

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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AUG 09 2018

Case No: 2014-002029

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Doyet Early, III., Circuit Court Judge

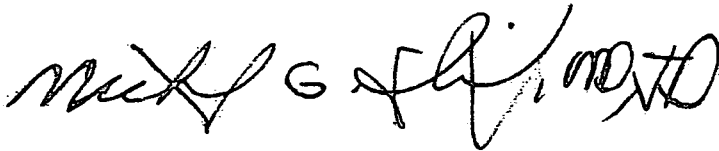
John R. Rakowsky, *Respondent*

v.

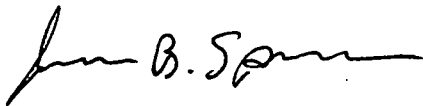
James Spencer, *Pro Se, Appellant*

APPELLANT'S PETITION FOR REHEARING

By:



Michael G. Sribnick, M.D., J. D.
3 Kenilworth Avenue
Charleston, S.C. 29403



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Pursuant to Rule 221(a) of the South Carolina Appellate Rules of Civil Procedure (“SCRAP”), *Pro Se* Appellant Spencer respectfully petitions this Court for a rehearing of Unpublished Opinion No. 2018-UP-338 issued on July 25, 2018 (“Opinion”). The basis for this petition is that the Opinion overlooks and misapprehends key points of law. The Court must reconsider and find that this case must be declared a mistrial because Judge Seal’s Order was the cornerstone used by the Respondents to deny discovery requests.

First under point 4 of the Opinion, the Court found that the issue of *ex parte* communications regarding the in-camera review which included undisclosed documents secretly presented by Respondent’s counsel that led to Judge Seal’s Order, executed on July 25, 2011 and filed on August 4, 2011 (**R. pgs. 1-4**) was not raised as an issue or ruled upon in the lower Court and therefore could not be reviewed by the Appellate Court. The Opinion was erred in this conclusion. Judge Early ruled in his Order filed on December 23, 2014, that the long outstanding motion regarding *ex parte* communications voiding Judge Seal’s Order was denied. (**R. 35, point 3.**) The Opinion also stated that there was no mention of the objection of the *ex parte* matter presented in Judge Seal’s Order. First, these *ex parte* misleading documents were not known about by the Appellants at the time of the hearing. When it was discovered that Respondent’s counsel had conducted the illegal *ex parte* communications and deliberately deceived the Appellants by

providing contrived documents to the Appellants to mislead them, (R., pgs., 194-195) the Appellants immediately filed a motion to overturn the ruling. Every motion hearing set to hear this motion was delayed by the Respondent's counsel for years until Judge Early ruled on the motion without a hearing (*emphasis added*) in his December 23, 2014 Order stating that Judge Seal's Order was "the law of the case." (R., p. 35, Section 3, line 4.) The law of this case was derived by denying due process to the Appellants who presented incontrovertible documentation to the deception and ex parte communications that resulted in the Order.

Second, point 3 of the Opinion, states the Appellants never asked for discovery but argued they should be entitled to discovery and no formal motion for that relief had been filed. *This Court apparently missed that in fact discovery was granted.* The Opinion further stated that without a formal transcript of this hearing in the record, this court is unable to discern what discovery Appellants requested. The Court overlooked that Judge Barber, the Chief Administrative Judge at the time, granted discovery in this case and the discussion on the Record of what was needed and what was granted numerous times in the May 7, 2012 transcript (R., pgs. 566-636). Specifically, see (R., p. 582, lines 9 -17), (R., p. 583, lines 20 – 25), (R., p. 584, lines 1-15), (R., p. 586, lines 22-25), (R., p. 587, lines 1-25), (R., p., 589, lines 19-25) and (R., p., 590 1-9, and 13-21). Within these pages of the transcript in the record, the Appellant clearly cites, and the Court concurs with Appellants

conducting discovery, including but not limited to the deposition of Respondent Rakowsky which Respondent and his counsels agreed to on the record as cited above.

The Appellants attempted over the years attempted to schedule the deposition of John Rakowsky which was included in the record see applicable section of Appellants' Omnibus Motion to Compel (**R. pgs. 371- 402**). Specifically, Judge Early requests the amount of discovery time needed by Appellants to complete discovery on June 17, 2014 (**R., p. 400**). Subpoenas included in the Record for the Deposition of John Rakowsky and Mara Ballard and the production of documents (**R., pgs. 390 - 399**) were issued on July 3, 2014 in accordance with the rulings by Judge Barber and in compliance with the request of Judge Early to conduct discovery. Respondent Rakowsky refused to comply with the subpoenas and discovery (**R., pgs., 401-402**) and claimed in the refusal that Judge Early in a letter dated July 3, 2014 had requested an Order be drafted by Adrian Falgione's counsel, Benjamin Burner that denied discovery to be allowed to be conducted in this matter. The Appellant has no knowledge of such a letter or Order issued by Judge Early and the record contains no such letter or Order emanated from this phantom letter both claimed to be in existence by Respondent's counsel Desa Ballard.

