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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeal

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
Hon. R. Scott Sprouse, Circuit Court Judge

Case No. 2019-CP-04-01942
Appellate Case No. 2023-001401

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

v.

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

D.R. Horton, Inc., Appellant,

v.

AJ Landscaping & Grading LLC, A/K/A AJ Landscaping & Grading, Inc; Allpro Textures, LCC; Alpha Omega Construction Group, Inc.; American Concrete and Precast, Inc., A/K/A ACP Concrete, Inc.; A&J Framing, Inc; Alpha E.M.C; A-Z, Inc.; Atlanta Floor Designs Center; A Grade Above Others, LLC; Brand-Vaughan Lumber Co., Inc.; BKF Builders, Inc; Builders Designhouse, LLC; BMC East, LLC D/B/A Coleman Floor, LLC; Builders Firstsource Southeast Group, LLC, A/K/A Builders Firstsource, Inc; Bravo Carpenters, Inc.; Caryl Mechanics II, Inc.; Caryl Mechanicals, Inc.; Cannaday Siding and Gutter, Inc; Cortes Painting, LLC; CBU Enterprises, Inc.; CPI Security Systems, Inc.; Dom Group, LLC; Ferguson Enterprises, Inc.; Five Star Construction Inc.; Five Star Foundations, LLC; Galloway-Bell, Inc.; A/K/A Galloway-Bell, Inc. II BGET Floored, LLC; GBS Building Supply-Us LBM, LLC, A/K/A GBS Building Supply, Inc.; General Shale Brick Inc.; Greener Pastures, Inc. A/K/A Greener Pastures of Aiken, Inc; IBP Asset, LLC D/B/A Blue Ridge Building Products; JLS Masonry, Inc.; Kings Landscaping, LLC; Landshapers, LLC; Lade-Danler, Inc.; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; L&M Electric, Inc.; Manale Landscaping, LLC; MJ Cowboys, LLC; M&L General Construction, LLC. A/K/A M&L General Construction, Inc.; M&Lreyna Construction, LLC; M&M Foundations, LLC; Nazareth Builders, LLC, NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&T Construction, LLC; P&L Enterprises, LLC; Probuild Company, A/K/A Probuild Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Sodfather, Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc, A/K/A Gale Gale Contractors Service; Tucker Materials, Inc., A/K/A Gypsum; UTM Enterprises, Inc., Dupree Plumbing Company, Inc.; Willow Tree Landscaping, Inc., Third-Party Defendants,

of which Builder Services Group (f/k/a Masco Contractor Services Central Inc. f/k/a Gale Industries, Inc. d/b/a Gale Contractors Services)¹ and IBP Assets, LLC d/b/a Blue Ridge Building Products, are the Respondents.

RESPONDENTS

IBP ASSETS, LLC d/b/a BLUE RIDGE BUILDING PRODUCTS' AND BUILDER SERVICES GROUP f/k/a MASCO CONTRACTOR SERVICES CENTRAL INC. f/k/a GALE INDUSTRIES, INC. d/b/a GALE CONTRACTORS SERVICES' JOINT MOTION TO STRIKE

Respondents IBP Assets, LLC d/b/a Blue Ridge Building Products (hereinafter “Blue Ridge”) and Builder Services Group f/k/a Masco Contractor Services Central Inc. f/k/a Gale Industries, Inc. d/b/a Gale Contractors Services (hereinafter “Gale”) (collectively “Respondents”) hereby move to strike certain matters from Appellant D.R. Horton, Inc.’s (hereinafter “DR Horton”) initial brief, designation of matter, and the record on appeal based on lack of relevance.

Rule 209(b), SCACR provides that “[a] party shall not include any matter in his Designation which is not relevant to this appeal.” Rule 210(b), SCACR provides that the Record on Appeal “shall not, . . . include matter which was not presented to the lower court or tribunal.” Points not set forth in the appellant’s statement of issues on appeal will not be considered. Allen v. Pinnacle Healthcare Sys., LLC, 394 S.C. 268, 277, 715 S.E.2d 362, 367 (Ct. App. 2011); Rule 208(b)(1)(B), SCACR.

Long-established precedent holds that issues not raised to and ruled upon by the trial court are not preserved for appellate review. Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Issue preservation rules give the circuit court a fair opportunity to rule on the issues

¹ Gale is improperly identified in the caption. The entity should be listed as *Builders Services Group, Inc d/b/a Gale Contractor Services*.

prior to appellate review. Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014).

All issues must be presented and argued in the initial briefs. No new arguments may be made in the final briefs. Rule 211(b), SCACR. An appellant may not use the reply brief as a vehicle to argue issues not argued in the appellant's brief. Glasscock, Inc. v. U.S. Fid. And Guar. Co., 348 S.C. 76, 557 S. E. 2d 689 (Ct. App. 2001).

In its initial briefing and designations of matter for the record on appeal, DR Horton attempted to construct an argument that the trial court incorrectly granted Respondents' motions for summary judgment because other similar motions (in DR Horton's view) were denied. This argument is not before this Court because it was not raised or ruled upon by the trial court, and it was not raised in DR Horton's statement of issues on appeal or argued in its initial brief. DR Horton has also made improper comments regarding liability insurance. Furthermore, DR Horton has made improper comments and attacks regarding Gale's counsel. Gale requests any quotation to Hamlet should be stricken from the record as a reply brief should adopt a respectful and cordial tone. Additionally, Hamlet was obviously not part of the record below. The Respondents move to strike these arguments and materials.

