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**Center on Property, Citizenship, and Social Entrepreneurism  
(PCSE) (“Peace”)**



*A CENTER FOR ADVANCED PROPERTY STUDIES  
AT THE BURTON BLATT INSTITUTE (BBI)*

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# PCSE OVERVIEW

The Center on PCSE brings together experts from a variety of fields and institutions to discuss and explore issues related to modern Real Estate Transactions and Finance; Community Development and Housing; Global Property Law Systems; and Access to Ownership for Inclusion of the Elderly, the Poor, and Persons with Disabilities.

A core principle of PCSE is that a just and accessible property law system is the basis for both good citizenship and successful economic development. Therefore, PCSE engages a diverse group of people to work collaboratively in all areas of property law and theory; including real, personal, intangible, intellectual, and cultural property. In doing this it is understood that property, in all its forms, addresses the fundamental relationships between the state and its citizens, and among the people themselves. For this reason PCSE examines property in terms of its ability to foster democratic forms of governance, advance social justice, promote citizenship, build sustainable and supportive communities, and enhance the stewardship of our global environment and its natural resources.

**This newsletter will be available each month at [www.law.syr.edu/pcse](http://www.law.syr.edu/pcse).**

# NEWS, ANNOUNCEMENTS, and EVENTS

Ann Bartow will be in Syracuse to speak at the College of Law on November 30<sup>th</sup>. Professor Bartow currently teaches Intellectual Property, Copyright Law, Trademarks and Unfair Competition Law, Cyberspace Law, and Constitutional Law II – Individual Liberties. In practice, she specialized in patent litigation. Her scholarship focuses on the intersection between intellectual property laws and public policy concerns.



The Working Group on PCSE is having its third annual meeting in Washington, D.C. on Friday November 10 and Saturday November 11. The 2006 PCSE Workshop topics include a focus on dealing with legal and policy issues related to a major disaster.

## Accessible Housing Could Become More Limited in Washington

The Building Code Council for the state of Washington will decide a proposal on November 17 that could reduce the percentage of “Type A” accessible housing units from the current state standard of 5% to the national standard of 2%.

Type A units include wider doors, greater toe clearances under sinks in kitchens and bathrooms, grab bars around toilets and showers and more space to maneuver a wheelchair.

Those opposed to the reduction argue that it will make it even harder for people seeking accessible housing to find what they are looking for. Also, they argue that as the country’s population is aging, more and more people will need accessible housing.

Those in favor of the reduction argue that the 5% requirement places an unreasonable cost burden on them. They argue that there are enough accessible housing units already.

Toby Olson, executive secretary of the governor's Committee on Disability Issues (in Washington) claims that a Type A unit costs .5 percent to 2 percent more than a non-Type A unit.



Example of an accessible kitchen



Example of an accessible front entrance



### **HENSLEY v. THE WAFFLE SHOP** **US District Court for the Eastern** **District of California** **September 28, 2006**

This matter was before the court to enforce a settlement agreement.

For the reasons stated below, the court granted plaintiff’s motion; Defendants were directed to complete the modifications to the subject premises as provided in the Settlement Agreement no later than 90 days from the date of the order.

#### **BACKGROUND**

On December 3, 2001, Plaintiff brought a claim under the ADA against Defendants, alleging various accessibility violations at The Waffle Shop, located in Yuba City, California. Defendants, the Muharebs, leased the restaurant facility

from Haney-Turner. In May 2004, Plaintiff entered a Settlement Agreement with Defendants, pursuant to which defendants paid plaintiff \$35,000.00 and the Muharebs agreed to perform certain modifications to the property.

The Muharebs conceded they had not completed the required modifications. Specifically, they admitted that the handrails, pressure doors and ramp repairs have not been completed. They explained, in response to the motion, that much of the work was delayed due to circumstances beyond their control. Ultimately, the Muharebs stated that they did not complete the work because they were evicted from the Premises. They maintained that the eviction excused their further performance under the Agreement.

