



Caution

As of: Jan 30, 2012

**BOBBIE HUMPHRIES, Plaintiff-Respondent/Cross-Appellant, ¹ v. POWDER
MILL SHOPPING PLAZA AND HOLLY GARDENS, INC.,
Defendants-Appellants/Cross-Respondents.**

1 At oral argument, plaintiff withdrew her cross-appeal seeking further enhancement of counsel fees in light of our recent decision in *Walker v. Giuffre*, N.J. Super. , (App. Div. 2010) (slip op. at 17).

DOCKET NO. A-6038-08T1

SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

2010 N.J. Super. Unpub. LEXIS 2664

**October 5, 2010, Argued
November 4, 2010, Decided**

NOTICE: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

SUBSEQUENT HISTORY: Certification granted by *Humphries v. Powder Mill Shopping Plaza & Holly Gardens, 2011 N.J. LEXIS 553 (N.J., Apr. 12, 2011)*

PRIOR HISTORY: [*1]

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-2889-05.

COUNSEL: Joseph A. O'Neill argued the cause for appellants/cross-respondents (Garofalo & O'Neill, P.A., attorneys; Mr. O'Neill, of counsel and on the brief).

Edward A. Kopelson argued the cause for respondent/cross-appellant.

JUDGES: Before Judges Wefing, Payne and Koblitz.

OPINION

PER CURIAM

Defendants Powder Mill Shopping Plaza and Holly Gardens, Inc., owners of the Powder Mill complex (Powder Mill), which includes the Powder Mill Shopping Plaza (Shopping Plaza) and the Powder Mill Corporate Park (Corporate Park), appeal the trial judge's award of counsel fees to plaintiff Bobbie Humphries under the fee-shifting provisions of the Americans with Disabilities Act (ADA), *42 U.S.C. § 12205*, and the New Jersey Law Against Discrimination (LAD), *N.J.S.A. 10:5-27.1*. After considering the contentions raised on appeal in light of defendants' arguments we affirm in part and reverse in part. We remand for the trial judge to enter an order reducing Humphries's counsel fees by the twenty percent enhancement she awarded.

Humphries alleged that several aspects of the Shopping Plaza's parking facilities were not in compliance with the [*2] Americans with Disabilities Act Accessibility Guidelines (ADAAG), 28 C.F.R. Part 36 Appendix A §§ 4.6.2 -- 4.6.4 (2010), *N.J.S.A. 39:4-198* and the applicable provisions of *N.J.A.C. 5:23-7.10*, which govern accessible parking requirements. The parties resolved part of their dispute by a settlement that required defendants to pay Humphries \$ 2500 in damages and to modify the parking area at the Shopping Plaza to become compliant with the ADAAG. The partial settlement left to the trial court a determination whether four or six handicap parking spaces were required at the Shopping Plaza and a decision on the issue of counsel fees. The trial judge determined that five handicap spaces were necessary in the ninety-four space lot at Powder Mill, the only lot that could provide individuals with disabilities access to the Shopping Plaza. Able-bodied patrons of the Shopping Plaza used other parking lots at lower levels of Powder Mill connected by stairs to the Shopping Plaza. The trial judge awarded counsel fees to plaintiff, in the amount of \$ 74,683.81, including a twenty percent enhancement, after granting plaintiff's counsel a 120-day extension to file his application for counsel fees.

Defendants [*3] raise the following issues on appeal:

I. THE PLAINTIFF, BOBBIE HUMPHRIES, WAS NOT THE PREVAILING PARTY AS DEFINED BY STATUTE AND DID NOT SUCCEED ON ANY SIGNIFICANT ISSUE IN THE LITIGATION OR ACHIEVE ANY SIGNIFICANT BENEFIT SOUGHT BY BRINGING THE SUIT AND IS NOT ENTITLED TO ATTORNEY FEES.

II. THE DETERMINATION OF THE PARKING COUNT RELIED ON BY THE COURT IS WITHOUT FOUNDATION ON THE RECORD.

III. PLAINTIFF'S FEE MOTION IS DEFECTIVE AND OUT OF TIME.

IV. THE COURT ERRED BY ALLOWING PLAINTIFF/RESPONDENT TO

CONTEST DOCUMENTS THAT HAD BEEN ADMITTED AS STIPULATED FACTS BY THE PARTIES.

