THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master in Equity

Appellate Case Number 2015-000157

Case No. 2010-CP-42-4430

Wells Fargo Bank, N.A., successor-by-merger to Wachovia Bank, N.A., 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, Susan C. Fallon are the, Appellants.

APPELLANTS' MOTION FOR REHEARING

Appellants respectfully move for a rehearing of this Court's order of June 15, 2015, on the basis that the Court erred as a matter of law in holding Appellants' Notice of Intent to Appeal was untimely based upon the novel application of notice via email. The notice of appeal (Notice) was timely filed and served because the transmission of an email from the trial court, or the receipt of the same, does not constitute written notice of the entry of an order as required by Rule 203 SCACR.

Pursuant to the requirements of Rule 203 (b) (1) SCACR service of a notice of appeal shall be served within thirty (30) days after receipt of written notice of entry of the order or judgment. The time in which to serve notice is based upon the date of the receipt of the order, not the date the order is mailed or transmitted. In this case the order was received by Appellants' trial counsel Rodney F. Pillsbury (Pillsbury) on December 18, 2014 (Tab #1, 6 and 7). Based upon the receipt of the order on that date Pillsbury correctly calculated the last day upon which the notice of appeal (Notice) could be served as January 19, 2015 (Tab #1, 7). The Notice was served on January 15, 2015 within the time frame required (see Tab B to the Respondent's Motion). (Footnote 1)

By email dated December 19, 2014 from Pillsbury to Appellants and appellate counsel, Alexander Hray, Jr. (Hray), Pillsbury notified them that the order had been received by him and last day to serve a Notice was January 19, 2015 and the Notice was served on January 15, 2015 (Tab #1, Ex. B and Tab #2, Ex. A). Based on the date that Pillsbury had calculated the due date to serve the

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[1] At the time the Notice was served, Hray understood that Pillsbury had received the order on December 19, 2014 and it was later realized that the Pillsbury received the order on December 18, 2014; however, if the order was received by Pillsbury on either of these two days the last date to serve the notice of appeal would nevertheless fall on January 19, 2015. Rule 203(e)(1)(C) of the SCACR provides "**if appropriate** for the determination of the timeliness of the appeal, a statement of when the appealing party received notice of the order or judgment from which the appeal is taken" shall be included in the notice of appeal. (Emphasis supplied). The dispute regarding the timeliness of the service of the Notice was not known by Hray until after the Notice had been served.

Notice the Notice was served four (4) days prior to the last date such was required. After service of the Notice the issue of the timeliness of the service of the Notice was raised by Respondent's trial counsel, Weyman C. Carter (Carter), by phone call to Hray and by email to Hray on January 30, 2015 (Tab #2, Ex. B).

The rules of both civil and appellate procedure adopted by our supreme court anticipate the transmission of notices and pleadings by way of hand delivery or use of the United States Postal Service (USPS). Rule 5 SCRCP and Rule 233(b) SCRAP are, in pertinent part, identical with respect to how legal process is to be effected. Both provide that "service upon the attorney or upon a party shall be made by delivering a copy to him or by **mailing** it to him at his last known address or, if no address is known, by leaving it with the clerk of court. Delivery of a copy within this Rule means: **handing** it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein . . ." (Emphasis added).

Respectfully, in its order the Court erred in applying the rules of service by e-filing as found in the recent amendment to Rule 77 SCRCP. On April 16, 2014, the South Carolina Supreme Court amended Rule 77 of the South Carolina Rules of Civil Procedure to incorporate service by email:

> (i)mmediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by **first class mail** upon every party affected thereby . . . and shall make a note in the case file or docket sheet of the **mailing**. For parties proceeding in the SCE-File electronic filing system, the clerk shall serve a notice of the entry by electronically transmitting a Notice of Electronic Filing to all parties. Such mailing or electronic transmission shall not be necessary to parties who have already received notice. Such mailing or electronic transmission is sufficient notice for all purposes for which notice of the entry of an order or judgment is required by these rules; ....
>
> SCRCivP Rule 77(d)

There is no dispute that the case within the lower court was not proceeding under the SCE-File electronic system.[2]

In this action the parties were not proceeding in the SCE-File system. Additionally, the electron transmission giving rise to the Respondent's motion was made by an employ of the master's office and not from the clerk of court. As such, portion of Rule 77(d) is inapplicable to the case at bar.

