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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

CASE NO. 2019-CP-04-01942

Natalie Zitek, individually, and on behalf of others
similarly situated..... Plaintiff,

v.

D.R. Horton, Inc., Jane Doe #1-10; and John Doe #1-50,Defendants,

D.R. Horton, Inc.,Third-Party Plaintiff,

vs

- A&J Framing, Inc.;
- A-Z, Inc.;
- AJ Landscaping & Grading, LLC, A/K/A AJ Landscaping & Grading, LLC;
- Allpro Textures, LLC;
- Alpha E.M.C.;
- Alpha Omega Construction Group, Inc.;
- American Concrete And precast, Inc.; A/K/A ACP Concrete, Inc.;
- Atlanta Floor Designs Center;
- A Grade Above Others, LLC;
- BFK Builders, Inc.;
- BMC East LLC D/B/A Coleman Floor, LLC;
- Brand-Vaughn Lumber Co, Inc.;
- Bravo Carpenters, Inc.;
- Builders Designhouse, LLC;
- Builders FirstSource Southeast Group, LLC, A/K/A Builders FirstSource, Inc.;
- Builders Services Group, LLC F/K/A Masco Contractor Services Central Inc. F/K/A Gale Industries, Inc. D/B/A Gale Contractor Services;
- Cannaday Siding & Gutter, Inc.;
- Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.;

CBU Enterprises, Inc.;;
Cortes Painting, LLC;
CPI Security Systems, Inc.;;
Dom Group, LLC;
Dupree Plumbing Company, Inc.;;
Ferguson Enterprises, Inc.;;
Five Star Construction Inc.;;
Five Star Foundations, LLC;
Galloway-Bell, Inc. A/K/A Galloway-Bell Inc. II;
GBS Building Supply – Us LBM, LLC, F/K/A/GBS Building Supply, Inc.;;
General Shale Brick Inc.;;
Get Floored, LLC;
Greener Pastures, Inc., A/K/A Greener Pastures of Aiken, LLC;
Installed Building Products, LLC A/K/A Installed Building Products II, LLC;
IBP Asset, LLC D/B/A Blue Ridge Building Products;
JLS Masonry, Inc.;;
Kings Landscaping, LLC;
L&M Electric, Inc.;;
Lade-Danlar, Inc.;;
Landshapers, LLC;
Lansing Building Products, Inc.;;
Long Heating & Air Conditioning, Inc.;;
M&L General Construction, LLC, A/K/A M&L General Construction, Inc.;;
M&L Reyna Construction, LLC;
M&M Foundations, LLC;
Manale Landscaping, LLC;
MJ Cowboys, LLC; Nazareth
Builders, LLC; NB
Contractors, LLC; Poinsett
Development, LLC; Poinsett
Homes, LLC;
P&L Enterprises, LLC;
P&T Construction, Inc., A/K/A P&T Construction, Inc.;;
Probuild Company, LLC A/K/A Probuild Holdings, Inc.;;
Rite Rug Co.;;
Rodney Howard Grading, Inc. A/K/A Rodney Howard Grading Co.;;
Sandlapper Concrete, LLC;
Silver Line Building Products Corporation;
Sodfather Inc., Landscape Contractors; Stock
Building Supply, LLC;
Topbuild Home Services., Inc., A/K/A Gale Contractors Service; Tucker
Materials, Inc., A/K/A Gypsum;
UTM Enterprises, Inc;
and
Willow Tree Landscaping, Inc Third-Party Defendants,

and

Aaron D. Peris;
Harrelson Painting, LLC;
Huttig Building Products; et alFourth and Fifth-Party
Defendants and Plaintiffs,

D.R. HORTON, INC.....Appellant/Petitioner.

Natalie Zitek, individually, and on behalf of others similarly
situated;

Jane Doe #1-10; and John Doe #1-50; A&J Framing, Inc.;
A-Z, Inc.;
AJ Landscaping & Grading, LLC, A/K/A AJ Landscaping & Grading, LLC; Allpro Textures, LLC;
Alpha E.M.C.;
Alpha Omega Construction Group, Inc.;
American Concrete And precast, Inc.; A/K/A ACP Concrete, Inc.; Atlanta Floor Designs Center;
A Grade Above Others, LLC; BFK Builders, Inc.;
BMC East LLC D/B/A Coleman Floor, LLC; Brand-Vaughn Lumber Co, Inc.;
Bravo Carpenters, Inc.; Builders Designhouse, LLC;
Builders FirstSource Southeast Group, LLC, A/K/A Builders FirstSource, Inc.;
Builders Services Group, LLC F/K/A Masco Contractor Services Central Inc. F/K/A Gale Industries, Inc.
D/B/A Gale Contractor Services;
Cannaday Siding & Gutter, Inc.;
Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.; CBU Enterprises, Inc.;
Cortes Painting, LLC;
CPI Security Systems, Inc.; Dom Group, LLC;
Dupree Plumbing Company, Inc.; Ferguson Enterprises, Inc.;
Five Star Construction Inc.; Five Star Foundations, LLC;
Galloway-Bell, Inc. A/K/A Galloway-Bell Inc. II;
GBS Building Supply – Us LBM, LLC, F/K/A/GBS Building Supply, Inc.; General Shale Brick Inc.;
Get Floored, LLC;
Greener Pastures, Inc., A/K/A Greener Pastures of Aiken, LLC;
Installed Building Products, LLC A/K/A Installed Building Products II, LLC; IBP Asset, LLC D/B/A
Blue Ridge Building Products;
JLS Masonry, Inc.;
Kings Landscaping, LLC;
L&M Electric, Inc.;
Lade-Danlar, Inc.;
Landshapers, LLC;
Lansing Building Products, Inc.;

Long Heating & Air Conditioning, Inc.;

M&L General Construction, LLC, A/K/A M&L General Construction, Inc.; M&L Reyna Construction, LLC;

M&M Foundations, LLC; Manale Landscaping, LLC; MJ Cowboys, LLC; Nazareth Builders, LLC; NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC;

P&L Enterprises, LLC;

P&T Construction, Inc., A/K/A P&T Construction, Inc.; Probuild Company, LLC A/K/A Probuild Holdings, Inc.; Rite Rug Co.;

Rodney Howard Grading, Inc. A/K/A Rodney Howard Grading Co.; Sandlapper Concrete, LLC;

Silver Line Building Products Corporation; Sodfather Inc., Landscape Contractors; Stock Building Supply, LLC;

Topbuild Home Services., Inc., A/K/A Gale Contractors Service; Tucker Materials, Inc., A/K/A Gypsum; UTM Enterprises, Inc; and

Willow Tree Landscaping, Inc;

Aaron D. Peris;

Harrelson Painting, LLC;

Huttig Building Products; and Therma-Tru, Ltd;

Arcides Garcia;

Brandon Chaves;

C&H Wood Flooring, Inc.; Dora Maria Pina;

Felix Tile;

Filadelfo Avila Carrillo;

Francisco Sanchez;

J&K Floor Corp;

JCT Flooring;

Jose Javier Marin;

Lemus Tile;

Leos Flooring, LLC;

Martin Garcia;

Nora Canales;

Othon Delgado Ramas;

Resendiz Flooring;

Richard Bumbalough;

Richard Gerardo Loreda Gomez; Robert Gillespie;

Roberto Morales Ferretiz;

Roberto Tile, Inc

Scorpio Tile Glass Work; and Urias Flooring, Co., LLC;

Zenon Gutierrez Antunez; Jesus Perez;

