No. 09-2421

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

THOUVENOT, WADE & MOERCHEN, INC.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS APPELLANT

LORETTA KING
Acting Assistant Attorney General

DENNIS J. DIMSEY
NATHANIEL S. POLLOCK
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-0333

STATEMENT REGARDING ORAL ARGUMENT

The United States respectfully requests that this Court hold oral argument. This appeal raises important issues regarding the proper interpretation and application of the Equal Access to Justice Act. The United States believes that argument would be helpful to the Court in understanding and resolving those issues.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

RULES:

LEGISLATIVE HISTORY: **PAGE**

MISCELLANEOUS:

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 09-2421

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

THOUVENOT, WADE & MOERCHEN, INC.,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES AS APPELLANT

JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. 1331, 42 U.S.C. 3612(o), and 42 U.S.C. 3614(a).

On October 2, 2008, the district court entered an order granting Thouvenot, Wade & Moerchen's (TWM) motion for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(d)(1)(A). App. A.[1] On October 17, 2008, the United States timely filed a motion to alter or amend the district court's October 2,

---

[1] "App. A," "App. B," and "App. C" refer to the appendices to this brief. "Doc. __" indicates the docket entry number of documents filed in the district court. "__ Tr. __" refers, by date and page number, to the transcript of proceedings before the district court. "Ex.__" refers by number to the United States' trial exhibits.

2008, Order, pursuant to Fed. R. Civ. P. 59(e). App. A. On March 30, 2009, the district court denied the United States' motion to alter or amend its October 2, 2008, Order awarding fees. App. B. On May 29, 2009, the United States' timely filed a notice of appeal from the district court's orders of October 2, 2008, and March 30, 2009. Doc. 235; see Fed. R. App. P. 3, 4(a)(1)(B), & 4(a)(4)(A)(iv).

This Court has jurisdiction to review the final attorney's fees award pursuant to 28 U.S.C. 1291.

STATEMENT OF ISSUES

1. Whether the district court erred in ruling that the United States was not "substantially justified" for purposes of 28 U.S.C. 2412(d)(1)(A) in seeking to hold TWM liable for violating the design and construction requirements of the Fair Housing Act (FHA).

2. Whether attorney's fees that TWM's liability insurance carrier was obligated to pay and did pay were "incurred" by TWM for purposes of 28 U.S.C. 2412(d)(1)(A).

STATEMENT OF THE CASE

On September 29, 2004, the Metropolitan St. Louis Equal Housing Council filed a complaint with the Department of Housing and Urban Development (HUD), alleging that the Applegate Apartments in Swansea, Illinois, were inaccessibly designed and constructed in violation of the FHA.[2] Doc. 1 at 3; 42

[2] In 1988, Congress amended the FHA to require that certain units in

(continued...)

U.S.C. 3610(a)(1)(A). HUD investigated and determined that there was reasonable cause to believe that TWM, the project's site engineer, and other defendants involved in the design and construction of Applegate Apartments, had violated the FHA. Doc. 1 at 3; 42 U.S.C. 3610(a)(1)(B) & 3610(g)(1). On March 15, 2005, HUD issued a charge of discrimination. Doc. 1 at 3; 42 U.S.C. 3610(g)(1). On March 25, 2005, the defendant property-owner Dan Sheils elected to have HUD's charge heard in federal district court. Doc. 1 at 4; 42 U.S.C. 3612(a). On April 25, 2005, pursuant to 42 U.S.C. 3612(o)(1) and 42 U.S.C. 3614(a), the United States filed a complaint alleging that TWM and three other defendants violated the FHA. Doc. 1.

On March 30, 2007, the United States obtained summary judgment as to liability against all defendants other than TWM. Doc. 112. The court later adopted a remedial plan requiring these defendants to remedy the inaccessible features at Applegate and assessed a civil penalty of $25,000 against the property owners. Doc. 233. The court also approved a settlement agreement between the United States and the architect, Netemeyer Engineering Associates, Inc., that required payment of a $25,000 civil penalty and $9,000 in damages. Doc. 185 at 3-4. As to TWM's liability, the court denied the United States' and TWM's cross

---

[2](...continued)
multifamily dwellings contain specific features to make the units accessible to persons with disabilities. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619.

motions for summary judgment. Doc. 112. On May 30, 2008, a jury found that TWM had not violated the FHA. Doc. 174.

TWM sought costs and attorney's fees under EAJA. Doc. 183, 189; 28 U.S.C. 2412(a) & 2412(d)(1)(A).[3] On October 2, 2008, the district court granted TWM's motions for costs and fees. App. A. After that ruling, the United States asked to be allowed to argue in response to TWM's motion for attorney's fees that its position was "substantially justified" for purposes of EAJA. Doc. 210. Because of a miscommunication between the United States and the court, the United States had not filed a response to the fees motion before the court ruled.[4] *Ibid.* In an October 17, 2008, motion titled as "motion to alter or amend," but which the United States asked the court to treat as its response to TWM's fees motion, the United States argued that its position was "substantially justified." Doc. 214.

---

[3] In 1980, Congress passed EAJA to allow "in specified situations an award of attorney fees, expert witness fees, and other costs against the United States." Equal Access to Justice Act, Pub. L. No. 96-481, § 202(c)(1), 94 Stat. 2321. Under EAJA, attorney's fees may be awarded to a "prevailing party" only when the fees are "incurred by that party" and the government's position is not "substantially justified." 28 U.S.C. 2412(d)(1)(A).

[4] The court had previously granted the United States an extension that allowed the United States ten days after the court ruled on TWM's costs motion within which to respond to TWM's motion for attorney's fees. Doc. 193. When the court ruled on costs and fees together, the United States reminded the court of the extension. The court responded with a finding that the extension was waived. Doc. 205. But the court later concluded — in response to the United States' motion to set aside the waiver ruling, Doc. 210 — that the United States had not waived the extension and vacated its waiver ruling. Doc. 219.

On March 30, 2009, the district court denied the United States' October 17, 2008, motion. App. B. The court addressed the merits of the United States' "substantially justified" argument and rejected it. App. B at 5 n.2, 5-8. The court summarily rejected the United States' other arguments. App. B at 8.

On April 8, 2009, the district court entered an order summarizing the judgments entered in this case, which disposed of all issues, and closed the case. Doc. 233. On May 29, 2009, the United States filed this appeal. Doc. 235.

STATEMENT OF FACTS

This case involves an apartment complex called Applegate Apartments that the district court found "totally excludes people with mobility impairments" and "violates almost every provision related to accessibility in the FHA." Doc. 112 at 23-24. Of particular relevance to this appeal are the inaccessible front entrances of the ground-floor units of Applegate Apartments. See 42 U.S.C. 3604(f)(7)(B). To access these units from the parking lot, one must traverse two stairs up and then eight stairs down. 5/29/08 Tr. 28; App. C (marked photograph). The stairs are necessary because the ground floor of these "two-and-a-half story" buildings are approximately four feet below the level of the parking lot. 5/28/08 Tr. 78-79, 144, 148, 152.

1. Starting in the Spring of 2001, TWM actively participated in the design and construction of Applegate Apartments. TWM was the site engineer for the project, which means it was responsible for designing the layout of the land itself, including changes in ground elevation. 5/28/08 Tr. 184; 5/29/08 Tr. 12-13, 33.

TWM prepared site engineering plans that showed buildings with ground-floor elevations three-and-a-half to four feet below the parking lot level. 5/28/08 Tr. 78-79, 148, 152; Ex. 46. The property owner, Dan Shiels, wanted to "sink" the buildings below ground level so they would be less than three stories high, and therefore would not require fire safety sprinklers. 5/27/08 Tr. 41-42; 5/28/08 Tr. 207; 5/29/08 Tr. 202-204. But sinking the buildings also meant that without ramps they would be inaccessible to mobility impaired individuals.

TWM's plans — the only site engineering plans prepared for Applegate, 5/58/08 Tr. 80-81; 5/29/08 Tr. 100 — failed to provide for an accessible route into the first-floor units of the buildings. 5/29/08 Tr. 172; Ex. 46. At one time TWM's plans had included ramps, but those ramps were later deleted. 5/29/08 Tr. 171. The final version of the plans that TWM provided to Sheils did not include ramps and did not include any accessible route into the buildings. 5/28/08 Tr. 75; 5/29/08 Tr. 171-172. TWM knew that Applegate Apartments would not be made accessible. Indeed, a TWM employee suggested to Sheils that the buildings be made accessible and Sheils refused. 5/29/08 Tr. 196-200. The plans were marked "for construction" and were in fact used to build Applegate Apartments. 5/28/08 Tr. 75, 79; Ex. 46. TWM never indicated to Shiels or anyone else involved in building Applegate that its plans should not be used. 5/28/08 Tr. 79-80; 5/29/08 Tr. 204.

Knowing that the project would be inaccessible in violation of federal law, TWM nevertheless advocated for village approval of Applegate Apartments.

5/29/08 Tr. 206-208, 214-215. The materials TWM submitted to the Village of Swansea, which included its own plans and the architect's, made clear that the ground floor units at Applegate could be reached only by going down steps. 5/29/08 Tr. 103-104, 172, 209-210. A note included in TWM's submission suggested that building a ramp to the rear entrance of a ground floor unit upon request of a disabled applicant would bring Applegate into compliance with federal law. 5/29/08 Tr. 200-201. But TWM had already informed Sheils that a ramp to the rear entrances would not satisfy federal requirements. 5/29/08 Tr. 198-199; see also *United States* v. *Edward Rose & Sons*, 384 F.3d 258, 263 (6th Cir. 2004) (ruling that front entrances of ground-floor units that have a landing shared by multiple apartments — the design employed at Applegate — must be accessible); 42 U.S.C. 3604(f)(3)(C)(i) (requiring "the public use and common use portions of [covered] dwellings [to be] readily accessible to and usable by handicapped persons").

TWM was also instrumental in obtaining building permits for Applegate. 5/29/08 Tr. 174-176. The village official responsible for issuing building permits instructed that the land around the buildings needed to be built up higher for Applegate to be classified as a two-story building. 5/27/08 Tr. 41; 5/28/08 Tr. 85-86. That classification was necessary in order to avoid the fire safety sprinkler requirement applicable to buildings with more than two stories. 5/27/08 Tr. 41. Sheils asked TWM — the site engineer listed on the building permit applications, 5/28/08 Tr. 144-146 — to respond to the village's concern. 5/28/08 Tr. 82-83,

140-143. TWM responded by producing a revised grading plan. 5/27/08 Tr. 41; 5/28/08 Tr. 86. That plan elevated the ground level on the sides of the buildings, increasing the portion of the buildings that was below the surface. 5/28/08 Tr. 85. The revised plan successfully addressed the village's concern. 5/28/08 Tr. 46. Indeed, the revised plan is dated November 28, 2001, and the village issued the first building permit for Applegate the next day. 5/28/08 Tr. 45-46.

