Attorney's Fees - U.L. v. Carteret ? 1986

Rough draft of brief with comments

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Introduction

Plaintiffs respectfully submit this brief in support of their appeal from the decision of the Honorable Eugene D. Serpentelli denying their application for counsel fees, experts' fees and costs in connection with the Mount Laurel litigation.[1] The crucial question presented here is one of law[2] whether attorney fees may be awarded to a prevailing plaintiff when, in an action involving a federal statutory fee claim and a nonfee state law claim, the case is resolved on the basis of the state claim and there is no ruling with respect to the federal claim.. Plaintiffs respectfully submit that where, as here, plaintiffs' federal civil rights claims were (1) substantial (Hagans v. Lavine, 415 U.S. 528 (1974) and, (2) arose from a common nucleus of operative facts (United Mineworkers v. Gibbs, 383 U.S. 715

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1 Except for the lower court's abuse of discretion in denying plaintiffs reimbursement for the fee of the court appointed master, the only questions presented are questions of law.

2 Indeed, in A. Wolf, "Pendent Jurisdiction, Multi-Claim Litigation, and the 1976 Civil Rights Attorney's Fees Awards Act," 2 W.N. Eng. L. Rev. 193 (1979), South Burlington County NAACP v. Tp. of Mount Laurel, 67 N.J. 151 (1975) ("Mount Laurel I") is used as an example of a state case in which the Hagans-Gibbs analysis would apply, "if the 1976 Fees Act had been public law at the time [it] was decided." Id. at 203-4. Prof. Wolf

(1966)), as the state claims upon which they prevailed, they are entitled to attorneys fees under 42 U.S.C.§3612(c). ✱ (insert fn 2)

The court below rejected this test in favor of a three prong test allegedly derived from the holding in Bung's Bar & Grille v. Florence Tp., 206 N.J. Super. 414 (Law Div. 1985) (hereafter "Bung's"). The Honorable Eugene D. Serpentelli held that plaintiffs' were required to establish [redacted] "... that a federal constitutional first violation occurred," (T71-20); second, [redacted] "to show a state constitutional violation ... if that constitutional violation would necessarily demonstrate a federal constitutional violation", (T71-25); and third, to "[redacted] show that the facts upon which it was awarded relief are the same facts upon which the unproven federal claim would turn." (T72-24). It is respectfully submitted there is neither authority nor logic for the test imposed by the trial court, and that that test is contrary to well settled law. This matter should accordingly be remanded for a determination of fees and costs consistent with the unprecedented results achieved in Mount Laurel II and its aftermath, the significant public interest vindicated, and this Court's directive in Frank's Chicken House, Inc. v. Manville, 208 N.J. Super. 542, 545 (App. Div. 1986):

> Although the Award's Act gives the court discretion in awarding attorneys' fees, fees should be liberally granted. Moreover, courts are not free to deny fees to prevailing plaintiffs unless special circumstances would make the award unjust. Thus, the prevailing party should normally recover attorney fees.

next page — PROCEDURAL HISTORY

The original complaint in this matter was filed in the Superior Court of New Jersey in July, 1974, eight months before the issuance of the landmark decision in Mount Laurel I. In its complaint, the Urban League averred that its members' civil rights under the Fair Housing Act, Title VIII of the [redacted] Act, 42 U.S.C. §§1981, 1982 and 3601 et seq. were being violated:

> 1. Low and moderate income persons, both white and nonwhite, bring this action against 23 municipal defendants in Middlesex County seeking to enjoin economic and racial discrimination in housing...
>
> 3. Plaintiffs' claims for relief are based upon N.J.S.A. 40:55-32; Article One, paragraphs 1,5, and 18, of the New Jersey Constitution; 42 U.S.C. §§1981, 1982 and 3601 et seq.; and the Thirteenth and Fourteenth Amendments to the United States Constitution. (p. 1-2)

On May 4, 1976, the Honorable David D. Furman held that the zoning ordinances of 11 of the defendant municipalities were constitutionally invalid under Mount Laurel I. Urban League of New Brunswick v. Carteret, 142 N.J. Super. 11 (Ch. Div. 1976), rev'd on other grounds, 170 N.J. Super. 461 (App. Div. 1979). Several defendants appealed and plaintiffs cross-appealed. The Appellate Division held in pertinent part that the trial court had erred in denying the Urban League plaintiffs standing to argue violations of §3601 et seq. ("Title VIII") and in dismissing their claim of racial discrimination under that

statute. This claim, upon which the instant application is predicated, was expressly reinstated by Judge Antell:

> On the cross-appeal the individual plaintiffs assert that the trial judge erred in denying them standing to argue violations of the 13th and 14th Amendments of the United States Constitution and violations of the Civil Rights Act of 1968, also known as the Fair Housing Act, 42 U.S.C.A. 3601 et seq. In ruling as he did the trial judge applied principles formulated in Warth v. Seldin, 422 U.S. 490 (1975). For reasons which we explained in Urban League of Essex Cty. v. Tp. of Mahwah, supra, at 33-34, this was error. New Jersey courts are not bound by federal rules of standing. The rights asserted by the individual plaintiff could only have arisen under 42 U.S.C.A. § 3612(a) and, by the language of that statute, are enforceable 'in appropriate State or local courts of general jurisdiction.'
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> * * *
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> Plaintiffs further claim that the trial judge erred in dismissing the corporate plaintiff's complaint for racial discrimination under the foregoing federal statute. The reason given was that no credible evidence of deliberate or systematic exclusion of minorities was before the court. Without deciding whether the evidence presented actually suffices to prove a violation, we conclude that the trial judge erred in requiring proof of a discriminatory intent since this ruling is in conflict with controlling authorities. (Citations omitted, emphasis added.) Id. at 468-469.

The Supreme Court granted certification and decided the Urban League matter along with five other cases in Mount Laurel II. Unambiguously reaffirming its commitment to the principles of Mount Laurel I, the Court found "widespread non-compliance with the constitutional mandate of our original opinion in this case." Id. at 199. The Court granted substantially all of the relief sought by the Urban League on state constitutional grounds:

> When the exercise of [the constitutional power to zone] by a municipality affects something as fundamental as housing, the general welfare includes more than the welfare of that municipality and its citizens: it also includes the general welfare - in this case the housing needs- of those residing

> outside of the municipality but within the region that contributes to the housing demand within that municpality. Municipal land use regulations that conflict with the general welfare thus defined abuse the police power and are unconstitutional. In particular, those regulations that do not provide the requisite opportunity for a fair share of the region's need for low and moderate income housing conflict with the general welfare and violate the state constitutional requirements of substantive due process and equal protection. (Citations omitted.) Id. at 209.

