UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

RICHARD FRAME,
WENDELL DECKER,
and SCOTT UPDIKE,

Plaintiffs,

vs. Civil Action No. 4:05-CV-0470-Y

THE CITY OF ARLINGTON,
a municipal corporation,

Defendant.

PLAINTIFFS' MOTION TO ALTER AND/OR AMEND THE JUDGMENT OF DISMISSAL AND MEMORANDUM OF LAW IN SUPPORT THEREOF

Plaintiffs, Richard Frame, Wendell Decker and Scott Updike (collectively, "Plaintiffs"), pursuant to Federal Rule of Civil Procedure 59(e), move this Honorable Court to alter and/or amend the judgment of dismissal. As grounds, Plaintiffs state:

1. The court committed a manifest error of law applying the limitations period to the facts of this case. The date the City of Arlington ("Arlington") created a barrier is not when a cause of action accrues. As the court correctly noted, a cause of action accrues when a plaintiff learns of the injurious act. Thus, this Court erred in dismissing the Fourth Amended Complaint because the court focused on whether Arlington created the barriers during the two (2) year period prior to the filing of the Complaint, rather than on whether Plaintiffs learned of the barriers during that period.

2. The court appears to have been influenced, in part, by Plaintiff Frame's various ADA lawsuits filed over the past give (5) years.

MEMORANDUM OF LAW

This Court has considerable discretion in deciding whether to grant or deny a motion to amend or alter under Federal Rule of Civil Procedure 59. *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 355 (5th Cir. 1993). In making its decision, the Court must consider two competing values (1) the need for finality, and (2) the need to render just decisions on the basis of all the facts. *Id*. Rule 59 motions provide a party the opportunity to correct manifest errors of law. *See Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989).

1. THE CAUSE OF ACTION ACCRUED IN THIS CASE WHEN PLAINTIFFS FIRST ENCOUNTERED THE BARRIERS IN ARLINGTON.

Plaintiffs believe this Court incorrectly applied the standard for determining when a cause of action accrues to the facts of this case. This Court correctly noted that "a cause of action accrues when 'the Plaintiff knows or has reason to know of the injury . . . and who has inflicted the injury.' [*See Watts v. Graves*, 720 F.2d 1416, 1423 (5th Cir. 1983)]." Order at 6-7. This Court, however, then found that "although Plaintiffs allege that they have attempted to use these roadways and sidewalks during the limitations period, their discrimination cause of action accrued when the improvements took place." *Id.* at 7. This conclusion is clearly incorrect, and is diametrically opposed to this Court's holding that a cause of action accrues when "the Plaintiff knows or has reason to know of the injury"; it does *not* always accrue when the improvements take place. *Id*.

Any doubt as to when Plaintiffs first encountered the violations set forth in the Fourth Amended Complaint should be resolved in favor of the Plaintiffs.

> A motion to dismiss under rule 12(b)(6) "is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chem. Sales v. Avondale Shipyards,* 677 F.2d 1045, 1050 (5th Cir. 1982). The complaint must be liberally construed in favor of the plaintiff, and all facts pleaded in the complaint must be

> taken as true. *Campbell v. Wells Fargo Bank,* 781 F.2d 440, 442 (5th Cir. 1986). The district court may not dismiss a complaint under rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2 L.Ed.2d 80 (1957); *Blackburn [v. Marshall]*, 42 F.3d [925,] 931 [(5th Cir. 1995)]. This strict standard of review under rule 12(b)(6) has been summarized as follows: "The question therefore is whether in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." 5 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1357, at 601 (1969).

Lowrey v. Texas A & M University System, 117 F.3d 242, 247 (5th Cir. 1997).

The motion before this Court was to dismiss the Fourth Amended Complaint, not for summary judgment. It was premature for this Court to assume that no discriminatory acts occurred within the limitations period. Certainly there was no allegation(s) in the Fourth Amended Complaint establishing that all the Plaintiffs had knowledge of all of the violations for over two years prior to the institution of this lawsuit. The opposite is true. Plaintiff, Scott Updike ("Updike"), did not even become disabled until September 8, 2003. Fourth Am. Compl., ¶ 51. The initial Complaint in this cause was filed on July 22, 2005. Thus, **every barrier Plaintiff Updike encountered in Arlington was discovered within two years of the filing of the complaint.**

It is irrelevant *when* the barrier was created by Arlington, so long as it was created after the 1992 enactment of the ADA. A cause of action accrues when "the Plaintiff knows or has reason to know of the injury." To find otherwise means that veterans disabled during the Iraq War will be unable to challenge barriers to access, nor will new residents to Arlington; even as yet unborn disabled persons will be left without remedy for Arlington's willful violation of the ADA.

There is no other type of discrimination where such a limitations effect would be tolerated. Imagine if a restaurant in Arlington had a policy of excluding African-Americans. No court would rule that unless African-Americans attempted to gain entry – and filed suit – during the two years after the policy went into effect, any subsequent victims would be time barred for seeking injunctive relief. Nor would any court provide safe harbor via the statute of limitations to a company with a policy of terminating pregnant women simply because no woman brought suit within two years after implementation of the unlawful policy.

These examples are, of course, ridiculous. Each act of discrimination starts its own limitations period. Such is the case with Plaintiffs here. Each time they try to cross a street for the first time, and are unable to because an intersection lacks curb cuts, it is a new act of discrimination. Obviously, if a person encounters the barrier and chooses not to act for two years, that person is time barred from filing suit. However, that person's individual decision has no effect on the limitations period for the next person that encounters the same barrier. Acts of discrimination are not acceptable simply because of the passage of time, or simply because others in the same boat encounter them and choose not to complain.