TWM also "staked" the first six buildings, meaning TWM went to the construction site and showed the builders where the corners of the buildings should be and how far down to dig. 5/28/08 Tr. 89-91, 180. TWM continued to provide this construction staking service even after the first two buildings had been constructed in an inaccessible manner. 5/28/08 Tr. 89-90, 154-155.

2. After filing suit against TWM and the other entities involved in Applegate's construction, the United States moved for summary judgment as to liability. Doc. 79. The United States obtained summary judgment against all defendants other than TWM. Doc. 112. Ruling on summary judgment, the district court determined that Applegate was designed and constructed in clear violation of FHA requirements. Doc. 112. Specifically, it determined that "there is no question that Applegate was designed and constructed in a way that totally excludes people with mobility impairments in violation of the FHA." Doc. 112 at 23. Indeed, the court concluded that "Applegate violate[d] almost every provision related to accessibility in the FHA." *Id.* at 24. The court then enumerated the many ways in which the property violated the FHA's design and construction

requirements, including the absence of "accessible routes to the ground floor units." *Id.* at 25-29.

The court also denied the United States' and TWM's cross motions for summary judgment because of "too many conflicting and disputed facts, some of which require credibility determinations." Doc. 112 at 19. The court expressed particular concern that TWM's submission to the village might have purposefully misled the village "into believing that a ramp to the rear door could be designed (post construction) that would comply with the FHA." Doc. 112 at 18. As the court noted, TWM had already concluded — correctly — that such a ramp would not comply with federal law. Doc. 112 at 19; see also 5/29/08 Tr. 198-199.

3. At a jury trial held to determine TWM's liability, the United States presented extensive evidence in support of its claim that TWM actively participated in Applegate's inaccessible design and construction. See pp. 5-8, *supra*. TWM maintained at trial that it never intended its site engineering plans to be used. Specifically, TWM pointed to the fact that no TWM engineer had placed his or her professional seal on the plans — a step that TWM argued shows plans have been completed by a licensed engineer, and is required to make the plans final for purposes of state law.[5] 5/29/08 Tr. 82-83. TWM also presented

[5] Prior to trial, TWM filed a motion in limine to exclude its own site plans because the plans were not sealed under Illinois law. Doc. 142. TWM argued that unsealed plans could not be used in construction. Doc. 142. The United States opposed this motion, pointing out that under Illinois law the lack of a seal did not preclude the plans from being used. Doc. 146 at 6. Rather, the seal only gave the

(continued...)

testimony that the plans were insufficiently specific for use in building. 5/29/08 Tr. 193-194.

At the close of the United States' case-in-chief, the court denied TWM's motion for judgment as a matter of law. 5/29/08 Tr. 123. Ruling on that motion, the court said:

> Looking at the evidence in the light most favorable to the plaintiff, we have evidence that the documents were marked for construction. We have evidence that the jury could believe that throughout this construction, these plans were used by everyone. We have a jury who could clearly believe that TWM was involved in both the design and the construction and given the Fair Housing Act, could believe that they are culpable.

5/59/08 Tr. 123.

At the close of all evidence, the court again denied TWM's motion for judgment as a matter of law, and allowed the case to proceed to the jury. 5/29/08 Tr. 247-248. Specifically, the court reasoned that the case turned on witness credibility and concluded that "based on the credibility issues * * * we still have a jury question." 5/29/08 Tr. 247.

On May 30, 2008, the jury found in favor of TWM. 5/30/08 Tr. 75-76.

4. On October 2, 2008, the district court granted TWM's motions for costs and attorney's fees. App. A. In that order, the court addressed the United States' argument that TWM had not "incurred" costs and fees for purposes of EAJA

---

[5](...continued)
designer protection from liability for damages resulting from deviations from the plans by the builder. *Ibid.* The court agreed with the United States and denied the motion. Doc. 151.

because its costs and fees were paid by its liability insurance company. App. A at 3-5; Doc. 197; 8/21/08 Tr. at 41-46. Relying on *Ed A. Wilson, Inc.* v. *General Services Administration*, 126 F.3d 1406 (Fed. Cir. 1997), the district court rejected the United States' argument. Specifically, the court held that TWM had incurred legal fees by paying its insurance premiums. App. A at 4. The court also reasoned, following *Wilson*, that "TWM was faced with a financial disincentive to litigating against the government action due to the threat of increased premiums." *Ibid.* The court did not make any finding, however, that TWM had actually been threatened with increased premiums, and TWM presented no evidence to that effect.

The court agreed with the United States that some of the costs TWM included were inappropriate. Accordingly, the court excluded costs related to compensation of expert witnesses and the court reporter. App. A at 6-9. The court did not conduct an individualized review of TWM's claimed attorney's fees, but found that the rates charged were reasonable. *Id.* at 4-5. The court awarded TWM $6,337.02 in costs and $199,397.53[6] in attorney's fees. *Id.* at 9-10.

The court's opinion briefly addressed the issue whether the United States' position was substantially justified — a requirement for obtaining fees under 28 U.S.C. 2412(d)(1). (No similar requirement exists for an award of costs against the United States under EAJA. See 28 U.S.C. 2412(a)(1).) The court merely

---

[6] This amount was later reduced when TWM acknowledged it had erroneously included $14.50 in its fee petition for an unrelated matter.

stated that "[u]pon reviewing the evidence, Plaintiff's position was not substantially justified and the jury ruled accordingly." App. A at 3.

5. On March 30, 2009, the district court denied the United States' motion to alter or amend, which the United States asked the court to treat as its response to TWM's attorney's fees motion. The court addressed the merits of the United States' "substantially justified" argument and rejected it. App. B at 5-8. The court stated that "[t]he test for whether the government's position is substantially justified is 'whether the agency had a rational ground for thinking it had a rational ground for its action.'" App. B at 6 (quoting *Kolman* v. *Shalala*, 39 F.3d 173, 177 (7th Cir. 1994)). It provided further that "[s]ubstantially justified is satisfied 'if reasonable people could differ as to the appropriateness of the contested action.'" *Ibid.* (quoting *Stein* v. *Sullivan*, 966 F.2d 317, 320 (7th Cir. 1992)). The court nonetheless held that the United States' position was not substantially justified. App. B at 8. It stated: "In this case, the jury has ruled and after reviewing all of the evidence presented at trial, the Court finds that Defendant TWM clearly did not belong in this case." *Id.* at 7. The court characterized the evidence as having "show[n] that TWM was only involved in the zoning process and had no role in designing the complex" and that TWM's "drawings" were not "prepared as building plans." *Ibid.*

The court summarily rejected the United States' other arguments. App. B at 8. The court said that it had already determined that TWM "incurred" fees for purposes of EAJA and that the United States failed to offer "new arguments" on

that issue. *Ibid.* The court also denied the United States' request that it hold a hearing to determine whether particular fees charged are reasonable and recoverable, saying that it had already reviewed "TWM's list of fees and found them to be reasonable." *Ibid.*

SUMMARY OF ARGUMENT

1. This Court should reverse the district court's award of attorney's fees. Under this Court's decisions, the government's position is substantially justified for EAJA purposes if the government had a reasonable basis in truth for the facts alleged and a reasonable basis in law for the theory propounded, and there was a reasonable connection between the facts alleged and the theory propounded. The government presented credible — often undisputed — evidence that established TWM's liability under that test. The government's legal theory — that any entity that contributes to a violation of the FHA's design and construction requirements is liable — is well supported by the relevant case law. And there is a reasonable connection between the facts the government alleged and the legal theory it advocated. The district court failed to apply this Court's test for determining whether the government's position was substantially justified. Indeed, the court's conclusion that the government's position lacked substantial justification is inconsistent with its reasoning in support of its denial of TWM's motions for summary judgment, for judgment as a matter of law at the close of the government's case, and for judgment as a matter of law at the end of the trial.

2. Alternatively, this Court should reduce the attorney's fees award to $43,662.98, the fees TWM "incurred." The attorney's fees that TWM's insurer was obligated to pay and did pay were not "incurred by" TWM and, accordingly, cannot be awarded under EAJA. The district court's conclusion that TWM incurred fees by paying its insurance premiums incorrectly interprets the statutory language. Instead, this Court should adopt the straightforward rule that fees are "incurred" only when there is a legal obligation to pay them.

Giving effect to EAJA's plain language also makes sense of the statute as a whole and serves the policy that led to EAJA's enactment. The district court's reading results in an award that will go to a large insurance company that does not meet EAJA's express eligibility requirements. The district court's interpretation also fails to serve EAJA's purpose of diminishing the deterrent effect attorney's fees may have upon challenging governmental action. Attorney's fees do not deter challenges to governmental action when those fees will be paid by an insurer. Moreover, neither the statutory language nor the legislative history offers any support for the notion, which the district court relied on, that EAJA was intended to protect parties from the threat of increased insurance premiums. Indeed, no evidence of any such threat is present in this case.

ARGUMENT

I

THE DISTRICT COURT ERRED IN RULING THAT THE UNITED STATES WAS NOT "SUBSTANTIALLY JUSTIFIED" IN SEEKING TO HOLD TWM LIABLE FOR ITS PARTICIPATION IN THE INACCESSIBLE DESIGN AND CONSTRUCTION OF APPLEGATE APARTMENTS

A. Standard Of Review

Generally, "this court reviews a district court's decision to award or deny attorneys' fees under the EAJA for abuse of discretion." *Sosebee* v. *Astrue*, 494 F.3d 583, 586 (7th Cir. 2007). This Court has repeatedly said that the "abuse of discretion" standard of review the Supreme Court set out in *Pierce* v. *Underwood*, 487 U.S. 552 (1988), requires meaningful review. *Jackson* v. *Chater*, 94 F.3d 274, 278 (7th Cir. 1996) (citing *Pierce* and explaining, "We review a district court's determination of whether a position meets [the "substantially justified"] standard for an abuse of discretion, but this deferential standard does not dilute our meaningful examination of the district court's decision"); see also *Golembiewski* v. *Barnhart*, 382 F.3d 721, 723 (7th Cir. 2004); *United States* v. *Hallmark Constr. Co.*, 200 F.3d 1076, 1078 (7th Cir. 2000).

This Court has also explained that "[i]f the district court reached its conclusion because of its interpretation of relevant law * * * then [this Court] review[s] that question of law de novo because a district court's application of an erroneous view of the law is by definition an abuse of discretion." *Sosebee*, 494 F.3d at 586; see also *Hallmark*, 200 F.3d at 1079 (affording less than normal

deference to the district court when "it is not apparent that the district court applied the proper legal standard to arrive at its conclusion regarding the [substantial] justification of the government's position [under EAJA]"). Likewise, "a district court abuses its discretion when it * * * makes a clearly erroneous finding of fact." *United States* v. *Mannie*, 509 F.3d 851, 856 (7th Cir. 2007).

