

**RECEIVED**

**Jan 12 2023**

**SC Court of Appeals**

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM CHESTER COUNTY

The Honorable Brian M. Gibbons, Circuit Court Judge  
The Honorable John C. Hayes, III, Circuit Court Judge  
The Honorable J. Mark Hayes, II, Circuit Court Judge

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Appellate Case No. 2022-001312 (consolidated)  
Trial Court Case Nos. 2018-CP-12-00117  
and 2018-AP-12-00074

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Heidi Gersten, Ivanka Ayoub, Daniel Hubbard.....Plaintiffs,  
Of whom Heidi Gersten is the .....Appellant.

v.

Kevin Carter, Richard Davis, Joseph Tirbovich, Nationwide Mutual Insurance Company,  
Interinsurance Exchange of The Automobile Club, John Ammendola, Trustguard  
Insurance Co., SC Department of Public Safety, Chevrolet,  
GMC, Unknown Joe Does,.....Respondents.

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**KEVIN CARTER’S AND RICHARD DAVIS’ MOTION TO DISMISS**

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Respondents Kevin Carter and Richard Davis, by and through their undersigned attorney,  
move this Court to dismiss this appeal as to certain Orders included in the Notices of Appeal.  
Specifically, Respondents move to dismiss the appeal as to the following Orders:

- A. The April 26, 2018 Form 4 Order of the Honorable Brian M. Gibbons consolidating Appellant’s purported property damage arbitration action with her Circuit Court tort action;
- B. The September 19, 2018 Order of the Honorable John C. Hayes, III Granting Defendants Kevin Carters’ and Richard Davis’ Motion to Dismiss;
- C. The May 21, 2018 Order of Protection entered by the Honorable Brian M. Gibbons; and

D. The March 7, 2022 Order of Protection entered by the Honorable Brian M. Gibbons.

Appellant previously appealed the April 26, 2018 and September 19, 2018 Orders, and that appeal was dismissed when Appellant failed to comply with Orders of this Court. Therefore, those Orders are the law of the case. Moreover, the appeal of those Orders is now untimely.

The May 21, 2018 and March 7 2022 Orders are merely orders of protection from court appearances. The time of protection under those orders has long since passed, and Appellant did not oppose the Orders when they were entered. Therefore, the Orders of Protection are not proper for appeal.

This Motion to Dismiss does not include the August 22, 2022 Order of the Honorable J. Mark Hayes, II. However, Richard Davis had already been dismissed by the time of that Order. Therefore, granting of this Motion to Dismiss would dismiss Respondent Davis completely from this case.

This Motion is made pursuant to Rule 240 of the South Carolina Appellate Court Rules and is supported by the Memorandum and Citation of Authorities in Support and exhibits filed contemporaneously with this Motion.

Respectfully submitted,

s/Wesley B. Sawyer  
Wesley B. Sawyer, Esquire, SC Bar # 100229  
MURPHY & GRANTLAND, P.A.  
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Attorneys for Respondents Kevin Carter and  
Richard Davis

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Insurance Co., SC Department of Public Safety, Chevrolet,  
GMC, Unknown Joe Does,.....Respondents.

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**MEMORANDUM OF LAW AND CITATION OF AUTHORITIES IN SUPPORT OF  
KEVIN CARTER’S AND RICHARD DAVIS’ MOTION TO DISMISS**

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**SUMMARY**

This case is before this Court for the second time. In addition to appealing a recent dismissal of her claims against Kevin Carter, Appellant attempts to re-appeal numerous orders that were entered in 2018. Although the appeal of the more recent dismissal is procedurally proper, the remainder of the appeal is procedurally improper and should be dismissed. The 2018 Orders were the subject of a prior appeal and cannot be re-appealed now. Moreover, an appeal of the 2018 Orders of dismissal is plainly out of time.

Appellant also attempts to appeal Orders of Protection. Those Orders relate to periods of protection that have long-since passed, and Appellant never opposed the Orders of Protection when they were entered. The Orders are not the type of Orders that are subject to appeal.

### **BACKGROUND**

This consolidated appeal arises out of an automobile collision between a vehicle operated by Appellant and a vehicle operated by Kevin Carter. Appellant filed suit naming numerous other defendants, which gave rise to a series of orders in 2018 dismissing those defendants. Respondent Richard Davis was one of the defendants dismissed in the 2018 dismissals. As discussed below, Appellant unsuccessfully appealed those orders, and the case was remanded to proceed against Kevin Carter only.

After remand, Appellant failed to respond to discovery or otherwise prosecute her case. On August 22, 2022, the Honorable J. Mark Hayes, II, entered an Order dismissing Appellant's case. At the time of the Order, Kevin Carter was the only defendant in the case. Appellant has appealed this Order, and this Motion to Dismiss does not seek a dismissal of that portion of her appeal. The August 22, 2022 Order is the only Order properly before this Court on appeal.<sup>1</sup>

In addition to the August 22, 2022 Order, Appellants' new Notice of Appeal attaches the following Orders relevant to Kevin Carter and/or Richard Davis:

- A. An April 26, 2018 Form 4 Order of the Honorable Brian M. Gibbons consolidating Appellant's purported property damage arbitration action with her Circuit Court tort action;
- B. A September 19, 2018 Order of the Honorable John C. Hayes, III Granting Defendants Kevin Carters' and Richard Davis' Motion to Dismiss;

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<sup>1</sup> To be clear, the dismissal Order was proper and should ultimately be affirmed by this Court. However, Respondent Carter acknowledges that the dismissal Order will be addressed by the Court in the regular appellate process after briefing and, if necessary, oral argument.

