

CA - General

11/9/76

- Memorandum in support of plaintiff's motion to recover  
Costs of litigation

- Sealing Affidavit

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R. 4:42-8(a) states that "(u)nless otherwise provided by law, these rules or court order, costs shall be allowed as of course to the prevailing party." In order to determine which costs are allowed we must look to N.J.S.A.

22A:2-8. This statute states:

A party to whom costs are awarded or allowed by law or otherwise in any action, motion or other proceeding, in the Law Division or Chancery Division of the Superior Court is entitled to include in his bill of costs his necessary disbursements, as follows:

The legal fees of witnesses, including mileage for each attendance, masters, commissioners and other officers;

The costs of taking depositions when taxable, by order of the court;

The legal fees for publication where publication is required;

The legal fees paid for a certified copy of a deposition or other paper or document, or map, recorded or filed in any public office, necessarily used or obtained for use in the trial of an issue of law, or upon appeal, or otherwise;

Sheriff's fees for service of process or other mandate or proceeding;

All filing and docketing fees and charges paid to the clerk of the court;

Such other reasonable and necessary expenses as are taxable according to the course and practice of the court or by express provision of law, or rule of court.

Plaintiffs here seek to have taxed as costs to which they are statutorily entitled, fees paid for copies of public documents, sheriff's fees, and filing fees; and have taxed

as "other reasonable and necessary expenses" the fees of expert witnesses and the cost of reproducing exhibits for distribution to defendants at trial. All costs are included and sworn to on the affidavit attached to the motion.

Because some of the costs for public documents, sheriff's fees, and initial filing are allowed as of right by statute, they will not be further discussed.

The costs plaintiffs are requesting by Court order as "reasonable and necessary expenses" fall into two categories. First, are the expenses incurred during and before the trial for copies of plaintiffs' exhibits for each of the 22 defendants. <sup>1/</sup> During the course of the trial the Court indicated to counsel that this specific cost item could be

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Because the plaintiffs failed to prove that Dunellen has engaged in any exclusionary practices, we do not seek to tax any costs against that municipality. Costs are sought, however, against the 11 defendants which were "conditionally dismissed" because of the finding of liability implicit in those dismissals. To obtain costs under Rule 4:42-8(a), the movant must be a "prevailing party". In our judgment, the word "prevailing" includes a party who succeeds in securing relief even though it may not be embodied in a final judgment entered by the court, after trial, entailing the ways in which the defendants' conduct violates the law. See Aspira of New York, Inc. v. Bd. of Ed., 65 F.R.D. 541 (S.D.N.Y. 1965); Parker v. Matthews, F. Supp. \_\_\_\_\_ (D.D.C. 1976). These defendants should not be able to avoid a taxation for costs merely by agreeing to revise their ordinances prior to the entry of a final decree. This is particularly true in this case since the agreements by the 11 municipalities did not occur until the end of the trial after the plaintiffs had expended large sums of money to pay the costs of litigation. They should be equally liable for costs as the other 11 municipalities.

reimbursed upon motion.

Second, plaintiffs are requesting reimbursement for the expenses or fees paid to expert witnesses who testified on behalf of plaintiffs. It is axiomatic in New Jersey that what costs are allowed is determined either by court rule or found under statutory authority. The allowance of certain costs such as expert witness fees is ordinarily discretionary with the court in a particular case. See U.S. Pipe and Foundry Co. v. United Steelworkers of America, AFL-CIO, Local No. 2026, 37 N.J. 343 (1962). See also, NJSA 2A:15-59. Plaintiffs urge that the "such other reasonable and necessary expenses" clause found at the end of NJSA 22A:2-8 (as quoted in full above) provides ample authority for the Court to award as a cost item against each defendant a proportionate share of the expenses or fees of expert witnesses.

