

OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

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THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Petitioner V. ROBERT CASEY, GOVERNOR OF

PENNSYLVANIA, ET AL.

CASE NO: 89-994

PLACE: Washington, D.C.

DATE: October 9, 1990

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 WEST VIRGINIA UNIVERSITY :

4 HOSPITALS, INC., :

5 Petitioner :

6 v. : No. 89-994

7 ROBERT CASEY, GOVERNOR OF :

8 PENNSYLVANIA, ET AL. :

9 - - - - -X

10 Washington, D.C.

11 Tuesday, October 9, 1990

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States at
14 1:13 p.m.

15 APPEARANCES:

16 ROBERT T. ADAMS, ESQ., Richmond, Virginia; on behalf
17 of the Petitioner.

18 CALVIN R. KOONS, ESQ., Senior Deputy Attorney General of
19 of Pennsylvania, Harrisburg, Pennsylvania; on behalf
20 of the Respondent.

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1 are other parts of the costs?

2 MR. ADAMS: We say that expert fees are part of
3 the attorney's fee, because they are part of the work
4 product. In other words, reasonable attorney's fee is a
5 term of art.

6 QUESTION: Even though concededly experts are
7 not attorneys.

8 MR. ADAMS: Concededly --

9 QUESTION: And they don't do attorneys' work.

10 MR. ADAMS: Concededly they are not, but before
11 the -- before the attorney can do his work, he's got to
12 work with that expert so he knows how to present his
13 client's case and how to prove it.

14 QUESTION: Well, that would be true of any
15 witness.

16 MR. ADAMS: But with respect to expert
17 witnesses, it's particularly important because when you're
18 dealing with civil rights litigation, it's a rare case
19 when you can have that kind of litigation go forward
20 without an expert. I think the thing that drives that --

21 QUESTION: Well, that's true of -- you can say
22 that about any -- you can't win a lawsuit without a
23 witness unless it's just a question of law.

24 MR. ADAMS: That's true, but if you have fact
25 witnesses you subpoena them and they come to trial and

1 they're going to testify. Expert witnesses unfortunately
2 have rents to pay, college tuitions to pay and they
3 normally will request some fee for their services.

4 But I think the point that drives us home is the
5 fact that when Congress enacted the fee-shifting provision
6 in section 1988, it did not sail into uncharted waters.
7 Instead, it selected the language of title VII's --

8 QUESTION: Well, an attorney -- an attorney can
9 certainly get -- they can get attorney's fees and they can
10 recover a fee that reflects the time the attorney spent
11 with an expert witness. If he -- he goes and finds them
12 and he forks him up, and he knows his testimony. He can
13 get him an attorney's fee for that. But you say that
14 included in the attorney's fees is the separate sum that
15 he must pay the expert?

16 MR. ADAMS: Yes, sir, I do. We would
17 respectfully submit --

18 QUESTION: And he -- and the expert is a
19 witness?

20 MR. ADAMS: The expert can be a witness.
21 Sometimes he is not. In this particular case it turned
22 out that all of our experts ended up testifying.

23 QUESTION: Uh-huh.

24 MR. ADAMS: We would respectfully submit to the
25 Court that the starting point for this Court's analysis of

1 this issue ought to be the same starting point that this
2 Court employed in the case of Missouri v. Jenkins.

3 QUESTION: But you would -- you would be making
4 the same argument even if these experts did not testify?

5 MR. ADAMS: I would be making the same argument.
6 Yes, sir.

7 QUESTION: I guess that's -- because you say the
8 \$30 provision just doesn't cover this.

9 MR. ADAMS: Just doesn't pay and quite candidly,
10 Your Honor, in today's litigation the attorney I think
11 most often goes out, finds the experts, gets them
12 acquainted with the case so they can do their work, and in
13 most instances, even though there may be the initial
14 expectation that the fee is going to be paid for by the
15 client, I can assure you that that expert is going to look
16 to that lawyer in the law firm to makes sure that he bill
17 gets paid to some extent.

18 And that's very important to a lawyer, because
19 if he is able to find quality people to be experts and all
20 of a sudden his experts don't get paid, I would submit
21 that it's going to be very hard for that attorney to
22 attract that expert again or other experts of like quality
23 when they hear that their fee is going to go unsatisfied.

24 QUESTION: Mr. Adams, I guess there are a number
25 of Federal statutes where there is express provision made

1 for expert witnesses?

2 MR. ADAMS: Yes, Your Honor.

3 QUESTION: And their fees?

4 MR. ADAMS: Yes, Your Honor.

5 QUESTION: And that was not done in section
6 1988. Should that be a concern to us? Congress knows how
7 to provide for them expressly.

8 MR. ADAMS: I think that is probably the best
9 argument that the Commonwealth of Pennsylvania has. But I
10 think when the argument is examined, it doesn't wash and
11 for a couple of reasons, Your Honor..

12 First of all, just as an initial matter, you
13 would have to completely ignore the legislative intent
14 behind the fee-shifting provision in section 1988.

15 Secondly, what you're really suggesting is that
16 Congress must use particular words and particular ways
17 every time it legislates. You effectively place Congress
18 into a legislative drafting straightjacket which is pretty
19 much akin to the way we used to have old common law
20 pleading, and courts and lawyers who were trained in
21 pleading found that to be an unworkable situation. And I
22 would submit it would not be appropriate to place Congress
23 in an equivalent situation.

