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**Aug 29 2023**

**SC Court of Appeals**

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHESTER COUNTY  
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

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Appellate Case No. 2022-001312

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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 Insurance Company,  
Interinsurance Exchange of the Automobile Club, John Ammendola, Trustgard  
Insurance Company, SC Department of Public Safety, Chevrolet, GMC, Unknown  
John Does, Defendants,

Of whom Kevin Carter is the .....Respondent.

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## STATEMENT OF ISSUES ON APPEAL

- I. Whether the Circuit Court acted within its discretion by dismissing Appellant's claims under Rule 41 for failure to prosecute in this five-and-a-half-year-old case where she had failed to provide initial discovery responses.**
- II. Whether the Circuit Court acted within its discretion by dismissing Appellant's claims under Rule 37 as a discovery sanction where she had failed to respond to initial discovery requests for multiple years.**

## INTRODUCTION

This is Appellant's second appeal of this case. During the case's long history, Appellant Gersten has requested twenty-five (25) extensions/continuances, which have generally been granted. While repeatedly seeking extensions and continuances, Gersten has disregarded this Court's orders, ignored Respondent's basic discovery requests, and failed to provide dates for depositions. Appellant's failure to comply with this Court's orders resulted in dismissal of her first appeal. On remand, Respondent served discovery requests and asked for deposition dates. Appellant ignored those requests. As a result, Respondent filed a Motion to Compel or, in the Alternative, Motion to Dismiss on August 26, 2020 – over three years ago. Appellant continued to ignore the discovery requests. On August 22, 2022, the Circuit Court entered an Order granting Respondent's Motion and dismissing the case for failure to prosecute and, alternatively, as a discovery sanction.

As the Circuit Court found, Gersten has shown an utter disregard for her responsibilities as a Plaintiff in this lawsuit. Her failure to engage in discovery prevented any development of this case, which involves an automobile accident that occurred almost eight and a half years ago. During that delay, Gersten's mother – a claimant and witness in the case – passed away, depriving Respondent of the ability to question a key witness in the case. Moreover, Gersten did not provide any explanation for her years-long refusal to participate in discovery in this case. After reviewing the case's lengthy history and hearing arguments of the parties, the Circuit Court exercised its discretion and dismissed

the case for failure to prosecute and, alternatively, as a discovery sanction. Gersten has not provided any argument as to why that decision was wrong – it was not. The decision should be affirmed.

### **STATEMENT OF THE CASE**

This case has a long and storied history. The history of Appellant’s dilatory actions is necessary to understand why the Circuit Court’s dismissal of this action – more than four (4) years after it began – was appropriate. Therefore, that history is set forth below.

In early 2018, Appellant Heidi Gersten filed two separate proceedings in the Chester County Court of Common Pleas, both arising out of a March 19, 2015 automobile collision. On February 21, 2018, Gersten filed a Summons and Claim for Property Damage under the property damage arbitration statute. (Summons and Claim, *Heidi Gersten v. Kevin Carter, Richard Davis, Naitonwide Mutual Ins. Co., Interinsurance of the Automobile Club, Trustguard Ins.*, 2018-CP-12-00074). Ivanka Ayoub was not listed on the Summons or the Claim.<sup>1</sup>

On March 16, 2018, Gersten filed the pending personal injury and property damage action. (Summons and Complaint, *Heidi Gersten, Ivanka Ayoub, Daniel Hubbard v. Kevin Carter, Richard Davis, Joseph Tirbovich, Nationwide Mutual insurance Company, Interinsurance Exchange of the Automobile Club, John Ammendola, Trustguard Insurance Company, SC Dep’t of Public Safety, Blackwell, GMC, Chevrolet, Unknown John Does*, 2018-CP-12-00117).<sup>2</sup> Ayoub is listed as a plaintiff on the caption. Ayoub did not sign the Summons, but the Complaint purports to bear her signature.

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<sup>1</sup> On March 27, 2018 – after the statute of limitations had expired, plaintiffs filed a First Amended Claim for Property Damage Verified, which purported to add Ivanka Ayoub as a plaintiff to the property damage arbitration claim. She is not an appellant in this appeal.

<sup>2</sup> Daniel Hubbard did not sign the notices of appeal in the first appeal in 2018. Therefore, he was not an appellant in the first appeal, and the dismissal of his claims became final. He is also not an appellant in this appeal.

On April 16, 2018, Defendants Kevin Carter and Richard Davis filed Motions to Dismiss or, in the Alternative, Motions to Strike and Sever in both cases. (Carter’s and Davis’ Mots. to Dismiss). On April 26, 2018, the Chief Administrative Judge of Chester County entered a Form 4 Order consolidating the two cases and placing them on the Common Pleas docket. (April 26, 2018 Circuit Court Order). On May 8, 2018, Plaintiffs Gersten and Ayoub moved to alter or amend the April 26, 2018 Order. The various other defendants also filed Motions to Dismiss the case.

