IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 04-507, 04-508

RICHARD & MILTON GRANT CO.; J. RICHARD GRANT; MILTON C. GRANT; PARKER, ESTES & ASSOCIATES, INC.,

Petitioners-Defendants

v.

UNITED STATES OF AMERICA; MEMPHIS CENTER FOR INDEPENDENT LIVING,

Respondents-Plaintiffs

ON PETITION FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. 1292(B) FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

ANSWER IN OPPOSITION FOR THE UNITED STATES AS RESPONDENT

Respondent-plaintiff United States hereby opposes the petitions of petitioner-defendants Richard and Milton Grant Co., J. Richard Grant, Milton C. Grant (Grants), and Parker, Estes and Associates, Inc. (Parker Estes) for permission to appeal, pursuant to 28 U.S.C. 1292(b), the order of the United States District Court for the Western District of Tennessee granting the United States partial summary judgment on liability for several violations of the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*, in this case. This Answer in Opposition is filed pursuant to Federal Rule of Appellate Procedure 5(b)(2).

In the order at issue, the district court held, as a matter of law, that

defendants discriminated against persons with disabilities by failing to design and construct two apartment complexes with accessible and adaptable features required by 42 U.S.C. 3604(f)(3)(C), such as accessible pedestrian routes from ground-floor units to the streets and site amenities; accessible parking at such amenities; entrances into covered units without excessively high thresholds; doorways in bathrooms, bedrooms, and walk-in closets sufficiently wide for use by persons in wheelchairs; thermostat controls in the reach of persons in wheelchairs; bathroom walls with reinforcement for later grab bar installation; and kitchens and baths with sufficient swing space for wheelchairs. (Order Granting Partial Summary Judgment for the United States, dated April 26, 2004 (April 26 Order)).[1] In so holding, the district court rejected defendants' arguments that approximately one-quarter of the 442 ground-floor units are exempted from the FHA requirements because of site impracticality, and that vehicular access routes in lieu of accessible pedestrian routes satisfied the FHA. The district court subsequently affirmed these holdings in its order granting in part defendants' motions for summary judgment, in which it also declined to dismiss plaintiffs' claims for punitive damages and civil penalties. (Order Granting In Part Defendants' Motions for Summary Judgment, dated June 29, 2004 (June 29 Order)).[2]

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[1] The Order Granting Partial Summary Judgment for the United States is attached to Parker Estes' Petition for Interlocutory Appeal.

[2] The Order Granting In Part Defendants' Motions for Summary Judgment is Attachment 1 to the Grants' Petition for Interlocutory Appeal.

Rather than allowing the litigation to proceed to the remedy phase and to final judgment, defendants moved the district court for certification of several issues related to its liability determinations for immediate interlocutory appeal, pursuant to 28 U.S.C. 1292(b). The United States and plaintiff Memphis Center for Independent Living filed briefs opposing the motions. The district court granted defendants' motions in part and amended its summary judgment orders to provide for interlocutory appeal. (Order Amending Summary Judgment Order to Permit Petition for Interlocutory Appeal, dated August 10, 2004 (August 10 Order)).[3] In so holding, the court found that three issues "involve[d] a controlling question of law as to which there is substantial ground for difference of opinion" and for which "an immediate appeal from the order may materially advance the ultimate termination of the litigation," as required by 28 U.S.C. 1292(b). Those issues are: (1) whether the FHA requires accessible pedestrian routes throughout a covered multifamily property when the units and their amenities are accessible to pedestrians from vehicular arrival points; (2) whether the FHA requires accessible parking at an amenity where no parking is planned; and (3) whether post-construction evidence can support the third prong of the site analysis test for exemption of otherwise covered dwelling units on the basis of site impracticality. Pursuant to Section 1292(b), defendants petitioned this Court for permission to

[3] The Order Amending Summary Judgment Order to Permit Petition for Interlocutory Appeal is Attachment 2 to the Grants' Petition for Interlocutory Appeal and is attached to Parker Estes' Petition for Interlocutory Appeal.

appeal the district court's amended order granting partial summary judgment, to which this Answer is directed.

