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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKLEY COUNTY
Court of Common Pleas

Dale E. Van Slambrook, Circuit Court Judge

RECEIVED
APR 17 2017
SC Court of Appeals

Case No.: 2016-CP-08-01261
Appellate Case No.: 2017-000796

Benjamin Reyna, d/b/a, El Alamo Restaurant,.....Appellant,

vs.

The Town of Hanahan, ... Respondent.

MOTION TO HOLD RESPONDENT'S MOTION TO DISMISS IN ABEYANCE
APPELLANT'S RETURN TO RESPONDENT'S MOTION TO DISMISS

Pursuant to Rule 240, *South Carolina Appellate Court Rules*, the appellant, Benjamin Reyna, d/b/a, El Alamo Restaurant, requests the Court to enter an Order suspending appellant's time limits to reply to Respondent's motion to dismiss, and holding briefing on the merits in abeyance.[1] The Appellant requests that the Court hold Respondent's motion to dismiss in abeyance based upon the following grounds.

[1] Rule 240(b) automatically suspends the briefing schedule pending resolution of the Respondent's motion to dismiss.

Respondent's motion to dismiss is based on its assertion that this Court's Order in *Wells Fargo Bank, N.A. v. Fallon Properties South Carolina, L.L.C.*, 413 S.C. 642, 776 S.E.2d 575 (Ct. App. 2015) supersedes the application of Rules 5 and 77 of the *South Carolina Rules of Civil Procedure* and Rule 203(b)(1) of the *South Carolina Appellate Court Rules*. Respondent asserts that the Court's holding in *Wells Fargo* relieves it and the Clerk of Court from notifying an opposing party of the entry of judgement by first class mail as required by the rules. In the *Wells Fargo* case the Court of Appeals dismissed an appeal from Spartanburg County for failure to appeal within thirty (30) days of alleged receipt of an electronic notice of entry of judgment.

The Respondent asserts, based on *Wells Fargo*, that electronic service alone is sufficient notice to an opposing counsel and constitutes service under Rules 5 and 77 of the *South Carolina Rules of Civil Procedure* and Rule 203(b)(1) *South Carolina Appellate Court Rules*. As discussed more fully below, the Supreme Court is reviewing *Wells Fargo* at the present time, and the Respondent's assertion is contrary the settled cases touching on this subject, which uniformly hold that that proper notice is actual notice obtained by mailing. "Service upon the attorney or the 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; or, if the office is closed or the person to be served has not office, leaving a copy at his dwelling place or usual place of abode with some person of

suitable age and discretion then residing there. Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint." Rule 5(b)(1) Likewise, Rule 77 requires the same method of service when done by the Clerk of Court. "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 appeal, and shall make a note in the case file or docket sheet of the mailing." Rule 77(d). Appellate Rule 203 says the same thing: "A notice of appeal shall be served on all respondents within thirty (30) days after receipt of a written notice of entry of the order or judgment." Rule 203(b)(1)

Despite the clear directives from the rules, and despite the undisputed bedrock legal principle of notice as the foundation of due process, Respondent contends all these bedrock principles are cast away by virtue of South Carolina lawyers maintaining a current e-mail address on the Bar's A.I.S., Attorney Information Service.

Leaving aside the fact that *Wells Fargo* is under review, Respondent overlooks that the e-filing requirements in South Carolina apply only to those counties participating in the Supreme Court Pilot Program for E-filing. Berkeley County does not participate in that program, and the Counties that do participate in the Pilot Program send explicit notices of filing much different to the "notices" Berkeley County sends. Because Berkeley County is not a participating county in the e-filing pilot program, the rules of e-filing do not apply.

Because Berkeley County is not in the program, Respondent's sole authority for its assertion is this Court's Order in *Wells Fargo*. *Wells Fargo* arose out of Spartanburg

County, which is now one of the 18 counties governed by the Pilot Program for the Electronic Filing of documents. See Supreme Court Order 2015-002439 signed by Chief Justice Donald W. Beatty on April 11, 2017, adding Aiken County to the list of e-filing counties. The present case is from Berkeley County, which is not an electronic filing county as may be seen in the attached Order.

