

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Hon. Bentley D. Price, Circuit Court Judge

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

RECEIVED

Aug 25 2023

S.C. SUPREME COURT

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 the

PETITIONER,

versus

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

RESPONDENTS.

**RESPONDENTS LATHER CONSTRUCTION SC, INC. AND LATHER
CONSTRUCTION, INC.'S BRIEF**

Jeffrey A. Ross, Bar No.: (S.C. Bar #74254)
Philip P. Cristaldi, Bar No.: (S.C. Bar #102219)
Scott H. Winograd, Bar No.: (S.C. Bar #103483)
Brenten H. DeShields, Bar No.: (S.C. Bar #105199)
863 Coleman Blvd., Suite B
Mt. Pleasant, South Carolina 29464
Phone: (843) 329-4040
jross@rclawsc.com
pcristaldi@rclawsc.com
swinograd@rclawsc.com
bdeshields@rclawsc.com

***Attorneys for Respondents Lather Construction, Inc.,
and Lather Construction SC, Inc.***

Other Counsel of Record:

Emily Lucey, Esq.
Carmen V. Ganjehsani, Esq.
Megan C. White, Esq.
Richardson, Plowden & Robinson, PA
235 MaGrath Darby Blvd Suite 100
Mt. Pleasant, SC 29464
egiffordlucey@richardsonplowden.com
cganjehsani@richardsonplowden.com
mwhite@richardsonplowden.com
Attorneys for Hutton's Landscapes, Inc.

John T. Crawford, Jr., Esq.
Jason Michael Imhoff, Esq.
Kenison Dudley & Crawford, LLC
704 E. Mcbee Ave.
Greenville, SC 29601
crawford@conlaw.com
jimhoff@conlaw.com
and
Carl F. Muller, Esq.
P.O. Box 1717
Greenville, SC 29602-1717
carl@carrlmullerlaw.com
Attorneys for D.R. Horton, Inc.

TABLE OF CONTENTS

Table of Authorities i
Statement of Issues on Appeal..... 1
Statement of the Case..... 1
Standard of Review..... 2
Arguments
1. PETITIONER’S ORIGINAL NOTICE OF APPEAL WAS DEFECTIVE AND PETITIONER FAILED TO PROPERLY SERVE ITS NOTICE OF APPEAL AS REQUIRED BY THE SOUTH CAROLINA APPELLATE COURT RULES 3
2. PETITIONER’S AMENDED NOTICE OF APPEAL WAS UNTIMELY 7
Conclusion 10

TABLE OF AUTHORITIES

CASES

Conner v. City of Forest Acres, 348 S.C. 454, 461-62, 560 S.E.2d 606, (2002)..... 2
Moody v. Dickinson, 54 S.C. 526, 32 S.E. 563 (1899) 2
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) 7
Elam v. S.C. Dep’t of Transp., 361 S.C. 9, 14 -15, 602 S.E.2d 772, 775 (2004)..... 9
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)..... 9
State v. Brown, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004)..... 9

OTHER AUTHORITIES

| | |
|--|---|
| Rule 203(e)(1), SCACR..... | 3 |
| Rule 203(b)(1), SCACR | 3 |
| Rule 262(c), SCACR | 3 |
| 2021-08-25-02 (S.C. Sup. Ct. Order dated August 25, 2021)..... | 3 |
| 2022-05-06-03 (S.C. Sup. Ct. dated May 6, 2022) | 3 |
| Rule 263(a), SCACR | 4 |
| Rule 203(a), SCACR | 4 |
| Rule 2, SCEF..... | 5 |
| Rule 102(a), SCACR..... | 5 |
| Rule 73, SCRCF..... | 6 |
| Rule 203(d)(3), SCACR | 7 |
| Rule 263, SCACR..... | 7 |

STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT OF APPEALS CORRECTLY DISMISS PETITIONER’S APPEAL FOR FAILING TO TIMELY FILE AND SERVE A PROPER NOTICE OF APPEAL?

STATEMENT OF THE CASE

The case arises out of a construction defect suit in which the plaintiffs filed suit against D.R. Horton, Inc. (“DR Horton” or “Petitioner”) and Lather Construction SC, Inc., Lather Construction, Inc., (collectively “Lather”) Hutton’s Landscapes, Inc. (“Hutton” and collectively “Respondents”), and other contractors. In turn, Petitioner filed crossclaims against Lather, Hutton, and other parties. On March 11, 2022, the circuit court granted both Hutton’s and Lather’s motions for summary judgment as to the crossclaims of DR Horton. (A. pp. 1–3). Petitioner moved to alter or amend, which was denied on March 24, 2022. (A. pp. 4–9; pp. 14–16).

