THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas
Gordon G. Cooper, Master in Equity

S.C. Sup. Ct. Case No. 2015-002018
S.C. Ct. App. Case No. 2015-000157
Lower Court 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, and Susan C. Fallon are ..... Petitioners.

RETURN TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

STATEMENT OF QUESTIONS PRESENTED

1. The Court of Appeals properly dismissed the Petitioner's appeal for failure to timely serve the notice of appeal within the time limits prescribed by Rule 203(b)(1) and (4), SCACR.

2. Petitioner has misread the Court of Appeals' opinion in *Canal Ins. Co. v. Caldwell*, 524 S.E.2d 416 (S.C. App. 1999).

3. Petitioner's argument that it is entitled to await and rely upon an "official communication" from the clerk's office is manifestly without merit.

4. Petitioner's reliance on *White v. South Carolina Dep't of Health & Envtl. Control*, 708 S.E.2d 812 (S.C. App. 2011) is misplaced, because that case is distinguishable and because Fallon does not challenge the Court of Appeals' ruling that *White* is distinguishable.

STATEMENT OF CASE

This is a commercial mortgage foreclosure case. The master granted foreclosure and sold the mortgaged property. Thereafter, the Appellants (Fallon) timely petitioned for an order of appraisal under S.C. Code Ann. § 29-3-680 (Rev. 2007). Respondent (Wells Fargo) opposed the petition upon the ground that Fallon had waived the right to petition for an order of appraisal under the procedures set forth in § 29-3-680(B). The master held an evidentiary hearing on the petition and, on December 15, 2014, the master entered an order denying the petition, finding that Fallon had waived any right to petition for an order of appraisal. (Appx. at 67-70).

On December 15, 2014, the trial court emailed the trial attorneys for both parties, and this email stated in full:

> 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

(Appx. at 72)(emphasis added).[1] Signed and file-stamped (entered) copies of the Form 4 and the appealed order were attached to the email. (Appx. at 65-66, 67-70; see also *id.* at 63, ¶ 4). Wells Fargo's trial counsel received this email on December 15, 2014. (Appx. at 63, ¶ 4). It is undisputed that Fallon's trial counsel received the email on the same date – Fallon never denies this in its certiorari petition, and it never challenges the Court of Appeals' express finding that it received the email on the same date. (See Pet., *passim*).[2]

Fallon served its Notice of Appeal on January 15, 2015. (Appx. at 74). As shown above, Fallon received written notice of the entry of the appealed order on December 15, 2014 via the trial court's email. Thus, Fallon was required to serve its Notice of Appeal no later than Wednesday, January 14, 2015. See Rule 203(b)(1), SCACR. Having failed to do, Fallon's notice of appeal was untimely and, therefore, the Court of Appeals properly dismissed its appeal under the following analysis:

1. Fallon received the court's email on the date it was sent, December 15, 2014. (Appx. at 21).

2. The email in this case provided sufficient notice in the same way as the faxed letter from opposing counsel in *Canal Ins. Co. v. Caldwell*, 524 S.E.2d 416 (S.C. App. 1999) provided notice of entry of the appealed order and, indeed, the email provided even more notice because it came from the court (rather than opposing counsel) and included a signed/clocked copy of the order (unlike the fax in *Canal*). (Appx. at 19).

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[1] "Sharon" is Sharon Winstead, the administrative assistant to the master who schedules hearings and handles submissions to the master, including proposed orders.

[2] In an affidavit submitted to the Court of Appeals in response to the motion to dismiss this appeal, Fallon's trial counsel admitted receiving the email but stated that he had no "*independent* recollection of when this email was received on my computer or on what date I had opened this email." (Appx. at 41, ¶ 3) (emphasis added). The affidavit from Wells Fargo's trial counsel demonstrates receipt of the email within minutes of it being sent at 2:48 p.m. (Appx. at 28-31). There is no reason to believe that Fallon's counsel would not have received it in the same time frame, particularly in the absence of any such showing by Fallon. In any event, the Court of Appeals expressly found that Fallon's attorney received the email on the day it was sent (December 15, 2014): "[T]his court finds [Fallon] received written notice of the entry of the order on December 15, 2014, the date of the email." (Appx. at 21). Fallon never challenges this finding in his certiorari petition and, therefore, it is the law of this case. *Moseley v. All Things Possible*, 719 S.E.2d 656, 658 n.4 (S.C. 2011) (court of appeals' ruling is law of the case if not challenged in the certiorari petition). Moreover, this finding is manifestly correct under the evidence presented to the Court of Appeals.