Although the Mount Laurel II Court noted that plaintiffs did "not appear to be press[ing] their Thirteenth and Fourteenth Amendment claims," it made no ruling with regard to plaintiffs' Title VIII claims. There was no need to reach these claims, since the relief sought had already been granted.[3] Indeed, the remedy fashioned by the Supreme Court included virtually all of

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[3] The Urban League plaintiffs requested judgment as follows:

> "(1) Permanently 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 non-white.
>
> (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 class they represent. In developing and 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 plan should include a precise program and timetable outlining the steps defendants will take to assure successful and expeditious implementation.
>
> (3) Granting the named plaintiffs the recovery of all costs, including attorney fees, incurred in maintaining this action, and such further relief as the interest of justice may require and this Court deems appropriate."

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the relief which could have been obtained under Title VIII. Significantly, those claims were never abandoned nor was there ever any adverse decision with regard to same.

The New Jersey Supreme Court remanded the seven remaining Urban League cases to the court below. On July 2, 1985, in response to Mount Laurel II, the New Jersey Legislature enacted the Fair Housing Act, which created the Council on Affordable Housing ("COAH"). In February, 1986 the New Jersey Supreme Court transferred four towns in the Urban League case to COAH in Hills Development v. Bernards Tp., 103 N.J. 1 (1986). By the time of Hills, four other towns had settled their matters. Following the Hills decision, South Brunswick moved before the trial court to transfer to COAH, which was granted on June 3, 1986. [redacted]

On March 20, 1986, in accordance with Hills, the Urban League filed motions for the imposition of conditions to preserve scarce resources pending transfer. These motions were resolved by Orders dated May 22, 1986. Plaintiffs filed their application for costs and fees in the court below on August 14, 1986 and oral argument was heard on November 14, 1986. By Order dated February 13, 1987, the trial court denied plaintiffs' request for costs and fees. (Pa1) The trial court rejected defendants' contentions that plaintiffs' request was untimely:

> 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. (T66-16)

Plaintiffs' Notice of Appeal was timely filed on March 30, 1987.

I. THE DECISION OF THE COURT BELOW WAS WRONG AS A MATTER OF LAW

The decision whether or not to award attorneys' fees, and the amount of such award, is generally within the discretion of the trial court. Fidelity Union Trust Co. v. Berenblum, 91 N.J. Super. 551 (App. Div. 1966), cert. denied, 48 N.J. 138. Here, however, the trial court erroneously found that it had no legal basis for awarding plaintiffs attorney fees:

> 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. (T61-17) (Emphasis added.)

The determination of the trial court that it lacked discretion to award counsel fees was erroneous as a matter of law. There was simply no basis for the test mistakenly formulated and applied below. Under the proper test, set forth by the United States Supreme Court in Maher v. Gagne, 448 U.S. 122 (1980) and followed in innumerable federal and state court cases, the court below not only had discretion to award fees, but affirmatively had an obligation to do so. In view of the strong presumption in favor of such awards, and

the trial court's expressed predilection for such an award, this matter should be remanded solely for a determination of the amount of such fees.

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B. There Is No Authority For The Three Part Test Relied Upon By The Trial Court.

The court below attributed to the Bung's court was not actually applied in that case.[4] Thus reversal of the decision below is not tantamount to a reversal of the Bung's holding. Reversal of the trial court's decision will merely signal the rejection of a test conspicuous for its lack of authority and cogency.[5] The court below set forth the first

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[4] "Thus, the legislative and decisional history of 1988 indicate that plaintiffs claiming bona fide civil rights violations, prevailing on alternative grounds, may recover fees and costs under Section 1988, through a later determination of the constitutional claim for that purpose, if the constitutional claim arises from the same nucleus of operative facts' or is "based upon related legal theories" and meets the substantiality test.'" Id. at 465. The Bung's test was succinctly set forth by Judge Haines: at 468 (quote to be inserted). Except for the inclusion of the somewhat ambiguous phrase "through a later determination of the constitutional claim for that purpose," this is precisely the test, mandated by Congress and the Supreme Court, urged here. While the aforementioned phrase may be construed to require a finding of a constitutional violation, as was found in Bung's, this is a far more rigorous requirement than any imposed by Congress. Whether the Bung's court actually imposed such a requirement, and, if so, if such imposition was error, is not before this Court.

[5] Indeed, the Maryland Court of Appeals was able to find only "one opinion, in an intermediate state appellate court, in which the court rejected the federal law standards and formulated its own test for the award of attorney's fees where a [illegible] ground was asserted but the plaintiff prevailed on some other ground. Caputo v. City of Chicago, [illegible], 466 N.E.2d 1240, 1242 (1983). This opinion is contrary to the multitude of cases throughout the country, both federal and state, which apply the federal law test set forth in the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988. See H.R.Rep. No. 94-1558, supra, p. 4 n.7. Moreover, the decision in the Caputo case was not inconsistent with federal law." County Exec. Prince Geo's Co. v. Doe, 479 A.2d 352 (Md.1984).

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prong of its three-part test:

> First, plaintiffs can recover fees only by showing that a federal constitutional violation occurred. (T71-18)

← It is precisely the point of Maher v. Gagne, ~~448 U.S. 122, 127 (1980)~~ (supra) that such a showing need not be made, since to require otherwise would undermine "the basic policy against deciding constitutional claims unnecessarily." Civil rights plaintiffs, like the Urban League here, should not be deprived of fees because of this longstanding judicial policy.

The instant case is analogous to Seaway Drive-In, Inc. v. Township of Clay, 54 U.S.L.W. 2613, cert. denied, 55 U.S.L.W. 3248. There, plaintiff movie theatre claimed that a local ordinance violated the United States Constitution and a state zoning statute. The court enjoined enforcement of portions of the ordinance on state law grounds. In overturning the district court's denial of plaintiff's request for attorney's fees, the 6th Circuit noted:

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> The theater alleged two types of claims: constitutional and state law. If it had asserted only 1983 claims and prevailed, it would have been entitled to attorneys' fees under 1988. Had it not asserted a 1983 claim, but asserted only state law claims or federal law claims not listed in 1988, and prevailed, it would not have been entitled to attorneys' fees.
>
> Instead, the theater asserted both fee and non-fee claims. The district court only addressed the non-fee claim because the theater succeeded on that claim and the court, following well settled doctrine, refused to comment unnecessarily on the constitutional issues. The theater thus has prevailed in an action to enforce a fee claim but, for reasons unrelated to the merits of that claim, the fee claim has

not been addressed. Id. at 2613.

The reasoning of the Seaway Drive-In is equally applicable here. The Seaway Drive-In court, like the court in Bung's Bar & Grille, properly refused to deprive a prevailing plaintiff of attorney's fees because of a judicial preference for an alternate route. Any other result would penalize plaintiffs for the well settled policy of avoiding unnecessarily decision of constitutional claims.

The second requirement imposed by the court below is merely a restatement of the first:

> 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. (T71-24)

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← Since the court again requires that plaintiffs "demonstrate a federal constitutional violation," this prong must be rejected for the same reasons as the first.

