

## STATE OF MAINE

YORK SS

SUPERIOR COURT

CIVIL ACTION

Docket No.

RE-09-111

YOR-12-599

ROBERT F. ALMEDER, and  
VIRGINIA S. ALMEDER, et al.

Plaintiffs,

-vs-

TOWN OF KENNEBUNKPORT et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS  
Non-Jury Trial

Before: Honorable G. Arthur Brennan,  
Active Retired Justice Of The Superior Court

Cumberland County Courthouse  
Portland, Maine

August 31, 2012

Kimberly McCulloch  
Official Court Reporter

APPEARANCES

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Party In Interest Henriksen:

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For Defendant Town of Kennebunkport:

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For Defendant Richard J. Driver:

Richard J. Driver, pro se

For Defendants TMF Group De Bene Esse:

Gregg R. Frame, Esq.  
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For Intervenor State of Maine:

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TRANSCRIPT OF PROCEEDINGS

(This matter came on before the Honorable G. Arthur Brennan, Active Retired Justice, at Portland, Maine, in the Superior Court, Cumberland County Courthouse, on August 31, 2012 for trial commencing at 8:36 a.m.)

THE COURT: Good morning, folks.

We are here in the Almeder matter and it looks like everyone is present.

As I understand it we are going to take up some -- it looks like everyone is present. It looks like, the TMF Group, they are missing -- there is Andre so he is here as well.

What we want to do is deal with some evidentiary issues?

MS. HEWEY: Yes.

THE COURT: Miss Hewey.

MS. HEWEY: If I stand here can you hear me?

THE COURT: Sure.

MS. HEWEY: Okay.

So, your Honor, this issue relates to a number of exhibits and let me just first give you a broad outline of what we are talking about.

There was in the town a man named Mr. Pinel, P-I-N-E-L, I am not sure how to pronounce it but that's

1 how I am going to pronounce it, and he was a historian  
2 who had a particular interest in Goose Rocks Beach, so  
3 over the years he would search out people who had  
4 pictures and postcards and brochures about Goose Rocks  
5 Beach and borrow them, scan them into an electronic  
6 database, and he compiled a fairly extensive database.

7           The database and most of the pictures or  
8 most of the exhibits that we intend to introduce include  
9 a picture and then some metadata on the side.

10           Your Honor, if I could just give you a copy  
11 of the Town's Exhibit 136 so you can sort of see what we  
12 are talking about here.

13           So what the Pinel files would include is the  
14 picture, then there's a map and essentially what he  
15 would do is he coded various portions of the beach,  
16 A being the west side, B being the east side and C and D  
17 being back lots, so he would find a picture, put it on  
18 the map and then include some other information as to  
19 where it came from and when he produced it.

20           So essentially that's one category of  
21 documents that we would seek to introduce.

22           I understand or believe that the plaintiffs  
23 objection to this is a hearsay objection and it is our  
24 position that these documents are -- fall within two  
25 specific exceptions to the hearsay rule.

1           First, these are ancient documents  
2           admissible under 803 16, they are pictures, the metadata  
3           itself is admissible under 803 20 which provides an  
4           exception to the hearsay rule for information as to  
5           reputation concerning property, that that rule requires  
6           that the reputation concerning property arise before  
7           litigation, and the date modified as to each of these  
8           pictures indicates that this information was in fact  
9           compiled before the litigation.

10           So what we have here I think are clearly  
11           documents that are exceptions to the hearsay rule.

12           I am not sure whether the plaintiffs also  
13           object on authentication grounds, and I can give the  
14           Court an offer of proof as to how we would authenticate  
15           these documents if that's also an objection.

16           That's sort of the big picture.

17           In addition to the pictures themselves,  
18           which are Town's Exhibits, 136, 137, 138, around there,  
19           we also have a couple of compilations that Mr. Pinel did  
20           which include both his pictures and some texts, which  
21           again I think falls within the 803 subsection 20  
22           exception to the hearsay rule.

23           On top of this -- first, let me back up and  
24           say that shortly after this litigation began Mr. Pinel  
25           passed away. He was working on this project however

1 with a woman named Barbara Barwise, who was formerly an  
2 assistant town clerk in Kennebunkport and is also -- was  
3 also the head of the Kennebunkport Historical Society,  
4 so she would be able to authenticate all these  
5 documents.

6 Miss Barwise herself also collected some of  
7 these documents and helped him put together his  
8 compilation. She is -- has been a long-term resident of  
9 Kennebunkport, she's familiar with places and she would  
10 be able to identify the picture by picture if that's  
11 what's required where things are and what happened. In  
12 fact, she and Mr. Pinel used to lead historic walks of  
13 Kennebunkport, so I think she's -- at Goose Rocks.

14 THE COURT: Let me just ask some questions  
15 for my own benefit. I am looking at the very first -- I  
16 think it's the picture you gave me, it's CE Jeffery  
17 cottage, Goose Rocks Beach, 306, the very first one.  
18 There is a picture there that contains some writing on  
19 the bottom, that is Jeffery cottage, Goose Rocks Beach.  
20 In its original is this a postcard?

21 MS. HEWEY: Yes.

22 THE COURT: All right, and it looks like --  
23 I haven't gone through them all but a fair number of  
24 them appear to be in the nature of postcards.

25 MS. HEWEY: There's -- there are two things,



1 there are postcards and where there are postcards often  
2 Mr. Pinel has listed there's a postmark and things like  
3 that.

4 There are also some photographs so where  
5 that's the case Mr. Pinel has listed who took them and  
6 where he obtained them.

7 THE COURT: And you are saying to me that  
8 Miss -- what is her last name?

9 MS. HEWEY: Barwise.

10 THE COURT: -- Barwise could look at that  
11 photograph and based on her own personal knowledge say  
12 that is a photograph of what it purports to be?

13 MS. HEWEY: Yes.

14 THE COURT: Now, other than the plaintiffs,  
15 Pete or Ben, does anybody object to these photos?

16 MR. DRIVER: No, your Honor.

17 MR. DUCHETTE: No, your Honor.

18 MR. LACHIATTO: Your Honor, doesn't the  
19 doctrine of apparent trustworthiness come into play as  
20 an exception to the hearsay rule?

21 THE COURT: I am not sure about that. If we  
22 are talking about the image itself I am not sure what  
23 the hearsay -- we will hear maybe what the hearsay  
24 objection is but --

25 MR. THAXTER: Well, first, your Honor, one

1 of the problems with the Pinel database is since that  
2 this case started a lot of stuff has been added and  
3 other people have put that information in.

4 I am proposing -- I didn't object to a group  
5 -- I went through all of those photos, I went through  
6 all thousand photos and some of them obviously have  
7 recent comments from recent people who have thrown --  
8 who have sent stuff to the database so they are not  
9 reliable as to what those comments say.

10 The ones I've done, we sanitized them,  
11 there's a little thing at the bottom that says notes, we  
12 just, you know, electronically took those off because  
13 they are not reliable.

14 Rule 803 Section 20 that was cited says  
15 evidence of a reputation in the community arising before  
16 the controversy, and some of these are after, there's  
17 some new pictures that, you know, just present-day  
18 pictures, as to the -- it says, as to the boundaries  
19 affecting land in the community. It does not say for  
20 the purposes of proving a prescriptive easement and it  
21 doesn't -- so I have a problem with the notes.

22 Most of those came in, there were lots of  
23 duplicates, they have blown up some, I objected to  
24 specific ones, I had a list -- I sent Melissa proposed  
25 stipulations that listed the ones that I objected to,

1 the pages, and allowed Exhibit 136 with the exception of  
2 pages 177, 182, 55 and 223.

3 Exhibit 137 was fine.

4 Exhibit 147, they were all recent pictures  
5 added to this -- you know, after the lawsuit as far as I  
6 could see.

7 Exhibit 153 were blown-up duplicates of  
8 pictures that were in there.

9 Exhibit 158 that she was arguing with me are  
10 brochures, they are not pictures, they are hearsay  
11 documents.

12 I agreed to let in the one of George Bush  
13 walking the beach, you know, there's two pictures of  
14 him.

15 Then their Exhibit 241 that I had exception  
16 to was historical documents, maps, you know, just -- you  
17 know, all kinds of hearsay writings.

18 So they weren't all -- our problem wasn't  
19 just the pictures. The pictures, if they are put in  
20 without the notes on the bottom, I am okay with.

21 I have a new exhibit, 172, that -- which are  
22 my pictures of the same, you know -- there's in the  
23 thousands for every one you see somebody -- a group on  
24 the beach, you see a picture obviously in summer where  
25 nobody is there, you know, so it is just -- that's the

1 problem, it's not the fact that they were there or the  
2 reliability of, you know -- the dates I am okay with,  
3 the dates are on the metadata, the little maps on the  
4 metadata I am okay with, but I am not okay with the  
5 notes because they are not reliable in all cases.

6 THE COURT: Well, okay.

7 I guess my reaction is I am looking at the  
8 top picture that was just handed to me. There are  
9 certain -- I don't see any objection to the admission of  
10 the picture, and I don't think I am hearing Pete object  
11 to its authenticity, that is, that it shows what it  
12 purports to show.

13 If somebody can -- when I look at it I  
14 don't -- although I am getting pretty familiar with  
15 Goose Rocks Beach but I couldn't identify where this is,  
16 so I mean it may be -- I don't find any problem with the  
17 admissibility if it comes in through Miss Barwise that  
18 way.

19 If I am hearing, Pete, all that needs to be  
20 taken off that is what's called notes -- am I hearing  
21 that right?

22 MR. THAXTER: Yes.

23 THE COURT: That's all that needs to come  
24 off that.

25 Again, we can have Miss Barwise testify --

1 if we have to go through all the pictures, we go through  
2 every picture, that's the way life is.

3           With respect to brochures, if you read the  
4 Eaton case I think it is pretty clear that -- and again  
5 I don't know if the brochures were objected to at the  
6 trial level or not, but it is clear that the Law Court  
7 when discussing the testimony of the local historian  
8 that the brochures -- advertising brochures came in not  
9 for hearsay purpose, not to prove the truth of what's  
10 contained in them but rather to show efforts that had  
11 been made by chamber of commerce, people like that, to  
12 publicize the use of the beach for commercial purposes.

13           So my inclination would be to admit them for  
14 that reason. They are not coming in to prove that all  
15 the words in there are true, they are being admitted to  
16 show this is how the town, the chamber of commerce,  
17 groups like that promoted the beach. I think that goes  
18 to the question of to what extent was this perceived as  
19 a public asset and to what extent would owners of  
20 property in the area be put on notice with respect to  
21 what the claims were.

22           So I don't know if I am helping you much. I  
23 mean, is there an easy way to take the notes off?

24           MS. HEWEY: I think we can take the notes  
25 off. My concern is simply a matter of time. If we take

1 the notes off then I am going to have to have the  
2 witness go over each one and say what they are.

3 MR. THAXTER: Your Honor, the notes are just  
4 unreliable. I think they are going to have to have  
5 somebody testify about them. Some of the notes are very  
6 recent additions to that. Somebody sends in a card and  
7 it goes into the database and they put a recent note on  
8 there and -- I don't know.

9 MS. HEWEY: Your Honor, I guess to the  
10 extent that there are notes on there that are recent,  
11 and it is very clear on these you see date modified, you  
12 can tell when the notes -- well, at least the latest  
13 date that the notes could have been added, so it seems  
14 to me that based on counsel's objection if that note is  
15 added before the date that this lawsuit was filed then  
16 there should be no objection and we should be able to  
17 keep it in.

18 If there are notes that are added after the  
19 lawsuit I would agree that I would need to authenticate  
20 those pictures one by one.

21 Does this make sense, Mr. Thaxter?

22 MR. THAXTER: No, because I mean I have  
23 looked at them and, you know, some of them say things  
24 and others that just I don't agree with.

25 THE COURT: Well, again I am looking at the

1 very first one. It apparently is a postcard. Inscribed  
2 on the bottom of the post card is the legend Jeffery's  
3 cottage, Goose Rocks Beach, Maine, and then whatever  
4 else there is unintelligible there.

5 The note says Kings Highway, west of  
6 Dyke Road, way west Jeffery's cottage at the west end of  
7 Jeffery's trailer camp, 149 Kings Highway today.

8 MS. HEWEY: So my argument, your Honor,  
9 would be that under 803 20 that is hearsay because it is  
10 a reputation as to real estate and it should come in  
11 without further adeu.

12 MR. THAXTER: It is not a reputation as to  
13 the boundary clearly. For example, that one -- I am not  
14 exactly sure but I think our witnesses might look at  
15 that on rebuttal and say no, that is down on the east  
16 end of the beach, you know, it is hard to tell.

17 The other thing I want to know is we got  
18 them in this very small form. I assume that that's the  
19 form that is going to the Court?

20 MS. HEWEY: I provided you with the larger  
21 forms when we talked about this.

22 MR. THAXTER: Well, I haven't seen -- I need  
23 to have the same form that the Court is getting.

24 MS. HEWEY: I gave that to you yesterday.

25 MR. THAXTER: I would like to have our

1 version be the same so I can see what is going on.

2 MS. HEWEY: That's what I gave you  
3 yesterday, Pete.

4 MR. THAXTER: Okay, we do have those. Thank  
5 you.

6 MS. HEWEY: Just while he is looking at that  
7 I would just note that Rule 803 20 does not just talk  
8 about boundaries, it talks about boundaries or customs  
9 affecting land in the community and reputation as to  
10 events of general history important to the community.

11 So I think that that rule squarely covers  
12 this.

13 THE COURT: Okay. Well, I guess I may want  
14 to take a look at the rule. I would be prepared to have  
15 Miss Barwise available, that's what I would be prepared,  
16 because I don't think there's -- I am not going to have  
17 much problem admitting them through a witness who says I  
18 am familiar with it, this is what it shows.

19 There may be rebuttal then testimony saying  
20 no, Miss Barwise is wrong, that is not what it shows and  
21 then I have to choose between those two versions of the  
22 evidence.

23 MS. HEWEY: Okay.

24 So I think we have enough guidance so that  
25 at least we can have --



1 THE COURT: You know, I think -- I mean, you  
2 want to be reasonably selective in terms of the quantity  
3 of documents you want to use rather than throwing them  
4 all against that wall to see what might peak the Judge's  
5 curiosity.

6 MS. HEWEY: I think I have discerned that  
7 that's your view, your Honor.

8 THE COURT: And of course once you do that,  
9 you indicate these are the ones that I actually want to  
10 offer, then Mr. Thaxter can get a peek at them and then  
11 we can have some more sort of concrete discussions to  
12 get them admitted.

13 But I think if you take the notes off, you  
14 are safe with me.

15 MS. HEWEY: Okay.

16 There are --

17 THE COURT: At least in terms of what I will  
18 call ancient documents, which I don't mean ancient,  
19 ancient, I mean things created before the litigation  
20 began.

21 MS. HEWEY: Okay.

22 There are two other issues --

23 THE COURT: Sure.

24 MS. HEWEY: -- that I know of. One relates  
25 to the Town's Exhibit 113 I think it is or is it 133 --

1 which is -- relates again to the brochures and it is  
2 just a compilation of brochures.

3 I don't know whether given the Court's  
4 ruling that counsel still objects to that or whether --

5 MR. THAXTER: I object to the exhibit for --  
6 even if the Court were to allow the brochures the  
7 exhibit has an introduction to them that is, again, you  
8 know, somebody's, you know, notations and they put that  
9 in there, and those aren't the brochures, then they have  
10 a bunch of brochures and within that same exhibit then  
11 they have a picture of so and so saying, you know, he  
12 was a police officer and then they have the dinghies at  
13 Dinghy Point, so these are very mixed exhibits, that's  
14 the problem, there's a whole lot of stuff in there and I  
15 just can't, you know, say okay. They have to select out  
16 what they mean to do.

17 MS. HEWEY: So this Exhibit, 113, includes a  
18 summary of voluminous documents at the front which  
19 simply tells the location, it looks like an index and  
20 then it goes and it has copies of the various brochures.

21 MR. THAXTER: Did I look at that?

22 That is not just brochures.

23 158 was the brochure document I was talking  
24 about, Exhibit 158.

25 Exhibit --

1 MS. HEWEY: Right, and that's why I am  
2 saying that this is a different issue because this is a  
3 compilation of brochures, rather than marking each  
4 brochure separately what Miss Barwise and Mr. Pinel did  
5 was collect brochures from commercial properties and  
6 advertisements from commercial properties and list them  
7 in a single document, which is Exhibit 113.

8 THE COURT: Robert?

9 THE CLERK: I am looking at the listing I  
10 have for you for Exhibit 113 as you stated and it shows  
11 1967 Town of Kennebunkport Committee Report.

12 MS. HEWEY: Okay, you are right. I meant  
13 133. Numbers are really bad with me. 133.

14 MR. THAXTER: So, Judge, if you look at 133  
15 on the bottom this is created in 2010, this is not a  
16 document that was -- it was created after the lawsuit  
17 and it is a compilation, but these folks are working for  
18 the town and what they have done is compiled a whole  
19 bunch of things and there's a lot more in this  
20 compilation, there's pictures of houses and pictures of  
21 different places, it is not just the brochures.

22 The brochures themselves are one thing but  
23 they have got all these cottages and houses and pictures  
24 and comments.

25 This was prepared in my view in conjunction

1 with the town by Mrs. Barwise for the purposes of  
2 putting together, you know, a compilation for the trial  
3 and it is hearsay as presented.

4 MS. HEWEY: It was compiled in connection  
5 with this litigation. It is a summary document that  
6 includes information that the Court has previously said  
7 is not hearsay.

8 If Mr. Thaxter wants me to break that up  
9 into 100 different documents then I can do that.

10 THE COURT: Well, what I said was the  
11 brochures come in.

12 MS. HEWEY: Yes.

13 THE COURT: What I said was at least in  
14 Eaton the brochures -- the decision discusses the fact  
15 that the Law Court apparently relied on fact finding by  
16 the trial judge relating to brochures which had been  
17 admitted.

18 I think the brochures are admitted.

19 The problem, as I am looking at 133, is that  
20 it is -- it is not simply the brochure in specie, it is  
21 someone's -- if what the face sheets were was a summary  
22 of the in specie brochures I don't think I would have  
23 much of a problem with that, but my first quick look at  
24 it is I am not sure that that's what this is as compared  
25 to somebody sort of cutting and pasting from brochures

1 sort of -- for what purpose I don't know exactly.

2 I mean, there's a different -- I think  
3 there's a difference there and I think, you know, the  
4 safe way is to put in the brochures.

5 MS. HEWEY: Okay.

6 THE COURT: Put them in and then we don't  
7 need a summary of them, the brochures themselves come  
8 in.

9 MR. THAXTER: The only thing I would like  
10 them to do, your Honor, is the exhibit with the  
11 brochures has pictures and other stuff. They have to  
12 have a clean exhibit with the brochures themselves.

13 THE COURT: Well, within reason.

14 MR. THAXTER: Right.

15 THE COURT: Within reason. We don't -- this  
16 is not the kind of case where things are going to go to  
17 a jury and so I don't want to create work merely for the  
18 purpose of creating work.

19 MR. THAXTER: No, I agree, your Honor, but  
20 what I am saying is if you look at their Exhibit 158 it  
21 then goes back in and has pictures with commentaries on  
22 the pictures and other things, it is not just a  
23 brochure.

24 My point is, you know, it doesn't take much  
25 to organize your exhibits so that you have one for

1 brochures.

2 MS. HEWEY: I hear him.

3 THE COURT: Good. I mean, fortunately we  
4 have three days or we will have three days between this  
5 afternoon and Tuesday morning. I am probably going to  
6 spoil a lot of people's end of summer rituals but --

7 MS. HEWEY: I can't think of a better way to  
8 end the summer, your Honor.

9 THE COURT: You are at the beach, I mean,  
10 what could be better?

11 MR. THAXTER: Your Honor, I have one other.  
12 Because they are pushing to put these pictures in I have  
13 my corresponding Pinel pictures, I already took the  
14 notes off, it is Exhibit 172, I have e-mailed it. I  
15 would just like permission to get that in.

16 MS. HEWEY: Okay, I didn't get your e-mail.  
17 So as soon as I see those I will do that.

18 THE COURT: I think what we will probably  
19 try to do on Monday morning or Tuesday morning -- I  
20 mean, what would make a lot of sense to me is if you  
21 folks could see if you could come to some sort of  
22 understanding of which Pinel pictures that Miss Hewey  
23 would like to put in and which ones Mr. Thaxter would  
24 like to put in and sort of have them come in together,  
25 and then to the extent that some testimony to explicate

1     them would be appropriate you have Miss Barwise and Pete  
2     has whoever he has.

3                     Am I making any sense here?

4                     MS. HEWEY: I am pausing because my  
5     understanding of Mr. Thaxter's position was that unless  
6     I can have somebody identify each photo that it wouldn't  
7     come in, so I will do that.

8                     MR. THAXTER: I am not saying that. I am  
9     saying the photos -- I already went down through the  
10    exhibits, I gave them a list of what my objections were,  
11    136 business photos, 137 I said no objection except for  
12    the notes, and 136 I said no objections, and I listed a  
13    couple of pictures were not Pinel pictures, they were  
14    recent pictures or they were -- there were a couple of  
15    brochures mixed in among the pictures so, you know, the  
16    pictures without the notes I am okay with.

17                    MS. HEWEY: We will work it out.

18                    THE COURT: Good.

19                    MS. HEWEY: So the last issue relates to the  
20    Town's Exhibit 134, which is the Walker diaries and  
21    Mr. Willing is going to handle that one.

22                    THE COURT: Who is Mr. or Miss Walker?

23                    MR. WILLING: The Walker family lived in the  
24    Arundel area back in the mid to late 1800s, your Honor,  
25    and for whatever reason numerous members of the family

1 kept daily journals. These journals are published I  
2 think in two different volumes, both in the libraries,  
3 certainly in Kennebunk, I am also aware that they are  
4 published in the State Library.

5 The documents speak of many, many things  
6 that these people were doing but amongst them use of the  
7 beach and particularly mention in a few occasions use of  
8 Goose Rocks Beach, one journal entry in 1871, one  
9 journal entry in 1872.

10 We believe these would come in under -- I've  
11 listed three exceptions to the hearsay rule. First of  
12 all, I think it's a public record given that these  
13 diaries are public and kept in the library.

14 Secondly, under 803 13 they are history,  
15 family histories that come in under that exception.

16 Third, the ancient documents, these are from  
17 well over 100 years ago and therefore would come in  
18 under that.

19 THE COURT: How many entries are we talking  
20 about here, individual entries?

21 MR. WILLING: Three or four that encompass a  
22 sentence or two each.

23 THE COURT: Pete?

24 MR. THAXTER: If he'll send me those three  
25 or four I can analyze those. My guess is they don't say



1 anything but, you know, I went to Goose Rocks Beach.  
2 But, I mean, these are hearsay documents, they are not  
3 historical documents, they are somebody's diary, and  
4 their own expert has testified that a lot of these  
5 people that weren't very literate back in those days,  
6 you know, you don't know -- you know, I question how  
7 relevant it is anyhow.

8 THE COURT: You take a look at them, Pete.  
9 If you have an objection, I will deal with it. But I am  
10 not -- I am doubtful that three or four entries in a  
11 personal journal going back to the late 1800s would be  
12 terribly helpful to me given 5,000 pages of other stuff.

13 MR. THAXTER: The only thing I would ask, I  
14 will want to look at these but if I had a readable copy  
15 of them -- I can't read these. Can you highlight  
16 them -- oh, you wrote down what it says?

17 MR. WILLING: Right at the bottom, Pete.

18 THE COURT: This is more like a trial now, I  
19 am feeling right at home.

20 Are you all set now, Pete? Are you going to  
21 look at those?

22 MR. THAXTER: Yes.

23 THE COURT: Andre?

24 MR. DUCHETTE: Our issue is resolved happily  
25 but I just want to get it on the record. There were

1 some objection to the photos, TMF Exhibit Number 330.

2 THE COURT: Yes.

3 MR. DUCHETTE: I believe that can be  
4 admitted by agreement.

5 MR. LEONI: Yeah, we sent them an e-mail  
6 last night. We are fine.

7 THE COURT: Thank you.

8 330, Robert, is admitted, a series of  
9 photographs.

10 Now, Paul presented some material this  
11 morning, I don't know, do we need to deal with that?

12 MR. THAXTER: Paul's material are all  
13 treatises -- I mean, it is a colonial ordinance. It has  
14 no relevance and there are case citations --

15 THE COURT: All right, so the point is if he  
16 offers it and I receive it de bene you don't have a  
17 problem?

18 MR. THAXTER: No.

19 MR. STERN: Very good.

20 Thank you.

21 THE COURT: Again, I feel like I am bound by  
22 the current state of the law and --

23 MR. THAXTER: I mean, a lot of that -- he  
24 cites cases in there. That doesn't come into evidence,  
25 it is part of an argument.

1 THE COURT: I mean, we can receive this  
2 material for its value.

3 Okay? All right.

4 Now, we were in --

5 MR. FRAME: May I enter, your Honor?

6 THE COURT: Yes, please.

7 We had completed Mr. MacDonald's testimony  
8 at the close of business yesterday afternoon and I think  
9 either Andre or Gregg you remain in your case in chief.

10 MR. FRAME: Correct, your Honor.

11 Good morning, your Honor.

12 Howard Whitehead.

13 THE CLERK: Please state and spell your name  
14 for the Court.

15 THE WITNESS: Howard Whitehead, H-O-W-A-R-D  
16 W-H-I-T-E-H-E-A-D.

17 Thereupon,

18 HOWARD WHITEHEAD

19 was called as a witness and, after having been duly  
20 sworn, was examined and testified as follows:

21 DIRECT EXAMINATION

22 BY MR. FRAME:

23 Q. Good morning.

24 A. Good morning.

25 Q. Do you mind, Judge Whitehead, if I and the other

1 attorneys call you Howard?

2 A. Not at all.

3 Q. Can you state your legal residence for the  
4 record?

5 A. Yes. I live at 281 Chestnut Street in Linfield,  
6 Massachusetts.

7 Q. Did you grow up in Massachusetts?

8 A. Yes.

9 Q. Great.

10 What do you do for work, Howard?

11 A. I'm a trial judge.

12 Q. In Massachusetts?

13 A. Yes.

14 Q. Great.

15 Do you or your family own a residence at  
16 Goose Rocks Beach?

17 A. Yes.

18 Q. What's the address for that residence?

19 A. 2 New Biddeford Road.

20 Q. Great.

21 Howard, you weren't here yesterday but we are  
22 asking the witnesses if you could take the orange pen,  
23 Howard, and go up to that TMF Defendants map, you will  
24 see some numbers on there, those numbers don't mean  
25 anything other than deeds numbers so if you could circle

1 2 New Biddeford Road on there that would be great.

2 A. It has the number 155.

3 Q. Great.

4 Howard, just while you are up can you take the  
5 red pen now and identify for the Court just the general  
6 route you take from that house to access the beach? If  
7 there's more than one identify the routes you take.

8 A. Well, the principal route is already marked, it  
9 is Jefferys Way, right down to the beach, I enter via  
10 other ways but primarily Jefferys Way.

11 Q. Have there been other ways that you have entered  
12 several times or frequently?

13 A. Yes.

14 Q. Can you identify those through an arrow coming  
15 from your property how you would walk down there or  
16 drive down there if you drove?

17 A. One of the routes is partially marked.

18 Q. Great, thank you. You can have a seat now.

19 Can you -- I think you said the first route you  
20 took was via Jefferys Way?

21 A. Yes.

22 Q. Can you describe for me the other two routes you  
23 took?

24 A. One of the other routes would go down Kings  
25 Highway to Sand Point Road and then out along Sand Point

1 Road and then near a residence which I know as the  
2 O'Harra residence. I am not sure of the owners now.  
3 There was a -- apparent right-of-way that went down to  
4 the beach.

