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IN THE  
**Supreme Court of Virginia**

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RECORD NO. 990404

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**GAIL STEPP and MARIE STEPP,**  
RICHMOND *Appellants,*

**v.**

**JAMES A. FOSTER, et al.,**

*Appellees.*

---

**JOINT APPENDIX**  
**Volume III**

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1 V I R G I N I A:

2 IN THE CIRCUIT COURT OF FAIRFAX COUNTY

3 - - - - - X

4 GAIL STEPP, individually and as :  
trustee, et al., :

5 :  
6 Plaintiffs, :

7 v. : In Chancery No. 146295

8 JAMES A. FOSTER, individually and :  
as trustee, et al., :

9 Defendants. :  
10 - - - - - X

11 Falls Church, Virginia

12 Wednesday, November 5, 1997

13 DEPOSITION OF MARVIN E. LEAR, the witness herein,  
14 called for examination by counsel for the plaintiffs in the  
15 above-entitled action, pursuant to notice, the witness being  
16 duly sworn by DEBORAH S. CUBBAGE, a notary public in and for  
17 the Commonwealth of Virginia at Large, at the law offices of  
18 Kasimer & Ittig, 7653 Leesburg Pike, Falls Church, Virginia,  
19 commencing at 3:19 o'clock p.m., the proceedings  
20 being taken down by stenotype by DEBORAH S. CUBBAGE and  
21 transcribed under her direction.

22

23

(November 5, 1997)



\* \* \*

1 BY MR. ANNINO: (Resuming)

2 Q. All right. And Mr. Brady was an attorney?

3 A. Yes.

4 Q. Is he still in the area?

5 A. I think he is still living.

6 Q. Is he still practicing, do you know?

7 A. I don't know.

8 Q. Have you attempted to contact him at all?

9 A. No.

10 He was our lawyer when we were building a golf  
11 course.

12 Q. And what exactly did he tell you about your duties  
13 and responsibilities?

14 A. Well, he indicated that all we had to do was to go  
15 back to the community and form an organization -- a board or  
16 whatever you want to call it -- to manage the park; and as  
17 trustee, that was our first duty. And once we had done that,  
18 then that was about all we had to do for -- in connection with  
19 this.

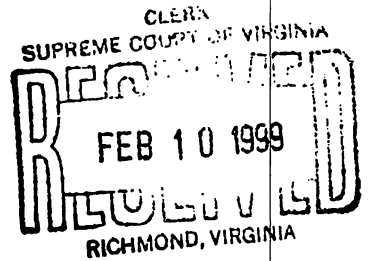
20 Q. He didn't discuss with you any specifics about  
21 dealing with your co-trustees or your obligations to  
22 beneficiaries of the trust?

23 A. I don't recall that, any of that conversation.

(November 5, 1997)

\* \* \*





1       V I R G I N I A

2               IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

3       . . . . .

4       GAIL STEPP, Individually       .

5       and as trustee, et al.,       .

6                       Plaintiffs,       .

7       vs.                       .       CHANCERY NO. 146295

8       JAMES A. FOSTER,       .

9       Individually and as       .

10       trustee, et al.,       .

11                       Defendants.       .

12       . . . . .

13                               Fredericksburg, Virginia

14                               Wednesday, February 18, 1998

15       Deposition of

16                       WILLIAM VAN S. JACKSON

17       at 60 Rifkind Drive, Fredericksburg, Virginia,

18       commencing at 10:00 a.m., Wednesday, February 18,

19       1998, before Elaine A. Merchant, a Registered

20       Professional Reporter and Notary Public.

21

22

ORIGINAL

\* \* \*

1 area.

2 Q While you lived there, were you a part of  
3 a community association called Belmont Bay Community  
4 Associates?

5 A Yes, I was.

6 Q And when did you first become associated  
7 with that organization?

8 A When it was founded.

9 Q And did you hold any office in that  
10 association?

11 A Yes. I was the president of it for a few  
12 years.

13 Q And how many terms did you serve, do you  
14 remember?

15 A I don't remember, but it was probably  
16 four or five years.

17 Q And when was it that you first became  
18 president?

19 A I don't remember the date.

20 Q You don't remember specifically?

21 A No.

22 MR. CLARY: I have a group of documents



1     that I'm going to ask the reporter to mark as  
2     Exhibit Number 1.

3                     (Jackson Deposition Exhibit Number 1 was  
4     marked for identification.)

5                     BY MR. CLARY:

6             Q     Have you looked at these documents, sir?

7             A     Yes, I glanced at them, yes.

8             Q     And I notice the first document begins  
9     with the date February 11, 1974; is that correct?

10            A     Yes, but I think the organization was  
11     founded before that time.

12            Q     Is that the date, however, that you first  
13     became the president of that association?

14            A     I think I was president before as near as  
15     I can remember.

16            Q     And the group of documents that are  
17     Exhibit 1, what are those?

18            A     Minutes of the meetings.

19            Q     And are these minutes during the period  
20     while you were president?

21            A     Yes, I assume so.

22            Q     I notice that with the exception of one

1 or two pages there's a unique feature of all of  
2 these documents in that they all have sort of a blue  
3 kind of like form like appearance. What is that?  
4 Why do they look that way?

5 A I worked at Fort Belvoir and had access  
6 to a mimeograph machine.

7 Q So all of these are mimeographed?

8 A Yes.

9 Q And did you personally mimeograph all of  
10 these?

11 A Yes.

12 Q And why did you mimeograph them?

13 A My handwriting is very poor. That  
14 primarily was the reason. And also for a matter of  
15 record keeping.

16 Q And how many copies would you generally  
17 make, bunches?

18 A A few more than a number of members that  
19 were at that time.

20 Q What did you do with the copies that you  
21 mimeographed?

22 A Distributed them at each meeting.



1 Q And who did you distribute them to?

2 A The members who were there at the  
3 meeting. And then the ones who were not at the  
4 meeting, I hand-carried them to their post boxes and  
5 also included people who owned property but did not  
6 live there. If I had their addresses, I sent the  
7 material to them.

8 Q So you mailed them to them?

9 A The minutes, yes.

10 Q And is that why you mimeographed them, so  
11 you could have enough copies to do that?

12 A Yes, that's right.

13 Q Now, you personally had them  
14 mimeographed?

15 A I did it myself, yes.

16 Q And did you personally mail them?

17 A Yes.

18 Q And how did you know the address to send  
19 them to people who didn't live in the neighborhood?

20 A I probably got them from Jim Foster  
21 because he was the unofficial keeper of the park, as  
22 it were, before they became organized into an

1 organization.

2 MR. CLARY: I don't have any further  
3 questions.

4 EXAMINATION

5 BY MR. ANNINO:

6 Q Mr. Jackson, the documents that you have  
7 before you which are going to be marked as  
8 Exhibit 1, did you have those in your possession?

9 A No.

10 Q Where did they come from?

11 A Jim Foster gave them to me.

12 Q When did he give them to you?

13 A About two weeks ago, I guess.

14 Q And have you talked with Mr. Foster?

15 A Yes. He's been down here twice.

16 Q And in your meetings with Mr. Foster what  
17 did you discuss?

18 A The suit that has been filed against him.

19 Q And what did he tell you about it?

20 A Merely that he was accused of --

21 Let's see. What did he say?

22 My memory.



1                   He discussed that he was being accused  
2   of --

3                   I'm not sure what really.

4                   You have to excuse me. My memory -- I'm  
5   82 years old and I tend to forget things.

6           Q       You're 82 years old and you tend to  
7   forget things?

8           A       Yeah.

9           Q       Did Mr. Foster tell you that an issue in  
10   the case was whether absentee lot owners had been  
11   notified of meetings?

12          A       Yes, yes.

13          Q       He told you that?

14          A       Yes, he did.

15          Q       Did he prompt you or suggest to you or  
16   attempt to remind you about events that occurred  
17   back in 1974?

18          A       We discussed things very briefly about  
19   the past of the organization.

20          Q       And did he suggest to you that you had  
21   mailed the documents that are marked as Exhibit 1 to  
22   absentee lot owners?

1           A       Yes.

2           Q       You didn't have any independent  
3       recollection of that prior to your speaking with  
4       him?

5           A       Not until I saw these minutes.

6           Q       And I notice in the documents there is no  
7       list of persons to whom these minutes were mailed.  
8       Why is that?

9           A       I guess it was a matter of saving time  
10      when I prepared the monthly reports to the  
11      committee.

12          Q       You didn't actually have a mailing list  
13      to work from, did you?

14          A       Yes, I did.

15          Q       Where is the mailing list?

16          A       I don't know where it is now. That was  
17      25 years ago.

18          Q       And it would be fair to say that  
19      independent of your conversations with Mr. Foster  
20      you would have no independent recollection of  
21      actually mailing the documents?

22                   MR. CLARY: Objection.

1 MR. TOLCHIN: Objection.

2 MR. CLARY: I'm going to object to that  
3 because he's testified that he didn't recall it  
4 until he saw the documents.

5 MR. TOLCHIN: He said once he saw the  
6 documents he did have the independent recollection.

7 MR. CLARY: Right.

8 BY MR. ANNINO:

9 Q Do you have any independent recollection  
10 of actually mailing the documents that are marked as  
11 Exhibit 1 to absentee lot owners?

12 A I had never thought about it until I saw  
13 these minutes.

14 Q Are there any absentee lot owners  
15 reflected in the documents that would help you  
16 determine whether, in fact, you sent them?

17 A Well, it brought back my memory of it. I  
18 know that I hand-carried them to all the members.  
19 And then I got, I think, from Jim Foster the  
20 addresses of the absentee -- or the people who  
21 bought lots but did not live there and I mailed them  
22 out.



1           Q       Do you know when you got that list from  
2       Mr. Foster?

3           A       I couldn't tell you.

4           Q       And you haven't seen that list recently?

5           A       No.

6           Q       And do you know how Mr. Foster obtained  
7       the list?

8           A       There were very few people out there at  
9       the time. Jim, I think, was the first person to  
10      build in the area. And I might have been second or  
11      third. So we got together, we talked and so forth.

12          Q       Did you actually go out to the courthouse  
13      to determine who owned the lots at that time?

14          A       No, I did not.

15          Q       Did Mr. Foster tell you that he had done  
16      that?

17          A       Yes, he did. I'm pretty sure that he  
18      did.

19          Q       He told you that?

20          A       I think so. Because he gave me the list.

21          Q       Why is it that you didn't keep the list?

22          A       Well, when I moved I just probably threw

1       it in the trash. It was of no value to me when I  
2       left there.

3           Q       You didn't throw in the trash, though,  
4       the documents that are marked as Exhibit Number 1;  
5       is that right?

6           A       These, the Exhibit Number 1?

7           Q       Right.

8           A       Yes, I didn't keep them.

9           Q       Who kept them?

10          A       Jim Foster gave me these.

11          Q       And he gave you those approximately two  
12       weeks ago?

13          A       Two to three weeks ago, yes.

14          Q       Did he indicate where he had obtained  
15       them?

16          A       No, but I assume that he --

17                   Because he continued to live there and  
18       still lives there, I guess they still have an  
19       organization so I guess he kept the minutes, the  
20       same as I kept them until I left.

21          Q       Do you know Marvin E. Lear?

22          A       Yes.

1           Q       And Mr. Lear was involved in this  
2 organization at the time you were involved in it?

3           A       As a member he was, yes, he was active.

4           Q       And would it change your recollection at  
5 all if you had been advised that Mr. Lear had  
6 testified that absentee lot owners were not advised  
7 of this organization?

8                   MR. CLARY: Object to the form. I object  
9 to the question as misstating evidence and not based  
10 on facts in evidence.

11                   You can still answer.

12                   THE WITNESS: Could you repeat the  
13 question?

14                   (The Court Reporter read back the  
15 following:

16                   QUESTION: And would it change your  
17 recollection at all if you had been advised that  
18 Mr. Lear had testified that absentee lot owners were  
19 not advised of this organization?)

20                   THE WITNESS: I have no recollection to  
21 that at all.

22                   BY MR. ANNINO:



1           Q       What about these documents prompted you  
2       to remember that you had sent the minutes to  
3       absentee lot owners?

4           A       Simply by association. Reading about the  
5       minutes, then it came back to me. Of course I kept  
6       copies for myself. I distributed copies to each  
7       member. And then I remembered that I had talked to  
8       Jim about addresses of absentee lot owners and he  
9       thought it would be a good idea also to send them  
10      copies.

11          Q       Did you make any record of sending copies  
12      to absentee lot owners?

13          A       I guess only in the sense of the  
14      financial -- what was five cents a letter, five  
15      cents a stamp in those days or three cents a stamp.  
16      That's all I can tell you.

17          Q       Can you identify for me any absentee lot  
18      owners that you sent the minutes to?

19          A       I couldn't possibly. I don't remember  
20      that.

21          Q       Are any of the names on the first page of  
22      Exhibit Number 1, for example, absentee lot owners?

\*       \*       \*

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1 with the collection of funds for the organization?

2 MR. TOLCHIN: I'm going to object unless  
3 you show it to him, which it's in the exhibits right  
4 here.

5 MR. CLARY: Let me show it to you.

6 THE WITNESS: Now, what was the question  
7 again?

8 BY MR. ANNINO:

9 Q Does that letter help you recall there  
10 being problems with --

11 A It brings become vague memories, but I  
12 couldn't give you specifics on it.

13 Q And the memories it brings back are that  
14 collection of funds to maintain the park area was a  
15 problem?

16 A Evidently that's so.

17 Q Can you tell me what your practice was  
18 about how far in advance of a meeting you would send  
19 notices or letters out to absentee lot owners?

20 A I think it was probably a week advising  
21 them of the meetings, inviting them to attend if it  
22 was possible for them to do so. Very few attended.

1 Q But you can't be certain of that?

2 A I can't give you specific numbers.

3 Q Who did you turn the records over to  
4 after you left office?

5 A Evidently to my successor. I don't  
6 really remember.

7 Q Do you know who your successor was?

8 A No. I don't know who took charge of them  
9 after I left.

10 MR. ANNINO: Can we number these pages or  
11 something?

12 MR. CLARY: Sure. I'll number them.

13 MR. TOLCHIN: Do you want to write on  
14 these?

15 MR. CLARY: Not really, but I don't have  
16 any other way of doing it.

17 (Discussion held off the record.)

18 BY MR. ANNINO:

19 Q Mr. Jackson, we've had the court reporter  
20 number the pages of Exhibit Number 1. I'm going to  
21 direct your attention to the document that starts at  
22 page 34.

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - - X

GAIL STEPP, INDIVIDUALLY AND :  
AS TRUSTEE, ET AL., :

Plaintiffs, :

-vs-

In Chancery No. 146295

JAMES A. FOSTER, INDIVIDUALLY :  
AND AS TRUSTEE, ET AL., :

Defendants. :

- - - - - X

Courtroom No. 5B  
Fairfax County Courthouse  
Fairfax, Virginia

Wednesday, March 4, 1998

The above-entitled cause came on for trial before  
THE HONORABLE KATHLEEN H. MacKAY, Judge, in and for the  
Circuit Court of Fairfax County, Virginia, at 9:38 o'clock  
a.m., the proceedings being recorded by stenotype by  
GENEVIEVE R. BATA of DSC Reporting, Inc.

(March 4, 1998)

## 1 APPEARANCES:

2 On behalf of the plaintiffs:

3 STEPHEN JOSEPH ANNINO, ESQUIRE  
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5 7653 Leesburg Pike  
6 Falls Church, Virginia 220437 On behalf of the defendant trustees James A.  
8 Foster, Marvin Lear, and Carolann Wright:9 MATTHEW A. CLARY III, ESQUIRE  
10 Clary & Moore  
11 10306 Eaton Place - Suite 240  
12 Fairfax, Virginia 2203013 On behalf of the defendant Belmont Bay Community  
14 Association, Inc.:15 EDWARD J. TOLCHIN, ESQUIRE  
16 Fettmann, Tolchin & Majors, P.C.  
17 10615 Judicial Drive - Suite 502  
18 Fairfax, Virginia 2203019  
20  
21  
22  
23  
(March 4, 1998)



P R O C E E D I N G S

(The court reporter, Genevieve R. Bata, was previously duly sworn by the clerk of the court.)

THE COURT: I'm going to limit each attorney to 15 minutes. Actually, I'm going to give Mr. Tolchin and Mr. Clary each ten and I'm going to give Mr. Annino 20. So please bear that in mind.

Mr. Annino?

MR. ANNINO: Thank you, Your Honor.

Your Honor, I first want to say that, on behalf of my clients and myself, we appreciate your patience. I know this has been a long trial. And you have been accommodating at every turn. And we do appreciate that.

Your Honor, as you've indicated you want me to do, I will focus on the Amended Bill of Complaint and tie some of the evidence that was presented before you to the allegations in the Amended Bill of Complaint.

First, Your Honor, in Count I -- and a lot of what this case is really about is declaratory relief..

We have people in this subdivision that need some guidance about what their rights and responsibilities are. First and foremost of those is Mr. Stepp. And I want to talk about the issues, as I see them, first with respect to

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1 Mr. Stepp and whether or not he is or is not a trustee.

2 With respect to that issue, Your Honor, the cases,  
3 I believe, turn on the power of removal which is set forth in  
4 the trust deed. And the trust deed is the sole memorial or  
5 document which governs what rights the other trustees have to  
6 remove a co-trustee.

7 And the case law and the authorities, particularly  
8 Scott on Trusts in Section 107.2, indicate that "a removal  
9 of a co-trustee must be strictly in accordance with the terms  
10 of the trust document."

11 And in Scott they cite for that proposition a  
12 Fourth Circuit case Spearis Sand and Clay Works v. American  
13 Trust Company, which is at 37 Fed. 2d 572.

14 Now, if we start from that proposition, we must  
15 then look to the terms of the trust deed to determine whether  
16 or not the co-trustees in this case properly exercised any  
17 right they might have had to remove Mr. Stepp.

18 We have of course in evidence the appointment of  
19 successor trustee's deed that was duly recorded in the land  
20 records.

21 THE COURT: But your theory is that they removed  
22 him.

23 MR. ANNINO: I believe so, Your Honor.

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1 THE COURT: Rather than that he resigned.

2 MR. ANNINO: Correct. That would be the only --  
3 that would be the only evidence that I think they presented.

4 The basis for -- and Mr. Foster, I believe,  
5 testified in his deposition that he didn't in fact resign.  
6 He simply believed that he was refusing to act as trustee.

7 And the --

8 THE COURT: But that is a resignation of sorts.

9 MR. ANNINO: Well, Your Honor, the resignation, I  
10 think, would have to be in writing and clear and unequivocal.  
11 The actions taken by Mr. Stepp would hardly be considered to  
12 be evidence of a resignation.

13 The authorities in fact indicate that a trustee  
14 cannot simply disregard or deny his responsibilities or  
15 refuse to exercise his responsibilities, once having accepted  
16 the trust. He has to in fact get permission from the court  
17 to resign as a trustee.

18 THE COURT: Well, when you -- as I recall, when I  
19 used to draft wills, I used to draft provisions all the time  
20 that someone would act as a trustee in an inter vivos trust  
21 or an executor in a will. And I always put in a provision,  
22 as this was, that in the event of an incapacity or refusal to  
23 act then a successor trustee would be appointed. And I don't

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1 recall ever having thought that my clients had to go to court  
2 in order to effect that provision.

3 Are you saying that in all cases where a trustee is  
4 named the only way you can resign or refuse to act is through  
5 a court order?

6 MR. ANNINO: The case law would indicate and the  
7 authorities in Scott on Trusts would indicate that, once  
8 the trustee has accepted the position of trustee, he cannot  
9 simply discharge or deny his responsibilities under the trust  
10 without some formal action being taken to seek the remission  
11 of the beneficiaries or the court to effect that removal.

12 The act -- the power to act to remove the trustees  
13 is set forth in the trustee's deed. And in order for there  
14 to be effective removal by the co-trustees, there has to be  
15 something that the trustee was required to do. There has to  
16 be some action on his part that would entitle a co-trustee to  
17 remove him, some action on his part that is set forth in the  
18 trustee's deed which would specify the basis for a removal.

19 And that -- those powers of appointment and sub-  
20 stitution are set forth in the trustee's deed.

21 The specifics are the event of -- "to elect or  
22 appoint a successor trustee in the event of death," which  
23 clearly didn't happen, "removal from the state, incapacity

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1 to act, refusal to act, or resignation of any trustee or  
2 trustees."

3 And in this case we don't have any act that was  
4 required of the trustees to take. At most, we have a  
5 situation where Mr. Stepp refused to correct something that  
6 did not need correcting.

7 The evidence from the defendants' perspective is  
8 that the reason that Mr. Stepp was being asked these  
9 questions was that there was a perception that there was a  
10 problem in the land records with his appointment of trustee.

11 And in fact, that was simply not the case.

12 THE COURT: But nobody knew that, Mr. Annino.  
13 Nobody knew that.

14 I mean, has there been any evidence presented that  
15 this community knew that that clerical error was not -- that  
16 there was in fact no error?

17 Mr. Stepp's own testimony was, as I recall, that  
18 he actually went to the land records and searched quietly in  
19 1996, right?

20 That issue came up repeatedly between 1993 and  
21 1995.

22 MR. ANNINO: But Mr. Foster indicated that he was  
23 confident that Mr. Stepp was a trustee in his deposition

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1 testimony.

2 THE COURT: He thought that the intent of the  
3 community was that he was a trustee.

4 He didn't ever testify, as I recall, that he knew  
5 that the Medlin theory that they were not properly recorded  
6 was not -- was correct -- was not correct. I don't know that  
7 he ever testified that he understood that.

8 I mean, you can point that out to me, if you can.

9 MR. ANNINO: In his deposition testimony,  
10 Your Honor -- on page 76 of the transcript of his deposition,  
11 which is part of the court's records, Mr. Foster testified as  
12 follows:

13 Question: "Well, what's your interpretation,  
14 Mr. Foster? Is it the trustees that elect or appoint a  
15 successor trustee?"

16 Answer: "My understanding is we appoint successor  
17 trustees."

18 Question: "And what's the function of a trustee --  
19 and that's the function of the trustee, correct?"

20 Answer: "Yes."

21 Question: "Not the beneficiaries or the board  
22 that's referred to in the trustee's deed, correct?"

23 Answer: "That's correct."

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1           Question: "And what's your understanding of when  
2 you need to do that?"

3           Answer: "It says right here 'in the event of  
4 death, removal from the state, incapacity to act, refusal to  
5 act, or resignation of any trustee or trustees.'"

6           Question: "Is it your understanding that those are  
7 the only events which would allow you to appoint a successor  
8 trustee?"

9           Answer: "I would have to by this document."

10          Question: "You would agree that other than this  
11 document there are no other documents that would assist you  
12 or guide you in determining your responsibilities as  
13 trustees?"

14          Answer: "This is the only document I know that  
15 governs the trustees."

16          Question: "Now, Mr. Stepp didn't die, correct?"

17          Answer: "That's correct."

18          Question: "And he didn't leave the state, did he?"

19          Answer: "No."

20          Question: "And he wasn't incapacitated to act,  
21 correct?"

22          Answer: "I don't know. To my knowledge, he  
23 wasn't."

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1 Question: "And he didn't resign, correct?"

2 Answer: "No."

3 Question: "Is it correct that --"

4 Answer: "Yes, he did not resign."

5 Question: "And there wasn't anything for him to do  
6 at the time he was called upon at that meeting, was there?"

7 Answer: "Not at that meeting, no."

8 And that's from his deposition testimony starting  
9 at page 76, line 16, and going through page 78, line 3.

10 THE COURT: I read it.

11 MR. ANNINO: So clearly Mr. Foster didn't view  
12 anything that Mr. Stepp said as a resignation.

13 And indeed, the evidence indicates that from the  
14 defendants' perspective there were continued communications  
15 with Mr. Stepp after that May 1994 meeting and the continued  
16 communications by other individuals in the community.

17 Mr. Foster, I believe, didn't have any other  
18 conversations after that.

19 But clearly -- put yourself in Mr. Stepp's  
20 position, Your Honor.

21 He has been told -- and this is uncontradicted --  
22 by Mr. Vandenberg in 1993 that he is not a trustee. He is  
23 told that during an attempt by Mr. Vandenberg and Mrs. Medlin

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1 when they go around to collect dues. And the next thing that  
2 happens is -- and this is from the defendants' own evidence  
3 -- he meets with Mr. Arnold. Mr. Arnold says "We're  
4 developing this criteria for you to be a trustee. And we  
5 want there to be a community referendum for you to be a  
6 trustee."

7 And all of these things are done on the auspice of  
8 "We need to correct the documents in the land records. We  
9 know that you are a trustee. But we need to correct them in  
10 the land records."

11 That is a premise that is false or mistaken.

12 It is a fact that there was nothing that Mr. Stepp  
13 had to do at that time. His trustee's deed was duly  
14 recorded. This was a misimpression by members in the  
15 community. He didn't have to do anything about it.

16 So the next thing, if you look at the evidence and  
17 the documents in the case from Mr. Stepp's perspective, he is  
18 presented with basically a challenge to himself being a  
19 trustee. He is told by Mr. Arnold that there's going to be  
20 this criteria developed.

21 And you'll see in Exhibit 28, the bylaws, Article  
22 XII, there is criteria for a trustee presented.

23 And he also sees an agenda for this May 3rd, 1994,  
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1 meeting, which is Exhibit 37, which sets forth specifically  
2 that "We're going to at this meeting adopt an amendment to  
3 the bylaws for criteria of a trustee. And we're going to  
4 nominate and appoint" -- let me read specifically from the  
5 board resolutions of that agenda. This is Exhibit 37.

6 "Board Resolution No. 1: A proposed amendment to  
7 the bylaws establishing criteria or nominating trustees of  
8 the association.

9 "Board Resolution No. 2: Ratification of the  
10 board's nomination of Gail Stepp as trustee of the community  
11 association."

12 And then you look at the minutes of that May 3rd,  
13 1994, meeting, which is Exhibit 65, Deposition 3, and you'll  
14 see that in fact there was a nomination and that there was --  
15 that Mr. Stepp declined the nomination.

16 You'll also see in Exhibit No. 39, which is in  
17 evidence, a ballot of officers in which the trustee/director  
18 position is set forth on the ballot of officers and under-  
19 neath that the three names listed: Jim Foster, Gene Lear,  
20 Gail Stepp.

21 THE COURT: It is a peculiar position to take, is  
22 it not? For someone who is interested in the well-being of  
23 this community, Mr. Stepp's position was a very peculiar

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1 position to take?

2 He was standing firmly on a technicality, which it  
3 appears he did not express to anyone and did not ever check  
4 out.

5 Now, how can you explain that? I don't understand  
6 it. I don't understand it. I really don't.

7 He stood on a technicality that no one in the  
8 community understood, including himself.

9 MR. ANNINO: From his perspective, Your Honor,  
10 having been told he wasn't a trustee, he's looking at the  
11 situation from that perspective. "The community doesn't  
12 believe I am a trustee. Now I have to go through a nomina-  
13 tion and election process."

14 We know from Mrs. Arnold's testimony that he in  
15 1988 or '89 voiced his opinion about what should be done with  
16 Rio Vista Drive and leave it as a walking trail.

17 So his perception is that he's going to have to go  
18 through this nomination and election process to become a  
19 trustee when he is of the opinion that he is already a  
20 trustee and doesn't need to do anything.

21 The other significant --

22 THE COURT: Do you think he ever clearly expressed  
23 that to anyone?

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1           The testimony was that he said he was too busy,  
2           that he didn't want to have anything to do with the  
3           association anymore, he had had it. That's the testimony  
4           from the many people --

5           MR. ANNINO: From the defendants' perspective,  
6           Mr. Stepp's testimony is that he indicated at that meeting  
7           that he was already a trustee and he didn't have to be  
8           nominated. And the Court is going to have to weigh that  
9           testimony and weigh the evidence.

10           But from the documentation that's in evidence, it  
11           is apparent, I would submit, that there was a misimpression  
12           about the board's position and authority to nominate and  
13           appoint a trustee.

14           And the evidence of the board's confusion on this  
15           issue is apparent in Exhibit No. 45, which is minutes of a  
16           meeting in August in which Mr. Vandenberg is voted in as a  
17           trustee by the board. And then later on, in Exhibit 54, the  
18           minutes indicate that Mr. Vandenberg declined to be a  
19           trustee.

20           THE COURT: Well, we can move on, Mr. Annino.

21           I don't have any problem giving you declaratory  
22           relief with regard to that question.

23           MR. ANNINO: Our position would be that the deed

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1 was duly recorded. Mr. Stepp did not have to do anything.  
2 It did not require any action on his part to be a trustee or  
3 to accept a nomination for trustee since that deed was duly  
4 recorded.

5 And through all of this, Mr. Foster sits mute  
6 after this May 1994 meeting. He knows that the trustees --  
7 substitute trustee's deed is recorded. He recalls that being  
8 done by Mrs. Lear, Marvin Lear's wife.

9 THE COURT: Years ago.

10 MR. ANNINO: Years ago.

11 THE COURT: But he hasn't made any independent  
12 search to verify whether Mrs. Medlin told him the accurate  
13 information or not. Or are you alleging that he did?

14 MR. ANNINO: He didn't make any independent search.

15 THE COURT: The fact of the matter is that  
16 everybody just did -- I mean, this is one of the most --  
17 there were years that went by between these discussions,  
18 right?

19 MR. ANNINO: That's correct, Your Honor.

20 THE COURT: Years and years.

21 MR. ANNINO: That's correct.

22 THE COURT: It didn't appear to me that anybody was  
23 really excited about this issue, to tell you the truth, in

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1 the sense of any kind of concerted effort to do somebody in.

2 Right?

3 Mr. Arnold raised that question in a three-hour  
4 conversation with the Steps in September 1993, as I recall.  
5 And it was not finally resolved until 1995.

6 Do you and I understand the facts?

7 MR. ANNINO: That's according to Mr. Arnold.

8 THE COURT: That's almost two years.

9 MR. ANNINO: That's Mr. Arnold's testimony  
10 concerning his discussions with --

11 THE COURT: But your client testified to that too  
12 -- that he had a conversation with George Arnold in 1993.

13 MR. ANNINO: That's true, Your Honor.

14 But in the context of the communication he is told  
15 by Mr. Vandenberg that he wasn't a trustee.

16 THE COURT: You know what Mr. Vandenberg is? He is  
17 just a miscellaneous person.

18 No insult to you, Mr. Vandenberg.

19 He appears to be a community work horse, is what he  
20 appears to be in this case. And he is just a miscellaneous  
21 person who was gossiping about this issue. I mean --

22 MR. ANNINO: So is Mr. Arnold, from that  
23 perspective, Your Honor.

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1 THE COURT: No. Mr. Arnold is president of the  
2 association.

3 MR. ANNINO: He is president of the association,  
4 but he is not a trustee. He doesn't have the right really to  
5 come to Mr. Stepp and suggest to him that he's going to  
6 develop criteria and have a community referendum and have  
7 Mr. Stepp appointed as trustee.

8 The communications all are occurring between  
9 Mr. Arnold and Mr. Stepp.

10 Mr. Foster and Mr. Lear are very passive concerning  
11 this issue. And when they do make mention of it, it's in the  
12 context of a general membership meeting where, from all  
13 testimony, the May 1994 meeting was a contentious meeting.  
14 Mr. Stepp was upset and people were upset about the roadwork  
15 that had gone on in the community.

16 So there is -- there is some obligation, I believe,  
17 on Mr. Foster's part to step forward and tell the community  
18 that Mr. Stepp is a trustee, he has been a trustee, and take  
19 a moment to look at the land records, to go down and search  
20 for this substitute trustee's deed which was duly and  
21 properly recorded in the land records.

22 THE COURT: It was everybody's obligation to do  
23 that, wasn't it, Mr. Annino? All the trustees had an

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1 obligation to do that, including Mr. Stepp; is that a fair  
2 statement?

3 They all had that obligation, to be clear with each  
4 other and to communicate clearly with each other.

5 MR. ANNINO: That's true, Your Honor.

6 THE COURT: It doesn't appear that anybody did.

7 MR. ANNINO: Well, the problem with communication  
8 is evident from both sides. Mr. Foster and Mr. Lear could  
9 very easily have met with Mr. Stepp privately and discussed  
10 this issue, discussed what had to be done.

11 But again, this is correcting a problem that didn't  
12 need correcting. And it's only the community's perception  
13 that it's a problem.

14 THE COURT: Is Mr. Lear sick at this time?  
15 Mr. Lear was sick at this time, wasn't he?

16 He is sick now.

17 MR. ANNINO: He is sick now, Your Honor. He wasn't  
18 at this time.

19 But the fact of the matter is the co-trustees did  
20 nothing to confront the issue either.

21 THE COURT: The evidence is that they both asked  
22 Mr. Stepp on several occasions to please reconsider and act  
23 as trustee.

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1 MR. ANNINO: From Mr. Stepp's perception, he viewed  
2 it as reconsider a nomination process and go through an  
3 election process that he didn't want to go through. That's  
4 Mr. Stepp's testimony and that's his mind-set at the time.

5 And I think from the documents you can see how he  
6 could get that impression. Because there are indications  
7 that there is going to be this election process. There are  
8 these bylaws that are being proposed. And it's just --

9 THE COURT: All right.

10 MR. ANNINO: It's his perception. And I think it  
11 was a reasonable one under the circumstances.

12 We also ask for declaratory relief as to the board  
13 that governs the use of Parcel A, Your Honor, and the board  
14 that has to be elected at a meeting called by the trustees of  
15 all lot owners in the community.

16 And from the testimony of Mr. Lear in his  
17 deposition -- that's Exhibit No. 60 -- he indicated that  
18 initially the meeting was not called of all lot owners. The  
19 trustees really didn't do anything after that initial meeting  
20 to administer the trust, to collect assessments, to pay  
21 expenses relating to Parcel A.

22 And from the defendants' position we take it that  
23 their argument is the trustees didn't have to do anything,

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1 that they were just holders of the legal title.

2 Well, if that's the case, then what did Mr. Stepp  
3 have to do? What did Mr. Stepp have to do to correct the  
4 legal title to the property that didn't need correcting?

5 The evidence also in Request for Admission No. 65  
6 is that "The notice of meeting to elect initial officers and  
7 directors of the corporation was not provided to all lot  
8 owners in Belmont Park Estates."

9 THE COURT: But would you concede that that was  
10 done in a rather haphazard fashion in the years, or even  
11 months, immediately after that first meeting? Isn't that  
12 Mr. Jackson's testimony in his deposition?

13 MR. ANNINO: That he did notify lot owners in a  
14 haphazard manner? Correct.

15 The admission I was speaking of was a request for  
16 admission in this case to the corporation concerning the  
17 initial officers and directors of the corporation that notice  
18 of that meeting was not provided to all lot owners in the  
19 subdivision.

20 THE COURT: You mean in --

21 MR. ANNINO: In 1994, when it was incorporated.

22 THE COURT: All right.

23 MR. ANNINO: And we believe that that's telling.

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1 Because under association law you have to have unanimous  
2 consent obtained in order to transfer assets from one  
3 association to the corporation -- to a new corporation.

4 THE COURT: What association law is that?

5 MR. ANNINO: The law of unincorporated associations  
6 in Virginia.

7 And I do have a case that I think bears on this  
8 question. I will tell the Court it's not on all fours, but  
9 it is illustrative of the general principles that are  
10 involved. It's Miller v. Union of United Brewery, 187 Va.  
11 889, which is cited for the proposition that "A transfer of  
12 the members in property of the association to another similar  
13 organization to the extinguishment of the former cannot be  
14 effected by the vote of a mere majority, especially where a  
15 quorum of the association seeks to maintain its existence."

16 THE COURT: Is that an association organized  
17 pursuant to a particular statute in Virginia?

18 MR. ANNINO: No, Your Honor. It was an  
19 unincorporated association which was in the nature of a union  
20 club.

21 And what happened in that case was the -- there was  
22 a general membership meeting at which point a vote was taken  
23 to incorporate the entity. And there was not a quorum in

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1 existence to -- there was only part of the organization in  
2 attendance at that meeting. And the court held that you have  
3 to have unanimous consent if the --

4 THE COURT: To incorporate?

5 MR. ANNINO: From the association to incorporate a  
6 new entity.

7 And I can pass that up for Your Honor.

8 THE COURT: Mr. Annino, I hate to rush you. But  
9 you only have a couple more minutes.

10 MR. ANNINO: Your Honor, we believe that there has  
11 to be a declaration from this Court that Parcel A and the  
12 trust that it administers -- expenses have to be limited to  
13 expenses associated with Parcel A. We can't have this  
14 community paying for roads and other things that are not  
15 directly attributable to Parcel A.

16 The trust deed is the thing that creates the trust  
17 obligations. It's the thing that creates the corpus of the  
18 trust.

19 And when an organization such as the corporation  
20 goes beyond those limitations and starts spending money for  
21 things like roads and other things in the community that are  
22 not attributable to Parcel A, then they step beyond the  
23 original purpose of the trust. And that's why we seek an

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1 accounting from the corporation for those monies.

2 The Court notes we did file a request for account-  
3 ing in Exhibit No. 80, the December 1995 letter.

4 And the evidence indicates that the roadwork was  
5 not done with the community approval. The November 1992  
6 minutes that the defendants rely upon for this approval don't  
7 reflect any authorization of the community for the specific  
8 roadwork that was involved. And --

9 THE COURT: Let me just ask you a theory. I am  
10 trying to get your theory of the case, Mr. Annino.

11 It appears to me you've got a little circle here  
12 that's Parcel A and is the trustees. And then you have a  
13 little circle here that's the homeowners' association. And  
14 in some parts they cross -- some parts.

15 MR. ANNINO: That's correct, Your Honor.

16 THE COURT: But they're separate entities. They're  
17 separate entities.

18 And if the homeowners' association wants to  
19 voluntarily collect dues from its members, which is what  
20 everybody agrees is the case, and wants to spend them to  
21 upkeep Rio Vista, why not?

22 It's not the trustees that are collecting that  
23 money. It's the homeowners' association.

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1 MR. ANNINO: But the trustees have the obligation  
2 to see to it that expenses attributable to Parcel A are paid  
3 to Parcel A.

4 And what has happened essentially is that those --  
5 that has been co-mingled with other duties and responsibil-  
6 ities of this organization. And if people don't pay these  
7 voluntary, quote/unquote, assessments -- although the  
8 correspondence indicates that they were anything from  
9 voluntary.

10 There is letters from Mr. Arnold saying "This is  
11 Virginia law. You have to pay these expenses."

12 Without that segregation, the people in the  
13 community are left with a Hobson's choice. "If we don't make  
14 these contributions to this organization, we could lose our  
15 rights to use the park." And they are compelled to make the  
16 obligations.

17 THE COURT: If my theory is correct that the  
18 trustees can collect and the association can collect and  
19 they're two separate entities, how would the homeowners who  
20 didn't contribute to the association ever lose their right to  
21 use Parcel A?

22 MR. ANNINO: Well, if the homeowners don't  
23 contribute to the association and the association is the one

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1 that's maintaining Parcel A, the association reports to the  
2 trustees "These people are not members in good standing.  
3 They haven't contributed to the expenses related to Parcel A.  
4 We want you to prevent them from the use of the parcel."

5 The trustees theoretically could preclude those  
6 people from using Parcel A.

7 THE COURT: Mr. Tolchin and Mr. Clary need to  
8 answer that question when they give their closing arguments.

9 Is there anything else, Mr. Annino?

10 MR. ANNINO: Your Honor, we would take the  
11 position, as we set forth in our trial memorandum starting at  
12 page 25, that there are fiduciary duties of these trustees  
13 and that they did not properly administer the trust from the  
14 get-go really, from the original organizational meeting of  
15 the corporation, and that they haven't been doing it through-  
16 out the existence of the corporation, and that they can't  
17 delegate those duties and responsibilities to this organiza-  
18 tion. That is a matter of construction of the trust deed.

19 THE COURT: Well, the deed clearly states that "to  
20 be governed in the use of said property and in all matters  
21 pertaining thereto by a board."

22 So is there any question in your mind that the  
23 board has the right under this trust document to tell the

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1 trustees how to deal with Parcel A?

2 MR. ANNINO: How to deal with the use of the  
3 parcel? No question about it, Your Honor.

4 But that is the limitation of the board's  
5 authority: to tell the trustees how the community wants to  
6 use Parcel A. It doesn't give the board the authority to  
7 determine uniform charges.

8 THE COURT: No, it doesn't. I agree with you. It  
9 doesn't.

10 So this community is left with kind of a big mess,  
11 just like when they came in. And you know, I don't know if I  
12 can help you with that.

13 I can do some construction on this declaration.  
14 And I can make some opinions as to the association. But I  
15 can't -- I don't believe that I can reorganize the community  
16 for you, which I think is what needs to be done.

17 And I really feel bad about that.

18 Mr. Clary, do you want to make your argument? Or  
19 Mr. Tolchin?

20 MR. TOLCHIN: I'll try to keep it short, since you  
21 have indicated you want us to remain as clear and succinct as  
22 possible.

23 I told you at the very beginning of this case that

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1 I had no idea why we were here and what was going on, what  
2 the charges were.

3 THE COURT: Well, you're here because this  
4 community has reached an impasse where they no longer can  
5 work together and they've got this befuddled, befuddled mix  
6 of legal documents that they don't know how to interpret.  
7 That's why you're here. I mean, I think that's clear.

8 MR. TOLCHIN: But that is if you listen to the  
9 complainants' complaints. But if you understand that those  
10 complainants are a small fringe minority, then you cannot  
11 reach that conclusion that that's why we're here.

12 The real reason why we're here is because the  
13 minority lost control. And they realized that in 1995 when  
14 they were voted out of office that they no longer can dictate  
15 to the majority what goes on in this community, because the  
16 majority decided that they were not going to be dictated to  
17 by the Edwardses. And that was the bottom line.

18 And that's the only reason why we're here. And  
19 that doesn't make a legal case. All that makes is a  
20 discussion in a community and makes a dispute in a community.  
21 But it doesn't make a legal case, not even for declaratory  
22 judgment. Because to have a declaratory judgment action, you  
23 have to have an actual legal controversy.

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1 THE COURT: You don't think the trust document  
2 presents an actual legal controversy?

3 MR. TOLCHIN: Not with respect to BBCAI.

4 As you noted on several occasions, the issues of  
5 the trust document and the issues of the bylaws are totally  
6 separate.

7 I am not going to address the trust document.

8 Mr. Clary will, however.

9 THE COURT: No. I appreciate that.

10 MR. TOLCHIN: With respect to BBCAI, there is no  
11 actual legal controversy that BBCAI and its members should  
12 have been dragged into court to listen to six days' worth of  
13 evidence about. Because there is nothing -- absolutely  
14 nothing -- that BBCAI has done other than try to serve the  
15 consensus in the community. And that's it.

16 And there is nothing illegal about that. There is  
17 nothing unlawful about that.

18 There is a case indeed directly on point, not with  
19 respect to the facts but with respect to the law, called  
20 Glass v. Glass. And I think I've handed up a copy to --  
21 I'm not sure if you have that one. But I will provide you  
22 with one.

23 The issues in this case are not the same. The

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1 issues in this case are the sale of stock, et cetera, and  
2 what was happening with the sale of stock among the minority,  
3 majority of the corporation.

4 But if you look at Note 7 -- Headnote 7 and the  
5 discussion there, what this law makes clear is that sometimes  
6 you have a minority in an organization. And when you have a  
7 minority, there are certain inherent problems with being a  
8 minority interest. And what the majority does to protect  
9 themselves or to protect the majority doesn't constitute  
10 unlawful action and doesn't constitute something upon which  
11 they can be sued. And that's what this case explains.

12 And that is the law. And it has to be the law.

13 Because if you think about it, what Mr. Annino has  
14 posited and asked of this Court is -- if you look in the  
15 Amended Complaint, exactly what he's asked for is that BBCAI  
16 be disbanded. They want you to issue an injunction  
17 essentially against BBCAI and turn everything over to BBCA,  
18 this rump organization which is the minority organization.

19 So the effect is that he's asking you to order the  
20 majority to have to listen to everything that the minority  
21 dictates. Because what will happen is one of two things:  
22 either the minority will continue to dictate; or within a  
23 week the majority will join BBCA and they will again be the

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1 majority and they will again outvote Mr. and Mrs. Edwards.  
2 And then we're back in court.

3 That's why the court system can't be used the way  
4 that they are trying to use it. They had a vote. They had a  
5 voice. They were encouraged to provide their voice. They  
6 were officers of the corporation. They were in the inner  
7 circle of this entity.

8 Their views did not hold sway. And when their  
9 views did not hold sway, they ran to court. And that's not  
10 what the court system is used for. Glass makes that clear.  
11 And common sense makes that clear.

12 There are five undeniable facts in this case.

13 The first is that BBCAI is nothing but a voluntary  
14 organization. That's it.

15 THE COURT: Right.

16 MR. TOLCHIN: Nobody has ever asserted otherwise.  
17 Nobody has ever claimed otherwise. Yet if you look at the  
18 Amended Bill of Complaint, the allegation is sought for  
19 declaratory relief that BBCAI is a voluntary organization.

20 THE COURT: It is.

21 MR. TOLCHIN: Again, the declaratory judgment  
22 statute says you can't do that. You can't seek a declaration  
23 about something that is not in legal dispute. But yet BBCAI

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1 has been dragged into court on this issue because they wanted  
2 to drag us into court.

3 The second undeniable fact is that -- and you've  
4 heard no evidence to the contrary -- BBCAI has done nothing  
5 in this case other than acted in a manner consistent with the  
6 consensus in the community. You've heard absolutely nothing  
7 to disabuse you of that notion.

8 Everything that was done was done after determining  
9 what the community wanted -- what the consensus of the  
10 community wanted.

11 And as Mr. Arnold explained to you, when it became  
12 clear that even two people had a very vehement objection to  
13 something and consensus couldn't be reached, it was dropped.  
14 That was the issue of amending the bylaws to have  
15 mandatory -- to have anything mandatory in it.

16 THE COURT: Right.

17 MR. TOLCHIN: That is the kind of organization  
18 you're dealing with here.

19 There is nothing wrong with that. That is exactly  
20 how our society operates. And there is nothing illegal,  
21 there is nothing unlawful, as Glass makes clear.

22 That is what happens when you have an organization  
23 of people. You are always going to have a minority. But

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1 that doesn't mean that they can dictate to the majority.

2 The third undeniable fact is that in this case,  
3 Judge, you only have four plaintiffs. You have the Stepps  
4 and you have the Edwardses. And that's it.

5 Now, they're trying to seek relief claiming that  
6 they represent a larger group.

7 You don't have that before you. You have four  
8 plaintiffs. And that's it.

9 They didn't bring a derivative action, because they  
10 don't claim that they're even members of this organization.  
11 They claim they have their own organization.

12 The fourth undeniable fact is what they are seeking  
13 in this case. And if you look at the Amended Complaint, it  
14 is absolutely clear beyond any peradventure that what they're  
15 seeking in this case is one thing only: to tie everybody up.

16 Count I sought to tie up the trustees by claiming  
17 that you needed unanimity and that Mr. Stepp was a trustee.

18 Count II tried to tie up the association --  
19 together with Count I tried to tie up the association by  
20 saying that only the minority can control the association.  
21 And that's what this case has been about from the very, very  
22 beginning.

23 But what this case is about is something that this

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1 Court cannot have any say in, because this is a democratic  
2 society. It is a democratic voluntary organization.

3 If Mr. and Mrs. Edwards and Mr. and Mrs. Stepp  
4 don't want to be members of that organization, they can walk  
5 away from it. Nothing stops them from walking away from it.

6 And indeed, nothing stops them from joining again.  
7 Nothing whatsoever. All they have to do is work within the  
8 consensus in the community.

9 Now, you asked us to look at the Amended Complaint  
10 and determine whether the relief being asked for is relief  
11 for which there's been any sort of evidence.

12 And in order to do that, you've got to look at the  
13 factual basis stated in the Amended Complaint. And to that  
14 with respect to BBCAI, there are only four paragraphs that  
15 even address BBCAI: paragraphs 14, 15, 18, and 21.

16 Paragraph 14 alleges as follows --

17 THE COURT: Don't read it, Mr. Tolchin. I've got  
18 it.

19 MR. TOLCHIN: Well, in any event, it alleges that  
20 the sole purpose of the association was to work on Parcel A.  
21 That was the sole purpose. That's the allegation.

22 The evidence was directly to the contrary. There  
23 is not a scintilla of evidence that supports that position --

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1 not a scintilla. Because --

2 THE COURT: I don't know if I'd go that far.

3 MR. TOLCHIN: Well, you have the bylaws of the  
4 organization.

5 THE COURT: They did get together. Because  
6 Mr. Foster was very, very anxious to do what he had to do to  
7 comply with the deed. And he got everybody together and they  
8 formed an association.

9 I will agree with you that over the years -- and  
10 we're talking now about over 20 years, 25 years -- that they  
11 did a lot of other stuff. It was a social organization as  
12 well as a --

13 MR. TOLCHIN: Right.

14 But the key is: Was the primary purpose Parcel A?  
15 Or was the sole purpose Parcel A?

16 It's clear that the primary purpose was the park at  
17 Parcel A. But it's equally clear -- and for this there is no  
18 evidence to the contrary -- that other purposes existed in  
19 that organization from the very date that it organized, from  
20 the very date that those bylaws were adopted.

21 Those bylaws, as Mr. Clary pointed out to you -- in  
22 the bylaws themselves they have a landscaping committee,  
23 which clearly had nothing to do with Parcel A. On the very

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1 day that the bylaws were adopted they were out there working  
2 on the front sign.

3 And it's clear throughout -- the minutes of the  
4 organization and Mr. Vandenberg told you -- that at the very  
5 beginning in 1974 they were already bulldozing that road,  
6 Rio Vista Drive. The very same people that organized that  
7 association was already paying to bulldoze the drive. They  
8 are already paying for the sign at the front. They were  
9 already using association money to pay for a lawyer to assist  
10 them. That was the very first check they wrote.

11 Everything that is being challenged as being beyond  
12 the scope of authority of this association is directly in the  
13 bylaws and directly in the history of this organization from  
14 the very, very beginning.

15 So for the allegation to be made that the sole  
16 purpose of this organization is Parcel A -- there simply is  
17 no evidence whatsoever to support that.

18 And that's very important. Because even if you  
19 find that there is a primary purpose or even a sole purpose,  
20 you have to also look at the history of what went on here.  
21 Because the law is that organizations can modify their roles.  
22 Organizations can ratify actions taken, even if they were  
23 beyond the rules.

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1           And we've given you the Brewer case, which deals  
2 with the ratification matter. And the general rule of  
3 modification says that people can come together to modify  
4 written agreements and written bylaws.

5           In this particular case, as in the Brewer case,  
6 there was a long history of what this corporation has done.  
7 And that long history is undeniable that it goes beyond  
8 Parcel A.

9           So for Mr. Annino to argue that the sole purpose  
10 was Parcel A simply does not ring true.

11           THE COURT: Tell me what legal position your client  
12 is in if it wants to continue to grade and improve Rio Vista?

13           MR. TOLCHIN: What legal position it's in?

14           THE COURT: Yes.

15           MR. TOLCHIN: It's in the legal position of simply  
16 doing what any civic association did.

17           THE COURT: But that property doesn't really belong  
18 to them, does it?

19           MR. TOLCHIN: It's irrelevant to this Court and to  
20 this matter. If this association wants to spend voluntary  
21 dues to go out and do something on this public road,  
22 Mr. Edwards can't complain about it, Mrs. Edwards can't  
23 complain about it, the Stepps can't complain about it. And

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1 this Court has no authority over it.

2 What the Court may have authority to do is simply  
3 to say that this is a voluntary association. "You don't want  
4 to pay your dues to do this Rio Vista Drive, don't pay your  
5 dues."

6 THE COURT: I think that's clear.

7 MR. TOLCHIN: That's clear.

8 But nobody has told them that they have to pay  
9 their dues. So therefore, there is no legal dispute with  
10 respect to that.

11 The only possible entity that could ever have  
12 standing to challenge anything that's done on Rio Vista Drive  
13 is Fairfax County. And Fairfax County doesn't complain  
14 whatsoever, because it doesn't want to spend its money on  
15 Rio Vista Drive. That's perfectly clear.

16 If you look at the documentation in the file -- I'm  
17 not going to go through it -- there have been letters being  
18 sent to Fairfax County from 1974 all the way through 1994  
19 saying "Please do something about those roads." And Fairfax  
20 County has done nothing.

21 So the civic association, because the majority  
22 wanted to, did something about a road that was leading down  
23 to the park.

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1 THE COURT: Right.

2 MR. TOLCHIN: There is nothing in this Court's  
3 authority to even address any of that.

4 I will finish up now by addressing the last  
5 argument that Mr. Annino made. Actually, there are two other  
6 arguments he made.

7 He said that he needs a declaration about whether  
8 BBCAI and the trustees, I guess working together, can exclude  
9 persons from Parcel A.

10 The evidence was undeniable that nobody ever in 25  
11 years has ever even theoretically come up with that concern.  
12 Nobody has ever said -- there is not a scintilla of evidence  
13 that anybody is excluding anybody else from Parcel A.

14 THE COURT: So you would agree that the association  
15 does not have the power to do that?

16 MR. TOLCHIN: I would agree -- I would agree that  
17 that issue is not before the Court, because it is a  
18 theoretical issue. And the Court is -- it is absolutely  
19 clear that the Court doesn't have authority to rule on  
20 theoretical types of issues.

21 Whether BBCAI has the authority, I doubt it. It is  
22 a voluntary organization. There is no reason why it should  
23 have the authority, there is no reason why it could have the

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1 authority to exclude anybody.

2 THE COURT: Well, the deed says "in all matters  
3 that the board is supposed to govern the trustees in the  
4 issue of the use of property."

5 MR. TOLCHIN: I guess in theory -- if somebody  
6 wanted to make an argument that BBCAI could govern the  
7 trustees because it could direct the trustees not to allow  
8 somebody to use Parcel A, I guess that is a theoretical  
9 argument. But it's not in the real world. And it's not the  
10 subject of a complaint under the declaratory judgment act.  
11 Because there is no actual legal controversy.

12 In fact, there are cases going way back --

13 THE COURT: You don't have to worry about it  
14 anymore, Mr. Tolchin.

15 MR. TOLCHIN: One other issue I would like to  
16 address is this issue of the Miller v. Union of United  
17 Brewery argument, the argument that nothing this board has  
18 done is legal because it doesn't exist in a legal fashion  
19 because the incorporation somehow rather was a new organiza-  
20 tion.

21 Well, if you look at Miller v. Union of United  
22 Brewery case, it makes absolutely clear why that argument  
23 simply doesn't hold sway here. It makes absolutely no sense.

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1           Because if you look at that case, what it was  
2 concerned about there was not just a mere incorporation of an  
3 entity. What it was concerned about was a new and completely  
4 separate association of the minority of the members.

5           It was not within the structure or limits of the  
6 constitution and bylaws under which it was attempted in order  
7 to -- the objects and purposes of the union and is not -- it  
8 was a completely and totally new organization of a group of  
9 members of the old organization.

10           And there the court said, "Well, if you're going to  
11 do something like that, then you've got to have some super-  
12 authority of the majority -- not even the majority, but  
13 perhaps everybody -- unanimity."

14           But that's not what this is about.

15           The issue of whether we can impose mandatory liens  
16 on property may be something that would require the majority  
17 -- would require unanimity.

18           But the issue of whether we as an entity want to  
19 incorporate is something that simply has no basis to be  
20 challenged. Because we're the same organization. We simply  
21 changed the name and incorporated for purposes of liability  
22 law. And that's it. There is no new organization here. We  
23 are the same old organization. We have the same officers.

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1           And in fact, when that reorganization took place,  
2           who was the treasurer and who was the secretary? Two of the  
3           plaintiffs in this case. And they remained the secretary,  
4           they remained the treasurer after that organization.

5           There is nothing to say that we cannot reorganize  
6           that way.

7           THE COURT: Okay.

8           MR. TOLCHIN: I ask you again. Why are we here?

9           And I think the answer is plain. We're here  
10          because at the beginning of this case Mr. Stepp and Mrs.  
11          Stepp and Mr. Edwards and Mrs. Edwards needed a foil for  
12          Mr. Foster to conspire with. And that's the only reason why  
13          BBCAI was dragged into this.

14          THE COURT: Mr. Clary?

15          MR. CLARY: I am going to try not to rehash a lot  
16          of the things that I argued in my motion to strike.

17          THE COURT: I want you to argue this. This is what  
18          I want you to argue.

19          And I'm not -- no one is making a motion to strike  
20          again, are they? He didn't say he was.

21          MR. CLARY: As a technicality, I think we have to  
22          renew our motion to strike in order to preserve, in the event  
23          there is an appeal, the right to rely upon our motion at the

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1 end of the plaintiffs' case.

2 MR. TOLCHIN: And if the record is unclear, we are  
3 renewing our motion to strike from yesterday. And I'm not  
4 going to repeat those arguments. But we would incorporate  
5 them.

6 MR. CLARY: Actually, I think the duties and  
7 obligations are really very well described in my brief.

8 If you want to go through those, I'll be happy to.  
9 But I don't think there is any contest about what the trust  
10 deed means.

11 Moreover, the circumstances of its preparation and  
12 execution, which have been brought to the Court's attention  
13 to assist it in interpreting the deed to the extent of any  
14 ambiguity, make it very plain that the sole and primary  
15 purpose of this deed was to simply convey title to get it out  
16 of the hands of a man who was generous and was willing to  
17 donate the property to the community after another nice  
18 gentleman had come to him and said, "Gosh, this was really  
19 intended for the benefit of the community. It's supposed to  
20 be the recreational land."

21 The fact of the matter is the deed was drafted  
22 apparently in the space of a matter of an hour or so after a  
23 phone call from Mr. Foster describing that they had almost

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1 lost the property after -- despite the good intentions of  
2 Mr. Hurvitz.

3 If there is anything that can be said about the --  
4 about the deed, it is that they are to hold the title for the  
5 use and benefit of the members of the community; it is that  
6 they are to be governed by this board; and it is that they  
7 are to obey a standard of conduct that is set forth in the  
8 deed itself.

9 The deed does contain authority for some powers.  
10 It does provide a power to replace trustees. But only under  
11 the circumstances described therein.

12 And we have to agree with Your Honor that a  
13 resignation may occur not just by a letter, but by conduct.  
14 And that is effectively what Mr. Stepp did.

15 THE COURT: You don't have to argue that,  
16 Mr. Clary.

17 What I would like you to argue, if you could -- and  
18 I've read your brief several times -- is I want you to talk  
19 about the point at which the duties -- not duties -- the  
20 point at which the functions of the association intersect  
21 with the responsibilities of the trustees.

22 And I'm not calling them duties. But I'm calling  
23 them --

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1 MR. CLARY: Powers.

2 THE COURT: They're powers.

3 And to some respect they've been -- I mean, your  
4 argument is the trustees did their thing in 19 -- how far do  
5 we go back?

6 MR. CLARY: 1973 actually.

7 THE COURT: There wasn't any need for them to do  
8 anything.

9 Everybody's testimony has been real clear that the  
10 trustees didn't do anything else. They put this board  
11 together. They appointed the trustees. And they let the  
12 board handle everything. It was completely voluntary.

13 MR. CLARY: Yes, ma'am.

14 Although in fairness, Mr. Foster -- when  
15 Mr. Jackson began taking over, he did go out and help find  
16 the identities of the nonresident lot owners. And he  
17 assisted Mr. Jackson in thereafter, according to  
18 Mr. Jackson's testimony, mailing out all of those mimeo-  
19 graphed sheets.

20 THE COURT: Right. He was very active in the  
21 beginning. And he was the prime mover in this whole thing  
22 taking off.

23 MR. CLARY: Yes, ma'am.

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1           THE COURT: But then everything settled down. And  
2 the community just kind of meandered along. And the trustees  
3 did very little, if anything. And the board did some stuff.  
4 It was all very haphazard.

5           The theory is that -- the problem with -- if you  
6 buy Mr. Tolchin's position, which is that the association is  
7 just a voluntary association, you can ask people to give  
8 money. If they do, they do. If they don't, they don't.

9           And they're going to take this money. And they're  
10 going to spread it over the community wherever they see fit,  
11 including expenditures in Parcel A.

12           Right?

13           MR. CLARY: Yes, ma'am.

14           THE COURT: So the theory is still that the  
15 trustees don't have to do anything. And this is just  
16 largesse. It's just largesse that's coming to Parcel A and  
17 everybody else involved in the community.

18           Then there is no point at which the trustees could  
19 deny Parcel A -- deny people access to Parcel A. Because the  
20 trustees have never done anything to -- I mean, they're  
21 supposed to be regulated by the board in the use.

22           MR. CLARY: That's true.

23           THE COURT: Okay. But let's say Mr. Stepp wants to

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1 use Parcel A. But he's not -- he is not a member of the  
2 association anymore. He is not a member of the board. He  
3 has not paid his dues. It is a voluntary organization.

4 He can't be forbidden to use Parcel A then.

5 MR. CLARY: Let me give you two points that I think  
6 are very important.

7 Number one: That issue is not before the Court.  
8 It is not in controversy. Because, as the evidence clearly  
9 shows, there has never been an attempt by the association to  
10 deny access to the park to anyone. There has never been a  
11 request to the trustees to do so. And the trustees have  
12 never exercised what at the very best is a discretionary  
13 power to make an assessment.

14 The fact that they have the power to make an  
15 assessment, however, unfortunately gives them absolutely no  
16 power to enforce it, except to deny access.

17 Those events have never occurred either. So truly  
18 what is posed is a hypothetical that indeed the cases in our  
19 brief, as well as the cases cited by Mr. Tolchin, clearly in  
20 black and white spell out "I'm sorry, Your Honor. You have  
21 no business getting into this," to be polite.

22 THE COURT: It is hard to --

23 MR. CLARY: Let me give you the answer that I think

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1 is the right answer.

2 And actually, you will find in the deposition  
3 testimony the testimony by Mr. Foster about what he would do  
4 if he were confronted with that situation.

5 And the answer is that, if there comes a point when  
6 at the direction of the board Mr. Foster is directed to deny  
7 access or use and enjoyment of the parcel --

8 THE COURT: Because they could do that.

9 MR. CLARY: If the board tells him to do that,  
10 simply because they haven't paid their dues to the associa-  
11 tion.

12 Then the question that Mr. Foster will have to  
13 wrestle with -- and indeed at that time, as he testified, he  
14 would seek legal advice -- is: By obeying the association,  
15 would he be infringing upon the beneficial real property  
16 ownership rights that may exist because of the deed?

17 And I think they probably do exist.

18 And if there is a conflict between those two -- the  
19 beneficial ownership rights and the direction of the board,  
20 indeed at that point in time Mr. Foster would be -- it would  
21 be important for -- it would be absolutely mandatory for him  
22 to seek legal counsel; and if counsel could not help him,  
23 then to seek the aid and guidance of the court.

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1 I digress for just one second. I was humored by  
2 the reference to Brimmer v. Bittner on the duty to seek aid  
3 and direction of the court. I can safely say, since Judge  
4 Vieregg isn't in the room, that I know more about that case  
5 than anybody in this room. That was my case.

6 And the fact of the matter is it bears absolutely  
7 no resemblance to this case at all. It was a case where the  
8 trustee under a deed of trust absolutely abandoned his  
9 obligations to the debtor and conspired, if you will, with  
10 the creditor to go ahead and foreclose, notwithstanding the  
11 fact that the case had been already partially tried by Judge  
12 Vieregg, who ruled that there was an appropriate recoupment  
13 claim against the note.

14 So I mean, it was -- Judge Vieregg made it very  
15 clear that was an extraordinary situation. And I think  
16 probably it's been written up in Legal Times as an extra-  
17 ordinary situation as well.

18 And trust me, Your Honor, it bears no resemblance  
19 to this case whatever.

20 THE COURT: Well, I appreciate your point. And I  
21 don't think that's a question that I have to answer.

22 MR. CLARY: Right.

23 THE COURT: But I wanted, at least as a by-product

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1 of this litigation, for the community to understand what kind  
2 of problems remain for them to be solved. And that's one of  
3 them.

4 I think there is a conflict between the provision  
5 in the trust deed as to the board's power to govern the use  
6 of Parcel A and the trustees' sole power to assess fees. And  
7 that's something that I want everybody to at least understand  
8 is a hypothetical problem which I cannot solve.

9 MR. CLARY: And indeed, let me go a bit further. I  
10 think the conflict may be even a little broader.

11 Because the direction to the trustee servants, as  
12 Mr. Bready put it, to be governed by the board is not simply  
13 the use. But the phrase is even broader. "And in all  
14 matters pertaining thereto."

15 My gracious. I mean, that may encompass the  
16 entirety of the world that even tangentially relates to  
17 Parcel A.

18 But I think the problem -- and I've answered this.  
19 The problem doesn't arise until there is an actual conflict.  
20 It's not here before the Court.

21 I don't want to overstay my welcome here.

22 THE COURT: I don't think you have to say much  
23 else. If you want to wrap it up, you can. It's already

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1 quarter to 11:00.

2 MR. CLARY: I think unfortunately that -- let me  
3 acknowledge that I certainly see there are disputes among  
4 members of the community and the way in which the community  
5 civic organization has been run. There are obviously  
6 disagreements between those parties as to what should be done  
7 and what shouldn't.

8 But unfortunately there is not an ounce of evidence  
9 of fault or blame on Mr. Foster's part.

10 Your Honor raised the issue when we were talking  
11 about somebody should have gone out and looked at the land  
12 records. But really this is a red herring.

13 And the reason it's a red herring is because  
14 virtually at the same time that this error is discovered and  
15 the quick-cure method announced to everyone, Mr. Stepp takes  
16 the position that he doesn't want to be a trustee.

17 Why on earth then, confronted with this refusal,  
18 should Mr. Foster then go out?

19 THE COURT: I understand.

20 MR. CLARY: So there is simply absolutely no  
21 grounds of fault or blame on his part.

22 In fact, Mr. Foster, the evidence shows, is the one  
23 who rescued the park for the community. He is, with his many

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1 neighbors, one who has selflessly volunteered his efforts,  
2 his time, his money in support of plans that the community  
3 approved.

4 The only thanks and the only recognition and the  
5 only compensation Mr. Foster has received for the dedication  
6 are bills for tens of thousands of dollars of attorneys'  
7 fees.

8 And it's not because of any conduct on his part.  
9 It's because he was simply in the way of the will of the  
10 Stepps and the Edwardses.

11 THE COURT: Do you think, Mr. Clary -- I know you  
12 were in summation. And I'm going to cause you to say some-  
13 thing else.

14 MR. CLARY: I'll be happy to answer questions.

15 THE COURT: The theory is that everyone knew that  
16 Mr. Stepp was the trustee and all they wanted to do was file  
17 some papers to correct that. And he made it clear he didn't  
18 want to be a trustee.

19 The fact that doesn't go with that scenario is the  
20 fact that Mr. Arnold was so concerned with putting forth  
21 nominating criteria.

22 If he was simply -- if we were just correcting a  
23 clerical error, there would be absolutely no need for the

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1 board to put together any kind of nominating criteria at all.

2 MR. CLARY: I agree, Your Honor.

3 But I think the explanation for that was offered by  
4 Mr. Arnold. And that was that he was trying his very best to  
5 persuade Gail that he wasn't an unloved member of the  
6 community, that indeed his experience and longevity were  
7 desirable traits for the community. He was trying to find a  
8 way of expressing to Mr. Stepp the support of the community.

9 And that is the prime -- that is one of the  
10 reasons, and certainly appears one of the primary reasons,  
11 when you identify that this only fits maybe one or two  
12 individuals in the whole community -- it is the primary  
13 reason for the criteria.

14 And the criteria were discussed, according to  
15 Mrs. Stepp and finally conceded by Mr. Stepp, in the  
16 meetings before you ever got to the May 3rd, 1994, meeting.

17 So -- but, Your Honor, it wasn't just the May 3rd,  
18 1994, meeting that caused the trustees finally to act. It  
19 was a long-term, persistent, unrefuted, consistent refusal to  
20 serve that lasted, at least to the trustees' knowledge, for  
21 more than a year and a half.

22 THE COURT: Okay. Let me make this brief.

23 This is the seventh day that you all have appeared

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1 in court. And it is clear to me that as a community that you  
2 care deeply about these issues. And I think it's -- it goes  
3 without saying that it's very, very sad that you've all come  
4 to this.

5 I note from the depositions that the founding  
6 members of this community, or at least some of them, are in  
7 precarious health. Mr. Jackson is 82 years old and is  
8 suffering from cancer. Mr. Lear is in failing health, and I  
9 believe he is also suffering from cancer. Mr. Stepp himself  
10 had to be hospitalized in the course of this proceeding.  
11 Mr. Foster appears to be in good health.

12 But I find it extraordinarily sad that after having  
13 lived in this community and raised your children in this  
14 community that you are so divided.

15 On the other hand -- and this may be an odd thing  
16 to say at this point -- I must compliment you all, if that is  
17 the word, for working so hard on this case.

18 Mrs. Arnold has devoted untold hours to assembling  
19 the records of this community. Major -- hours and hours have  
20 been spent in deposition.

21 At least you'll come out of this with good records.  
22 I mean, that's a minor consolation.

23 But I notice that as I go through the minutes they

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1 get better and better as you come up. The accounting  
2 standards get better. And you seem to be making progress.

3 The rigors of this trial and the strain of direct  
4 examination and cross-examination have been difficult for  
5 all.

6 I do not doubt anyone's sincerity who has testified  
7 in this case.

8 I was touched by all the witnesses' intense efforts  
9 to testify fully and truthfully as they could.

10 I must say that Mrs. Benson was the most refreshing  
11 witness that I heard. And I say that not to make fun of her.  
12 I didn't appreciate the laughter that happened when she  
13 testified.

14 She was absolutely unequivocal, honest, and clear  
15 in her answers. And she should not be punished by the  
16 community for that honesty.

17 I note that Mr. Edwards tried so hard to testify  
18 truthfully and faithfully and honestly in this case that my  
19 heart went out to him.

20 Litigation is not fun. And I think that we've all  
21 figured that one today.

22 Mr. Clary has put forth a theory that this case was  
23 concocted in a lawyer's office. Theories are often concocted

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1 in lawyers' offices. I do not take that as a personal attack  
2 on either Mr. Annino or the plaintiffs in this case.

3 I do not doubt the good faith of both the  
4 plaintiffs or the defendants.

5 As an aside, I do not doubt that anyone in Fairfax  
6 County who has bought a house has not experienced the ups and  
7 downs of having to deal with the community associations of  
8 various types. Thus, I did not need the expert testimony  
9 that was volunteered by the defendants in this case. And I  
10 want it to be clear that I am not taking her testimony into  
11 consideration at all in my opinion.

12 We are Americans. And in particular we are  
13 residents of this county. We are all familiar with how  
14 associations work.

15 We are as a whole an organizing bunch of people.  
16 But as often as we attempt to organize, there are people who  
17 want to be left alone.

18 And I don't know how in your community you're going  
19 to deal with this problem. But I am afraid that I'm not  
20 going to be able to solve all your problems for you.

21 I sincerely wish that this lawsuit could have been  
22 avoided. And in that respect, Dr. Polifko took the words out  
23 of my mouth when he testified that he thought the best means

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1 of meeting your community problems was simply to get together  
2 and talk about them.

3 That invitation to get together was extended to all  
4 people in December of 1995. But somehow Dr. Polifko's letter  
5 was circulated to the dissident homeowners in this community.  
6 And I believe that it did irreparable damage. And at that  
7 time I think it all put you on a course that you ended up  
8 here. And I really regret that.

9 As a lawyer in private practice, I probably would  
10 have advised you to get organized, just as Mr. Arnold tried  
11 to do and just as attorney Knowles advised you to do. I  
12 would have incorporated the association. I would have  
13 redrafted the covenants and bylaws. And I would have  
14 formalized the relationship between the trustees and the  
15 association.

16 All of that frankly is completely beside the point.

17 As a judge, it is with regret that I cannot do much  
18 for you except rule on the counts contained in Plaintiffs'  
19 Amended Bill of Complaint. It is still going to be up to you  
20 when you exit here today to repair the damage that has been  
21 done to your community.

22 I am going to begin by making some specific find-  
23 ings as to facts in contention in this case. And then I will

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1 go down through the counts.

2 I believe that there is no real evidence that  
3 Mr. Foster and Mr. Lear ever put into effect a plan to  
4 exclude Mr. Stepp as a trustee.

5 In making that decision, I have relied on the  
6 testimony of the following individuals: Mr. Stepp himself,  
7 Dr. Polifko, Mr. Drye, Mr. Foster, and particularly  
8 Mr. Arnold.

9 The latter's testimony was extremely specific and  
10 very fresh in my mind. He met with Mr. Stepp at least twice  
11 between September 1993 to May 1995. His testimony was that  
12 he met with him for an extraordinary length of time, for a  
13 period of three hours.

14 Mr. Stepp strikes me as being a taciturn man. And  
15 I think that that trait may have not done him a good service  
16 in this particular case.

17 The testimony was clear that he was asked again and  
18 again and again to be a trustee. There are numerous people  
19 who overheard those conversations; not only between  
20 Mr. Arnold and Mr. Stepp, but Dr. Polifko overheard it.  
21 Mr. Lear made a petition to him. Mr. Foster made a petition  
22 to him.

23 I don't know why he was so stubborn in his response

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1 or why he didn't explain clearly to people what the basis of  
2 his position was. But the testimony was that he had other  
3 things on his mind, that he was busy, that he was angry, that  
4 he didn't want to have anything to do with the association.

5 Number two, there is no evidence that Mr. Lear  
6 engaged in self-dealing.

7 He has been living in this community, or at least  
8 first bought a lot in this community, 40 years ago.

9 As with the issue of the trustee, time belies the  
10 theory. If he wanted to engage in self-dealing, my goodness,  
11 I would think he would have done it before now. He spent his  
12 whole life in that position.

13 MR. CLARY: I'm sorry, Your Honor. You said at the  
14 beginning, Mr. Lear. Did you mean Mr. Foster?

15 THE COURT: Mr. Foster and Mr. Lear. I'm sorry.

16 MR. CLARY: Okay. I didn't hear Mr. Foster.

17 THE COURT: Mr. Foster in particular. I made a  
18 mistake. Mr. Foster.

19 Mr. Clary makes the point in his brief that to  
20 charge someone with a breach of fiduciary duty, especially  
21 when the trust document itself says that that breach only can  
22 occur if someone acts with malice and bad faith, is an extra-  
23 ordinary thing to do.

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1           And the burden to prove that is a heavy one. And  
2           it has not been met in this case. Indeed, there's been  
3           almost no testimony that Mr. Foster has ever done anything in  
4           this community in bad faith.

5           So Rio Vista was graded. And that's supposed to  
6           be such a big deal, that he's going to make thousands and  
7           thousands of dollars selling those lots. It just doesn't  
8           make any sense.

9           Furthermore, the testimony was that Mr. Stepp  
10          himself in the past, as have many people in this community,  
11          had been involved with the kind of piecemeal repair involved  
12          in maintaining that road. And Mr. Stepp apparently has done  
13          that throughout.

14          I do not doubt that Mr. Foster is a powerful man  
15          in your community. But it really appears to me from the  
16          testimony I've heard that the newcomers in your community --  
17          namely, Mr. Arnold and Dr. Polifko -- really formed the  
18          impetus for change in the community.

19          The nature of your association -- this association,  
20          as everyone would agree -- the running of this association  
21          has been extremely haphazard, extremely haphazard.

22          The deposition of Mr. Lear is that there was -- he  
23          doesn't recall giving notices to lot owners. The deposition

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1 of Mr. Jackson said that there was an attempt to notify lot  
2 owners.

3 There is no question that Mr. Stepp didn't do  
4 anything much either. In fact, one of the stated positions  
5 for not being a trustee was because the board was holding too  
6 many meetings.

7 There are people in this community that didn't want  
8 to be bothered with all that. And that's not a good or a bad  
9 thing. But I don't think -- it's ironic that when Mr. Arnold  
10 took over the association and attempted to make things more  
11 regular that the very fact that things had been irregular was  
12 used against him in his efforts to do that in this lawsuit.

13 I am not going to begin to go through all those  
14 minutes and try to figure out who was given notice at various  
15 times, because it's hard to say.

16 I think listening to Mr. Bready was extremely  
17 interesting.

18 There is problems with this document. And I think  
19 Mr. Clary is correct that the trustees have power in this  
20 document but they do not have duties. And anybody who's ever  
21 taken an English course -- not even lawyers -- can read this  
22 document and understand the problems in this document.

23 "The trustees have the power to elect or appoint a

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1 successor trustee or trustees in the event of the death,  
2 removal from the state, incapacity to act, refusal to act, or  
3 resignation of any trustee; to deny access to or use of  
4 enjoyment of said property to such lot owners who neglect,  
5 refuse, or fail to pay uniform charge as determined by the  
6 trustees."

7 That's not the same voice. It's the passive voice.

8 There is no obligation in here that says to  
9 determine fees. "To apply funds collected to pay expenses  
10 incurred."

11 Anyway, I am not going to -- that document is very  
12 problematic.

13 With reference to each count, I am going to go down  
14 through Mr. Annino's request for declaratory relief.

15 "Therefore, the plaintiffs pray that this court  
16 enter a judgment declaring that Gail Stepp is a duly  
17 appointed trustee."

18 I hold that Gail Stepp was a duly appointed  
19 trustee. But I no longer think he is a duly appointed  
20 trustee.

21 I think he made it clear to everyone that he didn't  
22 want to do that job anymore. I think this was safely  
23 construed by everyone as a refusal to act as trustee. And I

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1 think the community was correct in appointing a successor  
2 trustee.

3 "That all trustees under the trust deed must act in  
4 unity in order to exercise any power provided in the trust."