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The third prong of the test applied by Judge Serpentelli is: "[T]hat the plaintiffs 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. (T72-24)

Although the trial court's reliance on Bung's for this proposition was misplaced. does not require that plaintiffs' fee claim prevail on the record below. Indeed, there is no authority for replacing the well established "common nucleus of operative facts" standard with the impossibly stringent requirement that

the federal and state claims be predicated on the same facts. Such a test would require plaintiffs to redundantly litigate every statutory fee claim, even where, as here, the court clearly indicated at an early stage of the litigation that it would take a different judicial route to the desired remedy.[6] Such a test would not only encourage but necessitate a tremendous waste of valuable court time as well as generating unconscionable legal fees for all parties.

It is respectfully submitted that the "test" distilled by the trial court is in fact mere [redacted] dicta. The first two prongs both adddress the legal conclusions of the awarding court, and redundantly require that the court find a federal constitutional violation. Such a finding, of course, would independently support a fee award. The last prong of the test imposed below requires a finding that the facts underlying the state and federal claims, if not the conclusions of law, were identical. ~~Underlying the state and~~

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[6] It should be recalled that Mount Laurel I was decided in 1975, shortly after plaintiffs filed their complaint. In Mount Laurel I the Supreme Court unambiguously expressed its preference for deciding these issues on state constitutional grounds:

> In Mount Laurel I, this court held that a zoning ordinance that contravened he general welfare was unconstitutional. We pointed out that a developing municipality violated that constitutional mandate by excluding housing for lower income people; that it would satisfy that constitutional obligation by affirmatively affording a realistic opportunity for the construction of its fair share of the present and prospective regional need for low and moderate income housing. Mount Laurel II at 204-5.

~~federal claims;~~ this is but another restatement of the first prong, since identical facts would perforce lead to identical conclusions of law. It is respectfully submitted that the "test" employed by the court below is a mere tautology, contrary to well established law, which should be rejected by this Court.

II. PLAINTIFFS ASSERTING A FEDERAL FEE CLAIM AND A STATE NONFEE CLAIM IN THE SAME ACTION, WHO PREVAIL ON THE NONFEE STATE CLAIM, ARE ENTITLED TO FEES WHERE THE FEDERAL CLAIM IS SUBSTANTIAL AND BOTH CLAIMS ARISE OUT OF THE SAME NUCLEUS OF OPERATIVE FACTS

The test that should have been applied below is set forth quite distinctly in Maher v. Gagne, supra, ~~448 U.S. 122 (1980)~~:

> The Report of the Committee on the Judiciary of the House of Representatives accompanying H.R. 15460, a bill substantially identical to the Senate bill that was finally enacted, stated:
>
> > To the extent a plaintiff joins a claim under one of the statutes enumerated in H.R. 15460 with a claim that does not allow attorney fees, that plaintiff, if it prevails on the non-fee claim, is entitled to a determination on the other claim for the purpose of awarding counsel fees. In some instances, however, the claim with fees may involve a constitutional question which the courts are reluctant to resolve if the non-constitutional claim is dispositive. In such cases, if the claim for which fees may be awarded meets the 'substantiality' test, attorney's fees may be allowed even though the court declines to enter judgment for the plaintiff on that claim, so long as the plaintiff prevails on the non-fee claim arising out of a common nucleus of operative fact.' (Citations omitted; emphasis added.) Id. at 132, n.15.

Denial of attorneys' fees where plaintiffs prevail on their nonfee claim would contravene the express intent of the legislature in enacting the fee-shifting civil rights statutes.[7] It is well established that plaintiffs prevailing on a nonfee state claim may be awarded counsel fees where they have asserted a nonfrivolous or "substantial" federal claim, arising from a common nucleus of facts, which is not addressed by the court. Smith v. Robinson, 104 S. Ct. 3457, 3465 (1984).

Indeed, denial of attorneys' fees where plaintiffs prevail on their nonfee claim would contravene the express intent of the legislature in enacting the fee-shifting civil rights statutes.[7]

> "Fees are allowed in a housing discrimination suit brought under Title VIII of the Civil Rights Act of 1968, but not in the same suit brought under 42 U.S.C. §1982, a Reconstruction Act protecting the same rights."

These explicit references to Title VIII in the Congressional discussion of the intent and purpose of the Fees Act unambiguously demonstrate the applicability of that discussion to Title VIII.

This principle is as applicable to proceedings brought in state court as to those brought in federal court. Maine v. Thiboutot, 100 S. Ct. 2502, 2507 (1980). The Maher test has been properly applied in state court actions. In International Association of Machinists v. Affleck, 504 A.2d 468 (R.I. 1986), for example, union and striking employees moved for an award of attorneys' fees after prevailing on their claim that a regulation denying public assistance benefits to striking employees was void as a matter of state law. There, like here, the court did not address plaintiffs' federal fee claim. In

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[7] The Attorneys' Fees Act of 1976, 42 U.S.C. 1988 (the "Fees Act") was a response to Alyeska Pipeline Service v. Wilderness Society, 421 U.S. 240 (1975). According to the legislative history:

> "[Alyeska] ... ruled that only Congress, and not the courts, could specify which laws were important enough to merit fee shifting under the 'private attorney general' theory." * * *

By enacting the Fees Act, Congress rejected the approach

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Congress vehemently rejected a double standard pursuant to which plaintiffs protecting the "same rights" might or might not be entitled to fees. It is precisely such a double standard that the decision below imposes on plaintiffs.

Congress never intended to deny attorneys' fees to an otherwise entitled plaintiff merely because of a judicial election to award relief on the basis of an alternative cause of action.

Federal circuit courts have agreed, applying the Maher test, in innumerable cases: Seals v. Quarterly County Court, Inc., 562 F.2d 390 (6th Cir. 1977); Kimbrough v. Arkansas Activities Ass'n., 574 F.2d 423 (8th Cir. 1978); Williams v. Thomas, 692 F.2d 1032 (5th Cir. 1980); Lund v. Affleck, 587 F.2d 75 (1st Cir. 1978); Milwe v. Cavuoto, 653 F.2d 80 (1d Cir. 1981); White v. Veal, 447 F. Supp. 788 (E.D. Pa. 1978).

awarding fees, the Rhode Island Supreme Court held:

> Attorneys' fees may be awarded to a prevailing plaintiff pursuant to 42 U.S.C.A. 1988 when, in an action involving a substantial constitutional claim, the case is resolved on the basis of a wholly statutory, non-civil-rights claim arising out of a common nucleus of operative fact. To conclude otherwise would both contravene the congressional goal of encouraging vindication of constitutional rights and undermine the judicial policy of avoiding unnecessary decision of important constitutional issues. Id. at ___.

