New Jersey
Appleseed

May 3, 2021

Jason H. Orlando, Clerk
New Jersey Superior Court
Appellate Division
Richard Hughes Complex
P.O. Box 006
Trenton, NJ 08625-006Justice C
50 W. Market Street, Room 31
Newark, New Jersey 07102

Hon. Richard J. Geiger
Hon. Carmen H. Alvarez
Hon. Stephanie Ann Mitterhoff

Re: Fuhrman v. Mailander, A-0080-20; __ N.J. Super. __ (App. Div., March 9, 2021)
Request for Leave to Intervene to Secure Post-Judgment Relief and to File a Motion to Correct As Within Time.

Dear Judges Geiger, Alvarez and Mitterhoff:

I am submitting this letter brief in lieu of a more formal brief on behalf of New Jersey Appleseed Public Interest Law Center ("NJ Appleseed") in support of the accompanying motions. These motions are in furtherance of NJ Appleseed's mission to empower voters, and specifically to advance its technical assistance role with respect to its Facilitating Local Initiative and Referendum Project.

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We received a copy of this Court's groundbreaking opinion in Fuhrman v. Mailander soon after it was released; despite our approval of its reasoning and its holding, we have grave concerns, as specifically outlined in the Certification of Renée Steinhagen, Esq., that the decision may inadvertently confuse municipal clerks and potential petitioners. Though we sought a form of post-judgment relief a mere six-days after the 10-day period in which a party may seek reconsideration, we employed an erroneous procedure that we seek to remedy at this time. See Burt v. W. Jersey Health Systems, 339 N.J. Super. 296, 310 (App. Div. 2001)(formal motion required; informal letter insufficient). Per the specific directions of Marie C. Hanley, Chief Counsel of the Appellate Division, we are now making a motion to intervene, pursuant to R. 4:33-2, and a motion to correct *nunc pro tunc* in accordance with R. 2:11-6(c) and R.1:1-2(a).

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STATEMENT OF FACTS

Applicant, NJ Appleseed, incorporates the statement of facts as set forth in the Court's opinion of March 9, 2021, and

those facts set forth in the Certification of Renée Steinhagen, dated May 3, 2021, which are relevant to NJ Appleseed's two motions (or three motions, if the Court considers its motion to file within time separate and distinct).

PROCEDURAL HISTORY

Applicant, NJ Appleseed, incorporates the procedural history set forth in the Certification of Renée Steinhagen, dated May 3, 2021, with respect to post-judgment procedures.

LEGAL ARGUMENT

I. **NJ APPLESEED SHOULD BE PERMITTD TO INTERVENE TO SEEK REVISION OF THE FINAL OPINION IN THIS MATTER UNDER THE DOCTRINE OF CHESTERBROOK LTD. VS.PLANNING BOARD.**

New Jersey courts have recognized that a party adversely affected by a judgment should be granted leave to intervene to pursue an appeal "if a party with a similar intent, who actively litigated the case in the trial court" chooses not to appeal. CFG Health Systems v. County of Essex, 411 N.J. Super. 378, 385 (App. Div.), certif. denied, 202 N.J. 64 (2010). Typically, this occurs when citizen participants rely on government officials to litigate the legality of certain public decisions that directly impact them or the validity of certain public processes.

As set forth in Paragraph 8 of the Certification of Renee Steinhagen, NJ Appleseed did not seek to intervene in this action, because it relied upon both of the parties -- the Committee of Petitioners and the government defendants -- to

protect, in their respect capacities, the voting public's statutory right of referendum. Tumpson v. Farina, 218 N.J. 450 (2014). That is, upon notification of the appeal, NJ Appleseed saw no pressing need to seek *amicus* status and file a brief in support of the Committee of Petitioners. Their referendum question would be on the ballot, and NJ Appleseed was confident that plaintiffs' counsel would ardently advocate for the Committee's right to go forward based on equitable estoppel. Moreover, NJ Appleseed had no reason to assume that the municipality would not, at minimum, inform the court of the statutory procedures that were applicable to the two questions involved in this matter. This was part of the information that the Ridgewood clerk had not properly provided to the Committee of Petitioners when they first had submitted their petition.

