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Anthony Sanders 00:04
Hello, and welcome to Short Circuit your podcast on the Federal Courts of Appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. If you enjoy this podcast, you should check out our newsletter, an often irreverent take on recent court of appeals opinions, which we publish every Friday, you can subscribe at shortcircuit.org and check out our sister podcast, the documentary series, Bound by Oath while you're there as well. We're recording this on Thursday, May 13, 2021. As usual, we've got two lawyers here ready to bring you up to speed on a couple of recent cases. One that regular listeners have heard here before is IJ's own, Bob McNamara, Bob. Welcome back to Short Circuit.

Robert McNamara 00:50
Thanks for having me.

Anthony Sanders 00:52
And as for the other, Bob and I have a special guest that we are honored to announce, David Lat. Now David is known for many things: founder of Above the Law, legal recruiter, federal prosecutor, Yale Law grad, even novelist, the list is a long one. But to me, he's two things. First, let me tell you a story. It was 2005. Among the sophisticated crowd, there was a buzz of anticipation that no one had felt since the summer of 1990, when everyone was waiting to find out who killed Laura Palmer. And this included the question of who was the writer of the blog, "Underneath Their Robes," a man or a woman? If I remember correctly, Judge Posner thought the former and we soon learned he was right. Because unlike the endless stringing along, David Lynch gave with Twin Peaks, we soon found out that the anonymous Article III Groupie was none other than Mr. David Lat. And although I think most people my age have moved on to calling him his real name. David, you'll always be Article III Groupie to me. And that's one reason we have you on is that, although you're not using that pen name, you're getting to relive a bit of those old times with your new newsletter. So tell us a bit about that, which by the way I've subscribed to, and so should our listeners.

David Lat 02:14

Well, thanks so much, Anthony. It's great to be here. Yeah, my new newsletter. It's called “Original Jurisdiction.” It's hosted on the Substack platform. It's at Davidlat.substack.com. And in many ways, it has a lot of the DNA of, “Underneath Their Robes.” I'm trying to offer an insightful insider's take on what's going on in the federal judiciary. But I also go beyond what I covered it Underneath Their Robes. I also cover the world of law firms, for instance. So in some ways, there are a lot of similarities. It's not quite I think, as irreverent or snarky, but I do try to keep it candid and authentic, just like Underneath Their Robes.

Anthony Sanders 02:53
Yeah, well. I'm sure we all have matured somewhat in the last 16 years. So, I think that maturity as a very much shown itself in the last few newsletters, and I look forward to more. I said, there were two things that David means to me. The second thing is an inspiration. Now, as many of you know, David was one of the very first people in the legal community to catch COVID in March of last year, and he publicly wrote about it in real time. So many of us could read about that on his Twitter account. And the reality of the pandemic really hit home for a lot of people through reading what happened to him, especially as his condition worsened. And then he was on a ventilator for six days. We were of course, so relieved when the news came that he was on the recovery. I remember checking Twitter over the weekend to see you know, I met you once in my life before this, but it was you're such a figure to so many legal communities. They want to know “Is David Okay, is it going to be okay?” It was so good to see when you were on recovery, of course, it's been a long recovery. But it really sunk into so many of us just how real COVID was and how we need to be careful. And so that has been a helpful thing to many of us over the last year. So, I want to say on behalf of everyone at IJ to thank you for your inspiration. I'm sure many of my colleagues had the same reaction. Anything about that you want to say for our listeners,

David Lat 04:20
Really, the thanks are all mine, Anthony. When I was sick, and in the hospital for three weeks, I just got such an outpouring of love and support and good wishes from so many in the legal community especially. And it really helped me through that difficult period. It was a scary time, in some ways, even scarier for my husband and my parents and my family and friends than for me because I was pretty out of it for most of the time. But I think we pulled through because of all the support that we received. So I'm really glad to be here and I'm happy to report that today I feel fairly recovered. I think the only thing is maybe I get a little bit shorter of breath than usual when I exercise but in terms of my day to day life Things look good. I saw the pulmonologist recently, I saw that cardiologist recently and everything looks

pretty okay, almost back to normal. So, I'm happy to report that a year and change later. Things look good.

Anthony Sanders 05:13
Well, that's very good to hear. Appreciate that. And if you want to hear more of the full story of David's battle with COVID, but also the article three groupie story and other stories, I know it's been a few places lately where you can check them out. But especially at the Advisory Opinions podcast over at there with our friends at the Dispatch, I think their episode on April 12th. They did a deep dive with him where you can hear more of this. But here on Short Circuit, our deep dive is to get underneath their robes with a couple cases. So, David, you're going to tell us about a recent one from the 11th Circuit, Gil v. Winn Dixie Stores? What's up with Winn Dixie and their website?