Although the court in Slawik v. State, 480 A.2d 636 (Del. 1984), decided that plaintiff's federal constitutional claim was "without merit" and thus denied fees, it too applied the Maher test, citing the legislative footnote. In County Exec., Prince Geo's Co. v. Doe, ~~479 A.2d 352 (Md. 1984)~~ Supra, the Maryland Supreme Court held: "And it is undisputed that where a plaintiff asserts alternative grounds for the same relief, one under Section 1983 and the other under state law or a provision of federal law carrying no authorization for attorney's fees, where he prevails on the latter ground, and where there is no decision on the 1983 ground, federal law ordinarily entitles him to an attorney's fee award if the 1983 ground was substantial and grew out of the same facts." Id. at 358.

Maine, too, has adopted the Hagans/Gibbs test mandated by Maher: "The House Report noted that in a situation where a party joins federal and state claims and prevails only on the state claim, attorney's fees may be awarded if (1) the federal claim is substantial, and (2) the state claim arises out of a common nucleus of operative fact.'" (citing House Report).

Jackson v. Inhabitants of Town of Searsport, 456 A.2d 852 (Me. 1983). See also Kay v. David Douglas Sch. Dist. No. 40, 79 Or. App. 384, 719 (P.2d 875 (1986); Filipino Accountants v. State Bd. of Accounting, 155 Cal. App. 3d 1023, 204 Cal. Rptr. 913 (Cal. App. 3 Dist. 1984); Fairbanks Correctional Center v. Williamson, 600 P.2d 743 (Alaska 1979). (Here, although Section 1983 was mentioned only in parenthesis of title of complaint, after the case was settled plaintiff was held entitled to attorney's fees under the federal standard; Davis v. Everett, 443 So.2d 1232 (Ala. 1984). (the plaintiff had won on state grounds without the federal claim being granted or denied and was awarded attorney's fees). Here, the Urban League plaintiffs easily met the Maher test, but the court below, erroneously failed to apply it.

A. Plaintiffs' Title VIII claim arose from the same "nucleus of operative facts" as the state claim on which plaintiffs prevailed

As set forth in paragraph one of plaintiffs' original complaint, the "common nucleus of operative facts" here consisted of the "zoning and other land use policies and practices of defendant municipalities which, by effectively excluding housing plaintiffs can afford, prevent them from residing in these municipalities ..." Plaintiffs were "low and moderate income persons, both white and nonwhite". It is significant that in the complaint, plaintiffs relied upon the same facts for their Title VIII claim and their state constitutional claim.[8]

In Mount Laurel I, published shortly after the commencement of the instant lawsuit, the New Jersey Supreme Court made it perfectly clear that relief under the state constitution included relief for "low and moderate income persons, both white and nonwhite." This decision rendered development of a separate record with respect to the nonwhite members of plaintiff class superfluous. The reasoning of the court below would have required plaintiffs to nonetheless proceed to litigate their

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[8]z These facts included specific statistics as to the minority composition of defendant municipalities. Paragraph 26, for example, provides:

> Most of the black and Puerto Ricans who work in Middlesex County are employed in low and moderate wage jobs. Of the blacks and Puerto Ricans who work in Middlesex County, more than 40 percent live outside the county, 37 percent live in New Brunswick and Perth Amboy, and only 21 percent live in the 23 defendant municipalities.

Title VIII claim.

It is inconceivable, moreover, that the development of the record which the the trial court insisted essential to a fee award, would have been permitted. Indeed, as noted by respondent Piscataway in its brief below, (Piscataway Brief, p. 10), the court refused to consider evidence regarding the race of the lower income households denied housing on remand.

The "common nucleus of operative facts " test contemplated by Congress and cited by the Maher court is the test used to decide whether a federal court may assert pendent jurisdiction over a state claim. The claims must be such that plaintiffs would ordinarily be expected to try them all in one proceeding. United Mine Workers v. Gibbs, supra at 725. This test does not require that the federal and state claims will each prevail on precisely the same record. Rather, the test is merely whether the proofs for each claim derive from a "common nucleus" so as to permit the exercise of jurisdiction over both by the same court.

The question is simply whether a federal court assuming jurisdiction over plaintiffs' Title VIII claims could properly assume pendent jurisdiction over their state constitutional claims. Under well settled federal law, applicable here through operation of the Supremacy Clause, Martinez v. California, 444 U.S. 277, 284 (1980), it is respectfully submitted that the unequivocal answer is yes.

Claridge House Onc, Inc. v. Borough of Verona, 490 F. Supp. 706 (D.N.J. 1980), affirmed, 633 F.2d 209 (3rd Cir. 1980), like the instant case,

involved a challenge to a municipal ordinance. There plaintiffs' federal claim alleged that the ordinance, which forbade the converting of apartments into condominiums, was unconstitutionally vague, deprived them of property without due process and violated the equal protection clause of the 14th Amendment. Plaintiffs' state claims alleged that the ordinance had been preempted by state legislative action. Although the proofs for the federal and state claims were obviously different, the circumstances from which those claims arose, like those here, were the same. The Claridge House court, asserting pendent jurisdiction over the state claims, further noted the desirability of such jurisdiction, where, like here, the state claims would be dispositive:

> Furthermore, deciding the state law claims will make it unnecessary to consider plaintiffs' constitutional claims. That factor also favors taking pendent jurisdiction. Id. at 710.

See also Guyette v. Stauffer Chemical Co., 518 F. Supp. 521 (D.N.J. 1981) (noting appropriateness of pendent jurisdiction where mere "overlap" of evidence necessary to prove state and federal claims). In the case at bar, moreover, the difficult factual issues presented, compounded by its institution as a class action suit, would have further militated for the assertion of pendent jurisdiction. Sussman v. Vornado, Inc., 90 F.R.D. 680 (D.N.J. 1981).

Citing Singer v. State, 95 N.J. 487 (1984), the Bung's court held that as an alternative to the "common nucleus" test,

plaintiffs need only establish that their state and federal claims were based upon "related legal theories." Id. at 465. The state and federal legal theories relied upon by plaintiffs below were not only related, but the latter were merged in the former under the Mount Laurel I analysis. Plaintiffs' Title VIII claim alleged discrimination against lower income minorities. Their state claim alleged discrimination against all lower income persons. The federal discrimination claim was not only related to, but subsumed under the state claim.

Although subsumed, it is important to note that these Title VIII claims remained a vital element of plaintiffs' action throughout the litigation below. The nondiscriminatory affirmative marketing clauses contained in all Final Orders and Judgments of Repose entered into by plaintiffs demonstrate their continuing concern, and that of the court, with their Title VIII claims. The crucial significance of race in this context was noted by the Mount Laurel II Court in the famous footnote 5, in which the court referred to suburban exclusion as one of the principal causes making America "two societies, one black, one white--separate and unequal", citing the Report of the National Advisory Committee on Civil Disorders (U.S. Gov't Printing Office, 1968).