Before Humphries filed suit, Disabled Advocates Working for Northwest (DAWN) wrote a letter to defendants on April 28, 2005, complaining about insufficient handicap spaces and curb cuts. Defendants responded on May 5, 2005, that

the complex was built many years ago, pursuant to laws and approvals in effect at that time. None of the changes you suggest can be made without substantial time, effort, expense and, ultimately, governmental approvals.

Plaintiff initially contacted her lawyer on May 19, 2005, after having trouble accessing a restaurant at the Shopping Plaza. Plaintiff, a member of DAWN, is confined to a wheelchair [*4] because of a spinal cord injury she suffered in 1973. She drives a van with a wheelchair platform lift. Plaintiff did not contact DAWN regarding the accessibility of the parking facilities at Powder Mill, and was unaware of any contact between DAWN and defendants. Several days after Humphries contacted counsel, DAWN also reached out to him regarding accessibility at Powder Mill.²

2 Counsel specializes in cases involving the rights of individuals with disabilities.

On June 15, 2005, plaintiff's attorney contacted defense counsel concerning the accessibility issues at Powder Mill. In his letter, plaintiff's counsel advised defense counsel that the Shopping Plaza's parking lot contained

too few handicap parking spaces, inadequate signage at existing handicap parking spaces, improper location of handicap parking spaces, absence of accessibility signage, and inadequate access to the stores at the complex including a broken-up curb ramp at the west end and a suicide ramp at the east end of the Plaza.³

Plaintiff's counsel further advised defense counsel that if

his clients did not promptly agree to fix these issues, a lawsuit would be filed.

3 Plaintiff's counsel asserts that this ramp is a "suicide [*5] ramp" because it has an incline which significantly exceeds the permissible scope under the ADAAG, 28 *C.F.R.* Part 36 App. A, § 4.1.6.(3)(a) (2010). This steep ramp at Powder Mill connected the shopping center walkway to handicap parking in a lower lot. A ramp that might appear handicap accessible but in fact is dangerous for wheelchair use could reasonably be considered much more dangerous than stairs that are clearly not wheelchair accessible; hence the moniker "suicide ramp."

Defense counsel responded with two letters. First, he wrote explaining he would need six weeks to address these issues with his client who was out-of-town. Ten weeks later, on August 25, 2005, he wrote another letter, asserting that Valley National Bank was responsible for making some of the requested accommodations, the "suicide ramp" was not intended for handicap access, and his client would improve signage, "patch" areas and add one handicap space. No time frame for these efforts was provided. Plaintiff's counsel responded requesting drawings of the planned remediation within thirty days and a copy of a contract with a vendor to make the accommodations within forty-five days thereafter. Defense counsel replied [*6] by saying that his client was engaged in reviewing the site with town officials, who were later determined to be a town police officer.

Humphries filed suit on October 13, 2005. Her expert, Edward Hoff, prepared a report after his February 14, 2007, site inspection. He opined that three lots contained 156 parking spots serving patrons of the Shopping Plaza. Two of the lots were on a lower level accessible to the Shopping Plaza by stairs. These lots contained handicap spots for customers of the establishments they were initially intended to serve. These handicap spots could not serve the Shopping Plaza due to their location. Pursuant to ADAAG, 28 *C.F.R.* Part 36 App. A, §§ 4.6.2 - 4.6.4 (2010), and *N.J.A.C.* 5:23-7.10, 156 parking spots require six handicap spots, with at least one spot being van accessible. He also indicated that all curb ramps that served the Shopping Plaza from the parking lot were too steep to comply with regulations.

Defendants conceded that able-bodied patrons of the

Shopping Plaza used two other parking lots located at a lower level because the ninety-four space lot on the same level as the Shopping Plaza was insufficient to service all of the shoppers. Defendants presented [*7] no expert in opposition to Mr. Hoff.

On March 20, 2008, the parties entered into a stipulation of settlement resolving most of the issues of the case. Defendants agreed to provide striping and signage for the existing handicap spots, repair two of the three ramps that serviced the Shopping Plaza and pay Humphries \$ 2500. The parties had two unresolved issues that they agreed the judge would decide. They framed those two issues as follows:

pursuant to the ADA and NJ Law whether the appropriate number of handicapped [sic] parking spaces at Powder Mill Shopping Plaza is four or six; and

attorney's fees and costs pursuant to the ADA and the LAD pertaining to the subject matter of this Stipulation.

