

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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**Jul 19 2023**

**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. 2022-001719

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 the ..... Petitioner,

And

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

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**BRIEF OF THE PETITIONER**

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TABLE OF CONTENTS

STATEMENT OF ISSUES ON APPEAL..... 1

STATEMENT OF THE CASE..... 1

STANDARD OF REVIEW ..... 3

FACTS..... 3

ARGUMENTS ..... 5

    1. A LAWYER CAN 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..... 5

    2. A NOTICE OF APPEAL MAY BE SERVED THROUGH THE SC COURTS E-FILING SYSTEM..... 9

    3. A LAWYER IS ALLOWED TO CORRECT A SCRIVENER’S ERROR IN HIS NOTICE OF APPEAL THAT  
    MISIDENTIFIES THE RESPONDENTS BUT CORRECTLY IDENTIFIES THE ORDERS UNDER  
    APPEAL ..... 10

CONCLUSION..... 12

TABLE OF AUTHORITIES

Cases

*Charlestown Lumber Co. Inc. v. Miller Housing Corp.*, 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995) .....3, 4, 10, 11

*Connor v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002).....11, 12

*Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004) ..... 5

*Moody v. Dickinson*, 54 S.C. 526, 32 S.E. 563 (1899) ..... passim

*Wells Fargo v. Fallon, Opinion 27773*, Feb. 28, 2018..... 5, 8

Rules

Rule 11(e), SCEF..... 6

Rule 2(b), SCEF ..... 6

Rule 203, SCACR.....6, 8

Rule 203(b)(1), SCACR..... 4

Rule 203(d), SCACR.....6, 7

Rule 262, SCACR.....4, 8

Rule 3(b), SCEF ..... 6

Rule 4, SCEF ..... 4

Rule 4(e)(2), SCEF ..... 5

Rule 4(e)(3), SCEF .....5, 6

Rule 6(b), SCRCF..... 6

The Supreme Court of South Carolina Order in Appellate Case No. 2022-000029, Order No. 2022-05-06-04, dated May 6, 2022..... 5

## STATEMENT OF ISSUES ON APPEAL

1. 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?
2. MAY A NOTICE OF APPEAL BE SERVED THROUGH THE SC COURTS E-FILING SYSTEM?
3. MAY A LAWYER CORRECT A SCRIVENER'S ERROR IN HIS NOTICE OF APPEAL THAT MISIDENTIFIES THE RESPONDENTS BUT CORRECTLY IDENTIFIES THE ORDERS UNDER APPEAL?

## STATEMENT OF THE CASE

The underlying case was initiated by the purchasers of a new home who were dissatisfied with its construction. Suit was filed against the Petitioner developer D.R. Horton, Inc., and various contractors, including Respondent contractors Hutton's Landscapes, Inc., Lather Construction, Inc. and Lather Construction SC, Inc. The Petitioner crossclaimed against the Respondent contractors on contractual indemnities and duties to defend. Those Respondents moved for summary judgment on the crossclaims. On March 11, 2022, the circuit court granted those motions for summary judgment for two of the respondents, Hutton's Landscapes, Inc. and Lather Construction, Inc. in a Form 4 Order. (A. pp. 1-3) Petitioner filed a Motion to Alter or Amend Judgment on March 18, 2022. (A. pp. 4-6) The circuit court denied the Motion to Alter or Amend Judgment on April 11, 2022. (A. pp. 7-9)

Petitioner's counsel Jason Imhoff filed and served a Notice of Appeal with Orders on April 11, 2022. (A. pp. 10-19) It was filed within the 30-day required window. Petitioner received from the court a Certificate of Electronic Notification listing the attorneys who had been electronically served the Notice of Appeal on April 11, 2022, which included Respondents' attorneys. (A. pp. 20-22) 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. (A. pp. 20-22)

On April 28, 2022, after discovering a scrivener's error concerning the identities of the Respondents, Mr. Imhoff sent an email to the court regarding the scrivener's error (A. p. 23) and filed an Amended Notice of Appeal with Orders, which corrected the error. by U. S. Mail. (A. pp. 24-36).<sup>1</sup> Both the original Notice of Appeal with Orders and the Amended Notice of Appeal with Orders correctly identified the Orders being appealed and identified the Respondents Hutton's Landscapes, Inc. and Lather Construction, Inc. as the prevailing parties on those Orders. They were also listed as defendants in the original Notice of Appeal and served electronically. (A. p. 10; pp. 20-22)