3. Fallon's reliance on the decision in *White v. South Carolina Dep't of Health & Envtl. Control*, 708 S.E.2d 812 (S.C. App. 2011) to oppose the motion to dismiss is misplaced, because *White* is distinguishable on several grounds, including the fact that this appeal is controlled by Rule 203(b)(1), SCACR rather than Rule 203(b)(6) which controlled in *White*, and the decision in *Canal* put parties on notice that a notice of entry by fax was sufficient in appeals controlled by Rule 203(b)(1). (Appx. at 20-21).

4. Since Fallon received written notice of the entry of the appealed order when it received the email on December 15, 2014, Rule 203(b)(1), SCACR required Fallon to serve its notice of appeal on or before January 14, 2015. Fallon did not do so; this Court has no authority to extend the time for serving the notice of appeal; and therefore, this appeal must be dismissed for failure to timely serve the notice of appeal.. (Appx. 21).

Fallon now petitions this Court for a writ of certiorari, contending that the Court of Appeals erred in dismissing its appeal. As demonstrated below, Fallon's arguments have no merit and its petition should therefore be denied.

ARGUMENT

The timely service of the notice of appeal is an absolute jurisdictional requirement and, upon the failure of an appellant to timely serve the notice, an appellate court must dismiss the appeal. *Elam v. South Carolina Dep't of Transp.*, 602 S.E.2d 772, 775 (S.C. 2004). This appeal is from an order issued by a master-in-equity. Rule 203(b)(4), SCACR, 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, this appeal involves receipt of "written notice of the entry of the order." Rule 203(b)(1), SCACR (emphasis added).[3]

[3] Throughout its petition, Fallon addresses the issues in this case in terms of "service" of the order and receipt of the order. (Pet., *passim*). The question, however, is when did Fallon receive written notice of the entry of the order, not when that notice was served or when the order was either served or received. It is notice of the *entry* of the order, not service or receipt of the order itself, that triggers the time to appeal under Rule 203(b)(1), SCACR. See, *e.g.*, *Ackerman v 3-V Chemical, Inc.*, 562 S.E.2d 613, 615 (S.C. 2002) (receipt of Form 4 judgment, not subsequent receipt of order, was notice of the entry of the order); *Canal Ins. Co. v. Caldwell*, 524 S.E.2d 416, 418 (S.C. App. 1999) (receipt of faxed letter advising that order had been entered, unaccompanied by Form 4 or order, was notice of the entry of the order); *accord Breeding v. S. & H. X-Ray Co.*, 174 S.E. 913, 915-916 (S.C. 1934) (receipt of letter from opposing counsel advising that order had been entered was sufficient notice of entry and commenced time to appeal). At times, Fallon couples its "service" arguments with musings about what would happen under recent amendments to Rule 77,

I. Fallon has misread the Court of Appeals' opinion in *Canal Ins. Co. v. Caldwell*, 524 S.E.2d 416 (S.C. App. 1999).

The heart of Fallon's petition for certiorari is based upon a complete and inexplicable misreading of the Court of Appeals' opinion in *Canal*. Fallon argues: (1) the court never stated specifically whether it was relying upon appellant's receipt of the fax or the letter; (2) the court never ruled specifically that receipt of the fax was "notice" under the SCACR; and (3) any such ruling was *dicta*, because the court's actual ruling was on the merits. (Pet. at 4-5, 7). Fallon's arguments are manifestly without merit.[4]

In *Canal*, the trial court issued its written order on March 17, 1997, and judgment was entered on March 19, 1997. 524 S.E.2d at 417. On June 24, 1997, the appellant's attorney wrote the respondent's attorney to inquire about the status of the final order. *Id.* On July 8, 1997, the respondent's attorney responded by letter that judgment had been entered on March 19. *Id.* This letter was sent by fax and the U.S. Mail. *Id.* The appellant's attorney later requested a copy of the order from the clerk's office and, ten days after receiving it, filed a motion to reconsider. *Id.* The trial court issued an order on the motion to reconsider, and the appellant's attorney thereafter appealed on March 17, 1998. *Id.* at 418.