- C. A May 21, 2018 Order of Protection entered by the Honorable Brian M. Gibbons; and
- D. A March 7, 2022 Order of Protection entered by the Honorable Brian M. Gibbons.

As to the April 26, 2018 and September 19, 2018 Orders (collectively referred to herein as the “2018 Orders”), Appellant already unsuccessfully appealed those Orders, and they are the law of the case. The May 21, 2018 and March 7, 2022 Orders are merely orders of protection from court appearances. They were never opposed, and the time for protection under those Orders has passed.

### ARGUMENT

**I. Appellant previously unsuccessfully appealed the 2018 Orders, and her new appeal is both procedurally improper and untimely.**

In early 2018, Appellant Heidi Gersten filed two actions in the Chester County Court of Common Pleas. The first action was purportedly filed as a property damage arbitration action, and the second action purported to seek personal injury damages arising out of the same automobile accident. On April 26, 2018, Judge Gibbons – acting as the Chief Administrative Judge of Chester County – entered a Form 4 Order consolidating the two cases. (Ex. A, Form 4 Order).

Respondents Kevin Carter and Richard Davis, along with the various other defendants, filed Motions to Dismiss or, in the Alternative, Motions to Strike and Sever. Judge John Hayes held a hearing on the various motions on September 5, 2018 and indicated from the bench that he would be granting the various motions to dismiss. He subsequently issued a series of dismissal orders addressing the various defendants’ respective motions. The Order granting Carter and Davis’ Motion to Dismiss was entered on September 18, 2018. (Ex. B, Order Granting Defendant Kevin Carter’s and Richard Davis’ Motion to Dismiss). On September 19, 2018, counsel for Respondents Carter and Davis placed copies of the Order in the mail to Appellant and Ivanka

Ayoub. (Ex. C, Affidavit of Facts).

Nineteen days later, Appellant filed untimely Motions to Alter or Amend regarding the April 26, 2018 consolidation Order and the September 5, 2018 Order. Judge Hayes denied that motion by a Form 4 on October 16, 2018. (Ex. D, October 16, 2018 Order).

On November 21, 2018, Respondent Carter and Davis received a Notice of Appeal, purporting to appeal the April 26, 2018, September 18, 2018, and October 16, 2018 Orders.<sup>2</sup> Appellants filed the Notice of Appeal with the Court of Appeals by fax on November 27, 2018 – more than 30 days after entry of the Order denying the Motion to Alter or Amend and more than 10 days after serving the Second Notice of Appeal. Appellant filed the Notice of Appeal with the clerk of the lower court on November 28, 2019.

Because the Notice of Appeal was untimely, Respondents Carter and Davis filed a Motion to Dismiss the Appeal. (Ex. E, Jan. 30, 2019 Motion to Dismiss Appeal as to Kevin Carter and Richard Davis). Appellant filed numerous motions for extensions of time to respond to the Motion. However, on April 9, 2019, this Court entered a final extension and warned that no further extensions would be granted. (Ex. F, April 9, 2019 Order).

Instead of complying with the Order, Appellant filed more requests for extensions. On May 2, 2019, this Court entered an Order directing Appellant to provide the specific dates she received written notice of entry of each order on appeal, or her appeal would be dismissed. (Ex. G, May 2, 2019 Order). When Appellant failed to comply, this Court dismissed her appeal. (Ex. H, May 14, 2019 Order). This Court subsequently denied Appellant's Petition to Reinstate her appeal. Appellant then sought a Writ of Certiorari, which was also denied. (Ex. I, April 24, 2020 Order).

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<sup>2</sup> Notably, Appellant has not included the October 16, 2018 Order in her current appeal.

“The doctrine of the law of the case prohibits issues that have been decided in a prior appeal from being relitigated in the trial court in the same case.” *Atkins v. Wilson*, 417 S.C. 3, 17, 788 S.E.2d 228, 235 (Ct. App. 2016) (quoting *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997) (cleaned up)). Likewise, it is an “elementary rule that conclusions announced on a former appeal will not be disturbed on a subsequent appeal.” *Salley v. McCoy*, 186 S.C. 1, 195 S.E. 132, 135 (1937) (citing *Cato v. Atlanta & C. A. L. R. Co.*, 164 S.C. 123, 162 S.E. 239 (1931)); *see also Robert E. Lee & Co. v. Commission of Public Works of City of Greenville*, 250 S.C. 394, 399, 158 S.E.2d 185, 188 (1967) (holding issue ruled upon in prior appeal “is foreclosed by . . . the prior appeal, which is binding upon the parties both as a precedent and as the law of this case.”).

Appellant already appealed – albeit untimely – the 2018 Orders. Because Appellant failed to comply with orders of this Court, that appeal was dismissed, and the Supreme Court declined to grant certiorari of that dismissal. Therefore, the dismissal of the prior appeal is law of the case, and Appellant cannot re-appeal the 2018 Orders. Moreover, Appellant’s appeal – over three years after the dismissals – is substantially out of time and barred. *See* Rule 203(b)(1), SCACR (“A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment.”). Therefore, Appellant’s appeal of the 2018 Orders should be dismissed.

