

RECEIVED

Jun 10 2024

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, Defendants,

Of whom Kevin Carter is the Respondent.

SECOND AMENDED RECORD ON APPEAL
With Leave of Court

Heidi Gersten
All Rights Reserved without Prejudice
1438 W. Lantana Rd. #330
Lantana, FL 33462
(323) 245-6142
Appellant

Wesley B. Sawyer
14406-B Forest Drive
P.O Box 6648
Columbia, SC 29260
(803) 782-4100
Attorney for the Respondent Kevin Carter

INDEX

Cover Sheet.....	i
Index.....	ii
Orders, Judgments, Decrees, Decisions	
Order consolidating cases filed April 26, 2018.....	10
1. Order granting Defendants Kevin Carter’s and Richard Davis’ Motion to Dismiss filed September 19, 2018.....	14
2. Order granting Defendant Interinsurance Exchange of the Automobile Club’s Motion to Dismiss filed September 19, 2018.....	24
3. Order granting Defendants South Carolina Department of Public Safety’s and Trooper Herbert Blackwell’s Motion to Dismiss filed September 21, 2018.....	34
4. Order granting Defendants Nationwide Insurance Company’s and Joseph Turbovich’s Motion to Dismiss filed September 21, 2018.....	40
5. Order granting Defendants Trustgard Insurance Company’s and John Ammendola’s Motion to Dismiss filed September 24, 2018.....	48
6. Court of Appeals Order filed April 9, 2019, in Appellate Case No. 2018-002115.....	59
7. REMOVE Court of Appeals Order filed May 14, 2019, in Appellate Case No. 2018- 002115.....	60
8. Court of Appeals Order dismissing appeal filed May 14, 2019, in Appellate Case No. 2018-002115.....	63
9. Court of Appeals Order denying petition for rehearing filed July 30, 2019, in Appellate Case No. 2018-002115.....	66

10. Supreme Court Order denying petition for writ of certiorari filed April 24, 2020, in Appellate Case No. 2019-001484.....	69
11. June 23, 2020, Remittitur from the Court of Appeals filed June 26, 2020, in Case No. 2018-CP-12-00117.....	72
12. Order dismissing case filed August 22, 2022, in Case No. 2018-CP-12-00117.....	74

Pleadings

13. Summons and Arbitration Claim for Property Damage filed February 21, 2018, in Case No. 2018-CP-12-00074.....	84
14. Affidavit of Heidi Gersten in Support of Property Damage Claim.....	86
15. Summons and Complaint filed March 16, 2018, in Case No. 2018-CP-12-00117.....	88
16. First amended claim for Property Damage (Filed March 17, 2018)	90
17. Affidavit of Service (Filed March 27, 2018)	92
18. Affidavit of Facts filed January 31, 2019, in Appellate Case No. 2018-002115.....	96
19. Petition for Rehearing filed May 29, 2019, in Appellate Case No. 2018-002115.....	98
20. Petition for Writ of Certiorari filed September 26, 2019, in Appellate Case No. 2019-001484.....	112
21. Answer of Defendant Kevin Carter (Filed April 16, 2018)	170

Transcripts

22. September 5, 2019 Hearing Transcript.....	190
23. July 28, 2022, Hearing Transcript in Case No. 2018-CP-12-00117.....	200
24. August 18, 2022, Hearing Transcript in Case No. 2018-CP-12-00117.....	202

Exhibits and Other Materials on Documents

25. Appellant Gersten’s Exhibit List A-L (Filed March 27, 2018)	259
26. Appellant Gersten’s Exhibit List A-G (Filed March 27, 2018)	260
27. Notice of Appeal filed November 27, 2018, in Appellate Case No. 2018-002115.....	261
28. Letter from the Court of Appeals to Gersten and Ayoub dated February 15, 2019, in Appellate Case No. 2018-002115.....	280
29. Carter’s First Set of Interrogatories and Requests for Production with certificate of service filed August 26, 2020, in Case No. 2018-CP-12-00117.....	300
30. August 13, 2020, Letter to Gersten filed August 26, 2020, in Case No. 2018-CP-12- 00117.....	320
31. December 18, 2020, Motions Roster Letter to Gersten filed on December 18, 2020, in Case No. 2018-CP-12-00117.....	325
32. First Set of Admissions, Interrogatories, and Admissions (Filed March 27, 2018)	328
33. Kevin Carter’s and Richard Davis’ Motion to Dismiss or, in the alternative, Motion to Strike and Sever filed April 16, 2018, in Case No. 2018-CP-12-00074.....	350
34. Kevin Carter’s and Richard Davis’ Motion to Dismiss and Motion to Strike or, in the alternative, Sever filed April 16, 2018, in Case No. 2018-CP-12-00117.....	360
35. Kevin Carter’s and Richard Davis’ Motion to Dismiss Appeal and Memorandum in Support filed January 31, 2019, in Appellate Case No. 2018-002115.....	365
36. Carter’s Motion to Compel or, in the alternative, Motion to Dismiss for Failure to Prosecute filed August 26, 2020, in Case No. 2018-CP-12-00117.....	372
37. Gersten’s “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” emailed to the Court on July 28, 2022.....	380
38. Carter’s Motion to Dismiss Claims of Ivanka Ayoub filed July 28, 2022, in Case No.	
39. Gersten’s Motion for Continuance filed August 22, 2018 in Case No. 2018-CP-12-00117.....	390
40. Gersten’s Motion for Extension of Time to File Initial Brief filed December 27, 2018, in Appellate Case No. 2018-002115.....	395
41. Gersten’s Motion for Extension of Time filed February 8, 2019, in Appellate Case No. 2018-002115.....	398
42. Gersten’s Motion to Allow Late Filing filed February 19, 2019, in Appellate Case No. 2018-002115.....	399
43. Gersten’s Motion for Extension of Time filed March 1, 2019, in Appellate Case No. 2018- 002115.....	405
44. Gersten’s Motion for Extension of Time filed March 12, 2019, in Appellate Case No. 2018-002115.....	410
45. Gersten’s Motion for Extension of Time filed March 21, 2019, in Appellate Case No. 2018-002115.....	415
46. Gersten’s Motion for Extension of Time filed March 28, 2019, in Appellate Case No. 2018-002115.....	418

47. Gersten’s Motion for Extension of Time filed April 8, 2019, in Appellate Case No. 2018-002115.....	422
48. Gersten’s Motion for Extension of Time filed April 18, 2019, in Appellate Case No. 2018- 002115.....	423
49. Gersten’s Motion for Extension of Time filed April 29, 2019, in Appellate Case No. 2018- 002115.....	425
50. Gersten’s Motion to Reinstate Appeal or Motion for Extension of Time filed May 31, 2019, in Appellate Case No. 2018-002115.....	428
51. Gersten’s Motion for Extension of Time filed September 4, 2019, in Appellate Case No. 2019-001484.....	435
52. Gersten’s Motion for Extension of Time filed November 7, 2019, in Appellate Case No. 2019-001484.....	440
53. Gersten’s Motion for a Continuance filed January 4, 2021, in Case No. 2018-CP-12-00117.....	445
54. Motion to Dismiss or Motion to Strike of Defendant Kevin Carter.....	450
55. Designation of Matter GERSTEN.....	455
56. Designation of Matter CARTER.....	460

Certificate by Appellant

April 26, 2018

Order consolidating cases filed April 26, 2018

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Chester
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP1200117

Heidi Gersten et al
PLAINTIFF(S)

Kevin Carter et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

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

This case shall be consolidated with case number 2018-CP-12-00074. These cases fall outside the scope of an arbitration and shall be placed on the Common Pleas docket for process.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

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

Unknown John Does

GMC

Chevrolet

Blackwell

S C Department of Public Safety

John Ammendola

Interinsurance Exchange of the Automobile Club

Nationwide Insurance Company

Joseph Tirbovich

Daniel Hubbard

Ivanka Ayoub

Heidi Gersten for Heidi Gersten

Heidi Gersten for Heidi Gersten

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

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



Chester Common Pleas

Case Caption: Heidi Gersten , plaintiff, et al VS Kevin Carter , defendant, et al
Case Number: 2018CP1200117
Type: Order/Electronic Form 4

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

Electronically signed on 2018-04-26 13:01:30 page 3 of 3

ELECTRONICALLY FILED - 2018 Apr 26 4:14 PM - CHESTER - COMMON PLEAS - CASE#2018CP1200117

September 19, 2018

Order granting Defendants Kevin Carter's and Richard Davis' Motion to Dismiss filed September 19, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHESTER

CIVIL ACTION NO: 2018-CP-12-00117

Heidi Gersten, Ivanka Ayoub, Daniel
Hubbard,

Plaintiff,

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

vs.

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

Defendants.

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

PROCEDURAL BACKGROUND

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

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

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

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

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

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

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

LAW

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

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

The Court will address each item in turn.

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

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

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

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

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

B. Daniel Hubbard’s claims.

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

C. Ivanka Ayoub’s claims.

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

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

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

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

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

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

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

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

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

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

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

E. Carter and Davis’ other motions.

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

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

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

CONCLUSION

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

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

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

It is so **ORDERED**.

John C. Hayes, III
Circuit Court Judge



Chester Common Pleas

Case Caption: Heidi Gersten , plaintiff, et al VS Kevin Carter , defendant, et al
Case Number: 2018CP1200117
Type: Order/Other

So Ordered

s/John C. Hayes III 2049

Electronically signed on 2018-09-18 17:57:44 page 9 of 9

September 19, 2018

Order granting Defendant Interinsurance Exchange of the Automobile Club's Motion to Dismiss
filed September 19, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHESTER

CIVIL ACTION NO: 2018-CP-12-00117

Heidi Gersten, Ivanka Ayoub, Daniel
Hubbard,

CIVIL ACTION NO: 2018-CP-12-00074

Plaintiffs,

**ORDER GRANTING DEFENDANT
INTERINSURANCE EXCHANGE OF
THE AUTOMOBILE CLUB'S
MOTION TO DISMISS**

vs.

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

Defendants.

This matter comes before the Court upon Defendant Interinsurance Exchange of the Automobile Club's ("AAA") Motions to Dismiss, to Strike, and to change venue. The Court held a hearing on its and the other Defendants' motions on September 5, 2018. All served Defendant's appeared by and through their attorneys and Plaintiffs Gersten and Ayoub appeared *pro se*; Plaintiff Hubbard did not appear. For the reasons set forth below, Defendant AAA's principal motions are granted.

PROCEDURAL BACKGROUND

This action arises out of an automobile collision that took place on March 19, 2015 between Ivanka Ayoub's vehicle operated by Heidi Gersten, and a vehicle both operated and owned by Kevin Carter. Plaintiff Gersten originally filed a property damage arbitration claim on February 21, 2018 (hereinafter "Arbitration Action"). The claim named Kevin Carter, Richard

Davis, Nationwide Mutual Insurance Company, Interinsurance of the Automobile Club, and Trustguard Insurance as defendants.

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

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

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

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

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

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

LAW

AAA's Motion to Dismiss seeks the following relief:

- a) Dismissal of all claims asserted against it for failing to state facts constituting a cause of action,
- b) Dismissal for a lack of standing to pursue the claim asserted claims,
- c) Dismissal of Daniel Hubbard's claims,
- d) Dismissal of Ivanka Ayoub's claims,
- e) That certain specified allegations be stricken,
- f) Dismissal for lack of *in personam* jurisdiction, and a
- g) Change of Venue

The Court will address each item in turn.

A. All Causes of Action

The Complaint numbers eighteen separate causes of action. Except for the negligence claim, these causes of action merely allege the legal elements of various other causes of action, and some fail to even allege the basic legal elements.

Exactly four *facts* in its almost five score paragraphs are germane to AAA:

- At Paragraph 6, that AAA is a North Carolina Company,

- At 10, the collision occurred in Chester County,
- At 14, the date and time of the accident, and
- At 18, Gersten was insured for liability by AAA.

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

These facts do not constitute any cause of action against AAA. They do not specify any acts of negligence, nor describe the essential allegations of fraud, nor any false statement, nor any deceitful act, nor any conduct at all entitling the Plaintiffs to relief of any kind. The facts simply do not constitute a cause of action against AAA, so the Complaint against it must be **dismissed**.

B. Standing

The Plaintiffs argue they have asserted a cause of action against AAA. To the extent they seek to assert third-party claims against such a liability insurer, they lack standing to do so. *Kleckley v. Northwestern Nat. Cas. Co.*, 526 S.E.2d 218, 219 (S.C. 2000). In *Kleckley*, the Supreme Court held that third-party claimants have no standing to pursue a cause of action

against a liability insurer. Alternatively, even if the court were to have held that facts constituting a cause of action had been stated and that one or more of the Plaintiffs could continue its suit against the AAA, that suit would have been severed from the negligence claim. Allowing the two causes of action to go forward together would present a honey pot of potential prejudice and inefficiency which this court would avoid. **SCRCP, Rules 20 and 21.**

C. Daniel Hubbard's claims.

AAA moved to dismiss Daniel Hubbard's claims because South Carolina does not recognize a cause of action for loss of a sibling's *consortium*. The attorney for AAA exhibited to the court a letter mailing notice of this hearing to Hubbard with notice to him that it intended to move for a dismissal if he did not appear.

Daniel Hubbard did not appear for the hearing on the Motion to Dismiss. Therefore, his claims are **dismissed** for failure to prosecute pursuant to Rule 41(b), SCRCP.²

D. *Consortium* claims.

Only Plaintiff Gersten claims to be an insured of the AAA. Ayoub and Hubbard are total strangers to the AAA, the AAA was not involved in the accident, and the only complaint they make are for maternal or filial loss of *consortium*, respectively. Plaintiff Ayoub, the mother of Plaintiff Gersten, was not involved in the accident but the Complaint alleges that she "suffers, among other things, loss of consortium." Plaintiff Hubbard, Gersten's brother, alleges he "was unable to work for a period and, accordingly, loss (*sic*) wages... ." He was not involved in the accident.

² Even had Hubbard appeared at the hearing, his claim would fail for the reasons set out below.

Our Supreme Court has refused to recognize a cause of action for maternal or filial loss of *consortium*. South Carolina does recognize loss of spousal *consortium*, but that cause of action was expressly created: **SC Code Ann. 15-75-20**. The Supreme Court has held that the absence of a similar statutory cause of action for other loss of *consortia* is persuasive evidence that the General Assembly did not intend to recognize any such causes of action.

In *Taylor v. Medenica*, this Court held that the determination of which relationships may give rise to a loss of consortium claim in South Carolina is one best left to the discretion of the legislature. 479 S.E.2d 35, 47 (S.C. 1996) (declining to recognize a cause of action for loss of parental consortium). The United States District Court for the District of South Carolina adopted the *Taylor* analysis in finding that South Carolina law did not provide a cause of action for loss of consortium of a child or for filial consortium. *Kirkland v. Sam's East, Inc.*, 411 F.Supp. 2d 639, 641 (D.S.C. 2005). Today, we extend our *Taylor* analysis in holding that South Carolina law does not recognize claims for loss of filial consortium. Such rights did not exist under the common law, and the legislature has not provided such a right by statute.

Doe v. Greenville Cty. School District 651 S.E.2d 305, 308 (S.C. 2007)

The claims by Ayoub and Hubbard are hereby **dismissed**.

E. In Personam Jurisdiction

The Affidavit of Gail C. Louis, the Secretary of AAA, makes it clear that AAA does not have minimum contacts with South Carolina. Indeed, it has no contacts with South Carolina: no office, no business conducted, no insureds, no property, and no activity. Neither does the Complaint allege that AAA committed a tort within this state. Thus, the Complaint against AAA is **dismissed** because this court lacks personal jurisdiction.

F. Striking Allegations

In view of the other rulings made herein, this court need not reach, so it does not address the AAA motions made to strike various allegations. Such motions are thereby **moot**.

G. Change of Venue

Similarly this court need not reach, so it does not address, the AAA motion made to change the venue of the trial as it is also **moot**.

H. All Other Causes of Action asserted by Gersten

The existence of insurance is inadmissible in a tort suit. **Rule 411 SCRE**. Such mentions are highly prejudicial and there can be no doubt that reason and authority expressly forbid bringing into evidence or argument the fact that any defendant is protected by liability insurance. *Hartford v. Carolina Glass Co.*, 75 S.E.2d 533, 541 (S.C. 1912); *Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc.*, 452 S.E.2d 619, 622 (S.C. App. 1994); *Norris v. Ferre*, 432 S.E.2d 491, 493 (S.C. App. 1993) (“Furthermore, the Supreme Court has been meticulous in keeping the issue of insurance coverage away from the jury”). Since the existence of insurance is inadmissible, AAA must be stricken as a defendant and all allegations against it, to the extent there were any surviving, would have been stricken.

CONCLUSION

For the above-stated reasons, the Court finds AAA's Motions are granted in part and mooted in part. It is ORDERED, ADJUDGED, and DECREED that:

- 1) All causes of action asserted against AAA are dismissed pursuant to Rule 12(b)(6), SCRCP.
- 2) All causes of action asserted against AAA are dismissed for lack of personal jurisdiction by this court,
- 3) The causes of action asserted by Daniel Hubbard are dismissed pursuant to Rule 41(b), SCRCP for failure to prosecute.
- 4) Ivanka Ayoub's & Danial Hubbard's loss of consortium claims are dismissed pursuant to Rule 12(b)(6), SCRCP because South Carolina does not recognize a claim for filial or maternal loss of *consortium*.
- 5) All causes of action against AAA are dismissed because it would not be permissible to try them with the claims against the negligence Defendants.
- 6) AAA's Motions to Strike are denied as moot.
- 7) AAA's Motion to Change Venue is denied as moot.

It is so **ORDERED**.

John C. Hayes, III
Circuit Court Judge

_____, SC
_____, 2018



Chester Common Pleas

Case Caption: Heidi Gersten , plaintiff, et al VS Kevin Carter , defendant, et al
Case Number: 2018CP1200117
Type: Order/Dismissal

So Ordered

s/John C. Hayes III 2049

Electronically signed on 2018-09-18 17:57:14 page 9 of 9

Order granting Defendants South Carolina Department of Public Safety's and Trooper Herbert Blackwell's Motion to Dismiss filed September 21, 2018

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHESTER	)	
	)	
Heidi Gersten, Ivanka Ayoub, Daniel	)	
Hubbard,	)	Civil Action No. 18-CP-12-117
	)	
Plaintiffs,	)	ORDER
	)	
v.	)	
	)	
Kevin Carter, Richard Davis, Joseph	)	
Tirbovich, Nationwide Insurance	)	
Company, Interinsurance Exchange of the	)	
Automobile Club, John Ammendola,	)	
Trustguard Insurance Company, South	)	
Carolina Department of Public Safety,	)	
Blackwell, Chevrolet, GMC, Unknown	)	
John Does,	)	
	)	
Defendants.	)	
	)	

This matter came before the Court on a Motion to Dismiss filed by the South Carolina Department of Public Safety and Trooper Herbert Blackwell. Present at the hearing was Heidi Gersten and Ivanka Ayoub (mother of Ms. Gersten). Daniel Hubbard was not present at the hearing.

After hearing argument from the attorney for the Defendants South Carolina Department of Public Safety and Trooper Herbert Blackwell, and hearing the Plaintiffs' positions, the Court hereby grants South Carolina Department of Public Safety and Trooper Herbert Blackwell's Motion to Dismiss.

The Defendants South Carolina Department of Public Safety and Trooper Herbert Blackwell have moved to dismiss the Complaint on various grounds and between the time the Defendants South Carolina Department of Public Safety and Trooper Herbert Blackwell moved

to dismiss the Complaint, Plaintiffs' filed an Amended Complaint. In regard to these Defendants, South Carolina Department of Public Safety and Trooper Herbert Blackwell, the Amended Complaint was filed timely; however, as was explained by the attorney for Defendants South Carolina Department of Public Safety and Trooper Herbert Blackwell, the motion to dismiss is applicable not only to the original Complaint, but also the Amended Complaint. From a review of both the Complaint and Amended Complaint, it appears that the Plaintiffs are alleging that there were some irregularities in the investigation and preparation of the accident report surrounding the accident involving the Plaintiffs and Kevin Carter on March 19, 2015.

The Defendants South Carolina Department of Public Safety and Trooper Herbert Blackwell have moved to dismiss Trooper Blackwell from the Complaint pursuant to the South Carolina Tort Claims Act, §15-78-30.

The Court finds that Trooper Blackwell was acting as a South Carolina Department of Public Safety Officer in regard to his investigation of the accident involving the Plaintiffs and Kevin Carter. For this reason, Trooper Blackwell is dismissed from this case. See §15-78-30, of the Code of Laws of the State of South Carolina, 1976 as amended.

As to the remaining grounds raised by Defendants South Carolina Department of Public Safety and Trooper Herbert Blackwell, it is clear from allegations in the Complaints, that the Plaintiffs have alleged that the South Carolina Department of Public Safety through Trooper Blackwell issued a Traffic Accident Report which was later amended by the South Carolina Multi-Disciplinary Accident Reconstruction Team (MAIT).

From a review of the Complaint and Amended Complaint, Plaintiffs have failed to establish any private right of action against the Defendant South Carolina Department of Public Safety for "an improper investigation". Generally, there is no common law duty to act; however,

an affirmative legal duty may arise by statute, contractual relationship, status, property interest, or some other special circumstance. *See, Rayfield v. South Carolina Dep't of Corrections*, 297 S.C. 95, 105-06, 374 S.E.2d 910, 916 (Ct. App. 1998); *see also, Jensen v. Anderson Cnty. Dep't of Soc. Servs.*, 304 S.C. 195, 199 403 S.E.2d 615, 617 (1991). While a duty may arise by virtue of statutory law, courts in South Carolina recognize what is known as the “public duty” rule. *Rayfield*, 297 S.C. 95, 104, 374 S.E.2d 910, 915; *see also, Parker v. Brown*, 195 S.C. 35, 10 S.E.2d 625 (1940) (Supreme Court adopting the public duty rule as the law in South Carolina). A statute establishing the specific “duties of a public office does not, without more, impose on the person holding that office a duty of care towards individual members of the public in the performance of those duties.” *Rayfield*, 297 S.C. 95, 105, 374 S.E.2d at 915-16; *see also, Jensen v. Anderson Cnty. Dep't of Soc. Servs.*, 304 S.C. 195, 403 S.E.2d 615 (1991) (Under the rule, public officials are not liable to individuals in negligence as a result of discharging duties as owed to the public at large rather than to anyone individually). In this case the Department, through its officers, are required to investigate and report on motor vehicle accidents involving serious injuries. See, South Carolina Code Ann. §56-5-1270, 1976 as amended. For this reason any duty imposed on these Defendants would be a public duty and not give rise to a private right of action.

Further any injuries received by the Plaintiffs arose out of the automobile accident and are not the proximate cause of any action undertaken by the South Carolina Department of Public Safety in the investigation of the accident and the issuance of the Uniform Traffic Report in this matter.

Finally, any claims that the Uniform Traffic Report could or would be evidence in this case fails to recognize that under §56-5-1290, accident reports are not evidence to establish due or lack of due care.

For these reasons, the Complaints (original and amended) failed to set forth a viable private right of action against Defendant South Carolina Department of Public Safety and therefore the Complaints are dismissed with prejudice.

IT IS THEREFORE ORDERED, that the action brought by the Plaintiffs is dismissed with prejudice.

IT IS FURTHER ORDERED, that the action brought by Michael Hubbard is dismissed as a result of the Plaintiff failing to appear at the hearing and therefore failed to prosecute the claim.

AND IT IS SO ORDERED.

The Honorable J.C. Hayes

SEPTEMBER __, 2018

CHESTER, SOUTH CAROLINA



Chester Common Pleas

Case Caption: Heidi Gersten , plaintiff, et al VS Kevin Carter , defendant, et al
Case Number: 2018CP1200117
Type: Order/Dismissal

So Ordered

s/John C. Hayes III 2049

Electronically signed on 2018-09-21 14:22:40 page 5 of 5

Order granting Defendants Nationwide Insurance Company's and Joseph Turbovich's Motion to Dismiss filed September 21, 2018

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHESTER

CIVIL ACTION NO: 2018-CP-12-00117

Heidi Gersten, Ivanka Ayoub, Daniel
Hubbard,

Plaintiff,

**ORDER GRANTING DEFENDANTS
NATIONWIDE INSURANCE COMPANY'S
AND JOSEPH TURBOVICH'S MOTION TO
DISMISS**

vs.

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

Defendants.

This matter comes before the Court upon Defendants Nationwide Mutual Insurance Company's ("Nationwide") and Joseph Tirbovich's ("Tirbovich") Motions to Dismiss. The Court held a hearing on these Motions and a number of other motions on September 5, 2018. For the reasons set forth below, Defendants Nationwide Mutual Insurance Company and Joseph Tirbovich's Motions are granted.

PROCEDURAL BACKGROUND

This action arises out of an automobile collision that took place on March 19, 2015 between a vehicle operated by Heidi Gersten and allegedly owned by Ivanka Ayoub and a vehicle operated and owned by Kevin Carter. Plaintiff Gersten originally filed a property damage arbitration claim on February 21, 2018 (hereinafter "Arbitration Action"). The claim

named Kevin Carter, Richard Davis, Nationwide Mutual Insurance Company, Interinsurance of the Automobile Club, and Trustguard Insurance as defendants.

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

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

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

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

consolidated, this Order will address the allegations set forth in the Circuit Court Complaint. However, the Court has reviewed all three Complaints, and the Court's ruling would be the same regardless of which pleading(s) were in effect.

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

LAW

Nationwide's and Tirbovich's Motion to Dismiss seeks dismissal of all claims asserted against Nationwide and Tirbovich on the following grounds:

- a) Dismissal of all causes of action for failure to state facts sufficient to constitute a cause of action;
- b) Dismissal of all causes of action due to lack of standing;
- c) Dismissal of Daniel Hubbard's claims;
- d) Dismissal of Ivanka Ayoub's claims;
- e) Dismissal of all claims against Joseph Tirbovich for failure to properly serve the Summons and Complaint;

The Court will address each of these grounds in turn.

A. All Causes of Action as to Defendants Nationwide and Tirbovich.

The Complaint only references Joseph Tirbovich in the caption and is not mentioned anywhere else in the Complaint. Nationwide is only mentioned in one paragraph, stating "The Defendant Nationwide Mutual Insurance Company is a company maintaining and operating and

doing business in the State of North Carolina.” (Compl. ¶ 5). Pursuant to Rule 12(b)(6), SCRCP, a Complaint should be dismissed if it fails “to state facts sufficient to constitute a cause of action.” Rule 12(b)(6), SCRCP. The Complaint alleges no factual allegations against Defendants Nationwide and Tirbovich.

B. Dismissal Due to Lack of Standing

The Plaintiffs argue they have asserted a cause of action against Nationwide and Tirbovich. To the extent they seek to assert third-party claims against such a liability insurer, they lack standing to do so. *Kleckley v. Northwestern Nat. Cas. Co.*, 526 S.E.2d 218, 219 (S.C. 2000). In *Kleckley*, the Supreme Court held that third-party claimants have no standing to pursue a cause of action against a liability insurer. Thus, Plaintiffs do not have standing to assert any claims against Nationwide or its adjuster, Tirbovich in either the Civil Action Complaint or the Arbitration Action.

C. Daniel Hubbard’s claims.

Nationwide and Tirbovich moved to dismiss Daniel Hubbard’s claims on the ground that South Carolina does not recognize a cause of action for loss of a sibling’s consortium. However, Daniel Hubbard did not appear for the hearing on the Motions to Dismiss. Therefore, his claims are dismissed for failure to prosecute pursuant to Rule 41(b), SCRCP.²

D. Ivanka Ayoub’s claims.

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

² Even if Hubbard had appeared at the hearing, his claim would nonetheless fail for the reasons set out in Part D.

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

Our Supreme Court has refused to recognize a cause of action in tort for filial loss of consortium. *See Doe v. Greenville County School Dist.*, 375 S.C. 63, 70, 651 S.E.2d 305, 308 (2007) (“Accordingly, in the absence of some action from the legislature, this Court has no authority upon which it could rely in finding that South Carolina law recognizes claims for loss of filial consortium.”).³ While South Carolina does recognize loss of spousal consortium, that cause of action was expressly recognized by the South Carolina General Assembly. *See* S.C. Code Ann. § 15-75-20. Our Supreme Court has held the absence of a similar statutory cause of action for filial loss of consortium indicates the General Assembly did not intend to recognize such causes of action. *See Greenville County School Dist.*, 375 S.C. at 69, 651 S.E.2d at 308.

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

E. All Other Causes of Action asserted by Plaintiffs

The Complaint lists eighteen separate causes of action. As it relates to Nationwide and Tirbovich, these causes of action merely allege the legal elements of various other causes of action, and several of these causes of action fail to even allege the basic legal elements. Rule 8(a) of the South Carolina Rules of Civil Procedure states that a pleading setting forth a cause of action “shall contain . . . a short and plain statement of the facts showing the pleader is entitled to relief.” Rule 8(a), SCRPC. In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court’s analysis is limited solely to the Complaint itself, and no other documents may be

³ *See also Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996) (declining to recognize loss of filial consortium claim of child relating to injury to parent); *Kirkland v. Sam’s East, Inc.*, 411 F. Supp. 2d 639, 641 (D.S.C. 2005) (“South Carolina does not recognize a cause of action for filial loss of consortium”).

considered. *See Woodell by Allen v. Marion School Dist. One*, 307 S.C. 297, 298, 414 S.E.2d 794, 794 (Ct. App. 1992). Moreover, a “trial court must dismiss a claim pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, if the pleadings, when taken in the light most favorable to the plaintiff, fail to allege sufficient facts to constitute a cause of action.” *Trancik v. USAA Ins. Co.*, 354 S.C. 549, 552, 581 S.E.2d 858, 860 (Ct. App. 2003).

Plaintiff must allege facts supporting each element of the causes of action asserted in the Complaint. She has failed to do so. Therefore, all causes of action against Nationwide and Tirbovich will be dismissed pursuant to Rule 12(b)(6).

CONCLUSION

For the above-stated reasons, the Court finds Defendants Nationwide Mutual Insurance Company’s and Joseph Tirbovich’s Motions should be granted. It is ORDERED, ADJUDGED, and DECREED that:

- 1) All causes of action asserted against Nationwide and Tirbovich are dismissed pursuant to Rule 12(b)(6), SCRCP.
- 2) All causes of action asserted against Nationwide and Tirbovich are dismissed for lack of standing;
- 3) The causes of action asserted by Daniel Hubbard are dismissed pursuant to Rule 41(b), SCRCP for failure to prosecute.
- 4) Ivanka Ayoub’s loss of consortium claim is dismissed pursuant to Rule 12(b)(6), SCRCP because South Carolina does not recognize a claim for filial loss of consortium.
- 5) All causes of action against Tirbovich are dismissed pursuant to Rule 12(b)(5) for Plaintiffs’ failure to serve him with the Summons and Complaint in either the Arbitration Action or the Civil Action.

It is so **ORDERED**.

John C. Hayes, III
Circuit Court Judge



Chester Common Pleas

Case Caption: Heidi Gersten , plaintiff, et al VS Kevin Carter , defendant, et al
Case Number: 2018CP1200117
Type: Order/Dismissal

So Ordered

s/John C. Hayes III 2049

Electronically signed on 2018-09-21 14:23:20 page 7 of 7

Order granting Defendants Trustgard Insurance Company's and John Ammendola's Motion to Dismiss filed September 24, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHESTER	)	Case No. 2018-CP-12-000074
	)	
Heidi Gersten and Ivanka Ayoub,	)	and
	)	
Plaintiffs,	)	Case No. 2018-CP-12-000117
	)	
vs.	)	
	)	
Kevin Carter; Richard Davis; Joseph	)	ORDER ON
Tirbovich, Nationwide Mutual Insurance	)	MOTION TO DISMISS
Company; Interinsurance Exchange of the	)	
Automobile Club; John Ammendola;	)	
Trustgard Insurance Company, <i>et al.</i>	)	
	)	
Defendants.	)	
	)	

These matters come before the Court pursuant to Defendants' Trustgard Insurance Company ("Trustgard") and John Ammendola's Motions to Dismiss, and Trustgard's Motion to Quash Discovery. The Court held a hearing on these and other Defendants' motions on September 5, 2018. Trustgard and John Ammendola appeared by and through their attorneys. Plaintiffs Gersten and Ayoub appeared *pro se*. Plaintiff Hubbard did not appear. For the reasons set forth below, the Motions to dismiss of Trustgard and John Ammendola are granted. Trustgard's Motion to Quash is dismissed, without prejudice, as moot.

