Law Offices
of
Saponaro and Sitzler
The Newbold House
27 Cedar Street
Mount Holly, New Jersey 08060
609-518-1256
609-267-8080
FAX 609-518-1257

GEORGE R. SAPONARO*
WILLIAM EMMETT SITZLER
*Member NJ and MD Bars

CRISTIAN M. TOWERS
Member NJ and PA Bars

November 2, 2007

Honorable Renee M. Bumb, J. U.S. District Court
Mitchell H. Cohen U.S. Courthouse
1 John F. Gerry Plaza
P.O. Box 886
Camden, NJ 08101

Re: ***Assembly of God v. Township of Riverside***
Docket No: 06-CV-3842-RMB-AMB

Dear Judge Bumb:

Enclosed herein please find an original and one copy of the Defendant's Brief in Opposition for Plaintiff's Application for Fees. Kindly file same and provide me with a stamped filed copy.

Thank you for Your Honor's attention to this matter.

Respectfully submitted,

GEORGE R. SAPONARO

GRS:amc
cc: Ann Marie Donio, U.S. Magistrate
William Sanchez, Esquire

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

ASSEMBLY OF GOD CHURCH RIVERSIDE, NEW JERSEY, et al Plaintiffs, v. **TOWNSHIP OF RIVERSIDE,** Defendant.	THE HONORABLE ANN MARIE DONIO CIVIL ACTION NO: 06-CV-3842-RMB-AMD **DEFENDANT'S BRIEF IN RESPONSE TO PLAINTIFF'S MOTION FOR FEES**

STATEMENT OF FACTS

1. The Township of Riverside enacted an Ordinance in an effort to address a growing problem with undocumented and illegal aliens.

2. One of the goals sought by the enactment of the subject Ordinance was to curb increasing housing and parking violations that were largely being committed by such persons.

3. The Ordinance was based on a similar one enacted in Hazelton, Pennsylvania.

4. Due to the challenge of the Constitutionality of the Hazelton Ordinance, the Township of Riverside decided not to enforce its Ordinance pending the outcome of the litigation in Hazelton.

5. In July of 2007, the Federal Judge presiding over the Hazelton matter ruled the Ordinance was unconstitutional.

6. Shortly after the ruling in the Hazelton matter, the Riverside Township Committee convened in a special session to discuss repealing the subject Ordinance.

7. On September 17, 2007, the Ordinance was repealed, never having been enforced.

LEGAL ARGUMENT

I. PLAINTIFFS HAVE NOT MET THEIR BURDEN WITH REGARD TO THE APPLICATION FOR ATTORNEYS' FEES.

In order for a Court to grant an application for attorneys' fees, the Plaintiffs must establish that they are a prevailing party. "A 'prevailing party' is one who has been awarded some relief by a court." Hanrahan v. Hampton, 446 U.S. 754, 758 (1980).

This Honorable Court has directed the parties to specifically address the "catalyst theory" in our respective briefs. The "catalyst theory" stands for the premise that "a plaintiff is a 'prevailing party' if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." Buchanon Bd. & Care Home, Inc. v. West Virginia Dept. of Health and Human Resources, 532 U.S. 598, 601 (2001). Buchanon is the seminal case on the "catalyst theory" and it is provides an in-depth analysis of the reasoning and rationale behind the Court's decision. The fact that the Plaintiffs have neglected to address it in any capacity in their Brief is foretelling that they realize its import. Buchanon represents a death knell for the Plaintiffs' application. There can be no other explanation for its absence, or for that matter, the absence of any case law specifically addressing the "catalyst theory."

The answer is clear. The law is well settled that the "catalyst theory" is not supported in conferring "prevailing party" status for the purpose of fee applications. In Buchanon, the Supreme Court ruled that merely being a "catalyst" to a defendant's voluntary change is insufficient to be considered a "prevailing party" for the purposes of recovering fees. "Although the Buchanon Court recognized that the plaintiff's suit might have been a catalyst of the

defendant's voluntary, legislative change, it held that the so-called "catalyst theory" was an insufficient basis on which to confer "prevailing party" status." Id., at 602; *See Also*, John T. v. Delaware County Intermediate Unit, 318 F.3d 545, 556 (U.S. Court of Appeals for the Third Circuit 2003). In denying the fees sought, the Buchanon court reasoned that the "catalyst theory" permits "an award where there is no judicially sanctioned change in the legal relationship of the parties" and that such a result would be contrary to existing precedent. Buchanon, at 604. The judicial imprimatur on the change is fundamentally necessary. Id., at 605.

