

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

FILED  
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CLERK OF SUPREME COURT  
SEPTEMBER 4, 2009  
STATE OF NORTH DAKOTA

A. William Lucas,	)	
	)	
Plaintiff/Appellant,	)	<b>Appellant's Reply Brief</b>
	)	
vs.	)	Supreme Court No. 20090122
	)	
Riverside Park Condominiums	)	Burleigh Co. No. 08-7-C-913
Unit Association, a North Dakota	)	
Non-Profit Corporation	)	
	)	
Defendant/Appellee.)	)	

**Appeal from  
March 6, 2009, Amended Judgment  
District Court of Burleigh County  
South Central Judicial District  
Case No. 08-7-C-913-1  
The Honorable Steven E. McCullough**

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## **TABLE OF AUTHORITIES**

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Plaintiff/Appellant A. William Lucas replies to the Appellee's Brief as follows.

## ARGUMENT

### A. Construction of Fair Housing Laws.

¶1 Cases under federal and state fair housing laws provide that plaintiff is to receive generous and liberal construction of the laws in order to achieve the purposes of the fair housing laws to stop housing discrimination. Plaintiffs are to be encouraged to bring housing discrimination cases. Attorney's fees and costs are awarded to a prevailing plaintiff to encourage plaintiff to bring discrimination cases.

¶2 State courts construe federal fair housing laws and state fair housing laws together because of the similarity in language and purpose of the statutes. Gourley v. Forest Lake Estates Civic Assn. of Port Richey, Inc., M.D.Fla.2003, 276 F.Supp.2d 1222.

¶3 The generous and liberal interpretation of fair housing laws in favor of the plaintiff has resulted in extremely favorable results as intended for plaintiffs. A recent Star Tribune article is attached dated July 27, 2009, quoting a U.S. Housing Secretary:

"Except for very rare exceptions, the law requires that a landlord make a reasonable accommodation for someone with a disability. That means that tenant who prove their need can have pets in a no-pet buildings.

But for the most part, for an individual with a medical need for a service animal, the landlord must accommodate that need. Landlords have to have the knowledge they can't just go around with a no-pets policy and stick their foot down. If they do and the prospective tenant sues, the cases are nearly impossible to win. Most landlords will opt for a settlement.

It's way too risky for a property owner to say, 'You can't have that animal, It would take a really exceptional case to say that.'

¶4 Contrary to the requirements of law for a generous and liberal interpretation, and the inferences, to be given on a summary judgment motion, with the law "stacked"

against the landlord or in this case the Association, trial judge McCullough found that there was not even a genuine issue of material fact to preclude Summary Judgment against Lucas. That decision must be reversed.

**B. Appellee's Brief.**

¶5 The Appellee's primary defense appears to be a reliance on Lucas I. (at least 16 references in Appellee's Brief). The Appellee's Brief goes on for thirty-six pages, primarily reviewing most of the documents filed in this matter and continuing to review Lucas I attempting to make Lucas I a part of this case.

¶6 When Judge McCullough decided that the "significant change" requirement of Lucas I simply meant whatever the definition of disability was the fair housing laws, there was no part of Lucas I relevant to this case.

¶7 The Appellee's Brief is significant for its failure to provide legal authority and argument on issues raised by Lucas contrary to the massive amount of legal authority presented by Lucas, requiring a reversal of the trial court, as follows:

¶8 1. Lucas in the Appellant's Brief showed that there was no case or authority on this planet to support the trial judge's decision that the Association should be awarded attorney's fees and costs as an "almost prevailing party". Appellee presented no cases or authority contrary to that statement.

¶9 2. Lucas showed that there is no authority or cases on this planet to award attorney's fees and costs to a prevailing defendant unless Plaintiff's claim is frivolous or filed in bad faith. Appellee presented no authority contrary to that requirement.

¶10 3. Lucas provided massive authority to show that the trial judge erred in dismissing his claim for emotional damages. The Association cited one North Dakota case which was not a fair housing law case. As indicated above North Dakota fair housing law should be interpreted the same as the federal fair housing law and a

massive number of cases permit damages for emotional distress under fair housing laws with not a case to the contrary.