Plaintiffs easily met both the "common nucleus" and the "related legal theory" tests. There can be no serious doubt that a federal court could have properly exercised jurisdiction over plaintiffs' state claims had plaintiffs filed their Title VIII

claims in federal court.

Nor can there be any question that a claim of discrimination in housing on the basis of race and a claim of discrimination in housing on the basis of income are "related" legal theories within the meaning of Singer. It is respectfully submitted that the lower court's failure to employ either of these tests necessitates the remand of this matter.

B. Plaintiffs' Title VIII Claim Meets the Substantiality Test

The Urban League's Title VIII claims were plainly substantial.

"Substantiality" merely requires a finding that the claims in issue are not "obviously frivolous," wholly "unsubstantial" nor "obviously without merit." Southeast Legal Defense Group v. Adams, 436 F. Supp. 891, 894 (D. Or. 1977) Clarification of this standard is provided in Filipino Accountants, supra:

> The limiting words "wholly" and "obviously" (as in wholly insubstantial and obviously frivolous) have cogent legal significance. In the context of the effect of the prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful questionable merit do not render them insubstantial for the purposes of 28 U.S.C. 2281. A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy'." (citing Hagans) Filipino Accountants, supra at ___.

Indeed, although ~~the trial court~~ he failed to apply the substantiality test, Judge Serpentelli implied that plaintiffs' Title VIII claim satisfied that test:

> 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. (T77-22)

The reinstatement of plaintiffs' Title VIII claim by this Court, following its dismissal by Judge Furman, further demonstrates the substantiality in the jurisdictional sense, of those claims.

their application for fees.

Plaintiffs did not, of course, seek a determination of their Title VIII claim on the basis of the record below. The court below, however, erroneously refused to take judicial notice of the statistical evidence set forth in plaintiffs' Supplemental Memorandum. This evidence, in the form of census data, shows that defendants' exclusionary zoning practices had an adverse impact on a greater percentage of nonwhites than whites. According to the 1980 census, minority populations in defendant municipalities were far smaller than the eleven county regional average. Moreover, those minority populations were isolated in ghettos within defendant municipalities. Although for purposes of the application below the Urban League did not need to prove its Title VIII claim, this census data gave rise to a prima facie case that defendants ~~below~~ North Brunswick, Cranbury, South Plainfield, Monroe, East Brunswick, Old Bridge and South Brunswick, did not even attempt to refute. Under these circumstances, ~~at the very least~~, there can be no serious claim that plaintiffs' Title VIII claims were "wholly without merit." Since plaintiffs satisfy both prongs of the Gibbs-Hagans test, established by Congress and set forth in Maher, it is respectfully requested that this matter be remanded for a determination of the amount of attorneys' fees and costs to be awarded ~~plaintiffs~~ them

C. The Courts Have Been Responsive to the Liberal Approach Favored by Congress With Respect to Fee Applications by Civil Rights Plaintiffs Who Prevail on Pendent Non-Fee Claims.

In Maher, for example, the United States Supreme Court upheld the award of attorney's fees under the Fees Act where, like here, there was no ruling on plaintiff's federal fee claim. Unequivocally upholding the rights of such plaintiffs to fees, Justice Stevens explained the rationale underlying such awards:

> We agree with the courts below that Congress was acting within its enforcement power in allowing the award of fee in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication. As the Court of Appeals pointed out, such a fee award furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues.'" (Citations omitted.) Id. at 133.

It is noteworthy that since the matter was settled in Maher, the Court never ruled in plaintiff's favor on any of her claims. A fee award was nevertheless determined to be appropriate, the Court holding that:

> Nothing in the language of 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated. Moreover, the Senate Report expressly stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief. (Citations omitted.) Id. at 129.

Similarly, plaintiffs have been held entitled to fees under the

Act where they have merely acted as "catalysts" in obtaining the desired result, even where "[t]he litigation successfully terminates by a consent decree, an out of court settlement, a voluntary cessation of the unlawful practice by the defendant, or other mooting of the case where the plaintiff has vindicated his right." (Citations omitted.) Martin v. Heckler, 773 F.2d 1145 (11th Cir. 1985). Indeed, as the 11th Circuit held in Fields v. Tarpon Springs, 721 F.2d 315 (11th Cir. 1983): "The catalyst test only demands that practical relief has been obtained that is factually a causal result of the lawsuit." Id. at 321. Here, of course, there was no need for the court below to determine whether plaintiffs had vindicated their rights since the New Jersey Supreme Court had unequivocally held that they had done so. "[Plaintiffs] proved a pattern of exclusionary zoning that was clear." Mount Laurel II, at 339.

It is respectfully submitted that plaintiffs here, like plaintiffs in the plethora of federal and state cases cited above, were entitled to attorney's fees. At the very least, such entitlement should have determined by application of the correct legal standard.

III. PREVAILING PLAINTIFFS IN CIVIL RIGHTS CASES ARE PRESUMED ENTITLED TO ATTORNEYS' FEES

A. A Prevailing Plaintiff is Entitled to Attorneys' Fees Unless "Special Circumstances" Render Such an Award Unjust

As the court below noted, there can be no real question that plaintiffs prevailed here:

> 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. (T67-8)

It is well established that requests for attorney's fees sought in connection with the vindication of civil rights, like those sought here, are to be dealt with liberally.[fn] As the United States Supreme Court held in <u>Hensley v. Eckerhart</u>, 461 U.S. 430 (1983), citing <u>Newman v. Piggie Park Enterprises, Inc</u>., 390 U.S. 400 (1968):

> The purpose of Section 1988 is to ensure 'effective access to the judicial process ' for persons with civil rights grievances. Accordingly, a prevailing plaintiff 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' (Citations omitted.) <u>Id</u>. at 1937, 429.

The New Jersey Courts have interpreted this standard generously. In <u>Jones v. Orange Housing Authority</u>, 559 F. Supp. 1379 (3d Cir. 1983) Judge Stern observed:

fn This is especially true where, like here, equitable as opposed to monetary relief was sought. "In the absence of monetary damages, the award of atty fees becomes an integral part of the remedy necessary to achieve compliance w/ Congressional policies".

> While the language of Section 1988 indicates that the award of attorneys' fees is within the Court's discretion, it is clear that this discretion is narrowly circumscribed. Attorneys' fees must be awarded to the prevailing party unless 'special circumstances' render the award of fees unjust, and cases in which such special circumstances have been found have been few and very limited.' (Emphasis added; citations omitted.) Id. at 1383.