They also agreed that the attached "stipulated facts and documents for trial . . . may be relied upon by the parties." The stipulated facts and documents relevant to this appeal are:

5. Invoices of MST Masonry dated June 25, 2005 and July 20, 2005 detailing work done to defendants' site [that] were supplied to plaintiff's counsel on January 2, 2007. Defendants paid the invoice[s] on February 22, 2007.

6. MST Masonry created parking spaces and 3 curb cuts at the shopping center in 2005, and it replaced [*8] a steep ramp ⁴ at the east end of the shopping center with stairs in 2005.

7. There are a total of 4 handicap parking spaces at the shopping center. One handicap space is adjacent to the fire lane in front of Il Villagio Restaurant.

8. Curb ramp serving west side of shopping center at the DePasquale

Salon/Spa has a running slope of 11.9% and flared side slopes of 15.8% and 15.7%

9. Curb ramp serving north side of shopping center at the Il Villagio Restaurant has a running slope of 11.0% and flared side slopes of 3.9% and 5.2%

10. Curb ramp serving northeastern side of shopping center near the Child Works location has a running slope of 12% and flared side slopes of 43% and 50%.

....

14. The shopping center and the aforementioned 94 parking spaces are located on higher ground than the other areas of the complex. There are two pedestrian routes from the other (lower) areas of the complex to the shopping center. Each pedestrian route includes a stairway and crosses a roadway.

15. Handicap Parking Signage has been installed at the site at all Handicap Parking spaces since September 2005. There are no "van accessible" signs at any of the handicapped [sic] parking spaces.

16. Letter from [defense [*9] counsel] Robert Garofalo to [plaintiff's counsel] Edward Kopelson indicating changes made to site, dated August 25, 2005 (Exhibit F).

....

27. Expert Witness report of Edward Hoff, with attachments (Exhibit N).

4 This "steep ramp" is a reference to the "suicide ramp."

The trial judge determined that five handicap parking spots were required. She asserted that ninety-four parking spaces could not "possibly be enough from a zoning/land use perspective to service the shopping center." Defense counsel agreed with this conclusion. The trial judge also

reasoned,

[t]hat means not only that more people use this shopping center than are going to be serviced by the 94 spaces, it means that some of the people who use this shopping center are going to have to use the spaces that are in the 26 parking space lot, or in the 123, of which 36 are adjacent to this shopping center. They're going to have to use one of those two lots.

The trial judge determined that most of the improvements made by defendants resulted from the lawsuit rather than any efforts made by defendants prior to the lawsuit or based on complaints from DAWN.

The parties disagreed as to when the "suicide ramp" was converted to stairs to [*10] avoid attracting its hazardous use by a person in a wheelchair. Defendant presented two masonry invoices from June and July 2005, included as stipulated facts, indicating repair of sidewalks, to prove the "suicide ramp" was converted during the course of that summer. The trial judge noted that the invoice dated July 20, 2005, bore the pre-printed number immediately preceding the number on the invoice dated June 25, 2005. Plaintiff presented another stipulated document, the August 25, 2005, letter from defense counsel referencing the "suicide ramp" as still in existence. The trial judge determined the "suicide ramp" was not repaired until after August 25, 2005, but could not determine if it was repaired before October 13, 2005, when the lawsuit was filed. She gave defendants an opportunity to submit further evidence on this point which they declined to do.

Defense counsel presented his stipulated October 17, 2005, letter as proof that the ramp was fixed as of that date and before the filing of the lawsuit four days earlier. The letter stated that his client "reviewed the property with various municipal officials and, as a result thereof, has made several changes throughout the property [*11] to accommodate their directions and advice as to what was necessary in order to comply with applicable regulations." Defense counsel then went on to argue that the conversion of the "suicide ramp" to a stairway would not justify awarding counsel fees under the ADA in any event, because the stairs are not handicap accessible and therefore the conversion was not an accommodation within the regulations. Defense counsel admitted the curb

cuts, which were ultimately modified, were not in compliance when the lawsuit was filed.

The trial judge found that defendants made the following changes in 2008: (1) modification of certain curb cuts because at the time of stipulation on March 20, 2008, they were not in compliance with the ADAAG; (2) addition of the fifth handicap parking space in the ninety-four space lot; and (3) addition of handicap signage. She awarded counsel fees, finding that the exact timing of the conversion of the "suicide ramp" to a stairway was not necessary for the counsel fee determination.

