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Response/Reply Brief of Appellants/Cross-Appellees, Jacob Scoggins v. Lee's Crossing Homeowners, 718 F.3d 262, Docket No. 11-02202 (Seventh Circuit Court of Appeals 2013)

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NO. 11-2202(L)

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

JACOB SCOGGINS,
DAN SCOGGINS and
DEBBIE SCOGGINS, (individuals),

Plaintiffs-Appellants/Cross-Appellees,

v.

LEE'S CROSSING HOMEOWNERS ASSOCIATION,
A Virginia corporation and Property Owner's Association
JACK H. MERRITT, JR., an individual,

Defendants-Appellees/Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Honorable Liam O'Grady, Presiding

RESPONSE/REPLY BRIEF OF APPELLANTS/CROSS-APPELLEES

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CROSS-APPELLEE'S SUMMARY OF THE ARGUMENT

Cross-Appellants seek to reverse the District Court's denial of their motion for attorneys' fees and costs under the Fair Housing Act, 42 U.S.C. § 3613(c)(2) ("FHA"). The standard for awarding fees and costs to a prevailing defendant in an FHA case is whether plaintiff's case was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." A case is not frivolous, unreasonable, or without foundation, if there exists case law under the FHA that supports the party's litigation position. Cross-Appellants' argument for reversal defies Supreme Court and 4th Circuit precedent.

Cross-Appellants argument that attorney's fees and costs should be awarded to them under Virginia law, due to the provisions and requirements of the Lee's Crossing Covenants, is in direct contravention of the public policy considerations in FHA and other civil rights cases.

This Court should affirm the District Court's decision denying Cross-Appellants' motion for attorney's fees and costs under the FHA.

APPELLANTS' REPLY BRIEF

ARGUMENT

Appellees' own brief demonstrates how expansive the genuine disputes of material facts are in this case. The argumentative nature of Appellees' Statement of Facts alone demonstrates the extent of these factual disputes. The Scogginses have submitted evidence to support every aspect of their case, while Appellees' strategy has been to assert that the evidence is insufficient, to utilize erroneous legal arguments that limit the effectiveness of the evidence, or make unsupported accusations. This case is replete with contested issues of fact. *See* J.A. at 166–71. Under the standard for summary judgment, the trial court's order should be reversed and the case remanded for trial so the factual disputes can be resolved by a trier of fact.

I. APPELLEES' REPEATED DENIALS CONSTITUTE A CONTINUING VIOLATION OF THE FAIR HOUSING ACT WHICH MAKES IT RIPE FOR JUDICIAL RESOLUTION.

This Court held in *Bryant Woods Inn, Inc. v. Howard County, Md.*, 124 F.3d 597, 602 (4th Cir. 1997), that an issue is sufficiently concrete for judicial resolution once an accommodation is denied. *Id*. at 602. A "denial can be both actual or constructive, as an indeterminate delay has the same effect as an outright denial." *Groome Res. Ltd., LLC v. Parish of Jefferson*, 234 F.3d 192 (5th Cir. 2000). Even if "the request is made orally," or made in a manner that does not

prescribe to the "provider's preferred forms or procedures for making such requests," it may be deemed to be a failure or denial to provide a reasonable accommodation (or modification). J.A. at 1241–1242, ¶ 12; 1242, ¶ 15 and J.A. 1254–1255, ¶ 15.[1] Here, Appellees actually and constructively denied the Scogginses' requests continuously over a prolonged period of time, most recently on October 18, 2010. J.A. at 2053–54. Therefore, this case is fit for judicial resolution.

A. Appellees Continually Denied The Scogginses' Ramp Requests.

The record shows that Appellees denied the Scogginses' requests through a series of related discriminatory acts before they filed suit. *See* Opening Br. at 37.

Actual Denials of the Ramp Modification Requests:

1. In 2003, Jack Merritt ("Merrit") denied the Scogginses' initial request for the ramp without allowing them an opportunity to submit a written application. J.A. at 394, ¶ 7 and 980.

2. In 2007, the Scogginses submitted a second request for the ramp, which was again summarily denied by Merritt. J.A. at 394, ¶ 13.

3. In 2010, the Scogginses made a final attempt and sent a letter request to property manager Mike Arndt. J.A. at 394 and 986.

4. On September 11, 2010, "almost 16 months after the May, 2009 [ATV] request," John Bennett ("Bennett"), who is not a member of the Architectural Review Board ("ARB"), requested information the Appellees

[1] *See* Opening Br. at 41 for discussion of deference. Additionally, 42 U.S.C. § 3608(a) vests HUD with the authority and responsibility to interpret § 3604. *See* 42 U.S.C.A. § 3608 (West)

already had about the ramp construction. J.A. at 395 and 988.

5. On September 20, 2010, the Scogginses provided Bennett the requested additional information, in spite of the fact that it was the LCHA and not the ARB making the request. J.A. at 395 and 986–87.

6. On September 22, 2010, Bennett responded, "denying any recollection of [the Scogginses'] previous requests for a ramp." J.A. at 395 and 416.

7. On October 18, 2010, Merritt, President of the ARB, denied the Scogginses' ramp request via letter. J.A. at 395 and 420–21.

Appellees attempt to dispute their discriminatory acts by superficially relying on the record; however, significant portions of Appellees' recitation of facts on pages 24 and 25 of the Response Brief are unsubstantiated and should not be considered. In contrast, the record undeniably reflects that the Appellees expressly denied the Scogginses' modification requests in 2003, 2007, and 2010. J.A. at 394–95.

B. Appellees' Unreasonable Delay In Deciding The Scogginses' Requests Constitutes A Constructive Denial.

The Appellees unreasonably delayed deciding the Scogginses' accommodation and modification requests. In *Groome*, the Court held that although the Parish officials in charge of the application did not "formally den[y] the request," the Parish's "unjustified and indeterminate delay" of ninety-five days "had the same effect of undermining the anti-discriminatory purpose of the FHAA" and therefore constituted a denial. *Id.* at 199–200. Ultimately, the court held that the issue was fit for review. *Id.*

In the present case, Appellees intentionally ignored and delayed deciding the Scogginses' requests well beyond the time presented in *Groome*. The events listed 1–7, *supra* at 3-4, are also constructive denials of the modification requests.

Constructive Denials of the ATV Accommodation Requests:

1. In May 2009, while their multiple requests for the ramp were pending, the Scogginses made their first request that Jacob be permitted to operate an ATV. J.A. at 394.

2. The Scogginses "received no response to [the] May 19, 2009 request for permission for an ATV." J.A. at 395.

3. In August 2010, the Scogginses sent their second request for the ATV. The Association still did not respond. J.A. at 395.

4. By September 2010, the Association still had not responded to the Scogginses' ATV requests. J.A. at 395.

5. The Association never responded to the Scogginses' ATV requests, took no proactive measure or initiative otherwise to meet with or discuss information with respect to the Scogginses' ATV requests. J.A. at 395, 641–42, 768, 733, 933–34, 936, and 946.

Approximately 2,552 days elapsed between the time the Scogginses submitted the ramp request in 2003 and the filing of the lawsuit. Approximately, 512 days elapsed between the time the ATV request was submitted in 2009 and the filing of the lawsuit. *See* Opening Br. at 24. The fact that the Appellees remarkably failed to inform the Scogginses of a decision regarding the accommodation requests for the ATV made in 2009 and 2010 indisputably amounts to an unreasonable delay and indicates that the Appellees constructively denied the

requests. These substantial delays clearly appear unjustified and indeterminate compared to *Groome* and have "the same effect of undermining the anti-discriminatory purpose of the FHAA." *See* Resp. Brief at 24 and Opening Br. at 37–38. The countless delays amount to a constructive denial and render the Fair Housing claims fit for judicial review.

