

STATE OF LOUISIANA  
THIRD CIRCUIT COURT OF APPEAL

DOCKET NO. 08 00505-CA

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COLLETTE JOSEY COVINGTON, ET AL  
*Plaintiffs – Appellees*

Versus

MCNEESE STATE UNIVERSITY AND THE BOARD OF  
SUPERVISORS FOR THE UNIVERSITY OF  
LOUISIANA SYSTEM  
*Defendant – Appellant*

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CIVIL APPEAL

Appeal from the Fourteenth Judicial District Court  
Parish of Calcasieu, State of Louisiana, Civil Docket Number 2001-2355,  
Division F, the Honorable Wilford D. Carter, Presiding

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APPELLANT/DEFENDANT’S (MCNEESE’S) REPLY TO  
APPELLEE/PLAINTIFF’S (COVINGTON’S) APPELLATE PLEADINGS  
AND MCNEESE’S ADDITIONAL MOTIONS TO STRIKE  
AND TO SUPPLEMENT THE RECORD

NOW INTO COURT, through undersigned counsel, comes Appellant, the Board of Supervisors for the University of Louisiana System (referred to as “McNeese” herein), who submits (1) this Reply to and Motion to Strike Appellee/Covington’s “Response to Appellant/Defendant’s Motion to Strike and Motion to Supplement the Record” and Appellee/Covington’s “Counter Motion to Strike Portions of Appellant/Defendant’s Original Brief;” as well as (2) an additional motion to supplement the record, for the following reasons:

1.

On June 30, 2008, Appellant, McNeese, filed a Motion to Strike and Motion to Supplement the Record.

2.

By said motion, McNeese sought to strike certain language of the brief submitted by Appellee/Covington, and to supplement the record.

3.

In response to McNeese's Motion to Strike and Motion to Supplement the Record, Appellee/Covington filed two pleadings, a "Response to Appellant/Defendant's Motion to Strike and Motion to Supplement the Record" and a "Counter Motion to Strike Portions of Appellant/Defendant's Original Brief" (both are referred to hereafter as Covington's "appellate pleadings").

4.

Appellee/Covington, rather than attempting to rectify the language complained about in McNeese's Motion to Strike, exacerbated the harm, further denigrating McNeese and its counsel. McNeese is shocked by the direction that Appellee/Covington has chosen and again objects to the language used in Appellee/Covington's appellate pleadings, which is clearly prohibited by Uniform Rule 2-12.4 and which cannot be allowed to persist.

5.

McNeese also objects to the paragraphs of Appellee/Covington's appellate pleadings which may be deemed by this Honorable Court to be supplemental briefs on the merits submitted without leave of Court.

6.

Covington's complaint about credibility arguments made by McNeese is difficult to understand. The credibility of Covington may be attacked by any party and in filing the lawsuit and submitting sworn deposition testimony and sworn affidavits, the plaintiff put her credibility at issue. The term "credibility" is used in a broad sense and includes not only Covington's subjective truthfulness, but also

her capacity, accuracy of perception, and any other factor affecting the determination of whether the testimony accords with reality. Extrinsic evidence to show a witness' bias, interest, corruption, or defect of capacity or extrinsic evidence of prior inconsistent statements and extrinsic evidence contradicting the witness' testimony is generally admissible when offered to attack the credibility of a witness (Handbook on Louisiana Evidence Law (2007), Art. 607).

7.

Considering the standard of proof in the trial court and the standard of review of a motion for summary judgment on appeal (in determining whether an issue is genuine, courts cannot consider the merits, make credibility determinations, evaluate testimony or weigh evidence),<sup>1</sup> McNeese properly pointed out credibility issues, testimony and evidence which should have precluded summary judgment.

8.

