11/14 (1986)

U.L. v. Carbet

Stenographic Transcript Motion

Mt. Laurel II

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : OCEAN/MIDDLESEX COUNTY
Docket No. C-4122-73

URBAN LEAGUE GREATER NEW BRUNSWICK, et als.,

Plaintiff,

vs.

CARTERET BORO MAYOR & COUNCIL, et als.,

Defendants.

STENOGRAPHIC TRANSCRIPT
of
MOTION

MOUNT LAUREL II

Place:

Ocean County Courthouse
Toms River, N.J.

Date:

November 14, 1986

BEFORE:

THE HONORABLE EUGENE D. SERPENTELLI, J.S.C.

TRANSCRIPT ORDERED BY: BARBARA J. STARK, Esq.

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Constitutional Litigation Clinic

Reported by:
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THE COURT: Mrs. Stark, you are all by your lonesome; all those people on the other side, it doesn't seem fair.

MS. STARK: It's just the beginning, your Honor.

THE COURT: Pardon?

MR. BENEDICT: Don't want to roll up the attorney's fees.

THE COURT: Let me just go back in history for a minute. Somewhere along the line here as this case wound through its various stages in the courts the 1983 claim got lost, apparently. In other words, it was apparently pleaded initially. I say, "apparently," because I no longer have the records of this case. They are, now, in the archives in Rutgers University, so they are more accessible to you than they are to me.

But it was pleaded, I gather, and it got to the Appellate Division after Judge Furman knocked both that out and the 36:01 claim, if I can use those two generically. The Appellate Division restored the 36:01 claim, the first housing claim, but didn't restore the 1983 claim.

MS. STARK: Yes, your Honor.

THE COURT: Is that right?

MS. STARK: That's my understanding.

THE COURT: But for that today you would be able to argue here that this case really fits even more closely with Judge Haines' decision and the other, because the Supreme Court found a due process violation in Mount Laurel II and, presumably, Mount Laurel I, and that that due process violation would equate to a violation of Civil Rights under the 1983 claim.

MS. STARK: Certainly.

THE COURT: Yet Judge Furman, in his opinion in 1986, on remand, I think, says at page 18, "No monetary or other specific recovery and no counsel fee for maintaining class actions are sought."

I don't know. I don't expect you to go into Judge Furman's mind. What do you think he meant by that?

MS. STARK: Your Honor, I have no idea, because we have a copy of the complaint, which was cited in our main brief in which counsel fees were expressly sought, and again that's the only response.

THE COURT: But you would have to concede at this point that if you are going to lock into

any fee statute, you can't lock into 1983 because of what the Appellate Division didn't do and, that is, it didn't reverse Judge Furman on that.

MS. STARK: Correct, your Honor. Our argument is based on Title A, which is all we need.

THE COURT: Well, I must admit it would be in my view a lot easier to deal with 1983.

MS. STARK: The Court --

THE COURT: 1983 is a good deal broader in its scope.

MS. STARK: Excuse me, your Honor. The Court, the New Jersey Supreme Court in Singer went back after, I think the same reasons or, guessing, similar reasons, went back and reinstated the 1983 claim that had been expressly rejected by the court below in order to hang the attorney's fees awarded in Singer.

THE COURT: But you are not asking me to do that in here.

MS. STARK: I'm not asking the Court to do that.

THE COURT: Even if you were, I couldn't. Correct. There is some limit here to what my jurisdiction is, now. But assuming even I had

the jurisdiction to do it, I couldn't do that, could I, really?

MS. STARK: This Court? Probably not, your Honor.

THE COURT: If you can get the Supreme Court to do it, it's all right with me.

Okay, go right ahead.

MS. STARK: Briefly, we'd like to address the issue, very briefly, the issue of jurisdiction. As Mr. Paley pointed out, this isn't just the proper, not only a proper forum; this is the only forum where application can be heard.

THE COURT: I will tell you I am persuaded you are right.

MS. STARK: Okay. As to the defendant municipalities' argument this application can be borrowed as a collateral proceeding, and we think it's well established, statutory fee claims are to be raised as collateral proceedings.

The New Jersey Rule 4:42-9(a) permits fees in all cases where counsel fees are permitted by statute. The statute under which plaintiffs are proceeding permits fees to prevailing plaintiffs which status can't be ascertained

until the conclusion of the proceedings. We submit that this is the right time, the right place and the right procedure.

THE COURT: Sounds like the name of a song.

MS. STARK: Yes, unless the Court has any questions on this, we don't want to spend any more time on it.

THE COURT: I have no problem.

MS. STARK: We think that defendants here tried to focus on the procedural arguments, even dubious procedural arguments as a distraction from their lack of any kind of substantive response. The New Jersey Supreme Court set forth the law in this area in Singer versus State, which most defendants do not even address.

THE COURT: Let's focus on Singer for a minute. What does Singer do for you here other than to deal with the term, "prevailing party"?

MS. STARK: Singer sets forth the two-part test under which prevailing plaintiff should be entitled to attorney's fees, seeking attorney's fees in a Civil Rights, under one of the Civil Rights statutes, a two-part test that's easily met by plaintiffs here, your Honor. The test is

the factual causal nexus between plaintiffs' litigation and the result achieved; and, two, that the relief ultimately achieved had a basis in law.

THE COURT: Okay. But you would concede, would you not, Singer is a different case factually than this?

MS. STARK: Singer is a different case. Singer involved a challenge to the casino, the conflict of the interest statute.

THE COURT: What I mean is that in Singer it is established that there was a violation of a state constitutional ground and a violation of a federal constitutional ground and that as far as the Singer court was concerned, that was good enough to couple, as you have to unless there is a determination of all in one lawsuit, to couple the two determinations and, therefore, award a fee under 1983. In other words, the difference between Singer and this case, the Urban League case at this posture, is that we had no determination of a violation of a statute. We've had a determination of a violation of the state constitution, but no statute. In Singer the Supreme Court says it's

obvious that the courts below, after the Appellate Division did some reversals, have upheld both the Federal and State constitutional grounds that the plaintiffs asserted and, therefore, they've earned a claim under 1983. So Singer was a step beyond where we are at in this case.

MS. STARK: Precisely, your Honor. As the courts pointed out, the distinction in Singer is that Singer prevailed on a nonfee federal claim. We, the Urban League plaintiffs, prevailed on a nonfee state claim.

THE COURT: No. But Singer prevailed on two claims, state and federal.

MS. STARK: Okay.

THE COURT: In other words, the facts in Singer, that is, Counts 1 and 2 of the complaint, alleged a federal constitutional violation.

MS. STARK: Right.

THE COURT: Counts 3 and 4 alleged a state constitutional violation and Counts 5 and 6 alleged a 1983 Civil Rights violation. The trial court said you are right as to Counts 1, 2, 3 and 4, but you are wrong as to 5 and 6. There was

a seventh count, I believe. The Appellate Division said, no. They are even right as to five and six, so in effect it was already proven a right under the Civil Rights Act to be awarded fees if they were prevailing. So the only issue in Singer is were they "a prevailing party?"

MS. STARK: I think all they had extra in Singer was a positive determination of the federal claim, if I am understanding the Court correctly.

THE COURT: I think they had a little more than that. Plaintiffs in Singer appealed from the trial court's entry of a judgment denying relief --

MS. STARK: Right.

THE COURT: -- under Counts 5 and 6 and a denial of its attorneys' fees, and the Appellate Division reversed that portion of the trial court's judgment concerning the denial of the attorneys' fees, and it ruled that the plaintiffs had succeeded on their section 1983 claim and that in any event the plaintiffs were entitled to an award, because they prevailed also on the federal claim. So in Singer it

sounds like the plaintiffs got the whole ball of wax before the Appellate Division, and the Supreme Court didn't do anything to set that aside. What the Supreme Court had to decide was the issue of given all that, was the plaintiff a prevailing, or plaintiffs, including apparently Harvey Moskowitz -- did anybody notice that, were the plaintiffs the prevailing party? That's the whole Singer case, isn't it, other than the fact they then go into the question of how you calculate the fees, which is not in issue here?

MS. STARK: I think the Singer claim, the Singer case was harder at this posture.

THE COURT: I'm sorry.

MS. STARK: I think the Singer case, because of the explicit denial of the dual claim, was a more difficult case than the Urban League case. It's plaintiffs' position that what we lack, what we don't have that Singer had is resolved by Seaway Drive-In by the recent denial of cert.of the United States Supreme Court. In Seaway Drive-In there was no federal claim -- there was a federal claim, but there was no determination with respect to the federal

claim. There the Sixth Circuit held that where plaintiffs had prevailed only a state claim, that they could still be awarded attorney's fees where they had asserted a federal fee claim. The United States under 1983 --

MS. STARK: The federal fee claim had been, the fee part of it, I believe, was a 1988 claim.

