

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

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

Appellate Case No. 2022-001312

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard, Plaintiffs,

Of whom Heidi Gersten is theAppellant,

v.

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

Of whom Kevin Carter is theRespondent.

**MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, MOTION TO REQUIRE
APPELLANT TO PROMPTLY CORRECT THE RECORD ON APPEAL**

Respondent Kevin Carter, by and through his undersigned counsel, moves this Court to dismiss the appeal against him because Appellant has failed to timely serve a compliant record on appeal despite many prior extensions from the Court and notice that her filing did not comply with the South Carolina Appellate Court Rules. This Motion is made pursuant to Rule 240 of the South Carolina Appellate Court Rules and is supported by a Memorandum of Authorities filed concurrently herewith. Alternatively, Respondent moves to require Appellant to promptly correct the Record on Appeal.

WHEREFORE, Respondent Carter respectfully requests that this Court grant his Motion and dismiss the appeal with prejudice. In the alternative, Respondent respectfully requests that the Court permit Appellant only one additional chance to promptly submit a fully correct record on appeal.

Respectfully submitted,

s/Wesley B. Sawyer

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June 12, 2024

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John Does, Defendants,

Of whom Kevin Carter is theRespondent.

**MEMORANDUM OF AUTHORITIES IN SUPPORT OF RESPONDENT’S
MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO REQUIRE
APPELLANT TO PROMPTLY CORRECT THE RECORD ON APPEAL**

After more than seven (7) months, six (6) extensions, and numerous deficiency letters, Appellant has still not served a compliant Record on Appeal. Appellant’s latest delay and noncompliance is part of a long pattern of such conduct in this case that has been ongoing for more than six (6) years. Therefore, Respondent Kevin Carter respectfully requests that this Court grant his Motion to Dismiss the Appeal with prejudice or, in the alternative, to require Appellant to promptly and fully correct the Record on Appeal.

BACKGROUND

I. Appellant's History of Dilatory Conduct in this Court and the Circuit Court

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

As the Circuit Court found, Gersten has shown an utter disregard for her responsibilities as a Plaintiff in this lawsuit. Her failure to engage in discovery prevented any development of this case, which involves an automobile accident that occurred over nine years ago. Appellant's history of dilatory conduct is more fully set forth in Respondent's Initial Brief. Appellant's pattern of disregarding the court rules and instructions continues in her second appeal.

II. Appellant's Dilatory Conduct Related to the Record on Appeal

Appellant's Reply Brief was originally due on September 8, 2023. After an extension, the Appellant filed her Reply Brief on October 10, 2023. Pursuant to Rule 210(a) of the South Carolina Appellate Court Rules, Appellant was required to serve a copy of the Record on Appeal on Respondent within thirty (30) days after filing her Reply Brief – i.e., by November 9, 2023. Rule 210(a), SCACR. However, the Court granted Appellant an extension and permitted her to serve the

Record on Appeal within 30 days from November 21, 2023 – i.e., by December 21, 2023. (November 21, 2023 Order). On its due date, Appellant moved for another extension to serve the Record on Appeal. (Appellant’s December 21, 2023 Mot. for Extension). The Court then ordered that Appellant serve the Record on Appeal by January 22, 2024. (December 27, 2023 Order). On its new due date, Appellant again moved for an extension to serve the Record on Appeal. (Appellant’s January 22, 2024 Mot. for Extension). The Court then ordered that Appellant serve the Record on Appeal by February 21, 2024. (January 23, 2024 Order). On its new due date, Appellant again moved for an extension to serve the Record on Appeal. (Appellant’s February 21, 2024 Mot. for Extension). The Court then ordered that Appellant serve the Record on Appeal by March 22, 2024. (February 22, 2024 Order). The Court’s February 22, 2024 Order stated: “No further extensions will be granted absent extraordinary circumstances.” (*Id.*).

On March 22, 2024, Appellant Gersten sent an email to counsel purporting to serve her “Record on Appeal.” However, the attached document she sent and labeled “Record on Appeal” was merely an index page and not an actual record on appeal. In addition, the index page did not list numerous items included on Respondent Kevin Carter’s Designation of Matter. *See* Rule 207(c), SCACR. The “Record on Appeal” also included several other deficiencies, which Respondent brought to the Court’s and Appellant’s attention by letter dated April 5, 2024. (Respondent’s April 5, 2024 Letter).

On April 9, 2024, the Court sent a letter to Appellant that stated:

Within ten days of the date of this letter you must serve and file a **complete record on appeal**, along with a motion requesting permission to file out of time, **or your appeal will be dismissed**.

(April 9, 2024 Letter) (emphasis added). On April 19, 2024, Appellant Gersten filed a document purporting to be the complete record on appeal. (April 19, 2024 Record on Appeal). The document

Appellant Gersten filed was not a complete record on appeal. Numerous documents included in Respondent Kevin Carter’s Designation of Matter were not actually included in this “Record on Appeal.” Of the 46 documents listed on Respondent’s Designation of Matter, Appellant failed to include 30 of them in her “Record on Appeal.” *Compare* (Respondent’s Designation of Matter) *with* (April 19, 2024 Record on Appeal). Some documents that are listed on the index did not actually appear in the “Record on Appeal.” *See* (April 19, 2024 Record on Appeal). Appellant Gersten did not even include all of the documents she listed in her own Designation of Matter. *Compare* (Appellant’s Designation of Matter) *with* (April 19, 2024 Record on Appeal). The index did not have page numbers for half of the documents listed, and the documents themselves were not consecutively numbered. *See* Rule 210(c), SCACR.