I. STATEMENT OF THE CASE

These two actions arise out of an automobile collision that took place on March 19, 2015. Plaintiff Heidi Gersten, was driving on I-77 in Chester County when she was involved in a motor vehicle accident with Kevin Carter. Carter was operating a vehicle insured by Nationwide Insurance. Gersten was driving a van owned by her mother, Plaintiff Ivanka Ayoub, which was insured by Trustgard.

Gersten filed a property damage arbitration claim on February 21, 2018, Case No. 2018-CP-12-000074, (hereinafter “Arbitration Action”). The claim also named as defendants Kevin Carter, Richard Davis, Nationwide Mutual Insurance Company, Interinsurance of the Automobile Club, and Trustgard.

Gersten later prepared a “First Amended Claim for Property Damage Verified” (hereinafter “Amended Arbitration Complaint”) dated March 2, 2018. The Amended Arbitration Complaint added Gersten’s mother, Ayoub, as a claimant, and added Joseph Tirbovich and John Ammendola as additional defendants. Gersten and Ayoub never obtained an Amended Summons listing Ayoub as a claimant. The Amended Arbitration Complaint was filed March 27, 2018.

On March 16, 2018, Gersten, Ayoub, and Daniel Hubbard filed a civil lawsuit, 2018-CP-12-000117, (“Circuit Court Action”) in this court, seeking, *inter alia*, recovery for injuries arising out of the collision. In addition to the Defendants named in the Amended Arbitration Complaint, the Plaintiffs named the South Carolina Department of Public Safety, Blackwell (sic), Chevrolet, GMC, and unknown John Doe defendants.

On April 26, 2018, Judge Gibbons, acting as the Chief Administrative Judge, for Chester County Circuit Court, entered an Order finding the claims asserted in the Arbitration Action were outside the scope of arbitration. He transferred the Arbitration Action to the Common Pleas docket and consolidated the case with the Circuit Court action. (April 26, 2018, Form 4 Order). Gersten and Ayoub filed a Motion to Alter or Amend that order.

Just before the hearing on the motions under consideration, Plaintiff served, via mail, an Amended Complaint dated August 29, 2018

The Court has reviewed the original Arbitration Action, the Amended Arbitration Action, the Complaint in the Circuit Court Action, and the Amended Complaint the Circuit Court Action;

the ruling is the same regardless of whether the cases have been consolidated or not, and regardless of which Complaint in the Circuit Court Action is operable.

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

II. STANDARD OF REVIEW AND DISCUSSION

A. SCRCP 12(b)(6) Failure to State Facts Sufficient to Constitute a cause of Action as to both Trustgard and John Ammendola

SCRCP 12(b)(6) allows a party to move to dismiss an action for “failure to state a claim upon which relief can be granted.” A decision on a 12(b)(6) motion “must be bottomed and premised solely upon the allegations set forth by the plaintiff.” Williams v. Condon, 347 S.C. 227, 233 (Ct. App. 2001). “The question to be considered is whether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief.” Id. “If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper.” Doe v. Marion, 373 S.C. 390 (2007). See Skywaves I Corp. v. Branch Banking & Tr. Co., 814 S.E.2d 643, 656 (S.C. Ct. App. 2018), reh'g denied (June 21, 2018). “[A] mere conclusory allegation, unsupported by any particularized allegations of fact, is insufficient” to withstand a 12(b)(6) motion to dismiss. Jones v. Gilstrap, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986)).

1. The Circuit Court Action

The only reference to Trustgard in the original Complaint in the Circuit Court Action is that it is “a company maintaining and operating and doing business in the State of North Carolina”

and that it insured Gersten and Ayoub. See Complaint at ¶ 7, 17, 19. The Complaint includes causes of action for Negligence against Kevin Carter, and against all Defendants for Fraud, Fraudulent Inducement, Intentional Inflection of Emotional Distress, Loss of Consortium, Product Liability, Breach of Contract, Invasion of Privacy, Strict Liability, Conspiracy, Misrepresentation, Deceit, Duress and Undue Influence, Slander, Libel, Defamation, Malicious Prosecution, and prayers for damages, all asserted against all defendants. However, there are no facts alleged which support any of the causes of action. The Compliant merely pleads some of the legal elements of the causes of action. The Court notes that Trustgard states that it is based on Ohio and that Gersten was not personally insured with Trustgard (only the vehicle she was driving), but regardless of the validity of these statements, absent any further allegations Plaintiffs have not alleged facts under which they would be entitled to relief under any legal theory.

John Ammendola's name does not appear anywhere in the body of the original Complaint in the Circuit Court Action, although he is listed in the caption. With no allegations made against Mr. Ammendola whatsoever, this action is factually insufficient on its face without the necessity of any further analysis. Potter v. Clark, 497 F.2d 1206, 1207 (7th Cir.1974) (per curiam)(dismissing complaint that was silent as to defendant except for his name appearing in caption).

This Court notes that a short time prior to the hearing in which the Motions to Dismiss were heard, Plaintiffs served an Amended Complaint in the Common Pleas Action. The Amended Complaint also includes causes of action for Negligence against Kevin Carter, and against all Defendants for Fraud, Fraudulent Inducement, Intentional Inflection of Emotional Distress, Negligent Inflection of Emotional Distress, Loss of Consortium, Product Liability, Breach of Contract, Invasion of Privacy, Strict Liability, Conspiracy, Misrepresentation, Deceit, Duress and

Undue Influence, Slander, Libel, Defamation, Malicious Prosecution, and prayers for damages, all asserted against all defendants. This Amended Complaint does not allege any material additional facts as to Trustgard or John Ammendola. The Amended Complaint alleges that both Ayoub and Gersten were insured with Trustgard. (¶¶ 46, 48.) Paragraph 65 alleges that Trustgard and John Ammendola (and other defendants) are all, "...in breach of contract, among other things." There is no allegation as to the terms of the contract, or how it was breached. Paragraph 71 alleges Trustgard, among other defendants, "...made a representation of false statements of material fact." There is no allegation of any representation made by Trustgard or John Ammendola. Paragraph 98 alleges Ayoub and Gersten had a contract with Trustgard, without any other detail. Paragraph 99 alleges the "Defendants breached their duty." Otherwise, the Amended Complaint merely attempts to set forth legal requirements of causes of action. It does not include any facts supporting any cause of action as to Trustgard or John Ammendola. Accordingly, the Circuit Court Action is dismissed as to Trustgard and John Ammendola pursuant to Rule 12(b)(6), SCRCP.

2. The Arbitration Action

In the Arbitration Action, the only references to John Ammendola are conclusory allegations that he violated the law without any specific facts to support such a violation. See First Amended Claim ¶¶ 168, 173, 174, 183, 188, 193, 198 (alleging Ammendola is in violation of S.C. Code Section 38-59-20); ¶¶ 203 and 208 (seeking damages for Ammendola's violation of S.C. Code Section 38-59-20). Without any specific facts that would support the violations, these legal conclusions are simply insufficient to withstand a Motion to Dismiss. Moreover, there is no private cause of action under S.C. Code Section 38-59-20.

Beyond these conclusory allegations and the undisputed fact that Trustgard issued an insurance policy involved in the accident, the only specific allegations in the Arbitration Claim

against Trustgard relate to certain communications between representatives of Trustgard and Gersten about a claims or claims regarding the accident. First Amended Claim at ¶ 229, 230, 232, 233. These allegations reference a payment from Trustgard to Gersten for Medpay and an offer of payment for a property damage claim. Setting aside that Trustgard has objected to Plaintiffs' characterization of these exchanges, and assuming they are true for the purpose of this Motion, Plaintiffs make no specific allegations made as to how Trustgard's handling of any claim regarding this accident violates either a statute or the term of any insurance policy. Neither these allegations nor any other allegations in the Arbitration Claim against Trustgard support Plaintiffs' claim for legal relief under any theory.

The same or similar unsupported conclusory allegations are made against Trustgard in the Amended Arbitration Claim. See First Amended Claim ¶ 215 (alleging Trustgard breached a contractual duty, was negligent, and acted in bad faith); ¶ 167, 172, 177, 182, 187, 192, 197 (alleging Trustgard is in violation of S.C. Code Section 38-59-20); ¶ 202 and 207 (seeking damages for Trustgard's violation of S.C. Code Section 38-59-20).¹

Further, the legal basis for the arbitration claim, S. C. Code § 38-77-710, provides solely for the arbitration of "property damage liability claims arising out of motor vehicle collisions...." It is not a mechanism for bringing any other type of claim.

Finally, S. C. Code § 38-59-20 does not create a private cause of action. Gaskins v. Southern Farm Bureau Cas. Ins. Co., 343 S.C. 666, 541 S.E.2d 269 (Ct.App.2000). Therefore,

¹ A number of allegations in both the Common Pleas Action and the Arbitration Claim broadly assert legal violations against all "Defendants," sometimes with formulaic recitations of the elements of causes of action. These allegations which do not distinguish in any way between the various Defendants in these actions are not creditable because they are both "conclusory" and "unsupported by any particularized allegations of fact." Skywaves I Corp. 814 S.E.2d at 656.

even if the conclusory allegation that Trustgard or John Ammendola were “...in violation of the South Carolina Code of Laws, Title 38, CHAPTER 59, ARTICLE 1, SECTION 38-59-20 Improper claim practices.” stated facts which were otherwise sufficient constitute a cause of action (it does not), there is no private cause of action for violation of that code section. It provides only for an administrative remedy before the Department of Insurance.

B. SCRCP 12(b)(2) Lack of Jurisdiction over John Ammendola

SCRCP 12(b)(6) allows a party to move to dismiss an action for “lack of jurisdiction over the person.” The burden of showing personal jurisdiction is on Plaintiffs. “At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction.” Coggeshall v. Reprod. Endocrine Assocs. of Charlotte, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007)(internal citation omitted)). To determine the propriety of personal jurisdiction over a nonresident defendant, the relevant analysis is whether “there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.” Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). Plaintiffs have not pled any facts as to Mr. Ammendola. They have not referred to his state of residency, the identity of his employer, or any other fact, and they have failed to make this prima facie showing by demonstrating the “minimum contacts” necessary for this court to have jurisdiction over him. To the extent it is argued that any minimum contacts that exist as to Trustgard be imputed to Mr. Ammendola, this argument fails because “the focus must center on the contacts generated by [Mr. Ammendola], and not on the unilateral actions of some other entity.” *Id.* at 492. As there are no allegations as to “minimum contacts” or that Mr. Ammendola took any action with respect to the accident or resulting claims, there is not even a starting point for a court to analyze the fundamental fairness of making him defend this lawsuit in

South Carolina. Plaintiffs have failed to meet their burden as to personal jurisdiction of Mr. Ammendola and the case against him must be dismissed pursuant to SCRPC 12(b)(2).

C. 12(b)(5) Insufficiency of Service of Process as to John Ammendola

Because John Ammendola was never served in either the Arbitration Action or the Circuit Court Action, dismissal is appropriate under SCRPC 12(b)(5). See Brown v. Evatt, 322 S.C. 189, 194, 470 S.E.2d 848, 850 (1996)(“A summons is not a mere notice, but a means for giving jurisdiction to the court, and unless it is waived, the court cannot otherwise obtain personal jurisdiction.”)(internal citation omitted). Service of the summons within the parameters of the rules of procedure is more than a mere formality, as without it a court has no power to render a personal judgment against a defendant. Louden v. Moragne, 327 S.C. 465, 468, 486 S.E.2d 525, 526 (Ct. App. 1997).

D. Dismissal of Loss Of Consortium Claims

Plaintiff Ayoub, the mother of Plaintiff Gersten, was not involved in the accident but the Complaint alleges that she “suffers, among other things, loss of consortium.” Plaintiff Hubbard, Gersten’s brother, alleges he “was unable to work for a period and, accordingly, loss (sic) wages...” He was not involved in the accident. Our Supreme Court has refused to recognize a cause of action for maternal or filial loss of consortium. South Carolina does recognize loss of spousal consortium, but that cause of action was expressly created: SC Code Ann. 15-75-20. The Supreme Court has held that the absence of a similar statutory cause of action for other loss of consortia is persuasive evidence that the General Assembly did not intend to recognize any such causes of action:

In *Taylor v. Medenica*, this Court held that the determination of which relationships may give rise to a loss of consortium claim in South Carolina is one best left to the discretion of the legislature. 479 S.E.2d 35, 47 (S.C. 1996) (declining to recognize a cause of action for loss of parental consortium). The United States District Court

for the District of South Carolina adopted the *Taylor* analysis in finding that South Carolina law did not provide a cause of action for loss of consortium of a child or for filial consortium. *Kirkland v. Sam's East, Inc.*, 411 F.Supp. 2d 639, 641 (D.S.C. 2005). Today, we extend our *Taylor* analysis in holding that South Carolina law does not recognize claims for loss of filial consortium. Such rights did not exist under the common law, and the legislature has not provided such a right by statute.

Doe v. Greenville Cty. School District 651 S.E.2d 305, 308 (S.C. 2007).

Moreover, Daniel Hubbard did not appear at the hearing. Ivanka Ayoub appeared at the hearing, but did not offer any argument. The claims by Ayoub and Hubbard are therefore dismissed.

ORDER

For all of the above-stated reasons, this Court hereby GRANTS Trustgard Insurance Company and John Ammendola's Motion to Dismiss the Complaints and Amended Complaints in both 2018-CP-12-000074 and 2018-CP-12-000117, with prejudice. Because the Motion to Dismiss is granted as to Trustgard, its pending Motion to Quash is hereby dismissed without prejudice as moot.

AND IT IS SO ORDERED!

John C. Hayes, III
Circuit Court Judge



Chester Common Pleas

Case Caption: Heidi Gersten , plaintiff, et al VS Kevin Carter , defendant, et al
Case Number: 2018CP1200117
Type: Order/Dismissal

So Ordered

s/John C. Hayes III 2049

Electronically signed on 2018-09-21 16:29:13 page 10 of 10

April 9, 2019

Court of Appeals Order filed April 9, 2019, in Appellate Case No. 2018-002115

The South Carolina Court of Appeals

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard, Plaintiffs,

Of whom Heidi Gersten and Ivanka Ayoub are
Appellants,

v.

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

Appellate Case No. 2018-002115

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

Trial Court Case No. 2018CP1200117, 2018CP1200074

ORDER

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

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

FILED

April 9, 2019

Columbia, South Carolina

cc:

Heidi Gersten

Ivanka Ayoub

Peter H. Dworjanyn, Esquire

Michael Reid Burchstead, Esquire

Wesley Brian Sawyer, Esquire

William Reynolds Williams, Esquire

David Richard Sligh, Esquire

William H. Davidson, II, Esquire

May 14, 2019

Court of Appeals Order filed May 14, 2019, in Appellate Case No. 2018-002115

May 14, 2019

Court of Appeals Order dismissing appeal filed May 14, 2019 in Appellate Case No. 2018-002115;

The South Carolina Court of Appeals

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard, Plaintiffs,

Of whom Heidi Gersten and Ivanka Ayoub are
Appellants,

v.

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

Appellate Case No. 2018-002115

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

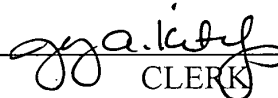
Trial Court Case No. 2018CP1200117, 2018CP1200074

ORDER

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

FOR THE COURT

BY


CLERK

FILED

May 14, 2019

Columbia, South Carolina

cc:

Heidi Gersten

Ivanka Ayoub

Peter H. Dworjanyn, Esquire

Michael Reid Burchstead, Esquire

Wesley Brian Sawyer, Esquire

William Reynolds Williams, Esquire

David Richard Sligh, Esquire

William H. Davidson, II, Esquire

July 30, 2019

Court of Appeals Order denying petition for rehearing filed July 30, 2019 in Appellate Case No. 2018-002115;

The South Carolina Court of Appeals

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard, Plaintiffs,

Of whom Heidi Gersten and Ivanka Ayoub are
Appellants,

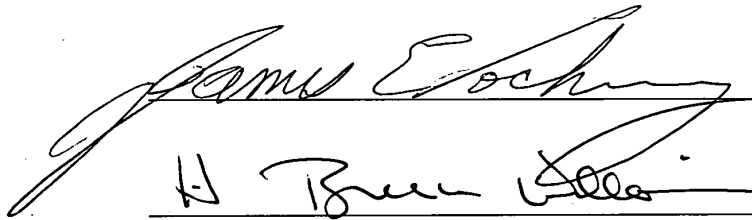
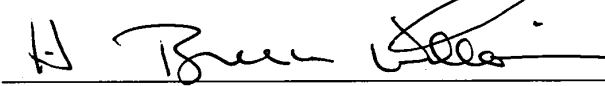
v.

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

Appellate Case No. 2018-002115

ORDER

After careful consideration of Appellant's motion to reinstate or to rehear the dismissal of this appeal, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing or reinstating this appeal. Accordingly, the motion is denied.

 C.J.
 J.
 J.

FILED

July 30, 2019

Columbia, South Carolina

cc:

Heidi Gersten

Ivanka Ayoub

Peter H. Dworjanyn, Esquire

Michael Reid Burchstead, Esquire

Wesley Brian Sawyer, Esquire

William Reynolds Williams, Esquire

David Richard Sligh, Esquire

William H. Davidson, II, Esquire

April 24, 2020

Supreme Court Order denying petition for writ of certiorari filed April 24, 2020 in Appellate
Case No. 2019-001484

The Supreme Court of South Carolina

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard, Plaintiffs,

Of whom Heidi Gersten and Ivanka Ayoub are
Petitioners,

v.

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

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

ORDER

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

FOR THE COURT

BY



CLERK

Columbia, South Carolina
April 24, 2020

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

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

June 23, 2020

Remittitur from the Court of Appeals filed June 26, 2020 in Case No. 2018-CP-12-00117;



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

June 23, 2020

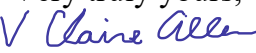
The Honorable Sue K. Carpenter
PO Drawer 580
Chester SC 29706-0580

REMITTITUR

Re: Heidi Gersten v. Kevin Carter
Lower Court Case No. 2018CP1200117, 2018CP1200074
Appellate Case No. 2018-002115

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

CLERK

Enclosure

cc: Heidi Gersten
Ivanka Ayoub
Peter H. Dworjanyn, Esquire
Michael Reid Burchstead, Esquire
Wesley Brian Sawyer, Esquire
William Reynolds Williams, Esquire
David Richard Sligh, Esquire
William H. Davidson, II, Esquire

August 22, 2022

Order dismissing case filed August 22, 2022 in Case No. 2018-CP-12-00117;

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHESTER

CIVIL ACTION NO: 2018-CP-12-00117

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard,

Plaintiffs,

v.

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

Defendants.

ORDER

This matter comes before the Court on Defendant Kevin Carter's Motion to Compel or, in the Alternative, Motion to Dismiss for Failure to Prosecute and his Motion to Dismiss the claims of Ivanka Ayoub pursuant to Rule 25. On August 18, 2022, the Court held a hearing via WebEx on these Motions. Plaintiff Heidi Gersten appeared pro se. Ivanka Ayoub did not appear, and no one appeared on her behalf. Attorney Wesley Sawyer appeared on behalf of Defendant Kevin Carter. After reviewing the record, the Motions, and arguments of the parties, the Court will grant both of Defendant's Motions to Dismiss.

PROCEDURAL HISTORY

This consolidated action began as two separate proceedings arising out of an automobile collision that took place on or about March 19, 2015. On or about February 21, 2018, Plaintiff Heidi Gersten filed a Summons and Claim for Property Damage under the property damage arbitration statute. Ivanka Ayoub was not listed on the Summons or the Claim.

Plaintiff Heidi Gersten filed the pending personal injury action on March 16, 2018. Ivanka Ayoub is listed as a plaintiff on the caption. Although Ayoub did not sign the Summons, the

Complaint purports to bear her signature. Daniel Hubbard was also named as a plaintiff. As to Ayoub and Hubbard, the March 16, 2018 Complaint attempted to assert a cause of action for loss of filial consortium, among numerous other claims. The March 16, 2018 Complaint named numerous additional defendants. Defendant Kevin Carter and other defendants moved to dismiss the property damage arbitration in light of the Circuit Court Complaint.

On March 27, 2018 – after the statute of limitations 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.

On April 26, 2018, the Honorable Brian M. Gibbons entered a Form 4 Order consolidating the two cases and placing them on the Common Pleas docket. On May 8, 2018, Plaintiffs Gersten and Ayoub moved to alter or amend the April 26, 2018 Order.

Kevin Carter and various other defendants filed motions to dismiss, among other motions. After a hearing on the various motions, the Honorable John C. Hayes, III, entered a series of orders dismissing all the defendants except Kevin Carter. The orders also dismissed the claims of Daniel Hubbard in their entirety and dismissed Ayoub's loss of consortium claim against Defendant 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.

Plaintiffs Gersten and Ayoub moved to alter or amend the Circuit Court's various dismissal orders.¹ On October 16, 2018, Judge John Hayes entered a Form 4 Order, denying the motions to

¹ The Motion to Reconsider identified a September 5, 2018 order. The hearing on the various motions took place on September 5, 2018. At the end of the hearing, Judge John Hayes indicated how he intended to rule and requested proposed orders. No written order was entered on September 5, 2018.

reconsider the “September 5, 2018” order. Plaintiffs Gersten and Ayoub then appealed. Their appeal was ultimately dismissed for failure to comply with orders from the Court of Appeals. The Court of Appeals denied a motion to reinstate or to rehear, and the Supreme Court ultimately denied Plaintiffs’ Petition for Writ of Certiorari. The Supreme Court issued its Remittitur on June 23, 2020.

On June 29, 2020, Defendant Carter served written discovery on Ayoub and Gersten. When no responses were provided, Defendant Carter sent a follow-up letter dated August 13, 2020 asking for the discovery responses and also asking for deposition dates. On August 26, 2020, when Plaintiffs failed to respond to the discovery requests and failed to respond to follow up letters, Defendant Carter filed a Motion to Compel or, in the Alternative, Motion to Dismiss for Failure to Prosecute.

The hearing on Carter’s Motion was first scheduled for January 13, 2021. Gersten moved to continue the hearing because she was litigating another matter in Florida, and she asked for a continuance of at least six months. 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. Shortly before the hearing, Gersten submitted an emergency motion to continue the hearing. On July 28, 2022, the Court held a hearing via WebEx. After hearing arguments on the emergency motion first, the Court agreed to reschedule the hearing to take place on August 18, 2022. During the July 28, 2022 hearing, Plaintiff Gersten stated that Ivanka Ayoub passed away on or about January 11, 2022. Ms. Gersten is Ivanka Ayoub’s daughter.

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, SCRCP. At the August 18, 2022 hearing, the

Court heard arguments on the Rule 25 Motion and the previously filed Motion to Compel or, in the Alternative, Motion to Dismiss for Failure to Prosecute.²

LAW

The record in this case supports dismissal on multiple grounds. As to Gersten and Ayoub's claims, the Court finds that dismissal is proper under both Rule 41 for failure to prosecute and under Rule 37 as an appropriate discovery sanction. Furthermore, as to Ayoub, dismissal would alternatively be appropriate under Rule 25.³

A. Rule 41 Dismissal 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), SCRCP. The decision of whether to dismiss a case for failure to prosecute is left to the discretion of the Circuit Court. *Small v. Mungo*, 254 S.C. 438, 442, 175 S.E.2d 802, 804 (1970). "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. American Motors Realty Corp.*, 279 S.C. 58, 60, 301 S.E.2d 757, 758 (1983).

The Fourth Circuit has established four factors when determining whether to dismiss for

² The Court also heard arguments on other motions filed by Plaintiff Gersten. However, most 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.

³ Gersten reported to the Court that she does not dispute that Ayoub has passed away, but she has been unable to obtain a death certificate. Counsel for Carter reported that he was unable to locate an obituary for Ayoub to confirm her death. Ultimately, this issue is immaterial. If Ayoub is still alive, dismissal is proper because she has not prosecuted her claim, she has not responded to discovery, and she has not appeared for the last two scheduled hearings. If she passed away in January as reported by Gersten, then no one has moved to substitute on her estate's behalf within a reasonable time. Either way, dismissal is proper.

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)).

In this case, each of the four factors weighs heavily in favor of dismissal:

- (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 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.

Ultimately, Rule 41 serves as a necessary part of the power of trial courts "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) (emphasis added). Dismissal at this point is the only orderly and expeditious disposition of this case. Therefore, the Court finds that dismissal

pursuant to Rule 41 is proper and well within this Court's discretion.

B. Rule 37 Dismissal as a Discovery Sanction

Alternatively, dismissal is also proper under Rule 37. "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), SCRCP. The Rule gives the Circuit Court discretion to, among other things, strike pleadings or dismiss an action. Rule 27(b)(C), SCRCP. While the decision of appropriate sanctions is left to the sound discretion of the Court, severe sanctions such as dismissal will only be imposed in cases involving bad faith, willful disobedience, or gross indifference to the opposing party's rights. *McNair v. Fairfield County*, 379 S.C. 462, 466, 665 S.E.2d 830, 832 (Ct. App. 2008).

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.* The Court of Appeals 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 over four years old. Defendant Carter served discovery on June 29, 2020 – well over two years ago. Defendant's

motion has been pending for nearly two years, and it has been set for a hearing three times. Thus, Plaintiffs have had notice of the issue far longer than the time that passed in *McNair*. Nonetheless, Plaintiffs have never attempted to respond to discovery. In the meantime, it appears Plaintiff Ayoub has 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 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.

Dismissal is a severe sanction. However, Defendant Carter has suffered significant prejudice both in the form of lost opportunity to obtain discoverable information and in the form of being tethered to this litigation for four years. For the reasons discussed above, the Court finds that dismissal is the only appropriate sanction for Plaintiffs' failure to participate in discovery.

C. Rule 25 Dismissal as to Ivanka Ayoub

Under Rule 25, SCRCP, when a party dies and the party's claim is not extinguished by her death, then "[i]f substitution is not made within a reasonable time, the action may be dismissed as to the deceased person." Rule 25(a)(1), SCRCP. "[R]ule [25] specifically provides for the dismissal of a deceased party where substitution of the proper parties *does not occur* within a reasonable amount of time." *Hillman v. Pinion*, 347 S.C. 253, 258, 554 S.E.2d 427, 430 (Ct. App. 2001) (emphasis in original).

The standard under the Federal Rule for a timely motion to substitute is 90 days. *See* Fed. R. Civ. P. 25. The South Carolina rules use a "reasonable time" standard. Even if a "reasonable time" is

something longer than 90 days, more than twice that amount of time has passed since Ayoub's purported death, and no one has moved to be substituted. Therefore, substitution has not occurred "within a reasonable time," and dismissal is proper.

CONCLUSION

For the above-stated reasons, Defendant Carter's Motions to Dismiss are GRANTED.

IT IS SO ORDERED.



Chester Common Pleas

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

Case Number: 2018CP1200117

Type: Order/Other

IT IS SO ORDERED

s/ J. Mark Hayes, II #2132

Electronically signed on 2022-08-22 13:18:27 page 9 of 9

February 21, 2018

Summons and Claim for Property Damage filed February 21, 2018 in Case No. 2018- CP-12-00074;

March 16 2018

Summons and Complaint filed March 16, 2018 in Case No. 2018-CP-12-00117;

January 31, 2019

Affidavit of Facts filed January 31, 2019 in Appellate Case No. 2018-002115;

May 29, 2019

Petition for Rehearing filed May 29, 2019 in Appellate Case No. 2018-002115;

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Honorable John C. Hayes III, Circuit Court Judge
Honorable Brian Gibbons, Circuit Court Judge

Appellate Case No: 2018-002115

RECEIVED
MAY 29 2019
SC Court of Appeals

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

Heidi Gersten, Ivanka Ayoub.....Appellants.

v.

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

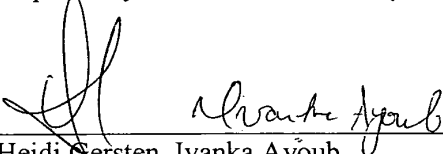
APPELLANTS' AMENDED RETURN TO RESPONDENTS
CARTER AND DAVIS' MOTION TO DISMISS APPEAL AND
AFFIDAVIT OF HEIDI GERSTEN TO BE COMBINED WITH
MOTIONS TO REINSTATE APPEAL AND/OR PETITION FOR
REHEARING OF MOTION TO DISMISS MADE BY RESPONDENTS
INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB,
KEVIN CARTER AND RICHARD DAVIS WITH LEAVE TO AMEND OR
MOTION FOR EXTENSION OF TIME TO SERVE AND FILE MOTION TO REINSTATE
APPEAL

Heidi Gersten, Ivanka Ayoub
1438 W. Lantana Rd., #330
Lantana, FL 33462
(323) 245-6142
(561) 756-9820 FAX
hanginhangout@gmail.com
Appellants

The Appellants, Heidi Gersten, Ivanka Ayoub ('Appellants') move this Court for an order to accept this amended return of the Respondents Kevin Carter and Richard Davis' (Respondents') motion to dismiss appeal as timely and combine it with a motion for reinstatement and/or a petition for rehearing of the motions to dismiss, along with leave of court, if necessary, as the crux of the matter is about proving timeliness in regards to the Notice of Appeal and the Court's jurisdiction, taking into strong consideration Appellant Gersten's extraordinary circumstances and extreme hardships suffered as a result of the Respondents' gross negligence, pursuant to SCACR 263(b), 260(a) and 221, on the grounds of good cause shown as evidenced by the attached Affidavit of Heidi Gersten and Timeline of Events with Law and Arguments That Include a Memorandum of Points and Authorities That Prove Timeliness of Appellants' Notice of Appeal.

The Appellants' argument will be more fully addressed in the attached Memorandum of Points and Authorities in Support and Timeline.

Respectfully submitted this 28th day of May 2019,



Heidi Gersten, Ivanka Ayoub
Appellants
1438 W. Lantana Rd., #330
Lantana, FL 33462
(323) 245-6142
(561) 756-9820 FAX
hanginhangout@gmail.com

Boca Raton, Florida
May 28, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Honorable John C. Hayes III, Circuit Court Judge
Honorable Brian Gibbons, Circuit Court Judge

Appellate Case No: 2018-002115

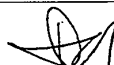
Heidi Gersten, Ivanka Ayoub, Daniel Hubbard, ...Plaintiffs,
Heidi Gersten, Ivanka Ayoub, ...Appellants.

v.

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
APPELLANTS' AMENDED RETURN TO RESPONDENTS CARTER
AND DAVIS' MOTION TO DISMISS APPEAL AND AFFIDAVIT OF
HEIDI GERSTEN TO BE COMBINED WITH MOTIONS TO
REINSTATE APPEAL AND/OR PETITION FOR REHEARING OF
MOTION TO DISMISS MADE BY RESPONDENTS
INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB,
KEVIN CARTER AND RICHARD DAVIS

WITH LEAVE TO AMEND OR MOTION FOR EXTENSION OF TIME
TO SERVE AND FILE MOTION TO REINSTATE APPEAL


Heidi Gersten, Ivanka Ayoub
1438 W. Lantana Rd., #330
Lantana, FL 33462

RECEIVED
MAY 29 2019
SC Court of Appeals

(323) 245-6142 (561) 756-9820 FAX
hanginhangout@gmail.com
Appellants

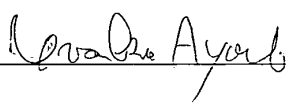
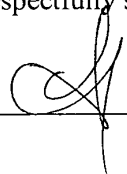
STATEMENT OF FACTS

The Appellants requested additional time to serve and file an amended return to the Respondents Carter and Davis' motion to dismiss appeal numerous times for good cause shown to sufficiently and adequately address the multiple errors made by the Respondents Carter and Davis. The return made in a good faith effort to comply with the previously underestimated calculations for extensions of time due to the Appellants, especially Appellant Gersten's, extraordinary circumstances and is permitted by **RULE 263(B), SCACR, EQUITABLE TOLLING** and **TITLE II OF THE AMERICAN DISABILITIES ACT**.