Petitioner filed a Notice of Appeal (the “original Notice of Appeal”) with the court of appeals on April 11, 2022,¹ naming only Plaintiffs Margaret A. Eberly and Barbara J. Pavelik as respondents to the appeal. (A. pp. 10–11). This appeal listed only Plaintiffs’ counsel² as the other counsel of record. (A. pp. 10–11). The Proof of Service (the “original Proof of Service”) filed concurrently with the Notice of Appeal stated that service was accomplished by mailing a copy of the same to the Beaufort County Clerk of Court as well as Plaintiffs’ counsels of record. (A. pp. 12–13). On April 28, 2022, Petitioner filed an amended Notice of Appeal (the “amended Notice of Appeal”) and Proof

¹ A total of 18 days passed between the order and filing of the original Notice of Appeal.

² Benjamin A.C. Traywick and Alexandra S. Williams of the Ben Traywick Law Firm were the counsels of record listed for Plaintiffs.

of Service (the “amended Proof of Service”). (A. p. 23). The Amended Notice of Appeal listed Hutton and Lather as the respondents, with other counsels of record listing the respective attorneys for the parties. (A. pp. 24–25). The amended Proof of Service noted that service was accomplished by mailing a copy to the listed attorneys for Hutton and Lather. (A. pp. 26–28).

Lather filed its motion to dismiss Petitioner’s appeal on May 12, 2022. (A. pp. 77–114). Petitioner filed its response in opposition to Respondents’ motion to dismiss on May 23, 2022. (A. pp. 115–49). Lather filed its reply to Petitioner’s response in opposition on May 31, 2022. (A. pp. 161–73). The court of appeals dismissed Petitioner’s appeal on July 21, 2022. (A. pp. 174–75). Petitioner filed its Petition for Rehearing on August 2, 2022,³ which was denied on November 15, 2022. (A. pp. 210–11).

Petitioner filed his Petition for a Writ of Certiorari on December 8, 2022. Lather filed its Return on January 9, 2023. This Court granted the Petition on May 23, 2023.

STANDARD OF REVIEW

This matter presents a question of law subject to *de novo* review. *See Conner v. City of Forest Acres*, 348 S.C. 454, 460–62, 560 S.E.2d 606, 609–10 (2002) (applying *de novo* review in reviewing the court of appeals’ decision to dismiss a notice of appeal); *Moody v. Dickinson*, 54 S.C. 526, 532-536, 32 S.E. 563, 565–67 (1899).

³ Lather filed a Return to Petitioner’s Petition for Rehearing on October 4, 2022.

ARGUMENTS

I. PETITIONER’S ORIGINAL NOTICE OF APPEAL WAS DEFECTIVE AND PETITIONER FAILED TO SERVE PROPER NOTICE OF APPEAL AS REQUIRED BY THE SOUTH CAROLINA APPELLATE COURT RULES.

Appeals from circuit court must have the name of the court, judge, and county from which the appeal is taken; the docket number of the lower court case; the date of the order from which the appeal is taken along with a statement of when the appealing party received notice of the same order; the name of the party taking the appeal; and the *names, mailing addresses, and telephone numbers of all attorneys of record and the names of the party or parties represented by each*. Rule 203(e)(1), SCACR. (emphasis added). “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.” Rule 203(b)(1), SCACR.

Whenever *under these Rules* service is required . . . [s]ervice upon the attorney . . . shall be made by: (1) delivering a copy to the person, in which case service is complete upon delivery. Delivery of a copy under this provision means: 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 at 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; (2) depositing a copy in the U.S. mail, properly addressed to the person. . . or, (3) serving a copy on the person by electronic means in a manner provided by order of the Supreme Court of South Carolina.

Rule 262(c), SCACR. Under Rule 262(c)(3), SCACR, the Court’s Order 2021-08-25-02 dated August 25, 2021,⁴ set forth the methods to serve electronically. This Court’s order set forth that service on another lawyer may be done by using the lawyer’s primary e-mail address listed in the Attorney Information System (AIS). 2021-08-25-02 ¶ (d)(1) (S.C. Sup. Ct. Order dated August 25,

⁴ This Order was later amended by 2022-05-06-03 (S.C. Sup. Ct. dated May 6, 2022), but the prior version was in effect at the time both the original and amended Notice of Appeals were filed and served on the respective parties named therein.