Fredy Perez and Venustiano Perez, Individually and D/B/A Fredy's HVAC;

Nicholas Sota a/k/a Nicholas Soto, Individually and D/B/A Soto HVAC;
Jason Weaver, Individually and D/B/A Tiger Mechanical; and
Panuncio Victoriano Martinez, Individually and D/B/A Victoriano HVAC, LLC;
Brothers Contractors, Inc.;
Brothers Contactors, LLC;
Nataren Contractors, LLC;
Jimenez Contactors, LLC;
Jimenez Contractors, Inc.;
Henry Construction, LLC;
SL Commercial Construction, Inc.;
Rogelio Basilio-Vazquez; Geovany Leiva;
Geovany Leiva D/B/A GSF Renovations, LLC; GSF Renovations, LLC;
RJ Quality Construction, Inc.;
Rafael Bonzalez-Colazo, Individually and D/B/A RJ Commercial Construction, Inc.;
Santos Metal Works, LLC;
AHR Construction, Inc.;
Denny Concepcion;
RJ Commercial Construction, Inc.;
Safeway Roofing;
Torres Quality Construction;
JJS Commercial Construction, Inc.;
Jose Hernandez;
Bonilla Construction, Inc.; and
Jose P. Jimenez, Individually and D/B/A Bonilla Construction, Inc.;
Carlos Humberto Landaverry;
Ngan My Giang; Landaverry Flooring, LLC; Hector Flooring;
Scorpio Tile & Glassworks, Inc.; Jose Javier Marin;
O&E Flooring; Othon Ramos; Saguay Flooring; and Cruz Flooring;
AJ&I Flooring, LLC;
Antonio's Flooring, LLC;

Bryan's Flooring Services, LLC; Enriquez Floors, LLC;
Garcia's Carpet, Inc.;
Hector Flooring, Inc.;
Carolina Hernandez D/B/A Josue's Flooring, LLC; NM Alex Carpet, Inc.;
Promesa Flooring; and
Vinny's Perfection Flooring, LLC;

Jesus Jimenez; and
Jesus Robles Montez A/K/A Robles Construction ;

Toribio Islas; and
Alejandro Soto... Respondents.

**PLAINTIFF’S-RESPONDENT’S RETURN IN OPPOSITION TO APPELLANT’S
PETITION FOR A WRIT OF SUPERSEDEAS AND/OR CROSS-MOTION TO DISMISS
APPEAL, GRANT LIMITED REMAND, OR OTHERWISE CONFIRM THAT TRIAL
MAY PROCEED**

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*Attorneys for Plaintiff/Respondent Natalie Zitek and
all others similarly situated*

September 7, 2023

Mount Pleasant, South Carolina

Plaintiff-Respondent, Natalie Zitek, individually, and on behalf of all others similarly situated (collectively, “Plaintiff”), by and through her undersigned counsel, submit this return in opposition to the Petition for a Writ of Supersedeas, filed on behalf of Appellant D.R. Horton (“Horton” or “D.R. Horton”), to delay a trial which began on September 1, 2023, with a full day pretrial hearing, and on September 5, 2023, with jury selection (the “Petition”). **To be clear**, the Petition seeks to delay the trial “pending final decision of [Horton’s] appeal of two orders granting summary judgment.” (Pet. At 6). Neither order granting summary judgment affects the Plaintiff’s **in process** trial against Horton, as both summary judgment orders concerned Horton’s third-party, contractual liability claims against its second-tier subcontractors, *which are not derivative in nature*, and therefore do not affect the mode of trial or any other aspect of the trial.

Alternatively, Plaintiff hereby cross-moves this Honorable Court to dismiss the appeal, to grant a limited remand of this case, or to otherwise confirm that the Circuit Court may proceed with the trial which began on September 5, 2023 (the “Instant Cross-Motion”).

INTRODUCTION

This construction-defect, certified class action litigation involves a Class of 220 single-family homes located in the Rose Hill subdivision in Anderson County, South Carolina (“Rose Hill”). Plaintiff filed suit against Horton only; Horton filed Third-Party claims against other subcontractors, who in turn filed Fourth- and Fifth-party claims against second and third-tier subcontractors.

As Horton conceded, the trial it seeks to delay has already begun. To accommodate a jury pool large enough to consider anticipated juror conflicts with a month-long commitment, the Anderson County Clerk of Court and her staff summoned over 500 potential jurors and made special arrangements for jury selection to occur in the Anderson County Civic Center. Pretrial occurred on September 1, 2023. Jury selection concluded on September 5, 2023, opening

statements occurred thereafter on September 5, 2023, and Horton’s expert Larry Steven Moore testified for one (1) full day on September 6, 2023 (Plaintiff called Defendant’s principal witness as Plaintiff’s initial witness and Defendant crossed him in full). The merits of Plaintiff’s case against Horton and Horton’s derivative and subsequent case against its subcontractors is in the process of being fully adjudicated on the merits.

At the outset, it is important to put the predicate summary judgment orders in context, as they have no relevance to the principal *interlocutory* Orders that Horton is trying to appeal. Both summary judgments addressed Third-Party claims that were *not derivative* of Plaintiff’s claims. Both summary judgment orders addressed Horton’s claim against Gale and IBP for indemnity of defense costs despite Horton conceding that these Third-Party Defendants had no causative fault in causing Plaintiff’s damages. In the case of Gale, Plaintiff stipulated the subject matter of Gale’s work out of the case. (*See Stip.*, July 20, 2023, attached hereto as Exhibit “A”). In the case of IBP, Horton simply did not contest IBP’s grounds that there was an absence of evidence supporting any claim of fault.

SUMMARY OF ARGUMENT

Horton’s eve of trial (unfiled) Notice of Appeal and *second day of trial* Petition to the Court of Appeals is a delay tactic, and more importantly, they are each deficient in many respects. First, Horton is not entitled to a writ of supersedeas, as none of the exceptions under Rule 241(b), SCACR apply. In fact, Horton has not argued that any of the exceptions listed in 241(b) apply. Additionally, Horton did not move for a writ of supersedeas in the Circuit Court which is required prior to filing the writ with the Appellate Court.

Second, the in-process trial is not a matter affected by the “appeal” under Rule 241(a), SCACR. This is true for several reasons. Only a properly taken appeal—*i.e.*, an appeal taken where there is in fact a right of immediate appeal, affects jurisdiction—and then only as to matters

affected by the appeal. If an appeal is not properly taken, it is a nonevent insofar as the continued progress of the case in the Circuit Court is concerned. *See S.C. Pub. Serv. Auth. v. Arnold*, 287 S.C. 585, 340 S.E. 2d 535 (1986) (“Where an order is interlocutory, and thus not appealable, the notice of intent to appeal does not transfer jurisdiction to this Court, nor does it stay proceedings in the lower court.”).

The “Appeal” is not properly taken. Horton *never* filed its Notice of Appeal with the Circuit Court in violation of Rule 203, SCACR. Therefore, the Circuit Court still retains jurisdiction of this entire case. Additionally, Horton’s Notice improperly appeals five interlocutory orders: Certification, Decertification, Discovery, and Trial Plan/Bifurcation and untimely appeals this Court’s grant of Summary Judgment as to Third-Party Defendant IBP. The last, and final, order Horton includes in its Notice – the Circuit Court’s grant of Summary Judgment as to Third-Party Defendant Gale – does not affect the mode of the trial **which is in process**. As a result of the foregoing, this appeal is not proper, and, consequently, the appeal does not affect the Circuit Court’s ability to proceed with the trial. Even if the appeal *were* proper, Judge Sprouse has properly determined that the long-scheduled trial of this case can and should go forward without delay, and most respectfully, whether by denying the Petition and/or by granting the Instant Cross-Motion, under both the governing law and guiding principles of equity, this Court should confirm the propriety of Judge Sprouse’s determination and decline Horton’s invitation to needlessly halt the in-process trial of this four-year old case.

