

THE STATE OF SOUTH VCAAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

RECEIVED

DEC 05 2017

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

99 Court of Appeals

Case № 2015-CP-24-00892

Appellate Case № 2017-00810

Jeffrey S. Kagan Appellant,

v.

D. Renne Simchon Respondent

Return to Motion to Strike Designation of Matter
To be Included in Record on Appeal

C. Rauch Wise
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S. C. Bar № 06188

Attorney for Appellant

Jeffery S. Kagan, the Appellant above named hereby responds to the Motion to Strike as follows:

At the January 24, 2017 hearing on the Motion for Summary Judgment both parties made reference to the depositions taken in this case. The Attorney for Renne Simchon tendered copies of both depositions to the Court. Hearing of January 24, 2017 at 16, ll 22-23. (Copy attached hereto) Robert Tinsley, counsel below for Jeffery Kagan made reference to exhibits introduced at the deposition. Hearing of January 24, 2017 at 7, ll 3-5. He further made a general reference to the deposition of Mr. Kagan at page 11, ll 15-23.

As the trial court had access to the full depositions which were tendered to him. Our Supreme Court has said “[S]ummary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.” *Baughman v. American Telephone and Telegraph Co.*, 306 s.C. 101, 112, 410 S.E.2d 537, 543 (1991). In keeping with the spirit of this holding, this Court should deny the request to strike from the record the entirety of the two depositions taken in this case. If trial counsel below inadvertently left out an important page of the deposition his client would be deprived of a trial of the disputed facts in his case.

Wherefore Jeffrey Kagan, Appellant herein, request the entirety of both deposition be included in the record in this matter.

December 1, 2017



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STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

IN THE COURT OF COMMON PLEAS

JEFFREY S. KAGAN,)
)
PLAINTIFF,)
)
)
-VS-)
)
SAM SIMCHON, ET AL,)
)
DEFENDANTS.)

CASE NO.: 2015-CP-24-00892

TRANSCRIPT OF RECORD

JANUARY 24, 2017
GREENWOOD, SOUTH CAROLINA

BEFORE:

THE HONORABLE FRANK R. ADDY, JR., JUDGE

APPEARANCES:

ATTORNEY FOR PLAINTIFF:

JAMISON TINSLEY, ESQUIRE

ATTORNEY FOR DEFENDANT:

J. WALKER COLEMAN, IV, ESQUIRE
EDWARD McCALLUM, ESQUIRE

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DEC 05 2017

SC Court of Appeals

TARA T. SCOTT, CVR
CIRCUIT COURT REPORTER

INDEX

WITNESS

PAGE NO.

Certificate of Reporter.....

EXHIBITS

NO.

DESCRIPTION

ID

EVIDENCE

1 THE COURT: We're going to go back on the record on
2 *Kagan vs. Simchon*, 15-CP-24-892. I believe that this is the
3 Defendant's motion for summary judgment. At least that's
4 what we have on tap for today. Mr. McCallum, I'm happy to
5 hear from you.

6 MR. McCALLUM: Mr. Walker Coleman is going to handle
7 the argument, Your Honor.

8 THE COURT: Mr. Walker, go ahead, sir.

9 MR. COLEMAN: Your Honor, good morning. Walker Coleman
10 on behalf of the one remaining Defendant, Renee Simchon, and
11 this is indeed our motion for summary judgment.

12 Your Honor, as you recall when we were here the last
13 time on our motion to dismiss, this is a case that involves
14 three purported loans that were made to Mrs. Simchon. As
15 Your Honor ruled last time in this case, based on those
16 loans there are three causes of action. There's one for
17 breach of contract, one for breach of contract accompanied
18 by fraudulent act, one for a promissory estoppel, and there
19 was also one for intentional infliction of emotional
20 distress. Your honor dismissed the intentional infliction
21 claim in full against all Defendants. And then dismissed
22 all of the Defendants except for Ms. Simchon. And then it
23 dismissed the other claims with respect to loans one and
24 three. So leaving only loan two. And if Your Honor
25 recalls, the only reason that you didn't dismiss that claim

1 as well was based on Mr. Kagan's counsel's representation to
2 the Court that he had a writing that would evidence that
3 second loan. And so, Your Honor held off. Did not dismiss
4 that case. Asked us to proceed through discovery, which
5 we've done, and we're here today. And there is no writing.
6 And, in fact, we're here almost a year later. And, in fact,
7 Mr. Kagan admitted in his deposition that there is no
8 writing.