In A.P. Boyd, Inc. and the Mechanical Contractors Assn. of New Jersey, Inc., v. Newark Public Schools, 44 Fed. Appx. 569 (U.S. Court of Appeals for the Third Circuit 2002), the Court ruled in an unpublished opinion that the "catalyst theory" is "moribund" in this judicial circuit. Id., at 573 (*Citing* Truesdell v. Phila. Hous. Auth., 290 F.3d 159, 163 n.3 (3d Cir.2002).

In the present case, the Township of Riverside enacted an Ordinance in an effort to address a legitimate concern surrounding illegal immigrants and the increased unlawful conduct allegedly perpetrated by such individuals. This Ordinance was fashioned after one recently enacted in Hazelton, Pennsylvania to address similar concerns in that town. After the Ordinance in Hazelton came under fire questioning its constitutionality, the Township of Riverside *voluntarily* refrained from enforcing its own Ordinance. Then, in or about August of 2007, shortly after a Federal Judge struck down the Hazelton Ordinance as unconstitutional, the Township Committee convened a special session aimed at repealing the subject Ordinance. These actions were taken by the Township of Riverside *voluntarily*, without any Court Order, Settlement Agreement, or Judgment. The Plaintiffs argue in their Brief that changes were made to the Ordinance and that the act of its repeal was brought about as a result of the within lawsuit.

This is not true. The Township of Riverside considered all of the social and economic ramifications of maintaining the Ordinance as well as other reasoning in its decision-making process. The Township also went through a shift in the political make-up of the governing Committee which may have impacted the process. All of these things, in conjunction with the Federal ruling on the constitutionality of the Hazelton Ordinance, were considered and played a role in modifying and ultimately repealing the subject Ordinance.

In light of the fact that there has been no legal change to the parties' respective positions and that the issues presented to this court for determination concerning the Ordinance are now moot due to its being repealed, the Plaintiffs cannot be considered a "prevailing party" for the purpose of fee shifting. It is clear that there has been no alteration to the legal relationship of the parties as no Orders, Judgments or Settlement Agreements have been entered. The Ordinance was voluntarily repealed and even, assuming *arguendo*, that Plaintiffs' actions were the "catalyst" of that change, the well-settled law in this jurisdiction does not permit fee-shifting in such instances.

II. PLAINTIFFS FEE REQUEST IS DEFICIENT AND THEREFORE SHOULD BE DENIED.

In the event the court determines that the Plaintiffs somehow satisfy the "prevailing party" burden, the application must either be denied and/or modified due to its unreasonableness in its present form. "[T]he court must examine the record to determine that the hours billed are not 'unreasonable for the work performed.'" A.V. and M.V. v. Burlington Township Bd. of Education, 2007 U.S. Dist. LEXIS 47309 (3d Cir. 2007) (*Citing* Washington v. Philadelphia

County Court of Common Pleas, 89 F.3d 1031, 1037 (3d Cir. 1996).

In the present application, the Plaintiffs submit invoices that total $87,750.00. The invoices, although divided into categories such as "Senior attorney and paralegal time spent in New Jersey," the entries are not made with sufficient specificity as to identify a particular issue or measure of relief sought for the entry. Furthermore, for all the entries for time spent in New Jersey, it appears that billing was entered for 100% of the waking day for each person for each day. This is clearly inappropriate over-billing. In fact, most of the subsequent entries appear to be blanket billing for an entire office-day. From August 4, 2006, until September 27, 2006, there was not a single entry for the Senior Attorney of less than 6.5 hours on any given day. As the court said in Washington, "where the documentation of hours is inadequate, the district court may reduce the award accordingly." Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1037 (3d Cir. 1996). In this case, if the court deems the Plaintiffs are a prevailing party, the fees sought must be adjusted significantly downward.