THE COURT: 1988. I mean the same Civil Rights Act.

MS. STARK: Yes, exactly. Since the United States Supreme Court denied cert., that was three weeks ago, and in view of the lack of any authority to the contrary in this circuit or any of our state courts and in view of the recognition by the New Jersey Courts as set forth in Bung's Bar & Grille, which was a cited approval by the Appellate Division in Frank's Chicken House, we submit that that's the law of New Jersey.

THE COURT: You have to come up with better names than Bung's Bar & Grille, and Frank's Chicken House. Even Judge Haines is embarrassed by that name. I spoke to him about that case.

MS. STARK: Good law.

THE COURT: It's a fine decision. That's Supreme Court-type of work.

MS. STARK: Your Honor, here plaintiffs prevailed on a pendant state claim. They obtained all the relief sought under that federal fee claim. Plaintiffs have been awarded fees where they have not formerly prevailed. Plaintiffs have been awarded fees where they've mooted, where the claims have been mooted, or set off, or voluntarily dismissed where, rather than all the relief sought, the lawsuit has merely acted as a catalyst in obtaining some of the relief sought. Mere practical relief has been considered adequate as an adequate premise predicate for the award of attorney's fees.

The Civic League is not claiming that it's entitled to fees simply, because there was a Title 8 claim in the complaint. Plaintiffs are entitled to --

THE COURT: By the way, it's not clear to me from the papers what legal fees you are claiming you are entitled to, and I don't mean amount. I read it, all of the objections to

the fact that you haven't spelled it out. In the technical sense they are certainly correct. You are supposed to do that, but I understand why you didn't. But how far back are you going for your legal fees here? To 1974 or just since the ACLU got in the case?

MS. STARK: Since the filing of the complaint, your Honor.

THE COURT: So for the entire history of this litigation?

MS. STARK: Yes.

THE COURT: I hate to even start calculating that. Okay.

MS. STARK: Why plaintiffs are entitled to counsel fees here, because they can satisfy the tests set forth in Maher versus Gagne set forth by Justice Stevens and again repeated in Bung's Bar and Grille. The test is whether the Title 8 claim was substantial, one, whether there was a substantial claim; and, two, whether it arose from the same nucleus, common nucleus of operative fact or, in the alternative, whether it was a related legal theory to the same claim upon which plaintiffs prevail.

THE COURT: See, the problem with that

kind of language, which is right through the decisions, is it's kind of like the bubble. You can find something there to support any position you want to take. Why don't we get more specific? Let me give you three criteria. Tell me if they are fair:

Does the plaintiff show that a federal violation occurred? The plaintiff has shown a state violation occurred. Is there a federal statutory or constitutional violation demonstrated in this case? Because then you'd fit into Singer.

MS. STARK: Your Honor, it's respectfully submitted that because of the long-standing judicial policy against decisions of unnecessary constitutional issues, there is no reason, that that issue should not be addressed by this court, as it was not addressed by the Mount Laurel Court and need not be addressed. That's the purpose, this test, this substantiality test and common nucleus of operative fact test is a precedent jurisdiction test. The question isn't whether there was a federal violation, which this court -- the cases are clear that a court should not be required to make that determination.

THE COURT: Judge Haines was required to make it in order to reach his decision in Bung, B-u-n-g.

MS. STARK: Judge Haines said that he, in Bung's the holding was that plaintiffs could have prevailed on their federal claim. It wasn't that they necessarily did prevail on the record below.

THE COURT: You are right. But he said in order to find for the plaintiff I have to find that the same operative facts that justified a finding of the state constitutional violation would have constituted a violation of the Civil Rights Act, the Federal Civil Rights Act and I so find. That's what he said. Therefore, they are entitled to counsel fees.

But do we have a finding here of either a federal violation of the Federal Constitution, that's redundant, a violation of the Federal Constitution or a violation of the federal statute?

MS. STARK: There has been no such finding. It's plaintiff's position that Bung's went further than the United States Supreme Court cases. In some situations a court will be

in a position to reconstruct retroactively to find a federal violation. That's obviously, as pointed out by defendant municipalities, an onerous burden, it's a matter of chance whether such a record will be developed during the course of the case. Here, your Honor, we think we can satisfy that test. But we think it's crucial that the court doesn't have to decide it. We think that plaintiffs -- we don't agree with the test in Bung's. We don't think it's the proper test, but we think that plaintiffs here could satisfy it.

THE COURT: The plaintiffs could satisfy me that there was a violation of the Federal Constitution or statute based on the record before me. Now, in this case --

MS. STARK: Excuse me, your Honor. Not based on that, the test in Bung's, rather then a retroactive interpretation of the record, I believe, is whether the common nucleus of operative facts could support such a determination, whether those, whether the common nucleus of facts include facts that were explicitly developed.

THE COURT: I'm suggesting to you that

Judge Haines, in my view, in my reading of that case, set forth three critical criteria that helps us define that rather fuzzy language that is in so many of these cases, "common," the "nexus" and the "related legal theories," you know. I suppose you could say anything that protects the Civil Rights of individuals and deals with discrimination is related in legal theory in a very broad sense, and then it's related to all of the Bill of Rights and all of those kinds of things. But if we mean "related" in that broader sense, there is no point arguing about any of these cases. Plaintiff wins everytime. I'm trying to get down to something more definitive, and the first thing that I see that Judge Haines really laid on was the fact that there was a finding of a federal violation in addition to state violation. My question was whether such a finding could be made in this case absent a retrial on the issue of racial segregation under Section 36:01 and so forth.

Let's go to the second test that I see he establishes. He says that to be entitled to fees it would be sufficient to show a state

constitutional violation as opposed to a statute, if that constitutional violation would necessarily demonstrate a federal constitutional violation.

Now, you certainly got the first thing. You've got the state violation. Does that necessarily show a federal constitutional violation? For example, let me, while you think about it -- I will give you a chance to think. I don't mean to be difficult with you. I'm very sympathetic to what you argue here. I'll say that up front. But I have some problems with the law.

He says a due process or just compensation violation under our state law can translate to a Fourteenth Amendment violation under the federal law without anything more, almost. I mean it just almost automatically does it in the setting of his case. Can the Mount Laurel finding, Mount Laurel II finding, does that have an automatic translation into a federal constitutional violation?

MS. STARK: To respond to the court's question, again with the caveat that it's our view that there is no, that it would be an

unnecessary judicial determination of the constitutional issue to make such, to determine the Title 8 case, Title 8 claim at this point. With that caveat we think, yes. Our Title 8 claim is included. There's been a New Jersey State Supreme Court decision finding of exclusionary zoning operative in all defendant municipalities against lower income persons, whites as well as nonwhites.

THE COURT: Poor, not colored, poor.

MS. STARK: Exactly, your Honor. That was the basis. Plaintiff's Title 8 claim did not address the exclusionary zoning as applied to lower income minorities. Plaintiff's Title 8 claim was completely subsumed in the relief afforded by the New Jersey Supreme Court, which is why after Mount Laurel I was decided, shortly after filing this claim that claim did not have to be individually specifically addressed. Because all the relief requested pursuant to that claim was afforded, was granted. Your Honor, excuse me.

THE COURT: Go ahead.

MS. STARK: Most of the defendant municipalities here appreciate the significance

of this statistical data provided by the Urban League, and they don't attempt to brush it aside. Most of them haven't even responded to that. Race has been an issue in this case from the beginning, from the explicit claims in the complaint to the discussion in Mount Laurel II of the urban ghettoes, to the nondiscriminatory affirmative marketing clauses in each of the final judgments entered before this court.

THE COURT: Except that the courts have said it isn't an issue. That's what's distressing. I mean the Supreme Court expressly says plaintiff doesn't even seem to be asserting the Thirteenth Amendment anymore.

MS. STARK: The Supreme Court, it's respectfully submitted that the Supreme Court has very wisely avoided just the kind of unnecessary judicial determination of constitutional issue that Justice Stevens warned about and that Congress took into account in developing these fee-shifting Civil Rights Statutes. They didn't want to force this order, reach these determinations unnecessarily. At the same time plaintiffs shouldn't be deprived of attorney's

fees to which they are otherwise entitled because of such an unnecessary judicial function.

THE COURT: That term, "unnecessary," in Judge Haines' opinion, and I say this very respectfully, because I probably said from this bench more times than with regard to any other judge, I admit admiration for him. But I am not so sure that the "unnecessary" was appropriate. Is it a question of unnecessary or is it a question of alternative? I don't understand what the term "unnecessary" means in the context he used it. I know what you mean when you use it, but in the context of that he used it in the Bung's case,it wasn't a question of it being unnecessary; it was a question of it being the alternative, wasn't it?

