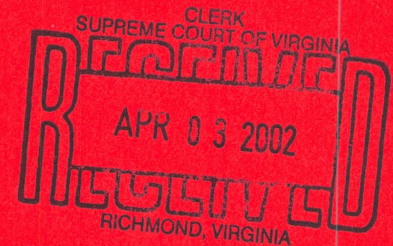

In The
Supreme Court of Virginia

RECORD NO. 012319



GELLES & SONS GENERAL CONTRACTING, INC.,

Appellant,

v.

**JEFFREY STACK, INC., t/a JSI Paving & Construction
and
NORTH AMERICAN SPECIALTY INSURANCE COMPANY,**

Appellees.

JOINT APPENDIX

Marc A. Busman (VSB No. 13030)
Douglas E. Mataconis (VSB No. 35715)
BUSMAN & BUSMAN, P.C.
Post Office Box 7514
Fairfax Station, Virginia 22039
(703) 503-8088 (Telephone)
(703) 425-8487 (Facsimile)

Counsel for Appellant

Andrew N. Felice (VSB No. 26277)
Eric B. Travers (VSB No. 42363)
KATZ & STONE
8230 Leesburg Pike, Suite 600
Vienna, Virginia 22182
(703) 761-3000 (Telephone)
(703) 761-6170 (Facsimile)

Counsel for Appellees

TABLE OF CONTENTS

	<u>Appendix Page</u>
Motion for Judgment, with Exhibits, filed March 30, 2001	1
<u>Exhibits:</u>	
1. Invoice # J07270001 dated July 27, 2000 revised August 4, 2000	6
2. Invoice # J08040001 dated August 4, 2000	7
3. Invoice # J08040002 dated August 4, 2000	8
4. Invoice # J08070001 dated August 7, 2000	9
5. Invoice # J08210001 dated August 21, 2000	10
6. Statement dated October 13, 2000	11
7. Labor and Material Payment Bond dated July 16, 1999	12
8. Letter to Rosalyn Busman, Esquire from Gregory G. O'Mahony, Esquire Re: Acknowledgment of Plaintiff's Claim Letter dated January 9, 2001	13

Defendants' Plea in Bar filed April 18, 2001	14
---	----

Memorandum of Points and Authorities in Support of Defendants' Plea in Bar, with Exhibits, filed April 18, 2001	15
--	----

Exhibits:

A. Affidavit of Jeffrey Stack dated September 17, 2001	23
---	----

B. Statement dated October 13, 2000	27
--	----

C. Letter to Bob Gelles from Jeffrey Stack Re: Final Payment dated December 13, 2000	28
---	----

D. Final Payment Check dated December 13, 2000	29
---	----

Plaintiff's Memorandum in Opposition to Defendants' Plea in Bar, with Attachment, filed May 11, 2001	30
---	----

Attachment:

<i>McMahon Food Corp. v. Burger Dairy Co.</i> decided December 30, 1996	37
--	----

Transcript of Hearing before The Honorable M. Langhorne Keith on August 2, 2001	53
---	----

Testimony of Jeffrey Stack:

Direct Examination by Mr. Felice	58
Cross Examination by Mr. Busman	101
Redirect Examination by Mr. Felice	149
Recross Examination by Mr. Busman	154

Testimony of Randall Elton Lenz:

Direct Examination by Mr. Busman	156
Cross Examination by Mr. Felice	163

Testimony of Robert Lane Gelles:

Direct Examination by Mr. Busman	170
Cross Examination by Mr. Felice	213

Plaintiff's Exhibits:

21. Jeffrey Stack, Inc.'s Letter and Accounting dated December 8, 2000	252
22. Gelles & Sons General Contracting, Inc.'s Letter dated December 11, 2000	255
23A. Jeffrey Stack, Inc.'s Letter dated December 13, 2000	257
23B. Final Payment Check dated December 13, 2000	258

Final Order of The Honorable M. Langhorne Keith Granting Defendants' Plea in Bar and Dismissing Plaintiff's Motion for Judgment entered August 2, 2001	260
Assignments of Error	262

VIRGINIA:

FILED
CIVIL INTAKE

01 MAR 30 AM 10:16
IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GELLES & SONS GENERAL CONTRACTING, INC.

JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

P. O. Box 358

Fairfax Station, Virginia 22039

Plaintiff

v.

Case No. _____

194613

JEFFREY STACK, INC.

t/a JSI PAVING & CONSTRUCTION

7817 Loisdale Road

Springfield, Virginia 22150

SERVE: Jeffrey S. Stack, Registered Agent

7823 Loisdale Road

Springfield, VA 22150

AND

NORTH AMERICAN SPECIALTY

INSURANCE COMPANY

The Center of NH, 650 Elm Street

Manchester, NH 03101-2524

SERVE: Commonwealth Legal Services Corporation

Registered Agent

4701 Cox Road, Suite 301

Glen Allen, VA 23060

Defendants

MOTION FOR JUDGMENT

TO: Jeffrey Stack, Inc. t/a JSI Paving & Construction

AND

North American Specialty Insurance Company

The undersigned hereby moves this Honorable Court for a Judgment against you in the sum

of TWENTY-SIX THOUSAND DOLLARS (\$26,000.00), for this; to-wit:

1. That on or about May, 2000, Defendant Jeffrey Stack, Inc. t/a JSI Paving & Construction (hereinafter referred to as "JSI") requested the Plaintiff to perform certain installation and construction services with respect to brick pavers at the Cameron East-West Parks, in the City of Alexandria, Virginia. Pursuant to the terms of the oral contract by and between the parties, JSI agreed to pay \$91,932.00 to the Plaintiff for such labor services, and was to provide all brick, edging and sand (with the exception of the sand for park benches and picnic tables), to enable Plaintiff to perform said construction services on the project.

2. That on or before August 4, 2000, the Plaintiff performed said installation of the brick/concrete pavers in compacted sand and performed other related services as directed by the Plaintiff's construction superintendent.

3. That although the Plaintiff did not install the sand for the park benches and picnic tables, it performed all other services in accordance with its obligations, in a good and workmanlike manner, said work having been completed on or about August 4, 2000. Upon information and belief, the Plaintiff believes that \$175.00 is a fair and reasonable amount as and for the aforementioned sand for park benches, et cetera.

4. That JSI identified certain "punch-out" items to Plaintiff which required additional work, and that the Plaintiff completed said punch list within one week.

COUNT I

BREACH OF CONTRACT AGAINST DEFENDANT JEFFREY STACK, INC.

5. That Plaintiff incorporates all previous paragraphs by reference as if fully set forth herein.

6. That Plaintiff submitted its invoices to JSI which totaled \$26,175.00 on or prior to August 21, 2000. A copy of the aforementioned invoices are attached hereto as Exhibits 1 through 5, respectively. Upon information and belief, JSI received each of the aforementioned Exhibits 1 through 5.

7. That on or about October 13, 2000, the Plaintiff submitted its statement in the sum of \$26,175.00 to JSI, and upon information and belief, the said JSI received said statement. A copy of said statement is attached hereto as Exhibit 6.

8. That JSI made no objection or complaint to Plaintiff's performance in a timely manner, and that it was not until December 13, 2000, that JSI made any reference to any deductions or back charges against the Plaintiff for alleged damages and/or improper performance.

9. That upon information and belief, JSI has received the remainder of its contract price from the owner, the City of Alexandria, Virginia, without deduction or back charge, as to the work performed by Plaintiff, and further, that there had been no scheduled reductions to the retention to be held for one year as a condition of JSI's contract with the City of Alexandria.

10. That the whole of said amount, \$26,000.00 (\$26,175.00 less \$175.00), is now due and owing, and that the Plaintiff has a just right to recover the same from JSI, exclusive of all set-offs and just grounds of defense, together with interest from October 13, 2000.

WHEREFORE, the Plaintiff prays that by reason of the foregoing, that judgment be entered in favor of the Plaintiff and against the Defendant, Jeffrey Stack, Inc., t/a JSI Paving & Construction, in the sum of TWENTY-SIX THOUSAND DOLLARS (\$26,000.00), plus interest thereupon at 9% per annum from October 13, 2000, and all costs expended herein, and such other and further relief as this Court deems appropriate.

COUNT II

BREACH OF LABOR AND MATERIAL PAYMENT BOND BY DEFENDANT

NORTH AMERICAN SPECIALTY INSURANCE COMPANY

1. That Plaintiff incorporates all previous paragraphs by reference as if fully set forth herein.
2. That as a condition to Plaintiff's contract with the City of Alexandria, Virginia, the Plaintiff entered into a Labor and Material Payment Bond with Defendant, North American Specialty Insurance Company (hereinafter referred to as "Surety"), in the penalty of \$3,198,505.00 on or about July 16, 1999. A copy of said bond is attached hereto as Exhibit 7.
3. That on or about January 3, 2001, the Plaintiff made a claim upon Surety for the unpaid portion of its contract with JSI, in the amount of \$26,175.00. Said Surety acknowledged Plaintiff's claim by letter dated January 9, 2001, a copy of which is attached hereto as Exhibit 8.
4. That said Surety has failed to make payment to Plaintiff pursuant to said bond.
5. That the Plaintiff has a just right to recover the same from Surety, exclusive of all set-offs and just grounds of defense.

WHEREFORE, the Plaintiff prays that by reason of the foregoing, that Judgment be entered

in favor of the Plaintiff and against the Defendant, North American Specialty Insurance Company, in the sum of TWENTY-SIX THOUSAND DOLLARS (\$26,000.00) (\$26,175.00 less \$175.00), plus interest thereupon at 9% per annum from January 9, 2001, all cost expended herein, and such other and further relief as this Court deems appropriate.

Gelles & Sons General Contracting, Inc.
By Counsel



MARC A. BUSMAN, ESQUIRE
VSB #13030
Counsel for Plaintiff
BUSMAN & BUSMAN, P.C.
P. O. Box 7514
Fairfax Station, Virginia 22039
(703) 503-8088
(703) 425-8487 (fax)



GELLES & SON GENERAL CONTRACTING, INC.

(703) 239-1060

P.O. Box 358

FAX (703) 239-1242

Fairfax Station, VA 22039

Mr. Jeffrey Stack - President
JSI Paving & Construction
7817 Loisdale Road
Springfield, VA 22150

INVOICE

July 27, 2000 revised August 4, 2000

Invoice #J07270001

RE: Cameron East & West Parks

\$ 32,416.00 Concession Plaza and 1-Specialty Handicap Ramp across from
Concession Plaza per Blueprint Sheet AM3 of 4 - Install 8,104
square feet of Balcon concrete pavers over compacted sand @
\$4.00 per square foot as agreed.

(\$15,528.00) Credit Payment received 8/3/00.

\$ 16,888.00 Total Due

Your business is greatly appreciated!

**PLAINTIFF'S
EXHIBIT**

GELLES & SON, GENERAL CONTRACTING, INC.

(703) 239-1060

P.O. Box 358

FAX (703) 239-1242

Fairfax Station, VA 22039

Mr. Jeffrey Stack - President
JSI Paving & Construction
7817 Loisdale Road
Springfield, VA 22150

INVOICE

August 4, 2000

Invoice #J08040001

RE: Cameron East & West Parks

\$ 8,116.00 Install Sign Panel adjacent to Somerville Street per Proposal dated
July 10, 2000.

(\$ 4,000.00) Credit Check #22569 8/29/00.

(\$ 1,884.00) Credit Check #22741 10/13/00.

\$ 2,232.00 Total Due

Your business is greatly appreciated!

**PLAINTIFF'S
EXHIBIT**

2



GELLES & SONS GENERAL CONTRACTING, INC.

(703) 239-10

P.O. Box 358

FAX (703) 239-12

Fairfax Station, VA 22039

Mr. Jeffrey Stack - President
JSI Paving & Construction
7817 Loisdale Road
Springfield, VA 22150

INVOICE

August 4, 2000

Invoice #J08040002

RE: Cameron East & West Parks

\$ 87.00 Reimbursement furnish and install 1-cubic yard 3,000 psi concrete to pour slab for Bill Teague per his request at concession area.

\$ 87.00 Total Due

Your business is greatly appreciated!

*memo
8-4-00*



GELLES & SON'S GENERAL CONTRACTING, NC.

(703) 239-1060

P.O. Box 358

Fairfax Station, VA 22039

FAX (703) 239-1242

Mr. Jeffrey Stack - President
JSI Paving & Construction
7817 Loisdale Road
Springfield, VA 22150

INVOICE

August 7, 2000

Invoice #J08070001

RE: Cameron East & West Parks

\$ 456.00 Remove existing pavers washed out at Concession Area. Install new compacted sand setting bed, install pavers per direction and approval of Bill Teague this day.

\$ 456.00 Total Due

Your business is greatly appreciated!

*mailed
8-7-00*

PLAINTIFF'S
EXHIBIT

4



GELLES & SON GENERAL CONTRACTING, NC.

(703) 239-1

P.O. Box 358

FAX (703) 239-1

Fairfax Station, VA 22039

Mr. Jeffrey Stack - President
JSI Paving & Construction
7817 Loisdale Road
Springfield, VA 22150

INVOICE

August 21, 2000

Invoice #J08210001

RE: Cameron East & West Parks

\$ 6,512.00 6-Specialty Handicap Ramps per Blueprint Sheet AM3 of 4 - Install
1,628 square feet of Balcon concrete pavers over compacted sand
@ \$4.00 per square foot as agreed.

\$ 6,512.00 Total Due

Your business is greatly appreciated!

*PAID & MAILED
8-21-00*





GELLES & SON GENERAL CONTRACTING, INC.

(703) 239-1060

P.O. Box 358

FAX (703) 239-1242

Fairfax Station, VA 22039

Mr. Jeffrey Stack - President
JSI Paving & Construction
7817 Loisdale Road
Springfield, VA 22150

STATEMENT

October 13, 2000

\$ 16,888.00 Invoice JSI07270001 Balance Remaining
\$ 2,232.00 Invoice JSI08040001 Balance Remaining
\$ 87.00 Invoice JSI08040002
\$ 456.00 Invoice JSI08070001
\$ 6,512.00 Invoice JSI08210001

\$ 26,175.00 Total Due

Your business is greatly appreciated!



Labor and Material Payment Bond

North American Specialty Insurance Company
Manchester, New Hampshire 03101

Bond #163954

NOTE: THIS BOND IS ISSUED SIMULTANEOUSLY WITH ANOTHER BOND IN FAVOR OF THE OWNER CONDITIONED FOR THE FULL AND FAITHFUL PERFORMANCE OF THE CONTRACT.

KNOW ALL MEN BY THESE PRESENTS:

That Jeffrey Stack, Inc. T/A JSI Paving & Construction, Springfield, Virginia

(Here insert the name and address, or legal title, of the contractor)

as Principal, hereinafter called Principal, and North American Specialty Insurance Company, a New Hampshire Corporation, as Surety, hereinafter called Surety, are held and firmly bound unto City of Alexandria, 100 North Pitt St, Alexandria, VA 22314

(Here insert the name and address, or legal title, of the owner)

as Oblige, hereinafter called Owner, for the use and benefit of claimants as hereinbelow defined, in the amount of Three Million One Hundred Ninety-Eight Thousand Five Hundred Five and NO/100 Dollars (\$ 3,198,505.00).

For the payment whereof Principal and Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, Principal has by written agreement dated July 12, 1999

PO 00-00490

entered into a Contract with Owner for Cameron East and West Parks, 4800 Duke Street, Alexandria, VA 22304

in accordance with drawings and specifications prepared by _____

(Here insert full name and title)

which Contract is by reference made a part hereof, and is hereafter referred to as the Contract.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is that if the Principal shall promptly make payment to all claimants as hereinafter defined, for all labor and material used or reasonably required for use in the performance of the Contract, then this obligation shall be void; otherwise it shall remain in full force and effect, subject, however, to the following conditions:

1. A claimant is defined as one having a direct contract with the Principal or with a sub-contractor of the Principal for labor, material, or both, used or reasonably required for use in the performance of the Contract, labor and material being construed to include that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment directly applicable to the Contract.

2. The above named Principal, and Surety hereby jointly and severally agree with the Owner that every claimant as herein defined, who has not been paid in full before the expiration of a period of ninety (90) days after the date on which the last of such claimant's work or labor was done or performed, or materials were furnished by such claimant, may sue on this bond for the use of such claimant in the name of the Owner, prosecute the suit to final judgment for such sum or sums as may be justly due claimant, and have execution thereon, provided, however, that the Owner shall not be liable for the payment of any costs or expenses of any such suit.

3. No suit or action shall be commenced hereunder by any claimant,

(a) Unless claimant shall have given written notice to any two of the following: The Principal, the Owner, or the Surety above named, within ninety (90) days after such claimant did or performed the last of the work or labor, or furnished the last of the materials for which said claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the materials were furnished, or for whom the work or labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the Principal, Owner or Surety, at any place where an office is regularly maintained for the transaction of business, or served in any manner in which legal process may be served in the state in which the aforesaid project is located, save that such service need not be made by a public officer.

(b) After the expiration of one (1) year following the date on which Claimant ceased work on said Contract.

(c) Other than in a state court of competent jurisdiction in and for the county or other political subdivision of the state in which the project, or any part thereof, is situated, or in the United States District Court for the district in which the project, or any part thereof, is situated, and not elsewhere.

4. The amount of this bond shall be reduced by and to the extent of any payment or payments made in good faith hereunder, inclusive of the payment by Surety of mechanics liens which may be filed or record against said improvements, whether or not claim for the amount of such lien be presented under and against this bond.

Signed this 16th day of July

A.D. 19 99

Jeffrey Stack, Inc. T/A JSI Paving & Construction

(Principal) (Seal)

Jeffrey S. Stack, President

(Title)

North American Specialty Insurance Company



NORTH AMERICAN SPECIALTY INSURANCE COMPANY

GENERAL POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, THAT THE NORTH AMERICAN SPECIALTY INSURANCE COMPANY, a corporation duly organized and existing under laws of the State of New Hampshire, and having its principal office in the City of Manchester, New Hampshire has made, constituted and appointed, and by these presents does make, constitute and appoint:

William J. Hogan, Lawrence R. Chamberlain, Denise H. Heery,
jointly or severally, and all of Alexandria, Virginia

its true and lawful Attorney-in-Fact, to make, execute, seal and deliver for and on its behalf and as its act and deed bonds or other writings obligatory in the nature of a bond on behalf of said Company, as surety, bonds, undertakings and contracts of suretyship to be given to all obligees provided that no bond or undertaking or contract of suretyship executed under this authority shall exceed in the amount of:

SIX MILLION (\$6,000,000.00) DOLLARS

The Power of Attorney is granted and is signed and sealed by facsimile under and by the authority of the following Resolution adopted by the Board of Directors of North American Specialty Insurance Company at a meeting duly called and held on the 24th of April, 1985:

"RESOLVED, that the President, and Vice President, any Assistant Vice President or any Secretary be and each or any of them hereby is authorized to execute Power of Attorney qualifying the attorney named in the given Power of Attorney to execute on behalf of North American Specialty Insurance Company bonds, undertakings and all contracts of surety, and that each or any of them hereby is authorized to attest to the execution of any such Power of Attorney and to attach hereto the seal of the Company, and

FURTHER RESOLVED, that the signature of such officers and the seal of the Company may be affixed to any such Power of Attorney or to any certificate relating thereto by facsimile, and any such Power of Attorney or certificate bearing such facsimile signatures or facsimile seal shall be binding upon the Company when so affixed and in the future with regard to any bond, undertaking or contract of surety to which it is attached.

In Witness Whereof, North American Specialty Insurance Company has caused its official seal to be hereunto affixed, and these presents to be signed by its President and attested by one of its Assistant Vice Presidents on the 14th of December, 1998.

BY Robert M. Solitro
Robert M. Solitro, President and Chief Operating Officer

BY Steven E. Holzwart
Steven E. Holzwart, Assistant Vice President

State of Ohio
County of Cuyahoga

On this December 14, 1998, before me, a Notary Public personally appeared Robert M. Solitro and Steven E. Holzwart personally known to me, who being by me duly sworn, acknowledged that they signed the above Power of Attorney as officers of said NORTH AMERICAN SPECIALTY INSURANCE COMPANY and acknowledged said instrument to be the voluntary act and deed of the corporation.

James Ziolo
Notary Public - State of Ohio
My commission expires May 6, 2003

James Ziolo, Notary Public

I, R. Scott Liptak, Assistant Vice President, of NORTH AMERICAN SPECIALTY INSURANCE COMPANY, do hereby certify that the above and foregoing is a true and correct copy of a Power of Attorney by said NORTH AMERICAN SPECIALTY INSURANCE COMPANY which is still in full force and effect. IN WITNESS WHEREOF.

I hereto set my hand and affixed the seal of said Company this 16th day of July, 1999



NAS SURETY GROUP

North American Specialty Insurance Company
Washington International Insurance Company

The Center of NH • 650 Elm Street • Manchester, NH 03101-2524
Direct Dial: 603-634-5213 • Toll Free: 800-542-9200
Facsimile: 603-634-5220 • e-mail: Greg_OMahony@nassurety.com

Gregory G. O'Mahony
Director of Surety Claims & Bond Claim Attorney

January 9, 2001

Busman & Busman
Attn: Rosalyn Busman
PO Box 7514
Fairfax Station Virginia 22039-7514

RE: Principal: JSI Paving & Construction
Claimant: Gelles & Sons General Contracting, Inc.
Project: Cameron East & West Parks PO# 00-00490
NAS Claim #: 63954

Dear Attorney Busman

This will acknowledge our receipt of your Notice of Claim letter dated January 3, 2001, on behalf of your client (Gelles & Sons General Contracting, Inc.) in connection with the captioned project.

As your Notice of Claim is the first notice that North American Specialty Insurance Company has received from your company concerning this matter, you can appreciate that we need to perform the necessary investigation before we can take any position with respect to your client's claim.

By copy of this letter, I would also request that JSI Paving & Construction inform us as to its view of this matter with any supporting facts or documentation it may have.

North American Specialty Insurance Company begins its investigation under a full reservation of rights and with the understanding that any actions we have taken or may take do not constitute a waiver of any defenses available under the bond or applicable law, including specifically any defenses pertaining to statutes of limitation or timely filing of appropriate notices.

Sincerely,

Gregory G. O'Mahony/hmk

Gregory G. O'Mahony
Director of Surety Claims & Bond Claim Attorney

GGO:hmk/63954-1

cc: JSI Paving & Construction
NAS-Atlanta



VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FILED
COURT SERVICES
JAN 18 PM 12:55

GELLES & SONS GENERAL CONTRACTING, INC.

Plaintiff,

v.

AT LAW NO. 194613

JEFFREY STACK, INC.

t/a JSI PAVING & CONSTRUCTION

and

NORTH AMERICAN SPECIALTY
INSURANCE COMPANY

Defendants.

JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

PLEA IN BAR

COMES NOW, Defendants Jeffrey Stack, Inc., t/a JSI Paving & Construction ("JSI Paving"), and North American Specialty Insurance Company ("the surety" or "NASIC")(hereinafter collectively "Defendants"), by counsel, plead that the claims asserted by Plaintiff Gelles & Sons General Contracting, Inc. (hereinafter "Gelles" or "Plaintiff") are barred by the doctrine of accord and satisfaction. In support of their Plea in Bar, Defendants herein incorporate by reference the attached *Memorandum of Points and Authorities in Support of Defendant's Plea in Bar*.

Respectfully submitted,

JEFFREY STACK, INC. t/a JSI PAVING
& CONSTRUCTION and NORTH AMERICAN
SPECIALTY INSURANCE COMPANY

By Counsel


Andrew N. Felice

Virginia Bar No. 26277

Eric B. Travers

Virginia Bar No. 43263

KATZ & STONE, L.L.P.

8230 Leesburg Pike

Suite 600

Vienna, Virginia 22182

(703) 761-3000

Counsel for Defendants Jeffrey Stack, Inc. t/a JSI Paving
& Construction and North American Specialty Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing PLEA IN BAR was mailed, first-class, postage prepaid this 18th day of April, 2001, to:

Marc A Busman, Esquire
Busman & Busman, P.C.
P.O. Box 7514
Fairfax Station, Virginia 22039

Counsel for Plaintiff Gelles & Sons General Contracting, Inc.


Andrew N. Felice

C:\MyFiles\10950.013\pld\0005ebt.wpd:er

KATZ & STONE, L.L.P.
ATTORNEYS AT LAW

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GELLES & SONS GENERAL CONTRACTING, INC.

Plaintiff,

v.

JEFFREY STACK, INC.
t/a JSI PAVING & CONSTRUCTION

and

NORTH AMERICAN SPECIALTY
INSURANCE COMPANY

Defendants.

FILED
COURT SERVICES

APR 12 2006 12:55

JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

AT LAW NO. 194613

**MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANTS' PLEA IN BAR**

COMES NOW, Defendants Jeffrey Stack, Inc., t/a JSI Paving & Construction ("JSI Paving"), and North American Specialty Insurance Company ("the surety" or "NASIC") (hereinafter collectively "Defendants"), by counsel, plead that the claims asserted against them by Plaintiff Gelles & Sons General Contracting, Inc. (hereinafter "Gelles" or "Plaintiff") are barred by the doctrine of accord and satisfaction. In support of their Plea in Bar, Defendants state as follows:

PLAINTIFF'S MOTION FOR JUDGMENT IS BARRED BY THE EXISTENCE OF AN ENFORCEABLE ACCORD AND SATISFACTION.

1. On or about May 2000, Gelles and JSI Paving entered into a contract wherein Gelles agreed to perform certain installation and construction services with respect to the placing of brick pavers at the Cameron East/West Parks project ("Project"), in the City of Alexandria, Virginia. See Affidavit of Jeffrey Stack, ¶ 3, attached hereto as Defendants'

Exhibit "A" (hereinafter "*Stack Affidavit*"):

2. JSI Paving supplied Gelles with a set of plans and specifications for the Project and Gelles subsequently commenced work. See *Stack Affidavit*, ¶ 4.

3. On or about August 4, 2000, Gelles abandoned the Project without having completed its work. Among the more serious breaches and/or omissions, JSI Paving discovered that at the time Gelles left the project it had not:

- provided sand in connection with the installation of the park benches and picnic tables;
- completed the installation of the brick pavers by pre-cleaning and sealing the pavers;
- supplied brick to replace certain pavers it damaged during its work; and
- installed the replacement brick.

See *Stack Affidavit*, ¶ 6.

4. Given the numerous omissions and/or breaches by Gelles, JSI Paving disputed that the final amounts billed by Gelles --as summarized in the October 13, 2000 Gelles statement-- represented the money Gelles was actually owed. A true and accurate copy of the disputed October 13, 2000 Gelles Statement is attached hereto as Defendants' "Exhibit B."

See *Stack Affidavit*.

5. The parties exchanged several letters regarding the dispute over the contract balance owed Gelles. Then, on December 13, 2000, JSI Paving wrote Gelles that "JSI Paving and Construction stands by its final amounts as stated in [its] latest correspondence dated December 8, 2000." As such, JSI Paving wrote that it was enclosing "a check in the amount of \$13,580.00 representing final payment on the contract." (emphasis added). This payment

was offered and intended as full satisfaction of the disputed payment. A true and accurate copy of JSI Paving's December 13, 2000 letter is attached hereto and made a part hereof as Defendants' Exhibit "C" (hereinafter "*Final Payment Letter*"(emphasis added)). See Stack Affidavit, ¶ 7.

6. Shortly thereafter, Gelles cashed the "final payment check" JSI Paving tendered with the *Final Payment Letter*. The check cleared the banking system on December 18, 2000. A true and accurate copy of the negotiated check is attached hereto and made a part hereof as Defendants' Exhibit "D" (hereinafter "*final payment check*"). See Stack Affidavit, ¶ 9.

7. As a matter of Virginia law, by virtue of aforementioned transaction the parties entered into an enforceable accord and satisfaction of their payment dispute. Accordingly, Plaintiff's Motion for Judgment is barred by the doctrine of accord and satisfaction. Virginia Code § 8.3A-311, COMMERCIAL CODE-NEGOTIABLE INSTRUMENTS (1950, as amended) provides as follows:

§ 8.3A-311. Accord and Satisfaction by use of an instrument-- (a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

(b) Unless subsection (c) applies, *the claim is discharged* if the person against whom the claim is asserted proves that the instrument *or an accompanying written communication* contained a conspicuous statement to the effect that the instrument was tendered as *full satisfaction* of the claim.

Va. Code § 8.3A-311 (emphasis added).

8. There are two exceptions to the above rule enumerated in subsection (c) of the Virginia Code which would preclude this finding of an accord and satisfaction. Neither exception, however, is applicable in the instant matter.

9. The first exception that the claim will not be discharged applies only if, at some point before tender of the final payment, a claimant that is an organization (i) instructed the person against whom the claim is asserted that "communications concerning disputed debts . . . are to be sent to a designated person, office, or place, and (ii) the instrument or accompanying communication was not received by that designated person, office, or place." Va. Code § 8.3A-311(c)(1). As JSI Paving was never instructed by Plaintiff to send communications regarding disputed debts to any designated person, office, or place, this first exception is inapplicable on its face.¹ See Stack Affidavit, ¶ 8.

10. The second exception to the operation of Va. Code § 8.3-311(b) is that the claim will not be discharged if the claimant "proves that within ninety days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted." Va. Code § 8.3A-311(c)(2). Since JSI Paving tendered final payment on the contract with its *Final Payment Letter*, and the instrument which accompanied that letter cleared on December 18, 2000, Gelles had, at most, ninety days from December 18, 2000 (i.e., until March 18, 2001) to retender payment of the entire check amount to JSI Paving. Gelles did not do so within the statutory ninety-day period. See Stack Affidavit, ¶ 11. Hence, Plaintiff cannot, as a matter of law, invoke the protection of this exception.

¹ This exception is designed to protect large companies. That is not the case here where the Plaintiff did not make the necessary statutory designation and where the presidents of both parties were involved in the payment dispute and the final payment was sent to the president of the Plaintiff corporation.

11. Given the above, the Plaintiff's entire claim is barred as a matter of Virginia law by the doctrine of accord and satisfaction. See Va. Code § 8.3A-311 (2000).

AS A MATTER OF VIRGINIA LAW, COUNT II OF THE MOTION FOR JUDGMENT IS BARRED AND MUST ALSO BE DISMISSED.

12. It is a longstanding rule that a surety is entitled to the same defenses available to its principal in order to avoid liability. See S. Williston on Contracts § 2:19, p.161 (4th ed. Lord 1990)("[T]he liability of the surety is co-extensive with that of the principal, up to the limits of the bond. This necessarily leads to the rule that the surety may raise any defense against the person seeking to enforce the obligation that would be raisable by the principal." (internal citations omitted)); 50 AmJur, Suretyship, § 135, p. 994 (As a general rule, the surety may plead any defense available to the principal).

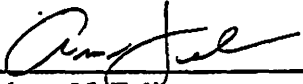
13. Since Gelles' claim against NASIC's principal -- JSI Paving -- is barred by the doctrine of accord and satisfaction, and since the surety is entitled to raise any defense that could be asserted by its principal, Count II of the Motion for Judgment is, like Count I, barred by the doctrine of accord and satisfaction and must be dismissed.

WHEREFORE, Defendants Jeffrey Stack, Inc. t/a JSI Paving & Construction and North American Specialty Insurance Company pray that the Motion for Judgment against them be dismissed with prejudice, that they be awarded their expenses and attorneys' fees incurred herein, and for such other relief as this Court deems fit and proper.

Respectfully submitted

JEFFREY STACK, INC. t/a JSI PAVING
& CONSTRUCTION and NORTH AMERICAN
SPECIALTY INSURANCE COMPANY

By Counsel



Andrew N. Felice
Virginia Bar No. 26277
Eric B. Travers
Virginia Bar No. 43263
KATZ & STONE, L.L.P.
8230 Leesburg Pike
Suite 600
Vienna, Virginia 22182
(703) 761-3000

Counsel for Defendants Jeffrey Stack, Inc. t/a JSI Paving
& Construction and North American Specialty Insurance Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' PLEA IN BAR** was mailed, first-class, postage prepaid this 18th day of April, 2001, to:

Marc A Busman, Esquire
Busman & Busman, P.C.
P.O. Box 7514
Fairfax Station, Virginia 22039

Counsel for Plaintiff Gelles & Sons General Contracting, Inc.



Andrew N. Felice

C:\MyFiles\10950.013\pld\0001ebt.wpd:er

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GELLES & SONS GENERAL CONTRACTING, INC.)

Plaintiff,)

v.)

AT LAW NO. 194613

JEFFREY STACK, INC.)

t/a JSI PAVING & CONSTRUCTION)

and)

NORTH AMERICAN SPECIALTY)

INSURANCE COMPANY)

Defendants.)

AFFIDAVIT OF JEFFREY STACK

JEFFREY STACK, being first duly sworn, hereby deposes and says:

1. I, Jeffrey Stack, am the president and founder of Jeffrey Stack, Inc. t/a JSI Paving & Construction ("JSI Paving"), a Virginia Corporation located at 7817 Loisdale Road, Springfield, VA 22150.

2. I am over the age of eighteen and I have personal knowledge of the facts contained herein as I was personally involved in the contract discussions and subsequent project work by Gelles & Sons General Contracting, Inc. ("Gelles") for J&S Paving on the Cameron East/West Parks project ("Project").

3. On or about May 2000, JSI Paving and Gelles entered into a contract in which Gelles agreed to perform certain installation and construction services to place brick pavers at the Project (the "Work").