Appellant also failed to include the certification required by Rule 210(g) of the Appellate Court Rules. Moreover, the index did not appear to be ordered in conformity with Rule 210(c), although the headings were in the correct order. Respondent Carter brought these deficiencies to the Court’s and Appellant’s attention by letter dated April 23, 2024. (Respondent’s April 23, 2024 Letter). More than a month later, Appellant still had not served a corrected Record on Appeal.

On May 29, 2024, the Court sent Appellant a letter noting deficiencies with her Record on Appeal. (May 29, 2024 Letter). The letter stated that “***any deficiency must be corrected within ten (10) days of the date of this letter or this matter will be dismissed.***” (May 29, 2024 Letter) (emphasis added). Thus, Appellant’s corrected record was due on June 10, 2024. With her Record of Appeal alone, Appellant has received six extensions.

On June 11, 2024, Appellant emailed Respondent’s counsel a document purporting to be her corrected Record on Appeal. (June 11, 2024 Record on Appeal). This document has many of the same issues as her April 19, 2024 filing. This “Record of Appeal” is deficient on its face. On its index, it

purports to have documents numbered through page 460. (*Id.* at p. 6). The record itself is only 252 pages long. (*Id.*).

There are numerous issues with this Record on Appeal. First, of the 46 documents listed on Respondent’s Designation of Matter, Appellant has failed to include 28 of them in her “Record on Appeal.” *Compare* (Respondent’s Designation of Matter) *with* (June 11, 2024 Record on Appeal). Many documents that are listed on the index do not actually appear in the “Record on Appeal.” *See* (June 11, 2024 Record on Appeal). For the documents that are actually included in the record, the page numbering on the index page is off. For example, according to the index, the July 28, 2022 Hearing Transcript begins on page 200. (*Id.* at p. 3). It actually begins on page 172. (*Id.* at p. 172). This is just one of many that are misnumbered on the index page. Number 38 on her index page has no page number at all. (*Id.* at p. 5). Additionally, Appellant has failed to include the certification required by the Appellate Court Rules – “that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.” Rule 210(g), SCACR. *See* (*Id.* at p. 7 (making some other “certification”)). It is now over seven (7) months from when Appellant was originally required to serve the Record on Appeal, and Appellant still has not served a compliant Record on Appeal.

ARGUMENT

By letter dated April 9, 2024, the Court stated that it would dismiss Appellant’s appeal unless she served and filed a “complete record on appeal” by April 19, 2024. (April 9, 2024 Letter). By letter dated May 29, 2024, the Court stated that “any deficiency must be corrected” by June 10, 2024 “or this matter will be dismissed.” (May 29, 2024 Letter). It is now after June 10, 2024, and Appellant still has not filed a “complete record on appeal” with the deficiencies corrected.

Rule 210 of the South Carolina Appellate Court Rules requires an appellant to timely file a record on appeal that complies with all of the Rule’s requirements. Among those requirements are: (1) including “all matter designated to be included by any party under Rule 209”; (2) arranging the documents in the order set forth in the Rule; (3) consecutively numbering each page of the record beginning with the index; and (4) certifying “that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.” Rule 210, SCACR. The Record on Appeal that Appellant filed fails to comply with each of these requirements. *See* (Respondent’s Designation of Matter); (Appellant’s Designation of Matter); (June 11, 2024 Record on Appeal). Rule 260 of the Appellate Court Rules 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.” Rule 260(a), SCACR. Therefore, Appellant’s appeal should be dismissed. *See State v. Burton*, 356 S.C. 259, 265 n.5, 589 S.E.2d 6, 9 n.5 (2003) (“A pro se litigant who knowingly elects to represent himself assumes full responsibility for complying with substantive and procedural requirements of the law.”); *McCullough v. McCullough*, 242 S.C. 108, 110, 130 S.E.2d 77, 78 (1963) (“The right of appeal is a matter of grace and is not an inherent or vested right. The rules of court and statutes must be followed in perfecting an appeal.”) (citations omitted).

CONCLUSION

Given the Appellant’s long history of delay and noncompliance with court rules and orders and her current failure to timely serve a compliant record on appeal, Respondent respectfully requests that the Court dismiss her appeal with prejudice. Alternatively, Respondent respectfully requests that the Court require Appellant to promptly submit a fully correct record on appeal.

Respectfully submitted,

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John Does, Defendants,

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PROOF OF SERVICE

I certify that I have served one copy of the Respondent’s Motion to Dismiss or, in the Alternative, Motion to Require Appellant to Promptly Correct the Record on Appeal and Memorandum of Authorities in Support on Appellant by depositing a copy of it in the United States Mail, postage prepaid to Heidi Gersten, on June 12, 2024, and by email only to opposing counsel on the same date.

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