

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas

Gordon G. Cooper, Master in Equity

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Appellate Case No. 2015-000157

Lower Court Case No. 2010-CP-42-4430

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**RECEIVED**

APR 08 2015

**SC Court of Appeals**

Wells Fargo Bank, N.A., successor-by-merger to  
Wachovia Bank, N.A., Respondent, ..... Respondent,

v.

Fallon Properties South Carolina, LLC, Timothy R. Fallon,  
Susan C. Fallon, Fallon Luminous Products Corporation,  
G. E. Business Capital Corporation, formerly Transamerica  
Business Capital Corporation, FSD Repurchase Solutions, LLC,  
and South Carolina Department of Revenue, ..... Defendants,

OF WHOM Fallon Properties South Carolina, LLC,  
Timothy R. Fallon, and Susan C. Fallon are ..... Appellants.

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REPLY TO RETURN TO  
MOTION TO DISMISS APPEAL

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The Appellants' Return to the Respondent's Motion to Dismiss Appeal suffers from three fatal flaws. First, the Appellants mistakenly describe the issue as being "the date of the receipt of the order, not the date the order is mailed or transmitted." (Ret. at 2, ¶ 2). The issue, however, is the date of receipt of written notice of the entry of the order, not the receipt of the order itself. Second, the Appellants misread this Court's opinion in *Canal, infra*, in which this Court, contrary

to the Appellants' assertion, clearly and expressly held that the receipt of a fax from opposing counsel commenced the 30 day period for serving the notice of appeal under Rule 203(b)(1), SCACR. Third, the Appellants misread the Respondent's argument under this Court's opinion in *White, infra*, in which this Court held that receipt of an ALC decision from the ALC commences the time to appeal under Rule 203(b)(6), SCACR. Contrary to the Appellants' argument under *White*, the Respondent's argument that receipt of the order under Rule 203(b)(6) is distinguishable from receipt of the notice of entry of the order under Rule 203(b)(1) is not a distinction created by the Respondent. Rather, it is the distinction used by this Court in *White* to reach a different conclusion than this Court reached in *Canal*. As demonstrated in the Respondent's Motion to Dismiss and herein, this Court's decision in *Canal* controls here and requires dismissal.

**I. The Appellants have misstated the issue.**

The Appellants open their argument with the following statement: "The time in which to serve the notice [of appeal] is based upon the date of the *receipt of the order ...*" (Ret. at 2, ¶ 2) (emphasis added). This is simply wrong. Under Rule 203(b)(1), SCACR, which controls here, the time to appeal commences upon "receipt of written notice of entry of the order," not receipt of the order.<sup>1</sup> Indeed, this was one of the fundamental rulings by this Court in *White, infra*:

The analyses in both *Ackerman* [the Form 4 case] and *Canal* [the fax case] explicitly distinguished the receipt of notice of the entry of an order [under Rule 203(b)(1), SCACR] from receipt of the order itself. *Receipt of notice was the critical event in Ackerman and Canal*, whereas receipt of the order itself is the critical event under Rule 203(b)(6), SCACR, in the present [*White*] case.

*White v South Carolina Dep't of Health & Env'tl. Control*, 708 S.E.2d 812, 815 (S.C. App) (underlining in original) (italics added).

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<sup>1</sup> Here, the appeal is from an order by a master-in-equity under Rule 203(b)(4), SCACR, which provides in full as follows: "The notice of appeal from an order or judgment issued by a master or special referee shall be served in the same manner as provided by Rule 203(b)(1)." Thus, Rule 203(b)(1) controls here

**II. The Appellants misread this Court’s opinion in *Canal Ins. Co. v. Caldwell*, 524 S.E.2d 416 (S.C. App. 1999)**

Throughout their Return, the Appellants make the following mistaken assertions about this Court’s opinion in *Canal*:

- a. “The court in *Canal* however did not specifically rule that service by fax constituted receipt by the attorney on the date of transmission.” (Ret. at 5).
- b. This Court’s opinion in *Canal* is unclear on “whether the appellant’s attorney disputed (1) whether he in fact had received the faxed letter or, if he had received it, (2) its effectiveness as receipt of notice of entry of an order.” (Ret. at 5).
- c. This Court “didn’t explicitly state that a fax transmittal constituted the receipt by counsel of the notice of entry of an order of filing as required by Rule 203 SCACR ....” (Ret. at 5).
- d. “The *Canal* case does not directly address the effectiveness of receipt via fax ....” (Ret. at 6).