4. Gelles was provided with a complete set of relevant plans and specifications for its work and was, as is usual and customary in the industry, obligated by its acceptance of the Work to complete the work per those plans and specifications.

5. On or about August 4, 2000 Gelles abandoned the job before completing its Work.

6. Among the more serious breaches, JSI Paving discovered that Gelles did not:
- (a) complete the installation of the brick pavers by failing or refusing to seal or preclean the brick pavers;
 - (b) supply brick to replace pavers it damaged;
 - (c) install the replacement brick; or
 - (d) provide sand in connection with the installation of park benches and picnic tables.

7. JSI Paving was forced to remedy the defects and omissions in Gelles work. This meant JSI Paving had to, among other things, seal and pre-clean the pavers, repair the damaged brick pavers, supply brick for the damaged pavers, and provide the sand required for the placement of the benches and picnic tables.

8. Accordingly, JSI Paving backcharged Gelles' contract to take into account the expenses it incurred to complete Gelles' contract. The final bill submitted to JSI Paving by Gelles was dated October 13, 2000 and was an invoice in the amount of \$26,175.00. After taking into account the various charges applicable against Gelles' account, as a result of the above errors and omissions, JSI Paving took the position that the final payment it owed Gelles on the contract was \$13,580.00.

9. After discussing the issue with Bob Gelles, and sending several letters regarding JSI Paving's position, I wrote Mr. Gelles on December 13, 2000 with the intent of settling the matter. In my letter, I reiterated a number of reasons why JSI Paving believed that its backcharges against Gelles were warranted, and noted that JSI Paving continued to stand by the final amounts stated in its December 8, 2000 correspondence. I then, on behalf of JSI Paving, tendered a check to Gelles which, I wrote, was "in the amount of \$13,580.00 representing final payment on the contract." (Emphasis added).

10. This payment of \$13,580.00 was intended to be a complete satisfaction of the disputed amount due, a fact which I made clear in my December 13, 2000 letter.

11. At no point prior to, or contemporaneous with, the tender of final payment with my December 13, 2000 letter did Gelles instruct JSI Paving that communications concerning the dispute were to be sent to a specific designated person, office, or place.

12. Gelles cashed the check and on December 18, 2000 the check cleared the banking system. At that point, I believed the dispute between JSI Paving and Gelles was resolved in accordance with the terms of my December 13, 2000 letter.

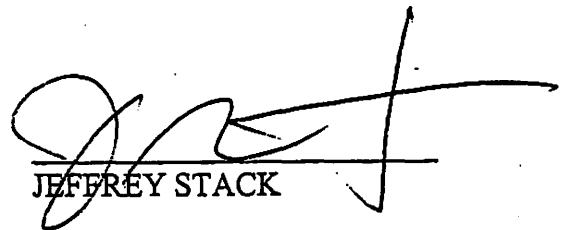
13. I heard nothing further from Gelles Construction until January 8, 2001. On January 8, 2001, JSI Paving received a letter, dated January 3, 2001, from Gelles' attorney Rosalyn R. Busman. In the letter, Ms. Busman demanded "payment in full" of \$26,175.00 within five days time, and threatened that "should litigation become necessary, you may be liable for any court costs, interest and attorney's fees, if applicable."

14. The January 3, 2001 letter from Gelles' attorney shocked us because, given the events in mid-December 2000 (when Gelles cashed the check JSI Paving tendered as "final payment on the contract"), JSI Paving considered the matter closed. Additionally, we were also

surprised because Gelles was demanding an amount it had invoiced in October 2000, without even *crediting* JSI Paving for the \$13,580.00 paid in December.

15. Gelles has not, at any time, offered to repay the \$13,580.00 final payment check it cashed in December 2000.

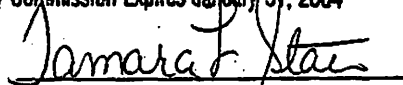
16. For the above reasons, I consider Gelles' lawsuit to be not only inflated but meritless, because it directly contradicts the agreement the parties reached last December when Gelles received my December 13, 2000 letter and cashed JSI Paving's \$13,580.00 check which was offered to settle the entire payment dispute.


JEFFREY STACK

STATE OF VIRGINIA
CITY/COUNTY OF Fairfax, TO-WIT:

Subscribed and sworn to before me this 17th day of April, 2001.

My Commission Expires: My Commission Expires January 31, 2004


Notary Public



GELLES & SONS GENERAL CONTRACTING, INC.

(703) 239-1060

P.O. Box 358
Fairfax Station, VA 22039

FAX (703) 239-1242

Mr. Jeffrey Stack - President
JSI Paving & Construction
7817 Loisdale Road
Springfield, VA 22150

STATEMENT

October 13, 2000

\$ 16,888.00 Invoice JSI07270001 Balance Remaining
\$ 2,232.00 Invoice JSI08040001 Balance Remaining
\$ 87.00 Invoice JSI08040002
\$ 456.00 Invoice JSI08070001
\$ 6,512.00 Invoice JSI08210001

\$ 26,175.00 Total Due

Your business is greatly appreciated!

EXHIBIT

B

JSI PAVING & CONSTRUCTION

7817 Loisdale Road • Springfield, VA 22150 • Phone: (703) 550-2344 • Fax: (703) 550-2001

December 13, 2000

Bob Gelles
Gelles & Sons General Contracting, Inc.
P.O. Box 358
Fairfax Station, VA 22039

Dear Bob:

This letter is in reference to the project at Cameron East/West Parks.


JSI Paving and Construction contracted with you to place the brick pavers at the above referenced project. We gave you a set of plans and specifications on this project and expected you to complete the work per the details and drawings, as is customary. JSI Paving and Construction stipulated that we would place the stone base and supply only the brick, edging and sand (not to include sand for the park benches and picnic tables) for you to complete the job. Accordingly, JSI Paving and Construction would have never agreed to your price if we did not expect you to seal the pavers (including pre-cleaning), when you were done. Also, the measurements you provided are incorrect. JSI Paving and Construction and your supervisor conducted field measurements of the pavers, and the totals provided by JSI are fair and accurate.

Furthermore, the other back charges are fair due to damage sustained by the brick pavers by Gelles & Sons General Contracting, Inc. JSI Paving and Construction, consequently, supplied the brick for you to replace the damaged pavers. In addition, JSI Paving and Construction completed the replacement of brick when Gelles & Sons refused to finish the work. Additionally, you were responsible for the sand required for placement of the benches and picnic tables.

JSI Paving and Construction stands by its final amounts as stated on the latest correspondence dated December 8, 2000. Enclosed, please find a check in the amount of \$13,580.00 representing final payment on the contract.

Thank you for your attention in this matter.

Sincerely,


Jeffrey Stack, President
JSI Paving and Construction
Enclosure

cc: CITY OF ALEXANDRIA

EXHIBIT

C

JSI PAVING & CONSTRUCTION

PH. 703-680-2344
7817 LOISDALE RD.
SPRINGFIELD, VA 22150

PROSPERITY BANK AND TRUST
CENTRAL SPRINGFIELD OFFICE
SPRINGFIELD, VIRGINIA 22152

22854

01-27/02

12/13/2000

\$ 13,580.00

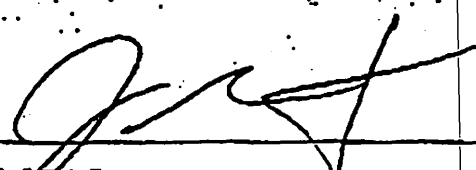
DOLLARS

PAY TO THE ORDER OF **GELLES & SONS, INC.**

Thirteen Thousand Five Hundred Eighty and 00/100 220131997 004 0387 0393 01 22

GELLES & SONS, INC.
P.O. BOX 358
FAIRFAX STATION, VA 22039

MEMO



⑈00022854⑈ ⑈056005075⑈

2010542012⑈

⑈0001358000⑈

12/15/00

055002707

4500487350

PROCESSED

00470000 RCPC
220131997 0520-0527
220131997 12-18

202386848
Alfred Smith

APR 12 2001

EXHIBIT

D

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GELLES & SONS
GENERAL CONTRACTING, INC.

Plaintiff,

v.

JEFFREY STACK, INC., et al

Defendants.

FILED
COURT SERVICES
01 MAY 1993
AM 8:38

JOHN J. FREY
CLERK, CIRCUIT COURT
FAIRFAX COUNTY, VA

AT LAW NO.: 194613-X, VA

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' PLEA IN BAR

COMES NOW the Plaintiff, GELLES & SONS GENERAL CONTRACTING, INC., by counsel, and for its opposition to the Plea in Bar filed herein by the Defendants states as follows:

I. Argument

A Plea in Bar is a defensive pleading that "reduce[s] the litigation to a single issue of fact which if proven creates a bar to the suit." Weichert Company of Virginia, Inc. v. First Commercial Bank, 246 Va. 108, 109, n.1 (1993), *citing* Campbell v. Johnson, 203 Va. 43, 47 (1961); *see also*, Coker v. State Farm Fire & Casualty Co., 45 Va. Cir. 510, 512 (Fairfax Co. 1998). The moving party carries the burden of proof with respect to the special pleas. Weichert, *supra* at p. 109, n. 1. Either party is entitled to have the issues raised in a Special Plea resolved by a jury.¹ Article I, §11, of the Constitution of Virginia guarantees the right of trial by jury in an action at law where disputed facts exist. Etheridge v. Medical Center Hospitals, 237 Va. 87, 95-96 (1989); Speet v. Bacaj, 237 Va. 290, 296 (1989).

As a preliminary matter, it should be noted that the sole support for Defendant's Plea in Bar consists of a series of documents attached to the Defendant's supporting memorandum and an affidavit. None of these documents were attached to the Plaintiffs' Motion for Judgment, nor were they the subject of a Motion Craving Oyer. Accordingly, they are not a part of the record in

¹ "The right of trial by jury as declared in Article I, Section 11 of the Constitution of Virginia and by statutes thereof shall be preserved inviolate to the parties." Code of Virginia (1950, as amended), §8.01-336(A).

this case. Additionally, while the use of these documents and affidavits may be appropriate for a Motion for Summary Judgment in federal court, they are entirely inappropriate, and improper, in connection with a Plea in Bar in Fairfax Circuit Court. See Fairfax Circuit Court Motions Procedures § E-5.08.9 Furthermore, they have not been subject to cross-examination by the Plaintiff and the Plaintiff would be denied its right to a trial by jury if the Court were to consider these documents in ruling on the Defendants' Plea in Bar. Therefore, since these documents are not part of the record in this case, they should not be considered as evidence by the Court in ruling on the Defendants' Plea in Bar. Even if the Court were to determine, however, that it could consider the exhibits employed by the Defendants in ruling on the Plea in Bar, it is clear that those documents do not tell the story which the Defendants want them to tell.

A. *The Defendants Did Not Comply with the Requirements of § 8.3A-311, Code of Virginia (1950) And Have Not Proven The Existence of an Accord And Satisfaction.*

Accord and satisfaction is a contractual agreement between parties to a disputed claim "to give and accept something in order to discharge a debt owed" *Decision Support Systems, Inc. v. BJMT Technology Corp.* 38 UCC Rep Serv 2d 893, 894 1999 WL 262416 (Fairfax County Circuit Court, Law No. 175518, Leslie M. Alden, Judge, 1999) As the Court in *Decision Support Systems* stated, The amount tendered in satisfaction of the debt *'must be offered and intended by the debtor as full satisfaction, and accepted as such by the creditor.'*" *Decision Support Systems* at 894 (quoting *Virginia-Carolina Electrical Works v. Cooper* 192 Va. 78, 80 (1951) (emphasis added). With the passage of § 8.3A-311, Code of Virginia (1950), this acceptance can be implied provided that the terms of the statute are strictly complied with. However, it is clear that the enactment of § 8.3A-311 did not remove the common law requirement that there must be mutual agreement for there to be an accord and satisfaction, it merely established a mechanism whereby that agreement could be implied, assuming that all of the elements of the statute were met.

In order to prove the existence of an accord and satisfaction under § 8.3A-311, a party must show (1) that it tendered *in good faith* an instrument *in full satisfaction of a claim*, (2),

that the claim was liquidated or subject to a *bona fide dispute*, (3) that the claimant obtained payment of the instrument and (4) that the instrument or an accompanying written communication contained a *conspicuous statement* that the instrument was being tendered as full satisfaction of the claim.² As argued in detail below, the evidence on record at this time demonstrates that, contrary to their argument, the Defendants have not complied with the requirements of § 8.3A-311 and have not otherwise demonstrated the existence of an accord and satisfaction.

1. ***The Instrument Tendered by the Defendant Was Not Accompanied by a Conspicuous Statement That it Was Being Tendered as Full Satisfaction of the Plaintiff's Claim Against the Defendants.***

§ 8.3A-311(b) requires that the instrument being tendered as full satisfaction either contain a conspicuous statement to that effect or that it be accompanied by a written communication with a similar, conspicuous, statement. "Conspicuous" is defined in § 8.1-201. (10), Code of Virginia (1950), which states:

" A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NONNEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is "conspicuous" if it is in larger or other contrasting type or color. But in a telegram any stated term is "conspicuous." Whether a term or clause is "conspicuous" or not is for decision by the court."

Additionally, it has been held by the 7th Circuit U.S. Court of Appeals, in ruling on Illinois's version of § 8.3A-311 (which is identical to Virginia's in all respects) that "*before a full satisfaction check can create an accord and satisfaction, the party who offers or presents the check must make it clear that the cashing of the check is intended to act as a settlement of*

2

Subsection (c) sets forth exceptions which, if applicable, would defeat the presumption that the claim is discharged. Neither of those exceptions are at issue in this motion; however, the Plaintiff reserves the right to plead the protection of those exceptions if warranted by any evidence which may be revealed during the course of discovery.

all outstanding claims between the parties" McMahon Food Corp v. Burger Dairy Co. 103 F.3d 1307, 31 UCC Rep Serv 2d 283, 294 (7th Circuit, 1996) (emphasis added) (A copy of the Court's opinion in McMahon is attached as Exhibit A)

The December 13, 2000 letter upon which the Defendants rely in support of their Plea in Bar consists largely of two lengthy paragraphs discussing JSI's alleged objections to work performed by the Plaintiff in connection with the Cameron East/West Parks project. It is not until the letter's final full paragraph that the check being tendered to the Plaintiff is even mentioned..

In that paragraph, Mr. Stack states:

"JSI Paving and Construction stands by its final amounts as stated on the latest correspondence dated December 8, 2000. Enclosed, please find a check in the amount of \$ 13,580.00 representing final payment on the contract"

The Defendants argue that this language demonstrates that the \$ 13,580 check was "offered and intended as full satisfaction of the disputed payment." A more objective reading, however, reveals a far more ambiguous situation. Mr. Stack does explicitly not state that the check was being offered in full satisfaction of the Plaintiff's claims in connection with the project. Nor does he clearly and explicitly inform the Plaintiff that by accepting the enclosed check (which on its own contains no language referring to the purported accord and satisfaction) the Plaintiff would be waiving any right to pursue the Defendants for the remaining balance due under their contract.

On its own, the language used by Mr. Stack — "final payment on the contract" — is not sufficiently clear and conspicuous to inform the Plaintiff of the consequences that would ensue if it were to submit the check for payment. Given the context of the parties dispute, the Plaintiff could have just as easily taken the letter to mean that JSI was willing to pay the undisputed portion of the Plaintiff's claim but that the Plaintiff would have to employ other means of collection in order to collect the remaining balance due. If, as Mr. Stack claims in Paragraph 10 of his affidavit, he intended the check to be complete satisfaction of the claim, then he could

have very easily make that clear in his letter. The fact that he did not do so makes any later claims of what his intention was highly doubtful at best. In any event, it is clear that the language actually used by Mr. Stack in his December 13th letter was not the kind of conspicuous statement required by § 8.3A-311 nor did it "make it clear that the cashing of the check is intended to act as a settlement of all outstanding claims between the parties", *McMahon supra* at 294. Accordingly, since the Defendants have failed to meet the requirements of § 8.3A-311, the plea in bar must be denied.

2. *There Is No Evidence That the Defendant Tendered the December 13th Check in a Good Faith Effort to Settle a Bona Fide Dispute.*

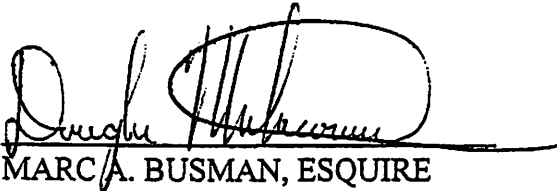
§ 8.3A-311 also requires that the payment constituting satisfaction have been submitted in "good faith" and that the claim either be unliquidated or subject to a bona fide dispute. Beyond the self-serving statements in the Defendants' motion and affidavit, there is no evidence before the Court to show that either of these requirements have been met.³ If it were to become evident, for example, that the complaints enunciated in Mr. Stack's letter were meritless and the purported defenses to the Plaintiff's claim baseless, then it would clearly be the case that neither of these requirements were met and the Court would have another ground upon which to base a denial of the Plea in Bar. As stated, however, it is the Defendants who have the burden of establishing that all of the requirements of the statute have been met.. Clearly, that burden has not been met and, based upon that fact, the Court is compelled to deny the Plea in Bar.

3

In fact, the Defendant's conduct during the course of events immediately after the purported accord and satisfaction raise serious doubts as to whether or not there was good faith present at the time the check was presented. Mr. Stack states that he was "shocked" to receive the demand letter from Plaintiff's counsel. However, at no time prior to the filing of this Plea in Bar has the defense of accord and satisfaction been raised by either the JSI or its counsel. If Mr. Stack were as "shocked" as he claims to have been in his affidavit, then one logically would have expected either him or his attorney to immediately contact the Plaintiff's counsel after receipt of the January, 2001 demand letter demanding to know what the Plaintiff was trying to collect on an obligation that if the present allegations are to be believed, had been settled nearly three weeks before.

WHEREFORE the Plaintiff prays that this Honorable Court deny the Defendants' Plea in Bar and for such other and further relief as the Court may deem just and proper.

GELLES & SONS GENERAL CONTRACTING, INC.
By Counsel

A handwritten signature in black ink, appearing to read "Douglas E. Mataconis", is written over a horizontal line.

MARC A. BUSMAN, ESQUIRE

Virginia State Bar #: 13030

DOUGLAS E. MATACONIS, ESQUIRE

Virginia State Bar #: 35715

BUSMAN & BUSMAN, P.C.

P.O. Box 7514

Fairfax Station, Virginia 22039

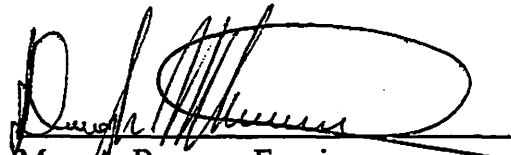
(703) 503-8088 (Phone)

(703) 425-8487 (Facsimile)

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that a true and correct copy of the foregoing was sent on this 9th day of May, 2001, to Counsel for the Defendant via facsimile and via first class mail, postage prepaid, to the following address:

Andrew N. Felice, Esquire
Eric B Travers, Esquire
Katz & Stone L.L.P.
8230 Leesburg Pike
Suite 600
Vienna, Virginia 22182

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

Marc A. Busman, Esquire
Douglas Mataconis, Esquire

McLAHON FOOD CORP. v. BURGER DAIRY CO.

United States Court of Appeals, Seventh Circuit, December 30, 1996

103 F3d 1307

¶ Rev3311] Good faith requirement for accord and satisfaction by use of an instrument.

A dairy supplier's acceptance and negotiation of a check tendered by a buyer in full satisfaction of the buyer's debt did not constitute an accord and satisfaction where there was no "honest dispute" between the parties as to the amount due at the time payment was tendered and the buyer did not act in good faith as required by Revised § 3-311. The buyer deliberately misled the supplier's manager, who had only recently been appointed to the position and had no knowledge of the buyer's history of payment problems. The buyer assured the supplier's manager from the outset that it had settled all accounts prior to a specific date with the previous manager, when in fact no settlement had been reached and the accounts remained in dispute. Because the buyer acted dishonestly and took advantage of the seller's manager at the time of tender, the buyer failed to meet the good faith requirement of Revised § 3-311 thereby rendering irrelevant a notation on the check stating that the instrument was a full satisfaction check.

¶ 2202.10] Admissibility of parol evidence.

In cases governed by the UCC, Illinois law provides that parol evidence is admissible to determine whether an agreement is completely or partially integrated, to explain the meaning of a fully integrated agreement, or to prove a fraud or deceit. Accordingly, testimony concerning a meeting between a supplier of dairy products and a buyer, at which the buyer misled the supplier's newly appointed manager by asserting that all of the disputed accounts had been settled, was admissible to show that the accord the parties reached as a result of that meeting fell short of fulfilling the requirement for a good faith negotiation.

¶ 1201.25(1), ¶ Rev3311] Deposit of check did not operate as an accord and satisfaction of all claims where "paid in full" language was ambiguous.

A dairy supplier and its buyer disagreed as to the amount of money the buyer owed. Although the buyer refused to pay the disputed debt, the parties continued to do business. Several months after the refusal, the buyer sent two checks to the supplier, each accompanied by vouchers listing the invoices being paid. One voucher also contained the notation "PAID IN FULL" through the date of the last invoice. The supplier deposited the checks. Held: The buyer's tender of the check with the voucher marked "paid in full" and the supplier's subsequent deposit of the check did not constitute an accord and satisfaction of all outstanding disputes between the parties. Under Revised § 3-311, the party who presents a full satisfaction check must make it clear that the tendering of the check is intended to act as a settlement of all outstanding claims before the check can operate as an accord and satisfaction. Here, the buyer's actions in tendering the check were not sufficient to make the supplier aware that the check was meant to settle all of the buyer's debts. Although the buyer tendered two checks, only one bore the notation "paid in full," and the restrictive language, while typed in capital letters, was merely the last of several lines referring to the included invoices. Viewed objectively, the record seemed to indicate that the buyer intended the check to be full payment only of the invoices appearing in the accompanying voucher. Since the "paid

UCC CASE DIGEST for quick entry into your reporter.

31 UCC REPORTING SERVICE 2d

Cite as 31 UCC Rep Serv 2d

in full" language on the check was ambiguous, its tender would not serve as full satisfaction of the supplier's claim against the buyer.

[¶ 1102.5(5), ¶ 1201.27, ¶ Rev3311] Imputation of knowledge that check was meant as full satisfaction of claims.

A dairy supplier and its buyer disagreed as to the amount of money the buyer owed. Although the buyer refused to pay the disputed debt, the parties continued to do business. Several months after the buyer's refusal, the buyer sent two checks to the supplier, each accompanied by vouchers listing the invoices being paid. The voucher attached to the second check also contained the notation "PAID IN FULL" through the date of the last invoice. The supplier's controller deposited the checks, admitting later that she did not notice the "paid in full" notation, as she examined only the checks themselves. Held: Knowledge of the full payment check could not be imputed to the supplier's manager, who, as the person with direct responsibility for the dispute with the buyer, would have realized that the check was tendered as full satisfaction of all claims. Comment 7 to Revised § 3-311 specifically states that where a person who processes a company's checks has no responsibility with respect to an accord and satisfaction, that person's knowledge is not imputed to the organization and it makes no difference whether that person sees or does not see that a check was tendered as full satisfaction.

[¶ Rev3311] Good faith dispute requirement for accord and satisfaction.

A dairy supplier and its buyer disagreed as to the amount of money the buyer owed. Although the buyer refused to pay the disputed debt, the parties continued to do business. Several months after the buyer's refusal, the buyer sent a check to the supplier, accompanied by vouchers listing the invoices being paid and containing the notation "PAID IN FULL." Held: The check did not operate as an accord and satisfaction of all claims, because there was no good faith dispute between the parties as required by Revised § 3-311. The buyer claimed that it acted in good faith when it tendered the check as full satisfaction of the outstanding debt, as the dispute over the earlier debt was known at the time of the tender. The buyer, however, had misled the supplier's manager during previous discussions by implying that the earlier debt had been settled. A subsequent statement by the buyer that it would not pay that debt was not enough by itself to create a good faith dispute; the buyer also had to show that it had a just basis for refusing to pay. As the buyer failed to proffer any credible reasons for believing it did not have to pay the debt, there was no good faith dispute, and the check could not constitute an accord and satisfaction.

UCC Sections Cited: § 1-201(10), (25), (27), § 1-207(2), § 2-202. [Rev] § 3-311 and Official Comments 3, 7 (III).

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Before CUDAHY, COFFEY, and FLAUM, Circuit Judges.

COFFEY, Circuit Judge. Burger Dairy Company ("Burger") and McMahon Food Corporation ("MFC") were involved in a contract dispute over milk products that Burger sold to MFC, as well as credits for empty milk cases that MFC returned. MFC brought a declaratory judgment action against Burger, asserting that it effected an accord

Use UCC CASE DIGEST for quick entry into your reporter.

it would not serve as

knowledge that check was

amount of money the buyer, the parties continued to. Buyer sent two checks to MFC being paid. The voucher marked "PAID IN FULL" through the checks, admitting liability. The checks, admitting liability, were examined only the check could not be imputed to MFC. Liability for the dispute was red as full satisfaction of the debt. As that where a person with respect to an accord and satisfaction, the organization and it made a check was tendered as full

accord and satisfaction.

amount of money the buyer, the parties continued to. Buyer sent a check to MFC being paid and containing the rate as an accord and satisfaction. The dispute between the parties was it acted in good faith when paying the debt, as the dispute over the debt, however, had misled the buyer, but the earlier debt was it would not pay that debt was. Buyer also had to show that it had no offer any credible reasons for a good faith dispute, and the check

2), § 2-202, [Rev] § 3-311 and

Court for the Northern District of Indiana, COFFEY, and

Company ("Burger") and involved in a contract with MFC, as well as credits. MFC brought a declaratory judgment that it effected an accord

reporter.

and satisfaction of its debt by tendering two checks with attached vouchers, one marked "payment in full through 6/6/92," the other marked, "paid in full thru 8/8/92," to Burger. Burger countersued, seeking \$58,518.41 from MFC. The trial court denied MFC relief, ruling that the accord which the first check purported to satisfy was obtained by deceit, while the second check was a unilateral action by MFC, on which the parties reached no accord. The court awarded Burger the full amount claimed. On appeal, MFC argues that (1) because the language "payment in full thru 6/6/92 . . . Clear statement of account thru 6/6/92 to follow," inscribed on the first voucher, was clear and unambiguous, the district court wrongly admitted parol evidence to elucidate the negotiations leading up to its tender; and (2) under U.C.C. [Revised] § 3-311, a second accord was reached when Burger objectively agreed to MFC's offer by cashing the second check. We are of the opinion that the trial court's findings of fact are not clearly erroneous. Therefore, we affirm.

I. Background

Burger Dairy Company, an Indiana vendor of dairy products, regularly sold milk products to McMahon Food Corporation, a Chicago distributor of dairy products, from October, 1991, until August 15, 1992.¹ MFC generally placed several orders each week. Burger's product manager entered the orders onto a "load ticket," which the loading crew relied upon when shipping a truckload of plastic milk cases² for the respective order. If there was a discrepancy between the amount MFC ordered and the amount Burger was able to ship, the load ticket reflected that discrepancy, including the exact number of milk cases. Burger used the load tickets to itemize the charges in its invoices for MFC. In addition, to make sure that MFC returned Burger's plastic milk cases, Burger charged MFC a \$1.00 deposit for each milk case delivered to MFC, and gave an equal credit for each case returned. Burger prepared and mailed a weekly invoice for MFC.

In addition to buying dairy products, MFC had a side-business selling used plastic milk cases to Burger. MFC had acquired a large stockpile of these cases from various suppliers, including Burger. Burger agreed that when MFC returned a truckload of cases to its plant, it

¹ All of the meetings and other events relevant to this appeal took place in 1992. Similarly, except for one disputed claim covering the last three months of 1991, all relevant Burger invoices and letters, and MFC checks, date to 1992.

² "Milk cases"—essentially open-topped plastic boxes—are widely used throughout the dairy industry to ship cartons of milk. Each case holds several cartons (half gallons, pints, etc.).

Use UCC CASE DIGEST for quick entry into your reporter.

31 UCC REPORTING SERVICE 2d

Cite as 31 UCC Rep Serv 2d

and satisfaction of its debt by tendering two checks with attached vouchers, one marked "payment in full through 6/6/92," the other marked, "paid in full thru 8/8/92," to Burger. Burger countersued, seeking \$58,518.41 from MFC. The trial court denied MFC relief, ruling that the accord which the first check purported to satisfy was obtained by deceit, while the second check was a unilateral action by MFC, on which the parties reached no accord. The court awarded Burger the full amount claimed. On appeal, MFC argues that (1) because the language "payment in full thru 6/6/92 . . . Clear statement of account thru 6/6/92 to follow," inscribed on the first voucher, was clear and unambiguous, the district court wrongly admitted parole evidence to elucidate the negotiations leading up to its tender; and (2) under U.C.C. [Revised] § 3-311, a second accord was reached when Burger objectively agreed to MFC's offer by cashing the second check. We are of the opinion that the trial court's findings of fact are not clearly erroneous. Therefore, we affirm.

I. Background

Burger Dairy Company, an Indiana vendor of dairy products, regularly sold milk products to McMahon Food Corporation, a Chicago distributor of dairy products, from October, 1991, until August 15, 1992.¹ MFC generally placed several orders each week. Burger's product manager entered the orders onto a "load ticket," which the loading crew relied upon when shipping a truckload of plastic milk cases² for the respective order. If there was a discrepancy between the amount MFC ordered and the amount Burger was able to ship, the load ticket reflected that discrepancy, including the exact number of milk cases. Burger used the load tickets to itemize the charges in its invoices for MFC. In addition, to make sure that MFC returned Burger's plastic milk cases, Burger charged MFC a \$1.00 deposit for each milk case delivered to MFC, and gave an equal credit for each case returned. Burger prepared and mailed a weekly invoice for MFC.

In addition to buying dairy products, MFC had a side-business selling used plastic milk cases to Burger. MFC had acquired a large stockpile of these cases from various suppliers, including Burger. Burger agreed that when MFC returned a truckload of cases to its plant, it

¹ All of the meetings and other events relevant to this appeal took place in 1992. Similarly, except for one disputed claim covering the last three months of 1991, all relevant Burger invoices and letters, and MFC checks, date to 1992.

² "Milk cases"—essentially open-topped plastic boxes—are widely used throughout the dairy industry to ship cartons of milk. Each case holds several cartons (half gallons, pints, etc.).

Use UCC CASE DIGEST for quick entry into your reporter.

31 UCC REPORTING SERVICE 2d
Cite as 31 UCC Rep Serv 2d

could add some of its "stockpiled" cases to the shipment, and Burger would credit MFC \$1.00/case. Frank McMahon, MFC's vice-president, claimed that Burger did not give MFC sufficient credit for extra cases MFC returned. For this reason, when he paid Burger's invoices, McMahon deducted from his check the amount of credit he thought MFC was entitled to.

In contrast, Burger's general manager, Richard L. Bylsma, asserted that not only was MFC always late in its payments, but more frequently than not Burger had difficulty collecting. Bylsma also stated his belief that when Frank McMahon remitted payment, he made unauthorized deductions for dairy products shipped and delivered which he claimed not to have received. In addition, Bylsma maintained that MFC was short-changing Burger, by consistently claiming credits for returning full truckloads of empty cases, while the count which Burger's loading-dock personnel made reflected only partial truckloads of returned cases: Burger did not give MFC the credit McMahon demanded, Bylsma asserted, because Burger never received the number of cases MFC claimed to have returned. These disputes over the unauthorized deductions for milk cases became a major source of friction between the two companies throughout the period of their business relationship. Burger's records indicated that by mid-February of 1992, MFC was in arrears \$58,518.41 ("the February debt"). About half of this total was for unauthorized credits for returned milk-cases.

Bylsma, on behalf of Burger, met with Frank McMahon on February 27, 1992, to discuss MFC's account with Burger, including the February debt. The parties dispute the results of that meeting. Both parties agree that they examined the invoices in question, and ultimately agreed that Burger would no longer charge MFC a deposit for milk cases—according to Bylsma, in exchange for MFC's agreement to pay the invoices as they became due. Bylsma testified that he and McMahon did not otherwise resolve the amounts past due, nor did they agree upon the amount of credit due for the empty milk cases allegedly returned.

Bylsma further claimed that he never agreed to excuse MFC from making payment in full for the past due accounts. Instead, he claims he made clear during their conversation, when he and McMahon were unable to reach an agreement, that they would simply table further discussion of the February debt at that time. Upon returning to Burger's plant and checking the records, Bylsma satisfied himself that the company had been giving MFC proper credit for the cases returned. Bylsma left Burger's employment shortly thereafter, without further

Use UCC CASE DIGEST for quick entry into your reporter.

31 UCC REPORTING SERVICE 2d

Cite as 31 UCC Rep Serv 2d

communication with McMahon and MFC about the February debt. Burger's records reflect that after the February 27th meeting, it continued to bill MFC for the full \$58,518.41 it claimed was in arrears at the time Bylsma and McMahon met. McMahon, in contrast, testified that he believed he had probably paid for some of the amount in arrears with a lump-sum check; that he had never received one of the shipments for which Burger billed him; and that MFC had returned a sufficient number of additional empty milk cases to make up for the amount which Burger claimed was due in February. Nonetheless, McMahon conceded that Bylsma told him he would have to return to Burger's headquarters and check the record there before he could straighten out the old charges and credits.