MS. STARK: If your Honor's referring to the judicial route chosen or --

THE COURT: He says, "The important right to recover the cost of successful litigation involving genuine issues of Civil Rights cannot be lost as a result of an unnecessary judicial election."

What could he mean by "unnecessary"?

I could see him saying, alternative judicial selection or discretionary judicial selection. But what do you understand to be the meaning of the term "unnecessary" here?

MS. STARK: Your Honor, I understand it as an explicit reference to the prior cases, referring to the judicial policy against -- where it's not necessary to decide constitutional issue it's not just an alternative. It's not that the court could choose the constitutional route or the state route. If the court doesn't have to take the constitutional route to reach the result, to reach justice, to reach the correct result, it should take the state route. That's how I read it, and I think that's consistent with the cases that we've cited.

THE COURT: You are saying Judge Haines was saying I shouldn't have necessarily used the grounds that I did to decide the case?

MS. STARK: No, your Honor. That's -- I'm sorry. That isn't what I mean.

THE COURT: Well, the reverse of "unnecessary" is "necessary."

MS. STARK: An unnecessary judicial election that it wasn't necessary for him to

take that route.

THE COURT: So the only other route he could have taken was the federal route?

MS. STARK: Right. It was an option. It's a policy, your Honor. It's not mandatory.

THE COURT: That's what he said, "alternatively"; that's what he was talking about, I think. Although I don't know and I haven't asked him.

Let me just touch upon what the third element of Judge Haines' opinion that is rather striking. He says, "The plaintiff must show the facts upon which it was awarded relief by the same facts which support the claim upon which the proven federal claim would turn."

Now, the facts upon which you were awarded relief before the Supreme Court was that there was by virtue of zoning an exclusion of the poor. Those facts, would they permit me to find a violation of Section 36:04, 36:05, or 36:06 of the Fair Housing Act? Specifically, would they permit me to find that there has been a violation and discrimination, or there's been discrimination in the sale or rental of housing based on race, color, religion, sex or

national origin, that there's been discrimination in financing of housing based on those factors or that there's been a discrimination of brokerage services based on those factors? I think the answer is evident. I just couldn't make that finding, could I, on the record, the factual record that was before the Supreme Court?

MS. STARK: The factual record before the Supreme Court included, "a county exploding with growth, providing jobs for all, and promising even more in the future, including employment for low and moderate income families, a county where the opportunity for lower income housing shrank faster than its need grew." This is quote from Mount Laurel II at 339.

"Armed with substantial documentation of the need, the exclusionary practices, and the obvious ability of the municipalities to absorb any reasonably calculated fair share of the region's need," your Honor, it's respectfully submitted that in conjunction with the uncontested statistical evidence of low minority populations in all of defendant municipalities, minority populations within those municipalities relegated in specific small areas, which the

court could at any time take judicial notice of, that such a finding could be made.

THE COURT: Of course none of that racial data was before anybody until it got here on this motion, as I understand it, is that right?

MS. STARK: Excuse me?

THE COURT: Go ahead. Is that wrong?

MS. STARK: Your Honor, in paragraph 26 of the original complaint cited in our reply brief, racial statistics, were the same facts.

THE COURT: It was pleaded. I didn't mean to say it wasn't pleaded. It wasn't proven.

MS. STARK: Your Honor, again the same facts, plaintiffs relied upon the same facts for their Title 8 claim and for their state claims. Plaintiffs didn't, after Mount Laurel I was decided there was no need to. It would have been redundant. It would have been unnecessary to produce a separate record as to how these claims -- the exclusionary zoning applied only to nonwhites.

THE COURT: I'm not suggesting, by the way, that the Urban League failed in doing anything here. If this record demonstrates

anything, it's the diligence and thoroughness of the representation the Urban League has had, but that's really not the issue. In a sense you got mousetrapped here, because you kind of won the bigger battle before you had a chance to fight the smaller war, or the smaller battle. Once the Supreme Court gave you more than you were even pleading in terms of the 3601 claim it was probably natural to say, well, why should we have to go, now, prove racial segregation? Because exclusion of the poor means exclusion of minorities and, therefore, we are going to win that battle too. So why do we have to prove it factually? I understand that completely. But the fact is that it was not proven, was it?

MS. STARK: Your Honor, two brief responses to that, to the Court's comment: One is precisely so that plaintiffs won't be forced to redundantly litigate after they prevail. If they win, what they need from the state cause of action, that they don't have to drag the defendants back, drag the court back and say, now, please, we need a determination of our federal constitutional claim for attorney's fees purposes. Plaintiffs couldn't possibly insist on

that. That's why Seaway Drive-In and the other cases have been decided, to say you can prevail where that claim has never been addressed, where that claim has been settled. A corollary of this is that if that claim was frivolous under Bung's, it would not have passed the substantiality test and it could have been thrown out. If that wasn't a bona fide claim, the burden was on the defendant municipality to have it dismissed, the cases. Why should the Urban League plaintiffs here not be awarded fees where if that claim had been settled, if that claim had never been addressed at all, if there had just been a settlement of this litigation, not saying a word about the federal claim, they could have had a bona fide -- they wouldn't have to prove anything or rely on the record in order to get fees?

THE COURT: No. I don't think you are in any different position here because of the fact that the case was litigated, then it was settled. That doesn't change anything. The same issues would have arisen on a motion after settlement. I mean, after all, some of these cases were settled. The same issues would still

exist. Those are the factors that we've been talking about, which you prefer to talk about in terms of nexus and related legal theories, and I prefer to talk about some other terms.

Let me go to the final thing in the Bung's case. It's really quite amusing that we talk about a Law Division case, which doesn't bind me, anyhow, as the real heart of this application. But nonetheless, it's such a well-reasoned case, I think it really helps us. Judge Haines phrases the ultimate issue at page 462. He says, "The question, therefore, is whether the right to fees and costs granted by the Act is to be denied, because this state court chose one path to a decision when it could have easily chosen another." That's the issue. That's what he meant by "unnecessary," I think. Can I say the same thing here?

Suppose the Supreme Court had chosen 36:01, the Fair Housing Act. I avoid using the "Fair Housing Act," because we now have our own --

MS. STARK: That's why we call it Title 8.

THE COURT: Yes. And if the Court had gone that way, you would have gotten much, much

more limited relief from the Supreme Court then you got, wouldn't you?

MS. STARK: If we had only prevailed on the Title 8 claims, we wouldn't have -- well, an argument could have been made, your Honor, under Tropicana that white lower income persons were also entitled to relief under Title 8, that they were being denied the benefit of integrated housing, that whites would benefit from that too. But I understand the Court's argument, and it's possible we would have gotten substantially less.

THE COURT: Which could not have happened in the Bung case. In the Bung case either way they went they would have gotten the same relief.

Do you know whether the original complaint filed in this action -- I'm embarrassed to ask you this, but I have to because I don't have it. That's all right. I will accept your representation.

Did it ask for a fair share methodology?

MS. STARK: That's easier than finding the complaint. That was set forth in plaintiff's main memoranda, the relief and footnote 2, page six.

THE COURT: Yes.

MS. STARK: It's the Urban League plaintiff's requested judgment as follows, and this is a quote, "Personally enjoining the defendants, their officers, agents and employees and all other persons acting in active concert or in participation with any of them from engaging in any zoning and other land use policies and practices which have the effect of excluding low and moderate income persons, both white and nonwhite.

"2. Requiring defendants individually and collectively to take reasonable steps to correct past discriminatory conduct by preparing and implementing a joint plan to facilitate racially and economically integrated housing within the means of plaintiffs and the claim they represent. In implementing such plan defendants should be required to solicit and utilize the advice and assistance of appropriate county, state and federal agencies and programs. Such a plan should include a precise program and timetable outlining the steps defendants will take to assure successful and expeditious implementation."

THE COURT: So the --

MS. STARK: And our last claim was for attorney's fees.

THE COURT: So we really don't know from what you read there that you expressly sought a fair share methodology or an allocation of fair share. I can tell from Judge Furman's opinion on remand that you were looking for that. I can tell that.

MS. STARK: Your Honor, we would certainly submit that the result achieved in Mount Laurel II would be included, would satisfy our request for a plan and the development of a plan and the development of processing the procedure.

THE COURT: Yes. I'm not doubting what the ultimate result was. What I am stating is that the original relief demanded, relief sought, whether that was within the same attainment or same scope as the Title 8 claim. That's where I was going.

MS. STARK: Yes.

THE COURT: And what you got out of the Supreme Court is something of a different ball of wax than you demanded based on what you just read. It's also quite different than what you

could have gotten out of a Title 8 claim. The most you could have gotten out of a Title 8 claim was an injunction or some permanent injunctions, damages, thousand dollars in punitive damages, which shows you how outdated that statute is, and reasonable counsel fees and costs. You have a lot more than that.