Covington/Appellee misconstrued McNeese's motion to supplement the record. McNeese previously asked this Honorable Court to supplement the record with the report of Dr. George Seiden because Covington stated in her brief that "McNeese never hired a medical expert to counter Dr. Shamieh's or any other doctor's testimony." McNeese did not attach the report to its motion to supplement the record, did not refer to its contents, and did not intend for the report to be considered on the merits of the appeal (there is ample evidence in the record). The report is offered so that this Court would be aware of and have sufficient

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<sup>1</sup> *Peters v. American Alternative Ins. Co.*, 976 So.2d 813, 230 Ed. Law Rep. 987, 2007-972 (La.App. 3 Cir. 2/13/08); *Sepulvado v. Toledo Nursing Center, Inc.*, 2007-122 (La.App. 3 Cir. 5/30/07), 958 So.2d 135; *Coto v. J. Ray McDermott, S.A.*, 99-1866, p. 4 (La.App. 4 Cir. 10/25/00), 772 So.2d 828, 830)

information before it to make its own determination as to the objectionable comments made in Covington's brief and to rule on McNeese's motion to strike.<sup>2</sup>

9.

McNeese took a conservative approach to the comments governed by Rule 2-12.4, submitting only a few examples of language in Covington's brief that trigger Rule 2-12.4 and asking only that Dr. Seiden's report be reviewed to evaluate the language used by Covington, to rule on McNeese's motion to strike, and to address Covington's statement that McNeese never hired a medical expert to counter Covington's medical evidence.

10.

For example, Covington complained on page 15 of her brief that McNeese's argument that Dr. Lynn Foret was "reluctant to prescribe Covington a wheelchair" was a "*patently false assertion*" and that McNeese "*fabricates this claim* without even bothering to depose Dr. Foret or hire its own expert to review his records and reports." Aside from the fact that Dr. Seiden was hired by McNeese, as previously noted, what was argued in McNeese's original brief, at page 3, was that "Dr. Foret was reluctant to prescribe Covington a wheelchair because he preferred that she 'walk and exercise as much as possible.' Appellant's brief, p. 3; TR, Vol. V, p. 1039. The medical records of Dr. Foret show that shortly before the alleged incident in this case, his nurse "discussed powered wheelchair [with Covington]. Patient informed that Dr. Foret rather than her ambulate." (TR, Vol. V, p. 1040).

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<sup>2</sup> It should be noted, however, that Appellee/Covington referred to the contents of Dr. Seiden's report in her appellate pleadings (see pages 7-8 of Appellee/Covington's Response to Appellant/Defendants' Motion to Strike and Motion to Supplement the Record"). Further, statements or reports that are not in the record still exist and their existence and their contents cannot be argued away or intentionally distorted simply because an attorney chooses to use such evidence before a jury rather than at a motion for summary judgment.

11.

McNeese hoped that by citing a few examples in Appellee/Covington’s brief to support its motion to strike, Covington might be alerted that such comments are inappropriate and reconsider the use of such language; instead, Appellee/Covington aggravated the issue by reiterating the objectionable comments and by adding additional objectionable language, as follows:

A. Appellee/Covington stated in her appellate pleadings that:

“Indeed, McNeese’s statement may rise to the level of defamation, as it effectively calls Covington a liar despite McNeese *having no such evidence.*” McNeese must point out that Appellee/Covington is well aware of the recorded statement given by Covington on March 29, 2001, less than two months after her alleged incident, which was taken in the presence of her attorney.<sup>3</sup> McNeese moves to supplement the record with that statement, solely for the purpose of providing the Court with sufficient information to evaluate the statements in Appellee/Covington’s brief and in Appellee/Covington’s appellate pleadings and to rule on McNeese’s motion to strike.

B. Appellee/Covington stated in her appellate pleadings that: “McNeese started referring to a vague suggestion that it could provide an aide to ‘help’ Covington urinate on campus by presumably lifting her onto toilets.” Appellee/Covington also stated that McNeese argues in its brief that “. . . if Covington wants to access its campus, she should have to surrender her

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<sup>3</sup> No other attorneys were present – the statement was taken by an investigator on behalf of the Louisiana Office of Risk Management prior to suit. See also footnote 2 above.

