ML- Morris County Fair Housing Council
vs. Boonton

Jan. 27, 1984

Transcript of Motion

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notes: double-sided pages.

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-MIDDLESEX COUNTY
Docket No. L-6001-78-P.W.
Appellate No. _____

J. Villoresi
compltr
file

MORRIS COUNTY FAIR HOUSING :
COUNCIL, et al,
:
Plaintiffs,
:
v. Transcript of Motion.
:
BOONTON TOWNSHIP, et al,
:
Defendants.
:

Friday, January 27, 1984,
Middlesex County Courthouse,
New Brunswick, New Jersey.

BEFORE: HONORABLE STEPHEN SKILLMAN, J.S.C.

TRANSCRIPT ORDERED BY:

ALFRED J. VILLORESI, ESQ.

APPEARANCES:

ALFRED J. VILLORESI, ESQ.,
For the Respondent.

IKE CITTONE, C.S.R.,
Official Court Reporter.

MR. VILLORESI: Your Honor, I have requested an opportunity to discuss the matter with you for several moments before this hearing, if that would be possible.

THE COURT: I recall that portion of your letter, Mr. Villoresi. I am not sure I understand what any of that could have to do with this motion.

MR. VILLORESI: I just represent to the Court that it would very possibly be material.

THE COURT: I'll hear you very briefly. You want to meet with me in chambers, is that the request?

MR. VILLORESI: Yes, sir.

THE COURT: Incidentally, Mr. Meiser, are you participating in this matter?

MR. MEISER: We really feel it would be improper for us to suggest anything to counsel for the defendant.

Our only request is within the limit of the Court's power not to permit extended delay of this case with any ruling it renders.

THE COURT: You are not asking to participate on the motion?

MR. MEISER: No, we are not.

THE COURT: Very briefly, Mr. Villoresi, I will meet with you in chambers.

(Short recess was taken.)

THE COURT: Mr. Villoresi, first of all, on this motion, in the order to show cause I identified you as currently appearing in this litigation for three defendants, Randolph, Denville and Parsippany-Troy Hills.

I gather from your answering papers that you are only representing Randolph and Parsippany-Troy Hills, is that correct?

MR. VILLORESI: Yes, sir.

THE COURT: One thing confused me a little bit, the final paragraph of your affidavit which I am having some difficulty locating.

MR. VILLORESI: Yes, sir.

THE COURT: You make reference there to Denville, I believe. That confused me a little.

MR. VILLORESI: Apparently, it was a typographical error by the secretary, knowing that we were municipal attorneys for that town. I overlooked it in reading it. We are still municipal counsel for all three. In this

I anticipated that is going to be a relatively short part of the case. Maybe you will be right and I will be wrong.

MR. VILLORESI: It was anticipated at that time that part of the case will take two or three months and the municipality part of the case would take approximately two days for each town.

THE COURT: That is when the proposed bifurcation would be the first phase of the case, would deal with region, regional need and fair share. Wasn't that the concept, that would be the first phase of the case, and the second phase would deal with the feature of the zoning ordinances of the individual municipalities?

MR. VILLORESI: I don't believe fair share was part of the first phase. I think the Public Advocate, based upon the DCA study, had used their allocated number from the beginning for each town. That was a given.

What was going to be was the region and regional need and each municipality was going to fight on the basis of what their particular zoning was, as to what their obligation

affidavit and memorandum of law, you indicated that some uncertainty as to what the conflict was that I had concern about.

Frankly, that took me back a little bit, because we've discussed this matter informally, it seems to me, for what, six months.

MR. VILLORESI: Your Honor, there have been three discussions in chambers concerning it.

THE COURT: And quite a few on the phone, some of them rather lengthy, if I recall correctly.

MR. VILLORESI: Your Honor, I don't know any of them were more specific than what your order to show cause stated, which is, as I indicated in my cover letter, if this order to show cause were being brought by anyone other than the Court, there would be specificity as to where the conflict lies.

THE COURT: The specificity, and this, as you know, has been amplified by our discussions, is that there is a conflict of interest in representing multiple defendants, particularly with respect to allocation of fair shares of regional need for lower-income housing.

MR. VILLORESI: That is what is set forth, that sentence, yes.

Your Honor, I believe one of the -- at least the way this matter was to be heard when it was before the prior two judges, was to be heard on a bifurcated authority. Initially, it was anticipated, at least at that time, that two or three months would be involved in determining the region question and then there would be individual trials for each municipality in alphabetical order as to whether their zoning met that fair share.