B. The Government's Position Is "Substantially Justified" Under EAJA When The Government Has A Reasonable Basis In Truth For The Facts Alleged And A Reasonable Basis In Law For The Theory Propounded, And There Is A Reasonable Connection Between The Facts Alleged And The Theory Propounded

EAJA allows prevailing parties to recover attorney's fees against the United States if its position is not "substantially justified." 28 U.S.C. 2412(d)(1)(A). "'Substantially justified' does not mean 'justified to a high degree,' but rather has been said to be satisfied if there is a 'genuine dispute,' or if reasonable people could differ as to the appropriateness of the contested action." *Stein* v. *Sullivan*, 966 F.2d 317, 320 (7th Cir. 1992) (quoting *Pierce*, 487 U.S. at 565). "The test for substantial justification is whether the agency had a rational ground for thinking it had a rational ground for its action." *Kolman* v. *Shalala*, 39 F.3d 173, 177 (7th Cir. 1994). Specifically, the government's position is substantially justified if: "(1) it had a reasonable basis in truth for the facts alleged; (2) it had a reasonable basis in law for the theory propounded; and (3) there was a reasonable connection between the facts alleged and the theory propounded." *Tchemkou* v. *Mukasey*, 517 F.3d 506, 509 (7th Cir. 2008) (citing *Conrad* v. *Barnhart*, 434 F.3d 987, 990 (7th Cir. 2006)).

C. The Government's Position Was "Substantially Justified"

1. The United States asserted facts that had "a reasonable basis in truth." See *Tchemkou*, 517 F.3d at 509. Specifically, the United States presented credible — often undisputed — evidence that TWM was responsible for designing and helped to construct the principal feature of Applegate Apartments that made it inaccessible. TWM prepared the only site engineering plans for Applegate Apartments. The plans were marked "for construction" and showed buildings that were "sunk" three-and-a-half to four feet below ground level. This meant the buildings would be inaccessible without a ramp. TWM's plans did not, however, provide for a ramp or any other accessible route into the buildings. The plans were nonetheless used to build Applegate Apartments. And TWM never suggested that the plans should not be used. See pp. 5-7, *supra*.

TWM also helped build Applegate Apartments in an inaccessible manner by "staking" the first six buildings. That means TWM went to the construction site and showed the builders where the corners of the buildings should be and how far down to dig. TWM continued to provide this staking service even after the first two buildings were built inaccessibly. See p. 8, *supra*.

Moreover, TWM knew that nothing would be done to make Applegate Apartments accessible. In fact, property-owner Sheils told TWM he would not make the buildings accessible. TWM nonetheless continued its involvement with the project. It represented the project on Sheils' behalf before the village planning commission using plans that made clear that the ground floor units at Applegate

would be reachable only by steps. It was also instrumental in obtaining building permits for Applegate, even to the point of creating a revised grading plan to address one of the village's concerns. See pp. 7-8, *supra*.

2. The United States similarly had a reasonable basis in law for the theory it propounded. See *Tchemkou*, 517 F.3d at 509. In the United States' motion for partial summary judgment, it asked the court to apply the legal standard set out in *Baltimore Neighborhoods, Inc.* v. *Rommel Builders, Inc.*, 3 F. Supp. 2d 661 (D. Md. 1998). Doc. 79 at 23-24 (quoting *Baltimore Neighborhoods*). That standard provides that: "When a group of entities enters into the design and construction of a covered dwelling, all participants in *the process as a whole* are bound to follow the FHAA. * * * In essence, any entity who contributes to a violation of the FHAA would be liable." *Baltimore Neighborhoods*, 3 F. Supp. 2d at 665. As the United States pointed out to the district court, Doc. 79 at 23, many courts have adopted the *Baltimore Neighborhoods* standard. See, *e.g.*, *United States* v. *Quality Built Constr., Inc.*, 309 F. Supp. 2d 756, 761 (E.D.N.C. 2003); *Doering* v. *Pontarelli Builders, Inc.*, No. 01-2924, 2001 WL 1464897, at *4 (N.D. Ill. Nov. 6, 2001); *Montana Fair Hous., Inc.* v. *American Capital Dev., Inc.*, 81 F. Supp. 2d 1057, 1069 (D. Mont. 1999); see also Robert G. Schwemm, *Barriers to Accessible Housing: Enforcement Issues in "Design and Construction" Cases Under the Fair Housing Act*, 40 U. Rich L. Rev. 753, 778 & n.130 (2006) (describing the *Baltimore Neighborhoods* rule as indicative of "the general view") (citing cases). Indeed, in a recent case, the Eleventh Circuit adopted and applied this standard.

Barker v. *Niles Bolton Assocs., Inc.*, 316 F. App'x 933, 942 (11th Cir. 2009) (describing the *Baltimore Neighborhoods* standard as "careful to distinguish between liability based solely on participation in a joint project (which it did not suggest) versus liability based on participation in actual wrongdoing").

The United States explained further in its motion for summary judgment that "[j]ust as an owner or developer is liable under the Act for its failure to construct accessible covered dwellings, architects and engineers are liable for their failures to design covered dwellings to meet the accessibility requirements." Doc. 79 at 23-24; see *Montana Fair Hous., Inc.*, 81 F. Supp. 2d at 1068 (quoting *United States* v. *Days Inns of America, Inc.*, 997 F. Supp. 1080, 1083 (C.D. Ill. 1998) for the proposition that "'[d]esign and construct' is a broad sweep of liability, [encompassing] architects, builders, and planners"). The United States also referred the court to a HUD technical assistance brochure that specifically states that the FHA's accessibility requirements apply to "site engineers." Doc. 79 at 24.

3. The facts the United States alleged are reasonably connected to — indeed, established liability under — the legal theory it propounded. See *Tchemkou*, 517 F.3d at 509. Specifically, the facts the United States alleged — and supported through testimony and evidence at trial — showed that TWM contributed to the FHA violation. These facts established that TWM was instrumental in designing and constructing the inaccessible below-ground-level front entrances of Applegate Apartments. See pp. 6-8, 17-18, *supra*. Accordingly, the government's evidence, if accepted, clearly established that TWM is an "entity

who contribute[d] to a violation of the" FHA's accessibility requirements and is therefore liable. *Baltimore Neighborhoods*, 3 F. Supp. 2d at 665.

The jury apparently accepted instead TWM's contention that it never intended its site plans to be used in the actual design and construction of Applegate Apartments. But that does not mean the United States' position was not "substantially justified." See *Pierce*, 487 U.S. at 569 ("Conceivably, the Government could take a position that is not substantially justified, yet win; *even more likely, it could take a position that is substantially justified, yet lose*." (emphasis added)). Rather, as the record plainly reveals, the United States presented evidence that had a reasonable basis in truth and was reasonably connected to its reasonably based legal theory. See *Tchemkou*, 517 F.3d at 509.

D. The District Court Failed To Apply This Court's Three-Part Test For Determining Whether The Government's Position Is Substantially Justified

Moreover, the district court utterly failed to apply this Court's test for determining whether the government's position is "substantially justified." The court concluded that the government's position was not substantially justified because "the evidence showed that TWM was only involved in the zoning process and had no role in designing the complex, nor were its drawings prepared as building plans." App. B at 7. In light of the overwhelming evidence discussed above, this finding is clearly erroneous. See *Mannie*, 509 F.3d at 856 ("[A] district court abuses its discretion when it * * * makes a clearly erroneous finding of fact."). In any event, this conclusion does not begin to address whether the

United States "had a reasonable basis in truth for the facts alleged." *Tchemkou*, 517 F.3d at 509. The court failed to assert that any of the evidence the United States relied on lacked a reasonable basis in truth. App. B at 7. Instead, the court simply ignored the United States' evidence describing TWM's role in the design and construction of Applegate Apartments. *Ibid.* Nor did the court conclude that the United States' legal theory was unreasonable, or that the facts the United States alleged and its legal theory lacked a reasonable connection. In short, the district court concluded that the United States' position was not substantially justified without citing or making any attempt to apply this Court's three-part test. App. B at 6-8; see *Tchemkou*, 517 F.3d at 509. In failing to apply binding precedent, the court committed clear legal error. See *Sosebee*, 494 F.3d at 586 ("[A] district court's application of an erroneous view of the law is by definition an abuse of discretion.").[7]

[7] Additionally, this Court requires the district court to "articulate specific reasons in addition to the jury's verdict that support its finding" that the government's position lacked substantial justification. *Wilfong* v. *United States*, 991 F.2d 359, 367 (7th Cir. 1993); see also *Hallmark*, 200 F.3d at 1080-1081 (stating that "the district court's analysis should contain an evaluation of the factual and legal support for the government's position throughout the entire proceeding" and requiring "a thorough explanation of the reasoning behind the district court's decision"). The district court's mere assertion — contrary to the evidence — that TWM had "no role in designing the complex" (App. B at 7) does not meet this standard. Indeed, the district court failed to make any finding that supports — under this Court's test — its conclusion that the United States' position was not substantially justified. See *Tchemkou*, 517 F.3d at 509.

E. The District Court's Conclusion That The United States' Position Was Not Substantially Justified Is Inconsistent With Its Own Reasoning In Prior Rulings

The district court's fees ruling also directly contradicts its own reasoning in support of prior rulings in the case. Indeed, this prior reasoning — supporting denial of TWM's motion for summary judgment and of TWM's two motions for judgment as a matter of law — affirmatively establishes that the government's position was substantially justified. Ruling on these motions, the district court effectively concluded that the government's evidence was reasonably based in truth, its legal theory was reasonably based in law, and that the two were reasonably connected. See *Tchemkou*, 517 F.3d at 509.

1. In denying summary judgment, the district court anticipated — correctly — that TWM's liability would turn on "credibility determinations" concerning conflicting accounts of its role in designing and constructing Applegate. Doc. 112 at 19. The court gave no indication that it considered the United States' evidence baseless. It also manifestly determined the United States "had a reasonable basis in law for the theory [it] propounded" (*Tchemkou*, 517 F.3d at 509) because it expressly adopted that theory. The court accepted the *Baltimore Neighborhoods* rule that the government proposed and endorsed the government's interpretation of that rule. Doc. 112 at 18 (rejecting TWM's reading of *Baltimore Neighborhoods* and instead reading the case — in accordance with the government's argument — to mean that "any entity who is involved with any stage in the design and construction of covered multifamily dwellings may be held liable

if it was a wrongful participant (i.e. if it contributed in some way to a violation of the FHAA)"). In its ruling denying summary judgment, the court essentially determined that the facts the United States alleged could establish liability under this legal theory, and therefore that the alleged facts and legal theory were reasonably connected. See *Tchemkou*, 517 F.3d at 509.