PERTINENT LAW AND STANDARD OF REVIEW

Rule 205, SCACR, explains the effect an appeal has on a Circuit Court's jurisdiction:

Upon the service of the notice of appeal, the appellate court shall have exclusive jurisdiction over the appeal; the lower court or administrative tribunal shall have jurisdiction to entertain petitions for writs of supersedeas as provided by Rule 241. Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal.

Rule 205, SCACR (emphasis added); *see* Rule 241(a), SCACR (“The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.”).

Rule 241 furthers this point, clarifying what it means for the Appellate Court to have, as Rule 205 puts it, “exclusive jurisdiction over the appeal[...].” “As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision.” Rule 241(a) (emphasis added). “This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, ... appellate court, or judge or justice of the appellate court.” *Id.* (emphasis added). **including the authority to enforce any matters not stayed by the appeal.**” *Id.* (emphasis added).

Thus, even where an appeal is properly taken and the automatic stay applies, the Circuit Court has jurisdiction over matters not affected by the appeal and, moreover, is duly empowered to lift any automatic stay imposed by the “General Rule” of Rule 241(a), SCACR.

Furthermore, and although completely unmentioned by Horton, the mere fact that a notice of appeal is filed/served does not necessarily have any jurisdictional consequence at all. Only a properly taken appeal, *i.e.*, an appeal taken where there is in fact a right of immediate appeal, affects jurisdiction-and then only as to matters affected by the appeal, as explained above. If an appeal is not properly taken it is a nonevent insofar the continued progress of the case in the trial court is concerned. *See S.C. Pub. Serv. Auth. v. Arnold*, 287 S.C. 584, 340 S.E.2d 535 (1986) (“Where an order is interlocutory, and thus not appealable, the notice of intent to appeal does not transfer jurisdiction to this Court, nor does it stay proceedings in the lower court.”).

ARGUMENT

I. Horton is Not Entitled to a Writ of Supersedeas.

First, Horton failed to make the requisite showing on a critical element for this Court to issue a writ of supersedeas. Our appellate rules expressly require supersedeas applications be brought *before the lower court*, unless extraordinary circumstances exist and make it impracticable to do so. Rule 241(d)(1), SCACR (stating “[e]xcept where extraordinary circumstances make it impracticable, an application for an order... for supersedeas must first be made to the lower court...which entered the order or decision on appeal.”).

Horton never asked the Circuit Court for a writ of supersedeas; it instead applied for supersedeas to the Court of Appeals. *See* Rule 241(d)(4)(C), SCACR (stating that a petition “shall contain... a showing that an application for this relief was made to the lower court...and was unjustifiably denied...”). In addition, Horton made no mention of extraordinary circumstances and made no attempt to demonstrate such a circumstance would have made it impracticable to apply for supersedeas to the Circuit Court. This was Horton’s burden, which it failed to carry. Horton’s Petition fails as a matter of law independently on each of these grounds.

Second, a writ of supersedeas is a remedy which may *only* be sought when Rule 241(a) does not apply. Here, Rule 241(a) applies, because the two summary judgment orders on which the supersedeas are based do not affect the jurisdiction of the Circuit Court to continue with the trial. *See id.* (“**The lower court ... retains jurisdiction over matters not affected by the appeal** [..]”) (emphasis added). Rule 241(c), SCACR, clearly lays out *when* a petition for a writ of supersedeas may be made:

In a case subject to an **exception**, any party may move for an order imposing a **supersedeas of matters decided in the order, judgment, decree or decision on appeal** after service of the notice of appeal.

Id. (emphasis added). The “exceptions” mentioned in 241(c) are detailed in Rule 241(b), which are, in effect, carve-outs of the “general rule” enunciated in Rule 241(a) (hereinafter “General Rule”). When a notice of appeal is filed, the General Rule is that a notice of appeal operates to stay the matters decided in the appealed order, judgement, decree, etc., unless lifted by the lower court. The General Rule goes on to clarify that the lower court *retains* jurisdiction over matters which are not affected by the appeal. *See generally* Rule 241(a), SCACR. The carve-outs listed in 241(b) are “exceptions” in that there is no automatic stay in certain circumstances, *i.e.*, the judgement, decree, order, etc., must take effect during the pendency of the appeal. In such a circumstance, and in such a circumstance **only**, does the legal mechanism known as “supersedeas” come into play. *See* Rule 241(c), *supra*.

To use one of Horton’s cited cases as an example, the South Carolina Supreme Court granted a writ of supersedeas in *Matter of Decker*. 322 S.C. 212, 214, 471 S.E.2d 459, 461 (1995). What Horton does not explain in its Petition is that, before doing so, the Court had to first find that that the General Rule did not apply. It did so:

Regarding civil contempt, this Court implicitly recognized in *Brunson v. Brunson*, 91 S.C. 411, 74 S.E. 928 (1912), that civil contempt is not automatically stayed. Therefore, we conclude that an order holding a person in civil contempt is not automatically stayed by the taking of an appeal.

Id. The same is true for *Kuhn v. Electric Manufacturing & Power Co.*, in which a pre-South Carolina Appellate Court Rules Supreme Court entertained a supersedeas on an *injunction*, which is now called out as an exception by Rule 241(b)(8). 92 S.C. 488, 75 S.E. 791, 791 (1912); *see also Andrews v. Sumter Commercial & Real Estate Co.*, 87 S.C. 301, 69 S.E. 604, 606 (1910) (entertaining a supersedeas on an injunction).

Here, Horton’s Petition concedes in the first sentence that it seeks “a supersedeas to delay the trial of this case pending final decision of its appeal of two orders granting summary judgment.”

(Pet., at 6). Judge Sprouse correctly found that those two appealed orders do not affect the instant and in-process trial of this case:

Furthermore, the defendant can appeal those rulings of summary judgment and it would not affect the ability of the case to go forward and in this situation, it would not affect the claims against the other parties. And under the language of Rule 241, the Court can continue to try cases that are not affected by the appeal.

(See Pre-Trial Hrg. Trans., Sept. 1, 2023, at 26:11-16, excerpts attached hereto as Exhibit “B”).

II. *Horton Cannot “Coattail” or “Bootstrap” Interlocutory Orders to a Summary Judgment Order for the Express Purpose of Delaying a Trial Which is Not Affected by the Summary Judgment Order Being Appealed.*

Horton averred in the Circuit Court that receipt of two final orders on summary judgment allows it to “coattail [...] the discovery order that affects class certification to those orders.” (See Ex. B, at 14:22-25). “Coat tailing” or “bootstrapping” of interlocutory orders to those which are immediately appealable is not as broad as Horton suggests. In fact, the case law only supports “appendage” of interlocutory orders not immediately appealable when (1) there is an underlying issue on appeal properly before the Court, and (2) the additional issue sought to be “appended” to the properly appealable issue is a “companion issue” which, if ruled upon, would “avoid unnecessary litigation.” See *Morris v. Anderson Cnty.*, 349 S.C. 607, 610, 564 S.E.2d 649, 651 (2002) (declining to bootstrap); see also *Brown v. Cnty. Of Berkeley*, 366 S.C. 354, 362, 622 S.E.2d 533, 538, fn. 5 (2005) (declining to bootstrap).

