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SUPREME COURT, U.S.  
WASHINGTON, D.C., 20543

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-322 & 86-328

TITLE CRAWFORD FITTING COMPANY, ET AL., Petitioners V. J.T. GIBBONS, INC.  
and CHAMPION INTERNATIONAL CORPORATION, Petitioner V. INTERNATIONAL  
WOODWORKERS OF AMERICA, AFL-CIO-CLC

PLACE Washington, D. C.

DATE April 29, 1987

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IN THE SUPREME COURT OF THE UNITED STATES

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CRAWFORD FITTING COMPANY, ET AL., :

Petitioners, :

v. : No. 86-322

J.T. GIBBONS, INC. :

and :

CHAMPION INTERNATIONAL CORPORA- :

TION, :

Petitioner, :

v. : No. 86-328

INTERNATIONAL WOODWORKERS OF :

AMERICA, AFL-CIO-CLC :

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Washington, D.C.

wednesday, April 29, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:55 o'clock a.m.

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APPEARANCES:

ERNEST P. MANSOUR, ESQ., Cleveland, Ohio;  
on behalf of the petitioners in No. 86-322.  
JEFFREY A. WALKER, ESQ., Jackson, Mississippi;  
on behalf of the petitioner in No. 86-328  
WILLIAM H. BLOCK, ESQ., Seattle, Washington;  
on behalf of the respondent in No. 86-322  
JAMES E. YOUNGDAHL, ESQ., Little Rock, Arkansas;  
on behalf of the respondent in No. 86-328.

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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear arguments next in two consolidated cases, No. 86-322, Crawford Fitting Company against Gibbons; and No. 86-328, Champion International Corporation against International Woodworkers of America.

Mr. Mansour, you may proceed whenever you're ready.

ORAL ARGUMENT OF ERNEST P. MANSOUR, ESQ.,

ON BEHALF OF PETITIONERS IN NO. 86-322

MR. MANSOUR: Thank you, Mr. Chief Justice, and may it please the Court:

At the conclusion of a long and complicated antitrust case, and after a hearing, Judge Palmeiri, who rendered a decision in favor of the defendants, granted an application for court costs, which included a request for fees involving three experts who testified at the time of trial on behalf of the defendant, yes, Justice White.

The -- Judge Palmieri approved those costs in two situations. He -- Dr. Robers' fees were allowed, and Dr. Saving's fees were allowed.

He disallowed the fees of James Baldwin, a partner with the accounting firm of Ernst & Whinney.

The basis of the allowance of the fees were

1 that these experts materially enabled the court to  
2 arrive at the decision the court ultimately arrived at,  
3 that is, that the merits of the complaint were  
4 meritless; that the circuit court adopted the opinions  
5 of these two experts; and that under 54(d) he had the  
6 discretion to allow the fees.

7 In an en banc opinion, the circuit court  
8 reversed. The circuit court based that reversal on the  
9 Alyeska case. The Alyeska case, as this Court is aware,  
10 involved attorneys' fees.

11 And basically what the circuit court did was,  
12 it said that attorneys' fees and expert fees are similar  
13 or the same, and the same rule ought to apply.

14 We suggest to the Court that there is a  
15 material distinction between attorneys' fees and expert  
16 fees.

17 We suggest to the Court that the basis of  
18 granting experts' fees is entirely different than  
19 obviating the American rule on attorneys' fees.

20 Historically, the role of an expert was to  
21 assist the court and/or the trier of facts to arrive at  
22 an appropriate conclusion. Historically, under our system  
23 of jurisprudence, the role of an attorney is to be an  
24 advocate on behalf of his client.

25 We suggest to this Court that those two roles

1 are entirely different --

2 QUESTION: (Inaudible) statute?

3 MR. MANSOUR: No, I think that the court of  
4 appeals said that the Alyeska case did not permit them  
5 to grant fees which did not -- which were not in the  
6 statute, Your Honor. And what they did was, they  
7 followed that district which decided that 1920 was  
8 exclusive, rather than those districts which have  
9 indicated that the adoption of 54(d) gave to the courts  
10 -- or I would prefer to say, underscored to the courts  
11 -- that discretion which the equity courts have always  
12 had historically.

13 QUESTION: Well, you could come to that  
14 conclusion whether or not you think it has anything to  
15 do with Alyeska. I mean, you could come to that  
16 conclusion as a matter of statutory interpretation --

17 MR. MANSOUR: That's correct.

18 QUESTION: -- whether you think Alyeska covers  
19 these things or not.

20 MR. MANSOUR: That's correct. But what the en  
21 banc court did was, they took Alyeska -- and I think  
22 that's a dangerous precedent, to say that attorneys'  
23 fees and expert fees are exactly the same.

24 I think from a historical standpoint that  
25 that's a dangerous precedent. And I think that that's a

1 misreading of the Alyeska case.

2 I think that there is a substantial difference  
3 between the districts involving Henkel and Farmer, for  
4 example. If you read Henkel, Henkel was written prior  
5 to the merger of law and equity.

6 Henkel was written prior to the adoption of  
7 the rules of civil procedure. Henkel involved a pure  
8 question of law; no discretion involved whatsoever.

9 Yet certain districts are using Henkel as the  
10 foundation of saying that courts have no discretion to  
11 award costs other than those found in 1920.

12 However, in Farmer, when the Farmer case was  
13 written, when the Farmer case came to this Court, it is  
14 obvious that what this Court wanted to do was to affirm  
15 the historical position of equity courts, that is, that  
16 equity courts have this broad discretion --

17 QUESTION: Well, that was pretty much dicta in  
18 Farmer, was it not?

19 MR. MANSOUR: I would suggest that -- Justice  
20 Rehnquist -- that it was not dicta, that it was the  
21 heart of the case that, as Judge Posner says, dicta is  
22 to be determined by the fact of whether you can remove  
23 the language and have the opinion make sense.

24 I would suggest to this Court --

25 QUESTION: Well, was that language necessary

1 to the holding in Farmer?

2 MR. MANSOUR: Absolutely. That was the only  
3 purpose --

4 QUESTION: Yes, but what was it used for, to  
5 deny or grant fees?

6 MR. MANSOUR: The opinion, in my opinion, Your  
7 Honor, Justice --

8 QUESTION: Well, you can just answer that  
9 question, can't you?

10 MR. MANSOUR: It was used to demonstrate that  
11 the lower court had the discretion to decide; they  
12 affirmed.

13 QUESTION: Well, my question now: Did it --  
14 did it result in denying fees or granting them?

15 MR. MANSOUR: They denied fees in excess of  
16 100 miles; that's correct.

17 QUESTION: So the district court had -- didn't  
18 -- wasn't required the grant the maximum fees.

19 MR. MANSOUR: That's correct, Justice White.  
20 However, the reading of the case certainly --

21 QUESTION: That's a long ways from saying you  
22 can grant more than the statute says you can.

23 MR. MANSOUR: I don't think -- I think the  
24 Farmer case says very clearly that the trial court has  
25 that discretion to consider whether or not.

1 I think looking at the result, basically, begs  
2 the decision in the case. The questions presented in  
3 this case relate to the power and discretion of a United  
4 States district court to tax as cost against the loser  
5 in a civil lawsuit expenses incurred by the winner in  
6 carrying on this litigation.