After the February meeting, MFC made full payments for three weeks of current purchases (nothing was done to pay off the February debt), but then made no further payments until May 13, 1992, when it remitted a \$100,000 check to Burger with an accompanying voucher stating "on account detail to follow." Burger's records, however, reflected that the \$100,000 covered less than half the debt that MFC had amassed by that time, including the \$58,518.41 February debt which was the subject of McMahon's meeting with Bylsma.

II. The June 17th Check

A. Background

Larry Carter, who replaced Bylsma as Burger's general sales manager about the first of May, 1992, met with McMahon on June 17, 1992, to review MFC's account. McMahon asserts that at the beginning of the meeting he told Carter that if they could agree on the amount that MFC owed, he would pay it on the spot. According to Carter's notes, made contemporaneously during the June 17th meeting, McMahon assured Carter that he had settled the February debt with Bylsma. Carter's notes included both a reminder to himself to call Bylsma to confirm McMahon's assertion, and a statement that McMahon "want[ed] a new statement of account reflecting these events."³ Accordingly, Carter and McMahon went through only the invoices dated February 15 through June 6, 1992. They determined that MFC still owed a balance of \$51,812.98. McMahon promptly made out a

³ The district court, interpreting Carter and McMahon's testimony, concluded that "these events" referred to the June 17th agreement with Carter and the alleged agreement with Bylsma regarding the February debt. The notation meant that Burger was to supply MFC with a new statement reflecting the two agreements, and showing that MFC's account was no longer in arrears.

31 UCC REPORTING SERVICE 2d
Cite as 31 UCC Rep Serv 2d

check to Burger for that amount. He attached a voucher to the check on which was typed, "payment in full thru 6/6/92 . . . \$51,812.98." Below the typed language McMahon added a handwritten note stating, "Clear statement of account thru 6/6/92 to follow," followed by his signature. Burger never sent McMahon the "statement of account." McMahon also asked Carter to sign the voucher as a condition of receiving the check, which Carter did without protest. At the end of his notes, Carter wrote, "current to 6-6-92."

After returning to Burger, Carter contacted Bylsma, who told Carter that he had never reached an agreement with McMahon about the February debt. Thereafter, sometime before the end of June, Carter called McMahon and told him that it was Burger's position that the February debt had not been settled. When McMahon replied that he refused to pay the February debt, and continued to insist that he had settled it with Bylsma, Carter held McMahon's June 17th check throughout the summer of 1992.

On September 24, Edward J. Geoghan, Burger's accounting manager and comptroller of Burger's parent company, negotiated the June 17th check. Before doing so, and without consulting with Carter, Geoghan crossed out MFC's restrictive endorsement "payment in full" and "full statement of account to follow" from the voucher, and added the notation "without prejudice," followed by his own signature. Geoghan later testified that he struck out the language on the voucher because he knew it was insufficient to make MFC's account current. The next day, Geoghan wrote to McMahon, informing him that the check had been cashed, the restrictive endorsement stricken, and that MFC still owed Burger over \$64,000.

On January 14, 1993, MFC filed suit against Burger, asking the federal district court to issue a declaratory judgment that it had reached an accord and satisfaction relieving it of any debt to Burger. Burger countersued, seeking the money which it claimed MFC still owed. With the consent of the parties, the case was tried before a magistrate judge without a jury. The trial court found MFC in arrears and awarded Burger damages in the amount of \$58,518.41, plus interest and costs. This appeal followed.

B. Analysis

1. Uniform Commercial Code § 3-311

Initially, MFC argues that Burger's negotiation of the check which McMahon tendered to Carter at their June 17th meeting constituted an accord and satisfaction. An accord and satisfaction is

Use UCC CASE DIGEST for quick entry into your reporter.

31 UCC REPORTING SERVICE 2d

Cite as 31 UCC Rep Serv 2d

contractual method of discharging a debt: the "accord" is the agreement between the parties, while the "satisfaction" is the execution of the agreement. *Fremarek v. John Hancock Mutual Life Ins. Co.*, 651 N.E.2d 601, 605 [27 UCC Rep Serv 2d 533] (Ill. App. Ct. 1995). The parties accept that Illinois law, including Illinois' enactment of the Uniform Commercial Code, governs the case at bar.

Shortly before this dispute arose, Illinois adopted a revised version of Article Three of the Uniform Commercial Code, including a new section specifically addressing the creation of an accord and satisfaction by use of a negotiable instrument. 810 ILCS 5/3-311 (1992). Section 3-311 provides:

"(a) If a person against whom a claim is asserted proves that (i) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (ii) the amount of the claim was unliquidated or subject to a bona fide dispute, and (iii) the claimant obtained payment of the instrument, the following subsections apply.

"(b) Unless subsection (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.

"(c) Subject to subsection (d), a claim is not discharged under subsection (b) if either of the following applies:

(1) The claimant, if an organization, proves that (i) within a reasonable time before the tender, the claimant sent a conspicuous statement to the person against whom the claim is asserted that communications concerning disputed debts, including an instrument tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, and (ii) the instrument or accompanying communication was not received by that designated person, office, or place.

(2) The claimant, whether or not an organization, proves that within 90 days after payment of the instrument, the claimant tendered repayment of the amount of the instrument to the person against whom the claim is asserted. This paragraph does not apply if the claimant is an organization that sent a statement complying with paragraph (1)(i).

"(d) A claim is discharged if the person against whom the claim is asserted proves that within a reasonable time before collection of the instrument was initiated, the claimant or an agent of the claimant having direct responsibility with respect to the disputed obligation knew that the instrument was tendered in full satisfaction of the claim."

UCC CASE DIGEST for quick entry into your reporter.

31 UCC REPORTING SERVICE 2d
Cite as 31 UCC Rep Serv 2d

810 ILCS 5/3-311. The purpose of § 3-311 is to encourage "informal dispute resolution by full satisfaction checks." U.C.C. § 3-311, comment 3. Its drafters intended to codify the common law of accord and satisfaction "with some minor variations to reflect modern business conditions." *Id.*

In the case at bar, Burger does not dispute that the voucher attached to MFC's June 17th check contained a conspicuous notation that it was tendered as full satisfaction of MFC's entire debt, thus satisfying the prerequisites of § 3-311(b) (*supra*) for discharging the claim. Neither did Burger follow the procedures which § 3-311(c) (*supra*) establishes to keep a claim from being discharged: it neither instructed MFC to send any full satisfaction checks to a specific person or office, nor sought to repay MFC after it deposited the check. 810 ILCS 5/3-311(c)(1)-(2). Furthermore, Geoghan's attempt to cash MFC's check without jeopardizing Burger's claim against MFC was improper under the U.C.C. Assuming there was an accord, Geoghan's bid to prevent a satisfaction by accepting the check but scratching out the restrictive endorsement and adding the words "without prejudice" before he cashed the check was to no avail, for under the revised version of the U.C.C., words of protest cannot change the legal effect of an accord and satisfaction. 810 ILCS 5/1-207(2). Accordingly, MFC argues, because the voucher clearly stated that the instrument was a full satisfaction check, and because Geoghan clearly understood that the check was tendered in full satisfaction of MFC's claim before he deposited it, Burger's acceptance and negotiation of the check completed the accord and satisfaction.

We disagree. Initially, under the plain language of the statute, in order to establish an accord and satisfaction, MFC bore the burden of establishing that it met the criteria of § 3-311(a) before the other subsections establishing the discharge of a claim come into play. 810 ILCS 5/3-311(a). To meet the criteria of § 3-311(a) under Illinois law, "a party must ordinarily prove that he or she acted in good faith in tendering an instrument as full satisfaction of a claim[.]" *Fremarek*, 651 N.E.2d at 605 (emphasis added). Thus, Illinois courts interpreting § 3-311 follow the common law of accord and satisfaction in holding that "there must be an honest dispute between the parties as to the amount due at the time payment was tendered." *A.F.P. Enterprises, Inc. v. Crescent Pork, Inc.*, 611 N.E.2d 619, 623 (Ill. App. Ct. 1993) (emphasis added). Consequently, under Illinois law, there can be no accord and satisfaction unless there was an "honest dispute" between MFC and Burger at the time McMahon tendered the \$51,312.98 check to Carter on June 17th. No such "honest dispute" existed.

Use UCC CASE DIGEST for quick entry into your reporter.

31 UCC REPORTING SERVICE 2d
Cite as 31 UCC Rep Serv 2d

The trial court found that McMahon deliberately misled Carter, who had but recently been appointed to his position of general manager and had no knowledge of MFC's previous problems with payment. McMahon did so, according to the court, by assuring Carter from the outset of their June 17th meeting that he had settled with Bylsma, the former general manager, all accounts prior to mid-February, 1992. The court found that McMahon was acting dishonestly and taking advantage of Carter at the time he tendered payment, and therefore MFC failed to meet the good faith requirement of § 3-311(a).⁴ A trial court's conclusion that a party failed to act in good faith is a finding of fact which we reverse only for clear error. *Covey v. Commercial Nat'l Bank of Peoria*, 960 F.2d 657, 662 (7th Cir. 1992); *Winters v. Dallman*, 238 F.2d 912, 914 (7th Cir. 1956). We find no such error in the case before us.

MFC protests that the court based its conclusions only on Carter's understanding of what happened at the June 17th meeting. MFC denies that McMahon misled Carter, and argues that at trial, it presented evidence to the court that McMahon believed he fully settled matters with Bylsma. This assertion amounts to nothing more than an argument that the trial court should have believed MFC's version of events rather than Burger's, even though the trial court specifically found that McMahon's testimony was less credible than the testimony of Carter and Bylsma. We give "[s]pecial deference . . . to [a trial court's] findings based upon credibility determinations, which 'can virtually never be clear error.'" *United States v. Hickok*, 77 F.3d 992, 1007 (7th Cir.) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985)), cert. denied, 116 S. Ct. 1701 (1996). Indeed, as Anderson explains, "[i]f the [trial] court's account of the evidence is plausible in light of the record viewed in its entirety, [an appeals court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." 470 U.S. at 573-74. Because MFC presented the same credibility arguments to the trial court, we defer to the factfinder's determination. See *United States v. Wimberly*, 79 F.3d 673, 676 (7th Cir.), cert. denied, 117 S. Ct. 164 (1996).

⁴ Article Three of the Uniform Commercial Code defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing." 810 UCC § 3-103(4).

Use UCC CASE DIGEST for quick entry into your reporter.

2. Parol Evidence

In a final attempt to escape the trial court's conclusion the accord and satisfaction resulted from the June 17th meeting, argues that because the June 17th check (with its accompanying voucher) was unambiguously a full satisfaction check, the parol evidence rule should have barred the court from admitting any evidence concerning the meeting which led up to McMahon's tendering it. Out evidence of the contents of the June 17th meeting as well as the aftermath, MFC notes (correctly), the court could not have found MFC acted deceptively and in bad faith.

This argument embodies an elementary mistake concerning the scope of the parol evidence rule under the Uniform Commercial Code. As this court has long recognized, Illinois common law follows the practice of insisting that parol evidence "is only admissible at trial for consideration by the trier of fact, if the trial court determines as a matter of law, that the contract is ambiguous." *Sunstream Express, Inc. v. International Air Service Co.*, 734 F.2d 1258, 1268 (7th Cir. 1984). Recently, however, the Supreme Court of Illinois explicitly stated that in cases which the U.C.C. governs—though only in Illinois cases—Illinois follows the more liberal standard of the Restatement (Second) of Contracts § 214, that parol evidence is admissible to determine whether an agreement is completely or partially integrated, to explain the meaning of even a fully integrated agreement. *Steel Contractors, Inc. v. C. Iber & Sons, Inc.*, 642 N.E.2d 1215, 1216 (Ill. 1994) (citing Restatement (Second) of Contracts § 214⁵ and ILCS 5/2-202). Indeed, under the U.C.C., "in order to determine whether the parties intended a writing to be the complete and exclusive agreement between them, a court must compare the writing with the prior negotiations." *L.S. Heath & Son, Inc. v. AT & T Information Systems*, 9 F.3d 561, 569 [22 UCC Rep Serv 2d 27] (7th Cir. 1993). Even under the common law, parol evidence is always admissible

⁵The Restatement (Second) of Contracts § 214 reads in pertinent part:

"Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish

- (a) that the writing is or is not an integrated agreement;
- (b) that the integrated agreement, if any, is completely or partially integrated;
- (c) the meaning of the writing, whether or not integrated;
- (d) illegality, fraud, duress, mistake, lack of consideration, or other vitiating cause;
- (e) ground for granting or denying rescission, reformation, specific performance, or other remedy."

Use UCC CASE DIGEST for quick entry into your reporter.

31 UCC REPORTING SERVICE 2d

Cite as 31 UCC Rep Serv 2d

prove a fraud or deceit. Herzog Contracting Corp. v. McGowen Corp., 976 F.2d 1062, 1068 [18 UCC Rep Serv 2d 1170] (7th Cir. 1992). As stated above, the U.C.C. unquestionably governs the case at bar. Consequently, testimony concerning the June 17th meeting was admissible to show that the accord which the parties reached as a result of that meeting fell short of fulfilling the requirement for a good faith, arms-length negotiation—an "other invalidating cause" within the meaning of the Restatement (Second) of Contracts § 214(d). Because we are convinced that the trial court did not clearly err in finding that McMahon demonstrated a lack of good faith, MFC has failed to present facts sufficient to convince us that it complied with the requirements for an accord and satisfaction under the U.C.C.

III. The August 18th Check

A. Background

Despite the conflict which arose when McMahon refused to pay the February debt, MFC continued to purchase milk from Burger through August 15, 1992. On August 18th, MFC sent two checks to Burger. The first check paid off three invoices dated July 4th, 11th, and 18th, while the second check covered invoices from July 25th, August 1st, and August 8th. A voucher accompanying each check listed the invoices being paid, and the deductions which MFC was making. The voucher accompanying the second of the two checks, dated August 18, 1992, bore a list reflecting that MFC was paying off three specified invoices, and also deducting \$1,758.46 for milk cases for which MFC believed it should receive credit. Typed in capital letters at the bottom of this list was the notation, "PAID IN FULL THRU 8/8/92." Burger immediately deposited both checks without further inquiry, as well as a check the following week for an August 15 invoice whose accompanying voucher also included a line stating, "PAYMENT IN FULL THRU 8/15/92." Denise Blough, Burger's assistant controller, testified that she received and deposited the two checks without noticing the "payment in full" language on the attached voucher. She added that it was her habit to examine the checks themselves, but that she ignored the memos or vouchers accompanying payments.

B. Analysis

MFC contends that the company tendered its check of August 18th, with the accompanying voucher marked "payment in full," as an

UCC CASE DIGEST for quick entry into your reporter.

intended full satisfaction check within the meaning of § 3-311 and Burger completed an accord and satisfaction when it cashed the check. The dispute over the February debt, MFC reasoned, had run out into the open at the end of June, when McMahon told Carter he would not pay it, thus creating a good faith dispute within the meaning of § 3-311(a). MFC argues that as a result, Burger should have realized that after the end of June, any check marked "payment in full" was meant to settle all outstanding disputes between the parties. The trial court, in contrast, concluded (and the record is barren of evidence to the contrary) that the August 18th check constituted an accord and satisfaction only for those invoices to which the accompanying voucher made reference, because Burger expressed no objective intent to enter into an accord for any other period. We agree with the trial court's conclusion, but for different reasons.

As previously noted, the principal purpose of § 3-311 is to encourage informal dispute resolution by full satisfaction checks. U.C.C. § 3-311, comment 3. The law of accord and satisfaction has long recognized that "[w]here [an] amount due is in dispute, and debtor sends [a] check for less than the amount claimed, and expressing that it is sent as settlement in full . . . [the] cashing of the check is almost always held to be an acceptance of the offer open as full satisfaction." 6 Corbin on Contracts § 1279. As a result, the objective act of cashing a full payment check may, by itself, be deemed an acceptance of an accord. See *Nelson v. Fire Ins. Exchange*, 137, 139 N.E.2d 137, 139 [4 UCC Rep Serv 2d 1344] (Ill. App. Ct. 1987); *Enterprises v. Crescent Pork*, 611 N.E.2d at 623-34.

Nevertheless, before a full satisfaction check can create an accord and satisfaction, the party who offers or presents the check must make it clear that the cashing of the check is intended to act as a settlement of all outstanding claims between the parties. 810 ILCS 5/3-311. We are convinced that MFC's actions in tendering the August 18th check were not sufficiently clear to make Burger aware that the check was meant to settle all MFC's outstanding claims. First, it is significant that MFC actually tendered not one but two checks dated August 18th. Both were in payment for invoices billed after McMahon told Carter he would not pay the February debt. The August 18th check included a deduction for empty milk cases for which Burger believed it was entitled to receive credit. Only one of the two checks, however, bore the notation "paid in full." In addition, the restrictive language, although typed in capital letters, was simply the first of several lines of information inscribed on the voucher accompanying the check, reflecting the items included for payment.

Use UCC CASE DIGEST for quick entry into your reporter.

31 UCC REPORTING SERVICE 2d

Cite as 31 UCC Rep Serv 2d

As noted above, an accord and satisfaction is a "contractual method of discharging a debt," *Fremarek*, 651 N.E.2d at 605, and like any contract the intentions of the parties must be viewed objectively. Viewing the record as a whole, it is objectively reasonable to conclude that MFC intended the August 18th check to be full payment only for those invoices to which the accompanying voucher made reference. The parties' long history of disputes over credits for empty milk cases makes this conclusion seem even more likely. Otherwise, it is difficult to understand why MFC would not have applied the "paid in full" notation to both of the checks it issued on August 18th, instead of just one. Thus, since the "paid in full" language on the August 18th check was at best ambiguous, its tender cannot serve as full satisfaction of Burger's claim against MFC.

Second, even if the "paid in full" language were clear, we refuse to impute to Burger knowledge that MFC intended the August 18th check as full satisfaction of its claim. MFC never contested the statement of Denise Blough, the Burger official who deposited the August checks, that she simply did not notice the "paid in full" language on the voucher accompanying the August 18th check. Though hardly dispositive, this is probative of the fact that the "paid in full" language was not sufficiently conspicuous. See 810 ILCS 5/1-201(10) (a statement is conspicuous if "it is so written that a reasonable person against whom it is to operate ought to have noticed it").⁶ Moreover, MFC never refuted Blough's deposition testimony that she would not have understood the significance of the notation unless Carter had told her. Instead, MFC argued that if Carter had exercised due diligence regarding the dispute over MFC's account, he would have informed Blough of the problem and told her to be on the lookout for precisely the sort of check which MFC tendered.

The problem with this argument is that the drafters of § 3-311 have anticipated and rejected it. Where a person who processes a company's checks has no responsibility with respect to an accord and satisfaction, it makes no difference whether that person "did or did not

⁶ The statute allows the claimant to place such a statement either on the check itself or on an accompanying written communication. 810 ILCS 5/3-311(b). A "paid in full" notation placed on the check itself would have been more conspicuous than the same statement on the accompanying voucher. Similarly, had MFC used more explicit language, see *Rang v. Hartford Variable Annuity Life Ins. Co.*, 908 F.2d 380, 381 (8th Cir. 1990) (reading in part "the endorsement of this check by payee constitutes a clear release in full settlement of the stated accounts"); *Air Van Lines, Inc. v. Buster*, 673 P.2d 774, 777 [37 UCC Rep Serv 1454] (Alaska 1983) (notation reading "full and complete payment Endorsement of this check constitutes a complete settlement of your claim"), we might have been constrained to reach a different result.

UCC CASE DIGEST for quick entry into your reporter.

see [a] statement that [a] check was tendered as full satisfaction of claim," the person's knowledge "is not imputed to the organization which she works. 810 ILCS 5/3-311, comment 7. Failure to impute the person who processes the organization's checks to look for satisfaction statements falls short of constituting a lack of due diligence on the part of the creditor. Id. (citing U.C.C. § 1-207(27)). It is true that Bough held a far more responsible position with Burger than, for example, the clerical workers in the examples discussed in commentary to § 3-311. It is also clear, however, that those comments are illustrative rather than exhaustive. Furthermore, MFC introduced into the record evidence demonstrating that Bough's duties regarding accounts receivable extended beyond examining the face of a check and then processing it, or that she had responsibility with respect to any accord and satisfaction which Burger might have with its customers.

Thus, based on the record before us, we cannot impute knowledge of the August 18th full payment check to Carter—who, as the person with direct responsibility for the dispute with MFC, would have been expected to know that the check was tendered as full satisfaction of Burger's debt. 810 ILCS 5/3-311(d) and comment 7. The Uniform Commercial Code, in effect, delineates when knowledge of a full satisfaction tender can be imputed to a claimant. See U.C.C. §§ 3-311, comments 1-201(25), 1-201(27). Thus, the statute accommodates modern business practices in receiving and processing checks, 810 ILCS 5/3-311, comment 3, while the cumulative result of its provisions is to preserve the common law rule that a debtor cannot unilaterally create an accord and satisfaction. *Shea, Rogal & Assoc. v. Leslie Volkswagen Inc.*, 576 N.E.2d 209, 212-13 (Ill. App. Ct. 1991). Because MFC failed to establish a sufficient foundation from which to impute knowledge of the full satisfaction tender to Burger, we hold that Burger's deposit of the August 18th check failed to create an accord and satisfaction as defined by U.C.C. § 3-311.

Finally, despite MFC's assertion to the contrary, we cannot hold that just because the conflict over the February debt was not yet open by the end of June, MFC acted in good faith when it tendered the August 18th check as full satisfaction of its outstanding debt to Burger. As noted above (Section II.B.1), the existence of a good faith dispute between the parties is a prerequisite to an accord and satisfaction under the U.C.C. 810 ILCS 5/3-311(a). There was no underlying good faith dispute because, as noted above, McMahon misled Carter about having settled MFC's February debt. That McMahon later made a statement to Carter that he wouldn't pay the February

Use UCC CASE DIGEST for quick entry into your reporter.

31 UCC REPORTING SERVICE 2d
Cite as 31 UCC Rep Serv 2d

is not, of itself, sufficient to create a good faith dispute within the meaning of the statute:

"The debtor's mere refusal to pay the full claim does not make it a disputed claim. Where the refusal is arbitrary and the debtor knows it has no just basis, the payment of less than the full amount claimed does not operate as an accord and satisfaction even though it is tendered and received as such."

Gerald R. Turner & Assoc. v. Moriarty, 25 F.3d 1356, 1360 (7th Cir. 1994). Thus, it is not enough for MFC to demonstrate that it openly refused to pay the February debt: MFC must also show that it had a just basis for refusing to pay. Under the *Turner* rationale, the trial court's findings concerning MFC's lack of good faith at the June 17th meeting between Carter and McMahon carry over into our analysis of MFC's later actions. As stated above, the trial court concluded that MFC proffered no credible reasons for believing it did not have to pay the February debt. Because after review we are convinced that this finding was not clearly erroneous, *supra*, we conclude that MFC has failed to carry its burden of establishing that there was a just basis for its dispute with Burger. Since MFC had no more basis for its refusal to pay the February debt in August than it had in June, there was no good faith dispute between the parties within the meaning of U.C.C. § 3-311, and the August 18th check cannot operate as an accord and satisfaction.

CONCLUSION

The trial court did not clearly err in concluding that MFC's first check marked "paid in full" did not effect a satisfaction, because the check which it purported to satisfy was reached only as a result of MFC's bad faith and deception. The court's admission of parole evidence in order to demonstrate MFC's lack of good faith was proper under the Illinois' enactment of the U.C.C. Neither did the second tender of MFC's debt to Burger, because MFC failed to make it sufficiently clear that depositing the check would settle all outstanding debts between the parties. The district court's determination that the second tender was a full satisfaction check within the meaning of U.C.C. § 3-311, and MFC was not entitled to declaratory relief, was affirmed.

CASE DIGEST for quick entry into your reporter.

012319

ORIGINAL

V I R G I N I A:

CIRCUIT COURT OF FAIRFAX COUNTY

FILED
COURT SERVICES
SEP 21 AM 9:54
JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

-----x
GELLES & SONS GENERAL
CONTRACTING, INC.,

Plaintiff,

v.

No. 194613

JEFFREY STACK, INC., et al.,

Defendants.
-----x

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
OCT 19 2001
RICHMOND, VIRGINIA

4110 Chain Bridge Road
Fairfax, Virginia

Thursday, August 2, 2001

The HEARING in this matter began at
10:03 a.m. pursuant to notice.

BEFORE:

JUDGE M. LANGHORNE KEITH

1 APPEARANCES:

2 On behalf of Plaintiff:

3 MARC A. BUSMAN, ESQUIRE
4 Busman & Busman, PC
5 P.O. Box 7514
Fairfax Station, Virginia 22039
(703) 503-8088

6 On behalf of Defendant:

7 ANDREW N. FELICE, ESQUIRE
8 ERIC B. TRAVERS, ESQUIRE
Katz & Stone, LLP
820 Leesburg Pike, Suite 600
9 Vienna, Virginia 22182
(703) 761-3000

10
11
12
13 * * * * *
14
15
16
17
18
19
20
21
22

C O N T E N T S

1	WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
2					
3	Jeffrey Stack	6	49	97	102
4	Randall Elton Lenz	104	111	117	
5	Robert Lane Gelles	118	161		
6	PLAINTIFF'S EXHIBITS:		IDENTIFIED	RECEIVED	
7	No. 1 - Fax Excerpt			124	124
8	No. 2 - Fax Excerpt			124	124
9	No. 3 - Square Footage Computation			126	126
10	No. 6 - Fixed Proposal Acceptance			126	126
11	No. 7 - July 19, 2000, Revised Proposal			131	131
12	No. 8 - July 20, 2000, Letter, Stack to Gelles			131	131
13					
14	No. 9 - Payment Credit Details			132	132
15	No. 10 - September 19, 2000, Letter, Stack to Gelles			133	133
16					
17	No. 11 - Letter re Washout			136	136
18	No. 12 - Payment Credit Details			137	137
19	No. 13 - Punch List			139	139
20	No. 14 - September 13, 2000, Fax, Gelles to Stack			139	139
21	No. 15A - Letter, Stack to Contractors			32	32
22	No. 15B - Punch List			32	32

BETA REPORTING

(202) 638-2400

1-800-522-2382

(703) 684-2382

			4
1	PLAINTIFF'S EXHIBITS (CONT'D): IDENTIFIED RECEIVED		
2	No. 17 - September 20, 2000, Fax, Gelles to Stack	142	142
3	No. 18 - October 13, 2000, Statement	143	143
4	No. 19 - [Not Identified]	146	146
5	No. 20 - [Not Identified]	146	146
6	No. 21 - December 21, 2000, Letter, Stack to Gelles	45	45
7	No. 22 - December 11, 2000, Fax, Gelles to Stack	46	46
8	No. 28 - Invoice	131	131
9	No. 29 - Invoice	131	131
10	No. 30 - Invoice	131	131
11	No. 31 - Invoice	131	131
12	No. 32 - Invoice	131	131
13	No. 33 - Invoice	131	131
14	No. 34 - August 1, 2000, Invoice	131	131
15	No. 35 - Invoice	131	131
16	DEFENDANTS' EXHIBITS:		
17	No. 3 - Square Footage Computation	43	43
18	No. 4 - Project Plans	28	28
19	No. 5 - Proposal for Picnic Tables	101	101
20	No. 16A - September 19, 2000, Letter, Stack to Gelles	34	34
21			
22			

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

..

5

DEFENDANTS' EXHIBITS (CONT'D): IDENTIFIED RECEIVED		
No. 16B - Plan Detail	34	34
No. 23A - December 13, 2000, Letter, Stack to Gelles	18	18
No. 23B - December 13, 2000, Check	18	18

* * * * *

P R O C E E D I N G S

THE COURT: I've read the papers,
so I don't think you need an opening
statement. So let's proceed.

MR. FELICE: May I introduce on
behalf of Defendants Jeffrey Stack of the
North American Specialty Insurance Company?

Why don't I call Jeffrey Stack to
the stand.

THE COURT: Are we ready? All
right.

Whereupon,

JEFFREY STACK

was called as a witness and, having been
first duly sworn, was examined and testified
as follows:

DIRECT EXAMINATION

Q Mr. Stack, would you state your
full name for the record, please?

A Jeffrey Steven Stack.

Q What is your current occupation,
Mr. Stack?

1 A I'm owner of JSI Paving and
2 Construction, Jeffrey Stack, Incorporated.

3 Q JSI Paving Construction is the
4 trade for Jeffrey Stack, Incorporated?

5 A Yes.

6 Q What type of work does JSI
7 perform?

8 A We're a general contractor. We
9 perform public works, paving, utilities,
10 grading-type projects; road projects; park
11 projects.

12 Q How long has JSI been in business?

13 A Since 1985.

14 Q How long have you personally been
15 in involved in construction work?

16 A Upwards of 25 years.

17 Q How many employees does JSI have?

18 A Currently it's between 40 and 50,
19 right around 45.

20 Q Does JSI hold any licenses from
21 any jurisdictions for construction work?

22 A Yeah. We're a Class A contractor

1 for both -- we're based in Virginia, but
2 we're a Class A contractor for Virginia,
3 Maryland.

4 Q What are your day-to-day duties as
5 president of Jeffrey Stack, JSI Paving?

6 A I oversee basically all
7 operations, both in the office and in the
8 field. I mainly run the office in
9 estimating and that part of it. My brother,
10 actually, is kind of head of field
11 operations. I also work in the field, as
12 well overseeing work there.

13 Q In your capacity, are you familiar
14 with the outgoing projects that JSI has?

15 A Yes, uh-huh.

16 Q Are you familiar with the bills
17 and records of your company?

18 A Yes.

19 Q Are you familiar with billings and
20 payables with the subcontractors and
21 vendors?

22 A Yes.

1 Q Mr. Stack, you're aware that in
2 this litigation, the Plaintiff is suing your
3 company, seeking \$26,000 on a Cameron
4 Station project?

5 A Yes.

6 MR. BUSMAN: Your Honor, may I
7 interrupt? There is a change. Counsel and
8 I have discussed it, and --

9 MR. FELICE: How about --

10 MR. BUSMAN: No. I just want to
11 let the Court know, I have failed to file an
12 amendment reducing the amount. If it may
13 please the Court, we got the October
14 statement, and we did not change it in our
15 lawsuit after the payment in question. The
16 amount in question, subject to a credit for
17 sand, should be \$12,595, I believe.

18 THE COURT: All right.

19 MR. BUSMAN: So we apologize for
20 not amending the suit and counter to reflect
21 the payment. It's strictly something that
22 counsel is responsible for, not my client,

1 Your Honor.

2 THE COURT: All right.

3 MR. BUSMAN: Thank you.

4 MR. FELICE: ----.

5 THE COURT: All right.

6 BY MR. FELICE:

7 Q You are familiar, are you not,
8 that you have been sued by Gelles and Sons
9 for a remaining balance due on the Cameron
10 Station project; is that correct?

11 A Correct.

12 Q Do you believe that your company
13 knows Gelles and Sons that money?

14 A No.

15 Q Why not?

16 A Two main reasons. They did not
17 finish the work. They finished most of it,
18 but we had to go in and finish it. So there
19 were some back charges for about \$6,000.
20 And, then -- and basically, they overbilled
21 us for another \$6,000, and there, we went
22 out, and he measured 15,000 square feet --

1 MR. BUSMAN: Objection, Your
2 Honor. Unless the witness can offer a
3 foundation as to who did the measurements,
4 when the measurements were done, whatever, I
5 don't believe he can testify to "they did
6 the measurements," Your Honor.

7 THE COURT: All right.

8 MR. FELICE: Your Honor, I'll lay
9 the proper foundation.

10 THE COURT: Lay the foundation.

11 BY MR. FELICE:

12 Q Mr. Stack, you just mentioned the
13 issue about the proper measurements. Were
14 you involved in measuring the Gelles and
15 Sons work on the project?

16 A Yes.

17 Q Could you explain the procedure
18 that took place to measure Gelles and Sons'
19 work on the project?

20 A Yes. Myself, Mark Stack, my
21 brother, another worker of ours, and Randy
22 went out and measured everything once it was

1 all installed to verify what the total
2 quantity installed was.

3 Q Which company was Randy from?

4 A Randy's with Gelles and Sons.

5 Q Prior to this measurement, did you
6 have any discussion with Mr. Gelles right
7 there regarding the measurement of the work
8 reflected in his bill?

9 A Yes. Very --

10 Q Could you identify the statement
11 or substance of those conversations?

12 A Yes. After they had worked for a
13 period of 6 weeks, they sent an initial
14 billing for the work they had done. I
15 received it. I went out and measured, and I
16 came up with a different measurement. I
17 called him on that, and said, "You know,
18 you're billing me for five thousand and some
19 square feet, and I'm coming up with five or
20 six hundred square feet less," I said, "so
21 your measurement is wrong. But, you know,
22 that can be verified. We can get together

1 and measure it and come up to an agreement."

2 And he had no problem with that.

3 They continued working. But, you know, that
4 carried through that -- you know, what they
5 measured and billed did not meet what I went
6 out and measured. And I offered to -- let's
7 get together, measure it together so we can
8 agree on it.

9 I thought Bob was going to come
10 out and do that. But he sent Randy, which
11 was fine. And we went out and measured
12 everything.