The Court has found narrow circumstances justify “bootstrapping” when, for example, the resolution of the appealable issue would moot the non-appealable, appended issue. See, e.g., *Ferguson v. Charleston Lincoln Mercury, Inc.*, 344 S.C. 502, 544 S.E. 2d 285 (Ct. App. 2001); aff’d, 349 S.C. 558, 564 S.E.2d 94 (2002) (following the grant of summary judgment on the merits which rendered the class certification issue moot, the Supreme Court held the class certification issue could be “appended” to the underlying appealable issue, grant of summary judgment, because (1) the appealable issue and additional issue arose in a single order, (2) where the additional issue’s

operation effected a motion to strike, and thus, could permissibly be reviewed on appeal just as a motion to strike, and (3) a ruling on appeal of the additional issue contained in the interlocutory order will avoid unnecessary litigation).

Unlike the narrow circumstances where appending an interlocutory order to a properly appealable issue was permitted, in the instant matter, no unnecessary litigation will be avoided. Instead, unnecessary litigation would be created.¹ The jury has been seated and the trial is in process. Furthermore, although Horton mentions that the appended, non-appealable order must be companion to the properly appealable order, it does not attempt to show that such a situation exists here (because it cannot—the appealed summary judgment orders concern a narrow issue of contractual indemnity with Third-Party Defendants brought into the case by Horton, issues which at best would be addressed in Phase II of the trial and not involving Plaintiff). Instead, Horton encourages the Court to take up the interlocutory orders because they concern “novel issues.” (Pet. at 9). That is not the standard enunciated by this Court or the South Carolina Supreme Court. Instead, Horton is citing to the supersedeas language from *Matter of Decker*, which is distinguished in Section I, *supra*.

III. Horton’s Appeal is Otherwise Deficient and Should be Dismissed.

Horton supposedly appeals five orders; however, Horton has not yet filed its Notice of Appeal with the lower court as required by Rule 203(d)(1)(A), SCACR: “[T]he notice of appeal shall be filed with the clerk of the lower court and the Clerk of the Court of Appeals.” *Id.* (emphasis added). Having not followed the Rule, Horton’s Notice of Appeal is deficient, leaving the circuit court with jurisdiction over this entire case.

¹ See *Tillman v. Tillman*, 420 S.C. 246, 251, 801 S.E.2d 757, 760 (Ct. App. 2017) (“While we can review an interlocutory order joined with an appealable issue, [...] **to do so here would work a false efficiency**, given the lawsuit from which the appeal was spun off remains to be heard in circuit court, along with Appellant’s formal motion to amend.”) (internal citations omitted) (emphasis added).

Even if Horton properly filed its Notice of Appeal with the Court, four (4) of these orders are not final orders, and the one that is a final order does not affect the mode of trial. To wit:

1. Class Certification. The Circuit Court’s Class Certification Order, filed on January 27, 2021, is an interlocutory order. *See Arnold, supra; see also Knowles v. Standard Sav. & Loan Ass’n*, 274 S.C. 58, 261 S.E.2d 49 (S.C. 1979). Judge Sprouse agreed. (*See Ex. B at 26:19-25*) ([Decertification] was originally decided by the Court back before I got involved in it. I think Judge Maddox issued the original [Certification] order, and then I heard the motions for [de]certification. This is an interlocutory matter, and I’ve read the Ferguson case that was handed up, and I do not find this is a matter that is proper to put off this case or stay this case.”). Moreover, Horton did not appeal this Order until this week, and it has no “nexus” or “companionship” to the appealed summary judgment order.

Additionally, the Class action mechanism worked, enabling Horton to consummate settlements, during mediation and pre-trial, with its Third-Party subcontractors. In fact, by the time of trial, Horton had used Plaintiff’s Class Certification Order (note there was no Third-Party class certification) to settle its claims against 90% of its subcontractors. (*See Mediators Report, July 6, 2023, attached hereto as Exhibit “C”*).

2. Class Decertification. The circuit court’s Decertification Denials² are similarly interlocutory Orders and have no “nexus” or “companionship” to the appealed summary judgment order. Judge Sprouse agreed. (*See Ex. B at 26:17-25*) (“decertification – now the decertification motion, again, I find this is an interlocutory matter.”).
3. Order Limiting Discovery and Amended CSO Orders. Both Orders are interlocutory, and Horton received notice of their entry more than 30 days ago, on May 8, 2023, and February 15, 2023, respectively. These orders and have no “nexus” or “companionship” to the appealed summary judgment order. Judge Sprouse agreed. (*See Ex. B at 23:4-5, 9-10, 18-20*) (“There have been multiple orders in this case regarding discovery . . . Discovery, except for under extremely narrow circumstances is an interlocutory issue . . . I find that this is a matter that is interlocutory that should not be coattailed, I believe was the word used, to granting summary judgment.”).
4. Trial Plan/Bifurcation. The circuit court entered its Trial Plan/Bifurcation Order on August 17, 2023. Horton did not file its Motion to Reconsider until eleven (11) days later, on August 29, 2023, due to alleged “technical issues”; however, if timely filed, the Circuit Court has not ruled on Horton’s reconsideration of this ruling which means that Horton’s appeal is premature – it cannot appeal from a non-existent, final ruling. Additionally, the issue of “bifurcation” has no “nexus” or “companionship” to the appealed summary judgment order. Judge

² The Circuit Court entered its Original Order Denying Decertification on July 19, 2023, and subsequently denied Horton’s Motion to Reconsider this Ruling on July 28, 2023.

Sprouse agreed. (*See* Ex. B at 23:21-22) (“Now, ordinarily, bifurcation is not [a]n appealable issue. That’s in the *Flagstar* case.” And distinguishing between the facts of the *Morrow* case argued by Horton).

Even if the Circuit Court were to have ruled on the trial plan/bifurcation issue, *Flagstar v.*

Royal Surplus Lines makes it clear that bifurcation does not affect the mode of trial:

An order granting bifurcation of issues for trial simply does not strike to the heart of this Court's traditional analysis of claims of denial of a mode of trial. That analysis proceeds by determining whether or not a party is erroneously denied a trial by jury in a law case, or is erroneously required to proceed before a jury in an equity case.

In this case, no party is denied the right to a trial by jury. Moreover, after trial, Royal will be free to advance on appeal that the trial judge abused his discretion in ordering bifurcation and that it has thereby been effectively deprived of a fair and/or fully informed fact finder. **An abuse of discretion, if any, by the trial court in its ruling can be corrected at that time.** . . . To hold otherwise would require this Court to, inter alia, predetermine the admissibility of evidence in advance of trial, to pass upon matters of pretrial discovery and to engage in “piecemeal litigation.”

In short, trial of all issues in the case in a single proceeding is not a mode of trial to which the parties are entitled as a matter of right. Any abuse of discretion on the part of the trial court in severing issues for trial may be appealed after the trial, and after full development of the evidence. We therefore hold that an order granting separate trials of issues in a contract case is not immediately appealable, either permissibly or mandatorily, pursuant to S.C. Code Ann. § 14–3–330(2) (1976). This ruling also disposes of the second issue of whether the portion of the order bifurcating discovery is immediately appealable. *See also Patterson v. Spector Broadcasting Corp.*, 287 S.C. 249, 335 S.E.2d 803 (1985) (discovery orders are not directly appealable).

