

Attorney's fees

2/28 (1986)

final draft of numerous student revisions  
of memo re: recovery of costs of court  
appointed experts

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From the desk of . .

John & Barbara

Eric Neisser

2/28/86

Final draft of numerous  
student revisions of memo  
re recovery of costs of  
A-applied experts.

I suggest we consider  
filing such a motion at  
time of transfer conditions  
motions.

Eric

POINT I: WHERE A PUBLIC INTEREST LITIGANT SUCH AS THE URBAN LEAGUE IS SUCCESSFUL IN MT. LAUREL SUITS, IT SHOULD BE PERMITTED TO RECOVER ALL COSTS ASSESSED FOR COURT-APPOINTED EXPERTS.

Mt. Laurel litigation is unique. Because it is unique, there is no precedence<sup>1</sup> to guide the court in the allocation of fees for court-appointed experts. Nevertheless, the court has power under various statutes and rules to permit a prevailing party in such litigation to recover costs previously assessed for court-appointed experts. The court should exercise this power and permit the Urban League, as prevailing party, to recover all costs previously assessed against it for court-appointed experts.

State and federal rules and statutes indicate that the court should include any fees for court-appointed experts as taxable costs and allow the Urban League to recover these costs.

N.J.S.A. 2A:15-59 provides that:

Except as otherwise provided by law, costs may be allowed or disallowed in the discretion of the court to any party in any action, motion, appeal or proceeding, whether or not he be successful therein; and where allowed, they may be taxed according to law.

N.J.S.A. 22A:2-9 states that:

A party to whom costs are awarded or allowed by law or otherwise in any action, motion or other proceeding...is entitled to include in his bill of costs his necessary disbursements... [including]...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.

In addition, New Jersey Court Rule 4:42-8(a) mandates that "[u]nless otherwise provided by law, these rules or

court order, costs shall be allowed as of course to the prevailing party." Further, "an award of taxed costs in favor of the prevailing party is not precluded by reason of the fact that the party is represented by a legal services interest or other clinic." Pressler, Current N. J. Court Rules, Comment R.4:42-8(a).

Federal Evidence Rule 706(a) specifically permits a court to retain the services of a court-appointed expert.

Despite the absence of any New Jersey rule specifically permitting New Jersey courts to appoint experts, these courts have utilized the services of court-appointed experts in various actions. Fellerman v. Bradley, 191 N.J.Super 73 (Ch. Div. 1983) (court had power to appoint accountant in matrimonial action and assess fees against husband); State v. Lanza, 74 N.J.Super. 362 (App.Div. 1962), aff'd 39 N.J. 595 (1963), cert denied, 375 U.S. 451 (1964)(court appointed expert regarding trees in condemnation action); Polulich v. J.G. Schmidt Tool, Die & Stamping Co., 46 N.J.Super. 135 (Cty.Ct. 1957)(court appointment of medical expert proper in workmen's compensation proceeding).

The New Jersey Supreme Court in Mt. Laurel II indicated that trial judges could retain court-appointed experts and masters in future Mt. Laurel litigation. In its decision, the Court clearly indicated that, if the court found it necessary to appoint masters, their fees were to be paid by the municipalities. With regard to compensation for court-appointed experts, the Court was less specific and left their compensation to the discretion of the trial court. It did indicate, however, that the outcome of the litigation could determine the ultimate

liability of the parties.

As for the compensation of court-appointed experts...the trial court should determine that matter at the time the expert is retained. One or more of the parties will have to pay; on occasion the ultimate liability may await the outcome of the litigation.

So. Burlington Cty NAACP v. Mt. Laurel Township, 92 NJ 158, 293 (1983)

Just as there is no rule permitting New Jersey courts to utilize the services of court-appointed experts, there is no rule indicating precisely how the costs of these experts' services shall be allocated by the court. The New Jersey Supreme Court's decision to allow the trial courts to determine the ultimate liability for compensation of court-appointed experts to await the outcome of the litigation clearly contemplated that the court would treat them in the same manner as other taxable costs recoverable by prevailing parties.

The decision to include these costs among those normally taxable is in accord with federal rules and precedence and with what little New Jersey case law there is in this area.

Fed.R.Evid. 706(b) provides that court-appointed experts' compensation "shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs." Leesona Corp. v. Varta Batteries, Inc., 522 F.Supp. 1304 (S.D.N.Y. 1981) (fees for court-appointed experts may be assessed as taxable costs in a patent infringement action).

The New Jersey Appellate Division has held that: "the power of a court to appoint an accountant and award fees against a party in a general equity matter is a recognized practice

within the broad discretion of the Court of Chancery."

Anzalone v. Anzalone Brothers, Inc., 185 N.J.Super. 481, 489 (App.Div. 1982) (the fact that husband's corporation was a proper party to action to set aside fraudulent conveyance did not make it a party to the matrimonial action, but the court still had power to assess the fees for court-appointed expert against the corporation).

If, as suggested by the Supreme Court of New Jersey in Mt. Laurel II, the trial court decides to appoint an expert, this expert is retained to aid the court in determining whether the municipal zoning ordinance is constitutional. At the time of trial, there is no way of knowing the ultimate outcome of the litigation. It is, therefore, appropriate at that time that all parties share, on an equal basis, the costs for the services of the court-appointed expert.

If and when the judge determines that a zoning ordinance violates the constitutional requirements of Mt. Laurel, this is no longer the case. At this time, it is clear that the plaintiff(s) have prevailed and that the zoning ordinance must be changed.

When a public interest litigant such as the Urban League is the prevailing party, it is appropriate and necessary that it recover all costs previously paid for the retention of the court-appointed expert.

This recovery is appropriate and necessary because of the Supreme Court of New Jersey's direction to the trial court and in the interests of promoting the general welfare. In

addition, there is federal precedence for awarding these costs and no local rule forbidding such an award.

Mt. Laurel is a doctrine fraught with broad social and political implications which can benefit from the fullest diversity of perspectives possible. In light of this fact, the New Jersey Supreme Court's reluctance to mandate that the costs of court-appointed experts be taxable costs to the prevailing party can best be explained by its desire that these costs be awarded at the trial court's discretion only in those situations where it is necessary and appropriate.

Reimbursing the public interest litigant, such as the Urban League, would be appropriate in order to reimburse it for the unnecessary expense to which it has been put. The return of these costs to public interest plaintiffs will encourage the useful participation of such institutions in Mt. Laurel cases in the same way that the builders' remedy encourages the useful participation of builders.

In Mt. Laurel I, the New Jersey Supreme Court held that any zoning ordinance which contravenes the general welfare is unconstitutional. However, Mt. Laurel II was necessary in order to eliminate unconstitutional zoning ordinances and prevent municipalities from fostering urban ghettos for the poor and setting aside decent housing elsewhere for everyone else.

In order to encourage public interest litigants such as the Urban League to continue its actions against recalcitrant

municipalities and in the interests of public policy and equity, the court should award the costs for court-appointed experts to the Urban League. This is especially true in light of the fact that the Urban League has no share in the profit incentive given to builders in Mt. Laurel II. This award will, of course, be a part of and not in lieu of all other normal court costs to which the Urban League is entitled under New Jersey rules and statutory guidelines.