13 Q Getting back to the original
14 question, you had indicated that you did not
15 think that you owed Gelles and Sons any more
16 money on the contract. The measurements,
17 obviously, that we just discussed was one of
18 them. Were there any other reasons?

19 A Yes. The bricks had to be sealed,
20 and that was part of their contract. They
21 did not do that work. In order to seal
22 them, they have to be cleaned. So we had to

1 go out and clean them, and virtually all the
2 stuff had to be cleaned due to their guys
3 cutting on them and making them dirty. So
4 we had to go out and clean them and seal
5 them. So that money was back-charged to
6 them.

7 Q Did there come a time when you
8 communicated your position to Mr. Gelles in
9 writing?

10 A Yes, I think verbally and in
11 writing.

12 MR. FELICE: Your Honor, may I
13 approach the witness?

14 THE COURT: Yes, sir.

15 MR. FELICE: Mr. Stack, excuse me
16 a second.

17 Your Honor, in order to avoid
18 confusion, we have the same exhibits. I
19 have made it simple.

20 MR. BUSMAN: I have a much greater
21 number. His book, I've already prepared.

22 THE COURT: All right.

1 MR. FELICE: I think he's
2 referring to what I call Plaintiff 21.

3 MR. BUSMAN: Actually, I call it
4 21A; 21B was related to 21A. The check is
5 21B.

6 THE COURT: I don't see it. Okay,
7 23A?

8 MR. FELICE: 21A, Your Honor.
9 Here's the letter. It's 20 --

10 THE COURT: The letter dated
11 December 13, 2000? It's 23A.

12 MR. FELICE: Correct, Your Honor,
13 23A. Yes. My mistake.

14 BY MR. FELICE:

15 Q Mr. Stack, the letter you have in
16 front of you, the December 13, 2000, letter?

17 A Yes.

18 Q Can you identify that letter?

19 A Yes. This is the letter we sent
20 in an effort to resolve our dispute on the
21 final payment, what was owed. We spelled
22 out what we felt we owed and why we owed it

1 and offered this as a resolution in the
2 matter.

3 Q What was your company's resolution
4 as to the dispute about the balance due to
5 Gelles and Sons?

6 A Say that again?

7 Q How much were you offering to pay
8 Gelles and Sons to resolve the records?

9 A \$13,580.

10 Q The check that accompanied it,
11 check number 22854, is that the check that
12 accompanied your December 13 letter to
13 Mr. Gelles?

14 A Yes.

15 Q Do you know whether Mr. Gelles or
16 Gelles and Sons negotiated that check?

17 MR. BUSMAN: We'll stipulate that
18 it was cashed, Your Honor. Counsel's
19 version has the endorsement on the back.
20 We'll stipulate that the check was in fact
21 cashed.

22 THE COURT: All right.

1 MR. FELICE: Your Honor, I would
2 also like to move that into evidence. You
3 have a copy of the check with the
4 endorsement on the back. I would like that
5 to be attached.

6 MR. BUSMAN: Would you like these
7 separate or put together?

8 MR. FELICE: Put together.

9 MR. BUSMAN: Either way. Do you
10 see what I'm saying?

11 THE COURT: Yes, sir. I'm
12 listening.

13 MR. BUSMAN: Yes. Well, actually,
14 yours doesn't have the ---- portion. So
15 now, you just add this --

16 THE COURT: Yes.

17 MR. FELICE: You can add that as
18 part of 23A, 23B.

19 THE COURT: All right.

20 MR. BUSMAN: B. 23B.

21 THE COURT: It'll be made part of
22 23B.

1 MR. FELICE: Your Honor, I'd like
2 to move into admission 23A and 23B.

3 THE COURT: Any objection to
4 admission?

5 MR. BUSMAN: No objection.

6 THE COURT: All right, 23A, 23B
7 are admitted.

8 (Defendants' Exhibit Nos. 23A
9 and 23B were marked for
10 identification and received in
11 evidence.)

12 BY MR. FELICE:

13 Q Mr. Stack, let's just backtrack to
14 how Gelles and Sons became involved in this
15 project.

16 Can you describe to the Court the
17 process by which Gelles and Sons became
18 involved in this job?

19 A Yeah. They were working -- we
20 were building a park adjacent to where they
21 were working -- I guess working with some
22 builders, doing brick pavement work. We

1 actually had someone else contracted to do
2 this work. They were having trouble getting
3 in and starting. And I guess they ran into
4 Bob. I don't think they knew him prior;
5 they just happened to come upon him when
6 they were out there, looking to get started.
7 And they kind of said that they were having
8 trouble --

9 MR. BUSMAN: Objection to hearsay,
10 Your Honor.

11 BY MR. FELICE:

12 Q Mr. Stack, let me just restate the
13 question. Maybe it's the question.

14 Did there come a time when you and
15 Bob Gelles had a discussion regarding the
16 Cameron Station project? Is that correct?

17 A Yes.

18 Q Would you describe to the Court
19 the goals those discussions between yourself
20 and Mr. Gelles?

21 A I believe he called me through
22 someone else. I was also given his number.

1 We had this work. That's the kind of work
2 they do. We came out. We met on the site.
3 We looked over the plans and we gave them
4 the plans and specs. We walked parts of the
5 site to show them where the work was being
6 installed. And we agreed to a price.
7 And --

8 Q Can you describe for me the
9 conversation you had as to what the scope of
10 Gelles's work was to be performed on the
11 project?

12 A Well, it was to be installed per
13 the plans and specifications. But we were
14 supplying some of the materials; we were
15 supplying the brick and the edging and the
16 sand. And then they were to give us a
17 finished product for pavers.

18 Q And so Gelles and Sons' work at
19 the project was to install certain brick
20 pavers, bricks and brick pavers on the
21 project?

22 A Correct.

1 Q You indicated that you had
2 reviewed with Mr. Gelles a copy of the
3 plans; is that correct?

4 A Yes.

5 MR. FELICE: May I approach, Your
6 Honor?

7 THE COURT: All right.

8 MR. FELICE: May I have the
9 witness look for one second, Your Honor?

10 THE COURT: Yes.

11 MR. FELICE: Is that the ----
12 counsel, my second witness?

13 MR. BUSMAN: I have no objection.

14 THE COURT: All right. No
15 objection. Go ahead.

16 MR. FELICE: Thank you.

17 May I approach the witness, Your
18 Honor?

19 THE COURT: Yes.

20 BY MR. FELICE:

21 Q Mr. Stack, let me show you what
22 I've just marked for identification as

1 Defendant's Exhibit No. 4 and ask you if you
2 can identify those.

3 A Yes. Those are the plans for the
4 project.

5 Q Are those the set of plans that
6 you provided to Mr. Gelles?

7 A These are what they call a half
8 set. But we gave them a full set.

9 Q Which is that? A half set or full
10 set. Is that merely the size or the number
11 of pages?

12 A It's just the size. These are
13 reduced. I guess it's less cumbersome.
14 But, yeah, it's the same.

15 Q Could you describe for me the
16 process that went on that day when you went
17 over the plans with Mr. Gelles?

18 A We looked at the plans and the
19 details that show how to -- how to and where
20 to construct the brick pavers.

21 Q Can you identify what page that
22 was on the set of plans that has the details

1 of how to construct the pavers?

2 A So -- the details are on this
3 sheet, PV-1 of 1.

4 Q Approximately where did this
5 conversation take place regarding reviewing
6 the project plans for the brick details?

7 A We had an office trailer set up.
8 I'm pretty sure we met in the office. We
9 looked over the plans and then we walked out
10 to the site.

11 Q Other than yourself and
12 Mr. Gelles, was anyone else present when you
13 reviewed that detail with Mr. Gelles?

14 A I'm pretty sure it was no one
15 else. It was just him and I.

16 Q Do you know whether Mr. Gelles had
17 a copy of that page with the brick detailing
18 on it?

19 A Yes, he had a complete set of
20 plans.

21 MR. BUSMAN: Objection, Your
22 Honor. Unless he can testify that he looked

1 through the copy that was given to Gelles
2 and --

3 THE COURT: That's
4 cross-examination. Overruled.

5 BY MR. FELICE:

6 Q Mr. Stack, are you aware of
7 whether the copy of the set of plans that
8 you gave to Mr. Gelles had that brick detail
9 page on it?

10 A I'm pretty sure it did, because we
11 were looking at the very plans that I then
12 handed him to -- he would need to, you know,
13 construct the project.

14 Q Who was your contract with at
15 Cameron Station?

16 A It was with the City of
17 Alexandria.

18 Q Was there any requirement in your
19 contract that he had to build the project to
20 those plans?

21 MR. BUSMAN: Objection, Your
22 Honor. The documents will speak for

1 themselves.

2 THE COURT: Overruled.

3 THE WITNESS: Yes. Yes. Our
4 contract with the City is that the project
5 is built according to plans and
6 specifications that they give us.

7 BY MR. FELICE:

8 Q Approximately how many
9 subcontractors have you had on the site?

10 A Oh, about 10.

11 Q Did your company have any policy
12 or practice as to whether those
13 subcontractors had to build their portion of
14 the project to the plans and specifications
15 which the City had issued?

16 MR. BUSMAN: Objection,
17 irrelevance, Your Honor. We're only talking
18 about whether it was with this particular
19 subcontractor, not what happened with other
20 subcontractors.

21 THE COURT: Overruled.

22 THE WITNESS: Yes, it's -- all of

1 them have to build for the plans and
2 specifications. It's pretty much standard
3 in the industry.

4 BY MR. FELICE:

5 Q Your contract with Mr. Gelles,
6 Gelles and Sons, was it ever reduced to a
7 written subcontract?

8 A We never did for this part --
9 portion of the initial brick pavement work.

10 Q Were there other written
11 agreements on the project regarding other
12 scopes of the work?

13 A Yeah. We had a written agreement
14 on some picnic tables and park benches and
15 on a couple of the signs they built for us.

16 Q Were those basically changes added
17 to the original scope of the work?

18 A Yes.

19 Q With regard to those documents,
20 was that type of work supposed to be built
21 to the plans and specifications?

22 A Yes.

1 Q Based upon your experience, could
2 Gelles and Sons have built their portion of
3 the project, the brick paving and whatnot,
4 if they did not have a copy of the plans?

5 A I don't see how. It's, you know,
6 intricate as the -- in the different designs
7 of the brick pavers that you couldn't build
8 this without a set of plans.

9 Q Your December 13 letter indicates
10 that JSI Paving and Construction would never
11 agree to a price if we did not expect you to
12 seal the pavers, including the free
13 cleaning, when you were done.

14 What is your company's basis for
15 that expectation, Mr. Stack?

16 A Well, like I say, it's right in
17 the details that it has to be done.

18 Q Could you read to the Court the
19 detail that's --

20 MR. BUSMAN: I'm going to object,
21 Your Honor, unless it's admitted into
22 evidence.

1 THE COURT: Yes. Well, is this
2 the plan?

3 MR. FELICE: Yes, Your Honor.

4 THE COURT: All right.

5 MR. FELICE: Your Honor, I would
6 like to admit what I have. It's Defense
7 Exhibit No. 4, Your Honor, and it's a copy
8 of the plans and specifications for the
9 project.

10 MR. BUSMAN: Your Honor, again, we
11 object. The witness testifies that he
12 thinks that's the same that was given to
13 Mr. Gelles. But unless he can definitively
14 state that, then I don't believe it's
15 admissible.

16 THE COURT: Well, I think it's
17 cross-examination. Overruled.

18 (Defendants' Exhibit No. 4 was
19 marked for identification and
20 received in evidence.)

21 BY MR. FELICE:

22 Q Mr. Stack, can you read to the

1 Court that figure that pertains to my
2 questions as to why you anticipated that
3 Gelles and Sons would be sealing the bricks?

4 A Under the details, it shows how to
5 build the brick pavers. So note number 4
6 says, "All concrete paver surfaces to be
7 sealed with paver guard, acrylic sealer, or
8 approved equal."

9 Q Do you recall approximately when
10 the issue about sealing the bricks came to
11 light?

12 A There was -- it was about in early
13 September, when they were finishing up, and
14 the City did a walk-through and gave us a
15 punch list. We reiterated to Gelles and
16 Sons that, you know, they had to get in and
17 seal the pavers; that was put on the punch
18 list by the City, which we sent them.

19 That was in early September, as I
20 recall.

21 MR. FELICE: Your Honor, may I
22 approach the witness?

1 THE COURT: Yes, sir.

2 MR. FELICE: This is Exhibit 13.

3 THE COURT: Right.

4 BY MR. FELICE:

5 Q Mr. Stack, let me show you what's
6 marked as Plaintiff's Exhibit 13. I'm
7 asking you to take a look at it, and if you
8 could identify it for the Court?

9 A This is the punch list that was
10 sent to us by the City.

11 Q Can you identify in there the
12 issue about the sealing of the bricks that
13 the exhibit so indicated?

14 A I'm sorry, I was --

15 Q Can you identify in there any
16 issues regarding sealing the bricks?

17 MR. BUSMAN: Excuse me, Counsel.

18 ----.

19 MR. FELICE: Your Honor, I'm going
20 to direct the attention of the witness also
21 to Plaintiff's Exhibits 15A and 15B. It's a
22 better copy.

1 THE COURT: All right.

2 BY MR. FELICE:

3 Q I'll show you what's been marked
4 as 15A and 15B and ask you if you can
5 identify those documents. Is 15A a cover
6 letter from yourself, Mr. Stack?

7 A Yes.

8 Q It's directed to your
9 subcontractors?

10 A Yes.

11 Q Can you identify 15B?

12 A 15B is the actual punch list from
13 the City that has all the various punch
14 lists on it need to be done for them to
15 accept the project when it's final.

16 MR. FELICE: Following sending the
17 punch list, your Honor, I would like to move
18 15A and 15B.

19 MR. BUSMAN: No objection, Your
20 Honor.

21 THE COURT: All right. 15A and
22 15B are admitted.

1 (Plaintiff's Exhibit Nos. 15A
2 and 15B were marked for
3 identification and received in
4 evidence.)

5 BY MR. FELICE:

6 Q Following sending the punch list
7 to Gelles and Sons, did you have any
8 conversations with Mr. Gelles regarding the
9 sealing of the bricks?

10 A Yes. I called him and said, you
11 know, we need to get it finished and to
12 clean and seal the brick, as well as -- I
13 think they were still finishing laying
14 some -- replacing some brick that was
15 damaged -- that they had damaged.

16 MR. FELICE: Your Honor, I would
17 like to approach the witness with the 16A
18 and 16B exhibits.

19 THE COURT: All right.

20 BY MR. FELICE:

21 Q Can you identify 16A and 16B,
22 Mr. Stack?

1 A Yes. We sent Gelles a letter
2 September 19 and asked them to please seal
3 the pavers per the details. And we sent
4 them a copy of the detail that was taken
5 right off the plans.

6 Q And the plans were the ones that
7 you had just referenced earlier in your
8 testimony?

9 A Yes.

10 Q Did Gelles and Son ever seal the
11 pavers of the project?

12 A No.

13 Q Moving off the sealers and the
14 pavers on the project, your December 13
15 letter indicates that -- wait a minute.

16 THE COURT: Are you moving 16A and
17 16B?

18 MR. FELICE: Yes, Your Honor.

19 MR. BUSMAN: No objection, Your
20 Honor.

21 THE COURT: All right. 16A and
22 16B are admitted.

1 (Plaintiff's Exhibit Nos. 16A
2 and 16B were marked for
3 identification and received in
4 evidence.)

5 BY MR. FELICE:

6 Q In addition to the measurements
7 you had indicated weren't correct and the
8 sealing of the pavers, do you accept the
9 13th letter also? It indicates the client
10 brick that was damaged and cleaning.

11 Can you just describe to the Court
12 or identify the problems in those instances?

13 A Yes. Gelles had -- in various
14 areas, had spilled mortar base on the brick
15 they had previously laid, stained it and
16 damaged it. The City would not accept it.
17 So they did replace a lot of those bricks
18 with bricks we had to supply.

19 So it was my feeling that we
20 shouldn't have had to supply of those
21 bricks. So we back-charged them a few
22 hundred dollars, \$200 or \$300 for the

1 additional brick that they damaged and had
2 to replace.

3 And then, we -- I think you said,
4 we came in and cleaned and sealed the
5 bricks, and we back-charged him for that
6 cost as well. We also had to end up
7 replacing some of the brick ourself that
8 they denied complete replacing. So we
9 back-charged them for cleaning, the sealing,
10 the labor and materials, and equipment to do
11 that work.

12 Q Mr. Stack, in the fall of 2000, it
13 would be, how often were you personally
14 present on site?

15 A I was there virtually every day,
16 at least three or four times a week,
17 sometimes passing through and just looking
18 at the project, other times walking the
19 project, because we're trying to finish it
20 and get off the punch list.

21 Q With regard to the damaged brick,
22 did you, in fact, yourself observe any brick

1 being damaged by activities done by Gelles
2 and Sons?

3 A I didn't actually see it being
4 damaged. My workers told me they saw it --

5 MR. BUSMAN: Objection, Your
6 Honor. Hearsay.

7 THE COURT: Sustained.

8 BY MR. FELICE:

9 Q Is it correct that you did not see
10 it being damaged?

11 A I did not personally see it
12 damaged. But it was obvious that it was --

13 MR. BUSMAN: Objection, Your
14 Honor. That's a conclusion that's not based
15 upon any foundation or evidence.

16 THE COURT: That's
17 cross-examination. Overruled.

18 BY MR. FELICE:

19 Q Mr. Stack, the areas in which it
20 was damaged, can you describe to the Court
21 approximately the breadth and width of how
22 the brick was damaged and the approximate

1 area?

2 A The areas that were damaged, when
3 they went to set the pavers at the benches,
4 the bench areas. The brick was set on top
5 of concrete. They mixed mortar to hold
6 their bricks in. So they were mixing the
7 mortar on top of the bricks that they had
8 previously laid, and they spilled it on top
9 of the bricks. Well, that stuff dried.

10 And so there was areas -- you
11 know, 5 by 5 areas, 3 by 3 areas in various
12 places where they mixed this mortar and it
13 just -- it damaged and ruined the brick. It
14 had to be replaced.

15 Q Were there any other
16 subcontractors or contractors working in
17 that area of this mortar at the time?

18 A No.

19 Q Did you have any discussions with
20 Mr. Gelles or anyone at his company
21 regarding the damage to the brick?

22 A We did, and they replaced a lot of

1 it. You know, they -- I mean, they were out
2 there, taking it up and replacing it.

3 Q Do you know why they didn't
4 complete the task of replacing it?

5 A No, not really. They did most of
6 it, I will say that. They did most of the
7 replacement. There was a couple of areas
8 that my men had to go in and replace. Two
9 or three areas. But they did most of it, I
10 will say that.

11 Q Did there come a time when you
12 calculated the amount of back-charging or
13 cost incurred by your company to complete or
14 correct Gelles's work?

15 A Yes.

16 Q Do you know approximately what
17 time frame that would have been?

18 A Well, my guys were in there in
19 October, by mid-late October, doing the
20 cleaning and sealing and, you know, the
21 little bit of repair, replacement. So some
22 time in November, I was probably

1 calculating, mid-November, when we were
2 calculating what those costs would be.

3 Q Mr. Stack, let me show what I've
4 marked as Defendant's Exhibit 3 and ask if
5 you can identify for the Court what that
6 document is.

7 A Yes. This is just some of my
8 computations on, you know -- the 15,175,
9 that's square feet times 4 is --

10 MR. BUSMAN: Your Honor, I'm going
11 to object to that as an exhibit. I would
12 object, Your Honor. This, among others, is
13 not the best evidence of what the back
14 charges are. There was an exhibit that we
15 prepared, No. 21, that his bookkeeper
16 prepared and sent to my client.

17 If these are his own personal
18 notes, either they're in Exhibit 21 or
19 they're not. If they're in 21, 21 is the
20 best evidence. If they're not in 21, this
21 was never given to my client, and he was
22 never told that this is the basis of his

1 back charges. So in either event, this
2 exhibit should not be admitted and he
3 shouldn't be able to read from it.

4 MR. FELICE: Your Honor, I don't
5 think that's a proper objection. I don't
6 think it's for a cumulative nature, and if
7 it is, it's barely cumulative, Your Honor.

8 THE COURT: All right. Overrule
9 the objection.

10 BY MR. FELICE:

11 Q Mr. Stack, you were saying the
12 figure of 15,175. What measurement is that?

13 A That would be the total
14 measurement that Randy, my brother, and
15 myself went out and measured and came up
16 with.

17 Q That's square feet?

18 A And that's square feet.

19 Q Is that greater or less than what
20 you had been billed to date by Gelles?

21 A That's less than.

22 Q Did you know approximately how

1 much less?

2 A Thirteen to fifteen hundred square
3 feet.

4 Q And the \$4 is the \$4 per square
5 foot you were paying?

6 A Yeah. That was the agreed-upon
7 price.

8 Q Do you know whether, in your
9 conversations with Mr. Gelles or anyone at
10 his company, they had ever objected to the
11 fact that you had calculated their work out
12 at 15,175 square feet?

13 MR. BUSMAN: Objection, Your
14 Honor. There's no foundation.

15 THE COURT: Well, he's asking him,
16 does he know. Overruled.

17 THE WITNESS: No.

18 BY MR. FELICE:

19 Q The other items on the page, would
20 you just briefly identify what they're for?

21 A The park benches was the 15,000;
22 15,000 was for the benches and the tables.

1 They built two signs and it was 16,232. We
2 agreed to that, and he built it; we had no
3 problem with that.

4 And then the back charge to clean
5 and seal the brick is just my calculation of
6 the man hours and materials to do that. The
7 additional two pallets of brick that had to
8 be replaced because it was damaged. The
9 1,080 is for sand that we had to supply that
10 they were supposed to supply for the picnic
11 tables and benches. And then we had some
12 man hours and equipment replacing some brick
13 pavers that should replace. That was my
14 back charges.

15 MR. FELICE: Your Honor, I'd like
16 to move in Exhibit 3.

17 MR. BUSMAN: Again, objection,
18 Your Honor. Again, I don't think this is
19 the best evidence. I would expect that this
20 is the president of the company. This is
21 his own handwritten calculations. We don't
22 have receipts showing what the replacement

1 brick was. We don't have receipts showing
2 the sand charges.

3 I would submit these are not
4 proper records, and these are not prepared
5 in the normal course of business. It's not
6 a business record.

7 MR. FELICE: Your Honor, we're not
8 here to prove whether a counterclaim is
9 valid or not. Your Honor, this is being
10 offered to show that contemporaneous at the
11 time, calculations were being made by our
12 client regarding back charges.

13 THE COURT: Overrule the
14 objection. Defendants' 3 is admitted.

15 (Defendants' Exhibit No. 3 was
16 marked for identification and
17 received in evidence.)

18 MR. FELICE: Your Honor, I'd like
19 to approach the witness with Plaintiff's
20 Exhibit No. 21.

21 THE COURT: All right.

22 MR. FELICE: Exhibit 21, Your

1 Honor.

2 BY MR. FELICE:

3 Q Mr. Stack, I'll show you what's
4 been marked as Plaintiff's Exhibit 21 and
5 ask you if you can identify that for the
6 record.

7 A December 8th, we sent them a
8 letter basically showing our accounting of
9 what we believed we owed them and asking
10 them to -- we showed the total square
11 footage as measured in the field, less the
12 back charges. And we asked them to -- okay,
13 this is what our record show we owe you, and
14 please adjust your invoice to reflect this.
15 Because they -- like I said, they were
16 asking for more, and we didn't agree with
17 what they were saying we owed them.

18 MR. FELICE: Your Honor, I'd like
19 to move Exhibit 21 into evidence.

20 MR. BUSMAN: No objection, Your
21 Honor.

22 THE COURT: Exhibit 21 is

1 admitted.

2 (Plaintiff's Exhibit No. 21 was
3 marked for identification and
4 received in evidence.)

5 BY MR. FELICE:

6 Q Did your company receive a
7 response from Gelles and Sons to the request
8 in your December 8 letter to adjust the
9 records and adjust the invoice reflecting
10 the ---- amounts? Do you recall whether you
11 received any response?

12 A I think we did issue a response.

13 MR. FELICE: Your Honor,
14 Plaintiff's Exhibit 22.

15 THE COURT: All right.

16 BY MR. FELICE:

17 Q Mr. Stack, let me show you
18 Plaintiff's 22. Can you identify that for
19 the record?

20 A This is a fax from Gelles and Sons
21 to us, stating that they had received a fax
22 from us on what we owed -- we said we owed

1 them, and disagreeing.

2 Q That's dated December 11, is it
3 not?

4 A Yes.

5 Q Following the receipt of
6 Exhibit 22?

7 THE COURT: Are you moving
8 Exhibit 22?

9 MR. FELICE: Yes, Your Honor.

10 MR. BUSMAN: No objection, Your
11 Honor.

12 THE COURT: All right, 22 is
13 admitted.

14 (Plaintiff's Exhibit No. 22 was
15 marked for identification and
16 received in evidence.)

17 BY MR. FELICE:

18 Q Following your receipt of
19 Exhibit 22, the December 11 letter, what
20 action, if any, did you take?

21 A We sent them a letter on
22 December 13 just explaining our position and

1 sending them a check for -- to resolve the
2 matter.

3 Q That is Exhibit 22A?

4 MR. BUSMAN: I've got it as 1, but
5 I'll change it.

6 MR. FELICE: Plaintiff's 22A?

7 MR. BUSMAN: Yeah.

8 THE WITNESS: We sent them letter
9 to resolve it.

10 MR. BUSMAN: Objection. There's
11 no question pending, Your Honor.

12 THE COURT: All right.

13 BY MR. FELICE:

14 Q Following sending the December 13
15 letter, did you receive any response from
16 Mr. Gelles or anyone at Gelles and Sons?

17 A No, we did not.

18 Q Mr. Stack, in the past, have you
19 sent similar letters to other subcontractors
20 to resolve payment disputes or disputes over
21 the final balance due to subcontractors?

22 MR. BUSMAN: Objection, Your

1 Honor. Relevance. What he did with other
2 subcontractors is irrelevant. All we're
3 talking about is this particular incident.

4 THE COURT: Sustain the objection.

5 MR. BUSMAN: Thank you.

6 BY MR. FELICE:

7 Q Mr. Stack, did you have any belief
8 once Mr. Gelles or Gelles and Sons cashed
9 the check as to whether the matter was
10 resolved with this company?

11 MR. BUSMAN: I'm going to object
12 again, Your Honor. His subjective intention
13 is not relevant to accomplish an accordant
14 satisfaction. Under 8.3A311, there has to
15 be a mutual agreement to accept his full
16 payment.

17 THE COURT: Well, this is one side
18 of it. Overruled.

19 THE WITNESS: Would you ask that
20 again, sir?

21 BY MR. FELICE:

22 Q Upon sending the check to Gelles

1 and Sons with your December 13 letter and
2 having it cashed, did it lead you to believe
3 that the matter had been resolved?

4 A It was my belief, yes, it had been
5 resolved.

6 MR. FELICE: I have no further
7 questions, Your Honor.

8 THE COURT: All right. Cross?

9 MR. BUSMAN: If you would, just
10 one second, Your Honor.

11 CROSS-EXAMINATION

12 BY MR. BUSMAN:

13 Q My understanding is that you're
14 claiming that the pavers at the park bench
15 Area were damaged by Gelles and Sons, and
16 you're seeking reimbursement based upon your
17 position that it was the mortar that Gelles
18 and Sons used on those pavers. They spilled
19 mortar. Is that your position?

20 A Yes.

21 Q Is it true that those pavers were,
22 in fact, damaged by epoxy cement?

1 A I'm not sure what type of cement
2 it was.

3 MR. BUSMAN: Your Honor, here's
4 copies of Defendant's answers to my
5 interrogatories.

6 THE COURT: All right.

7 BY MR. BUSMAN:

8 Q I'd like to direct you to your
9 response to number 13. Take a look at the
10 question right here on page 11, and then
11 your answer begins on page 12. Just take a
12 look at the answer after you've read the
13 question and tell me if that is, in fact,
14 your position.

15 A It is my position.

16 Q Is that your position, sir, yes or
17 no?

18 A Yes.

19 Q I see the word "epoxy" in
20 parentheses after the word "mortar," in the
21 third line of your answer. Why was that
22 word put in there?

1 A That was -- wasn't that part of
2 the question?

3 Q Yes, sir. What mortar is
4 customarily used in masonry work to a paver
5 such as this?

6 A I couldn't be really sure. I
7 mean, I'm not a mason. I know "mortar" is a
8 general term.

9 Q Let me interrupt you a minute.

10 A Okay.

11 Q Isn't mortar generally a Portland
12 cement-based product?

13 A I believe so, but I think they
14 also have epoxy mortars.

15 Q Epoxy mortars. Have you ever
16 worked with epoxy mortars?

17 A Not really.

18 Q Do you have any experience at all
19 with epoxy mortar?

20 A Not particularly, no.

21 Q Actually, wasn't epoxy used to
22 cement the anchor bolts? In other words, if

1 you have a the pads where the benches and
2 tables go. You have an area excavated; you
3 have sand in there; brick pavements around
4 it; and then you have these bolts that come
5 up to which you bolt the tables and benches.
6 Isn't that correct?

7 A That's correct.

8 Q How are these bolts anchored, sir?

9 A There was a type of epoxy that we
10 use. I don't know if it's epoxy mortar, but
11 it's an epoxy that you put a little bit in
12 the hole and then you stick the anchor bolt
13 down in it, and it holds it there.

14 Q And wasn't it your force, JSI
15 personnel, who put that epoxy in to do the
16 anchor bolts?

17 A Put epoxy into the hole, yes, to
18 anchor the bolt.

19 Q Did you observe your own employees
20 applying epoxy for the anchor bolts?

21 A I did not.

22 Q What would you say if I told you

1 that Mr. Randy Lenz, sitting over there,
2 observed your employees with a can and a
3 spout pouring epoxy and spilling it all over
4 the pavers? Would you believe that to be
5 correct or incorrect?

6 A Well, they could spill a little
7 bit, but it would be just a little bit right
8 there under the bench. The bench leg itself
9 would probably cover that little bit of
10 spill a job. It couldn't be 5 by 5 areas.

11 Q Well, your answer to
12 interrogatory 13 indicated, unless you know
13 exactly the material to use, you said epoxy
14 on here. And epoxy was the same material
15 that your own forces was using, wasn't it,
16 in that same area?

17 MR. FELICE: Objection. That's
18 been asked and answered.

19 THE COURT: Sustained.

20 BY MR. BUSMAN:

21 Q Let me ask you this, sir. You
22 have testified in response to Mr. Felice's

1 question that you felt that your company had
2 been overbilled by Gelles and Sons, and that
3 you and your brother, Mark, and Randy Lenz,
4 who's sitting over here, walked in and did
5 the measurement.

6 When did that occur?

7 A It must have been in September or
8 October time frame.

9 Q September? And you felt that you
10 only should have been charged for 15,175
11 square feet, and you were charged for more
12 than that, weren't you?

13 A Yes.

14 Q As a matter of fact, I'm going to
15 show you a copy of what's been marked as
16 Plaintiff's Exhibit 18 and ask you if you'd
17 ever seen that before, sir? That's a
18 two-page fax. The first page is a cover
19 letter. The second page is the statement.
20 I will stipulate that the handwritten page
21 was written at or by my client after this
22 was sent to you. You can ignore that.

1 Do you remember receiving this,
2 sir?

3 A Yes, I've seen it.

4 Q So by the time you got this
5 Exhibit No. 18, you had done the measurement
6 with Randy and with your brother, and you
7 determined that you had been overbilled.

8 Why did it take you 2 months,
9 until December, to notify Gelles of that
10 fact? That was your letter, the December 8
11 memo, Plaintiff's Exhibit 21.

12 A I had notified him much, much
13 earlier that his measurements weren't
14 correct.

15 Q How did you do that, sir?

16 A By phone. I may have even had
17 something in writing and --

18 Q Your counsel hasn't produced
19 anything in writing.

20 A But I -- and by phone, he -- back
21 in the early part of the job, his first
22 billing, he sent me a bill. And I said,

1 "Your measurements are wrong."

2 Q Excuse me, sir. I'm just talking
3 about after the October 26 event when you
4 went out and measured. You testified that
5 you spoke to him by phone. When did you
6 speak to him by phone?

7 A Before we measured, we were going
8 to get together and measure it together --

9 Q Excuse me. Please, we've only got
10 2 hours for the hearing. My question was
11 very specific. After you measured on
12 October 26, when did you talk to Mr. Gelles
13 to tell him that he had overbilled you and
14 that his measurements were wrong?

15 A I'm not sure.

16 Q You testified that you've had
17 other agreements with Mr. Gelles other than
18 the paving contract. Let me ask you this,
19 sir.

20 MR. BUSMAN: May I see the big set
21 of blueprints, Your Honor, Plaintiff's
22 Exhibit 22? May I also have what I've

1 marked ----?

2 BY MR. BUSMAN:

3 Q You testified that the full size,
4 or was it a half size, of this entire set
5 was given to Mr. Gelles?

6 A Full size.

7 Q Full size. So that would be
8 something twice as big as this?

9 A Yes.

10 Q A pretty hefty package, correct?

11 A Uh-huh.

12 Q Let me show you this, sir. Isn't
13 it true that this --

14 MR. BUSMAN: And, Counsel, I don't
15 have a copy here for you, I'm sorry.

16 BY MR. BUSMAN:

17 Q Isn't it true -- and please ignore
18 the handwritten entries and the pink
19 highlighting -- that these are in fact the
20 only pages of blueprints that you ever gave
21 to Mr. Gelles?