5 The other route I would go -- turn right at  
6 Biddeford Road onto Kings Highway, go down two or three  
7 houses and turn left, so a paved apparent right-of-way  
8 that goes along the Scribner property and onto the  
9 beach.

10 Q. Great.

11 Why would you take different right-of-ways or  
12 routes?

13 A. Well, the Jefferys Way route would be the primary  
14 route because it was the closest route and that's where  
15 most of my friends would be on the beach.

16 Sometimes I would have friends who would be a  
17 little farther down the beach so I would walk down -- a  
18 little farther down toward that Scribner right-of-way.

19 Other times if we were going to be engaging in  
20 activity on Sand Point we would go down and go onto Sand  
21 Point from that route.

22 Q. Great.

23 I want to get a little history, Howard. How long  
24 has the house at 2 New Biddeford Road been in the  
25 Whitehead family?

1 A. I think it was built in 1958 or '59.

2 Q. Were you -- your parents build it?

3 A. Yes.

4 Q. Were you alive at that time?

5 A. Yes.

6 Q. How old were you? Sorry to ask.

7 A. Eight or nine.

8 Q. Okay, great.

9 Has that property stayed in the Whitehead family  
10 the for the entire time?

11 A. Yes.

12 Q. What brought your family to Goose Rocks Beach --  
13 was 1959 the first time your family came to Goose Rocks  
14 Beach?

15 A. No, we have been coming since I was an infant.  
16 My father was born in Rhode Island but he grew up in  
17 Maine all his life, and we started renting when I was an  
18 infant and eventually he built the house in 1958 or '59.

19 Q. Do you know, Howard, where your family rented  
20 before they bought?

21 A. Yes.

22 Q. Was it at Goose Rocks Beach?

23 A. Yes.

24 Q. Was it on the beach?

25 A. One of the houses was on the beach and one of

1       them was up Biddeford Road a little bit.

2           Q.   Do you have recollection or knowledge of which  
3 house on the beach your folks rented?

4           A.   Yes.

5           Q.   Which house?

6           A.   A house which at the time was known as the  
7 Fessendens -- there are two Fessendens, not to be  
8 confused with the ones who were off the beach. At the  
9 time as you came down Kings Highway from New Biddeford  
10 Road it was the last house before the break in the beach  
11 where there are no houses on the ocean side.

12          Q.   Okay, so you would go down New Biddeford Road,  
13 take a right --

14          A.   Yes.

15          Q.   -- and it would be the last house --

16          A.   On the left.

17          Q.   -- on the left.

18          A.   It is now the next to the last house on the left.

19          Q.   Great, thank you.

20                 The home at New Biddeford Road, is that a  
21 year-round or is that a summer residence?

22          A.   You could live there year-round but no one in the  
23 family does.

24          Q.   Does your family utilize it during summers?

25          A.   Yes.



1 Q. How often?

2 A. Well, we opened the house -- now we open the  
3 house in May, it used to be in April, and keep it open  
4 until mid October, go down -- one family member or the  
5 other would be there virtually every weekend, and during  
6 the warm weather, June, July, August, September and now  
7 until October my mother would be there all the time.

8 Q. Great.

9 Starting in 1959 you were eight or nine at that  
10 point?

11 A. Yes.

12 Q. How often was your family coming up to  
13 Goose Rocks Beach after the house was built?

14 A. In addition to weekends in the spring we would  
15 leave for Maine the day school ended in June and we  
16 would stay full time until the day before school began  
17 in September and after that it would be back to  
18 weekends.

19 Q. Good memories, huh?

20 A. Yes.

21 Q. Was it just you and your folks or do you have  
22 siblings?

23 A. I have a sister.

24 Q. A sister older or younger?

25 A. Younger.

1 Q. Great.

2 In 1959 you were eight or nine years old, what  
3 was the -- what were the types of activities as an eight  
4 or nine year old that you engaged in on the beach?

5 A. At that time eight or nine years old we would  
6 swim, play the kinds of things kids do in the hard sand  
7 and soft sand, and I was starting to get into baseball a  
8 little bit at that time so we played ball on the beach.

9 Q. Great.

10 I apologize but I want to get a little bit more  
11 into the activities in the hard sand or soft sand. As  
12 the first witness of the day we kind of get those  
13 activities out there --

14 A. Yes.

15 Q. -- so I will spend a little more time on that.

16 What were the activities on the beach that you  
17 engaged in?

18 A. In the late '50s?

19 Q. Sure.

20 A. Basically lying on a towel, building sand  
21 castles, running and throwing a ball around and hitting  
22 a ball too.

23 Q. If you were lying on a towel would you generally  
24 be on the dry sand at that point?

25 A. Yes.

1 Q. Great.

2 The activities that you engaged in, some of them  
3 on the dry sand, some of them on the wet sand?

4 A. Yes.

5 Q. Did you ever make a distinction at that point,  
6 Howard, about what you could do on the dry sand versus  
7 or what you were permitted to do on the dry sand versus  
8 what you were permitted to do on the wet sand?

9 A. No.

10 Q. Fast forward 53 years, do you still make a  
11 distinction or do you still not make a distinction  
12 between what you can do on the dry sand versus what you  
13 can do on the wet sand on the beach?

14 A. No.

15 Q. Great.

16 Your sister was how many years younger than you?

17 A. Two years younger.

18 Q. So she was engaging in a lot of those similar  
19 activities?

20 A. Yes.

21 Q. And at eight or nine were you old enough at that  
22 point to kind of go down to the beach by yourself or did  
23 you still have to have your folks with you?

24 A. Actually I think we went down by ourselves.

25 Q. Any rules, don't swim in the water without us

1 down there, stuff like that?

2 A. Yes.

3 Q. Great.

4 Did you have to -- at that age did you have to  
5 stay kind of within sight of the house or within sight  
6 of --

7 A. No.

8 Q. No, okay.

9 So at eight or nine what kind of -- where would  
10 you go when you were down on the beach? You talked  
11 about the activities that you did but where would you  
12 go?

13 A. We -- at that time Sand Point didn't have any  
14 houses on it, so we had run of the beach really, we  
15 would -- we used to play a lot down in the sand dunes at  
16 Sand Point, on the soft sand on the beach along the  
17 river, but we would basically use on a daily basis the  
18 area from what I know as the O'Charter cottage, right in  
19 front of the Snow Goose, down to about the Scribner  
20 cottage or so, doing all those things I have already  
21 described, but we would also walk the entire beach, we  
22 liked to collect sand dollars so we would walk way down  
23 to the other end of the beach past the rocks that come  
24 close to shore.

25 Q. Down almost to the Batson?

1           A.    Yes.    That was the area we call the Sand Dollar  
2 Beach where you could find lots of sand dollars.

3           Q.    Okay, great.

4                    I just wanted to get a better sense, I am going  
5 to put up this other map, Howard, you talked about the  
6 O'Charter house.  Would you be able to identify that  
7 kind of on this map?

8                    You can see here this is Sand Point with  
9 Temerlins going all the way down.  This is Donna  
10 Lanky -- Lencki down here, that is the Scribner  
11 property.  Where was the O'Charter house?

12           A.    It is actually torn down now but it would be  
13 right there, actually right either there or there.

14           Q.    Great.

15                    As you got older, Howard, into your teen years  
16 did you start to make friends on the beach?

17           A.    Yes.

18           Q.    Back-lot owners, beach-front owners?

19           A.    Both.

20           Q.    That was around the time that -- Goose Rocks  
21 Beach Association was in play at that point, right?

22           A.    Yes.  They gave swimming lessons actually right  
23 from when I was very young on.

24           Q.    Did you and your sister participate in Goose  
25 Rocks Beach Association activities?

1 A. Yes.

2 Q. That is for the beach-front owners, back-lot  
3 owners?

4 A. Yes.

5 Q. How did those activities that you and your sister  
6 engaged in change as you or the location of those  
7 activities change as you got into your teen years?

8 A. The location didn't really change except in one  
9 respect, we tended as we got in to be teenagers we had  
10 powerboats, a lot of us did actually, and we got into  
11 water skiing. The best place to waterski was off of  
12 Sand Point because there would be a steep drop-off at  
13 the end of the beach.

14 Q. On the Little River?

15 A. Yes, the Little River, and so we would gather  
16 down there and jump off of the point on waterskis and go  
17 up Little River.

18 Q. When you are on -- I am not a waterskier so when  
19 you are waterskiing you are setting up your skis -- you  
20 are skiing at high tide generally because you are in the  
21 river?

22 A. It would have to be high tide.

23 Q. Great.

24 When you are getting your skis ready you are  
25 doing that on the beach on the dry sand, right?

1 A. Yes.

2 Q. The high dry sand?

3 A. Yes.

4 Q. Did you -- still playing ball at that time on the  
5 beach?

6 A. Yes.

7 Q. Still walking the length of the beach?

8 A. Yes.

9 Q. Friends all areas of the beach?

10 A. Yes.

11 I should -- the ball playing became much more  
12 intensive as we became teenagers and actually beyond  
13 then and we would have massive softball games on the  
14 beach that would involve literally 40 or 50 participants  
15 of all ages, and the people who weren't actually in the  
16 game would kind of line up on the soft sand and watch  
17 the game.

18 We would do that depending on where the flattest  
19 part of the beach was on that day because you would have  
20 ripples on some days almost as far down as Little River  
21 sometimes and going the other way as far down as say the  
22 Scribner, almost the de Malley cottage again depending  
23 upon the condition of the beach.

24 Q. Great.

25 You said all ages so you would have teenagers,

1 some younger kids?

2 A. We had parents too.

3 Q. Some old folks?

4 A. Yeah.

5 Q. Great.

6 Did -- when you were engaging in these activities  
7 as an eight or nine year old and then as a teen did you  
8 look around the beach and see other folks engaging in  
9 similar activities?

10 A. Yes.

11 Q. Were you always able to identify whether they  
12 were beach-front owners or back-lot owners?

13 A. No -- I knew some of them were -- I knew some  
14 were beach, some were back lot but the rest I just  
15 didn't know.

16 Q. When you were going down the beach looking to  
17 identify a good place to have some fun did you ever --  
18 well, let's take your teen years first. At that point  
19 did you ever consider we need to go to this spot because  
20 it is in front of this beach-front owner and they allow  
21 us to do that?

22 A. No.

23 Q. Have you done that at -- had that consideration  
24 to this day?

25 A. No.



1 Q. After your teen years did you go to college?

2 A. Yes.

3 Q. I assume you did, you are a judge so I hope you  
4 did.

5 A. Yes.

6 Q. Still go to Goose Rocks Beach in the summers?

7 A. Yes.

8 Q. After college right to law school?

9 A. Yes.

10 Q. Still go to Goose Rocks Beach in the summers?

11 A. Yes, got married along the way, but yes.

12 Q. That's good to know. And got married along the  
13 way?

14 A. Yes.

15 Q. Kids?

16 A. Yes.

17 Q. How many?

18 A. Two.

19 Q. How old are they?

20 A. 28 and 26.

21 Q. Great.

22 Have your kids spent summers at Goose Rocks  
23 Beach?

24 A. Weekends, yes.

25 Q. They will go up frequently?

1       A.   They both live out of State now.  When they  
2 lived --

3       Q.   When they were living at home they would come up  
4 with you?

5       A.   Yes.

6       Q.   When you had kids, Howard, I assume in some ways  
7 your activities on the beach changed a little bit?

8       A.   Yes.

9       Q.   Explain that to me.

10      A.   Didn't play as much baseball or softball.  The  
11 games kind of faded out as time went on.  Didn't do any  
12 more water skiing.  Mostly little kid things, again,  
13 building -- back to what I did as a kid, building sand  
14 castles and throwing a ball around, the kids would play  
15 Badminton on the beach and so forth and swimming and  
16 shelling and going to Sand Dollar Beach.

17      Q.   We have heard a lot of folks talk about tidal  
18 pooling because you get into the tidal pool and the  
19 water is warmer and the kids can play without fear of --

20      A.   Yes.

21      Q.   Do your kids do that?

22      A.   Yes.

23      Q.   Tidal pools change maybe from month to month,  
24 year to year?

25      A.   We would go to the rocky ones.  There were two

1 that we would go to essentially, the ones near Timber  
2 Island and then that group of rocks down on the west end  
3 of the beach sort of in the middle of the west end of  
4 the beach.

5 Q. When your kids got to be old enough that you were  
6 able to let them out of your sight did you instruct them  
7 on what was and was not permissible on the beach?

8 A. No.

9 Q. I assume you told them to be a good neighbor?

10 A. We didn't have to do that, they knew.

11 Q. Great.

12 Did you instruct them on where they were and were  
13 not permitted to go on the beach?

14 A. No.

15 Q. And when you observed your kids in their teen  
16 years -- 30 years past your teen years, correct?

17 A. (Motions head up and down.)

18 Q. -- engaging in activities on the beach, did you  
19 observe them engaging in similar activities to the ones  
20 that you engaged in?

21 A. Yes. They weren't as athletic as I was and my  
22 friends were, they would tend to walk on the beach, lie  
23 on the beach, get a suntan and they liked to go  
24 shelling.

25 Q. Socialize?

1 A. Yes.

2 Q. With friends?

3 A. Yes.

4 Q. Did they over the years accumulate friends up and  
5 down the beach?

6 A. Not to the extent that I did because they weren't  
7 there all the time the way I was.

8 Q. But did they have friends on the beach?

9 A. They had a few.

10 Q. Great.

11 Is it fair to say, Howard, that in your 53 years  
12 of coming to Goose Rocks Beach that the beach itself has  
13 been the focal point of your family's recreational  
14 activities?

15 A. Absolutely.

16 Q. And those activities have remained consistent  
17 with some changes, some additions, some deletions, maybe  
18 the softball games are gone but relatively consistent  
19 over that 53 year stretch?

20 A. Yes.

21 Q. I am not sure I asked you this, sometimes the  
22 witnesses run together --

23 THE COURT: You are telling me.

24 Q. Have you ever asked for permission to utilize  
25 Goose Rocks Beach?

1 A. No.

2 Q. Has anyone ever told you or any member of your  
3 family you need to move from this spot and go to the  
4 public beach?

5 A. Never.

6 Q. I assume when you were -- I don't want to assume.  
7 Were you friendly or at least recognized the  
8 Scribners and other folks who were on the beach when  
9 were you down there?

10 A. Definitely. Bob Scribner was kind of in our  
11 social circle and his sister Sue was a pretty good  
12 friend of my sister. He had another sister Joy who I  
13 didn't know, I believe she was much younger.

14 Q. Sometimes were beach-front owners engaging in  
15 these activities with you on the beach?

16 A. Yes.

17 Q. In all your years of being at Goose Rocks Beach  
18 did you ever see a beach-front owner deny someone the  
19 right to use Goose Rocks Beach?

20 A. Never.

21 Q. Where did you -- you said -- do you still have a  
22 boat?

23 A. Not anymore.

24 Q. When was the era when you had a boat, Howard?

25 A. Starting when I was about 12 until a couple of

1 years after the first oil crisis which would be about  
2 1975, so from 1962 to '75 or '6, somewhere in there.

3 Q. Free rein with the use of the boat?

4 A. Yes actually.

5 Q. Lucky man.

6 Did you have the boat back in the Little River or  
7 did you moor it out in the bay?

8 A. For the first year we kept it at Biddeford Pool  
9 and after that we started mooring it in Little River.  
10 We were one of the first -- there were only two or three  
11 boats in the beginning that moored in Little River, I  
12 think we were the second boat.

13 Q. So you go in, walk down Kings Highway, kind of  
14 access the boat, obviously I have been there at low  
15 tide, the boats are sitting on mud flats but high tide  
16 you access it?

17 A. Yes. You had about from two hours before high  
18 tide to two hours after high tide.

19 Q. How long of a stretch would that be that you  
20 could boat?

21 A. Four hours.

22 Q. Four hours total?

23 A. Sometimes we would leave the boat around and --  
24 well, we had another mooring out in front of Goose Rocks  
25 Island and we would leave it out there and we had a

1 dinghy on shore that we would take out to the boat.

2 Q. Great.

3 Did you have any sailboats?

4 A. No.

5 Q. Just motor boats?

6 A. Yes.

7 Q. Great.

8 MR. FRAME: Your Honor, I would like to  
9 approach the witness --

10 THE COURT: Surely.

11 MR. FRAME: 348, your Honor.

12 Your Honor, may I stand near the witness as  
13 we identify the photos?

14 Q. Howard, can you identify first the top left who's  
15 in that photo?

16 A. The little girl with the tongue sticking out is  
17 my older daughter Megan.

18 Q. How old was Megan in that photo?

19 A. She looks like she was about 18 months to two  
20 years which would be about 1980 -- I think probably the  
21 Summer of '86.

22 Q. Is that Megan on the right as well?

23 A. Yes.

24 Q. Around the same summer?

25 A. That -- I think that was probably a little bit

1 later in the season maybe towards fall.

2 Q. I should have said the same year. Same year,  
3 correct?

4 A. Yes.

5 Q. Do you have any idea where on the beach you might  
6 be there?

7 A. The top right one is definitely going down  
8 Jefferys Way, turn a little bit to the right, the soft  
9 sand to the right.

10 The bottom one I can't say for sure but that --  
11 that is the hard sand but generally the same area.

12 Q. Great.

13 The bottom photo there, who's in that photo?

14 A. That is my sister in the beach chair, my wife in  
15 the striped shirt, my daughter Ashley and my daughter  
16 Megan and myself.

17 Q. And how long ago would that have been do you  
18 think?

19 A. My daughter Ashley it looks like she's about a  
20 year old there so that would be about 1987 or so.

21 Q. Great.

22 Do you know where you are in that photo?

23 A. Again that would almost be dead in front of  
24 Jefferys Way, maybe a little bit to the right.

25 Q. Now, if you were -- you said your family



1 oftentimes would go down Jefferys Way, correct?

2 A. Yes.

3 Q. If you were going down Jefferys Way and there was  
4 nobody on the beach, would you generally set up right  
5 there?

6 A. Yes.

7 Q. If you were going down Jefferys Way and there  
8 were people set up right in front of you, would you turn  
9 and go home?

10 A. No.

11 Q. What would you do?

12 A. We would turn either left or right, usually the  
13 right for some reason just out of habit and walk until  
14 there was an open space.

15 Q. If there's more open space on the left would you  
16 go to the left?

17 A. Yes.

18 Q. You kind of do an eyeball test?

19 A. Yes.

20 Q. Great.

21 Turn to the next pictures. Starting at the top  
22 left can you identify who's in that photo?

23 A. That's again my older daughter Megan, the age I  
24 couldn't say, maybe she's -- she was always very tiny.  
25 She might be four or five in that picture.

1 Q. So that would be 20 plus years ago?

2 A. Yeah, 1988 or '89, somewhere in there.

3 Q. Do you know where that photo is?

4 A. I can't say for sure. Well, I can see the edge  
5 of Timber Island actually so it is roughly in front of  
6 Jefferys Way.

7 Q. How about the next photo?

8 A. To the right is my wife and Megan when she was an  
9 infant or about a year old.

10 That's down at Sand Point, that is almost down to  
11 the Little River and it is on the hard sand, it is low  
12 tide.

13 Q. Great.

14 Go to the next page.

15 A. The next page?

16 Q. Sure.

17 A. Yes.

18 Q. Some older photos here.

19 A. Yes.

20 Q. Let's start at the top left.

21 A. Yes.

22 Q. It looks to be -- it looks like you are playing  
23 that game we used to play when you see who could hit  
24 first in Wiffle Ball when you are up to bat.

25 A. That is -- we were -- there was a group of us,

1 five of us who we called ourself The Fabulous Five and  
2 we would challenge any group of people to a game where  
3 the five of us would take them on, and that is three of  
4 The Fabulous Five.

5 Q. Who is that?

6 A. To the left is myself, in the center is Mark  
7 Smith, to the right I think it is Brian Miller.

8 Q. Do you remember who the remaining two were in the  
9 Fab Five?

10 A. It varied but we had Bill Byron, we had Les  
11 Wilson, sometimes Mike Riley would be a player -- a  
12 substitute player in The Fabulous Five.

13 Q. What estimated year is that photo?

14 MR. THAXTER: I am confused. Can I see what  
15 photo?

16 MR. FRAME: Sure.

17 A. You know, I can't. Judging by the length of hair  
18 I would say it is the late '60s, early '70s, but I am  
19 not sure.

20 Q. Teen years or 20's?

21 A. Just above or below 20, I think.

22 Q. Next photo above that, middle top for the folks  
23 who are --

24 A. Should I turn it --

25 Q. This one right here.

1           A.    That one is -- that one is fairly recent  
2 actually.    That's a photo of my wife and myself, going  
3 from left to right my son-in-law and Mark Smith.

4           Q.    Are you guys on the wet sand or dry sand?

5           A.    Dry sand.

6           Q.    Great.

7                    How about bottom middle, who is that?  Is that  
8 your sister or your daughter?

9           A.    This one?

10          Q.    That one.

11          A.    That is my sister.

12          Q.    How old is your sister in that photo?

13          A.    She probably was about 18 or 19.

14          Q.    How old is she now?

15          A.    59.

16          Q.    Great.

17                    So that's about 40 years ago?

18          A.    Yes.

19          Q.    Do you know where that is on the beach?

20          A.    Yes, actually you can tell because of the houses  
21 in the background, it is down Jefferys Way and it is  
22 essentially over roughly one house lot.

23          Q.    Great.

24                    Let's go to the next page.  We are almost done  
25 here.

1 A. Yes.

2 Q. These, Howard, are more photos of you and your  
3 family on the beach?

4 A. Yes.

5 Q. Can you -- they look to be around the same age,  
6 correct?

7 A. Some of them are -- actually they cover a range  
8 of time. The one -- I will turn it -- the upper  
9 right-hand corner, it shows me about to catch a ball.  
10 That would be when I was about 15 or 16, that would be  
11 1965 or 1966.

12 Q. Okay.

13 A. The one to the left of that, upper middle, that's  
14 my nephew when he was about three years old, that would  
15 be about 1979.

16 The one on the bottom center is my mother, that's  
17 probably the oldest one, I am not sure when it is but it  
18 is in the '60s I would say.

19 Q. Great.

20 Howard, you are a trial judge, you deal with  
21 litigation all the time, correct?

22 A. Yes.

23 Q. Was the decision to have your family enter this  
24 case entered into lightly?

25 A. No.

1 Q. Why did you do it?

2 A. I had never heard anyone say that there were  
3 restrictions on our use of the beach until I heard of  
4 the lawsuit and felt that we had to intervene to protect  
5 the rights that we thought we had at that point in time.

6 MR. FRAME: Nothing further, your Honor.

7 THE COURT: Mr. Stern?

8 CROSS EXAMINATION

9 BY MR. STERN:

10 Q. Good morning, Judge.

11 A. Hi.

12 Q. I am Paul Stern with the Attorney General's  
13 Office.

14 A. Yes.

15 Q. Could you look at the last page of photographs of  
16 Exhibit 348?

17 A. Is that the one that has my wife holding the  
18 infant?

19 Q. Can I approach the witness, your Honor?

20 THE COURT: Yes, of course.

21 Q. Looking at the last page in the bottom middle --

22 A. Yes.

23 Q. What does that photograph depict?

24 A. I am going to have to put my glasses on for that  
25 one.

1 Q. Sorry about that.

2 A. The bottom middle as we --

3 Q. As you are looking at it right now.

4 A. As I am looking at it now that is my nephew  
5 Daniel actually in a baby stroller down near Sand Point  
6 with Timber Island in the background.

7 Q. When was that taken?

8 A. He looks to be about two years old so that would  
9 be about 1978.

10 Q. And is that stroller in the intertidal area?

11 A. Yes.

12 Q. When you had small ones did you push them on  
13 strollers in the intertidal area?

14 A. We didn't like to bring the stroller down to the  
15 beach because the sand would get in the wheels, my  
16 sister apparently had a different view but we didn't do  
17 it ourselves.

18 Q. When she did it did she push the stroller over  
19 the entire beach in the intertidal area?

20 A. I have to confess I don't have a memory of her  
21 use of the beach in that regard.

22 Q. That's okay.

23 Could you look at the bottom left?

24 A. Yes.

25 Q. What does that show?

1           A.   That's my sister with her son, again my nephew  
2 probably during the same year, 1978, standing in the  
3 water.

4           Q.   Is your -- is the child on the raft?

5           A.   Yes.

6           Q.   And was that a common occurrence?

7           A.   Yes.

8           Q.   Can you tell whether they are standing or --  
9 well, she is standing and he is floating above the  
10 intertidal area or the submerged lands below the low  
11 watermark?

12          A.   It would have to be in the intertidal area  
13 because the tide is up a little bit and she's in the  
14 water.

15          Q.   With respect to engaging in activities such as  
16 that did it matter to you whether the tide was high or  
17 low?

18          A.   No.  You couldn't play ball at high tide, but no.

19                   MR. STERN:  Thank you.

20                   THE COURT:  Mr. Driver?

21                   MR. DRIVER:  No questions.

22                   THE COURT:  Mr. Lachiatto?

23                   MR. LACHIATTO:  Nothing.

24                   THE COURT:  Mr. Willing?

25



## 1 CROSS EXAMINATION

2 By MR. WILLING:

3 Q. Good morning, I am Brian Willing for the Town of  
4 Kennebunkport.

5 A. Yes.

6 Q. Was there public parking in the vicinity of the  
7 New Biddeford Road, Kings Highway, Jefferys Way?8 A. Yes -- actually in the early years people parked  
9 right on Jefferys Way, they don't do that anymore, but  
10 there's parking on New Biddeford Road on Kings Highway.

11 Q. How did you tend to get to the beach, walking?

12 A. Yes.

13 Q. Did you observe members of the public parking in  
14 these areas along Kings Highway and Jefferys Way?

15 A. Yes.

16 Q. And did the public use -- go from those parking  
17 spots and their cars to use the beach?

18 A. Yes.

19 Q. Did they use all of the beach in the same way you  
20 and your family used the beach?

21 A. As far as I would keep track of them, yes.

22 Q. Did you ever in your time at Goose Rocks Beach  
23 observe a beach-front owner objecting to a member of the  
24 public using the beach?

25 A. Never.

1 Q. Did you in your time at Goose Rocks Beach ever  
2 see a beach-front owner ask a member of the public to  
3 move the to public beach?

4 A. Never.

5 Q. Where do you keep your dinghy or did you?

6 A. We don't have it now but we used to keep it right  
7 on the bend between the east end and the west end.

8 Q. Okay, and that -- is that sometimes called Dinghy  
9 Point or Gardiner Point?

10 A. I know -- the Gardiner house was the house on the  
11 point, yep.

12 MR. WILLING: No further questions.

13 THE COURT: Mr. Thaxter?

14 CROSS EXAMINATION

15 BY MR. THAXTER:

16 Q. Good morning, Judge Whitehead. May I call you  
17 Howard?

18 A. Yes.

19 Q. Thank you.

20 Obviously you are a Massachusetts Trial Judge,  
21 right?

22 A. Yes.

23 Q. You know about the Colonial Ordinance?

24 A. Yes.

25 Q. And you know Massachusetts people can own to the

1 low watermark?

2 A. Actually I don't know the status of the law in  
3 Massachusetts in that regard.

4 Q. So you don't do property cases?

5 A. We do sometimes but we have a -- I am on the  
6 Superior Court, we have a separate court, the Land  
7 Court, which primarily deals with those issues.

8 Q. During the time that you were down at the beach  
9 did you ever hear an area referred to as the public  
10 beach?

11 A. Yes.

12 Q. And that's the area generally if you look from  
13 The Tides back to the other end, it is right of  
14 The Tides or at least in the center of that area?

15 A. Right, it would be the area where there are no  
16 houses on the ocean side of the beach.

17 Q. Did you know that the town or that the  
18 conservation trust had acquired nine of those lots?

19 A. No, I did not know that.

20 Q. Now, your wife is Audrey, right?

21 A. No, that is my mother.

22 Q. Your mother, okay, and she is still alive and  
23 still lives in the house?

24 A. Yes.

25 Q. So does she live in the house when you come up

1 and visit her or how does that work?