On May 11, 2022, Respondent Hutton's Landscapes, Inc filed a Motion to Dismiss Appeal. (A. pp. 37-76) On May 12, 2022, Respondents Lather Construction, Inc. and Lather Construction, SC, Inc. filed a Motion to Dismiss Appeal. (A. pp. 77-114) Petitioner filed a Response in Opposition to the Motions to Dismiss on May 23, 2022. (A. pp. 115-149) Respondent Hutton's Landscapes, Inc. filed a Reply to Petitioner's Response in Opposition to the Motion to Dismiss Appeal on May 31, 2022. (A. pp. 150-160) Respondents Lather Construction, Inc. and Lather Construction, SC, Inc. filed a Reply to Petitioner's Response in Opposition to the Motion to Dismiss Appeal on May 31, 2022. (A. pp. 161-173)

On July 21, 2022, the Court of Appeals dismissed the appeal. (A. pp. 174-175) Petitioner filed a Petition for Rehearing on August 2, 2022. (A. pp. 176-194) Respondents Lather

<sup>1</sup> The appeal does not involve the plaintiff homeowners. It also does not involve Lather Construction SC, Inc. Out of an abundance of caution, it was included when the respondents' identities were corrected. 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. Respondent Lather Construction, Inc. acknowledged this in the appeals court and advised that court that it would be addressed in the circuit court.

Construction, Inc. and Lather Construction, SC, Inc. filed a Return to the Petition for Rehearing on October 4, 2022. (A. pp. 195-201) Respondent Hutton’s Landscapes, Inc. filed a Return to the Petition for Rehearing on October 10, 2022. (A. pp. 202-209) The Court of Appeals denied the Petition for Rehearing on November 15, 2022. (A. pp. 201-202)

Petitioner filed a Petition for Writ of Certiorari on December 8, 2022. Respondent Hutton’s Landscapes, Inc filed a Return on January 9, 2023. Respondents Lather Construction, Inc. and Lather Construction SC, Inc. filed a Return on January 10, 2023. Petitioner filed a Reply on January 19, 2023. The Court granted the Petition for Writ of Certiorari on May 23, 2023.

#### STANDARD OF REVIEW

The Court reviews a question of law de novo. *See, e.g., Moody v. Dickinson*, 54 S.C. 526, 32 S.E. 563 (1899) (Court reviewed whether the appeal failed due to a scrivener’s error de novo); *Charlestown Lumber Co. Inc. v. Miller Housing Corp.*, 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995) (Court reviewed whether the appeal failed due to a scrivener’s error de novo).

#### FACTS

On April 11, 2022, 18 days after the circuit court issued its March 24, 2022, order denying Petitioner’s motion to alter or amend, Petitioner’s counsel Jason Imhoff filed and served upon all the attorneys of record a Notice of Appeal correctly identifying the orders on appeal. (A. pp. 10-19) The Notice of Appeal states that Petitioner

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 [Petitioner’s] Motion to Alter or Amend Judgment of the Honorable Bentley D. Price dated and filed March 24, 2022. (A. p. 10)

The Notice of Appeal 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 including Lather Construction,

Inc., Hutton's Landscapes, Inc. and Lather Construction SC, Inc. On April 28, 2022, after discovering a scrivener's error concerning the identities of the Respondents, Mr. Imhoff then sent an email to the court regarding the scrivener's error (A. p. 23) and filed an Amended Notice of Appeal with Orders, which corrected the error. It was served by U. S. Mail. (A. pp. 24-36) The scrivener's error left no one misled or prejudiced. And no one has complained otherwise.

As of April 11, 2022, well within the 30-day required window, all counsel were fully informed of the proceedings and served with the Notice of Appeal.

Nonetheless, Respondents filed Motions to Dismiss the appeal on the grounds that the Notice of Appeal was not timely served. 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. (A. pp. 20-22). There is no dispute about the record and *the foregoing facts are not disputed*.

The Order dismissing the appeal is one paragraph long. (A. pp. 174-75) 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, Opinion* 27773, Feb. 28, 2018, and apply its ruling on electronic service only prospectively.

## ARGUMENTS

1. A LAWYER CAN 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.

“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 a hallmark of the fairness that South Carolina Courts strive to follow so that justice is served. But the confusion over the electronic service rules have resulted in a trap for the unwary lawyer and led to dismissal of an appeal that was filed within 18 days of the decision being appealed.

Petitioner’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), SCRCPP and Rule 203, SCACR. Petitioner’s Notice of Appeal was timely and properly served under the rules.

