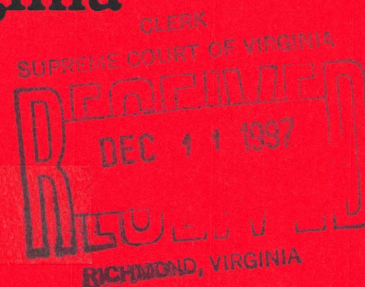


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IN THE
Supreme Court of Virginia

AT RICHMOND

RECORD NO. 970941



**INDER CHAWLA and
VERA B. CHAWLA,**

Appellants,

v.

BURGER BUSTERS, INC.,

Appellee.

**JOINT APPENDIX
Volume II**

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V I R G I N I A

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

CLERK
SUPREME COURT OF VIRGINIA

MAY - 2 1997

RICHMOND, VIRGINIA

BURGERBUSTERS, INCORPORATED

Petitioner,

-vs-

IN CHANCERY NO. 93-266

INDER CHAWLA
t/a Sonina Properties

and

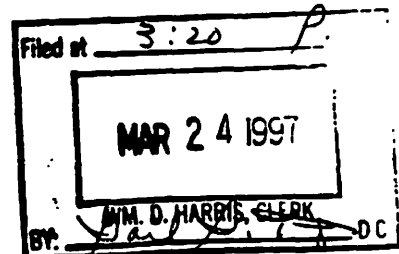
SOUTHERN FINANCIAL FEDERAL
SAVINGS BANK

Defendants.

Fauquier County Courthouse
Warrenton, Virginia

Friday, December 13, 1996

The above-entitled matter came on to be heard,
with a Jury, before the HONORABLE WILLIAM SHORE ROBERTSON,
Judge, in and for the Circuit Court of Fauquier County, in
the Courthouse, 40 Culpepper Street, Warrenton, Virginia,
beginning at 8:36 o'clock a.m.



P R O C E E D I N G S



MR. DURRETTE: Yes, sir. As Your Honor knows, there has been substantial testimony, or at least disagreement if not substantial testimony -- there has been testimony and substantial disagreement, might be a better way to put it, as to whether or not the result in this case included the restoration of those four parking spaces. That is, it is unseemly to us that the jury should be left to speculate on that question of law.

One of the Hensley criteria is the result but not attained. It is obviously Mr. O'Connell's position, and Dr. and Mrs. Chawla's position, that the results obtained were not terribly important and were only a part

1 of the relief sought. And there is obviously a
2 disagreement between the parties over the scope and effect
3 of the Court's ruling.

4 So our motion is, and for all I know, Mr.
5 O'Connell may agree with me, that you should decide that
6 question. The jurors should be told whether or not the
7 restoration of the four parking spaces is encompassed in
8 the Court's ruling. And that that issue is a question of
9 law, it is not a question of fact; that the jury should not
10 be the one to determine that, and that issue should be
11 removed from this case as far as the jury is concerned.

12 THE COURT: All right; thank you.

13 Mr. O'Connell?

14 MR. O'CONNELL: Your Honor, I think this motion
15 comes far too late. I think the result has been a matter
16 of opinion between the parties. I don't see how the Court
17 can go in at this stage and inject itself into this process
18 and pull out an issue we have. If they wanted that kind of
19 a statement, that should have been addressed right up
20 front, so that I could have adjusted the way I presented my
21 case.

22 I think that there is disagreement on it. And
23 as far as the result, it's a question of fact for the jury

1 to decide. And I don't think it would be proper to go
2 through and pick out one portion of the case and have you
3 instruct them. I mean, I think I know what your
4 instruction would be, but, you know, this comes as a
5 surprise to me. It should have been done at a pre-trial
6 conference or whenever. They knew there was going to be a
7 tremendous disagreement about the result. They knew that
8 from all the preliminary matters, from all of the
9 depositions, from all of the pleadings, from all of the
10 pre-trial matters that went on.

11 I think the jury should get this jury the way
12 it's coming to them, the way the Court has seen fit so far
13 to do it.

14 THE COURT: All right. Mr. Durette, further
15 argument, sir?

16 MR. DURRETTE: One final point, Your Honor.
17 Yes, the results have always been part of what was going to
18 be presented here. But that, of all the discovery, from
19 everything we knew before we walked into this courtroom,
20 that had to do with the definition of retail and damages
21 versus injunctive relief, and what the parties prevailed on
22 in the case.

23 I thought, and I believe everyone on our side

1 thought, obviously that that would be pretty simple to
2 establish. We've been wrestling with that for two days,
3 was why is that still in this case?

4 It is obvious that you're going to have to
5 decide this issue sometime, because it's got to be decided.
6 So to have an attorney fee petition go to the jury without
7 that issue being decided seems to me to simply invite the
8 jury to speculate on that.

9 THE COURT: All right. Well, let me see if I
10 can review the facts of this case as they have developed up
11 to this point and let you correct me if I state this
12 erroneously.

13 MR. DURRETTE: May I advise the Court of one
14 thing?

15 THE COURT: Yes.

16 MR. DURRETTE: If you want it, the transcript
17 of the hearing before Your Honor in which that was
18 discussed and the final plans were presented --

19 THE COURT: Well, let me tell you what I think,
20 and you tell me, gentlemen, if I'm in error. We do not
21 have a specific order in place in this case that speaks to
22 specifically the parking places.

23 What we do have is an order to remediate, or

1 correct, the structure on the reserved parcel, the bank
2 building, to conform it to the original lease agreement.
3 And it was my understanding and belief that in so doing
4 that would basically put things back the way they were on
5 the original exhibit, and they do show the parking places.

6 Now, am I right or wrong about that?

7 MR. DURRETTE: From our perspective, that's
8 correct.

9 MR. O'CONNELL: Your Honor, the Court's letter
10 opinion said submit a plan without the drive-throughs. We
11 could have submitted a plan that -- the fact that there is
12 parking in there, we could have submitted a plan, as Dr.
13 Chawla said, that had landscaping in there. We took the
14 Court's letter opinion the way it was written, and that was
15 that the drive-throughs were the problem and that they
16 should be removed.

17 I will also bring to the Court's attention that
18 when they elected to go ahead on the damage issue, they
19 said they were not asking for injunctive relief as far as
20 the parking spaces were concerned. Now, we can go through
21 the record and we can get into a big argument about that.
22 But I think that the jury should review this evidence and
23 the way it's been presented without the Court jumping in

1 and emphasizing one point or another.

2 So they've got all that evidence before them.

3 It's not clear on that. If that's the case, it's not
4 clear. Dr. Chawla, certainly from our point of view --
5 there was no specific direction to replace the parking
6 spaces, and I'm sure the Court didn't make that specific
7 direction, because they said they weren't going to ask for
8 injunctive relief as far as the parking spaces. They put
9 their eggs in the damage claim basket.

10 Now, we can go back and argue about all that.
11 This has been characteristic of this case. We keep --
12 we're regurgitating and regurgitating. I think it would be
13 tremendously prejudicial for the Court to jump in at this
14 time and say, well, here's the orders; here's the letter
15 opinion; but what I really meant was, they get their four
16 parking spaces back. That takes that one issue and blows
17 it all out of proportion.

18 Now, you know, if the Court -- with all due
19 respect, Your Honor, there is no order saying put the
20 parking spaces back.

21 THE COURT: I just said that, and that's true.

22 MR. O'CONNELL: And so the jury has got -- it's
23 a question of fact at this point, not a question of law.

1 And I don't think that we should be prejudiced because
2 there is an ambivalence or an ambiguity here.

3 THE COURT: Well, I would have to go back and
4 look at the Court's letters on this, and look at the
5 pleadings, and look at the orders and decrees that were
6 entered, and see just where this drops out. Now, if Mr.
7 O'Connell is correct that we go back to the amended Bill of
8 Complaint, that the question of parking places was solely
9 raised as a damage issue and has not been plead at all with
10 respect to injunctive relief or the remediation that the
11 Court has ordered on this site, I just don't remember as we
12 sit here.

13 I didn't anticipate this argument this morning,
14 and I apologize to you for not digging it out before we
15 started. But if the suggestion is that that was never an
16 issue that the Court could make an order about at all,
17 because it was not plead, then we may have another problem
18 in this case that I was not aware of.

19 It was my thinking that when we approved the
20 site plan that was ultimately approved that's being
21 executed on now, that that would have the effect of giving
22 to BurgerBusters that which they bargained for with respect
23 to the residual tract. But, if that's beyond the

1 pleadings, then I'm treading on thin ice, I think, to order
2 something that's not plead -- the old Alla Gaga Ad Probata
3 type thing. If you don't allege it and prove it, you don't
4 get it. And I guess the easy way is to look back at the
5 original amended Bill of Complaint and compare it to what
6 the Court --

7 MR. O'CONNELL: Your Honor, it would take hours
8 to sort this issue out now. We're getting ready to give
9 this case to the jury, and they want now to go back and
10 retry the whole case, argue about this, argue about that.

11 THE COURT: Well, we have in evidence -- don't
12 we have in evidence the amended Bill of Complaint for this
13 hearing?

14 MR. O'CONNELL: We have in evidence the amended
15 Bill of Complaint.

16 THE COURT: And if we put in evidence, and I
17 don't know that the final decree with respect to the
18 remediation or the going back to the footprint and building
19 a building/bank retail, whatever it might be, because that
20 wasn't resolved.

21 MR. O'CONNELL: It's also in evidence. The
22 plat is in evidence. The order -- all of that's in
23 evidence.

1 THE COURT: Query then, if it's all in
2 evidence, why wouldn't counsel be able to argue the
3 conflicting positions with respect to whether -- if it was
4 asked for and given, or asked for and not given?

5 MR. O'CONNELL: We can argue that, Your Honor,
6 and that's exactly what we should be allowed to do, pro and
7 con. And this is an advisory opinion only anyway. The
8 jury can make up their mind. But that question in this
9 case --

10 THE COURT: Well, I don't want you all to come
11 and say don't accept the advice -- that's fine to come and
12 say don't accept the advisory opinion of the jury. I
13 anticipate you will argue that one way or the other.

14 MR. O'CONNELL: I'm not saying that.

15 THE COURT: What I don't want is, I don't want
16 anyone to come in here and argue because the Judge has put
17 the wrong issues to them, because then we are wasting our
18 time here.

19 MR. O'CONNELL: Your Honor, the result in this
20 case is a question of fact for the jury to decide. It's
21 not a question of law. And to jump in and try to --

22 THE COURT: Well, I agree with that. That's a
23 factual issue.

1 MR. DURRETTE: Well, Your Honor, I guess
2 everybody thinks this case is going to the Court of
3 Appeals, and then to the Supreme Court. The Court has
4 stated that you --

5 THE COURT: Well, the rest of it's gone. I
6 think it would be unfair to them not to send it all.

7 MR. DURRETTE: And you have said several times
8 in my presence since I've been here, and I understand
9 before I got involved in the case, that you view this as an
10 opportunity to make some law in Virginia on the standards
11 to --

12 THE COURT: Well, I want to qualify that. I'm
13 not putting these people through this terrible experience
14 because of my personal desire that that be done. But I
15 think that we can hope for, if it does go forward, a
16 resolution of an extremely difficult problem that this
17 Court, and other trial courts in Virginia, are having to
18 address across the board with regard to how attorneys' fees
19 litigation should be conducted. That's the only thing.

20 MR. DURRETTE: Okay. Well, Your Honor, it
21 seems to me -- but, I disagree strongly that the
22 interpretation of a Court's order, when the Court entered
23 the order as presiding over the case, it's a question of

1 fact for a jury. That's a question of law for the Judge.
2 What did he rule and what is the scope of the ruling.

3 THE COURT: Well, I agree with that.

4 MR. DURRETTE: Now, we know that there's no
5 specific order that addresses the parking spaces. We
6 concede that. But, if you look at this hearing transcript
7 and the plan that was presented in this hearing transcript
8 at that time, and this Court's concern, and the follow-up
9 correspondence, I don't think there can be any question
10 whatsoever that the BurgerBusters was concerned as to
11 whether or not the proposed structure of the building and
12 the reconfiguration of the parking conformed with Exhibit
13 D, or it didn't. That was the relief sought.

14 THE COURT: Well, that's what I want to ask
15 you, because Mr. O'Connell has questioned that that relief
16 was not sought.

17 MR. DURRETTE: Well, let's look at that. But,
18 let me tell you what happened at the hearing.

19 MR. O'CONNELL: Your Honor, it would take hours
20 to do that.

21 THE COURT: All we've got to do is look at the
22 amended Bill of Complaint.

23 MR. O'CONNELL: We've got to go back to the

1 transcript at the beginning of the trial, on the second
2 phase of the beginning of the trial, where Mr. Lawrence
3 said -- at the beginning of the first trial, where Mr.
4 Lawrence said they were not seeking injunctive relief on
5 the issue of parking spaces. They were asking for damages.
6 So we've got to dig through all of that.

7 What they want you to do is amend your order
8 after the fact, and then go through all of the legal
9 arguments.

10 THE COURT: Well, Mr. O'Connell, let Mr.
11 Durette finish and then you can be heard further.

12 MR. O'CONNELL: I'm sorry, Your Honor.

13 MR. LAWRENCE: And I can tell the Court what I
14 said at that hearing.

15 MR. DURRETTE: At this hearing where the second
16 two plans were submitted, and you had first said that you
17 weren't going to do the drive-through, "I do not believe
18 that given the former rulings of the Court that I can
19 accept the drive-up window alternative, and I'm not sure
20 what that -- what I haven't checked is the parking
21 structure around this building, whether that differs. But
22 the building itself appears, by my recollection, to be
23 configured, square footed that is" -- and you go on to

1 discuss the building.

2 And then a couple of pages, several pages
3 later, this discussion is still going on. Mr. O'Connell
4 says, "Even though you weren't specific in saying that the
5 parking spaces had to be replaced, the parking is there."
6 So it seems to me if you -- and then you say, "I'm not
7 debating that, except to say I didn't have the thing to
8 make the comparison."

9 And so what you do -- this is what everyone was
10 looking at, and the parking in question is shown on this
11 diagram. And so what you do --

12 THE COURT: That is the one that I approved for
13 the -- I have a court order approving that diagram.

14 MR. DURRETTE: That's correct. And you
15 instructed Ms. Cleary to go back and make the comparison
16 and put it over top and to let you know whether or not they
17 were satisfied. And Mr. Lawrence wrote you on August the
18 15th, and one of the things he said, "The concept is
19 agreeable so long as, one, the parking spaces removed when
20 the presently existing bank building drive-through was
21 constructed, are restored."

22 Now, you don't have a specific order, but if
23 you did order it and they asked for it --

1 THE COURT: Well, why isn't that -- Mr.
2 Durette, respectfully, why isn't that specific? Although
3 it doesn't say in its text, the order does not say in its
4 text anything about the parking spaces.

5 But why, if the Court approved that plat and it
6 shows the parking spaces on it, why isn't that the order of
7 the Court?

8 MR. DURRETTE: It is.

9 THE COURT: So what else do I need say about
10 it?

11 MR. DURRETTE: So they shouldn't be able to
12 come in and argue that the relief did not include
13 restoration of the parking spaces.

14 THE COURT: Well, if they argue that, then you
15 show them the final order, isn't the trier of fact, given
16 precisely what the Court's order is and their credibility
17 before this jury, may be suspect.

18 MR. DURRETTE: Well, Your Honor, with all due
19 respect, yes, we could do it that way, but I don't think
20 that's the right way. I think the right way is for the
21 jury to have the same conclusion as to the relief secured
22 by BurgerBusters as you do. You're getting an advisory
23 opinion from this jury. If they decide that question

1 differently than you do, then you have impaired the value
2 of that advisory opinion. If we all agree, and you agree,
3 that your order requires the restoration of the parking
4 spaces removed by the drive-through, then they ought to be
5 told that.

6 THE COURT: What does the order say with
7 respect to that plat?

8 MR. DURRETTE: It approves that plat. The
9 order is already in evidence, Your Honor.

10 THE COURT: All right. Well, I have to look at
11 it. I can locate it with the exhibits faster than I can in
12 my own file. There it is.

13 And this plat, which was attached to the
14 Court's order of October 3rd, 1996, approves a plat which
15 has the parking spaces on it, doesn't it?

16 MR. DURRETTE: Yes, it does, as Mr. O'Connell
17 said.

18 THE COURT: Doesn't it, Mr. O'Connell?

19 MR. O'CONNELL: I don't see the need to do
20 anything further than what's already been done, Your Honor.
21 That's my position. It's now 9:00 o'clock, and we've been
22 arguing about this for a half an hour.

23 They've got the evidence. They can argue their

1 point. We can argue our point. And the jury can make a
2 decision.

3 MR. DURRETTE: I'll say my final word, Your
4 Honor. You should not leave that to the jury.

5 THE COURT: If we have this in evidence, which
6 shows the Court's order, and we are instructing them that
7 the only thing they can do is order costs and expenses
8 pursuant to this particular application, I don't think it's
9 appropriate to argue that this order isn't the order of the
10 Court. And the order of the Court clearly shows the
11 parking spaces.

12 Now, did the Court have the legal authority to
13 order the parking spaces? That would turn, I think, on
14 some of the other arguments that you are making. But,
15 looking at the amended Bill of Complaint, which drives this
16 -- the amended Bill of Complaint, paragraph Roman four,
17 permanently enjoins the bank. That deals with the bank.
18 Let's see.

19 I think, if you look at the prayer, as Ms.
20 Cleary calls the wherefore clause, which I used to call it,
21 I think it's broad enough to cover this issue. Now, I
22 don't think it would be appropriate to argue that matter
23 further, that they didn't do -- I mean this is the

1 controlling order, and they'll have it in evidence. And
2 anybody who argues against that is arguing on a facet of
3 the case that's already been judicially resolved, it seems
4 to me.

5 MR. O'CONNELL: Well, Your Honor, are you
6 indirectly telling me that I can't argue that there is no
7 specific order requiring replacement of the parking spaces?

8 THE COURT: You can argue that this order has
9 no specific language, but you can't argue against that
10 plat. That plat shows it, and the Court approved the plat.
11 So I'll note your objection.



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Q Mr. Palmer, when we closed you had shown the jury several examples of duplication of effort from the



1 time records that had been submitted.

2 Did you have an opportunity to review such
3 documents as the errata sheet for the trial transcript?

4 A I didn't actually review the document itself.
5 But I noticed that there was an errata sheet prepared.

6 Q You noticed that there was an errata sheet
7 prepared?

8 A Yes.

9 Q Do you have a comment on that?

10 A Well, frankly, when I saw it I didn't quite
11 understand why an errata sheet was being done for the --

12 * * *

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11 Q In your opinion, could BurgerBusters have
12 gotten a law firm in Warrenton or in Northern Virginia that
13 could have handled this case just as well as Faggert and
14 Frieden and the other attorneys that handled it?

15 A No question about that.

16 Q Now, what about the bills by Pearson and
17 Pearson, have you had an opportunity to review those?

18 Would you comment on that, please?

19 A I have not really reviewed those as closely as
20 I have the Faggert and Frieden bills. But the major work
21 that was done by Mr. Pearson did not really revolve around
22 the issues in this suit. He handled the initial
23 preliminary injunction hearing that was held, and I think

1 they probably prepared the original petition.

2 After that, so far as the litigation itself was
3 concerned, the only thing that he did was issue some 49(c)
4 subpoenas and things of that nature. He might have spoken
5 to some witnesses.

6 Q Now, Pearson and Pearson is a local law firm
7 here in Warrenton; correct?

8 A Yeah, Gary Pearson was the one -- it started
9 out, of course, it was Gulik, Carson and Pearson,
10 initially, and Robin Goulik was involved very briefly. And
11 then Gary Pearson started working on it.

12 Q Now, in relation to the request for fees for
13 travel time, what is your opinion as to whether or not
14 Pearson and Pearson could have handled any of those thirty-
15 three appearances that you've mentioned?

16 A Well, there's no question about that. I mean,
17 a lot of these appearances had to do with the entry of
18 orders, and so forth, and it was a matter of appearing
19 before Judge Robertson and saying what you thought ought to
20 be in the order. And that certainly could have been done
21 locally.



3 A There's an item in here for -- I think it's in
4 the realm of \$5,000. That statement was submitted by
5 Powell Duggan. He's located on Winchester Street.

6 Powell got in this case not because he was
7 representing one of the parties, but because Mr. O'Connell
8 had what is known as a 4:9(c) subpoena. When we get into
9 this litigation, we oftentimes need to get materials from
10 other people who are not parties to the litigation. And
11 under Rule 4:9(c) of the rules of the Supreme Court of
12 Virginia, a lawyer can request the clerk to issue a
13 subpoena to a person who is not a party to require them to
14 provide either copies or the originals of certain records
15 and other materials so that the lawyer can review it to see
16 if there's anything in there that they might use, or might
17 be of assistance, or whatever the use might be.

18 In most circumstances, or a lot of
19 circumstances, what the people who are subpoenaed do is
20 just make a copy of the records and send it. However, if
21 they are voluminous, they will make them available for
22 review, and then it's up to the lawyer to make arrangements
23 to have them copied.

1 Well, Mr. O'Connell issued a 4:9(c) to Taco
2 Bell, the corporation, not the BurgerBusters. And Taco
3 Bell got Powell Duggan -- actually, I say Taco Bell got
4 him, Faggert and Frieden really got him involved. But they
5 filed a motion to quash the subpoena that was issued, and
6 they got into -- and Mr. Duggan appeared, as a matter of
7 fact, in court at some point or another. They apparently
8 worked it out and there was some kind of order entered.
9 But there was a bill for almost \$5,000 for this work.

10 And I don't understand at all how the Defendant
11 in this case should be responsible for that. Taco Bell is
12 not even a party in the case. And, further, the fact that
13 they had records does not absolve them from any
14 responsibility for supplying records that might be relevant
15 to this case.

16 I subpoena records every day. Every day of the
17 week I subpoena records from people. Occasionally, you get
18 a motion to quash. Now, why it costs so much? That's
19 another thing. I have, on occasion, appeared for
20 corporations or individuals to move to quash a subpoena,
21 and how he gets to \$5,000 is beyond me. I mean,
22 it's a matter of preparing a motion. It takes half an hour
23 at the most to prepare. It may involve an appearance in

1 motions court, which would be probably a maximum of four
2 hours. There's virtually no research that would be
3 involved in preparing for it. And I just don't see where
4 this bill came from.

5 Q So is it your opinion, Mr. Palmer, that it's
6 both unnecessary and unreasonable?

7 A It's unnecessary -- I don't say unnecessary.
8 Taco Bell may have felt that they had a reason that they
9 didn't want to supply them. It's unreasonable, number one,
10 but so far as the Defense responsibility, certainly it is
11 not the Defendant's responsibility.

12 If BurgerBusters has got some kind of contract
13 with Taco Bell that says, if you are ever involved in
14 anything we're involved in, we're going to pay your
15 lawyers' fees, I don't see why Dr. Chawla should be
16 responsible for that.

17 Q I believe you reviewed a charge that they are
18 seeking reimbursement for a bill, Delta Associates, which
19 was one of Chawla's experts at trial, for the deposition of
20 their expert, law expert.

21 A I really didn't get a chance to review that
22 deposition, but I don't believe that that ultimately was an
23 issue upon which they prevailed. So I don't feel that is

1 something they should recover on.

2 Q All right. Now, also, I believe you've looked
3 at the charges relating to the expert identified as Mr.
4 Kimball.



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8 Yes, Mr. Kimball was an expert for the
9 Plaintiffs and testified about the parking spaces and the
10 congestion, but there was nothing about the size of the
11 building.



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21 Considering the standards, as you understand,
22 with regard to fees and the reasonableness of attorneys'
23 fees, and the other factors that you indicated that you

1 took into consideration, in your opinion, what would have
2 been a reasonable fee yo charge for the work that was
3 performed by these various law firms and the experts in
4 this case?

5 A I think a reasonable fee would have been
6 somewhere between \$30,000 and \$40,000.

7 Q Now, you did a report -- you actually did a
8 written report on this?

9 A Yes, sir.

10 Q Is this your report?

11 (Mr. O'Connell handed the witness a document
12 for his examination.)

13 A Yes, sir.

14 Q And I believe your conclusion of \$30,000 to
15 \$40,000 is in this report?

16 A Yes.

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Q Mr. Palmer, you had testified at some length yesterday, and I would say eloquently and passionately, on the issue of the number of lawyers involved in this case from the firm in Chesapeake, as you put it.

Do you recall that?

A Yes, sir.

Q And how many were there?

A As I recall, when I looked through the list, there were nine lawyers who were listed as having worked in this case, and that included Mr. Lawrence, who initially was not with the firm.

Q Correct; so we had Mr. Frieden, who appeared frequently in the bills?

A Yes.

Q And we had Mr. Sacks, who appeared frequently in the bills?

1 A Yes.

2 Q And we had Ms. Cleary, who appeared frequently
3 in the bills?

4 A Yes.

5 Q And we had Mr. Lawrence, who appeared
6 frequently in the bills?

7 A Correct.

8 Q So that's four of those attorneys; is that
9 right?

10 A Correct.

11 Q Now, did you do any calculations as to the
12 amount of the fees charged by the other five lawyers in
13 that firm?

14 A No.

15 Q Did you know who they are?

16 A Only from the list that was supplied with the
17 petition.

18 Q Do you know what they did?

19 A No.

20 Q Do you know --

21 A The only way to do that would be to go through
22 each bill and try to pick it out.

23 Q Well, would it surprise you to learn --

1 MR. DURRETTE: Well, first of all, let's let
2 Mr. Palmer have the blue book.

3 (Whereupon, Mr. O'Connell handed a document to
4 the Witness for his examination.)

5 BY MR. DURRETTE:

6 Q Now, Mr. Palmer, look in the blue book --

7 A (Witness complies.)

8 Q -- and tell the jury the amount of fees -- that
9 would be the amount of fees that Faggert and Frieden is
10 claiming in this law suit.

11 On page one, the first page of --

12 A \$297,100 and some dollars.

13 Q \$297,000 and dollars?

14 A Right.

15 Q And that's divided between an injunction suit
16 and defense suit, isn't it, on the bill?

17 A That's what it says.

18 Q On this exhibit?

19 A Yes.

20 Q And the fees for the injunction suit are how
21 much?

22 A \$280,600 and some dollars.

23 Q And the defense suit is \$16,000?

1 A Correct.

2 Q Now, this exhibit is going to go to the jury;
3 right?

4 A I don't know.

5 Q It's been admitted as Exhibit nine.

6 You wouldn't know that, would, you? It's
7 admitted as Exhibit nine and it's going to go to the jury.

8 A Okay.

9 Q So this \$297,104 charged by Faggert and Frieden
10 in this law suit, do you know how much of that was charged
11 by these other five lawyers that we talked about yesterday?

12 A Like I said, I did not try to review that.

13 Q Would it surprise you to learn that it was
14 \$10,825 for all five of them?

15 A No.

16 Q Do you know who Mr. Jay Andrew Basham is
17 besides -- well, I'll tell you he's a lawyer with Faggert
18 and Frieden?

19 A Then you know as much as I do.

20 Q All right. Do you know what he did on this
21 case?

22 A No.

23 Q Do you know what his hourly rate was billed?

1 A \$75 an hour.

2 Q \$75 an hour?

3 A Uh-huh.

4 Q Would it surprise you to learn that of that
5 \$10,825, that \$9,277 of it belongs to Andrew Basham?

6 A It wouldn't surprise me at all.

7 Q Did you consider it to be unreasonable for
8 attorneys charging \$100 to \$150 an hour to assign an
9 associate at \$75 an hour to do specific research tasks that
10 arise in a case over a three-year period of time?

11 A No.

12 Q That's not unreasonable, is it?

13 A No.

14 Q So it was okay for Mr. Basham to do legal
15 research on this case at \$75 an hour, wasn't it?

16 A It was okay to do it at \$75 an hour, yes.
17 Whether or not it justified \$9,000 worth of it is another
18 question.

19 Q But you don't have an opinion about that,
20 because you don't know what he did, do you?

21 A I frankly don't, but I can't imagine what he
22 did for that in this case.

23 Q But you don't know what he did, do you?

1 A No.

2 Q You don't know what issues he researched, do
3 you?

4 A Because the fact of the matter is that the
5 bills do not reflect --

6 Q Mr. Palmer --

7 A Let me finish my answer. The bills do not
8 reflect what the man worked on.

9 Q Are you going to tell me that you've reviewed
10 these bills and nowhere that Mr. Basham has his entries
11 does he put what legal research he did?

12 A No, I'm not going to say that. But there are
13 some \$77,000 worth of entries in this bill that there is no
14 description of the work that's being done. So it's
15 impossible for me to tell you, of that \$77,000, what this
16 person was working on.

17 Q Did you make these calculations?

18 A No, I did not.

19 Q Who did?

20 A Mr. O'Connell's secretary.

21 Q So all you can testify to is Mr. O'Connell told
22 you that it was \$77,000?

23 A No, sir. As a result of his secretary doing

1 that work, I took the materials that she supplied to me,
2 and I spot checked the materials to see if they were
3 accurate.

4 Q And they were inner-office conferences and
5 telephone calls, weren't they?

6 A Yes, sir.

7 Q It didn't have to do with legal research, did
8 it?

9 A No, you're right.

10 Q Did you review any of the entries made by Mr.
11 Basham -- you, personally?

12 A I don't have a recollection of doing that, no.

13 Q So you don't know what he did? You don't know
14 what legal research he did?

15 A I'm saying, I looked at the bill. I'm saying,
16 I do not have a recollection now of finding what he did.

17 Q So for Mr. Basham's involvement, aside from any
18 quibble or quarrel that you may have with how much research
19 he did or what research he did, which you don't know, the
20 fact that Mr. Basham was involved in this case to do
21 research at \$75 an hour is very reasonable for Faggert and
22 Frieden to do, isn't it?

23 A Yes.

1 Q Do you know how much time Mr. John Cussen
2 billed to this file?

3 A No.

4 Q Would it surprise you to learn that it was
5 \$280?

6 A Would it surprise me? Nothing surprises me.

7 Q Mr. John McLemore, do you know how much time he
8 spent?

9 A No.

10 Q Mr. Stephen St. John, do you know how much time
11 he spent?

12 A No.

13 Q Mr. Michael Hamer, do you know how much time he
14 spent?

15 A No.

16 Q Now, you testified yesterday that the proper
17 staffing in this case would be a partner, an associate, and
18 a paralegal, did you not?

19 A That's what I feel is all that is necessary.

20 Q Now, do you know how this case was staffed at
21 Faggert and Frieden?

22 A Frankly, from reviewing the bills and based
23 upon what I have seen, there appears to be a hierarchy

1 here, where Mr. Frieden was sort of honchoeing the case,
2 but was never really involved in it. Mr. Sacks is the one
3 who started out with the case, but then he got out of the
4 litigation, so to speak.

5 But we find throughout the whole case that
6 Frieden and Sacks are involved in the case. And then it
7 got to the point where Ms. Cleary and Mr. Lawrence were the
8 primary trial lawyers, apparently. The two of them
9 apparently ran the litigation, so to speak. And the other
10 person -- I'm trying to remember the name now -- they were
11 the primary ones, along with a paralegal, Anne Miller, I
12 guess it was.

13 So we had four -- five of them who were in
14 constant, constant turmoil about the case.

15 Q Now, until I asked you in your deposition
16 whether or not you knew that Skip Sacks left Faggert and
17 Frieden, you didn't know, did you?

18 A His name appears throughout the bills.

19 Q But you know now because I asked you that Skip
20 Sacks left Faggert Frieden, don't you?

21 A I don't know when or if he left.

22 Q Well, I'll represent to you that he left. And
23 I'll represent to you that he left in March of 1995, or

1 April of 1995.

2 Now, do you know whether or not Mr. Sacks and
3 Mr. Lawrence overlapped at Faggert and Frieden?

4 A Not off the top of my head, I don't know.

5 Q So while Mr. Sacks --

6 A Because I don't know when Mr. Sacks left.

7 Q Okay. So while Mr. Sacks was in Faggert and
8 Frieden, you don't know whether Mr. Lawrence billed any
9 time to this file or not, do you?

10 A While Mr. Sacks was at Faggert and Frieden, I
11 don't know if Mr. Lawrence billed any time?

12 Q That's right.

13 A I think Mr. Lawrence did bill some time. Mr.
14 Lawrence was involved in the case in early '95.

15 Q That's correct. My question was, while Mr.
16 Sacks was at Faggert & Frieden and was the lead trial
17 counsel on this case, do you know whether or not Mr.
18 Lawrence billed BurgerBusters any time?

19 A Not without really looking at the bills, I
20 can't tell you that.

21 Q Well, the truth of the matter is you don't
22 know, do you?

23 A Not off the top of my head, no, I don't.

1 Q Well, let's find out. Let's look, if you will,
2 in the blue book under the Faggert and Frieden bills, which
3 are at the front, and let's look at a bill -- let's look at
4 the bill for April 17th, 1995 --

5 A (Witness complies.)

6 Q -- that reflects the time entries from March
7 of 1995.

8 A Okay.

9 Q Can you do that?

10 A Uh-huh, I have it.

11 Q Now, if you look at that bill, you'll see that
12 there are numerous entries for Mr. Sacks, don't you?

13 A I don't know if there were numerous entries,
14 but there are some.

15 Q Well, let's look. Let's start at the
16 beginning.

17 A While I'm looking at the summary. There's a
18 summary on the last page, you might want to look at that
19 and save some time.

20 Q We can look at the summary on the last page.
21 Mr. Sacks is SJS, is he not?

22 A Right.

23 Q What was the amount of the fees that Mr. Sacks

1 billed to this file in March of 1995?

2 A Apparently he didn't file anything.

3 Q He billed zero. But let's look at Mr. Sacks'
4 entries. No dollars now -- no dollars charged to
5 BurgerBusters from March of 1995 from Mr. Sacks, and no
6 dollars claimed in this case. Let's look at the entries.
7 March the 2nd, 1995, SJS.

8 A (Witness complies.)

9 Q Would you read to the jury, please, what he did
10 on that day and what was the charge?

11 A What was it you're referring to? I'm sorry.

12 Q March 2nd, 1995, the first page of the bill.

13 A He prepared for and he traveled to Warrenton
14 for a hearing.

15 Q And he had an office conference with Alan
16 Frieden, didn't he?

17 A Right.

18 Q And what were the hours there?

19 A Zero.

20 Q Now, look at March 6th, 1995. Mr. Sacks has an
21 entry.

22 A (Witness complies.)

23 Q What is it? Would you read that entry, please?

1 A "Office conference with AMF and ADC; telephone
2 call with Mr. Paphites."

3 Q Now, you can thumb through the bill to satisfy
4 yourself that there are entries by Mr. Sacks throughout
5 this bill, and he didn't charge a dime, did he?

6 A There are entries in this month of March where
7 he did not charge.

8 Q Are there any that he did charge? If you look
9 at the summaries, you see zeros. So, there are no entries
10 where he has charged.

11 A I just testified to that.

12 Q Now, the testimony in this case is that in the
13 trial of April, 1995, Mr. Sacks was no longer at Faggert
14 and Frieden. He attended the trial, but he didn't charge
15 for his time.

16 And you have no reason to dispute that, do you?

17 A I don't know that.

18 Q So if my question is, you have no reason to
19 dispute it; isn't the answer, that's correct, I have no
20 reason to dispute it?

21 A If I don't know, I can only say I don't know.

22 Q Now, would you go to the Howell and Daughtery
23 bills in the blue book, please.

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11 Q Now, would you read to the jury what the first
12 date is on the first page of the first bill that Mr.
13 Lawrence charged anybody for his time in this case?

14 A March 20, 1995.

15 Q And that's the same month that Mr. Sacks
16 charged zero, isn't it?

17 A March is March, of 1995.

18 Q So the answer is, yes?

19 A That's right.

20 Q So there was no billing overlap between Mr.
21 Sacks and Mr. Lawrence, was there?

22 A In that month, you are correct.

23 Q If Mr. Sacks left the firm, then, in April of

1 1995 or at the end of March, there was never any billing
2 overlap, was there?

3 A Do you mean was there a billing for both of
4 them in the same month?

5 Q I mean throughout the life of this case, if Mr.
6 Sacks left Faggert and Frieden at the end of March of 1995,
7 charged no time in March of 1995, Mr. Lawrence's first
8 charge is in March of 1995, there was never a time when the
9 two of them billed --



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21 A You don't have to -- I mean do you want me to
22 say that Mr. Sacks didn't work on the case at the same time
23 as Mr. Lawrence based upon the bills?

1 Q Please.

2 A That would be correct.

3 Q Thank you. Then there was no overlap in their
4 billing; correct?

5 A I don't know when the word overlap came up, but
6 --

7 Q Let me try it a different way.

8 A There is no billing at the same time between
9 Mr. Sacks and Mr. Lawrence.

10 Q So that when Mr. Sacks was involved in this
11 case at Faggert and Frieden, he was the lead trial counsel,
12 was he not?

13 A I believe that's correct.

14 Q And Ms. Cleary was the associate, was she not?

15 A That's right.

16 Q And there was a paralegal, was there not?

17 A Right.

18 Q And that's the way you think this case should
19 be staffed; correct?

20 A Right.

21 Q And when Mr. Lawrence took the case over in
22 March, Mr. Lawrence was the lead counsel on this case, was
23 he not?

1 A I think that's correct.

2 Q And Ms. Cleary was the associate, was she not?

3 A That would be correct, also.

4 Q And the paralegal continued, did she not?

5 A Yes, sir.

6 Q And that's the way you think this case should
7 be staffed; correct?

8 A Yes.

9 Q And so except for Mr. Frieden's involvement,
10 and the approximately \$11,000 for the other five attorneys,
11 as far as Faggert and Frieden is concerned and Hal Daultry
12 is concerned, this case was always staffed the way you
13 think it should be; correct?

14 A Are you talking about number of lawyers?

15 Q Yes.

16 A Close, yes.

17 Q And there wasn't anything improper about having
18 Mr. Basham do research, as such?

19 A Well, no.

20 Q Now, do you know the total amount of time that
21 Mr. Frieden billed to this file?

22 A No.

23 Q Would it surprise you to learn that it was

1 \$11,000?

2 A I have no knowledge. I mean, I have the bills,
3 but I have not gone through and added up all of these
4 bills.

5 Q Mr. Palmer, there was an issue in this case on
6 waiver, was there not?

7 A Yes.

8 Q And what do you understand the issue of waiver
9 to be?

10 A The issue of waiver had to do in this case with
11 whether or not the Plaintiffs had waived the terms and
12 conditions of the lease that they were trying to enforce.

13 Q And do you know what facts that was based on?

14 A Obviously, I didn't go through the whole
15 transcript. I mean, I did not read the trial transcript.
16 But from reading the memos -- and, again, I didn't study
17 the memoranda.

18 But the memos were based on the fact, as I
19 recall, that there was correspondence. Dr. Chawla had
20 written a letter to Mr. Paphites. They might have had a
21 discussion after this letter. Then there was a follow-up
22 letter, or something, and then they started getting into
23 the construction and things of that nature. And,

1 essentially, the argument was that any right of the
2 Plaintiffs to enforce their lease was waived by Mr.
3 Paphites in the action, or whatever.

4 Q And there was conflicting testimony on that,
5 was there not; or do you know?

6 A I didn't read the transcripts.

7 Q Do you know whether there was any other aspect
8 of waiver that was injected into the case later on?

9 A There may have been an issue of waiver when it
10 came to use of the ingress and egress easements, and things
11 of that nature.

12 Q Do you know what it was?

13 A Off the top of my head, no, sir.

14 Q Now, would you agree or disagree with the
15 observation that this issue of waiver provoked in this case
16 lots of controversy and lots of discussion before the
17 Court?

