

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

CONSOLIDATED Under Case No.: 2008-CP-10-2641

Case No. 2012209606

Zan, LC.....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 Company, St. Andrews Title
& Abstract Agency, Inc., Chicago Title Insurance Company and Charles A. Funk &
Lillian M. Funk.....Defendants,

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

Zan, LLC, ...Plaintiff,

v.

East Coast Trading Company,.....Defendant.

FINAL BRIEF OF RESPONDENTS, RIPLEY COVE, LLC, W.H.KNIGHT,
W.M. BELOTE AND EAST COAST TRADING COMPANY

February 18, 2013

Stan Barnett
SMITH, BUNDY, BYBEE, & BARNETT, PC
Post Office Box 1542
Mount Pleasant, SC 29465-1542
(843) 881-1623
Attorneys for Respondents

RECEIVED

FEB 21 2013

SC COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

CONSOLIDATED Under Case No.: 2008-CP-10-2641

Case No. 2012209606

Zan, LC.....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 Company, St. Andrews Title
& Abstract Agency, Inc., Chicago Title Insurance Company and Charles A. Funk &
Lillian M. Funk.....Defendants,

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

Zan, LLC, ...Plaintiff,

v.

East Coast Trading Company,.....Defendant.

**FINAL BRIEF OF RESPONDENTS, RIPLEY COVE, LLC, W.H.KNIGHT,
W.M. BELOTE AND EAST COAST TRADING COMPANY**

February 18, 2013

Stan Barnett
SMITH, BUNDY, BYBEE, & BARNETT, PC
Post Office Box 1542
Mount Pleasant, SC 29465-1542
(843) 881-1623
Attorneys for Respondents

RECEIVED

FEB 21 2013

SC Court of Appeals

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES ON APPEAL.....	iv
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS.....	2
ARGUMENT.....	14
I. The trial court was justified in refusing to order rescission.....	16
II. The trial court was justified in awarding \$10,000.00 in damages..	21
CONCLUSION.....	23

TABLE OF AUTHORITIES

Cases

<i>Gibbs v. G.K.H., Inc.</i> , 311 S.C. 103, 427 S.E.2d 701 (Ct. App. 1993).....	16
<i>Townes Assoc., Ltd. v. City of Greenville</i> , 266 S.C. 81, 221 S.E.2d 773 (1976).	16
<i>Gray v. S.C.P.S.A.</i> , 284 S.C. 397, 325 S.E.2d 547 (1985).....	16
<i>Inabinet v. Inabinet</i> , 236 S.C. 52, 113 S.E.2d 66 (1960).....	16
<i>Thompson v. Brunson</i> , 283 S.C. 221, 321 S.E.2d 622 (Ct. App. 1984).....	16
<i>Dorrell v. Florence District One</i> , 288 S.C. 246, 341 S.E.2d 464 (Ct. App. 1986).	17
<i>Johnson v. Standard oil Co.</i> , 155 S.C. 179, 152 S.E.2d 176 (1930).....	17
<i>Bridge v. Wyandotte Worsted Co.</i> , 239 S.C. 37, 121 S.E.2d 300 (1961).....	17
<i>Fontaine v. Peitz</i> , 291 S.C. 536, 354 S.E.2d 565 (1987).....	17
<i>In re Goodwin</i> , 279 S.C. 274, 305 S.E.2d 578 (1983).....	17
<i>Edens v. Cole</i> , 261 S.C. 556, 201 S.E.2d 382 (1973).....	17
<i>Brenco v. S.C. Department of Transportation</i> , 363 S.C. 136, 609 S.E.2d 531 (Ct. App. 2005).....	17
<i>Goulson v. YumA Brands, Inc.</i> , 283 Fed. Appx. 374, 380 (6 th Cir. 2008).....	17
<i>Augustine v. Rogers</i> , 47 Mass. App. Ct. 901, 701 N.E.2d 1030 (Mass. App. Ct. 1999).....	17
<i>Hodgson v. Occidental Petroleum Corp.</i> , 875 F.2d 870 (9 th Cir. 1989).....	17
<i>Veazie v. Williams</i> , 49 U.S. 134, 8 How. 134, 12 L.Ed. 1018 (1850).....	17
<i>Government of Aruba v. Sanchez</i> , 216 F. Supp.2d 1320 (S.D. Fla. 2002).....	17
<i>Davis v. Cordell</i> , 237 S.C. 88, 100, 115 S.E.2d 649, 655 (1960).....	18
<i>Hemmingway v. Mention</i> , 228 S.C. 211, 89 S.E.2d 369 (1955).....	21

<i>Crittenden c. Thompson-Walker Co.</i> , 288 S.C. 112, 341 S.E.2d 385..... (Ct. App. 1986).....	21
<i>Wooten v. S.C. Department of Transportation</i> , 326 S.C. 516, 485 S.E.2d 119... (Ct. App. 1997). Aff'd as modified, 333 S.C. 464, 511 S.E.2d 876 (1999).....	23
<i>Chapman v. Allstate Ins. Co.</i> , 263 S.C. 565, 211 S.E.2d 876 (1975).....	23

STATEMENT OF THE ISSUES ON APPEAL

I.

Did the trial court err by declining to order rescission of the purchase of the subject property by Appellant?

II.

Was there sufficient evidence in the record to support the trial court's award of damages to Appellant of \$10,000.00?

