Chief of the
10 regulatory division. Ms. Hadden succeeded me when I left.
11 Basically, notifying of receipt of the Cease and Assist
12 letter from the Corps of Engineers, and their compliance
13 with what was required by that cease and assist.

14 Q. All right, sir.

15 A. And then there is the Cease and Assist letter from the
16 Corps of Engineers to Mr. -- I'm not sure I'll say this
17 right -- Parades, Century management. And it just lays out
18 a number of issues that the Corps has with regards to the
19 installation of structures that needed permits or needed a
20 permit modification that had not been obtained. And,
21 basically, echoed that certain things needed to be done.
22 And there are some drawings attached to that.

23 Q. What kind of structures was Ms. Hadden noting?

24 A. There were some pilings. There were some extensions to
25 docks and some finger piers, I believe, without the

1 requisite approvals from the Corps of Engineers.

2 Q. Now, Mr. Riggs, does the Corps have a policy about

3 receiving -- let me take that back. Does the Corps have a

4 policy with respect to approving additional modifications to

5 a facility like this marina if there are unauthorized

6 additions to that marina like the ones described in

7 Defendant's Exhibit 31?

8 A. Yes.

9 Q. What is that policy?

10 A. What the Corps does is if there is a violation or a

11 noncompliance issue with the terms and conditions of an

12 issued permit on a particular action that's covered by a

13 permit, the Corps will not accept or process or move to a

14 conclusion on any additional action until the until the

15 unauthorized parts of that activity have been resolved.

16 Q. What forms could resolution of these unauthorized

17 actions take?

18 A. Resolution could be from removal of all the structures

19 to -- worst case could be removal of the structures. Best

20 case would be after-the-fact permitting of the structures.

21 There may be some instances where it can go further. If the

22 Corps believes that a particular permit applicant is doing

23 things in willful disregard for the law and the terms and

24 conditions of the permit, they could refer the matter to the

25 Department of Justice and, actually, seek other penalties

1 other than removal of the structure.

2 Q. If you would, take in that notebook there, Mr. Mallett

3 was looking at there is an Exhibit 15-A.

4 A. Yes.

5 Q. It may still be up there.

6 A. It is.

7 Q. Okay. Joint public notice. Are you familiar with that

8 process?

9 A. Yes, I am.

10 Q. All right. And is it the Corps' process for receiving

11 and reviewing an application, once it goes out on a joint

12 public notice. Is that similar to what Mr. Mallett

13 described?

14 A. It is similar. The joint process is something that's

15 been established with the state and feds here in order to

16 make the process a little easier if we can, or if they can

17 for the general public. So you don't have to go off and

18 visit two or three agencies and try to get it all done. You

19 make one application and it constitutes an application for

20 both of these actions. But the processes are similar. The

21 notice is issued jointly. It solicits comments on the

22 proposed activities from anyone who feels like they're

23 interests are affected by the work. And then those comments

24 that are received are factored into the decision by the

25 Corps of Engineers.

1 Q. Is there anything in your experience that requires the
2 Corps to reach the same decision as the state?

3 A. No. In fact, the Corps cannot come to a favorable
4 decision in some instances until the state does. In this
5 case, when it's in the coastal zone, and there's an approved
6 Federal Coastal Zone Management Act that has approved the
7 state program, then there's a federal law. The Coastal Zone
8 Management Act, that precludes the Corps from coming to a
9 favorable decision until we know that the project is
10 consistent with the Coastal Zone Management Program. That
11 consistency is determined by issuance of a permit or a
12 letter citing consistency. Then the Corps can move to a
13 favorable decision, or it could move to deny a permit.

14 Q. And is navigation a factor in those types of decisions?

15 A. Navigation is certainly a factor. Section 10 of the
16 Rivers and Harbors Act is a navigation regulation.

17 Q. All right. Now, with respect to a marina that is held
18 by a permittee -- do y'all use the same term for the holder
19 of a permit?

20 A. Yes.

21 Q. The permittee of the marina. Is there anyone else that
22 can make application to the Corps under those regulations to
23 physically alter a marina other than the holder of the
24 permit?

25 A. The short answer is no. I mean, the permit is issued to

1 a responsible party, the party that applied for the permit.
2 A permit is issued in their name, and they're responsible
3 for everything that happens on that piece of property in
4 regard to what's permitted or not permitted. So no one else
5 can make application to alter that unless they can provide
6 evidence that they, one, had the authority to act on behalf
7 of this if it's property owners or home owners regime or
8 whatever it may be, or they can obtain the ownership to the
9 land; then they can apply -- or unless there are other
10 agreements in place through the Corps and the parties that
11 got the permit.

12 Q. All right, sir. If, while the permit is held by one
13 entity, that entity holder of the permit makes an
14 application, for instance, to add two pilings to a marina,
15 structures. And while the Corps is processing the
16 application, the permit is transferred to another entity,
17 what does the Corps' regulations require be done?

18 A. The Corps would ask for documentation from the previous
19 applicant that that ownership has been transferred or the
20 right to pursue that permit has been transferred to them,
21 and they're no longer involved so there's some evidence that
22 says these folks have the authority, the right of the
23 ownership to move forward with this application and we don't
24 care. If, on the other hand, they don't have that, or if
25 the folks that have applied for originally said, We may not

1 own it, but we're not giving them our stuff, for lack of a
2 better term; because they had some financial investment in
3 pursuit of that permit, and they have made some effort to
4 move forward with their financial assets to obtain a permit.
5 So they're wanting to give that away. So the Corps would
6 tell the new folks, You have got to apply for your own
7 individual permit.

8 Q. All right. In that notebook there in front of you,
9 there's a loose exhibit which has got an exhibit sticker of
10 Number 26 on it.

11 A. Yes, I see it.

12 Q. It's got a date of January 12, 2011.

13 A. Yes.

14 Q. If you would go with me to page -- sheet three of eight,
15 rather.

16 A. Three of?

17 Q. It's the second drawing rather.

18 A. Okay.

19 Q. And if you would look, sort of, up in here. You'll see
20 there are some numbers -- letter-number combinations, B-1,
21 B-2, so forth and so on.

22 A. Yes. Yes.

23 Q. And you said you were familiar with this marina?

24 A. Yes.

25 Q. Now, the long rectangular box shown on the drawing there

1 below B-1, do you know what that is?
2 A. It appears to be a floating dock.
3 Q. All right. And there's a shorter rectangular structure,
4 skinnier above that?
5 A. Yes.
6 Q. What's that?
7 A. It appears to be another floating dock off of the, I'd
8 say, parallel floating dock and shore.
9 Q. If the holder of this permit, this marina permit, were
10 to ask to put two pilings between those two floating
11 structures -- I'm not telling you where, but just between
12 these two structures -- what considerations in your role now
13 as somebody that prepares the permit application -- what
14 consideration would be in your mind that the Corps would be
15 looking at?
16 A. I would look at the outermost or the channel-most
17 piling, and where it would be installed. As you move back
18 toward the shoreline on that side, there's less issue with
19 regard to navigation, because there are other structures
20 there. There are probably other vessels there. So the
21 structure closer in or piling closer in would probably not
22 be an issue in my mind. As you move water toward the outer
23 limits of that knob, it becomes more critical with regard to
24 how far that pile goes to the water because of navigation in
25 and out of the area upstream or to the end of that canal.

1 Because you have a lot of activity in the back end of that
2 canal. You have a dry stack launching retrieval facility,
3 you have a fuel dock. So there's a lot of traffic that's
4 going to be coming through that area to the back. So how
5 far that water wood pile would go out would be the issue.
6 So you need to keep it far enough back so that it in and of
7 itself would create no greater hazard than the extent of the
8 floating dock that exists there now.

9 Q. Are you familiar with where that dry stack solely is?
10 A. Yes. It's across the river.

11 Q. Could you hold the drawing up. And, maybe, I could ask
12 you to walk to the judge. All of us know where that is.
13 I'm not sure the Court knows where the dry stack is.

14 (WHEREUPON, the witness complies.)

15 THE COURT: I think I saw it on a photograph.

16 WITNESS: This is the dry stack launching and
17 retrieval. The dry stack facility is --

18 THE COURT: Right on the other side?

19 WITNESS: -- across the road. The dry stack facility,
20 itself -- but the launching facility is here.

21 THE COURT: With the launching facility here.

22 WITNESS: So they are to get boats from here, and put
23 them in and take them out here.

24 THE COURT: That's right on the other side of B-1; is
25 that correct? Right on the other side of that floating dock

1 of B-1 is where they put them in?

2 WITNESS: Yes. That's where they put them in and take
3 them out. And they get them from across the river.

4 THE COURT: Thank you very much, sir.

5 WITNESS: Yes, sir.

6 (WHEREUPON, the witness returns to the stand.)

7 BY MR. BARNETT:

8 Q. All right, sir. Other than those navigational concerns
9 in both of your incarnations as Corps public servant and as
10 a private consultant for people looking for permits, are
11 there any other considerations related to putting in some
12 wooden pilings in that area?

13 A. No. The installation of floating docks, piles, those
14 type structures are typically have minimal environmental
15 issue or concern other than navigation and safety.

16 Q. Now, with respect to the Corps' regulations, if the
17 holder of this permit -- looked at the permit a minute ago,
18 Exhibit 26 -- that permit's been issued to the POA. If the
19 POA wanted to go back to the Corps and ask the Corps to
20 modify the marina again to add two pilings, could they do
21 that?

22 A. Yes, they can.

23 Q. So it's, like, there's no limitation? They don't get to
24 come in once every five years or something like that?

25 A. No. You can ask for anything you want. You may not get

1 it, but you may ask at any time.

2 Q. All right. Now, let me ask you one final question. The
3 public notice has got a date of June 13, 2008. The permit
4 was issued on January -- the state permit was issued on
5 January 12th of this year, about two and a half years later,
6 by my count. Is there anything unusual in your mind about
7 that period of time?

8 A. It's a little lengthy. I mean, typically, I would think
9 of an individual permit. It will take you at least 12
10 months, probably, closer to 18 months to get both state and
11 federal approvals. Beyond that, there was some issue
12 whether it was -- and I don't know what the issue was, but
13 it could have been some issue over navigation. It could
14 have been an adjacent owner. It could have been any number
15 of things that just surfaced that had to be dealt with. And
16 I'm not sure if the state in this particular case decided to
17 have a public hearing which draws it out as well. But in
18 any event, a year and a half is not untypical. Longer than
19 that, I would certainly believe that there was some other
20 issue that had to be resolved.

21 Q. Okay. As far as the Corps' regulations are involved,
22 was there anything in the Corps' regulations that would have
23 prohibited the POA from asking for permission along with
24 permission to authorize these previously unauthorized
25 structures to stick in a request to authorize two more

1 pilings?

2 A. No. They could have made it an after-the-fact and a
3 request for new activities.

4 Q. While that permit modifications request was in process,
5 the one that went out on public notice in June of 2008 - if
6 the POA had it dawned on them, gosh, we want to add two more
7 pilings, could they have come to the Corps and said, We want
8 to change our request now?

9 A. Yes, they could. They could do that at any time. The
10 Corps would then decide if whether they believed it was a
11 significant increase in the scope of the work or whether it
12 was not, and whether an issuance of a new notice would be
13 required.

14 Q. Would two pilings?

15 A. At the Corps level, if there was not a navigational
16 issue, I would say that they would not have reacted. It's
17 discretionary. That's what I would have done had I been
18 there.

19 MR. BARNETT: Thank you. That's all I have for you.
20 These other gentlemen or the Court may have questions for
21 you.

22 THE COURT: Any cross-examination?

23 MR. DUKES: No questions, Your Honor.

24 MR. DAVID: None, Your Honor.

25 MR. EPTING: None, Judge.

1 THE COURT: Okay. All right. Thank you very much.
2 Any objection to this witness being excused?
3 MR. BARNETT: No, sir.
4 THE COURT: Thank you so very much.
5 (The witness leaves the stand.)
6 THE COURT: All right. Call your next witness.
7 MR. DUKES: Mr. David's asked if we could take a quick
8 break.
9 THE COURT: Oh, you need a break? Okay. We'll take a
10 break. About ten minutes.
11 (WHEREUPON, there was a brief recess.)
12 COLLIN BRUNER, being first duly sworn,
13 testified as follows:
14 THE CLERK: Thank you. Please be seated. Sir, for the
15 record, if you would please state your name, spelling your
16 last name.
17 WITNESS: James Collin Bruner, B-r-u-n-e-r.
18 DIRECT EXAMINATION
19 BY MR. BARNETT:
20 Q. Mr. Bruner, how are you?
21 A. I'm well..
22 Q. All right. Tell the Court what you currently do for a
23 living.
24 A. I am currently the vice president of Century Management
25 of Charleston.

1 Q. Does Century Management of Charleston have anything to
2 do with the Ripley Light Marina Property Owners Association?
3 A. Yes. We are the agent for the community association
4 known as the Ripley POA.
5 Q. And how long have you -- has your company been involved
6 with them?
7 A. In coordination with Ripley Cove Property Owners
8 Association and Slips at Ripley Property Owners Association
9 since 2004 or five -- I think it's 2004.
10 Q. Have you been with Century the whole time?
11 A. No. I was hired in April of 2005.
12 Q. Okay. In April of 2005?
13 A. Yes.
14 Q. And I should have introduced you to these exhibits up
15 here. I'm sorry. There's a notebook here. Just turn -
16 this particular document is tabbed. And there are some
17 loose exhibits here that I may ask you to look at in a
18 second, by their number; and I may hand you other exhibits.
19 Right now I'm going to ask you to go back to 15-A. Do you
20 have your finger on it?
21 A. Yes.
22 Q. Let me ask you to do this. Just generally, as the
23 manager -- you said the manager of the regime or the POA?
24 A. Yes. We're the community association management.
25 Q. Okay. What does that entail?

1 A. That entails administering affairs of operations of the
2 association.
3 Q. Who is the central point of contact for unit owners
4 whether it be upland land or boat slip property at the
5 marina?
6 A. The assigned community management.
7 Q. So that would be yourself?
8 A. Currently, at this time, no.
9 Q. Okay. Who would it be then?
10 A. Right now, Barbara Vernon is the assigned community
11 manager for these associations.
12 Q. Okay. Were you that person -- or did you have that role
13 for a while?
14 A. I did.
15 Q. Between what years?
16 A. Roughly 2006 to 2009.
17 Q. Okay. All right. Which brings us to this document,
18 Exhibit 15-A in the notebook, that will be Plaintiff's 15-A,
19 entitled a Joint Public Notice. Are you familiar with the
20 permit application that is reflected in this joint public
21 notice?
22 A. Yes.
23 Q. Okay. Who is responsible for the -- in terms of the
24 regime and Century, who was responsible for making sure this
25 got done?

