

COURT OF APPEAL

THIRD CIRCUIT

STATE OF LOUISIANA

DOCKET NO. CA-08-505

COLLETTE JOSEY COVINGTON AND JADE COVINGTON

Plaintiffs – Appellees

Versus

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

Defendants - Appellants

CIVIL PROCEEDING

On Appeal from the Fourteenth Judicial District Court, Parish of
Calcasieu, State of Louisiana, Docket No. 2001-2355, Division “F,”
the Honorable Wilford Carter, Judge Presiding

**RESPONSE TO APPELLANT/DEFENDANTS’ MOTION TO STRIKE AND
MOTION TO SUPPLEMENT THE RECORD FILED ON BEHALF OF
APPELLEES, COLLETTE JOSEY COVINGTON AND JADE
COVINGTON**

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**APPELLEES COLLETTE JOSEY COVINGTON AND JADE
COVINGTON’S ORIGINAL RESPONSE TO APPELLANT BOARD OF
SUPERVISORS/MCNEESE STATE UNIVERSITY MOTION TO STRIKE
AND MOTION TO SUPPLEMENT THE RECORD**

MAY IT PLEASE THE COURT:

Plaintiffs-Appellees, COLLETTE JOSEY COVINGTON and JADE COVINGTON, (“Plaintiffs” or “Covington”) respectfully submit, through undersigned counsel, their Response to Appellant Board of Supervisors/McNeese State University’s (collectively, “McNeese”) Motion to Strike and Motion to Supplement the Record in the captioned matter and file their own attached Counter Motion to Strike, in compliance with the Uniform Rules of the Louisiana Courts of Appeal and the Local Rules of this Honorable Court.

Facts and Procedural History

This suit was filed in 2001 after wheelchair-bound Collette Covington was forced to urinate on herself and suffered a physical injury while attempting to utilize the women’s restroom in the McNeese Old Ranch student union while waiting for her Louisiana Vocational Rehabilitation van for the disabled to pick her up after class. Covington filed suit under the Americans with Disabilities Act (ADA) and other statutes, and McNeese admitted that its Old Ranch violated the ADA and that it failed to provide a single accessible restroom for the disabled despite posting signs indicating that the building is ADA compliant and despite the fact that this was the building designated by the State of Louisiana for use by the disabled to wait for their transportation.

McNeese further admitted that it spent \$450,000 on renovations to the Old Ranch since the passage of the ADA and that bringing the restrooms into compliance would only cost another \$4,000. However, McNeese’s officials testified that they will not bring the Old Ranch into compliance because they do not believe the disabled have the right to enter or use the student union and that the disabled should only be able to access certain buildings on campus. Furthermore, McNeese has asserted that it will not spend any of its own funds to bring the Old

Ranch into compliance. Seven and a half years after Covington's accident, there is still not a single accessible restroom for the disabled in the Old Ranch.

Plaintiffs won a partial summary judgment declaring that McNeese violated Covington's rights under the ADA by not making its services, programs, and activities readily accessible and usable to Covington in the most integrated setting appropriate and by segregating her and relegating her to lesser opportunities on campus. The trial court found that McNeese must provide at least one accessible restroom for the disabled in the Old Ranch and may not impose any burdensome requirements which have the effect of deterring the disabled from attending school. McNeese appealed that judgment and filed its Original Brief on May 30. Plaintiffs filed their Response on June 25 and their Concurrent Brief on July 1.

On June 30, 2008, McNeese filed a Motion to Strike five passages in Plaintiffs' Original Response Brief and to introduce the unsworn medical report of Psychiatrist Dr. George Seiden into the record. Plaintiffs oppose McNeese's Motion to Strike as well as McNeese's unorthodox attempt to introduce into the record an Independent Medical Report which McNeese chose not to introduce at the trial court and which has no relevance to this appeal or to the issue of Covington's orthopedic, urological, or neurological disabilities.

Response to McNeese's Motion to Strike

A. Plaintiffs' footnote that, "McNeese's conduct, and that of its counsel, has been insensitive to the point of outrageous" should not be stricken.

Counsel for Plaintiffs had no intention of offending opposing counsel or the court in using the term "insensitive to the point of outrageous" to describe the actions of defendants and defense counsel. However, it must be understood that this assertion was made after seven and a half years of litigation in which, 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.

