

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM BERKELEY COUNTY  
Court of Common Pleas

Dale E. Van Slambrook, Master-in-Equity

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C.A. No. 2016-CP-08-01261  
Appellate Case No. 2017-000796

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RECEIVED

APR 21 2017

SC Court of Appeals

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

v.

The Town of Hanahan.....Respondent.

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**REPLY TO APPELLANT'S RETURN  
TO RESPONDENT'S MOTION TO DISMISS**

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Appellant's Return is primarily devoted to impugning the motives of counsel and raising red herrings. Nowhere in the Return does Appellant deny the fact that he received notice of entry of the order on appeal by the same email that Respondent received on January 27, 2017, at 2:11 p.m.<sup>1</sup> The receipt of the email is dispositive and divests this Court of appellate jurisdiction. Dismissal is required. *Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, 413 S.C. 642, 646, 776 S.E.2d 575, 577 (Ct. App. 2015) ("*Wells Fargo*") (holding that failure to timely serve a notice of appeal after receipt of written notice (in the form of an email from the master-in-equity) of entry of the order on appeal divested the court's appellate jurisdiction and required dismissal of the appeal).

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<sup>1</sup> The January 27, 2017, email is attached as Exhibit D to Respondent's *Motion to Dismiss*, filed with the Court on April 7, 2017.

**I. *South Carolina Appellate Rule 203(b)(1)* requires “receipt of written notice,” not “service” as set forth in Rules 5 and 77 of the *South Carolina Rules of Civil Procedure*.**

Appellant argues that Rules 5 and 77, SCRCF, place limits on Rule 203(b)(1), SCACR. But Rule 5 governs “service” of papers in the court of common pleas under the Rules of Civil Procedure and includes nothing purporting to limit the manner in which notice is received under Rule 203(b)(1), SCACR. The purpose of Rule 203(b)(1) is to ensure that a party has notice that an order is entered before the time to appeal commences. Applying Rule 5 would be antithetical to Rule 203(b)(1) and its purpose because Rule 5 “is complete upon mailing,” whereas the appellate rule requires receipt. Appellant’s argument would commence the time to appeal at the date of mailing of the order rather than receipt of the notice of the entry of the order. Unlike the requirements for service in Rule 5, Rule 203 is directed to a deadline triggered by “receipt of written notice of entry of the order of judgment.” Nothing about Rule 203 contemplates the order of judgment will be served by opposing counsel, nor does it contemplate that notice has to come from any particular source. Rule 203 only requires “written notice.”

Rule 77(d), SCRCF, also governs “service” of notice of entry of orders or judgments in the court of common pleas. 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 Official Notes to Rule 77, SCRCF, recognize that service is required, “unless (as is customary) they have been notified, usually by the judge.”

(parenthetical in original). The above-emphasized language and Notes to the Rule demonstrate 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).<sup>2</sup>

Finally, Rule 73, SCRCF, makes clear that Rules 5 and 77 do not govern the procedure on appeal. Specifically, Rule 73 provides that the “[p]rocedure on appeal to the South Carolina Supreme Court or the South Carolina Court of Appeals shall be in accordance with the South Carolina Appellate Court Rules.” Rule 73, SCRCF. “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.’” *Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, 413 S.C. 642, 644, 776 S.E.2d 575, 576 (Ct. App. 2015). Thus, this Court in *Wells Fargo* correctly held that e-mail constitutes written notice under Rule 203(b)(1), SCACR.

**II. This Court’s holding in *Wells Fargo* applies to cases and counties not subject to the electronic filing system.**

Appellant argues “[s]ince Berkeley County is not an e-file county, the Respondent cannot rely on *Wells Fargo* ... .” *Return*, p. 4. This argument overlooks that when this Court decided *Wells Fargo*, Spartanburg County was not an e-filing county. It became an e-filing county on August 23, 2016, approximately a year after this Court issued its decision in *Wells Fargo*. See South Carolina Supreme Court Order No. 2015-002439,

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<sup>2</sup> In addition to Rules 5 and 77, SCRCF, Appellant relies on *White v. South Carolina Department of Health and Environmental Control*, 392 S.C. 247, 708 S.E.2d 812 (Ct.App.2011), which dealt with Rule 203(b)(6), SCACR, and the Administrative Law Court Rules. In *Wells Fargo*, this Court correct held that that *White* was distinguishable from an appeal from the court of common pleas that falls under Rule 203(b)(1). *Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, 413 S.C. 642, 645, 776 S.E.2d 575, 577 (Ct. App. 2015).

“Re: Expansion of Electronic Filing Pilot Program - Court of Common Pleas,” dated August 8, 2016 (“Spartanburg—Effective August 23, 2016”). Therefore, this attempt at distinction by Appellant fails.