For counties not participating in the E-file Pilot Program, the Supreme Court specifically notified lawyers that they must serve papers in accordance with Rules 5, 77, and 203:

> (c) Transmission of Notice of Court Orders or Judgments. Immediately upon the electronic entry of an order or judgment, the E-Filing System will transmit an NEF to all Authorized E-Filers in the case. Transmission of the NEF constitutes the notice required under Rule 77(d), SCRCP, for all parties who are proceeding in the E-Filing System. **Parties who are not proceeding in the E-Filing System must be served by Traditional Service as required under Rule 77(d), SCRCP.**
>
> Supreme Court Order on Electronic Filing Pilot Program (emphasis added)

Not only is Berkeley County not participating in the E-Filing Pilot Program (see attached Order), but also the Order in *Wells Fargo* does not mention or apply this rule. Moreover, lawyers are aware that notices from Counties participating in the e-filing program provide specific notice of the entry of judgment, using red, large font typeset to alert lawyers that the document is of high importance and to distinguish it from the hundreds of e-mails that arrive on a typical lawyer's computer in a day.[2] Since Berkeley County is not an e-file county, the Respondent cannot rely on *Wells Fargo* to excuse the Clerk from compliance with the rules and cannot rely on *Wells Fargo* to excuse counsel

[2] At the present time, the author of this Memorandum has 1,049 unread e-mails on the system. This is a typical number, and the number runs around a thousand constantly. The amount of time spent sifting through e-mails to discover which are important occupies a disproportionate amount of every lawyer's day. Efforts to control the influx of e-mails by increasing the filter only makes matters worse by sending too many legitimate e-mails to spam.

from his duties under the Attorney's Oath of Office not to mislead parties or authorize him to set procedure traps as occurred here. *Wells Fargo* is not authority to avoid the requirements of due process or the application of the *Rules of Civil Procedure.* "Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his client." *Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 385 (1947) In setting up the e-filing pilot program, the Supreme Court is aware of the inherent confusion accompanying such changes and emphasizes that the e-filing pilot program should not be used in such a manner as Respondent seeks to use it here to deprive a party of access to the Court:

> **(e) Construction.** These Policies and Guidelines shall be liberally construed to ensure substantial justice for all parties, and that cases are disposed of on the merits.
>
> **South Carolina Electronic Filing Policies and Guidelines Pilot Version-Common Pleas**

The Respondent's motion to dismiss ignores the requirements of Rules 5 and 77, and ignores the regulations establishing the e-filing procedure for participating counties. The Respondent asserts that this Court's August 25, 2015, Order in *Wells Fargo Bank, N.A. v. Fallon Properties South Carolina, L.L.C.,* 413 S.C. 642, 776 S.E.2d 575 (Ct. App., 2015) settles the controversy. However, by Order dated November 10, 2016, (copy attached), the Supreme Court granted *certiorari* to review the *Wells Fargo* Order to review that Order.[3] The present case is factually distinguishable from *Wells Fargo,*

[3] The Supreme Court held oral argument on the case on Wednesday, April 12, 2017, which ETV broadcast. While oral argument is not an indication on the ultimate decision, several Justices expressed concern that the lack of uniformity in the rules "invites mischief," which is exactly what occurred here when Respondent's counsel withheld the information from the Appellant that the circuit court entered an Order even though Appellant specifically asked counsel if the Order were signed and filed.

because here Appellant's counsel specifically asked Respondent's counsel if the circuit court had signed an Order and if Respondent's Counsel had filed it. (The Court directed Respondent's counsel to prepare the Order.) Instead of answering Appellant's direct question, Respondent's counsel sat silent, later offering the weak explanation that Appellant's request for information "fell through the cracks." The Appellant sent e-mails to the Respondent on February 13, 2017, March 1, 2017, and March 3, 2017, inquiring about the Order. Instead of answering Appellant's February 13, 2017, inquiry about whether the Court had signed an Order or whether Respondent had filed it, Respondent's counsel mislead Appellant by remaining silent until the 30 days—as he calculates them—had run. This is the kind of "mischief" the Supreme Court inquired about in oral argument on April 12th during oral argument in *Wells Fargo*. (The Supreme Court also had considerable colloquy about the apparent conflict between the e-filing policies and the Rules 5, 77 and 81 of the *South Carolina Rules of Civil Procedure*.) Appellant's counsel sent the February 13th inquiry is because of his concern about e-mail and data due to hackers damaging the Belk, Cobb server over the weekend of February 11th-12th, which required the law firm's I.T. manager to remove the server from the building for almost ten days. Because of concern about missing data, Appellant's counsel made a specific request for information concerning the status of the Order, and Respondent chose to mislead Appellant by remaining silent until he calculated the time for appeal had run. Such sharp practice is not only inconsistent with every lawyer's pledge of fairness (See Attorney's Oath Of Office), but also points out why the rules regarding e-filing and civil procedure must be harmonious.