Plaintiffs base their allegation of insensitivity on many actions, including the following few which are in the record:

1. **McNeese’s President declared under oath that McNeese does not consider it “fundamentally important” for the disabled to have access to the McNeese student union and that allowing the disabled access to non-academic buildings is not part of the “role of the institution.”** The ADA provides the disabled with the same protections against discrimination that are provided by other civil rights statutes. Most people in contemporary society would consider it insensitive and outrageous to declare that it is not “fundamentally important” for black students to be allowed to enter a university’s student union and that it is not part of the “role of the institution” to allow minorities equal access to campus. In this day and age, most people would likewise consider it insensitive and outrageous for the President of a public university to declare that the disabled are excluded from portions of campus and relegated to lesser status solely based on their disabilities.
2. **McNeese blames Covington for her accident because she could not get up from her wheelchair and walk.** Most people would consider it insensitive to the point of outrageous to blame a woman in a wheelchair for not leaving her personal effects unguarded, standing up from her wheelchair, and attempting to walk without her crutches across a restroom, yet McNeese does exactly this in its brief. Had Covington been able to walk without her crutches, she would have been able to enter McNeese’s inaccessible stall without being forced to urinate on herself moments prior to the accident. By dismissing Covington’s humiliation and blaming this disabled woman for not getting out of her wheelchair and walking is insensitive to the point of outrageous.
3. **McNeese blames Covington for her accident because she should have ignored the sign on the Old Ranch declaring the building to be ADA compliant and waited outside or in another building for her transportation.** Most people would consider it insensitive to the point of outrageous to declare that the disabled should be forced to wait outside in the heat, cold, and rain or in distant classroom buildings while the able-bodied enjoy the use of student union facilities. Most people would also consider it insensitive to mark a non-ADA-

compliant building as compliant and then blame a woman in a wheelchair for the resulting accident because she somehow should have known to ignore McNeese's inaccurate signs.

4. **McNeese ignores its own copies of the testimony or records and reports of four physicians, two hospitals, one registered nurse, and the State of Louisiana, all who claim that Covington is disabled and, instead, claims that she has fabricated her disabilities.** McNeese claims that Covington has refused to provide any medical records proving her need to use a wheelchair at McNeese and asserts that she is not disabled. Most people would consider it insensitive to the point of outrageous to accuse a wheelchair-bound woman of faking her disability, but it is particularly brazen to perpetuate such a position even after being presented with the requisite prescriptions and medical records.
5. **McNeese claims in its brief that if Covington wants to access its campus, she should have to surrender her private medical records and submit to a stranger “helping” her urinate.** Most people would consider it insensitive to the point of outrageous to demand that a disabled person unnecessarily submit to the humiliation of having a stranger come into a restroom with her. It is particularly insensitive to the point of being outrageous when McNeese imposes this requirement simply because it does not want to spend a small amount of money to bring one of its buildings into compliance.
6. **McNeese makes various defamatory statements about Covington in its brief.** Among other things, McNeese claims in its brief that Covington has “manufactured” evidence, used “misrepresentations and/or inaccuracies”, “has a significant problem with accuracy or the truth” and that it is not acceptable to believe Covington's version of events, even though McNeese has presented no counter evidence. McNeese's tactic in its brief has simply been to call Covington a liar. Most people would consider this approach insensitive to the point of outrageous.

It is wholly inappropriate for McNeese to lash out at Covington and then move to strike Plaintiffs' brief when Plaintiffs point out McNeese's insensitivity. Plaintiffs' choice of words is mild compared with what McNeese chose to call

wheelchair-bound Covington when she attempted to use its campus. Plaintiffs' statement as to McNeese's insensitivity and that of its counsel is not a violation of Uniform Rule 2-12.4 and 2-12.5, but rather, very justified under the circumstances.

B. Plaintiffs' statement that, "McNeese's effort to dispute Miss Covington's disability is based solely upon its attorneys' incompetent lay interpretation of notes in her medical records. . ." should not be stricken.

McNeese apparently questions the use of the word "incompetent" in this sentence. Black's Law Dictionary, 8th Ed., defines "incompetent" as "inadmissible, as evidence." Plaintiffs never imply that McNeese's counsel were incompetent as attorneys, and Plaintiffs state on the record that Mr. Ortego has personally been extremely professional and the parties have had an outstanding working relationship despite a vast difference of opinion.