STATEMENT OF THE CASE

This case arose out of the purchase of a lot in a subdivision in the City of Charleston and of a platted boat slip in a marina located in an adjacent dead end canal known as the Ripley Canal. The lot and slip were deeded simultaneously to Appellant by East Coast Trading Company at a closing on April 5, 2005 for a total payment at closing of \$685,589.78. Appellant filed the first of two cases against various parties over three years later on July 25, 2008 and the second case on June 2, 2009. Pertinent to this appeal, in the first case (Civil Action 2008-CP-10-2641) as amended on June 22, 2010, Appellant brought claims against East Coast Trading Co. for breach of contract, Ripley Cove, LLC for breach of contract, and against Ripley Cove, LLC, W. H. Knight, W. M. Belote and Karl McMillan for negligent misrepresentation and against Ripley Cove, LLC, W. H. Knight and Karl McMillan for constructive fraud. In the second case (Civil Action 2009-CP-10-3441), Appellant brought claims against Ripley Cove LLC for breach of contract, Ripley Cove, LLC, W. H. Knight and Karl McMillan for negligent misrepresentation and constructive fraud. The cases were consolidated for trial. Trial was held without a jury before the Honorable J. C. Nicholson, Jr. on July 26-28, 2011.

Appellants sought relief in the form of rescission of the contract to compel East Coast to purchase the property back from Appellant. Appellant also sought damages from East Coast and Ripley Cove, LLC for breach of contract, although the property was purchased by Appellant from East Coast. Damages were also sought from all parties on the misrepresentation claims. The trial court declined to order rescission but found for Appellant on the breach of contract and negligent misrepresentation claims. (Order, p. 8) Judgment was entered on those claims against Ripley Cove, LLC, East Coast, W. H.

Knight, W. M. Belote and Karl McMillan jointly and severally in the amount of \$10,000.00. (R. p. 13-14). The trial court's order was entered on February 10, 2012.

Appellant filed a notice of appeal on March 14, 2012.

STATEMENT OF FACTS

I.

EVIDENCE CONCERNING THE CONTRACT AND SALE OF THE PROPERTY

The facts concerning the events leading up to the contract of sale between Plaintiff, Zan, LLC, and Ripley Cove, LLC were not in dispute. The marina at Ripley Cove was originally permitted by the Army Corps of Engineers and the SC Coastal Council in 1984. All of the pilings, floating docks and other structures that make up the marina are authorized pursuant to that permit. (R. p. 743) The canal is a tidal waterway and is classified as a navigable water of the United States for purposes of federal law (the Rivers and Harbors Act of 1899) and as critical area for purposes of State law (the Coastal Zone Management Act). Any alteration of the canal either through placement of structures in the canal or by dredging the canal bottom requires permits from the Corps and from the State, now acting through the Ocean and Coastal Resources Management Division of DHEC. (R. p. 308, line 4 - p. 310, line 24; p. 325, line 2 – p. 327, line 24).

The marina was managed as a rental facility until its purchase by Ripley Cove, LLC from Freddy Collins. (R. p. 396, line 12 – p. 372, line 18). At that time, as required by federal and state regulations, the marina permit was transferred from Collins to Ripley Cove, LLC. Ripley Cove, LLC is a limited liability corporation, fifty percent of which is owned by W.M. Belote and fifty percent by Pavilion Development. (R. p. 394, line 12 – p. 399, line 7). Pavilion is a corporation owned by Lowell Frazier and Larry McNair. (R.

p. 394, line 20-21). Upon acquiring the marina and surrounding high land, Ripley began the process of converting it to a condominium regime. A number of upland home lots were subdivided. A plat was prepared identifying the marina slips as condominium units with specific dimensions and a Master Deed for the marina slips was recorded in August 2004. (R. p. 560-658; p. 166, line 16 – p. 173, line 25). A number of the upland home lots were identified as tied to a marina slip, the specific slip to be confirmed at the time of sale. (R. p. 581-582). The Master Deed explains that the owner of each slip was acquiring the right to use the area of water within a given slip and to use the docks, pilings and walkways – all common elements owned by the Slips at Ripley Property Owners Association – subject to the power of the government to regulate these structures and the navigable waters of the canal. (R. p. 565). The Master Deed also provided that upon the earlier of two events – one year after the sale of the first marina slip or 60 days after the sale of the last marina slip by Ripley Cove – the property owners association would take over control of the marina. (R. p. 586). The POA took over control of the marina at the end of May 2005, 60 days after the final sale of slips by Ripley Cove. (R. p. 783)

Most of the marina slips were sold by Ripley Cove in 2004. Belote and the owners of Pavilion agreed to have Ripley convey the remaining slips to themselves. On December 30, 2004, Ripley Cove conveyed upland lot 3 and marina slip B1 to East Coast Trading Company, a company owned entirely by Belote. (R. p. 709; p. 394, line 12 – p. 400, line 20). (See derivation clause). Belote at that time authorized Karl McMillan, a real estate broker who had been acting as the selling agent for Ripley Cove to sell these properties. (R. p. 402, line 1 – p. 403, line 12).

W.H. Knight, a long time associate of Belote, assisted Ripley Cove throughout the process of conversion of the marina to a condominium regime. He dealt with the various regulatory authorities including the City of Charleston, the Corps of Engineers and OCRM. He was the primary contact between McMillan and Ripley Cove. Knight was an independent contractor of Ripley Cove and received a percentage commission on properties sold at the project. Belote, Knight and McMillan all testified that McMillan's authority for both Ripley Cove and later for East Coast Trading Co. was limited to finding a buyer and bringing the buyer to Knight or Belote for confirmation of the terms of sale. He had no authority to make any representations or promises for Ripley Cove or East Coast Trading not expressly approved by them. (R. p. 395, line 3 – p. 396, line 11; p. 402, line 1 – p. 403, line 12; p. 422, line 2 – p. 430, line 11).