## **II. Orders of Protection that were not objected to at the time are not appealable.**

Appellant also appeals two orders that granted protection to counsel for Carter and Davis from court appearances for the periods of June 25, 2018-July 2, 2018 and April 11, 2022-April 18, 2022, respectively. Appellant never opposed those Orders when they were entered, and the orders are purely interlocutory in nature. They are simply not subject to appeal, and they certainly are not subject to appeal months or years after the protection afforded by the orders has passed.

**CONCLUSION**

For the above-stated reasons, Appellant's Notice of Appeal should be dismissed as to the 2018 Orders and the Protection Orders.

Respectfully submitted this 12<sup>th</sup> day of January, 2023.

*s/Wesley B. Sawyer*  
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Attorneys for Respondents Kevin Carter and  
Richard Davis

Heidi Gersten et al  
PLAINTIFF(S)

Kevin Carter et al  
DEFENDANT(S)

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  
 Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court:

This matter is outside the scope of an arbitration. This matter shall be placed on the regular Common Pleas docket for process. This case shall be consolidated with case number 2018-CP-12-00117.

**ORDER INFORMATION**

This order  ends  does not end the case.  See Page 2 for additional information.

**For Clerk of Court Office Use Only**

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/26/2018 .

Heidi Gersten for Heidi Gersten  
Ivanka Ayoub  
Heidi Gersten for Heidi Gersten

**NAMES OF TRADITIONAL FILERS SERVED BY MAIL**



**Court Reporter:**

**E-Filing Note:** The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Chester Common Pleas

**Case Caption:** Heidi Gersten VS Kevin Carter , defendant, et al

**Case Number:** 2018CP1200074

**Type:** Order/Electronic Form 4

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHESTER

CIVIL ACTION NO: 2018-CP-12-00117

Heidi Gersten, Ivanka Ayoub, Daniel  
Hubbard,

Plaintiff,

**ORDER GRANTING DEFENDANTS KEVIN  
CARTER’S AND RICHARD DAVIS’  
MOTION TO DISMISS**

vs.

Kevin Carter, Richard Davis, Joseph  
Tribovich, Nationwide Insurance Company,  
Interinsurance Exchange of the Automobile  
Club, John Ammendola, Trustguard Insurance  
Company, SC Department of Public Safety,  
Chevrolet, GMC, Unknown John Does,

Defendants.

This matter comes before the Court upon Defendants Kevin Carter’s and Richard Davis’ Motion to Dismiss and Motion to Strike or, in the Alternative, Motion to Sever. The Court held a hearing on this Motion and a number of other motions on September 5, 2018. For the reasons set forth below, Defendants Carter’s and Davis’ Motion is granted in part and denied in part.

**PROCEDURAL BACKGROUND**

This action arises out of an automobile collision that took place on March 19, 2015 between a vehicle operated by Heidi Gersten and allegedly owned by Ivanka Ayoub and a vehicle operated and owned by Kevin Carter. Plaintiff Gersten originally filed a property damage arbitration claim on February 21, 2018 (hereinafter “Arbitration Action”). The claim named Kevin Carter, Richard Davis, Nationwide Mutual Insurance Company, Interinsurance of the Automobile Club, and Trustguard Insurance as defendants.



Gersten then created a “First Amended Claim for Property Damage Verified” (hereinafter “Amended Arbitration Complaint”) on or about March 2, 2018, however, she did not file the Amended Arbitration Complaint at that time. The Amended Arbitration Complaint added Gersten’s mother, Ivanka Ayoub, as a claimant and added Joseph Tirbovich and John Ammendola as additional defendants. Gersten and Ayoub never obtained an Amended Summons listing Ayoub as a claimant, and the Amended Arbitration Complaint was not filed until March 27, 2018.

On March 16, 2018, Gersten, Ayoub, and Daniel Hubbard filed the above-captioned case in Circuit Court purporting to seek recovery for injuries arising out of the same collision. In addition to the defendants named in the Amended Arbitration Complaint, the Plaintiffs named the South Carolina Department of Public Safety, Blackwell (*sic*), Chevrolet, GMC, and unknown John Doe defendants.

Kevin Carter, Richard Davis, and the other Defendants who have allegedly been served in the case filed motions to dismiss both cases.<sup>1</sup> Interinsurance Exchange sought to dismiss the Arbitration Action, in part, on the grounds that the arbitration panel lacked jurisdiction over some of the claims asserted in the Arbitration Action. On April 26, 2018, Judge Gibbons, acting as the Chief Administrative Judge for Chester County Circuit Court, entered an Order finding the claims asserted in the Arbitration Action were outside the scope of arbitration. Therefore, he transferred the Arbitration Action to the Common Pleas docket and consolidated the case with the Circuit Court action. (April 26, 2018 Form 4 Order). Because the cases have been consolidated, this Order will address the allegations set forth in the Circuit Court Complaint. However, the Court

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<sup>1</sup> The Court has no record of Blackwell, GMC, Chevrolet or any John Doe defendants being served. Furthermore, John Ammendola and Joseph Tirbovich deny that they have been served.

has reviewed all three Complaints, and the Court's ruling would be the same regardless of which pleading(s) were in effect.

This case was set for a hearing on the various pending motions for September 5, 2018. The case was also placed on the non-jury roster for a merits hearing for the same week. Plaintiff Heidi Gersten filed a motion for continuance. At the hearing, the defendants all consented to continuing the merits hearing of the case, but they requested that the motions be heard. Gersten consented to the Court proceeding with hearing the various motions.

