

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS
THE HONORABLE BENTLEY D. PRICE
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2022-001719
CASE NO. 2019-CP-07-02629

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.; Lather
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.

RESPONDENTS LATHER CONSTRUCTION, INC. AND
LATHER CONSTRUCTION SC, INC.'S RETURN TO THE
PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

- I. Did the Court of Appeals correctly dismiss Petitioner D.R. Horton’s appeal against Respondents Lather Construction, Inc. and Lather Construction SC, Inc. because D.R. Horton failed to properly and timely serve a Notice of Appeal naming Lather Construction, Inc., and Lather Construction SC, Inc. as respondents within the thirty (30) day time period set forth under Rule 203(b)(1), SCACR by a method of service authorized under Rule 262(c), SCACR?

COUNTERSTATEMENT OF THE CASE

This case arises out of a construction defect suit in which the plaintiffs filed a complaint against D.R. Horton, Inc. (“D.R. Horton”) and other contractors. D.R. Horton filed certain cross-claims against some of the other named defendants, including Lather Construction, Inc. and Lather Construction SC, Inc. (hereinafter collectively referred to as “Lather”). On March 11, 2022, the circuit court issued an order granting summary judgment to Lather Construction, Inc. and co-defendant, Hutton’s Landscapes, Inc. (hereinafter referred to as “Hutton’s), on the cross-claims asserted by D.R. Horton. The circuit court issued its order denying D.R. Horton’s motion to alter or amend judgment on March 24, 2022.

D.R. Horton filed a Notice of Appeal with the Court of Appeals on April 11, 2022 which named only Plaintiffs Margaret A. Eberly and Barbara J. Pavelik as respondents to the appeal. The Notice of Appeal listed the only other counsel of record as the Plaintiffs’ attorneys. The Proof of Service to the Notice of Appeal stated that service was accomplished by depositing a copy of the Notice of Appeal in the United States Mail to the Plaintiffs’ attorneys, Alexandra S. Williams and Benjamin A.C. Traywick of the Ben Traywick Law Firm, LLC, on April 11, 2022. In the Notice of Appeal, D.R. Horton acknowledged it received written notice of the entry of the order denying the motion to alter or amend judgment on March 24, 2022.

This April 11, 2022 Notice of Appeal did not name Lather as respondents to the appeal. D.R. Horton also did not serve this April 11, 2022 Notice of Appeal upon Lather pursuant to the authorized methods of service provided under Rule 262(c), SCACR. The three methods of service permitted under this rule are hand delivery, U.S. Mail, and service by electronic means in a manner provided by order of this Court. The only electronic means authorized by this Court at the time of D.R. Horton's filing of its April 11, 2022 Notice of Appeal were set forth in this Court's August 25, 2021 Order which allowed service of a document by transmitting such document to the primary e-mail addresses listed in the Attorney Information System (AIS) for the respondent's attorneys of record and including a copy of the sent e-mail with the proof of service, affidavit of service, or certificate of service for that document.

Under Rule 203(b)(1), SCACR, the time for serving a notice of appeal from the circuit court's order denying D.R. Horton's motion to alter or amend judgment expired on April 25, 2022. On April 28, 2022, three days after the expiration of the thirty (30) day time period for service of the notice of appeal, D.R. Horton served an Amended Notice of Appeal upon counsel for Lather via U.S. Mail which now named Lather, along with Hutton's Landscapes, Inc., as respondents.

On May 13, 2022, Lather moved to dismiss D.R. Horton's appeal for failure to timely and properly serve a Notice of Appeal naming Lather as a respondent within thirty (30) days after receipt of written notice of the entry of the order or judgment as required by Rules 203(b)(1) and 262(c) of the South Carolina Appellate Court Rules.

On July 21, 2022, the Court of Appeals dismissed D.R. Horton's appeal against Lather because D.R. Horton did not effectuate proper service upon Lather within thirty (30) days after receipt of written notice of the entry of the order appealed. D.R. Horton filed a Petition for Rehearing with the Court of Appeals on August 2, 2022, which the Court of Appeals denied on

November 15, 2022. D.R. Horton has now filed this Petition for Writ of Certiorari with this Court seeking review of the Court of Appeals' dismissal of its appeal against Lather.

ARGUMENT

The Court of Appeals correctly dismissed Petitioner D.R. Horton's notice of appeal against Respondents Lather Construction, Inc., and Lather Construction SC, Inc. because D.R. Horton failed to properly and timely serve a Notice of Appeal naming Lather Construction, Inc., and Lather Construction SC, Inc. as respondents within the thirty (30) day time period set forth under Rule 203(b)(1), SCACR by a method of service authorized under Rule 262(c), SCACR.

