

**COURT OF APPEAL**

**THIRD CIRCUIT**

**STATE OF LOUISIANA**

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**DOCKET NO. 11-01077-CA**

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**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*

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**CIVIL PROCEEDING**

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

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**AMICUS BRIEF OF THE ADVOCACY CENTER  
IN SUPPORT OF APPELLEES COLLETTE JOSEY COVINGTON AND  
JADE COVINGTON’S ANSWER URGING AN ENHANCEMENT**

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The Advocacy Center files this *Amicus Curiae* Brief in support of Appellees Collette Josey Covington and Jade Covington, in the captioned matter, in compliance with the Uniform Rules of the Louisiana Courts of Appeal, particularly Uniform Rule 2-12.11, and the Local Rules of this Honorable Court. Our organization has reviewed the briefs of both Appellants and Appellees prior to preparing this Brief.

### **STATEMENT OF AMICUS CURIAE**

The Advocacy Center is a public interest organization with offices in New Orleans, Baton Rouge, and Lafayette. It is a tax-exempt, private non-profit corporation established in 1978 and governed by a volunteer Board of Directors. The Advocacy Center is the agency designated by the Governor of Louisiana to protect and advocate for the rights of individuals with disabilities in the State of Louisiana, pursuant to the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 USC §15041 *et seq.*; the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 USC § 10801 *et seq.*; and the Protection and Advocacy of Individual Rights program, 29 U.S.C. §794e. It is a member organization of the National Disability Rights Network, a nonprofit membership organization for the federally mandated Protection and Advocacy (P&A) Systems nationwide.

As the protection and advocacy agency for Louisiana, the Advocacy Center is interested in the enforcement of civil rights laws that protect the rights of individuals with disabilities to access services in the most integrated setting appropriate to their needs. This includes the right to



administrative personnel works daily for those with disabilities. We are familiar with the challenges encountered by attorneys litigating cases under these statutes, and are aware of the dearth of willing and capable attorneys who practice in this area in Louisiana. We submit this Amicus brief in support of Appellees (hereafter referred to as "Plaintiffs").

## INTRODUCTION

The Advocacy Center has taken the unusual position of filing an *Amicus Curiae* brief due to the unique factual circumstances of this case, the great public benefits resulting from this case, and the outrageous positions taken by McNeese State University in the litigation, including its position that Covington's Application for Attorneys' Fees and Sanctions should be denied in its entirety. In our 33 years of advocating for those with disabilities, we find that the results achieved by the Plaintiffs in this case to be truly impressive. We regard this as a landmark Louisiana case, because of the intransigence of the defendants, the extreme dedication and perseverance of the plaintiff's counsel, and the excellent results achieved, not merely for the individual plaintiff, but for all persons with disabilities who use the campus of McNeese State University. This case was much more contentious than any ADA case we have brought. Its successful prosecution was extremely important to the cause of making Louisiana institutions recognize and comply with their obligations under the law. It is similarly important to that cause for the plaintiff's attorneys to receive fair compensation.

For these reasons, we file this Brief on behalf of Plaintiffs-Appellees

## ARGUMENT

### **I. A fully compensatory fee to Plaintiffs' counsel in this case is necessary to fulfill the purpose of protecting the rights of individuals with disabilities in Louisiana.**

The Americans with Disabilities Act, 42 U.S.C. §12101 et seq. was passed in 1990 to remedy widespread discrimination against people with disabilities. It is based on Congressional findings that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.” 42 U.S.C. §12101(a)(2); and that “[D]iscrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services”, § 12101(a)(3). Congress concluded that there was a “compelling need” for a “clear and comprehensive national mandate” to eliminate discrimination against disabled individuals, and to integrate them “into the economic and social mainstream of American life.” S.Rep. No. 101-116, p. 20 (1989); H.R.Rep. No. 101-485, pt. 2, p. 50 (1990), U.S.Code Cong. & Admin.News 1990, pt. 2, pp. 303, 332. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674-75 (2001).

