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**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr.

Case No.: 2014-00091

RECEIVED

APR 24 2015

SC Court of Appeals

James Spencer, individually and on behalf of the Estate of Doris Holt
and on behalf of Southern Holdings, Inc.; and Irene Santacroce, Plaintiffs,

Of whom James Spencer is the Appellant, Appellant,

v.

John R. Rakowsky, Adrian L. Falgione, and The Law Offices of
Adrian Falgione, LLC, Defendants,

Of whom John R. Rakowsky and Adrian L. Falgione are the Respondents.

**RETURN TO APPELLANT'S MOTION TO SERVE
DESIGNATION OF MATTER AND BRIEF OUT OF TIME**

Respondent Adrian Falgione ("Respondent" or "Falgione"), by and through his undersigned counsel, submits this return in opposition to the Motion to Serve Designation of Matter and Brief Out of Time, dated April 15, 2015, filed by the Appellant, James B. Spencer ("Appellant" or "Spencer"). For the reasons set forth below, as well as those appearing in this Court's record, Falgione asks that the Court deny Spencer's motion and dismiss his appeal.

PROCEDURAL AND FACTUAL BACKGROUND

Spencer filed this appeal on January 13, 2014, seeking reversal of an Order

denying his Rule 59 motion for the trial court to reconsider its dismissal of his legal malpractice claims pursuant to S.C. Code § 15-36-100 and Rule 12(b)(6), SCRCP. (Notice of Appeal, January 13, 2014.) Spencer did not appeal the Court's Order of Dismissal. Id. On March 17, 2014, this Court dismissed this matter because Spencer neither provided information regarding the transcript nor served and filed his initial brief and designation of matter pursuant to Rules 207, 208 and 209, SCACR. (O. of March 17, 2014.) Spencer moved the Court to reinstate the case on the grounds that he was totally disabled, indigent and misunderstood the process. (Mot. for App. to Stay Case for Thirty Days Due to Misunderstanding of Fin. Process and Attempting to Live Within App.'s Means, April 2, 2014.) Falgione opposed Spencer's motion on several grounds; however, the Court gave the pro se Appellant the benefit of the doubt, construed his motion as one to reinstate the matter, and reinstated the appeal. (O. of May 21, 2014.) In the same Order, the Court denied Spencer's motion to proceed in forma pauperis. Id.

On July 14, 2014, the Court advised Spencer that his initial brief should have been filed and directed him to serve and file his brief and designation of matter within ten days. (Letter from Clerk to Spencer, July 14, 2014.) On July 31, 2014, more than two weeks later, the Court dismissed the appeal for a second time based upon Spencer's failure "to serve and file [his] initial brief and designation of matter and [failure] to serve and file a motion requesting permission to file the documents out of time, as requested in the Court's letter of July 14, 2014." (O. of July 31, 2014.) Once again, Spencer filed a motion to reinstate his appeal. He claimed the dismissal was the result of an oversight in the Clerk's Office. (Mot. to Reinstate the Appeal as Court Failed to Take into Account Rule 208(a)(1) which States the App.'s Initial Brief is Not Due Until Thrity [sic] Days

After Receipt of the Transcript, August 7, 2014.) On September 30, 2014, the Court again reinstated the appeal and gave Spencer until October 29, 2014 to serve and file his initial brief and designation of matter. (O. of September 30, 2014.)

On October 29, 2014, Spencer moved for a forty-five day extension of the deadline for his brief. (Mot. for Expansion of Time to File Initial Brief, October 29, 2014.) The Court granted Spencer's motion for an extension and directed him to serve and file his initial brief within thirty days, or by January 15, 2015. (O. of December 16, 2014.) Thus, the Court graciously granted Spencer a seventy-eight-day extension, not merely the forty-five days he requested.

