

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master in Equity

Appellate Case No. 2015-002018
Lower Court Case No. 2010-CP-42-04430

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DEC 14 2016

S.C. SUPREME COURT

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,

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

Defendants,

Petitioners.

BRIEF OF PETITIONERS

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE COURT OF APPEALS ERR IN HOLDING THAT RECEIPT OF A SCANNED COPY OF AN ORDER VIA EMAIL – NOT SENT FROM THE CLERK OF COURT’S OFFICE – CONSTITUTED “RECEIPT OF WRITTEN NOTICE OF ENTRY OF THE ORDER” FOR PURPOSES OF CALCULATING THE TIME TO FILE A NOTICE OF APPEAL UNDER RULE 203(B)(1) SCACR?

- II. DID THE COURT OF APPEALS ERR IN NOT HOLDING THAT WHEN A WRITTEN ORDER IS MAILED FROM THE CLERK OF COURT’S OFFICE VIA US MAIL AND RECEIVED BY COUNSEL SHORTLY THEREAFTER, FOR PURPOSES OF CALCULATING THE TIME TO FILE NOTICE OF APPEAL UNDER RULE 203(B)(1) SCACR, THE THIRTY (30) DAY PERIOD COMMENCES UPON RECEIPT OF THE ORDER THAT WAS MAILED?

STATEMENT OF THE CASE

This is an appeal from the Master in Equity regarding a denial of their petition for an Order of Appraisal arising from a deficiency judgment against them in the amount of \$2,325,590.05. On December 15, 2014, the master filed an order denying Appellants’ petition. That same day, the administrative assistant to the master emailed a copy of the filed order to Petitioners’ trial counsel. The clerk of court mailed copies of the filed order which was received by Petitioners’ trial counsel on December 18, 2014. Petitioners filed their notice of intent to appeal on January 15, 2015 – thirty-one (31) days after the administrative assistant’s email; twenty-eight (28) days after receipt of the order from the Clerk’s office via US mail.

Respondent filed a Motion to Dismiss the Petition on March 20, 2015, arguing that the Notice of Appeal was untimely based upon the administrative assistant’s emailing of the order on December 15, 2015. The Court of Appeals granted Respondent’s motion on June 15, 2015 and dismissed Appellants’ appeal. Appellants filed a Motion for Rehearing on June 30, 2015. The Court of Appeals denied this motion on August 26, 2015.

The Court of Appeals affirmed its decision to grant the Respondent’s Motion to Dismiss: Wells Fargo Bank, N.A. v. Fallon Properties of South Carolina, LLC, et al., Appellate C.A. No.

2015-000157. Petitioners sought a writ of certiorari to review that decision which was granted on November 9, 2016.

ARGUMENT

- I. THE COURT OF APPEALS ERRED IN HOLDING THAT RECEIPT OF A SCANNED COPY OF AN ORDER VIA EMAIL – FROM THE MASTER’S ADMINISTRATIVE ASSISTANT – CONSTITUTED “RECEIPT OF WRITTEN NOTICE OF ENTRY OF THE ORDER” FOR PURPOSES OF CALCULATING THE TIME TO FILE A NOTICE OF APPEAL UNDER RULE 203(B)(1) SCACR?

This case presents the novel question whether receipt of a scanned order by counsel via email (not sent by the clerk of court) constitutes “receipt of written notice of entry of judgment” for purposes of Rule 203(b)(1) SCACR, such that receipt of the clocked in order from the Clerk’s office by US mail received three (3) days later would be disregarded. The Court of Appeals answered this question in the affirmative. Petitioners respectfully submit this to be error.

Rule 203 (b) (1) SCACR requires that 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. The recent amendment to Rule 77 SCRCR will definitively resolve this issue once the Clerk of Court offices convert to the SCE-File electronic system. On April 16, 2014, this Court amended Rule 77 SCRCR 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;

SCRCR Rule 77(d)

However, because the Clerk's office for the lower court has not yet implemented the SCE-File electronic system, this amendment unfortunately does not apply. Instead, Petitioners' trial counsel relied upon the written receipt of the order from the Clerk's office as the official time by which Rule 203(b)(1) SCACR commenced. In this case the order was received by Appellants' trial counsel Rodney F. Pillsbury (Pillsbury) on December 18, 2014 (Appendix page 41). 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 (Appendix page 41-42). The Notice was served on January 15, 2015 within the time frame required (Appendix page 74).

