

RECEIVED

Aug 18 2025

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 (Consolidated)

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.

EMERGENCY

APPELLANT's TITLE II and TITLE III of the AMERICANS with
DISABILITIES ACT ("ADA") REASONABLE ACCOMMODATION to
ACCEPT as TIMELY FILED and GRANT
MOTION to RECALL REMITTITUR, REINSTATE APPEAL, and ASSIGN
ADA COORDIANATOR to ASSIST with RECORD RECONSTRUCTION
EXHIBIT "A" RECORD on APPEAL (898 Pages)

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

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

TO THE HONARABLE JUDGES OF THE SOUTH CAROLINA COURT OF APPEALS AND TO ALL CONCERNED:

NOW COMES, Appellant, Heidi Gersten (“GERSTEN”), proceeding as a qualified paralyzed disabled individual under Title II and Title III of the Americans with Disabilities Act (“ADA”), kindly and respectfully moves this State of South Carolina Court of Appeals (“COURT”) to recall the remittitur issued in this matter on August 15, 2025, and filed in the lower court today, August 18, 2025, pursuant to its inherent authority and Title II and Title III ADA, 42 U.S.C. § 12131, *et seq.*, and moves and seeks for an order(s) vacating the order of dismissal, reinstating the appeal, and granting GERSTEN a reasonable accommodation to cure the defect in the Record on Appeal.

(GERSTEN’s best effort is attached as Exhibit “A”)

This motion is based on the COURT’s mistake and inadvertence in failing to properly consider a reasonable accommodation for GERSTEN’s disability, which was the direct cause of the procedural default leading to dismissal.

This motion and ADA Title II and Title III reasonable accommodation request is timely filed on the same day the remittitur was filed in the lower court.

This COURT has the inherent jurisdiction to recall a remittitur to correct its own inadvertence and prevent a manifest injustice.

The remittitur was issued improperly and through clear court inadvertence because GERSTEN’s timely filed Motion for Reinstatement of November 8, 2024, remains pending and has not been ever adjudicated by

this COURT.

Furthermore, recalling the remittitur and reinstating this appeal is a necessary reasonable accommodation to remedy the court's prior failure to provide an effective accommodation for GERSTEN's disability, which resulted in the dismissal of her appeal and denied her fundamental right of access to the courts in violation of the ADA.

In support of this motion, GERSTEN states as follows:

STATEMENT OF THE CASE

This appeal was dismissed by this COURT on September 24, 2024, due to GERTEN's ongoing difficulties, stemming from her paralysis, in compiling and filing a Record on Appeal that complied with the South Carolina Appellate Court Rules (SCACR).

On November 8, 2024, Appellant timely filed a combined pleading entitled, **“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.”**

This single pleading contained two distinct requests for relief: (1) a Petition for Rehearing under Rule 221, SCACR; and (2) a Motion for Reinstatement under Rule 260, SCACR.

On February 10, 2025, this COURT issued an order stating, in its entirety: “After careful consideration of the petition for rehearing, 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. Accordingly, the petition for rehearing is denied.”

This said order, by its plain language, addressed only the petition for rehearing. This COURT did not rule on, address, or otherwise dispose of GERSTEN’s separate and distinct **Motion for Reinstatement**.

Subsequently, the South Carolina Supreme Court denied GESTEN’s petition for a writ of certiorari on August 13, 2025. This COURT then issued the remittitur on August 15, 2025, which was filed in the Chester County Court of Common Pleas on August 18, 2025. This motion is filed immediately upon notice of that filing.

ARGUMENT

I. The Court Retains Inherent Jurisdiction to Recall its Remittitur to Correct Its Own Mistake or Inadvertence and Prevent a Manifest Injustice.

While the issuance of a remittitur generally divests an appellate court of jurisdiction, South Carolina law recognizes a critical exception to this rule. The court retains the inherent authority to recall a remittitur to correct a mistake, error, or inadvertence on the part of the court or its officer. This is an extraordinary remedy, but one that is essential to ensuring justice. The Supreme Court of South Carolina has held that such a recall requires a “very

strong showing that the remittitur was recalled due to some mistake or inadvertence on the part of this court or its officer.” *State v. Barnes*, 413 S.C. 1, 6, 774 S.E.2d 454, 457 (2015).