There was no finding below of such "special circumstances." On the contrary, Judge Serpentelli observed:

> 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. (T75-18)

It is equally well established that the Piggie Park standard applies to New Jersey state courts. In Carmel v. Hillside, 178 N.J. Super. 185 (App. Div. 1981), Judge Pressler explained that the Piggie Park standard was fully binding upon the state courts. The Carmel plaintiffs appealed the denial of attorneys fees where, like here, their successful litigation had included a state cause of action as well as a federal civil rights claim. Holding that the trial judge had mistakenly exercised his discretion in declining to award fees, the Carmel court concluded:

> The standard to be applied by the federal courts in determining whether or not to allow counsel fees under 42 U.S.C.A. § 1983 has been prescribed by Newman v. Piggie Park Enterprises, Inc., holding that, consistent with the policy of federal civil rights legislation, a prevailing plaintiff "should ordinarily recover an attorney's

> fee unless special circumstances would render such an award unjust. (Citations omitted.) Id. at 189.

The Court rejected defendant's "special circumstances" arguments, including the demand that plaintiffs be denied fees because, like the Urban League plaintiffs, they were represented by the American Civil Liberties Union rather than a private attorney. Judge Pressler then noted that the only "special circumstances" before the Court "militate[d] for rather than against a counsel fee award." Referring to the conceded invalidity of the ordinance challenged in Carmel, the Court tersely observed:

> There appears to be no satisfactory explanation for the failure of the municipality thereupon to have repealed the ordinance instead of subjecting itself, plaintiffs and the courts to the time, expense and effort required in the prosecution of this action to final judgment. Id. at 190.

Since Mount Laurel I was decided shortly after the commencement of this litigation, the municipal defendants below were similarly on notice as to the invalidity of their respective ordinances. Here, as in Carmel, there was no "satisfactory explanation" for their subsequent failure to repeal those ordinances. Instead, like the Carmel defendants, they wasted the time and limited resources of the Courts as well as the Urban League plaintiffs. As the Supreme Court remarked: "The waste of judicial energy involved at every level is substantial and is matched only by the often needless expenditure of talent on the part of lawyers and experts." Mount Laurel II at 200. It is respectfully submitted that the enormity of that burden, compared

with that imposed in Carmel, is another "special circumstance," "militat[ing] for rather than against a counsel fee award" and that this matter should be remanded to determine the amount of such award.

B. The Piggie Park Standard is Applicable to Title VIII Cases.

Although the court below did not reach the question, it noted that defendant municipalities contended that the test under which fees are awarded in §1988 cases is not applicable to Title VIII cases. (T69-15) There is neither legal authority nor any logical basis for this proposition. As noted in E. Larson, Developments in the Law of Attorneys Fees (1986 Supplement):

> Except where express statutory language distinguishes one fee shifting statute from another, the courts have moved toward the adoption of a relatively uniform set of fee principles [citing Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983)]
>
> * * *
>
> The extensive legislative history of the Fees Act is often relied on in determining fee issues under other fee shifting provisions which have similar statutory language. [Citing New York Gaslight Club v. Carey, 447 U.S. 54, 70 n.9 (1980)]

The continuing importance of that legislative history is thus apparent. In the legislative history of the Fees Act, Congress explicitly analogized Title VIII claims to those addressed by §1988: insert from p.15

Congress vehemently rejected a double standard pursuant to which plaintiffs protecting the "same rights" might or might not be entitled to fees. It is precisely such a double standard that the decision below imposes on plaintiffs.

this goes to 15

belongs at 15.

Congress never intended to deny attorneys' fees to an otherwise entitled plaintiff merely because of a judicial election to award relief on the basis of an alternative cause of action. Federal circuit courts have agreed, applying the Maher test in innumerable cases: Seals v. Quarterly County Court, Inc., 562 F.2d 390 (6th Cir. 1977); Kimbrough v. Arkansas Activities Ass'n., 574 F.2d 423 (8th Cir. 1978); Williams v. Thomas, 692 F.2d 1032 (5th Cir. 1980); Lund v. Affleck, 587 F.2d 75 (1st Cir. 1978); Milwe v. Cavuoto, 653 F.2d 80 (2d Cir. 1981); White v. Veal, 447 F. Supp. 788 (E.D. Pa. 1978). The courts, moreover, have consistently applied that standard to such claims. In Jeanty v. McKey & Poague, 496 F.2d 1119 (7th Cir. 1974), for example, the Seventh Circuit cited Piggie Park in awarding fees under Title VIII:

> The court has the authority under 42 U.S.C. §3612(c) to award attorney fees when the plaintiff, as here, is financially unable to assume them. The general policy behind the award of attorney fees was set forth by the Supreme Court in Newman v. Piggie Park Enterprises, Inc. Although that case was under Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a-3(a), the language is equally applicable to a Title VIII action:
>
> > When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law.
> >
> > * * * * * *
> >
> > If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance

> the public interest by invoking the injunctive powers of the federal courts. (Citations omitted; emphasis added.) Id. at 1121.

The only additional requirements for fee awards under Title VIII, compared to awards under the Fee Act, are those expressly set forth in ~~the statute itself~~; i.e., that the party awarded a fee be a "prevailing plaintiff" ~~and~~ that it be unable to assume responsibility for its own fees.[9] It was undisputed below that the Urban League ~~satisfied both~~ criteria.

Contrary to the arguments of defendants below, prevailing plaintiffs are awarded fees far more readily than prevailing parties. This has been irrebutably documented in Tamanaha, "The Cost of Preserving Rights: Attorneys' Fee Awards and Intervenors in Civil Rights Litigation," 19 Harv. C.R.-C.L. Law Rev. 109 (1984):

> The Supreme Court's interpretation of "prevailing party" has resulted in different treatment of a party depending on whether it is a prevailing plaintiff or a prevailing defendant. When a plaintiff prevails, a presumption exists in favor of a fee award. When a defendant prevails, a presumption exists, in effect, against such a fee award.

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9. In view of the additional hurdle presented ~~for~~ by the requirement that a Title VIII plaintiff be unable to pay her own fees in order to be awarded fees, prudent post Fee Act Title VIII plaintiffs are likely to append a claim under the Fee Act. See "Multi-Claim Litigation," supra at 213 (citing Bunn v. Central Realty of Louisiana, 592 F.2d 891 (5th Cir. 1979). This is consistent with the relative dearth, compared to pendent Fee Act claims, of post-1976 pendent Title VIII fee claims. The case at bar, of course, was filed in 1974, two years before the enactment of the Fee Act.

* * *

> First, courts have defined when a plaintiff "prevails" in a much broader manner than they defined when a defendant "prevails." Plaintiffs have prevailed and been awarded fees when they succeeded on only some of the issues raised; when a case has been settled before trial or when a consent decree terminated the litigation; when no formal relief was granted to the party seeking fees; and when the case was not entirely concluded, but the court found a probable violation of law.
>
> * * *
>
> Second, when a plaintiff prevails, courts have determined that the plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." This position creates a strong presumption in favor of prevailing plaintiffs. Just what amounts to "special circumstances" is not certain, but their existence is very rare. Id. at 123-5.