341 S.C. 385, 533 S.E.2d 331 (2000) (some internal citations omitted) (emphasis added).

5. Grant of Summary Judgment as to IBP. Horton’s appeal of the circuit court’s Order Granting IBP Summary Judgment is also premature – the Circuit Court has not yet ruled on Horton’s reconsideration of this ruling, and Horton’s reconsideration was untimely filed in the first instance.
6. Grant of Summary Judgment as to Gale. This is the only Order that Horton timely appeals (although its Notice is deficient for other reasons as explained above); however, this Order does not affect this case. Plaintiff admittedly has no claim against Gale – it has been dismissed from this bifurcated case. Horton’s appeal only relates to its contractual indemnity claims against Gale which have no bearing on Plaintiff’s claims against Horton and do not otherwise affect either phase of the trial of this case, as Judge Sprouse explained:

[T]he Court would note the following[:] summary judgment was granted in this case because the only issue between the defendant these third-party defendants was that of contractual indemnity. It

was a provision of the contract in which [Horton] alleges the third-party defendant is bound to indemnify them for the sole negligence of the [third-party] defendant because there simply was no evidence in the record of any defective or negligent work by any of these third-party defendants. That was conceded at the hearing by the defense. There simply was no evidence and the Court found that the provisions of that contract indemnifying the party for the sole negligence of that party was not clear and unequivocal in the Concord and Cumberland standard. These third-party defendants are not similarly situated to other third-party defendants in that there is some evidence in the record of negligent work or defective work by these other parties. That's a jury question. And it also changes the nature of the indemnification issue, so they are not similarly situated.

(*See* Ex. B, at 25:16-26:10).

7. Motions to Reconsider Denials of other Summary Judgments. It is hornbook law in South Carolina that denials of summary judgment motions are also interlocutory rulings not ripe for appeal until final judgment.

The only timely filed order on appeal—which is still deficient for the reasons enunciated above—does not affect the issues in the **in-process** trial of this case; therefore, the Circuit Court retains jurisdiction over this trial. Furthermore, none of the admittedly interlocutory orders are “companion to” or otherwise have a sufficient “nexus” to the appealed summary judgment Order, and therefore cannot be bootstrapped or appended thereto.

CONCLUSION

Over 500 jurors were summoned to appear on September 5, 2023. The Anderson County Clerk of Court made special arrangements to hold jury selection at the Anderson County Civic Center to accommodate the jurors, attorneys, and parties. The parties selected a jury, gave opening statements to the jury, and the jury has thus far heard a full day of testimony from Horton's expert, Larry Steven Moore, and will hear from additional witnesses today, September 7, 2023. An entire month has been set aside for this long-awaited trial. Granting the relief Horton seeks would not prevent a miscarriage of justice; rather, it would cause one.

For the reasons set forth above, this Court should not further delay the trial of this case on account of the instant Petition and/or pending appeal taken by Horton. Plaintiff/Respondent respectfully requests that this Court deny Horton's Petition and/or dismiss Horton's appeal, grant limited remand, or otherwise confirm that the trial of this case may continue.

Respectfully submitted,

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September 7, 2023

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Plaintiff Natalie Zitek, by and through her undersigned counsel, hereby stipulate that she and the Class are not making defective construction claims for the below components in this case:

1. Batt and blown insulation;
2. Gutters and downspouts, garage doors, and garage door openers;
3. Improperly installed front doors and front door hardware;
4. Improperly installed roofs, except as to the intersections with other components;
5. Improperly installed hardi and vinyl siding, except as to the failure to check or repair the substrate, including WRB, prior to installation;
6. Improperly installed wall framing, except as it relates to truss lift, window/doors, and squeaky floors; and,
7. MEP issues (which are settled);

Provided, however, work relating to the foregoing may be required because of defective work by other parties. Nothing herein shall in any way limit the type or content of evidence put on by Plaintiff.

Dated this 20th day of July, 2023.

WE SO STIPULATE

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STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

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and on behalf of all others
similarly situated,

PLAINTIFF

-vs-

D.R. Horton, Inc., Jane Doe
#1-10; and, John Doe #1-50

DEFENDANTS

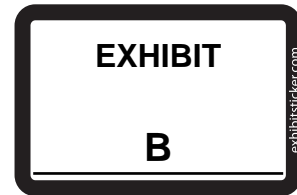
DR Horton, Inc.,

THIRD-PARTY PLAINTIFF

vs

AJ Landscaping & Grading, LLC
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LCC; Alpha Omega Construction
Group, Inc; American Concrete
And Precast, Inc., a/k/a ACP
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Brand-Vaughan Lumber Co., Inc.
BKF Builders, Inc.; Builders
Designhouse, LLC; BMC East,
LLC D/B/A Coleman Floor, LLC;
Builders Firstsource
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Painting, LLC; CBU Enterprises
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Inc.; DOM Group, LLC; Ferguson
Enterprises, Inc.; Five Star
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IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT
CASE NO: 2019-CP-04-1942



TRANSCRIPT OF RECORD

September 1, 2023
ANDERSON, SC

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Brandon Paul Jones, Esquire
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James Bryson, Esquire
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Willow Tree

Hugh Gallagher, Esquire
Attorney for BKF Builders, Inc.

Alexander Mende, Esquire
Attorney for Aaron Peris

Jonathan Clark, Esquire
Attorney for Harrelson Painting, NM Alex, Caryl
Mechanics II, Inc., and Alpha Omega

John Crawford, Esquire
Attorney for DR Horton

1 those is lost. We had to appeal those -- we had to appeal
2 those orders. We did not choose the timing of the motions for
3 summary judgment, and we did not choose the timing of Your
4 Honor's grant of those motions for summary judgment. We simply
5 acted within the 30-day window that we are given to file the
6 notice of appeal. And given the number of litigants in this
7 case and the requirement that the notice of appeal be served
8 on all respondents, we wanted to be sure that we didn't miss
9 anybody and that we did it giving ourselves a little bit of
10 time to amend it, if necessary.

11 So, we didn't -- we didn't do this, Your Honor, in order
12 to try to delay the trial. We did it because the rule
13 requires us to do it within 30 days, and that's what we did.
14 The motions for summary -- the appeal from the motions on
15 summary judgments is an appeal from a final order. There is
16 no -- there can be no dispute about that. The appeals that we
17 appended to that may or may not be interlocutory orders. And
18 the reason I say that is that there is case law that says that
19 discovery orders are generally interlocutory.

20 But as in every situation, there is an exception to that
21 rule. And one of those exceptions is set forth in a case of
22 the state Supreme Court, authored by Jean Toal, Chief Justice
23 Jean Toal. And what she said is that if there is a discovery
24 order that affects a substantial right, it can be appealable
25 and that was a case that was a discovery order that also

1 affected class certification. And what she said in that case
2 is that the discovery order restricting discovery was so
3 limiting that it, in effect, acted as an injunction, which is
4 appealable. Now, is every discovery order in the nature of an
5 injunction so restrictive that it is appealable, I don't know
6 the answer to that.

7 There is a recent case by -- in a recent case by Gary
8 Hill, when he was on the Circuit Court -- I'm sorry, the Court
9 of Appeals, now in the Supreme Court, that said, wait a
10 minute, not every -- not every discovery order that's
11 restricted is necessarily in the nature of an injunction, and
12 he is probably right about that. We think that this discovery
13 order restricting discovery is possibly -- in fact, likely,
14 but maybe not certainly, appealable. And that's why we're
15 taking it up, because if we don't take it up now, we may be
16 completely foreclosed from doing it.