5 It is not clear to me that the trust document says  
6 that.

7 MR. CLARY: Your Honor, that's already been ruled  
8 on in a motion for partial summary judgment by Judge Roush,  
9 who ruled that a majority ruled.

10 THE COURT: Majority rules?

11 MR. CLARY: Yes.

12 THE COURT: This says all trustees must act in  
13 unity.

14 MR. CLARY: Well, that was -- that's part of their  
15 strategy and claim.

16 But early on in the litigation we moved the court  
17 to enter partial summary judgment on this very issue.

18 THE COURT: Well, then, that stands.

19 MR. CLARY: Yes, ma'am.

20 THE COURT: I think I've already addressed (c).

21 I don't think that the trustees have duties. I  
22 think they have powers under the trust document.

23 I think that the board was properly begun in 1974.

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1 I think the lot owners were informed as best they could be at  
2 that time at some point approximate to the board's creation.

3 I think Carolann Wright was duly appointed a  
4 trustee.

5 I don't think that the board has power over the  
6 trustees.

7 Let me rephrase that. The board does have power  
8 over the trustees, as stated in the deed. "The trustees are  
9 to be governed in the use of said property and in all matters  
10 pertaining thereto by the board."

11 However, as we discussed, there is really big holes  
12 in how that's going to work. And I don't think that's before  
13 me today. But I think that's what Mr. Clary and I attempted  
14 to discuss.

15 I think that the Belmont Bay Community Association  
16 is a voluntary organization with no power to levy, collect,  
17 assess, or charge lot owners.

18 I am denying each side any attorneys' fees from the  
19 other.

20 I am denying all relief under Count II.

21 And I am denying relief under Count III, because I  
22 think the trustees are properly in place.

23 MR. TOLCHIN: Your Honor, there is one thing.

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1 There was an amendment to the claim for relief with respect  
2 to the election or appointment of Mr. Polifko, who is by --  
3 Mr. Annino added that to his claim for relief. We would ask  
4 that you address that as well.

5 THE COURT: Mr. Polifko succeeded Mr. Lear?

6 MR. TOLCHIN: Yes.

7 THE COURT: I don't see any problem with that.

8 MR. CLARY: Dr. Polifko is valid?

9 THE COURT: Yes.

10 Is there anything else I need to address?

11 MR. CLARY: Yes, Your Honor.

12 We have a post-trial motion. And although Your  
13 Honor has already alluded to part of it, I think Your Honor  
14 has not had the benefit of briefing on the applicable law.

15 While we have no argument --

16 THE COURT: These cases never end. I can't make a  
17 decision that ever ends anything.

18 MR. CLARY: Well, actually, I am going to give you  
19 a couple of cases on this, although I haven't actually done a  
20 brief yet. I was going to ask for time to do that.

21 Your Honor, unlike the corporation in asserting no  
22 claim to attorneys' fees under the General American Rule, the  
23 rule that applies to trustees is very different. And the

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1 reason is because of their position as trustees.

2 And the Virginia Supreme Court recognizes the fact  
3 that when trustees are sued and it is determined that they  
4 are blameless, as Your Honor has just done in your order,  
5 that they are entitled to reimbursement of the expenses of  
6 their defense from, first, the trust corpus.

7 Unfortunately in this instance, the trust corpus  
8 cannot be turned into money. And so the Virginia Supreme  
9 Court has answered that question as well. And what it says  
10 is that in that instance the money to reimburse the trustees  
11 for the expenses of their defense comes from the benefici-  
12 aries they sued.

13 The case -- and I would appreciate if Your Honor  
14 would -- if Your Honor wants a brief on this, I think it will  
15 be very instructive.

16 The case is Wilson v. Whitehead. It is found  
17 at --

18 THE COURT: What are Mr. Foster's fees?

19 MR. CLARY: I'm sorry?

20 THE COURT: What were Mr. Foster's fees?

21 MR. CLARY: And Mrs. Wright and Mr. Lear?

22 THE COURT: Yes.

23 MR. CLARY: I don't have a current bill. That's

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1 why I was going to have to present them to you.

2 THE COURT: Give me a round figure.

3 MR. CLARY: They're probably in the neighborhood of  
4 \$100,000.

5 As of December, Your Honor, we've taken 15  
6 depositions -- we took their plaintiffs and Mr. Jackson.  
7 They took several -- and I can go through the litany of  
8 every --

9 THE COURT: No, no. I don't want you to do that.  
10 You can submit an itemized statement.

11 Did you all understand that when you were going  
12 through this litigation? Did you understand that -- that you  
13 could possibly be in -- have a judgment against you for  
14 \$100,000?

15 MR. CLARY: Your Honor, at the very inception of  
16 this case I sent by mail -- if you want, I will dig up a copy  
17 of the letter -- I sent a copy of the case Wilson v.  
18 Whitehead to Mr. Annino, suggesting that it was  
19 inappropriate to proceed forward.

20 I think we made every effort that we could to avoid  
21 it.

22 In addition to the Wilson v. Whitehead, 181 Va.  
23 960, 27 S.E. 2d 213, there is also the opinion of Judge

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1 Winston in the Circuit Court of Arlington County, Case No.  
2 18187, November 27th, 1995, citing this case with approval.

3 I have other cases as well, Your Honor.

4 But unfortunately for the plaintiffs, the trustees  
5 did not rely upon the General American Rule.

6 There is specific authority that they should be  
7 reimbursed. So I would ask Your Honor leave to petition the  
8 Court for that. If you want it as a post-trial motion, I  
9 would be happy to do that.

10 THE COURT: You can -- we don't need to have  
11 another hearing. You can submit briefs.

12 MR. CLARY: Very well.

13 THE COURT: I hate to run up the costs even more.

14 Please make your briefs under five pages. It  
15 shouldn't be difficult to do that.

16 MR. CLARY: Yes, ma'am. It won't be.

17 MR. TOLCHIN: Your Honor, can we ask for one more  
18 clarification?

19 When you were ruling on Item -- Count I, Item (g),  
20 there are other issues there raised with respect to  
21 jurisdiction over Parcel A and declare any bylaws null and  
22 void.

23 I assume that you're denying that relief. I just

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1 didn't hear you say that.

2 THE COURT: I am not declaring the bylaws null and  
3 void.

4 And the community is left with the same confusing  
5 situation that you came in here with. I hope everybody  
6 understands that. You have trustees that act with regard to  
7 Parcel A. And you have trustees that are governed by a board  
8 in some respects. And you really have not solved that  
9 problem.

10 Is that a fair statement, Mr. Clary?

11 MR. CLARY: It is, Your Honor.

12 THE COURT: I really feel bad about that.

13 MR. CLARY: While I don't represent the community  
14 and while I can't offer any guarantees, I am aware of the  
15 fact that Mrs. Arnold as the president has called a meeting  
16 of the community -- the association -- for this Friday. And  
17 I think that there will be efforts made there to see if we  
18 can't progress in reaching a solution.

19 I can't promise you that it will happen. But at  
20 least there is an effort.

21 Do you want me to draft the order?

22 THE COURT: Yes, please.

23 I am just absolutely stymied by this \$100,000.

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1 It's just so depressing, I can hardly deal with it. It is  
2 just so depressing for the plaintiffs in this case.

3 MR. CLARY: Believe me, it is depressing for the  
4 trustees.

5 MR. ANNINO: We don't believe, Your Honor, that  
6 fees would be appropriate. And we will respond to the briefs  
7 as submitted.

8 Does the Court want to give us a timetable?

9 THE COURT: Well, just -- Mr. Clary and  
10 Mr. Tolchin, I don't want you to run up fees. Why don't both  
11 of you perhaps decide -- I mean, you represent the trustees.  
12 Both of you don't have to do this brief.

13 MR. TOLCHIN: We are considering asking you for  
14 fees under the bad-faith statute, 8.01-271.11. And we are  
15 considering filing a separate brief on that issue. But we  
16 will also keep it to five pages.

17 We think that if you look at this case, based upon  
18 your rulings, there was no basis for bringing the suit  
19 whatsoever other than there was a dispute in the community.  
20 But that doesn't make a litigation that this community had to  
21 spend tens of thousands of dollars to defend itself against,  
22 especially when they were being accused of conspiring with  
23 trustees.

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1 THE COURT: Well, why don't you file your briefs in  
2 seven days and then you file yours -- file your response in  
3 seven, so that in two weeks I have it.

4 MR. TOLCHIN: Yes, ma'am.

5 MR. ANNINO: Could we do it ten and ten, Your  
6 Honor?

7 THE COURT: I don't mind, if you want to do it ten  
8 and ten.

9 MR. CLARY: No objection.

10 THE COURT: Thank you.


11 (Whereupon, at 11:08 o'clock a.m., the hearing in  
12 the aforesaid matter was concluded.)  
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22  
23

(March 4, 1998)

## CERTIFICATE OF REPORTER

I, GENEVIEVE R. BATA, the stenographic reporter who was duly sworn to well and truly report the foregoing proceedings, do hereby certify that the transcript of said proceedings is true and correct to the best of my knowledge and ability; and that I have no interest in said proceedings, financial or otherwise, nor through relationship with any of the parties in interest or their counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 14th day of January, 1999.

  
\_\_\_\_\_  
GENEVIEVE R. BATA, Reporter

(March 4, 1998)



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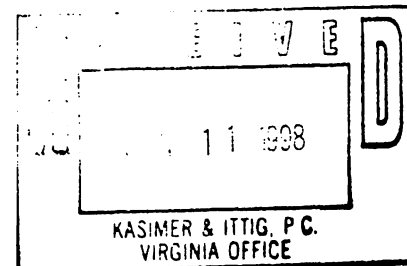
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Re: Stepp, et al. v. Foster, et al.  
In Chancery No. 146295

Dear Counsel:

At the conclusion of trial on March 4, 1998, the defendant trustees, James A. Foster, Marvin E. Lear, and Carol A. Wright, by counsel, moved this Court for recovery of attorney's fees and expenses against the complainants, Marie Stepp, Ralph Edwards, and Patricia Edwards. Counsel for the abovementioned defendants filed a brief in support of the motion. Counsel for complainants filed a response brief. The defendants then filed a reply. This letter opinion addresses the issue raised at trial which was subsequently briefed by counsel for the parties.

Under the American Rule, "attorney's fees are not recoverable by a prevailing litigant in the absence of a specific contractual or statutory provision to the contrary." Ryder v. Petrea, 243 Va. 421, 416 S.E.2d 686, 688 (1992). One exception to this general American Rule exists when a trustee incurs attorney's fees and expenses in a good faith defense of a suit "to which he has



been put without his own fault by reason of his being a trustee.” Willson v. Whitehead, 181 Va. 960, 27 S.E.2d 213, 216 (1943); *see also* Cooper v. Brodie, 253 Va. 38 (1997). In such a case, “the attorney’s fees and costs incurred should be charged to the trust estate.” Cooper, 253 Va. 38, 480 S.E.2d 101, 104 (1997).

The principle underlying Willson and Cooper is that it is the duty of the trustee “to defend all suits brought against him with respect to the trust subject.” Willson, 181 Va. 960, 27 S.E.2d 213, 216 (1943), *quoting*, Stull v. Harvey, 112 Va. 816 (1911). Therefore, “if [trustees] perform their duties faithfully, and are guilty of no unjust, improper or oppressive conduct, they ought not in justice and good conscience to be put to any expense out of their own moneys.” Willson, 181 Va. 960, 27 S.E.2d 213, 216 (1943).

Counsel for the complainants attempts to distinguish the facts and holding of Willson with the case at bar. He emphasizes language in Willson that would seem to limit the exception to only those trustees who “have no beneficial interest in the trust property.” *Id.* In the case at bar, counsel argues that the defendants were all beneficiaries of the trust as well as trustees so the exception stated in Willson cannot and should not be applied. However, this attempt to narrow the exception fails because counsel has neglected to incorporate the later controlling facts and holding of Cooper v. Brodie, 253 Va. 38, 480 S.E.2d 101 (1997).

In Cooper, the defendant trustee was also the executrix and a beneficiary of the trust. Despite the fact that she held a beneficial interest in the trust, the court applied the exception to her and she recovered attorney’s fees and expenses from the losing parties. 253 Va. 38, 480 S.E.2d 101, 104 (1997). Thus, a successful defendant trustee can also have a beneficiary interest in the trust and still recover.

The Cooper case also highlights an additional element required to invoke the exception. Not only must the defendant be a trustee and be blameless but he must have “a good faith basis for defending [the] suit.” *Id.* In this case, the defendants had a good faith basis to defend this suit because, as trustees and fiduciaries, they had a duty to defend the trust.

The complainants attempt to distinguish Willson by again and again singling out Mr. Foster as being particularly undeserving of the protection afforded to trustees by the case. Their attempt fails. First, Mr. Foster was not the only trustee sued. Mr. Clary represented all of the trustees recognized by the complainants and not only Mr. Foster. Any special efforts he may have made to protect Mr. Foster versus Mr. Lear were necessitated by the particular attacks that were made against Mr. Foster by the complainants.



Stepp, et al. V. Foster, et al.

In Chancery No. 146295

June 5, 1998

Page 3

Second, the Court exonerated Mr. Foster from any charge of self-dealing or wrongdoing. The evidence presented at trial simply did not support the allegations of the complainants. Under the exception to the American Rule as set out in Willson and Cooper, the attorney's fees and expenses incurred by the defendant trustees should be charged against the trust estate.

This result, however, begs the question. If attorney's fees and expenses are recoverable by the defendant trustees, from what source will those monies come since the trust estate is realty?

With regard to the source for payment of the attorney's fees and expenses, the court in Willson, 181 Va. 960, 27 S.E.2d 213, 216 (1943). *quoting*, Perry on Trusts and Trustees, 7th ed., § 894, stated:

'The general rule is that trustees shall have their costs either out of the trust fund, or from the cestuis que trust personally (upon the principle that he should be reimbursed all the expenses to which he has been put without his own fault by reason of his being a trustee.). If there is a fund within the control of the court, they may have their costs as between solicitor and client. Where there is no fund within control of the court, . . . [the trustees] are entitled to **costs against the cestuis que trust personally**, to be taxed as between solicitor and client.'

*Emphasis provided.*

"Cestui que trust" is defined as "[t]he beneficiary of a trust." Black's Law Dictionary 229 (6th ed. 1990). Thus, under Willson, if there is no trust fund within the Court's control, the trust beneficiary who placed the trustee in jeopardy by suit becomes personally liable for the attorney's fees and expenses incurred by the trustee.

In this case, there is no trust fund within the control of the court but, rather, the trust is non-liquid realty. Therefore, the complainants who are beneficiaries of the trust and who sued the trustee defendants are personally liable for the defendants' attorney's fees and expenses.

To hold individuals such as the Stepps and the Edwards personally liable to pay the Defendants' fees is severe. After all, the complainants are just ordinary people, so to speak, and complainants' fees are substantial. But this remedy is justified in this case because of the peculiar nature of trustee responsibilities and the high standard required to prove malfeasance. Bringing a case against a trustee is a serious business with attendant risks.

**Stepp, et al. V. Foster, et al.**

**In Chancery No. 146295**

**June 5, 1998**

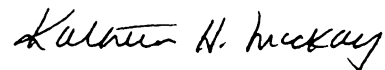
**Page 4**

Belmont Bay Community Association is in a very different position. The Court will not apply sanctions under VA Code §8.01-271.01 as advocated by Mr. Tolchin. The Association bears its own fees and costs.

I did consider all of the briefs filed in this case, including the defendant trustees' reply brief. The defendant's motion to strike on this issue is denied.

Mr. Annino has raised the issue of the reasonableness of the attorney's fees in this case. I will set this down for argument on Friday, June 19, 1998, for thirty minutes. Mr. Clary should present a complete order for entry at that time with a blank for fees. If Mr. Annino intends to put on witnesses, then the parties need to schedule a hearing date with the calendar control judge.

Sincerely,

A handwritten signature in cursive script, reading "Kathleen H. MacKay".

Kathleen H. MacKay

KHM/mam/ca

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V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - - x

GAIL STEPP, INDIVIDUALLY AND :  
AS TRUSTEE, ET AL., :

Complainants, :

-vs- :

In Chancery No. 146295

JAMES A. FOSTER, INDIVIDUALLY :  
AND AS TRUSTEE, ET AL., :

Defendants. :

- - - - - x

Courtroom No. 4G  
Fairfax County Courthouse  
Fairfax, Virginia

Friday, August 7, 1998

The above-entitled cause came on for trial before  
THE HONORABLE GERALD BRUCE LEE, Judge, in and for the Circuit  
Court of Fairfax County, Virginia, at 10:37 o'clock a.m.

APPEARANCES:

On behalf of the complainants:

STEPHEN J. ANNINO, ESQUIRE

On behalf of the defendants:

MATTHEW A. CLARY III, ESQUIRE

(August 7, 1998)

P R O C E E D I N G S

(The court reporter, Genevieve R. Bata, was first duly sworn by the Court.)

MR. ANNINO: Good morning, Your Honor. Stephen Annino for the complainant.

This is before the Court on my motion concerning some post-trial discovery issues.

Very briefly, Your Honor, this case was tried back in February. The action was brought by my clients as complainants against certain trustees and others involving a parcel of real estate that was owned in trust by the trustees and certain duties under the trust deed that we contended required the trustees to collect and administer assessments for the maintenance of the parcels.

THE COURT: And what you're about to do is have it heard in front of Judge MacKay on attorneys' fees?

MR. ANNINO: That's correct, Your Honor.

I've reached certain stipulations with Mr. Clary, which narrow the discovery issues before the Court today. And I just wanted to put on the record what we've agreed to so far.

And the only issue remaining outstanding is my discovery of correspondence with the insurance company,

(August 7, 1998)

1 including monies that we believe have been paid to Mr. Foster  
2 to reimburse him for some of the attorneys' fees.

3 THE COURT: And with the stipulation about the  
4 attorneys' fees paid by the insurance company?

5 MR. ANNINO: That's the only issue that remains  
6 outstanding.

7 THE COURT: The only issue to be argued? Okay.

8 MR. ANNINO: The other stipulations that we agreed  
9 to were that I sent Mr. Clary a letter August 5th that  
10 indicated after our discussion that he would search for  
11 Mr. Moore's time sheets and produce them for me; that he  
12 would produce a redacted copy of his Daytimer; and that he  
13 would have -- that he does not have any original time sheets  
14 for his time and that his time was either dictated or entered  
15 by him directly into the computer; that the computer that had  
16 the data for the billing was disposed of when the firm of  
17 Clary & Moore was liquidated; that there was no written fee  
18 agreement in this case; and that Mr. Foster and he had an  
19 oral agreement, which would be described in interrogatory  
20 answers; that the hourly rates that he charged in this case  
21 were the same as with other Foster matters; that he would  
22 produce copies of Mr. Foster's cancelled check showing the  
23 payment of the fees; and that there was no correspondence

(August 7, 1998)

1 with the insurance company concerning the reasonableness of  
2 his fees.

3 That left outstanding, Your Honor, our Motion --  
4 part of our Motion to Compel in which we requested informa-  
5 tion, correspondence, communications with the insurance  
6 company that we believe reimbursed Mr. Foster for part of the  
7 the attorneys' fees in this case.

8 MR. CLARY: I'm sorry to interrupt, Your Honor.

9 But he's made this purported stipulation a part of  
10 the record. There was a response. I would like him to make  
11 the response part of the record as well.

12 MR. ANNINO: Response?

13 MR. CLARY: You were faxed a response yesterday.

14 MR. ANNINO: I don't have a response.

15 MR. CLARY: For the record, the response indicated  
16 that we indeed agreed to produce Mr. Moore's time sheets.

17 However, if they are in fact in storage in Maryland  
18 in boxes, I asked Mr. Annino if he would be willing to pay  
19 the couple hundred dollars that it may require to get those  
20 out of storage.

21 The second matter that I -- and these were for  
22 points of clarification. Otherwise, the points that he set  
23 forth in his letter of August 5th were correct.

(August 7, 1998)

1           The second item of clarification was that I  
2 indicated that the insurance company had expressed no opinion  
3 with respect to the reasonableness of fees.

4           And in fact, as late as May 7th, 1998, I had  
5 expressly stated that, once they had had an opportunity to  
6 review the matter in its entirety, they would contact my  
7 office with respect to their position on what constitutes  
8 reasonableness.

9           And that is the stipulation with -- I was concerned  
10 about the breadth of the statement in the August 5th letter  
11 about -- concerning reasonableness of fees.

12           THE COURT: All right.

13           MR. CLARY: But that is in fact the position of  
14 the insurance company. And with those two modifications, the  
15 stipulations are agreed.

16           MR. ANNINO: I was out of the office yesterday and  
17 the day before. So I didn't get Mr. Clary's letter that he's  
18 referring to, Judge.

19           In any case, the issue now before the Court is  
20 whether we can obtain information about the attorneys' fees  
21 that may have been paid by the insurance company to  
22 Mr. Foster to reimburse him or directly to Mr. Clary.

23           The hearing upcoming on August 12 -- the purpose of

(August 7, 1998)

1 that hearing is to establish how much attorneys' fees my  
2 client is going to be responsible for.

3 Our position, Your Honor, is that this is a  
4 discovery issue -- we're dealing with discovery, not  
5 admissibility of course -- that we're entitled to information  
6 that could lead to the discovery of relevant evidence, which  
7 may include correspondence from the insurance company about  
8 the reasonableness of the fees, the amount of the attorneys'  
9 fees that were paid, and the actual reimbursement by the  
10 insurance company of the attorneys' fees that were incurred  
11 in this case.

12 As I understand it, Mr. Clary's objection to this  
13 discovery is that it would not be admissible into evidence  
14 because the collateral source rule would bar the admission of  
15 that evidence and that we would not be entitled to a credit  
16 for attorneys' fees paid by the insurance company against the  
17 amount awarded in this case.

18 And I believe, Your Honor, clearly the collateral  
19 source rule doesn't apply in this case. It doesn't have  
20 anything to do with this case.

21 The collateral source rule was stated by the court  
22 in Johnson v. Kellam, which is a Virginia Supreme Court  
23 case decided back in 1934 and reported at 175 S.E. 634.

(August 7, 1998)



1 THE COURT: Basically your position is that the  
2 issue before the court is the attorneys' fees that your  
3 client is going to have to pay, the reasonableness of them.

4 And you want to know what Mr. Clary and Mr. Foster  
5 were paid by insurance. That would give you some indication  
6 of what attorneys' fees the insurance company thought were  
7 necessary. You think that would be helpful to you in  
8 presenting to the court --

9 MR. ANNINO: Not only that, but I do believe as a  
10 matter of law that Mr. Foster has to incur the expense as a  
11 trustee of defending the trust estate before he's entitled to  
12 reimbursement of those expenses.

13 If he is covered by an insurance policy, he has not  
14 incurred those expenses.

15 THE COURT: That's an argument for Judge MacKay, is  
16 it not? That's an argument about what effect --

17 MR. ANNINO: But certainly I am entitled to  
18 discovery to determine what amount Mr. Foster has been paid  
19 so that I can ask Judge MacKay on the 15th (sic) to consider  
20 that when the amount of the attorneys' fees is awarded.

21 Because Mr. Foster clearly isn't entitled to a  
22 windfall in this case. He is entitled to a reimbursement of  
23 his attorneys' fees that he has incurred in defending the

(August 7, 1998)

1 case.

2 And as I've indicated, the collateral source rule,  
3 which is the only objection Mr. Clary has made to the  
4 discovery of this particular issue, doesn't apply. The  
5 collateral source rule applies in a tort case where the  
6 victim is covered by an insurance policy and the law, in  
7 balancing whether the victim should enjoy a windfall or the  
8 tortfeasor should enjoy a windfall, has balanced those  
9 respective interests in favor of the victim.

10 THE COURT: All right.

11 MR. ANNINO: And it has not allowed the tortfeasor  
12 to get a credit for the insurance reimbursement by the  
13 victim.

14 THE COURT: All right. I think I understand your  
15 position.

16 MR. ANNINO: If I could just mention to the Court  
17 also, the court looks at the very case that they cited,  
18 Slickling v. Aspenel (Phonetic).

19 The court in that case expressly says -- found that  
20 the collateral source rule did not apply. And it was a case  
21 involving a contract -- a contract issue where one of the  
22 parties was seeking a credit for the attorneys' fees.

23 I also wanted to cite for the Court United States

(August 7, 1998)

1 of America v. Paisley. And I can hand that opinion up to  
2 the Court. That's a Fourth Circuit case in which the issue  
3 was an equal -- it was an Equal Access to Justice Act request  
4 for reimbursement of attorneys' fees.

5 And in that case the issue before the court was  
6 was the claimant, which was requesting reimbursement of  
7 attorneys' fees, entitled to reimbursement under the Equal  
8 Access to Justice Act where the attorneys' fees had been paid  
9 by a third party.

10 And the court in that case found that because the  
11 attorneys' fees had been paid by a third party and the  
12 claimant had not incurred those fees, therefore it was not  
13 entitled to recover under the Act.

14 THE COURT: I appreciate you bringing that case to  
15 my attention. But I still believe that is a matter for  
16 Judge MacKay. What's before me right now is a discovery  
17 matter.

18 Let me hear from the other side.

19 MR. CLARY: Good morning, Your Honor. I'm  
20 Matthew Clary. I represent Mr. James Foster, Ms. Carolann  
21 Wright, and Mr. Marvin Lear, now deceased, who were the  
22 trustees.

23 And I represented these three defendants in this

(August 7, 1998)

1 case -- in the trial of this case, which at the conclusion of  
2 the case Judge MacKay determined to be groundless and in fact  
3 awarded attorneys' fees in a written opinion dated June 5th,  
4 1998.

5 Judge MacKay in her letter expressly identified one  
6 permissible issue that the court could further entertain, it  
7 being her concept frankly that this would have been heard on  
8 a motions day after her ruling.

9 And Your Honor will note that in her letter she  
10 says "Mr. Annino has raised the issue of reasonableness of  
11 the attorneys' fees in this case. I will set the matter down  
12 for argument on Friday, June 19th, for 30 minutes. Mr. Clary  
13 should present a complete Order for entry at that time with a  
14 blank for fees. If Mr. Annino intends to put on witnesses,  
15 then the parties need to schedule a hearing date with the  
16 calendar control judge."

17 Mr. Annino then advised me that he was going to do  
18 that. And we have a date now for August 12th.

19 And frankly, probably Judge MacKay should have  
20 heard this. But she's doing criminal today, and we don't  
21 have any more time before the 12th.

22 It is important, Your Honor, not to accept the  
23 broad expansive language of the counsel's argument here in

(August 7, 1998)

1 place of the specific language of his request and the narrow  
2 limits required under that, as well as the further narrowing  
3 of that request by his Motion to Compel.

4 Specifically, the request that he is addressing  
5 here asks for all communications to or from Kate Fogerty,  
6 who was an attorney initially engaged or appointed by  
7 Mr. Foster's insurance company; Ms. Wright and Mr. Lear,  
8 having no insurance, but obviously incurring fees and being a  
9 part of the reasonableness for the fees here; or for any  
10 attorney, a representative of Nationwide, who have been  
11 notified -- who you have notified or contend is responsible  
12 for any attorneys' fees incurred by Mr. Foster or any other  
13 trustee in this case.

14 THE COURT: Mr. Clary, it sounds like -- and I may  
15 be misunderstanding. It sounds like Mr. Annino has limited  
16 his request now to just a request for a statement of whatever  
17 attorneys' fees were paid by Mr. Foster's insurance company  
18 to you or Mr. Foster for legal fees. And he only wants to  
19 see that. That's all I've heard him ask for.

20 That's different than his request.

21 MR. CLARY: Yes, it is.

22 THE COURT: The question then becomes: Why isn't  
23 that discoverable?

(August 7, 1998)

1 MR. CLARY: And it's different than his Motion to  
2 Compel too.

3 THE COURT: I understand.

4 But the Court certainly encourages parties to reach  
5 stipulations to narrow the issues. And it sounds like you've  
6 gone from a full-blown motion with a lot of issues and you've  
7 settled most of them.

8 MR. CLARY: Yes, sir.

9 THE COURT: So the question becomes: Why wouldn't  
10 he be entitled under discovery to know just what fees were  
11 paid under the insurance policy to Mr. Foster?

12 MR. CLARY: If that had been asked, it might be  
13 before the Court.

14 It wasn't asked in the interrogatory or in the  
15 Request for Production. It wasn't asked in the Motion to  
16 Compel. And so we are here today in first instance respond-  
17 ing to this request.

18 THE COURT: Okay.

19 MR. CLARY: Which I don't believe is properly  
20 before the Court.

21 But more than that, Your Honor, the issue of  
22 reasonableness is not one for the insurance company to  
23 decide. This is -- and in this case there is insurance for

(August 7, 1998)

1     only one of the three defendants.

2             That insurance company has not expressed their  
3     views on what is reasonable and necessary. And in fact,  
4     Mr. Annino has been told that precisely they are waiting for  
5     the court to rule. They are waiting for the court to  
6     determine reasonableness before they figure out what they're  
7     going to do.

8             And as late as May 7th, 1998, they have expressly  
9     in writing said, "We're going to wait." And they have not  
10    given us any indication of what they're going to do.

11            THE COURT: So they haven't paid you anything  
12    either?

13            MR. CLARY: The insurance company hasn't paid me  
14    anything.

15            THE COURT: Have they paid Mr. Foster anything?

16            MR. CLARY: Yes, sir, they have.

17            THE COURT: Why isn't he entitled to know that and  
18    how much?

19            MR. CLARY: I don't think it's relevant to the  
20    issues. And the reason is because whether or not they have  
21    paid Mr. Foster any reimbursement has no bearing on this  
22    case.

23            THE COURT: All right.

(August 7, 1998)

1 MR. CLARY: The fact of the matter is that if the  
2 insurance company has paid Mr. Foster we must assume they  
3 have a right of subrogation to pursue the defendants.

4 THE COURT: All right. I understand your position.

5 MR. CLARY: Lastly, I have a matter of house-  
6 keeping, Your Honor, that I need to put the court on notice  
7 -- and I would ask Your Honor to make a record in the file  
8 for this -- and to opposing counsel.

9 When we began this process, in response to  
10 Judge MacKay's letter, we anticipated that this was simply  
11 going to be a documentary submission. And indeed, it was  
12 anticipated that it was.

13 As a result of that, we had not sought to recover  
14 on behalf of our clients any attorneys' fees involved in  
15 preparing the information of petition for attorneys' fees,  
16 which was filed sometime in May of this year.

17 Since that point in time and since Judge MacKay has  
18 rendered her opinion, we have been the recipient of two sets  
19 of interrogatories, two sets of request for production of  
20 documents.

21 Mr. Annino has now scheduled this case for hearing  
22 on August 12 for a full day's hearing. He has identified an  
23 expert witness and has declined to allow us to depose this

(August 7, 1998)



1 expert witness, requiring us to submit requests to supplement  
2 the --

3 THE COURT: Are you making an oral motion now?  
4 What is it you're trying to do?

5 MR. CLARY: All I'm doing is I am putting the  
6 court on notice that we are going to expand our request for  
7 attorneys' fees under the circumstances to recover the cost  
8 of all of these -- all of these post-trial proceedings.

9 THE COURT: All right. It sounds to me like that  
10 is something to be presented to Judge MacKay at the hearing.

11 MR. CLARY: Well, I am putting the parties on  
12 notice that this is our position. Because I don't want  
13 anyone to be surprised at the hearing on August 12th.

14 THE COURT: Well, you may not want to wait until  
15 August 12 to give him copies of the bills. You might want to  
16 give him the bills now.

17 MR. CLARY: He has copies of every bill that is  
18 rendered already, Your Honor.

19 THE COURT: I mean even for today.

20 MR. CLARY: We don't have a bill for today.

21 THE COURT: You will shortly.

22 Mr. Annino, I think that I have an understanding.  
23 You're basically just asking for discovery of what the

(August 7, 1998)

1 insurance company has paid Mr. Foster and what effect that  
2 has as to Judge MacKay at the hearing.

3 I am prepared to give you that right now. Okay?

4 So, Mr. Clary, how soon can you give him from  
5 Mr. Foster the amount that was paid by the insurance company  
6 in writing?

7 MR. CLARY: The insurance company has paid one  
8 check of \$40,000, which at the time was a total amount that  
9 Mr. Foster had paid.

10 THE COURT: All right. Thank you.

11 Does that solve the problem?

12 MR. ANNINO: I would like the documentation for  
13 that, Your Honor.

14 But I also believe that --

15 THE COURT: Why do you need the documentation?

16 He just told you the amount. What else do you  
17 need?

18 MR. ANNINO: There may have been correspondence  
19 that accompanied that.

20 THE COURT: I am not willing to give you  
21 correspondence. I am willing to give you just the amount and  
22 who it was paid by. The rest of the motion is denied.

23 Thank you.

(August 7, 1998)

1 Prepare an Order please.

2 (Whereupon, at 10:55 o'clock a.m., the hearing in  
3 the aforesaid matter was concluded.)

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(August 7, 1998)

## CERTIFICATE OF REPORTER

I, GENEVIEVE R. BATA, the stenographic reporter who was duly sworn to well and truly report the foregoing proceedings, do hereby certify that the transcript of said proceedings is true and correct to the best of my knowledge and ability; and that I have no interest in said proceedings, financial or otherwise, nor through relationship with any of the parties in interest or their counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 9th day of August, 1998.

  
GENEVIEVE R. BATA, Reporter

(August 7, 1998)

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Stepp, et al  
Plaintiff / Complainant,

v.

Foster  
Defendant.

At Law / In Chancery No.: 146275

ORDER

This matter came to be heard on the 7<sup>th</sup> day of August, 1998 on the  
~~Plaintiff~~ / Complainant / ~~Defendant's~~ motion to compel

Upon the matters presented to the Court at the hearing, it is hereby

**ADJUDGED, ORDERED, and DECREED** as follows:

Upon counsel for Defendant's proffer that  
Mr. Foster's insurance company has reimbursed  
him the sum of 40,000 which was at the time  
of such reimbursement the total amount paid by  
Mr. Foster; Complainant's motion is denied.

Entered this \_\_\_\_\_ day of \_\_\_\_\_, 1998.

\_\_\_\_\_  
Circuit Court Judge

SEEN: md c by et al

SEEN: \* example

Stephene K...  
Counsel for Plaintiff / Complainant

[Signature]  
Counsel for Defendant

1 V I R G I N I A:

2 IN THE CIRCUIT COURT OF FAIRFAX COUNTY

3 - - - - - X

4 GAIL STEPP, INDIVIDUALLY AND :  
AS TRUSTEE, ET AL., :

5 :  
6 Plaintiffs, :

7 -vs- :

In Chancery No. 146295

8 JAMES A. FOSTER, INDIVIDUALLY :  
AND AS TRUSTEE, ET AL., :

9 Defendants. :  
10 - - - - - X

11 Courtroom No. 5F  
12 Fairfax County Courthouse  
13 Fairfax, Virginia

14 Wednesday, August 12, 1998

15 The above-entitled cause came on for hearing before

16 THE HONORABLE KATHLEEN H. MacKAY, Judge, in and for the

17 Circuit Court of Fairfax County, Virginia, at 10:01 o'clock

18 a.m., the proceedings being recorded by stenotype by

19 GENEVIEVE R. BATA of DSC Reporting, Inc.  
20  
21  
22  
23

(August 12, 1998)

1 APPEARANCES:

2 On behalf of the plaintiffs:

3 STEPHEN JOSEPH ANNINO, ESQUIRE  
4 Kasimer & Ittig, P.C.  
5 7653 Leesburg Pike  
6 Falls Church, Virginia 22043

7 On behalf of the defendant trustees James A.  
8 Foster, Marvin Lear, and Carolann Wright:

9 MATTHEW A. CLARY III, ESQUIRE  
10 Holland & Knight, L.L.P.  
11 3110 Fairview Park Drive - Suite 900  
12 Falls Church, Virginia 22042  
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(August 12, 1998)

C O N T E N T S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Susan M. Pesner	47/62/90	126	199	--
Voir Dire (Clary)	58/90	--	--	--
Charles Molster III	211/224	255	268	269
Voir Dire (Annino)	217			

E X H I B I T S

<u>Plaintiffs'</u>	<u>For</u>	<u>In</u>
	<u>Identification</u>	<u>Evidence</u>
No. A-1 Letter from Nationwide Insurance dated 12/13/96	46	46
No. A-2 Summary chart of fees prepared by Ms. Pesner	89	90
No. A-3 Comparison of Clary & Moore bills	97	100
No. A-4 Breakdown of asterisked items	110	210
No. A-5 Mr. Annino's revised counter-affidavit	123	123
No. A-6 Defendants' expert designation	254	254

(August 12, 1998)



	<u>Defendants'</u>	<u>For</u> <u>Identification</u>	<u>In</u> <u>Evidence</u>
1			
2			
3	No. B-1 Mr. Clary's affidavit and billing dated 3/98	66	66
4	No. B-2 Mr. Clary's affidavit and billing dated 8/98	66	66
5			
6	No. B-3 Mr. Keith's pleading index	188	210
7	No. B-4 Mr. Clary's pleading index	191	210
8			
9	No. B-5 Document	235	235
10	No. B-6 Billing analysis prepared by Mr. Molster	237	237
11	No. B-7 Plaintiffs' expert designation	247	247
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(August 12, 1998)

P R O C E E D I N G S

(The court reporter, Genevieve R. Bata, was first duly sworn by the clerk of the court.)

THE COURT: This is the case of Gail Stepp, et al. v. James Foster, et al. We are here for a hearing on attorneys' fees.

MR. CLARY: Yes, ma'am.

Your Honor, before we begin, I have some housekeeping matters that I need to take care of.

The first item is we have filed -- and unfortunately it didn't get into the court file. Mr. Annino has a copy of this. You do not have a copy of this.

It is our defendants' request for an award of supplemental attorneys' fees, together with a supporting affidavit, to cover the period from the end of trial through this hearing. And I have that together with a brief and supporting cases on our entitlement to recover these fees.

THE COURT: All right.

MR. CLARY: Secondly --

THE COURT: How much were your fees since the end of trial? How much are we talking about?

MR. CLARY: I think the grand total now, including the expert witness fees we've had to incur for today's

(August 12, 1998)

1 hearing and everything else -- the grand total is 176,000.

2 THE COURT: Oh, my goodness. Okay.

3 MR. CLARY: That's fees and expenses, Your Honor.  
4 I think the expenses are 15,000 plus.

5 THE COURT: Yes.

6 MR. CLARY: In addition to that, we have indica-  
7 tions from the plaintiffs that they intend to present  
8 evidence on and argue certain issues pertaining to insurance  
9 and the availability of insurance counsel, which we believe  
10 is a red herring and we would like to get out of the way to  
11 begin with, to truncate the proceeding here today. And so we  
12 have filed and delivered to opposing counsel a motion in  
13 limine to prevent this evidence from coming in.

14 And there, Your Honor, is the motion in limine  
15 together with the supporting cases. And with the permission  
16 of the Court, I would argue that at this point in time.

17 THE COURT: I was reading all the material again  
18 this morning. And I knew the insurance business was going to  
19 come up. I wish I would have had this motion before now.

20 MR. CLARY: I apologize, Your Honor.

21 MR. ANNINO: I got it at 9:00 o'clock this morning,  
22 Your Honor.

23 MR. CLARY: We've been kind of working overtime on

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1 this. And actually, we had a hearing on Friday under their  
2 motion to compel.

3 THE COURT: Is there an order entered in that case?

4 MR. CLARY: There was, Your Honor.

5 And actually, is that not in the file?

6 THE COURT: Well, there was a lot of loose paper on  
7 top of the file today. I am not quite sure where it is.

8 I saw your motions.

9 MR. CLARY: If I can, I'm sure I have a copy in  
10 here, Your Honor, for just a quick reference. It's a  
11 handwritten order. But it would help you, I think, to see  
12 the results.

13 THE COURT: Thank you. No, I didn't see this.

14 Who was it? What judge?

15 MR. CLARY: Judge Lee, ma'am.

16 MR. ANNINO: Your Honor, I also have a transcript  
17 of that hearing.

18 THE COURT: Is this important to the motion in  
19 limine?

20 MR. ANNINO: I don't know that it's important to  
21 the motion in limine.

22 We are going to ask the Court to take judicial  
23 notice of that order and the proffer that's recited in it.

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1 THE COURT: You can take this back, Mr. Clary,

2 MR. CLARY: Yes, ma'am.

3 THE COURT: Is that your housekeeping or do you  
4 have more?

5 MR. CLARY: Well, I was going to argue the motion.

6 The other thing I do have as a matter of house-  
7 keeping, if you'd like to address this issue, is I have  
8 drafted a final decree for the Court. Mr. Annino has a copy  
9 of it. And so pursuant to Your Honor's instructions, there  
10 is a draft final decree.

11 MR. ANNINO: I got that, Your Honor, five minutes  
12 before the hearing started. So I haven't had an opportunity  
13 to look at it.

14 There were prior versions of that order that I did  
15 have some problems with, because I didn't believe that they  
16 had accurately reflected the Court's rulings. And I have  
17 drafted a counter-decree.

18 MR. CLARY: And we agreed to disagree on that prior  
19 drafting and the differences with respect to those issues.

20 THE COURT: Did you all do a transcript of the oral  
21 ruling from the bench? Did you do a transcript of that?

22 MR. CLARY: Yes, ma'am. I do have the transcript  
23 available for you today.

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1           And I also have, if Your Honor would like to see  
2   it, the correspondence between counsel trying to resolve the  
3   differences that sort of give you an idea of where everybody  
4   is coming from. I will be happy to give Your Honor that as  
5   well.

6           THE COURT: All right. Mr. Annino, do you want to  
7   give me your proposed order?

8           MR. ANNINO: Yes, Your Honor.

9           This order contemplated a subsequent order being  
10   entered for the attorneys' fee issue.

11          THE COURT: All right. I received a letter from  
12   Lowry Miller saying that Ms. Fogarty is out of town on  
13   vacation and will be unable to appear today.

14          I don't know who subpoenaed her.

15          MR. ANNINO: We had subpoenaed her, Your Honor.  
16   But I don't know that her testimony will be essential,  
17   depending on this issue about the insurance coverage.

18          THE COURT: Okay. I would like to do your argument  
19   then on the motion in limine.

20          MR. CLARY: Your Honor, as you are fully aware,  
21   this case has involved a suit against three individual  
22   trustees of a parcel of land in Belmont Bay. And I know  
23   Your Honor is intimately familiar with the details, so I'm

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1 not going to --

2 THE COURT: Tell me who the three individual  
3 trustees are again.

4 MR. CLARY: Marvin Lear, who is now deceased.

5 And essentially his son-in-law and daughter,  
6 Mr. and Mrs. Goeller, are in the court today representing his  
7 interest as the beneficiaries and personal representatives.

8 Mrs. Carolann Wright.

9 And Mr. James Foster.

10 Your Honor will recall that the issue for today's  
11 hearing, as set forth in your June 5th, 1998, letter, was the  
12 reasonableness of the trustees' fees. And that is the limit  
13 and scope of today's hearing.

14 Your Honor had previously decided, as set forth in  
15 the letter, the entitlement to reimbursement for attorneys'  
16 fees. So today we are simply limiting it to reasonableness.

17 Mr. Annino has raised -- in your letter you indeed  
18 said Mr. Annino has raised the issue of reasonableness and  
19 you are going to set the case down for 30 minutes. And if  
20 Mr. Annino intends to put on witnesses, then the parties need  
21 to schedule a hearing.

22 Mr. Annino has now made it clear, however, that he  
23 intends, unless constrained by the Court, to introduce

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1 evidence of insurance coverage for one of the three trustees  
2 -- that is, Mr. Foster. And he is going to do so for two  
3 purposes.

4 One is to argue that if the insurance company's  
5 counsel, Ms. Fogarty, had represented the trustees, such  
6 counsel may have charged less in attorneys' fees than did the  
7 trustees' chosen counsel.

8 Second, he wants to offer this to argue that,  
9 because Mr. Foster may have received payment of some monies  
10 under his insurance policy to reimburse him for payments that  
11 he had made for attorneys' fees, that the plaintiffs should  
12 get a credit for that payment, and that they should be  
13 excluded from the award of attorneys' fees that Your Honor  
14 considers in determining the amount that is reasonable.

15 Neither of these purposes has anything to do with  
16 reasonableness. And indeed, they create some red herrings  
17 that it is inappropriate for Your Honor to consider and  
18 become confused about the issue of the reasonableness of the  
19 fees that are in front of you.

20 Let me take first this issue of the availability of  
21 insurance company counsel.

22 First, it should be apparent that Mr. Foster is  
23 only one of the three trustees who were sued in this suit.

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1 And the other two trustees do not have the benefit or  
2 entitlement to representation of counsel by Mr. Foster's  
3 insurance company's selected counsel.

4 As it turns out, Mr. Foster was insured under a  
5 personal umbrella insurance policy. A copy of that policy is  
6 attached to our motion, Your Honor.

7 And the reason why the insurance company said that  
8 they would defend is because of an allegation of negligence,  
9 among many other allegations in the Complaint, against  
10 Mr. Foster.

11 In spite of the duty to defend, if you look at the  
12 contract itself, what you find is that this is one of the  
13 older style policies that did not grant to the insurance  
14 company the right or impose upon Mr. Foster the obligation to  
15 accept the insurance company's choice of counsel.

16 And Your Honor can see that if you look at the duty  
17 to defend on page 3 of 7 of the insurance policy, which lacks  
18 the necessary language according to the cases that I have  
19 cited, to empower the insurance company to control  
20 Mr. Foster's selection of counsel.

21 But there is an even additional reason, however.

22 THE COURT: Let me find that, before you move on.

23 MR. CLARY: Yes, ma'am. It's under Claims Defense,

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1 paragraph 1.

2 THE COURT: Tell me how that supports what you've  
3 just told me.

4 MR. CLARY: The problem with this language is that  
5 it does not contain a provision that says "We have the right  
6 to choose the counsel to defend you." And in order for that  
7 to -- in order for the insurance company to have that right,  
8 that right must be clearly stated in the policy.

9 Moreover, I would represent to the Court that in  
10 correspondence -- not in correspondence -- in discussions  
11 with the insurance company's adjuster they acknowledged and  
12 acceded that indeed there was -- that Mr. Foster had the  
13 absolute right to choose counsel of his choice.

14 But it is not just that provision that gives  
15 Mr. Foster the right to choose and makes it inappropriate for  
16 him to rely on insurance counsel. And the reason for that is  
17 because the insurance company also undertook the representa-  
18 tion under a reservation-of-rights letter.

19 And if Your Honor looks at the last document  
20 attached, which is dated December 13th, 1996 -- if we set  
21 aside for the moment that the insurance company is finally  
22 and for the first time responding to the lawsuit some month  
23 and a half after the original response was due by Mr. Foster,

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1 and thus he would have been in default -- but if Your Honor  
2 will read this, what you will see is this is a reservation-  
3 of-rights letter.

4 And what that means is that "Okay. We'll defend  
5 you. But we're going to reserve the right to deny any  
6 responsibility for paying any judgment that is entered  
7 against you."

8 Now, the case law in this issue is very clear that,  
9 even in those instances where the insurance company has an  
10 explicit contractual right to choose the lawyer, when they  
11 issue a reservation-of-rights letter it creates a conflict.

12 THE COURT: One would think so.

13 MR. CLARY: What?

14 THE COURT: One would think so.

15 MR. CLARY: I mean, do you want to be defended by  
16 somebody who after the case is done and they lose said,  
17 "Well, I'm sorry. We don't have to pay"? Does that suggest  
18 that perhaps they wouldn't put as much effort into it as one  
19 who has his interest at stake?

20 And this is sort of the rationale of all of  
21 these cases where when the insurance company has issued a  
22 reservation-of-rights letter the policyholder is at perfect  
23 liberty to choose counsel of his own selection in contra-

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1     vention of the policy language.

2                 Here we don't have language that allows the  
3     insurance company to do that. Secondly, they issued a  
4     reservation-of-rights letter. And third, the insurance  
5     counsel is not available to the other two trustees.

6                 So raising the possibility and suggesting that the  
7     costs of defense could have been cheaper if Ms. Fogarty's  
8     firm was used is simply a red herring and should not be  
9     considered in this case.

10                THE COURT: Let me ask Mr. Annino, just to see if  
11     we can explore that issue: You don't have the ability to go  
12     forward on that issue today anyway, do you? She is not going  
13     to testify. Or do you have the ability to go forward?

14                MR. ANNINO: I think we do, through our expert  
15     witness, Your Honor.

16                THE COURT: Okay. Go ahead, Mr. Clary.

17                MR. CLARY: The second half of this is Mr. Annino  
18     will argue and wants to introduce evidence of the proffer  
19     that I made to Judge Lee, which Your Honor -- it's in the  
20     court records, which I advised Judge Lee that indeed  
21     Mr. Foster has received a \$40,000 reimbursement from his  
22     insurance company which at the time of the reimbursement was  
23     the totality of the payments that he had made to my law firm

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1 in partial payment of his bill.

2 THE COURT: Does that mean he's made another claim  
3 against the insurance company for the rest of the bill?

4 MR. CLARY: Well, he is continuing to try and get  
5 more out of the insurance company. Whether they will pay or  
6 not, at this point is speculation.

7 But the problem with this argument -- and what  
8 Mr. Annino wants to do is to argue to Your Honor that "Well,  
9 see, this would be a windfall to the plaintiff -- to the  
10 defendant, Mr. Foster, if, on the one hand, a judgment is  
11 entered against the Stepps and he collects from them and at  
12 the same time he gets money from his insurance company."

13 Well, there is a couple problems with that.

14 One is the Collateral Source Rule in Virginia. And  
15 I'm sure you're familiar with the Collateral Source Rule,  
16 which essentially does not permit a party to claim a credit  
17 for monies received from their own insurance company.

18 After all, Mr. Foster is the one that paid the  
19 premiums for 50 years on this policy in order to get the  
20 benefits.

21 But that really isn't important either.

22 THE COURT: I don't know if the case law is going  
23 that way, Mr. Clary.

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1 MR. CLARY: I'm sorry?

2 THE COURT: I don't know that the case law on that  
3 issue is going that way.

4 MR. CLARY: I think you're right, Your Honor.

5 I think what is happening is that the case law in  
6 the United States is changing. I don't know that in Virginia  
7 we've gotten to that point.

8 THE COURT: There was a recent Supreme Court case  
9 regarding the payment of insurance benefits. I am trying to  
10 remember what it was.

11 Someone tried to collect twice from the insurance  
12 company and not return the proceeds.

13 MR. CLARY: Right.

14 The problem with all of that argument, however, is  
15 it ignores the more fundamental issue. And that is the  
16 insurance company's right of subrogation.

17 Because whether -- and in this case the insurance  
18 policy on page 6 of 7 in No. 8 expressly provides that "When  
19 we pay an insured's rights of recovery from anyone else, it  
20 becomes ours up to the amount we paid."

21 And then it continues with the language there,  
22 which Your Honor can read.

23 THE COURT: Explain to me how you think that's

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1 going to have a great bearing, assuming the worst for the  
2 plaintiffs, and they pay your client \$100,000 or whatever and  
3 then he has collected 40,000. You're saying the insurance  
4 company is going to ask for him -- what's 'going to happen  
5 next?

6 MR. CLARY: The insurance company is -- let's say  
7 the insurance company has paid 40,000.

8 THE COURT: The insurance company what?

9 MR. CLARY: Let's say the insurance company has  
10 paid 40,000.

11 They are now subrogated to the extent of that  
12 \$40,000 to whatever the Court finds as reasonable attorneys'  
13 fees against Mr. and Mrs. Stepp. That is the limit of their  
14 ability to obtain that from Mr. Stepp.

15 And to the extent that Your Honor enters a judg-  
16 ment, let's say, for the full amount asked here, 176,000,  
17 Mr. Foster is powerless to enforce that to the extent of the  
18 \$40,000; because it is the insurance company's to take care  
19 of.

20 In fact, the Asplenod case in the footnote, even  
21 though it deals with the Collateral Source Rule issue, notes  
22 that of course this concern about windfall doesn't occur  
23 whenever there is a right of subrogation. And the reason is

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1 because, in all instances, it prevents there from being a  
2 windfall.

3 There is only one recovery as between the man who  
4 is insured and his insurance company.

5 So that the issue that Mr. Foster may in the past,  
6 as I have represented to the Court, and may at some time in  
7 the future be able to get some money from his insurance  
8 company, is wholly irrelevant to the issue before the Court  
9 today, which is simply: What is the appropriate amount of  
10 attorneys' fees that the plaintiffs bringing the case, and  
11 the defendants having been found innocent of any fault,  
12 should be required to reimburse?

13 If you just -- just from a policy argument, if  
14 Your Honor were to credit the plaintiffs with whatever  
15 Mr. Foster, who paid 50 year's worth of insurance premiums to  
16 get this insurance -- if you credit them with that and don't  
17 give attorneys' fees up to that amount, then what you've done  
18 is to give them a windfall for something that they never paid  
19 for.

20 THE COURT: If we just take the amount of 100,000,  
21 which I know it's not, and I give Mr. Foster 60,000 on the  
22 theory that he's been paid 40,000, the insurance company will  
23 take 40,000 of the 60,000.

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1 MR. CLARY: That's right.

2 THE COURT: Isn't that what will happen?

3 MR. CLARY: Yes.

4 THE COURT: The insurance company under the  
5 subrogation rights will take 40,000 of the 60,000.

6 MR. CLARY: Yes, ma'am.

7 THE COURT: So he'll be out -- if I do that and I  
8 rule that Mr. Foster deserves to be compensated but I don't  
9 give him the full amount, he's going to be out 40,000, I  
10 think. It's hard to say.

11 MR. CLARY: Yes, ma'am. And this would then fly  
12 directly in the face of the whole concept of Wilson v.  
13 Whitehead, which is the trustees shouldn't be put to taking  
14 money out of their pockets.

15 So for these reasons, Your Honor, we believe that  
16 any discussion of insurance, whether it is in the context of  
17 "You should have used insurance counsel, and that if you did  
18 there would be cheaper costs" or that "There is a credit that  
19 ought to be made here for insurance payments" or it should be  
20 even considered in determining what the reasonable fees are,  
21 is wholly inappropriate.

22 THE COURT: Given the extremely contested nature of  
23 this litigation, I would be inclined to let the evidence come

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1 in and deal with it head-on, rather than to exclude it before  
2 it comes in.

3 But is this hearing going to be accomplished within  
4 one day?

5 MR. ANNINO: Almost certainly, Your Honor.

6 THE COURT: Is there any question about that?

7 MR. CLARY: I don't think so.

8 But I do know in their expert designation they have  
9 expressly identified Ms. Pesner as going to testify that, had  
10 Ms. Fogarty been employed, then certain benefits of that  
11 insurance carrier coverage would have flowed.

12 And I think that's inappropriate. And I think we  
13 can curtail the hearing by avoiding that. And I think it's  
14 improper to consider that.

15 THE COURT: Mr. Annino?

16 MR. ANNINO: That certainly can be taken under  
17 proffer.

18 And subject to the Court's ruling on the motion  
19 in limine, I don't think it will prolong the hearing  
20 extensively at all. I expect --

21 THE COURT: You can respond to his whole motion, if  
22 you'd like.

23 MR. ANNINO: Your Honor, Mr. Clary started with a

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1 number of housekeeping matters. And I'll reserve my comments  
2 on his motion for attorneys' fees for the moment and  
3 concentrate on the issues raised by the motion in limine,  
4 which as I indicated to the Court, I received at 9:00 o'clock  
5 this morning and obviously haven't had an opportunity to  
6 review the cases that he cited in his memorandum.

7 I would like to pass up to the Court copies of  
8 opinions which I feel are appropriate for the Court's  
9 consideration concerning the reasonableness of attorneys'  
10 fees and what is and is not at stake in connection with the  
11 hearing on the amount of attorneys' fees which should or  
12 should not be awarded in this case.

13 MR. CLARY: Is there at least a list of the cases?

14 MR. ANNINO: I will provide counsel with a copy  
15 when I offer it to the Court.

16 Your Honor, Mr. Clary makes much of the Court's  
17 comment at the end of its opinion about the hearing today  
18 being concerning the reasonableness of attorneys' fees.

19 There is -- I think it's nothing more than  
20 semantics. What the Court is considering is the amount of  
21 attorneys' fees that should or should not be awarded in this  
22 case.

23 And the concept of reasonableness certainly

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1 embraces many different factors, which, if the Court looks at  
2 the first case on the top of the cases that I've cited there,  
3 the Lansdowne Company v. Xerox Realty case, the court  
4 discusses what is a reasonableness of attorneys' fees and  
5 what types of consideration the evidence should embrace and  
6 the court should consider when considering a petition for  
7 attorneys' fees and how the issue of the insurance proceeds  
8 and the involvement of the insurance company, or noninvolvement  
9 of the insurance company attorney in this case, plays  
10 into it.

11 I think it is discussed by Judge Horne in the  
12 second-to-the-last page of that opinion where, in considering  
13 what is reasonable in that case, the court considered the  
14 allocation of work among the various attorneys involved in  
15 the case and went through a discussion of the fact that the  
16 resources in that case were used appropriately by the  
17 attorneys involved, that there was extensive involvement with  
18 associates in the case, and that all of that resulted in a  
19 fair allocation of attorneys' fees and a fair time for  
20 attorneys' fees to be taken into the court for consideration  
21 in that case.

22 So the -- and the issue of the involvement or the  
23 noninvolvement of insurance company's counsel in this case

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1 plays into it. Because Mr. Foster and the other trustees  
2 really had the benefit of another attorney, Katherine  
3 Fogarty, in the case since December of -- since that letter  
4 of December 13th, 1996, that counsel referred to wherein the  
5 company notifies the insured that it will provide counsel for  
6 the insured to fully defend the case.

7 And to suggest -- for counsel to suggest that this  
8 attorney would not have aggressively, appropriately, and  
9 adequately represented the interest of her client, I think  
10 flies in the face of the code of professional responsibility,  
11 among other things.

12 Certainly Ms. Fogarty would have given full time  
13 and attention and given appropriate representation to  
14 Mr. Foster in this case.

15 And as the Court can see from the file, what  
16 happened was Ms. Fogarty was essentially ignored. And there  
17 came a point in time when she filed a motion to withdraw from  
18 the case because of not being given appropriate information  
19 from Mr. Clary and not being allowed to really participate in  
20 the case, which we feel flies in the face of the assistance  
21 and cooperation clause in the insurance policy that counsel  
22 referred to and attached. That's paragraph 7 of the  
23 insurance policy, which requires --

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1 THE COURT: What about his argument that Mr. Foster  
2 was only one of three?

3 Ms. Fogarty would have represented Mr. Foster and  
4 then Mr. Clary would have represented the other two trustees?  
5 And he would have had two attorneys working instead of one?

6 MR. ANNINO: Your Honor, if counsel is cooperating  
7 and allocating resources, the benefits accrued from  
8 Ms. Fogarty's representation would have accrued to the other  
9 two trustees.

10 The issues involving the trustees were common.  
11 Mr. Clary represented all three of them. So the benefit  
12 which would have accrued was Ms. Fogarty could have been  
13 assigned tasks to perform for the benefit of all the parties  
14 that Mr. Clary would not have performed or would have not  
15 needed to perform.

16 Ms. Fogarty and her firm bill at a substantially  
17 less hourly rate than Mr. Clary and his firm bill at.

18 And our evidence will show that there is a research  
19 pool available to the attorneys that are working with an  
20 insurance defense counsel that would have eliminated or  
21 minimized the 23-some trips to the law library that Mr. Moore  
22 took in this case and the extensive involvement that  
23 Mr. Moore had in the case, billing at \$175 an hour, and

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1 Mr. Clary at \$225 an hour.

2 So we feel that the insurance coverage issue is  
3 important for the Court to consider for the very reason  
4 mentioned in the Lansdowne case and the other cases that I  
5 passed up the Court.

6 The Court has to, when looking at an attorneys' fee  
7 petition, weigh a number of factors. And whether counsel  
8 adequately used the resources available to it is one of the  
9 factors that the Court looks at.

10 And so I think that that evidence ought to be  
11 considered. It's part of the resources available to counsel.  
12 And the Court should consider that in determining what  
13 reasonable amount of fees should be awarded in this case.

14 Second -- the second issue that the insurance  
15 raises, and counsel referred to it as the Collateral Source  
16 Rule, is if the Court looks at the Schlickton case, which  
17 they cited, and its progeny, it is clear the Collateral  
18 Source Rule doesn't have any application to this case.

19 THE COURT: What about his arguments on subroga-  
20 tion?

21 MR. ANNINO: Well, that issue, Your Honor, may  
22 come up at another day and another time. And whether the  
23 insurance company in this case has a right of subrogation to

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1 its counsel fees is one thing.

2 It is, in my mind, a different issue than if it had  
3 paid a claim -- an insurance claim that it had against  
4 another person.

5 There is two distinct aspects of the subrogation.  
6 And it generally arises where the insurance company has paid  
7 out a claim on behalf of its insured.

8 THE COURT: How can I even figure all that out  
9 today, Mr. Annino, when it's not even clear what the  
10 insurance company is ultimately going to pay Mr. Foster? How  
11 can I possibly deal with the issue of insurance today when it  
12 seems like you just finished saying that it's not clear what  
13 the insurance company will do?

14 MR. ANNINO: Well, we know that the insurance  
15 company has paid \$40,000. And we know that the insurance  
16 company has indicated that it will await the outcome of the  
17 Court's ruling on the reasonableness of the fees before  
18 making any further reimbursement to Mr. Foster.

19 The Court can certainly in its opinion state that,  
20 you know, it finds an award in the amount of X dollars and  
21 that the complainant is entitled to credits in the amount of  
22 \$40,000 and such other credits as may arise from any payment  
23 of insurance proceeds received by --

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1           THE COURT: Let's say I stick to Mr. Clary's point  
2 of view, which is to rule strictly on the reasonableness of  
3 the fees, and I say that Mr. Foster and Mrs. Wright and  
4 Mr. Lear should not bear any costs in this case and I think  
5 the \$100,000 is a reasonable fee.

6           Why can't I just say that and let the insurance  
7 company figure out what they're going to do about that?

8           You see what I mean?

9           I have -- my first priority today is to make the  
10 trustees whole, because that's what I've already said I'm  
11 going to do.

12          MR. ANNINO: Right.

13          THE COURT: So I don't want to enter a ruling that  
14 jeopardizes that goal.

15          So if I give them \$100,000 and it looks like  
16 they've -- that the insurance company for some reason is not  
17 going to exercise its rights of subrogation, assuming  
18 Mr. Clary's analysis of that is correct, what would you do  
19 then? What would you do in the future then to tell the  
20 Court -- what kind of suit could you institute to tell the  
21 Court that we paid the Lears and the Fosters and the Wrights  
22 too much money?

23          You see what I mean?

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1 MR. ANNINO: What a ruling like that would put us  
2 in the position of is Mr. Foster and the trustees seek to  
3 collect from the Stepps the full amount of their recovery.

4 THE COURT: Yes.

5 MR. ANNINO: And then they turn around and take  
6 the position with the insurance company that this is not a  
7 properly subrogatable claim and that they're entitled to the  
8 full recovery that they obtained from the Stepps.

9 THE COURT: See, that whole issue is something  
10 that's going to be determined by someone else in the future,  
11 I think.

12 I don't see how I can do that today when it's not  
13 even clear how much the insurance company is going to pay  
14 them. If in fact, as you say, the whole right of subrogation  
15 is so confusing, I don't understand how I can deal with it  
16 today.

17 MR. ANNINO: Well, our position, Your Honor -- if I  
18 could pass up to the Court a case which I think is appropri-  
19 ate for the Court's consideration on this. It is U.S. v.  
20 Paisley. And I can pass this up to the Court.

21 THE COURT: The question I'm trying to ask you -- I  
22 was trying to -- obviously I want to protect everybody from  
23 some kind of injustice.

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1           So let's say that I give the trustees \$100,000  
2     and then they do argue to the insurance company "Hey,  
3     Mr. Insurance Company, you don't have any of this, what you  
4     paid us. Tough. We're going to take home 140,000."

5           What rights would you have at that time? You don't  
6     think you would have any?

7           MR. ANNINO: I don't think we would have any  
8     rights, Your Honor, if the order is not structured in a way  
9     that we're given -- that that issue is taken into account.

10          What the Court is looking at and should be  
11     concerned about is that the trustees -- any fees that the  
12     trustees incurred in connection with their defense of this  
13     case is reimbursed.

14          And what the Paisley case says and what I think  
15     the proper application of the Collateral Source Rule says is  
16     that payments by a third party to a claimant must be  
17     considered because the fees in that case are not incurred by  
18     the party.

19          The Paisley case involved an Equal Access to  
20     Justice Act claim where the claimant had a right to recovery  
21     of attorneys' fees but, having been indemnified by his  
22     employer for those fees, the court, in considering whether  
23     the fees had been incurred so as to trigger the obligation of

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1 the Equal Access to Justice Act, concluded that the fees  
2 can't be incurred because another party reimbursed and  
3 indemnified the claimant from any attorneys' fees that were  
4 incurred in connection with the case that was before the  
5 court.

6 THE COURT: Was subrogation an issue in that case?

7 MR. ANNINO: It wasn't an insurance claim. It was  
8 a claim by -- a claim of indemnity.

9 But essentially that's what an insurance policy  
10 does. It indemnifies the policyholder from claims or loss  
11 arising from an occurrence under the policy.

12 THE COURT: Can you give me the subrogation  
13 provision, Mr. Clary, in that policy again?

14 MR. CLARY: Yes, ma'am. It is on page 6 of 7. It  
15 is Item No. 8 at the -- it's the second numbered paragraph  
16 down from the top of the page.

17 And I did bring the original policy.

18 THE COURT: What do you think about that,  
19 Mr. Annino? Have you read that?

20 MR. ANNINO: Well, like I say, Your Honor --

21 THE COURT: Amazingly enough, it looks like one of  
22 those policies that must have been written in plain English.

23 "When we pay an insurer's right of recovery, money

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1 from anywhere else becomes ours up to the amount we paid."

2 I must say, that couldn't be much clearer.

3 Now, you're saying that that's on an insurance  
4 claim of some sort and not on attorneys' fees?

5 MR. ANNINO: Right.

6 A right of recovery -- I don't know if there is a  
7 definition for "right of recovery" under the policy.

8 THE COURT: But you see, you all have presented me  
9 with a dilemma. You want me to make a decision today based  
10 on events that may or may not happen in the future. And you  
11 want me to err on the side of your clients.

12 Because under the theory I've outlined to  
13 Mr. Clary, if the insurance company comes after Mr. Foster  
14 for these proceeds and collects, he will be out \$40,000.

15 So you want me to make a decision that, if there is  
16 any possibility of losing, it's Mr. Foster who loses and not  
17 the Stepps.

18 MR. ANNINO: Well, I think you can take that into  
19 account in any order that you entered, Your Honor, by finding  
20 a fixed amount and then providing in any -- in the order that  
21 Mr. Foster -- that there is a credit against that amount for  
22 any insurance proceeds recovered by Mr. Foster and expressly  
23 reserving in the order -- you know, having a caveat that it

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1 shall not affect the right of the insurance carrier to any  
2 subrogation claim that it may have.

3 So that if the insurance company decides to pursue  
4 that claim, they can pursue the Stepps and join in the  
5 recovery. And everybody is made whole and nobody suffers a  
6 windfall.

7 THE COURT: Okay.

8 MR. ANNINO: And like I say, Your Honor, I don't  
9 think the Collateral Source Rule applies at all in this case.

10 Even under the Schlickton case that counsel  
11 cites, the court in that case expressly found it was a  
12 contractual matter. And it didn't arise in a contractual  
13 context.

14 The Collateral Source Rule applies when there is a  
15 tortfeasor, which we don't have in this case.

16 And there is -- the policy is the victim should not  
17 have a windfall because the tortfeasor has -- the victim  
18 should not suffer a loss because a tortfeasor has incurred  
19 liability. So the tortfeasor has the benefit -- or should  
20 not get the benefit of any insurance policy that the victim  
21 has.

22 And that's the public policy considerations.  
23 You're dealing with a tort claimant and a victim. And the

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1 law allows -- or errs on the side of the victim in that case  
2 and says that the tortfeasor should not be granted any sort  
3 of windfall.

4 So those considerations don't apply in a  
5 contractual context. And that's essentially what the  
6 Schlickton case found.

7 The other issues concerning the supplemental award  
8 of attorneys' fees I can address now or wait for the Court's  
9 decision on this issue.

10 THE COURT: You mean you think that the  
11 supplemental attorneys' fees shouldn't be a part of this  
12 hearing?

13 MR. ANNINO: Absolutely.

14 THE COURT: Why is that?

15 MR. ANNINO: First of all, Your Honor, in  
16 Mr. Clary's initial affidavit and initial submission to the  
17 Court and petition for attorneys' fees he expressly indicated  
18 that the motion was not for any post-trial or -- any post-  
19 trial matters. That's expressly stated in his affidavit.

20 And yesterday at 4:54 p.m. I get served with this  
21 motion for supplemental attorneys' fees from Mr. Clary.

22 He mentioned it on Friday, the 7th, when we were  
23 before the Court arguing whether I should be allowed to

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1 obtain information concerning the insurance issues in the  
2 case. And that's the first I heard of it.

3 It certainly is not properly before the Court today  
4 or noticed for hearing today. And under the cases on that  
5 subject -- and there are a few cases concerning work done in  
6 preparing a motion for attorneys' fees which have found that  
7 it should not be compensated in the award of attorneys' fees  
8 that is made by the court.

9 I can pass up to you Saunders v. City of Roanoke.

10 THE COURT: Do you realize you all have given me  
11 this much information?

12 MR. CLARY: Sorry, Your Honor. A little light  
13 reading.

14 MR. ANNINO: The cite is 13 Va. Circuit at 378.

15 And that case -- and I believe there is some other  
16 cases cited in counsel's memorandum that he forwarded to me  
17 this morning which stand for the similar proposition, that  
18 your attorneys' fees incurred in recovering your attorneys'  
19 fees are not properly the subject of an attorneys' fees  
20 award. It is essentially considered the cost of doing  
21 business.

22 It arises quite frequently in a bankruptcy context  
23 where an attorney petitions for fees from the bankruptcy

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1 court and in an Equal Access to Justice Act context where  
2 those fees are petitioned for. And the courts have routinely  
3 said that you can recover your attorneys' fees incurred in  
4 the case, but your fees incurred in order to obtain your  
5 recovery is not part of the award of the court.

6 So both because this is -- you know, this is  
7 essentially sandbagging me at the eleventh hour without  
8 notification that this would be the subject of the Court's  
9 hearing today. My expert obviously has not had a full  
10 opportunity to review the supplemental petition, nor have I.

11 How am I supposed to address those matters this  
12 morning?

13 It's totally unfair. And according to the case  
14 law, it's not a proper subject of the Court in the first  
15 instance.

16 THE COURT: All right.

17 MR. CLARY: Your Honor, I think actually this  
18 should be held for resolution at the end. Because it's part  
19 of my closing argument to explain to the Court the different  
20 perspectives and approaches that it is appropriate for the  
21 Court to take and is supported by the case law because of  
22 the circumstances of the case; whether it arises out of a  
23 statutory award, whether it is a product of a contract, or

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1 whether, as it is here, it is the function of a policy of  
2 indemnification.

3 So I would ask Your Honor to hold judgment on this.

4 I would note, however, that, as is set forth in the  
5 opening part of the request for supplemental attorneys' fees,  
6 we noted that when on March 6th and April 2nd we filed our  
7 original request for attorneys' fees and indeed did not  
8 submit any expenses at that time for post-trial work, it was  
9 anticipated. And in fact, by your June 5th order it was  
10 fairly anticipated.

11 This is going to be simply documentary submission.

12 Since your letter, we have had -- we have been  
13 subjected to two sets of interrogatories, two requests for  
14 production of documents, one hearing on a motion to compel  
15 denied.

16 Plaintiffs' counsel has scheduled a full-day  
17 hearing today on these fees -- on the issue of attorneys'  
18 fees. He has designated an expert witness and refused to  
19 permit us to take the deposition of that expert witness,  
20 thereby forcing us to go back with multiple supplemental  
21 requests that he expand an abbreviated description he gave in  
22 his expert designation interrogatory response to us.

23 We've also had to hire our own expert witness.

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1           And so what has originally started out some four or  
2 five months ago as a documentary submission has been blown by  
3 the plaintiffs' actions into a minitrial.

4           And we believe that Your Honor, when you consider  
5 the circumstances, the cases that we cite, and the policy  
6 that we're trying to achieve here in this case -- Your Honor  
7 will agree that it is appropriate for these fees to be  
8 considered as well.

9           Your Honor will recall of course that the -- the  
10 landmark case on attorneys' fees, Mullens v. Richlands,  
11 expressly says that "The court should entertain estimates of  
12 what the future legal fees are going to be in arriving at a  
13 judgment."

14           Well, Mr. Annino has -- was given copies of  
15 everything that was billed in response to his request for  
16 production of documents back -- whenever he asked for them,  
17 he was given copies of them, including post-trial bills.

18           The only thing that we have submitted to him -- and  
19 he was put on express notice in our hearing on Friday that we  
20 were pursuing this because of what had happened and the  
21 position that he had put us in. And it is a matter of record  
22 in the proceedings of that court.

23           But on top of that -- so he had the bills that he

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1 could have reviewed with his expert. The only thing that he  
2 did not have was the unbilled time.

3 And certainly the expert should have plenty of time  
4 to look at these, given her experience in this case, and be  
5 able to comment on these bills.

6 The real issue is sort of a legal argument: Should  
7 the fees of the defendants which are incurred in attempting  
8 to get the full reimbursement to which they're entitled --  
9 should they bear the burden of that? Or should the policy of  
10 Wilson v. Whitehead prevail, which is they should not in  
11 good conscience and justice be required to pay anything out  
12 of their pocket?

13 So I would ask Your Honor to hold on your ultimate  
14 ruling on that particular --

15 THE COURT: I certainly am.

16 MR. ANNINO: Your Honor, I don't want to leave the  
17 Court with a misimpression, if I can just respond briefly to  
18 what Mr. Clary said.

19 The two sets of interrogatories, Your Honor,  
20 totalled four questions -- four questions. The document  
21 request was nine or ten requests, basically asking for the  
22 insurance information and the information on the backup for  
23 his attorneys' fees bills. I wanted to see the time sheets,

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1 et cetera, so that I could have that information.

2 We're talking about a \$150,000 attorney fee  
3 request. I certainly would be derelict if I didn't ask for  
4 that information.

5 Mr. Clary responded with discovery of his own to  
6 me -- four sets of interrogatories -- one each for each of my  
7 clients with, I think, 12 to 15 or more interrogatory  
8 questions, most of them which dealt -- were inappropriate and  
9 dealt with postjudgment collection matters, you know, asking  
10 me to supply him information about the assets of my client,  
11 et cetera.

12 The motion to compel I had to file because he  
13 objected to virtually all of my document requests, except  
14 one, and ultimately agreed to provide most of the information  
15 that I had requested in that document request, with the  
16 exception of the insurance information.

17 So -- and certainly counsel was on notice from the  
18 Court's order that this could not -- it was not necessarily a  
19 30-minute matter, that the Court expressly gave me the right  
20 to present evidence on the issue.

21 And for them to conclude it was going to be only a  
22 documentary submission, I think belies what in actuality  
23 happened in this case.

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1 THE COURT: Okay.

2 MR. CLARY: We don't quarrel with his right to do  
3 everything that he did. It's just that, having availed  
4 himself of that, my client should not be called upon to bear  
5 the cost of it.

6 THE COURT: All right. I did have an opportunity  
7 to read your motion in limine. And I did listen to the  
8 argument obviously.

9 I am going to deny the motion in limine. I am  
10 going to allow you to put on all the evidence you want today.  
11 Both Mr. Annino can put on what he wants and Mr. Clary can  
12 put on what he wants in terms of the supplemental attorneys'  
13 fees. So it's all going to come out.

14 I am perfectly capable of separating out what I  
15 think is going to be relevant and what's not.

16 MR. ANNINO: Your Honor is going to allow him to  
17 present supplemental?

18 Because I won't be in a position to address that  
19 supplemental petition. I'll have to have somebody analyze  
20 his supplemental billings that he submitted that I got --

21 MR. CLARY: Last night.

22 THE COURT: You want to have your expert look at it  
23 and have me take a half-hour break?

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1 MR. ANNINO: Well, in a half an hour, Your Honor, I  
2 don't know that --

3 THE COURT: Well, this case cannot afford to be  
4 prolonged anymore. It cannot afford to be prolonged anymore.

5 So I am going to allow you to -- I don't think that  
6 the supplemental bills should be all that difficult to  
7 analyze frankly.

8 I'm not sure how I'm going to rule on it.

9 I want it to come out. I want everybody to be able  
10 to give me whatever evidence they think are important.

11 And if Ms. Pesner is your expert, I will adjourn  
12 for a half an hour and you can give her that. I'm sure  
13 she'll be able to analyze it.

14 MR. ANNINO: All right, Your Honor. I guess that's  
15 what we'll have to do.

16 THE COURT: It is now -- how many witnesses are we  
17 going to have on each side? I just want to make sure we're  
18 sticking to a timetable here.

19 MR. ANNINO: Are you going to present your evidence  
20 first?

21 MR. CLARY: No. I think the posture of the case,  
22 as I understand it, is that Your Honor has accepted the  
23 affidavit as prima facie proof and --

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1 THE COURT: Mr. Annino has got to put on his  
2 evidence first.