On appeal, the respondent argued that the Court of Appeals lacked subject matter jurisdiction, because the appeal was untimely. 524 S.E.2d at 418. The court agreed under the following analysis:

SCRCP, and its contemplated implementation of electronic filing systems in the court of common pleas. (Pet. at 2-3). The issues in this case, however, are controlled by Rule 203(b)(1), SCACR, and case law from this Court and the Court of Appeals, not Rule 77, SCRCP.

[4] Fallon also asserts it is unknown whether the appellant's attorney in *Canal* disputed receipt of the fax. (Pet. at 5). This is irrelevant for two reasons. First, the Court of Appeals specifically ruled that there was "no question" that the appellant's attorney received written notice of entry on July 8, 1997. *Canal*, 524 S.E.2d at 418). As demonstrated in the text following this footnote, the court was referring to receipt of the fax. Thus, there was no dispute or it was resolved against the appellant. Second, and more importantly, it is undisputed in this case that Fallon's trial counsel received the court's email on the day that it was sent. See n.2 and accompanying text, *supra*.

> [T]here is no question that [the appellant's attorney] received written notice of entry of the judgment, including the judgment roll number, from opposing counsel on July 8, 1997. . . .[The appellant's] Motion for Reconsideration and Amendment of Judgment, served on August 22, was not timely. As a result, the motion did not stay the time for appeal and [the appellant] should have served notice [of appeal] on or before August 7. [The appellant], however, did not serve a notice of appeal until March 17, 1998. Accordingly, this court does not have subject matter jurisdiction in this matter.

524 S.E.2d at 418 (emphasis added) (citations omitted). This ruling makes it clear that the time to commence the appeal (or make the motion to reconsider) commenced on July 8, 1997. This was the date that the respondent's attorney faxed and mailed the letter regarding the status of the final order. It is an indisputable fact of the human condition that the U.S Postal Service does not deliver a letter on the same day that it is mailed. [5] Thus, it is clear that the Court of Appeals relied upon the receipt of the July 8 fax from opposing counsel as the operative fact and held that receipt of the fax was sufficient notice to commence the time to appeal and to make a motion to reconsider. Fallon's contrary arguments are manifestly without merit under the plain language of the opinion in *Canal*.

In an apparent attempt to avoid the foregoing, Fallon also argues that any "fax ruling" by the Court of Appeals was *dicta*, because the court ruled on the merits of the case. Again, the plain language of the court's opinion in *Canal* refutes this argument, and it demonstrates that the "merits ruling" was the *dicta* in *Canal*. After agreeing with the respondent that it lacked subject matter jurisdiction over the appeal, the court continued: "In any case, even if this appeal were timely, [the appellant] would not prevail [on the merits]." 524 S.E.2d at 418 (emphasis added). Thus, the court's "merits ruling" was unnecessary to the resolution of the appeal in *Canal*, addressed an issue

[5] 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 the Court of Appeals was relying on receipt of the fax, not receipt of the letter in the U.S. Mail.

that was not essential to the outcome of the appeal, and was a "by the way" ruling that assumed away the prior ruling of there being no jurisdiction in the Court of Appeals, all of which is the quintessential nature of *dictum*. See, *e.g.*, BLACK'S LAW DICTIONARY at 409 (5th Ed. 1979) (defining *dictum*). Indeed, since the court did not have subject matter jurisdiction over the appeal, its "merits ruling" arguably was void. See *Coon v. Coon*, 614 S.E.2d 616, 617 (S.C. 2005) (order issued without subject matter jurisdiction is void).

In summary, the Court of Appeals held in *Canal* that the appellant's attorney received the fax from opposing counsel on July 8; the receipt of this fax was the receipt of written notice of the entry of the order under the SCRCP and the SCACR; and the appellant's failure to appeal within thirty days after receiving the fax rendered his appeal untimely and deprived the court of subject matter jurisdiction. Fallon's contrary arguments are based upon a misreading of *Canal* and are manifestly without merit. [6]

II. Fallon's argument that it is entitled to await and rely upon an "official communication" from the clerk's office is manifestly without merit.