2. The reasoning the district court gave for denying TWM's motion for judgment as a matter of law at the close of the United States' case even more clearly conflicts with its later determination that the government's position was not substantially justified. The court stated:

> Looking at the evidence in the light most favorable to the plaintiff, we have evidence that the documents were marked for construction. We have evidence that the jury could believe that throughout this construction, these plans were used by everyone. We have a jury who could clearly believe that TWM was involved in both the design and the construction and given the Fair Housing Act, could believe that they are culpable.

5/29/08 Tr. 123.

If the jury "could clearly believe that TWM was involved in both the design and the construction and * * * [is] culpable" based on the evidence, *ibid.*, then necessarily the government's position was substantially justified. The court not only concluded that the United States alleged facts that "had a reasonable basis in truth," *Tchemkou*, 517 F.3d at 509, it found the United States' evidence "clearly believ[able]," 5/29/08 Tr. 123. Indeed, the court specifically credited as believable two pieces of evidence central to the government's case — that TWM's site engineering plans "were marked for construction" and "were used by

everyone" in building Applegate. *Ibid.* As explained above, p. 22, *supra*, the court had already expressly adopted the legal theory the United States propounded. And, the court manifestly concluded that "there was a reasonable connection between the facts alleged and the theory propounded," *Tchemkou*, 517 F.3d at 509, when it said that based on the facts "a jury * * * could clearly believe that TWM was involved in both the design and the construction and given the Fair Housing Act, could believe that they are culpable," 5/29/08 Tr. 123. The court's explanation for its denial of TWM's motion for judgment as a matter of law is therefore wholly inconsistent with its fees ruling.

3. The district court again denied TWM's motion for judgment as a matter of law at the close of the evidence. The district court did not give an expansive explanation for this denial as it had when it denied the earlier motion. The court did, however, make clear that resolution of the case would turn on the jury's determination of "credibility issues." 5/29/08 Tr. 247. As such, the district court reconfirmed that the government's evidence was reasonably based in truth and, if credited, would support a verdict against TWM.

4. The district court's conclusion that the United States was not substantially justified even though the jury "could believe [TWM is] culpable," 5/29/08 Tr. 123, conflicts with this Court's ruling in *Wilfong* v. *United States*, 991 F.2d 359 (7th Cir. 1993). In *Wilfong*, the district court denied the United States' motion for judgment as a matter of law, but noted that "there is ample evidence in the record" supporting the United States' position. 991 F.2d at 368. After the jury

found in favor of Wilfong, however, the district court found that the United States' position was not "substantially justified" and awarded attorney's fees. *Id.* at 368-369. This Court reversed and held that "[b]ecause the government's evidence, if credited by the trier of fact, was sufficient to support a verdict in its favor, there necessarily was a reasonable basis in fact for the government's position." *Id.* at 369. *Wilfong* is controlling in this case.

The court's fees ruling also conflicts with *Wilfong* in another way. In *Wilfong*, as in this case, "[r]esolution of the case turned on the jury's determinations of witness credibility." 991 F.2d at 368. This Court concluded "that when resolution of a case hinges to such an extent on determinations of witness credibility, it is an abuse of discretion to find that the government's position was not substantially justified." *Ibid.* Here, the district court explicitly stated — in ruling on summary judgment and the motion for judgment as a matter of law at the close of the evidence — that this case turns on the jury's "credibility" determinations. Doc. 112 at 19; 5/29/08 Tr. 247. Thus, under *Wilfong*, its determination that the government's position was not substantially justified was an abuse of discretion. See 991 F.2d at 368.

The district court noted the government's reliance on *Wilfong*, but did not treat *Wilfong* as binding. App. B at 7. Instead, the court relied on *United States* v. *Hallmark Construction Co.*, 200 F.3d 1076 (7th Cir. 2000). In *Hallmark*, the district court had expressed serious doubts about the merits of the government's case. 200 F.3d at 1079 (noting, *inter alia*, the district court's determination "that

'[m]uch of the government evidence rested on speculation and conjecture'"). But the district court gave only a terse explanation for its later determination that the government's position was substantially justified. *Ibid.* This Court acknowledged that the district court's "brief statement * * * might be satisfactory in some cases." *Ibid.* This Court concluded, however, that — particularly in light of the district court's earlier statements — the district court's apparent reliance on "the mere fact that the government succeeded in surviving summary judgment" was inadequate and remanded for more explanation. *Id.* at 1079-1080. In this case, we have the reverse of *Hallmark*: the district court indicated that it considered the government's evidence reasonably based but later made an inconsistent tersely-reasoned ruling that it was not.

The United States does not base its argument upon the fact that TWM's motion for summary judgment was denied. Instead, as explained above, the United States founds its argument upon: (a) the substantial justification of its position under this Court's three-part test; (b) the district court's failure to properly apply that test; and (c) the court's reasoning in support of its denial of TWM's motion for summary judgment and denials of TWM's motions for judgment as a matter of law. *Hallmark* is therefore inapposite.

The evidence, the governing law, and the district court's own prior rulings demonstrate that the United States' position was substantially justified. Accordingly, this Court should reverse the district court's fees ruling. See *Wilfong*, 991 F.2d at 367 (reversing an attorney's fees award because "review of

the trial record convinces [this Court] that the government was substantially justified").

II

ATTORNEY'S FEES THAT TWM'S INSURER WAS OBLIGATED TO PAY AND DID PAY WERE NOT "INCURRED BY" TWM UNDER EAJA[8]

A. Standard Of Review

Generally, "this court reviews a district court's decision to award or deny attorneys' fees under the EAJA for abuse of discretion." *Sosebee* v. *Astrue*, 494 F.3d 583, 586 (7th Cir. 2007). However, "[i]f the district court reached its conclusion because of its interpretation of relevant law * * * then [this Court] review[s] that question of law de novo because a district court's application of an erroneous view of the law is by definition an abuse of discretion." *Ibid.*

B. Under EAJA's Plain Language, Attorney's Fees Owed And Paid By TWM's Insurer Are Not "Incurred By" TWM

Under 28 U.S.C. 2412(d)(1)(A), courts can award attorney's fees to a "prevailing party" only if the fees are "incurred by that party in any civil action * * * brought by or against the United States." The language of the statute and its purpose confirm that attorney's fees a prevailing party's insurer was obligated to pay, and did pay, are not "incurred by [the prevailing] party." *Ibid.* The district court nonetheless ruled that TWM incurred attorney's fees that its insurer was

[8] If this Court concludes that the district court erred in determining that the position of the United States was not substantially justified, then it need not reach this issue.

obligated to pay, and did pay, and awarded $199,397.53 in attorney's fees. App. A at 4-5. That ruling is erroneous and should be reversed.

Section 2412(d)(1)(A)'s language makes clear that the only attorney's fees that can be awarded are fees "incurred by" TWM — the "prevailing party." In this case, TWM was obligated to pay its attorney up to the first $50,000 in costs and fees. 8/21/08 Tr. at 29. These costs and fees, that TWM actually owed and paid, were incurred. But after that first $50,000 was paid, TWM's insurer — U.S. Specialty Insurance Company (USSIC), see Doc. 192-2 at 2 — was obligated to pay pursuant to TWM's policy, and did pay, the rest of the attorney's fees. 8/21/08 Tr. at 29; Doc. 189-D at 2. "Fees are incurred where there is a legal obligation to pay them." *S.E.C.* v. *Comserv Corp.*, 908 F.2d 1407, 1414 (8th Cir. 1990); see also *United States* v. *Paisley*, 957 F.2d 1161, 1164 (4th Cir.) ("[A] claimant with a legally enforceable right to full indemnification of attorney fees from a solvent third party cannot be deemed to have incurred that expense for purposes of the EAJA, hence is not eligible for an award of fees under that Act."), cert. denied, 506 U.S. 822 (1992).[9] The *Comserv*/*Paisley* interpretation of the statute gives the word "incurred" its normal meaning. See *Black's Law Dictionary* 782 (8th ed. 2004) ("incur, *vb.* To suffer or bring on oneself (a liability or

---

[9] Of course, if — by reason of default — an insured prevailing party became obligated to pay attorney's fees, the fees would then be "incurred." See *S.E.C.* v. *Zahareas*, 374 F.3d 624, 631 (8th Cir. 2004) (concluding that a prevailing party "incurred" fees "that he [was] currently obligated to pay" because the third party that had agreed to pay the fees "reneged on that agreement" and had "gone bankrupt and no longer exist[ed]"). This result is fully consistent with the *Comserv*/*Paisley* interpretation of the statute.

expense).”). Except for the fees TWM itself paid,[10] TWM has not incurred fees precisely because USSIC — and not TWM — was “legally obligated to pay” those fees. See *Comserv*, 908 F.2d at 1414.

The district court did not rely on the straightforward reading of EAJA found in *Comserv* and *Paisley*, but instead relied on *Ed A. Wilson, Inc.* v. *General Services Administration*, 126 F.3d 1406 (Fed. Cir. 1997). *Wilson* reversed an agency decision that held — consistent with the *Comserv*/*Paisley* rule — “that fees and expenses are incurred [under EAJA] when the prevailing party is either liable for, or subject to paying them.” *Id.* at 1409. Admitting “the simplicity of the Board’s construction,” the court nonetheless concluded that the agency decision “cannot stand in light of precedent and the purposes underlying the Act.” *Ibid.*

Wilson was bound by a prior Federal Circuit decision that held that attorney’s fees are “incurred by a litigant ‘if they are incurred in his behalf, even though he does not pay them.’” *Wilson*, 126 F.3d at 1409 (quoting *Goodrich* v. *Department of the Navy*, 733 F.2d 1578, 1579 (Fed. Cir. 1984)). Apparently recognizing the inadequacy of *Goodrich*’s mere assertion that “incurred by” a prevailing party really means “incurred in his behalf,” *Wilson* advanced an

---

[10] Because of the $50,000 deductible, TWM incurred that amount in costs and expenses in this litigation. The United States does not challenge, and has already paid, the $6,337.02 in costs that the district court awarded to TWM. Thus, should the Court reach this issue, it should reduce the attorney’s fees award to $43,662.98 (the $50,000 deductible, minus the $6,337.02 costs award that has been paid).

alternative interpretation of "incurred." Comparing the facts before it — where an insurance company owed the fees — to those in *Goodrich* — where the prevailing party's union owed the fees — the court said: "the union employee and the insured can be viewed as having incurred legal fees insofar as they have paid for legal services in advance as a component of the union dues or insurance premiums." *Id.* at 1410.