CONCLUSION

While this country may have been founded by immigrants, times have changed over the past 121 years. Immigration laws and the need to control our borders have replaced the "open border" that seemingly existed back when the country was founded. Riverside attempted to address this growing problem by enacting the subject Ordinance. However, the Township never enforced the Ordinance in the wake of the difficulties experienced in Hazelton, Pennsylvania, and while they reconsidered its social and economic impact. The Township ultimately repealed the Ordinance voluntarily.

The Plaintiffs cannot be construed as a "prevailing party" for the purpose of being awarded fees. It is respectfully submitted that the Plaintiffs have failed to meet their burden to justify fee shifting and the within application should be denied. In the alternative, it is argued that the fee application submitted by the Plaintiffs is unreasonable, in the rate and number of hours charged as well as specificity and accordingly it should either be disregarded or substantially adjusted downward.

Respectfully Submitted,

GEORGE R. SAPONARO, ESQ.
Solicitor, Township of Riverside

CRISTIAN M. TOWERS, ESQ.
On the Brief

71 of 499 DOCUMENTS

A.P. BOYD, INC. AND THE MECHANICAL CONTRACTORS ASSOCIATION OF NEW JERSEY, INC. v. NEWARK PUBLIC SCHOOLS (District Court No. 00-cv-00100); NORTHERN NEW JERSEY CHAPTER, INC. NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION v. THE NEWARK PUBLIC SCHOOLS (District Court No. 00-cv-00101); AP-Boyd, Inc.; The Mechanical Contractors Association of New Jersey, Inc., Appellants

No. 01-4250

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

44 Fed. Appx. 569; 2002 U.S. App. LEXIS 16019

July 19, 2002 Submitted under Third Circuit LAR 34.1(a)
August 7, 2002, Decided
August 7, 2002, Filed

NOTICE: [**1] RULES OF THE THIRD CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: On Appeal from the United States District Court for the District of New Jersey. (D.C. Nos. 00-cv-00100 & 00-cv-00101). District Judge: Honorable Joseph A. Greenaway.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, contractors and a contractors' association, sued appellee public school district for maintaining a "set-aside" program for construction contracts. The contractors sought declaratory relief, but the work was completed before the case was heard. The contractors requested attorneys' fees under 42 U.S.C.S. § 1988, but the United States District Court for the District of New Jersey denied the request and the contractors appealed.

OVERVIEW: The district court consolidated the case with a similar case brought by electricians. The electricians entered into a consent order that provided that the school district would conduct a study to determine whether a set-aside program was warranted. Although the contractors refused to join the consent order, they argued they were entitled to attorney's fees under the "catalyst theory"--even though they did not prevail on the merits, the suit brought about a voluntary change in the school district's conduct. However, this theory was no longer viable because the United States Supreme Court had rejected it. The contractors then tried to amend their complaint to seek nominal damages so that they could claim to be the "prevailing party." The district court rejected this request, and the appellate court agreed. The contractors' complaint sought injunctive and declaratory relief, not compensatory damages, nominal or otherwise. This relief became moot because the work had been completed. The contractors could have been a prevailing party had they joined the consent order. There was no judicially sanctioned change in the legal relationship between the contractors and the school district.

OUTCOME: The appellate court affirmed the decision of the district court.

CORE TERMS: moot, set-aside, nominal damages, contractors, catalyst, prevailing party, injunctive relief, teachings, lawsuit, declaratory relief, consent decree, is also mo, injunctive, electrical, mootness, entitled to attorneys' fees, attorneys' fees, compensatory damages, judicial estoppel, irretrievably, instituted, plumbing, enjoined, inferred, nominal, enjoin, phase, join, equitable

LexisNexis(R) Headnotes

Civil Procedure > Justiciability > Mootness > General Overview
[HN1] A claim for nominal damages, extracted late in the day from a plaintiff's general prayer for relief and asserted solely to avoid otherwise certain mootness, bears close inspection.

Civil Procedure > Judgments > Preclusion & Effect of Judgments > Estoppel > Judicial Estoppel
[HN2] Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. This rule, known as judicial estoppel, generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.