I

Defendants argue that Humphries was not a prevailing party under the ADA and LAD and thus is not entitled to counsel fees. Defendants assert that although signage was changed, parking [*12] spaces were made van accessible and curb cuts were modified after suit was filed, these changes are not sufficiently substantial to warrant the award of counsel fees. Further, defendants complain that the addition of the handicap parking space as a result of the trial judge's June 2007 order was not actually required by *N.J.A.C. 5:23-7.10*. Lastly, defendants assert that the remedial measures taken at Powder Mill were not a result of the litigation, but rather due to DAWN's efforts. We find these arguments unpersuasive.

"An award of counsel fees is a decision that generally rests within the discretion of the judge and is thus reviewed for an abuse of that discretion." *Van Horn v. Van Horn*, 415 N.J. Super. 398, 408, 2 A.3d 401 (App. Div. 2010) (citing *Packard-Bamberger & Co. v. Collier*, 167 N.J. 427, 443-44, 771 A.2d 1194 (2001)). An abuse of discretion occurs when the trial judge's decision was "made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." *Van Horn*, supra, 415 N.J. Super. at 409 (quoting *United States v. Scurry*, 193 N.J. 492, 504, 940 A.2d 1164 (2008)).

New Jersey follows the "American Rule," which generally does not [*13] allow a prevailing party to recover counsel fees from a losing party. *Warrington v. Vill. Supermarket, Inc.*, 328 N.J. Super. 410, 417, 746 A.2d 61 (App. Div. 2000). Here, however, plaintiff invoked both state and federal fee-shifting statutes that provide for granting counsel fees to the prevailing party.

N.J.S.A. 10:5-27.1; 42 U.S.C.A. § 12205.

The Supreme Court found that "a plaintiff who is awarded some affirmative relief by way of an enforceable judgment against defendant or other comparable relief through a settlement or consent decree is a prevailing party under *N.J.S.A. 10:5-27.1* of the LAD." *Tarr v. Ciasulli*, 181 N.J. 70, 87, 853 A.2d 921 (2004) (adopting the United States Supreme Court's definition of "prevailing party" in *Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992)). The Court held that "a plaintiff 'prevails' when actual relief on the merits of his [or her] claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Id.* at 86 (quoting *Farrar supra*, 506 U.S. at 111-12, 113 S. Ct. at 573, 121 L. Ed. 2d at 503). "Further, a cause of action under LAD can be evidenced by a violation of [*14] administrative regulations . . ." *Estate of Nicolas v. Ocean Plaza Condo. Ass'n, Inc.*, 388 N.J. Super. 571, 587, 909 A.2d 1144 (App. Div. 2006).

We have held that "a prevailing party need only be nominally successful." *Warrington*, supra, 328 N.J. Super. at 421 (applying the catalyst theory to the LAD fee-shifting statute, which justifies an award of counsel fees if the lawsuit "prompted defendants to take action to correct the unlawful practice").

The United States Supreme Court in *Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001), required that a judgment be rendered for a party to be considered prevailing. The Supreme Court, although acknowledging that "*Buckhannon* is binding when counsel fee provisions under federal statutes are at issue," has found it appropriate to depart from the reasoning of federal cases that interpret federal statutes when interpreting New Jersey law. *Mason v. City of Hoboken*, 196 N.J. 51, 72-73, 951 A.2d 1017 (2008). As a result, the Court reaffirmed the catalyst test for determining whether a party is prevailing under state law. *Id.* at 73. Further, since the form of judgment is not conclusive, [*15] under New Jersey law "a settlement that confers relief sought may still entitle plaintiff to attorney's fees in fee-shifting matters." *Id.* at 74 (citing *Warrington*, supra, 328 N.J. Super. at 421.) To be a prevailing party under LAD,

(1) there must be a factual causal nexus between plaintiff's litigation and the relief ultimately achieved; in other words, plaintiff's efforts must be a necessary and important factor in obtaining the relief; and (2) it must be shown that the relief ultimately secured by plaintiffs had a basis in law.

[*Mason, supra, 196 N.J. at 73* (citations omitted).]

Buckhannon is binding on the court's awarding of fees under the ADA. A judgment was rendered in this case, thus fees are not precluded under the federal statute. See Pressler & Verniero, *Current N.J. Court Rules*, comment 2.8.3 to R. 4:42-9 (2011) (explaining that under *Warrington, supra, 328 N.J. Super. at 423-24*, plaintiff is a prevailing party under the ADA if awarded some of the relief sought).