In comparable cases, the New Jersey courts have allowed expert witness fees as part of the costs to the prevailing party. For example, in an action for damages for the cost of removing an encroaching retaining wall, plaintiff paid a fee for the appearance in court of a surveyor to prove his survey. Plaintiff asked for and received the fee as a cost item at the trial level, which was affirmed by the Appellate Division. Barber v. Bochinsky, 43 N.J. Super 186 (App. Div. 1956). In Barber, the surveyor's report was an essential ingredient in the plaintiff's case and thus the cost was allowed.

This is exactly the situation faced in the instant case. Plaintiffs are requesting reimbursement of the costs for expert witnesses because the services rendered by the experts constituted the very heart of plaintiffs' case. This is especially true in the case of Mr. Mallach. As the Court can appreciate, access to the courts by low and moderate income persons to vindicate constitutional rights, such as those involved in the instant case, will depend largely on the ability of public interest groups to provide the needed support and legal assistance. In cases such as this one, where the extensive expert testimony is required, the costs are necessarily heavy. Unless some of these costs can be recovered, it will be extremely difficult for these public interest groups to continue undiminished their efforts to assist low and moderate income persons in securing relief for violations of their constitutional rights.

Qualified experts, particularly in the complicated area of planning and land use, are seldom able -- and indeed they should not be required to -- donate their professional services free of charge. By the same token, public interest groups do not have the financial resources to absorb indefinitely the full measure of these litigation costs. The bulk of the costs of prosecuting such cases, of course, have been, and will not doubt continue to be donated - attorneys fees, travel expenses, the time and effort of the plaintiffs.

But requiring that prevailing low and moderate income plaintiffs also must bear the full cost of securing expert witnesses will necessarily impose an unsupportable burden on the limited resources of these plaintiffs and the public interest groups that assist them.

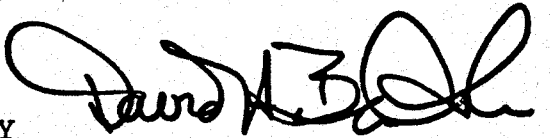
In determining whether certain "discretionary" costs should be allowed, the courts in this state have taken into account the extent to which the public interest is advanced. In Huber v. Zoning Board of Adjustments, Howell Township, 124 N.J. Super 26 (Law Div. 1973), the defendant Board had granted a variance and the Township Committee had granted a special permit for enlargement of a gas station. Plaintiff challenged these actions successfully, and moved to recover the cost of the transcript of the proceedings before the Board of Adjustment. The Court approved such a recovery emphasizing that plaintiff was an "interested citizen" whose suit would redound to the benefit of all citizens in the Township.

It is important that citizens should feel able to bring such actions when they believe that their representatives are not carrying out their duties correctly or effectively and should not be discouraged from doing so by the possibility of large costs. Id., at 29.

That holding in Huber is fully applicable to the request for expert witness fees made in this case.

Plaintiffs stress that the defendants in this case have been found to have violated plaintiffs' basic constitutional rights. Plaintiffs ask only that they be required to bear a part of the considerable expense that has been involved in securing the rights of citizens who would not otherwise be able to have their day in Court.

Respectfully submitted,

  
BY \_\_\_\_\_  
DAVID BEN-ASHER  
Attorney for Plaintiffs

Dated: 11-9-76





AFFIDAVIT OF DANIEL A. SEARING

Daniel A. Searing, of full age, being duly sworn according to law, deposes and says:

1. I am plaintiffs counsel in the above captioned case.

2. The following statutorily allowed costs were incurred during the course of the litigation:

- a. Filing fees of \$60.00, prorated share, \$2.72;
- b. Sheriff's fee of \$98.25, prorated share, \$4.43, plus mileage;
- c. Public documents;

Treasurer, State of New Jersey	\$15.00
Publication, Middlesex County Planning Bd.	<u>67.00</u>
	\$82.00
prorated share	\$ 3.73