Civil Procedure > Justiciability > Mootness > Real Controversy Requirement
[HN3] A case is moot when it has lost its character as a present, live controversy of the kind that must exist to avoid advisory opinions on abstract opinions of law. The mootness doctrine is centrally concerned with a court's ability to grant effective relief. If developments occur during the course of adjudication that eliminate a plaintiff's personal stake in the outcome of a suit or prevent a court from being able to grant the requested relief, the case must be dismissed as moot.

Civil Procedure > Justiciability > Mootness > Voluntary Cessation Exception
[HN4] Although ordinarily the voluntary cessation of allegedly illegal conduct does not deprive a federal court of jurisdiction, such action does bear on whether the court should, in the exercise of its discretion, dismiss the case as moot. However, some deference must be accorded to a state's representations that certain conduct has been discontinued.

Civil Procedure > Justiciability > Mootness > General Overview
Criminal Law & Procedure > Sentencing > Corrections, Modifications & Reductions > Eligibility, Circumstances & Factors
[HN5] Declaratory relief is moot when the challenged acts have already "irretrievably occurred."

Civil Procedure > Settlements > Settlement Agreements > General Overview
Civil Procedure > Judgments > Entry of Judgments > Consent Decrees
Civil Procedure > Judgments > Entry of Judgments > Enforcement & Execution > General Overview
[HN6] To be a prevailing party and thus entitled to attorneys' fees under 42 U.S.C.S. § 1988(b), the party must have either obtained a judgment on the merits or be a party to a settlement agreement that is expressly enforced by a court through a consent decree.

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview
[HN7] In the Third Circuit, for purposes of awarding attorney's fees, the "catalyst theory" is moribund.

COUNSEL: For AP BOYD INC., MECH CONTR ASSOC NJ, Appellants: Edward J. Frisch, Lindabury, McCormick & Estabrook, Westfield, NJ.

For NEWARK PUB SCH, Appellee: Vito A. Gagliardi, Jr., Porzio, Bromberg & Newman, Morristown, NJ.

JUDGES: Before: McKEE, FUENTES and ALDISERT, Circuit Judges.

OPINION BY: Ruggero J. Aldisert

OPINION

[*570] OPINION OF THE COURT

ALDISERT, Circuit Judge.

We decide today that Appellants A.P. Boyd, Inc. and the Mechanical Contractors Association of New Jersey, Inc. are not entitled to attorneys' fees for seeking declaratory and injunctive relief against the Newark Public School District. We will affirm the judgment of the district court.

Appellants filed suit against the Newark Public School District for maintaining a "set-aside" program for electrical and plumbing contracts for the Malcolm X. Shabazz High School (the "Shabazz Project"), as well [**2] as for Appellee's policy

of race-based contracting. Appellants argued that the Court's decision in City of Richmond v. J.A. Croson Co., 488 U.S. 469, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989), rendered Appellee's actions unconstitutional because the set-aside program, purportedly instituted according to Article 15 of the Public School Contracts Law ("PSCL"), N.J. Stat. Ann. 18A:18A-51 through 59, impermissibly discriminated according to race, in violation of Article 1 section 5 of the New Jersey Constitution, 42 U.S.C. §§ 1983, 1988(b) and (c) and section 1 of the Fourteenth Amendment to the United States Constitution. The set-aside program refers to the practice of excluding non-minority contractors from bidding on particular projects, in which they otherwise would be eligible, in order to assist minority contractors in getting work. Appellants sought both declaratory and injunctive relief, attempting to have the contract awards enjoined or nullified, and the set-aside program declared unconstitutional.

The district court consolidated Appellants' case at trial with a similar action brought by the National Electrical Contractors Association ("NECA"). [**3] The School District and NECA entered into a Consent Order which provided that the District would conduct a study to determine whether a set-aside program was warranted. The Order further provided that the District would not reinstate a set-aside program until such time as the study had been completed and found to warrant such a program. Appellants refused to join in the Consent Order.