7 That's the first paragraph of Justice Black's  
8 opinion. If you look at Justice Harlan's dissent, the  
9 last paragraph in his dissent says, the scope of the  
10 discretion of a district judge acting within his powers,  
11 which is the foundation of today's decision.

12 That's -- that's the dissent. It is clear  
13 what they were deciding, that is, whether or not a  
14 district judge has any discretion outside of 1920. And  
15 what they found was that judge did have a discretion to  
16 consider additional costs outside of 1920.

17 The courts who have ignored Farmer, since  
18 1965, have said, the reason we ignore Farmer is because  
19 that language is dicta. I suggest a reading of Farmer  
20 would indicate that that language is not dictum but the  
21 heart and soul of the decision.

22 And if that is so, and I would urge upon this  
23 Court that that is so, then Farmer is controlling.  
24 Henkel need not be reversed because it's simply  
25 inapplicable.

1           Alyeska dealt with attorneys' fees, a  
2 different animal; an entirely different animal.

3           We suggest to this Court --

4           QUESTION: You say it's an entirely different  
5 animal, Mr. Mansour. Expert witnesses are in fact  
6 advocates on the stand the same way lawyers are  
7 advocates in court, aren't they?

8           MR. MANSOUR: That distorts the historic view  
9 of an expert, Your Honor, Justice. And there are  
10 decisions which have said that when an expert becomes an  
11 advocate, he loses his objectivity and his opinion is  
12 then colored.

13           And we do not suggest to this Court that an  
14 application for fees of an expert who has become an  
15 advocate be granted.

16           QUESTION: Well, the ones who become advocates  
17 may be more successful at winning their cases than one  
18 who maintains strict neutrality.

19           MR. MANSOUR: But is that up to the discretion  
20 of the court to determine whether or not that expert was  
21 helpful to the court, rather than to one party or the  
22 other, in determining whether to award fees.

23           QUESTION: And you say that's the standard by  
24 which the district court ought to decide whether or not  
25 to award fees to a particular expert?

1 MR. MANSOUR: That's correct, Your Honor.

2 QUESTION: Well, how do you escape the  
3 limitation on witness fees' to \$30 a day, in 1821? An  
4 expert's a witness, isn't it?

5 MR. MANSOUR: Yes. But our position, Your  
6 Honor, is that in addition to that, that the court has  
7 discretion to award additional costs.

8 QUESTION: Where does it get it?

9 MR. MANSOUR: From 54(d).

10 QUESTION: Well, 54(d) says, unless -- unless  
11 a statute otherwise requires, doesn't it? Except as  
12 otherwise regulated by statute? What is that language?

13 MR. MANSOUR: Justice Black says this: while  
14 this rule could be far more definite as to what, quote,  
15 costs shall be allowed, the words, quote, unless the  
16 court otherwise directs, quite plainly vests some power  
17 in the court to allow, quote, some costs.

18 That's the Farmer decision.

19 QUESTION: Well, that part of it is certainly  
20 dicta.

21 QUESTION: Maybe to disallow some costs.

22 MR. MANSOUR: Perhaps.

23 QUESTION: Yes, but to disallow doesn't  
24 necessarily mean to allow.

25 MR. MANSOUR: Perhaps --

1           QUESTION: I mean, it could be, and this is  
2 the argument, that the rule sets forth what cost will be  
3 awarded automatically when the court says nothing at  
4 all.

5           But if the court says something, maybe all of  
6 those costs won't be allowed. But that doesn't  
7 necessarily mean the court can say, additional costs  
8 will be allowed.

9           MR. MANSOUR: Justice Scalia, that's the  
10 argument proposed by the proponent.

11          QUESTION: Right.

12          MR. MANSOUR: That does not fit the case --  
13 the Farmer case. The reading of the Farmer cases says  
14 quite clearly --

15          QUESTION: But that's what happened in  
16 Farmer. It was a disallowance of cost, rather than an  
17 allowance.

18          MR. MANSOUR: That was the result of Farmer.  
19 I would agree with that. However, the purpose of Farmer  
20 was to demonstrate the inherent equity power of the  
21 court to consider additional costs.

22          We take the position that the result didn't  
23 matter; that it's the principle that the court has the  
24 power to consider costs in addition to 1920.

25          And Farmer clearly says that that is the fact.

1 QUESTION: Well, 54(d) says, except where  
2 express -- except when express provision therefor is  
3 made either in a statute of the United States or in  
4 these rules.

5 MR. MANSOUR: That's correct, Justice White.

6 QUESTION: Well, here's 1821, says, \$30 a day  
7 for witnesses.

8 MR. MANSOUR: However, unless the court  
9 otherwise directs, Justice Black says, therein lies the  
10 ability for the court to direct other costs.

11 QUESTION: Well, they didn't direct other  
12 costs in Farmer.

13 MR. MANSOUR: That's correct.

14 QUESTION: Well, if that's a holding, I don't  
15 know what a dicta is.

16 MR. MANSOUR: I'll reserve the balance of my  
17 time.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
19 Mansour.

20 We'll hear now from you, Mr. Walker.

21 ORAL ARGUMENT OF JEFFREY A. WALKER, ESQ.,

22 ON BEHALF OF PETITIONER IN NO. 86-328

23 MR. WALKER: Mr. Chief Justice, and may it  
24 please the Court:

25 Champion echoes the arguments made by Mr.

1 Mansour concerning Rule 54(d) and the inherent equitable  
2 powers of Federal courts.

3 I would, with the Court's permission, like to  
4 focus our time, with one exception, on the issues  
5 arising out of Champion's status as a Title VII  
6 defendant.

7 But before I get to that, I wanted to finish  
8 up something that you were discussing with Mr. Mansour.  
9 And in our last brief, as well as our original brief, we  
10 have cited to the Court the case of Fishgold.

11 And I believe that that to be -- that to be  
12 the correct understanding of this proviso in Rule  
13 54(d). Our position is, as in Feingold -- or Fishgold,  
14 that is Congress has prohibited expressly, as it did in  
15 the Veterans Reemployment Act, taxation of costs against  
16 a party, the court can't do it.

17 But otherwise, the court has inherent  
18 equitable discretion, recognized by Rule 54(d), to  
19 define costs.

20 To the Title VII aspects of the case. The  
21 most direct way to put our position to you is that  
22 Champion is entitled to the same rule to which any of  
23 the other litigants in this case is entitled.

24 QUESTION: Before you get to that, counsel --

25 MR. WALKER: Yes.

1           QUESTION: -- how does Title VII get into this  
2 case? The question presented does not mention Title  
3 VII. And the provisions you're about to argue about are  
4 not even cited in the petition for certiorari.

5           I didn't even know that we were going to talk  
6 about this.

7           MR. WALKER: I think that's a good point. And  
8 my -- my interest in the issue is in response to briefs  
9 filed by the Woodworkers' union in this matter.

10           The issue arises, I suppose, from the  
11 woodworkers' standpoint, because our client, Champion,  
12 was a successful defendant in a Title VII action.

13           We requested our fees, our expert witness  
14 fees, under Rule 54(d). The woodworkers are arguing  
15 that in addition to the fact they say 54(d) does not  
16 include this inherent equitable discretion, that Title  
17 VII defendants somehow are a different group of  
18 litigant, and that we should be held -- if discretion  
19 exists, we should only get them once Christianburg  
20 criteria had been satisfied.

21           There is no question in this case that the  
22 Christianburg criteria were not satisfied, and that if  
23 Christianburg is held to apply to expert witness costs,  
24 that we would not be entitled to them.