Appellees mischaracterize and confuse the record by continuing to falsely accuse the Scogginses of being disobliging by "denying" Bennett into their home. *See* Resp. Br. at 24. Appellees, however, fail to provide the context of the facts. The record at page 395 clarifies that when Appellees sent Bennett to supposedly request to meet and discuss the ramp modification request with the Scogginses in 2010, the requests that had been pending with the Association for approximately seven years since the initial request in 2003. Notwithstanding, the Scogginses had already provided the Appellees the information necessary to build the ramp. *See* J.A. at 988 and Opening Brief at 42–43. The Scogginses did not welcome Bennett into their home after a seven year delay. They were perplexed why Bennett would want to meet with them if Lee's Crossing and its official representatives possess the indispensable authority to grant the request.[2] In essence, the decision was not a

[2] At the time Bennett proposed to visit the Scogginses' home to supposedly discuss the ramp request, Bennett was not a member of the ARB, the final arbiter on the ramp request, but only served as a messenger. J.A. at 162–63, 666–67 and 620–21. As such, the Scogginses were not obligated to allow Bennett to visit their home in an unauthorized capacity. J.A. at 807. Additionally, no one from the ARB

denial but rather served as a last resort appeal to urge the Association to review the Scogginses' numerous requests. J.A. at 418. Moreover, Bennett has denied any recollection concerning the request for the ramp. J.A. at 685 and 162–63.

C. Appellees' Request For Additional Information On The ATV Request, After An Unreasonable Sixteen (16) Months Delay, Constitutes A Constructive Denial.

In addition to the continuing denials of the ramp request by express denials, unjustified delays and disguised requests for more information, the Association's request for additional information after an unreasonable sixteen-month (16) delay since the initial ATV request in 2009 served as another ploy to grossly delay and constructively deny the Scogginses request. J.A. at 395. A housing provider constructively denies a request when he refuses to render a decision unless the requester provides unwarranted information. *See U.S. v. Town of Garner, NC,* 720 F. Supp. 2d 721, 729 (E.D.N.C. 2010); *Thompson v. U.S. Dept. of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 417 (D. Md. 2005); *U.S. v. Hialeah Hous. Auth.* 418 F. Appx. 872, 876 (11th Cir. 2011); *Overlook Mut. Homes, Inc. v. Spencer,* 415 F. Appx. 617, 622 (6th Cir. 2011) (unpublished). As such, Appellees' request for additional information from the Scogginses served as a ploy and went "above and beyond what the FHAA, Code of Federal Regulations [24 C.F.R. § 100], and the Modifications Joint Statement ("Joint Statement") require" – particularly when the

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contacted the Scogginses concerning their requests for the modification. J.A. at 395.

Scogginses had already submitted every requested detail. *See* J.A. at 181, 988, 2053–54, and Opening Br. at 42–43.

Housing providers may gather adequate information to learn of the requester's disability and desire for an accommodation. *See* Opening Br. at 26. However:

> If a person's disability is obvious, or otherwise known to the housing provider, and if the need for requested modification is also readily apparent or known, then the provider may not request any additional information about the requester's disability or the disability-related need for the modification. J.A. at 1243, ¶ 17.

The trial court held that "there is no dispute in […] that Jacob Scoggins is 'handicapped' and is entitled to reasonable accommodations and modifications under the FHAA. There is likewise no real dispute that Defendants knew or should have known of his disability." J.A. at 272. Considering that Appellees are well aware of Jacob's paraplegic condition, and accordingly, his obvious need for the ramp and ATV, their intrusive request for additional information, especially after a sixteen-month delay, was improper and a denial.

Based on the foregoing evidence of the Appellees' continual actual and constructive denials, the Appellees evidently were not ready and/or willing to process the Scogginses' application as the Appellees attempt to portray. *See* Resp. Br. at 24. As a result, the Scogginses had no choice but to turn to the courts to enforce their legal rights. The Scogginses did not act prematurely in filing their

suit. If the Scogginses bowed tacitly before the Association's indeterminate delays, the Appellees' past actions indicate that Appellees would have denied the request after an unreasonable delay of an additional 30-day review period and an another calendar year after the formal denial. *See* Opening Br. at 14, 27, 37, 38, and J.A. at 420–21. In fact, even after being served with of the Complaint, Appellees sent the Scogginses a written denial. J.A. at 395 and 979.

Thus, the evidence establishes that the trial court erred in denying the applicability of the continuing violations doctrine to recognize the constructive denials and, consequently, erred in granting summary judgment.

D. Alternatively, The Requisite Second Prong Of The Ripeness Test, Undue Hardship, Underscores Appellees' Faltering Claim For Dismissal Due To Ripeness.

The Scogginses will endure undue hardship unlike the Appellees if the case is dismissed on ripeness grounds. Appellees conveniently fail to address the requisite undue hardship prong of the ripeness test. *See* Resp. Br. at 21–25. Courts emphasize that housing discrimination creates a uniquely immediate injury. *Assisted Living Ass'n. v. Moorestown Twp.*, 996 F. Supp. 409 (D.N.J. 1998). "Such discrimination, which under the FHA includes a refusal to make accommodations, makes these controversies ripe." *Id.* at 426.

Withholding court consideration now will clearly result in undue hardship to the Scogginses, and no hardship to the Appellees. Absent a court review, Jacob

Scoggins will be permanently barred from entering and exiting his house like any ordinary person. Furthermore, his safety will be permanently compromised as a result of having only one exit out of his home. Additionally, the Scogginses' requests place neither financial nor administrative burdens on Appellees, or result in a fundamental alteration to the nature of the community. *See* Opening Br. at 20.[3] Moreover, the Association has not and will not suffer any financial hardship. The Scogginses, however, have expended $9,000 to comply with the Appellees' request that they plant adult trees to screen the cars in their driveway as a result of building the interior ramp. J.A. at 394. Therefore, like in *Groome*, "further delay in obtaining judicial resolution will cause additional harm" to the Scogginses. *See Groome Resources Ltd*, 234 F.3d at 200.

Finally, Appellees rely on an unpublished opinion, *Brayboy v. Robeson Cnty. Bd. of Educ.*, 401 F. Appx. 802 (4th Cir. 2010) (unpublished), *cert. denied*, 132 S. Ct. 200, *reh'g denied*, 132 S. Ct. 804 (2011), and misguidedly argue that the Scogginses forfeited appellate review of ripeness by not raising it in their Opening Brief. This argument is without merit. First, Appellees conveniently fail to reference that *Brayboy* is unpublished and therefore, it possesses no precedential value. Second, the Scogginses inherently preserved the ripeness of their FHA

[3] The Scoggins previously consulted with a realtor and property expert who informed them that building a ramp on their house would not "detract" from or diminish the property value as much as planting the trees would. J.A. at 394.

claims in their very discussion of continuing violations, discriminatory intent, and numerous denials of requests in the Opening Brief, and thus, waiver is not at issue.

Therefore, this court should dismiss any consideration of Appellees' ripeness claim because further delay would place concrete, undue hardship on the Scogginses and such result frustrates the purpose of the Fair Housing Act.

E. Appellees' Numerous Separate, Yet Related, Discriminatory Acts Constitute A Continuing Violation.

These repeated and related discriminatory denials, actual or constructive, constitute a continuing violation under *Havens Realty v. Coleman*, 455 U.S. 363 (1982). The Supreme Court in *Havens Realty* held that a pattern of five separate yet related acts of illegal discrimination creates a continuing violation which tolls the statute of limitations. *Id*. at 381. Similarly here, Appellees engaged in a prolonged period of discriminatory behavior. *See* Part I.A−C, *supra*; and Opening Br. at 37–38.

