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**Oct 10 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  
THE HONORABLE BENTLEY D. PRICE  
CIRCUIT COURT JUDGE

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

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Margaret A. Eberly and Barbara J. Pavelik,

**PLAINTIFFS,**

versus

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,**

versus

Hutton's Landscapes, Inc.; Lather Construction SC, Inc.; and  
Lather Construction, Inc.

**RESPONDENTS.**

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**RESPONDENT HUTTON'S LANDSCAPES, INC.'S RETURN TO  
D.R. HORTON, INC.'S PETITION FOR REHEARING**

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Respondent Hutton's Landscapes, Inc. ("Hutton's") hereby submits its Return to the Petition for Rehearing of Appellant D.R Horton, Inc. ("D.R. Horton") seeking review of this Court's July 21, 2022 Order dismissing D.R. Horton's appeal and shows the Court as follows:

This Court dismissed D.R. Horton's appeal because it failed to timely serve the Respondents, including Hutton's, with the Notice of Appeal pursuant to the requirements of Rule 262 of the South Carolina Appellate Court Rules. As shown in Hutton's May 11, 2022 Motion to Dismiss Appeal and its corresponding Reply filed on May 31, 2022, both of which Hutton's incorporates herein, it is undisputed that when D.R. Horton filed its original Notice of Appeal on April 11, 2022, it did not name Hutton's as a respondent. It is also undisputed that D.R. Horton did not serve the Notice of Appeal pursuant to the three methods of service authorized under Rule 262(c), SCACR— either by hand delivery, U.S. Mail, or by an e-mail sent to counsel for Hutton's as permitted under the Supreme Court's August 25, 2021 Order (amended May 6, 2022) with a copy of the sent e-mail attached to the proof of service for the Notice of Appeal.

D.R. Horton did not attempt to correct its error until April 28, 2022 after the thirty (30) day time period for service of the Notice of Appeal expired. See Rule 203(b)(1), SCACR. Therefore, D.R. Horton failed to meet the jurisdictional requirement of timely and proper service of a notice of appeal naming Hutton's as a respondent, and this Court properly dismissed its appeal. See, e.g., Camp v. Camp, 386 S.C. 571, 574–75, 689 S.E.2d 634, 636 (2010); State v. Brown, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004); Ex Parte Sadisco of Greenville, Inc. v. Greenville Cty. Bd. of Zoning Appeals, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000).

D.R. Horton’s Petition for Rehearing does not raise any valid points that were overlooked or misapprehended by this Court in dismissing the appeal. First, D.R. Horton argues that its Notice of Appeal was timely served under the South Carolina Electronic Filing Policies and Guidelines. These policies and guidelines, however, only apply to E-filing in the circuit courts, and a Notice of Electronic Filing [NEF] generated by the Circuit Court’s E-Filing System constitutes proper service only under Rule 5 of the South Carolina Rules of Civil Procedure. See In re S.C. Elec. Filing Pol'ys & Guidelines, 415 S.C. 1, 2, 7-8, 780 S.E.2d 600, 600, 603 (2015). The South Carolina Electronic Filing Policies and Guidelines do not apply to service under the South Carolina Appellate Court Rules.

D.R. Horton also incorrectly states that it timely and properly served the Notice of Appeal upon Hutton’s in accordance with the Supreme Court’s May 6, 2022 Order. See Order No. 2022-05-06-04 in Appellate Case No. 2022-000029. This particular Supreme Court Order, however, addressees “Service by E-mail in the Trial Courts” and is limited to methods of service in the trial courts throughout the state. The Supreme Court issued a separate order on May 6, 2022 in Appellate Case No. 2020-000447, Order No. 2022-05-06-03, for “Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022).” This particular order and the previous order issued by the Supreme Court on August 25, 2021, Order No. 2021-08-25-02, do not authorize use of the Circuit Court’s E-filing system established under the South Carolina Electronic Filing Policies and Guidelines as a method of service under the Appellate Court Rules.