After a September 5, 2018 hearing on the various motions, the Honorable John C. Hayes, III, entered a series of orders dismissing all the defendants except Kevin Carter.<sup>3</sup> The Orders also dismissed, in their entirety, the claims of Plaintiff Daniel Hubbard and dismissed Ayoub’s loss of consortium claim against Defendant Carter. *Id.* As a result, the only remaining claims were Gersten’s and Ayoub’s negligence claims against Carter. Although Kevin Carter asserted statute of limitations defenses, the Circuit Court withheld ruling on the statute of limitations issue and noted that Carter could file a separate motion on that issue in the future. (September 18, 2018 Circuit Court Order).

On September 19, 2018, counsel for Carter and Davis placed copies of the Order in the mail to Gersten, Ayoub, and Hubbard. (Affidavit of Facts). Nineteen days later, on October 8, 2018, Gersten and Ayoub filed a Motion to Alter or Amend the judgment regarding the April 26, 2018 consolidation Order and the September 18, 2018 Order.<sup>4</sup> (Gersten’s Mot. to Alter or Amend).

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<sup>3</sup> (September 18, 2018 Circuit Court Order (granting Carter’s/Davis’ Motion)); (September 18, 2018 Circuit Court Order (granting AAA’s Motion)); (September 21, 2018 Circuit Court Order (granting Department of Public Safety’s Motion)); (September 21, 2018 Circuit Court Order (granting Nationwide’s/Tirbovich’s Motion)); (September 21, 2018 Circuit Court Order (granting Trustgard’s Motion)).

<sup>4</sup> Gersten’s and Ayoub’s Notices of Appeal and all their filings with the Court of Appeals referred to a “September 5, 2018 Order.” However, there was no “September 5, 2018 Order.” Rather, the Motions hearing occurred on September 5, 2018, and the Circuit Court issued its Orders regarding

On October 16, 2018, the Circuit Court denied the Motion to Alter or Amend. (October 16, 2018 Circuit Court Order).

**A. Gersten’s First Appeal – Appellate Case No. 2018-002115**

On October 22, 2018, Respondent Carter received a Notice of Appeal, purporting to appeal the September 18, 2018 Order and other orders (hereinafter the “First Notice of Appeal”). However, Gersten and Ayoub never filed the First Notice of Appeal with the Court of Appeals or the Circuit Court.

On November 21, 2018, Respondent Carter received another Notice of Appeal, appealing the orders from April 26, 2018, September 18, 2018, and October 16, 2018 (hereinafter the “Second Notice of Appeal”). Gersten and Ayoub filed the Second Notice of Appeal with the Court of Appeals by fax on November 27, 2018 – more than 30 days after entry of the Order denying their Motion to Alter or Amend and more than 10 days after serving the Second Notice of Appeal. They filed the Second Notice of Appeal with the clerk of the lower court on November 29, 2018. (Second Notice of Appeal).

On January 31, 2019, Carter and Davis filed a Motion to Dismiss the appeal as to them on the ground that appellants did not timely serve the notice of appeal on the Court. (Mot. to Dismiss). The Court of Appeals sent Gersten a letter dated February 15, 2019, which stated:

Within ten days of the date of this letter you must serve and file a return to the motion to dismiss, specifically addressing whether your motion for reconsideration was made timely in the circuit court....You must also provide individual dates for when appellants received written notice of entry of each of the separate orders on appeal.

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the various Motions on September 18, 2018. Therefore, respondents interpreted this to mean the September 18, 2018 Order.

(February 15, 2019 Court of Appeals Letter). Gersten filed five (5) motions for extensions of time to file a return to the Motion to Dismiss. (Appellants' Mots. for Extensions of Time). On April 9, 2019, the Court granted Gersten an extension until April 15, 2019 but stated that "[n]o further extensions will be granted absent extraordinary circumstances." (April 9, 2019 Court of Appeals Order). Gersten then filed two more motions for extensions of time to file a return. (Appellants' Mots. for Extensions of Time). On May 2, 2019, the Court filed an Order that stated:

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.

(May 2, 2019 Court of Appeals Order). Gersten failed to comply with this Order, and the Court of Appeals dismissed the appeal by Order filed May 14, 2019. (May 14, 2019 Court of Appeals Order). Gersten petitioned the Court of Appeals for rehearing and petitioned the Supreme Court for a writ of certiorari, both of which were denied. (Pet. for Rehearing); (Pet. for Writ of Certiorari); (July 30, 2019 Court of Appeals Order); (April 24, 2020 Supreme Court Order). On June 23, 2020, the case was remitted to the Circuit Court. (June 23, 2020 Remittitur).

