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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.

APPELLANT'S REPLY to
RESPONDENT'S RETURN to
APPELLANT'S AMENDED EMERGENCY MOTION to
RECALL REMITTITUR

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TO THE HONORABLE 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 files with this State of South Carolina Court of Appeals (“COURT”) this Reply to “Respondent’s Return to Appellant’s Amended Motion to Recall Remittitur” (“RETURN”), filed on August 28, 2025.

Respondent’s RETURN fundamentally misapprehends the jurisdictional basis for the motion and attempts to obscure this COURT’s own inadvertence by constructing a false narrative of “dilatory conduct.” Respondent ignores the dispositive fact that this COURT never adjudicated GERSTEN’s timely filed Motion for Reinstatement of November 8, 2024. This judicial oversight—not the merits of the underlying dismissal—is the mistake that vests this COURT with the inherent authority and solemn duty to recall its remittitur and prevent a manifest injustice.

ARGUMENT

I. This Court Retains Jurisdiction Because the Remittitur Was Issued Through the Court’s Own Mistake and Inadvertence.

Respondent erroneously argues that this COURT lacks jurisdiction, claiming the remittitur was not sent by “mistake, error or inadvertence.” (RETURN, p. 1). This argument misses the point entirely. The error was not a mere clerical slip in mailing the remittitur; the error was this COURT’s

preceding failure to adjudicate a pending, substantive motion. South Carolina law is clear: an appellate court retains the inherent authority to recall a remittitur to correct a “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) (emphasis added).

An appeal is not finally determined, and a remittitur cannot be “properly sent,” while a timely motion affecting the judgment remains pending and unadjudicated. Here, GERSTEN’s November 8, 2024, filing contained a distinct Motion for Reinstatement under Rule 260, SCACR. This COURT’s February 10, 2025 order addressed only the Petition for Rehearing, leaving the Motion for Reinstatement in limbo. Issuing a remittitur while that motion remained unresolved was, by definition, an act of judicial inadvertence.

Respondent’s reliance on *Wise v. S.C. Dep’t of Corr.*, 372 S.C. 173, 642 S.E.2d 551 (2007), is misplaced and serves only to highlight the strength of GERSTEN’s position. In *Wise*, the court found the remittitur was “correctly sent” because the appellant had failed to *properly file* a timely petition for reinstatement. *Id.* at 174, 642 S.E.2d at 551. Here, the opposite is true. GERSTEN *did* file a timely Motion for Reinstatement. The inadvertence is this COURT’s own—its failure to rule on that pending motion. Because the remittitur was issued prematurely, this COURT retains jurisdiction to correct its own error and prevent the manifest injustice of terminating GERSTEN’s appeal without ever considering her request to reinstate it.

II. The Motion for Reinstatement Was Timely Filed and Must Be Construed Liberally.

Respondent's assertion that the Motion for Reinstatement was untimely is a hyper-technical argument that ignores the reality of the filing and the well-established practice of construing the pleadings of *pro se* litigants liberally, a principle that applies with even greater force to a litigant with a known disability.

On November 8, 2024, GERSTEN filed a single document conspicuously titled to include requests for relief under both Rule 221 (Rehearing) and Rule 260 (Reinstatement). The pleading was a combined motion. Respondent's argument that the COURT's prior order extending the deadline only for the "petition for rehearing" somehow nullified the reinstatement portion of the subsequent filing is illogical. That order could not prospectively invalidate a request for relief that was explicitly and timely made in the actual filing. The COURT's February 10, 2025 order, which denied the rehearing petition but was silent on reinstatement, constitutes an oversight. It did not, and legally could not, operate as a denial of a motion it never mentioned. As the Motion for Reinstatement was timely filed and has never been ruled upon, it remains pending.

III. Respondent's "Dilatory Conduct" Narrative Is a Disingenuous Attempt to Punish Appellant for Her Disability and Obscure the Court's Failure to Provide an *Effective Accommodation*.

Respondent dedicates a significant portion of its RETURN to cataloging every extension GERSTEN has requested over seven years, framing this

history as “dilatory conduct.” This is a gross and prejudicial mischaracterization. This history is not evidence of delay for delay’s sake; it is a clear and painful record of a paralyzed individual’s ongoing struggle to comply with complex procedural rules without the *effective* assistance the Americans with Disabilities Act (ADA) requires.

