

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APR 29 2015

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable Frank R. Addy, Jr.

Case. No. 2014-000091

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,

v.

John R. Rakowsky, Adrian L. Falgione, and the Law Offices of Adrian Falgione, LLC,
Respondents,

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 John R. Rakowsky respectfully submits this Return in opposition to Appellant's Motion to Serve Designation of Matter and Brief Out of Time. As set forth herein, Appellant's motion should be denied and this appeal should be dismissed based on Appellant's failure to comply with this Court's Order of March 4, 2015 and Appellant's continued disregard for the Rule of Appellate Procedure. Respondent's Return is supported by the Supplemental Affidavit of Counsel attached as Exhibit A, and the additional documents attached thereto as Exhibits B, C, D, E, F and G.

Appellant filed his Notice of Appeal on January 13, 2014. In the fifteen months since that time, his appeal has been twice dismissed and reinstated, and this Court has granted Appellant over five months of extensions to file and serve his initial brief and designation. The last extension came by way of this Court's Order of March 4, 2015, which required Appellant to file and serve his initial brief within thirty (30) days, and expressly provided that no further extensions will be granted absent extraordinary circumstances.

Despite this admonition, Appellant failed to timely serve his initial brief on or before April 3, 2015. After not receiving Appellant's brief or designation by April 9, 2015, Respondent moved to dismiss the appeal. On April 10, 2015 – one week after the expiration of the deadline – Appellant attempted to serve his initial brief, but failed to include a designation of matters, and misrepresented the date of mailing in his Certificate of Service as occurring three days earlier. Notwithstanding this three day discrepancy, Appellant's initial brief was still untimely and inadequate. Appellant has now moved this Court to allow him to serve his brief and designation out of time. Amazingly, Appellant's Certificate of Service included with the motion again misrepresented the date of mailing as occurring earlier than it actually did.

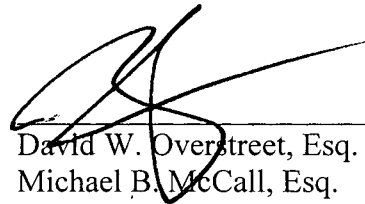
Appellant's motion itself is devoid of any mention of extraordinary circumstances, and is wholly unsupported by relevant, proper affidavits and other documents as required by Rule 240(c)(3), SCACR. If anything, Appellant's motion reveals that his failure to timely file and serve his initial brief and designation was the result of simple neglect or oversight, which does not rise to the level of "extraordinary circumstances." See Pelzer v. State, 378 S.C. 516, 662 S.E.2d 618, 621 ("We disagree

that [appellant's] error resulted from any lack of legal skill rather than simple neglect the narrow window by which [appellant's] application missed the statute of limitations cannot be construed as so exceptional a circumstance as to warrant equitable tolling.”).

Accordingly, based on Appellant's failure to comply with this Court's Order of March 4, 2015 and Appellant's continued disregard for the Rules of Appellate Procedure, this Court should deny Appellant's motion and dismiss this appeal.

April 27, 2015

Respectfully submitted,



David W. Overstreet, Esq.
Michael B. McCall, Esq.
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, South Carolina 29401
(843) 727-0307

Attorneys for Respondent John Rakowsky

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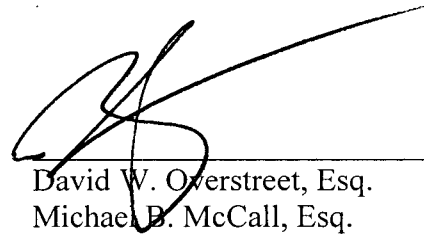
of whom John R. Rakowsky and Adrian L. Falgione are the Respondents.

PROOF OF SERVICE

I certify that I have served the Return to Appellant's Motion to Serve Designation of Matter and Brief Out of Time and Supplemental Affidavit of Counsel on all parties to this appeal by depositing a copy in the United States Mail, postage prepaid, on April 27, 2015, addressed to *pro se* Appellant and counsel of record as follows:

Warren C. Powell, Jr., Esq.
Benjamin C. Bruner, Esq.
Bruner, Powell, Wall & Mullins, LLC
P.O. Box 61110
Columbia, SC 29260-1110

James Spencer
7001 Saint Andrews Road
Suite 183
Columbia, SC 29212



David W. Overstreet, Esq.
Michael B. McCall, Esq.
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, South Carolina 29401
(843) 727-0307