1 A. In essence, the Board of Directors of the Ripley Light
2 Marina POA is responsible.

3 Q. Did you have a role in that?

4 A. I assisted with that process, yes.

5 Q. You assisted in it. What was your responsibility?

6 A. My responsibility was assisting to coordinate between
7 the Board of Directors and in general to help apply for this
8 permit modification.

9 Q. What was the purpose of this permit modification being
10 made to the Corps and the OCRM from your perspective?

11 A. There had been some modifications to the dock structure
12 between pilings and additional jet boat docks to those
13 structures that had not been previously permitted under the
14 permit. They needed to be put out to notice.

15 Q. All right. Had some of those structures - well, were
16 all of the structures that had been placed without
17 authorization, were they all still there, or had some of
18 them been removed?

19 A. At the time this was?

20 Q. Yes, in June of 2008.

21 A. I believe, all the structures were currently there. I
22 mean, the structures that were applied for were already in
23 place.

24 Q. Okay. They were still there, and y'all were asking to
25 have a permit?

1 A. Yes.

2 Q. Had there been other structures that were there that
3 weren't authorized that had been there for a while and had
4 been removed?

5 A. Yes.

6 Q. What were those?

7 A. Pilings.

8 Q. Do you know who removed the pilings?

9 A. The pilings were removed prior to dredging. And they
10 were -- I don't, actually, remember the company.

11 Q. Okay. That's fine. Do you know who paid to have the
12 pilings removed?

13 A. At that time, I believe, it would have been Ripley Cove,
14 LLC.

15 Q. Mr. Belote, the company he is affiliated with?

16 A. Yes.

17 Q. Do you know Mr. Buck? Eddie Buck, sitting here?

18 A. Actually, today was the first time I met him.

19 Q. Were you aware that Mr. Buck is affiliated with the
20 owner of the slip B-1?

21 A. Yes.

22 Q. Owned in the name of Zan, LLC?

23 A. Yes.

24 Q. And there has been some testimony about various notices
25 that were sent out by your company to unit owners. So far

1 as you know, were those sent to Zan, LLC?

2 A. Yes.

3 Q. What would be the nature of those notices? What

4 information did it contain?

5 A. Various notices for the association being annual meeting

6 notices; general news letter notices; notices, for instance,

7 on dredging timelines notifications; late payments. Just

8 general correspondence between the association and the unit

9 owner.

10 Q. If -- Mr. Bruner, if, prior to this permit application

11 which is reflected in this public notice, 2008 notice --

12 prior to that being filed with the Corps and the OCRM, is

13 somebody on behalf of Zan, LLC requested the regime to

14 include in that request a request to put in two more pilings

15 in the marina between slips B-1 and B-2, would you have been

16 able to do that?

17 A. I would have seen -- sure, we could. The Board of

18 Directors could have included that in their application

19 process.

20 Q. So you could have done it. The next question is: Would

21 you have done it?

22 A. I don't see any reason why not.

23 Q. What would be the consideration as a management company

24 advising board, what would you have looked at?

25 A. Again, looking at, one, would be the reason, I think,

1 The board would have also taken their own consideration to
2 look at what is the reasoning for having additional pilings,
3 and make a determination on their own then to see if it
4 would have been something that they would have considered
5 that it would not have been permissible.
6 Q. All right. The structures that have now been permitted
7 that were installed without authorization, they've now been
8 authorized by the state; is that correct?
9 A. That's correct.
10 Q. Do you know there's a form that you get permit
11 authorizing those structures as well or do you know?
12 A. I have not received anything.
13 Q. But have you been given any notice of that they're
14 thinking of not giving you the authorization?
15 A. No. My understanding is the OCRM does their thing, and
16 the Corps has the final joint authorization.
17 Q. Well, if that final Corps authorization is received, who
18 will own those structures that are the subject of this
19 permit application?
20 A. Ripley Light Marina.
21 Q. And if Zan, LLC asked to have two pilings placed in
22 between slips B-1 and B-2, who would be the owner of those
23 pilings?
24 A. Ripley Light Marina.
25 Q. If those pilings were put in place between slips B-1 and

1 B-2 with proper permits, and they were the property of the
2 regime, could the regime then, also, decide to have them
3 removed?

4 A. Yes. They could have them removed.

5 Q. What would be the process for making that decision?

6 A. Again, we would want to remove them if they would be
7 removed, but I believe we would also have to put the OCRM
8 and the Corps on notice that we are altering the existing
9 permit we have in place.

10 Q. Right. Exactly. All right. Thank you. Now, let me
11 ask you to pick up what is Exhibit 31. It's a loose exhibit
12 there. It looks like this. And ask you to go to the end of
13 that exhibit which is a July 25, 2006 letter addressed to
14 Mike Parades at Century Management and signed by Tina Hadden
15 with the Corps of Engineers.

16 A. Yes.

17 Q. Do you remember this letter?

18 A. I do.

19 Q. Who is Mike Parades?

20 A. Mike Parades was my predecessor at Century Management.
21 So at one point he also had a direct day-to-day functioning
22 with Ripley Light Marina and the Slips at Ripley and Ripley
23 Cove.

24 Q. And it may be a while since you've seen this letter. So
25 take a look at it if you want. I just want to ask you, were

1 you involved in the repercussions that started in this
2 letter that was received?

3 A. I was involved with the property in this letter.

4 Q. What was your understanding that the Corps was telling
5 Century at this time?

6 A. That we had unauthorized permit modifications that must
7 be applied for in Ripley Light Marina POA's name.

8 Q. Tell the Court what happened? What were the major
9 events that transpired after this letter was received with
10 respect to the marina and the board and the unit owners?

11 A. Well, there's a lot that goes on down there. So, you
12 know, I think, in general, during this time-frame there were
13 a couple of things that were occurring. Not only were
14 modifications that needed to be conducted, there were also
15 -- there was also dredging that needed to be conducted.
16 There was also a joint dredging agreement and joint channel
17 use agreement being put into place, as well as trying to get
18 the marina permit into compliance with the OCRM.

19 Q. Let me put it this way. Was this letter taken
20 seriously?

21 A. I believe so. Yes. I mean, we needed to act on it.
22 Absolutely. And it is completed. Obviously, it was
23 completed in January of 2011.

24 Q. Did this letter cause some anxiety?

25 A. Absolutely. I believe we briefly -- we met, if I'm not

1 mistaken, I believe, we met within a month or so.

2 Q. Was the Corps serious about this? Was there affects

3 serious about this matter?

4 A. Sure.

5 Q. And were some of the structures that Ms. Hadden talks

6 about in her letter -- were they, ultimately, removed as

7 opposed to being the subject of a permit modification

8 request?

9 A. Yes.

10 Q. And the others -- the other structures that were not

11 removed, were they then the subject of this permit

12 modification request?

13 A. And approval, yes.

14 Q. Okay. Her letter is dated July of 2006. The public

15 notice is not dated until June 13th of 2008, just shy of two

16 years later. Why the time lag, do you think?

17 A. Probably, mainly trying to get the organization of the

18 responsible parties for who installed the modifications as

19 well as the organization that was getting the permit

20 process, applying; getting bids for work to apply bore

21 process; getting general engineering to approve or to create

22 the application and permitting application; and submit it

23 all. And through the association, it was not a quick

24 process.

25 Q. Was there concern in your mind about the Corps,

1 actually, suspending the marina permit during this time
2 period?

3 A. I, certainly, knew they had the authority to do it. I
4 believe, that they're -- in the end, had we not done this,
5 yes, they had the permit right. I had a concern about it.

6 Q. How widespread was that concern with respect to the
7 owners and so forth?

8 A. I couldn't answer that. I don't know the answer.

9 Q. Was it a matter of concern to the board?

10 A. Yes.

11 Q. Was it a goal of your company to see to it that that did
12 not happen? That the government did not suspend the permit?

13 A. Absolutely. Again, our responsibility is to make sure
14 that we manage the affairs of the association operations,
15 and make sure they adhere to state and federal statutes.

16 Q. All right, sir. There is another exhibit -- I don't
17 think it is in front of you. This is Defendant's Exhibit
18 29. Are you familiar with that document?

19 A. Yes. I have, probably, seen it.

20 Q. Pardon me?

21 A. Yes.

22 Q. Did you prepare this document by chance?

23 A. No. These were Mike Parades signature.

24 Q. The meeting that's referenced on Tuesday, April 26,
25 2005, were you at the meeting?

1 A. I believe, I was, yes. Again, this being about nine
2 days -- no, roughly, 15 days after my hire.

3 Q. All right. Let me ask you this: If you would look at
4 the paragraph that starts, Elections of directors, on the
5 first page, and then it goes onto the second page. The
6 first page where it says, Election directors, it talks --
7 the very last sentence on this page, if you would look at
8 that. It says the last of the dock units were sold earlier
9 this month, thus the control period ends at the end of May.
10 Is that accurate so far as you can recall on terms of when
11 the POA took over the regime?

12 A. Yes. This meeting would have held an election of
13 directors. And a, quote, homeowner control board would have
14 presided over the association at that time. This being the
15 Slips at Ripley owners property regime.

16 Q. Prior to that date, the end of May, when the POA took
17 over, who was the holder of the marina permit?

18 A. In my understanding, it was Ripley Light Marina, I
19 guess, Corporation Inc., not the POA.

20 Q. After the association took over, who was the holder of
21 the permit, the marina permit?

22 A. The marina permit should have been held in Ripley Light
23 Marina POA.

24 Q. And that's the reason then when this permit application
25 was filed years later, it was filed in the name of Ripley

1 Light Property Owner -- or Ripley Light Marina Property
2 Owners Association?
3 A. Yes.
4 Q. Let me ask you this: Are you still involved in the
5 management of this marina?
6 A. Not in the everyday affairs of the association, but I do
7 keep track of what's going on, yes.
8 Q. It's within your general supervisory --
9 A. Absolutely.
10 Q. -- responsibility? Okay. If Zan, LLC were to come to
11 the POA today, come to Century, I assume, what would they
12 come -- if they wanted to put pilings in between slips B-1
13 and B-2, would they come to Century and talk to you about
14 that or where would they go?
15 A. To the -- a quarter of communication would come through
16 Century through the community manager to the board of
17 directors for that request.
18 Q. Has anybody from Zan, LLC, anyone, whether it was
19 Mr. Buck or his daughter, Ms. Cantey, or anyone on behalf of
20 Zan, LLC, ever ask the POA to make a request for the Corps
21 and the state for authorization to place two pilings in
22 between slips B-1 and B-2?
23 A. Not to my knowledge.
24 Q. Would you know if they had?
25 A. During my time there, I believe I would, yes.

1 Q. So since April of 2005?
2 A. Yes.
3 Q. Had that occurred, you would know about it?
4 A. I believe so.
5 Q. And that has not happened?
6 A. Not to my knowledge.
7 MR. BARNETT: That's all I have for you. These other
8 gentlemen may have some questions.
9 THE COURT: Any questions?
10 MR. DUKES: Nothing from me, Your Honor.
11 THE COURT: Mr. David?
12 MR. DAVID: No, sir.
13 THE COURT: Mr. Epting?
14 MR. EPTING: Just one.
15 CROSS-EXAMINATION
16 BY MR. EPTING:
17 Q. Mr. Bruner, you said you came in April of '05?
18 A. That's correct.
19 Q. Do you know Mr. Knight?
20 A. I do.
21 Q. Do you know Mr. Belote?
22 A. I do.
23 Q. Would you remember if either of them came to you and
24 asked you on behalf of the POA to make application to put
25 two pilings in? Would you remember that?

1 A. I believe, I would.

2 Q. If they came to you and said, Mr. Bruner - they wouldn't

3 call you Mr. Bruner. They'd call you?

4 A. I believe, we're on a first-name basis. Yes.

5 Q. So they'd say, Collin, we have a contract to put in two

6 pilings. Would you mind putting those two pilings in for

7 one of your homeowners?

8 Did they ever ask you to do that?

9 A. They never asked me to do that.

10 MR. EPTING: Thank you, sir.

11 THE COURT: Redirect?

12 MR. BARNETT: No, Your Honor.

13 THE COURT: You may step down. Thank you very much.

14 (The witness leaves the stand.)

15 MR. BARNETT: May Mr. Bruner be excused?

16 THE COURT: Any objection?

17 MR. EPTING: None here, Judge.

18 MR. DUKES: None here, Judge.

19 THE COURT: He may be excused. Thank you very much.

20 MR. BARNETT: The defense would call Karl McMillan to

21 the stand.

22 KARL MCMILLAN, being first duly sworn,

23 testified as follows:

24 THE CLERK: Thank you. Please be seated. Sir, for the

25 record, if you will please state your name, spelling your

1 last name.

2 WITNESS: Karl A. McMillan, M-c-M-i-l-l-a-n.

3 DIRECT EXAMINATION

4 BY MR. BARNETT:

5 Q. Mr. McMillan, what do you do for a living?

6 A. Real estate sales, development, and I'm also presently
7 working in the LED lighting field.

8 Q. Are you a licensed real estate broker?

9 A. Yes. I'm a licensed broker, and have been since 1984.

10 Q. Are you still acting as a real estate broker?

11 A. Yes. My license is still active.

12 Q. Is it safe to say that you were more active as a real
13 estate broker in some prior years than lately?

14 A. I would say prior to 2008, I was an active broker. I
15 don't think I'd call myself that today.

16 Q. When you were active, before things took a down turn,
17 how active were you? How many transactions would you say
18 you were doing in a year?

19 A. I was closing multi-million dollar gross sales numbers
20 at the height of the business. I would say most probably
21 close somewhere in the two hundred and fifty million dollar
22 range in the last decade, decade and a half.

23 Q. When did you first -- do you know Mike Belote, sitting
24 here?

25 A. I met Mike and Doc when they began to develop the

1 property with Ripley Light.
2 Q. When was that?
3 A. '04 I believe, '05 when we started the project.
4 Q. Okay. Did you work with them in some capacity?
5 A. I was -- I had a -- actually, I had a fairly large
6 brokerage company. At that point, I had three or four
7 agents working for me. And was hired as the listing broker
8 to market the real estate section of the Ripley Light
9 project. It happened that the real estate section had lots
10 that went along with the sales of the real estate. So I
11 handled that section of it, and knew the entities involved
12 and several people involved that set up the condo for the
13 rest of the slip sales. I was not involved in slip sales
14 only, but the real estate listing side of it that had slips
15 associated with the properties.
16 Q. Okay. Have you known Mr. David for a while?
17 A. Since childhood.
18 Q. How did you know Mr. David when you were a child?
19 A. He and my father were friends, peers, and, also, I
20 think, Dan's daughter used to ride horses. My family's
21 quite involved in the horses. So I knew -- we knew each
22 other through that.
23 Q. Have you know Mr. Edgar Buck?
24 A. About the same amount of time. Yes. My father was a
25 peer of Buck's, and they had a lot of mutual friends that my

1 dad went to school with. So, yes, I've known Mr. Buck since
2 I was a child.

