THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Hon. Bentley D. Price, Circuit Court Judge

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.

REPLY BRIEF OF THE PETITIONER

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STATEMENT OF THE CASE

The South Carolina Supreme Court granted Petitioner D.R. Horton's Petition for a Writ of Certiorari for the three issues on appeal listed above. Respondents filed briefs in which they collapsed and modified the issues, which created a confusing discussion of the three issues. For clarity, Petitioner's reply responds to Respondents' briefs within the framework of the issues on appeal listed above and for which the Court granted certiorari.

STANDARD OF REVIEW

All parties agree that the Court reviews this case *de novo*.[1]

FACTS

Petitioner's counsel Jason Imhoff filed and served a Notice of Appeal with Orders on April 11, 2022, 18 days after the circuit court's March 24, 2022, decision. (A. pp. 10-19) Seventeen days later, on April 28, 2022, after discovering a scrivener's error concerning the identities of the

[1] Lather agreed to this standard of review in its brief, page 2, and Hutton's joined Lather's brief, page 15, when it stated that, "Hutton's joins in the arguments contained in the brief of Lather Construction to the extent they are applicable and incorporates those arguments herein." Hutton's did not submit its own statement on the standard of review.

Respondents, Mr. Imhoff sent an email to the court regarding the scrivener's error (A. p. 23) and filed and served an Amended Notice of Appeal with Orders, which corrected the error. 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*. It was clear which orders were appealed and who the parties who prevailed on those orders were. In fact, there had been no other substantive orders in the case. 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. The scrivener's error left no one misled or prejudiced. And no one has complained otherwise.

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, which is discussed thoroughly in Petitioner's Brief.

After the notice of appeal was filed via the SC Courts E-Filing System, all parties, including Respondents, received a Notice of Electronic Filing (NEF) that indicated all parties' attorneys had been served electronically through the SC Courts E-Filing System and no parties' attorneys needed to be served by other means. Through the e-filing docket system, attorneys receive notice that a document has been filed, who has been served, and that the document is available for them to read, print, and download.[2] Respondents' assertion that they did not receive the actual document through the SC Courts E-Filing System is not accurate and misstates that the document is there for them to

[2] Occasionally a filing is made outside the system, but that is rare in commercial litigation.

read, print, and download at any time they choose. Moreover, Respondents have never alleged they did not receive the Notice of Appeal.

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.

Respondents argue that the electronic filing policies and guidelines are crystal clear to them. While they may believe they have a complete understanding of the rules, that does not mean the rules are crystal clear to many other South Carolina attorneys who are more used to paper filings, new to electronic filings, confused by the myriad of electronic filing rules pre-, post-, and during the coronavirus pandemic, or how those rules work together when a filing is required in two courts – in this case in the circuit court and the appellate court. "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. When the rules are confusing, it is useful for the Court to provide clarity.

Respondents' briefs lack any clarity as to the interplay among the electronic filing rules when a document must be filed in two courts. The purpose of a proof of service in any court is to provide a statement by the filing attorney that the recipient attorney or party has been provided the document. Proof of service is received via the South Carolina E-Filing System, through which all parties receive a Notice of Electronic Filing (NEF). The Notice of Appeal and the Amended Notice of Appeal were both filed in the circuit court through the electronic e-filing system and served through the NEF system. Every Respondent was served within 18 days of the circuit court's order.

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), SCRCP and Rule 203, SCACR.[3] Petitioner's Notice of Appeal was timely and properly served under the rules.

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

Sometimes it is useful to be clear about what a case is not about. In this case, that is especially true because Respondents have collapsed Petitioner's three issues into one or two, often blurring the lines among the issues and leading to confusion and misstatements through compound sentences that deal with two issues rather than one.[4]

This is not a case in which service did not occur. Nowhere in Respondents' pleadings do they deny having been electronically served on April 11, 2022. In fact, it is clear from their Briefs and their pleadings in the appeals court that they were served the Notice of Appeal on April 11, 2022 and the Amended Notice of Appeal on April 28, 2022. This is not a case in which service did not occur.