25           But to your original point, I agree with you.

1 We requested our expert witness costs from the district  
2 court under Rule 54(d). The district judge decided,  
3 determined, that he didn't have any discretion for us to  
4 even approach him with that question; that it didn't  
5 exist.

6 And what we're here to do today is to echo Mr.  
7 Mansour's arguments that Rule 54(d) does include such  
8 discretion.

9 But I would add --

10 QUESTION: You concede, I take it, that you're  
11 not entitled to attorneys' fees because of Christianburg.

12 MR. WALKER: Yes, sir.

13 QUESTION: You say expert witness fees come  
14 under a different category?

15 MR. WALKER: Yes, sir, we do. And -- and we  
16 would echo Mr. Mansour's remarks in that respect.

17 I submit to you, Mr. Youngdahl on behalf of  
18 the woodworkers will argue that even if Rule 54(d) does  
19 not include this discretion that we say does exist, that  
20 Title VII plaintiffs would be allowed to put their  
21 arguments to the court for such an award, but no one  
22 else would, because their position that expert witness  
23 fees are nothing different than attorneys' fees; and  
24 that only where Congress has authorized courts to award  
25 attorneys' fees would a litigant be entitled to them.

1           We don't think that it has anything to do with  
2 attorneys' fees.

3           QUESTION: Well, do we have to decide that  
4 question in this case of yours, do you suppose?

5           MR. WALKER: The question of whether a Title  
6 VII defendant would be exposed to a different standard?

7           QUESTION: Right.

8           MR. WALKER: I don't think that you'd have to  
9 decide it in this case. Because, again, our original  
10 request to the district court was for expert witness  
11 costs under Rule 54(d).

12           Since we only have 15 minutes, and since Mr.  
13 Youngdahl's brief on behalf of the woodworkers is solely  
14 devoted to that issue, we're prepared to respond to  
15 whatever questions you may have concerning that.

16           If, on the other hand, you're interested in  
17 additional discussion on Rule 54(d), we're more than  
18 interested and more than willing to pursue that with  
19 you. Because I think that is the first -- the first  
20 step for us.

21           We want to go back to the district court and  
22 say, you sat there, it essentially says this in your  
23 opinion, but you could not have decided the case without  
24 the testimony of our expert witness.

25           There is no reasonable way that this case

1 could have been decided for either party without the  
2 testimony of the expert witness.

3 QUESTION: But why is that different from,  
4 say, the only eyewitness to the case. Sometimes you  
5 can't decide the case without the testimony of the  
6 eyewitness.

7 MR. WALKER: Well, that's a different "can't  
8 decide the case", I submit to you. In our instance, the  
9 case could not have been decided because there was no  
10 one in the courtroom capable of performing the  
11 calculations; no one with the education and training to  
12 perform the calculations that were necessary to decide  
13 the case.

14 QUESTION: That's just because that happened  
15 to be the issue of fact in the case.

16 MR. WALKER: Well, yes, yes, that's true.  
17 We're not talking about fact witnesses here. We're  
18 talking about expert witnesses, which are, everyone  
19 concedes, to be a different breed of horse.

20 QUESTION: But would the rule be any different  
21 than, say, the only witness in the case lived in South  
22 America, and you had to fly him up here to testify to  
23 what he saw three years ago?

24 Same rule, you'd also say he's also entitled  
25 to all the extraordinary expenses?

1 MR. WALKER: No, I wouldn't. No, I wouldn't.

2 QUESTION: Why not?

3 MR. WALKER: Well, I would say that -- I would  
4 say that, to the extent that Farmer, and coming back to  
5 some of these questions, I think if there is any  
6 ambiguity in Farmer, it would go along those lines,  
7 whether we're just talking about certain types of  
8 nonstatutory, non-attorneys' fees costs, or are you  
9 going to limit yourself to things like expert costs,  
10 third party -- third party costs.

11 QUESTION: Well, all I'm asking is, your  
12 argument it seems to me doesn't necessarily apply just  
13 to expert witness fees.

14 MR. WALKER: No, it doesn't.

15 QUESTION: It applies to anything you really  
16 need to win your lawsuit.

17 MR. WALKER: No, it doesn't. And that's what  
18 we perceived to be one of the critical features of Rule  
19 54(d), is, on the trial bench, you're talking about a  
20 world of different litigation type expenses.

21 QUESTION: Certainly ones that were totally  
22 unknown to me in practice I must say.

23 MR. WALKER: Right. And only the trial judge

24 --

25 QUESTION: How about extraordinary travel

1 expenses account? Say your only lawyer who is really an  
2 expert in this field lives in Pascagoula, Mississippi,  
3 so you have to fly him to San Francisco to try the  
4 case. And he gets weekend travel expenses. I suppose  
5 they would be necessary.

6 MR. WALKER: No, they would not. Because  
7 again, with the distinction, very vast distinction we  
8 believe, to be drawn between attorneys and traditional  
9 out of pocket expenses that attorneys incur in  
10 presenting a case, and the question of bringing someone  
11 in to help the court, to help the judge and the jury  
12 decide the case.

13 QUESTION: Don't the lawyers help the court?

14 MR. WALKER: They do, but in an entirely  
15 different sense, and they have an entirely different  
16 duty, we submit, to the court than a witness or an  
17 expert witness.

18 An attorney is duty bound to be biased in  
19 favor of his client. An attorney is duty bound to  
20 present only -- to the extent it wouldn't be a  
21 concealment, but to put his client's best foot forward.

22 And although unfortunately there are some  
23 instances where experts can get out of hand and become  
24 advocates, I submit that that fortunately is the  
25 exception rather than the rule, and that a trial judge

1 more than anyone is capable of seeing that early on in a  
2 trial.

3 I -- I come back and point out to you that,  
4 again, back to the limited extent that Mr. Youngdahl I  
5 know will be talking about Title VII, I want to  
6 encourage you, when you consider -- if you consider  
7 whether Title VII policy might somehow be violated by  
8 allowing us to make these arguments to the trial court,  
9 if you just go through what analysis it would be.

10 I think very clearly the first thing that the  
11 trial judge would look at what whether our expert  
12 witness costs were indispensable to the case. That does  
13 no violence to any principle, any statement by a  
14 Congressman or anything like that, in Title VII.

15 Secondly, I believe it's unquestioned, and has  
16 been unquestioned, that in exercising its equitable  
17 discretion, courts look to the relative ability of  
18 parties to pay.

19 That has been a theme raised by the  
20 woodworkers in this case throughout it, that Title VII  
21 plaintiffs on large are impecunious plaintiffs.  
22 There's no question that that tends to be true.

23 However, they're not all impecunious.

24 QUESTION: Now, you're arguing in 322,  
25 86-322? You're arguing --

1 MR. WALKER: Champion case, yes, sir.

2 QUESTION: Oh, the Champion, all right.

3 MR. WALKER: Yes, sir. There's no question  
4 that many, many Title VII plaintiffs are impecunious.  
5 But the Woodworkers' Union is not an impecunious  
6 plaintiff.

7 The Equal Employment Opportunity Commission is  
8 not an impecunious plaintiff. And if we're able to  
9 convince the trial judge that the relative equities of  
10 all of this are on our side, if he recognizes that  
11 there's nothing wrong on the facts of this case with  
12 giving us the expert witness costs, I submit to you that  
13 it's an inherent and traditional power of the trial  
14 court to do that.