3 Q. Where were they -- you're father was friends with
4 Mr. Buck in school you say?

5 A. Well, mutual friends went to college together, and he
6 just knew him through that association.

7 Q. About how old were you when you think you first got to
8 know Mr. Buck?

9 A. I've probably known Mr. Buck from pre-teenager. I
10 guess, I was eight or ten years old.

11 Q. Before the events that led to this case, how would you
12 describe your relationship with Mr. Buck?

13 A. You know, I knew Mr. Buck. I worked at Stono Ferry.
14 They had a building business. I was -- worked for Stono
15 Ferry straight out of college; ended up in a development
16 capacity there. Had builders that were buying building
17 materials from him. So I'd say we were, you know, operating
18 inside the same industry. I always had a lot of respect for
19 him. He was quite successful at what he did.

20 Q. Did you have a social relationship with him?

21 A. I wouldn't say a social relationship, no. I mean, I saw
22 Mr. Buck at the functions at the Hibernia, but I wouldn't
23 say we broke bread together.

24 Q. Did your father have a social relationship with
25 Mr. Buck?

1 A. I'm sure over the years, they most probably had some
2 interaction.

3 Q. At what point -- I want to ask you, now, specifically,
4 about the sales of lot three and slip B-1 that brings us
5 here today. At what point did you first have any contact
6 with Mr. Buck or his daughter, then, Ms. Buck about that
7 particular transaction?

8 A. Mr. Buck called me one day. I guess, he got the number
9 off the sign. And said that -- I think he was, actually, at
10 the property at the time. He said, I know you've got the
11 property listed here. My daughter is looking for a building
12 lot. I'm looking for a boat slip. Can you come by and talk
13 with us?

14 And I believe -- I might have just come right on at
15 that point or quickly after that. I happen to be in the
16 area. I lived and my office was at Stono Ferry. So I was,
17 probably, in the general proximity. We met on the real
18 estate side of the property; looked at the lots that were
19 left available. And at that point, the lots that were left
20 had been allocated to the slips that were left -- there
21 weren't that many properties. I mean, you know, most of
22 them -- some of them had been sold. So everything was, kind
23 of, allocated out.

24 I showed Mr. Buck and his daughter -- and I believe
25 Ms. Carmody was there as well. She was there for that.

1 initial visit. At the time, all I had was the real estate
2 section of that plat. We looked at the lots and looked
3 across from where the lots were, across the marina. And I
4 said, You need the biggest slip in the marina. The biggest
5 slip left is B-1. It's right next to the dry -- where they
6 dry dock boats into the water.

7 Q. In that notebook that's in front of you there,
8 Mr. McMillan, go to the exhibit tab 6-A. There's a picture
9 that should look like that. Does this picture reflect,
10 generally, the view that you had when you were with Mr. Buck
11 and his daughter and Ms. Carmody?

12 A. This would be from directly across the channel. I would
13 say that we were more than the, I guess, south looking
14 across. But we were on the other side of the channel, but
15 we were further down looking back more toward California
16 Dreaming in that direction to see that slip.

17 Q. Tell the Court as near as you can recall exactly what
18 you told Mr. Buck and his daughter and Ms. Carmody.

19 A. At that point, I said the slip is the slip adjacent to
20 where the dock -- the dry dock, and it's an 80 foot slip.
21 That was our first meeting. At that meeting, I did not have
22 the plat. We ended up, prior to the closing which was
23 originally scheduled for March 5th. I dropped the package
24 off with the plat and the master -- you know, the condo
25 documents to Mr. Buck. They, I guess, reviewed those

1 documents, and Mr. Buck called me and said, Karl, this is
2 not what I understood that I was buying. I thought I was
3 getting from finger pier one over here to finger pier two
4 which was forty some odd feet.

5 And I said, Mr. Buck, I'm sorry for the
6 misunderstanding. That is two slips. Each slip has one
7 finger pier.

8 He said, Well, I don't want to go forward with it if
9 it's not big enough for my boat to fit in the slip. So we
10 went back to check the -- I knew what size the slip was. So
11 at that point, I treated it like I would have treated any
12 real estate -- any land deal that I had. If somebody wanted
13 to know if their house would fit on the lot, we would do a
14 general sketch of it, see if it would fit. We went to the
15 documentation records on Rookie IV. It said that that boat
16 was seventeen eight was the width of the boat. The boat was
17 sixty foot long. Obviously, that's at the widest point.
18 Just in a rough sketch as I would do in any real estate
19 transaction, taken into account drip lines and everything
20 else, to see if the boat would fit into the slip. The boat
21 does fit into the slip. Didn't have any problem from the
22 front moving back. The boat cannot go all the way to the
23 back of the slip, but as long as a house fits inside the
24 setback requirements, the boat stack within the setback
25 requirements -- I said, Yes, sir, your boat will fit in this

1 lot. He said - and I said, What else do you need?

2 And he said, Well, if I don't have a boundary to keep
3 the other boats off of me, I want two piers installed on the
4 line so that people aren't running into my boat.

5 And I said, All right. And, actually, I think, before
6 the conversation of the piers started, I said, Mr. Buck, I
7 made a mistake on this. When you looked at the layout here,
8 I apologize for that. I'll talk with Mike and Doc. I'm
9 willing to take a cut in my commission; they're willing to
10 discount some of their money if you want to move forward.

11 He said, If my boat will fit in the slip and you'll
12 agree to put in the two pilings and you'll give the
13 discount, I'll move forward with the closing.

14 So with that in mind, we rescheduled the closing two
15 weeks later. I had discussed with Doc Knight putting in the
16 piers and that the money would be there set aside with the
17 money that was there for the dredging. And he said that he
18 was fine with doing that; went to closing and somewhere in
19 the -- Dan had not been made aware of the deal about the
20 piers and where the piers were to go. During that time, I
21 think, Dan called Doc. Doc said, Yeah, I've spoken with
22 Karl. We are in agreement. We'll put in the two piers on
23 the boundary for Mr. Buck to define his slip.

24 So Dan prepared that letter. In fact, I think, Dan
25 might have even called me and said, Is this your

1 understanding?

2 I said, Yeah. I said the piers are supposed to go in
3 line with the other piers on the property corners to define
4 Mr. Buck's slip and to be sure that he had the protection he
5 needed from the slip next door to put his boat in.

6 Q. You mentioned a description or gave a description of
7 Mr. Buck's boat that's been testified to, the Rookie IV.

8 A. Right.

9 Q. Let me show you what has been admitted into evidence as
10 Exhibit Number 28, Defense Exhibit Number 28. Is this the
11 day sheet that you were talking about?

12 A. Yes, sir.

13 Q. What is it?

14 A. It is the Coastguard vessel documentation for the Rookie
15 IV.

16 Q. Now, Mr. McMillan, you told us you were a realtor and
17 you now are involved in the LED light bulb business.

18 A. Yes, sir.

19 Q. Are you a marine surveyor?

20 A. I'm not a marine surveyor. However, at that point in
21 time, I was working very closely with the guys that were
22 selling the boat slips. And they were involved -- actually,
23 I got the introduction to Mike Belote through the guys that
24 were doing the slip sales. One of them is the one who
25 explained to me how to figure distance --

1 Q. How wide does this day sheet show the Rookie IV to be?
2 A. Seventeen point eight.
3 Q. Okay. Is that the basis for your suggesting to Mr. Buck
4 that his boat would fit in that slip?
5 A. Yes, sir, it was. And that was the -- and I'm no more a
6 marine surveyor than I am an architect. This was done under
7 a general scope and scale of what would fit into what I
8 would call the setback requirements of the slip just like it
9 would in any other lot. If there had been any discrepancy
10 with that or any further documentation needed for that, we
11 would not have been able to go forward with the closing.
12 Certainly, at no point did we ever discuss moving the
13 property line two feet. We did discuss that Doc Knight and
14 those had the authority to put those piers in, because at
15 that point in time they were in control of the home owners
16 association. Irregardless of who the owner of the adjacent
17 property was whether it was Doc or whatever the split up of
18 the entity when they broke up the sales, it was still a
19 deeded platted property that they could not have given the
20 authority to do, nor would I have ever represented that.
21 I mean, I've been in this business since 1984. I have
22 never ever been in litigation over a real estate contract
23 since I started this business. I pride myself with my
24 reputation. I was embarrassed that we had the confusion
25 that we had, initially, and worked diligently to be sure

1 that the subdivision that was in place for those two lots or
2 dock slips was correct and acceptable for what Mr. Buck
3 needed to put his boat in the slip.

4 Q. If Mr. Buck had asked you if he could bring the Rookie
5 IV from the Wappoo Cut, where it is normally located I
6 gather from his testimony, to this slip, did you have the
7 authority from Ripley Cove or East Coast Trading Company to
8 let him try to put that boat in that slip?

9 A. Actually, we had done that on several other occasions,
10 and I did go through the proper channels with Dock Masters
11 and that kind of stuff, because at that point in time the
12 slips were being used. So, yes, that opportunity was
13 available and could be afforded, and we had done that in the
14 past for other people.

15 Q. But did Mr. Buck ask you to do that?

16 A. No, sir.

17 Q. Let me ask you about your agency with, first, Ripley
18 Cove. Who was your relationship with as a broker with
19 Ripley Cove?

20 A. Doc Knight was who I had day-to-day contact with as he
21 was project manager or developer for the owners. I also had
22 contact with Mike Belote. I knew Mr. McNair, but he didn't
23 have any day-to-day, you know, input into the project. I
24 had known him from the real estate business and other
25 matters. But I had signed a listing agreement to list and

1 market and sell the real estate. And, I believe, Doc was
2 the representative that signed the listing agreement for me
3 when I listed property for them.

4 Q. All right. Mr. McMillan, did you have authority from
5 Ripley Cove to represent to a buyer, a potential buyer of
6 property, that Ripley Cove would convey to them -- split up
7 another piece of property and convey to them a bit of
8 another boat slip? Did you have that authority?

9 A. I did not and would not have had that authority. And as
10 with any other real estate transaction if that had been a
11 request of the buyer, it would have been put in a
12 contractual form that would say my purchase is going to be
13 contingent upon me getting two foot more in another section.

14 Q. My next question, if Mr. Buck had asked you, or if
15 Mr. Buck had told you I'm not going to close on this deal
16 unless I get part of slip B-2, would it have been possible
17 to put that into a written contract?

18 A. Sure. We would have been able. We could have put it in
19 the -- we would not have been able to close at that time.
20 And I don't know that I could have gotten the contract
21 accepted, but it, certainly, would have been a presentable
22 contract with proper language in it asking for a re-
23 subdivision of the lot.

24 Q. All right. And the re-subdivision -- you heard
25 Mr. David's testimony about all the approvals that that

1 would require?

2 A. I didn't say that it would be anything that would be
3 possible. My job as the listing broker, representing the
4 seller in the transaction, is to present any and all offers.

5 Q. I asked you a bad question. I'm sorry. And you
6 answered the question I did ask. What I intended to ask you
7 was if there were regulatory approvals necessary for
8 subdividing B-2, could finalizing those regulatory approvals
9 had been made a contingency to this new contract?

10 A. Absolutely.

11 Q. Is that typically done?

12 A. That's the only way to do it, especially, in a deed
13 restricted or property with covenants and restrictions where
14 moving at the property lines or re-subdivision is a function
15 of the association. It's the only way that you can do it,
16 because the developer can't even grant that authority on his
17 own. He can only say that he will make best efforts to do
18 that. And if he's unable to do that, then the transaction
19 cannot move forward.

20 Q. Now, at the time you told Mr. Buck -- you apologized to
21 him for the confusion, and you offered to give up part of a
22 commission -- by the way, how much was the commission that
23 you gave up?

24 A. I believe it was \$5,000.

25 Q. You gave up \$5,000.

1 A. And then the balance came from Doc and Mike.
2 Q. In your position as a real estate broker, did you
3 believe that Mr. Buck, at that time, was contractually
4 obligated to buy slip B-1 as it was platted?
5 A. I, absolutely, do, yes.
6 Q. Do you think he was already contractually obligated to
7 buy it?
8 A. I think when we did go forward with the closing -- he
9 didn't go forward with the closing, and we satisfied his
10 concerns about what the size of the slip was and that the
11 boat would fit, and made the allowance to put the piers in,
12 yes.
13 Q. But at the closing, he closed on the deal?
14 A. Right.
15 Q. Were you at the closing?
16 A. I was not at the closing.
17 Q. That's not what I'm asking. At the time that he said, I
18 have concerns about the width of this slip and my boat.
19 Could he have gotten out of the deal?
20 A. At that point, yes, I believe he could have. With that
21 misunderstanding in place, yes sir.
22 Q. Now, you had been involved in the sale of these slips
23 since this condo diversion took place?
24 A. With the slips associated with the real estate, yes,
25 sir.

1 Q. Okay. How many lots was that?

2 A. I believe there was 12 single family lots and 30

3 something townhomes, and a condo pad, I believe, with,

4 approximately 40 units.

5 Q. If Mr. Buck had decided to walk away from this deal and

6 just say, I'm not doing it; I'm out of here. Was this a

7 marketable property, in your opinion at that time?

8 A. At that point in time, yes. I would say that was about

9 the peak of the market.

10 Q. How marketable?

11 A. You know, I mean, it was highly marketable, I would have

12 to say at that point in time.

13 Q. If you would rank it in the 12 upland properties or boat

14 slips that you had been dealing with, where would you rank

15 this one?

16 A. Well, because of the size of the slip that was

17 associated -- it was the largest slip left available in the

18 marina. So anybody with a, you know, 60 foot plus boat,

19 that's the only slip you could use.

20 Q. Do you think you could have brought another buyer?

21 A. Yeah. I think at that point in time we had sold quite a

22 bit of property in a very short period of time. Actually,

23 it took us longer to permit the property than it did the

24 actual sale of the pads.

25 Q. Have you been in the courtroom and heard all the

1 testimony of the trial so far?