3 MR. CLARY: Right.

4 THE COURT: So how many witnesses do you have?

5 MR. ANNINO: One.

6 THE COURT: One? Just Ms. Pesner?

7 MR. ANNINO: Yes.

8 THE COURT: And you have one?

9 MR. CLARY: Yes.

10 THE COURT: Oh, we'll be fine then. Okay.

11 One-half hour. That means 25 after 11:00.

12 MR. ANNINO: Now, that's assuming that both  
13 Mr. Clary's affidavit and my affidavit are accepted by the  
14 Court.

15 MR. CLARY: The Court has already reviewed those.

16 THE COURT: Is there some reason why I wouldn't  
17 accept them as a good-faith basis of what you all have done?

18 MR. CLARY: I think Tazewell and its progeny  
19 basically says that's sufficient.

20 THE COURT: I am going to go and begin reading this  
21 stuff. And one-half hour.

22 (Whereupon, at 10:55 o'clock a.m., a recess was  
23 taken.)

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(11:30 a.m.)

THE COURT: Mr. Annino, do you want to make an opening statement or do you just want to put on your witness?

MR. ANNINO: I think we'll put the testimony on, Your Honor.

May I have a rule on witnesses, Your Honor?

MR. CLARY: Your Honor, in view of the fact that Mr. Annino has designated this expert within the last week and a half or something like that and we didn't have the opportunity to depose her or even make a motion for it, given the short time span, and in view of the fact that what we have here are two experts who are going to be testifying, an obvious purpose of the second expert is going to be to rebut the testimony of the first. It would seem appropriate that we leave that witness in the room.

MR. ANNINO: Well, I disagree, Your Honor. I think I'm entitled to have a rule on witnesses. And experts are no different than any other witness that is going to testify.

Counsel was supplied with the substance of Ms. Pesner's testimony in interrogatory answers. So I don't see the need for another witness to be sitting in the courtroom while Ms. Pesner testifies.

THE COURT: I think experts are different than

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1 other witnesses. And I don't think it's unusual to allow  
2 them to sit in and evaluate the situation.

3 But, Mr. Annino, I will allow you a rule, if you so  
4 desire.

5 So who is going to be a witness in this case?

6 MR. CLARY: Mr. Charles Molster, Your Honor.

7 THE COURT: I would note that everyone sat in the  
8 courtroom already through about 45 minutes of argument  
9 involving fees.

10 Can you step out please, sir.

11 (The prospective witness left the courtroom.)

12 MR. ANNINO: Your Honor, before I start with the  
13 testimony, I would ask the Court to take judicial notice of  
14 the order that was entered on August 7th.

15 THE COURT: Yes, I will.

16 I have to find it. I don't know where it is in the  
17 file. But I do believe I have Mr. Clary's copy.

18 MR. ANNINO: And I would also like to offer a  
19 letter from Nationwide Insurance that was attached to  
20 Mr. Clary's motion in limine.

21 MR. CLARY: Again, just as a matter of housekeeping  
22 since they are being offered, we would ask that our  
23 objections to those be considered as being preserved through-

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1 out the trial, in view of our motion in limine.

2 THE COURT: Yes, they are preserved.

3 Do you want me to take the exhibit off his motion  
4 and mark it?

5 MR. ANNINO: That might be the best thing to do,  
6 Your Honor.

7 Should we use a different numbering system than the  
8 trial?

9 THE COURT: Yes. Why don't we start over again.  
10 I have no idea where we left off at the trial.  
11 The December 13th, 1996 letter, is what you want?

12 MR. ANNINO: Yes, Your Honor.

13 THE COURT: That will be marked as -- how about  
14 Plaintiffs' Exhibit A, instead of numbers?

15 MR. ANNINO: Why don't we say A-1.

16 THE COURT: Okay.

17 MR. ANNINO: And that's in evidence, subject to  
18 counsel's motion in limine?

19 THE COURT: Yes.

20 (The document referred to was  
21 marked as Plaintiffs' Exhibit  
22 No. A-1 for indentification and  
23 was received into evidence.)

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1 (Whereupon,

2 SUSAN M. PESNER

3 was called as a witness by and on behalf of the plaintiffs  
4 and, having been first duly sworn, was examined and testified  
5 as follows:)

6 DIRECT EXAMINATION

7 BY MR. ANNINO:

8 Q. Ms. Pesner, would you state your name and address  
9 for the record please.

10 A. Susan M. Pesner -- P-e-s-n-e-r; 2008 Wolf Trap Oaks  
11 Court, Vienna, Virginia, 22182.

12 Q. And where are you employed, Ms. Pesner?

13 A. I am a principal in the law firm of Gordon &  
14 Pesner, L.C., in McLean, Virginia.

15 Q. And where do you principally practice?

16 A. In the Northern Virginia area.

17 Q. And how long have you been with Gordon & Pesner?

18 A. Since its inception on March the 1st, 1996.

19 Q. And prior to that would you just give the Court a  
20 brief overview of your history with firms.

21 A. Certainly.

22 I started practice at Tysons Corner with the law  
23 firm of Walstead, Wickwire, Peterson, Gavin & Aslin, none of

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1     whom -- only two of whom are still partners.

2             And I continued as senior partner of that firm for  
3     13 years thereafter and then joined the firm of Gordon &  
4     Estabrook in 1992, which converted to Gordon, Estabrook &  
5     Pesner and has gone through some internal changes to where we  
6     are today.

7             Q.     And how long have you been practicing law?

8             A.     Eighteen years.

9             Q.     And would you give the Court a brief overview of  
10    your educational background.

11            A.     I have an undergraduate degree in political science  
12    from American University. I have a law school degree like-  
13    wise from American University.

14            Q.     Do you have any posteducation training --  
15    continuing legal education, that sort of thing?

16            A.     My continuing legal education credits always exceed  
17    the minimum requirements by about triplefold on an annual  
18    basis. And I teach for both CLE and for insurance continuing  
19    education for the State of Virginia.

20            Q.     And what courses have you taught?

21            A.     I've probably taught about 30 continuing education  
22    -- continuing legal education requirements, including current  
23    developments in real estate; many ethical issues in both real

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1 estate and nonreal estate matters; substantive issues involv-  
2 ing real estate that would include deeds, deeds of trust,  
3 qualities of insurance, insurance defense issues.

4 Q. And tell the Court a little bit about the firms  
5 that you have been associated with, the number of attorneys  
6 in the firm and their particular expertise.

7 A. Walstad-Wickwire at the time that I was there was  
8 approximately 18 attorneys. They did a majority of construc-  
9 tion litigation matters. And then they had a separate  
10 general practice/real estate department which was -- which is  
11 what I was mostly a part of.

12 In my early years in that firm I was associate of  
13 the day, where whatever the firm's practice needed the most  
14 attention, it was given to. So oftentimes I would work on  
15 major litigation cases for the litigation attorneys of  
16 Walstad-Wickwire

17 Gary Peterson and I mostly had a transactional  
18 practice, although Mr. Peterson has and does still, as I  
19 understand, appear in court matters.

20 And then over the 13 years we were involved in  
21 approximately 22 trial litigation cases, of which I was  
22 probably part of ten to 12.

23 Q. And --

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1           A.    The present firm or its predecessor since 1992 have  
2    had to trial -- through trial five cases in this court. And  
3    we've had one arbitration case all the way through arbitra-  
4    tion and appeal and a number of trials that have settled at  
5    or during trial.

6           Q.    And do you participate in litigation in the real  
7    estate context?

8           A.    Yes, I do.

9           Q.    Can you tell the Court about some of the cases  
10   involving homeowners' associations that you've been involved  
11   in in the litigation context.

12          A.    I've had two cases just this year -- in the last 12  
13   months on homeowners' association matters.

14                Both times I was representing homeowners in those  
15   circumstances. Both of them involved actions by adjacent or  
16   neighboring homeowners involving covenants, restrictions that  
17   would relate to the use of the property. And both involved  
18   restraining orders and injunctions requested by the  
19   plaintiffs in the case, all of which were denied.

20                Ultimately both cases were nonsuited by  
21   complainants. And both periods for bringing the case again  
22   have passed.

23          Q.    And of the litigation matters that you've handled

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1 or your firm's been involved with, what percentage of them  
2 have been real estate-based?

3 A. 95%.

4 I only hesitate to say 100% because there are  
5 matters sometimes within a case that are not a real estate  
6 matter.

7 Q. And what percentage of your practice would you  
8 consider to be litigation-based at the present time?

9 A. About 30%.

10 Q. Have you been involved in any bar activities?

11 A. In 1996 and 1997 I was the chair of the real estate  
12 section of the Virginia State Bar. Prior to that I held all  
13 of the offices you're required to have in the section before.

14 I have been in that section and actively involved  
15 in that section for about 15 years. I write extensively for  
16 the newsletter of the section.

17 I write for the Virginia Lawyer, which is the  
18 publication of the Virginia State Bar. And I perform  
19 probably once-a-year services at least for Virginia CLE in  
20 providing seminar training.

21 I published this year in the University of Richmond  
22 its survey on property law for 1996 to 1997. And I wrote the  
23 update to the Manual on Real Estate Practice on the issues

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1 of ethics.

2 Q. And how do your bar activities allow you to become  
3 familiar with customary and normal charges for attorneys  
4 routinely practicing before Northern Virginia courts?

5 A. In those bar activities you -- one of the benefits  
6 of the bar activity is your rubbing of shoulders with other  
7 lawyers throughout the Commonwealth and certainly within your  
8 own jurisdiction.

9 Our own real estate section of the Fairfax Bar has  
10 virtually been defunct for the last seven or eight years.  
11 And I noted yesterday in the Bar Journal of the Fairfax Bar  
12 that I was elected chairman of the real estate section, for  
13 which I did not volunteer. But Bob Adams has assured me that  
14 the job will be well done by me.

15 In the issues, especially in your role as chair of  
16 the substantive law section, oftentimes I would be the touch  
17 person where another attorney would be seeking somebody to  
18 act as an expert but asks for names and referrals of those  
19 people who might have expertise in certain areas.

20 And oftentimes the issues of attorneys' fees do  
21 come up.

22 I am presently before this court on a case that was  
23 postponed from a July trial date and has now been rescheduled

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1 for April on an issue of attorneys' fees in a case involving  
2 a title insurance company versus a title insurance agency.

3 Q. You've been retained as the expert in that case?

4 A. I have.

5 Q. And would you tell the Court briefly what that case  
6 involves.

7 A. That case is the culmination of two federal court  
8 cases and a circuit court case, not including the one that is  
9 before the circuit court now, involving a real estate matter  
10 as to whether a partner in a partnership that is in dissolu-  
11 tion has a severable interest in a property that gives them  
12 the right to lien it by a deed of trust and whether the  
13 trustee under that deed of trust and whether the insurance  
14 agent in the case was within its purview to issue the policy  
15 it did to the lender of the partnership interest and  
16 ultimately whether that lender had a severable interest or  
17 not.

18 Q. And in connection with that litigation, what  
19 involvement have you had in the review of attorneys' fees and  
20 analyzing attorneys' fees that were incurred in the litiga-  
21 tion?

22 A. In those related cases I've seen eight different  
23 law firms' bills. There was numerous law firms involved in

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1 the cases, all here in Northern Virginia -- eight law firms,  
2 including three expert witness bills.

3 Q. And what was the purpose of your analysis of those  
4 bills?

5 A. The case that is presently pending before the court  
6 by the title insurance company against its title insurance  
7 agent is under the issue of indemnity. And the title  
8 insurance company is seeking recompense from its agent for  
9 all of the attorneys' fees that the title insurance company  
10 has incurred in all of the litigation that preceded it.

11 Q. And what was your role in that respect?

12 A. I reviewed each of the billings of all of the  
13 attorneys in all of the different litigation. I reviewed the  
14 litigation to the extent that it impacted on the attorneys'  
15 bills.

16 I reviewed the expert witness reports.

17 I have reviewed trial memoranda and briefs and the  
18 orders of the courts.

19 Q. And have you been retained as an expert in any  
20 other cases?

21 A. That have gone to trial, no, sir.

22 But in cases that have settled prior to that, it  
23 was in two cases that I can recollect offhand.

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1 Q. And do those cases involve real estate matters?

2 A. They do.

3 Q. And how have your activities and involvement  
4 through your own practice and your bar activities enabled you  
5 to become familiar with the normal and customary charges for  
6 attorneys routinely practicing in Fairfax County Circuit  
7 Court?

8 A. It is a matter of discussion, I guess, among all  
9 attorneys in an informal way. But in the more formal way, it  
10 has to and requires discussion among attorneys when it comes  
11 to the situations like this one and the review of other  
12 attorneys' cases.

13 In our own litigation practice in cases where  
14 there's been an attorneys' fee grant for successful litigation,  
15 we've certainly had the opportunity to review other  
16 attorneys' fees.

17 In bar activities we're often consulted by lawyers  
18 who may be looking to make a move, large law firms that want  
19 to take in a local Virginia office asking what the going  
20 rates are for lawyers in an area in this type of practice.

21 Q. And what are your firm's normal hourly rates for  
22 your partners and associates?

23 A. Myself and my partner, Ray Gordon, bill private

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1 insurance defense work at 205 an hour. And insurance defense  
2 work varies between 150 and 160 an hour. And Virginia  
3 Department of Transportation bills at 135 an hour.

4 THE COURT: Do you want me to qualify her as an  
5 expert?

6 MR. ANNINO: Yes, Your Honor.

7 I was about to get to that.

8 THE COURT: Is there any objection to her being  
9 qualified as an expert?

10 MR. CLARY: I just wanted to ask a couple  
11 questions.

12 THE COURT: I thought you were asking a substantive  
13 question -- what she charges as fees.

14 MR. ANNINO: Right.

15 THE COURT: Are you still trying to ask her  
16 questions that would qualify her as an expert?

17 MR. ANNINO: Yes.

18 THE COURT: Okay. Well, go ahead then.

19 BY MR. ANNINO: (Resuming)

20 Q. Why are insurance defense matters billed at  
21 different -- at less of an hourly rate?

22 A. Insurance defense matters are always handled  
23 differently, in that the insurance companies tend to have a

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1 wealth of information and research that has been done,  
2 especially in a nationwide insurance company -- and I meant  
3 that as an insurance company that practices throughout the  
4 country -- in that they don't allow for attorneys to do what  
5 we call reinvent the wheel; that if an insurance company's  
6 defense counsel in New Mexico has already issued and had  
7 successfully entered into a case and done research, that  
8 research becomes part of a pool.

9 And as an attorney who's part of the network of  
10 those attorneys, we get access to all of that research.

11 So prior to doing any research in a case, we always  
12 have to go to our insurance companies who are providing the  
13 defense for their insureds and verify that the research had  
14 not previously been done.

15 And if so, they will provide it to us. And we tell  
16 them why we would or would not need to do any additional  
17 research on that issue that may just relate to independent  
18 state law on that issue.

19 Q. In connection with your involvement with insurance  
20 companies, do you also become familiar with rates charged in  
21 insurance matters in the Northern Virginia area?

22 A. Yes.

23 For one of the insurance companies that we work

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1 for, there is an annual retreat where all of the defense  
2 counsel are invited. And certainly fees are generally  
3 discussed throughout the Commonwealth; just the differences  
4 between Northern Virginia, Tidewater, and everywhere else.

5 Q. And have you in fact been retained by Nationwide  
6 Insurance to represent their policyholders on occasion?

7 A. I have been paid through Nationwide Insurance on  
8 behalf of one of their policyholders on an occasion.

9 MR. ANNINO: Your Honor, I would ask that  
10 Ms. Pesner be recognized as an expert.

11 MR. CLARY: I just have a couple of questions,  
12 Your Honor.

13 THE COURT: All right. Go ahead.

14 VOIR DIRE

15 BY MR. CLARY:

16 Q. Ms. Pesner, I just want to get a better under-  
17 standing of your litigation experience here.

18 Can you give me a feel for how many cases in your  
19 18 years of practice you've been the lead trial counsel in.

20 A. Two.

21 Q. And in the other cases, how many cases were you  
22 supporting counsel in?

23 And maybe I'm not using the right term.

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1 A. I would say all of them.

2 Q. And that would be maybe two dozen additional cases;  
3 is that a fair statement?

4 A. Yes.

5 Q. And in the role -- when you worked with somebody  
6 as leading or supporting, you recognize the necessity for  
7 communication between those parties?

8 A. I do.

9 Q. And that there is different roles that they serve?

10 A. I do.

11 Q. And in the cases that you have acted either as  
12 trial counsel -- either as lead or as support, how many of  
13 those cases are reported -- reported cases?

14 A. I am repeating it from my brain.

15 Are you including a circuit court-reported?

16 Q. Supreme Court -- Supreme Court, U.S. District  
17 Court, so that it appears in --

18 A. One.

19 Q. What was that one?

20 A. Sharma is the name of the defendant. And it was a  
21 landlord/tenant case that went to the Supreme Court approx-  
22 imately two and a half years ago.

23 Q. Were you the lead or the support?

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1 A. Support.

2 Q. You talked about rates with insurance defense.

3 Isn't it a fact that one of the reasons why counsel  
4 charge insurance companies less is because there is a deal?  
5 You get the volume of cases and you charge less?

6 A. That's not the circumstance in my personal  
7 experience, no.

8 Q. So you don't have any knowledge then of that as a  
9 possible reason why insurance counsel would charge less?

10 A. No. I do think I have knowledge.

11 I am engaged --

12 Q. So are you saying that in your experience in this  
13 bar of insurance defense counsel that it is -- that it is an  
14 unusual or uncommon experience that counsel who defend  
15 insurance cases charge what the current market rates are?

16 A. I'm sorry. I'm going to ask you to repeat the  
17 question, because I don't understand the relation between  
18 these two questions.

19 Q. All right. In your experience, are there in fact  
20 firms in Northern Virginia that are known as insurance  
21 defense firms?

22 A. Yes.

23 Q. And they do work primarily for insurance companies;

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1 isn't that true?

2 A. Some of them do, yes.

3 Q. And those firms that are known as insurance defense  
4 firms generally commit the vast majority of their resources  
5 towards representing insurance defense -- representing cases  
6 on behalf of insurance companies, don't they?

7 A. Some do and some don't.

8 Q. And as a consequence of that, they receive a large  
9 volume of cases?

10 A. They may.

11 Q. All right.

12 A. But oftentimes the --

13 Q. I'm sorry.

14 A. I'm sorry.

15 Q. Let me just ask the questions.

16 MR. ANNINO: Your Honor, if I could ask that the  
17 witness be allowed to finish her answer.

18 MR. CLARY: I think she was getting into volunteer-  
19 ing some information.

20 THE COURT: I think the answer was appropriate as  
21 it was.

22 BY MR. CLARY: (Resuming)

23 Q. Would it be fair to characterize your practice as

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1 primarily transactional real estate?

2 A. My personal practice or our law firm's practice?

3 Q. No. Your personal practice.

4 A. Yes.

5 Q. Your law firm is not here testifying.

6 A. Yes.

7 MR. CLARY: I don't have any objections.

8 THE COURT: You are admitted, Ms. Pesner, as an  
9 expert.

10 RESUMING DIRECT EXAMINATION

11 BY MR. ANNINO:

12 Q. Ms. Pesner, are you familiar with the charges  
13 rendered by the firm of Clary & Moore in the case presently  
14 before the Court?

15 A. I am.

16 Q. How did you become familiar with those charges?

17 THE COURT: Before you even begin on that, let me  
18 ask you: I received so much documentation in the form of  
19 affidavits. Are you going to have her testify from the  
20 affidavits? Are you going to give her some reference point  
21 in terms of Mr. Clary's charges?

22 Because I would rather have it in front of me if  
23 I --

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1 MR. ANNINO: We will be referring to Mr. Clary's  
2 bills.

3 THE COURT: Will you tell me where those are.  
4 I mean, I'll tell you what I've got.

5 MR. ANNINO: Your Honor, I believe they were  
6 attached to Mr. Clary's affidavit.

7 THE COURT: Are you talking about his letter of  
8 March 12th that has "Enclosed please find an affidavit in  
9 support of an award"?

10 MR. ANNINO: Right.

11 THE COURT: Is that what you're using?

12 MR. ANNINO: Yes, Your Honor.

13 Attached to that were the billing statements that  
14 we were under the impression were the subject of the hearing  
15 today.

16 THE COURT: It beginnings on page 1/2/98?

17 Ms. Pesner, is that what you've got, 1/2/98? Is  
18 that your first charge, 1/2/98?

19 THE WITNESS: No, 8/2/96.

20 Or maybe I have them in reverse order.

21 THE COURT: I'm sure I have them back the other  
22 way. Let's see.

23 THE WITNESS: If I may, Your Honor, the easiest

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1 way, I have found, in referring to them is using the billing  
2 date at the top right corner. And I start with a billing  
3 date of 1/3/97.

4 MR. ANNINO: I believe you just may have them in  
5 reverse order.

6 THE COURT: I do. The earliest one I have is dated  
7 -- is billing date 1/3/97.

8 Is that what you said?

9 THE WITNESS: Yes.

10 THE COURT: Okay.

11 BY MR. ANNINO: (Resuming)

12 Q. And I believe the question, Ms. Pesner, was: How  
13 did you become familiar with the Clary & Moore billing state-  
14 ments?

15 A. I reviewed billing statements commencing from a  
16 billing date of 1/3/97, which dated back to 8/2/96.

17 And prior to this morning, I had reviewed through  
18 billing date 3/6/98, which came forward to March 6, '98.

19 And in the half-hour recess there were two billing  
20 statements: One I believe is 5/6/98. Mine is a facsimile.  
21 And it starts from 3/5/98. And then the second, which has an  
22 August 11, '98, date, which appears to start on June 8, '98.

23 THE COURT: Before we get into that again -- I hate  
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1 to be picky about this. But let me see if I can get these  
2 things marked so that we don't run into any problem.

3 Mr. Clary, you originally attached your affidavit  
4 to a letter dated March 12th, 1998. You had your affidavit  
5 and you had Exhibit A and Exhibit B.

6 MR. CLARY: Yes, ma'am.

7 THE COURT: Do you mind if I mark them something  
8 you think is appropriate, so I can just use them in the  
9 litigation?

10 MR. CLARY: Please. That's fine with us.

11 If you want to call them Defendants' Exhibits 1, 2,  
12 and 3, that's fine with me.

13 THE COURT: So you want your affidavit to be 1 and  
14 A becomes 2, and then B becomes 3?

15 MR. CLARY: Now, you're talking about the affidavit  
16 that was just submitted?

17 THE COURT: No. I've got the affidavit that was  
18 submitted some time ago in March. And then I have an  
19 affidavit that was submitted this morning.

20 MR. CLARY: Yes, ma'am. You want to just mark --

21 THE COURT: Let's take your first affidavit and  
22 mark that as one exhibit.

23 We were using letters for Mr. Annino.

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1           Mr. Annino, how do you anticipate your exhibits  
2 being marked? You've done A-1.

3           MR. ANNINO: A-1, A-2, A-3.

4           THE COURT: Mr. Clary will be B-1.

5           And do you want this all as one exhibit, this whole  
6 thing, Mr. Clary?

7           MR. CLARY: It's probably more convenient to do it  
8 that way. But it doesn't matter. Whichever is most  
9 convenient for the Court, Your Honor.

10          THE COURT: When this goes up to the Supreme Court,  
11 for the record to be clear, is this B-2?

12          Your affidavit you gave me this morning, I'm going  
13 to do as B-2. Okay?

14          MR. CLARY: Yes, ma'am.

15          THE COURT: This is B-1 and B-2. And we all know  
16 what we're talking about.

17          MR. ANNINO: B-1 was the first affidavit and the  
18 bills? And B-2 is the second affidavit and the bills?

19          THE COURT: Right. And those will both be  
20 admitted.

21                               (The documents referred to  
22 were marked respectively as  
23 Defendants' Exhibit Nos. B-1

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1 and B-2 for identification and  
2 were received into evidence.)

3 BY MR. ANNINO: (Resuming)

4 Q. Ms. Pesner, in reviewing the billing statements,  
5 what factors did you use to determine the reasonableness of  
6 the fees charged in this case?

7 A. I relied on the Virginia law involving mostly  
8 Barber v. Kimbrough. It gives a 12-step approach to the  
9 attorneys' fees.

10 And recently there was an opinion issued by  
11 Judge Horne of the Circuit Court of Loudoun County that  
12 incorporated a great deal of the Barber v. Kimbrough fees  
13 and in fact moved a little bit beyond that.

14 Q. And what particular factors that the courts used in  
15 those cases did you find most appropriate in your analysis of  
16 the fees rendered by Clary & Moore in this case?

17 A. The novelty and the difficulty of the questions  
18 raised.

19 It appeared to me, from my review of the trial --  
20 excuse me -- from my review of the pleadings in the case,  
21 that, but for the question of unanimity versus majority, that  
22 the balance of the issues appeared to be interpretation of  
23 the obligations of the trustees under the deed. And the deed

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1 was a rather short instrument.

2 I also looked at the --

3 Q. So you didn't view that as particularly novel?

4 A. No, I did not view that as novel.

5 I thought the novel issue was whether unanimity or  
6 majority of the trustees was required on all actions. And I  
7 was unable to find very much information on that particular  
8 item. And I must conclude that it has a novel and unusual  
9 aspect to it. But it is the only item in the case that I  
10 felt was particularly novel.

11 Q. What other factors did you view as helpful and  
12 instructive in your review and analysis of the bills?

13 A. Certainly the customary fees for other attorneys in  
14 the area for work of like and similar nature.

15 The skill that was required to perform the work. I  
16 think that it's always very important to have your lead trial  
17 attorney be the attorney who is involved in the case at the  
18 point of depositions of the important witnesses in the case  
19 and at trial. Prior to that time I think your lead trial  
20 counsel is used in an inferior position when they are  
21 utilized for purposes pretrial other than those that we've  
22 discussed.

23 There is also the benefits that would ordinarily go

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1 for research assistants. We enjoy a wonderful array of law  
2 schools in this area and research assistants from a second-  
3 or third-year law school class are easy to come by and are  
4 not expensive and are very reliable. They have generally  
5 better research skills, if I may say, except for Your Honor,  
6 than everybody else here.

7 THE COURT: You don't have to exclude me.

8 THE WITNESS: The use of computer skills are  
9 something that were not in law school, at least at the time  
10 Mr. Clary and I were in school. Mr. Annino might have had  
11 research skills on the computer.

12 THE COURT: You mean Mr. Annino is a lot younger  
13 than we are?

14 Mr. Annino, I don't mean that as an insult.

15 MR. ANNINO: No insult taken, Your Honor.

16 THE WITNESS: I thought that, in looking at this  
17 matter, one of the other issues that were involved in the  
18 12-step approach was the amount that was in controversy.

19 This was a chancery case. This was not a case that  
20 involved \$10 million or \$20 million worth of real estate like  
21 is involved in the Lansdowne case out in Loudoun County.  
22 This was a case that did not have a monetary dollar sum  
23 requested in the pleadings. It was strictly chancery.

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1           And as such, it would be viewed in weighing the  
2 attorneys' fees that were incurred.

3           BY MR. ANNINO: (Resuming)

4           Q.   And were there any other factors that you felt were  
5 appropriate and which you considered in making your analysis  
6 of the Clary & Moore bills?

7           A.   In my research I came upon a case that was heard  
8 right before this Court in a case called Bruce v. Bruce.

9           THE COURT: I am slightly familiar with that one.

10          THE WITNESS: And I spoke with the attorney  
11 involved in that case and was given information about what  
12 their billing involved.

13               It was a trustees case. It was a protracted case.  
14 And it was a case of good skills by the trial attorneys and  
15 use of research tools and skills inside of a law firm and  
16 their total fees in that case.

17               I likewise used, in obviously reviewing this, all  
18 of the bills that were forwarded to us on behalf of Clary &  
19 Moore; on behalf of Kasimer & Ittig, your firm; and  
20 Mr. Tolchin's bills, who was the attorney for BBCAI.

21           BY MR. ANNINO: (Resuming)

22           Q.   And did you consider anything else in formulating  
23 your opinion about the reasonableness of the Clary & Moore

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1 bills?

2 A. In the reasonableness of the bills I did take  
3 particular note of Judge Horne's finding involving Arnold &  
4 Porter, who is a downtown D.C. firm working in a litigation  
5 case in Loudoun County, Virginia.

6 And Judge Horne specifically looked and enjoyed  
7 the relationship of a percentage of the partner -- the trial  
8 partner time versus the balance of the time in the case.

9 And I've used the general formula that was outlined  
10 in his opinion and have applied it to this case.

11 Q. And after your consideration of these factors, do  
12 you have an opinion about the reasonableness of the Clary &  
13 Moore bills?

14 A. I do.

15 Q. And what is that opinion?

16 A. My opinion in this case, based upon everything I've  
17 previously said, is that it was unfortunate -- I think that  
18 we all agree that unfortunate was the circumstances for  
19 prolonged litigation.

20 It appeared to me that, based upon the size of the  
21 firm -- and I understand completely, being a firm of only one  
22 more attorney than the Clary & Moore firm -- that oftentimes  
23 you must look at the nature of the work that is being

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1 performed in order to determine what the fee and the hourly  
2 rate would be.

3 In this case it would be my opinion that the fees  
4 would be in the nature of approximately \$80,000. And that  
5 would include post-trial work, if that were to be considered  
6 by Your Honor in the 28 minutes that I had.

7 Q. What underlying facts and data did you review and  
8 rely on in rendering that opinion?

9 A. I have carefully reviewed each of the bills that  
10 have now been marked into evidence. I have reviewed the  
11 information provided by Mr. Clary as to the logs and his own  
12 personal diary in conjunction with these.

13 I am assuming that Mr. Moore's time is no more  
14 elaborated because it's no longer available. Because I  
15 understand the computer that it was on has expired.

16 Q. And what -- was there any other documentary  
17 information that you relied on?

18 A. The affidavits of the individual attorneys in the  
19 case, which have now been admitted into evidence.

20 And my own knowledge of the hourly rates and the  
21 work that would have been done. And my review of notebooks  
22 in the case.

23 Q. And what did you learn about the fees of the other

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1 attorneys in the case versus the fees of Clary & Moore?

2 A. I spoke to the office of Ms. Fogarty, Miller,  
3 Miller, Kearney & Geschickter.

4 Ms. Miller was --

5 MR. CLARY: Your Honor, I think I have to object.

6 He directed it to fees of other counsel in the  
7 case. And as far as I know, she wasn't.

8 Mr. Tolchin and Mr. -- she took some actions as a  
9 consequence of the insurance companies telling her to do it.  
10 But I don't think she was ever considered to be counsel in  
11 this case. At least, I don't think Your Honor would  
12 recognize her in this case.

13 THE COURT: No, I wouldn't.

14 Didn't she actually formally withdraw from the  
15 case?

16 MR. CLARY: The only pleadings filed by Ms. Fogarty  
17 are a precipe entering her appearance at the behest of the  
18 insurance company and then her motion to withdraw in the  
19 order.

20 THE COURT: So you're asking her about what her  
21 rate of -- her billing rate was?

22 MR. ANNINO: Well, the purpose of the question was  
23 for Ms. Pesner to discuss the other attorneys' fees that were

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1 involved in the case, as compared to the Clary & Moore fees.

2 She was about to address the Fogarty fees, but also  
3 was going to address the Kasimer & Ittig fees and the Tolchin  
4 fees, just as a basis of comparison.

5 MR. CLARY: I'm not sure I see the relevance of  
6 Ms. Fogarty's fees in this particular instance.

7 In fact, I am not sure I see the relevance of the  
8 other counsels' fees either. But that's another story.

9 Clearly it would seem to me that --

10 MR. ANNINO: We can get into that in a minute,  
11 Your Honor. I'll withdraw the question and ask specifically.

12 BY MR. ANNINO: (Resuming)

13 Q. What other attorneys' fees did you review in this  
14 case where the attorneys were actively involved in the  
15 litigation? And how did that play into your comparison of  
16 the Clary & Moore fees?

17 A. I spoke at length with obviously Mr. Annino  
18 regarding their firm's fees. As the plaintiffs, they bear  
19 the burden of proof. And I have carefully reviewed those  
20 bills, which I unfortunately left sitting on my file folder  
21 if I need to pull anything out about them.

22 I have spoken with the prevailing counsel in the  
23 Bruce v. Bruce case. And Mr. Keith had advised me -- and I

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1 have reviewed the opinion letter of his case. He had given  
2 me a very extensive rundown of the proceedings in the case.

3 It was protracted litigation. It too was  
4 unfortunate. Any time you're involving trustees, it's always  
5 a difficult time.

6 And their fees in the case are, I believe, \$71,000  
7 and change.

8 And the reason that I had brought up Ms. Fogarty  
9 was because of the lack of fees of Ms. Fogarty in this case,  
10 that there were none to be reviewed. And her office advised  
11 me it was because there were very few that were promulgated  
12 to the court.

13 And Mr. Tolchin's fees I did review in making my  
14 determination.

15 Q. And how did the fees of Kasimer & Ittig and  
16 Mr. Tolchin's firm compare to the fees of Clary & Moore?

17 A. The hourly rates of Clary & Moore were higher in  
18 all instances.

19 And there was very little adjustment for work that  
20 was done by an attorney when they were doing work that would  
21 have been work that could have been done by either a lower --  
22 a lower-in-practice associate or a law clerk or research  
23 assistant.

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1           One of the problems you face in a small firm is the  
2           issue of what happens when there are only three warm legal  
3           bodies to do the work. And work needs to be done and you may  
4           not have the time to educate and bring up to date a research  
5           assistant or a law clerk. So work at that level then should  
6           be billed at what would be the rate for a person of like  
7           education or experience.

8           So if I go to the library to research an issue for  
9           a litigation matter for Mr. Gordon, my library time would be  
10          billed as if I were a law clerk or a first-year associate.

11          Q.    Now, what occasions have you had to be retained by  
12          insurance companies in your experience?

13          A.    Our insurance company defense work has been varied.  
14          We do work for title insurance companies as opposed to title  
15          insurance agencies. We do some work for title insurance  
16          agencies that are insured through an E&O policy.

17                We are appointed counsel for ANLIR and/or TVIR,  
18          which is American National Lawyers Insurance Reciprocal,  
19          which is the bar-endorsed insurance carrier for lawyers.  
20          And TVIR was its predecessor and known in Virginia as The  
21          Virginia Insurance Reciprocal.

22          Q.    And in those occasions how does the insurance  
23          company and defense counsel interact to construct budgets?

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1 And how do the fees compare to normal practice in the area?

2 A. Generally speaking, fees that -- when you are asked  
3 to represent an insurance company's insureds, the insurance  
4 company retains the right to be involved in the case.

5 Letters are signed by the insured to allow us to  
6 continue to communicate openly and regularly with insurance  
7 counsel -- excuse me -- with the insurance company's  
8 representative. Sometimes they are lawyers. Sometimes they  
9 are not lawyers.

10 And it gives us access to a lot of the resources of  
11 the insurance company's other defense teams. It gives us the  
12 ability to consult with other lawyers that might be engaged  
13 by that particular insurance company.

14 And all of those benefits do come with a price.  
15 They do heavily negotiate your fees. They negotiate how much  
16 time you can budget to a case. They require you to budget a  
17 case. Budgets must be reanalyzed quarterly, in the event  
18 that things have changed or matters you hadn't anticipated  
19 came to light.

20 Travel time is severely limited. Research time,  
21 I've already told you, is not only limited but very  
22 controlled.

23 Time in court -- pleadings and motions, arguments,

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1 senior lawyers, junior lawyers -- all are controlled and  
2 reviewed aggressively by insurance companies.

3 Q. And did you see any indication of that happening in  
4 the case of Clary & Moore?

5 A. I did not.

6 THE COURT: Of what happening?

7 MR. ANNINO: The insurance company being actively  
8 involved in the Clary & Moore firm.

9 THE WITNESS: No.

10 In fact, Ms. Fogarty's office advises me that they  
11 were minimally involved. And "involved" is an exaggeration  
12 of their work.

13 BY MR. ANNINO: (Resuming)

14 Q. And how would Ms. Fogarty's fees compare to the  
15 fees of Clary & Moore?

16 A. Ms. Fogarty's office advises me that her normal  
17 hourly fees are \$150 an hour. She has been admitted as an  
18 attorney for nine years. And her insurance company rates  
19 were not revealed to me, as they felt that they were not able  
20 to reveal that to me.

21 I did ask one question, which was: "Are they lower  
22 than \$150 an hour?" And after a guffaw, I was assured that  
23 they were.

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1           Q.    And in your review of the resources that were  
2    available to the Clary & Moore firm, what part did the  
3    failure to use Ms. Fogarty on a more regular basis have in  
4    your analysis?

5           A.    I am estimating that the amount of time that the --  
6    the amount of time that would have been available for  
7    purposes of research, if we were to use 25 of the hours --  
8    and this was prior to my review of the last two bills in the  
9    case.

10           THE COURT:   Yeah.   Since the trial.

11           THE WITNESS:   Yes.

12                   That no less than 25 of the hours of research  
13    should have been in the library of the insurance company and  
14    would have been made available by the insurance company at no  
15    charge.

16                   And that was a guess, based on trying to compare  
17    the bill with the pleadings file and looking at the research  
18    memorandums that went with the pleadings file.

19                   My estimate was approximately 25 hours of time.

20                   I believe all of Mr. Moore would have been absorbed  
21    by prior insurance company research and that Mr. Moore's time  
22    on research should not have been billed at 175 an hour, but  
23    should have been billed at 125 an hour at most.

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1 THE COURT: Are you saying it should have been  
2 billed at 125 an hour --

3 THE WITNESS: For the time remaining.

4 THE COURT: You mean after the 25 hours?

5 THE WITNESS: Right.

6 THE COURT: Go ahead.

7 BY MR. ANNINO: (Resuming)

8 Q. Were there any other aspects of the availability of  
9 the firm of Miller, Miller, Kearney & Geschickter to assist  
10 Clary & Moore in the case that you felt were proper  
11 consideration?

12 A. As noted by the Court, I was here for the earlier  
13 arguments. And I did understand completely the arguments  
14 involving the insurance company.

15 However, we have certainly been involved and are  
16 involved at present in multiple-party litigation where we may  
17 be representing a defendant that is insured and being  
18 represented as insurance counsel of Company A. Another  
19 defendant in the case may be represented by an insurance  
20 counsel appointed by Company B.

21 And ordinarily it is in all parties' best interest  
22 that that be shared. So what we'll do, and what I thought  
23 was going to be done, but once I researched the bills and

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1 compared them to some of the trial work -- when there was  
2 conferences mostly with Mr. Tolchin about matters that were  
3 coming up, it appeared that both parties were doing research  
4 on the same matters as opposed to a division of duties  
5 between defense counsel, something which ordinarily would  
6 happen between defense counsel.

7 Or if in fact the Miller firm were representing  
8 Mr. Foster in conjunction with his umbrella policy, that law  
9 firm would have been primary as to most of the research.

10 It may have been that Mr. Foster would have  
11 preferred, and certainly the other two trustees who had no  
12 insurance coverage, to have their own attorney review the  
13 research done by the Miller firm, review it as to its  
14 completeness, review it as to its applicability, and  
15 supplement it if necessary.

16 And I saw now no interaction between any of these  
17 resources.

18 What I could see from the resources was that the  
19 Clary & Moore firm handled this case as if they were the only  
20 counsel in the case.

21 In the times when Mr. Tolchin and somebody from  
22 the Clary & Moore firm were both present, then both billed.  
23 And there did not appear to be any allocation or use of

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1 resources.

2 And I was disappointed to see the withdrawal of the  
3 Miller firm as counsel due to lack of involvement.

4 THE COURT: Were there times they represented the  
5 parties that they coincided?

6 THE WITNESS: They did.

7 The Tolchin firm?

8 THE COURT: Yes.

9 THE WITNESS: Yes.

10 BY MR. ANNINO: (Resuming)

11 Q. You reviewed the initial letter from Nationwide in  
12 December of 1996 in which they advised the insured that  
13 Ms. Fogarty had been retained?

14 A. Yes, sir.

15 Q. And you reviewed my affidavit, attached to which  
16 was Ms. Fogarty's motion to withdraw from some years later?

17 A. Yes, sir.

18 Q. Now, in the case where you're representing an  
19 insured under a reservation of rights, do you feel at all  
20 that you don't have a responsibility to aggressively and  
21 adequately represent the party because there is no possibil-  
22 ity for the insurance company to deny liability for a judg-  
23 ment in the case?

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1           A.     Absolutely not.

2                     If anything, I probably am more careful, if you can  
3 be more careful in our work, in a case where I'm working  
4 under a reservation-of-rights letter, to make certain that  
5 the insured, although given the opportunity to have counsel  
6 of their choice at any time -- whether it is under a reserva-  
7 tion of rights or not, insureds are always given the right to  
8 counsel.

9                     And in cases where there is a reservation of  
10 rights, I would say we always err on the side of more  
11 research than less research, more brainstorming than less,  
12 less assumptions and more concern over whether that reserva-  
13 tion of rights could even potentially be clouding an issue.

14           Q.     Now, you referenced a comparable litigation that  
15 you used in your analysis -- the Bruce v. Bruce case -- as  
16 well as this case itself with the attorneys' fees of other  
17 counsel in the case.

18                     Was there any other comparable litigation that you  
19 considered in reaching your conclusions? And were there any  
20 other attorneys that you talked to besides Mr. Keith?

21           A.     I have spoken to Jordan Samuel, who is an attorney  
22 in Arlington, Virginia.

23                     He was counsel -- also a defense counsel in two of

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1 the homeowners' association cases that our firm had this past  
2 year. He was representing the developer in the case. And  
3 the developer was also responsible for the homeowners'  
4 association's bills.

5 And I inquired of him what their bills were  
6 collectively; meaning his law firm representing the developer  
7 and Hunton & Williams was representing the homeowners'  
8 association due to a conflict of interest.

9 And their collective fees in both cases, which came  
10 all the way to summary judgment but not to trial -- their  
11 collective fees in the two cases were under \$40,000.

12 Q. Now, with respect to the Clary & Moore bills, were  
13 there particular aspects of the billing that you found not  
14 normal or customary?

15 A. Yes, there were.

16 Q. Would you review those for the Court, particularly  
17 the indications of any written fee agreement.

18 A. It's my understanding that there is no written fee  
19 agreement in this case.

20 And I did go back and review my model rules of  
21 professional conduct. And under the present rules lawyers  
22 are not required to have written fee agreements. What the  
23 model rules will bring is -- who knows? Who knows if we'll

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1 even have them?

2 We certainly as a law firm would not take on a case  
3 of this magnitude without a written fee agreement. It is  
4 protective of the client, it is protective of the law firm in  
5 order to limit and/or quantify what the client expects and  
6 what the law firm expects the breadth of the work to be in  
7 the case.

8 I was quite surprised that there wasn't a written  
9 fee agreement.

10 But I can only tell you I was a little bit more  
11 surprised in the Loudoun County case for \$901,000 in legal  
12 fees that didn't have a written fee agreement.

13 So I realize that I might be more conservative than  
14 most when it comes to that particular issue.

15 Q. Were there aspects of the billing you found not  
16 normal or customary in the context of this case with respect  
17 to the hourly rates charged by Mr. Clary and Mr. Moore?

18 A. I believe that I might have previously stated in a  
19 small law firm you always have the problem of how many legal  
20 minds you have to do the work that needs to be done.

21 I think that Mr. Moore did a lot of work that could  
22 and would have been done either by a law clerk -- a second-  
23 or third-year law clerk, or a first- or second-year

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1     associate.

2                   And I have done my analysis based upon what I would  
3     give the benefit of the doubt at \$125 an hour for any  
4     research.

5                   Mr. --

6           Q.     Go ahead.

7           A.     Just finishing my answer to the question.

8                   Mr. Clary also had some time -- although not very  
9     much time -- in the case that was for matters that were below  
10    what I think his experience would command and his hourly rate  
11    would command.

12                   And I did not see an adjustment in the bills for a  
13    lower level of work being done by him, which would bring his  
14    hourly rate, which is what I conjectured, to 175 an hour.

15                   THE COURT:   So you think that work was beneath his  
16    experience?   It should have been 175 instead of 205?

17                   THE WITNESS:   225.

18                   THE COURT:   Yours was 205.   Excuse me.

19                   BY MR. ANNINO:   (Resuming)

20           Q.     What indication were there in the bills that you  
21    reviewed about paralegal time and that being a part of the  
22    billing?

23           A.     There were about half a dozen entries for paralegal

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1 time -- and I say entries, just meaning typed entries -- for  
2 trial with the initials of LRC. And that time is shown as No  
3 Charge.

4 But the lawyers' time is all in at full charge.

5 So ordinarily where you might have had a paralegal  
6 do some of the work -- and I realize that clearly charged on  
7 here their paralegal did about ten hours a day for, I  
8 believe, four or five days of trial and seven or eight hours  
9 on another day of trial -- that a paralegal and/or a law  
10 clerk and/or a junior associate clearly could have been used  
11 for a lot of the work.

12 THE COURT: Whom did they charge?

13 THE WITNESS: The bill -- if you could go to --

14 THE COURT: No. Just give me your answer.

15 THE WITNESS: Certainly.

16 On the billing itself are entries for a paralegal.  
17 But they are always notated as No Charge, which means to me  
18 that the paralegal did work for which the client wasn't  
19 charged. But the attorneys also did work for which the  
20 client was charged that may have been able to be done by a  
21 paralegal or somebody of a lower caliber than Mr. Moore or  
22 Mr. Clary.

23 THE COURT: Okay. When you say that there was time

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1 that Mr. Clary worked beneath his level of experience and  
2 should have been charged at 175, can you give me an example,  
3 looking at these bills, where you think that shows up.

4 THE WITNESS: Certainly.

5 It is on the bill that would be dated up in the  
6 right-hand corner -- it would be one of the oldest bills  
7 starting -- it's dated on January 3, 1997.

8 THE COURT: Right.

9 THE WITNESS: There is an entry on December 27th  
10 of -- there is an entry on December 27th by Mr. Clary where  
11 he reviewed and revised Foster's request for admissions.

12 He's got 1.1 hours, when previous to that he has  
13 Mr. Moore working extensively on the drafting of these  
14 documents billing at 175 an hour.

15 And I don't believe that Mr. Clary's litigation  
16 talents and trial talents were needed at 225 an hour for  
17 December 27th, 1996.

18 THE COURT: All right.

19 THE WITNESS: Did you just want --

20 THE COURT: Well, you can give me some others if  
21 you have them.

22 THE WITNESS: I do.

23 If you'll turn to a January 3rd entry, which is on  
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1 the bill date at the top, which will say 3/13/97, the billing  
2 date in the top right corner of the bill, and then an entry  
3 that you'll see on January 3rd for 2.7 hours for Mr. Clary.

4 Again, he has got a review and revise a request for  
5 admissions and drafted a letter to his client of 2.7 hours.

6 Again, I felt that that fell into the same  
7 category.

8 BY MR. ANNINO: (Resuming)

9 Q. Did you prepare a chart which had detailed  
10 references to adjustments in the billing time which you  
11 believe should be deducted from the start before any adjust-  
12 ment to the failure to use Ms. Fogarty and other considera-  
13 tions you've discussed?

14 A. I did.

15 MR. ANNINO: Maybe it would be beneficial to have  
16 that marked.

17 THE WITNESS: I also believe I have more copies of  
18 it, if you would like.

19 MR. ANNINO: Your Honor, if we could have that  
20 marked as Exhibit A-2.

21 (The document referred to was  
22 marked as Plaintiffs' Exhibit  
23 No. A-2 for identification.)

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1 THE COURT: Mr. Clary, do you have an objection?

2 MR. CLARY: I would have quick voir dire on that.

3 THE COURT: All right.

4 VOIR DIRE

5 BY MR. CLARY:

6 Q. When was that prepared?

7 A. Last night or this morning, depending upon which  
8 time you count it.

9 MR. CLARY: That's all.

10 THE COURT: All right. That's admitted.

11 (Plaintiffs' Exhibit No. A-2  
12 was received into evidence.)

13 THE COURT: Can you explain how it's organized.

14 THE WITNESS: I'll be happy to.

15 RESUMING DIRECT EXAMINATION

16 BY MR. ANNINO:

17 Q. You have before you what's been marked Exhibit A-2.  
18 Could you just describe the format of that and what the  
19 entries signify.

20 A. I've done it on a very simple chart form.

21 In the first cell, if you will, called code or  
22 category, any time I use something other than what I used  
23 previously, I've given a definition of it.

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1           For example, No Charge is shown as NC; meaning my  
2 entry which I believe should have a No Charge.

3           Research time is an RT designation, where I took  
4 the time of research work and I reduced it by \$20 an hour,  
5 because I had previously in another analysis reduced some of  
6 Mr. Moore's time to \$145 an hour from \$175 an hour. And when  
7 it came to actual research time, I pulled it down to what you  
8 would be paying to a top rate second- or third-year law  
9 student at \$125 an hour. And that's what I used as RT.

10           RR was a reduced rate. And it was what I used for  
11 the 225 versus the 175 categorization.

12           And other than that, there are no other acronyms  
13 that I've used.

14           I've done it based upon the name -- the initials of  
15 the attorney, as shown on the bills.

16           The third cell is the date of the entry of the  
17 item.

18           The fourth cell is the amount of either partial  
19 hours or full hours that I allocated to the code.

20           And then the adjusted billing time is in the far  
21 right-hand column for what brought it as a negative entry  
22 into the total.

23           At the end of each billing cycle I did a three-part

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1 adjustment, something called subtotal of adjustments, which  
2 was -- I'm sorry. I didn't even number the pages. That's  
3 what you get for attorneys doing someone else's work.

4 On the second page you'll see that there is some-  
5 thing called subtotal of adjustments. It was two bills in  
6 that case. And I've given the dollar amount.

7 And then is the fee expense adjustment. And that  
8 has an asterisk, which will take you to the next-to-the-last  
9 page of this analysis, where I have four asterisks at the  
10 bottom.

11 None of the fee and expense adjustment that was  
12 used included any of the four asterisked items, which were  
13 separately accounted for.

14 And then going back to the second page, just for an  
15 example --

16 THE COURT: Where is the asterisk?

17 THE WITNESS: It's at the end of each of the fee/  
18 expense adjustments. And then the asterisks are at the  
19 bottom of the next-to-the-last page of the chart.

20 There are four items in the code category: one  
21 called incoming/outgoing faxes, one called associate hourly  
22 rate, one travel time, and one research time.

23 And then I did a total adjustment of that

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1 particular bill and put it in bold. And it's what made up  
2 the total that came onto the next-to-the-last page.

3 I do believe that I do have one clerical error of  
4 about \$200 or \$300 in this particular entry I'm talking  
5 about, is the reason I brought it up.

6 BY MR. ANNINO: (Resuming)

7 Q. On the total adjustments?

8 A. Yes.

9 If you'll look on the second page, you'll see the  
10 subtotal adjustments is 1,039. The fee/expense adjustment  
11 was 1,407. And there's no way that those two numbers come to  
12 2,086. The numbers come to -- it's on one of the ones some-  
13 body has in their hands.

14 THE COURT: You want me to strike through this and  
15 correct it?

16 THE WITNESS: Please.

17 It came to 2,446.

18 THE COURT: Where you wrote the 2,086?

19 THE WITNESS: Yes. It should be 2,446.

20 Other than that, I believe all the balance and  
21 calculations to be correct.

22 THE COURT: All right. Doesn't that change your  
23 total though?

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1 THE WITNESS: Yes, it will.

2 THE COURT: Okay.

3 THE WITNESS: But it -- yes, it will.

4 THE COURT: Just by about \$400 -- a couple hundred  
5 dollars.

6 BY MR. ANNINO: (Resuming)

7 Q. Would you discuss your rationale for making the  
8 adjustments that were made for incoming/outgoing faxes and  
9 the other asterisked items that you have on the second-to-  
10 the-last page.

11 A. Yes.

12 About incoming and outgoing faxes, it appears to me  
13 from the bills that these are for local faxes. These are not  
14 long-distance.

15 Long-distance charges were billed separately, and I  
16 think are a proper expense to a client.

17 Incoming and outgoing faxes are staff time. And  
18 staff time should be, and I believe always is, included in an  
19 attorney's hourly time, just like you don't charge for paper  
20 and you don't charge for anything that involves your general  
21 overhead. You don't charge for the insurance premium for the  
22 health insurance for your staff.

23 It's all included in your hourly rate. And it's

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1 the determination you make as a business person.

2 So the incoming and outgoing fax entries on all of  
3 the bills totalled \$593.

4 Q. And the second asterisked item there, associate's  
5 hourly rate adjustment?

6 A. This involved when Mr. Moore was performing duties  
7 for the clients in this case. It appeared to me that there  
8 were many times that he was doing the work of what I would  
9 say was a five- or six-year associate.

10 A five- or six-year associate in the Northern  
11 Virginia area would be happy to be billed at \$145 an hour.

12 So I took the amount of hours of his time from 175  
13 to 145 and multiplied it times \$30 and came to the total of  
14 9,749.

15 Q. And the next asterisked item, the travel time to  
16 and from the library.

17 A. Travel time to and from the library, I believe  
18 likewise is part of an attorney's time; that you maintain a  
19 library in-house.

20 And an in-house library could be a CD-ROM. It  
21 could be hardback books. It could be continuing legal  
22 education notebooks. And the goal of all that would make it  
23 so that research could be done within your office without

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1 having to go to outside sources.

2 And the travel time to and fro the library that I  
3 did take off was when I would try to compare, which wasn't  
4 always possible. But when I would try to compare the briefs  
5 that would be filed and the research time that was done, if  
6 there wasn't a particular reference to something that I  
7 considered to be something that everybody would have in their  
8 office as a Virginia attorney, then I took that time to and  
9 fro the library out. And that totalled \$725.

10 The last one on research time, insurance company,  
11 as I spoke before, I took approximately -- not approximately  
12 -- I took 25 hours at \$145 an hour and removed it from the  
13 analysis. Because it easily could have been done without  
14 cost to the client by the insurance company, either through  
15 their pool of preresearched material or by the insurance  
16 company's research assistants.

17 Q. And the adjustments reflected on Exhibit A-2, do  
18 they assume the propriety of the entirety of the time?

19 A. No, they do not.

20 They were -- this was really an internal working  
21 memo that I did for myself in preparing myself for this. And  
22 it was to try to do as an appraiser would do.

23 An appraiser who determines the appraised value of

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1 a property takes more than one approach just to do a check  
2 and a balance of themselves, to make certain that they're not  
3 coming up with any kind of outlandish number.

4 And when I was applying the conclusions that I had  
5 previously drawn together with the rule-of-thumb and the 12-  
6 pronged test that was in both the Johnson case and the  
7 Barber case, I was just trying to make certain that my  
8 overall analysis was within the same purview.

9 But no, this is not a comprehensive list.

10 Q. So in addition to these adjustments, you would feel  
11 that other adjustments are appropriate?

12 A. I would.

13 Q. Because of the lack of resource use for the  
14 insurance company and co-counsel and that sort of thing?

15 A. And the nature of the case and the types of  
16 recovery being sought, yes.

17 Q. Now, did you also request preparation of a detailed  
18 breakdown for the Clary & Moore bills that separated the  
19 attorneys by month?

20 A. I did.

21 Q. I show you what we'll have marked as Exhibit A-3.

22 (The following document  
23 referred to was marked as  
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1                                   Plaintiffs' Exhibit No. A-3  
2                                   for identification.)

3                   BY MR. ANNINO: (Resuming)

4           Q.   And would you just describe for the Court what this  
5 document purports to be.

6           A.   In an effort to use the available personnel that we  
7 had, the office manager of your office was kind enough to  
8 provide to me verification of the mathematical comparisons  
9 between the bills.

10                   The billing program that was used appeared to have  
11 taken a change. And there was no way that you could look  
12 at -- if I could, I'll just pick the first one.

13                   In the first billing you had a five-column entry.  
14 So you would have a date, a description, the individual, the  
15 time, and then the amount of that charge.

16           Q.   You're referring to the Clary & Moore bills?

17           A.   Excuse me. I am. And I'm using the one dated  
18 January 3rd, 1997.

19                   And it was an excellent way to be able to verify  
20 the totals that were on the bill. But thereafter, the last  
21 column was no longer apparent in any of the bills. And my  
22 guess is in some update of the program or some different  
23 application of the program you no longer got the last column.

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1           So I was able to use the services of your office to  
2   be able to multiply out by rate and by hours and verify the  
3   totality of the bills.

4           Q.   And would Exhibit A-3 also serve to determine the  
5   exact amount of time and dollars spent by Mr. Moore versus  
6   Mr. Clary?

7           A.   Yes, it does.

8           Q.   And that's not possible in the Clary & Moore bills,  
9   because they lump all of that together?

10          A.   Yes, it does.

11          THE COURT: Do you want this admitted?

12          MR. ANNINO: Yes, Your Honor.

13          THE COURT: Any objection?

14          MR. CLARY: I'm not sure I understood -- I guess  
15   I'll do this in cross -- why you can't do it. Because you've  
16   got the time extensions on every bill. But I'll get that in  
17   cross.

18          So this is being offered for what purpose?

19          MR. ANNINO: For the Court's --

20          THE COURT: That's a good point.

21          Sometimes -- I think that this exhibit was  
22   extremely helpful in telling me what her opinion was. I am  
23   not quite so sure I understand this exhibit to be helpful.

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1 MR. ANNINO: This is a summary, Your Honor, of the  
2 bills and dates and time spent by Mr. Moore and Mr. Clary.

3 What it does for you is it tells you, for example,  
4 on the third page, the grand total section there, the amount  
5 of hours spent by Mr. Clary and the total fees billed by  
6 Mr. Clary --

7 THE COURT: Yes, it does.

8 MR. ANNINO: -- which you're not able to do from  
9 the Clary & Moore bills. Because they simply have a total at  
10 the end of the bill without a breakdown of the time.

11 THE COURT: Okay. I don't have any objection to  
12 seeing how many hours they spent on it. I think that's all  
13 right.

14 Do you have any objection?

15 MR. CLARY: No, ma'am.

16 THE COURT: It's admitted.

17 (Plaintiffs' Exhibit No. A-3  
18 was received into evidence.)

19 BY MR. ANNINO: (Resuming)

20 Q. And based on Exhibit A-3, Ms. Pesner, who is the  
21 attorney that spent the most time in the case? And how do  
22 you believe that was an effective use of the resources for  
23 that attorney?

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1 MR. CLARY: I am going to object to the question,  
2 because it's not specific as to time.

3 And I think, fairly viewed, Your Honor will see  
4 that at different points in time different attorneys did, in  
5 accordance with the division of labor outlined at the  
6 beginning, spend more time.

7 So in a global sense, just which attorney spent  
8 more time, I don't think has any help or relevance to the  
9 Court.

10 THE COURT: I must say I agree with that. I must  
11 say I agree with that. It has no value to me in making a  
12 decision as to reasonableness.

13 I have no way of knowing whether -- I know  
14 Ms. Pesner has made a very specific analysis of line items,  
15 which I find useful.

16 But to say that Mr. Clary shouldn't have spent  
17 229.9 hours in this case is -- I don't know. I don't know  
18 what I would do with that.

19 BY MR. ANNINO: (Resuming)

20 Q. Ms. Pesner, in your opinion, what division of  
21 duties with co-counsel are appropriate in a case of this  
22 type?

23 A. Specifically in this case --

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1 MR. CLARY: Your Honor, I'm going to object. I  
2 don't think she has any basis for this kind of opinion.

3 As I recall her testimony, it was one or two cases  
4 she served as lead counsel and the rest she's been the  
5 supporting counsel. I mean, if she's got a lot of experience  
6 in litigation to talk about the division between lead and  
7 support counsel, maybe it would be appropriate. But this is  
8 more speculation and fiction than it is --

9 THE COURT: I think there is a difference now in  
10 the questions than there were before.

11 I think in her analysis on a point-by-point basis  
12 as to whether or not Mr. Clary should have spent three hours  
13 researching a case at 225 versus -- I think that was very  
14 useful.

15 I am not quite so sure she can -- I think almost  
16 anybody would find it impossible to determine whether or  
17 not -- opine as to whether or not an attorney had spent too  
18 much time on a case.

19 MR. ANNINO: Well, Your Honor, part of the  
20 rationale Judge Horne used and Ms. Pesner used in making her  
21 analysis was whether the division of resources was effective-  
22 ly done and managed in a case to justify a fee of whatever  
23 amount the attorneys charged.

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1           So it's certainly appropriate in the discussion of  
2   reasonableness of the fees charged in a particular case to  
3   opine about the division of resources and whether time spent  
4   by Mr. Clary could more effectively have been used and  
5   charged at a lower hourly rate by a different attorney than  
6   the firm had available to it.

7           MR. CLARY: And if she had a whole bunch of  
8   experience as lead counsel and assigning --

9           THE COURT: Your objection is different than mine.  
10          I don't even know that anybody can answer those  
11   questions about whether or not --

12          MR. CLARY: On both grounds then, the objection.

13          THE COURT: Your objection is that she doesn't have  
14   the experience to answer the question, which I don't find as  
15   compelling.

16          I'll allow her to answer the question. But she's  
17   going to have to give me some good reasons for it.

18          You know, the problem with this whole analysis is  
19   that -- and I haven't read Judge Horne's opinion -- some  
20   people are better attorneys than others. And some attorneys  
21   are very demanding of themselves. And it's difficult to  
22   weigh how much you should work on a case.

23          I do think that if an attorney puts in 40 hours and

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1 maybe the case is only worth 20 but they put in 20 hours more  
2 because they're perfectionists, which attorneys often are, to  
3 tell you the truth, then there is a solution to just kind of  
4 wipe it off your bill. I mean, I think attorneys do that  
5 commonly also.

6 She can answer the question. But I would like her  
7 to explain what her reasoning is on it.

8 THE WITNESS: I believe that the question and the  
9 way I'm going to be answering it -- if it's not what you were  
10 asking, please let me know.

11 One of the particular notations in Judge Horne's  
12 decision -- and if nobody minds, it's only two sentences  
13 long.

14 "Time charged to associates and legal assistants by  
15 Arnold & Porter and recoverable pursuant to findings of the  
16 commissioner represent approximately two-thirds of the  
17 aggregate of such fees. The record shows that these persons  
18 assembled the many documents and prepared the privilege lists  
19 that required many hours of review and study by the court."

20 If you were to use a two-thirds/one-third  
21 application of experienced attorneys as lead counsel doing  
22 the one-third of the time involved taking a case all the way  
23 through trial and then take two-thirds of the amount of time

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1 to be used by those other than lead counsel, the A-3 exhibit  
2 does not support the two-thirds/one-third allocation.

3 THE COURT: What does it support? What's the  
4 allocation here? Did you do that? What is it?

5 THE WITNESS: If you'll look on page 2 of -- if  
6 you'll look in the left-hand column where it says MC3 and  
7 take it to the third page where it says Grand Total MC3, it  
8 comes to 84,262.50.

9 And if you'll look at RGM, the grand total comes to  
10 54,652.

11 And it clearly is not a one-third/two-thirds type  
12 analysis.

13 MR. CLARY: I'm sorry, Your Honor. I thought the  
14 case was talking about time, not dollars.

15 Is there somewhere on the exhibit where it says  
16 time?

17 MR. ANNINO: If you look in the far right-hand  
18 column.

19 THE WITNESS: The far right-hand column on the  
20 grand total sheets --

21 THE COURT: So you compare 229.9 to -- I find this  
22 whole analysis sort of fascinating.

23 If you've got a two-man firm and let's say you've

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1 got two trials pending at the same time, you may not be able  
2 to do that one-third/two-thirds. You may have an experienced  
3 attorney doing the whole thing, because they don't have any  
4 choice.

5 So your selection is always to downbill when that  
6 happens?

7 THE WITNESS: Yes.

8 THE COURT: It's 229.9 compared to 112.

9 THE WITNESS: And if that was what you were  
10 asking --

11 MR. CLARY: Can you point to me where that is. I  
12 haven't found that on this sheet.

13 THE WITNESS: I pulled mine apart for my own  
14 clarity. If you'll look on the left margin, there are  
15 initials --

16 MR. CLARY: A-3?

17 THE WITNESS: Yes.

18 THE COURT: It's page 5.

19 MR. CLARY: Okay, okay. I see.

20 THE COURT: Can we break for lunch?

21 MR. ANNINO: It's your call, Your Honor.

22 I'm almost finished.

23 THE COURT: Are we almost done with her direct?

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1 I would like to break at a reasonable point. But I  
2 don't want to rush you.

3 MR. ANNINO: I am almost done. But we haven't  
4 talked about the supplemental petition.

5 THE COURT: Well, I think we're going to have to  
6 break then. And we'll reconvene at 2:00 o'clock.

7 (Whereupon, at 1:01 o'clock p.m., a luncheon recess  
8 was taken, the proceedings to be reconvened at 2:00 o'clock  
9 p.m.)

10 AFTERNOON SESSION

11 (2:02 p.m.)

12 THE COURT: Mr. Annino, I would like you to wrap it  
13 up as quickly as you can.

14 MR. ANNINO: I'll do my best.

15 RESUMING DIRECT EXAMINATION

16 BY MR. ANNINO:

17 Q. Ms. Pesner, at the break we reviewed Exhibit A-3,  
18 if you could turn to that for a minute.

19 A. Yes. I have it in front of me.

20 Q. Did you notice anything with respect to the total  
21 on the hours?

22 A. Yes. I believe that in my testimony, if you were  
23 to look at the last page of the two respective attorneys'

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1 hours, the one marked MC3 on the last page, I incorrectly  
2 referred to the total of 229.9. That was for that last  
3 billing period.

4 The total, which is not on here, which needs to be  
5 handwritten on here, is 391 hours.

6 Q. And that's the grand total for each of the billing  
7 periods preceding that?

8 A. For Mr. Clary.

9 And for Mr. Moore the grand total for the billing  
10 hours was 197.3.

11 THE COURT: Ma'am, would you tell me the grand  
12 total again for Mr. Clary.

13 THE WITNESS: 391.

14 And for Mr. Moore, 197.3.

15 BY MR. ANNINO: (Resuming)

16 Q. And none of those totals relate to the two-thirds/  
17 one-third allocation that you referred to previously?

18 A. They are in fact mathematically exactly opposite of  
19 what Judge Horne was observing.

20 Judge Horne's observation was that, generally  
21 speaking, your trial counsel and lead counsel in the case  
22 would be brought in on those very specific items. And it  
23 would be that attorney's time rated at the partner level that

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1 would be one-third of the amount of time in the case as  
2 opposed to the statistics in this case, which are the flip of  
3 that.

4 If we round them both up, we've got 200 and 400  
5 hours out of a total of 600. And it really would -- the more  
6 preferable under Judge Horne's theory would have been 400 and  
7 200.

8 THE COURT: Is RML and LRC their paralegals?

9 THE WITNESS: Yes.

10 MR. ANNINO: And word processing, I believe,  
11 Your Honor.

12 BY MR. ANNINO: (Resuming)

13 Q. Did you also note in the billings charges for word  
14 processing services?

15 A. Yes. We were able to verify that the word  
16 processing services did appear not to be charged.

17 It was kind of unclear. The paralegal's time shows  
18 a No Charge. The word processor's time shows a charge. I  
19 think that in the long run they were ultimately taken out and  
20 don't have an issue with either.

21 Q. Now, if you'll look at Exhibit A-2 for a moment.

22 Do you have that in front of you?

23 A. You just need to tell me which one it is. I'm

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1       sorry.

2           Q.    It is your summary sheet.

3           A.    Okay.  Yes.

4           Q.    With respect to the asterisked items, have you  
5       prepared a more detailed breakdown to show the Court where  
6       those numbers came from?

7           A.    I did.  It was not attached to this attachment, but  
8       it was what I used.

9           Q.    If I can show you a document we'll have marked  
10       Exhibit A-4.

11                               (The following document  
12                               referred to was marked as  
13                               Plaintiffs' Exhibit No. A-4  
14                               for identification.)

15               THE WITNESS:  Yes.  This is a document that I  
16       prepared.

17               And you'll be able to see each of these entries as  
18       you go through the A-2 exhibit.  For example, if you would  
19       turn to the second page, the third item where it says fee/  
20       expense adjustment with an asterisk and it says 1,407, it's  
21       shown on this analysis with a breakdown off of which bill it  
22       was, the date this service was provided, and how many hours  
23       or tenths of an hour I used for purposes of this adjustment.

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1           And that 1,407 appears on the second page. The 312  
2 likewise appears seven entries down -- 312. And this is just  
3 the breakdown.

4           THE COURT: Tell me again what fee adjustment  
5 meant. Those were hours that shouldn't have been put in?

6           THE WITNESS: The fee adjustment that I used this  
7 for was for purposes of bringing the \$175-per-hour charge of  
8 Mr. Moore down to 145. And I did it as an individual  
9 breakdown on here.

10           And then on the A-2 exhibit I did a specific code  
11 category when I brought it down to just research time to 125.

12           But the new one that is being provided is the  
13 backup inside this one.

14           THE COURT: All right.

15           BY MR. ANNINO: (Resuming)

16           Q. Now, when you reviewed the Clary & Moore bills,  
17 other than the first billing statement, did you observe any  
18 No Charge entries for attorney time?

19           A. Very few. Very few No Charge entries for  
20 attorneys' time thereafter.

21           There were actually more No Charge entries in the  
22 supplemental bills that we just got than I think were  
23 probably in the rest of them.

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1 THE COURT: Would you go through this with me  
2 again.

3 THE WITNESS: It's no problem.

4 THE COURT: When I look at this, I want to  
5 understand it.

6 This is your adjusted billing time. I think I  
7 understand it. The asterisk is what I'm not sure I under-  
8 stand.

9 THE WITNESS: If you'll turn to the second page of  
10 A-2, the third entry says fee/expense adjustment. And if  
11 you'll look at the one I've just handed to you --

12 MR. ANNINO: A-4.

13 THE WITNESS: -- the fee/expense analysis is broken  
14 down for January 3rd, 1997. And in the far right-hand column  
15 it says 1,407.

16 THE COURT: Yeah. But you explained to me that  
17 that was the 175 down to 145.

18 Where does -- where does anybody tell me that on  
19 this thing? How can I know that -- that the fee/expense  
20 adjustment that you've done reflects that you've adjusted  
21 down the 175 fee to 145?

22 THE WITNESS: That's what I'm orally telling you,  
23 is I used the hours or parts of an hour out of the billing.

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1 I extrapolated -- in some cases you might have had a four-  
2 hour entry. And I assumed only one of those hours was the  
3 time.

4 So this is important for purposes of coming up with  
5 this \$30 calculation per-hour reduction.

6 The 1,407 is what gets used in the A-2 chart. And  
7 then they just break down by each of the bills thereafter.

8 And we thought this might be helpful for you to be  
9 able to see which parts of hours I allocated to time that was  
10 billed by Mr. Moore that I felt was at a higher hourly rate  
11 than the work appeared to require.

12 THE COURT: How can I tell by looking at this  
13 whether you're adjusting Mr. Moore's fees or Mr. Clary's  
14 fees?

15 THE WITNESS: Looking at A-4, they are totally  
16 Mr. Moore's fees.

17 THE COURT: So just walk me through this for a  
18 second.

19 The 1,407 for the 16th of October, the hourly  
20 charge is .2. So if I went to the Exhibit B-1 and pulled up  
21 October 16th, I should be able to see where you did that?

22 THE WITNESS: Yes.

23 THE COURT: Let me find it on my own, because I am

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1 going to be left with this.

2 THE WITNESS: If you picked the easiest of all of  
3 them, it's the one that has the last column in the billings.

4 THE COURT: I'm looking at October 16, '97.

5 THE WITNESS: 1996.

6 It was billed in '97. But it's --

7 THE COURT: Okay.

8 THE WITNESS: It should say page 2 in the top right  
9 corner.

10 And on October 16th you will see "To Fairfax  
11 Circuit Court to examine court file to determine date of  
12 service, RGM, .2 hour."

13 That's the .2 hour shown on A-4 as the first entry.

14 THE COURT: And that's a fee/expense adjustment?

15 THE WITNESS: Yes.

16 This is billed on the bill at 175 an hour. And I  
17 did a blanket adjustment of \$30 an hour from 175 to 145.

18 BY MR. ANNINO: (Resuming)

19 Q. Would you explain the reason for that, Ms. Pesner.

20 A. Yes. I'm sorry. I thought I had previously. I  
21 apologize.

22 The reasons were that I felt that the time that was  
23 spent by Mr. Moore in the case, although his chargeable

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1 hourly rate was at 175, the work appeared to be able to be  
2 done by a five- or six-year associate, who would ordinarily  
3 be billing at 145.

4 THE COURT: And you said this was Moore's analysis  
5 only?

6 THE WITNESS: Yes, supplemental to explanations of  
7 A-2.

8 THE COURT: Okay. We'd better hurry up. So let's  
9 get going.

10 MR. ANNINO: If the Court had no other questions.

11 BY MR. ANNINO: (Resuming)

12 Q. Ms. Pesner, were the things you relied on in  
13 rendering your analysis the kind of normal and customary  
14 things relied upon by people in your profession to determine  
15 reasonableness of attorneys' fees?

16 A. Yes, they were.

17 Q. With respect to the supplemental affidavit that  
18 was presented to us last night and which you reviewed this  
19 morning, would you advise the Court what observations you  
20 made concerning the charges in that bill and whether you have  
21 an opinion about its reasonableness.

22 A. There are two bills. One of them is dated in the  
23 top right-hand corner May 6th. And the entries on this --

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1 the first entry of March 5th should have been, instead of at  
2 175 -- under my calculations would have been at 145.

3 The next entry of 1.4 hours would have been at 145.

4 Mr. Clary's entry on March 11th appeared to me to  
5 be --

6 THE COURT: Where do we see on this bill what the  
7 rate is?

8 THE WITNESS: It's not on this bill.

9 MR. CLARY: I'm sorry?

10 THE WITNESS: The rate is not on this bill. I did  
11 that from the affidavit. And it was 225 for Mr. Clary and  
12 175 for Mr. Moore, is how I assume this has been calculated.  
13 I did not recalculate the figures.

14 So the March 5th entry, I believe should be at 145,  
15 not at 175; the same with the March 6th entry.

16 The March 10th entry, I believe is properly at 225.  
17 You're talking about a final decree of the court that  
18 Mr. Clary was the trial attorney on.

19 On the March 11th entry where we're now talking  
20 about revising an associate's brief on attorneys' fees, I  
21 think a senior associate would bill at 175 or a junior  
22 partner -- on line entry March 11th for Mr. Clary.

23 The March 11th entry for Mr. Clary should be a

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1 zero. You see it has a parentheses that says No Charge.

2 The March 12th entry, I believe that should be at  
3 145.

4 The March 13, March 16, March 20 -- I don't know if  
5 it's a 3 or a 5. It's .7 hour.

6 And then March 26, I think all of those should be  
7 at 145. That's five entries at 145.

8 The next one, if I'm breaking it down appropriate-  
9 ly, I would have said two hours of the March 27th entry would  
10 be at 125 and .3 hour would be at 145. Because I believe  
11 that the majority of that would have been research done in  
12 the case.

13 On line entries March 30th, March 31st, April 1st,  
14 April 2nd, I believe all of those relate to a sanctions  
15 motion which was not granted. And I'm going to assume that  
16 those would be zero entries for billing purposes.

17 And then on the second page, which is called page  
18 3, of the billing statement --

19 THE COURT: Where do you think it should be zero?

20 THE WITNESS: Line items March 30th, 31st, the 1st,  
21 and the 2nd.

22 THE COURT: Four entries of 12 hours should be no  
23 hours?

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1 THE WITNESS: Yes.

2 THE COURT: Why?

3 THE WITNESS: From what I could read in the very  
4 short amount of time I had, it did not appear that a  
5 sanctions motion really -- I think this was a genuine  
6 dispute.

7 BY MR. ANNINO: (Resuming)

8 Q. This is the sanctions motion of BBCAI that  
9 Mr. Clary is reviewing?

10 A. Yes.

11 MR. CLARY: Excuse me. It's RGM.

12 THE WITNESS: Well, it's some of both. Sorry.

13 Am I reading it wrong? I'm reading a fax.

14 MR. CLARY: You're the one that's testifying that  
15 it is a response regarding sanctions as opposed to a response  
16 to Mr. Annino's brief on our request.

17 THE COURT: I was trying to figure out where you  
18 got the sanctions business. All it says is "Draft response  
19 to Mr. Annino's brief."

20 Mr. Tolchin asked for sanctions.

21 All anybody was really asking for were attorneys'  
22 fees.

23 MR. CLARY: And indeed, the trustees did file a  
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1 responsive brief to Mr. Annino's brief on our issue.

2 MR. ANNINO: I believe some of those entries  
3 pertain to Mr. Clary reviewing Mr. Tolchin's motion for  
4 sanctions, which I think Ms. Pesner --

5 MR. CLARY: No entries are binding, number one.

6 THE WITNESS: Well, the April 2nd entry, "Review  
7 and revise attorneys' fee brief," I thought that it was  
8 repetitious. We've had attorneys' fee briefs repeatedly  
9 through these bills.

10 THE COURT: All right.

11 THE WITNESS: And then on page 3 there are three  
12 entries for Mr. Moore which I believe should be at 145, which  
13 if my math serves me well, the total of this bill would be  
14 \$2,659, not including if there were expenses.

15 THE COURT: Do you see a total for this?

16 MR. CLARY: It's on the front sheet, Your Honor,  
17 the summary page, which is 5/6/98 dated.

18 THE COURT: For 5,000?

19 MR. CLARY: Yes, ma'am. Those are the services.

20 THE WITNESS: The next bill is in a completely  
21 different format.

22 I believe that there has already been adjustment  
23 for some of these items on the front page. I believe that

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1 the front-page items, page 1 of an August 11, 1998, invoice,  
2 it's now off of Holland & Knight. It's a totally different  
3 billing format than we've been looking at.