9 So, Your Honor, we are here before you again. This
10 claim, like the others, should likewise be dismissed
11 pursuant to the South Carolina Lender Statute of Frauds
12 because it is not in writing. And, Your Honor, even if
13 there were a writing the remaining loan by Mr. Kagan's own
14 admission, he discovered the purported breach on March the
15 21st of 2011. This case wasn't filed until August the 25th
16 of 2015. So really over a year after the Statute of
17 Limitations ran. So even if there were a writing of any
18 sort, that knocks out the breach of contract claim, and it
19 also knocks out the breach of contract with fraudulent
20 attempt claim as well, leaving only the claim for a
21 promissory estoppel. That claim, likewise, should also be
22 dismissed under the *Wells Fargo vs. Carter* case which holds
23 that all claims in equity are subject to the three year
24 Statute of Limitations because the statute applies to imply
25 as well as expressed contracts.

1 So, Your Honor, we would ask that the Court grant our
2 -- the Defendant's motion for summary judgment dismissing
3 all claims with respect to the one remaining loan, loan two
4 at issue. Thank you, Your Honor.

5 THE COURT: All right. Mr. Tinsley?

6 MR. TINSLEY: Thank you, Your Honor. I've got a memo
7 to pass up to the Court for its review.

8 THE COURT: Please.

9 MR. TINSLEY: First of all, we dispute -- it's more of
10 a lost writing. It's not -- there's been no -- there's been
11 no admission by Mr. Kagan that no writing existed. And I
12 certainly -- I don't know that I may -- I don't -- it wasn't
13 like I made any misrepresentations to the Court at the last
14 hearing. I just want to make that clear right off the bat.

15 THE COURT: No. I understand that we were very early
16 in the litigation at the time of the last hearing and
17 obviously your understanding of the facts is subject to
18 change based on discovery. So I certainly did not hold that
19 against you.

20 MR. TINSLEY: Yes, sir, Your Honor. And first, they're
21 relying on this Lender Statute of Frauds which is found in
22 the Consumer Protection Act, which I guess my first point to
23 raise is that this is not a consumer protection issue. This
24 is Mr. Kagan lending money to his employer and his
25 employer's wife who is the only remaining party. So I have

1 issue with that Statute of Frauds even applying. Secondly,
2 I think there are sufficient writings even without the
3 actual specific contract, which seems to be lost, based off
4 what we're seeing in discovery from our perspective, Mr.
5 Kagan's testimony. There is a \$31,000 check issued by --
6 signed by Ms. Renee Simchon drawn on the Sam Simchon
7 investment account, Thornbrook Holdings Bay Island, LLC to
8 Mr. Kagan in March of 2011 for 31,000 some odd dollars for
9 repayment of loan. And you can see where -- and like I
10 said, signed by Mrs. Simchon. And you can see where in
11 October of 2010 Mr. Kagan transferred \$210,000 through the
12 County Bank to Mrs. -- to the County Bank loan for Renee
13 Simchon. And this loan was tied to a property over in
14 Laurens County that sold in March of 2011, I believe. And
15 that's when the \$30,000 check was cut. So we've got the
16 satisfaction of mortgage, the deed where Ms. Simchon signed
17 transferring title to the buyer. And we think all this
18 shows the parties' intent that there was a -- and confirms
19 their agreement. The written agreement that's lost. And
20 also, I would suggest that it does comply with the Statute
21 of Frauds. And further, while South Carolina is kind of --

22 THE COURT: Was there anything listed on the HUD
23 statement when the property was sold? Because that would
24 have been prepared theoretically by the Defendant if she was
25 the agent, and if there was something reflected on that in

1 terms of paying off the loan or -- I assume there was
2 nothing on the HUD?

3 MR. TINSLEY: I do not believe so. I am not in
4 possession of the HUD, and I believe I did see it in the
5 depositions.