2 A. She stays in the house from -- nowadays from June  
3 until roughly October. We come up on weekends.

4 Q. Okay, and you testified about playing baseball  
5 down at the beach. It was a pretty friendly place,  
6 right?

7 A. Absolutely.

8 Q. And you knew Bob Scribner?

9 A. Yes.

10 Q. Did he play baseball too?

11 A. Yes.

12 Q. And have you ever been on the Scribner's  
13 property?

14 A. Yes actually.

15 Q. And have you ever seen their private property  
16 sign?

17 A. I think I saw a private property sign not in the  
18 sand but somewhere up beyond the sand, yep.

19 Q. And did that not make you inquire as to  
20 whether -- think about, you know, who owns this  
21 property?

22 A. No.

23 Q. Okay, and when your mother answered these  
24 interrogatories she said, and I can hand them to you,  
25 but that when talking -- when asked about the

1 prescriptive use she said these activities occurred  
2 regularly at all areas of Goose Rocks Beach.

3 A. Yes.

4 Q. And it says while there may have been a certain  
5 area that we used more than others our use was in no way  
6 localized?

7 A. Right.

8 Q. But it's fair to say you didn't spend a lot of  
9 time up in the west end?

10 A. That's correct.

11 Q. And once you get around Sand Point you probably  
12 didn't spend a lot of time from there to the west end?

13 A. Right. We would go there but that wouldn't be  
14 the primary place we would go to.

15 Q. Did you hang out with the Scribners?

16 A. Yes.

17 Q. What other beach-front owner families did you  
18 hang out with?

19 A. There would be several, Lori Baciagalupo who had  
20 the house right on the beach front on Jefferys Way, the  
21 O'Connor family who had the house called the Snow Goose  
22 which I think is beach front, Bob Fanniff and his family  
23 right next to the Snow Goose, the Ramsey family who were  
24 next to the Fanniff family, Bill Cook and the Cook and  
25 Reid family who lived originally down at the other end

1 of the beach, the west end of the beach, the Pingree  
2 family who lived on the west end of the beach almost  
3 right in front of the rocks that come to the beach,  
4 Debbie Kinney was a little older than we were but she  
5 was sort of in our group.

6 Q. Did you ever visit these friends at their houses?

7 A. I visited the Pingrees a lot, Bill Cook  
8 sometimes, the O'Connors and Lori Baciagalupo and the  
9 Ramseys we would see all the time.

10 Q. Is it Bac --

11 A. Baciagalupo, I think it's B-A-C-I-A-G-A-L-U-P-O.  
12 They don't own the house.

13 Q. When -- I think you testified before that when  
14 you were on the beach and saw people sitting in front of  
15 a house you don't know whether they are the owners or  
16 the renters?

17 A. That's right.

18 Q. And you don't know whether --

19 A. Sometimes I would know if they were the owners,  
20 if I knew them.

21 Q. And you don't know whether they are from the  
22 general public or other back-lot owners unless you know  
23 the particular person?

24 A. Correct.

25 Q. Now let's go to the pictures and I may have a

1 little trouble with orientation because I am not sure of  
2 the version I got is the page setup exactly the same,  
3 but let's go to the first one and there's a woman  
4 holding a baby in the upper right of mine but maybe not  
5 yours?

6 A. Okay, the first one --

7 Q. Well, let's go to the first one, pardon me, let's  
8 start at the beginning.

9 There's a little baby silting right there in  
10 white, right?

11 A. I may have this --

12 THE COURT: That would be the very first  
13 page of 348.

14 MR. THAXTER: May I approach, your Honor?

15 THE COURT: Of course.

16 A. Okay, yes.

17 Q. If you look -- I think you identified the one  
18 with the baby as near Jefferys Way?

19 A. Yes.

20 Q. Then you described the next one with the people  
21 sitting in the chair near Jefferys Way?

22 A. Yes.

23 Q. And the next one where everybody is sitting in  
24 the chairs; this a summer day?

25 A. Yes.

1 Q. And you thought that was what year?

2 A. Actually by the age of the kids they look to be  
3 three and one, so that would be 1987.

4 Q. It looks pretty quiet there, right, you don't see  
5 anybody else?

6 A. There is a group on a towel a little farther  
7 down, some chairs set up but except for us and that  
8 group, yes.

9 Q. So when you come down Jefferys Way you go as far  
10 as you need to go to sit down?

11 A. Yes.

12 Q. And so if it is not crowded you are going to be  
13 pretty close to the entrance to Jefferys Way generally?

14 A. Yes, yes.

15 Q. And the next page it shows a woman with a baby?

16 A. Yes.

17 Q. And where is that?

18 A. That's down on Sand Point --

19 Q. Okay.

20 A. -- very close to Little River at low tide.

21 There's a big sand bar at low tide.

22 Q. When you waterskied did you go around the corner  
23 from the end of Sand Point to take off on the waterskis?

24 A. Yes.

25 Q. Okay.



1       A. Well, actually there were times when you couldn't  
2 walk all the way around, the configuration changes  
3 almost every year but we would always start out on the  
4 bank of the river right at the end of Sand Point.

5       Q. The picture -- the picture with the kid in the  
6 wheelbarrow, again, that's near Jefferys Way?

7       A. Yes.

8       Q. And who are the two -- I assume they are your  
9 kids?

10      A. Yes.

11      Q. And that's like 19 -- when?

12      A. That would be again I think now the little one is  
13 walking so that's probably 1988 or so, maybe '89.

14      Q. And I assume that those two people up in the  
15 background are your wife --

16      A. And my sister.

17      Q. And sister, okay.

18                Go to the next page where it looks like nine  
19 pictures there.

20      A. Yes.

21      Q. And I see there's a young woman -- in the middle  
22 on the right-hand side --

23      A. Yes.

24      Q. And you said again that's Jefferys Way?

25      A. That's actually -- she's in a pink bathing suit?

1 Q. Yes.

2 A. That's down Jefferys Way and go over one lot.  
3 That feature just behind her head was actually a little  
4 sun screen that a woman named Dot Smith had put up and  
5 it stayed there for years.

6 Q. Was that Dot Smith's house in the background?

7 A. She lived actually -- she eventually lived up on  
8 the water. At that time I think she was living closer  
9 to the street.

10 Q. If you go over in the middle section there's a  
11 guy on the water and then a group of people?

12 A. Yes.

13 Q. Again, is that Jefferys Way?

14 A. That is -- the group of people is maybe two lots  
15 over from Jefferys Way, yeah -- to the right.

16 Q. And on the next page there's another set of nine  
17 photos.

18 A. Yes.

19 Q. And there's one that you said was '79, it is like  
20 the little boy with the sand castle?

21 A. Yes.

22 Q. Where is that located?

23 A. That's Jefferys Way and just to the left on the  
24 hard sand.

25 Q. So did you go to the left of Jefferys Way

1 sometimes?

2 A. Yes.

3 Q. And that's based mostly on where you can see  
4 there's some space that is convenient?

5 A. Yes, and also to be honest wherever your friends  
6 happen to be, that would govern as much as anything.

7 MR. THAXTER: I have no further questions.

8 THE COURT: Anything further?

9 MR. FRAME: Two things, your Honor. One,  
10 can I offer 348?

11 THE COURT: Objections?

12 MR. THAXTER: None.

13 THE COURT: None. Admitted without  
14 objection.

15 MR. FRAME: Judge, one final question.

16 REDIRECT EXAMINATION

17 BY MR. FRAME:

18 Q. When you were on the beach did you ever think you  
19 needed to have a beach-front owner with you in order to  
20 engages in activities on the beach?

21 A. No.

22 THE COURT: Anything else?

23 Thank you, Judge. You may step down.

24 THE WITNESS: Thank you.

25 (Witness excused.)

1 THE COURT: Mr. Duchette.

2 MR. DUCHETTE: I call Edmund Case, your  
3 Honor.

4 THE CLERK: Please state and spell your name  
5 for the Court.

6 THE WITNESS: Edmund, E-D-M-U-N-D, Case,  
7 C-A-S-E.

8 Thereupon,

9 EDMUND CASE  
10 was called as a witness and, after having been duly  
11 sworn, was examined and testified as follows:

12 DIRECT EXAMINATION

13 BY MR. DUCHETTE:

14 Q. Good morning, Ed.

15 A. Good morning.

16 Q. Where do you currently reside?

17 A. My -- my full-time residence is in Newton,  
18 Massachusetts.

19 Q. Do you own a property at Goose Rocks Beach?

20 A. I do, I own 123 A Kings Highway.

21 Q. How long have you owned that property?

22 A. Since December 2009.

23 Q. Is that a beach-front property or back-lot  
24 property?

25 A. Beach-front property.

1 Q. Before you owned 123 A Kings Highway in 2009 did  
2 you own any other property at Goose Rocks Beach?

3 A. I did. From December of 1986 until April of 2010  
4 my wife and I owned what's now 7 Norwood Lane.

5 Q. And 7 Norwood Lane, was that beach-front property  
6 or a back lot?

7 A. No, that's a back lot.

8 Q. Before 1986 when you purchased 6 Norwood Lane had  
9 you come to Goose Rocks Beach before that time?

10 A. Yes. I first went to the beach in 1971 when I  
11 was in college and I had a job in Dock Square and my  
12 in-laws bought a house on Langsford Road in  
13 Cape Porpoise in 1972 or '3, so my wife and I would come  
14 and visit them and then we started renting at the beach  
15 in 1979 and we rented various properties from 1979 until  
16 1986.

17 Q. Take me through that rental history a little bit.  
18 Where was the first property you rented?

19 A. So the first property was -- it is now 310 Kings  
20 Highway, it was at the east end and it was right after  
21 the road goes off to Sand Point.

22 Q. When you were renting that property how would you  
23 typically access Goose Rocks Beach?

24 A. I think it is what -- I think it is Jefferys Road  
25 or Jefferys Way. I would have to actually look at a map

1 to be sure but I think that's what it was.

2 Q. And at that time -- and do you have children?

3 A. I do. My daughter was one year old when we  
4 started renting and I have a son who's -- he's -- he  
5 wasn't around until a few years later.

6 Q. And so when you get down to Jefferys Way would  
7 you stay right in Jefferys Way or would you go right or  
8 left?

9 A. I don't remember.

10 Q. What was the next --

11 A. With one exception -- excuse me.

12 I do remember that there is a rock at the east  
13 end of the beach that it is submerged at high tide and  
14 fairly prominent at low tide and when the tide goes out  
15 there is a little pool that formed around the rock and  
16 we used to call it -- my daughter's name is Emily and we  
17 used to call it Emily's Rock because when she was little  
18 she liked to go and paddle around in that, in the little  
19 pool that was formed there. That probably was in 1979  
20 and 1980.

21 Q. What was the next piece of property that you  
22 rented?

23 A. We called it the Bosworth cottage and it was on  
24 -- I think it is Crystal Street so it was near  
25 The Tides Inn, behind it sort of to the left. We were

1 there for one year.

2 Q. Do you recall how you would access the beach when  
3 you were in that area?

4 A. I would actually have to look at the map and  
5 figure it out. I think it might have been Belvidere  
6 Avenue and then I think there is an access point there.

7 Q. I might have you do that in a little bit but we  
8 will hold off.

9 What was -- did you rent any other house at  
10 Goose Rocks Beach?

11 A. Yes, then for three years -- we called it the  
12 duplex and it was on Dorrance Road which is also at the  
13 east end, it is a side-by-side place and we rented both  
14 sides, and then from 1984 to 1986 we rented on Norwood  
15 Lane, I think it is either number 9 or number 11.

16 Q. And then you purchased your property at 6 Norwood  
17 Lane in 1986?

18 A. Yes.

19 Q. In that period of time that you were renting  
20 between 1979 and 1986 did any the owners of those  
21 properties ever instruct you with respect to where you  
22 could go, what you could do on Goose Rocks Beach?

23 A. Never.

24 Q. Was there ever any indication that there were  
25 certain parts of Goose Rocks Beach that were private and

1 you needed permission to be there?

2 A. Never. Actually when we started renting we  
3 rented from the Burnhams, and the Burnhams were not  
4 warm-and-fuzzy people is the way I would put it, they  
5 came across very tough in terms of maintenance of the  
6 property and what you could do and what you couldn't do  
7 but they never said anything about where you could go on  
8 the beach.

9 Q. Now I am going to have you go ahead and take the  
10 orange marker and if you could go circle where you  
11 currently own. I will give you a hint, there are not  
12 too many people that are on --

13 A. I don't think it is on here.

14 Q. I think some people have been drawing arrows  
15 through it.

16 A. Okay, Sunset Lane -- circle it?

17 Q. Please.

18 A. (Witness complies.)

19 Q. While you are up there if you could circle, if  
20 you can find it, 7 Norwood Lane where you owned from  
21 1986 to 2009 or 2010?

22 A. (Witness complies.)

23 Q. You can sit back down.

24 A. (Witness complies.)

25 Q. When -- and when you were at 7 Norwood Lane how



1 would you access the beach?

2 A. There's a right-of-way at the end of Norwood  
3 Lane.

4 Q. When you would get down to the beach at Norwood  
5 Lane would you -- again, would you stay right in that  
6 right-of-way or would you go left or right?

7 A. So -- my wife and I, we are not unfriendly people  
8 but we like to sit at the beach by ourselves so -- I  
9 mean, we talk -- we over the years we got to know a lot  
10 of the people who spent time on Norwood Lane and we  
11 would talk to them but we would -- it really became our  
12 practice, we would come -- we would come to the top of  
13 the stairs, there's a wooden staircase down, and we  
14 would go down the stairs and we would say to each other  
15 which way do you want to go, and what we were doing was  
16 by looking to the left, looking to the right and seeing  
17 which way we wanted to go which was probably a factor of  
18 how far we would have to go and where there were the  
19 most people and were people running around or was it  
20 quiet, so we often -- we would go to the left or to the  
21 right.

22 Q. And was it uncommon for you or your family to --  
23 not travel quite a ways in order to find a quiet spot?

24 A. I don't -- it was not uncommon, no.

25 We also a history of boats and the boats tended

1 to -- when coming to shore tended to land where they  
2 would land, and we would end up sitting where the boats  
3 landed.

4 Q. And take me through that. When did you start  
5 owning a boat, was that when you had your property at  
6 7 Norwood Lane?

7 A. Yes, I first had Sunfish, which is a sailboat,  
8 and then I had a 14-foot Boston Whaler with a dinghy  
9 which I anchored out in the bay right in front of  
10 Norwood lane, then I had a 16-foot Boston Whaler and  
11 then I had kayaks.

12 Q. Let's start with when you had your Boston Whaler  
13 and that was moored out. Where would you keep your  
14 dinghy?

15 A. As best as I can recall I kept the dinghy either  
16 in front of the -- I don't know how -- we used to call  
17 it the cinderblock house, I don't actually know the  
18 owners. It is the first house to the east of the  
19 right-of-way or in front of the Gerrish house which is  
20 the next house down.

21 Q. Okay, and both of those homes are near Norwood  
22 Lane?

23 A. Yes.

24 Q. And your Sunfish, where would you -- would you  
25 always take that back up to the house or --

1       A. No, it was too heavy actually. In fact to get  
2 the Sunfish to the beach we would go -- I had a little  
3 set of wheels and I could roll it down to -- there's an  
4 access point near -- I know it as the Flynn house, it is  
5 like one house past that, but we would leave the Sunfish  
6 again where we left the dinghy.

7       Q. And your kayaks?

8       A. Same.

9       Q. When you owned your -- well, let's stop before  
10 that.

11               When you rented between 1979 and 1986, and I am  
12 not going to have you go through the entire list of  
13 activities, I think you heard Judge Whitehead describe  
14 some of the activities that he and his family would do,  
15 would that be similar to the activities that you and  
16 your family would engage in?

17       A. I don't remember a large softball game although I  
18 do remember we had friends visiting once and we created  
19 a baseball field and -- although there were only eight  
20 people.

21               Essentially the same. We would either sit and  
22 read or the kids would swim or go on rafts, we walked a  
23 lot and the boating. Bocce, we played Bocce a fair  
24 amount.

25       Q. And between 1979 and 1986 did any beach-front

1 owner ever try to obstruct your use of the beach?

2 A. No, never.

3 Q. And did you ever seek permission from any  
4 beach-front owners to use the beach?

5 A. Never.

6 Q. Between 1986 and 2010 or 2009, I think there is  
7 some overlap there when you had your property at  
8 7 Norwood Lane, same question, did any beach-front owner  
9 ever try to obstruct your use of Goose Rocks Beach?

10 A. No.

11 Q. Did any -- did you ever seek any permission from  
12 any beach-front owners to use the beach?

13 A. No.

14 Q. You purchased beach-front property in 2009?

15 A. Yes.

16 Q. And then you built your house?

17 A. Yes.

18 Q. And that's where you -- did you sell 7 Norwood  
19 Lane?

20 A. We did.

21 Q. When you sold your property at 7 Norwood Lane did  
22 you tell the buyers that as back-lot owners their use of  
23 Goose Rocks Beach was restricted in any way?

24 A. I did not tell them that but we had some  
25 difficulty selling our house because the buyer was

1 concerned about -- the buyer was concerned about access  
2 to the beach.

3 Q. Do you know why the buyer was concerned about  
4 access to the beach at that point?

5 A. I actually don't know when this lawsuit started,  
6 I don't know if it had started then or there was any  
7 publicity about it.

8 Q. When did you sell your property?

9 A. It was in December of 2009.

10 Q. When you purchased your property at 123 A Kings  
11 Highway did your opinion relative to the use of the  
12 beach change in any way?

13 A. No, not at all.

14 Q. Do you in any way feel that back-lot owners or  
15 beach-front owners -- do you feel that they don't have a  
16 right to use the beach in front of your property?

17 A. No, I don't.

18 Q. Do you feel as though your rights with respect to  
19 the use of Goose Rocks Beach changed in any way between  
20 when you were a back-lot owner or a beach-front owner?

21 A. No, I don't.

22 Q. Did you feel your rights changed in any way from  
23 when you were renting versus being a back-lot owner or a  
24 beach-front owner?

25 A. Nope.

1 Q. As a beach-front owner are you aware of any --  
2 now that you are a beach-front owner is there any  
3 unwritten rule or some sort of -- or have you had  
4 discussion with other beach-front owners that as  
5 beach-front owners you will permit walking on the beach  
6 in front of your property?

7 MR. LEONI: Objection.

8 THE COURT: Sustained. Next question.

9 BY MR. DUCHETTE:

10 Q. I will have you look at Exhibit 284.

11 If I may approach, your Honor.

12 THE COURT: Of course.

13 284, right?

14 Q. Yes.

15 THE COURT: I have got it.

16 Q. Looking at the first photo, the top photo --

17 A. Yes.

18 Q. -- who is in that picture?

19 A. That is my daughter, Emily.

20 Q. And judging by Emily in that photo about what  
21 year was that?

22 A. Well, what I am looking at has a handwritten date  
23 of 1980, which I put on the photo, and the way I  
24 determined that was I have photo albums and they are in  
25 chronological order and I think that the main markers

1 were the birthday parties, so this picture would have  
2 been after her second birthday which would have been in  
3 April of 1980 and before her third birthday which would  
4 have been the following year, that's how I figured out  
5 that this picture was in 1980.

6 Q. And she appeared to be flying a kite in that  
7 photo?

8 A. Yes.

9 Q. Do you know where about on Goose Rocks Beach --

10 A. Yes, I recognize the middle house is what I call  
11 the A-frame which is -- I think you access that off of  
12 Sand Point so that would be down -- we probably went  
13 down Jefferys Way for that -- actually I don't know how  
14 we got there but it's near Sand Point.

15 Q. Somewhere between Jefferys Way and the Little  
16 River?

17 A. Yes.

18 Q. You just indicated that you didn't always -- when  
19 you were down on the east end of the beach you didn't  
20 always access the beach via Jefferys Way?

21 A. If this -- the Summer of 1980 we were staying at  
22 the Bosworth cottage which was on Crystal Street which  
23 was near The Tides, so we must have -- we walked a ways  
24 down to get to this point.

25 Q. So it wasn't uncommon then for you to -- again,

1 The Tides end if you are in the middle section of the  
2 beach and this photo is between Jefferys Way and the  
3 Little River, and that wasn't uncommon for you to go and  
4 find an area on the beach far away from where you were  
5 staying?

6 A. Yes.

7 Q. Okay.

8 I will have you flip to the second page.

9 In the top photo do you recognize any of the  
10 people in that picture?

11 A. It is -- my wife is on the left and my daughter  
12 Emily is standing up. I don't actually recognize the  
13 other child.

14 Q. That wasn't a guest of yours?

15 A. I think it was another young child that was --  
16 must have temporarily befriended.

17 Q. And do you know where on Goose Rocks Beach this  
18 photo is?

19 A. It's somewhere on the east end. I think -- I  
20 think you can see the chimney of what I call the A-Frame  
21 again but I am not absolutely sure.

22 Q. In the top right-hand corner of that photo  
23 there's -- it appears to be a man sitting down on the  
24 hard dry sand?

25 A. Yes.



1 Q. Do you know what that is?

2 A. No, I don't.

3 Q. In the bottom photo do you recognize the people  
4 in that photo?

5 A. That's me when I was thinner and my daughter.

6 Q. And you had a beard then too?

7 A. Yes, I did.

8 Q. Where on the beach is that?

9 A. I believe that that's the Scribner house right  
10 straight behind where we were.

11 Q. Did you know the Scribner family?

12 A. No, I didn't. My sister-in-law rented from them  
13 one year but I never -- I didn't -- I wouldn't have  
14 known Mr. Scribner until a meeting that I went to and he  
15 spoke and identified himself recently.

16 Q. And again what time period was this photo taken?

17 A. Well, I dated this one 1983 and, again, it was  
18 that same -- when I was looking for photos it was that  
19 same mechanism of where in the chronological order of my  
20 family's photos it was.

21 Q. And there's people in the background of that  
22 photo on the beach near the Scribner property.

23 A. Right.

24 Q. Did you know any of those people?

25 A. No, I don't know.

1 Q. Was that a typical -- was it typical to have that  
2 many people on the beach on a summer day in 1983 back  
3 then, is that a typical scene?

4 A. I would say so. I am sure there were days when  
5 there were more and days when there were -- there  
6 actually don't look like there are that many people  
7 there but -- hard to say.

8 Q. So there were days when there were more, days  
9 when there were --

10 A. Definitely, yes.

11 Q. I am going to have you skip ahead a couple of  
12 photos. I am looking at a little kid sitting in a  
13 chair.

14 A. Yes.

15 Q. And who is that?

16 A. That's my daughter.

17 Q. Do you know where on the beach that is?

18 A. Well, it is definitely off of the end of Norwood  
19 Lane. I would -- I think it is probably in front of the  
20 Gerrish property --

21 Q. And the --

22 A. -- based on the houses in the back.

23 Q. And the bottom photo, who is that?

24 A. That is my son.

25 Q. And again where --

1           A.   That's what I would refer to as the cinderblock  
2 house at the end, that is to the immediate east of the  
3 right-of-way at Norwood Lane.

4                   MR. DUCHETTE:   Your Honor, I would like to  
5 offer Exhibit Number 284.

6                   MR. THAXTER:   No objection.

7                   THE COURT:   Admitted.

8                   MR. DUCHETTE:   No further questions, your  
9 Honor.

10                   THE COURT:   Mr. Stern?

11                                   CROSS EXAMINATION

12 BY MR. STERN:

13           Q.   Good morning.   My name is Paul Stern.   I'm with  
14 the Attorney General's Office.

15           A.   Good morning.

16           Q.   Could you look at Exhibit 284 again, the  
17 photographs, in the very first page, bottom photograph?

18           A.   Uh-huh.

19           Q.   We have seen hundreds of photographs.   That has  
20 to be my favorite photograph in this case.   Who is that?

21           A.   That's my daughter and Mickey Mouse.

22           Q.   How old was she then?

23           A.   She was three.

24           Q.   I think there's a year next to that written  
25 down -- don't turn the page.   What year was that taken?

1 A. 1981.

2 Q. Is that on Goose Rocks Beach?

3 A. Yes.

4 Q. Do you know where on Goose Rocks Beach?

5 A. That is -- I recognize the green house on the  
6 right and it is very close to The Tides Inn, it is to  
7 the west of The Tides Inn, not too far down.

8 Q. And she has something around her waist?

9 A. Yes.

10 Q. What is that?

11 A. A swimming tube I think you would call it.

12 Q. Does it have Mickey Mouse on the front?

13 A. It does.

14 Q. Did she take that in the water?

15 A. Yes, I am sure she did.

16 Q. Did it assist her?

17 A. I am sure it did.

18 MR. STERN: Thank you.

19 THE COURT: Mr. Driver.

20 CROSS EXAMINATION

21 BY MR. DRIVER:

22 Q. Good morning, Mr. Case. Richard Driver.

23 A. Good morning.

24 Q. If I understand it you used the beach from 1979  
25 to 1986 on both the east and the west end without any

1 objection from any property owner?

2 A. Yes.

3 Q. Then you bought 7 Norwood. Why did you buy  
4 7 Norwood?

5 A. I don't remember specifically. It became  
6 available, we liked the location, we had rented for  
7 three summers right across the marsh from it, my wife  
8 and I wanted to have a place there, my in-laws had a  
9 place in Cape Porpoise. I don't remember more  
10 specifically than that.

11 Q. Did the beach have anything to do with you  
12 purchasing 7 Norwood Lane?

13 A. Yes. Well, we love Goose Rocks Beach, I mean  
14 we -- by that time we wanted to spend time there.

15 Q. If you didn't have access to the beach would you  
16 have purchased 7 Norwood Lane?

17 A. Probably not.

18 Q. What was on 143 when you purchased the property,  
19 143 Kings Highway?

20 A. It is 123 A actually.

21 Q. 123 A.

22 A. 123 A was the only unbuilt lot on the waterfront  
23 and there was a path through the middle of it and there  
24 was what we call a lean-to, which is -- there are four  
25 poles and a roof that's probably eight by six or

1 something like that.

2 Q. There was no house on that?

3 A. No house.

4 Q. Is it the same reason in purchasing 7 Norwood  
5 that you wanted to have access to the beach?

6 A. My wife said endlessly that she really would like  
7 to see and hear the ocean for many years.

8 Q. Was your new house featured in some magazine?

9 A. Yes, it was.

10 Q. Which one?

11 A. Maine Home and Design.

12 MR. DRIVER: Thank you.

13 THE COURT: Mr. Lachiatto?

14 MR. LACHIATTO: No questions, your Honor.

15 THE COURT: Miss Hewey?

16 CROSS EXAMINATION

17 BY MS. HEWEY:

18 Q. Good morning, Mr. Case.

19 A. Good morning.

20 Q. Did I understand you that before you started  
21 renting in the Goose Rocks zone you had come to  
22 Goose Rocks Beach while you were staying at  
23 Cape Porpoise?

24 A. Yes, first -- I worked for two summers in  
25 Dock Square and lived in Dock Square and I went to the

1 beach then, and then my in-laws bought property on  
2 Cape Porpoise and we went and in visiting them we would  
3 go to the beach.

4 Q. I just want to focus again on the three years  
5 before you were staying in the Goose Rocks Beach zone.

6 During those three years did you use the beach in  
7 the same manner you have testified about before?

8 A. It was actually -- it would be from 1971 until  
9 1979, so --

10 Q. A little more than three years.

11 A. Well, other than -- basically yes, we didn't have  
12 a child until -- so we weren't tending to a child until  
13 1978. Before that my wife and I did go to the beach,  
14 sometimes we rode our bikes to the beach, sometimes we  
15 drove to the beach and we basically sat on the beach and  
16 walked.

17 Q. And when you were using the beach as a member of  
18 the public did anybody tell you that you had to go to  
19 the public beach or that you had to move on?