The rules of both civil and appellate procedure adopted by this Court anticipate the transmission of notices and pleadings by way of hand delivery or use of the United States Postal Service (USPS). Rule 5 SCRCF and Rule 203(b) SCACR 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 of Appeals erred in applying the rules of service by e-filing as found in the recent amendment to Rule 77 SCRCF. There is no dispute that the case within the lower court was not proceeding under the SCE-File electronic 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) SCRPC is inapplicable to the case at bar.¹

There is no South Carolina precedent with respect to the effectiveness of notice of the entry of an order by an email transmission under SCACR 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 SCACR Rule 203: *White v South Carolina Dep't of Health & Env'tl. Control*, 392 S.C. 247, 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*, 338 S.C. 1, 524 S.E.2d 416 (S.C. App. 1999) and *Ackerman v. 3-V Chemical, Inc.*, 349 S.C. 212, 338 S.C. 1, 562 S.E.2nd 613 (2002) to find otherwise. 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

¹ 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

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.

Similarly, respectfully, the Court erred in its reliance upon *Ackerman v. 3-V Chemical, Inc.*, 349 S.C. 212, 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 SCRPC 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 SCRPC, 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 as 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. 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 & Env'tl. Control*, 392 S.C. 247, 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) SCACR 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) SCACR 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) SCACR. 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 this Court wishes to permit other methods, such as email, to be utilized to constitute receipt then the new rules may be promulgated to put the Bar on notice whereby service by email is specifically allowed. As noted previously (*see, n.l, supra*), with the implementation of the SCE-File system, service by email is accounted for by those counties adopting the E-file system.

- I. WHEN A WRITTEN ORDER IS MAILED FROM THE CLERK OF COURT'S OFFICE VIA US MAIL AND RECEIVED BY COUNSEL SHORTLY THEREAFTER, THE COURT OF APPEALS ERRED BY NOT FINDING THAT FOR PURPOSES OF CALCULATING THE TIME TO FILE NOTICE OF APPEAL UNDER RULE 203(B)(1) SCACR, THE THIRTY (30) DAY PERIOD COMMENCES UPON RECEIPT OF THE ORDER THAT WAS MAILED?

The converse of the previous argument is another ground of error in the Court of Appeals' decision. The clerk's office mailed a copy of the filed order, as it routinely does. When that copy was received by Petitioners' trial counsel, it was marked "Received: Jan. 18, 2015" (Appendix page 41). For purposes of perfecting an appeal, members of the Bar should be entitled to rely upon communications from the clerk's office as the official communication regarding the status of any filing. To hold otherwise requires a new host of *ad hoc* rules and exceptions to be devised. For example, if an email was sent from someone other than the clerk's office, but a SPAM filter did not recognize the address, was the email "received"?

Trial counsel for the petitioners had a right to rely upon the official communication from the clerk of court as the trigger for any subsequent filing under either the Rules of Civil Procedure or the Appellate Court Rules. Given the fact that Petitioners timely filed their notice of appeal based upon receipt of the written order from the clerk of court, the Court of Appeals should have denied the Respondent's motion to dismiss.

CONCLUSION

For the reasons stated, Petitioners request that the order of the Court of Appeals holding that the appeal was not timely filed be reversed and that the appeal be allowed to continue.

Respectfully submitted,



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December 6, 2016

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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,

Petitioners.

PROOF OF SERVICE

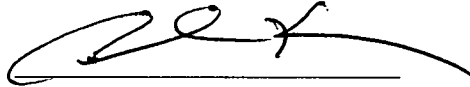
I certify that I have served the Petitioners' Brief on Writ of Certiorari and the Appendix by depositing copies thereof in the United States Mail, postage prepaid, on December 9, 2016, addressed to Respondent's attorneys of record, as follows:

(CONTINUED NEXT PAGE)

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December 9, 2016

A handwritten signature in black ink, appearing to read "Alex Hray", written over a horizontal line.

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