Petitioner’s Notice of Appeal was timely served electronically through the SC Courts E-Filing System according to the South Carolina Electronic Filing Policies and Guidelines. **“Service Complete Upon E-Filing.** Service of a pleading, motion, or other paper by NEF subsequent to the summons and complaint or other filing initiating a case is complete at the time of the submission of the pleading, motion, or other paper for E-Filing, provided an NEF is transmitted by the E-Filing System in accordance with paragraph (e)(2) of this Section. The Act of E-Filing the pleading, motion or other paper is the equivalent of depositing it in the United States Mail under Rule 5(b)(1), SCRCPP.” Rule 4(e)(3), SCEF **“Scope.** [A]ll filings in all civil cases commenced or pending in any E-Filing county after the effective date of the Pilot Program shall be E-Filed if the party is represented by any attorney.” Rule 2(b), SCEF **“Consent to Electronic Service and Electronic Filing of all Documents.** An Authorized E-Filer consents to E-Service ...” Rule 3(b), SCEF **“Construction.** These Policies and Guidelines shall be liberally construed to ensure substantial justice for all parties, and that cases are disposed of on the merits.” Rule 11(e), SCEF

A Notice of Appeal is unique in that it falls under both the lower courts and appellate courts systems because it is required to be filed in both. Rule 203(d), SCACR. For that reason, the E-Filings policies and guidelines in both systems were available to Petitioner for it. E-filing was in place with the lower court in this case and the Respondents’ attorneys were registered users of the system. E-filing with the lower court on April 11, 2022, was timely and sufficient filing and service.

Petitioner followed the applicable appellate court rule when it filed in the lower court. Rule 203(d), SCACR. Filing with the lower court through that E-filing System then resulted in proper service of the Notice of Appeal.

Petitioner is not suggesting that the lower court E-filing system is generally applicable to appeals. Only the Notice of Appeal falls into both.

In this case, the official court record confirms all counsel were electronically served: **“The following people were served electronically:** Megan Christine White for Hutton’s Landscapes Inc . . . Scott Harris Winograd for Lather Construction Inc, Lather Construction Sc Inc . . .” (A. p. 21) The next page lists “Emily Guifford Lucey for Hutton’s Landscapes Inc, Phillip Paul Cristaldi, III for Lather Construction Inc, Lather Construction Sc Inc, Jeffrey A Ross for Lather Construction Inc, Lather Construction Sc Inc.” (A. p. 22) The first page lists all of them under the heading “Certification of Electronic Notification.” (A. p. 20) If there is anything that South Carolina attorneys should be able to rely upon, it is what the court tells them. In this case, the circuit court told Petitioner’s attorneys that all the attorneys for all the parties in the case were served the notice of appeal on April 11, 2022, electronically through the circuit court’s electronic service system. The electronic service in A. p. 22 also has a section in bold that states: **“The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:”** The list is empty because everyone in the case was in fact served electronically.<sup>2</sup>

Thus, service was made to all attorneys for all parties no later than April 11, 2022 – well before the thirty-day window within which the rules require. They were served electronically at the primary email addresses they provided the circuit court, and each Respondent received electronic service to at least two attorneys of record – Hutton to both attorneys of record (Megan Christine

<sup>2</sup> The Plaintiffs in the case were also served via U.S Mail.

White and Emily Gifford Lucey) and Lather to three attorneys of record (Scott Harris Winograd, Phillip Paul Cristaldi, III, and Jeffrey A. Ross).

Respondents have never denied they were electronically served on April 11, 2022. Although it is clear from their Motions to Dismiss that they did receive the Notice of Appeal, they may have been confused about electronic service. *See Wells Fargo v. Fallon, Opinion 27773*, Feb. 28, 2018 (S.C. Supreme Court acknowledged the confusion that has arisen from electronic communications in the litigation sphere). In this case, the electronic service provisions, put into place due to the pandemic, may have created some confusion about service. Because the attorneys in circuit court cases must keep their primary email address up to date with the circuit court, the circuit court email list has all the parties and their attorneys' emails, and the circuit court service system provides almost instantaneous service to all attorneys of record. Service was perfected on all attorneys of record at their primary email addresses on April 11, 2022. Service via the circuit court system complies with Rule 262, SCACR, because it provides service to each attorney at the primary email address each attorney has provided the court system. Moreover, no Respondent has asserted that the email used by counsel as their primary email in the circuit court's system is not their primary email address – which makes sense because the burden to update one's primary email address is on the attorney whose email address has changed and not the appellant serving a Notice of Appeal. Respondents were served within the 30-day requirement and at each of their primary email addresses. Respondents have not alleged otherwise, nor could they genuinely do so.