18 Do you agree or disagree with that?

19 A I think there were memoranda submitted from
20 each side and it was argued. I don't know that I could
21 quantify it as lots of discussion. There's no record of
22 what went on.

23 Q Would you disagree with that statement?

1 A I'm not in a position to know.

2 Q So you don't know whether there was lots of
3 controversy and lots of discussion before the Court, do
4 you?

5 A I can't say. I'm not in a position to do that.

6 Q Do you know how many hearings there were on
7 this issue?

8 A On the waiver issue?

9 Q Uh-huh.

10 A (No response.)

11 Q Are you looking at your handwritten notes that
12 we talked about --

13 A Well, actually I did after the deposition what
14 I told you I was going to do, when I did it originally, I
15 had it typed up.

16 Q Okay. So now we can read it.

17 A Right.

18 Q But you're not looking at anything different
19 than what you and I had at your deposition?

20 A No, no. I'm not under the impression that that
21 was an issue that was argued anymore than anything else. I
22 say that solely on my notes, now. As I told you when I
23 made these notes, they are rather cryptic, and I don't see

1 anything that suggested to me that there were a whole lot
2 of motions or arguments on that issue.

3 Q Would you be able to agree or disagree with the
4 statement that there were several hearings leading up to
5 the final ruling by the Court on this issue?

6 A Do you mean after the trial?

7 Q No, sir. Before the -- well, let's define what
8 we're talking about as the trial.

9 What do you mean by the trial?

10 A Well, you had the initial trial in April for
11 four days, April of 1995.

12 Q And three days in August?

13 A Right; that's what I'm talking about, the
14 initial trial. And then the subsequent conclusion that
15 took place in August.

16 Q Do you know what the final ruling of the Court
17 was on the waiver issue?

18 A That was probably the -- no, that was the
19 ruling of the judge that we just put into evidence of
20 August 14th. I don't have a recollection of that, no. I'm
21 sorry.

22 Q Well, I will tell you it's in evidence. It's
23 the Court's ruling on January 29, 1996.

1 A Okay. Well, between that time I don't have any
2 indication that there was any great argument about the
3 waiver issue, between the time of the trial in August and
4 then that ruling then.

5 Because after the trial in August there was a
6 post-trial telephone conference in October; and then in
7 February of 1996, there was another telephone conference;
8 and then there was another hearing having to do with this
9 issue in March.

10 So I don't see any evidence in the record that
11 there was a whole lot of discussion with the Court or
12 argument on that issue.

13 Q Are you aware that one of those telephone
14 conferences resulted in further briefing and further
15 memoranda on this issue?

16 A It may have, yes.

17 Q So you can't agree or disagree with the
18 observation -- or can you? I don't want to put words in
19 your mouth -- but, there were several hearings leading up
20 to the final ruling by the Court on this issue alone?

21 A Well, based on what you're telling me, there's
22 at least one, and I think probably it was argued earlier on
23 before the case even went to trial.

1 Q Do you have any idea how much was spent in
2 attorneys' fees dealing with this issue raised by the
3 Chawla's?

4 A No.

5 Q You would agree, would you not, that the issue
6 of waiver, had BurgerBusters lost it, they would have lost
7 the entire case?

8 A I would agree with that.

9 Q You are aware, are you not, that there was a
10 cross-bill filed in this case?

11 A Yes.

12 Q Do you know how many counts it had?

13 A The initial cross-claim, as I recall it, was
14 just one count. But then it was amended later on, which
15 they -- excuse me, the original complaint was amended. And
16 it was amended -- and I recall there were three or four
17 counts on the cross-bill.

18 Q Do you remember what they were?

19 A The issues on the cross-claim by Dr. Chawla
20 primarily were asking, I think, for relief with regard to
21 the right-of-way and things of that nature. And actually
22 the cross-claim, to my way of thinking, essentially was
23 tied up with this issue of waiver.

1 The cross-claim sought relief alleging that the
2 provisions of the lease had been obtained by Mr. Paphites
3 under certain circumstances that should set them aside, and
4 they sort of had woven in there, also, I think, the waiver
5 argument to some degree.

6 Q But the issue with regard to how the agreement
7 was obtained was completely separate from waiver, isn't it?

8 A Yes. I mean, to that degree, that is
9 different, yes.

10 Q So let's go through the four counts of the
11 cross-bill.

12 Can you tell me what they were?

13 A The four counts of the cross-claim?

14 Q Uh-huh.

15 A I would have to look. Off the top of my head,
16 I can't.

17 Q Okay. Well, there was one count for breach
18 of --

19 A I might have made a note, but I don't recall.



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5 Q One count was breach of contract.

6 Do you know what the issues were on the breach
7 of contract count?

8 A Not without looking at the pleadings, I can't
9 tell you.

10 Q Do you know how much time was spent by
11 BurgerBusters' lawyers dealing with the allegations arising
12 under that count?

13 A No.

14 Q Do you recall that it had something to do with
15 an unreasonable refusal to agree?

16 A Okay. Now, you're refreshing my recollection.

17 The terms of the lease had to do with the
18 development of the rest of the shopping center there. And
19 the provision was that in the event of the development of
20 the shopping center by Dr. Chawla, he would seek approval
21 from Paphites -- or BurgerBusters, excuse me --

22 Q Go ahead.

23 A -- and that consent was being unreasonably

1 withheld.

2 Q Now, the development restriction that we're
3 talking about is in paragraph seven, isn't it?

4 A Yes. As I recall, the primary paragraphs in
5 the lease that we're concerned about is seven and eight --
6 as I recall.

7 Q In seven and eight?

8 A Right.

9 Q Now, in eight there is a provision, is there
10 not, that consent shall not unreasonably be withheld?

11 A That's right.

12 Q There is no provision in paragraph seven on
13 that point, is there?

14 A I'm sitting here looking at it, and I assume
15 that that's the provision of the lease. You're right.

16 Q So do you know how much attorney time and
17 effort on the part of BurgerBusters was expended to deal
18 with the allegation in the cross-bill that the unreasonable
19 refusal provision applied to seven as well as to eight?

20 A No.

21 Q Do you know how much legal research was
22 required, how much court time?

23 A I did not go through -- I can tell you, Mr.

1 Durette, I did not go through and pick out and say how
2 many hours was spent on each item.

3 Q So you don't know whether the amount of time
4 spent on this issue was reasonable or unreasonable, do you?

5 A Well, yes, I can, because all these issues are
6 intertwined. When you have a case of this nature and
7 you're talking about a lease, and you get into waiver, and
8 you get into the contract issues, these are all part of the
9 issues that are involved in litigating a lease issue.

10 And there's nothing magical about this.
11 There's nothing that complicated about it. And the issue
12 of waiver, you go out, you dig up the case law, and you
13 apply the case law to your case.

14 Q My question was -- well, never mind.

15 Let's go to the next count in the cross-bill.
16 The next count was one for reformation of the contract.

17 Do you recall that?

18 A Yes, sir.

19 Q Do you know how much time was spent in
20 research, depositions, court appearances, legal memoranda,
21 dealing with that issue?

22 A No.

23 Q The third count was rescission.

1 The same question, do you know?

2 A No, sir.

3 Q The fourth count was implied easement. Now,
4 the jury has previously learned what an implied easement is
5 and what an expressed easement is. An expressed easement
6 would be if we can find it up there, right? An implied
7 basement is based on a lot of things: conduct, other
8 writings, words spoken.

9 Do you and I agree on that?

10 A I think that's probably correct.

11 Q Do you know what the issue was in this case
12 regarding an implied easement?

13 A As I recall, it had to do with the use of the
14 entrance and exit on 29.

15 Q Do you know whether it had anything to do with
16 other documents, letters, handwritings, et cetera?

17 A I don't recall.

18 Q Do you know whether or not it had anything to
19 do with any conversations that took place between Dr.
20 Chawla and Mr. Paphites or anyone?

21 A I know it had to do with the conversations.

22 Q Do you know how much time was spent on
23 discovery, research, court appearances, or anything to do

1 with the implied easement issue?

2 A No, sir.

3 Q Now, you know, do you not, that BurgerBusters
4 prevailed on all four of these?

5 A The cross-claim was denied, yes. I know that.

6 Q Do you know whether the cross-claim was denied
7 as a result of the trial, or as a result of preliminary
8 motions, or a motion for summary judgment?

9 A Most of them were knocked out in the
10 preliminary motions.

11 Q Do you know how much time was spent making the
12 argument in those motions?

13 A No.

14 Q Do you know whether or not there was a defense
15 in this case raised by the bank on federal preemption?

16 A As a matter of fact, I had forgotten that there
17 was.

18 Q When I asked you yesterday you didn't know, did
19 you?

20 A It went right over my head. I was forgetting
21 about the bank.

22 Q Do you know how much time was spent
23 researching, legal memoranda, court appearances, dealing

1 with defense of federal preemption?

2 A I can't imagine there was much time spent on
3 that.

4 Q Why, was it frivolous defense?

5 A I think the Court thought so.

6 Q Do you know that there were defenses in this
7 case raised of res judicata and collateral estoppel?

8 A As I recall, those were issues that were
9 raised.

10 Q Do you know the basis for raising those issues?

11 A (The witness reviewed his notes.)

12 Those were argued on April the 3rd of '95. I
13 think that had to do with the fact that the judge had
14 already ruled in the preliminary injunction matter. And
15 that's the matter, it started out preliminarily with Mr.
16 Pearson, and then Mr. Sacks came up on another preliminary
17 that was granted; and then the petition for the injunction
18 was ultimately denied.

19 So Mr. Sacks lost that. And then in the later
20 pleadings, I think Mr. O'Connell raised collateral estoppel
21 and res judicata, but the Court had already ruled on that.

22 Q And, of course, BurgerBusters prevailed on that
23 issue, did they not?

1 A On the collateral estoppel? Yes, sir.

2 Q And res judicata?

3 A Right.

4 Q Do you know how much time was expended
5 researching, writing briefs, and appearing in court to
6 defend against that defense?

7 A No; but, again, that's a common type thing. It
8 would nt take very long to do that.

9 Q Whether or not there's res judicata or
10 collateral estoppel depends on the facts and circumstances
11 of any particular case, does it not?

12 A Collateral estoppel and res judicata does not
13 essentially get into any technical consideration of facts.
14 It's more a technical consideration of the law and what the
15 Court ruled, and whether or not the parties are the same
16 and the issues are the same.

17 Q And that would depend on a given case, would it
18 not?

19 A No question about that. It's all case
20 specific.

21 Q Now, how many motions to compel -- well, first
22 of all, I'm not sure we defined for the jury what a motion
23 to compel is. So why don't you just tell them what a

1 motion to compel is in the context of discovery?

2 A We file discovery proceedings. You've heard
3 about -- or I assume you've heard about interrogatories and
4 request for production and things of that nature. If the
5 lawyer doesn't do it within twenty-one days -- although
6 most of us don't wait for that twenty-first day to file a
7 motion. But after a reasonable time if you call a lawyer,
8 or you write to them and say, where are your answers, if
9 you don't get them, then you file a motion to compel.

10 Q And would you agree that at least in Virginia
11 it's customary for the lawyers to try to work it out before
12 the motion to compel is filed?

13 A In this case you are required to try to work it
14 out, in this court. The court rules require you to discuss
15 discovery matters before you bring them before the Court.

16 Q That's a good rule. I haven't looked at the
17 local rules because it hasn't been required of me in this
18 case. That's not true in every jurisdiction, I hate to
19 say.

20 Do you know how many discovery disputes arose
21 in this case over interrogatories?

22 A There seemed to be a lot.

23 Q Do you know how many arose over requests for

1 production of documents?

2 A Not really. There were a lot of motions with
3 regard to discovery.

4 Q Do you know how many court appearances related
5 to those?

6 A I could estimate for you.

7 (The witness reviewed his notes.)

8 It appears to me there were four. Normally,
9 there was more than one thing discussed, but four where the
10 major issue seemed to be the discovery issue.

11 Q Out of how many?

12 A Out of how many --

13 Q Court appearances?

14 A Well, I came up, as I told you, with about 33
15 court appearances that included trials.

16 Q So you came up with 33 court appearances. And
17 I think we agreed that you were counting the four-day trial
18 in April as one appearance?

19 A Exactly.

20 Q So even though it took four days, that was one
21 appearance. And the three days in August was one
22 appearance.

23 A That's true.

1 Q And then two days earlier on the preliminary
2 injunction hearings, that that was one appearance.

3 A There was a permanent injunction. That the
4 February 12th and 13th was a permanent injunction.

5 Q Was a permanent injunction. Yeah, I'm sorry,
6 you're correct. That was two days. But that was one
7 appearance.

8 A That's right.

9 Q So if we took those days and said each day is
10 an appearance, we'd have over 40 court appearances in this
11 case, wouldn't we?

12 A Yes, sir.

13 Q Do you know how much time was spent by the
14 lawyers physically in the courtroom during those 40
15 separate court appearances?

16 A That could have ranged from a half an hour to
17 five or six hours.

18 Q And you don't know how much it totaled, do you?

19 A No.

20 Q Do you know whether or not there was a motion
21 to reconsider in this case of the Court's rulings
22 dismissing counts one and four from the amended cross-bill?

23 A Yeah, I think that is correct.

1 Q Do you know how much time was spent briefing,
2 arguing, and appearing in court on Dr. Chawla's motion to
3 reconsider the dismissal of the two counts of his cross-
4 bill?

5 A I wouldn't think there would be much time spent
6 briefing or preparing, because you already argued that
7 issue. But certainly the Court thing.

8 Q But you don't know?

9 A No.

10 Q Do you know that there was a motion in this
11 case for election of remedies?

12 A As I recall, early on, that it was involved.
13 That had to do, of course, with the dichotomy between law
14 and equity.

15 Q Who filed that?

16 A I would imagine it would be Dr. Chawla's
17 pleading.

18 Q And do you know how much time was taken with
19 respect to all of the things that were done with regard to
20 that motion?

21 A No.

22 Q Do you know what has transpired in this case
23 since the Judge's opinion of January 29th, 1996, and the

1 subsequent order that's in evidence?

2 And I'm searching my memory now for the date.
3 Would I be right if I said May, 1996, that the order was
4 entered; do you recall that?

5 A I've seen a couple of orders since then. I
6 mean, since January there was an initial order having to do
7 with what kind of hearing would be held on attorneys' fees,
8 and there was a subsequent order as to the issues that
9 would be considered in making that determination.

10 Q The one that I had reference to is an order
11 that implemented the Court's letter opinion of January
12 29th. And I think you'll see that was entered on May 20th.
13 It's on the second page.

14 A Right.

15 Q Do you know what's happened since that order
16 was entered?

17 A There was -- I've been sort of getting that in
18 bits and pieces. Since that time, there was a proposal
19 submitted, as I recall, by Dr. Chawla to reform the
20 building, or reconform the building, excuse me. That was
21 rejected by the Court.

22 Q How many proposals were submitted by him at
23 that time?

1 A Well, I think there were three proposals
2 submitted at the same time. They were all written -- or
3 some kind of drawing. There were three or four of them.
4 They were drawings with proposals. And the Court rejected,
5 as I recall, the initial series of proposals.

6 Q Was there a court hearing?

7 A I believe there was. I think they appealed on
8 that.

9 Q Do you know how long it took to prepare for, or
10 appear in court on that hearing?

11 A I can't imagine it would take very long,
12 because we're talking about some engineer's drawings, and
13 the Judge is going to look at them and see if they conform
14 with what he thinks is contained in the lease.

15 Q But you don't know?

16 A Well, I can't imagine what anybody would have
17 to prepare for when it's a submission by a party of a
18 proposal to redo a building.

19 Q Go ahead.

20 A And it seems to me it's a matter of standing up
21 and arguing your position to Judge Robertson that either it
22 does or it doesn't meet the provisions of the lease.

23 Q Do you know what arguments were made on behalf

1 of the Chawla's to support their position that these four
2 proposals conform to the terms of Judge Robertson's order?

3 A I have not reviewed the transcript, no.

4 Q Do you know whether or not those four proposals
5 contained drive-through banking lanes and windows?

6 A As I recall, I think that's the reason that
7 Judge Robertson ended up turning it down. I think my
8 recollection is that Judge Robertson says that there's
9 nothing in this drawing that's attached to the lease that
10 allows a drive-through, and I'm not going to allow a drive-
11 through. That's my recollection.

12 Q That was pretty plain from the lease and the
13 Exhibit D, wasn't it?

14 A I wouldn't agree with that, no.

15 Q So in your view it was ambiguous?

16 A Well, I don't want to be stepping into it here.
17 I don't frankly agree with Judge Robertson's ruling on that
18 issue. But --



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Q And then what happened after we came back to court and we argued about what Judge Robertson meant when he wrote his opinion and entered his order?

And that hearing was on the July 1, I'll tell you that.

But you don't know how much time was spent?

A No, sir, I don't.

Q And then what happened?

A And then there was a subsequent submission by Dr. Chawla with another proposal, and I think ultimately the Court adopted a proposal for the reconfirmation of the building. During this time, also, I believe -- I stand to be corrected -- this was also -- we had -- it seems to me that there was also some motions by the Plaintiff at that time with regard to the nature of this case, this aspect of the case, with regard to attorneys' fees.

I think there were a couple of motions by the Plaintiffs in that regard that they filed.

1 Q Do you know when that hearing was held?

2 A No.

3 Q Do you know how much time was involved in that
4 hearing?

5 A No, sir.

6 Q I will tell you that it was held on Wednesday,
7 August the 21st of 1996, and that I'm looking at a
8 transcript of 98 pages.

9 A That hearing actually involved more than just
10 that issue. I don't even have that in my list.

11 Q You testified to that. I think you stated --

12 A A motion to quash and a motion to compel was
13 also involved in that day, and I believe those were filed
14 by the Plaintiff.

15 Q Do you know how long the hearing took?

16 A No. I said I indicated I don't know.

17 Q Now, are you aware of the decision -- well,
18 first of all, do you know whether or not the original Bill
19 of Complaint that was filed for temporary and permanent
20 injunctive relief contained a request for damages?

21 A I don't think it did initially.

22 Q It did not, did it?

23 A I don't think it did.

1 Q Are you aware of any efforts made by
2 BurgerBusters' attorneys to separate the trial of this case
3 between the determination of whether they were entitled to
4 injunctive relief and whether they were entitled to
5 damages?

6 A I thought it was Dr. Chawla who raised the
7 issue about splitting the case up, because there was a
8 dichotomy between chancery and law. But I'm not
9 recollecting anything that I read that got into that.

10 Q So you are not aware of the fact that on more
11 than one occasion BurgerBusters' attorneys requested the
12 Court to try the injunction phase of the case first and
13 determine whether or not they were entitled to an
14 injunction, and then, only if they were not, would you hold
15 the trial on damages?

16 You are not aware of that, are you?

17 A Are you talking about bifurcating the trial?

18 Q I wasn't going to use that word, but I'm
19 talking about bifurcating the trial.

20 A I don't have a recollection of seeing any
21 motion like that, but there were a lot of motions.

22 Q There were a lot of motions.

23 And you may not be aware that Dr. Chawla

1 opposed that, are you?

2 A Since I didn't know it existed, I didn't know
3 he opposed it, no.

4 Q But you understand that if that motion had been
5 granted, given the judge's ruling in this case, we would
6 never have had a trial on damages, would we?

7 A I don't understand your statement. I'm sorry.

8 Q Okay. Let me back up. If you have a claim for
9 damages in the future as a result of misconduct and you're
10 also asking the Court to order that the misconduct stop, or
11 the breach of the agreement stop, if you get the Court to
12 stop what's going on, then your future damages are
13 eliminated; correct?

14 A They can be, yes.

15 Q And are you aware that that's the position that
16 BurgerBusters took in this case?

17 A As I say, I'm not aware.

18 Q But if they took that position in this case,
19 and if the evidence shows that they took that position in
20 this case, and that Dr. Chawla opposed that position, then
21 if they had prevailed, there would have only been a trial
22 with respect to the injunction; correct?

23 A If Chawla prevailed?

1 Q No. If BurgerBusters prevailed on their
2 argument that we want to separate these trials, and we only
3 try the injunction -- we try the injunction alone, and they
4 got the injunction, we never would have had the trial on
5 damages.

6 A No, that's not true. Because if they had won
7 the injunction suit, then I assume they'd be running right
8 in here with a second trial on the damage aspect.

9 Q The future damages are eliminated by the
10 injunction, are they not?

11 A No.

12 Q Oh, they're not?

13 A Not unless you're removing something. Their
14 claim for damages arose allegedly out of a loss of some
15 parking spaces. And so at that point the claim for damages
16 existed. And, you know, they're going to come back -- if
17 they win the injunction suit, they're coming right back in
18 later on with another trial on the issue of damages.

19 Q Are you aware of the fact that in their motions
20 to the Court for summary judgment and for bifurcation, they
21 represented to the Court that if we get the injunction we
22 don't want damages?

23 A I don't know that any such representation was

1 ever made, and I certainly can't say that.

2 Q If that was the testimony in this trial, you
3 would have no basis to refute it, would you?

4 A I can't refute testimony; no, sir.

5 Q Did you make an effort to quantify the amount
6 of time devoted to travel?

7 A To travel?

8 Q (Nodding head.)

9 A That's another item that I think Mr.
10 O'Connell's secretary was kind enough to do at some point.
11 Frankly, I don't recall what the number is.

12 Q Okay. But you didn't do it?

13 A No, sir.

14 Q Now, do you know what Mr. Kimball testified to
15 at the trial in April, the expert that you talked about?

16 A Right. Based upon my review of his
17 deposition -- I made some notes, and they're cryptic, as I
18 indicated -- I went to Mr. O'Connell's office and --

19 Q Mr. Palmer, I don't want to know what he
20 testified to in his deposition. I want to know --

21 A No, no, no. This was his testimony at the
22 hearing.

23 Q I'm sorry. You said deposition.

1 A Excuse me. I'm sorry. I read the transcripts
2 at Mr. O'Connell's office. I went there one morning.

3 And you asked about Kimball?

4 Q Yes, in April.

5 A His testimony centered around the testimony
6 about the parking spaces, the loss of the parking spaces,
7 the alleged impact, some testimony about conjection. And
8 there was no testimony about the size of the building.

9 Q Okay. Now, are you eliminating his testimony
10 on his fees in this case because he didn't testify about
11 the size of the building?

12 A Yes. And didn't testify about anything that
13 the cross-claims were raising, having to do with any of
14 their issues.

15 Q Are you aware of the fact that one of the --
16 well, do you know what the expert retained by the Chawla's,
17 whose deposition was taken, and you expressed an opinion
18 that that should not be a recoverable expense, do you know
19 what he was testifying on?

20 A I didn't read this transcript (indicating) from
21 -- it seems to me that he was testifying about the parking
22 spaces and the need for parking in the area. I think that
23 was primarily the thrust of his testimony, although I stand

1 to be corrected on that.

2 Q Are you aware that the Chawla's expert
3 testified and rendered an opinion based on an algebraic
4 equation of some kind that in determining the forty-five
5 hundred square feet of space that you counted the drive-
6 through lanes and the drive-through that was outside as
7 part of the total configuration to comply with Exhibit D?

8 A As I say, I did not read his transcript.

9 Q So you don't know about that?

10 A No.

11 Q And are you aware that those drive-through
12 lanes are the lanes that eliminated the four parking spaces
13 that were at issue in this suit?

14 A I think that's right.

15 Q And so Mr. Kimball testified, did he not, about
16 the importance of those four parking spaces to
17 BurgerBusters' business that was eliminated by the drive-
18 through that BurgerBusters was complaining about, didn't
19 he?

20 A I don't think that was what BurgerBusters was
21 complaining about. BurgerBusters was complaining about the
22 fact that it was a bank and based upon the fact that the
23 drive-through was there. They created a problem with the

1 lights because Taco Bell had a drive-through, and that the
2 configuration as it had been built needed the light, and
3 because of that there was this issue about the fence, and
4 they had to put the fence up there so that at nighttime the
5 lights wouldn't be facing each other, and things of that
6 nature.

7 Q Isn't it true --

8 A And --

9 Q Excuse me.

10 A And they also indicated and claimed that these
11 four spaces -- or three or four spaces, whatever they
12 were -- allegedly were close to their building, close to
13 Taco Bell, and that they wanted -- suggested they wanted
14 these spaces back. That was one of the claims.

15 Q And in their amended bill, what they wanted was
16 this (indicating), isn't it?

17 A What they wanted was this? I don't --

18 Q The lot development shall be undertaken in the
19 shopping center, or none shall be undertaken, except as
20 shown on Exhibit D.

21 That's what they had plead for, wasn't it?

22 A Well, there's nothing shown on Exhibit D. All
23 we have is a footprint.

1 Q Right. But that footprint shows only a
2 building with no drive-through lanes, does it not?

3 A I don't think that that shows that, because I
4 think the use of that area doesn't show a building, either.
5 It's a footprint.

6 Q It shows a footprint, which is the base of the
7 building.

8 A No.

9 Q Well, you would agree with me, would you not,
10 that the Court ordered that the development comply with
11 that exhibit?

12 A Well --

13 Q And that the Court rejected all of the
14 proposals that contained drive-through lanes, wouldn't you?

15 A I understand that; yes, sir.

16 Q And you agree that BurgerBusters opposed all of
17 those proposals that contained drive-through lanes?

18 A I understand that; yes, sir.

19 Q And you agree that one of the reasons for that
20 was they wanted those four parking spaces?

21 A No; I don't think that the reason they wanted
22 to get rid of the drive-through was for four parking
23 spaces. The footprint is there.

1 Q So you disagree that BurgerBusters -- one of
2 BurgerBusters' arguments in this case upon which they were
3 asking the Court to render its order and to eliminate that
4 drive-through was because of the importance to them of
5 these four parking spaces.

6 Do you disagree with that?

7 A I'm not going to disagree with that statement.
8 I mean, it's all through their pleadings that these three
9 or four parking spaces are a big problem and they wanted
10 damages for them. I mena, they put on testimony that
11 they're worth millions of dollars.

12 Q That is correct, because they lost on their
13 motion to bifurcate, didn't they?

14 A No; they did that because they were asking for
15 damages.

16 Q All right. Mr. Palmer, if they had won on
17 their motion to separate these trials, those millions of
18 dollars of future damages would never have been claimed,
19 would they?

20 * * *

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22 THE WITNESS: That's not what they said in the
23 trial.

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Q Mr. Palmer, did you review the transcript of the hearing on the first of the four days when this case was originally set in April, that being April 24th, 1995?

A No.

Q Well, I need you to read you, then, what Mr. Lawrence said.

Mr. Lawrence: "I will tell the Court if the Court grants us the full measure of equitable relief that we wanted and which I think these cases I've discussed would mandate, we will not pursue a claim for damages. We will take our equitable relief and the attorneys' fees

1 which we think you're about to award pursuant to the terms
2 of the lease, and we will go home."

3 So you didn't have the benefit of Mr.
4 Lawrence's position in this case, did you?

5 A No, sir.

6 Q Now, would you describe for the Court, please,
7 exactly how you came up with your estimate as to the
8 \$30,000 to \$40,000 that you say would be a reasonable fee
9 in this case?

10 A I don't know that there's any exactitude about
11 it, but the method that I used was to review the materials,
12 the pleadings in the case, to familiarize myself with the
13 issues, determine what had gone on in the case, and then
14 take a look at the issues that had been litigated,
15 determine which issues I felt there had been a prevalence
16 on insofar as the Plaintiff was concerned, and then sat
17 down and, based upon my experience, came up with what I
18 felt was the time that would be reasonably spent in
19 handling this litigation.

20 Q And so you didn't attempt to look at the
21 specific court hearings and how much time was taken, or
22 specifically the memoranda and how much time was taken, and
23 made judgments as to whether or not those tasks were

1 reasonable or unreasonable?

2 A Not the specific memorandum, no. Now, I did
3 look generally at what had gone on. I mean, because you
4 pointed out

5 -- I had my chicken scratch that you can barely read, where
6 I listed hearing some things of that nature. And in making
7 the determination, I mean, I am imposing in that analysis
8 what I consider to be reasonable for this case.

9 Q But, again, I want to be sure I understand, you
10 did not look at -- let's say this case took four days in
11 April, three in August, and two in, was it February? -- it
12 took two in February?

13 A The two originally in February?

14 Q Right. So you didn't read through those trial
15 transcripts and try to determine, instead of nine full
16 days, how many days it should have taken?

17 A Well, actually I sort of did.

18 Q How many days should it have taken?

19 A As I indicated, that was something I did in
20 retrospect, too. I felt that --

21 Q Well, my question -- excuse me just one second.
22 My question is how you estimated the \$30,000 to \$40,000
23 that you did on October the 30th. Now, you're going to

1 tell me something you did after that. I want to know in
2 October.

3 A I don't have -- I was not that scientific at
4 the time that I did that. It was sitting down, figuring
5 what the issues were, and going through in that fashion;
6 and thinking through what I felt would be necessary, for
7 example, for research, trial time, motions, depositions,
8 things of that nature.

9 Q Again, I take it that with respect to the
10 actual issues that were raised in this case, you didn't go
11 through and say, well, to deal with waiver in this case it
12 should have taken X hours; to deal with the election of
13 remedies in this case, it should have taken Y hours; to
14 deal with res judicata in this case, it should have taken Z
15 hours.

16 You didn't do that?

17 A No. I looked at it as an overall, but taking
18 into consideration that those are issues in the case.

19 Q Yes, sir.

20 MR. DURRETTE: Would you mark this as
21 Petitioner's next exhibit? What are we up to, ten?

22 THE CLERK: Ten.

23 MR. DURRETTE: This is Mr. Palmer's bill.

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(The document referred to
above was marked Petitioner's
Exhibit Number 10, for
identification.)

BY MR. DURRETTE:

Q Mr. Palmer, I'm going to show you what we've
marked as Exhibit 10 for identification.

(Whereupon, Mr. Durette handed a document to
the Witness for his examination.)

BY MR. DURRETTE:

Q Is that the bill that you entered in this case,
through the date that's on there?

A Yes.

MR. DURRETTE: I'd move its admission, Your
Honor?

THE COURT: Any objection?

MR. O'CONNELL: No objection.

THE COURT: Petitioner's ten will be received.

(The document heretofore
marked Petitioner's Exhibit
Number 10, for
identification, was received
in evidence.)

1 BY MR. DURRETTE:

2 Q Now, Mr. Palmer, I don't think I have another
3 copy, so I can't direct you to the precise date, but would
4 you look on it? And there's a date on which you --

5 A I've got a copy here.

6 Q Oh, you've got a copy?

7 A Sure.

8 Q Are you ready?

9 A Yes.

10 Q Look at your entry on March 25th.

11 A Yes.

12 Q Would you read that to the jury?

13 A "Telephone conference with a client."

14 Q And you don't say what the conference was
15 about, do you?

16 A No.

17 Q Would you look at your entry at --

18 A I can tell you what it was about.

19 Q But it's not on the bill, is it?

20 A No.

21 Q Would you look at your entry on October 29th,
22 "Conference with O'Connell, one hour"?

23 A (Witness complies.)

1 Q You don't say what the conference was about, do
2 you?

3 A No. I can tell you what it was about. There's
4 only one reason why I'm in this case.

5 Q But it's not on your bill that you rendered, is
6 it?

7 A That's right.

8 MR. DURRETTE: Your Honor, I have no further
9 questions.

10 THE COURT: All right. Thank you. Redirect,
11 Mr. O'Connell?

12 MR. O'CONNELL: No questions, Your Honor.

13 THE COURT: May Mr. Palmer be excused?

14 MR. DURRETTE: As far as we're concerned.

15 MR. O'CONNELL: Yes, he may.

16 THE COURT: All right. Thank you, Mr. Palmer.
17 You're free to go, sir.

18 (Witness excused.)

19 MR. O'CONNELL: There will be no further
20 witnesses, Your Honor.

21 THE COURT: All right. The Defense rests?

22 MR. O'CONNELL: The Defense rests.
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(Whereupon, Mr. Durette handed a document to the Witness for her examination.)

BY MR. DURRETTE:

Q Ms. Cleary, I'll show you what was marked in this case -- I've already shown you what we've marked in this case as Plaintiff's Exhibit 11, and ask if you can identify that.

A Yes. This is a document I prepared. It's a

1 list of time spent on this case, and dollars billed for
2 that time for attorneys who weren't primarily involved in
3 the case.

4 Q And how did you make the calculation?

5 A If you look at the billing notebook --

6 Q Exhibit 9? You used Exhibit 9?

7 A Yes. At the end of each Faggert and Frieden
8 bill, there is a compilation. There will be a list of
9 attorneys by initials. Mine would be ADC. Mr. Lawrence is
10 JGL, and so on. And it shows for that particular time the
11 total number of hours billed by that particular attorney --
12 excuse me, for that particular bill, the total number of
13 time billed by that attorney, and the dollar equivalent
14 based on that attorney's billable rate.

15 And so I went through each of those bills, and
16 for each of these attorneys pulled the time and the
17 equivalent dollar rate and totaled it up.

18 Q And the exhibit contains subtotals after each
19 lawyer by name, the number of hours and the number of
20 dollars; right?

21 A Yes, sir.

22 Q And then it contains the total hours that all
23 of the lawyers, other than Mr. Frieden, you, Mr. Sacks, and

1 Mr. Lawrence from Faggert and Frieden billed; correct?

2 A That's correct.

3 Q And it also contains all the time that Robin
4 Gulick from Pearson and Pearson billed; is that correct?

5 A That's correct. Actually, I think the firm
6 name was a little different at the time. It started with
7 Mr. Gulick, and at the time he and Mr. Pearson were
8 partners.

9 Q Mr. Pearson was the only other attorney in that
10 firm that billed; is that correct?

11 A To my knowledge, yes.

12 MR. DURRETTE: Your Honor, I move the admission
13 of Plaintiff's eleven.

14 THE COURT: Any objection.

15 MR. O'CONNELL: No objection.

16 THE COURT: It will be received, Plaintiff's
17 eleven.

18 (The document heretofore
19 marked Petitioner's Exhibit
20 Number 11, for
21 identification, was received
22 in evidence.)
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17 Q Mr. Basham's total on this bill is how much?

18 A His total time spent on this file in hours was
19 123.7 hours. He billed at the rate of \$75 an hour. So
20 it's a total of \$9,277.50.

21 Q Now, what did Mr. Basham do primarily?

22 A Research.

23 Q And if Mr. Basham had not done that research,

1 who would have done it?

2 A I would have done it, or Mr. Sacks, or Mr.
3 Lawrence would have done it.

4 Q And your billing rate is how much?

5 A For this file it was \$100.

6 Q And Mr. Sacks was how much?

7 A I believe it was \$125.

8 Q And Mr. Lawrence was how much while he was at
9 Faggert and Frieden?

10 A While at Faggert and Frieden, I believe it was
11 \$150 an hour.

12 Q And why did you have Mr. Basham do the
13 research?

14 A Well, it seemed to be a more economical
15 approach to this. It saved the client money and got the
16 research done. Mr. Basham is fully capable of doing the
17 research we needed done on this file, and it saved our
18 client money.

19 Q Now, Ms. Cleary, there was some testimony from
20 Mr. Palmer yesterday regarding some billing entries at
21 Faggert and Frieden. I believe that it was in December of
22 1995, or December of 1994.

23 Do you recall?

1 A With respect to the waiver issue?

2 Q Yes.

3 A That would have been in 1995, it occurred.

4 Q Right.

5 A And actually it would have been on the December
6 bill, but it would have been November time.

7 Q November time on the December bill, right.

8 Now, did I ask you to go back through your
9 files --

10 A Yes, you did.

11 Q -- and look at your notes and the
12 correspondence that related to those entries?

13 A Yes, you did.

14 Q And would you tell the jury, please, what you
15 learned about what transpired at that point in time, and
16 particularly why it produced the office conferences, inter-
17 office conferences, that were testified to by Mr. Palmer?

18 A Including my bill. About two months after the
19 trial ended in August, we received a letter from the Court
20 requesting additional information concerning the waiver
21 issues. This was with respect to Mr. Paphites' note on the
22 bottom of the April 3 letter and some statements he made
23 under oath in testimony at an earlier hearing.

1 These issues had been previously raised by the
2 Chawla's in pretrial conference and in a hearing in between
3 the two trials, or the two parts of the trial. And then it
4 was raised again in closing arguments when the Judge asked
5 for additional information on it.

6 The parties, counsel and the Court, had a
7 telephone conference on October 30, at which we discussed
8 how these issues would be addressed, or the Court's
9 questions concerning these issues. And it was determined
10 that the parties would file briefs, and the schedule was
11 set up, and the issues to be briefed were discussed.

12 Approximately, a week later we received a draft
13 order from Mr. O'Connell of what he understood was the
14 outcome of this conference. It differed from what we were
15 told concerning the conference, and, in fact, differed from
16 Mr. Lawrence's notes concerning the conference.

17 Q Let me interrupt to ask you -- maybe you said.
18 I wasn't paying attention entirely.

19 But did you tell the jury that you did not have
20 a court reporter?

21 A No. I was getting to that point. The office
22 conferences resulted because we didn't have a court
23 reporter. And so we were discussing among ourselves

1 recollections, and comparing it with the notes and
2 comparing it with Mr. O'Connell's draft order. There was
3 no way to go back and confirm exactly what was said, since
4 the court reporter wasn't there recording everything that
5 was said.

6 So we had those conferences in an effort to
7 reconstruct what was said. And in the end, we prepared our
8 version of an order and sent it to Mr. O'Connell. The
9 parties went back and forth. Ultimately --

10 Q Did you ever reach an agreement?

11 A No, we didn't. Ultimately, each side sent
12 their order with a letter to the judge. And I don't
13 believe -- in fact, I'm certain that the Court never
14 ultimately entered either order. I checked the Court's
15 file this morning.

16 Q And is that because by the time that the
17 controversy resulted in sending both orders to the Court,
18 the issue, which was supposed to be addressed, was over?

19 A It was fairly moot at that point, because both
20 parties had filed their respective briefs and had used the
21 issues in the timetables that each side thought they had.

22 Q Now, did I also ask you to go back to your
23 files and retrieve certain pieces of correspondence that

1 were exchanged between Dr. Chawla and Alan Frieden in 1993?

2 A Yes, you did.

3 Q And did you do that?

4 A Yes, I did.

5 Q And did you give me those documents this
6 morning?

7 A After going through the rain and getting them
8 copied, yes, I did.

9 MR. DURRETTE: Your Honor, I have three of
10 them.



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you'll you just give me one of each. I'll put them in the date order. We have August 31 to Dr. Chawla. We have September 22nd to Dr. Chawla. And we have September 24 to Mr. Frieden from Dr. Chawla.

And that's what we should have?

MR. DURRETTE: That's what you should have.

OPEN COURT

THE COURT: Now, they will be marked in that order.

THE CLERK: Exhibits twelve, thirteen and fourteen.

THE COURT: Twelve, thirteen and fourteen, for identification only.

(The documents referred to above were marked
Petitioner's Exhibits Number
12, 13 and 14, for
identification.)





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(The documents heretofore
marked Petitioner's Exhibits
Number 12, 13 and 14, for
identification, were received
in evidence.)

MR. DURRETTE: Your Honor, I would like
permission to give the Witness my copies, which are



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to the Witness for her examination.)

BY MR. DURRETTE:

Q Now, I believe you said, Ms. Cleary, that you
went to your files at my request and you found this
correspondence?

A Yes, I did.

Q And the first letter, which is Exhibit 12, is a
letter dated August 31st, 1993, to Dr. Chawla from Alan
Frieden; is that correct?

A That's correct.

Q And there's a portion of that letter that I

1 would like you to read to the jury, please.