22 A No. I'm pretty sure I gave him an

1 entire set.

2 Q You're pretty sure? Are you
3 absolutely certain that you gave him an
4 entire set?

5 A I think so, yes. I'm absolutely
6 certain.

7 Q The detail that you quoted, could
8 you show me where that is in there, about
9 sealing the pavers?

10 A It's right here.

11 Q Did you personally go through the
12 copy that you gave Mr. Gelles and verify
13 that this page was included in there?

14 A I'm pretty sure we looked at this
15 page when we were looking at the plans I
16 gave him.

17 Q So it's your testimony that you're
18 absolutely certain that that page was
19 included in the set given to Mr. Gelles?

20 A Yes.

21 Q Let me ask you this, sir. Did you
22 come to an agreement of price on the day

1 that you met with Mr. Gelles and gave him
2 these plans?

3 A Yes.

4 Q And it was \$4 a foot?

5 A No. We agreed to \$3.65. He later
6 said we agreed to \$4, and I agreed with him.

7 Q Well, let me ask you this. The
8 day you gave him this entire package, which
9 looks like it's about a half an inch thick,
10 did Mr. Gelles look through the entire set
11 of plans?

12 A No.

13 Q So it's your testimony that, after
14 giving him that entire package, he agreed on
15 a price right there and then on the spot?

16 A Yes.

17 Q You testified that a contractor
18 couldn't do the brick work, the pavers,
19 without the plans. But let me show you what
20 was marked as Plaintiff's 5. This is just
21 one page.

22 Let me show how the brick is

1 supposed to be laid.

2 A This is us.

3 Q Where would he be other than this?

4 A I don't think that shows all the
5 areas. I don't believe that shows all the
6 areas that there's brick pavers.

7 Q Well, you had a complete set of
8 plans at your trailer, didn't you?

9 A Yes.

10 Q You invited Mr. Lenz to go to your
11 trailer any time he needed to to look at
12 your set, didn't you?

13 A I didn't, but he would have been
14 welcome to.

15 Q You don't recall telling your
16 foreman, Bill Teague, to tell Randy that any
17 time he needs to come to look at your set,
18 he's welcome to come and look at it in your
19 trailer?

20 A I don't believe I told Bill that.
21 But Bill would do that automatically.

22 Q I see.

1 A He wants it installed correctly,
2 so they need to look at plans. And if they
3 don't have them with them, then he can look
4 at ours.

5 Q Let me show you what's been marked
6 as Plaintiff's Exhibit No. 1.

7 MR. BUSMAN: Could we go off the
8 record for one second, Your Honor?

9 (Discussion off the record)

10 BY MR. BUSMAN:

11 Q Mr. Stack, I want to show you
12 what's marked as Plaintiff's Exhibit No. 1.
13 Do you recognize it, sir?

14 A Yeah. It's a fax cover sheet from
15 JSI to Bob Gelles.

16 Q You said this was after you'd
17 already had a verbal agreement with
18 Mr. Gelles regarding the public pavers,
19 isn't that correct? This is extra work?

20 A Yes. Yes.

21 Q Let me go back here again to this
22 detail work that you had. Where is that

1 paver detail?

2 A Right here.

3 Q This detail work that you
4 testified before, and I think it was PD 1,
5 this says 1 inch of sand.

6 Didn't this pertain only to the
7 park bench and table area?

8 A Uh-huh.

9 Q There's no inch layer of sand on
10 the public paver, which was the 15,175,
11 according to your measurements, was there?
12 You didn't put an inch of sand on that, did
13 you?

14 A Yes, we did. There was -- it was
15 actually -- it averaged more than that. An
16 inch is just a minimum. But it averaged
17 more than an inch.

18 Q Isn't this detail pertaining only
19 to the pads?

20 A No. This detail is for the --
21 what we call the mass paver work. And then
22 the --

1 Q After you sent Exhibit 1,
2 Plaintiff's Exhibit 1, to Mr. Gelles, take a
3 look at Exhibit 2. Didn't that accompany
4 Exhibit No. 1? That was the second page of
5 your fax. I just sat it aside separately,
6 numbered it separately.

7 A Yes.

8 Q If you look at the fax up at the
9 top, it's the second page.

10 A Uh-huh.

11 Q It has the same date and
12 everything?

13 A Uh-huh.

14 Q Why didn't you just give
15 Mr. Gelles a copy of this detail, instead of
16 drawing out in longhand Exhibit No. 2?

17 A It was on the -- the park
18 benches -- the park benches and the picnic
19 table, the detail is modified from the plans
20 per the agreement with the City. They let
21 us put a 4-inch concrete pad under those
22 areas instead of huge footers that they were

1 showing on the detail.

2 So if I had directed him to the
3 detail in the plans, it wouldn't have been
4 accurate. That was the accurate detail that
5 was agreed to by the City and JSI for the
6 benches and the picnic tables.

7 Q Well, quite frankly, Exhibit 2
8 looks pretty much like Exhibit 16B, which is
9 that detail.

10 A This is the detail for the brick
11 pavers we originally agreed to, and this is
12 what they did.

13 Q Are you stating, then, that you
14 have that 1 inch of sand, which is left
15 under the 4 inches of concrete, on all the
16 public pavers?

17 A Yes. But it averaged more. I
18 mean, 1 inch is 1 inch. One inch is usually
19 the minimum. I don't think it says 1 inch
20 minimum. But, it averages more like 2 to
21 3 inches -- at least 2.

22 Q It was represented to me that the

1 public pavers are laying a compacted gravel,
2 not a concrete.

3 A Yes. There's gravel, and then you
4 have sand on top of the gravel. And the
5 sand is kind of your leveling course and
6 your bedding course.

7 Q It appears that the benches are
8 laid in concrete; is that correct, sir, on
9 top of 1 inch of sand?

10 A Yes.

11 Q The sand may be more; it's
12 probably more than an inch?

13 A Yes.

14 Q After you sent this to Mr. Gelles,
15 what was his response? Did you get
16 something from him?

17 A Yes, he sent me a proposal.

18 Q Let me direct your attention to
19 Plaintiff's No. 3.

20 A That's not it, by the way. That's
21 for the signs.

22 Q Well, let me ask you this. Your

1 exhibit mentioned two signs, Exhibit No. 1.

2 A Yes.

3 Q Two signs?

4 A Yes. Okay.

5 Q So then you've got No. 3. Isn't
6 that correct, sir?

7 A Yes.

8 Q We got it on or about July 10.

9 May I direct your attention to
10 Exhibit No. 6? What is that, sir?

11 A That is the -- I agreed to pay him
12 \$8,116 per sign.

13 Q How many signs?

14 A Two signs.

15 Q So it would be double that amount
16 would be the total amount.

17 A Correct.

18 Q Did you also receive a response
19 from Mr. Gelles with respect to the park
20 bench and table pads?

21 A Yes.

22 Q Let me direct your attention to

1 No. 7. Do you recognize that, sir? It's a
2 two-page fax.

3 A Yeah. It's a fax.

4 Q Go to the second page.

5 A He sent me a quote for the benches
6 and picnic tables.

7 Q Did you accept this quote?

8 A No. The one that I signed or
9 accepted was -- I wrote back I had \$15,000
10 for this portion of the work. He wanted
11 \$16,000 and some. I said I had \$15,000 in
12 my budget for this. And I wrote on my copy
13 that, you know, that -- because he
14 originally sent me for 55 benches. I said,
15 but the benches have been reduced to 50.
16 And that's what I had agreed to, and that
17 was the \$15,000.

18 Q Well, if you'll take a look at the
19 first page of Exhibit 7, doesn't that say
20 that he's reduced his price and revised it?

21 A Yes. That does.

22 Q You testified in your direct

1 testimony that you had two other written
2 agreements, one for the signs and one for
3 the tables. Where is your written agreement
4 for the tables, sir? Isn't it your
5 testimony that whatever you signed, you
6 never faxed back to Mr. Gelles?

7 A No. I faxed it back with a note
8 written on the bottom.

9 Q Well, let me show you what was
10 marked as Exhibit 8. Take a look at that.

11 A Okay.

12 Q Is that what you're referring to?

13 A Well, there was something else I
14 wrote on, his quote. I said -- because I
15 called him. He sent me the price for the
16 benches and the tables for \$16,000. I said,
17 "Look, Bob, I've got \$15,000. I can pay you
18 for this."

19 I went on and signed it and sent
20 it back. And he said "No, I don't think
21 that's a problem. No problem."

22 Q But you said right here, beginning

1 on the third line, "I thought you were going
2 to do the benches and tables for \$15,000."

3 A Right.

4 Q That's not the same as I will
5 accept the only --

6 THE COURT: Well, you're arguing
7 with the witness now. Let's just move on.

8 MR. BUSMAN: All right.

9 BY MR. BUSMAN:

10 Q Let me ask you this, sir. Did
11 there come a time in which Mr. Gelles sent
12 you billings?

13 A Yes.

14 Q Did you get Exhibit No. 9?

15 A I'm sure we did.

16 Q A two-page invoice? It was an
17 invoice?

18 A I'm sure we did. Yes.

19 Q Do you remember seeing this,
20 though?

21 A I do remember seeing it.

22 Q Let me direct your attention to

1 Exhibit No. 10. Have you ever seen that,
2 sir?

3 A Yes.

4 Q The contents of your letter, could
5 you characterize it as sort of remember-to-
6 do-this type letter?

7 A Yes. We were trying to get them
8 to finish quite a bit of the pavers at that
9 time to install.

10 Q Mr. Gelles replied with
11 Exhibit 11, did he not? Had you received
12 this before?

13 A Yes, I remember it. Yes.

14 Q Let's go back to Exhibit 10 for a
15 minute. How important was sealing the
16 bricks, the pavers that you have testified
17 previously about?

18 A Well, part of the details in the
19 City insist that it be done, so it was
20 probably pretty important.

21 Q Pretty important? As a matter of
22 fact, you testified earlier that you showed

1 Mr. Gelles this detail, this PV 5 detail,
2 did you not, on the first day that you met?

3 A Yes, sir.

4 Q Then why didn't you mention
5 anything about sealing in Exhibit 10?

6 A I could have overlooked it at that
7 time.

8 Q You said it was a pretty important
9 item, didn't you?

10 A Well, it was -- obviously, when we
11 did the walk-through, they put it on the
12 punch list in early September, about a month
13 after this, and it was specifically called
14 out in the punch list.

15 But I didn't think of it then, or
16 it skipped my mind at that point.

17 Q I recall that you testified in
18 direct that you were on the site every day,
19 correct?

20 A Virtually, yes.

21 Q Did you ever see Gelles and Sons
22 employees applying the sealer on the pavers?

1 A I did not.

2 Q Well, it isn't that something
3 important enough to be mentioned in a letter
4 such as Exhibit 10?

5 A Well, you wouldn't do that until
6 you had finished the project.

7 Q But would you remind him to make
8 sure he does it?

9 A Well, I didn't remind him then.
10 But I reminded him later in another letter.

11 Q Let me skip over to Exhibit 13 and
12 just briefly say, isn't Exhibit 13 the first
13 time you sent the punch list that had
14 highlighting on --

15 A Yes.

16 Q You identified items 1, 4 and 15
17 on Exhibit 13 as the items that were
18 relevant to Mr. Gelles, didn't you?

19 A Well, there was another one that
20 had a lot more --

21 Q Well, take a look at Exhibit 14.
22 Did you receive that, sir?

1 A Yes.

2 Q Apparently when you highlighted
3 the items, they didn't fax too well.

4 Mr. Gelles wrote you Exhibit 14.
5 Did you respond with Exhibit 15A, sir?

6 A Yes.

7 Q Take a look at Exhibit 15B for a
8 minute. In the left-hand margin, there are
9 initials.

10 A Uh-huh.

11 Q Who wrote that?

12 A I believe that's my hand writing.

13 Q What do those initials represent?

14 A We wrote the -- next to the punch
15 list item, the company that would be
16 responsible for repairing -- responsible for
17 that punch list item.

18 Q Which items were Mr. Gelles
19 responsible for?

20 A One, four.

21 Q One, four.

22 A And 10.

1 Q Uh-huh. Go ahead.

2 A Fifteen. That's all. We -- I had
3 a copy of the same thing, but --

4 Q You mentioned 1, 4, 10, and 15.
5 Take a look at number 10. Whose
6 initial is that?

7 A That says JSI.

8 Q You wrote that yourself, didn't
9 you?

10 A I believe so, but, I mean, we're
11 ultimately responsible for all items.
12 But --

13 Q But in your own hand writing, you
14 indicated that number 10 was the
15 responsibility of JSI, didn't you?

16 A That's what it says here, yeah.

17 Q You faxed that to Mr. Gelles,
18 didn't you?

19 A I recall one that had Gelles next
20 to that. Well, that's well, but --

21 Q I know that the page sliced off at
22 the fax note at the top. But do you have

1 any reason to doubt that this is a copy of
2 the very exhibit that you had faxed to
3 Mr. Gelles?

4 A No, that's the copy we faxed to
5 him.

6 Q Shortly after that, didn't you
7 send him another letter, another fax?

8 A Yes.

9 Q Exhibit 16A, cover letter, and --

10 A Uh-huh.

11 Q Is that the first time you
12 discussed sealing with Mr. Gelles?

13 A No. I think I talked to him about
14 it before sending the letter. Then I --
15 which I do often -- is follow up the
16 conversation with a letter.

17 Q You sent him Exhibit 15B?

18 A Right.

19 Q With attachments, isn't that
20 correct?

21 A Correct.

22 Q Isn't that, in fact, the first

1 time you ever made Mr. Gelles aware of this?

2 A I don't believe so. I was just
3 pointing out that it's on the detail.

4 Q Right. Please take a look at
5 Exhibit 17.

6 A Yes.

7 Q Let me ask you this, sir. After
8 you received this fax from Mr. Gelles,
9 No. 17, what action, if any, did you take?

10 A I believe we had subsequent
11 conversations that he was responsible for
12 the sealing, and we expected him to do that.

13 Q What was his response?

14 A I believe he insisted that he
15 wasn't going to do it.

16 Q Did he say that it wasn't part of
17 his contract?

18 A He probably used language like
19 that, if I recall.

20 Q You didn't have one contract with
21 them? You actually had at least three
22 contracts; isn't that correct?

1 A Yes.

2 Q You had the pavers, you had the
3 sign posts, and you had the park benches and
4 pads?

5 A Right.

6 Q Weren't you also going to
7 reimburse him for concrete he provided?

8 A That is something that I heard
9 about later, that there was -- he poured --
10 apparently poured -- and I never checked
11 this with Bill Teague -- a pad for us for
12 \$133. And if he did that, we only put out
13 one concrete pad.

14 Q So you do all the reimbursements
15 for the concrete, correct?

16 A If he, in fact, had talked to
17 Bill, who would know -- should know that he
18 poured that pad, then I would agree I owe
19 him for that.

20 Q Didn't you also owe him for
21 reinstalling pavers that were damaged by
22 others?

1 A That I disagree with. There was
2 some areas that got damaged that I believe
3 he was responsible for replacing.

4 Q This epoxy issue? Is that what
5 you --

6 A That one. Then there was another
7 area where they hadn't completed their
8 installation. We got a rain, and some of
9 the pavers washed out. And it was my
10 feeling since if he hadn't completed and
11 hadn't finished filling all the joints with
12 sand, that he had to replace that area.

13 He did replace it. Later, he
14 tried to bill me for it, and I disagreed
15 that bill.

16 Q Did he also reinstall pavers that
17 were torn out because the conduit,
18 electrical conduit, to the concession stand
19 had to be re-excavated and sunk deeper?

20 A I'm not aware of that.

21 Q I direct your attention to
22 Exhibit 18. I think you've already seen

1 this and I couldn't recall if you received
2 it.

3 A Yes. Uh-huh.

4 Q After you received Exhibit 18,
5 what, if any, communication did you have
6 with Mr. Gelles?

7 A Well, this was about the time we
8 were having to go in and finish our work,
9 mid-October to late October. So I know he
10 was calling for money. One, the City wasn't
11 paying us, because we weren't done.

12 Q I'm sorry. The City wasn't paying
13 you?

14 A Right. They weren't paying that.
15 I mean, they were paying us for other work.
16 But they were -- they had gotten to this
17 point where they were saying, "Look, you've
18 got to do the punch list, complete it, move,
19 or you don't get any more money." So they
20 were holding retainers to make sure the job
21 got completed. At this point, we weren't
22 complete.

1 Q Well, let me ask you this, sir.
2 Wasn't there a second punch list from the
3 City?

4 A There probably was. There was two
5 or three walk-throughs. When they walked
6 through, they did --

7 Q Let me direct your attention to
8 Exhibit 19. Do you recognize that, sir?

9 A Faxed cover sheet, JSI. Okay.
10 This is a letter from the City, virtually.
11 Punch list items on it.

12 Q That was dated November 3. Which
13 items would apply to Mr. Gelles, sir?

14 A Several paver areas under the
15 benches and picnic tables need cleaning and
16 sealing. So 1, the -- number 2, curved
17 pavement walk way to performance area
18 remains unfinished, missing pavers. It
19 appears the area is under repair. One and
20 two.

21 Q Anything else?

22 A No. That will be just 1 and 2.

1 Q Mr. Gelles responded the same day,
2 didn't he? Take a look at Exhibit 20, if
3 you would, please. Did you receive that,
4 sir?

5 A Yes, I'm sure we received it.

6 Q Do you personally have a
7 recollection of seeing this, sir, is what
8 I'm asking?

9 A I assume they faxed it, but I'll
10 say yes. I remember seeing it.

11 Q On or about November 3, after you
12 sent Exhibit 19, do you recall receiving
13 this fax or something from Mr. Gelles in
14 which he states his position as contained in
15 there: That he did not believe he was
16 responsible for sealing, and that his forces
17 did not damage the pavers?

18 A Yeah. I mean, he was rearguing
19 what he had already told me.

20 Q Let me direct your attention to
21 Exhibit 21. Do you recognize that? I'm
22 sure. You've already identified in your

1 direct examination.

2 This is the fax, I believe, from
3 Dave Kensser.

4 A Yes.

5 Q Let me direct your attention to
6 the second page, the last page. It would be
7 the actual calculations. I'm looking at the
8 unit quantity and unit prices, just to make
9 sure that we understand it. These should be
10 reversed, should they not?

11 A Yes.

12 Q Because the columns don't line up
13 with the heading? Okay.

14 Is it your position that your
15 company should have only been billed for
16 15,175 square feet of pavers?

17 A Yes.

18 Q Is it your position that you
19 should only have been billed \$15,000 for the
20 benches and picnic table pads?

21 A Yes.

22 Q We went back through Exhibit 7A.

1 Can you identify Exhibit 7, which showed you
2 the prices that Mr. Gelles was charging?

3 A Uh-huh.

4 Q In Exhibit 8, where you state that
5 you thought it was \$15,000, what other
6 evidence can you direct the Court to to show
7 that you had an agreement to do the work for
8 \$15,000, as opposed to the sum of the two
9 items in Exhibit 7, which is \$16,486, I
10 believe?

11 A Well, I think we have a document
12 that I wrote on -- I said I have \$15,000 for
13 this. I talked to Bob. I said, "I have
14 \$15,000 I can pay you for the benches."

15 He said, "I don't think that's a
16 problem." And I thought we had agreed to
17 \$15,000.

18 Q That hasn't been produced, though?

19 A I saw it over there somewhere,
20 amongst all of the documents you were
21 looking through.

22 Q Let me ask you this, sir. After

1 your company submitted Exhibit 21, did you
2 receive any response from Mr. Gelles?

3 A Twenty-one, exhibit, yes. We got
4 a response.

5 Q Let me direct your attention to
6 Exhibit 22.

7 A Yes.

8 Q Is this consistent with every
9 other communication that Mr. Gelles has had
10 with you on those issues?

11 A Yes. He stated that he would see
12 that the work was done that he was going to
13 do.

14 Q After you received this, you
15 submitted to Mr. Gelles your Exhibit 23A and
16 23B check.

17 A Yes.

18 Q Is that correct, sir?

19 A Yes.

20 Q What, if any, communication,
21 verbal communication, did you have with
22 Mr. Gelles from December 8, when Mr. Kensser

1 sent this fax, to December 13, when you
2 submitted your letter or check?

3 A I don't think we did.

4 Q So then the only communication
5 would have been Exhibits 21, which is
6 Mr. Kensser's fax; 22, which is Mr. Gelles'
7 response; and 23, which is your letter of
8 December 13 and the check?

9 A Correct.

10 Q You testified before that you
11 expected this letter to resolve your issues
12 with Mr. Gelles; is that correct?

13 A Yeah, it was my feeling -- I know
14 that he was calling a lot. He needed money.
15 And I agreed, I owed him money. I disagreed
16 I didn't owe him money ----.

17 So we just reiterated our position
18 and said this is our accounting. So we feel
19 that this is justifiable, back charges,
20 completely accepted.

21 Q So you're saying in so many words,
22 here's \$13,580; you take it. If you don't

1 like it, sue me.

2 A No, it doesn't say that at all.

3 Q Well, it doesn't say, "Accept this
4 check in full and complete accord and
5 satisfactory and compromise either," does
6 it?

7 MR. FELICE: Objection, Your
8 Honor. That's argumentative.

9 THE COURT: Sustained.

10 BY MR. BUSMAN:

11 Q In other words, take a look at the
12 very last line of your second to the bottom
13 paragraph. Let me read it. It says,
14 "Enclosed please find a check in the amount
15 of \$13,580 representing final payment on the
16 contract." Is that what it says?

17 A Yes.

18 Q But you had these three contracts
19 with Mr. Gelles. Which contract does that
20 pertain to?

21 A Well, they're kind of all wrapped
22 into one. But it --

1 Q But it doesn't say that, does it?

2 A It does not say all three. I
3 looked at it as one contract, though.

4 BY MR. BUSMAN:

5 Q Do you know whether Mr. Gelles
6 looked at it as one contract or not?

7 A I do not.

8 Q Do you know whether Mr. Gelles
9 understood this to be an offer of settlement
10 or compromise?

11 A I believe the letter was clear
12 that we were -- the \$13,000 was based on
13 that accounting, which included signs and
14 brick pavers, and the original brick paver
15 price of \$4. So it should have been
16 understood that this was resolving any
17 monies we owed them for ----.

18 Q Let me direct your attention to
19 Exhibit 24. Did you receive that, sir?

20 A Yes.

21 Q You have submitted an affidavit in
22 connection with your plea in bar, which your

1 counsel filed with this Court, and my
2 recollection was you said you were shocked,
3 you stated in your affidavit, when you
4 received Exhibit 24?

5 A Yes.

6 Q At the time when you received
7 Exhibit 24, did you believe that you had
8 achieved a complete settlement and
9 compromise with Mr. Gelles by his acceptance
10 and cashing of that \$13,580 check?

11 A We didn't hear anything.

12 Q Well, just answer the question.

13 A Yes.

14 Q Now let me direct your attention
15 to Exhibit 25. Do you recognize that, sir?

16 A That's a letter from Katz and
17 Stone, I guess, to our bonding company.

18 Q But a copy went to you and a copy
19 went to Rosland (phonetic) and Busman; isn't
20 that correct?

21 A Yes.

22 Q Without saying what you and

1 Mr. Felice or anyone at this firm spoke
2 about, because that's privileged, did you
3 believe that Mr. Felice's letter expressed
4 all the defenses that you had to
5 Mr. Gelles's claim?

6 Take a look at it, sir.

7 MR. FELICE: Your Honor, I would
8 just object as to form. The letter speaks
9 for itself and also states that it's
10 including, but not limited to, listing all
11 of the problems there.

12 THE COURT: Well, it says as a
13 result that the deficiencies in work.

14 Well, go ahead. I think the
15 question can be answered.

16 BY MR. BUSMAN:

17 Q Did you --

18 A And your question is?

19 Q Did you expect this to contain all
20 the defenses you had with Mr. Gelles's
21 claim?

22 A No, because I was reading it the

1 same way. It's including but not limited
2 to.

3 Q If you know -- if you don't know,
4 just say "I don't know" -- but why didn't it
5 say "Accordance to satisfaction, by check"?

6 A I don't know.

7 Q Were you aware of the fact that if
8 a creditor receives a check tentative to
9 accordance satisfaction, and he didn't want
10 it to be that, that he has up to 90 days
11 within the statute to give it back to you?
12 Were you aware of that?

13 A No.

14 Q As of January 16, Mr. Gelles could
15 have returned that to you if he had
16 understood that he had unwittingly accepted
17 that check in full satisfaction, wouldn't
18 he? He could still give it back to you at
19 that time, couldn't he?

20 A I suppose.

21 Q Very briefly, I'm going to ask you
22 to look through the remaining exhibits. I

1 ask you to look through them only for the
2 purpose of determining that you received
3 them. I don't want to go through each one
4 of them. But you obviously didn't get
5 number 26, except after the suit was filed.
6 This is an amendment.

7 But take a look, if you will,
8 through, just very, very, briefly, 28
9 through 35. My question will be, did you
10 receive each of those?

11 A Well, I would say I couldn't be
12 totally sure.

13 Q Well, just take a look before you
14 indicate, sir.

15 A Well, a couple of them, I do not
16 remember, and I saw them later, when this
17 suit was coming, pending, whatever. And
18 that one was the extra for that concrete --

19 Q That's that \$87?

20 A Yeah. Okay. That one, I didn't
21 recall.

22 Q And number 30?

1 A Thirty?

2 Q Yes, sir.

3 A And then I don't recall this 456.

4 Q Thirty-one?

5 A Because I specifically talked to
6 them about that that was their
7 responsibility.

8 Q What about 32?

9 A Yeah. I'm pretty sure we received
10 this.

11 MR. BUSMAN: May I see Defendants'
12 handwritten contract ----? Okay. We'll get
13 another copy.

14 THE COURT: How much more do you
15 have?

16 MR. BUSMAN: Your Honor, one last
17 bit, another 2 minutes or so.

18 THE COURT: All right.

19 BY MR. BUSMAN:

20 Q Mr. Stack, I'm going to direct
21 your attention to your Exhibit No. 3 and
22 direct your attention to the sand charge.

1 \$1,080.

2 A Uh-huh.

3 Q How did you calculate that?

4 A I took the entire area of the
5 benches and kind of used what -- the average
6 sand we were using on the site, which was
7 not averaging 1 inch. It was going over
8 that.

9 Q But he was only obligated to put
10 1 inch, was he not? That's all that it
11 called for, isn't it?

12 A That would be -- yes.

13 Q I've already done the calculation
14 and rounded -- I've put it on a blackboard.
15 I've printed it out so that you all can
16 follow with me. Do you know how to use an
17 HP calculator? Do you want to use this to
18 follow me, sir.

19 A I have one somewhere, actually.

20 Q Excellent. Now, isn't it true
21 that Mr. Gelles did provide half the sand?

22 A No. I was aware he didn't supply

1 any sand.

2 Q My understanding is that the park
3 bench pads are 12 feet by 11 feet by 1 inch.
4 That's the quantity of sand that would go in
5 that hole, isn't that correct?

6 A Right.

7 Q Now, I've converted that 1 inch to
8 .08333 feet so that it all works out to
9 calculate cubic feet, in the second line.

10 A All right.

11 Q You want to just follow me
12 through? Did I give you one of these? I'm
13 sorry. There we go.

14 The third line takes the total
15 cubic feet of one pad and multiplies it by
16 the 15 to come up with the total cubic feet
17 for the park bench pads.

18 A Uh-huh.

19 Q Okay? Is that correct as far as
20 it goes?

21 A Yes.

22 Q Now let's talk about the picnic

1 table pads.

2 A Yes.

3 Q Do I have the correct dimensions,
4 4 feet by 8 feet by 1 inch of sand?

5 A Yes.

6 Q The next line, again, I have
7 calculated, converted the inch to feet. And
8 that works out, if you want to work it out,
9 2.666 cubic feet each.

10 A Yes. All right.

11 Q And we have 50 of those, which
12 equals 133.33 cubic feet.

13 The next calculation is totaling
14 the benches and the table pads, and I come
15 up with a total of 298332 total cubic feet.

16 A Yes.

17 Q And then you divide cubic feet by
18 27 to get the cubic yards; correct?

19 A Right.

20 Q I'm advised that a ton of sand is
21 equal to 2 cubic yards; is that correct,
22 sir?

1 A No, it's closer to 2.2.

2 Q Okay. Well, I'll tell you what.

3 You want to make it 2.2? I'll get my
4 calculator. So we have 11.049 times 2.2. I
5 come up with 24.31 instead of 22. 24.31.

6 Now, my understanding is it's
7 \$13.50 per ton; is that correct?

8 A Right. \$13.50 is correct.

9 Q So 24.31 times \$13.50, instead of
10 298, I got 328.16.

11 So if Gelles didn't provide one
12 drop of sand, that would be worth \$328.16;
13 isn't that correct?

14 A I disagree, if I could.

15 Q Well, where is my calculation in
16 error, sir?

17 A We weren't -- we were using,
18 probably 3 inches of sand on average on a
19 project.

20 Q But the specs says 1 inch.

21 A That's a minimum. But I'm not
22 saying that's not --

1 Q Why is Mr. Gelles obligated to pay
2 more than what the spec provides?

3 A Well, you know, because they were
4 using 2 to 3 inches everywhere. So I
5 calculated it closer to 3 inches. And using
6 the 2.2, you know, it's up in the 60s, and
7 you include some waste. That's how I came
8 up with the 80.

9 I would agree, maybe 60 is a
10 little more fair. But I totally disagree
11 that it's only 20.

12 MR. BUSMAN: Thank you. I have
13 nothing further.

14 THE COURT: Redirect?

15 MR. FELICE: Yes. Just a couple
16 of items.

17 REDIRECT EXAMINATION

18 BY MR. FELICE:

19 Q Mr. Stack, in response to
20 Mr. Busman's question regarding the
21 proposal, the agreement for the park
22 benches, you indicated that you had thought

1 there was another document.

2 MR. FELICE: Your Honor, may I
3 approach?

4 THE COURT: Yes.

5 MR. FELICE: Your Honor, I've
6 marked this as Defendants' Exhibit 5.

7 BY MR. FELICE:

8 Q I ask you if you could identify
9 that document, sir?

10 A Yeah. This is the proposal from
11 him, this first one give a price on the
12 benches and picnic tables.

13 Q Can you identify the handwriting
14 at the bottom of that document?

15 A That's my handwriting.

16 Q What was the purpose of you to
17 write that on the back of there?

18 A Just to express to him that I did
19 not have -- I couldn't agree to \$20,000 to
20 do this work; that in my budget, I had
21 \$15,000, and that's what I needed him to do
22 the work for.

1 Q Do you recall whether you had sent
2 that document with the handwriting back to
3 Gelles and Sons?

4 A Yeah. I faxed -- I would have
5 faxed it back to him. That's why I wrote on
6 it. And I also talked to him about it, and
7 I was under the impression that if I talked
8 to him that we were in agreement with the
9 \$15,000, and I told him to proceed with it.

10 Q Then his company did proceed with
11 the work?

12 A Yes.

13 Q Then you received a bill for
14 something larger than \$15,000; is that
15 right?

16 A Yes.

17 Q Did you recall having a discussion
18 between the time that you had discussed your
19 Defendants' Exhibit 5 and receiving that
20 invoice that Mr. Busman had showed you?

21 A No. We didn't discuss it again
22 until after I got the invoice.

1 Q What was the purpose for putting
2 the statement that "the most I could come up
3 with on the first invoice was 5,845 square
4 feet"?

5 A That was when -- July 11, they
6 sent the first bill, and I said I -- I was
7 just explaining to him that he had sent us
8 an invoice for a large amount of square
9 feet, and I went out and measured it and
10 came up with a sum quite a bit less.

11 And that's when we had the
12 conversation, look, we need to get together
13 at some point and measure this together,
14 because our measurements aren't jibing. But
15 if he were to install 8,000 square feet and
16 send me a bill for 10, I would not be liable
17 for the 10. I mean, you go out there and
18 measure what's in the field. That's kind of
19 what I was trying to explain to him.

20 MR. FELICE: Your Honor, I move
21 Defendant's Exhibit 5 into evidence.

22 MR. BUSMAN: We object, Your

1 Honor. This is totally self-serving.
2 There's no fax sheet or anything else to
3 indicate the authenticity of it. I don't
4 believe that, unless this witness can
5 testify that he personally sent the fax
6 himself --

7 THE COURT: Well, we asked him if
8 there was any document he had, and he said
9 yes it was: Overruled.

10 (Defendants' Exhibit No. 5 was
11 marked for identification and
12 received in evidence.)

13 BY MR. FELICE:

14 Q One final line of questioning,
15 Mr. Stack. In any of your conversations
16 with Mr. Gelles or anyone at Gelles and
17 Sons, did they ever indicate that they were
18 billing you on more than one contract?

19 A No.

20 Q Do you recall ever seeing any
21 communication as to whether there were one,
22 two, three, four, or five contracts between

1 your company and Mr. Gelles's company?

