

DANIEL TUMPSON, RUSSELL HOOVER, ERIC
VOLPE, CHERYL FALICK, and JOEL
HORWITZ ("COMMITTEE OF
PETITIONERS"),

Petitioners-Plaintiffs-
Respondents/Cross-Appellants

v.

JAMES FARINA, in his capacity as
Hoboken City Clerk, and the CITY OF
HOBOKEN,

Respondents-Defendants-
Appellants/Cross-Respondents

and

MILE SQUARE TAXPAYER ASSOCIATION
2009, INC., GINA DeNARDO, individually
and on behalf of all similarly
situated and 611-613 LLC, individually
and on behalf of all similarly
situated,

Respondents-Intervenors-
Appellants/Cross-Respondents

SUPREME COURT OF NEW JERSEY
Docket No: 072813

On petition for certification
from a Final Judgment of the
Appellate Division of the
Superior Court of New Jersey
(No. A-5454-10T4)

Sat below:

Hon. Clarkson S. Fisher, Jr.,
P.J.A.D., Carmen H. Alvarez,
J.A.D., and Jerome M. St.
John, J.A.D.

PETITION FOR CERTIFICATION

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STATEMENT OF THE CASE

This case presents important questions about the interpretation of the New Jersey Civil Rights Act. Plaintiffs, comprising the statutory Committee of Petitioners responsible for the circulation of a referendum petition, successfully obtained court orders compelling defendants James Farina (the "Clerk") and the City of Hoboken (the "City," and, with the Clerk, the "Defendants"), to place a referendum question on the November 2011 ballot in Hoboken. Although recognizing that these judicial decisions decisively overturned the Clerk's deprivation of Plaintiffs' statutory referendum rights, the Appellate Division's published ruling held that Plaintiffs' success in obtaining these orders converted the Defendants' actions from a "deprivation" of civil rights to a mere "interference" with those rights. Thus, the appellate decision guts both the plain language and intended impact of the NJCRA by punishing virtually all plaintiffs who obtain orders enjoining violations of their civil rights. Specifically, the decision penalizes these and other plaintiffs who, early in a case, obtain an injunction stopping defendants' unlawful activity, by denying them other NJCRA rights and remedies. The ruling extends far beyond the immediate facts of this case, or even to the field of election or municipal law. It offers a crabbed, legally incorrect reading of two substantive provisions of a far

more sweeping and generally-applicable law, the NJCRA, specifically N.J.S.A. 10:6-2(c).

First, the Court misunderstood the concept of "deprivation" of a civil right. In essence, the appeals court ruled that because Plaintiffs successfully obtained a court injunction placing a referendum on the ballot, after having been denied that right by Defendants, they 'only' had their civil rights "interfered" with. That is, they were not "deprived" of their rights. And, since this "interference" was not realized through threats, intimidation or coercion, there was no violation of the NJCRA, and hence no entitlement to the full panoply of remedies under the NJCRA, including counsel fees.

In this way, the Court perversely penalized the Plaintiffs with a dismissal of their NJCRA claims precisely because they had won an injunction vindicating their civil rights. To be sure, that injunction (and several court orders enforcing that injunction) arrested governmental deprivation of Plaintiffs' civil rights; however, one cannot deny that without those orders, the municipality's action deprived them of recognized civil rights - it didn't just interfere with them. As a result, the Court's imposition of a requirement that parties who reverse municipal deprivations by winning injunctions must also prove that the defendants' actions were accompanied by threats,

intimidation, or coercion, runs afoul of the plain language of N.J.S.A. 10:6-2.

