No. 08-1032

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JULIANNA BARBER AND MARCIA BARBER,

Plaintiffs-Appellants

v.

STATE OF COLORADO, DEPARTMENT OF REVENUE,
STATE OF COLORADO, DIVISION OF MOTOR VEHICLES,
M. MICHAEL COOKE, in her official capacity, and
JOAN VECCHI, in her official capacity,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Colorado

The Honorable Robert E. Blackburn, United States District Judge
Civil Action No. 05-cv-00807-REB-CBS

APPELLANTS' REPLY BRIEF

Respectfully submitted,

Amy F. Robertson
Timothy P. Fox
Fox & Robertson, P.C.
910 - 16th Street, Suite 610
Denver, CO 80202
303.595.9700

Kevin W. Williams
Carrie Ann Lucas
Colorado Cross Disability Coalition
655 Broadway, Suite 775
Denver, CO 80203
303.839.1775

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

The Agency Defendants' Answer Brief relies on facts that are not found in -- and indeed that often contradict -- the record in this case, including:

- Asserting that they offered Ms. Barber the option of designating her father to supervise her daughter's driving without assigning parental rights to him, whereas the record includes two letters from Defendants -- one coming after the key disputed conversation -- unambiguously stating that only someone with full parental authority could supervise Julianna's driving;
- Asserting that Ms. Barber refused to accept any option that involved a written document, whereas the record demonstrates that she said no such thing; and
- Asserting that it is reasonable as a matter of law to reduce the year of driving practice to a mere three months, whereas the record demonstrates that the explicit purpose of the minor's driver licensing program is to provide a full year of practice driving, as stated by the Colorado General Assembly.

At a minimum, this sharp clash of material facts demonstrates that summary judgment was inappropriate in this case.

DISPUTED ISSUES OF MATERIAL FACT

Colorado law required (at the relevant time) that a 15-year-old driving with a "minor's instruction permit" be supervised by a licensed parent, stepparent or guardian. Colo. Rev. Stat. § 42-2-106(1)(b)(2004). Plaintiff Marcia Barber, who is blind and therefore does not have a driver's license, requested of the Agency Defendants the reasonable accommodation that she be permitted to designate her father to supervise her daughter, Plaintiff Julianna Barber, while she practiced driving. The parties dispute whether the Agency Defendants insisted that Ms. Barber assign guardianship of Julianna to her father (Julianna's grandfather) in order to permit him to supervise Juliana's driving practice, or whether the Defendants offered Ms. Barber the opportunity to designate the grandfather without assigning him parental rights.

The parties present conflicting versions of a phone call between Ms. Barber and Attorney General John Suthers discussing this matter: Ms. Barber testified that he insisted she assign guardianship, informing her that "the ADA [doesn't] apply to statutes." (Joint Appendix ("JA") 101.) In contrast, the Agency Defendants assert that Gen. Suthers offered Ms. Barber "the possibility of signing or drafting some sort of document or limited delegation of authority that would comply with the spirit of the statute to allow Marcia Barber's father to supervise

the driving" but that Ms. Barber "was unwilling to sign any document whatsoever to allow her father to supervise the driving." Answer Br. at 8.

That the parties present conflicting versions of these key facts demonstrates that summary judgment was inappropriate. In addition -- in the summary judgment context in which all inferences must be drawn in favor of Ms. Barber, see O'Shea v. Yellow Tech. Servs., Inc., 185 F.3d 1093, 1096 (10th Cir. 1999) -- all of the evidence besides Gen. Suthers's testimony supports Ms. Barber's version. This evidence includes the following undisputed facts.

The Senior Director of the Division of Motor Vehicles sent Ms. Barber a letter stating that the grandfather would have to be a guardian and quoted the Black's Law Dictionary definition of "guardian": "a person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person . . .." (JA 199; Opening Br. Addendum Tab 8.) This letter is not cited in the Answer Brief's recitation of the facts and is mentioned only in passing, without reference to the stringent definition from Black's. See Answer Br. at 31.

Ms. Barber sent two letters after her conversation with Gen. Suthers, neither of which mentions the offer he alleges he made. Ms. Barber's January 21, 2005 letter explains how painful it was to hear that "another person might be a more suitable guardian, even temporarily, due to some physical attribute," requiring the

inference that Gen. Suthers insisted on guardianship rather than a "limited delegation of authority," (JA 217), and her January 25, 2005, letter states that she confirmed with the Department of Justice that "the ADA CAN override state statutes," requiring the inference that her account of the phone call -- that Gen. Suthers told her that the ADA did not apply to state statutes -- was accurate. (JA 216.) Neither of these letters is mentioned or cited anywhere in the Answer Brief.