D.R. Horton's Petition does not present any special or important reasons as required under Rule 242(b), SCACR for the grant of a writ of certiorari. The issues presented by D.R. Horton are neither novel nor complex. D.R. Horton's appeal against Lather was dismissed by the Court of Appeals because D.R. Horton failed to comply with unambiguous rules for the timely service of a notice of appeal. This Court should not rescue D.R. Horton for the errors it made in perfecting its appeal against Lather.

Rule 203(b)(1) of the South Carolina Appellate Court Rules requires that "[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," or "[w]hen a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion."

"Service of the notice of appeal is a 'jurisdictional requirement, and th[e] [c]ourt has no authority to extend or expand the time in which the notice of intent to appeal must be served.'" Camp v. Camp, 386 S.C. 571, 574-75, 689 S.E.2d 634, 636 (2010) (quoting Mears v. Mears, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985)). Based upon the circuit court's issuance of its order denying D.R. Horton's motion to alter or amend judgment on March 24, 2022 and D.R. Horton's

receipt of written notice of such order on the same day, any notice of appeal was required to be served upon Lather naming it as a respondent no later than April 25, 2022 for the Court of Appeals to have had appellate jurisdiction to consider the appeal.

Furthermore, Rule 262(c), SCACR provides that service under the Appellate Court Rules is to be made upon the attorney if the party is represented by an attorney and prescribes three methods of service. First, service under Rule 262(c) may be made by delivering a copy of the document upon the attorney by either handing it to the attorney or leaving it at the office of that person with a clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving a copy at the person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. See Rule 262(c)(1).

Second, service under Rule 262(c) may be made by "depositing a copy in the U.S. mail, properly addressed to the person at that person's last known address with sufficient first class postage attached." See Rule 262(c)(2), SCACR.

Finally, service may be made under Rule 262(c)(3) "by electronic means in a manner provided by order of the Supreme Court of South Carolina." This Court issued an order on August 25, 2021 (subsequently amended May 6, 2022), which was in effect for the relevant time periods of this appeal, establishing the method for the electronic service of documents in the appellate courts. Paragraph (d)(1) of this August 25, 2021 order provided that "[a] lawyer admitted to practice law in South Carolina may serve a document on another lawyer admitted to practice law in South Carolina using the lawyer's primary e-mail address listed in the Attorney Information System (AIS). For documents that are served by e-mail, a copy of the sent e-mail shall be enclosed

with the proof of service, affidavit of service, or certificate of service for that document.”

D.R. Horton’s Notice of Appeal filed on April 11, 2022 with the Court of Appeals named only Plaintiffs Margaret A. Eberly and Barbara J. Pavelik as respondents to the appeal. The Notice of Appeal listed the only other counsel of record as the Plaintiffs’ attorneys. The Proof of Service to the Notice of Appeal stated that service was accomplished by depositing a copy of the Notice of Appeal in the United States Mail to the Plaintiffs’ attorneys, Alexandra S. Williams and Benjamin A.C. Traywick of the Ben Traywick Law Firm, LLC, on April 11, 2022. This Notice of Appeal was not served upon any other attorneys of record in the case via the three methods authorized for service under Rule 262(c).

Therefore, Lather was neither named as a respondent to the appeal by D.R. Horton in its Notice of Appeal filed on April 11, 2022, nor was Lather served with this Notice of Appeal by either hand delivery, U.S. Mail, or via electronic service as permitted by this Court’s August 25, 2021 Order. Counsel for Lather was also not served by April 25, 2022, the last day of the thirty (30) day time period for service of the notice of appeal, with any notice of appeal naming it as a respondent pursuant to one of the prescribed methods of service under Rule 262(c).

On April 28, 2022, three days after the expiration of the thirty (30) day time period for service of the notice of appeal, D.R. Horton served an Amended Notice of Appeal upon counsel for Lather via U.S. Mail which now named Lather Construction, Inc. and Lather Construction SC, Inc., along with Hutton’s Landscapes, Inc., as respondents. In the cover letter to the Court of Appeals, counsel for D.R. Horton described its failure to initially name Lather and Hutton’s Landscapes, Inc. as respondents to the appeal as a “scrivener’s error.”