The trial court erred when it ignored the holding in *Havens Realty*. J.A. at 274−75. The trial court, assuming that all denials had in fact occurred, could not find a continuing violation. *Id*. Yet, if five denials constitutes a continuing violation, certainly twelve denials should as well. *Havens Realty*, 455 U.S. at 381.

Appellees' conveniently ignore *Havens Realty* and fail to distinguish it from the present case. Unconvincingly, Appellees rely only on *Miller v. King George County*, 277 F. Appx. 297 (4th Cir. 2008) (unpublished). Resp. Br. at 46. *Miller*

also stands as an unpublished opinion with no precedential value. Nonetheless, the case is readily distinguishable. In *Miller*, the plaintiff challenged the constitutionality of a water ordinance. *Miller*, 277 F. Appx. at 298. The city found the plaintiff in violation of the ordinance and took several legal actions to bring the plaintiff into compliance. *Id*. at 299. *Id.* This Court held that these legal actions were not "additional 'violations,'" but "merely the county's attempts to bring the [plaintiff] into compliance." *Id*.

Miller is not applicable to the Scogginses' claims. The Scogginses suffered from numerous discriminatory acts that were not ill effects of the first violation. Opening Br. at p. 37–38. Rather, each illegal act was a denial of a separate request for a reasonable modification and reasonable accommodation. To hold otherwise would eviscerate the continuing violation doctrine, and run contrary to the Supreme Court's holding in *Havens Realty*, 455 U.S. at 381.

Therefore, this Court should uphold *Havens Realty* and reverse the trial court's decision.

II. JACOB SCOGGINS NEEDS THE WHEELCHAIR RAMP TO FULLY ENJOY THE PREMISES AS PROVIDED BY SECTION 3604(f)(3)(A) OF THE FAIR HOUSING ACT.

In their opening brief, the Scogginses raised the critical issue that showing necessity in a reasonable accommodation request is clearly different than a modification request. The complaint and the arguments put forward clearly

requested a modification for the wheelchair ramp. Despite the Scogginses' properly pleading a denial of their modification request, the trial court reviewed Appellees' motion for summary judgment under the *Bryant Woods* reasonable accommodation test. This was plain error.

Had the trial court considered their request under a modification standard of necessity, summary judgment would have been denied. However, neither this Circuit, nor any other, has implemented a standard for reasonable modification cases. The Scogginses, based on the framework of the plain meaning of the reasonable accommodation standard of necessity, and the plain meaning of the modification language, suggested the following possible standard:

> The FHA thus requires a modification for persons with handicaps if the modification is (1) reasonable and (2) necessary (3) to afford the handicapped persons full enjoyment of the premises.

See the accommodation standard in *Bryant Woods,* 124 F.3d at 60.[4]

Clear factual and legal differences exist between an accommodation and a modification request that require different and distinct "necessity" standards. The party burdened (financial and otherwise) to bring about the request serves as the essential difference between an accommodation and modification. *See* 3604(f)(3)(A) (allocating costs related to the modification to the party requesting

[4] The Scogginses suggest adjusting the *Bryant Woods'* standard only where the language of 3604(f)(3)(A) ("modification" and "full enjoyment of the premises") differed from the language of 3604(f)(3)(B) ("accommodation" and "equal opportunity to use and enjoy the property").

it); 3604(f)(3)(B) (placing burden of action on non-requesting party). Here, the Scoggins family, not the Appellees, will pay for and install Jacob's wheelchair ramp. The case law surrounding the *Bryant Woods* accommodation standard of necessity hinges on the fact that accommodations allocate a burden of affirmative action on the non-requesting party. *See Bryant Woods*, 124 F.3d at 604, ("the requirement of even-handed treatment of handicapped persons does not include affirmative action by which handicapped persons would have a *greater* opportunity than non-handicapped persons … Congress only prescribed an *equal opportunity*," (Emphasis added)); *See also* Opening Br. at 32–6.

In this case, the Scogginses committed to pay all costs associated with the wheelchair ramp. Since Appellees' are not "affirmatively burdened" by this request (as they would have been with an accommodation request), Jacob and his family should be permitted to determine what Jacob needs in order to "fully enjoy" his dwelling.

A. The Issue Of Jacob's Need For A Wheelchair Ramp Is Not Barred On Appeal.

Appellees contend that the Scogginses are barred from bringing "new arguments" on appeal. *See* Resp. Br. at 36. However, this is not the standard.[5] This

[5] In support of their argument that the Scogginses are barred from arguing Jacob's need for a reasonable modification, Appellees' cite footnote five of *U.S. v. Evans*, 404 F.3d 227, 236 (4th Cir. 2005). Appellees cite this footnote, which uses the term "argument" rather than "issue," in order to paint the standard as one that bars

Court has stated that a party's failure to raise an issue in a complaint or opposition to summary judgment constitutes a waiver of that issue. *Estate of Weeks*, 99 F. Appx. At 474. However, the Scogginses raised the "issue" that a wheelchair ramp was necessary for Jacob to "fully enjoy" his dwelling (pursuant to section 3604(f)(3)(A)) in both their complaint and in opposition to Appellees' motion for summary judgment. J.A. at 21, ¶ 14, and 187. Therefore, the Scogginses did not waive this issue and are not barred from making their arguments on appeal.

B. Statutory Construction And Relevant Legislative History Supports The Scogginses' Recommendation Of A "Full Enjoyment" Modification Standard.

Since *Bryant Woods* adopts section 3604(f)(3)(B)'s (accommodations) "equally opportunity" language to explain the importance of balancing the competing interests associated with accommodations, the test using that language is strictly limited to accommodation requests. *Id.* at 604. The Scogginses supported this argument in their opening brief by citing well-established principles of statutory construction, namely that Congress intends sections drafted differently to be applied differently. *See Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809, (1989) ("It is a fundamental canon of statutory construction that the words of

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new "arguments" on appeal. New arguments are permitted, as long as the "issue" was properly raised in the complaint or in opposition to summary judgment. *See Estate of Weeks v. Advance Stores Co., Inc.*, 99 F. Appx. 470, 474 (4th Cir. 2004).

a statute must be read in their context and with a view to their place in the overall statutory scheme"); *See* Opening Br. at 33–35.

Furthermore, the legislative history corroborates that Congress intended section 3604(f)(3)(A) (modifications) to be treated separately from section 3604(f)(3)(B) (accommodations). Congress intended that "full enjoyment" in section 3604(f)(3)(A) have a different meaning than "equal opportunity to use and enjoy" in section 3604(f)(3)(B), because it defined them differently in both the statute and relevant legislative history. As to "full enjoyment" in section 3604(f)(3)(A):

> The Committee understands that the nature of individual handicaps, and therefore the potential need for environmental modifications, varies greatly. Therefore the term "full enjoyment" *has been used here to assure that reasonable modifications required by individual tenants to assure that he or she could fully use the premises would be protected under this Act.* Any modifications protected under this act must be reasonable and must be made at the expense of the individual with handicaps.

HOUSE REPORT NO. 100–711, H.R. REP. 100–711, 25, 1988 U.S.C.C.A.N. 2173, 2186 (emphasis added). As to "equal opportunity to use and enjoy" in section 3604(f)(3)(B):

> New Subsection 3604(f)(3)(B) makes it illegal to refuse to make reasonable accommodation in rules, policies, practices, or services if necessary to permit a person with handicaps equal opportunity to use and enjoy a dwelling…This section would require that changes be made to such traditional rules or practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling.

HOUSE REPORT NO. 100–711, H.R. REP. 100–711, 25, 1988 U.S.C.C.A.N. 2173, 2186. Congress drafted these two distinct sections to effectuate two distinct purposes. *See Davis*, 489 U.S. at 809.