On May 16, 2019, the Appellants learned of the orders dated May 2, 2019 and May 14, 2019 on-line on the Court's Website. They did not 'receive' them from the mail or from an email or from personal service. In a good faith effort to comply, this motion is being made which is combined as a Return and/or Motion for Reinstatement and/or Petition for Rehearing. It is being made under duress in an attempt to follow the rules laid out in SCACR. To prevent the miscarriage of justice, these documents are being overnighted as well as faxed to the Court, as they are to be received by the Court within fifteen (15) days of the date of the filing of the orders. The May 14, 2019 order stems from the alleged non-compliance of the order of May 2, 2019 which is the subject of this motion(s). It is suggested to permit the Appellants to amend this motion in light of the good cause shown for not receiving the order in time to fully comply.

For these reasons, the reasons in the attached Affidavit of Heidi Gersten and all documents in the Court file and the Appellants' forthcoming Brief, the Court has jurisdiction as the Notice of Appeal was timely served and filed per SCACR rules.

Respectfully submitted this 28th day of May 2019,



Heidi Gersten, Ivanka Ayoub
Appellants
1438 W. Lantana Rd., #330
Lantana, FL 33462
(323) 245-6142
(561) 756-9820 FAX
hanginhangout@gmail.com

Boca Raton, Florida
May 28, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Honorable John C. Hayes III, Circuit Court Judge
Honorable Brian Gibbons, Circuit Court Judge

Appellate Case No: 2018-002115

RECEIVED
MAY 29 2019
SC Court of Appeals

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

Heidi Gersten, Ivanka Ayoub.....Appellants.

v.

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

AFFIDAVIT OF APPELLANT HEIDI GERSTEN

Heidi Gersten, Ivanka Ayoub
1438 W. Lantana Rd., #330
Lantana, FL 33462
(323) 245-6142
(561) 756-9820 FAX
hanginhangout@gmail.com
Appellants

STATE OF FLORIDA,
SS:
COUNTY OF PALM BEACH,

HEIDI GERSTEN, BEING FIRST DULY CAUTIONED AND SWORN
DEPOSES AND STATES AS FOLLOWS:

1. I am the Appellant herein, and have read the foregoing Appellants' Motion to Reinstate Appeal as well as the attached Return to the Respondents Kevin Carter and Richard Davis' Motion to Dismiss Appeal With Leave and Petition for a Rehearing on said motion, which includes all pages attached, and know the contents thereof, that the same is true of my own knowledge, except as matters therein stated to be alleged on information and belief; and to those matters, I believe them to be true.
2. The facts stated herein are personally known to me and I have first-hand direct knowledge thereof and to those facts that are in addition stated are based on information and belief.
3. If called upon to do so, I would and could competently testify to hereto under oath in a court of law operating under the laws of the State of South Carolina and the United States Constitution.
4. The Appellants served and filed motions to extend time to amend their return to Kevin Carter and Richard Davis' motion to dismiss appeal on March 7, 18, 25, and April 5, 15, 25, 2019 and would have requested an additional extension on May 6, 2019, except due to mitigating circumstances, there were heavy thunderstorms that day that prevented the deadline from being met. (Exhibit 1)
5. I sat in my wheelchair with the paperwork that I was ready to turn in to comply with the 'motion for extension to file' rules when I heard the strike of thunder and looked outside and saw that it was raining heavily, with the sky very dark. With a heavy heart, I knew I would not be able to wheel to the post office and UPS store that day. I took a screenshot of the weather report that day at the time I was leaving. (Exhibit 1)
6. I became aware of the order dated May 2, 2019 on May 16, 2019, after I learned that the iPad I recently got was able to access the Court's website. I read said order online and in a good faith effort to comply under the South Carolina Appellate Civil Rules, **SCACR**, these motions and documents are being submitted. Prior to getting the iPad, I was unable to access the Court's website from my over 10 year old incompatible computer.

7. Had there not been thunderstorms on May 6, 2019, I would have been able to ride in my wheelchair to the post office and UPS store and the May 2, 2019 order would have been partially complied with as some of the information requested was in the documents that were anticipated to be served and filed that day. A new motion was being composed when the May 2nd and 14th orders were learned of.
8. In a frenzy to comply with the rules, a draft was written for a petition for rehearing and Henrietta from You've Been Served, LLC, processing service was contacted. I explained to her that the only way to have the documents received by May 17th, less than 24hrs of learning of the order, was to get the documents to her via computer and have her go in person to file them. I would not have been able to sign them since I don't have the technology to sign and then scan into my computer and office stores were closed at that hour. She brought up the fact that even if I could, she would only be bringing in a copy and not an original. Therefore, there was no real chance to comply with the order in such a short amount of time learning of it a day before its deadline nor correct the numerous errors that may be contained in it due to the very limited time to complete what is necessary to have it received by the Court within fifteen (15) days from the date of the order to prevent a remittitur being sent to the lower court or administrative tribunal in accordance with Rule 221. Hiring a process server to file in person appeared to be the only option at that point.
9. The petition for rehearing of the motion may be combined with the motion for reinstatement as they stem from the same issues.
10. I would also suggest that the Appellants' Return for the Respondents Kevin Carter and Richard Davis' motion for dismissal be combined when taking things under consideration since its' sole argument within the numerous unpaginated pages that are well over fifty (50) in count revolves around the sole issue of timeliness.
11. I called the Appellate Court on May 17, 2019 and spoke to Shelby who informed me that it wasn't necessary to do a petition for rehearing on the May 2, 2019 order however the May 14, 2019 triggered the time to do a motion to reinstate within 15 days being Wednesday, May 29, 2019.
12. In addition to being paralyzed, having an open phase 4 pressure wound on my left buttocks, phase 1 pressure wound on my right buttocks, living without a caregiver, litigating multiple lawsuits in multiple states without an attorney, having been the victim of numerous crimes, participating in a criminal pretrial conference as a subpoenaed victim, and the learning of the passing of my father under the cause of action of tortious interference with a dead body, I was summoned as a juror for May 13, 2019, all this year. (Exhibit 3) (Proof of any of the foregoing is available upon request.)

13. Leave of court should be administered in favor of justice. There is plenty of good cause shown.
14. Patience is a judicial canon. I require much patience. What seems like plenty of time to an able body is a fraction of the time it takes me to do simple things. It took 7 months before I was finally able to get my bathroom accommodated to where I am now able to shower independently, to give an example of the amount of time it took to be at a standard of living that most people take for granted.
15. This is an effort to show the Court that the Appellants take this matter seriously and are diligently attempting to comply with the rules. The American Disabilities Act permit modifying court rules to accommodate me due to my disabilities and remains undefeated when an action has been brought forward under Title II. Appellants prefer not to file a federal complaint. Time is of the essence however health is an issue to take into consideration.
16. Words do not describe the horror of being unable to care for myself at my standards since this collision. I was the one who took care of others and demonstrated an unprecedented amount of courage, strength, wisdom, knowledge, love, compassion, forthrighteousness, tenacity, candor, intuition, empathy, endurance and love in my family however perhaps I lacked gratitude for myself. I took for granted the amazing person that I am.
17. Judge Zamore was the first public authority I faced through this process who infused me with inner solidity, repeating to me as I looked into his eyes, "You are worthy!" My whole life, no one has ever said those words to me. I'm happy that he stood behind a red, white and blue flag. He understood my pain. Yet he is bound by these words on paper, called law. I will find the right combination and when I do, I will unlock the key to my therapy and simple pleasure of pursuing every remedy available to me in order to obtain control of my body. I will walk again!
18. Judge Underwood was the first judge to issue an order in favor of granting me a continuance to a court date I received a day before a holiday weekend last year, giving me 3 days to find a ride as a paralyzed person who hadn't left her bed in months and travel over 800 miles in one direction to attend and declared me a victim in addition to Judge Zamore. I called the clerk and wrote an objection to Respondent/Defendant Kevin Carter's acceptance of a plea offer to reduce his DUI charge, which in truth and fact, qualifies to be a felony charge as a DUI with great bodily injury. It's no surprise he took the offer of a \$440 fine and reckless driving in front of my eyes. This game of lucky breaks because someone knows how to manipulate the law better is unbelievable. My entire experience of how challenging it is to get help to be made whole again is history in the making.

19. This process has taught me to be indifferent.
20. It may be hard to imagine for some, the enormous amount of effort it takes to do simple things that able-bodied people can do, such as use a toilet.
21. I live under extraordinary circumstances and with extreme hardships.
22. Attached to this affidavit is a 5 page document labeled **TIMELINE OF EVENTS WITH LAW AND ARGUMENTS THAT INCLUDE A MEMORANDUM OF POINTS AND AUTHORITIES THAT PROVE TIMELINESS OF APPELLANTS' NOTICE OF APPEAL** that prove:
 - A. April 26, 2018 – Alleged Unsigned Order -Judge Gibbons (pgs. -).
(Note: These are pages one (1) and two (2) of two (2) pages)
 - B. May 6, 2018 – Served and May 8, 2018 – Filed - Claimants' Motion To Alter Or Amend A Judgment Or Order Pursuant To Rules 59(e), 60(4) SCRCF, and Request For Oral Hearing (pg.)
(Note: Only the top page is included as the proof of its timely filing is in question only at this stage and its contents will be discussed in the Appellants' upcoming brief. This motion was not ruled on nor was an order issued in response to it and will be further discussed in the Appellants' upcoming brief.)
 - C. May 8, 2018 – Served – Honorable Judge Gibbons
(Note: Appellant Gersten gave the document to Ruben Kirnos who gave the document to Mr. Atkinson, Chester County Clerk, who was instructed by Appellant Gersten to personally serve Judge Gibbons, from a rental car she was in, in front of the Chester County Courthouse, minutes prior to attending the sentencing of Respondent Carter at the Chester County Magistrate Court, after he was charged with DUI and she witnessed him plead guilty to reckless driving in front of Honorable Judge Yale Zamore.)
 - D. August 7, 2018 – Notice of Case Scheduling - Claimants' Motion To Alter Or Amend A Judgment Or Order Pursuant To Rules 59(e), 60(4) SCRCF, and Request For Oral Hearing (pg.)
(Note: This motion was not ruled on nor was an order issued in response to it and will be further discussed in the Appellants' upcoming brief.)
 - E. August 25, 2018 – Served - Amended With Or Without Leave Claimants' Motion To Alter Or Amend A Judgment Or Order Pursuant To Rules 59(e), 60(4) SCRCF, and Request For Oral Hearing (pgs. -)
 - F. August 29, 2018 – Filed - Amended With Or Without Leave Claimants' Motion To Alter Or Amend A Judgment Or Order Pursuant To Rules 59(e), 60(4) SCRCF, and Request For Oral Hearing (pg.)

(Note: Only the top page is included as the proof of its timely filing is in question only at this stage and its contents will be discussed in the Appellants' upcoming brief. This motion was not ruled on nor was an order issued in response to it and will be further discussed in the Appellants' upcoming brief.)

G. September 5, 2018 - Hearing Judge Hayes (pg.)

H. September 17, 2018 – Served and September 25, 2018 – Filed - Second Amended Complaint and Demand For Jury Trial With Leave (pg.)

(Note: This was scheduled on the roster for hearing on January 31, 2019 prior to the stay order issued by Honorable Judge Gibbons on January 15, 2019)

I. September 18, 2018 - Alleged Orders - Judge Hayes (pg.)

(Note: Only the top page is included as the proof of its filing and its contents will be discussed in the Appellants' upcoming brief. This order was not signed and will be further discussed in the Appellants' upcoming brief.)

J. September 21, 2018 - Alleged Orders - Judge Hayes (pg.)

(Note: Only the top page is included as the proof of its filing and its contents will be discussed in the Appellants' upcoming brief. This order was not signed and will be further discussed in the Appellants' upcoming brief.)

K. October 1, 2018 – Served – 2018-CP-12-00117 Notice of Motion/ Plaintiffs' Motion to Alter or Amend a Judgment or Relief From Judgment or Order Pursuant to Rules 52, 59 (e), 60 (4), SCRCP, and Request For Oral Hearing along with Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 (pg.)

L. October 8, 2018 – Filed - 2018-CP-12-00117 Notice of Motion/ Plaintiffs' Motion to Alter or Amend a judgment or Relief From Judgment or Order Pursuant to Rules 52, 59 (e), 60 (4), SCRCP, and Request For Oral Hearing along with Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9 (pg.)

M. October 16, 2018 - Alleged Unsigned Order – Honorable Judge Hayes (pg.)

N. November 15, 2018 – Served - Notice of Appeal (pg.)

O. November 19, 2018 – Received – Respondent Interinsurance Exchange of the Automobile Club Return Receipt, Green Card (pg.)

(Note: Respondents Interinsurance Exchange of the Automobile Club and Carter and Davis are the only ones out of all of the Respondents that motioned for orders to dismiss the appeal and therefore the Appellants are responding with returns to these separate motions and not fully addressing the remaining respondents.)

- P. November 21, 2018 – Court Received By Fax– Notice of Appeal (pg.)
 - Q. November 21, 2018 – Received – Respondents Carter and Davis Return Receipt, Green Card (pg)
 - R. November 27, 2018 – Filed - Notice of Appeal (pg.)
 - S. January 15, 2019 – Order – Honorable Judge Gibbons (pg.)
(Note: Only order signed in ink in this matter.)
23. Appellants' motions were not ruled on and orders were not made. This will be fully explained in the Appellants' upcoming brief.
24. The Appellants and Respondents are required to comply with the rules of **SCRCP**.
25. Note that under South Carolina's rules (**SCRCP**), service of motions is required on defendants however certified mail return with return receipt is not.

SCRCP 5 (1) Same: How Made.... *Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint.*

26. Note that under South Carolina's rules (**SCRCP**), proof of service, for the summons and complaint, is required to be filed and it further indicates that other paperwork that must be served, must also be filed with the court however there is no requirement of a certificate of service for such subsequent paperwork. Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint.

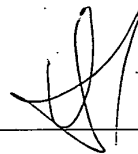
SCRCP 5(d) Filing. *All papers required to be served upon a party except as provided in Rule 26(g)(1), shall be filed with the court within five (5) days after service thereof. The summons and complaint shall be filed before service. Proof of service shall be filed within ten (10) days after service of the summons and complaint. Upon failure to serve the summons and complaint, the action may be dismissed by the court on the court's own initiative or upon application of any party. Upon failure of a party to file other pleadings, motions, or papers, the court may permit filing or proceed as though the same had not been served.*

27. Given the complexity of this matter, with numerous respondents and excessive documents to deal with, in addition to the extreme hardship and extraordinary circumstances Appellant Gersten lives with, there is good cause shown for additional time to provide the information that will prove the Appellants' timeliness in serving and filing the notice of appeal.
28. According to the **SCACR**, the Appellants should not be subjected to serving and filing a return when the Respondents Carter and Davis' Motion to Dismiss does not have the correct case number, along with the burden of sorting through 64 unpaginated pages. In addition, there is a litany of information nonrelated to the issue at hand therefore will be saved for the Appellants' brief. The only pertinent issue currently is proving timeliness of the Appellants' Notice of Appeal.
29. The date the Notice of Appeal was timely served and filed on Respondents Kevin Carter and Richard Davis was November 15, 2018. Proof of service was attached to said Notice of Appeal for the court's filing.
30. The motions for reconsideration were timely filed according to court rules.
31. The Appellants are hereby reserving the right to amend this return should additional information be necessary.
32. I was paralyzed as a result of the collision in controversy with the Respondent Kevin Carter and the Respondent Richard Davis co-owned the vehicle involved.
33. It is unfair to hold me to the same standards as able-bodied people.
34. The **American Disabilities Act**, An agency of the US Department of Justice Civil Rights Division, applies to and protects me.
35. **Title II of the American Disabilities Act** permits modifications to court rules to accommodate my situation due to my disability.
36. The **Doctrine of Equitable Tolling** may also be applied to my circumstances.
37. I urge the Court to permit this APPELLANTS' AMENDED RETURN TO RESPONDENTS CARTER AND DAVIS' MOTION TO DISMISS APPEAL AND AFFIDAVIT OF HEIDI GERSTEN TO BE COMBINED WITH MOTIONS TO REINSTATE APPEAL AND/OR PETITION FOR REHEARING OF MOTION TO DISMISS MADE BY RESPONDENTS INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB, KEVIN CARTER AND RICHARD DAVIS to be considered in light of the good cause shown.

38. These extensions were not for the purpose of delaying. For the furtherance of justice and to prevent its miscarriage, this appeal must be reinstated and the Appellants be permitted to move forward on its merits..

39. To be so strict on a date on the calendar causes the merits of the actions to be replaced as the primary purpose of litigation. The brief cover must be "red or read?".

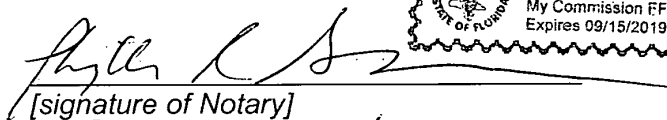
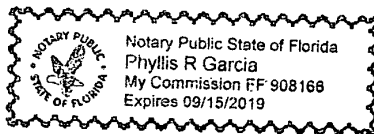
40. I can only do so much in a given day. I'm paralyzed without a caregiver.



Heidi Gersten
1438 W. Lantana Rd. #330,
Lantana, FL 33462

Subscribed and sworn to before me, this 28th day of May 2019.

[Notary Seal:]



[signature of Notary]

Phyllis R Garcia

[typed name of Notary]

NOTARY PUBLIC

My commission expires: 09/15/2019



Scan for updated forecast

Boca Raton, FL 10 Day Weather

3:24 pm EDT

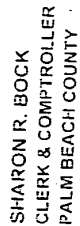
DAY		DESCRIPTION	HIGH / LOW	PRECIP	WIND	HUMIDITY
TODAY MAY 6		Heavy Thunderstorms/Wind	77°/73°	/ 100%	SSW 23 mph	80%
TUE MAY 7		PM Thunderstorms	87°/75°	/ 80%	NE 11 mph	76%
WED MAY 8		Mostly Sunny	85°/74°	/ 20%	E 13 mph	70%
THU MAY 9		Mostly Sunny	85°/74°	/ 20%	ESE 13 mph	70%
FRI MAY 10		Mostly Sunny	86°/75°	/ 20%	ESE 12 mph	68%
SAT MAY 11		Partly Cloudy	87°/75°	/ 20%	SSE 12 mph	65%
SUN MAY 12		PM Thunderstorms	89°/75°	/ 40%	S 14 mph	66%
MON MAY 13		PM Thunderstorms	90°/75°	/ 40%	SSW 12 mph	68%
TUE MAY 14		Scattered Thunderstorms	89°/76°	/ 50%	SSW 10 mph	70%
WED MAY 15		Scattered Thunderstorms	88°/75°	/ 50%	S 12 mph	71%
THU MAY 16		Scattered Thunderstorms	88°/75°	/ 50%	S 11 mph	68%
FRI MAY 17		Scattered Thunderstorms	87°/75°	/ 60%	S 11 mph	68%
SAT MAY 18		Scattered Thunderstorms	87°/75°	/ 50%	SSE 12 mph	67%
SUN MAY 19		Scattered Thunderstorms	87°/75°	/ 50%	SE 12 mph	67%
MON MAY 20		Scattered Thunderstorms	87°/75°	/ 40%	SE 10 mph	66%

ALMANAC

EXHIBIT

tabbles

16



JUROR SUMMONS

15th Judicial Circuit

You are summoned for jury duty at the
Palm Beach County Courthouse, 205 N. Dixie Highway, West Palm Beach, FL 33411-1028.

NAME	JUROR ID	JUROR NUMBER
HEIDI VERONIKA GERSTEN		

Your name was selected at random from the list of people qualified to serve.

Your jury duty will begin **May 13, 2019** at **8:00 AM** and continue until you are released from service. You will not be released from service until you are released from service.

You will not be released from jury duty until (1) you have served as a juror on a trial; (2) you have appeared for service and were not selected as a juror; or (3) you have been notified by the automated phone system that your service is not needed. You may be on telephone standby for up to one week from your original summons date. Please visit www.mccourt.ca.gov for more information.

Please visit www.mypalmbeachclerk.com/jury or call (561) 355-2930 or (888) 780-5032 after 5:00 p.m. the day before your summoned date. A recorded message will tell you whether to report. If there is no message or the telephone line is not in operation, and you have confirmed that the courthouse is open, please report as directed on this summons.

If selected to serve on a jury, electronic devices such as cell phones, cameras, laptop computers or any other similar technological device capable of making or transmitting images, text or data as well as audio and video recordings must, prior to the start of jury deliberations, be turned over to the courtroom deputy who will keep them while you deliberate.

Free parking is located at 505 Banyan Blvd. Bring parking ticket to the jury office to be validated. For directions and other helpful information about jury duty, visit www.mypalmbeachclerk.com/jury.

REQUEST FOR POSTPONEMENT OR EXCUSAL FROM JURY SERVICE

NAME HEIDI VERONIKA GERSTEN JUROR ID _____ JUROR NUMBER _____

You may not serve if (please check and submit required documentation by visiting www.mvgaalmbeachclerk.com/jury)

www.mypalmbeachclerk.com/jury or by mail):

- ☐ Not a legal resident of Palm Beach County
☐ Not a citizen of the United States
☐ Convicted of a felony and civil rights have not been restored
☐ Currently under criminal prosecution

Jurors are entitled to two postponements that together (to not exceed six months from the original summons date), if you want to participate in your service please visit www.nyjudiciary.org/jury or call (861) 355-2930 or (800) 780-3032 or contact and mail the placard from this summons. When seeking a postponement, you must choose a new date that falls on a Monday through Thursday (excluding court holidays). New date chosen.

New date chosen

You may choose not to serve if (please check):

- ☐ 70 or older -- Do you want to be permanently excused?
☐ Responsible for care of medically/mentally incapacitated person unable to catch for edit.
☐ Expectant Mother
☐ Parent not working full time with custody of a child under 6
☐ Full time law enforcement officer or law enforcement investigative assignment
☐ Summoned and reported for investigation

Under penalties of perjury, I declare that I have read the foregoing document and that the facts stated in it are true.

Signature _____ Contact Number _____

EXHIBIT

2

TIMELINE OF EVENTS WITH LAW AND ARGUMENTS THAT INCLUDE A
MEMORANDUM OF POINTS AND AUTHORITIES THAT PROVE TIMELINESS OF
APPELLANTS' NOTICE OF APPEAL

Appellants received and/or obtained written notice of entry of each of the following
separate orders on appeal.

ORDER DATE	FILE DATE	JUDGE	DATE OBTAINED	DATE RECEIVED
04/26/18	04/26/18	Judge Gibbons (Consolidation Order)(Subject of this Appeal)	05/05/18 - On-line Court Website	N/A

(NOTE: Pursuant to **SCRCP**, a timely Motion to Alter or Amend a Judgment or Order
was served on the Respondents (Defendants) on May 6, 2018 and filed on May 8,
2018, pursuant to **Rule 59(e), SCRCP**, which requires that a motion to alter or
amend be "*served not later than 10 days after receipt of written notice of the entry of
the order.*"

This rule does not preclude the motion from being served prior to or earlier than
'receipt'.

According to the interpretation of these rules, the said May 8th motion is timely as it
has been served prior to 'receipt', and would apply if the Appellants were to serve
and file it as of today's date since they have not 'received' a written notice of the
entry of the order being challenged. It was 'obtained' online via the Court's Website.

(Perhaps the time may be ripe in presenting the Highest Court with a certified
question in regards to whether or not initiating a case search on the Court's website
and reading pleadings, orders, judgments or other documents constitutes
"receiving" written notice or written notice of entry of judgments or orders or any
other service of process. Does 'obtaining' documents online complete service in the
process of active or inactive litigation? Is an uncertified or certified document
online form found online create service on the litigant seeking the information?)

Similar to defendant litigants learning of an action being filed in the courthouse and
within hours of the filing by plaintiff litigants, the defendant litigants obtain copies
of the documents either from making copies that are online or going to the
courthouse and requesting them in person. Does either of those two scenarios
constitute service according to **SCRCP** rules?

(Perhaps, when these laws were written, modern technology wasn't in mind and
with the advent of the computer, times have changed and this is something that
ought to be addressed. Otherwise you end up with laws, like in Ohio, where the

Supreme Court has ruled that both parties may actively participate in litigation, have a trial, and then one party proves that according to the rules, service was not perfected and everything is void. This logic defies common sense. There comes a point where the rules cannot dictate logic. In order to comply with rules, they must be self evident and in plain English and not ambiguous. The Appellants did follow the letter of the law as well as the spirit.)

The filing was made in person on May 8, 2018 by the Appellant/Claimant/Plaintiff Gersten, at the Chester Courthouse, minutes prior to the Respondent/Defendant Carter's sentencing in front of Judge Zamore, in Magistrate's Court. Deputy Clerk Atkinson was instructed and agreed to provide a copy to Judge Gibbons, pursuant to **Rule 59(g), SCRPC**, which requires that a party filing a **Rule 59** motion "*shall provide*" a copy of the motion to the judge within 10 days of filing. The Appellant Gersten traveled from Florida with her pressure wound, by vehicle with friends to attend the hearing she was subpoenaed to by Judge Underwood, invoking her Victim's rights under the **SC Victim's Constitution** as a witness.)

(ALSO, NOTE: There is no requirement of a certificate of service or proof of service to be filed with the court under **SCRPC** for anything other than the summons and complaint. Service is complete upon mailing, as in "regular mail". There is no requirement to certify or do registered mail in **SCRPC**.) (Perhaps this is ripe for a certified question as to whether or not certificates of service are required.)

05/21/18 05/22/18 Judge Gibbons 05/16/18 – On-line N/A
Court Website

(NOTE: Appellants have not received this order in the mail nor email nor any other method of service as provided by **SCRPC** nor was permitted to review it in the proposed form for accuracy or objections. The issue at hand is moot since it did not affect any part of this matter, so no need to address it in depth other than to make note that it was not served on Appellants/Plaintiffs and used as an example of the course of conduct.)

(ALSO, NOTE: Appellants served "Second Amended Complaint and Demand For Jury Trial With Leave on Respondent/Defendants on September 17, 2018 and overnighted for filing on and received on September 24, 2018, under the mailbox rule, and file stamped on September 25, 2018.) (The pleadings were not closed on the premature hearing of September 5, 2018 in front of Judge Hayes for a variety of reasons including, but not limited to, a timely amended complaint that was served on the Respondent/Defendants and not answered at the time of the said hearing. All of this will be further explained in the forthcoming brief which will focus on the merits and not timeliness. This is an attempt to satisfy the timeliness requirements although the American Disabilities Act Title II and Equitable Tolling excuse these restrictions and permit law to accommodate the Appellants and modify rules due to their disabilities.)

09/18/18	09/19/18	Judge Hayes III ("AAA" Order) (Subject of this Appeal)	09/19/18 - E-mail From <i>RESPONDENT</i> AAA	N/A
----------	----------	--	--	-----

(NOTE: Appellants' Notice of Appeal has a typo error and should reflect the correct receipt of this order as September 19, 2018 if e-mails apply to non-attorneys as valid service, possibly another certified question to conclude, either way, the Notice of Motion and Plaintiffs' Motion to Alter or Amend a judgment or Relief from Judgment or Order was timely served on October 1, 2018 and filed on October 8, 2018 according to **SCACR**, thus, tolling the time to serve and file the Notice of Appeal.)

09/18/18	09/19/18	Judge Hayes III ("Carter & Davis' Order) (Subject of this Appeal)	09/19/18 - On-line Court Website	N/A
----------	----------	---	-------------------------------------	-----

09/21/18	09/21/18	Judge Hayes III ("Nationwide & Tirbovich" Order) (Subject of this Appeal)	09/23/18 - On-line Court Website	N/A
----------	----------	---	-------------------------------------	-----

09/21/18	09/24/18	Judge Hayes III ("Trustgard & Ammendola" Order) (Subject of this Appeal)		N/A
----------	----------	--	--	-----

09/21/18	09/21/18	Judge Hayes III ("SC Dept. of Public Safety & Blackwell" Order) (Subject of this Appeal)	09/23/18 - On-line Court Website	N/A
----------	----------	--	-------------------------------------	-----

10/16/19	10/16/18	Judge Hayes III (Order) (Subject of this Appeal)(Order from Appellants' Motion for Reconsideration) (Tolled the time to serve Notice of Appeal)	10/21/18 - On-line Court Website	10/21/18 - USPS Regular Mail
----------	----------	---	-------------------------------------	------------------------------------

01/15/19	01/15/19	Judge Gibbons (Stay Order) (Pending Outcome of Appeal)	01/15/19 - Received Phone Call From The Chester County Clerk	01/25/19 - USPS Regular Mail
----------	----------	---	--	------------------------------------

02/15/19	02/15/19	Clerk (Letter) (Included As It Pertains to The Matter at Hand)		02/27/19 - USPS Regular Mail
----------	----------	--	--	------------------------------------

NOTE that the Appellants did not actually receive the letter until two (2) days after its instructions to comply with its requests, causing it to be impossible, save for a nunc-pro-tunc, to follow with respect.

04/09/19	04/09/19	Clerk (Order) (Extension Granted)		04/17/19 - USPS Regular Mail
----------	----------	---	--	------------------------------------

(NOTE that the Appellants did not actually receive the clerk's order until 2 (two) days after its instructions to comply with its requests, causing it to be impossible, save for a nunc-pro-tunc, to follow with respect. Regardless, it says "...absent extraordinary circumstances." There are plenty of extraordinary, mitigating and extenuating circumstances. The Appellants are unaware of the authority of clerks of court to issue orders. Is this their duty?. It appears to be void on its face. Judges issue orders. With all due respect, this will be addressed in the future.)

05/02/19	05/02/19	Judge Lockemy (?) (Order) (Subject Matter For This Motion To Reinstate)	05/16/19 On-line	05/17/19 - USPS Regular Mail
----------	----------	---	------------------	------------------------------------

(NOTE that the Appellants did not actually receive the judge's order, presuming that it was indeed a judge who signed this order as the last name is not legible and there is no printed legible version for the Appellants to ascertain its signor, until the day its instructions to comply were given, which was the same day. The first name "James" is legible and when the Court's website is accessed, one can see that there is a judge James Lockemy however is is uncertain if this is who signed this order or someone else. Again, with all due respect, the Appellants are doing what they can to follow orders and obey the law.)

Note that the Appellant Gersten called the Court and spoke with Shelby who informed her that this order did not trigger a motion to reinstate or petition for rehearing, which subsequently caused an order filed on May 14, 2019 issued by a clerk with illegible handwriting and no printed name. As said before, the Appellants

question or challenge the authority for clerks to issue orders. One of a judge's duty is to issue orders. The Appellants are unaware of any rule except for **Rule 260 (a) Involuntary Dismissal and Reinstatement, SCACR**, which states, "Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court. A case shall not be reinstated except by leave of the court, upon good cause shown, after notice to all parties. The clerk shall remit the case to the lower court or administrative tribunal in accordance with Rule 221 unless a motion to reinstate the appeal has been actually received by the court within fifteen (15) days of filing of the order of dismissal (the day of filing excluded). The Appellant Gersten spoke with case manager Elizabeth about a fax being permitted as being "received" by the court. The Appellants will also overnight this for an expected delivery date of May 29, 2019, which would be timely. Becky also affirmed that faxes and overnight deliveries are file-stamped the same day received.

05/14/19	05/14/19	Clerk	05/16/19	On-line	N/A
		(Dismissal Order)			
		(Note: Stay of			
		Remittitur is in Order			
		Pending Motion for			
		Reinstatement)			

(NOTE: The Appellants have not received written notice of entry of this order and learned about it on 05/16/19 after searching case records and in a good faith effort are attempting to comply.)

Given the extraordinary, mitigating and extenuating circumstances, the Appellants move this Court for an Order granting their motion for reinstatement and/or petition for rehearing of motion to dismiss and acceptance of their Return of Respondent Kevin Carter and Richard Davis' Motion to Dismiss as timely.