In this way, NJ Appleseed's shared interests in this matter with both parties (though if asked to take sides, it would align itself with the Committee of Petitioners). However, once the Court issued its decision, and neither party sought reconsideration or further review of such decision, neither party (and, in particular, the government defendants) no longer, if they ever did, "adequately represent" NJ Appleseed's interests. Cf. Chesterbrooke. Ltd. v. Planning Bd. of Township of Chester, 237 N.J. Super. lll, 124 (App. Div.), certif. denied, 118 N.J. 234 (1989) (finding that once the Planning

Board decided not to appeal final judgment, the Board no longer "adequately represented" the interests of objectors who had participated in the public processes before the Board, and had relied on the Board in the trial court). Though NJ Appleseed is not seeking to appeal the decision, post-judgment intervention is permitted since it is deemed necessary "to preserve some right which cannot otherwise be protected." Warner Co. v. Sutton, 270 N.J. Super. 658, 662 (App. Div. 1994) (quoting Chesterbrooke).

Furthermore, when a party, such as New Jersey Appleseed, seeks intervention "after the final judgment" for purpose of appealing that decision or just seeking an amendment to the written decision, "the critical inquiry is simply whether in view of all the circumstances, the intervener acted promptly after the entry of final judgment." Chesterbrooke, 237 N.J. Super. at 125 (quoting United Airlines. Inc. v. McDonald, 432 U.S. 385, 387 (1977)). In light of the pandemic and NJ Appleseed's initial request to the Court to revise its opinion within 16 days of its publication on-line, NJ Appleseed's motion is timely and certainly does not prejudice either party.[1]

[1] Indeed, NJ Appleseed's actions are certainly more timely than those of the landowners in Chesterbrooke, who first filed a Notice of Appeal from an order denying intervention, and the final judgment, before filing a motion in the Appellate Division for an order permitting intervention on appeal almost two months after they first attempted to seek post-judgment relief using an erroneous procedure.

II. **NJ APPLESEED'S MOTION TO CORRECT THE COURT'S OPINION *NUNC PRO TUNC* SHOULD BE GRANTED IN LIGHT OF THE COURT'S ROLE WITH RESPECT TO PROTECTING VOTERS' CIVIL RIGHTS.**

NJ Appleseed is filing this second (and, if the Court so considers, third) motion pursuant to R. 2:11-6(a), R. 2:11-6(c), and R. 1:1-2(a). Since July 1, 2013, motions for reconsideration received after the 10-day limit set forth in R. 2:11-6(a)[2] must be filed with a motion to file as within time. PRESSLER & VERNIERO, Current N.J. COURT RULES, Comment R. 2:11-6 (GANN 2019).

In general, R. 1:1-2(a) sets forth the standard a court should apply when determining whether to relax a time restriction set forth in another court rule. Specifically, the Rule states:

> The rules in Part I through Part VIII, inclusive, shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. Unless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice. . .
> (emphasis added)

Under the circumstances, NJ Appleseed asserts that a positive public benefit would arise were the Court to grant its

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[2] R. 2:11-6(a) states in part:

> (a) . . . Within ten days after entry of judgment or order, unless such time is enlarged by court order, a party may apply for reconsideration. . .
> (emphasis added)

motion to reconsider as timely. Conversely, were the Court to deny its motion as untimely, the Court would be forgoing an opportunity to educate members of the public about their statutory right of referendum as set forth in N.J.S.A. 40:69A-25.1 and N.J.S.A. 19:60-1.1.

NJ Appleseed is not asking the Court to reverse its decision; only to amend its opinion in order to clarify the statutory procedures, which the municipal clerk should have set forth in her first letter of deficiency, in order to properly inform future voters as to how to proceed. There is no prejudice to either party. On the other hand, NJ Appleseed asserts that a revision, in accordance with its request, would constitute a significant benefit to the public whereas a denial as untimely would constitute a significant injustice.