20 A. No, never.

21 Q. Now, you testified about leaving your boat in  
22 front of the Gerrish home and the cinderblock home. Did  
23 you get specific permission from the owners to leave  
24 your boat there?

25 A. No.

1 MS. HEWEY: No further questions.

2 THE COURT: Mr. Leoni?

3 MR. LEONI: Your Honor, unless there's an  
4 objection would you mind if we took a morning recess?

5 THE COURT: No. Why don't we take -- we  
6 will take 15 minutes. We will be back at 10:30, John?

7 THE JUDICIAL MARSHAL: Yes, your Honor.

8 (Thereupon, a recess was taken, and then the  
9 proceedings continued as follows:)

10 THE COURT: Good morning again.

11 Mr. Leoni, questions for Mr. Case.

12 CROSS EXAMINATION

13 BY MR. LEONI:

14 Q. Good morning, Mr. Case.

15 A. Good morning.

16 Q. My name is Ben Leoni and I represent the  
17 plaintiffs.

18 Do you mind if I call you Ed?

19 A. That's fine.

20 Q. Ed, you testified that since living at Norwood  
21 Lane when you come to access the beach down from Norwood  
22 Lane you will come to the end of the steps and you have  
23 a tradition of looking left and then looking right and  
24 trying to find an area that is quiet for your family to  
25 go sit?



1           A.   Yes.

2           Q.   We are going to take a look at some  
3 interrogatories that you sent us and I will give you a  
4 copy of these, these are Plaintiff's Exhibit 6, starting  
5 at page 228 -- may I approach, your Honor?

6                   THE COURT:   Sure.

7           Q.   I am going to turn your attention to page 2 of  
8 your interrogatories, there's question 2 which I think  
9 has been repeated many times through the past couple of  
10 days where it asks you to identify each and every  
11 particular property, use, et cetera.

12                   Could you do us a favor and please read the  
13 answer to your interrogatory? I have highlighted it for  
14 you to make it easier.

15           A.   During our period of ownership at Goose Rocks we  
16 regularly walked the entire length of Goose Rocks Beach  
17 all year long end to end. In addition we enjoy picnics,  
18 landing, launching boats and sitting on the beach.

19                   We specifically remember going all the way down  
20 to the east end of the beach with our daughter as a  
21 young child, she was born in 1978 so this would be from  
22 1979 to 1986 to a large rock that is just off shore at  
23 the end, we call it Emily's Rock and there was a pool  
24 that formed at high tide where she would sit in the  
25 water.

1           These activities occurred regularly at all areas  
2 of Goose Rocks Beach, however, we preferred our privacy  
3 so we often searched for a quiet area that was not  
4 crowded. This was not difficult to do on Goose Rocks  
5 Beach.

6           Q. Now, is it fair to say that since you purchased  
7 your home on Norwood Lane and started using Norwood Lane  
8 which was I believe 1986 through 2010 that those  
9 activities in fact occurred regularly in the area at the  
10 end of Norwood Lane?

11          A. Well, I would say most of the time we were close  
12 to Norwood Lane but we did --

13          Q. Occasionally?

14          A. I guess it depends on how you define occasionally  
15 but we would from time to time -- I heard testimony this  
16 morning about Sand Dollar Beach, I never called it that  
17 but we collected baskets and baskets of sand dollars  
18 walking all the way down to -- all the way to the west  
19 end.

20                 My wife is a very serious walker, we walk for  
21 like an hour and a half every day we are at the beach  
22 and that's the entire length of the beach. So, I mean,  
23 that's the best I can answer your question.

24          Q. So you regularly walk the entire beach and  
25 collect sand dollars?

1           A. We regularly walk the entire beach. When my  
2 children were younger we spent a lot of time going down  
3 I would say to the west end, part of which was  
4 collecting sand dollars, yes.

5           Q. When you say the west end, you are talking about  
6 coming down Norwood Lane and coming in this direction to  
7 the west end?

8           A. Yes.

9           Q. Now we are going to go a few pages back and it  
10 will be your answer to question 10 -- it is actually --  
11 your answer is on the last page and I am not sure we  
12 have done this question so I am just going to read the  
13 question into the record, it is pretty short, and then  
14 have you read your answer.

15                   Are you there yet?

16           A. Yes.

17           Q. As to each and every affirmative defense alleged  
18 by the TMF Defendants, and their answer, explain the  
19 basis of such defense and explain and describe each fact  
20 and legal argument to support that defense including  
21 identifying each person with knowledge of the same.

22                   Then your answer is on the next page.  
23 Specifically moving down, we can read your entire answer  
24 if there will be an objection, but what I would like you  
25 to focus on is the sentence that begins with we tended.

1 It is about halfway through your answer.

2 A. We tended to like to sit in a quiet area so our  
3 habit was to walk down the right-of-way at the end of  
4 Norwood Lane and then to spread out to either the east  
5 or the west, whichever was less crowded.

6 Q. Okay, and the previous sentence right before that  
7 you specifically referenced sitting in front of the  
8 Gerrish house, correct?

9 A. Yes.

10 Q. So you would come down Norwood Lane, you would  
11 look left and right and sometimes there would be people  
12 right in front of Norwood Lane, correct?

13 A. Yes.

14 Q. So you wouldn't want to sit there, you would want  
15 to move sometimes to the left, sometimes east and  
16 sometimes go and sit in front of the Gerrish house,  
17 correct?

18 A. Right.

19 Q. Because that was the area that was more quiet and  
20 gave you some privacy?

21 A. Right.

22 Q. The Gerrish home is only two properties to the  
23 east of the end of Norwood Lane; isn't that correct?

24 A. Yes.

25 Q. You rented a house near The Tides for a few

1 years?

2 A. Yes.

3 Q. And you said you don't remember exactly where you  
4 accessed the beach when you were down there. Do you  
5 recall seeing the beach in front of The Tides when you  
6 were renting there?

7 A. Yes, I think I said I would have to look at the  
8 map to figure it out but, yes, I also remember what the  
9 beach -- yes.

10 Q. Did you see guests of The Tides using that beach?

11 A. I didn't know who the people were. I am sure  
12 that happened.

13 Q. It was difficult to tell guests from The Tides  
14 from everybody else, wasn't it?

15 A. Yes.

16 Q. Okay. Do you permanently live down on  
17 Goose Rocks Beach now?

18 A. Not yet.

19 Q. Going to retire?

20 A. It is in discussion.

21 Q. Good for you.

22 A. It is a beautiful spot.

23 Q. Yes.

24 So is it fair to say that when you come up to  
25 Goose Rocks Beach a lot of the use has been on weekends?

1       A. We try to come for two weeks in the summer and  
2 then otherwise it is weekends. We do come -- we come  
3 every three weeks because my father-in-law lives in  
4 assisted living in Kennebunk and my wife is in charge of  
5 his medication so we have to come every three weeks so  
6 we are here at that frequency.

7       Q. I am just trying to get a general feel for when  
8 you are up at Goose Rocks Beach and that is usually two  
9 full weeks in the summer and other than that on  
10 weekends?

11       A. Yes.

12       Q. And you mentioned that you sometimes stored a  
13 dinghy on your -- on the beach to reach your boat?

14       A. Yes, that was back on Norwood Lane.

15       Q. Okay, and did you have a dinghy the entire time  
16 that you owned Norwood Lane?

17       A. No, not the entire time.

18       Q. The latter years?

19       A. You know, I honestly -- I would really have to  
20 try to sort out when the years I had the Boston Whalers.

21       Q. When you would come up for the weekends during  
22 your time in Norwood Lane you would bring your dinghy  
23 down to the beach to access your boats, you testified  
24 that you would sometimes bring your dinghy back up and  
25 keep it in front of -- I think you called it the

1 cinderblock house sometimes?

2 A. Yes.

3 Q. Or sometimes the Gerrish house?

4 A. Yes.

5 Q. And those are near the end of Norwood Lane?

6 A. Yes.

7 Q. And would you -- at the end of the weekend when  
8 you left on Sunday would you bring your dinghy back  
9 somewhere or would you just leave it on the beach all  
10 week?

11 A. So -- I think that we -- I think that the  
12 dinghies were probably left there during the two weeks  
13 or maybe it was three weeks some summers if we were  
14 lucky that we were there. I think when we were just  
15 coming on weekends, I don't -- I don't -- actually I  
16 honestly don't remember.

17 Q. Okay.

18 A. We might have left it there or put it away. We  
19 rented our house at Norwood Lane and we rented our new  
20 house at 123 A also so during that time period we  
21 wouldn't have left our boats down there.

22 Q. When did you rent your house?

23 A. We rented our house during the summer.

24 Q. How many weeks would you rent your house for?

25 A. Probably -- well, depending on the season we

1 would try to get as many weeks rent as we could so it  
2 would be up to eight, and that was the Norwood Lane  
3 house, and then this summer we rented our house for four  
4 weeks.

5 Q. I probably missed your testimony about renting or  
6 maybe you didn't talk about renting your property in  
7 direct so I would just like to ask you a few questions  
8 on that. Were those weekday rentals or would people  
9 rent for the span of a full week?

10 A. It was at least a week.

11 Q. At least a week?

12 A. Yes.

13 Q. So when you were renting the property for at  
14 least a week you wouldn't also be staying in the  
15 property with the renters, would you?

16 A. Correct.

17 Q. A few minutes ago you mentioned that you never  
18 recall any beach-front owners trying to obstruct your  
19 use of the beach.

20 A. Yes.

21 Q. Is it fair to say that you also try not to  
22 obstruct other people's use of the beach?

23 A. Yes.

24 Q. And that includes beach-front owners?

25 A. Yes.



1 Q. The time that you were renting Norwood Lane, we  
2 will focus on that area for now, did you ever see a  
3 lifeguard stand set up at the end of Norwood Lane?

4 A. No.

5 Q. Ever see garbage cans on the beach of Norwood  
6 Lane?

7 A. No.

8 Q. When you came down to Norwood Lane from Route 9  
9 would you access that by going through Dyke Road?

10 A. Usually, but sometimes we would -- if we were  
11 north or east we would go down to New Biddeford Road  
12 also.

13 Q. When you came down Dyke Road to access your  
14 property on Norwood Lane from the '80s to 2010 and you  
15 came down here there was no public parking up Dyke Road  
16 at that time, was there?

17 A. I actually don't remember. I know there is now  
18 but I don't remember when it started.

19 Q. But you don't remember having public parking  
20 there -- you said you know there is now but you don't  
21 remember having public parking there in the '80s,  
22 correct?

23 A. That's correct, yes.

24 Q. And the '90s, correct?

25 A. I don't remember.

1 Q. Since the '80s and '90s is it fair to say that  
2 there's been a noticeable increase in the volume of  
3 people using Goose Rocks Beach?

4 A. I would not agree with that, no.

5 Q. How would you say -- been consistent?

6 A. I think it's been consistent, yes.

7 Q. Okay.

8 Let's take a look at your photos, those are  
9 Exhibit 284. Are you there?

10 A. Yes.

11 Q. The top photo, you identified that as being your  
12 Sand Point, and that's a photo of your daughter in 1980,  
13 the Summer of 1980. Nobody else on the beach except for  
14 your daughter, correct?

15 A. In the photo, correct.

16 Q. From the photo, right. I mean, I understand that  
17 the photos are just a snapshot in time so they just show  
18 what is in the photo.

19 In the bottom photo nobody else on the beach,  
20 correct?

21 A. Correct.

22 Q. And that's in the area that you identified as  
23 sort of off of Dinghy Point?

24 A. Yes.

25 Q. In fact, your daughter is standing directly in

1 front of the Dicesare property that's on the north side  
2 of Dinghy Point, correct?

3 A. I don't know what that property is. Is that the  
4 green house?

5 Q. No, she is standing in front of a white house  
6 that is behind her.

7 A. If you say so. I don't know the house but --

8 Q. Okay.

9 A. -- yeah.

10 Q. Would you agree that it appears that there's  
11 portions of a house sticking out from either side of her  
12 arms?

13 A. Yes, sure.

14 Q. That's fine.

15 The next page, and this is again in the '80s, top  
16 photo, you don't see anybody else on the beach except  
17 for that little -- appears to be a couple on the far  
18 right-hand side?

19 A. Well, behind my wife it looks like -- I can see  
20 what looks like somebody else also.

21 Q. Right.

22 Do you know the Scribners?

23 A. I have -- I was -- I have never spoken to them  
24 personally.

25 Q. You have heard of them?

1           A. I heard Mr. Scribner speak at a meeting and he  
2 identified himself as who he was. I have never spoken  
3 to him.

4           Q. You stated that you have no idea who these other  
5 people are outside of your family members?

6           A. Correct.

7           Q. So they could be beach-front owners, correct?

8           A. They certainly could, correct.

9           Q. Next page, the children digging a hole?

10          A. Yep.

11          Q. Now, is that The Tides Inn that you can sort of  
12 see? I am having a little trouble figuring out where  
13 this is on the beach, right over the little blonde boy's  
14 head.

15          A. I think so, yes.

16          Q. You can actually see that there's power lines on  
17 the south side of where those houses are, correct?

18          A. Yes.

19          Q. So this is in the vicinity where there's no  
20 houses on the south side of Kings Highway, which would  
21 place you in the public beach section of the beach?

22          A. Yes.

23          Q. Back in the '80s?

24          A. Yes.

25          Q. Very few people in that picture, correct?

1           A.    There are a few.

2           Q.    That's the '80s when you testified that there's  
3    been no increase to your knowledge of the use of  
4    Goose Rocks Beach since then?

5           A.    I don't know where more people would come from to  
6    have increased use, that's the basis of my answer.  
7    There isn't anymore parking --

8           Q.    I didn't ask you why -- what your basis was, I  
9    just asked you whether you have seen increase of use of  
10   the beach.

11          A.    Okay.

12          Q.    Next page -- we are almost done -- top photo.  
13   You testified that you believe that you were sitting  
14   right in front of the Gerrish property, correct?

15          A.    I think my daughter is sitting, yes.

16          Q.    Wasn't it true that the stairs that you see  
17   behind your daughter's head, those are the stairs coming  
18   from Norwood Lane, correct?

19          A.    I don't believe that's possible actually because  
20   I recognize the very modern house in the upper right and  
21   that's a little bit further down and it doesn't appear  
22   to be enough distance. I could be wrong. I mean, it  
23   could be the angle of the photo but --

24          Q.    Does that property in the top right photo, isn't  
25   that the Gerrish property?

1           A.   No.   The top right -- the one that is labeled  
2   1986?

3           Q.   Yes.

4           A.   That -- I don't know the owner but it is a very  
5   distinct house.  It is modern, it is next to Peter Gray,  
6   I could look on the map and tell you which side.

7           Q.   Looking at that photo in 1986 there is only one  
8   other small group of people in the background and they  
9   are right at the foot of those stairs?

10          A.   Yes.

11          Q.   The photo just below it, is that your son --

12          A.   Yes.

13          Q.   -- wearing the Yale shirt?

14          A.   Yes.

15          Q.   The property on the far right that you can see a  
16   portion of, is that the Gerrish property or is that the  
17   one that you --

18          A.   Yes.

19          Q.   Okay, that's the Gerrish property, so this is  
20   right at the end of Norwood Lane?

21          A.   Yes.

22          Q.   And you dated this 1988?

23          A.   Yes.

24          Q.   No other people on the beach.

25                Next page.

1           Next page. These are taken in the '90s looking  
2 -- it appears to be looking east. Were these photos  
3 taken on one of your walks up and down the beach?

4           A. Actually we probably were sitting and then -- we  
5 probably were sitting and then got up to take the  
6 picture. We used to send holiday cards with the four of  
7 us sitting on the beach.

8           Q. You can see a large stretch of that beach. See  
9 any other people on the beach in those photos?

10          A. Well, I actually do.

11          Q. Where is that?

12          A. Well, it is hard to make out but, I mean, I see  
13 what appear to be people in the top one. I also see  
14 what looks like a boat or a raft pulled up with someone  
15 sitting in front of it.

16                 The bottom one I see a boat at least. It is very  
17 hard to make out on the bottom of it -- people.

18          Q. Is it fair to say that's what the beach still  
19 looks like?

20          A. Depending on the weather and, you know, whether  
21 it is a weekend and things like that. It is so hard --

22                         THE COURT: It's what the beach looked like  
23 that day in any event.

24          A. Yes.

25                         MR. LEONI: Okay. That's all I have. Thank

1 you, Mr. Case.

2 THE COURT: Are we all set? We are not all  
3 set.

4 REDIRECT EXAMINATION

5 BY MR. DUCHETTE:

6 Q. You were asked some questions by Attorney Leoni  
7 regarding walking up and down the beach. Are you aware  
8 of any written or unwritten agreement among beach-front  
9 owners with respect to walking on the beach?

10 A. Nope.

11 Q. You currently own beach-front property.

12 A. Yes.

13 Q. Why did you join the suit?

14 A. Well, I have -- well, my answer to that is that I  
15 find the goals of this lawsuit to be really offensive  
16 and I, over 24 years, I got to know people, you know, my  
17 neighbors who I am now friendly with on Norwood Lane and  
18 there was completely unrestricted use of the beach and I  
19 couldn't imagine why because I had the good fortune of  
20 getting a beach-front property that I would all of a  
21 sudden say oh, things have changed, no one should sit in  
22 front of my property. I just -- it is just -- and then  
23 I could go on but I would say that is essentially it.

24 MR. DUCHETTE: No further questions.

25 THE COURT: Anything else?



1 MR. LEONI: A couple of quick followups.

2 RE CROSS EXAMINATION

3 BY MR. LEONI:

4 Q. In response to Andre's question you said the  
5 goals of this lawsuit you found really offensive.

6 A. Uh-huh.

7 Q. What are the goals of this lawsuit?

8 A. Well, to -- my understanding is that part of it  
9 is that people would not be allowed to recreate on -- on  
10 the beach basically.

11 Q. So you think -- you joined this lawsuit because  
12 you think that if you didn't you would not be able to  
13 recreate anywhere on the beach?

14 A. Well, I would be able to because I own a  
15 beach-front property but I felt that everyone else  
16 should be able to too.

17 Q. And the plaintiffs in this case have testified  
18 that they do not have a problem with reasonable  
19 recreational use of the property --

20 MR. DUCHETTE: Objection.

21 THE COURT: Sustained.

22 BY MR. LEONI:

23 Q. You just stated a moment ago that you believed  
24 that you owned beach-front property, correct?

25 A. I do own a lot that is on the beach front, yes.

1 Q. Do you think that you own the beach?

2 A. I actually don't know. My deed does not -- my  
3 understanding is that my deed only goes to the seawall  
4 and, I don't know, I have never researched and I have  
5 never been advised about whether I have some other basis  
6 of owning the beach in front of my house. I don't  
7 really care actually.

8 Q. If you saw use in front of your property now that  
9 you own beach-front property that you found  
10 objectionable do you believe that you should be allowed  
11 to go down and ask that activity to stop?

12 A. If someone was doing something that was really,  
13 you know, bothering me -- I don't know whether it would  
14 be because I have a right to but I would like to think I  
15 could go ask someone to stop, and I think if there were  
16 problems actually I think that -- I mean, if someone is  
17 disturbing the peace there is a remedy for that.

18 I mean, I sympathize if there have been problems  
19 and I think there should be remedies for it but not to  
20 ban, essentially declare the beach to be private  
21 property.

22 MR. LEONI: Okay. No further questions.

23 MR. DUCHETTE: Nothing further.

24 THE COURT: Thank you, Mr. Case. You are  
25 all set.

1 THE WITNESS: Thank you.

2 (Witness excused.)

3 THE COURT: Mr. Frame.

4 MR. FRAME: Ellen Nixon, your Honor.

5 THE CLERK: Please state and spell your name  
6 for the Court.

7 THE WITNESS: Ellen Nixon, E-L-L-E-N  
8 N-I-X-O-N.

9 Thereupon,

10 ELLEN NIXON

11 was called as a witness and, after having been duly  
12 sworn, was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MR. FRAME:

15 Q. Good morning. Can you take the orange pen,  
16 Ellen, and identify on the map where it says TMF  
17 Defendants and circle your family's property on Goose  
18 Rocks Beach?

19 A. Yep.

20 Q. Great.

21 With the red pen, Ellen, can you -- it may  
22 already be marked but I want to make sure -- can you  
23 circle the route or routes your family would take to get  
24 onto Goose Rocks Beach from your home?

25 A. Yep, primarily right here.

1 Q. Great.

2 You can have a seat now, thanks, Ellen.

3 A. (Witness complies.)

4 Q. Your home or your family's home is on the west  
5 end, correct?

6 A. Correct.

7 Q. And can you just describe briefly -- you are  
8 blocking the Judge's view -- describe briefly the route  
9 that you took to get down from your home?

10 A. Our right-of-way which is directly in front of  
11 our property.

12 Q. Great.

13 What's the address for your property at  
14 Goose Rocks Beach?

15 A. 112 Kings Highway.

16 Q. You said there's a right-of-way?

17 A. There is.

18 Q. Is that in a deed?

19 A. Yes, it is.

20 Q. Does the deed say anything about what you can and  
21 can't do on the beach?

22 A. It does not.

23 Q. Now that we have the formalities out of the way  
24 let's get a little bit of history.

25 When did you first start coming to Goose Rocks

1 Beach, Ellen?

2 A. 1968.

3 Q. I have to do this to everyone, I apologize. How  
4 old were you in 1968 when you first started coming?

5 A. Eight.

6 Q. Eight years old, okay.

7 Did your family -- how did you get to Goose Rocks  
8 Beach, what drew your family to Goose Rocks Beach?

9 A. Well, we live in Connecticut primarily, and my  
10 mom back then we were -- we had five children, my mom  
11 and my dad, and she was looking for a beach to bring all  
12 our family to to begin a family vacation, five young  
13 kids looking for a beach, had heard about -- we had been  
14 up a year before up to Kennebunk, had heard about a  
15 family beach.

16 She wrote -- didn't really use phones back then  
17 -- wrote to the Chamber of Commerce, to the Chamber of  
18 Commerce in Kennebunkport saying, hey, I heard that  
19 there is beaches in your area. I am looking for a nice  
20 family beach to bring a family of seven to, you know,  
21 can you help me out.

22 They wrote her back and said we have the perfect  
23 family beach for you, and the reason it is a perfect  
24 family beach in the letter what they said was that it is  
25 a very safe beach because there's no undertow, because

1 the tide goes out so far and, you know, it is safe for  
2 young children, puddles form, yaada yaada, provided  
3 realtors names, that kind of thing.

4 Q. Great.

5 Approach?

6 THE COURT: Yes.

7 Q. So you are one of five kids?

8 A. I am.

9 Q. Is your mom here in the courtroom today?

10 A. She is.

11 Q. The woman out back?

12 A. Betsy Nixon.

13 Q. Great.

14 Did -- that first Summer of '68 did you rent the  
15 place?

16 A. We did.

17 Q. Do you recall where that place was on the beach?

18 A. I do, it ended up being -- we rented the house  
19 that we currently own.

20 Q. How many years did you rent the house you  
21 currently own?

22 A. We rented -- that specific house for two or three  
23 summers.

24 Q. Then did your family buy it after that point?

25 A. No, we did not. We rented from 1968 to 1978 when

1 Helen Towne's whole properties went on sale and we  
2 bought in 1978, so for 10 years we rented.

3 Q. Is that a year-round home or is that a summer  
4 home?

5 A. It is a year-round home.

6 Q. Does your mom live there year-round?

7 A. She does not, she and my dad have additional  
8 properties in Connecticut.

9 Q. Does anyone live there year-round?

10 A. My sister lives there year round.

11 Q. Great.

12 A. One of the five.

13 Q. Excuse me?

14 A. One of --

15 Q. And starting in 19 -- well, from 1968 to 1978 how  
16 often would your family come up for the summer, what  
17 stretch of time?

18 A. From 1968 to 1978 we would come for a minimum of  
19 three, four weeks, anywhere from that to the entire  
20 summer which is from the time we got out of school until  
21 the time we had to go back to school.

22 Q. Great.

23 When you bought the property from the Towne's  
24 estate in '78 did your family's use in terms of the  
25 length of time at Goose Rocks Beach change or evolve

1 over time?

2 A. It did because we now were able to come off  
3 season a little bit, we could come up in March, in  
4 April. We hadn't winterized it at that point in 1978  
5 when we bought it, it was still a cottage so -- but we  
6 were able to certainly extend our season and then we  
7 winterized it and updated it.

8 Q. Great.

9 Where do you fit in the picking order of the five  
10 kids?

11 A. The oldest is Howie, then came my brother Dave.  
12 My brother Dave passed away at Goose Rocks. Then comes  
13 myself, I am Ellen, then Sheila who resides at  
14 Goose Rocks and then Tim.

15 Q. So you are right in the middle?

16 A. I am right in the middle.

17 Q. Is Howie the marathon runner?

18 A. No, that is Tim.

19 Q. Okay, sorry.

20 From the time you were eight through your --  
21 let's say to your teenage years, you were primarily  
22 renting on the west end, correct?

23 A. Correct, except for just one time which -- Helen  
24 Towne was very old, we had rented a cottage from Helen  
25 Towne down on the west end, when we showed up our big



1 family with the seven of us she had double rented it,  
2 this was at the very end of her life so we had arrived  
3 without any house and we ended up staying over VARRIER'S  
4 store, I don't know if you know --

5 Q. Is that more down -- if I recall some earlier  
6 testimony it is more towards the center of the beach?

7 A. Right. Everybody refers to it now I guess as the  
8 east end. We call it the other end.

9 Q. So except for that one summer where you were  
10 on -- you were renting on the east end, your family's  
11 use or your family's location of your home has been or  
12 your rental home has been on the west end?

13 A. It has.

14 Q. Great.

15 When you were a kid were you constrained to  
16 staying in that west end of the beach?

17 A. No.

18 Q. Did you access other parts of the beach during  
19 that time?

20 A. Yes, and we have friends basically from Dyke Road  
21 to the west, we have multiple friends along the way that  
22 we developed over 40 years of use and they live, you  
23 know, primarily from Dyke Road west, so.

24 Q. Great.

25 I got to believe and I am just guessing here that

1 with five kids you guys got shipped off to the Goose  
2 Rocks Beach Association once in a while?

3 A. We did, we did. We spent more time at Charlie  
4 Butts' store buying candy but we did go to the  
5 Goose Rocks Beach Association a few times.

6 Q. So when you were -- you have heard the earlier  
7 testimony regarding kind of the uses along the beach,  
8 you heard Mr. Case, you heard Howard Whitehead -- I  
9 think you were here for Judge Whitehead this morning.

10 The uses that you as a kid up to the time -- we  
11 will take it up to the time you bought, your family  
12 bought that place in '78, is your use of the beach  
13 relatively consistent with the uses that you have heard  
14 from Mr. Case and Judge Whitehead?

15 A. Yes.

16 Q. Anything different that you guys did or that  
17 was -- you were here, you said you would come up off  
18 season as well, right?

19 A. Yes.

20 Q. Starting in '78 when your family bought the  
21 property, were no longer renters, did your use change  
22 because you were now owners in the Goose Rocks Beach  
23 zone?

24 A. Absolutely not, no.

25 Q. Great.

1           When you were out with -- I assume you played  
2 with your siblings on the beach?

3           A.    We did.

4           Q.    After '78 did you continue -- you're now 18 at  
5 that point --

6           A.    Yes.

7           Q.    Did you continue to come to Goose Rocks Beach?

8           A.    Absolutely at that point with friends,  
9 boyfriends.

10          Q.    Great.

11                Have you been to -- has there ever been a summer  
12 that you haven't been to Goose Rocks Beach?

13          A.    There has never, no -- since 1968.

14          Q.    What amount of time do you generally come to  
15 Goose Rocks Beach, is it now mostly weekends or do you  
16 come for a week or two at a time? How does that work?

17          A.    I begin coming weekends in March. I usually get  
18 up for, you know, a weekend in March and then in April I  
19 spend a good week, usually about 10 days. My husband  
20 and I have four children so based around school  
21 schedules.