15 And that's really, when you boil all this  
16 down, both sides, the 54(d) question and to whatever  
17 extent Title VII is involved here --

18 QUESTION: You talk about inherent traditional  
19 power. How often in your experience have trial courts  
20 allowed expert witness fees as costs?

21 MR. WALKER: Very rarely. And I believe if  
22 you look in the Crawford Fitting brief, you will notice  
23 the experience under the Third Circuit, which has for a  
24 long time permitted the standard that we're arguing for.

25 The trial judges are very hard nosed about

1 this. And they're not just simply opening up some kind  
2 of floodgates so everybody gets their expert witness  
3 costs.

4 First of all, I think it's a difficult  
5 standard for any litigant to meet, to convince the trial  
6 judge that he couldn't have decided the case without  
7 that expert.

8 Most trial judges believe they can decide the  
9 case with very little testimony in some instances; and  
10 the expert testimony to them is -- may or may not be  
11 superfluous.

12 And you'll find very many decisions which say  
13 precisely that when they deny them.

14 One additional point that I want to make is  
15 that, if you're concerned -- if anyone's concerned about  
16 the dollar amounts involved, I submit to you that in  
17 every case -- almost every case that I've ever been  
18 involved with, simple depositions costs frequently come  
19 to extraordinary amounts.

20 And that if Congress had intended to insulate  
21 Title VII plaintiffs from all possible financial  
22 responsibility, they would have also insulated them from  
23 the presumptively taxable statutory costs.

24 They have not. There's never been any  
25 discussion of it.

1           QUESTION: But deposition costs are authorized  
2 by statute, are they not?

3           MR. WALKER: Yes, they are. Yes, they are.  
4 But if we come back to trying to balance Title VII  
5 policy in all of this, the argument that we've heard  
6 from the woodworkers and the amicus is that you can't do  
7 that.

8           Any financial -- possible financial hurdle to  
9 a Title VII plaintiff will chill their willingness to  
10 file suit.

11          QUESTION: Referring to your deposition cost,  
12 isn't it possible to read Farmer as saying that the  
13 discretion that was awarded to the trial judge was to  
14 deny excessive deposition costs, such as daily  
15 transcript and things like that; that that's the scope  
16 of the discretion is, within the area of allowable  
17 costs, sometimes are excessive, and there's discretion  
18 to cut back.

19          MR. WALKER: Well, I'll go back. Mr.  
20 Mansour's response to that is -- is that that's what  
21 they did. But if you go back and read the opinion, they  
22 did deny --

23          QUESTION: And clearly they do have discretion  
24 to do that?

25          MR. WALKER: There's no question that they

1 have discretion to deny them. There's no question under  
2 our proposed standard that they would have discretion to  
3 deny expert witness costs.

4 The question is whether it extends --

5 QUESTION: Whether they have discretion to  
6 allow costs not authorized by statute?

7 MR. WALKER: To allow them. And I think very  
8 clearly from Farmer that's what you were looking at.

9 QUESTION: Well, why were we?

10 MR. WALKER: Because that's the fundamental  
11 question --

12 QUESTION: We denied fees.

13 MR. WALKER: You affirmed the denial of them.

14 QUESTION: Exactly.

15 MR. WALKER: And added --

16 QUESTION: We didn't allow any costs that  
17 weren't authorized by statute.

18 MR. WALKER: No, you didn't. And I've never  
19 taken --

20 QUESTION: Well, what do you mean we're  
21 focusing on allowing costs, then?

22 MR. WALKER: No, I don't think you focused on  
23 allowing costs. I think you were focusing on the  
24 discretion in Farmer. And very clearly --

25 QUESTION: Yes, and as Justice Stevens says,

1 to deny costs even though they might have been allowable  
2 within the statute.

3 MR. WALKER: That was the fact of Farmer,  
4 that's true. But the passage from the case that Mr.  
5 Mansour read you, as well as the last sentence from the  
6 dissent in that opinion I think very clearly points out  
7 that it was broader than the simple facts of that case,  
8 and that the trial court's overall discretion --

9 QUESTION: So it was broader -- the language  
10 was broader than the holding?

11 MR. WALKER: Yes. I will concede that. But I  
12 don't believe --

13 QUESTION: Dictum or not?

14 MR. WALKER: But I don't believe that you can  
15 excise that language from the Farmer opinion itself.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
17 Walker.

18 We'll hear now from you, Mr. Block. And just  
19 to keep ourselves straight, you represent J.T. Gibbons,  
20 Inc.

21 ORAL ARGUMENT OF WILLIAM H. BLOCK, ESQ.,  
22 ON BEHALF OF RESPONDENT IN NO. 86-322

23 MR. BLOCK: I represent J.T. Gibbons, Inc.,  
24 Mr. Chief Justice, and may it please the Court. And I  
25 will be addressing in my portion of divided argument the

1 issue whether this Court should hold the district courts  
2 have power to award expert witness fees in excess of the  
3 amount specified in statute where the district court, as  
4 Mr. Mansour phrased it, determines that the expert  
5 materially enabled the district court to arrive at its  
6 decision.

7 Mr. Youngdahl, on behalf of International  
8 Woodworkers, will address the effect of Title VII of the  
9 Civil Rights Act of 1964, and the Civil Rights Attorneys  
10 Fees Act of 1976, on awards of expert witness fees.

11 QUESTION: Which is not involved in your case  
12 at all?.

13 MR. BLOCK: Which is not involved in my case  
14 at all.

15 My case involves --

16 QUESTION: (Inaudible) issue is contrary to  
17 yours?

18 MR. BLOCK: Actually, he agrees with mine with  
19 regard to the general discretion. He believes that  
20 there is a particular statutory authorization that would  
21 allow plaintiffs to recover attorneys fees in Title VII.

22 QUESTION: All right.

23 MR. BLOCK: And my position is that where  
24 Congress has spoken and given a statutory authorization,  
25 the courts certainly may follow that authorization.

1           The question that is posed by this case is  
2 whether, when Congress has defined a maximum amount,  
3 courts may exceed it.

4           Let me start by reviewing briefly the  
5 regulation of expert witness fees in the Federal court.

6           The basic amounts payable to witnesses are  
7 defined by 28 USC Section 1821. That is a direct  
8 successor to the Fee Act of 1863, which prescribed the  
9 amounts that were payable to witnesses -- that were  
10 taxable as costs for witnesses in Federal courts.

11           The Fee Act by its terms covered both law and  
12 equity cases. And that now appears no longer to be in  
13 dispute. Equity cases routinely held that the Fee Act  
14 governed the taxation of witnesses -- witness fees in  
15 Federal courts.

16           The Fee Act covered both lay and expert  
17 witnesses. And that was directly the issue faced by  
18 this Court in *Henkel v. Minneapolis, St. Paul and Omaha*  
19 *Railway*.

20           In that case, the expert witness fees had not  
21 been governed by the Federal statute, they were  
22 awardable under state law, under the rules of decision  
23 act. If they were regulated by Federal statute, they  
24 were not so awarded.

25           The Court held that they were regulated by the

1 statute that is now Section 1821.

2 The Congress has definitely prescribed its own  
3 requirement with respect to the fees of witnesses, and  
4 I'm quoting. The Congress has dealt with the subject  
5 comprehensively, and has made no exception of the fees  
6 of expert witnesses.

