

TWENTY-FIFTH JUDICIAL CIRCUIT
OF VIRGINIA

THOMAS H. WOOD
AUGUSTA COUNTY COURTHOUSE
P. O. BOX 889
STAUNTON, VIRGINIA 24401
(703) 245-5323



WILLIAM S. MOFFETT, JR., RETIRED
AUGUSTA COUNTY COURTHOUSE
P. O. BOX 889
STAUNTON, VIRGINIA 24401
(703) 245-5323

COUNTIES
ALLEGHANY, AUGUSTA, BATH,
BOTETOURT, CRAIG, HIGHLAND, ROCKBRIDGE
CITIES
BUENA VISTA, CLIFTON FORGE, COVINGTON,
LEXINGTON, STAUNTON AND WAYNESBORO

June 30, 1994

Matthew B. Murray, Esquire
P. O. Box 559
Charlottesville, VA 22902-0559

F. Bosley Crowther, III, Esquire
P. O. Box 308
1001 Main Street
Palmyra, VA 22963

Re: Fried, et al v. Dunkerton

Gentlemen:

After considering the authorities, the Memoranda of counsel and the views of counsel, the Court is of the opinion that Mr. Dunkerton is indeed entitled to reasonable attorney's fees and costs.

By way of a very brief explanation, this award is not a sanction and is not being made pursuant to Section 8.01-271.1 of the Code of Virginia. On the record, this obviously was not a frivolous lawsuit. In fact, depending upon the testimony of Mr. Beale, the plaintiffs very well could have prevailed.

The award is being made pursuant to Section 55-515 of the Code of Virginia. As I read that Section, the award of attorney's fees and costs is mandatory in those cases in which it can be reasonably held that one party is the "prevailing party". In that regard, the case of Raintree of Albemarle Homeowners' Association, Inc. v. Jones, 243 Va. 155, 413 S. E. 2d 340 (1992), is simply not on point. In that case, neither party clearly prevailed. That is not the case before me.

Matthew B. Murray, Esquire
F. Bosley Crowther, III, Esquire
June 30, 1994
Page 2

In the case at bar, the defendant clearly prevailed, and, I believe he is entitled, as a matter of law, to reasonable attorney's fees and costs.

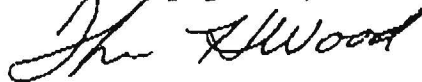
One further observation involves the mischaracterization by plaintiffs' counsel of the rationale for the Court's decision. Plaintiffs' Memorandum, pp. 7-8. The Court did not rule that either the Homeowners' Association or the actual plaintiffs were estopped to enforce the ARB decision or that they had waived their rights. The Court did rule that plaintiffs had failed to prove a violation in the first place. Beale did not testify that he did not recall telling defendant he could move the garage. He did testify that he did not recall, at all, what he had said. In other words, he did not deny that he had told Dunkerton he could move the garage.

Accordingly, it is the judgment of the Court that Mr. Dunkerton is entitled to recover from plaintiffs attorney's fees in the amount of \$19,123.00 and his court costs. I do not believe that he is entitled to recover incidental expenses, such as a witness fee, that he may have incurred as well.

As a footnote, I was not aware of the provision in the statute which required an award of attorney's fees to the prevailing party. Obviously, this statute creates an exception to what is the accepted practice. However, it is obvious plaintiffs were aware of this provision since they requested attorney's fees in their Bill of Complaint. The Court can thus award attorney's fees with a clear conscience secure in the knowledge that plaintiffs ought not to be surprised by defendant's request and the subsequent award.

I would appreciate it if Mr. Murray would prepare and circulate an appropriate Order and submit it to the Court for entry.

Sincerely yours,



Thomas H. Wood

THW/gl