

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

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

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NOV 15 2017

SC Court of Appeals

Case No. 2015-CP-24-00892

Appellate Case No. 2017-00810

Jeffrey S. Kagan.....Appellant,

v.

D. Renee SimchonRespondent.

**RESPONDENT'S MOTION TO STRIKE DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

K&L GATES LLP
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Attorneys for Respondent

The Respondent moves, pursuant to Rules 209(b) and 210(c) of the South Carolina Appellate Court Rules (“SCACR”), to strike certain matters that the Appellant has proposed to be included in the Record on Appeal on the ground they were not presented in the lower court.

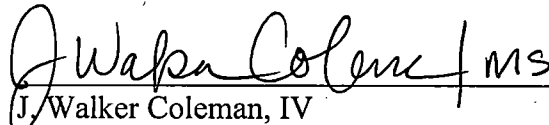
Rule 209(b), SCACR, provides that “. . . the Designation may only propose to include portions of the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [See Rule 210(c)].” Rule 210(c), SCACR, provides that, “The Record shall not, however, include matter which was not presented to the lower court or tribunal.” *See also, Argabright v. Argabright*, 398 S.C. 176 (2012); *State v. White*, 372 S.C. 364 (Ct. App. 2007).

In Appellant’s Designation of Matter to be included in the Record on Appeal, Appellant lists Item Nos. 3 and 4: “Deposition of D. Rene [*sic*] Simchon” and “Deposition of Jeffrey S. Kagan.” While it appears Appellant intends to include the entire deposition testimony of D. Renee Simchon and Jeffrey S. Kagan in the Record on Appeal, neither party presented the full deposition transcripts in the lower court. Nothing in the Record reflects that Items 3 and 4 were presented or provided to the Court in their entirety during oral arguments, or that said items were attached in full as exhibits by the Appellant or Respondent in any other respect. Rather, the parties attached only certain excerpts of the aforementioned deposition transcripts to their respective briefs and read into the record only certain portions of the testimony during oral argument. Accordingly, Rule 210(c) prohibits Items 3 and 4 from being included in the Record on Appeal in their entirety and, thus, under Rule 209(b), the Appellant may not designate such items. Instead, the Record on Appeal must be limited to those specific deposition excerpts presented in the lower court as exhibits or during oral arguments.

The undersigned counsel for the Respondent consulted with the Counsel for Appellant regarding this matter. Counsel for Appellant did not provide a definitive response as to whether he would consent to amending Appellant's designation to withdraw Items 3 and 4 and/or identify only those appropriate portions of the deposition transcripts presented in the lower court. Therefore, Respondent hereby moves the Court for an order striking Items 3 and 4 or, in the alternative, limiting Items 3 and 4 to those excerpts presented in the lower court.

Respectfully submitted,

K&L GATES LLP

Handwritten signature of J. Walker Coleman, IV in cursive script, underlined.

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November 13, 2017

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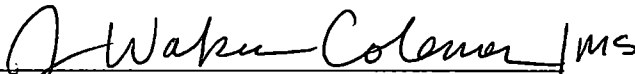
v.

D. Renee SimchonRespondent.

PROOF OF SERVICE

I certify that I have served Respondent's Motion to Strike Designation of Matter to Be Included in the Record on Appeal on Jeffrey S. Kagan, Appellant, by depositing a copy in the United States Mail, postage prepaid, on November 13, 2017, addressed to his attorney of record, C. Rauch Wise, Esq., 305 Main Street, Greenwood, SC 29646.

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MS

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Attorneys for Respondent

November 13, 2017

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The Honorable Jenny Abbott Kitchings
Clerk of Court, SC Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: **D. Renee Simchon v. Jeffrey S. Kagan**
Appellate Case No. 2017-000810

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SC Court of Appeals

Dear Ms. Kitchings:

Enclosed for filing are following documents in connection with the above-referenced case:

1. Original and one copy of Respondent's Initial Brief;
2. Original and one copy of Proof of Service of Respondent's Initial Brief;
3. Original and one copy of Respondent's Designation of Matter to Be Included in the Record on Appeal;
4. Original and one copy of Proof of Service of Respondent's Designation of Matter;
5. Original and seven copies of Respondent's Motion to Strike Designation of Matter to Be Included in the Record on Appeal; and
6. Original and one copy of Proof of Service of Respondent's Motion to Strike Designation of Matter to Be Included in the Record on Appeal.

Also enclosed is our check in the amount of \$25.00 for the Motion filing fee. Please return stamped copies to us in the enclosed self-addressed stamped envelope.

By copy of this letter, we are serving all counsel of record.

Thank you for your assistance with this matter. Please do not hesitate to contact me if you have any questions.

With kind regards, I remain

Very truly yours,



J. Walker Coleman, IV

Enclosures

cc: C. Rauch Wise, Esq. (via U.S. Mail, w/encl.)
Edward S. McCallum, III, Esq. (via U.S. Mail, w/encl.)
Jennifer H. Thiem, Esq. (w/encl., via email)
Meg Sawyer, Esq. (w/encl., via email)



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