7 Under these provisions, additionally amounts  
8 paid as compensation or fees to expert witnesses cannot  
9 be allowed or taxed as costs in cases in Federal courts.

10 QUESTION: Unless -- unless the court appoints  
11 them.

12 MR. BLOCK: Unless the court appoints them.  
13 And Congress has dealt -- Congress has continued to  
14 regulate, exactly, Mr. Justice, the times at which  
15 expert witness fees in excess of those statutory  
16 amounts, may be taxed.

17 We cited in our brief at pages 23 to 24 29  
18 statutes involving some 34 provisions defining -- and  
19 Congress defining -- exactly when expert witness fees in  
20 addition to those specified in Section 1821, may be  
21 awarded.

22 QUESTION: How many of those say they may, and  
23 how many of them say they must, do you know?

24 MR. BLOCK: I believe they predominantly say  
25 they may; some of them say they shall.

1 But I believe --

2 QUESTION: Because to the extent they say they  
3 must, they don't help your case very much. In fact,  
4 they don't help your case at all.

5 It's only those --

6 MR. BLOCK: In the sense -- in the sense, if  
7 that was Congress wishing to take away the discretion to  
8 deny that it's recognized in Farmer?

9 QUESTION: That's right, because if they say  
10 they must, it doesn't indicate any disbelief on  
11 Congress' part that the court couldn't have done it  
12 without the statute.

13 But they're just saying, we know you could do  
14 it, but we're saying you must do it.

15 MR. BLOCK: I wouldn't so read them. But I  
16 believe predominantly they say, the court may. And in  
17 one example on that is Congress' own distinction between  
18 a private expert witness and a court appointed expert,  
19 to return to the question of Mr. Justice White.

20 Let's look at what Congress has done and  
21 required in Federal Rule of Evidence 706, which is then  
22 tied to 28 USC Section 1920 sub 6, with respect to a  
23 court appointed, as opposed to a private expert.

24 A private expert engages his ingenuity on  
25 behalf of his client. That's not wrong. That's what

1 he's engaged to do. He presents the strength of his  
2 client's case. And in the adversarial system, it is for  
3 the adversary to present the weakness in the experts'  
4 client's case.

5 The court appointed expert is quite  
6 different. Rule 706 says, first, that a witness so  
7 appointed shall be informed of his duties by the court  
8 in writing, a copy of which shall be filed with the  
9 clerk or at a conference in which the parties shall have  
10 the opportunity to participate.

11 Now, when a court informs an expert of his  
12 duties, the court says, I would like you to present not  
13 only the strengths of one side, but the strengths of the  
14 other side.

15 I would like you to present not only the  
16 weaknesses of the other side, but the weaknesses of the  
17 side that you might otherwise have represented.

18 The expert is not part of the adversarial  
19 process. He is presenting both sides.

20 There's a second portion to that phrase. The  
21 parties participate in the framing of the instructions.  
22 And the framing of the instructions to an expert may  
23 determine the outcome.

24 If a party can say, look not just at this  
25 market share but at that market share; look not just at

1 this item of business, but at that patent and its effect  
2 upon the market; the expert may come to a different  
3 conclusion.

4 Congress has said, with a court appointed  
5 expert, both sides get an opportunity to participate in  
6 those instructions.

7 The rule continues that a witness so appointed  
8 shall advise the parties of his findings. He reports to  
9 both sides. In discovery a private expert's opinions  
10 can only be limitedly discovered.

11 In this case, the expert is fully available to  
12 both sides.

13 Congress has made the determination that in  
14 this situation expert witness fees in addition to those  
15 specified in Section 1821 may be taxed as costs.  
16 Congress has comprehensively regulated that situation,  
17 and has made choices.

18 To adopt a new rule allowing a broad based  
19 grant of expert witness fees in excess of those  
20 specified in Section 1821 would substantially disrupt  
21 the Congressional provisions.

22 And nowhere in fact is that clearer than the  
23 case before the Court. J.T. Gibbons, Inc., is an  
24 antitrust plaintiff. Under the antitrust laws, 15 USC  
25 Section 15, Congress has provided that a prevailing

1 plaintiff is to recover his reasonable attorneys' fees.  
2 A defendant is not.

3 Congress has struck a balance. And the Court  
4 since 1926, the Strauss v. Victor Talking Machine Case,  
5 have held that neither side under those antitrust  
6 provisions may recover their expert witness fees.

7 So we have a situation in which Congress has  
8 said, we wish to favor plaintiffs to a particular degree  
9 to encourage private enforcement of the antitrust laws.  
10 We know this will burden defendants, but that will  
11 discourage them from violating the laws.

12 It is a balance that Congress has struck.  
13 Neither side is to recover their expert witness fees.

14 This is something Congress has chosen to do.  
15 And they have reviewed the antitrust laws, probably as  
16 much as any on the books. And they have never seen fit  
17 to shift the allocation of the burden of expert witness  
18 fees from where it sits under statute.

19 The exception proposed by petitioners in this  
20 case would substantially disrupt the antitrust laws in  
21 that respect.

22 QUESTION: Do you assert that prevailing  
23 plaintiffs are entitled to attorneys' fees under the  
24 antitrust statute?

25 MR. BLOCK: Attorneys fees or --

1 QUESTION: No, I'm sorry, expert witness fees.

2 MR. BLOCK: That is not at issue in our case.

3 QUESTION: No, but what's your view on it, in  
4 view of your construction of the law?

5 MR. BLOCK: In view of my construction of the  
6 law, the lower courts have been consistent in holding  
7 that a prevailing plaintiff is not so entitled.

8 I certainly would not object if the Court were  
9 to reconstrue the statute. But if the Court construed  
10 the statute to allow plaintiffs to recover expert  
11 witness fees, still certainly defendants could not.  
12 Because the statute is a plaintiffs-only statute in all  
13 regards.

14 So the question of whether plaintiffs can or  
15 not --

16 QUESTION: (Inaudible) that means -- that  
17 means that 1821 doesn't mean what it says.

18 MR. BLOCK: Congress can by additional statute  
19 provide for additional attorney fees.

20 QUESTION: Well, of course it can.

21 MR. BLOCK: I mean, excuse me, additional  
22 expert witness fees.

23 QUESTION: Yes.

24 QUESTION: What if Congress doesn't?

25 MR. BLOCK: If Congress does not, then they

1 are not awardable. Unless 15 USC Section 15 were  
2 determined by the Court to include expert witness fees,  
3 which it has never been read as being.

4 QUESTION: No, it certainly hasn't.

5 MR. BLOCK: Then we are in agreement. I  
6 believe they are not awardable under 15 USC Section 15.

7 QUESTION: Even to plaintiffs?

8 MR. BLOCK: Even to plaintiffs. That issue is  
9 not before the Court, but I believe they are not  
10 awardable, and that Congress has made a determination as  
11 to what allocation.

12 The Farmer case, which is relied upon  
13 extensively by petitioners, I believe has been discussed  
14 during the primary argument. In that case Congress by  
15 statute allowed recovery of a particular cost. It  
16 stated that witness travelling from outside the  
17 continental United States shall recover their actual  
18 costs of travel.

19 The district court was therefore authorized  
20 by Congress to award those amounts. It declined to do  
21 so. It exercised discretion not to do so, which is  
22 recognized in Rule 54 as, unless the court otherwise  
23 directs. That's the Rule 54 discretion. That is all  
24 that Farmer upheld.

25 It did not suggest that this Court should

1 exceed Congressional limits.