The trial judge found that Humphries was a prevailing party because

at least three of the four curb cuts had to be reconstructed because they were not compliant with the CFR. The parking spaces were not adequate, as [*16] I found, and an additional parking space was instituted on the upper level, which was where the consumer shopping took place in this multi-level facility . . . [Plaintiff's counsel] also complained about the painting, the signage, and the location of the parking spaces. . . . The signage was -- was done, and I saw some pictures at some point of striping that was not adequate. [Defense counsel] said that that was clearly done on a routine basis, but some of it was clearly done as a result of this litigation.

Further, she concluded that the "vast majority, if not all, of the relief sought by the plaintiff was obtained as a result of, and certainly after -- and well after, for most of it, the filing of the suit on October 13, 2005." In rejecting defendants' argument that the changes in the curb cuts were insignificant, the judge explained:

to say that the difference between an 8 percent slope and an 11 percent slope is

really not significant is . . . to undercut the regulations that are promulgated pursuant to the Americans with Disabilities Act.

While the trial judge could not determine exactly when the "suicide ramp" was converted to a stairway, she acknowledged that it could have occurred [*17] prior to litigation. She correctly did not make the reconstruction of this ramp the dispositive factor in deciding to award counsel fees. The ramp conversion, although clearly appropriate, was arguably not covered by the statutes and regulations, and other remedial actions taken by defendants were sufficient to warrant an award of counsel fees.

Although the changes brought about by this litigation are significant, the magnitude of the changes is not dispositive in determining whether a party is entitled to counsel fees. The addition of the parking space, changes in signage, and changes in curb cuts after the filing of the complaint are sufficient for plaintiff to be a prevailing party under the LAD and ADA. See *Farrar, supra, 506 U.S. at 112-14, 113 S. Ct. at 573, 121 L. Ed. 2d at 503; H.I.P. v. Hovanian at Mahwah V.I., Inc., 291 N.J. Super. 144, 676 A.2d 1166 (Law Div. 1996)* (Although the issue of counsel fees was ultimately settled, the court noted that minor changes to handicap restrooms are extremely important to individuals with disabilities who the plaintiff represented.).

II

Defendants argue that the trial judge improperly required defendants to install an additional handicap parking space that [*18] was not required by statute or regulation. Defendants contend further that the trial judge should not have relied on Edward Hoff's expert report in fashioning this remedy because his expertise was not established. Additionally, defendants object to Mr. Hoff's arbitrary determination of how many spots in the other lots were being used for the Shopping Plaza.

The defense presented no conflicting expert evidence. Plaintiff's expert report was admitted as a stipulated document as part of the settlement. Mr. Hoff's complete reasoning was not utilized in the judge's opinion in any event. If she had completely accepted Mr. Hoff's analysis, she would have required the defendants to install two additional handicap spots for a total of six spots. Mr. Hoff's report determined that thirty-six spots

from the east parking lot and twenty-six spaces from the lower lot were serving Powder Mill. The judge, however, did not designate any specific number of parking spaces from the lower lots as serving the Shopping Plaza. Rather, she determined (as conceded by defense counsel) that at least seven more spaces than the ninety-four at the upper level were needed and available to able-bodied shoppers to adequately [*19] handle the traffic incurred by the Shopping Plaza. More than 100 spots require five handicap spots.

N.J.A.C. 5:23-7.10(c) requires that parking lots containing a total of 76 to 100 spaces have at least four handicap spaces and parking lots with a total of 101 to 150 spaces require five of those spaces to be handicap accessible. Further, *N.J.A.C. 5:23-7.10(a)* requires that "[a]ccessible parking spaces shall be the closest parking spaces provided and those spaces shall be on the shortest route, which shall be an accessible route, to an accessible entrance."

The parties agreed the trial judge would determine how many handicap parking spaces were required at the Shopping Plaza. Here, three parking lots surrounded the Shopping Plaza. Only four handicap parking spots were located in the ninety-four space lot on the main level near the retail businesses. The trial judge correctly considered the number of overall parking spaces in the surrounding lots regularly used by patrons of the Shopping Plaza. Defendants conceded that more than the ninety-four spots in the adjacent lot were used by shopping plaza patrons. Able-bodied shoppers used the other two lots on the property located at a lower level [*20] and climbed stairs to access the Shopping Plaza. Shoppers did not park on the street or illegally at another unconnected commercial establishment due to insufficient parking. Defendants, who own and operate this "strip mall," were aware that shopping plaza patrons parked in the other lots connected to the shopping center. Because over 100 spaces were needed and utilized by shoppers, more than four handicap spaces were required. Clearly the handicap spaces in the lower lots could not be utilized by shopping plaza patrons with disabilities. Under these somewhat unusual circumstances, the trial judge correctly determined that another handicap spot was statutorily required within the lot on the shopping plaza level to permit individuals with disabilities the same access to the retail businesses as able-bodied shoppers.