2 A "In terms of your request for BurgerBusters'
3 approval to deviate from the planned development of this
4 shopping center, BurgerBusters will not be in a position to
5 review your request until such time as a punch list on the
6 parking lot has been completed.

7 "As you know, there can be no deviation from
8 the plan of the development of the shopping center without
9 BurgerBusters' consent. And if any such work is undertaken
10 without BurgerBusters' consent, we have been instructed to
11 file an immediate request for an injunction prohibiting
12 such development."

13 Q Would you look next at Exhibit 13?

14 A (Witness complied.)

15 Q Exhibit 13 is a letter dated September 22nd,
16 1993, to Dr. Chawla from Alan Frieden.

17 Would you read part of that letter?

18 A Yes, I will. "If you do not agree to the terms
19 of my letter of September 9, 1993, and all remaining issues
20 cannot be resolved on an amicable basis, then my client is
21 prepared to do whatever is necessary to protect its
22 interest.

23 "If you break ground on the bank building prior

1 to the resolution of all issues in accordance with your
2 agreement with BurgerBusters, then BurgerBusters will file
3 an injunction against you to prevent such construction.
4 BurgerBusters sincerely hopes this will not be necessary.
5 However, it expects Brown Building to live up to its
6 contract with you and you to live up to your agreement with
7 BurgerBusters."

8 Q And what is Brown Building?

9 A Brown Building is the construction company that
10 constructed the Taco Bell restaurant.

11 Q And the September 24th, 1993, letter to Mr.
12 Frieden from Dr. Chawla -- would you read a good portion of
13 that, please?

14 A Yes. Dr. Chawla indicated, "I will be looking
15 to BurgerBusters to pay my legal fees in defense against
16 Brown Building as per lease agreement."

17 In the next paragraph he states, "Finally, I am
18 not impressed by your repeated threats to file an
19 injunction against construction of the bank building. Any
20 attempt to file an injunction will be vigorously resisted,
21 and I can assure you of going to great lengths to ask for
22 financial compensation against BurgerBusters/Alan Frieden
23 for a frivolous attempt."

1 Q At the conclusion of this suit, Dr. Chawla and
2 Mrs. Chawla did in fact request attorneys' fees, did they
3 not?

4 A Yes, they did.

5 Q And that was denied by the Court, wasn't it?

6 A Yes, it was.

7 MR. DURRETTE: I'll return these while I'm
8 thinking about it.

9 (Mr. Durette handed the Clerk documents.)

10 BY MR. DURRETTE:

11 Q There was some testimony by Mr. Palmer this
12 morning that you're not aware of regarding an errata sheet
13 that was prepared relating to the court transcripts
14 prepared by one of the paralegals in your firm.

15 Do you recall that being done?

16 A Yes, I do. I directed Ms. Miller to prepare
17 that.

18 Q Can you tell the jury why you had her do that?

19 A I have read quite a few transcripts in the
20 years that I've been practicing, and this transcript, as I
21 went through parts of it when we first got it, was
22 troubling, given the number of errors, inaccuracies, and
23 misstatements in that transcript.

1 I had my secretary go through -- my
2 secretary/paralegal. She's a jack-of-all-trades for me. I
3 asked her to go through, rather than me doing it, given the
4 billable rates, and --

5 Q What is her rate?

6 A I believe we bill Ms. Miller at \$50 an hour.

7 Q Okay.

8 A She may be \$35 on this file. I'm not certain.
9 And I asked her to go through and to make an errata sheet
10 of the most glaring problems. We fully expected this
11 matter would be appealed by the Chawla's, and it's
12 imperative that an accurate transcript be available if the
13 Virginia Supreme Court is going to review it.

14 In fact, an appeal was filed and portions of
15 this errata sheet were used or attached to an order
16 amending the transcript for purposes of the appeal because
17 of the significance of some of the inaccuracies of the
18 transcript.

19 Q And who entered that order?

20 A Judge Robertson. I believe it was an agreed
21 order.

22 Q It was an agreed order?

23 A To the best of my recollection, yes.

1 Q So as a consequence of this effort, portions of
2 the transcript were corrected. Is that correct?

3 A Yes.

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Q Mr. Paphites, in his testimony yesterday, Dr. Chawla testified as to conversations that the two of you had in 1993. I think at or about April of 1993 and subsequently.

Do you recall having conversations with Dr. Chawla at that time on the subject of the building that was going to be built, and so forth?

1 A Yes, sir.

2 Q Did you ever tell Dr. Chawla that you at that
3 time were going to approve what he wanted to build?

4 A No, sir.

5 Q What did you tell him?

6 A I told Dr. Chawla that I would not be in any
7 position to make a decision on anything, unless he gave me
8 a site plan that was drawn to scale by an engineer, so I
9 could review exactly what he wanted and so I could send it
10 to my franchise, or Taco Bell Corporation, which also has
11 to approve any changes.

12 And I told him not to bother doing that unless
13 he was going to make sure that everything I had negotiated
14 for, all the total square footage of retail, parking
15 spaces, the traffic, which was the concerns I addressed in
16 negotiations for admissability and accessibility, that all
17 those remained. He was welcomed to try to figure out
18 anything that he wanted to, but I would look at any
19 proposals as long as it was done correctly.

20 Q Now, the two of you, you and Dr. Chawla, at the
21 trial in this case testified about all your conversations
22 and everything that happened in 1993 before the
23 construction of this bank building began, did you not?

1 A Yes, sir.

2 Q And that testimony related to -- or do you
3 understand that that testimony related to the issue of
4 waiver that was litigated throughout this case?

5 MR. O'CONNELL: Your Honor, he's asking this
6 witness to make a judgment on a legal issue. I don't think
7 that's proper.

8 MR. DURRETTE: Your Honor, I'm only asking for
9 his understanding. But that's not a question --

10 MR. O'CONNELL: We've already been over this in
11 Mr. Paphites' direct testimony. Your Honor, this is the
12 second time we're going over this material. I don't think
13 you're entitled to do that.

14 MR. DURRETTE: I think I am in light of what
15 Dr. Chawla testified to.

16 THE COURT: I think the testimony is
17 appropriately offered on rebuttal. I will allow it.

18 BY MR. DURRETTE:

19 Q Do you need the question again?

20 A Yes, sir.

21 Q Did you and Dr. -- well, the question was, did
22 you understand that your testimony about all of these
23 events leading up to the construction of the bank, and the

1 testimony of Dr. Chawla, related to the issue of waiver
2 that was litigated throughout the course of this case?

3 A Yes, sir.

4 Q And did you understand that that issue has been
5 resolved by this Court and resolved in favor of
6 BurgerBusters?

7 A Yes, sir.

8 MR. DURRETTE: No other questions of this
9 witness.

10 THE COURT: Cross-examination, Mr. O'Connell?

11 MR. O'CONNELL: May I have that Exhibit,
12 please, the April 4th letter?

13 (Whereupon, Mr. O'Connell handed a document to
14 the Witness for his examination.)

15 CROSS-EXAMINATION

16 BY MR. O'CONNELL:

17 Q I show you what's been marked as Defendant's
18 Exhibit Number 1, and ask you if the handwriting on the
19 bottom of this letter is yours?

20 A Yes, sir.

21 Q And would you read that handwriting, please?

22 A Yes. "Preliminary sketch is approved pending
23 all parking lot on site plan, dated July 16, 1990, is

1 completed at the same time. The final approval will be
2 given once a site plan is submitted to BurgerBusters.
3 Thank you. Tassos Paphites."

4 Q And in August you received a copy of the site
5 plan showing the layout; isn't that true?

6 A No, sir.



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12 Q Would you state your full name for the jury,
13 please?

14 A Randolph D. Frostick.

15 Q And where do you reside, Mr. Frostick?

16 A I live in Fauquier County. It's a Warrenton
17 mailing address over in Ivy Hill.

18 Q And are you an attorney?

19 A Yes, I am.

20 Q And where do you practice law?

21 A I practice law throughout Northern Virginia.
22 My office is in Manassas.

23 Q Do you have any cases in Fauquier County?

1 A A few; mostly in Prince William and Fairfax.

2 Q Prince William and Fairfax.

3 Would you please briefly describe for the jury
4 your -- from graduation of law school forward, your legal
5 experience and legal affiliations?

6 A Sure. I went to the Marshall Witt School of
7 Law at the College of William and Mary and graduated there
8 in May of 1982. I received what's called the Order of Coif
9 Award, which is a honors distinction for the top ten
10 percent of the law school class. I was fortunate enough to
11 be able to graduate second out of 150 of the other law
12 students in my class.

13 From May of 1992 until July of -- excuse me.
14 From May of '82 until July of '82, I worked for a law firm
15 in Fairfax, Virginia, as a summer associate. Then for a
16 year after that, from July of 1982 through July of 1983, I
17 was a law clerk for a Federal District Court Judge, the
18 Chief United States District Judge for the Western District
19 of Virginia, the Honorable James C. Turk.

20 After leaving the clerkship in 1983, I came
21 back to the firm that I was with initially right out of law
22 school, which was called McCandlish, Lillard, Rust and
23 Church. That was a firm in Fairfax, Virginia. And I

1 proceeded to do principally medical malpractice defense
2 work on behalf of hospitals, doctors and nurses. I also
3 did legal malpractice defense work on behalf of attorneys
4 who were being sued.

5 I principally did that type of litigation from
6 1983 until about 1985, thereabouts, when the attorney I had
7 been working with left the firm. And I shifted my
8 litigation practice over to a general commercial civil
9 litigation practice involving contract disputes,
10 construction disputes, landlord/tenant disputes, land use
11 disputes.

12 In 1987, I left that firm and joined a small
13 firm in Manassas called Montavon and Vanderpool. I joined
14 as an associate with Mike Vanderpool, and basically took
15 over his litigation practice, as well as bringing some of
16 my own clients with me at the time.

17 I worked at Montavon and Vanderpool again
18 principally in general civil litigation, with an emphasis
19 on litigation related to real estate matters. By that, I
20 mean very generally, we represented engineering firms. So
21 when an engineering firm is sued because of a professional
22 liability, we defend that firm. We would bring suits on
23 their behalf to collect sums that they were owed.

1 We represented supply companies, so we would
2 bring cancelling actions to recover sums owed for them. We
3 also -- for example, I personally handled a products
4 liability case for one of our supply companies involving
5 fire retardant fire board.

6 Since joining Montavon and Vanderpool and up to
7 the present, a large portion of my practice has been
8 involved in litigating landlord/tenant disputes. I
9 represent several malls in Prince William County, and I
10 have handled all types of landlord/tenant disputes, ranging
11 from simply failure to rent, to violations of lease
12 provisions allegedly by the landlord or allegedly by the
13 tenant. I would say about 25 to 30 percent of my
14 litigation practice involves landlord/tenant disputes.

15 That's a brief summary.

16 Q Have you included in your litigation practice
17 involvement with cases in which a restricted covenant, or
18 the provisions of a lease requiring the landlord or the
19 tenant to do something have been the subject of the
20 litigation?

21 A Yes. Just last November, I was involved in a
22 lawsuit against a K-Mart store in Manassas on Sudley Road.
23 And that particular case involved the compliance of the

1 tenant with various maintenance and repair provisions in
2 the lease with respect to -- in this particular case, it
3 was an underground fuel storage tank.

4 And the dispute between the parties was who had
5 the obligation to repair, remove, and remediate any
6 problems with these underground storage tanks.

7 So that's the most recent example of the type
8 of problems with leases that I've had.

9 Q And now would you tell the jury, please, what
10 you do as a law clerk to, really any judge, but what did
11 you do as a law clerk to Judge Turk?

12 A A law clerk principally handles -- at least
13 with Judge Turk. I don't want to speak for all law clerks.
14 But with Judge Turk, what we were tasked with usually was
15 acting as a double check on positions that the attorneys
16 had presented in their cases. Obviously, in any litigation
17 you've got two sides to a case, and you'll have both sides
18 trying to put the best position forward to achieve the
19 result they're trying to achieve.

20 With Judge Turk, what we'd frequently be asked
21 to do is review the materials that had been submitted by
22 the attorneys and provide the Court with our more, if you
23 will, objective assessment as to what the actual law was

1 and how the law should be applied to the facts of the case.
2 The Court always made the ultimate decision. He was just
3 looking for additional input to help him make that
4 decision.

5 Once that was done, the Court would then task
6 us frequently to writing legal opinions to reach the result
7 the Court wanted to reach.

8 So we would frequently write legal opinions. I
9 think I, on behalf of the Court, offered I believe five or
10 six published opinions, including a published opinion when
11 Judge Turk sat with a panel before Circuit Court of Appeals
12 in Richmond. In addition to the published opinions, there
13 was probably 20 or 30 other judicial opinions. And then
14 just the day-to-day management of the Court, working with
15 the attorneys, setting up pretrial conferences, preparing
16 orders, reviewing fee applications in connection with civil
17 rights cases and advising the Court on that.

18 Q Now, it is correct, is it not, that those
19 clerkship positions with Federal Court Judges are highly
20 sought after by law school graduates?

21 A That is a fact. I believe Judge Turk -- the
22 position that I obtained, I think he mentioned to me that
23 about 20 or 30 resumes had been considered.

1 Q And isn't it also true that those positions are
2 generally reserved for those who graduated at the top of
3 their classes?

4 A Yes.

5 Q In the course of your practice, have you had
6 occasion to be involved in disputes that caused you to
7 review bills submitted by law firms to their clients or for
8 compensation in a particular litigation?

9 A Yes.

10 Q And would you tell the jury about that, please?

11 A I was retained by a large Northern Virginia law
12 firm to file suit against one of their former clients who I
13 believe owed about \$140,000 in that case with respect to a
14 trial that had taken place in Prince William Circuit Court.

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16 And in the course of doing that work, of course
17 I became very familiar with the usual legal standards that
18 are applied in fee application disputes, because you have
19 to prove your ability to cover those fees in order to get
20 them from your client if your client won't pay, worked
21 extensively with local counsels who I had obtained as an
22 expert witness to do that.

23 In a separate case involving what's called the

1 payment bond, it's a bond that allows people on a
2 construction project to recover sums that may be owed if
3 the owner of the general contractor doesn't pay, I was also
4 retained to act as an expert witness with respect to the
5 question of the reasonableness of the fees in that case.

6 Q Have you had other occasions, besides as an
7 expert witness or an advocate, to review bills from other
8 law firms?

9 A Well, other than as a law clerk I would review
10 bills from other law firms. Other than serving as an
11 expert in that one payment bond case and litigating the
12 case on behalf of that law firm -- another specific example
13 that I can recall is, I was defending someone once in an
14 estate dispute, and the other side brought what's called a
15 sanctions motion saying that my client's position had not
16 been appropriate, and asking the Court to award their legal
17 fees in that case. So I became very involved in reviewing
18 their bills for the question of reasonableness of those
19 fees.

20 Of course I review bills on a monthly basis.
21 I'm sending out bills --

22 Q Your own bills?

23 A -- my own bills to my own clients. And I also

1 submit on behalf of clients affidavits when we prevail on
2 their behalf and we're asking for an award of attorneys'
3 fees in other cases.

4 Q And in your general practice, do you also have
5 discussions with other lawyers in the Northern Virginia
6 area regarding their billing practices?

7 A Oh, certainly.

8 Q Including how they record their time and what
9 they bill for in their firms, and other matters such as
10 that?

11 A Sure.

12 Q Have you been part of any seminars or
13 continuing legal education programs, or anything of that
14 nature, where law office management and building practice
15 has been the subject of discussion?

16 A Well, I've attended many of them. I usually
17 try to attend once every other year or so, something based
18 on more or less the administrative nature of the practice
19 of law.

20 I'm trying to recall the last one I went to.
21 It was about a year ago. I used to be a member of the Law
22 Practice Management Section of the American Bar
23 Association, which deals very predominantly with

1 administrative matters, including billing matters.

2 As far as actually participating in seminars as
3 a speaker, I have participated in a seminar in front of the
4 Fairfax Bar Association to speak on discovery in federal
5 practice.

6 MR. DURRETTE: Your Honor, I submit that Mr.
7 Frostick be qualified as an expert to render an opinion on
8 the reasonableness of the fees in this case.

9 MR. O'CONNELL: May I voir dire, Your Honor?

10 THE COURT: Yes, voir dire, Mr. O'Connell.

11 VOIR DIRE

12 BY MR. O'CONNELL:

13 Q Mr. Frostick, you graduated from law school in
14 1982.

15 When did you pass the bar?

16 A In May of 1982.

17 Q All right. And you were a summer associate in
18 May of 1982. Then you clerked for a Federal Judge from
19 July of 1982 to July of 1983; is that correct?

20 A Well, actually through the end of June.

21 Q How many clerks did Judge Turk have at that
22 time?

23 A Three.

1 Q So you were one of three clerks?

2 A Yes, that's right.

3 Q All right.

4 A I also worked with Judge Dalton as well.

5 Q And you were an associate in the McCandlish law
6 firm from 1983 through 1985; is that correct?

7 A Actually, I was an associate with the
8 McCandlish firm from 1983 until about 1987. During that
9 time frame, the McCandlish firm merged. Half of the
10 attorneys with the McCandlish firm merged with a firm
11 called Miles and Stockbridge. Half of the attorneys merged
12 with a firm called Hunton and Williams.

13 I stayed with the group that I had been working
14 with, which was the core group that I started with,
15 McCandlish, Lillard, through that time frame. And the name
16 of the firm when I left it in 1987 was Miles and
17 Stockbridge. Since then, that core group of attorneys
18 that's left Miles and Stockbridge has reformed the firm of
19 McCandlish and Lillard.

20 Q But in '87 you joined Vanderpool?

21 A Montavon and Vanderpool.

22 Q As an associate?

23 A Correct.

1 Q And how long were you with them?

2 A Until January 1, 1990, when Mike Vanderpool,
3 myself and Jan Massey formed our present form, which is
4 called Vanderpool, Frostick, and Massey.

5 Q So until 1990, you were an associate?

6 A Correct.

7 Q And when you formed the law firm with Mr.
8 Vanderpool, then you and he became partners?

9 A We're shareholders, we're principals. It's the
10 equivalent to a partnership.

11 Q But you were an associate until 1990?

12 A That's correct.

13 Q Are you a member of the American College of
14 Trial Lawyers?

15 A No.

16 Q Are you a member of any state bar committees,
17 whose duties and responsibilities it is to look into law,
18 what lawyers charge, and that kind of thing, reasonableness
19 of law fees?

20 A No.

21 Q Are you a member of any American bar committees
22 that have the same type of tasks?

23 A In terms of evaluating reasonableness of fees,

1 no.

2 Q All right. Have you ever argued a case before
3 the full Virginia Supreme Court?

4 A No.

5 MR. O'CONNELL: Your Honor, I would object. I
6 don't think he's qualified.

7 THE COURT: Mr. Durette?

8 MR. DURRETTE: Of course he's qualified, Your
9 Honor.

10 THE COURT: The question of whether or not a
11 witness is qualified to render an opinion in a trial of the
12 case is left to the sound discretion of the trial Court.
13 The Court finds that the witness is qualified to render an
14 opinion with respect to the issues at bar, and he is
15 allowed to be questioned as to that opinion at this time.

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10 Q Mr. Frostick, did we agree at the outset that
11 all of the opinions that I ask you for you will render with
12 a reasonable degree of professional certainty?

13 A Yes.

14 Q Now, before I ask you for the opinions, I'd
15 like to ask you when you were -- if you recall, when you
16 were first contacted by the members of the Faggert and
17 Frieden firm with respect to your assignment in this case?

18 A I believe it was in early February, 1996. I
19 was contacted by Mr. Lawrence, and perhaps Ms. Cleary as
20 well, by telephone.

21 Q And what were you asked to do?

22 A Well, I was asked whether I would be willing to
23 review the case materials, the billing records, and provide

1 them with my opinions as to the reasonableness of the
2 attorneys' fees requested in this case.

3 Q And were you asked to give an additional
4 preliminary opinion?

5 A Well, what I told them basically was that I
6 would be willing to do that. We talked generally about the
7 case, and they explained how long the case had taken and
8 the amount of effort that had been involved. They told me
9 the general range of fees, which sounded, based on their
10 general information, to be possibly reasonable.

11 I told them that I would be willing to look at
12 them, look at the materials, and give them a preliminary
13 opinion as to the range of reasonableness. I understood at
14 the time that the case was still ongoing, so that there
15 would be additional fees that were being incurred.

16 Q Did you undertake to conduct the review that
17 you're describing?

18 A Yes, I did.

19 Q And what did you do?

20 A I was provided with over one 144 separate
21 papers that were filed in the court, ranging from the
22 initial motion for a temporary restraining order, the
23 amended Bill of Complaint, all the discovery, all the

1 notices, briefs, memorandum, notices of depositions -- the
2 list goes on and on.

3 But, essentially, I was provided with about 144
4 separate court filings, pieces of paper that had been filed
5 with the Court.

6 I was also provided with the law firms's
7 itemized billing statements and with copies of the cost
8 advance sheets. I had all of this up to -- I think I
9 received everything by March 6th or March 7th of 1996. And
10 I reviewed those materials, as well as speaking with Mr.
11 Lawrence and Ms. Cleary.

12 Q And at that time did you make any calculations
13 as to the number of sets of discovery, the numbers of
14 depositions, the numbers of motions, court hearings?

15 A Well, in reviewing the materials what I did was
16 I tried to get an overall sense of how complex the case had
17 been and what had been involved in the case. And I was
18 able to observe from these materials that there had been
19 over 15 depositions taken in the case. I think the actual
20 number is probably closer to 20. That there had been
21 approximately 50 to 51 separate court motions filed, which
22 are matters other than the trial itself that are to be
23 brought to the Court's attention to be argued for any

1 number of reasons.

2 It appeared from my review of the materials
3 that there had been about 30 separate court hearings,
4 including the trials. There had been what essentially had
5 become a bifurcated trial only by time. The trial started
6 in April, the first three-day portion of it, and it ended
7 up in August of 1995.

8 There was a total of, I believe, eight sets of
9 discovery, written questions that the parties exchanged,
10 where they would seek information about the basis for a
11 claim or the identity of witnesses or other facts related
12 to litigation.

13 The petitioner of this case had served, I
14 believe, six sets of discovery upon the principal
15 respondent, as well as two sets of discovery to the bank.
16 And on the other side of the coin, the respondents had
17 submitted, I believe, four to the principal defendant and
18 perhaps two to the bank -- just going back and forth.

19 So what you saw here was a tremendous amount of
20 effort that had gone into the case, both in terms of
21 preparation of discovery materials, legal issues that were
22 being presented to the Court in the form of motions, and
23 then an extensive amount of discovery related to the

1 depositions.

2 Q Now, what do you recall that you learned at
3 this point from the invoices that had been given to you
4 regarding the amount of fees that had been accumulated from
5 the three law firms that had worked on this case?

6 A For the period from October of 1993, when the
7 case was first started, up through the period of December,
8 1995, those are the materials I first had when I was
9 looking at this in late February or early March of 1996.

10 I believe the total fees that had been incurred
11 to date were about \$285,000 in legal fees, plus there was
12 approximately another \$15,000 in expenses. And by that I
13 mean deposition transcript costs. The court reporter here
14 is taking down the testimony and they'll go back and
15 they'll type up what has been said. That takes place in
16 depositions, and it takes place in hearings where there's
17 court reporters.

18 There was approximately, I believe, \$15,000 in
19 cost of those natures. Private process servers, people who
20 actually serve subpoenas on parties, charge a fee for that.
21 The transcript fees -- other costs, such as expert witness
22 costs that the law firms paid were about \$15,000.

23 And then the petitioner had paid, I believe,

1 approximately another \$50,000 to \$52,000 worth of similar
2 costs themselves, or itself. It paid that directly without
3 going through the law firms.

4 And at that point in early March, the attorneys
5 for the prevailing party had estimated that the future fees
6 would be about another \$50,000 in connection with three
7 general areas. One was the implementation of the Court's
8 order with respect to the bank. The second was an
9 anticipated appeal, or a petition for appeal to the
10 Virginia Supreme Court. And the third was the application
11 for attorneys' fees itself. The estimate at that point was
12 approximately \$50,000 I believe.

13 So when you add all that up, the range that we
14 were looking at was about \$390,000 to \$400,000. And given
15 the magnitude of the case and the amount of time that had
16 been expended, I thought that that was an acceptable range.

17 Q Now, at the time that the estimate was given to
18 you for future fees, do you recall whether the attorneys
19 expected to have a trial before the judge or expected to
20 have a jury trial on the attorneys' fees?

21 A At that point it was my understanding that it
22 was not going to be a jury trial on the fees.

23 Q And you rendered an opinion at that time on

1 this preliminary basis that the fees were within the range
2 of reasonableness, as you just testified; is that correct?

3 A That's right.

4 Q Now, had you had any recent experience in a
5 case of similar kind with respect to the level of effort
6 and the fees that were expended in that case that you
7 utilized in reaching this decision?

8 A Yes, in part.

9 Q And would you tell the jury what that is,
10 please?

11 A My firm had been involved in a covenants
12 enforcement case. As a matter of fact, it was still
13 ongoing in the bankruptcy level at the time I was first
14 asked to do this. But we had already obtained the
15 principal relief from the State Court.

16 The case I'm talking about is in the Prince
17 William Circuit Court. We represented a group of
18 homeowners who had purchased homes in a rural subdivision.
19 Some restrictive covenants were filed in this subdivision
20 which prohibited anyone who owned land there from
21 connecting that subdivision to another subdivision, except
22 over an existing road bend, and it was a very old existing
23 road bend; it was very narrow. Basically, the purpose,

1 from at least my point of view, was to keep the rural
2 character of the subdivision.

3 An individual, actually a development company,
4 had purchased one of the lots in the subdivision, as well
5 as a large tract of land right next to the subdivision.
6 And he had used this lot within the subdivision where there
7 was these covenants restricting access to adjoining
8 property, he used that lot to build a new road and a cul de
9 sac, which was not within the location of the road.

10 We had filed suit on behalf of the subdivision
11 owners to ask that that road be removed and that the road
12 that was originally in place be restored to the way it was
13 originally.

14 The case was principally intensive only in the
15 legal issues. There was a lot of briefing on equitable and
16 legal principles with respect to the relief that we were
17 requesting. One of the issues that came up in that case
18 which I saw addressed in this case was a question of the
19 balancing of the equities.

20 What was the relative harm between the
21 homeowners who wanted to put the road back to the way it
22 was and the developer, on the other hand, who wanted to put
23 a road into the subdivision.

1 That case, I believe, was no more than a two
2 day trial with a subsequent oral hearing, and discovery was
3 very limited. I think the depositions didn't exceed three
4 or four depositions. Of course there was a lot of
5 conferences with clients. There was a lot of legal
6 research. There was some written discovery as well. But
7 it came nowhere near to the magnitude of the effort that
8 went into this case.

9 And I knew, when I first got this case, to look
10 at as far as reasonableness of fees. The fees in that case
11 were already about \$120,000. And so just comparing them on
12 a very rough-end basis, the extent of the effort that was
13 required on that one case, where the discovery was fairly
14 limited and where there weren't 15 depositions or 20
15 depositions, and there had not been 37 court appearances,
16 that looking at the effort from the pleadings and bills I
17 saw in this case, and comparing them to what had taken
18 place in that case, I felt very comfortable that this was
19 an appropriate range.

20 Q Now, since the time that you did the work that
21 you've just described and formed your preliminary opinion
22 regarding the range of the fees, have you done additional
23 work?

1 A I have.

2 Q And what have you done additionally?

3 A Well, when I formed my first opinion I did not
4 read all those materials in extreme detail. What I did was
5 I read them enough to understand what they were about, what
6 was being asked for in the pleadings, what had happened in
7 the case, and I reviewed the bills. I read all the bills.
8 I didn't study them. I didn't sit down and try to analyze
9 them to get an overall sense of what had taken place in the
10 case.

11 Since then, two basic things have happened.
12 First, there's been additional time and effort that has
13 gone into the case, so I've gotten additional bills through
14 October of 1996. I've got all that additional material to
15 review. But I was also provided with a report from Tom
16 Palmer where he leveled certain criticisms against the
17 bill. And I was asked to analyze and to provide a response
18 to Mr. Palmer's opinions.

19 So I went back with Mr. Palmer's report and
20 conducted an in-detail, in-depth review of all the
21 materials I had skimmed before, which basically included
22 reading everything that I had been provided, as well as
23 additional pleadings that were provided to me with respect

1 to the fee application at issue, what we're here for today;
2 the appellate briefs that were filed by the landlord, as
3 well as the tenants in terms of the Supreme Court of
4 Virginia on the landlord's petition for an appeal; and some
5 additional materials that had taken place in this case.

6 So I basically supplemented my knowledge with
7 the materials that came after that. But I sat down and
8 read everything in great detail, and did calculations, and
9 took notes, and went into great depth with what happened in
10 this case and what Mr. Palmer's criticisms were, and what
11 my reaction was to his criticisms.

12 Q Now, with respect to the review of the
13 pleadings that you just described, could you characterize
14 to the jury, if you would, the types of issues that were
15 raised in this case and how that impacted the level of
16 effort required by BurgerBusters?

17 A Yes. Litigation is a very uncertain thing.
18 Every case is difficult to predict with any certainty
19 exactly what is going to happen. You can follow some cases
20 and get a quick resolution; other cases will go on. It's
21 difficult to give estimates on what a case will cost
22 because to a large extent, you don't know how the other
23 side is going to react and how the Court is going to react

1 to the different positions that are being taken by the
2 parties.

3 In this case, the Defendants vigorously,
4 vigorously defended the evidence, as they were entitled to
5 do, and they did so to a great degree of what I thought
6 were very good arguments. There was a number of persuasive
7 points raised by both sides of this case. And as a result
8 of this extremely vigorous and innovative and good defense,
9 the Petitioners had to exert a similar effort in order to
10 prevail on the merits of the case, as they have done.

11 So what you basically saw here was by virtue of
12 trying to defend the case as well as they could, as they
13 are entitled to do, the effort that went into the case
14 increased dramatically. There was all kinds of things that
15 were specifically raised.

16 At the very beginning of the case, when the
17 lawsuit was filed, there were defenses being raised
18 essentially saying -- I don't know if you want me to go
19 into all of this?

20 Q Yes, I do.

21 A May I refer to my notes to help me?

22 Q Please.

23 A (Referring to notes.) The trial has raised

1 what I think were essentially about 13 or 14 general issues
2 or matters during the course of those three years of
3 litigation that were some very good arguments, and they
4 required a lot of effort on behalf of the Petitioner to
5 overcome the arguments.

6 One of the first ones that was raised from the
7 outset of the case -- you may have heard about a letter
8 dated April 3, 1993. The Chawla's took the position that
9 BurgerBusters had approved the plan to construct the bank
10 building and alter the parking lot in the fashion that the
11 Chawla's ultimately did. That presented not only a series
12 of legal issues about approval, and consent, and waiver,
13 but a series of factual issues that had to be addressed:
14 discovery, depositions, interrogatories.

15 There was also the issue raised that the
16 construction of the bank as it was actually done by the
17 Chawla's, of whether the development substantially shown on
18 Exhibit D to the lease and did not require consent,
19 pursuant to paragraph seven of the lease. That also
20 created a lot of factual issues, and I think there was some
21 testimony to the effect of the experts on behalf of the
22 Defendants about what the nature of the Exhibit D was, and
23 what it showed, and what types of -- how it can be

1 interpreted.

2 In other words, whether it could be interpreted
3 as an actual rendition of how big the building should be
4 and where it should be, versus a maximum possible use that
5 could have less intensity, another issue that was raised.

6 There was also an issue raised about the bank
7 building being a retail use, so it conformed with Exhibit
8 D. Then there was a motion to dismiss the bank, Southern
9 Financial Federal Savings Bank, from this joinder. The
10 Court had granted leave to amend to bring the bank in as a
11 partner because it had a lease for this particular
12 building, therefore, its interest in the property would be
13 effected by the Court's ruling. And the respondent's had
14 moved to dismiss that from this joinder. That required a
15 response by the Petitioners.

16 There was a further defense being raised about
17 whether BurgerBusters had unreasonably withheld their
18 consent to the alteration of the lot and the construction
19 of the building as shown on the plan. Again, the issue of
20 consent and whether the consent was being unreasonably
21 withheld raised some factual legal issues that have to be
22 analyzed, researched and briefed.

23 Another issue that was raised was whether or

1 not the Petitioner had had remedy of law. As I understand
2 it, one of the events that occurred in this case is that
3 the Petitioners -- well, let me back up for a second.

4 Some of the relief sought in this case related
5 to getting the Court to order the landlord to do certain
6 things. That was one part of what the Petitioners
7 received. They wanted the building -- initially, they
8 wanted the building not constructed at all. But once it
9 was constructed, they wanted it either removed, because it
10 was in violation of the development restriction, or they
11 wanted it to be altered to conform to the development
12 restriction. That's one part of the lawsuit.

13 Another part of the law suit was the request
14 for money damages, an award of money. And the theory from
15 which that came, in other words the violation of the lease
16 provision, is the same. The idea is that the lease has
17 been violated, and as a result of that violation, we did a
18 couple of things.

19 Perhaps a clearer analogy would be if you had a
20 contract to sell a house, or to buy a house, if the party
21 that was going to sell you the house breached that
22 agreement, you might have one or two remedies arising out
23 of the same breach. You might be able to sue that person

1 and get the Court to order him to sell you a house. That's
2 injunctive relief versus conformance. Or you might be able
3 to get the Court to give you a monetary award. Say you
4 went out and if you had to find a replacement house, and it
5 cost you more money and you had expended certain funds, it
6 relies on the contract and they breached it, you might get
7 a monetary award.

8 But the underlying nature of the claim is still
9 the same. It's a violation of a contract, and that's what
10 we found here -- it is what I found here, as well, that the
11 underlying dispute was the violation of the lease and the
12 easement in question.

13 So at one point I understand that the
14 Petitioner had asked the Court whether they could separate
15 out the two issues and go forward simply with the question
16 of injunctive relief; and then if necessary go forward with
17 the question of damages, what damages they're entitled to.
18 It's my understanding that the landlord objected to that
19 type of bifurcation. So as a result, they needed to do
20 both at the same time. Because again, as I said at the
21 outset, you never know what the result is going to be in a
22 litigation. You have to keep your options open. And to
23 ask for the alternate relief is the only way to do that.

1 So the Defendants were entitled to object to
2 it. If that's what they wanted to do, that's certainly
3 their right. So it went forward on both issues. But,
4 again, that includes a particular cost.

5 There was also a subpoena to Taco Bell
6 Corporation, the franchisor of BurgerBusters, which
7 resulted in additional costs and additional effort in
8 responding to that subpoena for documents.

9 The discovery that I mentioned earlier, the ten
10 sets, I think, or eight sets that were sent out by the
11 Petitioner, and the four to six sets that were sent out by
12 the Respondents, resulted, as it usually does, in a series
13 of motions designed to get the appropriate set of responses
14 from the parties, and that happened in this case.

15 There were numerous motions to compel filed
16 both by and against the Chawla's, one of which I understand
17 involved -- again, just by way of example, there was a
18 motion to compel filed by the Chawla's to require
19 BurgerBusters to turn over an entire box of documents
20 before BurgerBusters' attorneys had been able to go through
21 it and see which documents were responsive to the request
22 for production of documents. And as I understand, that
23 motion was denied. But, again, BurgerBusters' attorneys

1 had to respond to that, and so the costs goes up.

2 Then what happened, sort of later on, a little
3 bit further on in the case, the Chawla's were allowed to
4 file an amended cross-bill, where they raised a series of
5 not totally new claims, but a slightly different focus from
6 some of the earlier defenses that they raised in the case.
7 A cross-bill is where essentially instead of just defending
8 against the suit, the other party then takes an affirmative
9 or an aggressive stance, saying I want some relief instead
10 of just saying you're not entitled to get from me what
11 you're asking.

12 Q Mr. Frostick, in the interest of time, I think
13 I covered that cross-bill pretty good with Mr. Palmer. So
14 I'm going to just let you skip that.

15 A There was another motion -- this litigation
16 progressed or evolved over time, and there was a series of
17 motions, starting with the very beginning motion for a
18 temporary restraining order. There was another motion for
19 a preliminary injunction prohibiting the Chawla's from
20 interfering with the tenant's property interest and the
21 rights to the parking spaces; two other motions for
22 preliminary injunction; and then finally at the final
23 hearing, where the Court subsequently decided to order

1 the Chawla's to either remove the building or conform with
2 the development restriction.

3 But as a result of that the Chawla's at one
4 point before the final hearing raised another legal issue,
5 called a plea of res judicata and collateral estoppel,
6 saying that because there had been some earlier
7 determinations, they couldn't come forward and ask for
8 injunctive relief. Again, it was another point that had to
9 be briefed and responded to by the Petitioners.

10 Q Again, in the interest of time, I'm going to
11 interrupt you.

12 A Certainly. I'm sorry. I could go on and on.

13 Q I know you could, and I thought I wanted you
14 to. But I'll ask you a general question.

15 In the amount of time I've given you and the
16 things that you've discussed, you still have not discussed
17 all of the issues raised by the Chawla's in this case that
18 BurgerBusters had to deal with, have you?

19 A That's correct.

20 Q And there have been --

21 A Or the bank.

22 Q Or raised by the bank, such as --

23 A Yes.

1 Q But you're aware of these? You looked through
2 this file and studied it thoroughly enough, and looked at
3 it and analyzed each and every one of these; is that
4 correct?

5 A Yes.

6 Q Now, did you calculate the number of hours that
7 were expended by the lawyers and the paralegals in this
8 case on behalf of BurgerBusters?

9 A Yes. The total hours, I believe, was about
10 3,186, I believe -- about 3150 hours.

11 Q And I don't think -- I think Mr. Palmer's
12 testimony was that he didn't have any problem with the
13 hourly rates in this case, and I take it you don't either?

14 A No, sir. The rates were on actually the lower
15 end of the Northern Virginia scale. They were within the
16 Northern Virginia scale, but -- I mean just by way of
17 example, Harbinger Rates in Northern Virginia during this
18 time frame, if you include Fauquier all the way into
19 Alexandria and Arlington, Tyson's Corner, \$150 to \$250 an
20 hour.

21 So when Mr. Frieden was charging \$150 an hour,
22 that was certainly within the lower range of fees.

23 Q Now, based on this effort that you've described

1 for the jury, and some of the effort that you haven't
2 described to the jury, did you come to a conclusion as to
3 whether or not the fees and expenses sought by
4 BurgerBusters in this case were reasonable?

5 A Yes, I did.

6 Q And what is that opinion?

7 A My opinion is that for the period through
8 October of 1996, the total fee requested, \$369,000, is
9 reasonable; and that the expense request for that same
10 period, from October of 1993 to October of 1996, three
11 years, of \$51,000, is reasonable; and that their future
12 fees, if you will, fees that I haven't seen bills for yet,
13 but I can estimate what it would likely cost, and that
14 would include November and there's time in December, of
15 about \$25,000, would also be reasonable.

16 So, my opinion is that the total sum of
17 \$445,000 is reasonable attorneys' fees and expenses for
18 this case.

19 Q Mr. Frostick, that's a lot of money, isn't it?

20 A Yes, it is.

21 Q And do you think that's reasonable?

22 A Given the magnitude of this case, the issues
23 involved, what was required to resolve those issues, I

1 think that's a reasonable fee.

2 Q Now, you were asked also, were you not, to do
3 some calculations to address certain aspects of Mr.
4 Palmer's opinion?

5 A Yes.

6 Q And, first of all, you were asked to calculate,
7 were you not, the amount of the charges from the Faggert
8 and Frieden bills associated with travel?

