

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM CHESTER COUNTY S.C. SUPREME COURT
Court of Common Pleas

Honorable Brian Gibbons, Circuit Court Judge
Honorable John C. Hayes, Circuit Court Judge

C.A. No: 2018-002115 (Appellate Court of Appeals)
2019-001484 (Supreme Court)

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard.....Plaintiffs,

Of whom Heidi Gersten, Ivanka Ayoub are Petitioners,

v.

Kevin Carter, Richard Davis, Joseph Tirbovich, Nationwide Mutual Insurance Co.,
Interinsurance Exchange of the Automobile Club, Trustgard, John Ammendola,
Blackwell, SC Department of Public Safety, Unknown John Does,.....Respondents,

AMENDED PETITION FOR A WRIT OF CERTIORARI WITH LEAVE OF COURT

or

REPLY WITH LEAVE TO AMEND

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November 11, 2019

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INDEX

INDEX.....i
CERTIFICATE OF COUNSEL.....1
QUESTIONS PRESENTED.....2
INTRODUCTION.....3
STATEMENT OF THE CASE AND FACTS.....4
ARGUMENT.....6
1. THE COURT OF APPEALS INCORRECTLY DISMISSED THE APPEAL
2. THE COURT FAILED TO DISCOVER THAT MATERIAL FACT OR PRINCIPLE OF
LAW HAD BEEN EITHER OVERLOOKED OR DISREGARDED
3. THE COURT ERRED IN FINDING APPELLANTS FAILED TO COMPLY WITH THE
COURT’S ORDER OF MAY 2, 2019
4. THE COURT FAILED TO RECOGNIZE THE ORDER WAS UNLAWFUL, VOID
AND/OR VOIDABLE
5. THE COURT FAILED TO ACKNOWLEDGE TIMELY RETURNS MADE BY THE
APPELLANTS
6. THE COURT FAILED TO FIND THE INFORMATION IT REQUESTED IN
DOCUMENTS SUBMITTED BY THE APPELLANTS
7. THE COURT AFFIRMED THAT ‘SHALL’ IS PERMISSIVE
8. THE COURT FAILED TO COMPLY WITH TITLE II OF THE AMERICAN
DISABILITIES ACT
9. THE COURT FAILED TO APPLY THE DOCTRINE OF EQUITABLE TOLLING
10. THE COURT ERRED IN NOT RULING ON MOTIONS OR PERMITTING
APPELLANTS TO FILE BRIEFS
11. DO THE ALTERNATE DISPUTE RESOLUTION (‘ADR’) RULES APPLY TO S.C.
CODE ANN. §§38-77-710 TO 770 (1989)?
12. IS ARBITRATION AN ADR?
13. IS THE ORDER OF APRIL 26, 2019 BY JUDGE GIBBONS VOID AND/OR -
VOIDABLE?
14. IS A JUDGE PERMITTED TO PRECLUDE A PARTY FROM INITIATING AN
ACTION PURSUANT TO S.C. CODE ANN. §§38-77-710 TO 770 (1989)?
TABLE OF AUTHORITIES.....
CONCLUSION.....

