

21-5361

Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

EDUARDO FLORES
Petitioner

v.

SHARP GROSSMONT HOSPITAL *et al.*
Respondent 5

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA
COURT OF APPEAL, FOURTH APPELLATE DISTRICT

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Self-Represented

ORIGINAL

QUESTION PRESENTED (Rule 14.1(a))

Whether the Superior Court of the State of California, San Diego County and the California Court of Appeal, Fourth Appellate District violated the 14th Amendment of the United States Constitution and the American with Disabilities Act of 1990 by failing to provide Mr. Flores, a disabled self-represented litigant, with meaningful accommodation and equal access to the court.

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v.

SHARP GROSSMONT HOSPITAL, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA
COURT OF APPEAL, FOURTH APPELLATE DISTRICT

Petitioner, Eduardo Flores, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, filed on **February 17, 2021**.

OPINION BELOW

The opinion of the California Court of Appeal, which was **unpublished**, was issued on **February 17, 2021** and is attached as Appendix A. The California Court of Appeal's one page order denying rehearing is attached as Appendix B. The California Supreme Court's one-page order denying review is attached as Appendix C. The

transcript of the trial court decision is attached as Appendix D. A transcript from the February 15, 2019, trial court hearing is attached as Appendix E. A copy of the relevant California Rules of Court is attached as Appendix F.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The decision of the California Court of Appeal for which petitioner seeks review was issued on February 17, 2021. The decision of the California Court of Appeal on Petitioner's request for rehearing was issued on March 4, 2021. The California Supreme Court order denying petitioner's timely petition for discretionary review was filed on May 12, 2021. This petition is filed within 90 days of the California Supreme Court's denial of discretionary review, under Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment 14 provides, in relevant part:

No state . . . shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title II of the Americans with Disabilities Act sections 35.149 and 35.150 provide in relevant part:

Except as otherwise provided in section 35.150, no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with

disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity... This paragraph does not—...

Require a public entity to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens. In those circumstances where personnel of the public entity believe that the proposed action would fundamentally alter the service, program, or activity or would result in undue financial and administrative burdens, a public entity has the burden of proving that compliance with §35.150(a) of this part would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the head of a public entity or his or her designee after considering all resources available for use in the funding and operation of the service, program, or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.

42 U.S.C. § 12101(b)(1) (2012)

The California statutory provisions and court rules that are relevant to this petition, California Rules of Court, Rule 1.100, are reprinted in Appendix J.

STATEMENT OF CASE

On June 25, 2008, Mr. Flores was transferred to Sharp Grossmont Hospital from a Kaiser Medical Clinic after he suffered a heart attack. Mr. Flores had an EKG at Kaiser Medical Clinic which evidenced the heart attack he suffered. Mr. Flores was seen in Sharp Grossmont Hospital Emergency Room, where he had another EKG and had a catherization ordered by Dr. Kobernick, M.D.

In 2014, Mr. Flores was scheduled to have brain surgery. Prior to the surgery, Mr. Flores was seen by Dr. Hoagland. At the time of his visit with Dr. Hoagland, Mr. Flores informed Dr. Hoagland that he was seen at Sharp Grossmont Hospital for a heart attack in 2008. Mr. Flores' 2008 Sharp Grossmont Hospital records were not examined prior to his 2014 brain surgery because although the records were requested the records were not provided to Dr. Hoagland. Consequently, Mr. Flores was cleared for brain surgery by Dr. Hoagland. On June 9, 2014, Mr. Flores had brain surgery and suffered a multitude of serious complications due to his history of cardiac problems. Mr. Flores sued Sharp Grossmont Hospital for injuries he sustained during his brain surgery.

At all times throughout the life of this case Mr. Flores has represented himself. In Mr. Flores's original and first amended complaint against Sharp Grossmont Hospital Mr. Flores asserted the following causes of actions: medical malpractice and wrongful denial of access to his medical records. Sharp Grossmont Hospital filed a motion for judgment on the pleading arguing that Mr. Flores' claims were time-barred because Mr. Flores had

one year from his June 2014 injuries to file suit. The California Trial Court granted Defendant Sharp Grossmont's motion for judgment on the pleadings disposing of Mr. Flores' causes of action determining that Mr. Flores' claim for malpractice was time barred and that Mr. Flores' did not provide a legal theory to support his cause of action for wrongful denial of access to his medical records. Mr. Flores' request for leave to amend his complaint was denied.