17 THE COURT: Well, let me just stop you. What order are
18 you talking about?

19 MR. MULLER: That was the discovery order that restricted
20 discovery to either 10 or 20 of the absent-class plaintiffs.

21 THE COURT: But that order was issued months ago.

22 MR. MULLER: That order was issued a long time ago, but
23 because we now have final orders that are appealable, we can
24 coattail that -- we can coattail the discovery order that
25 affects class certification to those orders. That's what the

1 Bell has the same scope of work as Chip's client and Rett's
2 client that you granted the summary judgment motion for. And
3 as Justin said earlier, the installation has been completely
4 removed from the case. He's made a statement to the Court
5 it's not a part of the case, he's filed a response to the
6 request to admit. It's not part of the case, so I agree with
7 Justin on this issue, and I just want to bring that to the
8 Court's attention. Thank you, Your Honor.

9 MRS. WOOTEN: Well, Your Honor, now I feel I have to
10 respond to that. The problem is, with the summary judgment
11 order that you issued with IBP, there is a ruling in there
12 that our contract is not clear and unequivocal as to
13 contractual indemnity. All these parties are still part of
14 this case, and that's what the final ruling was. And that's
15 why it is immediately appealable, and that's one of the things
16 we're seeking that has to do with issues that are still in
17 this case.

18 THE COURT: Okay. Thank you, Mrs. Wooten. All right.
19 We will be in recess for a little while.
20 (Brief recess.)

21 THE COURT: Thank you, thank you. Be seated please. All
22 right, let's go back on the record. Counsel, I have reviewed
23 the cases that the parties have cited and I will say, this is
24 a complicated case. It is designated a complex case, 2019
25 case. I have been involved in it for a little over a year.

1 Multiple orders have been issued and I am going to deal with
2 each one of these in order, I believe, of the arguments,
3 although I may take one of order. But the first is that of
4 discovery. There have been multiple orders in this case
5 regarding discovery. The initial one was in November of last
6 year setting the parameters and dates of discovery. There was
7 another order issued in the winter, and then that order was
8 extended. We have a February order, and that was extended.
9 Discovery, except for under extremely narrow circumstances is
10 an interlocutory issue. The Eldridge case was handed up to
11 the Court in which an injunction becomes an appealable --
12 discovery becomes an appealable issue when it constitutes an
13 injunction. That's very narrow circumstances.

14 The Court would note that if that was considered an
15 injunction an appealable issue, that should have been appealed
16 back in February when the order was issued. The test is
17 whether it affects the substantial right. This is something,
18 again, I find that this is a matter that is interlocutory that
19 should not be coattailed, I believe was the word used, to
20 granting summary judgment.

21 The other issue is bifurcation of the case. Now,
22 ordinarily, bifurcation is not on appealable issue. That's in
23 the Flagstar case. Now, when we talk about these other cases,
24 the Morrow case sets forth also the standard that it affects
25 the fundamental right -- it uses the term substantial right.

1 Now, that case involved a nursing home and that case is
2 distinguished from our present case in that it broke up the
3 Plaintiff's claims. The Plaintiff in that case brought suit
4 and had different claims and it broke up the actual
5 Plaintiff's claims. This is not the case in our present case
6 and the standard -- and I quote the case. It says effects of
7 this order is to prevent the Morrows from being architects of
8 their own complaint and deprives them of bringing their case
9 against the defendant of their choosing. The right of the
10 Plaintiff to choose her defendant is a substantial right and
11 it was immediately appealable. That's not the situation here.

12 The Plaintiff did not bring suit against to the third-
13 party defendants, and furthermore, the right of the defendant
14 to have a jury trial in this matter is unaffected by this
15 Court's order. The Court did not bifurcate the entire case.
16 The Court merely bifurcated the phases of the case. The
17 issues, the same jury will hear the Plaintiff's case that will
18 hear the defense's case against the third-party defendants and
19 the fourth-party defendants against any fifth-party defendants
20 that may be still in the case. While Phase 2 would be a
21 simplified proceeding in that liability would have to had been
22 established in the first phase, it becomes merely a matter for
23 the jury to determine what liability any third-party
24 defendants would have to the defendant and the fourth-party
25 issues as well.

1 But it's a simplified proceeding with the same jury, so
2 it would not be necessary for an entirely new trial to take
3 place and no one would be prejudiced by that. The Court's
4 order does not take away any party's rights to have a jury,
5 the same jury, decide the issues in this case. And I would
6 note, and we're going to hear this in a minute -- the Court
7 reserved the right to modify this trial plan should there be
8 developments. And a number of parties have settled, and I had
9 the Clerk come and ask you who was still in the case.
10 Certainly, that takes some people out of it. And it affects
11 how we do groups and how we do strikes, and I'm going to hear
12 from you on that.

13 Now, let's go down to the next issue, the granting of
14 summary judgment. Now, it is correctly stated by counsel for
15 the defense that that is an immediately appealable issue.
16 That is correct. Now, however, the Court would note the
17 following, summary judgment was granted in this case because
18 the only issue between the defendant and these third-party
19 defendants was that of contractual indemnity. It was a
20 provision in the contract in which the defendant alleges the
21 third-party defendant is bound to indemnify them for the sole
22 negligence of the defendant because there simply was no
23 evidence in the record of any defective or negligent work by
24 any of these defendants -- these third-party defendants. That
25 was conceded at the hearing by the defense. There simply was

1 no evidence and the Court found that the provisions of that
2 contract indemnifying the party for the sole negligence of
3 that party was not clear and unequivocal in the Concord and
4 Cumberland standard.

5 These third-party defendants are not similarly situated
6 to the other third-party defendants in that there is some
7 evidence in the record of negligent work or defective work by
8 these other parties. That's a jury question. And it also
9 changes the nature of the indemnification issue, so they are
10 not similarly situated.

11 Furthermore, the defendant can appeal those rulings of
12 summary judgment and it would not affect the ability of the
13 case to go forward and in this situation, it would not affect
14 the claims against the other parties. And under the language
15 of Rule 241, the Court can continue to try cases that are not
16 affected by the appeal.

17 Now, I would say, that the other issues, decertification
18 -- now the decertification motion, again, I find this is an
19 interlocutory matter. This matter was originally decided by
20 the Court back before I got involved in it. I think Judge
21 Maddox issued the original order, and then I heard the motions
22 for decertification. This is an interlocutory matter, and
23 I've read the Ferguson case that was handed up, and I do not
24 find this is a matter that is proper to put off this case or
25 stay this case. I would also note that there are motions,

1 multiple motions for reconsideration pending where an appeal
2 is filed with the motion still pending, which I would note
3 that for the record. And I would also talk about the Tillman
4 case. That's handed up. That is a Family Law case. It
5 affects a case involving custody and visitation rights, and
6 there was a question of what issue had been appealed. The
7 party appealed the custody order but did not appeal the
8 visitation, and it was a situation where the rights of parents
9 regarding children and everyday life regarding the children
10 were being affected. That's a completely different situation
11 than what we have in this case.

12 So, where do we go from here? This case is four years
13 old. There has been vast amounts of time and resources spent
14 on discovery and preparation of this case. We've had multiple
15 hearings on this case. The Clerk and I have met many times.
16 I had a meeting with her entire staff. Over 500 jurors have
17 been summoned to appear. Arrangements had to be made for the
18 Anderson Civic Center to accommodate these -- we can't get all
19 the people, if they all show up, into this courtroom.
20 Arrangements had to be made with the sheriff's department, the
21 County government, substantial resources have been placed into
22 this case.