### LAW

Carter and Davis' Motion to Dismiss seeks the following relief:

- a) Dismissal of all claims asserted against Richard Davis;
- b) Dismissal of Daniel Hubbard's claims;
- c) Dismissal of Ivanka Ayoub's claims; and
- d) Dismissal of all causes of action asserted by Heidi Gersten with the exception of the negligence cause of action.<sup>2</sup>

The Court will address each item in turn.

#### **A. All Causes of Action as to Defendant Richard Davis.**

The Complaint only references Richard Davis in one paragraph, stating "The Defendants Kevin Carter and Richard Davis reside in Iredell County, North Carolina." (Compl. ¶ 2). The Complaint does not allege Richard Davis was involved in the automobile collision. Pursuant to Rule 12(b)(6), SCRCP, a Complaint should be dismissed if it fails "to state facts sufficient to

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<sup>2</sup> Carter and Davis also sought dismissal of the co-defendants. However, the co-defendants each moved on their own behalf for dismissal. Those motions were also heard at the September 5, 2018 hearing, and the Court will grant each of those motions in separate orders.

constitute a cause of action.” Rule 12(b)(6), SCRCPP. The Complaint alleges no factual allegations against Defendant Richard Davis.<sup>3</sup>

Moreover, Richard Davis is a citizen and resident of the State of North Carolina. The Complaint does not allege any actions that Richard Davis took in this State. Therefore, this Court lacks personal jurisdiction over Richard Davis pursuant to Rule 12(b)(2), SCRCPP. For both of these reasons, the claims against Richard Davis are dismissed.

**B. Daniel Hubbard’s claims.**

Kevin Carter and Richard Davis moved to dismiss Daniel Hubbard’s claims on the ground that South Carolina does not recognize a cause of action for loss of a sibling’s consortium. However, Daniel Hubbard did not appear for the hearing on the Motion to Dismiss. Therefore, his claims are dismissed for failure to prosecute pursuant to Rule 41(b), SCRCPP.<sup>4</sup>

**C. Ivanka Ayoub’s claims.**

Plaintiff Ayoub appears to have asserted a property damage claim in the Amended Arbitration Complaint and a cause of action for loss of consortium in the Circuit Court Complaint. Ayoub is Gersten’s mother. The Circuit Court Complaint does not allege Ayoub was personally

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<sup>3</sup> The Arbitration Action Complaint alleges Davis co-owned the vehicle operated by Carter. Even if that were true, co-ownership of a vehicle does not support a cause of action. *See Fletcher v. Anderson*, 27 Kan. App. 2d 276, 3 P. 3d 558, 567-68 (2000) (because “no action for negligent entrustment can occur where the person entrusting the vehicle lacked a superior or exclusive right of control over the vehicle,” a nonowner is not liable for returning car to owner); *McGlothlin v. Municipality of Anchorage*, 991 P.2d 1273, 1280 (Alaska 1999) (“doctrine of negligent entrustment requires that the defendant have a greater right of possession or control of the chattel than the person to whom he entrusts it”); *De Blanc ex rel. De Blanc v. Jensen*, 59 S.W.3d 373 (Tex. Ct. App. 2001) (“In order for the [Defendant] to be liable under a theory of negligent entrustment, we would have to conclude that it is negligent for a nonowner to return control of a vehicle to its owner. We decline to so hold.”).

<sup>4</sup> Even if Hubbard had appeared at the hearing, his claim would nonetheless fail for the reasons set out in Part C. below.

involved in the accident, but it does allege she “suffered, among other things, loss of consortium.” (Compl. ¶ 103).

Our Supreme Court has refused to recognize a cause of action in tort for filial loss of consortium. *See Doe v. Greenville County School Dist.*, 375 S.C. 63, 70, 651 S.E.2d 305, 308 (2007) (“Accordingly, in the absence of some action from the legislature, this Court has no authority upon which it could rely in finding that South Carolina law recognizes claims for loss of filial consortium.”).<sup>5</sup> While South Carolina does recognize loss of spousal consortium, that cause of action was expressly recognized by the South Carolina General Assembly. *See* S.C. Code Ann. § 15-75-20. Our Supreme Court has held the absence of a similar statutory cause of action for filial loss of consortium indicates the General Assembly did not intend to recognize such causes of action. *See Greenville County School Dist.*, 375 S.C. at 69, 651 S.E.2d at 308.

Because South Carolina does not recognize claims for loss of filial consortium, the causes of action asserted by Ayoub in the Circuit Court Complaint must be dismissed.

Carter and Davis also seek to dismiss the property damage claim asserted by Ayoub in the Arbitration Action on Rule 12(b)(8) grounds. Because the Arbitration Action has been consolidated with the Circuit Court action, the Court finds that motion is now moot. At the hearing, Carter and Davis also raised the statute of limitations as an additional ground for dismissal of the property damage claim. The Court finds that a ruling on the statute of limitations issue is premature at this time, but Defendant Carter may file a separate motion on that issue in the future.

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<sup>5</sup> *See also Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996) (declining to recognize loss of filial consortium claim of child relating to injury to parent); *Kirkland v. Sam’s East, Inc.*, 411 F. Supp. 2d 639, 641 (D.S.C. 2005) (“South Carolina does not recognize a cause of action for filial loss of consortium”).