Fallon argues that is trial counsel "had a right to rely upon the official communication from the clerk of court as the trigger for any subsequent filing under the [SCRCP or SCACR]. (Pet at 8). This argument is manifestly without merit. Nothing in Rule 203(b)(1), SCACR, limits the triggering notice to an "official communication" from the clerk of court. Moreover, this Court has

[6] Fallon notes that it missed its appellate deadline by only one day whereas the appellant in *Canal* did not serve the notice of appeal until several months after the deadline. (Pet. at 5). 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 is 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). Fallon also argues that the focal point in *Canal* was the appellant's failure to immediately request a copy of the order. (Pet. at 5). Although the Court of Appeals noted this in *Canal*, it clearly was not the focal point of the court's ruling that it did not have subject matter jurisdiction. Rather, that ruling was based on the failure to serve the notice of appeal within 30 days after receiving the fax from opposing counsel. Nothing in the court's opinion indicates the court's ruling would have been different had the appellant's counsel requested a copy of the order on that same day or very soon thereafter. Any such ruling would be nonsensical, because it is axiomatic that appellate courts cannot extend the time for serving the notice of appeal. See *Southbridge* and *Mears*, both *supra*; see also Rule 263(b), SCACR (appellate courts cannot alter the time for serving the notice of appeal under Rule 203).

long held that notice by letter from opposing counsel is sufficient notice to commence the time to appeal. See *Breeding v. S. & H. X-Ray Co.*, 174 S.E. 913, 915-916 (S.C. 1934) (receipt of letter from opposing counsel advising that order had been entered was sufficient notice of entry and commenced time to appeal). The reason for this is simple. Rule 203(b)(1) requires actual notice of the entry of the order to trigger the time to appeal. Actual notice can come from any source, and nothing in the SCACR indicates any intent to change the long-standing rule reflected in *Breeding, supra* or otherwise limit the actual notice requirement of Rule 203(b)(1) to notice from a particular source or to "official communications" from the clerk of court.

Moreover, acceptance of Fallon's argument would allow an appellant to control the time to appeal even if it possessed a file-stamped copy of the order from a source other than the clerk of court. This Court rejected a similar argument in *Ackerman*, when it ruled that the time to make a motion to reconsider was triggered by receipt of the Form 4 rather than any subsequent receipt of the actual order. 562 S.E.2d at 615. Fallon's argument should likewise be rejected.

III. Fallon's reliance on *White v. South Carolina Dep't of Health & Envtl. Control*, 708 S.E.2d 812 (S.C. App. 2011) is misplaced, because that case is distinguishable and because Fallon does not challenge the Court of Appeals' ruling that *White* is distinguishable.

Fallon argues that the Court of Appeals' ruling in *White v. South Carolina Dep't of Health & Envtl. Control*, 708 S.E.2d 812 (S.C. App. 2011) precludes the dismissal of its appeal. (Pet. at 6-7). This argument fails for two reasons. First, as noted earlier, the Court of Appeals held that *White* was distinguishable on several grounds. (Appx. at 20-21). Fallon never mentions or challenges this ruling (Pet., *passim*) and, therefore, it is the law of this case. *Moseley v. All Things Possible*, 719 S.E.2d 656, 658 n.4 (S.C. 2011) (court of appeals' ruling is law of the case if not challenged in the certiorari petition). Second, as shown below, the decision in *White* is distinguishable and inapplicable.

In *White,* the Court of Appeals held that the time to serve the notice of appeal from an ALC order did not commence when the appellant's attorney received an email from a party with a copy of the filed order attached to the email. The court distinguished *Canal, supra*, as follows:

1. *Canal* involved an appeal under Rule 203(b)(1), SCACR, which requires service of the notice of appeal within 30 days after receiving "written notice of the entry of the order." In contrast, *White* involved an appeal from an ALC order under Rule 203(b)(6), SCACR, which requires service of the notice of appeal within 30 days after "receipt of the decision." 708 S.E.2d at 815-816.

