

RECEIVED

Jul 31 2023

SC Court of Appeals

THE STATE of SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

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

Case No. 2018-CP-12-00117
2028-AP-12-00074

Appellate Case Nos. 2022-001312 and 2022-001390

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard, Plaintiffs,

Of whom Heidi Gersten is Appellant,

v.

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

MOTION for LEAVE to FILE RULE 60 (b), SCRPC, MOTION And PETITION for LIFT of AUTOMATIC STAY, REMAND And STAY of APPEAL PENDING TRIAL COURT RULING on RULE 60 (b), SCRPC, MOTION And INITIAL BRIEF And APPENDIX And DESIGNATION OF MATTER with LEAVE TO AMEND PERTAINING TO RESPONDENT KEVIN CARTER

Heidi Gersten, Appellant
All Rights Reserved without Prejudice
1438 W. Lantana Rd. #330
Lantana, FL 33462
323-245-6142
hanginhangout@gmail.com

The Appellant Heidi Gersten, (hereinafter “GERSTEN”) moves this Court, pursuant Rule 60 (b), SCRCF and Rule 241, SCACR, for leave of court to file her Rule 60 (b), SCRCF motion for RELIEF FROM JUDGMENT OR ORDER, pertaining to Respondent Kevin Carter, lifting the automatic stay in place of the trial court, remand, and staying this instant appeal pending the trial court ruling on the said Rule 60 (b), SCRCF, motion, and states as the basis or grounds the following:

1. On August 22, 2022, Judge J. Mark Hayes, II, entered an order dismissing Respondent Kevin Carter’s, (hereinafter CARTER), motion to dismiss.
2. On August 22, 2022, Wesley B. Sawyer, Attorney for CARTER, emailed
3. GERSTEN said order in item #1.
4. On September 21, 2022, GERSTEN served CARTER with notice of appeal.
5. On October 3, 2022, GERSTEN filed said notice of appeal with this South Carolina Court of Appeals (hereinafter COURT) and assigned Case No.: 2022-001390.
6. On November 8, 2023, began a series of motions to substitute counsel and motions to dismiss were filed by various attorneys for numerous respondents of Appellate case 2022-001390 placing the appeal in abeyance. (Not all listed here for brevity.)
7. On November 9, 2022, a letter from this COURT stated in part, “...Appellate case 2022-001390 will be consolidated with appellate case

2022-001312 for consideration by the Court under the South Carolina Appellate Court Rules (SCACR), and we anticipate receiving one record on appeal. The times for perfecting this appeal will run from the service of the last notice of appeal.”

8. On December 1, 2022, GERSTEN served and filed a Title II of the Americans with Disabilities Act Reasonable Accommodations Request to permit her to serve the Respondents via email.
9. On January 9, 2023, GERSTEN served and filed a second Title II of the Americans with Disabilities Act Reasonable Accommodations Request to permit her to serve the Respondents via email along with a motion for extension of time to file her return to Respondent Nationwide Insurance Company and Joseph Tirbovich.
10. On January 11, 2023, this COURT issued an order stating in part, “...Appellant has filed a motion for extension to file a return to Respondents Nationwide Insurance Company and Joseph Tirbovich’s motion to dismiss a party. This motion is Granted. The return to motion to dismiss a party is to be served and filed by January 19, 2023.”
11. On January 18, 2023, an order was issued by this COURT stating: “After careful consideration, this appeal is dismissed. *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.”); *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005) (“An order which does not finally end a case or prevent a

final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed.”)

12. On February 2, 2022, GERSTEN served and filed a motion for extension of time to serve and file a motion to reinstate until and including February 17, 2022.
13. On February 6, 2022, this COURT granted GERSTEN’S motion for extension in item #11.
14. On February 13, 2022, GERSTEN filed an Emergency 2nd Request Title II of the Americans with Disabilities Act Reasonable Accommodations Request to permit her to serve the Respondents via email.
15. On February 15, 2022, this Court issued an order stating, “Appellant’s request to serve future filings upon Respondents via email is granted. Appellant shall serve all future filings on each Respondent’s counsel via the email address listed for them in the Attorney Search database, which can be found at <https://www.sccourts.org/attorneys/dspSearchAttorneys.cfm>.”
16. On February 17, 2022, GERSTEN served and filed her motion to reinstate.
17. On March 30, 2023, this COURT issued an order stating, “Appellant’s petition for rehearing is granted as to the August 22, 2022 order on appeal, for which Kevin Carter is the respondent. All future

filings must include the above caption.”