Furthermore, NJ Appleseed is not making a traditional motion for reconsideration. Rather it is invoking R. 2:11-6(c), which states that "[t]he court may, where appropriate, summarily redetermine the appeal or amend its opinion." See Darel v. Pennsylvania Mfrs. Ass'n Insurance Co., 114 N.J. 416 (1989) (holding that the court may *sua sponte* reverse its decision without a request by a party). Although NJ Appleseed is not asking the Court to reverse its decision or order, but rather merely to revise its opinion in light of the Court's role in protection voters' civil

rights, the sentiment expressed by the N.J. Supreme Court's decision in Darel is nonetheless apt:

> As has been observed elsewhere, "[c]onfession of error is good not only for the soul but for an accurate view of the law." Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 179 n. 1 (1979) (concurring opinion). In any event, whatever might be the result in some other context, we perceive no demonstrable unfairness to defendant in the unfolding of the events leading to the Appellate Division's change of position in this case. All that happened was that the plaintiff was ultimately awarded the judgment of which she had been erroneously deprived the first time around. We are confident that the world will continue to turn if judges are allowed to correct their mistakes.

Darel, *supra*, 114 N.J. at 426.

Let us be clear. NJ Appleseed is not alleging that the Court committed any error in rendering its decision in favor of the Committee of Petitioners and the voters who overwhelmingly cast their vote in favor of the referendum. Rather, in order to make sure that the opinion is properly understood and does not create unnecessary confusion, NJ Appleseed is requesting that the Court revise its opinion to include a footnote or endnote setting forth the appropriate statues governing a petition seeking to move municipal or school board elections to November. We respectfully suggest the following:

> Notwithstanding our holding affirming the phraseology of the single ballot question in this case, moving both the municipal and school board elections to November, and its approval by the voters, we clarify the correct procedure that should be followed, going forward, regarding the petitions that lead to a public question on these matters.

First, in a municipality governed by the Faulkner Act, a change in date of the municipal election is governed by N.J.S.A. 40:69A-25.1(a)(2)(a) and (b). The question of whether to move the municipal election may be initiated by the voters when a petition is "signed" by 25% of the total votes cast in the municipality at the last election of which members of the General Assembly were elected." The format of such petition is governed by N.J.S.A. 40:69A-186, requiring a Committee of Petitioners and a circulator affidavit, and the petition is submitted to the Clerk of the municipality to be processed in accord with N.J.S.A. 40:69A-187 to 196 (omitting 40:69A-189 and parts of 40:69A-191 relating to ordinances). However, because a citizens' petition to amend a municipal charter or change the form of government requires a question, not an ordinance, the specific provision of N.J.S.A. 40:69A-186 requiring the petition to contain "the full text of the proposed ordinance," does not apply to any petition to amend a municipal charter or change the form of government under N.J.S.A. 40:69A-25.1 or -19.

Second, in all municipalities with elected boards of education, a change in the date of the school board election is governed by N.J.S.A. 19:60-1.1(a)(1). The question of whether to move the school board election may be initiated by the voters when a petition is "signed by not less than 15% of the number of legally qualified voters who voted in the district at the last preceding general election of electors for the President and Vice President of the United States." Such a petition must be submitted to the Board of Education, and the Board must submit the question to the County Clerk. The relevant statute does not prescribe any specific format to the petition, and does not require a circulator affidavit.

While N.J.S.A. 40:69A-184 (Faulkner Act) and N.J.S.A. 40:74-9 (Walsh Act) both preserve citizens' rights to initiate "any" ordinance, when a citizens' petition constitutes a proposal to change the municipal charter or the date of board of education elections, neither N.J.S.A. 40:69A-25.1 nor N.J.S.A. 19:60-1.1 (which govern such petitions) require citizens to draft or initiate an ordinance, only a petition that must include a ballot question.

CONCLUSION

For all the foregoing reasons, NJ Appleseed requests that its Motion to Intervene for Post-Judgment Relief and its Motion to Amend the Court's Opinion *Nunc Pro Tunc* be granted.

Respectfully submitted,

/s/Renée Steinhagen
Renée Steinhagen, Esq.
Executive Director, NJ Appleseed

/s/Flavio Komuves
Flavio Komuves, Esq.
Trustee, NJ Appleseed

cc: Scott D. Salmon, Esq.
William W. Northgrave, Esq.
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