**BAND'S REFUSE REMOVAL, INC v. BOROUGH OF FAIR LAWN, AND FRANK CAPASSO AND GERALD F. CAPASSO**

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**Superior Court of New Jersey, Appellate Division 62 N.J. Super. 522; 163 A.2d 465**

**June 7, 1960, Argued, July 27, 1960, Decided**

**JUDGES: Goldmann, Freund and Haneman. The opinion of the court was delivered by**

**Goldmann, S.J.A.D.**

**OPINION:**

**[Editor's note: In February 1957, the Borough of Fair Lawn advertised for bids for collection of garbage in town. After considering bids, the borough council unanimously voted to award the contract to the Capassos, the lowest qualifying bidder, at a base price of $18,260 per month. The contract was signed in May, and the Capassos promptly began garbage collection.**

**In August 1957, the borough adopted ordinance 688, which required a permit to collect garbage and provided that only a person who held a contract with the town could be granted a permit. This meant that only the Capassos could collect garbage in Fair Lawn. Plaintiff Band's Refuse then had a contract to collect garbage from the Western Electric plant in town, so it applied for a permit. The borough denied the application pursuant to the ordinance.**

**On November 25, 1957, Band's Refuse filed a complaint alleging that ordinance 688 was arbitrary, discriminatory, and unconstitutional. It asked the court to declare it void and order the borough to renew its previous permit or issue a new one. Plaintiff sued the borough and a number of its officials, and all these defendants filed an answer alleging their action was proper since the contract had been awarded to the Capassos under proper competitive bidding as required by state statute. On request, the Capassos themselves were allowed to intervene in the suit as defendants and filed an answer that was identical with the borough's. They also filed a counterclaim asking that the borough be restrained from issuing a permit to plaintiff during the term of their contract, restraining plaintiff from collecting garbage in the town and adjudging ordinance 688 and the contract valid.**

**Meanwhile, a grand jury investigation into scavenger (garbage collection) contracts in the county disclosed allegations of improprieties in the bidding for the Fair Lawn contract and led to indictments of numerous Fair Lawn officials. On May 15, 1958, the plaintiff was allowed (over defendant's objections) to file an amended complaint which added a third count alleging that the Fair Lawn-Capasso contract was not the result of open competitive bidding but of "secret agreements and understandings...which tainted the bidding with fraud." Both the municipal defendants and the Capassos denied fraud and claimed compliance with the bidding statutes.**

**The trial court declared void ab initio and set aside the Capasso's garbage removal contract with the Borough of Fair Lawn; declared illegal and void ab initio all payments made to them under the contract; set aside as illegal and void ab initio Fair Lawn ordinance No 688, a supplement to the borough sanitary code; and awarded $ 303,052.62 in favor of the borough against them. The Capassos now appeal]**

**...We conclude, under the issues defined at pretrial, that the Fair Lawn ordinance was valid and that plaintiff had no standing to [\*\*475] attack the contract and was also barred by R.R. 4:88-15(a) from questioning its validity.**

**The Capassos next contend that the judgment must be reversed because of the manner in which the trial judge [\*541] conducted the proceedings. On the very first day of the trial, June 19, 1958, counsel for these defendants moved that the judge disqualify himself because his activities before trial demonstrated that he had prejudged the issues and exhibited a plan to use the**

**litigation as a vehicle for a broad municipal investigation. Additionally, counsel during the trial objected repeatedly to the participation in the prosecution of the action by both the trial judge and the amicus curiae whom he had appointed. There were also several motions for mistrial because of the allegedly prejudicial actions of the court. All of these were overruled or denied.**

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**The Capassos charge -- and it is conceded by the trial judge and plaintiffs attorney, Mr. Zimel -- that the judge communicated with Mr. Zimel before the trial began and discussed with him the production of various witnesses. It is also an admitted fact that when, during the course of a telephone conversation, Mr. Zimel informed the judge of the possibility of discontinuing the third count of the complaint, the judge said that if that were done he would immediately declare the contract void. When this was subsequently revealed in the course of a colloquy shortly to be mentioned, the trial judge sought to justify what he said on the ground that this was his sole means of controlling the case, since a very important issue involving the public welfare would be eliminated. We find the justification without merit. What the trial court said suggests a possible prejudging of the issues before a single word of testimony had been adduced. Indeed, it foreshadows what later became manifest -- an attitude on the part of the court that a complete exploration into everything that might possibly touch upon the contract was his personal responsibility.**

**In discharge of his duty, as he conceived it, the trial judge addressed letters to various counsel demanding the production of certain witnesses and records, thus reflecting a prior partisan analysis and preparation of the case normally [\*542] considered the exclusive function and legitimate interest of counsel representing the respective parties.**