2021). It further requires that a copy of the sent e-mail shall be enclosed with the proof of service.

Id.

It is undisputed that Petitioner received written notice of the order granting Lather's motion for summary judgment on March 24, 2022, via Petitioner's admission to such in its original Notice of Appeal. Therefore, it must also be undisputed that the deadline for Petitioner to serve its Notice of Appeal was April 25, 2022. It is undisputed that Petitioner's amended Notice of Appeal would substantially comply with the South Carolina Appellate Court Rules. It cannot be disputed that Petitioner's amended Notice of Appeal was served after the April 25, 2022, deadline under Rule 203(b)(1), SCACR, and Rule 263(a), SCACR.

Neither the South Carolina Rules of Civil Procedure nor the South Carolina Appellate Court Rules created any trap for any "unwary lawyer." This matter is clear—Petitioner's original Notice of Appeal was defective and was not properly served. Petitioner's original Notice of Appeal did not list Lather as a respondent to the appeal, nor did it list Lather's attorneys as counsel of record. *See* Rule 203(e)(1), SCACR (setting forth the requirements for a notice of appeal, specifically requiring the name, mailing addresses, and telephone numbers of all attorneys of record and the names of the party or parties represented by each); *see also* Rule 203(a), SCACR ("A party intending to appeal *must serve . . . a notice of appeal and otherwise comply with these rules.*"). (emphasis added). Petitioner should have known that it was required to list Lather as a respondent, Lather's counsel as counsel of record, and actually serve Lather via the means specifically set forth under Rule 262(c), SCACR, and this Court's Order referred to by Rule 262, SCACR. The original Proof of Service showed that Petitioner did not serve Lather as required. *See* Rule 262(c), SCACR (setting forth the requirements for service); 2021-08-25-02 (S.C. Sup. Ct. Order dated August 25, 2021) (setting forth the

requirements for electronic service on other attorneys). Petitioner was required to either deliver a copy of the notice of appeal to counsel, leave it at counsel's office, mail via U.S. mail, or via e-mail to the AIS address, including a copy of the email with the proof of service. *See* Rule 203(a), SCACR; Rule 262(c), SCACR; 2021-08-25-02 (S.C. Sup. Ct. Order dated August 25, 2021). Petitioner did none of the above, instead only mailing a copy to the plaintiffs. *See* Rule 203(a), SCACR; Rule 262(c), SCACR; 2021-08-25-02 (S.C. Sup. Ct. Order dated August 25, 2021). Therefore, Petitioner failed to both file and serve a proper notice of appeal as required by the South Carolina Appellate Court Rules.

Petitioner now advances multiple arguments that obfuscate and confuse the true issue. First, Petitioner argues that it properly served Lather with its Notice of Appeal by using the circuit court e-filing system's Notice of Electronic Filing ("NEF"). Petitioner argues that the ECF sent by the circuit court is sufficient; however, Petitioner's argument conflicts with the South Carolina Appellate Court Rules and this Court's Order on electronic service.⁵ *See* Rule 203(a), SCACR; Rule 262(c), SCACR; 2021-08-25-02 (S.C. Sup. Ct. Order dated August 25, 2021). The South Carolina Appellate Court Rules set forth the *only* means that service can be completed when under the South Carolina Appellate Court Rules. *See* Rule 203(a), SCACR ("Service . . . [is] defined by Rule 262."); Rule 262(c), SCACR. ("Whenever under these Rules service is required . . . [s]ervice *shall be made by* . . ."). Using the circuit court's ECF system is neither listed as an acceptable means of service in Rule 262(c), SCACR, or within this Court's Order No.: 2021-08-25-02, which controlled the methods of electronic service on other attorneys at the time the defective Notice of Appeal was served on

⁵ Likewise, Petitioner's reliance on the South Carolina Electronic Filing Policies and Guidelines is misplaced. These rules apply only to circuit courts, whereas the South Carolina Appellate Court Rules and the applicable Order of this Court detailing electronic service control regarding appellate litigation. *See* Rule 2, SCEF; Rule 102(a), SCACR.