Appellants agree with Respondent that there is no South Carolina precedent with respect to the effectiveness of notice of the entry of an order by an email transmission under Rule 203(b)(1). Only one case has addressed the specific issue of whether transmission of an order via email triggered the time requirements under Rule 203: *White v South Carolina Dep't of Health & Envtl. Control*, 708 S.E.2nd 812 (SC App. 2011). There, the Court held that email did not trigger the time deadlines under Rule 203 SCRAP.

Respectfully, in its order granting Respondent's motion to dismiss, the Court erred as a matter of law in relying upon the *dicta* of the *Canal Ins. Co. v. Caldwell*, 524 S.E.2d 416 (S.C. App. 1999) and *Ackerman v. 3-V Chemical, Inc.*, 562 S.E.2nd 613 (2002) to find otherwise. In *Canal* an extensive amount of time had elapsed from the time that the order was rendered to when the Appellant in that case served its notice of appeal. In that case the order was dated March 17, 1997 and a form judgment entered on March 19, 1997 in which was indicated that copies had been sent to

[2] As the various counties adopt and implement the SCE-File electronic filing system, issues like the case at bar will become moot, because service is specifically provided by email. Knowing that email was not service, it was completely reasonable for Appellants' counsel to rely upon receiving the clocked in order via US mail as the trigger date for filing the notice of intent to appeal.

all parties. The trial counsel for that appellant wrote to opposing counsel by letter dated June 24, 1997 and inquired about the status of the final order. (*Canal* 417).

In *Canal* the attorney for the Respondent "responded via fax and **mail** on July 8, expressing surprise that opposing counsel had not been notified of the judgment and stating that it had been entered on March 19 as Judgment Roll Number 211763" (Emphasis added) (*Canal* at 417). In that case the court noted that the letter of opposing counsel, in addition to being faxed, had also been mailed. In this case, the Appellate Court respectfully erred as a matter of law in relying upon the *dicta* of *Canal Ins. Co.* to find that *Canal* stands for the legal proposition that receiving a fax constitutes valid written notice for purposes of calculating the time for appeal under Rule 203(b)(1).

In *Canal Ins. Co.*, the focus of the inquiry was not the **means** by which the appellant received notice of the judgment (i.e., via telefax versus regular mail). Rather, the Court in *Canal Ins. Co.* took issue with the fact that after receiving written notice of the judgment from opposing counsel both via telefax and via US mail, the Appellant waited almost a month to contact the clerk's office to request a written order. The appellant in *Canal Ins. Co.* did not serve the notice of intent to appeal until over eight (8) months later.

In the case at bar, the time differential between when the Respondent contends the Notice should have been served and when it was served is **one (1) day**. The court in *Canal* held that there was no question that he (appellant's attorney) received written notice of entry of the judgment, including the judgment roll number, from opposing counsel on July 8, 1997 (*Canal* at 418). The court in *Canal* however did not specifically rule that service by fax constituted receipt by the attorney on the date of transmission.

The facts as recited by the court in *Canal* do not provide a full explanation and leaves to conjecture regarding other facts may have been involved; it is not stated one way or the other by the court in *Canal* 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. The *Canal* 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 and certainly that holding should not be extrapolated to be construed that a transmission of an order or notice of entry of order via email to counsel of record meets that requirements of Rule 203 SCACR. [Ultimately the *Canal* case was determined on its merits and not with regards to the timeliness of the appeal.]

Similarly, respectfully, the Court erred in its reliance upon *Ackerman v. 3-V Chemical, Inc.*, 562 S.E.2nd 613 (2002). The issue before *Ackerman* was not the **means** by which the appellant received the appealed order. Rather, the *Ackerman* court hinged upon the distinction between receiving a Form 4 order of judgment versus receiving the detailed order signed by the Court. In *Ackerman*, neither the Court nor the parties were concerned about receiving the order via email, via telefax, via hand-delivery or via US Mail. The sole focus of inquiry was whether the receipt (presumably via US Mail) of the Form 4 order triggered the ten (10) day time requirement for filing a Motion to Reconsider under Rule 59 SCRCP as opposed to receipt (presumably via US Mail) of the signed order.