"The Legislature's intent is the paramount goal when

interpreting a statute and, generally, the best indicator of that intent is the statutory language." *DiProspero v. Penn*, 183 N.J. 477, 492, 874 A.2d 1039 (2005). A court should "ascribe to the statutory words their ordinary meaning and significance, and read them in context with related provisions so as to give sense to the legislation [*21] as a whole." *Ibid.* See also *Soto v. Scaringelli*, 189 N.J. 558, 569, 917 A.2d 734 (2007). Ultimately, a court's role when analyzing a statute is to give effect to the legislature's intent as evidenced by the "language of [the] statute, the policy behind it, concepts of reasonableness and legislative history." *Johnson Mach. Co. v. Manville Sales Corp.*, 248 N.J. Super. 285, 303-04, 590 A.2d 1206 (App. Div. 1991) (citing *Cedar Cove v. Stanzone*, 233 N.J. Super. 336, 340, 558 A.2d 1351 (App. Div. 1989), *rev'd on other grounds*, 122 N.J. 202, 584 A.2d 784 (1991)).

Although "[a] trial court's interpretation of the law and legal consequences that flow from established fact are not given any special deference," *Manalapan Realty v. Manalapan Twp. Comm.*, 140 N.J. 366, 378, 658 A.2d 1230 (1995), "[i]t is well-established that the LAD is intended to be New Jersey's remedy for unacceptable discrimination and is to be construed liberally Among its other objectives, the LAD is intended to insure that handicapped persons will have 'full and equal access to society, limited only by physical limitations they cannot overcome.'" *Estate of Nicolas*, *supra*, 388 N.J. Super. at 587 (citations omitted).

The trial judge framed her decision as predominantly equitable in nature [*22] because she viewed defendants as complying with the letter of the regulations, if not the spirit of the statutory and regulatory scheme. Each lot, when viewed individually, had the required number of handicap spots for that lot. We find, however, that the regulations when applied to these somewhat unusual circumstances do require the additional handicap space ordered by the judge. Accordingly, the judge properly exercised her discretion in requiring defendants to add a fifth handicap parking space.

III

Defendants contend that plaintiff's motion for counsel fees was untimely because it was filed on October 13, 2008, three months after the date of the original entry of judgment. Defendants further assert that plaintiff's failure to make the application for fees before the entry of final judgment or move to alter or amend the judgment within twenty days, pursuant to *Rule 4:49-2*,

constituted a waiver of her rights with regard to a fee motion. Defendants did not raise this issue below. Defendants did not object to the trial judge's extension of time for plaintiff's counsel to file the motion for counsel fees at trial. We will not reverse due to this delay since it is challenged for the first [*23] time on appeal, and the extension was not "clearly capable of producing an unjust result." *R. 2:10-2*.

Rule 4:42-9 has generally been construed as requiring the application for fees to be made either before entry of final judgment or within the time prescribed by *Rule 4:49-2* for a motion to alter or amend the judgment. See *Pressler & Verniero, Current N.J. Court Rules*, comment 5 on *R. 4:42-9*. *Rule 4:49-2* requires that the motion to alter or amend a judgment be served no later than twenty days after service of the original judgment. The time limitation of *Rule 4:49-2* is subject to the more expansive provisions of *Rule 4:50*. See *Ricci v. Corporate Express of the E., Inc.*, 344 N.J. Super. 39, 48, 779 A.2d 1114 (App. Div. 2001), certif. denied, 171 N.J. 42, 791 A.2d 220 (2002) (applying *Rule 4:50-1* and finding an application for counsel fees made after entry of final judgment to be timely). Here, the parties' settlement agreement specifically reserved the issue of counsel fees for the trial judge to decide. The trial judge granted plaintiff a 120-day extension from the judgment entered on August 15, 2008, to file her motion and certification for counsel fees. Plaintiff's counsel filed the motion well within that time. [*24] Plaintiff's counsel is entitled to rely on an extension provided by the trial judge.