4 I believe that the first three or four entries have  
5 already been zeroed out in your affidavit pursuant to other  
6 work that Mr. Clary was doing for the Fosters. So the first  
7 four entries of June 8th, June 9th, two entries for June  
8 10th, are zeros in the big picture of what's being claimed.

9 And the interviewing of expert witnesses by  
10 Mr. Clary, those are decisions.

11 I have not reviewed the law on this issue, not  
12 knowing that I was going to be testifying on it. But it does  
13 appear that there is about \$1,000 worth of fees on telephone  
14 calls or interviews with prospective or potential expert  
15 witnesses, one of which, I imagine, is their expert witness  
16 today.

17 THE COURT: Which page are you on now?

18 THE WITNESS: I am on page 3, the entry on July the  
19 20th.

20 THE COURT: I see. Okay.

21 THE WITNESS: August 3rd -- excuse me -- July 31st  
22 and August 3rd.

23 On August 3rd Mr. Moore has an entry which appears  
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1 to me to virtually be either duplicative of other work that's  
2 previously been done or associate work at 145 an hour. And I  
3 left it at 145 for 1.2 hours.

4 On the next page, page 4, on August 4th there are  
5 two entries for Mr. Clary, some of which are related. The  
6 first one might have some hours related to expert witnesses.

7 And August 5th, I don't have enough information.

8 On August the 6th, I think again we have research  
9 time that should be at 125.

10 And then on August 7th, it appears, I believe,  
11 that it's 2.1 hours where Mr. Moore is again discussing with  
12 Mr. Clary the attorneys' fees issue, which when you delve  
13 through these, you'll see has been researched months before  
14 this August date.

15 And then on lines -- on August 8th and August 10th,  
16 we've got 17 hours' worth of preparation for this hearing.

17 And I only wish I had 17 hours of Mr. Annino's time  
18 before this hearing. But I did not. It seems like an awful  
19 lot of time on that.

20 And then the last entry on the bill, which is on  
21 page 5, Mr. Moore has his time at 175, although I think it's  
22 probably duplicative. And I didn't have time to do it. I  
23 pulled it down to 125 as research, which ultimately brought

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1 this last bill from 13 to -- I'm sorry. I didn't keep the  
2 total off of the last one. I think it was something like  
3 9,500 or something close to 10,000.

4 BY MR. ANNINO: (Resuming)

5 Q. And how did those billings compare to the billings  
6 of Kasimer & Ittig during the same period of time?

7 A. Kasimer & Ittig's bills, I've been told, although  
8 I've not seen them --

9 MR. CLARY: Object then. If she hasn't seen them,  
10 she can't express an opinion about them.

11 THE COURT: Sustained.

12 MR. ANNINO: Your Honor, she's an expert. She can  
13 base her opinions on facts told to her.

14 MR. CLARY: She can't base them on thin air.

15 THE COURT: But that's really far afield for this  
16 kind of testimony. If you want her to testify about your  
17 bills, you should have shown them to her.

18 MR. ANNINO: Your Honor, I didn't know that was  
19 going to be an issue until they filed their motion.

20 MR. CLARY: Your Honor, they designated as a part  
21 of her expert designation that she was going to testify about  
22 their bills and the other gentleman's bills. That was their  
23 response to our interrogatory weeks ago.

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1 MR. ANNINO: During the time period that was an  
2 issue, which Mr. Clary represented in his affidavit was only  
3 up to the period through trial. So --

4 THE COURT: I'm going to sustain the objection.

5 MR. ANNINO: Your Honor, the only other thing I had  
6 was you had marked Mr. Clary's affidavits. I probably  
7 believe it appropriate then to have my revised affidavit  
8 marked as Exhibit A-5. It should be in the court's file.

9 MR. CLARY: I don't think I have it. Have you  
10 given it to me?

11 MR. ANNINO: It was filed March 24th, 1998.

12 MR. CLARY: Okay. Then I have that one. I have  
13 that one.

14 MR. ANNINO: It was filed in connection with the  
15 initial submission. It should say Revised Counter-Affidavit.

16 THE COURT: A-5.

17 (The following document  
18 referred to was marked as  
19 Plaintiffs' Exhibit No. A-5  
20 for identification and was  
21 received into evidence.)

22 MR. ANNINO: If that's in, Your Honor, I don't have  
23 anything else.

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1 THE COURT: Mr. Clary, when did you notice  
2 Mr. Annino that you were going to raise this issue about the  
3 supplemental fees?

4 MR. CLARY: I'm sorry?

5 THE COURT: When did you tell me you gave him  
6 notice about these supplemental fees?

7 MR. CLARY: Friday, at the hearing.

8 MR. ANNINO: Your Honor, I didn't actually receive  
9 the documentary submission until this morning.

10 MR. CLARY: Well, that's not actually true, since  
11 he had requested that we produce all copies of all Clary &  
12 Moore bills in the course of discovery that he conducted. So  
13 actually he's had the Clary & Moore bill that is posthearing  
14 for, I assume, several weeks.

15 The only thing that he hasn't had is the Holland &  
16 Knight computer printout of unbilled time. Because none of  
17 this has in fact been billed yet. It's still stored in the  
18 computer.

19 Unfortunately we are still getting a number  
20 assigned because the conflict checks take so long. But  
21 that's one of the problems of being in a larger firm now.

22 So actually the clients have not been billed for  
23 that part. And in my affidavit it is unidentified as

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1 unbilled time.

2 THE COURT: You are not in the same firm as you  
3 initially were?

4 MR. CLARY: No, ma'am. I am now a partner -- as of  
5 May 1st, 1998, I am now a partner in the firm of --

6 THE COURT: That's useful to know after all this  
7 testimony about a two-man firm.

8 MR. CLARY: Oh, I'm sorry, Your Honor.

9 THE COURT: Where are you working now?

10 MR. CLARY: I'm with a firm called Holland &  
11 Knight.

12 THE COURT: Oh, I see. You are with a big firm  
13 now.

14 MR. CLARY: Clary & Moore's representation of the  
15 Fosters concluded on April 30th, which is when that firm  
16 essentially ceased.

17 THE COURT: Okay.

18 MR. CLARY: I am sorry for any confusion in not  
19 explaining that to you.

20 THE COURT: It's just interesting.

21 MR. ANNINO: I'll just make a clarification of  
22 Mr. Clary's statement.

23 Two weeks ago, when he faxed me the Clary & Moore  
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1 billing that he's referring to, I asked him why that was  
2 faxed to me. And he indicated that his secretary had just  
3 done that as a matter of course. And it wasn't until Friday,  
4 the 7th, that I learned that he indeed was going to make a  
5 supplemental petition for the attorneys' fees.

6 So I had no reason to regard that bill.

7 MR. CLARY: And this is correct, Your Honor.

8 It wasn't until recently that the client, upon  
9 seeing how big this bill is becoming and not anticipating  
10 where this thing was going on attorneys' fees, could not --  
11 while they were willing to absorb maybe \$5,000 worth of fees  
12 if it was going to be, you know, just a documentary applica-  
13 tion, now he's really put into a bind and did not believe  
14 that that was fair or appropriate.

15 And I must say I have to agree with him. I don't  
16 think that's in the spirit of Wilson v. Whitehead.

17 THE COURT: Go ahead and cross-examine please.

18 CROSS-EXAMINATION

19 BY MR. CLARY:

20 Q. Ms. Pesner, I just want to clarify a few things  
21 about all of these charts. Take A-3 for just a minute here.

22 A. Yes, sir.

23 Q. Now, on A-3, the hours that you have -- and you

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1 made a correction?

2 A. Yes, sir.

3 Q. After the break you realized that the hours recited  
4 here -- that you recited earlier were incorrect. And you  
5 came up with new totals.

6 Is that correct?

7 A. I did.

8 Q. And the totals that you came up with of 179.3 and  
9 391, how did you come up with those?

10 A. I took the subtotals off of -- in the case of  
11 Mr. Moore, if you'll turn to the first page of the two pages  
12 of his hours, there are subtotals in the far right-hand  
13 column. And I added them up.

14 Q. Okay. So basically it's from the other pages of  
15 this document?

16 A. Yes.

17 Q. Now, these total hours, they include, however, time  
18 that was not billed, don't they?

19 A. These hours include only the time that I had  
20 through trial.

21 Q. These hours that you're comparing here include  
22 hours that were not billed, don't they?

23 There is no great magic to this. If you look at

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1 the first block on the front page, you have a column that has  
2 dollars.

3 That is indicative of the amount that was billed,  
4 wasn't it?

5 A. Yes.

6 Q. And in fact, you've listed for me for that billing  
7 period 19.5 hours, correct?

8 A. Yes.

9 Q. And did I bill for 19.5 hours?

10 A. No.

11 Q. Okay. So the computation that you ultimately made  
12 at the end and you just related to the Judge includes time  
13 that wasn't billed, doesn't it?

14 A. It includes time that was spent that was not  
15 billed, yes. You're correct, just as the chart shows.

16 Q. So in talking to the Judge about this relationship  
17 of two to one, which is nice if you've got a whole bunch of  
18 associates, actually this chart gives a misimpression,  
19 doesn't it?

20 A. It may for a minority of the numbers, which I would  
21 be happy to add up and supplement.

22 Q. Well, let me ask you this: Where is Mr. Moore's  
23 charges from October of '96 through April of '97?

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1           A.    I did not prepare these.

2                   And what they were originally prepared for was to  
3 just verify the mathematical calculations on the billings.

4           THE COURT: Let me find what he's talking about  
5 here.

6           THE WITNESS: He is correct. There appears to be a  
7 hole in the mathematical computations of --

8           THE COURT: To tell you the truth, the more I look  
9 at this, the more confused I'm getting.

10                  If you look at A-3 on No. 1, it has the 2nd of  
11 August, right, at the very top?

12           THE WITNESS: Yes.

13           THE COURT: I don't know what year that is, do I?

14           THE WITNESS: It's '96. It started with the first  
15 set of billings.

16                  This goes right in line with these billings.

17           THE COURT: Would you mind if I write that in  
18 there?

19           THE WITNESS: I don't mind.

20           THE COURT: What date did you say Mr. Moore did not  
21 include?

22           THE WITNESS: From August 1st, 1996, through April  
23 30th, 1997.

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1 THE COURT: How can you tell that by looking on  
2 here?

3 MR. CLARY: Because they don't have the dates in  
4 there.

5 If you look at Mr. Moore's list, his begins with  
6 the 2nd of May.

7 THE COURT: Then how do I know yours?

8 MR. CLARY: Well, if you'll start from the end,  
9 start from March, the end of his total, and work backwards,  
10 March '98 and go back to '97 in December --

11 THE COURT: You go backwards to make any sense out  
12 of it?

13 MR. CLARY: I'm sorry?

14 THE COURT: You have to go backwards to make any  
15 sense out of it?

16 MR. CLARY: Well, you have to go backwards to  
17 realize that they have just excluded six months' worth of his  
18 work.

19 THE COURT: Mr. Moore's begins the 2nd of May,  
20 1997?

21 MR. CLARY: On this chart.

22 THE COURT: On the chart.

23 MR. CLARY: And actually, you could derive that by  
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1 looking at the actual bills.

2 THE COURT: Yeah, I'm sure.

3 BY MR. CLARY: (Resuming)

4 Q. So your analysis that Mr. Moore spent 197 hours  
5 versus my 391 not only fails to exclude time that was not  
6 billed for the comparison but, in addition to that, you  
7 failed to exclude six months' worth of Mr. Moore's time;  
8 isn't that correct?

9 A. I have to review this chart more accurately to  
10 answer.

11 Yes, it did include some minimal amounts of time  
12 that were not charged on your bills. And I don't know what  
13 happened to the middle pages of this chart. There was more  
14 of it, last I saw.

15 THE COURT: Can you proffer to me before we go any  
16 farther on this that, if I went through all your affidavit  
17 and the bills, the fact that Mr. Moore did put in time before  
18 1997?

19 THE WITNESS: Yes.

20 THE COURT: I am assuming that's true.

21 MR. CLARY: Yes, ma'am.

22 As a matter of fact, not uncommonly he would put in  
23 the vast majority of time in the early stages of the litiga-

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1 tion, which he did.

2 THE COURT: All right.

3 BY MR. CLARY: (Resuming)

4 Q. So that your argument and analysis and opinion  
5 about the relative amounts of associate-versus-partner time  
6 is really very flawed and should be disregarded, shouldn't  
7 it?

8 A. I am unwilling to conclude that. Because I believe  
9 that there is another page to the chart that I had been using  
10 that is not here.

11 Q. Well, in fact, Mr. Moore's time is well over 300  
12 hours, isn't it? Or you don't know?

13 A. Let me see if I have any of my other --

14 THE COURT: I will allow you time to gather up your  
15 papers, if you feel like you have something missing. You can  
16 go look at your things if you'd like.

17 THE WITNESS: I found it, Your Honor.

18 THE COURT: Mr. Clary, these two pages don't add up  
19 to 197.

20 MR. CLARY: I haven't done the math, Your Honor.  
21 But I just know it's all wrong.

22 THE COURT: I mean, there must be a page missing,  
23 because the two pages that are here don't add up to 197.

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1 MR. CLARY: For Mr. Moore?

2 You've got 112 plus, it looks like, about 85. It's  
3 a little over 200, is what it looks like to me.

4 THE COURT: I just have one and a half pages for  
5 RGM, right?

6 MR. CLARY: Yes, ma'am. That's what I have.

7 THE WITNESS: And there are two and a half. I have  
8 found the other page.

9 THE COURT: The far right-hand column? The time?

10 MR. CLARY: Yeah.

11 THE COURT: So 69, 72, 77, 78 --

12 MR. CLARY: There is 112 down at the bottom there  
13 on mine.

14 THE COURT: That was the total.

15 MR. CLARY: No. That is actually just --

16 THE WITNESS: That was a month.

17 MR. CLARY: See, that was her mistake earlier that  
18 she recognized. That is not a total of everything. That is  
19 just for that one period.

20 THE COURT: I thought it was completely wrong.

21 It was a total for a period?

22 MR. ANNINO: Yes, ma'am. She didn't carry through.

23 THE COURT: Oh, I thought it was a completely wrong

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1 number, so I crossed it off.

2 So it is supposed to be 112.

3 Maybe, Mr. Annino -- in terms of this record, maybe  
4 you should give me a new exhibit entirely.

5 THE WITNESS: We would be happy to, Your Honor.

6 I'm not even sure what I was able to pull out as to  
7 all the pages.

8 THE COURT: Do you want to look at the actual  
9 exhibit, to see if you've got it right?

10 THE WITNESS: No, ma'am.

11 BY MR. CLARY: (Resuming)

12 Q. Am I understanding we are going to have a  
13 supplemental exhibit?

14 A. Yes, sir.

15 Q. And will that exhibit not include No Charge time?

16 A. It will not include No Charge time.

17 THE COURT: But is it going to include Mr. Moore's  
18 time?

19 I want her to introduce it, so I can look at a copy  
20 of it.

21 You don't have a copy, do you?

22 MR. CLARY: No, ma'am, I don't.

23 MR. ANNINO: If we can have the bailiff make a copy

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1 of it.

2 THE COURT: The bailiff? I assure you that they  
3 don't do that.

4 I'll ask my clerk to do it.

5 THE WITNESS: I can also fax it in tonight after I  
6 verify it.

7 THE COURT: Is this a page you want to add?

8 THE WITNESS: Yes. But I just want to verify it's  
9 the one we're talking about.

10 I believe there is another page before this,  
11 Your Honor, that is missing.

12 THE COURT: I'm going to put this aside,  
13 Mr. Annino. Because we're getting hopelessly confused.

14 BY MR. CLARY: (Resuming)

15 Q. Ms. Pesner, what I would like to do is take you to  
16 Exhibit A-2. And I would like to clarify this.

17 I am not going to go through every page.

18 But would it be fair to say that just taking the  
19 first page is a fair representation of the manner in which  
20 you analyzed and created Exhibit A-2?

21 A. I would assume it is, yes.

22 Q. Okay. Just so I fully understand -- the column  
23 that says Adjusted Billing Time, that, just so I understand

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1 it, is the dollar amount by which you think the fee should be  
2 reduced?

3 A. Yes, sir.

4 Q. Okay. All right.

5 And the codes help to explain why?

6 A. Yes, sir.

7 MR. CLARY: Okay. Let me start first with the very  
8 first -- and, Your Honor, it may be helpful in this instance  
9 to have the bill available. And fortunately this will be the  
10 very first bill -- Clary & Moore bill.

11 I think it would be helpful for Your Honor to have  
12 that handy, so you can read what the entries are.

13 BY MR. CLARY: (Resuming)

14 Q. Ms. Pesner, do you need a copy of the bill?

15 You have it. Okay. Good.

16 THE COURT: We're going to the very first bill?

17 MR. CLARY: Yes, ma'am.

18 BY MR. CLARY: (Resuming)

19 Q. And the column entitled Date is the date of the  
20 entry, right?

21 A. Correct.

22 Q. Now, up until Mr. Moore's entry on October 16th,  
23 there in fact were no charges; isn't that correct?

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1 A. That's correct.

2 Q. In fact, from August to October, I spent a fairly  
3 significant amount of time assisting the trustees and  
4 Mr. Foster in their dispute before a lawsuit was filed,  
5 didn't I?

6 A. About eight hours.

7 Q. And at my rate, that's a couple thousand dollars?

8 A. Yes.

9 Q. Okay. Did you include that in your computation of  
10 the reasonableness of the overall fees?

11 A. I did not.

12 Q. Okay. Do you -- now, I see that the first item  
13 here you have a No Charge by.

14 A. I do.

15 Q. And it was two hours.

16 And the entry reads "To Fairfax Circuit Court to  
17 examine court file to determine date of service," right?

18 A. It was .2 hour, yes.

19 Q. It was .2 hour. Okay.

20 And would it not appear from that that in fact it  
21 is our practice not to charge for travel time?

22 A. I don't -- there is no entry in travel time for  
23 this entry, correct.

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1 Q. And that is true of every other entry, isn't it?

2 A. No. There are other entries that talk about to and  
3 fro -- to Fairfax.

4 Q. Doesn't this say "To Fairfax Circuit Court"?

5 A. Yes, it does.

6 Q. And in fact, .1 is probably a reasonable estimate  
7 of time to stand at the Clerk's counter while you're getting  
8 the file and examining it, isn't it?

9 A. Yes, it would be.

10 Q. But you have No-Charged it?

11 A. I have.

12 Q. And you've taken out the entire \$35 that was  
13 charged for that?

14 A. I have.

15 Q. And your reason for that is what?

16 A. That it could easily have been handled by a staff  
17 person, who could have telephoned the court to review the  
18 court file.

19 Q. And how much would -- well, does the court always  
20 have returns of service timely?

21 A. Not always. But generally.

22 And generally you can check with the client as to  
23 when they were served.

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1 Q. Do you know the circumstances surrounding service  
2 in this case?

3 A. I do not, other than what was in the brief files.

4 Q. Would your opinion change if you were confronted  
5 with a situation where the client calls you anxious because  
6 they've just returned from a two-week vacation and found a  
7 document on their door and they don't know when it happened?

8 A. And I would verify that somebody should have  
9 checked. Yes, I would.

10 Q. How much should have been charged for that person?

11 A. A staff person would ordinarily not charge for it  
12 at all.

13 Q. Okay. Just so I understand now the relationship  
14 between Exhibits A-2 and A-4, you have also listed this entry  
15 on Exhibit A-4, haven't you?

16 A. Yes.

17 Exhibit A-4 was the original computations that I  
18 did for Mr. Moore's entries. And I put them into an Excel  
19 spreadsheet in order to allow Excel to do the calculation of  
20 the difference between \$175 an hour and \$145 an hour.

21 Q. So a \$30-per-hour difference?

22 A. Yes.

23 Q. And that in fact is what this 46.9 and \$1,407

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1 equals? It's simply multiplying those tenths of an hour by  
2 \$30, correct?

3 A. I'm sorry. I don't know what 46.9 is.

4 Q. Isn't that the total on Exhibit A-4 for the first  
5 billing period?

6 A. I'm sorry. Yes, it is.

7 Q. Now, you took that 1,407.

8 And if I come back to A-2, that was a subtraction  
9 on the second page, 1,407, correct?

10 A. Yes.

11 Q. So you subtracted that amount?

12 A. Yes.

13 Q. And that was in addition to the subtractions that  
14 initially appeared from the first page of 1,039?

15 A. Yes, Mr. Clary.

16 Q. So that in this particular instance you have in  
17 essence subtracted this twice?

18 A. You may look at it that way.

19 THE COURT: I want you to tell me that again before  
20 she answers.

21 MR. CLARY: Ms. Pesner has subtracted --

22 THE COURT: She subtracted 1,407 based on this,  
23 right?

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1 MR. CLARY: Yes, ma'am. She got to 1,407.

2 You bring it over to Exhibit A-2. And she adds  
3 together 1,407 and 1,039 to end up with her total adjustments  
4 for that period.

5 Does Your Honor see that?

6 THE COURT: Yes, I do.

7 That's what I was wondering when I was asking  
8 before about this chart. I couldn't figure out what the  
9 adjustments would be in addition to the adjustments that had  
10 already been made on a line item basis.

11 Is that what you're saying?

12 MR. CLARY: Yes, ma'am.

13 THE COURT: These all represent adjustments, right?

14 MR. CLARY: Yes, ma'am.

15 THE COURT: So that adds up to 1,309. And then you  
16 make another big adjustment right here.

17 THE WITNESS: Okay. The first adjustments, which  
18 are on A-4, were to bring Mr. Moore's hourly rates from 175  
19 to 145. That's what A-4 did.

20 On A-2 what I was doing -- and please understand  
21 that all these were internal to me to allow me to make my  
22 determination.

23 Because you will find that these do not go line by

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1 line into what my final testimony is as to what I believe  
2 were the reasonable fees that should have been charged in the  
3 case. Because there are 11 other factors that go with it.

4 So these were my internal documents.

5 And Mr. Clary is correct that, as to that \$35  
6 entry, one could say that it appeared twice.

7 But these were used internally by me in order to  
8 just have an understanding about what the bills were. I  
9 loved the first bill. And every bill after that was more  
10 difficult, because we lost the last column of the chart.

11 So to the extent that Your Honor is going to be  
12 using these to assist her, I would say that they were  
13 internal to assist me in a better understanding.

14 BY MR. CLARY: (Resuming)

15 Q. So in other words, the Court should not rely upon  
16 the 30,308 as your conclusion as to the total adjustments  
17 that should be made to the bill?

18 A. Absolutely correct.

19 Q. That's the result of your computation? 30,308.50?

20 A. Tell me what you're on.

21 Q. I am on the last page of A-2, total adjustments,  
22 all bills.

23 Did I misstate? 40,308.

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1           A.    It was certainly one of the adjustments that I used  
2           in my calculations. It is not the only adjustment. And it  
3           is not technically a line-item-by-line-item adjustment dollar  
4           for dollar. Because there was a bigger picture that affected  
5           the attorneys' fees in this case, in my opinion.

6           Q.    In other words, you would agree with me then that  
7           the reasonableness of attorneys' fees is actually not some-  
8           thing that you can do a computation on -- a strict  
9           computation?

10          A.    Absolutely.

11          Q.    It is not a mathematical certainty?

12          A.    Absolutely.

13          Q.    And so on the first entry you double-charged us for  
14          that, you would agree?

15          A.    Or double-deducted.

16          Q.    Okay. Double-deducted.

17                   And that may have happened in other cases in here  
18          too?

19          A.    It certainly may have.

20                   THE COURT: Is it accurate to say that on this one  
21          you just lowered his rate? On this one you lowered  
22          Mr. Moore's rate all across the board wherever his name  
23          appeared?

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1 THE WITNESS: Yes.

2 THE COURT: On this one you kind of picked out  
3 things you thought -- in addition to the rate being lower,  
4 you thought they shouldn't even have been charged at all?

5 THE WITNESS: Potentially. Or I thought they  
6 should have been charged even a lower rate.

7 THE COURT: There's two different criteria.

8 One, you lowered his rate. And two, you made a  
9 judgment as to the expenditure of time on each item, as to  
10 whether he spent too much time.

11 THE WITNESS: Or whether it should have been at an  
12 even lower rate than 145. Whether it should have been a 125  
13 rate.

14 THE COURT: It's tricky.

15 THE WITNESS: It is tricky. And it had to be used  
16 in order to meet the test and to meet my requirements.

17 BY MR. CLARY: (Resuming)

18 Q. Now that I understand A-4 a little better, it is  
19 just a broad brush taking Dick Moore down from 175 to 145?

20 A. Yes.

21 THE COURT: Did he go with you to your new firm?

22 MR. CLARY: Yes, ma'am, he did.

23

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1 BY MR. CLARY: (Resuming)

2 Q. What do you know about Mr. Moore?

3 A. What you provided to me.

4 Q. Which was?

5 Did you ask me for something?

6 A. I did not. I figured if you --

7 Q. Then how could I have provided something to you?

8 A. It was his CV attached to your affidavit.

9 Q. And that's all you know about him?

10 A. It is.

11 Q. And in your opinion, that CV is worth \$145 an hour?

12 A. No, that is not what I said.

13 I said that the work that appears to have been done  
14 by the attorney in that slot could have done by someone who  
15 is a five- to six-year associate in a Northern Virginia firm  
16 who would have had the expertise to do the same work, whose  
17 general hourly rates would be 145.

18 Q. But then you took all of the research down to 125?

19 A. I took some of the research -- most of the research  
20 time down to 125.

21 Q. So actually you took it down 50 bucks?

22 A. Which you might have been able to get for 95.

23 Q. Okay. With respect to research, what do you know

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1 about Mr. Moore's research skills?

2 A. I know nothing about Mr. Moore's research skills.

3 Q. Are you aware that Mr. Moore was the chief judge of  
4 the Navy Marine Corps Appellate Review Activity?

5 A. I know everything that is on here.

6 Q. So that if Mr. Moore had specialized expertise in  
7 legal research and in fact was renowned in that field, that  
8 is something that you did not consider in arriving at your  
9 conclusion as to the appropriateness of his rate?

10 A. That's correct.

11 Q. And in fact, as one gains experience in research,  
12 they also gain efficiency, do they not?

13 A. Occasionally.

14 Q. And isn't it a fact that one of the reasons a lead  
15 counsel -- I'm sorry -- isn't it a fact that one of the  
16 reasons it might be more efficient to choose a seasoned  
17 researcher over a younger researcher is because they would  
18 have a better grasp and could more efficiently get productive  
19 results to be used?

20 A. And I gave him credit at \$125 an hour versus 95 or  
21 85.

22 Q. But it is a fact that you know nothing about him?

23 A. I know what is provided to me, which I thought was

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1 quite clear as to his abilities.

2 THE COURT: Is this the 125 on this here?

3 THE WITNESS: No.

4 THE COURT: This is when you reduced it from 175?

5 THE WITNESS: Yes.

6 BY MR. CLARY: (Resuming)

7 Q. Actually, I think I've got this right.

8 A-4 reduces it from 175 to 145? This reduces it  
9 further from 145 to 125?

10 A. In the cases of those line items, yes.

11 THE COURT: Just in the case of those line items.

12 THE WITNESS: In the codes of RT, research time.

13 THE COURT: Can I ask one other question?

14 I'm sorry to be so obtuse. I find this formula a  
15 little bit hard to understand.

16 Will you explain research time 125 versus 145.  
17 You've explained it here as an RT deduction.

18 THE WITNESS: I have.

19 THE COURT: Where you -- you've got the reduced  
20 rate down here too.

21 THE WITNESS: That's just for Mr. Clary.

22 I gave him a separate entry of an RR for reduced  
23 rate, where on those particular line items I felt that, had

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1 they had a mid-level or a senior associate or a junior  
2 partner, that's what they would have done at that hourly  
3 rate.

4 THE COURT: But is there a reason why you didn't  
5 put on this form another reduced rate terminology called  
6 something else to include this? Why is this out here by  
7 itself?

8 THE WITNESS: Well, because -- remember, these were  
9 all done internally. This was done at the crack of dawn this  
10 morning.

11 A-4 was done originally just to come up with the  
12 number of hours that were billed by Mr. Moore at 175 based on  
13 after I had reviewed all of the pleadings that the work that  
14 was done on the pleadings appeared to me to be done -- could  
15 have been done by the level --

16 THE COURT: You could have -- if you had had more  
17 time and you weren't working at dawn, you could have  
18 incorporated this form into this form? And we wouldn't have  
19 had to refer to different forms?

20 THE WITNESS: Absolutely. Most certainly.

21 THE COURT: And you wouldn't have had RT, RR, RS,  
22 or something, right?

23 THE WITNESS: Yes.

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1 THE COURT: I just wondered. Okay.

2 BY MR. CLARY: (Resuming)

3 Q. Just so we're clear on this -- just so we're clear  
4 on this, are the -- there is a column on A-4 entitled Hourly  
5 Charge.

6 It really is an amount of time, isn't it?

7 A. Yes.

8 Q. It's tenths of an hour?

9 A. Correct.

10 Q. So it should be hours or tenths of an hour?

11 A. Yes.

12 Q. Do those jive with the hours that are shown on A-2?

13 A. Do they -- they're not always the same, if that's  
14 what you're asking me.

15 I mean, sometimes I had to make independent  
16 evaluations as to the amount of time that might have been out  
17 of a complete entry. I would have taken a portion of it that  
18 might have related to research when you had a lumping of a  
19 large entry.

20 Q. And how did you make that determination? Would it  
21 be fair to say that you guessed?

22 A. It would be fair to say that I estimated.

23 Q. Okay. In fact, you guesstimated on 14 of the 20

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1 entries on the first page, didn't you?

2 MR. ANNINO: Objection. Argumentative.

3 THE COURT: Overruled.

4 THE WITNESS: I will compare them.

5 BY MR. CLARY: (Resuming)

6 Q. Let me go through this with you.

7 THE COURT: Go ahead.

8 BY MR. CLARY: (Resuming)

9 Q. Fortunately I'm only going to do this on the first  
10 page. Because I think this will epitomize the value of this  
11 document.

12 The fourth entry, 10/28, if we look at 10/28 in the  
13 bill, it has a variety of different tasks that are recited in  
14 there, doesn't it?

15 A. It does.

16 Q. And what basis -- did you ask Mr. Moore how much  
17 time he had spent on one task versus the other?

18 A. I did not.

19 Q. So in making your determination, you, as you said,  
20 made an educated guess?

21 A. I believe I did.

22 Q. And it could be substantially in error, couldn't  
23 it?

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1 A. It certainly could be.

2 Q. And so I think what I have called these entries is  
3 entries where other tasks are indicated.

4 A. Okay.

5 Q. So the first one is another task entry.

6 And it's a guess as to how much; is that right?

7 A. What's the first one?

8 Q. The 10/28.

9 A. Yes.

10 THE COURT: You went from 5.4, right, to 2.7?

11 MR. CLARY: Right.

12 BY MR. CLARY: (Resuming)

13 Q. And the next entry, October 29th, that's the same  
14 guess? Because there are other tasks in that one, aren't  
15 there?

16 A. Yes.

17 The other task was "Confer with MC3 and complete  
18 draft of demurrer and review and revise it."

19 Q. Is there any entry by MC3 for conferring with  
20 Mr. Moore?

21 A. No. I would have listed it if there were and if it  
22 were objectionable.

23 Q. In fact, as you go through the bill, there are rare

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1 occasions where that is billed?

2 A. That's correct.

3 Q. In fact, in your --

4 A. And I commend you for it.

5 Q. In your expert designation, you expressly indicated  
6 you were going to testify about double billings.

7 But they don't exist, do they?

8 A. And when I had the opportunity to look more care-  
9 fully at things, it was a rarity where they existed. It's  
10 not that they don't, it's just a rarity.

11 Q. Now, if we take -- so again, the October 29th  
12 entry is again your guess of how much of it should have been  
13 written down?

14 A. Right, from 6.3 hours.

15 Q. Okay. And you also have an entry -- a No Charge  
16 entry?

17 A. I do.

18 Q. For October 29th?

19 A. I do.

20 Q. And you say "Filing, 1 hour."

21 A. I do.

22 Q. And that is all part of that one entry on 6/29 by  
23 Mr. Moore, isn't it?

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1 A. Yes.

2 Q. The 6.3 hours.

3 And how do you know how much time is appropriate to  
4 indicate for filing?

5 A. I don't.

6 Q. Isn't it -- isn't it just as likely that he was at  
7 the courthouse doing research and dropped it off, but wanted  
8 to make a record that he had filed it?

9 A. I don't think so. That I don't think so.

10 He was at George Mason Law Library doing research.

11 Q. Well, in fact, this is another example where on  
12 Exhibit A-4 you reduce his rate and give a credit for the  
13 entire 6.3 hours, including that 1 hour that you're now  
14 giving a double credit for here as well?

15 A. And I again say, you know, you're wanting to rely  
16 upon this as the reason why my opinion comes to what it does.

17 And of the 12-prong test that comes out of the  
18 cases, this is a small part. This was used internally by me.

19 Q. Would it be fair to say we should disregard this as  
20 it has so many potential errors?

21 A. No.

22 I think it is a guide. It is merely a guide.

23 Q. If we look at the next entry, December 11th, that

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1 also is one where there are other tasks indicated in the  
2 entry, aren't there?

3 A. There are.

4 Q. Correct?

5 A. You said December 11?

6 Q. Yes.

7 A. Yes.

8 Q. And so again, it is your guess as to how much?

9 A. It is.

10 Q. Same thing with December 12th?

11 A. Yes.

12 Q. Same thing with December 13th?

13 A. I mean, I don't know how many times you want me to  
14 say this, Mr. Clary.

15 Q. Well, I asked you the question to begin with that  
16 in fact 14 of the 20 entries on this page were in fact  
17 guesses by you as to how much time was spent. And you made a  
18 guess and concluded that we should subtract some money from  
19 the fees.

20 A. What I did was I used it as a guide.

21 I understand a small firm. I've been a managing  
22 partner of a small firm for many, many years.

23 Q. I would just like you to answer my questions.

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1 I understand. And I apologize for making you feel  
2 defensive. That's unfortunately part of what we're doing  
3 here.

4 A. No. It is not a defensive issue.

5 It is a guide.

6 Q. So the 14 entries representing 70% of all the data  
7 on this page has potential errors.

8 In addition to that, you have two other entries  
9 which are double-counting. And you have -- let's go down to  
10 these entries of reduced rate for me.

11 MR. ANNINO: Your Honor, I think this is asked and  
12 answered.

13 She's explained what the chart represents. This is  
14 just duplicative.

15 MR. CLARY: I would like to finish this page,  
16 Your Honor, and then move on.

17 THE COURT: I don't think it's duplicative.

18 If we hadn't gone through this exercise, I don't  
19 think I ever would have fully understood these charts.

20 Go ahead, Mr. Clary.

21 BY MR. CLARY: (Resuming)

22 Q. So then if we look at the two entries -- so far  
23 we've got 14 entries where it's a guess, two entries where

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1 you double-deducted in coming up with your computation.

2 And now we've got two entries here where you have  
3 reduced the fees that I charged on December 27th and December  
4 30th as lead counsel in doing the final revisions to a  
5 pleading -- in fact, a request for admissions.

6 And you felt it could have been done by someone  
7 other than the lead counsel?

8 A. No. I didn't say that at all.

9 And I think that the words "lead counsel" are  
10 misleading. I think that when you're talking about an hourly  
11 rate of \$225 an hour you are talking about your experience in  
12 the courtroom, you are talking about your experience in your  
13 ability to deal with witnesses, you are talking about your  
14 experience in being able to provide you the best slant to a  
15 client's case before the judge.

16 Q. And, Ms. Pesner, what is it that you know about my  
17 experience?

18 A. About your experience personally?

19 Q. Yes, ma'am.

20 A. I've certainly been in practice -- the entire time  
21 I've been in practice, so have you.

22 Q. Have we had a case together?

23 A. Just one.

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1 Q. Do you recall what it was?

2 A. It was not a litigation case.

3 Q. It was a nonlitigation case?

4 A. It was a nonlitigation case, yes.

5 Q. It was a case in which my wife hired you to write  
6 some covenants for a subdivision that she was developing,  
7 wasn't it?

8 A. I have to tell you I honestly don't remember.

9 Q. I do.

10 A. But now that you say it, I do remember.

11 Q. Okay. I guess where I'm focusing on here is --

12 THE COURT: Where are those two entries?

13 MR. CLARY: 12/27 and 12/30.

14 BY MR. CLARY: (Resuming)

15 Q. Ms. Pesner, do you understand the impact of  
16 obtaining admissions from the opposing party in terms of the  
17 function that it may serve in truncating the litigation?

18 A. I do.

19 Q. Do you think it would be prudent for the senior and  
20 lead counsel to have the last cut at those?

21 A. I do.

22 Q. And isn't that what these entries represent?

23 A. Those entries do appear to represent the last cut

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1 at those.

2 Q. Okay. So that, taking the first page of Exhibit  
3 A-2 as, in your words or concession, typical of this entire  
4 analysis, 14 of the entries were guesswork, two were double-  
5 billed, two reflect an errant view of the appropriate role of  
6 lead counsel.

7 And so really there isn't much value to this, is  
8 there?

9 MR. ANNINO: Objection. Argumentative.

10 MR. CLARY: I'll withdraw the question.

11 I think I'm done with that exhibit.

12 BY MR. CLARY: (Resuming)

13 Q. What is the hourly rate that you are charging for  
14 your services as an expert witness?

15 A. \$225.

16 Q. The same as my rate?

17 A. It is, for this litigation.

18 I don't know what your rate might otherwise be.

19 Q. And did I misunderstand -- did you say Nationwide  
20 paid you?

21 A. Nationwide was involved in the case that I was  
22 involved in, yes.

23 Q. Oh, it's a different case?

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1 A. Oh, than this case?

2 Q. Yeah.

3 A. Oh, yes.

4 Q. I'm sorry.

5 So it is the plaintiffs here that are paying you  
6 for this case?

7 A. Yes.

8 Q. And do you have a relationship -- do you have a  
9 prior relationship with Mr. Annino's firm?

10 A. In 1978 to 1980, two of the partners in his firm  
11 were associates in the Walstad-Wickwire firm with me.

12 Q. And do you regularly do work that is referred from  
13 them currently?

14 A. No, I do not.

15 Q. You don't do any work with their firm currently?

16 A. No.

17 Q. Okay. You indicated you talked to John Keith about  
18 his case and he told you the fees were around 71,000.

19 A. I did.

20 Q. And did you feel that those were appropriate and  
21 reasonable?

22 A. I did.

23 Q. In that context, did you review the Bruce case?

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1           A.    I reviewed the opinion prior to speaking with  
2 Mr. Keith. And then I went over the case with him via  
3 telephone.

4                   I did not go and pull the file.

5           Q.    And so you didn't look at, for instance, his bills  
6 of time entries to see, for instance, what the mix of senior  
7 partner versus junior partner --

8           A.    I did not.

9           Q.    Do you recall how much Mr. Keith charged per hour?

10          A.    I believe it was 175 an hour.

11          Q.    You sure it wasn't 250?

12          A.    I do not -- I feel sure it was not 250.

13          Q.    Okay. All right.

14                   It could have been 225 though?

15          A.    I don't believe it was. I believe it was under  
16 \$200.

17                   I did look through my notes this morning to see if  
18 I could find them. I found them on Ms. Fogarty's bill. But  
19 I did not find it on his.

20          Q.    Was there a petition for attorneys' fees in that  
21 case?

22          A.    I don't believe so.

23          Q.    So there is nothing in the court record that you

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1 could determine that from?

2 A. No.

3 Q. Okay. All right.

4 You know, you've talked about this 12-point test,  
5 which actually was a federal case, wasn't it?

6 A. It is.

7 Q. The Barber case.

8 A. Barber v. Kimbrough.

9 Q. It has been recited in a few Virginia Circuit Court  
10 cases, hasn't it?

11 A. Yes.

12 Q. And among the factors to consider in those 12  
13 points is whether or not -- let me see if I can find the case  
14 here -- is the undesirability of the case and awards in  
15 similar cases.

16 Do you recall those as being some of the 12?

17 A. I certainly do.

18 Q. And in fact, the whole focus of these 12 points are  
19 really aimed at how much should be awarded in attorneys' fees  
20 when you have situations where a plaintiff is pursuing a  
21 statutory or civil rights or some sort of cause of action  
22 that, because he is probably impecunious, the legislature has  
23 made the decision that it is a valuable cause and we want to

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1     incentivize attorneys to take the case, isn't it?

2           A.    I did not read the cases for that purpose.  I don't  
3     know that that was the purpose for which they were brought.

4           Q.    Would you -- is it then -- it would be fair to say  
5     that your opinion as to reasonableness does not consider the  
6     context -- that is, whether it is a case in which a  
7     plaintiff's attorney has voluntarily entered into an arrange-  
8     ment with a prospective plaintiff, knowing that it's going to  
9     be a contingent fee case and that he is going to be subjected  
10    to a review based on these 12 factors; or whether, on the  
11    other hand, it's a contract case where the parties have  
12    agreed in their contract that reasonable attorneys' fees  
13    should be awarded?

14                You haven't considered any of that in your opinion  
15    in terms of what fees are reasonable, have you?

16           A.    In my opinion, I did see early on either -- I  
17    believe it was correspondence where Mr. Annino was advised  
18    that it was your clients' intention to seek recompense for  
19    their legal fees.

20           Q.    You mean the letter of March 13th, 1997, about a  
21    year before we finished the litigation?

22           A.    Probably.

23                It was after the initiation and long before trial.

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1 Q. And who initiated this litigation?

2 A. The plaintiffs.

3 Q. Mr. Annino's client?

4 A. Yes.

5 Q. But my client didn't initiate the litigation?

6 A. No.

7 Q. It wasn't a conscious, knowing, and voluntary  
8 choice on my clients to engage in litigation, was it?

9 A. I would say no defendant does.

10 Q. In fact, you know, I was looking at one of the  
11 cases that Mr. Annino handed to me. It's Hernandez v.  
12 Trawler Miss Verdie May, which is a Newport News Circuit  
13 Court case. And in fact, this is actually a sanctions case.

14 A. I am aware of the case.

15 Q. And it in fact recites the 12 points.

16 But the judge makes the distinction that sanctions  
17 are different than fee shifting cases.

18 A. I believe that to be true.

19 Q. And so indeed the context of the attorneys' fees  
20 may indeed impact how you evaluate whether fees are reason-  
21 able or not; isn't that true?

22 A. Yes.

23 Q. You indicated that you felt that the only novel

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1 issue in this case was unanimity versus majority on the  
2 trustees, correct?

3 A. Yes.

4 Q. And you concede that that was a novel issue?

5 A. Yes.

6 Q. And so the research into whether or not it was a  
7 charitable trust and whether or not the legislature's  
8 expression as to the fact that when you have three trustees  
9 the majority rules, whether that is retroactive, indeed were  
10 novel issues that deserved attention?

11 A. Yes.

12 Q. With respect to -- and I understand that your view  
13 of this litigation is that it is simply one of the construc-  
14 tion of in essence a two-page instrument; is that right?

15 A. That's certainly what it stems from.

16 Q. And that's your view of the predominant point of  
17 the litigation?

18 A. It is.

19 Q. Okay. And so I take it then, as a real estate  
20 attorney, that indeed it would be your view that we should  
21 simply look at the four corners of the instrument and  
22 determine what the intent is; is that correct?

23 A. I wish real estate were that easy.

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1           No, I don't think that's only the issue before you.

2           Q.    The fact that the parties disagreed as to what the  
3 proper interpretation was necessitated the introduction of  
4 evidence, didn't it?

5           A.    Yes.

6           Q.    And so the fact that it may not have been new or  
7 novel has no bearing on the necessity for incurring the time  
8 and expense necessary to resolve that ambiguity, does it?

9           A.    Correct.

10          Q.    And in fact, the document was drafted 25 years  
11 before we were in the courtroom, wasn't it?

12          A.    I believe it was.

13          Q.    And do you recognize that there is added difficulty  
14 to trying to obtain evidence of that antiquity?

15          A.    I do.

16          Q.    Okay. And would that in fact cause an increase in  
17 the cost of preparing for trial?

18          A.    It may.

19          Q.    All right. Now, you felt however, nevertheless,  
20 that the construction was not a novel or challenging issue;  
21 is that correct?

22          A.    I never used the word "challenging."

23                "Novel" was --

(August 12, 1998)

1 Q. What are your words?

2 A. "Novel."

3 Q. Then did it come as a surprise to you that it was  
4 in 1997 that the Supreme Court of Virginia in the Lake  
5 Arrowood case finally resolved and set what in essence was a  
6 controlling precedent for this case about this very kind of  
7 dispute?

8 A. And the beginning of your question was did it come  
9 as a surprise to me that the Supreme Court only addressed it  
10 in 1997?

11 Q. Yes. Right.

12 A. No, of course not.

13 We've got controlling Virginia law from the 1800s  
14 that still has not been addressed by the Supreme Court  
15 further.

16 Q. Well, I understand that.

17 But the fact that the Supreme Court found it  
18 necessary in 1997 to clarify this issue of interpretation,  
19 doesn't that suggest that at the time the suit was filed it  
20 was actually a novel and different issue?

21 A. Well, I think it was unheard by the Supreme Court.

22 Whether it was novel was something else. We've  
23 only recently even had circuit court reporters in Virginia.

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1 Q. You believe that \$80,000 is reasonable attorneys'  
2 fees in this case for -- to reimburse the defendants; is that  
3 correct?

4 A. I do.

5 Q. Now, in your expert designation you indicated that  
6 in fact the fees that were reasonable were between 75,000 and  
7 85,000; isn't that correct?

8 A. I believe so, yes.

9 Q. And you further indicated in that that you felt a  
10 credit -- that a credit was appropriate for the insurance  
11 proceeds that had been paid?

12 A. I had very little information about the insurance  
13 at the time. I was not certain whether it was, what I have  
14 now since found out, an umbrella policy of Mr. Foster's.

15 Q. So -- all right.

16 A. I didn't know whether it was an association policy,  
17 whether they had D&O coverage, trustees' coverage.

18 Q. But that factored into and was a part of your  
19 expert designation on the reasonableness of fees, wasn't it?

20 A. It was at the time.

21 Q. At the time when you said 75,000 to 80,000 was a  
22 reasonable fee, at that time you didn't know that we were  
23 going to ask for the supplemental fees for post-trial up to

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1 today, did you?

2 A. I did not.

3 Q. So that when you in your expert designation opined  
4 that \$75,000 to \$85,000 was reasonable, that meant up to the  
5 date of trial, didn't it?

6 A. It did.

7 Q. And now today you have come in here and said  
8 \$80,000 is reasonable all the way through today?

9 A. I have.

10 Q. Did I misunderstand your testimony?

11 A. No, you have not.

12 Q. Okay. So --

13 A. It was based on your --

14 Q. I'm sorry. There is no question pending, ma'am.

15 A. Oh, excuse me.

16 THE COURT: Mr. Clary, was your question the  
17 first 80,000 estimate was related to the statement of her  
18 expertise?

19 MR. CLARY: No, ma'am.

20 In her testimony here today she testified that she  
21 felt reasonable attorneys' fees for the defendants to be  
22 \$80,000. And that was the entirety through today.

23 THE COURT: But I mean, you contrasted that with

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1 the statement in her --

2 MR. CLARY: Her expert designation, yes, ma'am.

3 I'm sorry.

4 And she conceded that in her expert designation,  
5 which she made before she learned of the supplemental  
6 request, that \$75,000 to \$80,000 were reasonable attorneys'  
7 fees in that designation, without considering the post-trial  
8 work.

9 And she has acknowledged that indeed that was the  
10 way it was.

11 BY MR. CLARY: (Resuming)

12 Q. I think you've already acknowledged that the 900-  
13 some-odd thousand dollars' worth of legal fees that Judge  
14 Horne awarded in the Lansdowne case was without having any  
15 written fee agreement?

16 A. Yes, it was, according to the opinion.

17 Q. And in fact, he expressly says it ain't necessary?

18 A. Absolutely. As did I.

19 Q. But you are aware, from your review of the  
20 discovery in this instance, that Mr. Foster and the other  
21 trustees had agreed with my law firm at the inception to pay  
22 the hourly rate that was billed?

23 A. It was what your affidavit said.

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1           Q.    And in fact, you are aware that in fact Mr. Foster  
2   and the other trustees have to date paid approximately  
3   \$160,000 plus in legal fees; is that correct?

4           A.    I don't know that it was all legal fees. I believe  
5   it included expenses.

6           Q.    You're right. It does include some expenses.

7                    You have testified that the current case was a  
8   straight chancery case. There wasn't any amount in  
9   controversy.

10                   So that is one of your factors in determining --  
11   and in fact, is one of the factors that many courts, I think,  
12   recognize in determining the reasonableness of the attorneys'  
13   fees; is that correct?

14          A.    Yes.

15          Q.    And then I take it you are unaware that by -- that  
16   on the eve of trial the plaintiffs procured an expert who was  
17   prepared to and attempted to testify in accordance with his  
18   designation that Mr. Foster and the other trustees should be  
19   liable for roughly \$160,000 worth of damages, together with  
20   continuing cost for the maintenance of the road for some  
21   unspecified period of time of \$7,500 a year?

22          A.    I am unaware.

23          Q.    And I take it then that you did not observe in the

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1 original Amended Complaint the prayer for relief at the end  
2 which specifically requested damages, although it did not  
3 specify the amount?

4 A. I did notice it, yes. Of course, I did.

5 Q. So I guess it's not accurate to say that there  
6 wasn't any amount in controversy. It's just that no one knew  
7 about it at the time.

8 Is that true?

9 A. The implications of the determination in a chancery  
10 case would have had monetary implications, yes.

11 Q. The prayer for relief specifically asked for  
12 damages?

13 A. In the amended.

14 Q. The amended was filed in -- I'm sorry -- March or  
15 February of 1997?

16 A. Right. About six months after the case had  
17 originally started.

18 Q. In October. All right.

19 The -- so in arriving at your conclusion about the  
20 reasonableness of the attorneys' fees, you have ignored the  
21 fact that there was a damage claim?

22 A. No, I have not ignored the fact at all.

23 Q. You said you were unaware of it.

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1           A.    No.

2                   What I said was that the case was brought as a  
3   chancery case.

4           Q.    Does that somehow prevent the court from awarding  
5   damages, ma'am?

6           A.    Of course not.

7           Q.    In fact, that's very common, isn't it?

8           A.    It may be common to include damages in a chancery  
9   case.

10          Q.    Ms. Pesner, I would like to talk with you about  
11   your understanding of the point of this case as it appears  
12   from the pleadings.

13          A.    Okay.

14          Q.    Do you understand that, if the plaintiff had been  
15   successful in requiring his reinstatement as a trustee and  
16   that a unanimity would have been required for any actions by  
17   the trustee, that he could have blocked any action by the  
18   other two trustees?

19          A.    Yes, I did understand that.

20          Q.    Do you understand that, if the plaintiff was  
21   successful in having Mr. Foster and Mr. Lear removed as  
22   trustees and him reinstated, that regardless of whether it  
23   was unanimity or majority, he then would be the trustee to

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1 select the next two trustees and could have had his will in  
2 that fashion?

3 A. Yes. It was in the deed.

4 Q. Are you also aware that the homeowners' association  
5 was a voluntary association?

6 A. Yes.

7 Q. Are you aware that in the defendants' answer they  
8 acknowledged -- although it was not alleged to be a voluntary  
9 organization, the defendant trustees acknowledged that it was  
10 a voluntary organization?

11 A. I don't recollect it.

12 But yes, I am aware of the fact that the voluntari-  
13 ness of the organization was important.

14 Q. Did you review the transcripts of the trial?

15 A. No, I was -- no. I do not have all the transcripts  
16 of the trial.

17 Q. Are you aware from either Mr. Annino or your  
18 clients that one of the positions that Mr. Stepp in this case  
19 took was that he did not desire to spend money or be forced  
20 to spend money to maintain or improve the access road to the  
21 park? Do you have any understanding of that?

22 A. I have quite a good understanding of a number of  
23 the issues involved, one of which involved maintenance of

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1 roadways, creation of roadways, pavement of roadways to  
2 different areas within the subdivision.

3 Q. And specifically one of those was the access road  
4 to the six acres of waterfront property that we refer to as  
5 the park, right?

6 A. Yes.

7 Q. And you were aware that Mr. Stepp was opposed to  
8 spending money to maintain that, weren't you?

9 A. I am.

10 Q. And in fact, during his tenure as the president of  
11 the homeowners' association and during the same time he was a  
12 trustee, he went out of his way never to go out and try and  
13 collect money to improve --

14 MR. ANNINO: Your Honor, I object to this line of  
15 questioning.

16 MR. CLARY: I'm asking if she is aware of this.

17 MR. ANNINO: We're going far afield from what this  
18 witness is testifying to.

19 MR. CLARY: I'm going to connect it up in a minute,  
20 Your Honor. I'm going to connect it up in terms of the value  
21 of the case.

22 THE COURT: I find this whole recitation to be a  
23 fascinating recapitulation of the six days of testimony that

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1 we heard in this case. So I'm going to let it go on.

2 This case was so litigated for so many days.

3 And I find it extremely interesting. Because to  
4 say that this case was an easy case, I'm incredulous.

5 MR. ANNINO: I don't think that's been the  
6 testimony.

7 THE COURT: No. But even to surmise that it was.

8 And that's why I think Mr. Clary's questioning is  
9 absolutely fascinating for me, as the presiding judge in this  
10 case, to go over this whole thing again. It was such an  
11 intense six days.

12 Go ahead, Mr. Clary.

13 BY MR. CLARY: (Resuming)

14 Q. So are you aware that during Mr. Stepp's tenure as  
15 the president and trustee in this case that he specifically  
16 went out of his way not to service or collect monies to  
17 maintain the access road to the park?

18 A. I can't say that I know with specificity that it  
19 was only during the time that he was the president of the  
20 association.

21 I know that association fees were not collected  
22 for many years during the association's existence -- or  
23 maintenance fees.

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1 Q. That is consistent with your understanding of his  
2 particular bias and desire with respect to the maintenance of  
3 the roadway?

4 A. I know that there was great concern about the  
5 expending of funds in a manner that seemed different than the  
6 way he thought they should be.

7 Q. Ms. Pesner, were you aware that when Mr. Stepp  
8 turned over the reins of the association to Mr. Arnold that  
9 in fact the road had become into such disrepair that it was  
10 not passable by vehicles?

11 A. I am not.

12 Q. Would you agree with me that if the road was not  
13 passable by vehicles that you could not launch a boat from  
14 the property?

15 A. I am not a boat person.

16 It sounds reasonable.

17 Q. Are you aware of the physical description of the  
18 property?

19 A. Yes.

20 Q. You know that it's six acres on Belmont Bay?

21 A. I do.

22 Q. And there's one access road?

23 A. There is.

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1 Q. And that's the road we're talking about here?

2 A. Yes, it is.

3 Q. Okay. And so you would agree with me then, I take  
4 it, that indeed if the road had become impassable for boats  
5 it would have diminished the value of the property?

6 A. The value of whose property?

7 Q. Well, let's look at it in two different  
8 perspectives.

9 I guess it would have diminished the value of  
10 Parcel A, the park land; because it was not accessible for  
11 the use that it was intended for.

12 Would it?

13 A. No. I think park land has an intrinsic value.

14 And it's not assessed for any tax purposes. It  
15 doesn't get appraised.

16 Q. Actually, it did, didn't it?

17 It wasn't only in 1985 that the legislature changed  
18 the law on that.

19 A. Correct.

20 Q. And up until that period of time --

21 A. We paid real estate taxes.

22 Q. And in fact, early on the trustees -- the  
23 association paid real estate taxes when it owned the property

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1 up until that change in the law?

2 A. Correct.

3 Q. But you've said the park land doesn't change.

4 But I take it what you're reserving is the fact  
5 that, if indeed the water amenity were no longer accessible  
6 for its use to the members of the subdivision, that that  
7 indeed would have impacted the value of every lot in the  
8 subdivision?

9 A. It may have impacted them from the standpoints of  
10 special assessments coming due in the future.

11 Q. Well, let's be very specific about it.

12 If I own a lot that has access to the water, isn't  
13 my property more valuable?

14 A. Generally speaking, it is.

15 Q. At least it would have been reasonable for these  
16 trustees to fear that, if indeed Mr. Stepp's plan, as  
17 outlined by his pleadings here, succeeded and he was able to  
18 thwart any ability to maintain that property -- the access  
19 road to the property, that indeed the value of every  
20 beneficiary of that trust, every lot owners' value would have  
21 been diminished?

22 A. It would appear to diminish value to take away an  
23 amenity.

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1           Q.    So that defending the lawsuit in fact wasn't just  
2   some vindictive effort to vindicate the correctness of their  
3   positions for the accusation of self-dealing, was it?

4           A.    I've never made any statement about vindictiveness  
5   or self-dealing.

6           Q.    Didn't you say in your expert designation that you  
7   thought the main point of the defense was to vindicate the  
8   proper conduct of the trustees as opposed to doing something  
9   more helpful, like getting construction of the deed?

10           MR. ANNINO: Your Honor, we're talking about the  
11   witness's testimony here today. And that's not a proper  
12   question.

13           MR. CLARY: So perhaps she has withdrawn this  
14   opinion?

15           THE COURT: Well, I haven't heard that.

16           MR. CLARY: All right. I'll abandon that.

17           BY MR. CLARY: (Resuming)

18           Q.    You are aware from the pleadings that, in addition  
19   to limiting the power of the trustees and circumscribing  
20   their ability to assess and utilize funds under the trust  
21   deed, it was Mr. Stepp's -- the plaintiffs' position that  
22   funds collected by the trustee could not be used outside of  
23   the boundaries of Parcel A?

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1 A. I am aware that that was pled, yes.

2 Q. And you are aware that the access road is outside  
3 of the boundaries of Parcel A?

4 A. I am.

5 Q. And are you further aware from the pleadings that  
6 it is the -- it was the position of the plaintiff that the  
7 homeowners' association was initially organized solely and  
8 exclusively for the purpose of maintaining Parcel A and that  
9 therefore any expenditure of dues made by that organization  
10 outside of Parcel A was also inappropriate?

11 A. I don't feel like I can answer the question,  
12 because I don't think I understand it.

13 Q. All right. Did you understand from the pleading  
14 that the plaintiffs were taking the position that the  
15 original homeowners' association, organized in 1973-74, could  
16 do no more than maintain Parcel A?

17 A. The homeowners' association?

18 Q. The homeowners' association.

19 A. It was not my conclusion that that was their  
20 position.

21 Q. Okay. So you're unfamiliar with the allegation  
22 that says that the reason they objected to the corporate  
23 entity was that it changed the purpose and the scope of the

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1 expenditures to be made from limited to Parcel A to include a  
2 variety of things other than Parcel A?

3 A. I would say I am unaware.

4 Q. Okay. Would it be fair to say, however, that in  
5 toto, after our examination and recitation here, the fact  
6 of the matter is that there was more at stake than simply a  
7 chancery action construing the deed? There was in fact at  
8 stake whether there would be a potential diminution of value  
9 of every owners' lot because he was deprived of access to the  
10 water amenity? And there was at least \$160,000 worth of  
11 damages that were being claimed against the trustees?

12 A. I believe that the chancery case would have brought  
13 you to the conclusions, regardless of which way it went, as  
14 to the obligations of the trustees, whether they had met  
15 those obligations, the role of the voluntary association.

16 It would have determined whether it was more common  
17 for one lot owner to have a vote per lot, be assessed one per  
18 one.

19 I mean, there were certainly uniquenesses involved  
20 in running an association off of a two-page deed.

21 Q. Your understanding --

22 THE COURT: I must say, that's well put,  
23 Ms. Pesner.

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1 MR. CLARY: Yes. That's true.

2 THE WITNESS: Thank you.

3 THE COURT: Given the facts of this case.

4 BY MR. CLARY: (Resuming)

5 Q. And in order to clarify all of this, you understand  
6 it was in fact necessary to go back to the seventies to find  
7 out the events that had occurred there, not just between one  
8 individual and another, but between all the members of a  
9 community?

10 A. It certainly impacted on the outcome of the case.

11 Q. And it impacted upon the amount of work that had to  
12 be done in order to recreate and convey to the Court in the  
13 form of evidence the events that had occurred more than 25  
14 years before the trial, didn't it?

15 A. It would have impacted on the amount of the work.

16 THE COURT: Mr. Clary, we are not going to have  
17 time for your witness.

18 MR. CLARY: I'm sorry, Your Honor. I'm moving as  
19 fast as I can. I apologize. I really have some very  
20 important things to cover.

21 BY MR. CLARY: (Resuming)

22 Q. The fact that a firm is small or large, does that  
23 impact the reasonable rates for a specific attorney?

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1           A.    No.

2           Q.    Okay.  Indeed, I am sure Plato is earning a bundle  
3 now.  And he has a very small firm, doesn't he?

4           A.    He does.

5           THE COURT:  Who are we talking about?

6           THE WITNESS:  Plato Cacheris.

7           MR. CLARY:  Plato Cacheris.  His firm is very  
8 small.

9           THE COURT:  It's a boutique firm though.

10          MR. CLARY:  Yes, ma'am.

11          BY MR. CLARY:  (Resuming)

12          Q.    You complained about a lack of coordination between  
13 counsel, specifically my office and Mr. Tolchin's.

14                But did you observe the time entry on May 29th in  
15 which Mr. Tolchin and I got together and coordinated to  
16 divide up the tasks of the litigation?

17          A.    I noticed a number of entries involving coordina-  
18 tion on strategies with Mr. Tolchin and coordination, if you  
19 will, of efforts.

20          Q.    I'm specifically referring to a May 29th entry by  
21 me.  "Meeting in office with Ed Tolchin to confer on alloca-  
22 tion of various tasks in coordination of defense effort."

23                Doesn't that suggest that in fact that there was

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1 coordination?

2 A. Well, there certainly was some. But Mr. Tolchin's  
3 time in the case is very, very limited.

4 Q. Indeed, it appears that he didn't do a whole bunch  
5 in the case?

6 A. It appears that way.

7 Q. Could that have been a function of the fact that  
8 the association didn't have any money to pay him?

9 A. It certainly could have.

10 MR. CLARY: Your Honor, I think I would just like  
11 to finish with one series of questions here.

12 BY MR. CLARY: (Resuming)

13 Q. It appears to me that the seminal case you feel is  
14 comparable and you've recited for comparable reasonable  
15 attorneys' fees is the Bruce v. Bruce case.

16 Is that a fair statement?

17 A. It is the most current case before this court  
18 involving obligations of trustees that I am aware of.

19 Q. Okay. Let me just do a few -- and you're familiar  
20 with that case?

21 A. I've read the opinion a number of times. And I've  
22 spoken to Mr. Keith.

23 Q. Okay. And you understand, I take it, that the

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1 Bruce v. Bruce case was essentially a dispute between two  
2 brothers?

3 A. It was.

4 Q. One an attorney in California, and one a broker  
5 locally. And John Keith represented the broker locally.

6 Does that jive with your recollection?

7 A. Yes.

8 Q. Now, in the Bruce case Mr. Keith charged 71,000  
9 and change and represented the plaintiff, didn't he?

10 A. He did.

11 Q. And in the case I represented defendants, didn't I?

12 A. You did.

13 Q. And are you aware -- and on one occasion the United  
14 States Circuit Court of Appeals for the Seventh Circuit made  
15 an observation that "Even apart from potential loss, the task  
16 of defending a civil case may require more work than the task  
17 of prosecuting."

18 Would you agree with the Seventh Circuit?

19 A. I haven't read the case that I know of. You have  
20 not cited me to the case.

21 Q. Do you have -- do you think that your extensive  
22 litigation background would qualify you to disagree that it  
23 may require more work in defense than in prosecution?

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1           A.    I have been involved in both sides.  And sometimes  
2 it does and sometimes it doesn't.

3           Q.    Okay.  You are aware that Mr. Keith represented one  
4 client, correct?

5           A.    I understand that, yes.

6           Q.    And the opposing party was one client?

7           A.    Yes.

8           Q.    In contrast here, we were defending -- and I  
9 represented three clients?

10          A.    Yes.

11          Q.    Does the fact that we have three clients indicate  
12 that probably it will take more time to represent them than  
13 one client?

14          A.    I did not take that into consideration, because I  
15 don't believe that to be true.

16          Q.    You don't believe that it takes more time to  
17 represent three individuals, who have different perspectives  
18 and potential liability in a lawsuit, than it does to  
19 represent one?

20          A.    You have reworded your question.  And the answer is  
21 that I believe that their interests were the same.

22                I assume you gave them multiparty representation  
23 and they were told up front about the nature of this case.

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1           It was one of your jobs to tell them what you  
2 intended you would be expending in the case in order that  
3 they be appropriately informed. I don't think --

4           Q.    So it is your opinion that representing three  
5 defendants requires no more time than one defendant?

6           A.    No, I did not say that.

7                   I will not allow you to put words in my mouth.

8           Q.    Let me -- the Bruce case from the date of filing  
9 until the conclusion -- until the final order entry took ten  
10 months, are you aware of that?

11          A.    I was.

12          Q.    This case from the date of filing until finally  
13 when we're going to have an order entered in the next few  
14 days, I hope, has taken 22 months.

15                   Do you think that it may have required more effort  
16 to engage -- to represent a case in a client that takes 22  
17 months versus ten months?

18          A.    Not particularly.

19                   Just take a case in the federal court.

20          Q.    Let me show you what John's office was kind enough  
21 to fax over to me yesterday afternoon, which is their  
22 pleading index. And I will ask this be marked as the next  
23 trial exhibit in order for the defendants.

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1 (The following document  
2 referred to was marked as  
3 Defendants' Exhibit No. B-3  
4 for identification.)

5 BY MR. CLARY: (Resuming)

6 Q. Do you see from that exhibit that in fact there  
7 were roughly 40 pleadings filed in that case?

8 A. That is what this exhibit says.

9 MR. ANNINO: Your Honor, I have no copy of that  
10 document. I have no way of verifying --

11 MR. CLARY: I am sorry.

12 MR. ANNINO: -- what it is.

13 MR. CLARY: Unfortunately I only have the one.

14 I think you will see that it has the original  
15 facsimile translation from Blankingship & Keith yesterday  
16 afternoon.

17 MR. ANNINO: I have no way of knowing whether this  
18 is complete.

19 I think the court's file would be a more accurate  
20 representation of what's represented in that.

21 THE COURT: I think that, given her testimony, he  
22 is free to cross-examine her pretty freely with regard to  
23 this case.

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1 I doubt that -- I really don't think there -- I  
2 doubt that that would be a wrong document. I don't think  
3 that -- I am sure Mr. Clary wouldn't represent something that  
4 wasn't complete.

5 MR. CLARY: I will represent to the Court that I  
6 have a copy of the court's docket sheet in this case, which  
7 is about two-thirds of a page long. And I'll be happy to  
8 make that available as well.

9 THE COURT: You knew the Bruce case was coming,  
10 huh?

11 MR. CLARY: I did when they put in her expert  
12 designation as to the case she was relying on.

13 THE COURT: That's good you had it in your expert  
14 designation.

15 MR. CLARY: Actually, this is the civil cover sheet  
16 and docket sheet for the Bruce case, which was obtained  
17 from the courthouse yesterday. And there is no second page  
18 to it.

19 THE COURT: Please show it to Mr. Annino.

20 BY MR. CLARY: (Resuming)

21 Q. And indeed, in Mr. Keith's pleading book index a  
22 number of the items there really are things like a precipe or  
23 a -- there is a precipe where there is a change of address

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1 noted for counsel.

2 But a lot of them are really not substantive, are  
3 they?

4 A. Right.

5 Q. Let me show you the index of pleadings in this  
6 case.

7 I will represent to the Court this is my index of  
8 pleadings for the case.

9 Would you tell me how many entries -- how many  
10 pleadings --

11 A. There are 125 entries on this list.

12 Q. Something in excess of three times the amount of  
13 pleadings filed in the Bruce case?

14 THE COURT: How many were there for Keith?

15 MR. CLARY: Forty, Your Honor.

16 I could not get a copy of our docket sheet for our  
17 case because it was in chambers yesterday. I don't know what  
18 it looks like.

19 THE COURT: You want me to get it for you? This  
20 file is voluminous.

21 I will ask my clerk to see if she can pull those  
22 out in some fashion. Would you like a copy?

23 MR. CLARY: Yes, ma'am, if I could. But I don't

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1 want to delay the Court's time. I would rather --

2 THE COURT: We're not. We're not.

3 THE WITNESS: Your Honor, I can state that this is  
4 virtually identical to what I reviewed from Mr. Annino.

5 THE COURT: Then we don't need to go any farther.  
6 Do we need to go any farther?

7 MR. CLARY: If I could have the index to pleading  
8 files marked as an exhibit and amended.

9 THE COURT: We'll just mark these then, right.

10 (The following document  
11 referred to was marked as  
12 Defendants' Exhibit No. B-4  
13 for identification.)

14 BY MR. CLARY: (Resuming)

15 Q. Ms. Pesner, did you read the Complaint in the  
16 Bruce case?

17 A. No, I did not.

18 Q. I will represent to you -- and it's actually in the  
19 court's file. And I ask the Court to take judicial notice of  
20 it, since the Court is familiar with the case, that it is a  
21 three-page, one-count issue.

22 Are you familiar with the Amended Bill of Complaint  
23 in this case, which is 15 pages, three counts, and has

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1 multiple claims for relief -- multiple claims and multiple  
2 requests for relief against the defendants?

3 A. I am.

4 Q. Would it be fair to state that there is absolutely  
5 no similarity in the complexity of the issues that are  
6 involved?

7 A. I would say there are similarities in the issues  
8 involved, in that they both stem from the obligations of the  
9 trustees to its beneficiaries.

10 Q. In the Bruce case the issue was a three-year  
11 relationship between two brothers as co-fiduciaries, wasn't  
12 it?

13 A. It is.

14 Q. In our case it wasn't two people's relationship.  
15 It was an entire community's relationship that spanned not  
16 just the 25 years since the association began, but really  
17 going back 40 years to the commencement of the subdivision.

18 Isn't that true?

19 A. I would say the maximum it was was the 25 years. I  
20 did not see very much --

21 Q. But in terms of the contrast of the time period  
22 that had to be examined, it is a substantial difference  
23 between looking at the relationship between two people over

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1 three years and the residents of a 141-lot community over 25  
2 years, wasn't there?

3 A. I would say there is a difference.

4 Q. Are you aware that the Bruce trial was a two-day  
5 trial?

6 A. I am.

7 Q. Are you aware that this case was a seven-day trial?

8 A. I am.

9 Q. Are you aware that Mr. Annino did not complete the  
10 plaintiffs' direct examination until the fifth day of trial?

11 A. I am.

12 Q. Are you aware that it took the Bruce case eight  
13 months from the date of filing to the date of trial?

14 MR. ANNINO: Objection. Asked and answered.

15 MR. CLARY: I asked a different question. That was  
16 the date of filing to final order. This is to the date of  
17 trial.

18 THE COURT: It is a slam on me.

19 MR. CLARY: No, Your Honor.

20 BY MR. CLARY: (Resuming)

21 Q. Do you understand that?

22 A. I do.

23 Q. Do you know it took 17 months for this case to get

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1 from filing until date of trial?

2 A. I do.

3 Q. Are you aware it wasn't the plaintiffs that noticed  
4 the case for term date to get it set for trial but that it  
5 was the defendants?

6 A. I am.

7 Q. Are you aware of the discovery done by Mr. Keith in  
8 the Bruce case?

9 A. Tangentially.

10 Q. Okay. In the Bruce case Mr. Keith deposed only  
11 the opposing party.

12 A. Yes.

13 Q. Are you aware that in this case I deposed only the  
14 opposing parties and one additional deponent, which was a  
15 de bene esse because of his inability to appear at court,  
16 and that transcript was admitted in court as trial testimony?

17 A. If I am not mistaken, I thought it was beyond -- I  
18 had a list of the parties. And I have a list of the  
19 depositions, not all of which I read.

20 I believe that some of the depositions were in  
21 excess of the complainants'.

22 Q. But the fact of the matter is it was Mr. Annino who  
23 was taking those depositions, wasn't it?

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1           A.    He had his own list of depositions, yes.

2           Q.    So would it be fair to say that you actually don't  
3 recall who took what depositions?

4           A.    I don't recall in front of me, no.

5           Q.    So you would have no basis for disagreeing with me  
6 when I tell you that I took only the depositions of the  
7 plaintiffs and the one witness who was the de bene esse for  
8 trial?

9           A.    Actually, taking the depositions, you're right. I  
10 would not disagree with you.

11          Q.    And are you aware that in this particular case  
12 Mr. Annino took two depositions of two of the three trustees  
13 and, in addition to that, five other depositions?

14          A.    Yes.

15          Q.    Okay. And you would agree with me that it was  
16 necessary and appropriate for the trial counsel to attend  
17 those depositions?

18          A.    I would.

19          Q.    And that the fact of the matter is my attendance  
20 was not my voluntary choice in terms of scheduling the  
21 deposition, was it?

22          A.    It was not.

23          Q.    It was the opponent's choice.

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1           Are you aware that in the Keith case -- I'm sorry  
2   -- in the Bruce case Mr. Keith propounded one set of  
3   interrogatories and request for production of documents to  
4   the sole adversary?

5           A.    I am not.

6           Q.    Are you aware that in this case I propounded one  
7   set of interrogatories to two of the four plaintiffs?

8           A.    I am.

9           Q.    I requested a request for production of documents  
10   together with their depositions?

11          A.    I am.

12          Q.    And the only other effort besides the request for  
13   admissions at the very outset of the case was a supplemental  
14   request for production to the extent that they hadn't given  
15   it to me at their depositions?

16          A.    And are you asking me if --

17          Q.    Are you aware?

18          A.    That that was all you requested?

19          Q.    Is that your understanding that was all of the  
20   discovery that the trustees initiated?

21          A.    I would disagree.

22          Q.    And what other item of discovery did the trustees  
23   initiate that I may have overlooked?

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1           A.    I thought in my review of the last two bills there  
2    was an extensive amount of requests of discovery items.

3           Q.    In the supplemental.

4                    I'm talking up to trial.

5           A.    I'm sorry.

6           Q.    As I recall your testimony, Mr. Keith didn't have  
7    post-trial work.

8                    What we're comparing is the Bruce case.

9           A.    Yes.  And I was comparing yours previously up to  
10   trial.  But now you're including up to that.

11                   If you're now limiting that, then I believe that to  
12   be correct.

13           Q.    And in fact, the plaintiffs in this case initiated  
14   against the trustees three sets of interrogatories -- this is  
15   prior to trial; I am not including this stuff after trial --  
16   three sets of interrogatories, four sets of requests for  
17   production of documents, one request to supplement in ten  
18   days the prior discovery, two depositions of Foster and Lear,  
19   and five additional depositions, two subpoena duces tecum  
20   to nonparties; and then to the association propounded four  
21   sets of interrogatories, including one to the entity, three  
22   to prior officers, two sets of requests for production of  
23   documents, and one corporation deposition.

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1           Would you agree with me that in this case the  
2           discovery initiated by the plaintiffs far exceeded that  
3           initiated by the defendants?

4           A.    Yes.

5           Q.    And would you agree with me that the discovery  
6           initiated by the defendants more closely resembles the  
7           discovery initiated by Mr. Keith in the Bruce case?

8           A.    Yes.

9           Q.    If Mr. Keith's fees, which you believe to be  
10          reasonable for the services in the Bruce case were \$71,000,  
11          doesn't the fact of the tremendous additional work in this  
12          case suggest that, using that standard, the trustees' legal  
13          fees should be two to three times what Mr. Keith's were?

14          A.    No.

15                THE COURT: Rephrase that or say it again.

16                MR. CLARY: Given her acceptance as reasonable  
17          attorneys' fees in the Bruce case of Mr. Keith at \$71,000  
18          plus some change, doesn't the comparison of the level of  
19          effort and complexity of the issues and pure time spent,  
20          together with the discovery initiated by the plaintiffs in  
21          this case, all of these factors that I have just gone over,  
22          don't they suggest that in fact the proper analysis, if  
23          indeed the Bruce case -- Mr. Keith's fees are appropriate

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1 for that case, a two-day trial, that the fees charged the  
2 trustees in this case should be two to three times that  
3 amount?

4 And her response was no.

5 MR. CLARY: Your Honor, in the interest of time, I  
6 am going to stop here.

7 MR. ANNINO: I have a few follow-up, Your Honor.

8 REDIRECT EXAMINATION

9 BY MR. ANNINO:

10 Q. Ms. Pesner, when you reviewed the bills of Clary &  
11 Moore, did you determine how many times Richard Moore went to  
12 the law library?

13 A. I did.

14 MR. CLARY: Is this really redirect or is this  
15 something he forgot?

16 MR. ANNINO: No. This is concerning --

17 THE COURT: I will allow it.

18 MR. ANNINO: He inquired extensively about  
19 Mr. Moore and his research abilities.

20 BY MR. ANNINO: (Resuming)

21 Q. Do you recall?

22 A. I believe 23 was the answer, prior to trial.

23 Q. And are you aware of any novel issues -- legal

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1 issues, as opposed to factual issues, in the case that would  
2 warrant a renowned expert of Mr. Moore's capabilities to  
3 spend so much time in the law library?

4 A. As I stated before, I don't know that Mr. Moore's  
5 got renowned research skills. I can only say that no client  
6 of mine, and as a managing partner, no associate of mine,  
7 would have a need in what I've been able to garner from the  
8 facts of this case to spend that much time at a law library  
9 as opposed to being able to research within our office as  
10 sufficiently as possible.