COUNTERSTATEMENT OF FACTS

The Facts sections of defendants' petitions for interlocutory appeal to this Court contain numerous inaccuracies, many of which the district court rejected in its summary judgment orders. The United States takes this opportunity to correct some of those inaccuracies.

As an initial matter, defendants maintain that "the Grants were unaware of the [Fair Housing] Act's requirements at the time of completion of Wyndham's design and construction in 1998," but that "they developed Camden Grove with deliberate and thoughtful efforts to comply with the Act's requirements." (Grant Pet. for Interlocutory Appeal at 4). In fact, as the district court expressly found in denying defendants' motion for summary judgment on the issue of punitive damages, Milton Grant was unambiguously informed of the detailed requirements of the FHA in early 1997. (June 29 Order at 18-19). The court also found that the Grant defendants were subsequently informed of FHA violations at the Wyndham complex in September 2001, but nevertheless went on to replicate many of the same violations at Camden. (*Id.* at 19).

Regarding accessible pedestrian routes, defendants assert that they intended the apartment complexes at issue "to mimic the design of single family subdivisions" and that vehicular access points to public and common use areas satisfied the FHA because the communities were "designed for vehicular travel."

(Grant Pet. for Interlocutory Appeal at 4-5). Contrary to defendants' belief, however, accessibility of public and common use areas as defined by HUD regulations requires more than that those areas "can be approached, entered, and used by individuals with physical handicaps." (*Id.* at 4 (quoting 24 C.F.R. 100.201)). The regulation defendants cite subsequently notes that "[e]xterior accessible routes may include parking access aisles, curb ramps, walks, ramps and lifts. A route that complies with the appropriate requirements of ANSI A117.1-1986 or a comparable standard is an accessible route." 24 C.F.R. 100.201. The naming of architectural features that facilitate foot, not vehicular, traffic and the incorporation of ANSI standards that prescribe surface, width, slope, headroom, and passing space requirements for wheelchairs and persons on foot clearly indicate that HUD considered accessible pedestrian routes to be the rule unless good reason was shown to make an exception. This choice is most consistent with the FHA's mandate that public and common use areas be "readily accessible to" persons with disabilities (42 U.S.C. 3604(f)(3)(C)(i)); public and common areas that can be accessed only by car are not "readily accessible" to persons with mobility impairments because many of them do not drive, and even if driven by others, many have great difficulty entering and exiting vehicles.

With regard to the issue of site impracticality, defendants correctly cite HUD's site analysis test for determining the number of ground-floor units exempt from the FHA's mandate of accessible housing based upon site terrain, but incorrectly assert that the test allowed them to exempt units post-construction for

failure to meet the slope requirements of step C of the test. (Grant Pet. for Interlocutory Appeal at 6-8). This argument is circular, as it uses the fact that units were not built in compliance with the FHA to "prove" that such units could not be built in compliance with the FHA, and improperly shifts the burden of entitlement to the exemption away from defendants. Invoking the exemption after the final grading of the exterior, moreover, does not make good business sense because a builder would not know whether it must make the interiors of ground-floor units accessible while they are being constructed, and therefore must either always make them accessible or assume the risk of rebuilding them once constructed. Not surprisingly, the district court rejected defendants' position and agreed with the United States that the third step should occur at the planning stage. (April 26 Order at 11).

ARGUMENT

DEFENDANTS' PETITIONS FOR INTERLOCUTORY APPEAL SHOULD BE REJECTED FOR FAILURE TO SATISFY 28 U.S.C. 1292(B)

The appellate jurisdiction of the federal court of appeals is generally limited to reviewing a district court's final judgment. 28 U.S.C. 1291; *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). Requiring the appealing party to bring all claims of error in a single appeal following a final judgment prevents "the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). Congress has carved out a narrow exception

to the final judgment rule in Section 1292(b) of Title 28 of the United States Code, which provides for immediate appeal of a district court's interlocutory order in the following circumstances:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. 1292(b). The party seeking interlocutory review bears the burden of persuading the court that exceptional circumstances exist that justify a departure from the final judgment rule, *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 374 (1981), and review is "granted sparingly," *In re City of Memphis*, 293 F.3d 345, 350 (6th Cir. 2002).

