

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

RECEIVED

JAN 19 2017

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, Defendants,

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

BRIEF OF RESPONDENT

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STATEMENT OF QUESTIONS PRESENTED

1. The Court of Appeals properly dismissed the Petitioner's appeal for failure to timely serve the notice of appeal under Rule 203(b)(1) and (4), SCACR, because Petitioner failed to serve the notice of appeal within 30 days after receiving the December 15 email from the trial court.
2. Petitioner's "official communication" argument that notice under Rule 203(b)(1), SCACR is limited to notice received from the Clerk of Court by U.S. Mail or hand delivery is not properly before this Court and, in any event, has no merit.

STATEMENT OF CASE

This is a commercial mortgage foreclosure case. The master granted foreclosure and sold the mortgaged property. Petitioners (Fallon) sought an appraisal under S.C. Code Ann. § 29-3-680 (Rev. 2007). Respondent (Wells Fargo) responded that Fallon had waived its appraisal right pursuant to § 29-3-680(B). The master held a hearing and entered an order finding that Fallon had waived any appraisal rights. (Appx. 67-70).

Fallon appealed to the Court of Appeals (Appx. 74), and Wells Fargo moved to dismiss the appeal for failure to timely serve the notice of appeal. (Appx. 56-74). Fallon filed a Return, and Wells Fargo filed a Reply. (Appx. 22-31; 32-55). Chief Judge Few, granted the motion to dismiss in a single-judge order. (Appx. 18-21). Fallon timely petitioned for rehearing (Appx. 9-17), and a full panel of the Court denied rehearing in a detailed order that again dismissed the appeal. (Appx. 3-7).¹ Fallon timely petitioned this Court for a writ of certiorari to the Court of Appeals, which this Court granted.

BACKGROUND FACTS and LAW

The relevant facts are straightforward and undisputed. On December 15, 2014, the master's administrative assistant emailed the attorneys for both parties, advising them that

¹ This full-panel order is published at *Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC*, 776 S.E.2d 575 (S.C. App. 2015). For the convenience of the Court, citations to this order are to the copy in the Appendix.

the master had entered an order on Fallon's claim for appraisal rights, and forwarding copies of the entered Order and the entered Form 4 Judgment as attachments to the email:

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.

(Appx. at 72; see also *id.* at 63; ¶ 4; 65-66, 67-70)(emphasis added). It is the law of this case that Fallon received the email on December 15, 2014.² On December 18, 2014, Fallon received copies of the entered Order and the entered Form 4 Judgment in the U.S. Mail. (Appx. 41, ¶ 6). Fallon served its Notice of Appeal on January 15, 2014. (*Id.* at 74).

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). The time to serve the notice of appeal cannot be extended by the appellate courts, even if (as here), 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).

Rule 203(b)(4), SCACR, provides that service of the notice of appeal from a master's order or judgment shall be in same manner as required by Rule 203(b)(1), SCACR. Under Rule 203(b)(1), an appellant must serve its notice of appeal "within thirty (30) days after receipt of written notice of entry of the order or judgment." Fallon's appeal is untimely if receipt of the email on December 15 triggered this 30-day time limit, because the January 15 notice of appeal was served 31 days after receipt of the December 15 email. Fallon's appeal is timely if the email did not trigger the time to appeal.

² The Court of Appeals found that Fallon received the email on December 15. (Appx. 6; 21). Fallon did not challenge this ruling in its certiorari petition or its Brief of Petitioner. Thus, it is the law of this case. *E.g., Moseley v. All Things Possible*, 719 S.E.2d 656, 658 n.4 (S.C. 2011) (failure to challenge in petition).