However, Plaintiffs have an obligation to point out that opposing counsel's testimony as to medical issues is incompetent in the sense that it is inadmissible as evidence. Dr. Foret and Dr. Shamieh never waived in their assertions that Covington is disabled, and the only testimony in the record which contradicts their position is the "testimony" of McNeese's counsel. Dr. Foret, who prescribed Covington two wheelchairs, never said, for instance, that he was "reluctant to prescribe" a wheelchair to Covington. This was simply the unsupported medical opinion of McNeese's counsel. While Plaintiffs hold opposing counsel in high regard as attorneys, McNeese must concede that their counsel's interpretation of Dr. Foret's office notes is not competent evidence because no lawyer is competent to interpret a doctor's office notes to contradict the doctor's own report.

It is only with great reluctance that any attorney mentions another attorney in a brief; however, opposing counsel reached its own medical conclusions, and Plaintiffs were obligated to point out that the source of these interpretations were

not of a medical origin. Plaintiffs' statement did not violate the Uniform Rules and should not be stricken.

C. Plaintiffs' statement that, "McNeese, by contrast, submitted no evidence, medical or otherwise" is accurate in its context and should not be stricken.

McNeese falsely asserts that Plaintiffs accused it of not submitting any evidence. That is not accurate. Here is what Plaintiffs' brief actually says:

The Court's *conclusion on disability* was supported by the deposition testimony and reports of four doctors and ten exhibits. McNeese, by contrast, submitted no evidence, medical or otherwise. No doctor has testified or opined that Miss Covington was not disabled. Rather, McNeese's effort to dispute Miss Covington's disability is based solely upon its attorneys' incompetent lay interpretation of notes in her medical records that are expressly contradicted by the actual Reports and depositions from her doctors.

Clearly, this paragraph in Plaintiffs' brief refers to McNeese's submission of evidence *on the topic of disability*. Plaintiffs state in their brief that McNeese attached limited records of Dr. Foret and limited testimony from Dr. Shamieh which were already in the record but no additional medical evidence. Plaintiffs do not dispute that McNeese submitted evidence about other things, but none of this evidence related to Covington's medical disability. As such, this sentence should not be stricken simply because McNeese has read one sentence out of context.

D. Plaintiffs' statement that, "It is disingenuous and inappropriate for McNeese to claim a "credibility issue" about damages that Plaintiffs have not yet attempted to prove" is accurate and should not be stricken.

McNeese apparently finds offense at the word "disingenuous". Disingenuous is defined as, "lacking in frankness, candor, or sincerity." In its brief, McNeese claims that Covington lacks credibility because one of her medical records from three months after her accident mentions that she had a fall "last week." Somehow, McNeese has turned a discussion of a subsequent fall into a

question of Covington's need for a wheelchair on the day of her accident. The two are not related.

Covington is not claiming to have been disabled on the basis of a shoulder injury, and she has not put on any evidence about her shoulder injury because it is unrelated to the question of whether she was disabled. It is clearly not "frank", "candid", or "sincere" for McNeese to talk about Covington's shoulder in an effort to claim that she did not require a wheelchair. Therefore, McNeese's argument is disingenuous, and Plaintiffs statement should not be stricken.

E. Plaintiffs' statement that, "McNeese never hired a medical expert to counter Dr. Shamieh's or any other doctor's testimony" should not be stricken

McNeese wants to strike Plaintiffs' statement that, "McNeese never hired a medical expert to counter Dr. Shamieh's or any other doctor's testimony." Plaintiffs concede that McNeese did hire an expert, a psychiatrist named Dr. George Seiden.

McNeese chose not to submit Dr. Seiden's report into the record, presumably because he is a psychiatrist who cannot testify as to her orthopedic or neurological conditions or her need for a wheelchair. Dr. Seiden's unsworn report never countered Dr. Shamieh's eye-witness testimony regarding Covington's seizures or his medical conclusion that Covington required a wheelchair, and Dr. Seiden never countered Dr. Foret's conclusion that Covington required a wheelchair. Therefore, as Plaintiffs assert, McNeese never hired a medical expert to counter any physician's testimony.

Most significantly, McNeese never introduced Dr. Seiden's unverified report into the record despite having every opportunity to do so. While McNeese may technically have hired an expert, it certainly did not introduce any of its expert's testimony into the record or utilize that testimony to counter any of Plaintiffs' evidence. Therefore, Plaintiffs' statements are correct and should not be stricken.