This is the theory the district court adopted. App. A at 4 ("TWM has incurred legal fees by paying for those services in the form of premiums."). But it is wrong for several reasons. First, the insurance premiums that TWM had previously paid were not in any way attributable to this lawsuit and therefore were not "incurred by [TWM] in [a] civil action * * * brought by or against the United States." 28 U.S.C. 2412(d)(1)(A). Second, although the district court stated that TWM had "incurred legal fees * * * in the form of premiums," App. A at 4, the court did not calculate the *amount* of the fees award by reference to TWM's past or future insurance premiums. Thus, even if the (past and future) insurance premiums for which TWM "incurred" liability could somehow be attributed to this lawsuit, that fact would provide no basis for the fees award that the court actually entered. Finally, in this case, as in *Wilson*, 126 F.3d at 1411, the fees award will clearly not reimburse the prevailing party for its premium payments because TWM will have to turn the award over to its insurer.

Interpreting a tax statute similar to EAJA, 26 U.S.C. 7430, the Ninth Circuit recently advanced yet another interpretation of "incurred." *Morrison* v.

Commissioner of Internal Revenue, 565 F.3d 658 (9th Cir. 2009). The court rejected the dictionary definition of "incur," regarding it as "too narrow to give effect to the statute as a whole." *Id.* at 662. Instead, it held that fees are "incurred" if the party has "a contingent obligation to repay the fees in the event of their eventual recovery" — *i.e.*, if the court awards attorney's fees. *Ibid.* This amounts to a rule that fees are "incurred" if there might be a legal obligation to pay them in the future. Cf. *Zahareas*, 374 F.3d at 631 (concluding that a prevailing party "incurred" fees because "he [was] *currently* obligated to pay" them (emphasis added)). As such, it is at odds with the plain meaning of "incurred." This Court should therefore not adopt the Ninth Circuit's rule, but instead should hold that "fees are incurred when there is a legal obligation to pay them." *Comserv*, 908 F.2d at 1414.

C. Awarding Attorney's Fees Owed And Paid By TWM's Insurer Undermines EAJA's Eligibility Requirements

The award of attorney's fees to reimburse fees paid by USSIC also undermines EAJA's express eligibility requirements. Though the fees may technically be awarded to TWM, TWM is obligated under its insurance policy to reimburse USSIC for the fees it paid. 8/21/08 Tr. 47. Effectively, therefore, the award is to USSIC. The relevant provision of EAJA limits recovery to "fees and other expenses * * * incurred by [the prevailing] party." 28 U.S.C. 2412(d)(1)(A). The statute then defines "party" for purposes of subsection (d) to exclude companies or organizations with more than 500 employees or a net worth of more

than $7,000,000. 28 U.S.C. 2412(d)(2)(B). Plainly, the statute manifests Congress's intent that attorney's fees not be awarded to entities that do not meet these eligibility requirements. See H. R. Rep. No. 1418, 96th Cong., 2d Sess. 15 (1980) (Section 2412(d)(2)(B) "establishes financial criteria which limit the Bill's applications to those persons and small businesses for whom costs may be a deterrent to vindicating their rights."). Accordingly, fees should be denied if they would merely be passed on to an ineligible entity. See *Comserv*, 908 F.2d at 1416 ("EAJA was not written to compensate National Union [Insurance Company] for the risks it has assumed or its costs of doing business."); see also *Unification Church* v. *INS*, 762 F.2d 1077, 1082 (D.C. Cir. 1985) (Congress did not intend EAJA to "subsidize * * * the purchase of legal services by large entities easily able to afford legal services"). Here, the fees the district court awarded would go to USSIC — a large insurance company that is clearly an ineligible entity.[11] This result would circumvent EAJA's eligibility requirements in a manner that would "make [the fees] award unjust," 28 U.S.C. 2412(d)(1)(A). See *Comserv*, 908 F.2d at 1416 ("If [the prevailing party] recovered fees under EAJA, * * * National Union [Insurance Company] would recover an EAJA award to which it is not entitled.").

---

[11] According to the Texas Department of Insurance, USSIC's net worth as of December 31, 2008, was $309,132,883. See https://apps.tdi.state.tx.us/pcci/pcci_show_profile.jsp?tdiNum=5208&companyName=U.S.%20Specialty%20Insurance%20Company&sysTypeCode=CL (last visited July 13, 2009).

That the fees award in this case will go to reimburse an ineligible entity distinguishes it from *Morrison*, where the court relied on the fact that the third party that paid the fees "itself qualified for recovery." 565 F.3d at 666. *Morrison* nonetheless mischaracterized *Comserv* and *Unification Church*, describing the reasoning in those cases as narrowly focused on preventing parties who do not meet the eligibility requirements for attorney's fees from seeking out "a plaintiff who does and bring[ing] suit in that person's name." *Id.* at 665. In fact, those cases properly avoided an interpretation of EAJA that would permit an entity that Congress expressly made ineligible for an attorney's fees award to nonetheless receive such fees. This concern is present whether the ineligible entity sought out an eligible "straw man" plaintiff or not. Indeed, the situation in this case is the same as in *Comserv*: an ineligible insurance company would receive — pursuant to the terms of the policy — "an EAJA award to which it is not entitled." 908 F.2d at 1416.

D. Awarding Attorney's Fees Owed And Paid By TWM's Insurer Does Not Serve The Purpose Of EAJA

The district court also relied on *Wilson* to assert that the purpose of EAJA requires interpreting it to allow courts to award attorney's fees owed and paid by a prevailing party's insurer. App. A at 4. But the purpose of the statute actually counsels against that interpretation. Congress expressly stated that the Act's purpose is to "diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in specified situations for an award of

attorney fees * * * against the United States." Pub. L. No. 96-481, § 202(c), 94 Stat. 2321; see also § 202(a) ("The Congress finds that certain individuals, partnerships, corporations, and labor and other organizations may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense involved in securing the vindication of their rights in civil actions and in administrative proceedings."). This policy is not implicated unless the party will actually have to pay fees. A party that is not obligated to pay fees — because its insurer is obligated to pay them — will not be deterred from "seeking review of, or defending against, unreasonable governmental action." *Ibid.* In such a case, fee shifting would not accomplish EAJA's purpose. See *Comserv*, 908 F.2d at 1415 ("To allow [parties not obligated to pay attorney's fees] to shift [their] fees under a statute intended to remove the deterrent effect of fees is pointless.").

Wilson's policy argument relies on its conclusion that the threat of increased premiums would — if recovery of attorney's fees were not available — deter litigation against the government. 126 F.3d at 1410-1411; see App. A at 4 (relying on this theory). But the prospect that TWM will be asked to pay higher premiums in the future is speculative, and TWM will have no legal obligation to pay such premiums if it regards the insurer's demand as excessive. Moreover, the statute and legislative history make clear that Congress was concerned about the deterrent effect of attorney's fees. See Pub. L. No. 96-481, § 202(a) & (c), 94 Stat. 2321; H. R. Rep. No. 1418, 96th Cong., 2d Sess. 9 (1980). The statute does not address any

potential deterrent effect of increased liability insurance premiums. Indeed, no evidence establishes that TWM's liability insurance premiums will increase if USSIC fails to recover the attorney's fees it paid on TWM's behalf. Even if such evidence were present, the very purpose of liability insurance is to eliminate or substantially defray the cost of necessary litigation. It makes little sense to simply assume that TWM, or a similarly situated party, would forgo a challenge to government action it considers unreasonable because of concern about increased premiums.

Morrison found further support for *Wilson*'s policy argument in cases awarding attorney's fees to litigants represented by *pro bono* counsel. But only one of the three cases the Ninth Circuit cited — *Cornella* v. *Schweiker*, 728 F.2d 978 (8th Cir. 1984) — interpreted a statute that requires fees to be incurred. The others — including *Hairston* v. *R & R Apartments*, 510 F.2d 1090, 1092 (7th Cir. 1975) — interpret fee-shifting statutes that allow an award of reasonable attorney's fees without requiring those fees to have been "incurred by" a prevailing party that meets specific financial eligibility requirements. The Eighth Circuit later made clear that *Cornella* recognized "an *exception* to the requirement that a legal liability for attorneys' fees must be incurred in order to be eligible for an EAJA award." *Comserv*, 908 F.2d at 1415. Moreover, because an award of fees under this exception goes directly to the attorney, the problem of fees being paid to a statutorily ineligible entity does not arise.

Morrison and *Wilson* also cite legislative history to assert that refusing to award attorney's fees paid by a third-party backer will undermine Congress' goal of deterring unreasonable government action. See *Morrison*, 565 F.3d at 663-665; *Wilson*, 126 F.3d at 1410. These cases express concern that the government will be motivated to act unreasonably toward insured parties because it will know that it is free from the "pecuniary risk" of having to pay fees. See *Morrison*, 565 F.3d at 663; *Wilson*, 126 F.3d at 1410. That argument misapprehends Congress' concern. The House Report on which *Wilson* and *Morrison* rely expresses concern about the government's intentionally targeting small businesses that do not have the financial resources to litigate against it. See H. R. Rep. No. 1418, 96th Cong., 2d Sess. 9 (1980) ("[T]here is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue."). The legislative history, however, does not indicate that Congress thought the government would be motivated to "act unreasonably" by "the knowledge that it will be exposed to no attorney fee award." See *Morrison*, 565 F.3d at 663; *Wilson*, 126 F.3d at 1410.

A straightforward reading of EAJA's language will serve its purpose far more effectively than the interpretations offered in *Wilson* and *Morrison*. Indeed, Section 2412(d)(1)(A)'s plain language and purpose support the rule that "fees are incurred when there is a legal obligation to pay them." *Comserv*, 908 F.2d at

1414. If this Court reaches this issue,[12] it should adopt the *Comserv* rule and reduce the attorney's fees award to $43,662.98.[13]

CONCLUSION

This Court should reverse the district court's award of attorney's fees because the government's position was "substantially justified." Alternatively, the Court should reduce the award to $43,662.98, the amount of fees TWM "incurred."

Respectfully submitted,

LORETTA KING
Acting Assistant Attorney General

DENNIS J. DIMSEY
NATHANIEL S. POLLOCK
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-0333

[12] See n.8, *supra*.

[13] See n.10, *supra*.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared using Wordperfect 12.0. It contains 9,707 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, which has been sent to the Court by first-class mail on a compact disc, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

_____

NATHANIEL S. POLLOCK
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2009, two paper copies and one electronic copy in CD format of the foregoing "Brief For The United States As Appellant" were served by first-class mail on the following counsel of record:

William Thomas
Rabbitt, Pitzer & Snodgrass, P.C.
100 South Fourth Street
4th Floor
St. Louis, Missouri 63102

_____
NATHANIEL S. POLLOCK
Attorney

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiffs,

v.