This Court has observed that it possesses the discretion to permit an appeal to be taken from an order certified for interlocutory appeal if (1) "the order involves a controlling question of law" as to which a "substantial ground for difference of opinion exists," and (2) "an immediate appeal may materially advance the ultimate termination of the litigation." *In re City of Memphis*, 293 F.3d at 350. Defendants fail to satisfy either of these requirements, thus falling far short of the "exceptional circumstances" required to circumvent the normal appellate review process. Accordingly, defendants' petitions should be denied.

A. There Are No Controlling Issues Of Law As To Which A Substantial Ground For Difference Of Opinion Exists

Defendants argued below that the issues it sought to certify are controlling

issues of law because a ruling from this Court that defendants' complexes comply with the Act would terminate "a major part of the litigation" and would have precedential value for future cases. (Grant Mem. in Support of Mot. for Certification (Grant Mem.) at 5-6). Defendants further reasoned that "[t]he lack of precedent also supports a finding that there is substantial ground for a difference of opinion on these issues." (*Id.* at 6). Agreeing with defendants, the district court concluded that the questions it certified "could decide the case, and therefore the issues are controlling" (August 10 Order at 4) and that a substantial ground for difference of opinion existed regarding the questions because they "present issues of first impression in the Sixth Circuit" and "are difficult and could have large impact" (*id.* at 6). This analysis is inconsistent with the law and with common sense.

While this Court has not yet addressed the position espoused by defendants and the district court, at least two other circuits have held that the mere fact that an issue is one of first impression is insufficient, by itself, to establish a substantial ground for difference of opinion on that issue.[4] See *In re Flor*, 79 F.3d 281, 284

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[4] In support of this position, defendants cited *Klinghoffer* v. *S.N.C. Achille Lauro*, 921 F.2d 21 (2d Cir. 1990), and *West Tennessee Chapter of Associated Builders & Contractors, Inc.* v. *City of Memphis*, 138 F. Supp. 2d 1015 (W.D. Tenn. 2000) (which cited *Klinghoffer*). (Grant Mem. at 6). To the extent that *Klinghoffer* was ever good law on this point, it is clearly superseded by *In re Flor*. The case the district court cited for this point, *Brown* v. *Mesirow Stein Real Estate, Inc.*, 7 F. Supp. 2d 1004, 1008 (N.D. Ill. 1998), is no more worthy of credence, as it merely held that "[i]f a controlling court of appeals has decided the issue, no substantial ground for difference of opinion exists and there is no reason for an

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(2d Cir. 1996); *White* v. *Nix*, 43 F.3d 374, 378 (8th Cir. 1994). This outcome accords with common sense. The lack of judicial precedent on a specific issue does nothing to indicate that the issue is difficult, much less one on which reasonable minds could disagree; it merely shows that the issue had not yet arisen before any other court. The importance of an issue and the impact its resolution might have on future cases is likewise completely irrelevant to whether a substantial ground for a difference of opinion exists regarding that issue.[5]

The appropriate course for a court to take on this factor is to "analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is a *substantial* ground for dispute." *In re Flor*, 79 F.3d at 284 (quoting *Max Daetwyler Corp.* v. *Meyer*, 575

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[4](...continued)
immediate appeal." The district court provided no reason to believe that the inverse of this statement — if a controlling court of appeals has not decided the issue, a substantial ground of difference of opinion exists — is necessarily true.

