Att. Fees — 1/29/88

U.L. v. Carteret

Rough Draft of Brief —

pgs = 22

yellow p.i. # 4078

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THE STATE UNIVERSITY OF NEW JERSEY
RUTGERS

Interdepartmental Communication

1/29/88

John and Eric,

This is a very rough draft. It can be -- and will be -- better organized, but I think most of it is here. I'd like to beef up the section on Singer, to try to persuade them that we aren't asking them to go that much further than they've gone before.

Also attached please find recent digest re pleading requirements for attorney fee awards.

Barbara

attchmt

Introduction

This brief is respectfully submitted on behalf of the Civic League plaintiffs in opposition to the petition of the defendant municipalities for certification, or, in the alternative, in support of plaintiffs' cross petition for certification. The only error of the Appellate Division's decision of December 29, 1987 was the onerous burden imposed on plaintiffs on remand. That decision requires plaintiffs to prove a prima facie case of racial discrimination under Title VIII of the Civil Rights Act; U.S.C. 3601 et seq. using only a twelve year old trial record and facts which the trial court may judicially notice. This is a far more rigorous test than required by the United States Supreme Court in Maher v. Gagne (as well as the plethora of federal and state authorities cited in plaintiffs' brief below) and it is blatantly unfair to plaintiffs. Nevertheless, the Civic League plaintiffs believe that they can easily make the required showing and respectfully

urge this Court to deny certification, which can only result in further delay and even higher fees for defendants.

If certification is granted, however, the Civic League respectfully submits that the test formulated by the Appellate Division should be rejected in favor of the Hagans/Gibbs test explicitly adopted by the Maher Court. Under that test, no court will be required to render a decision on the sensitive constitutional issue presented here, i.e., did the defendant municipalities' zoning ordinances discriminate against minorities?--merely for the purpose of awarding fees. The proper test presents a simple question of law, well within the scope of this Court on review. First, were plaintiffs' Title VIII claims [redacted] "substantial" (Hagans v. Lavine, 415 U.S. 528 (1974) and, second, [redacted], did they arise from "a common nucleus of operative facts" (United Mineworkers v. Gibbs, 383 U.S. 715 (1966)), as the state claims upon which they prevailed? There has been no finding that

plaintiffs do not satisfy this test. There has merely been a persistent refusal to apply it. As plaintiffs show in their brief below, both prongs are easily satisfied here and plaintiffs are accordingly entitled to attorneys' fees under 42 U.S.C. § 3612(c).[1]

It is respectfully submitted that certification should be denied and this matter be remanded to the trial court in accordance with the decision of the Appellate Division. If certification is granted, it is respectfully submitted that the test imposed on plaintiffs by the Appellate Division should be rejected in favor of the Hagans/Gibbs test mandated by the Supreme Court.

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[1] 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. Professor Wolf served as special counsel to the Honorable Robert Drinan when Congressman Drinan was acting as floor manager for the Fees Act. Id. at n.14.

ARGUMENT

I. DEFENDANT MUNICIPALITIES' PETITION FOR CERTIFICATION SHOULD BE DENIED

Plaintiffs will not waste the valuable time of this Court by replying on a point by point basis to defendants' extended arguments as to the exact amount, allocation among defendants, and specific costs to be included in the fee sought. [This assumes defendants argue what they argued before.] As recognized by the trial court, these are tangential issues which should be addressed on remand.

To grant certification would merely extend already interminable proceedings, generating substantial additional legal fees and requiring yet a further commitment of judicial resources. Moreover, as noted by the Appellate Division, (slip op. at ___) the procedural posture of this case is unique. A rule of law designed to accommodate its peculiar contours may well prove an awkward fit for future, more conventional cases.

There is no reason to let this "hard case make bad law," and defendants have no right to compel such an adjudication. Defs present no question of general public importance which should be settled by [this Court] R. 2:12-4. There is no need here for this Court's supervision or attention and cert. should be denied. Mahony v. Danis 95 N.J 50, (1983).

The only real flaw in the Appellate Division's decision is the test imposed on the Civic League plaintiffs. As set forth at page 16 of the slip opinion, the Appellate Division held that:

> Because the fee claim has not been adjudicated, plaintiffs may be regarded as "prevailing parties" within the meaning of Sec. 3612(c) if the record developed in 1976 established a prima facie violation of Sec. 3604(a) which was not rebutted.