**D. All Other Causes of Action asserted by Gersten with the Exception of Negligence.**

The Complaint lists eighteen separate causes of action. With the exception of the negligence claim, these causes of action merely allege the legal elements of various other causes of action, and several of these causes of action fail to even allege the basic legal elements. Rule 8(a) of the South Carolina Rules of Civil Procedure states that a pleading setting forth a cause of action “shall contain . . . a short and plain statement of the facts showing the pleader is entitled to relief.” Rule 8(a), SCRPC. In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court’s analysis is limited solely to the Complaint itself, and no other documents may be considered. *See Woodell by Allen v. Marion School Dist. One*, 307 S.C. 297, 298, 414 S.E.2d 794, 794 (Ct. App. 1992). Moreover, a “trial court must dismiss a claim pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, if the pleadings, when taken in the light most favorable to the plaintiff, fail to allege sufficient facts to constitute a cause of action.” *Trancik v. USAA Ins. Co.*, 354 S.C. 549, 552, 581 S.E.2d 858, 860 (Ct. App. 2003).

Plaintiff must allege facts supporting each element of the causes of action asserted in the Complaint. She has failed to do so. Defendant Carter concedes the Complaint alleges sufficient facts to create a cause of action for negligence between Plaintiff Heidi Gersten and Defendant Kevin Carter. However, the Complaint alleges no facts that would support the other causes of action enumerated in the Complaint. Therefore, all causes of action with the exception of Gersten’s negligence claim will be dismissed pursuant to Rule 12(b)(6).

**E. Carter and Davis’ other motions.**

Carter and Davis also moved to dismiss the claims asserted against the various co-defendants or, in the alternative, to sever the causes asserted against those defendants. As noted above, the Court is granting the motions to dismiss the co-defendants via separate orders.

Therefore, Carter and Davis' motion to dismiss the co-defendants or, in the alternative, to sever is denied as moot.

In addition to moving to dismiss various claims asserted in the Complaint, Carter and Davis also moved to strike a number of paragraphs in the Complaints. Shortly before the hearing on the Defendants' various motions, Gersten apparently served an Amended Complaint on some of the defendants in the Circuit Court action. Counsel for Carter agreed at the hearing on this Motion that the Motion to Strike would need to be addressed after the Amended Complaint has been filed. Therefore, Carter's Motion to Strike is denied without prejudice and with leave to refile.

### CONCLUSION

For the above-stated reasons, the Court finds Defendants Kevin Carter's and Richard Davis' Motions should be granted in part and denied in part. It is ORDERED, ADJUDGED, and DECREED that:

- 1) All causes of action asserted against Richard Davis are dismissed pursuant to Rule 12(b)(6), SCRPC.
- 2) The causes of action asserted by Daniel Hubbard are dismissed pursuant to Rule 41(b), SCRPC for failure to prosecute.
- 3) Ivanka Ayoub's loss of consortium claim is dismissed pursuant to Rule 12(b)(6), SCRPC because South Carolina does not recognize a claim for filial loss of consortium.
- 4) All of the remaining causes of action against Kevin Carter with the exception of Heidi Gersten's negligence cause of action for personal injuries and property damage and Ivanka Ayoub's negligence cause of action for property damage are dismissed pursuant to Rule 12(b)(6), SCRPC.
- 5) Carter's Motion to Dismiss the property damage claim by Ivanka Ayoub is denied, but Carter may file a separate motion based on his statute of limitations argument at a later time.
- 6) Carter's Motion to Sever is denied as moot.
- 7) Carter's Motion to Strike is denied without prejudice and with leave to refile in light of the recently-served Amended Complaint.

8) Carter's and Davis' Motion to Dismiss pursuant to 12(b)(8) is denied as moot.

It is so **ORDERED**.

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John C. Hayes, III  
Circuit Court Judge



Chester Common Pleas

**Case Caption:** Heidi Gersten , plaintiff, et al VS Kevin Carter , defendant, et al

**Case Number:** 2018CP1200117

**Type:** Order/Other

So Ordered

s/John C. Hayes III 2049

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Case No. 2018-CP-12-00117  
2018-AP-12-00074

**RECEIVED**  
JAN 31 2019  
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Heidi Gersten, Ivanka Ayoub, Daniel Hubbard.....Plaintiffs,

Of whom Heidi Gersten and Ivanka Ayoub are, .....Appellants.

v.

Kevin Carter, Richard Davis, Joseph Tribovich, Nationwide Mutual Insurance Company,  
Interinsurance Exchange of The Automobile Club, John Ammendola, Trustguard Insurance  
Co., Blackwell, SC Department of Public Safety, Chevrolet, GMS, Unknown Joe Does,  
.....Respondents.

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**AFFIDAVIT OF FACTS**

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I, Wesley B. Sawyer, being first duly cautioned and sworn, state as follows:

1. I am the attorney for Respondents Kevin Carter and Richard Davis.
2. I mailed copies of the September 18, 2018 Order to Appellants on September 19, 2018.
3. I received a Notice of Appeal by certified mail on October 22, 2018 (attached to Respondents Carter's and Davis's Memorandum of Authorities in Support of Motion to Dismiss as Exhibit D, including a double-sided copy of the mailing envelope with a stamped date of receipt). As noted in the Certificate of Service and the date stamp on the envelope, it appears the First Notice of Appeal was mailed on October 19, 2018.
4. I received a second Notice of Appeal by certified mail on November 21, 2018 (attached to Respondents Carter's and Davis's Memorandum of Authorities in Support of Motion to Dismiss as Exhibit E). As noted in the Certificate of Service and the postage stamp



on the envelope, it appears the Second Notice of Appeal was mailed on November 15,  
2018.