#### **ANALYSIS Enforcement of the Settlement Agreement**

The Muharebs did not dispute that under the terms of the Settlement Agreement, they were obligated to perform the requisite modifications to the Premises. Indeed, the Muharebs completed some of the necessary work. With respect to the remaining work, they maintained that they were not obligated to perform the work due to their eviction from the property.

Their argument was unavailing for several reasons. First, the Settlement Agreement did not condition the Muharebs' performance on their possession of the property. Where the language of a contract is clear and explicit, it must govern the contract's interpretation. Here, the terms of the Settlement Agreement were clear, comprehensible and unambiguous. The Muharebs did not cite any provision of the contract that supported their argument, nor did they identify any ambiguity in the contract's terms.

Stating their argument another way, the Muharebs next contended that under the doctrine of frustration of purpose their further performance under the Settlement Agreement is excused. For the doctrine to be applicable, the Muharebs had to establish that (1) the parties' principal purpose in entering the contract was substantially frustrated; (2) without fault of their own; and (3) by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made.

The Muharebs did not establish these elements because (1) the purpose of the Settlement Agreement was to settle liability owed to plaintiff; (2) the Muharebs' eviction was foreseeable; and (3) the Muharebs were the cause of the eviction. Contrary to the Muharebs' protestations, the purpose of the Settlement Agreement was clearly to settle plaintiff's ADA claims against defendants, not to allow the Muharebs to remain on the property so long as they made the necessary modifications.

Finally, the doctrine of frustration of purpose was further made inapplicable here as the Muharebs' caused their eviction. The Muharebs' lost an unlawful detainer action and were ordered to vacate the premises by the Sutter County Superior Court on July 7, 2005. Thus, based on their own conduct in failing to comply with the terms of the lease, the Muharebs were evicted from the property. As such, in failing to meet any of the required elements for application of the doctrine of frustration of purpose, the Muharebs could not invoke the doctrine to excuse their further performance under the contract.

Accordingly, having conceded that further work is due under the Settlement Agreement, the Muharebs, were ordered to complete the requisite work.

## CONCLUSION

For the foregoing reasons, the court granted Plaintiff's motion to enforce the settlement agreement. The Muharebs were directed to complete the requisite modifications to the-Premises as set forth in the Settlement Agreement no later than 90 days from the date of the order.



## **TORRES v. RITE AID** **US District Court for the Northern** **District of California** **January 27, 2006**

This action alleged access discrimination against a visually impaired man and both sides moved for summary judgment. Defendant Rite Aid Corp. operates the store that allegedly failed to conform to ADA building standards. It moved for summary judgment on plaintiff's ADA and state-law claims. Plaintiff Jesus Torres moved for summary judgment on whether certain in-store displays that protrude into the aisles of a Rite Aid store would violate ADA regulations. Neither side was entitled to judgment as a matter of law. Both motions were therefore denied.

## BACKGROUND

At age four, plaintiff was diagnosed with glaucoma. He has a prosthetic right eye with no vision and limited vision in his left eye. He is generally unable to see objects as he walks indoors, with the occasional exception of shopping carts at a distance of six inches or less.

The Rite Aid store where plaintiff alleged ADA violations is in Pittsburg, California. The store's aisles are lined with

shelves that hold merchandise ranging from vodka to diapers. On April 13, 2005, plaintiff and his wife, Mabel Torres, visited the store. Although plaintiff went to the store on other occasions, the April 13 trip is the one primarily at issue in the case. During that visit, Ms. Torres encountered four or five objects sticking out from the shelves. One object was an advertising sign made of plastic and cardboard, which plaintiff felt with his hand. It projected about 9 to 11.5 inches from the shelf. It apparently consisted of paper attached to a hinged plastic clip that was affixed to a store shelf. The hinge allowed the advertisement to give way if a shopper bumped into it. The other objects were identical or nearly identical to objects plaintiff's counsel later photographed in the store.

The Torreses went to the store April 13 to buy beer. Plaintiff carried with him the cane he uses to detect objects in his path. He was dragging the cane on the ground to detect obstacles but not using it with the same technique he used when by himself. In addition, Ms. Torres guided plaintiff through the store by holding his arm. Plaintiff was also using his cane to identify himself as visually impaired to passersby who might wonder why he was being guided by another person. The Torreses browsed the merchandise for nearly twenty minutes before getting their beer.