On December 15, 2014, Spencer moved for a second extension of time for his initial brief. (Omnibus Mot. for, Clarification, Continuation and Recusal of Judge Stephanie McDonald, December 15, 2014.) Spencer amended this second motion on January 15, 2014, and asked the Court to extend the deadline to March 9, 2015, for medical reasons. (Am. Mot. for Continuation and Recusal of Judge Stephanie McDonald, January 15, 2015.) Falgione did not oppose the motion. Once again, the Court allowed the pro se Appellant wide latitude. The Court extended the deadline beyond the March 9th deadline sought to April 3, 2015. (O. of March 4, 2015.) Therefore, Spencer received another seventy-eight-day extension. Id. The Court admonished Spencer, however, that no further extension would be granted "absent extraordinary circumstances." Id.

Despite receiving these gracious extensions of time, Spencer failed nonetheless to serve and file his initial brief and designation of matter by the April 3rd deadline, nor did he request additional time. At the earliest, Spencer served and filed his brief four days

late and his designation of matter twelve days late. (Initial Informal Br. of App. p. 41, April 7, 2015; Designation of Matter To Be Included in Record on Appeal p. 7, April 15, 2015.)

On April 9, 2015, Respondent John R. Rakowsky moved to dismiss the appeal based upon Spencer's failure to timely file his brief. (Mot. to Dismiss Appeal, April 9, 2015.) On April 13, 2015, Falgione moved for dismissal upon the same grounds, in addition to the Appellant's failure to file or serve any designation of matter. (Mot. to Dismiss by Resp. Adrian L. Falgione, April 13, 2015.)

Thereafter, Spencer filed the immediate motion for leave to serve his initial brief and designation of matter out of time.

ARGUMENT

Although Spencer gives several explanations why he failed to meet the deadline for his brief and designation of matter, he has demonstrated no extraordinary circumstances beyond his control which warrant additional time or which excuse his failure to comply with the South Carolina Appellate Court Rules.

"[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. It is incumbent upon counsel to provide material that complies with the Rules and facilitates appellate review." Henning v. Kaye, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992). "A pro se litigant who knowingly elects to represent himself assumes full responsibility for complying with substantive and procedural requirements of the law." State v. Burton, 356 S.C. 259, 265, 589 S.E.2d 6, 9 n. 5 (2003); see also State v. Policao, 402 S.C. 547, 558, 741 S.E.2d 774, 779 (Ct. App. 2013). A party

required to demonstrate “extraordinary circumstances” must demonstrate circumstances which are “beyond what usual, regular and customary” or are “remarkable.” Webster’s New Collegiate Dictionary 407 (1973).

In essence, Spencer offers three explanations why he failed to timely file his brief and designation of matter. First, Spencer claims his medical condition and indigent status¹ caused him to miss the deadline. That claim, however, is undermined by Spencer’s own statement in the following paragraph that he placed his initial brief “in the US Mail by caretaker” on April 3, 2015. (Mot. to Serve Designation Of Matter and Brief Out of Time p. 2, April 15, 2015.) If Spencer did, in fact, give his caretaker a copy of his brief to mail on April 3rd, then nothing prevented him from completing his brief before the deadline expired, not even the paralysis he claims the Respondents caused him.² Id. The unsworn statement from Spencer’s caretaker further weakens Spencer’s argument, for the caretaker claims the initial brief was mailed two days prior, on April 1st. (Wadley Decl. ¶ 2, April 10, 2015, Attachment A to Mot. to Serve Designation Of Matter and Brief Out of Time.) Therefore, Spencer’s argument that his medical condition caused him to miss the filing deadline is questionable at best. Moreover, the Court has already extended the filing deadline over five months based upon Spencer’s medical condition. Any additional time which the Appellant’s condition warrants has already been granted.

Second, Spencer argues, “On April 3, 2015, [he] had addressed and placed in the US Mail by caretaker his Initial Informal Brief to the Clerk of Court.” (Mot. to Serve

¹ Spencer offered no sworn statement to establish these facts. Even so, this Court has already denied Spencer’s motion to proceed in forma pauperis, thereby rejecting Spencer’s claim of indigence.