22                In May I am always here, Memorial Day Weekend as  
23 well as one other weekend in June I come for about 10  
24 days, in July I am here for a good week, this year it  
25 was 10 days. In August I am typically here two to three

1 weeks.

2 I am here Labor Day Weekend and will continue  
3 that in September and October, our younger children are  
4 back in school so I come primarily on weekends.

5 Q. And you stay at the house --

6 A. I stay at 112 Kings Highway.

7 Q. Great.

8 You are one of five kids in your family. You  
9 have four kids now of your own. Has the experience that  
10 you observed -- your children's experience at Goose  
11 Rocks Beach differed at all from your experience on  
12 Goose Rocks Beach growing up?

13 A. No, no.

14 Q. When you first started coming up in '68 did your  
15 parents give you any instructions on what you were  
16 allowed to do on the beach and where you were allowed to  
17 go on the beach other than safety things?

18 A. No.

19 Q. With your four kids, Ellen, do you provide them  
20 with any instruction on where they are allowed to go on  
21 the beach and where they are not allowed to go on the  
22 beach?

23 A. No other than my youngest son, I still have some  
24 tight reins on with regards to how far he can go, you  
25 know, away from the house at any given time.

1 Q. Is that a safety issue?

2 A. Yes.

3 Q. For the 10 years -- I should have asked you this  
4 earlier and I should apologize for not going in a linear  
5 fashion here. For the 10 years that you folks were  
6 renting do you recall ever being given instructions by  
7 Helen Towne as -- you said you rented directly from her,  
8 right?

9 A. We rented from Helen Towne for about two or three  
10 years but then we rented with Doris Reando, she had  
11 several cottages.

12 Q. Great.

13 So Helen or Doris, do you recall them ever giving  
14 instructions to you or your parents about where you  
15 could go on the beach and what you could do on the  
16 beach?

17 A. No, there was never any.

18 Q. You said that from kind of west of Dyke Road down  
19 to the west end that you over the years you and your  
20 siblings have made a number of friends in that area?

21 A. Uh-huh.

22 Q. Fair to say that you during that time have  
23 used -- have recreated on a lot of that area?

24 A. We have.

25 Q. At your end of the beach, the west end you are at

1 the end of the beach, correct?

2 A. Correct.

3 Q. But there is -- there's some parking spots down  
4 there for the public.

5 A. There are.

6 Q. There are some ways for the public to get to the  
7 river to enjoy that?

8 A. Yes, and we use that as well.

9 Q. Over the years has the use that you have observed  
10 of that end of the beach, has that increased or  
11 decreased or stayed relatively consistent?

12 A. It is absolutely the same as ever. I don't  
13 notice any difference truly.

14 Q. When you -- you're friends or at least neighbors  
15 with some of the beach-front owners --

16 A. Correct.

17 Q. -- correct?

18 So you have been -- strike that.

19 Have you been on the beach at times with the  
20 Almeders?

21 A. Yes.

22 Q. The Shermans?

23 A. Yes.

24 Q. Gregorys?

25 A. Yes.

1 Q. Coughlins?

2 A. No.

3 Q. They are not out very much?

4 A. They are -- I cannot recall a time them ever  
5 being on the beach.

6 Q. And have you -- have you been engaged in  
7 activities with them on the beach, with those folks?

8 A. Absolutely.

9 Q. Have you ever seen the Almeders, the Gregorys,  
10 the Shermans or any other -- any of those other  
11 beach-front owners, have you ever seen them tell someone  
12 to get off the beach?

13 A. Never.

14 Q. Have you ever seen them tell someone you can be  
15 on the beach but you need to go east young man or woman  
16 to the public section of the beach?

17 A. Never.

18 Q. And have you ever felt that you couldn't be on  
19 the beach unless you were in front of one of those  
20 friend's houses?

21 A. No.

22 Q. Have you ever in your -- I will do the math here  
23 -- 44 years of being at Goose Rocks Beach, have you ever  
24 asked anyone for permission to use the beach?

25 A. No, never.

1 Q. And you have never been denied the right to use  
2 the beach, have you?

3 A. Never.

4 MR. FRAME: Nothing further, your Honor.

5 THE COURT: Mr. Stern?

6 MR. STERN: Nothing, further.

7 THE COURT: Mr. Driver?

8 MR. DRIVER: Nothing, your Honor.

9 THE COURT: Mr. Lachiatto?

10 MR. LACHIATTO: Nothing, your Honor.

11 THE COURT: Miss Hewey?

12 MS. HEWEY: Nothing, your Honor.

13 THE COURT: Pete?

14 CROSS EXAMINATION

15 BY MR. THAXTER:

16 Q. Ellen, my name is Pete Thaxter and I represent  
17 the plaintiffs.

18 Can I call you Ellen?

19 A. Yes.

20 Q. Okay. I just pulled out a copy of your deed  
21 which is an exhibit. I just want to read this and ask  
22 you if that's consistent with what you testified to  
23 earlier?

24 A. Uh-huh.

25 Q. Your deed says also conveying to the grantees



1 herein and their heirs and assigns a right-of-way  
2 easement for foot travel over a five-foot strip of land  
3 and the extension thereof, said five-foot strip lying  
4 along the northeasterly boundary of lot 12 as shown on  
5 said plan and runs from said road to the sea, said strip  
6 being part of said lot 12.

7 Is that consistent with your memory of the deed?

8 A. I haven't actually read my deed since 2009, so.

9 Q. The deed is in evidence but you never knew that  
10 the deed actually said running to the sea -- the strip?

11 A. I couldn't recall and I don't recall the specific  
12 verbiage in the deed, I just know that we have always  
13 had a right-of-way with our property.

14 Q. Who's William Nixon, III, is that a relative of  
15 yours?

16 A. He is not as far as we know.

17 Q. Now, you were testifying as to how much you were  
18 up here. So do we go back to '78 and was that a similar  
19 pattern or were you up here different times in different  
20 amounts different years?

21 A. In '78 I was still in college so it would be more  
22 weekend use until summertime.

23 Q. Would you look at -- do you have the exhibits,  
24 the pictures which are -- I think you talked about some  
25 of them but I think it is Exhibit 327, is there a book

1 there --

2 A. There is, 327? Okay.

3 Q. Now, let's turn to the 4th page of that, the  
4 pages are not numbered --

5 A. Yep.

6 Q. Somebody has written a note on that page and it  
7 indicates that you -- these are Nixons on the left?

8 A. That's the Nixon house on the left.

9 Q. I am talking about the one showing some people  
10 sitting on the beach with an umbrella.

11 THE COURT: The bottom photo of that page.

12 A. The bottom -- did you say --

13 Q. May I approach, your Honor?

14 THE COURT: Sure.

15 Q. This one.

16 A. Okay.

17 Q. It appears that there are two groups of people on  
18 the beach there --

19 A. Okay.

20 Q. -- right?

21 Somebody wrote there I assume, right? So it says  
22 the Nixons, that's you on the left, Nixons on the left?

23 A. That's correct.

24 Q. Okay, and it shows over on the right the Almeders  
25 and the Junkers?

1 A. That's correct.

2 Q. So the Almeders and the Junkers were all together  
3 in one group there, right?

4 A. Yes, correct.

5 Q. And they were friends?

6 A. I believe so, yes.

7 Q. Were you and your family friends with the  
8 Almeders also?

9 A. We were.

10 Q. Prior to this lawsuit?

11 A. Correct.

12 Q. Okay, and did you -- don't the Almeders have or  
13 didn't they have an annual cookout in front of their  
14 house?

15 A. In their house, yes.

16 Q. And you attended that?

17 A. I did.

18 Q. And part of that was down on the beach?

19 A. Sometimes it was. He used to grill.

20 Q. Did Bob grill down on the beach?

21 A. No, he grilled on the deck usually.

22 Q. But generally the families were friends --

23 A. (Motions head up and down.)

24 Q. I think you indicated as you were talking you  
25 lighted up when you talked about the Gregorlys. Were you

1 friends with the Gregorys?

2 A. I am.

3 Q. Still friends with the Gregorys?

4 A. We are.

5 Q. Friends with the Shermans?

6 A. Friendly with the Shermans, I just don't know  
7 them as well.

8 Q. And you don't know John Coughlin quite as well?

9 A. I do not.

10 Q. Okay.

11 Would you turn the page and there's a little boy  
12 in the grass in the lower picture.

13 A. Yes.

14 Q. Who is that boy?

15 A. My oldest son Nick.

16 Q. And you see there's kind of a path through the  
17 sea grass?

18 A. Yes.

19 Q. And is that the right-of-way path that you used?

20 A. That is.

21 Q. And it runs right along the edge of the Almeder's  
22 house, doesn't it?

23 A. Yes, it does.

24 Q. Okay, and go to two more pages in and there's a  
25 picture of some houses with names on them.

1 A. Yes.

2 Q. So there you show the -- is that your family  
3 sitting there?

4 A. It is part of my family. The first person is  
5 Phil Gregory, then is myself, then is my husband Rick,  
6 then is my son Tom -- excuse me, my son Nick and then  
7 walking in the background in the white shirt I am not  
8 sure, it might be Bob Almeder but I am not sure.

9 Q. Okay, and I can -- it shows the Nixon house there  
10 and the Gregory house. I can see an open space between  
11 the two. Is that still the case?

12 A. An open space between the Gregory house and the  
13 Nixon house?

14 Q. Well, really between the Gregory house and what  
15 would be the Almeder house on the right.

16 A. The Almeder's house is not in that picture.

17 Q. Right.

18 A. So that is open space, correct.

19 Q. And is that still open space?

20 A. It is.

21 Q. Do you know who owns that land?

22 A. Do I know who owns that land? The beach?

23 Q. Well, let's just talk about the grassy area that  
24 you see.

25 A. I do not.

1 Q. And so in this picture you are near the Gregory's  
2 line but in front of this open space, right?

3 A. I would say we are sitting in front of the  
4 Gregory's house, that's what I would say from that  
5 picture.

6 Q. And you are there with your friend Phil Gregory,  
7 right?

8 A. Correct.

9 Q. Okay.

10 Go about -- I will count these pages -- five more  
11 pages in.

12 A. Okay.

13 Q. I assume that that's your family on the beach?

14 A. The picture in the top with the four children  
15 sitting in the sea grass?

16 Q. Yes.

17 A. Those are my four children, correct.

18 Q. Okay, and who are the people down below?

19 A. Then down below on the beach would be John  
20 Gregory throwing a football and then in front of him is  
21 Betsy Nixon, my mother, Natalie, my daughter, myself.

22 Q. And you have labeled the two houses in the back,  
23 one is the Gregorys and the other one is the Almeders?

24 A. That's correct.

25 Q. Now, in your answers to interrogatories that your

1 parents filed they said when they answered the question  
2 of which properties do you use and how often do you use  
3 them and what do you do, they described the activities  
4 but I will read you the last sentence.

5           They said the activities occur regularly at all  
6 areas of Goose Rocks Beach. While there may have been a  
7 certain area that we have used more than others our use  
8 was in no way localized to one particular area.

9           Is that correct?

10          A. That is correct.

11          Q. So do you go down all the way to the other side  
12 of Dyke Road and take your kids and all the stuff and  
13 sit down there?

14          A. I do. I do a couple of times a year and the  
15 reason is because we have many friends over the years  
16 that we have introduced Goose Rocks to who come and rent  
17 and they rent all over the beach, they rent all the way  
18 down to New Biddeford Road, some very, very good  
19 friends, they are there for three weeks in the summer,  
20 additional ones to the west of Dyke Road, so we -- when  
21 they are there we trade off, you know, which part of the  
22 beach we are going to sit on.

23          Q. Do you have some friends down there that are  
24 beach-front owners anywhere along the beach?

25          A. Not any -- well, Jeanne and Roger Miller, they

1 are beach-front owners, we are still good friends with  
2 them.

3 The Gornys are lifetime family friends, they are  
4 beach-front owners.

5 Q. So sometimes you go down and sit with them at  
6 their houses also?

7 A. Yep, have bonfires, uh-huh.

8 Q. Anybody else that comes to mind?

9 A. Beach-front owners?

10 Q. Yes.

11 A. No, nothing that comes to mind right now.

12 Q. Go back to the pictures and go to the first page  
13 of the pictures.

14 A. Okay.

15 Q. And there are a couple of boys there with some --  
16 what look to be sand castles.

17 A. Correct.

18 Q. Do you know when this was taken?

19 A. I do.

20 Q. When?

21 A. When it was taken?

22 Q. Yes.

23 A. It would have been 1968 or 1969.

24 Q. Going over to the next page do you know what year  
25 that was taken?



1           A.    The top photo was taken in the Summer of 1990 and  
2 the bottom photo -- I can't date it specifically except  
3 my sister-in-law is on the beach and she married my  
4 brother in 1992 so I would say that would be Summer of  
5 '92 or '93.

6           Q.    So the top one you said is 1990?

7           A.    It is.

8           Q.    And is that the Almeder's house off to the right  
9 there?

10          A.    No, that's the Coughlin house off to the right.

11          Q.    Okay, that's the Coughlin house, thank you.

12                Let's go to the next page, and I have already  
13 talked to you about the bottom picture on that page.  
14 First, could you date both pictures?

15          A.    I could date it pretty close.  The top photo  
16 where we are in front of the Almeder house, that little  
17 boy in the dark is my son Nick.  The little boy in the  
18 blonde is one of the Gregory boys, Mark, and they both  
19 look -- they were born a week apart and that would put  
20 that at 1992.

21          Q.    That's your house in the background, right?

22          A.    Not in that photo, that's the Gregory -- excuse  
23 me, that's the Almeder house.

24          Q.    On the right, on the very right side of that  
25 photo -- are we looking at the same photo?

1 A. Maybe not. I am sorry.

2 Q. This photo.

3 A. This photo?

4 Q. It is the photo with the little boy digging a  
5 hole.

6 A. Yes.

7 Q. You want to date that one?

8 A. I can't see him. I know it is my son Nick but I  
9 can't see him so I can't gauge the year. I would say  
10 '93, '94.

11 Q. In the '90s anyhow, right?

12 A. Early.

13 Q. And you can actually see where the path comes  
14 along right beside the Almeder house there on the right?

15 A. Yes, you can.

16 Q. And you can see the Gregory house there on the  
17 left?

18 A. Yes, I can.

19 Q. So he is in between those two houses, right?

20 A. He is, yes, on the beach in between those two  
21 houses.

22 Q. And the bottom picture, do you know the date on  
23 that?

24 A. If Natalie is five -- 1997.

25 Q. You testified earlier those are the Almeders with

1 the Junkers right next to you, right?

2 A. Well, that is Lisa Almeder, I don't know which  
3 other ones, they are blocked by the umbrella.

4 Q. Lisa is one of Bob's daughters?

5 A. Correct.

6 Q. And she is a friend of yours?

7 A. We were friendly, yes.

8 Q. You talked about access on the far end of  
9 Kings Highway up near you. Is it my understanding there  
10 are like three or four parking spots up there?

11 A. You know, I haven't counted them. For years of  
12 course there were no parking spaces so people just would  
13 park all along. Now there's defined spaces. I mean, it  
14 used to be. We had a lot of cars so now maybe three,  
15 four maybe.

16 Q. And if you follow Kings Highway all the way out  
17 and you take a right at the end of that road you are in  
18 the Rachel Carson area?

19 A. I am not sure what --

20 Q. Isn't there a Rachel Carson Preserve out there  
21 off the end of the --

22 A. At the very end of our road?

23 Q. Yes.

24 A. At the very end of our road? I actually don't  
25 know that. I don't know that.

1 MR. THAXTER: Thank you.

2 Hold on, I may have one more question.

3 Sorry.

4 Would you take a look, and I am just going  
5 to show you this book, I will ask you, did you ever see  
6 Bob Almeder's private property signs?

7 A. No, I never did.

8 Q. Do you actually -- on the path is your path an  
9 open path with no gate or anything on it?

10 A. No.

11 Q. Do you have a sign on it?

12 A. There is a sign on it.

13 Q. What does it say?

14 A. Private way.

15 MR. THAXTER: Thank you.

16 MR. FRAME: Your Honor, can we offer 327?

17 MR. THAXTER: No objection.

18 THE COURT: Admitted.

19 MR. FRAME: We are almost done.

20 REDIRECT EXAMINATION

21 BY MR. FRAME:

22 Q. The five foot right-of-way that Attorney Thaxter  
23 talked about, he said that that says to the sea,  
24 correct?

25 A. If that is what he said.

1 Q. Great.

2 Has it been your understanding that your use of  
3 the beach was only limited to getting down into the  
4 water and staying in the water?

5 A. No.

6 Q. Have you ever been on the beach with your friend  
7 Phil Gregory or your former friend Bob Almeder and see  
8 people nobody knows on the beach in front of their  
9 house?

10 A. No.

11 Q. So you have always known -- when you are down on  
12 the beach with Bob Almeder and Phil Gregory you have  
13 always known who has been around you? There's never  
14 been members of the general public who have been down  
15 there or someone else you don't know?

16 A. Oh, I thought the question --

17 Q. Do you want me to restate it?

18 A. Could you?

19 Q. Sure.

20 You said you have been down on the beach with  
21 your friend Phil Gregory, right?

22 A. Correct.

23 Q. And you have been down on the beach with Bob  
24 Almeder before, correct?

25 A. Yes.

1 Q. And sometimes you have been in a group with them,  
2 correct?

3 A. Many times.

4 Q. Have you ever seen people on the beach at that  
5 point in time when you are with them that you don't know  
6 and you are sure nobody else knows?

7 A. Sitting with us in our group?

8 Q. No.

9 A. Oh, just when I looked to the left and looked to  
10 the right --

11 Q. In front of you, behind you.

12 A. Yes, of course I have sat on the beach with the  
13 Almeders and the Gregorys and there have been other  
14 people sitting that I didn't know.

15 Q. And they have -- you have testified that they  
16 never told any of those people to leave the beach,  
17 correct?

18 A. I never saw anybody ever say that.

19 Q. Great.

20 If you were to walk by Bob Almeder's house and  
21 see a barbecue going on would you just walk in his  
22 house?

23 A. No, I would not.

24 Q. Would you walk into his house for a barbecue if  
25 he extended an invitation for you to go to a barbecue at

1 his house?

2 A. I would have.

3 Q. When you go down to the beach and you sat with  
4 Bob Almeder or sat with Phil Gregory were you doing that  
5 because they had given you an invitation to come to the  
6 beach and sit next to them?

7 A. No and no.

8 MR. FRAME: Nothing further.

9 RE CROSS EXAMINATION

10 BY MR. THAXTER:

11 Q. Just a couple more questions.

12 Your end of the beach is very quiet, though, and  
13 nice, right?

14 A. It's a very quiet -- not when all of the Nixons,  
15 Surretts are there, no, it is not quiet.

16 Q. Well, in terms of members of the -- people you  
17 don't know, that is not -- it is not something that  
18 happens every day?

19 A. Yes, it is.

20 Q. When you see people sitting there that you don't  
21 know do you know -- do you know if they are renters or  
22 connected to somebody in another house?

23 A. If you see them there for a couple of days in a  
24 row I usually know they must be renting but I pretty  
25 much know when people are renting in the houses because

1 there aren't that many rental houses down that end.

2 MR. THAXTER: Thank you.

3 THE COURT: All set now?

4 Thank you, Miss Nixon. You may step down.

5 (Witness excused.)

6 THE COURT: Mr. Duchette.

7 MR. DUCHETTE: I would like to call Barbara  
8 Wostbrock.

9 THE CLERK: Please state and spell your name  
10 for the Court.

11 THE WITNESS: Barbara Wostbrock, W-O-S, as  
12 in Sam, T, as in Tom, B, as in Barbara, R-O-C-K.

13 Thereupon,

14 BARBARA WOSTBROCK

15 was called as a witness and, after having been duly  
16 sworn, was examined and testified as follows:

17 DIRECT EXAMINATION

18 BY MR. DUCHETTE:

19 Q. Barbara, I am going to have you grab the orange  
20 pen and if you could find your property on the parcel  
21 map and circle it?

22 A. I would say it is what you have numbered 159.

23 Q. Could you circle that?

24 A. (Witness complies.)

25 Q. Then if you want to reach behind you and grab the



1 red pen and if you could draw a line with respect to the  
2 ways you have accessed the beach?

3 A. Okay. I am assuming our access is the same one.  
4 You don't have it marked as an access --

5 Q. Okay, but if you could -- so if you want to draw  
6 a connecting line to your property?

7 A. It is right next to the Fleming property.

8 Q. Do you access the beach any other way?

9 A. No.

10 Q. How long have you owned your property at  
11 Goose Rocks Beach?

12 A. We bought it in 1992.

13 Q. 1992.

14 Prior to 1992 did you know about Goose Rocks  
15 Beach, had you visited Goose Rocks Beach in the past?

16 A. My husband's grandfather used to go to Blue Hill  
17 and his doctor told him that Goose Rocks Beach was a  
18 wonderful beach and don't bother going that far up and  
19 that's when they started coming to Goose Rocks which was  
20 in the early 1900s.

21 Q. And when did you first visit Goose Rocks Beach?

22 A. Personally?

23 Q. Yes.

24 A. 1955.

25 Q. 1955.

1           Did you come with your family or --

2           A.   That was the year my husband and I were married  
3 and we came up there.

4           Q.   Okay.  Where did you stay when you came up in  
5 1955?

6           A.   I can't answer that.  All over.

7           Q.   Did you sometimes rent properties?

8           A.   We didn't stay actually at Goose Rocks at that  
9 point.

10          Q.   Okay.

11                 So you would stay -- where would you be staying,  
12 in town or --

13          A.   The only thing I really remember is it was still  
14 in New Hampshire.

15          Q.   So you would come sometimes to Goose Rocks Beach  
16 for the day?

17          A.   Yes.

18          Q.   And did you have any family that owned any  
19 property in Goose Rocks Beach?

20          A.   At that time his mother owned property and his  
21 uncle owned property.

22          Q.   And would you sometimes come to visit them?

23          A.   That was vacant property at that time.

24          Q.   When you would come to visit Goose Rocks Beach  
25 did you ever have an understanding as to there were

1 areas where you could or could not go on Goose Rocks  
2 Beach?

3 A. No.

4 Q. Did you ever have any understanding that you  
5 could only use Goose Rocks Beach for certain activities?

6 A. Say that again.

7 Q. Did you ever -- in your mind was there any sense  
8 that you could only use Goose Rocks Beach for certain  
9 activities?

10 A. No.

11 Q. The types of activities when you would come to  
12 visit Goose Rocks Beach, were they similar to the  
13 testimony you have heard already this morning?

14 A. Yes.

15 Q. When you purchased your property in 1992 you said  
16 you used the access way by the Fleming property?

17 A. Correct.

18 Q. So when you would come down that access way would  
19 you stay right in front of that access way or would you  
20 go left or right?

21 A. Wherever there was a vacant spot.

22 Q. When you were on the beach at that point in time  
23 did anyone ever obstruct your use of the beach?

24 A. No.

25 Q. Did anybody ever say this is private property,

1 you need to move?

2 A. No.

3 Q. Did you ever seek permission from any of the  
4 beach-front owners in that area with respect to use?

5 A. No.

6 Q. Did you ever have a sailboat?

7 A. We have a sailboat and three kayaks and a tub.

8 Q. And when you would bring your sailboat to the  
9 water how would you typically get it there?

10 A. Sometimes through the Fleming area, other times  
11 at the end of Goose Rocks there's a sandy area you can  
12 tow your boat in.

13 Q. Once you put your sailboat in the water would you  
14 take it out every time or would you sometimes leave it  
15 on the beach?

16 A. Left it for the day, probably would bring it home  
17 at night.

18 Q. When you would leave it on the beach for the day  
19 or at least when you weren't sailing in the water did  
20 you ever seek permission from any of the beach-front  
21 owners to leave your boat there?

22 A. No.

23 Q. Would you -- would the boat always remain in the  
24 vicinity of the right-of-way or would it sometimes be to  
25 the left, to the right?

1       A. It usually -- after it was sailed for a while  
2 would end up closer to the Fleming entrance because  
3 that's where all our people would be.

4       Q. Do you have children?

5       A. Do I have children?

6       Q. Yes.

7       A. I have five children.

8       Q. Have they come to visit you and stay with you --

9       A. We have 15 grandchildren, five children, five  
10 in-laws and we are always with people.

11      Q. So you have a very large family?

12      A. Yes, we do.

13      Q. And when they come -- and they come to visit you  
14 at Goose Rocks Beach?

15      A. They have all been there this summer.

16      Q. And have you ever given them any instructions as  
17 to where they could go or what they could do on  
18 Goose Rocks Beach?

19      A. No.

20      Q. Has their use ever been obstructed in any way?

21      A. I have never heard anyone comment about --

22      Q. And do your children and grandchildren, do they  
23 always stay right in that -- the vicinity of the  
24 right-of-way near the Fleming property or do they use  
25 other areas of Goose Rocks Beach?

1           A. They walk the beach, they pick sand dollars, they  
2 walk both ways because we have relatives at other end of  
3 the beach, they go to Timber Island.

4           Q. And your relatives, what end of the beach are  
5 they on, west end, east end?

6           A. East end I guess.

7           Q. Each end of the beach.

8                   MR. DUCHETTE: No further questions.

9                   THE COURT: Mr. Stern?

10                  MR. STERN: Nothing.

11                  THE COURT: Mr. Driver?

12                  MR. DRIVER: Nothing.

13                  THE COURT: Mr. Lachiatto?

14                  MR. LACHIATTO: No.

15                  THE COURT: Miss Hewey?

16                  MS. HEWEY: Nothing.

17                  THE COURT: Mr. Leoni?

18                                   CROSS EXAMINATION

19 BY MR. LEONI:

20           Q. Good morning, Mrs. Wostbrock. My name is Ben  
21 Leoni and I am an attorney for the plaintiffs.

22                   Is it Wostbrock?

23           A. Wostbrock.

24           Q. Wostbrock.

25                   Going back a little bit with your history of

1 Goose Rocks Beach you stated that you first came in  
2 1955?

3 A. I first -- that was the first time I ever came to  
4 Goose Rocks.

5 Q. And the first time that you ever purchased  
6 property on Goose Rocks Beach wasn't until 1992?

7 A. 1992.

8 Q. Before 1992 did you ever rent property on  
9 Goose Rocks Beach?

10 A. We stayed at the Spangs, which I believe is on  
11 Route 9, for 25 years, from 1966 until the time we  
12 purchased.

13 Q. When you came to the Spangs, how long did you  
14 stay there for?

15 A. A week to 10 days.

16 Q. A summer?

17 A. A summer.

18 Q. So prior to 1992 you only came to Goose Rocks  
19 Beach for -- between a week and 10 days every summer?

20 A. Correct.

21 Q. Do you know the Flemings?

22 A. Do I what?

23 Q. Do you know the Flemings?

24 A. I didn't catch that last word.

25 Q. The Flemings, do you know them?

1           A. To say hello. They have certainly been friendly  
2 to us, yes.

3           Q. Have you seen them when you have been down on the  
4 beach area in front of their house?

5           A. Yes.

6           Q. Are they still friendly to you?

7           A. Yes.

8           Q. Have you seen -- did you see the sign that the  
9 Flemings put up in front of their right-of-way down to  
10 the beach in 2007 or 2008?

11          A. I heard it was there but when I looked it was  
12 gone, so I didn't actually see it, no.

13                   MR. LEONI: That's all I have,  
14 Mrs. Wostbrock. Thank you.

15                   THE WITNESS: Okay.

16                                   REDIRECT EXAMINATION

17 BY MR. DUCHETTE:

18          Q. When -- I think you just testified in response to  
19 Attorney Leoni's questions that you know the Flemings.