## **B. Order on Appeal**

On June 29, 2020, Respondent Carter served his first set of Interrogatories and Requests for Production on the Plaintiffs Gersten and Ayoub. (Carter's Interrogatories and Requests for Production). Pursuant to Rules 33 and 34, SCRPC, Plaintiffs were required to respond to those discovery requests by July 29, 2020. Plaintiffs failed to respond and failed to request any extensions. On August 13, 2020, counsel for Carter sent letters to Plaintiffs asking that they provide

responses to the discovery within ten (10) days and also asking for a list of available days in September to take Plaintiffs' depositions. (August 13, 2020 Letter). Plaintiffs neither provided the requested discovery responses nor provided dates of availability for their depositions. Consequently, on August 26, 2020, Carter filed a Motion to Compel or, in the Alternative, Motion to Dismiss for Failure to Prosecute. (Carter's Mot. to Compel).

The hearing on Carter's Motion was first scheduled for January 13, 2021. (December 18, 2020 Circuit Court Letter). On January 4, 2021, Gersten filed a Motion to continue the hearing because she was litigating another matter in Florida, and she asked for a continuance of at least six months. (Gersten's Mot. for Continuance). The Circuit Court did not grant the Motion, but it did continue the hearing.

The hearing was eventually rescheduled to take place on July 28, 2022 – over two years after Respondent served the discovery requests. Hours before the hearing, Gersten submitted an “Emergency Notice of Objection to and Request/or Motion for Order of Continuance of Scheduled Telephonic Hearing.”<sup>5</sup> (Gersten's Emergency Notice). On July 28, 2022, the Court held a hearing via WebEx. After hearing arguments on the emergency notice first, the Court agreed to reschedule the hearing to take place on August 18, 2022. (July 28, 2022 Hearing Tr., pp. 8-9). During the July 28, 2022 hearing, Plaintiff Gersten stated that Ivanka Ayoub passed away on or about January 11, 2022. (*Id.* at pp. 9, 12). Ms. Gersten is Ivanka Ayoub's daughter. (*Id.*).

Shortly after it was disclosed that Plaintiff Ayoub had passed away, Defendant Carter filed a Motion to Dismiss Ayoub's claims pursuant to Rule 25, SCRPC. (Carter's Mot. to Dismiss).

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<sup>5</sup> Gersten did not file this document with the Court. She emailed it to Carter's counsel. It is our understanding that she also just emailed it to the Court. (July 28, 2022 Hearing Tr. 2:21-23 (“Prior to beginning this hearing I received an email request from the plaintiff for a continuance, as well as an attached 27 page memorandum.”)).

Despite her death more than six (6) months prior, no one had moved to substitute for Plaintiff Ayoub. At the August 18, 2022 hearing, the Circuit Court heard arguments on Carter’s Rule 25 Motion and Carter’s previously filed Motion to Compel or, in the Alternative, Motion to Dismiss for Failure to Prosecute.<sup>6</sup> (August 18, 2022 Hearing Tr.). The Circuit Court granted both Motions. It held that as to Gersten’s and Ayoub’s claims dismissal was proper under both Rule 41 for failure to prosecute and under Rule 37 as an appropriate discovery sanction. (August 22, 2022 Circuit Court Order). The Circuit Court held that as to Ayoub dismissal was also appropriate under Rule 25. (*Id.*).

In finding dismissal of Gersten’s claims appropriate for Gersten’s failure to prosecute and, alternatively, as a proper discovery sanction, the Circuit Court explained:

- (1) Plaintiffs are solely responsible for their failure to respond to discovery and to provide deposition dates. Therefore, the degree of responsibility rests wholly with the Plaintiffs.
- (2) Defendant presented argument on several forms of prejudice. First, it appears Ayoub has passed away, which has deprived Defendant of the opportunity to depose her. This alone is substantially prejudicial. Plaintiff sent discovery requests and requested deposition dates in 2020 – long before Ayoub’s death in 2022. Moreover, the passage of time prejudices Defendant because it will be harder to find witnesses and develop facts relating to the case and because he has been stuck in litigation for over four years without having basic discovery responses. Therefore, prejudice is plainly present.
- (3) The history of this litigation – especially in light of the appellate record – shows a drawn-out history of dilatory proceeding. Plaintiffs have requested numerous

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<sup>6</sup> At the hearing, the Circuit Court also heard arguments on other motions filed by Plaintiff Gersten. However, the Court did not rule on those motions. As its Order explained:

[M]ost of those motions involve reconsideration of rulings from other Circuit Court judges. Some of those rulings were the subject of the prior appeal. Moreover, Judge John Hayes previously denied a motion to reconsider as to some of those issues. Ultimately, the Court does not need to rule on those issues because it is granting Defendant’s Motions to Dismiss.

