

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Dec 08 2022**

**S.C. SUPREME COURT**

APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Hon. Bentley D. Price, Circuit Court Judge

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APPELLATE CASE NO. 2022-000469  
Case No. 2019-CP-07-02629

Margaret A. Eberly and Barbara J. Pavelik,  
Plaintiffs

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 which 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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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. May a lawyer correct a scrivener's error in his Notice of Appeal that misidentifies the respondents but correctly identifies the orders under appeal?
2. Can a lawyer rely on an official communication from the Court of Common Pleas through the SC Courts E-Filing System, sent to all registered counsel in a case, that it has served a Notice of Appeal on all of them?
3. May a Notice of Appeal be served through the SC Courts E-Filing System?

## STATEMENT OF THE CASE

There are two reasons that the Supreme Court should grant certiorari. The first is that the Court of Appeals overrode longstanding South Carolina Supreme Court precedent when it refused to allow appellant's counsel to correct a scrivener's error in the caption of the Notice of Appeal. The error was misidentifying the respondents. The orders appealed from were correctly described and they were the only orders in the case. No one was misled by the error. Since at least 1899, the South Carolina Supreme Court has allowed such errors to be corrected.

The second reason that the Supreme Court should grant certiorari is that the bar deserves and needs guidance on the scope of service by the SC Courts E-Filing System. The SC Courts E-

Filing System is both new and complex, even daunting to lawyers raised in a world that relied solely on paper and manual delivery. These challenges are magnified when the matter involves service at the bridge between the Court of Common Pleas and the Court of Appeals. Disruptions and changes to judicial proceedings, including service and filing, brought about by the pandemic have made these problems even more confusing and worse.

This issue is novel. It has not been decided by the South Carolina Supreme Court.

Its resolution stymied the Court of Appeals, which did not address the important point that a lawyer should—indeed must—be able to rely on an official communication from the Court of Common Pleas through the SC Courts E-Filing System.

At minimum, the Court of Appeals decision, because it relates to a complex novel issue that is without precedent and involves a wholesale change in procedure - namely electronic filing disrupted by a pandemic - should be applied only prospectively, and not in this case. Equally significant, this case gives the Supreme Court the opportunity to clarify the scope of electronic filing, which is of importance far beyond the parties now before it.

On appeal, this case never reached the briefing stage. It was dismissed because the Court of Appeals refused to acknowledge the validity of service by the Court of Common Pleas through the SC Courts E-Filing System. Service of the Notice of Appeal was accomplished by that system within the 30-day requirement of Rule 203(b)(1) SCACR. That is clear from the record generated and sent to all counsel by the SC Courts E-Filing System and the Court of Common Pleas. Exhibit A. There is no dispute about the record. Even so, the Court of Appeals dismissed the appeal.

The underlying case was initiated by the purchasers of a new home who were dissatisfied with its construction. Suit was filed against the appellant developer and various contractors. The developer crossclaimed against the respondent contractors on contractual indemnities and duties to defend. Those respondents moved for summary judgment on the crossclaims and on March 11,

2022 the judge granted those motions for two of the respondents. The appeal does not involve the homeowners as respondents. It should not involve the respondent whose motion was not granted. That respondent is Lather Construction SC, Inc. Out of an abundance of caution, it was included when the respondents' identities were corrected. The appellant timely moved to alter or amend on March 18, 2022. The respondent Lather Construction SC, Inc. did not move so move. The judge denied the appellant's motion on March 24, 2022. Lather Construction SC, Inc., should now be dismissed as a respondent.

On April 11, 2022, 18 days after the circuit court issued its March 24, 2022 order on appellant's motion to alter or amend, appellant's counsel Jason Imhoff filed and served a Notice of Appeal correctly identifying the orders on appeal. It was filed within the 30-day required window. All counsel were served by the Court of Common Pleas through the SC Courts E-Filing System. The Court informed all counsel that they had been served electronically and that no one needed to be served by mail or hand delivery. All counsel were fully informed of the proceedings. No one was misled or prejudiced.

On April 28, 2022, after discovering his scrivener's error concerning the identities of the respondents Mr. Imhoff then filed an Amended Notice of Appeal, which corrected the error. It was served electronically, as before, and also by U. S. Mail.

## ARGUMENT

“Civil procedure and appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 602, S.E.2d 772 (2004). That is precisely what has happened in this case.

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

The official court record states, “The following people were served electronically.” It lists the Respondents. 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.

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.

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.

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.

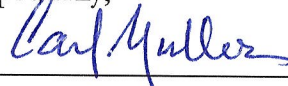
Lather Construction SC, Inc. is not a proper party to the appeal because the circuit court did not grant its motion for summary judgment. Regarding Lather Construction SC, Inc. there is no order to appeal. Appellants request that the Court acknowledge this so there is no confusion on that issue.

CONCLUSION

Appellant respectfully requests that the South Carolina Supreme Court look favorably upon its Petition and issue a Writ of Certiorari to the Court of Appeals in this case.

Date: December 8<sup>th</sup>, 2022

Respectfully,



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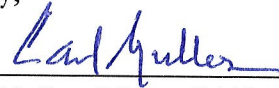
S.C. SUPREME COURT

CERTIFICATE OF COUNSEL

I, the undersigned counsel for Petitioner, hereby certify that a Petition for Rehearing was made and finally ruled on by the Court of Appeals. The Petition was filed on August 2, 2022. It was finally ruled on by the Court of Appeals on November 15, 2022.

Date: December 8<sup>th</sup>, 2022

Respectfully,



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