Mr. Flores appealed to the state Court of Appeals arguing that he should have been allowed to show grounds for extending the statute of limitations. The state Court of Appeals found that Mr. Flores should be allowed to amend his complaint to allege facts to overcome the statute of limitations defense based on a tolling rule which would apply during a person's incapacity. The case was remanded back to the state Trial Court to give Mr. Flores the opportunity to allege facts under section 352 subdivision (a). The state Court of Appeal noted that Mr. Flores' "pleadings and written submissions" were unclear and required Mr. Flores to state the specific wrong doing committed by Sharp Grossmont Hospital, which led to Mr. Flores' injuries.

The state Court of Appeals further made the following determinations:

- (1). Mr. Flores' argument that he should be permitted to amend his malpractice claim to allege tolling based on a fraud and concealment theory was denied, as Mr. Flores had not met his burden to establish a basis for such an amendment.

(2). Mr. Flores forfeited any objection to the Trial Court's ruling that Mr. Flores did not state a viable cause of action under California law as it pertained to his access to his medical records because Mr. Flores did not raise this issue on appeal.

(3). Mr. Flores' challenges to the Trial Court's decision to grant Sharp Grossmont Hospital's motion to quash his subpoenas was without merit.

Upon remand, Mr. Flores' filed a Third Amended Complaint. Sharp Grossmont Hospital filed a demurrer. Mr. Flores responded by filing a motion requesting permission to file a Fourth Amended Complaint. The Trial Court granted Mr. Flores permission to file a Fourth Amended Complaint. Mr. Flores' Fourth Amended Complaint alleged the following causes of action: professional negligence for failure to maintain proper medical records, intentional misrepresentation, and negligence as it pertained to the hiring of its licensed physicians. In the Fourth Amended Complaint, Mr. Flores stated his basis for tolling under 352 sub-division (a), which included the stroke and respiratory failure Mr. Flores suffered resulting in seven additional surgeries, a shunt implant, extended stay in the hospital and rehabilitation.

Sharp Grossmont Hospital filed a demurrer to the Fourth Amended Complaint. On the first cause of action, professional negligence in maintaining medical records, Sharp argued the cause of action was improper because the specific law applied to nursing homes and the Court of Appeals previously upheld the Trial Court's ruling on this issue.

On the second cause of action, intentional misrepresentation, Sharp argued the cause of action was improper because the Court of Appeals previously held that Mr. Flores did not meet his burden on a fraudulent concealment theory. On the third cause of action, negligence, Sharp argued that the hospital does not employ its physicians; the law cited by Flores applied to nursing facilities; and the issue regarding the medical records had already been adjudicated and upheld on appeal.

In response Mr. Flores contended he cited the wrong section of Title 22 and asked that he be permitted to amend his complaint to cite the correct law. Mr. Flores argued that Sharp Grossmont Hospital owed him a duty for the conduct of both Dr. Hoagland and Dr. Kobernick because they each hold privileges at the hospital. The Trial Court granted Sharp Grossmont Hospital's demurrer without leave to amend determining that Mr. Flores failed to identify a viable theory and failed to plead specific facts as to his lack of legal capacity. The Trial Court further determined that on Mr. Flores' second cause of action, intentional misrepresentation, the state Court of Appeals did not grant Mr. Flores permission to plead a fraudulent concealment theory.

Again, Mr. Flores appealed to the state Court of Appeal.

On February 17, 2021, the California Court of Appeal, Fourth Appellate District, Division One affirmed the trial court's decision to dismiss Mr. Flores' action. App. A. The Court provided the following reasons for upholding the Trial Court's decision:

-
- 1). The first cause of action, professional negligence, was barred under the law of case doctrine.
 - 2). The second cause of action, intentional misrepresentation, because the state Court did not grant Mr. Flores permission to add new cause of action to his complaint. The state Court of Appeal further found that Mr. Flores' intentional misrepresentation claim was not plead with specificity.
 - 3). The state Court of Appeal found that Mr. Flores claim of negligence was not specifically addressed in his appellate brief, was time barred, and failed under the law of the case doctrine.

Mr. Flores sought discretionary review of the issue in the California Supreme Court, making the same federal constitutional argument and citing the same basic authorities set forth above. App. C, pg. 6-7. The California Supreme Court summarily denied review. App. C, pg. 1.