D.R. Horton’s failure to name Lather as respondents to the appeal and its corresponding

failure to serve counsel for Lather with a Notice of Appeal naming Lather as respondents within the thirty (30) day time period set forth under Rule 203(b)(1) and pursuant to the methods of service prescribed in Rule 262(c) was not a mere scrivener's error, but rather a failure of D.R. Horton to perfect its appeal against Lather in accordance with the requirements of the Appellate Court Rules.

A notice of appeal must be timely served because service of the notice of appeal is jurisdictional and therefore, the appellate court cannot extend the time for serving the notice of appeal. See 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) (“This Court has consistently stated that service of the Notice of Appeal is a jurisdictional requirement, and [the appellate court] has no authority to extend or expand the time in which the Notice of Appeal must be served.”); see also Rule 263(b), SCACR (“The time prescribed by these Rules for performing any act *except the time for serving the notice of appeal* under Rules 203 and 243 may be extended ” (emphasis added)).

The notice of appeal must also be properly served upon the parties because the appellate court also cannot waive procedural defects in serving the notice. The failure of a party to comply with the procedural requirements for perfecting an appeal deprives the court of appellate jurisdiction over the case. Great Games, Inc. v. S.C. Dep't of Revenue, 339 S.C. 79, 82 n.5, 529 S.E.2d 6, 7 n.5 (2000); see also State v. Brown, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004) (holding the failure of a party to comply with the procedural requirements for perfecting an appeal from the magistrate's court deprived the circuit court of appellate jurisdiction over the case).

This Court has also held that an appeal against two defendants was required to be dismissed when the two defendants were not served with a notice of appeal naming them as respondents

within the thirty (30) day time period prescribed by Rule 203(b)(1). Conner v. City of Forest Acres, 348 S.C. 454, 460-62, 560 S.E.2d 606, 609-10 (2002).

The last day for D.R. Horton to have served the Notice of Appeal upon Lather pursuant to the authorized methods for service under Rule 262(c) naming Lather as respondents was April 25, 2022. D.R. Horton did not timely or properly serve a Notice of Appeal naming Lather as a respondent until April 28, 2022 – three days too late to confer appellate jurisdiction upon the Court of Appeals. As such, the Court of Appeals “lack[ed] jurisdiction to consider the appeal and ha[d] no authority or discretion to ‘rescue’ the delinquent party [here, D.R. Horton] by extending or ignoring the deadline for service of the notice.” Elam v. S.C. Dep’t of Transp., 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004).

The Court of Appeals therefore properly dismissed D.R. Horton’s appeal because D.R. Horton did not effectuate proper service of a notice of appeal upon Lather within the required thirty (30) day time period for service of a notice of appeal.

The issue involved here is straightforward, and the applicable rules for the service of a notice of appeal provided clear guidance to D.R. Horton. Nonetheless, D.R. Horton attempts in its Petition to portray the Appellate Court Rules as “complex” and “daunting” to cover for its carelessness in perfecting its appeal.

As the appellant, D.R. Horton was required to comply with the procedural requirements of the Appellate Court Rules in perfecting its appeal, as all litigants are expected to do. State v. Burton, 356 S.C. 259, 265, n.5, 589 S.E.2d 6, 9, n.5 (2003). D.R. Horton was responsible for ensuring it had appealed its case properly, something that should not be taken lightly, and as the appellant, it alone controlled what was appealed, who was named in the appeal, and the service of

the appeal.

It is undisputed that when D.R. Horton filed its original Notice of Appeal on April 11, 2022, it did not name Lather as respondents. It is also undisputed that D.R. Horton did not serve this Notice of Appeal upon Lather 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 Lather as permitted under this 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.

On April 19, 2022, the Court of Appeals issued its initial appeal letter to D.R. Horton via e-mail, which, in providing the caption for the appeal, alerted D.R. Horton to the fact that Lather were not respondents. The Court of Appeals' letter also only copied counsel for the Plaintiffs and did not copy counsel for Lather because the Court of Appeals did not consider Lather as respondents to the appeal.

Despite the issuance of the Court of Appeals' initial appeal letter which gave notice to D.R. Horton that Lather were not respondents in the appeal, D.R. Horton took no steps before the thirty (30) day time period for service of the notice of appeal expired on April 25, 2022 to properly add and serve Lather as respondents to the appeal. Nothing prevented D.R. Horton from correcting its own error – an error which if not corrected was fatal to the Court of Appeals' jurisdiction over Lather. Therefore, when D.R. Horton did not correct its error before the thirty (30) day time period for service of the Notice of Appeal expired, the Court of Appeals properly dismissed its appeal.

