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SC Court of Appeals

THE STATE of SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge
Brian M. Gibbons, Circuit Court Judge

Case No. 2018-CP-12-00117
2028-AP-12-00074

Appellate Case Nos. 2022-001312 and 2022-001390

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard, Plaintiffs,

Of whom Heidi Gersten is Appellant,

v.

Kevin Carter, Richard Davis, Joseph Tirbovich, Nationwide Insurance Company, Interinsurance Exchange of the Automobile Co, John Ammendola, Trustgard Insurance Company, Blackwell, SC Department of Public Safety, Chevrolet, GMC, Unknown John Does, Respondents.

TITLE II OF THE AMERICANS WITH DISABILITIES ACT REASONABLE ACCOMMODATIONS REQUEST TO PERMIT APPELLANT TO SERVE RESPONDENTS VIA EMAIL

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Appellant

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The Appellant Heidi Gersten pursuant Title II of the Americans with Disabilities Act (ADA) Reasonable Accommodations Request, requests and moves this Court to permit the Appellant Gersten to serve any and all Respondents in the above cases by email in their entirety.

The basis or grounds for this request is that the Appellant is paralyzed disabled as a result of the collision in controversy in this matter which causes her to be substantially limited on one or more of her major life activities. She suffers from numerous secondary complications from being paralyzed that include, but are not limited to, a pressure wound located on her left buttocks that prevents her from sitting down for very long without further injury to it. And recently, a third degree burn the size of two quarters on her right calf. (Pictures available upon request.) In addition, she has no control over her bowel movements and frequently experiences diarrhea "attacks" or "explosions".

Under South Carolina law, she is a "vulnerable adult"; defined, in part, as a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection. She has no caregiver or aid or assistant. She lives under extreme hardship.

For the previous reasons, and more, she's a qualified individual of and protected under the Americans with Disabilities Act (ADA). A "'qualified individual with a disability' is defined as "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the

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provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity."

United States v. Georgia, 546 U.S. at 153–54, 126 S.Ct. 877 (quoting 42 U.S.C. § 12131(2)).

The Appellant simply is unable to perform at the level of able bodies. It takes her approximately fifty-two (52) times longer to complete basic daily functions or tasks than an able body. She spends most of her days performing bowel movements, and other self-care, like wound care, for example, that includes, but is not limited to, cleaning up after each perpetual function.

This is a complex matter and there are numerous respondents. It takes her a tremendous amount of time to type up documents, print and/or scan them, address envelopes that are handwritten and wheel to the post office every time she is to comply with a law necessary in perfecting her appeal. All this extra effort is very damaging to her said wound and causes further injury from prolonged sitting required to complete these tasks. The only way the wound on her left buttocks will heal, is by staying off it. The Appellant is mostly bedridden because of this. It's already quite difficult for her to simply type documents and being paralyzed alone makes everything, including but not limited to, daily life and complying with court deadlines, much more difficult than for an able body.

On May 6, 2022, in Appellate Case No. 2022-000029, RE: Service by E-Mail in the Trial Courts, the Supreme Court of South Carolina issued an order that permitted non attorneys to serve attorneys via email. It states in part:

(d) E-Mail Service By and On Self-Represented Litigants. A self-represented litigant who is not a lawyer admitted to practice in this state may consent in writing to be served by e-mail and designate a correct e-mail address for service. A lawyer may consent in writing to accept service by e-mail from a self-represented litigant.

Also on May 6, 2022, in Appellate Case No. 2020-000447, RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), the Supreme Court issued another order that non attorneys may file by email. It states in part:

> **(b) Electronic Methods of Filing.** Filings with an appellate court may be made electronically using the methods listed below.
>
> **(2) Filing by E-mail.** Filings may be made by e-mail. For the Supreme Court, the e-mail shall be sent to supctfilings@sccourts.org; for the Court of Appeals, the e-mail shall be sent to ctappfilings@sccourts.org. This method may not be suitable for large documents, and if it becomes necessary to split a document into multiple parts, the e-mail shall identify the part being sent (i.e., Record on Appeal, Part 1 of 4). A document filed by this method must be in Adobe Acrobat portable document format (.pdf). Filers shall not utilize any other file format or a file-sharing service when e-mailing documents for filing. The clerk of the appellate court may reject any document submitted by e-mail in a format other than .pdf or using a file-sharing service.

A more fair and permissible approach for the Appellant to be on the same playing field as able bodies in this Court is to permit her to serve via email. Permitting her to email the Respondents for service of documents filed would substantially reduce the time she would spend producing documents in the multitude, especially since there are rules that instruct frequent updates of process to all parties, such as the transcript stage. Documents are voluminous.

If she were to find it necessary to amend a document for a simple

grammatical correction or typo, she would be required to spend so much more time and effort completing the process, where copying and pasting on the computer would reduce her time doing mundane tasks and allow her to be able to keep a better pace with able bodies and not be hindered with the much slower and time-consuming process of mailing everyone by hand.