18. On March 30, 2023, this COURT sent a letter stating, “Enclosed is the Court’s decision on the motion to reinstate. Appellant is to notify the Court of the status of the transcript within 10 days from the date of this letter or this appeal will be dismissed.”
19. On April 18, 2023, this COURT sent a letter stating, “This Court sent a letter on March 30, 2023 requesting a status update on the transcript within 10 days from the date of that letter. To date, no status update has been received. An update is to be served and filed within 10 days from the date of this letter or this appeal will be dismissed.”
20. On May 5, 2023, GERSTEN served and filed a TITLE II OF THE AMERICANS WITH DISABILITIES ACT (ADA) REASONABLE ACCOMMODATION REQUEST to ACCEPT APPELLANT’S STATUS UPDATE OF TRANSCRIPT and MOTION FOR EXTENSION OF TIME TO FILE BRIEF and AMENDED RULE 221 SCACR AND RULE 260 SCACR PETITION FOR REHEARING AND REINSTATEMENT and REPLY to NATIONWIDE INSURANCE COMPANY AND JOSEPH TIRBOVICH’S RETURN TO APPELLANT’S PETITION FOR REINSTATEMENT as TIMELY FILED.
21. On May 31, 2023, this COURT issued an order stating, “Appellant has filed a motion for extension of time to serve and file the appellant’s initial brief and designation of matter. This motion is granted. The time for serving and filing the appellant’s initial brief and designation of

matter is hereby extended until June 30, 2023.”

22. On June 30, 2023, GERSTEN served and filed a TITLE II OF THE AMERICANS WITH DISABILITIES ACT (ADA) REASONABLE ACCOMMODATION REQUEST to ACCEPT APPELLANT’S MOTION FOR EXTENSION OF TIME TO SERVE AND FILE THE APPELLANT’S INITIAL BRIEF AND DESIGNATION OF MATTER.
23. On July 3, 2023, this COURT issued an order stating, “The time for serving and filing the appellant’s initial brief and designation of matter is hereby extended until July 31, 2023. No further extensions will be granted absent extraordinary circumstances.
24. GERSTEN is attaching her initial brief with its appendix and designation of matter with leave to amend.
25. GERSTEN is paralyzed disabled as a result of the collision in controversy with Respondent Kevin Carter.
26. GERSTEN is a qualified individual of and protected under the Americans with Disabilities Act, (Hereinafter “ADA”).
27. A “qualified individual with a disability’ is defined as “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”
United States v. Georgia, [546 U.S. at 153–54](#), [126 S.Ct. 877](#)

(quoting [42 U.S.C. § 12131\(2\)](#)).

28. Under Title II of the ADA Reasonable Accommodation Request, policies, practices, procedures, laws, or rules, as an example, can be modified to accommodate her due to her disability of being paralyzed and there is no limit to the amount of requests that GERSTEN can make.
29. In addition to being paralyzed, she suffers from numerous secondary complications of being paralyzed, including but not limited to, loss of control of bowel movements in which she experiences frequent diarrhea attacks and explosions, and pressure wounds; one is located on her left buttocks, which prevents her from sitting down for extended periods of time without further injury, and other wounds on various parts of her body. It takes her between two to five hours to perform one bowel movement, in addition to clean up and wound care. Pictures and video evidence are available upon request, and this is an offer of proof.
30. GERSTEN has no caregiver, aid, or any assistance in her daily life. She lives under extreme hardship and extraordinary circumstances.
31. GERSTEN is also litigating other matters in multiple states without an attorney and filing and service deadlines to comply with are in proximity of each other with multiple orders involving research and document preparation.
32. GERSTEN's disability of being paralyzed renders her incapable of asserting or defending her claims in a timely manner.
33. Under South Carolina law, GERSTEN is a "vulnerable adult";

defined, in part, as a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection

34. GERSTEN simply is not capable of performing basic daily tasks at the same speed as able- bodies. It takes her approximately fifty-two (52) times longer to complete functions than those not paralyzed disabled.

35. **RULE 60 RELIEF FROM JUDGMENT OR ORDER**

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered

Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud, misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (b)

does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. During the pendency of an appeal, leave to make the motion must be obtained from the appellate court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. In the note section of the above rule, this language can be found: Finally, Rule 60(b) provides, leave to make the motion need not be obtained from any appellate court except during such time as an appeal from the judgment is actually before the appellate court. This permits the motion to be made before the trial court. The United States Supreme Court approved a similar result in Standard Oil Co. v. U.S., 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976). (Added highlights to emphasize leave must be obtained from this COURT before a Rule 60(b), SCRCPP, motion can be filed in the trial court if, such as in this case, an appeal has been filed.)

