

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SEP 29 2015

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

SC Court of Appeals

Frank R. Addy, Jr. Circuit Court Judge

APPELLATE CASE NO. 2014-000091

John R. Rakowsky, Respondent
Adrian Falgione, Respondent

v.

James Spencer, Appellant

**REPLY TO RETURN TO APPELLANT'S
MOTION TO STRIKE**

Appellant James Spencer, *Pro Se*, ("Appellant") submits this reply to return ("Return") from Respondent Adrian L. Falgione, Esquire ("Respondent") to Appellant's Motion to Strike.

BACKGROUND

- On January 25, 2012, Respondent attempted to have the complaint of the Appellant dismissed because,

“dismissal is appropriate because the Plaintiffs failed to timely and properly serve the summons and complaint pursuant to the South Carolina Rules of Civil Procedure. Although, the Plaintiffs are appearing in this action *pro se*, these Rules and statutes apply in full force.” See attached Exhibit A with Respondent’s Affidavit.

The court ruled against the Respondent as Respondent had repeatedly been served by Appellant under the Rules and Respondent repeatedly attempted to avoid service. See Attached Exhibit B.

- On April 15, 2014, Respondent filed a perjured affidavit attempting to have Appellant’s Motion for Sanctions dismissed before this court. The problems with this affidavit are fully discussed in the Appellant’s Reply to Return to Motion for Sanctions, filed simultaneously with this Reply.
- Appellant points out that the very date the Respondent claims is unreliable in his Return on Appellants Motion to Strike, the postal service stamped “*date of delivery*” is the exact date the Respondent cites as an exacting “*date of delivery*” in his April 15, 2014, attempt to have Appellant’s motion dismissed. See attached Exhibit BB, which Respondent uses to justify the date

Respondent, cites for Appellant's alleged untimely filing, Respondent made as Exhibit C. You simply cannot have it both ways.

DISCUSSION

The United States Postal Service stamp "*date of delivery*" has been the standard used by the Respondent to establish the standard or touchstone in his pleadings with respect to the determination of timeliness of the pleadings of the *Pro Se* Appellant throughout this case. Respondent now wants to change the standard from the US postal stamp "*date of delivery*" in this specific filing in this case to that of the manually manipulated Pitney Bowes date. Appellant besides having to deal with perjured affidavits is now asked by Respondent to defend the legitimacy of the U.S. postal service postmark as shown below.

Black's Law Dictionary defines a "postmark" as "[a]n official mark put by the post office on an item of mail to cancel the stamp and to indicate the place and date of sending or receipt."

In *Bowman v. Adm'r, Ohio Bureau of Emp't Services* the Federal Appellate Court was clear on this matter.

"The court of appeals reversed, holding that a private meter postmark is not sufficient as a matter of law to satisfy the requirement of Ohio Adm. Code 4146-13-01 that timely mailing of a notice of appeal be evidenced by a "postmark." The court found that "postmark" means a postmark imprinted by the United States Postal Service which, it asserted, cannot be manipulated or backdated. Thus, the court concluded that

Bowman's notice was not properly "postmarked," and, therefore, was properly deemed to be filed when received, not when allegedly deposited in the mail." **Bowman v. Adm'r, Ohio Bureau of Emp't Services, 30 Ohio St. 3d 87, 88, 507 N.E.2d 342, 343 (1987)**

SCACR Rule 262 (a)(2) states, "The date of filing shall be the date of delivery or the date of mailing." The "*date of the mailing*" is not established by the manually adjustable date on the postal meter but by the United States Post Office stamp, which is considered a third party confirmation of the true mailing date without question.

Respondent, however, goes so far as to question the date of the mailing stamp by the United States Post Office, which is on the South Carolina Court of Appeals website. The Respondent states,

"the stamp [US Postal Stamp which indicates the true mailing date] if it is the work of the U.S. Postal Service at all, (emphasis added) must have been placed on the envelope at some later time and, therefore, is no reflection of the date the document was deposited into the U.S. Mail."

The United States Government requires all tax returns to be dated by midnight on April 15 by the postal service each year as proof of "*the date of mailing*". There is no plot to change the dates of when a letter was mailed so one can safely assume is the legally defined "*date of the mailing*" irrespective of the suggestion of a U.S. postal dating conspiracy by the Respondent.

CONCLUSION

The Respondent's suggestions that the U.S. Postal Service has tampered with the "*date of mailing*" stamp is unbelievable. Respondent's suggestions for the first time in this case that the U.S. Postal Service's date stamp be ignored simply because it does not meet Respondent's needs is prejudicial against the Appellant and the last gasp in a futile attempt to save what was obviously serious misbehavior on the part of the Respondent.