2 Alyeska Pipeline Service Company v. Wilderness  
3 Society is directly on point in its reasoning. It  
4 stated that where Congress has comprehensively regulated  
5 the award of costs between solicitor and client, which  
6 are the private costs developed to support one side,  
7 that this Court should not create exceptions to that  
8 rule.

9 Alyeska did recognize three traditional  
10 exceptions, which it held that Congress had understood  
11 and effectively incorporated into the statutes.

12 QUESTION: Why would those exceptions allow  
13 the awarding of costs that Congress hasn't provided for?

14 MR. BLOCK: The court stated that in  
15 developing its congressional schemes, Congress had  
16 understood those three to exist.

17 QUESTION: You mean, the witness fees, \$30 a  
18 day in 1821, except when one of these three conditions  
19 exist?

20 MR. BLOCK: well, I can do no better than --

21 QUESTION: Is there a difference between  
22 attorneys fees and witness fees? Witness fees have been  
23 as regulated as attorneys fees. You were just talking  
24 about attorneys fees in Alyeska.

25 But the principle was the regulation, and the

1 degree of regulation. Witness fees have been as  
2 regulated as attorneys fees, and in the same statutes.

3 QUESTION: Well, we don't have to deal with  
4 that here, do we?

5 MR. BLOCK: Attorneys fees?

6 QUESTION: No, we don't have to deal with  
7 whether one of these exceptions would actually allow --

8 MR. BLOCK: No.

9 QUESTION: -- expert witness fees.

10 MR. BLOCK: No, none of these exceptions is  
11 met here. The only question is whether a new exception  
12 should be created.

13 And I submit that it should not. As this  
14 Court stated in Alyeska: It appears to us that the rule  
15 suggested here would make major inroads on a policy  
16 matter that Congress has reserved for itself.

17 Since the approach taken by Congress to this  
18 issue has been to carve out specific exceptions to a  
19 general rule that Federal courts cannot award attorneys  
20 fees beyond the limits of 28 USC Section 1923, which was  
21 what was at stake there, those courts are not free to  
22 fashion drastic new rules with respect to the allowance  
23 of attorneys' fees to the prevailing party in Federal  
24 litigation.

25 Petitioner's exception would effectively

1 swallow the rule that Congress has established. Taking  
2 only the antitrust laws as an example, in virtually all  
3 mainstream antitrust cases, an expert is going to  
4 materially enable the district court to arrive at its  
5 decision.

6 One needs an expert to show the market, to  
7 show the effect upon the market, to define whether or  
8 not predatory pricing is indeed unjustifiably low  
9 pricing by statistical and economic evidence; to show  
10 statistical evidence of concerted parallelism if that is  
11 what is at issue.

12 In virtually every antitrust case an expert is  
13 going to materially assist the district court. Yet  
14 Congress has said in 15 USC Section 15 that only  
15 plaintiffs get attorneys fees, and neither side gets  
16 expert witnesses.

17 There would be the substantial disruption that  
18 Alyeska refused to create if the rule suggested by  
19 petitioners were adopted here.

20 QUESTION: Before you sit down, Mr. Block, may  
21 I just ask you one question? This case was tried in the  
22 Eastern District of Louisiana, wasn't it?

23 MR. BLOCK: Yes, it was.

24 QUESTION: Did you try it?

25 MR. BLOCK: I did not try it.

1 QUESTION: Did Seattle counsel try it?

2 MR. BLOCK: No. Actually, San Francisco  
3 counsel tried, not in my law firm.

4 QUESTION: And your opponent was a Cleveland  
5 lawyer, is that correct?

6 MR. BLOCK: That's correct.

7 QUESTION: None of them were members of the  
8 bar down there, I guess?

9 MR. BLOCK: They associated local counsel,  
10 Your Honor.

11 QUESTION: I see.

12 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
13 Block.

14 We'll hear now from you, Mr. Youngdahl.

15 ORAL ARGUMENT OF JAMES E. YOUNGDAHL, ESQ.,

16 ON BEHALF OF RESPONDENT IN NO. 86-328

17 MR. YOUNGDAHL: Mr. Chief Justice, and may it  
18 please the Court:

19 In a very narrow sense, my client won below.  
20 The International woodworkers doesn't have to pay  
21 \$11,000 in expert witness fees to Champion under any  
22 theory, under any judge's view of the amount of money  
23 set by the magistrate.

24 But in a broader and much more serious sense,  
25 the IWA and private enforcement of the nation's civil

1 rights laws suffered a grievous blow by that decision.

2 The portion of the decision that is really  
3 damaging outside of the discussion of the issue about  
4 expert witness fees being recoverable in Title VII cases  
5 --

6 QUESTION: Are you arguing for --

7 QUESTION: You're arguing for your opponents?  
8 You're arguing on the side of your opponents in a sense?

9 MR. YOUNGDAHL: No, sir, I'm not. I don't  
10 understand it to be that. He is saying that if Title  
11 VII considerations are to apply, that -- he said they're  
12 not to apply. And I'm saying they are to apply.

13 And I'm saying, moreover, the intention of  
14 Congress of how expert witness fees are dealt with as  
15 part of attorneys fees, how Congress defined attorneys  
16 fee in the Civil Rights Attorneys Fee Award Act of 1976  
17 is a critical question.

18 QUESTION: But you're arguing for affirmance  
19 here, are you not?

20 MR. YOUNGDAHL: I'm arguing for affirmance,  
21 but I'm arguing for reversal of the direction the court  
22 majority below, and the en banc majority, extends its  
23 opinion by saying, in the exercise of our supervisory  
24 power, we direct all district courts to follow this rule  
25 that nobody gets expert witness fees.

1           It doesn't say at that point, but it clearly  
2 means, including Title VII plaintiffs. Now, Title VII  
3 plaintiffs --

4           QUESTION: Who else could object to that --  
5 who else could object to that direction? Since it went  
6 to anybody, could anybody object to it?

7           MR. YOUNGDAHL: well, we certainly were a  
8 party, Your Honor. We didn't petition for certiorari,  
9 but in our response --

10          QUESTION: You have to be more than a party.  
11 You have to be harmed by the direction --

12          MR. YOUNGDAHL: All right. Well, we are  
13 directly harmed in that our --

14          QUESTION: Not in this case.

15          MR. YOUNGDAHL: Not in this case; that is  
16 correct.

17          QUESTION: I really don't see how the issue  
18 gets here.

19          QUESTION: You should have cross-petitioned,  
20 shouldn't you, if you want this kind of relief?

21          MR. YOUNGDAHL: Beg your pardon?

22          QUESTION: If you want this kind of relief,  
23 you should have cross-petitioned.

24          MR. YOUNGDAHL: It is my understanding of the  
25 rule about cross-petitioning that if the judgment, the

1 bottom line judgment is affirmed, and we are not asking  
2 for more or less than the affirmed decision. We're  
3 asking that affirmed -- be affirmed here, but we are  
4 objecting to the reasoning of a court in reaching that.

5 We ask for reinstatement of the district  
6 court's reasoning, the panel reasoning, and the  
7 reasoning of every other circuit. And the problem comes  
8 in the direction.

9 I certainly considered that. It seemed to me  
10 that since we were saying that the judgment stands, that  
11 we did not have to cross-petition.

12 QUESTION: Mr. Youngdahl, I can't tell you how  
13 often it is that lawyers win the case and they think the  
14 reasoning is terrible.

