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Sep 05 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

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.

REPLY And

AMENDED 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
With LEAVE to AMEND And EXHIBITS
PERTAINING TO RESPONDENT KEVIN CARTER

Heidi Gersten, Appellant
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The Appellant Heidi Gersten, (“GERSTEN”) moves this South Carolina Court of Appeals (“Court”) pursuant Rule 60 (b), SCRCP and Rule 241, SCACR, for leave of court to file her amended Rule 60 (b), SCRCP motion for RELIEF FROM JUDGMENT or ORDER, and PETITION for LIFT of AUTOMATIC STAY, REMAND, and STAY of APPEAL pending trial court ruling on RULE 60 (b), SCRCP, MOTION with LEAVE to AMEND and Exhibits, pertaining to Respondent Kevin Carter (“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), SCRCP, motion, and petition, and states as the basis or grounds the following: “GERSTEN” addresses all of the points and/or issues raised in “CARTER’s” response to her said motion and petition, along with their accompanying exhibits.

1. On August 22, 2022, Judge J. Mark Hayes, II, entered an order granting “Carter’s” motion to dismiss.
2. On August 22, 2022, Wesley B. Sawyer, Attorney for “CARTER”, emailed “GERSTEN” said order in item #1.
3. On September 21, 2022, “GERSTEN” served “CARTER” with notice of appeal.
4. On October 3, 2022, “GERSTEN” filed said notice of appeal with “COURT”; assigned Case No.: 2022-001390.
5. 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.)
6. 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.”

7. 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.

8. 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.

9. 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.”

10. 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.”)

11. 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.

12. On February 6, 2022, this “COURT” granted “GERSTEN’s” motion for extension in

item #11.

13. 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.

14. 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>.”

15. On February 17, 2022, “GERSTEN” served and filed her motion to reinstate.

16. 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.”

17. 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.”

18. 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.”

19. 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.

20. 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."

21. 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.

22. 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."

23. "GERSTEN is attaching her initial brief with its appendix and designation of matter with leave to amend.

24. "GERSTEN" is paralyzed disabled as a result of the collision in controversy with "CARTER".

25. GERSTEN is a qualified individual of and protected under the Americans with Disabilities Act, ("ADA").

26. 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)).

27. Under Title II of the ADA Reasonable Accommodation Request, policies, practices, procedures, laws, or rules, as an example, can be modified to accommodate “GERSTEN” due to her disability of being paralyzed and there is no limit to the amount of requests that “GERSTEN” can make.

28. In addition to being paralyzed, “GERSTEN” suffers from numerous secondary complications of being paralyzed, including but not limited to, loss of control of bowel movements in which she often 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, in addition to 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.)

28. “GERSTEN” has no caregiver, aid, or any assistance in her daily life. She lives under extreme hardship and extraordinary circumstances.

29. “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.

30. “GERSTEN’s” disability of being paralyzed renders her incapable of asserting or defending her claims in a timely manner.

31. 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

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

33. 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), SCRCP, motion can be filed in the trial court if, such as in this case, an appeal has been filed.)

34. RULE 241 STAY AND SUPERSEDEAS IN CIVIL ACTIONS

- 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.

35. 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), SCRPC, 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.
36. Rule 60 (b), SCRPC, permits at least a year to file a motion under it.
37. The instant order under appeal was filed on August 22, 2022.
38. “GERSTEN” is within the time limits to file a motion under Rule 60 (b), SCRPC.
39. 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 and more, having shown good cause and extraordinary circumstances, the Appellant, Heidi Gersten, “GERSTEN” respectfully moves this South Carolina Court of Appeals “COURT”, for leave of court to accept as timely filed and served, her filed amended Rule 60 (b), SCRPC motion for RELIEF FROM JUDGMENT OR ORDER, and PETITION for LIFT of AUTOMATIC STAY, REMAND and STAY of APPEAL PENDING TRIAL COURT RULING on RULE 60 (b), SCRPC, MOTION with LEAVE to AMEND and Exhibits, pertaining to the Respondent Kevin Carter “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), SCRPC, motion and said petition. 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 5TH day of September 2023

September 5, 2023

_____/S/Heidi Gersten_____

Heidi Gersten, Appellant
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Other Counsel of Record

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(Attorney for Respondents SC Dept. of Public Safety and Herbert Blackwell)

Reynolds Williams
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(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 REPLY And AMENDED 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 EXHIBITS 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 September 5, 2023:

Wesley Brian Sawyer, Esquire
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(Attorney for Respondents Kevin Carter and Richard Davis)

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Respectfully submitted this 5TH day of September 2023

September 5, 2023

/S/Heidi Gersten
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34. RULE 241 STAY AND SUPERSEDEAS IN CIVIL ACTIONS

- 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.

35. 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.

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

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

38. "GERSTEN" is within the time limits to file a motion under Rule 60 (b), SCRCPP.

39. 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 and more, having shown good cause and extraordinary circumstances, the Appellant, Heidi Gersten, "GERSTEN" respectfully moves this South Carolina Court of Appeals "COURT", for leave of court to accept as timely filed and served, her filed amended Rule 60 (b), SCRCPP motion for RELIEF FROM JUDGMENT OR ORDER, and PETITION for LIFT of AUTOMATIC STAY, REMAND and STAY of APPEAL PENDING TRIAL COURT RULING on RULE 60 (b), SCRCPP, MOTION with LEAVE to AMEND and Exhibits, pertaining to the Respondent Kevin Carter "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), SCRCPP, motion and said petition. 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 5TH day of September 2023

September 5, 2023

/s/Heidi Gersten
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Sep 05 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 AMENDED 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 EXHIBITS 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 September 5, 2023:

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Respectfully submitted this 5TH day of September 2023

September 5, 2023

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