In *Wise v. South Carolina Department of Corrections*, 372 S.C. 173, 175, 642 S.E.2d 551, 552 (2007), the Supreme Court affirmed that while it “loses jurisdiction over a case once the remittitur has been sent to the lower court,” it may nevertheless recall the remittitur “in cases of mistake, error or inadvertence.” Here, a mistake occurred when the Court failed to address and grant a necessary reasonable accommodation, leading to the unjust termination of Appellant’s appeal. The prompt filing of this motion underscores the urgency and importance of correcting this error.

An appellate court generally loses jurisdiction over a case once the remittitur has been issued and the matter is returned to the lower court. *Stogsdill v. S.C. Dep’t of Health & Human Servs.*, 415 S.C. 568, 784 S.E.2d 669 (2016). However, this rule is not absolute. South Carolina law has long recognized that an appellate court retains the inherent power to recall its remittitur in extraordinary circumstances, such as “to correct a mistake, relieve a party from the consequences of fraud, or to prevent a manifest injustice.” *Carpenter v. Lewis*, 65 S.C. 400, 43 S.E. 881 (1903).

The key exception applies where the remittitur was “sent down through a mistake or inadvertence of the court.” *Wise v. S.C. Dep’t of Corr.*, 372 S.C. 173, 642 S.E.2d 551 (2007). Unlike the situation in *Wise*, where the motion to

reinstate was untimely, here the motion for reinstatement was timely filed. The inadvertence is the Court's own—its failure to rule on that pending motion before issuing the remittitur. Because the remittitur was issued prematurely and by mistake, this COURT retains jurisdiction to correct its error and prevent the manifest injustice of terminating GERSTEN's appeal without ever having ruled on her request to reinstate it.

II. The Remittitur Was Issued Improperly and Through Court Inadvertence As Appellant's Motion for Reinstatement Remains Pending.

The dispositive issue before this COURT is the clear, objective fact that GERSTEN's Motion for Reinstatement, filed on November 8, 2024, has never been decided. A remittitur can only issue after an appeal has been finally determined. An appeal is not finally determined while a timely, non-frivolous motion affecting the judgment—such as a motion to reinstate an appeal under Rule 260, SCACR—remains pending.

GERSTEN's November 8, 2024 filing explicitly sought relief under both Rule 221 (Rehearing) and Rule 260 (Reinstatement). These are two different forms of relief with different standards. While this COURT fully considered and denied the petition for rehearing, its February 10, 2025 order is silent as to the motion for reinstatement. This omission is a clerical mistake and an instance of judicial inadvertence.

Because the motion for reinstatement remains pending, the September 24, 2024 dismissal never became the final, unalterable judgment of this COURT.

The issuance of the remittitur was therefore premature and must be recalled. This COURT cannot properly return jurisdiction to the lower court while a motion seeking to restore jurisdiction in this COURT remains unresolved.

III. Recalling the Remittitur is Necessary to Remedy Violations of Appellant’s Federally Protected Rights Under Title II of the Americans with Disabilities Act (ADA).

The procedural history of this case is replete with GERSTEN’s requests for reasonable accommodation based on her paralysis. The dismissal on appeal was a direct consequence of her disability, which significantly impairs her ability to perform the complex physical and organizational tasks required to compile and format a multi-volume Record on Appeal in compliance with this COURT’s exacting rules.

Title II of the ADA is a federal mandate that prohibits public entities, including state courts, from discriminating against qualified individuals with disabilities. This prohibition requires courts to provide reasonable accommodations to ensure individuals with disabilities have meaningful access to judicial proceedings. *See Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (holding that Title II validly abrogates state sovereign immunity as it pertains to the fundamental right of access to the courts).

While this COURT granted GERSTEN numerous extensions of time, these accommodations proved ineffective. The ADA requires more than rote gestures; it requires an “interactive process” to determine an *effective* accommodation. *See Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114 (9th Cir.

2000). This COURT never engaged GERSTEN in such a process to understand *why* the extensions were insufficient and what alternative accommodation might succeed.

Instead, this COURT issued orders stating “No further extensions will be granted absent extraordinary circumstances,” which functions as a categorical denial prohibited by the ADA’s mandate for individualized assessment. *See Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005).