ARGUMENT

The manifest purpose of Rule 203(b)(1) is to ensure that a party has actual notice and actual knowledge that an order has been entered before the time to appeal commences. The December 15 email, on its face, and even without the attached copies of the Order and Form 4, provided this notice. To avoid this indisputable fact, Fallon reads (re-writes) Rule 203(b)(1) as limiting the receipt of notice to an “official communication” that must come from the Clerk of Court, and only the Clerk of Court, and must be received by U.S. Mail or hand delivery, and only U.S. Mail or hand delivery. (Pet. Br. 9; 1-9, *passim*).

The argument that notice must come from the Clerk of Court, and only the Clerk of Court, is not properly before this Court, because Fallon never made this argument to the Court of Appeals. (Appx. 9-17 and 32-55, both *passim*). *Linda Mc Co v. Shore*, 703 S.E.2d 499, 506-507 (S.C. 2010). In any event, this argument has no merit, because nothing in Rule 203(b)(1) imposes the “Clerk of Court” limitation. In like manner, nothing in Rule 203(b)(1) imposes the “U.S. Mail or hand delivery” limitation advanced by Fallon.

I. The Court of Appeals correctly ruled that receipt of the December 15 email triggered the time to appeal under Rule 203(b)(1), SCACR.

As correctly held by the Court of Appeals: “Since the adoption of Rule 203 in 1990, the only limitation ever expressed on how notice must be received is that it must be ‘written notice.’” (Appx. 4). The Court concluded that “the email constitute[d] written notice.” (Appx. 4). Here, Fallon does not dispute the Court’s ruling that the email satisfies the “written” requirement of Rule 203(b)(1). (Pet. Br., *passim*; see also Appx. at 9-17 and 32-55, both *passim*). Thus, it is the law of this case. *Proctor v. Whitlark & Whitlark, Inc.*, 778

S.E.2d 888, 896 (S.C. 2015).³ Fallon’s only argument is its “official communication” (source and method) argument that the written notice can only come from the Clerk of Court and can only be delivered by U.S. Mail or hand delivery. This argument has no merit as shown in Argument II, *infra*.

After reviewing the facts of this case, the Court of Appeals held that Fallon’s appeal was untimely, because Fallon failed to serve its notice of appeal within 30 days after receiving the December 15 email:

Receipt of written notice is the critical event under Rule 203(b)(1), and [Fallon] received written notice on December 15, 2014 – the date of the email. [Fallon] failed to timely serve the notice of appeal “within thirty ... days after receipt of written notice.”

(Appx. 6).⁴ In so ruling, the Court of Appeals correctly relied on its earlier opinion in *Canal Ins. Co. v. Caldwell*, 524 S.E.2d 416 (S.C. App. 1999). (Appx. 4-5, 6).

In *Canal*, the Court of Appeals held that receipt of a faxed letter from opposing counsel triggered the time to appeal under the following facts:

1. March 17, 1997: the trial court issued its written order and thereafter entered judgment on March 19. 524 S.E.2d at 417.
2. June 24, 1997: the appellant’s attorney wrote the respondent’s attorney, inquiring about the status of the final order. *Id.*
3. July 8, 1997: the respondent’s attorney faxed and mailed a letter to the appellant’s counsel, advising that judgment had been entered on March 19 and giving the Judgment Roll Number. *Id.*

³ Any attempt to challenge this ruling in a reply brief would be a futile act, because arguments for reversal cannot be made for the first time in a reply brief. *McChurg v. Deaton*, 716 S.E.2d 887, 888 n.2 (S.C. 2011).

⁴ Fallon summarily argues that allowing the December 15 email to be notice under Rule 203(b)(1) requires the development of *ad hoc* rules and exceptions, touting the example of what happens if the email is intercepted by the recipient’s SPAM filter. (Pet. Br. 9). This argument fails for several reasons. First, Fallon never made this argument to the Court of Appeals. (Appx. at 9-17 and 32-55, both *passim*). Thus, it is not properly before this Court. *Linda, supra*. Second, it is undisputed that Fallon received the email, and there has never been any contention that it was intercepted by a SPAM filter or otherwise not delivered or not received. (See n.2 and accompanying text, *supra*). Third, if an email was in fact intercepted by a SPAM filter, then it is by definition “undelivered” and therefore not received.