2 A. Yes, sir. I'm afraid I have.

3 Q. Is there any truth, Mr. McMillan, at all any truth to
4 the suggestion that you lied to Mr. Buck about him getting
5 part of slip B-2?

6 A. There is no -- there was never any conversation about
7 moving into slip B-2. It goes against everything that I
8 know about real estate sales and development. And I have
9 done sales and development. I have worked with Horizontal
10 Property Regimes. I've worked with POAs. I've worked with
11 every kind of residential component and a limited commercial
12 properties in dealing with platting and subdivision. I'm,
13 certainly, no lawyer, but I would say that I have
14 development expertise and understanding covenants and
15 restrictions. And I would never, under any circumstances,
16 have made any indication that we would be able to give them
17 additional property on another platted line; would never
18 have done that.

19 MR. BARNETT: That's all I have you. Please answer any
20 questions these other gentlemen have for you or the Court.

21 WITNESS: Yes, sir.

22 THE COURT: Mr. Dukes, any cross-examination?

23 MR. DUKES: Nothing from me.

24 THE COURT: Mr. David?

25 MR. DAVID: Nothing from me, Your Honor.

1 THE COURT: Mr. Epting?
2 CROSS-EXAMINATION
3 BY MR. EPTING:
4 Q. Good afternoon, Mr. McMillan. You, clearly, understood
5 that Mr. Buck was buying B-1 in order to put his Rookie IV
6 boat in there; right?
7 A. Yes, sir. He explained that to me.
8 Q. Right. And he at no time, according to your testimony,
9 told you that he needed 20 feet of clearance? You never
10 heard those words?
11 A. No. The slip was 20 feet and he wanted to be sure that
12 his boat fit in the slip. And I believe, Ms. Carmody
13 testified to the same thing. As long as the boat fit into
14 the slip and he could get the pilings and the financial
15 consideration, he would move forward with the closing.
16 Q. All right. Now, what is the actual clearance in the
17 slip, Mr. McMillan?
18 A. I do not know what the -- from the scale there, I don't
19 know how wide that finger pier is.
20 Q. Would you be willing to meet Mr. Buck's son out tomorrow
21 morning and measure what the clearance is?
22 A. I don't have any problem doing that.
23 Q. Because what we know -- because it had to fit; right?
24 A. Yes, sir. And it fit based on -- the outside dimensions
25 of the boat, it fit the parcel.

1 Q. No. But my question -- and I think your testimony was
2 this sale was contingent on his boat fitting in this slip;
3 right?
4 A. Yes. He wanted to know that his boat would fit into the
5 slip.
6 Q. So the answer to my question is the sale, you
7 understood, was contingent upon his boat fitting in this
8 slip.
9 MR. DUKES: Objection, Your Honor. That question asks
10 for an answer that is barred by the parole evidence rule.
11 THE COURT: Overruled. Go ahead.
12 WITNESS: No. The sale was not contingent upon --
13 there was nothing in the contract that said it was
14 contingent upon the boat going in the slip. Mr. Buck asked
15 me if his boat would fit into the slip. And based on the
16 information that was available from the documentation, the
17 boat would fit into the slip. That was not a contingency of
18 the sale.
19 BY MR. EPTING:
20 Q. Mr. McMillan, I thought you just told me right before I
21 asked you that question, Mr. Buck -- well, you said Mr. --
22 A. Now, there's a difference between --
23 THE COURT: Hold on a second.
24 WITNESS: I'm sorry.
25 THE COURT: Don't interrupt the lawyer.

1 WITNESS: Okay.

2 THE COURT: Listen to his question. Answer it.

3 WITNESS: Okay.

4 THE COURT: And then you can give any explanation. Do
5 you understand?

6 WITNESS: Yes, sir. Sorry about that.

7 BY MR. EPTING:

8 Q. I asked you, immediately, before -- Mr. Buck was not
9 going to close on this slip if his boat did not fit in that
10 slip. He was not going to buy this property; right?

11 A. That's right.

12 Q. You, clearly, understood that?

13 A. Yes, sir.

14 Q. So whether it's written in that document or not, you
15 knew that Mr. Buck closing was contingent on his boat
16 fitting in that slip?

17 MR. DUKES: Judge, can I just make a continuing
18 objection.

19 THE COURT: Yes, sir. That's fine. Overruled.

20 WITNESS: During that two-week period where there was a
21 discrepancy over what Mr. Buck getting, yes. He said, If my
22 boat fits in the slip, I'll move forward if I can get the
23 two pilings and the financial consideration.

24 BY MR. EPTING:

25 Q. Is the answer, Mr. McMillan, to my question, if my boat

1 won't fit in the slip, there's no deal? That was what
2 Mr. Buck told you and you, clearly, understood that; right?
3 A. Well, that's what I just said. Yeah, that was one of
4 the three contingencies of this -- one of the three things
5 he wanted to move forward after there was a confusion about
6 that.
7 Q. Now, you said you were not a marine surveyor?
8 A. That's correct.
9 Q. Did you know -- or did anybody -- who did you talk to --
10 and I'm looking at the Exhibit 28. Who did you talk to
11 about Exhibit 28?
12 A. I think it was Ed Bartia (ph) told me how to check,
13 because he was a yacht broker, how you can check what size
14 of the boats are.
15 Q. And do you know when the Coast Guard uses hull breadth,
16 what they talk about?
17 A. It's my understanding it's the widest point of the boat.
18 Q. At the waterline?
19 A. No, sir. The widest point of the boat.
20 Q. The widest point of the boat. And is that what you
21 based your calculations on?
22 A. Yes.
23 Q. All right. And so if the widest part of the boat is at
24 the waterline --
25 A. I'm sorry. The widest part of the boat is not at the

1 waterline.

2 Q. Well, that's your testimony; right?

3 A. Well, I don't -- I mean, I don't believe the widest

4 point of the boat would be at the waterline.

5 Q. Look at Exhibit one. Are you familiar with the Rookie

6 IV?

7 A. I've seen it in the waterway.

8 Q. Do you recognize that the boat flares up from the

9 waterline?

10 A. The boat flares out from the waterline?

11 Q. And do you recognize that people can walk across and

12 alongside the cabin of the boat on both sides?

13 A. Yes, sir.

14 Q. Now, you've indicated that you drew a sketch of how this

15 boat fit in this slip; right?

16 A. Right. Based on, you know, the size of the boat would

17 go in. Yes, sir.

18 Q. And did you give a copy of that to Mr. Buck?

19 A. No, I did not.

20 Q. Do you have a copy of it here with you today?

21 A. No. It's a sketch that I would have done based on any

22 real -- it's the same thing we would have done to see if it

23 would fit, just like we would have talked about on a lot

24 where we had three trees to go on.

25 Q. And these pilings that you were going to put in, they

1 were going to be in B-1, not in B-2; right?

2 A. Yes, sir. On the line. On the property line to define
3 his property.

4 Q. So completely within that line?

5 A. Centered on the line, inside the line, we had the small
6 pilings -- eight or ten foot pilings, whatever they would
7 be. Yes, sir.

8 Q. All right. Now, you say eight or ten foot pilings?

9 A. Inches, I'm sorry. The diameters -- the small wooden
10 pilings, not a concrete pier.

11 Q. What width did you figure when you were figuring that
12 this boat would fit? What size did you use, eight inches?

13 A. Well, I mean, eight inches, twelve, whatever. Twelve
14 inches would have worked based on the -- if you put it on
15 the line. Yes, sir.

16 Q. So we would have this boat, whatever the size of it is,
17 fitting in this slip, and then we would have these pilings
18 that it was agreed to be put in inside the line between B-1
19 and B-2?

20 A. Okay.

21 Q. Right?

22 A. Yes, sir.

23 Q. That's the way you were figuring it; right?

24 A. It would have to be. Yes, sir.

25 Q. Because you knew the boat had to fit within that area?

1 A. Yes, sir.

2 Q. All right. Now, you also said that you couldn't fully
3 access the slip; that you couldn't bring the Rookie IV all
4 the way back into the slip?

5 A. You can't bring it all the way back into the slip
6 because of the power boxes that are sitting there.

7 Q. Are you saying that the only impediment in bringing the
8 Rookie IV in is the power boxes? I mean, when you did your
9 sketch, how much of the slip could the Rookie IV use?

10 A. The Rookie IV -- the front of Rookie IV could be all the
11 way back inside the 80 foot slip. I don't remember exactly
12 how far back it would go.

13 Q. Well --

14 A. It would go back inside the slip and the cockpit would
15 be along the walk way.

16 Q. Right. But, Mr. McMillan, help me with this. This is
17 an 80 foot platted slip.

18 A. That's correct.

19 Q. All right. And this is a 60 foot boat?

20 A. Yes, sir.

21 Q. All right. Now, you're not insinuating to this judge,
22 are you, that you have the boat 20 feet forward of the back
23 of the slip and it fits; is that what you're saying?

24 A. Yeah. Yeah, I believe it would.

25 Q. So if we had to go 20 feet forward of the back of this

1 slip, the boat would fit?

2 A. Yeah.

3 Q. And did you go over with Mr. Buck that it would fit if

4 you moved the boat 20 feet forward from the front of the

5 slip?

6 A. I didn't go through any of that with Mr. Buck. All I

7 did is what I would do on any transaction that was involving

8 a setback requirement and a building site for what somebody

9 would want to build that it would go on to the lot. I'm not

10 a marine surveyor nor am I an architect. I am neither one

11 of those things. I was asked -- and Mr. Dan David and

12 Mr. Buck knows I'm not a marine expert. I'm not a boat

13 surveyor. But I did it based on the best information that I

14 had based on what I knew about the setback requirements and

15 putting a building pad or a boat into a slip. I used the

16 same methodology.

17 Q. All right. Well, let me ask you this question,

18 Mr. McMillan. Let's just say that the -- well, the slip is

19 -- it's 80 feet long.

20 A. Uh-huh.

21 Q. Mr. Buck's boat is, actually, 63 feet long.

22 A. Yes, sir.

23 Q. All right. Now, let's just say that we put this boat in

24 so that it is 17 feet forward of the back of this slip.

25 A. Uh-huh.

1 Q. So that it is not outside of the perimeter of the slip.
2 A. Yes, sir.
3 Q. All right. Did you make any assumptions about having to
4 put additional piling up to hold the front of the boat?
5 A. Mr. Buck -- and that was one of the questions that where
6 the pilings were going to go were up to Mr. Buck. That's
7 why Mr. Buck met with Doc and with American Dock and Marine
8 to decide where exactly he wanted them to go. But if you
9 put them side by side with each other and you measure the
10 distance from line to line, they're still enough room to get
11 the boat into the slip.
12 Q. All right. Well, let me just make sure I heard you
13 correctly. You said that the agreement with Mr. Buck was
14 where the pilings went was up to Mr. Buck, that was the
15 deal?
16 A. Where he wanted them positioned to define the lot or the
17 slip was up to Mr. Buck. At the closing, the letter that
18 Dan wrote and said --
19 THE COURT: Hold on a second. You testified you
20 weren't at the closing. So you're not going to testify to
21 what --
22 WITNESS: I only saw the letter. I was --
23 THE COURT: I said you're not going to testify to what
24 occurred at the closing. You weren't there.
25 WITNESS: Okay.

1 THE COURT: You already said that. Okay.
2 WITNESS: Yes, sir.
3 THE COURT: Please proceed.
4 BY MR. EPTING:
5 Q. All right. Now, you testified that it was up to
6 Mr. Buck about where to put the pilings; right?
7 A. Where the pilings were to be positioned.
8 Q. Where the pilings were to be positioned.
9 A. To define the lot.
10 Q. And that was the deed that was made to close this. The
11 pilings go where Mr. Buck says they go.
12 A. No, sir. The pilings were to go to define Mr. Buck's
13 boat slip as it was platted on the plat.
14 Q. How do you know that?
15 A. Because that's what I discussed with Mr. Buck. Mr. Buck
16 said I want my slip defined so that I know that the boat
17 next to me is not going to bump into my boat, and I've got
18 the piers that I need that I can tie up to that defines my
19 slip.
20 Q. All right. So what we know then, Mr. McMillan, is these
21 piers were going to go between Mr. Buck's boat in B-1 and
22 whatever might in B-2; right?
23 A. Yeah. Those piers could have gone on the side -- one of
24 them could go on the side. One of them could go all the way
25 out to the front, wherever Mr. Buck wanted to have the

1 definition of his lot is where those piers could go.

2 Q. All right. My question, Mr. McMillan, is they wouldn't

3 go, pointing with my finger here, to the left side of the

4 slip. They were to protect his boat from the boat next

5 door; right? You understood that?

6 A. That was my understanding, yes.

7 Q. All right, sir. Can you tell us how far you had the

8 boat forward in the slip in order that it fit in the slip?

9 A. It had plenty of room to spare, 63 feet or whatever you

10 were talking about, but I don't have any -- I don't know

11 exactly how far it would go back with the two piers. And

12 there, again, that would depend on where they placed the two

13 piers. The one pier goes all the way out in the front

14 corner, and the other pier goes all the way out in line with

15 the ones in the back. Then the boat could come further

16 back. So there is no way to define that until there's a

17 decision on whether the two piers are in line with the back

18 piers or whether they're in line with the longer piers out

19 in front that goes with the slips further down.

20 Q. Why -- you agree with Mr. Buck on this -- it was the

21 responsibility of Ripley and or East Coast to get these

22 pilings put in; right?

23 A. Absolutely, it was. In fact, when I was served with

24 original papers, and I called Doc. I said, We have not been

25 able to perform in putting the piers in as per our contract.

1 So, yes, there is no question at any point in time, other
2 than that they said they would put these piers in to define
3 the slip.

4 Q. And you said that at the time you knew they had the
5 right to do it; right? You represented that to Mr. Buck
6 according to you?

7 A. Yes. Because at that point in time, they still
8 controlled the Property Owners Association. And as to the
9 guy that testified earlier, it's whoever controls the regime
10 has to make the application for the marina permit, because
11 those improvements would be considered common elements.

12 Q. Mr. McMillan, did you know by the time of the closing
13 that the property that was B-2 had been sold?

14 A. I did not know that it had been sold. And, really,
15 those lots were still available for sale. I think it was
16 more of a dissolution of the assets, because, I guess, their
17 mortgages were paid off or whatever.

18 Q. Mr. McMillan, I would like to -- if you're still willing
19 since we're going to be here tomorrow, I'd like to take you
20 up on your offer to meet Mr. Buck, himself, at the site
21 tomorrow, and measure how much clearance really is in B-1.