A letter from the Attorney General's office after the phone call again insisted that only a driver with "full parental authority" could supervise Julianna's driving. (JA 173; Opening Br. Addendum Tab 9.) This letter was written after the author was briefed by Gen. Suthers on his phone call with Ms. Barber and it was later endorsed by Gen. Suthers. (JA 120 (36:7 - 37:5), 212:1-3, 215:5-13.) Far from correcting what Defendants claim are Ms. Barber's incorrect conclusions from her call with Gen. Suthers, this letter is completely consistent with Ms. Barber's account of the call. This letter was not mentioned or cited in the Answer Brief.

The Answer Brief repeatedly misrepresents Ms. Barber's testimony concerning her willingness to designate Julianna's grandfather in writing. The brief states that Ms. Barber was "unwilling to sign any document whatsoever" to

allow the grandfather to supervise Julianna's driving. Answer Br. at 8, 22, 23.[1] This is untrue and unsupported: there is no evidence that Ms. Barber said any such thing. Instead, in the record pages on which the Agency Defendants rely, she makes clear that she was unwilling to assign full or limited guardianship of her daughter. (JA 102 (50:20 - 52:9) (she did not explore limited guardianship), 103 (55:19 - 56:5) (she did not "explor[e] any kind of guardianship or limited guardianship" nor did she "inquire with anyone or with [Gen. Suthers] as to whether [she] could simply file a piece of paper saying that [she was] giving a limited guardianship for the purposes of supervising [her] daughter's driving."), cited in Answer Br. at 8, 22, 23.)

There is no evidence -- in these cited pages or elsewhere -- that Ms. Barber was unwilling to sign a written document memorializing the accommodation she requested: designating her father to supervise Julianna's driving without assigning him parental rights. To the contrary, Ms. Barber testified that she was never offered the opportunity to sign such a document until August, 2005, and that

---

[1] See also id. at 3 (characterizing Plaintiffs' position as insisting on designation "in the absence of any written authorization"), 18 (same), 21-22 (asserting that Ms. Barber would not have been willing to sign a "limited delegation of authority permitting her father to supervise Julianna's driving"), 36 (Ms. Barber insisted on designation "without a writing"). The Answer Brief also spends a great deal of time asserting the importance of documenting the designation in writing. See, e.g., Answer Br. at 18, 20, 31, 36. This entire argument is a red herring, as Ms. Barber did not refuse to document her requested accommodation; she refused to assign guardianship of her daughter to another.

she would have been willing to sign the same document she signed then -- when the state finally permitted her to designate without assigning parental rights -- at any time starting in October, 2004, when she first requested an accommodation. (JA 201-02 (¶¶ 5-6).) So when the Answer Brief states -- without citation -- that there is no disputed issue of fact because Ms. Barber "admitted in her deposition that she would not have accepted the accommodation Attorney General John Suthers maintains he offered her – permitting her to sign a limited delegation of authority to permit her father to supervise Julianna's driving . . .," Answer Br. at 21-22, it is simply wrong.

Finally, the Answer Brief does not cite, refer to, or attempt to explain away the fact that the Colorado General Assembly placed a great deal of importance on ensuring that teenage drivers have "additional behind-the-wheel training with a parent, guardian, or other responsible adult before obtaining a minor driver's license . . .." Colo. Rev. Stat. § 42-2-105.5(1)(b). Instead, Defendants attempt to redefine the harm their conduct caused as a one-month delay in Julianna obtaining her driver's license. Properly understood in light of the purpose of the minor driver instruction program, however, Defendants' denial of Ms. Barber's requested accommodation took away seven to ten of the eleven relevant months of driving practice that is the goal of the statute.