The Supreme Court issued two separate orders regarding electronic service—one

order for cases pending in the circuit courts and a different order for cases pending in the appellate courts. It is misleading for D.R. Horton to cite to the Supreme Court's Order regarding electronic service in the circuit courts versus the Supreme Court's Order applicable to the appellate courts. The Supreme Court's issuance of two separate orders authorizing different methods of service in the trial courts versus the appellate courts demonstrates that had the Supreme Court meant for the Circuit Court's E-filing method of service to apply to the appellate courts, it could have explicitly referred to this particular means of service in its order applicable to the appellate courts. The Supreme Court chose not to do so. Therefore, the automatically generated NEF for D.R. Horton's April 11, 2022 filing of its Notice of Appeal with the circuit court did not constitute proper service under Rule 262(c), SCACR.

Second, D.R. Horton's reliance upon Wells Fargo Bank, N.A. v. Fallon Props. S.C., LLC, 422 S.C. 211, 810 S.E.2d 856 (2018) has no relevance here. This particular case dealt with whether notice of the entry of an order received via e-mail would trigger the time to appeal under Rule 203(b)(1), SCACR. It was unclear at the time because nothing about e-mail was referenced in the applicable rules. The Supreme Court, while determining that an e-mail providing written notice of entry of an order or judgment for purposes of Rule 203(b)(1), SCACR does trigger the time to appeal, applied this holding prospectively out of fairness since the rule was, prior to the Supreme Court's holding, ambiguous.

In contrast to the facts of Wells Fargo Bank, there is both a specific rule [Rule 262(c)] and order [the Supreme Court's August 25, 2021 Order, amended May 6, 2022] expressly establishing the methods of service in the appellate courts, including the proper

way to serve documents via e-mail. The applicable rule and order pose no confusion here unlike in Wells Fargo Bank where the rule did not provide clear guidance. Accordingly, there is no need for this Court to apply the service rules of Rule 262(c) and the Supreme Court's August 25, 2021 Order, amended May 6, 2022, prospectively because the rules regarding service in the appellate courts are explicit and clear-cut.

The issue here is also not simply a scrivener's error as D.R. Horton tries to convince this Court. This is a case where the notice of appeal was not properly served by an authorized method under the applicable rules within the thirty (30) day time period. See Rule 203(b)(1), SCACR. D.R. Horton's failure to serve Hutton's with a notice of appeal naming it as a respondent within this required thirty (30) day time period for the service of the notice of appeal is not a mere clerical or scrivener's error which can be corrected because this Court has no authority to rescue a litigant from an untimely notice of appeal. Elam v. S.C. Dep't of Transp., 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004).

Finally, this Court's Order sufficiently explains to D.R. Horton that the appeal was dismissed because D.R. Horton did not comply with service requirements set forth in the Appellate Court Rules and the Supreme Court's Order for electronic service in the appellate courts and thus did not timely and properly serve Hutton's with the notice of appeal within the required thirty (30) day time period.

Accordingly, for the reasons set forth herein and in its previously filed Motion to Dismiss Appeal and corresponding Reply, Respondent Hutton's Landscapes, Inc. respectfully requests this Court to deny Appellant D.R. Horton, Inc.'s Petition for Rehearing.

Respectfully submitted,

/s/ Carmen V. Ganjehsani

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HUTTON'S LANDSCAPES, INC.**

October 10, 2022.

Oct 10 2022

SC Court of Appeals

CERTIFICATE OF SERVICE

I, the undersigned, attorney for Respondent Hutton's Landscapes, Inc., do hereby certify that I have this date served the foregoing Return to D.R. Horton, Inc.'s Petition for Rehearing, dated October 10, 2022, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Order dated May 6, 2022, on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable):

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CONSTRUCTION, INC. AND  
LATHER CONSTRUCTION SC, INC.**

A copy of the sent email is enclosed with this Certificate of Service.

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Dated: October 10, 2022.


## Carmen Ganjehsani

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**Subject:** 2022-000469 Eberly v. D.R. Horton  
**Attachments:** 2022-000469 Eberly v. D.R. Horton (Hutton's Rtn to Pet for R'hing).pdf

Pursuant to the Supreme Court's Order dated May 6, 2022, please find served upon you Respondent Hutton's Landscapes, Inc.'s Return to D.R. Horton, Inc.'s Petition for Rehearing in the above-referenced appeal.

Thank you,  
Carmen Ganjehsani

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