

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.

RESPONDENT’S RETURN TO APPELLANT’S MOTION FOR REINSTATEMENT

Wesley B. Sawyer, Esquire
S.C. Bar No. 100229
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
wsawyer@murphygrantland.com
Attorney for Respondent

SUMMARY

Due to Appellant's delay and lack of compliance with court rules and orders, this case has been ongoing for more than six and a half (6 ½) years. This Court dismissed Appellant's prior appeal due to her failure to comply with the Court's filing deadlines and orders. The Circuit Court then dismissed the case on remand because Appellant failed to timely participate in discovery and prosecute her case. This Court has now ultimately dismissed this second appeal after Appellant (again) repeatedly failed to meet filing deadlines for nearly two years. (September 24, 2024 Order). Appellant has now filed a Motion for Reinstatement.¹ Appellant's Motion for Reinstatement should be denied because it is not timely filed. It should also be denied because Appellant has not shown good cause for reinstating the case.

BACKGROUND

On March 16, 2018, Appellant filed this lawsuit. It is now more than six and a half (6 ½) years later. And yet, not even initial discovery has been completed. Appellant Gersten's repeated failure to comply with court rules and orders has prevented any development of this case, which arises out of an auto accident that occurred more than nine and a half (9 ½) years ago.

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 forty (40) extensions/continuances, which have generally been granted. Appellant's failure to comply with this Court's orders resulted in dismissal of her first appeal.

¹ Appellant styled her document as "TITLE II OF THE AMERICANS WITH DISABILITIES ACT REASONABLE ACCOMMODATION REQUEST to ACCEPT as TIMELY FILED And GRANT RULE 221 SCACR And Rule 260 SCACR PETITION FOR REHEARING And MOTION FOR REINSTATEMENT VACATING DISMISSAL And APPENDIX Attached Including RECORD ON APPEAL." Respondent's Return herein is addressed to the Motion for Reinstatement as the Court has not requested that Respondent file a return to the Petition for Rehearing at this time. *See* Rules 221(a) and 260, SCACR.

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 four 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. 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. In this appeal alone, she has requested twenty (20) extensions, which have generally been granted.

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 were 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. On its new due date, Appellant again moved for an extension to serve the Record on Appeal. (Appellant's June 10, 2024 Mot. for Extension).

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 had many of the same issues as her April 19, 2024 filing. This “Record of Appeal” was deficient on its face. On its index, it purported to have documents numbered through page 460. (*Id.* at p. 6). The record itself is only 252 pages long. (*Id.*).

On June 12, 2024, Respondent filed a Motion to Dismiss the Appeal or, in the Alternative, Motion to Require Appellant to Promptly Correct the Record on Appeal. (Respondent's Mot. to Dismiss).

Appellant then sought and received two extensions before filing her Return to the Motion to Dismiss. After filing her Return on July 25, 2024, Appellant then filed an unauthorized “Amended Return” on August 1, 2024 and an unauthorized “Second Amended Return” on August 12, 2024. With each of these filings and without authorization from the Court, Appellant attached documents purporting to be corrected records on appeal. As explained in Respondent’s Replies to these “Returns,” these purported records on appeal were also deficient.

On September 24, 2024, the Court filed an Order dismissing this appeal because the Appellant failed to timely file a compliant record on appeal, despite numerous extensions. (September 24, 2024 Order).

Appellant’s Motion for Reinstatement again attaches an unauthorized document that she purports to be a corrected record on appeal. Again, this “Record on Appeal” is deficient on its face. On its index, it purports to have documents numbered through page **1013**. The entire document is only **300** pages long. It is now over one year from when Appellant was originally required to serve the Record on Appeal, and Appellant still has not served a compliant Record on Appeal.

ARGUMENT

Appellant’s Motion for Reinstatement should be denied because it is not timely filed. It should also be denied because Appellant has not shown good cause for reinstating the case.