22 A. I have no problem meeting to measure the distance on the
23 pier, but we have no way of finding that line that's the
24 center line between the two without a surveyor marking it on
25 the ground. So, I mean, we can, certainly, measure -- and

1 honestly, we don't really know without a surveyor coming how
2 far the pier goes the other way. So, I mean, if you want to
3 have a surveyor survey it and then we can look at it, I
4 don't have a problem with that. But I can't survey the lot.
5 All I can do is the same thing I drew based on what's there.
6 I don't have any indication of where to start the
7 measurements from. I'm not a surveyor.

8 Q. Well, sir, let me ask you this, Mr. McMillan: When you
9 drew your little sketch -

10 A. Off of the site plan right there. Off the site plan. I
11 mean, off of the plat. Just like any land planner would do
12 to size any building is exactly what I did. You don't state
13 the building on the site until you survey it and put it on
14 the plat. Then you have a surveyor mark it out.

15 Q. Well, I must not be understanding. I thought you said
16 that you understood the boat would fit, and that you did a
17 sketch -

18 A. A site plan sketch over that map right there, not on
19 site. I mean, we could, certainly, do it. I don't think
20 there's any question that on the site will match up, but I
21 don't have the expertise to go on site and measure how far
22 that pier goes. That needs to be done by the surveyor, not
23 by me. I can only go by what the surveyor wrote, and can
24 draw out on top of it as a sketch plan.

25 Q. Right. But, Mr. McMillan, what you're telling me is

1 that I should be suspect of your sketch, because you're
2 saying you don't even know if what you were using for your
3 sketch was right. Is that what you're saying?
4 A. No. You can scale it off right there. Okay. But if
5 you don't have a monument to work from to find the
6 measurements on the ground, you cannot physically do it on
7 the ground.
8 Q. Right.
9 A. You can only do it based on the plat, based on what's
10 there. Now, if the survey's not correct, then it's an issue
11 with the surveyor. If we want to have a surveyor come plot
12 it out and measure it and see that it matches what's on the
13 plat, I'm happy to do that; but I can't tell you where the
14 corners are. The surveyor has to put them in.
15 Q. Mr. McMillan, Mr. McMillan, when you did your sketch,
16 that finger pier was in there; right?
17 A. Uh-huh.
18 Q. This finger pier was in there?
19 A. That's right.
20 Q. And the finger pier that serves the dry stack was in
21 there?
22 A. That's right.
23 Q. And Mr. Buck's boat was going to fit or not based on
24 where those finger piers were constructed; right?
25 A. It's based on where the slip's going to go on the other

1 side, which you cannot measure if you don't know where to
2 start the measurement from. And you can do it on paper, but
3 you can't do it, physically, on the site.

4 Q. Well, would you be so kind as to meet Mr. Buck over
5 there tomorrow and perhaps we'll have a surveyor?

6 MR. DUKES: Objection.

7 THE COURT: Yes, sir? What's your legal objection?
8 Number one, that's not your witness. You haven't asked any
9 questions, but I've been allowing you all to double team.
10 Now, if the attorney who called the witness has an
11 objection, I'll be glad to hear it. I haven't raised that
12 issue on your prior objections.

13 MR. BARNETT: I don't think I would have an objection
14 to Mr. McMillan agreeing to meet over there. I have an
15 objection, perhaps, to him coming back and presenting some
16 evidence of his onsite meeting.

17 THE COURT: I understand. We'll have to deal with that
18 if and when it happens. Okay.

19 MR. BARNETT: Plus, Your Honor, had that happened --

20 THE COURT: I understand. But we'll just have to deal
21 with that if and when it happens.

22 MR. BARNETT: Yes, sir.

23 THE COURT: I mean, I think, right now this is
24 supposition, but we'll deal with it. Okay.

25 Mr. Dukes, I wasn't trying to cut you off, but,

1 technically, it's not your witness.

2 MR. DUKES: You're right, Your Honor, I apologize.

3 BY MR EPTING:

4 Q. Is ten o'clock too early?

5 A. To do what? If the lot's surveyed out and we look at it

6 -- I don't really know what you want me to do. I'm not a

7 surveyor. I can't survey it on the site.

8 Q. Well, would you meet Mr. Buck there?

9 A. Honestly, I came here without legal representation. I'm

10 truly in default because I didn't answer the suit. I've

11 tried to do everything that I can do here to tell the truth

12 and lay out the facts as I know them. Honestly, I think,

13 before I will do anything like that, I'd want to consult

14 legal representation. I feel like I'm being badgered here.

15 I laid it out on this plat in an honest and fair way, based

16 on the information that I had here. I'm not a surveyor. I

17 don't have any surveying knowledge. So until I would

18 consult legal counsel about whether I'm going to go on site

19 and meet with this, as deep as I am in this, I can't really

20 -- I'm not trying to be argumentative or hard to get along

21 with, but I don't see any reason to do that at this point

22 without more information without consulting a lawyer. And

23 I'm sorry that I have to do that. I didn't want to come

24 here with legal representation. I thought if I told the

25 truth that this would be what I had to do. But I can't go

1 Meet with Mr. Buck and his surveyor on the site. What am I
2 going to allude to? I'm happy to -- at this point, I really
3 don't know what to say about that.

4 I mean, if you tell me I have to go, I'll go; but I
5 don't really --

6 THE COURT: I'm not going tell you you have to go.
7 That's up to you.

8 WITNESS: I mean, I don't know. Maybe, I've been
9 watching too many --

10 THE COURT: If you don't want to go, then tell the man
11 you don't want to go; and let's quit arguing about it.
12 Okay?

13 WITNESS: All right, sir.

14 No, thank you. I'm not interested in going.

15 BY MR. EPTING:

16 Q. Mr. McMillan, you bring up an interesting point, that
17 you're here without legal representation. You were sued in
18 2008?

19 THE COURT: Do we need to get into all of that?

20 MR. EPTING: No. I just wanted to ask him one
21 question.

22 THE COURT: Okay. All right.

23 WITNESS: You know. You served me.

24 BY MR. EPTING:

25 Q. But at any point in time, have you ever gotten a lawyer?

1 A. Not in this matter. I have not.
2 MR. EPTING: All right, sir. Thank you. No further
3 questions.
4 THE COURT: Any redirect?
5 MR. BARNETT: It is pretty brief, Your Honor.
6 THE COURT: Before you start, I want to ask
7 Mr. McMillan a question.
8 MR. BARNETT: Yes, sir.
9 WITNESS: Yes, sir?
10 THE COURT: Mr. McMillan, when did you first see this
11 Coast Guard vessel documentation? When was it first given
12 to you?
13 WITNESS: I think I found out the distance - the site
14 on this boat when we had the discrepancy about whether
15 Mr. Buck's boat would fit.
16 THE COURT: Defendant's Exhibit Number 8 was requested
17 through Windows Explorer provided by Turner, Padget. And
18 Mr. Dukes represents Turner, Padget in this lawsuit. Did
19 you get this when you were allegedly setting up the boat in
20 this dock, or did you get this after this lawsuit started
21 from Mr. Dukes at Turner, Padget? Because that's what the
22 documentation says. Turner, Padget requested it.
23 WITNESS: The information for the size of Mr. Buck's
24 boat came from information that I obtained to be sure his
25 boat would fit into the slip.

1 THE COURT: Now, you're telling me that you obtained
2 this from the Coast Guard?

3 WITNESS: I didn't have the document. I just knew what
4 the size of his boat was at seventeen eight.

5 THE COURT: Well, where did you obtain that information
6 of seventeen eight from? That's my question.

7 WITNESS: From the guys who were working on the boat
8 slips in marinas. They told me what the documentation was
9 on the boat. I mean, a boat surveyor can tell you that --
10 what that is. They look up that information just like a
11 plat on a piece of real estate.

12 MR. EPTING: Your Honor, then, I move to strike his
13 testimony, because that's not what he said.

14 THE COURT: I understand. I understand what he said.
15 I was just asking -- I wanted to know where he said he got
16 it from, because, obviously, Turner, Padgett got that off the
17 internet.

18 MR. EPTING: Well, he testified that he did it,
19 himself, and I didn't object. And, now, he's testified that
20 he got it from somebody else. I move to strike. It's
21 hearsay.

22 THE COURT: That's fine. It is hearsay. I'll strike
23 what he said about who told him what.

24 MR. BARNETT: Yes, Your Honor. I think he testified he
25 got that information.

1 THE COURT: He said he got the information. I'll
2 strike when he said that the surveyor told me. Okay.
3 He answered my question.
4 MR. BARNETT: Yes, sir.
5 THE COURT: Anybody have any questions in reference to
6 the question I asked?
7 MR. BARNETT: Not in reference to that question.
8 THE COURT: Pardon?
9 MR. BARNETT: Not in reference to that question.
10 THE COURT: Do you have any other questions?
11 MR. BARNETT: Just one.
12 THE COURT: Please, feel free to proceed.
13 REDIRECT EXAMINATION
14 BY MR. BARNETT:
15 Q. Mr. McMillan, you talked about it would be possible to
16 get -- to have brought the Rookie IV to this boat slip?
17 A. Absolutely.
18 Q. Okay. All right. Are you familiar with where Mr. Buck
19 keeps the Rookie IV?
20 A. Yes, sir.
21 Q. All right. Have you ever been to his house?
22 A. No, sir. I've just seen the boat from the Wappoo Cut.
23 Q. All right. If you would pull out Exhibit 26.
24 A. It only goes through 17.
25 Q. Pardon me?

1 A. It only goes through 17.

2 Q. It's probably a loose exhibit here on the table. This
3 sheet, this drawing sheet which is labeled sheet one of
4 eight.

5 A. Uh-huh.

6 THE COURT: One of eight?

7 MR. BARNETT: Yes, sir. This is what he's looking at.

8 THE COURT: Thank you, sir.

9 BY MR. BARNETT:

10 Q. And would you hold that -- or I tell you what, if you
11 could just approach. Show the judge, if you would,
12 generally, where Mr. Buck keeps the Rookie IV if it appears
13 on this sheet one of eight.

14 A. Let me get my bearings. I guess, this is -- I'm
15 thinking he's about right here and the marina's right here.
16 It's just around the corner.

17 Q. About how far is that by water?

18 A. Maybe, a mile.

19 Q. How many minutes at a normal cruising speed?

20 A. I mean, you'd have to go no wake there, but I would
21 assume, maybe, ten or fifteen minutes.

22 Q. Okay.

23 THE COURT: Okay. Thank you very much.

24 MR. BARNETT: That's not very far. Thank you.

25 (The witness returns to the stand.)

1 MR. EPTING: I have a follow up question.
2 THE COURT: Okay. Please, proceed.
3 RE CROSS-EXAMINATION
4 BY MR. EPTING:
5 Q. Mr. McMillan, from where this boat is from October to
6 May in Juniper, Florida, how far is it?
7 A. Six hundred miles?
8 Q. And do you know how much gas it burns -- diesel it burns
9 in May?
10 A. No, sir.
11 Q. A gallon and a half, sir, just in case you were curious.
12 MR. EPTING: Thank you.
13 THE COURT: All right, Mr. McMillan, you may step down.
14 Thank you very much.
15 WITNESS: Thank you.
16 (The witness leaves the stand.)
17 THE COURT: May I see the attorneys up here for a
18 second.
19 (WHEREUPON, there was an off-the-record bench
20 conference.)
21 THE COURT: All right. We'll adjourn at 9:30 in the
22 morning.
23 (WHEREUPON, the following was held on July 28, 2011.)
24 THE COURT: All right. Are we ready to proceed?
25 MR. BARNETT: Yes, Your Honor.

1 THE COURT: Okay. If you'll call your next witness.
2 MR. BARNETT: Yes, sir.
3 THE COURT: Is Mr. McMillan here?
4 MR. McMILLAN: Yes, sir.
5 THE COURT: Okay. I just wanted to make sure he stays
6 here for the trial, because I think we've got some damage
7 issue you wanted to take up; is that correct?
8 MR. EPTING: Yes, sir.
9 THE COURT: Mr. McMillan, do you understand?
10 MR. McMILLAN: Sir?
11 THE COURT: Do you understand I want you here?
12 MR. McMILLAN: Yes, sir.
13 THE COURT: I don't want you here. I'm telling you to
14 be here and stay here. Do you understand?
15 MR. McMILLAN: Yes, sir.
16 THE COURT: When we finish this testimony, Mr. Epting
17 at the start of the trial wants to go into a damage hearing
18 on your default. Do you understand?
19 MR. McMILLAN: Yes, sir.
20 THE COURT: All right. That's why I want you here.
21 You be here the whole trial. I want you to hear everything.
22 And let me tell you, at the damage hearing, you'll be able
23 to ask questions of whoever Mr. Epting wants to put up to
24 prove his damages. Now, he's already done some of that.
25 But I'm going to give you the opportunity to cross-examine

1 Witnesses concerning those damage issues. Do you
2 understand?

3 MR. McMILLAN: Yes, sir.

4 THE COURT: When we get to it.

5 MR. McMILLAN: Yes, sir.

6 THE COURT: Okay. Thank you very much.

7 MIKE BELOTE, being first duly sworn,
8 testified as follows:

9 THE CLERK: Thank you. Please be seated.

10 MR. EPTING: Judge, can we approach just one second?

11 THE COURT: Yes, sir.

12 MR. EPTING: I just neglected to mention something.
13 (WHEREUPON, there was an off-the-record bench
14 conference.)

15 THE CLERK: Sir, for the record, if you'll please state
16 your name, spelling your last name.

17 WITNESS: Mike Belote, B-e-l-o-t-e.

18 DIRECT EXAMINATION

19 BY MR. BARNETT:

20 Q. Okay. Mr. Belote, good morning.

21 A. Morning.

22 Q. Mr. Belote, tell the Court just briefly where you are
23 from.

24 A. I'm from Dublin, Georgia.

25 Q. Have you lived your life anywhere else or always in

1 Dublin?

2 A. In Dublin.

3 Q. And what have you done to make a living?

4 A. My family's been in the land and timber business mainly

5 since the 40's, and we just buy and sell timberland.

6 Q. Okay. Well, the project that brings us here today was

7 not a timberland?

8 A. No, sir.

9 Q. All right. Have you done any other projects that were

10 not timberland other than this one?

11 A. No. This is the only one, and the last.

12 Q. All right. Let me ask you about the Ripley Cove, LLC,

13 one of the defendants in the case. Tell the Court, if you

14 would, what is Ripley Cove, LLC?

15 A. It's a limited liability company made up of my company,

16 East Coast Trading Company and a company called Pavilion

17 Development that's owned by a couple of guys from

18 Greenville, South Carolina who are developers and who have

19 done this most of their lives.