(August 22, 2022 Order, p. 4 n.2).

continuances at the trial level. At the appellate level, Plaintiffs requested numerous extensions. The Court of Appeals made multiple requests for Plaintiffs to provide information to the Court. Ultimately, the Court of Appeals dismissed the appeal when Plaintiffs failed to provide the information requested by the Court. Most importantly, Plaintiffs have been on notice of Defendant's Motion to Compel for almost two years. During that time, they have continued to fail to provide any discovery responses.

- (4) At this point, there is not a less drastic sanction that would afford Defendant Carter procedural due process. The Rules of Civil Procedure are designed to give both parties an opportunity to fully develop their case. By failing to participate in discovery for so long – to the point at which one claimant and witness has passed away – Plaintiffs have prevented Defendant Carter from having a full and fair opportunity to defend his case. Any less severe sanction will not give Defendant Carter the ability to depose Ayoub or to depose any other witnesses with the same recollection that they would have had two years ago.

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...At a minimum, the failure to respond to discovery requests for over two years shows the very type of gross indifference to Defendant's rights that justifies dismissal. Moreover, given the fact that the hearing on this Motion has been scheduled three times with no effort by Plaintiffs to respond to the discovery requests, there is an adequate basis in the record to find willful disobedience. This willful failure to respond to discovery for such a long period of time is a complete disregard of Plaintiffs' obligations under the Rules of Civil Procedure.

(*Id.* at pp. 5, 7). During the hearing, Judge Mark Hayes advised Gersten that she could file a motion to reconsider and he would look more favorably on the motion if she had sent discovery responses by the time she filed the motion. (*Id.* at p. 57). However, she chose not to comply with the discovery requests or to file a motion to reconsider. Instead, she filed this appeal.

### **C. Gersten's Second Appeal – Appellate Case No. 2022-001390**

On September 19, 2022 – almost a year ago – Gersten filed a Notice of Appeal purporting to appeal five orders from 2018<sup>7</sup> and a March 7, 2022 Order of Protection for Carter's counsel.

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<sup>7</sup> In her September 19, 2022 Notice of Appeal, the 2018 Orders Gersten purported to appeal were: (1) the April 26, 2018 Order consolidating the cases; (2) a May 21, 2018 Order of Protection for Carter's counsel; (3) the September 18, 2018 Order granting Defendant Davis' Motion to Dismiss and granting Defendant Carter's Motion to Dismiss in part; (4) a September 21, 2018 Order granting certain other Defendants' Motion to Dismiss; and (5) a September 21, 2018 Order granting certain other Defendants' Motion to Dismiss.

(Gersten’s Sept. 19, 2022, Not. of Appeal). Gersten’s September 19, 2022 Notice of Appeal did not include the August 22, 2022 Circuit Court Order dismissing her case against Kevin Carter. (*Id.*).

On October 3, 2022, Gersten filed another Notice of Appeal. Her October 3, 2022 Notice included the August 22, 2022 Order dismissing the case.

This Court consolidated the two appeals. On January 12, 2023, Carter moved to dismiss. (Carter’s Mot. to Dismiss). As to the Orders other than the Orders of Protection, Gersten had already unsuccessfully appealed those Orders. Therefore, Carter argued that those Orders were now the law of the case, and the current appeal of them was untimely. (*Id.*). As to the Orders of Protection, Carter argued that the time for protection under those Orders had long since passed, and Gersten did not oppose those Orders when they were entered. (*Id.*). Several of the other prior defendants also moved to dismiss.

By Order filed January 18, 2023, this Court dismissed Gersten’s second appeal. (January 18, 2023 Court of Appeals Order). On February 17, 2023, Gersten filed a “Petition for Rehearing and Reinstatement.” (Gersten’s Pet. for Reinstatement). By Order filed March 30, 2023, the Court granted her petition for rehearing “as to the August 22, 2022 order on appeal, for which Kevin Carter is the respondent.” (March 30, 2023 Court of Appeals Order). Thus, the reinstated second appeal is limited to the August 22, 2022 Circuit Court Order.