¶11 4. Association failed to respond with any legal authority that the Association could recover attorney's fees and costs when the attorney's fees and costs were paid by their insurance carrier and when the Association had not paid any attorney's fees and costs.

¶12 5. Appellee failed to address the argument and legal authority which indicated a constructive denial of Lucas' fourth request for an accommodation. As indicated the Association already had all of the facts and information it needed to make a decision as follows:

¶13 a. Two of Bismarck's finest physicians had certified that Lucas needed an accommodation to permit Lucas to keep a assistive therapeutic companion service animal (dog), that there had been a significant change, and that Lucas qualified as a person with a disability which quoted in the same document the fair housing law definition of a disability. (App. 47)

¶14 b. That if Sugar was not sufficiently individually trained that Lucas would obtain a dog that was sufficiently trained. I am not aware of any specific training or skill that would be necessary that Sugar does not have. The cases indicate that no special training or skills are required for depression because it is the innate qualities of a dog, in particular a dog's friendliness and ability to interact that makes it therapeutic. No special training had been required for the two requests already applied by Association.

¶15 c. There was no question as to need. The Association had already approved at least two requests based on depression and the need for a dog. The "need" requirement is met when a person's life and enjoyment of his residence, may be enhanced by the presence of a dog.

¶16 d. It is a bad faith argument to threaten a malicious use of Lucas' medical records and then when Lucas requests a procedure for confidentiality of the records, the Association refuses to accept the medical records with the simple reasonable requirement that the records be kept confidential.

¶17 In response to Mr. Rogneby's letter dated June 14, 2007 requesting additional unnecessary information, Lucas responded:

¶18 1. In a letter dated May 17, 2007, addressed to three board members, the requested information was submitted on condition that the information be kept confidential. (see Exhibit A attached).

¶19 2. In a letter dated June 27, 2007 to Mr. Rogneby I submitted the requested information with reasonable requirements to ensure confidentiality. (See Exhibit B and attachment to Deposition Exhibit 5, App. 21) That submission of the requested information was rejected by Mr. Rogneby apparently on the basis that the confidentiality requirements were "unreasonable".6.6

Douglas infra , at page 1123 fn 23 states:

Joint Statement 11 C "an undue delay and responding to a reasonable accommodation request may be deemed to be a failure to provide a reasonable accommodation."

¶20 An undue delay caused by requesting unnecessary information should in this case be considered denial of the request.

¶21 6. The Association summarily states that it properly defended itself in this action without showing any authority for the Association to delegate the management of this lawsuit to a non-officer non-board member, contrary to its By-laws.

#### **Inaccurate Statements, Conclusions, Opinions of Appellee**

¶22 The attorney for the Appellee in Appellee's Brief makes many inaccurate conclusions and predictions as to the state of mind and intent of Lucas including the following:

¶23 a. Appellee states that the medical opinions attached to Lucas' fourth request were "vague and conclusory opinions" from two "purported" health care providers. Later in Appellee's Brief, Appellee refers to those two health care providers as "alleged" health care providers. Later the Appellee states that the opinions were "purportedly" completed by Dr. Huber and Dr. Johnson. It is submitted that these are bad faith arguments and statements by the Appellee. Apparently the Appellee is alleging that Lucas' health care professionals, Dr. Jay Huber and Dr. Terry Johnson are not really health care providers or that Lucas submitted medical opinions that were not in fact prepared and signed by the medical care providers. Those are bad faith statements that Mr. Rogneby knows to be bad faith and false statements.

¶24 b. The Appellee states that Lucas had a full opportunity to litigate the issues in this matter. The facts are that trial judge McCullough refused to require the Association to respond to the Plaintiff's first set of discovery requests, and soon thereafter closed off discovery before Lucas could take depositions or submit a follow-up set of discovery requests.

### **C. Summary Judgment.**

¶25 Many of the recent appellate cases have reversed and remanded cases because there was a genuine issue of material fact to be determined by the trier of fact. Oras v. Housing Authority, 861A 2d 194 (N.J. Super. A.D. 2004); (genuine issue of material fact, remanded as to whether tenant's request for 47 pound dog was reasonable accommodation) Storms v. Fred Meyer Stores, Inc. 120 P. 3d 126 (Wash. App. Div. 2005); Janush v. Charities Housing Development Corp. 169 F. Supp. 2d 1133 (N.D.Cal. 2000).

