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May 31 2022

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

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

APPELLATE CASE NO. 2022-000469
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 REPLY TO D.R. HORTON, INC.'S
RESPONSE IN OPPOSITION TO THE MOTION TO DISMISS APPEAL**

Respondents Lather Construction, Inc., and Lather Construction, SC, Inc.’s (hereinafter collectively referred to as “Lather”) hereby submit their Reply to the Response in Opposition by Appellant D.R Horton, Inc. (“D.R. Horton”) to the Motion to Dismiss the Appeal and shows the Court as follows:

For this Court to obtain jurisdiction over D.R. Horton’s appeal against Lather, D.R. Horton must show that it timely and properly served Lather with a notice of appeal naming it as a respondent in accordance with the Appellate Court Rules. It cannot do so.

It is undisputed that when D.R. Horton filed its original Notice of Appeal on April 11, 2022, it did not name Lather 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) of the South Carolina Appellate Court Rules – either by hand delivery, U.S. Mail, or by an e-mail sent to counsel for Lather as permitted under the Supreme Court’s August 25, 2021 Order 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. D.R. Horton failed to meet the jurisdictional requirement of timely and proper service of a notice of appeal naming Lather as a respondent, and therefore, this Court lacks jurisdiction over D.R. Horton’s appeal as to Lather. 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 Cnty. Bd. of Zoning Appeals, 340 S.C. 57, 59, 530 S.E.2d 383, 384 (2000).

D.R. Horton unscrupulously paints its failure to comply with the Appellate Court Rules as a “trap” set by Lather. 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 appellant, it alone controlled what was appealed, who was named in the appeal, and the service of the appeal.

On April 19, 2022, this Court 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 was not a respondent. This Court's letter also only copied counsel for the plaintiffs and did not copy counsel for Lather because the Court did not consider Lather as a respondent to the appeal.¹ See the Court's April 19, 2022 e-mail and letter attached hereto as Exhibit "A."

Despite the issuance of this Court's initial appeal letter which clearly gave notice to D.R. Horton that Lather was not a respondent 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 a respondent to the appeal. Nothing prevented D.R. Horton from correcting its own error – an error which if not corrected was fatal to this Court's jurisdiction over Lather.

D.R. Horton also insists that the Notice of Electronic Filing [NEF] generated by the Circuit Court's E-Filing System complies with Paragraph (d)(1) of the Supreme Court's August 25, 2021 Order permitting the service of a document by a lawyer upon another lawyer via e-mail. The Supreme Court's 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

¹ A copy of this letter was located by counsel for Lather on the judicial department's C-Track Public Access system.

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.

On the other hand, the NEF does not constitute proper service for a notice of appeal under the Appellate Court Rules, and there is no order authorizing a NEF automatically generated by the circuit courts' E-Filing System to qualify as proper service of a notice of appeal. If the Supreme Court had intended a NEF automatically generated from the circuit courts' E-Filing System to suffice for the service of a notice of appeal under the Appellate Court Rules, it could have expressly authorized such manner of service in its August 25, 2021 Order but it chose not to do so. 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's failure to serve Lather with a notice of appeal naming it as a respondent within the 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).

In response to D.R. Horton's Section II of its Response in Opposition, Lather states that it believes it was an oversight by the lower court to not include both Lather entities in its Order Granting Summary Judgment, as the motion for summary judgment was as to both entities and upon information and belief, the Court intended to include both Lather entities. This was indeed a scrivener's error. Since the case is stayed at the circuit court level, this issue will need to be addressed down the road. However, that does not change the fact the Appellate court lacks jurisdiction to hear

an appeal as to either Lather entity.

Accordingly, for the reasons set forth herein and in the Motion to Dismiss Appeal, Respondents Lather Construction, Inc., and Lather Construction, SC, Inc. therefore respectfully request this Court to dismiss the appeal of Appellant D.R. Horton, Inc. for lack of appellate jurisdiction due to the untimely and improper service of the Notice of Appeal.

Respectfully submitted,

/s Scott H. Winograd

Jeffrey A. Ross, Bar No.: 74254

Philip P. Cristaldi, III, Bar No.: 102219

Scott H. Winograd, Bar No.: 103483

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

Mt. Pleasant, South Carolina

May 31, 2022

EXHIBIT “A”

Spencer, Shelby

From: Spencer, Shelby
Sent: Tuesday, April 19, 2022 3:37 PM
To: 'dudley@conlaw.com'; 'imhoff@conlaw.com'; 'crawford@conlaw.com';
'ali@bentraywicklaw.com'; 'ben@bentraywicklaw.com'
Subject: Margaret Eberly v. D.R. Horton, Inc. (2022-000469)
Attachments: Eberly v. D.R. Horton, Inc. - Initial Letter.pdf

Dear Counsel,

Attached is a copy of this Court's letter. If you have any questions or concerns, please do not hesitate to contact our office.

Warmly,

Shelby Spencer

Appeals Specialist II
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201
Phone: 803.734.1890
Fax: 803.734.1839
E-Filing Email: ctappfilings@sccourts.org



The South Carolina Court of Appeals

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April 19, 2022

Mr. Jason Michael Imhoff, Esquire
704 East Mcbee Avenue
Greenville SC 29601

Mr. John T. Crawford, Jr., Esquire
704 E. McBee Ave.
Greenville SC 29601

Mr. Thomas Elihue Dudley, III, Esquire
704 E. McBee Ave.
Greenville SC 29601

Re: Margaret Eberly v. D.R. Horton, Inc.
Appellate Case No. 2022-000469

Dear Counsel:

This Court has received your notice of appeal, and the case has been assigned the appellate case number that appears above. Please use this number on all future correspondence relating to this matter.