2 A No.

3 MR. FELICE: Your Honor, I have no
4 further questions.

5 THE COURT: All right. Let's take
6 our morning break. Be back in 15 minutes.

7 MR. BUSMAN: Thank you.

8 (Recess)

9 THE COURT: Is that your case,
10 Mr. Felice?

11 MR. FELICE: Yes, Your Honor.
12 But, I think Mr. Busman has --

13 MR. BUSMAN: Your Honor, I had
14 spoke too soon. If I may ask Mr. Stack just
15 two questions?

16 THE COURT: All right.

17 RECROSS EXAMINATION

18 BY MR. BUSMAN:

19 Q Mr. Stack, I had mentioned earlier
20 and asked you if, among the other bills that
21 you remembered receiving this -- I'm going
22 to show you what's been marked as

1 Exhibit 34.

2 Did you receive that, sir?

3 A I'm sure we did.

4 Q Actually, your company, in fact,
5 paid it on August 29, didn't they?

6 A I wouldn't have paid the whole
7 thing.

8 Q Do you know what, if any, amount
9 you paid on August 29?

10 A No. But we were paying -- we may
11 have sent in a check, but it may have been
12 for a couple of things. Part of it may have
13 been that. But I wouldn't have paid the
14 entire amount, because I disagreed with the
15 entire amount.

16 Q So did you give any communication
17 to Mr. Gelles advising him that you were not
18 paying the entirety of Exhibit 34, of
19 \$16,468?

20 A I'd have to check with my -- the
21 people who actually sent out the check. I
22 don't actually send the checks out. I don't

1 believe we paid that invoice in full like
2 that.

3 MR. BUSMAN: That's all I have,
4 Your Honor.

5 THE COURT: Thank you, Mr. Stack.

6 (Witness excused)

7 MR. BUSMAN: Call Randy Lenz, Your
8 Honor.

9 THE COURT: All right.
10 Whereupon,

11 RANDALL ELTON LENZ
12 was called as a witness and, having been
13 first duly sworn, was examined and testified
14 as follows:

15 DIRECT EXAMINATION

16 BY MR. BUSMAN:

17 Q Please state your full name for
18 the Court.

19 A Randall Elton Lenz.

20 Q Mr. Lenz, what is your occupation?

21 A Superintendent for Gelles and
22 Sons.

1 Q State your experience, if you
2 would, in the brick and masonry trades.

3 A I've been doing it for around 20,
4 24 years.

5 Q How long have you worked with
6 Mr. Gelles's company?

7 A Five years.

8 Q You've heard the testimony so far
9 this morning, have you not, sir?

10 A Yes.

11 Q Let me show you what's been marked
12 as Plaintiff's 4 and 5. Do you recognize
13 these documents, sir, Plaintiff's 4 and 5?

14 A Yes. I do.

15 MR. BUSMAN: Let me just do a
16 housekeeping thing. I see a couple of the
17 original exhibits. I assume you want these
18 to be --

19 BY MR. BUSMAN:

20 Q What, if any, blueprints, other
21 than these two did your company receive on
22 the job from JSI?

1 A That's the only blueprints that I
2 have seen for the job.

3 Q In front of you is a half-size set
4 of blueprints. Did your company ever
5 receive that, to the best of your knowledge,
6 or a full-sized version of it?

7 A No.

8 Q Let me ask you, did there come
9 times that you were required to look at the
10 full set of Mr. Stack or Mr. Stack's
11 company's blueprints in their trailer?

12 A Yes.

13 Q Did there come a time that you had
14 any conversation with anyone at JSI
15 regarding coming to the trailer and seeing
16 the blueprints?

17 A Just the superintendent in charge
18 there, Bill. Teague, I think, was his last
19 name.

20 Q What did he tell you?

21 A He said whenever I needed to see
22 the prints, just to go to the trailer.

1 Q Let me ask you, sir, is there any
2 mortar that is customarily used in the
3 building trades that contains epoxy?

4 A No.

5 Q Have you ever seen or heard of
6 mortar that has epoxy in it?

7 A No.

8 Q Was epoxy used on the project
9 about the area of the table pads and bench
10 pads?

11 A Yes, there was epoxy used, but it
12 wasn't by our company.

13 Q Will you tell the company what was
14 done with the epoxy and who used it?

15 A The epoxy was used for setting the
16 bench and the tables.

17 Q Anchor bolts?

18 A Anchor bolts, right. Correct.
19 Because they didn't leave the anchor bolts
20 in the concrete for the benches. So they
21 had to drill them out, and then they take
22 the epoxy to set the legs and shield and the

1 bolts into place into the concrete.

2 Q Who did that?

3 A JSI.

4 Q Did you actually observe them
5 doing that?

6 A Yes, I did. And I brought it up
7 to Bill Teague, saying that the guys were
8 making a big mess of it, and they were
9 getting it all over our brick.

10 Q Let me ask you, let's suppose, for
11 example, some of your people dumped or
12 spilled or just got excess mortar on the
13 bricks. How long does that mortar take to
14 dry?

15 A It takes several hours for it to
16 cure hard enough to where you can't do
17 anything with it.

18 Q How long does the epoxy take to
19 dry?

20 A It depends. Seconds. A minute at
21 the most.

22 Q The stuff that the JSI people were

1 using on the anchor bolts, do you recall
2 about how long it took that to set up?

3 A I really don't know. I would say
4 maybe 30 seconds.

5 MR. FELICE: I object, Your Honor.

6 THE COURT: Sustained.

7 BY MR. BUSMAN:

8 Q But did it take longer for the
9 epoxy to dry than it would have for the
10 mortar to dry?

11 A Oh, the epoxy dries a lot faster.

12 Q If you see mortar on top of
13 bricks, what can you do about it?

14 A You can brush it off with a broom
15 or water, take care of it right away.

16 Q That eliminates the mortar on the
17 bricks?

18 A Right.

19 Q What happens when epoxy gets on
20 bricks? How do you get rid of that?

21 A You've got to replace the bricks.

22 Q Thank you.

1 Now, you've heard the testimony
2 this morning about sealing pavers. In your
3 24 years of experience, how many times have
4 you seen pavers required to be sealed?

5 A I never yet have done it. I've
6 never seen it.

7 Q If you get a big enough job, could
8 you have the manufacturer provide sealed
9 pavers?

10 A Yeah, if you call them.

11 Q Did there come a time that you
12 participated in a measurement of the work
13 with Jeffrey Stack and, I believe, Mark
14 Stack?

15 A Right.

16 Q Do you remember when that was?

17 A Right offhand? No. That was --

18 Q Did you keep track of the figures?

19 A Yes, and I gave them to my
20 company.

21 Q Did you compare them with
22 Mr. Stack?

1 A No.

2 Q So each side kept their own tally?

3 A Right.

4 Q I see. Thank you.

5 MR. BUSMAN: Nothing further, Your
6 Honor.

7 CROSS-EXAMINATION

8 BY MR. FELICE:

9 Q Sir, you can't dispute Mr. Stack's
10 measurement of 15,175 square feet, can you?

11 A I didn't see what he came up with.
12 I just sent whatever I had to my office.

13 Q But is it your testimony today
14 that you don't know what your number was,
15 and therefore, you were unable to --

16 A I mentioned to him that the way he
17 was doing it, his radiuses were not correct
18 in the measurements.

19 Q So there was some dispute as to
20 the amount, or how you measured the work in
21 order to bill it?

22 A Correct.

1 Q But as far as you know, isn't it
2 correct, your company never, ever modified
3 the billing to reflect the measurements that
4 you took out in the field that day; isn't
5 that correct?

6 A I couldn't -- no, that's not
7 correct.

8 Q Do you believe there's an invoice
9 out there that re-corrects or corrects a
10 previous billing?

11 MR. BUSMAN: Objection, Your
12 Honor. There's no evidence that the
13 previous bill is wrong.

14 MR. FELICE: Okay. I'll strike
15 that. Let me move on to --

16 THE WITNESS: I just give
17 measurements. It's not my position to send
18 the bill. So I wouldn't --

19 BY MR. FELICE:

20 Q But isn't that the case, that
21 Mr. Stack had a concern, and you were out
22 there to address the concern, regarding

1 whether measurements were, in fact,
2 accurate?

3 A I don't know if it was correct or
4 incorrect. I was told to go out in the
5 field and measure it with Mr. Stack.

6 MR. FELICE: Your Honor, may I
7 approach?

8 THE COURT: Yes.

9 MR. FELICE: Thank you. Could I
10 have those, 4 and 5 down there?

11 BY MR. FELICE:

12 Q Do you testify that these are the
13 only two documents you used in order to
14 build or construct your work on the project?

15 A Right.

16 Q This document, which is Exhibit 5,
17 which is a circular plaza, concessions
18 plaza, features layout, is this still the
19 only paving you had to do on the project?

20 A Actually, it's missing the park
21 benches.

22 Q And so there is another part

1 that's --

2 A Pads.

3 Q Pads? It's missing where they're
4 located on the site, is that correct?

5 A Right.

6 Q The detail's for how to put the
7 park bench pads on; isn't that correct?

8 A Right.

9 Q Let me direct your attention to
10 what is Plaintiff's Exhibit 4, page Paving
11 Detail PV 1 of 1.

12 Is that the detail for
13 contractors? Can you refer to --

14 A I don't remember seeing those, no.

15 Q But the --

16 A The bench pads were to be
17 installed by them. And they were already
18 installed, and they just showed me where to
19 put the brick.

20 Q But they didn't show you a pattern
21 as to how to put it? They didn't show you a
22 detail as to how the edging was supposed to

1 be on the brick?

2 A That was verbal.

3 Q On the issue about the sealers,
4 were you involved at all about issues
5 Mr. Stack had raised about the fact that
6 Gelles and Sons was supposed to, in his
7 opinion, seal the bricks.

8 Were you involved in that decision
9 at all?

10 A No.

11 Q Did you have any conversations
12 with your boss, with Mr. Gelles, about
13 whether that in fact was within your scope
14 of work?

15 A They had mentioned it to me, and I
16 said that we weren't supposed to do it. It
17 wasn't in our scope of work -- by my
18 company.

19 Q That's based upon the scope of
20 work as indicated between what Mr. Gelles
21 told you and what you were doing out there?

22 A Right.

1 Q So it's your testimony you never
2 saw this concrete paver note at the bottom
3 here?

4 MR. FELICE: Objection. Asked and
5 answered, Your Honor. He said he hadn't
6 seen it.

7 THE COURT: Go ahead.

8 THE WITNESS: I never seen that
9 page, period, that whole book.

10 BY MR. FELICE:

11 Q Do you recall whether you saw the
12 page that ---- your company, according to
13 what Mr. Stack's letter and the September --

14 A Oh, as far as the benches?

15 Q Correct.

16 A Like I said, I never saw a page on
17 the benches. They provided the slabs, and
18 all that was sent to the office, I assumed.
19 But apparently not.

20 Q Let me move on to another item, if
21 I may.

22 MR. FELICE: Your Honor, we have

1 no further questions.

2 THE COURT: All right. Redirect.

3 REDIRECT EXAMINATION.

4 BY MR. BUSMAN:

5 Q Just one on redirect. Counsel
6 asked you if those two pages were the only
7 ones you used; is that correct?

8 A Right.

9 Q But didn't you also testify that
10 you went into their trailer and looked at
11 his set of plans?

12 A Right.

13 MR. BUSMAN: Nothing further, Your
14 Honor.

15 (Witness excused)

16 MR. BUSMAN: I call Bob Gelles.

17 THE COURT: All right.
18 Whereupon,

19 ROBERT LANE GELLES
20 was called as a witness and, having been
21 first duly sworn, was examined and testified
22 as follows:

1 MR. BUSMAN: Right. He has a set
2 of these exhibits there.

3 THE COURT: All right.

4 DIRECT EXAMINATION

5 BY MR. BUSMAN:

6 Q Please state your name?

7 A Robert Lane Gelles.

8 Q What is your relationship to
9 Gelles and Sons General Contracting?

10 A I'm the president.

11 Q How long have you been president
12 of the company?

13 A Since its inception. I've been in
14 the business for 25 years.

15 Q Do you possess any licenses or
16 certificate in the state of Virginia?

17 A I'm a Virginia Class A registered.

18 Q Class A registered?

19 A Virginia Class A registered,
20 right.

21 Q Contractor?

22 A Contractor, general contractor.

1 Q Yes. Thank you. Is there any
2 specialty area that your company works in?

3 A We specialize in masonry and entry
4 features.

5 Q How long have you been doing that
6 type of work?

7 A Twenty-five years.

8 Q Did there come a time prior to
9 your coming in contact with Mr. Stack that
10 your company had been working in the Cameron
11 Station Alexandria area?

12 A We had been working in the Cameron
13 Station subdivision for 3 years, prior to
14 myself meeting Mr. Stack.

15 Q Who were you working for?

16 A We worked for the developer and
17 nine different builders.

18 Q Did there come a time in which you
19 had contact with Mr. Stack about doing some
20 paving work?

21 A Yes. Mr. Stack telephoned me and
22 asked me if I'd give him a price to do some

1 paving work at the park.

2 Q Do you know when that was?

3 A Middle of June.

4 Q When were you supposed to start
5 the work?

6 A He said he had the pavers on site,
7 and the sand and the edging, and as soon as
8 we could mobilize the men, we'd get started.

9 Q Let me ask you. Take us back to
10 that day when you met with Mr. Stack. Tell
11 us exactly what you two spoke about in terms
12 of what he wanted you to do, what you agreed
13 to do, and the price.

14 A Well, I met Mr. Stack in his
15 construction trailer, and he showed me a
16 full set of blueprints on --

17 Q Did he give you that set?

18 A No, he didn't.

19 Q What did he give you?

20 A He didn't give me anything that
21 day.

22 Q Okay.

1 A He showed me a full set of
2 blueprints and said he had a previous
3 contractor set up that had bailed on him and
4 wasn't going to do the job, and knew that I
5 was doing pavers at the Cameron Station
6 subdivision; would I be interested to do the
7 pavers at the park?

8 And I said yes.

9 And he had mentioned that his
10 previous contractor was going to do it for
11 \$3.65 a square foot, and I indicated I could
12 not do anything close to that price; that
13 the best I could do it would be \$4 a square
14 foot.

15 Q Was there ever a writing drawn up
16 that both of you signed that memorialized
17 your agreement?

18 A No.

19 Q Tell me exactly what his company
20 was supposed to do.

21 A He had the brick on site, the sand
22 on site, and the edge strip on site. And we

1 were to provide the labor to install those
2 items over top of his compacted gravel base.
3 He said his superintendent, Bill Teague,
4 would stake out all the areas with the
5 engineer and get all the compacting done,
6 and that would define the area that we had
7 to put the pavers down.

8 Q At any time, did anyone from the
9 Stack company ever give you or anyone at
10 your company a complete set of plans as
11 represented by that big thick packet there?

12 A No. I never knew these little
13 half plans ever existed. The only one was a
14 full set at his trailer, and I never
15 received those.

16 Q I'm showing you again Exhibits 4
17 and 5. Were these the only blueprints for
18 the work that you were to do that you were
19 given?

20 A Those were the only two blueprints
21 I ever received, accompanied by one faxed
22 detail for the park benches and the picnic

1 table pads.

2 Q That's Exhibit 16B, I think? Is
3 that what you're talking about?

4 A It would be Exhibit 2.

5 Q Oh, 2?

6 A It was on June 26.

7 Q I'm sorry?

8 A June 26.

9 Q Okay.

10 A On a faxed correspondence from
11 Mr. Stack, requesting for a price for picnic
12 table and park benches.

13 Q That was for the extra work?

14 A That's correct.

15 Q Now --

16 THE COURT: Are you moving 2?

17 MR. BUSMAN: Your Honor, if I
18 could wait til the end, I could move all of
19 them.

20 THE COURT: Well, are there going
21 to be any objections to any of the exhibits?

22 MR. BUSMAN: Well, let me move

1 Exhibits 1 and 2.

2 MR. FELICE: I have no objection,
3 Your Honor.

4 THE COURT: All right. 1 and 2
5 are admitted.

6 (Plaintiff's Exhibit Nos. 1 and
7 2 were marked for identification
8 and received in evidence.)

9 MR. BUSMAN: Thank you, Your
10 Honor.

11 BY MR. BUSMAN:

12 Q When you met with Jeffrey Stack,
13 did you ever discuss sealing of the pavers?

14 A Never.

15 Q Let me ask you this. In your
16 experience in the masonry trade, have you
17 ever come across a job where you had to put
18 in seal pavers before?

19 A It's never been specified in any
20 of the jobs that I've done.

21 Q Let me ask you this. If you got a
22 fairly big job with a fairly large,

1 expansive area -- and I understand it from
2 looking at the blueprints, this was a fairly
3 expansive area -- is it possible to order
4 pre-sealed bricks from the manufacturer?

5 A I've never ordered them. I mean,
6 this job is a good-sized job. But compared
7 to next door at Cameron Station where we
8 worked, it's 1/20th the size, and we've
9 already laid 2 million pavers over there.

10 Q Were any of them sealed?

11 A Never.

12 Q Did anybody ever call out sealing
13 for any of the pavers?

14 A No.

15 Q You've seen Exhibits 1 and 2
16 before. Both of them together were one fax,
17 were they not?

18 A That's correct.

19 Q Okay.

20 A Page 1 and page 2.

21 Q Did you respond with Exhibit
22 No. 3; that's the signs?

1 A Yes. Those were proposed for the
2 two entry monuments.

3 Q Was that proposal accepted?

4 A It was signed and accepted by
5 Mr. Stack.

6 Q Look at Exhibit 6, if you would,
7 please. Is that the acceptance you
8 received?

9 A That's correct. It was via fax.

10 MR. FELICE: Your Honor, in
11 addition to 4 and 5, the two blueprints, I
12 would move 3 and 6 as well.

13 THE COURT: Any objection to 3 and
14 6?

15 MR. FELICE: No, Your Honor.

16 THE COURT: All right. 3 and 6
17 are admitted.

18 (Plaintiff's Exhibit Nos. 3 and
19 6 were marked for identification
20 and received in evidence.)

21 BY MR. BUSMAN:

22 Q Let me direct your attention to

1 Exhibit 7. Did you send that to Mr. Stack,
2 a two-page Exhibit No. 7?

3 A Yes, I did.

4 Q As to picnic table pads and bench
5 pads?

6 A That's correct. That was the
7 revised proposal.

8 Q What was the original proposal?
9 How did the revised proposal get changed
10 from the original?

11 A The original was July 10. I was
12 going to supply all material and labor,
13 including the concrete bases and the brick.
14 And then on -- I believe it was July 11,
15 which I don't have that one in front of me,
16 he was to supply the concrete pads and
17 the -- and the brick.

18 Q Wasn't the number of benches
19 reduced?

20 A It was reduced, from 55 to 50.

21 Q Thank you.

22 A And that's reflected on the

1 July 19 proposal.

2 Q Did you receive a communication
3 from Mr. Stack relative to the tables and
4 benches?

5 A I did.

6 Q Take a look at Exhibit 8, please.

7 A Yes.

8 Q When did you receive that?

9 A July 20.

10 Q I'm going to show you what was
11 marked and admitted as Defendant's Exhibit
12 No. 5 and ask you if you recognize it?

13 A No. I recognize the proposal,
14 because I --

15 Q No, I meant the handwritten part
16 down below.

17 A No.

18 Q Besides from seeing this today,
19 have you ever seen this document before?

20 A Not with the handwritten notes.

21 Q Who receives faxes at your
22 company?

1 A Myself only.

2 Q Is there anyone else who could
3 have seen it or taken it --

4 A No, I do all the office work.

5 Q You do all the billing yourself
6 too?

7 A I do all the billing myself too.

8 Q So it's your testimony that you
9 were unaware that Mr. Stack wanted you or
10 expected you to do this for \$15,000?

11 A I've never seen this handwritten
12 portion down there.

13 Q Was it your understanding that he
14 accepted your proposal at the prices you
15 quoted on Exhibit 7?

16 A It was.

17 Q Take a look at Exhibit 34. That's
18 the invoice of August 1.

19 A Correct. I invoiced him on
20 August 1 for \$16,468.

21 Q Was that exact amount paid?

22 A It was paid on August 29, 2000.

1 Q Let me take you back again. Did
2 there come a time in which you commenced
3 sending regular billings to JSI?

4 A Yes. I billed on a regular basis
5 as the work progressed, commencing --
6 July 10 was my first invoice.

7 Q Let me take you just for a minute,
8 for the sake of brevity, and ask you to look
9 through Exhibits 28 through 35.

10 A Okay.

11 Q Were those all prepared by you
12 personally?

13 A They were.

14 Q Were they all sent by you
15 personally to JSI?

16 A They were.

17 Q Were they sent on or about the
18 dates stated on there?

19 A They were sent on the dates
20 stated. That's the invoice date.

21 MR. BUSMAN: Your Honor, I move
22 Exhibits 7 and 8, as well as 28 through 35,

1 into evidence.

2 THE COURT: Seven and eight? Any
3 objection to 7 and 8?

4 MR. FELICE: No, Your Honor.

5 THE COURT: All right, 7 and 8 are
6 admitted.

7 (Plaintiff's Exhibits Nos. 7 and
8 were marked for identification
9 and received in evidence.)

10 THE COURT: Any objection to 28
11 through 35?

12 MR. FELICE: The only objection
13 would be to 31. I think Mr. Stack ----.
14 That would be our objection.

15 THE COURT: All right, 28 through
16 35 are admitted. I think that just goes to
17 the weight of it, not to its admissibility.
18 He says he sent them.

19 MR. BUSMAN: Okay.

20 (Plaintiff's Exhibit Nos. 28
21 through 35 were marked for
22 identification and received in

1 evidence.)

2 BY MR. BUSMAN:

3 Q Now let me direct your attention
4 to Exhibit 9. Is it your practice, when you
5 send billings, to identify how you're
6 applying customers' payments?

7 A When they're not in full.

8 Q Does Exhibit 9 indicate how you
9 applied a credit of \$20,000?

10 A It does.

11 Q Did Mr. Stack indicate that he
12 didn't agree with your application?

13 A No, he didn't.

14 MR. BUSMAN: I move Exhibit 9,
15 Your Honor.

16 THE COURT: Any objection to 9?

17 MR. FELICE: No, Your Honor.

18 THE COURT: Nine's admitted.

19 (Plaintiff's Exhibit No. 9 was
20 marked for identification and
21 received in evidence.)

22 BY MR. FELICE:

1 Q Exhibit 10. Do you recognize
2 that, sir?

3 A It's a letter I received from
4 Mr. Stack.

5 Q At any time prior to September 19,
6 2000, had you and Mr. Stack, at any time,
7 discussed having an obligation to clean
8 and/or seal any of the pavers?

9 A No.

10 Q There's no mention in Exhibit 10
11 of cleaning or sealing pavers, is there?

12 A That's correct.

13 MR. BUSMAN: I move Exhibit 10,
14 Your Honor.

15 MR. FELICE: No objection, Your
16 Honor.

17 THE COURT: Ten's admitted.

18 (Plaintiff's Exhibit No. 10 was
19 marked for identification and
20 received in evidence.)

21 BY MR. BUSMAN:

22 Q Take a look at Exhibit 11, please.

1 Do you recognize that, sir?

2 A I do.

3 Q Let me direct your attention to
4 the washout. Was your work product finished
5 at the time of this washout?

6 A At that portion where it washed
7 out, we were complete with the area that
8 washed out.

9 Q Had not Mr. Stack or other
10 contractors not finished the down spout
11 drainage as it should have been at the time
12 of the washout?

13 MR. FELICE: Objection, Your
14 Honor. Relevance.

15 THE COURT: Sustained.

16 BY MR. BUSMAN:

17 Q Let me direct your attention to
18 the second paragraph of Exhibit 11. Please
19 tell us at what point of completion the
20 downspout drainage was at the time of the
21 washout.

22 MR. FELICE: Objection, Your

1 Honor. There's no foundation as to whether
2 he knows that.

3 THE COURT: Set a foundation.

4 BY MR. BUSMAN:

5 Q What was the state of the
6 downspout drainage at the time you commenced
7 working in the area where the washout
8 subsequently occurred?

9 A They were not installed in the
10 concession area.

11 Q Did there come a time in which you
12 completed your work?

13 A Yes.

14 Q Did there come a time in which a
15 washout occurred?

16 A Yes.

17 Q Was the downspout drainage
18 completed at or about the time you completed
19 your work?

20 A No, it was not complete.

21 Q In your 26 years of experience,
22 had the downspout drainage been completed at

1 the time, would your work have been
2 destroyed or affected by the water?

3 A Not if proper rinsing and control
4 measures were taken.

5 Q Were they subsequently taken?

6 A I believe so.

7 Q Let me direct your attention to
8 Exhibit 12.

9 THE COURT: Are you moving 11?

10 MR. BUSMAN: I'm moving 11.

11 MR. FELICE: No objection, Your
12 Honor.

13 THE COURT: All right. Eleven's
14 admitted.

15 (Plaintiff's Exhibit No. 11 was
16 marked for identification and
17 received in evidence.)

18 BY MR. BUSMAN:

19 Q No. 12. Again, is Exhibit 12
20 consistent with your policy of indicating
21 how you're applying the credits, the second
22 page of number 12.

1 A Yes.

2 Q Was there any objection by anyone
3 at JSI to your application?

4 A No.

5 MR. BUSMAN: I move Exhibit 12,
6 Your Honor.

7 MR. FELICE: No objection.

8 THE COURT: All right. Twelve's
9 admitted.

10 (Plaintiff's Exhibit No. 12 was
11 marked for identification and
12 received in evidence.)

13 BY MR. BUSMAN:

14 Q Please take a look at Exhibit 13.
15 Did you receive Exhibit 13?

16 A Yes. I did.

17 Q Were you able to make out or read
18 the entries at items 1, 4, and 15?

19 A No, I was not.

20 Q Did that lead to your sending a
21 fax to Mr. Stack on September 13?

22 A Correct.

1 Q Take a look at Exhibit 14. Is
2 that the fax you sent?

3 A It is.

4 Q Now take a look at Exhibit 15A,
5 please. Is that the response you received
6 from Mr. Stack?

7 A Correct.

8 Q Take a look at 15B, the punch
9 list. Now; compare 15B, if you would, with
10 Exhibit 13, aside from the fact that you
11 couldn't read certain items. There were no
12 initials in the left margin on 13. My copy
13 says "Gelles," opposite number 1, and items
14 1, 4 and 15 are circled.

15 A Correct.

16 Q Go back, please, to Exhibit 15B.
17 What was your understanding as to
18 the items that you were responsible to
19 correct?

20 A Number 1, number 4, and number 15.

21 Q Take a look at items 10 and 11.
22 Did you believe that they pertained to you

1 in any way?

2 A No, because it didn't have my name
3 in front of it.

4 Q Were you responsible for the items
5 substantively, the items in number 10 and
6 11?

7 A No. It was not in the scope of my
8 work.

9 MR. BUSMAN: Your Honor, I move
10 Exhibits, I think, 13, 14 and 15.

11 MR. FELICE: No objection.

12 THE COURT: All right. I think 15
13 has already been admitted.

14 MR. BUSMAN: Okay.

15 THE COURT: Thirteen and fourteen
16 are admitted.

17 (Plaintiff's Exhibit Nos. 13 and
18 14 were marked for
19 identification and received in
20 evidence.)

21 BY MR. BUSMAN:

22 Q Let me just go back to 15 for a

1 minute. Do you know who wrote those
2 initials on there?

3 A I do not.

4 Q Do you know from what company was
5 it received?

6 A It was received from JSI.

7 Q Take a look, please, at
8 Exhibit 16. It's in two parts, 16A and 16B.
9 I'm going to direct your attention to
10 Exhibit 16B.

11 When was the first time you ever
12 saw this document?

13 A When I received this from
14 Mr. Stack.

15 Q Had Mr. Stack ever shown this to
16 you before?

17 A No.

18 Q Let me direct your attention to
19 the big set of blueprints, the half-size of
20 blueprints here. There was a page that's
21 marked; there's a detail in the lower left
22 corner.

1 Is that not, in fact, a reduced
2 version of Exhibit 16B?

3 A It appears to be.

4 Q Had you ever been shown this at
5 the time you met with Mr. Stack the first
6 time?

7 A No, not -- no.

8 Q Had this ever been shown to you or
9 given to you at any time since then?

10 A Based on this date that I
11 received, it would be a fax.

12 Q Did you respond to Mr. Stack?

13 A I did the following day.

14 Q Take a look at Exhibit 17. You
15 recognize that, sir?

16 A I do.

17 Q Is that in fact the response you
18 sent to Mr. Stack?

19 A It is.

20 MR. BUSMAN: Your Honor, I move 16
21 and 17 into evidence.

22 THE COURT: All right. Sixteen is

1 already in, isn't it?

2 MR. FELICE: I have no objection.

3 THE COURT: Seventeen's admitted.

4 (Plaintiff's Exhibit No. 17 was
5 marked for identification and
6 received in evidence.)

7 BY MR. BUSMAN:

8 Q Take a look at Exhibit 17 for a
9 minute. There were some items, warranty
10 items, that you did have to do; isn't that
11 correct?

12 A There were a couple of things.

13 Q The missing edging restraints and
14 repair of the loose edges. Were they, in
15 fact, repaired?

16 A Yes, they were.

17 Q Take a look, please, at
18 Exhibit 18, rather. Do you recognize that,
19 sir?

20 A I do.

21 Q Did you in fact prepare it and
22 send it to JSI?

1 A I did.

2 Q Let me ask you, sir. Take a look
3 at the second page of Exhibit 18.

4 THE COURT: Are you moving 18?

5 MR. BUSMAN: Yes, I am, Your
6 Honor.

7 MR. FELICE: No objection, Your
8 Honor.

9 THE COURT: Eighteen's admitted.

10 MR. BUSMAN: Thank you, Judge.

11 (Plaintiff's Exhibit No. 18 was
12 marked for identification and
13 received in evidence.)

14 BY MR. BUSMAN:

15 Q At what time, other than the
16 warranty work, was all the work represented
17 by this October 13 statement actually
18 completed by your company?

19 A August 21, when the final invoice
20 was mailed to them.

21 Q From August 21 until September 19,
22 which is the date of Exhibit 16, had you

1 ever had any communication, verbal, written
2 or otherwise, with Jeffrey Stack or anyone
3 at JSI regarding cleaning and sealing the
4 pavers?

5 A I'm sorry. Would you repeat that?

6 Q Yes, sir. I hope I give it back.
7 From the time you finished your work,
8 August 21 until September 19, which was the
9 date of Exhibit 16, the fax from Mr. Stack,
10 did you have any communications, verbal or
11 otherwise, with Jeffrey Stack or anyone in
12 his company regarding sealing and cleaning
13 pavers?

14 A No.

15 Q So at the time this October 13
16 invoice was submitted, JSI was already
17 2 months in arrears, were they not?

18 A Correct.

19 Q Let me direct your attention to
20 Exhibit 19. Did you recall receiving that,
21 sir?

22 A Yes, I did.

1 Q Did you respond the same day?

2 A The same day I received it.

3 Q Let me direct attention to
4 Exhibit 20. Is that your response?

5 A It is.

6 Q Does it set forth your position
7 with respect to the items that apparently
8 pertain to your company?

9 A It does.

10 Q Had you ever changed your
11 position, as stated in Exhibit 20, as to the
12 damaged pavers or to the requirement of you
13 having to seal them?

14 A It's been consistent.

15 Q Let me direct your attention
16 just --

17 THE COURT: Are you moving 19 and
18 20?

19 MR. BUSMAN: Yes, I am, Your
20 Honor.

21 THE COURT: Any objection?

22 MR. FELICE: No objection, Your

1 Honor.

2 THE COURT: Okay. Nineteen and
3 twenty are admitted.

4 MR. BUSMAN: All right. Thank
5 you, Judge.

6 (Plaintiff's Exhibit Nos. 19 and
7 20 were marked for
8 identification and received in
9 evidence.)

10 BY MR. BUSMAN:

11 Q Let me just direct your attention
12 to the reference to the epoxy in the fifth
13 line down of Exhibit 20. Tell us what that
14 has to do with. Why is that relevant?

15 A It's my understanding, originally,
16 that the concrete slab was to have anchor
17 bolts protruding from the concrete slab that
18 JSI installed, and modification was made to
19 that design prior to us placing the brick.
20 And we installed the brick, and after our
21 brick was completed, they took and
22 hammer-drilled holes into the brick work to

1 install leg shields so they can bolt the
2 park benches and picnic tables in place.

3 Q Those bolts, are they also known
4 as anchor bolts?

5 A Anchor bolts and --

6 Q How are they affixed to the brick
7 work?

8 A They had affixed them with epoxy.

9 Q You heard Mr. Lenz testify that if
10 mortar was spilled on brick -- I'm going to
11 summarize -- it doesn't dry for quite a
12 while and you have time to sweep it away.

13 A Correct.

14 Q What about epoxy?

15 A Epoxy is fast-drying and
16 impervious to any wash-off. It's epoxy.
17 That is what epoxy is.

18 Q Epoxy. Would you say it's also
19 sticky and --

20 MR. FELICE: Objection, Your
21 Honor.

22 THE COURT: I think it's

1 cumulative. Sustained.

2 MR. BUSMAN: Okay.

3 BY MR. BUSMAN:

4 Q Had excess mortar of the Portland
5 cement variety been spilled on bricks, was
6 it your company's policy and did you
7 instruct your workers to sweep it off?