**On June 10, 1958 counsel for the Capassos wrote the court requesting an adjournment of the trial because Frank Capasso, one of the parties, was in Europe and would not return for more than a month, and for the further reason that plaintiff had not yet answered the interrogatories authorized under the pretrial order. Although counsel for the other parties consented to the adjournment, the court immediately wrote in reply: "Under no circumstances will there be an adjournment of this case."**

**Six days before the opening of the trial -- on June 13, 1958 -- the trial judge requested counsel to appear before him. The attorney for the Capassos could not attend because he was engaged in another trial. Nevertheless, the court proceeded to question counsel for plaintiff and the borough, requesting that they produce and subpoena certain named witnesses. As to some of these, plaintiffs attorney said that he had had no intention of calling them. It was during this court appearance that mention was made of the telephone conversation between the trial judge and Mr. Zimel, in the course of which the possibility of discontinuing the third count of the amended complaint was discussed. Mr. Zimel told the court on June 13 that he had amended the complaint because the grand jury had indicted Health Officer Begyn and made a presentment. He frankly admitted, "I have no information other than was contained in the indictment and in the newspapers \* \* I have no further proof on that than is contained in the presentment." He went on to explain that the reason he [\*\*476] had mentioned dropping the third count when he spoke to the judge on the phone was that "In the recent trial of Mr. Begyn, that part of the indictment which involves him with Capasso Brothers was dismissed by the Court. Since that was dismissed by the Court and there was no ruling on it by any jury or otherwise, I felt that perhaps under those circumstances I might drop the third count and proceed [\*543] on the illegality of the ordinance itself, feeling now very confident, in my mind anyway, that I would be successful on that point."**

After further colloquy, the trial judge proceeded to read a statement obviously prepared in advance for public presentation at the June 13 court session. He reviewed the contents of the pleadings, their filing dates, and the similarity of the positions taken by the borough and the Capassos. He observed that "the fact that the Borough appears unwilling to inquire into the validity of the contract under the present circumstances is most unusual," and then went on to refer to such obviously extra-judicial and legally inadmissible materials as the grand jury investigation, its presentment, and the indictment of two Fair Lawn officials for an offense unrelated to the litigation. "These facts," he said, "together with the newspaper accounts of fraud connected with the collection of garbage under the contract involved in this suit, makes it imperative in the public interest that the matter be investigated \* \* \*." He concluded this part of his statement with the remark that the apparent neglect of the borough to undertake and adequately protect the public interest and welfare involved in the suit "borders on criminal nonfeasance."

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The trial judge then proceeded to appoint an amicus curiae, whose duty it would be "to present evidence, subpoena witnesses, examine all witnesses, and submit to the court briefs on the law and facts."

Counsel for the Capassos characterizes the court's statement of June 13 as revealing "a mind ripe for a finding of illegality, fraud, collusion and impropriety." That conclusion is, of course, partisan and strongly stated, but a full reading of the statement readily demonstrates that what the trial judge said was not well advised. His remarks cast a long shadow of a suspicion that the whole case was to be considered in the light of what the grand jury had done and what the newspapers had said; that there was something wrong about the borough and the Capassos taking

[\*544] the same position and filing almost identical pleadings, and that the position of the borough officials bordered on criminal nonfeasance.

With the appointment of an amicus curiae who was to participate fully as an adversary representative of the court in support of the pleaded position of plaintiff, the basis was laid for what in fact became the equivalent of a municipal investigation instead of an impartial trial. A trial judge, no matter how sincerely motivated, may not convert civil litigation into a municipal investigation. The latter is fully provided for under N.J.S. 2A:67A-1. ...

Even a casual reading of the record, covering some 2,000 pages of printed appendix, reveals an extraordinary participation by the judge in the trial of the cause. He obviously [\*545] had devoted much time in preparing for the questioning of witnesses and the offering of exhibits. This preparation on the part of the court extended to the issuance of subpoenas by the court itself and by its amicus curiae, and the contacting of witnesses for their appearance. The trial judge secured files and documents from the prosecutor's office and sifted them in advance, in preparation of having such of them as he deemed relevant offered as exhibits.

At the hearings the judge called witnesses on his own motion or had the amicus do so, and examined and cross-examined them at length. He offered exhibits he had called for. He ruled upon the propriety of his own questions and upon the admissibility of his own exhibits. On occasion he attacked the credibility of witnesses called by him.

In all, there were 32 witnesses who took the stand during the 21 trial days. Of these, the parties produced five; the trial judge, by his own subpoena, direction or arrangement, called 27. Of the latter, 24 were permitted to testify upon questioning by the court or amicus curiae, and this over the objection of counsel for the Capassos that their names had not been supplied in answer to interrogatories....