20 Q. Okay. Who are those two people that own Pavilion?

21 A. Lowell Frazier and Larry McNair.

22 Q. And what is East Coast Trading Company?

23 A. It's a company that just buys and sells timberland.

24 Q. Who owns East Coast Trading Company?

25 A. I do.

1 Q. Is that a sole proprietorship?
2 A. Yes.
3 Q. How long has East Coast Trading Company been around?
4 A. We formed that, I think, in '86. Something like that,
5 '86.
6 Q. All right. Now, do you know Doc Knight?
7 A. Yes.
8 Q. Sitting here. What is Doc Knight's relationship to
9 Ripley Cove, LLC?
10 A. Doc was the on-the-ground, kind of, contractor that saw
11 the project through, and did all the necessary work to
12 oversee everything; get the permitting and all those things
13 that needed to be done.
14 Q. Does Mr. Knight have any ownership interest in Ripley
15 Cove?
16 A. No, sir.
17 Q. Was he an employee of Ripley Cove?
18 A. No, sir. Not really.
19 Q. What was he?
20 A. He was more of a contractor. He shared a profit and had
21 a percent.
22 Q. What about with respect to East Coast Trading Company?
23 Does Mr. Knight have any ownership interest in that?
24 A. No, sir.
25 Q. Is he an employee of East Coast Trading Company?

1 A. No, sir.

2 Q. What is his relationship with East Coast Trading
3 Company?

4 A. We've done timberland things together in the past. I
5 mean, we'd bring something, we'd buy and sell, and we'd
6 share the profit in some manner however we determined it at
7 the time.

8 Q. Okay. Do you regard him as an independent contractor?

9 A. Yes, sir.

10 Q. Do you have a written contractual agreement with him?

11 A. No, sir.

12 Q. All right. Well, let's talk about this marina that's
13 shown here. The whole thing is shown here on this plat, the
14 Ripley Marina. How did Ripley Cove, LLC come to get
15 involved in this marina?

16 A. Doc found this land for sale, property for sale from a
17 guy named Fred Collins. And so we were looking at it, and
18 through a mutual friend we, we got to know Larry and Lowell.
19 We didn't want to attempt this without somebody who knew
20 what they were doing. So we formed an LLC, Ripley Cove with
21 these two fellows, and we did that together.

22 Q. All right. Did you purchase the marina property from
23 Freddy Collins?

24 A. Yes, sir.

25 Q. When did you do that?

1 A. I think it was in '04 or something like that.
2 Q. All right. And were you intending to make it into a
3 condominium property?
4 A. We were intending to do what we did as far as divide it
5 up and put some single family lots and townhouses and then a
6 section for a condominium, I think.
7 Q. Okay. You intended to sell them with the boat slips?
8 A. Yes.
9 Q. The condominiums?
10 A. Yes. Oh, yes.
11 Q. When did you start selling condominium boat slips?
12 A. Early on. It was not long after we took title to it,
13 and we started closing. As a matter of fact, we sold some
14 when we closed.
15 Q. Okay. Now, with respect to -- was there a master deed?
16 A. Yes.
17 Q. For the property?
18 A. Yes.
19 Q. Okay. And if you want to refer to it, it's in that
20 notebook sitting there. It's got tabbed numbers. And I
21 believe it's tab 13. I'm not going to refer you to it now,
22 but, certainly, any that question I ask you causes you to
23 want to look at it, it's tab 13.
24 A. Okay.
25 Q. What obligations, if any, did Ripley Cove, LLC have to

1 the people that boat slips to that marina that are set out
2 in the master deed?
3 A. Say that again.
4 Q. What obligations -- once Ripley Cove sold a boat slip to
5 somebody, did they have some obligations to them that are
6 set out in that master deed?
7 A. To the individual after he bought the property?
8 Q. Yes, sir.
9 A. I think, personally, we didn't. It was all deeded by
10 the master deed. It was all set out.
11 Q. Well, what was Ripley Cove obliged to do after the sale
12 of the slips in the master deed?
13 A. We were supposed to do some work on the slips and to
14 upgrade some things that needed to be done.
15 Q. Okay. All right. What were you supposed to do in terms
16 of upgrading the slips?
17 A. We were -- there were decking on the side that needed to
18 be replaced. There was some electrical things that needed
19 to be done. There was some of those boxes set on the piers
20 that needed to be replaced. There was some plumbing that
21 needed to be seen about, that kind of thing.
22 Q. All right. What about dredging the canal?
23 A. Oh, yes. Yes. We had to dredge the canal.
24 Q. And after you acquired the property, did you set about
25 trying to get those things done?

1 A. Immediately, dredged. We sure did.
2 Q. At some point, did East Coast Trading Company acquire
3 title to the boat slip B-1?
4 A. Yes, sir.
5 Q. So at the beginning of all this, Ripley Cove owned it
6 all?
7 A. That's right.
8 Q. When did East Coast Trading Company take title to the
9 slip B-1?
10 A. I think it was the end of '04, December '04.
11 Q. All right. I don't remember the exhibit number. I
12 think, maybe, it was 19 or 20. Take a look at Number 20.
13 A. Twenty is a deed.
14 Q. That's it. So what property did East Coast Trading
15 Company take from Ripley pursuant to that deed?
16 A. Lot three and boat slip B-1.
17 Q. When did you -- when did East Coast, you, take title to
18 lot three and B-1?
19 A. Let me see.
20 Q. It should be toward -- there's a signature; right?
21 A. Yes. December 30th.
22 Q. Of?
23 A. '04.
24 Q. December 30, 2004?
25 A. Yeah.

1 Q. Well why did you take title? What was going on there?
2 A. Most of the property was sold, and we were just
3 dispersing out the ownership as far as profits were
4 concerned. Pavilion took some lots and I took that one lot.
5 Q. All right. So this one upland lot and that boat slip,
6 that's your pay?
7 A. Yes.
8 Q. And then the other two guys, McNair and Frazier, with
9 Pavilion, they were going to take title to some other lots?
10 A. That's right.
11 Q. And did they, ultimately, take title of those lots?
12 A. Yes, they did.
13 Q. Take a look at Exhibit 18, which should be sitting right
14 there in front of you.
15 A. Uh-huh.
16 Q. All right. Is Exhibit 18 the deed by which Pavilion
17 took title to their lots?
18 A. Yes, sir.
19 Q. All right. What's the date of that transaction?
20 A. That's March 23rd of '05.
21 Q. All right.
22 A. I better get my glasses.
23 Q. Okay.
24 A. All right. I'm ready.
25 Q. All right, sir. Now, let me ask you a more general

1 question before we focus in on this transaction. About how
2 many real estate transactions have you been involved in your
3 career?
4 A. I don't know. A bunch. I mean, I've done it all my
5 life. I mean, I don't know how many as far as buying and
6 selling land and timber. I don't know. Just a lot.
7 Q. Well, you heard Mr. Buck estimate the value of the
8 transactions he might have been involved in. Could you
9 provide a similar estimate for the value --
10 A. Well, timberland, yeah. We can buy some big tracts,
11 some timberland tracts for several million dollars. You
12 know, so it's probably four or five hundred million dollars
13 worth of timberland.
14 Q. Have you ever entered into a transaction for land sales,
15 substantial land sales without a written contract?
16 A. No.
17 Q. The written contracts that you've entered into, do they
18 always specify the property that's being sold?
19 A. Yes. We, normally, have a surveyor or timber crews. We
20 have a due diligence period where we have time to cruise the
21 timber, be sure the timber's there like it's represented
22 that the acreage is there like it's represented. We hire
23 consultants that do that, and then we close. Once that's in
24 place -- if it's not, then, we don't close or we adjust the
25 price.

1 Q. Now, you know Karl McMillan who's sitting here?
2 A. Yes. Uh-huh.
3 Q. What was Karl McMillan's relationship with Ripley Cove?
4 A. He was the broker that sold the lots for us, the housing
5 lots, the individual home sites that had the slips attached
6 to them.
7 Q. What authority did Mr. McMillan have with respect to
8 Ripley Cove?
9 A. He was our broker. He found the buyers for us. Most of
10 the buyers on those lots, Karl found.
11 Q. Were there any limits to his authority?
12 A. Yes. All he did was just bring the buyer, you know.
13 Q. Did he have the authority to set a price?
14 A. No. No. We set the price.
15 Q. Would Mr. McMillan bring a potential contract back to
16 you for approval?
17 A. Yes, or Doc. Yeah.
18 Q. If he went to Mr. Knight, would Mr. Knight bring them to
19 you for approval?
20 A. He would call me and we'd talk about it.
21 Q. But you always knew about every sale?
22 A. Yes, sir.
23 Q. All right. Did Mr. McMillan have the authority to offer
24 other property that Ripley might have owned for sale to bind
25 Ripley to sell other property to somebody?

1 A. No.

2 Q. Did he have the authority to bind Ripley at all?

3 A. No, sir.

4 Q. With respect to East Coast Trading Company, same

5 question. What was Mr. McMillan's relationship to East

6 Coast Trading Company?

7 A. He mainly was with Ripley. He was selling for Ripley,

8 that entity that East Coast was a part of. And then this

9 lot when it came up for sale, same relationship as a broker.

10 Q. Did he have the authority to bind East Coast Trading

11 Company to sell other property?

12 A. No, sir.

13 Q. Let me ask you about this transaction. The contract for

14 sale is Exhibit Number 3 in that notebook.

15 A. Uh-huh.

16 Q. Just turn to the first page of Plaintiff's Exhibit

17 Number 3.

18 A. In this book here?

19 Q. Yes. In that notebook.

20 A. All right.

21 Q. And the contract it speaks for itself. The contract is

22 between Zan, LLC --

23 A. Right.

24 Q. -- and Ripley Cove, LLC.

25 A. Right.

1 Q. And if we go to the signature page, the very last page,
2 it's dated -- well, Ms. Carmody and Ms. Buck signed it on
3 February 3, 2005.
4 A. Right. Yes.
5 Q. And Mr. Knight signed it the next day on February 4th?
6 A. Right.
7 Q. Now, at this point, Ripley Cove didn't own lot three?
8 A. No, sir.
9 Q. It didn't own lot slip B-1; did it?
10 A. No, sir.
11 Q. So when did you become aware that this contract had been
12 -- that this contract had been executed incorrectly in the
13 name of Ripley Cove, LLC?
14 A. I don't know that I know a specific time. It was
15 shortly right after that. And we just left it in place,
16 because we intended to sell it just like it was.
17 Q. Did you ever disavow the contract?
18 A. No, sir.
19 Q. Did you ever say, Mr. Buck, no, I'm not going to sell it
20 to you for that price?
21 A. No, sir.
22 Q. Did you always agree to sell these properties at the
23 price agreed upon?
24 A. Yes, sir.
25 Q. Did you agree to give Mr. Buck a credit off the purchase

1 price?

2 A. Yes, sir.

3 Q. All right. Why did you give him a credit?

4 A. Well, you know, I figured that was part of negotiations.

5 He didn't want to close the first time. And there was some

6 confusion about the slip, and so we were told that's what he

7 wanted to do; and we agreed to do that.

8 Q. At any point, were you made aware that Mr. Buck had

9 found something wrong with lot number three?

10 A. No, sir.

11 Q. At any point, were you made aware that he found

12 something wrong with boat slip B-1?

13 A. No.

14 Q. So he just asked you to reduce the price?

15 A. That's right.

16 Q. And you agreed to reduce the price?

17 A. Yes, sir.

18 Q. All right. Mr. Belote, when is the first time you heard

19 that Mr. Buck wanted to have you pay to put some pilings in?

20 A. In the day of closing, April or March, sometime when the

21 second closing took place. I think Dan called Doc and said

22 they wanted to put a couple of pilings in. And Doc called

23 me, and I said that would be all right.

24 Q. All right. At that time, were you aware of any

25 government approvals that would be required to put the

1 piling in?

2 A. Yeah. I knew we'd have to get a permit from the Corps.

3 And it also states that in the deeds, every deed that we

4 gave everybody out there everything you did was subject to

5 the Corps' approval.

6 Q. Had you all been dealing with the Corps and OCRM at that

7 point?

8 A. Yes, sir.

9 Q. What kind of relationship did you have?

10 A. It was pretty good. It was okay.

11 Q. Was there approval required to get the dredging done?

12 A. Yes.

13 Q. Did you get some help in trying to get approval to get

14 the dredging done from Newkirk Environmental?

15 A. Yes. Uh-huh.

16 Q. Now, on the day of the closing, April 5, 2005, did

17 Ripley Cove still control the marina?

18 A. On the day of closing? Yes, I think so. Yeah.

19 Q. Okay. All right. Ripley Cove still held the marina

20 permit on April 5th?

21 A. Uh-huh.

22 Q. Do you know when the POA, itself, the homeowners POA

23 took over the regime?

24 A. I think it was May or June. Right after that.

25 Q. At the point the POA took over, who held the marina

1 permit?
2 A. The POA did.
3 Q. Mr. Belote, at any time, at any time before the closing
4 on April 5, 2005, did anybody tell you that Mr. Buck wanted
5 to get title to not only to slip B-1, but to part of slip
6 B-2?
7 A. No, sir.
8 Q. There's a blow up of the plat there.
9 A. I know what you're talking about. Yeah. No.
10 Q. Not at all?
11 A. No. Absolutely, nobody.
12 Q. Did anybody tell you he wanted any additional property
13 conveyed to him?
14 A. No, sir.
15 Q. On April 5, 2005, did you have the ability to convey to
16 Mr. Buck any part of slip B-2?
17 A. No, I didn't, nor would I have tried to.
18 Q. Why wouldn't you have tried to?
19 A. It would have been a nightmare to get that done.
20 Q. Okay.
21 A. You would have never got it done.
22 Q. How many of the boat slips had been sold to other
23 parties other than your partners? Your partners had gotten
24 title to some, but how many have been sold to people
25 completely unrelated to Ripley Cove by this point?

1 A. Well, there was 82 slips out there, you know. Probably,
2 40 or 50 people, I reckon. Some bought more than one.
3 Q. Would you have to get approval from those people? Was
4 that your understanding?
5 A. Yeah. And the dry stack owner. And the board at the
6 POA. And, you know, you'd have to go back to the City and,
7 I reckon, to the Corps again. I don't know.
8 Q. Now, do you remember when the POA took over control of
9 the marina?
10 A. I -- yeah, I remember that they did.
11 Q. What was your relationship like when the POA board took
12 control?
13 A. It wasn't good.
14 Q. Can you be more specific than that?
15 A. Well, you know, we were working on doing the things that
16 we thought we had to do, that we had agreed to do as far as
17 plumbing and water and some repairs and doing some
18 electrical stuff. And they came and wanted us to double the
19 amp size of the electrical down there.
20 Q. Who -- was there a board member that you recall that was
21 particularly interested in doubling the ampage?
22 A. I think it was mainly Anthony Rhodes.
23 Q. Okay. Was this the same Anthony Rhodes that had
24 installed the pilings and docket stations illegally?
25 A. Yes, sir.