During the visit, plaintiff did not bump into any of the protruding objects he challenges in this action. His wife guided him around four or five such objects sticking out from shelves. On one occasion, he was walking down an aisle with his right shoulder about an inch from the shelves when his wife abruptly told him to stop. She then told him that his face had almost hit a plastic sign and guided him around it.

## **ANALYSIS**

### **Defendant's Motion for Summary Judgment on Section 4.4.1.**

Defendant contended that the ADA regulations apply to fixed, permanent parts of buildings but not to temporarily placed and moveable objects. It claimed the display items encountered at the store by plaintiff were moveable. Defendant argued that the displays therefore could not have violated the regulations. It asked for summary judgment on that issue.

Defendant's contention that the regulations, as a whole, never cover moveable objects conflicts with the text of the regulations. In fact, the standards explicitly regulate freestanding objects in certain cases. They govern "[f]reestanding" water coolers, which is the most obvious example of a moveable thing covered by the regulations. They also cover potentially moveable objects such as vending machines, library magazine displays, airport clocks, telephone books and devices that dispense tableware, condiments, food and beverages. It is therefore impossible to accept the following syllogism advanced by defendant: moveable objects are never regulated by the standards, the objects in question here are moveable and therefore those objects are not regulated. It would be error to dismiss, out of hand, the possibility that the protruding objects at the Rite Aid store were covered by the regulations.

The crucial issue thus becomes whether the placement of the Rite Aid displays were an alteration within the meaning of the ADA regulations. As stated above, an alteration is "a change to a place of public accommodation or a commercial facility that affects or could affect the usability of the building or any part thereof." This court simply does not have enough evidence to make a determination,

as a matter of law, whether or not affixing the objects that protrude into Rite Aid's aisles were alterations under the ADA. This question turns on facts the parties have not addressed. For example, the answer may hinge on whether the displays can be removed quickly by a typical store employee, or whether a specialist must come in to move them. It may make a difference how much they weigh, how flexible they are, how they are affixed to the shelf and the exact nature of the shelves themselves. These myriad factual issues have not been addressed by the parties. The Court therefore cannot rule, as a matter of law, on whether putting the protruding objects on the shelves was an alteration. Without being able to make that determination, this Court cannot grant summary judgment to defendant on the issue of whether the objects at issue were covered by Section 4.4.1.

### **Defendant's Motion on Denial of Access.**

Defendant also moved for summary judgment on the grounds that neither "the single cardboard advertisement Plaintiff alleged he encountered" . . . [nor] any other allegedly protruding objects' in the store denied him access... in violation of the ADA".

Defendant missed the point here. Plaintiff did not seek to prove ultimately that he was denied access. To prevail, he must instead demonstrate that Rite Aid discriminated against him. Discrimination in the provision of public accommodations, such as the Rite Aid store, is defined as failing to alter a facility "in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities." Thus, whether or not plaintiff was able to get to all the merchandise and parts of the store is not dispositive. In fact, he did not need to enter the store at all to make out a case. Plaintiff

may make out a valid claim of discrimination based solely on Rite Aid's purported failure to conform the store's alterations to Section 4.4.1. For this reason, defendant's argument for summary judgment on grounds that plaintiff was not denied access is rejected.



### **Going Nowhere Fast: Web Accessibility in the UK**

In 2004, the Disability Rights Commission surveyed over 1000 websites and found that 80% failed to comply with basic accessibility standards. Another study undertaken a year ago by AbilityNet has found that little or nothing has changed.

One of the reasons that is suspected for the lack of change is a lack of awareness. Many businesses and organizations are not aware of the guidelines they must follow regarding web accessibility.

Another reason for the lack of change is that the standards may be difficult to comply with because of technology issues. A parallel issue is that the standards may be difficult to interpret and they may be ambiguous in places.

To avoid issues with accessibility, the best thing to do is to consider accessibility before any website is built. As with other types of property, it is more difficult to retrofit than to do it correctly the first time.