11 Q. Mr. Clary talked about depositions in this case.

12 Are you aware of how long the deposition of  
13 Ralph Edwards took?

14 A. I am.

15 Q. And how long was that?

16 A. It was my understanding that it was terminated by a  
17 protective order at the end of the third day.

18 Q. And you are aware of the manner in which Mr. Clary  
19 conducted that deposition?

20 A. I have spoken with Mr. Edwards and with you and  
21 have read part of the deposition, yes.

22 Q. And just briefly, describe how that proceeding went  
23 and what made it extend so long.

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1 MR. CLARY: I'm sorry. This is a whole new area.

2 MR. ANNINO: This is not a new area. He talked  
3 about the depositions.

4 MR. CLARY: I would like to have a few questions on  
5 redirect if he's allowed to get into that, the specifics of  
6 that deposition.

7 MR. ANNINO: Counsel compared the depositions --

8 THE COURT: There is no question that you could ask  
9 a legitimate question as to how long the deposition of Ralph  
10 Edwards took and that it would be a reasonable response to  
11 his argument that your discovery was much more extensive than  
12 his.

13 But when you get into the manner in which the  
14 deposition is conducted, I am not sure there is any end to  
15 that inquiry if we're going to start talking about the manner  
16 in which litigation was conducted. Because this case was  
17 fought with a great deal of -- I don't know how you would  
18 describe it other than tenseness between all the parties.

19 I don't know where we're going with that.

20 MR. ANNINO: I will withdraw that question.

21 THE COURT: Thank you.

22 BY MR. ANNINO: (Resuming)

23 Q. Counsel referred to all of the things the

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1 complainants' counsel took -- discovery, interrogatories and  
2 such, and a number of depositions.

3 Despite all that work that complainants' counsel  
4 did, do you know what the fees comparatively were to the  
5 firms?

6 MR. CLARY: I object.

7 We had this issue before. She didn't get to see  
8 the statements. And Your Honor sustained an objection before  
9 about his -- about Kasimer & Ittig's bills.

10 THE WITNESS: That was post-trial, Your Honor.

11 THE COURT: I sustain an objection as to post-  
12 trial.

13 I think she can testify as to pretrial.

14 THE WITNESS: Yes, I have had the opportunity to  
15 review them.

16 MR. CLARY: I have one further objection on this.

17 And that is that in their designation they did not  
18 identify the Kasimer & Ittig bills as the source of her  
19 opinion in this case. Specifically in fact they avoided  
20 mentioning the bills. The only thing they said was the rates  
21 of the individuals at that firm.

22 And if Your Honor would like to see that expert  
23 designation, I have it right here.

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1 THE COURT: I would. I would.

2 MR. ANNINO: Your Honor, the designation in an  
3 interrogatory question.

4 We specified -- what did you hand her?

5 MR. CLARY: It was the third supplement to the  
6 expert designation.

7 MR. ANNINO: Where is the first and second?

8 MR. CLARY: They were far more abbreviated.

9 MR. ANNINO: We specified a review of attorneys'  
10 fees incurred by other attorneys in the case, Your Honor.

11 THE COURT: You can answer the question. I'll  
12 overrule the objection.

13 THE WITNESS: Yes, I did review the bills pretrial  
14 of Kasimer & Ittig.

15 BY MR. ANNINO: (Resuming)

16 Q. And despite all of that work and effort, how did  
17 the fees compare to the Clary & Moore fees?

18 A. The fees from Kasimer & Ittig through trial were  
19 approximately -- including costs, were approximately \$80,000.

20 Q. Now, Mr. Clary talked about the estimates that you  
21 made concerning a number of the billing statements.

22 How did you approach that issue and how  
23 conservative were you in the estimating process?

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1 MR. CLARY: I'll object to the form of the question  
2 regarding the characterization of "conservative."

3 THE COURT: Sustained, sustained.

4 BY MR. ANNINO: (Resuming)

5 Q. Would you describe for the Court how you approached  
6 that issue.

7 A. I did my best to use my expertise and knowledge in  
8 the amount of time that would be expended based upon previous  
9 time entries and post- -- a particular entry's time.

10 And I tried to always err on the side of cautious.  
11 And in the event of a deduction, I would use my best judgment  
12 to give more to what stayed and less to what was reduced.

13 Q. And in your review of the bills from Clary & Moore  
14 and the way the litigation was conducted, did you find any  
15 reason for them not to use the services of Ms. Fogarty and  
16 her firm?

17 A. I found no reason why the defendants would have not  
18 utilized the services of counsel provided and why defense  
19 counsel would not have more utilized their much lower hourly  
20 rates, just on a review process as opposed to the complete  
21 initiation.

22 We often have times where we might have overlimit  
23 coverage, where coverage in a claim might be half a million

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1 dollars but the claim might be for 750,000. So as insurance  
2 counsel designated, we would have suggested to the insured  
3 that they would want to get their own counsel, just like  
4 under a reservation-of-rights letter or any other occurrence.

5 They are always entitled to. And it would give  
6 them whatever sense of assurance they needed to make certain  
7 that the work we were doing would be complete and adequate  
8 and that the work that was being researched by others or  
9 garnered by others was useful and appropriate.

10 Q. And with respect to the Lansdowne case that you  
11 had considered in your analysis, was that concerning a civil  
12 rights issue?

13 A. No. It was involving a real estate contract.

14 Q. And the court in that case did take up the analysis  
15 used by the Barber court?

16 A. Completely incorporated it.

17 Q. In connection with this case, do you recall from  
18 your review of the pleadings who the majority lot owner of  
19 the subdivision was?

20 A. I do.

21 Q. And who is that?

22 A. One of the trustee defendants.

23 Q. And who appeared to be most interested in maintain-

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1 ing the value of property?

2 MR. CLARY: Didn't we get into this issue in the  
3 trial on the merits?

4 MR. ANNINO: Your Honor, he made much of the fact  
5 that in terms of the amount in controversy it was of some  
6 import that the value of people's property was the subject of  
7 this proceeding.

8 And Mr. Foster has a personal interest in --

9 THE COURT: The thing that -- the issue that  
10 intrigues me in this case is, no matter how often I try to  
11 lay it to rest, somehow Mr. Foster always assumes some kind  
12 of bugaboo status in this case, which I don't think is  
13 warranted.

14 And I can't imagine why we're asking these  
15 questions again.

16 The questions that Mr. Clary asked were calculated  
17 to show how complex this litigation was. And I think he did  
18 that. He didn't do it with reference to any particular  
19 individuals other than the plaintiffs.

20 And I -- it intrigues me that we always keep coming  
21 back to these complaints about Mr. Foster.

22 Mr. Annino, you're going to have to wrap it up.  
23 The afternoon is dying down.

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1 MR. ANNINO: I don't believe I have any other  
2 questions, Your Honor.

3 I will submit a revised Exhibit A-3 with the pages  
4 that were omitted from that exhibit.

5 I'll have to call my office to --

6 THE COURT: Do you object to that, Mr. Clary?

7 MR. CLARY: I would like to see them first.

8 THE COURT: I don't know how to do it frankly.

9 MR. CLARY: Let me voice an objection and then see  
10 if we can't end it.

11 THE COURT: You can step down then.

12 Ms. Pesner, I want to ask you something.

13 I haven't read all the cases you provided me --  
14 Judge Horne's decision and the 12 steps. But there is a  
15 certain intangible.

16 THE WITNESS: There is.

17 THE COURT: And you don't necessarily hire the  
18 cheapest attorney you find; isn't that true?

19 THE WITNESS: I hope not.

20 THE COURT: And when you evaluate whether or not  
21 attorneys' services were warranted, it would be -- you  
22 really -- you are in a difficult position.

23 You would almost have to sit through six days of

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1 trial and determine how it was going and whether that  
2 attorney, if he was charging Cadillac prices, was worth the  
3 Cadillac or whatever the cost, right?

4 THE WITNESS: Absolutely.

5 THE COURT: It is a very difficult thing. It is  
6 like getting married to somebody. It is not something that  
7 if you just take the bargain basement -- you don't take the  
8 cheapest attorney around necessarily. And that's what  
9 impresses me about this analysis.

10 Okay. You can step down.

11 What price do you put on competence?

12 THE WITNESS: I'm sorry if that's the conclusion  
13 you've drawn from these hours.

14 Because I think that what needs to be looked at in  
15 a determination of attorneys' fees is not -- and there's  
16 never been, at least in my mind, and certainly I was hopeful  
17 not in my testimony, the thought that defense counsel did  
18 anything other than, you know, a perfectly wonderful job.

19 He won the case. And the outcome of the case is  
20 certainly one of the 12 steps in determining this.

21 But at the same time one would have to look at in  
22 the 12 steps what was the expectation of the client when they  
23 started.

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1 I couldn't possibly tell you that, because they  
2 have no written fee agreement.

3 There was nothing that said, as my fee agreements  
4 do and what's suggested by the bar, that you give a range of  
5 fees about what you thought the case might cost. And  
6 possibly that range of fees when it was initiated might have  
7 been in the \$50,000, \$60,000, \$70,000 category.

8 And possibly, as this litigation went, it changed  
9 as a result of the facts in this case.

10 But nonetheless, the courts have to be relying on  
11 something. And they have gone through great pains to  
12 determine 12 factors, which is a lot of factors in a case.

13 And I've been thwarted in my effort, because there  
14 weren't things like a written fee agreement. There wasn't  
15 testimony that I was able to garner about what the expecta-  
16 tions of the defendants might have been.

17 I know -- I don't know a client who isn't surprised  
18 by their attorneys' fees. And I would like to meet them and  
19 would like them to be my client. But it doesn't happen.

20 But I do believe that there comes a time that a  
21 case is only worth what a case is worth.

22 You can't hire Plato Cacheris to defend you on, you  
23 know, your traffic charges if you want to have the feeling

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1 that the case is only worth what the case is worth.

2 THE COURT: All right. You can step down.

3 (Witness excused)

4 THE COURT: Before this next witness starts, there  
5 are some exhibits that haven't been admitted.

6 MR. CLARY: As a matter of housekeeping, I would  
7 like to admit --

8 THE COURT: A-4, I'm going to admit. We had a lot  
9 of discussion about.

10 (Plaintiffs' Exhibit No. A-4  
11 was received into evidence.)

12 THE COURT: The exhibits on the indexes,  
13 Mr. Annino, do you have a problem with those?

14 MR. ANNINO: No, Your Honor.

15 THE COURT: Those are admitted.

16 (Defendants' Exhibit Nos. B-3  
17 and B-4 were received into  
18 evidence.)

19 (Whereupon,

20 CHARLES MOLSTER III

21 was called as a witness by and on behalf of the defendants  
22 and, having been first duly sworn, was examined and testified  
23 as follows:)

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## 1 DIRECT EXAMINATION

2 BY MR. CLARY:

3 Q. Would you please state your name.

4 A. Charles Molster III.

5 Q. And what is your address?

6 A. 815 Blacks Hill Road, Great Falls, Virginia.

7 Q. And what is your occupation?

8 A. I am an attorney.

9 Q. And how long have you been an attorney?

10 A. I was licensed in 1984. I've been an attorney for  
11 14 years.

12 Q. And what is your area of practice?

13 A. Trial work and litigation.

14 Q. Has it always been trial work and litigation?

15 A. Yes. Principally it has been some general  
16 business, but the vast majority of it has been trial work and  
17 litigation.

18 Q. Are you admitted to practice in Virginia?

19 A. Yes.

20 Q. And do you regularly practice in the courts in  
21 Northern Virginia?

22 A. Yes.

23 Q. Does that include the federal court?

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1 A. Alexandria, yes.

2 Q. And all of the circuit courts in Northern Virginia?

3 A. Yes.

4 Q. Okay. Would you generally describe -- I understand  
5 you have been doing litigation work all this time.

6 But would you give the Court a feel for the  
7 quantum, the amount, of your litigation experience other than  
8 just in years.

9 A. Sure.

10 I -- my first experience was I clerked for Judge  
11 Cacheris in the federal court from 1983 to '84.

12 Q. Different Cacheris.

13 A. I actually worked for Plato in 1982, my second and  
14 third years of law school.

15 Then I went to work for the judge after I graduated  
16 from law school. I worked with him for a year.

17 I went to work for a firm in Washington and went to  
18 work in 1984 in Virginia -- in 1984, a medical malpractice  
19 firm -- and remained -- came back down here from the Virginia  
20 Supreme Court.

21 And since 1984, I've done a wide range of cases in  
22 Fairfax, Alexandria, Arlington, and some of the other more  
23 rural counties, which have included medical malpractice,

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1 personal injury, drunk driving cases in General District  
2 Court, a variety of cases in Juvenile and Domestic Relations  
3 Court, much more sophisticated litigation in Fairfax and some  
4 of the other counties. That's including trade secrets  
5 litigation, securities litigation, proxy litigation.

6 Q. In fact, have you become involved in litigation  
7 involving a charitable trust?

8 A. The case I just finished was the Jack Kent Cooke  
9 v. Marlena Cooke case in Fauquier County, Virginia. And  
10 that did involve a charitable trust.

11 Q. And in connection with that, just out of curiosity,  
12 did you happen to have to contend with the issue of whether  
13 or not the attorney general was a party to the suit?

14 A. Yes. In fact, the attorney general was a party to  
15 the suit in that case. And he played a very active role in  
16 the Jack Kent Cooke case.

17 Q. You are aware after Judge Roush ruled the trust in  
18 this case as a charitable trust one of the defenses asserted  
19 was that they needed to include the attorneys' fees?

20 A. Yes.

21 MR. ANNINO: Are we going to voir dire the  
22 witness and qualify him as an expert?

23 THE COURT: Are you willing to have him be an

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1 expert? Can we agree on that?

2 MR. ANNINO: I have some inquiries, concerns, about  
3 it.

4 But more particularly, their expert designation of  
5 this witness's testimony provided me with no details  
6 concerning the substance of his testimony, did not mention  
7 the Cooke v. Cooke case that he's apparently going to rely  
8 on.

9 MR. CLARY: It does say he has experience --  
10 litigation experience, including charitable trust. It does  
11 say that.

12 THE COURT: If we're just on voir dire, I don't  
13 think we --

14 MR. CLARY: One other area then before proffering  
15 to the Court.

16 BY MR. CLARY: (Resuming)

17 Q. Mr. Molster, are you familiar with the fees of  
18 attorneys in Northern Virginia?

19 A. Yes.

20 Q. And what is the basis of your familiarity?

21 A. It started when I clerked with the judge and was  
22 involved in Title 7 cases and in other kinds of cases as  
23 well. And then over the years I think there's sort of a

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1 general awareness of what is happening in the market, I  
2 think, with other lawyers.

3 But I have had specific involvement most recently  
4 in the Cooke case where at times I was required to go out  
5 and hire lawyers to represent witnesses that we couldn't  
6 represent because of conflicts or potential conflicts.

7 So I was becoming familiar with lawyers and  
8 Northern Virginia's hourly rates in doing that, because we  
9 were going to pay for it. I represented the estate. We were  
10 going to pay for those lawyers, even though they were going  
11 to represent the witnesses. So I became familiar with the  
12 hourly rates in that context.

13 Previously I was involved in a number of cases in  
14 Northern Virginia in the Haft litigation involving inter-  
15 pleaders by leaseholders in various shopping centers around  
16 Northern Virginia and in Washington and in Maryland.

17 And in those cases a number of the leaseholders  
18 ultimately filed attorneys' fee applications, claiming that  
19 either one side or the other should be responsible for the  
20 attorneys' fees that they had incurred in interpleading their  
21 rents into various courts, including Fairfax.

22 There was a hearing before Judge Brown and another  
23 hearing before Judge Bach on attorneys' fees.

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1           So I saw bills that lawyers in Northern Virginia  
2           had submitted to their clients and then to the court,  
3           claiming reimbursement.

4           Q.    And just in the interest of full disclosure, your  
5           prior association with me and the firms that I have been with  
6           have actually been in litigation adversarial to --

7           A.    Always adverse. That's correct, Mr. Clary.

8           Q.    Okay. The nature of your litigation has been civil  
9           litigation?

10          A.    Some criminal. My firm does some pretty high-  
11          profile white-collar criminal work. I don't do much, but  
12          from time to time I have some involvement.

13                   Most of the criminal has been lower-level.

14          Q.    Has your trial work been both as support and as  
15          first chair?

16          A.    Yes, yes. Last and first chair.

17                   In some of the bigger cases -- Cooke, for example  
18          -- the lawyer who was hired was one of my partners in  
19          Chicago. I was the supervising lawyer in the firm for the  
20          case and ran it on a day-to-day basis but was not the marquis  
21          participant.

22          Q.    I understand.

23                   Would it be fair to say you have significant

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1 experience, at least in civil litigation, working in your  
2 firm?

3 A. Yes, with Winston & Strong.

4 THE COURT: Is that a Chicago firm?

5 THE WITNESS: Chicago-based, yes. Our largest  
6 office is in Chicago.

7 MR. CLARY: I would proffer Mr. Molster as an  
8 expert witness.

9 THE COURT: Mr. Annino, did you wanted to voir  
10 dire?

11 MR. ANNINO: Yes, Your Honor.

12 VOIR DIRE

13 BY MR. ANNINO:

14 Q. Mr. Molster, have you ever been retained as an  
15 expert witness to testify concerning reasonableness of  
16 attorneys' fees?

17 A. No.

18 Q. In the Haft litigation you mentioned where  
19 parties submitted bills in support of their fee petitions,  
20 where was that litigation based?

21 A. There were a number of cases, probably 15 plus, in  
22 Maryland, D.C., Superior Court and Federal Court, Alexandria  
23 state court.

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1           In Fairfax state court there were probably four or  
2 five cases. In Prince William County, I think there was one  
3 case.

4           I think that is -- that's it for Virginia. There  
5 were a number of Maryland and a number of D.C.

6           Q. What was your role in connection with those cases?

7           A. I represented an entity called Combined Properties,  
8 Incorporated, which was the real estate company -- the real  
9 estate management company which managed 45 shopping centers  
10 around the metropolitan Washington area owned by 34, I think,  
11 partnerships with various members of the Haft families in  
12 each of the partnerships.

13           And sometimes CPI, Combined Properties,  
14 Incorporated, I think was also either a general -- I think a  
15 general partner in some of the partnerships. And there were  
16 some joint venture agreements with some other entities that  
17 owned some of the partnerships.

18           But part of what I did -- it was actually several  
19 pieces of litigation that were involved in the case.

20           What I did when attorneys' fees came up was -- in  
21 the interpleader cases, Herbert Haft, who was on the other  
22 side of the case from me and my clients, wrote letters to  
23 tenants in a number of these shopping centers directing them

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1 to pay their rent to Herbert personally rather than to CPI.

2 When the tenants got those letters, some of them  
3 continued to pay CPI and some of them wouldn't pay anybody.  
4 But what some folks did, including Mr. Clary's clients, was  
5 to interplead the money into the court. They said, "We don't  
6 know who to pay. We don't want to pay the wrong person and  
7 get sued." So they paid the money into court.

8 Then while things were being sorted out as to --

9 THE COURT: Mr. Annino, we do not have to hear the  
10 history of the Haft litigation. I mean, don't -- I'm sure  
11 it is an interesting story.

12 MR. ANNINO: I thought he was getting to the point  
13 in the attorneys' fees.

14 BY MR. ANNINO: (Resuming)

15 Q. Was your role at all involved in assessing the  
16 reasonableness or amount of the attorneys' fees petitions  
17 that --

18 A. Well, I reviewed the bills that were submitted by  
19 the lawyers for the various tenants.

20 And one of the things that we discussed with our  
21 client was whether or not we would object to the  
22 reasonableness of the fees.

23 Q. And you didn't -- you weren't retained in that case

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1 to testify about the reasonableness of the fees?

2 A. No. I was not an expert. I was a lawyer in the  
3 case.

4 Q. And other than that experience, you indicated you  
5 hired lawyers to represent witnesses?

6 A. True.

7 Q. On how many occasions did you do that?

8 A. One comes to mind. We talked to some other folks.  
9 One that I'm sure of.

10 Q. Who is that?

11 A. Peter Greenspun.

12 Q. So on one occasion you hired a lawyer to represent  
13 a witness in your case.

14 And the fee applications with the judge, those were  
15 when you were clerking 13 years ago -- 15 years ago?

16 A. Right, 15 years ago.

17 Q. And you're not relying on any aspect of that work  
18 to render your opinion today, are you?

19 A. Well, I guess it would depend on where my testimony  
20 went.

21 If you were to ask me do I think there is a  
22 difference -- maybe there is a difference between attorneys'  
23 fees for lawyers in the District of Columbia as opposed to

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1 attorneys' fees for lawyers in Northern Virginia, I might  
2 well rely on my experience with the judge to answer that  
3 question.

4 Q. That experience was based 14 years ago?

5 A. Right.

6 Q. And the amounts of the fees have changed in 14  
7 years?

8 A. Absolutely.

9 Q. In the Cooke litigation -- and how many cases do  
10 you currently have pending in Fairfax County Circuit Court in  
11 which you are the lead counsel?

12 A. I am defending a case, I think -- one products  
13 liability case that's on for a status conference tomorrow  
14 morning, as a matter of fact. I think that's the only case I  
15 have currently in Fairfax.

16 I actually have one in Juvenile and Domestic  
17 Relations Court that I was in last month, which is sort of in  
18 an inactive mode right now, assuming everybody behaves okay.

19 Q. And in fact though, your practice takes you all  
20 over the country, correct?

21 A. Sometimes, right.

22 Q. And you wouldn't say the majority of your practice  
23 is in Fairfax County Circuit Court, would you?

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1 A. Not right now.

2 Q. And other than those things I mentioned, the only  
3 other experience you've had with attorneys' fees have been  
4 your general awareness of them; is that correct?

5 A. The things I mentioned being?

6 Q. Being the Haft litigation and you hired a lawyer  
7 one time to represent a witness and you reviewed fee  
8 applications with the judge.

9 A. That's what comes to mind, as I sit here right now.

10 Q. And the general awareness you're speaking of, would  
11 that include experience in your own firm?

12 A. Yeah.

13 And I have a number of friends who are lawyers in  
14 Northern Virginia. And I have some general idea what they  
15 charge.

16 And actually, I should backtrack. Because I think  
17 I refer business to friends of mine from time to time and get  
18 some general idea of how much they're going to be, what it's  
19 going to cost the client.

20 Q. Now, Winston & Strong is a firm of 500 lawyers?

21 A. Probably more.

22 THE COURT: In Chicago or here or worldwide?

23 THE WITNESS: About 300 in Chicago, about 125 or

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1 probably more here, about 100 in New York, and then Geneva  
2 and Paris.

3 BY MR. ANNINO: (Resuming)

4 Q. And prior to being with Winston & Strong, you were  
5 with Cack, Mehan & Cate?

6 A. True.

7 Q. And that was a firm of in excess of 100 lawyers?

8 A. At one point, about 375.

9 Q. And they had offices in Chicago, Peoria, Oakbrook,  
10 Houston, Los Angeles, San Francisco, New York, and Far Hills,  
11 New Jersey?

12 A. Right.

13 Q. But no -- you don't maintain an office in Fairfax  
14 County?

15 A. No.

16 I did actually for -- up until we joined Winston &  
17 Strong, we always had a relationship with Gus Watson across  
18 the street at 4085 Chain Bridge Road and used it for  
19 depositions and sometimes as --

20 Q. But you didn't maintain an office there?

21 A. Well, it was Gus's office.

22 Our name was on the -- when you walk in the door --  
23 I'm not sure what it's called. But the board when you walk

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1 in the door had my name on it.

2 Q. It wasn't staffed?

3 A. Well, Gus was there and Gus had a secretary.

4 Q. Was Gus with the firm?

5 A. No.

6 Q. He is with a different firm?

7 A. He was with Gus's firm, right.

8 MR. ANNINO: I don't have anything further,  
9 Your Honor.

10 I don't think -- although the witness may have  
11 extensive involvement in litigation, I don't know that he  
12 has the requisite experience to know about the normal and  
13 customary charges for attorneys practicing before this court.  
14 So I would object to him testifying.

15 RESUMING DIRECT EXAMINATION

16 BY MR. CLARY:

17 Q. Mr. Molster, as a result of your practice in this  
18 court and your associating --

19 MR. ANNINO: Your Honor, are you going to accept  
20 the witness?

21 MR. CLARY: Is voir dire closed?

22 THE COURT: Oh, sure, I'm going to accept him.

23 I'll tell you why I'm going to accept him. 95% of

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1 Ms. Pesner's testimony was her -- at least I recall that  
2 being most of it -- was her analysis of how she would break  
3 down the tasks in a case. And that's what I think is -- what  
4 is at issue in this reasonableness of fees to date.

5 And I think that this witness has had extensive  
6 experience in litigation. And he can tell the Court how he  
7 views that subject.

8 Now, he works for a very big firm. And I assume  
9 it's very high-priced. And I will take that into considera-  
10 tion when he tells me about hourly fees.

11 But I think he can opine as to how tasks are  
12 performed. Indeed, tasks in his practice are probably  
13 performed more like what Ms. Pesner thinks they should be  
14 performed than in a small firm. Because I'm sure they have  
15 oodles of associates and paralegals.

16 Right?

17 THE WITNESS: We do.

18 THE COURT: So I am going to let him testify.

19 BY MR. CLARY: (Resuming)

20 Q. Mr. Molster, you were engaged by me on behalf of  
21 the trustees to analyze the fees charged to them in this case  
22 and to reach an opinion as to reasonableness in this case,  
23 were you not?

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1 A. Yes.

2 Q. And you are charging us for those services at the  
3 rate of \$250 an hour?

4 A. That's correct.

5 Q. And you've estimated the fees to be incurred in  
6 connection with your preparation and testimony, although it  
7 has ended up being very late today, as being approximately  
8 20 hours or \$5,000?

9 A. I think that got us through about 11:30 this  
10 morning.

11 Q. Yes, sir.

12 Have you formed an opinion regarding the reason-  
13 ableness of fees?

14 A. I have.

15 Q. And what steps did you take in arriving at that  
16 opinion?

17 A. Well, I reviewed your billing statements, which I  
18 think, including the thirteenth bill, total about 46 pages.

19 I reviewed some of your pleadings -- your pleading  
20 binders, your pleading file index in some detail. I looked  
21 at particular pleadings which I thought were important to  
22 look at to get an understanding of the case, including the  
23 Bill of Complaint, the Amended Bill of Complaint, your first

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1 demurrer, your second demurrer, your motion for partial  
2 summary judgment, Mr. Annino's motion for partial summary  
3 judgment, the request for admissions, Mr. Annino's responses  
4 to request for admissions.

5 I read the case law again: Tazewell, Mullens,  
6 the George Willis case, the case with Jack Linow (Phonetic),  
7 Shafer Shaw, the most recent Supreme Court articulation, I  
8 guess.

9 I talked to you at substantial length. I talked to  
10 Dick Moore, your partner.

11 I read the Judge's letter, I think, of June 5 --  
12 I'm sorry -- yeah, the Judge's letter of June 5, and the  
13 transcript of the opinion -- the transcript of the decision  
14 in March.

15 That is what comes to mind as to what I did.

16 I discussed with you, I think, in substantial  
17 detail the case and what it was about and tried to learn from  
18 you some of the things I couldn't get just from reading the  
19 documents. I talked about discovery and about the number of  
20 depositions, who was deposed, why they were deposed, what was  
21 done with the depositions.

22 Q. Did you explore -- did you do any work to determine  
23 the impact on the trust beneficiaries of the plaintiffs

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1 prevailing in the case?

2 A. Yes. One of the things that I did was to talk to a  
3 fellow who I believe testified at trial, Nick Felicione, a  
4 real estate fellow in Lake Ridge.

5 And as I understand, he is the managing broker of  
6 Long & Foster in Lake Ridge's office. I talked to him about  
7 what the impact would be if there was a lack of usable access  
8 to Parcel A, being the waterfront access of the property, and  
9 got an idea from Mr. Felicione that it would have a  
10 potentially substantial negative impact on the value of the  
11 lots and the value of the property that the homeowners down  
12 there had.

13 Q. Okay. As a consequence of all of the work that you  
14 have just described, what opinion did you reach regarding the  
15 reasonableness of the fees that have been billed to date and  
16 are unbilled, as reflected in the supplemental affidavit, and  
17 estimated through today's date?

18 A. I think they are reasonable.

19 Q. Okay. I would like to kind of take you through  
20 what I think are some of the elements of that reasonableness  
21 and determination and ask you to explain to the Court how  
22 you -- what factors you considered and how you evaluated  
23 these various factors in arriving at the elements of reason-

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1 ableness.

2 First, let me ask this: Did you have the  
3 opportunity to learn about Mr. Moore and myself in terms of  
4 our experience and abilities?

5 A. Sure.

6 I read Dick's -- Mr. Moore's bio. I also had had  
7 some prior experience with each of you in prior litigation.

8 And I knew, especially after reading Mr. Moore's  
9 bio, that he had been a practicing lawyer for many years. I  
10 think it's 40 plus. It looks to me like he was in the  
11 military at some substantial JAG positions from, I think  
12 it's, 1954 to 1981, like almost 30 years. Plus he's also  
13 been in the private practice of law for a number of years.

14 And so I was very comfortable that he has an  
15 excellent background and, I think, knows well what he's  
16 doing. I think he served as a judge in some of those  
17 positions with the military.

18 And I had experience with you, both in a very  
19 interesting and well-litigated and hard-fought proxy case in  
20 front of Judge Tom Kenny a number of years ago. And so I  
21 hate to say it, Mr. Clary, but I developed a respect for your  
22 ability. And then I also had experience with you and your  
23 firm in the Haft litigation.

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1           So I had some familiarity with what I perceived to  
2   be your ability and your reputation in the legal community.  
3   And I also read your bio, which confirmed that you had had  
4   lots of experience in fairly complex civil litigation,  
5   especially in the securities field.

6           Q.   Mr. Molster, examining the rate that was charged  
7   for Mr. Moore in relationship to his experience level -- he  
8   charged \$175 an hour -- and trying to view it from the  
9   perspective of Virginia lawyers as opposed to D.C. lawyers,  
10   which I think you indicated you understood the difference  
11   from your years of experience with Judge Cacheris --

12          A.   I think there is a difference.

13          Q.   What impact -- what conclusion did you reach with  
14   respect to Mr. Moore at \$175 an hour?

15          A.   I think \$175 an hour is a reasonable figure for  
16   Dick Moore's time in Northern Virginia. Absolutely.

17          Q.   And with respect to my fee of 225?

18          A.   I think \$225 an hour for your time is a reasonable  
19   figure in Northern Virginia, in Fairfax.

20          Q.   And do you -- is that based upon your experience  
21   with people of comparable experience practicing in Northern  
22   Virginia?

23          A.   Yes, it is.

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1           And also, I should probably add, not only Peter  
2 Greenspun that we talked about -- your hourly rate is less  
3 than Peter's -- but also my firm's co-counsel in the Cooke  
4 litigation was McGuire, Woods, Battle & Boothe. I was joined  
5 at the hip with them for quite some time and have some  
6 familiarity with the general fee structure of McGuire-Woods.

7           So that has been an additional factor that I figure  
8 in with evaluating whether you all's -- 175 for Dick Moore  
9 and 225 for you -- are reasonable. Absolutely, they are.

10          Q.    In evaluating the reasonableness of the fees, how  
11 did you evaluate the number and complexity of the issues that  
12 were presented in this litigation?

13          A.    Starting with the Bill of Complaint and the Amended  
14 Bill of Complaint, Count I, especially in the Amended Bill of  
15 Complaint, if you go through it, there are six or seven maybe  
16 different claims for relief just under Count I.

17                Count II -- and Count I, without looking at it, I  
18 don't remember.

19          Q.    I'm sorry.

20                Would it help you to have it?

21          A.    No. I've got it. But I think I can speed through  
22 it probably.

23                It wants a declaration that Gail Stepp is a trustee

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1 and wants removal of Carolann Wright. It attacks the power  
2 of the incorporated association in two different ways.

3 Can I look at it?

4 Q. Sure.

5 A. First is that Gail be declared a trustee.

6 Number two, that the trustee requires unity, which  
7 is a substantial issue in and of itself.

8 Three, a declaration of what powers the trustees  
9 can -- that they must exercise and cannot delegate, a  
10 substantial issue in itself.

11 Fourth, a declaration as to the identity of the  
12 persons who constitute the properly elected board for whom  
13 the trustees can take direction concerning the use of the  
14 property.

15 Five is to remove Carolann Wright.

16 Six is to declare that Belmont Bay Community  
17 Association, Inc., has no power, jurisdiction, or authority  
18 to govern or direct the trustees.

19 Seven is to declare the Association, Inc., as a  
20 voluntary organization with no power to levy or collect.

21 Eight is a claim for fees.

22 The second count, the accounting, which pretty  
23 clearly charges Mr. Foster, et al., with -- certainly

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1 Mr. Foster with self-dealing and Mr. Lear with conspiring  
2 with Mr. Foster to self-deal and then ultimately asks for an  
3 accounting.

4 I think Count III, which is the removal of the  
5 trustees count, asks that Mr. Foster and Mr. Lear be removed;  
6 that if they're not removed that there be an injunction; and  
7 then finally for an unspecified amount of damages for their  
8 breach of fiduciary duties and self-dealing.

9 Q. So was it your view then that the Amended Complaint  
10 in the case actually presented a variety of, not just simple,  
11 but complex issues?

12 A. Well, there is certainly a number of issues there  
13 and, I think, varying degrees of complexity.

14 Q. Were you aware in the course of your investigation  
15 what impact, if any, on the amount of fees that were  
16 ultimately charged in the case did the difficulties of proof  
17 have in this case?

18 A. Well, based on my discussions with you both about  
19 the discovery and about what ultimately happened at trial, I  
20 concluded that there were some substantial factual issues  
21 that needed to be established and that required you to go  
22 back certainly to 1974 to put the pieces -- or '73. As I  
23 recall, that's when Mr. Hurvitz executed the trust deed.

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1 But certainly back to the '73-'74 time frame with  
2 respect to the meetings of the lot owners. And then maybe  
3 even back all the way to 1956 or whenever the subdivision was  
4 first created.

5 Q. As a litigator, are there special problems created  
6 by trying to recreate facts that occurred 25 or 40 years ago?

7 A. Of course. You've got the unavailability of  
8 witnesses, the difficulty in finding them, the difficulty in  
9 finding documents.

10 Q. Does that generally take more time then?

11 A. Than a case that -- where we're going back three  
12 years. Absolutely.

13 MR. CLARY: Actually, we have gone through a fairly  
14 detailed comparison of the Bruce case in cross-examination  
15 of Ms. Pesner. And I won't ask this witness to go back  
16 through it in the interest of time, although I will tell  
17 Your Honor that he was prepared to tell you something --

18 MR. ANNINO: I'm going to object to proffers of  
19 counsel.

20 MR. CLARY: He was prepared to tell you what you  
21 had already lived through.

22 THE COURT: I don't think he's proffering anything.  
23 He is just telling me he's not going to go through the

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1 Bruce -- review that again.

2 I am going to take a ten-minute break right now.

3 While I'm gone, if you all would endorse each  
4 other's decree so I can enter one of them.

5 Mr. Tolchin is not on both of them. There is  
6 nothing you can do about that at this point.

7 Did you want to introduce that?

8 MR. CLARY: These are documents from the court  
9 record that the Court could take judicial notice of. I  
10 pulled them from the case file.

11 THE COURT: Mr. Annino, did you object to him  
12 putting that in evidence, because he didn't put it in  
13 evidence or at least have a discussion of it?

14 MR. ANNINO: No, Your Honor.

15 THE COURT: You don't object?

16 Do you want it in evidence?

17 MR. CLARY: All right then.

18 THE COURT: If you want me to put that in, I will.

19 (The following document  
20 referred to was marked as  
21 Defendants' Exhibit No. B-5  
22 for identification and was  
23 received into evidence.)

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1 MR. ANNINO: If I could, Your Honor, I did make a  
2 copy at the break of the transcript of the judge's ruling.

3 THE COURT: Yes, I would like that. I certainly  
4 don't remember exactly what I said.

5 MR. ANNINO: And there are -- I haven't seen  
6 Mr. Clary's latest decree. But there were some distinctions  
7 in the two orders that I think are important.

8 THE COURT: I'll look at them very closely. I  
9 would like your signature on both of them.

10 MR. CLARY: Your Honor, I've gone ahead and  
11 executed and just put "seen and objected." With the Court's  
12 permission, if you enter their decree, I would ask for  
13 permission to come back and modify the text of the objection  
14 to conform with the order.

15 THE COURT: Okay. If Mr. Annino has no objection.  
16 We'll take a ten-minute break.

17 (A recess was taken.)

18 BY MR. CLARY: (Resuming)

19 Q. Mr. Molster, as a part of your analysis of the  
20 case, did you have an opportunity to break down the time  
21 spent on this case in terms of the nature of the work that it  
22 addressed?

23 A. Yes. We tried to make estimates of various

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1 categories of effort.

2 Q. If I may show you a document, I'll ask it be marked  
3 as the next exhibit in order.

4 THE COURT: B-6.

5 (The following document  
6 referred to was marked as  
7 Defendants' Exhibit No. B-6  
8 for identification.)

9 BY MR. CLARY: (Resuming)

10 Q. Would you describe to the Court what that is.

11 A. Yes. This is the estimate that we created based on  
12 our review of the billing records principally.

13 And the first category is pleadings, motions,  
14 briefs, and legal research. And 160.4 hours was the total  
15 hours that we attributed to that category.

16 No. 2 was responding to discovery initiated by  
17 plaintiffs. And we had 150.4 hours that we attributed to  
18 that category. Conducting discovery initiated by the  
19 defendant trustees, 111.7 hours; client discussions, inter-  
20 views, factual investigations, coordination with counsel for  
21 other defendants -- that's Mr. Tolchin -- and miscellaneous,  
22 we had 27.8 hours we attributed to that category.

23 Trial prep, which we took the -- concentrated on

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1 the time just before trial. And we had a total of 108.6 for  
2 that.

3 Trial, we just started at the day of trial, which I  
4 think was the 23rd of February, and went through, I think it  
5 was, the 4th of March, the last day, and attributed 127.6  
6 hours to that.

7 Some of that is time, I believe, where Dick Moore  
8 was -- included some of Dick Moore's time where he's probably  
9 upstairs or downstairs in the library. But we thought it was  
10 appropriate to attribute that to trial time.

11 Post-trial is the total of the actual bills that --  
12 there were 13 bills that I reviewed. And 12 of the 13  
13 were -- I think 12 is March 1 -- maybe March 5 of '98 through  
14 April 30 of '98. And the 13th one was, I guess, unbilled  
15 time of May 1, '98, through August 10th.

16 Q. I notice in your evaluation that apparently there  
17 was more time spent responding to discovery initiated by the  
18 plaintiff than there was initiating or obtaining discovery on  
19 behalf of the trustees.

20 A. Yes.

21 Q. Okay.

22 A. And maybe I can clarify. We included deposition  
23 time, depending on who was taking the deposition. So as I

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1 understand it, as I recall, there were -- you took five  
2 depositions, each of the four plaintiffs and Mr. Jackson  
3 de bene esse down in Spotsylvania County.

4 Q. Right.

5 A. And Mr. Annino took, I think, another six deposi-  
6 tions, as I recall.

7 Q. Okay. In terms of whether the time that was spent  
8 by our firm in representing the trustees was increased by  
9 particular tactics of the defense, did you have any  
10 observation -- by the plaintiffs, did you have any observa-  
11 tions with respect to that?

12 MR. ANNINO: I'm going to object to that,  
13 Your Honor.

14 That's not properly -- can't be testified to or  
15 about by this witness -- by this witness. He is testifying  
16 to the reasonableness of the fees in the case, not the  
17 tactics employed by the attorneys.

18 MR. CLARY: Well, I think what he would be  
19 testifying to is --

20 THE COURT: He's only testifying to that with  
21 reference to time and effort, not with regard to any kind of  
22 good and bad.

23 MR. CLARY: Yeah. This is not intended to be --

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1 THE COURT: It's not a characterization. It's  
2 simply a time-and-effort analysis.

3 MR. CLARY: Exactly, exactly.

4 THE WITNESS: Well, there was obviously time spent  
5 on the first demurrer, which was successful.

6 There was time spent -- it appeared to me,  
7 especially reviewing the request to admit, that the responses  
8 to the request to admit -- and my understanding are based on  
9 my discussions with you about what happened at trial -- that  
10 the responses to the request to admit, occasioned an increase  
11 in the level of effort that would not have been required if  
12 there had been different responses to the request to admit.

13 BY MR. CLARY: (Resuming)

14 Q. Did you -- in terms of evaluating the reasonable-  
15 ness of the fees, did you contrast the fees that were  
16 incurred and the amount of time expended here with other  
17 cases that are, in your experience, comparable in Northern  
18 Virginia?

19 A. I didn't pick a particular case and try to say  
20 "This case is like that case; and therefore there should be a  
21 mirror quality of the fees." Because I just don't think  
22 that's workable. I think every case is different.

23 What I tried to do in terms of determining whether

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1 I thought -- at least one of the factors in determining the  
2 reasonableness, first of all, is to look at the time that was  
3 on the time sheets and the effort that was on the time sheets  
4 and sort of follow what Tazewell says and the other case.  
5 Look at the time consumed. Look at the effort. Look at the  
6 nature of the services. Look at the other attendant circum-  
7 stances.

8 And that's what I did. I tried to see whether it  
9 looked to me, based on, first of all, a review of the time  
10 records and then follow-up discussions with you and  
11 Dick Moore, whether the case was handled efficiently.

12 It was clearly handled effectively, because you  
13 won. You couldn't have gotten more relief for your client.  
14 So the result was the most that you could have hoped for.

15 So then the question was was it handled  
16 efficiently. Because I think that arguably is one of the  
17 issues when you're conducting an evaluation of reasonable-  
18 ness. And it looked to me that it was handled efficiently.

19 You functioned as the fellow who went to trial, who  
20 took the depositions, who was sort of the front-office guy,  
21 if you will; while Dick is doing the support work, the legal  
22 research, helping get the discovery cranked out, taking the  
23 first whack at putting motions together, submitting motions

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1 for summary judgment.

2 You could see it very clearly going through the  
3 bills. He is doing this work, bringing it to you. You're  
4 doing less effort.

5 Then that gets filed. Then when it's actually  
6 time, however -- you know, he may be working on deposition  
7 outlines. I see places where he is working on deposition  
8 outlines. He hands the baton to you. You go take the  
9 deposition.

10 I think that's the way to do it, especially in a  
11 firm of your size. You're talking about a two-man firm. I  
12 think the Judge is exactly right.

13 In my firm where I have all sorts of associates and  
14 paralegals it may be a different story in terms of the way we  
15 staff things. Rates are a lot higher. But it may be -- you  
16 don't have that luxury of calling up a paralegal or grabbing  
17 an associate walking down the hall and put him in your office  
18 and give him a task.

19 Certainly in a firm in your size, I'm not sure it  
20 would be all that efficient. Because you've got Dick already  
21 involved in the case. If you bring somebody else up to  
22 speed, there is a certain inefficiency there.

23 Plus based on his experience, when he goes and

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1 spends an hour in the library at \$175 an hour, that is a  
2 whole lot more efficient than a \$125-an-hour associate going  
3 to the library.

4 Q. Why is that?

5 A. Because of his experience. He knows what he's  
6 doing.

7 And based on my conversations with you, it's my  
8 conclusion that you all have been working together for 20  
9 plus years. You have a certain ability to communicate with  
10 each other. He knows what you want. He is able to go to the  
11 library, get it, come back. And you guys can talk about it.

12 It appeared to me to be in a very efficient manner.

13 Q. Did you consider in the -- in your assessment of  
14 the reasonableness of the fees the value of the litigation?

15 I guess sometimes it's referred to by Mullens and  
16 its progeny or Tazewell as the amount in controversy.

17 A. Sure. And I looked at that from a couple of  
18 perspectives.

19 I guess the floor would be the plaintiffs' expert's  
20 report, which, as I recall, totals about \$149,000 in damages  
21 that he's claiming that Mr. Foster is responsible for his  
22 breach of fiduciary duty.

23 That includes a component actually that is \$7,500

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1 per year. And who knows for how long that lasts? So it's  
2 really 149,000 or 148,000 plus some change, plus \$7,500 a  
3 year, plus attorneys' fees.

4 There is an attorney fee component in there of  
5 \$33,000, I think. But that's as of some point in February of  
6 '98. So presumably that number was going up every day.

7 Q. Prior to trial?

8 A. Right.

9 Q. So indeed, just as Ms. Pesner has testified, the  
10 trial bill for Kasimer & Ittig ultimately ended up at approx-  
11 imately 80,000, I think, wasn't it?

12 A. Okay. That --

13 Q. That would have been at stake too?

14 A. That just lumped another 50 grand on that number.  
15 So now that's almost \$200,000 based on plaintiffs' own  
16 numbers of what was at risk from a pure -- \$200,000 plus  
17 \$7,500 a year.

18 THE COURT: Why do you think that was at risk --  
19 the legal fees?

20 THE WITNESS: It was part of the claim.

21 THE COURT: You mean just simply because they were  
22 asking for it?

23 THE WITNESS: And it was in the damage calculation

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1 that the expert did.

2 I don't know if it was filed with the court,  
3 Your Honor. But it was sent over by the plaintiffs on the  
4 13th of February and then supplemented.

5 MR. CLARY: Did the Court not have that?

6 THE COURT: I don't recall that playing a big role  
7 in the case.

8 MR. CLARY: Well, I think they tried to.

9 THE COURT: I think that there was somebody who  
10 testified -- what was his name?

11 MR. CLARY: Mr. Spadaccini.

12 THE COURT: Yes, I remember Mr. Spadaccini.

13 He talked about damage to the wharf and all that  
14 kind of stuff. As I recall, he didn't get a lot in.

15 MR. CLARY: What I guess Your Honor may have  
16 missed -- and maybe we ought to put that in so Your Honor can  
17 see. And I guess it is important here now that we focus on  
18 this. And what I'll do is I'll ask to substitute copies  
19 after the hearing.

20 BY MR. CLARY: (Resuming)

21 Q. You are referring, Mr. Molster, to the expert  
22 designation of the plaintiffs' expert; is that correct?

23 A. Yeah.

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1 Q. In the underlying case?

2 A. There are three documents actually.

3 Q. Do you have them?

4 A. Well, I have coffee on them, I'm embarrassed to  
5 say.

6 February 13th and two of February 18th and a  
7 supplement from Mr. Annino on February 20.

8 MR. CLARY: Okay. I think what they are,  
9 Your Honor, is -- in our tabs in our pleading book they are  
10 Tab 91 and 94.

11 THE COURT: Mr. Annino, do you recall what this is  
12 about?

13 MR. ANNINO: Not specifically, Your Honor.

14 MR. CLARY: I think towards the end of the inter-  
15 rogatory responses their answer to --

16 THE WITNESS: Page 18, Your Honor, of the one on  
17 February 13th has --

18 THE COURT: I see. I do recall this now.

19 You can give this to me.

20 Mr. Annino is going to put in the amended exhibit.  
21 You can give this to me too.

22 Do you want me to introduce it?

23 MR. CLARY: Yes, ma'am.

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1 THE COURT: It will be B-7.

2 MR. CLARY: Tab 94 is an updated one that he sent  
3 us on the 18th of February. It adds a few more dollars.

4 I can get both of them. You want me to put them  
5 both as one exhibit, Your Honor?

6 THE WITNESS: There's three, Matt.

7 MR. CLARY: And on the 20th of February he sent us  
8 another substitute page, adding a few more dollars to.

9 THE COURT: All right.

10 (The following document  
11 referred to was marked as  
12 Defendants' Exhibit No. B-7  
13 for identification and was  
14 received into evidence.)

15 THE WITNESS: So you were asking me about what's at  
16 stake?

17 MR. CLARY: Right.

18 THE WITNESS: Actually, one of the things we looked  
19 at, if you include then -- if you change the attorneys' fees  
20 to 80,000 from 33,000, that puts it at about \$200,000 plus  
21 7,500 a year.

22 Plus there is a request to remove Mr. Foster and  
23 Mr. Lear because of their alleged self-dealing and breach of

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1 fiduciary duty and a thinly veiled fraud claim in there.

2 BY MR. CLARY: (Resuming)

3 Q. It actually alleges that they acted in concert,  
4 doesn't it?

5 A. The conspiracy claim, absolutely. It's a thinly  
6 veiled conspiracy claim because it says concert. But there  
7 is also a claim that they missed -- there was a dissemination  
8 of misinformation by Mr. Foster.

9 And so, you know, those are pretty disturbing  
10 allegations. So there was, I think, as a floor of what was  
11 at risk there was that.

12 As a ceiling, which I'm not sure where that ceiling  
13 is, would be the reduction if the plaintiffs were successful  
14 in the litigation and the access to the Parcel A was  
15 eliminated -- at least meaningful access, anything other than  
16 foot traffic.

17 If you lost the ability to take your boat on the  
18 trail down to Parcel A and all you had was foot traffic to  
19 Parcel A, then that's not -- that sort of impairment of  
20 waterfront access, at least according to Mr. Felicione -- and  
21 it certainly makes sense to me -- is going to decrease the  
22 value of every one of those 141 lots there by some figure.

23 And maybe it's \$2,000 a lot. Maybe it's \$20,000 a

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1 lot. Who knows? But it's going to make a real impact on the  
2 value, not only from a dollar standpoint, but also their  
3 enjoyment of the property. If you've been living there, you  
4 want to be able to take a boat down there. And all of a  
5 sudden, you can't do it anymore.

6 Q. And of course, every owner of the lot was a  
7 beneficiary of the trust that the trustees were holding,  
8 weren't they?

9 A. Correct.

10 Q. I think you have probably articulated before the  
11 coordination between lead trial counsel and research and  
12 writing.

13 I take it you thought that was effective and  
14 beneficial?

15 A. I did.

16 And there were a couple of points that Tazewell  
17 and Mullens talk about other attendant circumstances.

18 There were a number of paralegal charges -- I think  
19 88.5 hours of paralegal charges that you didn't charge the  
20 client for. And I would have dragged you into my office if  
21 you were working for me. And we would have had some  
22 discussions about that.

23 I think that was generous, at best.

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1           Then there were, as I understood from talking to  
2           you, your charges for meetings when you and Mr. Moore were  
3           having discussions that typically only one lawyer -- and  
4           usually only the lower billing lawyer -- would charge for  
5           that meeting.

6           I think that that's commendable and laudable. But  
7           I think the standard practice is to charge for meetings  
8           between lawyers, assuming that you're talking about  
9           substantive matters and you're actually furthering the ball  
10          for the client.

11          Q.    Something other than simply the status of the case?

12          A.    Right.

13          Q.    And there were a number of times -- not only the  
14          paralegal charges -- 88.5 hours of paralegal charges that you  
15          didn't charge for, but I think there were about 16 or 17  
16          hours of your time that was not -- it's documented in the  
17          billing records, but it's documented as No Charge.

18                And most of it is in the first billing period. The  
19          first billing period was, I think, August of '96 through  
20          December of '96.

21                But there were in that first month, I think, 13  
22          hours of your time where there was No Charge for the client  
23          at all.

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1           Q.    Do you know whether or not the firm utilized any  
2 other outside services in the process of investigation or  
3 organization of documents?

4           A.    Well, it's my understanding that the clients did a  
5 lot of that work themselves, which I think helped to keep the  
6 fees down.  Because rather than having a paralegal, since you  
7 weren't charging for paralegals -- maybe they would have been  
8 better off if you didn't have paralegals.

9                   But they did -- my understanding is that they did a  
10 lot of legwork themselves, getting together documents and  
11 putting together for you a binder of what the organizational  
12 documents were from '56 -- 1956 or 1974.  But --

13          Q.    Based on your substantial experience as a  
14 litigator, how did you view the appropriateness of the issues  
15 selected by the trustees for presentation to the Court?

16          A.    I didn't have any problem with any of the issues  
17 selected for presentation to the Court.

18                   You were successful on the first demurrer.

19                   The second demurrer, I am not sure why you weren't  
20 successful.

21                   Your motion for partial summary judgment was  
22 granted.

23                   Your motion to compel Mr. Edwards to put the

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1 documents in order to expedite the deposition, while it was  
2 not granted, I think is a reasonable motion to bring to the  
3 court, especially after you'd been slugging through the  
4 deposition for two days where you're going through documents  
5 saying "Which one does this relate to?"

6 Q. As a litigator, why would you think that that would  
7 be appropriate, just by way of explanation? Would you  
8 explain to the Court how the documents are produced.

9 A. Well, it's my understanding when you sent a  
10 document request that says "Please produce all documents  
11 responsive to X" and then the next one says "responsive to  
12 Y," and you've got a number of specifications, what comes  
13 back is a stack of documents like that with no effort to have  
14 them hook up to the particular requests.

15 And it's -- it makes it much more difficult and  
16 sort of obligates you to go through and find out "Well, are  
17 there any documents that support your claim for this? If  
18 there are, what am I supposed to do? Try to figure out where  
19 they are in this two feet of documents?"

20 Q. And on the other side of the coin, if you were to  
21 produce documents in that fashion, why as a litigator would  
22 you do that?

23 A. Well, I wouldn't want to attribute any -- certainly

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1 if you put a bunch of documents together and produce them  
2 en masse like that, it is difficult to -- it may help  
3 camouflage documents that you are particularly concerned  
4 about.

5 Q. Would it also then make it difficult to ascertain  
6 whether or not specific allegations there was no specific  
7 for?

8 A. Whether there were documents that supported  
9 specific allegations, unless you go through each one with a  
10 witness.

11 Q. And as the litigator on the other side, would it  
12 have been reasonable to assume that your interpretation was  
13 correct and there were categories that there were no  
14 documents, if you hadn't asked the question?

15 A. I don't know about that.

16 Q. Okay. In toto as a review -- as you have  
17 reviewed all of the efforts, including the post-trial efforts  
18 by counsel in this case, what did you ultimately conclude was  
19 your opinion with respect to the reasonableness of the fees  
20 and charges, not only that had been billed, but unbilled,  
21 pursuant to the affidavit and estimated through today's  
22 services?

23 A. I think they were reasonable.

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1 MR. CLARY: Nothing further.

2 MR. ANNINO: Your Honor, just for the record, I  
3 would move to strike his testimony as not being consistent  
4 with the supplemental response to interrogatories and request  
5 for production which I got, which contained a one-paragraph  
6 summary.

7 THE COURT: May I see it?

8 MR. ANNINO: Yes, Your Honor.

9 There are a lot of conclusions, but no facts.

10 THE COURT: Your motion is denied.

11 MR. ANNINO: Your Honor, if we could have that  
12 marked for the record, so I could have that in as part of the  
13 record.

14 THE COURT: All right. That's A-6.

15 THE COURT: Do you have any objection to him  
16 introducing this?

17 MR. CLARY: No, Your Honor.

18 THE COURT: Admitted into evidence.

19 (The following document  
20 referred to was marked as  
21 Plaintiffs' Exhibit No. A-6  
22 for identification and was  
23 received into evidence.)

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## CROSS-EXAMINATION

BY MR. ANNINO:

Q. Mr. Molster, when were you retained in this case?

A. I believe last -- sometime last week.

Q. Sometime last week?

A. Probably Wednesday.

Q. Wednesday of last week?

A. Probably.

Q. And how many hours went into your analysis?

A. Before today, I think we were at about 16 or 17.

Q. And much of your analysis has relied upon what Mr. Clary has told you?

A. I'm sorry?

Q. Some of your analysis relied upon what Mr. Clary has told you happened in the case?

A. Some of it.

Q. And your experience in the last -- in practice for the last 15 years has been with large firms, correct?

A. No. The first law firm I went to work for was a small law firm after I finished clerking for the judge. That was Cack, Mehan & Cate.

Q. So the Cack firm -- you started with that firm about 12 years ago?

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1 A. '86, yes.

2 Q. And then you went with Winston & Strong.

3 And both of those are out of the D.C. office?

4 A. True.

5 Q. And you agree that rates often differ, depending on  
6 the geographic location?

7 A. Yes. I think that the rates downtown are normally  
8 higher than out here. I think there are exceptions depending  
9 on particular lawyers and their reputations.

10 But as I say, I think I've taken that into account.

11 Q. And you haven't participated in any attorneys' fee  
12 arbitrations, have you?

13 A. No.

14 Q. In your review of the pleadings in this case did  
15 you come upon the pleadings filed by Katherine Fogarty?

16 A. Yes.

17 Q. You're aware that she entered an appearance on  
18 behalf of Mr. Foster in the case?

19 A. Maybe I need to revise my answer.

20 I saw her motion to withdraw. I don't remember  
21 seeing a notice of appearance.

22 Q. You're aware that Ms. Fogarty had been assigned to  
23 Mr. Foster back in December of 1996?

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1           A.    I'm sorry? Ms. Fogarty had been what?

2           Q.    Mr. Foster had been advised that Ms. Fogarty had  
3    been retained by Nationwide Insurance to represent him back  
4    in December of '96.

5           A.    It's my understanding that Ms. Fogarty had some  
6    involvement in the case on behalf of Nationwide.

7                   I don't know the details of whether Nationwide said  
8    "This is the lawyer that we will pay for to represent you,  
9    Mr. Foster." I'm sorry. I just don't -- I'm not totally up  
10   to speed on exactly what the discussion -- what Mr. Foster  
11   was told by Nationwide.

12          Q.    And in your analysis of the fees and the tasks  
13   assigned in this case, you limited your analysis to the  
14   resources available within Mr. Clary's firm, correct?

15          A.    We discussed the Fogarty issue and Miller, Miller,  
16   Kearney & Geschickter and whether that was appropriate for  
17   any kind of adjustment, if you will, or consideration.

18                   And I don't think it is. I think that it's clear  
19   to me Mr. Foster was entitled to have represent him whoever  
20   he wanted to have represent him. Nationwide themselves  
21   acknowledged that. And plus there was the issue you all  
22   talked about this morning with the conflict that arises when  
23   there is a reservation-of-rights letter.

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1 Q. So your understanding is that it was Mr. Foster  
2 that decided the Clary & Moore firm would have the involve-  
3 ment in this case?

4 A. I believe that's right. But I am not -- I am not  
5 sure that anybody has told me that directly.

6 Q. You're aware that Ms. Fogarty's services and the  
7 services of her firm would have been at no cost directly to  
8 Mr. Foster, correct?

9 MR. CLARY: I object to the question.

10 I don't think that has a foundation that it's no  
11 cost.

12 THE COURT: I was wondering myself. Because I  
13 don't think there's been any testimony as to what her fees  
14 are.

15 MR. CLARY: Right.

16 MR. ANNINO: Well, I believe Ms. Pesner testified  
17 to what her fees would be.

18 But there is also in evidence the letter from the  
19 insurance company indicating that she had been --

20 THE COURT: The reservation-of-rights letter?

21 MR. ANNINO: Yes.

22 THE COURT: I didn't know it was in there. If it's  
23 in there, then it's in there.

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1 I don't recall Ms. Pesner testifying about her  
2 fees.

3 MR. ANNINO: She indicated she called the Miller  
4 firm and she was told \$150 an hour.

5 THE COURT: Oh, yes, 150.

6 And then she asked what it would do for insurance  
7 work. And they laughed in the phone and wouldn't tell her.

8 MR. ANNINO: Right. And her experience was for  
9 Nationwide it would be around \$125.

10 MR. CLARY: I don't recall that part.

11 THE COURT: I don't recall that part either. I  
12 don't recall the 125. I recall the exchange about they  
13 wouldn't tell her.

14 MR. CLARY: Less.

15 THE COURT: She said, "Is it safe to to say it's  
16 less than 150?" And they laughed and said, "Yes."

17 MR. ANNINO: And the reservation-of-rights letter  
18 is in.

19 THE COURT: The reservation-of-rights letter says  
20 nothing --

21 MR. ANNINO: It says they would defend Mr. Foster  
22 -- that Nationwide would incur the --

23 THE COURT: Who introduced the letter? I forget.

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1 Who introduced the letter?

2 I think that you did.

3 MR. ANNINO: It was attached to Mr. Clary's motion  
4 in limine. And I introduced it.

5 THE COURT: Okay.

6 BY MR. ANNINO: (Resuming)

7 Q. Were you aware of that letter, Mr. Molster?

8 A. I was aware that there was a reservation of rights  
9 by the carrier. There was a discussion about that.

10 Q. And you were aware that they had agreed to defend  
11 Mr. Foster -- they would provide a defense to Mr. Foster?

12 A. I don't know any of the details on that.

13 Q. Did you look at the reservation-of-rights letter?

14 A. No.

15 Q. Do you know anything about the Miller, Miller,  
16 Kearney & Geschickter firm?

17 A. Yes. I've had cases against them.

18 Q. And do you know what their hourly rates are?

19 A. No, I don't.

20 Q. Now, you would agree -- and you talked also to  
21 Mr. Felicione?

22 A. Yes.

23 Q. And he was Mr. Foster's real estate agent?

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1           A.    I think that's right.  I believe that's right.

2                    When I talked to him I asked him what did he do.

3   And he told me he was the managing broker of the Long &  
4   Foster Lake Ridge office.

5           Q.    You're aware Mr. Foster was the majority lot owner  
6   in this subdivision?

7           A.    No, I don't think I know that.  I am not -- it is  
8   my understanding he had 38 lots.

9                   MR. CLARY:  Your Honor, I am going to object.

10                   I mean, time is short here.  But this is a mis-  
11   statement of the evidence.  Mr. Foster individually was not  
12   the majority owner.  There was a joint venture, as Your Honor  
13   will recall.

14                   BY MR. ANNINO:  (Resuming)

15           Q.    The Hurvitz-Foster Joint Venture?

16           A.    I don't know if there was anybody who had more or  
17   not.  So I don't know if he was the majority.  As I recall, I  
18   think he had 38 lots.  I read something like that.

19           Q.    Would you agree that Mr. Foster had more at stake  
20   in this litigation than the other trustees?

21           A.    I don't know that that's true.

22           Q.    You indicated that the agent told you that there  
23   would be a cost impact potentially on the value of the lots

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1 in the subdivision, correct?

2 A. Right.

3 Q. And Mr. Foster as a joint venturer owned many lots  
4 in the subdivision, correct?

5 A. Right.

6 Q. So there would be more impact to them than another  
7 person that owned only one lot, correct?

8 A. I don't know what the others own. I don't know  
9 what Mrs. Wright owns. I don't know what Mr. Lear owns.

10 Q. Now, in your firm you indicated that in dividing  
11 tasks you would delegate certain tasks to associates so the  
12 client realizes the benefit of less of an hourly charge,  
13 right?

14 A. Well, yeah. As a general matter, I would use  
15 associates on cases, yes.

16 Q. And the theory behind that is to get the client a  
17 cost savings, correct?

18 A. That's one of the considerations. Absolutely.

19 Q. Does your firm charge for word processing time?

20 A. You know, I am not sure about that, Mr. Annino,  
21 whether we charge for -- we don't have word processing per se  
22 in Washington.

23 We do in Chicago. And I don't know whether the

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1 Chicago office charges for it or not.

2 My understanding is that Mr. Clary did not charge  
3 for it in this case.

4 Q. Your firm also has a well-stocked law library, I  
5 presume?

6 A. It's okay.

7 Q. Are you aware of any case law that would support  
8 the argument that a party should be allowed to complete all  
9 of the depositions before another party can start its  
10 depositions?

11 A. No, not off the top of my head.

12 Q. And are you aware of any -- isn't it a fact that  
13 under the rules a party is not required to designate  
14 documents in response to a document production request?

15 A. Well, I think the alternative is to produce what's  
16 kept in the ordinary course of business.

17 But I think there is an obligation under the  
18 Federal Rule 33(c), which I think is also in Virginia, that  
19 you've got to -- you've got -- if the other guy can't figure  
20 it out, then you've got to cooperate.

21 Q. You're aware that that issue was argued before the  
22 court in this case and found otherwise?

23 A. I don't know what the -- my understanding is the

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1 motion was denied. I don't know what the argument was.

2 THE COURT: That was a discovery argument?

3 MR. ANNINO: Yes, Your Honor.

4 BY MR. ANNINO: (Resuming)

5 Q. Now, you referenced Exhibit B-6, this breakdown of  
6 attorneys' fees incurred?

7 A. Yes.

8 Q. Did you prepare this document yourself?

9 A. My secretary typed it.

10 Yeah, I did. And I had some help.

11 Q. How did you go about allocating the descriptions in  
12 the bills to the different categories?

13 A. I went through the bills with Mr. Clary.

14 I did some by myself. He did some of them.

15 Q. Did you make a determination of how much of these  
16 different categories Mr. Moore had done versus Mr. Clary?

17 A. No.

18 THE COURT: So you looked at it from a gross  
19 perspective. Ms. Pesner looked at it from a micro-  
20 perspective.

21 I am not saying anything profound here. But that's  
22 the way it appears that you did it.

23 You said, "This is the value of the case. And

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1 these people did a good job."

2 It's interesting that the approach is different.

3 THE WITNESS: I think I also looked at it from a  
4 division of labor between Mr. Moore and Mr. Clary and  
5 satisfied myself that it was appropriate and efficient.

6 BY MR. ANNINO: (Resuming)

7 Q. Do you know what that division of labor was,  
8 Mr. Molster?

9 A. You can tell by looking at the bills, sure.

10 Q. Do you know from your recollection?

11 A. The exact hours?

12 Q. Approximately what the ratio was?

13 A. I can probably answer that. Can I look at -- I  
14 have a document that will probably show me.

15 The total for Dick Moore was about 362. And the  
16 total for Matt Clary was about 422.

17 Does that add up right?

18 Q. That's a little short your of your 801 hours that  
19 you show?

20 A. That doesn't have -- I suppose it does have 13.

21 But it's a rough cut.

22 MR. CLARY: Your exhibit has estimated.

23 THE WITNESS: Thank you.

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1 BY MR. ANNINO: (Resuming)

2 Q. So Mr. Clary spent the majority of the time on the  
3 case?

4 A. No -- yes. Right, right. Under -- that's true.

5 And you know, part of what you've got, if you look  
6 at this on a month-by-month basis, for the time period of  
7 January 1, '98, through March 4, '98, Mr. Clary had 230  
8 hours -- 229.9 -- and Mr. Moore had 112.

9 So in the early part of the case when it's being  
10 worked up and more of the legwork is being done, it is more  
11 skewed towards Mr. Moore in terms of the time that's being  
12 billed to the case. And most of Mr. Clary's involvement is  
13 actually conducting depositions -- defending depositions.

14 Once you get to the period just before trial and  
15 trial, it gets shifted the other way and it's much more  
16 Mr. Clary.

17 Q. Now, with respect to your comment about Mr. Clary  
18 not having the luxury of calling up an associate to do the  
19 work because he only had a two-man firm, you recall that  
20 testimony?

21 A. Well, I think what I said is he couldn't grab an  
22 associate walking down the hall. He doesn't have the same  
23 luxury that I do or larger firms do where there is a labor

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1 force that is more available to you.

2 Q. Well, he certainly had the luxury of calling  
3 Ms. Fogarty, correct?

4 A. I don't know what he could have done with  
5 Ms. Fogarty.

6 Q. And he didn't utilize that resource at all from  
7 your analysis, correct?

8 A. I don't see any time on here for Ms. Fogarty.

9 Q. The litigation you've been involved in,  
10 Mr. Molster, at least according to your CV, is pretty  
11 complicated litigation; isn't that true?

12 A. Some of it has been pretty complex commercial  
13 litigation. Some of it has been DUIs downstairs.

14 Q. What you highlight in your CV is business litiga-  
15 tion, injunctions, RICO, antitrust litigation, alternative  
16 dispute resolution, products liability litigation, corporate  
17 governance shareholder litigation, securities litigation,  
18 construction arbitration, parent litigation, and trademark  
19 copyright litigation matters; isn't that right?

20 A. Right.

21 Q. And your analysis didn't take into account at all  
22 the attorneys' fees spent by other attorneys in the same  
23 case, did it?

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1           A.    Well, I looked at Mr. Tolchin's bills.  So I don't  
2 know if that means I took it into account or not.

3                   I didn't know what your fees were.

4           Q.    Did you review trial exhibits in the case?

5           A.    I don't think so.

6           Q.    Do you know -- so you don't know how many trial  
7 exhibits the trustees actually presented to the Court?

8           A.    I don't think I do.  If I looked at it, I have no  
9 recollection, as I sit here now.

10           MR. ANNINO:  I don't have anything further,  
11 Your Honor.

12           THE COURT:  Redirect?

13                   REDIRECT EXAMINATION

14           BY MR. CLARY:

15           Q.    Just to clarify, I take it you have no knowledge  
16 whatsoever about whether -- the failure to use Ms. Fogarty's  
17 services because of Nationwide's refusal to pay for counsel  
18 they selected and the counsel that the client selected at the  
19 same time?

20           A.    Can I have the question again.  I am sorry.

21           Q.    I understand that from your lack of knowledge you  
22 don't know whether the failure to use Ms. Fogarty's service  
23 was a consequence of the unwillingness of the insurance

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1 company to pay for both the lawyer that they selected and the  
2 lawyer that the client selected?

3 A. That's true.

4 Q. You did, however, note that the insurance company  
5 didn't notify the client of finding an attorney for them  
6 until a month and a half after the initial response to the  
7 Complaint was already due in court?

8 A. That's my understanding.

9 MR. ANNINO: Just a few follow-up on that.

10 RECROSS-EXAMINATION

11 BY MR. ANNINO:

12 Q. Mr. Molster, in your experience, when insurance  
13 companies provide counsel and agree to defend an insured,  
14 they do it at no cost to the insured, do they not?

15 MR. CLARY: Beyond the scope.

16 THE COURT: There is -- when you asked the question  
17 originally, I was sort of fidgeting in my seat. And I  
18 thought better of it.

19 There's been no evidence at all as to what  
20 Ms. Fogarty's role could have been. There is no evidence as  
21 to that.

22 MR. ANNINO: Your Honor, there is the letter that's  
23 in evidence.

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1 THE COURT: Beyond the letter. Beyond the letter.  
2 Beyond the letter.

3 But you asked a question that asked him whether or  
4 not Mr. Clary had taken advantage of Ms. Fogarty's services.

5 And I haven't the faintest idea whether Ms. Fogarty  
6 was willing -- whether that arrangement was available to  
7 Mr. Clary. I don't have any evidence of that.

8 MR. ANNINO: Your Honor, there is the policy, which  
9 is in evidence, which Mr. Clary referred to that requires the  
10 insured to assist and cooperate with counsel.

11 There is the letter from the insurance company that  
12 specifies that Ms. Fogarty is defending -- will defend  
13 Mr. Foster in connection with the litigation.

14 There is Ms. Pesner's testimony that the research  
15 services of the Miller, Miller, Kearney & Geschickter firm  
16 could have been utilized to minimize the cost of research  
17 time.

18 THE COURT: No, I don't know that. I don't know  
19 that.

20 You mean that once Mr. Clary was chosen by the  
21 trustees he could have still used Miller, Miller, Kearney &  
22 Geschickter?

23 MR. ANNINO: That firm was of record as defending  
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1 Mr. Foster, Your Honor, until they moved to withdraw late in  
2 the case.

3 THE COURT: But it's very murky. I have no  
4 evidence about anyone who was directly involved as to what  
5 the situation was.

6 I understand that -- I believe what your point is.  
7 I mean, I believe that Mr. Foster could have said, "Okay,  
8 Ms. Fogarty. You represent me." I believe that that's true.

9 But once he declined to do that, I have no evidence  
10 as to whether or not Nationwide would have anything more to  
11 do with legal representation in this case.

12 MR. ANNINO: Your Honor, you have the motion from  
13 Ms. Fogarty that was part of my affidavit that detailed that  
14 information.

15 Ms. Fogarty was subpoenaed to appear today.

16 THE COURT: I know. I know she was.

17 And she couldn't come.

18 MR. ANNINO: If the Court wants to hear that  
19 evidence, I will present it.

20 THE COURT: I can't let this case go on any  
21 further. The fees have gotten so high. This is it today.  
22 Absolutely.

23 I am sorry she couldn't come. But --

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1 MR. ANNINO: Your Honor, I do have a subpoena for  
2 her to be here. She was served. And if that testimony is  
3 necessary for the Court, I would like to present it.

4 THE COURT: Well, I think the appropriate remedy  
5 would have been -- I can't say that -- it's doubtful that I  
6 would have granted it.

7 But when somebody doesn't respond to a subpoena,  
8 the appropriate remedy is to ask the Court for a continuance,  
9 isn't it, or ask the Court to issue a rule to show cause  
10 against the person who hasn't responded to a properly issued  
11 subpoena?

12 I notice -- when we did housekeeping, I said, "Do  
13 you all know that Ms. Fogarty can't make it today?"

14 I don't recall anybody saying much about it.

15 MR. CLARY: I think Mr. Annino said he would wish  
16 to proceed.

17 THE COURT: I believe that that was what happened.

18 So we are going to go forward today. And this is  
19 going to be the end of it.

20 MR. ANNINO: Note my objection, Your Honor.

21 And I would request that the Court allow me to  
22 present Ms. Fogarty's testimony. She is under subpoena. And  
23 I am entitled to have her evidence presented, if necessary,

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1 in rebuttal.

2 THE COURT: I don't think that's proper actual  
3 rebuttal testimony. I think it would be part of your case in  
4 chief. I mean, that's what your case in chief is about.

5 I'm sorry, Mr. Annino. There is nothing much I can  
6 do about that.

7 You can step down, sir.

8 (Witness excused)

9 THE COURT: It's gotten so late. Do you want to do  
10 closing argument?

11 I can't imagine that you wouldn't. But I --

12 MR. CLARY: I can try and keep it very short.

13 THE COURT: There is really no reason not to.

14 I've been a participant in this case from the very  
15 beginning. I think I understand everything that was said  
16 today.

17 The part of this case that's a new issue to me is  
18 the fees that have been generated since the trial date. If  
19 you want to address that or if there's any case law in  
20 that -- you might have given it to me. I've got a whole pile  
21 of stuff here.

22 MR. CLARY: I have given you case law on that  
23 subject, Your Honor. And it is addressed in our brief.

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1           And I'm not going to -- in my closing argument I am  
2 not going to sit here and argue Your Honor's appropriate  
3 evaluation of the two experts that have testified before you  
4 in the interest of time. I think you heard the testimony and  
5 you can make your decision on what relative weight to give  
6 each of them.

7           There is one area though I would like to address.  
8 And it has to do -- I don't think it's contained in any  
9 brief. But I think it has to do with the appropriate  
10 approach that I think the Court should take in evaluating the  
11 reasonableness of attorneys' fees in this situation. And I  
12 suspect it probably comes under the Court's heading of the  
13 other attendant circumstances in deciding what is an  
14 appropriate case.

15           Your Honor may have picked up -- as we were going  
16 through some of the questions on cross-examination, I asked  
17 some questions about whether or not reasonableness in one  
18 context might be the same as reasonableness in another.

19           And I think one of the things that's important for  
20 the Court, and I believe is reflected, although not perhaps  
21 bright-lined and explicitly stated by the various courts and  
22 opinions that you find here -- but I think that what you find  
23 is a difference of weighing of reasonableness, depending upon

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1 the circumstances that give rise to the request for  
2 attorneys' fees.

3 And I think if you -- and I don't, by any means,  
4 intend by my discussion to exclude other categories of cases.

5 And certainly there are sanctions, which is one of  
6 the cases here. And in that particular aspect, the intent of  
7 the court there or the policy -- the social policy that is  
8 intended to be implemented by that is to discourage abusive  
9 tactics in that instance.

10 THE COURT: Right.

11 MR. CLARY: If we look, however, at -- I think  
12 probably the greater percentage of the cases that have been  
13 presented to Your Honor for consideration -- I think what you  
14 see is kind of three different categories -- three major  
15 categories of attorney fee award cases.

16 And they each -- in each case reasonableness is in  
17 fact, and I think should be, approached differently from the  
18 court depending upon what the social policy that's underlying  
19 the award is asking for.

20 In one category you have statutory rights of action  
21 where there is provision in the statute for an award of an  
22 attorneys' fee.

23 And in those instances, I think, by and large,

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1 those kinds of cases are the kinds of cases where the  
2 legislature, in enacting the statute, has recognized that  
3 there is a high social purpose and policy to be served by  
4 opening the courthouse door to impecunious plaintiffs who  
5 could otherwise not afford to take advantage of that.

6 By the same token, there has to be an encouragement  
7 for an attorney to represent that kind of person. And so the  
8 award of attorneys' fees in those cases is something that the  
9 attorney who gets involved in the case knows at the outset  
10 and makes the voluntary, knowing, and conscious decision to  
11 become embroiled in the litigation and to risk later on that  
12 he will recover only what the court determines is reasonable.

13 And on the one hand, it has to be an incentive --  
14 if the court is looking at reasonable, it has to be an  
15 incentive to maintain the social policy of opening the door.  
16 But at the same time it can't be so out of reach that it  
17 starts fostering frivolous litigation. And so that's a  
18 delicate balancing act.

19 But the interesting aspect of that is, number one,  
20 the courts -- the operative events that give rise -- and by  
21 that, I don't mean a cause of action.

22 But the decision to engage in litigation is some-  
23 thing that is made at a time when the attorney who is

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1 involved and the plaintiff who is involved know at the outset  
2 and have the ability to make the decision to engage in this  
3 litigation, choose voluntarily to engage in this litigation;  
4 know that at the end of the day the court is going to review  
5 whatever the attorneys' fees are submitted; and finally knows  
6 that the impact of the court's decision is simply going to be  
7 what the attorney recovers.

8 And the client in that instance will have no  
9 further liability to the attorney for any fees that, based on  
10 his hourly rate, might have exceeded what the court ultimate-  
11 ly determines.

12 And that is a unique and particular type of case.  
13 And in those cases indeed frequently you have discussions of  
14 lodestar amount and you have the discussion about what was  
15 the value of the case to people.

16 And oftentimes if it was very valuable, you would  
17 find that the -- I guess like the cigarette cases, you would  
18 find that the award to the attorneys would just be astounding  
19 in relationship to the amount of time and effort that was  
20 spent.