MS. STARK: Yes, your Honor.

THE COURT: Okay. Anything else?

MS. STARK: Yes. Also just briefly responding to your Honor's observation that, of course, this court is not bound by the decision in Bung's Bar and Grille by the Law Division, we don't see -- we think the problem with Bung's Bar and Grille, how do you reconcile that with the cases where there was no record whatsoever? Nevertheless there was an award of attorney's fees, Fields versus Tarpon Springs, Martin versus Heckler. They are cited in our brief where the cases, the federal claims, the court could not retroactively establish that plaintiffs would have prevailed.

THE COURT: Can you cite a single case where the state court extrapolated from a state facts to Title 8 without a clear factual record

at the state court level?

MS. STARK: Where a state court extrapolated?

THE COURT: Yes. In other words, as opposed to a 1983 claim. Most of your cases are 1983 cases, if not all of your cases. That's why I started off this whole discussion with the observations that a due process violation under our state constitution rather easily translates into a Civil Rights violation under 1983. Not automatically, I don't mean that, but much more easily and that's what Judge Haines had. He just said there's no difference, essentially. But the Civil Rights Act is a very, very broad piece of legislation which kind of, I don't want to overstate it, but basically states deprivation of Civil Rights may be actionable and allow counsel fees. I don't think anyone can claim Title 8 is that broad.

MS. STARK: Excuse me, your Honor. In Geanty versus McKey and the Piggie Park, Newman versus Piggie Park standard, which was the standard cited in Hensley versus Eckerhart, the other Supreme Court case, and also relied upon in the Civil Rights cases.

THE COURT: This case takes the case from,ridiculous case text, Piggie Park. Okay, I remember that one. I might not have remembered a lot of the others you cited.

MS. STARK: The standard in Piggie Park is that prevailing plaintiffs ordinarily recover attorney's fees unless special circumstances would render such an award unjust. The New Jersey courts have given Piggie Park a very expansive reading. As Judge Stern held in a housing case, Jones versus Orange Housing, fees must be awarded to prevailing plaintiffs unless there's such special circumstances. This was applied to the state courts by Judge, expressly by the Appellate Division award. Piggie Park was a Title 2 case and was expressly applied to Title 8 in Geanty versus McKey and Poague where they said that even though Piggie Park addressed Title 2, it was applicable in Title 8.

THE COURT: In Piggie Park the petitioners instituted this class action under Title 2 of the Civil Rights Act to enjoin racial discrimination at five drive-in restaurants. That was Piggie Park. Right?

MS. STARK: Yes, your Honor.

THE COURT: Did they then carry-over into a Title 8 claim for counsel fees?

MS. STARK: Yes, your Honor, in two ways. One, in the legislative, three ways, actually, one, the legislative history of the Fees Act which expressly referred to Title 8, used Title 8 as an example. Title 8 was one of the earliest fee-shifting Civil Rights statutes reflecting the congressional sense that discrimination in housing was crucial to prevent the discrimination. Title 8 was referred to by the legislature when they were saying in their discussion of developing the Fees Act, and in Geanty v. McKey it was expressly applied, the Piggie Park standard was expressly applied to Title 8.

Defendants here, the defendant municipalities have failed to set forth any special circumstances whatsoever why such an award would be unjust.

THE COURT: Let's go back to Piggie Park.

MS. STARK: Piggie Park, fine.

THE COURT: I suppose they got the name, you pig out at these restaurants. No, that wasn't popular in 1950. Let's see, how old is this case?

MS. STARK: '68.

THE COURT: '68. Are you sure that that case didn't just award counsel fees under Title 2?

MS. STARK: Your Honor, the --

THE COURT: I don't see any reference to Title 8 in the case.

MS. STARK: Okay. Let me give the court a cite. There's no reference in Piggie Park to Title 8, certainly, but there are later references by congress to Piggie Park in enacting the Fees Act of '76, and there are also references in the '76 Act to Title, the applicability of those standards of Title 8.

THE COURT: Okay. So, now, we both agree that the Piggie Park case didn't reach from a state violation to a federal violation and award fees under Title 8. We both agree to that. My question was, is there any such case ever in the history of our jurisprudence that has done that?

MS. STARK: Where, your Honor, what plaintiffs have provided,building blocks showing what their cases, where it's well established that a state appendant, if you prevail on an

appendant state claim you're entitled to fees under the Civil Rights Act, that Title 8 is a fee under the Civil Rights Act.

THE COURT: But the Piggie Park case, we don't need building blocks, because in the Piggie Park case it was a federal suit under a federal act which provided for counsel fees for a violation of that federal act. You didn't have to make a jump.

MS. STARK: Right.

THE COURT: You didn't have to say, we didn't decide that issue in this case, and now we've got to decide it. It was ripe as part of the Piggie Park action that the court said you are suing under 42 U.S.C.A. 2000, and so forth.

MS. STARK: Exactly.

THE COURT: And as part of that statute, counsel fees are permitted if you prevail. So they won under it and they are entitled to counsel fees. Piggie Park did say, and, by the way, one who succeeds shall ordinarily recover attorney's fees unless specific circumstances would render such an award unjust. So that's not a shocking result. I mean if we had a statute in this state, well, we have a rule in

this state that says under certain circumstances matrimonial actions, foreclosures and so forth you get counsel fees or can get them. That's really no different than Piggie Park.

MS. STARK: I agree, your Honor.

THE COURT: So we don't have still cited to me a case that says under pendent jurisdiction or under this leap that Judge Haines made from invalidating the local assessment ordinance, which, by the way, twenty years ago would come as shocking to any municipal attorney, that there was a violation of Civil Rights. We don't have a comparable leap from a state violation to a right to counsel fees under Title 8, do we?

MS. STARK: Your Honor, the Seaway Drive-in says that you have a right to counsel fees not under Title 8 but under 1988, the Maher v. Gagne.

THE COURT: But the problem I keep going back to, '88, 1988, is immensely broader in its scope of prohibitive activity then is Title 8.

MS. STARK: Your Honor, it is respectfully submitted Title 8 requires you to

be a prevailing plaintiff. It's because, if anything, the Title 8 standard, once you are a prevailing plaintiff this presumption comes into effect. The applicability of Title 8 to the Piggie Park standard, your Honor, has been established by the Sixth Circuit and by Congress. I cannot cite a case where each of these elements coalesce, if that's what the court is asking for. But we can cite a case for every necessary step of the process, for every element that has to be established under any of the fee-shifting statutes, specifically under Title 8.

Defendants have given no special circumstances. The only things they've claimed are that as taxpayers, because eventually taxpayers would have to pay for any attorney's fees, they should be exempt. That's expressly been denied by the courts. It's been rejected by this circuit, but in Inmates of Allegheny -- it was a recent Third Circuit opinion. The other argument defendants make is that their good faith should somehow relieve them from any obligation. Again that has never been held to be a special circumstance entitling --

THE COURT: I wouldn't mind paying a

700,000,000 fee as a taxpayer or 800,000,000. How many people have we in this state? I don't know. I guess that's really not a relevant factor, the good faith issue.

MS. STARK: Finally, your Honor, we didn't address experts' fees in our reply brief, so I would briefly like to respond to defendant's argument on that. They cited Helton for the proposition that we should, that experts' fees and deposition costs should not be granted. In Helton the Appellate Division expressly declined to make a determination as to Bung's and in a footnote noted that different considerations may well apply to actions instituted under the federal Civil Rights Act where there is generally little or no financial incentive to bring such suits. It's respectfully submitted that the Urban League case fits squarely under that footnote and that Helton is no bar to an award here. Your Honor, I think the Court is focusing the fact that this is a Title 8 claim, the legislative history, the wide-spread judicial deference to that legislative history and the express holdings in Geanty,in Carmel, in Piggie Park show that there is no reason

for treating Title 8 claims differently from other Civil Rights claims. Indeed, its status is one of the earlier Civil Rights fee-shifting statutes to set forth the determination of Congress to prevent discrimination in housing. Defendants attempt to refute the explicit legislative history of the Supreme Court cases and the multitude of upper court decisions by unsupported speculation and by easily distinguishable cases. They fail to set forth any special circumstances, as that term has been used by the courts. Rather they are asking this Court to define it, justifying the denial of fees and costs here. We respectfully submit we are entitled to them.

THE COURT: Thank you. I'm sorry to have kept you on your feet so long.

Mr. Paley.

MR. PALEY: Yes, your Honor, Phillip Paley for Piscataway Township. First, your Honor, I want the record to note that counsel has received a letter from Mr. Bisgaier representing a developer in Cranbury, I believe, who has asserted that he intends to rely upon all of the arguments put forth by the Civic League in terms

of seeking counsel fees on behalf of a private developer client, not that that issue has not been addressed, but I would certainly hope that this court notes Mr. Bisgaier's absence, that no brief was filed on behalf of any private litigant and that just for the record Piscataway would certainly object to any award to anybody, but particularly to a private developer.