8 A Yes, they would routinely clean
9 it. Portland can be cleaned in many ways.

10 Q What about epoxy? Once that's
11 spilled and hardens on brick. What can you
12 do with that?

13 A Short of grinding it off, but then
14 you would destroy the surface of the brick.

15 Q Okay.

16 MR. BUSMAN: I move 20, Your
17 Honor.

18 THE COURT: Any objection to 20?

19 MR. FELICE: No objection, Your
20 Honor.

21 THE COURT: All right. Twenty is
22 admitted.

1 BY MR. BUSMAN:

2 Q Let me direct your attention to

3 21. It's already admitted, I believe.

4 Do you recognize this exhibit?

5 A I do.

6 Q Let me direct your attention to

7 the third page of it, the schedules of

8 accounts, so to speak.

9 Did you receive that, sir?

10 A I did.

11 Q What, if any, portion of it do you

12 believe to be correct and accurate?

13 A The only thing that was accurate

14 on that entire page that I can recall was,

15 the payments issued, \$70,486 to date, was

16 correct.

17 Q Take a look at the top, where it

18 says "total calculated." The line item for

19 brick pavers, is that accurate, sir?

20 A No.

21 Q Why is it not accurate?

22 A Well, first, it's transposed.

1 But, secondly, the brick that I installed
2 was approximately 600 square feet greater
3 than that.

4 Q Take a look at the second line
5 item. That would be benches and tables.
6 Why is that?

7 A The line of the quantity is
8 transposed, and that was not the agreed-upon
9 amount for my proposal and invoicing.

10 Q You invoiced on Exhibit 34. Is it
11 your testimony that that was the correct
12 amount, the price for that line item?

13 A It was correct.

14 Q Is it your testimony also that JSI
15 paid that?

16 A Yes, they did.

17 Q Take a look at the third item, the
18 signs. Is that accurate?

19 A That is accurate.

20 Q Now, go down to where it says
21 "less charges to vendors." The first item,
22 clean and seal bricks, why is that not

1 accurate?

2 A I was not responsible to seal the
3 brick.

4 Q Take a look at the second item,
5 additional brick charge.

6 A I don't know what that pertained
7 to.

8 Q Take a look at the third item,
9 sand charge.

10 A We provided sand.

11 Q How much?

12 A I know at one time, we provided
13 approximately half. We used their sand for
14 the east park benches, but we provided the
15 sand for the west park benches.

16 Q You've seen the calculations for
17 the sand?

18 A I have.

19 Q Except for the last line, which
20 says "Gelles use of one half sand," is the
21 calculation down to the total charge,
22 assuming that you'd take 2.2 cubic yards per

1 ton, would that be correct at \$328.16 for
2 the entire sand?

3 A Precisely accurate.

4 Q It's your testimony that you
5 provided half of that?

6 A That's correct.

7 Q But you do admit that you owe
8 credit for the other half?

9 A I do.

10 THE COURT: Is this Exhibit 36?

11 MR. BUSMAN: I beg your pardon,
12 Your Honor?

13 THE COURT: Are you moving this?

14 MR. BUSMAN: I thought it was more
15 like a demonstrative exhibit, Your Honor.

16 THE COURT: All right.

17 MR. BUSMAN: It's a calculation
18 that could have been done on a blackboard.
19 I just made sheets --

20 THE COURT: I understand.
21 Proceed.

22 MR. BUSMAN: Thank you.

1 BY MR. BUSMAN:

2 Q Let me direct your attention to
3 Exhibit 22, which has already been admitted.
4 Was that your response to Exhibit 21, sir?

5 A It is.

6 Q Did it accurately set forth your
7 position?

8 A It does.

9 Q Let me direct your attention now
10 to Exhibit 23. Did you receive that
11 exhibit, sir, 23A and 23B?

12 A Yes, I did.

13 Q Do you know approximately when you
14 received it?

15 A It didn't come via fax. It was by
16 first class mail, and I don't --

17 Q Within a matter of days after
18 December 13? Would that be accurate?

19 A I would say some time in the
20 middle of December. It would be the middle
21 of December.

22 Q When you received Exhibit 23A,

1 what was your impression? What were your
2 conclusions?

3 MR. FELICE: Objection, Your
4 Honor. Your Honor, that's irrelevant.
5 Currently under the state of the law, under
6 83-8.3A, 311, Your Honor, that the --

7 THE COURT: I understand, but I
8 think you asked the same question on your
9 side, and I allowed him to answer it. So
10 I've overruled the objection.

11 MR. BUSMAN: Thank you.

12 BY MR. BUSMAN:

13 Q When you received that, what was
14 your conclusions or your impressions?

15 A That the \$13,580 was voluntarily
16 what Mr. Stack was going to pay, and I'd
17 have to sue him for the rest.

18 Q Let me ask you this. In your
19 experience, tell us how frequently you
20 encounter situations in which you have a
21 payment disagreement with a contractor and
22 you receive a payment with no language that

1 states "in full," "in complete
2 satisfaction," "accordance satisfaction," or
3 similar words of that sort. How often does
4 that happen?

5 MR. FELICE: Objection.
6 Relevance, Your Honor.

7 THE COURT: Sustained.

8 BY MR. BUSMAN:

9 Q Let me ask you this, sir. Did you
10 interpret this letter to be an offer of
11 compromise or settlement?

12 A Negative.

13 Q Did you treat it as if it were an
14 offer of compromise or settlement?

15 A Negative.

16 Q Did you have any verbal
17 communications or other written
18 communications with Jeffrey Stack or any one
19 at JSI from the period of December 8, the
20 date of the fax from Dave Kensler, through
21 the date you cashed the check?

22 A Negative.

1 Q Did there come a time that you
2 retained the firm of Busman & Busman to seek
3 recovery on the remainder of the remainder
4 on the contract?

5 A That is true.

6 Q I direct your attention to
7 Exhibit 24. Did you request that that law
8 firm take action to recover the remaining
9 balance?

10 A The remaining balance, yes.

11 Q \$26,175 is not the correct
12 balance, is it?

13 A That is not -- was not the
14 remaining balance at that point in time.

15 Q What should it have been?

16 A I left my notes at the --

17 Q Well, let's work it out.

18 THE COURT: Twenty-six minus
19 thirteen.

20 MR. BUSMAN: Exactly.

21 THE WITNESS: Yeah. \$12,000 or
22 something.

1 BY MR. BUSMAN:

2 Q Did you get a copy of this
3 Exhibit 24?

4 A Yes.

5 MR. BUSMAN: I would move the
6 admission of Exhibit 24, Your Honor.

7 MR. FELICE: I object, Your Honor.
8 It's irrelevant. The ---- after tendering
9 his check, it's irrelevant ----.

10 MR. BUSMAN: Your Honor, his own
11 witness -- I didn't move it into admission
12 at that time, but Mr. Stack identified
13 Exhibit 24 saying he received it.

14 THE COURT: What's the relevance?
15 What's the relevance?

16 MR. BUSMAN: The relevance is,
17 Your Honor, that if they, in fact, had made
18 a -- had an agreement for accordance
19 satisfaction, then a demand for the
20 remaining balance is inconsistent with that
21 agreement. And I think the law would impose
22 a duty on the party who wants to enforce the

1 agreement to notify the other party that you
2 are incorrect; that we have an agreement to
3 settle this, and you have no right to make
4 that demand.

5 THE COURT: I sustain the
6 objection.

7 BY MR. BUSMAN:

8 Q Let me direct your attention now
9 to Exhibit 25. Did you receive a copy of
10 this, sir?

11 A I did.

12 Q Let me take you back, if you
13 would, please, to Exhibit 23A. Take a look
14 at the last line, the last sentence of the
15 next to the last paragraph, which begins,
16 "Enclosed."

17 How many contracts did your
18 company have with JSI?

19 A Five.

20 Q Would you tell the Court what they
21 are?

22 A Well, the general pavers, the two

1 entry monuments --

2 Q Wait a second. The general
3 pavers, was that the first contract?

4 A That was the first contract.

5 Q What was the next one?

6 A The entry monuments.

7 Q The signs?

8 A The two entry monuments. The
9 third would be the 50 park benches and the
10 15 picnic tables. The fourth would be the
11 supply of concrete on their behalf, to pour
12 some concrete.

13 Q Exhibit 31, I think.

14 A Correct. And the last being --

15 Q Thirty, rather.

16 A Thirty. And the last being the
17 repair of washout damage that Bill Teague
18 instructed me to do.

19 Q Still in Exhibit 31? Is that --

20 A Correct.

21 Q When you read that line, did you
22 know which contract Mr. Stack was

1 addressing?

2 A Negative.

3 Q You know what the total amount
4 your company billed JSI?

5 A It's reflected on all of the
6 invoices: 27 -- 28 through 35. \$96,000.

7 Q Your Honor, I would represent to
8 the Court that if you don't count the
9 credits, just the total amounts of the bill
10 from Exhibit 28 to 35, I came up with
11 \$96,643.

12 A That's correct.

13 THE COURT: All right.

14 BY MR. BUSMAN:

15 Q You do believe that a credit is
16 due, though, for at least half of the sand?

17 A I think that would be fair.

18 MR. BUSMAN: That concludes our
19 case in chief.

20 THE COURT: All right.

21 CROSS-EXAMINATION

22 BY MR. FELICE:

1 Q Good afternoon, Mr. Gelles. Andy
2 Felice; I'm with ----.

3 I'm a little bit confused about
4 this contract issue. From the motion for
5 judgment in this case that you filed, you
6 indicated in paragraph 1 that "On or about
7 May 20, Defendant Jeffrey Stack, the
8 president of JSI Paving, requested the
9 Plaintiff to perform certain installation
10 and construction services. Pursuant to the
11 terms of the oral contract by and between
12 the parties, JSI had agreed to pay \$91,932
13 to the Plaintiff for such labor and services
14 and for installation of the brick" and
15 whatnot.

16 I understand that you've updated
17 the accounting a little bit, so you've
18 actually performed \$96,000 worth of work on
19 this?

20 A I've always performed \$96,000.
21 That's reflected on the invoice.

22 THE COURT: I don't think you have

1 to belabor this point very much. Let's move
2 on.

3 MR. FELICE: Why don't we move to
4 reform the pleadings to the evidence, Your
5 Honor.

6 THE COURT: Well, this isn't the
7 trial on the merits. This is a plea in bar.

8 BY MR. FELICE:

9 Q Let's go right to Exhibit 23A,
10 23B. From your testifying, I took from it
11 that you definitely saw the word "final
12 payment" on the contract that's included in
13 the fourth paragraph. JSI gave you
14 instructions to identify final amounts as
15 stated on its latest correspondence, dated
16 December 8, 2000. "Enclosed, please find a
17 check in the amount of \$13,580 representing
18 final payment of the contract."

19 You read that on or about
20 December 13, after receiving this letter and
21 the check; isn't that correct?

22 A It would be the middle of

1 December. It was dated the 13th, and he
2 mailed it. But, yes, I did read it.

3 Q So you did read it. And with 25
4 years in the business you have a firm
5 appreciation of what's a progress payment,
6 what's a partial payment, and what's a final
7 payment; isn't that correct?

8 A Well, they differ. Okay. Yes.

9 Q You do, do you not?

10 A Yeah.

11 Q When a contractor who you have
12 contracted to do work for says "Here's your
13 final payment," you understand the
14 ramifications of what the final payment is?

15 A No.

16 MR. BUSMAN: Objection. Lack of
17 foundation, Your Honor. I don't know what
18 he intends --

19 THE COURT: Overruled.

20 BY MR. FELICE:

21 Q Do you say you do not?

22 A It didn't specify which contract

1 this was to be applied towards. I had to do
2 my own accounting. They never paid a single
3 invoice in full.

4 Q Isn't it a fact, after receiving
5 this money, you deposited it in your
6 account, cashed the check, and received the
7 funds for \$13,580?

8 A I did cash the check.

9 Q Unlike your previous practice, you
10 never wrote them back and said, "Thank you
11 for your payment; I'm applying it to this
12 invoice or that invoice," isn't that
13 correct?

14 A That is correct.

15 Q In September, the issue about the
16 brick pavers being sealed or not sealed came
17 to light; isn't that correct?

18 A Correct. It did in September.

19 Q It came to light as a result of
20 the punch list that was issued by the City.
21 Isn't that correct?

22 A What exhibit would that be?

1 Q Well, let me show Exhibit --

2 THE COURT: It was the Dewberry
3 and Davis first punch list.

4 THE WITNESS: Okay. That was the
5 first time.

6 BY MR. FELICE:

7 Q That was the first time. So in
8 September, you now learned that Mr. Stack
9 was under the assumption or belief that
10 sealing the pavement was within your scope
11 of work?

12 MR. BUSMAN: Objection, Your
13 Honor. If you're looking at Exhibit 15B --

14 THE COURT: What's the ground of
15 the objection?

16 MR. BUSMAN: I'm sorry, Your
17 Honor?

18 THE COURT: What's the ground of
19 the objection?

20 MR. BUSMAN: That assumes facts
21 not into evidence already. He's assuming
22 that JSI was saying at the time that the

1 punch list was delivered that he was
2 obligated. That one did not come until the
3 next letter, which was the 19th of September
4 or several days later.

5 THE COURT: It sounds like a
6 speaking objection to me. I overrule it.

7 MR. BUSMAN: I'm sorry, Your
8 Honor.

9 MR. FELICE: Thank you, Your
10 Honor.

11 BY MR. FELICE:

12 Q So as of September 19, you at
13 least knew that Mr. Stack, the person with
14 whom you had negotiated the contract with,
15 had a different opinion as to what your
16 scope of work was regarding the pavers.
17 That's Exhibits 16A and 16B, to help you
18 along. Is that correct?

19 A That's correct.

20 Q That's a fair statement? And you
21 indicated that when you came out to look at
22 the job with Mr. Stack, he had showed you

1 some plans pertaining to your work; isn't
2 that correct?

3 A Yes. There were maybe 75 pages.

4 Q You're the person in your company
5 who negotiates contracts with contractors
6 like Mr. Stack; is that correct?

7 A That's correct.

8 Q Part of your responsibility is to
9 find out the scope of work that the general
10 contractor intends for you to take on that
11 particular job; isn't that correct?

12 A I think he described that scope of
13 work to me.

14 Q That scope of work included
15 concrete pavers; isn't that correct?

16 A Installation of pavers he had on
17 site.

18 Q You readily admit that there was a
19 full set of plans on site, at least it
20 appeared to you?

21 A In his construction trailer, he
22 had a whole set of plans. I don't know if

1 every page was in there, but it was a huge
2 set of plans.

3 Q You do not agree that you received
4 a full set of plans?

5 A I did not get a full set of plans.

6 Q Do you also do not agree that you
7 never received a specification book like
8 this?

9 A I don't even know that I've seen
10 their specification book.

11 Q With regard to scoping out your
12 work, your responsibility is to find out
13 what truly needed to be done. You readily
14 admit, do you not, that on a job for the
15 City of Alexandria, all the work has got to
16 performed to the plan specifications?

17 A I was only working for Mr. Stack.
18 I wasn't working for the City of Alexandria.

19 Q So even though it was the City of
20 Alexandria job, you didn't understand your
21 work to have to conform to some City of
22 Alexandria standards?

1 MR. BUSMAN: Objection. Asked and
2 answered.

3 THE COURT: Overruled.

4 BY MR. FELICE:

5 Q Isn't that right?

6 A All I had to do was install the
7 brick per his direction.

8 Q Would the paving details be
9 something that you would normally look at to
10 determine whether items were within your
11 scope of work or not?

12 A If I were supplying all material
13 and labor, yes. But I was only supplying
14 labor.

15 Q For instance, the edging on this
16 particular project, the pavement details on
17 that one sheet, PV 1, shows the type of, as
18 you were saying, strengths, and indicates
19 how --

20 A This is PV 1?

21 Q Let me go back. Exhibit 4 and 5,
22 the large sheets, sir, that you're familiar

1 with, are you not?

2 A Yes, uh-huh.

3 Q Those do not give a pattern,
4 herringbone pattern, which way the
5 herringbone pattern run --

6 MR. BUSMAN: Objection.

7 THE COURT: Is there going to be a
8 course for this?

9 THE WITNESS: Yeah. They give all
10 the details. It says "herringbone pattern,
11 solder course, double accent band." I mean,
12 it clearly shows you through the whole plan.
13 It gives all of the handicapped details.

14 BY MR. FELICE:

15 Q Where on this document does it
16 show the edging and how the edging is
17 supposed to be installed?

18 A Down here in this corner. They
19 didn't install steel edging. He only
20 provided plastic edging.

21 Q Okay. September, there's an issue
22 in dispute over sealing of the bricks. You,

1 then, responded, I think, to what is
2 Exhibit 17, if you could take a look at that
3 document.

4 See that document, sir?

5 A I do.

6 Q Mr. Stack had raised with you,
7 prior to the September time frame, whether
8 the measurements that you had been billing
9 him on were accurate; isn't that correct?

10 A He telephoned and said he would
11 like to walk the job sometime to measure it
12 all up.

13 Q Let me direct your attention to
14 Plaintiff's Exhibit 8 in your packet there.
15 You see that reference on the bottom?

16 A Yes.

17 Q "We will have to meet outside to
18 measure those tiles together, as I had a
19 total of 5,845 square feet." Did you
20 ever --

21 A Well, that's what I billed him for
22 on Exhibit 35, 5,845 square feet.

1 Q Did you ever have an opportunity
2 to go out there and measure any of your work
3 with Mr. Stack?

4 A I did not measure with Mr. Stack.
5 I measured it myself. I'm the one that made
6 the invoices.

7 Q Later, Mr. Stack again raised the
8 issue about whether the measurements were
9 accurate; isn't that correct?

10 A At some point after that time, as
11 I said.

12 Q You sent out Randy to --

13 A To accompany Mr. Lenz.

14 Q He in fact went out there and
15 measured the work in place; did he not?

16 A He did.

17 Q Are you disputing Mr. Stack's
18 measurement of 15,175 square feet?

19 I didn't hear that.

20 A I dispute his measurement of
21 15,175 square feet.

22 Q As early as July, in Defendants'

1 Exhibit 8, Mr. Stack is raising the issue
2 about whether your billing is going to be
3 accurate.

4 MR. BUSMAN: Objection, Your
5 Honor. Asked and answered.

6 THE COURT: Sustained.

7 BY MR. FELICE:

8 Q Let me move on, then.

9 Exhibit 21, the letter that you
10 received from Mr. Kensser with the schedule
11 of accounts, prior to receiving this letter,
12 you knew that at that point, JSI wanted you
13 to reduce your invoice, I understand it was,
14 \$26 some-odd thousands, to reflect the
15 number of \$13,058. Is that fair?

16 A I would assume that.

17 Q Was that your understanding when
18 you read this letter?

19 A Well, they were reducing my
20 invoices.

21 Q Between the December 8 letter, you
22 then faxed to Mr. Stack your December 11

1 letter, which is Exhibit No. 22,
2 Plaintiff's 22.

3 A One would most likely receive that
4 on December 11, the December 8 letter.
5 That's why I responded promptly.

6 Q In this letter, you don't mention
7 any credit due for sand; isn't that correct?

8 A That is correct.

9 Q You indicated to Mr. Busman's
10 questions that the measurement that he
11 showed you was precisely accurate, if you
12 remember?

13 A The calculation is for 1 inch of
14 sand.

15 Q Is it your testimony that
16 everywhere you put 1 inch of sand? No more,
17 no less?

18 A It was what was specified on
19 Exhibit 2.

20 Q Do you know whether the job was
21 running at the 1-inch level, or was it at
22 2 inches or 3 inches?

1 Resources billed \$7,700.

2 Strategic Resources did not
3 believe that money was owed. Wrote back a
4 letter, which says -- I will give you the
5 exact quote -- "This check covers all
6 approved hours and expenses for all projects
7 per our discussion. This will now settle
8 your account with SRI." Coty wrote -- and
9 that was what the debtor wrote.

10 In the case of Coty, Coty wrote on
11 the front of his check, "Accepted as partial
12 payment, balance due \$34.50, for deposit
13 only." He wrote, "Accept this partial
14 payment," Your Honor.

15 So this case went was decided on a
16 summary judgement in the General District
17 Court here in Fairfax. It was appealed.
18 The appeal was only based upon the grounds
19 of the attorney's fees that the General
20 District Court awarded on an indemnification
21 clause. It is illustrative, Your Honor. I
22 know it's picked up. But it is illustrative

1 of the fact that there doesn't need to be
2 full satisfaction; words of this document
3 waives all your legal rights. In this case,
4 the General District Court stated, or at
5 least held, that "this settles your account"
6 is enough. Oddly enough, the defense said
7 the attorney fees were too much, because
8 this was an issue that should have been
9 decided with less attorney fees, Your Honor.

10 There are a number of cases from
11 other jurisdictions, Your Honor, and I would
12 submit them to the Court for the Court to
13 read, which basically hold that it doesn't
14 even have to say "final payment" in order
15 for it to be a final payment check. As long
16 as it is clear and conspicuous that the
17 money is being offered to the effect to
18 settle the dispute, it is sufficient.

19 The second problem which I believe
20 Mr. Busman will argue is, it's not a bona
21 fide dispute, Your Honor. Your Honor, if I
22 could cite to a case -- I'll provide it to

..

1 you -- also regarding a bona fide dispute,
2 Virginia has not reached this issue. But
3 "Black's Law Dictionary" defines bona fide
4 "in or with good faith, honestly, openly and
5 sincerely without deceit or fraud." The
6 Maryland Court of Appeals says, "All
7 definitions are articulated by courts focus
8 mainly on whether the party making or
9 resisting a claim has a good faith basis for
10 doing so, whether there is a legitimate
11 dispute over the validity of the claim, or
12 the amount that is owed."

13 In the context of an accordance
14 satisfaction under 833.11, under the UCC,
15 there is a case out of the Supreme Court of
16 Utah which basically says that a bona fide
17 dispute is when there is a good faith
18 disagreement over the amount due under the
19 contract.

20 Clearly, we're dealing with an
21 oral contract on a large project where there
22 is a dispute over the scope of work, where

1 there's a dispute over whether work was
2 damaged by one party or another party,
3 whether the bill was correct. Those were
4 clearly in dispute and in place for a good
5 part of this undertaking.

6 On December 13, Mr. Stack wrote,
7 we stand by our final accounts, here's final
8 payment. At that point, with the words of
9 White and Summers, Mr. Gelles is in the
10 exquisite dilemma. He has a check that's
11 been communicated to him. Clearly, that's
12 final payment on the contract. He
13 understands what final payment on the
14 contract is. It means that there will be no
15 further payments at all; that his acceptance
16 of that check relinquishes his rights to
17 come after him for further payment, Your
18 Honor. One thing the code since 1993 has
19 told us is that you cannot take the check
20 and then sue for the balance. You must
21 return the check.

22 The question is whether Mr. Stack

1 is required to inform Mr. Gelles that he
2 ought to return the check within 90 days.
3 The code doesn't say that. We are not here
4 to help or to save Mr. Gelles from the code.
5 Mr. Stack proceeded. He should draw the
6 benefit and the protection of the code.

7 THE COURT: All right.

8 MR. BUSMAN: Your Honor, in the
9 interim, since we filed the grievance, my
10 associate had come across something, and I
11 apologize for not bringing it to you
12 earlier. And again, it doesn't answer the
13 question, should he have known or shouldn't
14 have known, but it talks to the words "final
15 payment." It's a South Carolina case, and
16 the last page is where the Court makes the
17 determination, on page 794, after discussing
18 the law.

19 And I'm going to quote the last
20 words: "Accepting a check that bears the
21 words 'final payment' or similar phrases
22 does not constitute an accordance

1 satisfaction as a matter of law."

2 Now, the facts are entirely
3 different. But again, the check had the
4 words "final payment." Counsel seems to
5 dwell on the fact that Mr. Gelles should
6 have known that "final payment" meant, "I
7 offer this to you in final payment. If you
8 accept it, then you have no right to come
9 back after me."

10 That's not what the letter said.
11 And you heard both sides say there were no
12 verbal communications. All there was was
13 Exhibit 21, the 12/8 memo from Dave Kensser;
14 Mr. Gelles's reply, where he reiterates his
15 position; and then the December 13 letter
16 and the check.

17 Mr. Gelles testified, Your Honor,
18 that he interpreted it to mean, this is all
19 I'm going to give you; sue me if you want
20 the balance.

21 THE COURT: This opinion doesn't
22 even mention the UCC.

1 MR. BUSMAN: I beg your pardon?

2 THE COURT: This opinion doesn't
3 even mention UCC.

4 MR. BUSMAN: I understand that,
5 Your Honor. But I would submit that, again,
6 the words have to be such that a person of
7 reasonable intelligence in the trade
8 interprets them to be a offer of compromise.

9 And there are three grounds upon
10 which we believe that counsel's motion must
11 fail. First of all, it has got to be not
12 only understood, but agreed that the
13 acceptance of the check is a compromise
14 settlement of or an accord and satisfaction.
15 There is, I would submit, at the very least
16 considerable ambiguity. What contracts are
17 talking about? Is this the general paver
18 contract? I mean, because the amount of
19 money falls within the realm. Could this be
20 the sign contract? Could this be the park
21 bench and table contract?

22 THE COURT: I don't really accept

1 Mr. Gelles's testimony that there were five
2 contracts. He sues under one contract. He
3 sends out a response to the proposal to
4 reduce his contract and lists the project as
5 Cameron Station East and West Park, and he
6 doesn't mention anything about the five
7 contracts. I just don't accept that
8 testimony. I think that's an attempt to
9 perhaps avoid accordance satisfaction.

10 MR. BUSMAN: Well, secondly, Your
11 Honor, we don't think that this was tendered
12 in good faith. You've heard the testimony
13 back and forth about the damage to these
14 bricks. Mr. Stack admitted that his
15 employees used epoxy to glue the bolt.
16 That's what damaged those bricks. Mortar
17 takes so long to dry, you can brush it off.
18 These bricks were not damaged by mortar. So
19 any charge for cleaning or replacing bricks
20 was not the responsibility of Mr. Gelles.

21 Your Honor, let me also address --

22 THE COURT: Well, Mr. Stack

1 testified it wasn't just around the benches.
2 There were large areas in excess of
3 25 square feet that needed to be cleaned.

4 MR. BUSMAN: But, again, Your
5 Honor, if it's mortar that has been left on
6 there, that is easily swept away, whereas
7 epoxy is not. And epoxy was used, Your
8 Honor.

9 Secondly, the sealing, whether or
10 not -- if you accept Mr. Stack's version, on
11 the very day he meets with Gelles, throws
12 down this great big 75 page, whatever,
13 packet of plans and specs. Mr. Gelles
14 agrees to do what he tells him to do orally.
15 There was a substantial difference of
16 opinion as to whether the plans and specs
17 were given. There's also a substantial
18 difference as to whether that specific
19 detail on the pavers was provided on the day
20 the oral agreement was made.

21 THE COURT: Well, I accept
22 Mr. Gelles's testimony that usually pavers

1 aren't sealed. I mean, he's dealing with
2 the City of Alexandria. We all know the
3 government sometimes demands things that
4 nobody else demands. And he's got a set of
5 plans that's that thick, and he's
6 undertaking paving, and his foreman says
7 that he knew what was in the plans, or he
8 had access to the plans and looked at them
9 from time to time.

10 I'm not saying that in a lawsuit
11 JSI would prevail on that. But I certainly
12 can't find myself saying that that's not a
13 bona fide dispute under --

14 MR. BUSMAN: Your Honor, the
15 contract is what the parties agreed upon.
16 This is a verbal contract.

17 I would submit, Your Honor, that
18 there would be testimony is just not
19 credible on the fact that that particular
20 detail, that requirement -- what difference
21 does it make if it's the City of Alexandria
22 or the federal government, Your Honor? If

1 he is dealing with this gentleman, it's this
2 gentleman's responsibility --

3 THE COURT: Well, but they knew it
4 was a city contract, and they knew the plans
5 were there, and they said they were going to
6 do it in accordance with the plans. And it
7 was in the plans.

8 MR. BUSMAN: That's not what this
9 witness said. He said he was going to do
10 what Jeffrey Stack told him to do, Your
11 Honor. That's what his testimony was.

12 THE COURT: Jeffrey Stack told him
13 to seal it.

14 MR. BUSMAN: He told him to seal
15 it after the work was done.

16 THE COURT: I'm not saying,
17 necessarily, that if this matter was a
18 trial, if this was a trial today, that one
19 side or the other would prevail on this
20 issue. I think that the only question is
21 whether it is a bona fide bone of
22 contention.

1 MR. BUSMAN: That's exactly my
2 point, Your Honor. And if I could, let me
3 direct your attention to Exhibit 15B.

4 In 15B, items 10 and 11, written
5 on there in Mr. Stack's handwriting, he has
6 identified parties other than Gelles being
7 responsible for cleaning and sealing pavers
8 and removing concrete splash from pavers
9 prior to sealing. Now, I'll admit that in
10 item 15, there is a reference to cleaning
11 the pavers. But the main thrust is repair
12 and sand to gazebo pavers.

13 So my point is, Your Honor, that
14 up until September 19, Mr. Gelles had no
15 knowledge that that was a requirement. And
16 Mr. Stack, in his own handwritten notes,
17 identified people other than Gelles as
18 responsible for the cleaning and the
19 sealing. He finds out later, when the City
20 does the punch list, says "Uh-oh, I should
21 have had somebody else to do it." That is
22 like maintaining that Gelles —— is not

1 made in good faith. He knew it was not
2 Gelles's responsibility, and trying to
3 impose it after the fact.

4 The sand charge, Your Honor. You
5 have heard 183. We went through a
6 calculation to show even if Gelles made a
7 mistake and did not give him the credit,
8 we're talking an error of \$100 or \$200 or
9 \$300, not \$1,000.

10 I would submit, Your Honor, that
11 in order to be construed as an offer in good
12 faith, Exhibit 21, the accounting, would
13 have to have appropriate charges. On the
14 benches and table charges, there's an entry
15 of \$15,000. Exhibit Defense 5, Mr. Gelles
16 stated he never got, never received that.
17 As far as he knew, the price of his written
18 proposal was accepted. So instead of
19 \$16,468, I believe, it's that amount. You
20 heard Mr. Gelles testify, and Mr. Stack did
21 not rebut the fact that that exact amount
22 was paid on Exhibit 34.

1 THE COURT: Well, Mr. Gelles also
2 just testified he's never paid a single
3 invoice in full. So, I mean, where does
4 that leave the Court? I mean, he says on
5 the one hand it was paid exactly, and then
6 he testified that never a single invoice was
7 paid in full. So, I mean, I'm not left with
8 his credibility in either statement.

9 MR. BUSMAN: We go down further.
10 He charges to the vendors the cleaning and
11 sealing and all these other things. We
12 submit that this was not provided to
13 Mr. Gelles in good faith. So I don't think,
14 first of all, that it was shown that it was
15 understood and agreed to be offered as a
16 compromise. Secondly, I don't think it's
17 been showed that it was attempted in good
18 faith. And, thirdly, Your Honor, I don't
19 think that that complies with the
20 requirement to be conspicuous. And the code
21 does provide a definition for conspicuous.
22 You read it out. It's in 8.120110.

1 THE COURT: Okay.

2 MR. BUSMAN: I submit, Your Honor,
3 that the words "final payment on account" do
4 not imply that it was intended as a final
5 compromised settlement. The case that
6 counsel read, the Coty case, has the word --

7 THE COURT: But Mr. Felice asked
8 Mr. Gelles whether he was familiar as a
9 contractor with the concept of partial
10 payment, progress payment, final payment.
11 And he said yes.

12 MR. BUSMAN: But he did not
13 elaborate that final payment was implied as
14 a compromise. There's no other one.
15 Counsel has not submitted any other
16 authority or any other statute to establish
17 that.

18 We submit, Your Honor, that his
19 own authority, the Coty case, talks in terms
20 of, "This will now settle your account with
21 SRI." I will submit, Your Honor, there is a
22 sea change of difference between these and

1 the words "settling your account" and "final
2 payment on the contract."

3 THE COURT: Well, what else could
4 "final payment" mean?

5 MR. BUSMAN: That's all I'm going
6 to give you; sue me if you don't like it.

7 I mean, Your Honor, I could
8 represent to you, I do a lot of commercial
9 collection cases, and clients tell me that
10 all the time. They may say, "I got this
11 check of payment, and the guy says, 'If you
12 don't like it, sue me.'" The popular media
13 has that constantly. You can see shows on
14 TV where someone goes and says, "If you
15 don't like it, sue me." I think that it's
16 perfectly reasonable that a person of
17 reasonable intelligence could have
18 interpreted that language to mean just that.
19 "That's all I'm going to give you. You
20 don't like it, sue me."

21 I think the code requires and the
22 case law says the burden is on the party

1 A I don't know.

2 Q But the fact remains, as of
3 December, now, 11th, you haven't shown any
4 credit for the sand. You know that there's
5 a credit due; isn't that correct?

6 A I think you're missing the point
7 that this only relative to the park benches
8 and picnic tables. Mr. Stack supplied the
9 sand for 95 percent of the job under his
10 scope of work.

11 Q Isn't it correct that at this
12 time, Mr. Stack or JSI has informed you we
13 have certain deductions, specified on
14 December 8th, to your contract amount.
15 Please adjust your contract. And you wrote
16 back, "I do not accept or acknowledge any
17 deductions from my previously submitted
18 invoices."

19 Isn't it a fact, as of this date,
20 there were no credits for sand showing on
21 any of those invoices?

22 A That is correct.

1 Q Isn't it a fact also that this
2 letter doesn't mention whether sand was
3 going to be given a credit at all by your
4 company?