I'm not sure, because I don't think it has been finally determined, how the matter is to be tried here, but that item that you just mentioned in your order to show cause relates only to fair share, what we call in the early letter the mini-trials for each of the municipalities and doesn't really address whether there is a conflict in representing towns, as to what the region of New Jersey is, which is really, in terms of time and testimony, and so forth, the major thrust of the case. It was anticipated --

THE COURT: I hope not, Mr. Villoresi.

litigation Denville has separate counsel.

THE COURT: You are regular municipal attorney for all three municipalities, but at this point you are litigation counsel for Randolph and Parsippany-Troy Hills?

MR. VILLORESI: Correct, sir.

THE COURT: Incidentally, that substitution of attorney on behalf of Denville, do you have a date when that was filed? It was like November or so. Am I right in my recollection, it was in the fall?

MR. VILLORESI: Correct.

THE COURT: I seem to recall having received a telephone call from -- is it Mr. Murphy?

MR. VILLORESI: John Harper.

THE COURT: Harper. Right about the time the expert reports were due?

MR. VILLORESI: That is approximately right. It would have been September, I believe.

THE COURT: It had slipped my mind at the time this order was entered.

In your affidavit you make mention of communications with other members of the judiciary on this subject. Is there anything --

and I think I know the answer to this from our informal discussions -- was anything ever reduced to writing?

MR. VILLORESI: To my knowledge, nothing was ever reduced to writing. All counsel, my recollection, is I believe 22 attorneys at the time, had some lengthy discussions with Judge Muir, who was the original Judge handling this matter when it was brought, it was the Judge hearing it in '78, '79 and early '80, and that's the time that the question arose, because I represented various municipalities and four other attorneys represented at least two municipalities, and I guess it was around 17 lawyers who represented one municipality initially.

So we had a discussion on this topic as to whether it would constitute a conflict, and so on, but it was not a motion returnable or any such thing.

THE COURT: And I take it also that it all predated the decision in Mount Laurel II?

MR. VILLORESI: Yes, sir.

THE COURT: In the transmittal letter that you sent to me, with your answering

would be.

THE COURT: Incidentally, when we first discussed this matter informally, I think it was July, I had suggested that counsel give consideration to presentation of this issue with the Advisory Committee of Professional Ethics. I didn't know if they would entertain it, since it was a pending matter, but I suggested that possibility.

I presume that hasn't been done, there is nothing from the Advisory Committee?

MR. VILLORESI: I recall you indicated to the four or five of us in chambers at the time. I don't know if you suggested if anyone do that.

THE COURT: I suggested that consideration be given to it, I didn't say to anyone to do it.

I suggested that that would be one thing that ought to be considered.

I take it, it hasn't been done, in any event?

MR. VILLORESI: You're correct.

THE COURT: I have carefully read your affidavit and carefully read your

memorandum. Do you have anything to add to that?

MR. VILLORESI: No, sir. Only thing I want to mention, since I didn't mention it in the affidavit, the one municipality, Randolph Township, has adopted a resolution last fall, when this topic first came up, when I was then forwarded a letter from the municipality manager, advising me that I was not to voluntarily withdraw from this matter under any circumstances and withdraw only if there was an order of the Court so entered, and I want that in the record, so your Honor doesn't think I am beating a dead horse.

THE COURT: It helps to understand your situation.

All right. This matter is before the Court on an order to show cause issued at the Court's own initiative, stated as follows: It appears that Alfred J. Villoresi is appearing as counsel for the Township of Randolph, Township of Denville and Township of Parsippany-Troy Hills. It appears that he was inaccurate, while he was at one time representing all three of these defendants, he is now representing only

Randolph and Parsippany-Troy Hills.

The order goes on to say, and that such representation may violate disciplinary Rule 5-105B, in that these defendants may have conflicting interests in the litigation, particularly in connection with the allocation of these respective defendants of their fair shares of regional need for lower income housing.

It is on this 11th day of January, 1984, offered that Alfred J. Villoresi show cause before the Court why he should not be disqualified from continuing to provide representation in the litigation to aforementioned defendants.

Preliminarily, I would note that while the issue has not been raised in any of the answering papers, I suppose it is self-evident the Court does have an independent responsibility to maintain compliance with the disciplinary rules, even though no motion for disqualification has been made by any other party to the case.