**D. Continuances/Extensions**

In this case alone, Gersten has sought twenty-five (25) extensions/continuances, which are identified below:

| Stage Of Case         | Date of Extension Request |
|-----------------------|---------------------------|
| During Original Cases | • August 22, 2018 Motion  |

|   |   |
|---|---|
| <p>During First Appeal</p>              | <ul style="list-style-type: none"> <li>• December 27, 2018 Motion</li> <li>• February 8, 2019 Motion</li> <li>• February 19, 2019 Motion</li> <li>• March 1, 2019 Motion</li> <li>• March 12, 2019 Motion</li> <li>• March 21, 2019 Motion</li> <li>• March 28, 2019 Motion</li> <li>• April 8, 2019 Motion</li> <li>• April 18, 2019 Motion</li> <li>• April 29, 2019 Motion</li> <li>• May 31, 2019 Motion</li> </ul> |
| <p>On Petition to the Supreme Court</p> | <ul style="list-style-type: none"> <li>• September 4, 2019 Motion</li> <li>• November 7, 2019 Motion</li> </ul>   |
| <p>After Remittur</p>                   | <ul style="list-style-type: none"> <li>• January 13, 2021 Motion</li> <li>• July 28, 2022 Request</li> </ul>  |
| <p>During Second Appeal</p>             | <ul style="list-style-type: none"> <li>• November 21, 2022 Motion</li> <li>• January 9, 2023 Motion</li> <li>• February 2, 2023 Motion</li> <li>• February 13, 2023 Motion</li> <li>• May 5, 2023 Motion</li> <li>• May 24, 2023 Motion</li> <li>• June 30, 2023 Motion</li> </ul>  |

|  |   |
|--|---|
|  | <ul style="list-style-type: none"><li>• August 15, 2023 Motion</li><li>• August 25, 2023 Motion</li></ul> |
|--|---|

However, she never requested an extension to serve her initial discovery responses. Moreover, despite finding the time to prepare twenty-five (25) requests for extensions and litigating other cases in other jurisdictions, Gersten did not bother to respond to written discovery or otherwise comply with her obligations as the Plaintiff bringing this lawsuit. At this point, the case has been ongoing for nearly five-and-a-half years without Gersten having provided initial discovery responses.

### **STANDARD OF REVIEW**

Under Rule 41 (b), SCRPC, a defendant may move for dismissal of an action for failure of the plaintiff to prosecute or to comply with the South Carolina Rules of Civil Procedure or any order of court. Rule 41(b), SCRPC. “The plaintiff has the burden of prosecuting his action, and the trial court may properly dismiss an action for plaintiff’s unreasonable neglect in proceeding with his cause.” *Don Shevey & Spires, Inc. v. Am. Motors Realty Corp.*, 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983). “Such power is deemed to be necessarily vested in trial courts [in order for them] to manage their own affairs so as to achieve orderly and expeditious disposition of cases.” *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 212, 493 S.E.2d 826, 832 (1997) (citation omitted). The question of whether an action should be dismissed for failure to prosecute “is left to the discretion of the circuit judge and his decision will not be disturbed except upon a clear showing of an abuse of such discretion.” *Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970).

“The selection of a sanction for discovery violations is within the trial court's discretion. This court will not interfere with that decision unless the trial court abused its discretion.” *Griffin*

*Grading & Clearing, Inc. v. Tire Serv. Equip. Mfg. Co.*, 334 S.C. 193, 198, 511 S.E.2d 716, 718 (Ct. App. 1999) (citation omitted). “Absent an abuse of discretion, the trial court's imposition of discovery sanctions will not be reversed on appeal, and the party appealing from the order of sanction carries the burden of proving an abuse of discretion occurred.” *McNair v. Fairfield Cnty.*, 379 S.C. 462, 465–66, 665 S.E.2d 830, 832 (Ct. App. 2008).

### **ARGUMENT**

Based on the Court’s reinstatement order, this appeal is limited to the Circuit Court’s August 22, 2022 Order dismissing Gersten’s claims under Rule 41 for failure to prosecute and under Rule 37 as a discovery sanction.<sup>8</sup> Given Gersten’s history of delay, her failure to comply with prior court orders, and her failure to provide initial discovery responses for over two years, the Circuit Court did not abuse its discretion by dismissing her claims. Furthermore, Gersten’s brief contains no facts, arguments or case law to show that dismissal was an abuse of discretion.

As to Gersten, the Circuit Court’s August 22, 2022 Order ruled on a single Motion to Dismiss, which rendered all other motions moot. As Gersten admits in her Brief, she did not obtain rulings on her other motions. Consequently, those issues are not preserved for appeal.