4. Almost a month after receiving the fax, the appellant's attorney requested a copy of the order from the clerk's office. Ten days after receiving the order from the clerk of court, the appellant filed a motion to reconsider. *Id.*
5. The trial court issued an order on the motion to reconsider, and the appellant thereafter appealed on March 17, 1998. *Id.* at 418.

The Court of Appeals dismissed the appeal for failure to timely serve the notice of appeal, concluding that the appellant received written notice on July 8 when it received the fax and, therefore, the appellant had to serve the notice of appeal on or before August 7. The appellant failed to do so and, therefore, the appeal was untimely. 524 S.E.2d at 418. This ruling is fully supported by this Court's long-standing precedent that that the receipt of 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).

There is no meaningful distinction between the December 15 email at issue here and the July 8 fax at issue in *Canal*. Both provided the only notice required by Rule 203(b)(1), *i.e.*, that the order had been entered. Indeed, as found by the Court of Appeals, the December 15 email provided far more notice than was provided in *Canal*, because the December 15 email was from the judge that issued the order (rather than opposing counsel), and it included copies of the entered Order and the entered Form 4 Judgment (rather than simply advising of the date of entry and judgment roll number). (Appx. 4-5).⁵

⁵ The Court also noted that notice by email was contemplated by the rules, citing Rule 410(e), SCACR. (Appx. 5 & n.5). Fallon never mentions or challenges the Court reliance on Rule 410(e). (Pet. Br., *passim*). Thus, it is the law of this case.

Fallon argues that the Court of Appeals' reliance on *Canal* was misplaced, because the Court never held that receipt of the fax was the receipt of notice. (Pet. Br. at 5-6).⁶ Simply reading the opinion in *Canal* demonstrates the fallacy of Fallon's argument:

[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 notice of entry was received 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.⁷ Thus, it is clear that the Court of Appeals relied upon the receipt of the fax on July 8 as the operative fact and held that receipt of the fax was the receipt of notice that the order had been entered. Fallon's contrary arguments are manifestly without merit under the plain language of the opinion in *Canal*.⁸

⁶ Fallon also argues that the Court of Appeals erred in relying on *dicta* in *Ackerman v. 3-V Chemical, Inc.*, 562 S.E.2d 513 (S.C. 2002). (Pet. Br. 5, 6-7). The Court of Appeals, however, never cited or discussed *Ackerman*. (Appx. 3-7, *passim*).

⁷ 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).

⁸ Fallon also argues that the key fact in *Canal* was that the appellant waited too long to request a copy of the order from the clerk of court, and it was this delay that rendered the appeal untimely. (Pet. Br. 6). Nothing in *Canal* supports this argument. The Court specifically held that the deadline for serving the notice of appeal was August 7, which was 30 days after the appellant received the fax on July 8. 524 S.E.2d at 418. Had the delay in requesting the order been the key fact, the deadline to appeal would have been some date after August 7. Fallon never explains how its "timely request" rule would work, *e.g.*, what was the deadline for requesting the order from the clerk, and how long was the appellant entitled to wait on a response from the clerk?

Fallon also argues that this case is controlled by the decision in *White v. South Carolina Dep't of Health & Envtl. Control*, 708 S.E.2d 812 (S.C. App. 2011), and the ruling in *White* requires a reversal of the Court here. (Pet. Br. 7-8). This argument has no merit and, in any event, it is barred by the law of the case doctrine, because Fallon fails to challenge the Court of Appeals' rulings that rejected Fallon's argument on *White*.