That is true with respect to any litigation. I think it's especially true when the litigation involves significant public interests and the representation of public agencies.

I also would note, as discussed with counsel, that concerns over municipal representation have been discussed informally on at least five different occasions, either in person or by telephone, and the possibility of those concerns being presented by way of inquiry to the Advisory Committee on Professional Ethics has been raised, but that no such inquiry has been made, and I would add that in any event, apart from any inquiry that might have been to the Advisory Committee, I do have an independent obligation, as I've indicated before.

Since this case is approaching the point of trial and/or serious settlement discussions, I concluded that after this period of informal review, that I did have an obligation to bring the issue to a head, which is what I have done by the issuance of order to show cause.

Now, the fact given rise to the order to show cause is that the respondant represents two different municipality defendants in the litigation, that is Randolph and Parsippany-Troy Hills.

The applicable rule with respect to such multiple representation is disciplinary

Rule 5-105B, which reads as follows: A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under Disciplinary Rule 5-105C.

5-105C refers at the end of the Disciplinary Rule 5-105B, is inapplicable to this situation. Because both the respondant's clients are public entities, and it is well-established that public entities cannot consent to representation which would otherwise violate the disciplinary code. Therefore, the only question is whether defendant's independent professional judgment will be or is likely to be affected by his representation of two defendants in this lawsuit.

And in addressing that question I have been mindful of the guidance provided by the Supreme Court of New Jersey in its In Re. opinion number 415 of the New Jersey Advisory Committee on Professional Ethics, an opinion of the Court found in 81 New Jersey 318, in a 1979 decision.

There the Court said, at page 323

to 324 as follows:

A lawyer who has been requested to represent multiple clients having potentially different interests, must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. To achieve the objecting towards which every member of a profession should strive, the attorney should resolve all doubts against the propriety of the representation.

Viewed against the background of that admonition, I have concluded that the impairment of independent professional judgment within the meaning of disciplinary Rule 5-105B is not only likely, but inevitable in a situation of representation of multiple defendants in a Mount Laurel case such as the present one.

And to understand why that is so, I think a brief review of the Mount Laurel doctrine as enounced in Mount Laurel is necessary.

That case holds very briefly that every municipality located in a growth area as designated by the State Department of Community Affairs in the State Development Guide Plan Document issued by that agency, must

make provision through its zoning ordinances for its fair share of present and prospective need for housing for low-income persons.

A determination of the fair share of regional housing need is a critical part of any Mount Laurel case involving a municipality located in a growth area.

Both Randolph and Parsippany-Troy Hills are located in growth areas, and, in fact, there have been prior stipulations in this case that those designations of those two communities will not be subject to challenge or at least there will be no claims that the municipalities lie entirely outside any growth area. Hence, it is now established within the parameters of this litigation that they do have regional fair share obligation.

Now, the determination of fair shares in Mount Laurel litigation is a three-step process. It involves, first of all, a determination of the relevant housing region; second of all, the regional need for low-income housing, both present and prospective; and, thirdly, the fair share of that regional need of each defendant municipality, whether it also requires a determina-

tion of the fair share of each non-defendant municipality in the region is an issue as to which there is some dispute among counsel litigating in this area, presently an unresolved matter.

Now, neither Mount Laurel nor any of the predecessor decisions of the Supreme Court of New Jersey contain any specific standards or formulas by which regions, regional need, particularly fair shares, are to be determined and the methodology to be used in making those determinations remain a hot area of contention in Mount Laurel litigation.

It is possible for different defendant municipalities in a Mount Laurel case such as this to have conflicting strategic views in the definition of region and regional need.

Indeed, I would note in this particular case the expert retained by Randolph, who has proposed that the relevant region consists of Morris County, whereas the expert retained on behalf of Parsippany-Troy Hills appears to say that the relevant region is the Newark SMSA, which, I understand, is a four-county region that encompasses Essex County.

There are differences between those

two experts in their calculations of regional need. Randolph's expert, as I read his report, puts the regional need of Morris County at 56,400 units, which, if I recall correctly, is even a larger number than that of the Public Advocate's, whereas Parsippany-Troy Hills' expert puts the relevant number at 18,544 for the entire SMSA region and only 8,599 for that part of the region in Morris County.

So there are differences in determination of region and regional need, and I could envision counsel for one defendant wanting to vigorously attack the methodology employed on these issues by the planner on behalf of another municipality. I specifically would not be at all surprised to find that the Randolph calculations are subject to attack by co-defendants in this case.