24 QUESTION: Well, I guess it's not unreasonable
25 to think that we should apply the common ordinary

1 understanding of the words that Congress does choose to
2 employ. That's not putting Congress in a straightjacket,
3 would you say?

4 MR. ADAMS: It is not. But when you find plain
5 evidence of a legislative intent to work some other
6 result, then the result would be if you followed a plain
7 language construction --

8 QUESTION: Well, but it's just a little bit of a
9 stretch isn't it to say an attorney's fee includes fees
10 paid to experts?

11 MR. ADAMS: With respect, Your Honor, I would
12 disagree and for this reason. If you examine both the
13 Senate report and the House report, both reports
14 specifically comment that they are selecting title VII's
15 fee-shifting language and they say the reasons for that
16 selection -- they said, number 1, the courts are familiar
17 with these terms. They have interpreted these terms and
18 have given them meaning, and furthermore they cite case
19 law that have interpreted title VII's fee-shifting
20 language. And when you examine that case law, they have
21 interpreted title VII's language to embrace experts' fees.

22 QUESTION: Well, and you think that every
23 committee member who signed on to that report not only
24 read those cases and knew that that's what those cases
25 said -- that they covered not only attorney's fees but

1 also expert fees.

2 MR. ADAMS: I think that's the presumption, Your
3 Honor.

4 QUESTION: And it's also the presumption not
5 only that the other members of the Congress read those
6 committee reports, but also that the other members of
7 Congress also read those cases that were cited in the
8 committee reports, even though the committee -- as I
9 understand it the committee reports don't even say
10 explicitly that experts' fees are covered.

11 MR. ADAMS: That's correct.

12 QUESTION: All they do is cite these cases which
13 had held that experts' fees were covered.

14 MR. ADAMS: That's correct.

15 QUESTION: And the theory of the matter is that
16 from that citation of the cases we can be sure that the
17 whole committee and the whole Congress intended expert
18 fees to be covered.

19 MR. ADAMS: I think that's the evidence that
20 would be before the court, and I don't think there's any
21 evidence to contradict that particularly when you
22 examine --

23 QUESTION: Well, there's the evidence of the
24 language which says attorney's fees and the evidence of
25 other statutes which say attorney's fees and expert fees

1 are recoverable. Now, if I'm a member of Congress and
2 voting on that statute, I'm not going to go and read a
3 committee report and then read the cases cited in the
4 committee report. I'm going to know that when we say
5 attorney's fees, we mean attorney's fees and when we say
6 attorney's fees and expert fees, we mean both.

7 MR. ADAMS: Your Honor --

8 QUESTION: Isn't that much more reasonable to
9 assume?

10 MR. ADAMS: I would disagree. I'm aware that
11 you in some of your opinions have approached legislative
12 history in a different way than perhaps we would --

13 QUESTION: No, but this goes beyond legislative
14 history. This goes relying on nothing but the name of a
15 case which you expect the members of Congress to have
16 read.

17 MR. ADAMS: But I think, Your Honor, when you
18 look at the entire set of contemporaneous circumstances
19 that surrounded the enactment of this fee-shifting
20 provision, it is absolutely clear in my opinion that the
21 Congress wanted to abrogate the effects of Alyeska with
22 respect to civil rights litigation. And they were
23 particularly concerned that when they took this
24 legislative action that they supply something that was a
25 meaningful and fully compensatory remedy.

1 QUESTION: Well, Alyeska just dealt with
2 attorney's fees. They didn't deal with expert witnesses.

3 MR. ADAMS: Well, unfortunately I think
4 everybody concluded from reading your opinion, Justice
5 White, that it had --

6 QUESTION: That wasn't my opinion. It was the
7 Court's opinion.

8 MR. ADAMS: You're correct, Your Honor. But I
9 think everybody assumed and I believe correctly so that
10 based upon that opinion it would be a very weak argument
11 to suggest that that opinion did not reach to expert fees.

12 QUESTION: This presumption that the members of
13 Congress or at least the committee have read all the
14 cases, have we said there's that presumption?

15 MR. ADAMS: I don't think you have said it in
16 those terms, but I don't think that this Court has ever
17 abandoned the notion that legislative reports and whatever
18 legislative -- other legislative history exists is not
19 something appropriate to look at and --

20 QUESTION: When the statutory language is
21 ambiguous --

22 MR. ADAMS: I think in this case, Your Honor --

23 QUESTION: Do you think attorney's fees is
24 ambiguous, so that just reading that language it might
25 include expert witness fees?

1 MR. ADAMS: I think to people who are aware of
2 --

3 QUESTION: You can answer that question yes or
4 no, and then you can explain your --

5 MR. ADAMS: I think it is ambiguous to the
6 uninitiated.

7 QUESTION: Of whom do the uninitiated consist?

8 QUESTION: Like us?

9 MR. ADAMS: Certainly not, Your Honor.

10 (Laughter.)

11 QUESTION: Well, absent any legislative history,
12 would you say the language is ambiguous?

13 MR. ADAMS: If --

14 QUESTION: Absent any legislative history?

15 MR. ADAMS: If there was no legislative --

16 QUESTION: None.

17 MR. ADAMS: -- history. It was just this
18 statute, I would probably not be sitting here today.

19 QUESTION: So you say it would not be ambiguous?

20 MR. ADAMS: If there were not this legislative
21 history --

22 QUESTION: Yes, yes.

23 MR. ADAMS: -- if there were not this set of
24 contemporaneous circumstances --

25 QUESTION: So you say this is a plain language

1 case and I lose.