REASONS FOR GRANTING THE PETITION

Accommodating a person's disability is required by federal and state law. The American with Disabilities Act (hereinafter "ADA") require that people with disabilities be afforded equal access to government buildings and services. 42 U.S.C. § 12101(b)(1) (2012). Because access to the judicial process is a fundamental right, the United States Supreme Court has held that Title II of the ADA is constitutionally valid. In *Tennessee v. Lane*, the Court held that "Title II unquestionably is valid...as it applies to the class of cases implicating the accessibility of judicial services [.]” 124 S.Ct. 1978, 1993 (2004). The Court observed that the “duty to accommodate is perfectly consistent with the well-established due process principle that ‘*within the limits of practicability, a State must afford to all individuals a meaningful opportunity to be heard*’ in its courts.” *Id.* at 1994 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)) (emphasis added).

This includes equal access to the California court system which provides a path for all Californians to represent themselves in legal proceedings. “[T]he right to represent oneself in civil proceedings conducted in this state, though established by precedent rather than statute, is firmly embedded in California jurisprudence. This right is necessary to protect and ensure the free exercise of express constitutional rights, including the right to acquire and protect property and to access the courts. It is also implicitly recognized by statute. For these reasons, we conclude that the right to represent oneself

in civil proceedings is a general law of this state.” *Baba v. Board of Supervisors* (2004) 124 Cal.App.4th 504, 526.

Californians with disabilities face greater hardships when they appear pro se in legal proceedings. California Rule of Court, Rule 1.100 was designed to alleviate the hardships disabled litigants face when appearing pro se. Whether a cognitive disability limits their understanding of the hearing process or a physical disability prevents them from collecting documents to submit as evidence, disabled self-represented litigants generally require accommodations.

However, in the instant matter Mr. Flores, a disabled man suffering from a traumatic brain injury, was not provided equal access to the California court system because the court did not take any affirmative steps to provide meaningful accommodation. In Mr. Flores’ first appeal to the state Court of Appeal on this matter, the court noted that Mr. Flores’ pleadings and submissions were unclear. There was no effort made to seek clarity, so that Mr. Flores case could be heard on merits. Instead, the state Court of Appeal, remanded the case back to the Trial Court and disposed of a significant issue, fraudulent concealment, in Mr. Flores’ case indicating that he did not properly raise the issue on appeal.

On the issue of fraudulent concealment, the state Court of Appeal could have asked for additional briefing. The state Court of Appeal acknowledged that Mr. Flores’ written submissions were not clearly articulated. Mr. Flores could have received

accommodations at this state to assist him in better articulating this theory. Or the state Court of Appeal could have remanded the case back to the Trial Court and permitted Mr. Flores to better articulate his position with the assistance of some form of accommodation.

Unfortunately, there has been little attention paid to reasonable accommodations for mental disabilities under the ADA because “after the ADA passed . . . the statute as applied to physical disabilities received the most attention.” *U.S. Comm’n on Civil Rights*, No. 005-907-00594-4, *Sharing the Dream: Is the ADA Accommodating All?* (2000), www.usccr.gov/pubs/ada/ch5.htm. Cognitive disabilities include intellectual disabilities (a type of developmental disability formerly known as “mental retardation”) and certain learning disabilities (such as dyslexia), and can also stem from organic brain syndrome, Alzheimer’s Disease and other dementias, and stroke. http://www.colemaninstitute.org/article_braddock_1.pdf; <http://www.ct.gov/dss/cwp/view.asp?a=2349&q=304658>. Ensuring access for someone with a psychiatric or cognitive disability is just as important as accommodating a physical or sensory disability.

Thus, the instant case presents an important issue over which the federal and state courts across the country have not adequately addressed. As the demand grows for reasonable accommodations for individuals with mental disabilities in the judicial system, courts must ensure compliance with federal law. A few court systems, including

the federal administrative courts, have started to recognize the importance of making accommodations for individuals with mental disabilities.

First, in *Franco-Gonzales v. Holder*, a California district court held that mental disabilities may impede an individuals' ability to meaningfully access immigration removal proceedings. Thus, the court concluded, individuals with mental disabilities are entitled to a "qualified representative" as a reasonable accommodation under federal disability law. 767 F. Supp. 2d 1034, 1056 (C.D. Cal. 2010). Here, the court concluded that after a "fact-specific individualized analysis of the disabled individual's circumstances and the accommodations that might allow meaningful access to the program" it was a reasonable accommodation to provide these individuals a qualified representative, an attorney providing services pro bono or at the government's expense. *Id.* at 1054–58. However, the question remains whether a court must make affirmative steps to accommodate a disabled self-represented litigant and whether court rules such as California Rule of Court, Rule 1.100 adequately address this issue.