In contrast to Appellees' contention that a modification standard would be "wholly amorphous," section 3604(f)(3)(A) sets forth a precise standard for granting a modification, which must (1) begin with a dialogue between the parties, (2) be reasonable, and (3) be necessary to afford "full enjoyment." *See* Resp. Br. at 38. Both accommodations and modifications require that a request be reasonable and necessary. The sole difference is that a disabled person would have more leeway in determining what they believe to be necessary because they are paying for the modification and not placing any burden on the other party. Therefore, a modification standard would be no more "amorphous" than the existing accommodation standard.

C. The Trial Court's Use Of The Reasonable Accommodation Standard of Necessity Test Was A Departure From Its Prior Modification Request Analysis.

In *Nester v. Analostan Homes Association, Inc.*, 2002 WL 32657037 (E.D. Va. 2002), the trial court reviewed a plaintiff's request to replace the shingles on the roof of his home with a preferred brand that plaintiff believed would afford him fire-safety. *Id*. at 1. In analyzing the plaintiff's need for additional fire-safety, the trial court did *not* perform a *Bryant Woods* reasonable accommodation standard of

necessity analysis, despite the fact that *Nester* was decided eight-years after *Bryant Woods*. *Id.* at 2. The trial court concluded that the fire-retardant shingles would provide "Plaintiff with the *full enjoyment* of his premises because of its superior fire protection." *Id.* at 3, (emphasis added). Although the court did not end up granting the modification request for other reasons, it did conclude that fire-safety modifications are necessary for a mobility-impaired persons' full enjoyment of the premises. *Id.* at 3.

Even though there are no other modification cases in the Fourth Circuit that have applied the *Bryant Woods*' accommodation test, Appellees' still contend that it is the proper standard. In support, Appellees cited three accommodation-based request cases, in addition to *Nester*. *See Resnick v. 392 Central Park West Condominium*, 2007 WL 2375750 (S.D.N.Y. 2007); *Gavin v. Spring Ridge Conservancy, Inc.*, 934 F. Supp. 685 (D. Md. 1995), *aff'd*, 92 F.3d 1178 (4th Cir. 1996); and *Loren v. Sosser*, 309 F.3d 1296 (11th Cir. 2002). These accommodation cases are not on-point because they do not indicate whether the accommodation standard of necessity can be appropriately or properly applied to a modification request.

Appellees' reliance on *Nester* was also misplaced because *Nester* establishes that the trial court has not formerly used the *Bryant Woods*' standard of necessity to review a modification request. Therefore, in this case, the trial court's use of the

Bryant Woods' test was clear error. Had the trial court applied the "full enjoyment" standard, as it did in *Nester*, then it would have held that a wheelchair ramp to the front door of Jacob's dwelling was necessary.

D. A Wheelchair Ramp Is Necessary To Afford Jacob Scoggins "Full Enjoyment Of The Premises."

A wheelchair ramp is necessary to afford Jacob the ability to enter and exit his home in the same manner and location as his family was properly alleged in the First Amended Complaint, J.A. at 21, ¶ 14.

The trial court reviewed Jacob's need for a wheelchair ramp under the *Bryant Woods* "amelioration" requirement calling for plaintiff to demonstrate "a direct link between the proposed accommodation and the equal opportunity to be provided to the person with a disability." J.A. at 272. *See Bryant Woods Inn, Inc.*, 124 F.3d at 604. Applying this test, the trial court erroneously granted summary judgment for the Appellees. The trial court stated:

> . . . Plaintiffs [Scogginses] have not brought any evidence that placing a ramp on the exterior of the home would directly ameliorate the effect of the disability in a way that the current ramp [in the garage] does not . . . While having an additional ramp on the front of the home may be the Scogginses' *preference*, it cannot be said to be *causally connected to ameliorating the effect* of Jacob's disability. Therefore, the accommodation cannot be said to be necessary.

JA at 272–73, (emphasis added).

The ruling misstated the "effect" Jacob seeks to ameliorate as general access to his family's home. Rather, Jacob endeavors to gain the ability to enter and exit

through the front door like everyone else.[6] J.A. at 21, ¶ 14. A ramp would directly ameliorate this "effect" of Jacob's disability by allowing him to enter through that door. Therefore, the Scogginses already alleged enough facts to prove Jacob's need for a modification, or at minimum, enough to create a genuine issue of fact necessary to overcome summary judgment.

1. Jacob Needs To Have An Alternative Exit In Case Of An Emergency For Full Enjoyment Of The Premises.

The Scogginses' First Amended Complaint also alleges that Jacob needs to have an additional entry or exit from his home in case of an emergency, especially a fire. J.A. at 21 ¶ 16. The Scogginses pointed out that "each year fires kill more Americans than all natural disasters combined, and the most common place fires start in the home are in kitchens." J.A. at 189.

Currently, Jacob can only exit his home through the kitchen and out the garage via the garage door ramp. If there is a fire in the kitchen, Jacob will not be able to escape. Although Appellees state that Jacob also has the walk-out basement as a point of exit, if Jacob is not in the basement at the time of a fire he would have to first get out of his wheelchair, strap himself into an electronic chair-lift to get down the stairs, then get himself out through the door, and literally drag himself to

[6] Jacob testified that as a result of not being able to enter through the front door that "[he] did not feel equal to his family." He testified, "I felt I was second class. Like I was not good enough to go through the front of my home." J.A. at 434.

safety.[7] J.A. at 444–45, 166. In defense of their denial, Appellees have mischaracterized the home's true accessibility. *See* Resp. Br. at 41.

The trial court incorrectly identified Jacob's request for an additional, safer exit point as a preference instead of as a need. J.A. at 273. Appellees' continued effort to paint this request as a preference only reinforces the fact that the trial court erred in applying accommodation law. Since Appellees' only interest in opposing the ramp that will cost them nothing is aesthetic at best (or based on a discriminatory animus at worst), there is no reason that Appellees should be permitted to qualify Jacob's "full enjoyment" of his home as a preference. J.A. at 273, 1793–94. His need is abundantly clear.

In *Nester*, the same trial court that heard this case determined that fire-retardant shingles were necessary to provide a mobility-impaired plaintiff "full enjoyment" of his home. *Nester*, 2002 WL 32657037 at 3. Although the court did not permit the installation of the plaintiff's "preferred brand" of shingles, its decision to do so was based on the fact that they substantially accomplished the same "full enjoyment" goal as the existing shingles. *Id.* In this case, neither the garage ramp nor the walkout basement substantially satisfies Jacob's need to fully

[7] In the event that there is a fire, the walkout-basement can hardly be considered an acceptable exit as it leads to a patio, no longer than eleven-feet, which ends in a grassy, sloped terrain, inaccessible to a wheelchair user. J.A. at 166; *see also* J.A. at 2198–2203 (photo exhibit of backyard). Additionally, use of an electronic chairlift during a fire cannot be considered a safe alternative for egress. J.A. at 444–45.

enjoy his dwelling. Since Jacob, like the plaintiff in *Nester*, is a mobility-impaired person who could benefit from a fire-safety modification, the issue of Jacob's need for the ramp should be remanded for further consideration under the proper modification standard.

III. SUMMARY JUDGMENT IS INAPPROPRIATE FOR THE ATV ACCOMMODATION CLAIM BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACTS.

Every aspect of the Scogginses' reasonable accommodation claim is supported by evidence. While Appellees dispute these material facts, the existence of this dispute demonstrates that summary judgment is inappropriate.

A. The Scogginses' Evidence Establishes Necessity.

The record establishes that the Scogginses submitted sufficient evidence to prove that the ATV accommodation is necessary for Jacob to be independently mobile. J.A. at 392. Appellees attempt to twist the evidence to unfairly paint the Scogginses as misrepresenting the facts. *See* Resp. Br. at 26.