1 Q. He wanted you to double the ampage. What would be the
2 difference in price between repairing the electrical service
3 to the ampage that was there when you got the marina versus
4 doubling the size?
5 A. I don't know exactly. It was at least \$150,000,
6 something like that.
7 Q. Did you agree to do that?
8 A. Nope.
9 Q. Why not?
10 A. Well, it wasn't a part of what we agreed to do.
11 Q. Did you agree to go in and redo the electrical service
12 completely to the original?
13 A. To the original situation that it was in. Yes, sir.
14 Q. Was the POA okay with that?
15 A. No. They wanted us to upgrade it.
16 Q. Did you ever do the electrical?
17 A. We fixed it like we was supposed to.
18 Q. Did the POA ever threaten to sue you over this?
19 A. Yeah. Uh-huh.
20 Q. All right. And how long did this dispute go on?
21 A. I don't know. Two or three years. We spent I don't
22 know how much money, but engineers -- I don't know. Two or
23 -- a couple of years anyway.
24 Q. It took you while to get the dredging done; didn't it?
25 A. Yeah.

1 Q. When did the dredging finally get done?
2 A. I think it was in '08. I swear I don't remember, but I
3 think it was in '08.
4 Q. All right. In between when y'all started selling these
5 slips -- let me be more specific. In between the time the
6 POA took over in the middle of 2008 -- I mean, 2005, I'm
7 sorry. When the dredging got done in 2008, was there any
8 controversy over that?
9 A. Oh, the dredging?
10 Q. Yes.
11 A. Oh, yeah.
12 Q. Did Ripley Cove get sued over that?
13 A. Oh, yeah. Uh-huh.
14 Q. How many people sued?
15 A. I don't know. Let's see, the Vastek guy sued us.
16 Anthony Rhodes sued us. Chivers guy sued us. I think that
17 might have been it, just them three.
18 Q. So Mr. Rhodes and Mr. Chivers, the same two guys that
19 put in illegal pilings and dock extensions?
20 A. Yeah.
21 Q. We heard the testimony about this. They sued you
22 because the dredging didn't get done fast enough?
23 A. Yeah. That's right.
24 Q. All right. Did they also sue you because they didn't
25 think the electrical system had been upgraded the way they

1 wanted it?

2 A. Yeah.

3 Q. What happened to that lawsuit? The claims by

4 Mr. Chivers, what happened to those?

5 A. He just went away.

6 Q. What about Mr. Rhodes?

7 A. We gave him \$5,000.

8 Q. And he went away?

9 A. Yes, sir. And we didn't want to do that, but it was

10 costing us more than that to deal with it.

11 Q. What about the dry stack guy? Who was the dry stack

12 guy?

13 A. The dry stack guy is a guy named Joe Miller.

14 Q. Okay. What did he sue you over?

15 A. You know, if a bird flew over the place wrong, he tried

16 to sue us. But he, specifically, sued us over the dredging

17 and he sued us over -- I think he sued us over repairing a

18 landing for the forklift.

19 Q. Did you repair the landing?

20 A. Yes, sir.

21 Q. All right. How much did you pay to repair the landing?

22 A. Thirty-two thousand dollars.

23 Q. How much did Mr. Miller want you to give him?

24 A. Two hundred and seventy-five.

25 Q. What happened to that dispute?

1 A. That was the end of it.

2 Q. Did he continue to sue you over the dredging?

3 A. Yes.

4 Q. How long did that go on?

5 A. A year or two years, I think. You know, a couple of

6 years.

7 Q. Did it go on after the dredging was done?

8 A. Oh, yeah.

9 Q. Okay. Why did it continue after the dredging was,

10 actually, done?

11 A. Well, he said it wasn't done right.

12 Q. Okay. All right. And how was that dispute resolved?

13 A. We ended up giving him \$25,000 to just let him leave us

14 alone.

15 Q. How many people did you hire as a consultant as near as

16 you can recall to defend the dredging that was done?

17 A. Well, let's see Tom Gary Taylor.

18 Q. Who's an engineer; correct?

19 A. Yes. I think GEL helped us. And we had a surveyor to

20 help us. I think that's it that I can remember.

21 Q. Did you pay Mr. Riggs?

22 A. Yes. Newkirk helped us.

23 Q. And legal representation?

24 A. Oh, yeah. Many, many legal dollars.

25 Q. Now, did you try -- well, do you know whether Mr. Knight

1 | tried to get approval to put those pilings in?
2 | A. Yes.
3 | Q. Did you have any personal involvement in that?
4 | A. No, sir.
5 | Q. Okay. And was he able to get government approval to put
6 | those two pilings in?
7 | A. No, sir.
8 | Q. When the POA took over the marina permit, could you have
9 | gone -- you, as East Coast Trading company, could you have
10 | gone over and asked the Corps for permission to put the
11 | pilings in?
12 | A. No. We'd have to go through them.
13 | Q. To the POA?
14 | A. Yes.
15 | Q. And was your relationship to the POA such that you could
16 | go over and ask them to do you that favor?
17 | A. No.
18 | Q. Was Mr. Rhodes on the board?
19 | A. Yes.
20 | Q. One of these people that installed illegal pilings,
21 | illegal docking stations, and had sued you?
22 | A. Yes.
23 | Q. And was Mr. Miller on the board?
24 | A. Yeah, he was for a while, I think. Yeah. Wonderful
25 | board.

1 Q. Were you in the position to go to the POA and ask them
2 for approval to subdivide lot B-2 so that Mr. Buck could get
3 part of B-2?
4 A. No. As far as a relationship with them?
5 Q. Yes.
6 A. No.
7 Q. If Mr. Buck or the POA, actually, for a more corrective
8 statement, were to get approval from the government to put
9 those pilings in the water, at a location approved by the
10 government, tomorrow or next week or next month, would you
11 pay to put them in?
12 A. Yes.
13 Q. Did East Coast Trading Company ever enter into a
14 contract with Mr. Buck or Zan, LLC obligating you, as a
15 matter of law, to put those pilings in, in your mind?
16 MR. EPTING: Your Honor, I object on two grounds.
17 Number one, he's been leading the witness since the
18 beginning, number one, but it's going faster. But I'm going
19 to object here, too. I don't think this gentleman can
20 answer whether --
21 MR. BARNETT: It's a bad question. I'll withdraw the
22 question.
23 THE COURT: Okay.
24 BY MR. BARNETT:
25 Q. Did East Coast Trading Company ever enter into a

1 contract with Zan, LLC, agreeing to install those pilings?
2 A. No.
3 Q. In that notebook, will you take a look at Exhibit Number
4 five.
5 A. Tab five?
6 Q. Tab five.
7 A. Yes, uh-huh.
8 Q. Did you see this letter at the time it was done April 5,
9 2005?
10 A. No, sir.
11 Q. Did you have any discussions with Mr. David about this?
12 A. No. I think Doc did.
13 Q. Okay. All right. When Mr. David conducted this
14 closing, you were the seller -- East Coast Trading Company
15 was the seller?
16 A. Yes, sir.
17 Q. Was Mr. David your lawyer?
18 A. No, sir.
19 Q. He prepared the deed?
20 A. Right. He did the deed for us.
21 Q. And he was paid for that?
22 A. Yes, sir.
23 Q. He was paid for that out of the funds that came?
24 A. That's right.
25 Q. Was he your lawyer or agent for any other purpose at

1 that closing?

2 A. No, sir.

3 MR. BARNETT: That's all the questions I have for you,

4 Mr. Belote. Please answer any questions that these other

5 gentlemen have or the Court.

6 THE COURT: Mr. David, do you have any questions?

7 MR. DAVID: No, Your Honor.

8 MR. DUKES: Nothing from me, Your Honor.

9 THE COURT: Mr. Epting?

10 MR. EPTING: Yes, sir. Thank you.

11 CROSS-EXAMINATION

12 BY MR. EPTING:

13 Q. Mr. Belote, I heard you mutter under your breath

14 something I thought was "wonderful board." Did I hear that

15 right?

16 A. Yeah.

17 Q. You had problems with the POA --

18 A. Yes, sir.

19 Q. -- from the beginning; correct?

20 A. Yes, sir.

21 Q. And when you agreed or gave Dan, or Doc gave Dan David

22 the authority to write the letter about the two pilings, you

23 understood then what your relationship was with the POA;

24 didn't you?

25 A. Yes, sir.

1 Q. And you understood when you authorized Dan David to sign
2 that letter that you have to have Corps approval to do it?
3 MR. BARNETT: Objection, Your Honor.
4 THE COURT: I'm sorry. What's your legal objection?
5 MR. BARNETT: I believe he's misstating what Mr. David
6 said.
7 If you want to ask him what he told Mr. David, but what
8 you've done is you've said -
9 THE COURT: No. He can summarize what he thought he
10 heard, and he can answer it whether he understood that's
11 what he said or didn't say.
12 WITNESS: Say it again.
13 MR. EPTING: Well, I was going to ask Madam --
14 THE COURT: Just listen to the question, please, sir.
15 If you would rephrase the question.
16 MR. EPTING: Would you please read that last question?
17 Oh, I think I remember my question.
18 BY MR. EPTING:
19 Q. Mr. Belote, you understood that in agreeing to put these
20 pilings in that you have to go through the Corps and OCRM
21 and get permits to do it; didn't you?
22 A. Well, at that point, when we closed, I think we,
23 ourselves, had the ability to do it.
24 Q. Right. But you understood at that time that you would
25 have to go through the Corps?

1 A. Yes.

2 Q. Right.

3 A. Yeah.

4 Q. All right, sir. And you recognized that it could be a
5 problem getting the POA to do it if the authority were
6 transferred to the POA because of your relationship to the
7 POA?--

8 THE COURT: What's that have -- I don't understand how
9 -- I don't mean to interpose an objection, but what's the
10 relevance? At the time that letter was written, he had the
11 authority. The man, Mr. Riggs, he said if he had filed that
12 they would have listened to him.

13 MR. EPTING: Yes.

14 THE COURT: And they would deal with it. So I mean,
15 what difference does it make about the POA, because they had
16 the authority to do it at the time they entered into the
17 agreement, allegedly?

18 MR. EPTING: Well, at 60, Judge, what you can say is
19 it's just bad lawyering, because I know better than to be
20 chasing a rabbit. But I just got down the road chasing a
21 rabbit.

22 THE COURT: I mean, that's a red herring.

23 MR. EPTING: I agree. I agree. I'll move on.

24 THE COURT: We've been chasing it for two days.

25 MR. EPTING: I know. I agree, Judge. Sorry. I'll

1 move on.

2 BY MR. EPTING:

3 Q. If I understand it right, Mr. Belote, Karl McMillan was

4 the real estate agent for Ripley; right?

5 A. He was our broker. Yes, sir.

6 Q. All right. Well, look at the contract; that is Exhibit

7 3.

8 A. Okay.

9 Q. All right. Turn to the last page.

10 A. Okay.

11 Q. Mr. McMillan is identified as the listing agent, is he

12 not?

13 A. Yes, sir.

14 Q. All right. And he had the same authority with regard to

15 East Coast Trading Company, did he not, Mr. Belote, to sell

16 lot three and slip B-1?

17 A. Yes, sir.

18 Q. All right. Now, in the order of things, Mr. Belote, is

19 Doc Knight -- his real name is W. H.?

20 A. Yes, sir.

21 Q. But everybody calls him "Doc"?

22 A. Doc, yes, sir.

23 Q. All right. But Doc Knight was your guy on the ground?

24 A. Yes, sir.

25 Q. And Doc Knight had authority to speak for you?

1 A. He would talk to me. He couldn't just do things without
2 talking to me.

3 Q. All right. Is there anything in this transaction as you
4 see it, Mr. Belote, that you believe that Doc Knight didn't
5 have your authority to do?

6 A. In this one paper right here?

7 Q. In the --

8 A. In this agreement to purchase and sell?

9 Q. Yes, sir.

10 A. I think this represents what we were looking to do.

11 Q. All right. And when Doc Knight called you from the
12 closing, did you give him authority to do what is in Dan
13 David's letter?

14 A. I told Doc that we would try -- we'd put in them
15 pilings. Yeah, we'd try to put them in.

16 Q. All right. Did you ever get a copy of this letter?

17 A. No, sir, I didn't.

18 Q. Did you ever ask for a copy of the letter?

19 A. Not really.

20 Q. Did you Trust Doc Knight to do the right thing for you?

21 A. Yes, sir.

22 Q. You had confidence in him to do that?

23 A. Yes, sir.

24 Q. And he often times did act on your behalf?

25 A. Yeah, but we always talked about what the acting would

1 be.
2 Q. All right. But he had a power of attorney, too; didn't
3 he?
4 A. Yes, sir, in some of these. Yes, sir.
5 Q. Right. And he executed these documents; did he not?
6 A. Yes, sir.
7 Q. Did he execute it on behalf of East Coast Trading
8 Company?
9 A. That's right.
10 MR. EPTING: All right, sir. Thank you. Nothing
11 further.
12 THE COURT: Any redirect?
13 MR. BARNETT: No, Your Honor.
14 THE COURT: Sir, you may step down. Thank you very
15 much. Call your next witness.
16 (The witness leaves the stand.)
17 MR. BARNETT: W.H. Knight.
18 W.H. KNIGHT, being first duly sworn,
19 testified as follows:
20 THE CLERK: Thank you. Please be seated. Sir, for the
21 record, if you'll please state your name, spelling your last
22 name.
23 WITNESS: W.H. Knight, K-n-i-g-h-t.
24
25

1 DIRECT EXAMINATION

2 BY MR. BARNETT:

3 Q. Okay. Mr. Knight, tell me what you have done for a

4 living in your life, briefly.

5 A. Mainly, timberland. Buying and selling timberland.

6 Timber dealer one time. You know, purchasing timber, and

7 then I moved on into the timberland business.

8 Q. Where are you from?

9 A. Dublin, Georgia.

10 Q. Have you lived there your whole life?

11 A. Well, I lived in another place. I moved to Dublin in

12 1978. I was born in Waynesville, Georgia.

