

original

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM CHEROKEE COUNTY  
COURT OF COMMON PLEAS  
The Honorable R. Keith Kelly, Circuit Court Judge

**RECEIVED**

MAY 31 2018

Appellate Case No.: 2017-002171

**SC Court of Appeals**

Circuit Court Case No. 2014-CP-11-0938

Joey Lemmons, d/b/a Rugs International, ..... Appellant,

v.

Macedonia Water Works, Inc., ..... Respondent.

REPLY BRIEF OF APPELLANT

J. Falkner Wilkes  
114 Whitsett Street  
Greenville, SC 29601  
(864) 282-1292

N. Douglas Brannon  
Christopher D. Kennedy  
KENNEDY & BRANNON, P.A.  
229 Magnolia Street  
Spartanburg, SC 29306  
(864) 707-2020

*Attorneys for Appellant*

**TABLE OF CONTENTS**

Table of Authorities ..... ii

Statement of Issues in Reply ..... iii

Argument

I. THE RESPONDENT FAILED TO RAISE THE FACTUAL ISSUE OF THE  
TIMELINESS OF POST TRIAL MOTIONS TO THE LOWER COURT AND  
THEREFORE THE RECORD FAILS TO SHOW THAT POST TRIAL MOTION WAS  
UNTIMELY ..... 1

Conclusion ..... 2

**TABLE OF AUTHORITIES**

*Cases*

Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC, 422 S.C. 211, 810 S.E.2d 856 (2018) . 1

*Rules*

Rule 203(b)(1), SCACR ..... 1

## **ISSUES ON APPEAL**

1. Does this Court have jurisdiction to hear the appeal?
2. Was the Respondent required to raise the issue of the timeliness of the Appellant's Motion to Reconsider/Alter or Amend to the trial court?
3. Does the lack of evidence in record preclude this Court from finding that the Appellant's post trial motion untimely?

## ARGUMENT

### I. THE RESPONDENT FAILED TO RAISE THE FACTUAL ISSUE OF THE TIMELINESS OF POST TRIAL MOTIONS TO THE LOWER COURT AND THEREFORE THE RECORD FAILS TO SHOW THAT POST TRIAL MOTION WAS UNTIMELY.

The Respondent argues that the Appellant's post trial motion was untimely and therefore the time for filing notice of appeal expired prior to filing. The question as to whether the post trial motion was timely is a factual issue. The issue of timeliness of the post trial motion was not raised nor ruled on by the trial court and as a result, no factual determination was made by the trial court. The record is insufficient for this court to find that the motion was untimely. The Respondent allowed the record to be set by its failure to raise the issue. As a result, it should not benefit from a lack of evidence in record. Had the issue been raised by the Respondent timely, the Appellant would have had the opportunity to admit evidence and obtain a factual determination and ruling on the issue. The Respondent failed to timely raise the issue and thus prevents the Appellant this opportunity to respond to the challenge.

Rule 203(b)(1), SCACR sets forth the procedures for appealing a decision of the court of common pleas. This rule provides, in pertinent part: "A notice of appeal shall be served on all respondents within thirty (30) days after *receipt* of written notice of entry of the order or judgment." Rule 203(b)(1), SCACR (*emphasis added*). Thus, the time to serve the notice of appeal from a circuit court decision begins on the day the party receives written notice that an order or judgment has been entered. *See Wells Fargo Bank, N.A. v. Fallon Properties S.C., LLC*, 422 S.C. 211, 214–15, 810 S.E.2d 856, 857–58 (2018). The key being that it is the day of receipt that is essential to the analysis, not the day notice is sent. In all of the cases relied on by the Court

in Wells Fargo, *supra*, there was no issue as to the date of receipt, whether electronic or otherwise.

Here the Respondent raised no issue as to the timeliness of the motion in the circuit court. As a result, the Appellant was not put on notice or called upon to submit evidence on the issue of timeliness. Now that the Appellant's opportunity to submit evidence of the date of receipt has passed, the Respondent would have this Court assume a date of receipt without evidence in record to support it. There is nothing in record, that was presented to the trial court on the issue that would establish the date or method of service of the notice of entry in this case. The Respondent would have this Court accept a document from the AIS System that was not presented to the trial court for a determination of the issue. Even if this Court were to accept the Notice of Electronic Filing, it does not constitute proof of receipt of notice by counsel. There is nothing in the record that would establish counsel's actual receipt of notice in this case. The date notice has been sent has never been the operative date preceding the use of emails. Nor is the date of sending never been held conclusive evidence as to the date of receipt. Emails, although commonly used, are nonetheless subject to unpredictable and unexplainable travels, delayed and sometimes failed delivery, just as are letters mailed through the postal system. While the Respondent would have this Court assume that an email was sent, and that counsel received it on the same day, the record simply fails to show that to be the case.