THE COURT: Good. Doesn't cost much to write a letter.

MR. PALEY: Twenty-two cents, I believe.

THE COURT: There will be no relief for Mr. Bisgaier unless he shows up and maybe not even then.

MR. PALEY: A few comments, your Honor, first of all, I heard Miss Stark address the question of seeking legal fees back to 1974. I think that it's clear what Judge Haines did in Bung's. This court only has the authority to address applications for legal fees in the Superior Court, Law or Chancery Division, that this court cannot address an application for legal fees for a certain case in the Appellate Division or in the Supreme Court. I am not quite sure how Judge Haines got around to that

in Bung's, but I don't think there is authority for that proposition. One would certainly object under any circumstances to going back to 1974 and asking this Court to adjudicate any entitlement to counsel fees that were incurred in 1974 and 1975 before Judge Furman, obviously, a different judge, when a judgment was entered in 1975 or '76 by Judge Furman in the Chancery Division. That judgment would have been finalized either by the entry of that judgment or by the Supreme Court's decision in Mount Laurel II -- no. Strike that. On the following, yes, Mount Laurel II, that's correct. There was no mention made before Judge Furman in it, this application, and there was no mention made before the Supreme Court. There was no mention made before this court for legal fees following the remand to this court. So I would suggest that there has been a lack of timeliness with respect to that.

As to the services that were rendered before your Honor, however, many hours may have been put in. That's where I have some problem with the word "prevailing," because I can understand although not necessarily agree with counsel's argument as to the prevailing party

in terms of having an adjudication that Piscataway's ordinance and the other municipalities' ordinances are unconstitutional based on the various opinions that have been rendered here. But what was done before your Honor was not to address the question of constitutionality. Your Honor's said at least thirty times to me that I can recall, "The question of unconstitutionality has already been determined." So that nothing was, no part of the testimony presented before your Honor addressed the question of the prevailing status of the plaintiff in terms of determining unconstitutionality. I would argue, therefore, that they do not have a right to legal fees on the services rendered before you following the remand, because they are not prevailing parties here.

As to some of the points that were raised in the colloquy which the court just had with Ms. Stark let me say this: I think there were two reasons why the question of racial components and racial discrimination are not relevant to this application and, therefore, would bar plaintiff from proceeding under the federal

Fair Housing Act. First when Piscataway attempted to introduce evidence to show its racial balance in the fair share hearing and its racial composition, that evidence was objected to by Mr. Gelzer,who was trial counsel, on the grounds it was not relevant to the issues before this court, which were the determination of the fair share methodology. Second of all, I refer the Court to a compendium of Law Review articles which is entitled "Civil Rights" which was put out by the Rutgers Law Review within the past six months. It's quite a thick text, and there is a very interesting article in that compendium about deprivation of civil rights in a housing context. Not once is Mount Laurel mentioned. Not once have the remands been mentioned, and that's odd, because the author of the article was Mr. Gelzer who tried this case before your Honor. If he didn't think that racial discrimination played a part in the case. I don't know that it's simply for Miss Stark to argue that.

As to the question of timeliness, again it's presented squarely before this court by the provisions of 4:42-9(d), which I think states

explicitly that the judgment or order which reflects the relief that was granted must contain the provision of legal fees. As I pointed out, none does here. There was no specific reservation in anything indicating that counsel would have a right to come back before this court and to make the application within thirty days or sixty days as is common in other contexts. That did not take place.

THE COURT: Of course the rule is it doesn't have to.

MR. PALEY: I'm not relying very heavily on that argument, your Honor, on the fact there was no explicit reservation. But the fact of the matter is that there was, there should have been made within a reasonable time after the entry of judgments an application. Counsel argues that even though Piscataway's judgment was entered on September 17, 1983, that the real finality happened when the Supreme Court remanded to the Affordable Housing Council or transferred to the Affordable Housing Council in February of 1986, and we are here, now, in October or November of 1986 following this application, which was made in September. I

don't think there was untimeliness about it.

Addressing the arguments about costs and experts' fees, it's certainly true that Judge Haines in Bung's awarded expert fees, and he pointed out explicitly, I believe, that one of the reasons in his thinking was that those experts were absolutely essential to the ultimate determination of the case. In the ultimate determination there was a deprivation of constitutional rights. Indeed, he said without the testimony that the experts had provided before the Planning Board, I believe, or possibly the Zoning Board the municipal agency, the opinion might have been substantially different. I don't think that the two situations are analogous at all. Here the experts that were presented by the Civic League and, indeed, Miss Lerman, who was appointed by the court, presented testimony as to a methodology; they did not present testimony as to the constitutionality of the case. That methodology, now, has been supplanted by legislative enactments and administrative regulations, which are substantially at variance with that which was

presented here.

THE COURT: One could argue about that. One could argue that in '85 he was positive what the Fair Housing Act, the Council on Affordable Housing has done represents a carbon copy of the consensus, and it's only in the areas that dramatically affect the numbers that there is a modification. So I wouldn't say that that was all for naught.

MR. PALEY: Well, I am not suggesting it was exactly a waste of time either, your Honor. But by the same token can Piscataway, whose Judge Furman's order number was 1333, argue in any way that it pervades, because its number is only 911?

THE COURT: I don't think so, not necessarily, not here at least.

MR. PALEY: I do not make that argument. I do not believe that the testimony of the experts were required for the ultimate determination of order to constitute plaintiffs as the prevailing party here. I would respectfully submit that they have shown no entitlement either to legal fees or to experts' costs. Thank you.

THE COURT: Thank you.

Mr. Moran.

MR. MORAN: Your Honor, I would just like to address a few basically historical points with regard to the history of this case and the history of the allegations or lack of allegations of racial discrimination in the case. Judge Furman, this was a class action originally and Judge Furman certified it as a class action. He certified it, this, his class action on behalf of all persons of low and moderate income living in Northeastern New Jersey who sought housing in Middlesex County, but were barred from getting the housing because of the zoning practices of the municipality. There was nothing in the class action to indicate it was a class of some group of minority persons other than the fact that they shared the economic status of being of low and moderate income. The fact the people that were representative of the class,would designate plaintiffs in the case, were a racially diverse group representing virtually all of the races that live in New Jersey, when he made his decision, as the court has already pointed out, he specifically

dismissed both the 1983 and the Title 8 claims.

The Appellate Division made its decision reversing him with regard to the Title 8 claims, didn't make a finding there was racial discrimination. It simply said there was, in fact, it specifically said it's not ruling on the sufficiency of the evidence in the case. It's quite puzzling why it ever reached the conclusion, because its ultimate result was to reverse Judge Furman on the question of region without a remand. Therefore, it in effect dismissed the action, and it could be argued that the other part of its decision with regard to the Title 8 claim was mere dicta and surplusage in the decision. It wasn't necessary to reach the final result.

THE COURT: Do you know why the Appellate Division didn't reverse on the civil rights aspect as well?

MR. MORAN: No. I read it at the time when the opinion came down, and I was very puzzled by it.

THE COURT: It seems to me, it just does seem to me if the plaintiffs should have been given a chance to prove the Title 8 claim,

they should have been given a chance to prove the civil rights claim. I don't understand it, but I mean that's history.

MR. MORAN: The fact the court, Appellate Division said they should have been given the opportunity to prove it became mooted out by the action they took later on in the opinion, which was to reverse him on the region question without a remand, which brought the case to a screaming halt at that point but for the appeal that was taken to the Supreme Court by the plaintiffs. There was no subsequent hearing at the pretrial level until we got back to this court, and there was certainly no evidence presented before this court on the racial discrimination issue. In fact, the first evidence of any nature that we've seen is the statistical data that was attached to the motion.

I would submit, A, that it's improperly submitted at this time because, B, there is no opportunity to cross-examine on it. There is no opportunity to present rebuttal testimony, and I am sure this court does not want to open up a full factual hearing on the racial discriminatory facts of the various zoning ordinances in the

various municipalities. The best that can be said about the statistical data with regard to at least some of the towns, including Cranbury, it doesn't seem to prove much of anything at all. I think that the interpretation that the plaintiffs are arguing for would permit any plaintiff in any kind of an action to throw in a count for racial discrimination, not sort of try and prove it, but prove something else that is not a federal claim and claim an entitlement to counsel fees because of the fact they merely pleaded a racial discrimination argument. I don't think that's something that this court wants to do, because it's certainly going to open the flood gates for those kinds of claims.

I would also repeat my charge in the brief about failure to comply to the rules. I think the rule is quite clear. It sets forth three things that have to be done when you make such a motion, and plaintiff has ignored all three of them with regard to this motion.

