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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

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

Appellate Case No. 2025-000493

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard, Plaintiffs,

Of whom Heidi Gersten is thePetitioner,

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.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

- I. Whether the Court of Appeals properly dismissed Petitioner’s appeal due to her failure to comply with the record on appeal requirement after the Court of Appeals gave Petitioner seven (7) extensions for such record and numerous orders and letters setting forth the deficiencies to be corrected.**

COUNTER-STATEMENT OF THE CASE

In her Petition, Heidi Gersten (“Petitioner” or “Plaintiff”) challenges the Court of Appeals’ dismissal of her appeal – but not on any grounds previously raised to or ruled on by the Court of Appeals. The Court of Appeals dismissed Petitioner’s appeal, after numerous extensions, because she failed to file a record on appeal that complied with the requirements of Rule 210, SCACR.

Petitioner’s current Petition for Writ of Certiorari states the following “Questions Presented”:

1. Is the South Carolina Court of Appeals (“COURT”) required by Title II of the Americans with Disabilities Act (“ADA”) to designate an ADA Coordinator and make their contact information available?
2. Can a remittitur be issued before the COURT rules on both a petition for rehearing and reinstatement, and not just one of them when both are served and filed by litigant?
3. If both a petition for rehearing and a petition for reinstatement are filed, is the COURT required to act on both?
4. Can a Title II or Title III of the ADA Reasonable Accommodation Request be used to reinstate an appeal?

(Pet. for Writ of Certiorari, p. 5). None of these grounds were raised to or ruled on by the Court of Appeals or included in Petitioner’s Petition for Rehearing. Therefore, none of these issues are preserved. *See* Rule 242(d)(1), SCACR.

This case has a long and storied history. Due to Petitioner’s delay and lack of compliance with court rules and orders, this case has been ongoing for more than seven (7) years. This lawsuit concerns an auto accident that happened over ten (10) years ago. At this point in time, Petitioner has not even provided responses to Respondent’s initial discovery requests, which were due on July 29, 2020.

This is Petitioner's second appeal in this case. In 2019, the Court of Appeals dismissed her first appeal due to her failure to comply with filing deadlines and the court's orders. In 2020, this Court then denied her first petition for writ of certiorari. On remand, the Circuit Court dismissed this case because Petitioner failed to timely participate in discovery and prosecute her case.

The Court of Appeals has now dismissed Petitioner's second appeal because she, again, repeatedly failed to comply with court orders and filing deadlines for nearly two years. During the case's long history, Petitioner Gersten has requested more than forty (40) extensions/continuances, which have generally been granted. In her second appeal, Petitioner's Record on Appeal was originally due on November 9, 2023. Ultimately, on September 24, 2024 – after nine (9) extensions, seven (7) deficient "records on appeal" filed, and numerous orders and letters outlining the deficiencies with Petitioner's record on appeal – the Court of Appeals dismissed Petitioner's second appeal due to her failure to comply with the record on appeal requirement.

This Court, the Circuit Court, and the South Carolina Court of Appeals have repeatedly provided Petitioner accommodations. However, Petitioner's physical limitations do not absolve her from failing for the past seven years to prosecute her case, to comply with court rules, and to comply with court orders.

PROCEDURAL HISTORY

On March 16, 2018, Petitioner filed this lawsuit. It is now more than seven (7) years later. And yet, not even initial discovery has been completed. Petitioner 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 ten (10) years ago.

I. Petitioner's History of Dilatory Conduct

This is Petitioner’s second appeal of this case and second petition for writ of certiorari. Petitioner’s failure to comply with the Court of Appeals’ orders during her first appeal resulted in dismissal of that appeal. On remand, Respondent served discovery requests and asked for deposition dates. Petitioner 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. Petitioner continued to ignore the discovery requests. On August 22, 2022, after a hearing, 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, Petitioner 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 and, while she was ignoring discovery requests, at least one witness in the case passed away. Petitioner’s history of dilatory conduct is more fully set forth in Respondent’s Initial Brief previously filed with the Court of Appeals.