23 So, for that reason, I would rule that this matter is not
24 stayed and that we are going to proceed in the case. And the
25 Defense's arguments are noted for the record. And if the

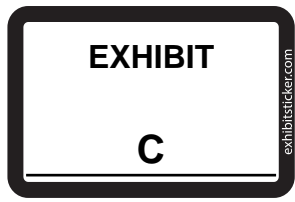
1 Court of Appeals rules otherwise, that is their prerogative,
2 but I'm going to find that we are going to proceed. So, at
3 this point, I want to hear from the parties regarding the
4 trial plan. Now, again, I reserved the right to change to the
5 trial plan.

6 This is -- this is my concern. I don't want 30 lawyers
7 questioning every witness in the Plaintiff's case. That would
8 unnecessarily bog down the case. Juror strikes is another
9 issue, is one reason why I chose the group method. However,
10 even the third-party defendants in Phase 2 would still --
11 they're still having input in the case, and I believe the
12 Plaintiff had objected, saying that gives them
13 disproportionate influence over the case. And then there's
14 objections on the other side that it's not sufficient, that
15 everything ought to be according to normal strikes and normal
16 procedure.

17 My concern is we have four weeks to the try the case. We
18 have to get everything done in orderly fashion. I have gone
19 through the witness lists of the parties, and I will -- let me
20 get my -- the number of witnesses that I came up with, based
21 on the parties that have submitted them -- now, again, I got
22 witness lists from 15 parties in the case. Fifteen different
23 parties submitted a list, and the aggregate of witnesses that
24 have been listed is 272. Now, I don't know how many of those
25 are actually going to be called. A lot of those are class

STATE OF SOUTH CAROLINA)
)
 COUNTY OF ANDERSON)
)
 Natalie Zitek, individually, and on behalf of)
 all others similarly situated,)
)
 Plaintiffs,)
)
 v.)
)
 D.R. Horton, Inc.)
)
 Defendant.)
)
)
 D.R.Horton, Inc.)
)
 Third Party Plaintiff)
)
 v.)
)
 AJ Landscaping & Grading, LLC, et al)
)
 Third Party Defendants

IN THE COURT OF COMMON PLEAS
 FOR THE TENTH JUDICIAL CIRCUIT
 CASE NO.: 2019-CP-04-1942



MEDIATION RESULTS REPORT

(THIS FORM TO BE COMPLETED BY THE MEDIATOR WITHIN 10 DAYS OF CONCLUSION OF THE CONFERENCE, WHETHER OR NOT AGREEMENT WAS REACHED BY THE PARTIES.)

1. Mediated settlement conference was held on June 5-8, 2023 with persons attending in person and by Zoom. Negotiations are ongoing. This is an interim mediation report
2. As a result of these conferences, this case should be considered *(please check one)*:
 - () Fully Settled *(please check one)*:
 - () by Consent Judgment, to be filed by _____ or,
 - () by Voluntary Dismissal, to be filed by _____
 - (X) Partially Settled, with agreement of the parties on the following issues:
(attach separate sheet, if necessary):

The following partial settlements were reached:

The Plaintiff settled all Mechanical, Electrical and Plumbing (MEP) issues through an issue release. The following 3rd and 4th party defendants are released from the case by this issue release: Longs Heating & Air; Caryl Mechanical; Fredy’s HVAC; Victoriano HVAC, Jesus Perez, Zenon Gutierrez, Soto HVAC and Nicholas Soto

D. R. Horton settled with several 3rd and 4th party defendants. The following 3rd and 4th party defendants are released for the case based on their settlements with DR Horton: **All Pro Textures; ACP Concrete Materials; A-Z, Inc.; Cortes Painting; CBU Enterprises; NB Construction; Brand Vaughn Lumber; Alpha Omega Construction; Bonilla Construction; Denny Concepcion; Geovany Liva/GSF Renovations; Henry Construction; Jiminez Contractors; Nataren Construction; RJ Commercial Construction; RJ Quality/Juan Jiminez; Safeway Roofing; Santos Metal Roofing; SL Commercial; Torres Quality; AHR Construction; Jose Hernandez; JJS Commercial Construction; Brother Contractors; A Grade Above; AJ Landscaping; Kings Landscaping; Manale Landscaping; Willow Tree Landscaping; Sodfather/Landscape Construction; Rodney Howard Grading; Landshapers; Alpha EMC;**

Negotiations are continuing with all other parties.

() At an impasse.

(X) In need of further mediation. (I am willing and will continue to mediate this case further).

() Continued (Date) _____

- 3. Plaintiffs X were/ _____ was not present.
- Defendants X were/ _____ was not present.
- Third-Party Defendants X were/ _____ was not present

4. Other participants were:

- X attorneys for plaintiffs - Justin Lucey and Dabny Lynn, Esquire
- X attorneys for defendant DR Horton – John Crawford and Jason Imhoff, Esquire
- X attorneys for over 100 3rd and 4th party defendants
- X Representatives for insurance carriers

Guardian ad litem _____

experts _____

5. This case was co-mediated with: _____

6. Choice of the mediator was by:

Stipulation of Mediator Selection

Court Order.

Date: July 6, 2023

Signature of Mediator:



Print Name of Mediator

Franklin J. Smith, Jr.

RECEIVED

Sep 07 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

Hon. R. Scott Sprouse, Circuit Court Judge

CASE NO. 2019-CP-04-01942

Natalie Zitek, individually, and on behalf of others
similarly situated..... Plaintiff,

v.

D.R. Horton, Inc., Jane Doe #1-10; and John Doe #1-50,Defendants,

D.R. Horton, Inc.,Third-Party Plaintiff,

vs

A&J Framing, Inc.;

A-Z, Inc.;

AJ Landscaping & Grading, LLC, A/K/A AJ Landscaping & Grading, LLC;

Allpro Textures, LLC;

Alpha E.M.C.;

Alpha Omega Construction Group, Inc.;

American Concrete And precast, Inc.; A/K/A ACP Concrete, Inc.;

Atlanta Floor Designs Center;

A Grade Above Others, LLC;

BFK Builders, Inc.;

BMC East LLC D/B/A Coleman Floor, LLC;

Brand-Vaughn Lumber Co, Inc.;

Bravo Carpenters, Inc.;

Builders Designhouse, LLC;

Builders FirstSource Southeast Group, LLC, A/K/A Builders FirstSource, Inc.;

Builders Services Group, LLC F/K/A Masco Contractor Services Central Inc. F/K/A Gale Industries, Inc. D/B/A Gale Contractor Services;

Cannaday Siding & Gutter, Inc.;

Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.;

CBU Enterprises, Inc.;

Cortes Painting, LLC;

CPI Security Systems, Inc.;

Dom Group, LLC;

Dupree Plumbing Company, Inc.;

Ferguson Enterprises, Inc.;

Five Star Construction Inc.;

Five Star Foundations, LLC;

Galloway-Bell, Inc. A/K/A Galloway-Bell Inc. II;

GBS Building Supply – Us LBM, LLC, F/K/A/GBS Building Supply, Inc.;

General Shale Brick Inc.;

Get Floored, LLC;

Greener Pastures, Inc., A/K/A Greener Pastures of Aiken, LLC;

Installed Building Products, LLC A/K/A Installed Building Products II, LLC;

IBP Asset, LLC D/B/A Blue Ridge Building Products;

JLS Masonry, Inc.;

Kings Landscaping, LLC;

L&M Electric, Inc.;

Lade-Danlar, Inc.;

Landshapers, LLC;

Lansing Building Products, Inc.;