plaintiffs' counsel and filed.⁶ Petitioner's argument that it properly served its original Notice of Appeal with Lather via the circuit court e-filing system's NEF disregards the plain text of the Notice of Appeal itself. Petitioner named the plaintiffs as respondents and properly included their attorneys as counsels of record; Petitioner *did not* name Lather as a respondent and *did not* include its attorneys as counsel of record. Furthermore, Petitioner's argument disregards its original Proof of Service that again properly named plaintiffs as respondents and noted they had mailed a copy to counsel of record for plaintiffs; whereas Lather was again *not named as a respondent* and again *did not list Lather's attorneys as counsels of record*. Petitioner had the wherewithal to follow the requirements in naming plaintiffs as the respondents, as well as the requirements for serving a Notice of Appeal for the plaintiffs that were named respondents, but now imply these same rules created a trap for lawyers.⁷

Petitioner both failed to follow the requirements of the South Carolina Appellate Court Rules as it relates to form of its Notice of Appeal and failed to follow the South Carolina Appellate Court

⁶ The NEF only alerts counsels that a document has been filed with the circuit court. While the rules allow this to function as service at the circuit court level, the South Carolina Appellate Court Rules do not allow the circuit court's NEF function to perfect service.

⁷ There is no trap—the South Carolina Rules of Civil Procedure specifically state that the procedure to be followed on appeal is in accordance with the South Carolina Appellate Court Rules. *See* Rule 73, SCRCP. Service of the notice of appeal is required under both Rule 203(a), SCACR, and Rule 203(b)(1), SCACR. Rule 203(a), SCACR, specifically states that Rule 262, SCACR, defines service. Rule 203(d)(1)(B), SCACR, only requires that the notice of appeal is filed with the clerk of the lower court within ten days following the service of the notice of appeal, as well as what must accompany the notice. The only reasonable conclusion is that the only time in which any circuit court or ECF rules are applicable is as it relates solely to *filing the notice of appeal with the circuit court*. *See id.* Rule 203(b)(1), SCACR, is the rule that requires service and Rule 203(d)(1)(B), the relevant portion of the rule mentioning the lower court, is silent as to service. Indeed, the required filing with the circuit court should happen *after* service of the notice of appeal. Rule 203(d)(1)(B), SCACR (“The notice of appeal shall be filed with the clerk of the lower court . . . within ten days after the notice of appeal is served.”). Rule 262, SCACR, aptly titled “Filing and Service,” specifically sets forth the filing requirements for the appellate courts *as well as* the requirements of serving all appellate documents. *See* Rule 262(c), SCACR (“Whenever under these Rules service is required . . . service . . . shall be made by: . . .”). Thus, there is no reasonable basis for an attorney to ever believe that either the Electronic Filing Rules or South Carolina Rules of Civil Procedure apply to the service of the notice of appeal in order to satisfy the service requirement under the South Carolina Appellate Court Rules.

Rules related to service of its Notice of Appeal. *See* Rule 203(b)(1), SCACR; Rule 203(e)(1), SCACR; Rule 262(c), SCACR; and Order No.: 2021-08-25-02; *see also* Rule 203(a), SCACR. (“A party intending to appeal *must serve and file a notice of appeal and otherwise comply with these rules.*”). (emphasis added). This “scrivener’s error” is actually two fundamental flaws with Petitioner’s appeal. Therefore, the court of appeals properly dismissed Petitioner’s Notice of Appeal and this Court should affirm the ruling of the court of appeals.

II. PETITIONER’S AMENDED NOTICE OF APPEAL WAS UNTIMELY.

If the notice of appeal is not timely filed, then the appeal *shall* be dismissed. Rule 203(d)(3), SCACR. The service of the notice of appeal is jurisdictional and cannot be extended by the appellate court. *See* Rule 263, 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); *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).

In *Moody*, 54 S.C. at 534, 32 S.E. at 566, this Court held there was no error “in allowing the defendant to correct a mere clerical error in the title of his notice of intention to appeal, whereby it is not even claimed that plaintiffs were misled or in any way prejudiced[.]” *Id.* at 534, 32 S.E.2d at 566. In *Conner*, 348 S.C. at 461–62, 560 S.E.2d at 609–10, this Court examined a case that was substantially similar to the case at hand, ultimately holding that the court of appeals erred in granting a motion to correct the record and accepting a backdated notice of appeal. In *Conner*, Conner appealed the trial court’s decision, naming only the “City of Forest Acres” as a respondent. *Id.* at 460, 560 S.E.2d at 609. Some time passed and Conner filed a “corrected” notice of appeal and proof of service, now naming two further respondents—Rowe and Langley. *Id.* at 461, 560 S.E.2d at 609.