The Supreme Court has noted that confusion has arisen regarding the electronic service rules. *See Wells Fargo v. Fallon, Opinion 277773*, Feb. 28, 2018. 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. 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. One need look no farther than the multiple orders concerning E-Filing and service issued by the Supreme Court in the last 5 years for the truth of that observation. In addition, the Supreme Court has issued order after order during the past 3 years as it fought the pandemic. All of this has created confusion which is only now beginning to abate. 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.

2. A NOTICE OF APPEAL MAY BE SERVED THROUGH THE SC COURTS E-FILING SYSTEM.

This case provides the Supreme Court an opportunity to clarify application of the electronic filing rules to the notice of appeal, which is a unique bridge between two systems: lower court and appellate court, and to do so in a manner that comports with its allegiance to fairness and justice.

Petitioner's understanding of the rules is that they allow for appellants to use the electronic system for filing and service to effectuate an appeal, as Petitioner did in this case and as Petitioner has demonstrated above when the circuit court and appellate court systems meet at service of the notice of appeal. This understanding of the rules is consistent with the goals of using paperless filings and service. Clarification on this matter would benefit the bench and bar as we embark on ever increasing digital means of engaging in the judicial system.

3. A LAWYER IS ALLOWED TO CORRECT A SCRIVENER'S ERROR IN HIS NOTICE OF APPEAL THAT MISIDENTIFIES THE RESPONDENTS BUT CORRECTLY IDENTIFIES THE ORDERS UNDER APPEAL.

An amended Notice of Appeal with Orders was filed. After discovering a scrivener's error in the case style, Petitioner's counsel discussed the issue with the Clerk's office at the Court of Appeals and then filed an Amended Notice of Appeal and Proof of Service on April 28, 2022. (A. pp. 24-36) The Amended Notice of Appeal is identical to the original Notice of Appeal, except that it corrects the case style as to Lather Construction, Inc. and Hutton Landscapes, Inc. and it was served on an attorney for every party in the case via U.S. Mail. As previously, they were also served electronically. Respondents do not dispute that they were served the Amended Notice of Appeal.

In its dismissal of Petitioner's appeal, the Court of Appeals overrode longstanding South Carolina Supreme Court precedent when it refused to allow Petitioner'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. *See Moody v. Dickinson*, 54 S.C. 526, 32 S.E. 563 (1899).

In the original notice of appeal, the proper respondents were misidentified. The orders under appeal were properly identified and the Respondents were identified as the prevailing parties, 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. Likewise, 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.

Respondents were electronically served notice of the appeal on April 11, 2022; that notice clearly advises them of the summary judgment orders being appealed, and specifically names Hutton’s Landscapes, Inc., and Lather Construction in the description of the summary judgment decisions being appealed. Moreover, there have been no other dispositive motions decided by the circuit court in the case that could have possibly confused Respondents. Respondents are in a position similar to that of the appellees in *Charlestown Lumber Co., Inc. v. Miller Housing Corp.*, 318 S.C. 471, 458 S.E.2d 431 (Ct. App. 1995), in which the court held that a scrivener’s error in the cases listed for appeal in a multi-case matter did not warrant a dismissal of the appeal and there was no prejudice. *Id.* at 478. Respondents relied below upon *Connor v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002) for the proposition that Connor’s appeal was not perfected because she had not listed two defendants as respondents within 30 days of the order on appeal. However, that is an incorrect understanding of *Connor*. The appeals court notified Connor of her error and she did not correct the error soon after filing or even within 5 months of having filed her appeal. The court held that “Indeed, the rule of *Moody* compels us under these facts to find Rowe and Langley were

misled into believing they were not part of this appeal by the almost five-month delay in amending the Notice, and therefore, they clearly were prejudiced by the amendment.” *Id.* at 462. Here, unlike in *Connor*, the correction was quickly made, Respondents were served both Notices of Appeal, and the description of what is being appealed specifically names them. Counsel for the Petitioner did not delay. There was no prejudice or laxity alleged in Respondents’ Motions to Dismiss Appeal, nor could any be alleged in this case.

### CONCLUSION

Petitioner respectfully requests that the South Carolina Supreme Court reverse the Court of Appeals and reinstate its appeal. It would also be helpful if the Court would provide guidance on the use of electronic filing and service at the confluence of circuit and appellate courts.

Date: July 19, 2023

Respectfully,

s/Carl F. Muller, SC Bar #4131

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