Under the lay person standard, Jacob's testimony properly establishes that an ATV accommodation is necessary for him because a lay person can readily comprehend his disability and use of a wheelchair. The Scogginses are not required to use expert testimony to establish necessity. *See* Opening Br. at 18. It is uncontested that Jacob's disability necessitates the use of some device for him to move independently. Though Jacob owns both a manual and motorized

wheelchair, Jacob testified that both are unfit for use on unpaved roads. J.A. at 448. Finally, the strain that a manual chair causes on his shoulders are well within the comprehension of a layperson.

As to the power wheelchair, Jacob testified that he does not use it outside on Lee's Crossing's roads because he has been instructed that he should not operate the wheelchair on unpaved roads. J.A. at 452–453. Appellees also attempt to characterize Jacob's tricycle as a viable alternative to the manual wheelchair. Resp. Br. at 28. However, Jacob has not used the tricycle in some time because of the time it takes for him to place himself in the tricycle, and the strain this causes on his body. J.A. at 454–57.

Appellees offer no evidence to rebut the Scogginses' evidence. Rather, Appellees misinterpret *Matarese v. Archstone Pentagon City*, 761 F. Supp. 2d 346 (E.D. Va. 2011)[8] to hold that expert testimony is required in all housing discrimination cases. *See* Resp. Br. at 28–29; J.A. at 276. Yet, *Matarese* applies the lay person standard to the very situation in which Appellees contend expert testimony is required.

The court in *Matarese* only required an expert witness since the question of "whether a proposed accommodation will ameliorate the effects allegedly caused

[8]Appellees also discuss case *Douglas v. Victor Capital Group*, 21 F.Supp.2d 379 (S.D.N.Y. 1998). However, *Douglas* does not apply the lay person standard like *Matarese*. *Id*. at 391.

by certain chemicals to the degree necessary to afford [plaintiff's] equal opportunity in housing and not just ameliorate the burdens shared by all individuals exposed to chemicals, *is not within the knowledge of a layperson*." *Id*. (Emphasis added).[9]

Appellees also attempt to distinguish *Katz v. City Metal Co*., Inc., 87 F.3d 26 (1st Cir. 1996) (considering the effects of a heart attack within the knowledge of a lay person), and *Marinelli v. City of Erie, Pennsylvania*, 216 F.3d 354, 357–8 (3d Cir. 2000) (holding that neck and arm pain are "the least technical in nature and are the most amenable to comprehension by a lay jury."). Unconvincingly, Appellees assume that this is only applicable to establishing disability, and an expert witness is required in establishing necessity. *See* Resp. Br. at 29. However, Appellees fail to articulate any reason why this distinction is meaningful. In fact, the case that Appellees rely on, *Matarese*, explicitly applies the layperson standard for necessity. *Matarese*, at 365.

Therefore, the Scogginses testimony is well within the scope of common knowledge of the layperson and demonstrates necessity. When the disputed facts

[9] *See also* Federal Rules of Evidence Rule 701. If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is (a) rationally based on the witness' perception; (b) helpful to clearly understanding the witness' testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

are viewed in a light most favorable to the Scogginses, summary judgment is inappropriate.

B. There Is A Genuine Issue Of Fact Concerning Jacob's Ability To Operate An ATV.

The Scogginses submitted sufficient evidence to establish reasonableness as a triable issue. *See* Opening Br. at 20–21. Though Appellees attempt to characterize the key facts to the reasonableness issue as "undisputed," the parties clearly dispute whether Jacob can safely operate an ATV. Resp. Br. at 30; J.A. at 166. Therefore, summary judgment was error.

Appellees only argue that the accommodation is unreasonable because "it would be unsafe for him and for other members of the community and the public." Resp. Br. at 30. Appellees' entire argument centers on attacking the safety of the accommodation. *Id*. However, the Scogginses submitted a substantial amount of evidence rebutting this argument. *See* Opening Br. at 20–21.

For example, Jacob testified that he can indeed operate the ATV safely, and the Scogginses submitted a video of Jacob operating the ATV in a safe manner. J.A. at 1264. Appellees argue that Jacob cannot operate the ATV without torso support, yet Jacob has stated numerous times that Appellees' argument is incorrect and demonstrated it on the video. J.A. at 45, 475–77, 481. Appellees point to the fact that the ATV does not have a "torso belt," in reference to the Woodrow Wilson Report. Resp. Br. at 33. During Jacob's deposition, however, Jacob stated

numerous times he was instructed that he did not require the "torso belt." J.A. at 485–87, 520–21.

Once again, contrary to Appellees' assertion, usage of the ATV presents an issue of disputed facts. When viewed in a light most favorable to the Scogginses, Appellees' safety concerns are refuted. As the Appellees' sole objection to the reasonableness of the accommodation is centered on the argument that it is an "unsafe practice," the Scogginses met their burden to establish reasonableness, and summary judgment should be reversed.

IV. THE RECORD PROVIDES SUBSTANTIAL EVIDENCE OF DISCRIMINATION BY APPELLEE MERRITT.

Appellee Merritt alleges that "the uncontested facts make clear that the Scogginses cannot establish" that Merritt should be personally liable for his discriminatory behavior. Resp. Br. at 47. Merritt attempts to shield himself from liability by claiming that "at all times relevant…Merritt was acting in his capacity as an officer and board member of the association." *Id.* However, personal liability can be assessed where the person discriminating does so intentionally in reliance upon the trial court's opinion and *Martin v. Constance*, 843 F. Supp. 1321 (E.D. Mo. 1994). *Scoggins v. Lee's Crossing Homeowners Ass'n,* 1:10–CV–1157–LO, 2011 WL 4578409 (E.D. Va., Sept. 29, 2011) ("It is clear that an officer or board

member of the HOA cannot be held vicariously liable for the acts of the HOA unless the evidence shows that he or she acted with discriminatory intent.")

In contrast, Merritt engages in a lengthy, unnecessary discussion of *Meyer v. Holley*, 537 U.S. 280 (2003). *Meyer* is inapplicable. The Scogginses do not argue that Merritt should be held vicariously liable through the principles of agency; rather, the Scogginses contend that Merritt should be liable for his own actions.

Because Merritt, in the Response, does not distinguish the rule cited by the trial court (that an officer or board member of the HOA can be held liable for the acts of the HOA if he or she acted with discriminatory intent), the authority is therefore conceded. *See Martin*, 843 F. Supp. at 1325, ("A plaintiff can show a violation of section 3604(f) by . . . showing discriminatory intent on the part of the defendants."

A. Summary Judgment Was Improper Because There Is A Dispute Of Fact Regarding Whether Appellee Merritt Intentionally Discriminated Against The Scogginses.

Discriminatory intent can be shown by circumstantial or direct evidence of intent. *See Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977). Indirect or circumstantial evidence can suffice to prove state of mind because direct evidence of discriminatory intent is seldom available. *Warren v. Halstead Indus., Inc*., 802 F.2d 746, 752 (4th Cir. 1986) (quoting *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 714, (1983)). Plaintiff's

evidence of discriminatory intent need not show that the handicapped status of the intended inhabitants was the sole factor of the defendant's decision to seek enforcement of the restrictive covenant, only that it was a motivating factor. *Arlington Heights*, 429 U.S. at 255–66.