CERTIFICATE OF PETITIONERS COUNSEL

The Petitioners, Heidi Gersten and Ivanka Ayoub, certify that a petition for rehearing was made on May 29, 2019 and finally denied by the Court of Appeals on July 30, 2019.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in dismissing this appeal is stating that the Court was unable to discover that any material fact or principle of law had been either overlooked or disregarded, and hence, found no basis for granting a rehearing or reinstating the appeal?
2. Did the Court of Appeals err in dismissing this appeal is stating that the Court was unable to discover that any material fact or principle of law had been either overlooked or disregarded, and hence, found no basis for granting a rehearing or reinstating the appeal when in truth and fact there were?
3. Did the Court of Appeals err in finding that the Appellants failed to comply with the Court's order dated May 2, 2019?
4. Did the Court of Appeals err in finding that the Appellants failed to comply with the Court's order dated May 2, 2019 when the order was received by the Appellants after the deadline to comply with the order?
5. Did the Court of Appeals err in finding that the Appellants failed to comply with the Court's order dated May 2, 2019 when there was a timely return made to Interinsurance Exchange of the Automobile Club's motion to dismiss left to decide?
6. Did the Court of Appeals err in finding that the Appellants failed to comply with the Court's order dated May 2, 2019 when in truth and fact the information requested had been previously presented by the Appellants and therefore the order was complied with?
7. Did the Court of Appeals err in finding that the word 'shall' is permissive?
8. Did the Court of Appeals err in not complying with Title II of the American Disabilities Act?
9. Did the Court of Appeals err in not applying the doctrine of Equitable Tolling to the Appellate Gersten's extreme hardship due to her illness of pressure wounds, a secondary complication from the paralysis she sustains as a result of the collision in controversy?
10. Did the Court of Appeals err in not permitting the Appellants to formulate their brief?
11. Do the Alternate Dispute Resolution ('ADR') rules apply to S.C. Code Ann. §38-77-710 to 770 (1989)?
12. Is arbitration an ADR?
13. Is the order of April 26, 2019 by Judge Gibbons void and/or voidable?
14. Is a judge permitted to preclude a party from initiating an action pursuant to S.C. Code Ann. §38-77-710 to -770?

INTRODUCTION

This Petition arises from a dismissal of the Court of Appeals. (App'x at 3-4). It presents a novel question as to the ability of a judge to consolidate two matters (cases)(a state legislative non-binding arbitration regarding property damage due to an automobile collision and a civil action) comprised of different plaintiffs and different defendants and only the arbitration matter or case having perfected service at the time of the consolidation ruling being challenged, among other things, before the Court of Appeals and the civil action had not perfected service at the time of the consolidation order, creating a void and/or voidable order according to the law.

In addition, the Court of Appeals mistakenly dismissed the appeal for a variety of reasons, misanalysing the standard of review in conflict with the previous opinions of this Court, conflating an action at law with a question of law. This error will give rise to confusion in any case seeking a declaratory judgment and raising questions of statutory construction. These issues implicate the express terms of Rule 242, SCACR, and warrant a grant of discretionary review by this Court.

This argument is further supported by **S.C. Code Ann. §38-77-710 to -770 (1989)** and "*Furthermore, the arbitration procedures set forth in § 38-77-710 to -770 are compulsory in the sense they may be initiated by one of the disputing parties without agreement of the other party.*" *Cooper v. Poston*, 326 S.C. 46, 483 S.E.2d 750 (1997), Opinion No. 24595

In that filing, like this appeal, both an issue of significant public interest and a legal principle of major importance are present. Those concerns remain, following

the dismissal of the Court of Appeals. This appeal warrants prompt consideration and final determination by this Court.

STATEMENT OF THE CASE AND FACTS

Petitioner Gersten and Respondent Carter were involved in an automobile collision on March 19, 2015 in Chester County, South Carolina which resulted in paralyzing Petitioner Gersten. Petitioners Gersten and Ayoub timely filed and served an arbitration hearing under statute S.C. Code Ann. §§38-77-710 to 770 (1989) against the respondents. A subsequent case was filed adding Daniel Hubbard as a plaintiff and additional defendants were named.

On April 26, 2018, at App'x 92-94, Judge Gibbons made a consolidation ruling without hearing or notice to consolidate these two actions. At the time of said ruling, the second action was not served upon defendants causing the ruling to be void and/or voidable.

On May 8, 2019, at App'x 234-241, a timely motion to alter or amend a judgment or relief from judgment or order was made pursuant to Rules 59(e), 60(4), SCRPC by the plaintiffs. See App'x 21-23.

On September 5, 2018 a hearing was made before Judge Hayes however this motion was not ruled on as well as other motions before the court and the hearing was premature because the pleadings were not closed and the plaintiffs had submitted a timely amended complaint to which the defendants had not answered at the time of the hearing. Judge Hayes verbally dismissed all litigants except for Plaintiffs Heidi Gersten and Ivanka Ayoub and Defendant Kevin Carter against the

plaintiffs' objections.