CERTIFICATE OF SERVICE
(Appellate Case No: 2018-002115)

The undersigned, over 18 years of age and not a party to the said action, hereby certifies that (s)he has served the following named individuals with a copy of the foregoing: Appellate Case No: 2018-002115 APPELLANTS' AMENDED RETURN TO RESPONDENTS CARTER AND DAVIS' MOTION TO DISMISS APPEAL AND AFFIDAVIT OF HEIDI GERSTEN TO BE COMBINED WITH MOTIONS TO REINSTATE APPEAL AND/OR PETITION FOR REHEARING OF MOTION TO DISMISS MADE BY RESPONDENTS INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB, KEVIN CARTER AND RICHARD DAVIS, ALONG WITH EXHIBITS AND A MORE DETAILED RESPONSE TO THIS COURT'S LETTER DATED FEBRUARY 15, 2019, ORDERS OF APRIL 9, 2019 MAY 2, 14, 2019 along with letter to the Court dated May 28, 2019, and AFFIDAVIT OF APPELLANT HEIDI GERSTEN and, MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT, by mailing a copy of same to them in the U. S. Post Office mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

Wesley Brian Sawyer, Esquire
Murphy & Grantland, P.A.
4406 Forest Drive #B
Columbia, SC 29206
(Attorney for Kevin Carter and Richard Davis)

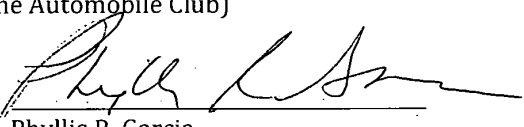
David R. Sligh
P.O. Box 2116
Myrtle Beach, SC 29578
(Attorney for Nationwide Mutual Ins. Co)

Peter H. Dworjanyn, Esquire and
Michael R. Burchstead, Esquire
Collins & Lacy, PC
1330 Lady Street, 6th Floor (29201)
Post Office Box 12487
Columbia, SC 29211
(Attorneys for Trustguard Insurance Company)

William H. Davidson II, Esquire
Davidson & Lindemann, PA
P.O. Box 8568
Columbia, SC 29202
(Attorney for SC Dept. of Public Safety
and Trooper Herbert Blackwell)

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

Alexander S. Gogsette
P.O. Box 5478
Florence, SC 29502
(Attorney for Joseph Tirbovich)

By: 

Phyllis R. Garcia

Boca Raton, Florida

RECEIVED
MAY 29 2019
SC Court of Appeals

May 28, 2019
1438 W. Lantana Rd., #330
Lantana, FL 33462

Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1220 Senate St.
Columbia, SC 29201
(843)662-3258 Fax (843)662-1342

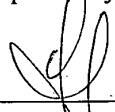
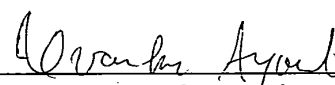
RE: Appellate Case No.: 2018-002115

Dear Ms. Kitchings or To Whom It May Concern:

Good day to you.

Please find 2 (two) enclosed U.S. postal money orders in the amount of \$50.00 each (\$100.00 total), as I was unaware of the correct amount due, for the enclosed original APPELLANTS' MOTION FOR REINSTATEMENT AND/OR PETITION FOR REHEARING OF MOTION AND AMENDED RETURN OF RESPONDENT CARTER AND DAVIS' MOTION TO DISMISS along with a more detailed response to this Court's letter dated February 15, April 9, May 2, and 14 all in the year of 2019, along with 7 copies. Please file the original and return a file-stamped copy in the pre-paid postage envelope provided. Thank you for your time regarding this matter.

Respectfully submitted,



Appellants Heidi Gersten, Ivanka Ayoub
hanginhangout@gmail.com
(323)245-6142 Fax (561) 756-9820

HG/Enclosures

RECEIVED
MAY 29 2019
SC Court of Appeals

UNITED STATES POSTAL SERVICE®
This product is for use with Priority Mail Express™. Misuse may be a violation of federal law. This label is not for resale.

PRIORITY MAIL EXPRESS
VISIT US AT USPS.COM®
Label 119, Jan 2015



U.S. POSTAGE PAID
PME 1-Day
BOCA RATON, FL
33432
MAY 28, 19
AMOUNT
\$28.30
R2305K143038-07

UNITED STATES POSTAL SERVICE®
Misuse may be a violation of federal law.



UNITED STATES POSTAL SERVICE®

PRIORITY MAIL EXPRESS®



CUSTOMER USE ONLY

FROM: (PLEASE PRINT) PHONE 323 275 6142
Heidi Gersten, Ivanka Ayoub
1438 W. LANTANA RD. #330
LANTANA, FL 33462

DELIVERY OPTIONS (Customer Use Only)

☒ **SIGNATURE REQUIRED** Note: The mailer must check the "Signature Required" box if the mailer: 1) Requires the addressee's signature; OR 2) Purchases additional insurance; OR 3) Purchases COD service; OR 4) Purchases Return Receipt service. If the box is not checked, the Postal Service will leave the item in the addressee's mail receptacle or other secure location without attempting to obtain the addressee's signature on delivery.

Delivery Options

☐ No Saturday Delivery (delivered next business day)
☐ Sunday/Holiday Delivery Required (additional fee, where available*)
☐ 10:30 AM Delivery Required (additional fee, where available*)
*Refer to USPS.com® or local Post Office® for availability.

TO: (PLEASE PRINT) PHONE ()
Honorable Jenny Abbott Kitchens
Clerk of Court
SC Court of Appeals
1220 SENATE ST.
COLUMBIA, SC
ZIP + 4® (U.S. ADDRESSES ONLY)
29201 - SC Court of Appeals

RECEIVED
MAY 29 2019

■ For pickup or USPS Tracking™, visit USPS.com or call 800-222-1811.
■ \$100.00 insurance included.

ORIGIN (POSTAL SERVICE USE ONLY)

☒ 1-Day ☐ 2-Day ☐ Military ☐ DPO

PO ZIP Code 33432 Scheduled Delivery Date (MM/DD/YY) 05/29/19 Postage \$25.50

Date Accepted (MM/DD/YY) 05/28/19 Scheduled Delivery Time ☐ 10:30 AM ☒ 3:00 PM Insurance Fee \$ COD Fee \$

Time Accepted 5:08 ☐ AM ☒ PM 10:30 AM Delivery Fee \$ Return Receipt Fee \$2.80 Live Animal Transportation Fee \$

Special Handling/Fragile \$ Sunday/Holiday Premium Fee \$ Total Postage & Fees 28.30

Weight 2.00 lbs. Flat Rate \$ Acceptance Employee Initials \$

DELIVERY (POSTAL SERVICE USE ONLY)

Delivery Attempt (MM/DD/YY) Time ☐ AM ☐ PM Employee Signature

Delivery Attempt (MM/DD/YY) Time ☐ AM ☐ PM Employee Signature

LABEL 11-B, JULY 2018

PSN 7690-02-000-9996

PEEL FROM THIS CORNER

VISIT US AT USPS.COM®
FOR FREE SUPPLIES ONLINE



UNITED STATES POSTAL SERVICE®

This packaging is the property of the U.S. Postal Service® and is provided solely for use in sending Priority Mail Express™. Misuse may be a violation of federal law.

September 26, 2019

Petition for Writ of Certiorari filed September 26, 2019 in Appellate Case No. 2019- 001484;

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED

SEP 26 2019

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Honorable Brian Gibbons, Circuit Court Judge
Honorable John C. Hayes, Circuit Court Judge

C.A. No: 2018-002115 (Appellate Court of Appeals)
2019-001484 (Supreme Court)

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

v.

Heidi Gersten, Ivanka Ayoub,.....Petitioners.

PETITION FOR A WRIT OF CERTIORARI

Heidi Gersten, Ivanka Ayoub
1438 W. Lantana Rd., #330
Lantana, FL 33462
(323) 245-6142
(561) 756-9820 FAX
hanginhangout@gmail.com

September 24, 2019

Other Counsel of Record:

Wesley Brian Sawyer, Esquire
Murphy & Grantland, P.A.
4406-B Forest Drive
Columbia SC 29206
Attorney for Respondents Kevin Carter & Richard Davis

David R. Sligh
P.O. Box 2116
Myrtle Beach, SC 29578
Attorney for Respondent Nationwide Mutual Insurance Company

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

Alexander S. Gogsette
P.O. Box 5478
Florence, SC 29502
Attorney for Respondent Joseph Tirbovich

Peter H. Dworjanyn, Esquire and
Michael R. Burchstead, Esquire
Collins & Lacy, PC
P.O. Box 12487
Columbia, SC 29211
Attorney for Respondents Trustgard & Ammendola

William H. Davidson II, Esquire
Davidson & Lindemann, PA
P.O. Box 8568
Columbia, SC 29202
Attorneys for Respondents Department of Public Safety & Trooper Herbert
Blackwell

INDEX

INDEX.....	i
CERTIFICATE OF COUNSEL.....	1
QUESTIONS PRESENTED.....	2
INTRODUCTION.....	3
STATEMENT OF THE CASE AND FACTS.....	4
ARGUMENT.....	6
1. THE COURT OF APPEALS INCORRECTLY DISMISSED THE APPEAL	
2. THE COURT FAILED TO DISCOVER THAT MATERIAL FACT OR PRINCIPLE OF LAW HAD BEEN EITHER OVERLOOKED OR DISREGARDED	
3. THE COURT ERRED IN FINDING APPELLANTS FAILED TO COMPLY WITH THE COURT'S ORDER OF MAY 2, 2019	
4. THE COURT FAILED TO RECOGNIZE THE ORDER WAS UNLAWFUL, VOID AND/OR VOIDABLE	
5. THE COURT FAILED TO ACKNOWLEDGE TIMELY RETURNS MADE BY THE APPELLANTS	
6. THE COURT FAILED TO FIND THE INFORMATION IT REQUESTED IN DOCUMENTS SUBMITTED BY THE APPELLANTS	
7. THE COURT AFFIRMED THAT 'SHALL' IS PERMISSIVE	
8. THE COURT FAILED TO COMPLY WITH TITLE II OF THE AMERICAN DISABILITIES ACT	
9. THE COURT FAILED TO APPLY THE DOCTRINE OF EQUITABLE TOLLING	
10. THE COURT ERRED IN NOT RULING ON MOTIONS OR PERMITTING APPELLANTS TO FILE BRIEFS	
CONCLUSION.....	

CERTIFICATE OF PETITIONERS COUNSEL

The Petitioners, Heidi Gersten and Ivanka Ayoub, certify that a petition for rehearing was made on May 29, 2019 and finally denied by the Court of Appeals on July 30, 2019.

RECEIVED

SEP 26 2019

S.C. SUPREME COURT

QUESTIONS PRESENTED

1. Did the Court of Appeals err in dismissing this appeal is stating that the Court was unable to discover that any material fact or principle of law had been either overlooked or disregarded, and hence, found no basis for granting a rehearing or reinstating the appeal?
2. Did the Court of Appeals err in dismissing this appeal is stating that the Court was unable to discover that any material fact or principle of law had been either overlooked or disregarded, and hence, found no basis for granting a rehearing or reinstating the appeal when in truth and fact there were?
3. Did the Court of Appeals err in finding that the Appellants failed to comply with the Court's order dated May 2, 2019?
4. Did the Court of Appeals err in finding that the Appellants failed to comply with the Court's order dated May 2, 2019 when the order was received by the Appellants after the deadline to comply with the order?
5. Did the Court of Appeals err in finding that the Appellants failed to comply with the Court's order dated May 2, 2019 when there was a timely return made to Interinsurance Exchange of the Automobile Club's motion to dismiss left to decide?
6. Did the Court of Appeals err in finding that the Appellants failed to comply with the Court's order dated May 2, 2019 when in truth and fact the information requested had been previously presented by the Appellants and therefore the order was complied with?
7. Did the Court of Appeals err in finding that the word 'shall' is permissive?
8. Did the Court of Appeals err in not complying with Title II of the American Disabilities Act?
9. Did the Court of Appeals err in not applying the doctrine of Equitable Tolling to the Appellate Gersten's extreme hardship due to her illness of pressure wounds, a secondary complication from the paralysis she sustains as a result of the collision in controversy?
10. Did the Court of Appeals err in not permitting the Appellants to formulate their brief?

INTRODUCTION

This Petition arises from a dismissal of the Court of Appeals. (Appx. at 3-4). It presents a novel question as to the ability of a judge to consolidate two matters (cases)(a state legislative non-binding arbitration regarding property damage due to an automobile collision and a civil action) comprised of different plaintiffs and different defendants and only the arbitration case having perfected service at the time of the consolidation ruling being challenged, among other things, before the Court of Appeals. In addition, the Court of Appeals mistakenly dismissed the appeal for a variety of reasons, misanalysing the standard of review in conflict with the previous opinions of this Court, conflating an action at law with a question of law. This error will give rise to confusion in any case seeking a declaratory judgment and raising questions of statutory construction. These issues implicate the express terms of Rule 242, SCACR, and warrant a grant of discretionary review by this Court.

This argument is further supported by In that filing, “this appeal presents both an issue of significant public interest and a legal principle of major importance. Those concerns remain following the dismissal of the Court of Appeals. ...this appeal warrants prompt consideration and final determination by this Court.

STATEMENT OF THE CASE AND FACTS

Petitioner Gersten and Respondent Carter were involved in an automobile collision on March 19, 2015 in Chester County, South Carolina which resulted in paralyzing Petitioner Gersten. Petitioners Gersten and Ayoub timely filed and served an arbitration hearing under statute against A subsequent case was filed adding Daniel Hubbard as a plaintiff and additional defendants were named. Judge Gibbons made a consolidation ruling without hearing or notice to consolidate these two actions. At the time of said ruling, the second action was not served upon defendants causing the ruling to be void or voidable. On a timely motion to amend was made by the plaintiffs. On September 18, 2018 a hearing was made before Judge Hayes however this motion was not ruled on as well as other motions before the court and the hearing was premature because the pleadings were not closed and the plaintiffs had submitted a timely amended complaint to which the defendants had not answered at the time of the hearing. Judge Hayes verbally dismissed all litigants except for Plaintiffs Heidi Gersten and Ivanka Ayoub and Defendant Kevin Carter against the plaintiffs' objections. Written orders were issued on without the plaintiffs opportunity to review them for accuracy. On Plaintiffs Gersten and Ayoub timely filed and served a motion to amend. On Judge Hayes arbitrarily and generically denied the motion without oral hearing or legal determination. A timely motion for appeal was made by Appellants on. A motion to extend time to serve brief was timely filed and served on however via a letter from the Court of Appeals stated that Respondent AAA had filed a motion to dismiss the same day as the Appellants therefore the Court of Appeals returned their check for

L/

\$50 instructing or advising the Appellants that the matter was stayed until a decision was made by the Court of Appeals on the motion to dismiss per statute Rule, SCACR. The date of the receiving of the motion was on however at that time, the Respondent AAA had not paid the proper filing fee and was given time to cure the deficiency by the Court of Appeals although rule of SCACR says that a clerk shall dismiss the motion for failure to comply with the rules Rule SCACR see letter. A timely return was made by the Appellants based on the date that the. On Respondents Carter and Davis filed a motion to dismiss. During the time permitted to file and serve a return, Appellant Gersten suffered a series of health complications related to a pressure wound she has been dealing with for over 4 years as a result of being paralyzed as a result of the collision in controversy that caused the Appellants to file a series of motions to extend time to file and serve the return. In addition the motion was not paginated as the rules instruct and had the wrong case number. The sole argument through the litney of information was that the Appellants had not filed their appeal timely. The remaining respondents had not filed motions to dismiss. One only has to study the record to find the Appellants complaining about not receiving the documents related to this action until days after the requested information. This course of conduct is significant because the official reason for dismissing the appeal alleged that the appellants did not follow the rules. The questions that Judge asked were already answered when the notice of appeal was served and filed regardless of which date pertained to which respondent. There is no question or debate of whether or not the return to AAA was made on time. Carter and Davis' return was made

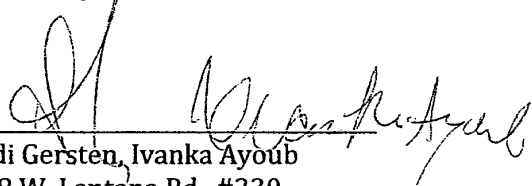
CONCLUSION

As argued above, the Court of Appeals applied the wrong standard of review in this case and failed to comply with Title II of the American Disabilities Act resulting in harmful error to the Appellants.

The Petition for Writ of Certiorari and Appendix is due on September 24, 2019 per Order of this Court dated September 24, 2019 in said case number and therefore is timely. Due to Petitioner Gersten's extreme hardships suffered from being paralyzed as a result of the controversy in action and the pressure wounds that resulted as secondary complications from being paralyzed, the Petitioners hereby thank this Court for the compassion extended in granting an additional six (6) days of the requested twenty (20) that was requested due to the Petitioner Gersten's life threatening illness. She is unable to sit for more than a few hours at a time and lives without a caregiver, performing her own wound care as well as litigating numerous lawsuits without an attorney. The Petitioner's also appreciate the rapid response to the request however did not receive notice of the Order until September 17, 2019 as the course of conduct from the inception of filing as shown that the Petitioners often receive information after the due dates issued in letters which is the crux of the dismissal of the Petitioner's Appeal and in the following they will attempt to explain how the Court of Appeals misinterpreted and or misapplied laws, making harmful errors to the Petitioner's. With all due respect, it has been said that "Ignorance is no excuse for the law and that non-attorneys are held to the same standards as attorney. With that logic, then non-attorneys should be treated equally under the law and the phrase, "What's good for the goose is good for the gander should apply."

The official Order of the Appellate Court mistakenly states that the Appeal is dismissed because the Petitioners failed to follow the laws laid out in SCACR. Not only did the Petitioners follow the law, they provided the Court of Appeal with a total of in for motions for extensions of time to make a Return to Carter and Davis' Motion to Dismiss. There are no grants for each individual motion made. There is one Order made on extending to and a request for three questions. The Petitioners were ordered to produce information and received the order after the deadline of the time to comply making it impossible to comply.

Respectfully submitted,



Heidi Gersten, Ivanka Ayoub
1438 W. Lantana Rd., #330
Lantana, FL 33462
(323) 245-6142
FAX (561) 756-9820
hanginhangout@gmail.com

RECEIVED

SEP 26 2019

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Honorable Brian Gibbons, Circuit Court Judge
Honorable John C. Hayes, Circuit Court Judge

C.A. No: 2018-002115
2019-001484

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

v.

Heidi Gersten, Ivanka Ayoub,.....Petitioners.

PROOF OF SERVICE

This is to certify that this day, the undersigned, over 18 years of age and not a party to the said action has served the following named individuals, counsel for the Respondents, in the foregoing matter, the foregoing Petitioner's Petition for Writ of Certiorari and accompanying Appendix by depositing (mailing) a copy of same to them in the United States Post Office mail, with sufficient postage affixed thereto(thereon) to ensure delivery and return address clearly marked on the date indicated below, addressed as follows:

Wesley Brian Sawyer, Esquire
Murphy & Grantland, P.A.
4406-B Forest Drive
Columbia SC 29206
Attorney for Respondents Kevin Carter & Richard Davis

David R. Sligh
P.O. Box 2116
Myrtle Beach, SC 29578

RECEIVED

SEP 26 2019

S.C. SUPREME COURT

Attorney for Respondent Nationwide Mutual Insurance Company

Reynolds Williams

P.O. Box 1909

Florence, SC 29503-1909

Attorney for Respondent Interinsurance Exchange of the Automobile Club

Alexander S. Gogsette

P.O. Box 5478

Florence, SC 29502

Attorney for Respondent Joseph Tirbovich

Peter H. Dworjanyn, Esquire and

Michael R. Burchstead, Esquire

Collins & Lacy, PC

P.O. Box 12487

Columbia, SC 29211

Attorney for Respondents Trustgard & Ammendola

William H. Davidson II, Esquire

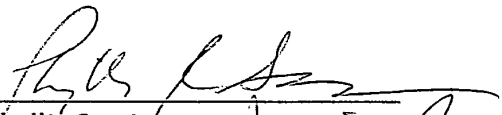
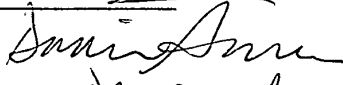
Davidson & Lindemann, PA

P.O. Box 8568

Columbia, SC 29202

Attorneys for Respondents Department of Public Safety & Trooper Herbert

Blackwell


Phyllis Garcia
102 N.E. 2nd Ave.
Boca Raton, FL 33432
(561) 393-3231

DANIECIA AMUROSO

September 24, 2019

RECEIVED

SEP 26 2019

S.C. SUPREME COURT

Arbitration Claim for Property Damage (Filed February 21, 2018)

Complaint (Filed March 17, 2018)

First amended claim for Property Damage (Filed March 17, 2018)

Affidavit of Service (Filed March 27, 2018)

Affidavit of Heidi Gersten in Support of Property Damage Claim

1 STATE OF SOUTH CAROLINA
2 COURT OF COMMON PLEAS
3 COUNTY OF CHESTER
4 2018-CP-12-00117

5 Heidi Gersten

6 Vs.

7 Kevin Carter, et al.

8

9 Chester, South Carolina

10 September 5, 2018

11 Before the Honorable John C. Hayes, III

12 APPEARANCES

13 For the Plaintiff: Heidi Gersten, Pro Se

14 For the Defendants: Sawyer, Slye, Williams, Dworjanyn,

15 Davidson

16 Reported by: Michael C. Watkins

17 Official Court Reporter

18

19

20

21

22

23

24

25

1 THE COURT: Moving back over to the motions roster, I
2 am at number 21, which is a motion for continuance by Heidi
3 Gersten, and it will take me a minute to get everybody's
4 appearance. All right. And you're Ms. Gersten?

5 MS. GERSTEN: Yes.

6 THE COURT: Counsel, tell me who you are and you
7 represent.

8 MR. SAWYER: Yes, sir, Judge. Wesley Sawyer, I
9 represent Kevin Carter and Richard Davis.

10 THE COURT: All right, Carter and Davis.

11 MR. SLYE: Your Honor, I am David Slye, and I represent
12 Nationwide Mutual Insurance Company and Joseph Tirbovich.

13 THE COURT: Spell that for me.

14 MR. SLYE: T-i-r-b-o-v-i-c-h.

15 MR. WILLIAMS: Your Honor, I'm Reynolds Williams, I
16 practice in Florence. I represent the Interinsurance
17 Exchange of the Automobile Club.

18 THE COURT: Tell me that again.

19 MR. WILLIAMS: Interinsurance Exchange of the
20 Automobile Club.

21 THE COURT: I still couldn't hear you, that's my fault
22 not yours. Tell me again.

23 MR. WILLIAMS: It's Interinsurance, that's all one
24 word. It's like Interstate Commerce except it's
25 Interinsurance Exchange of the Automobile Club.

1 MR. DWORJANYN: Peter Dworjanyn with Collins and Lacey.

2 THE COURT: I'll have to get you to spell that for me.

3 MR. DWORJANYN: D-w-o-r-j-a-n-y-n.

4 THE COURT: And you represent?

5 MR. DWORJANYN: Trust Guard Insurance Company and John
6 Ammendola, A-m-m-e-n-d-o-l-a.

7 THE COURT: All right.

8 MR. DWORJANYN: Thank you.

9 THE COURT: Ms. Gersten, this is your motion, it's a
10 motion to continue.

11 MR. DAVIDSON: Your Honor, I'm trying to -- I decided
12 to take the jury box for my desk. Will Davidson, and I
13 represent the South Carolina Department of Public Safety and
14 Trooper Herbert Blackwell.

15 THE COURT: Herbert Blackwell?

16 MS. GERSTEN: Yes, sir.

17 THE COURT: All right. Good to see you.

18 MR. DAVIDSON: Thank you, sir.

19 MR. SAWYER: Your Honor, if I may real briefly, I
20 believe one thing that may help in terms of housekeeping and
21 moving things along, I don't know that any of the defendants
22 oppose the motion for continuance as it would apply to the
23 roster for the jury or an arbitration proceeding if one were
24 to take. I think we would just oppose the continuance of
25 motions that are before the Court.

1 THE COURT: All right. So collectively the defendants
2 do not oppose a motion to continue the actual hearing of
3 arbitration or a trial on the merits.

4 MR. SAWYER: Is that right?

5 (All defense attorneys said yes.)

6 THE COURT: Is that what you're asking to continue and
7 let us go for the requested motions today, Ms. Gersten?

8 MS. GERSTEN: Well, sir, before we get started I
9 thought we were having a court reporter here.

10 THE COURT: We do.

11 MS. GERSTEN: Oh, Michael, I didn't know you were the
12 court reporter, I just wanted to make sure. And my mother,
13 Ivanka Ayoub, is also a claimant in the arbitration and a
14 plaintiff in the civil action.

15 THE COURT: All right. I'm here, I'm a Judge, I've
16 been assigned to hear these cases. They're consenting to
17 you continuing the trial on the merits of the arbitration
18 and the civil litigation but we've got some motions to hear
19 today, do you understand that?

20 MS. GERSTEN: Yes.

21 THE COURT: Are you ready to go forward on those?

22 MS. GERSTEN: Yes, sir.

23 THE COURT: All right. Mr. Clerk, again, that puts us
24 with the Mr. Sawyer's motion to strike?

25 MR. SAWYER: Yes, sir, Your Honor.

1 THE CLERK: Correct.

2 MS. GERSTEN: Objection.

3 THE COURT: All right. Wait just one second, you're
4 getting ahead of me. All right. What is your objection?

5 MS. GERSTEN: My objection is he can't do a motion to
6 strike because he already did an answer. The rules say
7 you've got to do a strike before the answer and he answered
8 before the strike.

9 THE COURT: What rule says that?

10 MS. GERSTEN: Sir, I put it in my paperwork, it's in my
11 record here that says -- I would need a minute here.

12 MR. SAWYER: Judge, I can save us some time. Rule 12F
13 says that in part, but then it also says at anytime the
14 Court may order stricken from any pleading any insufficient
15 defense or any/or redundant immaterial pertinent or
16 scandalous matter. So the rule says the Court can do that
17 at anytime. And in my experience the common practice is to
18 file an answer and a motion to strike simultaneously,
19 because we're not moving to strike the entire complaint,
20 we're moving to strike portions of the complaint.

21 THE COURT: And you served them simultaneously?

22 MR. SAWYER: I did, yes, Judge.

23 MS. GERSTEN: But I still object for the record
24 because, sir, the rules say it's got to be before.

25 THE COURT: All right. I overrule your objection.

1 MS. GERSTEN: Excuse me?

2 THE COURT: I overrule the objection and we'll go
3 forward on the motion.

4 MS. GERSTEN: What is it, you said you overruled?

5 THE COURT: Yes, ma'am. We will go forward with the
6 motions. I'm looking at Rule 12F and --

7 MS. GERSTEN: I want to reserve my right to a motion
8 or --

9 THE COURT: You do. Once you say you object and I
10 sustain it you don't have to say you reserve your right,
11 it's automatically preserved.

12 MS. GERSTEN: Okay. I apologize.

13 THE COURT: That's okay. I understand you don't have
14 an attorney, but -- all right. Let's go forward on the
15 motion to strike.

16 MR. SAWYER: Thank you, Your Honor. This is actually a
17 motion to dismiss or in the alternative a motion to strike.

18 THE COURT: Oh, okay.

19 MR. SAWYER: We have two actions as you recognize, I
20 believe, Judge, that have been consolidated into one action
21 by Judge Gibbons.

22 MS. GERSTEN: Objection.

23 THE COURT: Yes, ma'am.

24 MS. GERSTEN: The consolidation is a void judgment and
25 that's what caused a lot of confusion, I apologize. But

1 Judge Gibbons didn't allow me to have an arbitration when
2 the rules say that I'm allowed to have an arbitration. It
3 doesn't prejudice anybody, it's an alternative dispute
4 resolution and Rule 12 of ADR is where I derive that from.

5 THE COURT: Well, but I was told by the clerk earlier
6 today that Judge Gibbons regardless of what -- has
7 consolidated the two cases.

8 MS. GERSTEN: But I never had a hearing so he violated
9 my fair due process law.

10 THE COURT: Well, that would be something for you to
11 appeal, I can't change what Judge Gibbons has done.

12 MS. GERSTEN: Well, then it wouldn't be an appeal, sir,
13 because it's an alternative dispute resolution.

14 THE COURT: Well, I'm not going to sit here and argue
15 with you, and I'm not saying that I'm the pinnacle of legal
16 knowledge, I have to --

17 MS. GERSTEN: I apologize, sir, I can't hear you.

18 THE COURT: Is that on now? Let me speak into it.
19 Mr. Sawyer, what do you have to say about that? I'm trying
20 to dig my way through it.

21 MR. SAWYER: Yes, sir, Your Honor. Very briefly, these
22 cases started out as two different cases.

23 MS. GERSTEN: Objection, it did not start out as two
24 separate cases, sir, that's not true.

25 THE COURT: Well, let's hear from him and then I'll

1 give you an opportunity to tell me --

2 MS. GERSTEN: As long as I can reserve my objections.

3 THE COURT: Well, you don't have to object to every
4 word. What you have to do is hear what he says and then
5 respond, do you understand? It's like a tennis match, he
6 gets to play his ball and then you get to return serve
7 however you wish. I'm not trying to squelch you or prevent
8 you from asserting any rights you may have, but I think you
9 are very well protected if he presents something and then
10 you present the other side.

11 MS. GERSTEN: Well, do you object to me yelling
12 objection when I hear something --

13 THE COURT: No. I don't object to your objection, you
14 object -- go ahead. At this time I'm finding that the cases
15 are consolidated at least for me hearing these motions, not
16 for trial, I don't know about that.

17 MS. GERSTEN: That's much better, thank you.

18 MR. SAWYER: Judge, by way of background, Ms. Gersten
19 originally filed a property damage arbitration case, and
20 then subsequently filed an action in circuit court for
21 bodily injuries. Both cases arise out of the same
22 automobile accident that occurred on March 19th of 2015. It
23 was an accident between a vehicle operated by Ms. Gersten
24 and a vehicle operated by one of my two clients, Kevin
25 Carter, and owned by Mr. Carter. There's no dispute that an

1 accident occurred. There's no dispute that both claims seek
2 damages out of that accident. Ms. Gersten, I understand,
3 represents that the property damage arbitration seeks the
4 property damages from that accident --

5 THE COURT: Well, let me -- this comes across my mind.
6 Did she file for a third person arbitration? Did she file
7 under the arbitration statute? Because she mentioned
8 alternative -- the ADR code, Alternative Dispute Resolution,
9 those rules wouldn't apply to a statutory arbitration. Did
10 you ask for a three judge or a three lawyer panel to
11 arbitrate the property damage under that statute?

12 MS. GERSTEN: I did. But the Rule 12 that I'm
13 referring to is a nonbinding arbitration hearing and an
14 award, which the rules would apply.

15 THE COURT: Well, I disagree with you on that but you
16 can appeal me. We're talking about two different things.
17 Arbitration a is a statutory procedure.

18 MS. GERSTEN: Yes.

19 THE COURT: The rules for that would be applied -- I've
20 never heard of any rule issue involving that, but the
21 alternative -- that's not -- in reality it's sort of an
22 alternative dispute resolution but I don't believe it falls
23 under the alternative dispute resolution like mediation and
24 arbitration for a matter that's brought in civil court.

25 MS. GERSTEN: I disagree, sir.

1 THE COURT: I just wanted to clear up what I see as the
2 posture. All right, go ahead.

3 MR. SAWYER: Thank you, Judge. And it was the under
4 statute arbitration statute for property damage claims,
5 that's what it was filed under seeking a three panel
6 arbitration through the process through the circuit clerk of
7 court. The second action being the circuit court action,
8 but there's no dispute they both arise out of the same
9 automobile accident. The arbitration case in addition to
10 naming Kevin Carter named a slough of other defendants and
11 had allegations about insurance and about all sorts of other
12 things, I think it was about a 200 paragraph complaint.
13 When Judge Gibbons saw that, I think rightfully so, and
14 several things moved me to argue this is not within the
15 confines of the statutory property damage arbitration, and
16 seeing that Judge Gibbons said, "That's right. I'm removing
17 it from arbitration now that we've got two circuit court
18 actions that both deal with the same auto accident with the
19 same plaintiff they're supposed to be formed into one case."
20 And the Supreme Court set that precedent back in the 1920's
21 and 30's, I think the common law goes back well before that,
22 that you can't bring two actions to recover from one
23 accident. It's all supposed to be done in one action.