#### **I. The Circuit Court did not abuse its discretion by dismissing Gersten’s claims under Rule 41 for failure to prosecute.**

“For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him.” Rule 41(b), SCRC.P. The decision of whether to dismiss a case for failure to prosecute is left to the discretion of the Circuit Court. *Small*, 254 S.C. at 442, 175 S.E.2d at 804. “The plaintiff has the burden of

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<sup>8</sup> The Circuit Court’s Order also dismissed Ayoub’s claim under those same grounds and, in the alternative, under Rule 25 for failure to timely substitute. (August 22, 2022 Circuit Court Order, p. 4 n.3). However, Ayoub is not an appellant in this action, and Gersten does not have standing to appeal Ayoub’s dismissal on her behalf.

prosecuting his action, and the trial court may properly dismiss an action for plaintiff's unreasonable neglect in proceeding with his cause." *Don Shevey & Spires, Inc.*, 279 S.C. at 60, 301 S.E.2d at 758.

The Fourth Circuit has established four factors when determining whether to dismiss for failure to prosecute, which have been adopted by South Carolina State Courts: (1) the plaintiff's degree of personal responsibility; (2) the amount of prejudice caused the defendant; (3) the presence of a drawn out history of deliberately proceeding in a dilatory fashion; and (4) the effectiveness of sanctions less drastic than dismissal." *McComas v. Ross*, 368 S.C. 59, 63, 626 S.E.2d 902, 904 (Ct. App. 2006) (citing *Hillig v. Comm'r of Internal Revenue*, 916 F.2d 171, 174 (4th Cir. 1990)).

As to the first factor, Gersten is solely responsible for her failure to respond to discovery and to provide deposition dates. She failed to provide the Circuit Court or this Court with any plausible explanation for why she chose not to respond to discovery for a period of over two years. Therefore, the degree of responsibility rests wholly with her.

As to the second factor, Gersten has caused Carter substantial prejudice. Not only has she kept Carter in this protracted litigation for the past five and a half years, she has also failed to respond to initial discovery requests for more than three years. This alone is substantially prejudicial. The case could not move forward without Gersten's participation in discovery. Additionally, the passage of time has substantially prejudiced Defendant Carter. Perhaps the most obvious example is the loss of the ability to depose Ivanka Ayoub. Gersten claims Ayoub owned the van involved in the accident and that Ayoub "gifted" her claim to Gersten. (Aug. 18, 2022 Hearing Tr. 38:15). Ayoub also would have had information regarding the contents in the van for which Gersten seeks recovery. Now, the opportunity to obtain that testimony is gone.

Likewise, it will be harder to find any other witnesses to develop facts relating to the case. Any witnesses that can be located will be asked to recollect events that took place in 2015. Thus, the quality of available discovery has been significantly diminished.

Additionally, Respondent has been prejudiced by being tethered to protracted and seemingly unending litigation. This case is nearly five and a half years old. Respondent has been unable to proceed with the case, but also unable to get out of the case. The delay is not the result of the complexity of the case. Rather, the delay is wholly caused by Appellant's disregard for her obligations as a litigant in this lawsuit that she filed. Therefore, Gersten's conduct has resulted in several forms of prejudice.

With respect to the third factor, the above procedural background section documents Gersten's drawn out history of dilatory proceeding. Gersten has requested twenty-five (25) extensions/continuances over the course of this case. In her first appeal of the case, this Court made multiple requests for Gersten to provide information to the Court. Ultimately, this Court dismissed her first appeal due to her failure to provide the requested information. With her second appeal herein, this Court again dismissed Gersten's appeal due to her failure to timely comply with Court deadlines. (January 18, 2023 Court of Appeals Order). Most importantly, Gersten had been on notice of Carter's Motion to Compel for almost two years before the hearing on such Motion. During that time, she failed to provide any discovery responses. To date – more than three years later, Gersten still has not provided any discovery responses. Thus, her drawn out history of dilatory proceeding is well documented.

One other point highlights Appellant's utter disregard for her obligations in this case. In multiple motions, Appellant has asked for either a continuance or an extension because she is actively litigating cases in other jurisdictions. *See, e.g.*, (Jan. 4, 2021 Mot. for Continuance

(seeking six-month continuance while Gersten litigates case in Palm Beach County, Florida)); (Aug. 15, 2023 Mot. for Extension, pp.4-5 (“In addition to her health crises, [Appellant] has other court matters with deadlines within proximity of this case here.”)); (Aug. 25, 2023 Mot. for Extension (“[S]he has other court matters with deadlines within proximity of this case here. In the past ten (10) days, an order of court on another matter in another state required her to produce documents....It took her days to finish....”)). Appellant has shown she is willing and able to pursue litigation in other jurisdictions, including participating in mediation and other matters, but she has disregarded those same obligations in this case. Thus, her dilatory practices in this case are simply unjustified.

