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N.J. Justice Sees Old Ruling Reversed on Appeal

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NJ Supreme Court Justice Faustino Fernandez-Vina
Carmen Natale

In an unusual occurrence, a ruling made by a New Jersey Supreme Court justice while he was a trial judge has been reversed by an appeals court.

A two-judge Appellate Division panel Oct. 6 said Justice Faustino Fernandez-Vina erred when, as the Camden County assignment judge, he denied a plaintiff's petition to proceed as an indigent and have her filing fees waived in a lawsuit alleging violations of the state's Open Public Records Act by a school board.

Fernandez-Vina, who was nominated to the Supreme Court by Gov. Chris Christie in September 2013 and who was sworn into office in November of that year, denied the plaintiff's motion in December 2011. In the ruling she is identified only

as L.R.

In denying L.R.'s motion to proceed as an indigent, Fernandez-Vina relied on OPRA's fee-shifting provisions, which say that a successful plaintiff can have his or her counsel fees and costs reimbursed.

But Appellate Division Judges Carmen Alvarez and Alexander Waugh Jr., in an unreported opinion, said that provision would have been of little use to L.R.

"If an indigent person cannot pay the filing fee, the prospect of having the fee reimbursed in the future is of no value," they wrote in *L.R. on Behalf of J.R. v. Cherry Hill Board of Education*.

L.R.'s attorney on the appeal, Cherry Hill, N.J.-based solo Jamie Epstein, said that while the ruling is unpublished, it will have value, especially to law firms and legal services groups that represent indigent clients.

Requiring an indigent plaintiff to pay a filing fee in matters that permit fee-shifting could discourage lawyers from taking those cases, Epstein said.

"The trial court seems to have said that attorneys would have to advance the fees on behalf of the client," he said.

L.R. lives in subsidized housing in Camden, N.J., and is the mother of three children, one of whom is severely disabled, according to the appeals court's opinion. The appeals court said she lives on some child support and Social Security benefits for the disabled child. The court also said she pays \$300 a month in rent and has about \$23,000 in debt.

L.R. has been seeking to determine how much money the Cherry Hill school board has paid out in certain settlement agreements and how many civil rights lawsuits have been filed against the district, according to the opinion. The district has largely complied, but has redacted any information that would identify the plaintiffs. L.R. is demanding that the school board provide the parties' initials.

She filed her OPRA complaint and her motion to proceed as an indigent Nov. 9, 2011. Fernandez-Vina denied the motion Dec. 5, 2011, and a motion for reconsideration was denied Jan. 6, 2012. The school board has not challenged her motions to proceed as an indigent. The lawsuit was later dismissed for failure to prosecute.

L.R. retained Clinton, N.J., solo Walter Luers, who focuses on OPRA cases, and on April 15, 2013, Luers filed a motion to reinstate the complaint. He offered to pay the \$200 filing fee plus the \$30 fee for the motion to reinstate. Fernandez-Vina denied the motion as being out of time.

Epstein, who is acting pro bono, said in his brief to the appeals court that L.R. had previously been permitted by other judges to proceed as an indigent and should have been allowed to do so in this case.

He quoted the U.S. Supreme Court's ruling in *Boddie v. Connecticut*: "A cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's opportunity to be heard."

Epstein said it was wrong for Fernandez-Vina to conclude that OPRA's fee-shifting provision made the filing fee waiver for L.R. unnecessary.

"The implication of this statement is that an attorney who represents a client on a claim with a fee-shifting provision should advance court costs and filing fees in anticipation of a prevailing party fee award at the conclusion of the suit," Epstein said. "Counsel is charging no fee to plaintiff for his representation and so should not be required to advance personal funds in order to litigate plaintiff's claims."

The school board's attorney, Eric Harrison, noted that the board has never opposed any of L.R.'s motions to proceed as an indigent.

"Our only opposition was to the reinstatement of a long-dismissed case, with the knowledge that plaintiff could always file another OPRA request or another OPRA lawsuit," said Harrison, of Methfessel & Werbel in Edison, N.J.

Epstein said he believes it is rare for a justice to have his or her rulings, made while he or she was serving as a trial court judge, reversed.

In fact, most justices do not have experience as trial judges. Rather, they tend to come from private firms or have had close ties to the governors who nominate them through cabinet posts, and thus do not have rulings that could be reviewed.

Currently, the only other justice to serve as a trial judge is Justice Lee Solomon, who succeeded Fernandez-Vina as assignment judge last year. Solomon served as a judge in Camden County from 2006 to 2010.

Justice Jaynee LaVecchia was the director and chief administrative law judge for the Office of Administrative Law from 1989 to 1994.

Judge Mary Cuff is an Appellate Division judge, although she is temporarily assigned to the Supreme Court.

Judges and justices are prohibited by court rule from discussing their rulings, and the judiciary declined to comment.

Other cases Fernandez-Vina decided while in Camden have fared better on appeal.

For example, on Aug. 7, the Supreme Court ruled in *Merchantville v. Malik & Son* that Fernandez-Vina was correct in ruling that a condemning agency is not required to negotiate with the holder of a final judgment of foreclosure.

And, in June, the court said in *Gormley v. Wood* that Fernandez-Vina was correct in finding that a lawyer attacked by her own client at a state-run psychiatric hospital could pursue claims against state officials.

Fernandez-Vina recused from the *Merchantville* ruling. *Gormley* was argued before he was sworn in as a justice.

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