6 MR. MCCALLUM: We made you a copy at deposition.

7 MR. TINSLEY: Okay, well...

8 THE COURT: I'm sorry to interrupt. Go ahead, please.

9 MR. TINSLEY: I don't seem to currently be in -- but it
10 was -- the HUD was there and I've seen it. But I believe my
11 understanding, just going off memory, is that the money went
12 straight to Mrs. Simchon, and then she cut the \$31,000 check
13 to Mr. Kagan and then took 180 that we claim he was still
14 owed under their agreement and gave it to Mr. Simchon
15 without his knowledge. But some states also -- South
16 Carolina hasn't ruled one way or the other on the lost --
17 this lost memorandum exception of the Statute of Frauds,
18 which basically it's -- the states that have recognized it,
19 essentially they require -- they allow parol evidence to
20 prove the existence of a -- of a contract that's contained
21 in a lost or destroyed document and they require clear and
22 convincing evidence as a standard, is my understanding. So
23 the same with all these writings. We would say that that --
24 that gets there.

25 And also, I'll just point to section three --

1 subsection three of the Lender Statute of Frauds which -- I
2 mean, it specifically excludes a loan of money used for
3 personal, family, or household purposes from that statute,
4 and it also does not apply to promissory notes, real estate
5 mortgages, security agreements, guaranteed surety agreements
6 and letters of credit. So I don't -- I don't think this
7 loan is barred by the statute that they rely on.

8 As to the Statute of Limitations, here's where it gets
9 murky. As Your Honor knows, allege the two other loans to
10 Mr. Simchon, or to Bay Island, and those have been dismissed
11 for no writing. I mean, we never claimed there was a
12 writing on those. And Mr. Kagan was still receiving
13 payments from Mr. Simchon, and some from Mrs. Simchon, up
14 until November of 2013, and we filed this suit in 2015. So
15 at that point, if he's receiving payments from Mr. Simchon
16 on whatever loan, they sort of to me could be very
17 reasonable in thinking that Mr. Simchon was acting as Mrs.
18 Simchon's agent, and vice versa. The fact is, he's getting
19 paid, so why would he file a lawsuit. And he filed a
20 lawsuit once he quit getting paid. We say that's when the
21 breach occurred in November of 2013 and he filed in 2015.
22 So we think we're timely.

23 Thank you, Your Honor.

24 THE COURT: Thank you. You want to --

25 MR. COLEMAN: Thank you. So Mr. Kagan, really he's --

1 as a matter of law he's out of luck either way. So even if
2 Your Honor assumes based on the parol evidence that opposing
3 counsel just discussed, if that's enough to give rise based
4 under this lost memo standard, which our court is not even
5 official accepted. And I'll get to the case at issue here.
6 Even if that's the case and there is a contract, then under
7 the Statute of Limitations he loses because as Your Honor
8 knows, under the *Glover vs. Lockheed* case, a promissory
9 estoppel claim is only applicable when a contract does not
10 exist. So if you're saying a contract does exist then the
11 claim's not timely on the second loan. And so, it's out as
12 a matter of law.

13 And, Your Honor, also with respect to the lost memo
14 issue. The case really that is on point here is the *Yadkin*
15 *Valley Bank and Trust* case versus *Oaktree Homes* case. And
16 in that case our Court of Appeals, it basically affirmed the
17 grant of summary judgment under the Lender Statute of Frauds
18 under very similar circumstances. And here it's stated on
19 appeal, actually on a writ to the Supreme Court, the --
20 which was -- which the Supreme Court also affirmed it. But
21 on appeal the opposing side tried to argue, tried to cobble
22 together some things to constitute this lost memo document.
23 And the standard is indeed clear and convincing evidence.
24 And I will submit, Your Honor, that really under that --
25 under that case the documents that are provided as -- as

1 parol evidence, they do not rise to the level of clear and
2 convincing evidence of existence of a contract which is the
3 threshold. It's not preponderance of the evidence. It's
4 clear and convincing. And those documents don't -- don't
5 reference a loan. They don't even, you know, have any of
6 the loan terms in them. And I think without that they, once
7 again, do not rise to that level of clear and convincing
8 evidence.