Rowe and Langley objected to the “corrected” notice of appeal, and Conner filed a motion to correct the record. *Id.* This motion was granted by the court of appeals and the court accepted the backdated Notice of Appeal. *Id.* Rowe and Langley thereafter argued to this Court that the court of appeals erred in allowing this “correction” because it was not “a typographical error or mere oversight” and instead contended that Conner initially pursued an appeal against the City and City alone. *Id.* This Court held “Clearly, Row and Langley were not served with a Notice of Appeal naming them as respondents within the 30-day time period prescribed by Rule 203(b)(1), SCACR.” *Id.* This Court also distinguished *Moody*, holding that Conner did not “soon” after filing his Notice discover any mistake; Conner was alerted to this mistake; and it was not until the court of appeals “invited Conner to ‘correct’ the Notice that Conner took any action.” *Id.* at 462, 560 S.E.2d at 610. Accordingly, this Court held that the court of appeals erred in granting Conner’s motion. *Id.*

Petitioner attempted to remedy his defective Notice of Appeal and failure to properly serve Lather by filing and serving the amended Notice of Appeal on April 28, 2022. It cannot be disputed that April 28, 2022, follows the expiration of the 30-day period to file a notice of appeal as set forth under Rule 203(b)(1), SCACR. The last possible day Petitioner could have served its Notice of Appeal on Lather was April 25, 2022, and thus Petitioner’s amended Notice of Appeal was untimely under Rule 203(b)(1), SCACR.

Furthermore, this case can be distinguished from *Moody* in one major way—while the title of the notice was wrong, the correct respondents were still served—this is a distinct difference from the case at hand where Lather was not properly served. *Contra Moody*, at 54 S.C. at 531, 32 S.E. at 565–66. This case is much more akin to *Conner*—it was not a mere clerical error to not name Lather as a respondent on the Notice of Appeal, to not include counsel for Lather as counsels of record, and

to not include counsels of record for Lather on the Proof of Service or otherwise serve Lather as required under the South Carolina Appellate Court Rules. *See Conner*, 348 S.C. at 461, 560 S.E.2d at 609. Like the original notice of appeal in *Conner*, Petitioner filed a defective notice of appeal that did not name Lather as a respondent. *See id.* at 460, 560 S.E.2d at 609. Finally, like the time taken in *Conner*, it was not “soon after” Petitioner’s original improper Notice of Appeal was filed and served that Petitioner realized its mistake—it was past the deadline for serving a Notice of Appeal. *See id.* Petitioner filed a defective and confusing notice of appeal and did not even have this defective and confusing notice of appeal properly served on Lather.

Ultimately, the court of appeals lacked jurisdiction to consider the appeal and likewise had no ability or discretion to rescue Petitioner from its own mistakes by extending or ignoring the deadline for service. *See Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004); *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) (“The failure of a party to comply with the procedural requirements for perfecting an appeal may deprive the court of ‘appellate’ jurisdiction over the case[.]”); *see also State v. Brown*, 358 S.C. 382, 387, 596 S.E.2d 39, 41 (2004) (holding the failure to comply with procedural requirements for an appeal divests a court of appellate jurisdiction).

Additionally, Lather joins in the arguments contained in the brief of Hutton to the extent they are applicable and incorporates those arguments herein.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the court of appeals.

(Signature Page to Follow)

Respectfully submitted,

ROSS & CRISTALDI, LLC

s/ Brenten H. DeShields

Jeffrey A. Ross, Bar No.: 74254

Philip P. Cristaldi, Bar No.: 102219

Scott H. Winograd, Bar No.: 103483

Brenten H. DeShields, Bar No.: 105199

863 Coleman Blvd., Suite B

Mt. Pleasant, South Carolina 29464

Phone: (843) 329-4040

Email: jjross@rclawsc.com

pcristaldi@rclawsc.com

swinograd@rclawsc.com

bdeshields@rclawsc.com

***Attorneys for Respondents Lather Construction,
Inc., and Lather Construction SC, Inc.***

Mt. Pleasant, South Carolina

August 25, 2023