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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
J. Mark Hayes, II, 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.

APPELLANT'S INITIAL BRIEF AND APPENDIX

July 31, 2023

___/S/Heidi Gersten
Heidi Gersten, Appellant
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STATEMENT OF ISSUES ON APPEAL

- I. Did the lower court err in failing to rule on Appellant’s motions?
- II. Did the lower court err in failing to rule on Appellant’s Title II of the Americans with Disabilities Act Reasonable Modifications request?

III. Did the lower court err and abuse its discretion with a harsh penalty of dismissal?

STATEMENT OF THE CASE

This action arises out of a collision between the Respondent Kevin Carter and the Appellant Heidi Gersten and Ivanka Ayoub owned the vehicle that GERSTEN was travelling in on March 19, 2015.

ARGUMENTS

I. The lower court erred and abused its discretion in failing to rule on Appellant's motions.

(A): Appellate Standard of Review

The trial court's decision concerning the following motions timely served and filed by GERSTEN.

An abuse of discretion occurs when the trial court's ruling based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious.

State v. Allen, 370 S.C. 88, 634 S. E. 2d 653 (2006); *see also Exparte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006)

II. The lower court erred and abused its discretion by not ruling on a Title II of the Americans with Disabilities Act Reasonable Accommodations Request made by GERSTEN, to set one motion at a time per hearing due to her disability of being paralyzed and lack of help with her care.

ADA's reference to "essential eligibility requirements," when defining a "qualified individual with a disability," did not necessarily refer to each and every formal legal eligibility requirement

imposed for participation in public program or benefit; some relatively minor eligibility requirements, even if set by statute, will not be deemed essential because they will not be necessary to prevent the fundamental alteration of the program's nature. Americans with Disabilities Act of 1990, §§ 201(2), 202, 502, 42 U.S.C.A. §§ 12131(2), 12132, 12202; 28 C.F.R. § 35.130(b) (7).

Under the ADA, covered entities must 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. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

To prove a violation of Title II of the ADA, a party must establish: (1) that he is a “qualified individual” with a disability; (2) that he was excluded from participation in a public entity's services, programs or activities or was otherwise discriminated against by a public entity; and (3) that such exclusion or discrimination was due to his disability. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

Typically, the determination under the ADA of whether a particular modification is “reasonable” involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it. Americans with Disabilities Act of 1990, §§ 201(2), 202, 42 U.S.C.A. §§ 12131(2), 12132; 28 C.F.R. § 35.130(b)(7).

Congress clearly did not intend to give public entities more latitude under the ADA than private parties to discriminate against the disabled. Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

Title II of the ADA should not be construed to require automatic deference to a program's

formal legal eligibility requirements, however minor they may be. Americans with Disabilities Act of 1990, § 201 et seq., 42 U.S.C.A. § 12131 et seq.

The ADA requires a court to analyze the importance of an eligibility requirement for a public program or benefit, when determining whether a requested modification would fundamentally alter the nature of the service, rather than defer automatically to whatever “formal legal eligibility requirements” may exist, no matter how unimportant for the program in question they may be. Americans with Disabilities Act of 1990, §§ 201(2), 202, 502, 42 U.S.C.A. §§ 12131(2), 12132, 12202; 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. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

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. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

ADA's reasonable modification requirement contemplated modification to state laws, thereby permitting preemption of inconsistent state laws, when necessary to effectuate Title II's reasonable modification provision. Americans with Disabilities Act of 1990, § 2(b)(1), 42 U.S.C.A. § 12101(b)(1).

Under the doctrine of federal preemption, state laws that conflict with federal law are without effect. U.S.C.A. Const. Art. 6, cl. 2.

Purpose of Congress is the ultimate touchstone of pre-emption analysis. U.S.C.A. Const. Art. 6, cl. 2.

An actual conflict between state and federal law exists, which results in federal preemption, when compliance with both federal and state regulations is a physical impossibility, or when state law is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress; an actual conflict also exists where federal law is in irreconcilable conflict with state law. U.S.C.A. Const. Art. 6, cl. 2.

When the question is whether a federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed; if the purpose of the act cannot otherwise be accomplished, if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect, the state law must yield to the regulation of Congress within the sphere of its delegated power. U.S.C.A. Const. Art. 6, cl. 2.

The ADA preempts inconsistent state law when appropriate and necessary to effectuate a reasonable accommodation under Title II. Americans with Disabilities Act of 1990, §§ 2(b)(1), 201(2), 42 U.S.C.A. §§ 12101(b)(1), 12131(2).

A plaintiff may sue a state official acting in his official capacity, notwithstanding the Eleventh Amendment, for prospective, injunctive relief from violations of federal law. U.S.C.A. Const. Amend. 11.

“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.” 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.

III. The lower court erred and abused its discretion with the harsh penalty of dismissal.

State Law Standard

Federal Law Standard

Respondent Kevin Carter Has Not Been Prejudiced

CONCLUSION

For the grounds and reasons set forth herein, GERSTEN should be permitted to file her Rule 60 (b), SCRCP, the lower court’s rulings should be reversed, discovery requests accepted and the matter should move towards trial by jury.

Respectfully submitted this 31st day of July 2023

July 31, 2023

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Jul 31 2023

SC Court of Appeals

PROOF OR CERTIFICATE OF SERVICE

I hereby certify that service of a true and accurate copy of the Appellant's INITIAL BRIEF And APPENDIX And DESIGNATION OF MATTER with LEAVE TO AMEND in the above-captioned cases was made upon all parties and counsel of record by email on July 31, 2023:

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DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL
PERTAINING TO RESPONDENT KEVIN CARTER

The Appellant Heidi Gersten proposes the following be included in the Record on Appeal:

1. Order of August 22, 2022
2. Arbitration Claim for Property Damage Filed February 21, 2018
3. Complaint Filed March 17, 2018
4. First Amended Claim for Property Damage Filed March 27, 2018
5. Appellant Gersten's Exhibit List A-L Filed March 27, 2018
6. Appellant Gersten's Exhibit List A-G Filed March 27, 2018

7. First Set of Admissions, Interrogatories, and Admissions Filed March 27, 2018
8. Affidavit of Service March 27, 2018
9. Affidavit of Heidi Gersten in Support of Property Damage Claim
10. Answer of Kevin Carter Filed April 16, 2018
11. Motion to Dismiss or Motion to Strike of Kevin Carter Filed April 16, 2018
12. Transcript of Proceedings
13. Appellant Gersten's Exhibits

I certify that this designation contains no matter which is irrelevant to this appeal.

July 31, 2023

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