9 So whether or not Your Honor decides there is a
10 contract, it's still out as a matter of law because it
11 violates the Statute of Frauds. And if Your Honor decides
12 that it's an implied contract it also is out as a matter of
13 law under the *Wells Fargo vs. Carter* case.

14 THE COURT: I've been leafing through some of what Mr.
15 Tinsley handed up, and obviously I haven't had an
16 opportunity to take a good hard look at what the Plaintiff
17 has provided. In the Defendant's memorandum they reference
18 deposition testimony of Mr. Kagan where he basically -- it
19 says, "Rather Plaintiff agree --" and I'm looking on page
20 three. Rather Plaintiff agreed to this arrangement based
21 on, quote, a handshake and a look in the eye, end quote.
22 And there's reference to a cotton investment and things of
23 that nature. I mean, can -- can you expand, Mr. Tinsley on
24 -- and, of course, I'll look at the deposition excerpts that
25 you've attached. But can you expand on -- if there's a lost

1 writing obviously this isn't a handshake and a, you know,
2 look in the eye kind of agreement. But, I mean, was there
3 somewhere in the deposition where someone testified that at
4 some point this was reduced to writing, or that there were
5 emails or any kind of communication that could be
6 interpreted as a writing? Obviously the Court is in a
7 difficult position. If the Court is being asked to enforce
8 a contract, then the question becomes, well, what was the
9 agreement. And it's hard for the Court to speculate -- I
10 mean, the Court's not supposed to even speculate about the
11 terms absent a writing.

12 MR. TINSLEY: Yes, sir, Your Honor.

13 THE COURT: That's what I'm really struggling with more
14 than anything else.

15 MR. TINSLEY: Mr. Kagan did testify that Mrs. Simchon
16 drafted their -- the second loan, drafted a contract between
17 them. I think the handshake and the look in the eye, I
18 think that's where we get to the murkiness, because
19 admittedly his dealings with Bay Island through Mr. Simchon
20 for loans one and three were not reduced to writing, and I
21 think that's where the handshake and look in the eye come
22 into play is that -- and also, he was still getting paid up
23 until November of 2013 is where I think the handshake, look
24 in the eye and dealing with Mr. Simchon, because admittedly,
25 Mr. Simchon was not ever a party to any written agreement.

1 But Mrs. Simchon and him did, and there's specific
2 testimony, I believe I cited in here --

3 THE COURT: Are you saying that she drafted a contract
4 and that it was signed by all involved and that now that
5 document is gone missing?

6 MR. TINSLEY: Correct. Signed by those two. I don't
7 -- I haven't heard -- I haven't seen anything saying that
8 Mr. Simchon signed that agreement.

9 THE COURT: Right. I understand that.

10 MR. TINSLEY: But, yeah, that's -- that is what we're
11 saying, Your Honor.

12 MR. MCCALLUM: May I, Your Honor?

13 THE COURT: Sure.

14 MR. MCCALLUM: Your Honor, if you -- on page 33 of Mr.
15 Kagan's deposition this specific issue is addressed.

16 THE COURT: Hold on. Let me look at page 33 then, if I
17 may. I think that -- well, no, this is the deposition of
18 Mrs. Simchon that I turned to.

19 MR. MCCALLUM: Okay, I'm --

20 THE COURT: Hold on. Maybe I have it.

21 MR. MCCALLUM: Yeah.

22 THE COURT: I got it. I'm where I think you are.

23 MR. MCCALLUM: (READING) When did you say to Renee
24 Simchon, if ever, Renee, I want my \$210,000? Let me think,
25 because again this was all verbal. It was all based on

1 trust. There were not writings? Answer. There was a
2 writing contract from Renee to me and that's how we agreed
3 on the 1,250. And 1,250 refers to the interest payments.
4 You have a copy of such writing? That I'd have to find.
5 There was a verbal -- I mean, a written agreement. This
6 lawsuit has been pending, what, for a year and a half or
7 more. I've moved four times. Question. That's fine.
8 Answer. I have to find the paperwork. Question. Have you
9 been able to identify any writing that represents this
10 transition? Answer. From Renee to myself? Question. Yeah,
11 or you to Renee. Answer. I'm working that -- on that right
12 now. I mean, like I said, Ed, I've moved four times. I've
13 checked through -- Question. So as of today you cannot
14 produce a writing? Answer. As of right now I cannot
15 produce a writing. As of right now that's correct, yes.