The *Ackerman* court answered the question in the affirmative and held that, for purposes of Rule 59 SCRCivP, the receipt of the Form 4 was written notice of entry of the order which commenced the running of the time in which to file a motion to reconsider. Appellants concede that the mere receipt of a Form 4, not accompanied by a signed order, is sufficient to commence the

running of the thirty (30) days in which to serve the Notice; but the issues raised by the Respondent's motion and this return has to do with the method of how the notice of filing given and what constitutes receipt a prescribed by the Rules not whether a Form 4 or a copy of the signed order has to be supplied. In this case the date of receipt by Pillsbury of the Form 4 and the order occurred simultaneously. (Attachment #1) The *Ackerman* case did not address receipt by a certain method of transmission rather what is to be transmitted as the notice of entry.

In the case of *White v South Carolina Dep't of Health & Envtl. Control*, 708 S.E.2nd 812 (SC App. 2011) the appellate counsel undeniably received an email copy of the decision of the ALC but the counsel maintained that Rule 203(b)(6) contemplates receipt of the decision through proper service by mail or hand delivery and that the applicable rules do not authorize service of the decision by email. (*White* at 815) Accordingly, the thirty-day period in which to file a notice of appeal did not commence on the day that counsel received the decision via e-mail. 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 rule 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.

The issue in this case is, as in *White*, whether receipt of the decision by counsel via email was met the requirement of the rule. In *White* under the ALR the decision was to be transmitted to trigger the running of the time to serve a notice of appeal, and in that case it was undisputed that the decision actually was provided by email prior to its mailing, as in this case. Nevertheless, the court in *White* held that such a notice was not in compliance with the Rules and held that the appeal was timely.

Thus, *White* is the only case to date that has **specifically** examined the question of whether transmission via email (as opposed to receipt of the written order via other means) satisfies the requirements under Rule 203(b). In that circumstance, the Court has found that it does not. As such, Appellants respectfully argue that the Court of Appeals erroneously relied upon the *dicta* of *Canal Ins. Co.* and *Ackerman* to find otherwise.

If the Supreme Court wished to permit other methods, such as email, to be utilized to constitute receipt then the Supreme Court could adopt rules specifically making that method allowable, but it has not. As noted previously (*see*, n.2, *supra*), with the implementation of the SCE-File system, service by email is accounted for by those counties adopting the E-file system.

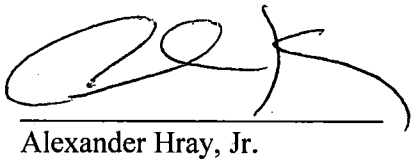
CONCLUSION

The court rules contemplate that legal process is to be handled in basically one of two ways, either via the United States Postal Service or hand delivery. The *Canal* case does not directly address the effectiveness of receipt via fax and the facts of that case, especially with the length of delay in serving the notice of appeal, lie in sharp contrast to the facts of this case. Likewise the issue in the *Ackerman* is not applicable to the issues in this case in that that case dealt with what type

document was received by counsel and not how it was transmitted. The *White* is the only case specifically addressing whether the means of electronic transmission satisfies the requirements of Rule 203, and, there, albeit under Rule 203(b)(3), the Court held that it did not.

For these reasons, Appellants respectfully urge the Court to grant their motion for a rehearing, and to DENY Respondent's motion to dismiss the appeal.

Respectfully submitted,



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June 29, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Court of Common Pleas

The Honorable Gordon G. Cooper, Master in Equity

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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, Susan C. Fallon are the, Appellants.

PROOF OF SERVICE

I certify that I have served the Appellants' Motion for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on June 30, 2015, addressed to Respondent's attorneys of record, as follows:

(CONTINUED NEXT PAGE)

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June 30, 2015

The Honorable Jenny Abbott Kitchings
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RE: Wells Fargo Bank, N.A. *etc.* v. Fallon Properties South Carolina, LLC, *et al.*; Case No. 2010-CP-42-4430; Appellate Case No. 2015-000157

Dear Ms. Kitchens:

Enclosed for filing is the original of the Appellants' Motion for Rehearing together with six (6) copies thereof and required filing fee. Also enclosed is a Proof of Service of the Motion on the Respondent.

Sincerely,

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Enclosures as noted

cc: Weyman C. Carter, Esq., Attorney for Respondent
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