3. The following other costs were incurred as reasonable and necessary expenses:

a. Cost of exhibit reproduction	\$1,138.09
prorated share	\$ 51.73
b. Expert witnesses	
Alan Mallach	\$7,500.00
Lawrence Mann	122.23
Annette Petrick	<u>200.00</u>
	\$7,822.23
prorated share	\$ 355.56

4. The following chart totals all expenses by defendant:

Defendant	Filing Fee Share	Sheriff's Fee Plus Mileage	Public Documents Share	Other Documents	Exhibit Share	Witness Share	Total
Carteret	\$ 2.72	\$ 4.46 + 2.60	\$ 3.73		\$ 51.73	\$ 355.56	\$ 420.80
Cranbury	2.72	4.46 2.80	3.73	\$ 3.00	51.73	355.56	424.00
E. Brunswick	2.72	4.46 1.20	3.73	95.75	51.73	355.56	515.15
Edison	2.72	4.46 1.20	3.73	2.00	51.73	355.56	421.40
Helmetta	2.72	4.46 2.00	3.73		51.73	355.56	420.20
Highland Park	2.72	4.46 .20	3.73		51.73	355.56	418.40
Jamesburg	2.72	4.46 2.40	3.73		51.73	355.56	416.20
Metuchen	2.72	4.46 1.20	3.73		51.73	355.56	419.40
Middlesex	2.72	4.46 2.00	3.73		51.73	355.56	420.20
Milltown	2.72	4.46 .80	3.73		51.73	355.56	419.00
Monroe	2.72	4.46 2.80	3.73	2.00	51.73	355.56	423.00
N. Brunswick	2.72	4.46 .80	3.73	4.00	51.73	355.56	422.20
Old Bridge	2.72	4.46 3.20	3.73		51.73	355.56	421.40
Piscataway	2.72	4.46 1.40	3.73		51.73	355.56	419.60
Plainsboro	2.72	4.46 3.00	3.73		51.73	355.56	421.20
Sayreville	2.72	4.46 2.00	3.73		51.73	355.56	420.20
South Amboy	2.72	4.46 2.40	3.73		51.73	355.56	420.60
S. Brunswick	2.72	4.46 2.20	3.73	7.50	51.73	355.56	427.60

Defendant	Filing Fee share	Sheriff's Fee Plus Mileage		Public Documents Share	Other Documents	Exhibit Share	Witness Share	Total
S. Plainfield	2.72	4.46	2.00	3.73		51.73	355.56	420.20
S. River	2.72	4.46	1.20	3.73		51.73	355.56	419.40
Spotswood	2.72	4.46	1.60	3.73	2.00	51.73	355.56	421.80
Woodbridge	2.72	4.46	2.60	3.73		51.73	355.56	420.80

*Daniel A. Searing*  
DANIEL A. SEARING

Subscribed and sworn to before me this 9th day of November, 1976.

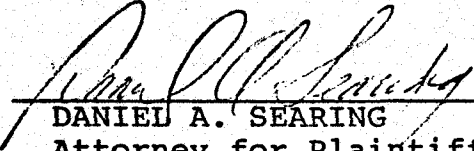
*Martha Hewitt*  
NOTARY PUBLIC  
*District of Columbia*  
MY COMMISSION EXPIRES OCTOBER 31, 1978

CERTIFICATE OF SERVICE

RECEIVED & RECORDED  
MIDDLESEX COUNTY, N.J.

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I hereby certify that service of this Notice of Motion was made by mailing the original and one copy to the <sup>FRANK SCHATZMAN</sup> ~~CLERK~~ Clerk, Superior Court of New Jersey, one copy to the Middlesex County Clerk, one copy to the Honorable David D. Furman, and one copy to each of the attorneys for the defendants.

  
\_\_\_\_\_  
DANIEL A. SEARING  
Attorney for Plaintiffs  
National Committee Against  
Discrimination in Housing, Inc.

Dated: November 9, 1976