9 A Yes.

10 Q And did you do so?

11 A Well, when I say calculate them, I did not
12 personally calculate the travel charges myself. What I did
13 was I reviewed what had been calculated by Faggert and
14 Frieden as to what their travel charges were. And I
15 believe they were \$19,000 for all their travel time.

16 I'd like to just add something here --

17 Q Well, that's okay. I was going to ask you a
18 question. You were aware, because you had been told, that
19 the reason why the lawyers in Chesapeake were retained on
20 this case was at the preference of the client,
21 BurgerBusters?

22 A Yes.

23 Q Now, do you consider it to be reasonable for a

1 client to choose to be represented by a law firm with whom
2 he has had the type of relationship, the lengthy
3 relationship that you'd been told about by us, in this
4 case?

5 A Absolutely.

6 Q Would you tell the jury why?

7 A Well, there's any number of reasons. But,
8 first off, Faggert and Frieden have prior knowledge and
9 experience with respect to the issues in this case. So
10 immediately they become a logical choice of someone to
11 handle the issues.

12 Secondly, Faggert and Frieden had been
13 representing BurgerBusters for some time. They are their
14 principal attorneys. As a result of that, BurgerBusters
15 becomes very comfortable with them, put their trust in
16 them. They know them. They're comfortable with the way
17 they work, and what-not, and that's crucial to the
18 attorney/client relationship. If you don't trust your
19 attorney, if you're not able to work with him on a very
20 close basis, then the relationship frequently, or can,
21 unfortunately, not work as well as it should.

22 So the choice, the client's choice of counsel,
23 is very important, and is, I think, worth respecting.

1 Q Now, if a Northern Virginia firm located in
2 some parts of Fairfax County, or some parts of Washington,
3 or some parts of Alexandria, had been retained in this
4 case, would they have had travel time to come to Fauquier?

5 A Certainly, if their offices were in those
6 locations.

7 Q Approximately --

8 A Well, if your office is located in Tyson's
9 Corner or Old Towne Alexandria, from Tyson's Corner to
10 Warrenton is approximately an hour each way. So every
11 court appearance would have a minimum of two hours
12 associated with it.

13 Q So while it wouldn't have been the same amount
14 of travel time, there still could have been travel time
15 involved, even if it was a firm up here.

16 A I understand the travel time here was about
17 seven hours each way. So you would still have about two
18 hours travel time.

19 Q Now, with respect to the practice of a law firm
20 for billing for inter-office conferences, would you tell
21 the jury, please, what your opinion is with respect to that
22 practice in Northern Virginia?

23 A Well, it is done as a very customary and

1 routine part of the practice of law in Northern Virginia.

2 Let me give you some reasons why.

3 You see, the practice of law is really less of
4 a science than it is art. Frequently, although you might
5 think that you could look at any particular legal issue --
6 and for some you can. I'm not saying you can't do this at
7 all. But often there is an impression that law is simply
8 something that you can open up a book and there is the
9 answer, and you ask somebody a question and you just answer
10 it like that.

11 Again, that does happen sometimes, but it
12 depends on the question. The law also is really a question
13 of making, or taking legal principles and taking the facts
14 of each individual case, and applying those legal
15 principles, which sometimes have to be determined in the
16 first place; whether they're critical principles and what
17 are the detailed provisions of those principles, and apply
18 them to the facts of the case, in developing a persuasive
19 argument, or a persuasive theory of the case, to get the
20 result that you're looking for.

21 As a result, again, there's not usually just
22 one way of handling litigation. There are lots of ways to
23 handle litigation. And almost as many lawyers -- there's

1 as many ways to handle a particular case as there are
2 lawyers. There are numerous variations in emphasis and
3 approach and theory.

4 One of the reasons that inter-office
5 conferences among attorneys is very important is that it
6 helps develop the concept of the theory of the approach
7 that you're going to take in the litigation. It's very
8 easy to sit back as one lawyer and just look at something
9 and say, yes, this is how I'm going to do it, because
10 you're one lawyer doing that. And you can develop -- or
11 whoever is doing that analysis can overlook an important
12 issue and can forget that there are certain ways to rebut
13 this argument, can overlook a piece of evidence.

14 So one of the most important things about
15 having lawyers work together is the ability to share those
16 ideas and have an interchange of information so that they
17 can develop the best theory to represent their client.
18 That's one of the things that goes on in inter-office
19 conferences. And that can go on between senior attorneys
20 and junior attorneys, and senior attorneys on the same
21 level, that sharing of information, that development of
22 concepts and theories as the case evolves.

23 It's almost like a study group in college.

1 Sometimes the mass generated by a study group results in a
2 better understanding of what's been taught and how to apply
3 what's been taught than if you just sit there and look at
4 it yourself. That's one of the reasons inter-offices
5 conferences are very common and very important for
6 advancement of the client's interest.

7 Another one is a delegation of assignments. In
8 this case, Mr. Frieden was billing at \$150 an hour. Mr.
9 Sacks was billing at \$125 an hour, until he left the firm
10 and Mr. Lawrence took over as chief litigation -- or head
11 litigation counsel. And Ms. Cleary was billing at \$100 an
12 hour. And I believe there was another associate billing at
13 \$75 an hour.

14 Well, Mr. Sacks and Mr. Frieden could have done
15 all the work in this case. They're certainly capable of
16 researching issues and drafting discovery, as Ms. Cleary
17 is. But what you try to do is delegate the work down to
18 the appropriate level that would produce a quality product
19 for a reasonable cost.

20 So some of the inter-office conferences
21 involved discussions between attorneys -- well, senior
22 attorneys, like Mr. Sacks, Mr. Frieden, and Mr. Lawrence,
23 and Ms. Cleary, for example -- to say, here's an issue in

1 the case, and I want you to go out and research that.

2 For another example, we've just learned this,
3 here's a new factual wrinkle in the case. I want you to
4 prepare, we've got the amended cross-bill, look at the
5 issues that have just been raised. Go out and prepare
6 discovery directed towards these issues.

7 And so instead of the more senior attorney
8 doing all the work and billing at a higher rate, there is
9 some discussion between the two attorneys about what needs
10 to be done. And the attorney who is billing at the lower
11 rate goes gets to go out and do the work. That's an
12 appropriate delegation of the work load to try to hold the
13 cost down.

14 Then another general reason for office
15 conferences, and I'll try to be very quick about it, is
16 that when you have a case where there's two or three
17 principal attorneys working on it, and there's also one
18 attorney who may be the principal contact with the client,
19 you have to coordinate with one another so that you know
20 what's going on. And the principal client contact, in this
21 case Mr. Frieden, has to be up to speed with what's going
22 on in the case.

23 It's like a strategy meeting, basically, so

1 that, one, he knows where the case is going; and, two, so
2 that when a client calls up and says what's happening with
3 my case, he can tell them that.

4 Those are three broad, general areas for inter-
5 office conferences that are customarily used and very
6 necessary to prosecute a case on behalf of somebody.

7 Q Is there a particular type of law practice
8 where the clients are very strict about inter-office
9 conferences?

10 A Well, basically, when you get large volume
11 similar issue cases, and I think the most frequent examples
12 these days is automobile liability defense work, you will
13 find that certain clients with large economic clout.

14 For example, an insurance company who has given
15 all of its cases to one or two law firms. That law firm
16 may get 700 cases a year from this one client, 600 cases,
17 or whatever, and because the insurance company has such
18 large economic clout, it can be very very forceful in terms
19 of the types of things it doesn't want to see. So you'll
20 see a lot of times insurance companies will say, no inter-
21 office conferences, or hold down on the inter-office
22 conferences. That's where it principally occurs.

23 Now, other large institutional clients have

1 other policies regarding inter-office conferences. Some
2 say you should try to hold them down, you should do them
3 only when necessary, et cetera. But the principal type of
4 legal work that you see where there is a discouragement of
5 inter-office conferencing is the high-volume, fairly
6 similar legal issue, and to some degree, actual issue
7 cases, like automobile liability.

8 Q Are you familiar with the reputation in
9 Northern Virginia of Mr. Palmer and his firm as to the type
10 of work that they predominantly do?

11 A My understanding is principally automobile
12 insurance defense work, as well as other defense work.

13 Q Did you make any calculations about the dollar
14 value or the amount of the inter-office conferences in this
15 case?

16 A I did.

17 Q And would you tell the jury what that is,
18 please?

19 A I took all of the inter-office conferences
20 between the attorneys of Faggert and Frieden and added them
21 up. And I included as well some of Mr. Lawrence's time
22 while he was working at his first firm. When I saw
23 conferences between Mr. Lawrence and the attorneys of

1 Faggert and Frieden, I also included that.

2 The total value of the conferences among the
3 attorneys, just among the attorneys, was -- the dollar
4 value was approximately \$60,000 -- excuse me, let me double
5 check that. No, it was approximately \$40,000. That was
6 the total of inter-office conferences.

7 Q Now, the basis of Mr. Palmer's criticisms of
8 the inter-office conferences -- do you understand that to
9 be a duplication of that?

10 A Yes.

11 Q And what is your view then of how you would --
12 if you accepted Mr. Palmer's view that the inter-office
13 conferences are a duplication of effort and, therefore,
14 should not be billed, what would be the appropriate amount
15 to deduct from the lawyers' fees in this case, based on
16 your calculations and your opinion?

17 A Well, as your question says, I don't accept
18 that inter-office conferences were a duplication of effort
19 by its definition. A duplication of effort is the
20 attorneys doing the same thing. And in these situations
21 they weren't doing the same thing. They were doing each
22 different things.

23 But if you were to accept this premise that

1 every inter-office conference represented a duplication of
2 effort and the total fees is \$40,000, well that means one
3 of the attorneys was doing the original effort. So you can
4 cut it in half and it would be \$20,000. You wouldn't
5 deduct the full amount. By its definition, duplication
6 means someone is doing something that someone else has
7 already done.

8 So if you add up both of them and you come up
9 with \$40,000, you're just knocking off the duplication,
10 that would leave \$20,000.

11 Q Now, did you do that requested calculation with
12 respect to the amount of time devoted to the issue of
13 damages which we've heard a lot about in this testimony?

14 A Again, I didn't personally.

15 Q Did you review it?

16 A I did review it. What I saw in this case was
17 there had been a request through the discovery that the
18 Defendants filed in this case that the lawyers go back with
19 the petitioners and itemize out in their bills in greater
20 detail than we had originally done as to whether certain
21 aspects of that effort was directed to damages or whether
22 certain effort was directed to this question of whether the
23 bank was a "retail use."

1 And the attorneys, we went back and itemized
2 that, came up with \$23,000 as being the amount of legal
3 fees that were incurred with respect to the question of
4 damages, as well as
5 to --

6 Q Go ahead and do retail.

7 A The retail was \$3,000. So a total of \$23,000.

8 Q Mr. Frostick, did you render bills in this case
9 for the effort that you had expended?

10 A Yes.

11 Q May I have those, please?

12 A (Witness complies.)

13 MR. DURRETTE: I don't know what number it is.

14 THE CLERK: Plaintiff's fifteen.

15 THE COURT: Plaintiff's fifteen, for
16 identification only.

17 (The document referred to
18 above was marked Petitioner's
19 Exhibit Number 15, for
20 identification.)

21 (Whereupon, Mr. Durette handed a document to
22 the Witness for his examination.)
23

1 BY MR. DURRETTE:

2 Q I'm now showing you a duplicate of Plaintiff's
3 Exhibit 15 and ask you, are those bills that you entered?

4 A Yes, they are.

5 Q And do they indicate the amount of time that
6 you spent on the tasks that you were asked to do?

7 A Yes.

8 Q And a description of what you did?

9 A Yes.

10 MR. DURRETTE: Your Honor, I ask that these be
11 admitted.

12 THE COURT: Any objection?

13 MR. O'CONNELL: No objection, Your Honor.

14 THE COURT: Plaintiff's fifteen will be
15 received.

16 (The document heretofore
17 marked Plaintiff's Exhibit
18 Number 15, for
19 identification, was received
20 into evidence.)

21 BY MR. DURRETTE:

22 Q Now, at our request, also, Mr. Frostick, I
23 believe you mentioned earlier that you had done an analysis

1 of the issues raised in Mr. Palmer's report; is that
2 correct?

3 A Yes, sir.

4 Q And do you have that with you?

5 A Yes, I do have a copy of it.

6 Q And you furnished this to Mr. O'Connell?

7 A Yes, in my deposition.

8 Q At your deposition?

9 A Yes.

10 (Mr. Durette handed the Clerk a document.)

11 THE CLERK: Plaintiff's sixteen.

12 THE COURT: Plaintiff's sixteen.

13 (The document referred to
14 above was marked Plaintiff's
15 Exhibit Number 16, for
16 identification.)

17 BY MR. DURRETTE:

18 Q Is that your only copy?

19 A That is my only copy.

20 Q And is that your written report analyzing the
21 various issues raised by Mr. Palmer in his report?

22 A Yes, it is.

23 MR. DURRETTE: Your Honor, I'd move its

1 admission.

2 THE COURT: Any objection?

3 MR. O'CONNELL: No objection, Your Honor.

4 THE COURT: It will be received, sixteen.

5 (The document heretofore
6 marked Plaintiff's Exhibit
7 Number 16, for
8 identification, was received
9 into evidence.)

10 BY MR. DURRETTE:

11 Q I'm not going to go over it in detail, because
12 the jury is going to have it, but I just want to call your
13 attention to a couple of things.

14 In Mr. Palmer's report, he expressed an opinion
15 on Mr. Pearson's bill, which at that time was \$18,432; is
16 that correct?

17 A Yes.

18 Q And in his opinion, what did he say? Do you
19 need his report?

20 A No. Basically, what he said is he thought
21 those fees were excessive for arguing a motion for a
22 temporary restraining order and issuing a few subpoenas
23 duces tecum.

1 Q Is that what he said in his report that Mr.
2 Pearson did?

3 A That's the substance that I recall, yes.

4 Q And what do you say Mr. Pearson did, after
5 looking at Mr. Pearson's bills?

6 A Mr. Pearson did far more than simply
7 participate in the motion for the temporary restricting
8 order back in 1993 and issue a few subpoenas.

9 Q Instead of having you read it, let me just hold
10 it up and ask if on the fourth page of your report, it's a
11 full page listing all the things that Mr. Pearson did
12 descriptively?

13 A Yes. This doesn't list them all.

14 Q I'm sorry.

15 A This is a summarization of the key points that
16 I tracked from the bills showing what Mr. Pearson had done
17 in the case.

18 Q And in fact it goes over to about a third of
19 the next page, doesn't it?

20 A Yes, it does.

21 Q Now, you also analyzed or commented on an
22 expense of an attorney named Powell Duggan; is that right?

23 A Yes.

1 Q A local attorney. And who was he hired by?

2 A The Taco Bell Corporation, the franchisor of
3 BurgerBusters.

4 Q And why was he hired?

5 A He was -- my understanding from reviewing the
6 materials is that he was hired in connection with the
7 subpoena duces tecum that had been issued by the Chawla's
8 to Taco Bell Corporation to obtain documents related to
9 BurgerBusters.

10 Q And the reason -- and they filed a motion to
11 quash?

12 A Yes, they filed a motion to quash, which was
13 argued.

14 Q And the reason for that is that Taco Bell did
15 not believe it ought to produce all the documents that were
16 asked for?

17 A That's correct.

18 Q And there was an argument about that?

19 A Yes.

20 Q And that's what Mr. Duggan did?

21 A As well as once that the Court ruled on the
22 argument, Mr. Duggan had some involvement in getting some
23 documents together for the Chawla's.

1 Q And so there was an argument in court on that?

2 A Yes.

3 Q That Mr. Duggan had to prepare to come to
4 court?

5 A Yes.

6 Q And do you consider his bill of \$4,712 to be
7 reasonable for what he did based on your review?

8 A In connection with the argument, preparing the
9 argument, and ultimately producing documents, I do.

10 Q Now, BurgerBusters is claiming reimbursement
11 for that in this case.

12 Do you know why?

13 A Well, the -- I do understand that BurgerBusters
14 had to reimburse Taco Bell Corporation for that expense.
15 It's my understanding that their franchise group requires
16 BurgerBusters to pay Taco Bell Corporation back any legal
17 fees that Taco Bell Corporation incurs in relationship to
18 the BurgerBusters' franchise.

19 Q Mr. Palmer complains in his report about a
20 charge of \$812.50 to a Maryland law firm named Paxton and
21 Adler; is that right?

22 A Yes.

23 Q And he says in his report -- he complains about

1 it because he didn't know what they did.

2 A That's right.

3 Q What did they do?

4 A They conducted a deposition of one of the
5 Chawla's witnesses, which incidentally did save some
6 additional travel time.

7 Q Because otherwise these attorneys would have to
8 go to Maryland, right?

9 A Yes, that's correct.

10 Q And the rest of this the jury can look at when
11 they go back to the jury room.

12 Finally, there's been a lot of testimony here
13 on an issue over the extent to which BurgerBusters
14 prevailed in this case, the relief that they got.

15 Do you have an opinion in that regard?

16 A I do.

17 Q Would you tell the jury what it is, please?

18 A It is in my opinion that BurgerBusters obtained
19 substantial, excellent relief for what it sought in this
20 case. You may recall, I testified a few moments earlier
21 about the different types of alternative recovery that you
22 can sometimes get from enforcement of one's legal rights.

23 You'll recall I talked earlier about specific

1 performance of a real estate contract versus damages of a
2 real estate contract. This suit basically involved whether
3 or not the Chawla's had violated the lease and the deed of
4 easement. That was the central issue in the case.

5 What was sought in the case for that violation
6 was alternate theories. In the very beginning of the case,
7 BurgerBusters sought to prohibit the Chawla's from building
8 the bank in the first place. They didn't get that, but
9 that didn't mean they lost the case. That just meant that
10 the case had to continue for the development of further
11 evidence and further argument on legal principles.

12 The bank building was ultimately constructed.
13 After it had been constructed, they got a ruling that the
14 building had to be either removed or reconfigured to
15 conform with the development restriction. They also,
16 during the course of the litigation, obtained injunctive
17 relief prohibiting the landlord from interfering with their
18 rights to the parking and travelways in the shopping
19 center.

20 That was the central thrust of what was sought
21 in this case, enforcement of their rights under the lease
22 and the easement. They did not get a damages award for the
23 loss of three and a half to four parking spaces that had

1 been taken when the drive-through was put in. Certainly,
2 they would have liked to have that. They asked for it.
3 But of course once the injunctive relief was granted, any
4 damages for that could only be granted up to the time of
5 the injunctive relief anyway, because presumably the
6 parking spaces were going to go back.

7 But the fact that they didn't win on the
8 damages issue doesn't mean that they didn't substantially
9 prevail. They got principally what they were looking for,
10 enforcement of their rights under the lease and easement.

11 Q And are you aware that the representations by
12 Mr. Lawrence to the Court in the course of his argument in
13 April before the trial even started was that if he could
14 prevail on injunctive relief, he wouldn't want any damages
15 and he'd take his bags and go home?

16 A Yes, I am.

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Q Were you retained to do a critical analysis of the fees that were charged in this case? Yes or no, please?

A I was retained, yes, to do a critical analysis.

Q Then, if you were retained to do a critical analysis, why isn't there one single fee, claim, deduction, that you disagree with that is in this thousands and thousands of dollars in fees?

Correct me if I'm wrong, I don't think that in your counsel's questioning of you, you disagreed with one single entry in any of the bills that you were presented to review.

How come? How is that, Mr. Frostick?

1 A Actually, Mr. O'Connell, I disagreed with a few
2 entries even before the fee application was submitted.

3 Q Oh, you did? You did disagree with some of it?

4 A Did you hear the rest of the answer?

5 Q Would you tell us what those are?

6 A Did you hear the rest of the answer?

7 Q No.

8 A Before the fee application was submitted.

9 Q But after the fee application was submitted,
10 you made no further changes and disagreements with these
11 thousands and thousands of dollars that are being sought;
12 is that correct?

13 A I did have a question about the fees in
14 connection with Judge Sacks.

15 Q Anyone else?

16 A No.

17 Q That was a minor charge, \$700 or \$800.

18 A It was. I also had a few questions about
19 certain entries, but they were adequately explained.

20 Q Now, you were -- I believe you said the
21 materials you were sent were the filings, the 144 filings?

22 A Yes.

23 Q And those filings were court filings?

1 A Yes.

2 Q All right. And roughly how many file boxes did
3 that encompass?

4 A When it first came to me, they were loose. I
5 believe they came in one large box, about two and a half by
6 one and a half feet. I subsequently put them into
7 notebooks and I made up, I believe, six notebooks worth of
8 pleadings.

9 Q I believe when I took your deposition -- you
10 correct me if I'm wrong -- you basically had the materials
11 that you indicated to me at the deposition you reviewed in
12 two boxes, two roughly square boxes.

13 Is that fair to say?

14 A That is not fair to say. What I had in our
15 deposition was my six notebooks of documents. My seventh
16 notebook of bills was about this thick, about the size of
17 that notebook up on the Court's bench.

18 Q These bills that are in this blue book?

19 A Correct.

20 Q Okay.

21 A I also had a manila file of this nature
22 (indicating), as well as a second manila file of this
23 nature (indicating).

1 Q So what is that, roughly one file drawer in a
2 file cabinet?

3 A I don't know. You might be able to get it into
4 one file drawer, maybe it will take two.

5 Q That's the total amount of written material
6 that you reviewed in this case; correct?

7 A Yes.

8 Q Now, you know Mr. Palmer, don't you?

9 A Yes.

10 Q And you know that he's a highly respected trial
11 lawyer in Northern Virginia?

12 A He is indeed.

13 Q Isn't that true?

14 A Yes.

15 Q All right. And you know that he is respected
16 among his peers, don't you? Isn't that fair to say --
17 highly respected?

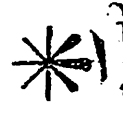
18 A I would assume he is. I know I respect him.

19 Q Mr. Palmer gave an opinion that you shouldn't
20 treat your less sophisticated clients any different than
21 your most sophisticated clients.

22 Do you agree with that, Mr. Frostick?

23 A Yes, I certainly agree with that statement.

1 Q You will agree, won't you, Mr. Frostick, that
2 this case was originally filed by BurgerBusters against the
3 Chawla's?
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Q Now, Mr. Frostick, I believe I asked you at
your deposition if you had any knowledge about whether you
had talked to Mr. Frieden about what he had done in the
case, and you indicated that you had not; is that correct?

A That is correct, Mr. O'Connell.

Q So all these entries on these bills that shows
Mr. Frieden's initials, you made no effort to talk to him
to find out what he did in this case; is that correct?

1 A That is correct.

2 Q And I believe your answer was the same for all
3 the other parties whose initials are indicated there,
4 except perhaps Mr. Sacks, Ms. Cleary, and Mr. Lawrence;
5 isn't that correct?

6 A Yes. And, in fact, as well, Mr. O'Connell, I
7 haven't spoken to Mr. Sacks.

8 Q And you have not spoken to Mr. Sacks. Thank
9 you for your candor there. And, as I understand it --
10 maybe we ought to get this in front of you.

11 (Whereupon, Mr. O'Connell handed a document to
12 the Witness for his examination.)

13 BY MR. O'CONNELL:

14 Q Just go to the first page of the Faggert and
15 Frieden bills, if you will?

16 A (Witness complies.) The November 16th, 1993,
17 bill?

18 Q Yes, the November 1993.

19 A Yes, sir.

20 Q Where they show AMF, that's Mr. Frieden, right?

21 A Right.

22 Q You didn't make an effort to find out what that
23 telephone call was about or whether that time was

1 reasonable, did you?

2 A I wouldn't say any effort. In terms of talking
3 to Mr. Frieden, no, I didn't talk to Mr. Frieden about
4 that. However --

5 MR. DURRETTE: Let him finish his answer,
6 please.

7 BY MR. O'CONNELL:

8 Q Go ahead.

9 A However, I reviewed the bills and the bills
10 help provide context to what these entries reflect.

11 Q Well, if you didn't talk to Mr. Frieden about
12 this one-tenth of an hour, you didn't know what the
13 telephone call was about with Mr. Paphites, did you?

14 A That's correct. I didn't have any direct
15 personal knowledge of what that telephone call was about,
16 other than what I could derive from the context.

17 Q The same would be for the next entry for Mr.
18 Frieden, for a tenth of an hour for review of a letter from
19 Dr. Chawla; true?

20 A (Nodding head.)

21 Q And the next entry --

22 A I'm sorry. What was your question?

23 Q I said you made no effort to ask Mr. Frieden

1 what he did when he reviewed that letter and whether it
2 really took all that time to review that letter?

3 A No, I did not ask him anything about that
4 entry, that's correct. The entry reflected that it took
5 him six minutes to review the letter.

6 Q And you didn't question that, did you?

7 A I did not talk to Mr. Frieden about that.

8 Q And the same with the next entry, 10-13-93 --
9 you didn't ask Mr. Frieden how much time he had spent
10 talking to Mr. Paphites and what they talked about, and
11 then you didn't make an independent judgment about whether
12 or not that was a reasonable time; correct?

13 A That's true, Mr. O'Connell.

14 Q And the next entry, 10-19-93, ADC -- and I
15 believe that's Ms. Cleary.

16 A Yes.

17 Q Three hours, office conference with AMF, review
18 lease, draft correspondence, draft Bill of Complaint,
19 motion for judgment and temporary injunction.

20 You didn't sit down with Ms. Cleary on that
21 entry and go over what she did in those three hours and
22 then make a critical judgment about whether or not those
23 three hours were necessary, did you?

1 A No, it wasn't necessary.

2 Q And the same would be true of the next entry as
3 well, correct?

4 A That's true.

5 Q And the next entry?

6 A As I indicated, Mr. O'Connell, I didn't review
7 the entries with each of the attorneys in detail, because I
8 was able to look at entries in the context of other
9 entries, or the specific narrative discussion as contained
10 in the entries to determine what was happening.

11 Q I understand that, but that would be true for
12 all the bills that are reflected.

13 A That's true.

14 Q I also understood at the time of your
15 deposition that you had not reviewed the trial transcripts
16 from the first three-day trial or the second three-day
17 trial; correct?

18 A That is correct.

19 Q And that's still true today?

20 A Yes, sir.

21 Q Okay. I also understand that you did not go
22 through the billings and attempt to review the deductions
23 that had been made for the building damage claim and the

1 car damage claim?

2 A If what you mean is I did not go through and
3 add up the deductions, that is correct. That had already
4 been done by the attorneys.

5 Q I believe that it's implicit in what your
6 counsel asked you, but I'll try to sharpen the focus on
7 this. There certainly were law firms in Northern Virginia
8 that could have handled this case just as competently as
9 Faggert and Frieden; isn't that true?

10 A I would believe that.

11 Q And I believe that you indicated that -- again,
12 you correct me if I'm wrong, that it would have taken at
13 least four to five attorneys to handle this case, based
14 upon the vigorous defense and the good argument that had
15 been put up by Dr. Chawla?

16 A As I think I went on further to elaborate in my
17 deposition testimony, the term "handled this case" is a
18 rather relative --

19 Q I'll agree with that.

20 A -- a variable term. I think I also went on to
21 say that, yes, you could have two attorneys that could
22 handle this case, but that I felt that the four to five
23 principal attorneys who had handled this case did so in a

1 fashion that allowed them to get the excellent results that
2 they had obtained.

3 Q Now, isn't it fair to say that you didn't
4 review what was done in this case, what was actually done
5 in this case, and then go out and create a budget or a
6 critical analysis of what you believe the time it should
7 have taken to do what was actually done by the fee
8 applicants in this case?

9 In other words, you didn't try to create a
10 model of a case that had the same issues and compare those
11 with the time that was actually spent in this case; is that
12 fair to say?

13 A Well, your question assumes, Mr. O'Connell,
14 that when you got ready to prepare the analysis you would
15 be able to anticipate all of the defenses that your
16 opponent was going to raise in the case and how the Court
17 would react to those defenses throughout the course of the
18 litigation.

19 I don't think you can accurately create a model
20 in the fashion that you're talking about, because
21 litigation is inherently uncertain. And as it evolves, you
22 cannot predict -- sitting here at the beginning of a case,
23 you cannot predict particularly how a case like this is

1 going to evolve over time.

2 Q Well, let me try to simplify it a little bit.

3 You knew what was done in the case because you
4 had the pleadings?

5 A Yes.

6 Q So let's take the original Bill of Complaint,
7 or the amended Bill of Complaint, that was filed I believe
8 by Faggert and Frieden.

9 Did you look at the time that Faggert and
10 Frieden actually spent performing that task on one side,
11 and then sat down and, based on your experience, do a model
12 for what you believed it should have taken to do the same
13 task?

14 A You're asking me did I look at the time that
15 they spent preparing the amended Bill of Complaint and then
16 decided whether I thought that was excessive or not?

17 Q No. I asked whether you did a duplication, a
18 budget, if you will, for comparing the Bill of Complaint,
19 and then comparing that to what time was actually being
20 claimed, on a side-by-side analysis for all those pleadings
21 that you were given?

22 A No. What I did is I looked at all the
23 pleadings and I looked at all the bills, and I did an

1 analysis as to whether I thought the time entries were
2 appropriate for the effort that I saw.

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Q Have you seen the memoranda between the
lawyers? Have you seen records of what was said or not
said in the various meetings between the lawyers and the
client?

You haven't seen any of that, have you?

A No.

Q Yet that's being charged for in these bills,
isn't it?

1 A Yes.

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Q Go back to the October 19th, 1993, entry that
Mr. O'Connell asked you about for Anne Marie Cleary.

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A (Witness complies.) Yes.

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Q It was three hours, office conference with Mr.
Frieden, reviewed the lease, plat, and correspondence,
draft a Bill of Complaint and a motion for temporary
injunction.

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Is three hours a reasonable charge for that
level of effort?

17

A Oh, absolutely.

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MR. DURRETTE: That's all I have, Your Honor.

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THE COURT: All right. May Mr. Frostick be
excused?

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MR. DURRETTE: Yes, sir, he may be excused.

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(Witness excused.)

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THE COURT: All right; thank you very much,

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THE COURT: Further rebuttal case?

MR. DURRETTE: Happily, we rest.

THE COURT: All right. Rebuttal case is
rested. Is there surrebuttal?

MR. O'CONNELL: No, Your Honor, there is not.

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Instruction two is the long instruction regarding the burden of proof and the factors to be considered in keeping with, purportedly in keeping with the pretrial order.

Any objection, Mr. O'Connell? And take your time. I don't wish that anyone should feel rushed.

MR. O'CONNELL: I object to the word "must" in the second paragraph -- "you must award BurgerBusters."

1 You may award BurgerBusters each item of fees and costs as
2 shown on this fee application, unless the Chawla's proved
3 by the greater weight of the evidence that --

4 THE COURT: All right. Are there other
5 objections?

6 MR. O'CONNELL: Well, we get into the what I
7 think is the issue of Hensley v. Eckerhart, and the factors
8 by themselves, they are the factors that saved Hensley from
9 the pretrial order. And I guess, maybe, in this
10 instruction by itself -- it would be my contention that
11 this instruction by itself, that this instruction must be
12 accompanied by other instructions which gives the jury,
13 instructs the jury that these factors are not all equal and
14 that the result is the most important factor.

15 Otherwise, I think we get back into the law of
16 the State of Virginia, which has three or four factors, and
17 it doesn't mention the relationship with the client, which
18 undoubtedly they're going to argue is on an equal par with
19 the results, and they're not in Hensley v. Eckerhart.
20 Certainly, the interpretation is that the result is the
21 most important factor.

22 So we either get back into the three general
23 areas that we've discussed in Virginia, which result as

1 one, or we get into a qualification that says that these
2 factors are not all of equal importance, because there's no
3 question that in reading Hensley they're not. And what's
4 the most important factor is the result -- you know, it
5 tells the Court how to analyze the result qualitatively and
6 quantitatively.

7 THE COURT: All right.

8 MR. O'CONNELL: So that was kind of a
9 rambling --

10 THE COURT: That's all right.

11 MR. O'CONNELL: I'm sorry.

12 THE COURT: That's fine. I understand your
13 position. It's one that we discussed earlier in the case,
14 and I should hear from Mr. Lawrence on that issue.

15 MR. LAWRENCE: Your Honor, just --

16 THE COURT: He may agree with you.

17 MR. LAWRENCE: No. The use of the word "must,"
18 that's a function of the Chawla's burden of proof. If the
19 Chawla's don't prove that the fees and expenses claimed are
20 unreasonable or excessive, the jury must award the fees and
21 expenses claimed. It's a proper statement of the law.
22 They have no discretion.

23 Regarding Hensley, I think the Court decided --

1 THE COURT: Mr. Palmer has already said that I
2 was wrong on one occasion in this case, and I take self-
3 evident that all counsel agree that the Court has erred
4 innumerable times in this case. I've tried my best, and I
5 know how the system works. So feel free if you wish to
6 agree with Mr. O'Connell on applicability of Hensley or
7 disagree with him.

8 MR. LAWRENCE: No. I think the pretrial order
9 was very clear. I can tell you I was the one who added the
10 language about factors, and I did that for a reason. I
11 expressed before that pretrial order was entered my concern
12 that Hensley was a case arising under the Civil Rights
13 Recovery Act.

14 In a civil rights context that the enhancement
15 or diminution of fees that is involved in a civil rights
16 case has no application here, and that some factors that
17 may be weighted or be applicable or inapplicable civil
18 rights cases may not necessarily be applicable here, where
19 BurgerBusters has a contractual right to recover attorneys'
20 fees, costs, and expenses incurred in enforcing its rights
21 under the lease.

22 So we agree with the factors, but we do not
23 agree on the wholesale application, and the Court did not

1 order it, most importantly, on Hensley. And what case law
2 there is from the Virginia Supreme Court -- Mullins comes
3 to mind; Mr. Durette's case, Tazewell Oil, is another.
4 The case I had in the Virginia Supreme Court, Heinzman,
5 Fine, Fine, Legum and Fine, which is an often cited case
6 about a quantum meruit fee. It talks about the factors to
7 be utilized by the Court.



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2 But I think the Court's ruling is imminently
3 correct. And the one indication we have from the Supreme
4 Court of Virginia is that there are factors. But there is
5 no statement in any Virginia Supreme Court decision, or
6 maybe even a circuit court opinion that I have read, that
7 indicates that any factor is going to be or should be given
8 any particular weight. It's for the jury to consider all
9 these statutes together, much as the Court does in an
10 equitable distribution proceeding, and determine what is a
11 reasonable fee and what are reasonable expenses under the
12 facts and circumstances of this particular case.



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THE COURT: I want the record to -- although we've discussed this on at least two other occasions in the context of these instructions, I want the record to show where the Court views the situation as we are at this time so that the Appellate Court, when it reviews this record, won't have to search the record, we'll have it right here at the point of instructions.

This Court, in discussing with counsel throughout the issue of the award of attorneys' fees,

1 indicated that it believed that the law of Virginia was not
2 fully settled on the standard to be used in making this
3 determination. And it would be helpful for the Court and
4 counsel to agree on what that standard was before we tried
5 this case, for no other reason than to make objections as
6 to relevance simpler, to allow counsel to try to the same
7 issues, and also to allow us in preparing our instructions
8 to focus on the same body of law.

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2 What we've done, we have contrived almost by
3 agreement the additional factors unrevealed. We don't know
4 whether these are the factors the Virginia Supreme Court
5 will adopt at all. They may look at this record and say,
6 Judge Robertson and ladies and gentlemen, when you tried
7 this case, you were all wrong. When we said such
8 circumstances, or other attending circumstances, or any
9 other relevant circumstances, we weren't talking about what
10 Hensley was talking about at all. But you people agreed to
11 it when you tried this case, and we're not going to let you
12 now raise on appellate review an objection to something you
13 agreed to.



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12 thing

13 -- two other things that I need to determine about number
14 two, your objections -- first, the word "must," and second,
15 whether or not some of the factors that we put in the
16 pretrial order have not been shown by the evidence. As you
17 will recall, the pretrial instruction has this language to
18 the extent shown by the evidence. So if it's not shown by
19 the evidence, we may have to strike one or more of these
20 factors.

21 But I want to come back to the word "may" or
22 "must." That is "must," as suggested. And if you'll give
23 me a moment to read it.

1 (Pause.)

2 THE COURT: I think the analysis of the word
3 "must" turns on whether or not -- and I turn us back to the
4 pretrial order again -- whether or not the Court itself
5 must say that the prima facie entitlement to recover a fee
6 or cost at all has been established.

7 Look at the pretrial order. The Petitioner may
8 offer its authenticated claim for fees, costs and expenses
9 incurred by it to establish its prima facie entitlement to
10 recover. Then we deal with the responsive issue of burden
11 of proof to challenge the prima facie case made by the
12 applicant for the fee, BurgerBusters.

13 And that's really where it comes down. And I
14 suppose the struggle that I have to deal with on this
15 objection is whether or not we have some type of directed
16 verdict in Virginia. We have to watch -- the Virginia
17 Trial Court doesn't direct a verdict by the language of its
18 instruction, but leaves it to the trier of fact to award a
19 verdict.

20 Now, having said that, the concept of prima
21 facie is a concept of establishing a basic premise for
22 recovery. It's either a presumption or an inference,
23 depending on what area of the law you're working in. But

1 it creates a suggestion of recovery which then can -- I
2 like the balloon idea. You blow up the balloon and the
3 other side tries to let the air out of it; the balloon
4 floats -- if you've blown it up and it's beginning to float
5 off, you've got a prima facie case; you pop the bubble and
6 it comes back down again. And that's what those people
7 decide.

8 Because of the concern about directed verdict,
9 I'm more comfortable with the word "may." I don't think
10 that does damage particularly to BurgerBusters.

11 MR. LAWRENCE: I think I've made my position
12 clear. I disagree with the Court, because I think if a
13 prima facie case has been made, and the Court's already
14 ruled that it has been made, and if it is not adequately
15 rebutted, and by that I mean
16 if --

17 THE COURT: Well, the question is whether I can
18 take it away from the trier of fact. I haven't had any
19 earlier motions on this. The trier of fact is entitled to
20 decide itself whether the prima facie case has been made.
21 Or do I say, as a directed verdict, that the prima facie
22 case has been made and it's up to the Defendant to then
23 move to the excessive reasonableness challenge?

1 MR. LAWRENCE: I think the pretrial order
2 establishes that, Your Honor.

3 MR. DURRETTE: Your Honor, I think you ruled a
4 prima facie case was made.

5 THE COURT: Well, I did on the motion to
6 strike, but now I've got all of the evidence.

7 MR. LAWRENCE: And there has been no motions.

8 THE COURT: You know how lawyers struggle with
9 words. You're right. You brought that up, I forgot the
10 motion to strike. How could I forget that?

11 MR. DURRETTE: Your Honor, you either make a
12 prima facie case or you don't, Your Honor. With all due
13 respect, we made it.

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MR. O'CONNELL: The general principle in jury
instructions in Virginia is to avoid just what you're
talking about, and that's words like "must." The jury has
to know that they have the option or you're going to run
into the issues of whether or not you're directing this
verdict.

THE COURT: All right. I think that on the

1 motion to strike -- I have made the prima facie finding for
2 purposes of the motion to strike, but I am concerned about
3 there being an implication of a directed verdict on this.
4 I'm more comfortable with may, and you can argue it. If
5 they come back and they don't award anything at all on this
6 evidence, it's not much of a verdict.



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The Court instructs the jury that you must determine what costs and expenses, including attorneys' fees, incurred by BurgerBusters, Incorporated, may be recovered by it against Dr. and Mrs. Chawla.

The Court instructs the jury that the burden is on Dr. and Mrs. Chawla to show that the attorneys' fees and costs claimed by BurgerBusters are excessive or unreasonable, including those which have been incurred and

1 those which may reasonably be expected to be incurred in
2 the future.