D.R. Horton's Petition to this Court does not raise any reason warranting reversal of the Court of Appeals' dismissal of its appeal. First, D.R. Horton argues that its Notice of Appeal was timely served under the South Carolina Electronic Filing Policies and Guidelines and that the

Notice of Electronic Filing [NEF] generated by the Circuit Courts' E-Filing System complied with Paragraph d(1) of this Court's August 25, 2021 Order permitting the service of a document by a lawyer upon another lawyer via e-mail. This Court's August 25, 2021 Order contemplates specifically sending the lawyer an e-mail with the document to be served attached and requires that the sent e-mail accompany all proofs, affidavits, or certificates of service.

The NEF, on the other hand, is a notice automatically generated by the Circuit Courts' E-Filing System which merely includes a description of the filed document and does not actually include the document as an attachment. See In re S.C. Elec. Filing Pol'ys & Guidelines, 415 S.C. 1, 2, 780 S.E.2d 600, 600 (2015). Under the rules for E-Filing in the circuit courts, the NEF constitutes proper service under only Rule 5 of the South Carolina Rules of Civil Procedure. Id. At 7-8, 780 S.E.2d at 603.

The NEF does not constitute proper service for a notice of appeal under the Appellate Court Rules, and there is no order authorizing an NEF automatically generated by the Circuit Courts' E-Filing System to qualify as proper service of a notice of appeal to the appellate courts. Therefore, D.R. Horton cannot rely upon the automatically generated NEF to constitute service of the April 11, 2022 Notice of Appeal upon Lather.

D.R. Horton further attempts to manufacture confusion by arguing that it timely and properly served the Notice of Appeal upon Lather in accordance with this Court's Order No. 2022-05-06-04 in Appellate Case No. 2022-000029 issued on May 6, 2022. This particular Supreme Court Order, however, addresses "Service by E-mail in the Trial Courts" and is limited to methods of service in the trial courts throughout the state.

This 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 order and the previous order issued by this Court on August 25, 2021, Order No. 2021-08-25-02, do not authorize the use of the Circuit Courts’ E-Filing System established under the South Carolina Electronic Filing Policies and Guidelines as a method of service under the Appellate Court Rules. Use of the Circuit Courts’ E-Filing System has never been authorized as a method of service in the appellate courts both prior to and after the Covid-19 pandemic. D.R. Horton’s depiction of the pandemic as causing mass disruption and confusion in regard to service in the appellate courts is simply fiction. The Appellate Court Rules regarding service were clear prior to the pandemic and have been clear after.

This Court issued two separate orders regarding electronic service—one order for cases pending in the trial courts and a different order for cases pending in the appellate courts. It is misleading for D.R. Horton to cite to this Court’s Order regarding electronic service in the trial courts versus this Court’s Order applicable to the appellate courts. This Court’s issuance of two separate orders authorizing different methods of service in the trial courts versus the appellate courts demonstrates that had this Court meant for the Circuit Courts’ 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. This 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 of the Notice of Appeal upon Lather 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. Wells Fargo Bank, 422 S.C. at 219 n.4, 810 S.E.2d at 860 n.4. This 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 this Court's holding, ambiguous. Wells Fargo Bank, 422 S.C. at 217, 219, 810 S.E.2d at 859, 860.

In contrast to the facts of Wells Fargo Bank, there is both a specific rule [Rule 262(c)] and order [this 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 this 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); Rule 262(c), SCACR. D.R. Horton's failure to serve Lather with a notice of appeal naming it as respondents 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, 361 S.C. at 14–15, 602 S.E.2d at 775. The defect relates to a jurisdictional requirement that cannot be extended or expanded by this Court. See,

e.g., Camp, 386 S.C. at 574–75, 689 S.E.2d at 636; Brown, 358 S.C. at 387, 596 S.E.2d at 41; Ex Parte Sadisco of Greenville, Inc., 340 S.C. at 59, 530 S.E.2d at 384.

Finally, the Court of Appeals' Order dismissing the appeal 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 this Court's Order for electronic service in the appellate courts and thus did not timely and properly serve Lather with the notice of appeal within the required thirty (30) day time period.

As to Lather Construction SC, Inc., the Court does not need to address anything as to that entity, as the appeal was properly dismissed by the Court of Appeals, and any issue as to the lower court not yet ruling on Lather Construction SC, Inc.'s Motion for Summary Judgment can be addressed by the lower court once the case resumes at that level.

CONCLUSION

For the reasons set forth herein, Respondent Lather respectfully requests this Court to deny D.R. Horton's Petition for Writ of Certiorari.

Respectfully submitted,

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January 9, 2023