

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE LEXINGTON COUNTY
Court Of Common Pleas

Frank R. Addy, Circuit Court Judge

APPELLATE CASE NO.: 2014-000091

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JUL 01 2016

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.

AFFIDAVIT OF COUNSEL

PERSONALLY APPEARED BEFORE ME, Benjamin C. Bruner, who being
duly sworn, deposes and says as follows:

1. I am over 18 years old.
2. I have personal knowledge of the facts stated herein, except for those set forth upon information and belief.
3. I represent Respondent Adrian L. Falgione in this appeal.
4. I have reviewed my file to confirm the facts set forth below.
5. On May 26, 2016, this Court ordered that the Respondents serve the Appellant with copies of certain documents in their possession within ten days. The

Court further ordered that within twenty days of receiving those documents the Appellant “serve and file an amended record on appeal that includes the excluded documents and complies with Rule 210, SCACR.”

6. On June 3, 2016, I sent the Appellant copies of Respondent Falgione’s Motion to Change Venue, filed May 17, 2012, and Falgione’s Memorandum in Support of his Motion to Dismiss, dated January 27, 2012. I sent the documents by both U.S. Mail and by e-mail.

7. On June 27, 2016, I received a flat, yellow 9” x 12” envelope that contained only a smaller, white envelope. Neither envelope contained any documents.

8. The mailing label of the yellow envelope shows it was sent on June 24, 2016, twenty-one (21) days after I served Appellant with the documents. A true and accurate picture of the mailing label is attached as **Exhibit A**.

9. Upon receipt of the empty envelopes, I immediately notified the Clerk of Court’s office, requested notice of anything filed with the Court, and served copies of the correspondence on Appellant and counsel of record.

10. On June 28, 2016, I received a copy of the Record on Appeal from Appellant that consisted of two volumes. According to the mailing label on the box in which the Record was shipped, the Record on Appeal was mailed on June 27, 2016, twenty-four (24) days after I served Appellant with the documents. A true and accurate photograph of the mailing label is attached as **Exhibit B**.

11. Although the mailing label shows the Record was mailed on June 27, 2016, Appellant certified in his proof of service that he served the Record on Appeal on June 22, 2016. A true and accurate copy of the proof of service is attached as **Exhibit C**.

12. A certificate of compliance accompanied the Record stating “the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.” A true and accurate copy of the certificate of compliance is attached as **Exhibit D.**

13. Contrary to Rule 210, SCACR, and to the certificate of compliance, the Record I received on June 28, 2016 does not contain all material the parties proposed to be included; it includes additional material not designated by any party; and it includes improper material in violation of Rule 210(c), SCACR.

14. The Record does not include the following material from the parties’ designations:¹

- a. Amended Complaint of Southern Holdings (Appellant’s designated item 7);
- b. Amended Complaint of Doris Holt (Appellant’s designated item 8);
- c. Correspondence to Bruner dated November 27, 2012 (Appellant’s designated item 10);
- d. Notice of Withdrawal of Complaint Regarding Southern Holdings dated October 12, 2012 (one of three items included in Appellant’s designation number 14);
- e. Expedited Motion to Compel and to Stay Hearings dated July 30, 2012 (Appellant’s designated item 15);
- f. Declaration of Irene Santacroce dated July 30, 2012 (Appellant’s designated item 15);
- g. Proposed Order Granting Defendants’ Motions to Change Venue, August 1, 2012 (Appellant’s designated item 19);

¹ This conclusion is based on a comparison of the contents of the Record to Appellant’s Designation of Matter filed June 1, 2015; Falgione’s Designation of Matter filed July 29, 2015; and Rakowsky’s Designation of Matter filed July 30, 2015.

- h. Order of Continuance and denial of Santacroce's motion to disqualify signed June 14, 2014 and filed June 28, 2012 (Falgione's designated item 23 and Rakowsky's designated item 8); and
- i. Page 23 of the "Excerpts from May 7th, 2012 Hearing" attached as an exhibit to Appellant's Brief on Corrections filed June 27, 2013. (*See R. pp. 201-202.*)

15. Appellant acknowledges in an "Addendum Notation" in the index that the Record he prepared does not include all material proposed by the parties, as required by the Rules.

16. The Record also includes the following material which no party designated:

- a. Expedited Motion to Compel Defendants' Participation in Discovery in C/A No. 2008-CP-40-6656,² July 14, 2011 (R. pp. 92-118);
- b. Proposed Order granting Appellant's Motion to Disqualify Defense Counsel (R. pp. 73-74);
- c. Affidavit of Aimee Zmroczek bearing no file stamp (R. pp. 243-254);
- d. Order issued January 14, 2008 by Judge Harwell in Civil Action No. 4:02-cv-01859-RBH, ECF No. 577 (R. pp. 560-561);³
- e. Response of Certain Defendants to Plaintiffs' Motions and Motion for Sanctions filed June 12, 2007 in Civil Action No. 4:02-cv-01859-RBH, ECF No. 490 (R. pp. 502-514);⁴

² This is a separate case initiated by Rakowsky to interplead funds into Court related to the underlying federal lawsuit. Appellant also has an appeal pending in that case, *Rakowsky v. Law Offices of Adrian L. Falgione, LLC, et al.*, Appellate Case No. 2014-002029.

³ Only ECF No. 582 (motion to reconsider the Order filed as ECF No. 577) was designated and listed in the index, not the Order that was to be reconsidered.