The Opinion also states that there is nothing on the Record that shows the Appellants objected to the Affidavit of Mara Ballard. This is an oversight by the

Court. During the hearing on August 20, 2014 (**R., pgs. 566-636**) the Appellants strongly objected to the admission of Mara Ballard's affidavit. **See (R., pg. 542, lines 16 – 17)** in which the Appellants moved "to strike the expert witness report wrongfully submitted to the Court by Mara Ballard." (*emphasis added*) The Opinion also wrongfully stated the Appellants in the Record did not raise an objection to Judge Early overruling a prior Order of Judge Barber. **See (R., p. 373, point 3, and p. 375, point 11, p. 376, point 12, R., pgs. 378- 380 and R., p. 544, lines 1-7).** On (**R. p. 380**) the Appellants ask for a mistrial because of the denial of discovery, "discovery has been Ordered to occur by Judge Barber, Orders which under South Carolina law cited herein cannot be overruled by another circuit court judge [Judge Addy] and is required to be conducted under Rule 26 of the (SCRCP) *sic* SCACR."

The issues raised in the Opinion under point 3, based on the above are not applicable and the admission of such accounting by Mara Ballard by the lower Court was clearly inadmissible as the Court failed to allow cross examination and discovery of the documents used to reach such an opinion by Mara Ballard.

Third, point 2 of the Opinion, the Opinion wrongfully took the affidavit of Mara Ballard submitted as an expert witness as the gospel. However, the Opinion failed to address the questions raised regarding the fact that Mara Ballard did not comply with the required procedures under South Carolina law which requires the Appellant receive both the materials upon which the report presented to the Court

was placed and to present the expert (Mara Ballard) to be deposed by the Appellants **(R., p.,377, Applicable law)**. Citing an expert's report as the basis of the decision by the Appellate Court without meeting the requirements stated above is not allowed under South Carolina law **(R., pgs., 371)**. The Appellants objections to the use of Mara Ballard were clearly stated and the lower Court and Appellate Court erred in basing a decision on the proper accounting procedures had been followed by the testimony of this witness.

Fourth, point 7 of this Opinion, the Court asserts the awarding of Attorney fees incurred by Respondent Rakowsky was not addressed by the Appellants under the doctrine of equitable indemnification. However, the Appellants did address this as they answered regarding Attorney fees received by Rakowsky were unwarranted because this interpleader action was brought due to the failure of Respondent Rakowsky to keep proper records under Rule 417 and the distribution of funds under Rule 407 1.8(g). See Appellants Final Brief, pages 2 and 3 point 6. The representation contracts were clear there was to be no compensation for legal fees under any circumstances unless the funds received exceeded expenses incurred, which was not the case in this action. Rakowsky's incurring personal legal fees in any regard, much less his due to his own malpractice, is not covered under the Representation Agreements as stated in the Appellants final brief on page 2 and 3. **(R., pgs., 451-460)**. Additionally, Appellants directly addressed the lack of basis

for equitable indemnification. See (R., p. 544, lines 17 – 25 and p. 545, lines 1-11). The Appellants cited the reasons equitable indemnification did not apply due to the facts surrounding this interpleader action. (*Emphasis added*). Finally, in the Opinion the Court claimed the Appellants stated Respondent Rakowsky was not entitled to anything because he represented himself on a *Pro Se* basis. Appellants cannot find where they ever claimed that Respondent Rakowsky should be denied anything because he represented himself on a *Pro Se* basis. In summary, Ms. Ballard knew there was no informed consent agreement despite her claims to the contrary and filed this action knowing if her client Respondent Rakowsky had complied with the Rule 407 1.8(g) this interpleader would not have been necessary and there would have been no appeal in the Federal District Court. The Appellants should not be required to pay for the legal fees of a lawsuit wrongfully filed to cover the malpractice of the Respondent.

Fifth point 6 of the Opinion, the Appellant agrees with the Appellate Court and feels the need to point out that based on the accounting presented by the Respondent, even at a 40% contingency, Respondent and his co-counsel are not entitled to any attorney fees because they did not exceed the expense parameter confirmed by the Opinion of the Appellate Court.

Timeliness and Jurisdiction

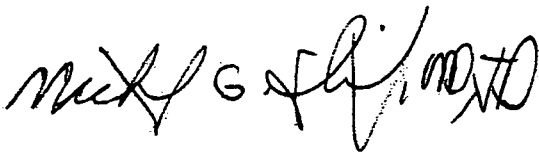
The Court issued its Opinion in this case on July 25, 2018. This Motion for Reconsideration is being filed within 15 days, as required by Rule 221 of the SCRAP, from the date of issuance which occurred on July 25, 2018. The motion is timely, and this Court retains jurisdiction.

CONCLUSION

Because the Opinion overlooks Appellant's factual representations, and because the Opinion does not consider certain applicable statutes, Appellant respectfully requests that this Court reconsider its Opinion and consider remanding this case back for to the Circuit Court requiring the Court to Order the Respondent to produce the "informed consent agreement" and to have the entire \$55,000.00 returned to the Appellant who provided the funds for non-attorney legal costs so he can use the funds to repay the personal loans he took out that are not reported to the Court.

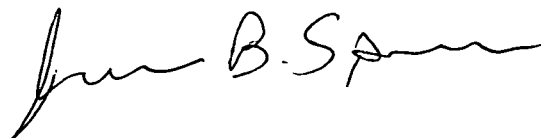
Submitted this 9th day of August 2018,

By:



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3 Kenilworth Avenue
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By:



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 8, 2018, the document described below, was(were) served on all parties of record in this case by mailing a copy, by US mail or by courier.

Documents Served: **APPELLANT'S PETITION FOR REHEARING**

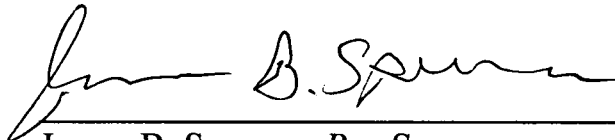
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