**III. The undersigned did not “mislead Appellant,” and did not engage in any “mischief” or other unethical conduct as argued by Appellant.**

Appellant resorts to impugning the motives of counsel, presumably to distract from the crucial and dispositive fact that Appellant received notice of entry of the order on appeal by the same email as was received by Respondent on January 27, 2017. The order on appeal was also uploaded by the clerk of court to the Berkeley County Online Public Index on January 27, 2017.

Several days later, on February 13, 2017, Appellant’s counsel emailed the undersigned and stated:

“I know you’re slammed, but can you let me know the status of the Order in Reyna? I know Judge Slambrook asked you to send him an Order. Has it been signed? Filed?”

On February 13, 2017, the undersigned, as the Vice Chair of the Berkeley County School Board, was filling in as Chair at a School Board meeting in the midst of an FBI and SLED investigation regarding the Chief Financial Officer’s admitted theft of School District Funds.<sup>3</sup> The undersigned acknowledges that due to the press of other business and through inadvertence alone, he did not respond to Appellant’s initial February 13,

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<sup>3</sup> See *Post and Courier* Article “Former CFO of Berkeley Schools Confesses to Taking \$382,252 from the District, Board Member Says,” dated, February 14, 2017 (“Chairwoman Sally Wofford, who had surgery last week, was not at Tuesdays [February 13, 2017] meeting . . . after a closed session with district lawyers Tuesday [February 13, 2017], McQuillin, reading from a prepared statement said Thomas . . . converted 10 refund checks worth a total of \$382,252”).

2017, email.<sup>4</sup> For his part, Appellant's counsel apparently failed to check his own email inbox, contact the court, check the online public index, or call the undersigned after receiving no response to his email of February 13, 2017. Instead, Appellant's counsel waited until March 1, 2017, to send a follow-up email to check on the status of the order, at which time the undersigned informed Appellant's counsel that the clerk of court had emailed Appellant the order on appeal on January 27, 2017. **Exh. A.**

At no time prior to the filing of Appellant's Return, did Appellant's counsel mention any issues with his server, which allegedly occurred on February 11-12, well after both attorneys received notice of entry of the order on appeal. Indeed, Appellant's counsel indicated he meant to remove any reference to server issues in Appellant's Return because that issue was "less important." **Exh B.** Appellant's unfortunate allegations against the undersigned and after-the-fact excuses are unavailing given this Court's clear holding in *Wells Fargo*.

### CONCLUSION

This Court's decision in *Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, 413 S.C. 642, 776 S.E.2d 575 (Ct. App. 2015) remains the law and controls the disposition of this appeal. Appellant argues that the Court should hold Respondent's *Motion to Dismiss* in abeyance "until the Supreme Court speaks to *Wells Fargo* [because] neither party presently knows how to address the applicability of the case's holding to this case since review of it is currently pending." However, a grant of certiorari by the South Carolina Supreme Court does not invalidate this Court's holding or its

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<sup>4</sup> In his Return, Appellant's counsel states that he currently has "1,049 unread emails" on his system and characterizes this as "a typical number" while complaining about the amount of time "spent sifting through emails." *Return*, p. 4. Thus, he is well-aware that all incoming emails are not immediately read and/or responded to promptly.

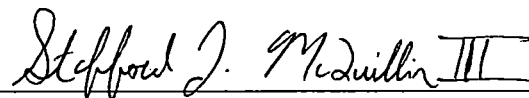
applicability. This Court's holding that "an e-mail from the office of the master-in-equity with the order on appeal as an attachment constitutes written notice of entry of the order under Rule 203(b)(1) of the South Carolina Rules of Appellate Procedure" remains the controlling law. *Id.* at 643, 776 S.E. 2d at 576. Accordingly, this Court "lacks appellate jurisdiction" and "is required to dismiss the appeal." *Fallon Properties*, 413 S.C. at 646-47, 776 S.E. 2d at 577-78.

Respondent respectfully urges this Court to apply applicable law to this appeal rather than waiting months before the South Carolina Supreme Court issues a decision regarding this Court's holding in *Wells Fargo*. This case involves the City of Hanahan's revocation of the business license of Appellant's nightclub. During the pendency of this appeal, Appellant continues to operate a nightclub that the City of Hanahan regards as a threat to the well-being of its citizens. Indeed, last month there was a shooting in the parking lot, and SLED cited the nightclub for illegally serving alcohol without a license. Respondent fears that any delay in the disposition of this matter will permit criminal activity to continue indefinitely at the expense of the citizens of Hanahan. In the event this Court is not inclined to dismiss the appeal immediately, Respondent respectfully requests that this Court order expedited briefing on the merits to prevent any additional delays.