ARGUMENT

I. The Barbers Introduced Sufficient Facts to Support a Claim for Intentional Discrimination under Section 504.

A. The Barbers' Evidence Establishes Intentional Discrimination.

The only remaining claim in the case is one for compensatory damages under section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504"). The district court held that Plaintiffs had "easily" established that discrimination occurred, but that they had not established intentional conduct sufficient to support a claim for compensatory damages. (JA 253-54.) The question before this Court is whether disputed issues of material fact exist as to whether the Agency Defendants' denial of Ms. Barber's accommodation constituted intentional discrimination, that is, whether Ms. Barber had alerted the Agency Defendants to her request and whether the Defendants' failure to act was deliberate rather than negligent. See Duvall v. County of Kitsap, 260 F.3d 1124, 1139 (9th Cir. 2001)).[2]

In opposition to summary judgment, the Barbers submitted evidence:

---

[2] The Agency Defendants agree that this is a correct statement of the standard for intentional conduct in the context of a request for an accommodation. See Answer Br. at 25, 31. Despite this, elsewhere Defendants assert that the gravamen of the Barbers' complaint was disparate impact. Id. at 28; see also id. at 17 (asserting that section 504 "does not require the state to evaluate the impact of facially neutral regulations . . ."). This mischaracterizes Plaintiffs' complaint, which pleaded a failure-to-accommodate violation of Section 504. (See JA 45 (Second Am. and Supplemental Compl. ¶ 77).)

- that Ms. Barber repeatedly requested, both orally and in writing, the accommodation that her father be permitted to supervise Julianna's driving, thereby putting the Agency Defendants on notice (JA 177:4-24, 180-181, 187:6-8, 198, 216, 217);
- that Ms. Barber informed the Agency Defendants that they were required to make accommodations under the ADA despite the state law guardianship provision (JA 198, 216); and
- that Defendants knowingly and repeatedly denied that request, both orally and in writing (JA 173, 180-181, 194-195, 199).

Although Gen. Suthers has a different account of his phone call with Ms. Barber, that simply creates a disputed issue of fact, rendering summary judgment inappropriate. The remainder of the evidence is undisputed: the Senior Director of the DMV admits he denied Ms. Barber's request (JA 194:21 - 195:11), and the letters speak for themselves. (JA 173-74, 196-200, 216, 217.)

Plaintiffs submitted evidence sufficient to establish intentional conduct; summary judgment was thus inappropriate.

B. Defendants Did Not Offer a Reasonable Accommodation by Attempting to Amend the Statute.

Defendants argue that their cooperation in amending the statute constituted a reasonable accommodation. Plaintiffs explained in their opening brief that -- by

leaving Julianna with at most three months of relevant driving practice -- this did not provide the "meaningful access" required by section 504. See Chaffin v. Kan. State Fair Bd., 348 F.3d 850, 857 (10th Cir. 2003) (holding that to assure meaningful access, reasonable accommodations may have to be made; (quoting Alexander v. Choate, 469 U.S. 287, 301 (1985)); see Opening Br. at 34-35.

Defendants' response is to attempt to shift the focus from the reduction in the driving practice deemed essential by the General Assembly, to the amount of time Julianna was delayed in ultimately obtaining her license. See Answer Br. at 11. This is completely irrelevant. The purpose of the statute is not to speed up the day on which teenagers receive their licenses; it is to try to ensure that they get "additional behind-the-wheel training with a parent, guardian, or other responsible adult before obtaining a minor driver's license" at the age of 16. Colo. Rev. Stat. § 42-2-105.5(1)(b), see also Colo. Laws 1999 ch. 334, §§ 1(c), (d). By denying Ms. Barber's request in October, 2004, and instead merely cooperating in an effort to amend the statute that did not bear fruit until May, 2005,[3] the Agency Defendants cut that year of practice time to at most three months.

---

[3] The Barbers assert that the statute as amended still required Ms. Barber to assign away legal rights through a step -- signing a power of attorney -- that was not required of non-disabled parents. Thus the date on which Julianna could practice driving without this extra burden was August 10, 2005, when the state relented and permitted Ms. Barber to sign a "designation" that did not involve relinquishment of rights. At that point, only one month remained before Julianna turned 16 and could drive with any licensed driver.

Plaintiffs cited to seven cases holding that it is a question of fact whether a delayed accommodation is reasonable. See Opening Br. at 36-37 & n.5. Defendants neither cite nor distinguish any of them. Instead, they rely on three cases that are easily distinguishable from the current circumstances. In Gregory v. Otac, Inc., 247 F. Supp. 2d 764 (D. Md. 2003), the defendant restaurant provided a ramp that the plaintiff customer was too impatient to use, choosing instead to attempt to proceed -- with his walker -- by the more direct route over the curb, causing him to fall. Defendants rely on the court's statement that the ADA did not require a quicker route when the ramp was temporarily blocked. Id. at 772, cited in Answer Br. at 24. The extra time in that case was a matter of, at most, minutes and perhaps more important, there is no evidence that the ramp violated the ADA. Id. at 771.

