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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Appellate Case No. 2022-000469
Case No. 2019-CP-07-02629

Margaret A. Eberly and Barbara J. Pavelik,
Plaintiffs /Respondents,

v.

Advanced Flooring & Design Division of ISI, LLC; Archer Exteriors, Inc.; Crossroads Enterprises, LLC; D.R. Horton, Inc.; East Coast Construction Cleanup Corp.; Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc.; Professional Drywall & Paint Services, LLC; Professional Exteriors II, LLC; and Valim Construction, LLC

Defendants of whom D. R. Horton, Inc. is Appellant,

And

D. R. Horton, Inc.,

Cross-claimant and Appellant,

v.

Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc
Cross-defendants and Respondents

PETITION FOR REHEARING

Carl F. Muller
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Attorney for Appellant D. R. Horton, Inc.

Appellant D.R. Horton, Inc., through its undersigned counsel, files this Petition for Rehearing of the Court’s Order dated July 21, 2022, dismissing its appeal. The Petition is pursuant to and in compliance with Rules 221, 240 and 242(c), SCACR, and asks the Court to reconsider and vacate its Order dismissing Appellant’s appeal, to deny Respondents’ motions requesting dismissal, and to reinstate Appellant’s appeal. The Petition is based upon the following reasons and issues.¹

1. Appellant’s Notice of Appeal was timely served utilizing the South Carolina Electronic Filing Policies and Guidelines (SCEF) promulgated by the South Carolina Supreme Court. Rule 4(e)(2), SCEF, provides “the E-Filing of that pleading, motion or other paper . . . constitutes proper service under Rule 5, SCRCF . . .” Rule 4(e)(3), SCEF, states “Service of a pleading, motion or other paper . . . is complete at the time of the submission of the pleading, motion, or other paper for E-Filing) . . .” The Supreme Court Order in Appellate Case No. 2022-000029, Order No. 2022-05-06-04, dated May 6, 2022, states, “(e) Requirement for Service. In all cases: . . . (4) . . . “Lawyers are reminded that **the E-Filing System automatically serves parties that have appeared in a case, and the Notice of Electronic Filing (NEF) indicates which parties have been served.**” (Emphasis supplied). That Order also states in footnote 1, “The Supreme Court similarly permits service by electronic means in matters governed by the SCACR in accordance with 262(c)(3), SCACR, which states that, in addition to service by delivery or via U.S. mail, a party may also serve a copy by electronic means in a manner specified by order of the Supreme Court.” Timely service of a notice of appeal is

¹ Appellant incorporates herein Appellant D.R. Horton, Inc.’s Response in Opposition to Respondents, Lather Construction, Inc., Lather Construction, SC, Inc., and Hutton’s Landscapes, Inc., Motions to Dismiss Appeal.

covered by both the South Carolina Rules of Civil Procedure and the South Carolina Appellate Court Rules. E.g., Rule 6(b) SCRCR and Rule 203 SCACR. Appellant's Notice of Appeal was timely and properly served under the rules.

2. The official court record states, "The following people were served electronically." It lists the Respondents. See Exhibit A. They were served within the required thirty-day period. Exhibit A also states, "The following people . . . must be served by traditional means." No one is listed to be served that way. The Respondents were properly served.
3. The Supreme Court has noted that confusion has arisen regarding the electronic service rules. *See Wells Fargo v. Fallon*, Opinion 277773, Feb. 28, 2018 (S.C. Supreme Court acknowledged the confusion that has arisen by electronic communications in the litigation sphere). Accordingly, the Supreme Court has stated that fairness dictates that clarification concerning Rule 203, SCACR, for notices of appeal should be applied only prospectively. *See Id.* Fairness should apply in this case, as well.
4. In the original notice of appeal, the proper respondents were misidentified. This was a scrivener's error. The order under appeal was properly identified, however, and for that reason there could be no mistake about the respondents. Since at least 1899 the Supreme Court has allowed scrivener's errors in notices of appeal to be corrected, including a mistake in the case caption wherein respondents are incorrectly listed. *See Moody v. Dickinson*, 54 S.C. 526, 32 S.E. 563 (1899) (error in title/no prejudice found); *Charlestown Lumber Co. Inc. v. Miller Housing Corp.*, 318 S.C. 471, 478, 458 S.E.2d 431 (Ct. App. 1995) (failure to identify order appealed from/no prejudice found; also, "Clerical errors in a notice of appeal do not destroy the appeal") (citing *Moody, supra*) ("the court may properly allow an appellant to correct a mere clerical error in the title to

his notice of intention to appeal where there is no prejudice to appellee”). In *Charleston Lumber* the court stated, “Clerical errors in a notice of appeal do not destroy the appeal . . . We find this error was clerical in nature, and does not warrant dismissal of the appeal. Charleston Lumber does not allege any prejudice as a result of the omission and there can be no doubt that Charleston Lumber had notice that the Millers had appealed all cases. Charleston Lumber’s effort to take advantage of a mere clerical error by which they were in no way prejudiced or misled is rejected.” 318 S. C. at 478. There was no prejudice in this case, no prejudice was asserted, and none could be asserted in good faith because the scrivener’s error concerning the respondents was corrected as soon as it was discovered.²