In reality, this Court expressly noted that, on July 8, opposing counsel had faxed and mailed the letter advising that the order had been entered. 524 S.E.2d at 417. The Court expressly stated there was “no question that [appellant’s counsel] received written notice of entry ... from opposing counsel on July 8.” *Id* at 418. This Court thus concluded that the appellant “should have served notice on or before August 7.” *Id* It is therefore obvious that this Court held that receipt of the fax on July 8 triggered the time to appeal. August 7 is 30 days after July 8, and the appellant obviously did not receive the mailed copy of the letter on the date that it was mailed, *i e.*, July 8.<sup>2</sup> Thus, the receipt of the fax on July 8 triggered the time to appeal.<sup>3</sup>

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<sup>2</sup> As a matter of common knowledge and therefore judicial notice, mail is not delivered on the same date that it is placed in the U S Mail *E g, Moss v Aetna Life Ins Co*, 228 S E.2d 108, 112 (S C 1976) (courts may take judicial notice of “matters of common and general knowledge”), *South Carolina Dep’t of Soc Servs v Janice C*, 678 S E 2d 463, 467 (S C App 2009) (same). Moreover, even a cursory reading of *Canal* demonstrates that this Court was relying on receipt of the fax, not receipt of the letter in the U S Mail

<sup>3</sup> The Appellants note that the appellant in *Canal* did not serve the notice of appeal until several months after the August 7 deadline but that they missed the deadline by only one day (Ret at 4) This difference is meaningless Timely service of the notice of appeal is an absolute jurisdictional requirement that cannot be extended by the appellate courts, even if it missed by only one day See *Southbridge Props, Inc v Jones*, 355 S E 2d 535, 536 (S C 1987) (appeal dismissed when notice of appeal served three days late), *applying Mears v Mears*, 337 S E 2d 206 (S C 1985)

Here, there is no meaningful difference between the email in this case and the fax in *Canal*. Both gave the appellant notice that the order had been entered, and that it is all that is required to commence the time to appeal under Rule 203(b)(1), SCACR as this Court held in *Canal*. Accordingly, the instant appeal must be dismissed for lack of jurisdiction.<sup>4</sup>

**III. The Appellants misread the Respondent's argument under and this Court's holding in *White v. South Carolina Dep't of Health & Env'tl. Control*, 708 S.E.2d 812 (S.C. App. 2011).**

The Appellants mistakenly believe that the Respondent created the distinction between the triggering events under Rule 203(b)(1), SCACR (receipt of written notice of entry) and Rule 203(b)(6), SCACR (receipt of ALC's decision):

Respondent in its motion attempts to make a distinction in this case as opposed to the *White* case in that the *White* case fell under [R]ule 203(b)(6) requiring the receipt of the administrative law decision rather than receipt of a written notice of entry of an order. *However, that distinction is invalid*

(Ret. at 6) (emphasis added) This distinction, however, was made by this Court in *White* to hold that the ruling in *Canal* (which controls here) did not control in *White*, i.e., that *Canal* arose under Rule 203(b)(1), SCACR and *White* arose under Rule 203(b)(6), SCACR. For a fuller discussion of this Court's distinction in *White*, see Resp. Motion to Dismiss at pp. 3-5.

The Appellants also rely on *White* to argue that "receipt of written notice of entry" under Rule 203(b)(1), SCACR must be based on notice received from the court or opposing party in compliance with the "service" rules under the SCRCPP and the SCACR. (See Ret. at 3, 6). In *White*,

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<sup>4</sup> The Appellants never deny receiving the December 15 email on December 15, and they never argue that their trial counsel did not receive this email on December 15 (Ret., *passim*). In his affidavit, their trial counsel admits receiving the email but states he has no "independent recollection of when this email was received on my computer or on what date I had opened this email" (Ret. at Exh 1, p 2, ¶ 3). As demonstrated in Exhibit A hereto, the Respondent's counsel received this email within minutes of it being sent at 2:48 p.m. There is no reason to believe that the Appellants' counsel would not have received it in the same time frame, particularly in the absence of any such showing by the Appellants. His lack of memory as to when he opened the email is meaningless. One cannot avoid notice by avoiding the instrument giving notice. To hold otherwise would allow an appellant to say the following even with respect to the U.S. Mail: "I received the envelope containing the notice on Day 1, but I did not open it until Day 2, so the time to appeal did not begin until Day 2."