Further Affiant sayeth naught.

  
\_\_\_\_\_  
Wesley B. Sawyer

SWORN TO and subscribed before me this

30<sup>th</sup> day of January, 2019

Orlene L. Black (L.S.)  
Notary Public for SC

My Commission Expires: 7-29-19

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Case No. 2018-CP-12-00117  
2018-AP-12-00074

**RECEIVED**  
JAN 31 2019  
SC Court of Appeals

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard.....Plaintiffs,

Of whom Heidi Gersten and Ivanka Ayoub are, .....Appellants.

v.

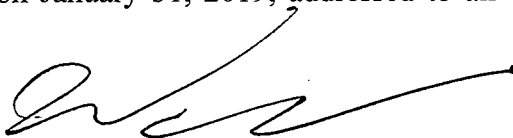
Kevin Carter, Richard Davis, Joseph Tribovich, Nationwide Mutual Insurance Company, Interinsurance Exchange of The Automobile Club, John Ammendola, Trustguard Insurance Co., Blackwell, SC Department of Public Safety, Chevrolet, GMS, Unknown Joe Does,

.....Respondents.

**PROOF OF SERVICE**

I certify that I have served the Motion to Dismiss Appeal as to Kevin Carter and Richard Davis, Affidavit of Facts, and Memorandum of Authorities in Support of Respondents Kevin Carter's and Richard Davis' Motion to Dismiss by depositing a copy of it in the United States Mail, postage prepaid, on January 31, 2019, addressed to all attorneys of record listed below.

January 31, 2019



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Attorney for Respondents Kevin  
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Appellants

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(Attorney for Nationwide Mutual Ins. Co.)  
(Attorney for Joseph Tirbovich)  
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Michael R. Burchstead, Esquire  
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And Herbert Blackwell)  
(803) 806-8222

Heidi Gersten et al  
PLAINTIFF(S)

Kevin Carter et al  
DEFENDANT(S)

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED** (*CHECK REASON*):  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  
 Other
- ACTION STRICKEN** (*CHECK REASON*):  Rule 40(j), SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):  
 Affirmed;  Reversed;  Remanded;  
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court:

As to the order of September 5, 2018, Plaintiff's motion of October 8, 2018 is denied without a hearing. Said order does not violate plaintiffs' due process rights under the Constitution of the United States or South Carolina.

**ORDER INFORMATION**

This order  ends  does not end the case.  See Page 2 for additional information.

**For Clerk of Court Office Use Only**

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 10/16/2018 .

Unknown John Does  
GMC  
Chevrolet  
Ivanka Ayoub  
Heidi Gersten for Heidi Gersten  
Heidi Gersten for Heidi Gersten

**NAMES OF TRADITIONAL FILERS SERVED BY MAIL**



**Court Reporter:**

**E-Filing Note:** The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

---



Chester Common Pleas

**Case Caption:** Heidi Gersten , plaintiff, et al VS Kevin Carter , defendant, et al

**Case Number:** 2018CP1200117

**Type:** Order/Electronic Form 4

So Ordered

s/John C. Hayes III 2049

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Case No. 2018-CP-12-00117  
2018-AP-12-00074

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard.....Plaintiffs,

Of whom Heidi Gersten and Ivanka Ayoub are, .....Appellants.

v.

Kevin Carter, Richard Davis, Joseph Tribovich, Nationwide Mutual Insurance Company,  
Interinsurance Exchange of The Automobile Club, John Ammendola, Trustguard Insurance  
Co., Blackwell, SC Department of Public Safety, Chevrolet, GMS, Unknown Joe Does,  
.....Respondents.

**MOTION TO DISMISS APPEAL AS TO  
KEVIN CARTER AND RICHARD DAVIS**

Respondents Kevin Carter and Richard Davis, by and through their undersigned attorney,  
move this Court to dismiss the appeal against them because Appellants did not timely serve the  
Notice of Appeal on this Court. Respondents Carter and Davis also file a Memorandum of  
Authorities in support and an Affidavit of Facts.

This Motion is made pursuant to Rule 240 of the South Carolina Appellate Court Rules  
and is supported by the affidavits, memoranda of law, and such other documents filed with this  
Motion.

Respectfully submitted,

*[Handwritten Signature]*  
RECEIVED  
JAN 31 2019  
SC Court of Appeals  
Wesley B. Sawyer, Esquire, SC Bar # 100449  
Murphy & Grantland, PA  
P.O. Box 6648



Columbia, South Carolina 29260  
(803) 782-4100  
wsawyer@murphygrantland.com  
Attorneys for Respondents Kevin Carter and  
Richard Davis

January 30, 2019

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Case No. 2018-CP-12-00117  
2018-AP-12-00074

**RECEIVED**  
JAN 31 2019  
SC Court of Appeals

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard.....Plaintiffs,

Of whom Heidi Gersten and Ivanka Ayoub are, .....Appellants.

v.