**Defendants Capasso do not question the right of a judge to interrogate a witness in order to qualify testimony or elicit additional information, Ridgewood v. Sreel Investment Corp., 28 N.J. 121, 132 (1958), or his right under special circumstances to summon a witness on his own initiative, as in Polulich v. J.G. Schmidt Tool Die & Stamping Co., 46 N.J. Super. 135,143 et seq. (Cty. Ct. 1957). Generally, a court's interrogation of witnesses, where not excessive, has been sustained. Lawton v. Virginia Stevedoring Co., 50 N.J. Super. 564, 580 (App. Div. 1958), where some of the cases are collected. As was pointed out by our Supreme Court in the Ridgewood case, above, the power to take an active part in the trial of a case must be exercised by the judge with the greatest restraint. "\* \* \* There is a point at which the judge may cross that fine line that separates advocacy from impartiality. When that occurs there may be substantial prejudice to the rights of one of the litigants. \* \* \*" (28 N.J., at page 132)**

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**The motivation of the trial judge may be found in what he said in his opinion in justification of his appointment of amicus curiae; he felt that the court was "faced with a grave situation testing its ability and will to use its powers, if necessary, to prevent fraud, preserve justice, and [\*548] protect the public interest." He also observed that he had the power to investigate as auxiliary to his power to decide, and "the power to investigate implies necessarily the power to summon and to question witnesses."**

**What is called for here is a balancing of judicial power against the interests of a litigant. On the one hand, there is the recognized power of a trial judge to call witnesses... Balanced against this power of a trial judge must be the necessity of judicial self-restraint and the maintenance of an atmosphere of impartiality... Courts must not only be impartial; they must give the appearance of impartiality...**

**The power of a trial judge to call and examine witnesses is not unlimited. His conduct of a trial contrary to traditional rules and concepts which have been established for the protection of private rights constitutes a denial of due process... The limitations upon the activities and remarks of a trial judge have usually been considered within the frame of reference of a jury trial. However, the necessity of judicial self-restraint is no less important where the judge sits alone; if he participates to an unreasonable degree in the conduct of the trial, even to the point of assuming the role of an advocate, what he does may be just as prejudicial to a defendant's rights as if the case were tried to a jury...**

**In our opinion, the conduct of the District Judge did not conform to the standard required by the foregoing authorities. Whether unconsciously or otherwise, he failed from the start of the trial to view this case with the impartiality between litigants that the defendants were entitled to receive. His active participation in the case and in the questioning of witnesses exceeded what was reasonably necessary to obtain [\*\*480] a clear understanding of what their testimony was and fully justified appellants' complaint that at times 'he, figuratively speaking, stepped down from the bench to assume the role of advocate for the plaintiff.' \* \* \*" (232 F. 2d, at page 467)**

**It is our conclusion that the trial judge overstepped the permissible bounds of judicial inquiry in this case. In effect, he took on the role of advocate, his activities extending from investigation and preparation to the actual presentation of testimony and exhibits at the trial. He converted the action into what amounted to a municipal investigation. Cf. Canons of Judicial Ethics, Canon 15, dealing with a judge's interference in the conduct of a trial...**

**We agree with defendants Capasso that the trial court committed prejudicial error by producing a large number of witnesses and admitting their testimony in evidence.**

**Defendants Capasso served supplemental interrogatories upon plaintiff on May 20, 1958 requesting the names and addresses of all witnesses to the facts alleged in the third count of the amended complaint. The answer, sworn to about a week before the trial began, read, "Alfonse Begyn, W. T. Williamson, Frank Sogorka, Joseph Matule, all of Fair Lawn, N.J., Frank Capasso, Gerald Capasso, John Ciratelli." This answer was not supplemented or amended before trial. '**

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**The court, as noted, produced 27 witnesses on its own motion; 24 had not been named in the answer to interrogatories. [\*551] Counsel for the Capassos had no advance notice of the identity of these witnesses and no opportunity to conduct adequate pretrial investigation. He made proper objection as each witness was called, but to no avail. The testimony they gave, as a reading of the trial judge's lengthy opinion and supplemental opinion will demonstrate, played an important part in the factual conclusions he reached.**

**Under R.R. 4:23-12 of our interrogatory rules, the penalty for failure to name a witness in answer to interrogatories is the exclusion of the testimony of that witness at the trial...**

**It would seem anomalous to give a party protection from surprise witnesses when they are called by the opposition, but not when called by the court itself. The potential for harm is identical in either case. In addition, the testimony of the witnesses here called by the court brought entirely new issues into the case which were in no wise comprehended by the pretrial order. These issues found their way into the court's opinions and will be mentioned hereinafter...**