2 MR. ADAMS: If all you do is look to the four
3 corners of this statute, if you are not willing to ask the
4 additional question of what else was Congress trying to
5 do, yes, I think I do lose.

6 QUESTION: Of course, you'd lose the paralegal
7 case, too, wouldn't you?

8 MR. ADAMS: Yes.

9 QUESTION: Yeah.

10 MR. ADAMS: And I think that's the significance
11 of this Court's beginning of its analysis in the Missouri
12 v. Jenkins case. Because in the very initial part of that
13 decision, it's apparent to me that this Court considered
14 and rejected the plain language argument that's being
15 advanced by the Commonwealth of Pennsylvania today.

16 QUESTION: In fact, we rejected it 8 to 1,
17 didn't we?

18 MR. ADAMS: I believe it was 7 to 1. I believe
19 that Justice Marshall --

20 QUESTION: No, I think it's 8 to 1 on the
21 question whether any paralegals were allowed. Only the
22 Chief Justice ruled and said, no fees at all for
23 paralegals.

24 MR. ADAMS: I will defer to you, Justice
25 Stevens. I believe Justice Marshall took no part in that

1 decision. I hope to get his vote today.

2 (Laughter.)

3 QUESTION: But I suppose there's quite a
4 difference between paralegals and expert witnesses.
5 Paralegals are in essence doing part of the attorney's
6 work, are they not?

7 MR. ADAMS: They clearly are and so are --

8 QUESTION: And expert witnesses are perhaps more
9 like independent contractors in a sense. They're outside
10 a law office and the lawyer's work.

11 MR. ADAMS: With respect, I would disagree. I
12 think you are -- I think with -- that you're trying to
13 draw a distinction based upon employment relationships and
14 I think Judge Posner's decision for the Seventh Circuit is
15 particularly good in explaining that if you really examine
16 that, that doesn't seem to be a very appropriate basis for
17 a distinction. You can have -- you've got a -- you pay
18 for a paralegal in order to make this fully complete
19 remedy, but you don't pay for the expert and yet the
20 expert probably provides a far more valuable service and
21 the attorney needs access to his services more than he
22 does his own paralegal.

23 QUESTION: Well, then you disagree with Missouri
24 v. Jenkins, because that was the rationale of Justice
25 Brennan. He said that attorney's fees include

1 secretaries, those that are integral to the operation of
2 the office. And it seems to me that, page 2470, that
3 that's all he means.

4 MR. ADAMS: With respect, I would disagree. I
5 read -- I read that his decision as indicating that any
6 person whose labor has contributed to the work product of
7 the attorney ought to have --

8 QUESTION: No, for which an attorney bills the
9 client.

10 QUESTION: -- bills the client. Before the
11 attorney can bill his client for a successful prosecution
12 of a civil rights claim, he has got to work with that
13 expert. He cannot even seriously consider taking the case
14 unless he knows there is some reasonable expectation in a
15 meritorious civil rights case of being able to pay that
16 expert.

17 QUESTION: When you refer to civil rights cases,
18 uh, you obviously refer to your own case here where the
19 West Virginia University Hospital sued the State of
20 Pennsylvania or sued the Governor of Pennsylvania on a
21 statute where it claimed it had some entitlements.

22 So you're really not talking about civil rights
23 in any narrow sense. You're talking about any plaintiff
24 who has a claim under Federal law.

25 MR. ADAMS: As broadly as this Court has

1 construed that. In my particular situation, of course,
2 Your Honor, your -- this Court --

3 QUESTION: And you aren't talking about somebody
4 who couldn't independently -- wouldn't independently have
5 the money to pay the expert.

6 MR. ADAMS: I think I am talking --

7 QUESTION: Why?

8 MR. ADAMS: -- about the person, because if you
9 were to decide this case against my client, it would seem
10 to me that you have established a precedent, not just for
11 my client who had the fortune of having some kind of cash
12 flow, but you'd have also set a precedent for the
13 individual who did not have --

14 QUESTION: Well, that may be but your client has
15 the money to pay the expert.

16 MR. ADAMS: Not true, Your Honor, and let me
17 explain why. I would direct the Court's attention to page
18 B48 in the petition's -- appendix. There the district
19 court discusses the testimony of Dr. James Vertrees, who
20 was the Commonwealth of Pennsylvania's expert. And the
21 reason the district court was discussing that particular
22 testimony was that Dr. Vertrees had clearly testified that
23 the imposition of Pennsylvania's payment system on a
24 hospital such as my client had the potential, the real
25 potential of bankrupting a large university teaching

1 hospital. And that's particularly serious in a Medicaid
2 program, because if you examine the legislative history to
3 the Social Security Act you will find that Congress had an
4 express concern for these large teaching hospitals that --
5 to put it bluntly -- are the dumping grounds of -- for
6 poor patients.

7 And so my client as I said -- it had a cash
8 flow, but I would respectfully submit my client did not
9 have a deep pocket that was unending. So, it's very
10 important if we're going to continue to deliver -- in my
11 client's case -- needed health care to our indigent
12 citizens that they are able to recover what it costs them
13 to vindicate their rights in Federal court.