Petitioner has sought forty-four (44) extensions/continuances, which have generally been granted:

Stage Of Case	Date of Extension Request
During Original Cases	<ul style="list-style-type: none"> • August 22, 2018 Motion
During First Appeal	<ul style="list-style-type: none"> • December 27, 2018 Motion • February 8, 2019 Motion • February 19, 2019 Motion • March 1, 2019 Motion • March 12, 2019 Motion • March 21, 2019 Motion

	<ul style="list-style-type: none"> • March 28, 2019 Motion • April 8, 2019 Motion • April 18, 2019 Motion • April 29, 2019 Motion • May 31, 2019 Motion
On Petition to the Supreme Court (1 st Time)	<ul style="list-style-type: none"> • September 4, 2019 Motion • November 7, 2019 Motion
After Remittur	<ul style="list-style-type: none"> • January 13, 2021 Motion • July 28, 2022 Request
During Second Appeal	<ul style="list-style-type: none"> • November 21, 2022 Motion • January 9, 2023 Motion • February 2, 2023 Motion • February 13, 2023 Motion • May 5, 2023 Motion • May 24, 2023 Motion • June 30, 2023 Motion • August 15, 2023 Motion • August 25, 2023 Motion • September 8, 2023 Motion • October 23, 2023 Motion • December 21, 2023 Motion • January 22, 2024 Motion

	<ul style="list-style-type: none"> • February 21, 2024 Motion • April 19, 2024 Motion • June 10, 2024 Motion • June 25, 2024 Motion • July 5, 2024 Motion • July 15, 2024 Motion • October 8, 2024 Motion • October 24, 2024 Motion • November 22, 2024 Motion • November 25, 2024 Motion • December 3, 2024 Motion • December 6, 2024 Motion • December 10, 2024 Motion
On Petition to the Supreme Court (2nd Time)	<ul style="list-style-type: none"> • March 12, 2025 Motion • April 1, 2025 Motion

In this appeal alone, Petitioner has requested more than twenty (20) extensions, which have also generally been granted. Despite the courts' repeated accommodations, Petitioner has again failed to comply with the court rules and the Court of Appeals' orders, resulting in dismissal of her second appeal.

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

Petitioner's Reply Brief was originally due on September 8, 2023. After an extension, the Petitioner filed her Reply Brief on October 10, 2023. Pursuant to Rule 210(a), SCACR, Petitioner

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

On March 22, 2024, Petitioner 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 Petitioner’s attention by letter dated April 5, 2024. (Respondent’s April 5, 2024 Letter).

On April 9, 2024, the Court sent a letter to Petitioner 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, Petitioner Gersten filed a document purporting to be the complete record on appeal. (April 19, 2024 Record on Appeal). The document she filed was not a complete record on appeal. Numerous documents included in Respondent's Designation of Matter were not actually included in this "Record on Appeal." Of the 46 documents listed on Respondent's Designation of Matter, Petitioner 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). Petitioner 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.

Petitioner 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 Petitioner's attention by letter dated April 23, 2024. (Respondent's April 23, 2024 Letter). More than a month later, Petitioner still had not served a corrected record on appeal.

On May 29, 2024, the Court of Appeals sent Petitioner 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, Petitioner's corrected record was due on June 10, 2024. On its new due date, Petitioner again moved for an extension to serve the record on appeal. (June 10, 2024 Mot. for Extension).

On June 11, 2024, Petitioner 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 was 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). Petitioner then sought and received two extensions before filing her Return to the Motion to Dismiss. After filing her Return on July 25, 2024, Petitioner 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 of Appeals, Petitioner 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 Petitioner failed to timely file a compliant record on appeal, despite numerous extensions. (September 24, 2024 Order).