this Court relied on such rules because of the distinction between Rule 203(b)(1) and Rule 203(b)(6), to-wit: since Rule 203(b)(6) required receipt of the ALC decision, and since the ALC rules required the ALC to serve that decision by U.S. Mail, the triggering event for an appeal under Rule 203(b)(6) was receipt of the decision via the U.S. Mail from the ALC. (See discussion of *White* in Resp. Motion to Dismiss at 3-5). Here, however, the triggering event is receipt of written notice of the entry of the order. Neither the SCRCP nor the SCACR prescribes the manner for giving or receiving this written notice and, therefore, the ruling in *White* does not apply here. Moreover, this Court rejected any such argument in *Canal, supra*, when it held that the time to appeal commenced upon receiving a faxed letter from opposing counsel, which would not constitute “service” under the SCRCP or the SCACR.

#### CONCLUSION

For the reasons set forth above, and for the reasons set forth in the Respondent’s Motion to Dismiss Appeal, it is respectfully submitted that this appeal must be dismissed for lack of jurisdiction.

Respectfully Submitted,



Robert L. Widener  
MCNAIR LAW FIRM, P.A.  
Post Office Box 11390  
Columbia, South Carolina 29211  
(803) 799-9800

Weyman C. Carter  
MCNAIR LAW FIRM  
Post Office Box 447  
Greenville, South Carolina 29602  
(864) 271-4940

ATTORNEYS FOR RESPONDENT

April 6, 2015  
Columbia, SC

# **EXHIBIT A**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY  
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v.

Fallon Properties South Carolina, LLC, Timothy R. Fallon,  
Susan C. Fallon, Fallon Luminous Products Corporation,  
G. E. Business Capital Corporation, formerly Transamerica  
Business Capital Corporation, FSD Repurchase Solutions, LLC,  
and South Carolina Department of Revenue, ..... Defendants,

OF WHOM Fallon Properties South Carolina, LLC,  
Timothy R. Fallon, and Susan C. Fallon are ..... Appellants.

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AFFIDAVIT OF WEYMAN C. CARTER

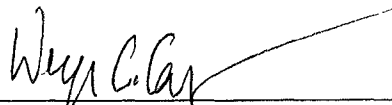
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PERSONALLY APPEARED BEFORE ME, Weyman C. Carter, who first being duly sworn, does  
depose and state as follows:

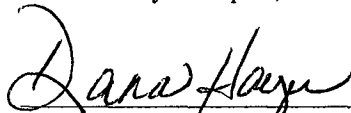
1. The email message that I received from Sharon Winstead of the Spartanburg County Equity  
Court transmitting copies of the signed, filed Order and Form 4 shows that it was sent on  
December 15, 2014 at 2:48 p.m. Opposing counsel Mr. Pillsbury was copied on the  
message.

2. I was at my desk when the message arrived. I opened and read the message promptly upon receiving it.
3. I sent a "reply to all" response to the message to acknowledge receipt; the text of my response read simply "Thank you", followed by my signature block.
4. My reply was dated December 15, 2014 at 2:56 p.m., which was less than ten minutes after Ms. Winstead sent her message to trial counsel.
5. A copy of my reply, which also reflects the transmittal message from court staff and the previous messages in the string, is attached to this Affidavit.

FURTHER AFFIANT SAYETH NOT.

  
\_\_\_\_\_  
Weyman C. Carter

Sworn to and subscribed before me  
this 6th day of April, 2015.

  
\_\_\_\_\_  
Notary Public for South Carolina (Seal)  
My Commission Expires: 1/20/20

## Widener, Robert

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**From:** Carter, Weyman  
**Sent:** Monday, December 15, 2014 2:56 PM  
**To:** Winstead, Sharon  
**Cc:** Rodney Pillsbury  
**Subject:** RE: Proposed Order Denying Petition for Appraisal Rights (2010-CP-42-4430)

Thank you.