14 I would point out to the Court with respect that
15 this Court has not shied away from rejecting plain
16 language arguments when it has come to section 1988.
17 Missouri v. Jenkins was not the first time this Court so
18 held. I would point you specifically to the
19 Christiansburg Garment case where you rejected that kind
20 of argument because it would have frustrated Congress'
21 intend.

22 Likewise in related fee-shifting statutes, EAJA,
23 for example, the Clean Air Act shifting statute, you have
24 not given any credence to arguments based on minor
25 variations in language between one statute and another.

1 You have been more concerned about ensuring that Congress'
2 intent behind those statutes was followed.

3 QUESTION: Yeah, except that, you know, if we
4 ignore the plain language of what the statute and says and
5 goes to what Congress intended, I doubt whether very many
6 members of Congress thought that civil rights actions
7 consisted of suits by hospitals, for-profit hospitals,
8 some of them, for millions of dollars that were wrongfully
9 withheld under a statute for Medicaid treatments. I don't
10 -- how many members of Congress do you think would
11 consider that a civil rights action. That's what they had
12 in mind when they were talking about civil rights actions?
13 I doubt very many.

14 MR. ADAMS: Your Honor, I don't know really how
15 to answer that other than to --

16 QUESTION: Well, the way to answer it is the
17 statute says what it says and it describes this kind of an
18 action and that's good enough.

19 MR. ADAMS: I disagree, because I think if
20 Congress was truly serious about making any kind of
21 promise to the American people it had to be a substantial
22 promise not a hollow promise, and I would submit it is a
23 hollow promise if expert witnesses cannot be made
24 available to all civil rights litigants.

25 I would also respectfully submit that the

1 adoption of the construction that we are proffering to the
2 Court is fully consistent with the notion that we are
3 dealing with a remedial statute that is entitled to a
4 broad construction.

5 Furthermore, we believe that that notion of a
6 broader construction than the one being offered up by
7 Pennsylvania is also consistent with the notion of work
8 product as we find that mentioned in the Jenkins case,
9 because this Court has said that the work product doctrine
10 is an intensely practical doctrine grounded in the
11 realities of litigation, and experts are a reality of
12 litigation whether we like it or not.

13 West Virginia's construction, we believe, is
14 fully consistent with every expression of legislative
15 intent that we can find.

16 QUESTION: I suppose you can also make the same
17 argument about private investigators and private
18 detectives?

19 MR. ADAMS: If an --

20 QUESTION: Here's a case -- here's a case that a
21 lawyer wants to hire an investigator to find out the facts
22 and find some witnesses, and he just won't get off the
23 ground without him?

24 MR. ADAMS: A qualified yes, Your Honor, and let
25 me explain the qualification. As we understand the

1 legislative history behind section 1988, Congress intended
2 to restore the courts to what their practice had been in
3 fee-shifting prior to the Alyeska decision. I am not here
4 to suggest that that means that we should vest into the
5 Federal courts the ability to further expand whatever that
6 equitable fee-shifting policy was. Instead I'm suggesting
7 whatever it was in 1975 that's what Congress intended to
8 give back. Now, if investigators -- which are not a part
9 of this case -- but if investigators had been considered a
10 part of the appropriate fee shifting under pre-Alyeska
11 practice, yes, I would give you the -- I -- a yes answer
12 to that.

13 QUESTION: Do you think prior to Alyeska it was
14 an accepted practice to shift -- shift the cost for expert
15 witness fees to the loser?

16 MR. ADAMS: Yes, sir, and the court exercising
17 its discretion, and if you examine our footnote 15 on page
18 18 of the opening brief, you'll see what we hope is a
19 fairly complete list of the reported cases on that point.
20 We have certainly found no reported case that suggests
21 otherwise nor have we seen any case cited by the
22 Commonwealth of Pennsylvania for a contrary position.

23 Well, we believe that the construction that we
24 would offer to you today is consistent with the intent to
25 encourage the private enforcement of civil rights. We

1 think it's consistent with the notion of creating a broad
2 remedy. We think it's consistent with the purpose of
3 equalizing the resources between the litigants and we do
4 think it is fully consistent with a continuation of the
5 pre-Alyeska practice.

6 QUESTION: Mr. Adams, I suppose in any event if
7 these witnesses were to testify in court that the Crawford
8 case would limit the payment to \$30 a day.

9 MR. ADAMS: I've given that a great deal of
10 thought, Your Honor, and I can say that, yes, you can
11 probably construct an argument where you could draw the
12 line in that fashion, but I don't really think that's the
13 correct place to draw the line. The reason being --

14 QUESTION: Crawford said at least in the opinion
15 that expert witnesses are limited by the statute to \$30 a
16 day, absent explicit authorization to the contrary.

17 MR. ADAMS: Yes, ma'am -- yes, Your Honor, but
18 two responses to qualify my answer. Number one, if you
19 examine the provisions of section 1821 which was the
20 subject matter of Crawford, clearly Congress -- there's a
21 clear recognition that Congress might come in with some
22 other fee-shifting statute to supplant 1821, 1920, and 54.
23 And we believe 1988 is such a statute.