² The Respondents represented Spencer and others in an underlying lawsuit in Federal Court. Spencer has absolutely no basis upon which to claim his former attorneys caused him paralysis.

Designation Of Matter and Brief Out of Time p. 2, April 15, 2015.) This argument offers him no support. Under Rule 262, SCACR, “filing may be accomplished by . . . **depositing** the document in the U.S. mail, properly addressed to the clerk, with sufficient first class postage attached.” Rule 262(a)(2), SCACR (emphasis added). The Rules also provide,

Service upon the attorney or upon a party shall be made by . . . by mailing it to him at his last known address . . . Service by mail is complete upon mailing.

Rule 262(b), SCACR. Nothing in the Rules allows filing and service to be accomplished by placing the brief in the hands of one’s caretaker; the brief must be placed in the mail, properly addressed, with sufficient postage affixed. Rule 262(a)(2), SCACR. See also State v. Burton, 356 S.C. 259, 265, 589 S.E.2d 6, 9 n. 5 (2003) (recognizing a pro se litigant must fully comply with Court rules). Therefore, to the extent the pro se Appellant argues he did, in fact, timely serve and file his brief by placing it “in the U.S. Mail by caretaker,” application of the Appellate Court Rules renders a contrary conclusion.

Although Spencer tries to place the blame on his caretaker for not mailing his brief, he has offered no admissible, credible evidence to support that contention. See Rule 240(c)(3), SCACR. Spencer filed no sworn affidavit from himself or his caretaker establishing why the brief was served late, nor did he offer any document for the Court to consider. He submitted only an unsworn, unverified statement. Even if it were admissible and proper for the Court to consider, the caretaker’s unsworn statement raises questions about the accuracy of facts Spencer argues in his motion. As discussed above, Spencer’s caretaker claims the brief was mailed on April 1, 2014, yet Spencer claims he placed it in the mail by caretaker on April 3, 2015. The first brief filed and served,

however, is dated April 7, 2015. It is unclear when Spencer believes he first accomplished filing and service of his brief.

It must also be noted that at no time has Spencer explained why he failed to file his designation of matter timely. According to his motion, the Appellant appears to have learned on August 9, 2015, that a designation of matter was required. Rule 209(a), SCACR, clearly requires that a party's designation of matter be filed with his initial brief. Appellant's ignorance or misinterpretation of the Appellate Court Rules is no excuse for his failure to timely file his designation of matter. See State v. Burton, 356 S.C. 259, 265, 589 S.E.2d 6, 9 n. 5 (2003). Regardless of whether his brief is accepted late, Spencer's failure to timely file and serve his designation of matter without any justification is fatal to his appeal.

For these reasons, Spencer's second argument falls woefully short of justifying his inability to meet the deadline.

Third, Spencer argues his delinquency is attributable to the conduct of Respondents' attorneys. It is the Appellate Court Rules, however, not counsel, which have imposed the obstacles that have proven insurmountable for the Appellant. For Appellant to argue that he has been unduly prejudiced by demands that he comply with the requirements for service in the Appellate Court Rules is unreasonable and absurd.

True to form, Spencer takes the opportunity in his latest motion to accuse defense counsel once again of committing fraud on this Court.³ (Mot. to Serve Designation of Matter and Brief Out of Time pp. 2-3, April 15, 2015; see also App.'s Resp. in Opp. to

³ Inevitably, Spencer will respond to this filing with further accusation fraud and unethical conduct.