The ADA is intended to provide a “clear and comprehensive national mandate” for eliminating disability discrimination as well as “clear, strong, consistent, enforceable standards” addressing such discrimination. *Frame v.*

Congress enacted fee-shifting statutes such as 42 U.S.C. §1988<sup>1</sup> “to encourage individuals injured by ...discrimination to seek judicial relief,” *Newman v. Piggie Park Enter.* 390 U.S. 400, 402 (1968), and “to ensure that the costs of violating civil rights laws were more fully borne by the violators, not the victims.” *Id.* The ultimate goal was to reduce the frequency of civil rights violations and promote the vindication of civil rights. See S. Rep No. 872, 88<sup>th</sup> Cong., 2d Sess., pt. 1 at 11, 24 (1964); H.R. Rep. No. 914, 88<sup>th</sup> Cong, 1<sup>st</sup> Sess., pt. 1 at 18 (1963); H.R. Rep. No. 914, 88<sup>th</sup> Cong., 1<sup>st</sup> Sess. pt. 2, at 1-2 (1963). Thus, when a plaintiff brings a civil rights action and prevails, he is acting as a “private attorney general, vindicating a policy that Congress considered of the highest priority.” *Newman, supra*, 390 U.S. at 402.

It would be hard to find a case that presents more compelling example of the need for “private attorneys general” to enforce civil rights laws than Ms. Covington’s suit against McNeese State University. In 2001, a decade after the ADA was passed, and almost thirty years after the enactment of §504 of the Rehabilitation Act, which prohibits discrimination against individuals with disabilities in programs receiving federal financial assistance, a State university utterly failed to carry out its responsibility to make its programs accessible to students with disabilities.

Alerted by this case, the United States Department of Justice undertook a rare investigation of McNeese, and found, in November 2008, barriers to access “that in the absence of alternative measures to achieve

individuals with disabilities,” including, but not limited to, failures to provide:

- (a) Accessible parking (where parking facilities are otherwise provided by the University).
- (b) Accessible approaches from adjacent parking areas, walkways, and public transportation drop-off points to the extent that it is within the University’s control and not in the public right-of-way.
- (c) An accessible entrance to the building and into those rooms or spaces open to the public where such programs, services, or activities are provided.
- (d) Accessible routes between facilities.
- (e) Accessible amenities (e.g., a water fountain or an accessible public telephone).
- (f) Accessible men’s and women’s toilet rooms.
- (g) Signage (identifying permanent rooms and spaces) with raised and Braille characters, as well as directional signage.
- (h) One accessible means of vertical access (an accessible elevator, ramp or lift) if any program, service, or activity offered is located above or below the accessible entry level.
- (i) Accessible seating in classrooms or auditoriums or other spaces that meets the appropriate ADA Standards.
- (j) Accessible routes from the accessible entrance to each accessible program, service or activity.

Settlement Agreement between the United States of America, Mcneese State University, et al. under Title II of the Americans with Disabilities Act, DJ #204-33-109, <http://www.ada.gov/mcneese.htm> (last visited November 15, 2011).

Not only were McNeese’s facilities woefully inadequate to meet the needs of students with disabilities, but when confronted with a clear, pressing need to make changes, McNeese mounted a defense that prompted

*alia*, the two main student cafeterias on campus, offices for student government and activities, and a state-of-the-art computer laboratory. McNeese's decision to ignore a federal mandate is reminiscent of the intolerance of the past. We had hoped that the days where a court has to step in to ensure that people were treated equally under the laws of this country were gone. Yet, still, McNeese is emboldened enough to bring such a case to an appellate court where a published, written opinion will forever memorialize its discrimination against this country's disabled citizens.

*Covington v. McNeese State University*, 996 So. 2d 667, 687-88 (La.App. 3 Cir. 11/5/08).

Without the dogged pursuit of this matter by Plaintiffs' counsel, who placed his own career on hold, supported the case through other legal employment, and logged over 5,400 hours over a ten year period, McNeese would no doubt still be engaging in its disgraceful discrimination against Louisiana citizens with disabilities, with the full support of Louisiana's attorney general's office. If Plaintiffs' counsel is not adequately compensated for the results they achieved in this case, individuals with disabilities in this State have little hope that they can escape the type of humiliating and degrading experience that Ms. Covington received from a Louisiana state institution.