This is not a case in which service occurred outside the jurisdictional thirty-day period to provide a notice of appeal. Nowhere in Respondents' pleadings do they deny having been electronically served on April 11, 2022 and nowhere do they claim the Notice of Appeal was not timely filed. Accordingly, Respondents' cases *Camp v. Camp,* 386 S.C. 571, 689 S.E.2d 634 (2010); *Ex Parte Sadisco of Greenville, Inc. v. Greenville Cnty. Bd. Of Zoning Appeals*, 340 S.C. 57, 530 S.E.2d 383 (2000); *Great Games, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 79, 529 S.E.2d 6 (2000) and *State v. Brown*,

[3] A detailed discussion of the rules and electronic service is included in Petitioner's Brief.
[4] For example, the collapsing of the issues led Respondents to essentially assert that a scrivener's error corrected after the 30-day window for filing an appeal may not be remedied. That is not the law in South Carolina. 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).

358 S.C. 382, 596 S.E.2d 39 (2004) are all inapposite for this case. This is not a case in which service occurred outside the jurisdictional thirty-day period to provide a notice of appeal.

This is not a case in which the Notice of Appeal was untimely filed. The notice of appeal was filed only 18 days after the order being appealed was issued.

This is not a case in which Petitioner seeks time beyond the 30-days allowed to serve a notice of appeal. The notice of appeal was served upon all attorneys within 18 days of the appealed order.

This is not a case in which the Respondents were prejudiced or were unaware of the orders that were appealed. There was no prejudice or laxity alleged in Respondents' Motions to Dismiss the Appeal or in their Briefs, nor could any be alleged in this case. The notice of appeal 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 had 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. This is not a case in which the Respondents were prejudiced or were unaware of the orders that were appealed.

This *is* a case in which Petitioner's counsel relied upon the NEF system that told Petitioner's counsel that Hutton's and Lather's attorneys were served on April 11, 2022. A lawyer should be able to 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. 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.

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 on April 28, 2022. 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. 24-320 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. It is a long-standing practice of the South Carolina Supreme Court to allow such errors to be corrected. *See Moody v. Dickinson*, 54 S.C. 526, 32 S.E. 563 (1899).

Once again it is useful to clarify what this case is not about.

This is not a case in which the Respondents were prejudiced or were unaware of the orders that were appealed. There was no prejudice or laxity alleged in Respondents' Motions to Dismiss the Appeal or their Briefs, nor could any be alleged in this case. Respondents have not alleged prejudice. They have not alleged that they were in any way confused or unaware of the orders on appeal. Nor could they credibly make such allegations. The notice of appeal 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. This is not a case in which the Respondents were prejudiced or were unaware of the orders that were appealed.

This is not case in which delay in correcting a scrivener's error occurred. This case is distinguishable from *Connor v. City of Forest Acres,* 348 S.C. 454, 560 S.E.2d 606 (2002), on the essential issue decided in *Connor* - prejudice. *Connor* is decided on the question of whether there was prejudice to the respondents when the scrivener's error was not corrected for more than 5 months. There is no credible argument otherwise about what *Connor* says or means. It is because scrivener's errors are correctable in the appeals court, including errors as to the respondents, that *Connor was even decided.* In *Connor* the respondents were not corrected for more than 5 months. Respondents in this case mistakenly rely upon *Connor* for the proposition that Connor's appeal was not perfected because she had not listed two defendants as respondents within the jurisdictional 30-days to appeal an order. However, that is an incorrect understanding of *Connor.* If the correction had happened within the 30-days to serve an appeal, there would not have been any dismissal of Connor's appeal and the case would not have happened. Connor had a right to modify her appeal within the 30-day window. It is only because the correction happened after the 30-day window to serve the appeal that there was a motion to dismiss. *Connor* is different from this case because Connor delayed correcting the scrivener's error for more than 5 months. Five months is vastly different from what occurred in this case. Due solely to a 5 month delay, the court held that "[i]ndeed, the rule of *Moody v. Dickinson*, 54 S.C. 526, 32 S.E. 563 (1899), 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 the order being appealed specifically names them. Counsel for the Petitioner did not delay. This is not case in which delay in correcting a scrivener's error occurred, nor is delay or prejudice even alleged.

"Clerical errors in a notice of appeal do not destroy the appeal" (citing *Moody v. Dickinson*, 54 S.C. 526, 32 S.E. 563 (1899)*, 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, Respondents efforts in this case to take advantage of a mere clerical error should be rejected because there can be no doubt that Respondents' had notice that Petitioner appealed the orders, 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 and Respondents had notice that Petitioner appealed the orders.

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 of process at the confluence of circuit and appellate courts.

Respectfully,

Date: September 18, 2023

s/Carl F. Muller, SC Bar #4131

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