Now, I suppose, that despite these differences and potential conflicts over definition of regional and regional need, it could be argued -- I could not accept the argument -- but I suppose there is some argument that there is no essential conflict in the positions between defendants on those issues, because they do have at least a common interest in keeping regional need

number as low as possible.

However, if that conclusion of a common interest, with regard to region and regional need could be reached, it is clear that there is a direct conflict in the final step of the fair share calculation, and that is the allocation of fair shares of the regional need among the municipalities in the region.

Many different methodologies are being proposed by different experts as to this calculation and each methodology works out differently for different defendant municipalities, some more and some less favorable.

Some methodologies being proposed either emphasize or rely solely on vacant developable land, others either emphasize or rely wholly upon employment growth within a certain time span. Others deal with the total employment in the municipalities, and yet there are other factors that are relied upon by different experts.

And each one of these methodologies work out differently, depending on whether a given municipality has had or will have great increase in employment or whether it has a large or small total employment, or whether it has

large or small total vacant developable land, and so forth, with the other factors that various experts are pointing to.

Now, while the expert report submitted on behalf of Randolph and Parsippany-Troy Hills, both seem to use the same methodology, that is to rely soley upon vacant developable land as the relevant criteria, that identity or similarity of the fair share methodology being used by the planners retained by Parsippany-Troy Hills and Randolph do not avoid or solve any conflict problem. Rather, the conflict exists because different methodology will have different impacts upon the different municipalities and they therefore may have different interests either in proposing or opposing various methodologies, whether those are presented by their own retained experts or by experts retained by the Public Advocate or other defendants.

In other words, one municipality may come out very badly with respect to a methodology being proposed by the Public Advocate whereby a co-defendant and want to target and most vigorously oppose that particular methodology, while the other municipality being represented

by a respondant may do relatively well under the Public Advocate's methodology or that presented by the planner for another co-defendent and, therefore, not want to vigorously oppose that methodology.

Now, the authority which must -- which is most closely analogous to the present situation is opinion number 54 of the Supreme Court's Advisory Committee on Professional Ethics.

In that opinion the Committee concluded that two attorneys, both partners in the same law firm, could not represent different municipalities in a suit in which one of the municipalities was challenging the assessment practices of the other municipalities, where if that suit were successful the defendant municipality would have its share of county taxes increased and that of the plaintiff municipality decreased.

The Advisory Committee reached a similar conclusion in opinion number 236. The only difference factually in that opinion was that there the one partner was the attorney for one of the two municipalities involved in this county assessment challenge, whereas the other partner was the mayor of one of the two municipalities.

Now, these situations are analogous. In the situation dealt with in opinions 54 and 236, there is a fixed county budget which needs to be divided among the constituent municipalities and if the share of one municipality is increased, the share of the others will be decreased.

Similarly, in a Mount Laurel case, once a total regional need for lower income housing is determined, it must be allocated among the municipalities in the region, and to the extent that one municipality is able to persuade the trier of fact that it should adopt or follow a particular methodology, that leads to a particular fair share for that municipality, the remaining regional need will, of course, have to be apportioned among the remaining municipalities in the region.

In both situations, that is both the County tax dispute situation and the Mount Laurel case, there is an essential interconnection between the shares of different municipalities, whether it be the respective shares of the cost of county government or the respective shares of the regional need for total low-income housing. Therefore, in both situations there is a conflict

for the same attorney to represent the two different municipalities.

The respondant states that his representation of municipality defendant was either approved or acquiesced in by other Judges in earlier points in this litigation.

There is no Court order or anything else in writing to memorialize such approval, and I have been unable to independently verify the existence of such a ruling.

In any event, even if there had been an informal acquiescence in multiple representations prior to the decision in Mount Laurel II, that decision significantly altered the defense of Mount Laurel cases.

In Oakwood at Madison v. Township of Madison, reported at 72 New Jersey, 481, a 1977 decision of the Supreme Court, the Court held that fair share allocations need not be precise or based upon a specific formula to win judicial approval and that a municipality could defend a Mount Laurel case simply by showing its bona fide efforts to remove exclusionary barriers.

Under that opinion, in Oakwood at

Madison, a defendant municipality or several defendant municipalities might have defended a Mount Laurel action such as this suit simply by seeking to show that each municipality independently was making bona fide efforts to eliminate exclusionary zoning.