**II. The extraordinary results in this case should result in an enhancement of the fee award above "reasonable and customary" rates.**

The results achieved in this case clearly reflect superior performance by Plaintiffs' counsel. Our organization has litigated many cases under the Americans with Disabilities Act dealing with accessibility of State and local government programs, and we are familiar, through the resources of the National Disability Rights Network, with the work of other organizations

ADA settlements in a case of this nature in the country.

In addition, the case induced the United States Department of Justice to undertake its investigation of the campus. This resulted in a settlement with the Department of Justice that not only requires McNeese to make its entire campus fully compliant with the ADA, but also extends beyond McNeese to involve an agreement by the Board of Supervisors of the entire University of Louisiana System to enhance ADA compliance at all other schools in the UL System. Pursuant to this agreement, the Louisiana Division of Administration/Office of Facility Planning will emphasize ADA accessibility rules and regulations for all capital outlay projects, including the adoption of an internal plan detailing requirements to comply with the ADA and involving field verification of key ADA features.

Such results go far beyond the norm in ADA physical access cases, and Plaintiffs' counsel should be rewarded for achieving them. This can be done either by an enhancement to the hourly rate subsumed in the lodestar, or, if, as appears here, the lodestar reflects only "reasonable and customary" rates in the area, by providing an enhancement of the fee award.

**III. Defendant's unreasonable litigation conduct, which resulted in exceptionally protracted litigation, justifies an enhancement of the fee award.**

The previous reported opinion of the Court of Appeals in this case, the trial court's Written Reasons for Judgment, and the Original Brief of Appellants in this appeal all document the fact that this case was, and is, unreasonably protracted and, for want of a better word, ugly. McNeese took

was faking her disability.

In connection with the award of attorneys' fees, which the Supreme Court has clearly stated "should not result in a second major litigation," *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), McNeese has taken a similarly extreme position—that the plaintiffs' attorney should recover nothing. McNeese has sought abnormally broad and burdensome discovery and litigated the attorneys' fee award in a lengthy trial. On appeal, armed with information gleaned from an extensive "fishing expedition," McNeese now questions plaintiffs' attorney's credibility and integrity.

Civil rights litigation is arduous and difficult. There is no ready source of support for private attorneys who have to forego fees and advance expenses for years while litigating cases of this nature. It is not surprising that attorneys have to support their ability to represent civil rights plaintiffs by undertaking other paid employment.

Having to wait for payment can be a normal consequence of civil rights litigation from the plaintiffs' side. However, when there is "unanticipated delay, particularly where the delay is unjustifiably caused by the defense" the Supreme Court has recognized that an enhancement to fees may be in order. *Perdue v. Kenny A. ex rel. Winn*, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1662 (2010).

It could not possibly have been anticipated, when counsel undertook to represent a student who could not find an accessible restroom in the student union of a public university, that the case would occupy over 5,000 hours of attorney time and take ten years to resolve. It could not be

Unless consequences are visited upon defendants who attempt to exploit the delay caused by their own intransigent litigation posture, by seeking to paint attorneys who work the extra long hours and endure hardships attendant upon civil rights litigation as dishonest, one could not blame private attorneys for shying away from these cases. This is particularly true in this extraordinary case, because of its obvious merit and the stellar results counsel obtained. In this case, an award limited to the lodestar will be insufficient to fulfill the purpose behind the Civil Rights Fee Awards act, which is to attract competent counsel to similar cases. An enhancement to the fee award would be appropriate to compensate plaintiffs' counsel for the risks and hardships encountered as a result of defendants' delaying, "scorched earth" litigation tactics.

### CONCLUSION

For the reasons provided, the Advocacy Center of Louisiana submits this Amicus Brief in favor of Appellees Collette Covington and Jade Covington.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief of Amicus Curaie filed by the Advocacy Center of Louisiana was sent by United States mail, postage prepaid and properly addressed to the following counsel of record, Lafayette, Louisiana, on this, the 16<sup>th</sup> day of November, 2011:

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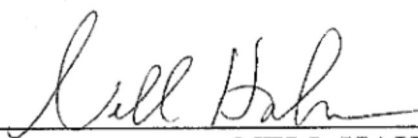
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