24 MS. GERSTEN: Objection.

25 THE COURT: Overruled. Go ahead.

1 MR. SAWYER: Okay. So Judge, that's where we are
2 today. Today we have a consolidated case of the circuit
3 court case, and we have three plaintiffs. The arbitration
4 case originally had Ms. Gersten. She did attempt to add her
5 mother, Ms. Ayoub, who is here. The circuit court actions
6 has Ms. Gersten, her mother Ms. Ayoub, and her brother,
7 Daniel Hubbard, who I don't believe is here today and is not
8 represented by an attorney. That at least gets us to where
9 we are now, which is a lot of background. The motions are
10 simply this, first of all we move to dismiss when there was
11 a separate arbitration case, move to dismiss that case under
12 Rule 8 because there was the pending circuit court action.
13 Under the Flickner (phonetically) case, which is the South
14 Carolina Supreme Court case, it's 182 southeast 104, it's a
15 1935 case. The South Carolina Supreme Court held that a
16 plaintiff can't bring separate actions, can't split their
17 causes between bodily injury and property damage. Once you
18 choose to bring the bodily injury case you have to bring
19 everything in under it. So that's from the Supreme Court,
20 it's well established precedence, and therefore the property
21 damage case, once the circuit court action was filed was
22 duplicative under Rule 12 and it should have been dismissed.
23 So that gets rid of that case. And Judge, to give you an
24 idea of where we're heading, my goal by the end of this
25 argument is to show what we should have, despite all of this

1 pleading and everything else, what we should have at the end
2 of this day is an action between Heidi Gersten and Kevin
3 Carter for negligence. We've got a few steps to take to get
4 there but that's where we're headed. Hopefully I'll walk us
5 through that logically, I'll do my best. So that gets rid
6 of the property damage arbitration case and gets us down to
7 one action, I think that's the easiest and first step. The
8 second step, of course, is dealing with all the various
9 claims in the circuit court complaint. This names the
10 insurance companies, it names Joe Tirbovich, an insurance
11 adjustor; it names John Ammendola, who is CEO and President
12 I think of Grey's Insurance; it names the Department of
13 Highway; it names the investigating trooper; it names GM,
14 who manufactured the van that Ms. Gersten was operating,
15 although I don't believe they've been served. It names a
16 lot of different entities for a lot of different claims. If
17 you look at the complaint, though, Judge, the only factual
18 allegations that would support any cause of action are the
19 facts alleged against Mr. Carter. And, Judge, I represent
20 Mr. Carter, at the end of the day I expect him to still be
21 in this case. He's got a covenant not to execute dealing
22 with the bodily injury claim, but I do expect him to still
23 be in the case at the end of the day. As to Richard Davis,
24 who is my other client, the allegation against him is that
25 he co-owned the Honda Ridgeline that Kevin Carter was

1 driving at the time of the time of the accident, and as a
2 co-owner negligently entrusted, I guess, the vehicle to the
3 other owner of the vehicle, Kevin Carter. As a factual
4 matter that's not true, but for purposes of the motion to
5 dismiss I know that the facts don't necessarily matter. But
6 more importantly, Judge, you can't negligently entrust a
7 vehicle to the vehicle's owner. All of the courts that have
8 looked at that as far as I can tell across the country say
9 that's not a valid claim, because the owner who is driving
10 the vehicle at the time of the accident has a right of
11 possession. So you can't be liable for letting somebody who
12 has a right to possess the vehicle possess a vehicle, Judge.
13 And I think for that reason, Judge, the claim against
14 Richard Davis, the co-owner, should go out the window. At
15 that point it leaves all the other co-defendants. And
16 simply put, Judge, those can be put up into two balls:
17 Claims against the insurance companies, and claims against
18 the Department of Public Safety, and the trooper. The
19 claims against the insurance companies appear to try to
20 assert a breach of contract action and what might be some
21 form of third party bad faith action. And I say might
22 appear because there aren't facts that really explain all of
23 this, but that's my best gleaning from the complaint. Well,
24 there's no allegation of any contractual provisions that
25 were breached so there's no statement of any claim for

1 breach of contract in any of the complaints. And South
2 Carolina doesn't recognize third party bad faith, that's the
3 Cleckley case that's cited in our motion and the
4 co-defendant's motions, it's well established law, which
5 means there's no Standing for Ms. Gersten, or Mr. Hubbard,
6 or Ms. Ayoub to file any third party claim against
7 Nationwide or Joe Tirbovich either. So all of those claims
8 are not -- there's no facts to support them, and they are
9 not legally supported. For those grounds all of those
10 co-defendants and on the insurance side of things, which
11 would be Interinsurance Exchange, Trust Guard, John
12 Ammendola, and Joe Tirbovich should be dismissed. That
13 leaves us with Heidi Gersten and Kevin Carter, the
14 Department of Public Safety and Trooper Blackwell, and GM.
15 GM is real easy. There's no allegations of any product
16 defect that caused any injury to Ms. Gersten in the van.
17 There's no allegations of a component of the van that
18 malfunctioned, they're gone.

19 THE COURT: What are the allegations by Ivanka Ayoub.
20 Was she a passenger?

21 MR. SAWYER: She's not, Judge. Ms. Gersten was alone
22 in the vehicle. Ms. Ayoub claims a claim for loss of
23 consortium for her daughter's injuries, and apparently that's
24 what Mr. Hubbard claims. Now, with Mr. Hubbard not being
25 here I would move to --

1 MS. GERSTEN: Objection. He's not saying truthfulness
2 on some of that -- my mother, Ms. Ayoub, owned the vehicle.

3 THE COURT: Okay.

4 MR. SAWYER: Mr. Hubbard is not here. With him not
5 being here and not being represented I would move to dismiss
6 him for failure to prosecute since we're here for a motion
7 to dismiss anyhow. As to the loss of consortium claim for
8 Ms. Ayoub, Judge, the South Carolina Supreme Court in Doe
9 versus the County of Greenville School District case said
10 that the only consortium cause of action we recognize in
11 South Carolina is a spousal loss of consortium, and the only
12 reason that we recognize that is because there's a statute
13 that creates that right. And the what Supreme Court said in
14 the Doe case was, "All right. If the General Assembly
15 recognizes it here and doesn't recognize it for filial
16 consortium, then there is no filial consortium in South
17 Carolina. So that's the law in South Carolina. There is no
18 claim for filial consortium under our law, which means that
19 cause of action should also be gone. And I think that gets
20 us down to the Department of Public Safety and Trooper
21 Blackwell. The allegations against them are essentially
22 that they didn't do enough of an investigation after the
23 accident. Well, Judge, I don't think that there's any legal
24 duty that creates a tort claim against the Department of
25 Public Safety to conduct a certain level of investigation

1 after an accident, and even to the extent there is a duty it
2 didn't create any injuries here. The injuries here resulted
3 from the accident, not from the investigation.

4 MS. GERSTEN: Objection. It's not accurate, that's not
5 the claim.

6 THE COURT: Well, what he's saying is that something
7 that happened after the accident couldn't be what the law
8 calls a proximate cause of the accident, and, of course,
9 there's got to be proximate cause of the accident for there
10 to be the proximate cause of any injuries or damages.

11 MS. GERSTEN: I understand that, sir. It's a little
12 more entailed, though. Because the trooper originally was
13 not -- and I already spoke with Trooper Blackwell, he's a
14 fine man, but he said he's not qualified or trained to do
15 accident reconstruction and it prevented me from getting
16 counsel, because the early --

17 THE COURT: All right. Let Mr. Sawyer finish and then
18 I'll hear all of your --

19 MR. SAWYER: Thank you, Judge. There's no duty to
20 investigate on the part of the DPS, the Department of Public
21 Safety. And, of course, their counsel is here, I'm sure he
22 can elucidate that a lot better than I can. But with no
23 duty, there's no breach, there's nothing that can create a
24 causative action, plus there's an issue of proximate cause
25 for damages. So now we've got two cases boiled down to one

1 case, all of the other defendants are gone, and we've got
2 Heidi Gersten versus Kevin Carter. The last part of my
3 argument -- I'm almost done.

4 THE COURT: Okay. I'm having to think as we go along.
5 Wouldn't Ms. Ayoub have -- she should be the proper party in
6 the arbitration action to begin with, right? Not Ms.
7 Gersten.

8 MR. SAWYER: The problem -- that's right. The problem
9 with that part of the claim, Judge, was that Ms. Ayoub was
10 added to the arbitration case, the filing for adding her was
11 filed after the statute of limitations.

12 MS. GERSTEN: Objection. The rules don't say that.
13 The rules say that an amendment can be made before service,
14 so I filed the arbitration and mistakenly left my mother's
15 name off, and when I saw that I remedied it. They have no
16 prejudice because when they were actually served they were
17 served with her name attached.

18 MR. SAWYER: Judge, briefly to respond to that so we
19 don't have to do too much back and forth. Rule 5D says two
20 things: One, the summons and complaint shall be filed
21 before service, and two, that anything that doesn't have to
22 be filed before service has to be filed within five days of
23 service. Well, Mr. Carter and Mr. Davis were served on
24 March, I believe -- I've got a timeline here -- they were
25 served on March 17th, and the amended complaint wasn't file

1 until March 27th, 10 days later. The Court of Appeals in
2 what is albeit an unpublished decision, Venture Engineering
3 Inc. versus Algerie (phonetically) it's a 2008 Westlaw
4 9832815 held that when an amended complaint is served and
5 not filed within the five day time period, it's treated as a
6 nullity at least until it's filed. Well, Judge, it wasn't
7 filed until after the statute of limitations, and it's an
8 amendment adding a party, which means it can't relate back,
9 there's case law on that, too. So if it's filed after the
10 statute of limitations outside of the time required by Rule
11 5D and it can't relate back because it adds a party, then
12 it's void, the statute limitations applies. And on top of
13 all of that, Judge, there was no amended summons but they
14 added a party. If you add a party you can't just do an
15 amended complaint, you have to do an amended summons, and
16 there was never an amended summons that was issued and
17 served. So again, with all due respect, Ms. Ayoub's
18 property damage claim, it's gone by way of statute of
19 limitations.

20 MS. GERSTEN: And I object to that.

21 MR. SAWYER: So Judge, finally, the last part is,
22 there's about 18 different causes of action in the circuit
23 court bodily injury common pleas complaint. Most of them
24 attempt to just broadly state the elements of causes of
25 action, they go from fraud to duress to also sorts of other

1 claims. We really don't need to go through them item by
2 item, because Judge, if you just take a mere glance at it
3 you'll see that they don't allege any facts. And most of
4 the allegations, mostly the captioned causes of action,
5 don't even allege the elements, but in South Carolina you
6 can't just allege elements, you have to allege facts.

7 MS. GERSTEN: Objection, because it's been amended.
8 He's talking about the original but it has been timely
9 amended since then.

10 MR. SAWYER: I'm talking about the complaint that I
11 think -- is there a new one that was filed with the Court?

12 MS. GERSTEN: Yes.

13 THE COURT: You served it on the other party?

14 MS. GERSTEN: Yes.

15 THE COURT: When did you do that?

16 MR. SAWYER: Judge, I think that there is an amended
17 one that the parties are receiving right now in the mail.
18 Was it just mailed this week?

19 MS. GERSTEN: It was mailed timely before -- about 15
20 days before the court, ten days plus five days for mailing.
21 It was mailed on time.

22 THE COURT: Well, you attempted -- you filed an amended
23 complaint after the parties had answered.

24 MS. GERSTEN: Actually not all of their answers. The
25 last party that was actually served was July 15th,

1 July 15th, and you have 180 days before this can even go on
2 to a jury roster. And the last party hasn't even finished
3 their time that they're allowed to have to answer, they're
4 still in the answer. That's why this whole thing -- all of
5 these motions are premature, sir, the pleadings are not
6 closed.

7 MR. SAWYER: Judge, can I approach?

8 THE COURT: Yes.

9 MR. SAWYER: This, I believe, is the amended complaint
10 that she's referring to dated August 29th of 2018. Judge,
11 you'll notice from looking at that complaint again, the
12 exact same argument I was just going to give you still
13 applies, which is there's no factual allegations that
14 support the very many causes of action that are asserted in
15 the complaint, and cursory glance will reveal that, and
16 therefore all of those causes of action with the exception
17 of the negligence claim should be dismissed. And that gets
18 us down to where we should be, which is Heidi Gersten --

19 THE COURT: But any amendment under the Rule 15A, once
20 responsive pleadings are filed then you would have to have
21 leave of the Court to amend.

22 MR. SAWYER: Well, Judge, the problem with the amended
23 complaint, we're going to argue the exact same issues
24 because it alleges the same substance with the same defects.

25 THE COURT: I understand. I'm just trying to get the

1 procedure of where we are. Okay. Go ahead. I've got now a
2 copy in my hand, a copy of the amended complaint.

3 MR. SAWYER: And if she doesn't have leave that makes
4 it easier, of course, Judge.

5 THE COURT: Thank you.

6 MR. SAWYER: So Judge, that gets rid of everything. It
7 boils it down to what it should be, which is a complaint
8 against Kevin Carter by Heidi Gersten for negligence, it
9 simplifies this case into what it should be. If there are
10 any UIM carriers they can be properly served pursuant to the
11 UIM statute. And if there are any valid claims against any
12 insurance companies, none have been alleged, but if there
13 are they need to be dealt with in a separate legal action
14 and the law on that is clearly cited in everybody's motions,
15 I believe, and certainly in my motion. So Judge, that's
16 really the substance of it. We also have a motion to strike
17 a lot of the various allegations in the complaint as being
18 improper under Rule 12F, some of them dealing with the
19 investigation, which you just ruled on two motions ago, some
20 of them dealing with personal identifying information, some
21 dealing with various other aspects of the case. Those are
22 set out in the motion. I don't want to belabor the point
23 especially with the amended complaint, because I think we
24 would have to go line by line through the amended complaint
25 on the motion to strike, so I don't think we need to waste a

1 lot of the Court's time on that issue now. We can deal with
2 it at a subsequent point if we need to. Thank you, Your
3 Honor.

4 THE COURT: And anybody else on behalf of any of the
5 defendants?

6 MR. WILLIAMS: I would like to speak if I may, Your
7 Honor, very briefly. I'm Reynolds Williams again for
8 Interinsurance Exchange of California. The only allegation
9 in the complaint against my client is that they are -- that
10 they insured Mrs. Gersten at the time of the this wreck, and
11 I think they're entitled to be dismissed for failure to
12 state a claim of facts constituting a cause of action. In
13 addition my client -- I have filed an affidavit that has not
14 been contested from an appropriate executive officer of my
15 client, a vice president --

16 MS. GERSTEN: Objection, hearsay.

17 MR. WILLIAMS: And I filed an affidavit in support --

18 THE COURT: I overrule your objection. It's motions,
19 you can rely on affidavits.

20 MR. WILLIAMS: I filed that affidavit in support of my
21 motion for summary judgment in the -- and it was filed on
22 April 24th of this year.

23 MS. GERSTEN: Objection. I never received a summary
24 judgment. I've never received a summary judgment.

25 MR. WILLIAMS: It was placed in the United States Mail

1 for delivery to the plaintiff, Your Honor, and filed with
2 the Court. It's the affidavit of Gayle Lewis, who says that
3 my insurance company has no -- is not licensed in South
4 Carolina, has no offices, no agents, no property, no
5 policies issued, no employees, no address, no vehicles, and
6 does not even advertise in South Carolina. In other words,
7 it has zero contacts. It does not conduct business in the
8 state period. So it has -- it does not have minimum
9 contacts with the State of South Carolina, so this Court
10 would not have jurisdiction over it.

11 MS. GERSTEN: Objection. You would have jurisdiction
12 under the long armed statute.

13 THE COURT: Under the what?

14 MS. GERSTEN: The long armed statute.

15 THE COURT: I'm familiar with the long term statute,
16 but how would the Court have jurisdiction with somebody who
17 has no minimum contacts with the state?

18 MS. GERSTEN: Because they're providing services in the
19 state.

20 MR. WILLIAMS: I have an unchallenged affidavit that we
21 don't do that.

22 THE COURT: The affidavit states that they don't
23 provide services.

24 MS. GERSTEN: But it's hearsay, objection.

25 THE COURT: Well, I can accept what's stated in the

1 affidavit for the purposes of the motions. Go ahead.

2 MR. WILLIAMS: In addition, Your Honor, I think the law
3 in South Carolina is clear that insurance companies do not
4 get to be named as parties in causes of actions seeking to
5 determine liability for an accident. And I also -- in my
6 brief I cited a case of the South Carolina Supreme Court, it
7 is Doe versus South Carolina -- I think the citation is --

8 MS. GERSTEN: Objection. Because allowing it -- he
9 hasn't answered the amended complaint that I gave to you.

10 THE COURT: I've got the amended complaint in my hand.

11 MR. WILLIAMS: Your Honor, that amended complaint we
12 would argue is A, I haven't been served with, I've never
13 seen it, never laid eyes on it; B, it was improper for her
14 to file it. Because I filed my motion to dismiss this --
15 the complaint that I know about I filed on the day after
16 service, which was, in fact, July -- I filed it on July 25th
17 of this year, which is more than 30 days prior to, of
18 course, August 29th and she doesn't have leave with the
19 Court. But in any event, the case to which I was going to
20 call Your Honor's attention is Doe v. Greenville County
21 School District, 651 Southeast Second 305 at page 308, in
22 which the Supreme Court makes it crystal clear that there's
23 no cause of action for a maternal loss of consortium or
24 filial loss of consortium in South Carolina, and no parents
25 and no siblings have such a cause of action.

1 MS. GERSTEN: Objection.

2 THE COURT: What's your objection?

3 MS. GERSTEN: I am here to write history. That might
4 be some case law but this is new case law right here.

5 THE COURT: All right. Thank you. Objection
6 overruled. I have to go on precedent so I have to follow
7 the law.

8 MR. WILLIAMS: And finally, Your Honor, I think it's
9 finally, Mr. Hubbard is not here. I wrote Mr. Hubbard a
10 letter and informed him that if he were not here at this
11 hearing that we were moving to strike his complaint for
12 failure to prosecute. And I sent him a notice, a copy of
13 the Court's notices of the hearing and a copy of what
14 motions would be pending at this time.

15 MS. GERSTEN: Objection. I'm not familiar with that.

16 THE COURT: Well, that's dealing with Mr. Hubbard.
17 Mr. Hubbard's claim is separate from yours.

18 MR. WILLIAMS: I sent similar notice to Ms. Gersten and
19 similar notice to Ms. Ayoub since each of them is
20 representing themselves. Ms. Ayoub is here and Ms. Gersten
21 is here so I don't make that motion with respect to them.
22 And at the risk of repeating myself, with the interruption I
23 lost my train of thought a little bit, but I don't believe
24 that the complaint fails to -- I don't believe that the
25 complaint states facts constituting a cause of action

1 against the Interinsurance Exchange, because the only fact
2 about it stated in the complaint is that it insured
3 Ms. Gersten at the time of the accident. I don't know think
4 that's a cause of action to be an insurer of a person.

5 Thank you, Your Honor.

6 MR. DWORJANYN: May it please the Court? I'll try not
7 to cover too much of the same ground and I would adopt their
8 arguments. I represent -- sorry, Your Honor, Pete
9 Dworjanyn, and Trust Guard Insurance Company, and John
10 Ammendola. But I do have to say some things specific as to
11 Mr. Ammendola. He's the President and CEO of Trust Guard
12 Insurance Company. The Court lacks personal jurisdiction
13 over him -- first going to both -- of all of the pleadings,
14 the plaintiffs don't make any allegations as to Mr.
15 Ammendola whatsoever. And in the common pleas lawsuit he's
16 in the caption and that's it, there's no factual
17 allegations. And in the arbitration action it says he
18 violated Improper Claims Practices Act but there are no
19 facts as to it. There's no allegation that would bring
20 him -- there's no allegation as to his state of residency,
21 where he works, what he does, anything, just his name is in
22 the pleadings. He hasn't been served with the complaint, so
23 it's --

24 MS. GERSTEN: Objection. He has been served and I have
25 proof of service here.

1 MR. DWORJANYN: They mailed the complaint to Trust
2 Guard Insurance Company, but Mr. Ammendola did not sign for
3 it, and as a person being sued individually they would have
4 to serve him personally so they haven't served him
5 personally.

6 MS. GERSTEN: Objection.

7 THE COURT: Overruled.

8 MR. DWORJANYN: And finally and most importantly, there
9 are no allegations against Mr. Ammendola period, and there
10 are no allegations against Trust Guard Insurance Company.
11 Now, the reality is is that Trust Guard Insurance Company
12 had a property damage policy on Ms. Ayoub's vehicle that's
13 owned by Ms. Ayoub, the co-plaintiff, that's true, but they
14 didn't insure Ms. Gersten or Mr. Hubbard.

15 MS. GERSTEN: Objection.

16 MR. DWORJANYN: And there are no allegations in any of
17 the pleadings as to anything that Trust Guard did or did not
18 do. I know that that point has been stressed before, but
19 there's causes of action listed but there are no facts to
20 support a cause of action. It's kind of impossible to
21 defend a complaint where they don't say you did anything. A
22 legal conclusion isn't a cause of action. And I don't want
23 to waive this and I've got to argue it at this time, Your
24 Honor, I do have one other motion. So I've got motions to
25 dismiss Mr. Ammendola and Trust Guard, and I also have a

1 motion to quash discovery, which this might be moot
2 depending on what the Court does. But in the arbitration
3 action, which was joined with the common pleas lawsuit
4 consolidated, the plaintiffs served 62 requests to admit, 32
5 interrogatories, and 22 requests for production, which
6 don't -- aren't directed to any of the defendants. If you
7 don't mind I'll hand it up because I didn't put it in the
8 record. It's just these broad based allegations, almost all
9 of which don't have anything do with insurance, but they
10 really address the property damage claims. And, you know,
11 with respect to the request to admit they exceed the
12 possible numbers of requests to admit --

13 MS. GERSTEN: Objection. No, I didn't.

14 THE COURT: Overruled.

15 MR. DWORJANYN: If the case is going to go forward
16 against any party I would ask that the Court require the
17 plaintiffs to tailor their discovery requests to the
18 appropriate parties, and to limit her requests to admit to
19 the correct number of requests to admit. But that being
20 said, the cases against Trust Guard and Mr. Ammendola, Your
21 Honor, should be dismissed. Thank you.

22 MR. SLYE: Your Honor, David Slye on behalf of
23 Nationwide and Joe Tirbovich. I also adopt the arguments of
24 counsel, and I would appreciate Mr. Sawyer's recitation of
25 where we were going and I wholeheartedly agree with that.

1 THE COURT: Who is Tirbovich?

2 MR. SLYE: Tirbovich is an adjuster for Nationwide, and
3 then Nationwide is the liability insurance carrier on the
4 vehicle that was being driven by Kevin Carter. So that's
5 Nationwide's role in this. At this stage of the proceedings
6 it's not appropriate for the liability insurance carrier or
7 their adjusters to be involved any way in a property damage
8 arbitration or a lawsuit where they're litigating liability
9 and an automobile accident case. And so at this stage
10 certainly Nationwide and Mr. Tirbovich should be dismissed.
11 That's clearly established in Cleckley versus Northwestern
12 National, 338SC131, that's already been mentioned here
13 today. As it relates to the common pleas action, or the
14 arbitration action, Mr. Tirbovich, to my knowledge, has not
15 been served with any of these documents. He's been named as
16 an individual --

17 MS. GERSTEN: Objection, he's been served.

18 MR. SLYE: To the extent he's been served, Your Honor,
19 I haven't seen anything supporting that at this time. The
20 only allegation in the common pleas case is that Nationwide
21 does business in North Carolina, that's it. The rest of it
22 is just a recitation of the elements of the case and
23 generically labeling things as defendants. As has already
24 been mentioned, that's insufficient under South Carolina law
25 to form the basis for any of these causes of action as it

1 relates to Nationwide or Mr. Tirbovich, and therefore the
2 causes of action -- or both complaints in both cases should
3 be dismissed. But again, I just adopt the arguments that
4 have already been set forth, I think they apply equally to
5 all of the insurance companies.

6 THE COURT: All right. Thank you.

7 MR. DAVIDSON: Will Davidson on behalf of the Highway
8 Department and Trooper Blackwell. Your Honor, counsel was
9 correct in regard to where we probably ought to end up at
10 the end of the day. My motion was filed on -- in such a
11 time frame that probably her amended complaint would be
12 applicable to my case. My motion, however, not only applies
13 to the original complaint but the amended complaint, and the
14 reason being, Your Honor, in the original complaint she
15 really never set forth any factual basis for her claims
16 against the highway department, public safety, and Trooper
17 Blackwell. In the amended complaint she now does set forth
18 some facts that deal with Trooper Blackwell, and therefore
19 the department, but it all centers around the accident
20 report that was prepared by Trooper Blackwell, and according
21 to her taking the pleadings as she has drafted them, later
22 amended by the MAIT Team, and that's paragraph 61, 62 and
23 63, she then claims that as a result of being given the
24 report on the day of her appearance in court, upon reading
25 the report she suffered damages. Well, the fact that the --

1 or troopers are required to prepare accident reports, and
2 number two, those accident reports are not evidence of lack
3 of due care and can only be used in a very limited time
4 frame of when the trooper is on the stand to help refresh
5 his memory. They are not the basis for any liability or any
6 claim of negligence in this case. So it's our position, you
7 know, under our motion that she did not set forth a valid
8 claim against the department, because the department's
9 duties and Trooper Blackwell's duties are, in fact, public
10 duties that apply to the public at large. Under the case of
11 Rayfield versus Pardon and Parole Board, and Arthur versus
12 Akin County, and other cases that deal with public duty, and
13 it goes back to originally Parker versus Brown, which is the
14 original case that decided that there was a public duty
15 issue in South Carolina, a citizen, and in this is
16 Ms. Gersten from Florida, would not have the ability to
17 bring a claim against the department, or for that matter the
18 trooper, because the only duty exists is that of a public
19 duty, and that public duty does not give rise to a private
20 right of action, number one. Number two, the damages she
21 sustained in this event occurred as a result of the
22 automobile accident which occurred in March of '15.
23 Therefore the post-accident report would not be the
24 proximate cause to give rise to any type of claim or cause
25 of action against either the department or Trooper

1 Blackwell. Next, Your Honor, under the Tort Claims Act
2 Trooper Blackwell is immune from suit and you have to sue
3 the department. Yet the department in this instance is
4 complying with the law, which says they are to have their
5 troopers prepare accident reports, and under the Tort Claims
6 Act that is a new function. Next, Your Honor, because the
7 cause of action originated as a result of her automobile
8 accident in 2015, this action on the face of the complaint
9 was brought in 2018. Under the South Carolina Tort Claims
10 Act, be it the amended complaint or the original complaint,
11 there is a two year statute of limitations to bring a cause
12 of action against the department. Last but not least, Your
13 Honor, she asked for punitives against everybody, including
14 me. And as the Court is aware under both the common law and
15 under the Tort Claims Act punitives aren't recoverable in
16 this matter against the department. So from the department
17 and Trooper Blackwell's point, whether I'm under the amended
18 complaint or under the original complaint, and I appreciate
19 Ms. Gersten submitting an amended complaint to clarify what
20 her claims were against the department, but even with that
21 clarification under the grounds that I have set forth, the
22 department and Trooper Blackwell insofar as he might have
23 any exposure in this matter, although I think under the Tort
24 Claims Act he's immune, we believe that the amended
25 complaint should be dismissed along with the original

1 complaint against the department. If the Court feels that I
2 need to file another motion I'll be glad to file another
3 motion, I'll be glad to come to another hearing, but for
4 economy's sake since everybody is here today I would just as
5 soon the Court go ahead and rule. Thank you, Your Honor.

6 THE COURT: All right. Ms. Gersten, now I will be glad
7 to hear from you.

8 MS. GERSTEN: Thank you, sir. First of all I just want
9 to thank everybody for being here. I'm here to remedy my
10 grievances along with my mother. And it started out, sir,
11 where I read the law about this arbitration hearing for
12 property damage, and that was filed first, and everything
13 else came after when I realized it wasn't happening. Now
14 I've been told that here in this courthouse they haven't
15 done many arbitration hearings, if at all, and I feel the
16 confusion comes from the consolidating of the two because
17 they're separate plaintiffs and separate defendants, similar
18 but separate. And I would like to move the Court for an
19 opportunity to amend, because I understand it's the first
20 time I'm meeting Wesley, Mr. Sawyer, I've met him before at
21 the criminal when his client, Mr. Carter, was charged with
22 DUI. I went to the sentencing and I met Mr. Sawyer but
23 everyone else I've never met before. I would like to have
24 an opportunity to amend the complaint with leave of Court so
25 that I can address everything they're saying. I understand

1 maybe the communication was off, and it's not an
2 unreasonable request. I have come a long way, sir, and it's
3 not to delay anything, it's to present these facts, because
4 I'm an injured party and I just want to find my remedy. And
5 I still feel that the arbitration hearing should go on
6 because it's state legislative and it would give the parties
7 an opportunity to bring everything together, and a lot of
8 their complaints have to do with -- the arbitration said you
9 don't need all of these formalities. It didn't say you
10 couldn't use the discovery tools, but it said it wasn't
11 required, so I think there's a very misunderstanding with
12 what this is meant to be, that I wasn't supposed to be --
13 well, we -- my mother and I, we weren't supposed to be
14 restricted by all of these rules and regulations. My
15 understanding was it was a summary procedure, we could just
16 bring everything in and if either side didn't like it then
17 we go to jury trial. I decided to file, along with my
18 mother and my brother, other issues. But I feel that I'm
19 totally prejudiced because they got merged together, which
20 through the balance of the time limits and through the
21 balance of what everything was supposed to be way off, and
22 if you're ruling still that you're not going to overturn
23 what I consider the void judgment of Honorable Mr. Gibbons,
24 I would like an opportunity to amend the complaint based on
25 their arguments. So I move the Court for an opportunity to

1 amend this complaint. I may not know the exact case law,
2 sir, but courts advocate for people to have an opportunity,
3 First Amendment, Second Amendment, it's not unheard of. And
4 also some of the things that they were saying centered
5 around the word shall. Mr. Sawyer was speaking about
6 timeliness and things were done on a certain five days they
7 had to be filed, and I saw this, but I also know that
8 federal rules say that the only mandatory word is must. So
9 I understand -- and a lot of this rides on this discretion
10 of you, sir. And just so everybody knows, I'm sitting on a
11 pressure wound right now and so if I have a little issue
12 speaking I'm in a lot of pain. I came from Florida, my
13 friend drove me, it was very hard to endure but I'm here
14 because it's important. And I would like my opportunity to
15 remedy their arguments, because I put a lot of time and
16 effort into this. My life was changed. And I'm very, very
17 grateful to be here, and I'm so thankful that you are
18 listening, and I think that I have valid arguments, and
19 perhaps all the facts as they're saying did not line up with
20 the elements. But just understand in the beginning it was a
21 summary, and then some of the arguments they said it was too
22 much, everybody says it was out of the scope of arbitration,
23 it was too much, too much information. So when the civil
24 action was filed, it's true, I went along with my mother and
25 my brother, and we toned it down, we thought we were making

1 it easier. Now I understand what their arguments are, and a
2 lot of what they're saying I would like to examine the court
3 file, because I don't believe that some of these things have
4 been sent -- I do not remember any summary judgment being
5 filed. I would like a motion to continuance for another
6 opportunity to remedy what they're saying.

7 THE COURT: Well, I'm not going to second guess Judge
8 Gibbons, he's the administrative judge for this circuit and
9 this county and I'm bound by his ruling as far as the
10 consolidation, I'm not changing that, so the cases are still
11 consolidated. If he's wrong in that somewhere down the line
12 a higher court than myself, either a Court of Appeals or the
13 Supreme Court can tell Judge Gibbons he did the wrong thing,
14 I can't.

15 MS. GERSTEN: Okay, sir. But just know that the time
16 that things were due was thrown off. Common sense will tell
17 you that I didn't -- we didn't file until March 16th of 2018
18 for the second action. At that point the arbitration had
19 all been served, everybody was served, and I have proof of
20 service for everybody right here right now. And as a matter
21 the fact I would like to give this to you, sir --

22 THE COURT: I don't need it. I'm not concerned about
23 the times, the times are not going to be the basis for
24 whatever I do. I'm not concerned about whether or not
25 something was served on time or not.

1 MS. GERSTEN: I don't understand that you mean that
2 you're not concerned with what time was.

3 THE COURT: Well, let me let you finish your
4 presentation and then I will tell you what I think. I'm
5 thinking now how I need to dispose of this and let me listen
6 to the rest of what you have to say before I do it.