15 You can't appeal because you don't like the  
16 reason you were given a victory.

17 MR. YOUNGDAHL: I didn't appeal, Your Honor.  
18 And I'm saying that what -- it's the direction. If they  
19 had not put in there -- if there had been a panel, a  
20 panel of the Fifth Circuit, and they had said, we think  
21 we ought to do this for this reasoning, we could go to  
22 another panel, we could do lots of things.

23 But this was an en banc decision, number one.  
24 And it was a decision which says we, in the exercise of  
25 our supervisory power, we direct the courts and the

1 Fifth Circuit to do that.

2 QUESTION: So you're saying as a respondent,  
3 I'm just suggesting that the judgment be affirmed on  
4 another ground?

5 MR. YOUNGDAHL: Yes, sir.

6 The problem right now, and this is a problem  
7 not only from my experience, but a problem discussed in  
8 the Congressional hearing for the 1976 legislation, the  
9 problem is, that since June 2nd, 1986, when this  
10 decision was issued, and its direction was issued, that  
11 when a civil rights plaintiff walks in with a perfectly  
12 good case to a lawyer's office in Mississippi or  
13 Louisiana or Texas and so on, and says, okay, will you  
14 take our case, the lawyer has a choice of doing one of  
15 three things, under the direction in this case.

16 Number one, he could say, well try it without  
17 an expert witness. Very dangerous, as I learned on the  
18 merits of the very case at bar.

19 Two -- and certainly not practical in the  
20 growing complexity of litigation -- two, he can say,  
21 I'll reduce my attorneys' fee expectancy, because I as a  
22 lawyer will be responsible for paying the expert bill,  
23 and go ahead and contract with an expert, and we'll  
24 present our best case, but I won't get a reasonable  
25 attorneys fee in accordance with market rates, et

1 cetera.

2 Or three, he can reject the case, and say, I  
3 can't afford to do this.

4 Now, those are the only choices open to him,  
5 and those very choices were discussed at length in day  
6 after day hearings before Congress on the 1976 civil  
7 rights attorneys fee award legislation.

8 QUESTION: Well, there's another choice.  
9 Sometimes a plaintiff recovers a monetary award. Say  
10 you have a big class action, a lot of back pay, then  
11 the plaintiff can pay the fee. That's a possibility in  
12 some cases.

13 MR. YOUNGDAHL: That's true, Your Honor. If  
14 there's a big back pay award, it's likely to be a class  
15 award, and the amount going to individual people --

16 QUESTION: And there the expert could be paid  
17 by the client.

18 MR. YOUNGDAHL: It's a possibility. It's not  
19 typical in my experience, but it certainly is a  
20 possibility.

21 QUESTION: Well, we see some pretty big  
22 numbers once in awhile.

23 MR. YOUNGDAHL: But when there are large  
24 classes, so that the individual entitlement may not have  
25 been all that much.

1           QUESTION: (Inaudible) ground that you want  
2 an affirmance on.

3           MR. YOUNGDAHL: I'm not going to argue that,  
4 Your Honor. I would let everyone else take care of  
5 that. I agree with the counsel for the correspondent. I  
6 think it is an awkward situation. It was created  
7 frankly out of the consolidation of these two cases;  
8 it's a different issue.

9           QUESTION: In this connection, Mr. Youngdahl,  
10 would you buy Judge Rubin's approach in dissent?

11          MR. YOUNGDAHL: Yes, totally. I think what  
12 Judge Rubens said is the way he read what Congress  
13 said. And it's impossible, reasonably, if you look at  
14 the legislative history, to get any other kind of  
15 conclusion, it seems to me.

16          As he looked at what Congress meant, he says,  
17 Congress says, attorneys' fees for purposes of civil  
18 rights litigation are all those amounts that an attorney  
19 normally bills his client for; which include expert  
20 witness fees.

21          QUESTION: Are you talking about attorneys  
22 fees provision in Title VII or in 1988?

23          MR. YOUNGDAHL: Both, Your Honor. This Court  
24 has repeatedly said that since the legislative history  
25 is sparse with Title VII, that it will look to 1988 --

1 QUESTION: With respect to the attorneys' fees  
2 provision?

3 MR. YOUNGDAHL: Yes, sir, it was patterned  
4 exactly after it. And the Congress -- both House and  
5 Senate reports, and repeatedly on the floor, members of  
6 Congress said, we want to pattern 1988 after Title VII  
7 because we want to have exactly the same judicial  
8 interpretation of the attorneys fee section -- the  
9 attorneys fee section -- of Title VII transposed over  
10 and continued in 1988, and repeal Alyeska or reverse  
11 Alyeska with respect to civil rights litigation.

12 QUESTION: But you say that -- you say that  
13 approaching it that way these defendants aren't --  
14 weren't entitled to expert witness fees because they  
15 weren't entitled to attorneys' fees.

16 MR. YOUNGDAHL: That's right, because of  
17 Christianburg. Exactly right. And Congress --

18 QUESTION: Which is a different ground for  
19 affirmance --

20 MR. YOUNGDAHL: Precisely.

21 QUESTION: -- than your colleague here is  
22 arguing?

23 MR. YOUNGDAHL: Precisely, Your Honor.

24 But the problem is that if we don't get that,  
25 it's not going to be a question of lawyers losing cases

1 and having an opportunity to appeal and reach this issue  
2 next year or whenever.

3 It means that the prospective opportunity to  
4 file civil rights lawsuits that are going on right away,  
5 right now today, in those states, is lost.

6 Because lawyers can't afford to take cases  
7 without having some sort of opportunity to recover  
8 expert witness fees, which the Fifth Circuit majority  
9 has said, no, you don't have; you don't ever have.

10 Yes, we agree totally with Judge Rubens'  
11 analysis.

12 QUESTION: (Inaudible.)

13 MR. YOUNGDAHL: Pardon?

14 QUESTION: This is a piece of statutory  
15 construction.

16 MR. YOUNGDAHL: Yes.

17 QUESTION: This isn't just supervisory power.  
18 Their final conclusion says, 1821.

19 MR. YOUNGDAHL: what they say there, the last  
20 sentence --

21 QUESTION: Well, I know, they direct all their  
22 district courts to, but that's just surplussage. They  
23 could have put a period after their first sentence, and  
24 all the district courts would have had to comply.

25 MR. YOUNGDAHL: well, do it anyway.

1 QUESTION: So it's a piece of statutory  
2 construction, and it's really a question of, did they  
3 construe the statute correctly.

4 MR. YOUNGDAHL: Well, that's true. But what  
5 I'm saying is that it just makes it more evident to the  
6 district judges that in no way and at no time in civil  
7 rights litigation can they award expert witness fees to  
8 prevailing plaintiffs.

9 Now, I urge the most careful examination of  
10 the legislative history which the amici brief  
11 particularly deals with. There was a statement from  
12 the Floor by the chief sponsor saying, the term,  
13 attorneys fees, means all expenses necessary for  
14 effective --

15 QUESTION: Well, that's a strange way of --  
16 strange way of saying that; 1988 doesn't say that.

17 MR. YOUNGDAHL: No, but for a very good  
18 reason, Your Honor. Because 1988, unless --

19 QUESTION: Where does something say it that  
20 would overturn or would suggest that 1821 doesn't govern?

21 MR. YOUNGDAHL: Your Honor, 1821 and the  
22 statutes and Rule 54 particularly say that other than  
23 when provided for by Congress in other matters.