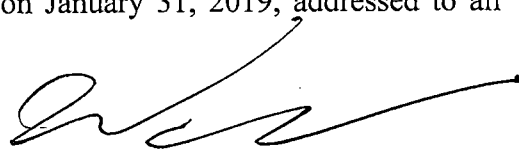
Kevin Carter, Richard Davis, Joseph Tribovich, Nationwide Mutual Insurance Company, Interinsurance Exchange of The Automobile Club, John Ammendola, Trustguard Insurance Co., Blackwell, SC Department of Public Safety, Chevrolet, GMS, Unknown Joe Does,

.....Respondents.

**PROOF OF SERVICE**

I certify that I have served the Motion to Dismiss Appeal as to Kevin Carter and Richard Davis, Affidavit of Facts, and Memorandum of Authorities in Support of Respondents Kevin Carter's and Richard Davis' Motion to Dismiss by depositing a copy of it in the United States Mail, postage prepaid, on January 31, 2019, addressed to all attorneys of record listed below.

January 31, 2019



Wesley B. Sawyer, Esquire  
Murphy & Grantland, P.A.  
P.O. Box 6648  
Columbia, SC 29260  
(803) 782-4100  
Attorney for Respondents Kevin  
Carter and Richard Davis

Heidi Gersten  
Ivanka Ayoub  
1438 W. Lantana Rd., #330  
Lantana, FL 33462  
(323) 245-6142  
Appellants

Other Counsel of Record:  
David R. Sligh, Esquire  
P. O. Box 2116  
Myrtle Beach, SC 29578  
(Attorney for Nationwide Mutual Ins. Co.)  
(Attorney for Joseph Tirbovich)  
(843) 213-5519

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Michael R. Burchstead, Esquire  
Collins & Lacy, PC  
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And John Ammendola)  
(803) 255-0404

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(Attorney for Defendant Interinsurance  
Exchange of the Automobile Club)  
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Davidson & Lindemann, PA  
P. O. Box 8568  
Columbia, SC 29202  
(Attorneys for SC Dept. of Public Safety  
And Herbert Blackwell)  
(803) 806-8222

# The South Carolina Court of Appeals

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard, Plaintiffs,

Of whom Heidi Gersten and Ivanka Ayoub are  
Appellants,

v.

Kevin Carter, Richard Davis, Joseph Tirbovich,  
Nationwide Insurance Company, Interinsurance  
Exchange of the Automobile Club, John Ammendola,  
Trustguard Ins. Co., Blackwell, SC Department of Public  
Safety, Chevrolet, GMC, Unknown John Does,  
Respondents.

Appellate Case No. 2018-002115

The Honorable John C. Hayes, III,  
The Honorable Brian M. Gibbons  
Chester County

Trial Court Case No. 2018CP1200117, 2018CP1200074

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## ORDER

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The time for serving and filing the amended return to the motion to dismiss filed by Kevin Carter and Richard Davis is hereby extended until April 15, 2019. If the amended return is not actually received in this office on or before April 15, 2019, the Court will consider only the motions and the filings previously received in this matter. No further extensions will be granted absent extraordinary circumstances.

FOR THE COURT

BY *V. Claire Allen, Deputy*  
CLERK

**EXHIBIT**

**F**

**FILED**

*April 9, 2019*

Columbia, South Carolina

cc:

Heidi Gersten

Ivanka Ayoub

Peter H. Dworjanyn, Esquire

Michael Reid Burchstead, Esquire

Wesley Brian Sawyer, Esquire

William Reynolds Williams, Esquire

David Richard Sligh, Esquire

William H. Davidson, II, Esquire

# The South Carolina Court of Appeals

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard, Plaintiffs,

Of whom Heidi Gersten and Ivanka Ayoub are  
Appellants,

v.

Kevin Carter, Richard Davis, Joseph Tirbovich,  
Nationwide Insurance Company, Interinsurance  
Exchange of the Automobile Club, John Ammendola,  
Trustguard Ins. Co., Blackwell, SC Department of Public  
Safety, Chevrolet, GMC, Unknown John Does,  
Respondents.

Appellate Case No. 2018-002115

---

## ORDER

---

By letter of February 15, 2019, this court required Appellants to file a response within ten days providing specific and individual dates indicating when Appellants received written notice of entry of each of the separate orders on appeal. This court also required Appellants to address the timeliness of their motion to alter or amend, which was filed on October 8, 2018. This court has granted Appellants multiple extensions to file their response, but Appellants have failed to comply with this court's request. Unless Appellants file a response as to the specific dates Appellants received written notice of entry of each of the orders on appeal, including the September 18, 2018 order, by May 10, 2019, this appeal will be dismissed. No further extensions will be granted.

  
FOR THE COURT

Columbia, South Carolina

**FILED**

May 2, 2019

**EXHIBIT**

**G**

cc:

Heidi Gersten

Ivanka Ayoub

Peter H. Dworjanyn, Esquire

Michael Reid Burchstead, Esquire

Wesley Brian Sawyer, Esquire

William Reynolds Williams, Esquire

David Richard Sligh, Esquire

William H. Davidson, II, Esquire

# The South Carolina Court of Appeals

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard, Plaintiffs,

Of whom Heidi Gersten and Ivanka Ayoub are  
Appellants,

v.