7 MS. GERSTEN: I didn't hear you.

8 THE COURT: Just go ahead with your argument.

9 MS. GERSTEN: Well, it's undisputed that Mr. Carter and
10 I had a collision.

11 THE COURT: Everybody agrees with that.

12 MS. GERSTEN: And I feel they want to sever away from
13 that, they feel it's a separate action because there's
14 breach of contract, and I feel that -- if it pleases the
15 Court, if you want to sever it I would still like to move
16 forward with my breach of contract issues.

17 THE COURT: What kind of contract did you have with
18 Mr. Carter?

19 MS. GERSTEN: No, not with Mr. Carter.

20 THE COURT: What kind of contract did you have with any
21 of these people?

22 MS. GERSTEN: With the Exchange --

23 THE COURT: You had a contract with the Exchange.

24 MS. GERSTEN: Yes, I did. I had a half million dollar
25 policy, and my underinsured motorist was not paid, along

1 with Trust Guard under insurance was not paid. Nationwide,
2 I feel that they were very dishonest with me. And I have a
3 recording of every single conversation I've had with every
4 single insurance company, and I can prove that what they
5 said to me was violations of many things, giving legal
6 advice. Nationwide wanted me to settle with what we didn't
7 agree upon, and the gentleman was very rude on the phone.
8 And these are separate actions that I would like to present,
9 perhaps not the proximate cause of the collision but
10 definitely -- and even if you were to dismiss I'm still well
11 within the statute of limitations for breach of contract
12 actions. So I would -- if you choose to sever I would like
13 an opportunity to amend my arguments and my facts, our facts
14 together about what had happened and why I am here today,
15 along with my mother.

16 THE COURT: Anything else?

17 MS. GERSTEN: Well, I mean, just going through the -- I
18 feel that the judgment of Judge Gibbons, Honorable Judge
19 Gibbons, is void for the record. And I still feel I would
20 like to have an arbitration hearing and to discuss
21 liability, which I could not find anything that says
22 liability is at fault. I believe that those are two
23 separate at fault and liability, especially when Nationwide
24 said that they accept liability, they accepted liability and
25 in my admissions they admitted that.

1 THE COURT: All right. Anything else?

2 MS. GERSTEN: I don't think that the pleadings are
3 closed.

4 THE COURT: Beg your pardon?

5 MS. GERSTEN: The pleadings are not closed.

6 THE COURT: Why not?

7 MS. GERSTEN: Because the time that the last person was
8 served, which was the South Carolina Department, was
9 July 15th, and this is a premature court hearing because we
10 haven't finished the pleadings and the discovery wasn't
11 closed.

12 THE COURT: Well, I disagree. I'm going to grant the
13 motions by the parties and ask each attorney to prepare an
14 order based on their presentation to the Court today,
15 including Mr. Hubbard's failure to prosecute, which will
16 leave the case with Ms. Gersten, and to the extent she has
17 an interest in the property I guess Ivanka Ayoub, against
18 Kevin Carter. Of course, you would have a right to appeal.
19 Just like you have a right to appeal Judge Gibbons you have
20 the right to appeal my orders once you get them.

21 MS. GERSTEN: I didn't understand what you just said.

22 THE COURT: I am granting their various motions to
23 dismiss the claims against everybody but Mr. Carter.

24 MS. GERSTEN: Everybody but Mr. Carter.

25 THE COURT: Yes.

1 MS. GERSTEN: Thank you, sir. Is that the end of this
2 proceeding?

3 THE COURT: Beg your pardon? Yes, it is.

4 MS. GERSTEN: And I really truly appreciate you, thank
5 you so much.

6 THE COURT: All right. Thank you.

7 (End of the hearing.)

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

July 28, 2022 Hearing Transcript in Case No. 2018-CP-12-00117;

1 STATE OF SOUTH CAROLINA
2 COURT OF COMMON PLEAS
3 COUNTY OF CHESTER
4 2018-CP-12-00117
5 Heidi Gersten
6 Vs.
7 Kevin Carter
8
9 (Webex Hearing)
10 July 28, 2022
11 Before the Honorable J. Mark Hayes
12 APPEARANCES
13 For the Plaintiff: Heidi Gersten, Pro Se
14 For the Defendant: Wesley B. Sawyer
15
16 Reported by: Michael C. Watkins
17 Official Court Reporter
18
19
20
21
22
23
24
25

1 THE COURT: Thank y'all for getting together. Is it --
2 do I say that correctly, Gersten? Do I say that correctly?

3 MS. GERSTEN: Oh, hi, yes. This is Heidi Gersten. Did
4 you receive my emergency --

5 THE COURT: Ma'am, ma'am, ma'am, let me -- we're making
6 a recording of everything that's here, so let me start and
7 I'll get right back to you on that. Okay?

8 MS. GERSTEN: Oh, I didn't know, are you the Judge or
9 the clerk?

10 THE COURT: I am the Judge, ma'am.

11 MS. GERSTEN: I apologize, I didn't know. I just
12 wanted to make sure that I put motion for a continuance
13 on --

14 THE COURT: Yes, ma'am, we got your motion. Let me
15 start this hearing and we'll get right back to you. Okay?

16 MS. GERSTEN: Okay. I apologize, I didn't know that I
17 was connected.

18 THE COURT: Thank you very much. We've got -- this is
19 the matter that has been scheduled as Gersten versus Carter.
20 I've got this as being case number 2018-CP-12-00117, and
21 2018-AP-12-00074. Prior to beginning this hearing I
22 received an email request from the plaintiff for a
23 continuance, as well as an attached 27 page memorandum. I
24 was provided copies of an exchange of emails from plaintiff
25 and defense counsel indicating that there was not an

1 agreement on the request for a continuance, so we will start
2 with the request for a continuance. Ms. Gersten, I've
3 reviewed your memo and then I reviewed the -- Mr. Sawyer's
4 response where he did not agree to it. Is there anything
5 else that you would like to add to your memo on the request
6 for a continuance?

7 MS. GERSTEN: Well, other than I'm sitting in diarrhea
8 and urine at the moment being paralyzed with a pressure
9 wound, and I'm just not able to proceed properly like this.
10 This is very hard for me. I didn't expect this, I got sick,
11 I didn't want this, but there were extenuating
12 circumstances. And I'm a member -- a qualified individual
13 of the Americans with Disabilities, and it's also an
14 accommodation request under Title Two. And everything that
15 I put in you called it a memorandum, the 27 pages, I
16 attached pictures in case anyone didn't believe me, and
17 they're graphic and gross, but this is part of being
18 paralyzed, this is part of it. I ask for if anything a
19 small continuance so I can least clean up and not be like
20 this.

21 THE COURT: Okay. Thank you very much for that. Mr.
22 Sawyer, is there anything that -- I just received your
23 emails indicating that you did not agree with it. Is there
24 anything else that you would like to add?

25 MR. SAWYER: Judge, very, very briefly, and thank you

1 for your time, Your Honor. May it please the Court? I
2 represent Kevin Carter who's the remaining defendant in this
3 case. But just to give the Court context for the reason
4 that we don't consent to this continuance. This case has
5 been riddled with motions for continuances and motions for
6 extensions. On August 22nd of 2018, there was a motion for
7 a continuance filed by Ms. Gersten in connection with a
8 worsening pressure wound. When this hearing was scheduled
9 last year on January 13th, on January 4th she also moved for
10 a continuance citing numerous other cases she was involved
11 in, and stating that she was a victim of a crime and had
12 litigation going on in Florida. In the Court of Appeals she
13 filed, I believe, eight motions for extensions, four of
14 those referenced pressure wounds, one of them referenced
15 diarrhea explosions, and then other ones referenced other
16 reasons for request for continuances. And then ultimately
17 the Court of Appeals dismissed the case when she failed to
18 comply with an order to provide information and to file a
19 return, and then it went to the Supreme Court and was also
20 denied there as well. So, Judge, if we didn't have such a
21 long and repeated history of this it would be one thing.
22 The other thing that I would note, of course, is her motion
23 itself states she spends I can't remember if it was four or
24 five hours drafting the motion for a continuance. She's
25 here by phone, the Court has accommodated by allowing her to

1 attend by phone, so I don't think that the burden to
2 attending today's hearing is overwhelming given the
3 circumstances.

4 THE COURT: Okay. Ma'am, is there anything that --
5 since you're the moving party you get to close and offer me
6 anything in response what he just stated.

7 MS. GERSTEN: Thank you. He -- everything he's saying
8 is very misleading, because I've never once had this like
9 this, not like this. And the pressure wound, yes, it's
10 ongoing, just like being paralyzed. It's not something that
11 I can just say: Well, you know, I mentioned I was paralyzed
12 everyday of my life and she keeps talking about being
13 paralyzed -- are you there?

14 THE COURT: Ma'am, I'm listening to you.

15 MS. GERSTEN: My phone -- I apologize, the phone, it
16 looked like it cut out, my apologies. And this is the trial
17 court, he's bringing into the appellate court and those were
18 separate issues but still ongoing. And this is unique
19 because those were -- you make an order to the appellate but
20 there's no oral hearing, so I was never actually sitting in
21 urine and feces like I am. And when he says that I put it
22 took me five hours, yes, in between trying to swim through
23 my own diarrhea. I mean, I hate talking like this, this
24 bothers me but this is my life. I didn't want this. And I
25 took the pictures and submitted them so that nobody thinks

1 I'm making this up, because if I didn't the way he sounds,
2 the way Mr. Sawyer sounds, I'm just using this as an excuse.
3 But this is legitimate. What am I supposed to do? Okay?
4 And because this means so much to me I chose to go ahead and
5 just bypass what should be the first thing to do, which is
6 clean yourself up, because I knew that getting a continuance
7 would be challenging. You don't think that I'm crying
8 inside thinking why? Why now? Well, I don't know. This is
9 where I'm at and this is -- he doesn't agree. I apologize,
10 but I have no control over my bowels and no caregiver, no
11 aid, nada. I'm by myself right now. And if you need more
12 proof I'll take more pictures.

13 THE COURT: All right. Thank you for sharing that with
14 me, and I'm very sorry to hear that you're going through
15 this situation that you've related to us. All right. These
16 are my options. You know, we've prepared for this hearing,
17 these are old cases, they are dated 2018, actually one is
18 dated 2019 -- I'm sorry, they're both dated 2018, so these
19 cases need to bring -- need to move forward. Due process
20 not only applies to the plaintiff but it also applies to the
21 defendants, and so both sides are entitled to fair process
22 that brings a reasonable resolution of the claims, or
23 counterclaim, or the positions of the parties. So this is
24 what I'm willing to do, and I would like to get input from
25 the parties, the motions that apply that I have been told

1 that I need to address, some of them actually don't apply,
2 and so I can summarily deal with those issues because I
3 don't think a resolution of those issues prejudice either
4 the plaintiff or the defendant in this case, they just need
5 some type of final resolution, so I will go ahead and take
6 care of the matters that have been assigned to me that just
7 need to -- they're like housekeeping matters as opposed to
8 substantive matters. On the substantive matters, what I
9 would propose is I am actually assigned back into the
10 circuit the week of August 15th, I could schedule these
11 hearings since we will be doing these hearings remotely, I
12 can work back -- I can work the hearings back in the week of
13 the 15th, and then if that's not appropriate I could also
14 work in the hearings at some other time. Again, given the
15 fact that Court Administration is allowing us to do remote
16 proceedings, the burden on the parties, as well as the Court
17 itself, will not be that significant to actually reschedule
18 this. So, in short, I'm going to grant the continuance, but
19 before I grant the continuance we need to go ahead and get
20 this thing rescheduled. So how does the week of August the
21 15th work for the parties? And I'll let the plaintiff go
22 first.

23 MS. GERSTEN: I'm just surprised that it's my brother's
24 birthday, and I mean, I want to say yes because I don't want
25 to delay, but I'm like of all days.

1 THE COURT: Okay. Well, I'm not saying the 15th, I'm
2 saying the week of the 15th.

3 MS. GERSTEN: Oh, okay. Well, what day?

4 THE COURT: What day would suit you?

5 MS. GERSTEN: Well, if we could not have it on the
6 15th, just -- it's my brother's birthday, that's --

7 THE COURT: Okay. So any day, Tuesday, Wednesday,
8 Thursday, or Friday, that would suit you?

9 MS. GERSTEN: That's fine. And I will prepare
10 accordingly and make sure that I very much watch what I eat
11 more than ever, not that I have control, but yes.

12 THE COURT: All right. Then let's -- how about, Mr.
13 Sawyer, do you have any conflicts that week that I need to
14 know about?

15 MR. SAWYER: Judge, we'll make any day that week work,
16 thank you so much.

17 THE COURT: Why don't we pick Thursday the 18th at
18 10:00.

19 MS. GERSTEN: That's August 18th at 10:00.

20 THE COURT: Right. The reason that I picked that date
21 is that I am assigned other court matters that week and it
22 would be easier for the Court if we did it later in the week
23 on a Thursday then at the beginning of the week, because I
24 would have other matters that possibly that it would
25 conflict with that I would have to take care of. So that

1 will give me enough time to get through some matters, so I
2 will hear y'all -- we'll get back together Thursday on the
3 18th, August 18th, at 10:00. Okay?

4 MS. GERSTEN: Can I interject one thing, though, as I'm
5 thinking about it?

6 THE COURT: All right.

7 MS. GERSTEN: Okay. So my mother passed unfortunately
8 this year, I have not received the death certificate yet.
9 So I'm not even sure how I'm able to proceed, if I need an
10 attorney or if the power of attorney that she granted me,
11 the durable power of attorney is -- I'm not asking for legal
12 advice, but this becomes more complex because she is a
13 listed plaintiff and the owner of the van in controversy,
14 and I never expected or -- it saddens me that she passed,
15 but I don't know what to do at this stage concerning her
16 because I would like to move forward with her claim as well.

17 THE COURT: Well, thank you for highlighting that to
18 us. I -- you are right, I am not in a position as a Judge
19 that I can give legal advice. But I will tell you that, as
20 I tell all pro se litigants, I'm of the very strong opinion
21 it's not a wise thing to do for a pro se person to ever
22 represent themselves in a court of law. And so -- and this
23 is -- because very frequently pro se litigants, they are
24 held to the same substantive standard that lawyers are, and
25 lawyers have been -- not only received a formal education

1 but probably have a lot of experience working through the
2 court system. And I find in my experience as a Judge that
3 sometimes all too often the Rules of Evidence and the Rules
4 of Civil Procedure, which apply equally both to a pro se
5 litigant as well as litigant represented by an attorney,
6 will frequently in layman's term trip up a pro se litigant,
7 and that sometimes the merits of a proceeding are never
8 addressed because pro se litigants failed to comply with the
9 Rules of Evidence or the Rules of Procedure. So I always
10 encourage pro se litigants to seek the advice of counsel,
11 and this is one of those times where I can express to you my
12 very strong belief that you do need to talk to a lawyer. So
13 you asked my opinion on that so I expressed it to you. I
14 would encourage you to do that, and if you do let the lawyer
15 know that we have this hearing scheduled for August 18th at
16 10:00.

17 MS. GERSTEN: Well, here is the thing, because now that
18 we're talking about my mom, I mean, I would like to have a
19 little extra time so I can do that because I wasn't
20 factoring that in, and I don't want to --

21 THE COURT: Ma'am, let me suggest something to you.
22 You are a pro se litigant, you do not have the authority in
23 South Carolina to represent your mother, nor do you have the
24 authority to represent her estate, so any questions that you
25 would raise about that matter are premature and I would not

1 want to put you in the bad situation of one day being
2 accused of practicing law without a license.

3 MS. GERSTEN: No, I'm not doing that, that's why I'm
4 being forthright with the courts right now. And I'm saying
5 to you that I would like to explore chatting with an
6 attorney to represent her I suppose as a deceased person,
7 but that would require more time.

8 THE COURT: No, ma'am, it will not require more time
9 for the matters that have been assigned to me. And so you
10 definitely -- I encourage you to go talk to a lawyer on
11 behalf of your mother's estate, you can do that between now
12 and the 18th. And if you do talk to a lawyer and they
13 decide to represent the interests of your mother, they can
14 advise the Court and we can address those issues at that
15 time. I think it puts the cart before the horse for me to
16 make any comments or to express anything about that without
17 having a proper person that can represent the legal
18 interests of that of your mother's estate. Okay?

19 MS. GERSTEN: I didn't understand what you just said, I
20 apologize, it's a lot to process.

21 THE COURT: In a nutshell, you need to go talk with a
22 lawyer because you can't represent your mother's estate.
23 Okay?

24 MS. GERSTEN: Not even with a durable power of
25 attorney?

1 THE COURT: Ma'am, I can't tell you whether that would
2 suffice or not, but I can tell you that in my history it
3 would not. But a lawyer may very well tell you differently
4 and I would look forward to receiving that argument from a
5 lawyer.

6 MR. SAWYER: Your Honor, thank you so much for your
7 time today. This morning with this motion for a continuance
8 is the first time I have heard of Ms. Ayoub's death. Can I
9 ask on the record of Ms. Gersten the date of Ms. Ayoub's
10 death?

11 MS. GERSTEN: I didn't hear you, could you please
12 repeat what you just said?

13 MR. SAWYER: Yes, ma'am. I was wondering what the date
14 of your mother's death was.

15 MS. GERSTEN: I was told January 11th of 2020. I only
16 got information, being paralyzed I couldn't even be there.

17 THE COURT: All right. Now, I noticed in one of the
18 pleadings that beside your mother's name there was a
19 parenthesis that she had been deceased. So you're informing
20 us all that your mother passed away in January of 2020?

21 MS. GERSTEN: Yes. No, no, no, '22, January. Without
22 a death certificate I don't actually know, and I'm not
23 sure -- I mean, hopefully I get it before next -- you know?
24 It's in the process, I just don't have it handy and I wasn't
25 there, I only received the phone call from a relative --

1 it's a long story, I'm not going to get into it. So I don't
2 have all of the information other than that's approximately
3 to the best of my knowledge that's the date.

4 THE COURT: All right. Just be aware that we're not
5 dealing with the mother's issues, we're dealing with the
6 claim that you have brought. We look forward to
7 receiving -- yeah. I think you talk with a lawyer, a lawyer
8 will get involved and make the appropriate contact with the
9 court officials and with the lawyers on the other side.
10 Okay? Well, listen, thank y'all very much for your time.
11 We will -- I'll see y'all, again, on August 18th at 10:00.
12 Now, part of the -- since we already know this far in
13 advance that I will be doing it, I'm sure the clerk of court
14 will do what they do, but my office will try to informally
15 not by any rule, but just as a matter of courtesy to the
16 parties in this case, we might be sending out some emails
17 just letting y'all know about anything that we think y'all
18 need to know about, you know, changes or stuff, but we'll be
19 in touch with y'all, but do look for notification.

20 MS. GERSTEN: That's something I put into my order that
21 according to the rules the new -- the one issued by the
22 South Carolina Supreme Court, it says that a non-lawyer is
23 supposed to make written consent, which they never have.
24 And I put a stipulation that I will consent to receiving
25 court documents if the defendants also agree. Otherwise I

1 have not -- I have not consented to any receiving of
2 including the notice of hearing. That was a surprise to me
3 because I have never received any documents via email
4 through the courts and --

5 THE COURT: Okay. I did notice in your motion for
6 continuance you did make other types of requests for relief.
7 Do you wish to argue those other types of requests for
8 relief?

9 MS. GERSTEN: Well, yes, because -- this as a
10 self-represented litigant who is not an attorney admitted to
11 practice in this state may consent, it doesn't say must. It
12 is not required in writing to be served by email and
13 designate an email address for service, and then a lawyer
14 may consent in writing to accept service by email from a
15 self-represented litigant. So I'm not even aware if Mr.
16 Sawyer will accept service by email or not.

17 THE COURT: Okay. I tell you what, Ms. Gersten, if
18 we're going to argue these other requests that you have made
19 in your explanation in your 27 page memo wanting the
20 continuance, we'll just go ahead and do the motions today,
21 too, then we don't have to get back together in August. I'm
22 coming to the conclusion that you have the ability and the
23 willingness to argue your motions of the other requests,
24 that I hear your motions, or your motion for a continuance,
25 so it's sort of coming -- it's sort of telling me that you

1 have the ability and wherewithal to argue the other
2 outstanding motions. Do you wish to proceed?

3 MS. GERSTEN: We can just go to the 18th when I can at
4 least clean myself up. I mean, it's interesting how the
5 will -- the human spirit that I have is greater than my
6 condition sometimes and how it can be flipped on me is
7 amazing to me. No disrespect to you, sir. I hope none of
8 you -- I hope none of you experiences being paralyzed
9 because it's not fun.

10 THE COURT: And Ms. Gersten, I say this with all
11 sincerity, if there becomes a time in the course of this
12 litigation where you feel like that -- and you still want to
13 pursue in representing yourself, if there comes a time where
14 you feel like that you cannot physically or mentally or ever
15 however represent yourself, ask the Court for assistance in
16 having someone appointed to stand in your shoes. Okay?

17 MS. GERSTEN: I didn't know that was an option.

18 THE COURT: Well, we can -- if you lack the mental
19 capacity or the physical capacity in order to represent
20 yourself there can be guardians appointed for you and we can
21 explore that as an option. Of course, we would have to hear
22 from the other side whether they agree or disagree, but we
23 can try to find someone to actually be able to come to court
24 in an appropriate manner so that due process for both sides
25 is not violated. Okay?

1 MS. GERSTEN: Well, I'm not claiming that I'm
2 incompetent, I want to be clear about that, and the law for
3 a vulnerable adult is not an issue of competency.

4 THE COURT: Okay. Well, if that ever gets to be a
5 problem you let us know.

6 MS. GERSTEN: Is that an issue of competency that
7 you're referring to?

8 THE COURT: If you feel like ever you get to the point
9 where you can't represent yourself either due to physical
10 problems or a mental problem you let us know. Okay?

11 MS. GERSTEN: Well, you say physical or mental, so if I
12 said physical, which is what I'm in, that does not include
13 mental; is that correct?

14 THE COURT: Those are two different words to this
15 Court.

16 MS. GERSTEN: That didn't make sense to me, there are
17 two different words, mental and physical.

18 THE COURT: Ma'am, I think you get my point, is that we
19 need to move forward with these cases.

20 MS. GERSTEN: I'm here in the sitting in my own feces
21 and urine because I get the importance. I know that the
22 courts don't have the -- I mean, thank you for the
23 continuance but this is a hard road and I get it. And I get
24 it.

25 THE COURT: Anything else, ma'am?

1 MS. GERSTEN: I suppose I should put it in writing that
2 you don't think that I wanted to pursue more issues.

3 THE COURT: Ma'am, I'm giving you the option, if you
4 want to pursue the rest of the issues we'll be more than
5 happy to go ahead and hear them absent some objection from
6 Mr. Sawyer.

7 MS. GERSTEN: I get it. I feel at this point -- my
8 brain is not 100 percent because of my situation right now,
9 I would like to clean up. Yes.

10 THE COURT: Okay. So which will see y'all on the 18th.
11 If you have issues with Mr. Sawyer, I've never met Mr.
12 Sawyer, don't know Mr. Sawyer, he's never appeared in front
13 of me, but you can reach out to him on any issues, and then
14 if you can't just reach out to the Court and we'll be glad
15 to be of assistance to you. Okay?

16 MS. GERSTEN: I agree. I'm willing to be amiable with
17 you, Mr. Sawyer, like we have in the past, today was a
18 surprise to me.

19 THE COURT: All right. Then we will see y'all on the
20 18th.

21 MS. GERSTEN: Oh, how do I get my transcript? How do I
22 get the transcript?

23 THE COURT: Transcript?

24 MS. GERSTEN: Isn't this a -- I was told that there was
25 going to be a court reporter.

1 THE COURT: There is a court reporter. You need to
2 reach out to court administration and they can advise you
3 how the order the transcript. Okay?

4 MS. GERSTEN: Well, how do I reach the court
5 administration?

6 THE COURT: If you had a lawyer that would be really
7 easy to answer, but court administration has a website that
8 you can go to. Okay?

9 MS. GERSTEN: What is the website called?

10 THE COURT: I do not know it, but I generally look up
11 South Carolina Court Administration and it usually comes up.

12 MS. GERSTEN: Do I get even a name of the court
13 reporter?

14 THE COURT: Mike Watkins is our court reporter assigned
15 to us.

16 MS. GERSTEN: Mike Watkins?

17 THE COURT: Yes, ma'am.

18 MS. GERSTEN: Okay. And so I will just contact the
19 court administration.

20 THE COURT: That would be my suggestion. There might
21 be easier ways but I do not know.

22 MS. GERSTEN: Okay.

23 THE COURT: All right. I will see y'all on the -- or
24 hear from you on the 18th at 10:00.

25 MS. GERSTEN: Okay.

1 THE COURT: Thank you very much.

2 MR. SAWYER: Thank you, Your Honor.

3 MS. GERSTEN: Thank you.

4 (End of the hearing.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

August 18, 2022 Hearing Transcript in Case No. 2018-CP-12-00117;

1 STATE OF SOUTH CAROLINA
2 COURT OF COMMON PLEAS
3 COUNTY OF CHESTER
4 2018-CP-12-00117

5 Heidi Gersten

6 Vs.

7 Kevin Carter, et al.

8

9 Webex Hearing

10 August 18, 2022

11 Before the Honorable Mark Hayes

12 APPEARANCES

13 For the Plaintiff: Heidi Gersten, Pro Se

14 For the Defendants: Wesley Sawyer

15 Reported by: Webex (transcribed by Michael C. Watkins

16 Official Court Reporter)

17

18

19

20

21

22

23

24

25

1 THE COURT: Ms. Gersten, can you hear me okay?

2 MS. GERSTEN: Yes, I can, sir.

3 THE COURT: Okay. And I can hear you fine. Mr.
4 Sawyer, can you hear me and Ms. Gersten all right?

5 MR. SAWYER: I can. It's coming in a little soft but I
6 think I will be able to make due, Your Honor.

7 THE COURT: Okay. If ever either of you cannot hear me
8 just let me know and I'll move closer to a microphone or
9 move around. Thank y'all for getting together for the
10 reconvening of this hearing. I have got -- according to
11 what was submitted to me by the Clerk of Court's office
12 we've got four -- well, five motions that were given to me
13 to be heard. I did review them prior to our last time we
14 got together, also I reviewed them prior to us getting
15 together this time. One of them I'm going just to throw out
16 there and suggest that I not address because it is the
17 plaintiff's motion to recuse or disqualify Judge Gibbons and
18 Judge Hayes. The Judge Hayes that she's referring to is the
19 Judge John Hayes. It is customary that, and I think that
20 the rules will provide that in the event -- well, first of
21 all Judge John Hayes is now retired so he would never hear
22 any of these cases -- that the motion to recuse or
23 disqualify would need to be addressed to the judge that
24 actually is being asked to be disqualified or to recuse
25 himself, so I would just put that one aside. And that in

1 the event that ever Judge Gibbons is asked to address
2 anything that the plaintiff believes needs to -- that issue
3 of recusal or the issue of disqualification needs to be
4 addressed it can be addressed by him at that time. Because
5 I don't -- it's not proper for another circuit court judge
6 to disqualify another circuit court judge, so I'm going to
7 move that one aside. The other remaining four motions I'm
8 going to take in order of filing. Some of them -- and by me
9 taking them in this order I don't want either side to
10 believe or to infer that there is some predetermined outcome
11 for the -- or how the motion should or should not be
12 addressed, I'm just going to take them just as they got
13 filed, because to me that chronologically makes the most
14 simple way to address them. So the first motion is going to
15 be the plaintiff's objections and opposition to designation
16 of non-jury docket and motion to transfer to the appropriate
17 docket that was filed August the 22nd, 2018. And it could
18 be that there's a history in this case that now some of
19 these motions are moot or no longer needs to be addressed by
20 the Court, but if that is the position, you know, let me
21 know, but I did not want to presuppose any type of argument
22 from anybody. So with that being the first motion, Ms.
23 Gersten do you wish to -- me to address that motion or hear
24 any further arguments other than what you've filed in the
25 written document?

1 MS. GERSTEN: Well, actually that was one that I think
2 that has already been fixed, hasn't it? Or --

3 THE COURT: Okay. I couldn't tell. I thought it might
4 have been but I'm not -- I didn't want to suppose anything.
5 I did view the file and it did look like that that one
6 probably has been resolved, so thank you for sharing that
7 with me.

8 MS. GERSTEN: I mean, if I'm incorrect I'll address it
9 later, but that wasn't one of the ones that I was focusing
10 on today, but thank you for bringing that up.

11 THE COURT: Certainly. Thank you for sharing that with
12 me. And then the next one, and it might be this is the same
13 type of resolution, plaintiff's motion to amend with or
14 without leave, plaintiff's motion to alter or amend judgment
15 or relief from judgment that's dated August the 29th, 2018.
16 Do you feel that that motion is still pending or needs to be
17 resolved in some way?

18 MS. GERSTEN: Yeah, I do. Let me get my documents for
19 that. I just require a minute of patience, there's a lot to
20 sort through. But honestly, I think before we get into
21 those, I think that my emergency motion that I filed on the
22 28th, there was some issues that were left unresolved, so
23 before I get to the amended one I think we need to talk
24 about my Title Two of the Americans With Disabilities
25 reasonable accommodation request. Did you remember that

1 one, sir?

2 THE COURT: Ma'am, I do not have that one. I have your
3 motion where you filed and asked for the continuance based
4 upon, you know, when we started the last hearing, and I
5 believe I granted your request for the continuance.

6 MS. GERSTEN: Right. But there was more on there. As
7 I was proceeding to talk about it you very kindly said to
8 bring it up at the next hearing, so that's why I bring it
9 up.

10 THE COURT: Well, thank you for bringing that up.
11 Let's bring that up in order, though, of filing and I will
12 be more than happy to address that at that time.

13 MS. GERSTEN: Oh, okay, okay, okay. That's fine if you
14 want to put that later then that's fine. Okay. So let me
15 get my ducks in a row here.

16 MR. SAWYER: While she's getting her papers organized,
17 I just -- as a matter of housekeeping, I think we've got an
18 updated motions roster where some of these motions have been
19 dropped or other motions are on, so just to bring that the
20 Court's attention. And there's a second motion to amend
21 complaint with leave that was filed October 22nd, 2018, by
22 Ms. Gersten, I believe, because that's the second motion
23 that's probably the operative motion for a motion to amend
24 that we should address. And I don't want to jump ahead of
25 things, I just want to avoid unnecessary confusion.

1 THE COURT: So the October 22nd, 2018, supplanted or
2 leapfrogged over the August 29, 2018 motion?

3 MR. SAWYER: I would expect so since the August motion
4 was before Judge Hayes, the other Judge Hayes heard the
5 motions to dismiss and the other matters.

6 THE COURT: Okay. Ms. Gersten, do you -- what I heard
7 from Mr. Sawyer is that the -- your October 22nd, 2018,
8 motion to amend is the one that we need to hear.

9 MS. GERSTEN: Well, no. Actually there are two
10 different ones. I can sort of do a combo on both of them if
11 you would like because they're similar.

12 THE COURT: Okay. If you want to do that, that would
13 be great.

14 MS. GERSTEN: Okay. Do you want me to just start
15 talking?

16 THE COURT: Sure. I will be more than happy to hear
17 from you. What we'll do is you give me -- I've got the
18 written motions and you just -- this is your chance to
19 present your oral arguments as to those motions. Once you
20 are finished then we'll turn to Mr. Sawyer to get his
21 response, so please listen to Mr. Sawyer, and then if you
22 have anything that you wish to present and reply to Mr.
23 Sawyer I'll let -- you have the opportunity to reply to
24 anything that he said, but your reply really should not
25 present any new arguments, you're just replying to his

1 arguments. Okay. I'll be more than happy to hear from you.

2 MS. GERSTEN: Okay. First of all I just want to say
3 thank you to you, Mr. Sawyer, all of the clerks, the court
4 reporter. South Carolina is a fine group of people, one day
5 I might move there. I just want to put that out there
6 because I'm litigating in other states that are not like
7 this, so I really appreciate you. And with that being said
8 let's talk about the motions. Okay. So back in 2017, let
9 me bring it back to how I even got in to this, of course.
10 Oh, and I just wanted --

11 THE COURT: Let me ask you to do this: We have other
12 matters to do. If you would, explain to me what it is that
13 you're wanting to amend and then you can give me a narrative
14 as to why you want to amend it, let's do it that way.
15 Because your task in presenting an oral argument is to
16 persuade me to decide in your way, so help me understand
17 what exactly you're asking me to amend. Start with that and
18 then tell me why.