5. The Order dismissing the appeal is one paragraph long. It cites Rule 262, SCACR, as the basis for dismissal but does not explain why that rule requires dismissal. It does not explain why the official court record in this case--noting sufficient service--is not valid. It does not explain why Rule 4, SCEF--which validates service in this case--does not apply. It offers no explanation as to why it is not following the law stated by the Supreme Court allowing correction of scrivener’s errors. *See Moody v. Dickinson*, 54 S.C. 526, 32 S.E. 563 (1899); *Charlestown Lumber Co. Inc. v. Miller Housing Corp.*, 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995). It does not dispute that confusion exists in the application of the electronic service rules, and does not explain why it does not in fairness follow the South Carolina Supreme Court’s decision in *Wells Fargo v. Fallon, supra*, and apply its ruling on electronic service only prospectively.

² As Appellant clarified in its Response in Opposition to Respondents’ Motion to Dismiss Appeal, Lather Construction SC, Inc. was not a proper party respondent in the appeal because the circuit court did not grant that entity’s motion for summary judgment – which neither it nor any other party respondent has disputed.

6. Lather Construction SC, Inc. is not a proper party to the appeal because the circuit court did not grant its motion for summary judgment. Regarding Lather Construction SC, Inc. there is no order to appeal. Appellants request that the Court acknowledge this so there is no confusion on that issue.

Conclusion and Requested Relief

Appellant respectfully requests that the Court rehear and reconsider its July 21 Order dismissing Appellant's appeal, that it vacate that Order, that it deny the Respondents' Motions to Dismiss, and that it clarify its ruling regarding Lather Construction SC, Inc.

Respectfully,



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August 2, 2022

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Attorneys for the Respondent Plaintiff

**Exhibit A “Notice of Appeal and Electronic
Service.”**

***** IMPORTANT NOTICE - READ THIS INFORMATION *****

NOTICE OF ELECTRONIC FILING [NEF]

A filing has been submitted to the court RE: 2019CP0702629

Official File Stamp: 04-11-2022 01:15:27 PM

Court: CIRCUIT COURT

Common Pleas

Beaufort

Case Caption:

Margaret A Eberly , plaintiff, et al VS Advanced
Flooring & Design Division Of Isi Llc , defendant,
et al

Document(s) Submitted:

Appeal/Notice of Appeal to Court of Appeals

- Exhibit/Filing of Exhibits
- Exhibit/Filing of Exhibits

Filed by or on behalf of:

Jason Michael Imhoff

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Megan Christine White for Huttons Landscapes
Inc

Thomas Elihue Dudley, III for D R Horton Inc

Scott Harris Winograd for Lather Construction Inc,
Lather Construction Sc Inc

Jason Michael Imhoff for D R Horton Inc

Stacey Patterson Canaday for Valim Construction
Llc

Clarke W. DuBose for Professional Drywall &
Paint Services Llc

John T. Crawford, Jr. for D R Horton Inc

Michael Lawrence Leech for East Coast
Construction Cleanup Corp.

ELECTRONICALLY FILED - 2022 Apr 11 2:56 PM - BEAUFORT - COMMON PLEAS - CASE#2019CP0702629

Brent Morris Boyd for Professional Drywall & Paint Services Llc

Benjamin Alexander Crute Traywick for Margaret A Eberly et al

Francis Heyward Grimball for Archer Exteriors Inc

James H. Elliott, Jr. for Archer Exteriors Inc

Alexandra Scott Williams for Margaret A Eberly et al

Emily Gifford Lucey for Huttons Landscapes Inc

Philip Paul Cristaldi, III for Lather Construction Inc, Lather Construction Sc Inc


Jeffrey A Ross for Lather Construction Inc, Lather Construction Sc Inc

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

Certificate of Electronic Notification

| Recipients | |
|---------------------------|---|
| James Elliott | - Notification transmitted on 04-11-2022 01:15:43 PM. |
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| Jeffrey Ross | - Notification transmitted on 04-11-2022 01:15:45 PM. |
| Philip Cristaldi | - Notification transmitted on 04-11-2022 01:15:44 PM. |
| Francis Grimball | - Notification transmitted on 04-11-2022 01:15:46 PM. |
| John Crawford | - Notification transmitted on 04-11-2022 01:15:43 PM. |
| Jason Imhoff | - Notification transmitted on 04-11-2022 01:15:43 PM. |
| Michael Leech | - Notification transmitted on 04-11-2022 01:15:45 PM. |

Subject: Received Notice: Your filing, Re: 2019CP0702629 - (100) Constructions - Appeal/Notice of Appeal to Court of Appeals, was received

 **efiledonotreply@sccourts.org** <efiledonotreply@sccourts.org>
to Jason Imhoff, Stephanie Simpson ▾

Mon, Apr 11, 2022, 1:15 PM

 **You are viewing an attached message.** Carl Muller Attorney at Law Mail can't verify the authenticity of attached messages.