There is no reason for treating Title VIII claims differently than other civil rights claims. Indeed, its status as one of the earliest civil rights fee shifting statutes clearly shows the particular determination of Congress to prevent discrimination in housing. The case moreover, at bar fully vindicates Congress' view as to the utility of the "private attorney general" approach in this context. The explicit legislative history, the Supreme Court cases and the multitude of upper court decisions were ignored by the court below. It is respectfully submitted that in accordance with the cited authority, the Urban League plaintiffs' request for costs and fees should have been granted.

IV. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DENYING THE PREVAILING PARTY COSTS, INCLUDING EXPERT FEES

R. 4:42-8(a) provides in pertinent part that, "... costs shall be allowed as of course to the prevailing party." Although the court below expressly found that the Urban League was the prevailing party, it denied plaintiffs costs. This was plain error as a matter of law. In addition - explain next 2 pts.

A. Reasonable and Necessary Costs Included the Urban League's Share of the Court-Appointed Expert's Fee and the Court Below Abused Its Discretion in Denying Reimbursement for Such Fees

put last as you admit it's discret-

In addition to the statutory costs expressly allowable pursuant to N.J.S.A. 22A:2-8, the cited statute provides that the prevailing party is also entitled to:

> 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.

Here such "reasonable and necessary expenses" include the Urban League's share of all fees paid or owing to the court-appointed expert, Carla Lerman, in connection with the pretrial and trial proceedings. The Mount Laurel II court expressly authorized such an award. Id. at 293. T-81-11 It is respectfully submitted that the trial court abused its discretion in denying reimbursement for the $1839.62 of Ms. Lerman's fees which has been billed to the Urban League (Pa__).

Equity, as well as case law, mandates that the towns, rather than the plaintiffs, bear the full cost of Ms. Lerman's fees. It was the towns' unconstitutional ordinances which compelled this litigation in the first instance. Their continuing resistance

resulted in a far greater expenditure of time and effort on Ms. Lerman's part than should have been necessary.

Plaintiffs should have been relieved of these costs, moreover, because their primary objective in this litigation has been the advancement of the public interest. None of the Urban League plaintiffs sought personal pecuniary gain, nor indeed any form of personal as opposed to public relief.

It is respectfully submitted that Huber v. Zoning Board of Adjustment, 124 N.J. Super. 26 (Law Div. 1973), is controlling here. There, the court required the party opposing the public interest plaintiff to bear costs, even though, unlike here, the court "was unable to find a reported case" supporting its award of the particular costs; i.e., "costs of a transcript of hearings before a municipal body for use in an action in perogative writs." The court held that it nevertheless had the authority to tax such costs because the plaintiff, like the plaintiffs below, represented the public interest. In Huber the defendant Board had granted a variance and the Township committee had granted a special permit for the enlargement of a gas station. The Huber Court, striking the variance, noted that such plaintiffs should not be "discouraged" from bringing such suits by the "possibility of large costs":

> Plaintiff in this case is an interested citizen whose property was close enough to the property in question to give him standing to challenge the decisions of the board and governing body. His challenge had the effect of insuring the correct enforcement of the Township Zoning Ordinance. In this sense, his suit is one brought on behalf of all the citizens of the Township, who will benefit from the correct

> application of local zoning regulations.* * * It is important that citizens should feel able to bring such actions where 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. (Citations omitted; emphasis added.) Id. at 29.

~~It is respectfully submitted that~~ here, far more than in Huber, the "[citizen's] representatives [were] not carrying out their duties correctly." Indeed, their malfeasance reached constitutional dimensions. In view of the importance of the rights vindicated, the Urban League plaintiffs should not have been penalized for bringing such actions by being forced to pay the substantial costs thereby incurred.

The extent to which the public interest has been advanced has consistently been taken into account by courts in this and related litigation and the towns have been held responsible for the masters' fees. Urban League of Essex County v. Mahwah, 207 N.J. Super. 169 (Law Div. 1984). The court below set forth no reason whatsoever for changing that policy. Instead, the court denied reimbursement on the anomalous ground that:

> "[T]he 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,[10] and the margin benefit which resulted from the voluntary process of consensus was clearly to the plaintiff. (T82-10)

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[10] Since Judge Serpentelli held that plaintiffs, too, had to pay their own experts, this is no reason to spare the defendants.

In short, the court denied plaintiffs reimbursement because Ms. Lerman's expert opinion was helpful to them. Under this reasoning, prevailing plaintiffs would never be entitled to costs awards because they would have already benefitted by prevailing in the action. This completely illogical approach, contrary to well established principles of law in this area as well as the intent of the Mount Laurel II Court, represents an abuse of discretion on the part of the trial court. It is respectfully submitted that this matter should be remanded and the trial court directed to allocate responsibility for Ms. Lerman's fee among defendants.

B. The Trial Court Erred in Finding that it Lacked Discretion to Award Plaintiffs' Experts Fees

Plaintiffs also requested reimbursement for the expenses and fees of their experts, Alan Mallach, AICP, and Rogers, Golden and Halpern. The court below denied this request, holding that:

> Having found no right to recover under [Title VII] 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. (T81-4)

Even if plaintiffs were not entitled to fees under Title VII, it is well established in New Jersey that the allowance of such expert witness fees as costs is within the discretion of the trial court. U.S. Pipe and Foundry Co. v. United Steelworkers of America, AFL-CIO, Local No. 2026, 37 N.J. 343 (1962). Judge Serpentelli's holding that he lacked such discretion was plain error.

This Court has affirmed the trial court's award of experts' fees as a cost item where, like here, such fees have been

considered necessary. Barberi v. Bochinsky, 43 N.J. Super. 186 (App. Div. 1956), for example, involved an action for damages for the cost of removing an encroaching retaining wall. The award of experts' fees was upheld since the testimony of the prevailing plaintiff's surveyor was crucial to plaintiff's case.

In Bung's, the court addressed plaintiffs' motion for summary judgment allowing counsel fees and costs, including expert witness fees. Granting the request for experts' fees, the Bung's court held:

> The plaintiffs seek an award of costs, including the cost of three expert witnesses. These witnesses testified at municipal hearings prior to the institution of this litigation. Their testimony was not accepted at the municipal level. When this court rejected the original assessments and established new ones, however, it relied primarily on their opinions. Those opinions were contained in the record of the municipal proceedings; that record provided the basis for the decision here - no trial was required....Substantial costs were saved. This result would not have been possible without the expert testimony produced by the plaintiffs. It is also clear that such testimony was a necessity; its absence would have denied plaintiffs any chance of success. (emphasis added) Id. at 478.