Although delays in the other two cases were held to be reasonable, there is no evidence in either that time was of the essence. In Rennie v. United Parcel Service, 139 F. Supp. 2d 159 (D. Mass. 2001), the court specifically held that the employer could "move at whatever pace he chooses as long as the ultimate problem . . . is not truly imminent." Id. at 172 (emphasis added). In Trobia v. Henderson, 315 F. Supp. 2d 322 (W.D.N.Y. 2004) -- an employment case -- the court held that the plaintiff employee was not qualified for the position he requested because he could not perform the essential functions. Id. at 332. The

court further held that the defendant had fully participated in the required interactive process and that any delays in the administrative process were reasonable. Id. at 337. There is no evidence that the requested accommodation was time-sensitive and since the court ultimately held that the plaintiff was not qualified for the job he sought, any delay would have been harmless.[4]

In contrast, the accommodation requested in this case was time-sensitive -- Julianna had only eleven relevant months in which to practice driving -- and Ms. Barber alerted Defendants to this fact early on. (See JA 198.) Because Defendants' proposed alternative accommodation -- attempting to amend the statute -- cost Julianna most of the practice driving time deemed valuable by the General Assembly, it was improper to conclude that this alternative was reasonable as a matter of law. To the extent summary judgment was based on such a determination (see JA 305), it was inappropriate.

---

[4] The Ferguson case on which Defendants rely at length is distinguishable based on the crucial fact that there was insufficient knowledge on the part of the defendant city in that case to establish deliberate indifference. Ferguson v. City of Phoenix, 157 F.3d 668, 676 (9th Cir. 1998). In contrast, Ms. Barber put the Agency Defendants on explicit and repeated notice of her requested accommodation, a key element in the intent standard that both parties agree applies here.

II. The Agency Defendants' Denial of Ms. Barber's Requested Accommodation Constituted Discrimination Under Section 504.

Discrimination under Section 504 can consist of a denial of a reasonable accommodation where necessary to ensure that a disabled person has meaningful access to a recipient's programs. See Chaffin, 348 F.3d at 857 (quoting Choate, 469 U.S. at 301). In the absence of a reasonable accommodation, Ms. Barber would either have had to give up guardianship of her daughter so she could practice driving -- an enormous imposition on fundamental liberty interests, see, e.g., Troxel v. Granville, 530 U.S. 57, 65 (2000) -- or withhold her daughter from the driving practice deemed crucial by the General Assembly. Because neither of those options constituted meaningful access, the accommodation was required under Chaffin and Choate.

A. Requiring Ms. Barber to Assign Limited Guardianship is Not Meaningful Access.

Defendants argue that no discrimination occurred because Ms. Barber could have assigned limited rather than full guardianship. As noted above, there is considerable evidence that the state insisted that Ms. Barber assign full guardianship. (JA 173, 180-81, 199.) This is thus a disputed issue of fact.

Even if Ms. Barber could have secured practice driving time for Julianna by assigning the grandfather a limited guardianship, this would have represented the alienation of at least part of her parental rights over Julianna, a burdensome and

potentially expensive step not required of non-disabled parents who want their teens to practice driving. See Opening Br. at 41-43.

The Agency Defendants do not cite any cases supporting the proposition that it is reasonable to ask a mother to give up parental rights to permit her daughter to participate in a state program such as the minor driver's licensing program. Instead, they argue that "the additional requirement of a written instrument is not onerous." Answer Br. at 20. There are several things wrong with this argument.

First, assigning away parental rights is a very different and much heavier burden than simply signing a written document.

Second, as explained above, there is no evidence that Ms. Barber refused to sign a written document designating her father to supervise Julianna's driving; what she refused to do was assign parental rights to him. (JA 103.)

Finally, the three cases on which Defendants rely do not even relate to the signing of a document, much less assignment of parental rights. Rather, each of the cases involved the imposition of an additional eligibility or testing requirement on a driver with a disability, based on the state's safety concerns relating to the driver's disability. See Theriault v. Flynn, 162 F.3d 46, 47 (1st Cir. 1998) (state required the plaintiff to take an additional road test to demonstrate that his cerebral palsy would not affect his ability to safely drive a car); Bailey v. Anderson, 79 F.

Supp. 2d 1254, 1255-56 (D. Kan. 1999) (state required plaintiff to submit a report detailing her ability to drive safely with device designed to correct visual impairments); Briggs v. Walker, 88 F. Supp. 2d 1196, 1197 (D. Kan. 2000) (state required plaintiff who used a wheelchair to submit completed medical certification before taking driving test).