24 And my second point has just gone out of my head
25 and I apologize for that.

1 But going back to Pennsylvania's arguments. We
2 believe when you examine their arguments that they are
3 plainly inconsistent with the expressions of legislative
4 intent that we can find for this statute. It would not
5 encourage private enforcements at least in those cases
6 where the civil rights plaintiff does not have the means
7 to proceed.

8 It's not a fully complete remedy. It's an
9 incomplete remedy. There certainly would be no level
10 playing field between a State actor who can access the
11 State treasury and the private litigant.

12 And lastly, the pre-Alyeska practice simply is
13 not restored. We think in the final analysis reasonable
14 attorney's fee is a term of art. It's just as Judge
15 Posner described it in the Friedrich case. It's a
16 shorthand expression. And I can only go back and iterate
17 the point that I made earlier, that Congress did --

18 QUESTION: Well, it's the shorthand expression
19 for what?

20 MR. ADAMS: I think the way he phrased it is
21 it's a shorthand expression for what the courts were
22 doing, what was taken away from them, and what Congress
23 then restored to them. And that's why I would go back to
24 the point where if we try to draw lines between
25 testimonial and nontestimonial services, it seems to me

1 that really the better approach is to look at what pre-
2 Alyeska practice was, and I don't believe that line
3 drawing took place at that time.

4 I see that my time is about up. I'd like to
5 reserve the balance for rebuttal, if I may.

6 QUESTION: Very well, Mr. Adams.

7 Mr. Koons, we'll hear now from you.

8 ORAL ARGUMENT OF CALVIN R. KOONS

9 ON BEHALF OF THE RESPONDENT

10 MR. KOONS: Thank you, Mr. Chief Justice, and
11 may it please the Court:

12 We believe the starting point for the Court's
13 analysis in this case should begin with the Crawford
14 decision rather than the Missouri v. Jenkins opinion. In
15 Crawford the court specifically said that the \$30-a-day
16 limit for attendance fees for witnesses in Federal court
17 was fully applicable to expert witnesses and further said
18 that this limitation would be respected or had to be
19 respected by Federal courts unless there was some explicit
20 statutory authorization which would modify the limit.

21 The court went on to say that repeals by
22 implication were not favored and that it would not likely
23 infer that the limitations of the \$30-a-day limit would be
24 repealed absent some statute or authority explicitly
25 referring to witness fees.

1 Quite simply, 1988 -- section 1988 upon which
2 petitioner relies to shift the cost of expert witness fees
3 contains no specific authorization. It contains no
4 specific authorization either in the plain language of the
5 statute, which refers to a reasonable attorney's fee and
6 not a witness fee, nor does it contain any explicit
7 statutory authorization in the legislative history which
8 contains in the comments and the floor debates no
9 reference to witness fees whatsoever.

10 And finally, --

11 QUESTION: Excuse me, may I ask you a question
12 about your interpretation of the plain language, just
13 focusing on the language for a minute? Do you read the
14 statute as saying it authorizes the prevailing party in
15 the discretion of the court to recover, one, attorney's
16 fees; and secondly, where it says costs, does that mean
17 taxable costs to you? What does the word costs mean?
18 And, of course, the witness fee of \$30 a day would be a
19 taxable cost.

20 MR. KOONS: What I read the statute 1988,
21 Justice Stevens, as saying is that a reasonable attorney's
22 fee is allowed as part of the costs. I interpret that as
23 adding to section 1928 U.S.C. -- 1920 -- another item of
24 taxable cost in the form of --

25 QUESTION: So, it's -- other than attorney's

1 fees and those items that are taxable by statute is cost,
2 that's it?

3 MR. KOONS: That's the way I interpret it.

4 QUESTION: I'm putting aside for a moment the
5 paralegal problem because I -- what about things about
6 Justice White indicated investigators, telephones, xerox,
7 transportation to depositions, a lot of things that are
8 not taxable as costs but are commonly billed by lawyers to
9 their clients as expenditures or disbursements and I
10 noticed in this case there are \$45,000 of disbursements
11 that you did not challenge, most of which were not taxable
12 costs.

13 MR. KOONS: That's correct, Your Honor, we did
14 not challenge them in this case. However, --

15 QUESTION: Why didn't you if the language was as
16 plain as you say it is?

17 MR. KOONS: Well, Your Honor, we wanted to
18 choose our issues, and the decision was simply made that
19 we would not contest those expenditures.

20 QUESTION: You're just giving the State's money
21 away, weren't you, under your view of the case?

22 MR. KOONS: Well, Your Honor, we made a decision
23 as to --

24 QUESTION: Right, but under view of the case you
25 could have challenged most of the \$45,000?

1 MR. KOONS: I think some of those expenditure we
2 may have been able to challenge.

3 QUESTION: Well, including cab fare for the
4 attorney to get to the deposition?

5 MR. KOONS: Well, Justice --

6 QUESTION: I thought you meant by attorney's
7 fees anything that the attorney would normally bill to the
8 client for his work in the case, which would include that
9 stuff --

10 MR. KOONS: Justice --

11 QUESTION: -- including xeroxing.

12 MR. KOONS: Excuse me, Justice Scalia, I think
13 that many of those items probably would have been better
14 looked at as cab fare and so forth as items which the
15 attorneys would absorb on terms of overhead rather than
16 billing directly to the client.