All parties to this matter are advised that all filings must comply with the requirements of Rule 267 of the South Carolina Appellate Court Rules (SCACR). The SCACR are available online at www.sccourts.org/courtreg. Additionally, any filings submitted by counsel admitted in South Carolina must include counsel's bar number.

The attention of the parties is directed to the order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. The order can be found at www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2014-04-15-02. Please note that the responsibility for insuring that information is redacted or sealed as required by this order rests with counsel and the parties. This office will not review filings for redaction or to determine if materials should be sealed.

This is to advise that the title in the above matter has been changed to read as follows:

Margaret A. Eberly and Barbara J. Pavelik, Respondents,

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 Appellant.

All future records in this matter should be changed to reflect this title. If you have any questions, please do not hesitate to contact this office.

Very truly yours,

A handwritten signature in blue ink that reads "Catherine J. Fanning, deputy". The signature is written in a cursive style.

CLERK

cc: Alexandra Scott Williams, Esquire
Benjamin Alexander Crute Traywick, Esquire

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IN THE COURT OF APPEALS**

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

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

Margaret A. Eberly and Barbara J. Pavelik,

PLAINTIFFS,

versus

Advanced Flooring & Design Division of ISI, LLC; Archer
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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.

Proof of Service

I certify that I have served Lather Construction, Inc. and Lather Construction, SC, Inc.'s Reply to D.R. Horton's Response in Opposition to the Motion to Dismiss Appeals dated May 31, 2022, by personally serving the same pursuant to Rule 262 (c)(3), SCACR, and S.C. Supreme Ct. Order

dated August 25, 2021 on the following counsel of record using the primary email address listed in the Attorney Information System (if applicable):

Emily Lucey, Esq.
Carmen V. Ganjehsani, Esq.
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Attorneys for D.R. Horton, Inc.

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

s/ Scott H. Winograd
Jeffrey A. Ross, Bar No.: 74254
Philip P. Cristaldi, III, Bar No.: 102219
Scott H. Winograd, Bar No.: 103483
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*Attorneys for Lather Construction, Inc. and Lather
Construction SC, Inc.*

Scott Winograd

From: Scott Winograd
Sent: Tuesday, May 31, 2022 5:57 PM
To: 'Carmen Ganjehsani'; imhoff@conlaw.com; crawford@conlaw.com; dudley@conlaw.com; carl@carlmullerlaw.com; Jeff Ross; Philip Cristaldi
Cc: Emily Gifford Lucey; Megan White; Emily Seelig; teresa@bentraywicklaw.com; cappy@bentraywicklaw.com; Alexandra Williams; Kay Kelly; Benjamin Traywick; Lin McDougall; Tom Bacon; Hope Grate; Katy Barnes
Subject: RE: 2022-000469 Eberly v. D.R. Horton
Attachments: 2022.05.31 Lather Reply to DR Horton Response.pdf

Pursuant to the Supreme Court's Order dated May 6, 2022, please find served upon you the Reply to D.R. Horton, Inc.'s Response in Opposition to the Motion to Dismiss Appeal filed on behalf of Respondents Respondents Lather Construction, Inc., and Lather Construction, SC, Inc. in the above-referenced appeal.



Scott Winograd
Associate
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Admitted in SC, NC, & OH

Please note our email address change – our entire firm will now be “first initial, last name @rclawsc.com”

Please note our firm address change

Please note our firm is paperless – please request hard copies if desired

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From: Carmen Ganjehsani <CGanjehsani@RichardsonPlowden.com>
Sent: Tuesday, May 31, 2022 12:03 PM
To: imhoff@conlaw.com; crawford@conlaw.com; dudley@conlaw.com; carl@carlmullerlaw.com; Jeff Ross <jross@rclawsc.com>; Philip Cristaldi <pcristaldi@rclawsc.com>; Scott Winograd <swinograd@rclawsc.com>
Cc: Emily Gifford Lucey <egiffordlucey@richardsonplowden.com>; Megan White <MWhite@RichardsonPlowden.com>; Emily Seelig <ESeelig@RichardsonPlowden.com>; teresa@bentraywicklaw.com; cappy@bentraywicklaw.com; Alexandra Williams <ali@bentraywicklaw.com>; Kay Kelly <kay@carlmullerlaw.com>; Benjamin Traywick <ben@bentraywicklaw.com>; Lin McDougall <lin@mlf.law>; Tom Bacon <tom@mlf.law>; Hope Grate <HGrate@RichardsonPlowden.com>; Katy Barnes <Kbarnes@rclawsc.com>
Subject: 2022-000469 Eberly v. D.R. Horton

Pursuant to the Supreme Court's Order dated May 6, 2022, please find served upon you the Reply to D.R. Horton, Inc.'s Response in Opposition to the Motion to Dismiss Appeal filed on behalf of Respondent Hutton's Landscapes, Inc. in the above-referenced appeal.

Thank you,
Carmen Ganjehsani

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