3 You may award BurgerBusters each item of fees
4 and costs shown on its fee application, unless the Chawla's
5 prove by the greater weight of the evidence that such item
6 is excessive or unreasonable.

7 In measuring the excessiveness or
8 unreasonableness of fees and costs, you may consider the
9 following factors: (1) the time and labor required; (2)
10 the novelty and difficulty of the questions; (3) the skill
11 requisite to perform the legal services properly; (4) the
12 customary fees; (5) the amount involved and the results
13 obtained; (6) the experience, reputation and ability of the
14 attorneys; (7) the nature and length of the professional
15 relationship with the client.

16 And last, for your use, the Court has a verdict
17 form which is as follows: "We, the jury, on the issues
18 joined award BurgerBusters, Incorporated, costs and
19 expenses, including attorneys' fees from Inder Chawla and
20 Vera V. Chawla in the amount of \$____," for you to insert
21 such amount as you shall find from the evidence. "Signed,
22 Your Foreman," his or her name to be printed thereafter
23 under the signature.

1 MR. DURRETTE: Ladies and gentlemen, thank you
2 for your time and your patience on behalf of Mr. Paphitis.
3 Sometimes we lawyers feel a need to tell you more than you
4 want to know or need to know, but that's the nature of our
5 profession. I hope we haven't done that too much here. I
6 hope we have given you the things that will be useful to
7 you and that will help you make the judgment that you need
8 to make.

9 This case begins and ends with a contract. And
10 to many a contract is a very solemn obligation, whether
11 it's a handshake or a written document. In fact, it's sort
12 of a fundamental principle, I would say, of this nation,
13 and of our laws. We do what we say we do. We obligate
14 ourselves one to another in a lot of ways, and we should
15 keep our promises.

16 And when we don't, that's what courts are for.
17 And unless we're going to go to the streets and pick up
18 cudgels, it's where we have to come to resolve our
19 disputes. And so here we are.

20 This case began with a contract, and we're here
21 today on a contract. The court has already found that Dr.
22 and Mrs. Chawla breached their contract. They violated
23 their contract. They did not do what they agreed to do.

1 And the judge has ordered them to do it.

2 And so that provision of the contract has been
3 litigated, and BurgerBusters has prevailed. And he now
4 turns to another provision of the contract, and to you.
5 This provision of the contract says, "Tenant shall pay the
6 landlord, and landlord shall pay the tenant."

7 The landlord is Dr. and Mrs Chawla, and the
8 tenant is BurgerBusters. All costs and expenses, including
9 attorney's fees, incurred by, in this instance, tenant, in
10 exercising any of their rights or remedies, hereunder," any
11 of their rights or remedies, hereunder, "or enforcing any
12 of the terms, conditions, or provisions, hereof; that is
13 this contract."

14 Now, it would be a very logical question to
15 ask, "Well, that says, all. Why am I being instructed that
16 I've got to consider eight factors, or seven factors, or a
17 certain number of things in deciding how much to award?"

18 Because the law, even where parties contract to
19 pay all -- and remember at the inception of this
20 litigation, both of these parties were looking at the word,
21 all. But, the law says, "Even where you reached an
22 agreement to pay all, we're not going to impose on you
23 anything that you can prove is excessive or unreasonable."

1 And that's what the burden of proof instruction
2 in this case means to you. Dr. and Mrs. Chawla have the
3 burden, the law has placed on them the burden, because they
4 contracted to pay all. The law says you don't have to pay
5 all if you do prove that they are excessive or
6 unreasonable.

7 Now, that's important because the burden is not
8 on BurgerBusters to prove they are reasonable -- although,
9 if it was, I think we've done it. I think we've proved
10 that they're reasonable. But, that's not our burden. It
11 is their burden to show that they're unreasonable.

12 And if they don't meet that burden, they don't
13 convince you that they're unreasonable, you're uncertain
14 whether they're reasonable or unreasonable, then the
15 instruction is, you should award the fees to BurgerBusters
16 because they have not met their burden.

17 It's called the greater weight of the evidence,
18 or the preponderance of the evidence; that they have to
19 marshal enough evidence to satisfy you that these fees
20 were excessive and unreasonable.

21 Now, ladies and gentlemen, the character of
22 this case was decided, if not before, on September 24,
23 1993. And this is exhibit 14, and Ms. Cleary read this to

1 gone. It's not for the future, not with what we've been
2 through. But, that's all we're asking for. Thank you very
3 much.





MR. O'CONNELL: Ladies and gentlemen, on behalf of Dr. and Mrs. Chawla, I want to thank you for your time and attention you have given to this case. I know this has been a long and arduous routine for you, but you have an awesome responsibility in making a determination as to what is reasonable in this case.

And the reason -- what the law is all about, really, is common sense, reasonableness, and using your judgment. And what these lawyers -- what I say, and what Mr. Durette says, isn't evidence in this case.

When it's all said and done, and you listen to the evidence and you take it back to the jury room, you use your common sense and you decide what is a reasonable result in this case. That is your responsibility and it's solely yours.

What I am going to try to do is, I'm going to

1 try and go through some of the instructions that the court
2 has given you, and I'm going to discuss some of the
3 evidence. And, then, I will only be able to speak once.

4 The way this procedure works is Mr. Durette
5 opens, I give my statement, and then Mr. Durette gets an
6 opportunity to respond. So, you're only to going to hear
7 from me once, and I hope not to take too much of your time.
8 But, this is a very important case to the Chawlas.

9 They didn't start this case. They were sued.
10 And you'll have the Bill of Complaint with you in your room
11 to look at. And you will see, it's been outlined and it's
12 been discussed by the attorneys, they had no choice but to
13 respond to this. So, it's not a case where they went out
14 and sued BurgerBusters. They were sued by BurgerBusters
15 and they had no alternative but to respond.

16 Now, there's a lot of discussion in this case
17 about, well, you know, we got exactly what we asked for.
18 And so, therefore, we should get all of these charges
19 because of this clause in the lease.

20 Well, they have discussed that without talking
21 about any of the qualitative differences between what they
22 asked for and what they got. And the reason they haven't
23 is because they want you to think that all of these hours

1 that they have churned up, and all of this time that they
2 have put in this book, they're entitled to collect it.
3 They're not. They're only entitled to collect what you
4 deem to be reasonable charges that were spent.

5 Now, they knew from the outset that they were
6 going to ask for attorney's fees. You're going to have
7 this book in your room to look at. What you're going to
8 see on these pages, the pages and pages of bills, isn't
9 going to give you the slightest idea of what portions of
10 this case they succeeded on, and what portions of the case
11 they didn't succeed on.

12 When you compare what happened in this case
13 qualitatively and quantitatively, BurgerBusters didn't get
14 anything. The final order in this court -- the Taco Bell
15 building is here (indicating). I'm sorry, I'm not a very
16 good artist. The bank building is over here (indicating).
17 Right now there's a couple of drive-throughs. Those drive-
18 throughs are going to be removed and there's going to be a
19 building there.

20 So, what result did they get? I can sue
21 somebody for assault and battery when they brush me with a
22 feather. Now, is it reasonable for me to go out and hire
23 an attorney and spend a whole lot of money when I sue

1 somebody for assault and battery because they brushed me
2 with a feather?

3 That's what we're dealing with here. They took
4 a minor point -- now if somebody comes up and punches me in
5 the fact, sure, I'm justified in going out and getting an
6 attorney and pressing the case to the limit. But, they
7 started this.

8 Was it reasonable for them to spend all of this
9 money, churn up all of this time, to accomplish this
10 minimal result?

11 You heard the evidence from Mr. Palmer. He
12 testified that this result may have even hurt their
13 business. They got the bank reconfigured. People are not
14 going to be able to go up to the bank through the drive-in
15 now and do their business. They're going to have to drive
16 up and get out of their car.

17 There's no evidence that this has done them one
18 ounce of good. It's just like me suing the guy that
19 brushed me with a feather and spending thousands and
20 thousands of dollars but getting a ten dollar judgment.
21 That's the comparison that we have here in this case.

22 They aren't entitled to one single dime for the
23 damage claim. They sued Dr. and Mrs. Chawla for several

1 million dollars in damages. I defy anybody to go through
2 this book and try to determine what amount of time was
3 spent on the damage part of the case, and what amount of
4 the time was spent on the small portion of the case that
5 we've covered, what part of the time was spent on the bank
6 versus retail portion of the case. There is absolutely no
7 way.

8 Now, if you can't do that by going through
9 this, when they knew from the get-go, as Mr. Durette has
10 said, that they were going to ask for attorney's fees, then
11 who should suffer? Not Dr. Chawla. They could have
12 brought their attorneys in that are mentioned in these
13 bills, and they could have explained what they did, and why
14 they did it, and why it was justified.

15 I suggest there's a reason why they didn't do
16 that. Because if they told you what they did and the
17 amount of time they took, you wouldn't believe that that
18 was necessary to handle a case like this. There is
19 absolutely no way.

20 This is where we have instructions on the
21 credibility of witnesses. It tells you that you can accept
22 or disregard all the testimony of a witness as you think
23 proper. "You are entitled to use your common sense." You

1 don't have to go along with what Mr. Durette said. You
2 don't have to go along with what Mr. Paphitis said, or Mr.
3 Frostick said, or Ms. Cleary, or any of the other witnesses
4 that appeared. You use your common sense.

5 I submit, this case was never about this minor
6 problem. I submit, this case was about trying to beat up
7 on Dr. Chawla and gain some leverage over him. Use your
8 common sense.

9 Why would somebody spend all this time, going
10 to all of this trouble, to get this minor little correction
11 on an off-site? Why would they do that?

12 This instruction tells you that you don't have
13 to look at this in a vacuum. You can read between the
14 lines. You can see what was really going on here.

15 Now, if Mr. Paphitis wants to pay his own
16 attorneys for churning this account and billing these
17 hundreds and hundreds of hours that they can't account for,
18 that's fine. But, these instructions tell you that to the
19 extent that these fees are unreasonable, the Chawlas don't
20 have to pay a dime. Do not have to pay a dime.

21 And I will direct your attention to Mr.
22 Palmer's testimony. Mr. Palmer was very clear, he did what
23 you should do in order to determine what was reasonable in

1 this case. He's got 30 years of experience. His
2 credentials are so impeccable, they even stipulated to his
3 credentials.

4 And he said, "I looked at the result that they
5 achieved and I gave them the benefit of the doubt. I used
6 my experience. I determined what it would have taken to
7 file the pleadings, what it would have taken to do the
8 discovery, what it would have taken to try the case, what
9 it would have taken to handle any post-trial matters, and I
10 came up with a range of \$30,000 to \$40,000." And you got
11 his testimony as to the number of days that he assigned to
12 each one of those tasks.

13 If you are inclined to award anything to these
14 people, I would suggest that you key in on Mr. Palmer's
15 report and take a look and determine, in your own mind, if
16 you do not think this is reasonable in view of the result
17 that these people achieved.

18 You have an instruction that tells you that you
19 are free to use your own judgment in determining what
20 weight should be given to the expert witnesses. And I ask
21 you to compare the testimony of Mr. Frostick to that of Mr.
22 Palmer's.

23 Mr. Palmer has 30 years of experience in

1 litigation. Mr. Frostick has limited experience. Mr.
2 Palmer is a member of the American College of Trial
3 Lawyers. Mr. Frostick has never argued a case before the
4 full Virginia Supreme Court.

5 Mr. Palmer was a member of both regional and
6 nationwide law committees whose sole task was to look at
7 the reasonableness of attorney's fees and determine how
8 that should be handled. And you factor that into his
9 testimony. I don't think there's any comparison between
10 not just the credentials of the expert witnesses, but in
11 the method of analysis.

12 I think it's clear, from Mr. Frostick's
13 testimony, he was hired to justify this fee. He didn't do
14 a critical analysis of the fee. He didn't look at the time
15 entry and then go to the attorney and say, what did you do
16 for this amount of time and then make an independent
17 judgment, that that was an appropriate amount of time.

18 He just basically said, oh, yeah, I looked at
19 this. All he looked at were this book and the pleadings;
20 all right? Now, that's two boxes. Maybe a file drawer.
21 But, what they want you to pay for is over here
22 (indicating). All those boxes that they proudly brought in
23 and said, "This is what we spent -- the time that we spent

1 on this case."

2 You don't have to pay them for that. You don't
3 have to pay them for what was reasonable to do the work,
4 only the portion of the work upon which they succeeded,
5 it's in those two boxes. But, Mr. Frostick's testimony
6 isn't any help in that regard. He made no effort to do
7 that. He just basically was hired to justify this huge and
8 hideous amount of money.

9 But, again, if Mr. Paphitis, for his
10 corporation, wants to pay that, that's fine. But, Dr. and
11 Mrs. Chawla shouldn't have to pay for that.

12 I think it's clear that what has been done here
13 is -- and unfortunately it happens in too many civil
14 cases -- they come in and throw out a huge amount of money
15 and they expect, or hope that they would get something.
16 Well, the authority to grant them anything is solely yours.

17 And, again, I would ask you to key in on Mr.
18 Palmer's testimony on what was really necessary to carry
19 this case forward to the result that was obtained.

20 There is an instruction that says, you
21 shouldn't base your verdict on guesswork or speculation. I
22 don't know how you could possibly follow that instruction
23 and give them credit for anything that's in this book,

1 other than guessing and speculation. Because there's no
2 way for you to make an informed judgment on the factors
3 that you're supposed to consider as to whether or not this
4 fee was a reasonable fee.

5 If you can't determine that it was reasonable,
6 it certainly is likely that it was unreasonable -- if you
7 have to guess or speculate. I think it's interesting that
8 Mr. Durette starts out by discussing, well, if you don't
9 agree with this, you can take that off. If you don't agree
10 with that, you can take that off; a hundred or so thousand
11 dollars in deductions right off the bat. I suggest that
12 that shows some indication of the faith he's got in this
13 case.

14 Now, the preponderance of the evidence -- you
15 have an instruction on the preponderance of the evidence.
16 It's not beyond a reasonable doubt, which is the -- in a
17 jury case. All we have to show to show that what they're
18 asking for is unreasonable, is just enough to tip those
19 scales. That's the preponderance. That's the greater
20 weight of the evidence.

21 And I submit that we have shown that through
22 our witnesses, through the testimony -- I submit, they've
23 shown it in their failure to explain why all of these

1 charges were made, what all these people were doing.
2 Nobody came in and said, the normal amount of time to write
3 a memorandum of law on this subject is X number of hours,
4 and so and so at the Faggert and Frieden law firm did it in
5 half the time, or twice the time, or three times the amount
6 of time. Nobody came in and tried to justify their fee.
7 Mr. Frostick didn't do that.

8 You're entitled to deduct all charges that you
9 find that were not reasonably expended, or were excessive,
10 or unreasonable. That means that they can't justify what
11 they did. They can't connect that to the portion of the
12 case upon which they're successful. They aren't entitled
13 to it.

14 So, when you -- again, I emphasize, that look
15 at all the time that was spent and look at the little
16 result that they achieved. Three thousands hours were
17 expended. Three thousand hours is one lawyer working 40
18 hours a week for a year and a half. As Mr. Palmer said,
19 that's outrageous for a case like this to produce the minor
20 result that you have here.

21 Again, remember my example of the guy striking
22 you across the face with a feather and the difference of
23 the guy punching you in the mouth.

1 Why would they really do all of this? I submit
2 it's not for this result, that there was another agenda.
3 The level of skill that was required, Mr. Palmer
4 testified -- that's one of the factors that you are
5 instructed on. This was not a difficult case. Why did Mr.
6 Frieden have to be in this case? Why did this firm have to
7 be in this case and spending all this time going back and
8 forth?

9 The document -- you'll have it in the jury room
10 -- that he drafted was about 25 or 30 pages. The
11 paragraphs that they're talking about that had all these
12 blow-ups are two or three sentences. There wasn't anything
13 difficult about this case. This wasn't a complicated
14 products liability case. It wasn't complicated factually.
15 It wasn't complicated legally.

16 You will have an exhibit in your jury room.
17 It's exhibit number three. And it's an August 14, 1995,
18 ruling by Judge Robertson on the damage case. And I think
19 the most telling part of his analysis of their case is
20 contained in these two sentences on page four.

21 "The court is also concerned about the lack of
22 reasonable causation of these damages." That's the
23 complaint about the loss of the parking spaces. You know,

1 compare that with the feather and the guy that punches you
2 in the face. They had 33 parking spaces. They always had
3 33 parking spaces. Four parking spaces way in the back of
4 the lot, that was their -- this is the -- they're claiming
5 that maybe they got this back, and this was all they ever
6 wanted, and we were justified in spending all of this
7 money. That's baloney.

8 The court concludes, "The evidence is strained,
9 forced, and contrary to reason." I suggest that to ask you
10 to award all these hundreds of thousands of dollars based
11 on this book and what you have heard here, is strained,
12 forced, and contrary to reason. And that what is fair and
13 reasonable and just is in the realm of what Mr. Palmer's
14 report was.

15 I would suggest to you that these file boxes
16 over here (indicating) are not evidence, such as they are
17 evidences of excess. I think what you do here today is
18 important for another reason. Because this is one of the
19 few times that lay people like yourselves can send a
20 message to people about the way they charge fees.

21 And I think that these fees are outrageous. I
22 think the evidence indicates they're outrageous. I think
23 the way this litigation is conducted by BurgerBusters and

1 their real agenda is outrageous. And I think that in your
2 verdict you can send a message to these people. Thank you
3 for your time.

4 THE COURT: Thank you, Mr. O'Connell.

5 Mr. Durette, any rebuttal argument, sir?

6 MR. DURRETTE: Yes, sir.

7 You've had sort of an interesting mini-trial
8 the last three days. But, there's insight here into
9 exactly how this case got to be what it was.

10 Whose witnesses and whose efforts have given
11 you the numbers and the facts that you have? You see,
12 rather than BurgerBusters, through me and through the
13 witnesses, trying to throw a big number up and hoping that
14 you'll accept it, what really happened here is that
15 BurgerBusters prepared and submitted a volume of bills,
16 every single day, detailing everything that every lawyer
17 did, with the exception of some descriptions about some
18 phone conferences and some office conferences.

19 When they drafted the Bill of Complaint, they
20 wrote it down. When they researched, they wrote it down.
21 When they did discovery, they wrote it down. Page after
22 page after page.

23 Mr. O'Connell said that BurgerBusters began

1 this lawsuit. The lawsuit, yes; the problem, no. The
2 Chawlas began the problem when they were told by
3 BurgerBusters, do not build this building unless you build
4 it in conformance with the contract. The Chawlas decided
5 they weren't going to build the building in conformance
6 with the contract and just started construction. So, what
7 choice did BurgerBusters have?

8 The individuals who had the choice were the
9 Chawlas. The choice was to do what they agreed to do. The
10 only relief that BurgerBusters ever wanted in this case,
11 and ever sought, was an order from this court directing the
12 Chawlas to put the structure on the shopping center as you
13 agreed to do it in paragraph seven and in accordance with
14 exhibit D. And that's exactly what the court ordered,
15 exactly what the court ordered.

16 Because the Chawlas, through their attorney,
17 Mr. O'Connell, argued that office conferences were
18 unreasonable and wanted you to look at that bill, they
19 wanted you to look at that bill and not know how much money
20 was actually devoted to office conferences in the hopes
21 that you would think that it was enormous, instead of
22 approximately \$20,000.

23 They told you the travel time was improper in

1 this case. But, they didn't tell you how much was devoted
2 to travel time because they wanted you to think it was
3 enormous. We told you it was \$19,000.

4 They argued that you shouldn't give us any
5 money on anything related to damages, which we never wanted
6 in the first place, and which Mr. Lawrence told the judge
7 we wouldn't even pursue. We could just have the trial on
8 injunctions.

9 They forced the trial on damages, yet, they
10 don't want you to compensate BurgerBusters for the time of
11 its lawyers. But, they didn't tell you how much that was,
12 because they wanted you to think it was an enormous sum of
13 money. We told you it was \$23,000.

14 They argued that we didn't prevail on retail
15 use and and that you should not compensate BurgerBusters
16 for any fees devoted to retail use. They didn't tell you
17 how much that was. We told you it was \$3,000.

18 Mr. Palmer wanted you to believe, when he
19 testified, that one of the problems with these fees was it
20 was overstaffed, there were too many lawyers. That, they
21 had nine lawyers working on this case. That was
22 outrageous. We told you who those lawyers were and how
23 much money they really charged.

1 Mr. Palmer wanted you to believe, because he
2 believed that Mr. Sacks and Mr. Lawrence worked on this
3 case together. So they had two partners instead of the one
4 partner he thought to be staffing the case, along with Ms.
5 Cleary.

6 We told you, and pointed out from the bills in
7 the blue book that Mr. O'Connell doesn't want you to pay
8 any attention to, that although Mr. Sacks left Faggert and
9 Frieden, in the whole last month he was there he didn't
10 bill this client. And we're not asking the Chawlas to pay
11 for it.

12 Why do you suppose that at the time the lawyers
13 at Faggert and Frieden chose not to charge for Mr. Sacks'
14 time that entire month, including a trip to Warrenton? Do
15 you know why? Because it wouldn't have been fair to
16 BurgerBusters. Because Mr. Lawrence had to get up to speed
17 and it wouldn't have been fair to charge for both Mr. Sacks
18 and Mr. Lawrence in the month of March. And so they
19 didn't.

20 This is the law firm that Mr. O'Connell wants
21 you to believe was churning this file and doing unnecessary
22 work. You can weigh Mr. Palmer and Mr. Frostick. They're
23 both nice guys. They're both good lawyers. Mr. Frostick

1 is much younger, has not practiced as long. But, he
2 graduated second in his class. He clerked for a federal
3 judge. He's Order of the Coif, which is a real honor among
4 lawyers.

5 He's a sincere and honest young man. He's
6 handled cases just like this. He was in a case, and he
7 told you what the fees were in that case, and that the
8 level of effort in this case was four to five times the
9 amount of the level of effort in that case.

10 But, most importantly, which witness knew
11 this file; which witness knew the issues; which witness
12 understood the complexity and the effort in this case? Not
13 in a typical case, but this case.

14 I submit to you that I would painstakingly ask
15 Mr. Palmer a host of questions about the issues in this
16 case, some of them he didn't even know existed. He didn't
17 know what they were. He didn't know what briefs were
18 required. He didn't know what the positions were required.
19 He didn't know what court appearances were required. He
20 didn't know how long the lawyers had been in court.
21 Because he didn't spend enough time analyzing the bills for
22 whatever reason.

23 He didn't even know Mr. Sacks -- when you look

1 at his report, he didn't even -- he criticized the Pearson
2 bill because he thought that all the Pearson law firm had
3 done was deal with the temporary injunction. They worked
4 for three years on this case at various times.

5 He said BurgerBusters couldn't recover for a
6 law firm's efforts in Maryland. You look at his report, he
7 didn't even know what they had done. He learned what they
8 had done when I took his deposition; that they had actually
9 taken the deposition of an expert in this case.

10 Ladies and gentlemen, I'll end where I began.
11 Mr. O'Connell wants you to ignore the contract in this
12 case. He wants you to believe for some reason that when
13 BurgerBusters wrote these letters in August of 1993, and
14 said do not build anything except in accordance with this
15 contract, and that the judge ordered in May of 1996, do not
16 build anything except in accordance with this contract,
17 that BurgerBusters didn't prevail.

18 Ladies and gentlemen, they got exactly what
19 they wanted. Mr. Paphitis sat on that witness stand and
20 told you how important it was. Mr. O'Connell wants to
21 liken that to suing for assault because you got brushed
22 with a feather.

23 Mr. Paphitis told you what that meant to his

1 business, what those prime parking spaces meant, what the
2 traffic confusion of the drive-through meant, what the
3 returns on his property meant, what the loss of those
4 parking places meant, that it hurt his business.

5 Do you really think -- remember that the letter
6 that I quoted you from, Dr. Chawla threatened BurgerBusters
7 to seek their attorney's fees in this case if BurgerBusters
8 sued. And Dr. Chawla tried to get his attorney's fees in
9 this case, but the judge said no.

10 Do you think for one single minute that this
11 successful businessman would have invested this amount of
12 money in this lawsuit because he got brushed with a
13 feather?

14 Do you think for one minute that Dr. and Mrs.
15 Chawla would have hired Mr. O'Connell to raise all the
16 defenses that he raised in this suit, and put these parties
17 through, and this court went through, what they went
18 through because it didn't make any difference?

19 I don't think so. Mr. O'Connell wants you to
20 ignore the evidence in this case. He wants you to ignore
21 the relief in this case. He threw up a host of things
22 hoping that somehow, some way, you will blame the law firm,
23 blame BurgerBusters, blame me, blame Mr. Frostick, blame

1 everybody except who bears the sole responsibility for what
2 happened here is his client's. And you should give
3 BurgerBusters every cent they're asking for because they
4 have not shown that any of it was excessive or
5 unreasonable. And we ask you to do precisely that. Thank



1 THE COURT: Gentlemen, we'll be sending in, of
2 course, the exhibits and the instructions of the Court.
3 And while that is being done, I want to personally commend
4 you for your professionalism and collegiality with each
5 other and with the Court. It's always a pleasure to have
6 such distinguished counsel appear here, and it's one of the
7 great pleasures of this job to work with you in a very
8 modest way in bringing about a solution to this case and to
9 the other cases we do.

10 Mr. Durette, I hope you and Mr. Lawrence and
11 Ms. Cleary will have another opportunity to return to
12 Fauquier County, perhaps on a default judgment sometime.
13 But in any event, come back. We're happy to have you.

14 And as always, Mr. O'Connell, thank you, sir,
15 for your help.

16 MR. O'CONNELL: Thank you, judge.

17 MR. DURRETTE: Thank you, Your Honor.

18 (Off the record.)

19 (Whereupon, at approximately 4:58 o'clock p.m.,
20 the court reconvened.)

21 THE COURT: With respect to receiving questions
22 from the jury, we have a criminal case that suggests,
23 unless counsel agrees that the better approach is to call

1 the jury in and take the question from them directly, but
2 we follow the practice here, if counsel will agree, of
3 simply have them send the question out on a piece of paper.

4 Will that be acceptable?

5 MR. O'CONNELL: That will be acceptable.

6 THE COURT: All right. That will be allowed.

7 (Off the record.)

8 THE BAILIFF: Your Honor, somewhere along the
9 line they forgot to tell me they did not want the question
10 asked.

11 THE COURT: Well, I think Mr. O'Connell and Dr.
12 Chawla came the distance. This will happen occasionally.
13 You'll get a question, and there will be a delay in
14 responding to it, and the question will go away. I'm sorry
15 for the --

16 MR. DURRETTE: Is that what happened?

17 THE COURT: It looks that way. I'm sorry that
18 you were inconvenienced. If you want to stay around?

19 MR. O'CONNELL: I'm going to stay.

20 THE COURT: What shall we do to entertain you?
21 We don't have really anything to offer.

22 MR. O'CONNELL: I may go back to my office to
23 do some work.

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FOREPERSON: (Complies.)

THE CLERK: We, the jury, on the issues joined,
award BurgerBusters, Incorporated, costs and expenses,
including attorneys' fees from Inder Chawla and Vera V.
Chawla. in the amount of \$446,389.56. Carole F. Beach,

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jury members were dismissed from the courtroom.)

THE COURT: Are there post-trial matters to take up at this time?

MR. O'CONNELL: How does Your Honor intend to proceed on this? I would obviously have motions that would challenge this verdict.

THE COURT: Well, as you know, the issue of this verdict must now be considered by the Court, it being an issue out of chancery. It might be appropriate for us to ask that if there are any motions or matters to be considered with reference to this verdict, or to the subsequent step that the Court must necessarily take, given this verdict, that we identify a date by which such motions shall be filed, and that we set this case down for argument

1 on any such motions.

2 May I suggest that we do that? If you are not
3 able to do that tonight, that is with dates, you can
4 coordinate those with each other and with the Clerk's
5 office, and we can work with you.

6 I envision that there will be an order entered
7 setting forth a cutoff date for the filing of any such
8 matters, and that there be a date set for argument. I do
9 not think, however, that we need extensive argument. I
10 would think something in the nature of one hour, at the
11 greatest, would be appropriate, but perhaps we should wait
12 and see what the motions are.

13 MR. O'CONNELL: Your Honor, I would like 30
14 days, if I could have it, judging by my schedule.

15 THE COURT: Any objection, given the season of
16 the year?

17 MR. LAWRENCE: I think not, Your Honor.

18 THE COURT: Do you want to file your motion
19 within 30 days?

20 MR. O'CONNELL: Yes.

21 THE COURT: All right. If you want us to
22 assign a hearing date to you at this time, we can do that;
23 or if you'd rather wait --

1 MR. O'CONNELL: Not at this time, Your Honor.
2 I don't have my calendar with me.

3 THE COURT: All right. Any motions to be
4 filed, and that would be with respect to this matter from
5 either side, should be filed within thirty days. We will
6 give you a specific date. We'll look at a January calendar
7 and see what thirty days actually would be.

8 THE CLERK: The 13th is on a Monday, January
9 13th.

10 THE COURT: All right. Would that be
11 appropriate for any motions to be filed by close of
12 business on the 13th?



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Instruction 2A

The Court instructs the jury that the burden is on Dr. and Mrs. Chawla to show that the attorneys' fees and costs claimed by Burgerbusters are excessive or unreasonable, including those which have been incurred and those which may reasonably be expected to be incurred in the future.

You may award Burgerbusters each item of fees and costs shown in its fee application unless the Chawlas prove by the greater weight of the evidence that such item is excessive or unreasonable.

In measuring the excessiveness or reasonableness of fees and costs, you may consider the following factors:

1. the time and labor required;
2. the novelty and difficulty of the questions;
3. the skill requisite to perform the legal service properly;
4. the customary fees;
5. the amount involved and the results obtained;
6. the experience, reputation, and ability of the attorneys;
7. the nature and length of the professional relationship with the client .

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FILED DEC 13 1996

VIRGINIA:

IN THE CIRCUIT COURT FOR FAUQUIER COUNTY

BURGERBUSTERS, INC.

Petitioner,

v.

CHANCERY NO. CH93-266

INDER CHAWLA, et al.

Respondents.

MOTION TO SET ASIDE JURY VERDICT AND AWARD NEW TRIAL

COME NOW the respondents, INDER CHAWLA and VERA V. CHAWLA, by counsel, and request this Court to set aside the verdict of the jury on the issue out of chancery rendered on the 13th day of December, 1996, awarding \$446,389.56, upon the following grounds:

1. A chancery verdict is advisory only and may be disregarded by the Court.

2. The jury awarded the full amount of the petitioner's request - \$446,389.56. The jury could not possibly have applied the factors set forth in Instruction No. 2A and awarded the full amount of the Petitioner's Fee Application.

3. The jury was not instructed on the analysis and importance of result as set forth in Hensley v. Eckerhart, 461 U.S. 424 (1983).

4. Instruction 2A, over the objection of respondents, gave the jury the impression that all of the factors were of equal importance. Clearly they are not. The trial Court has recognized this difference in the case of Kmonk v. Aiani, a case which the Court brought to the parties' attention in pretrial conferences

leading up to the Court's decision on how it was going to approach the issue of the fee application. In the Kmonk v. Aiani case, on conflicting testimony, the court awarded only 20% of what was requested and implied that the result was an important factor used in reaching that conclusion.

5. This jury is guilty of misconduct in violating the express instructions of this Court:

a. In the Court's opening remarks and at each break, the jury was explicitly instructed not to discuss the case prior to receiving all the evidence and being instructed on the law. In violation of these explicit orders and repeated admonishments, three of the jurors were overheard discussing the merits of this case at the lunch break on the third day of trial.

b. After the conclusion of three days of trial, with numerous exhibits submitted by both sides, the jury deliberated approximately 1½ hours before it came back with its verdict. The jury could not possibly have obeyed the instructions of this Court to conduct an analysis of the fee application in the manner in which it was instructed after three days of trial and return with a reasoned decision in 1½ hours.

6. The respondents were immeasurably prejudiced because they were not allowed to argue the analysis of the 12 factors that was established by the case of Hensley v. Eckerhart, 461 U.S. 424 (1983), a case which the Court explicitly, or at least impliedly, indicated it was going to use in instructing the jury.

7. This impression was not a mistaken impression of the respondents. Attached hereto as Exhibit "A" is a copy of an instruction (No. 3) prepared and proposed by the petitioner which is taken directly from the analysis set forth in Hensley v. Eckerhart, supra, on p. 440.

WHEREFORE, the respondents respectfully request that the verdict of the jury on the issue out of chancery be set aside and a new issue out of chancery ordered.

INDER CHAWLA and
VERA V. CHAWLA
By Counsel

O'CONNELL & MAYHUGH, P.C.

By: 

Daniel M. O'Connell, Jr.
Virginia Bar No. 01108
82 Main Street
Warrenton, Virginia 20186
Telephone: (540) 347-2424
Counsel for Respondents Chawla

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of January, 1997, a true and correct copy of the foregoing has been furnished by U.S. Mail to: Annemarie DiNardo Cleary, Esq. and J. Gray Lawrence, Jr., Esq., FAGGERT & FRIEDEN, P.C., 1435 Crossways Boulevard, Suite 200, Chesapeake, VA 23320-2840, Counsel for Petitioner; Wyatt B. Durette, Jr., Esq., DURRETTE, IRVIN & BRADSHAW, P.C., 600 E. Main Street, 20th Floor, Richmond, VA 23219, Co-Counsel for Petitioner; and to Eric V. Zimmerman, Esq., PRICE & ZIMMERMAN, 305 Harrison Street, S.E., 3rd Floor, Leesburg, VA 22075, Counsel for Southern Financial F.S.B.


Daniel M. O'Connell, Jr.

Instruction No. 3

You have heard evidence concerning the issue of whether the claims brought by BurgerBusters on which it was successful were related to claims on which it did not prevail. The Court instructs you that BurgerBusters is entitled to recover fees and costs on claims on which it prevailed. It is also entitled to recover on claims on which it did not prevail unless you find from a preponderance of the evidence that such claims were distinct in all respects from claims on which it did prevail and unless you find from a preponderance of the evidence, in accordance with Instruction 2, that those fees and costs were excessive or unreasonable.

Exhibit "A"
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ORIGINAL

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IN THE CIRCUIT COURT OF FAUQUIER COUNTY

CLERK
SUPREME COURT OF VIRGINIA

-----X
BurgerBusters, Incorporated

RECEIVED
MAY - 2 1997

Plaintiff,

v.

Chancery No: CH93-266

Inder Chawla, et al.,

Defendants.
-----X

January 31, 1997

Warrenton, Virginia

Transcript of motions hearing before the Honorable
William Shore Robertson, beginning at approximately 2:00
p.m., when were present on behalf of the parties:

For the Plaintiff:

Wyatt B. Durette, Esq.
J. Gray Lawrence, Esq.

For the Defendants:

Daniel M. O'Connell, Jr., Esq.

STABNER COURT REPORTING COMPANY
(540) 667-3704

3:18 P

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19 the relative importance or unimportance of the factors
20 listed in instruction 2-A, even if they implied any of
21 those factors in this case, a fee award of \$446,000 for
22 a minor technical result could not possibly be

1 justified.

2 With all due respect, the jury was not
3 correctly instructed. While the respondents and even
4 the petitioner were led to belief that the jury would be
5 instructed on the analysis and particularly the
6 importance of result, as set forth in Hensley versus
7 Eckerhart, the jury, in instruction 2-A, were given bare
8 factors without any instruction for proper analysis.

9 Instruction 2-A is simply an incomplete
10 statement of the law based on many of the judicial
11 authorities that have examined and analyzed request for
12 attorneys fees over the past 20 years.

13 The modern development of analysis of
14 attorneys fees culminated in Hensley versus Eckerhart.
15 This is a decision by the highest court in the United
16 States as to how an analysis of a request for attorneys
17 fees should be handled.

18 The respondent submitted eight instructions
19 based on the analysis set forth in Hensley versus
20 Eckerhart, in the way the United States Supreme Court
21 said that analysis should be conducted.

22 This court refused to give these instructions.

1 Without these instructions, the jury had absolutely no
2 basis upon which to make the critical discriminations
3 and weigh the various factors that is necessary to
4 arrive at a determination of the reasonableness or
5 unreasonableness of an application for attorneys fees.

6 The rejected instructions were respondents
7 instructions H, I, J, K, L, M, N, and O. The jury was
8 simply not given the correct instructions. They were
9 not given the analytical tools that all of the modern
10 judicial and academic authorities who have looked at
11 attorneys fees applications have agreed are essential to
12 analyzing a fee application.

13 Again, in all due respect this Court should
14 recognize, number one, that the jury was not properly
15 instructed and, number two, the way to correct this is
16 to disregard the jury award, order a new trial with
17 proper instructions that give the jury the analytical
18 tools they need to be able to correctly disseminate the
19 weight of the various factors that should be applied.

20 Michies Jurisprudence, Section 9, lists as
21 grounds for a new trial error in refusing instruction.
22 Failure to give the instructions prepared by the

1 respondent on the basis of Hensley versus Eckerhart was
2 highly prejudicial because obvious implication of the
3 Court's pretrial order was that the Hensley versus
4 Eckerhart analysis would be given.

5 The respondent would have tried this case
6 differently if it had known that the analytical
7 instructions were not going to be given.

8 There is authority that even without
9 objections to the refusal of jury instructions, the
10 Court can reconsider its instructions and if it believes
11 in retrospect they were incorrect and misled the jury,
12 the Court may set aside the verdict. .

13 This is certainly the case, although
14 objections were made by the respondent to the refusal to
15 grant the instructions which would have provided the
16 jury with the correct analysis of the Hensley versus
17 Eckerhart factors.

18 My authority for that, Your Honor, is Smith
19 versus Combined Insurance Company of America, 202
20 Virginia 758 120 Southeast 2d, 267, a 1969 case.

21 The impression gained by the respondents,
22 that is, Doctor Chawla and particularly his counsel, was

1 that the Court would instruct on the various elements
2 that result is the most important factor and how the
3 various aspects of result should be analyzed is based
4 upon the Court's pretrial orders and the letters upon
5 which those pretrial orders were based.

6 The Court issued a letter opinion, which I
7 have just handed up, dated June 12, 1996, and
8 specifically referred the parties to the Court's recent
9 attorney fee decision in the case of Kamonk versus
10 Aiani, Law Number, CL 95-358, and it made specific
11 reference to the result obtained factors.

12 The court attached a copy of its ruling in
13 Kamonk versus Aiani, and in the third page of that
14 letter, the Court stated it as follows: quoting
15 EC-2-20. Quote: The fees of a lawyer will vary
16 according to many factors, including the time required,
17 his experience, ability and reputation, the nature of
18 the employment, the responsibility involved and the
19 result obtained, and the Court underlined "result
20 obtained" and, in parenthesis, indicated it was
21 emphasizing that.

22 It was certainly reasonable to conclude, since

1 the Court had emphasized the, quote, result obtained,
2 that central to any analysis of a fee application the
3 result obtained would in fact be given emphasis.

4 While it may not have been intentional, a
5 review of what the Court did in Kamonk versus Aiani
6 compared to the results obtained indicates an almost
7 perfect parallel between the fee award and result.

8 At page 2 of the Court's letter opinion, it
9 pointed out that plaintiff had sued for \$35,000, but had
10 obtained an award of \$5,513. This is 15.7 percent.
11 This means the plaintiff received 15.7 percent of what
12 it sued for.

13 The award was \$5,133 in attorneys' fees, based
14 upon the application for \$32,697 attorneys' fees, which
15 happens to be 15.7 percent of the amount requested.

16 The clear implication of the Court's letter
17 and the result in Kamonk versus Aiani is that the
18 Court was going to give absolute priority in determining
19 the fee in this case to the result that had been
20 obtained.

