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Aug 28 2025

SC Court of Appeals

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 AMENDED MOTION TO RECALL
REMITTITUR**

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SUMMARY

Due to Appellant's delay and lack of compliance with court rules and orders, this case has been ongoing for more than seven (7) 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 then ultimately dismissed this second appeal after Appellant (again) repeatedly failed to meet filing deadlines for nearly two years. (September 24, 2024 Order). On August 13, 2025, the Supreme Court denied Appellant's Petition for Writ of Certiorari. On August 15, 2025, the Court remitted this matter to the Circuit Court. Appellant has now filed an Amended Motion to Recall Remittitur.

"When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. The only exception to this rule is when the remittitur is sent down by mistake, error or inadvertence of the Court." *Wise v. S.C. Dep't of Corr.*, 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007) (citations omitted). Here, the Court did not send the remittitur down by mistake, error or inadvertence. Consequently, the Court no longer has jurisdiction over the matter, and the Motion should be dismissed.

PROCEDURAL HISTORY

On March 16, 2018, Appellant filed this lawsuit. It is now more than seven (7) 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 ten (10) years ago.

I. Appellant's History of Dilatory Conduct

This is Appellant's second appeal of this case. Appellant's failure to comply with this Court's orders during her first appeal resulted in dismissal of that 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 five years ago. Appellant 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, Appellant 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. Appellant's history of dilatory conduct is more fully set forth in Respondent's Initial Brief previously filed with this Court.

Appellant sought forty-six (46) extensions/continuances, which have generally been granted:

Stage Of Case	Date of Extension Request
During Original Cases	• August 22, 2018 Motion
During First Appeal	• December 27, 2018 Motion • February 8, 2019 Motion • February 19, 2019 Motion • March 1, 2019 Motion • March 12, 2019 Motion • March 21, 2019 Motion

	• 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)	• September 4, 2019 Motion • November 7, 2019 Motion
After Remittitur	• January 13, 2021 Motion • July 28, 2022 Request
During Second Appeal	• 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

	• 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)	• March 12, 2025 Motion • April 1, 2025 Motion • June 12, 2025 Motion • August 1, 2025 Motion

In this appeal alone, Appellant has requested more than twenty-five (25) extensions, which have also generally been granted. Despite the courts' repeated accommodations, Appellant failed to comply with the court rules and this Court's orders, resulting in dismissal of 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), SCACR, 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. 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. (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. (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. (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.*). Thus, the Court granted repeated requests for accommodations.

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 she filed was not a complete record on appeal. Appellant Gersten did not request any accommodations from the Court, other than accepting her late filing as timely filed.

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). Appellant 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. (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 was only 252 pages long. (*Id.*). Again, Appellant did not request any accommodations, other than accepting her late filing as timely filed.

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 filed a Petition for Rehearing and again attached an unauthorized document purporting 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.

On August 13, 2025, the Supreme Court denied Appellant's Petition for Writ of Certiorari. On August 15, 2025, the Court remitted this matter to the Circuit Court. On August 18, 2025, Appellant filed a Motion to Recall Remittitur. On August 19, 2025, Appellant filed an Amended Motion to Recall Remittitur.

ARGUMENT

Appellant's Motion to Recall should be dismissed because the Court did not send the remittitur down by mistake, error or inadvertence. Additionally, even if this action was still properly before this Court, Appellant has not asserted any grounds warranting reversal of this Court's dismissal of the appeal.