36. **RULE 241 STAY AND SUPERSEDEAS IN CIVIL ACTIONS**

(a) General Rule. As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or

decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

37. It states in part in part **(c) Supersedeas or Lifting of Automatic Stay.**

(1) After service of notice of appeal, any party may move for an order lifting the automatic stay in cases which involve the general rule.

It states in part in part **(d) Procedure for Obtaining Lift of Stay or Supersedeas.**

(1) Except where extraordinary circumstances make it impracticable, an application for an order lifting the automatic stay or for supersedeas must first be made to the lower court or administrative tribunal which entered the order or decision on appeal. The requirement of Rule 60 (b), SCRCPP, to obtain leave from the appellate court in order to file a motion under it in the trial court renders it an extraordinary circumstance making it impracticable for an application to be made to the lower court.

38. Rule 60 (b), SCRCPP, permits at least a year to file a motion under it.

39. The instant order under appeal was filed on August 22, 2022.

40. GERSTEN is within the time limits to file a motion under Rule 60

(b), SCRCF.

41. There is a strong probability that the issues raised in this appeal can be resolved in the lower trial court.

THEREFORE, for the previous foregoing reasons, having shown good cause, GERSTEN respectfully moves this COURT, for leave of court to file her Rule 60 (b), SCRCF motion for RELIEF FROM JUDGMENT OR ORDER, pertaining to Respondent Kevin Carter, lifting the automatic stay in place of the trial court, remand, and staying this instant appeal pending the trial court ruling on the said Rule 60 (b), SCRCF, motion.

This does not prejudice CARTER or any of the listed Respondents.

This is not made to cause delay, rather, in the furtherance of justice and to prevent its miscarriage.

Respectfully submitted this 31st day of July 2023

July 31, 2023

/S/Heidi Gersten
Heidi Gersten, Appellant
All Rights Reserved
1438 W. Lantana Rd. #330
Lantana, FL 33462
(323) 245-6142
hanginhangout@gmail.com

Other Counsel of Record

Wesley Brian Sawyer, Esquire
Murphy & Grantland, P.A.
4406-B Forest Drive
Columbia, SC 29206
(Attorney for Respondents Kevin Carter and Richard Davis)
(803) 782-4100
wsawyer@murphygrantland.com

Pamela J. Larson, Esquire
WOMBLE BOND DICKINSON (US) LLP
PO Box 999
Charleston, SC 29402
(Attorney for Respondent Nationwide Mutual Insurance Company and Joseph
Tirbovich)
(843) 213-5519

Shelley S. Montague, Esquire
Jessica W. Laffitte, Esquire
Gallivan, White & Boyd, P.A.
P.O. Box 7368
Columbia, SC 29202
(Attorneys for Trustgard Insurance Company and John Ammendola)

William H. Davidson, II, Esquire
Davidson, Wren & Plyler, P.A.
P.O. Box 8568
Columbia, SC 29202
(Attorney for Respondents SC Dept. of Public Safety and Herbert Blackwell)

Reynolds Williams
P.O. Box 1909
Florence, SC 29503-1909
(Attorney for Respondent Interinsurance Exchange of the Automobile Club)
(843) 662-3258

PROOF OR CERTIFICATE OF SERVICE

I hereby certify that service of a true and accurate copy of the Appellant's MOTION for LEAVE to FILE RULE 60 (b), SCRCP, MOTION And PETITION for LIFT of AUTOMATIC STAY, REMAND And STAY of APPEAL PENDING TRIAL COURT RULING on RULE 60 (b), SCRCP, MOTION And INITIAL BRIEF And APPENDIX And DESIGNATION OF MATTER with LEAVE TO AMEND PERTAINING TO RESPONDENT KEVIN CARTER

in the above-captioned cases was made upon all parties and counsel of record by email on July 31, 2023:

Wesley Brian Sawyer, Esquire
wsawyer@murphygrantland.com
(Attorney for Respondents Kevin Carter and Richard Davis)

Pamela J. Larson, Esquire
Pamela.larson@wbd-us.com
(Attorney for Respondent Nationwide Mutual Insurance Company and Joseph Tirbovich)