The present case -- in contrast to the cited cases -- does not involve a disabled driver being required to prove she is a safe driver and Defendants do not argue that the statute's limitation to licensed parents, stepparents and guardians was necessary to address safety concerns. To the contrary, granting the requested accommodation would have best served the State's safety concerns by ensuring that Julianna got the maximum possible driving practice.

B. It Is Irrelevant That Non-Disabled Parents Without Licenses May Also Be Affected by this Statute.

Defendants argue that because Ms. Barber "faced the same obstacle that any non-disabled unlicensed parent faced," she did not encounter discrimination "'solely' because of her disability," as prohibited by Section 504. See Answer Br. at 18. However, as the District Court correctly held in denying Defendants' motion to dismiss on these grounds,

> For purposes of a disability discrimination claim, it does not particularly matter that the statute also impacts non-disabled persons who also do not have driver's licenses. The Supreme Court has rejected "comparator" analysis in these types of cases. See McGary

> v. City of Portland, 386 F.3d 1259, 1266 (9th Cir. 2004) (citing Olmstead v. L.C. ex rel. Zimring, 527 U.S. 581, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999)). The inquiry is "not whether the benefits to persons with disabilities and to others are actually equal, but whether those with disabilities are as a practical matter able to access benefits to which they are legally entitled." Henrietta D. v. Bloomberg, 331 F.3d 261, 273 (2nd Cir. 2003).

(JA 21 n.1). In Henrietta D., for example, the plaintiffs -- individuals with AIDS and HIV who received services from the City of New York -- sued under Section 504 and the ADA, alleging that the City failed to provide them with adequate access to benefits. Id. at 264. The City argued that the plaintiffs had not shown that the lack of access was "'by reason of [their] disability' . . . rather than as a result of other forces . . . that affect the non-disabled as well as the plaintiffs." Id. at 272-73. The Second Circuit held that the plaintiffs did not have to identify a "'comparison class' of 'similarly situated individuals given preferential treatment.'" Id. at 273 (quoting Olmstead, 527 U.S. at 598).

Similarly, Olmstead and its progeny demonstrate that Ms. Barber does not have to point to a class of unlicensed non-disabled parents who were able to designate others to supervise their teenagers' driving. Rather, she must demonstrate -- as she has -- that the statute denied her meaningful access to the state program in question. Where a person with a disability is denied meaningful access, reasonable accommodations are required. See Chaffin, 348 F.3d at 857 (quoting Choate, 469 U.S. at 301).

III. The Barbers' Evidence to is Sufficient to Sustain a Claim for Compensatory Damages.

Defendants argue that Plaintiffs did not suffer a cognizable injury. Defendants' argument mischaracterizes Julianna's testimony, omits most of Ms. Barber's relevant testimony, and ignores applicable circuit precedent.

Ms. Barber testified at some length concerning the injuries she suffered, including feeling "kicked in the teeth," that "it was very painful," and that it undermined her confidence and caused "humiliation over not being able to afford my daughter a normal opportunity." (JA 178:7 - 179:6, 183:9-18, 185:4-18.)

Julianna Barber testified that it made her frustrated and angry, and that she missed out on at least one hundred hours of driving practice. (JA 220-21 (¶¶ 2-5); see also JA 95 (47:2-12).) It is undisputed that Julianna was unable to practice driving at all from November, 2004 until May, 2005, and was only able to practice for a total of six hours from May to August, 2005. (JA 130-33.) Defendants assert that "Julianna admitted that she did not sustain any damages whatsoever." Answer Br. at 11 (citing JA 92-93), 38. This is incorrect. Julianna testified she did not lose any money as a result of losing driving practice. (JA 95 (47:24 - 48:4)). Nowhere does she testify that she did not sustain any damages.[5]

---

[5] Elsewhere, Defendants assert that "Julianna admits that she was not discriminated against." Answer Br. at 11. Julianna does not claim that she was subject to discrimination; rather, that she was injured by the discrimination against (continued...)

Plaintiffs provided sufficient evidence to defeat summary judgment and present their claim for emotional distress and other compensatory damages to the jury. This Court has held that "[e]motional distress is an intangible damage, and is an issue of fact within the providence of the jury." Canady v. J.B. Hunt Transp., Inc., 970 F.2d 710, 715 (10th Cir. 1992). In Hampton v. Dillard Department Stores, Inc., 247 F.3d 1091, 1114-15 (10th Cir. 2001), this Court rejected the defendants' argument that there was no support for a $56,000 emotional distress verdict, holding that the plaintiff's own testimony that she felt "humiliated and disgraced" and feared ridicule and humiliation while shopping was sufficient to sustain it. See also U.S. v. Balistrieri, 981 F.2d 916, 932-33 (7th Cir. 1992) (holding that an award for emotional distress may be appropriate even where the only direct evidence is the plaintiff's own testimony and that "[t]he jury is in the best position to evaluate both the humiliation inherent in the circumstances and the witness's explanation of his injury.").