¶26 Fair housing law cases are by their very nature fact intense and fact specific preclude summary judgment



“Whether a pet is a sufficient assistance to a tenant to require a landlord to relax its pet policy so as to reasonably accommodate the tenant’s disability requires a fact-sensitive examination. Oras, supra.

Douglas v. Kriegsfeld Corp. 884 A 2d 1109 (D.C. 2005) at 1121 stated:

We recognize that cases involving requests for “reasonable accommodation” are “highly fact-specific, requiring case-by-case determination” and that circumstances occurring between the request for accommodation and the eventual trial can affect the result.”

**D. Significant change requirement of Lucas I**

¶27 After many motions made by Lucas to determine the meaning of “significant change”, the trial judge ruled that a “significant change” simply meant whatever the requirements are of a disability under the fair housing laws. That requirement was met by the two medical opinions attached to Lucas’ fourth request for a reasonable accommodation. See App. p 47. Both Dr. Jay Huber and Dr. Terry Johnson certified that Lucas had disability as defined in the fair housing laws. Those medical opinions clearly complied with Judge McCullough’s interpretation of the “significant change” requirement.

**E. Attorney’s Fees and Costs Awarded to Association**

¶28 The only remaining possible authority for the award of attorney’s fees and costs, is the fair housing law provision for an award to the prevailing party with the limitation that a prevailing defendant can only be awarded those fees where the plaintiff’s claim is frivolous or filed in bad faith.

¶29 Black’s Law Dictionary defines frivolous as lacking a legal basis or legal merit; not reasonably purposeful claim and bad faith as dishonesty of belief or purpose.

¶30 No specific fact has been presented or could be presented by the Association or by the trial judge, which would constitute bad faith or a frivolous claim. Lucas believes he

submitted a prima facie case and that summary judgment should have been granted in his favor.

**F. Unresolved Questions.**

¶31 1. Why is the Association denying Lucas' request for a reasonable accommodation and defending this action? Our current president recently told me "Bill, it is too bad you moved in next door to Tom Prischmann (former long term president) because it was his way or the highway!" inferring to me that my dog issues with the Association exist only because of Tom.

¶32 There is no expense to the Association to approve an accommodation for Lucas. The Association has already approved requests from two other condo owners for a dog. One owner moved in after I did and is on her third dog. The minimum number of dogs in our condos at any one time is TWO and the maximum number of dogs I have seen at one time is TEN. On one occasion five Labrador retriever size dogs came out the front door of my next door neighbor's condo, while the neighbor was on the Board of Directors. The same neighbor while on the Board kept a Pug dog and other dogs on a regular basis.

¶33 2. Who is actually denying Lucas' request and causing the litigation. There is no reference in any of the minutes of Board or Association meetings to indicate that the Board or Association have ever discussed my requests for a reasonable accommodation or taken any action, or authorized this litigation or that the Board or Association has any involvement in this litigation. All copies of correspondence from attorney Rogneby shows copies going to Lyall Workman, who is not an officer or board member and to Paul Aamod, a lawyer with American Family Insurance Company.

¶34 I do not believe that the Association and/or Board are denying my requests, causing this litigation, or involved in this matter. The Association is being used.

**CONCLUSION**

¶35 Lucas respectfully requests that this Court reverse all of the trial court's decisions, Orders, and Judgment and remand this matter back to the trial court with a Order that Hon. Steven H. McCullough be removed and replaced as trial judge in this matter, and that Lucas be awarded his costs and fees on this appeal.

Dated this 4th day of September, 2009. /s/ A. William Lucas

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## **Certificate of Service by E-Mail**

¶36 I hereby certify that on the 4th day of September, 2009, true and correct copies of Appellant's Brief were served electronically upon the following:

Monty Rogneby [mrogneby@vogellaw.com](mailto:mrogneby@vogellaw.com)

Clerk of the Supreme Court [supclerofcourt@ndcourts.gov](mailto:supclerofcourt@ndcourts.gov)

/s/ A. William Lucas  
A. William Lucas (ND Bar ID # 02675)