20          A. Yes.

21          Q. And you testified that they have seen you on the  
22 beach.

23          A. We have had no trouble.

24          Q. And have you seen them on the beach as well?

25          A. Yes.



1 Q. Have you ever seen them ask anybody to leave the  
2 beach?

3 A. No, but at one point he put a huge raft in the  
4 water and he told us particularly -- not particularly  
5 but specifically told us that our children were welcome  
6 to swim out to the raft and get on it and use it.

7 Q. But he's never given you any permission to use  
8 the beach in front of his property, has he?

9 A. No.

10 MR. DUCHETTE: Nothing further.

11 MR. LEONI: All set.

12 THE COURT: Thank you, Mrs. Wostbrock. You  
13 are all set. Thanks.

14 (Witness excused.)

15 MR. FRAME: Your Honor, we have got four  
16 lined up for right after lunch. We will be done by  
17 4 o'clock. Can we break early?

18 THE COURT: Sure, so back at a quarter to  
19 1:00.

20 (Thereupon, the luncheon recess was taken,  
21 and then the proceedings continued as follows:)

22 THE COURT: Good afternoon. We are here, it  
23 looks like everybody is here.

24 Mr. Frame.

25 MR. FRAME: Good afternoon, your Honor.

1 Chris Rodden.

2 THE CLERK: Please raise your right hand and  
3 state and spell your name for the record.

4 THE WITNESS: Christine Rodden, R-O-D-D-E-N.  
5 Thereupon,

6 CHRISTINE RODDEN  
7 was called as a witness and, after having been duly  
8 sworn, was examined and testified as follows:

9 DIRECT EXAMINATION

10 BY MR. FRAME:

11 Q. Hi, Chris.

12 A. Hi.

13 Q. Chris, can you state your legal residence for the  
14 Court?

15 A. I live in North Andover, Mass, 47 Prescott  
16 Street.

17 Q. Great.

18 Does your family currently own a home at  
19 Goose Rocks Beach?

20 A. Yes.

21 Q. Where is your home at Goose Rocks Beach?

22 A. 236 Kings Highway.

23 Q. And is that across the street from the ocean side  
24 of Kings Highway?

25 A. It is.

1 Q. Great.

2 Can you, Chris, take the orange marker, I  
3 apologize for making you get up as you sat down, but can  
4 you go up to the map identified as TMF Defendants map  
5 and identify your house at 236 Kings Highway?

6 A. (Witness complies.)

7 Q. Great.

8 While you are up, Chris, can you take the red  
9 marker and draw the route or the routes you take to the  
10 beach from 236 Kings Highway?

11 A. Okay.

12 Q. Great.

13 How long have you and your family owned the home  
14 at 236 Kings Highway?

15 A. About six years.

16 Q. Six years.

17 Prior to 2006 did your family own a home at Kings  
18 Highway?

19 A. Yes.

20 Q. And where was the house prior to 2006 that your  
21 family owned at Kings Highway?

22 A. That was across the street on the beach right  
23 next to the public way.

24 Q. What number was that?

25 A. I am not sure.

1 Q. You don't know. Is that one of the homes that is  
2 now owned by Bill Forrest and Nancy Julian?

3 A. It is, yes.

4 Q. How long did you own that beach-front home, your  
5 family own --

6 A. We bought it in 1961.

7 Q. Was 1961 your family's first summer at  
8 Goose Rocks Beach?

9 A. No.

10 Q. Give me a little bit of a -- of backdrop on the  
11 first time your family came to Goose Rocks Beach.

12 A. Well, it was my first time we came up and found  
13 the house and bought it, but my mum grew up at  
14 Goose Rocks Beach as a child, she is 86 years old now,  
15 and she spent summers and rented property up and down  
16 the beach.

17 Q. Up until 1961?

18 A. Yes -- well, no, we had a little time in between  
19 where we had a camp in New Hampshire so we didn't go to  
20 Goose Rocks, but --

21 THE COURT: Which raises an interesting  
22 question that I have been pondering. Why is it that if  
23 we go to a lake house it's a camp and if we go to a  
24 beach house it's a cottage?

25 A. You're right.

1 THE COURT: It just goes to show how I spend  
2 my idle time.

3 MR. FRAME: Your Honor, at 4 o'clock I am  
4 going to camp in Belgrade so I am not going to our  
5 cottage.

6 Good question.

7 BY MR. FRAME:

8 Q. So prior to 1961 were you -- when were you born,  
9 Chris?

10 A. 1949.

11 Q. So from 1949 to 1961 you said your family rented  
12 some homes at Goose Rocks Beach and also what was at a  
13 camp or rented a camp in New Hampshire?

14 A. No.

15 Q. Okay.

16 A. We did not rent at Goose Rocks Beach from 1949,  
17 we had a place in New Hampshire so we just went there --

18 Q. Okay.

19 A. -- but we drove through and found the house in  
20 '61 and bought it.

21 Q. Great.

22 Drove through -- your mom and dad?

23 A. Yes.

24 Q. Do you have siblings, Chris?

25 A. I do.

1 Q. How many?

2 A. Two.

3 Q. So were they born in -- by 1961 were there three  
4 kids?

5 A. There were three kids.

6 Q. Great.

7 You said your mom had kind of grown up around  
8 Goose Rocks Beach, correct?

9 A. She did, yes.

10 Q. So is she the kind of prime mover for your family  
11 taking a look at Goose Rocks Beach?

12 A. Yes.

13 Q. Is your mom still around today?

14 A. She is, yes.

15 Q. Where does she live?

16 A. She lives in Lexington, Mass.

17 Q. Does she still spend some time at the cottage on  
18 Kings Highway?

19 A. We all do, yes.

20 Q. Great.

21 How frequent -- starting with in 1961, Chris, how  
22 frequently would your -- you and your family come to  
23 Goose Rocks Beach in the summer?

24 A. We would spend the whole summer.

25 Q. Was it fairly typical, dad would come up on the

1 weekends and --

2 A. Yes.

3 Q. -- and mom and the kids would stay there the  
4 whole summer?

5 A. Yes.

6 Q. Dad would maybe take a block of time but  
7 otherwise weekends?

8 A. Yes.

9 Q. Great.

10 What kind of activities -- you weren't here  
11 earlier this morning so I have to plow a little bit of  
12 ground.

13 What kind of activities did you and your siblings  
14 engage in on Goose Rocks Beach in the '60s?

15 A. We -- we had a huge group of friends, we were up  
16 and down the beach all the time, we were in and out of  
17 the water swimming, sun bathing, but friends lived all  
18 over the whole beach so we would go in front of  
19 different people's houses the whole time.

20 Q. Go wherever the friends were?

21 A. Right, right.

22 Q. In that group of friends that you are talking  
23 about, Chris, did you have or were any of those folks  
24 back-lot friends or were they mostly beach front?

25 A. Oh, no, both. Both.

1 Q. Were you involved -- you were 12 I think when you  
2 moved there. Were you involved in the Goose Rocks Beach  
3 Association?

4 A. Yes, tennis every -- and then for a while they  
5 had swimming, they had some sailing lessons, we did all  
6 that.

7 Q. Great.

8 A. The dances every week, movie nights eventually.

9 Q. You said earlier, Chris, I want to make sure I  
10 got it, that you had friends all up and down the beach?

11 A. Yes.

12 Q. And that depending upon where the group of  
13 friends were that's where you go and hang out?

14 A. Yes.

15 Q. Were you mindful, Chris, at that age that, oh, I  
16 am with Johnny Jones and we need to stay in front of  
17 Johnny Jones' house?

18 A. No.

19 Q. Not at all?

20 A. Not at all.

21 Q. When you engaged in these activities with your  
22 friends up and down the beach would you see people on  
23 either side, east or west of you, doing similar  
24 activities?

25 A. Yes.



1 Q. Did you always know who they were?

2 A. No.

3 Q. Great.

4 At some point you became a little bit older, got  
5 in your 20's. Did you continue to come to Goose Rocks  
6 Beach?

7 A. Yes.

8 Q. Great.

9 Do you have a family, Chris?

10 A. Yes.

11 Q. How old are your kids?

12 A. Well, now they are 40 and 37 and we have  
13 grandchildren.

14 Q. Great.

15 Your children, did they have a similar experience  
16 to you in terms of coming up to Goose Rocks Beach for  
17 some or all of the summer?

18 A. Not the whole summer, some, yes.

19 Q. Would you come up for long stretches, a week or  
20 two?

21 A. Probably a week. The house was too small, it  
22 didn't hold all of us but we would all take turns all  
23 summer.

24 Q. Great.

25 Did you observe your children engaging in similar

1 activities to the activities you engaged in on the  
2 beach?

3 A. Yes.

4 Q. Did they -- you were up here for the whole summer  
5 when you were a kid so was their experience a little bit  
6 different in terms of not knowing as many people on the  
7 beach?

8 A. That's right, yes.

9 Q. Did you ever teach them to be mindful of where  
10 they were on the beach in terms of where they were  
11 allowed to go?

12 A. Never, no.

13 Q. Did you ever teach them to be mindful or to do  
14 certain activities on the beach and not do others?

15 A. No.

16 Q. Great.

17 Your grand kids, have you witnessed your kids  
18 giving them instructions on what they are allowed to do  
19 and not allowed to do and where they are allowed to go  
20 and not allowed to go on the beach?

21 A. No. We used the whole beach.

22 Q. Now, in that time we are talking -- we are going  
23 from you, beach front owner, your kids staying with a  
24 beach-front owner to now you, your kids and your grand  
25 kids, back-lot owners, 2006. That changes things,

1 right?

2 Does your use change at all when you went from  
3 owning a home on the beach to owning a back lot?

4 A. No.

5 Q. And does the -- has the place of -- your family's  
6 recreational uses changed at all since you have gone  
7 from being a beach-front owner for 50 plus years or,  
8 excuse me, 40 plus years to a back-lot owner?

9 A. No.

10 Q. When -- were you involved at all in advising your  
11 mom when there was the change of -- from the beach-front  
12 home to purchase the back-lot home?

13 A. We were involved in the purchase, yes, in the  
14 sale, yes.

15 Q. And Bill Forrest and Nancy Julian bought that  
16 house from you, right?

17 A. Yes.

18 Q. Great.

19 As part of that you -- actually Bill approached  
20 you because your mother wanted to buy a back lot,  
21 correct?

22 A. Yes.

23 Q. Did Bill Forrest say anything to you regarding  
24 your ability to use the beach?

25 A. He did.

1 Q. In front of his house?

2 A. Yes.

3 Q. What did he say to you?

4 A. He told us that we could always use it and we  
5 were welcome to it and we could -- you know, just treat  
6 it like it was ours, just never worry about it, we could  
7 always sit there and do what we wanted.

8 Q. Well then that begs the question, Chris, you had  
9 verbal assurance from Bill Forrest that you could use  
10 the beach in front of his house. Why would you join  
11 this lawsuit?

12 A. Because if something ever happened, if Bill sold  
13 his house or there were problems we wanted assurance  
14 that we can still use the beach, we want everybody else  
15 to be able to use it too.

16 Q. And Bill didn't give you any assurances that all  
17 the neighbors east and west of him were going to permit  
18 you to use the beach in front of their house, did he?

19 A. No.

20 Q. Chris, when you were a beach-front owner -- when  
21 your family was a beach-front owner did you or your  
22 family ever get a request for permission to use the  
23 beach in front of your house?

24 A. Never.

25 Q. Did you ever observe anyone in your family

1 telling someone on the beach they could not use the  
2 beach in front of your house?

3 A. Just once when some people came and sat on the  
4 steps and had loud music going, we asked if they could  
5 move off the steps so we could get down them, that's the  
6 only time we had to do anything.

7 Q. So someone was in the walkway to get down to the  
8 beach?

9 A. Yes.

10 Q. Did you guys tell them get out of here and get  
11 down to the public part of the beach?

12 A. No, we just asked them if they could move off the  
13 steps please.

14 Q. You testified earlier you had tons of friends up  
15 and down the beach. Probably still have tons of friends  
16 up and down the beach, right?

17 A. Not as many, but yes.

18 Q. And I would assume that you were on the beach  
19 when you were a beach-front owner often with friends who  
20 were beach-front owners and back-lot owners, correct?

21 A. Yes, yes.

22 Q. At some point in time or maybe often were you on  
23 the beach with friends who were back-lot owners and  
24 people you didn't even know?

25 A. Yes.

1 Q. Did you ever tell those people you didn't even  
2 know to get down -- get off your beach?

3 A. Of course not.

4 Q. That's what I thought.

5 MR. FRAME: Nothing further, your Honor.

6 THE COURT: Mr. Stern?

7 MR. STERN: No questions.

8 THE COURT: Richard?

9 MR. DRIVER: No questions.

10 THE COURT: Alex?

11 MR. LACHIATTO: Just a couple.

12 CROSS EXAMINATION

13 BY MR. LACHIATTO:

14 Q. Good afternoon.

15 A. Hi.

16 Q. It is my understanding you had a history of use  
17 of the beach in front of the ocean-front premises from  
18 1961 to the time you acquired the former Kember  
19 property; is that right?

20 A. Yes.

21 Q. And that existed continuously for a period in  
22 excess of 40 years?

23 A. Yes.

24 Q. Now, you mentioned that the Goose Rocks Beach  
25 Association had sailing lessons?

1 A. They did.

2 Q. Did you partake in those sailing lessons?

3 A. My sisters did.

4 Q. All right, and do you recollect where the sailing  
5 lessons were held?

6 A. I don't remember. I think they were right out  
7 there near Goose Rocks.

8 Q. Right.

9 How close to the Bel-Air path?

10 A. Well, we had a big box that they kept all the  
11 sails in and the life preservers right there on the  
12 path.

13 Q. Two boxes?

14 A. Yes, a big green -- big green wooden box.

15 Q. Two big green --

16 A. Two.

17 Q. Right, and the oars were kept there and the buoys  
18 and the life jackets and that was on the west side of  
19 the Bel-Air -- not Bel-Air, Bartlett Avenue  
20 right-of-way?

21 A. Yes.

22 Q. And you recollect when those disappeared?

23 A. I don't remember.

24 Q. But they were there in 1961?

25 A. (Motions head up and down.)

1 Q. And they were there in the early '70s; isn't that  
2 correct?

3 A. They were there for a while. I don't remember  
4 the dates.

5 MR. LACHIATTO: Okay. Thank you.

6 THE COURT: Mr. Leoni?

7 CROSS EXAMINATION

8 BY MR. LEONI:

9 Q. Good afternoon Chris Rodden. My name is Ben  
10 Leoni and I'm an attorney with the plaintiffs.

11 Do you mind if I call you Chris?

12 A. No.

13 Q. Your mother was Suzanne Wilson?

14 A. Yes, still is.

15 Q. And she's the one who sold the property to Bill  
16 Forrest?

17 A. Yes.

18 Q. Is your family friendly with Bill Forrest?

19 A. We are.

20 Q. You testified a moment ago to when you sold your  
21 property that Bill Forrest came over to you and your  
22 mother and said feel free to use our beach any time you  
23 want to, use it as if it is your own?

24 A. Yes, yes.

25 Q. And he also said that you could keep a boat in



1 front of his property?

2 A. Yes.

3 Q. At that time did you say -- did you tell Bill  
4 that, Bill, we don't need your permission to do anything  
5 in front of your house?

6 A. No.

7 Q. Since -- you started coming to the beach in 1961?

8 A. Yes.

9 Q. And were you a beach-front owner?

10 A. Yes.

11 Q. You have noticed an increase in the volume of the  
12 use of Goose Rocks Beach; isn't that correct?

13 A. Somewhat.

14 Q. And you are familiar that with -- well, strike  
15 that.

16 You understand that people in the community refer  
17 to an area east of The Tides as the public beach  
18 section?

19 A. Yes.

20 Q. And they have always done that, correct?

21 A. Yes.

22 Q. I'm going to ask you a few questions about  
23 parking on Dyke Road. When you were a kid in the 1960s  
24 do you recall seeing cars parked up and down Dyke Road?

25 A. No, not much.

1 Q. Do you see cars now parking up and down Dyke Road  
2 on busy days?

3 A. Yes.

4 Q. How many cars do you see there on a busy day now?

5 A. Well, usually when I am at the beach I don't  
6 leave the beach.

7 Q. Why would you?

8 A. There could be 15, maybe 20, you know, but some  
9 of them are in marked parking spaces.

10 Q. Some are in marked parking spaces --

11 A. But then there are some further down, yep. Maybe  
12 ten further down, I don't know.

13 Q. And that parking up and down Dyke Road, the way  
14 that you see it now, you didn't see that back in the  
15 1990s.

16 A. I don't remember that now.

17 Q. Do you ever recall trash cans being located on  
18 the property in front of your house when you still owned  
19 Bill Forrest's house -- I am sorry, your beach-front  
20 property.

21 A. On the beach?

22 Q. Right.

23 A. No.

24 Q. Did you ever see lifeguard stands on the beach in  
25 front of your property?

1 A. No.

2 Q. Do you recall seeing a lifeguard stand in the  
3 '60s and '70s down in the public beach section?

4 A. In front of The Tides.

5 Q. Have you ever seen people have events on the  
6 beach such as large cookouts?

7 A. Yes.

8 Q. Have you ever seen weddings on the beach?

9 A. Yes.

10 Q. A lot of people for those activities such as the  
11 weddings?

12 A. Yes.

13 Q. A few years ago Bill Forrest had a 50th birthday  
14 party. Were you around for that?

15 A. We went to it.

16 Q. You did?

17 A. Yes.

18 Q. Do you recall hearing about how the police chief  
19 came down and said you can't have your birthday party  
20 here, you have to pick up and leave?

21 A. I didn't know he said you have to leave, I just  
22 knew that there was a little friction but I didn't know  
23 that's what happened.

24 Q. If you heard that the police chief said that he  
25 had to take down the tent and move everything off the

1 beach that day would you say --

2 MR. LACHIATTO: I will object.

3 THE COURT: Let me hear the rest of the  
4 question.

5 Q. -- would you say that that would be a deviation  
6 from the past practice of the town of allowing -- of  
7 allowing a public or events on the beach?

8 THE COURT: The objection is overruled and  
9 you may answer.

10 A. Answer?

11 Q. You may answer.

12 THE COURT: You may answer.

13 A. Can you ask that one more time?

14 THE COURT: It basically was assume for the  
15 sake of the question that either the code enforcement  
16 officer, the police officer, asked Mr. Forrest to move  
17 the tent, would that be different than how you  
18 understood the beach had been used in the past?

19 A. I -- say that one more time.

20 Is the officer asking Bill to move different,  
21 that never happened?

22 THE COURT: In other words if people had  
23 used tents or other events like that, was that the  
24 custom in the past or the custom in the past was if  
25 people were engaging in these kinds of activities they

1 would be asked to cease?

2 A. I don't know if anyone was ever asked before.

3 MR. LEONI: Okay. Thank you, your Honor.

4 THE COURT: Mr. Frame?

5 MR. LEONI: I am sorry, I am not finished, I  
6 was thanking you for clarifying my question.

7 A. Sorry.

8 Q. No, it's okay.

9 THE COURT: Wishful thinking on my part.

10 MR. LEONI: On everyone's part.

11 BY MR. LEONI:

12 Q. Would you say that back in -- during the time  
13 when you owned your beach-front property that there was  
14 a neighborly atmosphere in the Goose Rocks Beach area?

15 A. Yes.

16 Q. And sort of -- you would go and visit your  
17 friends in their areas of the beach and they would come  
18 and sometimes visit you in your area of the beach?

19 A. Yes.

20 Q. The green box with the sailboat that you just  
21 talked about, I believe you said that that was, quote,  
22 on the path of Bartlett Avenue?

23 A. It was on the public way there, yes.

24 Q. Okay.

25 That wasn't out on the beach?

1 A. No.

2 Q. A moment ago you said that there is this one time  
3 when you owned the beach-front property that you had to  
4 ask people to move because they were sitting right in  
5 front of your steps?

6 A. They were on the steps, we just couldn't get down  
7 the steps.

8 Q. Right.

9 Do you recall being interviewed by News 8 a few  
10 days ago?

11 A. Yes.

12 Q. And do you recall saying that beach-front owners  
13 should have the right to ask people to move if they are  
14 interfering with the owner's use of their own property?

15 A. Well, I think that if I said that I think if  
16 there was a big problem I thought that if the -- and if  
17 they wanted to have a cookout or play Bocce or  
18 volleyball they should be able to do it in front of  
19 their house.

20 MR. LEONI: Thank you. No further  
21 questions.

22 REDIRECT EXAMINATION

23 BY MR. FRAME:

24 Q. Chris, was your response to News 8 related to the  
25 Beach Use Ordinance?

1 A. Yes.

2 Q. Great.

3 You said in response to Attorney Leoni's question  
4 that you recall Goose Rocks Beach when you were a  
5 beach-front owner as being neighborly in your time  
6 there?

7 A. Yes.

8 Q. Has that neighborliness changed as a result of  
9 this lawsuit?

10 A. Yes.

11 MR. FRAME: Nothing further, your Honor.

12 THE COURT: Anything else?

13 Thank you, Miss Rodden. You may step down.  
14 Thanks kindly.

15 (Witness excused.)

16 THE COURT: Mr. Duchette.

17 MR. DUCHETTE: I would like to call Don  
18 Anderson, your Honor.

19 THE CLERK: Please state your name and spell  
20 your name for the Court.

21 THE WITNESS: Donald Anderson, D-O-N-A-L-D  
22 A-N-D-E-R-S-O-N.

23

24

25

1 Thereupon,

2 DONALD ANDERSON

3 was called as a witness and, after having been duly  
4 sworn, was examined and testified as follows:

5 DIRECT EXAMINATION

6 BY MR. DUCHETTE:

7 Q. Hi, Don. How are you?

8 A. Well thank you.

9 Q. Don, do you have a piece of property at  
10 Goose Rocks Beach?

11 A. We actually have two.

12 Q. You have two. What are the addresses of those  
13 properties?

14 A. 37 Dyke Road, 22 Dyke Road.

15 Q. So both of those -- do each of those properties  
16 have a house on them?

17 A. They do.

18 Q. Both of those are on Dyke Road?

19 A. Correct.

20 Q. Do you live in both properties or rent one out?

21 A. We actually rent out the 37 Dyke Road and we live  
22 in the 22 for the summer.

23 Q. The property that you rent out, how long have you  
24 been renting that property out?

25 A. Since 2010 when we purchased the 22 Dyke Road



1 property.

2 Q. When you rent that out do you give any  
3 instructions to your renters with respect to where they  
4 can go or what they can do on Goose Rocks Beach?

5 A. We do not.

6 Q. You purchased that property I think you said in  
7 2010, correct?

8 A. The 22 Dyke Road. The 37 Dyke Road cottage that  
9 we rent we purchased in 2002.

10 Q. 2002.

11 Prior to your ownership of property at  
12 Goose Rocks Beach had you come -- had you visited  
13 Goose Rocks Beach before that?

14 A. We started actually in 1977 --

15 Q. 1977.

16 A. -- and it's been continuous with the exception of  
17 1978 when we went to The Cape for the year and realized  
18 our mistake.

19 Q. And so when you came to visit Goose Rocks Beach  
20 were you renting?

21 A. We rented for --

22 THE COURT: The Saginaw Traffic Circle, that  
23 might have something to do with that.

24 A. You know it, Judge. You know it, Judge.

25 Q. So you rented at Goose Rocks Beach?

1 A. Five weeks a year.

2 Q. Was that consistent every year?

3 A. Every year.

4 Q. Except --

5 A. Well, up until 1996, then we rented a two-room  
6 apartment at the beach from April 15th to October 15th,  
7 so from 1996 to 2002 we were here all summer.

8 Q. And take me through some of the properties, and  
9 you rented for quite a bit of time so we don't have to  
10 go through every single one but did you always rent the  
11 same house at Goose Rocks Beach?

12 A. We rented a number of houses, several of them  
13 were beach front and several of them were back lot.

14 Q. And did you tend to rent in the east end of the  
15 beach, in the middle part of the beach or west end?

16 A. More towards the middle of the beach although  
17 once we rented the west end, the Celi cottage.

18 Q. When did you rent the Celi cottage?

19 A. That was in 1990.

20 Q. Who owned that property at that time?

21 A. I believe it was the Celis.

22 Q. The Celis.

23 When you rented that property did they give you  
24 any instructions with respect to the beach is private  
25 and you can only use the beach in front of our property?

1 A. None whatsoever.

2 Q. When you were renting the Celi cottage I am  
3 assuming the Celis were there when you were renting it?

4 A. They were not.

5 Q. And at that time did other people use the beach  
6 in front of the Celi property?

7 A. All the time.

8 Q. Just during the time that you were renting  
9 property at Goose Rocks Beach did you engage in we will  
10 call it normal beach activities?

11 A. Yes.

12 Q. Build sand castles?

13 A. Sand castles, Frisbees, flying kites, sun  
14 bathing, volleyball, Bocce Ball, I guess that would --

15 Q. And when you were renting -- I think you said you  
16 have rented property in the middle section and on the  
17 west end. Did you -- did your beach use activities  
18 always occur in the direct vicinity of those -- of the  
19 properties you were renting or did you use other areas  
20 of Goose Rocks Beach?

21 A. We predominantly used four areas, we used the  
22 area in front of The Tides, we used the area down in  
23 Dyke Road because of all the islands there so we could  
24 snorkel, we did a lot of snorkeling with my children and  
25 then both ends of the beach, the Batson River mouth and

1 the Little River mouth we used extensively, those four  
2 areas.

3 Q. Would you have rented at Goose Rocks Beach if you  
4 weren't allowed to use the beach?

5 A. Absolutely not.

6 Q. You would have stayed in the cape?

7 A. Yes.

8 Q. I am going to have you -- if you can take the  
9 orange pen I will have you circle the two properties  
10 that you own on Dyke Road if you would.

11 A. (Witness complies.)

12 Q. With the red pen could you draw a line with  
13 respect to how you access Goose Rocks Beach from those  
14 properties?

15 A. (Witness complies.)

16 Q. Since 2002 when you have owned your property on  
17 Dyke Road and you come down the Dyke Road extension onto  
18 the beach do you always stay within the Dyke Road  
19 right-of-way or do you go left or right?

20 A. We go both left and right. Yeah, I have been  
21 both ways.

22 Q. Have you ever used a boat at Goose Rocks Beach?

23 A. I have owned five boats at Goose Rocks Beach,  
24 three sailboats, one Zodiac and now in addition I have a  
25 Center Console which is moored out in the bay.

1 Q. And just the Center Console, is that the only  
2 time you have moored a boat on the bay or have you --

3 A. I have moored the Zodiac at times too.

4 Q. Okay.

5 When you moored your boat how do you get to it,  
6 do you have a dinghy?

7 A. I have a dinghy.

8 Q. Where do you store that?

9 A. At Dinghy Point.

10 Q. And have you ever -- has anybody ever given you  
11 permission to store your dinghy there?

12 A. No.

13 Q. Why do you store your dinghy there?

14 A. I store it there because of tidal purposes. It's  
15 like the highest point at the beach so it is least  
16 likely to be washed away, and that's where all the other  
17 dinghies are as well.

18 Q. With respect to your use of the beach both during  
19 the time that you were renting as well as the time you  
20 owned your property on Dyke Road has anyone ever  
21 objected to your use of the beach?

22 A. Never.

23 Q. Have you ever asked permission to recreate on  
24 Goose Rocks Beach?

25 A. I never have.

1 Q. I am going to have you, if you will open up to  
2 Exhibit 279, if I may approach, your Honor?

3 THE COURT: Sure.

4 Q. Looking at that first photo do you recognize any  
5 people in that photo?

6 A. I do, one is my son and one is my nephew.

7 Q. Do you know where they are on Goose Rocks Beach?

8 A. That probably would be down in front of the Star  
9 cottage.

10 Q. And the Star cottage, where is that?

11 A. The Star cottage would be -- it doesn't show me  
12 where the -- it is right here.

13 Q. Right in the middle of the beach?

14 A. In the middle of the beach.

15 Q. And what year -- judging by your son's age can  
16 you tell about what year that was?

17 A. I think it is around 1982.

18 Q. I will have you skip the second page, other than  
19 the note that I hope your children filled in that hole,  
20 and if you look at -- there's a photo, it looks like a  
21 big sand castle there. Do you recognize anyone in that  
22 photo?