Petitioner's Petition for Rehearing again attached an unauthorized document that she purported to be a corrected record on appeal. As explained in Respondent's Return to the Petition for Rehearing, this purported record on appeal was also deficient. It is now over a year from when Petitioner was originally required to serve the Record on Appeal, and Petitioner still has not served a compliant record on appeal.¹

¹ Rule 242 requires the Petitioner to file an appendix that includes a compliant record on appeal. *See* Rule 242, SCACR. Although the Court is now willing to compile its own appendix "obtained from the electronic records of the case before the Court of Appeals," this would still require the

STANDARD OF REVIEW

The Court “will grant certiorari to the Court of Appeals only where special reasons justify the exercise of that power.” *Haggins v. State*, 377 S.C. 135, 136, 659 S.E.2d 170 (2008) (citation omitted); *South Carolina Dep’t of Soc. Servs. v. Benjamin*, 430 S.C. 235, 236, 844 S.E.2d 373 (2020). Pursuant to Rule 242 of the South Carolina Appellate Court Rules, reasons for granting certiorari include “novel questions of law,” “[w]here there is a dissent in the decision of the Court of Appeals,” and “[w]here the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court,” “[w]here substantial constitutional issues are directly involved,” and “[w]here a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.” Rule 242(b), SCACR.

ARGUMENT

I. Petitioner’s Petition should be denied because the questions raised in her Petition are not in accordance with Rule 242 and not preserved for this Court’s review.

Rule 242 of the South Carolina Appellate Court Rules states: “Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.” Rule 242(d), SCACR. In her Petition, Petitioner raises three issues in four questions – none of which she raised in the Court of Appeals and in her Petition for Rehearing.

Petitioner’s first question presented states: “Is the South Carolina Court of Appeals (“COURT”) required by Title II of the Americans with Disabilities Act (“ADA”) to designate an ADA Coordinator and make their contact information available?” (Pet. for Writ of Certiorari, p.

Petitioner to have filed a compliant record on appeal with the Court of Appeals. *See* (August 25, 2021 Supreme Court Order Re: Reduced Number of Copies Required in Appellate Matters). At this time, Petitioner still has not filed a compliant record on appeal.

5). At no time during the appeal did Petitioner raise the issue of an ADA coordinator or argue that her appeal should not have been dismissed because she lacked contact with an ADA coordinator. Likewise, her Petition for Rehearing includes no argument concerning an ADA coordinator. *See* (Pet. for Rehearing). Therefore, this is not a proper question for inclusion in the Petition, and this issue is not preserved for review. *See Williams v. Jeffcoat*, 444 S.C. 224, 237, 906 S.E.2d 588, 595 (2024) (finding that an issue was “not preserved for appellate review” because the Court of Appeals “did not address the issue” and petitioner “did not petition for rehearing on the issue”); *Doe ex rel. Roe v. Orangeburg Cnty. Sch. Dist. No. 2*, 335 S.C. 556, 561 n.8, 518 S.E.2d 259, 261 n.8 (1999) (finding issue not raised in petition for rehearing to the court of appeals was not preserved for review before the Supreme Court); *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 516, 426 S.E.2d 304, 305 (1993) (holding Supreme Court would not address issue that Court of Appeals did not address and which was not raised in petition for rehearing).

Under her second and third questions, Petitioner argues that the Court of Appeals should not be permitted to issue remittitur before ruling on both her Petition for Rehearing and “Petition for Reinstatement.” (Pet. for Writ of Certiorari, p. 5). With respect to her Petition for Rehearing, the Court of Appeals ruled on it. Its February 10, 2025 Order states: “[T]he petition for rehearing is denied.” (February 10, 2025 Order). With respect to the “Petition for Reinstatement”, Rule 260 of the Appellate Court Rules permits a party to file a motion to reinstate a dismissed appeal. Rule 260(a), SCACR. However, that motion to reinstate must be “actually received by the court within fifteen (15) days of filing of the order of dismissal.” Rule 260(a), SCACR. On September 24, 2024, the Court of Appeals entered its Order dismissing the appeal. (September 24, 2024 Order). Petitioner did not file a motion to reinstate within 15 days of the filing of this Order. Thus, there was no timely motion to reinstate upon which the Court of Appeals could make a ruling.

Although Petitioner filed a Motion for Extension requesting an extension of time to file a petition for rehearing and a motion for reinstatement, the Court of Appeals granted the extension only as to the petition for rehearing. (October 8, 2024 Mot. for Extension); (October 9, 2024 Order (“The time for serving and filing the appellant’s petition for rehearing is hereby extended until October 24, 2024.”)). Petitioner did not challenge the Court of Appeals failure to grant her an extension to file a motion to reinstate. This issue was also not raised in her Petition for Rehearing. *See* (Pet. for Rehearing). Thus, any arguments related to a motion to reinstate are not preserved for appellate review.