The fact that GERSTEN required numerous extensions is direct evidence that the accommodation provided—mere extensions of time—was ineffective. The ADA requires more than rote gestures; it demands a flexible, “interactive process” to determine an accommodation that actually works. *See Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1114 (9th Cir. 2000). This COURT never engaged in such a process. It granted extensions and then, after warning that no more would be granted “absent extraordinary circumstances,” dismissed the appeal. This is the very definition of providing a series of failed accommodations and then penalizing the disabled individual when those accommodations prove insufficient. The dismissal itself is *prima facie* evidence that GERSTEN was denied a reasonable and effective accommodation in violation of federal law. *See Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (holding Title II ensures meaningful access to the courts).

IV. An Effective Accommodation Is a Federally Mandated Right, Not a Matter of Discretion, and Is the Only Just Remedy.

Respondent wrongly suggests that GERSTEN is now improperly requesting new forms of accommodation. This is false. The request for assistance from an ADA coordinator or other neutral party is the proposed

remedy for the COURT's past failure to accommodate. It is what should have been considered as part of an interactive process long ago.

Furthermore, Respondent's argument that GERSTEN's alternative request for "an additional sixty (60) days" undermines her need for assistance is nonsensical. (Return, p. 11). GERSTEN was providing the COURT with a range of possible solutions in a good-faith effort to cure the defect and advance her appeal. This flexibility should be commended, not used as a weapon against her.

Finally, Respondent's reliance on the standard for *pro se* litigants from cases like *State v. Burton*, 356 S.C. 259, 589 S.E.2d 6 (2003), is inapplicable here. The ADA is a superseding federal statute that affirmatively requires a public entity like this COURT to modify its standard rules and procedures when necessary to provide meaningful access to a person with a disability. 28 C.F.R. § 35.130(b)(7). Holding a paralyzed *pro se* litigant to the exact same procedural standard as an able-bodied attorney, when her disability is the direct cause of the procedural default, is precisely the form of discrimination Title II was enacted to prevent. Forcing her to hire an attorney is not an accommodation; it is an abdication of the COURT's own duty under federal law.

CONCLUSION

Respondent's RETURN is an attempt to deflect from the core issue: this COURT's own inadvertence in issuing a remittitur while GERSTEN's

timely Motion for Reinstatement remained un-adjudicated. This mistake compounded the COURT's prior failure to provide an effective accommodation for GERSTEN's paralysis, resulting in the unjust dismissal of her appeal and denying her fundamental right of access to the courts in violation of the ADA.

WHEREFORE, GERSTEN respectfully prays this Honorable COURT
REJECT

Respondent's arguments, GRANT her motion, and issue an order 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; and
4. **GRANTS** GERSTEN an effective reasonable accommodation under Title II of the ADA to ensure she can perfect her Record on Appeal and have her case heard on the merits.

Respectfully submitted this 5th day of September 2025,

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PROOF OR CERTIFICATE OF SERVICE

I hereby certify that service of a true and accurate copy of the “APPELLANT’S REPLY to RESPONDENT’S RETURN to APPELLANT’S AMENDED EMERGENCY MOTION to RECALL REMITTITUR”, PROOF or CERTIFICATE of SERVICE, and Cover Letter 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 September 5, 2025, at:

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Respectfully submitted this 5th day of September 2025,

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The Honorable Jenny Abbott Kitchings
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Re: Appellate Case Nos. 2022-001312 and 2022-001390

TO ALL CONCERNED:

Good day to you!

Please accept the attached APPELLANT'S REPLY to RESPONDENT'S RETURN to APPELLANT'S AMENDED EMERGENCY MOTION to RECALL REMITTITUR, and Proof or Certificate of Service for filing and email me back a time-stamped copy at the above email address.

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

Kind regards,

____/S/Heidi Gersten_____

hg/enc./APPELLANT'S REPLY to RESPONDENT'S RETURN to APPELLANT'S AMENDED EMERGENCY MOTION to RECALL REMITTITUR, Proof or Certificate of Service, Cover Letter

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