Appellees state that the evidence put forth by the Scogginses is "not grounded in fact." *See* Resp. Br. at 47. However, the Scogginses recite the evidence they alleged as proof of Merritt's discriminatory actions in their Opening Br. at 46–50. This evidence is not refuted by Merritt in his response. Therefore, the Scogginses have alleged sufficient direct, indirect, and circumstantial evidence of discrimination. *Id.*

In his response, Merritt argues for a higher standard than the one established by relevant authority. Merritt states "neither the Scoggins[es] nor their witnesses… were able at their depositions to identify a single *derogatory* statement made by Merritt or any discriminatory or derogatory conduct directed toward Jacob Scoggins." Resp. Br. at 50. However, this is not the standard. *See Warren v. Halstead Indus.*, Inc., 802 F.2d 746, 752 (4th Cir. 1986) ("Indirect or circumstantial evidence can suffice to prove state of mind *since direct evidence of discriminatory intent is seldom available*") (emphasis added); *See also* Scoggins' Opening Br. at 45, citing *Arlington Heights*, 429 U.S. at 255–66 ("Plaintiff's evidence of discriminatory intent need not show that the handicapped status of the

intended inhabitants was the sole factor of the defendant's decision to seek enforcement of the restrictive covenant, only that it was a motivating factor.").

Appellee Merritt additionally refers to the observations and opinions of the Scogginses and their "friends" as "subjective" to match the language of *Goldberg v. Green and Co., Inc.*, 836 F.2d 845 (Cir. 1988). *See* Resp. Br. at 50.

In *Goldberg*, this Court held that the plaintiff's "own naked opinion, without more is not enough to establish a prima facie case of age discrimination." *Id*. at 847. Appellees rely on this authority to conclude that the opinions of the Scogginses' witnesses, George Garsson, Victor DeAnthony, and Terrance Tracey, under oath, are somehow "bereft of any factual[ity]" because they are subjective opinions of "friends." *See* Resp. Br. at 50. Merritt's reliance on *Goldberg* is misplaced because *Goldberg* only decided the evidentiary inadequacy of plaintiff's own, subjective "naked opinion." *Goldberg*, 836 F.2d at 848

In this case, the Scogginses have alleged more than their own "naked opinion," which is evidenced by direct and consistent corroborative evidence from multiple witnesses (Garsson, DeAnthony, Tracey). This is exactly the kind of evidence that the plaintiff in *Goldberg* failed to bring. Merritt implies, when discussing the Scogginses' witnesses as "friends" that their testimony is somehow less reliable, at one point going as far as to state:

> When pressed to provide a basis for the statements made in their declarations under penalty of perjury, all retreated to the same position

> claiming that it was the "tone" of the meeting that led them to conclude in their own minds that Mr. Merritt opposed the request.

See Resp. Br. at 54. It is unclear what standard of evidence Merritt requests the Scogginses meet. The Scogginses produced three witnesses to corroborate their allegations. The fact that these witnesses concluded "... in their own minds that Mr. Merritt opposed the request," only demonstrates that three *different* witnesses "subjectively" came to the same conclusion. Unlike the plaintiff in *Goldberg*, the evidence supporting the Scogginses' allegations is not a subjective conclusion isolated to the "naked opinion" of the Scogginses. When taken in the light most favorable to the Scogginses it demonstrates that there is an issue of material fact regarding Merritt's discriminatory actions and intent.

Moreover, Merritt concedes the existence of an issue of material fact. *See* Resp. Br. at 52–54. By bringing competing witness testimony to rebut the Scogginses, Merritt concludes, "The Scoggins[es]' final, desperate claims related to Merritt's treatment of them related to the violations are also clearly contradicted by the facts." *Id.* at 54. Therefore, Merritt concedes that this case presents issues of "contradictory facts." As issues of fact remain, summary judgment regarding the issue of Merritt's personal liability should be reversed.

CROSS APPELLEE'S RESPONSE BRIEF

ARGUMENT

This Court should affirm the District Court's decision denying the Cross-Appellants' motion for attorneys' fees and costs under the Fair Housing Act, 42 U.S.C. § 3613(c)(2) ("FHA"). The District Court correctly held that awarding attorneys' fees in this case would run contrary to the public policy goals of the FHA. J.A. at 304. Importantly, the District Court properly found that the Cross-Appellees' lawsuit was not "frivolous, unreasonable, or without foundation." *Id.* at 303; *see Bryant Woods*, 124 F.3d 597, 606. Cross-Appellees provided sufficient facts for both the ATV and the ramp request to establish that the claims were brought in good faith and with ample legal foundation. Moreover, the District Court's entry of summary judgment in Cross-Appellants' favor does not signify Cross-Appellees' claims were frivolous. Finally, the Fair Housing Act, along with the case law and other authority interpreting it, trumps any contrary fee-shifting provisions within Virginia contracts. For these reasons, this Court should affirm the District Court's denial of Cross-Appellants' motion for attorneys' fees and costs.

A. THE PUBLIC POLICY CONSIDERATIONS UNDERLYING THE FHA DO NOT SUPPORT AWARDING THE CROSS-APPELLANTS' ATTORNEYS' FEES IN THIS CASE.

The strong policy considerations that support awarding attorneys' fees and

costs to prevailing plaintiffs in civil rights cases are not available to prevailing defendants. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418-19 (1978). Prevailing plaintiffs are ordinarily awarded attorneys' fees and costs in all but special circumstances. *Id. at* 417. Prevailing defendants, on the other hand, are awarded fees only upon a finding that the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 417, 421; *see Bryant Woods Inn, Inc.*, 124 F.3d 597, 606 (4th Cir. 1997). The District Court recognized the significance of the *Christiansburg* analysis in determining whether to award attorneys' fees. J.A. at 303. In *Bryant Woods*, this Court held that regardless of the substantive outcome, attorneys' fees will be denied to a prevailing defendant when a plaintiff has a reasonable legal basis to initiate and pursue a claim. *Id.* at 607.

As the District Court correctly stated, "allowing a neighborhood covenant to provide an end run superseding congressional intent would be contrary to public policy." J.A. at 304. "If aggrieved plaintiffs contemplate that they will be forced to bear attorneys' fees at the outset of litigation, a congressionally chosen means to avoid FHA violations might not be pursued." *Id. See also Newman v. Piggie Park Enterprises, Inc*., 390 U.S. 400, 402 (1968) (noting in reference to Title II of the Civil Rights Act that "[i]f successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to

advance the public interest by invoking the injunctive powers of the federal courts."). In light of the public policy considerations surrounding the FHA, this Court should affirm the District Court's decision denying Cross-Appellants' motion for attorneys' fees and costs.

B. CROSS-APPELLEES' CASE WAS NOT FRIVOLOUS, UNREASONABLE, OR WITHOUT FOUNDATION.

In determining whether a case is frivolous, unreasonable, or without foundation, this Court has considered factors such as the plaintiff's reliance on case law "decided under the Fair Housing Act as authority for its litigation position." *See Bryant Woods,* 124 F.3d at 607 (denying prevailing defendant's claim for attorney fees where plaintiff had a reasonable legal basis for initiating and pursuing its cause of action based on prior cases decided under the FHA). Therefore, despite Cross-Appellants efforts to "spin" the facts to suit their narrative of victimhood, the legal question presented to this Court is whether Cross-Appellees brought their claim in good faith and with sufficient legal foundation.

The test for awarding fees to a prevailing defendant in a civil rights case is never whether the plaintiff's claim was successful. Rather, in determining whether a suit is frivolous, "a district court must focus on the question whether the case is so lacking in arguable merit as to be groundless or without foundation rather than whether the claim was ultimately successful." *Jones v. Texas Tech University,* 656 F.2d 1137, 1145 (5th Cir. 1981). A district court should "avoid

engaging in the *post hoc* reasoning that because a plaintiff did not prevail, the claim was necessarily without merit." *See Nester v. Analostan Homes Association, Inc.*, 2002 WL 32657214, *1 (E.D. Va. 2002) (citing *Christiansburg*, 434 U.S. at 422).[10] "To award attorneys' fees simply because a plaintiff loses the case risks undercutting the intent of Congress to promote vigorous enforcement of is laws." *Id.* Cross-Appellees' case was replete with legal support under the FHA (and cases and other authority interpreting it), both at the motion to dismiss and summary judgment stage. Accordingly, Cross-Appellees' case was not frivolous, unreasonable, or lacking foundation. For these reasons, this Court should affirm the District Court's decision denying Cross-Appellants' motion for attorneys' fees and costs.