Shelley S. Montague, Esquire
Jessica W. Laffitte, Esquire
smontague@gwblawfirm.com
jlaffitte@gwblawfirm.com
(Attorneys for Trustgard Insurance Company and John Ammendola)

William H. Davidson, II, Esquire
wdavidson@dml-law
(Attorney for Respondents SC Dept. of Public Safety and Herbert Blackwell)

Reynolds Williams
reynolds@willcoxlaw.com
(Attorney for Respondent Interinsurance Exchange of the Automobile Club)

Email addresses listed sent by ctappfilings@sccourts.org

jcobb@gwblawfirm.com
pholland@gwblawfirm.com
dblack@murphygrantland.com
thumphries@willcoxlaw.com

carla.cerchione@wbe-us.com
nbouknight@dml-law.com

July 31, 2022

_____/S/_____
Heidi Gersten, Appellant
All Rights Reserved
1438 W. Lantana Rd. #330
Lantana, FL 33462
(323) 245-6142
hanginhangout@gmail.com

THE STATE of SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

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

Case No. 2018-CP-12-00117
2028-AP-12-00074

Appellate Case Nos. 2022-001312 and 2022-001390

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard, Plaintiffs,

Of whom Heidi Gersten is Appellant,

v.

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

APPELLANT'S INITIAL BRIEF AND APPENDIX

July 31, 2023

___/S/Heidi Gersten
Heidi Gersten, Appellant
All Rights Reserved
1438 W. Lantana Rd. #330
Lantana, FL 33462
(323) 245-6142
hanginhangout@gmail.com

TABLE OF CONTENTS

	Page No.
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUES ON APPEAL.....	ii
STATEMENT OF THE CASE.....	ii
ARGUMENTS.....	iii
1. THE LOWER COURT ERRED IN FAILING TO RULE ON APPELLANT’S MOTIONS.....	iii
2. THE LOWER COURT FAILED TO RULE ON A TITLE II OF THE AMERICANS WITH DISABILITIES ACT REASONABLE MODIFICATIONS REQUEST.....	
3. THE LOWER COURT ERRED AND ABUSED ITS DISCRETION WITH A HARSH PENALTY OF DISMISSAL	
LAW.....	
CONCLUSION.....	
CERTIFICATE OF SERVICE.....	

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

- I. Did the lower court err in failing to rule on Appellant’s motions?
- II. Did the lower court err in failing to rule on Appellant’s Title II of the Americans with Disabilities Act Reasonable Modifications request?

III. Did the lower court err and abuse its discretion with a harsh penalty of dismissal?

STATEMENT OF THE CASE

This action arises out of a collision between the Respondent Kevin Carter and the Appellant Heidi Gersten and Ivanka Ayoub owned the vehicle that GERSTEN was travelling in on March 19, 2015.

ARGUMENTS

I. The lower court erred and abused its discretion in failing to rule on Appellant's motions.

(A): Appellate Standard of Review

The trial court's decision concerning the following motions timely served and filed by GERSTEN.

An abuse of discretion occurs when the trial court's ruling based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the trial court is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case, such that it may be deemed arbitrary and capricious.

State v. Allen, 370 S.C. 88, 634 S. E. 2d 653 (2006); *see also Exparte Capital U-Drive-It, Inc.*, 369 S.C. 1, 630 S.E.2d 464 (2006)

II. The lower court erred and abused its discretion by not ruling on a Title II of the Americans with Disabilities Act Reasonable Accommodations Request made by GERSTEN, to set one motion at a time per hearing due to her disability of being paralyzed and lack of help with her care.

ADA's reference to "essential eligibility requirements," when defining a "qualified individual with a disability," did not necessarily refer to each and every formal legal eligibility requirement

imposed for participation in public program or benefit; some relatively minor eligibility requirements, even if set by statute, will not be deemed essential because they will not be necessary to prevent the fundamental alteration of the program's nature. Americans with Disabilities Act of 1990, §§ 201(2), 202, 502, 42 U.S.C.A. §§ 12131(2), 12132, 12202; 28 C.F.R. § 35.130(b) (7).

Under the ADA, covered entities must make reasonable accommodations in order to provide qualified individuals with an equal opportunity to receive benefits from or to participate in programs run by such entities. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

To prove a violation of Title II of the ADA, a party must establish: (1) that he is a “qualified individual” with a disability; (2) that he was excluded from participation in a public entity's services, programs or activities or was otherwise discriminated against by a public entity; and (3) that such exclusion or discrimination was due to his disability. Americans with Disabilities Act of 1990, § 202, 42 U.S.C.A. § 12132.