private medical records and submit to a stranger ‘helping’ her urinate.” McNeese has absolutely no idea where Appellee/Covington came up with this assertion. McNeese has consistently argued in the Trial Court and on appeal that Covington’s frequent need to urinate was not a disability under the ADA, so why would McNeese suggest *any* type of accommodation of that alleged impairment? McNeese has reviewed its memorandum in the Trial Court (TR, Vol. 4, pp. 959-989) where McNeese argued that “[i]t has been held that the need to frequently use the bathroom does not substantially limit any major life activities and, thus, is not a disability under the Americans with Disabilities Act (ADA).” (TR Vol. 4, p. 965; and that Covington “. . . could not go long periods without restroom facilities, a condition that does not qualify as a disability under the ADA.” (TR, Vol. 4, p. 976). McNeese also reviewed its appellate brief, where it argued: “Aside from the fact that the plaintiff’s description of her bladder problem directly contradicts her medical records, it has been held that the need to frequently use the restroom does not substantially limit any major life activities and, thus, is not a disability under the ADA. (Appellant/McNeese original brief, pp. 14-15).

C. Appellee/Covington stated in her appellate pleadings that: “McNeese makes various defamatory statements about Covington in its brief” and “[t]his entire passage serves no purpose but to impermissibly defame Covington’s character.” Again, it is difficult to understand this unsupported accusation

by Appellee/Covington. It is, of course, permissible to attack Covington's credibility, as mentioned in Paragraph 6 above. More significantly, it is absolutely incredible that Appellee/Covington would accuse McNeese and its employees and counsel, in writing, of defamation.

D. Appellee/Covington stated in her appellate pleadings that: "... both on and off the record, defendants have made numerous statements which are regarded by most in contemporary society to be insensitive and highly offensive." Appellee/Covington has couched this comment in vague terms, but its purpose is obvious. The comment is certainly not supported by the record, McNeese is unaware of any such statements, and Dr. Hebert would never tolerate such statements.


E. Appellee/Covington stated in her appellate pleadings that: "It is *insulting and offensive, and possibly obscene*, for McNeese to claim that Covington did not want help simply because she did not want to be subjected to having her naked body being lifted onto a toilet by a stranger employed by McNeese." Please see Paragraph 11B above; as stated therein, McNeese consistently argued that Covington's frequent need to urinate was not a disability under the ADA and McNeese never argued the polar position that the frequent need to urinate could be accommodated. Again, McNeese is at a loss to understand the basis of Appellee/Covington's morbid assertion.

McNeese is fully aware of Code of Civil Procedure article 2164, cited by Covington, and its principle of deciding a case on the record. As stated above, there is ample evidence in the record and McNeese's requests to supplement the record with Dr. Seiden's report and with Appellee/Covington's statement of March 29, 2001, are solely for the purpose of helping the Court to evaluate the language of Covington's brief and to rule on McNeese's motion to strike.<sup>4</sup>

WHEREFORE, McNeese prays that this reply, motion to strike, and motion to supplement be deemed good and sufficient and that those aspects of Covington's brief and appellate pleadings which may be deemed by this Honorable Court to be contrary to the provisions of Uniform Rule 2-12.4 and an impermissible supplemental brief on the merits submitted without leave of Court be stricken; and, further, that the appellate record be supplemented, solely for the purpose of evaluating the language of Covington's brief and ruling on Appellant/McNeese's motion to strike, with the report of Dr. George Seiden and the March 29, 2001 statement by Covington referred to herein.

Respectfully submitted,

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<sup>4</sup> Besides, it is well settled that this Honorable Court is fully empowered to remand a case to the trial court for the taking of additional evidence if necessary to reach a just decision.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing pleadings was served by United States mail, postage prepaid and properly addressed, to all counsel of record.

Lake Charles, Louisiana, this 14<sup>th</sup> day of July, 2008.

  
ADAM L. ORTEGO

STATE OF LOUISIANA  
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**ORDER**

Considering the foregoing motion:

IT IS HEREBY ORDERED that the Motion to Strike and Motion to  
Supplement the Record be and they are hereby

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Lake Charles, Louisiana, this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

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**JUDGE**  
Third Circuit Court of Appeal