16 Mrs. Simchon, on the other hand, denies that there was
17 ever a writing between them. She's never acknowledged that
18 there was a writing between them. And, Your Honor, even if
19 there were writing, I think that there's an important point
20 that's kind of being glossed over here, and that is if you
21 believe everything that the Plaintiff said, that he loaned
22 the \$210,000 and he was supposed to get his \$210,000 back
23 when the house closed, even assuming all that, what happened
24 was, and as the Plaintiff has acknowledged, he received a
25 \$31,616.46 check. That represented \$30,000 of principal and

1 the interest that was due for the last month when the house
2 closed. The other \$180,000 went to Mr. Simchon's investment
3 account. Into the cotton futures. Mr. Kagan knew that in
4 2011. If he had a problem with Mr. Simchon making that
5 investment on his behalf, he should have raised that then.
6 Not in 2015 four years later and claim that it was a loan.
7 He acquiesced and he acknowledges in his deposition that he
8 acquiesced in Mr. Simchon receiving that money and investing
9 that money on his behalf.

10 If you look at his -- page 56 of his deposition.

11 (READING) Did you ever make a request to Renee Simchon?

12 Answer. I did not authorize Renee Simchon. Question. Did
13 you make a request? Answer. I don't -- I don't recall if I
14 personally went to her office and said Renee, I need \$5,000.
15 I don't recall that. Question. Is the answer to -- Answer.
16 My dealings were with Sam Simchon after this money went to
17 Sam Simchon. That's what I'm saying to you. This money
18 went to Sam Simchon. I worked for Sam Simchon. I trusted
19 Sam Simchon. I trusted Renee Simchon.

20 The point being that we're looking at one loan. We're
21 looking at this one number two loan. This \$210,000 loan.
22 In March of 2011 that loan ceased to exist. \$180,000 was
23 paid towards the investment account and the \$31,616 was the
24 balance of the loan plus the interest on the loan that was
25 due at that point in time. That was the end of Mrs.

1 Simchon's obligation, if any, to Mr. Kagan.

2 MR. COLEMAN: Your Honor, just to add -- Walker
3 Coleman, just to add one. So essentially what Mr. Kagan's
4 counsel is stating, he's basing this on -- on really the
5 testimony of Mr. Kagan and in the -- in the Yadkin case.
6 Again, the Court -- it's a cited quote in here. It says the
7 very purpose in the Statute of Frauds is defeated where the
8 sole proof of the existence and contents of the document are
9 relied upon to avoid the statute is the testimony of the
10 Plaintiff. You know, once again, that goes to the clear and
11 convincing standard. The heightened level required to
12 define as to parol evidence is sufficient to constitute a
13 writing that should -- that should exist.

14 THE COURT: All right. I assume that the future -- the
15 Defendant's position is that the futures investment didn't
16 quite work out the way everyone had hoped. Is that -- am I
17 putting that mildly?

18 MR. MCCALLUM: They lost a significant amount of money.
19 Yes, sir. Although Mr. Simchon did make payments on that --
20 there was no distinction in any of the payments whether it
21 was loans one, two, or three that Mr. Simchon transferred
22 the money to Mr. Kagan. And there's arguments as to whether
23 those transfers were bonuses or whether they were payments
24 on loans. But you dismissed all those claims against Mr.
25 Simchon.

1 THE COURT: Mr. Tinsley, you wanted another word?

2 MR. TINSLEY: I'm just -- this cotton futures stuff,
3 our position is Mr. Kagan didn't -- had no knowledge that
4 that's what happened to the money until -- he was never
5 provided any statements until we get into this lawsuit and
6 Mr. McCallum provided us documents showing where \$180,000
7 went into a cotton futures account. And so, I don't -- I
8 think you've got to have full knowledge of the facts, and
9 our position is that Mr. Kagan did not. So I don't think
10 you can acquiesce in something without full knowledge of any
11 facts. And also our position is a breach didn't occur until
12 the payments stopped being made.