In early 2005, Edgar Buck began to look for a home lot for his daughter Suzanne and a boat slip for his boat, *Rookie IV*. Buck approached McMillan, whom he had known since McMillan was a child, and asked about the project at Ripley Cove. Buck conducted the negotiations with McMillan and did not deal with either Belote or Knight prior to closing on the sale. (R. p. 29, line 21 – p. 37, line 25). At some point prior to signing a contract, McMillan met Buck and his daughter at the marina and toured the home lot. From a point across the marina canal, McMillan pointed out the area where slip B1 is located and told Buck and his daughter that was the location of the slip they would purchase with the upland lot # 3. The testimony of Buck and his daughter (now Suzanne Cantey) was that McMillan pointed to the area between the long floating dock next to the dry stack facility and the shorter floating dock toward the Ashley River. McMillan did not have a plat at the time to show them, but testified that he emphasized that slip B1 was

the area nearest the long dock next to the dry stack facility. There were no pilings or other physical markings of the boundary between B1 and B2 visible from the opposite bank of the canal. However, along the walkway leading to the slips of B Dock, electric box covers are plainly marked with "B1" at the edge of B1 and with "B2" at the edge of B2. (R. p. 801- 802; p. 32, line 21 – p. 37, line 25).

On February 3, 2005, Suzanne Buck signed a contract on behalf of Zan, LLC, a limited liability company of which she is the managing member and which is owned by her and her father. (R. p. 521- 525; p. 56, line 20 – p. 57, line 4). The contract provides that Zan, LLC is to purchase Lot 3 for \$700,000.00. It does not specify a particular boat slip to be sold with Lot 3, but the Master Deed provides that Lot 3 is tied to one of the B Dock slips to be determined upon contract. The contract provides for a due diligence period of 21 days for the buyer. (R. p. 522). It also provides at paragraph 26 that the contract may only be modified by a written agreement signed by both parties. At the time of sale, East Coast Trading Co. owned Lot 3 and slip B1. The contract was executed in the name of Ripley Cove, LLC by Knight on February 4, 2005. Belote testified that it was simply an error for the contract to be listed in the name of Ripley Cove, LLC, as that company no longer had any interest in Lot 3 of slip B1. Belote offered undisputed testimony that at no time did Belote, Knight or East Coast Trading Co. disavow the contract with Zan and instead treated it as a contract between Zan and East Coast Trading Co. (R. p. 524; p. 403, line 2 – p. 405, line 2).

A closing was set for early March 2005 but was postponed by the parties. A second closing date of April 5, 2005 was set. (R. p. 39, lines 10-12). On March 23, 2005,

Ripley Cove, LLC conveyed the remaining marina slips to Pavilion Development, including slip B2 which borders B1. (R. p. 709 -716).

Two days before the closing, Buck received a copy of the plat showing the boundaries of slip B1. Buck testified the *Rookie IV* requires twenty feet clearance. He testified that until that time, he believed he was being conveyed all of the space between the two floating docks – the space shown on the plat as slips B1 and B2. Buck examined that plat and saw that the long floating dock next to the dry stack facility occupied part of slip B1. He testified that he concluded that the only way his boat could use the slip was if several feet of B2 were conveyed to him along with the originally platted width of B1. (R. p. 37, line 3 – p. 40, line 9).

Buck testified he contacted McMillan and told him he would not close unless he were conveyed part of slip B2. He says he explained that as there was a slip next to B1, it would be necessary for two pilings to be installed between the slips to protect his boat from injury from a boat entering slip B2. He says he told McMillan that in order to get the necessary twenty feet clearance for his boat and the two pilings, part of B2 would have to be conveyed along with all of B1. Buck testified that McMillan told him that his clients owned B2 and could work out what Buck needed and that they would install the pilings for him. (R. p. 37, lines 10-25).

McMillan denied Buck asked him at any time to have his clients convey part of B2 to Zan and testified that he did not have the authority to make such a promise to a buyer. McMillan acknowledged that Buck requested that East Coast install two pilings, but it was his recollection that Buck wanted them on the line between slips B1 and B2 for the purpose of marking off his slip and to better secure the bow of his boat. (R. p. 358,

line 3 – p. 369, line 18). At the closing on April 5, 2005, Buck was present along with his daughter, Suzanne, and Lynn Carmody, the realtor for Zan, LLC. Dan David was the closing attorney and a long time friend of Buck's. David and Belote testified that David did not represent East Coast at the closing and that he was not an agent for East Coast. The deed was executed on behalf of East Coast Trading Co. by Knight pursuant to a power of attorney. (R. p. 526 – 534; p. 39, lines 13-14; p. 69, line 10 – p. 75, line 25; p. 91, lines 10-22; p. 175, line 21; p. 197, line 20 – p. 200, line 16; p. 415, line 13 – p. 416, line 5).

David testified that at the closing Buck requested that East Coast agree to install two pilings in the canal at locations he would specify. David called Knight to verify that East Coast would install the pilings. Knight contacted Belote who confirmed he would pay for installing the pilings and Knight relayed this to David. David testified that Buck requested written confirmation that the pilings would be installed by East Coast Trading and David prepared a letter. This letter does not specify any location of for the pilings, saying only, "This is to confirm that two pilings will be replaced (sic) in line with the existing pilings of the adjoining boat slips as shown on the plat recorded in Plat Book EH at Pages 172-174." (R. p. 535; p. 136, line 2 – p. 148, line 25).