21 As a separate category of case, and actually was  
22 the kind of case involved in Judge Horne's decision in the  
23 Lansdowne case, is the cases that arise because of a

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1 contractual agreement with respect to attorneys' fees.

2 And in that instance, Your Honor, what has happened  
3 is that two parties to a commercial transaction have entered  
4 into an agreement, each utilizing their bargaining power to  
5 ultimately fashion what the agreement is with respect to  
6 future legal fees in the event that somebody fails to  
7 perform.

8 In some cases where one party has a lot more  
9 bargaining power banks than the other, you frequently have  
10 situations where they say that "We get every single penny we  
11 spend. Regardless of whether it's reasonable or not, you  
12 waive your right to contest reasonableness."

13 In other instances the other party to the bargain  
14 comes back and says "Well, no. I wanted there to be some  
15 referee in this action. So let's stick the word 'reasonable'  
16 in the contract to determine legal fees."

17 And that really is where a lot of Mullens and its  
18 progeny come from, in contractual kind of cases.

19 But interestingly, in that event as well, what do  
20 we have? We have parties who are deciding to allocate the  
21 risk of attorneys' fees before they engage in the trans-  
22 action. And it is done with the voluntary act of the parties  
23 before it ever begins.

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1           Further, each of the parties can make their  
2 decision whether to expose themselves to this liability or  
3 not by breaching the agreement and exposing themselves to  
4 that liability.

5           And finally, in that category of case the obliga-  
6 tion of the client to pay the attorney that he contracted to  
7 hire is unaffected entirely by what the court's ultimate  
8 determination of a reasonable attorney fee that the losing  
9 party has to pay pursuant to the contract provision.

10           So each party has knowingly entered into a situa-  
11 tion where, as a matter of commerce, they recognize that they  
12 may indeed be out on the hook ultimately for whatever they  
13 owe their lawyer based on an hourly rate agreement and his  
14 normal rates. But -- and what they may get back is whatever  
15 the referee that they have chosen to be the court in the case  
16 of reasonable fees determines.

17           Those two categories contrast distinctly from any  
18 instance in which the policy -- the social policy that is to  
19 be served is to indemnify those people who are innocent and  
20 blameless.

21           And a good example of that cited in my brief is the  
22 Virginia Supreme Court decision in Davidson v. Fastcom.  
23 Davidson v. Fastcom was a situation in which Davidson had

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1 been accused and involved in an SEC investigation. He was an  
2 officer --

3 THE COURT: Which brief are you talking about?

4 MR. CLARY: This is the entitlement to an  
5 attorneys' fee brief.

6 Mr. Annino has one.

7 THE COURT: I read those last night. And I don't  
8 recall --

9 MR. CLARY: This is a new one. This is today.

10 THE COURT: Well, that's what I mean. This is one  
11 that you filed today?

12 MR. CLARY: Yes, ma'am.

13 MR. ANNINO: Which I didn't see before today and  
14 haven't had an opportunity to respond to.

15 MR. CLARY: Right.

16 THE COURT: That's in addition to your motion in  
17 limine brief.

18 MR. CLARY: Yes, ma'am, it is. It is.

19 THE COURT: Okay.

20 MR. CLARY: And essentially, as I think our brief  
21 acknowledges, Virginia Supreme Court cases that deal with the  
22 issue -- well, we could not find any Virginia Supreme Court  
23 case that deals directly with the issue of fees that would

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1 support or litigate the appropriateness or reasonableness of  
2 fees.

3 There are a number of circuit court cases.  
4 Mr. Annino came up with one that actually we had not found,  
5 the Roanoke case, which is an '88 case.

6 But the only ones that we had found were Lemon Law  
7 cases. And I think in those instances you have a statutory  
8 policy that they address, which is more on the first  
9 category, the statutory right of action.

10 But the category where the social policy is  
11 indemnification is portrayed by the Davidson v. Fastcom  
12 case, again a circuit court case, not a Supreme Court case.

13 And indeed, in this instance the social policy of  
14 indemnification is embodied in the statute itself. And so in  
15 that case indeed the court -- the circuit court held and  
16 ruled upon the reasonableness of fees, not only in the  
17 underlying litigation, but also found for and awarded fees  
18 for the -- in litigating the petition for getting the  
19 attorneys' fees awarded.

20 That policy, however -- and again, let's talk about  
21 this category of cases where --

22 THE COURT: Judge Chamblin.

23 MR. CLARY: Judge Chamblin.

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1 THE COURT: I've been looking through Virginia.

2 He went through all these fees in great detail.

3 MR. CLARY: Yes, ma'am, he did. He certainly did.

4 By coincidence, the Crowell & Morning initials are  
5 the same as Clary & Moore. But please don't confuse the two.

6 But in this third category the social purpose that  
7 we're trying to achieve here is to insulate people who have  
8 been dragged into litigation, not as the plaintiff making the  
9 free, voluntary, and knowing choice to engage in litigation,  
10 but those people who are dragged into litigation and then  
11 found to be innocent.

12 THE COURT: Right.

13 MR. CLARY: And this, Your Honor, is different than  
14 the other categories. Because these people didn't make the  
15 decision to engage in the litigation. They didn't have the  
16 choice.

17 And in fact, if you look at the language of  
18 Wilson v. Whitehead, what it says is that "In justice and  
19 good conscience, the trustees should not be put to have money  
20 out of their pockets."

21 And that is the case here. And the social policy  
22 to be served here is to prevent that.

23 I submit to Your Honor that as the Court examines

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1 the reasonableness of attorneys' fees in each of these  
2 different kinds of cases the mandate of attendant circum-  
3 stances is that, in a case where the social policy is to  
4 prevent innocent people from being harmed, that the limit of  
5 the inquiry on reasonableness should simply be to see if  
6 there is an abuse, as distinguished from trying to engage in  
7 the nickel-and-diming that we saw here today.

8 Thank you, Your Honor.

9 MR. ANNINO: Your Honor, I will be brief. Because  
10 I know Your Honor has heard a lot of testimony. And the  
11 cases that I passed up to the Court I think speak for them-  
12 selves.

13 The distinction that Mr. Clary is trying to make in  
14 the categories of cases that have been provided to the Court  
15 is something of his own surmise. It is not reflected in any  
16 Virginia Supreme Court opinion or indeed any opinion from any  
17 other court.

18 What the cases that I have provided to the Court  
19 say is that the court looks at the attorneys' fees incurred  
20 in the case, and the court makes its assessment both from the  
21 evidence presented and in some cases from its own knowledge  
22 of having been in practice, what a reasonable attorneys' fee  
23 in a case would be.

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1 THE COURT: You want me to analyze the Bruce case  
2 from my own knowledge?

3 You all did a very odd thing in using that case as  
4 your standard.

5 I mean, maybe you didn't do an odd thing. I mean,  
6 I know exactly what that case is about. You won't find  
7 another judge who knows exactly what it is about.

8 I mean, you don't mind if I use that? I feel like  
9 I kind of have knowledge that most judges wouldn't have had,  
10 by virtue of the fact that I tried that case.

11 MR. ANNINO: That is certainly part of the  
12 knowledge that the Court can consider.

13 But the cases -- one of the cases that I cited  
14 for the Court, Lane Construction v. Trading Merchandise  
15 Company, the court says specifically "A contract clause  
16 requiring the payment of attorneys' fees" -- which the  
17 parties enter into at the outset of the relationship and they  
18 know that if they don't prevail in the litigation they could  
19 be held accountable for the attorneys' fees -- the court says  
20 "A contract clause requiring the payment of attorneys' fees  
21 is not an executed blank check authorizing the payee to fill  
22 in any amount."

23 And that's essentially what Mr. Clary's argument to

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1 the Court is; that the Court should just disregard its own  
2 notions of reasonableness, disregard what the cases say the  
3 Court should consider in factoring reasonableness; and simply  
4 write Mr. Foster a blank check for his attorneys' fees in  
5 this case, attorneys' fees that he incurred as a matter of  
6 choice by selecting the Clary & Moore firm.

7 And he made a conscious decision to do that rather  
8 than engage the services of the attorney that was provided to  
9 him free of charge by his insurance company. That's a  
10 conscious decision that he made. That's not a cost that my  
11 client should bear.

12 And most importantly, I mean, Mr. Foster had an  
13 independent stake in this litigation, apart from his role as  
14 a trustee in this case. He is the majority lot owner. It's  
15 his interests that are being affected. And certainly that  
16 played a factor in his decision to select counsel in the  
17 case.

18 But it is a factor that the court in the Wilson  
19 v. Whitehead case didn't consider appropriate for  
20 consideration. In that case the trustee had no independent  
21 outcome, no independent monetary value to the litigation,  
22 nothing at stake other than his services rendered as a  
23 trustee for the benefit of the trust estate.

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1           And therefore, I don't think that the Court should  
2 simply write Mr. Foster a blank check and the other trustees  
3 a blank check in this case to allow the Clary & Moore firm to  
4 bill whatever they want in the case without regard to the  
5 reasonableness of the fees.

6           Certainly the decision made to undertake the  
7 litigation was one that was done with trepidation at the  
8 outset. But as the case proceeded, there are many decisions  
9 made by counsel that are decisions of their own choosing.

10           Clary & Moore made decisions. Mr. Foster made  
11 decisions. The other trustees made decisions. The fact of  
12 the matter is that the decision to engage in the litigation  
13 is not just plaintiffs' decision.

14           The parties could have met and resolved their  
15 differences long before coming to court.

16           But regardless, the knowledge --

17           THE COURT: Well, why didn't they? Why didn't  
18 they?

19           MR. ANNINO: Because neither side could come to a  
20 resolution. But that's a two-sided sword. You know, that's  
21 a two-way street.

22           But the fact that attorneys' fees were potentially  
23 awardable doesn't mean that we give the other party a blank

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1 check and write those -- allow a check to be written for  
2 whatever fees are incurred in the case. And that's what the  
3 case law says.

4 Your Honor has to look at all of the factors  
5 involved, has to weigh the factors, and has to make a  
6 determination of what a reasonable fee is.

7 And the fact that the -- that Mr. -- the trustees  
8 in this case have selected counsel and incurred those fees is  
9 not dispositive of the issue before the Court. If that were  
10 the case, then there would be case law that says that. And  
11 there simply isn't any.

12 THE COURT: There is not a whole lot of case law on  
13 the whole issue of trustees and fees, is there?

14 MR. ANNINO: Not in Virginia, Your Honor.

15 THE COURT: You all briefed that issue citing two  
16 or three cases.

17 MR. ANNINO: So, Your Honor, we would urge the  
18 Court to consider the cases that have been presented,  
19 consider the factors that our witnesses have testified to.

20 Ms. Pesner did a microanalysis. But she also did a  
21 macroanalysis. She considered all of the factors in the case  
22 in rendering her opinion, that the reasonable amount of  
23 attorneys' fees would be in the neighborhood of \$80,000 in

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1 this case and considered -- and also went to the effort of  
2 making specific notations concerning reductions in fees in  
3 certain instances.

4 So -- and I believe Ms. Pesner testified quite  
5 extensively what the basis for her opinion was and relied on  
6 the factors that, in large part, Mr. Molster also referenced  
7 during his testimony. So --

8 THE COURT: I think Ms. Pesner worked very hard to  
9 try to figure out a reasonable basis for her opinion. I  
10 think she put a lot of time into it. And you know, I think  
11 she did a good job on that.

12 MR. ANNINO: So, Your Honor, we do ask that the  
13 Court consider the case law and the Court make its own  
14 independent determination of what a reasonable amount of  
15 attorneys' fees are and that certainly the Court not consider  
16 any post-trial petition -- post-trial attorneys' fees  
17 incurred in this case, both because Mr. Clary was late in  
18 presenting that information to me and because under the case  
19 law the cases say that fees incurred in making an attorneys'  
20 fees petition are not properly the subject of an attorneys'  
21 fees award.

22 If the Court looks at those cases, I think it will  
23 find that the reason for that is in those cases you are

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1 getting into the principle of -- the principle of attorney --  
2 the American Rule regarding attorneys' fees. Because in that  
3 situation the attorneys' fees that are being requested are  
4 part of the claim that is presented against the other party.

5 So I think that the Court should disregard the  
6 post-trial submission made --

7 THE COURT: What's the numbers again? Just tell  
8 me.

9 Mr. Clary, I've got your affidavit.

10 MR. CLARY: I think the post-trial is about 13,000.  
11 I think that's right. I think the expense part is bigger,  
12 because of course we had to have the expert. But as I  
13 recall, I think the fee part is a little over 13,000.

14 THE COURT: And the expert was somewhere up above  
15 5,000?

16 MR. CLARY: Yes, ma'am. I am afraid so.

17 THE COURT: And what were your fees prepared for  
18 post-trial?

19 MR. ANNINO: Well, I believe the fees between the  
20 date of post-trial, March 5th, to the present date have been  
21 approximately \$9,000.

22 THE COURT: Okay. All right.

23 Thank you.

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1 MR. CLARY: Thank you, Your Honor.

2 THE COURT: This trial was so intense.

3 I don't know. I just feel kind of bad for every-  
4 body in the case in terms of the fees being so high, which  
5 isn't to say they're unreasonable. I am just saying that  
6 they're there.

7 Okay. We're through. I'll have to step off, so  
8 you can leave. Then I can come back and carry all this  
9 stuff.

10 MR. CLARY: Does Your Honor -- I take it Your Honor  
11 will --

12 THE COURT: Well, here is my situation. Mr. Clary  
13 wants me to sign an order tomorrow. And I think I'm running  
14 behind on my advisory opinions. And you all gave me just a  
15 tad to read.

16 MR. CLARY: Yes, ma'am. We did.

17 THE COURT: And I am going on vacation next week.  
18 So I am going to try -- I'm here next week. But I'm behind  
19 in another opinion letter. And I'm going to get to that  
20 first. I'll see if I can do that.

21 I don't think this is going to take me as long as  
22 you might think.

23 It's very interesting -- very interesting issues,

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1 as usual.

2 MR. CLARY: You don't need to see us again though?

3 THE COURT: No. You need to submit through

4 chambers your exhibit and your exhibit tomorrow.

5 MR. CLARY: Yes, ma'am.

6 THE COURT: Thank you.

7 (Whereupon, at 6:11 o'clock p.m., the hearing in  
8 the aforesaid matter was concluded.)

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(August 12, 1998)



## CERTIFICATE OF REPORTER

I, GENEVIEVE R. BATA, the stenographic reporter who was duly sworn to well and truly report the foregoing proceedings, do hereby certify that the transcript of said proceedings is true and correct to the best of my knowledge and ability; and that I have no interest in said proceedings, financial or otherwise, nor through relationship with any of the parties in interest or their counsel.

IN WITNESS WHEREOF, I have hereunto set my hand this 18th day of January, 1999.

Genevieve R. Bata  
GENEVIEVE R. BATA, Reporter

(August 12, 1998)

800 GRAVES MILL ROAD  
P.O. BOX 10865  
LYNCHBURG, VA 24506-0660



December 13, 1996

Mr. James A. Foster  
7454 Belmont Landing Road  
Mason Neck, VA 22079-3820

RE: Style: Gail Stepp, etc. v. James A. Foster, et al.  
Suit File: 53 32270

Dear Mr. Foster:

We have received a copy of the Bill of Complaint in the above referenced matter and have referred this file to the attention of Katherine Fogarty, Esq., with the law firm of Miller, Miller, Kearney & Geschickter to undertake your defense in this matter. Her office will be in touch with you shortly.

Based upon the allegation within this Bill of Complaint for negligence, Nationwide can provide you with a full defense in this action. However, the insurance contracts with Nationwide do not provide coverage for the relief requested in this action, namely, plaintiff's attorney fees and costs, responsibility for funds which may have been paid for unauthorized purposes and/or which are not properly accounted for, and any and all damages or monetary relief resulting from any breach of fiduciary duties or depression in value of the trust estate, profit or such other damages as alleged within the Complaint. As such, while Nationwide will provide you with a defense in this case, this Company will deny payment of any judgment that may be obtained against you resulting from this incident and the allegations contained within this Bill of Complaint.

This defense will be handled under a Reservation of it's Rights to deny coverage under the insurance contracts and to deny payment of any judgment that may be obtained against you resulting from this incident. This Reservation of Rights is necessary as the aforesaid insurance contracts do not provide coverage for you as a result of your actions in this occurrence. Any acts, investigation, defense or offer of settlement made by this Company or by it's representative shall not be considered a waiver of rights by this Company.

P  
#A1 1439

NATIONWIDE MUTUAL INSURANCE COMPANY  
NATIONWIDE MUTUAL FIRE INSURANCE COMPANY  
NATIONWIDE LIFE INSURANCE COMPANY  
NATIONWIDE GENERAL INSURANCE COMPANY  
NATIONWIDE PROPERTY AND CASUALTY INSURANCE COMPANY

HOME OFFICE: COLUMBIA, MO 64101

800 GRAVES MILL ROAD  
P O. BOX 10869  
LYNCHBURG, VA 24506-0869



Page 2  
Suit File: 53-32270

It is requested that you fully cooperate with counsel in the defense of this action. and if you have any questions on this or any other matter, please do not hesitate to contact me.

Very truly yours,

Robert C. Wetzel  
Senior Claims Attorney

RCW/swc

cc: Katherine M. Fogarty, Esquire  
Miller, Miller, Kearney & Geschickter  
10400 Eaton Place, Suite 312  
Fairfax, VA 22030

A-2

CODE OR CATEGORY	ATTORNEY	DATE	HOURS	ADJUSTED BILLING TIME
NO CHARGE (NC)	FGM	10/16/96 (analyze ct file)	.2	35.00
RESEARCH TIME (RT) \$125 v \$145	FGM	10/23	2.7	54.00
RT	FGM	10/25	4.1	82.00
RT	FGM	10/28 (1/2)	2.7	54.00
RT	FGM	10/29 (1/2)	3.15	63.00
NC (filing)	FGM	10/29	1.0	175.00
RT	FGM	12/11	1.2	24.00
RT	FGM	12/12	4.3	86.00
RT	FGM	12/13	2.5	50.00
RT	FGM	12/16	1.6	32.00
RT	FGM	12/17	1.2	24.00
RT	FGM	12/18	1.0	20.00
RT	FGM	12/19	1.7	34.00
RT	FGM	12/20	1.0	20.00
RT	FGM	12/23	1.0	20.00
RT	FGM	12/23	1.0	20.00
RT	FGM	12/27	2.1	42.00
REDUCED RATE (RR) \$225 v \$175	MC3	12/27	1.1	55.00
RT	FGM	12/30	1.3	26.00
RR	MC3	12/30	2.1	105.00

RT	RGM	12/31	.9	18.00
SUBTOTAL ADJUST- MENTS	1/3/97 BILL AND 2/17/97 BILL			1,039.00
Fee/Expense adjustment*				1,407.00
TOTAL ADJUST- MENTS	1/3/97 BILL AND 2/17/97 BILL			<del>\$2,086.00</del> 2,446.00
RT	RGM	1/2/97	3.2	64.00
RR	MC3	1/3	2.7	135.00
RR	RGM	1/3	2.0	40.00
NC	RGM	1/3	.6	87.00
SUBTOTAL ADJUST- MENTS	3/13/97 BILL			326.00
Fee/Expense adjustment*	3/13/97 BILL			312.00
TOTAL ADJUST- MENTS	3/13/97 BILL			<b>\$638.00</b>
NC	RGM	2/14	.7	101.50
RR	RGM	2/27	1.0	20.00
RR	RGM	3/6	2.0	40.00
RR	RGM	3/11	.7	14.00
RR	RGM	3/13	2.1	42.00
RR	RGM	3/20	.5	10.00
RR	RGM	3/21	1.0	20.00
RR	RGM	3/21	1.2	24.00

RR	RGM	3/25	.5	10.00
SUBTOTAL ADJUST- MENTS	4/4/97 BILL			281.50
Fee/expense adjustment*	4/4/97 BILL			888.00
TOTAL ADJUST- MENTS	4/4/97 BILL			<b>\$1,169.50</b>
RR	RGM	4 / 1	2.4	48.00
RR	RGM	4 / 2	2.0	40.00
RR	RGM	4 / 3	2.0	40.00
RR	RGM	4 / 4	3.5	70.00
NC	RGM	4 / 4	.5	72.50
RR	RGM	4 / 7	1.0	20.00
RR	RGM	4 / 8	3.7	74.00
RR	RGM	4 / 9	4.6	92.00
SUBTOTAL ADJUST- MENTS	5/12/97 BILL			456.50
Fee/expense adjustment*	5/12/97 BILL			843.00
TOTAL ADJUST- MENTS	5/12/97 BILL			<b>\$1,299.50</b>
RR	RGM	5 / 2	- -	50.00
RR	MC3	5/15-6/17	7.1	355.00
SUBTOTAL ADJUST- MENTS	7/15/97 BILL			405.00
Fee/expense adjustment*	7/15/97 BILL			33.00

TOTAL ADJUST- MENTS	7/15/97 BILL			<b>\$438.00</b>
NC	FGM	7/14	.3	43.50
RR	MC3	7/17	.5	25.00
RR	FGM	7/17	2.3	46.00
RR	FGM	7/21	1.0	20.00
RR	FGM	7/22	1.0	20.00
RR	FGM	7/23	1.0	20.00
RR	FGM	7/24	2.7	54.00
NC	FGM	8/20	7.5	1,087.50
SUBTOTAL ADJUST- MENTS	9/14/97 BILL			1,316.00
Fee/expense adjustment*	9/14/97 BILL			1,902.00
TOTAL ADJUST- MENTS	9/14/97 BILL			<b>\$3,218.00</b>
RR	FGM	10/28	1.0	20.00
RR	FGM	10/29	3.2	64.00
SUBTOTAL ADJUST- MENTS	11/7/97 BILL			84.00
Fee/expense adjustment*	11/7/97 BILL			168.00
TOTAL ADJUST- MENTS	11/7/97 BILL			<b>\$252.00</b>
NC	FGM	11/4	4.4	638.00

PR	RGM	11/17	2.1	42.00
SUBTOTAL ADJUST- MENTS	12/12/97 BILL			680.00
Fee/expense adjustment*	12/12/97 BILL			36.00
TOTAL ADJUST- MENTS	12/12/97 BILL			<b>\$716.00</b>
PR	RGM	12/9	.3	6.00
SUBTOTAL ADJUST- MENTS	1/10/98 BILL			6.00
Fee/expense adjustment*	1/10/98 BILL			210.00
TOTAL ADJUST- MENTS	1/10/98 BILL			<b>\$216.00</b>
NC	RGM	1/2-1/7	24.5	3,552.50
PR	MC3	1/27	.6	30.00
NC	RGM	1/16-1/19	2.4	348.00
NC		1/2-1/23		1,200.00
PR	MC3	1/28	.6	30.00
NC	MC3	2/2	1.0	225.00
PR	RGM	2/2	1.0	20.00
NC		2/3-2/5		1,868.00
PR	MC3	2/5	6.6	330.00
PR	RGM	2/12	2.5	50.00
PR	RGM	2/13	4.3	86.00
PR	RGM	2/16	2.8	56.00
PR	RGM	2/17	1.5	30.00



NC	MC3	2/18	1.5	337.50
RR	RGM	2/18	4.6	92.00
RR	RGM	2/19	3.0	60.00
RR	RGM	2/20	3.7	74.00
NC	MC3	2/21	2.0	450.00
NC		2/16-2/21		2,550.00
RR	RGM	2/21	2.0	40.00
SUBTOTAL ADJUST- MENTS	3/6/98 BILL			11,429.00
Fee/expense adjustment*	3/6/98 BILL			3,357.00 875.50
TOTAL ADJUST- MENTS	3/6/98 BILL			<b>\$15,661.50</b>
*Incoming outgoing faxes				593.00
*associates hourly rate charge adjustment for non- research items	\$175 v \$145			9,749.00
*travel time to/fro library				725.00
*research time/insur- ance company				3,625.00

TOTAL ADJUST- MENTS ALL BILLS				<b>\$40,386.50</b> t
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**KASIMER & ITTIG, P.C.**

ATTORNEYS AT LAW

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—  
CABLE ADDRESS  
BUILDLAW

August 13, 1998

**VIA MESSENGER**

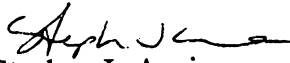
The Honorable Kathleen H. MacKay  
Judicial Chambers  
5th Floor  
4110 Chain Bridge Road  
Fairfax, Virginia 22030

**RE: Stepp v. Foster, et al.  
Chancery No. 146295**

Dear Judge MacKay:

Enclosed please find Exhibit A(3) to be substituted for the Exhibit presented at the hearing.

Very truly yours,

  
Stephen J. Annino

SJA:taf

Enclosure  
cc: Matthew Clary, Esq.

# EXHIBIT

A-3

ALL-STATE® INTERNATIONAL

Attorney	Rate	Date	Hours			
MC3	225	2-Aug	0.1	\$0.00		
MC3	225	5-Aug	0.7	\$0.00		
MC3	225	6-Aug	2.1	\$0.00		
MC3	225	7-Aug	0.4	\$0.00		
MC3	225	28-Aug	1.2	\$0.00		
MC3	225	16-Oct	4.0	\$0.00		
MC3	225	23-Oct	2.5	\$562.50		
MC3	225	29-Oct	0.6	\$0.00		
MC3	225	15-Nov	0.4	\$0.00		
MC3	225	3-Dec	0.1	\$22.50		
MC3	225	6-Dec	0.8	\$0.00		
MC3	225	11-Dec	0.3	\$67.50		
MC3	225	19-Dec	1.8	\$0.00		
MC3	225	20-Dec	1.3	\$0.00		
MC3	225	27-Dec	1.1	\$247.50		
MC3	225	31-Dec	2.1	\$472.50		
					\$1,372.50	19.5
MC3	225	3-Jan	2.7	\$607.50		
MC3	225	8-Jan	0.7	\$0.00		
MC3	225	16-Jan	0.3	\$0.00		
MC3	225	17-Jan	0.5	\$0.00		
MC3	225	23-Jan	0.5	\$112.50		
MC3	225	23-Jan	0.5	\$0.00		
MC3	225	31-Jan	0.5	\$0.00		
					\$720.00	5.7
MC3	225	7-Feb	0.6	\$0.00		
MC3	225	13-Mar	2.3	\$517.50		
MC3	225	14-Mar	0.6	\$135.00		
MC3	225	20-Mar	1.0	\$225.00		
MC3	225	24-Mar	0.3	\$67.50		
					\$945.00	4.8
MC3	225	2-Apr	5.6	\$1,260.00		
MC3	225	4-Apr	1.0	\$225.00		
MC3	225	11-Apr	4.7	\$1,057.50		
MC3	225	15-Apr	0.3	\$67.50		
					\$2,610.00	11.6
MC3	225	15-May	1.3	\$292.50		
MC3	225	16-May	0.3	\$67.50		
MC3	225	21-May	1.8	\$405.00		
MC3	225	27-May	1.6	\$360.00		
MC3	225	29-May	1.3	\$292.50		
MC3	225	4-Jun	0.5	\$112.50		
MC3	225	17-Jun	0.3	\$67.50		
					\$1,597.50	7.1
MC3	225	17-Jul	0.5	\$112.50		
MC3	225	11-Aug	0.5	\$112.50		
MC3	225	18-Aug	4.7	\$1,057.50		
MC3	225	19-Aug	8.7	\$1,957.50		
MC3	225	20-Aug	9.0	\$2,025.00		
MC3	225	25-Aug	0.3	\$67.50		
MC3	225	27-Aug	0.3	\$67.50		

					\$5,400.00	24.0
MC3	225	2-Sep	0.3	\$67.50		
MC3	225	9-Sep	0.5	\$112.50		
MC3	225	22-Sep	4.3	\$967.50		
MC3	225	23-Sep	7.3	\$1,642.50		
MC3	225	23-Sep	0.5	\$112.50		
MC3	225	24-Sep	8.5	\$1,912.50		
MC3	225	25-Sep	0.5	\$112.50		
					\$4,927.50	21.9
MC3	225	16-Oct	0.5	\$112.50		
MC3	225	17-Oct	1.5	\$337.50		
MC3	225	21-Oct	2.4	\$540.00		
MC3	225	22-Oct	0.2	\$45.00		
MC3	225	30-Oct	3	\$675.00		
MC3	225	31-Oct	3.5	\$787.50		
MC3	225	31-Oct	3.1	\$697.50		
					\$3,195.00	14.2
MC3	225	3-Nov	0.3	\$67.50		
MC3	225	4-Nov	5.6	\$1,260.00		
MC3	225	5-Nov	9.2	\$2,070.00		
MC3	225	5-Nov	0.5	\$112.50		
MC3	225	6-Nov	7.9	\$1,777.50		
MC3	225	13-Nov	0.3	\$67.50		
					\$5,355.00	23.8
MC3	225	1-Dec	3.9	\$877.50		
MC3	225	2-Dec	7.6	\$1,710.00		
MC3	225	3-Dec	10	\$2,250.00		
MC3	225	10-Dec	0.7	\$157.50		
MC3	225	16-Dec	5.2	\$1,170.00		
MC3	225	31-Dec	1.1	\$247.50		
					\$6,412.50	28.5
MC3	225	8-Jan	0.5	\$112.50		
MC3	225	8-Jan	0.3	\$67.50		
MC3	225	8-Jan	0.3	\$67.50		
MC3	225	15-Jan	0.5	\$112.50		
MC3	225	20-Jan	2.4	\$540.00		
MC3	225	20-Jan	0.7	\$157.50		
MC3	225	21-Jan	0.7	\$157.50		
MC3	225	22-Jan	4.5	\$1,012.50		
MC3	225	27-Jan	5.1	\$1,147.50		
MC3	225	27-Jan	0.6	\$135.00		
MC3	225	28-Jan	0.6	\$135.00		
MC3	225	29-Jan	0.7	\$157.50		
MC3	225	2-Feb	9.8	\$2,205.00		
MC3	225	3-Feb	0.5	\$112.50		
MC3	225	3-Feb	0.8	\$180.00		
MC3	225	5-Feb	6.6	\$1,485.00		
MC3	225	6-Feb	0.6	\$135.00		
MC3	225	6-Feb	6.5	\$1,462.50		
MC3	225	10-Feb	3.2	\$720.00		
MC3	225	12-Feb	2.7	\$607.50		
MC3	225	13-Feb	8.6	\$1,935.00		

MC3	225	14-Feb	6.8	\$1,530.00		
MC3	225	16-Feb	5.6	\$1,260.00		
MC3	225	17-Feb	9.2	\$2,070.00		
MC3	225	18-Feb	11.0	\$2,475.00		
MC3	225	19-Feb	1.0	\$225.00		
MC3	225	19-Feb	0.7	\$157.50		
MC3	225	20-Feb	11.6	\$2,610.00		
MC3	225	21-Feb	12.3	\$2,767.50		
MC3	225	22-Feb	9.6	\$2,160.00		
MC3	225	23-Feb	14.0	\$3,150.00		
MC3	225	24-Feb	16.0	\$3,600.00		
MC3	225	25-Feb	13.0	\$2,925.00		
MC3	225	26-Feb	9.8	\$2,205.00		
MC3	225	27-Feb	1.4	\$315.00		
MC3	225	28-Feb	6.3	\$1,417.50		
MC3	225	1-Mar	10.0	\$2,250.00		
MC3	225	2-Mar	14.7	\$3,307.50		
MC3	225	3-Mar	15.8	\$3,555.00		
MC3	225	4-Mar	4.9	\$1,102.50		
<b>TOTAL HRS</b>			391		\$51,727.50	229.9
<b>GRAND TOTAL:</b>				\$84,262.50		

RGM	175	16-Oct	0.2	\$35.00		
RGM	175	24-Oct	2.7	\$472.50		
RGM	175	25-Oct	4.1	\$717.50		
RGM	175	28-Oct	5.4	\$945.00		
RGM	175	29-Oct	6.3	\$1,102.50		
RGM	175	11-Dec	1.4	\$245.00		
RGM	175	12-Dec	4.3	\$752.50		
RGM	175	13-Dec	2.5	\$437.50		
RGM	175	16-Dec	1.6	\$280.00		
RGM	175	17-Dec	1.2	\$210.00		
RGM	175	18-Dec	1.5	\$262.50		
RGM	175	19-Dec	2.7	\$472.50		
RGM	175	20-Dec	4.1	\$717.50		
RGM	175	23-Dec	2.4	\$420.00		
RGM	175	23-Dec	1.3	\$227.50		
RGM	175	27-Dec	2.1	\$367.50		
RGM	175	30-Dec	1.3	\$227.50		
RGM	175	31-Dec	1.8	\$315.00		
					\$8,207.50	46.9
RGM	175	2-Jan	3.2	\$560.00		
RGM	175	3-Jan	2.6	\$455.00		
RGM	175	16-Jan	1.4	\$245.00		
RGM	175	17-Jan	3.2	\$560.00		
					\$1,820.00	10.4
RGM	175	3-Feb	0.4	\$70.00		
RGM	175	6-Feb	2.1	\$367.50		
RGM	175	14-Feb	0.7	\$122.50		
RGM	175	26-Feb	3.7	\$647.50		
RGM	175	27-Feb	1.6	\$280.00		
RGM	175	6-Mar	2.3	\$402.50		
RGM	175	10-Mar	0.8	\$140.00		
RGM	175	11-Mar	1.4	\$245.00		
RGM	175	12-Mar	2.1	\$367.50		
RGM	175	13-Mar	1.7	\$297.50		
RGM	175	14-Mar	3.6	\$630.00		
RGM	175	17-Mar	2.3	\$402.50		
RGM	175	18-Mar	1.8	\$315.00		
RGM	175	19-Mar	0.3	\$52.50		
RGM	175	20-Mar	1.4	\$245.00		
RGM	175	21-Mar	1.5	\$262.50		
RGM	175	24-Mar	1.2	\$210.00		
RGM	175	25-Mar	0.7	\$122.50		
					\$5,180.00	29.6
RGM	175	1-Apr	2.6	\$455.00		
RGM	175	2-Apr	4.3	\$752.50		
RGM	175	3-Apr	4.8	\$840.00		
RGM	175	4-Apr	4.5	\$787.50		
RGM	175	7-Apr	3.4	\$595.00		
RGM	175	8-Apr	3.7	\$647.50		
RGM	175	9-Apr	4.6	\$805.00		
RGM	175	30-Apr	0.2	\$35.00		
					\$4,917.50	28.1

RGM	175	2-May	0.7	\$122.50		
RGM	175	9-May	0.4	\$70.00		
					\$192.50	1.1
RGM	175	11-Jul	2.1	\$367.50		
RGM	175	14-Jul	1.7	\$297.50		
RGM	175	16-Jul	1.5	\$262.50		
RGM	175	17-Jul	2.6	\$455.00		
RGM	175	18-Jul	2.3	\$402.50		
RGM	175	21-Jul	3.1	\$542.50		
RGM	175	22-Jul	2.8	\$490.00		
RGM	175	23-Jul	2.4	\$420.00		
RGM	175	24-Jul	3.2	\$560.00		
RGM	175	25-Jul	3.0	\$525.00		
RGM	175	28-Jul	4.1	\$717.50		
RGM	175	29-Jul	1.3	\$227.50		
RGM	175	30-Jul	3.4	\$595.00		
RGM	175	31-Jul	4.2	\$735.00		
RGM	175	1-Aug	4.1	\$717.50		
RGM	175	4-Aug	3.2	\$560.00		
RGM	175	5-Aug	0.4	\$70.00		
RGM	175	6-Aug	1.7	\$297.50		
RGM	175	7-Aug	2.5	\$437.50		
RGM	175	8-Aug	5.3	\$927.50		
RGM	175	11-Aug	5.8	\$1,015.00		
RGM	175	12-Aug	0.5	\$87.50		
RGM	175	18-Aug	2.3	\$402.50		
					\$11,112.50	63.5
RGM	175	17-Oct	0.5	\$87.50		
RGM	175	28-Oct	1.6	\$280.00		
RGM	175	29-Oct	3.2	\$560.00		
RGM	175	30-Oct	0.3	\$52.50		
					\$980.00	5.6
RGM	175	3-Nov	1.2	\$210.00		
RGM	175	4-Nov	4.4	\$770.00		
RGM	175	6-Nov	0.4	\$70.00		
RGM	175	17-Nov	2.1	\$367.50		
					\$1,417.50	8.1
RGM	175	1-Dec	0.5	\$87.50		
RGM	175	2-Dec	0.2	\$35.00		
RGM	175	3-Dec	0.2	\$35.00		
RGM	175	4-Dec	0.3	\$52.50		
RGM	175	9-Dec	0.3	\$52.50		
RGM	175	18-Dec	0.6	\$105.00		
RGM	175	23-Dec	1.2	\$210.00		
RGM	175	31-Dec	3.7	\$647.50		
					\$1,225.00	7.0
RGM	175	2-Jan	5.4	\$945.00		
RGM	175	5-Jan	6.1	\$1,067.50		
RGM	175	6-Jan	7.3	\$1,277.50		
RGM	175	7-Jan	5.7	\$997.50		
RGM	175	8-Jan	0.3	\$52.50		
RGM	175	9-Jan	1	\$175.00		



RGM	175	14-Jan	0.4	\$70.00		
RGM	175	16-Jan	1.6	\$280.00		
RGM	175	19-Jan	0.8	\$140.00		
RGM	175	20-Jan	3.2	\$560.00		
RGM	175	21-Jan	2.7	\$472.50		
RGM	175	22-Jan	3.5	\$612.50		
RGM	175	23-Jan	3.1	\$542.50		
RGM	175	29-Jan	1.2	\$210.00		
RGM	175	30-Jan	3.7	\$647.50		
RGM	175	2-Feb	2.6	\$455.00		
RGM	175	3-Feb	1.3	\$227.50		
RGM	175	4-Feb	0.6	\$105.00		
RGM	175	5-Feb	0.8	\$140.00		
RGM	175	10-Feb	1.4	\$245.00		
RGM	175	11-Feb	0.7	\$122.50		
RGM	175	12-Feb	2.5	\$437.50		
RGM	175	13-Feb	4.3	\$752.50		
RGM	175	16-Feb	3.8	\$665.00		
RGM	175	17-Feb	3.1	\$542.50		
RGM	175	18-Feb	4.6	\$805.00		
RGM	175	19-Feb	5.2	\$910.00		
RGM	175	20-Feb	4.7	\$822.50		
RGM	175	21-Feb	3.4	\$595.00		
RGM	175	22-Feb	5.3	\$927.50		
RGM	175	23-Feb	2.1	\$367.50		
RGM	175	24-Feb	4.2	\$735.00		
RGM	175	25-Feb	3.5	\$612.50		
RGM	175	26-Feb	2.8	\$490.00		
RGM	175	27-Feb	1.3	\$227.50		
RGM	175	1-Mar	4.6	\$805.00		
RGM	175	2-Mar	3.2	\$560.00		
				\$19,600.00	112.0	
<b>GRAND TOTAL:</b>				\$54,652.50		
<b>TOTAL HOURS:</b>				312.3		

RML	30	3-Jan	0.8	\$24.00			
RML	30	7-Jan	0.3	\$9.00			
RML	30	8-Jan	0.2	\$6.00			
RML	30	13-Jan	0.5	\$15.00			
RML	30	16-Jan	0.4	\$12.00			
					\$66.00	2.2	
RML	30	3-Apr	2.5	\$75.00			
RML	30	3-Apr	0.3	\$9.00			
RML	30	4-Apr	1.3	\$39.00			
RML	30	4-Apr	0.3	\$9.00			
RML	30	7-Apr	0.3	\$9.00			
RML	30	8-Apr	0.5	\$15.00			
RML	30	8-Apr	0.2	\$6.00			
RML	30	8-Apr	0.2	\$6.00			
RML	30	23-Apr	0.2	\$6.00			
RML	30	30-Apr	1.5	\$45.00			
					\$219.00	7.3	
RML	30	21-May	0.3	\$9.00			
					\$9.00	0.3	(NOT CHARGED)
RML	30	8-Jul	1.0	\$30.00			
RML	30	14-Jul	0.8	\$24.00			
RML	30	25-Jul	0.8	\$24.00			
RML	30	28-Jul	0.5	\$15.00			
RML	30	30-Jul	0.4	\$12.00			
RML	30	31-Jul	2.5	\$75.00			
RML	30	31-Jul	0.4	\$12.00			
RML	30	4-Aug	1.5	\$45.00			
RML	30	18-Aug	0.3	\$9.00			
					\$246.00	8.2	
TOTAL HF			18				

LRC	75	22-Oct	4.4	\$330.00		
LRC	75	23-Oct	5.6	\$420.00		
LRC	75	24-Oct	3.3	\$247.50		
LRC	75	27-Oct	2.7	\$202.50		
<b>TOTAL HRS</b>			16	\$1,200.00		16

71-61

## Fee and Expense Analysis

Billing Date		Date Service Provided	Hourly Charge	Hourly rate adjustment
3-Jan-97		16-Oct	0.2	
		24-Oct	2.7	
		25-Oct	4.1	
		28-Oct	5.4	
		29-Oct	6.3	
		11-Dec	1.4	
		12-Dec	4.3	
		13-Dec	2.5	
		16-Dec	1.6	
		17-Dec	1.2	
		18-Dec	1.5	
		19-Dec	2.7	
		20-Dec	4.1	
		23-Dec	2.4	
		23-Dec	1.3	
		27-Dec	2.1	
		30-Dec	1.3	
		31-Dec	1.8	
		Total	46.9	\$1,407.00
13-Mar-97		2-Jan	3.2	
		3-Jan	2.6	
		16-Jan	1.4	
		17-Jan	3.2	
		Total	10.4	\$312.00

# Fee and Expense Analysis

Billing Date		Date Service Provided	Hourly Charge	Hourly rate adjustment
4-Apr-97		3-Feb	0.4	
		6-Feb	2.1	
		14-Feb	0.7	
		26-Feb	3.7	
		27-Feb	1.6	
		6-Mar	2.3	
		10-Mar	0.8	
		11-Mar	1.4	
		12-Mar	2.1	
		13-Mar	1.7	
		14-Mar	3.6	
		17-Mar	2.3	
		18-Mar	1.8	
		19-Mar	0.3	
		20-Mar	1.4	
		21-Mar	1.5	
		24-Mar	1.2	
		25-Mar	0.7	
		Total	29.6	\$888.00
12-May-97		1-Apr	2.6	
		2-Apr	4.3	
		3-Apr	4.80	
		4-Apr	4.50	
		7-Apr	3.40	
		8-Apr	3.70	
		9-Apr	4.60	
		30-Apr	0.20	
		Total	28.10	\$843.00
15-Jul-97		2-May	0.7	
		9-May	0.4	
		Total	1.1	\$33.00

# Fee and Expense Analysis

Billing Date		Date Service Provided	Hourly Charge	Hourly rate adjustment
14-Sep-97		11-Jul	2.1	
		14-Jul	1.7	
		16-Jul	1.5	
		17-Jul	2.6	
		18-Jul	2.3	
		21-Jul	3.1	
		22-Jul	2.8	
		23-Jul	2.3	
		24-Jul	3.2	
		25-Jul	3	
		28-Jul	4.1	
		29-Jul	1.3	
		30-Jul	3.4	
		31-Jul	4.2	
		1-Aug	4.1	
		4-Aug	3.2	
		5-Aug	0.4	
		6-Aug	1.7	
		7-Aug	2.5	
		8-Aug	5.3	
		11-Aug	5.8	
		12-Aug	0.5	
		18-Aug	2.3	
		Total	63.4	\$1,902.00
7-Nov-97		17-Oct	0.5	
		28-Oct	1.6	
		29-Oct	3.2	
		30-Oct	0.3	
		Total	5.6	\$168.00
12-Dec-97		3-Nov	1.2	
		4-Nov	4.4	
		6-Nov	0.4	
		17-Nov	2.1	
		Total	8.1	\$36.00

# Fee and Expense Analysis

Billing Date		Date Service Provided	Hourly Charge	Hourly rate adjustment
10-Jan-98		1-Dec	0.5	
		2-Dec	0.2	
		3-Dec	0.2	
		4-Dec	0.3	
		9-Dec	0.3	
		18-Dec	0.6	
		23-Dec	1.2	
		31-Dec	3.7	
		Total	7	\$210.00
6-Mar-98		2-Jan	5.4	
		5-Jan	6.1	
		6-Jan	7.3	
		7-Jan	5.7	
		8-Jan	0.3	
		9-Jan	1	
		14-Jan	0.4	
		16-Jan	1.6	
		19-Jan	0.8	
		20-Jan	3.2	
		21-Jan	2.7	
		22-Jan	3.5	
		23-Jan	3.1	
		29-Jan	1.1	
		30-Jan	3.7	
		2-Feb	2.6	
		3-Feb	1.3	
		4-Feb	0.6	
		5-Feb	0.8	
		9-Feb	1.4	
		11-Feb	0.7	
		12-Feb	2.5	
		13-Feb	4.3	
		16-Feb	3.8	
		17-Feb	3.1	
		18-Feb	4.6	
		19-Feb	5.2	
		20-Feb	4.7	
		21-Feb	3.4	
		22-Feb	5.3	
		23-Feb	2.1	
		24-Feb	4.2	
		25-Feb	3.5	

# Fee and Expense Analysis

Billing Date		Date Service Provided	Hourly Charge	Hourly rate adjustment
		25-Feb	2.8	
		27-Feb	1.3	
		1-Mar	4.6	
		2-Mar	3.2	
		Total	111.9	\$3,357.00
			Sub Total	\$9,156.00
		Incoming Outgoing Fax Charges	Sub Total	\$593.00
			Grand Total	\$9,749.00



A-5

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GAIL STEPP, <i>ET AL.</i> ,	)	
	)	
Complainant,	)	
v.	)	Chancery No. 146295
	)	
JAMES A. FOSTER, <i>ET AL.</i> ,	)	
	)	
Defendants.	)	

**REVISED COUNTER AFFIDAVIT IN OPPOSITION TO AWARD  
OF ATTORNEYS FEES FOR DEFENDANTS FOSTER, LEAR AND WRIGHT\***

The Affiant, Stephen J. Annino, being duly sworn, deposes and states as follows:

1. I am a principal in the law firm of Kasimer & Ittig, P.C. and served as counsel for complainants in connection with the above-styled litigation.

2. I have reviewed the invoices and billings which detail and describe the nature of the legal services performed by Clary & Moore, P.C.

3. The attorneys fees alleged to have been charged are three times the attorneys fees incurred by the complainants and five times the attorneys fees incurred by the co-defendant. Given the nature of the case, and the interest involved, the fees charged are beyond those which would be normal, reasonable or expected in a case of this type.

4. The defendant's conduct in connection with depositions which were held in the case forced the complainants to seek a protective order from the court which was partly granted by limiting depositions to six hours. See Exhibit #2. The motion was filed after the defendant conducted its first deposition in the case of Ralph Edwards which spanned a period of three days and was not concluded.

5. The complainants also raised defenses in interrogatory answers which had already been ruled upon by the court and caused all parties to incur expenses associated with motions to eliminate those defenses which had to be filed by the complainant and were granted by the court. One of these defenses had to do with the issue of the Attorney General being a necessary party to this litigation. This defense was raised after an earlier hearing had been held at the behest of the defendants in which they insisted that

\*Filed to clarify original paragraph 4 and to correct typographical error in paragraph 5, page 2 of original Affidavit.

all lot owners be joined as necessary parties to the litigation. The trustees also challenged on more than one occasion procedural aspects of allowing service on lot owners to be made by Order of Publication. Repeatedly asserting positions already covered by the court needlessly increased the cost of the litigation. See, Demurrer and Motion to Quash Service by Publication filed February 27, 1997, Decree dated January 17, 1997.

6. The billings include representation and time spent in representing Carol Ann Wright, who was not sued in her capacity as trustee because no trustees deed appointing her a trustee had been recorded at the time the Complaint or Amended Bill of Complaint were filed. In fact, no trustees deed was filed with the County until late January of 1998. The time spent from January 2, 1998 through January 9, 1998 appear to relate primarily with representation of Ms. Wright.

7. Time spent in connection with researching the issue of the Attorney General as a necessary party, analyzing research regarding necessary party and preparing briefs and opposition to the partial summary judgment motion concerning excluding the defense of the Attorney General as a necessary party should not be charged because the issues involving who are necessary parties were previously raised, briefed and determined early on in the litigation. Accordingly, time spent in January of 1998 concerning these issues should not be chargeable.

8. The billings from Clary & Moore reflect an intimate involvement of Mr. Clary in the defense of BBCAI. In fact, prior to the complaint being filed, the association initially directed me to direct any further inquiries to Mr. Clary. The billings are replete with incidences where Mr. Clary and/or Moore are meeting with Mr. Tolchin to review documents and potential exhibits furnished by BBCAI (2/5/98) and preparing expert witness testimony of Piatrioni (an expert witness proffered by BBCAI whose testimony was largely irrelevant and of little assistance to the court). These conferences are referenced on 2/17/98, 2/20/98, 2/21/98. The billings also reflect an expert witness fee paid to Piatrioni on 3/6/98 in the amount of \$875.50. Mrs. Piatrioni was called as an expert witness by BBCAI.

9. The billings also reflect time spent and services spent in connection with drafting the deed of substitution for appointment of Ms. Wright and Dr. Polifko and conferences with Jim Foster regarding issues relating to the trustee's meeting held in late January of 1998. See entries on January 20, 1998.


January 21, 1998. These services would have been required to be performed regardless of this litigation and are not properly chargeable to the trust.

10. There appear to be discrepancies in the billings from Mr. Clary as compared to the billings from Mr. Tolchin. For example, Mr. Clary's entries on 10/31/97 indicate telephone conference w/Mr. Tolchin and time spent of 3.10 hours. There is no corresponding entry for Mr. Tolchin on 10/31/97. On 2/5/98, Mr. Clary's billings indicate a meeting of Mr. Tolchin in review of BBICA documents and time spent of 6.60 hours. Mr. Tolchin's entries of the same day indicate meeting with Mr. Clary for 2.5 hours.

11. There is no indication from the billings how any of the work performed by Mr. Clary benefitted the trust as opposed to Mr. Foster personally, and the hours and time expended are in my opinion, unreasonable.


12. The means for compensation to Mr. Clary for his services exists by virtue of the insurance policy which is in force and effect covering Mr. Foster and as referenced in the motions filed by Katherine Fogarty in this case attached as Exhibit 1. Upon information and belief, BBICA has also in place an obligation to indemnify the trustees from costs incurred in connection with the litigation and established a legal defense fund to pay attorneys fees. Given these sources of compensation, I believe it would be inequitable for the court to allow Mr. Clary to recover his attorneys fees from the Stepps or Edwards.

And further the Affiant sayeth not.

  
Stephen J. Annino

COMMONWEALTH OF VIRGINIA  
CITY/COUNTY OF Fairfax, TO WIT:

Subscribed and sworn to before me, the undersigned Notary Public, this 24<sup>th</sup> day of March, 1998.

  
Notary Public

My Commission expires: 12-31-98

# **EXHIBIT 1**

V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

GAIL STEPP, Individually and  
as Trustee, et al.,

Plaintiffs,

vs.

Chancery No. C146295

JAMES A. FOSTER, Individually  
and as Trustee, et al.,

Defendants.

NOTICE

TO: JAMES A. FOSTER  
7454 Belmont Landing Road  
Mason Neck, Virginia 22079

PLEASE TAKE NOTICE that on Friday, January 9, 1998 at 10:00  
a.m. or as soon thereafter as counsel may be heard, Katherine M.  
Fogarty will move for leave to withdraw as counsel for James A.  
Foster, Individually and as Trustee, pursuant to the attached  
motion. This notice is given to you for such action as you deem  
appropriate.

MILLER, MILLER, KEARNEY & GESCHICKTER, L.L.P.  
10400 Eaton Place, Suite 312  
Fairfax, Virginia 22030  
(703) 218-1300  
(703) 218-1303 - Facsimile  
Virginia State Bar No. 30787

By:   
Katherine M. Fogarty

I HEREBY CERTIFY that a true copy of the foregoing was  
mailed, postage prepaid, December 10, 1997 to:


Matthew A. Clary, III  
10306 Eaton Place, Suite 240  
Fairfax, Virginia 22030

MILLER, MILLER, KEARNEY & GESCHICKTER, LLP

ATTORNEYS AT LAW  
10400 EATON PLACE, SUITE 312  
FAIRFAX, VIRGINIA 22030  
(703) 218-1300

Joseph H. Kasimer  
Stephen J. Annino  
7653 Leesburg Pike  
Falls Church, Virginia 22043

James A. Foster  
7454 Belmont Landing Road  
Mason Neck, Virginia 22079-3820



Katherine M. Fogarty

V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

GAIL STEPP, Individually and  
as Trustee, et al.,

Plaintiffs,

vs.

Chancery No. C146295

JAMES A. FOSTER, Individually  
and as Trustee, et al.,

Defendants.

MOTION TO WITHDRAW

COMES NOW Katherine M. Fogarty, and moves this Court for entry of an order granting her leave to withdraw as counsel for the defendant James A. Foster, Individually and as Trustee, and states as her grounds as follows:

1. This is an action seeking declaratory relief as well as monetary damages. Certain allegations contained in the Bill of Complaint and Amended Bill of Complaint filed herein triggered a defense of this action under a policy of insurance that James A. Foster has with Nationwide Insurance Company. Based on these allegations, this case was referred to Katherine M. Fogarty by Nationwide Insurance Company to defend their insured, James A. Foster.

2. Based on this referral and with the agreement of James A. Foster, Katherine M. Fogarty entered an appearance as additional counsel for Mr. Foster in this case. Mr. Foster was at that time and continues to be represented by attorney Matthew Clary.

3. Attorney Matthew Clary later advised Ms. Fogarty that

Mr. Foster wished to have Mr. Clary continue to represent him and that Ms. Fogarty's services were not needed or desired.

4. Although Ms. Fogarty has been counsel of record in this case, Mr. Clary has failed to copy Ms. Fogarty with any pleadings, discovery, notices, etc., filed in this case and she has not received any copies of pleadings from plaintiff's counsel since May 9, 1997.

WHEREFORE, for the foregoing reasons, Katherine M. Fogarty respectfully requests that she be granted leave to withdraw as counsel on behalf of James A. Foster in this matter.

MILLER, MILLER, KEARNEY & GESCHICKTER, L.L.P.  
10400 Eaton Place, Suite 312  
Fairfax, Virginia 22030  
(703) 218-1300  
(703) 218-1303 - Facsimile  
Virginia State Bar No. 30787

By: 

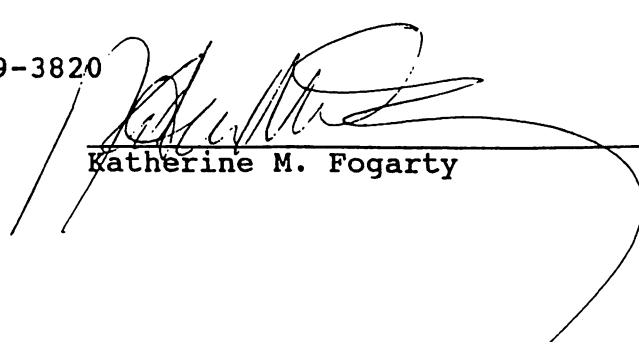
Katherine M. Fogarty

I HEREBY CERTIFY that a true copy of the foregoing was mailed, postage prepaid, December 10, 1997 to:

Matthew A. Clary, III  
10306 Eaton Place, Suite 240  
Fairfax, Virginia 22030

Joseph H. Kasimer  
Stephen J. Annino  
7653 Leesburg Pike  
Falls Church, Virginia 22043

James A. Foster  
7454 Belmont Landing Road  
Mason Neck, Virginia 22079-3820

  
Katherine M. Fogarty



## **EXHIBIT 2**

97 OCT 22 16:11:16  
UNTY

CLE: [REDACTED] HOUR: [REDACTED]

**Chancery No. 146295**

**Defendants.**

**COME NOW Complainants, Gail Stepp and Marie Stepp, by counsel, and respond to the Motion to Compel Depositions filed by the Defendants, Foster, Lear and Wright, as set forth below:**

The Defendants' motion seeks to require all of the Complainants to submit to depositions before the Complainants are allowed to conduct depositions of their own. The Defendants then request the Court to assist them in subjecting the Complainants to extremely burdensome and harassing techniques in the conduct of those depositions. For obvious reasons, the Court should not entertain the Defendants' motion and should grant Complainants' appropriate relief in the form of a protective Order.

A. THE DEFENDANTS ARE NOT ENTITLED TO TAKE ALL OF THE COMPLAINANTS' DEPOSITIONS BEFORE COMPLAINANT IS ALLOWED TO TAKE ANY DEPOSITIONS.

Depositions in this case were initially unilaterally scheduled by the Defendants in which they sought to conduct all four depositions on the same day. Complainants objected to the taking of all four depositions on the same day, as well as the manner in which Defendants sought the production of documents. A copy of the Response and Objection is attached as Exhibit "1".<sup>1</sup>

The Deposition Notice contained broad definitions of terms and requested that documents "supporting, evidencing, referring, concerning or relating" to various sub-categories be produced.<sup>2</sup> At the deposition, counsel insisted on the witness picking out each document from the box of documents that were responsive to the numerous sub-categories of requests, marking each document as an exhibit and asking numerous questions about each one.<sup>3</sup> It was pointed out to counsel that an objection had been filed to the production and that documents had been produced in the ordinary course of affairs and could not be segregated any further because of the broad definitions given in each of the requests. The depositions of the first Complainant continued for a period of three days. The second Complainant was deposed for an additional day and the same techniques were used.

The Complainants, Gail and Marie Stepp, were initially noticed for deposition on July 22, 1997, but because of counsel's scheduling requirements and the unexpected death of their son, the depositions were postponed indefinitely. At the deposition of Ralph and Patty Edwards,

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<sup>1</sup>The Notice of Deposition was 19 pages long and contained 13 categories of documents, the first of which contained 29 subparts.

<sup>2</sup>See, e.g., Deposition Notice at Page 9 for definitions of referring or relating to.

<sup>3</sup>Even after numerous days of deposition, counsel had not reviewed all the documents and would read the content of many as the witness waited for questions.

new dates of deposition for the Stepps, as well as deposition dates for Lear and Foster, were discussed. Counsel's understanding was that the dates of October 1, 13 and 17 were available on counsel's calendar for Foster and Lear's deposition and that counsel would check with his clients concerning their availability on those dates. After clearing the dates of October 1, 13 and 17 on counsel's calendar, Complainant sent deposition notices.<sup>4</sup> See, Exhibit "2" attached.

Notwithstanding the fact that Mr. Foster and Mr. Lear are retired, after discussing a deposition schedule, counsel refused to give a date in October for Mr. Lear's deposition and would not confirm Mr. Foster's availability on October 17. Correspondence concerning these issues is attached as Exhibit "3". Although deposition dates of October 30 and 31 were discussed for the Stepps depositions, it was not counsel's intention to finalize dates until the dates for Defendants' depositions were agreed upon. Since the initial discussion, subsequent events have made the dates of October 30 and 31 inappropriate for the Stepps deposition.<sup>5</sup> Counsel has now refused to cooperate in the scheduling of these depositions. See, Exhibit "4".

The deposition dates of Foster and Lear came and went without any appearance at the depositions or any agreed upon date for a continuance of the depositions. This failure to appear was not excused. See, Exhibit "3". It is apparent from these events that counsel was intent all

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<sup>4</sup>Counsel assumed Mr. Clary knew October 13 was a Federal holiday when the date was agreed upon. Counsel for Complainant worked a full day on the 13th and assumed counsel would do likewise.

<sup>5</sup>The Stepps are the owners of a contracting business whose fiscal year ends October 31, 1997. Mrs. Stepp was ill for three weeks in late September and early October and has had to reschedule numerous business appointments and attend to items of business which must be concluded by October 31, 1997. In addition, counsel's calendar has changed and matters rescheduled due to Defendants' failure to appear at depositions.

along on refusing to make his clients available for deposition until after all the Complainants were deposed.

It is well settled that there is no priority given in discovery matters. See, Rule 4:1(d) Rules of the Supreme Court of Virginia. Discovery can be conducted in any order and one does not have to wait until the other side is finished conducting depositions before depositions of opposing witnesses are conducted.

**B. THE DEFENDANTS' DEPOSITION CONDUCT IS UNDULY BURDENSOME AND HARASSING.**

It is also well settled that the Court may grant a party relief from depositions which are unduly burdensome or are conducted in an improper and harassing manner. The Defendants' depositions in this case go well beyond what should be expected and the Defendants should be ordered to cease and desist their harassing tactics. Defendants production of documents at the depositions have been in accordance with the Notice of Deposition and the Rules of Court.<sup>6</sup>

The Defendants are not entitled to a stay of discovery until they have concluded their discovery. The Defendants are also not entitled to have documents segregated in the manner and using the harassing tactics that have been displayed to date. Consequently, the Court should deny the relief requested and order the Defendants to (a) cease and desist their harassing tactics; (b) to limit Defendants' deposition of Complainants to no more than six hours per deponent; (c) to cooperate in the scheduling of depositions; (d) to reimburse Complainant for attorney's fees expended in connection with this motion; and, (e) for such other and further relief as the Court

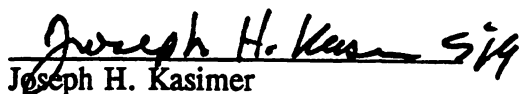
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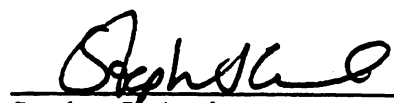
<sup>6</sup>At the deposition of Patty Edwards, notwithstanding the fact that it is not a requirement, a more methodical attempt was made to categorize which document was produced in response to which category or sub-category of documents that were requested. By doing so, Plaintiffs have not waived and, do not waive, the objections previously filed.

deems necessary.

GAIL STEPP, INDIVIDUALLY AND  
AS TRUSTEE, ET AL.  
By Counsel

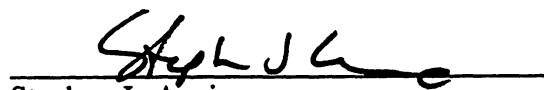
KASIMER & ITTIG, P.C.

  
Joseph H. Kasimer

  
Stephen J. Annino  
7653 Leesburg Pike  
Falls Church, Virginia 22043  
(703) 893-3914

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was mailed, via first class mail, postage prepaid, this 21<sup>st</sup> day of October, 1997 to Edward J. Tolchin, Esquire, Fettmann, Tolchin & Majors, P.C., 10615 Judicial Drive, Suite 502, Fairfax, Virginia 22030-7501 and Matthew Clary, Esquire, Clary & Moore, P.C., 10306 Eaton Place, Suite 240, Fairfax, Virginia 22030.

  
Stephen J. Annino

S13/stepp/response.2/sfc

Law Offices

**HOLLAND & KNIGHT LLP**

**3110 Fairview Park Drive  
Suite 900  
Falls Church, Virginia 22042**

**703-645-8600  
FAX 703-645-8610**

Atlanta	New York
Boca Raton	Orlando
Fort Lauderdale	San Francisco
Jacksonville	St. Petersburg
Lakeland	Tallahassee
Melbourne	Tampa
Mexico City	Washington, D.C.
Miami	West Palm Beach

**FACSIMILE**

TO:

**Stephen Annino, Esq. Kasimer & Ittig**  
NAME COMPANY/FIRM

CITY STATE

(703) 893-8944  
FAX NUMBER TELEPHONE NUMBER

FROM:

**Matthew A. Clary, III (703) 645-8670**  
NAME TELEPHONE NUMBER

**4**  
TOTAL NUMBER OF PAGES

MESSAGE:

If you did not receive all of the pages or find that they are illegible, please call

**(703) 645-8600**

**CONFIDENTIALITY NOTE:**

The following facsimile is intended solely for the use of the individual to whom it is addressed and may contain information that is privileged, confidential, or otherwise exempt from disclosure under applicable law. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via the U.S. Postal service. Thank you.

FOR THE RECORD:

DATE: **August 10, 1998**

URGENCY: ☐ SUPER RUSH ☐ RUSH ☐ REGULAR

FXED BY: AMOUNT:

FILE #: CLIENT NAME:

CONFIRMED: ☐ YES ☐ NO NAME: TIME:

CP DNF-EX. #A-6  
DATE 8-12-98  
FAXED KRM  
FILE # C146295

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GAIL STEPP, et al.

Plaintiffs,

vs.

JAMES A. FOSTER, et al.

Defendants.

In Chancery No. 146295

DEFENDANTS JAMES A. FOSTER'S  
AND CAROLANN WRIGHT'S SUPPLEMENTAL RESPONSE  
TO PLAINTIFFS' INTERROGATORIES AND  
REQUEST FOR PRODUCTION OF DOCUMENTS

COMES NOW Defendants James A. Foster and Carolann Wright, and for their supplemental responses to Plaintiffs' Interrogatories, state as follows:

I. Response To Interrogatories

1. As to any person whom you expect to call as an expert witness at the scheduled August 12, 1998 hearing:

- a. Fully identify the expert;
- b. State the subject matter on which the expert is expected to testify; and
- c. State the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

ANSWER:


Based upon the expert designation received from Plaintiffs as supplemented on August 7, 1998, Defendants' expect to call Charles B. Molster, Winston & Strawn, 1400 L Street, N.W., Washington, D.C. 20005, to testify concerning the amount and reasonableness of the attorney's fees



and expenses incurred by the three trustee Defendants in this case. The substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion is that based on the witness' extensive experience in litigation (including recent litigation involving a charitable trust), a review of the bills, pleadings, transcripts, discovery and other documents in the case, including the Court's ruling, a review of the issues and proof required and the nature of the litigation and interview of Defendants' counsel, the fees charged were reasonable; that the available resources in the case were managed effectively and efficiently; that for comparable litigation in the jurisdiction, the fees of the attorneys in the case were reasonable; that no instances of "double-billing" or duplicative charges appear from the bills; that the use of and charges for paralegal time were appropriate and generous; that the intra-office communications were neither extensive nor inappropriate; charges for incoming faxes and outgoing faxes and in-house duplicating charges are customary and appropriate. Furthermore, the cost of the litigation was not increased by tasks not directly related to the litigation, communications concerning insurance coverage issues, or Defendants' discovery tactics and/or "nonselectivity in the presentation of issues for court resolution" as asserted by Plaintiffs. Defendants' attorney's fees were increased by virtue of Plaintiffs' pretrial and trial tactics.

Mr. Molster's curriculum vitae detailing his background is attached.

HOLLAND & KNIGHT LLP



Matthew A. Clary, III, Esquire  
Virginia State Bar No. 12041  
3110 Fairview Park Drive, Suite 900  
Fall Church, Virginia 22042  
(703) 645-8600  
Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that, a true copy of the foregoing Supplemental Response to Plaintiffs' Interrogatories and Request for Production of Documents was faxed and mailed, this 10<sup>th</sup> day of August 1998 to the following counsel of record:

Joseph H. Kasimer, Esquire  
Stephen J. Annino, Esquire  
Kasimer & Ittice, P.C.  
7653 Leesburg Pike  
Falls Church, VA 22043

Edward J. Tolchin, Esquire  
Fettman, Tolchin & Major, P.C.  
10615 Judicial Drive, Suite 502  
Fairfax, Virginia 22030



Matthew A. Clary, III

EX 1

Post 11/11/97

B-1 - A66D + B, 11

B-2 - 2nd A66D + B, 11

CLARY & MOORE, P.C.  
10306 Eaton Place  
Suite 240  
Fairfax, Virginia 22030  
STATEMENT FOR THE BILLING PERIOD:  
AUGUST 1, 1996 - DECEMBER 31, 1996

FOSTER, LEAR AND WRIGHT, TRUSTEES  
c/o JAMES E. FOSTER  
7554 BELMONT LANDING ROAD  
MASON NECK, VA 22079  
Attn: JIM FOSTER

BILLING DATE 01-03-97

ACC'T NO. 0-MC396006001-1A

RE: - Stepp et al. v. Foster et al.

PREVIOUS BALANCE

\$0.00

DATE PROFESSIONAL SERVICES RENDERED

TIME

(SEE ATTACHED LIST)

TOTAL FOR THE ABOVE SERVICES

66.40 \$9,580.00

DATE EXPENSES

08-30-96	INCOMING FAXES	\$9.00
10-31-96	INCOMING FAXES	\$5.00
11-30-96	INCOMING FAXES	\$6.00
11-30-96	IN-HOUSE DUPLICATING	\$3.75
11-30-96	DUPLICATING CHARGES - LAW LIBRARY	\$60.00
12-31-96	IN-HOUSE DUPLICATING	\$118.75
12-31-96	LAW LIBRARY - DUPLICATING	\$97.00
12-31-96	INCOMING FAXES	\$11.00
12-31-96	OUTGOING FAXES	\$24.00
12-31-96	POSTAGE	\$2.38
12-31-96	MILEAGE AND PARKING	\$11.89

TOTAL FOR THE ABOVE EXPENSES

\$348.77

TOTAL \$9,928.77

TOTAL PAYMENTS

\$0.00

AMOUNT DUE \$9,928.77

PAYMENT DUE UPON RECEIPT  
PLEASE MAKE CHECKS PAYABLE TO: CLARY & MOORE, P.C.

1480

FOSTER, LEAR AND WRIGHT, TRUSTEES  
 c/o JAMES E. FOSTER  
 7554 BELMONT LANDING ROAD  
 MASON NECK, VA 22079  
 Attn: JIM FOSTER

BILLING DATE 01-03-97

ACC'T NO. 0-MC396006001-1A

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME	
08-02-96	PHONE CALL FROM JIM FOSTER REGARDING HOMEOWNERS ASSOCIATION PROBLEM (AT NO CHARGE)	MC3	0.10	\$0.00
08-05-96	PHONE CALLS (X3) FROM JIM FOSTER REGARDING TRUSTEE/HOMEOWNERS ASSOCIATION ISSUES (AT NO CHARGE)	MC3	0.70	\$0.00
08-06-96	CONFERRED OUT OF OFFICES WITH STEVE ANNINO; TELEPHONE CONFERENCE WITH JIM FOSTER TO REPORTS RESULTS OF CONFERENCE (AT NO CHARGE)	MC3	2.10	\$0.00
08-07-96	PHONE CALL FROM JIM FOSTER RE DEVELOPMENTS WITH HOMEOWNER'S ASSOCIATION AND THEIR RESPONSE TO STEVE ANNINO'S LETTER (AT NO CHARGE)	MC3	0.40	\$0.00
08-28-96	PHONE CALL FROM JIM AND CATHY FOSTER; TELEPHONE CONFERENCE WITH STEVE ANNINO AND REVIEW FAX (AT NO CHARGE)	MC3	1.20	\$0.00
10-16-96	CONFERRED IN OFFICES WITH JIM FOSTER, GENE LEAR, ET AL. RE SUIT BY FELLOW LOT OWNER (COURTESY VISIT AT NO CHARGE)	MC3	4.00	\$0.00
10-16-96	TO FAIRFAX CIRCUIT COURT TO EXAMINE COURT FILE TO DETERMINE DATE OF SERVICE	RGM	0.20	\$35.00
10-23-96	CONFERRED IN OFFICES WITH TRUSTEES ET AL. RE RESPONSE TO SUIT	MC3	2.50	\$562.50
10-24-96	CONFERRED WITH MC3 REGARDING INSTRUCTION RE: RESEARCH; TO FAIRFAX LAW LIBRARY FRO RESEARCH	RGM	2.70	\$472.50
10-25-96	ANALYZE LIBRARY RESEARCH; TO FAIRFAX LAW LIBRARY FOR RESEARCH	RGM	4.10	\$717.50
10-28-96	ANALYZE LIBRARY RESEARCH; DRAFT OUTLINE OF DEMURRER; CONFER WITH MC3; TO FAIRFAX LAW LIBRARY FOR RESEARCH	RGM	5.40	\$945.00
10-29-96	PHONE CALLS FROM JIM AND CATHY FOSTER (AT NO CHARGE)	MC3	0.60	\$0.00
10-29-96	TO GEORGE MASON LAW LIBRARY FOR RESEARCH; ANALYZE LIBRARY RESEARCH; COMPLETE DRAFT OF DEMURRER AND REVIEW AND REVISE DEMURRER; CONFER WITH MC3; TO FAIRFAX COURTHOUSE TO FILE DEMURRER	RGM	6.30	\$1,102.50
11-15-96	PHONE CALL FROM JIM AND CATHY FOSTER (AT NO CHARGE)	MC3	0.40	\$0.00
11-19-96	REVIEWED LOT OWNER LIST FAXED FROM JIM			

FOSTER, LEAR AND WRIGHT, TRUSTEES  
 c/o JAMES E. FOSTER  
 7554 BELMONT LANDING ROAD  
 MASON NECK, VA 22079  
 Attn: JIM FOSTER

BILLING DATE 01-03-97

ACC'T NO. 0-MC396006001-1A

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME	
	AND CATHY FOSTER	MC3	0.10	\$22.50
12-03-96	PHONE CALL FROM KATE FOGARTY AND TELEPHONE CONFERENCE WITH JIM AND CATHY FOSTER REGARDING INSURANCE COVERAGE (AT NO CHARGE)	MC3	0.80	\$0.00
12-06-96	RETURNED TELEPHONE CALL FROM STEVE ANNINO REGARDING OUR DEMURRER AND HIS HAVING ALREADY SET CASE FOR HEARING ON DECEMBER 20, 1996	MC3	0.30	\$67.50
12-11-96	REVIEW PLAINTIFFS' BRIEF; TO FAIRFAX LAW LIBRARY FOR RESEARCH; ANALYZE LIBRARY RESEARCH	RGM	1.40	\$245.00
12-12-96	CONTINUE ANALYSIS OF PLAINTIFFS' BRIEF; TO FAIRFAX LAW LIBRARY FOR RESEARCH AND COPYING PLAINTIFFS' AUTHORITIES	RGM	4.30	\$752.50
12-13-96	BEGIN DRAFT OF LETTER TO JUDGE MCWEENY; ANALYZE LIBRARY RESEARCH; BEGIN ANALYSIS OF ALL CASES AND OTHER AUTHORITIES; TO FAIRFAX LAW LIBRARY FOR RESEARCH	RGM	2.50	\$437.50
12-16-96	REVIEW AND REVISE LETTER TO JUDGE MCWEENY; TO FAIRFAX LAW LIBRARY FOR RESEARCH AND COPYING OF DEMURRER AUTHORITIES; ANALYZE LIBRARY RESEARCH	RGM	1.60	\$280.00
12-17-96	PREPARE COPIES OF CASES FOR JUDGE MCWEENY AND DELIVER CASES AND COVER LETTER TO JUDGE'S CHAMBERS; TO FAIRFAX LAW LIBRARY FOR RESEARCH	RGM	1.20	\$210.00
12-18-96	DRAFT ARGUMENT FOR HEARING ON DEMURRER; ANALYSIS OF LIBRARY RESEARCH	RGM	1.50	\$262.50
12-19-96	CONFERRED IN OFFICES WITH RGM IN PREPARATION FOR HEARING ON DEMURRER AFTER REVIEW OF PLEADINGS AND AUTHORITIES (AT NO CHARGE)	MC3	1.80	\$0.00
12-19-96	CONTINUE TO DRAFT ARGUMENT ON DEMURRER; CONFER WITH MC3 RE: ALL DEMURRER ISSUES; PREPARE COPIES AND ANALYSIS OF ALL CASES FOR HEARING ON DEMURRER	RGM	2.70	\$472.50
12-20-96	CONFERRED IN OFFICES WITH RGM RE RESULTS OF HEARING BEFORE JUDGE MCWEENY; TELEPHONE CONFERENCE WITH JIM AND CATHY FOSTER RE SAME (AT NO CHARGE)	MC3	1.30	\$0.00
12-20-96	TO FAIRFAX LAW LIBRARY FOR FINAL REVIEW			

FOSTER, LEAR AND WRIGHT, TRUSTEES  
 c/o JAMES E. FOSTER  
 7554 BELMONT LANDING ROAD  
 MASON NECK, VA 22079  
 Attn: JIM FOSTER

BILLING DATE 02-17-97

ACC'T NO. 0-MC396006001-1A

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME
12-23-96	OF ARGUMENT ON DEMURRER; TO FAIRFAX COURT FOR HEARING ON DEMUERRER; CONFER WITH MC3; BEGIN DRAFT OF REQUESTS FOR ADMISSION	RGM	4.10
12-23-96	COMPLETE DRAFT OF REQUEST FOR ADMISSION; DRAFT LETTER TO MR. ANNINO; DRAFT PROPOSED DECREE; TO FAIRFAX LAW LIBRARY FOR RESEARCH	RGM	2.40
12-23-96	REVIEW AND REVISE LETTER TO MR. ANNINO; PREPARED PROPOSED DECREE AND REQUEST FOR ADMISSION; ANALYZE LIBRARY RESEARCH	RGM	1.30
12-27-96	REVIEWED AND REVISED FOSTER REQUESTS FOR ADMISSIONS	MC3	1.10
12-27-96	RESEARCH ATTORNEY FEE AND COMMISSION AND COMPENSATION ISSUES; CONFER WITH MC3; SHEPARDIZE CASES; LIST CASES FOR LIBRARY AND COPYING	RGM	2.10
12-30-96	CONFER WITH MC3; ANALYZE CASES RE: ATTORNEYS FEES; TO FAIRFAX LAW LIBRARY FOR RESEARCH	RGM	1.30
12-31-96	REVIEWED AND REVISED REQUESTS FOR ADMISSIONS	MC3	2.10
12-31-96	ANALYZE LIBRARY RESEARCH; REVIEW AND ANALYZE LETTER FROM MR. ANNINO AND ATTACHED PROPOSED DECREE; DRAFT RESPONSE TO MR. ANNINO; REVISE PROPOSED DECREE; DRAFT PRAECIPE AND MOTION FOR ENTRY OF DECREE	RGM	1.80

DATE	EXPENSES	
08-30-96	INCOMING FAXES	\$9.00
10-31-96	INCOMING FAXES	\$5.00
11-30-96	INCOMING FAXES	\$6.00
11-30-96	IN-HOUSE DUPLICATING	\$3.75
11-30-96	DUPLICATING CHARGES - LAW LIBRARY	\$60.00
12-31-96	IN-HOUSE DUPLICATING	\$118.75
12-31-96	LAW LIBRARY - DUPLICATING	\$97.00
12-31-96	INCOMING FAXES	\$11.00
12-31-96	OUTGOING FAXES	\$24.00
12-31-96	POSTAGE	\$2.38

FOSTER, LEAR AND WRIGHT, TRUSTEES  
c/o JAMES E. FOSTER  
7554 BELMONT LANDING ROAD  
MASON NECK, VA 22079  
Attn: JIM FOSTER

BILLING DATE 02-17-97

ACC'T NO. 0-MC396006001-1A

## DATE EXPENSES

12-31-96 MILEAGE AND PARKING  
12-31-96 OUTGOING FAXES

\$11.89  
\$49.00

CLARY & MOORE, P.C.  
10306 Eaton Place  
Suite 240  
Fairfax, Virginia 22030  
JANUARY 1, 1997 - JANUARY 31, 1997

FOSTER, LEAR AND WRIGHT, TRUSTEES  
c/o JAMES E. FOSTER  
7554 BELMONT LANDING ROAD  
MASON NECK, VA 22079  
Attn: JIM FOSTER

BILLING DATE 03-13-97

ACC'T NO. 0-MC396006001-1A

RE: - Stepp et al. v. Foster et al.