SHANRIE CO., INC., DAN SHEILS, NETEMEYER ENGINEERING ASSOCIATES, INC., AND THOUVENOT WADE & MOERCHEN. INC.,

Defendant, **No. 05-306-DRH**

MEMORANDUM AND ORDER

HERNDON, Chief Judge:

I. INTRODUCTION

Before the Court is **Defendant Thouvenot Wade & Moerchen, Inc.'s (TWM) Motion Pursuant to 28 U.S.C. § 2412, Equal Access to Justice Act, Application for Fees and Other Expenses** (Doc. 189) and **Bill of Costs** (Doc. 183). The United States of America has filed a response in opposition to the motion for costs, arguing that Defendant is not entitled to costs and objecting to various costs listed in Defendant's Bill of Costs (Doc. 191). On August 21, 2008, the Court heard oral arguments in regards to Defendant TWM's Motion for Fees and other Expenses (Doc. 189) and Motion for Costs (Doc. 183).

II. ANALYSIS

B. Plaintiffs' Motion for Attorney's Fees

Defendant TWM has moved, pursuant to **FEDERAL RULE OF CIVIL PROCEDURE 54(d)** and **28 U.S.C. § 2412**, **Equal Access to Justice Act ("EAJA"),** for an award of attorney's fees in the amount of $ 199,397.53. The Court finds that pursuant to EAJA, Defendant TWM is entitled to $ 199,397.53 in attorney fees and expenses.

It is a general rule in the United States that in the absence of legislation providing otherwise, litigants must pay their own attorney's fees. ***Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975)**. Defendant argues that it is entitled to recover its attorneys' fees and other non-taxable expenses under **28 U.S.C. § 2412**. The EAJA provides in part that "a court may award reasonable fees and expenses of attorneys…to the prevailing party in any civil action brought by or against the United States…" **28 U.S.C. § 2412(b)**. Under the EAJA, the court may award attorney's fees where:

> 1) the claimant is a prevailing party; 2) the government's position was not substantially justified; 3) no special circumstances make an award unjust; and 4) the fee application is submitted to the court within 30 days of final judgment and is supported by an itemized statement.

***United States of America v. Hallmark Construction Company*, 200 F.3d 1076, 1078-79 (7th Cir. 2000).** Further, the Fair Housing Act provides that a prevailing defendant in an action under 42 U.S.C. § 3614(a) may recover reasonable attorney's fees and costs from the United States to the extent provided by the EAJA. **42 U.S.C. § 3614(d)(2)**.

In this case, the Court finds that Defendant is entitled to recover its attorney's fees. Defendant certainly is a prevailing party, as the jury returned a verdict in its favor against the Plaintiff. Upon reviewing the evidence, Plaintiff's position was not substantially justified and the jury ruled accordingly. Furthermore, Defendant has met the requirements of **28 U.S.C. § 2412(d)(2)(B)** and has filed a timely application for attorney's fees under **28 U.S.C. § 2412(d)(1)(B)**.

Plaintiff, however, argues that while Defendant may be a prevailing party under the EAJA, it is not entitled to attorney's fees and expenses because it has not incurred such costs. Plaintiff argues that while the EAJA provides for a discretionary award to a prevailing party, such an award is limited to reimbursement for the costs incurred by such party, and TWM has failed to show that it, rather than its insurer, has incurred such costs. **(Doc. 191, p. 2).** Plaintiffs rely heavily on ***SEC v. Comserv, Corp., et al*, 908 F.2d 1407 (8th Cir. 1990)**, and the cases that apply it, for their proposition that TWM has not incurred expenses. **See also *United States v. Hodgekins*, 832 F. Supp. 1255, 1261-62 (N.D. Ind. 1993), *United States v. Telegraph Park P'Ship*, C.A.No. 4:94CV00758 (E.D. Mo. Oct. 23, 1997)** In *Comserv*, the defendant was denied expenses because his employer corporation was legally obligated to pay his attorney fees under a severance agreement. The Court rejects this argument.

While the Seventh Circuit has yet to address this issue, this Court agrees with the thoughtful analysis set forth in ***Ed. A. Wilson., Inc. v. General Services***

***Administration,* 126 F.3d 1406 (Fed. Cir. 1997)**. In awarding attorney's fees to a party whose expenses had been covered by its liability insurance, the Federal Circuit determined that the prevailing party had in fact incurred attorney fees, prepaying for those fees through its insurance premiums. ***Id.* at n.4.** The Court also distinguished its decision from that in *Comserv* due to the increased premiums incurred by the prevailing party. ***Id.* at 1411.** The Federal Circuit found that this interpretation of statutory language fit within the purpose of the statute, which was to diminish the deterrent effect and financial disincentives of defending against government action. ***Id.* at 1409-10.** It was the threat of increased premiums that led to the deterrent effect the Act was designed to prevent because a party would have to decide whether fighting a government action was worth the threat of increased premiums. ***Id.* at 1411.** As the court noted, to deny a party "which in its keen acumen has obtained insurance to insulate itself from liability for accidents during contract performance…an award of fees for attorney services that it procured as part of its policy would thwart the Act's purpose of deterring unreasonable governmental action." ***Id.* at 1410.**

Here, TWM's situation is similar to *Wilson*. TWM has incurred legal fees by paying for those services in the form of premiums. Furthermore, TWM was faced with a financial disincentive to litigating against the government action due to the threat of increased premiums. Therefore, the Court finds that TWM has incurred legal fees under **28 U.S.C. § 2412.** Further, the Court finds that the rates Defendant

TWM's counsel charges are reasonable and as such, the Court awards TWM $ 199,397.53 in attorney's fees.

B. Plaintiffs' Bill of Costs

Defendant TWM has moved, pursuant to **Federal Rule of Civil Procedure 54(d)** and **Local Civil Rule 54.2**, for an award of costs as set forth in the Bill of Costs (Doc. 183):

(1)	Fees for service of summons and subpoena	$ 381.74
(2)	Fees of court reporter for all/part of transcript obtained for use in case	$ 5,421.92
(3)	Fees for exemplification and copies of papers for use in the case	$ 2,123.21
(4)	Compensation of court-appointed experts	$ 866.65
TOTAL:		**$ 8,793.52**

The Court first notes that the invoices provided total $2,600 in compensation for the two experts rather than $866.65 as listed in Defendant TWM's bill of costs. (See Doc. 183, Ex. A pp. 1, 26-27). Further, the Court notes that a calculation of the invoices total $6,120.32 in fees of court reporters rather than $5,421.92 as listed in Defendant TWM's bill of costs. (See Doc. 183, Ex. A pp. 1, 6-21).

First, Plaintiff's contend that Defendants are not entitled to costs because they have not incurred costs for the purposes of the Equal Access to Justice Act, 28

U.S.C. § 2412. **(Doc. 191, p. 2)**. The Court has already discussed and rejected Plaintiff's argument in Part A of this order.

Plaintiff also objects to two items within Defendants' Bill of Costs: 1) fees for compensation of Plaintiff's expert witnesses Bill Hecker and Gina Hilberry during their respective depositions, and 2) court reporter fees.

1. Compensation of Court-Appointed Experts

Plaintiff contends that it should not have to pay for compensation of experts because the experts were not appointed by the Court. The Court again notes that the invoices provided total $2,600 in deposition fees of the two experts rather than $866.65 as listed in Defendant TWM's bill of costs. (See Doc. 183, Ex. A pp. 1, 26-27).

Under 28 U.S.C. § 1920, the prevailing party can recover costs for, among other things, "compensation of court appointed experts." 28 U.S.C. § 1920(6). 28 U.S.C. § 1920 (6), along with 28 U.S.C. § 1821 allow expert witnesses a modest attendance fee plus travel and subsistence, but additional amounts paid to expert witnesses cannot be taxed as costs. ***Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 801 F.2d 908, 910 (7th Cir. 1986).** However, fees of experts, other than those appointed by the court, can not be taxed as a cost. **See *Chicago College of Osteopathic Medicine*, 801 F.2d at 910 (finding that while 1920(6) provides for costs of compensating court appointed experts, the party's expert was not appointed by the court and thus the prevailing party was not**

entitled to tax the cost).

Here, Bill Hecker and Gina Hilberry were expert witnesses retained by the United States, not the Court. Therefore, expenses incurred by TWM during the depositions of Hecker and Hilberry can not be recovered and the Court will disallow these costs.

2. Fees for Court Reporter

Plaintiff also objects to the fees for court reporters submitted on Defendant TWM's bill of costs on three grounds.

First, Plaintiff argues that there is a calculation error by the court reporter in regards to the deposition of expert Gina Hilberry. (Doc. 183, Ex. A p. 20). Plaintiff is correct that there is a calculation error on the invoice. The reporter charged $270.10 for a copy of the transcript, $10.00 for one ASCII Disk, $11.75 for photocopies of exhibits, and $6.00 for delivery. Adding those items together, the total sum of the invoice should be $297.85 ($270.10 + $10.00 +$11.75 + $6.00). This results in an overcharge on the invoice of $9.90. Therefore, the maximum amount that could possibly be recovered would be $297.85.

Plaintiff also objects to court reporter invoices billed to the counsel of Defendants Shanrie and Sheils in the amount of $2,022.35 related to the depositions of Bill Hecker and Gina Hilberry. Plaintiff argues that such costs were not billed to TWM and TWM has failed to prove that it incurred those costs. The invoices were addressed to Kitay Law Office, the attorney for Defendants Shanrie and Sheils. (Doc. 183, Ex. A pp. 19, 21). Defendant TWM has failed to explain how it incurred court

reporter costs that were billed to the attorney for Defendants Shanrie and Sheils. Furthermore, Defendant TWM has already submitted an invoice billed to TWM's lawyers for copies of transcripts related to the deposition of Gina Hilberry (Doc. 183, Ex. A p. 20) and is not entitled to seek duplicate costs that were billed to Shanrie and Sheils' attorney. Therefore, the Court will disallow the $2,022.35 taxed as costs in association with depositions of Gina Hilberry and Bill Hecker.

Plaintiff next objects to charges of $175.00 (objected to $205.00 which included the costs associated with the Hecker and Hilberry depositions) associated with ASCII disks, in addition to transcript copies, for each deposition. ASCII are merely for the convenience of the party's and are not taxable as costs. ***Ochana v. Flores*, 206 F. Supp. 2d 941, 945 (N.D. Ill 2002) (citing *Weeks v. Samsung Heavy Indus. Co.*, 126 F.3d 926, 946 (7th Cir. 1997) (party acknowledged that ASCII disks of transcripts were not taxable as costs))**. Therefore the Court will disallow $175.00 for ASCII disks.

Plaintiff further objects to charges totaling $81.00 (Plaintiff's motion listed $102.00 which included costs billed to the Shanrie Defendants' lawyers for the Hecker and Hilberry depositions) for delivery of deposition transcripts. Under Judicial Conference Guidelines, costs of delivery of transcripts are considered ordinary business expenses and are generally not recoverable. ***Alexander v. CIT Tech. Fin. Servs.*, 222 F. Supp. 2d 1087, 1091 (N.D. Ill. 2002); See also COURT REPORTER MANUAL, ch. 20, pt. 20.9.4**. Therefore, the court will disallow the

$81.00 for delivery of deposition transcripts.