**MCNAIR**  
ATTORNEYS

**Weyman C. Carter**  
Shareholder  
wcarter@mcnair.net

**McNair Law Firm, P.A.**  
**Greenville Office** Poinsett Plaza, 104 South Main Street | Suite 700 | Greenville, SC 29601  
864 271 4940 Main | 864 271 4015 Fax  
**Mailing** Post Office Box 447 | Greenville, SC 29602  
**VCard** | **Bio URL** | **Web site**

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**From:** Winstead, Sharon [mailto:swinstead@spartanburgcounty.org]  
**Sent:** Monday, December 15, 2014 2:48 PM  
**To:** Carter, Weyman  
**Cc:** Rodney Pillsbury  
**Subject:** RE: Proposed Order Denying Petition for Appraisal Rights (2010-CP-42-4430)

Gentlemen,  
Please see attached copy of signed and clocked Form 4 and Order. I have also mailed a copy to all listed on the Form 4  
Thanks,  
Sharon

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**From:** Carter, Weyman [mailto:WCarter@mcnair.net]  
**Sent:** Friday, December 12, 2014 4:05 PM  
**To:** Winstead, Sharon  
**Cc:** Rodney Pillsbury; 'Alexander Hray, Jr.'  
**Subject:** Proposed Order Denying Petition for Appraisal Rights (2010-CP-42-4430)

I have attached a proposed order and a Form 4 from the hearing held yesterday. The proposed order includes additional language that Judge Cooper requested. I and Mr. Pillsbury agree on the form and content of the proposed order.



**Weyman C. Carter**  
Shareholder  
wcarter@mcnair.net

**McNair Law Firm, P.A.**  
**Greenville Office** Poinsett Plaza, 104 South Main Street | Suite 700 | Greenville, SC 29601  
864 271 4940 Main | 864 271 4015 Fax  
**Mailing** Post Office Box 447 | Greenville, SC 29602



**VCard | Bio URL | Web site**

MCNAIR  
ATTORNEYS

April 6, 2015

Robert L. Widener  
SC Bar No. 6089

rwidener@mcnair.net  
T 803 799 9800  
F 803 753 3278

Honorable Jenny Abbott Kitchings  
Clerk of Court  
S.C. Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

RECEIVED  
APR 08 2015  
SC Court of Appeals

Re: Wells Fargo Bank, N.A. v. Fallon Properties South Carolina, LLC, et al.,  
Of Whom Fallon Properties South Carolina, LLC; Timothy R. Fallon,  
Susan C. Fallon are Appellants  
Appellate Case No. 2015-000157

Dear Ms. Kitchings:

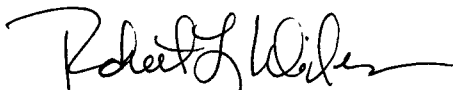
Enclosed for filing, please find the original and seven copies of Respondent's Reply to Return to Motion to Dismiss Appeal. By copy of this letter, we are serving a copy on the reply on counsel for the Appellants. Please file the motion and return the file-stamped extra copy to me in the return envelope provided.

**PLEASE NOTE:** Due to the time constraints for filing this Reply, we are filing it with a copy of the affidavit that is part of Exhibit A to the Reply. We will file the original affidavit immediately upon receipt.

Thank you for your assistance in this matter.

Respectfully yours,

McNAIR LAW FIRM, P.A.



Robert L. Widener

RLW/as  
Enclosures

cc: Alexander Hray Jr.

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Post Office Box 11390  
Columbia, SC 29211

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COLUMBIA 1208296v1

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FSD Repurchase Solutions, LLC; and  
South Carolina Department of Revenue, ..... Defendants,

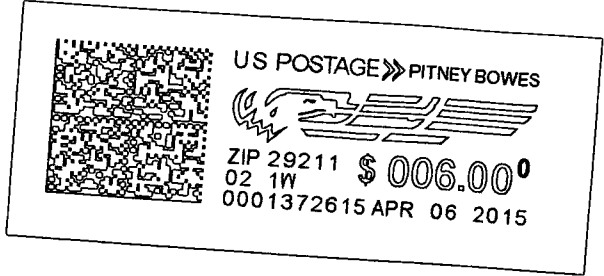
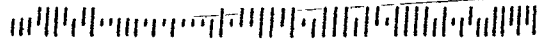
Of Whom Fallon Properties South  
Carolina, LLC; Timothy R. Fallon;  
Susan C. Fallon are, ..... Appellants.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the Reply to Return to Motion to Dismiss Appeal by depositing a copy in the United States Mail, postage prepaid, on April 6, 2015 addressed to the attorney of record, as follows:

Alexander Hray, Jr., Esquire  
389 E. Henry Street, Suite 107  
Spartanburg, SC 29302

  
Ann Shuler



**MCNAIR** | McNair Law Firm, PA  
ATTORNEYS | Post Office Box 11390  
Columbia, SC 29211  
www.mcnair.net

Honorable Jenny Abbott Kitchings  
Clerk of Court  
S.C. Court of Appeals  
Post Office Box 11629

FIRST CLASS MAIL

**RECEIVED**  
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