1. The ATV Request.

It is undisputed that the covenants allow a homeowner to petition the LCHA for an exemption to use an ATV in the streets of Lee's Crossing. J.A. at 44, ¶ 3, 374, and 383. It is also undisputed that Debbie Scoggins provided a written request on May 19, 2009, requesting such exemption as a reasonable accommodation. J.A.

[10] *Accord Johnson v. City of Chesapeake, Va.*, 2002 WL 32593922, *10 (E.D. Va. 2002) (successful motion to dismiss was not enough by itself to entitle prevailing defendants to attorneys' fees where court could not say claims were frivolous, unreasonable, or groundless); *Wells v. Willow Lake Estates, Inc.*, 2010 WL 572731, *4 (S.D. Fla. 2010) (defendants not entitled to attorneys' fees despite court granting two motions to dismiss claims that were not sufficiently frivolous, unreasonable, and without merit).

at 44–45. The Cross-Appellants failed to produce any evidence that the Scoggins were ever contacted about the LCHA Board's alleged desire to discuss the ATV request, or letting the Scoggins know that the ATV request would be discussed at the July and September 2009 LCHA Board meetings. J.A. at 47–48, 58. Although property manager Mike Arndt circulated a *draft* email to the LCHA Board members, there is no evidence that the email was ever sent to the Scoggins, and the Scoggins have denied under oath that it or any other communication from the LCHA regarding the May 19, 2009 ATV request was ever received prior to their second request some sixteen months later. J.A. at 177–178, n.8. Moreover, several Lee's Crossing residents who attended the September 2009 LCHA Board meeting provided sworn testimony that derogatory and condescending comments were made about the Cross-Appellees by Merritt and Mrs. Merritt, and that Merritt and Mrs. Merritt were opposed to the ATV request from the outset of the September 2009 LCHA Board meeting. J.A. at 48; 177.

In opposition to Cross-Appellants' Motion to Dismiss, Cross-Appellees cited the Joint HUD/DOJ Accommodations Statement as authority for their position that a one year delay should be deemed a failure to provide a reasonable accommodation request. Cross-Appellees' argument was bolstered by the District Court's denial of the Motion to Dismiss and its recognition that the Cross-Appellants had "put off the hearing" on the ATV request. Supp. J.A. at 2992.

At the summary judgment stage, Cross-Appellees provided extensive authority to support their position that Cross-Appellants effectively denied the ATV request. While the District Court did not ultimately agree that the Cross-Appellants' actions constituted an intentional delay, Cross-Appellees cited significant authority that overwhelmingly supported the conclusion that a sixteen-month delay could constitute a denial. J.A. at 56–57, 173–175.

First, with respect to undue delay constituting an actual or constructive denial of the ATV request, Cross-Appellees included relevant citation to the Joint HUD/DOJ Accommodations Statement, at least five federal circuit opinions, including two that specifically cited the Joint HUD/DOJ Accommodations Statement in their analysis, as well as several district court opinions.[11] *Id.* In addition, Cross-Appellees provided extensive authority to support their position that it was the Cross-Appellants' affirmative duty to investigate and engage in an interactive process in response to a reasonable accommodation request. J.A. at 57-58; 178-179. Although the District Court reached the conclusion that Cross-Appellees failed to meet their evidentiary burden on the "reasonable" and "necessary" elements, this hardly means Cross-Appellees' ATV claim was completely lacking foundation.

With regard to the reasonable element, and Jacob Scoggins' ability to safely

[11] The cases also indicated that the Joint HUD/DOJ Accommodations Statement was to be accorded substantial and/or controlling deference. *Id.* at 56–57, n.11.

operate the ATV, Cross-Appellees produced day-in-the-life videos of Jacob Scoggins which demonstrated his strength and physical capability to safely operate the ATV and to easily transfer on and off the ATV. J.A. at 66. Dan Scoggins also provided sworn testimony that he spent a significant amount of time training Jacob Scoggins on the operation of the ATV. J.A. at 46. A subsequent Woodrow Wilson report also indicated that Jacob Scoggins no longer needed a support device for trunk control support when operating a vehicle. J.A. at 45, 46, and 576. Moreover, Cross-Appellants' expert witness reached his conclusions without ever examining Jacob Scoggins or viewing the day-in-the-life videos. Indeed, he never even provided sworn testimony to the District Court in support of his opinion. Cross-Appellants submitted his *unsworn* report in support of their Motion for Summary Judgment.

With regard to the necessary element, Cross-Appellants' expert witness is not a medical expert, physician, or physical therapist, and has no demonstrable qualification to render an opinion about the ATV's effect on Jacob's body or disability. On the other hand, based on his interactions with his physicians and therapists, it is not entirely unreasonable to conclude that Jacob Scoggins had a competent understanding about the effects of excessive wheeling to his shoulders when traversing in his manual wheelchair over unstable terrain. J.A. at 185. It is not entirely unreasonable to conclude that Jacob Scoggins has a competent

understanding about the costly effects that dusty, gravelly roads will have on his power wheelchair after interacting with the professionals who sold it to him. *Id.* Cross-Appellees provided support for the legal conclusion that a layman can express an opinion on matters appropriate for expert testimony when the lay witness has personalized knowledge of facts underlying the opinion. J.A. at 186-187. An action is deemed frivolous when it lacks an arguable basis in law or in fact. *Allmond v. Mosley*, 2002 WL 32376941, *1 (E.D. Va. 2002). S*ee also Cavines v. Somers,* 235 F.2d 455, 456 (4th Cir.1956) (stating that a complaint is frivolous if it is "utterly without merit"). Cross-Appellees' ATV claim was not frivolous, unreasonable, or without foundation.

Finally, Cross-Appellees never intentionally mislead the District Court with respect to the ATV, and Jacob Scoggins did not intentionally mislead the District Court with his initial declaration. J.A. at 185. The references to his specially adapted ATV, and needing the ATV to get to a neighbor's house, were accurate at one time. *Id*. Jacob was forthcoming about his misunderstanding in his subsequent declaration and was forthcoming in his deposition when he explained that the ATV was manufactured with hand controls, an automatic clutch, and other equipment. *Id*. None of which negated the fact that he could operate the ATV.

"An award of attorneys' fees against a losing plaintiff in a civil rights action is an extreme sanction that must be limited to truly egregious cases of

misconduct." *Jones v. Continental Corp*., 789 F.2d 1225, 1232 (6th Cir. 1986). As the District Court recognized, Cross-Appellees' conduct does not rise to that level.

2. The Ramp Request.

Cross-Appellees' access ramp claim also had ample legal foundation. In opposition to Cross-Appellants' Motion to Dismiss, Plaintiffs cited the Joint HUD/DOJ Modifications Statement[12] and HUD's implementing regulations of the Fair Housing Act which supported the contention that the Cross-Appellees' ramp request is sufficient to trigger the protections of the FHA if made orally, and that the Cross-Appellants were placing unreasonable conditions on the request which constituted a denial. In denying Cross-Appellants' Motion to Dismiss at oral argument, the District Court ruled that the LCHA requirements were "not binding on the Fair Housing Act," and that compelling Cross-Appellees to build the ramp in their garage "was unreasonable to begin with, but they complied with it." Supp. J.A. at 2999. Accordingly, there was nothing about Cross-Appellees' claim that was frivolous, unreasonable, or without foundation.