Attorneys for Respondent John Rakowsky

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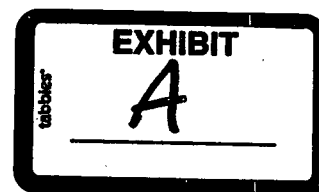
John R. Rakowsky, Adrian L. Falgione, and the Law Offices of Adrian Falgione, LLC,
Respondents,

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

SUPPLEMENTAL AFFIDAVIT OF COUNSEL

PERSONALLY APPEARED BEFORE ME, Michael B. McCall, who being duly sworn, deposes and says as follows:

1. David W. Overstreet and I are the attorneys for Respondent John R. Rakowsky in the above-captioned appeal.
2. This affidavit is intended to supplement the Affidavit of Counsel dated April 9, 2015, which was previously attached to Respondent Rakowsky's Motion to Dismiss.
3. On April 9, 2015, I filed and served Respondent's Motion to Dismiss for failure to comply with this Court's Order of March 4, 2015, which required Appellant to file



and serve his initial brief within thirty (30) days, and provided that no further extensions will be granted absent extraordinary circumstances.

4. On April 13, 2015, I received Appellant's initial brief in the envelope attached as "Exhibit B," which reflects a postmark date of April 10, 2015.

5. Appellant's April 10, 2015 mailing included the Certificate of Service attached as "Exhibit C," in which Appellant certifies that his initial brief was served on April 7, 2015, three days prior to the postmark date reflected in Exhibit B.

6. Appellant's April 10, 2015 mailing did include a Designation of Matter to be Included in the Record on Appeal.

7. On April 20, 2015, I received the following in the envelope attached as "Exhibit D," which reflects a postmark date of April 16, 2015: Appellant's Motion to Serve Designation of Matter and Brief Out of Time; Appellant's unsigned initial brief dated April 15, 2015; and Appellant's Designation of Matter to be Included in the Record on Appeal dated April 15, 2015.

8. Appellant's April 16, 2015 mailing included three Certificates of Service in which Appellant certified that the motion, brief and designation were served on April 15, 2015, one day prior to the postmark date reflected in Exhibit D. The three Certificates of Service are attached as "Exhibit E," "Exhibit F," and "Exhibit G."

9. The documents referenced herein are the only documents received by my office from Appellant since the Court's March 4, 2015 Order.

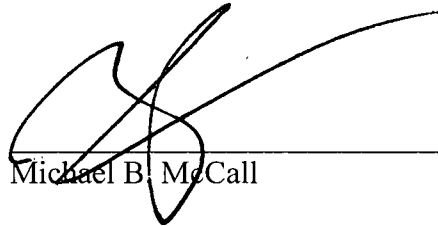
10. Appellant has not served any documents by hand delivery to my office.

11. Appellant asserts in his Motion to Serve Designation of Matter and Brief Out of Time that he mailed a copy of his initial brief to the court and other parties on April 7,

2015. Appellant further asserts that his volunteer courier made hand delivery on April 9, 2015 and again served the other parties by personal and mail delivery.


12. My office has not received any mailings from Appellant with a postmark date of April 7, 2015 or April 9, 2015, and my office did not receive any documents by hand delivery on April 9, 2015.

FURTHER AFFIANT SAYETH NOT.

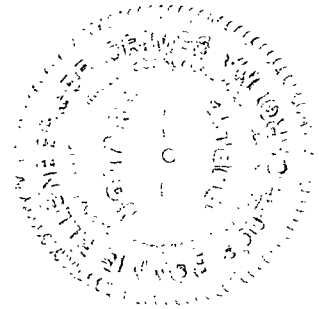


Michael B. McCall

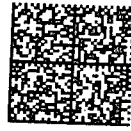
SWORN to and subscribed before me
this 2nd day of April, 2015.



Notary Public for South Carolina
My commission expires: 12/15/20



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CARLOCK, LOPELAND & STAIR, LLP
40 CALHOUN St., SUITE 400
CHARLESTON, SC 29401



EXHIBIT
B

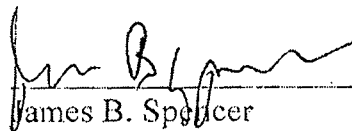
CERTIFICATE OF SERVICE

I, James Spencer, *Pro Se*, Plaintiff, do hereby certify that the foregoing Informal Initial Brief this day April 7, 2015, been served on the following person(s) by either mail, fax or electronic transfer a true and correct copy, as follows:

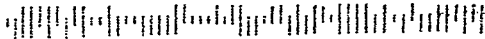
Andrew Countryman, Esquire
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 727-0307
acountryman@carlockcopeland.com

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Benjamin C. Bruner, Esquire
Bruner, Powell, Wall & Mullins, LLC
1735 St Julian Place, Suite 200
PO Box 61110
Columbia, SC 29260-1110
(803) 753-0060