19 MS. GERSTEN: Okay. Well this has to do with the very
20 first order that was made on April 26th, 2018, by Judge
21 Gibbons. Okay. It was a consolidation order. I never had
22 a ruling on this even though I filed -- I was the first
23 one -- you brought it up, you said it was the first one that
24 needs to be addressed and the first one I filed. Why it was
25 filed is because I already know, I saw that this was going

1 to confuse everything, because the consolidation was not
2 supposed to take away the arbitration, the property damage
3 arbitration for property damage that I found. It's Title
4 38, Chapter 77, Article 7 of the South Carolina --

5 THE COURT: Let me interrupt again because I want to be
6 sure I'm understanding you. What are you asking me to
7 amend? You can explain to me, but clue me in as to what
8 you're asking me to amend. Are you asking me to amend a
9 complaint? Are you asking me to amend a prior order? Are
10 you asking me to -- what is it you're asking me to consider
11 that needs to be amended?

12 MS. GERSTEN: Okay. Bottom line is I feel the
13 arbitration matter should not be dismissed. It was never
14 dismissed by any order. I would like to have the property
15 damage just as the law says, where it's supposed to be a
16 sit-down with three neutral attorneys that are brought in,
17 it was a \$5 thing, for property damage only for liable
18 parties. And liable parties, according to the law, includes
19 insurance companies. I've read books, I've read whatever
20 and it was supposed to be done within 60 days --

21 THE COURT: Let me ask you this then, Ms. Gersten, I'm
22 sorry to interrupt, because I need to understand this, are
23 you asking me to amend a prior order that Judge Gibbons
24 signed that consolidated the arbitration with the liability
25 claim? Is that what you're asking me to amend?

1 MS. GERSTEN: Yes.

2 THE COURT: Okay. All right. So it's the prior order
3 that was signed by Judge Gibbons. Okay. All right. So
4 your position is that Judge Gibbons was wrong?

5 MS. GERSTEN: You know, he may not have been wrong.
6 Okay. But the merging confused -- I think confused
7 everybody. And what I mean by confused is by merging it was
8 not supposed to prevent or preclude an arbitration hearing
9 from happening. It was -- it was meant for a trial purpose
10 is how I interpreted it. Okay. So I think that the order
11 had it not happened then we would have had an arbitration.
12 I was expecting to sit down with all parties and it says
13 that I can bring in -- it's supposed to be summary. I mean,
14 you know, I can read the law to you but I'm going by how I
15 took it. It's supposed to be the arbitrators were going to
16 hear the matter in the courthouse so it doesn't preclude
17 anyone if they weren't happy with the results of having a
18 jury trial after. It was basically -- I looked at it as
19 your -- like a mediation, like a chance for the meeting of
20 the minds, and I had everything prepared for that and it
21 never happened. And it's -- to my understanding property
22 damage claims in South Carolina, you can't get an attorney
23 for contingency on property damage. This was explained to
24 me that it was summary in nature and that it was supposed to
25 be simple and geared for non-attorneys, and that's me,

1 that's what I wanted to start with, and it never happened.
2 We never had -- we never had this arbitration. I mean, I
3 can read the law into the record but it's in my -- it's in
4 my motion, I clearly talk about --

5 THE COURT: It is. And I also read your motion and I
6 just wanted to be sure that I understood correctly what you
7 were asserting, and so I do understand -- that is -- the way
8 you presented it to me verbally is what I understood your
9 motion, or your -- I won't say your complaint with what
10 Judge Gibbons did, the way you've explained it is consistent
11 with the way that I read your files.

12 MS. GERSTEN: Can you say is it so that I can see if
13 you're understanding? Because you're very good at just
14 summarizing this in quick words. So what do you think --
15 how are you interpreting what I'm saying to you?

16 THE COURT: Well, that's -- part of what we do in these
17 hearings is you have to persuade me to your position, and so
18 what I'm hearing is that you took issue or you disagreed
19 with Judge Gibbons of consolidating the liability claim with
20 the arbitration claim that is allowed under the arbitration
21 process of doing property damage claims, and that you didn't
22 like that and you wanted to have them separated so you could
23 do your property damage separately from your liability
24 claims.

25 MS. GERSTEN: That's part of it, and the other part is

1 the fact that there was no hearing on his consolidation
2 order. I felt like, you know, government is supposed to
3 notice and an opportunity for a hearing, so there was never
4 a hearing on the consolidation anyway. It just came out as
5 all the sudden, you know, we have the motion hearings, and I
6 feel like this was -- this should have happened before any
7 motion hearing, this one, because that's the way the law was
8 written.

9 THE COURT: Okay. So you've got not only a substantive
10 issue, we also have a process issue with what Judge Gibbons
11 did.

12 MS. GERSTEN: You're amazing. I really appreciate
13 the fact that --

14 THE COURT: Can I get that in writing from you? I
15 would like to share that with other people that feel
16 otherwise, but thank you for saying that.

17 MS. GERSTEN: I didn't -- what did you just say?

18 THE COURT: I said thank you for saying that because a
19 lot of people don't say that about me.

20 MS. GERSTEN: Oh, I'm not trying to look for favoritism
21 at all. As long as you're fair and neutral in this process,
22 we're making a record today and I'm very happy to be here.
23 Just like I've always said, I really appreciate Mr. Sawyer
24 because he's been kind to me as well, and that's all I can
25 ask for.

1 THE COURT: Okay. Well, thank you. Let me do this,
2 let me get Mr. Sawyer's response on that, on the issue of
3 the order that -- where Judge Gibbons consolidated the
4 property damage claim with the liability claim. You're
5 muted, Mr. Sawyer. Mr. Sawyer, I've got you muted, I'm not
6 sure --

7 MR. SAWYER: Sorry. It's been awhile since I've had a
8 Webex hearing, Your Honor, but thank you for fixing that for
9 me. Your Honor, I appreciate your time today, thank you for
10 hearing these matters. As to the issues of the property
11 damage arbitration, when the subsequent broader lawsuit was
12 filed in the circuit court we filed a motion on the view
13 that you can't have two separate claims, you can't split
14 your claims against one defendant, you have to bring all of
15 your claims arising out of the same set of facts or
16 circumstances in one lawsuit, and that's well established
17 South Carolina law. And by bringing the circuit court
18 action, of course, that would be the proper action to
19 survive between that and the property damage arbitration
20 claim. And as a result Judge Gibbons signed the
21 administrative order acknowledging that essentially
22 consolidating the two cases into the circuit court action,
23 which will, of course, include the property damage claim,
24 and, you know, at the time included the other claims
25 asserted in the complaint, many of which, of course, have

1 now have been dismissed. But the rule in South Carolina is
2 you can't split claims into property damage, arbitration is
3 not an exception to that rule. In fact, it's been my
4 experience and common practice that when there is a property
5 damage arbitration pending and a plaintiff's attorney
6 subsequently files a bodily injury suit in circuit court the
7 parties have in every case I've ever had agreed that at that
8 point the property damage claim has to be consolidated or
9 dismissed and brought before the circuit court. Judge
10 Gibbons just followed that practice, which is in compliance
11 with South Carolina law, and I think that's a proper basis.
12 In terms of procedurally, Rule 59, Judge, I don't know that
13 there's any evidence that a copy of the Rule 59 motion was
14 sent to Judge Gibbons, which, of course, we know is required
15 by the rule, but that's a technical procedural matter. But
16 substantively the ruling was right and frankly typically, of
17 course, Judge Gibbons would have to hear a motion to
18 reconsider his own ruling.

19 THE COURT: Let me ask you a question. So my
20 understanding in my involvement with the litigation is that
21 the facts and the law arising from the liability claim and
22 the property damage claim is going to be identical; is that
23 correct?

24 MR. SAWYER: Yes, Your Honor.

25 THE COURT: All right. But the difference is --

1 between the liability claim and the property damage claim
2 would be the actual damages that are sought. Because in a
3 property damage claim a plaintiff seeks damages for an
4 automobile or property damage, but in the liability claim
5 the plaintiff seeks damages for things that are what I call
6 personal injuries or loss of income, bodily injury,
7 emotional damage, those types of things; is that correct?

8 MR. SAWYER: Well, Your Honor, I think generally they
9 can choose what they want to bring when they bring a
10 complaint, and they can choose to include property damage
11 with their bodily injury claims, or they can choose to only
12 pursue bodily injury claims, but what they can't do is split
13 their claims. South Carolina doesn't allow claim splitting
14 against one defendant. We do allow, of course, separate
15 lawsuits against different defendants, but we don't allow
16 separate lawsuits against the same defendant arising out of
17 the same facts and circumstances, all of those claims have
18 to be brought together in one action.

19 THE COURT: Okay. I think I understand that. Ms.
20 Gersten, this is your opportunity to present any argument
21 that you wish to present in reply to what Mr. Sawyer just
22 argued.

23 MS. GERSTEN: Okay. Well, the thing is that I did
24 serve Judge Gibbons, I want to be clear about that. I'm not
25 putting Mr. Atkinson on the spot here, but on that date, I

1 believe it was May 8th -- because right after I went to a
2 hearing in front of Judge Zamore where I personally
3 witnessed Mr. Sawyer's client, Mr. Carter, plead guilty to
4 reckless driving, and prior to that I went over to the
5 courthouse and I made sure that Mr. Gibbons was served. So
6 I want to make sure that I'm clear that I did follow that
7 part and made sure that he was personally served. Now,
8 getting back to originally filing this arbitration claim,
9 that was really all I was going to do. After speaking to
10 Mary Orr, who I heard that she passed, I think she has
11 passed, I apologize, I'm not sure, but I think she did, but
12 prior to her passing I spoke with her on August 30th, 2017,
13 with regards to filing the arbitration on a property damage
14 liable claim, that was the original plan. But when I
15 realized after speaking with her that she didn't even know
16 what I was talking about and she asked me if I could send
17 her a copy of the law that she could give to the Judge,
18 because she said she spoke to Judge Gibbons and he was
19 unfamiliar with this as well. Now, maybe there have been
20 times that it was filed, but at the time that I called she
21 specifically did not know what I was talking about, put me
22 on hold to talk to Judge Gibbons, came back and said: Send
23 the law. So on August 31st, 2017, I sent the law, one day
24 after I spoke with her. I put together a letter, it's in
25 the file, and I showed her the law, and she said -- called

1 me back and said: Okay. We're going to do it. When I
2 realized time was going by by the time I filed I got
3 nervous. Okay. You yourself said that often pro se
4 clients, which I want to interject that there's plenty of
5 case law that says there's supposed to be leniency towards
6 pro se's, plus I'm a vulnerable adult with a pressure wound.
7 I've got all these things against me, and lawyers --
8 attorneys in South Carolina have access to e-filing, which
9 even to this day, correct me if I'm wrong for this because I
10 do e-filing, so there's always been this not held to the
11 same standards but below standards as a pro se, as one in a
12 wheelchair and all of these negatives. So I filed with my
13 mother and at the time my brother just to CYA, cover our
14 butts, to make sure that we didn't miss the statute of
15 limitations. And so really it's separate plaintiffs -- I
16 mean, sorry -- well, no, because my brother was added to the
17 claim --

18 THE COURT: Well, Ms. Gersten, before you get too far
19 array, this is the part where you get to respond in a reply
20 to what Mr. Sawyer argued, and so don't bring up new matters
21 because that would be inappropriate at this time, respond to
22 what he was saying.

23 MS. GERSTEN: Oh, I was bringing up what he triggered.
24 He triggered these things to me that made me think of things
25 that -- and, of course, we didn't actually cover --

1 everything we're talking about has to do with the first one,
2 not the second filing that included Judge Hayes. This is
3 the amendment strictly for the order made by Judge Gibbons.

4 THE COURT: Correct, yeah. That's what we're dealing
5 with, just the one with Judge Gibbons right now.

6 MS. GERSTEN: Okay. I just wanted to be clear. So
7 when he's saying that they're supposed to be separate, or
8 that they're supposed to be together even under
9 consolidation, even the law says it doesn't mean that you --
10 they still have their own separate issues to deal with. I
11 wasn't supposed to have the arbitration hearing when it's
12 not supposed to be removed, that's not what consolidation
13 even says. Consolidation is supposed to keep everything
14 still as it is for purposes, I guess, to keep the trial
15 aspect of it. But nowhere in the order does it say no more
16 arbitration, it just is putting the matters together and
17 they are separate, they're distinctly separate. As a matter
18 of fact even insurance is separate that you've got --
19 they're separate, they're not the same or identical, they're
20 different and separate. And I still would like to have the
21 arbitration hearing even with the parties that were
22 dismissed because they should not have been dismissed.

23 THE COURT: Okay. I think I understand that. Okay.
24 All right. Thank y'all very much for your presentations.
25 Now, on my list the next matter I've got would be

1 plaintiff's notice of motion to amend the complaint that was
2 also filed October 22nd, 2018. Do you have that, Ms.
3 Gersten?

4 MS. GERSTEN: I'm looking for that one right now. It's
5 the one for October 8th?

6 THE COURT: I've got filed October 22nd, 2018.

7 MS. GERSTEN: You have October 22nd?

8 THE COURT: My summary reads that it was filed on
9 October 22nd.

10 MS. GERSTEN: My file stamp says the 8th, October 8th.

11 THE COURT: Of 2018?

12 MS. GERSTEN: Yeah, that's what my file stamp says,
13 October 8th.

14 THE COURT: Give me one second. Your stamp is better
15 than mine because my stamp is so light I can barely make it
16 out. I've got -- okay. The title of the one that I'm
17 looking at reads notice of motion and plaintiff's motion to
18 amend complaint with leave pursuant to Rule 15 request for
19 oral hearing.

20 MS. GERSTEN: I don't have the leave on here. You said
21 you have notice of motion with leave? It's possible I
22 grabbed the wrong one. It's a big file. See, one of the
23 things that I wanted to address in my emergency motion
24 was --

25 THE COURT: Okay. That's fine. Ms. Gersten, let's

1 deal with them as I've got them so that we can --

2 MS. GERSTEN: I apologize, it's just the Title Two of
3 the Americans Disabilities always says that those are
4 supposed to go first, but it's okay, if you want to do it
5 different it's okay. I'm not mad or anything, I'm just --
6 it's just important, because part of what I wanted was my
7 disability thing is because I can only sit in this chair for
8 so long. It's easier to do one motion at a time because I
9 have a -- I have a communication disability on top of
10 everything else, so we won't discuss that because you wanted
11 to discuss it later, I apologize.

12 THE COURT: No, ma'am. I tell you what we can do, I'll
13 take a break because I've got a criminal matter I need to go
14 take care of, and let me go take care of that criminal
15 matter and you can have a break and we'll come back in about
16 probably ten or 15 minutes. Is that sufficient?

17 MS. GERSTEN: That's not going to work for me because
18 it would take me a half hour to get out of the chair, it's a
19 different road. I'm not trying to be anything hard with
20 you, I'm trying to paint a visual that I'm sitting on a
21 wound. I lost a half hour of time because Attorney Sawyer
22 gave me the incorrect call in access code. I took for
23 granted that his letter dated July 28th, 2022, had the
24 correct information and it didn't and that cost me 30
25 minutes of time. I apologize. I apologize. So --

1 THE COURT: Well, I'll take a 30 minute break. No,
2 ma'am, I'll take a 30 minute break and we'll come back.

3 MS. GERSTEN: Well, 30 minutes is how long it takes me
4 to get out of the chair, if you can give me a two hour break
5 then that would be great.

6 THE COURT: Okay. Well, I tell you what we'll do,
7 we'll reconvene at 3:00, How about that?

8 MS. GERSTEN: Oh, that would be amazing. Are you okay
9 with that?

10 THE COURT: Mr. Sawyer, does your schedule permit that
11 we reconvene at 3:00?

12 MR. SAWYER: Yes, Your Honor, I'll make due. That will
13 and fine.

14 THE COURT: Okay. We'll reconvene at 3:00 then, I'll
15 see y'all then.

16 MR. SAWYER: Judge, I assume that you'll close down the
17 Webex for now?

18 THE COURT: Well, I have to. I don't know whether --
19 my administrative assistant, Sharon, is, I guess, the main
20 host so she'll do what she does.

21 MR. SAWYER: Okay. And, Judge, just one point, because
22 I know the roster you're running off of is the previous
23 roster. On the roster for today is one additional motion,
24 which is in light of learning about Ms. Ayoub's passing
25 away, we filed a motion to dismiss under Rule 25. So I know

1 that -- it sounds like you may be running on the previous
2 roster so I wanted to make sure I brought that to your
3 attention.

4 THE COURT: Okay. If you could -- well, what I'm
5 working under is we did a -- it's not really a
6 roster/roster, it's not prepared by the clerk's office, it's
7 just a summary that my office generated. If you want to be
8 sure that I've got that, if you want to go ahead and be sure
9 that you send it to me to get a hard copy since I am
10 physically not in Chester, I am physically in Fairfield now,
11 but at 3:00 I'll physically hopefully be in Spartanburg.

12 MR. SAWYER: So electronic copies, is that what you
13 would prefer right now so you'll have --

14 THE COURT: Yeah. That will be fine, yeah.

15 MR. SAWYER: Okay. Thank you, Your Honor.

16 THE COURT: Thank y'all. See y'all at 3:00.

17 (Break in proceedings.)

18 THE COURT: Okay. Thank y'all for getting back
19 together. Mr. Sawyer, can you hear me okay?

20 MR. SAWYER: Yes, Your Honor, I can.

21 THE COURT: And Ms. Gersten, can you hear me okay?

22 MS. GERSTEN: Yes, I can, thank you for asking.

23 THE COURT: Certainly. Okay. Thank y'all. We will go
24 back and pick up. The next thing on my list was going to be
25 the plaintiff's second motion as I refer to it, second

1 motion to alter or amend that was filed -- and Ms. Gersten,
2 I did find an October 8th motion that I think you were
3 referencing. And if I understand it -- I've taken a look at
4 it, if I understand correctly this is your motion where
5 you're asking that the prior ruling by Judge Gibbons to be
6 altered or amended pursuant to Rule 52, 59E, and Rule 60(4);
7 is that correct? Does that ring a bell to you?

8 MS. GERSTEN: Yes. And I think I would like to explain
9 because I also reviewed, because you had said October 22nd,
10 and I see there's a bit of confusion. Under the Federal
11 Rules of Civil Procedure failure to state a claim under 42
12 USC Section 1983, the Court noted that allegations such as
13 those asserted by the petitioner, however inartfully
14 pleaded, are sufficient to call for the opportunity to offer
15 evidence. And it says in part that we hold less stringent
16 standards in form of pleadings drafted by lawyers. And I
17 bring that up only because as I mentioned before, I'm very
18 disabled, a vulnerable adult with a pressure wound, and I'm
19 sitting here and you graciously gave me a timeout because I
20 took a bathroom break and I appreciate that. So getting
21 back to this motion, I think why I have put it in so many
22 times is because I needed a ruling. The first time that I
23 had put it in and it was up in front of the other Judge
24 Hayes, his remark was take it up with the appellate court,
25 but without a written order or anything there was nothing I

1 could do with it. And I was asked by the appellate judges
2 when he made the ruling, but he never actually made a
3 ruling, so that is why I'm seeking that. Because when I
4 looked in Westlaw I only saw two cases that even referenced
5 the particular arbitration hearing that I'm referencing.
6 One was -- oh, good Lord, this is where my nerves -- I
7 apologize, I really appreciate your patience, but there were
8 two of them. There was one -- no, Cooper. Cooper versus
9 Poston, and Blizzard versus Miller, and that was all I could
10 find regarding the arbitration. So I think this is a first
11 impression -- and I really believe that regardless of which
12 way you go with this it's going to benefit people in the
13 future that I have this confusion. I really think that
14 we're doing a good thing by talking about it, because I came
15 into it thinking it would be simple, to just have a simple,
16 you know, within 60 days sit down with everybody and just
17 talk about the concerns. It was supposed to be moved, no
18 strict procedural, easy breezy, and it was far from that,
19 even to this day it seems to be very complex, and so that is
20 why it is mentioned so many times. And sure -- please do, I
21 apologize, I'm long winded.

22 THE COURT: That's okay. And so -- and I'm taking a
23 look at the documents. So the relief that you're asking
24 with this particular motion is for me to avoid -- and I'm
25 just going to quote you, the Court to avoid reversible error

1 and correct the mistake that has been made perhaps due to
2 lack of communication. And so you want me to reverse the
3 prior ruling of Judge Gibbons, and then also of Judge -- and
4 then also of Judge Hayes, the other Judge Hayes; is that
5 correct?

6 MS. GERSTEN: Well, here is the thing, it may not need
7 to be reversed. But the big issue is I really think in all
8 fairness, including the parties that were -- the insurance
9 parties that were dismissed, there's a very grave
10 miscarriage of justice happening right now, because there
11 were insurance policies. And my understanding of this
12 arbitration has to do simply with the property damage due to
13 a vehicle collision, motor vehicle collision, and that's
14 what this was. Even when I looked up consolidation, which I
15 can read to you, it says that in consolidation matters that
16 the word may is in there, that trials may be still
17 separated. It doesn't mean -- gosh, I'm trying to find
18 that, I don't want to take up a lot of time, I apologize, I
19 had it all together but trying to retrieve what I need to so
20 much. So I guess in answer to your question is that I
21 really just think that these matters, the breach of contract
22 that were put into the actual civil action could be
23 addressed in the arbitration, like a lot of the issues are
24 really for arbitration. I mean, it is undisputed that Kevin
25 Carter and I had something, but these other insurance

1 companies I had beyond the minimal, and for them to get away
2 with not paying me anything, I got nada. I had over
3 insurance, I have letters, I have evidence, I have so much
4 to present, and I feel that the easiest way in my opinion is
5 to go ahead and let's do that arbitration sit-down. It
6 doesn't, you know -- anybody doesn't lose their right to a
7 jury trial, but it would be less complex, two hours of a
8 round table meaningful chat. I can bring in my big book of
9 300 pages of -- I'm a musician, all my equipment, everything
10 in that van was destroyed, intellectual property, so much.
11 And nothing was ever paid by any insurance, not the van, not
12 property damage, and that is completely separate from any
13 bodily injury or anything else.

14 THE COURT: Okay. I think I understand that. And,
15 Mr. Sawyer, do you want to respond to that particular
16 motion?

17 MR. SAWYER: Yes, Your Honor. And thank you, again,
18 for your time. I think this is fairly duplicative of the
19 motion that was argued earlier today on Judge Gibbons'
20 ruling. I would just bring to the Court's attention the
21 Powers versus Calvert Fire Insurance Company case, it's 216
22 South Carolina 309, it's a 1950 case. But it notes that
23 when a claim is brought for personal injury -- or arising
24 out of an accident, a claim for personal injury and claim
25 for property damage must be sued in one action or the

1 omitted claim is lost. So I think that fairly summarily
2 addresses the issue. Obviously if the concern is process,
3 the Rules of Civil Procedure would have required mediation
4 once the case was in circuit court, so there would have been
5 an opportunity for that. Of course, we haven't gotten
6 discovery responses, which is a different motion that you'll
7 hear later on today, Your Honor, that's postponed all of
8 that. But in terms of having an opportunity to sit down and
9 go through it, that could have taken place really a long
10 time ago had things gone differently, Your Honor. But at
11 the end of the day Judge Gibbons' order follows the law.
12 It's really his order that she's asking to have
13 reconsidered. There was reference to insurance, of course,
14 that's not relevant to the Court's consideration in either
15 the PDR or this, they're both civil litigation claims
16 arising out of automobile accidents. And the case law says,
17 as well as Rule 12B8, you can't split your claims for
18 damages for the same tort, same cause of action.

19 THE COURT: All right. Thank you very much for that.
20 And Ms. Gersten, since you're the moving party on this
21 motion you get to close with any type of reply response to
22 what Mr. Sawyer just argued.

23 MS. GERSTEN: Thank you. So I think the rule that
24 Judge Gibson (sic) was going under was Rule 42. And in A it
25 says consolidation. When actions involving a common

1 question of law or fact are pending before the Court it may
2 order a joint hearing or trial of any or all parties in
3 issue in the action. It may order all of the actions
4 consolidated, and it may make such orders concerning
5 proceedings therein and may tend to avoid unnecessary costs
6 or delay. Now in B it says separate trials. The Court in
7 furtherance of convenience, or to avoid prejudice, or when
8 separate trials would be conducive expedition and economy
9 may order a separate trial of any claims, cross claims,
10 counterclaims, or third party claim, or of any separate
11 issue, or of any number of claims, crossclaims,
12 counterclaims, third party claims, or issues always
13 preserving (inaudible) I'm not sure if I said that right,
14 the right of trial by jury is declared by the Constitution
15 or is given by a statute or the state. Now, I'm not sure if
16 this is a part of the same one, this might be the
17 October 22nd thing you're referring to, you'll let me know,
18 but I have a first amended claim for property damage, and in
19 there I think in my opinion if the arbitration is not
20 possible then they should have been ordered to just pay a
21 fee and put them in their separate category. I put them all
22 together not realizing that that was an issue. Okay. But
23 they were definitely pled separately. Breach of contract is
24 a completely different cause of action, and it should
25 definitely be in furtherance of justice and to avoid a

1 miscarriage be permitted to provide evidence of contracts
2 and documentation to show that there indeed was additional
3 insurance that not only did I bargain for, I paid, and
4 letters of promises. And even Trust Guard offered a check,
5 which they offered the check, sent the check after the
6 action was filed, after the action. And if you scope the
7 transcript you'll see that they did not argue about a
8 arbitration, they were not having a problem with one at all,
9 and they shouldn't, because there was underinsured, and
10 again, none of the property damage was paid. So I think
11 that covers everything with this issue.

12 THE COURT: Okay. Thank you for providing that. All
13 right. I've got the next motion is going to be the
14 defendant's motion to compel or in the alternate to dismiss.
15 Now, with this motion this is Mr. Sawyer's motion so he is
16 the moving party so he gets to go first, present to me his
17 arguments, and then, Ms. Gersten, you will respond in full
18 to anything you want me to know and then he gets to close by
19 making his reply to your argument. So at this time I will
20 turn this over to Mr. Sawyer to receive his argument.

21 MR. SAWYER: Your Honor, thank you. And may it please
22 the Court? This is my client, Kevin Carter's, motion to
23 compel, or in the alternative motion to dismiss. Judge, by
24 way of background, as you know from looking through this
25 fairly extensive file, this action was filed in the early

1 part of 2018. There were a number of motions to dismiss
2 and, you know, attempt to amend pleadings that ultimately
3 were narrowed down significantly by an order from Judge John
4 Hayes, which Ms. Gersten appealed to the Court of Appeals.
5 Those appeals were dismissed by the Court of Appeals after
6 failure to respond to a motion to dismiss and to respond to
7 a request by the Court of Appeals for certain information
8 from Ms. Gersten. That was petitioned to the Supreme Court,
9 which they rejected, and once the remand or remittitur was
10 issued, the remand, excuse me, we promptly served written
11 discovery, including requests for production and
12 interrogatories both to Ms. Gersten and to Ivanka Ayoub, who
13 were the two remaining plaintiffs after the motions practice
14 that took place before the case went to the appellate
15 courts. When we did not receive timely responses to those
16 discovery requests, which were sent in June of 2020, I sent
17 what would be typically a Rule 11 letter asking --
18 notifying, asking Ms. Gersten and Ms. Ayoub that they were
19 overdue, and also, Judge, asking for deposition dates due to
20 the age of the case and the concern for fading memories.
21 When there was no response to those and no discovery
22 responses provided we filed this motion to compel, which was
23 filed August 26th of 2020, almost two years ago now, Your
24 Honor. Two years have passed. Ms. Gersten asked that the
25 prior -- in a separate hearing last year Ms. Gersten asked

1 that that be continued due to pending litigation that she
2 had in Florida in another case, and the case was continued,
3 and then we fell before you, Your Honor, this year. Despite
4 the fact that the discovery is well over two years old, and
5 the fact that we've filed a motion to compel that's been
6 pending for very nearly two years, two years within two
7 weeks from now, Your Honor, that Ms. Gersten has moved for
8 two continuances on this motion, and has obviously been
9 aware of this motion and these discovery requests at this
10 point for well over two years. While we've seen other
11 filings we've not seen a single document produced, any
12 interrogatories provided, or deposition dates provided.
13 And, Your Honor, while, you know, in 2020 when this was
14 filed maybe the appropriate relief would have been an order
15 compelling. Given the fact that we're now in 2022, two
16 years later, I think that the more appropriate remedy based
17 upon the status of this case is, in fact, a dismissal. And
18 Your Honor has two avenues that you can choose within your
19 discretion, it's broad discretion, as to whether or not
20 dismissal is appropriate. Those avenues are, one, under a
21 failure prosecute the action, and two, as a sanction for
22 failure to comply with discovery, so either under Rule 41 or
23 rule 37B2C. The Small v. Mungo case addresses the standard
24 for dismissal for failure to prosecute under Rule 41. In
25 that case a party failed to show up for trial, it was their

1 only time failing to appear for something in the case. The
2 trial judge to manage the docket struck the case and the
3 appellate court affirmed finding that that was a proper
4 exercise in the Court's discretion. It talked about the
5 elements for whether to dismiss, which includes orderly
6 disposition of cases in the face of repeated opportunities
7 to proceed, unreasonable neglect, indifference pled to the
8 rights of the defendants. And, Your Honor, I don't think we
9 could have a better example here where we have two years
10 passing without an effort to respond to basic
11 interrogatories, basic requests for production, or provide
12 dates for depositions. There's been no excuse provided for
13 that. Obviously other things have been submitted to the
14 Court in that time, but there's been no documents produced,
15 no answers to interrogatories, leaving us at a loss as to
16 exactly what to do with the case, Your Honor. In terms of
17 orderly disposition, we've got a four year old case now, and
18 I think the background is relevant, too, in the fact that
19 the reason the Court of Appeals dismissed the appeal was
20 because of after repeated requests for extensions and
21 extensions of time for Ms. Gersten to respond to an inquiry
22 from the Court. Ultimately the Court of Appeals got fed up,
23 gave her a date to provide a response, to which she did not
24 provide a response, and as a result dismissed the case. So
25 there's a pattern of practice in this case of disregarding

1 rules, including orders from the Court. And Judge, in terms
2 of prejudice, where we are now is not only are we four years
3 into a case and my client is still in, but more importantly
4 now that we have learned that Ivanka Ayoub has actually
5 passed away, so we have, in fact, lost a witness, and lost
6 someone who could have been deposed and provided information
7 in the case. So the prejudice is baked into the situation
8 that we find ourselves in right now. And, Judge, all of
9 those, I think, are more than adequate as a basis under Rule
10 41 to dismiss for failure to prosecute. I believe you noted
11 at our prior hearing that was continued that the obligations
12 apply to both parties in the case, not just to the
13 defendant, and those obligations have not been fulfilled by
14 the plaintiff. And, Judge, certainly as to Ivanka Ayoub who
15 is not here, now granted we have a Rule 25 motion as to her
16 as well because we believe she's passed away, but certainly
17 that would be another grounds for failure to prosecute as to
18 her claim. Judge, moving on to the issue of it being done
19 as a proper discovery sanction, McNair versus Fairfield
20 County would be the case I would point you to, it's 379
21 South Carolina 462, that's a 2003 Court of Appeals case. In
22 that case, Judge, you had a much shorter timeline. You had
23 discovery served on the county, the county did actually make
24 an attempt to respond, they provided 800 pages in response
25 to the discovery requests. The plaintiff in that action

1 moved to compel arguing that the discovery responses were
2 inadequate, the court ordered production, the county failed
3 to comply. All of this took place within one year of the
4 original discovery requests. And ultimately the circuit
5 court, when the county failed to promptly provide
6 supplemental discovery responses, struck the county's answer
7 and its counterclaim. And Justice Hearn, sitting in the
8 Court of Appeals, affirmed that as a proper use and exercise
9 of the circuit court's broad discretion in these matters
10 because there was no excuse for the delay, and found that
11 striking the answer and counterclaim was the only sanction
12 that would create a just result for the plaintiff in that
13 case. And, Judge, again, we're in a case four years in.
14 We've had no discovery, we've lost a witness at this point,
15 and at this point the only just result for this kind of
16 delay and loss of information is to dismiss the case as a
17 proper discovery sanction. There's been no regard
18 whatsoever for the obligations under the rules to respond to
19 discovery. And I know that Ms. Gersten has noted that she's
20 pro se repeatedly, but she clearly has access to the Rules
21 of Civil Procedure. She's been involved in litigation as
22 she's filed with this Court and Florida, she's also been
23 involved in litigation in Ohio, so she's not a stranger to
24 the courtroom, and ignoring the rules of discovery is
25 something that just can't be permitted for four years out

1 into a case. So while we recognize that it's a fairly
2 drastic result, Your Honor, we think that the record here
3 more than adequately supports that on either a Rule 41 or a
4 Rule 37 basis.