THE COURT: All right. Counsel, you don't have to go if you don't want to. Mr. Benedict.

MR. BENEDICT: Did you know I had it, more

or less, he didn't think I would leave, to keep my mouth shut when I was ahead.

THE COURT: Along that line and to paragraph, even a fool is counted wise if he holds his tongue. I never heard that one either.

MR. BENEDICT: Judge, I am going to join the arguments you've heard. It seems to me that you've grasped the arguments or understand all the arguments I put forth in my brief and I will submit.

THE COURT: Fine, thank you.

MS. MOON: Mary Welby Moon on behalf of Frank Santoro for the Borough of South Plainfield. We too rely on the brief presented to the court, and I would say obviously your Honor has addressed most of the issues that we presented in our brief as well.

THE COURT: Thank you.

MR. BUSCH: Bertram E. Busch from East Brunswick. My line item in my budget did not have enough money to submit a real brief. Your Honor, my certification has been rendered irrelevant. The only thing I would add, that if they really are looking for counsel

fees back to 1974 when about eleven towns settled in 1976, why aren't they here too? Because they certainly generated some of the litigation as well. I would simply join the co-defendants.

MR. PIDGEON: John R. Pidgeon for Plainsboro Township. Your Honor, I would just like to note for the record a substitution of attorney will be filed, since I have left Mattson, Madden and Polito. So it is in the process of being filed.

I will not reiterate the arguments of my colleagues. However, specifically with reference to Plainsboro Township, plaintiff has conceded that there is insufficient evidence in the record to support a Title 8 claim. However, she says that that's a matter of chance. I disagree. I submit that the fact that there is insufficient evidence in the record to support that claim would indicate that plaintiff has in fact abandoned that claim.

With regard to the data of the 1980 census data submitted with plaintiff's supplemental memoranda, I agree with Mr. Moran that it should not be considered by the court

at this time but even if it is, I submit that with regard to specifically Plainsboro Township it proves nothing. Plaintiff admits in the discussion of Exhibit H, which applies to Plainsboro Township, that the extent of segregation within Plainsboro could not be ascertained from this data. I submit that the only thing that the data does show, that the Plainsboro minority population in 1980 was 11% of the total population. Since there is no word for the town, it certainly does not show any segregation within that town. I submit that plaintiff does not even have a prima facie case against Plainsboro.

THE COURT: Thank you.

MR. APUZZO: Mario Apuzzo for Monroe Township. I would like to just add, your Honor, that the plaintiffs state in their reply brief that it is good judicial policy for courts not to reach unnecessary constitutional issues. Therefore, your Honor should consider that in looking at this case, that is, that there was no ruling on the federal issues. However, I must consider that the record is deficient in making out any kind of a federal constitutional claim,

federal statutory claim, that the only claims that were reached were the state claims. The arguments of my co-counsel also, your Honor, you have pointed out some very good points, I believe, in your exchanges with Miss Stark about the factual record and whether you could make your leap from the state claims to federal claims. I think that is really the heart of this matter, and we submit that the counsel fees and related costs should not be granted on those grounds.

THE COURT: Thank you.

MR. CONVERY: Jerome Convery on behalf of Old Bridge Township. Your Honor, I would like to rely on the certification filed on behalf of Old Bridge Township as well as the arguments and briefs submitted by the various municipal attorneys. Thank you.

THE COURT: Miss Stark, since you are outpersoned by about nine to one I'll give you another opportunity.

MS. STARK: Thank you, your Honor. Very briefly, first with respect to Mr. Paley's arguments, most of the issues raised by Mr. Paley, as set forth in our prior briefs, we believe, should be raised in a collateral

proceeding. They address the amounts and the times and which costs for which fees would be eligible. Second, Mr. Paley said that there is a timeliness problem, because there were not prior applications for fees at earlier stages of the proceeding. In Gaines versus Daugherty there were prior applications in a proceeding which were denied. This was a desegregation case. It went on for eighteen years. They went up to the Appellate Division. They were not addressed by the Appellate Division, and the court ultimately found that even though those fees had been denied by the trial court they could still be reinstated at the end of the proceedings.

As the Court pointed out in response to Mr. Paley's discussion of the expert testimony and its adoption by the Council on Affordable Housing, your Honor, it's submitted that goes to plaintiff's catalyst argument that we've substantially obtained the relief that we sought not only in housing already committed, not only in housing already built, but in the development through this process of coherent approach to the problem of affordable housing.

THE COURT: There's really two aspects to

your expert's involvement. One would be his testimony and that portion of this case which was actually litigated, and the other would be his involvement in the consensus group that arrived at the fair share methodology.

MS. STARK: Yes, your Honor.

THE COURT: They are really in different settings, but I understand what you are saying.

MS. STARK: With respect to Cranbury's argument that the plaintiff under the test the Civic League proposes, plaintiff could there in a Civil Rights claim proceed on another basis and prevail, that's a misstatement of the Urban League's position. The Urban League, any plaintiff would still have to prove that the federal claim was substantial and that it rose from the same nucleus of operative facts as in United Mineworkers versus Gibb. Furthermore, a decision by your Honor of fees here would open no flood gates; it's very rare. Your Honor asked for a specific cite as to the Title 8 claim, awarding counsel fees under this, the state, where there is pending state jurisdiction. The pending state jurisdiction cases only developed after 1976, only developed after the

Fees Award Act. This case was filed before then. Since 1976 exclusionary zoning cases are claiming 1988, because since '76 they can get fees under that as well. We don't have Title 8 claims that are proceeding solely to attorney's fees for Title 8 anymore. There are no flood gates here. That's also the reason I believe why there are no such, there are no cases specifically on point. There wouldn't need to be, because why should plaintiffs prove that they can't afford to pay fees when they can prevail under the 1988 standard without proving that extra point?

THE COURT: Or the other reason. I think that's a good explanation as to why you can't cite any cases. The other explanation, however, is that there is a much clearer relationship between a due process violation based on exclusionary zoning and the violations that are protected under the Civil Rights Act. I mean one almost follows the other.

MS. STARK: I agree, your Honor.

Finally, Plainsboro again demands that the Court, Plainsboro would like our Title 8 claim to disappear and again says that there

was virtually an abandonment of the claim. This case is distinguishable from those cases where there was such an abandonment, because it was expressly reinstated. Vacations don't permit an as if reading, don't permit the concept of implied abandonment that Plainsboro is urging this court to adopt. Thank you.

THE COURT: Thank you. In rendering decisions, oral decisions, I am sometimes fond of using the approach that I once hated a judge for, and that was never knowing what he was going to say until he got to the last sentence and just to keep everybody awake. However, this is not one of those cases,because I have to express in advance my personal frustration with the result I'm going to reach. There is something wrong about the result I'm going to reach in terms of equity, but I don't think that I have that kind of latitude to do what I just inherently feel is right in this case and, that is, that the Urban League should prevail. By a course of history and procedural fate the Urban League never got a chance to prove its case, and it can't prove it, now. It can't prove it factually, now, looking backward.

If it could do that, then the Bung's case might give us some basis for granting relief. Perhaps an Appellate Court could find some way out of that morass, but I can't. And I say that up front, because it is a disturbing case to me. It's disturbing, it was disturbing up to after I had reviewed the law and assessed where I was at to make me hesitate for a long period of time to reach the decision that I feel that I am absolutely compelled to reach based on the law that's before me. It's also the reason why I didn't bother responding to the objections raised by defendants' counsel that there has been a failure to comply with the rules. If I had intended to rule in favor of the Urban League or the Civic League, I would not have done so until the record was supplemented by an appropriate affidavit, so that we could address all of the issues in accordance with the requirements of the rules. But there is simply no point in putting the plaintiffs to that in light of the result that I feel compelled to reach.

As Miss Stark indicated in her colloquy, perhaps the Appellate Division or the Supreme Court can find some yet unexpressed principle of

law to support this application. I can't do that, and I think Judge Haines' opinion represents perhaps the frontier of awards under this pending jurisdiction theory. Some might argue that it's the most liberal application of the principle yet to be developed. I don't say that critically. But this would go far beyond anything Judge Haines did in his opinion, and I am quite satisfied that I am correct in making that statement.

The plaintiff seeks to recover attorney's fees and costs pursuant to our court Rule 4:42-8(a) which allows recovery if it is permitted by statute among other things, and Section 42 of the, I'm sorry, Title 42 of the U.S.C.A., Section 36:12c, which is part of the Fair Housing Act, is a statute which would permit the imposition of counsel fees. At N.J.S.A. 2A:22-8 is a statute which would permit the assessment of statutory costs. The plaintiff bases its right to recover on the theory that it clearly prevailed in Southern Burlington County N.A.A.C.P. versus Mount Laurel, 92 New Jersey 158 (1983) and that while the Supreme Court based its decision on the state constitution, it could have just as

easily granted the same relief based on the federal Fair Housing Act, which has been referred to here alternatively as Title 8 and also as Section 36:01, et seq.of Title 42,U.S.C.A.