Second, the appeals court failed to recognize that the NJCRA is an appropriate vehicle for vindicating both constitutional and statutory rights. Although it, like the trial court, aptly cited to the NJCRA's provisions that allow an action to vindicate deprivations of rights secured by the "Constitution or laws" of the United States or New Jersey, (slip op. (App. # 2) at 22)¹ the court later discussed the NJCRA as if it were a statute designed to vindicate only constitutional rights, as opposed to rights created by statute. (Slip op. at 23-24). As such, the Court fundamentally misunderstood the NJCRA and improperly restricted its ambit to constitutional rights. Plaintiffs' thesis was that their statutory rights to referendum - something enshrined in the text of state law and in various decisions of this court - were violated by the municipality's initial refusal to process their petitions in accord with the statute, and its subsequent defiance of the trial court's order directing the Clerk to do so. The appellate decision, while expressly recognizing referendum as a protected "right" (slip op. at 2, 15), nevertheless did not analyze this statutory right when analyzing the NJCRA. Instead, the court

¹ The Appellate Division's published opinion is attached as Appendix # 2 to this Petition. It will be referred to herein as the "slip op."

meandered into theories Plaintiffs had never pleaded, about whether the municipality's actions had deprived Plaintiffs of a constitutional substantive due process or procedural due process right. (Slip op. at 24). In short, the Court's ruling was premised on the incorrect idea that Plaintiffs were claiming a violation of a constitutional, not statutory right.

The Appellate Division's ruling reflects a serious misconstruction of the plain meaning of the NJCRA, as well a grave misunderstanding of the remedial purposes of this law. The trial court rightly understood that when the municipal clerk decisively rejected the Plaintiffs' lawful demand to have the ordinance submitted to the voters, he deprived Plaintiffs of their statutory right to referendum, and did not merely interfere with that right. The fact that Plaintiffs convinced several judges otherwise before the election occurred, and thus allowed the election to go forward, proves, rather than refutes, Plaintiffs' claim that the NJCRA was violated by Defendants.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The full procedural and factual history of this matter is set forth in the attached opinion of the Appellate Division. (App. #2), Although the procedural history is complex, including multiple appeals and motion practice in the Appellate Division, along with Plaintiffs' successful motion to vacate a stay in this Court (No. 69,234; M-228) (App. # 8), those details

may be presented in a more summary manner, given the limited issues raised by Plaintiff's Petition for Certification.

Briefly stated, Plaintiffs commenced this action on May 4, 2011, challenging the Hoboken Municipal Clerk's refusal to properly process their duly-filed petitions demanding a referendum on a municipal ordinance that had scaled back rent control protections. The five-count Complaint challenged Defendants' actions under theories of mandamus, prohibition, equitable estoppel, waiver, and the NJCRA. By the time the Plaintiffs commenced their court action, their referendum efforts were effectively dead, in that the Clerk (with full knowledge of the Hoboken City Council) had decisively rejected their petitions. By Orders dated June 14, 2011 and June 24, 2011, (App. # 3,4) the first trial judge granted Plaintiffs' application, invalidated the Clerk's rejection of the petition as arbitrary and capricious, directed the Clerk to process their petition, and, subsequently, permitted Plaintiffs to file an amended petition. Defying the Court's order, the Clerk also rejected this amended petition.

Thereafter, there was extensive motion practice in the Appellate Division. (E.g., App. #5). The motion practice in that Court led to an August 25, 2011 Order Enforcing Litigants' Rights by the trial court that reversed the Clerk's defiance of its decision (App. # 6), ordered him to treat the supplemental

petitions as sufficient, and directed that the referendum process proceed in the manner fixed by law. Although a panel of the Appellate Division stayed that Order, (App. # 7), this Court summarily vacated the stay. (App. # 8). Thus, it is clear that but for the various judicial orders entered in this case, the Clerk's actions stopped the Plaintiffs' petitions dead in its tracks.