Meanwhile, the electrical and plumbing work on the Shabbazz Project had been awarded and, for all intents and purposes, had been substantially completed. Because Appellants sought only to vacate the contracts and enjoin the work, the court determined that their action was now moot. Appellants then sought attorneys' fees under the "catalyst theory" as articulated by this court in Baumgartner v. Harrisburg Hous. Auth., 21 F.3d 541 (3d Cir. 1994). Appellants relied ostensibly on the theory that, although they did not receive a judgment in their favor, the Consent Order was germinated by Appellants' lawsuit, and that their lawsuit was the catalyst that brought about the reforms. This contention is argued vigorously even though Appellants refused to join in the Consent Order. That aside, the [**4] Court has rejected the catalyst theory in Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res., 532 U.S. 598, 149 L. Ed. 2d 855, 121 S. Ct. 1835 (2001). Appellants then sought to amend their complaint to [*571] request nominal damages. Their goal was to thereby qualify as a prevailing party under the prevailing party theory, and thus be entitled to fees. The district court denied the request and this appeal followed.

Appellants present three issues. They argue that the district court was inconsistent in its application of the teachings of Buckhannon with respect to nominal damages, while determining that their equitable arguments were moot; that they were prevailing parties by virtue of the Consent Order and alternatively, that the district court erred in applying the teachings of Buckhannon. Because we are writing for parties who are familiar with the facts and procedural history in the district court, we will discuss only the legal issues presented before us and the material facts relating thereto.

I.

Reducing Appellants' first argument to a logical syllogism, their major premise is that when a case is moot, the court is prohibited from considering any [**5] other motion; this case is moot; therefore the court may not consider the nominal damages issue. So stated, it becomes obvious that this contention takes the form of the classic material fallacy of non sequitur. It was Appellants who argued that because their equitable contentions were determined as moot, the court should have considered an implied demand for compensatory damages in the form of nominal damages. Their request having been denied, they now argue before us that the court's action was inconsistent.

A.

Appellants are not entitled to nominal damages because, to revert to a common law analysis that still persists on the question of whether one is entitled to a jury trial, their complaint sounds in equity and not law. It sought injunctive and declaratory relief, not compensatory damages, nominal or otherwise. We apply the teachings of Fox v. Bd. of Trustees of the State Univ. of N.Y., 42 F.3d 135 (2d Cir. 1994), where students brought an action against SUNY seeking declaratory and injunctive relief on First Amendment grounds. Because the plaintiffs were no longer students during the litigation, they argued, as do Appellants here, that they implicitly pled nominal [**6] damages when requesting "such other relief as the court deemed just and proper." The court responded by stating: "there is absolutely no specific mention in [the Complaint] of nominal damages. Nor can a request for such damages be inferred from the language of [the Complaint]." Fox, 42 F.3d at 141; see also Arizonans for Official English v. Arizona, 520 U.S. 43, 71, 137 L. Ed. 2d 170, 117 S. Ct. 1055 (1997) ([HN1] "a claim for nominal damages, extracted late in the day from [plaintiff's] general prayer for relief and asserted solely to avoid otherwise certain mootness, [bears] close inspection").

It would have been preferable if Appellants' Brief contained a Summary of Argument, as required by Rule 28(a)(8), Federal Rules of Appellate Procedure, to make more clear how this argument relates to their attack on mootness on the theory that a claim for nominal damages could be inferred from the averment "such other relief as the court may award." Their contention here flies in the face of their argument in support of a preliminary injunction where their counsel argued: "If the project is

awarded to somebody else, my client loses that project, he has no right [**7] of action to collect any monetary damages." Appellants' App. at 90. At the very least, the nominal damages argument is foreclosed by dictates of Judicial Estoppel. See New Hampshire v. Maine, 532 U.S. 742, 749, 149 L. Ed. 2d 968, [*572] 121 S. Ct. 1808 (2001) ([HN2] "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him . . . This rule, known as judicial estoppel, generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.") (internal citations omitted).

B.

Subsumed in this "inconsistency" argument is Appellants' contention that the matter was not moot. We now turn to this contention. [HN3] A case is moot when it has lost its character as a present, live controversy of the kind that must exist to avoid advisory opinions on abstract opinions of law. Diffenderfer v. Cent. Baptist Church of Miami, Florida, Inc., 404 U.S. 412, 414, 30 L. Ed. 2d 567, 92 S. Ct. 574 (1972) [**8] (per curiam).