Notwithstanding the distinguishing factual differences between the present case and *Wells Fargo*, the Appellant relies upon the same rules and authorities set forth in the briefing in the *Wells Fargo* case, in particular the controlling requirements of Rules 5, 77 and 81 of the *South Carolina Rules of Civil Procedure*. Under either Rule 5 of the *Rules of Civil Procedure* or Rule 203(b) of the *South Carolina Appellate Court Rules*, both require that service shall be made by: "delivering a copy to him or by mailing it to him at his last known address. . ." As set forth above, the rule defines delivery: "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." These rules are consistent with the Supreme Court's directive in the e-filing pilot program as quoted above on page 4. Even if A.I.S. rules could trump the rules of civil procedure, the e-file pilot program makes clear that the A.I.S. rules only apply to e-filing counties, and Berkeley County is not one of these.

As discussed throughout this motion, the most important distinguishing fact from *Wells Fargo* is that here, the Appellant sent a direct inquiry about the status of the Order as follows:

> February 13, 2017, 8:21 a.m.
>
> I know you're swamped, but can you let me know the status of the Order in Reyna? I know Judge Van Slambrook asked you to send him an Order. Has it been signed? Filed?
> /s/ Thomas Goldstein

It is undisputed that Respondent's counsel ignored this request, explaining—only after the thirty days had run by his e-filing calculation—that the Appellant's request "fell through the cracks." As explained above, the reason Appellant's counsel sent the February 13th inquiry was because the firm was in Day 3 of dealing with a server breach and had no server, no access to data—including e-mail attachments—and was limping along on a temporary, limited e-mail system. Such inherent unreliability in electronic communications is the precise reason the rules of civil procedure require mailing and or hand-delivery and why the Supreme Court requires that non e-filing counties follow the traditional rules. Moreover, there is no reason for a lawyer to be looking for an electronic filing in a County that does not participate in the system. As demonstrated in the attached affidavit of the law firm's I.T. expert, once the system was restored, every recovered document in the system now bears the date "February 20, 2017" as the date of creation of such document. In short, Appellant's counsel was flying almost blind and relying on Respondent's truthfulness in determining whether an Order had been signed and or filed. Respondent's counsel's conduct in such circumstances at best paints a bleak picture of the professionalism of the Bar and at worst violates the Attorney's Oath of Office, which requires lawyers to "employ for the purpose of maintaining the causes confided to me only such means as are consistent with trust and honor and the principles of professionalism, and will never seek to mislead an opposing party . . . by a false statement of fact or law."

In contrast to the *Wells Fargo* case, which is now under advisement by the Supreme Court, the only settled case in South Carolina specifically dealing with the

issue of whether electronic notification starts the 30 day deadline is *White v. South Carolina Dept. of Health & Envtl. Control*, 392 S.C. 247, 708 S.E.2d (S.C. App. 2011). There, construing Rule 203(b)(6) (appeals from Administrative Law Court), which is the same as 203(b)(1) (appeals from Common Pleas), the Court said:

> Coffin Point's counsel does not deny receiving the e-mail transmission of the ALJ's January 28, 2009 decision. Rather, counsel maintains 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 e-mail. 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. We agree.
>
> *White* at page 815.

The Court went on to explain that an e-mail notice does not supersede the *Rules of Civil Procedure* or the *Rules of the Administrative Law Court*, which control the manner in which service by the rules must be accomplished. That is the case today, and in a nutshell, there is now a conflict between the Rules of Procedure (both civil and appellate) and the A.I.S. sign-up application on which Respondent relies. See page 2 of Respondent's motion to dismiss: "Attorneys practicing in South Carolina have been required since November 18, 2011, to keep a valid e-mail address on file with the AIS." In short, Respondent argues that the lawyer's obligation to maintain a valid e-mail address on file with the A.I.S. relieves a party from complying with the rules of procedure regarding service of legal papers. The *White* case, which is not being reviewed, holds that the rules of procedure govern over a lawyer's acknowledgment of A.I.S. In order to be consistent with traditional notions of due process, the rule could not be any other way:

For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified." [citations omitted] It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." [citations omitted][4]

Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 506 (1972)

Since the Respondent is relying entirely upon *Wells Fargo* for its legal position, until the Supreme Court speaks to *Wells Fargo*, neither party presently knows how to address the applicability of the case's holding to this case since review of it is currently pending. Moreover, it is plausible that the Supreme Court could issue an Opinion in *Wells Fargo* in such a manner as to be dispositive of Respondent's pending motion to dismiss.