As the appeals court noted, after the judicial orders placing the referendum question on the ballot were issued, the election was held (where the voters upheld the ordinance). On the eve of the election, the second trial judge granted Plaintiffs' motion for summary judgment on its claims under the NJCRA (App. #9), and after the election, denied Defendants' motion for reconsideration. (App. # 10). The trial judge found that Plaintiffs had successfully proven that (1) referendum rights under the Faulkner Act were among the statutory rights that the NJCRA were intended to vindicate; (2) Defendants' refusal to process the initial and supplemental petitions had deprived plaintiffs of these rights, not merely delayed or interfered with them; and (3) the counsel fees sought by Plaintiffs were reasonable in all respects. (App. # 9, 10). As a result, the trial court entered orders granting summary judgment to Plaintiffs and awarding them counsel fees for work performed at the trial level. The Court declined to rule on

Plaintiffs' request for counsel fees incurred for appellate practice.

Defendants appealed both trial courts' decisions, and Plaintiffs filed a cross-appeal. In a published decision dated May 29, 2013, the appellate panel affirmed the trial judge's rulings about the impropriety of the Clerk's actions. (Slip op. at 13-21).² The panel, however, held that the Clerk's action in denying the initial and amended petitions "does not qualify as a violation of the NJCRA." (Slip op. at 21). The Court's core holding was that Plaintiffs were "not deprived of [their] right to referendum because the Ordinance was submitted to the voters of Hoboken in November 2009 [sic: should be 2011]." (Slip op. at 23). Rather, the Court's view was that the Clerk's actions constituted at most an "interference" with Plaintiffs' rights. (Slip op. at 23-24). Plaintiffs thereafter filed a timely Notice of Petition for Certification. (App. # 1).

QUESTIONS PRESENTED

1. Where a plaintiff obtains an injunction stopping a government defendant's violation of his civil rights, does his

² The Court posited that because the election had been held, the substantive aspects of the appeal might be technically moot, but that the issues they raised were of sufficient importance that they fell within appropriate exceptions to the mootness doctrine on appeal. (Slip op. at 11-13). Regardless of the mootness of the substantive aspects of the appeal under the Faulkner Act, however, neither party disputed that there was still a live controversy over the award of counsel fees to Plaintiff under the NJCRA.

or her success in obtaining the injunction convert the defendant's actions from a "deprivation" of civil rights into mere "interference" with civil rights, thus requiring that plaintiff plead and prove that threats, intimidation, or coercion were used prior to the issuance of the injunction, in order to obtain the remedies the Legislature provided for in the NJCRA?

2. Do the remedies provided by the NJCRA, which textually allows for actions vindicating deprivations of rights secured by the "Constitution or laws" of the United States and this State, apply to violations of Plaintiff's statutory rights of referendum under the Faulkner Act?

REASONS TO GRANT CERTIFICATION/
COMMENTS ON THE APPELLATE DECISION

The Appellate Division's published ruling seriously damages the principles undergirding the NJCRA by holding that a plaintiff who successfully obtains injunctive relief terminating a defendants' violation of civil rights cannot thereafter receive the full range of rights and remedies dictated by the NJCRA. This weakens the deterrent effect of the NJCRA and reduces the possibility that an injured plaintiff will even be able to obtain legal representation to redress a deprivation of their rights.

N.J.S.A. 10:6-2(c) provides that a person who has been deprived of their constitutional or statutory rights³ may sue for the vindication of those rights under the New Jersey Civil Rights Act:

Any person who has been deprived of . . . any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief.

N.J.S.A. 10:6-2(f) further provides that counsel fees may be awarded to a prevailing party in such an action:

In addition to any damages, civil penalty, injunction or other appropriate relief awarded in an action brought pursuant to subsection c. of this section, the court may award the prevailing party reasonable attorney's fees and costs.