This test, which is without legal precedent, requires that the federal and state claims be based on the same facts, rather than the "common nucleus" test mandated by the United States Supreme Court. This test is prejudicial to the Civic League, not defendant municipalities. If plaintiffs are nonetheless willing to proceed under that test, they should be permitted to do so.

In Mount Laurel I, published shortly after the commencement of the instant lawsuit, this Court made it perfectly clear that relief under the state Constitution included relief for "low and [This will be developed depending on ds brief]

moderate income persons, both white and nonwhite." Mount Laurel I was decided in 1975, shortly after plaintiffs filed their complaint. In its landmark decision, this 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 the 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.

The Mount Laurel I decision rendered development of a separate record with respect to the nonwhite members of the plaintiff class superfluous. The reasoning of the Appellate Division in the decision below would have required plaintiffs to proceed nonetheless to litigate their Title VIII claims. Under the Appellate Division's test, every prudent plaintiff would be required 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. It is inconceivable that the development of such a record would have been permitted in this case. Indeed, as noted by defendant Piscataway in its brief below, the trial court refused to consider evidence regarding race on remand.[4] Thus, the record to which plaintiffs are restricted is likely to be barren of any evidence of a prima facie case of a Title VIII violation. This assumes, moreover, that these records are available or can be reconstructed, twelve years and at least as many lawyers after the trial. The Appellate Division, furthermore, has held that plaintiffs may ~~not~~ only supplement or clarify that [redacted] threadbare record with [insert from p. 8]

> [I]n any event it would be senseless to add to the cost of the case associated with an evidentiary hearing merely to determine the counsel fee claim .... Slip op. at 13.

The Appellate Division also directed the trial court to

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~~consider~~ "facts which it may judicially notice," ~~slip op. at~~ ___, and experts' reports interpreting these facts. Slip op. at ___. Under the Appellate Division test, plaintiffs will not be awarded ~~entitled to~~ attorney fees, in short, unless they can establish a prima facie Title VIII case ~~under this case~~. with one hand tied behind their backs. (this is the idea. I'd like a better way of saying it)

Defendants can have no legitimate objection to such a test. It does not even ~~only~~ permit plaintiffs to establish what they could have shown in 1976, had there been any reason to do so and if the court had permitted it. ~~It does not even permit plaintiffs to do all that they could have done,~~ By prohibiting the introduction of any testimony or other proofs except as narrowly set forth above, There is no statute, precedent or logical basis for so circumscribing plaintiffs seeking to prove a civil rights violation. The test is especially egregious ~~in this case~~ because ~~of the~~ plaintiffs should not be required to prove any such violation in order to be granted fees under well established

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law. Defendants have been given yet another an opportunity to avoid their obligations, [redacted]. Ds nevertheless [redacted] seek certification, and plaintiffs oppose it, because all of the parties know that plaintiffs had a prima facie Title VIII case in 1976 and that they can [redacted] prove it now— even without the full evidentiary hearing which they should have been granted if they were going to be required to [redacted] do so. Attorneys fees may be awarded under Title VIII without a finding of racial discrimination. In Morales v. Haines, 486 F.2d 880 (1973), decided prior to the enactment of the Fees Act, a black purchaser of a federally subsidized house sought to enjoin the defendant municipality from preventing its construction. Plaintiff also sought damages and attorneys fees. The court granted the injunctive relief on the ground that there was economic discrimination, without addressing the issue of racial discrimination. The Seventh Circuit, finding that a determination as to racial discrimination was "material to

the resolution of the plaintiff's prayers for actual and punitive damages and attorneys' fees", (id. at 882), remanded the case for a determination of that issue.

Prior to the enactment of the Fees Act, a remand for the determination of plaintiffs' Title VIII claim, like the remand in Morales, may well have been necessary here. As the Maher Court explained, however, a court may legitimately avoid such a determination. Indeed this approach is consistent with the well established judicial policy of avoiding the unnecessary determination of federal constitutional questions.