Plaintiff does not dispute any of the other costs contained within the bill of costs. Therefore, the Court will let these costs stand. The Court finds the following amended amounts are taxable against Plaintiff:

(1)	Fees for service of summons and subpoena	$ 381.74
(2)	Fees of court reporter for all/part of transcript obtained for use in case	$ 3,832.07
(3)	Fees for exemplification and copies of papers for use in the case	$ 2,123.21
(4)	Compensation of court-appointed experts	$ 0
TOTAL:		**$ 6,337.02**

III. CONCLUSION

The Court finds that Defendant TWM is entitled to attorney's fees in this case under 28 U.S.C. § 2412 because Defendant TWM has incurred fees under the statutory provision. Therefore, the Defendant's motion for attorney's fees (Doc. 189) is **GRANTED**. Accordingly, the Court awards Defendant TWM **$199,397.53** in attorney's fees.

Furthermore, the amount of taxable costs as stated in Defendant's original Bill of Costs has hereby been amended by the Court. Accordingly, Defendant's Bill of Costs (Doc. 205) is hereby **GRANTED IN PART AND DENIED IN PART**, as the Court has determined certain costs are taxable but

not in the amount originally requested by Defendant. The Court awards Defendant TWM **$ 6,337.02** in costs.

IT IS SO ORDERED.

Signed this 30th day of September, 2008.

/s/ David R Herndon

Chief Judge
United States District Court

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff,

v.

SHANRIE CO., Inc.,
DAN SHEILS,
NETEMEYER ENGINEERING
ASSOCIATES, INC., and THOUVENOT,
WADE & MOERCHEN, INC., **No. 05-306-DRH**

Defendant.

MEMORANDUM AND ORDER

HERNDON, Chief Judge:

I. Introduction

Before the Court is Plaintiff United State's Motion to Alter or Amend the Court's October 2, 2008 Order Awarding Fees and Expenses to Defendant Thouvenot, Wade & Moerchen, Inc. ("TWM") (Doc. 214). Defendant TWM has filed a response to the motion (Doc. 216). Plaintiff has filed a reply (Doc. 223).

II. Procedural History

This motion stems from an Order the Court issued on October 2, 2008 regarding Defendant TWM's motion for attorney's fees and motion for bill of costs (Doc. 204). The Court heard oral arguments on August 21, 2008 regarding both motions, including TWM's motion for attorney fees. On October 2, 2008, the Court issued an Order granting both Defendant TWM's motion for bill of costs and motion for attorney fees pursuant to 28 U.S.C. § 2412, Equal Access to Justice Act

("EAJA"). Also on October 2, 2008, the Court issued an Order deeming Plaintiff's motion for extension of time to file a response to Defendant TWM's motion for attorney's fees ten days after an issuance of the Order regarding Defendant's motion for bill of costs (Doc. 192) waived in light of the August 21, 2008 hearing (Doc. 205).[1]

On October 10, 2008, Plaintiff filed a motion asking that the Court's October 2 Order (Doc. 205), related to Plaintiff's motion for extension of time, be set aside, arguing that the Court had not modified the Order granting the motion for extension of time and that statements by counsel did not constitute a waiver (Doc. 210). Further, Plaintiff argued that additional briefing was needed on the "substantially justified" prong under the **Equal Access to Justice Act ("EAJA") 28 U.S.C. § 2412**. The Court, acknowledging that waiver of the extension order was not specifically discussed at the August 21, 2008 hearing, granted Plaintiff's motion to vacate the October 2, 2008 Order stating that the July 9, 2008 Extension Order (Doc. 204) had been waived. On October 17, 2008, Plaintiff filed the current motion, requesting that the Court amend its October 2, 2008 Order granting Defendant TWM's motion for attorney fees.

III. Analysis

Technically, a "motion to reconsider" does not exist under the Federal Rules of Civil Procedure. The Seventh Circuit has held, however, that a motion

[1] Counsel for Plaintiff had stated during oral arguments that Plaintiff's argument against attorney's fees would be substantially the same as its argument against Defendant's motion for bill of costs, but that it would submit further briefing on the topic if necessary. The Court determined that further briefing was not necessary and deemed the motion for extension of time waived.

challenging the merits of a district court order will automatically be considered as having been filed pursuant to **Rule 59(e)** or **Rule 60(b)** of the **FEDERAL RULES OF CIVIL PROCEDURE**. **See, e.g., *Mares v. Busby*, 34 F.3d 533, 535 (7th Cir. 1994); United States v. Deutsch, 981 F.2d 299, 300 (7th Cir. 1992)**. Under these rulings, the date the motion was filed determined under what rule it would be analyzed. **See *Deutsch*, 981 F.2d at 300.** If the motion was served within 10 days of the rendition of the judgment/order, the motion fell under Rule 59(e); if it was served after that time, it fell under Rule 60(b). ***Id.* (citations omitted)**. Most recently, however, the Seventh Circuit has clarified that although motions filed after 10 days of the rendition of the judgment are still analyzed under Rule 60(b), motions filed within 10 days of the rendition of the judgment can be analyzed under either rule depending upon the substance of the motion.

> [W]hether a motion filed within ten days of the rendition of the judgment should be analyzed under Rule 59(e) or Rule 60(b) depends on the *substance* of the motion, not on the timing or label affixed to it. Therefore, the former approach - that, no matter what their substance, all post-judgment motions filed within 10 days of judgment would be construed as Rule 59(e) motions - no longer applies. In short, motions are to be analyzed according to their terms. When the substance and label of a post-judgment motion filed within 10 days of judgment are not in accord, district courts should evaluate it based on the reasons expressed by the movant. Neither the timing of the motion, nor its label..., is dispositive with respect to the appropriate characterization of the motion.

***Obriecht v. Raemisch*, 517 F.3d 489, 493 (7th Cir. 2008) (citations omitted).**

Here, the Court filed its Order on October 2, 2008 (Doc. 214). Plaintiff filed their motion to alter or amend on October 17, 2008. Since the motion was filed

within ten days of the Order, the Court must look to the substance of the motion to determine whether the motion should be construed under Rule 59(e) and Rule 60(b). ***Obriecht,* 517 F.3d at 493**. Here, Plaintiff argues that the October 2, 2008 Order awarding attorney's fees to Defendant TWM should be alter or amended because the Court was incorrect in finding that Plaintiff's position was not substantially justified under the EAJA. Therefore, the Court finds that this motion is brought pursuant to Rule 59(e).

FEDERAL RULE OF CIVIL PROCEDURE 59(e) motions serve a narrow purpose and must clearly establish either a manifest error of law or fact or must present newly discovered evidence. ***Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir. 1996); *Federal Deposit Ins. Corp. v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986); *Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985).** "The rule essentially enables a district court to correct its own errors, sparing the parties and the appellate courts the burden of unnecessary appellate proceedings." ***Russell v. Delco Remy Div. of General Motors Corp.*, 51 F.3d 746, 749 (7th Cir. 1995) (citation omitted).** The function of a motion to alter or amend a judgment is not to serve as a vehicle to re-litigate old matters or present the case under a new legal theory. ***Moro*, 91 F.3d at 876 (citation omitted); *King v. Cooke*, 26 F.3d 720, 726 (7th Cir. 1994), cert. denied, 514 U.S. 1023 (1995).**

Morever, the purpose of such a motion "is not to give the moving party

another 'bite of the apple' by permitting the arguing of issues and procedures that could and should have been raised prior to judgment." ***Yorke v. Citibank, N.A. (In re BNT Terminals, Inc.)*, 125 B.R. 963, 977 (N.D.Ill. 1990) (citations omitted).** Rule 59(e) is not a procedural folly to be filed by a lowing party who simply disagrees with the decision; otherwise, the Court would be inundated with motions from dissatisfied litigants. ***BNT Terminals*, 125 B.R. at 977.** The decision to grant or deny a Rule 59(e) motion is within the Court's discretion. **See *Prickett v. Prince*, 207 F.3d 402, 407 (7th Cir. 2000); *LB Credit Corp. v. Resolution Trust Corp.*, 49 F.3d 1263, 1267 (7th Cir. 1995).**

Plaintiff's primary argument is that the Court should have denied Defendant TWM's motion for attorney's fees because the United States' position was substantially justified.[2]

Pursuant to **28 U.S.C. § 2412(d)(1)(A),** "the court shall award to a prevailing party other than the United States fees and other expenses...unless the court finds that the position of the United States was substantially justified." **Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A)**. "Although there is no presumption that a prevailing party against the government will recover attorney's fees under the EAJA, the government bears the burden of providing that its position

[2] Defendant TWM argues that Plaintiff's motion to alter or amend should be denied because Plaintiff previously made these arguments during the August 28, 2008 hearing and Plaintiff puts forth no new evidence or evidence establishing that the Court made a manifest error of law or fact. However, in light of the Court vacating its October 2, 2008 Order regarding the waiver of Plaintiff's extension of time to respond to Defendant TWM's motion for attorney's fees, the Court will review Plaintiff's arguments regarding the substantially justified prong under the EAJA.

meets the substantially justified standard." ***United States of America v. Hallmark Construction Company*, 200 F.3d 1076, 1079 (7th Cir. 2000) (citing *Marcus v. Shalala*, 17 F.3d 1033, 1036 (7th Cir. 1994); *Jackson v. Chater*, 94 F.3d 274, 278 (7th Cir. 1996))**. The test for whether the government's position is substantially justified is "whether the agency had a rational ground for thinking it had a rational ground for its action." ***Kolman v. Shalala*, 39 F.3d 173, 177 (7th Cir. 1994)**. Substantially justified is satisfied "if reasonable people could differ as to the appropriateness of the contested action." ***Stein v. Sullivan*, 966 F.2d 317, 320 (7th Cir. 1992) (citing *Pierce v. Underwood*, 487 U.S. 552, 565 (1988))**. The government's position must be reasonable both in law and fact. ***Conrad v. Barnhart*, 434 F.3d 987, 990 (7th Cir. 2006)**. Although the question of whether a party is entitled to attorney's fees under the EAJA should not result in a second major litigation, "the district court must reexamine the legal and factual circumstances of the case from a different perspective than that used at any other stage of the proceedings." ***Hallmark*, 200 F.3d at 1079.**

The Government argues that its position was substantially justified both in law and fact. The Government argues that its legal theory was substantially justified, pointing to the fact that the Court, in denying summary judgment, stated that any entity involved with any stge in design and construction of multifamily dwellings could be held liable if it was a wrongful participant and that the Court was troubled by the ADA Accessibility note that was attached by TWM to the zoning

proposal. The Government further argues that it presented evidence from which a reasonable person could have found TWM liable, stating that it put forth evidence that TWM prepared non-complaint site plans and that TWM knew the plans violated federal law and continued to assist Sheils.[3] The Government also points to the Court's decision to deny TWM's motion for judgment as a matter of law at the close of the Government's evidence, stating that the Court's reasoning that a jury could believe that TWM was involved in both the design and construction of Applegate demonstrates that the Government's position was substantially justified. **See *Wilfong v. United States*, 991 F.2d 359, 369 (7th Cir. 1993)**.