The one case cited by Defendants, Armstrong v. Turner Industries, Inc., 141 F.3d 554 (5th Cir. 1998), is not to the contrary. The Fifth Circuit made clear that the plaintiff had "not alleged any actual injury flowing from the alleged [ADA]

---

[5](...continued)
her mother. See Ord. Granting Pls.' Mot. to Reconsider at 2-5 (JA 28-31) (holding that Julianna "although not herself disabled, may assert claims under . . . the Rehabilitation Act for discrimination against a disabled person that directly injures that party.")

violation" and that his attorney "seemed to admit that, for this very reason, [he] was not entitled to damages relief." Id. at 561 n.18. In contrast, Plaintiffs here do allege injuries flowing from the alleged ADA violation, and -- as explained above -- have presented sufficient evidence of such injuries to defeat summary judgment.

IV. Defendants Did Not Respond to Several Key Arguments.

Plaintiffs made several arguments in their Opening Brief to which Defendants did not attempt to respond:

1. Plaintiffs cited at least nine cases -- five of them directly addressing reasonable accommodations -- that stand for the proposition that Section 504 and analogous provisions of the Americans with Disabilities Act trump inconsistent state law. Opening Br. at 27-28 & n.3. Defendants did not cite much less attempt to distinguish any of them.

2. Plaintiffs demonstrated that the history of Section 504's damages remedy focuses on the notice to the recipient -- undeniably present here -- and there is no support for an exception for attempts to comply with state law. Opening Br. at 30-32. Defendants did not respond or distinguish those cases.

3. Plaintiffs cited circuit precedent that there is no "good faith" exception to the damages remedy under Section 504. Roberts v. Progressive Independence, Inc., 183 F.3d 1215, 1222-23 (10th Cir. 1999), Opening Br. at 32-33. Defendants did not respond or distinguish that case.

CONCLUSION

For the reasons set forth above and in Appellants' Opening Brief, Appellants respectfully request that this Court reverse the district court's decision granting summary judgment to Defendants and remand the case to the district court for trial.

CERTIFICATE REGARDING LENGTH OF BRIEF

As required by Fed. R. App. P. 32(a)(7)(C), undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i), and that this brief contains 4,322 words. Counsel relied on the word count of WordPerfect X3, which was used to prepare this brief.

Respectfully submitted this 21st day of July, 2008,

/s/ Amy F. Robertson

Amy F. Robertson
Timothy P. Fox
FOX & ROBERTSON, P.C.
910 - 16th Street, Suite 610
Denver, CO 80202
303.595.9700

Kevin W. Williams
Carrie Ann Lucas
Colorado Cross Disability Coalition
655 Broadway, Suite 775
Denver, CO 80203
303.839.1775

Attorneys for Plaintiffs-Appellants Julianna Barber and Marcia Barber

Certificate of Service and Digital Submission

The undersigned hereby certifies that,

1. Appellants' Reply Brief was filed in writing and in Digital Form (as that term is defined in the General Order of August 10, 2007) by esubmission to the United States Court of Appeals for the Tenth Circuit on July 21, 2008.

2. There being no redactions, the document submitted in Digital Form is an exact copy of the written document filed with the Court.

3. The digital submission referenced in Paragraph 1 has been scanned for viruses with the most recent version of Symantec AntiVirus (version 10.1.6.6000, scan engine 81.1.0.13, 7/19/2008 rev. 5) and, according to the program, is free of viruses.

4. On July 21, 2008, copies of Appellants' Reply Brief (in electronic and written versions) were sent to:

Elizabeth McCann
James X. Quinn
Office of the Attorney General
1525 Sherman Street
7th Floor
Denver, CO 80203

Kevin W. Williams
Carrie Ann Lucas
Colorado Cross-Disability Coalition
655 Broadway, Suite 775
Denver, CO 80203

their last known addresses, by way of United States mail.

/s/ Amy F. Robertson
Amy F. Robertson
Fox & Robertson, P.C.
910 - 16th Street, Suite 610
Denver, CO 80202
303.595.9700

Date signed: July 21, 2008