Precisely such a question was raised by plaintiffs' Title VIII claim in the Mount Laurel litigation. By ruling in plaintiffs' favor on their state claim; and granting the plaintiffs all of the relief which they could have obtained under their federal claim, and more; this Court wisely avoided deciding substantial federal constitutional issues.[2] In enacting the Fees

Act, Congress rendered the kind of remand required in Morales unnecessary, thereby eliminating the need for exactly the kind of redundant litigation ordered by the Appellate Division. While determination of these difficult federal issues should not be required to ascertain plaintiffs' entitlement to attorney fees, in order such a determination can be made in far less time, at much less expense and with substantially less risk of establishing troublesome precedent, than the determination which has ordered a truncated proceeding, to avoid the demand of this Court has. The Appellate Division cost in time as well as money of a full evidentiary hearing. Slip op. at ___. Plaintiffs agree that this is a critically important R2:12-4 consideration in this case. There is no reason "special" for this Court as required by to spend any more time on this matter and it is respectfully submitted that certification should be denied

The underlying issues here have been resolved.

II. IF THIS COURT GRANTS CERTIFICATION, IT SHOULD REJECT THE TEST IMPOSED BY THE APPELLATE DIVISION IN FAVOR OF THE TEST SET FORTH BY THE UNITED STATES SUPREME COURT

If certification is granted, it is respectfully submitted that The only issue properly before this Court is whether the test imposed by the App Div. to be considered by this Court is the test on ps The real question

2 Not only was there a question of racial discrimination against plaintiffs, but whether Warth v. Seldin, 422 U.S. 490 (1975) required more. Indeed, as defendants concede, by reinstating plaintiffs' Title VIII claim, Judge Antell expressly recognized that these were open questions.

Hagans/Gibbs test set forth in Maher v. Gagne, 448 U.S. 122 (1980)[3] should be applied where, like here, plaintiffs prevail on a state claim arising from a "common nucleus of operative facts" as that of a "substantial" federal fee claim, which has been raised in the same case but has not been decided by the court. It is respectfully submitted that the Appellate Division's failure even to apply the Maher test here was reversible error. It was not necessary for plaintiffs to prevail on their federal fee claim under ~~42 U.S.C. §3601 et seq.~~ Title VIII in order for a fee to be granted where, like here, they easily satisfy the two-pronged Hagans/Gibbs test.

The Appellate Division misconstrued plaintiffs' argument:

> Boiled down, plaintiffs argue that when a fee claim is appended to a nonfee claim and there is recovery on the nonfee claim but no

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[3] Under this test, if plaintiffs' federal civil rights claim was (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 (1966), as the state claim upon which they prevailed, they are entitled to attorneys' fees under their federal fee claim.

> disposition is made of the fee claim, a court should follow the same nucleus of operative facts' doctrine and decide whether to allow attorney fees and costs pursuant to §3612(c). Plaintiffs argue that a court should simply look at the complaint that was filed in 1974 to see if plaintiffs alleged fee (federal constitutional or statutory violations) as well as nonfee (state constitutional or statutory) violations. If both were alleged and plaintiffs became a prevailing party' within the meaning of 3612(c), then attorney fees and costs should be awarded pursuant to R. 4:42-9(a)(8). (Slip op. at 9-10).

This is an interesting test, but it does not even resemble the test imposed by the United States Supreme Court in Maher, which is the test urged by plaintiffs.

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While it is not clear precisely what the Appellate Division means by "a court should follow the same nucleus of operative facts doctrine," it is plain that the Court has failed to distinguish between a "common nucleus" and "a same nucleus" of operative facts. The former is the Gibbs formulation, the latter, although required by a minority of jurisdictions, is not the law in this state.

The gist of Maher is simply that as long as there is no

adverse determination with respect to a plaintiff's fee claim, a fee award may be predicated upon that claim if plaintiffs meet the requirements of Hagans/Gibbs. If plaintiffs' federal claims were not "substantial" as required by the Hagans prong of this test, defendants could have moved to dismiss them at any phase of the extensive litigation below. Defendants were put on notice of plaintiffs' fee claim in the original complaint. Hagans/Gibbs was the law of the land throughout the ensuing litigation. Defendants' apparent ignorance of applicable federal law should not excuse them from its operation.

insert from p.13 ★ It is well established in the majority of jurisdictions, including the United States District Court for the District of New Jersey, that the Gibbs test merely requires an evidentiary overlap between the state and federal claims. Guyette v. Stauffer Chemical Co., 518 F. Supp. 521 (D.N.J. 1981). The evidentiary overlap between plaintiffs' Title VIII claim, in

which they alleged that the zoning ordinances in 23 municipalities operated to exclude lower income blacks, and their state constitutional claim, in which they alleged that those same ordinances in those same communities operated to exclude all lower income persons, clearly met that standard.