Mr. Flores' experience with the California court system demonstrates the problem with California Rule of Court, Rule 1.100 (b) and California's response to accommodating disabled self-represented litigants. California Rule of Court, Rule 1.100 (b) provides:

"It is the policy of the courts of this state to ensure that persons with disabilities have equal and full access to the judicial system. To ensure access to the courts for persons

with disabilities, each superior and appellate court must delegate at least one person to be the ADA coordinator, also known as the access coordinator, or designee to address requests for accommodations. This rule is not intended to impose limitations or to invalidate the remedies, rights, and procedures accorded to persons with disabilities under state or federal law.”

The rule allows for disabled self-represented litigants to request accommodations but imposes no duty on the court to ask a litigant on the record if they need accommodation. California Rule of Court, Rule 1.100 discriminates against disabled persons with cognitive disabilities who may not know or understand how to request accommodations. The rule is based in the very ableism it seeks to mitigate. The rule does not provide equal access to the court system in any meaningful way. Moreover, in Mr. Flores case it allowed the trial court and the state Court of Appeals to dismiss Mr. Flores’ case on procedural and technical grounds rather than on the merits of the case.

Other courts have interpreted the access requirement under Title II to require provision of an affirmative accommodation to ensure “meaningful access to a public service.” *Nunes v. Massachusetts Dept. of Correction*, 766 F.3d 136, 145 (5th Cir. 2014) (quoting *Henrietta D. v. Bloomberg*, 331 F.3d 261, 273–76 (2d Cir. 2003)). Specifically, a public entity must furnish an accommodation “where necessary to afford individuals with disabilities . . . an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.” 28 C.F.R. §35.160(b)(1). The public entity shall give “primary consideration” to the accommodation requested by the

individual with a disability, however the administrative authority may decide if an “equally effective” alternative accommodation will be made. 28 C.F.R. § 35.160(b)(2); <https://www.thearc.org/file/ADAresourceguide.pdf> (asserting “the courts are to give primary consideration to the accommodation requested by the person with the disability”).

Some state court systems recognize the importance of providing accommodations for individuals with mental disabilities. The Washington State Court system has General Rule 33 which provides that reasonable accommodations may include “as to otherwise unrepresented parties to the proceeding, representation by counsel, as appropriate or necessary to making each service, program, or activity, when viewed in its entirety, readily accessible to and usable by a qualified person with a disability.” Wash. GR 33. Washington’s General Rule 33 also requires a court to “make its decision on an individual-and-case-specific basis with due regard to the nature of the applicant’s disability and the feasibility of the requested accommodation.” *Id.*

Additionally, some states and advocacy organizations have recognized the importance of non-attorney support persons to assist individuals with disabilities in court proceedings. The Judicial Council of Georgia identifies support service providers, individuals who assist persons who are deaf-blind or those who have intellectual, or other cognitive disabilities with court appearances. *Judicial Council of GA., Access to Justice for People with Disabilities: A Guide for Georgia Courts* (2017). The Judicial Council of

Georgia's ADA Handbook provides that "[i]n addition to helping reduce the anxiety of court proceedings for a person with cognitive or intellectual disabilities, a support person may also assist the person by explaining court proceedings in simple terms, explaining paperwork or follow-up obligations, or identifying signs of confusion or misunderstanding." *Id.* The Council's recommendations are based in part on a report by The Arc, the largest national advocacy organization for individuals with cognitive and intellectual disabilities, that discusses different ways that states can support these individuals in judicial proceedings. *The Arc of the U.S., The Arc's Justice Advocacy Guide: An Advocate's Guide on Assisting Victims and Suspects with Intellectual Disabilities* 11–12 (2006) (noting Vermont's "Communication Specialist" program "that is similar to an ASL interpreter for someone who is deaf which allows the person with a disability to communicate effectively with attorney, judge, court staff and others in the judicial system").

It is clear in Mr. Flores' case before this Court that Mr. Flores struggled to articulate his causes of action, not because he did not have a viable cause of action but because he could not sufficiently express himself due to his traumatic brain injury. Mr. Flores needed accommodation of which the California court system was not prepared to provide in a meaningful manner. The result of this lack of accommodation was the dismissal of Mr. Flores' case and a denial of justice.