I. Appellant's asserted grounds for recalling the remittitur are not proper grounds for recalling a remittitur.

Appellant's Motion does not assert that the Court sent down the remittitur by mistake, error or inadvertence. Rather, she asserts that the remittitur itself was improper because of the Court's "mistake and inadvertence in failing to properly consider a reasonable accommodation for GERSTEN's disability." (Am. Mot. to Recall, p. 2 ("This motion is based on the COURT's mistake and inadvertence in failing to properly consider a reasonable accommodation for GERSTEN's disability....")). This is not a proper basis for recalling the remittitur. *See Wise v. S.C. Dep't of Corr.*, 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007) ("When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter. The only exception to this rule is when the remittitur is sent down by mistake, error or inadvertence of the Court.") (citations omitted); *State v. Keels*, 39 S.C. 553, 17 S.E. 802, 802-03 (1893) ("In order to justify this court in exercising the unusual power of recalling the remittitur after it has been sent down, a very strong showing would be required that the remittitur was sent down through some mistake or inadvertence on the part of this court or its officer, and there is no pretense of any such showing in

this case. It is not enough to show that the default of the appellant in perfecting his appeal was due to some excusable neglect, for the proper time to make such a showing would be when the motion to dismiss the appeal was made, or at least before the remittitur was sent down.”).

The Court did not inadvertently issue the remittitur or issue it by error or mistake. On September 24, 2024, the Court issued an Order that stated:

Appellant has received numerous extensions and opportunities to file a record on appeal that complies with the South Carolina Appellate Court Rules. On May 29, 2024, this court directed Appellant to serve and file a compliant record within ten days or this appeal would be dismissed. Although Appellant has since served and filed two additional records on appeal, both were deficient. The record was originally due nearly a year ago, and Appellant has still failed to serve and file a complete record that conforms to the Rules. Accordingly, this appeal is dismissed. ***The remittitur will be sent as required by Rule 221(b), SCACR.***

(September 24, 2024 Order) (emphasis added). The Appellant delayed the issuance of the remittitur by filing a Petition for Rehearing and Petition for Writ of Certiorari. *See* Rule 221(b), SCACR. However, the Court sent the remittitur after the Supreme Court denied Appellant’s Petition for Writ of Certiorari. Thus, the Court did not issue the remittitur by mistake, error or inadvertence. The Court had planned to issue the remittitur since at least September of last year.

II. Even if this action was still properly before this Court, Appellant has not asserted any grounds warranting reversal of this Court’s dismissal of the appeal.

A. Motion for Reinstatement

The Appellant argues that “[t]he 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.” (Am. Mot. to Recall, pp. 2-3). However, Appellant’s Motion for Reinstatement was untimely and her asserted grounds did not meet the “good cause” standard of Rule 260, SCACR.

(i) Appellant's Motion for Reinstatement was untimely.

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, this Court entered its Order dismissing the appeal. (September 24, 2024 Order). Appellant did not file a motion to reinstate within 15 days of the filing of this Order – i.e., by October 9, 2024. Thus, there was no timely motion to reinstate upon which this Court could make a ruling.

Although Appellant filed a Motion for Extension requesting an extension of time to file a petition for rehearing and a motion for reinstatement, the Court 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.”)). Appellant did not challenge the Court’s failure to grant her an extension to file a motion to reinstate. This issue was also not raised in her Petition for Rehearing or in her Petition for Writ of Certiorari. *See* (Pet. for Rehearing); (Pet. for Writ of Cert.).

(ii) Appellant's Motion for Reinstatement did not meet the Rule 260 “good cause” standard for reinstatement.

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.” *Henning 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, Appellant was given over seven (7) months of extensions to file a compliant record on appeal. She was also given explicit guidance from this Court and Respondent’s counsel about the deficiencies that needed to be corrected. Despite all of these accommodations, Appellant never filed a compliant record on appeal. As demonstrated by her own actions, Appellant’s physical limitations did not prevent her from filing a record on appeal.¹ In fact, she filed six (6) non-compliant “records on appeal.” According to her Motion for Reinstatement, she was able to collect the requested documents, place them in order, paginate them, and redact them. (Mot. for Reinstatement, p. 10). According to her Motion for Reinstatement, 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, Petitioner did not file a compliant record on appeal before this case was remitted to the Circuit Court.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. *See Henning*, 307 S.C. at 437, 415 S.E.2d at 794.