21 Point number three: there is yet an
22 additional reason for setting aside the jury's verdict,

1 and that relates to the jurors violating other
2 instructions of this Court.

3 The court reporter has reported that three of
4 the jurors were discussing the case--you have heard the
5 testimony--while eating lunch. There is reason to
6 believe they were discussing the case.

7 At the beginning of the trial and before each
8 lunch break on each day of the trial, the jury was
9 explicitly instructed and reminded not to discuss the
10 case among themselves during lunch or before hearing all
11 the evidence and the instructions of the Court.

12 Disobeying the instructions of the Court or
13 misunderstanding them is a reason to set aside a jury
14 verdict. The jury was expressly instructed: Quote:
15 Until this case is submitted to you for your
16 deliberation, you should not decide any issue in this
17 case and you should not discuss the case with anyone or
18 remain within hearing of anyone who is discussing it.
19 There will be occasional recesses during the trial.
20 During the recesses, you should not discuss the case
21 with your fellow jurors or go to the scene or make any
22 independent investigation or receive any information

1 about this case from radio, television or newspapers.

2 Again, Your Honor, this is cumulative. The
3 instruction was violated by the three jurors when the
4 court reporter overheard them discussing the case; at
5 least, there is reason to believe they were discussing
6 the case.

7 By lunch on the third day of trial, the
8 respondent was still putting on its case. The
9 discussion of the jurors during lunch on that day
10 indicated that they had already formed opinions about
11 the outcome of the case without hearing all the
12 evidence, particularly the rest of respondent's case.

13 Point number four: it is difficult to believe
14 that after three days of trial, with only one and one
15 half hours of deliberation a jury could apply the
16 instructions of the Court that were given and analyze
17 the application of several hundred pages in the amount
18 of \$446,000 and arrive at any kind of a reasoned
19 judgment based on the instructions.

20 This jury was not a serious juror, Your Honor.
21 I sat here while they deliberated. For most of the
22 time, they were raucous; they were telling jokes. I

1 have sat here while juries have argued cases before and
2 you hear argument, but you don't hear laughing and
3 joking, and that's all I heard while I was sitting here.

4 Point number five: there is no question that
5 the respondents were severely prejudiced because they
6 were not allowed to refer to the explicit instructions
7 on the analysis of the 12 factors established by Hensley
8 versus Eckerhart.

9 As had been previously pointed out, the Court
10 explicitly or at least impliedly indicated it was going
11 to use the Hensley versus Eckerhart analysis in
12 instructing the jury.

13 The respondent is aware of the Court's
14 circumspection regarding federal judiciary. However, in
15 this case, it must be given credence, because of the
16 more recent cases heard by the federal courts on
17 attorneys fees as compared to the relatively few state
18 courts that have had a chance to hear attorneys fee
19 issues.

20 There is no question that the major theme
21 running through all of the current case law and academic
22 authorities on the issue of attorneys fees is the

1 importance of result and how that result must be
2 analyzed both qualitatively and quantitatively.

3 The Supreme Court of the United States in
4 Hensley versus Eckerhart makes that abundantly clear.
5 The American Bar Association's comments on DR2-106, upon
6 which the Court's instruction 2-A was based, are
7 instructive.

8 Your Honor, I have just handed you a copy of
9 the American Bar Association Manual, Number 170, dated
10 October 30, 1996. From the discussion under DR-106 at
11 page 49, we find the following comments:

12 In determining reasonableness of a fee in any
13 of these contexts, lawyers and tribunals need not start
14 from scratch in each instance. Model Rule 145-A in the
15 Model Codes DR2-106(b), contained identical lists of
16 factors to be considered.

17 Further, in DR-106 under relevant factors, at
18 page 50 of the document in front of you, the ABA
19 specifically includes an analysis of the results under
20 the heading, How well the Lawyer Actually Performed.

21 At page 50, the following comment is made: What
22 result did the lawyer achieve? how and to what extent

1 did the client benefit from the lawyer's services. That
2 is page 50 of the October 30, 1996 ABA Manual.

3 Now, here is the American Bar Association
4 giving the rule and emphasizing the importance of
5 result. How and to what extent did the client benefit
6 from the lawyer's services?

7 The jury was not instructed, number one, that
8 the result is the most important factor, and, number
9 two, to determine how and to what extent did the client
10 benefit from the lawyer's services. This has a direct
11 bearing on the reasonableness or unreasonableness of the
12 fee, and the jury was not given these important tools to
13 apply to the facts in this case.

14 The Court repeatedly said it was going to base
15 its rulings and instructions and decision in this case
16 on the Hensley factors, the same factors set forth in
17 DR-2-106(b).

18 Again, here is the American Bar Association
19 saying that it is essential to determine how and to what
20 extent the client benefitted from the lawyer's services.

21 Your Honor, you allowed me to argue it but
22 there is no substitute for an instruction from the Court

1 that says, This is the most important factor and this is
2 how you will analyze it.

3 The precedence, the impression that an
4 instruction from a court over the argument of counsel,
5 there is no comparison. The jury is going to give much
6 more credence to the Court's instructions.

7 Suffice it to say that had the jury been given
8 this instruction, it would have been obvious there is no
9 demonstrable benefit to the complainant in this case for
10 the minor result obtained.

11 More importantly, in further comment by the
12 ABA under DR-106 in the same volume, in the same manual,
13 Your Honor, at page 51, the following is found:

14 In ABA Formal Opinion 329 (1972), the
15 committee advised that while a DR-106(b) enumerates
16 certain factors to be considered in fixing fees it does
17 not prescribe the manner in which those factors are to
18 be applied. And therefore at least by implication does
19 not prescribe any reasonable method of fixing fees which
20 takes them into account.

21 The implication of this comment for this case
22 could not be clearer. Without an instruction as to how

1 the factors are to be applied and what weight they are
2 to be given, there is no reasonable method of fixing
3 fees which takes those factors into account.

4 The jury in this case was deprived of any
5 reasonable method of fixing fees which took the factors
6 into account. An obvious implication in this is that a
7 Court cannot just give the jury the factors and expect
8 them to arrive at a reasonable result.

9 They obviously did not arrive at a reasonable
10 result in this case. They arrived at an unreasonable
11 result, because they did not have the instructions
12 necessary to conduct a correct analysis. .

13 The ABA Manual, as of October 26, 1996, could
14 not have made this point clearer. The jury could not
15 possibly have been expected to reach a reasonable result
16 and they did not.

17 Point number six, Your Honor. The impression
18 that the analysis in Hensley versus Eckerhart was going
19 to be given along with the 12 factors was not a
20 unilateral one on the part of the respondent. Despite
21 what the applicant may now say, what BurgerBusters may
22 now say, it is obvious from their instruction number

1 3 that they expected the instructions would be based on
2 the analysis of Hensley versus Eckerhart.

3 To quote from the applicant's instruction
4 number 3 that, quote, such claims were distinct in all
5 respects from claims from which it did prevail is direct
6 almost word for word from paragraph 2 on 440 in Hensley
7 versus Eckerhart.

8 Point number seven: A mere recitation of the
9 12 factors without providing the analytical rules
10 relating to the weight of these factors and a
11 qualitative and quantitative application gives no
12 guidance in arriving at a reasonable result. On this
13 point, academic authorities agree.

14 Samuel R. Burger, in a 1977, this is a
15 pre-Hensley article, published in 28 Southern Texas Law
16 Review, 189, entitled Court Awarded Reasonable Attorneys
17 Fees; What is Reasonable?

18 After discussing the 12 factors from Johnson
19 versus Georgia Highway Express, the basis of DR-106,
20 made the following statement: That is, after
21 criticizing district courts for purporting to use the 12
22 factors without explaining the analysis and merely

1 announcing conclusions.

2 This is his statement: Quote: Other courts
3 have discussed some or all of the factors, the 12
4 factors, seriatum, and then jumped to a no less
5 conclusionary judgment. This is criticizing the
6 district court.

7 Paragraph, quote: The fundamental problem
8 with an approach that does no more than assure that the
9 lower courts will consider a plethora of conflicting and
10 at least partially redundant factors is that it provides
11 no analytical framework for their application.

12 It offers no guidance on the relative
13 importance of each factor, whether they are to be
14 applied differently in different contexts, or indeed,
15 how they are to be applied at all.

16 Further quoting from page 287, Mr. Burger's
17 argument: Quote: A few circuits recognized that such
18 an approach is an invitation to further confusion and
19 have adopted a particular analytical framework to be
20 used by the lower courts in setting fees.

21 That's why we got Hensley.

22 This author has put his finger on the problem

1 that has resulted in a jury verdict in this case which
2 must be set aside.

3 Even judges in federal district courts cannot
4 be trusted to reach reasonable results without appellate
5 courts giving them guidance on how to apply and weigh
6 the 12 factors. How could anyone expect a jury to be
7 reasonable in reviewing a fee application when given
8 only the 12 factors, when federal district courts cannot
9 be trusted to give a reasonable result under the same
10 circumstances?

11 There is no question, Your Honor, that this
12 jury verdict must be set aside and a new trial granted.

13 That's my argument. Thank you.

14 THE COURT: Thank you, Mr. O'Connell. Do you
15 gentlemen wish to be heard on this? Mr. Durette.

16 MR. DURRETTE: Your Honor, addressing the
17 initial motion first, which is to set-aside without
18 analysis the fee petition, and to, I suppose, as a
19 subset of that, to give some examples as to why that
20 should be done. To state that motion differently, it is
21 to ask the Court after having had a jury advise the
22 Court's conscious on the questions of reasonableness and

1 excessiveness and whether or not it is shocking to the
2 Court's conscious, rendering advice that the fee should
3 be awarded to the penny requested, to ask the Court to
4 completely ignore that and conclude that the fee
5 application on its face is so excessive that it should
6 be set aside without analysis, which is, indeed, I think
7 a paradoxical result.

8 I don't know how much more ought to be said
9 about that motion to set it aside without analysis,
10 except to say that to the extent that the Court chooses
11 to follow other federal authority other than to use the
12 12 factors from Hensley, I think it is important to
13 remind the Court that the Sun Publishing Company case
14 that is cited and utilized is a second or third sequence
15 of applications, several hundred thousand dollars of
16 attorneys fees having already been awarded in that case,
17 that that fee petition was for defending a challenge to
18 the prior attorney fee petition that, in the words of
19 the Court, the record indicates that as many as six
20 lawyers from three different firms billed significant
21 amounts of time in preparing for the short hearing on a
22 simple issue. One hearing I believe somewhere else in

1 the opinion shows that it lasted an hour and a half.

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8 that the term, "satisfy the conscious of the Chancellor"
9 is an elastic expression, which Mr. O'Connell cited.

10 The next sentence in that opinion is that,
11 Words oft-times fall into formulai which are but
12 shibboleths to conjure with. That is 1926. I am not
13 sure the Court today would use the same terminology, but
14 I was fascinated by it.

15 So taking that as a shibboleth to conjure
16 with, I suppose that we have to ask the question of how
17 that verdict should be treated.

18 And this same case I think gives us the
19 standard that ought to be utilized by Your Honor, and
20 certainly the standards in Virginia.

21 THE COURT: You criticize that not just
22 because it ends in a preposition?

1 MR. DURRETTE: Not just because it ends in a
2 preposition. I suppose that's one reason to criticize
3 it, but I have seen a number of sentences that end in
4 prepositions in the courts and in the Supreme Court.

5 THE COURT: Shibboleth is an interesting word.
6 I knew the word from ancient English literature. But I
7 looked it up when I read this case to refresh my
8 recollection. If you haven't done that, you might want
9 to read what Webster has to say, although you recall,
10 although you weren't here, Mr. Lawrence and Mr.
11 O'Connell will recall my condemnation of dictionary
12 definitions when it came to "retail." You heard about
13 that? You saw it?

14 MR. DURRETTE: Yes, sir. I wasn't here but I
15 read the opinion.

16 THE COURT: Maybe on a word like this, they
17 are a little more solid.

18 MR. DURRETTE: Perhaps so. That Court goes on
19 to say that the verdict is, this is on page 731, and

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16 the OJ civil case, the jury, are they still out?

17 MR. DURRETTE: They were.

18 THE COURT: They are still out on a shorter

19 case but they were out much longer than the criminal

20 case was and the criminal case was a longer trial.

21 MR. DURRETTE: Right.

22 THE COURT: I'm sure some of the academics and

1 the media will probably comment on that if they haven't
2 already done so.

3 MR. DURRETTE: Undoubtedly. And I will say to
4 this Court that I have had trials to go for weeks with
5 short periods of deliberations. I had one a few years
6 ago that went six weeks and the jury was out less than
7 four hours. I've had cases go for one day and the jury
8 stay out the next day.

9 I'm not sure what conclusions, if any, one
10 could draw from that, but because this jury stayed out
11 less than two hours means absolutely nothing as to how
12 well they analyzed and considered all the factors that
13 they were supposed to consider.

14 THE COURT: The longest jury I think I ever
15 had in terms of the time of deliberation was elongated
16 all night after the trial was a day trial and they went
17 virtually all night, or almost into the waking hours of
18 the morning, and that's because we ordered them pizza by
19 midnight. We could have starved them out, they might
20 have come out earlier.

21 MR. DURRETTE: We all know because we've all
22 read the books, that sometimes a jury will go out and

1 they will read the instructions, they will talk for a
2 little while, they will take a preliminary vote and they
3 will find there is a consensus. And they work their way
4 through to where it doesn't take very long.

5 On the other hand, they may have six people
6 one way, one person the other way and that one person
7 may hang them up for hours and hours and hours until
8 they can reach some sort of verdict. So there just
9 isn't any rationale there.

10 The next point is that the jury was not

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1 conclusion.

2 Without being able to put my finger on it--.

3 THE COURT: Well, you refer to the pretrial
4 order of December 1 of '96, which states the jury
5 instruction and the ultimate decision of the Court will
6 be based on the following factors from Hensley versus
7 Eckerhart, 461 U.S., 424 1983 cases, if and to the
8 extent shown by the evidence, and we list the factors.

9 MR. DURRETTE: Yes, sir, Your Honor, that's
10 the order and it clearly says that it is going to based
11 on the factors. There is nothing in that order
12 whatsoever that should allow, and counsel, attorneys in
13 the cases on both sides have all sorts of hopes and
14 aspirations and expectations as to what kind of jury
15 instructions they are going to get from the Court, but
16 there is nothing in that order that would convey a
17 misimpression or that would in any way prejudice or in
18 any way that would justify setting aside the jury
19 verdict; there is just nothing there that allows anyone
20 to conclude anything other than that those 12 factors
21 are going to be used, or whichever ones that are
22 justified by the evidence. There is nothing to suggest

1 that any rationale of Hensley is going to be used.

2 The second prong of that argument has to do
3 with the analysis the Court in the letter of June 12 and
4 the fact that the Court includes the Kamonk versus Aiani
5 case. This sort of reminds me of a case I had in D.C.
6 Circuit Court of Appeals some years ago where both sides
7 recognized in their briefing that the only precedent
8 available in the D.C. Circuit was a footnote in a case
9 about 3 or 4 years earlier. So we spent our briefs
10 arguing the interpretation of that footnote as to why it
11 should benefit each of us.

12 When we arrived before our panel that morning
13 the chief judge of the panel was the author of the
14 footnote. So we found ourselves in the position of
15 trying to convince him of what he meant when he wrote
16 this footnote.

17 Here we are talking about the Court's opinion
18 in terms of what you meant when you wrote your opinion.
19 There is a key sentence here that I believe is important
20 in terms of how counsel could receive your opinion and
21 analyze it and that is the sentence after you say, For
22 your information,, the Court has recently rendered an

1 conclusion.

2 Without being able to put my finger on it--.

3 THE COURT: Well, you refer to the pretrial
4 order of December 1 of '96, which states the jury
5 instruction and the ultimate decision of the Court will
6 be based on the following factors from Hensley versus
7 Eckerhart, 461 U.S., 424 1983 cases, if and to the
8 extent shown by the evidence, and we list the factors.

9 MR. DURRETTE: Yes, sir, Your Honor, that's
10 the order and it clearly says that it is going to based
11 on the factors. There is nothing in that order
12 whatsoever that should allow, and counsel, attorneys in
13 the cases on both sides have all sorts of hopes and
14 aspirations and expectations as to what kind of jury
15 instructions they are going to get from the Court, but
16 there is nothing in that order that would convey a
17 misimpression or that would in any way prejudice or in
18 any way that would justify setting aside the jury
19 verdict; there is just nothing there that allows anyone
20 to conclude anything other than that those 12 factors
21 are going to be used, or whichever ones that are
22 justified by the evidence. There is nothing to suggest

1 opinion, and, you say, Please note that the result
2 obtained factor is but one used by the Court in reaching
3 its judgment.

4 I don't think there is anything from that
5 letter or from from the Court's opinion in that case
6 that would say to anyone that of necessity in the
7 BurgerBusters case we are going to instruct the jury
8 that result is the most important factor among all of
9 the factors that are to be considered by the jury.

10 So there is nothing in the Court's letter or
11 the Court's opinion in the Kamonk case that would ever
12 justify a reliance on the certainty that a jury
13 instruction was going to be obtained, based upon the
14 Hensley analysis, that's a statement from the jury
15 instruction based on the Hensley factors.

16 Now that sort of is point four, as well. That
17 has to do with what the content of the instruction would
18 be and how important the result factor is in the case.

19 Along with that I gather are some comments
20 made today based on the model rules from the ABA and as
21 I was skimming through this, I noticed that on page 43
22 in the discussion of the amounts of the fee and the

1 standards to be used the article mentions that the
2 peculiarities of southern states, and it's not



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THE COURT: Maybe therein lies why we are here
all together.

MR. DURRETTE: Maybe so. As this Court has
said, you certainly hope and expect that this case will
encourage the Supreme Court to give us greater guidance
than it has in the past.

This portion that Mr. O'Connell read on page

1 51 is kind of stated in the negative when it talks about
2 various factors being enumerated in ABA Formal Opinion
3 329, but it does not prescribe the manner in which those
4 factors are to be applied, and, therefore, at least by
5 implication, does not proscribe any reasonable method of
6 fixing fees which takes them into account.

7 Now we have to remember that in this article
8 we are primarily talking about the way that the
9 attorneys bill their clients. We are not necessarily
10 talking about the environment that we have here.

11 But there is certainly nothing in that that
12 proscribes any reasonable method and I would suggest
13 that this Court adopt a reasonable method by giving the
14 jury all the factors that the evidence warranted that it
15 could consider in its wisdom in advising the conscious
16 of the Court.

17 The Court ultimately in this case, perhaps
18 unlike a civil case, is seeking guidance from the jury.
19 This Court, more than in a civil case, frames the
20 instructions in a manner to get that guidance that you
21 are seeking and you gave them after our argument all the
22 instructions and all the factors that you wished for

1 that jury to consider, and I believe that is a correct
2 application of the law, certainly, as best we can read
3 it in Virginia, where they tell us there are some
4 factors and there are others and we tried to put some
5 meat on that others and gave them those factors.

6 There is not a single suggestion in any case
7 in Virginia that the jury or the Court should weigh
8 those factors one over another in some kind of generic
9 sense, and we would urge the Court certainly not to set
10 aside this jury verdict on that grounds.

11 I am not going to say anymore about jury
12 misconduct. I think that has already been disposed of.

13 A part of factor number five here I have also
14 commented on because it has to do with the time of the
15 jury deliberation.

16 Number six is the respondents were
17 immeasurably prejudiced because they were not allowed to
18 argue the analysis of the 12 factors that was
19 established by the case of Hensley versus Eckerhart.

20 Well, Your Honor, I went through the
21 transcript, and I am certainly not going to go through
22 here and read all this to the Court, but I have got a

1 whole bunch of redlines in here about all the times
2 result was argued to the jury in the closing argument by
3 Mr. O'Connell. It was the thrust of his argument time
4 after time, page after page. Repeatedly.

5 Again, I emphasize, look at all the time that
6 was spent and look at the little result that was
7 obtained. They can't connect that to the portion of the
8 case upon which they were successful. They aren't
9 entitled to it. That Mr. Palmer said that's outrageous
10 for a case like this to produce the minor result that
11 you have here.

12 I remember like it was yesterday the analysis
13 of a suit for assault and battery because someone hit
14 someone else with a feather, suggesting that the result
15 that we obtained in this case was equivalent to suing
16 the Chawlas for assault and battery because we got hit
17 with a feather. Every effort conceivable was made by
18 Mr. O'Connell in his argument to convince this jury that
19 result was critical, was important, was the cornerstone
20 of the the unreasonableness of these fees, that the
21 result was inconsequential and unimportant, and
22 obviously the jury didn't agree with that.

1 There was an abundance of evidence produced on
2 behalf of BurgerBusters and the result that was obtained
3 was the only result that was ever wanted, and that it
4 was extraordinarily valuable to the business.

5 Mr. Paphites testified as to why those parking
6 spaces were important. And I will remind the Court
7 again that it was BurgerBusters who said to this Court
8 in its argument prior to months before this jury trial
9 was ever held, and asked the Court to bifurcate the
10 case, to have a trial on the injunctive relief only and
11 said, We'll pack our bags and go home and we will never
12 seek any damages. And the jury obviously concluded that
13 the result that was obtained was really the only result
14 that was ever wanted, and the rest of it was kind of
15 baggage that was there in the case but did not relate to
16 the significance of the result.

17 The only other point I believe has to do with
18 the instruction that was Exhibit A to the motion,
19 instruction number 3 that was advanced by BurgerBusters
20 in the jury instructions that were submitted to the
21 Court as some indication that BurgerBusters also had
22 interpreted the pretrial correspondence to the Court's

1 ruling in the Aiani case and the pretrial order
2 directing the Hensley factors, and BurgerBusters had
3 also interpreted that to mean there was going to be an
4 instruction, that we were going to follow the Hensley
5 analysis and that, therefore, we were also basing our
6 case, because of that, we were basing our case on the
7 Hensley analysis.

8 Your Honor, I think any good trial lawyer has
9 to anticipate just about everything that he thinks can
10 come up in a trial. I don't know how you go into a
11 trial based on assumptions that jury instructions are
12 going to be a certain way because that's the way they
13 ought to be. You have to prepare yourself I think for
14 just about any contingency that could possibly come up.

15 If you are defending a simple automobile
16 accident case, or if you are the plaintiff in an
17 automobile accident case, either way, you are going to
18 prepare instructions on negligence and contributory
19 negligence and last clear chance and assumption of risk
20 and everything else that you can think of that might
21 possibly come up, and then you are going to make motions
22 to strike the evidence because there is no evidence to

1 support those offenses, and you are going to be prepared
2 to deal with whatever comes up.

3 We didn't know coming in exactly what the
4 Court was going to do in terms of analysis, and had you
5 chosen to make an analysis that placed result in some
6 super important category, we wanted to make sure that we
7 had an instruction that related to the question of
8 whether or not the claims were inter-related or they
9 weren't inter-related.

10 That doesn't indicate anything about an
11 assumption that we made as to what the law was going to
12 be. It was merely our precaution in case the
13 instruction was given, that we were prepared to deal
14 with it because we thought we had inter-related claims
15 and we wanted to be sure that the proper standard was
16 applied if we got into that kind of an argument.

17 So, in conclusion, Your Honor, as this Court
18 knows, the question of submitting this issue to the jury
19 was not at BurgerBusters' urging. In fact, I think with
20 my arrival in the case I urged just the opposite.

21 THE COURT: At least two such urgings, one from
22 you and one from, or maybe two from Mr. Lawrence and Ms.

1 Cleary.

2 MR. DURRETTEE: And I think I tried once again
3 on the morning when I got into the case and those
4 efforts were unsuccessful.

5 THE COURT: That's why we got a late start the
6 first day, because you had to do that; isn't that right?

7 MR. DURRETTEE: That's right. I wish I could
8 say it was the the first time I had ever reversed my
9 view on something like that, but it's not. I'm glad in
10 the Court's wisdom that you decided to have that jury
11 trial.

12 Seriously, Your Honor, we struggled here for
13 three days. Both sides produced a great deal of
14 evidence, two expert witnesses, lay witnesses. Every
15 argument that was made here today to the Court was made
16 here to this jury, including whether or not there was
17 some standard that wasn't articulated by any expert on
18 the witness stand that the billing practices in Virginia
19 require a lawyer to put descriptions down as to the
20 content of their office conference or telephone call.

21 As you know from my cross examination of Mr.
22 Palmer, he didn't do that on his bill. There is not a

1 single legal bill in this case where that was done. Mr.
2 Frostick's--none of the attorneys described the contents
3 of telephone calls or interoffice conferences
4 consistently, and no expert came in and said the
5 attorneys were required to do that.

6 But all of this was deliberated. I would
7 remind the Court that while the attack was made on
8 travel time and the attack was made on interoffice
9 conferences on behalf of the Chawlas, the definition of
10 those practices in terms of the dollars associated with
11 them was done by BurgerBusters.

12 One of the arguments that we made to the jury
13 was that we computed the dollar figures attached to
14 every component part of this case. And we asked the
15 jury to find that these fees were reasonable, and,
16 indeed, they did.

17 And I would conclude with this: Fortunately,
18 or unfortunately, and we touched on this in voir dire
19 with the jury, we all know that our profession is often
20 the victim of some very cynical and critical sentiments
21 on the part of the lay community.

22 We candidly, as again I think the Court would

1 know from voir dire and just from common sense, we were
2 concerned about that. We knew that attorneys fees of
3 the magnitude that this case had required, coupled with
4 the attitude many lay people have toward lawyers, posed
5 for us a significant risk.

6 And, frankly, that is one of the reasons we
7 preferred to have this decided by the judge who presided
8 over the case. In retrospect, I guess we were
9 overly-cynical and perhaps overly-skeptical of the
10 wisdom of the community.

11 But I think it's absolutely remarkable,
12 absolutely remarkable that these seven people from this
13 county came to this courtroom for three days and heard
14 this evidence and decided that BurgerBusters deserved
15 every single penny that they were asking for.

16 They didn't reduce this one bit. And I think
17 that is a self-evident proclamation that those people,
18 that these seven lay folks from across this county,
19 could agree that these fees were reasonable; they were
20 not excessive; they did not shock their conscious. And
21 this Court certainly knows what went on in this case and
22 how many hours these folks labored in this courtroom and

1 outside of this courtroom.

2 And we believe there is more than ample
3 justification for this Court to simply enter judgment on
4 this verdict.

5 No one has asked you in any formal motion to
6 come up with another figure. There is certainly no
7 basis to set it aside, and there is certainly no basis
8 to do so without anyalaysis.

9 So I really have argued everything including
10 our motion to enter judgment, and I will rest on that
11 point.

12 THE COURT: Thank you, Mr. Durette. Mr.
13 O'Connell, further argument?

14 MR. O'CONNELL: Just briefly, Your Honor.

15 The motion to disregard this application
16 without analysis is a serious motion. If you compare
17 the findings of the Court on the practices of the
18 attorneys in the Sun Publishing case where they achieved
19 the positive result, and a very good positive result,
20 and compare them to the fee application in this case,
21 there is no need to conduct the analysis, as the Fourth
22 Circuit has said, the application can be summarily

1 denied.

2 And, as I said, you have to bear in mind that
3 these parties knew from the very beginning that they
4 were going to ask for attorneys' fees. They knew that
5 they had alternate theories upon which they could
6 prevail, and if they had wanted to have the law properly
7 and directly applied, they could have allocated their
8 fee charges from the very beginning, and they did not.
9 And if they did not, what the Fourth Circuit is saying
10 is that, who should suffer? The fee applicant is the
11 one who should suffer.

12 The argument of the motion to set aside the
13 verdict, Your Honor, they have still not answered the
14 primarily policy question that this Court has to answer,
15 and that is, was the jury properly instructed by just
16 being given the 12 factors.

17 I have given the Court academic authority. I
18 have given the Court authority from the American Bar
19 Association, that judges, district judges, can't even be
20 trusted to have the 12 factors and reach a reasonable
21 conclusion unless they are given the kind of guidance
22 that the Supreme Court set forth in the Hensley case.

1 That I thought that the Hensley analysis was
2 going to be given when the pretrial order was entered I
3 think is perfectly reasonable when you look at the
4 pattern of events that led up to it. Why would the
5 Court underline "result"? It underlined result because
6 result wasn't specifically mentioned.

7 And when you look at the result in the Kamonk
8 case, you can see that that was in fact what the Court



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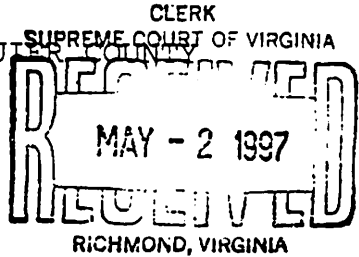
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PARTIAL TRANSCRIPT

VOLUME #11

VIRGINIA

IN THE CIRCUIT COURT OF FAUQUIER COUNTY



BURGERBUSTERS, INC.

Plaintiff,

-vs-

INDER CHAWLA

Defendant.

IN CHANCERY NO. 93-266

South Courtroom
Fauquier County Courthouse
Warrenton, Virginia

Friday, January 31, 1997

The above-entitled matter came on to be heard
before the HONORABLE WILLIAM SHORE ROBERTSON, Judge, in
and for the Circuit Court of Fauquier County, in the
Courthouse, Warrenton, Virginia, beginning at 2:07 p.m.

APPEARANCES:

On Behalf of the Plaintiff:

WYATT B. DURRETTE, JR., ESQUIRE
J. GRAY LAWRENCE, JR., ESQUIRE

On Behalf of the Defendant:

DANIEL M. O'CONNELL, JR., ESQUIRE

FILED AT 10:40 A
APR - 7

John D. T.

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THE COURT: Thank you, Mr. O'Connell and Mr. Durette, for your argument. Your argument has been penetrating and helpful to the Court, and it does not surprise me. I care not a whit, really, as to what people out there might think; I am extremely impressed with the competence that you have shown in presenting this very difficult case.

If we were to find fault with this process, it is fault basic to the law itself, and that is, the law is not a static, fixed, black and white circumstance in many areas. It is a growing, changing, developing circumstance. It is a process, if you will.

Unfortunately for Burgerbusters, Incorporated and Dr. and Mrs. Chawla, as we began the analysis of this very important issue between them, the law in our Commonwealth had not reached a point of development and maturity that we could put to rest some of the issues that created the difficulties for us, and so we had, I think, to do the best that we could, and that is to try to seek

1 out and understand what the law was, and if the law was
2 unclear, to fill the breach and to apply what was
3 reasonable and proper under the circumstances.

4 As this case matured through its various
5 motions, trials, and the like, and after the Court made
6 its ruling or rulings that triggered the attorney's fee
7 clause of the parties' lease agreement, it became apparent
8 that we would have to consider an appropriate dispositive
9 standard by which those attorneys' fees would be set.
10 That was not, for any of us, a particularly easy process.

11 By chance, and only by chance, this judge had
12 had, in another case, an unrelated case factually to our
13 case, the issue of the reasonableness of attorneys' fees
14 to be awarded under a contract between two parties, and
15 that letter opinion from the case of Kmonk versus Aiani,
16 A-i-a-n-i, Circuit Court of Fauquier County, At Law Number
17 CL-95-358, was made available to counsel in a letter of
18 June 12, 1996, to which counsel has alluded.

19 In the Kmonk case, the Court discussed the
20 development of Virginia law and cited one of the cases
21 pertinent to the analysis of what is a reasonable
22 attorneys' fee to be awarded where there is a contract
23 directing that reasonable attorneys' fees, or attorneys'

1 fees particularly, should be awarded.

2 And in discussing the Mullins case, the Court
3 noted that the award of attorneys' fees requires the fact-
4 finder to consider such circumstances as -- and some were
5 outlined -- and other attending circumstances; and then
6 with respect to future fees, certain factors; and then
7 such other relevant circumstances.

8 I read the Mullins case and the other cases,
9 and only one was cited particularly in the Kmonk opinion,
10 to indicate that the Virginia law was open with respect to
11 what factors would be considered.

12 In the Kmonk case, the Court located a case
13 through 23 ALR 5th 905, a 1990 case, identified as Talb,
14 styled Talb, T-a-l-b, Inc. versus Dot Dot Corporation, a
15 case from the Supreme Court of Alabama, that applied what
16 was called the lodestar standard analysis; that is, what
17 was the fee to be allowed for a reasonable fee against
18 one's own client, where there is a suit by an attorney
19 against his own client, would be applied over to third
20 parties in these type contract cases. And the Court did
21 emphasize, in the Kmonk case, the result obtained.

22 Now, it is important to understand in the
23 Kmonk case that this judge was sitting not only as the

1 arbiter of the law -- that is, to decide issues relating
2 to the law -- but was sitting also as trier of fact.

3 And as trier of fact, the Court determined in
4 the Kmonk case that it, in its analysis of the case before
5 it, should make particular emphasis on the one factor from
6 the Dot Dot case, the results obtained, and did reach the
7 conclusion, based upon the facts of that case as trier of
8 fact, that that was an important fact, and made an award
9 substantially less than that which was claimed.

10 Now, I think there is no secret -- whether we
11 have it all together on all of the records of all of our
12 proceedings, I am uncertain at this point, but I do know
13 that I have discussed with counsel on several different
14 occasions the Court's concern regarding what would be the
15 applicable standard to be applied in setting a reasonable
16 attorneys' fee in this case, and had given counsel the
17 Aiani opinion as a piece of material that could help
18 counsel search out what the standard was -- if you will,
19 where Mullins leaves us open to determine other
20 circumstances, or other attending circumstances, what
21 circumstances should properly be considered.

22 At some point in our discussion, I suggested
23 to counsel that it might be appropriate for us to have a

1 pre-trial order, the purpose of which would be, since the
2 issue of attorneys' fees reasonableness is somewhat open
3 in Virginia, that we would at least, for our case, settle
4 upon the factors to be considered.

5 And counsel apparently shared the Court's
6 concern about this, and in so doing presented to the Court
7 a substantially agreed order, Mr. Lawrence reserving the
8 issue regarding an issue out of Chancery, but a
9 substantially agreed order that we would apply the factors
10 from the case of Hensley versus Eckerhart, 461 U.S. 424, a
11 1983 case, and we did, in fact, enter a pre-trial order
12 upon agreement with those factors from the Hensley case,
13 listed therein.

14 And the purpose of that, of course, was to
15 assist us in focusing the presentation of the evidence in
16 the case, and also to prepare the instructions which would



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Now, the other thing that is extraordinarily peculiar about this case was why this Court wanted this matter to be tried before a jury, and that was simply because the Court was confronted with a complex litigation that went over a long period of time, that required a great number of hearings that engaged the Court's time, and a substantially large chunk of the Court's time, over a long period of time, and was confronted with a substantial demand for attorneys' fees, and since this

1 judge had not practiced law since 1980, I thought it
2 necessary that I have my conscience illuminated. And all
3 of this is on the record, as to why the Court felt these
4 concerns.

5 And so the Court determined, over the
6 objection of Burgerbusters at least three times, maybe
7 more, to do an issue out of Chancery.

8 Let's think briefly about an issue out of
9 Chancery, which is brought under 8.01-336(E), which
10 provides in part, "In any suit in equity the Court may, on
11 its own motion or upon motion of any party" -- that
12 certainly didn't happen here -- "supported by the
13 affidavit" -- that didn't happen -- "that the case shall
14 be rendered doubtful by conflicting evidence..."

15 We even had a hearing on that particular
16 point. I believe, Mr. Lawrence, you brought a number of
17 cases, and I rejected those cases and said that we will go
18 ahead with this and direct an issue out of Chancery.

19 In the case of Nelms, N-e-l-m-s, versus Nelms,
20 236 Virginia 281, decided in 1988, the Court, in
21 discussing the office of the issue out of Chancery, says
22 this, and it quotes an earlier case:

23 "The object of an issue out of Chancery is to

1 satisfy the conscience of the chancellor in a doubtful
2 case, but it is not to be directed merely because the
3 evidence is contradictory. The conflict of evidence must
4 be great and its weight so nearly evenly balanced that the
5 Court is unable, or with difficulty able, to determine
6 where the preponderance lies. It is a matter within the
7 sound judicial discretion of the chancellor, and is
8 subject to review on appeal."

9 I do not know how the Appellate Court, should
10 this matter be appealed, will review this matter, but I
11 can tell you that the trial of this case is the proof in
12 this. The trial of this case clearly shows the wisdom on
13 these facts of an issue out of Chancery, to inform the
14 Court's conscience.

15 If you look at, for example, the language, the
16 balancing -- it is unable or difficult to determine where
17 the preponderance lies, and that was the issue that this
18 jury was asked to resolve under the factors set forth in
19 the pre-trial order here.

20 The question then is, what is the
21 conclusiveness of this verdict? And there are a number of
22 cases that have discussed the conclusiveness of an issue
23 out of Chancery.

1 For example, in the Nelms case itself, the
2 Court says, "A jury's findings under Subsection E" --
3 that's an issue out of Chancery -- "are not binding and
4 conclusive but are merely advisory, informing the
5 chancellor's conscience."

6 Having said that, though, I think a reading of
7 all the cases that I have been able to find convince me
8 that the Nelms statement that I just read you, while it is
9 repeated over and over again, is not the full sense of how
10 this Court, having done an issue out of Chancery, must
11 review this verdict.

12 And I would suggest to you -- and I don't find
13 that this language, although it is an old case, is no
14 longer the law of Virginia. It just simply hasn't been
15 emphasized. It has certainly not been overruled. It's
16 the case of Fitchette, F-i-t-c-h-e-t-t-e, versus Cape
17 Charles Bank, which I believe one of you has cited -- I
18 believe Mr. Durrette -- 146 Virginia 715, decided in 1926.

19 In that case, there was an issue about whether
20 an issue out of Chancery was properly or improperly
21 directed, and so I will read you just that part, but that
22 is not essentially the argument here, but I want to read
23 on into the next section, beginning at Page 715.

1 "If an issue," speaking of an issue out of
2 Chancery, "has been improperly directed, upon which a
3 verdict has been rendered, it is the duty of the
4 chancellor, notwithstanding the verdict, to set aside the
5 order directing the issue and dispose of the controversy
6 upon all the evidence in the case, including that taken on
7 terms before the jury."

8 And I emphasize the following, and this is --
9 number of cases in Lyles Equity Pleading and Practice,
10 quotation for this statement:

11 "But where the issue has been properly
12 directed," and this Court finds that it was properly
13 directed on the facts of this case, and for the reasons
14 previously stated, "and a verdict rendered, it has no
15 force or value except to assist the chancellor in arriving
16 at the merits of the controversy. However, such a verdict
17 ought generally be treated by the chancellor as
18 conclusive, unless there be a good cause for a different
19 course.

20 "If the chancellor does not approve the
21 verdict and act upon it, he may set it aside and direct
22 another trial of the issue, or he may decide the cause
23 contrary to the verdict without the aid of another jury.

1 "But," in general, it may be said that "when
2 the evidence is contradictory and evenly-balanced, it is
3 the practice, without good cause for the contrary course,
4 for the chancellor to abide by the verdict of the jury."

5 In this Court's judgment, it is that last
6 sentence that is controlling and dispositive of this
7 matter.

8 The purpose, remember, was to inform this
9 Court's conscience with respect to the quantum of these
10 attorneys' fees, and where -- on this contradictory
11 evidence, and where the result could well have been either
12 way before this jury, it is this Court's judgment that it
13 must conclude that its conscience, notwithstanding
14 whatever it may have been before this case was heard, has
15 been informed, and that the evidence being such as it was,
16 that there is no proper basis upon which this Court can
17 set aside this jury verdict.

18 I do not further address the issue of jury
19 misconduct. That has been addressed earlier on our record
20 today.

21 I believe, again, that the Court was bound to
22 follow the pre-trial order, in an area of the law where
23 the law was not clear and certain, as being the law of

1 this case.