Dismissing GERSTEN’s appeal under these circumstances amounts to a denial of her fundamental right to court access because of her disability. Recalling the remittitur is now itself a necessary component of a reasonable accommodation to remedy this violation.

IV. This Motion is Timely Filed.

GERSTEN is filing this emergency motion on August 19, 2025, the very day the Remittitur was docketed by the lower court. This shows the utmost diligence and highlights the urgent need for this COURT’s intervention before the lower court takes any substantive action that might further complicate the proceedings. No party is prejudiced by a recall made this promptly to correct a manifest error.

STATEMENT OF FACTS

1. GERSTEN is a “qualified individual with a disability” as defined by the ADA due to paralysis, which substantially limits one or more major

- life activities, including the ability to perform manual tasks necessary to compile and perfect a complex legal record.
2. On September 24, 2024 this COURT dismissed the instant appeal for GESTEN's failure to provide a complete Record on Appeal as required by the South Carolina Appellate Court Rules.
 3. GERSTEN's failure to provide a complete Record on Appeal was not the result of negligence or willful disregard for this COURT's Rules, but was a direct consequence of the physical limitations imposed by GESTEN's paralysis.
 4. Following the dismissal, GERSTEN filed a timely request for a reasonable accommodation under Title II of the ADA. The request sought an extension of time to file both a Petition for Rehearing and a Motion to Reinstate the appeal, explaining that the disability was the cause of the procedural defect.

II. The Court's Failure to Address the ADA Accommodation for Reinstatement Constitutes a Mistake or Inadvertence Warranting Recall.

The "mistake" or "inadvertence" warranting recall in this case is this COURT's failure to fulfill its obligations under federal disability law. GERSTEN's initial procedural default was caused by a disability. GERSTEN explicitly notified this COURT of this fact in the ADA request for an accommodation. This COURT, however, issued an order that implicitly denied the request for an accommodation as it related to

reinstatement without any analysis or consideration of its duties under the ADA.

By granting an extension only for the Petition for Rehearing—a petition with a very high bar for success—while denying the more practical path to curing the defect via a Motion to Reinstate, this COURT inadvertently failed to provide a meaningful accommodation. This failure to engage with the substance of the ADA request constitutes a mistake of law and an inadvertent oversight of this COURT’s duties under a superseding federal statute. This is precisely the type of judicial error that the power to recall a remittitur is designed to correct.

III. The Dismissal and Refusal to Reinstate Violate Title II of the Americans with Disabilities Act.

Title II of the ADA mandates that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. The South Carolina court system is a “public entity” subject to Title II’s requirements.

A public entity must make reasonable modifications to its “rules, policies, or practices... when the modifications are necessary to avoid discrimination on the basis of disability.” 28 C.F.R. § 35.130(b)(7). Here, the rigid application of this COURT’s procedural rules regarding

the timely filing of a complete Record on Appeal, without modification to account for GERSTEN's disability, has resulted in the denial of a fundamental service: the right to appellate review. Dismissing an appeal and refusing to grant a path to reinstatement, when the underlying default was caused by a known disability, is a form of discrimination. The ADA required this Court to modify its standard dismissal procedure to provide a reasonable accommodation, which it failed to do.

IV. Reinstatement and an Accommodation to Reconstruct the Record on Appeal is the Appropriate Remedy.

To remedy this error and comply with the ADA, Appellant requests that this COURT reinstate the appeal and grant a new reasonable accommodation. Appellant has demonstrated good faith by working diligently, despite physical limitations, to cure the procedural defect.

Request for Reasonable Accommodation: Pursuant to Title II of the ADA, GERSTEN requests that this COURT grant an accommodation to perfect the Record on Appeal. Specifically, GERSTEN requests that this COURT either (1) provide assistance and guidance from the Clerk's office to help finalize the Record on Appeal based on the draft provided, or (2) grant GERSTEN an additional sixty (60) days to independently finalize and file the corrected Record on Appeal. Attached to this Motion as **Exhibit A** is "Appellant's Best Effort Reconstructed Record," which GERSTEN believes substantially

corrects the deficiencies that led to the dismissal.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, the remittitur in this case was issued through clear court inadvertence while a substantive motion for reinstatement remained—and still remains—un-adjudicated. This mistake compounded violations of GERSTEN’s rights under the ADA and has resulted in a manifest injustice.