*SIGNATURE ON FOLLOWING PAGE*

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



Stafford J. McQuillin III (S.C. Bar 78203)

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Charleston, South Carolina 29402

Phone: (843) 724-1120

[mmcquillin@hsblawfirm.com](mailto:mmcquillin@hsblawfirm.com)

*Attorney for Respondent*

*The City of Hanahan*

April 20, 2017

# **EXHIBIT A**

## McQuillin, Mac

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**From:** McQuillin, Mac  
**Sent:** Wednesday, March 01, 2017 3:22 PM  
**To:** 'Thomas Goldstein'  
**Cc:** Gulick, Kathy  
**Subject:** RE: Reyna Order

Tommy:

I hope all is well. Yes, we received written notice and a copy of the order by email. I am totally swamped right now. I will look for it when I come up for air and send it to you.

By the way, I am not representing the City in the new case you filed. You will have an IRF lawyer on that one.

-Mac

**Haynsworth  
Sinkler Boyd, PA.**

ATTORNEYS AND COUNSELORS AT LAW

**Stafford J. ("Mac") McQuillin III** | Attorney | Haynsworth Sinkler Boyd, P.A.

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**From:** Thomas Goldstein [<mailto:tgoldstein@COBBLAW.NET>]  
**Sent:** Wednesday, March 01, 2017 2:33 PM  
**To:** McQuillin, Mac  
**Subject:** Reyna Order

Did you ever get an Order from the Court? If not, I can go by the Clerk's office on Friday and ask them to copy one for us.

# **EXHIBIT B**

## McQuillin, Mac

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**From:** Thomas Goldstein <tgoldstein@COBBLAW.NET>  
**Sent:** Monday, April 17, 2017 1:02 PM  
**To:** McQuillin, Mac  
**Subject:** RE: Reyna vs. Town of Hanahan - Exhibits to Return

I meant to take that out, but I was under the gun because I was almost out of time. We did suffer a bad hack over the weekend of February 11<sup>th</sup>-12<sup>th</sup>, which required him to take our server out of the building, and we were flying pretty blind for about ten days. However, I meant to take that out because after I read the rules on e-filing in conjunction with the fact that Wells Fargo is under advisement, I thought it became less important.

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**From:** McQuillin, Mac [<mailto:mmcquillin@hsblawfirm.com>]  
**Sent:** Monday, April 17, 2017 12:15 PM  
**To:** Thomas Goldstein  
**Cc:** Gulick, Kathy  
**Subject:** RE: Reyna vs. Town of Hanahan - Exhibits to Return

It mentions the "attached affidavit of the law firm's I.T. expert," but no affidavit is attached.

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**From:** Thomas Goldstein [<mailto:tgoldstein@COBBLAW.NET>]  
**Sent:** Monday, April 17, 2017 11:55 AM  
**To:** McQuillin, Mac  
**Subject:** RE: Reyna vs. Town of Hanahan - Exhibits to Return

That's a relief 'cause there are not any!

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**From:** McQuillin, Mac [<mailto:mmcquillin@hsblawfirm.com>]  
**Sent:** Monday, April 17, 2017 11:52 AM  
**To:** Thomas Goldstein  
**Subject:** Reyna vs. Town of Hanahan - Exhibits to Return

I did not get a copy of the exhibits to your return in the mail or by email, and they are not online. Please email me those.

-Mac

**Haynsworth  
Sinkler Boyd, P.A.**

ATTORNEYS AND COUNSELORS AT LAW

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**PROOF OF SERVICE**

I certify that I have served the Respondent's Reply to Appellant's Return to Respondent's Motion to Dismiss to on all attorneys of record by depositing a copy of it in the United States Mail, postage prepaid, on April 20, 2017, addressed to Thomas R. Goldstein, Esq., Belk, Cobb, Infinger & Goldstein, P.A., P.O. Box 71121, Charleston, SC 29415-1121.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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April 20, 2017

Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211


Re: Benjamin Reyna d/b/a El Alamo Restaurant v. The Town of Hanahan  
Appellate Case No. 2017-000796

Dear Ms. Kitchings:

Enclosed herewith for filing, please find an original and seven copies of Respondent's Reply to Appellant's Return to Respondent's Motion to Dismiss, along with a Proof of Service, in the above-referenced matter. Please return one copy of the file-stamped Reply and Proof of Service to me in the enclosed envelope.

Thank you for your attention to this matter.

Very truly yours,



Stafford J. McQuillin III

SJM/kmg  
Enclosures  
cc (w/encl.): Thomas R. Goldstein, Esq.

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Haynsworth  
Sinkler Boyd, PA

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