In *White*, the appellant appealed from an order of the ALC under Rule 203(b)(6), SCACR, which requires service of the notice of appeal within 30 days after "receipt of the decision" itself. After the ALC issued its order, the respondent emailed the ALC's entered decision to the appellant. The appellant served its notice of appeal more than 30 days after receiving the email, and the respondent moved to dismiss the appeal. The Court of Appeals denied the motion under the following analysis, which included a ruling that *White* was distinguishable from *Canal*:

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).
3. Finally, and most importantly, due process precluded the Court from granting the motion to dismiss, because the Court had recently held in *Trowell, infra* that the time to appeal under Rule 203(b)(6) did not commence upon receipt of the agency's decision via a fax from the agency. Thus, an email could not be ruled to be effective notice when a fax had recently been ruled as ineffective. *Id., citing and explaining Trowell v. South Carolina Dep't of Pub. Safety*, 681 S.E.2d 893 (S.C. App. 2009).

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. 708 S.E.2d at 816.

Here, the Court of Appeals distinguished *White* on two grounds. First, this appeal is under Rule 203(b)(1), which requires only receipt of notice of entry of the order, as opposed to Rule 203(b)(6), which requires receipt of the decision itself. (Appx. 5-6). Second, the due process concerns that controlled in *White* were not present here, because the decision in *Canal* had put parties on notice that receipt of notice of the entry of an order via fax triggered the time to appeal under Rule 203(b)(1). Thus, there was no due process impediment to holding that receipt of an email was likewise receipt of notice of the entry of an order that triggered the time to appeal under Rule 203(b)(1). (Appx. 6).

Fallon never addresses the Court of Appeals' discussion of *White* and, in particular, never challenges the Court's ruling that *White* was distinguishable due to the lack of any due process concerns, including the fact that *Canal* had put parties on notice that a fax triggered the time to appeal under Rule 203(b)(1). (Pet. Br. *passim*). Thus, it is the law of the case. *Proctor, supra*. In any event, the Court was correct. Nothing in Rule 203(b)(1) prescribes or proscribes any particular source or method for receiving written notice of the entry of the order.⁹

⁹ To the extent necessary, Wells Fargo respectfully submits that *White* was wrongly decided. Although the ALC rules required the ALC 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 and knowledge that the order has been issued and entered. 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. 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.

Finally, Fallon argues that the Court of Appeals erred, because it applied the service by email provisions in the 2014 amendment to Rule 77, SCRCF. (Pet. Br. at 4-5; see also *id.* at 3-4). This argument is manifestly without merit, because the Court of Appeals never cited and never relied on Rule 77 as a basis for its ruling. (Appx. 3-7, *passim*). In any event, and contrary to Fallon’s argument, Rule 77 would not preclude the ruling here, even if Rule 77 applied here, and even if the Court of Appeals had relied on Rule 77.

In 2014, this Court amended Rule 77 to provide for service by email in cases subject to the SCE-File electronic filing system. Rule 77(d) provides in pertinent part:

Immediately 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 who is not in default for failure to appear, 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.

(Emphasis added). The above-emphasized language demonstrates that Rule 77 does not limit receipt of notice to service from the clerk of court, and nothing in Rule 77 purports to apply its provisions and requirements to Rule 203(b)(1), SCACR.

II. Fallon’s “official communication” argument is not properly before this Court and has no merit.

Fallon’s real argument here is that receipt of notice under Rule 203(b)(1), SCACR, occurs when, and only when, a party receives an “official communication” of the entry of the order. This “official communication” limitation on the receipt of notice is a “source and method” argument that has two prongs. The first prong (source) is that the notice must come from the Clerk of Court, and only the Clerk of Court. The second prong (method) is

that the clerk must deliver this notice by U.S. Mail or hand delivery, and only by U.S. Mail or hand delivery. (Pet. Br., *passim*).

Fallon never argued the first prong (only the clerk of court) to the Court of Appeals. (Appx. 9-17 and 32-55, both *passim*). Thus, it is not properly before this court. *Linda, supra*. In any event, this argument has no merit, because nothing in Rule 203(b)(1) imposes the “Clerk of Court” limitation. In like manner, nothing in Rule 203(b)(1) imposes the “U.S. Mail or hand delivery” limitation advanced by Fallon.