At this point, there is not a less drastic sanction that would afford Defendant Carter procedural due process. The Rules of Civil Procedure are designed to give both parties an opportunity to fully develop their case. By failing to participate in discovery for so long – to the point that one claimant and witness has passed away – Gersten has prevented Defendant Carter from having a full and fair opportunity to defend his case. Any less severe sanction will not give Defendant Carter the ability to depose Ayoub or to depose any other witnesses with the same recollection that they would have had three years ago. Thus, the Circuit Court acted well within its discretion when it dismissed the case for failure to prosecute.

**II. Alternatively, the Circuit Court did not abuse its discretion by dismissing Gersten’s claims under Rule 37 as a discovery sanction.**

Dismissal was also proper under Rule 37 as a discovery sanction. The Rule provides in pertinent part: “If a party . . . fails . . . to serve answers or objections to interrogatories, or to serve a written response to request . . . under Rule 34 . . . the court . . . on motion may make such orders in regard to the failure as are just . . .” Rule 37(d), SCRCF. The Rule gives the Circuit Court discretion to, among other things, strike pleadings or dismiss an action. Rule 37(b)(C), SCRCF.

Although severe sanctions such as dismissal should only be imposed in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights, the Circuit Court properly found that one or more of those factors were present here. *See McNair*, 379 S.C. at 466, 665 S.E.2d at 832.

In *McNair*, the trial court struck Fairfield County's answer and counterclaim for failure to adequately respond to requests for production. Notably, the county in that case made an attempt to respond to discovery, producing over 800 documents. *Id.* at 464, 665 S.E.2d at 831. However, the plaintiff believed the responses were inadequate and moved to compel. The trial court agreed and entered an order compelling supplemental responses. Notably, that entire process took about five months. *Id.* When the county failed to supplement its responses within six months, the plaintiff moved for sanctions. After a hearing, the trial court struck the county's answer and its counterclaim. *Id.* This Court affirmed, finding that the trial court properly exercised its discretion and considered the appropriate factors before imposing the sanction of dismissal. *Id.* at 467, 665 S.E.2d at 832-33. The timeline at issue in *McNair* is telling here. When the trial court struck the county's answer and counterclaim, the case was less than a year-and-a-half old. Moreover, the county had made some effort to respond to discovery, including producing over 800 documents.

Here, the case is nearly five and a half years old. Defendant Carter served discovery on June 29, 2020 – well over three years ago. Before the Circuit Court issued its Order, Defendant's Motion had been pending for nearly two years, and it had been set for a hearing three times. Thus, Gersten had notice of the issue far longer than the time that passed in *McNair*. Nonetheless, Gersten never attempted to respond to discovery. In the meantime, it appears Plaintiff Ayoub passed away, depriving Defendant Carter of his ability to depose her or to obtain discovery from her. At a minimum, the failure to respond to discovery requests for over two years showed the very type of

gross indifference to Carter’s rights that justifies dismissal. Moreover, given the fact that the hearing on the Motion to Compel/Dismiss had been scheduled three times with no effort by Gersten to respond to the discovery requests, there was an adequate basis in the record to find willful disobedience. This willful failure to respond to discovery for such a long period of time is a complete disregard of Plaintiff Gersten’s obligations under the Rules of Civil Procedure. Furthermore, at the hearing on the Motion, the Circuit Court advised Gersten that she could file a motion to reconsider and the Court would look more favorably on the motion if she had sent discovery responses by the time of a motion to reconsider. (August 18, 2022 Hearing Transcript, p. 57). Nonetheless, Gersten chose not to provide any discovery responses and chose to forego any motion to reconsider. Therefore, the Circuit Court did not abuse its discretion by dismissing Gersten’s claims as a Rule 37 discovery sanction.

**III. Appellant makes no substantive argument to support a reversal.**

Gersten’s Brief contains no alleged facts, case law, or arguments to support her assertion that the Circuit Court abused its discretion by dismissing her case. *See* (Appellant’s Br.). This section of her brief in its entirety states as follows:

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

(Appellant’s Br., p. 7). Despite having the burden of proof to show an abuse of discretion, she has given this Court no basis – in fact or in law – to find an abuse of discretion. Her failure to provide any argument waives her appeal. *Taylor v. State*, 258 S.C. 369, 375, 188 S.E.2d 850, 853 (1972) (finding ground for appeal waived by failure to argue it in the brief); *Maus v. Pickens Sentinel Co.*, 258 S.C. 6, 14, 186 S.E.2d 809, 812 (1972) (same); *State v. Bostick*, 253 S.C. 205, 208, 169 S.E.2d