Written orders were issued on September 18, 2018 and three (more) on September 21, 2018 without the plaintiffs opportunity to review them for accuracy.

On October 8, 2018, Plaintiffs Gersten, Ayoub, Daniel Hubbard timely filed and served a motion to amend. See App'x 21-25, especially App'x 23. The Plaintiffs received the notice of the order and order on September 21, 2018 and according to the rules ten (10) days is permitted plus according to Rule 6(e) an extra five (5) days shall be added to the prescribed period, causing the motion to be timely served and filed.

On October 16, 2019, Judge Hayes arbitrarily and generically denied the motion without oral hearing or legal determination. See App'x 120-121.

A timely motion for appeal was made by Appellants on November 15, 2018 at App'x 45-94, 126-128.

A motion to extend time to serve brief was timely filed and served on however via a letter from the Court of Appeals stated that Respondent AAA had filed a motion to dismiss the same day as the Appellants therefore the Court of Appeals returned their check for \$50 instructing or advising the Appellants that the matter was stayed until a decision was made by the Court of Appeals on the motion to dismiss per statute Rule, SCACR. The date of the receiving of the motion was on however at that time, the Respondent AAA had not paid the proper filing fee and was given time to cure the deficiency by the Court of Appeals although rule of SCACR says that a clerk shall dismiss the motion for failure to comply with the rules Rule SCACR see letter. A timely return was made by the Appellants based on the date that the. On

Respondents Carter and Davis filed a motion to dismiss. During the time permitted to file and serve a return, Appellant Gersten suffered a series of health complications related to a pressure wound she has been dealing with for over 4 years as a result of being paralyzed as a result of the collision in controversy that caused the Appellants to file a series of motions to extend time to file and serve the return. In addition the motion was not paginated as the rules instruct and had the wrong case number. The sole argument through the litney of information was that the Appellants had not filed their appeal timely. The remaining respondents had not filed motions to dismiss. One only has to study the record to find the Appellants complaining about not receiving the documents related to this action until days after the requested information. This course of conduct is significant because the official reason for dismissing the appeal alleged that the appellants did not follow the rules. The questions that Judge asked were already answered when the notice of appeal was served and filed regardless of which date pertained to which respondent. There is no question or debate of whether or not the return to AAA was made on time. Carter and Davis' return was made

TABLE OF AUTHORITIES

CASES

Cooper v. Poston 326 SC 46, 483 SE2d 750 (1997), Opinion No. 24595.....

CONCLUSION

As argued above, the Court of Appeals applied the wrong standard of review in this case and failed to comply with Title II of the American Disabilities Act resulting in harmful error to the Appellants.

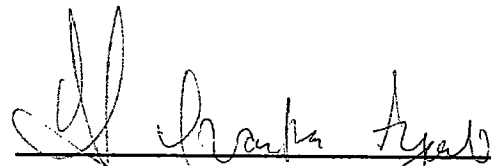
The Petition for Writ of Certiorari and Appendix was due on September 24, 2019 per Order of this Court dated September 24, 2019 in said case number and therefore is timely. Due to Petitioner Gersten's extreme hardships suffered from being paralyzed as a result of the controversy in action and the pressure wounds that resulted as secondary complications from being paralyzed, the Petitioners hereby thank this Court for the compassion extended in granting an additional six (6) days of the requested twenty (20) that was requested due to the Petitioner Gersten's life threatening illness. She is unable to sit for more than a few hours at a time and lives without a caregiver, performing her own wound care as well as litigating numerous lawsuits without an attorney. The Petitioner's also appreciate the rapid response to the request however did not receive notice of the Order until September 17, 2019 as the course of conduct from the inception of filing as shown that the Petitioners often receive information after the due dates issued in letters which is the crux of the dismissal of the Petitioner's Appeal and in the following they will attempt to explain how the Court of Appeals misinterpreted and or misapplied laws, making harmful errors to the Petitioner's. With all due respect, it has been said that "Ignorance is no excuse for the law and that non-attorneys are held to the same standards as attorney. With that logic, then non-attorneys should be treated equally under the law and the phrase, "What's good for the goose is good for the gander should apply."