James B. Spencer
Suite 183, 7001 Saint Andrews Road
Columbia, SC 29212
(803) 414-0889
JamesBSpencer@sc.rr.com





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Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401

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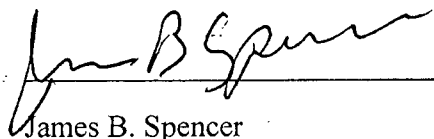
EXHIBIT

CERTIFICATE OF SERVICE

I, James Spencer, *Pro Se*, Plaintiff, do hereby certify that the foregoing Informal Initial Brief and accompanying Designation of Matter this day April 15, 2015, been served on the following person(s) by either mail, courier, fax or electronic transfer a true and correct copy, as follows:

David W. Overstreet, Esquire
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 727-0307

Benjamin C. Bruner, Esquire
Bruner, Powell, Wall & Mullins, LLC
1735 St Julian Place, Suite 200
PO Box 61110
Columbia, SC 29260-1110
(803) 753-0060

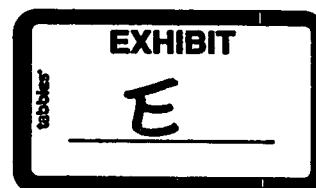


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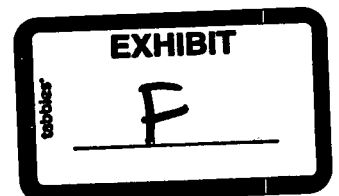
CERTIFICATE OF SERVICE

I, James Spencer, *Pro Se*, Plaintiff, do hereby certify that the foregoing Informal Initial Brief this day April 15, 2015, been served on the following person(s) by either mail, fax or electronic transfer a true and correct copy, as follows:

David W. Overstreet, Esquire
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
(843) 727-0307

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1735 St Julian Place, Suite 200
PO Box 61110
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(803) 753-0060

James B. Spencer
Suite 183, 7001 Saint Andrews Road
Columbia, SC 29212
(803) 414-0889
JamesBSpencer@sc.rr.com



CERTIFICATE OF SERVICE

I, James Spencer, *Pro Se*, Plaintiff, do hereby certify that the foregoing **DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** this day April 15, 2015, been served on the following person(s) by either mail, fax or electronic transfer a true and correct copy, as follows:

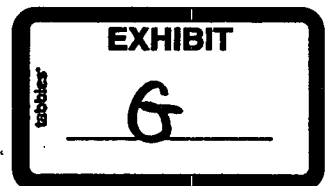
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1735 St Julian Place, Suite 200
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(803) 753-0060



James B. Spencer, *Pro Se*
Suite 183, 7001 Saint Andrews Road
Columbia, SC 29212
(803) 414-0889
JamesBSpencer@sc.rr.com



LAW OFFICES

CARLOCK, COPELAND & STAIR, LLP

A LIMITED LIABILITY PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

MICHAEL B. MCCALL

DIRECT DIAL NUMBER
843-266-8205

E-MAIL ADDRESS
mmccall@carlockcopeland.com

FACSIMILE
843-727-2995

40 CALHOUN STREET, SUITE 400
CHARLESTON, SC 29401

TELEPHONE (843) 727-0307

www.carlockcopeland.com

ATLANTA OFFICE

191 Peachtree Street, N.E.
Suite 3600
Atlanta, Georgia 30303-1235
(404) 522-8220

REPLY TO SC OFFICE

April 27, 2015

Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

Re: James Spencer v. John R. Rakowsky, *et al.*
Case No.: 2014-000091
CCS File No.: 2283-35025

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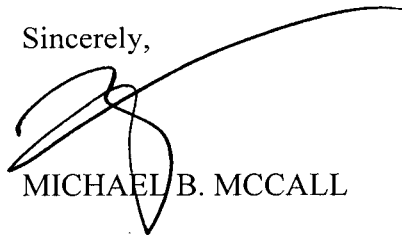
APR 29 2015

SC Court of Appeals

Dear Ms. Kitchings:

Enclosed for filing, please find the original and 6 copies of Respondent John R. Rakowsky's Return to Appellant's Motion to Serve Designation of Matter and Brief out of Time, in this case. By copy of this correspondence, I am serving a copy of the same upon the Appellant and all counsel of record. If you have any questions, please do not hesitate to contact me. With kind regards, I am

Sincerely,




MICHAEL B. MCCALL

MBM:bjg
Enclosures

cc: James Spencer
Benjamin C. Bruner, Esq.
Warren C. Powell, Esq.

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