But the Court in Mount Laurel II overruled that part of the Oakwood at Madison decision. It said that bona fide good faith efforts are not enough and that precise fair shares must be determined.

Therefore, even if it could have been said before Mount Laurel II that no conflict arose from representation of multiple defendants, that is certainly no longer the case.

In opposing the order to show cause, respondant also argues that there is no conflict because both of his clients have determined to present a common defense.

Actually, this assertion is not all together accurate. As I said before, they have retained different experts who have taken different positions as to the calculation of the fair share of regional low-income needs.

In any event, even if a common

defense were being pursued, the conflict would not thereby be eliminated. A common defense may not be in the best interest of one or both of the defendants, and they are entitled to independent representations to determine whether a common defense is in their best interest, without having that decision influenced by the extraneous consideration of their having a common lawyer, who may even subconsciously be pushed in the direction of urging a common defense in order to avoid any conflict.

I feel similarly that independent representation is required in order to evaluate any settlement proposal. A defendant municipality needs advice on any settlement proposal which is not subject to the extraneous influence of counsel seeking to eliminate or in some way address his own position of conflict.

Settlements may be highly desirable in many Mount Laurel II cases. However, it is imperative that the local citizenry have the complete confidence in the advice being received by the municipality concerning possible settlement.

If there were any doubt about that,

certainly it is made clear by some of the concerns now being expressed by citizens of Warren Township over a proposed settlement over a Mount Laurel case against that municipality.

That necessary confidence can only be secured, in my judgment, if advice concerning settlement is coming from counsel who represents only one interest in the litigation.

Now, respondant also notes that no municipality has filed a cross-claim attacking another municipality's zoning. However, that is not a pre-condition to the existence of a conflict.

Most common situation of all, very common one, is to have multiple defendants in a criminal case and multiple representation is prohibited if there is even a possibility of conflicting interest in the defense of a criminal case, even though, of course, criminal defendants do not have cross-claims among themselves. And the same is true for multiple defendants in civil litigation, where there is a conflict or may be a conflict, they should not be represented by the same counsel, and an adversary opinion so stating is in re. Opinion

126 of the Supreme Court Committee of Professional Ethics.

The final question is what order should be entered.

It is clear that a disqualifying conflict of interest in the representation of two defendants having been found, that the respondent must withdraw from representing any party. The reason for that rule is stated in Clark v. Corelese, 98 New Jersey Super, 323, Appellate Division, 1967, page 327, is that otherwise the disqualified attorney will be exhibiting partiality in favor of one client at the expense of the other.

There is also the frequently stated concern that confidential communications may be disclosed and used to the advantage of the retained client over the other client.

In addition, to assure the orderly proceeding of this litigation, it is imperative that new counsel be appointed promptly.

Therefore, I will enter an order disqualifying respondant from continuing to provide representation to any party in this litigation and that order will also direct that substitutions of attorney as to both Randolph and Parsippany-

Troy Hills be filed no later than February 15 of 1984.

Anything further, Mr. Villoresi?

MR. VILLORESI: I guess one of the questions that I am going to be asked by these clients, is assuming they have separate counsel, one of them settled and was no longer in the case, would it be your Honor's ruling, there would still be a conflict if there is one town remaining, insomuch as your Honor has been told in chambers on several occasions, the likelihood of settlement in these areas is quite high?

THE COURT: I think Imade it clear, that it would be my expectation that before you even reach that point that there would be separate counsel appointed, that there is a need for separate counsel.

MR. VILLORESI: I understand that.

THE COURT: In terms of providing representation, even in connection with the proposed settlement. So the answer to the question is yes.

MR. VILLORESI: Maybe I wasn't articulate enough. Assuming that these two municipalities appointed new counsel tomorrow and some

time in the next several weeks one of them was no longer in the case, their question to me is going to be, you are our municipal attorney for the last 15 years, could you be re-substituted and handle the case for us.

THE COURT: No. Once the disqualification occurs, that removes you from the case. So the answer is you are out, regardless of what may be later developments in the case.

MR. VILLORESI: Thank you.

THE COURT: Anything further?

MR. VILLORESI: No.

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CERTIFICATE

I, IKE CITTONE, one of the Official Court Raporters in and for the State of New Jersey, certify that the foregoing is a true and accurate transcript of my stenographic notes to the best of my knowledge and ability.

IKE CITTONE, C.S.R.

Dated: 2/15/24