24 QUESTION: Like 1821.

25 MR. YOUNGDAHL: Okay, so we're saying it was

1 provided for in other matters by 1988. And we're saying  
2 the reason it doesn't say the words, expert witness  
3 fees, is because Congress intended a broader concept  
4 than that.

5 QUESTION: Where do you get that?

6 MR. YOUNGDAHL: From the legislative history.  
7 The House report and the Senate report say, over and  
8 over again, the reason we are tracking exactly Title VII  
9 language is because we want to reinstate Title VII case  
10 law as to the meaning of the word, attorneys fee.

11 And Title VII case law of attorneys fees says,  
12 case after case after case, says, expert witness fees,  
13 travel, all sorts of other things outside of 1821, are  
14 included in the kind of expenses an attorney normally  
15 bills his client; included therefore in what attorneys  
16 fees means in this statute, and should be recoverable by  
17 prevailing plaintiff; not by prevailing defendant  
18 because of Christianburg, but by prevailing plaintiff.

19 QUESTION: So expert, attorneys fees are  
20 expert witness fees, or expert witness fees are  
21 attorneys fees; is that --

22 MR. YOUNGDAHL: Yes. All the things that an  
23 attorney has to spend for the effective presentation of  
24 the case. You have to be reasonable. The court has  
25 discretion in granting them to be sure.

1           QUESTION: I thought your argument was that  
2 they were the costs as between solicitor and client;  
3 that they were part of cost, not part of fees. Maybe I  
4 misunderstood your argument.

5           MR. YOUNGDAHL: Well, I don't know whether it  
6 makes a whole lot of difference whether they're called  
7 costs or fees. Congress called them fees.

8           Representative Drinan got up -- the key  
9 sponsor in the House got up on the floor and said, these  
10 -- the term, attorneys fees, includes expert witness  
11 fees -- I'm not sure he used the term, expert witness  
12 fees, but all things necessary which are expenditures  
13 for the prosecution of the case.

14          QUESTION: But it is important to me in trying  
15 to understand the statute. Your view is that the expert  
16 witness fees are allowable as part of attorney's fees,  
17 rather than as part of costs?

18          MR. YOUNGDAHL: Yes, Your Honor. That's  
19 correct. I think that is more clearly --

20          QUESTION: But attorneys' fees in turn are  
21 part of cost; is that it?

22          MR. YOUNGDAHL: I don't know, Your Honor. I  
23 have -- Judge Wisdom gave me the same kind of thing on  
24 the first Fifth Circuit panel. But Congress meant them  
25 as part of fees.

1           Congress said, we intend the term, fees, to  
2 include all the necessary outlay that an attorney had as  
3 normally billed a client. That's what Congress said.

4 And I --

5           QUESTION: So you would include in that, too,  
6 then, just to make it clear, extraordinary travel  
7 expenses. If you employ a Seattle lawyer to try the  
8 case in Louisiana, travelling back and forth is just  
9 part of the costs; part of the fees.

10           MR. YOUNGDAHL: Sure. I would be subject to  
11 an attack on nonreasonable. I mean the House committee  
12 said, we keep the reasonableness; we keep the  
13 discretion; we keep the prevailing party concept.

14           We don't have a mandatory fee like the  
15 antitrust law has, and some other statutes have; we keep  
16 those things in. But we keep those things in because we  
17 want to incorporate the case law that's developed under  
18 Title VII and Title II of the '64 Civil Rights Act and  
19 the Voting Rights Act of 1975 and so on.

20           And all that case, there has never been any  
21 question about this before the en banc decision in this  
22 case.

23           QUESTION: Well, once again, whatever is in,  
24 is in only for the plaintiff. So we really don't have  
25 to worry about what's in here, because here you have the

1 defendant --

2 MR. YOUNGDAHL: Well, I think that's a little  
3 overstatement, Your Honor. The Christianburg said that  
4 unless the case is vexatious, without grounds, or  
5 brought in bad faith --

6 QUESTION: Yes, the traditional --

7 MR. YOUNGDAHL: That is correct.

8 QUESTION: Sure, sure. But these other things  
9 you're talking about, the special Title VII additions,  
10 are only in for the plaintiff.

11 And you've got a defendant here. So what  
12 difference does it matter to this case? What difference  
13 does it make to this case?

14 MR. YOUNGDAHL: It makes a difference because  
15 now --

16 QUESTION: You got a bad dictum down there.

17 MR. YOUNGDAHL: -- because nobody is getting  
18 representation. People are getting representation at  
19 great peril and at great sacrifice to a lawyer or --

20 QUESTION: Because they're following a dictum  
21 that's no good. But the first case where that dictum is  
22 followed can be appealed, can't it?

23 MR. YOUNGDAHL: It's dictum in the sense that  
24 -- yes, but in the meantime, prospective litigation has  
25 been turned down because lawyers cannot undertake this

1 kind of responsibility --

2 QUESTION: That's why dicta is bad stuff,  
3 because it causes people to follow it. But we've never  
4 allowed it to be appealed for that reason.

5 MR. YOUNGDAHL: Well, I'm not able to argue  
6 that you have ever reversed the reasoning below, have  
7 never or have, and upheld the judgment.

8 The --

9 QUESTION: (Inaudible).

10 MR. YOUNGDAHL: Well -- thank you very much.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
12 Youngdahl.

13 Mr. Mansour, you have two minutes remaining.

14 REBUTTAL ARGUMENT OF ERNEST P. MANSOUR, ESQ.,

15 ON BEHALF OF PETITIONERS IN NO. 86-322

16 MR. MANSOUR: Thank you, Mr. Chief Justice.

17 In response to one of the previous questions,  
18 that is, the respondent has taken the position that the  
19 discretion talked about in Farmer is a downward  
20 discretion, that is, that the Court has the discretion  
21 to disallow costs.

22 I would suggest that a reading of the opinion  
23 in Farmers indicates that that is not what the opinion  
24 states, nor what Justice Black was talking about.

25 He said in his opinion that we do not read

1 therule, being Rule 54(d), as giving district judges  
2 unrestrained discretion to tax costs, to reimburse a  
3 winning litigant for every expense he has seen fit to  
4 incur in the conduct of his case.

5 He goes on to state that any other practice --  
6 items proposed by winning parties as costs should always  
7 be given careful scrutiny.

8 QUESTION: But he could have meant taxable  
9 costs when he was --

10 MR. MANSOUR: He did not say that.

11 QUESTION: No, but he wasn't focused on that.

12 MR. MANSOUR: What he did say is, therefore  
13 the discretion given district judges to tax costs should  
14 be sparingly exercised with reference to expenses, not  
15 specifically allowed by statute.

16 I propose that the language is clear. I  
17 propose that the meaning is clear.

18 I propose that what he said in an unambiguous  
19 statement was that the court in spite of --

20 CHIEF JUSTICE REHNQUIST: Your time has  
21 expired, Mr. Mansour.

22 The case is submitted.

23 (Whereupon, at 11:55 a.m., the case in the  
24 above-entitled matter was submitted.)

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#86-322 - CRAWFORD FITTING COMPANY, ET AL., Petitioner V. J. T. GIBBONS, INC., and  
#86-328 - CHAMPION INTERNATIONAL CORPORATION, Petitioner V. INTERNATIONAL WOODWORKERS  
OF AMERICA, AFL-CIO-CLC

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

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