5 THE COURT: All right. Thank you for those arguments.
6 Ms. Gersten, I would be more than happy to hear anything you
7 would like for me to know in response to this argument.

8 MS. GERSTEN: Yes. It is quite laughable in such a
9 horrible situation that's ideal with the pain of
10 misrepresentation. Where to begin. Let's start, not one
11 mention of a pandemic, a pandemic that changed of lives of
12 everybody I know, causes me to cry when I think about it.
13 How dare you, Mr. Sawyer, not mention that. That pandemic
14 began March 13, 2022 (sic) and everybody, including my life
15 especially, has changed because of it. There are plenty of
16 excuses. Number one, I never received any of that
17 documentation, and I will gladly look at evidence of
18 receipts of these discovery motions. I never received any
19 of them. During that time that's -- I saw in the docket but
20 the docket has a disclaimer that says that the information
21 on the docket it's sort of at risk. So I'm not held to
22 chase documents that I didn't receive.

23 THE COURT: Ms. Gersten, I must warn you, that argument
24 does not carry much weight with me. I understand the
25 disclaimer that all clerk's of court puts on their web page,

1 but if you looked at it you were aware that there were
2 documents out there, and I did not hear and I've not heard
3 any of this brought up that you didn't receive it.

4 MS. GERSTEN: I'm telling you now because it's never
5 been argued before, we've never discussed this. And for --

6 THE COURT: Okay. My point is making an argument that
7 you didn't receive it is one thing, but making the argument
8 that the clerk of court because they have a disclaimer on
9 their web page that's another type of argument. Okay. So
10 if your argument is you never received it, that's something
11 else. I'm not saying -- so just be mindful of I'm trying to
12 help you with your credibility with your arguments to me.
13 Okay?

14 MS. GERSTEN: I apologize. He touched a nerve because
15 he didn't mention the pandemic, and the pandemic was a big
16 cause of why things went awry, especially with the appellate
17 courts. Because the appellate courts -- he's saying that I
18 repeatedly didn't comply. Okay. What they were repeatedly
19 asking me for was written dates of receiving orders and I
20 couldn't give them because I didn't receive them. And I've
21 learned that actual notice is not the same as written
22 notice. And according to my --

23 THE COURT: Let me ask you to clarify that. You said
24 that they were asking you to receive copies of written
25 orders. You mean your medical records?

1 MS. GERSTEN: No, no, orders of the trial court. No
2 one ever served me orders. And I now have in my possession
3 certified copies of this. And as of -- I have to look at
4 the exact date, but a few days ago I've now received the
5 orders, so now I will be filing a notice of appeal because I
6 was not able to answer that question. That is really the
7 real reason that there was no merit to the claims because I
8 couldn't answer that. I never received written notice, it
9 was never served on me.

10 THE COURT: Oh, you're talking about the appeal that
11 went to the Court of Appeals.

12 MS. GERSTEN: Yes.

13 THE COURT: Okay. All right. I'm sorry. I'm clear
14 now. Go ahead, I'm sorry.

15 MS. GERSTEN: I didn't repeatedly not comply. The
16 dismissal is not appropriate because I have never failed to
17 appear. I've done everything that I'm asked to do within
18 reason. And my mother's passing, the only thing they lost
19 was her testimony that she owned the van, that's it. She
20 wasn't in the van, she didn't witness the collision, that's
21 it, so he lost nothing. Because she gave me a power of
22 attorney -- we're jumping ahead. The only service that I
23 received was his recent -- Mr. Sawyer's recent serving. And
24 I apologize because normally I'm really cool because this
25 pandemic thing, when I just think about not acknowledging

1 that it even happened is upsetting to me, because it changed
2 the course of everybody's lives, not just my life. And
3 during that time I even explained to the appellate courts
4 where I was living, which I'm not living there now, we were
5 not getting mail, and I -- the address that I have is not
6 where I lived. There was always other people. I went
7 through so many caregivers, and I don't even have a
8 caregiver now, back then there were so many different ones,
9 things were lost, things were gone. And if you're saying
10 that I'm held to even though I -- if I saw something on the
11 docket or if that's not a good argument, serve me again and
12 I will definitely -- it's fine, I have no problems. I
13 served my own discovery, I get it, but I wasn't trying to
14 avoid anything. But as far as saying that I filed
15 continuances and making insinuations that the Court granted
16 them and that's why we're two years into this is not true.
17 It's not true. I have no control over what happened. There
18 was actually a hearing set for the 13th that got canceled
19 not because of me. I put in continuances for my own reasons
20 but they were never ruled on, and my continuances had no
21 part of the Court canceling those hearings. And I don't
22 want to be rude to the Court because I appreciate everyone
23 in South Carolina, and even Mr. Wesley, he just touched a
24 nerve because he never mentioned the pandemic, and so the
25 four years that have gone by is all because of me. No, none

1 of it is because of me. I'm here, I've been ready. On the
2 13th I would have dealt with however the Court would have
3 dealt with it but they canceled it on their own, and that
4 can be easily verified, I'm not making that up. I just want
5 to make sure that I cover everything that he said. The
6 pandemic. Did not ignore and received -- okay. And yeah.
7 The only thing she would have testified to is insurance
8 stuff and -- but I'm not -- I'm not -- I'm not -- I'm not
9 practicing law without a license, that's why I've stayed
10 away from that. Because if you want to talk about it,
11 Judge, I do have law that I looked at about unauthorized
12 practice of law and what it actually means. Because when
13 you had mentioned that I wasn't even sure what that is,
14 because I'm not representing her. But her not being here,
15 she definitely has gifted me her claim, or the van, or how
16 ever you want to look at it, and so, you know, what is the
17 practice of law? It is neither practicable nor wise to
18 attempt the comprehensive definition by way of a set of
19 rules. The better course is to decide what is and what is
20 not the unauthorized practice of law in the context of an
21 actual controversy. And this is in regards to unauthorized
22 practice of law rules proposed by this South Carolina Bar,
23 309 SC 304 422 SC2D 123 1992. And it says in the South
24 Carolina Bar that state law does not set forth a list of
25 activities that constitute the unauthorized practice of law.

1 And I mentioned that she was deceased because she -- well,
2 here is the other interesting thing, I wasn't there. I only
3 received a message. I never spoke to anybody about it,
4 didn't go to a funeral, and just like Mr. Sawyer, can't find
5 an obituary, have been seeking a death certificate.
6 Unfortunately at this point it's hearsay. And I'm jumping
7 ahead because he's got a motion on the table that I did
8 receive and I know that's not this one, so I think that I
9 covered everything that I want to say. Oh, he's never once
10 called me, never called me, never sent an email. I mean,
11 those are probably the two best ways to reach me. I
12 apologize, but during that time -- and I can prove that
13 because I -- he's right, I have other claims, and that was
14 one of my big issues during that time because that was
15 shortly right after the pandemic. Where I lived it was
16 madness. They had people marching, no justice, no peace,
17 vandalizing. I mean, it was chaos. I mean, it was hard.
18 People were scared where I lived. The mail was missing,
19 things went awry. It was a hard time right during that
20 period. When he said two years, this was right after things
21 were really hot, and it was different in different places,
22 but where I was it was extremely -- people were touchy. I
23 was scared to go anywhere. I started wearing a Go Pro
24 camera around my chest because I got assaulted by a security
25 guard. And I'm not trying to drift off, I'm just painting

1 an image that during that time was a very unique time in the
2 history of the world, not just one place, it was Washington,
3 all kinds of madness. It was heavy times during then. And
4 I did not personally receive his discovery. Had he called
5 me, had he sent an email things would have been different.

6 THE COURT: All right. I think I understand, I've got
7 your argument. What I heard was pandemic related was a
8 causative factor in not responding, that there's no
9 prejudice due to the death -- or potential death of your
10 codefendant, and that you're now contesting whether or not
11 the codefendant has actually passed away or not. You also
12 claim that you never were served with the discovery
13 requests. And that -- also on the issue of prejudice, that
14 the only issue that your codefendant would be involved with
15 would be the issue of ownership, not the issue of liability,
16 just the issue of the ownership of the vehicle. I think I
17 got that.

18 MS. GERSTEN: Right. I want to interject that just a
19 correction, I'm not -- I'm not challenging that she's not
20 deceased, I have no reason to believe that she's not, but I
21 have no proof that she is.

22 THE COURT: Okay. Are you going to contest that she's
23 not deceased?

24 MS. GERSTEN: No, not at all. I'm seeking a death
25 certificate. Unfortunately the first place that I tried I

1 had bad information and it wasn't -- it was the state she
2 was actually in. It's a long story that led to that moment,
3 and that's not of the concern you said last time about what
4 happened or whatever.

5 THE COURT: Okay. I think I've got that. And whether
6 or not she is deceased or not deceased, your position is
7 still that there's no prejudice, that she's not involved in
8 the litigation, is that correct, due to the fact that her
9 only involvement is over the issue of the ownership of the
10 vehicle.

11 MS. GERSTEN: Well, yeah. And the other issues would
12 not be Kevin Carter related I don't believe, because it has
13 to do with insurances. That's what I have to take up with
14 the insurance company.

15 THE COURT: Right. Okay. Yes, good point, thank you
16 for pointing that out.

17 MS. GERSTEN: And I apologize if I got too passionate,
18 and I didn't mean to, I honestly -- it's a trigger for me
19 because a lot of bad things happened during those two years.

20 THE COURT: That's fine. You argued quite well and you
21 argued better than some lawyers that come in front of me, so
22 thank you for that. Don't say that to the other lawyers,
23 though. Do not say that to the other lawyers. Any reply to
24 that, Mr. Sawyer?

25 MR. SAWYER: Yes, Your Honor, very briefly. First of

1 all the pandemic, certainly we all dealt with it, we all
2 learned now to deal with it. I know Ms. Gersten litigated
3 other matters during the pandemic. And also the immediate
4 issues of the pandemic have certainly subsided
5 substantially, yet we haven't gotten discovery responses, so
6 I think that was a Red Herring. Certainly it's an emotional
7 appeal but it doesn't really explain the delay. In terms of
8 the prejudice, Judge, first of all I should clarify, this
9 motion is as to both Ms. Gersten and Ms. Ayoub. Ms. Ayoub
10 claimed ownership of the van. Because of learning of her
11 death I felt compelled to also file a Rule 25 motion, which
12 is really a motion in the alternative. Either she has
13 passed away, and I submit a sufficient amount of time has
14 passed such that because no one has moved to substitute
15 under Rule 25 her claim has to be dismissed. Or she's
16 alive, she's not here, and that's a failure to prosecute.
17 So really we have either way her claim should be dismissed,
18 but they're under two alternatives. But as to prejudice,
19 Judge, Ms. Gersten just represented that the claim for the
20 van has been somehow given over to her by her mother. I
21 cannot depose her mother to find out about that. I was
22 never aware of that claim being handed over. So again, the
23 prejudice there is abundant. Also, I would have to take
24 Ms. Gersten's word as to what her mother knew or did not
25 know about the contents of the van, the value of those

1 contents, the condition of those contents. And since the
2 claim here is primarily about the contents of the van now
3 I've lost a valuable source of information. To get to
4 probably the most important point that Ms. Gersten raised,
5 which is the claim that she did not receive these documents,
6 we have filed certificates of service of the discovery
7 requests with our motion to compel, or in the alternative
8 motion to dismiss. We also have certificates of service
9 mailing these documents, the motion to compel itself to Ms.
10 Gersten, just like we mailed notices of the hearings to
11 Ms. Gersten. She claims she didn't get the orders from the
12 underlying case, but, Judge, she filed a notice of appeal on
13 the underlying case earlier orders, so she filed a notice of
14 appeal attaching those other orders. So, Judge, she clearly
15 has been getting these things, otherwise she wouldn't have
16 been able to attach them to a notice of appeal. And, Judge,
17 when she got notice of the hearing a year ago, or notice of
18 this hearing, that would have certainly put her on notice
19 that the discovery had been sent, and I've never been told
20 until today or implied that she didn't receive the discovery
21 or didn't receive our motion. But frankly, Your Honor, if
22 she didn't we've mailed them, which is all the rules require
23 us to show, and we've provided the certificate of service to
24 that. But frankly, Your Honor, just the context and the
25 fact that this is only being raised now unfortunately

1 doesn't bear a lot of credibility given the background of
2 this and the fact that this motion has been pending without
3 any notice to the Court or to me stating that these have not
4 been received previously. So, Your Honor, I think that's
5 why we have certificates of service, we rely upon those, and
6 those were in the Court's record, and I would point to
7 those. And, Judge, here we are four years later, we've lost
8 a witness, we have no discovery, and the case just has been
9 dragged on for far too long at this point. I think that
10 those address the four things that Ms. Gersten raised.

11 THE COURT: Okay. Let me ask you a question, I know
12 that you filed a separate motion, the pleading with the
13 codefendant, do you feel like -- and I've got a copy of
14 that -- do you feel like you've now argued that motion
15 sufficiently? Because I think both of you -- both you and
16 Ms. Gersten have educated me as to what your positions are
17 on those, but do you have anything else just related to that
18 motion?

19 MR. SAWYER: Judge, very briefly, and it won't take me
20 long to address that one. It's Rule 25. And obviously
21 there's not a lot of case law on Rule 25, but there is a
22 little bit of it. It's based off the federal rule, but our
23 rule promulgators, I think, made a wise decision in two
24 regards. One, I dealt with this in the federal courts, the
25 federal courts require almost an impossible service rule,

1 which is you have to serve the beneficiaries of what would
2 be the estate, and as the opposing party typically it's
3 almost impossible to be in a position to identify those
4 individuals. Our state court rule promulgators thankfully
5 did not include that part in our version of Rule 25. So in
6 the service rule to my understanding it says as with any
7 other motion under the South Carolina rules which is you
8 mail to the last known address, and that's important just as
9 a point of distinction because I've dealt with that in the
10 federal court recently. But more importantly, our court --
11 our version uses the phrase a reasonable time, the federal
12 rule says 90 days. The commentary on it notes that that's
13 actually a substitute, it's not meant to modify the time
14 substantially, but it gives the Court a little bit more
15 room, I believe, in terms of what is a reasonable time. But
16 in light of the fact that it's based upon -- says it's a
17 substitute for the 90 days in the federal rule I would
18 certainly think that in excess of 180 days after her
19 purported date of death is beyond the reasonable time for
20 someone to move to substitute. The Court of Appeals has
21 also noted as to Rule 25 that there is no requirement for
22 anything to be done by the opposing party, nor the party
23 that would be moving to dismiss under Rule 25. The rule
24 requires that the case be dismissed if no one moves to
25 substitute within a reasonable time of the decedent's

1 passing. So it's an automatic thing, it doesn't require any
2 personal jurisdiction, it doesn't require any proof of
3 service, all the question that the Court has is all right,
4 has someone passed away and has a reasonable amount of time
5 passed without a substitution being filed. And, Your Honor,
6 the only date that I have to operate with is the date that
7 Ms. Gersten put on the record during our last hearing, which
8 was January of this year, which is well over six months and
9 gets us past that 180 day mark by quite a margin. So that
10 would be the alternative basis, Your Honor, if the Court has
11 concerns about whether Ms. Ayoub is still alive, either
12 she's failed to prosecute and failed to respond to
13 discovery, or she's passed away and no one has moved to
14 substitute on her behalf within a reasonable period of time.
15 So it's just -- it's two different ways to deal with this in
16 the alternative, Your Honor.

17 THE COURT: All right. Ms. Gersten, Mr. Sawyer was
18 giving me his supplemental arguments relating to Rule 25 and
19 the dismissal of Ms. Ayoub's case. Do you have anything
20 that you wanted to add to that? And I caution you, I know I
21 mentioned practicing without a license, and I still would
22 caution you on that, I think I would be remiss if I did not.
23 But given my statement about that, do you have anything to
24 argue based on what Mr. Sawyer just argued? And I won't
25 hold you to the standard that you're practicing law without

1 a license, how about that.

2 MS. GERSTEN: Well, thank you very much. And I
3 definitely can even do it in a way that I think will even
4 more so avoid that. I'll just read the law that he's
5 referring to, which is Rule 25, substitution of parties. A
6 death, number one. If a party dies and the claim is not
7 thereby extinguished, the Court may order substitution of
8 the proper party. Motion for substitution may be made by
9 any party or by the successors or representatives of the
10 deceased party, and together with the notice of hearing
11 shall be served on the parties as provided in Rule 5, and
12 upon persons not parties in the manner provided by Rule 4 of
13 the service of summons. If substitution is not made within
14 a reasonable time the action may be dismissed as to the
15 deceased party. Counsel of record for such deceased party
16 shall give notice to all other parties of the death of such
17 parties as soon as practicable after obtaining such
18 knowledge and of the name and address of the proper parties
19 who should be substituted. Now, there is a note that says
20 this Rule 25A1 is substantially the same as Federal Rule
21 25A. In the federal rule the motion for substitution is to
22 be made within 90 days after notice of death is suggested
23 upon the record. The rule substitutes a reasonable time
24 after such knowledge is obtained. So in just discussing
25 this law and staying away from even appearing as though I'm

1 practicing law, which I'm not, or representing someone, the
2 key thing here is made within 90 days after notice of death
3 is suggested, suggested upon the record. Well, I suggested
4 it July 28, 2022, and if you give 90 days that hasn't
5 happened yet. October 26, 2022, would be 90 days. Now,
6 although I mentioned the date of January 11th, 2022, this
7 year, which I have not confirmed for myself yet, I did not
8 say that that's the date that I learned of this, but that's
9 all irrelevant according to the rules. According to the
10 rules it's the suggestion on the record, that was suggested
11 July 28th, 2022, as I intend on filing a substitution of
12 parties, and I have even spoken to numerous attorneys, so
13 many. And there's probate, there's all kind of different
14 ways, there's so many different ways of that. But the thing
15 is I'm within that reasonable time and I would ask the Court
16 to put a pause on this and perhaps set another hearing to
17 permit at least the 90 days, which I'll have to work faster
18 than this, it's getting a death certificate, which I think
19 is the key to proving that she's deceased. Otherwise I
20 don't know how else I can prove other than the power of
21 attorney that I do have, which I have not submitted because
22 I felt that my time wasn't due yet, that I'm still within
23 the reasonable time. And, yes, I feel that that has not
24 expired yet. It did not begin on a date of her death, it's
25 a date that's suggested on the record.

1 THE COURT: Okay. Thank you very much. Any reply to
2 that, Mr. Sawyer?

3 MR. SAWYER: Yes, Your Honor. It can't be the date
4 that's suggested on the record because that's definitely
5 supposed to be filed or dealt with by her attorney, and she
6 doesn't have an attorney, so it in effect will never
7 actually get his anywhere with this. And frankly I'm not in
8 a position that I could ever get the proof of her death
9 without knowing about it. But at the end of the day the
10 rule itself actually -- and not the comments to the rule,
11 but the rule itself says it's not made within a reasonable
12 time. It says if a party dies. So the opening line of
13 paragraph A1 is if a party dies and the claim is not thereby
14 extinguished...and then if a substitution is not made within
15 a reasonable time the action may be dismissed as to the
16 deceased party. Rule A1, which sets that forth doesn't
17 state that it's based upon the suggestion of death, and
18 that's not how the Court of Appeals has looked at it either
19 when it has reviewed that rule. So at the end of the day
20 we're not 90 days, we're 180 days, and that's well beyond a
21 reasonable time for someone to have filed a substitution if
22 it was going to happen, and at the end of day it hasn't.

23 THE COURT: Okay. Okay. And thank y'all very much.
24 Can I ask a point of privilege? Can I take a break for
25 about 30 minutes and then let's reconvene and I will give

1 you an update? If I'm able to make a ruling, make a ruling
2 at that time, if not I'll just reconvene and let you know
3 I'm not going to make a ruling. Can we do that?

4 MR. SAWYER: That's fine with me, Your Honor.

5 THE COURT: Ms. Gersten, is that okay with you?

6 MS. GERSTEN: Well, I mean, do I need to -- because I
7 would like to take a break. Again, it takes me a half hour
8 to get out of the chair, and so if I would have to wait I
9 would be just sitting in the chair for a half hour. I'm not
10 trying to be difficult, it's just that it would be easier
11 for me -- I mean, I don't want to be difficult. I mean, do
12 I just sit in the chair? You said you may not even have a
13 ruling, maybe it would be easier for you to take a full day
14 to think about this, and I'm fine, I don't need an answer
15 today.

16 THE COURT: I would like to -- I just want to review my
17 notes to be sure that I've got all of the questions that I
18 have has been answered, and if I have anymore maybe ask more
19 of them. But I tell you what, can we get back in 40
20 minutes, how about that? That would put us at 4:30.

21 MS. GERSTEN: Okay. So then I could take a quick
22 catheter break, thank you very much.

23 THE COURT: Thank y'all very much, we'll see y'all
24 about 4:30.

25 (Break in proceedings.)

1 THE COURT: Okay. Thank y'all for getting back
2 together. Mr. Sawyer, can you hear me okay?

3 MR. SAWYER: Yes, Your Honor.

4 THE COURT: Ms. Gersten, can you hear me okay?

5 MS. GERSTEN: Yes, sir, thank you for asking.

6 THE COURT: Thank y'all very much. Okay. A couple of
7 general observations first. Okay. Ms. Gersten, I probably
8 covered this with you last time because I cover this with --
9 I try to do this with any pro se litigant. I'm of the very
10 strong opinion it's never a wise thing to do for a lay
11 person to represent themselves in a court of law. You
12 definitely have a right to do so, but I just don't think
13 it's a wise thing to do. Frequently pro se litigants are --
14 get tripped up or get -- or else -- pro se litigants are
15 bound by the same rules of evidence and the rules of
16 procedures that people who are represented by lawyers.
17 There's definitely, as you've mentioned on several
18 occasions, there's a preference for the Court, and this
19 Court tries to do the same, to not hold pro se litigants in
20 strict compliance with the rules and allows some leeway.
21 But the Court also has to apply the rules of evidence and
22 the rules of procedure in a way that is fair to everybody.
23 I say that because I'm going to grant the motion to dismiss
24 in regards to the cases. And let me offer you a reason why.
25 And I want to tell you and encourage you to not let this be

1 the end of it, of your pursuit of this litigation, because I
2 can tell by your, for lack of better words, passion, but
3 also your ability to prepare for these hearings that you are
4 very sincere and genuine in seeking those claims. But I
5 want to encourage you to talk to a lawyer. I did have a
6 chance to review the pleadings even though the issues
7 related to the pleadings were not the material issues in
8 front of this Court. This is an automobile accident that
9 happened a long time ago, March of 2015 as alleged in the
10 complaint. And based on the allegations in the complaint,
11 the complaint is crafted in a way that it seems to, this is
12 my description, and I'm sure that maybe lawyers will come up
13 with a better way to say it, that the single complaint has
14 tried to act as a catch all to bring everybody into the
15 action. And that is unusual for this Court to see a
16 complaint filed like that, where everybody, and I mean
17 everybody, including insurance companies, liability
18 insurance company, UIM insurance companies, just an array of
19 different defendants have been brought into the same action,
20 and so that is unusual. And if you do have -- and the
21 reason I want you to talk to a lawyer is because the
22 complaint itself -- if we had lawyers arguing today they
23 would argue probably they wanted separate different types of
24 lawsuits in regards to the -- in regards to the litigation
25 that was filed. Because insurance coverage, whether it be

1 first party coverage, or liability coverage, or UIM
2 coverage, or UM coverage, all of that is handled separately
3 from the actual litigation that establishes the claims of
4 liability and damages, and I really think you would be well
5 served if you have legal counsel to filter through that.
6 Because an individual who has been involved in an automobile
7 accident may have claims against the at-fault party's
8 insurance companies, as well as have claims as you have
9 argued today where your own insurance company where possibly
10 you paid for some type of insurance coverage, or they would
11 have obligations to respond. And those are different
12 obligations, and those different obligations arise different
13 duties under the law. I know you phrased your complaint as
14 both in negligence as well as breach of contract claims, and
15 those are -- and in automobile accidents that's just unusual
16 to have those pled together, so I encourage you to talk to a
17 lawyer about those. I'm going to grant the motions to
18 dismiss dealing with the motions to compel and in the
19 alternative the motions to dismiss as to both the
20 defendants. So I'll ask Mr. Sawyer to prepare a formal
21 order that will summarize his arguments to me. I think his
22 arguments succinctly gave the reasons that justified the
23 dismissal. In particular the one of the -- once you get
24 involved in litigation one of the aspects of being involved
25 in litigation is you've got to comply with discovery. I

1 think both sides are entitled to conduct discovery, and
2 given that this is a 2015 litigation this motion, the
3 discovery requests were filed in 2020, even with the
4 regrettable pandemic that we all lived through that did not
5 stop the litigation, and so I think a sufficient enough time
6 has passed to grant the motion. I think if I didn't I would
7 actually be denying reasonable due process to the
8 defendants. In regards to the other motions, I went back
9 and took a look at the procedural process of those motions.
10 I would -- if I were ruling on those motions since other
11 judges have decided them I would have to apply an abuse of
12 discretion standard, and I would have to set out -- I would
13 have to find that the other judges, Judge Hayes and Judge
14 Gibbons, had abused their discretion in issuing those
15 orders. There's a procedural barrier that prevents me from
16 making that determination whether they did or they did not,
17 and that is that those motions -- the present motions are
18 such that they needed to be filed and heard by the judge
19 that made those motions. The rules of procedure provides
20 that the -- that those motions needed to be filed with those
21 judges to allow those judges to revisit their rulings.
22 There's also a generalized rule that has been applied to me
23 in other cases to tell me I can't make rulings, and that is
24 that once a circuit court judge in a particular case has
25 made a ruling, another circuit court judge cannot reverse or

1 change that ruling that another circuit court judge has made
2 even if that second circuit court judge disagrees with them.
3 So based upon the fact that I view those motions having have
4 to be ruled on by those judges, I will -- I can't make that
5 ruling addressing the substance of it, but the procedural
6 aspects of those motions prevent me from making a ruling on
7 those motions. I will make a general observation that you
8 argued very articulately and very passionately about why you
9 feel that you need to have a separation of the property
10 damage claim and the liability claim. I struggle -- I want
11 to take a look at the law -- I struggle, that word may that
12 you referenced to me is very important. I struggled to find
13 that that word may would be defined as shall be separated,
14 and so with that word may being in there that would have
15 gone into my decision in trying to determine whether or not
16 those other judges had abused their discretion. And I just
17 point that out to you that that was some important language
18 that you pointed out, but I think that I am prohibited from
19 going in and reversing or making a decision that's contrary
20 to those other judges on those motions. I cannot stress to
21 you how impressed I am with -- while you're not represented
22 by a lawyer with your preparedness on the -- on arguing the
23 various points of rules that you wanted the Court to
24 consider. I think both Mr. Sawyer and you have provided me,
25 which is what oral argument is supposed to do, a good

1 educational foundation as to what your positions are, so I
2 wanted to be sure I understood your foundational arguments
3 from the standpoint of what law to apply or what rules to
4 apply. The -- I will note that Mr. Sawyer is being asked to
5 prepare a formal order, that's a customary practice in state
6 court litigation. It will -- I don't imagine Mr. Sawyer --
7 Mr. Sawyer has never appeared in front of me before that I
8 recall, but I don't think -- he's probably going to be fast
9 enough I'll get the order immediately. I mention that
10 because I want you to consider very seriously my
11 encouragement to go talk with a lawyer, because once Mr.
12 Sawyer delivers me the order I will make my own changes in
13 it, so what I say today is not a final ruling. Final
14 rulings made by state circuit court judges only appear in
15 the written document, so I may change something he makes, I
16 might change my mind completely, I don't do that frequently
17 but that is something that could happen. So I encourage you
18 to go talk with a lawyer and to let a lawyer know we've had
19 this proceeding, let the lawyer know what the status of it
20 is and take to that lawyer all of the documents that relate
21 to this case, because I do think that the passion that
22 you've shown and the preparation you've shown speaks well
23 for your position, and I would want you to receive the
24 appropriate legal advice. With that being said, there are
25 as you probably know -- once I do sign a final order, in the

1 event the final order is not in your favor, you do have two
2 options as I see it, you might have other options, that's
3 why I say talk to a lawyer because another lawyer might give
4 you other options, but two customary options is you can one,
5 file a motion for reconsideration. There is a time line for
6 filing that, I believe it is ten days after the order is
7 issued. That -- I will let you know that if I am asked to
8 reconsider the motion it might serve you well to have
9 complied with the discovery, the fact that we've taken so
10 long to have this motion addressed and the motion has been
11 pending. Going back and checking the clerk of court's file,
12 the clerk of court notified the parties as much as I think
13 it was October or January back when the motion was filed in
14 2020, that the motion to dismiss was pending, and then there
15 has not been any type of discovery responses filed. So I
16 would view, not to say it would be determinative, but I
17 would view favorably, I would look more favorably to a
18 motion for reconsideration if, in fact, discovery had been
19 complied with by the time the motion for reconsideration was
20 filed. Or your second alternative would be to file an
21 appeal of the written decision once I make it. Sometimes --
22 and I mention that, that sometimes I have seen parties take
23 a preliminary ruling made by a judge, they'll file --
24 they'll go through the process of filing a motion or filing
25 an appeal only to be told by the Court of Appeals or the

1 Supreme Court: You're too early, you can't file a motion,
2 then you've done a lot of work for no good. The time for
3 filing a motion to appeal also does not occur until a formal
4 order has been issued by a Court. But anyway, those are my
5 rulings on these matters. I do appreciate everyone's
6 patience with me, and I look forward to receiving a formal
7 order. Thank y'all very much.

8 MR. SAWYER: Thank you, Your Honor.

9 THE COURT: Thank y'all.

10 MS. GERSTEN: Thank you.

11 THE COURT: Thank you.

12 (End of the hearing.)

13

14

15

16

17

18

19

20

21

22

23

24

25

Appellant Gersten's Exhibit List A-L (Filed March 27, 2018)

Appellant Gersten’s Exhibit List A-G (Filed March 27, 2018).....

Notice of Appeal filed November 27, 2018 in Appellate Case No. 2018-002115...

I certify that this record on appeal contains no matter which is irrelevant to this appeal, except I'm not responsible for items that Respondent Carter listed in his designation of matter.

Respectfully submitted,

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

RECEIVED
Jun 10 2024
SC Court of Appeals

Other Counsel of Record
Wesley Brian Sawyer, Esquire (SC Bar # 100229)
Murphy & Grantland, P.A.
4406-B Forest Drive
Columbia, SC 29206
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
wsawyer@murphygrantland.com
(Attorney for Respondents Kevin Carter and Richard Davis)

Pamela J. Larson, Esquire
WOMBLE BOND DICKINSON (US) LLP
5 Exchange St.
Charleston, SC 29401-2948
PO Box 999
Charleston, SC 29402
(843) 213-5519
(843) 720-4630
pamela.larson@wbd-us.com
(Attorney for Respondents Nationwide Mutual Insurance Company and Joseph Tirbovich)

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

William H. Davidson, II, Esquire
Davidson, Wren & Plyler, P.A. & DeMasters
P.O. Box 8568
Columbia, SC 29202
wdavidson@dml-law.com
(803)806-8222
(Attorney for Respondents SC Dept. of Public Safety and Herbert Blackwell)

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

PROOF OR CERTIFICATE OF SERVICE

I hereby certify that service of a true and accurate copy of the APPELLANT'S Title II of the Americans with Disabilities Reasonable Accommodation Request, Motion to Accept as Timely Filed, AMENDED RECORD on Appeal, Proof or Certificate of Service, and Cover Sheet [Total of 262 Pages including Cover Sheet] in the above-captioned Appellate Case Nos. 2022-001312 and 2022-001390 was made upon all parties and counsel of record by email on June 10, 2024:

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

Respectfully submitted this 10th day of June 2024

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