Buck's and his daughter's testimony differ from David's in that they say Buck told David the pilings had to be located inside the boundary of slip B2, that slip B1 by itself was too narrow for his boat and that a part of slip B2 had to be conveyed to Zan along with all of B1. It is unclear exactly what width of B2 was, according to Buck, to be conveyed. The most consistent distance – and the distance which Buck claimed he was entitled to in his final testimony at the trial – was two feet. Lynn Carmody was also

present at the closing but had no recollection of what the precise agreement was between the parties, only that David's letter satisfied Buck. (R. p. 89, line 11 – p. 109, line 15).

David denied that Buck or his daughter ever asked that some of slip B2 be conveyed to Zan. (R. p. 188, line 13 – p. 192, line 13). He explained that to subdivide slip B2 would, pursuant to the Master Deed, require a complete revision of the Master Deed as well as approval of a new plat of the marina slips and consent of all purchasers of the slips. By April 5, 2005, all of the marina slips had been sold. David emphatically said that had Buck or his daughter made closing contingent on conveyance of any part of slip B2, as they claim, he would have refused to close the sale. (R. p. 173, line 21 – p. 177, line 24). David had closed the transfer of slip B2 from Ripley Cove to Pavilion on March 23, 2005, only two weeks prior to the Zan closing, and, therefore, knew that Ripley Cove no longer owned slip B2.

All parties present at the closing testified that Suzanne Buck signed the deed from East Coast to Zan acknowledging that the property was subject to the Master Deed and the rules and regulations governing the condominium regime. (R. p. 91, lines 17-22). The deed also provided 13 specific special conditions and reservations. Numbers 5, 6, 7, 9 and 10 note that the marina slip is subject to the navigation servitude of the State and the United States and the permitting authority that springs from that power over navigable waters including at condition 6, "the power of said agency to mandate the removal or modification of any docking facility constructed in accordance with its permitting authority." (R. p. 526-533).

Based on his own personal experience with having a substantial docking facility permitted on Wappoo Cut adjacent to his home in 1984, 1989 and in the mid 1990s, Buck

admitted that he was well aware of the power of the State and federal governments over any structure placed in navigable waters. (R. p. 780-781; p. 126, line 5 – p. 129, line 13). He also testified that he understood that any pilings placed in the canal would be the property of the POA and not of Zan. (R. p. 128, line 20 – p. 129, line 13). While he testified that if the pilings had been placed as he wanted and then removed by either the government or the POA, he would sue who ever removed the pilings, he nonetheless acknowledged that any such pilings would be subject to removal at the instance of either the POA or the government regulatory agencies – the Corps and OCRM. (R. p. 126, line 5 – p. 129, line 13). Buck also testified to long and extensive experience with large real estate transactions over a 45 yr period. (R. p. 24, line 4 – p. 25, line 10).

Buck and David testified that at the end of the closing, David advised that Buck contact Knight for the purpose of meeting at the marina to specify the exact location for the pilings. It is unclear exactly when this meeting took place, but it was either sometime in May or June of 2005 according to Mr. Buck's testimony. (R. p. 44, lines 8-24). Knight testified that at the meeting it was his recollection that Buck wanted the pilings located so that his slip would be marked off. (R. p. 427, line 23 – p. 428, line 23). Buck testified that he told Knight the pilings had be located inside B2 so as to provide twenty feet of clearance and to protect his boat from injury by boats entering slip B2. (R. p. 44, line 8 – p. 45, line 6). Knight denied that Buck ever mentioned acquiring any part of B2 or locating the pilings inside B2. (R. p. 428, line 21 – p. 404, line 24). It is uncontested that the owner of B2 had the right to have that slip free of any encumbrances interfering with free use of the water surface within the boundaries of B2. (R. p. 580-581).

Shortly after the meeting with Buck, Knight testified that he visited the Corps of Engineers office in Charleston and discussed the possibility of placing two pilings in the canal at slip B1 with Robin Socha with whom he had up until that time a good working relationship. Knight testified that he was not allowed to apply for a permit for the pilings and that when he visited Socha, she was already aware of the existence of a number of pilings and extended walkways installed without Corps authorization in violation of the Rivers and Harbors Act. (R. p. 431, lines 12 – p. 415, line 15). The Corps' enforcement file documents that the Corps was informed of the existence of these illegal structures in June, 2005, concluded that they were installed by two slip owners, Jerry Chivers and Anthony Rhodes, and commenced an enforcement action against both men. (R. p. 788-800). When the matter remained unresolved, the Corps sent the manager of the condominium regime, Sentry Management, a letter in July 2006 in which the Corps demanded that steps be taken to remove the illegal structures that interfered with navigation and to have the others either removed or permitted. (R. p. 788-800). Collin Bruner, who was managing the marina POA at the time testified as did David, Belote and Knight that the Corps made it known they were threatening to revoke the entire marina permit. (R. p. 343, line 5 – p. 350, line 5).

In uncontested testimony, Bob Riggs, former chief of permitting functions for the Corps in Charleston, and Fred Mallet, with OCRM's permitting office, explained that so long as unpermitted structures remained in a marina, such as those installed by Rhodes and Chivers, both agencies' regulations forbid consideration of any additional structures such as the pilings Buck wanted placed next to Zan's slip. (R. p. 325, line 2 – p. 336, line 8). In fact, the POA applied to authorize some of the unauthorized structures installed by

Rhodes and Chivers in a permit application that went out on public notice on June 15, 2008. (R. p. 674-684). A permit was finally issued by OCRM on January 12, 2011 modifying the original 1984 permit so as to permit those structures. (R. p. 757-772). The other illegal structures installed by Rhodes and Chivers, according to the testimony of Bruner and Knight, were removed by Ripley Cove, LLC so that required maintenance dredging of the canal could be done. This work was not performed or paid for by Rhodes or Chivers according to Knight. (R. p. 343, line 3 – p. 350, line 15).