However, the Court must reexamine the legal and factual positions of the Government, as the outcome of the case or the stage that it was decided alone can not establish that a position was or was not substantially justified. **See *Hallmark*, 200 F.3d at 1079, 1080.** The Court makes a ruling for summary judgment without seeing all of the trial evidence or knowing what the finder of facts will do. In this case, the jury has ruled and after reviewing all of the evidence presented at trial, the Court finds that Defendant TWM clearly did not belong in this case. As Defendant TWM points out, the evidence showed that TWM was only involved in the zoning process and had no role in designing the complex, nor were its drawings prepared as building plans. After reviewing all of the evidence, the Court finds that

[3] The Government points to its expert witness architect Bill Hecker's testimony that TWM was responsible for included a ramp between the parking lot and ground floor apartments which it failed to do. The Government also presented evidence that the plans were marked "for construction" although TWM contended that the plans were not meant to be used in the actual design and construction of Applegate.

the Government's position was not substantially justified.

The Government also argues that TWM has not incurred attorney's fees under the EAJA. However, the Government argued its position extensively at the oral hearings and in its brief for bill of costs. The Court determined that Defendant TWM had incurred attorney's fees. The Government offers no new arguments regarding this issue. Further, the Court has already reviewed Defendant TWM's list of fees and found them to be reasonable. Thus, the Government's request for a hearing regarding the amount of fees recoverable or, in the alternative, to significantly reduce the fees cited by TWM is denied.[4]

IV. Conclusion

Accordingly, the Court **DENIES** Plaintiff United States' Motion to Alter or Amend the Coutr's October 2, 2008 Order Awarding Fees and Expenses to Defendant TWM (Doc. 214).

IT IS SO ORDERED.

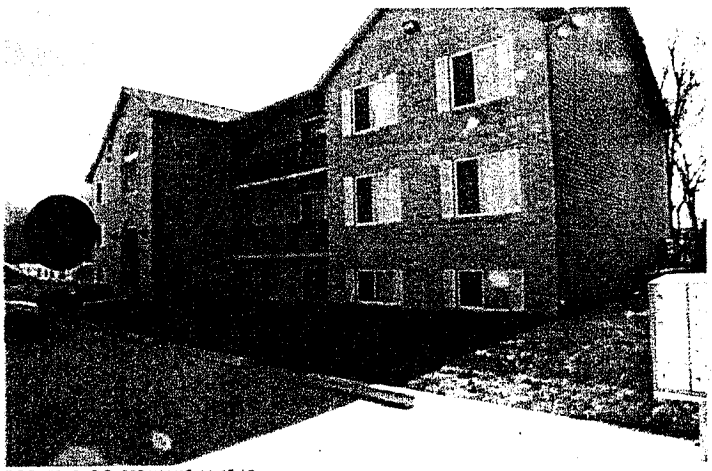
Signed this 30th day of March, 2009

/s/ David R Herndon

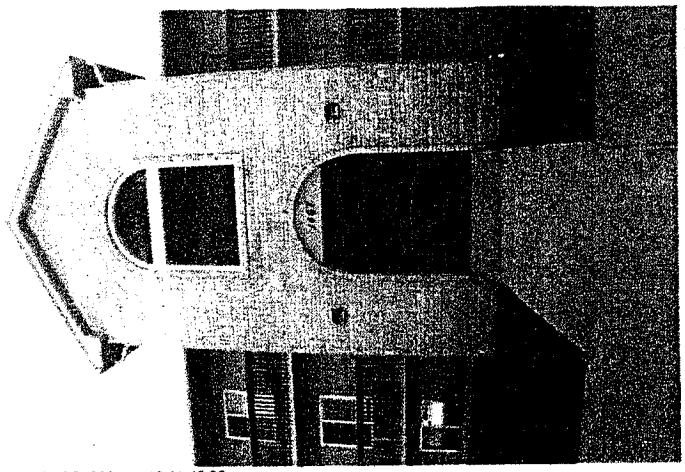
Chief Judge
United States District Court

[4] TWM did admit that the March 28, 2006 entry referencing voluntary disclosures and Bernard Reinart was not an entry related to the above captioned case and has agreed to deduct the $14.50 from the total amount of attorney's fees. However, TWM maintains that the remaining entries have been carefully reviewed and are accurate and reasonable.

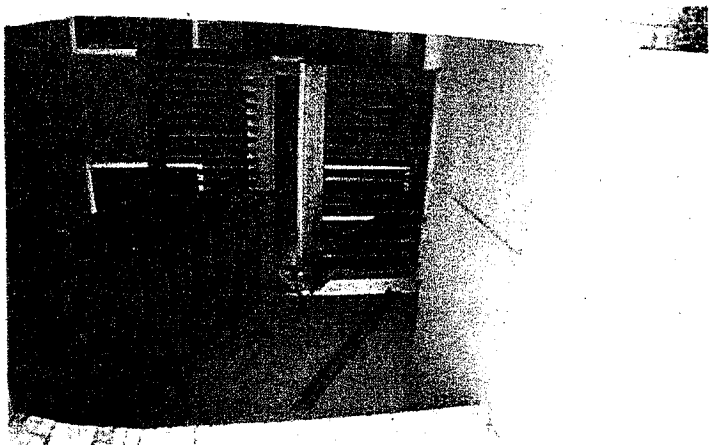
APPENDIX C



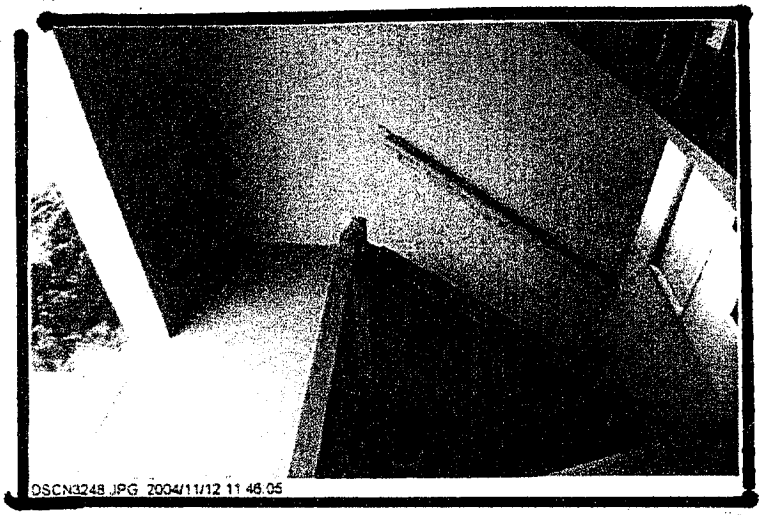
DSCN3245.JPG 2004/11/12 11:45:16



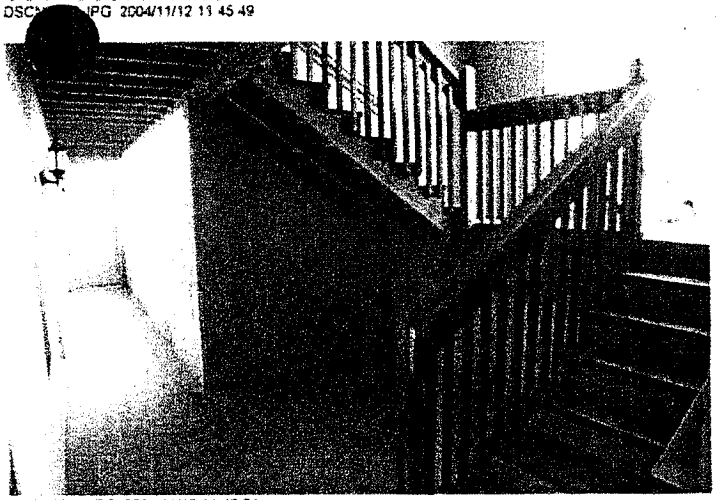
DSCN3246.JPG 2004/11/12 11:45:36



DSCN3247.JPG 2004/11/12 11:45:49

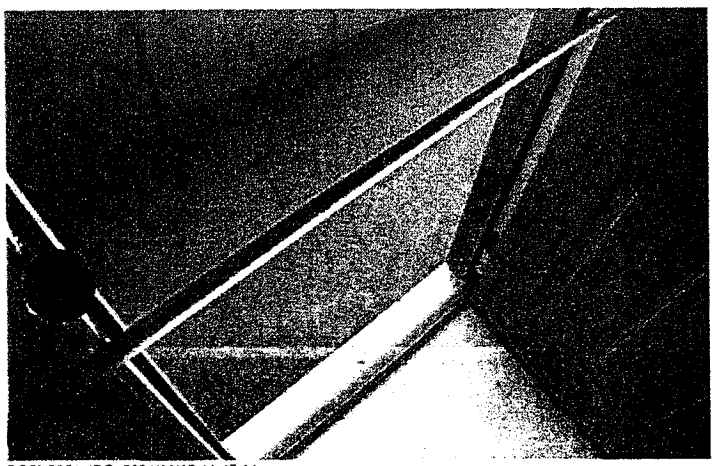


DSCN3248.JPG 2004/11/12 11:46:05

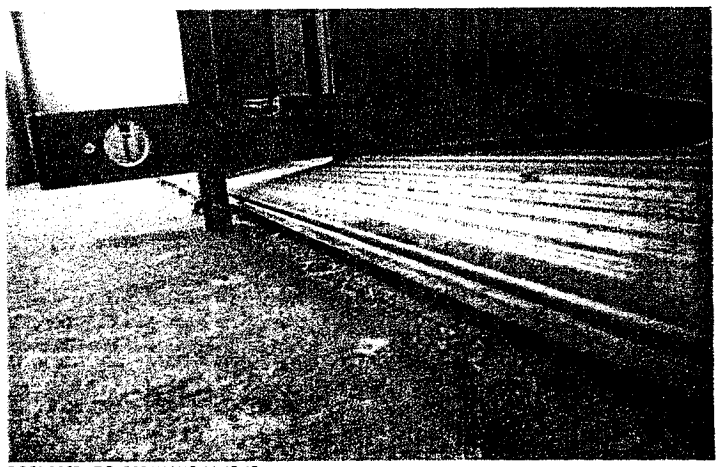


DSCN3249.JPG 2004/11/12 11:46:24

DSCN3250.JPG 2004/11/12 11:46:46



DSCN3251.JPG 2004/11/12 11:47:14



DSCN3252.JPG 2004/11/12 11:48:40