23 A. It looks like more nephews.

24 Q. And again do you know where on the beach this is  
25 located -- that was located?

1           A. This is a little bit further down, probably right  
2 around by the Fessendens.

3           Q. The next photo, do you recognize anyone in that  
4 photo?

5           A. That is nieces, nephews, my -- it looks like my  
6 wife might be in that one, my sons, and behind is the  
7 Star cottage itself, and next to it is the Mauls,  
8 M-A-U-L, it's another owner.

9           Q. And in looking at that photo can you tell what  
10 year that is?

11          A. Around 1984. I am thinking that most of these  
12 had dates on the back.

13          Q. I will have you skip the next one, skip the other  
14 one.

15                 There's a picture there. Where on the beach is  
16 this photo?

17          A. This is the Celi cottage.

18          Q. And that's a property you rented in the past?

19          A. For one year.

20          Q. I noticed that there's no one in that photo.  
21 Does that mean no one ever used the beach in front of  
22 the Celi cottage?

23          A. No. People used the beach.

24          Q. You just happen to have taken a photo on that  
25 particular day when there was no one there?

1 A. Correct.

2 Q. And, again, do you know about what time period  
3 that was?

4 A. I do not. In terms of year?

5 Q. Yes.

6 A. I think it was 1990.

7 Q. I am going to have you skip ahead a little bit.

8 A. Yep.

9 Q. The group. Do you recognize anybody in that  
10 photo?

11 A. This one, again, more nephews here and I don't  
12 really think I can recognize the rest of them.

13 Q. I see some -- so it looks like some island in the  
14 background.

15 A. Correct.

16 Q. Where on the beach is this located?

17 A. This one -- oh, I can tell. This one is towards  
18 the east end of the beach way down. You can see the  
19 Timber Island and then the low tides allowing walking  
20 out to it, so that's probably fairly close to the Little  
21 River.

22 MR. DUCHETTE: Okay. I think that's all the  
23 questions I have, yes.

24 I would like to offer Number 279.

25 MR. LEONI: No objection.



1 THE COURT: Admitted.

2 BY MR. DUCHETTE:

3 Q. Mr. Anderson, one last question. Since you have  
4 been coming to Goose Rocks Beach in the '70s and since  
5 your ownership would you say that the beach itself has  
6 been the focal point of you and your family's  
7 recreational activities?

8 A. Entirely.

9 MR. DUCHETTE: No further questions.

10 THE COURT: Mr. Stern?

11 CROSS EXAMINATION

12 BY MR. STERN:

13 Q. Mr. Anderson, I am Paul Stern with the Attorney  
14 General's Office.

15 Did you testify that you snorkeled down at  
16 Goose Rocks Beach?

17 A. Yes.

18 Q. When did you do that?

19 A. We did that in the '80s, in the '90s.

20 Q. Who did you go snorkeling with?

21 A. My children.

22 Q. Any of their friends?

23 A. And some nieces and nephews. I was kind of  
24 responsible for the kids.

25 Q. Did you lose any of them?

1 A. I never did.

2 Q. Good.

3 A. Fortunately.

4 Q. Yes.

5 Did you see other people snorkeling?

6 A. Actually yes.

7 Q. Where did you snorkel, all over the beach or one  
8 particular area?

9 A. All over the beach but there was one area that we  
10 really enjoyed and that was at the Dyke Road entrance  
11 because there were islands that at low tide go way out.

12 Q. There are what?

13 A. Islands, rock islands that continue out into the  
14 bay.

15 Q. When you went snorkeling what did you -- did you  
16 have any special equipment?

17 A. We had the snorkel, we have the masks, we  
18 eventually got wet suits, we had the fins. We were  
19 pretty serious.

20 Q. Is it possible to snorkel through the water  
21 without this special snorkeling equipment?

22 A. I am not sure how I would define snorkeling  
23 without a snorkel.

24 THE COURT: I think it's called swimming.

25 Q. Which is closely related to snorkeling by the

1 way.

2 You testified over time you have had five boats.

3 A. Correct.

4 Q. Including the Zodiac?

5 A. Correct.

6 Q. Only one of them was moored off shore?

7 A. Actually the Zodiac has been at times and the  
8 Triumph, the Center Console.

9 Q. Did you ever swim out to the boats?

10 A. I walked out to the boats at low tide and --  
11 walked and swam too.

12 Q. Could you look at Exhibit 279 which are the  
13 photographs and look at page 5, a photo with --

14 A. With the raft?

15 Q. Right.

16 A. Okay.

17 Q. That's an inflatable raft?

18 A. It is.

19 Q. And you used it?

20 A. Many times.

21 Q. And are there sort of oar -- did you use that  
22 with oars?

23 A. Yes.

24 Q. And I am just curious, is that a Boombox next to  
25 it?

1 A. It is.

2 Q. When was this taken?

3 A. 1984.

4 MR. STERN: Great.

5 Thank you, your Honor.

6 THE COURT: Mr. Driver.

7 CROSS EXAMINATION

8 BY MR. DRIVER:

9 Q. Good afternoon, Mr. Anderson.

10 A. Good afternoon.

11 Q. Your house has an interesting history, doesn't  
12 it?

13 A. It does.

14 Q. So it was Chips at one time?

15 A. Correct.

16 Q. Could you tell the Court what Chips was?

17 A. Chips was an ice cream stand/fried food  
18 restaurant.

19 Q. Was that an active place?

20 A. That was a landmark back then for sure, everybody  
21 went there.

22 Q. Then after Chips it became --

23 A. For one year it became an ice cream stand called  
24 Here's The Scoop and then that didn't make it, it then  
25 became Albee's for a length of time and then after

1 Albee's it became the Blue Sky Grill for one year.

2 Q. And then it was renovated to a single-family  
3 house?

4 A. Correct.

5 Q. And you are right on the Rachel Carson marsh?

6 A. We are.

7 Q. Have you heard -- you have been here for a while  
8 today?

9 A. I have.

10 Q. Have you heard the question about parking up and  
11 down Dyke Road?

12 A. Correct, I have.

13 Q. Is there parking up and down Dyke Road?

14 A. No.

15 Q. Is there some parking beyond the bridge?

16 A. There is.

17 Q. Is it only on one side or is it on both?

18 A. One side.

19 Q. Are you the first house past the bridge --

20 A. We are.

21 Q. -- on the left?

22 A. Correct.

23 Q. Is the parking up to your house?

24 A. No.

25 Q. About how many cars -- let me ask it differently.

1           Is it about 10 cars?

2           A.    No.

3           Q.    How many cars?

4           A.    Four to five.

5           Q.    Four to five.

6           Is there a sign that says parking off the  
7 pavement or no parking on the pavement?

8           A.    I believe there is but I couldn't -- I couldn't  
9 testify to that.

10          Q.    Is there another sign that says no parking beyond  
11 this point?

12          A.    I believe, yes, there is, and on the other side  
13 of the road there is as well.

14                   MR. DRIVER:   Thank you.

15                   MR. LACHIATTO:  Nothing, your Honor.

16                   MS. HEWEY:    No.

17                                    CROSS EXAMINATION

18   BY MR. LEONI:

19          Q.    Hi, Mr. Anderson.  My name is Ben Leoni and I  
20 represent the plaintiffs.

21                   Would you prefer Mr. Anderson or Don?

22          A.    Whichever suits you.

23          Q.    So in 1990 you rented the Celi cottage?

24          A.    Correct.

25          Q.    Did you rent that through an agency?

1 A. We did.

2 Q. Did you have any contact with the Celis?

3 A. Did not.

4 Q. So when you stated earlier that the Celis never  
5 gave you any instructions as to the beach, that was  
6 because you had no contact with the Celis?

7 A. Correct.

8 Q. We will just quickly take a look at photos, there  
9 are a few that got skipped over, Exhibit 279.

10 I guess we will start at the first photo. I had  
11 a little trouble seeing from back there but it looked  
12 like you were pointing that that photo was taken  
13 somewhere over in this area?

14 A. I believe so, right around the Star cottage.

15 Q. That's right near the end of Proctor Road?

16 A. Yes, it is actually probably two to the left of  
17 Proctor as you are looking at it.

18 Q. Like here?

19 A. Two to three, correct.

20 Q. And that's in the area of the public beach  
21 section, correct?

22 A. Actually I think -- I don't know where the public  
23 beach section is to be honest with you.

24 Q. Okay.

25 Do you understand that the town owns or that the

1 Town of Kennebunkport Conservation Trust, whatever it is  
2 called, owns some beach-front parcels there?

3 A. I am familiar with that.

4 Q. Do you know where they are?

5 A. Not exactly, no.

6 Q. Did the next photo with your kids digging a large  
7 hole -- when your family dug large holes like that would  
8 you typically fill it in after you left?

9 A. Absolutely.

10 Q. I think you said -- I was having a little trouble  
11 following along with Andre. Was it this picture or the  
12 following picture that you said was in front of the  
13 Fessenden property?

14 A. I think it was the next one.

15 Q. Okay.

16 A. Which is the sand castle, it was more towards  
17 that side.

18 Q. Okay, and then the -- past the sand castle the  
19 next photo which has a human pyramid?

20 A. The human pyramid.

21 Q. And that's in front of the Star cottage as well,  
22 correct?

23 A. Correct.

24 Q. I am going to go three more photos and that's the  
25 photo of the Celi house --



1 A. Yes.

2 Q. -- that you identified.

3 Towards the beginning of your testimony Andre  
4 asked when you were staying there if you saw other  
5 people using the beach and you said, quote, all of the  
6 time.

7 A. Yes.

8 Q. So this is one of those flukes where there's no  
9 people?

10 A. Correct.

11 Q. And the next page, that depicts the very west end  
12 of the beach that same year, correct?

13 A. Correct.

14 Q. So is this down by John Coughlin's house?

15 A. I don't know who John Coughlin is.

16 Q. And I think it is self-explanatory, I don't see  
17 anyone on the beach, do you?

18 A. I do not.

19 Q. I think I am done with the photos.

20 I was having trouble writing down some things  
21 when Andre was going through the questions. You  
22 identified that there was four areas that you used a lot  
23 and I got three of them, I think --

24 A. Correct.

25 Q. I got in front of The Tides --

1 A. In front of The Tides by the cottage.

2 Q. By the --

3 A. The Star cottage.

4 Q. The Star cottage?

5 A. Right.

6 In front of the entrance at Dyke Road.

7 Q. Okay.

8 A. This is where all the islands are, and then both  
9 ends of the mouths of the rivers, east and west end of  
10 the beach.

11 Q. Okay.

12 What was it about the ends of the rivers that  
13 attracted you to those areas?

14 A. Swimming and snorkeling.

15 Q. Into the river?

16 A. Correct.

17 Q. Jump off the edge of the sand into the river  
18 sometimes?

19 A. Yep.

20 Q. So when you said the east end and the west end,  
21 those were for the activities that you were doing in the  
22 rivers on either end?

23 A. Well, we would sun bathe down there as well.

24 Q. Yep.

25 You answered some interrogatories in this case.

1 Do you remember giving those?

2 A. I do.

3 Q. I have to find them.

4 I think we all know what question 2 stated.

5 Question 2 just says to identify all of the areas that  
6 -- particular properties that you spent time on and the  
7 areas of the beach that you spent time on and the period  
8 of use and the extent of the use, and I will bring you  
9 your answer if that's okay.

10 A. Sure.

11 Q. Do you mind if I approach, your Honor?

12 If you could just read that into the record?

13 A. During our period of ownership of both  
14 37 Dyke Road and 22 Dyke Road we regularly walked the  
15 entire length of Goose Rocks Beach.

16 In addition there were campfires, slept  
17 overnight, picnicked, lunched, launched and landed  
18 boats, made cooking fires and ate, flew kites, bird  
19 watched, collected sand dollars, fished, surfed, wind  
20 sailed, kayaked, canoed, sailed, biked, baby-sat and  
21 played sports including Frisbee and catch.

22 These activities occurred regularly in all areas  
23 of Goose Rocks Beach.

24 Q. Thanks.

25 So you mentioned all area -- regularly all areas

1 of Goose Rocks Beach. You would agree that you did not  
2 identify any areas of the beach that you used more than  
3 others in this answer?

4 A. I did not.

5 Q. But now you are testifying that the east end and  
6 the west end, Dyke Road and then the Star cottage area  
7 were the areas that you used the most?

8 A. I am.

9 Q. You mentioned also campfires?

10 A. (Motions head up and down.)

11 Q. And slept overnight?

12 A. Cook -- well, cook fires.

13 Q. Cook fires?

14 A. Correct.

15 Q. Okay. I believe it says cooking fires in 8 and  
16 then before it it says built campfires.

17 A. I think they are one in the same, campfires, cook  
18 fires.

19 Q. Okay.

20 Did you ever have a campfire or a cook fire after  
21 2000?

22 A. We have.

23 Q. Where did you have that campfire or cook fire?

24 A. Usually right in front of The Tides after 2000.

25 Q. After 2000?

1 A. (Motions head up and down.)

2 Q. Why not before 2000?

3 A. And before 2000.

4 Q. So -- we will stick with after 2000 for now.

5 You live down here on Dyke Road?

6 A. Correct.

7 Q. And you had your campfires or your cook fires  
8 down near The Tides, which is down here?

9 A. Correct.

10 Q. Why wouldn't you just have your camp fire down  
11 here on the beach?

12 A. All of our friends were at the other entrances so  
13 we would just go down where the friends are.

14 Q. Were you aware of the Town's policies regarding  
15 fire permits after 2000?

16 A. I am, yes.

17 Q. So you are aware that they refer to that area in  
18 the permits as the public beach section?

19 A. I was not familiar with that to be honest.

20 Q. Did you ever apply for a permit?

21 A. My family did. I don't think I ever did  
22 personally.

23 MR. LEONI: I think I am done. I am going  
24 to flip through my notes real quick.

25 I am all set. Thank you, Mr. Anderson.

1 THE COURT: All set?

2 Mr. Anderson, you can step down.

3 THE WITNESS: Thank you. Have a nice  
4 weekend.

5 THE COURT: You too.

6 (Witness excused.)

7 MR. FRAME: Your Honor, Mary Kudaroski.

8 THE CLERK: Please state your name and spell  
9 your name for the record.

10 THE WITNESS: Mary Kudaroski,  
11 K-U-D-A-R-O-S-K-I.

12 Thereupon,

13 MARY KUDAROSKI

14 was called as a witness and, after having been duly  
15 sworn, was examined and testified as follows:

16 DIRECT EXAMINATION

17 BY MR. FRAME:

18 Q. Before you sit down, Mary, can you take the  
19 orange pen, Mary? You own -- your family owns two  
20 properties at Goose Rocks Beach?

21 A. Correct.

22 Q. Can you circle both of those? I will ask you a  
23 little bit about them.

24 A. Okay.

25 Q. Great.

1           Before you sit down -- you can speak in the  
2 microphone but don't sit down yet -- what's the address  
3 of those two properties?

4           A.   One of them is 110 Kings Highway and the other is  
5 7 Sunset Lane.

6           Q.   Great.

7           With the red pen, Mary, can you identify -- you  
8 may need to go over someone else but -- identify the  
9 routes that you generally used to access the beach in  
10 those two properties?

11          A.   Yes.

12           This right-of-way here has changed.

13          Q.   Great.

14           You can sit down now.   Sorry.

15          A.   (Witness complies.)

16          Q.   Where is your legal residence, Mary?

17          A.   Portsmouth, New Hampshire.

18          Q.   Great.

19           When did you first come to Goose Rocks Beach?

20          A.   When I was first born so that was 1958.

21          Q.   Have you been coming to Goose Rocks Beach for  
22 every summer since 1958?

23          A.   Every summer.

24          Q.   In 1958 did your family own property at  
25 Goose Rocks Beach?

1           A.   My grandmother did.

2           Q.   Is it one of these properties, Sunset Lane or  
3 Kings Highway?

4           A.   It was on Sunset Lane but it is next-door to the  
5 one we own.

6           Q.   Great.

7                    At what point in time, just briefly for the  
8 Court, take us through how 7 Sunset Lane and 110 Kings  
9 Highway came into your family.

10          A.   Okay. Well, first my mother has been going up  
11 there since the '40s with her family, hence my  
12 grandmother owned 5 Sunset Lane, we stayed up there --

13          Q.   Is your mother still alive?

14          A.   No, she passed away.

15                    She -- one of her -- another daughter bought it  
16 in 1978 and we bought the cottage next to it or my  
17 parents bought it in 1978.

18          Q.   And that's Sunset Lane?

19          A.   7 Sunset Lane, yes.

20          Q.   Yep.

21          A.   Both my parents passed away but prior to passing  
22 away they deeded it to my two sisters and I.

23                    110 Kings Highway was owned by my uncle, they  
24 purchased that property in 1978, and they both passed  
25 away and they had an only child who was a nun so she



1 sold it to us and -- my sister and I.

2 Q. So you and -- just so I have got this right, it  
3 is important -- you and two of your sisters own 2 Sunset  
4 Lane?

5 A. Correct.

6 Q. And you and one of your sisters own Kings  
7 Highway?

8 A. Correct.

9 Q. Great.

10 Your two sisters, have they, like you, have been  
11 coming to Goose Rocks Beach since they were born?

12 A. Yes.

13 Q. Has there ever been a summer for you that you  
14 have not come to Goose Rocks Beach?

15 A. I don't believe so.

16 Q. When you were a kid Sunset Lane was home base?

17 A. Yes.

18 Q. What -- you heard earlier a lot of the activities  
19 that happened on the beach. I am going to ask you a  
20 simple question. Were the activities that you engaged  
21 in on the beach consistent with what you have heard here  
22 today?

23 A. Pretty much so, yeah.

24 Q. Anything different?

25 A. We used to go clamming, walk out to the rocks,

1 collect shells. No, I don't think so. Frisbee, sun  
2 bathing, reading, volleyball.

3 Q. Your folks, were they any stricter than any of  
4 the other folks we heard about who allowed their kids to  
5 roam around Goose Rocks Beach?

6 A. No. It was always a safe beach but we always  
7 stayed with the family.

8 Q. Okay, and when you were with the family would you  
9 look around and see other families engaging in  
10 activities remarkably similar to what you were engaging  
11 in?

12 A. Yes.

13 Q. Great.

14 The 7 Sunset Lane and 110 Kings Highway, do you  
15 rent either of those?

16 A. We do, we rent Kings Highway I think from  
17 beginning of June through mid September and then we use  
18 it off season, and Sunset Lane has a little kind of a  
19 garage attachment and so we do rent that part of it but  
20 the family stays at the main house.

21 Q. Kind of like an inlaw apartment?

22 A. Yes.

23 Q. Great.

24 So Sunset Lane, do you and your siblings, your  
25 two sisters split time there or are you there at the

1 same time? How does that work?

2 A. We are all going to be there tonight.

3 Q. Great.

4 A. So, yeah, we stay. It all depends.

5 Q. Are there kids, nieces, nephews, stuff like that?

6 A. Yes. I don't have children. My sister, niece  
7 and nephew.

8 Q. Great.

9 Have you been on the beach at times with your  
10 nieces and nephews?

11 A. Yes.

12 Q. Is there any difference in the types of  
13 activities that you have observed them engaging in than  
14 what you engaged in as a kid?

15 A. No.

16 Q. Did your parents give you instructions on where  
17 you were allowed to go on the beach?

18 A. No, they just said don't swim alone.

19 Q. Don't swim alone.

20 Did your parents give you instructions on --  
21 besides don't swim alone -- on what you were allowed to  
22 do on the beach?

23 A. No.

24 Q. Great.

25 Have you observed your sisters giving their kids

1 any greater instructions than those that you were  
2 provided by your parents?

3 A. No.

4 Q. You have a rental inlaw apartment at Sunset,  
5 correct, and then you rent Kings Highway for a lot of  
6 the summer, right?

7 A. Yes.

8 Q. Do you -- is Goose Rocks Beach for you purely  
9 summer or do you utilize Goose Rocks Beach outside of  
10 the high season so to speak?

11 A. All year.

12 Q. What kind of activities do you do at the beach  
13 outside of, you know, June through September?

14 A. Oh, walk the beach, sometimes I sit and read on  
15 the beach, we have a right-of-way that goes right down  
16 by the Almeder's house and if you bundle up right there  
17 you can sit and read.

18 Q. Up in the high dry sand?

19 A. Yeah.

20 Q. Great.

21 When you said -- you said you walked the beach  
22 and sit down and read. Have you ever when you have been  
23 walking the beach and sat down to read, have you ever  
24 taken into consideration where you are sitting?

25 A. Never.

1 Q. Ever thought I can't be in front of this  
2 particular beach-front owner's house or on this type of  
3 sand?

4 A. No.

5 Q. For your renters, the renters at the inlaw  
6 apartment at Sunset Lane and the renters for the summer  
7 -- for a lot of the summer at Kings Highway, is there a  
8 consistency in the renters you get each year? Do you  
9 have a lot of families that come back year after year?

10 A. Most are repeats.

11 Q. Most are repeats.

12 Have you ever needed to give -- do you rent it  
13 yourself or do you do it through a rental agency?

14 A. Maria Junker.

15 Q. Have you ever instructed Maria on where the  
16 tenants are allowed to go on the beach or what the  
17 tenants are allowed to do on the beach?

18 A. No.

19 Q. Do you leave -- I know that when people rent  
20 houses a lot of times they will read something that says  
21 listen, you know, the washer/dryer is a little bit on  
22 the fritz so only use this much detergent. Do you leave  
23 anything like what you are allowed to do on the beach?

24 A. Absolutely not.

25 Q. Down at the west end by Sunset Lane, beach-front

1 owners including Shermans, Gregorys, Baylis', Engles,  
2 Coughlins, are you friends with all those people?

3 A. I am friends with Engles, Shermans, used to be  
4 friendly with Mr. Almeder, we are just cordial now I  
5 think.

6 Q. So have you been out on the beach at times with  
7 those folks?

8 A. Yes, and I have had dinner in their homes.

9 Q. Great.

10 Have you ever seen any of them kick people off  
11 the beach?

12 A. No.

13 Q. Have you ever seen any of them tell people you  
14 need to go to the so-called public section of the beach?

15 A. No.

16 Q. And have you ever felt that you could only be on  
17 the beach because you were perhaps hanging out with the  
18 Shermans or the Coughlins or the Almeders?

19 A. No.

20 MR. FRAME: Permission to approach, your  
21 Honor?

22 THE COURT: Of course.

23 MR. FRAME: 316, your Honor.

24 Your Honor, once again is it okay if I stand  
25 near the witness to make it easier?

1 THE COURT: Of course.

2 MR. FRAME: Thank you.

3 These pages are numbered, your Honor, so it  
4 will be a little bit easier.

5 Q. Mary, the first page, up top, do you recognize  
6 that place?

7 A. I never knew it -- while I was alive. I  
8 recognize it from the photo because it burnt.

9 Q. It burnt in the '47 fire?

10 A. Yes.

11 Q. Great.

12 Do you know where that property was located?

13 A. 5 Sunset Lane.

14 Q. That was your aunt's or your grandmother's house  
15 next to the place you now own?

16 A. Yes.

17 Q. Great.

18 Go down a couple of pages. Let's go to page 3,  
19 all of page 3. You weren't born yet in '52, correct?

20 A. Nope.

21 Q. Do you recognize any of the folks in that top  
22 left photo?

23 A. Let's see. That is -- it is hard to see. It is  
24 my mother and her friends. I think one of them at the  
25 time was her finance.

1 Q. Great.

2 Is that your mother on the left or in the middle?

3 A. It is my mother on the left.

4 Q. She was Edna?

5 A. Edna, yes.

6 Q. Great.

7 The one on the right, who are the folks in that  
8 photo?

9 A. It is a dark photo. It is hard to see.

10 Q. If you can't, that's okay.

11 A. I think it is my grandmother and my mother --

12 Q. Your mother on the far right?

13 A. Yeah, my mother and -- I can't see the people, it  
14 is so dark.

15 Q. Let's go down a couple of pages. Let's go to  
16 page 4, the bottom of page 4, that is a little bit of a  
17 clearer photo?

18 A. A little bit, yeah.

19 Q. And this is pre Mary Kударoski, the year before  
20 you came into the world?

21 A. Well, a couple.

22 Q. Do you recognize people in that photo?

23 A. I do. It's still pretty dark. It is my  
24 grandmother, my aunt Mary, my mother and her -- some  
25 friends, I don't know who.



1 Q. Great.

2 Do you recognize where that photo was taken, do  
3 you recall at all?

4 A. I believe it was taken right about where the  
5 Cole's house is, right -- like next to the Celis.

6 Q. Okay. So a little bit further east down the  
7 beach from --

8 A. Yes, from the Celis.

9 Q. Great.

10 Let's go to page 5. For you that top left one.

11 A. Okay, that's --

12 Q. Who is that?

13 A. That is my father on the left and my grandmother  
14 sitting next to him.

15 Q. So Mrs. Charles Cronin is your grandmother --

16 A. Yes.

17 Q. -- or was your grandmother?

18 A. Yes.

19 Q. Can you orient us a little bit as to where maybe  
20 you are on the beach in that photo?

21 A. Directly behind the picture you can see the  
22 Celi's house kind of up over their head.

23 Q. So again further --

24 A. A little bit further east.

25 Q. And the photo below that or to the right of that,

1     who is in that photo?  Again, family photo?

2           A.  Yes.  It is my father, my sister, my niece and  
3     two cousins and -- my other sister.

4           Q.  Is that up close to the Celis again?

5           A.  Yes.

6           Q.  Did you make it a point to sit in front of the  
7     Celis because they were -- they would allow you to sit  
8     on the beach in front of their house?

9           A.  No, that's just where the right-of-way came out  
10    so that's where we sat.

11          Q.  I am going to ask you a silly question but I have  
12    to ask.  If you walk down the right-of-way and people  
13    were in front of you on the right-of-way would you look  
14    to your left -- left, excuse me, or right off the  
15    right-of-way or would you turn and go home because  
16    someone was in the right-of-way?

17          A.  I would go left or right.

18          Q.  Let's go to page 6.  We are almost done here,  
19    Mary.

20                 Bottom photo, Mary.  Who is that in the photo?

21          A.  That is -- oh, that's me.

22          Q.  That's you.

23                         MR. THAXTER:  Could I just see which one?

24                         MR. FRAME:  Sure.

25          Q.  That bottom photo, Mary, it looks like a white

1 coverup or something? Are you there?

2 MR FRAME: On page 6, Pete.

3 MR. THAXTER: I got it.

4 MR. FRAME: Okay.

5 Q. That's you, Mary?

6 A. Yes, it is.

7 Q. It's probably hard to tell if at all where you  
8 are on the beach there, right?

9 A. Well, yeah.

10 Q. Do you see people --

11 A. Oh, no, it's not hard to tell.

12 Q. Oh, it's not hard to tell.

13 A. No, no, I thought you said --

14 Q. Why is it not hard to tell?

15 A. Because that's where we all -- that's in front of  
16 like the general Celi, Cole area.

17 Q. Okay.

18 A. The Coles bought the property next to the Celis  
19 so --

20 Q. Great.

21 Are there people in the background of that photo?

22 A. Quite a few.

23 Q. Do you know all those people in the background of  
24 that photo?

25 A. I know a couple of people.

1 Q. But some you don't know?

2 A. Yes.

3 Q. Is that an unusual scene to see other people on  
4 the beach when you were down there in the '80s?

5 A. No.

6 Q. Is that an unusual scene to see other people on  
7 the beach now when you go down there?

8 A. No.

9 Q. Is that unusual -- more unusual in one part than  
10 the others, more towards the Celis versus towards the  
11 Almeders or do you see people on the beach when you are  
12 out there all the time?