2 And further, for the reasons stated, the Court
3 deems itself obliged, having its conscience informed, no
4 matter what it may have been before this case was heard,
5 to uphold this verdict.

6 This is a difficult case. It was well tried
7 by each side. It is not easy for the Court to make
8 decisions of this nature. It is not the office of any
9 judge to necessarily look for the easy way out, and this
10 certainly isn't an easy way out. It wasn't easy to do an
11 issue out of Chancery. I could have been as summary as
12 any Federal judge who ever had a civil rights case,
13 including some of the cases that we've discussed and been
14 cited to me.

15 But while the law may be clear to our
16 distinguished judges of those courts -- for example, the
17 Fourth Circuit and other courts may have set forth
18 particularized requirements -- we didn't have those in
19 this case. We had to seek out and try to find what they
20 were and apply them, to the best of our ability.

21 Now, it may be, upon review, that should this
22 matter be appealed, the Supreme Court of Virginia will
23 view the matter and determine that the factors that were

1 used here by this pre-trial order should have been
2 weighted and balanced, as they were in the Hensley case,
3 or it may be that the Court would deem there to have been
4 an abuse of discretion to do an issue out of Chancery on
5 the facts of this case. That is for that Court to resolve
6 upon a full review on appeal.

7 But, this trial judge humbly suggests that all
8 that can be done has been done here.

9 These motions with respect to this verdict
10 will be denied, except that seeking to have judgment
11 entered in accord with it, and I'll note counsel's
12 exception.



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Your Honor, I'd like some time to prepare exceptions to this decree. Knowing the way the Supreme Court operates these days, I just don't want to endorse this with --

THE COURT: How long will it take you to do that?

MR. O'CONNELL: You know, five days?

THE COURT: Any objection to that?

MR. DURRETTE: We don't have any problem with that, Your Honor.

1 THE COURT: All right, this decree will be
2 held for five days. That will take us to the 5th of
3 February, which is Wednesday.

4 We'd better give you two more -- Mr.
5 O'Connell, give you two more days; we'll give you through
6 Friday, because you are counting off your weekend.

7 MR. DURRETTE: Excuse me? I'm sorry, Your
8 Honor.

9 THE COURT: You are counting off your weekend,
10 so if we give you five days from today, since this is a
11 Friday, would you like to have five working days, until
12 next Friday?

13 MR. O'CONNELL: Yes.



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MR. LAWRENCE: Judge, do I understand that

1 come February 7 Mr. O'Connell will bring in his
2 objections, will endorse the decree --

3 THE COURT: Right.

4 MR. LAWRENCE -- in its present form?

5 THE COURT: Yes, with the objections.

6 MR. LAWRENCE: With the objections, correct.

7 MR. O'CONNELL: Well, I haven't had a chance
8 to sit down and study the decree, Your Honor. I can't say
9 that I am going to automatically endorse it in its present
10 form.

11 THE COURT: Well, would you let Mr. Lawrence
12 or Mr. Durette know early in the week so we can get a
13 revised --

14 MR. O'CONNELL: Yeah, I will do that, Your
15 Honor. I mean I --

16 THE COURT: Because I think it is -- I haven't
17 read it, either, but I think it is rather straightforward,
18 and if there is some substantive question --

19 MR. O'CONNELL: It appears to be. I just
20 haven't had a chance to study it.

21 THE COURT: All right, and also, Mr.
22 O'Connell, I don't -- I feel some temerity in doing this,
23 but I suppose I should, for the record -- not for you,

1 because I know you wouldn't do this, but I had a reversal,
2 a Court of Appeals reversal, because I extended to counsel
3 the right to set forth objections after, afterwards, and
4 the objections had never been presented to me; they were
5 all new arguments and new issues. That wouldn't happen to
6 you.

7 I just want the record to show that you are
8 going to memorialize what you have already stated.

9 MR. O'CONNELL: And I am going to set forth my
10 exceptions to the rulings --

11 THE COURT: Which are matters you have already
12 ruled on.

13 MR. O'CONNELL: -- on the three motions.

14 THE COURT: That's right.

15 MR. O'CONNELL: That's what I'm going to --
16 I'm going to have an attachment.

17 THE COURT: That's right.

18 I say that with reluctance, but I just -- I
19 was not able to deal with the objections, and the Court of
20 Appeals said the trial court let counsel submit objections
21 later, and therefore, even though they weren't ever
22 presented to the trial court, they still could be
23 considered on appeal.

1 See what happened?

2 MR. DURRETTE: Well, I guess, from our
3 perspective, Your Honor, we need to be concerned about
4 that, too, so I am assuming that the Court's allowance of
5 this, it constitutes --

6 THE COURT: Is conditional on the fact that
7 nothing new --

8 MR. DURRETTE: Nothing new.

9 THE COURT: -- other than what has been argued
10 will be presented. It is just simply articulating
11 objections in a written form to this decree, and we shall
12 await its review.



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VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF FAUQUIER

BURGERBUSTERS INC.,

Petitioner,

v.

CHANCERY NO. CH93-266

INDER CHAWLA, et al.,

Respondents.

DECREE

THIS CAUSE came this 31st day of January, 1997, to be heard on the motion of the petitioner, BurgerBusters Inc., by counsel, for a decree entering judgment against the respondents, Inder Chawla and Vera V. Chawla, in accordance with the verdict of the jury rendered December 13, 1996, and upon the respondents' Motion to Dismiss, Without Analysis, the Fee Application of Petitioner and the Motion to Set Aside Jury Verdict and Award New Trial, and was argued by counsel.

stated on the record
The Court, without objection ~~on the part of the respondents,~~ heretofore ordered an issue out of chancery on petitioner's claim for attorneys' fees and costs now or hereafter to be incurred in this action. On December 11, 1996, a jury was impanelled to hear and determine such issue. The petitioner and respondents presented evidence ore tenus and exhibits. On December 13, 1996, the jury returned with a verdict in favor of petitioner against the respondents in the sum of Four Hundred Forty-Six Thousand Three Hundred Eighty-Nine and 56/100 Dollars (\$446,389.56).

The Court, having considered the arguments of counsel and the authorities presented to it in support of or in opposition to the respective motions, does

ORDER, ADJUDGE and DECREE that respondents' motions be, and they hereby are, **OVERRULED** for the reasons set forth in the transcript of the hearing held this date.

It is further **ORDERED, ADJUDGED and DECREED** that judgment be, and it hereby is, **ENTERED** in favor of BurgerBusters Inc. against the respondents Inder Chawla and Vera V. Chawla, jointly and severally in the sum of Four Hundred Forty-Six Thousand Three Hundred Eighty-Nine and 56/100 Dollars (\$446,389.56), together with interest at the judgment rate from December 13, 1996.

ENTER this ^{7th} 31st day of ~~January~~ ^{Feb.}, 1997 at 1:15 p.m.



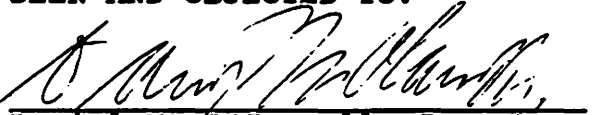
William Shore Robertson, Judge

WE ASK FOR THIS:



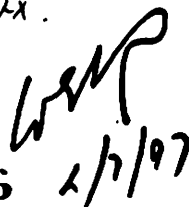
Wyatt B. Durette, Jr.
Counsel for Petitioner

SEEN AND OBJECTED TO: —



Daniel M. O'Connell, Jr.
Counsel for Respondents
Inder Chawla and Vera V. Chawla

See Letter to court dated Feb. 7, 1997 and pleading entitled Exceptions to Decree from Hearing on January 31, 1997 with mailing date of Feb 7, 1997. All filed on Feb. 7, 1997 at 12:25 PM.



VIRGINIA:

IN THE CIRCUIT COURT FOR FAUQUIER COUNTY

BURGERBUSTERS, INC.

Petitioner,

v.

CHANCERY NO. CH93-266

INDER CHAWLA, et al.

Respondents.

EXCEPTIONS TO DECREE FROM HEARING ON JANUARY 31ST, 1997

Exceptions to ruling of the court on the issue of attorneys fees:

1. The respondents except to the ruling of the court denying its motion to dismiss without analysis the fee application of the petitioner. The motion should have been granted based upon the holding in Sun Publishing Company, Inc. v. Mecklanburg News Inc. et. al., 823 F2d 818 (4th circuit 1987). The abuses set forth by the Fourth Circuit in Sun Publishing are the same kind of abuses that were perpetrated by the petitioner in its fee application in this case. Therefore, the fee application of the petitioner should have been rejected by this court in whole, without analysis. These exceptions are set forth more fully in the argument of the respondents on the record on January 31, 1997.

2. Exception is taken to the ruling of the court on January 31, 1997 refusing respondents motion to set aside the chancery jury

verdict and award a new trial. ~~Reasons for this exception are set forth as follows:~~ **BK 0080860053**

(a) The chancery verdict was advisory only and should have been totally disregarded by the court.

(b) Based upon the instructions given in the case there is absolutely no way the jury could have applied those instructions and awarded the respondent the full amount it requested. The jury award indicates that the jury disobeyed the court's instruction 2A as it made no attempt to apply the factors set forth in that instruction.

(c) The Jury was not properly instructed. The court indicated in its pretrial order that the instructions and the ultimate decision in the fee case were going to be based upon the factors set forth in the United States Supreme Court Case of Hensley v. Eckerhart, 461 U.S. 424 (1983). The court surprised and prejudiced the respondents by giving only a listing of the factors as set forth in Hensley without supplying the jury with the essential analysis and weighing of the factors that is necessary, as fully and completely described by the United States Supreme Court in Hensley.

(d) The respondents except to the failure of the trial court to grant its instructions H, I, J, K, L, M, N and O which would have given the jury the proper instructions on the analysis that should be given; and the analytical tools that should be used in an assessment of an attorneys fee application.

(e) The trial court abused its discretion by refusing to reject this jury verdict and impanel a new jury with proper instructions.

(f) The trial court further abused its discretion by concluding that the defective jury verdict satisfied its conscience, when it was apparent that neither the evidence nor the proper law applied to the facts in this case could have given the result the jury reached.

(g) The trial court abused its discretion and misled the respondents to their prejudice by its letter opinion of June 12, 1996 attaching its decision in Kmork v. Aiani where it emphasized that the result obtained was going to be the most important factor.

(h) The court further abused its discretion in failing to investigate evidence of juror misconduct, as reported by the court reporter, and which is contained in the record of January 31, 1997 relating to three jurors discussing the case outside of the jury room and before the conclusion of the case. There is evidence of direct violation of the trial court's repeated orders to the jury not to discuss the case before it was concluded and not to discuss it outside of the jury room.

(i) Exception is further taken to the ruling of the trial court refusing to set aside the jury verdict. It should have been obvious the jury failed to apply even instruction 2A; when after three days of trial and more than 200 pages of fee application with

numerous exhibits the jury reached a verdict after only one and one-half hours of deliberation.

(j) The trial court abused its discretion in failing to grant the instructions requested by the respondents that applied the analysis of Hensley v. Eckerhart. The trial court abused its discretion by failing to recognize that the most current and developed law on the issue of fee applications is that set forth in such Federal cases as Hensley v. Eckerhart and Sun Publishing.

(k) The trial abused its discretion by failing to recognize and apply the correct law, either in its granting of jury instructions or, in its ruling adopting the jury verdict. The trial court should have recognized that result in attorneys fee applications is the most important factor; and that the result must be analyzed both qualitatively and quantitatively along the lines of the analysis set forth in Hensley. Had this analysis been conducted by the court or upon proper instructions to the jury, the petitioner would have been entitled to little or no fee because the petitioner produced absolutely no evidence that the result obtained ie. the minor correction of an offsite building, would be of any benefit to it.

(l) The court abused its discretion by failing to recognize the clear explanation under American Bar Association Professional Manual DR 106 that neither a trial court nor a jury could reach a proper result in a fee case by being given only a listing of factors without supplying the analytical framework on

how to weigh and apply, qualitatively and quantitatively, those factors.

(m) The trial court abused its discretion by failing to recognize that it had misled the respondent and that this was not a unilateral mistake or misinterpretation by the respondents because the petitioner had itself submitted an instruction based upon the analysis of result set forth in Hensley.

(n) The trial court abused its discretion by failing to recognize that merely listing factors to be considered, without giving any analytical framework, deprived the jury of any reasonable method of fixing attorneys fees which takes the factors into account.

(o) The trial court abused its discretion in failing to recognize that the award of the jury in this case was not a reasonable result and that the verdict should have been set aside and a new trial awarded under instructions of correct analysis.

3. Because the ruling of January 31, 1997 adjudicates the principles of the fee application in this case, the attached decree is a final appealable decree on this issue. Therefore, the exceptions to the court's earlier rulings relating to the application by the respondents for their attorneys fees, and the ruling of the court on the burden of proof on the fee issue, are reserved and reiterated herein as follows:

(a) By order entered March 29, 1996 the court denied the respondents motion for approval to file a fee application on their

behalf. The respondents excepted to the ruling for the reasons stated on the record which include the fact that the clear meaning of the fee clause in the lease between the petitioner and respondents gave the respondents the absolute right to file a fee application for reimbursement for fees in the portions of the case in which they successfully defended their rights under the lease. The courts ruling was not a correct interpretation of the fee clause in the lease.

(b) By order entered July 1, 1996, after argument and submission of authorities, the court ruled that it was the respondents that should bear the burden of proof on the issue of whether the petitioners costs and expenses are excessive or unreasonable. The respondents excepted to that ruling in an attachment to the order which is as follows:

(i) The courts July 1, 1996 order is based upon its letter opinion dated June 12, 1996. This opinion and referenced order are excepted to on the basis that the burden of proof, where no specific amounts or percentages are set forth in the agreement, is upon the fee applicant to prove the reasonableness of the fee and not upon the party opposing the fee application to show that it is unreasonable. The clause in the lease that refers to fees contains no specific amount of fees and does not contain a percentage or amount of fees. The fact that it says "all fees" is not the equivalent of stating that the opposing party will pay all attorneys

fees no matter what they may be. This language does not have the effect of shifting the burden of proof as the court decided in its letter opinion.

(ii) None of the authorities cited by the parties supported the position taken by the court which provides that the burden of proof should be on the party opposing the fee application when there is no specific dollar amount set forth in the fee agreement or a specific percentage.

(iii) The respondents further reiterate by reference the objections and exceptions to this court's rulings as stated on the record at the hearings on the fee issue conducted on March 29, 1996 and May 20, 1996.


4. During discovery, the respondents requested proof of the payments petitioners claim to have made for the fees it was seeking to be reimbursed in the fee application. Petitioners objected to supplying this proof in the form of cancelled checks, etc. After a hearing, the court refused to order the proof requested by the respondents. The court abused its discretion by not ordering the petitioner to produce this proof. Exceptions were taken to this ruling by the respondents on the record. If the fees are not in fact paid, then this is evidence they were not incurred.

5. If the first sentence of the second paragraph on page one of the draft decree from the hearing on January 31, 1997

is not struck from the decree entered by the court, exception to the failure of the court to so delete is hereby taken. The reason for the exception is because this sentence is inaccurate and misleading. It implies the respondents did not except to earlier rulings of the court which they have. It is not in fact part of what the court ruled on the record and is not necessary to accomplish the substance of what the court ruled on January 31, 1997.

INDER CHAWLA and
VERA V. CHAWLA
By Counsel

O'CONNELL & MAYHUGH, P.C.

By: 
Daniel M. O'Connell, Jr.
Virginia Bar No. 01108
82 Main Street
Warrenton, Virginia 20186
Telephone: (540) 347-2424
Counsel for Respondents Chawla

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7 day of February, 1997, a true and correct copy of the foregoing has been furnished by U.S. Mail to: Annemarie DiNardo Cleary, Esq. and J. Gray Lawrence, Jr., Esq., FAGGERT & FRIEDEN, P.C., 1435 Crossways Boulevard, Suite 200, Chesapeake, VA 23320-2840, Counsel for Petitioner; Wyatt B. Durette, Jr., Esq., DURRETTE, IRVIN & BRADSHAW, P.C., 600 E. Main Street, 20th Floor, Richmond, VA 23219, Co-Counsel for Petitioner; and to Eric V. Zimmerman, Esq., PRICE & ZIMMERMAN, 305 Harrison Street, S.E., 3rd Floor, Leesburg, VA 22075, Counsel for Southern Financial F.S.B.


Daniel M. O'Connell, Jr.

H:\...chawla\answer.doc
2/6/97

ASSIGNMENTS OF ERROR

1. The Court Erred in Not Permitting the Landlord to Recover Attorneys' Fees for its Successful Defense of Burger Busters' Claims.
2. The Court Erred in Placing the Burden of Proof as to Reasonableness of Fees on the Respondents.
3. The Court Erred in Instructing the Jury that the Burden of Proof to Show Unreasonableness of Fees Rested on the Respondents.
4. The Court Erred in Not Requiring a Breakdown and Specific Description of the Attorneys' Fees Sought.
5. The Court Erred in Permitting an Award of Attorneys' Fees Disproportionate to the Result Obtained.
6. The Court Erred in Not Ordering a New Trial.

FAGGERT & FRIEL
ATTORNEYS AND COUNSELOR

v. CH93-266

Inder Chawla et al

870 GREENBRIER CIRCLE, SUITE 300
CHESAPEAKE, VIRGINIA 23320

Filed 12/11/96

August 23, 19

PLTff

Exhibit 1

Judge

VIA FEDERAL EXPRESSThe Honorable William Shore Robertson
Fauquier Circuit Court
40 Culpeper Street
Warrenton, VA 22186Re: BurgerBusters v. Inder Chawla, et al.
Fauquier County Circuit Court
Chancery No. CH93-266
Our File No. 0143.036

Dear Judge Robertson:

As you may be aware, Mr. O'Connell has filed a Motion for Scheduling Order in the above matter on behalf of the Respondents, Dr. and Mrs. Chawla. He points out in his Motion that the matter is currently set for a two-day trial and suggests that an additional two days will be needed. To be frank, I have also been concerned about being able to complete the trial in two days and was considering what steps to take when I received Mr. O'Connell's Motion. Although the Motion is currently scheduled to be heard on Friday, August 26, I thought it would be helpful to share my thoughts with the Court and Mr. O'Connell prior to the hearing.

First and foremost, we hope to avoid any scenario under which the trial would be continued to a later date. We have been concerned from the outset that the higher the bank building rises, the more difficult the Court's decision ultimately will be. Additionally, now that it appears the bank will be occupying the building, we are concerned about the inevitable conflicts which will arise between the bank and the restaurant because of their contradictory and overlapping property rights. The situation will be difficult enough between now and the October 27 trial date without exacerbating matters by delaying the trial.

Second, we may be able to save substantial time at trial by deferring testimony regarding damages until a later date. As we have indicated from the outset, BurgerBusters' primary and ultimate goal is the removal of the bank building which violates the development restrictions agreed to by the parties, and specific performance of other obligations under the lease and related easements. Although some testimony regarding the damaging impact of the Respondents' acts will be necessary, if the Court rules that BurgerBusters' rights have been violated and orders the injunctive relief sought, there will be no need for evidence of future damages. This would save the parties substantial expenses relating to expert witnesses and would save both the parties and the Court one to two days of trial. If, on the other hand, the Court determines that BurgerBusters' rights have been violated but does

The Honorable William Shore Robertson
August 23, 1994
Page 2

not order injunctive relief, the trial could be recommenced at a subsequent, scheduled date so the parties can present evidence relating to both pretrial and post-trial damages. In response to the Respondents' Motion for Scheduling Order, BurgerBusters would propose to "bifurcate" the case, keep the October 27 and 28 trial dates, and schedule two subsequent trial dates for evidence on damages, if necessary.

Finally, we will do whatever it takes to have the matter heard sooner rather than later. Accordingly, we will make ourselves available for the weekend of October 29 and 30 or any other time if necessary to expedite matters.

Respectfully,



Stewart J. Sacks

SJS/11e

cc: Daniel M. O'Connell, Jr., Esquire
Gary M. Pearson, Esquire
Mr. Tassos J. Paphites
Eric V. Zimmerman, Esquire

11e\0143\036\L-Rober2.SJS

Burgerbusters, Inc.

V. CH93-266

TWENTIETH JU Inder Chawla et al

OF VI Filed 12/14/96

RAYNER V. SNEAD, JUDGE RETIRED
CARLETON PENN, JUDGE RETIRED

WILLIAM SHORE ROBERTSON, JUDGE
40 CULPEPER STREET
WARRENTON, VIRGINIA 22186

FAUQUIER, LOUDOUN AND
RAPPAHANNOCK COUNTIES
January 29, 1996

PLTff
Exhibit 2
Judge

JAMES H. CHAMBLIN, JUDGE
POST OFFICE BOX 123
LEESBURG, VIRGINIA 22075

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9 Culpeper Street
Warrenton, VA 22186

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Annmarie DiNardo Cleary, Esq.
J. Gray Lawrence, Jr., Esq.
1435 Crossways Boulevard, Suite 200
Chesapeake, VA 23320

Daniel M. O'Connell, Jr., Esq.
82 Main Street
Warrenton, VA 22186

Eric V. Zimmerman, Esq.
305 Harrison Bldg., Third Floor
Leesburg, VA 22075

Re: Burgerbusters, Inc. v. Chawla, et al.
Circuit Court of Fauquier County
In Chancery No: CH93-266

Gentlemen & Ms. Cleary:

By an order entered on August 28, 1995, the Court set the remaining issues to be tried upon the petitioners' Amended Bill of Complaint and the issues to be tried upon Count IV of the respondents' Amended Cross-Bill. The trial of these issues was held on August 28, 29, & 30, 1995, and the Court again took this case under advisement. In addition, a post-trial telephone conference was held on October 30, 1995 directing additional briefing. After considering the evidence and argument of counsel, the Court will grant the Petitioners' injunctive relief by ordering the removal of the bank building or alternatively allowing the respondent to conform it to the size

and shape of the agreed development plan. The Court will deny the respondents relief upon their Amended Cross-Bill. The Court's opinion will be briefly summarized here.

1. Does the bank as constituted violate paragraphs 7 & 8 of the parties' lease?

Because this issue can be decided under paragraph 7 in a way which is dispositive, only the development restriction there will be discussed. Paragraph 7 provides in part that "landlord agrees that no other development shall occur in the Shopping Center other than as shown on the Shopping Center site plan." That plan shows a Building No. 2 of 4500 square feet designated retail. In lieu of that development, the landlord constructed a Building No. 2 of 1953 square feet designated and used as a bank. That structure as designated and used also has a drive thru canopy and windows with a related traffic flow not shown on the site plan referenced by paragraph 7.

Burgerbusters is entitled to have Chawla substantially comply with paragraph 7. In Akers v. Barnes, 227 Va. 367, 371 (1984) substantial compliance is defined as follows:

Substantial compliance with reference to contracts means that, although the conditions of the contract have been deviated from in trifling particulars not materially detracting from the benefit the other party would derive from a literal performance, he has received substantially the benefit he expected, and is, therefore, bound to pay.

The question is then whether the constructed 1953 square foot bank with a drive thru deviates in more than trifling particulars materially detracting from the benefit Burgerbusters would derive from a literal performance of the requirement that a 4500 square foot retail building be constructed. In terms of size and structure, the Court concludes that the deviation is more than trifling. The structure built is only 43.4 % of the one promised and its construction with a drive thru does not even schematically conform to the structure to be constructed.

The more difficult issue is the descriptive term "retail." Earlier the Court suggested to counsel that the term would lie within common knowledge or usage. Nevertheless, the Court allowed each party without objection to offer evidence on its meaning. A Court may take judicial notice of words if a matter of common knowledge. McWhorter v. Commonwealth, 191 Va. 857 (1951). The Court may also

consult authoritative sources, such as dictionaries to refresh its memory as to meaning, but such facts must lie within common knowledge. Lassen v. Lassen, 8 Va.App. 502 (1989).

After consulting Black's Law Dictionary, 6th Ed. (West, 1990); Merriam Webster's Collegiate Dictionary, 10th Ed. (Merriam Webster, 1994); The Oxford English Dictionary (Clarendon Press, Oxford, 1970), Webster's New World Dictionary, 3d College Ed. (Simon & Schuster, 1988); and the American Heritage Dictionary, 3d Ed. (Houghton, Mifflin Co., 1992), the Court concludes that in common usage the term retail means the sale of goods or articles individually and in small quantities directly to the consumer. This definition does not include a bank as defined in this case. However, such a definition may not be as clear as the Court may wish it to be. As the word expert, Bill Bryson has noted, "The fact is that the real meanings are far more complex than the simple dictionary definitions would lead us to suppose." See Bryson, The Mother Tongue (Morrow) pg. 150. Thus in the case of U.S. v. Manufacturers Hanover Trust Company, 240 F.Supp. 367 (1965), the Court defines the term "retail bank" and the Town of Warrenton Zoning & Subdivision Ordinances, pg. 23, in evidence, define the term "retail stores and shops" as including buildings for the rendering of personal services which could include a bank. The Court also finds the evidence hopelessly conflicting on this term. For this reason, the Court is unable to conclude that the lease term does or does not encompass a bank.

Having concluded that the bank building constructed by size and structure, if not by use, does not comply with the development plan, the Court must decide what remedy is appropriate to rectify the violation of paragraph 7. Where, as here, the parties entered into an agreement with the development restriction in paragraph 7, the Court in issuing an injunction does not balance the equities. The Court must enforce the parties' bargain. Traylor v. Holloway, 206, Va. 257 (1965). As noted,

"If parties, for valuable consideration with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say by way of injunction that which the parties have already said by way of covenant, that the thing shall not be done, and in such the case the injunction does nothing more than give the sanction of the process of the court to that which already is the contract between the parties. It is not, then, a question of convenience or inconvenience, or of the amount of damage or injury - it is the specific performance, by the court, of that negative bargain which the parties have made, with their eyes

open, between themselves.'"
Id., pg. 261.

While the covenant here is affirmative and not negative as in Traylor, the principle is the same. In Traylor the Court ordered structural removal. Here the Court will order structural removal or modification to bring the building in compliance as to size and structure.

2. Can Parole Evidence be allowed to show that the parties intended an easement for ingress and egress to the remainder of the property from Route 29/Lee Highway entrance over the demised premises and if so had Mr. Paphites on behalf of the petitioners, made statements or admissions which preclude him now from arguing that no such access was intended under the rule in Massie v. Firmstone, 134 Va. 450 (1922)?

In the letter opinion of April 18, 1995, the Court held that there was no reserved or implied easement over the demised premises. The Court also held that while an easement can be created by estoppel, the requisite facts to create such an easement are not present here. The Court has found no authority which would allow parole evidence to show what the parties intended contrary to their agreement and deed which would create such an easement. Indeed such evidence would seem to violate the parole evidence rule. Friend, The Law of Evidence in Virginia, 4th Ed. (Michie, 1993) Section 20-1. However, this issue is subsumed in the second inquiry regarding the alleged statements and admissions of Mr. Paphites. Dr. Chawla asserts that Burgerbusters may not argue that no such access was intended under the rule of Massie v. Firmstone, 134 Va. 450, 462 (1922) where the Court said:

No litigant can successfully ask a court or jury to believe he has not told the truth. His statements of fact and the necessary inferences therefrom are binding upon him. He cannot be heard to ask that his case be made stronger then he makes it. Where, as here, it depends upon facts within his own knowledge and as to which he has testified.

At the November 1, 1993 injunction hearing, the Court asks Mr. Paphites questions to orient it regarding the site plan offered as Exhibit D. On pg. 25 of the November 1, 1993 transcript, this exchange was reported:

THE COURT: And it would be from that location that the bank under the original drawing was to be serviced also; right?

THE WITNESS: They would be serviced from the same two entrances as we are.

THE COURT: Either way. All right. All right. I am oriented.

It is the Court's judgment that in this exchange, Mr. Paphites expresses only his opinion which is at best a misimpression as to Burgerbusters' legal obligations regarding this issue. As such, the Massie doctrine does not apply. Ravenwood Towers, Inc. v. Woodyard, 244 Va. 51 (1992).

3. Waiver.

The last questions raised by the Court at the post-trial telephone conference and briefed by counsel are:

(1) Is waiver an issue in view of the Court's August 28, 1995 pretrial order; and

(2) Was the development restriction (paragraph 7 of the lease) waived by virtue of the April 3, 1993 letter and the written statements thereon, which is joint trial exhibit No. 7?

By a pretrial order entered on August 28, 1995, the Court framed the issues to be tried. Although waiver was argued at trial, it was in derogation of this order and not appropriately considered. Rule 4:13 provides that such an order "controls the subsequent course of the action unless modified at trial to prevent manifest injustice." No such modification occurred at trial. Further it is argued that a Court should consider evidence at the hearing on April 23, 1994 conducted upon the Petitioners' Motion for Injunction. That evidence was not offered at trial and indeed it could not have been properly offered at trial because Dr. Chawla was available to testify. Gray v. Graham, 231 Va. 1 (1986).

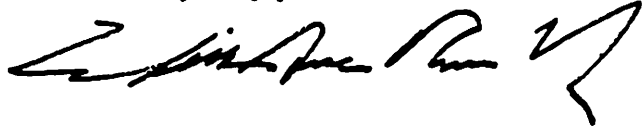
However, even if the Court is in error regarding the procedural posture of this issue, the Court must conclude that Chawla has not carried his burden of proof as to the elements of waiver by clear, precise, and unequivocal evidence. Utica Mutual v. National Indemnity, 210 Va. 769 (1970). "Waiver is the intentional relinquishment of a known right, with both knowledge of its existence and an intention to relinquish it." May v. Martin, 205 Va. 397 (1964). Here the Court finds that at best any alleged waiver found in the letter of April 3, 1993 is conditional and not unequivocal. It does

Gary M. Pearson, Esq., et al.
January 29, 1996
Page 6

not meet the burden to show Mr. Paphites' intent to relinquish Burgerbusters' development rights regarding the bank building.

Ms. Cleary and Mr. Lawrence are requested to prepare an appropriate decree according to this letter opinion to which all counsels' exceptions may be noted. Respecting the injunctive relief granted here, the Court will appoint a Special Commissioner to superintend the execution and compliance of the Court's decree. Counsel is further requested to set by praecipe from the next civil Motion's Day a date upon which attorneys' fees, if any, are to be awarded to the petitioners pursuant to the parties' lease agreement.

Very truly yours,

A handwritten signature in black ink, appearing to read "William Shore Robertson", with a large, stylized flourish at the end.

William Shore Robertson

WSR/mkb

V I R G I N I A :

IN THE CIRCUIT COURT FOR

BURGERBUSTERS, INC.

Petitioner

v.

INDER CHAWLA, et al

Respondents

Burgerbusters, Inc.

V. CH93-266

Inder Chawla et al

Filed 12/11/96

PLTff

Exhibit 3

WCR

Judge

In Chancery No. CH93-266

ORDER

This day came the parties, by Counsel, upon their respective Motions, and was argued by Counsel, and in consideration whereof, it is hereby

ORDERED that the Motion to sever the issue of the reimbursement and transfer to the law side of this Court filed by the Respondents Inder Chawla and Vera Chawla (the "Chawlas") is denied in that this Court is without statutory authority to do the same; and it is further

ORDERED that the Chawlas' Motion to dismiss, without analysis, the fee application was withdrawn by the Chawlas.

It further appearing to this Court that the issue of the amount of the fees and costs to be awarded to the Petitioner is a factual issue which is appropriate to be addressed by a jury as an issue out of chancery, it is

ORDERED that the issue of the amount of the fees and costs to be awarded to the Petitioner be and it hereby is set down for argument before a jury on December 11, 12 and 13, 1996.

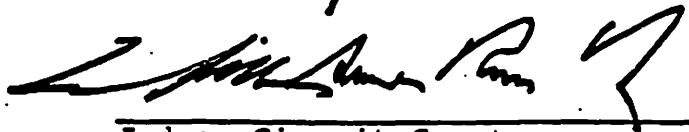
Further, this Court having previously ruled in its letter

opinion of January 29, 1996, that the Respondents have violated the development restriction in paragraph 7 of the Lease between the Petitioner and the Chawlas and directed that the Respondent shall remove the Bank Building or, in the alternative, alter the Bank Building, it is

ORDERED that (a) within sixty (60) days from March 29, 1996, the Respondents shall with due diligence prepare and file with the court a written proposal, including appropriate engineer-prepared drawings, to demolish the Bank Building or bring its size, shape and structure into conformity with Exhibit D to the Lease, as more fully detailed in the Court's written opinion, ~~which proposal shall include specifically the date by which the demolition or renovation shall be completed;~~ (b) thereafter, Petitioner shall file its objections, if any, to the proposal within ~~sixty (60)~~ ^{thirty (30)} days of receipt of the proposal by Petitioner; and (c) if the Petitioner should file objections, a hearing shall be ~~scheduled with the Court~~ ^{held on July 1, 1996, at 3:00p.} for resolution of the same.

And this matter is continued.

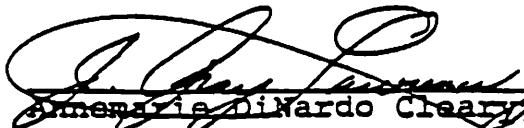
Entered this 20th day of May, 1996.

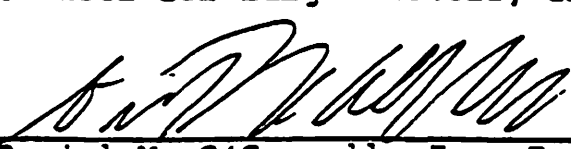


Judge, Circuit Court


Seen and agreed as to part
and objected as to part:


*Objection noted in transcript of
hearing of March 29, 1996, and
May 20, 1996*


Dinardo Cleary, Esquire
J. Gray Lawrence, Jr., Esquire
FAGGERT & FRIEDEN
1435 Crossways Boulevard
Suite 300
Chesapeake, Virginia 23320
Counsel for BurgerBusters, Inc.


Daniel M. O'Connell, Jr., Esquire
O'CONNELL & MAYHUGH, P. C.
82 Main Street
Warrenton, Virginia 22186
Counsel for Inder Chawla, et al

*Exclusions on p. 11
Ex. A. attached
here to. -*


Eric V. Zimmerman, Esquire
PRICE & ZIMMERMAN
305 Harrison Street, S. E.
Leesburg, Virginia 22075
Counsel for Southern Financial Bank

A COPY TESTE: WM. D. HARRIS, CLERK
BY  DEPUTY CLERK
GAIL I. KING
FAUQUIER COUNTY CIRCUIT COURT, VA.

VIRGINIA:

IN THE CIRCUIT COURT FOR FAUQUIER COUNTY

BURGERBUSTERS, INC.

Petitioner,

v.

CHANCERY NO. CH93-266

INDER CHAWLA, et al.

Respondents.

RESPONDENTS' CHAWLAS' EXCEPTIONS

The respondents, INDER CHAWLA and VERA V. CHAWLA, note their exceptions to the Court's letter opinion dated January 29, 1996 as follows:

1. Exception is taken to the letter opinion with respect to the Court's finding that the bank building by size and structure violates paragraph 7 of the lease. The evidence at trial showed compliance with paragraph 7 in that there is at least 4,000 square feet of retail space with the bank building as presently constructed.

2. Exception is taken with respect to the Court's finding on the issue of waiver. For the reasons set forth in co-respondents' post-trial Memoranda of Law, the Court should have found that the petitioner had waived any right to object to the construction of the bank building.

EXHIBIT "A"

3. Exception is taken with respect to the Court's finding on the issue of parol evidence. The Court should have applied the rule in Massie v. Firmstone, 134 Va. 450, that parol evidence should have been allowed to preclude the petitioner from arguing that no access was intended to the balance of the property through the Route 29 entrance.

4. Exception is taken with respect to not allowing co-respondents Chawla to submit a fee application. A substantial part of the fees spent by the Chawlas in this case were to enforce their rights under the lease and for this reason the Chawlas come within the terms of the fee reimbursement clause in the lease.

INDER CHAWLA and
VERA V. CHAWLA
t/a SONINA PROPERTIES
By Counsel

O'CONNELL & MAYHUGH, P.C.

By: _____
Daniel M. O'Connell, Jr.
Virginia Bar No. 01108
82 Main Street
Warrenton, Virginia 22186
Telephone: (540) 347-2424
Counsel for Respondents

O'CONNELL & MAYHL Inder Chawla et al
ATTORNEYS AND COUNSELORS
82 MAIN STREET Filed 12/12/96
WARRENTON, VIRGINIA 221
540-347-2424
METRO 471-0528
TELECOPIER 540-349- PLT++ Exhibit 4
WMP Judge

DANIEL M. O'CONNELL, JR.
GEORGE M. MAYHUGH

May 24, 1996

Via Hand-Delivery

The Honorable William Shore Robertson
Fauquier County Circuit Court
40 Culpeper Street
Warrenton, Virginia 22186

RE: BurgerBusters, Inc. v.
Inder Chawla et al.:
Chancery No. CH93-266

Dear Judge Robertson:

Enclosed are four (4) drawings submitted on behalf of Dr. and Mrs. Chawla showing alternative plans for conformance of the bank building pursuant to your letter opinion of January 29, 1996, in the referenced matter.

Respectfully submitted,

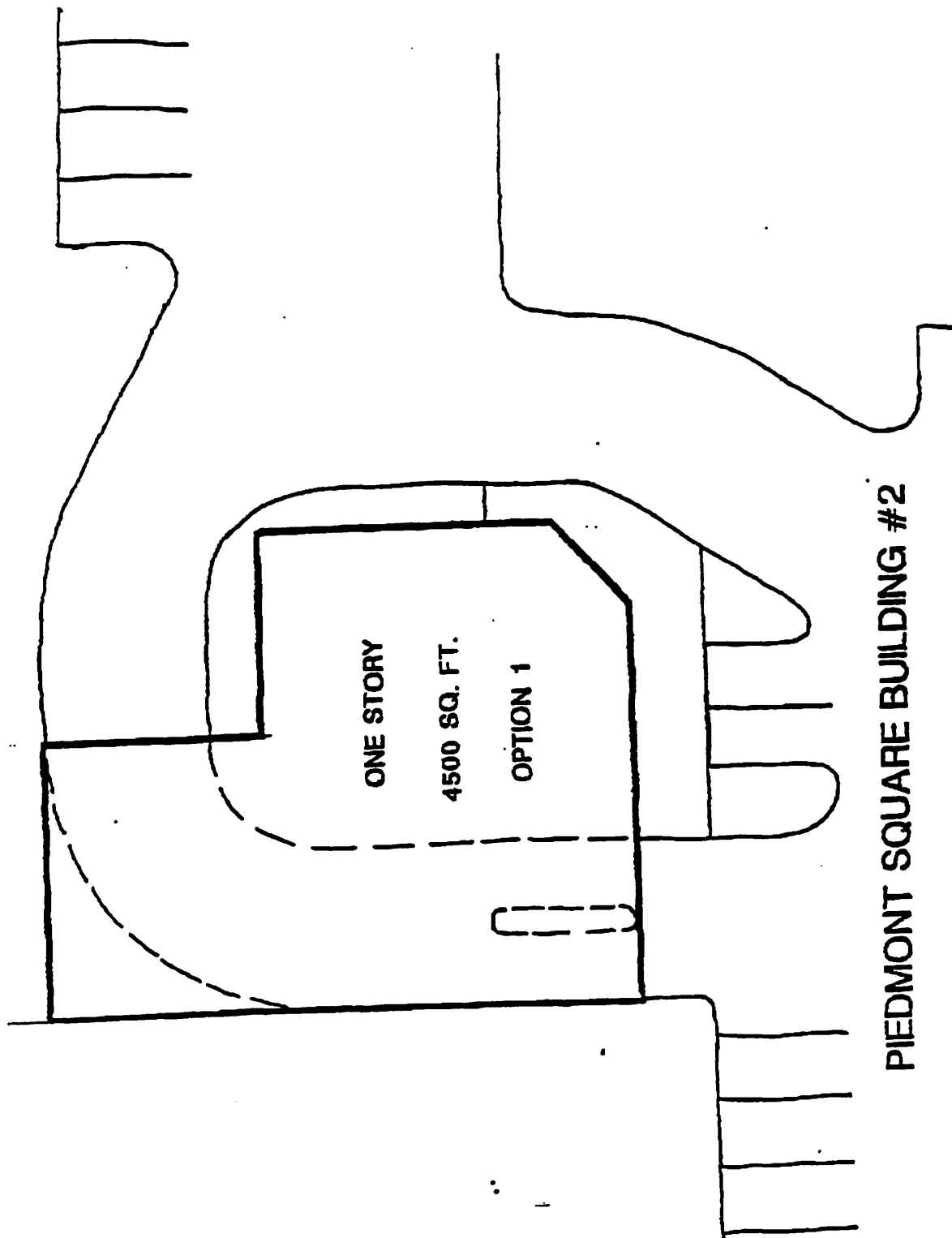

Daniel M. O'Connell, Jr.