To: Jason Michael Imhoff imhoff@conlaw.com
From: efiledonotreply@sccourts.org
Date: 2022-04-11 13:15:27.133
Subject: Your electronic filing, Re: 2019CP0702629 - (100) Constructions - Appeal/Notice of Appeal to Court of Appeals, was received by CIRCUIT COURT.

Case Number: 2019CP0702629

Case Type: (100) Constructions

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Hon. Bentley D. Price

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CASE NO. 2019-CP-07-02629

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Margaret A. Eberly and Barbara J. Pavelik.....Respondent,

v.

Advanced Flooring & Design Division of ISI, LLC;  
Archer Exteriors, Inc.; Crossroads Enterprises, LLC;  
D.R. Horton, Inc.; East Coast Construction Cleanup Corp.;  
Hutton's Landscapes, Inc.; Lather Construction SC, Inc.;  
Lather Construction, Inc.; Professional Drywall & Paint Services, LLC;  
Professional Exteriors II, LLC; and Valim Construction, LLC.....Defendants

Of Whom

D.R. Horton, Inc.....Appellant.

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**NOTICE OF APPEAL**

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D.R. Horton, Inc. appeals the Order of the Honorable Bentley D. Price granting the Motions for Summary Judgment of Lather Construction and Hutton's Landscapes, Inc filed on March 11, 2022 as well as the Order Denying Defendant D.R. Horton, Inc.'s Motion to Alter or Amend Judgment of the Honorable Bentley D. Price dated and filed March 24, 2022. Counsel for the Respondent received written notice of entry of the Order Denying Defendant D.R. Horton, Inc.'s Motion to Alter or Amend Judgment on March 24, 2022.

s/ Jason M. Imhoff

---

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Hon. Bentley D. Price

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CASE NO. 2019-CP-07-02629

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Margaret A. Eberly and Barbara J. Pavelik.....Respondent,

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D.R. Horton, Inc.; East Coast Construction Cleanup Corp.;  
Hutton's Landscapes, Inc.; Lather Construction SC, Inc.;  
Lather Construction, Inc.; Professional Drywall & Paint Services, LLC;  
Professional Exteriors II, LLC; and Valim Construction, LLC.....Defendants

Of Whom

D.R. Horton, Inc.....Appellant.

---

**PROOF OF SERVICE**

---

I certify that I have served the Notice of Appeal on Respondent by depositing a copy to them in the United States Mail, postage prepaid, on April 11, 2022, addressed as follows:

Alexandra S. Williams, Esquire  
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Hon. Jerri Ann Roseneau  
Beaufort County Clerk of Court  
P.O. Box 1128  
Beaufort, South Carolina 29901

s/ Jason M. Imhoff

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April 11, 2022

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**Aug 02 2022**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

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Case No. 2019-CP-07-02629

Margaret A. Eberly and Barbara J. Pavelik,  
Plaintiffs /Respondents,

v.

Advanced Flooring & Design Division of ISI, LLC; Archer Exteriors, Inc.; Crossroads Enterprises, LLC; D.R. Horton, Inc.; East Coast Construction Cleanup Corp.; Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc.; Professional Drywall & Paint Services, LLC; Professional Exteriors II, LLC; and Valim Construction, LLC

Defendants of whom D. R. Horton, Inc. is Appellant,

And

D. R. Horton, Inc.,

Cross-claimant and Appellant,

v.

Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; Lather Construction, Inc  
Cross-defendants and Respondents


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CERTIFICATE OF SERVICE AND FILING

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The undersigned does hereby certify that on August 2, 2022, a copy of the Petition For Rehearing was served by email and United States 1<sup>st</sup> class mail on counsel for all Respondents as follows and filed by email with the Clerk of Court for Beaufort County in this proceeding:

August 2, 2022

  
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SC Court of Appeals

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Re: Petition For Rehearing  
Margaret A. Eberly and Barbara J. Pavelik vs. Advanced Flooring & Design *et al.*;  
Appellate Case No. 2022-000469  
CASE NO.: 2019-CP-07-02629  
Beaufort County

Dear Ms. Kitchings:

Please find enclosed the Petition For Rehearing in the above case. Per your office we are emailing a copy (ctappfilings@sccourts.org) of the Petition For Rehearing and Certificate of Service and we're mailing the originals with a check for the \$50.00 filing fee.

Thank you for emailing a court stamped copy of the Petition For Rehearing and Certificate of Service. We appreciate!

Very truly yours,



Carl F. Muller

CFM:dkk  
Enclosures