David recorded the deed from East Coast Trading to Zan and upon receipt of a recorded copy, forwarded it to Zan by letter of September 13, 2005 in which he said that Zan was the owner in fee simple of both Lot SF3 and Dock Unit CS B1. (R. p. 552). Buck testified he did not read the deed when it was sent to him in September 2005. (R. p. 122, lines 2-15). His daughter signed the deed at closing however. (R. p. 66, lines 3-9; p. 91, lines 10-22). Buck testified that he simply waited for the pilings to be installed, making occasional inquiries as to when this would be accomplished, although he expected them to be installed in 90 days. (R. p. 50, line 3 – p. 51, line 3). He explained that nearly three years later, when he learned that slip B2 was, in fact, owned by someone other than East Coast or Ripley Cove, he decided to file suit as it was clear to him at that point that part of B2 could not be conveyed to him. Neither Buck nor his daughter explained why they did not realize this at the time they closed on the conveyance of slip B1, why they did not read the Master Deed, why they did not insist that conveyance of a specific portion of B2 be made the subject of a written agreement prior to closing or why they never inquired prior to closing about the ownership of B2. Their testimony is that they simply relied on “professionals”, referring specifically to David and McMillan to

insure that they received what they claim they said was necessary for the property to be of use to them. (R. p. 49, line 4 – p. 52, line 17).

Both Buck and his daughter acknowledged that without conveyance to Zan of part of slip B2 – Buck used the number two feet several times – slip B1 even with pilings in place would have been useless to Zan as the *Rookie IV* could not use the slip. Buck claimed that the deed did not convey what he thought he was getting. (R. p. 120, line 1 – p. 123, line 22). The evidence is not conclusive as to whether this is correct or not and Buck never took the boat the short distance from his house to slip B1 to determine if it would fit in B1. (R. p. 389, line 15 – p. 390, line 21).

II.

EVIDENCE CONCERNING DAMAGES

Both Buck and his daughter testified that they received a recorded copy of the same deed delivered to them at the closing on April 5, 2005 in September 2005. That deed did not reflect transfer of any part of slip B2. Neither Buck nor his daughter testified they actually read the deed. Buck testified that he expected the pilings to be placed between slips B1 and B2 and periodically asked about the status. Nearly three years later, when Buck says he came to realize that East Coast did not own slip B2 and, therefore, could not convey any part of that property to Zan, he filed this suit. (R. p. 49, line 4 – p. 52, line 17).

Zan placed the entire property, slip B1 and upland lot 3, on the market for sale for some \$800,000, according to the testimony of Tommy Hartnett, and has left it on the market at that price without success. (R. p. 467, lines 6-23). This price is some \$100,000 more than Zan paid for the property. At no time did Buck or his daughter or anyone seek

to have the pilings permitted by the Corps and OCRM either through a direct application or by asking the POA to include two pilings in the POA's permit application which was processed by those agencies between 2008 and 2011. (R. p. 352, lines 4-25). The undisputed testimony is that neither the Corps nor OCRM would have found two pilings between B1 and B2 in the location Buck identified objectionable. (R. p. 320, lines 11-15; p. 337, lines 8-22) Collin Bruner testified that the POA would have included such a request in its permit application if Zan had requested it and would agree to make a separate application today if Zan asked for one. (R. p. 352, lines 4-25). Belote testified that East Coast has always been willing to pay for installation of two pilings if they were permitted and remains willing to do so today. (R. p. 413, line 8 – p. 389, line 12).

Buck claimed that Zan sustained damages as the result of not being conveyed part of slip B2 in the form of costs including taxes paid on the property, POA dues paid on the property, insurance, and fees to an architect to design a house for lot 3. (R. p. 687). The only documents submitted in support of these claimed costs were an invoice from an architect and print outs from the Charleston County website reflecting taxes assessed on slip B1 and Lot 3. (R. p. 659-673). In addition, Buck claimed that Zan paid \$226,445.14 in interest. There is no recorded mortgage on the property, however. No document of any kind was submitted into evidence by Zan confirming the existence of any debt associated with the property. Appellant's claimed damages, exclusive of interest, were set forth on Plaintiff's Exhibit 17 and were as follows:

Deposit:	5,000.00
Paid at Closing:	680,589.78
Architect invoice:	3,800.00

Dues/Regime Fees:	6,786.50
Interest on Note:	226,445.14
Insurance:	8,216.00
Real Estate Taxes:	43,949.77

The undisputed testimony was that in 2005 the property could have been resold had Appellant not purchased it. (R. p. 368, lines 20-24). In November, 2005, the adjoining boat slip B-2 and an upland lot like the one purchased by Appellant sold for \$725,000. (R. p. 553-559).

ARGUMENT

SUMMARY OF ARGUMENT

On Appeal, Appellant complains that the trial judge erroneously denied the equitable remedy of rescission so as to force the seller of the property to repurchase it from Appellant. Appellant also complains that the amount of damages awarded by the trial court, \$10,000.00, was not supported in the record. As rescission is an equitable remedy, this Court may make its own findings of facts from the record of the trial. However, as to the decision of the trial court to deny rescission, the standard of review on appeal is one of abuse of discretion. If there are facts supporting denial of rescission as a remedy, that decision being one within the sound discretion of the trial court, denial of that remedy should be upheld. Similarly, if there is evidence upon which the trial court could make an award of damages of \$10,000.00, that award should be upheld.