This Court has previously and repeatedly recognized that the citizens' ability to promote a referendum under the Faulkner Act is a "right" possessed by citizens. In re Ordinance 04-75, 192 N.J. 446, 459 (2007) ("By enacting N.J.S.A. 40:69A-185, the Legislature provided the voters of Faulkner Act municipalities

³ New Jersey case law acknowledges that a statutory provision may provide a claim for relief under the New Jersey Civil Rights Act, Felicioni v. Administrative Office of the Courts, 404 N.J. Super. 382, 401 (App. Div. 2008), certif. denied, 203 N.J. 440 (2010) and abundant federal case law exists establishing that the remedy under the federal statutes on which the NJCRA was based (42 U.S.C. §§ 1983 and 1988) broadly encompasses violations of federal statutory as well as constitutional law. See e.g., Maine v. Thiboutout, 448 U.S. 1 (1980).

the right to subject an ordinance passed by a city or town council to a popular plebiscite"); In re Petition for Referendum on City of Trenton Ordinance 09-02, 201 N.J. 349, 360 (2010) (referendum law "confers on the citizens 'the right to test a challenged ordinance in the crucible of the democratic process.'") (quotation omitted); see also City of Ocean City v. Somerville, 403 N.J. Super. 345 (App. Div. 2008).

Applying the foregoing framework, the trial judge's decision granting summary judgment on Plaintiffs' NJCRA claims was correct. The court found that Defendants had violated their statutory referendum rights, which could be vindicated under the NJCRA. (App. # 9 at 13-6 to 14-17). Furthermore, the Court explained that Defendants' actions constituted a deprivation, and not merely a delay of Plaintiffs' rights. (Id. at 14-4 to 24). But for the trial court's Orders of June 14, June 24, and August 25, 2011 plus the Appellate Division Order of August 12, 2011 and this Court's Order of October 5, 2011 (App. # 3-6, 8), the right of Hoboken's citizens to vote on the rent control ordinance would have been lost forever, not just delayed. With all due respect to the appellate panel, they missed the point about the causal factors associated with how the referendum ultimately was presented to the voters. It was not good will on the part of the Clerk, or a voluntary surrender when sued: it was judicial action, including a decision of this Court, which

secured for Plaintiffs their right of referendum. These orders were fully justified by the NJCRA itself, including its provision that an injured party can "bring a civil action for . . . injunctive or other appropriate relief." N.J.S.A. 10:6-2(c). Plaintiffs, having obtained one of the remedies fixed by the NJCRA - an injunctive order putting the question on the ballot - should not thereby have to forfeit another NJCRA remedy, the right to counsel fees.

A plaintiff that prevails in litigation under a New Jersey statute that authorizes fee-shifting is entitled to receive fees "as a matter of course in the absence of special circumstances." Dunn v. N.J. Department of Human Services, 312 N.J. Super. 321, 333 (App. Div. 1998). The general formula for computing fees involves the Court computing the number of hours reasonably expended and multiplying it by a reasonable hourly rate. Rendine v. Pantzer, 141 N.J. 292, 335 (1995).

The discretionary authority to deny fees outright is extremely limited and should be sparingly exercised. Gregg v. Hazlet Township Comm., 232 N.J. Super. 34, 37-38 (App. Div. 1989); The African Council v. Hadge, 255 N.J. Super. 4, 12 (App. Div. 1992) (reiterating that "counsel fees should be liberally granted").

An overly vigorous or unconstrained use of the power to deny fees would frustrate and potentially defeat the legislative

purpose underlying the NJCRA (and 42 U.S.C. §§ 1983 and 1988, the federal statutes on which it is based), which exists to promote the vindication of constitutional and certain statutory values by creating a financial incentive for competent counsel to undertake civil rights cases. Student PIRG v. AT&T Bell Labs, 842 F.2d 1436 (3d Cir. 1988); New Jerseyans for Death Penalty Moratorium v. New Jersey Dept. of Corr., 185 N.J. 137, 153 (2005) (absent fee shifting to vindicate public rights, "the ordinary citizen would be waging a quixotic battle against a public entity vested with almost inexhaustible resources"). Moreover, another important value served by awarding attorneys' fees against a public entity that has violated citizens' rights is the deterrent effect that such awards create. Walker v. Guiffre, 209 N.J. 124, 130 (2012) (fee-shifting provisions "are designed ... to promote respect for the underlying law and to deter potential violators of such laws") (citation omitted). The appellate opinion here firmly tells municipal clerks served with initiative or referendum papers that they must process them promptly and in accordance with the law (Slip op. at 13-21). Yet, in Part IV of its opinion, that same court tells clerks that they will suffer no adverse consequences beyond an injunction if they, as the Clerk here, unlawfully reject such a petition and then defy later corrective court orders.⁴ Surely

⁴ In addition, in circumstances like this case where a litigants

this result cannot have been the Legislature's intent in passing a sweeping civil rights act that allows a wide range of rights and remedies when such civil rights are denied.