David Lat 05:51
Yeah, so this case was decided on April 7th by the 11th Circuit. And I actually learned about it from Short Circuits excellent round up, which I always check when I prepare my own weekly legal news round up for Original Jurisdiction, which I call Judicial Notice. And I think the summary from short circuit is a fairly good one. The question as described by Short Circuit is “can a grocery store be held liable under the ADA because its website is not accessible to the visually impaired?” And the holding is summarized by you guys, and I think accurately is “Nope, a website is not itself a place of public accommodation under the ADA. And the website's limited functionality does not prevent visually impaired customers from visiting the physical store.” So this is a very interesting case of statutory interpretation. The panel was divided by Judge Lisa Branch, a Trump appointee to the 11th Circuit wrote for herself and Judge Reeves, who is sitting by designation. He's from the Eastern District of Kentucky, and then Judge Jill Pryor because of course, there are two Judge Priors on the 11th Circuit, Judge Jill Pryor filed a dissent. So, the deal with Winn Dixie is website is, it is not a website where you can actually make purchases, but it's a website where essentially you can enhance your shopping experience. You can get coupons electronically handled so that you don't have to cut them out and present them. You just give your Winn Dixie customer card, and they'll be automatically processed the coupon discounts and you can also refill existing prescriptions using the website. So, the plaintiff in this case, man by the name of Juan Carlos Gil out of Florida, uses screen reader website, a screen reader software to read websites because he is legally blind. And because the Winn Dixie website is not optimized for screen readers, he was not able to take advantage of the website. So, in 2016, he sued Winn Dixie, which, as many of you know, probably is a chain of grocery stores or supermarkets out of the southeast. And he alleged that the website was a place of public accommodation under the ADA,

and that the company must therefore provide full and equal enjoyment of the website to disabled customers like himself. He also alleged based on some dicta that had been in some prior 11th Circuit cases, that the website has, quote, a direct nexus to the physical stores and pharmacies and therefore under the ADA, the Americans with Disabilities Act, Winn Dixie was required to make this website readable and accessible to the visually impaired. So, Winn Dixie admitted that its stores its physical stores or places of public accommodation but denied that its website is. There ended up being a bench trial, and the District Court ruled in favor of Gil. The District Court did not address the question of whether a website is a place of public accommodation under the ADA, but instead relying on 11th Circuit precedent, the district court found a sufficient nexus, nexus being the key word between the website and the physical stores such that the inaccessible website did not give equal access to the physical stores. So, after the bench trial, Winn Dixie took an appeal and there were two major issues in the case was also a minor issue and standing that was quickly resolved. Everyone agreed on that. The first is are websites places of public accommodation within the ADA. And then second does Winn Dixie is inaccessible website otherwise violate the ADA? On the first question, I actually think this question is not too difficult, although there is a circuit split on it. The ADA has this long laundry list of places that are places of public accommodation in the statute, and they're all physical places, restaurants, grocery stores, hotels, things like that, and websites aren't listed. The DOJ has never taken a position on whether websites are public accommodations. So based on this statutory language, the 11th Circuit concluded that websites are not places of public accommodation. There's now a circuit split on this with four circuits taking the view that they are not places of public accommodation, and two other circuits taking the opposite view. The second question, which I think is a bit harder is, does the website otherwise violate the ADA? Because the ADA provides that a place of public accommodation can be liable, if it quote, “fails to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services?” close quote. So then the issue is, is a visually accessible website an auxiliary service that Winn Dixie was required to have? Here, the majority answered “No”, making a number of observations pointing out that the website is not a point of sale. It's a limited use website, pointing out that Gil was able to use the physical stores for years and did so without an issue. And the majority essentially declined to adopt a standard that would require disabled and non-disabled customers to have identical experiences. In dissent Judge Pryor like the district court declined to reach the places of public accommodation issue, whether websites fall under that, but she really relied on the auxiliary aid and services language and said that Winn Dixie, by not having this accessible website failed to provide an auxiliary aid that was necessary to give visually impaired customers full and equal enjoyment of Winn Dixie, these services. And for example, she cites evidence