Typically, the determination under the ADA of whether a particular modification is “reasonable” involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it. Americans with Disabilities Act of 1990, §§ 201(2), 202, 42 U.S.C.A. §§ 12131(2), 12132; 28 C.F.R. § 35.130(b)(7).

Congress clearly did not intend to give public entities more latitude under the ADA than private parties to discriminate against the disabled. Americans with Disabilities Act of 1990, § 302(a), 42 U.S.C.A. § 12182(a).

Title II of the ADA should not be construed to require automatic deference to a program's

formal legal eligibility requirements, however minor they may be. Americans with Disabilities Act of 1990, § 201 et seq., 42 U.S.C.A. § 12131 et seq.

The ADA requires a court to analyze the importance of an eligibility requirement for a public program or benefit, when determining whether a requested modification would fundamentally alter the nature of the service, rather than defer automatically to whatever “formal legal eligibility requirements” may exist, no matter how unimportant for the program in question they may be. Americans with Disabilities Act of 1990, §§ 201(2), 202, 502, 42 U.S.C.A. §§ 12131(2), 12132, 12202; 28 C.F.R. § 35.130(b)(7).

In the ADA, Congress provided a broad mandate to effectuate its sweeping purpose to forbid discrimination against disabled individuals in major areas of public life, including public services. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

As a remedial statute, the ADA must be broadly construed to effectuate its purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

ADA's reasonable modification requirement contemplated modification to state laws, thereby permitting preemption of inconsistent state laws, when necessary to effectuate Title II's reasonable modification provision. Americans with Disabilities Act of 1990, § 2(b)(1), 42 U.S.C.A. § 12101(b)(1).

Under the doctrine of federal preemption, state laws that conflict with federal law are without effect. U.S.C.A. Const. Art. 6, cl. 2.

Purpose of Congress is the ultimate touchstone of pre-emption analysis. U.S.C.A. Const. Art. 6, cl. 2.

An actual conflict between state and federal law exists, which results in federal preemption, when compliance with both federal and state regulations is a physical impossibility, or when state law is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress; an actual conflict also exists where federal law is in irreconcilable conflict with state law. U.S.C.A. Const. Art. 6, cl. 2.

When the question is whether a federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed; if the purpose of the act cannot otherwise be accomplished, if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect, the state law must yield to the regulation of Congress within the sphere of its delegated power. U.S.C.A. Const. Art. 6, cl. 2.

The ADA preempts inconsistent state law when appropriate and necessary to effectuate a reasonable accommodation under Title II. Americans with Disabilities Act of 1990, §§ 2(b)(1), 201(2), 42 U.S.C.A. §§ 12101(b)(1), 12131(2).

A plaintiff may sue a state official acting in his official capacity, notwithstanding the Eleventh Amendment, for prospective, injunctive relief from violations of federal law. U.S.C.A. Const. Amend. 11.

“The ADA was passed by large majorities in both Houses of Congress [in 1990] after decades of deliberation and investigation into the need for comprehensive legislation to address discrimination against persons with disabilities.” *Lane*, 541 U.S. at 516, 124 S.Ct. 1978.

“Congress found that ‘individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, [and]

failure to make modifications to existing facilities and practices....' ” *Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir.1996) (alteration in original) (quoting 42 U.S.C. § 12101(a)(5)). The ADA aims “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” 42 U.S.C. § 12101(b) (1). “It forbids discrimination against persons with disabilities in three major areas of public life: employment, which is covered by Title I of the statute; public services, programs, and activities, which are the subject of Title II; and public accommodations, which are covered by Title III.” *Lane*, 541 U.S. at 516–17, 124 S.Ct. 1978.

III. The lower court erred and abused its discretion with the harsh penalty of dismissal.

State Law Standard

Federal Law Standard

Respondent Kevin Carter Has Not Been Prejudiced

CONCLUSION

For the grounds and reasons set forth herein, GERSTEN should be permitted to file her Rule 60 (b), SCRCP, the lower court’s rulings should be reversed, discovery requests accepted and the matter should move towards trial by jury.