WHEREFORE, GERSTEN kindly and respectfully prays for an order(s) from this COURT that:

1. **RECALLS** the Remittitur issued on August 15, 2025;
2. **VACATES** this COURT’s order of Dismissal dated September 24, 2024;
3. **REINSTATES** GERSTEN’s appeal;
4. **GRANTS** GERSTEN an effective reasonable accommodation under Title II of the ADA by appointing or assigning an ADA coordinator or a neutral third-party, such as a paralegal or pro bono attorney, or a clerk, for the sole and limited purpose of assisting GERSTEN in compiling, formatting, serving, and filing a compliant Record on Appeal, and setting a firm deadline for the completion of that task only after such assistance is in place; unless the attached Exhibit “A” is deemed perfected and complete.; and
5. For such other and further relief as this Court deems just and proper.

Respectfully submitted this 18th day of August 2025,

/S/Heidi Gersten
Heidi Gersten, Paralyzed Didabled Appellant,
All Rights Reserved, Without Prejudice
1438 W. Lantana Rd. #330
Lantana, FL 33462
(323) 245-6142
hanginhangout@gmail.com

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)

Aug 18 2025

PROOF OR CERTIFICATE OF SERVICE

I hereby certify that service of a true and accurate copy of the “EMERGENCY APPELLANT’s TITLE II and TITLE III of the AMERICANS with DISABILITIES ACT (“ADA”) REASONABLE ACCOMMODATION to ACCEPT as TIMELY FILED and GRANT MOTION to RECALL REMITTITUR, REINSTATE APPEAL, and ASSIGN ADA COORDIANTOR to ASSIST with RECORD RECONSTRUCTION EXHIBT “A” RECORD on APPEAL (898 Pages)”, PROOF or CERTIFICATE of SERVICE, and Cover Letters in the above-captioned Appellate Case Nos. 2022-001312 and 2022-001390 [was made upon all parties and counsel of record by email per Title II and Title III of the Americans with Disabilities Act Reasonable Accommodation Request, as well as court order on August 18, 2025, at:

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@scourts.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 18th day of August 2025,

_____/S/Heidi Gersten_____
Heidi Gersten, Paralyzed Didabled Appellant,
All Rights Reserved, Without Prejudice
1438 W. Lantana Rd. #330
Lantana, FL 33462
(323) 245-6142
hanginhangout@gmail.com

Exhibit A

RECORD on APPEAL

GERSTEN's BEST EFFORT with PARALYSIS

August 18, 2025
1438 W. Lantana Rd. #330
Lantana, Florida 33462
(323) 245-6142
hanginhangout@gmail.com

The Honorable Jenny Abbott Kitchings
Clerk of Court,
The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
(803) 734-1890
ctappfilings@sccourts.org

Re: Appellate Case Nos. 2022-001312 and 2022-001390

TO ALL CONCERNED: Good day to you!

Please accept the attached EMERGENCY APPELLANT's TITLE II and TITLE III of the AMERICANS with DISABILITIES ACT ("ADA") REASONABLE ACCOMMODATION to ACCEPT as TIMELY FILED and GRANT MOTION to RECALL REMITTITUR, REINSTATE APPEAL, and ASSIGN ADA COORDIANATOR to ASSIST with RECORD RECONSTRUCTION, EXHIBT "A" RECORD on APPEAL (898 Pages)

and Proof or Certificate of Service for filing and email me back a time-stamped copy at the above email address.

There is no fee for ADA Title II or Title III reasonable accommodation requests.

Let me know if you have any questions. Emailing preferred.

Kind regards,

____/S/Heidi Gersten_____

hg/enc./ EMERGENCY APPELLANT's TITLE II and TITLE III of the AMERICANS with DISABILITIES ACT ("ADA") REASONABLE ACCOMMODATION to ACCEPT as TIMELY FILED and GRANT MOTION to RECALL REMITTITUR, REINSTATE APPEAL, and ASSIGN ADA COORDIANATOR to ASSIST with RECORD RECONSTRUCTION EXHIBT "A" RECORD on APPEAL (898 Pages), Proof or Certificate of Service, Cover Letter

Total Amount of Pages including this cover letter: 915 Pages