in the record showing that when Mr. Gil wanted to refill a prescription, instead of being able to do so on the website, like non visually impaired customers, he had to go to the store, he had to ask for employee help, he had to tell the pharmacist what he needed. He had to wait 20 or 30 minutes to get it refilled. Sometimes he had privacy concerns because he would have to say the name of his medications out loud, and maybe other people could hear it. Similarly, if you wanted to use coupons, he had to get employee help. Sometimes the employees seemed annoyed or irritated. So in Judge Pryor's view, providing an accessible website was necessary to ensuring that disabled customers like deal are not quote treated differently under the ADA than sighted customers. So really, just to kind of reduce it all. At the end of the day. The question is, how far does the business need to go and providing similar experiences to disabled and non-disabled customers? And how similar must to those experiences be? And I think this is an interesting and important question for two reasons. One, you know, there are millions of Americans who have disabilities, and as companies make increasing use of websites and apps, the extent to which the technology must be accessible to disabled individuals is going to become increasingly important. The other thing is, there are tons of these lawsuits floating around in lower courts, these ADA lawsuits. And you know, their critics say, well, they're kind of like nuisance lawsuits, people find some kind of really trivial violation or alleged violation and try to sue and get a settlement. So, there is a lot of this litigation and the standards by which this litigation is governed, you know, will determine the fate of all those cases. So anyway, I think it's an interesting case. And I'm grateful that short circuit highlighted it.

Anthony Sanders 13:36
Of course. Well, well, Bob, you often do little work for our newsletter. What's your what's your take on this case?

Robert McNamara 13:44
Yeah. So the thing that strikes me about this case is it's always interesting to read a panel that is so clearly struggling with existing circuit precedent whose premises it just does not want to embrace, because I think you can state the pedal holding very clearly in a way that's persuasive where it says, look, the ADA doesn't apply to websites. And the plaintiff here actually went to this Winn Dixie all the time before he even knew they had a website. And so, the fact that the website isn't accessible doesn't prevent him from accessing the Winn Dixie, the Winn Dixie is the only thing the ADA applies to. And so that's like the fact that you subsequently found out they have a website and got mad about it doesn't

mean you can't go to the Winn Dixie. And I think like stated that way, it's perfectly logical. And the problem the panel has is earlier 11th Circuit precedent holding that, for example, the ADA applied to Domino's website because you could order a pizza on Domino's, and then show up at the Domino's and pick up the pizza. And the panel tries to distinguish that away by saying oh and Domino's you can complete the whole transaction on the website and go pick it up and Winn Dixie only lets you apply coupons. You can't actually complete the purchase. And I'm not quite sure that really holds up like I'm I have not looked at the record in the Domino's case. But I suspect the Domino's plaintiffs had ordered Domino's pizzas before he discovered that their website was inaccessible. And so I think David is right that a lot of this really does boil down to how we're going to treat websites generally. And it seems like, you know, the ADA applies to websites or it doesn't apply to websites. But while we are struggling with this, we're going to have panels trying to draw these kind of strange distinctions about exactly what the functionality of the website is, and how that relates to the store. When in reality, you know, most of these websites are actually going to bar you from the store and no one thinks they bar you from the store. What we're really talking about is how we want to regulate websites, which I agree with David seems like a thing Congress has not spoken to. And courts are sort of trying to fill in the gaps in a statute that was written when there really wasn't an internet to speak of.

Anthony Sanders 15:54
Yeah, well, the issue in the background is, is Amazon a place of public accommodation? It seems like probably it's not from what said here, to the extent that it's not physical. But there's this Netherworld in the middle here. I also like the dicta that they didn't follow this earlier, 11 Circuit case, like to argue that some of it was dicta. But then there's this Supreme Court case, the famous PGA Tour case that the Supreme Court ruled on, where there's dicta that they said, “Well, that's Supreme Court dicta.” And that's a little bit more important, and that actually helps the majority. And so they were going to follow that dicta, but not the other dicta. Of course, we've all seen plenty of cases where dicta is just dicta. And the court can do whatever it wants and not following it. So anyway, another point,

Robert McNamara 16:47
I think we all know that the definition of dicta is language in a court opinion, that is not helpful to my opinion

Anthony Sanders 16:55
Well, then here's another point in a string site if you're trying to argue that, so I would recommend this case of if nothing else, then that. Well, this is going to be an important one to watch for the ADA and its

evolution going forward. So thanks so much, David, for selecting this and, and giving the conversation here today, we're now going to move on to Bob that has something that almost everyone seems to misunderstand these days. And that's Section 230. Now, we recently had on someone who actually does understand it, Mike Masnick of Techdirt, where we discussed at Section 230 case from the Second Circuit. Now, Bob has another Section 230 case, this time from the Ninth Circuit where David clerked by the way, maybe he can give us some insights about that. But this one is pretty different than the other case, Lemmon v. Snap, Inc. Bob, there's some pretty tragic facts here. But some clarifying legal analysis as well.