Adrian L. Falgione’s Return pp. 5-9, April 16, 2014.) But see Rule 11(a), SCRCR (“A party who is not represented by an attorney shall sign his pleading, motion or other paper and state his address.”); and Rule 262(b), SCACR (stating service may be accomplished by delivery to a party’s last known address). Throughout this dispute, Spencer has levied baseless accusations against the lawyers defending his former attorneys. Even in the brief he filed late, Spencer accuses one of those lawyers of being untruthful to the trial court. (App.’s Br. p. 37 (“It is apparent that Dudgeon was untruthful with the court”)) Spencer’s baseless and incendiary accusations against defense counsel, which are unrelated to the merits of the matter before this Court, have no place in this appeal and deserve no further discussion here. See Holmes v. Haynsworth, Sinkler & Boyd, P.A., 408 S.C. 620, 644, 760 S.E.2d 399, 411 (2014) (affirming sanctions under both Rule 11 and FCPSA where, among other things, pro se appellant “submitted numerous affidavits and memoranda accusing [Respondents] and [Respondents’] counsel of engaging in all manner of inappropriate and abusive conduct, each of which has been dismissed and discounted by the Court, and all of which were submitted without reasonable basis.”).

CONCLUSION

Spencer’s chronic failure to abide by the South Carolina Appellate Court Rules is inexcusable. Despite having received the benefit of the doubt and over five months worth of extensions from the Court, Spencer failed to meet the deadline for his brief, and he failed to file and serve his designation of matter until twelve days past the deadline. Spencer has shown no extraordinary circumstances that prevented him from meeting the April 3rd deadline, nor has he provided this Court any good reason to excuse his shortcomings and allow this appeal to proceed. For these reasons, this Court should deny

Spencer's Motion to Serve Designation of Matter and Brief Out of Time and dismiss this appeal.

Respectfully submitted,

A handwritten signature in black ink that reads "Benjamin C. Bruner". The signature is written in a cursive style with a large, prominent initial "B" and a long, sweeping horizontal line extending to the right.

Warren C. Powell, Jr.
Benjamin C. Bruner
Bruner, Powell, Wall & Mullins, LLC
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Attorneys for Adrian L. Falgione

April 24, 2015

THE STATE OF SOUTH CAROLINA
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v.

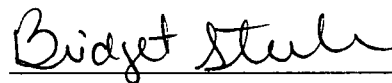
John R. Rakowsky, Adrian L. Falgione, and The Law Offices of
Adrian Falgione, LLC, Defendants,

of whom John R. Rakowsky and Adrian L. Falgione are the Respondents.

PROOF OF SERVICE

I, Bridget Steele, an employee of Bruner, Powell, Wall & Mullins, LLC, attorneys for Respondent Adrian L. Falgione, do hereby certify that I have served the *Return to Appellant's Motion to Serve Designation of Matter and Brief Out of Time* by depositing a copy of it in the U.S. Mail, postage prepaid, on April 24, 2015, addressed to the *pro se* Appellant, James B. Spencer, 7001 Saint Andrews Road, Suite 183, Columbia, South Carolina 29212, and to Respondent John R. Rakowsky's attorneys of record, David W. Overstreet, Esquire and Michael B. McCall, Esquire at Carlock, Copeland & Stair, LLP, 40 Calhoun Street, Suite 400, Charleston, South Carolina 29401.

April 24, 2015



Bridget Steele

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April 24, 2015

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SC Court of Appeals

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings

Clerk of Court, S.C. Court of Appeals

1220 Senate Street

Columbia, SC 29201

Re: James Spencer, et al. v. John Rakowsky, et al.

Case No.: 2014-00091

Dear Ms. Kitchings:

Enclosed please find an original and one (1) copy of the *Return to Appellant's Motion to Serve Designation of Matter and Brief out of Time* in the above referenced action. Please file the original, clock-in the copy and return them to me via our courier.

Thank you for your assistance in this matter. If you have any questions, please do not hesitate to contact me.

With my kindest regards, I am,

Very truly yours,


Benjamin C. Bruner

Enclosure

CC: James B. Spencer
David W. Overstreet, Esq.
Michael B. McCall, Esq.