17. The index of the Record also misidentifies the Affidavit of Aimee Zmroczek, which no party designated, as a "Court's Exhibit" when it was not one. (Appellant's Designation of Matter, Rakowsky's Designation of Matter, and Falgione's Designation of Matter (all omitting any reference to Zmroczek's affidavit); *and* Tr. from June 5, 2013 hearing, R. p. 258.)

18. Furthermore, the Record served upon me includes matter which was not presented to the lower court, specifically:

- a. Expedited Motion to Compel Defendants' Participation in Discovery dated July 14, 2011 (prior to the complaint) in C/A No. 2008-CP-40-6656 (R. pp. 92-118);⁵
- b. Affidavit of John Rakowsky dated May 23, 2014 (after this appeal was filed) filed in C/A No. 2008-CP-40-6656 (R. pp. 218-221);⁶
- c. E-mail from Ms. Freda Sartin, secretary to Judge Addy, dated October 12, 2015 (after this appeal was filed) (R. p. 590); and
- d. An unsworn statement purportedly from an employee of the Lexington County Clerk of Court dated after this appeal was filed (R. p. 591).

Rule 210(c), SCACR (record shall not contain matter not presented to lower court).

19. In addition to the shortcomings set forth above, I am informed and believe the Record Appellant recently served upon me fails to comply with Rule 210(c) because the material contained in it is not arranged in the order required by the Rule and the index is inaccurate. (*See, e.g.*, R. pp. 212-215, 324-393.) The Record also contains duplicate

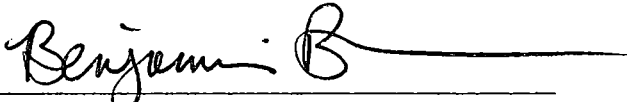
⁴ Appellant designated ECF No. 491 filed June 13, 2007 in Civil Action No. 4:02-cv-01859-RBH. (Appellant's designated item 27.)

⁵ *Ibid.*

⁶ *Ibid.*

copies of the entire transcript from the May 7, 2012 status conference. (Compare R. pp. 324-393 to R. pp. 394-463.)

FURTHER AFFIANT SAYETH NOT.



Benjamin C. Bruner

SWORN TO ME this 29th day of June, 2016



Notary Public for South Carolina

Name: Lora J. Fether

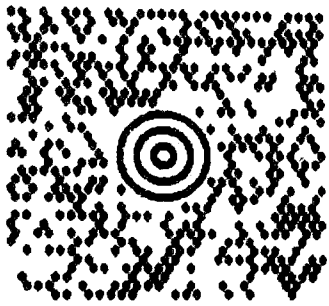
My Commission Expires: 4/27/2026

JAMES B SPENCER
(803) 414-0889
THE UPS STORE #3072
7001 ST ANDREWS RD
COLUMBIA SC 29212-1144

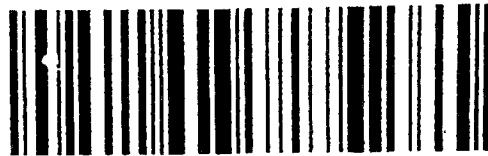
1 LBS 1 OF 1
SHP WT: 1 LBS
DATE: 24 JUN 2016

SHIP BRUNER, POWELL, WALL & MULLINS
TO: STE 200
1735 JULIAN PLACE

COLUMBIA SC 29260-1110

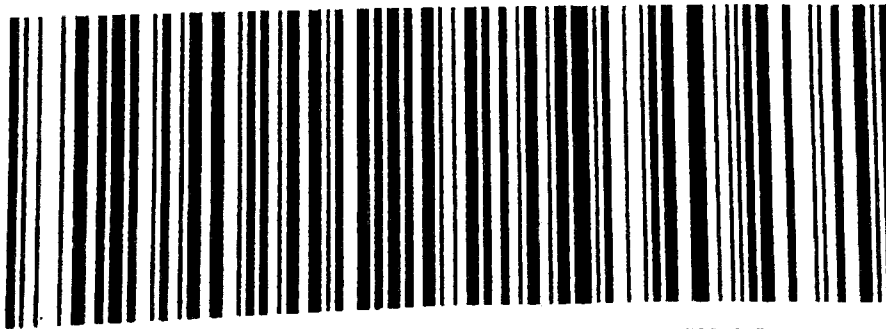


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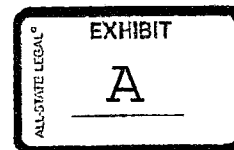


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SC Court of Appeals

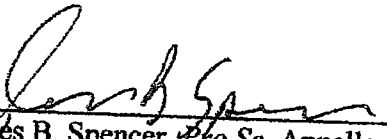
The undersigned hereby certifies that on , the document described below, was(were) served on all parties of record in this case by mailing a copy, by US mail and/or delivery by courier on this date June 22, 2016.

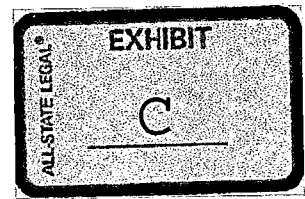
Documents served: **Record On Appeal, Volume I of II**

Parties Served:

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Bruner, Powel, Wall & Mullins, LLC
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Post Office Box 61110
Columbia, South Carolina 29260-1110

David W. Overstreet
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Attorneys for John Rakowsky


By: 
James B. Spencer, *Pro Se*, Appellant
Suite 183
7001 Saint Andrews Road
Columbia, SC 29212
(803) 414-0889



CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

By:



James B. Spencer, *Pro Se*
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Columbia, SC 29212

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