608, 610 (1969) (same); *Nienow v. Nienow*, 268 S.C. 161, 173, 232 S.E.2d 504, 510 (1977) (“However, appellant has failed to specifically argue this contention in her brief and is deemed to have abandoned this exception.”); *Gasque v. Heublein, Inc.*, 281 S.C. 278, 281, 315 S.E.2d 556, 558 (Ct. App. 1984) (“Exceptions not argued by an appellant in its brief are deemed abandoned.”); *Barr v. Barr*, 287 S.C. 13, 14, 336 S.E.2d 481, 482-83 (Ct. App. 1985) (“The wife raised five exceptions to the family court order, but she has abandoned all but one either by not arguing them in her brief or by failure to assign error in the exceptions.”). Therefore, the Circuit Court’s dismissal should be affirmed.

#### **IV. The issues raised in Gersten's motions are not preserved for appellate review.**

“Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review.” *In re Walter M.*, 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009). As the South Carolina Supreme Court explained:

In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. Issues not raised and ruled upon in the trial court will not be considered on appeal....An issue that was not preserved for review should not be addressed by the Court of Appeals....

*State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693–94 (2003) (citations omitted). Appellant admits that the Circuit Court did not rule on her motions in its August 22, 2022 Order. Her own proposed issues on appeal are: (1) “Did the lower court err in failing to rule on Appellant’s motion?”; and (2) “Did the lower court err in failing to rule on Appellant’s Title II of the Americans with Disabilities Act Reasonable Modifications request?”. (Appellant’s Br., p. 2) (emphasis added). Moreover, the Circuit Court’s Order also specifically stated that the Court was not ruling on Gersten’s motions. (August 22, 2022 Circuit Court Order, p. 4 n.2) (recognizing that the Court heard arguments on Gersten’s motions, but stating: “Ultimately, the Court does not need to rule on those issues because it is granting Defendant’s Motions to Dismiss.”). Gersten did not file a

Rule 59 motion. Therefore, the issues raised in Appellant’s motions and request are not preserved for appellate review.

Moreover, to the extent that Gersten argues that only one motion per hearing should have been addressed, she waived that argument by arguing several of her own motions at the August 18, 2022 motions hearing. (Appellant’s Br., p. 3 (stating the “lower court erred and abused its discretion but not ruling” on her request “to set one motion at a time per hearing”)); (August 18, 2022 Hearing Transcript (Gersten arguing August 29, 2018 motion to alter or amend consolidation order, August 29, 2018 motion to amend complaint, and October 22, 2018 motion to amend complaint)).<sup>9</sup>

### **CONCLUSION**

For the above-stated reasons, the Circuit Court’s holding should be affirmed. This case has been ongoing for more than five-and-a-half years, and Plaintiff Gersten has failed to respond to initial discovery requests for more than three years. Consequently, the Circuit Court properly dismissed her claims for failure to prosecute and, alternatively, as a discovery sanction. Appellant has failed to show that the Circuit Court abused its discretion by doing so. Therefore, Respondent Carter respectfully requests that the Court affirm the Circuit Court’s dismissal of Gersten’s claims.

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<sup>9</sup> Appellant never filed a motion requesting that the Circuit Court hear “one motion at a time per hearing.” *See* (Appellant’s Br., p. 3). Immediately before the July 28, 2022 hearing, Gersten emailed the Circuit Court a 27-page document, which she entitled “Emergency Notice of Objection to and Request/or Motion for Order and Objection to and Request/or Motion for Order for Continuance of Scheduled Telephonic Hearing Thursday July 28, 2022, at 10:00 AM Due to Illness Pursuant to Rule SCRCP and Exhibits and Americans With Disabilities Reasonable Accommodation Request (Title II) and Request for Clarification.” She alleges that she made such request in this document, which was not a filed motion. Therefore, for this reason also, this issue is not preserved for appeal.

Respectfully submitted,

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August 29, 2023

**RECEIVED**  
**Aug 29 2023**  
**SC Court of Appeals**

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM CHESTER COUNTY  
Court of Common Pleas

The Honorable J. Mark Hayes, II, Circuit Court Judge

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Appellate Case No. 2022-001312

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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 Insurance Company,  
Interinsurance Exchange of the Automobile Club, John Ammendola, Trustgard  
Insurance Company, SC Department of Public Safety, Chevrolet, GMC, Unknown  
John Does, Defendants,

Of whom Kevin Carter is the .....Respondent.

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**CERTIFICATE**

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I, Wesley B. Sawyer, Esquire, attorney for Respondent, certify that the Respondents' Initial Brief and Designation of Matter comply with the South Carolina Supreme Court Order of August 13, 2007.

*s/Wesley B. Sawyer*  
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