Robert McNamara 17:57
Yes, so Lemmon v. Snap, which is a case out of the Ninth Circuit about Section 230, I have heard that the best way to get attention on the internet is to say false things about Section 230 of the Communications Decency Act. And so, I intend to get in on some of that action.

Anthony Sanders 18:12
To get legislation passed as well.

Robert McNamara 18:15
Exactly, that this is how I'm going to make my mark Anthony. And so, the underlying facts in lemon are tragic car full of teenage boys speeding at over 100 miles an hour, crashes into a tree, catches on fire, and all the young men die. And it subsequently emerges that while they're driving at these outrageously fast speeds, they're Snapchatting. And apparently, for reasons passing all understandings, Snapchat has a skin you can put on your snaps. It's a speed filter that purports to show the actual speed you're going at the time you've recorded your Snapchat. And I, just speaking candidly, as an old person, I cannot think of a reason to have this, that is not driving a car at absurd speeds, but they have it. And so, the family of the young man sues and says this is a product liability case, you negligently designed Snapchat to put this filter on that encourages people to drive insanely fast speeds and subsequently to get in terrible accidents. And Snapchat said “Whoa, whoa, whoa, we're immune under Section 230. We are an interactive computer service, and you can't hold us liable for other people's speech on our service.” And what the panel says, I think correctly, is this case isn't governed by Section 230. Sure, sure, snapchat is an interactive computer service. But nothing about this case is trying to hold them liable for anyone snaps nothing's trying to hold them liable for any information published by a third party on their service. The allegation is just that the speed filter itself is a negligently designed product that doing this caused the accident, even if nobody ever snapped about it. And so, the panel reverses and

remains. And so, I think that's correct. As a matter of Section 230 law, what I find interesting about this is that it I think it's a good example of how preexisting rules of law can twist claims into shapes where they're ultimately doomed to collapse. Because I think you can state the plaintiff's claim here in a way that's very intuitive and makes sense. It says, look, Snapchat created this filter. When people use this filter, it encourages people to kind of compete and have snaps that show them going faster and faster. And that kind of interaction is what led to these young men dying. But the problem is that Section 230 would bar that claim, you can't hold Snapchat liable for other people using this skin. And so, what the plaintiffs are left saying is, this is just a bad product. It's negligently designed, even if nobody ever snapped anything under that. And I think the difficulty they're going to have on remand and the panel explicitly declined to address whether they had properly pled that the negligent design caused the accident, is if you take out what was actually going on, which is other people's snaps were encouraging speeding, you're left with basically a speedometer that this entire skin is just a tool that shows you how fast you're going. And sure, sometimes people will have a tool that show how fast they're going or going to go as fast as they can. But it doesn't strike me as meaningfully different from the car speedometer. And I can't figure out a way they could have played this that didn't run squarely into Section 230 that also would have given them a good argument for how Snapchat caused this accident. But it's something you see sometimes in litigation where someone shows up with a square peg, and they're met with a round hole. So, they take a chisel, and they take their square peg, and they turn it into a round peg. And as soon as they're through that first obstacle, the courts going to say, Okay, show me your square peg. And they said, Well, I had it a minute ago, it was right here. And so, this is it's a temporary defeat for snap. It's a victory for the plaintiffs. But it's a victory for the plaintiffs that seems to set them up in a very difficult position on remand, because their basic intuitive claim is that Snapchat is incentivizing these snaps that show people going absurdly fast. And that's exactly the claim they have had to affirmatively waive in order to persuade a panel at the Ninth Circuit to revive their lawsuit.

Anthony Sanders 22:29
David, do you see a round hole or a square peg?

David Lat 22:33
So, I think one allegation they didn't make in this case was, I don't use Snapchat, it's one of the few social media things I'm not on. But there was some allegation that Snapchat somehow, or there was a rumor that Snapchat somehow incentivizes people, or if you hit a certain speed, you get some kind of prize or a shout out or something. And again, you know, at this stage, I think the panel supposed to take this as true. So, they do have that allegation. But I agree with Bob, I think that this case is correctly

decided. Because under Section 230, the issue is, is the lawsuit trying to hold the defendant liable as a quote, publisher or speaker of the information. So somebody wrote a snap that was defamatory, or that violated somebody's privacy, the text of it, if I wrote a snap, saying, “Oh, you know, Anthony is a thief, or whatever it is”, that snap would not be liable for because that was on me. But if snap designs an app that leads people or encourages people to engage in dangerous behavior, then I think they could be liable. So I have an embarrassing confession to make. I've broken this addiction, but for a time, I was very addicted to PokemonGo. And they actually even reached level 40, which used to be the highest level. And when did I notice in PokemonGO was it doesn't let you you're not supposed to be able to do certain things when you're in a moving vehicle, much too sometimes my disappointment, even if I was a passenger, and you have to click on something saying I'm not in a moving vehicle, I'm not driving or something like that. So apps can be designed so that certain features are not available when you are moving at a speed above a certain level. And it looks like Snap did not do that here. So, I think I'm more optimistic about the plaintiff’s chances than Bob is I think that, you know, they might have a shot here on remand.