There is ample evidence to support the trial court's decision not to order rescission. Appellant acknowledges purchasing a boat slip which had dimensions Appellant's principal believed to be too small to accommodate the boat he claims he

wanted to moor in the slip. The evidence is inconclusive as to whether the boat would have fit or not, Appellant never having brought the boat the short distance from his home to the slip. There is no allegation that the land lot was in any way defective or unacceptable to Appellant. Appellant claims a promise was made outside of the contract and deed for the seller to provide a portion of the neighboring boat slip – one which the seller did not own on the date of closing – and to install two pilings along the boundary of the two slips. After having declared he would not purchase the property unless those pilings were installed where Appellant designated, Appellant did exactly that on the strength of a letter which promised only that two pilings would be installed. Appellant proceeded to wait years before taking any affirmative action regarding his expectations, finally consulting counsel and filing the suits at issue. Appellant made no effort to check ownership of the adjacent slip, something easily done, or even to read the Master Deed governing the property, which would have made clear to him that subdivision of the slip was not possible. For years, Appellant made no effort to sell the property he now claims was worthless to him without the ability to moor his boat in the slip.

The relative value of the slip to the upland lot was a fraction of the total purchase price. On this record, it was entirely within the discretion of the trial court to find that the extraordinary remedy of rescission would be inequitable as the inability to use the slip affected only a small fraction of the value of the property and Appellant made no effort whatsoever to protect himself by taking easily available steps to determine that no portion of the adjacent slip could be conveyed to him and putting the property, which he claims was useless to him, up for sale at a time when the undisputed evidence is that a resale would have been likely.

As to damages, it was entirely reasonable on the evidence before the trial court to find damages of \$10,000.00 for the breach of contract and misrepresentation. Using Appellants' damage figures, the trial court could have awarded six months worth of the cost taxes, insurance, and Property Owners' Association dues and the cost of the architect plans for the home on the upland lot. That amount is slightly over \$10,000.00.

I.

The trial court was justified in refusing to order rescission.

A.

Standard of Review of Denial of Rescission

An action seeking rescission is one in equity. Gibbs v. G.K.H., Inc., 311 S.C. 103, 427 S.E.2d 701 (Ct. App. 1993). On appeal, there are two principles which govern the standard of review. First, this Court makes a de novo review of the record and may find facts from the record different from the findings of the trial court. Townes Assoc., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976); and Gray v. S.C.P.S.A., 284 S.C. 397, 325 S.E.2d 547 (1985). The general rule is that the trial court is understood to be in the better position to judge the veracity of the testimony and the appeals court is not obligated to disregard the findings of fact of the trial court. In light of the advantage the trial court has in viewing the evidence first hand, an appellate court typically will accord great weight to the trial judge's findings. Inabinet v. Inabinet, 236 S.C. 52, 113 S.E.2d 66 (1960); and Thompson v. Brunson, 283 S.C. 221, 321 S.E.2d 622 (Ct. App. 1984).

Second, a decision by a trial court sitting in equity as to a remedy is a matter within the sound discretion of the trial court and is understood to be subject to reversal

only if it is shown to result from an abuse of discretion. Dorrell v. Florence District One, 288 S.C. 246, 341 S.E.2d 797 (Ct. App. 1986); and Johnson v. Standard Oil Co., 155 S.C. 179, 152 S.E.2d 176 (1930). Abuse of discretion has been held to mean that the ruling of the trial court was without reasonable factual support, resulted in prejudice to the rights of a party, and therefore amounted to an error of law. It occurs when the trial court's ruling is based on an error of law or, if based upon factual conclusions, is without evidentiary support. Bridge v. Wyandotte Worsted Co., 239 S.C. 37, 121 S.E.2d 300 (1961); and Fontaine v. Peitz, 291 S.C. 536, 354 S.E.2d 565 (1987). Abuse of discretion must be clear or manifest in order to warrant reversal. In re Goodwin, 279 S.C. 274, 305 S.E.2d 578 (1983); and Edens v. Cole, 261 S.C. 556, 201 S.E.2d 382 (1973).

Rescission is deemed to be an extraordinary and harsh remedy, rarely to be granted. The rule is that a contract *may* be rescinded if proper grounds are established, not that it *must* be rescinded. Brenco v. S.C. Department of Transportation, 363 S.C. 136, 609 S.E.2d 531 (Ct. App. 2005); Goulson v. YumA Brands, Inc., 283 Fed. Appx. 374, 380 (6th Cir. 2008), "That rescission or cancellation is an available remedy does not lead to the conclusion that it is required"; Augustine v. Rogers, 47 Mass. App. Ct. 901, 701 N.E.2d 1030 (Mass. App. Ct. 1999); Hodgson v. Occidental Petroleum Corp., 875 F.2d 870 (9th Cir. 1989), "Rescissory power however, should be exercised sparingly in conformity with clearly established principles of equity jurisprudence," citing Veazie v. Williams, 49 U.S. 134, 8 How. 134, 12 L.Ed. 1018 (1850); and Government of Aruba v. Sanchez, 216 F.Supp.2d 1320 (S.D. Fla. 2002), "Rescission is a harsh remedy which lies within the sound discretion of the court and is not available as a matter of right."

B.

Evidence Supporting Denial of Rescission

Appellants' essential argument is that the elements supporting rescission were present in the record and, therefore, the trial court was obligated as a matter of right to order rescission. There is no support for this contention in South Carolina law. Other jurisdictions which have addressed the matter have emphasized that rescission is a matter of discretion, not a matter of right, a remedy to be rarely and sparingly granted. (See cases cited above). The record does not, and Appellants have not demonstrated even their argument as to why it should, support an order of rescission as the only proper remedy in this case.