PREVIOUS BALANCE \$9,977.77

DATE	PROFESSIONAL SERVICES RENDERED	TIME	
	(SEE ATTACHED LIST)		
	TOTAL FOR THE ABOVE SERVICES	18.30	\$2,606.00

DATE	EXPENSES	
01-31-97	MILEAGE AND PARKING	\$6.31
01-31-97	INCOMING FAXES	\$13.00
01-31-97	OUTGOING FAXES	\$24.00
01-31-97	POSTAGE	\$1.96
01-31-97	DUPLICATING	\$95.00
	TOTAL FOR THE ABOVE EXPENSES	\$140.27

TOTAL \$12,724.04

TOTAL PAYMENTS \$0.00

AMOUNT DUE \$12,724.04

PAYMENT DUE UPON RECEIPT  
PLEASE MAKE CHECKS PAYABLE TO: CLARY & MOORE, P.C.

1485



FOSTER, LEAR AND WRIGHT, TRUSTEES  
 c/o JAMES E. FOSTER  
 7554 BELMONT LANDING ROAD  
 MASON NECK, VA 22079  
 Attn: JIM FOSTER

BILLING DATE 03-13-97

ACC'T NO.

0-MC396006001-1A

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME
01-02-97	TO FAIRFAX LAW LIBRARY FOR RESEARCH; TELEPHONE CALL FROM MR. ANNINO; BEGIN DRAFT OF REQUEST FOR ADMISSIONS; ANALYZE LIBRARY RESEARCH	RGM	3.20
01-03-97	REVIEW AND REVISE REQUEST FOR ADMISSIONS; DRAFT LETTER TO CLIENT	MC3	2.70
01-03-97	TO FAIRFAX LAW LIBRARY FOR RESEARCH; AND CLERK'S OFFICE TO FILE PRAECIPE AND MOTION FOR ENTRY OF DECREE	RGM	2.60
01-03-97	WORD PROCESSING - LETTER TO MR. FOSTER, MR. LEAR AND MS. WRIGHT	RML	0.80
01-07-97	WORD PROCESSING - CERTIFICATE OF MAILING	RML	0.30
01-08-97	TELEPHONE CONFERENCE WITH JIM FOSTER (AT NO CHARGE)	MC3	0.70
01-08-97	PREPARE AND FILE IN CLERK'S OFFICE CERTIFICATE OF MAILING FOR REQUEST FOR ADMISSIONS	RML	0.20
01-13-97	WORD PROCESSING - LETTER TO KATE FOGARTY	RML	0.50
01-16-97	TELEPHONE CONFERENCE WITH KATE FOGARTY (AT NO CHARGE)	MC3	0.30
01-16-97	DRAFT LETTER TO MR. ANNINO; PREPARE FOR HEARING ON MOTION TO ENTER DECREE	RGM	1.40
01-16-97	WORD PROCESSING - FAX TO MR. ANNINO	RML	0.40
01-17-97	MEETING IN OFFICE WITH RGM RE: ENTRY OF ORDER (AT NO CHARGE)	MC3	0.50
01-17-97	TO FAIFAX LAW LIBRARY FOR RESEARCH; TO FAIRFAX CIRCUIT COURT FOR HEARING ON MOTION; CONFER WITH MR. ANNINO AND MR. TOLCHIN; CONFER WITH MC3	RGM	3.20
01-23-97	CONFERENCE WITH RGM AND FOGARTY RE: REPRESENTATION (AT NO CHARGE)	MC3	0.50
01-23-97	TELEPHONE CONFERENCE WITH MR. FOSTER	MC3	0.50
01-31-97	MEETING IN OFFICE WITH JIM FOSTER (AT NO CHARGE)	MC3	0.50

CLARY & MOORE, P.C.  
10306 Baton Place  
Suite 240  
Fairfax, Virginia 22030  
FEBRUARY 1, 1997 - MARCH 31, 1997

FOSTER, LEAR AND WRIGHT, TRUSTEES  
c/o JAMES E. FOSTER  
7554 BELMONT LANDING ROAD  
MASON NECK, VA 22079  
Attn: JIM FOSTER

BILLING DATE 04-04-97

ACC'T NO. 0-MC396006001-1A

RE: - Stepp et al. v. Foster et al.

PREVIOUS BALANCE \$12,724.04

DATE	PROFESSIONAL SERVICES RENDERED	TIME	
	(SEE ATTACHED LIST)		
	TOTAL FOR THE ABOVE SERVICES	34.40	\$6,125.00

DATE	EXPENSES		
03-31-97	FAX MESSAGE	\$91.00	
03-31-97	DUPLICATING	\$49.75	
	TOTAL FOR THE ABOVE EXPENSES		\$140.75

TOTAL \$18,989.79

TOTAL PAYMENTS \$0.00

AMOUNT DUE \$18,989.79

PAYMENT DUE UPON RECEIPT  
PLEASE MAKE CHECKS PAYABLE TO: CLARY & MOORE, P.C.

FOSTER, LEAR AND WRIGHT, TRUSTEES

BILLING DATE 01-04-97

C/O JAMES E. FOSTER

7554 BELMONT LANDING ROAD

ACC'T NO.

0-MC396006001-1A

MASON NECK, VA 22079

Attn: JIM FOSTER

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME
2-03-97	BEGIN COMPARATIVE ANALYSIS OF REQUESTS FOR ADMISSIONS RESPONSES.	RGM	0.40
2-06-97	ANALYZE AMENDED PLEADING; RESEARCH ISSUES FOR POTENTIAL MOTIONS; STRUCTURE PROPOSED ANSWER & GROUNDS OF DEFENSE.	RGM	2.10
2-07-97	TELEPHONE CALL FROM JIM FOSTER (AT NO CHARGE).	MC3	0.60
2-14-97	TELEPHONE CALL TO AND FROM MR. TOLCHIN; REVIEW AND ANALYZE MR. TOLCHIN'S MOTION; DRAFT RESPONSE TO MOTION & PRAECIPE AND FILE WITH CLERK OF COURT.	RGM	0.70
2-26-97	TELEPHONE CALL TO AND FROM MR. AND MRS. FOSTER; RESEARCH ISSUES FOR AND DRAFT DEMURRER AND MOTION TO QUASH.	RGM	3.70
2-27-97	TELEPHONE CALL FROM MR. TOLCHIN; DRAFT POTENTIAL ANSWER; FILE DEMURRER AND MOTION TO QUASH; EXAMINED RECORDS OF CASE IN CLERK OF COURT'S OFFICE.	RGM	1.60
03-06-97	TELEPHONE CALL TO MR. FOSTER; RESARCH ISSUES & PREPARATION FOR HEARING ON DEMURRER AND MOTION TO QUASH.	RGM	2.30
03-10-97	MEETING WITH MR. & MRS. FOSTER; REVIEW DOCUMENTS FOR HEARING ON DEMURRER AND MOTION TO QUASH.	RGM	0.80
03-11-97	TELEPHONE CALL FROM MR. & MRS. FOSTER; RESEARCH ISSUES FOR HEARING ON DEMURRER AND MOTION TO QUASH.	RGM	1.40
03-12-97	CONTINUE RESEARCH OF ISSUES FOR HEARING ON DEMURRER AND MOTION TO QUASH; TO FAIRFAX LAW LIBRARY FOR FURTHER RESEARCH.	RGM	2.10
03-13-97	MEET IN OFFICE WITH RGM REGARDING HEARING AND STRATEY RE SAME; DRAFT LETTER TO STEVE ANNINO REGARDING SAME.	MC3	2.30
03-13-97	CONFER WITH MC3; PREPARATION FOR HEARING ON DEMURRER AND MOTION TO QUASH.	RGM	1.70
03-14-97	MEETING IN OFFICE WITH RGM RE HEARING; TELEPHONE CALL TO ED TOLCHIN REGARDING PROPOSED STRATEGY.	MC3	0.60
03-14-97	PREPARATION FOR AND HEARING ON DEMURRER AND MOTION TO QUASH; CONFER WITH MR. TOLCHIN; CONFER WITH MC3; CONFERENCE		

FOSTER, LEAR AND WRIGHT, TRUSTEES

BILLING DATE 04-04-97

C/O JAMES E. FOSTER

75542 BELMONT LANDING ROAD

ACC'T NO: 0-MC396006001-1A

MASON NECK, VA 22079

Attn: JIM FOSTER

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME
	CALL WITH MR. TOLCHIN.	RGM	3.60
03-17-97	BEGIN DRAFT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND ATTORNEY'S FEES; RESEARCH ISSUES FOR MOTION.	RGM	2.30
03-18-97	DRAFT MOTION FOR PARTIAL SUMMARY JUDGMENT AND ATTORNEY'S FEES & PROPOSED DECREE.	RGM	1.80
03-19-97	REVIEW AND REVISE MOTION FOR PARTIAL SUMMARY JUDGMENT.	RGM	0.30
03-20-97	CONFER WITH MC3 RE: MOTION FOR PARTIAL SUMMARY JUDGMENT; RESEARCH RETROACTIVITY ISSUE.	RGM	1.40
03-20-97	REVIEW AND REVISE MOTION AND ORDER FOR SUMMARY JUDGMENT.	MC3	1.00
03-21-97	CONTINUE RESEARCH RE: RETRO ACTIVITY ISSUE; MEET WITH MR. FOSTER; FILE SUMMARY JUDGMENT.	RGM	1.50
03-24-97	RESEARCH RETRO ACTIVITY ISSUE.	RGM	1.20
03-24-97	REVIEW CORRESPONDENCE FROM STEVE ANNINO.	MC3	0.30
03-25-97	TELEPHONE CONFERENCE FROM MRS. FOSTER TO FAIRFAX LAW LIBRARY FOR RESEARCH.	RGM	0.70

CLARY & MOORE, P.C.  
10306 Baton Place  
Suite 240  
Fairfax, Virginia 22030  
APRIL 1, 1997 - APRIL 30, 1997

FOSTER, LEAR AND WRIGHT, TRUSTEES  
c/o JAMES E. FOSTER  
7554 BELMONT LANDING ROAD  
MASON NECK, VA 22079  
Attn: JIM FOSTER

BILLING DATE 05-12-97

ACC'T NO. 0-MC396006001-1A

RE: - Stepp et al. v. Foster et al.

PREVIOUS BALANCE \$18,989.79

DATE	PROFESSIONAL SERVICES RENDERED	TIME	
	(SEE ATTACHED LIST)		
	TOTAL FOR THE ABOVE SERVICES	47.00	\$7,746.50

DATE	EXPENSES		
04-30-97	MILEAGE AND PARKING	\$4.31	
04-30-97	DUPLICATING	\$131.75	
04-30-97	POSTAGE	\$2.98	
04-30-97	FAX MESSAGE	\$62.00	
	TOTAL FOR THE ABOVE EXPENSES		\$201.04

TOTAL \$26,937.33

TOTAL PAYMENTS \$0.00

AMOUNT DUE \$26,937.33

PAYMENT DUE UPON RECEIPT  
PLEASE MAKE CHECKS PAYABLE TO: CLARY & MOORE, P.C.

FOSTER, LEAR AND WRIGHT, TRUSTEES

BILLING DATE 05-12-97

C/O JAMES E. FOSTER

ACC'T NO. 0-MC396006001-1A

7554 BELMONT LANDING ROAD

MASON NECK, VA 22079

Attn: JIM FOSTER

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME
4-01-97	TELEPHONE CALL FROM MR. FOSTER; TO FAIRFAX LAW LIBRARY TO RESEARCH ISSUES FOR SUMMARY JUDGMENT ARGUMENT	RGM	2.60
4-02-97	TELEPHONE CONFERENCE WITH STEVE ANNINO RE: MOTION FOR SUMMARY JUDGMENT; MEETING IN OFFICE WITH RGM AND REVIEW CASES IN CONNECTION WITH OUR RESPONSE TO ANNINO'S CROSS-MOTION FOR SUMMARY JUDGMENT; REVIEW AND REVISE DRAFT RESPONSE	MC3	5.60
4-02-97	REVIEW AND REVISE ANSWER AND GROUNDS OF DEFENSE; DRAFT FAX TO MR. TOLCHIN; BEGIN ANALYSIS OF LIBRARY RESEARCH; CONFER WITH MC3	RGM	4.30
4-03-97	FINALIZE ANSWER, GROUNDS OF DEFENSE AND AFFIDAVIT; REVIEW AND ANALYZE CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT; RESEARCH ISSUES FOR OPPOSITION TO MOTION; TELEPHONE CALL FROM MR. TOLCHIN; TO FAIRFAX LAW LIBRARY FOR RESEARCH	RGM	4.80
4-03-97	WORD PROCESSING - ANSWER, GROUNDS OF DEFENSE AND AFFIDAVIT	RML	2.50
4-03-97	WORD PROCESSING - LETTER TO MR. TOLCHIN	RML	0.30
4-04-97	REVIEW CASES AND BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT	MC3	1.00
4-04-97	ANALYZE LIBRARY RESEARCH; TELEPHONE CALL FROM MR. FOSTER; DRAFT OPPOSITION TO CROSS-MOTION FOR SUMMARY JUDGMENT; REVIEW AND REVISE OPPOSITION; CONFER WITH MC3; ORGANIZE CASES RELIED UPON; TO FAIRFAX COURT TO FILE ANSWER AND OPPOSITION TO CROSS-MOTION	RGM	4.50
4-04-97	WORDPROCESSING - OPPOSITION TO CROSS MOTION	RML	1.30
4-04-97	WORDPROCESSING - LETTER TO ED TOLCHIN	RML	0.30
4-07-97	ANALYSIS OF CHARITABLE TRUST STATUTES; DRAFT LETTER TO JUDGE FOR FRIDAY'S HEARING; TO FAIRFAX LAW LIBRARY FOR RESEARCH	RGM	3.40
04-07-97	WORD PROCESSING - LETTER TO JUDGE	RML	0.30
04-08-97	ANALYZE LIBRARY RESEARCH; TELEPHONE CALL TO CLERK OF COURT; ORGANIZE CASES		

FOSTER, PLEAR AND WRIGHT, TRUSTEES

BILLING DATE 05-12-97

C/O JAMES E. FOSTER

7554 BELMONT LANDING ROAD

ACC'T NO.

0-MC396006001-1A

MASON NECK, VA 22079

Attn: JIM FOSTER

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME
	FOR JUDGE; TO FAIRFAX LAW LIBRARY FOR RESEARCH	RGM	3.70
04-08-97	WORDPROCESSING - DECREE	RML	0.50
04-08-97	WORDPROCESSING - LETTER TO CLERK	RML	0.20
04-08-97	WORDPROCESSING - LETTER TO JUDGE	RML	0.20
04-09-97	CONFER WITH MC3; ORGANIZE ALL BRIEFS AND CASES FOR FRIDAY'S HEARING ON CROSS-MOTIONS; ANALYZE LIBRARY RESEARCH	RGM	4.60
04-11-97	PREPARATION FOR AND PARTICIPATION IN MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO CROSS-MOTION FOR SUMMARY JUDGMENT; FOLLOW-UP MEETING WITH CLIENT RE: RESULT	MC3	4.70
04-15-97	REVIEW CORRESPONDENCE FROM ED TOLCHIN	MC3	0.30
04-23-97	WORDPROCESSING - FAX TO BOB WETZEL	RML	0.20
04-30-97	DRAFT LETTER TO MR. AND MS. FOSTER	RGM	0.20
04-30-97	WORD PROCESSING - LETTER TO FOSTERS	RML	1.50

CLARY & MOORE, P.C.  
10306 Eaton Place  
Suite 240  
Fairfax, Virginia 22030  
MAY 1, 1997 - JUNE 30, 1997

FOSTER, LEAR AND WRIGHT, TRUSTEES  
c/o JAMES E. FOSTER  
7554 BELMONT LANDING ROAD  
MASON NECK, VA 22079  
Attn: JIM FOSTER

BILLING DATE 07-15-97

ACC'T NO. 0-MC396006001-1A

RE: - Stepp et al. v. Foster et al.

PREVIOUS BALANCE \$26,937.33

DATE	PROFESSIONAL SERVICES RENDERED	TIME	
	(SEE ATTACHED LIST)		
	TOTAL FOR THE ABOVE SERVICES	8.50	\$1,790.00

DATE	EXPENSES	
05-02-97	POSTAGE	\$0.32
05-30-97	FAX MESSAGE	\$8.00
05-30-97	FEDERAL EXPRESS	\$17.91
05-30-97	LONG DISTANCE	\$13.30
06-30-97	IN-HOUSE DUPLICATING	\$64.50
	TOTAL FOR THE ABOVE EXPENSES	\$104.03

TOTAL \$28,831.36

TOTAL PAYMENTS \$0.00

AMOUNT DUE \$28,831.36

PAYMENT DUE UPON RECEIPT  
PLEASE MAKE CHECKS PAYABLE TO: CLARY & MOORE, P.C.



FOSTER, LEAR AND WRIGHT, TRUSTEES  
c/o JAMES E. FOSTER  
7554 BELMONT LANDING ROAD  
MASON NECK, VA 22079  
Attn: JIM FOSTER

BILLING DATE 07-15-97

ACC'T NO. 0-MC396006001-1A

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME
05-02-97	TO FAIRFAX COURTHOUSE TO EXAMINE LAND RECORDS	RGM	0.70
05-09-97	TELEPHONE CONFERENCE WITH MC3, ED TOLCHIN AND MR. ANNINO RE: MOTION TO RENDER ORDER	RGM	0.40
05-15-97	MEETING IN OFFICE WITH JIM AND KATHY FOSTER RE: STATUS AND ISSUES IN CASE	MC3	1.30
05-16-97	REVIEW LETTER FROM KATHY FOSTER	MC3	0.30
05-21-97	REVIEW DOCUMENTS DELIVERED BY FOSTERS	MC3	1.80
05-21-97	WORD PROCESSING - FAX TO NATIONWIDE	RML	0.30
05-27-97	REVIEW ADDITIONAL MATERIALS SUBMITTED BY JIM AND KATHY FOSTER RE: RECORDS FROM ASSOCIATION FROM 1974	MC3	1.60
05-29-97	MEETING IN OFFICE WITH ED TOLCHIN TO CONFER ON ALLOCATION OF VARIOUS TASKS IN COORDINATION OF DEFENSIVE EFFORT	MC3	1.30
06-04-97	TELEPHONE CONFERENCE WITH JIM FOSTER RE: RECENT DEVELOPMENTS	MC3	0.50
06-17-97	TELEPHONE CONFERENCE WITH MR. FOSTER RE: RECENT DEVELOPMENTS	MC3	0.30

CLARY & MOORE, P.C.  
10306 Eaton Place  
Suite 240  
Fairfax, Virginia 22030  
JULY 1, 1997 - AUGUST 30, 1997

FOSTER, LEAR AND WRIGHT, TRUSTEES  
c/o JAMES E. FOSTER  
7554 BELMONT LANDING ROAD  
MASON NECK, VA 22079  
Attn: JIM FOSTER

BILLING DATE 09-14-97  
ACC'T NO. 0-MC396006001-1A

RE: - Stepp et al. v. Foster et al.

PREVIOUS BALANCE \$28,831.36

DATE	PROFESSIONAL SERVICES RENDERED	TIME
	(SEE ATTACHED LIST)	
TOTAL FOR THE ABOVE SERVICES		95.70 \$16,758.50

DATE	EXPENSES	
07-31-97	COURIER	\$7.00
08-30-97	OUTGOING FACSIMILE	\$4.00
08-30-97	DUPLICATING	\$251.00
08-30-97	INCOMING FACSIMILE	\$9.00
09-10-97	COURT REPORTER - R. EDWARDS DEPOSITION	\$641.14
09-12-97	MILEAGE, PARKING, ETC.	\$10.52
TOTAL FOR THE ABOVE EXPENSES		\$922.66

TOTAL \$46,512.52

TOTAL PAYMENTS \$0.00

AMOUNT DUE \$46,512.52

PAYMENT DUE UPON RECEIPT  
PLEASE MAKE CHECKS PAYABLE TO: CLARY & MOORE, P.C.

FOSTER, LEAR AND WRIGHT, TRUSTEES  
 c/o JAMES E. FOSTER  
 7554 BELMONT LANDING ROAD  
 MASON NECK, VA 22079  
 Attn: JIM FOSTER

BILLING DATE 09-14-97

ACC'T NO. 0-MC396006001-1A

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME
7-08-97	WORD PROCESSING - FOUR NOTICES OF DEPOSITIONS AND CERTIFICATE OF SERVICE	RML	1.00
7-11-97	BEGIN REVIEW AND ANALYSIS OF INTERROGATORIES AND DOCUMENT REQUESTS	RGM	2.10
7-14-97	DRAFT LETTERS TO MESSRS. FOSTER AND LEAR; DRAFT OBJECTIONS TO INTERROGATORIES AND DOCUMENT REQUESTS; DRAFT CERTIFICATE OF MAILING	RGM	1.70
7-14-97	WORD PROCESSING - LETTER TO MESSRS. FOSTER AND LEAR	RML	0.80
7-16-97	MEETING WITH MR. AND MRS. FOSTER; REVIEW AND REVISE OBJECTIONS TO INTERROGATORIES AND DOCUMENT REQUESTS	RGM	1.50
7-17-97	REVIEW INTERROGATORY ANSWERS FROM PLAINTIFFS	MC3	0.50
7-17-97	REVIEW AND REVISE OBJECTIONS TO DISCOVERY; PREPARE NOTICES OF DEPOSITIONS FOR ALL FOUR PLAINTIFFS, WITH DOCUMENT REQUESTS	RGM	2.60
7-18-97	CONTINUE PREPARATION OF NOTICES OF DEPOSITIONS AND DOCUMENT REQUESTS; LEGAL RESEARCH	RGM	2.30
7-21-97	REVIEW FAX FROM MR. FOSTER; REVIEW AND REVISE NOTICES OF DEPOSITIONS AND DOCUMENT REQUESTS; REVIEW PLAINTIFFS' DISCOVERY; LEGAL RESEARCH	RGM	3.10
7-22-97	FINAL REVIEW OF DEPOSITION NOTICES AND DOCUMENT REQUESTS; CONTINUE LEGAL RESEARCH; BEGIN OUTLINE OF DEPOSITION MATTERS	RGM	2.80
7-23-97	PREPARE OUTLINE FOR PLAINTIFFS' DEPOSITIONS; RESEARCH LEGAL ISSUES	RGM	2.40
7-24-97	MEETING WITH MR. AND MRS. FOSTER; BEGIN RESEARCH ON DEPOSITION ISSUES	RGM	3.20
7-25-97	RESEARCH DEPOSITION ISSUES; BEGIN REVIEW OF MATERIALS FOR RESPONSE TO PLAINTIFFS' DISCOVERY REQUESTS; TELEPHONE CONFERENCE WITH MR. TOLCHIN	RGM	3.00
7-25-97	WORD PROCESSING - LETTER TO MR. ANNINO; REVISED NOTICES OF DEPOSITION	RML	0.80
7-28-97	PREPARATION OF DISCOVERY RESPONSES; TO TERM DAY TO SET TRIAL DATE; CONFER WITH		

FOSTER, LEAR AND WRIGHT, TRUSTEES  
 c/o JAMES E. FOSTER  
 7554 BELMONT LANDING ROAD  
 MASON NECK, VA 22079  
 Attn: JIM FOSTER

BILLING DATE 09-14-97

ACC'T NO.

0-MC396006001-1A

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME
	MR. ANNINO AND MS. FOGARTY; MEET WITH MR. AND MRS. FOSTER	RGM	4.10
7-28-97	WORD PROCESSING - LETTER AND FAX TO CLIENTS	RML	0.50
7-29-97	REVIEW NEW MATERIALS FROM MR. AND MRS. FOSTER; CONTINUE PREPARATION OF DISCOVERY RESPONSES	RGM	1.30
7-30-97	CONTINUE PREPARATION OF DISCOVERY MATERIALS; TELEPHONE CONFERENCE WITH MR. ANNINO; DRAFT LETTER TO MR. ANNINO; REVISE NOTICES OF PLAINTIFFS' DEPOSITIONS	RGM	3.40
7-30-97	WORD PROCESSING - LETTER TO MR. ANNINO	RML	0.40
7-31-97	CONTINUE PREPARATION OF PLAINTIFFS' DISCOVERY; DRAFT LETTER TO MR. AND MRS. FOSTER	RGM	4.20
7-31-97	WORD PROCESSING - LETTER TO MR. ANNINO; FOUR REVISED NOTICES OF DEPOSITIONS	RML	2.50
7-31-97	WORD PROCESSING - LETTER TO CLIENT	RML	0.40
8-01-97	CONTINUE PREPARATION OF PLAINTIFFS' DISCOVERY; TELEPHONE CONFERENCE WITH STEVE ANNINO	RGM	4.10
8-04-97	CONTINUE DRAFT OF DISCOVERY RESPONSES; MEET WITH MR. FOSTER; REVIEW NEW MATERIALS FROM MR. AND MRS. FOSTER	RGM	3.20
8-04-97	WORD PROCESSING - DISCOVERY RESPONSES	RML	1.50
8-05-97	TELEPHONE CALL TO MR. ANNINO; TELEPHONE CALL TO MR. TOLCHIN; REVIEW AND REVISE NOTICES OF PLAINTIFFS' DEPOSITIONS	RGM	0.40
8-06-97	ORGANIZE DOCUMENTS FOR PRODUCTION TO PLAINTIFFS; CONTINUE OUTLINE OF DISPOSITION INQUIRIES; REVISE INTERROGATORY RESPONSES	RGM	1.70
8-07-97	ORGANIZE DOCUMENTS FOR DISCOVERY PRODUCTION	RGM	2.50
8-08-97	PREPARE AND ORGANIZE DOCUMENT REQUEST RESPONSES; REVIEW AND REVISE FOSTER AND LEAR INTERROGATORY RESPONSES; DRAFT NOTICE OF MAILING	RGM	5.30
08-11-97	REVIEW DRAFT INTERROGATORY ANSWERS	MC3	0.50
08-11-97	MEETING WITH MR. AND MRS. FOSTER AND MR. LEAR (X2); TELEPHONE CALL TO MR. FOSTER;		

FOSTER, LEAR AND WRIGHT, TRUSTEES  
 c/o JAMES E. FOSTER  
 7554 BELMONT LANDING ROAD  
 MASON NECK, VA 22079  
 Attn: JIM FOSTER

BILLING DATE 09-14-97

ACC'T NO. 0-MC396006001-1A

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME
	REVIEW AND REVISE RESPONSES TO INTERROGATORIES TO MR. FOSTER AND MR. LEAR; CONTINUE OUTLINE FOR PLAINTIFFS' DEPOSITIONS	RGM	5.80
08-12-97	ORGANIZE AND PREPARE ADDITIONAL MATTERS FOR INCLUSION IN DEPOSITION OUTLINE FOR PLAINTIFFS' DEPOSITIONS	RGM	0.50
08-18-97	PREPARATION FOR PLAINTIFFS' DEPOSITIONS	MC3	4.70
08-18-97	TELEPHONE CALL TO MR. AND MRS. FOSTER; REVIEW DOCUMENTS FOR USE IN DEPOSITIONS; DRAFT LETTER TO MR. ANNINO; PREPARATION OF EXHIBITS FOR DEPOSITIONS	RGM	2.30
08-18-97	WORD PROCESSING - FAX TO MR. ANNINO	RML	0.30
08-19-97	BEGIN DEPOSITION OF RALPH EDWARDS	MC3	8.70
08-20-97	EDWARDS DEPOSITION CONTINUED	MC3	9.00
08-25-97	TELEPHONE CONFERENCE WITH MR. MEDLIN RE: DEPOSITION	MC3	0.30
08-27-97	TELEPHONE CONFERENCE WITH ANNINO RE: RESUMPTION OF DEPOS	MC3	0.30

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10306 Eaton Place  
Suite 240  
Fairfax, Virginia 22030  
SEPTEMBER 1, 1997 - SEPTEMBER 30, 1997

FOSTER, LEAR AND WRIGHT, TRUSTEES  
c/o JAMES E. FOSTER  
7554 BELMONT LANDING ROAD  
MASON NECK, VA 22079  
Attn: JIM FOSTER

BILLING DATE 10-29-97  
ACC'T NO. 0-MC396006001-1A

RE: - Stepp et al. v. Foster et al.

PREVIOUS BALANCE \$46,512.52

DATE	PROFESSIONAL SERVICES RENDERED	TIME	
	(SEE ATTACHED LIST)		
	TOTAL FOR THE ABOVE SERVICES	21.90	\$4,927.50

DATE	EXPENSES	
09-30-97	INCOMING FAXES	\$3.00
09-30-97	OUTGOING FAXES	\$2.00
09-30-97	BLOCK COURT REPORTING	\$1,433.00
	TOTAL FOR THE ABOVE EXPENSES	\$1,438.00

	TOTAL	\$52,878.02
TOTAL PAYMENTS		\$0.00
	AMOUNT DUE	\$52,878.02

PAYMENT DUE UPON RECEIPT  
PLEASE MAKE CHECKS PAYABLE TO: CLARY & MOORE, P.C.

FOSTER, LEAR AND WRIGHT, TRUSTEES  
c/o JAMES E. FOSTER  
7554 BELMONT LANDING ROAD  
MASON NECK, VA 22079  
Attn: JIM FOSTER

BILLING DATE 10-29-97

ACC'T NO. 0-MC396006001-1A

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME
09-02-97	TELEPHONE CONFERENCE WITH STEVE ANNINO RE: DEPOSITION SCHEDULING	MC3	0.30
09-09-97	TELEPHONE CONFERENCE WITH STEVE ANNINO RE: DEPOSITION SCHEDULING	MC3	0.50
09-22-97	PREPARATION FOR EDWARDS DEPOSITION	MC3	4.30
09-23-97	DEPOSITION OF RALPH EDWARDS	MC3	7.30
09-23-97	ORGANIZE MATERIALS TO CONTINUE DEPOSITION ON THE FOLLOWING DAY	MC3	0.50
09-24-97	CONTINUE DEPOSITION OF PATTY EDWARDS	MC3	8.50
09-25-97	TELEPHONE CONFERENCE WITH JIM AND KATHY FOSTER RE: DEPOSITIONS	MC3	0.50

CLARY & MOORE, P.C.  
10306 Eaton Place  
Suite 240  
Fairfax, Virginia 22030  
OCTOBER 1, 1997 - OCTOBER 31, 1997

FOSTER, LEAR AND WRIGHT, TRUSTEES  
c/o JAMES E. FOSTER  
7554 BELMONT LANDING ROAD  
MASON NECK, VA 22079  
Attn: JIM FOSTER

BILLING DATE 11-07-97

ACC'T NO. 0-MC396006001-1A

RE: - Stepp et al. v. Foster et al.

PREVIOUS BALANCE \$52,878.02

DATE	PROFESSIONAL SERVICES RENDERED	TIME	
	(SEE ATTACHED LIST)		
	TOTAL FOR THE ABOVE SERVICES	35.80	\$5,375.00

DATE	EXPENSES	
10-31-97	OUTGOING FAXES	\$14.00
10-31-97	DUPLICATING - LAW LIBRARY	\$36.50
10-31-97	INCOMING FAXES	\$14.00
10-31-97	POSTAGE	\$8.06
10-31-97	DUPLICATING	\$7.00
	TOTAL FOR THE ABOVE EXPENSES	\$79.56

TOTAL \$58,332.58

TOTAL PAYMENTS \$0.00

AMOUNT DUE \$58,332.58

PAYMENT DUE UPON RECEIPT  
PLEASE MAKE CHECKS PAYABLE TO: CLARY & MOORE, P.C.



FOSTER, LEAR AND WRIGHT, TRUSTEES  
 c/o JAMES E. FOSTER  
 7554 BELMONT LANDING ROAD  
 MASON NECK, VA 22079  
 Attn: JIM FOSTER

BILLING DATE 11-07-97

ACC'T NO. 0-MC396006001-1A

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME
10-16-97	MULTIPLE TELEPHONE CONFERENCES WITH ANNINO RE: DISCOVERY ISSUES	MC3	0.50
10-17-97	MULTIPLE TELEPHONE CONFERENCES WITH ANNINO RE: DISCOVERY; DRAFT MOTION AND MEMORANDUM TO COMPEL DEPOSITIONS	MC3	1.50
10-17-97	REVIEW AND REVISE MOTION TO COMPEL; TO FAIRFAX COURT TO FILE MOTION TO COMPEL	RGM	0.50
10-21-97	TELEPHONE CONFERENCE CLIENTS RE: DEPOS; REVIEW ADDITIONAL MATERIALS FORWARDED BY FOSTERS RELATED TO CASE	MC3	2.40
10-22-97	TELEPHONE CONFERENCE WITH CLIENT	MC3	0.20
10-22-97	REVIEW OF DEPOSITION TRANSCRIPTS OF P. EDWARDS AND RELATED EXHIBITS AND ASSIST IN INITIAL PREPARATION OF MR. FOSTER FOR DEPOSITION	LRC	4.40
10-23-97	CONTINUE REVIEW OF DEPOSITION TRANSCRIPT OF P. EDWARDS AND BEGIN REVIEW OF R. EDWARDS; REVIEW OF DEPOSITION EXHIBITS; ASSIST MR. FOSTER WITH DEPOSITION PREPARATION	LRC	5.60
10-24-97	COMPLETE REVIEW OF R. EDWARDS DEPOSITION TRANSCRIPT; CONTINUE REVIEW OF DEPOSITION EXHIBITS	LRC	3.30
10-27-97	COMPLETE REVIEW OF DEPOSITION EXHIBITS; MAKE WORKING COPIES OF PERTINENT EXHIBITS FOR FOSTER AND LEAR	LRC	2.70
10-28-97	CONFER WITH MC3 RE: MOTION TO COMPEL; RESEARCH DISCOVERY ISSUES; DRAFT PROPOSED DECREE; TO FAIRFAX LAW LIBRARY FOR RESEARCH	RGM	1.60
10-29-97	CONFER WITH MC3; REVIEW AND REVISE PROPOSED DECREE; ANALYZE LIBRARY RESEARCH; FURTHER RESEARCH OF DISCOVERY ISSUES; DRAFT CHRONOLOGY; TO FAIRFAX LAW LIBRARY FOR RESEARCH	RGM	3.20
10-30-97	REVIEW DISCOVERY DOCUMENTS IN PREPARATION FOR PREPARING CLIENTS FOR DEPOSITIONS	MC3	3.00
10-30-97	CONFER WITH MC3 RE: MOTION TO COMPEL; ANALYZE LIBRARY RESEARCH	RGM	0.30
10-31-97	DISCOVERY MOTION - FAIRFAX CIRCUIT COURT	MC3	3.50
10-31-97	MEETING IN OFFICE WITH CLIENTS;		

FOSTER, LEAR AND WRIGHT, TRUSTEES  
 c/o JAMES E. FOSTER  
 7554 BELMONT LANDING ROAD  
 MASON NECK, VA 22079  
 Attn: JIM FOSTER

BILLING DATE 11-07-97

ACC'T NO. 0-MC396006001-1A

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME
	TELEPHONE CONFERENCE WITH ED TOLCHIN	MC3	3.10

CLARY & MOORE, P.C.  
10306 Eaton Place  
Suite 240  
Fairfax, Virginia 22030  
NOVEMBER 1, 1997 - NOVEMBER 30, 1997

FOSTER, LEAR AND WRIGHT, TRUSTEES  
c/o JAMES E. FOSTER  
7554 BELMONT LANDING ROAD  
MASON NECK, VA 22079  
Attn: JIM FOSTER

BILLING DATE 12-12-97

ACC'T NO. 0-MC396006001-1A

RE: - Stepp et al. v. Foster et al.

PREVIOUS BALANCE \$58,332.58

DATE PROFESSIONAL SERVICES RENDERED  
(SEE ATTACHED LIST)

TIME

TOTAL FOR THE ABOVE SERVICES

31.90 \$6,772.50

TOTAL \$65,105.08

TOTAL PAYMENTS \$0.00

AMOUNT DUE \$65,105.08

PAYMENT DUE UPON RECEIPT  
PLEASE MAKE CHECKS PAYABLE TO: CLARY & MOORE, P.C.

FOSTER, LEAR AND WRIGHT, TRUSTEES  
 c/o JAMES E. FOSTER  
 7554 BELMONT LANDING ROAD  
 MASON NECK, VA 22079  
 Attn: JIM FOSTER

BILLING DATE 12-12-97

ACC'T NO. 0-MC396006001-1A

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME
1-03-97	TELEPHONE CONFERENCE WITH ANNINO RE: DEPOSITIONS	MC3	0.30
1-03-97	REVIEW PLEADINGS AND DISCOVERY RESPONSES; OUTLINE ISSUES FOR SCHEDULED DEPOSITIONS	RGM	1.20
1-04-97	PREP FOR HEARING AND DEPOSITIONS; DRAFT FAX TO ANNINO; MEETING IN OFFICE WITH CLIENTS	MC3	5.60
1-04-97	MEET WITH MC3 AND MR. AND MRS. FOSTER, AND MR. LEAR TO PREPARE FOR DEPOSITIONS	RGM	4.40
1-05-97	DEPOSITION OF MS. MEDLIN AND DEPOSITION OF MR. LEAR; CONSULT WITH CLIENTS RE: SAME	MC3	9.20
11-05-97	TELEPHONE CONFERENCE WITH MR. FOSTER RE: CONCERNS OF IMPACT OF LEAR DEPOSITION	MC3	0.50
11-06-97	DEPOSITION OF MR. FOSTER AND FOLLOW-UP CONSULTATION WITH CLIENTS RE: SAME	MC3	7.90
11-06-97	TELEPHONE CONFERENCES WITH MR. BREADY; DRAFT FAX TO MR. BREADY; REVIEW DOCUMENTS TO SEND MR. BREADY; TELEPHONE CONFERENCE WITH MR. BREADY	RGM	0.40
11-13-97	TELEPHONE CONFERENCE FROM ED TOLCHIN RE: POTENTIAL RATIFICATION STRATEGY	MC3	0.30
11-17-97	ANALYZE DISCOVERY FROM COMPLAINANTS; RESEARCH PROPERTY ACT ISSUE BY COMPUTER AT FAIRFAX LAW LIBRARY	RGM	2.10

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10306 Eaton Place  
Suite 240  
Fairfax, Virginia 22030  
DECEMBER 1, 1997 - DECEMBER 31, 1997

FOSTER, LEAR AND WRIGHT, TRUSTEES  
c/o JAMES E. FOSTER  
7554 BELMONT LANDING ROAD  
MASON NECK, VA 22079  
Attn: JIM FOSTER

BILLING DATE 01-10-98

ACC'T NO. 0-MC396006001-1A

RE: - Stepp et al. v. Foster et al.

PREVIOUS BALANCE \$65,105.08

DATE	PROFESSIONAL SERVICES RENDERED	TIME	
	(SEE ATTACHED LIST)		
	TOTAL FOR THE ABOVE SERVICES	35.50	\$7,637.50

DATE	EXPENSES	
12-31-97	POSTAGE	\$2.56
12-31-97	INCOMING FAXES	\$13.00
12-31-97	BLOCK COURT REPORTING	\$414.00
12-31-97	BLOCK COURT REPORTING	\$559.44
12-31-97	OUTGOING FAXES	\$2.00
12-31-97	IN-HOUSE DUPLICATING	\$6.75
	TOTAL FOR THE ABOVE EXPENSES	\$997.75

TOTAL \$73,740.33

TOTAL PAYMENTS \$0.00

AMOUNT DUE \$73,740.33

PAYMENT DUE UPON RECEIPT  
PLEASE MAKE CHECKS PAYABLE TO: CLARY & MOORE, P.C.

FOSTER, LEAR AND WRIGHT, TRUSTEES  
 c/o JAMES E. FOSTER  
 7554 BELMONT LANDING ROAD  
 MASON NECK, VA 22079  
 Attn: JIM FOSTER

BILLING DATE 01-10-98

ACC'T NO. 0-MC396006001-1A

ATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME
2-01-97	MEETING IN OFFICE WITH CLIENTS AND OTHER COMMUNITY MEMBERS IN ADVANCE OF GAIL STEPP DEPO	MC3	3.90
2-01-97	REVIEW DISCOVERY TO OTHER DEFENDANTS	RGM	0.50
2-02-97	PARTICIPATE IN DEPOSITION OF GAIL STEPP AND FOLLOW-UP MEETING WITH CLIENTS	MC3	7.60
2-02-97	TELEPHONE CONFERENCE WITH MR. TOLCHIN	RGM	0.20
2-03-97	PARTICIPATE IN DEPOSITION OF MARIE STEPP; CONSULT WITH CLIENTS	MC3	10.00
2-03-97	TELEPHONE CONFERENCE WITH MR. TOLCHIN	RGM	0.20
2-04-97	TELEPHONE CONFERENCE WITH MR. TOLCHIN	RGM	0.30
2-09-97	RESEARCH RATIFICATION ISSUE	RGM	0.30
2-10-97	DRAFT LETTER TO OPPOSING COUNSEL RE: DISCOVERY; MEETING IN OFFICE WITH CLIENTS	MC3	0.70
2-16-97	ATTEND DEPOSITION OF JIM FOSTER AND FOLLOW-UP MEETING WITH CLIENTS	MC3	5.20
2-18-97	REVIEW NEW DISCOVERY TO MR. FOSTER AND MRS. WRIGHT	RGM	0.60
2-23-97	PREPARATION OF DISCOVERY MATTERS	RGM	1.20
2-31-97	MEETING IN OFFICE WITH CLIENTS	MC3	1.10
2-31-97	PREPARATION OF DISCOVERY; CONFER WITH MR. AND MRS. FOSTER	RGM	3.70

CLARY & MOORE, P.C.  
10306 Eaton Place  
Suite 240  
Fairfax, Virginia 22030  
JANUARY 1, 1998 - MARCH 4, 1998

FOSTER, LEAR AND WRIGHT, TRUSTEES  
c/o JAMES E. FOSTER  
7554 BELMONT LANDING ROAD  
MASON NECK, VA 22079  
Attn: JIM FOSTER

BILLING DATE 03-06-98

ACC'T NO. 0-MC396006001-1A

RE: - Stepp et al. v. Foster et al.

PREVIOUS BALANCE		\$73,740.33
DATE	PROFESSIONAL SERVICES RENDERED	TIME
	(SEE ATTACHED LIST)	
TOTAL FOR THE ABOVE SERVICES	414.40	\$69,138.50
DATE	EXPENSES	
	(SEE ATTACHED LIST)	
TOTAL FOR THE ABOVE EXPENSES		\$5,156.38
	TOTAL	\$148,035.21
	TOTAL PAYMENTS	\$0.00
	AMOUNT DUE	\$148,035.21

PAYMENT DUE UPON RECEIPT  
PLEASE MAKE CHECKS PAYABLE TO: CLARY & MOORE, P.C.

FOSTER, LEAR AND WRIGHT, TRUSTEES  
 c/o JAMES E. FOSTER  
 7554 BELMONT LANDING ROAD  
 MASON NECK, VA 22079  
 Attn: JIM FOSTER

BILLING DATE 03-06-98

ACC'T NO. 0-MC396006001-1A

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME
01-02-98	TELEPHONE CONFERENCE WITH MS. WRIGHT; CONTINUE PREPARATION OF DEFENDANTS' DOCUMENT REQUESTS AND OF INTERROGATORIES TO PLAINTIFFS; MEET WITH MR. AND MRS. FOSTER; PREPARE ANSWERS TO INTERROGATORIES TO MRS. WRIGHT AND DOCUMENT REQUEST TO MR. FOSTER	RGM	5:40
01-05-98	MEETING IN OFFICE WITH MS. WRIGHT; CONTINUE PREPARATION OF MRS. WRIGHT'S RESPONSES TO PLAINTIFFS' INTERROGATORIES AND DOCUMENT REQUESTS	RGM	6.10
01-06-98	PREPARE MS. WRIGHT'S RESPONSES TO PLAINTIFFS' INTERROGATORIES AND DOCUMENT REQUESTS	RGM	7.30
01-07-98	PREPARATION OF MS. WRIGHT'S RESPONSES TO PLAINTIFFS' INTERROGATORIES AND REQUEST FOR PRODUCTION	RGM	5.70
01-08-98	TELEPHONE CONFERENCE WITH GEORGE ARNOLD RE: GENE LEAR DEPOSITION AND OTHER WITNESS TESTIMONY	MC3	0.50
01-08-98	REVIEW FAX FROM CATHY FOSTER	MC3	0.30
01-08-98	TELEPHONE CONFERENCE WITH JIM AND CATHY FOSTER RE: FAX RE: WITNESS TESTIMONY	MC3	0.30
01-08-98	REVIEW AND REVISE MR. FOSTER'S DOCUMENT RESPONSES; TELEPHONE CONFERENCE WITH MS. WRIGHT	RGM	0.30
01-09-98	MEETING WITH MS. WRIGHT; REVIEW ALL DISCOVERY FROM MS. WRIGHT	RGM	1.00
01-14-98	ANALYSIS OF BBCEI OPPOSITION TO MOTION TO COMPEL	RGM	0.40
01-15-98	TELEPHONE CONFERENCE WITH GENE LEAR RE: DEPOSITION SCHEDULING; TELEPHONE CONFERENCE WITH STEVE ANNINO RE: SAME; FOLLOW-UP TELEPHONE CONFERENCE WITH GENE LEAR	MC3	0.50
01-16-98	RESEARCH ISSUE OF ATTORNEY GENERAL AS NECESSARY PARTY; PREPARE FAX TO MR. ANNINO; TO FAIRFAX LAW LIBRARY FOR RESEARCH OF THIS ISSUE	RGM	1.60
01-19-98	ANALYZE RESEARCH RE: NECESSARY PARTIES	RGM	0.80
01-20-98	MEETING WITH MR. LEAR RE: BALANCE OF DEPOSITION TESTIMONY; MULTIPLE TELEPHONE		



FOSTER, LEAR AND WRIGHT, TRUSTEES  
 c/o JAMES E. FOSTER  
 7554 BELMONT LANDING ROAD  
 MASON NECK, VA 22079  
 Attn: JIM FOSTER

BILLING DATE 03-06-98

ACC'T NO. 0-MC396006001-1A

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME
	CONFERENCES WITH JIM FOSTER AND JANE GOELLER RE: GENE LEAR DEPOSITION SCHEDULING	MC3	2.40
01-20-98	DRAFT DEED OF SUBSTITUTION FOR APPOINTMENT OF MS. WRIGHT AND DR. POLIKO	MC3	0.70
01-20-98	CONTINUE RESEARCH FOR OPPOSITION TO PARTIAL SUMMARY JUDGMENT; BEGIN DRAFT OF OPPOSITION; TO FAIRFAX LAW LIBRARY FOR RESEARCH IN SUPPORT OF OPPOSITION	RGM	3.20
01-21-98	TELEPHONE CONFERENCE WITH ED TOLCHIN; TELEPHONE CONFERENCE WITH JIM FOSTER RE: ISSUES RELATING TO TRUSTEES MEETING AND DEED IN CONNECTION WITH LITIGATION	MC3	0.70
01-21-98	DRAFT OPPOSITION TO SUMMARY JUDGMENT; TO FAIRFAX LAW LIBRARY FOR SUPPORTING RESEARCH	RGM	2.70
01-22-98	MEETING OUT OF OFFICE WITH G. GALT BREADY; MULTIPLE TELEPHONE CONFERENCES WITH FOSTERS; DRAFT NOTICE OF TRUSTEES MEETING; REVIEW WITH CLIENT	MC3	4.50
01-22-98	CONTINUE PREPARATION OF OPPOSITION TO SUMMARY JUDGMENT; ANALYZE PRIOR LIBRARY RESEARCH; TO FAIRFAX LAW LIBRARY FOR ADDITIONAL RESEARCH TO SUPPORT OPPOSITION	RGM	3.50
01-23-98	ANALYZE PRIOR LIBRARY RESEARCH; DRAFT LETTER TO JUDGE ROUSH; FINAL REVISION OF BRIEF IN OPPOSITION	RGM	3.10
01-27-98	PREPARATION FOR AND TAKING OF DEPOSITION OF GAIL STEPP; FOLLOW-UP CONFERENCE WITH CLIENTS	MC3	5.10
01-27-98	MULTIPLE TELEPHONE CONFERENCES WITH JANE GOELER AND STEVE ANNINO RE: LEAR DEPOSITION	MC3	0.60
01-28-98	MULTIPLE TELEPHONE CONFERENCES WITH JANE GOELLER AND STEVE ANNINO RE: SCHEDULING AND LOCATION OF LEAR DEPOSITION	MC3	0.60
01-29-98	MEETING IN OFFICE WITH JIM AND CATHY FOSTER RE: NEWLY DISCOVERED RECORDS FROM MS. TRUMPETER	MC3	0.70
01-29-98	DRAFT PROPOSED DECREE; PREPARE FOR HEARING ON PARTIAL SUMMARY JUDGMENT	RGM	1.20

FOSTER, LEAR AND WRIGHT, TRUSTEES  
 c/o JAMES E. FOSTER  
 7554 BELMONT LANDING ROAD  
 MASON NECK, VA 22079  
 Attn: JIM FOSTER

BILLING DATE 03-06-98

ACC'T NO. 0-MC396006001-1A

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME	
01-30-98	TO FAIRFAX LAW LIBRARY FOR ADDITIONAL RESEARCH AND PREPARATION FOR HEARING ON MOTION FOR PARTIAL SUMMARY JUDGMENT; PARTICIPATE IN HEARING; CONFER WITH MR. ANNINO RE: DECREE	RGM	3.70	
02-02-98	MEETING OUT OF OFFICE WITH MR. LEAR TO PREPARE FOR DEPOSITON; ATTENDANCE AT DEPOSITION; WITNESS INTERVIEWS (FELICIONE, JACKSON AT WOODBRIDGE OFFICE OF LONG & FOSTER AND FREDRICKSBURG HOME OF BILL JACKSON)	MC3	9.80	
02-02-98	REVIEW PLAINTIFFS' OBJECTIONS TO DISCOVERY; RESEARCH BASIS FOR PLAINTIFFS' OBJECTIONS; DRAFT LETTER TO MR. ANNINO; BEGIN DRAFT OF MOTION TO COMPEL; TO FAIRFAX FOR RESEARCH TO SUPPORT MOTION	RGM	2.60	
02-03-98	REVIEW AND REVISE FAX TO ANNINO RE: PLAINTIFFS' DISCOVERY RESPONSES	MC3	0.50	
02-03-98	TELEPHONE CONFERENCE WITH ED TOLCHIN RE: BBCAI RESPONSE TO DISCOVERY REQUESTS, WITNESS INTERVIEWS, DOCUMENTS FURNISHED BY PLAINTIFFS IN CONNECTION WITH LEAR DEPOSITON	MC3	0.80	225 10
02-03-98	ANALYZE LIBRARY RESEARCH; TELEPHONE CONFERENCE WITH MR. ANNINO RE: OBJECTION TO DISCOVERY; DRAFT FAX TO MR. ANNINO	RGM	1.30	
02-04-98	ANALYZE ORDER; TELEPHONE CONFERENCE WITH MR. TOLCHIN; REDRAFT OF MOTION TO COMPEL	RGM	0.60	145 87
02-05-98	MEETING OUT OF OFFICE WITH ED TOLCHIN TO REVIEW DOCUMENTS AND POTENTIAL EXHIBITS FURNISHED BY BBCAI; REVIEW OF ISSUES IN ADVANCE OF BBCAI DEPOSITION; REVIEW DISCOVERY FURNISHED BY BBCAI TO PLAINTIFFS	MC3	6.60	225 1485
02-05-98	REVIEW DISCOVERY ISSUES FOR MOTION TO COMPEL; TELEPHONE CONFERENCE WITH MR. ANNINO; TELEPHONE CONFERENCE WITH CALENDAR CONTROL JUDGE; TELEPHONE CONFERENCE WITH MR. TOLCHIN; RESEARCH SUPPLEMENTATION OF DISCOVERY ISSUES	RGM	0.80	145
02-06-98	MULTIPLE TELEPHONE CONFERENCES WITH JIM			

FOSTER, LEAR AND WRIGHT, TRUSTEES  
 c/o JAMES E. FOSTER  
 7554 BELMONT LANDING ROAD  
 MASON NECK, VA 22079  
 Attn: JIM FOSTER

BILLING DATE 03-06-98

ACC'T NO. 0-MC396006001-1A

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME
	FOSTER AND DR. WHEELER (MR. JACKSON'S PHYSICIAN) RE: ATTENDANCE OF MR. JACKSON AT TRIAL	MC3	0.60
02-06-98	ATTEND DEPOSITION OF BBCAI; FOLLOW-UP MEETING WITH CLIENTS	MC3	6.50
02-09-98	REVIEW PLAINTIFFS' REQUEST TO SUPPLEMENT DISCOVERY; DRAFT OPPOSITION TO REQUEST	RGM	1:40
02-10-98	TELEPHONE CONFERENCE WITH ED TOLCHIN RE: ADDITIONAL DEPOSITIONS; TELEPHONE CONFERENCE WITH CLIENTS RE: SAME; TELEPHONE CONFERENCE WITH MS. RIFKIND RE: PHYSICAL ABILITY AND WILLINGNESS OF MR. JACKSON TO HAVE DEPOSITION TAKEN TO PRESERVE TRIAL TESTIMONY; MULTIPLE TELEPHONE CONFERENCES WITH CLIENTS AND STEVE ANNINO RE: DEPOSITION ISSUES; PREPARE OUTLINE OF JACKSON TESTIMONY AND EXHIBITS	MC3	3.20
02-11-98	REVIEW AND REVISE OBJECTIONS TO DISCOVERY	RGM	0.70
02-12-98	PREPARATION FOR MULTIPLE DEPOSITIONS BY PLAINTIFFS; TELEPHONE CONFERENCE WITH JIM FOSTER	MC3	2.70
02-12-98	RESEARCH DISCOVERY ISSUES AND DEPOSING NON-PARTY WITNESSES; TO FAIRFAX LAW LIBRARY FOR ADDITIONAL RESEARCH ON THESE ISSUES	RGM	2.50
02-13-98	GENERAL TRIAL PREPARATION; ATTENDANCE AT DEPOSITONS OF FELICIONE; DRYE AND FALLOIS	MC3	8.60
02-13-98	ANALYZE PRIOR LIBRARY RESEARCH; TO FAIRFAX LAW LIBRARY FOR RESEARCH IN PREPARATION OF TRIAL BRIEFS	RGM	4.30
02-14-98	REVIEW PLAINTIFFS' ANSWERS TO INTERROGATORIES CONTAINING DESIGNATION OF EXPERT WITNESSES; DRAFT FAX TO MR. ANNINO; TELEPHONE CONFERENCE WITH STEVE ANNINO'S OFFICE RE: SAME; MISCELLANEOUS TRIAL ORGANIZATION WORK	MC3	6.80
02-16-98	MEETING IN OFFICE WITH TOM GOELLER; INITIAL TRIAL PREPARATION; TELEPHONE CONFERENCE WITH PIA TRIGIANI; REVIEW		

FOSTER, LEAR AND WRIGHT, TRUSTEES  
 c/o JAMES E. FOSTER  
 7554 BELMONT LANDING ROAD  
 MASON NECK, VA 22079  
 Attn: JIM FOSTER

BILLING DATE 03-06-98

ACC'T NO. 0-MC396006001-1A

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME
	DOCUMENTS SENT BY MS. TROMPETER; REVIEW WITNESS SUBPOENAS	MC3	5.60
02-16-98	ANALYZE PRIOR LIBRARY RESEARCH; BEGIN PREPARATION OF TRIAL BRIEFS	RGM	3.80
02-16-98	TRIAL PREPARATION - BINDERS, EXHIBITS, WITNESS SCHEDULES, ETC. (AT NO CHARGE)	PLG	3.50
02-17-98	REVIEW DRAFT BRIEFS AND LEGAL RESEARCH; REVISIONS TO BRIEFS; TELEPHONE CONFERENCE WITH PIA TRIGIANI RE: EXPERT WITNESS TESTIMONY; DRAFT POTENTIAL SCOPE OF EXPERT TESTIMONY	MC3	9.20
02-17-98	TO FAIRFAX LAW LIBRARY FOR RESEARCH; CONTINUE DRAFT OF TRIAL BRIEFS	RGM	3.10
02-18-98	DEPOSITION IN FREDRICKSBURG OF BILL JACKSON; MULTIPLE WITNESS INTERVIEWS IN BELMONT BAY PARK ESTATES (ROBARGE; MUNRO, WRIGHT AND JANE GOELLER)	MC3	11.00
02-18-98	ANALYZE PRIOR LIBRARY RESEARCH; DRAFT TRIAL BRIEFS; TO FAIRFAX LAW LIBRARY FOR FURTHER RESEARCH	RGM	4.60
02-19-98	MEETING OUT OF OFFICE WITH G. GALT BREADY RE: DEED AND TRIAL TESTIMONY	MC3	1.00
02-19-98	ORDER OF PROOF AND EXHIBIT ORGANIZATION; CONFERENCE WITH PIA TRIGIANI, POTENTIAL EXPERT WITNESS	MC3	0.70
02-19-98	ANALYZE PRIOR LIBRARY RESEARCH; CONTINUE TO DRAFT TRIAL BRIEFS; TO FAIRFAX LAW LIBRARY FOR FURTHER SUPPORTING RESEARCH	RGM	5.20
02-20-98	MEETING IN OFFICE WITH MR. ARNOLD AND DR. POLIFKO; TELEPHONE CONFERENCE WITH PIA TRIGIANI RE: EXPERT WITNESS MATTERS; MEETING WITH NICK FELICIONE RE: REVIEW OF DEPOSITION TRANSCRIPT	MC3	11.60
02-20-98	ANALYZE PRIOR LIBRARY RESEARCH; DRAFT TRIAL BRIEFS; TO FAIRFAX LAW LIBRARY FOR FURTHER SUPPORTING RESEARCH	RGM	4.70
02-21-98	TRIAL PREPARATION; TELEPHONE CONFERENCE WITH PAI TRIGIANI RE: TESTIMONY; MEETING IN OFFICE WITH JIM AND CATHY FOSTER RE: TRIAL TESTIMONY; MEETING OUT OF OFFICE WITH ED TOLCHIN, VARIOUS OFFICERS AND WITNESSES; MEETING OUT OF OFFICE WITH		

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FOSTER, LEAR AND WRIGHT, TRUSTEES  
 c/o JAMES E. FOSTER  
 7554 BELMONT LANDING ROAD  
 MASON NECK, VA 22079  
 Attn: JIM FOSTER

BILLING DATE 03-06-98

ACC'T NO. 0-MC396006001-1A

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME
	PIA TRIGIANI	MC3	12.30
02-21-98	ANALYZE PRIOR LIBRARY RESEARCH; DRAFT TRIAL BRIEFS	RGM	3.40
02-22-98	TRIAL PREPARATION; REVIEW WITH RGM STATUS OF VARIOUS BRIEFS AND ONGOING LEGAL RESEARCH AND ANTICIPATED FINAL AREAS OF LEGAL RESEARCH	MC3	9.60
02-22-98	DRAFT TRIAL BRIEFS	RGM	5.30
02-23-98	PREPARATION FOR AND ATTENDANCE AT TRIAL; FURTHER PREPARATION FOR NEXT DAY	MC3	14.00
02-23-98	TO FAIRFAX COURTHOUSE TO MEET WITH MC3 RE: TRIAL ISSUES; TO FAIRFAX LAW LIBRARY FOR SUPPORTING RESEARCH	RGM	2.10
02-23-98	PARALEGAL ASSISTANCE AT TRIAL - CORR DINATING WITNESS AND DOCUMENTS AND RECORDING TESTIMONY, EXHIBITS, ETC. (AT NO CHARGE)	LRC	10.00
02-24-98	CONTINUED PREPARATION FOR AND PARTICIPATION IN TRIAL; REVIEW OF PLAINTIFFS' TRIAL BRIEF	MC3	16.00
02-24-98	ANALYZE PRIOR LIBRARY RESEARCH; PREPARE TALKING PAPER FOR ORAL ARGUMENT ON TRIAL ISSUES; CONTINUE DRAFT OF TRIAL BRIEFS; TO FAIRFAX LAW LIBRARY FOR SUPPORTING RESEARCH	RGM	4.20
02-24-98	PARALEGAL ASSISTANCE AT TRIAL - COORDINATING WITNESSES AND DOCUMENTS AND RECORDING TESTIMONY, EXHIBITS, ETC. (AT NO CHARGE)	LRC	10.00
02-25-98	CONTINUED PREPARATION FOR AND PARTICIPATION IN TRIAL	MC3	13.00
02-25-98	ANALYSIS OF PRIOR LIBRARY RESEARCH; REVIEW AND REVISE TRIAL BRIEFS AND TALKING PAPER; TO FAIRFAX LAW LIBRARY FOR SUPPORTING RESEARCH	RGM	3.50
02-25-98	PARALEGAL ASSISTANCE AT TRIAL - COORDINATING WITNESSES AND DOCUMENTS AND RECORDING TESTIMONY, EXHIBITS, ETC. (AT NO CHARGE)	LRC	10.00
02-26-98	CONTINUED PREPARATION FOR AND PARTICIPATION IN TRIAL	MC3	9.80
02-26-98	ANALYZE PRIOR LIBRARY RESEARCH; TO		

FOSTER, LEAR AND WRIGHT, TRUSTEES  
 c/o JAMES E. FOSTER  
 7554 BELMONT LANDING ROAD  
 MASON NECK, VA 22079  
 Attn: JIM FOSTER

BILLING DATE 03-06-98

ACC'T NO. 0-MC396006001-1A

DATE	PROFESSIONAL SERVICES RENDERED	INDIV	TIME	
	FAIRFAX LAW LIBRARY FOR SUPPORTING RESEARCH	RGM	2.80	
02-26-98	PARALEGAL ASSISTANCE AT TRIAL - COORDINATING WITNESSES AND DOCUMENTS AND RECORDING TESTIMONY, EXHIBITS, ETC. (AT NO CHARGE)	LRC	10.00	
02-27-98	MULTIPLE TELEPHONE CONFERENCES WITH CLIENTS AND OPPOSING COUNSEL; PREPARATION FOR WEEKEND WORK	MC3	1.40	
02-27-98	ANALYZE PRIOR LIBRARY RESEARCH	RGM	1.30	
02-28-98	FOSTER TRIAL PREPARATION	MC3	6.30	
03-01-98	ADDITIONAL TRIAL PREPARATION; REVIEW AND REVISE MEMORANDUM AND LAW IN RESPONSE TO PLAINTIFFS' TRIAL BRIEF	MC3	10.00	
03-01-98	REVISE TRIAL BRIEFS AND TALKING PAPER; CONFER WITH MC3 RE: TRIAL ISSUES	RGM	4.60	
03-01-98	PARALEGAL ASSISTANCE - COORDINATION OF WITNESS TESTIMONY, TRANSCRIPTS AND EXHIBITS (AT NO CHARGE)	LRC	7.00	
03-02-98	CONTINUED PREPARATION FOR AND PARTICIPATION IN TRIAL	MC3	14.70	
03-02-98	FINALIZE TRIAL BRIEFS; TO FAIRFAX COURT	RGM	3.20	
03-02-98	PARALEGAL ASSISTANCE AT TRIAL - COORDINATION OF WITNESSES AND DOCUMENTS AND RECORDING TESTIMONY, EXHIBITS, ETC. (AT NO CHARGE)	LRC	10.00	
03-03-98	CONTINUED PREPARATION FOR AND PARTICIPATION IN TRIAL	MC3	15.80	
03-03-98	PARALEGAL ASSISTANCE AT TRIAL - COORDINATION OF WITNESSES AND DOCUMENTS AND RECORDING TESTIMONY, EXHIBITS, ETC. (AT NO CHARGE)	LRC	10.00	
03-04-98	CONTINUED PREPARATION FOR AND PARTICIPATION IN TRIAL	MC3	4.90	
03-04-98	PARALEGAL ASSISTANCE AT TRIAL - (AT NO CHARGE)	LRC	2.00	
03-06-98	CORRECT ERROR IN INITIAL BILLING BALANCE FORWARD	ADJ		-49.00
03-06-98	CREDIT FOR PRIOR NON-LAWYER STAFF ENTRIES	ADJ		-2,140.00

## CLARY & MOORE

### Attorneys' Biographical Summaries

**MATTHEW A. CLARY, III**, born Dallas, Texas, April 30, 1946; admitted to bar, 1971, Virginia and U. S. District Court, Eastern District of Virginia; 1972, U. S. Court of Military Appeals; 1974, U. S. Claims Court; 1975, U. S. Court of Appeals, Fourth Circuit; 1983, District of Columbia; 1988, U. S. District Court for the District of Columbia; U. S. Bankruptcy Court, Eastern District of Virginia; 1991. **Education:** Johns Hopkins University (B.A., 1968); George Washington University (J.D., with honors, 1971; LL.M., in Corporation Law, 1982). Phi Delta Phi. Recipient, Distinguished Advocate Award. **Lecturer:** Securities Law, CLE Programs, Fairfax Bar Association, 1981-. President, Springfield Rotary Club, 1984-85; and President, Springfield Chamber of Commerce, 1986-87. **Member:** Virginia State Bar; District of Columbia Bar; Fairfax Bar Association (Member, Section on: Business Law); Virginia Trial Lawyers Association. [Judge Advocate, Capt., U. S. Marine Corps Reserve, 1971-1974].

**RICHARD G. MOORE**, born Poughkeepsie, New York, July 30, 1930; admitted to bar, 1954, Illinois; 1956, U. S. Court of Military Appeals; 1958, U. S. Supreme Court; 1969, District of Columbia; 1972, District of Columbia Court of Appeals; 1982, California, U.S. District Court, Southern District of California, and U. S. Court of Appeals, Ninth Circuit; 1983, U. S. Court of Appeals for the District of Columbia Circuit; 1984, Virginia, U. S. Claims Court, U. S. Court of Appeals, Fourth Circuit, and U.S. District Court, Eastern District of Virginia; 1987, U.S. Court of Appeals for the Federal Circuit. **Education:** John Hopkins University (B.A., 1951); Northwestern University (J.D., 1954). Phi Alpha Delta. **Author:** "The Multilateral Aspects of Diplomatic Immunity in the Case of U. S. Marine Corps Security Guards," 1976, U. S. Department of State. **Guest Lecturer:** Texas State Bar Association, Military Justice, 1973; Northwestern University School of Law, Short Course for Defense Attorneys in Criminal Cases, 1974; Dickinson School of Law, Military Justice, 1975 and International Law, 1979. Assistant Judge Advocate General of the Navy (Military Law) and Officer-in-Charge, Navy-Marine Corps Appellate Review Activity, 1978-1981. **Member:** The District of Columbia, Fairfax County, San Diego County, Virginia, Illinois State, Federal and American (Member, Litigation Section) Bar Associations; The State Bar of California; The Virginia State Bar; The District of Columbia Bar; The State Bar of Illinois; The Association of Trial Lawyers of America; Virginia Trial Lawyers Association. [Brigadier General, U. S. Marine Corps, 1954-1981, (Ret.)]

## Circuit Court of Fairfax County

PAUL BRUCE  
v.  
STEVEN BRUCE

Chancery No. 149624

Pleading Book I

TAB #	PLEADING	PARTY	DATE
1.	Bill of Complaint	Paul-Plf	5/15/97
2.	Affidavit of Service (in CA 5/22)	Paul-Plf	5/30/97
3.	Motion for Pendente Lite Order	Steven-Def	5/30/97
4.	Order (written consent of both required to obtain medical procedures for Martin)		6/ /97
5.	Answer and Cross-Bill of Complaint	Steven-Def	6/10/97
6.	Praecipe (Cochran address change)	Steven-Def	6/12/97
7.	Praecipe (Motion for Further Pendente Lite Relief)	Steven-Def	6/30/97
8.	Answer to Cross Bill of Complaint	Paul-Plf	7/3/97
9.	Opposition to Def's Motion for Further Pendente Lite Relief	Paul-Plf	7/3/97
10.	Brief in Opposition to Motion for Further Pendente Lite Relief	Paul-Plf	7/3/97
11.	Order-Pendente Lite Relief	Court	7/11/97
12.	Certificate of Mailing	Steven-Def	7/22/97
13.	First RPD to Plf.	Steven-Def	7/22/97
14.	First Interrogs. to Plf.	Steven-Def	7/22/97
15.	Request for Subpoenas/Depos. Brenda Kelly 9/23 1:00 pm Adrienne Braverman 9/23 2:30 pm Gerald Gregg 9/23 3:30 pm Diane Bruce 9/24 9:00 am	Steven-Def	8/25/97
16.	Notice of Depo. (Paul 9/24 10:30 am)	Steven-Def	8/25/97

PLF-DEF EX-83  
DATE 8-12-98  
JUDGE KKM  
CASE # C140295

1517



## Circuit Court of Fairfax County

PAUL BRUCE  
v.  
STEVEN BRUCE

Chancery No. 149624

Pleading Book I

<u>TAB #</u>	<u>PLEADING</u>	<u>PARTY</u>	<u>DATE</u>
17.	First Interrogs. to Def.	Paul-Plf	8/26/97
18.	First RPD to Def.	Paul-Plf	8/26/97
19.	Plf's Response to First RPD	Paul-Plf	8/29/97
20.	Plf's Answers to First Interrogs.	Paul-Plf	8/29/97
21.	Notice/Motion to Compel Discovery and for Protective Order	Paul-Plf	8/29/97
22.	Memo in Support of Motion to Compel	Paul-Plf	9/02/97
23.	Notice of Depo. (Steven 9/24 10:00am)	Paul-Plf	9/02/97
24.	Memo in Oppos. to Motion to Compel	Steven-Def	9/03/97
25.	Objections to Discovery	Steven-Def	9/11/97
26.	Order (discovery compelled/deny protect. order)		9/12/97
27.	Answers to Interrogs. [endorsed original w/minor corrections]	Steven-Def	9/16/97 10/3/97
28.	Supp. Answers to Interrogs.	Steven-Def	10/27/97
29.	Request for Witness Subpoena Diane Bruce Gerald Gregg Tom Flood Brenda Kelly	Steven-Def	12/16/97
30.	Praecipe [Cochran address change]	Steven-Def	12/22/97
31.	Supp. Answers to Interrogs.	Steven-Def	12/23/97
32.	Request for Witness Subpoenaes Mary Jane Harper Joni Opprasser-Cohen	Steven-Def	12/23/97
33.	Def's Exhibits	Steven-Def	1/08/98
34.	Plf's Exhibits	Paul-Plf	1/ /98

Circuit Court of Fairfax County

PAUL BRUCE  
v.  
STEVEN BRUCE

Chancery No. 149624

Pleading Book II

<u>TAB #</u>	<u>PLEADING</u>	<u>PARTY</u>	<u>DATE</u>
35.	Def's Trial Memorandum (unsigned)	Steven-Def	1/ /98
36.	Plf's Trial Memorandum (unsigned)	Paul-Plf	1/ /98
37.	Opinion Letter	Judge McKay	2/20/98
38.	Motion to Enter Final Decree Notice for 3/13/98	Paul-Plf	3/2/98
39.	Praecipe to Continue to 3/20	Paul-Plf	3/5/98
40.	Memo in Support of Motion for Entry of Final Decree	Paul-Plf	3/16/98
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42.			
43.			

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VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GAIL STEPP, et al.

Plaintiffs,

vs.

JAMES A. FOSTER, et al.

Defendants.

In Chancery No. 146295

FILED 8-12-98  
DATE 8-12-98  
BY KFM  
CASE # C/46295

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| 1.  | Bill of Complaint  | October 8, 1996   |
| 2.  | Demurrer   | October 29, 1996  |
| 3.  | Belmont Bay's Answer and Grounds of Defense  | October 31, 1997  |
| 4.  | Plaintiffs' Request for Production to Belmont Bay and Notice of Service  | November 6, 1996  |
| 5.  | Belmont Bay's Responses to Request for Production and Notice   | November 27, 1996 |
| 6.  | Notice of Hearing for Demurrer   | December 6, 1996  |
| 7.  | Memorandum in Opposition to Demurrer of Defendants   | December 10, 1996 |
| 8.  | Foster, Lear and Wright First Request for Admission to Plaintiffs  | January 3, 1997   |
| 9.  | Notice and Motion for Entry of Decree  | January 3, 1997   |
| 10. | Decree   | January 17, 1997  |
| 11. | Affidavit for Service by Publication<br>Order of Publication   | January 31, 1997  |
| 12. | Amended Bill of Complaint  | February 11, 1997 |
| 13. | Defendant Belmont Bay's First Set of Interrogatories, First<br>of Request for Admissions and Request for Production of | February 4, 1997  |
| 14. | Motion to Require Plaintiffs to Serve All Documents on All   | February 12, 1997 |

el February 12, 1997

15. Response to Motion to Require Service on All Counsel February 14, 1997
16. Plaintiff's Response to (Foster, et al.) Request for Admissions January 29, 1997
17. Defendants (Arnold, et al.) Demurrer to Amended Bill of Complaint February 26, 1997
18. Defendant (Foster, et al) Joinder in Demurrer February 27, 1997
19. Defendants' (Foster, et al.) Demurrer and Motion to Quash Service February 27, 1997
20. Plaintiffs' Objections to BBCAI Discovery Requests March 3, 1997
21. Plaintiffs' Responses to BBCAI Request for Admissions, Request for Production and Objections to Discovery Requests March 3, 1997
22. Plaintiffs' Response to Demurrer and Motion to Quash Order re: Demurrer and Motion to Quash March 5, 1997
23. Motion (Foster, et al.) for Partial Summary Judgment March 14, 1997  
March 21, 1997
24. Complainants' Answers to Defendant's (BBCAI) Interrogatory Requests March 28, 1997
25. Plaintiffs' Response to Motion for Summary Judgment and Cross Motion for Partial Summary Judgment March 28, 1997
26. Notice and Motion by Complainant to have Court Resign Order of Publication April 2, 1997
27. Defendant Belmont Bay Community Association, Inc. et al.'s Opposition to Plaintiffs' Cross Motion for Partial Summary Judgment April 3, 1997
28. Answers and Grounds of Defense and Affirmative Defenses of Defendants Foster, Lear and Wright, to Amended Bill of Complaint April 4, 1997
29. Defendants Belmont Bay Community Association, Inc., Michael Polifko, George E. Arnold, Nancy. Arnold, Fritz Vanderberg, and Thomas G. Goeller's Answers and Grounds of Defense to Plaintiffs' Amended Bill of Complaint April 4, 1997
30. Defendants Foster's, Lear and Wright's Opposition to Plaintiffs' Cross-Motion for Partial Summary Judgment April 4, 1997
31. Decree Granting Defendants (Foster, et al.) Motion for Partial Summary Judgment April 11, 1997
32. Notice and Motion by Complainants to the Court to Resign Order of Publication April 18, 1997

33. Praecipe Notice

	Order of Publication	April 21, 1997
34.	Term Day Praeipe	June 6, 1997
35.	Praeipe/Notice and Motion of Kate Fogarty to Withdraw	June 12, 1997
36.	Notice of Service of Complainants Interrogatories and Request for Production of Documents to Foster, Lear and BBCAI (37,38,39)	July 10, 1997
37.	Interrogatories to Belmont Bay Community Association, Inc.	July 10, 1997
38.	Interrogatories and Requests for Production of Documents to Marvin Lear, Individually and as Trustee	July 10, 1997
39.	Interrogatories and Requests for Production of Documents to James A. Foster, Individually and as Trustee	July 10, 1997
40.	Defendants (Foster, et al.) Notice of Deposition of Plaintiff Gail Stepp, Marie Stepp, Ralph Edwards and Patty Edwards and Designation of Materials to be Produced at Depositions	July 22, 1997
41.	Notices of Deposition (Revising dates for 40 above)	August 6, 1997
42.	Defendant Marvin E. Lear's Response to Plaintiff's Interrogatories and Requests for Production of Documents	August 11, 1997
43.	Plaintiff's Response to Document Production Requests in Notices of Deposition and Notice of Service	August 11, 1997
44.	Plaintiffs' Notice of Deposition of Luella Medlin, Praeipe for Issuance of Subpoena and Subpoena Duces Tecum and Notice of Service	August 11, 1997
45.	Plaintiffs' Praeipe Requesting Subpoena Duces Tecum (from attorney John Knowles)	August 11, 1997
46.	Defendant James A. Foster's Response to the Plaintiff's Interrogatories and Requests for Production of Documents	August 11, 1997
47.	Plaintiffs' Interrogatories and Requests for Production (Vanderberg)	August 22, 1997
48.	Plaintiffs' Interrogatories and Requests for Production (Polifko)	August 22, 1997
49.	Plaintiffs' Interrogatories and Requests for Production (Arnold)	August 22, 1997
50.	Plaintiffs' Amended Notice of Deposition (Medlin)	September 23, 1997
51.	Plaintiffs' Notice of Deposition (Lear)	September 23, 1997

52.	Plaintiffs' Notice of Service of Deposition Notices for Medlin and Lear	September 23, 1997
53.	Plaintiffs' Amended Notice of Deposition (Lear)	September 29, 1997
54.	Plaintiffs' Motion to Compel Discovery from Arnold, Polifko and Vandenberg	October 7, 1997
55.	Plaintiffs' Amended Notice of Deposition (Lear)	October 7, 1997
56.	Plaintiffs' Notice of Deposition (Foster)	October 7, 1997
57.	Vandenberg, Polifko and Arnold Responses to Interrogatories and Requests for Production of Documents	October 15, 1997
58.	Defendants's Notice & Motion to Compel Discovery and Memorandum in Support of Motion to Compel	October 17, 1997
59.	Plaintiffs' Notice of Deposition (Lear & Foster)	October 21, 1997
60.	Plaintiff's Response to Motion to Compel Order re: Discovery	October 21, 1997 October 31, 1997
61.	Plaintiffs' Notice for Service of Request for Production on BBCAI	November 6, 1997
62.	Notice of Service and Request for Admissions and Request for Production of Documents on BBCAI	November 13, 1997
63.	BBCAI Responses to Plaintiffs' Request for Production	November 27, 1997
64.	BBCAI Responses to Plaintiffs' Request for Admissions	December 8, 1997
65.	Praecipe and Request for Subpoena Duces Tecum to Long & Foster	December 8, 1997
66.	Motion and Order Permitting Kate Fogarty to Withdraw as Counsel	December 10, 1997
67.	Plaintiffs' Request for Production of Documents to Foster	December 17, 1997
68.	Plaintiffs' Interrogatories and Request for Production of Documents to Wright	December 17, 1997
69.	Plaintiffs' Motion to Compel Discovery from Arnold, Polifko and Vandenberg	December 31, 1997
70.	Plaintiffs' Amended Interrogatories and Requests for Admission to Belmont Bay	December 31, 1997
71.	Plaintiffs' Request for Subpoena Duces Tecum to John Ariail	January 7, 1998

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GAIL STEPP, et al.