At the summary judgment stage, Cross-Appellees also provided extensive authority to support their position on the ramp request. Although the District Court

[12] At the hearing on the motion to dismiss, Cross-Appellees' counsel provided the Court with citation to a 4th Circuit case that indicated the deference accorded to the Joint HUD/DOJ Modifications Statement was more than the deference afforded in *Chevron*. Supp. J.A. at 2992.

did not agree with Cross-Appellees' arguments and determined that Cross-Appellees failed to show "necessity" for the ramp, Cross-Appellees provided legal authority that would support the opposite conclusion. The Joint HUD/DOJ Modifications Statement, which is to be accorded substantial or controlling deference, places an emphasis on adding an access ramp to make the *primary* entrance of a home accessible to wheelchair users. J.A. at 60–61, 179–180. In addition, Cross-Appellees provided case law to support the argument that the necessary element is linked to the goal of equal opportunity to use and enjoy a dwelling the same way non-disabled persons enjoy a residence, which normally would have been the front entrance of the Scoggins home. *Id*. at 187. Moreover, the Court had already come to the conclusion at the motion to dismiss stage that the garage was an unreasonable alternative. Supp. J.A. at 2999.

In granting Cross-Appellants' Motion for Summary Judgment, the District Court found "no reason why the modification should not be subject to the process delineated by the Protective Covenants and the aesthetic approval of the Architectural Review Board. If Cross-Appellees complete the process and provide the relevant details to the ARB, the ramp could be approved." However, Cross-Appellees provided legal authority that could support the opposite conclusion.

First, HUD's implementing regulations, which are entitled to *Chevron* deference, specify that a reasonable modification can only be subject to: (1) a

reasonable description of the proposed modifications, (2) reasonable assurances that the work will be done in a workmanlike manner, and (3) that any required building permits will be obtained. J.A. at 60. Second, the Joint HUD/DOJ Modifications Statement, which has been accorded substantial or controlling deference by other courts, states that a reasonable modification request can be made orally and the requester does not have to use a provider's preferred forms or procedures for making such requests. *Id.* at 61. While the housing provider can require the requester to: 1) obtain any needed building permits, 2) perform the work in a workmanlike manner, and 3) provide a reasonable description of the proposed modifications, a description of the modification may be provided either orally or in writing depending on the extent and nature of the proposed modification.[13] *Id* at 62-63. The regulations and the Joint HUD/DOJ Modifications Statement do not require the submission of detailed plans, designs, and specifications for construction, exterior colors, materials, landscaping, outside lighting, drawings depicting changes to existing topography and proposed landscape improvements – the elements which Cross-Appellants complain were lacking in the Cross-Appellants' request. *Id*.

[13] It is certainly reasonable to argue that an access ramp for the front exterior of a large home that sits on a ten (10) acre homestead is not going to have a significant aesthetic impact on Lee's Crossing, other than to allow Jacob Scoggins to use and enjoy his home the way his non-disabled family members and friends do.

C. AN AWARD OF ATTORNEYS' FEES AND COSTS BASED ON THE FEE-SHIFTING PROVISION IN THE LEE'S CROSSING COVENANTS IS INAPPROPRIATE IN A FAIR HOUSING ACT CASE.

In 1988, the FHA was amended to make its attorneys' fees provisions consistent with the attorneys' fees provisions of other civil rights statutes. Congress adopted language that parallels the attorneys' fees provision in the 1964 Civil Rights Act[14] and 42 U.S.C. § 1988.[15] Both of these provisions have been interpreted to allow defendants to recover attorneys' fees *only if* the plaintiff's case is "frivolous, unreasonable, or without foundation." *Christiansburg*, 434 U.S. at 422 (interpreting the fee-shifting provision in 42 U.S.C. § 2000e-5(k)); *Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (interpreting the fee-shifting provision in 42 U.S.C. § 1988). The *Christiansburg* standard has been applied by this Court to attorneys' fee awards under the Fair Housing Act. *See, e.g.*, *Bryant Woods Inn*, at 606 - 607.

The purpose of an attorneys' fees award under 42 U.S.C.A. § 3613(c)(2) is to encourage individuals injured by discriminatory housing practices to vindicate their own rights, as well as the public interest in eradicating housing discrimination. *Bethishou v. Levy*, 1989 WL 122435, *1 (N.D. Ill. 1989). An

[14] The 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(k), provides that "the court, in its discretion, may allow the prevailing party ... a reasonable attorneys' fee ... as part of the costs ..."

[15] 42 U.S.C. § 1988(b) was amended in 1976 to read: "the court, in its discretion, may allow the prevailing party ... a reasonable attorneys' fee as part of the costs."

attorneys' fees award under 42 U.S.C.A. § 3613(c)(2) encourages private enforcement of the Fair Housing Act that allows individuals injured by discriminatory housing practices to vindicate their own rights as well as promote the public interest in eradicating housing discrimination. *City of Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 1991 WL 255582, *1 (N.D. Ill. 1991). The eradication of housing discrimination is a policy that Congress considered to be of the highest priority. *Id*. Plaintiffs in Fair Housing Act litigation function as private attorney generals enforcing a policy that Congress considered of the highest importance. *Cole v. Wodziak,* 1998 WL 395162, *5 (N.D. Ill. 1998), *aff'd on other grounds*, 169 F.3d 486 (7th Cir. 1999). Congress enacted the fee shifting provision specifically because the private market for legal services was such that the ordinary citizen could not afford to purchase legal services at prevailing rates. *Id*.

The argument advanced by Cross-Appellants – that a fee shifting provision in the Lee's Crossing Covenants should be applied in an FHA case – flies in direct contravention of an important Congressional goal, and is directly at odds with the interpretation enunciated by the Supreme Court, and applied by the this Court to attorneys' fee awards under the FHA.

Moreover, allowing the Cross-Appellants to apply what is tantamount to a "loser pays" rule would impose a "chilling effect" on future litigants attempting to vindicate their rights under the FHA. *Foster v. Barilow*, 6 F.3d 405, 408 (6th Cir.

1993); *Sassower v. Field*, 973 F.2d 75, 79, (2d Cir. 1992); *Clark v. Oakhill Condominium Association, Inc.*, 2011 WL 1296719, *6 (N.D. Ind. 2011). Taken to its logical conclusion, the Lee's Crossing Covenants could be amended at a future date to include a provision where a plaintiff resident would be barred from bringing a Fair Housing Act claim altogether.[16]

[16] It should also be noted that (a) Jacob Scoggins is not an owner of the property and, therefore, cannot be liable under the fee shifting clause in homeowners documents to which he is not a party; and (b) his parents were added as Plaintiffs at the Defendant's insistence on the grounds that Jacob Scoggins (a non-homeowner) was not able to assert a claim on his own behalf. Supp. J.A. at 2976, n.1. ("Had the parents brought suit … they would have an FHA cause of action … Jacob Scoggins lacks standing to maintain this action"). In this context, therefore, shifting fees would be highly inequitable.

CONCLUSION

The Scogginses respectfully request that this Court reverse and remand the Order of the trial court granting Summary Judgment to Appellees. In the event this Court affirms the trial court's order granting Appellees' Motion for Summary Judgment, it should likewise affirm the District Court's ruling denying Appellees/Cross-Appellants' motion for attorneys' fees and costs.

REQUEST FOR ORAL ARGUMENT

Appellants/Cross-Appellees respectfully requests that this Court hear oral argument in this case.

Respectfully submitted,

July 30, 2012 By: /s/ Miguel M. de la O

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CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)

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/s/Miguel M. de la O
Attorney for Appellants/Cross Appellees
Dated: 7/30/2012

CERTIFICATE OF SERVICE

I hereby certify that on 7/30/2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document was served this day on all counsel of record and pro se parties identified on the attached Service List either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized matter for those counsel or parties who are not authorized to receive Notices of Electronic Filing.

/s/ Miguel M. de la O
Miguel M. de la O