A party seeking rescission is required to show that he gave proper and timely notice that rescission was being demanded. Davis v. Cordell, 237 S.C. 88, 100, 115 S.E.2d 649, 655 (1960). The record in this case is uncontroverted that Appellant never demanded rescission of this nearly \$700,000 sale until almost three years after closing. (R. p. 49, line 4 – p. 52, line 17). That is a wholly unjustified and unconscionable delay in making such an extraordinary demand. That delay is of fundamental importance. Had Appellant taken the simple steps needed to determine that pilings could not be placed where they say they wanted them – in another person's boat slip over which the seller had no control whatsoever, rescission could have been demanded in 2005. The record is undisputed that at that time, in that market, the seller would have been able to resell the property. Failing the seller's willingness to agree to repurchase the property in 2005, the record is uncontroverted that Appellant could have sold the property for a price equal to or higher than what was paid. (R. p. 368, lines 20-24; p. 553-559). By waiting nearly

three years even to ascertain the pertinent facts and then make a demand for rescission – after the collapse of the real estate market – Appellant made it impossible to return the parties to the position they occupied in 2005. This delay alone is sufficient reason for the trial court to have denied rescission of the sale.

The facts of the case also provide additional justification for the trial court to decline to order rescission. As the trial court noted, rescission is improper where it is not possible to place the parties back into the position they occupied at the time of the sale. This is not a case in which, as Appellants admit, the boat slip alone can be reconveyed to the seller. The Master Deed forbids separation of the slip from the upland parcel. (R. p. 172, line 5 – p. 177, line 24; p. 560-658). There is nothing wrong with the upland lot. Appellant's desire to place a specific boat into the boat slip, a condition never set forth in the contract of sale or the deed, is not so fundamental a problem as to force undoing of the entire sale. As already noted, Appellant did not even bother to read the Master Deed until shortly before filing this suit, almost three years after the closing. (R. p. 49, line 4 – p. 52, line 17).

Appellant asks this Court to hold that it is entitled, as a matter of legal right, to rescission of a sale consummated in April 2005 where:

- Appellant closed on the sale having already concluded that the boat slip being purchased was not of sufficient size to accommodate the boat to be moored there;
- Appellant made no effort to measure the boat properly or the slip or to try to fit the boat into the slip;

- Appellant did not require either 1) the fit of its boat in the slip as a condition of the contract or 2) a contract provision requiring that part of the adjoining slip be conveyed to it subsequent to the closing;
- Appellant knew that any pilings placed in the canal – the seminal requirement Appellant claims justify rescission – would not be its property but that of the Home Owners' Association and also subject to control, including required removal, of the United States and State governments; and
- Appellant made no effort whatsoever within a reasonable time to force compliance with what it contends were binding conditions, or a repurchase of the property or, failing that, to try to sell the property on its own to recoup its loss, and waited nearly three years even to demand rescission.

The trial court clearly concluded that on these facts, requiring rescission would effect a significant injustice. It is important to emphasize that Appellant's principal, Edgar Buck, was a man with long experience in real estate transactions of considerable value. Earlier in his career he was actually employed by a bank in its real estate department. (R. p. 24, line 4 – p. 25, line 15). There can be no suggestion that he was anything other than sophisticated about all of the aspects of even the most complex real estate contracts and closings. His wife is an attorney and he testified to having routine counsel from attorneys skilled and experienced in real estate. (R. p. 24, line 20 – p. 25, line 2). The record is sufficient to support the conclusion that Appellant kept the property for years after concluding the boat slip would not accommodate its boat. The reason could have been the hope of selling the property for a profit or anticipation of acquiring

another boat which would fit. The reasons, however, are not important – a delay such as this which so egregiously affected the rights of the parties is sufficient to justify denial of an equitable remedy such as rescission. Hemningway v. Mention, 228 S.C. 211, 89 S.E.2d 369 (1955), “Equity aids the vigilant, not those who sleep on their rights.”

The trial court was justified on the record and according to the law governing rescission to decline to order rescission and limit Appellant to money damages for breach of contract by the seller.

II.

The trial court was justified in awarding \$10,000.00 in damages.

A.

Standard of Review of Damage Awards

On appeal, there is a presumption that an award of damages was within the discretion of the trial court. All the evidence and the inferences reasonably deducible from the evidence must be viewed in the light most favorable to sustaining the award. Crittenden v. Thompson-Walker Co., 288 S.C. 112, 341 S.E.2d 385 (Ct. App. 1986).

B.

Evidence Supporting the Award of \$10,000.00 in Damages

The trial court found Appellant’s damages flowing from the breach of contract and misrepresentation were \$10,000.00. The record is sufficient to support this award. As noted above, Appellant waited for nearly three years to determine that pilings could not be placed so as to convey part of the adjoining boat slip to Appellant and thus accommodate its boat. Appellant never sought to force the issue of placement of the pilings and conveyance of title to part of the adjoining slip, never read the Master Deed

and, perhaps most importantly, never demanded rescission or attempted to sell the property so as to minimize its loss until 2008, when the real estate market had collapsed. It was reasonable, therefore, for the trial court not to award damages to Appellant which were caused by its own unreasonable delay and not by the actions of the defendants.

The undisputed evidence is that in the year following the closing on the property, it likely would have sold for a price equal to or greater than that paid by Appellant. It was reasonable for the trial court to conclude that the only damages due Appellant were those costs which were unavoidably incurred during a reasonable time after closing during which Appellant could have resold the property or convinced the seller to repurchase the property.

Appellant put forward evidence of payment to an architect for plans for a house designed for the upland lot. This cost was \$3,800. (R. p. 673). There was no proof, however, that these plans had no value even if they were not used on the upland lot. It was reasonable for the trial court to refuse to award this cost, therefore.

Appellant claimed interest was paid on a note that financed the purchase, but provided no evidence of the existence of any loan other than Mr. Buck's claim of one. It was reasonable for this claimed damage to be disregarded.