Pursuant to Rule 260 of the Appellate Court Rules, “[t]he 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 being excluded).” Rule 260(a), SCACR. The Court did not receive a motion to reinstate the appeal within fifteen (15) days of the filing of the Order. The Court filed the Order on September 24, 2024. In accordance with Rule 260(a), a motion for reinstatement was due

on or before October 9, 2024. The Appellant did not file a motion for reinstatement by October 9, 2024. Although the Appellant sought an extension to file a petition for rehearing and a motion for reinstatement, the Court only granted an extension as to the petition for rehearing. *Compare* (October 8, 2024 Mot. for Extension) *with* (October 9, 2024 Order). The October 9, 2024 Order states: “The time for serving and filing the appellant’s petition for rehearing is hereby extended until October 24, 2024.” (*Id.*). Thus, the time for filing a motion for reinstatement has expired, and such motion should be denied. *See Wise v. S.C. Dep’t of Corr.*, 372 S.C. 173, 173, 642 S.E.2d 551, 551 (2007) (stating remittitur is properly sent to the lower court “unless a motion to reinstate the appeal has been actually received by the court within fifteen days of filing of the order of dismissal” and that “[w]hen the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter”). The dismissal became final on October 9, 2024, upon Appellant’s failure to timely file a motion to reinstate her appeal.

Appellant’s Motion for Reinstatement should also be denied because Appellant has not shown good cause for reinstating the case. Pursuant to Rule 260, “[a] case shall not be reinstated except by leave of the court, upon *good cause shown*, after notice to all parties.” Rule 260(a), SCACR (emphasis added). Appellant alleges that her physical limitations have prevented her from filing a compliant record on appeal. (Appellant’s Mot. for Reinstatement). However, Appellant’s physical limitations have not prevented her from filing two lawsuits against the Respondent, two appeals in this case, or from allegedly litigating simultaneous lawsuits in other jurisdictions. *See (id.* at p. 10). Through numerous extensions, this Court gave Appellant more than ten (10) additional months to file a compliant record on appeal. During that time, Appellant’s physical limitations did not prevent her from filing numerous motions for extensions and numerous non-compliant “records on appeal.” Additionally, the Court and the Respondent repeatedly brought to Appellant’s attention the specific

deficiencies with her filings. *See, e.g.*, (Respondent’s April 5, 2024 Letter); (April 9, 2024 Letter); (Respondent’s April 23, 2024 Letter); (May 29, 2024 Letter); (June 12, 2024 Mot. to Dismiss). Notably, Appellant’s Motion does not allege that she has any cognitive disabilities that impair her ability to understand the South Carolina Appellate Court Rules or the Court’s instructions. This Court, the Circuit Court, and the South Carolina Supreme Court have repeatedly provided Appellant accommodations. However, Appellant’s physical limitations do not absolve her from failing for the past six and a half years to prosecute her case, to comply with court rules, and to comply with court orders. Therefore, Appellant has not shown “good cause” why the case should be reinstated, and her Motion for Reinstatement should be denied.

CONCLUSION

For the above-stated reasons, Respondent respectfully requests that the Court deny Appellant’s Motion for Reinstatement.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

s/Wesley B. Sawyer
Wesley B. Sawyer, Esquire
S.C. Bar # 100229
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100
wsawyer@murphygrantland.com
Attorneys for Respondent Kevin Carter

Columbia, South Carolina
November 15, 2024

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Of whom Kevin Carter is theRespondent.

PROOF OF SERVICE

I certify that I have served one copy of the Respondent’s Return to Appellant’s Motion for Reinstatement on Appellant by depositing a copy of it in the United States Mail, postage prepaid to Heidi Gersten, on November 15, 2024, and by email only to opposing counsel on the same date.

s/Wesley B. Sawyer
Wesley B. Sawyer, Esquire (SC Bar # 100229)
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
wsawyer@murphygrantland.com
Attorney for Respondent Kevin Carter

Heidi Gersten
1438 W. Lantana Rd., #330
Lantana, FL 33462
(323) 245-6142
Appellant

Other Counsel of Record:
Pamela J. Larson, Esquire
Womble Bond Dickinson, LLP
5 Exchange St.
Charleston, SC 29401-2948
(Attorney for Nationwide Mutual Ins. Co.)
(Attorney for Joseph Tirbovich)
(843) 720-4630
pamela.larson@wbd-us.com

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

William H. Davidson, II, Esquire
Davidson, Wren & DeMasters
P. O. Box 8568
Columbia, SC 29202
wddavidson@dml-law.com
(Attorneys for SC Dept. of Public Safety)
(803) 806-8222

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 Trustguard
Insurance Company)
(Attorneys for John Ammendola)