DMO/tal

Enclosures

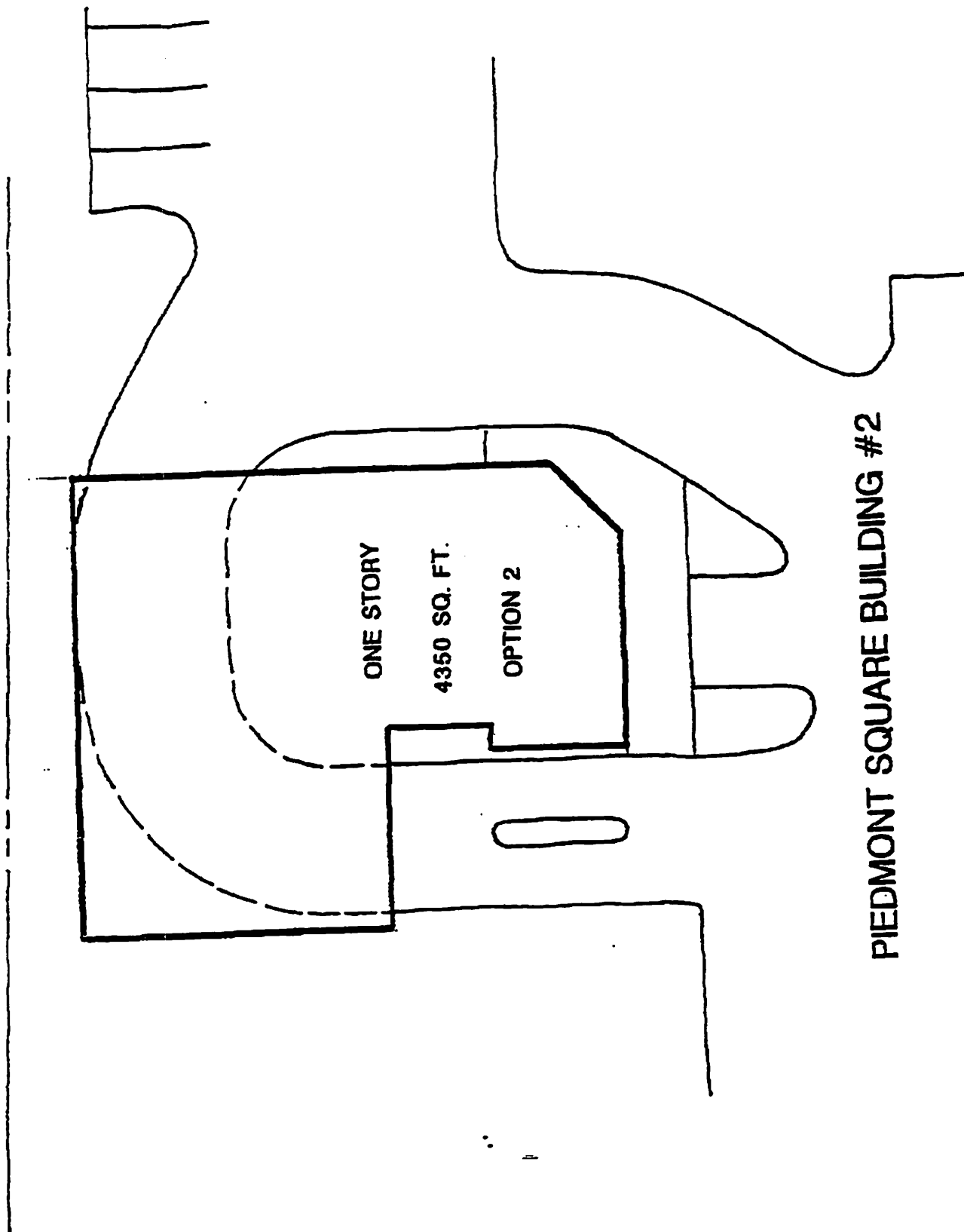
cc: Annemarie DiNardo Cleary, Esq. ✓
J. Gray Lawrence, Esq. ✓
Eric V. Zimmerman, Esq.
Inder Chawla, M.D.

h:\...chawla\robertson.ltr



PIEDMONT SQUARE BUILDING #2

As /



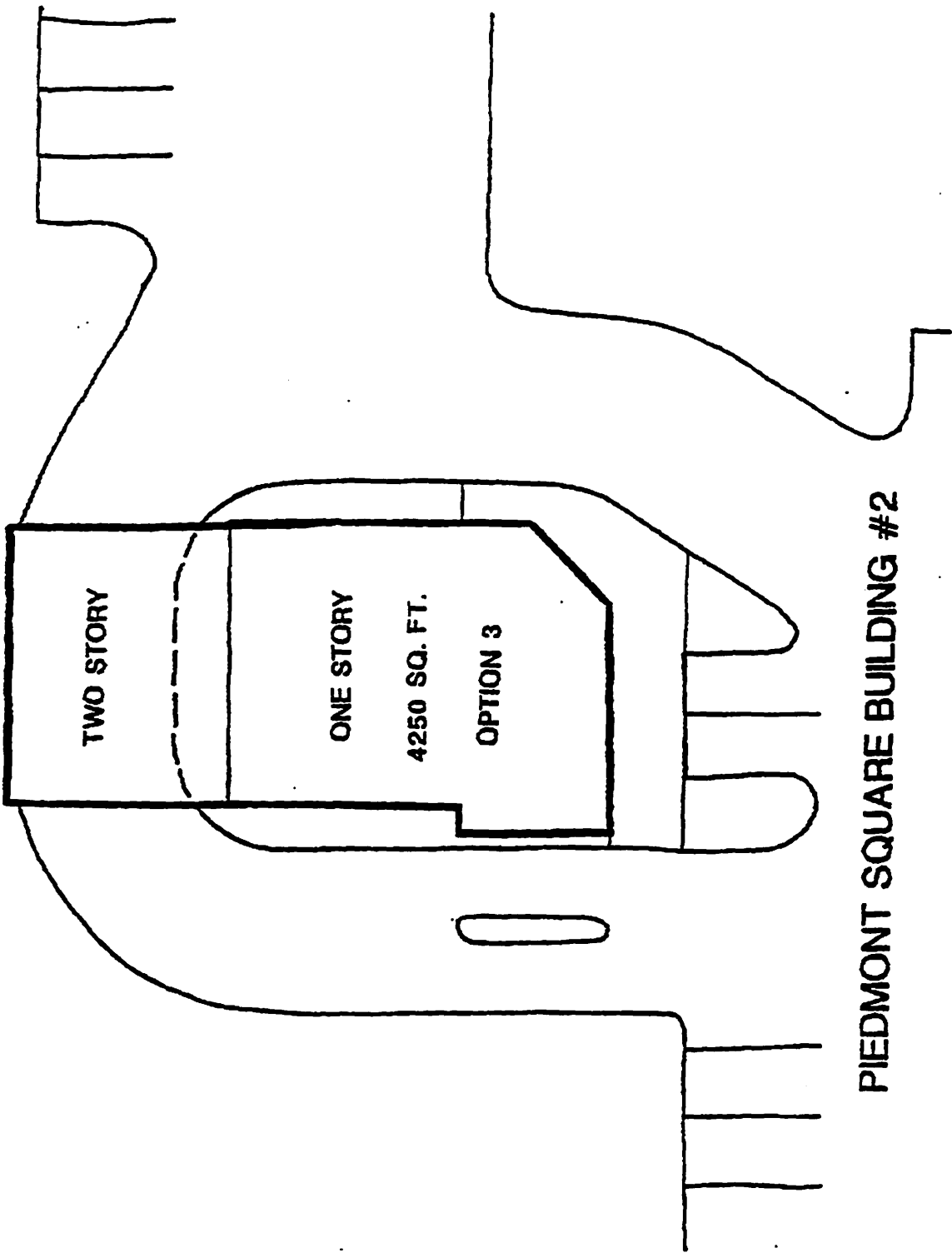
ONE STORY

4350 SQ. FT.

OPTION 2

PIEDMONT SQUARE BUILDING #2

42

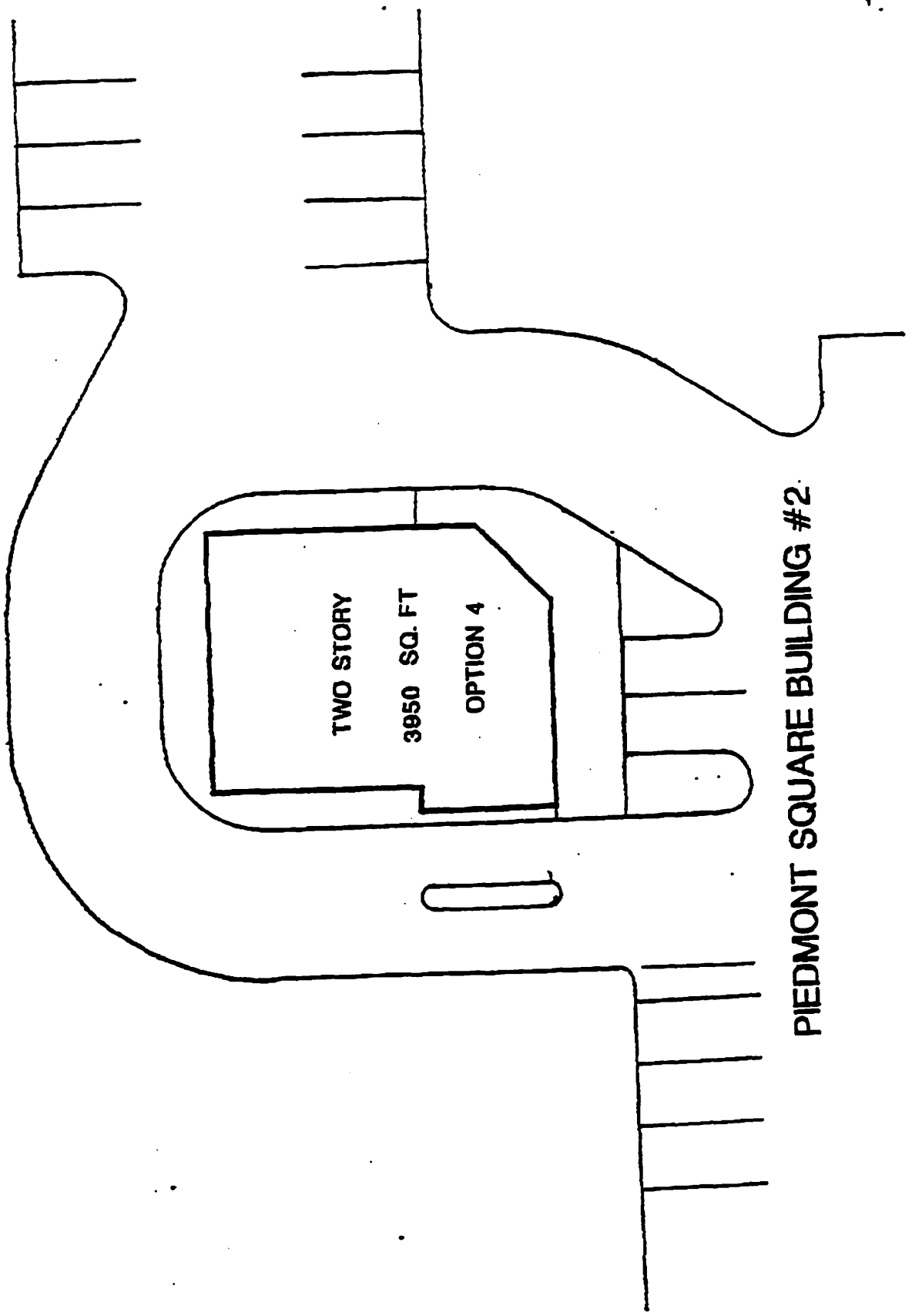


PIEDMONT SQUARE BUILDING #2

43

44

PIEDMONT SQUARE BUILDING #2



TOTAL P. 85

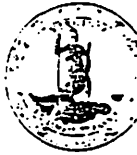
Burgerbusters, Inc.

V. CH93-266

Inder Chawla et al

TWENTIETH JUDICIAL
OF VIRGINIA

Filed 12/12/96



Pltff

Exhibit

5

Judge

RAYNER V. SNEAD, JUDGE RETIRED
CARLETON PENN, JUDGE RETIRED

WILLIAM SHORE ROBERTSON, JUDGE
POST OFFICE BOX 985
WARRENTON, VIRGINIA 22186

FAUQUIER, LOUDOUN AND
RAPPAHANNOCK COUNTIES

JAMES H. CHAMBLIN, JUDGE
POST OFFICE BOX 123
LEESBURG, VIRGINIA 22075

July 24, 1996

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82 Main Street
Warrenton, VA 22186

Eric V. Zimmerman, Esq.
305 Harrison Bldg., Third Floor
Leesburg, VA 22075

Re: Burgerbusters, Inc. v. Chawla, et al
Circuit Court of Fauquier County
In Chancery No: CH93-266

Gentlemen & Ms. Cleary:

On July 1, 1996, the Court conducted a hearing on whether the respondent can conform his building to the size and shape of the agreed development plan. After considering the evidence and argument of counsel, the Court concludes that the proposals offered (Defendant's Exhibits 1-4) do not conform this building.

As noted in the Court's letter opinion of January 29, 1996, "in terms of size and structure, the Court concludes that the deviation is more than trifling. The

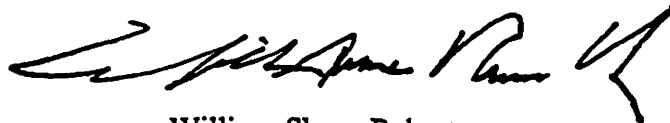
Gary M. Pearson, Esq., et al.
July 24, 1996
Page 2

structure built is only 43.4% of the one promised and its construction with a drive thru does not even schematically conform to the structure to be constructed."

The respondent is directed to produce a plan in conformity with the development plan in size and structure without a drive thru in 20 days. If not approved, the Court will order the present structure removed.

Ms. Cleary is requested to prepare an order according to this letter to which all counsel may note their exceptions.

Very truly yours,

A handwritten signature in black ink, appearing to read "William Shore Robertson", with a stylized flourish at the end.

William Shore Robertson

WSR/mkb

VIRGINIA: IN THE CIRCUIT COURT FOR THE COUNTY OF FAUQUIER

BURGERBUSTERS INC.,

Petitioner,

v.

CHANCERY NO. CH93-266

INDER CHAWLA, et al.,

Respondents.

ORDER

THIS MATTER came to be heard this 1st day of July, 1996, on the issue of whether the four renovation proposals submitted by the Respondents, Inder and Vera Chawla, conform the bank building to the size and shape of the building on the agreed development plan and on the Objection to Proposals filed by Petitioner in response to the Respondents' proposals. Upon consideration of the Respondents' proposals, the Petitioner's objection, the evidence presented by the parties and the argument of counsel, and for the reasons set forth in the Court's letter opinion of July 24, 1996, the Court finds that the Respondents' four proposals do not conform to the size and shape of the development plan as required by the Court's January 26, 1996 letter opinion.

Accordingly, it is hereby ADJUDGED, ORDERED and DECREED that Respondents shall submit a plan in conformity with the development plan in size and structure without a drive-thru on or before August 13, 1996, with a copy of such plan to be mailed to counsel for Petitioner on or before that date. It is further ORDERED that if

Respondents' revised plan is not approved, the present structure shall be removed.

ENTERED this 14th day of August, 1996.

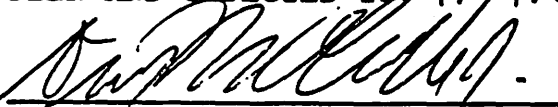


William Shore Robertson
Circuit Court Judge


SEEN:


Counsel for BurgerBusters Inc.

J. Gray Lawrence, Jr., Esquire
Annemarie DiNardo Cleary, Esquire
FAGGERT & FRIEDEN, P.C.
1435 Crossways Blvd., Suite 200
Chesapeake, Virginia 23320-2840
(757) 424-3232

SEEN AND OBJECTED TO *for the reasons stated in the*
 *record on July 11, 1996 as to why the*
plan submitted should be approved.
Counsel for Inder Chawla and
Vera V. Chawla

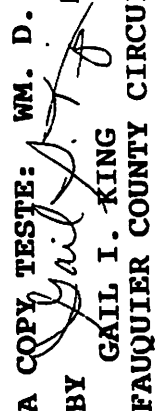
Daniel M. O'Connell, Jr., Esquire
O'CONNELL & MAYHUGH, P.C.
82 Main Street
Warrenton, Virginia 22186
(540) 347-2424


Counsel for Southern Financial
Federal Savings Bank

Eric V. Zimmerman, Esquire
PRICE & ZIMMERMAN
Third Floor
305 Harrison Street, S.E.
Leesburg, Virginia 22075
(540) 777-8850

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ENTERED AUG 14 1996

A COPY TESTE: WM. D. HARRIS, CLERK
BY  DEPUTY CLERK
GAIL I. KING
FAUQUIER COUNTY CIRCUIT COURT, VA.

V.

CH93-266

O'CONNELL & I

ATTORNEYS AND CC

82 MAIN

WARRENTON, VIRE

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METRO

TELECOPIER

Inder Chawla et al

Filed 12/12/96

PLTFF

Exhibit 6

Judge

DANIEL M. O'CONNELL, JR.
GEORGE M. MAYHUGH

August 9, 1996

Via Hand-Delivery

The Honorable William Shore Robertson
Fauquier County Circuit Court
40 Culpeper Street
Warrenton, Virginia 20186

RE: BurgerBusters, Inc. v.
Inder Chawla et al.:
Chancery No. CH93-266

Dear Judge Robertson:

In response to your letter opinion of July 30, 1996, I attach hereto two alternate plans for conformation of building no. 2.

As will readily be apparent, the only difference between the two plans is that one shows a drive-up window on the opposite side of the building where the drive-thrus are now located.

Both plans contemplate 4,325 square feet of inside space on a single floor. The current drive-thru lanes and canopy will be removed and replaced with the interior space.

Dr. Chawla has had discussions with the Town of Warrenton and has been advised that any change over the current plan will require a site plan amendment. While it does not appear that the Town would have a problem with either one of these plans, they cannot tell us definitely until the detailed plans are submitted pursuant to a regular request for an amendment under the site plan ordinance. Obviously we are not able to submit the plans for amendment until we know what plan or plans the Court is going to approve.

The Honorable William Shore Robertson
August 9, 1996
Page Two

The obvious reason for the two plans relates to the continuing desire of Dr. Chawla to continue the lease to Southern Financial. Dr. Chawla has been advised by Southern Financial that if it does not have at least some capability for customers to do business from their automobiles, they will vacate the premises and seek other space. For this reason Dr. Chawla would like approval of both plans so that when he gets into the details of the conformation of the building he will have the ability to retain the bank as a tenant.

If the Court approves both plans then Dr. Chawla will chose one and proceed to have the building rebuilt immediately in conformity therewith.


Anticipating that the Court will want to have some idea of the time it will take to complete the conformation, it is anticipated that detailed drawings could be prepared within 30 to 60 days and then submitted to the Town for amendment of the site plan. The site plan review process usually takes 30 to 45 days. Once the site plan review process is complete and Dr. Chawla knows exactly what the Town is requiring then he should be in a position to get bids from contractors for the reconstruction. These bids should be obtainable within another 30 to 45 days and the necessary demolition and reconstruction should take six to nine months. Realistically, in order to do the conformation, a one-year period would be reasonable in order to complete it.

I would be remiss if I did not make one last pitch for the plan preferred by the Chawlas, and that is with a drive-up window on the far side of the building as shown. There will be nothing more than a window opening in the side of the building where bank customers could drive up and pass their checks etc. to a bank employee inside. There will be no canopy or pneumatic tube. I hope the Court will take into consideration the history of this case and the fact that, in equity, fairness and a balance between competing interests is a consideration. Suffice it to say that conformation of this building is going to be expensive and it is hoped that the Court will see fit to allow the Chawlas at least the chance to retain their present tenant.

The Honorable William Shore Robertson
August 9, 1996
Page Three

I hope that the Court does not consider Dr. Chawla being presumptive assuming that the plan without the drive-up window will at least be approved. This plan is almost exactly the schematic footprint that is shown on Exhibit D to the lease.

Respectfully submitted,



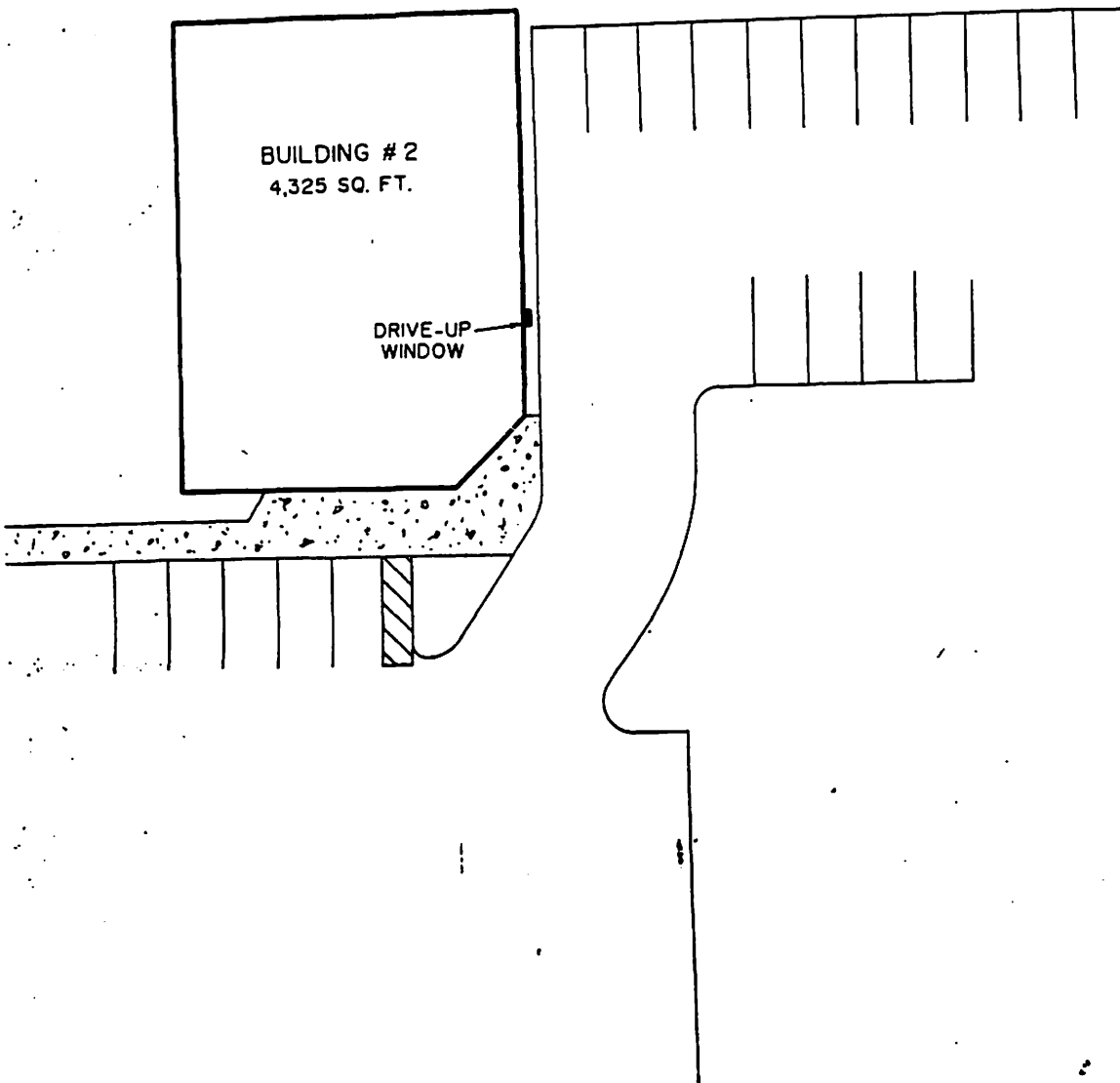
Daniel M. O'Connell, Jr.

DMO/tal

Enclosures

cc: Annemarie DiNardo Cleary, Esq. ✓
J. Gray Lawrence, Esq. ✓
Eric V. Zimmerman, Esq.
Inder Chawla, M.D.
Mr. Tom Dougher

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VIRGINIA: IN THE CIRCUIT COURT FOR Filed 12/12/96

BURGERBUSTERS INC.,

Petitioner,

v.

INDER CHAWLA, et al.,

Respondents.

Pltff Exhibit 7
WJR Judge

CHANCERY NO. CH93-266

ORDER

THIS MATTER CAME to be heard on this 21st day of August, 1996, upon consideration of the two renovation proposals submitted to the Court by the Respondents on August 9, 1996. Upon consideration of the same, the prior rulings of this Court and the argument of counsel,


It is hereby ADJUDGED, ORDERED and DECREED as follows:

1. the proposal with a drive-up window is rejected for the reasons set forth in the transcript, a court reporter having been present to record the proceedings;

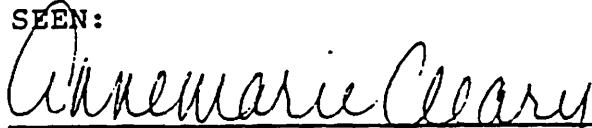
2. the proposal without the drive-up window, a copy of which is ~~attached hereto~~ filed hereto as Exhibit A, is approved.

It is further ORDERED that the parties shall appear before the Court at 1:00 p.m. on Wednesday, October 23, 1996, to present evidence on the timetable for completion of the renovations depicted in Exhibit A.

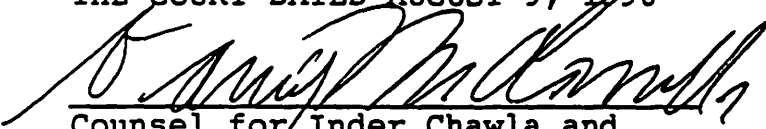
ENTERED this 3d day of Oct, 1996.

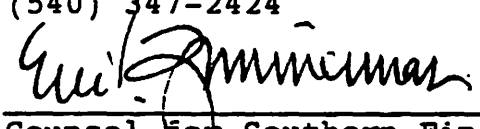

William Shore Robertson
Circuit Court Judge

SEEN:



Counsel for BurgerBusters, Inc.
J. Gray Lawrence, Jr., Esquire
Annemarie DiNardo Cleary, Esquire
FAGGERT & FRIEDEN, P.C.
1435 Crossways Blvd., Suite 200
Chesapeake, Virginia 23320-2840
(757) 424-3232

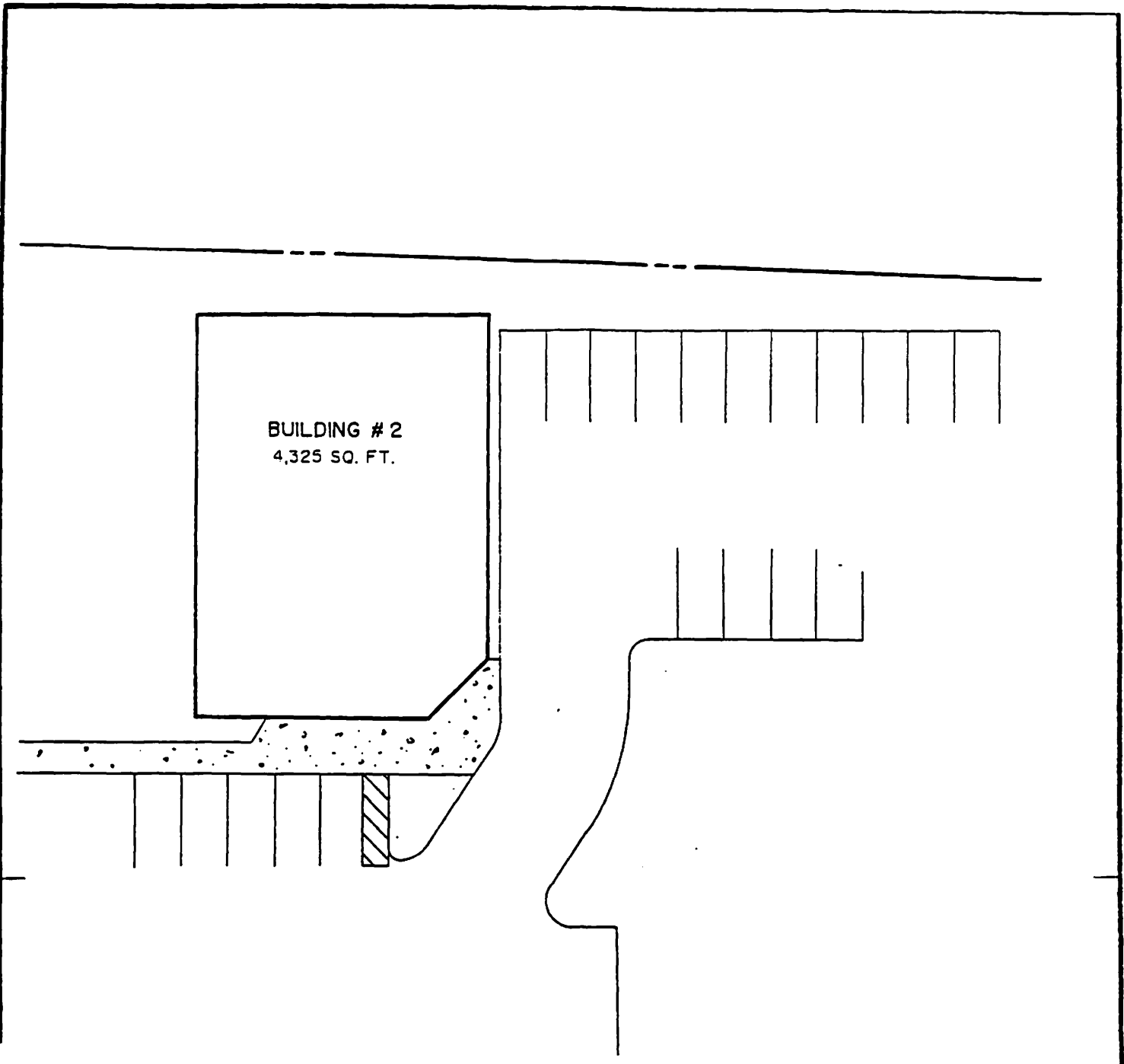
SEEN AND OBJECTED TO FOR THE REASONS
STATED ON THE RECORD AS WELL AS THE
COURT'S FAILURE TO RECOGNIZE THE
REASONS FOR APPROVAL OF THE PLAN WITH
A DRIVE-UP WINDOW AS SET FORTH IN
CO-RESPONDENTS' COUNSEL'S LETTER TO
THE COURT DATED AUGUST 9, 1996


Counsel for Inder Chawla and
Vera V. Chawla
Daniel M. O'Connell, Jr., Esquire
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Counsel for Southern Financial
Federal Savings Bank
Eric V. Zimmerman, Esquire
PRICE & ZIMMERMAN
Third Floor
305 Harrison Street, S.E.
Leesburg, Virginia 22075
(540) 777-8850

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A COPY TESTE: WM. D. HARRIS, CLERK
BY  DEPUTY CLERK
GAIL I. KING
FAUQUIER COUNTY CIRCUIT COURT, VA.



A site plan showing a rectangular building labeled 'BUILDING #2' with an area of '4,325 SQ. FT.'. The building is situated on a plot with a road or boundary line at the top. To the right of the building is a large rectangular area divided into vertical lines, possibly a parking lot. Below the building is a horizontal strip with a stippled pattern, and further down is another area with vertical lines. A curved line, possibly a driveway or path, connects the building area to the lower right. The entire plan is enclosed in a rectangular border.

BUILDING # 2
4,325 SQ. FT.

Inder Chawla et al

VIRGINIA: IN THE CIRCUIT COURT FOR THE

Filed 12/12/96

BURGERBUSTERS INC.,

Petitioner,

PLTff

Exhibit 8

Judge

v.

CHANCERY NO. CH93-266

INDER CHAWLA,
t/a SONINA PROPERTIES,

VERA V. CHAWLA,
t/a SONINA PROPERTIES,

and

SOUTHERN FINANCIAL FEDERAL SAVINGS BANK

SERVE: Georgia Derrico, Managing Officer
Southern Financial Federal Savings Bank
37 East Main Street
Warrenton, Virginia 22186

Respondents.

AMENDED BILL OF COMPLAINT

NOW COMES the Petitioner, BurgerBusters Inc. ("BurgerBusters"), by counsel, and as and for its Amended Bill of Complaint against the respondents, Inder Chawla and Vera V. Chawla, trading as Sonina Properties, (collectively, the "Chawlas"), and Southern Financial Federal Savings Bank (the "Bank") states as follows:

1. BurgerBusters is a Virginia corporation with its principal place of business in Charlottesville, Virginia.

2. Upon information and belief, the Chawlas are residents of the state of Maryland and own property located in Warrenton, Virginia, which is the subject of this action.

3. Upon information and belief, the Bank is a federal savings bank existing pursuant to the law of the United States of America and having a principal office in Warrenton, Virginia.

4. On or about January 22, 1992, BurgerBusters and the Chawlas entered into that certain Lease Agreement (the "Lease"). A copy of the Lease is attached hereto as Exhibit A and incorporated herein by this reference.

5. A Memorandum of Lease, dated September 23, 1992, evidencing the terms of the Lease, was recorded in the Clerk's Office of the Circuit Court of Fauquier County on May 6, 1993 in Deed Book 693 at Page 1349. A copy of the Memorandum of Lease is attached hereto as Exhibit B and incorporated herein by this reference.

6. Pursuant to the terms of the Lease, the Chawlas were obligated to, inter alia, develop and lease to Petitioner a Taco Bell Restaurant (the "Demised Premises") on a portion of the property owned by the Chawlas and referred to in the Lease as the "Shopping Center."

Count I

(Construction of Bank Building)

7. BurgerBusters hereby incorporates the allegations contained in paragraphs 1 through 6 as if set forth fully herein.

8. Under the terms of the Lease, the Chawlas agreed, inter alia, that there would be no other development in the Shopping Center except as substantially shown on the site plan attached to the Lease as Exhibit D (the "Site Plan").

9. Contrary to the terms of the Lease, the Chawlas initiated construction of a building (the "Bank Building") adjacent to the Demised Premises which Bank Building constitutes development other than as substantially shown on the Site Plan.

10. Under the terms of the Lease, the Chawlas also granted an easement (the "Easement") to BurgerBusters permitting BurgerBusters, its invitees, guests, employees and agents and their successors and assignees to use all parking areas, parking spaces, driveways, sidewalks, entrances and exits located on the Shopping Center throughout the entire term of the lease and any extension thereof and covenanting that the parking areas, parking spaces, driveways, sidewalks, entrances and exits would not be obstructed in any manner or in any way altered, reduced, relocated or modified in size without the prior written consent of BurgerBusters.

11. The Easement is further evidenced by that certain Deed of Easement, dated January 8, 1993, recorded in the Clerk's Office of Fauquier County in Deed Book 693 at Page 1366 (the "Deed of Easement"). A copy of the Deed of Easement is attached hereto as Exhibit C and incorporated herein by this reference.

12. The Chawlas' construction of the Bank Building has, and will continue to, obstruct and/or alter the parking areas, parking spaces and driveways in the Shopping Center contrary to the terms of and in violation of the Easement. The Chawlas have neither requested nor obtained BurgerBusters' written consent to said obstruction and/or alteration.

13. The Chawlas' construction of the Bank Building is an encroachment and trespass on the interests of BurgerBusters as granted by the Lease and Easement.

14. If the Chawlas are permitted to construct the Bank Building and lease it to the Bank and/or obstruct and/or alter the parking areas, parking spaces and driveways in the Shopping Center, BurgerBusters will be irreparably harmed and will have no adequate remedy at law.

Count II

(Bank Lease)

15. BurgerBusters hereby incorporates the allegations contained in paragraphs 1 through 14 as if set forth fully herein.

16. Upon information and belief, the Chawlas and the Bank have entered into or intend to enter into a lease (the "Bank Lease") for the Bank Building.

17. The Bank Lease is contrary to BurgerBusters' interests in the Demised Property and the Shopping Center as evidenced by the Lease and the Deed of Easement.

18. If the Bank is not enjoined from entering into the Bank Lease and from using the Bank Building in a manner contrary to the Lease and the Deed of Easement, BurgerBusters will be irreparably harmed and will have no adequate remedy at law.

COUNT III

(Parking Spaces)

19. BurgerBusters hereby incorporates the allegations contained in paragraphs 1 through 18 as if set forth fully herein.

20. Pursuant to the terms of the Lease, the improvements constructed by the Chawlas on the Demised Premises were to include at least thirty-three (33) parking spaces.

21. There are fewer than thirty-three parking spaces on the Demised Premises.

22. The Chawlas have breached the Lease by failing to construct the minimum number of parking spaces on the Demised Premises.

WHEREFORE, BurgerBusters respectfully requests that this Court enter an Order: (i) permanently enjoining the Chawlas from further development and construction at the Shopping Center other than in accordance with the terms of the Lease, (ii) permanently enjoining the Chawlas from further development and construction at the Shopping Center contrary to the Easement; (iii) permanently enjoining the Chawlas from constructing the Bank Building; (iv) permanently enjoining the Bank from using and/or leasing the Bank Building in a manner contrary to the Lease and the Easement; and (v) awarding BurgerBusters its damages for breach of contract, trespass and encroachment, together with attorney's fees and costs expended in this matter, and such other and further relief as this Court may deem appropriate.

BURGERBUSTERS INC.

By: *Annemarie Cleary*

Of Counsel

Robin C. Gulick, Esquire
Gary M. Pearson, Esquire
Gulick, Carson & Pearson
9 Culpepper Street
Warrenton, Virginia 22186
(703) 347-2660

Alan M. Frieden, Esquire
Stewart J. Sacks, Esquire
Annemarie DiNardo Cleary, Esquire
Faggert & Frieden, P.C.
870 Greenbrier Circle, Suite 300
Chesapeake, Virginia 23320
(804) 424-3232

CERTIFICATE OF MAILING

I hereby certify that a true copy of the foregoing Amended Bill of Complaint was mailed to Daniel M. O'Connell, Jr., Esquire, 82 Main Street, Warrenton, Virginia 22186, and Georgia Derrico, Managing Officer, Southern Financial Federal Savings Bank, 37 East Main Street, Warrenton, Virginia 22186, on December 17th, 1993.

Annemarie Cleary

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