17 QUESTION: Well, some attorneys bill them
18 separately. Let's assume you have -- just as some
19 attorneys bill paralegal time separately and some don't.
20 You can either bump your rate up or you can show it
21 separately. But let's assume that an attorney shows in
22 his billing -- shows travel expenses separately as many
23 do, airfare -- I'm not sure about cab fare, but airfare --

24 QUESTION: And as they did in this case.

25 QUESTION: And as they did in this case. You

1 wouldn't consider that to come within attorney's fees?

2 MR. KOONS: What I would consider to be within
3 attorney's fee, Your Honor, in conjunction with the
4 Court's decision in Missouri v. Jenkins, is work which is
5 performed by an attorney, work which is -- monies which
6 can be incorporated into overhead in terms of the lawyer's
7 office, what it takes him to run his office, and that, I
8 think, would be it.

9 QUESTION: And not anything else that's
10 necessary for him to do his part of the case.

11 MR. KOONS: Well, Your Honor, there might be a
12 few things -- no, I would have to say that that's the best
13 -- correct --

14 QUESTION: I would think --

15 MR. KOONS: The other items I think would have
16 to be absorbed in perhaps the attorney's rate.

17 QUESTION: Are you answering Justice Scalia --
18 are you now reading the statute differently than when you
19 answered my question? What about xerox, just xerox
20 expenses, long distance telephone, travel to a deposition?
21 Those are not taxable as costs but now you're saying they
22 are part of attorney's fees.

23 MR. KOONS: Your Honor, I think perhaps they
24 could be in connection with those types of things that are
25 done in the office for the attorney to present the case,

1 although I point out --

2 QUESTION: Well, what if the -- what if there's
3 a normal practice in a particular community? The lawyer
4 normally hires (a) an investigator, (b) an expert to just
5 help him on reading Forbes documents, say, and he normally
6 bills the clients, disbursement, expert to help reading
7 Forbes documents and that's the normal practice of that
8 community. Does he recover it or not under your view?

9 MR. KOONS: I think not, Your Honor, because I
10 think that the phrase reasonable attorney's fee has to be
11 given some kind of meaning. To say -- to say simply --

12 QUESTION: Not the meaning Justice Scalia has
13 described to us.

14 MR. KOONS: To say simply that it means all
15 expenses of litigation is really to deprive it of any
16 meaning whatsoever. I think, Justice Stevens --

17 QUESTION: No, but his suggestion was it means
18 all expenses normally charged by an attorney in performing
19 the routine work of an attorney in trying a lawsuit.

20 MR. KOONS: Well, Your Honor, if accepted that
21 earlier, I reject it because if -- if we get to the level
22 of investigator and that sort of thing --

23 QUESTION: Can I reject it, too? I didn't say
24 that.

25 (Laughter.)

1 MR. KOONS: Thank you, Your Honor.

2 QUESTION: I said, normally charged by an
3 attorney for his work in the suit. If it's charged for
4 somebody else's work -- I mean, and that's where
5 paralegals are different because that's his work. He can
6 do it himself or he can have somebody else do his work and
7 bill that -- anyway, so --

8 QUESTION: But I'm still not sure --

9 QUESTION: Don't include me in your
10 condemnation.

11 (Laughter.)

12 QUESTION: I'm still not clear whether long
13 distance telephone, travel, and depositions and so forth
14 is included or not, or a secretary. You have to hire a
15 secretary to do work late at night.

16 MR. KOONS: Well, Your Honor, I think if you've
17 suggested in Missouri -- or it has been suggested in
18 Missouri v. Jenkins that that might be an item that would
19 be includable at least as overhead, although I don't know
20 that it would be separately billable.

21 But in any case, in this case we do have a
22 statute which specifically --

23 QUESTION: Well, I'm thinking of items that are
24 not overhead. They're work that is especially required
25 for a particular piece of litigation, which lawyers

1 regularly charge and they list in their disbursements and
2 normally get them. And you had them in this case, \$45,000
3 worth that you didn't challenge.

4 MR. KOONS: Well, Your Honor, we did -- that did
5 actually represent a compromise of a claim. We did -- we
6 did negotiate a settlement --

7 QUESTION: But you didn't challenge -- you
8 disagreed as to certain items I know, but you didn't
9 challenge the general principle.

10 MR. KOONS: Well, we didn't challenge it in this
11 case, Your Honor.

12 We think that the argument of the Petitioner
13 really boils down to this that they're asking the Court to
14 rewrite the language of the statute because they say that
15 its purpose would be better served and that it would be a
16 better law. It would effectuate Congress' purpose better
17 if it included more things.

18 We think that it is certainly true that Congress
19 intended to promote private enforcement of civil rights
20 laws, but that it did not intend to write a blank check.
21 It chose a very specific means to do that. The means that
22 it chose was to award a reasonable attorney's fees and to
23 shift that major expense of litigation in favor of the
24 prevailing party. It did this also to make legal
25 representation available to civil rights plaintiffs.

1 It's certainly true that Congress could have
2 done more. Congress could have said that it wanted to
3 provide all expenses of litigation. It could have said it
4 wanted to award treble damages or liquidated damages, but
5 it did not. Now, clearly all of those things would have
6 done more to encourage private enforcement of civil rights
7 actions. But Congress did not choose those avenues, and
8 it would be no more proper to write into the law an expert
9 witness fee as part of the cost than it would be to
10 include those items as well.