Therefore, in the interests of judicial economy, the appellant requests an Order of the Court holding Respondent's pending motion to dismiss in abeyance pending a decision of the Supreme Court in the case currently under review there.

Respectfully submitted,

April 13, 2017

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[4] The United States Supreme Court's' statement about meaningful due process comports with the State Supreme Court's directive to courts to interpret the rules governing e-filing rules "to ensure substantial justice for all parties, . . ." quoted on page 5 and attached.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKLEY COUNTY
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Dale E. Van Slambrook, Circuit Court Judge

Case No.: 2016-CP-08-01261
Appellate Case No. 2017-000796

Benjamin Reyna, d/b/a, El Alamo Restaurant,.....Appellant,

vs.

The Town of Hanahan, ... Respondent.

PROOF OF SERVICE

I certify that I have served the Appellant's Motion to Hold Appeal in Abeyance on the Respondent, The Town of Hanahan, by depositing a copy of it in the United States Mail, postage prepaid, on April 13, 2017, addressed to its attorney of record, Stafford John McQuillin, III, P. O. Box 340, Charleston, S. C. 29402.

April 13, 2017

Thomas R. Goldstein, #2186
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(843) 554-4291; (843) 554-5566 fax
Attorneys for the Appellant

2017-04-11-01

The Supreme Court of South Carolina

Re: Expansion of Electronic Filing Pilot Program -
Court of Common Pleas

Appellate Case No. 2015-002439

ORDER

Pursuant to the provisions of Article V, Section 4 of the South Carolina Constitution,

IT IS ORDERED that the Pilot Program for the Electronic Filing (E-Filing) of documents in the Court of Common Pleas, which was established by Order dated December 1, 2015, is expanded to include Aiken County. Effective April 25, 2017, all filings in all common pleas cases commenced or pending in Aiken County must be E-Filed if the party is represented by an attorney, unless the type of case or the type of filing is excluded from the Pilot Program. The counties currently designated for mandatory E-Filing are as follows:

Allendale	Anderson	Beaufort	Cherokee
Clarendon	Colleton	Greenville	Hampton
Jasper	Lee	Oconee	Pickens
Spartanburg	Sumter	Williamsburg	
Horry	Georgetown	**Aiken—Effective April 25, 2017**	

Attorneys should refer to the South Carolina Electronic Filing Policies and Guidelines, which were adopted by the Supreme Court on October 28, 2015, and the training materials available at **http://www.sccourts.org/efiling/** to determine whether any specific filings are exempted from the requirement that they be E-Filed. Attorneys who have cases pending in Pilot Counties are strongly encouraged to review, and to instruct their staff to review, the training materials available on the E-Filing Portal.

s/Donald W. Beatty
Donald W. Beatty
Chief Justice of South Carolina

Columbia, South Carolina
April 11, 2017

South Carolina
JUDICIAL DEPARTMENT

6. Signing and Entry of Court Orders and Judgments

(a) Signing of Orders. Orders shall be electronically filed by the court or court personnel. Judges or court personnel authorized to sign orders should utilize an electronic signature page for the electronic signing of all orders, including any form orders. Where electronically signed by a judge, the signature on the electronic signature page shall include the individual judge's code assigned by Court Administration and the s/typed name of the judge as an electronic signature. Electronically signed and filed court orders and judgments shall have the same force and effect as if the judge had affixed a written signature to a paper copy of the order. Orders may also be signed by judges using a Traditional Signature, rather than an electronic signature, if signed during a hearing or as required by the circumstances.

(b) Entry of Order. All court orders or judgments where one or more parties are proceeding in the E-Filing System will be entered electronically. Electronic entry constitutes entry of the order or judgment in accordance with Rules 58 and 77, SCRCP.