2. The ALC rules contemplated service of the ALC decision "by the ALC via the United States Postal Service and not by a party via electronic mail." *Id.* at 815 (underlining in original).

Based on these differences, the Court of Appeals held that *Canal* did not control in *White*, and that the appellant timely served the notice of appeal within 30 days after receiving the decision from the ALC. *Id.* at 816.

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 by its own terms. Rather, as noted in *White* itself, and as correctly held by the Court of Appeals in this case, the timeliness of Fallon's notice of appeal is controlled by *Canal*, not *White*.[7]

Moreover, and unlike *White*, the email in this appeal came from the trial court, not a party, and this email gave the notice required by Rule 203(b)(1), SCACR, in three separate ways:

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[7] To the extent necessary, Wells Fargo respectfully submits that *White* was wrongly decided. Although the ALC rules required the administrative law court to serve the parties with a copy of the order, and although the time to appeal an ALC order is triggered by receipt of the decision rather than notice of entry of the order, nothing in the ALC rules or the SCACR limits the triggering of the time to appeal to receipt of the decision from the ALC. As with the "receipt" requirement in Rule 203(b)(1), the purpose of Rule 203(b)(6) is to ensure that a would-be appellant has actual notice. See Arg. II, *supra*. The appellant in *White* received that actual notice when it indisputably received a file-stamped copy of the order via email from the opposing party. The opinion in *White* therefore conflicts with this Court's ruling in *Ackerman, supra* that a party should not be allowed to control the time to act under court rules by ignoring the actual notice received and awaiting some other type of actual notice. See Arg. II, *supra*. In any event, the ruling in *White* does not apply here as correctly found by the Court of Appeals and, therefore, it appears unnecessary to address the correctness of *White* in this case.

1. The body of the email notified the appellant that the order had been entered as did the fax in *Canal*.

2. A signed and filed copy of the Form 4 was attached to the email and gave the same notice of entry of the order that this Court found sufficient in *Ackerman*.

3. Finally, a signed and filed copy of the order itself was also attached to the email.

In short, Fallon received written notice of the entry of the order on December 15, 2014. Thus, it had to serve its notice of appeal on or before January 14, 2015. It failed to do so and, therefore, the Court of Appeals properly dismissed the appeal.

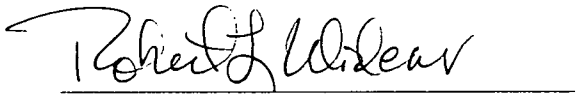
CONCLUSION

There is no meaningful difference between the email in this case and the fax relied upon by the Court of Appeals in *Canal* and cited with approval by this Court in *Ackerman*, except that the email in this case gave far more notice of entry than the fax in *Canal*. Here, like the fax in *Canal*, the body of the email gave notice that the appealed order had been entered. Here, unlike the fax in *Canal* and the email in *White*, the email came from the trial court, not a party. Here, unlike the fax in *Canal*, signed and filed copies of the Form 4 and the appealed order were attached to the email.

The Court of Appeals held that, under the rationale of *Canal*, Fallon's undisputed receipt of the email from the trial court triggered the time to appeal under Rule 203(b)(1), SCACR. Fallon attacks this ruling under *inter alia* three faulty grounds: (1) an erroneous reading of the findings and rulings in *Canal*; (2) a meritless argument that the notice required by Rule 203(b)(1) is limited to "official communications" from the clerk of the circuit court; and (3) a misplaced reliance on the readily distinguished decision in *White*.

For these reasons, and for the other reasons set forth in this Return, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully Submitted,



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November 9, 2015
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
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and South Carolina Department of Revenue, ... Defendants,

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

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of the McNair Law Firm, certify that I have served the Respondent's Return to Petition for Writ of Certiorari via email and by depositing a copy in the United States Mail, postage prepaid, on November 9, 2015 addressed to the attorney for Petitioners, as follows:

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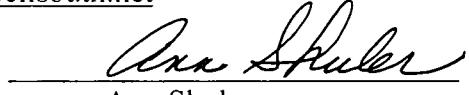

Ann Shuler