Here, as in Bung's, the court placed great reliance on the opinion of plaintiffs' experts, particularly Mr. Mallach. All of those involved in this litigation are aware of the central role played by Mr. Mallach in the development of the consensus methodology utilized in other cases as well as the case at bar.[11]

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[11] Indeed, the importance of Mr. Mallach's role in this litigation was expressly noted by the New Jersey Supreme Court in

Nor can there be any question of the essential role Mr. Mallach's complete mastery and insightful analysis of the facts played in the development of plaintiffs' case. The absence of Mr. Mallach's testimony would undoubtedly have "denied plaintiffs any chance of success." His ability to generate creative approaches to this complex and difficult matter, moreover, inured to the benefit of all parties. Finally, requiring the prevailing low and moderate income plaintiffs here to bear the full cost of their expert imposes an unsupportable burden on the very limited resources of these plaintiffs and the public interest groups that assist them. It is respectfully submitted that here, as in Barberi and Bung's, defendants should have been required to pay plaintiffs' experts' fees and that the matter should accordingly be remanded to the trial court for a determination of an appropriate award.

C. Defendants Should have been Required to Reimburse the Urban League Plaintiffs for the Costs of Depositions

Again, the trial court plainly erred in holding that it lacked discretion to award such fees. N.J.S.A. 22A:2-8 provides in pertinent part that a party:

> ... is entitled to include in his bill of costs his necessary disbursements, as follows:
> * * *
> The costs of taking depositions when taxable,

Hills Development Co. v. Township of Bernards, Id.. at ___.

by order of the court.

While observing the dearth of reported cases in which costs of depositions have been awarded, the Court in Finch, Pruyn & Co., Inc. v. Martinelli, 108 N.J. Super. 157 (Ch. Div. 1969) noted that:

> The clerk of the court has advised that orders directing the taxation of the expenses of depositions are not uncommon in [the Chancery] Division. Id. at 159.

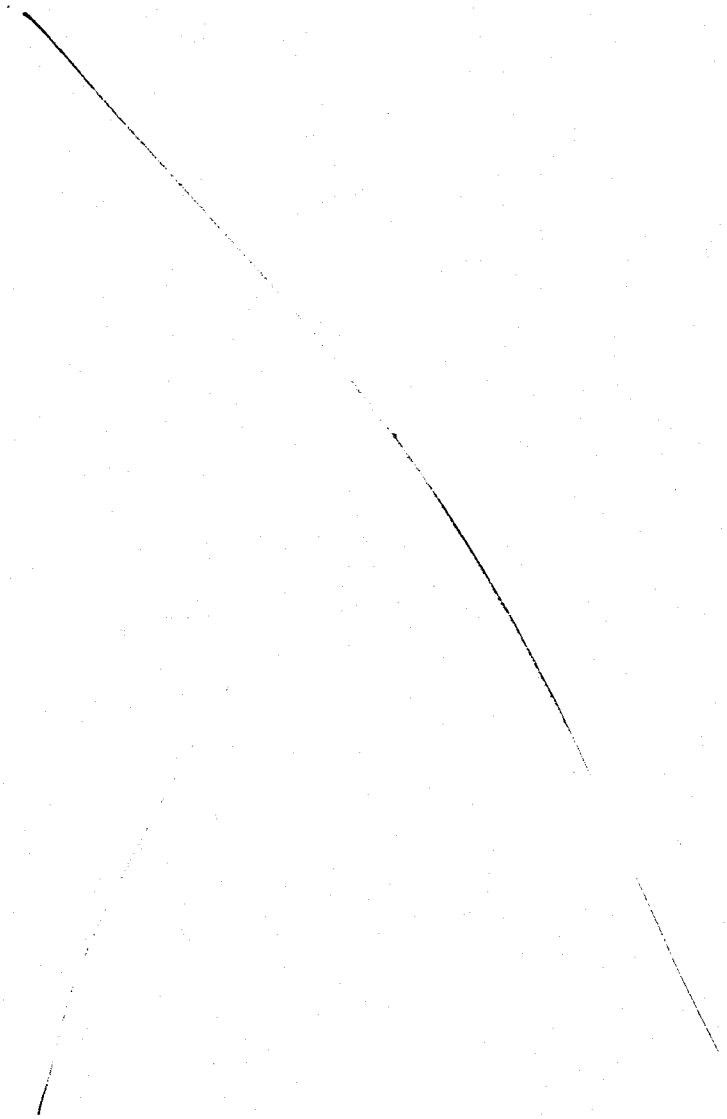
The Finch Court proceeded to grant plaintiff's application for the cost of those depositions which plaintiff was constrained to take by reason of defendant's "fraud or other reprehensible conduct," where such depositions were "necessary" and "actually used at the trial." Id. at 176. It is respectfully submitted that the court below, like the Finch Court, clearly had authority to grant plaintiffs' application for such costs. Under the Finch standard, moreover, plaintiffs here should have been reimbursed for deposition costs totalling $3450.50. (Pa ___). Indeed, the Urban League plaintiffs' claim for reimbursement is much more compelling than that of the plaintiff in Finch in view of the strong public policy reasons for awarding costs to prevailing plaintiffs in public interest matters. See Huber and Bung's, supra.

In Finch, the court found that defendant's reprehensible conduct, i.e., his efforts to avoid paying his debts by transferring his interest in real estate to his wife, justified the imposition of costs. Here, the persistent and deliberate

exclusion of lower income households was the "reprehensible" conduct of the defendant municipalities necessitating depositions. Defendants' "determination to exclude the poor," deplored by the New Jersey Supreme Court in Mount Laurel II, surely merits censure as much as the Finch defendant's chicanery.

Nor can there by any question of the need for these depositions. The information obtained thereby was of critical importance in trial preparation and all of the depositions were carefully reviewed and analyzed for that purpose. Portions of the depositions were actually used at trial on cross-examination.

In Huber, the court frankly stated that it had found no reported cases where the prevailing party was awarded costs for transcripts of hearings before a municipal body. In contrast to the "not uncommon" award of deposition costs noted by the Finch Court, moreover, the clerk reported "no established pattern within the Law Division" for taxing such transcript costs. The court nevertheless awarded the costs of these transcripts to Mr. Huber "....so that plaintiff is not in effect penalized for taking the initiative in acting for his community." Id. at 29. The initiative taken by the Urban League plaintiffs has had far-reaching and beneficial effects in defendant municipalities. Here, as in Huber, plaintiffs should not have been penalized for "acting for [their] community." It was well within the discretion of the trial court to determine an appropriate award and it is respectfully submitted that this matter should be remanded for that purpose.



CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this matter should be remanded to the trial curt for a determination of the amount of attorneys' fees, experts' fees and costs to be awarded to the Urban League plaintiffs.

~~Respectfully submitted,~~

JOHN PAYNE, ESQ.
BARBARA STARK, ESQ.
ATTORNEYS FOR URBAN LEAGUE
On Behalf of the
American Civil Liberties Union
of New Jersey

Dated:

The invaluable assistance of Jamie Plosia, a law student at Rutgers Law School, in the preparation of this brief is gratefully acknowledged.

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