2. EVEN IF PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS, THE DEFENDANT'S ACTIONS ARE A CONTINUING VIOLATION OF THE ADA WHICH OCCURRED DURING THE LIMITATIONS PERIOD.

This Court recognized that the continuing violation theory "does save [Plaintiffs] from the effects of limitation." *Id*. The court further correctly stated that "[b]ut even under this theory, at least one of the discriminatory acts must have occurred within the limitations." *Id.* However, the "discriminatory act" that must have occurred within the

limitations period is *not* the improvement of the public rights of way, but rather Plaintiffs' exposure to the non-compliant, inaccessible, public rights of way.

This Court cites with approval to *Deck v. City of Toledo*, 56 F. Supp. 2d 886 (N.D. Ohio 1999). Indeed, there is little difference between *Deck* and the instant case. It is important to note that in *Deck* the court responded to the Plaintiffs' concern – that they would need to "scour the newspaper for evidence of recently altered public facilities, visit each altered facility and, if necessary, challenge its accessibility within two years of the project's completion" – by noting that the "limitations period is measured beginning only from the time when the plaintiff knew or should have known of the injury." *Deck*, 56 F. Supp. 2d at 892.

Moreover, *Deck* held that even if the two-year statute barred the claim, Plaintiffs could nevertheless proceed under the continuing violation theory. For this holding, *Deck* relied heavily on *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S. Ct. 1114 (1982), where the continuing violation theory was first articulated by the Supreme Court. The Court held that "statutes of limitations . . . are intended to keep stale claims out of the Courts . . . . Where the challenged violation is continuing one, the staleness concern disappears." *Id*. at 380, 102 S. Ct. at 1125. The Court concluded:

> "Where a Plaintiff . . . challenges not just one incident of [unlawful] conduct . . . but an unlawful practice that continues into the limitations period, [in such cases] the complaint is timely when it is filed within [the statute of limitations period of the last asserted occurrence of that practice."

Id.

Deck also held that where a city continuously constructs inaccessible curb ramps, a Court can find a policy of discriminatory action. *Deck*, at 893-95. Where such a policy exists, the continuing violation theory will allow plaintiffs to proceed. The Fourth

Amended Complaint pleads such a pattern of discrimination by Arlington. *See* Fourth Am. Compl., ¶¶ 6, 7, 58.

3. THE COURT'S WEARINESS WITH PLAINTIFF FRAME IS UNJUSTIFIED.

Plaintiff, Richard Frame ("Frame"), was surprised by this Court's comments in footnote 1 of the Order. The Court has apparently grown "weary" of Plaintiff Frame based on nothing more than the number of filings. This Court took it upon itself to research the various ADA lawsuits filed by the Plaintiff Frame. Unfortunately, the research was incomplete. Attached as Exhibit "A" is an Affidavit from Plaintiff Frame setting forth in detail the results of each of his various lawsuits in this District. Each of these filings followed an attempt by Plaintiff Frame to use the respective defendant's place of public accommodation. All the lawsuits that have been concluded were successful in obtaining architectural changes at a place of public accommodation that was previously inaccessible to the disabled.[1]

It is unfortunate that this Court has grown "weary" of Plaintiff Frame for his actions in vindicating the rights granted to him by the United States Congress, and for enforcing a law that has been on the books for other fifteen (15) years but is widely ignored by businesses all across this country. This Court should recognize that Plaintiff Frame's actions are largely selfless insofar as he gains no monetary reward, but creates access for himself and others who will come after him. The relief sought by Plaintiff Frame in these cases is critical to all disabled persons in Arlington.

> Experts in the field have suggested that "[d]isability is not really the cause of an undignified, harsh life. The real cause is lack of access to buildings, jobs, transportation, segregation and denial of services." Mary Johnson, Jerry's Kids, THE NATION, Sept. 14, 1992, at 232. Congress,

[1] The only exception was a lawsuit where the defendant sold the premises and therefore was no longer in possession and control.

> recognizing the truth of this assertion, took a monumental step toward ending such discrimination by enacting the Americans with Disabilities Act, ("ADA"), 42 U.S.C. § 12101, et seq. The underlying premise to this legislation is that it is preferable to provide access to opportunities rather than to "take care of" people with disabilities.

Doe v. Judicial Nominating Commission, 906 F. Supp. 1534, 1538 (S.D. Fla. 1995).

CONCLUSION

For the foregoing reasons, this Court should amend and/or alter the judgment of dismissal and allow Plaintiffs' claims to go forward.

Respectfully submitted,

DE LA O, MARKO, MAGOLNICK & LEYTON
Attorneys for Plaintiffs
3001 S.W. 3rd Avenue
Miami, Florida 33129
Telephone: (305) 285-2000
Facsimile: (305) 285-5555

By:______________________
Miguel M. de la O
Florida Bar No. 0822700
delao@dmmllaw.com
Charles D. Ferguson
Florida Bar No. 0741531
ferguson@dmmllaw.com

LEAD COUNSEL

MOSELEY · MARTENS, LLP
John L. Freeman, Esq.
State Bar No. 07425500
John Mitchell Nevins, Esq.
State Bar No. 14935800
4949 Hedgcoxe Road, Suite 270
Plano, Texas 75024-3928
Telephone: (214) 525-3905
Facsimile: (214) 387-9434

LOCAL COUNSEL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by U.S. Mail and facsimile, this 14th day of April 2008, to Edwin Voss, Esq., Brown & Hofmeister, LLP, Counsel for Defendant, 740 East Campbell Road, Suite 800, Richardson, Texas 75081 (214-747-6111).

Miguel M. de la O