As noted, the Civic League was unable to find any case which utilized the same rationale with respect to that section, as has been commonly utilized with regard to the Civil Rights Act. In fact, the plaintiff asks the court to find that the same facts which our Supreme Court in Mount Laurel II held to be violative of our state constitution under due process and equal protection concepts, that is, the exclusion of poor and low and moderate income people based on zoning practices also amounts to a violation of the federal Fair Housing Act. The federal statute by its terms prohibits discrimination in the sale, rental, financing and brokerage of housing because of race, color, religion, sex or national origin. The plaintiff previously attempted to show the impact that exclusion has on minorities.

Now, defendants have raised a myriad of objections, some of which I'll just briefly summarize. The first is jurisdictionally speaking

this court no longer should be involved in this kind of thing based on Hills Development versus Bernards, 103 New Jersey (1986). I just wish the word would get around, because the motions keep getting filed. But the defendants argue that the Supreme Court remand really limited the jurisdiction of this court to imposing conditions with respect to transfer and, indeed, at this posture, since the Council is in the position to even deal with the scarce resources, that the court doesn't have any jurisdiction. I wouldn't mind getting such a judicial determination, but it seems to me that the argument made by the Urban League is correct. This is the only place where this type of application could be brought. I don't think the House and Council would entertain it.

Procedurally there is an objection to the failure to comply with Rule 4:42-9, and I've already commented on my reason for ignoring what is an obvious failure to comply with that rule. Other objections include an argument that if the defendants are going to be required to reimburse the court-appointed master for her work in the development of the

consensus methodology, either all municipalities in the State of New Jersey or at least all municipalities in the region or at least all municipalities in the area should contribute. I don't see any merit in that argument. The people who paid and filed here in these suits are the ones who are the parties. Another defendant claims that the settlement did not provide for counsel fees and if required to pay any portion of it, it reserved the right to reopen its claim and move to transfer. The law is clear that the settlement didn't have to deal with counsel fees, and the burden is on the parties to exclude an application for counsel fees if that's their intention.

Several defendants claim laches and, conversely, one says the application is premature. I'm not too sure you can have it both ways. The claim of it being premature is because there is no final order in the one case. There will not be one until the Council on Affordable Housing grants substantive certification. I see no laches, and I don't believe it's premature. Really this case had its final ending at such time as the court concluded its hearings on

scarce resources, which is really not too long ago. It could well have been premature to bring this motion before then given the fact counsel fees in my judgment would have been awardable if they were establishable under law up until the present time and including today's application.

Some of the defendants suggested, fortunately, it wasn't done in open court today, because it would have been difficult to maintain a straight face, that the plaintiff is not entitled to prevail here or not entitled to legal fees because they didn't prevail. I don't really have to spend a lot of time with that. The plaintiff here prevailed by any common sense definition of that term in bringing about a finding of exclusionary zoning and through getting the courts to devise a fair share methodology which then goaded the legislature into action, and it was plaintiffs, not defendants, that brought about the Fair Housing Act in a very clear sense. Clearly, I'm sure, there was municipal action to get the defense of the Fair Housing Act, but the reason that the Fair Housing Act was passed

after approximately ten years of inaction was that the plaintiffs won the case.

There is the argument, which we commented on earlier, that the public bears the ultimate cost of this litigation and they shouldn't be asked to spend any more money at this late date. That's never been a consideration for the award of counsel fees under the rule or the statutes involved. With regard to the merits of the plaintiff's legal analysis and the case law that the plaintiff has relied on, several of the defendants claim that the Bung's case is not applicable in that the court was dealing with a different federal statute, one which is broader than the Fair Housing Act; and, secondly, that the New Jersey Supreme Court election of the state constitution as a basis for relief was not an insignificant judicial election or, in the words of Bung's, "necessary election."

The Supreme Court choice of law was considered and it deserves great weight. It would be improper for this trial court to make an independent determination that the Supreme Court just made an unnecessary selection. Additionally, some defendants point out that the

relief granted pursuant to Mount Laurel II and that available to the federal Fair Housing Act is quite different. The two principles or laws target and protect different people, although there may be an overlap. Mount Laurel protects against discrimination of lower and moderate persons in housing, while the federal Fair Housing Act expressly protects against discrimination in housing based on race, color, religion, sex and national origin, not income. Additionally, the Act does not address itself to zoning, but rather improper practices in sales and rental of housing generally by individual persons because of their race.

Several of the defendants argue that due to the limiting planning of the fee section, that is,prevailing plaintiffs versus prevailing parties as in other civil rights legislation, specifically 42 U.S.C.A. 1988 as well as the caveat that the court find that the plaintiff be unable to bear its own costs, that evinces an intent by Congress to require that the plaintiff actually prevail under the section. Thus it's inappropriate to analogize the cases involving violations of 1983. Furthermore, one

defendant states that attorney's fees are only available when one is expressly found to have violated Sections 36:04 to Section 36:06 of the Fair Housing Act, citing Shannon versus U. S. Department of Housing and Urban Development, 409 Fed. Sup. 1189, Eastern District of Pennsylvania, 1976,wherein the plaintiff did not receive attorney's fees in a suit brought pursuant to Section 36:08, administrative section, even though the plaintiff prevailed under that section.

The defendants also rebut the plaintiff's reliance on State versus Singer, 95 New Jersey 487 (1984) which sets forth the test for determining whether a plaintiff has prevailed pursuant to 42 U.S.C.A. 1988 and Metropolitan Housing Development Corporation versus Village of Arlington Heights, 558 Fed. Second at 1283, Seventh Circuit, 1977, which establishes the test for violation of the Fair Housing Act.

The Singer case is not dispositive in this case. In the Singer case the Supreme Court supported the Appellate Division holding that the plaintiffs were entitled to a fee award, because they prevailed. They prevailed

on federal constitutional ground in addition to a state constitutional ground. Thus there was no missing unadjudicated link. The plaintiff's real hope for relief and success in this case lies in the decision of Judge Haines in Bung's Bar and Grille, Incorporated versus Florence Township, 206 New Jersey Super. 432, Law Division, 1985. I think I've already said that it's obvious that one trial court is not bound by the decision of another trial court. Frankly, I think the Bung's case is an extraordinary decision, and I wouldn't hesitate to be bound by its analysis. However, its analysis leads me to the opposite result in this case.

Bung's notes three key elements which led to the plaintiff's success in that case, which appear to be missing here. First the plaintiff can recover fees only by showing that a federal constitutional violation occurred. That's at page 44 of Bung's. No such showing has been made throughout the twelve years or so of this litigation.

Secondly, to be entitled to fees it would be sufficient to show a state constitutional

violation as opposed to a statute, if that constitutional violation would necessarily demonstrate a federal constitutional violation. Now, that reading may be at variance with the court rule to the extent that the court rule mentions "Statute." But I am willing to accept it and I think it's correct. Judge Haines' example is that if a state due process or just compensation violation automatically translates to a Fourteenth Amendment violation, then fees are awardable. Now, that analysis can be found at 456 and 457 of the decision.

The Mount Laurel II constitutional finding has no automatic concomitant in the federal constitutional law that remains in this case. What remains is a possible Thirteenth Amendment claim, which is not concomitant to the due process claim or due process finding under state law, and what doesn't remain is the federal Civil Rights Act which may be concomitant to the state, federal constitutional claim that does remain in this case.

The third element mentioned in Judge Haines' decision is that the plaintiff must show that the facts upon which it was awarded relief

are the same facts which support the claim upon which the unproven federal claim would turn. In short, it must be clear that the result in Judge Haines' words, the result would have been no different, page 462-63. I simply cannot reach that conclusion here. It is by no means clear that the Thirteenth and Fourteenth Amendment claims or the Section 36:12 claims would have been proven and, if so, what the result would have been. That issue cannot, now, be proven by affidavit, and a full trial on the issue is hardly fair or appropriate and in all likelihood would be barred under the single controversy doctrine in any event.

It was based on these three key factors that if one looks at the decision you'll find that Judge Haines frames the issue after stating these factors at page 462. He says, "The question, therefore, as to whether the right to fees and costs granted by the Act is to be denied, because the court chose one path to decision when it could have very easily chosen another. The question provides its own answer. The important right to recover the cost of successful litigation involving genuine issues of civil

rights cannot be lost as a result of an unnecessary judicial election."