Appellant put forward proof of insurance purchased for six years, POA regime fees paid for 2007 and a portion of 2008, and real estate taxes paid over a four year period. (R. p. 659-672; p. 687). If the trial court chose to award six months of these costs based on the only evidence provided by Appellant, to reflect costs unavoidably incurred during a reasonable period in which the Appellant could have extricated itself from the purchase, those costs would be as follows:

- Insurance 4/5/05 to 8/1/11 \$8,216.00 (6 months = \$657)
- Taxes 12/21/06 to 1/12/11 \$43,849.77 (6 months = \$5,481)
- Dues/Regime Fees 12/23/06 to 4/7/08 \$6,786.50 (6 months = \$2,545)

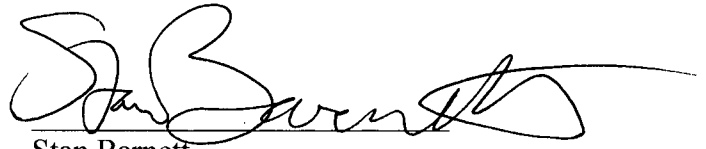
These amounts total \$8,683. This analysis serves to demonstrate that an award of \$10,000 is consistent with the evidence and all inferences which can reasonably be drawn from the evidence. Were this a jury verdict, it would clearly be consistent with the evidence. Townes, holding that the factual findings of a jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings; and Wooten v. S.C. Dept' of Transportation, 326 S.C. 516, 485 S.E.2d 119 (Ct. App. 1997), aff'd as modified, 333 S.C. 464, 511 S.E.2d 876 (1999). An award by a judge in a bench trial is entitled to the same presumption of correctness as that of a jury. Townes; and Chapman v. Allstate Ins. Co., 263 S.C. 565, 211 S.E.2d 876 (1975).¹ As there is a reasonable basis in the record supporting the damage award, it should be affirmed.

CONCLUSION

The evidence admitted into the record and the reasonable inferences which can be drawn from that evidence is ample support for the trial judge's decision not to grant rescission and for the trial judge's award of \$10,000.00 in damages to Appellant. The decision below should be affirmed.

¹ Nor is this the only way in which the trial court might have applied the evidence of damages to reach an award of \$10,000. The trial court might have rejected the claim for regime fees and dues in light of the testimony by Appellant that these were not paid after 2008. The cost to put in the two pilings the sellers agreed to place in the canal was testified to be \$2,500 – represented to the court by Respondents' counsel to be per piling, for a total cost of \$5,000. Awarding this sum along with approximately six months of taxes and insurance would total about \$11,000.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Stan Barnett', with a long horizontal flourish extending to the right.

Stan Barnett
Smith, Bundy, Bybee & Barnett, P.C.
1037 Chuck Dawley Blvd.
Suite 100, Building F
Mt. Pleasant, South Carolina 29464
(843) 881-1623
Attorneys for Respondents, Ripley Cove,
LLC, East Coast Trading Co., W.H. Knight
and W. M. Belote

February 18, 2013
Mount Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

CONSOLIDATED Under Case No.: 2008-CP-10-2641

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 Company, St. Andrews Title &
Abstract Agency, Inc., Chicago Title Insurance Company and Charles A. Funk & Lillian
M. Funk,.....Defendants,

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

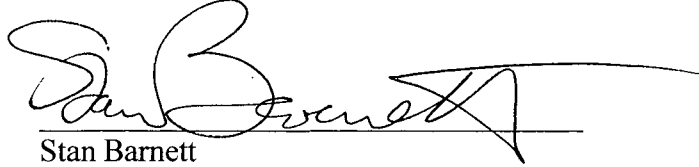
Zan, LLC, ...Plaintiff,

v.

East Coast Trading Company,.....Defendant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondents' Ripley Cove, LLC,
W.H. Knight, W. M. Belote and East Coast Trading Company's complies with Rule
211(b), SCACR.

A handwritten signature in black ink, appearing to read "Stan Barnett", written over a horizontal line.

Stan Barnett

SMITH, BUNDY, BYBEE, & BARNETT, PC

Post Office Box 1542

Mount Pleasant, SC 29465-1542

(843) 881-1623

Attorneys for Respondents, Ripley Cove, LLC, W.
H. Knight, W. M. Belote, East Coast Trading
Company

On this 18th day of February, 2013
Mount Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

CONSOLIDATED Under Case No.: 2008-CP-10-2641

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, 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 as the principal of
Karl A. McMillan, Inc., W.M. Belote and East Coast
Trading Company are the,

Respondents.

ZAN, LLC

Plaintiff,

v.

East Coast Trading Co.,

Defendant.

PROOF OF SERVICE

RECEIVED
FEB 21 2013
SC Court of Appeals

I certify that I have served the Respondents' Final Brief on the Appellant by depositing a copy of it in the United States Mail, Postage prepaid, on February 18, 2013, addressed to their attorneys of record as follows:

Andrew K. Epting, Jr.
Michelle N. Endemann
46A State Street
Charleston, SC 29401

Kerry Koon
147 Wappoo Creek Drive, Suite 203
Charleston, SC 29412

A handwritten signature in black ink, appearing to read "Stan Barnett", with a long horizontal line extending to the right.

Stan Barnett
Smith, Bundy, Bybee & Barnett, P.C.
1037 Chuck Dawley Blvd., Suite 100-F
Mount Pleasant, SC 29464
843.881.1623; Fax: 843.881.4406
Attorney for Respondents, Ripley Cove, LLC,
W.H. Knight, W.M. Belote, and East Coast Trading
Company

February 18, 2013
Mount Pleasant, South Carolina