Kevin Carter, Richard Davis, Joseph Tirbovich,  
Nationwide Insurance Company, Interinsurance  
Exchange of the Automobile Club, John Ammendola,  
Trustguard Ins. Co., Blackwell, SC Department of Public  
Safety, Chevrolet, GMC, Unknown John Does,  
Respondents.

Appellate Case No. 2018-002115

The Honorable John C. Hayes, III,  
The Honorable Brian M. Gibbons  
Chester County

Trial Court Case No. 2018CP1200117, 2018CP1200074

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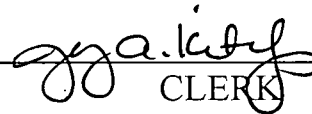
## ORDER

---

Appellant has failed to comply with the Court's order dated May 2, 2019.  
Accordingly, this matter is dismissed. The remittitur will be sent as provided by  
Rule 221(b), SCACR.

FOR THE COURT

BY

  
CLERK

**FILED**

**EXHIBIT  
H**

May 14, 2019

Columbia, South Carolina

cc:

Heidi Gersten

Ivanka Ayoub

Peter H. Dworjanyn, Esquire

Michael Reid Burchstead, Esquire

Wesley Brian Sawyer, Esquire

William Reynolds Williams, Esquire

David Richard Sligh, Esquire

William H. Davidson, II, Esquire

# The Supreme Court of South Carolina

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard, Plaintiffs,

Of whom Heidi Gersten and Ivanka Ayoub are  
Petitioners,

v.

Kevin Carter, Richard Davis, Joseph Tirbovich,  
Nationwide Insurance Company, Interinsurance  
Exchange of the Automobile Club, John Ammendola,  
Trustguard Ins. Co., Blackwell, SC Department of Public  
Safety, Chevrolet, GMC, Unknown John Does,  
Respondents.

Appellate Case No. 2019-001484  
Trial Court Case Nos. 2018-CP-12-00117, 2018-CP-12-  
00074

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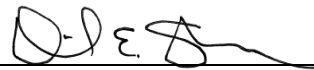
## ORDER

---

Based on the vote of the Court, the petition for a writ of certiorari is denied.

FOR THE COURT

BY



CLERK

Columbia, South Carolina  
April 24, 2020

cc: Peter H. Dworjanyn, Esquire  
Michael Reid Burchstead, Esquire

**EXHIBIT**

**I**

William H. Davidson, II, Esquire  
Wesley Brian Sawyer, Esquire  
William Reynolds Williams, Esquire  
David Richard Sligh, Esquire  
Ivanka Ayoub  
Heidi Gersten

**RECEIVED**  
**Jan 12 2023**  
**SC Court of Appeals**

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM CHESTER COUNTY  
The Honorable Brian M. Gibbons, Circuit Court Judge  
The Honorable John C. Hayes, III, Circuit Court Judge  
The Honorable J. Mark Hayes, II, Circuit Court Judge

---

Appellate Case No. 2022-001312 (consolidated)  
Trial Court Case Nos. 2018-CP-12-00117  
and 2018-AP-12-00074

---

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard.....Plaintiffs,  
Of whom Heidi Gersten is the .....Appellant.

v.

Kevin Carter, Richard Davis, Joseph Tirbovich, Nationwide Mutual Insurance Company,  
Interinsurance Exchange of The Automobile Club, John Ammendola, Trustguard  
Insurance Co., SC Department of Public Safety, Chevrolet,  
GMC, Unknown Joe Does,.....Respondents.

---

**PROOF OF SERVICE**

---

I certify that I have served Respondents Kevin Carter’s and Richard Davis’ Motion to Dismiss, Memorandum in Support of Motion to Dismiss, and Exhibits by email only to opposing counsel and by depositing a copy of it in the United States Mail, postage prepaid to Heidi Gersten, on January 12, 2023.

s/Wesley B. Sawyer  
Wesley B. Sawyer, Esquire (SC Bar # 100229)  
Murphy & Grantland, P.A.  
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Attorney for Respondents Kevin Carter and Richard  
Davis

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Appellant

Other Counsel of Record:  
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(Attorney for Joseph Tirbovich)  
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[pamela.larson@wbd-us.com](mailto:pamela.larson@wbd-us.com)

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[jlaffitte@gwblawfirm.com](mailto:jlaffitte@gwblawfirm.com)  
(Attorneys for Respondent Trustguard  
Insurance Company)  
(Attorneys for John Ammendola)

January 12, 2023

**RECEIVED**  
**Jan 12 2023**  
**SC Court of Appeals**

Honorable Jenny A. Kitchings  
South Carolina Court of Appeals  
1015 Sumter Street  
P.O. Box 11629  
Columbia, SC 29211

Re: Heidi Gersten, et al. v. Kevin Mark Carter, et al.  
Appellate Case No.: 2022-001312  
Claim No.: 553954-gc  
Date of Loss: 03-19-15  
Our File No.: 1150-0747

Dear Ms. Kitchings:

Attached please find Respondents Kevin Carter and Richard Davis Motion to Dismiss, Memorandum in Support of Motion to Dismiss, Exhibits, and Proof of Service for filing with the Court.

By copy of this letter I am serving the Motion and Memorandum on opposing counsel and parties.

With warm personal regards, I am

Sincerely yours,

*S/Wesley B. Sawyer*

Wesley B. Sawyer

WBS/dlb

CC: Heidi Gersten, via U.S. Mail  
Counsel of Record for all represented parties (*via email*)