Even where the judge has not granted an extension, we have allowed counsel fees based upon a delayed request. In *Warrington, supra*, 328 N.J. Super. at 424, we declined to apply *Rule 4:42-9* where plaintiff's rights to counsel fees were founded in both federal and state discrimination law because its application "could operate to diminish the federal right to barrier-free access to public facilities." The court in *Warrington, supra*, 328 N.J. Super. at 410, held "that a later application may be granted pursuant to *R. 4:50-1* for such good cause as the implementation of significant governmental policy, there handicap access." *Pressler & Verniero, Current N.J. Court Rules*, comment 5 on *R. 4:42-9* (2011). In *Warrington, supra*, 328 N.J. Super. at 423-24, plaintiff's counsel did not file a motion until six months after entry of judgment, and we held that "although counsel's course is not condoned, under these circumstances, the rule should not be applied to bar the fee application." Based

on our decision in *Warrington*, and the permission granted by the trial judge for the delayed fee application, we find the [*25] award of counsel fees is not time-barred.

Although generally objecting to the awarding of counsel fees, defendant does not dispute the lodestar calculation appropriately utilized here. Defendant does not object to the number of hours expended by plaintiff's counsel or the hourly fee requested.

The trial judge enhanced the counsel fee by twenty percent. Subsequent to her decision in this case, we adopted the "six important rules" delineated in *Perdue v. Kenny A.*, ___ U.S. ___, ___, 130 S. Ct. 1662, 1669, 176 L. Ed. 2d 494, 501-02 (2010), which require the applicant to prove the "rare and exceptional circumstances" which justify an enhancement. *Walker v. Giuffre*, 415 N.J. Super. 597, 609, 2 A.3d 1165 (App. Div. 2010). Plaintiff did not make such a demonstration in this case, nor do we find any support in the record to enhance the counsel fees given the stringent standards established in *Perdue, supra*, ___ U.S. at ___, 130 S. Ct. at 1669, 176 L. Ed. 2d at 501-02. We reverse the enhancement and remand for the trial judge to adjust the counsel fees accordingly.

IV

Finally, defendants argue that plaintiff "backed away from the Stipulation of March 20, 2008 [by] contesting the accuracy of [*26] [invoices which she] stipulated to." Defendants claim the invoices in question were for the repair of the "suicide ramp." The stipulation did not require that the parties accept as true the contents of the attached documents. Defendants, in fact, disputed plaintiff's expert report, which was attached to the stipulation. The letters between counsel that were attached also reflect opinions hotly disputed by the parties.

Stipulations of fact are binding as long as they are "definite and certain" and assented to by the parties. *N.J. Div. of Youth & Family Servs. v. J.Y.*, 352 N.J. Super. 245, 265, 800 A.2d 132 (App. Div. 2002) (citing *Kurak v. A.P. Green Refractories Co.*, 298 N.J. Super. 304, 325, 689 A.2d 757 (App. Div.), certif. denied, 152 N.J. 10, 702 A.2d 349 (1997)), but will not be construed as reaching matters not clearly included therein. *Triffin v. Mellon PSFS*, 372 N.J. Super. 221, 223-24, 858 A.2d 1 (App. Div. 2004), overruled on other grounds, *Triffin v. TD Banknorth, N.A.*, 190 N.J. 326, 920 A.2d 649 (2007).

The stipulation agreement did not bind the trial judge to find that the June 20 and July 25 invoices were for the repair of the "suicide ramp" or any of the other work done as a result of the litigation. The stipulation regarding the invoices [*27] stated the dates of the invoices and that they were done for work on ramps and curb cuts at Powder Mill during 2005. Further, the documents themselves identify the work as sidewalk repair. As a result, the stipulation concerning the invoices was not "definite and certain." The dates on the invoices were also inconsistent with the pre-printed numbers and were submitted many months after the work was completed.

As a result, the trial judge was justified in finding that the invoices were not related to the repair of the

"suicide ramp." Her comments questioning the authenticity of the invoices did not affect her findings in this matter as she did not award counsel fees based on the repair to this ramp.

Humphries was appropriately designated the prevailing party, and counsel fees were properly awarded. The fifth handicap parking spot was required by the ADA as implemented by the ADAAG and the LAD. We affirm the trial judge, reversing only the enhanced portion of the counsel fees, and remand for further proceedings consistent with this opinion.

Cross-appeal withdrawn. Affirmed in part and reversed in part.