In the case before me I cannot say that the Supreme Court could have easily chosen another path or that it would, that it made an unnecessary judicial election. That involves an appropriate specialization and extrapolation on my part. One could just as easily argue that the Supreme Court purposely chose its path, because the election under 36:12 would not have protected as broad a class of persons as did the opinion of the court and it would not have given the court the broad sweeping powers, which then set upon the trial courts to deal with discretionary zoning. It would have limited the court to the relief provided under the Federal Housing Act, which is essentially injunctive and damages, so it's by no means clear. In fact, one could make very strong argument that it is alternatively clear to the contrary, that the court knew exactly where it wanted to go with its choice of legal theory. However, both statements are speculative at best.

The plaintiff's claim here, therefore, does not fit into the parameters established in

the Bung's case. The bottom line is that absent meeting these criteria, the plaintiff cannot claim to be a prevailing party within the meaning of 36:12. It prevails in every sense of the word in terms of its ultimate objective. It prevails in bringing about the unique legal principle to our state, which is unparalleled in our country. As I say, it, not the defendants, can properly assert it brought about unparalleled state legislation in the Fair Housing Act. Without its litigation it's doubtful that the Act would exist today. The eight years between Mount Laurel I and Mount Laurel II evidenced that fact, and it was only even after that that the court did start producing fair share numbers that the legislative response solidified.

It seems very unfair that the significant achievement in vindicating the Civil Rights of many should go uncompensated when lesser achievements have resulted in awards. That the plaintiffs in the Bung's case would get counsel fees and that the plaintiffs in this case would not is certainly disturbing to this court. When one talks about the importance of a local

assessment as relates to the importance of the legal issue in this case there seems to be no comparison. Had the 1983 aspect of this suit not been submitted, perhaps a different result could be reached. But the very uniqueness of the Mount Laurel doctrine and the closely defined and limited scope of the Fair Housing Act, that is, the federal Fair Housing Act, precludes the result that I believe is appropriate in this case.

The principal thrust of the federal Act at Section 36:01, et seq. is to prohibit discriminatory housing practices. That term is defined as an unlawful act within the meaning of Section 36:04, 36:05 and 36:06. 36:04 is addressed to discrimination of the sale or rental of housing, and it creates a violation if there is a refusal to sell or rent after a bona fide offer because of race, color, religion, sex, national origin. If there is a discrimination in services or facilities connected with those factors, if there is a publication indicating preference based on those factors, if there is a representation that property is not available for inspection, sale or rental because of those

factors, or if there is what is known as blockbusting because of those factors. Section 36:05 protects against unlawful practices by financial institutions because of race, color, religion, sex or national origin, and 36:06 creates a violation if any person is denied access or membership or participation in any multiple listing service and so forth again because of those practices.

It's for a violation of these three sections and these three sections alone and of their specific terms at Section 36:12 provides the right of a private person to injunctive relief, actual damages, punitive damages up to a thousand dollars, court costs and reasonable attorney's fees to a prevailing plaintiff if the plaintiff is not financially able to assume the fees. Mount Laurel II approaches a broad housing problem from a very different direction. The problem is related to the extent that both Mount Laurel II and the federal Fair Housing Act deal with fair housing. Certainly there is an overlap to the extent that the exclusion of the poor could and in all likelihood does mean the exclusion of certain races, people of certain

national origins. But Mount Laurel does not ground its constitutional violation on discrimination of race, color, sex, or national origin. Its thrust is totally different, and its relief is unlike anything that the federal Act envisioned.

Mount Laurel II is meant to put teeth into the Mount Laurel I document which, of course, is the constitutional basis. At page 208 of Mount Laurel II the Supreme Court says, and I quote, "Municipal land use regulations that conflict with general welfare abuse the police power and are unconstitutional. In particular, those regulations that do not provide the requisite opportunity for fair share of the region's need for low and moderate income housing conflict with the general welfare and violate the state constitutional requirement of substantive due process and equal protection." That is the heart, soul and basis of the Mount Laurel doctrine.

The plaintiffs state in its brief that the Supreme Court noted in its opinion that the plaintiffs did "not appear to be expressing their Thirteenth and Fourteenth Amendment claims."

Thus the plaintiffs argue that the New Jersey court did not feel called upon to address its constitutional claims. The plaintiff notes that its fair housing claim was not even mentioned while most likely the Supreme Court felt that was also not being expressed. The plaintiff argues there was no need to reach that issue, because the court had already granted the plaintiff all relief that it was entitled to under the federal Fair Housing Act and then some, using the New Jersey Constitution for its decision.

The Singer test does require a federal nexus between the cause of action and the relief obtained. I do not -- I think I said "federal nexus." I mean a factual nexus. The factual nexus is not present in this case. A violation of the federal Fair Housing Act would not require, I'm sorry, a violation of the federal Fair Housing Act would require a finding of discrimination based on race, color, sex, religion or creed, not low or moderate income. The Supreme Court finding was confined to the impact defendants' improper use of its power to zone was having on persons of lower and moderate

income. While it may be that the impact was most greatly felt by nonwhites, minorities, no court has found low or moderate income to be equivalent to race. See Waldie versus Schlesinger, 509 Fed. 2d 1110, Second Circuit, 1975, relying on James v. Valtierra, V-a-l-t-i-e-r-r-a, Second Circuit -- I'm sorry, 402 U.S. 137, 1971.

While the plaintiff attempts to prove disparte impact defendant's actions had on minorities, as I've indicated, such evidence should not be considered at this stage and certainly was not relied upon by the Supreme Court. Additionally, it is often the case, that is, that a state court will rely on its own constitution to provide its citizens with even greater protection than is available under the federal constitution. That is clearly the fact in this case. There in all likelihood cannot be a federal Mount Laurel, say violation of our state constitution, which may provide greater protection which in certain areas does not necessarily result in a violation of the federal constitution. In the instant case I cannot say that the same facts which give

rise to the New Jersey violation also violate the federal Act.

Now, the plaintiff also seeks compensation for its expert fees and deposition fees. Having found no right to recover under 36:12, any claim must be limited to state law. I find no support in our state rules or the tax court statute for the plaintiff's position. Some of the defendants' briefs adequately address those issues. Miss Lerman's, L-e-r-m-a-n-'-s, fees fall into a different category. Since payment of them is governed by what the Supreme Court said in Mount Laurel II, they are not treated as tax costs or other allowable fees under any statutory or court rule, and I am mindful in ordinary circumstances under Mount Laurel II that the burden might fall fully on municipalities to cover the court-appointed expert. Here besides the relatively minute amount that the plaintiff has been called upon to pay, the unique circumstances justify leaving the parties where they are with regard to the master's ability, the development of the consensus methodology evolved in this case. It was a unique benefit of the plaintiff, and the master's

role in it, I believe, was well beyond anything that the court envisioned when it authorized the trial courts to use masters in Mount Laurel cases.

I think it's fair to say that the Supreme Court might have been very surprised by the entire consensus approach, that they certainly did not contemplate that particular device, specifically. The defendants in addition to contributing to the master's costs in the process of developing a consensus methodology, also had to pay their own experts to participate in that methodology to protect their own interest, and the margin benefit which resulted from the voluntary process of consensus was clearly to the plaintiff. The concept of appointing a master in these cases evolves out of the fact that the Supreme Court thought that the trial judges might find it necessary to utilize an expert to help the municipalities do what they should do. In this particular case that was not in principle at least or in the main how the master was used. The municipalities all agreed to what they should do, at least up to that point, in

developing a consensus methodology, and on that basis I think it's quite fair to allow or to permit the Urban League and require the Urban League to bear what is a rather insignificant aspect of the total cost here involved.

All right, any questions?

MS. STARK: No questions.

THE COURT: Thank you. I might say, Mrs. Stark, that your briefs were extremely well done, and the result doesn't reflect the excellent job that you did.

MS. STARK: Thank you, Judge.

THE COURT: That doesn't say anything negative about the defendants' briefs.

MR. MORAN: Do you want an order submitted?

THE COURT: Yes. Anybody want to volunteer?

MR. PALEY: I will do that.

MS. STARK: Your Honor, shouldn't -- well, we didn't get it, but it's up to them or one of us, doing it.

THE COURT: Would you like to submit it? You are welcome. I just didn't want to place an additional burden. Submit it under the five-day order.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION : OCEAN/MIDDLESEX COUNTY
Docket No. C-4122-73

URBAN LEAGUE GREATER NEW BRUNSWICK, et als.,

Plaintiff,

vs.

CARTERET BORO MAYOR & COUNCIL, et als.,

Defendants.

CERTIFICATE

I, DAVID G. VORSTEG, certify the foregoing to be a true and accurate transcript of the testimony and proceedings in the above-entitled cause.

David G. Vorsteg

David G. Vorsteg, C.S.R.
License Number XI00368

Dated: 1/16/82