Respectfully submitted this 31st day of July 2023

July 31, 2023

/S/Heidi Gersten
Heidi Gersten, Appellant
All Rights Reserved
1438 W. Lantana Rd. #330
Lantana, FL 33462
(323) 245-6142
hanginhangout@gmail.com

Other Counsel of Record

Wesley Brian Sawyer, Esquire
Murphy & Grantland, P.A.
4406-B Forest Drive
Columbia, SC 29206
(Attorney for Respondents Kevin Carter and Richard Davis)
(803) 782-4100
wsawyer@murphygrantland.com

Pamela J. Larson, Esquire
WOMBLE BOND DICKINSON (US) LLP
PO Box 999
Charleston, SC 29402
(Attorney for Respondent Nationwide Mutual Insurance Company and Joseph
Tirbovich)
(843) 213-5519

Shelley S. Montague, Esquire
Jessica W. Laffitte, Esquire
Gallivan, White & Boyd, P.A.
P.O. Box 7368
Columbia, SC 29202
(Attorneys for Trustgard Insurance Company and John Ammendola)

William H. Davidson, II, Esquire
Davidson, Wren & Plyler, P.A.
P.O. Box 8568
Columbia, SC 29202
(Attorney for Respondents SC Dept. of Public Safety and Herbert Blackwell)

Reynolds Williams
P.O. Box 1909
Florence, SC 29503-1909
(Attorney for Respondent Interinsurance Exchange of the Automobile Club)
(843) 662-3258

RECEIVED

Jul 31 2023

SC Court of Appeals

PROOF OR CERTIFICATE OF SERVICE

I hereby certify that service of a true and accurate copy of the Appellant's INITIAL BRIEF And APPENDIX And DESIGNATION OF MATTER with LEAVE TO AMEND in the above-captioned cases was made upon all parties and counsel of record by email on July 31, 2023:

Wesley Brian Sawyer, Esquire
wsawyer@murphygrantland.com
(Attorney for Respondents Kevin Carter and Richard Davis)

Pamela J. Larson, Esquire
Pamela.larson@wbd-us.com
(Attorney for Respondent Nationwide Mutual Insurance Company and Joseph Tirbovich)

Shelley S. Montague, Esquire
Jessica W. Laffitte, Esquire
smontague@gwblawfirm.com
jlaffitte@gwblawfirm.com
(Attorneys for Trustgard Insurance Company and John Ammendola)

William H. Davidson, II, Esquire
wdavidson@dml-law
(Attorney for Respondents SC Dept. of Public Safety and Herbert Blackwell)

Reynolds Williams
reynolds@willcoxlaw.com
(Attorney for Respondent Interinsurance Exchange of the Automobile Club)

Email addresses listed sent by ctappfilings@sccourts.org

jcobb@gwblawfirm.com
pholland@gwblawfirm.com
dblack@murphygrantland.com
thumphries@willcoxlaw.com
carla.cerchione@wbe-us.com
nbouknight@dml-law.com

_____/S/_____

July 31, 2022

Heidi Gersten, Appellant
All Rights Reserved
1438 W. Lantana Rd. #330
Lantana, FL 33462
(323) 245-6142
hanginhangout@gmail.com

THE STATE of SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

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

Case No. 2018-CP-12-00117
2028-AP-12-00074

Appellate Case Nos. 2022-001312 and 2022-001390

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard, Plaintiffs,

Of whom Heidi Gersten is Appellant,

v.

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

DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL
PERTAINING TO RESPONDENT KEVIN CARTER

The Appellant Heidi Gersten proposes the following be included in the Record on Appeal:

1. Order of August 22, 2022
2. Arbitration Claim for Property Damage Filed February 21, 2018
3. Complaint Filed March 17, 2018
4. First Amended Claim for Property Damage Filed March 27, 2018
5. Appellant Gersten's Exhibit List A-L Filed March 27, 2018
6. Appellant Gersten's Exhibit List A-G Filed March 27, 2018

7. First Set of Admissions, Interrogatories, and Admissions Filed March 27, 2018
8. Affidavit of Service March 27, 2018
9. Affidavit of Heidi Gersten in Support of Property Damage Claim
10. Answer of Kevin Carter Filed April 16, 2018
11. Motion to Dismiss or Motion to Strike of Kevin Carter Filed April 16, 2018
12. Transcript of Proceedings
13. Appellant Gersten's Exhibits

I certify that this designation contains no matter which is irrelevant to this appeal.

July 31, 2023

 /S/Heidi Gersten
Heidi Gersten, Appellant
All Rights Reserved
1438 W. Lantana Rd. #330
Lantana, FL 33462
(323) 245-6142
hanginhangout@gmail.com