Petitioner’s fourth question presented states: “Can a Title II or Title III of the ADA Reasonable Accommodation Request be used to reinstate an appeal?” (Pet. for Writ of Certiorari, p. 5). As explained above, Petitioner did not timely file a motion to reinstate the appeal or obtain an extension to file such a motion. *See* Rule 260(a), SCACR. She also did not challenge the Court of Appeals’ failure to grant her an extension to file a motion to reinstate or raise this issue in her Petition for Rehearing. Thus, whether Title II or III of the ADA can be used as a ground for reinstating an appeal is not preserved for review. Moreover, Petitioner never argued to the Court of Appeals or in her Petition for Rehearing that the Court of Appeals’ failure to grant a prior reasonable accommodation request entitled her to reinstatement of the appeal. Instead, she argued in her Petition for Rehearing that “[i]n other out-of-state courts that GERSTEN is litigating in, it’s the clerk of courts duty to provide the record” and that she attached a compliant record on appeal to her Petition for Rehearing that should be accepted. (Pet. for Rehearing, pp. 10-11). Therefore, this issue is also not preserved for review.

II. In the alternative, Petitioner’s Petition for Writ of Certiorari fails to set forth any “special reasons” justifying the Court’s review in this case.

The Court of Appeals' dismissal Order does not merit review because it is in full accord with the rules and rulings of this Court and does not involve a novel question of law. Additionally, the dismissal does not involve substantial constitutional issues or conflict with a decision of the United State Supreme Court. Under the standards set forth by this Court, the Court of Appeals' dismissal of Petitioner's appeal does not merit this Court's review.

Rule 260 of the South Carolina 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, which shall have the same force and effect as an order of the appellate court." Rule 260(a), SCACR. "[T]he South Carolina Appellate Court Rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State." *Heming v. Kaye*, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992). It is incumbent upon the parties "to provide material that complies with the Rules and facilitates appellate review." *See id.* An appellate court is "completely justified" in dismissing an appeal based on numerous violations of the Rules. *Id.*

Here, Petitioner was given over seven (7) months of extensions to file a compliant record on appeal. She was also given explicit guidance from the Court of Appeals and Respondent's counsel about the deficiencies that needed to be corrected. Despite all of these accommodations, Petitioner never filed a compliant record on appeal. As demonstrated by her own actions, Petitioner's physical limitations did not prevent her from filing a record on appeal. In fact, she filed five non-compliant "records on appeal." According to her Petition for Rehearing, she was able to collect the requested documents, place them in order, paginate them, and redact them. (Pet. for Rehearing, p. 10). According to her Petition for Rehearing, she is also physically able to simultaneously litigate other cases in other jurisdictions. (*Id.*); *see also* (August 18, 2022 Circuit

Court Hearing Transcript p. 7, lines 5-7; p. 29, line 25-p. 30, line 2). However, to this day, Petitioner still has not filed a complaint record on appeal.² “A pro se litigant who knowingly elects to represent [her]self assumes full responsibility for complying with substantive and procedural requirements of the law.” *State v. Burton*, 356 S.C. 259, 265 n.5, 589 S.E.2d 6, 9 n.5 (2003). Thus, the Court of Appeals was “completely justified” in dismissing the appeal.

CONCLUSION

For the above stated reasons, Petitioner’s Petition for Writ of Certiorari should be dismissed or denied. The Petition for Certiorari should be denied because the questions raised in the Petition are not in accordance with Rule 242(d) and not preserved for this Court’s review. Additionally, the Petition fails to set forth any “special reasons” justifying the Court’s review in this case. The Court of Appeals made numerous accommodations for the Petitioner. Despite all of those accommodations, Petitioner continually failed to comply with the Appellate Court Rules. Therefore, in accordance with Rule 260, the Court of Appeals properly dismissed the appeal.

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² As a result, this Return includes no citations to any record on appeal or appendix.