**Response to McNeese's Motion to Introduce the Report of
Dr. Seiden into the Record**

At the trial court, McNeese failed to introduce a single piece of independent evidence (other than evidence already introduced by Plaintiffs) regarding Covington's status as disabled, even though Plaintiffs courteously agreed to and the trial court granted McNeese numerous continuances for an entire year to prepare its case, and McNeese has had seven years in total to introduce evidence.

McNeese now wishes to introduce an unsworn report of Dr. Seiden, a psychiatrist that McNeese insisted that Covington travel four hours to Shreveport to see. Even if McNeese could introduce this report, it does not create an issue of fact as to Covington's disabilities, since Dr. Seiden cannot and did not investigate Covington's seizures or neurological conditions or her orthopedic conditions and cannot and did not render any opinion about Covington's need for a wheelchair.

Of course, the content of Dr. Seiden's report is irrelevant. The point is, it was never in the record, and there is no good cause for it not being in the record if McNeese intends to rely upon it. McNeese had from January 24, 2006 until December 14, 2006 to review Plaintiffs' filed and served Motion for Summary Judgment and produce this report. Furthermore, the trial judge granted McNeese several additional weeks following Plaintiffs' presentation of evidence with which to come up with an issue of material fact. McNeese makes no assertion that this evidence was improperly excluded. Indeed, McNeese concedes that it chose never to introduce the evidence.

LSA-C.C.P. art. 2164 provides:

The appellate court shall render any judgment which is just, legal, and proper **upon the record** on appeal. The court may award damages for frivolous appeal; and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable. (Emphasis added)

Pursuant to LSA-C.C.P. art. 2164 an appellate court must render judgment upon the **record** on appeal. The record on appeal is that which is sent by the trial court to the appellate court and includes the pleadings, court minutes, transcript, jury instructions, judgments and other rulings, unless otherwise designated. LSA-C.C.P. arts. 2127 and 2128; Official Revision Comment (d) for LSA-C.C.P. art. 2127. **An appellate court cannot review evidence that is not in the record on appeal and cannot receive new evidence.** See, e.g., *Our Lady of the Lake Hosp. v. Vanner* 95-0754 (La. App. 1 Cir. 12/15/95), 669 So.2d 463, 465, writ denied, 97-1567 (La. 9/26/97), 701 So.2d 992.

The Louisiana Supreme Court held only a month ago that:

Appellate courts are courts of record and may not review evidence that is not in the appellate record, or receive new evidence. La. C. Civ. P. art. 2164; *Gallagher v. Gallagher*, 248 La. 621, 181 So.2d 47 (La.1965); *Bullock v. Commercial U. Ins. Co.*, 397 So.2d 13 (La.App. 3rd Cir.1981); *Holmes v. St. Charles General Hosp.*, 465 So.2d 117 (La.App. 4th Cir.1985); *B.W.S., Jr. v. Livingston Parish School Board*, 02-1981, p. 2 (La.8/16/06), 936 So.2d 181, 182 (*per curiam*). None of the depositions relied on by the Plaintiffs were properly before the trial court at the time of the hearing, nor were they properly part of the record on appeal. Thus, based on the content of the record before us, we must conclude that Plaintiffs failed to meet their burden of proof in this matter. As this Court noted in *Cichirillo*, “[f]ailure to adequately prepare the record by neglecting to offer matters into evidence can alter the outcome of a case, especially in an exception of prescription where the burden of proof may shift between the parties .” *Cichirillo*, 917 So.2d at 428, n. 7.” *Denoux v. Vessel Management Services, Inc.*, 2007-2143 (La. 5/21/08), 2008 WL 2150924, 3

Clearly, McNeese cannot now introduce into the record a report which it chose not to introduce for the last seven years. At the risk of having McNeese move to strike this brief for using the word “outrageous”, Plaintiffs respectfully assert that it is outrageous for McNeese to ask this court to ignore Louisiana law and allow the first-time admission of evidence never introduced at the trial court.

Plaintiffs-Appellees, COLLETTE JOSEY COVINGTON and JADE COVINGTON, respectfully request this Court to deny the Motions to Strike and Supplement the Record filed by MCNEESE STATE UNIVERSITY AND THE

BOARD OF SUPERVISORS FOR THE UNIVERSITY OF LOUISIANA
SYSTEM.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Original Brief was sent by United States mail, postage prepaid and properly addressed to all counsel of record:

Mr. Adam Ortego
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On this, the 2nd day of July, 2008.

SETH HOPKINS