Long Heating & Air Conditioning, Inc.;

M&L General Construction, LLC, A/K/A M&L General Construction, Inc.;

M&L Reyna Construction, LLC;

M&M Foundations, LLC;

Manale Landscaping, LLC;

MJ Cowboys, LLC; Nazareth
Builders, LLC; NB
Contractors, LLC; Poinsett
Development, LLC; Poinsett
Homes, LLC;

P&L Enterprises, LLC;

P&T Construction, Inc., A/K/A P&T Construction, Inc.;

Probuild Company, LLC A/K/A Probuild Holdings, Inc.;

Rite Rug Co.;

Rodney Howard Grading, Inc. A/K/A Rodney Howard Grading Co.;

Sandlapper Concrete, LLC;

Silver Line Building Products Corporation;

Sodfather Inc., Landscape Contractors; Stock
Building Supply, LLC;

Topbuild Home Services., Inc., A/K/A Gale Contractors Service; Tucker
Materials, Inc., A/K/A Gypsum;

UTM Enterprises, Inc;

and
Willow Tree Landscaping, Inc Third-Party Defendants,

and

Aaron D. Peris;
Harrelson Painting, LLC;
Huttig Building Products; et alFourth and Fifth-Party
Defendants and Plaintiffs,

D.R. HORTON, INC.....Appellant/Petitioner.

Natalie Zitek, individually, and on behalf of others similarly
situated;
Jane Doe #1-10; and John Doe #1-50; A&J Framing, Inc.;
A-Z, Inc.;
AJ Landscaping & Grading, LLC, A/K/A AJ Landscaping & Grading, LLC; Allpro Textures, LLC;
Alpha E.M.C.;
Alpha Omega Construction Group, Inc.;
American Concrete And precast, Inc.; A/K/A ACP Concrete, Inc.; Atlanta Floor Designs Center;
A Grade Above Others, LLC; BFK Builders, Inc.;
BMC East LLC D/B/A Coleman Floor, LLC; Brand-Vaughn Lumber Co, Inc.;
Bravo Carpenters, Inc.; Builders Designhouse, LLC;
Builders FirstSource Southeast Group, LLC, A/K/A Builders FirstSource, Inc.;
Builders Services Group, LLC F/K/A Masco Contractor Services Central Inc. F/K/A Gale Industries, Inc.
D/B/A Gale Contractor Services;
Cannaday Siding & Gutter, Inc.;
Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.; CBU Enterprises, Inc.;
Cortes Painting, LLC;
CPI Security Systems, Inc.; Dom Group, LLC;
Dupree Plumbing Company, Inc.; Ferguson Enterprises, Inc.;
Five Star Construction Inc.; Five Star Foundations, LLC;
Galloway-Bell, Inc. A/K/A Galloway-Bell Inc. II;
GBS Building Supply – Us LBM, LLC, F/K/A/GBS Building Supply, Inc.; General Shale Brick Inc.;
Get Floored, LLC;
Greener Pastures, Inc., A/K/A Greener Pastures of Aiken, LLC;
Installed Building Products, LLC A/K/A Installed Building Products II, LLC; IBP Asset, LLC D/B/A
Blue Ridge Building Products;
JLS Masonry, Inc.;
Kings Landscaping, LLC;
L&M Electric, Inc.;
Lade-Danlar, Inc.;
Landshapers, LLC;
Lansing Building Products, Inc.;

Long Heating & Air Conditioning, Inc.;

M&L General Construction, LLC, A/K/A M&L General Construction, Inc.; M&L Reyna Construction, LLC;

M&M Foundations, LLC; Manale Landscaping, LLC; MJ Cowboys, LLC; Nazareth Builders, LLC; NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC;

P&L Enterprises, LLC;

P&T Construction, Inc., A/K/A P&T Construction, Inc.; Probuild Company, LLC A/K/A Probuild Holdings, Inc.; Rite Rug Co.;

Rodney Howard Grading, Inc. A/K/A Rodney Howard Grading Co.; Sandlapper Concrete, LLC;

Silver Line Building Products Corporation; Sodfather Inc., Landscape Contractors; Stock Building Supply, LLC;

Topbuild Home Services., Inc., A/K/A Gale Contractors Service; Tucker Materials, Inc., A/K/A Gypsum; UTM Enterprises, Inc; and

Willow Tree Landscaping, Inc;

Aaron D. Peris;

Harrelson Painting, LLC;

Huttig Building Products; and Therma-Tru, Ltd;

Arcides Garcia;

Brandon Chaves;

C&H Wood Flooring, Inc.; Dora Maria Pina;

Felix Tile;

Filadelfo Avila Carrillo;

Francisco Sanchez;

J&K Floor Corp;

JCT Flooring;

Jose Javier Marin;

Lemus Tile;

Leos Flooring, LLC;

Martin Garcia;

Nora Canales;

Othon Delgado Ramas;

Resendiz Flooring;

Richard Bumbalough;

Richard Gerardo Loreda Gomez; Robert Gillespie;

Roberto Morales Ferretiz;

Roberto Tile, Inc

Scorpio Tile Glass Work; and Urias Flooring, Co., LLC;

Zenon Gutierrez Antunez; Jesus Perez;

Fredy Perez and Venustiano Perez, Individually and D/B/A Fredy's HVAC;

Nicholas Sota a/k/a Nicholas Soto, Individually and D/B/A Soto HVAC;
 Jason Weaver, Individually and D/B/A Tiger Mechanical; and
 Panuncio Victoriano Martinez, Individually and D/B/A Victoriano HVAC, LLC;
 Brothers Contractors, Inc.;
 Brothers Contactors, LLC;
 Nataren Contractors, LLC;
 Jimenez Contactors, LLC;
 Jimenez Contractors, Inc.;
 Henry Construction, LLC;
 SL Commercial Construction, Inc.;
 Rogelio Basilio-Vazquez; Geovany Leiva;
 Geovany Leiva D/B/A GSF Renovations, LLC; GSF Renovations, LLC;
 RJ Quality Construction, Inc.;
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 Santos Metal Works, LLC;
 AHR Construction, Inc.;
 Denny Concepcion;
 RJ Commercial Construction, Inc.;
 Safeway Roofing;
 Torres Quality Construction;
 JJS Commercial Construction, Inc.;
 Jose Hernandez;
 Bonilla Construction, Inc.; and
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 Carlos Humberto Landaverry;
 Ngan My Giang; Landaverry Flooring, LLC; Hector Flooring;
 Scorpio Tile & Glassworks, Inc.; Jose Javier Marin;
 O&E Flooring; Othon Ramos; Saguay Flooring; and Cruz Flooring;
 AJ&I Flooring, LLC;
 Antonio's Flooring, LLC;

 Bryan's Flooring Services, LLC; Enriquez Floors, LLC;
 Garcia's Carpet, Inc.;
 Hector Flooring, Inc.;
 Carolina Hernandez D/B/A Josue's Flooring, LLC; NM Alex Carpet, Inc.;
 Promesa Flooring; and
 Vinny's Perfection Flooring, LLC;

 Jesus Jimenez; and
 Jesus Robles Montez A/K/A Robles Construction ;

 Toribio Islas; and
 Alejandro Soto... Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on this day, September 7, 2023, she served a true copy of the within and foregoing Return in Opposition to Appellant's Petition for a Writ of Supersedeas and/or Cross-Motion to Dismiss Appeal, Grant Limited Remand, or Otherwise Confirm that Trial May Continue, upon all counsel of record to this matter via electronic mail to the e-mail addresses listed on the following pages:

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