11 We say that the Court should respect the limits
12 of the language that Congress used, which deserve
13 certainly as much respect as the ends, as well as respect
14 the limits that Congress set on taxable costs in 1920 and
15 1821.

16 Secondly, we say that the legislative history
17 does not show that Congress meant to include expert
18 witness fees. The fees -- the only reference that
19 petitioner can point to are several witnesses who at the
20 subcommittee level requested that expert fees added --
21 would be added. The issue of witness fees is never
22 mentioned in any report or in floor debates and there is
23 certainly no evidence of clear congressional intent, such
24 as the court in Crawford said it would require, even by
25 examining a legislative history.

1 Congress specified in other pieces of litigation
2 when it wanted to award expert witness fees as part of the
3 costs. For example, in -- many cases which we've cited at
4 pages 34 and 37 or statutes of our brief, Congress
5 specified reasonable attorney's fees as well as expert
6 witness fees. Some of these statutes were passed right
7 around the time the amendments to section 1988 were being
8 debated, the Toxic Substance Act, for example, the Natural
9 Gas Pipe Line Safety Act, and the Resource Conservation
10 and Recovery Act. So, it does appear that Congress knew
11 how to specify both expert fees and attorney's fees when
12 it wanted to do so, and here it did not.

13 We say, again, that the result that we're urging
14 is not in conflict with the court's decision in Missouri
15 v. Jenkins, because in that case we did not have a
16 specific statute which governed the item of cost as we
17 have here and in addition it is a different thing we think
18 to say that -- that attorney's fees may include paralegal
19 time than to say that it may include expert witness time.

20 Paralegals are a separate class of legal
21 assistant who are trained in the law and who typically do
22 for lawyers at a cheaper rate that kind of work that they
23 would have to do themselves otherwise. They do work which
24 typically eventuates into a legal work product. That's
25 not the case with expert witnesses or with any witness.

1 Witnesses are in the business of giving testimony of
2 producing evidence, and we think that to apply the term
3 attorney's fee to witnesses would really be to distort it
4 beyond all recognition and deprive it of all meaning
5 whatsoever.

6 In conclusion, we think our construction fairly
7 gives effect to all three statutes as Congress wrote them,
8 is fully in accordance with Crawford and is not
9 inconsistent with Jenkins, and respects the fact that in
10 some statutes Congress chose to shift both expert fees and
11 attorney's fees and in other statute it did not.

12 QUESTION: Mr. Koons, maybe you've said this
13 -- what is your position with respect to expert fees that
14 do not result in expert testimony and were not intended to
15 result in expert testimony. Let's say the lawyer consults
16 an expert to find out something about the case.

17 MR. KOONS: Yes, Justice Scalia. Our position -
18 -

19 QUESTION: Is that attorney's fees?

20 MR. KOONS: Our position would be that it would
21 not be, because it is not work done by an attorney that
22 results in a legal work product, although, of course, the
23 Court would be free to resolve -- reserve that issue for
24 another day --

25 QUESTION: Uh-huh.

1 MR. KOONS: -- as the witnesses here were purely
2 testimonial witnesses.

3 QUESTION: Well, supposing in like the case
4 against Brown against the Board of Education, the lawyers
5 decide to hire some historians to do a lot of research on
6 the enactment of the Fourteenth Amendment and so forth,
7 strictly to help them prepare their brief. Attorney's
8 fees or not?

9 MR. KOONS: I think not, Your Honor. Under our
10 construction, it would not be work done by an attorney and
11 it wouldn't be -- wouldn't be compensatory.

12 QUESTION: Well, Mr. Koons, what do you make of
13 the language in Missouri v. Jenkins to the effect that the
14 terms reasonable attorney's fees must refer to a
15 reasonable fee for the work product of an attorney. The
16 fee must take into account the work not only of attorneys
17 but also of secretaries, messengers, librarians, janitors,
18 and others whose labor contributes to the work product for
19 which an attorney bills her client.

20 MR. KOONS: We interpret that phrase, Your
21 Honor, as referring to those people that are necessary in
22 the running of the attorney's office and who assist the
23 attorney in generating the work product.

24 QUESTION: Well, by its terms, it's not so
25 limited, is it?

1 MR. KOONS: It may not be, Your Honor, but that
2 is -- that is our construction of it.

3 Thank you, Your Honor.

4 QUESTION: Well you just -- it's just wrong to
5 say that 1988 covers all reasonable expenses incurred by
6 an attorney in representing a civil rights plaintiff.

7 MR. KOONS: I think -- that is our construction.

8 QUESTION: Thank you, Mr. Koons.

9 Mr. Adams, you have 5 minutes remaining.

10 REBUTTAL ARGUMENT OF ROBERT R. ADAMS

11 ON BEHALF OF THE PETITIONER

12 MR. ADAMS: Thank you. With respect I would
13 disagree with Mr. Koons' statement that the witnesses in
14 this case were purely testimonial. That is not correct,
15 and I believe that the bills that we have supplied to you
16 in the appendix demonstrate that for 2 years, for 2 years
17 before we got to trial we were working hand in glove with
18 these experts in how to draft the pleading, and how to
19 develop discovery strategy, and how to assess and analyze
20 the discovery results that we were finally given in this
21 case.