**Prejudicial error also resulted from the creation of new issues by the court -- issues never mentioned or suggested in the pretrial order.**

**On September 10, 1958, the eleventh day of the trial and four months after the pretrial conference was held, the trial judge on his own motion, and without prior notice, stated that he was adding new issues, and this over the most strenuous objection of counsel for the Capassos...**

**The five added issues provided a substantial foundation for the court's conclusion that the Capasso contract was invalid. Although the trial judge in his original opinion made the bare statement that "There was no justifiable reason to allege surprise on any new issue raised during the trial," we cannot agree. The issues were injected into the case without notice or warning. There was no reason for the Capassos or their counsel to anticipate that these questions were issues to be tried until the judge, against a background of testimony he was largely responsible for adducing, brought them into the trial picture.**

**As in the case of the judge's other activities before and during trial, so here -- he apparently considered it his duty to introduce new issues because of the public character of the case, in disregard of those which had been defined by the parties, and in disregard of the rules and precedents applicable in civil cases.**

**The function of a trial judge is to serve litigants by determining their disputes and the issues implicated therein in accordance with applicable rules and law. Established procedures lie at the heart of due process and are as important to the attainment of ultimate justice as the factual merits of a cause. A judge may not initiate or inspire litigation and, by the same token, he may not expand a case before him by adding new issues which come to mind during the trial, without giving the parties affected a full and fair opportunity to meet those issues....**

**On September 11, 1958, the twelfth day of the trial, the recently substituted counsel for the borough and its officials applied for permission to change the position theretofore taken by them, as set forth in their original answer and amended answer and as repeated on a number of occasions during the preceding trial days. Up to that moment the borough and its officials had insisted that the ordinance and the contract were valid. These defendants were now allowed to**

file a second amended answer alleging fraud and the invalidity of the contract, and a cross-claim seeking recovery against the Capassos of all moneys paid them under the contract. This change of position was permitted over the vigorous and extended objection of the Capassos' attorney. Counsel's request for adequate time to protect the interests of his client by investigation and discovery proceedings was promptly denied.

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The Capassos insist that this sudden shift came as a shock and a surprise and amounted to a substantial deprivation of their fundamental rights. They quote from Grobart v. Society for Establishing Useful Manufactures, 2 N.J. 136, 149 (1949), where former Chief Justice Vanderbilt said:

"\* \* \* It is not a mere matter of formal logic that leads the courts to insist that litigants shall not shift their position in successive pleadings. \*\* \* [S]hifting causes of action in successive

pleading will completely block the purpose of all pleading, i.e., getting to an issue or issues where one party asserts the affirmative and the other the negative on a question or questions of law or of fact."

It seems inappropriate to extend the Grobart rule to the present case. When the original answer was filed by the borough and borough officials -- and so with the amended answer to plaintiff's

amended complaint -- the officials apparently had the honest belief that the Capasso contract was

in all respects valid. What came out in the course of the trial, mostly through witnesses and exhibits brought into [\*557] the case by the court and its amicus curiae, must have changed

their minds. It is also possible that they had a second thought in the light of the impact of the grand jury's action upon the public and the newspapers, and the impending legislative investigation into the scavenger business.

If the Capasso contract was not in fact the result of bona fide competitive bidding, it was important and proper from the point of view of the paramount public right and interest to allow

the amended answer. However, fairness to defendants dictated that they be allowed a reasonable

time for discovery and investigation, in order that the facts in support of their claim that the contract was valid might be developed and [\*\*484] presented. They had up to that moment

been dealing with a situation where the borough and its officials had stoutly affirmed the validity

of the contract. The municipality had taken no steps to rescind the agreement, but had accepted scavenger service and made monthly payments thereunder even during the period of the hearings.

Its position had been affirmed and reaffirmed, in its pleadings, in the pretrial order, and during the trial. Fundamental fairness required that the court allow the Capassos sufficient time to meet the radically new situation facing them. The denial of that opportunity was the denial of due process...

The judgment is reversed and the matter remanded for a full trial to determine the validity of the scavenger contract. Substituted pleadings should be filed, reasonable discovery allowed and

a new pretrial conference held, in order that the exact position of the several parties will be

manifest, their respective contentions clearly defined, and the issues sharply drawn. **In** view of the fact that the borough, mayor and council, and borough manager now challenge the validity of

the Capasso contract, there would appear to be no need for the services of an amicus curiae. The parties can be relied upon to develop fully what are patently the issues of the case, including such questions as compliance with the bidding, appropriation and prequalification statutes, and the charges of collusion and connivance among the bidders and between the Capassos and the borough officials. Costs to abide the result of the new trial.