(c) Transmission of Notice of Court Orders or Judgments. Immediately upon the electronic entry of an order or judgment, the E-Filing System will transmit an NEF to all Authorized E-Filers in the case. Transmission of the NEF constitutes the notice required under Rule 77(d), SCRCP, for all parties who are proceeding in the E-Filing System. **Parties who are not proceeding in the E-Filing System must be served by Traditional Service as required under Rule 77(d), SCRCP.**

(d) Receipt of Written Notice of Entry of Order or Judgment. An Authorized E-Filer has receipt of written notice of the entry of a judgment or the filing of an order upon receipt of the emailed NEF. It shall be the responsibility of an Authorized E-Filer to review the content of the E-Filed order to determine its force and effect; however, any delay in accessing the E-Filing System to review the order does not affect the time of receipt.

Amended by Order dated January 25, 2016.

(emphasis added)

South Carolina
JUDICIAL DEPARTMENT

11. Miscellaneous

(a) Discovery. The E-Filing System shall not be used for the electronic exchange of discovery materials and other communications between the parties that are not intended to be filed with the court.

(b) Citation. These Policies and Guidelines may be cited as follows: Section __, SCEF.

(c) Courtesy Copies. The court shall not require parties to furnish courtesy paper copies of E-Filed documents.

(d) Request to Correct Data Entry Error. A party or an attorney for a party may seek to correct an alleged data entry error in case information entered in the E-Filing System or the Case Management System Public Index by filing a written request with the Clerk of Court in the county in which the case was filed.

(1) A request may only be filed where a party asserts a data entry error, such as a clerical error or scrivener's error, occurred during entry of case or event information in the Case Management System or the E-Filing System. Examples include circumstances where the names of parties were correctly set forth in pleadings, but were incorrectly entered by the E-Filer or the Clerk of Court electronically. Other examples include the incorrect selection of a filing event by the E-Filer or the Clerk of Court.

(2) No request may be filed as a means to amend a filed pleading, order, or other document. Where a party believes a pleading or order of the court contains an error that requires amendment, the party may seek to amend the pleading or order or request other relief in accordance with the SCRCP.

(3) Requests to Correct Data Entry Errors shall be processed as follows:

(A) The party or an attorney for a party shall file a Request to Correct Data Entry Error on a Form approved by the Supreme Court. The request shall contain a brief description of the data entry error and the specific correction that is requested.

(B) If the request properly alleges a data entry error under paragraph (d)(1) of this section, the Clerk of Court shall, within ten days, make the requested correction and file a Response to the Request to Correct Data Entry Error on a Form prescribed by the Supreme Court.

(C) If the request does not properly allege a data entry error under paragraph (d)(1) of this section, the Clerk of Court shall, within ten days, file a Response to the Request to Correct Data Entry Error declining to make the correction on a Form prescribed by the Supreme Court.

(D) Where it is unclear whether the request properly alleges a data entry error under paragraph (d)(1) of this section, the Clerk of Court shall refer the matter to the Chief Judge for Administrative Purposes or other judge involved in the matter for a determination of whether the change is appropriate.

(E) A party who believes the Clerk of Court has erroneously declined to correct a data entry error in accordance with this section may seek relief from the court.

(e) Construction. These Policies and Guidelines shall be liberally construed to ensure substantial justice for all parties, and that cases are disposed of on the merits.

(emphasis added)

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April 12, 2017

Hon. Jenny A. Kitchings,
Clerk of Court
S. C. Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

Re: Benjamin Reyna vs. Town of Hanahan; Case No.: 2016-CP-08-1261

Dear Ms. Kitchings,

I enclose an original and seven copies of my motion to hold motion in abeyance along with a certificate of mailing and our firm's check in the amount of $25.00 as the filing fee. Would you be so kind as to file the motion and return an extra copy to me in the self, addressed, return envelope? I thank you for your attention to this request. With kind regards, I am

Very truly yours,

BELK, COBB, INFINGER & GOLDSTEIN, P.A.
Thomas R. Goldstein

TRG/
enclosure: Motion, return envelope #17774

cc: (with enclosure)
Mac McQuillin, Esq.

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APR 17 2017
SC Court of Appeals

Hon. Jenny A. Kitchings,
Clerk of Court
S. C. Court of Appeals
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