The official sole reason of the Order of the Appellate Court mistakenly states that the Appeal is dismissed because the Petitioners failed to follow the laws laid out in SCACR. Not only did the Petitioners follow the law, they provided the Court of Appeal with a total of in for motions for extensions of time to make a Return to Carter and Davis' Motion to Dismiss. There are no grants for each individual motion made. There is one Order made on extending to and a request for three questions. The Petitioners were ordered to produce information and received the order after the deadline of the time to comply making it impossible to comply.

The Respondents continue to produce inaccurate and misleading remarks regarding the Petitioners' timeliness. They claim that actions can be "easily' done by the Petitioners. There is nothing that can be phrased 'easily' when referencing the Petitioner Gersten's circumstances and be taken seriously as the odds of her being Able to timely comply with the rules and procedures have all been miraculously satisfied. The dismissal of the Court of Appeals is a reversible error and the reasons that justify this determination are explained in this writ.

The Petitioner's are seeking leave to amend this document as the Petitioner Gersten's left buttocks illness of her pressure wound moved into a Phase 4 from a Phase 3 stage due to the extra physical effort she has placed in complying with the law. She also has incontinence issues she is dealing with and often wakes up soaking in her own urine. A reasonable person can ascertain that her efforts are remarkable given the seemingly insurmountable obstacles laid before her.

Respectfully submitted,



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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHESTER COUNTY
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Honorable Brian Gibbons, Circuit Court Judge
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C.A. No: 2018-002115
2019-001484

Kevin Carter, Richard Davis, Joseph Tirbovich, Nationwide Mutual Insurance Co.,
Interinsurance Exchange of the Automobile Club, Trustgard, John Ammendola,
Blackwell, SC Department of Public Safety, Unknown John Does,.....Respondents,

v.

Heidi Gersten, Ivanka Ayoub,.....Petitioners.

PROOF OF SERVICE

This is to certify that this day, the undersigned, over 18 years of age and not a party to the said action has served the following named individuals, counsel for the Respondents, in the foregoing matter, the foregoing Petitioner's Petition for Writ of Certiorari and accompanying Appendix by depositing (mailing) a copy of same to them in the United States Post Office mail, with sufficient postage affixed thereto(thereon) to ensure delivery and return address clearly marked on the date indicated below, addressed as follows:

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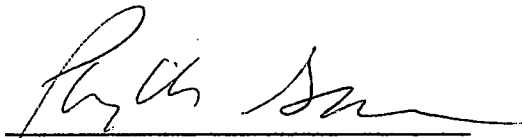
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S.C. SUPREME COURT



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November 12, 2019

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The Honorable Daniel Shearouse
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Re: Heidi Gersten, Ivanka Ayoub Daniel HubbardPlaintiffs,

Of whom Heidi Gersten and Ivanka Ayoub are Petitioners

v.

Kevin Carter, Richard Davis, Joseph Tirbovich, Nationwide Mutual Insurance Co.,
Interinsurance Exchange of the Automobile Club, Trustgard, John Ammendola,
Blackwell, SC Department of Public Safety, Unknown John Does.....Respondents.

Supreme Court Case No: 2019-001484 / Court of Appeals Case No: 2018-002115

Dear Mr. Shearouse or To Whom It May Concern:

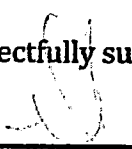
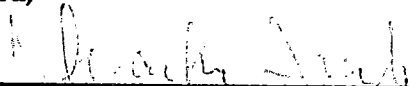
Good day to you!

Enclosed for filing, please find an original and seven (7) copies of
Petitioners'/Appellants' Amended Petition for Writ of Certiorari and/or Reply,
together with Proof of Service of same. Please return clocked or file-stamped copies
in the enclosed self-addressed prepaid stamped envelope.

By copy of this letter, a copy of the fore-mentioned is served on all counsel of record.
Please call the above number if you have any questions.

Thank you for your time and assistance regarding this matter.

Respectfully submitted,

Heidi Gersten, Ivanka Ayoub
Appellants/Petitioners

Enclosures

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