The *Pro Se* Appellant has filed motions to file out of time to comply with the SCRAP unlike the Respondent. Respondent raising the issue of the *Pro Se* Appellant having complied with the Rules to file out of time previously in this case in his Return is simply not relevant to the matters in issue. The failure to follow the rules by Respondent resulted in Appellant filing the Motion to Strike.

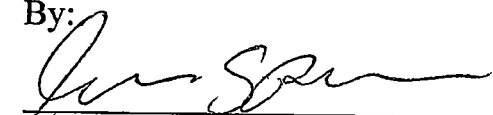
Therefore, the Appellant respectfully requests that based on Respondent's untimely and improper service and filing with the court in conjunction with his failure to follow the Rules, which the Respondent has asked the court to deny any special treatment to the lay *Pro Se* Respondent, ("*Although, the Plaintiffs are appearing in this action pro se, these Rules and statutes apply in full force.*"¹), that this Honorable Court enforce the Rules on the licensed attorneys and in so doing

¹ Cited herein above.

that this Honorable Court Strike Respondent Falgione's Opening Brief and Designation of Matter with Prejudice.

Respectfully submitted this September 29, 2015,

By:

A handwritten signature in cursive script, appearing to read "James Spencer", written over a horizontal line.

James Brian Spencer, Appellant, *Pro Se*
Suite 183
7001 Saint Andrews Road
Columbia, SC 29212

SCRCP (summons and complaint must be filed, and then served). By rule, the deadline for service was December 13, 2011. Thus, the Plaintiffs failed to timely serve the summons and complaint, and this action should be dismissed with prejudice.

IV. Insufficient Service of Process

Finally, the complaint should be dismissed because the Plaintiffs have not yet properly served the Summons and Complaint. Instead, the Plaintiffs attempted to serve Falgione and the Law Firm by delivering a copy of the Summons and Complaint to a temporary employee, who had no authority—actual, implied, or apparent—to accept service of process. In a recent decision, the Supreme Court of South Carolina recognized,

The class of persons authorized to sign on behalf of defendants is narrow: “Actual appointment for the specific purpose of receiving process normally is expected and the mere fact a person may be considered to act as defendant’s agent for some purpose does not necessarily mean that the person has authority to receive process.” Service on an employee is effective when the employee has apparent authority to receive it on behalf of the employer.

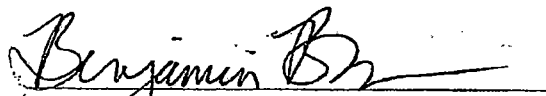
Graham Law Firm, P.A. v. Makawi, Op. No. 27086, 2012 WL 130671 (S.C. Jan. 17, 2012) (quoting Moore v. Simpson, 322 S.C. 518, 473 S.E.2d 64 (Ct.App.1996)). The Makawi court relied in part on Roberson v. S. Fin. of S. C., Inc., 365 S.C. 6, 615 S.E.2d 112 (2005), a case in which the plaintiff attempted service by certified mail. In Roberson, a clerical employee of the defendant signed the return receipt, and the defendant failed to answer and the trial court entered a default judgment. 365 S.C. at 8-9, 615 S.E.2d at 114. The defendant/employer moved to set aside the judgment under Rule 60(b), but the court denied the motion. 365 S.C. at 9, 615 S.E.2d at 114. On appeal, the Court noted that the employee testified she was never authorized to accept service of process. Id. (“[A]n agent has no implied authority unless she herself believed she had such authority.”). Reversing the trial court, the Supreme Court held there was no evidence on the record that the defendant/employer had manifested that the employee was its

agent for service of process, nor was there any evidence that the employee had actual or implied authority to act as the defendant's registered agent. 365 S.C. at 11, 615 S.E.2d at 115.

Similarly in this case, there is no evidence that Julie Owens, the temporary clerical employee who received the Summons and Complaint, was authorized to accept service of process for either Falgione or his law firm. To the contrary, the Affidavits of record demonstrate that Ms. Owens never had authority to accept service of process. Therefore, the Plaintiffs have failed to properly serve the Falgione Defendants in accordance with the South Carolina Rules of Civil Procedure, and the Complaint should be dismissed pursuant to Rule 12(b)(5), SCRCPP.

V. Conclusion

Based upon these several grounds, the Falgione Defendants seek dismissal of the claims against them. Not only have the Plaintiffs failed to file the required expert affidavit, they also failed to commence their action within three years of the May 9, 2007, hearing, at which they watched their case being settled without their consent. Furthermore, dismissal is appropriate because the Plaintiffs' failed to timely and properly serve the summons and complaint pursuant to the South Carolina Rules of Civil Procedure. Although the Plaintiffs are appearing in this action *pro se*, these Rules and statutes still apply with full force.