Rule 203(b)(1) is devoid of any language that supports the “source and method” limitation argued by Fallon in its “official communication” argument. Indeed, Fallon never cites any rule or other authority for the proposition that notice under Rule 203(b)(1) must come from the Clerk of Court, and only the Clerk of Court, *i.e.*, the “source” prong of Fallon’s “official communication” argument. The reason is simple. There is no such rule or authority. As to the “method” prong of its “official communication” argument, Fallon relies on the “service” provisions in Rule 5, SCRCF, and Rule 203, SCACR. (Pet. Br. 4). This reliance is woefully misplaced.

Rule 5, SCRCF, governs the service of papers, etc. in the court of common pleas. Nothing in Rule 5 purports to limit the manner in which notice is received under Rule 203(b)(1), SCACR. Rule 5, SCRCF, never mentions Rule 203(b)(1), SCACR, and Rule 203(b)(1) never mentions Rule 5, SCRCF. The reason is simple. “Service” is not the issue under Rule 203(b)(1). Rather, the issue is whether party actually received notice of the entry of the order without any “source or method” requirement or limitation. This is not surprising, because the purpose of Rule 203(b)(1) is to ensure that a party has actual notice and actual knowledge that the order has been entered before the time to appeal commences.

Here, the December 15 email fully satisfied this purpose. Moreover, applying Rule 5, SCRCR, would be antithetical to Rule 203(b)(1) and its purpose, because service under Rule 5 is “complete upon mailing” after the commencement of the action. Rule 5(b)(1), SCRCR. Under this rule, the time to appeal would commence upon the mailing of the order rather than the receipt of the notice of the entry of the order.

Rule 262, SCACR, governs service under the SCACR. It is mentioned in Rule 203(a), SCACR, as prescribing the method for serving the notice of appeal.¹⁰ Nothing in Rule 203(b)(1), however, mentions Rule 262 or limits the receipt of notice to service under Rule 262. Moreover, Rule 262 does not mention Rule 203(b)(1), nor does anything in Rule 262 limit the receipt of notice under Rule 203(b)(1) to service under Rule 262. Finally, Rule 262 provides that “[s]ervice by mail is complete upon mailing.” Rule 262(b), SCACR. Thus, as with Rule 5, SCACR, applying Rule 262 to Rule 203(b)(1) would be antithetical to the purpose of Rule 203(b)(1), and the time to appeal would commence upon the mailing of the order rather than the receipt of the notice of the entry of the order.


CONCLUSION

The manifest purpose of Rule 203(b)(1), SCACR is to ensure that a party has actual notice and actual knowledge that an order has been entered before the time to appeal commences. The December 15 email at issue here fully satisfied this purpose. There is no meaningful distinction between this email and the 1934 letter from opposing counsel that this Court approved in *Breeding, supra* or the 1997 fax approved by the Court of Appeals in *Canal, supra*. Moreover, nothing in the SCACR supports Fallon’s argument that the receipt of notice under Rule 203(b)(1) is limited to an “official communication” from the

¹⁰ Fallon mistakenly refers to Rule 203(b), SCACR as prescribing the rules for service under the SCACR. (Pet. Br. at 4).

Clerk of Court that is delivered by U.S. Mail or hand delivery. Indeed, Rule 203(b)(1) does not impose any “source or method” limitations or requirements on the receipt of notice of entry of the order. For these reasons, and for the other reasons set forth above, it is respectfully submitted that this Court should affirm the Court of Appeals.

Respectfully Submitted,



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January 19, 2017
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THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
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Gordon G. Cooper, Master in Equity

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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 Brief of Respondent by depositing a copy in the United States Mail, postage prepaid, on January 19, 2017 addressed to the attorney for Petitioners, as follows:

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Ann Shuler