

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Frank R. Addy, Jr. Circuit Court Judge

APPELLATE CASE NO. 2014-000091

John R. Rakowsky, *Respondent*
Adrian Falgione, *Respondent*

v.

James Spencer, *Pro Se, Appellant*

OPPOSITION TO FALGIONE MOTION
TO DISMISS APPEAL

Appellant *pro se* submits this opposition to yet another use of untruthful Affidavits by Respondent to dismiss this appeal. Appellant was previously unsuccessful when he tried to obtain sanctions for the Respondent's and Respondent's counsels use of an imaginary courier to purportedly personally serve Appellant at an address that made the act impossible to have occurred. The Respondent's counsel unbelievably admitted to the fraud and sought to excuse it by

claiming the fraud was perpetrated to prove to this Honorable court some undefined difficulty Respondent had in serving the Appellant. The only alternative the *pro se* Appellant had left to lawfully reign in the Respondent to comply with the South Carolina Appellant Court Rules (“SCACR”) was to seek sanctions and filed a motion for such on August 20, 2015. However, this Honorable Court denied sanctions and Mr. Falgione and his counsel have once again used an untruthful Affidavit in yet another motion to dismiss.

DISCUSSION

The Respondent’s motion to dismiss besides the untruthful Affidavit is again based on half-truths, misrepresentations, and previously litigated matters already decided yet once again regurgitated by the Respondent. The Appellant will conserve this Honorable Court’s time by not addressing matters previously ruled upon that were once again presented by Respondent.

ALLEGATIONS FIRST RAISED BY RESPONDENT

The Respondents contention¹ that the Appellant served the Record on Appeal a day late is demonstrably false. On December 14, 2015, a courier hand delivered an unbound version of the Record on Appeal consisting of 333 pages along with a request for documents to be provided to add to the record of appeal as Appellant did not have access to all the documents identified as many were missing from clerk of

¹ Falgione’s Motion to Dismiss, page 3, line 11.

courts files and judges' files. Attached hereto as exhibits "A" and "B," respectfully are the Affidavit from the courier attesting to the service of the request for documents for the Record on Appeal and the service of 333 unbound pages of the Record of Appeal and the request for documents from the Respondent.

The deliberate omission of these pertinent facts from the motion papers is nothing short of an outrageous attempt to mislead the Court. Indeed, it is probably sanctionable misconduct. See SCRPC 3.3(a)(1), 8.4(a), (d).

Insofar as Respondent contends that the Record on Appeal does not contain all of the items that he requested be inserted, it is again noted that Appellant did not have them and a diligent search of both the court files and the judges records failed to provide records that the Appellant also identified to be included in the joint appendix. For that reason, on November 13, 2015, a motion was made by Appellant to remand the case to the trial court so those items could be obtained and inserted in the Record on Appeal. On November 23, 2015, Respondent Falgione filed an opposition to the motion to remand and it was denied by this Court.

It seems rather perverse that Respondent's counsel is complaining that items were not inserted in the Record on Appeal when he both opposed the motion to remand and refused to supply them to Appellant.

Counsel also ignores that the Record on Appeal already contained over 333 pages and was more than sufficient to address the narrow issue on appeal as to

whether summary judgment was properly granted. Yet, he insists that the Record on Appeal include motions and orders going to change of venue, disqualification, and reconsideration and even notices of appearance.

Once again, it is Respondent's counsel who has failed to comply with the relevant court rules. See SCRAP 209(b) ("A party shall not include any matter in his Designation which is not relevant to the appeal.").

In any event, Appellant has no problem consenting to the Respondent's filing of a supplemental record, pursuant to SCRAP 212(b), if that will resolve the current motion. In this manner, Respondent's bluff will be called. If he has the documents named to be included now is the time to produce them.

The claims that the *pro se* litigant intentionally withheld information are baseless as he sought to include materials and in an effort to do filed FOIA requests, made a motion to remand to obtain materials and requested materials in writing from Respondent. Finally, the certificate of service of the Record on Appeal has been filed under the rules for the unbound documents along with the request for documents from Respondent both served on December 14, 2015.

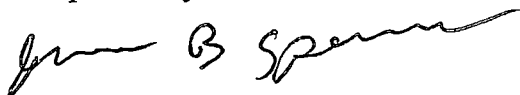
CONCLUSION

Based on the above, the Respondent's motion to dismiss should be denied and the case remanded back for discovery of documents.

SIGNATURE ON FOLLOWING PAGE.

January 4, 2016

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James B. Spencer". The signature is written in a cursive style with a large, prominent "B".

James B. Spencer, *Pro Se* Appellant
7001 Saint Andrews Rd.
Columbia, SC 29212
(803) 414-0889

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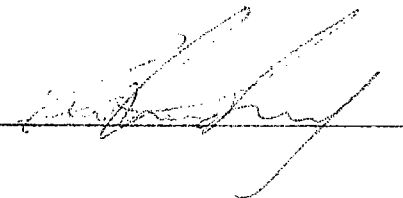
AFFIDAVIT OF ROBERT WADLEY

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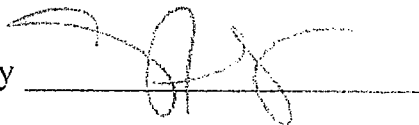
PERSONALLY APPEARED before me the undersigned Robert Wadley who after being duly sworn states the following:

1. I am over eighteen years of age and qualified to testify.
2. The information in this affidavit is based on my personal knowledge.
3. On the morning of December 14, 2015, I served a true copy of the Request for Documents and an unbound Record of Appeal of over 330 pages at the offices of Bruner, Powel, Wall & Mullins, LLC

AFFIANT FURTHER SAYETH NAUGHT

Signature 

SUBSCRIBED AND SWORN TO before me this 2nd day of January, 2016,

by 

NOTARY PUBLIC FOR SOUTH CAROLINA

My Commission Expires: 2/15/21

RW

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EXHIBIT B

James B. Spencer
Box 183
7001 Saint Andrews Drive
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(803) 414-0889

December 14, 2015

Benjamin C. Bruner
Bruner, Powel, Wall & Mullins, LLC
1735 St. Julian Place, Suite 200
Post Office Box 61110
Columbia, South Carolina 29260-1110

Mr. Bruner,

Attached please find the documents assembled for the Record on Appeal. Please supplement with any materials named and missing. My motion to remand was turned down and unless you have the documents sought after I have no ability to obtain them. I will be sending you binded copies in the next few days. Please email me any documents you have and I will include them.

Thank you very much.

Sincerely,


James B. Spencer

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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 January 4, 2016.

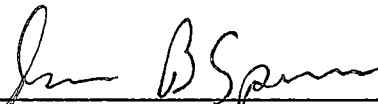
Documents served:

**Parties Served: OPPOSITION TO FALGIONE MOTION
TO DISMISS APPEAL**

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Attorneys for John Rakowsky

By:



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