Furthermore, Appellant filed a single document on November 8, 2024 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

¹ Appellant has never asserted that any mental limitations prevent her from understanding or complying with the Court’s rules.

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

SCACR PETITION FOR REHEARING And MOTION FOR REINSTATEMENT VACATING DISMISSAL And APPENDIX Attached Including RECORD ON APPEAL.” In such document, she did not distinguish between the grounds allegedly supporting her petition for rehearing and the grounds allegedly supporting her motion for reinstatement. Thus, when ruling on her Petition for Rehearing, the Court considered the grounds set forth in this document. Consequently, Appellant’s motion for reinstatement argument should not result in the reversal of the Court’s dismissal – even if the Court still had jurisdiction over this appeal.

B. Reasonable Accommodation

Appellant never argued to the Court or argued in her November 8, 2024 Petition for Rehearing/Motion for Reinstatement that the Court’s failure to grant a prior reasonable accommodation request entitled her to reinstatement of the appeal. Instead, she argued in her November 8, 2024 filing 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). Consequently, Appellant’s arguments after remittitur that the multiple extensions she received were not enough and she was entitled to additional accommodations beyond time extensions are unavailing. She never raised these arguments to this Court before the remittitur. Additionally, Appellant’s own Motion to Recall undermines her argument that some other accommodation beyond time extensions was required. In her Motion, she requested several accommodations in the alternative, one of which is “an additional sixty (60) days to independently finalize and file the corrected Record on Appeal.” (Am. Mot. to Recall, p. 11). Thus, it is still Appellant’s belief that all she needs is more time to correct the deficiencies that resulted in the dismissal of her appeal.

Moreover, if Appellant's only disability is physical, then the additional time she already received should have permitted her to comply with the court rules. *See* (Am. Mot. to Recall, p. 3 (alleging her failure to comply with court rules was the result of "physical limitations")). Based on the numerous "records on appeal" Appellant filed, it appears that her failure to comply with the Court rules was not the result of physical limitations but the result of a failure to comply with the requirements of the rules. This could have been cured by Appellant hiring an attorney to perfect her appeal. A court-appointed attorney in a civil case is not a reasonable accommodation, particularly for someone who has not shown that her disability prevents her from understanding the legal process or communicating with the court. *See* (Am. Mot. for Recall, p. 12 (requesting that the Court assign "a paralegal or pro bono attorney, or a clerk" to assist with "compiling, formatting, serving, and filing a compliant Record on Appeal")); *see also Young v. Austin*, No. CV RDB-21-880, 2021 WL 4820535, at *4 (D. Md. Oct. 14, 2021); *O'Grady v. Zurich Holding Co. of Am.*, 12 F. App'x 96, 98 (4th Cir. 2001). Here, Appellant has not shown that her physical disability prevents her from understanding the appellate court rules. "A pro se litigant who knowingly elects to represent [her]self assumes full responsibility for complying with substantive and procedural requirements of the law." *Burton*, 356 S.C. at 265 n.5, 589 S.E.2d at 9 n.5; *see also Cohen v. Cohen*, 438 S.C. 9, 19, 881 S.E.2d 650, 655 (Ct. App. 2022) ("Pro se litigants have a duty to remain up-to-date on the progress of their case and comply with court orders."); *Hill v. Dotts*, 345 S.C. 304, 310, 547 S.E.2d 894, 897 (Ct. App. 2001) ("Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney."). Consequently, Appellant's reasonable accommodation argument should not result in the reversal of the Court's dismissal – even if the Court still had jurisdiction over this appeal.

CONCLUSION

For the above-stated reasons, Respondent respectfully requests that the Court deny Appellant's Motion to Recall the Remittitur.

Respectfully submitted,

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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 to Recall Remittitur by depositing a copy of it in the United States Mail, postage prepaid to Heidi Gersten, on August 28, 2025, and by email only to opposing counsel on the same date.

s/Wesley B. Sawyer

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