On remand, Mr. Flores was not provided with accommodation by the Trial Court. As stated in Mr. Flores' Petition for Review to the state Supreme Court, the trial court failed to treat Mr. Flores' statements on February 15, 2019 as a request for accommodation pursuant to CRC 1.100. Mr. Flores made several statements to the court about his ability to communicate effectively and understand the proceedings.

"Tell him I'm a disabled person. And my...my grade is less than that of a child who...7th grade. And when I'm...during these moments, I get mentally blocked."

App. E, pg. 4.

When Mr. Flores asked for a Spanish language interpreter to help him convey words he could not explain in English, the Trial Court informed Mr. Flores that he could only speak in Spanish.

Interpreter: Yes. And, Your Honor, I do want to inform the Court that Mr. Flores has requested that the interpreter only interpret when he is quote, unquote, "stuck" with a term....

The Court: The request is denied. You can't have an interpreter for some purposes.

App. E, pg. 3.

The Trial Court showed great indifference to Mr. Flores' disability and the Trial Court's commentary led to further confusion for Mr. Flores.

The Court: "Sir, something you said at the Court of Appeal, that you did not tell me, motivated Justice Haller to order me to give you another chance to plead this case. I don't know what it was you said maybe you remember. But that's what she allowed you to do – she ordered me to allow you to do. And I am carrying out that requirement...you had in mind

when you were at the Court of Appeal some new theory or some new allegation. That's what you need to put into your complaint...You explained to Judge Haller...Just write that down and put it in an amended complaint." App. E, pg. 7.

The Trial Court was aware of what was required of Mr. Flores because the state Court of Appeal issued an opinion detailing what was required of Mr. Flores. The Trial Court's instruction to Mr. Flores that he could submit a "new allegation" was precisely what the state Court of Appeal cited in the second opinion on this case that Mr. Flores had no "right" to do. App. A, pg. 14. Rather than instruct Mr. Flores inaccurately from the bench, the Trial Court should have taken Mr. Flores case seriously and provided him with clear instruction and accommodation.

The state Court of Appeals cites Mr. Flores failure to follow procedure as the reason for affirming the dismissal of his cause of action, as the court applied the law of case doctrine after Mr. Flores purportedly did not raise the issue of fraudulent concealment of his medical records on appeal. The state Court of Appeal further admonished Mr. Flores for adding new causes of actions and not following the Court of Appeals instruction. The state Court of Appeals praised the Trial Court for showing "commendable tolerance and understanding" in the Trial Court's dealings with Mr. Flores. However, there was no mention of Mr. Flores being provided with accommodation because the trial court not only failed to accommodate but instead Mr.

Flores was treated as if he at least minimally understood the court's procedure and simply failed to follow it.

Mr. Flores' should have been provided with accommodation to avoid the dismissal of his malpractice action due to technicalities and to ensure his case was heard on its merits. Accommodations for someone like Mr. Flores, not only benefits him by protecting his rights, but also decreases the cost of litigation for an opposing party and preserves the judicial economy.

Mr. Flores was denied justice in the most basic sense because he did have his fair day in court. The purpose of our system of justice is still...“the orderly ascertainment of the truth” *Jones v. Superior Court* (1962) 58 Cal.2d 56, 60 and the application of the law to that truth. Just because a court must rely on fallible litigants to present competent evidence does not vitiate the fundamental purpose of the proceeding, which is most assuredly not to have a *contest* but to establish what actually happened. The adversarial system works not because it is a contest to see who has the cleverest lawyer but because allowing two or more sides to present evidence to a neutral decisionmaker is an epistemologically sophisticated way *to get at the truth*. And while certain aspects of the law, namely the fact that there are fixed rules and outcomes, allow it to be analogized to a game, it is most definitely not a spectator sport. *Guardianship of Simpson* (1998) 67 Cal.App.4th 914, 934–935. Mr. Flores needed assistance in the form of an

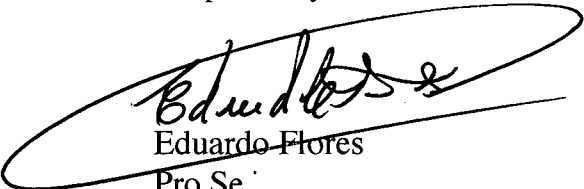
accommodation and instead the Trial Court and the state Court of Appeal treated him as a seasoned attorney.

CONCLUSION

For the foregoing reasons, petitioner requests that this Court grant the petition for certiorari.

Dated: August 4, 2021

Respectfully submitted,



Eduardo Flores
Pro Se