13 THE COURT: I understand your position on the Statute
14 of Limitations. I think the threshold issue is really
15 whether or not this agreement -- assuming for the moment
16 that there was an agreement along the lines of what you're
17 saying, whether that's enforceable at law or in equity.

18 Allow me to look at the file and do a little bit of
19 independent research myself, and I hope to have you all
20 something -- a decision on this by the end of the week, if
21 not sooner. Okay?

22 MR. MCCALLUM: Your Honor, would you like copies of the
23 depositions? There's just two.

24 THE COURT: I think I may have been provided with -- I
25 saw the relevant portions, I think, from both Simchon and

1 Kagan. So if there's something in addition to what I've
2 already been provided that's relevant, feel free to shoot it
3 my way. But I'm assuming that you all hit the high notes
4 with what has been provided so far.

5 MR. McCALLUM: We will double check it --

6 THE COURT: If you all would --

7 MR. McCALLUM: --in the next 48 hours if we feel there's
8 something else relevant.

9 THE COURT: That's fine.

10 MR. COLEMAN: And, Your Honor, would it be helpful for
11 the parties -- the respective parties to also submit a
12 proposed order for Your Honor?

13 THE COURT: No. I'd rather -- instead of one side
14 wasting time, I'd rather make my decision and then I'll be
15 in touch with you all on what I do, if I could.

16 MR. McCALLUM: Thank you, Your Honor.

17 MR. COLEMAN: Thank you.

18 MR. TINSLEY: Thank you for your consideration, Your
19 Honor.

20 - - - END OF REQUESTED TRANSCRIPT OF RECORD - - -

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1 Certificate of Reporter

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I, the undersigned, Tara T. Scott, Official Court Reporter for the Eighth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Circuit Court for Greenwood County, South Carolina, on the 24th day of January, 2017.

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Tara T. Scott

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Tara T. Scott, CVR

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Circuit Court Reporter

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June 13, 2017

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas
Hon. Frank R Addy, Jr, Circuit Court Judge

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DEC 05 2017

SC Court of Appeals

Case No 2017-000810

Jeffrey S. Kagan, Appellant,

vs.

D. Renee Simchon Respondent

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me, Sandy Traynham who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Appellant in the above entitled case. That on December 1, 2017, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Motion to File Out of Time the Return to Motion to Strike Designation of Matter to be included in Record on Appeal together with a copy of the Return to Motion to Strike Designation of Matter to be included in Record on Appeal in the above case addressed to J. Walker Coleman, IV, Meg E. Sawyer, K&L Gates,, 134 Meeting Street, Ste. 500, Charleston, SC 29401, and Edward S. McCallum, III, PO Box 148, Greenwood SC 29648.

Sworn to and Subscribed

Sandy Traynham

before me this 1 day

of December, 2017

[Signature]

Notary Public for South Carolina

My Commission Expires: 12/7/2018

LAW OFFICE OF
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December 1, 2017

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

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SC Court of Appeals

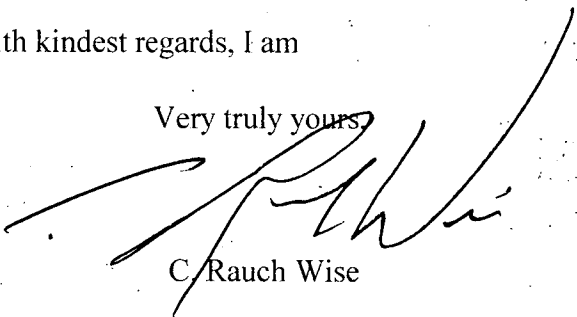
Re: Kagan vs. Simchon, Appellate Case No. 2017-000810

Dear Ms. Kitchings:

I am enclosing herewith the original and six copies of the Motion to File Out of Time together with the original and six copies of the Return to Motion to Strike Designation of Matter to be Included in Record on Appeal. I am also enclosing herewith a check in the amount of Twenty-Five (\$25.00) Dollars and the original Affidavit of Service.

With kindest regards, I am

Very truly yours,


C. Rauch Wise

CRW/slt
Enclosure

cc Edward McCallum
J. Walker Coleman, IV

LAW OFFICE OF
C. RAUCH WISE
Attorney & Counselor at Law
305 Main Street
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