

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

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SC Court of Appeals

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

v.

Macedonia Water Works, Inc., Respondent.

REPLY BRIEF OF APPELLANT

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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.

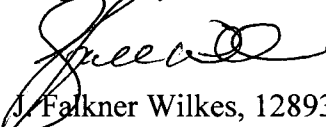
Nothing in Wells Fargo changes the rule that it is the receipt of notice that is the operative fact in determining timeliness of a post trial motion, not merely its sending. Where Respondent failed to raise the issue before the trial court, and allow a factual determination as to timeliness, it can not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


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