[5] Defendants place particular emphasis on this point in their petitions for interlocutory appeal:

> If the district court's decision is permitted to stand without appeal, its substantial broadening of the fundamental scope and particulars of the Act will become the standard by which all other litigation on this subject is measured across the country. The outcome of this case has nationwide implications for developers, builders, architects, engineers and residents of multifamily housing, as well as for those agencies and individuals charged with the responsibility for enforcement of the Act.

(Grant Pet. for Interlocutory Appeal at 12-13). This argument is a "straw man," as the issue before this Court is not whether defendants will have the opportunity to appeal the district court's decision at all, but whether they should be allowed to appeal the court's decision *now*.

F. Supp. 280, 283 (E.D. Pa. 1983)). While there may be little direct, on-point precedent interpreting the language of the exemptions defendants invoke, the district court relied upon ample precedent from this Court and other courts that any "[e]xemptions to the FHA must be construed narrowly, in recognition of the important goal of preventing housing discrimination," and that "the burden of showing impracticality is heavy" in correctly rejecting defendants' attempt to make it significantly easier to exclude multi-family housing from FHA coverage. (April 26 Order at 9 (internal quotation marks omitted)). The court relied on standard principles of statutory construction and the HUD guidelines in determining that defendants were not entitled to replace accessible pedestrian routes with vehicle routes. (*Id.* at 13-14). This Court recently took this very approach to resolve an accessibility question of first impression under the FHA. See *United States* v. *Edward Rose & Sons*, 2004 WL 1882662, at *3 & n.4 (6th Cir. Aug. 25, 2004). The district court's reasoning in granting partial summary judgment for the United States was sound, and defendants fail to proffer any new evidence or reasoning that could lead this Court to find that there is substantial ground to believe that another court may reach a different conclusion.

B. An Interlocutory Appeal Will Not Materially Advance The Ultimate Termination Of This Litigation

Regarding the question of whether an interlocutory appeal will materially advance the ultimate termination of this litigation, defendants argued that an opinion from this Court "would prompt further settlement discussions," and in the

absence of settlement, would result in a "much less complicated and involved" trial on damages and remedies. (Grant Mem. at 6-7). The district court agreed, concluding that if defendants prevailed on any of the questions, litigation would at minimum "be significantly truncated," while if plaintiffs prevailed, "the action would not be likely [to] proceed to a full trial on the merits because the remaining issues would influence damages." (August 10 Order at 5). This reasoning is seriously flawed.

First, it is settled law in this Court that "[w]hen litigation will be conducted in substantially the same manner regardless of [the court's] decision, the appeal cannot be said to materially advance the ultimate termination of the litigation." *In re City of Memphis*, 293 F.3d at 351 (quoting *White*, 43 F.3d at 378-379) (second alteration in original). That is precisely the situation in this case. The remaining litigation on damages and remedies will be conducted in "substantially the same manner" and with the same defenses regardless of the outcome of an interlocutory appeal because damages and remedies for the bulk of the FHA violations found by the district court (the undisputed violations occurring on the interior of the residential units for which no exemptions are claimed) are not affected by the issues identified by defendants and certified by the district court for appeal.[6] See,

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[6] For this reason, defendants' contention that a decision by this Court will induce a settlement is completely unfounded. Indeed, there is a great possibility that a decision by this Court will merely place the parties in the same litigation posture in which they currently sit. See *Judicial Watch, Inc.* v. *National Energy Policy Dev. Group*, 233 F. Supp. 2d 16, 28 (D.D.C. 2002) (observing that

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e.g., *Isra Fruit Ltd.* v. *Agrexco Agric. Exp. Co.*, 804 F.2d 24, 25-26 (2d Cir. 1986) (remanding interlocutory appeal of denial of motion to dismiss claims because there would be no "appreciable saving of time" regarding trial on remaining claims regardless of the outcome of that appeal). Because defendants may still appeal from a final judgment any issue included in their interlocutory appeal, moreover, permitting such an appeal raises the strong possibility of unnecessary delay.