There is no prejudice to the Respondents. The majority of the Respondents' attorneys are currently serving her via email without first getting consent from her anyway. (Proof available upon request.) This alone gives the Respondents an unfair advantage against the Appellant.

The Appellant's disability of being paralyzed renders her incapable of asserting her claims in a timely manner. Electronic service on the Respondents will help her to have a more equal opportunity of fair due process.

"The ADA was passed by large majorities in both Houses of Congress [in 1990] after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities." *Lane,* 541 U.S. at 516, 124 S.Ct. 1978. "Congress found that 'individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, [and] failure to make modifications to existing facilities and practices....' " *Crowder v. Kitagawa,* 81 F.3d 1480, 1483 (9th Cir.1996) (alteration in original) (quoting 42 U.S.C. § 12101(a)(5)). The ADA aims "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."

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42 U.S.C. § 12101(b)(1). "It forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III." *Lane*, 541 U.S. at 516–17, 124 S.Ct. 1978.

"Title II of the ADA [, 'Public Services,'] provides that 'no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity,or be subjected to discrimination by any such entity.' " *United States v. Georgia*, 546 U.S. at 153, 126 S.Ct. 877 (quoting 42 U.S.C. § 12132). The statute "require[s] that covered entities make reasonable accommodations in order to provide qualified individuals with an equal opportunity to receive benefits from or to participate in programs run by such entities." *Tsombanidis v. West Haven Fire Dep't*, 352 F.3d 565, 573 (2d Cir.2003) (internal quotation marks omitted).

The ADA "defines 'public entity' to include 'any State or local government' and 'any department, agency, ... or other instrumentality of a State.' " *United States v. Georgia*, 546 U.S. at 154, 126 S.Ct. 877 (quoting 42 U.S.C. § 12131(1)) (some internal quotation marks omitted).

United States v. Georgia, 546 U.S. at 153–54, 126 S.Ct. 877 (quoting 42 U.S.C. § 12131(2)). "A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally

alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).

"In the ADA, Congress provided [a] broad mandate" to "effectuate its sweeping purpose[to] ... forbid[ ] discrimination against disabled individuals in major areas of public life, [including] ... public services...." *Id.* at 675, 121 S.Ct. 1879. "As a remedial statute, the ADA must be broadly construed to effectuate its purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." *Noel v. New York City Taxi and Limousine Comm'n,* 687 F.3d 63, 68 (2d Cir.2012) (internal quotation marks omitted).

As noted above, "[i]n the ADA, Congress provided [a] broad mandate" to "effectuate its sweeping purpose[to] ... forbid[ ] discrimination against disabled individuals in major areas of public life, [including] ... public services...." *Martin,* 532 U.S. at 675, 121 S.Ct. 1879. "Congress found that 'individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, [and] failure to make modifications to existing facilities and practices....' " *Crowder,* 81 F.3d at 1483 (alteration in original) (quoting 42 U.S.C. § 12101(a)(5)). The ADA aims "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). Title II of the ADA represents Congress's attempt to apply this "clear and comprehensive national mandate" to the "services, programs, or activities," 42 U.S.C. § 12132, of " 'any State or local government' and 'any department, agency, ... or other

instrumentality of a State,' "

United States v. Georgia, 546 U.S. at 154, 126 S.Ct. 877 (omission in original) (quoting 42 U.S.C. § 12131(1)).

Congress clearly meant Title II to sweep broadly. If all state laws were insulated from Title II's reasonable modification requirement solely because they were state laws, "state law [would serve as] an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting Title II. *Marsh,* 499 F.3d at 177. Far from "provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," 42 U.S.C. § 12101(b)(1), the ADA would be powerless to work any reasonable modification in any requirement imposed by state law, no matter how trivial the requirement and no matter how minimal the costs of doing so. We conclude that the ADA's reasonable modification requirement contemplates modification to state laws, thereby permitting preemption of inconsistent state laws, when necessary to effectuate Title II's reasonable modification provision. And this statement must be considered in context. Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

THEREFORE, having shown good cause, the Appellant respectfully requests this Court under Title II of the Americans with Disabilities Act for a reasonable accommodation to permit her to serve any and all Respondents in this matter

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by email at their listed email addresses.

This is not made to cause delay, rather, in the furtherance of justice.

Respectfully submitted this 1st day of December 2022

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PROOF OR CERTIFICATE OF SERVICE

I hereby certify that service of the Appellant's TITLE II OF THE AMERICANS WITH DISABILITIES ACT REASONABLE ACCOMMODATIONS REQUEST TO PERMIT APPELLANT TO SERVE RESPONDENTS VIA EMAIL in the above-captioned cases was made upon all parties and counsel of record by depositing a copy of it in the United States Mail, postage prepaid, and return address clearly marked on December 1, 2022, to:

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