Plaintiffs,

vs.

JAMES A. FOSTER, et al.

Defendants.

In Chancery No. 146295

FILED 8-12-98  
DATE 8-12-98  
BY KRM  
CASE # C146295

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| 5.  | Belmont Bay's Responses to Request for Production and Notice   | November 27, 1996                     |
| 6.  | Notice of Hearing for Demurrer   | December 6, 1996                      |
| 7.  | Memorandum in Opposition to Demurrer of Defendants   | December 10, 1996                     |
| 8.  | Foster, Lear and Wright First Request for Admission to Plaintiffs  | January 3, 1997                       |
| 9.  | Notice and Motion for Entry of Decree  | January 3, 1997                       |
| 10. | Decree   | January 17, 1997                      |
| 11. | Affidavit for Service by Publication<br>Order of Publication   | January 31, 1997<br>February 11, 1997 |
| 12. | Amended Bill of Complaint  | February 4, 1997                      |
| 13. | Defendant Belmont Bay's First Set of Interrogatories, First Set<br>of Request for Admissions and Request for Production of Documents | February 12, 1997                     |
| 14. | Motion to Require Plaintiffs to Serve All Documents on All Counsel   | February 12, 1997                     |

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| 15. | Response to Motion to Require Service on All Counsel  | February 14, 1997 |
| 16. | Plaintiff's Response to (Foster, et al.) Request for Admissions   | January 29, 1997  |
| 17. | Defendants (Arnold, et al.) Demurrer to Amended Bill of Complaint   | February 26, 1997 |
| 18. | Defendant (Foster, et al) Joinder in Demurrer   | February 27, 1997 |
| 19. | Defendants' (Foster, et al.) Demurrer and Motion to Quash Service   | February 27, 1997 |
| 20. | Plaintiffs' Objections to BBCAI Discovery Requests  | March 3, 1997     |
| 21. | Plaintiffs' Responses to BBCAI Request for Admissions, Request for Production and Objections to Discovery Requests  | March 3, 1997     |
| 22. | Plaintiffs' Response to Demurrer and Motion to Quash  | March 5, 1997     |
|     | Order re: Demurrer and Motion to Quash  | March 14, 1997    |
| 23. | Motion (Foster, et al.) for Partial Summary Judgment  | March 21, 1997    |
| 24. | Complainants' Answers to Defendant's (BBCAI) Interrogatory Requests   | March 28, 1997    |
| 25. | Plaintiffs' Response to Motion for Summary Judgment and Cross Motion for Partial Summary Judgment   | March 28, 1997    |
| 26. | Notice and Motion by Complainant to have Court Resign Order of Publication  | April 2, 1997     |
| 27. | Defendant Belmont Bay Community Association, Inc. et al.'s Opposition to Plaintiffs' Cross Motion for Partial Summary Judgment  | April 3, 1997     |
| 28. | Answers and Grounds of Defense and Affirmative Defenses of Defendants Foster, Lear and Wright, to Amended Bill of Complaint   | April 4, 1997     |
| 29. | Defendants Belmont Bay Community Association, Inc., Michael Polifko, George E. Arnold, Nancy L. Arnold, Fritz Vanderberg, and Thomas G. Goeller's Answers and Grounds of Defense to Plaintiffs' Amended Bill of Complaint | April 4, 1997     |
| 30. | Defendants Foster's, Lear's and Wright's Opposition to Plaintiffs' Cross-Motion for Partial Summary Judgment  | April 4, 1997     |
| 31. | Decree Granting Defendants (Foster, et al.) Motion for Partial Summary Judgement  | April 11, 1997    |
| 32. | Notice and Motion by Complainants to the Court to Resign Order of Publication   | April 18, 1997    |
| 33. | Praeipie Notice and Motion by Complainants to the Court to Resign   |                   |



72.	Defendant Lear's Interrogatories to Plaintiffs	January 9, 1998
73.	Defendants' (Foster, et al.) Request for Production of Documents to Plaintiffs	January 9, 1998
74.	Defendants' (Belmont) Opposition to Complainant's Motion to Compel	January 9, 1998
75.	Defendant Foster's Responses to Plaintiffs' 12/17/97 Request for Production of Documents	January 12, 1998
76.	Defendant Wright's Responses to Plaintiffs' Interrogatories and RFP	January 12, 1998
77.	Plaintiffs' Notice of Corporate Deposition of BBCAI	January 13, 1998
78.	Plaintiffs' Notice, Motion and Memorandum for Partial Summary Judgment	January 15, 1998
79.	Order granting in part Plaintiffs' Motion to Compel BBCA Discovery	January 16, 1998
80.	Defendant Wright's First Set of Interrogatories to Plaintiffs	January 17, 1998
81.	Defendant's (Belmont) Answers to Plaintiffs' Amended Discovery (Request for Admission A&B)	January 21, 1998
82.	Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment	January 23, 1998
83.	Plaintiffs' Notice of Depositions (Drye, Felicione, Foulois)	January 30, 1998
84.	Order granting in part and denying in part Plaintiffs' Motion for Partial Summary Judgment	January 30, 1998
85.	Amended Reply to Document Requests to Defendants' Arnold, Polifko and Vandenberg and Amended Responses to Request for Admission B2 and B19 to BBCAI	February 5, 1998
86.	Plaintiffs' Request for Supplementation of Prior Responses to Defendants (Foster, et al.)	February 6, 1998
87.	Defendants' (Foster, et al.) Notice of Deposition (William Jackson)	February 11, 1998
88.	Plaintiffs' Notice and Motion to Amend Prayer for Relief	February 12, 1998
89.	Praecipe Request Subpoena and Subpoena Duces Tecum to Attorney John Knowles	February 12, 1998
90.	Defendants' Revised Notice of Deposition (Jackson)	February 12, 1998
91.	Complainants' Answers to Interrogatories of Lear and Wright	February 13, 1998

92.	Defendants' Objections to Plaintiffs' Request for Supplementation of Prior Requests	February 13, 1998
93.	Defendants' Request for Witness Subpoena for trial	February 16, 1998
94.	Complainants' Supp. Answers to Interrogatories of Lear and Wright	February 18, 1998
95.	Plaintiffs' Notice to BBCAI to Produce at Trial	February 19, 1998
96.	Order permitting amendment to Plaintiffs' prayer for relief for Counts I and III	February 23, 1998
97.	Plaintiffs' Trial Memorandum	February 25, 1998
98.	Defendants' (Foster, et al.) Trial Memorandum (Removal of Trustee - Standard of Proof)	March 3, 1998
99.	Defendants' (Foster, et al.) Trial Memorandum (Bad Faith - Standard of Proof)	March 3, 1998
100.	Defendants' (Foster, et al.) Trial Memorandum (Limited Court Review of Trustee Discretion)	March 3, 1998
101.	Defendants' (Foster, et al.) Trial Memorandum (No Breach or Delegation of Trustee Duties)	March 3, 1998
102.	Defendants' (Foster, et al.) Brief for Attorney's Fees	March 6, 1998
103.	Defendants' (BBCAI) Motion for Sanctions	March 12, 1998
104.	Affidavit in Support of Award of Attorney's Fees	March 12, 1998
105.	Complainants' Response to Brief in Support of Award of Attorneys Fees	March 24, 1998
106.	Defendants' (Foster, et al.) Response to Complainants' Opposition to Award of Attorneys Fees	April 2, 1998
107.	Defendants' (BBCAI) Response to Complainants' Opposition to Motion for Sanctions	April 2, 1998
108.	Complainants' Motion to Strike Reply Briefs	April 13, 1998
109.	Judge MacKay's Letter Opinion	June 4, 1998
110.	Complainants' Request for Production of Documents	June 24, 1998

111.	Defendants' Interrogatories to Complainants	July 10, 1998
112.	Complainants' Interrogatories to Defendants Foster and Wright	July 14, 1998
113.	Complainants' Second Set of Interrogatories to Defendants	July 16, 1998
114.	Defendant Foster's Response to June 24, 1998 Request for Production	July 20, 1998
115.	Complainants' Motion to Compel Discovery	July 22, 1998
116.	Complainants' Responses to Defendants' Interrogatories	July 31, 1998
117.	Defendants' Opposition to Motion to Compel Discovery	July 31, 1998
118.	Defendants' Responses to Complainants' Interrogatories and Second Set of Interrogatories and Request for Production	August 4, 1998
119.	Order (Motion to Compel Discovery)	August 7, 1998
120.	Plaintiffs' Supplemental Interrogatory Answer	August 7, 1998
121.	Defendants Supplemental Response to Interrogatories	August 10, 1998
122.	Affidavit in Support of Supplemental Award of Attorney's Fees	August 11, 1998
123.	Defendants' Request for Award of Supplemental Attorney's Fees	August 11, 1998
124.	Defendants' Motion in Limine to Exclude Evidence	August 11, 1998
125.	Defendants' Brief in Support of Award of Attorney's Fees	August 11, 1998

**Circuit Court of Fairfax County**  
**CIVIL COVER SHEET**

BRUCE, PAUL CO GUARDIAN ET AL

KEITH, JOHN A C

PQ

VERSUS

BRUCE, STEVEN CO GUARDIAN ET AL

PD

CASE FILE NUMBER C149624

DATE ENTERED.	DATE FILED	PROCEEDINGS
	05/15/1997	PETITION FILED ✓
	05/21/1997	PROCESS ISSUED TO SPS ✓
10-13-97	7-3-97	Order ✓
7-11-97	7-3-97 ✓	Amended Brief ✓
	7-11-97	Order ✓
	7-11-97	Answer & X Bill ✓
	9-2-97	Memo
9-18-97	9-4-97	Memo
	9-12-97	Order ✓
	3-16-98	Memo
3-20-98	3-17-98	Final Decn ✓
	3-17-98	Pet.

Cover Sheets are administrative records, therefore, this cover sheet may not be an accurate account of filings in this case file.

*[Signature]*  
Fairfax Circuit Court

PLF-REP-EX.# 1-5  
DATE 8-12-98  
JUDGE KHM  
CASE # C146295

*[Handwritten signature]*

V I R G I N I A :

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

FILED  
CIVIL INTAKE  
MAY 15 PM 3:52  
JOHN F. COLE  
CLERK, CIRCUIT COURT  
FAIRFAX, VA

PAUL BRUCE )  
Co-Guardian of Martin Bruce )  
and Co-Trustee of The Martin )  
Bruce and Sylvia Bruce Trusts )

Plaintiff, )

v. )

STEVEN BRUCE )  
Co-Guardian of Martin Bruce )  
and Co-Trustee of The Martin )  
Bruce and Sylvia Bruce Trusts )

Serve: 867 Kansas )  
San Francisco CA 94107 )

Defendant. )

CHANCERY NO. 149624

BILL OF COMPLAINT FOR AID AND DIRECTION AND OTHER RELIEF

COMES NOW the Plaintiff Paul Bruce, Co-Guardian of Martin Bruce and Co-Trustee of The Martin Bruce Trust and Sylvia Bruce Trusts ("Paul") and for his Bill of Complaint against Steven Bruce, Co-Guardian of Martin Bruce and Co-Trustee of The Martin Bruce Trust and Sylvia Bruce Trusts ("Steven"), states as follows:

1. Paul is an adult resident of the Commonwealth of Virginia residing at 2402 Jackstay Terrace, Reston (Fairfax County), Virginia 22091.

2. Steven is the brother of Paul and is an adult resident of the state of California residing at 867 Kansas, San Francisco, California 94107.

3. On or about December 16, 1994, Paul and Steven were appointed guardians of the person and estate of their father, Martin Bruce, by Order of this Court in Fiduciary No. 54640.

4. Martin Bruce is a resident of the Commonwealth of Virginia residing at 3701 S. George Mason Drive, Suite 2315N, Falls Church, Virginia 22041.

5. Paul and Steven are also the Co-Trustees of trusts created by their father, Martin Bruce, and their mother, Sylvia Bruce ("the Trusts").

6. So long as he lives, Martin Bruce is the sole beneficiary of the Trusts.

7. Although the Trusts are, by their terms, governed by Florida law, they are comprised largely of assets which are located outside of Florida. Approximately 25% of the trust estate is held and managed in an agency account with Crestar Bank. Roughly 50% of the trust estate is in a Paine Webber account which is placed with a broker in New York. The remainder of the assets in the Trusts consists of investments in a Vanguard Mutual Fund and real estate in Ohio, North Carolina, Florida and Virginia.

8. Since 1994, when Paul and Steven became Co-Guardians and Co-Trustees, they have had difficulty cooperating with one another and in making even the most basic decisions.

9. Steven, who is a lawyer, has repeatedly threatened to sue Paul to remove him from his fiduciary responsibilities. In fact, Steven recently brought suit against Paul in United States

District Court for the Northern District of California seeking Paul's removal as Co-Trustee and Co-Guardian. Steven's suit was dismissed for want of subject jurisdiction.

10. Steven's attitude towards administration of the Trusts and guardianship has been uncooperative, suspicious and obstructionist.

11. As a result of Steven's attitude and actions the Trusts and the guardianship have been deprived of effective and efficient fiduciary management.

12. Because of the constant threatening and bickering which has been engendered by Steven, it is difficult and at times impossible for the fiduciaries to carry out their responsibilities effectively and competently.

13. Steven has breached his fiduciary duties as Co-Trustee and Co-Guardian.

WHEREFORE, Paul prays that this Court grant him aid and direction or alternative relief as follows:

1. That the Court assist Paul and Steven as Co-Trustees and Co-Guardians in establishing a means by which decisions can be made such as an arbitrator or other court appointed tie-breaker; or

2. In the alternative, that Steven be removed as Co-Guardian and as Co-Trustee; or


3. In the alternative, that the Court remove both Co-Guardians and Co-Trustees and appoint a neutral person or persons to fill these fiduciary positions; and

4. That the Court grant such other and further relief as the Court may deem appropriate.

Respectfully submitted,

PAUL BRUCE,  
By Counsel

BLANKINGSHIP & KEITH,  
a Professional Corporation  
4020 University Drive, Suite 312  
Fairfax, Virginia 22030  
(703) 691-1235

By:   
\_\_\_\_\_  
John A. C. Keith, VSB 14116  
Counsel for Plaintiff, Paul Bruce

BH:Bruce\Complaint



VIRGINIA :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

FILED

97 JUN 11 AM 11:55

JOHN T. FREY  
CLERK, CIRCUIT COURT  
FAIRFAX, VA.

PAUL BRUCE )  
(individually, as Co-Trustee of the Martin )  
Bruce Trust and the Sylvia Bruce Trusts, )  
and as Co-Guardian of Martin Bruce) )

Complainant/Cross-Defendant, )

v. )

Chancery No. 149624

STEVEN BRUCE )

Defendant/Cross-Complainant. )  
---

**ANSWER AND CROSS BILL OF COMPLAINT**

COMES NOW the Defendant/Cross-Complainant, and for his Answer and Cross Bill of Complaint states as follows:

1. The allegations of paragraph 1 are admitted.
2. The allegations of paragraph 2 are admitted.
3. The allegations of paragraph 3 are admitted.
4. The Defendant/Cross-Complainant admits that Martin Bruce resides at 3701 S.

George Mason Drive, Falls Church, Virginia, but denies that he is a resident of the Commonwealth of Virginia.

5. The allegations of paragraph 5 are admitted.
6. The allegations of paragraph 6 are admitted.
7. The allegations of paragraph 7 are admitted except that there is significant commercial real estate in Orange Park, Florida.
8. The allegations of paragraph 8 are admitted.
9. The Defendant/Cross-Complainant denies that he has repeatedly threatened to sue the Complainant/Cross-Defendant but admits the remaining allegations of this paragraph and he admits that he has sued his brother on one prior occasion, which suit is still pending on

jurisdictional issues. Co-Trustees have agreed on major post mortem monetary decisions benefiting both. The Complainant/Cross-Defendant refuses to cooperate on matters on which he receives no money. Defendant/Cross-Complainant has only threatened to sue after a fiduciary breach by Complainant/Cross-Defendant.

10. The allegations of paragraph 10 are denied.
11. The allegations of paragraph 11 are denied.
12. The allegations of paragraph 12 are denied.
13. The allegations of paragraph 13 are denied.

#### CROSS BILL OF COMPLAINT

-----  
COMES NOW the Defendant/Cross-Complainant, *pro se* and by co-counsel, and for his Cross Bill of Complaint states as follows:

#### COUNT I

1. The allegations of paragraph 1 through 3 and 4 through 8 of the Bill of Complaint are incorporated herein and realleged.
2. Martin Bruce resides at 3701 S. George Mason Drive, Suite 2315-N, Falls Church, Virginia 22041.
3. Martin Bruce (age 80) suffers from multiple stroke dementia and has been previously adjudicated incompetent by a Virginia court for the sole purpose of post-mortem estate planning. In 1992, he was succeeded as Trustee by Sylvia Bruce, mother of the parties, due to his incapacitation.
4. The Complainant/Cross-Defendant has consistently acted with hostility towards the Defendant/Cross-Complainant and has refused to cooperate in the management of the trust estate and in fulfilling his role as Co-Guardian for Martin Bruce, including, but not limited, to the following:
  - a. The Complainant/Cross-Defendant has consistently refused to verbally

communicate (even in conference telephone calls with the Defendant/Cross-Complainant) regarding significant and necessary matters affecting both the person and property of Martin Bruce.

b. The Complainant/Cross-Defendant attempted to authorize surgery on Martin Bruce that had a significant risk of death and little benefit to said Martin Bruce, all without the permission or consent of the Defendant/Cross-Complainant and without verbal communication.

5. The Complainant/Cross-Defendant, in his role as Co-Trustee and Co-Guardian, owes a fiduciary duty to Martin Bruce and, as Co-Trustee and Co-Guardian with the Defendant/Cross-Complainant, both by operation of law and pursuant to the express terms of the trust document, has no legal authority to make decisions involving the trust or Martin Bruce without the consent of the Defendant/Cross-Complainant.

6. In violation of his fiduciary duties and the obligation to obtain the consent of the Defendant/Cross-Complainant, the Complainant/Cross-Defendant's breaches of his fiduciary duty include, but are not limited to, the following:

a. The Complainant/Cross-Defendant concealed material facts relating to a lease and sale of real estate in Syracuse, New York;

b. The Complainant/Cross-Defendant permitted his secretary to render a legal opinion regarding an estate tax audit;

c. The Complainant/Cross-Defendant has failed to adequately communicate with the Defendant/Cross-Complainant on virtually all trust and guardianship matters, including the surgery referenced above;

d. The Complainant/Cross-Defendant has diverted funds to Martin Bruce's grandchild (the Complainant/Cross-Defendant's child) in direct contradiction to Martin Bruce's intent and breached a contract to cooperate in a charitable remainder trust for abused children for

\$500,000;

e. The Complainant/Cross-Defendant has exerted undue influence over a property manager, Phillips Development Company, and Gerry Gregg, in connection with assets of the trust;

f. The Complainant/Cross-Defendant engaged an Ohio attorney without a retainer agreement and without the approval of the Defendant/Cross-Complainant, and then directed said attorney to cease his work, again without the Defendant/Cross-Complainant's approval. This same attorney refused to disclose his hourly rate to either of the parties.

g. That Complainant/Cross-Defendant has directed accountants to act outside the scope of engagement without Defendant/Cross-Complainant's knowledge or consent.

WHEREFORE, the Defendant/Cross-Complainant prays as follows:

1. That Paul Bruce be removed as Co-Trustee of the Martin Bruce Trust and the Sylvia Bruce Trusts, and as Co-Guardian of Martin Bruce.
2. That Paul Bruce provide a full and accurate accounting regarding all trust matters during his tenure as Co-Trustee.
3. That Paul Bruce be required to reimburse the trust for all monies improperly diverted by him and for all damages sustained by the trust as a result of his breaches of fiduciary duty, to include interest from the date that any funds were diverted or from the date that any damages were incurred.
4. Costs and counsel fees incurred herein.
5. And such other and further relief as to the Court may deem appropriate.

## COUNT II

1. The allegations of paragraphs 1 through 6 are incorporated herein and realleged.
2. The Complainant/Cross-Defendant and the Defendant/Cross-Complainant reached

an agreement pursuant to which each was to receive an equal distribution from the Martin Bruce Trust.

3. At that same time, the Complainant/Cross-Defendant and the Defendant/Cross-Complainant agreed that the Complainant/Cross-Defendant would be permitted to disclaim \$1,000,000 of the distribution being made to him, and that that sum of money would be placed in a generation skipping trust for the benefit of his daughter.

4. In exchange for the Defendant/Cross-Complainant's agreement to permit this generation skipping trust to be funded in this fashion, the Complainant/Cross-Defendant agreed to distribute from the Martin Bruce Trust the sum of \$500,000 to a charitable trust for abused children.

5. The payment to the generation skipping trust could not have been accomplished without the cooperation and approval of the Defendant/Cross-Complainant, and this act enabled the Complainant/Cross-Defendant to save hundreds of thousands of dollars in estate taxes.

6. Despite repeated requests that he honor his agreement to cooperate with the Defendant/Cross-Complainant in funding the charitable trust for abused children, the Complainant/Cross-Defendant has refused to do so.

WHEREFORE, the Defendant/Cross-Complainant prays as follows:

1. That Paul Bruce be directed to take all such steps as are necessary to fulfill his agreement, as Co-Trustee, to make a \$500,000 distribution to a charitable trust for abused children, plus interest from May 1, 1995.

2. That, in the alternative, judgment be entered against Paul Bruce and/or the Martin Bruce Trust for \$500,000, plus interest from May 1, 1995.

3. For such other and further relief as to the Court may deem appropriate.

STEVEN BRUCE  
By Counsel

2. That, in the alternative, judgment be entered against Paul Bruce and/or the Martin Bruce Trust for \$500,000, plus interest from May 1, 1995.

3. For such other and further relief as to the Court may deem appropriate.

STEVEN BRUCE  
By Counsel

THE JEFFERSON LAW FIRM, P.L.C.  
1980 Gallows Road  
Vienna, Virginia 22182  
(703) 790-3310

By: Stephen G. Cochran  
Stephen G. Cochran  
VSB # 12956  
Co-Counsel for Defendant/Cross-Complainant

Steven Bruce, Esquire  
*Pro Se*  
507 Polk Street, Mezzanine  
San Francisco, CA 94102

Certificate of Service

I hereby certify that a true copy of the foregoing Answer and Cross Bill of Complaint was forwarded via first class mail, postage prepaid, to John A.C. Keith, Blankingship & Keith, P.C., 4020 University Drive, Suite 312, Fairfax, Virginia 22030 this 10th day of June, 1997.

Stephen G. Cochran  
Stephen G. Cochran

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

PAUL BRUCE

Complainant,

v.

STEVEN BRUCE

Defendant.

Chancery No. 149624

ORDER

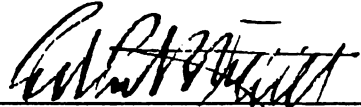
THIS MATTER CAME TO BE HEARD upon the joint Motion of the parties, and it appearing to the Court that said Motion should be granted, it is hereby

ADJUDGED, ORDERED AND DECREED as follows:

1. The written consent of both Paul Bruce and Steven Bruce shall be required for any medical procedures to be performed upon Martin Bruce as well as for any change in his residence or in the party or parties caring for him.

2. In the event of a life threatening situation, either Paul Bruce or Steven Bruce may authorize any appropriate medical care; provided, however, that any such emergency medical care shall be approved by Dr. Weisshaar, as long as he is available.

ENTERED this 13<sup>th</sup> day of June, 1997.

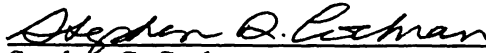
  
The Hon. Arthur B. Vieregg, Jr.

2000(2) (C.1)

I ASK FOR THIS:

THE JEFFERSON LAW FIRM, P.L.C.  
1980 Gallows Road  
Vienna, Virginia 22182  
(703) 790-3310

By:



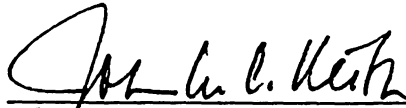
Stephen G. Cochran  
VSB # 12956  
Counsel for Defendant

Stephen Bruce, Esquire  
507 Polk Street, Mezzanine  
San Francisco, CA 94102

SEEN AND AGREED:

BLANKINGSHIP & KEITH, PC  
4020 University Drive, Suite 312  
Fairfax, Virginia 22030

By:



John A.C. Keith, Esq.  
Counsel for Complainant



V I R G I N I A :

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

PAUL BRUCE,  
Co-Guardian of Martin Bruce  
and Co-Trustee of The Martin  
Bruce and Sylvia Bruce Trusts )

Plaintiff, )

v. )

CHANCERY NO. 149624

STEVEN BRUCE,  
Co-Guardian of Martin Bruce  
and Co-Trustee of The Martin  
Bruce and Sylvia Bruce Trusts )

Defendant. )

PLAINTIFF'S ANSWER TO CROSS BILL OF COMPLAINT

COMES NOW the Plaintiff Paul Bruce, Co-Guardian of Martin Bruce and Co-Trustee of The Martin Bruce and Sylvia Bruce Trusts ("Paul"), and for his answer to the Cross Bill of Complaint filed by Steven Bruce, Co-Guardian of Martin Bruce and Co-Trustee of The Martin Bruce and Sylvia Bruce Trusts ("Steven"), states as follows:

COUNT I.

1. The allegations of paragraph 1 are admitted.
2. The allegations of paragraph 2 are admitted.
3. In response to the allegations of paragraph 3, Paul admits that his father suffers from multiple stroke dementia and that he and Steven were appointed Co-Guardians of their father in 1994. Paul further admits that Martin Bruce was succeeded by his wife, Sylvia Bruce, as Trustee of the Martin Bruce Trust in 1992. The remaining allegations of paragraph 3 are denied.

4. The allegations of paragraph 4 are denied.

5. Paul admits that in his capacity of Trustee, he owes a fiduciary duty to Martin Bruce. The remaining allegations of this paragraph contain conclusions of law which require no response from Paul. The Trusts speak for themselves.

6. The allegations of paragraph 6 are denied.

WHEREFORE, Paul prays that Count I of the Cross Bill of Complaint be dismissed and that he be awarded his costs incurred herein.

COUNT II.

1. In response to paragraph 1 of Count II, Paul repeats his responses to paragraphs 1 through 6 of Count I above.

2. The allegations of paragraph 2 are denied.

3. The allegations of paragraph 3 are denied.

4. The allegations of paragraph 4 are denied.

5. Paul admits that payment to the Bruce Irrevocable Trust was accomplished with Steven's cooperation. The remaining allegations of paragraph 5 are denied.

6. The allegations of paragraph 6 are denied.

WHEREFORE, Paul prays that Count II of the Cross Bill of Complaint be dismissed and that he be awarded his costs incurred herein.

Respectfully submitted,

PAUL BRUCE,  
By Counsel

BLANKINGSHIP & KEITH,  
a Professional Corporation  
4020 University Drive, Suite 312  
Fairfax, Virginia 22030  
(703) 691-1235

By:



John A. C. Keith, VSB 14116  
Counsel for Plaintiff, Paul Bruce

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was  
mailed, first class postage, prepaid, this 30 day of July,  
1997, to the following:

Mr. Steven Bruce  
867 Kansas  
San Francisco CA 94107

Stephen G. Cochran, Esquire  
The Jefferson Law Firm, PLC  
1980 Gallows Road, Suite 200  
Vienna, Virginia 22182

  
JOHN A.C. KEITH

C:\ISM\ANS-TO-CBRC

C  
A  
VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

PAUL BRUCE

Complainant,

v.

STEVEN BRUCE

Defendant.

Chancery No. 149624

ORDER

THIS MATTER CAME TO BE HEARD upon the Motion for Further *Pendente Lite* Relief by the Defendant/Cross-Complainant, and was argued by counsel, and it appearing to the Court that said Motion should be granted, it is hereby

ADJUDGED, ORDERED AND DECREED as follows:

1. Neither party shall ~~have any discussions with~~ **give any instructions, on sub-**  
**stantive matters to**  
accountants of the Martin Bruce or Sylvia Bruce trusts ~~and/or of the Martin Bruce Guardianship~~  
**consent**  
without the participation of the other party, ~~unless the other party executes a written waiver of his~~  
right to participate in such discussions.

2. ~~Neither party shall take action of any nature or make any decision for or in behalf~~  
**This does not prohibit either party**  
**From having discussions with such agents,**  
~~of any of the trusts and/or the Martin Bruce Guardianship, without the written consent of the~~  
**Representatives or accountants.**  
~~other party.~~

ENTERED this 11th day of July, 1997.

Dennis J. Ford  
JUDGE

~~LAST FOR THIS:~~ *Seen & objected*

THE JEFFERSON LAW FIRM, P.L.C.  
1980 Gallows Road  
Vienna, Virginia 22182  
(703) 790-3310

By: *Stephen G. Cochran*  
Stephen G. Cochran  
VSB # 12956  
Counsel for Defendant

Stephen Bruce, Esquire  
507 Polk Street, Mezzanine  
San Francisco, CA 94102

SEEN AND OBJECTED TO:

BLANKINGSHIP & KEITH, PC  
4020 University Drive, Suite 312  
Fairfax, Virginia 22030

By: *John A.C. Keith*  
John A.C. Keith, Esq.  
Counsel for Complainant

V I R G I N I A :

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

PAUL BRUCE  
Co-Guardian of Martin Bruce  
and Co-Trustee of The Martin  
Bruce and Sylvia Bruce Trusts

Plaintiff,

v.

STEVEN BRUCE  
Co-Guardian of Martin Bruce  
and Co-Trustee of The Martin  
Bruce and Sylvia Bruce Trusts

Defendant.

CHANCERY NO. 149624

ORDER

THIS MATTER came on to be heard on the motion of the  
Plaintiff Paul Bruce, by counsel, for an order compelling  
discovery; and

IT APPEARING TO THE COURT that the motion should be denied in  
part and granted in part

IT IS HEREBY ORDERED that Defendant Steven Bruce respond to Interrogatory No. 9,  
limited in time from <sup>September,</sup> 1992 to present; that Defendant Steven Bruce respond to Interrogatory No. 10 ~~to~~  
insofar as describing the nature and extent of his law practice and whether he works full time  
or part time.

IT IS FURTHER ORDERED that Plaintiff's request for a protective order ~~be~~, and  
hereby is, ~~denied~~. However, to the extent that Defendant's discovery responses reveal informatio  
not known prior to the ~~set~~ depositions scheduled for 9/23/97 and 9/24/97, Complaint may  
ENTERED THIS 12th day of September, 1997. Schedule further depositions  
limited to such ~~inform~~ issues.

  
Judge

I ASK FOR THIS:

BLANKINGSHIP & KEITH, P. C.  
4020 University Drive, Suite 312  
Fairfax, Virginia 22030  
(703) 691-1235

By: Elizabeth C. Morrogh  
John A. C. Keith, VSB 14116  
Elizabeth Chichester Morrogh, VSB 25112  
Counsel for Plaintiff, Paul Bruce

SEEN AND Objected to strenuously for the reasons stated  
LAW OFFICES OF STEVEN BRUCE to the court  
867 Kansas  
San Francisco CA 94107

BY: \_\_\_\_\_  
Steven Bruce

THE JEFFERSON LAW FIRM  
1980 Gallows Road, Suite 200  
Vienna, Virginia 22182

BY: Stephen G. Cochran  
Stephen G. Cochran  
Counsel for Defendant, Steven Bruce

BH:Bruce\Caption

Paul's part stopped immediately. Steven told Paul to "cease from your reckless behavior." (See Paul's Exhibits #76 and 77). There is simply no evidence that Paul intended to go ahead with the procedure without Steven's approval nor that he intended any harm to befall his father.

The brothers operated in this instance as they did in every instance covered in this lawsuit. Paul communicated with Steven only in writing or through a third party. Steven responded in the most volatile fashion and attacked Paul personally. He ascribes to Paul the most vicious of motives.

**REAL ESTATE LEASES AND INFORMATION**

(See Paul's Exhibits #39-52, 61, 67, 68 and Steven's Exhibits #6-18, 20 and 22).

Paul Bruce is a real estate broker. He has been in the business since 1982, as a broker since 1986. He had helped his mother with her various real estate holdings all his professional life but in particular since 1992 after his father's stroke. Steven is a lawyer and completely capable of understanding real estate transactions but he did not begin as a fiduciary with the same detailed history that Paul had, nor was he in close proximity to the properties themselves. Hence, as with his father's health, the very facts at the outset created a frustrating situation for Steven.

A. Steven alleges that Paul "concealed material facts relating to the lease and sale of real estate in Syracuse, New York." The Bruces owned a large retail property in Syracuse. The issue was the renting of a large space to replace a tenant who was leaving. Paul was acting with regard to the property not only as a fiduciary but also as a property manager. As such, he had to hire a broker to help lease the property. In so doing he had to beat back the aggressive attempts of an outfit called Pyramid Brokerage Company, Inc., to take over the deal. Pyramid threatened litigation in 1995. (To date that litigation has never happened). Steven claims he was not informed promptly of the possible litigation and was forced to make decisions without full disclosure.

However, as early as July 1994, Paul informed Steven of problems with Pyramid. (See Paul's Exhibit #39A). In particular he noted that Pyramid had submitted "a frivolous request for a commission." Steven claims he was not informed until December 1994. (See Paul's Exhibit #41).

Steven complains that he should have known earlier about Pyramid's claim. Paul explains that in his day-to-day dealings with the property the dispute with Pyramid was not significant, but just a part of the "hurley burley" of the real estate business. Further, Paul claims he made every attempt to keep Steven informed on a systematic basis of all real estate matters through an employee named Joe Doran. (See Paul's Exhibit #40A&B). In conclusion, the Court is convinced by Paul's version of the events, and finds that Paul did not breach his



fiduciary duties with regard to the Syracuse property.

B. Steven alleges that "Paul refused for many months to provide leases and other documents that were essential to informed decisions."

In a March 1995 letter to his brother, Steven complained that he had been seeking documents from Paul for over two years. (See Paul's Exhibit #47). There is no question in the Court's mind that Steven wanted every piece of paper that is or has even been a part of any file connected with the Bruce real estate holdings.

Paul explains his predicament very clearly in a letter to Steven dated November 10, 1993. (See Steven's Exhibit #6). The letter reviews various real estate matters that were pending at the time and begins by addressing the documentation issue: "There is no personal reason why you have not received the copies of all of the documents. Its just one of the many things I have not gotten to." Paul goes on to explain the amount of materials involved ("a full foot of documents," etc.) and what is actually happening with regard to several of the properties.

Paul's attempts to comply with Steven's request for copies in the months following (See Steven's Exhibit #8) culminated in his mailing to Dan Heller three file storage boxes full of materials in March 1995. (See Dan Heller's letter to Steven dated March 24, 1995, Steven's Exhibit #18).

Although Steven complains frequently and bitterly about Paul's failure to provide him with information or copies of material, the Court could find no evidence of Steven ever attempting to take the bull by the horn, so to speak, and arranging himself to have the documents copied.

The constant bickering over real estate matters resulted in delays in getting business done. For instance, Dan Heller reminded Steven in his March 24th letter that Steven had yet to sign a Property Management Agreement with a new property manager. (See Steven's Exhibit #18). Steven halted the sale of a Virginia Beach property, alleging that he had not agreed to the broker's commission when he had in fact signed the Agreement of Sale containing the commission. (See Paul's Exhibit #61A). Steven complained about being kept in the dark regarding litigation involving the Virginia Beach property despite having reviewed written reports on that and other matters from Joe Doran. (See Paul's Exhibits #40A, B & C). Finally, Paul had to justify hiring a particular attorney to help with the Syracuse property, despite the fact that Steven had approved the hiring in writing. (See Paul's Exhibits #48, 49, 50, 51 & 52).

What is particularly illuminating about the last episode is that Paul was reduced to sending to Dan Heller copies of his phone and fax records to pinpoint various times during which

he spoke to or faxed someone something in order to prove to Steven that his complaints were groundless. This represents an extraordinary waste of Paul's, Steven's, and Dan Heller's time. The Court finds this kind of paranoia and the endless paperwork it generates to be the antithesis of good management.

C. Steven alleges that Paul "attempted to retain an attorney to handle a matter in Ohio, despite the fact that the attorney refused to provide a written fee agreement or any explanation of how his charges would be calculated."

Gerald Gregg, another Bruce employee, intended to hire a lawyer in Ohio name Shanahan to handle some real estate matters. He had worked for the brothers the year before with out any problems. Apparently Shanahan worked only for people he liked and only charged a fee that everyone was happy with. Steven objected to his being hired. Paul agreed and the discussion ended. There was never any evidence that Mr. Shanahan had done poor work or overcharged for his services. Indeed, the evidence was that if a client did not like his fee, he reduced it.

In all these matters, the Court finds no evidence that Paul Bruce breached his fiduciary duties.

#### CHARITABLE REMAINDER TRUST

(See Paul's Exhibits #21-23, 25, 29 and Steven's Exhibits #19 & 21)

Apparently just before her death, Sylvia Bruce attempted to give \$250,000 to a charity, not named, to benefit Jewish abused and neglected children. She gave an unsigned check in this amount to Steven. (What an unsigned check means as regards her intent is impossible to determine). She died before a gift could be made and Steven has since felt obligated to carry out her wishes.

Since their mother's death the brothers had discussed setting up a trust to benefit a charity involving children as their mother contemplated. In May 1995 Paul agreed with Steven that in return for the latter's cooperation in estate planning benefiting Paul's children, Paul would cooperate in establishing a \$500,000 charitable remainder trust. (See Steven's Exhibit #21). When the trust was not set up by February of 1996, Steven threatened to report Paul to the IRS. He said he was retaining counsel to go into "Federal District Court." (See Paul's Exhibit #29).

No issue illustrates more clearly the different approaches taken by the brothers. In the interval of time between Paul's promise and April 1996, their parent's estate had to pay substantial gift taxes. The question to Paul and Steven as fiduciaries was what fund would pay the taxes and with what assets. The question of liquidity loomed large as well as who would pay if Martin died before the three-year interval after the gift had been made. This was not a minor

**Bruce v. Bruce**  
**In Chancery No. 149624**  
**February 20, 1998**  
**Page 8**

issue and Steven was aware of the problem. (See Paul's Exhibit #25 in which Steven acknowledges the problem and seems to accuse Dan Heller of not informing him beforehand). Until this issue was addressed Paul did not feel free to set up the \$500,000 trust. Paul's conservative approach was not unreasonable.

Paul also felt that there was a singular lack of information as to what charities should benefit from the gift. Steven appears to have put little or no effort into identifying a charity or understanding in any detail how the gift would benefit the recipients. Paul felt that such an investigation was Steven's responsibility. In the face of the lack of information, Paul suggested that several charities be identified and investigated. Steven responded with threats. (Although Dan Heller had identified a charity in Florida, no one really looked into how the particular charity worked. As it turned out the charity in question funded many activities).

The Court does not find that Paul's slow approach was improper. Indeed, the Court wondered why Steven put forward no information as to how the money would be spent. One would think that part of the joy of giving would be to pick out the recipients with some knowledge of who they really were or what the institution actually did.

#### THE ACCOUNTANTS

(See Paul's Exhibits #63A-F and Steven's Exhibits #23-27)

Steven maintains that "Paul had frequent contact with trust accountants, without Steven's permission or knowledge, and at great expense to the trust."

It does appear that Paul had conversations with the trust accountants on his own. The Court declines to find that this is a breach of his fiduciary obligations. The brothers did agree that Anchin Block and Anchin (ABA) was not performing adequately, but as usual disagreed completely as to the timing of their dismissal. The successor to ABA was the accounting firm of Murray, Johnson and White. The letters Steven sent to this new firm were in their tone, almost as accusatory as the letters he had sent to Paul attacking his integrity. (See Paul's Exhibit #63C). The relationship with Murray, Johnson and White did not last but it appears that Steven's extreme distrust of Paul sabotaged the relationship.

#### WHY RELATIONSHIP IMPOSSIBLE

(See Paul's Exhibits # 28, 29, 33-37, 41, 47, 50, 51, 64, 65B, 67-70)

In their disagreement over the funding of the charitable remainder trust and the generation - skipping trust that was the quid pro quo, Steven wrote to Paul and threatened to turn him into the IRS (See Paul's Exhibits #29, 33-37). In this correspondence, Steven impugns Paul's integrity many times and does not hesitate to relate his alleged spurious conduct to family

history. (See Paul's Exhibit #35).

From January 1995 through February 1997, Steven wrote letters threatening to sue Paul over the alleged breach of his fiduciary duties thirteen times. (See Paul's Exhibits #28, 29, 35, 41, 47, 50, 51, 64, 65B, 67, 68, 69, 70). Steven states he has no trust in Paul, (See Paul's Exhibit #64), accuses Paul of fraud, suggests that Paul retain counsel (See Paul's Exhibit #68) and again does not hesitate to relate Paul's behavior to family history in a particularly cruel attack. (See Paul's Exhibit #70). Steven ascribes to Paul the worst possible motives. These threats culminated in the California lawsuit filed by Steven in February 1997.

The Court's does not find that Paul is blameless. He had a tendency to tune his brother out. On a personal level Paul kept Steven at arm's length, refusing to talk with him except in the presence of third parties. This only infuriated Steven more and brought about attacks that became more intense. The Court is unable to determine which came first, that is, Paul's reserve or Steven's tendency to distrust. The mention of family history leads one to speculate that the differences did not begin at the death of Sylvia Bruce.

At any rate, the situation as it exists today cannot continue. The Court believes that the level of discord between the brothers is a detriment to the management of the estate and reaches the level of dysfunction that has been recognized by the Florida courts as sufficient to justify the removal of a trustee. The Court retains Paul Bruce as the trustee because of his experience in the real estate field and in particular with the properties in the Bruce estate. His calm demeanor serves him well as a trustee. The Court believes that his conservative approach benefits the estate.

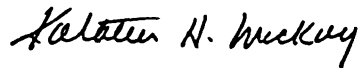
He cannot act alone. Steven's interests need to be protected and the Court appoints attorney Dan Heller to act in Steven's stead. This is the one man who has the experience to act as trustee and who both men have trusted in the past. The fact that the estate has to pay for his services is the price both Paul and Steven must pay for their inability to get along.

Both brothers are to continue as co-guardians over their father's person. This responsibility is too intimate to the family for one brother to displace the other. I expect Paul and Steven will continue to rely on the good offices of Blair Blunda (and family member Dr. Paul Weisshaar).

**Bruce v. Bruce**  
**In Chancery No. 149624**  
**February 20, 1998**  
**Page 10**

This has been a difficult decision. It is not the Court's intent to accuse Steven Bruce of malfeasance. Mr. Keith will please prepare an Order in conformance with this opinion to be endorsed by both parties. Included in the Order should be the requirement that the charitable remainder trust, or an equivalent, be ready to fund within the next sixty days. I appreciate your patience in waiting for this opinion. Both attorneys did a very good job.

Sincerely,



Kathleen H. MacKay

KHM/dmm

C  
A  
VIRGINIA :

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

PAUL BRUCE )  
Co-Guardian of Martin Bruce )  
and Co-Trustee of The Martin )  
Bruce and Sylvia Bruce Trusts )

Plaintiff, )

v. )

CHANCERY NO. 149624

STEVEN BRUCE )  
Co-Guardian of Martin Bruce )  
and Co-Trustee of The Martin )  
Bruce and Sylvia Bruce Trusts )

Defendant. )

FINAL DECREE

This matter came before the Court for trial on January 12 and 13, 1998. Upon consideration of the pleadings, the testimony of the witnesses and documentary evidence presented by both sides, the trial briefs and authorities presented by both sides, and argument of counsel, for the reasons set forth in the letter opinion issued by the Court on February 20, 1998, which is incorporated herein, it is

1cp P/H  
ADJUDGED and DECREED as follows:

1. Steven Bruce shall be and hereby is removed as co-trustee of the Sylvia Bruce QTIP Trust, the Sylvia Bruce Revocable Trust, and the Martin Bruce Revocable Trust ("the

Trusts"). Steven Bruce is also removed as guardian of the property of his father, Martin Bruce.

2. Paul Bruce shall remain as co-trustee of the trusts.

3. Dan Heller, Esquire, of Miami, Florida, shall be and hereby is appointed as co-trustee of the Trusts in place of Steven Bruce, *and Dan Heller's letter of March 16, 1998 is incorporated herein.*

4. Paul Bruce and Steven Bruce shall both remain as co-guardians of the person of their father, Martin Bruce.

5. A petition shall be filed by the co-trustees pursuant to Va. Code § 37.1-137.5 to establish a charitable remainder trust (or an equivalent) in memory of Michael Bruce within sixty (60) days from the date of this Order. The co-trustees are authorized to select and transfer assets for the purpose of funding the charitable remainder trust.

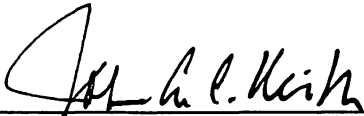
ENTERED this 20<sup>th</sup> day of March, 1998.

Kathleen H. MacKay  
Kathleen H. MacKay, Judge

SEEN AND AGREED:

BLANKINSHIP & KEITH,  
a Professional Corporation  
4020 University Drive, Suite 312  
Fairfax, Virginia 22030  
(703) 691-1235

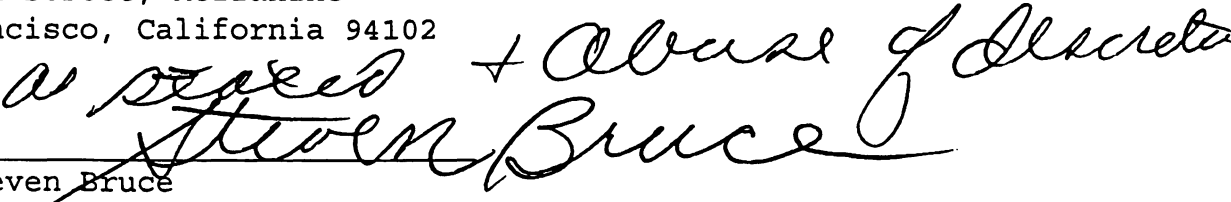
By:

  
John A.C. Keith, VSB 14116  
Elizabeth Chichester Morrogh, VSB 25112  
Counsel for Plaintiff, Paul Bruce  
---

SEEN AND OBJECTED TO:

LAW OFFICES OF STEVEN BRUCE  
507 Polk Street, Mezzanine  
San Francisco, California 94102

By:

*a signed + Abuse of Discretion*  
  
Steven Bruce

THE JEFFERSON LAW FIRM

1980 Gallows Road, Suite 200  
Vienna, Virginia 22182

By:

\_\_\_\_\_  
Stephen G. Cochran  
Counsel for Defendant,  
Steven Bruce

BH:Bruce\FinalDec.Ord



**STEPP, et al. v. FOSTER, et al.**  
**Chancery No. 146295**

**Breakdown of Attorneys Fees Incurred by Defendant Trustees (Estimated)**

<b><u>Description</u></b>	<b><u>Hours</u></b>
1. Pleadings, Motions, Briefs and Legal Research:	160.4
2. Responding to Discovery Initiated by Plaintiffs:	150.4
3. Conducting Discovery Initiated by Defendant Trustees:	111.7
4. Client Discussions, Interviews, Factual Investigations Coordination with Counsel for Other Defendants, and Miscellaneous:	27.8
5. Trial Preparation:	108.6
6. Trial:	127.6
7. Post-Trial (through 8/10/98):	94.5
8. Estimated Fees for 8/11/98 - 8/12/98	<u>20.0</u>
<b>Grand Total:</b>	<b>801.0</b>



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center  
4110 Chain Bridge Road  
Fairfax, Virginia 22030-4009

(703) 246-2221

Fax: (703) 385-4432

COUNTY OF FAIRFAX

CITY OF FAIRFAX

F. BRUCE BACH  
J. HOWE BROWN  
MICHAEL P. McWEENY  
MARCUS D. WILLIAMS  
GERALD BRUCE LEE  
STANLEY P. KLEIN  
ROBERT W. WOOLDRIDGE, JR.  
ARTHUR B. VIEREGG  
JANE MARUM ROUSH  
M. LANGHORNE KEITH  
DENNIS J. SMITH  
DAVID T. STITT  
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JONATHAN C. THACHER  
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JAMES KEITH  
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LEWIS H. GRIFFITH  
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THOMAS J. MIDDLETON  
THOMAS A. FORTKORT  
QUINLAN H. HANCOCK  
RICHARD J. JAMBORSKY  
JACK B. STEVENS  
RETIRED JUDGES

November 23, 1998

Stephen J. Annino, Esquire  
Kasimer & Ittig  
7653 Leesburg Pike  
Falls Church, Virginia 22043

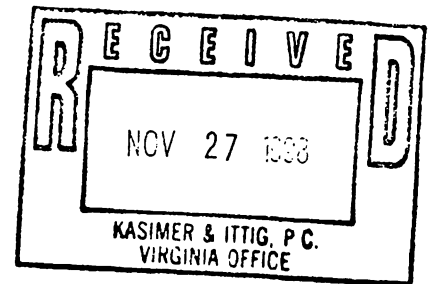
Matthew A. Clary, III, Esquire  
Holland and Knight  
3110 Fairview Park Drive  
Suite 900  
Falls Church, Virginia 22042

Edward J. Tolchin, Esquire  
Fettmann, Tolchin and Major  
10615 Judicial Drive  
Suite 502  
Fairfax, Virginia 22030

Re: Gail Stepp, et al. v. James A. Foster, et al.  
In Chancery No. 146295

Dear Counsel:

The issue addressed in this opinion letter is to what extent the Plaintiffs are liable to the Defendants for the payment of their attorney's fees and costs incurred in this litigation. The Court must consider the reasonableness of Defendants' fees having already decided in its letter opinion of June 5, 1998 that Plaintiffs in theory are liable for these fees. With minor exceptions the Court finds that Defendants' fees are reasonable for the reasons set out below.



Gail Stepp, et al. v. James A. Foster, et al.

In Chancery No. 146295

November 23, 1998

Page 2

### Background

The Plaintiffs in this case are Gail and Marie Stepp and Ralph and Patricia Edwards as individuals; Gail Stepp as a trustee; and Ralph Edwards as a representative of the Belmont Bay Community Associates (Associates). The Defendants are James A. Foster and Marvin E. Lear, individually; James A. Foster and Marvin E. Lear as trustees and Carol Ann Wright as a putative trust; the Belmont Bay Community Association, Inc. (BBCAI); and the following as beneficiaries of the Belmont Park Estates Trust Agreement: Michael Polifko, William B. Foullois, Thomas G. Goeller, George E. and Nancy L. Arnold, Fritz Vandenberg as well as other individuals and organizations listed in Exhibit E to the Bill of Complaint.

At issue in this community dispute is the interpretation of a Deed dated February 24, 1973 whereby certain property in the Belmont Park Estates Subdivision was transferred to James A. Foster, Marvin E. Lear and Marshall L. Ware as trustees for the use and benefit of all lot owners in the Subdivision. The parcel was composed primarily of a lake and beach. The litigation arose over conflicting interpretations as to the duties and responsibilities of the trustees and their relationship to lot owners in the Subdivision as well as to the two rival homeowner associations, Associates and BBCAI.

The Bill of Complaint asked for relief in three counts: Count I sought declaratory relief on a number of issues including the manner in which trustees could act, the relationship between the trustees and the BBCAI, whether the BBCAI had the power to collect assessments on lot owners, and who were the properly appointed trustees; Count II asked the Court to order an accounting for all monies collected by Defendants Lear and Foster from 1994 on and to hold the Defendants accountable for any funds which were spent for unauthorized purposes or were unaccounted for; Count III asked the Court to remove Defendants Lear and Foster as trustees and asked that damages be assessed against them for breach of their fiduciary duties.

The Bill of Complaint was filed on October 3, 1996 and the case was tried on February 23, 1998. The Court rendered its decision on March 4, 1998 finding no merit in Plaintiffs' claim that Defendants had breached their fiduciary duties. The Court agreed with Defendants' theory as to the legal relationship between the trustees and lot owners. At the close of the trial the Defendants asked for their fees and costs.

The Court took this issue under advisement and issued an opinion letter on June 5, 1998, having reviewed briefs submitted by counsel. At Plaintiffs' request the Court held a hearing on the reasonableness of fees on August 12, 1998.

Legal Standard

The Virginia Supreme Court has opined that:

"In determining a reasonable fee, the fact finder should consider such circumstances as the time consumed, the effort expended, the nature of the services rendered, and other attending circumstances. Ordinarily, expert testimony will be required to assist the fact finder." Mullins v. Richlands Nat'l Bank, 241 Va. 447, 449 (1991). Tazewell Oil Co. v. United Virginia Bank/Crestar Bank, 243 Va. 94, 113 (1992).

The United States Court of Appeals for the Fourth Circuit has set out twelve factors relevant to a determination of attorney's fees. While the parties did not present evidence on every one of these factors, considerable evidence was presented as to the following factors which are similar to the general considerations set out in Mullins: time and labor expended; novelty and difficulty of the questions raised; skill required to properly perform the legal services rendered; the customary fee for like work; the amount in controversy and the results obtained; the experience, reputation and ability of the attorney; and attorney's fees awarded in similar cases. Barber v. Kimbrell's, Inc., 577 F.2d 216, 226 (1978).

In the following analysis the Court has considered all of these factors but has organized its discussion under more general headings.

Nature of the Case

The Court has summarized the nature of the relief sought by the Plaintiffs. The Bill of Complaint makes specific allegations against James A. Foster. For instance in Paragraph 16 the pleading alleges that Foster was the author of a plan to exclude Gail Stepp from functioning as a trustee

"so that certain personal objectives of James A. Foster could be advanced without interference .... These objectives included the development and enforcement of roads in the subdivision and the establishment of a formal homeowner's association to govern the subdivision, all of which would be to the primary use and advantage of James A. Foster and/or his partnerships who own at least 38 lots in the subdivision which he desired to develop and sell."

Paragraphs 17 through 19 elaborate on this thesis. Paragraphs 20 and 21 allege that the new Association (BBCAI) received funds properly belonging to an older organization, the Belmont Bay Community Associates (Associates). The Bill of Complaint alleges that BBCAI

collected funds from lot owners under false pretenses.

In order for the Defendants to defend themselves from these accusations the Defendants were obliged to put on as evidence the entire history of this community from 1973 to the present. Present day practices could only be explained with reference to past practices. The somewhat haphazard records of a volunteer association had to be collected and analyzed and digested so that a theory could be constructed that was coherent and presentable to the Court. This in itself was an extremely tall order.

Both Plaintiffs and Defendants were called upon to explain how the community was established, the origination of the trust document, how the original and successor trustees were selected, how lot owners were notified of community meetings, how the rival associations were formed, how funds were collected, how these funds were spent, and who benefited from expenditures.

From 1994 on, both sides had to show literally who said what to whom in order to illustrate either the presence or absence of the alleged conspiracy. We are talking about a community of homeowners. We are not talking about a sophisticated entity that was experienced in record keeping. To accumulate the evidence necessary to put on a case both sides had to conduct extensive discovery. They had to rely on narratives from the members of the community. The depositions in this case were in fact a sort of oral history of the Belmont Park Estates Subdivision.

It is not an exaggeration to say that when Plaintiffs filed this lawsuit they ignited a firestorm. The Court heard testimony from seventeen members of the community and four expert witnesses including the lawyer who drafted the 1973 trust document.<sup>1</sup> By the Court's rough estimate it appears that some twenty families were represented in the courtroom every day of the trial.

The trial itself lasted six and one-half days. Plaintiffs' exhibit book consisted of some eighty-two exhibits. Each exhibit contained many pages and the Court estimates the total exhibit book to be over a thousand pages. The Defendants' exhibit book was only slightly less bulky and consisted in the main of every official record or piece of correspondence which had ever been drafted or sent or received by BBCAI or its predecessor from 1972 to October 1997. Defendants even presented a brochure advertising the development dated 1961. (The lake figured

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<sup>1</sup> These numbers are taken from the Court's own notes rather than from an actual transcript.

prominently.).

The Court's file reflects the contested nature of this litigation. The Court's ledger reflects thirty-three separate entries for pleadings filed or orders entered prior to trial. Three Demurrers were filed by the Defendant trustees as well as one Motion for Partial Summary Judgment. Defendants were victorious as to their first Demurrer and won their Motion for Summary Judgment.<sup>2</sup>

The legal issue in the case, that is, the interpretation of an ambiguous trust document, although challenging was not nearly so daunting as was the compilation of the historical record. Even though both sides had to struggle with this task in order to make their case, Attorney Clary's (Clary) fees were substantially larger than Attorney Annino's (Annino).

At this point it is important to note that Defendants won the case. It was clear to the Court that Clary had mastered his material. He was extremely effective. It is reasonable to assume that the extra time he spent on the case yielded the result he obtained.

#### Nature of the Representation

Attorney Clary and Attorney Moore of the firm Clary and Moore represented the Defendants. Clary is asking the court to award his clients his fees and costs through trial and his fees and costs post trial. Through trial the fees of Clary and Moore were \$138,506 and the costs were \$9,529.21.<sup>3</sup> Clary billed at \$225.00 an hour and Moore at \$175.00. Clary was lead counsel in the case and alone represented his clients at trial. He represented all the named trustees and individuals. He submitted his fees and expenses through trial by means of a three page affidavit and a thirty-seven page billing statement dating from August 8, 1996 through March 6, 1998. It appears from his billing statement that Clary wrote off some 15.5 hours of his time as "no charge" and some 72.5 hours of paralegal time as "no charge."

At the August 12th hearing the Plaintiffs put on an expert, Susan Pesner, Esquire to opine that Clary's fees were not reasonable. She stated that Clary and Moore performed tasks that a

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<sup>2</sup> See Judge McWeeney's Order of January 17, 1997 and Judge Roush's Order of April 11, 1997. Plaintiffs had some success in their own Partial Motion for Summary Judgment. See Judge Roush's Order of January 30, 1998.

<sup>3</sup> Defendants were represented by the firm of Clary and Moore through April 30, 1998 and by Holland and Knight from May 1, 1998, both Messrs. Clary and Moore having joined the Holland and Knight firm.

research associate or paralegal could have performed more cheaply. She opined that if the Defendants had used an attorney that had been offered through Mr. Foster's insurance carrier economies on research time could have been realized. She compared this case to that of Bruce v. Bruce, Circuit Court of Fairfax, Chancery No: 149624, where the fees to represent the Defendant were lower. She opined that the fees should have been in the range of \$80,000 including all post trial work.

The Defendants put on an expert to justify their fees. Charles Molster, Esquire testified that the hourly rates charged by Clay and Moore were reasonable, that the type of work done by Defendants' attorneys bore a reasonable relationship to the fees charged, that the litigation itself was complex, and that the favorable result for the Defendants was testimony to the fact that the litigation was efficiently and effectively conducted. He regarded the charges made by the Plaintiffs against Defendants Foster and Lear to be akin to a "thinly-veiled fraud claim."

It is this Court's opinion that the pre-trial and trial fees and costs were reasonable. In support of this finding the court notes that the seriousness of the charges merited the expenditure of time and money by the Defendants. Had the trustees lost their case they would have been accountable for such monetary relief as the Court determined for breach of their duties "taking into account any loss or depression to the value of the Trust Estate resulting from self-dealing, any profit made by the Defendant through self-dealing, or any property that would have accrued to the estate if there had been no self-dealing." (Bill of Complaint, Count III).<sup>4</sup> It goes without saying that the affairs of the community would have been in great turmoil had Plaintiffs prevailed.

The Court finds that given the fact that Clary and Moore was a two-man firm that they managed their time wisely. They donated a significant amount of their time at the beginning of the litigation to their clients and they appropriately used paralegal time to prepare exhibits for trial.<sup>5</sup> Mr. Clary's rate of \$225.00 an hour was reasonable. If anything it is low compared to

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<sup>4</sup> In their Supplemental Answers to Interrogatories Plaintiffs stated that they expected their expert, Ralph Spadaccini, to opine as to damages in the amount of \$131,578.25. In addition they asked for attorney's fees paid to Annino and to Ed Tolchin, representing BBAI. (Supplemental Answers were submitted to Court by Clary on 8/14/98).

<sup>5</sup> By letter of March 14, 1997, Clary wrote Annino setting out his understanding of the Willson v. Whitehead case whereby unsuccessful plaintiffs suing defendant trustees could be liable for defendants' attorney's fees. 181 Va. 960 (1943). It was prior to that date that Mr. Clary donated a significant amount of time. After that date litigation went forward in earnest.

other attorneys of his experience practicing in Fairfax. Mr. Moore's rate was also reasonable given his experience.

The Court is not convinced that had Defendants used a lawyer from an insurance defense firm that economies would have resulted. This case was unique. Success depended a great deal upon a mastery of the facts of the case, the history of the community and an understanding of the characters and interpersonal relationships involved. This was not a situation where pulling case law out of a common file or off a computer would save great deal of time.

Finally, this case bears no resemblance to the Bruce case. Coincidentally, this Court presided over that trial. That case was tried in two days and although fact specific, involved just two brothers and their relationship to their father. In contrast, the case at hand had many parties all who contributed to setting forth the twenty-five year history of Belmont Park Estates. Defendant attorneys in Bruce accumulated fees in the amount of \$71,000. If anything that fee justifies a larger fee in Stepp given the greater complexity of the case.

The Court would make two minor adjustments and that is to deduct from the fees the amount of \$1,000 as the price of the protective order obtained by the Plaintiffs on October 31, 1997, and the cost of an expert witness, Pia Trigiani, who was called by BBCAI rather than Defendant trustees.<sup>6</sup> The fee paid to the expert witness was \$875.00.

#### Insurance

Defendant Foster is an insured under a Personal Umbrella homeowners insurance policy issued by Nationwide Insurance. The policy potentially covered him for the costs of defending a lawsuit based upon alleged acts of negligence but not for intentional conduct. A copy of the policy is attached as an Exhibit to Defendants' Motion In Limine presented at the August 12th hearing. Nationwides' Reservation of Rights letter of December 13, 1996 was Plaintiffs' Exhibit A-1 at the August hearing.

At that hearing, Defendants sought to exclude any evidence of Mr. Foster's insurance coverage. The Court denied this motion and accepted a proffer from Annino that Nationwide had reimbursed Foster some \$40,000 to cover his legal fees. Annino asked the Court to enter an order with regard to fees that would reduce any fees owed by the Plaintiffs by the amount paid by the insurance company to Foster.

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The letter of March 14th was attached to Clary's brief in support of an award of attorney's fees.

<sup>6</sup> The Court is requiring BBCAI to bear its own fees and costs.



With regard to the insurance question generally, Foster had the right to select an attorney other than the one offered by Nationwide. The charges leveled against Foster were serious. The December Reservation of Rights letter while legally proper and correct may have given rise to skepticism on Foster's part as to the enthusiasm with which he would be represented. The letter stated, "As such, while Nationwide will provide you with a defense in this case, this Company will deny payment of any judgment that may be obtained against you resulting from this incident and the allegations contained within this Bill of Complaint." See letter, page 1.

With regard to the requested set off, Mr. Foster is only one defendant of many. All of the Defendants are liable to pay for Clary's fees and costs. A payment to Foster personally should not benefit all of the Defendants jointly. Furthermore, pursuant to the collateral source rule, compensation recovered by a tort victim may not be applied as a credit against the amount of damages the tortfeasor owes. Shickling v. Aspinall, 235 Va. 472 (1988); Walthew v. Davis, 201 Va. 557 (1960); Burks v. Webb, 199 Va. 296 (1957); Johnson v. Kellam, 162 Va. 757 (1934).

Finally, it is highly unlikely that Mr. Foster will benefit from any windfall. Article 8 under "Exclusions" in Foster's policy clearly gives the insurance company the right of subrogation. The policy in plain English states: "When we pay, an insured's rights of recovery from anyone else becomes ours up to the amount we paid."<sup>7</sup> For all these reasons the Court deems Foster's insurance to be irrelevant to the Court's ultimate determination as to fees and costs owed by the Plaintiffs.

#### Post Trial Fees and Costs

In addition to reimbursement for their fees and costs to defend the case at trial, the Defendants are asking the Court to award them their fees and costs spent to defend their fees through August 12, 1998. The Plaintiffs contest this claim and ask that each party bear their own costs on this issue pursuant to the American Rule.

As the Defendants note in their brief there is scant Virginia law on the issue of the award to a party of attorney's fees and expenses incurred in litigating the reasonableness of previously incurred fees and expenses to which the court has determined that party is entitled. Defendants cite two circuit court decisions that discuss analogous situations and cite a number of cases from other states and from a federal court that deal directly with the issue. See Fresh Meadows Med. Assoc. v. Liberty Mut. Ins. Co. 49 N.Y. 2d 93 (1979); Prandini v. National Tea Co., 585 F.2d 47

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<sup>7</sup> Foster's insurance policy was attached to Defendants' Motion in Limine.

Gail Stepp, et al. v. James A. Foster, et al.

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(3d Cir. 1978); Guinn v. Dotson, 28 Cal. Rptr. 2d 409, and Gagne v. Maher, 594 F.2d 336 (2d Cir. 1979).

Plaintiffs argue that no fees are warranted because Defendants represented that they were not seeking post trial fees when they filed their billing statements immediately after trial. Plaintiffs also argue for the Court's imposition of the American Rule since Defendants are making an "affirmative claim" by seeking fees. Plaintiffs allege that the Defendants are no longer in the defensive position contemplated by Willson v. Whitehead, 181 Va. 960 (1943).

It appears to this Court that to find that Defendants are owed fees and then to require them to bear their own fees to defend their fees flies in the face of common sense as well as legal sense. The Court in Guinn v. Dotson recognized this problem when it stated: "... where a doctrine supports the award of reasonable attorney's fees, "it will often be frustrated, sometimes nullified, if awards are diluted or dissipated by lengthy, uncompensated proceedings to fix or defend a rightful fee claim.'" 28 Cal. Rptr. 2d at 414 (citation omitted).

Once Plaintiffs made it clear that reasonableness was an issue upon which they would present evidence, all bets were off, so to speak, as to Clary's response. Both sides hired experts, both sides conducted discovery even to the point of having to appear in Court on a discovery motion. Clary responded to this issue in the same manner that he litigated this entire case--- with a meticulous thoroughness that was time-consuming and expensive. For instance, he filed two briefs in support of his post trial expenses, copying the Court with dozens of cases from all over the United States to support each and every argument.

The Court will make one adjustment to his fees based on his statement that he and his expert spent seventeen hours preparing for the August 12th hearing. See statement attached to Clary's Affidavit In Support of Supplemental Award, August 8 and 10, 1998. Mr. Clary did not need that much preparation given his performance in the past. The Court will reduce his post trial fees by \$2000. Although the fee for Mr. Molster seems high, the Court will let that fee stand since Clary really had no choice but to put on an expert in response to Annino.

#### Final Statement

The Court accepts Clary's fees through trial in the amount of \$138,506 minus \$1,000 and his costs of \$9,529.21 minus \$875.50, for a total of \$146,159.71.

The Court accepts Clary's fees through August 12, 1998 in the amount of \$22,837.50 minus \$2,000 and his costs of \$5500.00, for a total of \$26,337.50.

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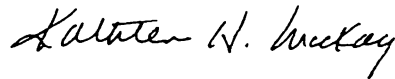
November 23, 1998

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The total fees payable by the Plaintiffs to the Defendants are \$158,343.50. The total costs payable by the Plaintiffs to the Defendants are \$14,153.71, the total for all is \$172,497.21.

I have signed the Order that was presented by the Defendants.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kathleen H. MacKay".

Kathleen H. MacKay

KHM/ca

VIRGINIA

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

GAIL STEPP, et al.

Complainants,

v.

JAMES A. FOSTER, et al.

Defendants.

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In Chancery No. 146295

FINAL DECREE

This cause came on to be heard on the Plaintiffs' Amended Bill of Complaint for Declaratory and Other Relief; and

IT APPEARING to the Court, after the presentation of evidence, and the briefs and argument of counsel, that, inter alia, judgment ought to be granted in favor of the Defendants; that there is no evidence that Mr. Foster or Mr. Lear ever put into effect a plan to exclude Mr. Stepp as a trustee under the Deed of February 24, 1973 (the Deed); that while Mr. Stepp was once a duly appointed trustee under the Deed, he no longer is a duly appointed trustee, and Mrs. Wright was duly appointed as his successor; that Mr. Polifko was duly appointed a successor trustee to Mr. Lear; that there is no evidence that Mr. Foster or Mr. Lear engaged in self-dealing, breached their fiduciary duties, or have done anything in the community with bad faith; that the trustees have powers in the Deed, but they do not have duties; that the trustees have the power to elect or appoint a successor trustee or trustees in the event of the death, removal from the state, incapacity to act, refusal to act, or resignation of any trustee; and the power to deny access to or use and enjoyment of the property to such lot owners who neglect, refuse, or fail to pay a uniform charge as determined by the trustees;

that the Board of not less than five (5) or more than nine (9) lot owners described in the Deed was properly created in 1974, and is now the Board of Directors of Belmont Bay Community Association, Inc., which has the power to govern the trustees in the use of Parcel A of Belmont Park Estates Subdivision, and in all matters pertaining thereto; that Belmont Bay Community Association, Inc. is a voluntary organization; that Defendant Trustees performed their duties faithfully and are guilty of no unjust, improper or oppressive conduct; that the Defendant trustees have incurred \$176,057.71 in legal fees and expenses including estimated legal fees and expenses in connection with obtaining a judgment for legal fees and expenses against Complainants of which sums the trustees have paid to date \$160,639.71; that the trustees in justice and good conscience should not be put to any expense out of their own monies; and, for the reasons stated in the Court's June 5, 1998 letter to counsel, incorporated herein by reference, Trustees are entitled to recover from the Complainants their legal fees and expenses hereafter set forth which the Court determines are reasonable to be reimbursed to the Trustees; that Belmont Bay Community Association, Inc. application for sanctions is denied; it is, therefore

ORDERED and DECREED that judgment be, and hereby is, entered in favor of the Defendants, and each of them; and it is further

ORDERED and DECREED that Plaintiff Gail Stepp is not a trustee under the Deed, the three current trustees under the Deed being Defendants James A. Foster, Carolann M. Wright and Michael Polifko; and it is further

ORDERED and DECREED that the Court's prior Decree of April 11, 1997, granting partial summary judgment in favor of Defendants Foster, Lear and Wright, remains as previously entered; and it is further

ORDERED and DECREED that the trustees have power in the Deed, but do not have duties; and it is further

ORDERED and DECREED that the trustees have the power to elect or appoint a successor trustee or trustees in the event of the death, removal from the state, incapacity to act, refusal to act, or resignation of any trustee, and the power to deny access to or use and enjoyment of the property to such lot owners who neglect, refuse, or fail to pay a uniform charge as determined by the trustees; and it is further

ORDERED and DECREED that the Board of not less than five (5) or more than nine (9) lot owners described in the Deed was properly created in 1974, and is now the Board of Directors of Belmont Bay Community Association, Inc., which has the power to govern the trustees in the use of Parcel A described in the Deed, and in all matters pertaining thereto; and it is further

ORDERED and DECREED that Belmont Bay Community Association, Inc. is a voluntary organization; and it is further

ORDERED and DECREED that all relief requested by the Complainants be, and hereby is, denied; and it is further

ORDERED and DECREED that Defendants be awarded judgment against the Complainants,  
jointly and severally, in the sum of \$ 172,497.21 as reasonable attorney's fees and expenses;  
and it is further *Ordered that the Court's November 23, 1998 letter to counsel*  
*as to attorney's fees is incorporated herein by reference and it is further*  
XHM

ORDERED and DECREED that, in view of the extensive litigation efforts to which the  
trustee's have been put in both the underlying trial on the merits and in seeking the recovery of legal  
fees and expenses paid and the difficulties presented thereby in reasonably estimating the future  
legal expense of the trustees should the matter be appealed or in efforts to collect the judgment  
awarded hereby, that leave is granted to the Trustees to subsequently apply to the Court for an  
additional award of attorneys fees and expenses should such be hereafter incurred by the Trustees.

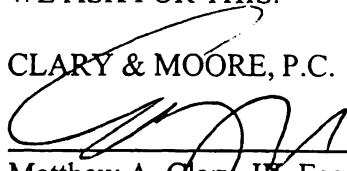
This cause is final.

ENTERED this 23 day of Nov, 1998.


Kathleen H. MacKay  
Kathleen H. MacKay  
Circuit Court Judge

WE ASK FOR THIS:

CLARY & MOORE, P.C.

  
Matthew A. Clary, III, Esquire  
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Counsel for Defendants  
Foster, Lear and Wright

FETTMANN, TOLCHIN & MAJORS, P.C.



Edward J. Tolchin, Esquire

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Fairfax, Virginia 22030

(703) 385-9500

Counsel for Defendants


Belmont Bay Community Association, Inc.,

and Defendants Polifko, George E. and Nancy

L. Arnold, Goeller and Vandenberg

SEEN AND OBJECTED TO FOR THE REASONS STATED IN THE TRIAL MEMORANDUM; FOR THE REASON THAT THE COURT HAS NOT ADDRESSED NECESSARY ASPECTS OF THE DECLARATORY RELIEF REQUESTED; THAT THERE WAS NO EVIDENCE THAT MR. STEPP REFUSED TO DO ANYTHING AS A TRUSTEE WHICH HE WAS REQUIRED TO DO; THAT THE TRUSTEES CANNOT HAVE POWERS WITHOUT A CORRESPONDING DUTY; THAT THE COMMINGLING OF TRUST FUNDS WITH VOLUNTARY CONTRIBUTIONS IS IMPROPER; AND THAT THE TRUSTEES IMPROPERLY DELEGATED THEIR DUTIES TO A NON-REPRESENTATIVE BOARD OF LOT OWNERS:

KASIMER & ITTIG, P.C.



Stephen J. Annino, Esquire

Virginia State Bar No. 20551

7653 Leesburg Pike

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(703) 893-3914

Counsel for Plaintiffs



### **ASSIGNMENTS OF ERROR**

1. The trial court erred in entering a personal judgment against the Stepps in the amount of \$172,497.21 as attorneys' fees and costs awarded to Foster, Lear and Wright.
2. The trial court erred in ordering and decreeing that Gail Stepp is not a trustee under the Deed, and in ordering and decreeing that the current trustees under the Deed are James A. Foster, Carol Ann Wright and Michael Polifko.
3. The trial court erred in ordering and decreeing that the trustees under the Deed may act by majority, rather than unanimously.
4. The trial court erred in denying the Stepps' request for an accounting of all funds collected and expenses paid on behalf of the Belmont Park Estates.
5. The trial court erred in denying the Stepps' request for removal of Foster and Lear as trustees under the Deed, and in denying the Stepps' request for relief as a result of Foster and Lear's breach of fiduciary duties.

# THE HISTORY OF THE

REIGN OF THE EMPEROR OF THE EAST

FROM THE DEATH OF THE EMPEROR OF THE WEST

TO THE DEATH OF THE EMPEROR OF THE EAST

BY THE REV. J. G. BURTON, D.D.

LONDON: J. G. BURTON, D.D.

1844

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