Even assuming *arguendo* that an interlocutory appeal would hasten the end of litigation, the judicial economies achieved would be minimal given that the majority of the case is already concluded. Indeed, in the same breath as asserting that interlocutory appeal would result in "significant financial and temporal savings," defendants readily conceded that "it is true that this litigation could hardly be said to be in its early stages."[7] (Grant Mem. at 7). This Court has previously held that if the remaining trial is brief, then the savings in judicial resources is insufficient to justify the risk of piecemeal litigation in the court of appeals. See *Kraus* v. *Bd. of County Road Comm'rs*, 364 F.2d 919, 922 (6th Cir. 1966). The circumstances of this case — liability has been resolved in favor of one

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[6](...continued)
"Defendants' contention that certification of this Court's Orders for interlocutory appeal will materially advance this litigation necessarily assumes that they will prevail on appeal," a "result [that] is far from certain").

[7] This admission renders defendants' reliance (see Grant Mem. at 7) on *West Tennessee Chapter of Associated Builders & Contractors, Inc.* — a case in which the certified issue was the district court's exclusion of evidence well before trial — completely inappropos.

party or the other for almost all issues, leaving little other than determining remedies for defendants' violations of the FHA — is particularly ill-suited to interlocutory review. See *Syufy Enters.* v. *American Multi-Cinema, Inc.*, 694 F. Supp. 725, 729 (N.D. Cal. 1988) (rejecting party's request for certification of interlocutory appeal of order granting partial summary judgment to opposing party because such an appeal "would prolong the litigation rather than advance its resolution"); *Laverne* v. *Corning*, 316 F. Supp. 629, 639 (S.D.N.Y. 1970) (holding that summary judgment on liability was not suitable for interlocutory appeal because the only remaining issue of damages would not require long or extensive litigation); cf. *Republic Natural Gas Co.* v. *Oklahoma*, 334 U.S. 62, 68 (1948) ("[T]he requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up — for example, where liability has been determined and all that needs to be adjudicated is the amount of damages.").

CONCLUSION

Defendants' petitions for interlocutory appeal should be denied.

Respectfully submitted,

R. ALEXANDER ACOSTA
Assistant Attorney General

DENNIS J. DIMSEY
CHRISTOPHER C. WANG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530
(202) 514-9115

CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2004, a copy of the foregoing ANSWER IN OPPOSITION OF THE UNITED STATES AS RESPONDENT was served by first-class mail, postage prepaid, on each of the following counsel of record:

Theresa L. Kitay
Coughlin & Kitay, P.C.
3091 Holcomb Bridge Road
Suite A-1
Norcross, GA 30071
(counsel for Grant defendants)

John I. Houseal, Jr.
Jeffrey A. Jarratt
Glankler Brown, PLLC
One Commerce Square
Seventeenth Floor
Memphis, TN 38103-2566
(counsel for Grant defendants)

Jeffrey D. Keiner
Joel E. Roberts
GrayRobinson, P.A.
301 E. Pine Street
Suite 1400
Orlando, FL 32801
(counsel for Parker, Estes & Associates, Inc.)

Steven H. Biller
The Bogatin Law Firm, PLC
1661 International Place Drive
Suite 300
Memphis, TN 38120
(counsel for Parker, Estes & Associates, Inc.)

CERTIFICATE OF SERVICE

John S. Richbourg
Siskind Susser
5400 Poplar Avenue
Suite 300
Memphis, TN 38119
(counsel for John Gillentine)

Steven W. Vescovo
Thomason, Hendrix, Harvey, Johnson & Mitchell, PLLC
2900 One Commerce Square
40 S. Main Street
Memphis, TN 38103
(counsel for Henry Hart Engineering)

Margaret Barr-Myers
Memphis Area Legal Services, Inc.
109 N. Main Street
Suite 201
Memphis, TN 38103
(counsel for Memphis Center for Independent Living)

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CHRISTOPHER C. WANG
Attorney