13 A. I see people everywhere.

14 Q. Let's go to the next page, page 7. Again for the  
15 upper right photo it looks to be a neat photo lineup of  
16 Kudaroskis, right?

17 A. My father, my mother, it's -- I can't see from  
18 this angle. They are close friends that always stayed,  
19 the Fieburgs and another couple.

20 Q. Great, and people behind them, correct?

21 A. Yes.

22 Q. Do you recognize or can you identify all the  
23 people behind them?

24 A. No.

25 Q. Great.

1           The photo to the -- if you are either looking at  
2   it to the left of that one or to the bottom of that  
3   depending upon how you are holding the page, it looks to  
4   be someone carrying a baby and your father. Is that  
5   accurate?

6       A.   That's correct.

7       Q.   Coming up from the beach?

8       A.   Yes.   That's my brother-in-law, Wayne Taylor.

9       Q.   What's going on in the background there, Mary?

10      A.   I think it's a volleyball game or something.

11      Q.   That looks to be in the wet sand, right?

12      A.   Yes.

13      Q.   Was that a frequent occurrence or an infrequent  
14   occurrence to have games in the wet sand?

15      A.   It was frequent. We had a net.

16      Q.   If you came down -- did your mom ever come down  
17   to watch you guys play volleyball?

18      A.   Yes. She played as well.

19      Q.   If people weren't playing would they watch?

20      A.   They would watch or join in.

21      Q.   Great.

22               Sometimes if they watched would they stand in the  
23   wet sand?

24      A.   Yeah.

25      Q.   Would they put a beach chair on the dry sand and

1 watch?

2 A. Sure.

3 Q. Did you ever care whose house you were in front  
4 of you?

5 A. No.

6 Q. One more maybe. Just 13.

7 A. Page 13?

8 Q. Yes. That's a photo of Goose Rocks Beach in the  
9 winter?

10 A. Yes.

11 Q. You walk on the beach in the winter?

12 A. Yeah.

13 Q. You walk on the beach in the fall?

14 A. Yes.

15 Q. Walk on the beach in the spring?

16 A. Yes.

17 Q. In the winter I assume you don't stop and sit  
18 down and enjoy the view because it is probably a little  
19 chilly, right?

20 A. Yep.

21 Q. Would you be apt to stop and enjoy the view in  
22 the fall or, you know, temperate fall or spring day?

23 A. Oh, yeah.

24 MR. FRAME: Your Honor, I have forgotten to  
25 do this every time and I am going to do it this time, I

1 will offer this, please.

2 THE COURT: 316.

3 Admitted without objection.

4 MR. FRAME: Thank you. Nothing further.

5 THE COURT: Mr. Stern.

6 CROSS EXAMINATION

7 BY MR. STERN:

8 Q. Good afternoon.

9 A. Hi.

10 Q. I am Paul Stern with the Attorney General's  
11 Office.

12 Could you look at page 3 of Exhibit 31, that is  
13 the photographs?

14 A. Page 3?

15 Q. Right. In the upper left is that a picture of  
16 three people including your mother and some sort of  
17 watercraft?

18 A. Yes.

19 Q. Do you know what kind of watercraft that was?

20 A. I don't. It looks like a raft.

21 Q. Have you and members of your family floated out  
22 on the water off of Goose Rocks Beach in rafts and other  
23 watercraft?

24 A. Yes.

25 Q. Any particular area of the beach or all over the

1 beach?

2 A. Pretty much on the west end.

3 Q. On the west end. Have you seen other folks out  
4 there floating on a variety of watercraft?

5 A. Yes.

6 Q. Some of them are inflated?

7 A. Yes.

8 Q. Some of them are Styrofoam?

9 A. Right.

10 Q. Any other kinds you have seen out there?

11 A. No -- or those little stick things that kids  
12 have.

13 Q. Stick --

14 A. You know, the Styrofoam -- well, I guess they are  
15 Styrofoam, yeah.

16 MR. STERN: Nothing further. Thanks.

17 MR. DRIVER: Nothing, your Honor.

18 THE COURT: Mr. Lachiatto?

19 MR. LACHIATTO: Nothing, your Honor.

20 THE COURT: Miss Hewey?

21 MS. HEWEY: Nothing.

22 THE COURT: Mr. Thaxter?

23 CROSS EXAMINATION

24 BY MR. THAXTER:

25 Q. Can I call you Mary? I am Pete Thaxter.



1 A. Oh, yes, of course.

2 Q. Mary, do you remember answering some  
3 interrogatories?

4 A. Yes.

5 Q. I will hand them to you, and I am just going to  
6 read and ask you if that's what you remember.

7 The interrogatory asked if you could identify  
8 your uses up and down the beach and which plaintiffs  
9 properties you used and the times, and your answer was  
10 while there have been certain areas that we used more  
11 than others our use was not strictly localized to one  
12 particular area.

13 Is that correct?

14 A. That is correct, but I believe in that answer I  
15 wrote that we used actually the beach from the Batson to  
16 the Little River and that with the bulk of the use in  
17 front of the Flynn home down to the Batson River.

18 Q. Let me just show you that answer to that  
19 question.

20 THE COURT: Check to make sure that is hers,  
21 Pete.

22 Q. I will ask you about question 2.

23 A. Okay.

24 Q. Would you look at the question and then you can  
25 look at your answer. The answer is on the bottom of

1 page 2 and it continues to page 3.

2 A. Yes, I am looking at that. Yes, I wrote these  
3 activities occurred regularly at all areas of  
4 Goose Rocks Beach, while there may have been a certain  
5 area that we used more than others our use was not  
6 strictly localized to one particular area.

7 Q. Let's go to the pictures now, maybe you can help  
8 me with that.

9 Take a look at -- and we are thankful these are  
10 numbered. Take a look at page 7. If you look at the  
11 bottom of the page there's a whole group. I assume  
12 that's your family, right?

13 A. Yes.

14 Q. And there's a house up in the background. Whose  
15 house is that?

16 A. That's The Westerly.

17 Q. That is not the Flynn's house, right?

18 A. No.

19 Q. Okay. What is The Westerly?

20 A. The Westerly?

21 Q. Yes.

22 A. A cottage.

23 Q. How far down the beach is it?

24 A. It is next to -- it's Celi, Cole, Westerly.

25 Q. Okay.

1 A. Yeah.

2 Q. So that's two over from Celi, right?

3 A. Yes.

4 Q. I hand you this exhibit but I don't want to make  
5 you pull out the big book. I will show you the one I  
6 have.

7 Exhibit 76 indicates that you purchased this lot  
8 in 2000, April 2000; is that correct?

9 A. At 110 Kings Highway.

10 Q. And also this -- and that's from a Monica Daily?

11 A. Yes.

12 Q. And also there's a release deed in here from  
13 Monica Daily in 1998 that talks about a five-foot  
14 easement. Are you familiar with that?

15 A. Yes.

16 Q. And was that for 110?

17 A. No, that was for 7 Sunset Lane.

18 Q. Who is -- so she owned property near 7 Sunset  
19 Lane?

20 A. No, Monica daily was my cousin whom I bought 110  
21 from.

22 Q. Okay, so you got an easement for Sunset Lane and  
23 did you have an easement from 110? Do you have an  
24 access easement to the beach from 110?

25 A. Yes. It's on my deed.

1 Q. Okay, and where does that easement run, does it  
2 run right next to Celi's house?

3 A. No, it runs parallel to Almeders and the  
4 Gregorys, just right in between.

5 Q. It runs right in between the Almeders and the  
6 Gregorys?

7 A. Yes.

8 Q. Okay.

9 So let's take another look at page 7. So there's  
10 another one that shows the house in the background.  
11 That is dated 1990, right?

12 A. Yes.

13 Q. And that house is again The Westerly?

14 A. Correct.

15 Q. So you are a couple of lots down from Celis  
16 there, you have Celi --

17 A. Yes.

18 Q. Who is the next one?

19 A. Cole, they just bought the property.

20 Q. Celi, Cole and then who?

21 A. Then Westerly.

22 Q. And then on page 8 at the bottom. Again, that's  
23 a picture of your family grouping?

24 A. Yes.

25 Q. And again that's The Westerly in the background?

1 A. Correct.

2 Q. Then there's -- on page 9 there's another photo  
3 and it says end of August '88 and people are coming down  
4 the stairs. Do you know where that is?

5 A. That is the -- that is now the Cole property but  
6 it used to be the right-of-way to the beach.

7 Q. There used to be a right-of-way over the Cole  
8 property?

9 A. No, this is the right-of-way that everybody on  
10 Sunset Lane, and that area use for a right-of-way but  
11 when the Coles bought the property the right-of-way  
12 moved.

13 Q. Okay, and on page 11 there's a picture. Is that  
14 your brother?

15 A. That's my brother-in-law, sister and my nephew.

16 Q. Do you know where they are located in that  
17 picture?

18 A. That's about probably pretty close to the Celi,  
19 Cole line.

20 Q. How often in the 1990s, how many weeks were you  
21 here in the summer?

22 A. Personally?

23 Q. Personally?

24 A. 1990? I have to think.

25 Q. A week, two weeks?

1           A.  Oh, no, more than that.  I came up frequently.  
2  My parents were here all summer.  I have an irregular  
3  work scheduled, sometimes I would come up for a week,  
4  then I might not be here for a week, then a weekend, so  
5  very frequently, yeah.

6           Q.  But do you take -- you are working, right?

7           A.  Yes.

8           Q.  So I assume to take a week you take a vacation?

9           A.  No, I am a flight attendant so I get large chunks  
10 of time off.

11                   MR. THAXTER:  Thank you.

12                   MR. FRAME:  Very briefly, your Honor.

13                               REDIRECT EXAMINATION

14  BY MR. FRAME:

15           Q.  Mary, these easements that Attorney Thaxter was  
16 asking you about at both properties, when you walk down  
17 the beach -- down to the beach through those easements  
18 do you feel constrained to stay within the bounds of the  
19 easement?

20           A.  No.

21           Q.  Do you feel like you need to go down to the water  
22 before you can go east or west because perhaps the  
23 easement says it runs to the sea?

24           A.  Well, I do now that one of the easements has  
25 changed because there's nowhere to go, it's about a foot

1 wide, so you have no choice. But when you get to the  
2 water you can go left or right.

3 Q. Great.

4 Do the easements say anything about what you are  
5 permitted to do when you are down on the beach?

6 A. No.

7 MR. FRAME: All set, your Honor.

8 THE COURT: Paul?

9 RE CROSS EXAMINATION

10 BY MR. STERN:

11 Q. Mr. Thaxter asked you some questions about your  
12 89.

13 Answers to interrogatories. Do you recall that?

14 A. Yes.

15 Q. You referred to activities but he didn't give you  
16 the opportunity to describe what activities the  
17 interrogatory was referring to. Do you recall that?

18 A. Yes.

19 Q. Was one of the activities bird watching?

20 A. Yes.

21 Q. And did you do that from the dry sand?

22 A. Yes.

23 Q. Did you do it from the intertidal area?

24 A. Yes.

25 MR. STERN: Thank you.

1 THE COURT: Anything else?

2 Thank you, Miss Kudaroski. You may step  
3 down.

4 (Witness excused.)

5 THE COURT: You have one more?

6 MR. FRAME: We have one more. Can we take a  
7 break?

8 THE COURT: Yes. We will be back at 2:30.

9 MR. DRIVER: Your Honor, may I be excused?

10 (Discussion held off the record.)

11 THE COURT: You may be excused.

12 MR. DRIVER: Thank you, your Honor.

13 THE COURT: And if Mr. Lachiatto is your  
14 chauffeur or you are his chauffeur he may likewise be  
15 excused. The rest of you lawyers are going to be here.

16 (Thereupon, a recess was taken, and then the  
17 proceedings continued as follows:)

18 THE COURT: Good afternoon, folks. We are  
19 here in the Almeder matter.

20 Gregg?

21 MR. FRAME: Thank you, your Honor. Our  
22 final witness, Joanne Gustin.

23 THE CLERK: Please state your name for the  
24 record.

25 THE WITNESS: Joanne Gustin, G-U-S-T-I-N.



1 Thereupon,

2

JOANNE GUSTIN

3 was called as a witness and, after having been duly  
4 sworn, was examined and testified as follows:

5

DIRECT EXAMINATION

6 BY MR. FRAME:

7 Q. Joanne, you know the drill, can you with the  
8 orange pen circle the back lot that you own?

9 A. Yep, the back lot that I own is 9 Wildwood.

10 Q. Great.

11 Is that red that's identifying down to the beach,  
12 is that what you would take to get to the beach from  
13 that lot?

14 A. It is.

15 Q. Can you with your orange pen identify the  
16 beach-front home that you own?

17 A. I will.

18 Q. Great.

19 Thank you. Sit down, Joanne.

20 A. Yes, sir.

21 Q. Going up to camp --

22 THE COURT: The phrase is please be seated  
23 Miss Gustin.

24 Q. Please be seated.

25 A. Thank you, sir.

1 Q. Joanne, can you --

2 THE COURT: It's a generational thing.

3 A. Truly, I believe it is.

4 MR. FRAME: Oh, please, your Honor.

5 Q. Can you describe -- when did your family first  
6 come to Goose Rocks Beach, Joanne?

7 A. My parents in 1947 had their honeymoon at the end  
8 of Beachwood and Wildwood and I have two uncles who were  
9 here far before that, I can't tell you when, but in 1947  
10 my parents started coming down.

11 Q. I don't want to interrupt. Go ahead.

12 A. In 1957 after renting for 10 years they bought a  
13 house and that's the year I was born and that's when we  
14 came down.

15 Q. The house that they bought, your parents bought  
16 in 1957, is that house you identified on the map?

17 A. That's the 9 Wildwood, the back lot.

18 Q. And the house you identified as the beach front,  
19 what is the address of that house?

20 A. 235 Kings Highway.

21 Q. Great.

22 When did you and your husband acquire 235 Kings  
23 Highway?

24 A. '98 or '99. My uncle built it in 1950 and when  
25 he died it became mine.

1 Q. When you come to Goose Rocks Beach now which  
2 house do you stay in?

3 A. 235 Kings Highway.

4 Q. Who stays in the Wildwood house?

5 A. That's a tiny bit complicated because my brother  
6 has a life tenure down there, so he uses it as a rental.  
7 I own the house but he has a lot of use on it, and then  
8 it's rented usually.

9 Q. Great.

10 You heard -- you have been here all afternoon,  
11 correct?

12 A. I have.

13 Q. And you have heard the uses of the beach that  
14 people have talked about, correct?

15 A. I have.

16 Q. Has -- well, let's go back first. 1957 was your  
17 first summer on Goose Rocks Beach, you were just a baby,  
18 correct?

19 A. A tiny baby.

20 Q. Have you spent parts of every summer on  
21 Goose Rocks Beach since then?

22 A. Every single summer for the last 55 years.

23 Q. Great.

24 Have the uses that everyone has talked about  
25 today been consistent with the uses that you have

1 engaged in on the beach in your 55 years?

2 A. More or less they have. I suspect I have done  
3 more clamming than the average citizen.

4 Q. Okay.

5 A. But more or less, swim lessons, everything.

6 Q. Great.

7 Have the uses that you have heard other people  
8 talk about, have they been consistent with what you have  
9 observed your family engaging in at Goose Rocks Beach?

10 A. Absolutely.

11 Q. You said your uncle, I want to make sure I have  
12 this right, sometime in 1959 built on the lot that your  
13 beach-front home is on, correct?

14 A. 1950, yes.

15 Q. And when you and your family would go down to the  
16 beach starting in 1957, you probably couldn't remember  
17 1957 but starting in the '60s when you probably could  
18 remember things did you stay on the beach in front of  
19 your uncle's house?

20 A. Not exclusively, no.

21 Q. Where would you go?

22 A. Wherever for that day. We would -- usually come  
23 down the beach through the Bartlett entrance down there,  
24 there was a public way, again, like everyone else we  
25 would go right or we would go left. For us it depended

1 where the group of friends were.

2 Occasionally we would go as far over as three or  
3 four houses where my uncle was and occasionally four or  
4 five in the other direction, and if we were after waves  
5 we would go all the way over.

6 Q. Down in one of the --

7 A. In front of The Tides, yeah.

8 Q. Did you ever go down to either the rivers, to --  
9 I think people said, you know, someone used the term  
10 running the river, the tide would come out and you could  
11 float out or float in --

12 A. Sure.

13 Q. -- depending upon --

14 A. Sure, and the best clamming is down the far west  
15 end, you go around there just down the river a little  
16 bit.

17 Q. Great.

18 When you were engaging in those activities in  
19 your youth with other back-lot owners and other  
20 beach-front owners did you ever make a distinction?

21 A. No, absolutely not, they were my friends.

22 Q. All over the beach?

23 A. All over the beach.

24 Q. Do you recall your uncle or any of your family in  
25 the Kings Highway house ever kicking someone off the

1 beach?

2 A. Certainly not.

3 Q. Do you recall them ever saying you can be on the  
4 beach but you need to go east to the public or so-called  
5 public section of the beach?

6 A. Never once.

7 Q. When you were on beach whether it was in front of  
8 your uncle's house or anywhere else on the beach did you  
9 always know who was around you?

10 A. No.

11 Q. Sometimes there would be other beach-front owners  
12 or back-lot owners or members of the general public,  
13 correct?

14 A. Absolutely.

15 Q. And, again, they were as you testified engaging  
16 in activities similar to what you were engaging in?

17 A. Most definitely.

18 Q. Did you -- have you ever asked for permission  
19 from any beach-front owner to use the beach in front of  
20 their house?

21 A. No.

22 Q. You are a beach-front owner now so did that --  
23 prior to 1999 when you weren't a beach-front owner did  
24 you ask for permission then?

25 A. No.

1 Q. Now, you certainly -- it wasn't an issue being in  
2 front of your uncle's house, right? Was it an issue  
3 anywhere?

4 A. No.

5 Q. Since you have been a beach-front owner do you  
6 feel like you have acquired greater rights to use  
7 Goose Rocks Beach?

8 A. No, just a shorter walk.

9 Q. And since you have been a beach-front owner have  
10 you ever told someone not to engage in a recreational  
11 activity on the beach in front of your house?

12 A. Absolutely not.

13 Q. Are you aware of any agreement written or  
14 otherwise among beach-front owners about the ability of  
15 beach-front owners to walk the beach?

16 A. I am aware of no agreement.

17 Q. 54 years you have used Goose Rocks Beach.

18 A. Correct.

19 Q. Sometimes for the entire summer?

20 A. Correct.

21 Q. Sometimes for a little bit less?

22 A. Correct.

23 Q. Were you asked to join the litigation as a  
24 beach-front owner?

25 A. When this started, and I have lost track of

1 dates, a questionnaire did come out and I suspect  
2 feeling out how people felt about owning stuff, you  
3 know, having the beach for their own. I don't think I  
4 answered in a way that would have made me a target to  
5 join the thing, so no.

6 Q. How did you answer that as best you can recall?

7 A. There were a lot of questions on not the words  
8 but did I feel I owned the beach, did I have a right to  
9 the beach, and of course I do not feel that, I feel the  
10 beach is for everyone, I simply -- I happen to live a  
11 little closer than other people.

12 I would have to look at it again but there were a  
13 lot of questions that I was -- I don't know, is insulted  
14 the right word? Certainly sad about and a little  
15 disgusted, but no, I would not have been someone they  
16 would have approached.

17 Q. And you heard the testimony earlier today about  
18 the neighborly nature of Goose Rocks Beach. Did you  
19 feel that the litigation was consistent with the  
20 Goose Rocks Beach that you have known all your life?

21 A. Absolutely not and that's the sad part because  
22 part of the beauty of that beach is all the neighbors.

23 Q. Has this been difficult or emotional for you?

24 A. Yes.

25 Q. In fact your uncles -- your history goes back



1 well over a hundred years, correct?

2 A. Probably, yeah. Yeah. Wow.

3 MR. FRAME: Nothing further, your Honor.

4 THE COURT: Mr. Stern?

5 MR. STERN: Nothing, your Honor.

6 MR. DRIVER: Nothing, your Honor.

7 MR. LACHIATTO: Nothing.

8 THE COURT: Miss Hewey?

9 MS. HEWEY: Nothing.

10 THE COURT: Mr. Leoni?

11 CROSS EXAMINATION

12 BY MR. LEONI:

13 Q. Hi, Miss Gustin. My name is Ben Leoni and I  
14 represent the plaintiffs. I just have a couple of quick  
15 questions.

16 You recall receiving that questionnaire from the  
17 beach-front owners prior to this lawsuit?

18 A. Yes.

19 Q. In the second question that you received asks you  
20 if you had ever given permission to use the beach?

21 A. Uh-huh.

22 Q. And you answered, quote, absolutely, yes,  
23 exclamation point, friends, family, neighbors, anyone  
24 who chooses to visit me is more than welcome. List of  
25 names far too long.

1           Is that your recollection?

2           A.   That's what I would have written.

3                   MR. LEONI:  No further questions.

4                               REDIRECT EXAMINATION

5  BY MR. FRAME:

6           Q.   Can you explain that answer, Joanne?

7           A.   I would love to.  It means that I have no problem  
8  with anyone, anywhere who wishes to use the beach, and  
9  quite honestly I don't feel it is my right to give you  
10 permission to use the beach that's there for everyone,  
11 that's what that answer would have meant, not that I am  
12 giving you permission but that there's no need.

13                   MR. FRAME:  Thank you, Joanne.  I am all  
14 set, your Honor.

15                               REXCROSS EXAMINATION

16  BY MR. LEONI:

17           Q.   So I think you just told us what you really meant  
18 by that which was that you believe that everyone has a  
19 right to use the beach?

20           A.   Uh-huh.

21           Q.   So why didn't you say that?

22           A.   Well, it was a questionnaire that came over  
23 e-mail more than five years ago.  Had I known what it  
24 was actually intending then perhaps I would have put no,  
25 but what I said and meant was that I don't need to give

1 permission for people to use the beach.

2 MR. LEONI: Okay, thanks.

3 THE COURT: All set?

4 Miss Gustin, thanks very much.

5 THE WITNESS: Thank you.

6 THE COURT: You may step down.

7 (Witness excused.)

8 THE COURT: Now, if I understand things,  
9 Gregg, you are prepared to I guess we will say rest or  
10 to -- this is the end of your evidentiary presentation  
11 at this point?

12 MR. FRAME: Correct, your Honor.

13 THE COURT: Okay.

14 Now, Paul, you are on your feet. Does that  
15 have some significance?

16 MR. STERN: No.

17 THE COURT: We are going to wrap up now for  
18 this afternoon if I understand things.

19 I am going to be here on Tuesday morning. I  
20 am hopeful that some of the little evidentiary issues we  
21 discussed this morning will be worked out, but if they  
22 aren't I would like to be able to deal with those at  
23 8:30 so we can begin taking testimony at 9 o'clock.

24 A couple of things before we leave today,  
25 one, is that, Diane, I want to thank you and your staff,

1 I know this is a huge burden -- this is a York County  
2 case that the Cumberland County Clerk's Office, which is  
3 the busiest clerk's office in the State, has agreed to  
4 staff, and that's huge, and I know Kim and Tim and Janet  
5 have gone out of their way to be sure that we have the  
6 Official Court Reporters so I appreciate that.

7 I also want to thank you counsel, and that  
8 includes Mr. Driver and Mr. Lachiatto, everybody has  
9 been here on time, the witnesses have been here on time  
10 and I think we have used our time, you know, as  
11 efficiently and productively as we can.

12 Again, we do have a pretty hard deadline  
13 next Friday for the prescriptive easement aspect of the  
14 case. I would like to reserve some time, at least an  
15 hour on each side, which I guess means -- or sometime at  
16 least on each side for kind of what I will call  
17 rebuttal. We are trying this case upside down.  
18 Normally Pete wouldn't have rebuttal but normally he  
19 would have seen the cases put on by the Town and the  
20 TMF Group before he was required to put on his case so I  
21 think it is only fair that we reserve some rebuttal  
22 time, so I think we need to be mindful of that.

23 The other thing is what I usually do in  
24 cases like this and would be inclined to do in this case  
25 is once the evidence is completed I will request

1 proposed findings and conclusions from the parties.

2 I have generally found it to be more  
3 beneficial, more productive rather than next Friday  
4 afternoon to stand up and make closing arguments let you  
5 put together your findings and conclusions because then  
6 you are going to be more coherent and it's going to  
7 be -- and I will have read them in advance, and  
8 hopefully that will be more productive.

9 If people are thinking that they may want  
10 transcripts, and I am not suggesting you could or  
11 shouldn't, but if you do it would be a good idea -- Kim  
12 won't be here next week -- so it would be a good idea to  
13 let court reporters know now rather than wait to the end  
14 because I am told that there's a pretty heavy trial  
15 schedule in September.

16 I don't need or want cites to the transcript  
17 with respect to witness testimony, however, it would be  
18 helpful to me to be directing me to any particular  
19 exhibit you wanted me to look at because exhibits in  
20 this case give the word voluminous a whole new meaning  
21 in my experience.

22 So, questions? I guess we will start with  
23 the plaintiffs. Pete?

24 MR. THAXTER: Your Honor, I would just -- on  
25 Tuesday I know we have to take all this stuff and bring

1 it back. Can we start at 9:00? I have --

2 THE COURT: It's okay with me as long -- but  
3 if there are evidentiary issues -- you want to take it  
4 home because you want to work with it, Pete?

5 MR. THAXTER: Yes -- not that I want to.

6 THE COURT: Well, I didn't bring the case.

7 MR. THAXTER: I know.

8 MS. HEWEY: Does that mean we have to take  
9 it home? Can I leave some of this here?

10 THE COURT: This room will be locked so you  
11 don't have to take anything home except what you want to  
12 take home for your own benefit.

13 We will start at 9:00 but based on the  
14 conversations we have had earlier today do you think we  
15 are going to work this stuff out or do you think you  
16 still have evidentiary problems?

17 MS. HEWEY: I hope we are going to work it  
18 out. I remain girlishly optimistic.

19 THE COURT: You know what Oscar Wilde said  
20 about second marriages? Triumph of hope over  
21 experience.

22 Well, let's assume we are going to work it  
23 out. So we will start at 9:00. Okay?

24 Now, Melissa, questions?

25 MS. HEWEY: The only question I have is when

1 we were arguing on the evidentiary issue this morning I  
2 gave you my only copy of Exhibit 136.

3 THE COURT: Let me give it immediately back  
4 to you.

5 MS. HEWEY: Thank you. That would make my  
6 life a lot easier.

7 THE COURT: That's my job, to make your life  
8 easier.

9 Now, Paul?

10 MR. STERN: Has the Court given any thought  
11 to when it would like its findings and conclusions?

12 THE COURT: Well, I would like them ASAP.  
13 Would two weeks seem reasonable?

14 MS. HEWEY: That would be perfect.

15 MR. THAXTER: That would be fine.

16 MR. STERN: (Motions head up and down.)

17 MR. FRAME: Great.

18 THE COURT: So if it's two weeks we are  
19 talking about early 20's in September, right?

20 Then we will schedule the closing arguments,  
21 which may be here or may be in York County, it will  
22 depend on where the availability is, and I would like to  
23 do that -- ideally I would like to do it before the 27th  
24 of September, if that's possible.

25 Gregg, questions?

1 MR. FRAME: Nothing, your Honor.

2 THE COURT: Richard?

3 MR. DRIVER: Nothing, your Honor.

4 THE COURT: Alex?

5 MR. LACHIATTO: No.

6 THE COURT: Okay, so we are set then for  
7 9 o'clock Monday morning and the State will be in its  
8 case in chief.

9 (Thereupon, the foregoing proceedings  
10 concluded at 2:56 p.m.)

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C E R T I F I C A T I O N

I, Kimberly McCulloch, Official Court Reporter  
for the State of Maine, do hereby certify the foregoing  
transcript as true and accurate to the best of my  
ability.

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Kimberly McCulloch  
Official Court Reporter