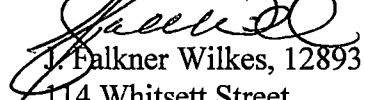
Nothing in Wells Fargo changes the rule that it is the receipt of notice that is the operative fact in determining timeliness of a post trial motion, not merely its sending. Where Respondent failed to raise the issue before the trial court, and allow a factual determination as to timeliness, it can not now ask this Court to assume facts not in record in an attempt to make the notice of

appeal to be untimely.

### CONCLUSION

Based on the foregoing this Court has jurisdiction to hear the appeal of this case.

Respectfully submitted,

  
J. Falkner Wilkes, 12893  
114 Whitsett Street  
Greenville, SC 29601  
(864) 282-1292

N. Douglas Brannon  
Christopher D. Kennedy  
KENNEDY & BRANNON, P.A.  
229 Magnolia Street  
Spartanburg, SC 29306

Attorneys for Appellant

May 29, 2018.

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

APPEAL FROM CHEROKEE COUNTY  
COURT OF COMMON PLEAS  
The Honorable R. Keith Kelly, Circuit Court Judge

Appellate Case No.: 2017-002171  
Circuit Court Case No. 2014-CP-11-0938

**RECEIVED**  
MAY 31 2018  
SC Court of Appeals


Joey Lemmons, d/b/a  
Rugs International, ..... Appellant,

v.

Macedonia Water Works, Inc., ..... Respondent.

CERTIFICATE OF COUNSEL

I certify that the Reply of Appellant has been redacted in accordance with the  
Supreme Court's Order on the redaction of personal identifiers and private data.

  
\_\_\_\_\_  
J. Falkner Wilkes, 12893  
114 Whitsett Street  
Greenville, SC 29601  
(864) 282-1292  
*Counsel for Appellant*

May 29, 2018.

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

APPEAL FROM CHEROKEE COUNTY  
COURT OF COMMON PLEAS  
The Honorable R. Keith Kelly, Circuit Court Judge

---

Appellate Case No.: 2017-002171  
Case No. 2014-CP-11-0938

---

**RECEIVED**  
MAY 31 2018  
SC Court of Appeals

Joey Lemmons, d/b/a  
Rugs International, ..... Appellant,

v.

Macedonia Water Works, Inc., ..... Respondent.

---

CERTIFICATE OF SERVICE

---

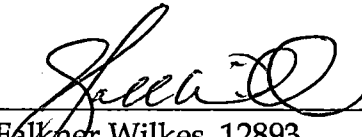
I certify that on May 29, 2018, I served Appellant's Reply Brief on the Respondent by placing a copy into the U.S. Mail, first-class postage prepaid, addressed to the Respondent's counsel of record as follows, and to others if indicated, and by facsimile if indicated:

Joseph L. V. Johnson  
Joseph L. Mathis  
Saint-Amand Thompson & Mathis, LLC  
210 Limestone Street, Suite 1  
Gaffney, SC 29340-3014

Lawrence E. Flynn, III  
Pope Flynn, LLC  
P.O. Box 11509  
Columbia, SC 29211-1509

*and to:*

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



---

J. Falkner Wilkes, 12893  
114 Whitsett Street  
Greenville, SC 29601  
(864) 282-1292  
*Counsel for Appellant*

N. Douglas Brannon  
Christopher D. Kennedy  
KENNEDY & BRANNON, P.A.  
229 Magnolia Street  
Spartanburg, SC 29306

*Attorneys for Appellant*

May 29, 2018.



1000



29211

U.S. POSTAGE  
PAID  
GREENVILLE, SC  
29602  
MAY 29 18  
AMOUNT  
**\$1.42**  
R2304M110659-05

J. Falkner Wilkes  
Attorney at Law  
114 Whitsett Street  
Greenville, SC 29601

---

**Jenny Abbott Kitchings**  
Clerk of the Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211



**RECEIVED**  
MAY 31 2018  
SC Court of Appeals