22 QUESTION: Does the record show they -- that
23 they were the regular counsel for the hospital, regular
24 accountants for the hospital or that --

25 MR. ADAMS: I don't believe that the record

1 shows that and that is not correct, because as a matter of
2 fact it was myself and my colleague, Mrs. Krebs, who
3 essentially located the experts for the hospital to see
4 whether or not there was a case to bring in view of the
5 hospital's belief that they were not getting paid the
6 right amount of money.

7 QUESTION: And what about the billing? Does the
8 record reflect that the billing went directly to the
9 client?

10 MR. ADAMS: The record doesn't reflect, but I
11 will stipulate that the billing did go straight from the
12 experts to the client after it had been approved by me.

13 But I think the point that's so crucial,
14 particularly in modern civil rights litigation, is that
15 lawyers do not sit in their ivory tower by themselves.
16 They sit there next to their experts, and if you deny the
17 attorney access --

18 QUESTION: Mr. Koons, this is also true in the
19 antitrust litigation. Do you know what the practice is
20 with the fee-shifting provisions of the antitrust laws?

21 MR. ADAMS: Your Honor, I stayed so far away
22 from the antitrust laws I would not even want to hazard a
23 guess on that. I don't have an answer for you.

24 QUESTION: There are a lot of experts there and
25 it's been a fee-shifting statute that's been on the books

1 a long time. But you don't know what the answer is there?

2 MR. ADAMS: I really do not.

3 QUESTION: But -- you're arguing that, you know,
4 gee, you can't have an attorney without -- without all
5 these experts. It would really apply across the board to
6 every other kind of statute as well.

7 MR. ADAMS: That's true, but you know there is
8 one unique distinction about 1988 in comparison to all
9 these other fee-shifting statutes that we have. And that
10 is, to the best of my knowledge, 1988 is a statute which
11 addresses not only violations of Federal statutory law
12 that is the -- in place to address constitutional
13 violations. We have one in this case, a violation found
14 by the district court of the equal protection clause. And
15 I find it somewhat amazing that you could have a fee-
16 shifting statute that, granted, is part of a very
17 important national policy for the environment which covers
18 the experts, but when you get to the area of
19 constitutional violations, Congress was somehow inept and
20 didn't cover fees in that arena? It just doesn't make
21 sense, with all due respect.

22 QUESTION: Well, maybe it thought -- you know,
23 when you think of environmental litigation, you think of
24 experts right away. When you think of civil rights cases,
25 as I think civil rights cases meant -- what civil rights

1 cases meant to Congress, you don't as automatically think
2 of expert witnesses.

3 MR. ADAMS: That may be true, but as a matter of
4 fact today if we are to give honor to this notion of work
5 product, this intensely practical doctrine, I think the
6 court ought to.

7 QUESTION: But I would -- you would then be
8 making the same argument in -- on -- in any other fee-
9 shifting statute which simply said the prevailing
10 plaintiff in this kind of a case is entitled to recover
11 reasonable attorney's fees.

12 MR. ADAMS: If it had the same legislative
13 history as --

14 QUESTION: No, no, no, no, no, no, no.
15 Just attorney's fees. I thought you were really arguing
16 that reasonable expenses that were -- that -- that are
17 necessary for the attorney to represent the client can be
18 compensated under attorney's fees.

19 MR. ADAMS: My case is only about a civil rights
20 violation under section 1988.

21 QUESTION: You mean you're going -- if we don't
22 -- if we don't think the legislative history is that
23 potent, you lose, is that it?

24 MR. ADAMS: I think that is correct, Your Honor.

25 QUESTION: Mr. Adams.

1 MR. ADAMS: Yes, sir.

2 QUESTION: Somebody that works with you 2 years,
3 working up questions and answers and all, and that's a
4 witness?

5 MR. ADAMS: In this case, we were fortunate that
6 the people --

7 QUESTION: You haven't used any other experts to
8 work up your cases?

9 MR. ADAMS: Yes, sir. Yes, Your Honor.

10 QUESTION: And you get fees for that?

11 MR. ADAMS: Yes, Your Honor.

12 QUESTION: Or can you get fees for only
13 testifying?

14 MR. ADAMS: You should get fees for both
15 functions.

16 QUESTION: You do?

17 MR. ADAMS: Yes, Your Honor. That's what our
18 position would be.

19 QUESTION: I just -- the only trouble -- I said
20 what is a fact?

21 MR. ADAMS: What is a fact? Yes, until, until
22 the courts --

23 QUESTION: It's these people who work up a case
24 with you, and I would consider that legal work.

25 MR. ADAMS: You're exactly right, Your Honor.

1 QUESTION: Well, if you call one of your lawyers
2 as a witness, would that be an expert witness?

3 MR. ADAMS: Well, Your Honor, I guess it would
4 depend on what he was testifying about, but, yes, I guess
5 he could qualify as an expert witness.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Adams.
7 The case is submitted.

8 (Whereupon, at 1:53 p.m., the case in the above-
9 entitled matter was submitted.)
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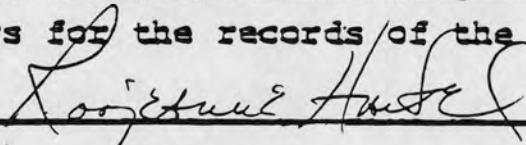
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#89-994 - WEST VIRGINIA UNIVERSITY HOSPITALS, INC., Petitioner V.

ROBERT CASEY, GOVERNOR OF PENNSYLVANIA, ET AL.

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