Moreover, even setting aside the deterrent effect of fee-shifting statutes, this Court cannot ignore the fact that it is primarily because of fee-shifting statutes that cases like this - involving no economic damages - are even brought to Court. Both private firms and public-interest organizations take on substantively meritorious cases like this one with an expectation that if they prevail in substance - and there is no dispute here that Plaintiffs prevailed, with multiple court orders in hand awarding them all the relief they sought - that counsel will be fairly compensated. As the Court explained in the Death Penalty Moratorium case, fee-shifting statutes "share a common rationale: . . . to ensure 'that plaintiffs with bona fide claims are able to find lawyers to represent them[,] . . . to attract competent counsel in cases involving statutory rights . . . and to ensure justice for all citizens.'" Id. at 153 (quoting Coleman v. Fiore Bros., 113 N.J. 594, 598 (1989))

is adjudged to be in violation of another litigant's rights (see App. # 6), and is "accorded relief," counsel fees can be awarded as part of the remedy. R. 1:10-3. Although the trial court's fee award to plaintiffs was based on the NJCRA, and not that rule, that rule nevertheless demonstrates the principle that fee awards are especially appropriate when, as here, a violation of civil rights is accompanied by defiance of a remedial court order by that same government defendant.

(emphasis added). This case not only involved highly accelerated proceedings, but extensive motion practice in the Appellate Division, and a prior appeal to this Court, and as such, required substantial attorney effort at all three levels of the court system. The case ended with Plaintiffs getting their referendum on the ballot - and an appellate affirmance of that result. Surely that cannot be a justifiable reason to deny Plaintiffs their NJCRA rights and remedies. But if this Court allows the published appellate ruling to stand, it will impair the pursuit of "justice for all citizens," that both the Legislature (through the NJCRA) and this Court (through its decisional law) have set as polestars in New Jersey civil rights jurisprudence.

CONCLUSION

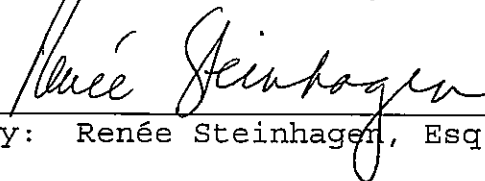
Allowing the Appellate Division's ruling to go uncorrected would create serious damage to the remedial scheme enacted by the Legislature when it passed the NJCRA. The ruling stands for the proposition that a plaintiff who obtains early injunctive relief in a civil rights litigation only suffers an "interference" with their rights rather than a "deprivation." This in turn exponentially increases the proofs that such a successful plaintiff must offer to receive the other rights and remedies under the NJCRA. The ruling also impermissibly truncates the reach of the NJCRA by recognizing only violations

of constitutional rights and not violations of certain remedial statutes. Because both interpretations are contrary to the plain meaning and intent of the NJCRA, the Petition for Certification should be granted.

The undersigned counsel certifies that this Petition presents a substantial question and is filed in good faith and not for the purposes of delay.

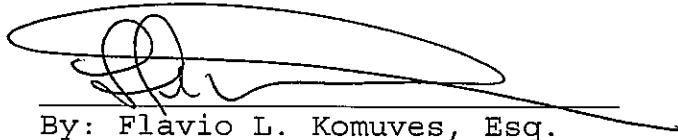
Respectfully submitted,

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Dated: June 27, 2013.