> The mootness doctrine is centrally concerned with the court's ability to grant effective relief. 'If developments occur during the course of adjudication that eliminate a plaintiff's personal stake in the outcome of a suit or prevent a court from being able to grant the requested relief, the case must be dismissed as moot.'

County of Morris v. Nationalist Movement, 273 F.3d 527, 533 (3d Cir. 2001) (quoting Blanciak v. Allegheny Ludlum Corp., 77 F.3d 690, 698-699 (3d Cir. 1996). Appellants' lawsuit is moot because they sought only injunctive or declaratory relief by voiding the contracts. The work is substantially finished, a new study of minority participation is being conducted, and no MBE set-aside contracts will be awarded in the meantime.

In N.J. Tpk. Auth. v. Jersey Cent. Power and Light, 772 F.2d 25 (3d Cir. 1985), we held that the plaintiff's action to enjoin the shipping of hazardous materials on the New Jersey Turnpike was moot because there was no reasonable expectation that the wrong would be repeated.

Similarly, in Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50 (2d Cir. 1992), [**9] plaintiff contractors brought a 1983 claim against the State of New York alleging constitutional violations stemming from the state's minority set-aside program. The court held that because New York State had instituted emergency regulations for suspending enforcement of the set-aside program pending a post Croson study, plaintiff's claims were moot. It reasoned that [HN4] although "ordinarily the voluntary cessation of allegedly illegal conduct does not deprive a federal court of jurisdiction, such action does bear on whether the court should, in the exercise of its discretion, dismiss the case as moot." Id. at 59. It noted that "some deference must be accorded to a state's representations that certain conduct has been discontinued." Id.

Finally, in Maryland Highways Contractors Assn., Inc. v. State of Md., 933 F.2d 1246 (4th Cir. 1991), a case with facts almost identical to those present here, the contractors had alleged that the state's minority set-aside program violated their equal protection rights. Because Maryland commissioned a post Croson study during the pendency of the appeal, the court held that plaintiff's claims became moot. We are persuaded by [**10] the reasoning of these cases.

Moreover, we believe that [HN5] declaratory relief is also moot when the challenged acts have already "irretrievably occurred." [*573] Accordingly, we apply the teachings of N.J. Tpk. Auth., that the claim for injunctive relief had become "academic by reason of these changed circumstances . . . ." Id. at 27. Here, as in N.J. Tpk. Auth., the challenged action awarding the contracts has already occurred, and the work required by them has already been performed. There is no longer a "'subject matter upon which the judgment of the court can operate' to make a substantive determination on the merits." Id. at 30 (quoting Ex Parte Baez, 177 U.S. 378, 390, 44 L. Ed. 813, 20 S. Ct. 673 (1900)); see also Jersey Cent. Power and Light Co. v. State of N.J., 772 F.2d 35, 36 (3d Cir. 1985) (holding that injunctive claim was rendered "meaningless since the State action sought to be enjoined has irretrievably occurred").

II.

For Appellants [HN6] to be prevailing parties and thus entitled to attorneys' fees under 42 U.S.C. 1988(b), they must have either obtained a judgment on the merits or be a party to a settlement agreement that is expressly enforced by the court through a consent decree. [**11] Neither has occurred here. First, as previously discussed, they have not prevailed on the merits because their claims were dismissed as moot. They were not a party to a court enforced consent decree because they deliberately refused to be a party to the Consent Order. There has been no "judicially sanctioned change in the legal

relationship" between Appellants and the District. Buckhannon, 532 U.S. at 605. Appellants' application for attorneys' fees therefore rests entirely on the catalyst theory.

III.

We reject the alternative argument that [HN7] the catalyst theory is alive and well in this judicial circuit. Indeed, it is moribund. Truesdell v. Phila. Hous. Auth., 290 F.3d 159, 164 n.3 (3d Cir. 2002) ("In Buckhannon, the Supreme Court rejected the "catalyst theory," holding that where a party has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct, the plaintiff is not a "prevailing party.").

* * * * *

We have considered all contentions presented by the parties and conclude that no further discussion is necessary.

[**12] The judgment of the district court will be affirmed.

/s/ Ruggero J. Aldisert

Circuit Judge

DATED: August 7, 2002