5 A It does not.

6 Q Let me ask you a question. If the
7 check that you received on December 13, in
8 the memo portion, or right below your
9 endorsement, read "final payment on
10 contract," would you have understood it,
11 sir, to have been an attempt to resolve and
12 settle all disputes on this project?

13 A No.

14 MR. FELICE: I have no further
15 questions.

16 THE COURT: Redirect?

17 MR. BUSMAN: No redirect, Your
18 Honor.

19 THE COURT: Thank you, sir. You
20 can step down.

21 (Witness excused)

22 THE COURT: All right. Argument?

1 MR. FELICE: Yes, Your Honor.

2 Your Honor, the code, since 1993,
3 is very specific. Your Honor, our position
4 is clear and set out in the plea in bar, and
5 it is simply this.

6 The code provision provides an
7 accordane satisfaction defense. If, in
8 good faith, a debtor --

9 THE COURT: I've read your
10 memorandum. Do you have anything you wish
11 to add to that?

12 MR. FELICE: Yes, I do wish to,
13 Your Honor. I believe that Mr. Busman will
14 argue that there's some magic words that
15 need to be included to make this an
16 effective accordane satisfaction.

17 First of all, the conspicuous
18 nature of the language is clear. The
19 provision is whether the language ought to
20 be recognized. Because if it was
21 recognized, Your Honor, there are numerous
22 cases -- well, first of all, the code does

1 not specify specific language --

2 THE COURT: The term of clause is
3 conspicuous when it's so written that a
4 reasonable person against whom it is to
5 operate thought to have noticed it.

6 MR. FELICE: Your Honor, I believe
7 that it is conspicuous. Now, the language,
8 "final payment on contract," does that do
9 it? In our minds, it does, Your Honor.

10 I would like to draw the Court's
11 attention to a Supreme Court case that just
12 recently came out, a Virginia Supreme Court
13 case. I have a memo, Your Honor, on it, but
14 it's called *Coty* (phonetic) v. *Strategic*
15 *Resources*. May I approach?

16 THE COURT: Yes, sir.

17 MR. FELICE: Your Honor, this is a
18 June 11, 1999, case from the Virginia
19 Supreme Court. It started, coincidentally,
20 in the General District Court of Fairfax
21 County. It was a case in which a
22 consultant wrote a contract with Strategic

1 Resources billed \$7,700.

2 Strategic Resources did not
3 believe that money was owed. Wrote back a
4 letter, which says -- I will give you the
5 exact quote -- "This check covers all
6 approved hours and expenses for all projects
7 per our discussion. This will now settle
8 your account with SRI." Coty wrote -- and
9 that was what the debtor wrote.

10 In the case of Coty, Coty wrote on
11 the front of his check, "Accepted as partial
12 payment, balance due \$34.50, for deposit
13 only." He wrote, "Accept this partial
14 payment," Your Honor.

15 So this case went was decided on a
16 summary judgement in the General District
17 Court here in Fairfax. It was appealed.
18 The appeal was only based upon the grounds
19 of the attorney's fees that the General
20 District Court awarded on an indemnification
21 clause. It is illustrative, Your Honor. I
22 know it's picked up. But it is illustrative

1 of the fact that there doesn't need to be
2 full satisfaction; words of this document
3 waives all your legal rights. In this case,
4 the General District Court stated, or at
5 least held, that "this settles your account"
6 is enough. Oddly enough, the defense said
7 the attorney fees were too much, because
8 this was an issue that should have been
9 decided with less attorney fees, Your Honor.

10 There are a number of cases from
11 other jurisdictions, Your Honor, and I would
12 submit them to the Court for the Court to
13 read, which basically hold that it doesn't
14 even have to say "final payment" in order
15 for it to be a final payment check. As long
16 as it is clear and conspicuous that the
17 money is being offered to the effect to
18 settle the dispute, it is sufficient.

19 The second problem which I believe
20 Mr. Busman will argue is, it's not a bona
21 fide dispute, Your Honor. Your Honor, if I
22 could cite to a case -- I'll provide it to

1 you -- also regarding a bona fide dispute,
2 Virginia has not reached this issue. But
3 "Black's Law Dictionary" defines bona fide
4 "in or with good faith, honestly, openly and
5 sincerely without deceit or fraud." The
6 Maryland Court of Appeals says, "All
7 definitions are articulated by courts focus
8 mainly on whether the party making or
9 resisting a claim has a good faith basis for
10 doing so, whether there is a legitimate
11 dispute over the validity of the claim, or
12 the amount that is owed."

13 In the context of an accord and
14 satisfaction under 833.11, under the UCC,
15 there is a case out of the Supreme Court of
16 Utah which basically says that a bona fide
17 dispute is when there is a good faith
18 disagreement over the amount due under the
19 contract.

20 Clearly, we're dealing with an
21 oral contract on a large project where there
22 is a dispute over the scope of work, where

1 there's a dispute over whether work was
2 damaged by one party or another party,
3 whether the bill was correct. Those were
4 clearly in dispute and in place for a good
5 part of this undertaking.

6 On December 13, Mr. Stack wrote,
7 we stand by our final accounts, here's final
8 payment. At that point, with the words of
9 White and Summers, Mr. Gelles is in the
10 exquisite dilemma. He has a check that's
11 been communicated to him. Clearly, that's
12 final payment on the contract. He
13 understands what final payment on the
14 contract is. It means that there will be no
15 further payments at all; that his acceptance
16 of that check relinquishes his rights to
17 come after him for further payment, Your
18 Honor. One thing the code since 1993 has
19 told us is that you cannot take the check
20 and then sue for the balance. You must
21 return the check.

22 The question is whether Mr. Stack

1 is required to inform Mr. Gelles that he
2 ought to return the check within 90 days.
3 The code doesn't say that. We are not here
4 to help or to save Mr. Gelles from the code.
5 Mr. Stack proceeded. He should draw the
6 benefit and the protection of the code.

7 THE COURT: All right.

8 MR. BUSMAN: Your Honor, in the
9 interim, since we filed the grievance, my
10 associate had come across something, and I
11 apologize for not bringing it to you
12 earlier. And again, it doesn't answer the
13 question, should he have known or shouldn't
14 have known, but it talks to the words "final
15 payment." It's a South Carolina case, and
16 the last page is where the Court makes the
17 determination, on page 794, after discussing
18 the law.

19 And I'm going to quote the last
20 words: "Accepting a check that bears the
21 words 'final payment' or similar phrases
22 does not constitute an accordance

1 satisfaction as a matter of law."

2 Now, the facts are entirely
3 different. But again, the check had the
4 words "final payment." Counsel seems to
5 dwell on the fact that Mr. Gelles should
6 have known that "final payment" meant, "I
7 offer this to you in final payment. If you
8 accept it, then you have no right to come
9 back after me."

10 That's not what the letter said.
11 And you heard both sides say there were no
12 verbal communications. All there was was
13 Exhibit 21, the 12/8 memo from Dave Kensler;
14 Mr. Gelles's reply, where he reiterates his
15 position; and then the December 13 letter
16 and the check.

17 Mr. Gelles testified, Your Honor,
18 that he interpreted it to mean, this is all
19 I'm going to give you; sue me if you want
20 the balance.

21 THE COURT: This opinion doesn't
22 even mention the UCC.

1 MR. BUSMAN: I beg your pardon?

2 THE COURT: This opinion doesn't
3 even mention UCC.

4 MR. BUSMAN: I understand that,
5 Your Honor. But I would submit that, again,
6 the words have to be such that a person of
7 reasonable intelligence in the trade
8 interprets them to be a offer of compromise.

9 And there are three grounds upon
10 which we believe that counsel's motion must
11 fail. First of all, it has got to be not
12 only understood, but agreed that the
13 acceptance of the check is a compromise
14 settlement of or an accord and satisfaction.
15 There is, I would submit, at the very least
16 considerable ambiguity. What contracts are
17 talking about? Is this the general paver
18 contract? I mean, because the amount of
19 money falls within the realm. Could this be
20 the sign contract? Could this be the park
21 bench and table contract?

22 THE COURT: I don't really accept

1 Mr. Gelles's testimony that there were five
2 contracts. He sues under one contract. He
3 sends out a response to the proposal to
4 reduce his contract and lists the project as
5 Cameron Station East and West Park, and he
6 doesn't mention anything about the five
7 contracts. I just don't accept that
8 testimony. I think that's an attempt to
9 perhaps avoid accordance satisfaction.

10 MR. BUSMAN: Well, secondly, Your
11 Honor, we don't think that this was tendered
12 in good faith. You've heard the testimony
13 back and forth about the damage to these
14 bricks. Mr. Stack admitted that his
15 employees used epoxy to glue the bolt.
16 That's what damaged those bricks. Mortar
17 takes so long to dry, you can brush it off.
18 These bricks were not damaged by mortar. So
19 any charge for cleaning or replacing bricks
20 was not the responsibility of Mr. Gelles.

21 Your Honor, let me also address --

22 THE COURT: Well, Mr. Stack

1 testified it wasn't just around the benches.
2 There were large areas in excess of
3 25 square feet that needed to be cleaned.

4 MR. BUSMAN: But, again, Your
5 Honor, if it's mortar that has been left on
6 there, that is easily swept away, whereas
7 epoxy is not. And epoxy was used, Your
8 Honor.

9 Secondly, the sealing, whether or
10 not -- if you accept Mr. Stack's version, on
11 the very day he meets with Gelles, throws
12 down this great big 75 page, whatever,
13 packet of plans and specs. Mr. Gelles
14 agrees to do what he tells him to do orally.
15 There was a substantial difference of
16 opinion as to whether the plans and specs
17 were given. There's also a substantial
18 difference as to whether that specific
19 detail on the pavers was provided on the day
20 the oral agreement was made.

21 THE COURT: Well, I accept
22 Mr. Gelles's testimony that usually pavers

1 aren't sealed. I mean, he's dealing with
2 the City of Alexandria. We all know the
3 government sometimes demands things that
4 nobody else demands. And he's got a set of
5 plans that's that thick, and he's
6 undertaking paving, and his foreman says
7 that he knew what was in the plans, or he
8 had access to the plans and looked at them
9 from time to time.

10 I'm not saying that in a lawsuit
11 JSI would prevail on that. But I certainly
12 can't find myself saying that that's not a
13 bona fide dispute under --

14 MR. BUSMAN: Your Honor, the
15 contract is what the parties agreed upon.
16 This is a verbal contract.

17 I would submit, Your Honor, that
18 there would be testimony is just not
19 credible on the fact that that particular
20 detail, that requirement -- what difference
21 does it make if it's the City of Alexandria
22 or the federal government, Your Honor? If

1 he is dealing with this gentleman, it's this
2 gentleman's responsibility --

3 THE COURT: Well, but they knew it
4 was a city contract, and they knew the plans
5 were there, and they said they were going to
6 do it in accordance with the plans. And it
7 was in the plans.

8 MR. BUSMAN: That's not what this
9 witness said. He said he was going to do
10 what Jeffrey Stack told him to do, Your
11 Honor. That's what his testimony was.

12 THE COURT: Jeffrey Stack told him
13 to seal it.

14 MR. BUSMAN: He told him to seal
15 it after the work was done.

16 THE COURT: I'm not saying,
17 necessarily, that if this matter was a
18 trial, if this was a trial today, that one
19 side or the other would prevail on this
20 issue. I think that the only question is
21 whether it is a bona fide bone of
22 contention.

1 MR. BUSMAN: That's exactly my
2 point, Your Honor. And if I could, let me
3 direct your attention to Exhibit 15B.

4 In 15B, items 10 and 11, written
5 on there in Mr. Stack's handwriting, he has
6 identified parties other than Gelles being
7 responsible for cleaning and sealing pavers
8 and removing concrete splash from pavers
9 prior to sealing. Now, I'll admit that in
10 item 15, there is a reference to cleaning
11 the pavers. But the main thrust is repair
12 and sand to gazebo pavers.

13 So my point is, Your Honor, that
14 up until September 19, Mr. Gelles had no
15 knowledge that that was a requirement. And
16 Mr. Stack, in his own handwritten notes,
17 identified people other than Gelles as
18 responsible for the cleaning and the
19 sealing. He finds out later, when the City
20 does the punch list, says "Uh-oh, I should
21 have had somebody else to do it." That is
22 like maintaining that Gelles ---- is not

1 made in good faith. He knew it was not
2 Gelles's responsibility, and trying to
3 impose it after the fact.

4 The sand charge, Your Honor. You
5 have heard 183. We went through a
6 calculation to show even if Gelles made a
7 mistake and did not give him the credit,
8 we're talking an error of \$100 or \$200 or
9 \$300, not \$1,000.

10 I would submit, Your Honor, that
11 in order to be construed as an offer in good
12 faith, Exhibit 21, the accounting, would
13 have to have appropriate charges. On the
14 benches and table charges, there's an entry
15 of \$15,000. Exhibit Defense 5, Mr. Gelles
16 stated he never got, never received that.
17 As far as he knew, the price of his written
18 proposal was accepted. So instead of
19 \$16,468, I believe, it's that amount. You
20 heard Mr. Gelles testify, and Mr. Stack did
21 not rebut the fact that that exact amount
22 was paid on Exhibit 34.

1 THE COURT: Well, Mr. Gelles also
2 just testified he's never paid a single
3 invoice in full. So, I mean, where does
4 that leave the Court? I mean, he says on
5 the one hand it was paid exactly, and then
6 he testified that never a single invoice was
7 paid in full. So, I mean, I'm not left with
8 his credibility in either statement.

9 MR. BUSMAN: We go down further.
10 He charges to the vendors the cleaning and
11 sealing and all these other things. We
12 submit that this was not provided to
13 Mr. Gelles in good faith. So I don't think,
14 first of all, that it was shown that it was
15 understood and agreed to be offered as a
16 compromise. Secondly, I don't think it's
17 been showed that it was attempted in good
18 faith. And, thirdly, Your Honor, I don't
19 think that that complies with the
20 requirement to be conspicuous. And the code
21 does provide a definition for conspicuous.
22 You read it out. It's in 8.120110.

1 THE COURT: Okay.

2 MR. BUSMAN: I submit, Your Honor,
3 that the words "final payment on account" do
4 not imply that it was intended as a final
5 compromised settlement. The case that
6 counsel read, the Coty case, has the word --

7 THE COURT: But Mr. Felice asked
8 Mr. Gelles whether he was familiar as a
9 contractor with the concept of partial
10 payment, progress payment, final payment.
11 And he said yes.

12 MR. BUSMAN: But he did not
13 elaborate that final payment was implied as
14 a compromise. There's no other one.
15 Counsel has not submitted any other
16 authority or any other statute to establish
17 that.

18 We submit, Your Honor, that his
19 own authority, the Coty case, talks in terms
20 of, "This will now settle your account with
21 SRI." I will submit, Your Honor, there is a
22 sea change of difference between these and

1 the words "settling your account" and "final
2 payment on the contract."

3 THE COURT: Well, what else could
4 "final payment" mean?

5 MR. BUSMAN: That's all I'm going
6 to give you; sue me if you don't like it.

7 I mean, Your Honor, I could
8 represent to you, I do a lot of commercial
9 collection cases, and clients tell me that
10 all the time. They may say, "I got this
11 check of payment, and the guy says, 'If you
12 don't like it, sue me.'" The popular media
13 has that constantly. You can see shows on
14 TV where someone goes and says, "If you
15 don't like it, sue me." I think that it's
16 perfectly reasonable that a person of
17 reasonable intelligence could have
18 interpreted that language to mean just that.
19 "That's all I'm going to give you. You
20 don't like it, sue me."

21 I think the code requires and the
22 case law says the burden is on the party

1 wishing to show the accordance satisfaction:
2 That it was unambiguous; that it was clear;
3 that it was offered as a compromise; that it
4 was conspicuous. And I don't think he makes
5 it on those. I would ask that the plea in
6 bar be denied.

7 THE COURT: I think I'm ready to
8 rule. I think you have to review this case
9 in the context of the fact that a statement
10 was sent, Exhibit 21, saying, here's our
11 schedule of account, adjust your records.

12 Gelles and Sons General
13 Contracting comes back and says, I've got
14 the letter and I don't accept it, this is
15 past due, et cetera, et cetera.

16 And then there is a reply that
17 says we stand by our final amount that's
18 stated in the latest correspondence, and
19 enclosed find a check in the amount of
20 \$13,580 representing final payment on the
21 contract.

22 Now, 8.1-20110 says a term of

1 clause is conspicuous when it is so written
2 that a reasonable person against whom it is
3 to operate ought to have noticed it. Not
4 only did Mr. Gelles notice it, he testified
5 he read it.

6 And I don't see how anyone could
7 think that this was anything other than, in
8 effect, a drop-dead letter that says, "This
9 is it. This is what we're going to pay
10 you." And he cashed the check.

11 I think there was a bona fide
12 dispute. I think the claim was
13 unliquidated. And 8.38311 says unless
14 subsection C applies, which it does not, the
15 claim is discharged if the person against
16 whom the claim is asserted that the
17 instrument or accompanying written
18 communication contained a conspicuous
19 statement to the effect that the instrument
20 was tendered as full satisfaction of the
21 claim.

22 As I said, when you look at these

1 three documents, Exhibit 21, 22, and 23A, I
2 don't see how you can -- or I can't reach
3 any other conclusion, other than it was
4 intended as a full and final payment. And
5 therefore, I think there was an accord and
6 satisfaction, and I sustain the plea in bar.

7 MR. FELICE: Thank you, Your
8 Honor.

9 THE COURT: Please do an order
10 before you leave.

11 (Whereupon, at 1:15 p.m., the
12 HEARING was adjourned.)

13 * * * * *

CERTIFICATION OF TRANSCRIPT

I certify that the attached transcribed hearing in the case Gelles & Sons General Contracting Inc -v- Jeffrey Stack Inc et al in Virginia: Circuit Court of Fairfax County on Thursday, August 2, 2001, was held as herein appears and that this is the original transcript.

I, the undersigned, do certify that this is a true, accurate and complete transcript prepared from the electronic recording taken by Keesha Daniels of Beta Reporting and Videography Services, on the aforementioned date, and that I have verified the accuracy of the transcript by comparing the typewritten transcript against the electronic recording.

Transcriber/Proofreader:

M. Ramirez

Date:

8/13/01

012319

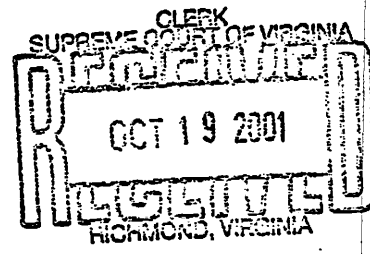
BETA REPORTING

202-638-2400 800-522-BETA 703-684-BETA

-PERSONALIZED RATES AND SERVICES-

DEPOSITIONS • ARBITRATION • HEARINGS • STENOGRAPH REPORTERS • VIDEO TAPED
 DEPOSITIONS • CONDENSED TRANSCRIPTS • KEYWORD INDEX • ASCII • AUDIO & VIDEO
 TAPE TRANSCRIPTION SERVICES • SECURED E-MAIL
 WEB-BASED TRANSCRIPT DELIVERY

ERRATA SHEET



IN RE:

DEPOSITION OF:

DATE OF DEPOSITION:

At the time the above named deponent read and signed this deposition, the deponent desired to make the following changes:

<u>PAGE</u>	<u>LINE</u>	<u>AS TRANSCRIBED</u>	<u>CHANGE TO</u>
9	20	"not amending the suit [and counter]	Delete "and counter"
10	13	knows	owes
21	11-12	"Is that the counsel, my second witness?"	???
45	12	issue	receive
116	4	FELICE	BUSMAN
183	9	grievance	brief

ALSO, transcript fails to note that Marc Busman handed up copy of Tremont Construction v. Dunlap to Judge Keith.

9/20/2001

Date

Signature of Deponent

Counsel for Plaintiff

**PAVING & CONSTRUCTION**

7817 Loisdale Road • Springfield, VA 22150 • Phone: (703) 550-2344 • Fax: (703) 550-2001

FACSIMILE TRANSMITTAL COVER SHEET

DATE: 12/8/2000TO: BOB GELLESCOMPANY: GELLES & SONSFAX#: 703-239-1242PHONE#: 703-239-1080FROM: DAVE KINZERRE/JOB: CAMERON

JSI PAVING & CONSTRUCTION

7817 LOISDALE ROAD

SPRINGFIELD, VA 22150

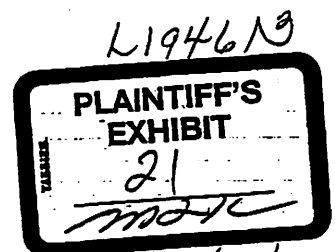
PHONE# (703) 550-2344

FAX # (703) 550-2001

NOTES:

NUMBER OF PAGES INCLUDING COVER SHEET: 3

PLEASE NOTIFY SENDER IF YOU DO NOT RECEIVE ALL PAGES



**PAVING & CONSTRUCTION**7817 Loisdale Road • Springfield, VA 22150 • Phone: (703) 550-2344 • Fax: (703) 550-2001

December 8, 2000

Bob Gelles
Gelles & Sons General Contracting, Inc.
P.O. Box 358
Fairfax Station, VA 22150

Dear Bob:

Attached, please find a schedule of account for Gelles & Sons General Contracting, Inc.
as of December 1, 2000.

Please note the adjustments made for work performed and materials provided by JSI
Paving and Construction in order to properly complete the work. Please adjust your
records to reflect the scheduled amounts and remit to us your adjusted invoice reflecting
the stated adjustments.

Thank you for your attention to this matter and please contact us with any questions.

Sincerely,

A handwritten signature in dark ink, appearing to read 'D. Kinzer'.

David F. Kinzer, Controller
JSI Paving and Construction

Schedule of Account
Gelles & Sons General Contracting, Inc.

<u>Description</u>	<u>Unit Quantity</u>	<u>Unit Price</u>	<u>Measure</u>	<u>Total</u>
Total Calculated				
Brick Pavers	4.00	15,175.00	SF	60,700.00
Benches & Tables	1.00	15,000.00	LS	15,000.00
Signs	2.00	8,116.00	INVOICE	16,232.00
Subtotal				91,932.00
Less: Charges to Vendor				
Clean and seal brick	1.00	5,650.00	CALC	(5,650.00)
Additional brick charge	2.00	168.00	PALLET	(336.00)
Additional sand charge	80.00	13.50	TON	(1,080.00)
Repair brick	1.00	800.00	CALC	(800.00)
Subtotal				84,066.00
Less: Payments issued				(70,486.00)
Total Amount Due Vendor				13,580.00



GELLES & SON GENERAL CONTRACTING, INC.

(703) 239-1060

P.O. Box 358

Fairfax Station, VA 22039

FAX (703) 239-1242

FAX Transmittal

To: Mr. Jeff Stack
JSI Paving & Construction

FAX: (703)-550-2001

From: Bob Gelles

CC:

Date: December 11, 2000

Project: Cameron Station East & West Park

Items Faxed: October 13, 2000 Statement

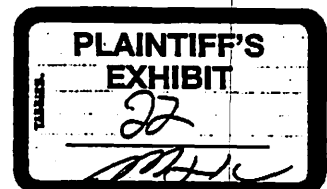
Number of Pages (including this sheet): 2

Comments:

Mr. Stack:

I received a letter on Sunday evening via FAX from David F. Kinzer, Controller of your Company. I do not accept or acknowledge any deductions from my previously submitted Invoices as reflected on my October 13, 2000 Statement in the amount of \$26,175.00 with history dating back to July 27, 2000, over 135 days past due. I never contracted the sealing of brick as I have previously discussed with you over a month ago. I promptly performed services related to warranty items within two days of receipt of your punch list. I have been extremely patient in light of the fact, you received payment from the City last Monday. I know you had to certify that suppliers and subcontractors have been paid in order to receive your check. I don't think the City would be pleased to know that I have not been paid. I have been in business for 26 years and I know the major players at the City, don't let it come to this. Thank you, I will come tomorrow morning to pick up my check.

[Handwritten signature]
-255-



8/2/01



GELLES & SON GENERAL CONTRACTING, INC.

(703) 239-1060

P.O. Box 358

FAX (703) 239-1242

Fairfax Station, VA 22039

Mr. Jeffrey Stack - President
JSI Paving & Construction
7817 Loisdale Road
Springfield, VA 22150

*DR. CROW
PAUCS*

*SANDRA
WILSON
838-4892*

STATEMENT

October 13, 2000

\$ 16,888.00 Invoice JSI07270001 Balance Remaining
\$ 2,232.00 Invoice JSI08040001 Balance Remaining
\$ 87.00 Invoice JSI08040002
\$ 456.00 Invoice JSI08070001
\$ 6,512.00 Invoice JSI08210001

\$ 26,175.00 Total Due

*JEFF
PITZER*

*838 4941
X2.2*

*838 6493
ATTN:*

Your business is greatly appreciated!

60E FBINBERG



PAVING & CONSTRUCTION

7817 Loisdale Road • Springfield, VA 22150 • Phone: (703) 550-2344 • Fax: (703) 550-2001

December 13, 2000

Bob Gelles
Gelles & Sons General Contracting, Inc.
P.O. Box 358
Fairfax Station, VA 22039

Dear Bob:

This letter is in reference to the project at Cameron East/West Parks.

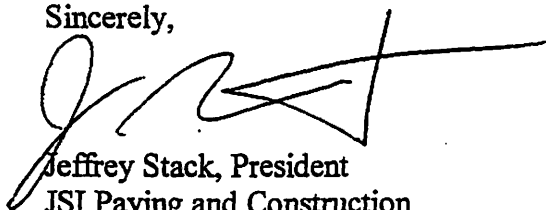
JSI Paving and Construction contracted with you to place the brick pavers at the above referenced project. We gave you a set of plans and specifications on this project and expected you to complete the work per the details and drawings, as is customary. JSI Paving and Construction stipulated that we would place the stone base and supply only the brick, edging and sand (not to include sand for the park benches and picnic tables) for you to complete the job. Accordingly, JSI Paving and Construction would have never agreed to your price if we did not expect you to seal the pavers (including pre-cleaning), when you were done. Also, the measurements you provided are incorrect. JSI Paving and Construction and your supervisor conducted field measurements of the pavers, and the totals provided by JSI are fair and accurate.

Furthermore, the other back charges are fair due to damage sustained by the brick pavers by Gelles & Sons General Contracting, Inc. JSI Paving and Construction, consequently, supplied the brick for you to replace the damaged pavers. In addition, JSI Paving and Construction completed the replacement of brick when Gelles & Sons refused to finish the work. Additionally, you were responsible for the sand required for placement of the benches and picnic tables.

JSI Paving and Construction stands by its final amounts as stated on the latest correspondence dated December 8, 2000. Enclosed, please find a check in the amount of \$13,580.00 representing final payment on the contract.

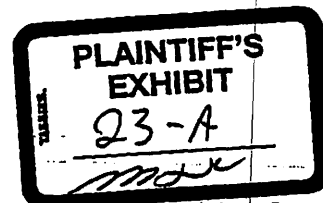
Thank you for your attention in this matter.

Sincerely,



Jeffrey Stack, President
JSI Paving and Construction
Enclosure

CC: CITY OF ALEXANDRIA



L194613
8/2/01

JSI PAVING & CONSTRUCTION

PH. 703-550-2344
7817 LOISDALE RD.
SPRINGFIELD, VA 22150

PROSPERITY BANK AND TRUST
CENTRAL SPRINGFIELD OFFICE
SPRINGFIELD, VIRGINIA 22152

22854

68-50702
580

12/13/2000

PAY TO THE ORDER OF GELLES & SONS, INC.

\$ **13,580.00

Thirteen Thousand Five Hundred Eighty and 00/100*****

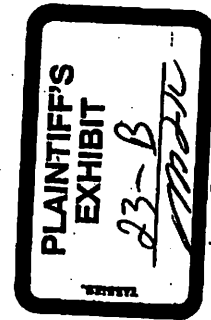
DOLLARS

GELLES & SONS, INC.
P.O. BOX 358
FAIRFAX STATION, VA 22039

[Signature]

⑈00022854⑈ ⑆056005075⑆ 2010542012⑈

Security Features Included



L194613
8/2/01

-258-

JSI PAVING & CONSTRUCTION

GELLES & SONS, INC.

Date	Type	Reference	Original Amt.	Balance Due	12/13/2000 Discount	22854 Payment
08/07/2000	Bill	jo8070001	456.00	456.00		456.00
07/10/2000	Bill	J07100001	28,044.00	8,044.00		708.00
07/27/2000	Bill	270001	32,416.00	12,416.00		12,416.00
					Check Amount	13,580.00

Prosperity Bank

13,580.00

JSI PAVING & CONSTRUCTION

PH. 703-850-2344
7817 LOISDALE RD.
SPRINGFIELD, VA 22150

PROSPERITY BANK AND TRUST
CENTRAL SPRINGFIELD OFFICE
SPRINGFIELD, VIRGINIA 22152

22854

9-2202

12/13/2000

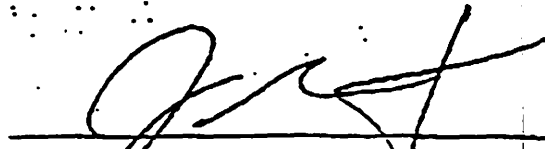
\$ 13,580.00

DOLLARS

PAY TO THE ORDER OF **GELLES & SONS, INC.**

Thirteen Thousand Five Hundred Eighty and 00/100 220131997 004 0387 0393 01 22

GELLES & SONS, INC.
P.O. BOX 358
FAIRFAX STATION, VA 22039



MEMO

#00022854# 056005075#

2010543012#

#0001358000#

12/13/00

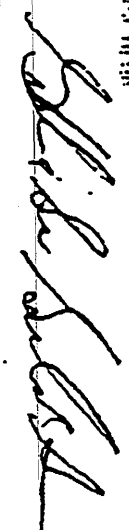
055002707

4000487350

PROCESSED

00470000 RCPC
NN20131997 0520-0527
NN20131997 12-18

202386848



APR 15 2001

7/2/01

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GELLES & SONS GENERAL CONTRACTING, INC.)

Plaintiff,)

v.)

AT LAW NO. 194613

JEFFREY STACK, INC.)

t/a JSI PAVING & CONSTRUCTION)

and)

NORTH AMERICAN SPECIALTY)

INSURANCE COMPANY)

Defendants.)

ORDER

UPON CONSIDERATION of Defendants Jeffrey Stack, Inc. t/a JSI Paving and Construction and North American Specialty Insurance Company's Plea in Bar for the above-captioned action, any opposition thereto and argument of counsel, it is

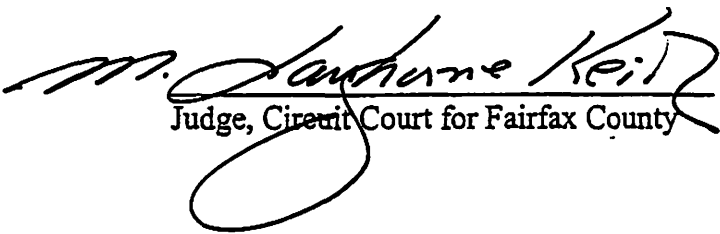
APPEARING TO THE COURT, that the causes of action asserted in the Motion for Judgment are barred and have been comprised by the doctrine of accord and satisfaction, it is

ORDERED, that the Defendants' Plea in Bar is granted and that Plaintiff's Motion for Judgment against Defendants Jeffrey Stack, Inc. t/a JSI Paving & Construction and North American Specialty Insurance Company should be and, hereby are DISMISSED WITH PREJUDICE; and it is further

~~ORDERED that Defendants be awarded their expenses and attorneys' fees incurred herein in the amount of \$~~

ENTERED this 2 day of August, 2001.

AND THIS MATTER IS FINAL.


Judge, Circuit Court for Fairfax County

WE ASK FOR THIS:


Andrew N. Felice

Virginia Bar No. 26277

Eric B. Travers

Virginia Bar No. 43263

KATZ & STONE, L.L.P.

8230 Leesburg Pike

Suite 600

Vienna, Virginia 22182

(703) 761-3000

Counsel for Defendants Jeffrey Stack, Inc. t/a JSI Paving
& Construction and North American Specialty Insurance Company

SEEN: *and Objections noted for the reasons stated in Plaintiff's memorandum in opposition to Defendant's Plea in Bar and for Counsel's reasons stated in closing argument including but limited to the offer of compromise not having been made in good faith, not conspicuous per Title 8.1-201(10), and not an unambiguous & unequivocal offer of compromise.*


Marc A. Busman, Esquire

Busman & Busman, P.C.

P.O. Box 7514

Fairfax Station, Virginia 22039

Counsel for Plaintiff Gelles & Sons General Contracting, Inc.

ASSIGNMENTS OF ERROR

1. The Court erred in holding that the Defendants had met the requirements of § 8.3-311, Code of Virginia (1950), as amended, and had proven the existence of an accord and satisfaction between the parties.

2. The Court erred in holding that the December 13, 2000 letter and accompanying check, admitted into evidence as Exhibits 23A and 23B, contained a conspicuous statement that it was being tendered in full satisfaction of the Plaintiff's claim against the Defendants.

3. The Court erred in holding that the phrase "final payment on the contract" as set forth in Exhibits 23A and 23B was conspicuous as that term is defined by § 8.1-201(10), Code of Virginia (1950).

4. The Court erred in holding that the phrase "final payment on the contract" was sufficiently clear to inform the Plaintiff that the accompanying check was being tendered as an accord and satisfaction.