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Benjamin C. Bruner
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*Attorneys for Adrian L. Falgione and The Law
Offices of Adrian L. Falgione, LLC*

January 25, 2012
Columbia, South Carolina

EXHIBIT A

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

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

C/A No. 2011-CP-40-5384

v.)

AFFIDAVIT OF)
ADRIAN L. FALGIONE)

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

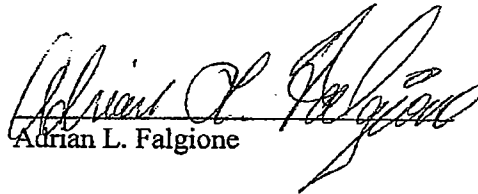
RICHLAND COUNTY
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JEANETTE W. MERRITT
C.C.P. & S.

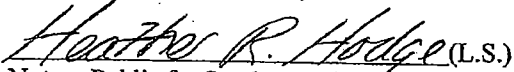
PERSONALLY appeared before me, the undersigned, who being duly sworn, says:

1. I am over the age of eighteen years old.
2. I am licensed to practice law in the State of South Carolina, and my office is currently located in Lexington, South Carolina.
3. On the afternoon of December 15, 2011, I received a copy of the Summons and Complaint filed in this action from Julie Owens, a temporary employee at my firm. Ms. Owens told me a man had just come by the office and dropped off some papers for me.
4. Upon information and belief, the Complaint in this action was filed on August 15, 2011.
5. Ms. Owens is neither an officer nor a manager at my office, and I never authorized her to accept any service of process for me or my law firm. I am listed as the registered agent for The Law Offices of Adrian Falgione, LLC.
6. To the best of my knowledge, December 15, 2011 was the first time the Plaintiff attempted to serve me or my firm with the Summons and Complaint.
7. Neither I nor my firm has taken any action to impede the Plaintiff's ability to serve the Complaint.

FURTHER AFFIANT SAYETH NOT.

Sworn and subscribed to before me
this 22nd day of December, 2011.


Adrian L. Falgione


Notary Public for South Carolina

My Commission expires on 11/15/2016

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Case No. 2011-CP-40-5384

JENNIFER W. MEDRIDE
C.C.P. & G.S.

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RICHLAND COUNTY
FILED

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

)
)
Plaintiffs,)

)
v.)

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

)
)
Defendants.)

**AFFIDAVIT OF
ALDEN WHEELER**

I, Alden Wheeler, hereby declare under the penalty of perjury the following based on my personal knowledge:

1. I am over the age of eighteen years old and I am competent to testify.
2. On December 15, 2011, I personally served and service was accepted by Ms. Julie Owens for Adrian Falgione at the law offices of Adrian Falgione at 113 E. Main St, Lexington, SC 29072.
3. When I entered Mr. Falgione's law office I asked Ms. Owens to see Mr. Falgione as I had papers to serve him.

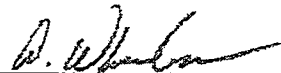
4. In response, Ms. Owens excused herself as she informed me she needed to go talk to Mr. Falgione.
5. A few minutes later, when Ms. Owens returned from speaking to Mr. Falgione she informed me that Mr. Falgione was tied up on the telephone but she would be glad to accept service for Mr. Falgione.
6. Ms. Owens then offered to make copies of the papers for me and I accepted her offer to do such.
7. I have been a process server for over three years.
8. It is my understanding and belief that my service of Mr. Falgione was the first successful service and the fourth attempt to serve this Summons and Complaint to Mr. Falgione since December 1, 2011.

Affiant Sayeth Further Naught.

I DO SOLEMNLY SWEAR AND AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE ABOVE FORGOING STATEMENTS ARE TRUE AND CORRECT TO THE BEST OF MY PERSONAL KNOWLEDGE.

12-31-11

Date



Alden Wheeler

EXHIBIT "BB"

Box 183
7001 Saint Andrews Road
Columbia, SC 29212

EXHIBIT C

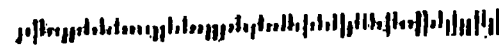
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SC Court of Appeals

PROFF OF SERVICE

The undersigned hereby certifies that on , the document described below, was(were) served on all parties of record in this case by mailing a copy, by US mail and/or delivery by courier on this date September 29, 2015.


Documents served: **REPLY TO RETURN TO APPELLANT'S**
MOTION TO STRIKE

Parties Served:

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By:


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