13 Q. All right. You need to speak up just a little bit.

14 A. Okay.

15 Q. Your voice kind of trails off. How long have you worked

16 with Mr. Belote?

17 A. Well, since the early -- in 1981 or 1980, we met and

18 became friends.

19 Q. And did you ever have any ownership interest in Ripley

20 Cove?

21 A. No, sir.

22 Q. Were you ever employed with them?

23 A. No, sir.

24 Q. Did you -- how did you get paid for what you did?

25 A. I got a percentage of the sales and was issued a 1099.

1 Q. All right. How about East Coast Trading Company? The
2 same?
3 A. I never dealt -- I mean, I was never employed by East
4 Coast Trading.
5 Q. All right. Let me ask you about the transaction that
6 brings us here today. When was the first time that you
7 discussed this transaction with Mr. Buck or anybody on his
8 behalf?
9 A. On whose behalf?
10 Q. When did you first talk to Mr. Buck about this
11 transaction, lot B-1 and lot three?
12 A. I guess, it was after the closing. I met him out to see
13 where, you know, the pilings were to be placed.
14 Q. Okay. There's been much talk about the letter which is
15 Exhibit 5. If you would go to that notebook that's in front
16 of you. April 5th letter 2005 with Dan David on it addressed
17 to Lynn Carmody.
18 A. Yes, sir.
19 Q. Plaintiff's Exhibit 5. When did you first see this
20 letter?
21 A. I guess, I first saw that letter, maybe, two or three
22 weeks ago.
23 Q. Two or three weeks ago? It's got a place for your
24 signature here?
25 A. Right.

1 Q. Did you ever sign any version of this letter?
2 A. No.
3 Q. Did you have a discussion with Mr. David on the day of
4 closing?
5 A. Yes, sir. He had called me. And I believe he was in
6 the closing.
7 Q. Where were you?
8 A. I don't remember. I don't remember. But I do remember
9 he was calling and said that they wanted, you know, some
10 pilings put on it, you know, so he could delineate his lot
11 or his boat slip, and wanted us to put them in. And I said,
12 Look, we'll do whatever we can for him. You know, I'll work
13 to do whatever I can to help him put the slips in, but I
14 need to call Mike and talk with him. And I told Mike and
15 called Dan back and told him, you know, we'd do what we
16 could to help him get the slips -- the pilings put in.
17 Q. I think I heard you say "put the slips in."
18 A. No. Pilings in.
19 Q. You said you would do everything you could to help him
20 put the pilings in?
21 A. Yeah.
22 Q. At this time in 2005, did you already have some sort of
23 relationship with the Corps of Engineers Office here locally
24 and the OCRM Office here locally?
25 A. Yeah. I had a good relationship with them.

1 Q. Had you met Mr. Mallett?
2 A. Yeah. That's the first guy I met when I came into
3 Charleston.
4 Q. What were you talking to those people about? The Corps
5 and the OCRM?
6 A. Mainly, it was about the, you know, the conversion of
7 the marina and also about dredging. That was the main thing
8 of it was the dredging.
9 Q. Did you have a good relationship with them?
10 A. Yes.
11 Q. All right. Now, as near as you can recall, did you tell
12 Mr. David that East Coast Trading Company would --
13 MR. EPTING: Object, Your Honor. Leading.
14 THE COURT: What's your legal objection?
15 MR. EPTING: Leading.
16 THE COURT: Okay. I'll sustain the objection.
17 MR. BARNETT: I'll rephrase the question.
18 BY MR. BARNETT:
19 Q. As near as you can recall, Mr. Knight, what did you tell
20 Mr. David with respect to putting in pilings?
21 A. I just told him, you know, I'll do anything I could to
22 help him put the pilings in, you know.
23 Q. Did you agree to contract to put the pilings in?
24 A. No.
25 Q. Was there a reason why you did not?

1 A. Well, I knew I had to go get permits and that kind of
2 things. So I couldn't contractually enter into something
3 that I didn't know what the outcome was going to be.
4 Q. Had you seen the -- the contract is Exhibit Number 3 in
5 that book that you have open. Had you seen that contract
6 before the closing?
7 A. Yes, sir. I, actually, signed the contract.
8 Q. Okay. Is there any contingency in that contract related
9 to putting in pilings?
10 A. No, sir.
11 Q. Were you ever asked to agree to a contingency to put in
12 pilings? In other words, making the sale of slip B-1
13 contingent on putting the pilings in?
14 A. No.
15 Q. Would you have agreed to such a thing?
16 A. I couldn't.
17 Q. You couldn't agree?
18 A. No.
19 Q. Why not?
20 A. Well, it had to be permitted. And you never know if you
21 get the permit until it's permitted. I mean, you just
22 couldn't do it.
23 Q. At the time, in 2005, had you had some experience with
24 putting in pilings in this canal?

1 A. Yeah. We had -- I hadn't put any in, but we had done
2 modifications or doing that kind of stuff to the marina.
3 But we were fixing to have to pull a bunch of pilings for
4 the dredging, you know, to get that done.
5 Q. All right.
6 A. And then right in that period of time the Anthony Rhodes
7 and the Chivers thing happened.
8 Q. Do you recall if you knew at that time what it would
9 cost to put in a couple of pilings in that slip?
10 A. Yeah. We figured about \$2500 because we were doing work
11 down on the E docks, replacing those and putting new pilings
12 and stuff in there. We was just going to run the barge up,
13 you know, if we could have got it permitted and all and
14 stick them in. They would have done it for around \$2500.
15 Q. Okay. All right. If approval could be gotten from the
16 government entity, the Corps or the state to put the two
17 pilings somewhere in there, B-1, B-2, somewhere in there,
18 would East Coast Trading Company be willing to do it today?
19 A. Yes, sir. Mike said he'd be glad to put the pilings in.
20 Q. Have you ever communicated to anybody on behalf of Zan,
21 LLC a refusal to pay to put the pilings in?
22 A. No.
23 Q. Now, after the closing, you said you had some
24 communication with Mr. Buck. After your telephone
25 conversation with Mr. David, you had a meeting with

1 Mr. Buck; is that what you said?
2 A. Yeah, but I can't remember the date of that meeting when
3 we did meet.
4 Q. Who was there?
5 A. I, specifically, can't remember who was there. I know
6 it was me and Mr. Buck. But whoever else, I just can't
7 remember.
8 Q. Tell the Court about the meeting.
9 A. We went out and, you know, he pointed out where he would
10 like the pilings put.
11 Q. Where do you recall that he pointed out to put the
12 pilings?
13 A. He wanted one -- I can show you on the --
14 Q. The plat is sitting in front of you. Turn it so you can
15 show the judge.
16 A. Yeah. One was on this line here and then right here is
17 where I was told to put, you know, he wanted the pilings.
18 Approximately. Mainly, up here and one in here.
19 Q. Okay. And what did you tell Mr. Buck?
20 A. I told him, fine.
21 Q. Did Mr. Buck tell you the pilings had to be inside slip
22 B-2?
23 A. No.
24 Q. When's the first time you've ever heard that Mr. Buck
25 wanted those pilings to be inside slip B-2?

1 A. A couple of weeks ago.

2 Q. If Mr. Buck had told you the pilings needed to be inside
3 slip B-2, what would you -- what would that have brought to
4 your mind?

5 A. I couldn't do it.

6 Q. Why not?

7 A. If he had know what -- I had to go through OCRM, the
8 Corps of Engineers and the City of Charleston to get that
9 plat approved, and we'd go back and forth making, you know,
10 getting changes. And then once it was approved, then they
11 had to go through another department. I mean, it just took
12 forever to get it done. And, you know, once they approved
13 it, to get it changed would take an act of congress; not to
14 mention we'd have to get every other land owner out there to
15 agree to move the line. And it would have been virtually
16 impossible to get it done.

17 And at the time that I had met Mr. Buck to see where he
18 wanted the pilings put, during that time we had a really
19 rough go -- we were having a rough go with the POA.

20 Q. You heard Mr. Belote testify about disputes; do you
21 recall those as well?

22 A. Yeah.

23 Q. You were sort of in the middle of all that?

24 A. Yes.

25 Q. Who owned slip B-2 when you met -- at the time you met

1 Mr. Buck, do you know who owned slip B-2?

2 A. I'm not sure who owned it. You know, I don't know if

3 Pavilion had deed it -- sold it or, you know, if Pavilion or

4 whoever they had sold it to. I mean, it wasn't of any

5 concern to me who owned it.

6 Q. But is it your testimony that the question just never

7 came up?

8 A. It never came up.

9 Q. Mr. Buck -- did he ever say to you, I've got to have

10 title to part of B-2?

11 A. No. It never happened.

12 Q. It never happened. All right. After your meeting with

13 Mr. Buck, did you take any steps toward seeing to it that

14 government approval could be given for the pilings?

15 A. Yeah. I had a relationship at the Corps with Robin

16 Sosha. And I went over there, and I can't remember the date

17 or anything like that, but I did go over and talk with her.

18 And I told her what I wanted after I met with Mr. Buck. I

19 told her what I wanted to do. And she said -

20 MR. EPTING: Your Honor, I'm going to object to what

21 she said. It's hearsay.

22 THE COURT: Okay. I'll sustain the objection. I'm

23 sorry. Do you want to give any argument on why it's

24 admissible? I apologize for not giving you that

25 opportunity.

1 MR. BARNETT: No. I understand. I'll rephrase.
2 BY MR. BARNETT:
3 Q. Mr. Knight, did you say to the Corps, to Ms. Sosha, that
4 you wanted to put in application to put those two pilings
5 in?
6 A. Yes.
7 Q. Was the Corps -- did the Corps indicate whether they
8 would accept that application?
9 MR. EPTING: Judge? Your Honor?
10 THE COURT: I'll sustain the objection.
11 BY MR. BARNETT:
12 Q. Were you able to put in an application to the Corps?
13 A. No.
14 Q. Okay. Pick up Defendant's Exhibit Number 31. It should
15 be a loose exhibit.
16 A. Oh, okay.
17 Q. And I want you to go to the seventh page in. The top of
18 the page has Violation Analysis.
19 A. Okay.
20 Q. All right. It has statute of limitations begin date.
21 A. All right.
22 Q. Violation report received June 2005; do you see that?
23 A. On the violation analysis?
24 Q. Yes.
25 A. Yes.

1 Q. Okay. And it says associated parties, Anthony Rhodes?
2 A. Yes, sir.
3 Q. Okay. Just, generally, take a look at what this memo
4 says.
5 A. Okay.
6 Q. At the time that you visited with Ms. Sosha --
7 A. Uh-huh.
8 Q. -- was she aware of this? What's in this violation
9 report?
10 A. Yes. Yes.
11 Q. Did you take any further steps toward getting government
12 approval to put those two pilings in?
13 A. I could not, because there was a violation, you know.
14 And she told me that -
15 MR. EPTING: Object to what she said.
16 THE COURT: I'll sustain the objection.
17 MR. BARNETT: I believe there was testimony yesterday
18 by Mr. Riggs, un-objected to, the Corps' policy were and are
19 that if there are existing violations -- this document is in
20 without objection -- that no permit can be accepted. I
21 believe Mr. Knight should be allowed to testify that he was
22 told exactly the same thing by the Corps.
23 THE COURT: Show me -- is it Defendant's Exhibit 31?
24 MR. BARNETT: Thirty-one, yes.
25 THE COURT: Show me where it says that no permits would

1 be permitted.

2 MR. BARNETT: This does not say that.

3 THE COURT: I think the gentleman yesterday said that
4 the permits could have been permitted.

5 MR. BARNETT: Not until the violation had been
6 resolved.

7 THE COURT: Pardon?

8 MR. BARNETT: Not until the violation had been
9 resolved.

10 THE COURT: Where does it say that?

11 MR. BARNETT: I mean, Mr. Riggs said that. That the
12 Corps regulations and the policies are that they will not
13 consider any additional changes to a marine structure --

14 THE COURT: While there's a violation?

15 MR. BARNETT: That's right.

16 THE COURT: All this started after the property owners
17 association took over. It didn't have anything to do with
18 these people back in April.

19 MR. BARNETT: No, sir. What it had to do with when
20 they went and tried to get the approval, they ran into this
21 buzz saw.

22 THE COURT: When were these violations filed?
23 Originally first filed date wise?

24 MR. BARNETT: June. It just says June of 2005.

25 THE COURT: 2005. This closing was in April of 2005.

1 MR. BARNETT: That's correct.

2 THE COURT: So they had, approximately, two months to
3 file before these violations were even filed?

4 MR. BARNETT: That's right.

5 THE COURT: So, I mean, I don't know what these
6 violations had to do with their failure to file in a two
7 month period -- approximately, two months. It wasn't quite
8 two months, where they had the opportunity to file.

9 MR. BARNETT: Well, sir, I think, when he went --

10 THE COURT: I know he went to them after all this
11 started.

12 MR. BARNETT: Yes, sir.

13 THE COURT: But that's after the horse is out of the
14 barn. He should have done it within the first two months.
15 I mean, that was his obligation because he knew he was going
16 to lose control at the end of May.

17 MR. BARNETT: Yes, that's true.

18 THE COURT: I mean, that's why I don't understand why
19 all this has to do with it.

20 MR. BARNETT: Well, sir, had the application been
21 filed, Mr. Riggs' testimony is --

22 THE COURT: Had the application been filed in April or
23 May, the Corps would have accepted it.

24 MR. BARNETT: Would have accepted it, but --

25 THE COURT: Right. I'm not saying they would have

1 approved it, but they would have accepted it.

2 MR. BARNETT: They would have stopped processing it
3 once they discovered the violations.

4 THE COURT: Well, maybe, maybe not. Nobody's addressed
5 that issue. Okay.

6 MR. BARNETT: Yes, sir.

7 THE COURT: It would have been a separate permit
8 requested. Whether they would have stopped the process or
9 included it in the violation, I don't know. Because it
10 wasn't done is the problem.

11 MR. BARNETT: I think the testimony is that he made a
12 good faith effort to try to get this done.

13 THE COURT: After he had lost the permit. That's the
14 problem. And I don't know what the relevancy of all this
15 has to do with it other than trying to mitigate any damages.
16 I'm not trying to prejudge your case. I'm just talking to
17 you out loud.

18 MR. BARNETT: Yes.

19 THE COURT: His efforts after the ability to do it
20 would mitigate his damages and show good faith, I will
21 agree.

22 MR. BARNETT: Yes, sir.

23 THE COURT: But as far as complying with what he could
24 have done, I don't know what the relevancy of it has. They
25 agreed to try to do the pilings.