The Appellate Division found that plaintiffs "mistakenly relied on a series of federal cases" involving pendent jurisdiction. Again, plaintiffs rely on these cases pursuant to the Supreme Court mandate. The Appellate Division may question the appropriateness of the adoption by Congress of what was originally a jurisdictional test for determining entitlement to fees, but it is well established that the federal law, as interpreted by the United States Supreme Court, is binding on the state courts. (Cite Martin v. Hunter's Lessee; Cooper v. Aaron.)

Moreover, the Appellate Division formulation indicates a fundamental misunderstanding with respect to fee and nonfee

claims. Not all federal statutory violations are addressed by the Fees Act. Indeed, the federal statute on which the Maher plaintiffs prevailed was just such a nonfee federal claim. The question is not whether plaintiff prevails on a federal or a state claim, but whether plaintiff prevails on a fee or a nonfee claim. Thus, there is no basis for the Appellate Division's attempt to distinguish the instant case on the grounds that some of the cases relied on by plaintiffs involved federal claims [redacted]:

> In [Maher, Singer, Frank's Chicken House] the plaintiff prevailed in a settlement or based on a determination made from the evidence presented that either a federal statute or the federal Constitution had been violated. Slip op. at 14.

There is no question that where the claim on which plaintiffs prevail is addressed by the Fees Act, as in Frank's Chicken House, plaintiffs may be granted fees. [redacted] Even where plaintiffs prevail on a nonfee federal claim, as in Maher, fees may be awarded. The crucial point here is that parties prevailing on nonfee state claims may also be granted

fees under the Fees Act as set forth in state supreme court decisions which have addressed the question. [fed cases insert]

In International Association of Machinists v. Affleck, 504 A.2d 468 (S.Ct. R.I. 1986), for example, union and striking employees moved for an award of attorney 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 plaintiff's federal fee claim. In 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. (emphasis added.) 504 A.2d at 470.

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, 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.
> (Emphasis added.) Id. at 358.

Maine, too, has adopted the Hagans/Gibbs test mandated by Maher:

> The House Reporter 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, (emphasis added), 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 won on state grounds without the federal claim being granted or denied and was awarded attorney's fees).

In Singer v. State, this Court recognized that plaintiffs prevailing on a nonfee state claim could be entitled to attorneys fees under the Civil Rights Act of 1988 if the state and federal claims were based upon "related legal theories" 95 N.J. 487, 465 [check]. The instant case is analagous to Singer in that plaintiffs here, like the Singer plaintiffs, prevailed on a nonfee claim. The reasoning of the court is equally applicable here: [cite from Singer].

Plaintiffs submit that the legal theories were related within the meaning of Singer. 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.

Even if the state and federal claims were not "legally related," however, plaintiffs would be entitled to fees under a Maher analysis. Congress implicitly recognized that the state and federal claims need not be parallel. As the Maher Court noted in Maher [illegible] (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.

Congress never contemplated that the state and federal claims would necessarily be "legally related," nor has such a requirement been imposed by the Supreme Court. The Appellate Division correctly refused to impose such a test here. It is respectfully submitted that the imposition of an even more stringent test; i.e., requiring the prevailing party to retrospectively prove a prima facie case on a conspicuously inadequate record, similarly contravenes the express intent of the legislature in enacting the fee-shifting civil rights statutes and should be reversed by this Court.

[brief section to effect that Court should decide we meet H/G, and send it back to Serp to add up time sheets]

Conclusion

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. The Appellate Division recognized this principle, but

applied its own test rather than the Maher test explicitly mandated by the Supreme Court.

For the reasons set forth below, plaintiffs urge this Court to deny certification and let that test stand, albeit flawed. If certification is granted, however, it is respectfully submitted that New Jersey should comply with well established federal law and adopt the H/G test set forth in Maher.

JP
BS
attys for CL, ACLU

dated: Feb 15, 1988