Anthony Sanders 24:22
You never almost accidentally walked off a cliff. Did you David?

David Lat 24:28
I think the dangerous for PokemonGo. We're just to my productivity, but not to my physical person.

Robert McNamara 24:34
I mean, it does raise the question and the, you know, the Ninth Circuit notes that the district court hasn't yet decided which states tort law is going to govern, but the usual products liability question is kind of could you have gotten the useful part of this project, the useful part of this product without the dangerous element that the plaintiff’s are complaining about? And for the life of me, I can't figure out what the useful part of this, what is it for, if not teenagers doing this again? Am I supposed to carry my phone with me at the track and snap myself when I'm going really fast, I just, it seems like 100% of the uses are in fact, the thing the plaintiffs are going to say was negligent?

Anthony Sanders 25:11

Well, it seems to me that the parallel is something like, you take a picture of yourself, and you can, you know, put a highlights on your face or put a cartoon hat and then send it to your friend, you know, those kinds of harmless device apps. And so, this is doing the same thing. But it's proving that you know, the reality of this dangerous thing that you're doing. And of course, you would never do that, if someone else didn't see it. And I think I may be, having been a long time since I took torts from Don Marshall at the University of Minnesota. I'm a little bit in the middle of the two of you on what the implications might be, but there does seem to be definitely some incongruity there. And I have to say, when I first started reading the case, I thought, what, what is Section 232? In here, this has nothing to do with Section 230. And this has just been a misreading, but the more I think about it, Bob, I there is some you know, although I think some of us are big fans of Section 230, from a free speech perspective, there is some rough around the edges that perhaps case law will straighten out. But, you know, it could be something down the road that might need to be given a look at if we have more litigation like this.

David Lat 26:31
Well you know, it's interesting to me, I kind of like decisions like this, because, overall, in general, I am a fan of Section 230. And this kind of makes sense. You know, we used to have reader comments on Above the Law, sometimes they were controversial, and I wouldn't want to be held responsible for those things. I didn't write them. So why should my website be held accountable? So generally, I like Section 230. But I think that it kind of became this monster that took on a life of its own. I think that when it was originally passed, when they referred to interactive service providers, they were probably talking about your internet company, like an AOL or something. And then it got expanded to include websites and blogs and commerce sites and all of these other things. And that's fine. I think I think it's true when people have these scholarly analyses of Section 230. And they say it's integral to the growth of the internet. Sure, I think that's true. So I like section 230, overall. But I also like it when section 230 is cabined by case law, because if the courts don't put limits on section 230, somebody else will, in whether it's former President Trump or Congress or someone, there's been a lot of talk has been over the past few years about getting rid of Section 230, dramatically cutting it back. And I don't want to ness, I worry with Section 230 reform that the medicine is worse than the disease.

Robert McNamara 27:42
I think that's right, that the value in cases like this is that it does establish that Section 230 means what it says and isn't just kind of a get out of jail free card because you are a tech company. And so, if in fact, it turns out that when you go over 100 miles an hour, the Snapchat app lights up and says congratulations on speeding, like then you can actually have a solid argument that they're inducing

people to do these things. And it doesn't matter that they're an interactive company, when they design a product that you know, gives you special cupcakes as a result of going 100 miles an hour in a residential area.

Anthony Sanders 28:15

We sometimes say on our legislative team at the Institute for Justice, especially say, an eminent domain statute, that's pretty good, but could use a little bit of help, you know, around the edges, we say, “Well, you know that that law is like a box of chocolates, you open it up, you don't know what's going to happen.” And so that could be with Section 230, even with the best of intentions. So, I like your point, David, about how the courts can keep things reasonable, and as they as they were intended. Well, I'd like to thank our friend David Lat. And my friend, Bob, and your friend too of course, for coming on today. This has been an interesting discussion about a couple of interesting cases. The next couple of weeks, we're going to have some more interesting episodes, including a focus on the Second Amendment and then a focus on non-delegation doctrines and, and majoritarianism in the state. So both of those should be some fascinating episodes. Please stay tuned for please sign up for David's newsletter. And from all of us. We ask you to get engaged.