I. Materials and arguments relating to dispositive motions filed by subcontractors other than the Respondents who are not parties to this appeal are not relevant to this appeal.

DR Horton's Statement of Issues on Appeal raised four issues. (Init. Br. of Appellant filed Feb. 8, 2024, p. 6.) The first two have to do with the "clear and unequivocal" standard for enforceability of indemnity agreements. (Id.) The third concerns damages, and the fourth argues severability. (Id.) Nowhere in the Statement does it set forth any argument that the trial court ruled inconsistently as compared to other subcontractors. After reviewing the documents

designated for the record on appeal, the undersigned are unaware of anything reflecting an argument to the trial court regarding inconsistent rulings.

DR Horton's Statement of the Case in its Initial Brief included a reference to motions for summary judgment that the trial court denied on November 3, 2022.² (Init. Br. of Appellant filed Feb. 8, 2024, p. 9.) DR Horton also referred to earlier and later trial court rulings in its Summary of the Facts. (Id. at pp. 13-14.) However, DR Horton did not pursue these points in its arguments. This is yet another reason DR Horton's "inconsistent trial court rulings" argument is not before this Court: Issues listed in the statement of issues on appeal but not addressed in the initial brief are deemed abandoned. Wright v. Craft, 372 S.C. 1, 20–21, 640 S.E.2d 486, 496–97 (Ct. App. 2006).

DR Horton's Proposed Designation of Record on Appeal lists "Transcript 9/15/2023, pages 20-22" under Item 16. DR Horton refused to provide a copy of that transcript to counsel for Blue Ridge. The transcript Blue Ridge subsequently obtained had different pagination. Blue Ridge was able to locate the passage in the transcript DR Horton identified. It is contained in a transcript of the trial that occurred *after* the trial court granted the Respondents' motions for summary judgment and while this appeal was pending.

Accordingly, Blue Ridge addressed this issue in its initial brief. In its Counter-Statement of the Facts on page 12, Blue Ridge pointed out that the trial judge had distinguished other subcontractor motions on the ground that there was evidence those other subcontractors were negligent. (Init. Br. of Respdnt. Blue Ridge filed Apr. 10, 2024.)³

² This order is relevant to DR Horton's appeal against Blue Ridge only in that it disposed of other motions, but inadvertently failed to address Blue Ridge's motion. (See IBP Init. Br., p. 2.)

³ Blue Ridge also referenced the negligent verdict against DR Horton at trial. This was responsive to DR Horton's initial brief and designation in two ways. First, DR Horton wrongly argued that the "clear and unequivocal" standard does not apply because DR Horton was not negligent. (DRH

DR Horton apparently took that reference as an open door. Its reply brief and designation of matter in reply are replete with references to the subsequent trial. These are improper because a party may not raise an issue for the first time in an appellate reply brief. ABB, Inc. v. Integrated Recycling Grp. of SC, LLC, 432 S.C. 545, 553, 854 S.E.2d 171, 175 (Ct. App. 2021).

DR Horton began by acknowledging that the trial occurred well after Respondents' motions for summary judgment were heard. (Init. Reply Br. of Appellant Replying to IBP filed May 13, 2024, p. 9. and Init. Reply Br. of Appellant Replying to Gale filed May 13, 2024, p. 5.) DR Horton represented that it settled with Plaintiff and left the courtroom. This representation by counsel is not proper. Cobb. v. Benjamin, 325 S.C. 573, 581, 482 S.E.2d 589, 593 (Ct. App. 1997) (holding that unsupported statements by counsel will not be considered). DR Horton then proceeded to make an extended argument concerning another subcontractor, JLS Masonry. (Init. Reply Br. to IBP, pp. 9-10. and Init. Reply Br. of Appellant Replying to Gale filed May 13, 2024, p. 5.) DR Horton argued that the trial court's ruling concerning JLS Masonry is inconsistent with its ruling as to the Respondents. (Id.) Several items listed in the Record on Appeal DR Horton filed relate to this new argument of inconsistent rulings.

Concurrently with its reply brief, DR Horton filed a designation of matter for the record on appeal seeking to add JLS Masonry's motions, its subcontract with DR Horton, an order denying JLS Masonry's dispositive motion, and numerous pages from the trial transcript relating to JLS

Init. Br., p. 15; Blue Ridge Init. Br., pp. 17-18.) Second, Blue Ridge rebutted any argument based on equitable indemnity in that DR Horton could not show clean hands. (Blue Ridge Init. Br., pp. 27-28.) See Rule 220(c), SCACR; I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724 (2000) (holding that appellate courts may affirm based on any ground appearing in the record).

Masonry.⁴ (Proposed Suppl. Designation of Record filed May 13, 2024, items 2, 4, 5, 6, 7, 8, and 10.) Curiously, the trial transcript reflects that DR Horton’s attorneys appeared and participated in the trial. Even if DR Horton settled before the verdict was returned, it was DR Horton that presented the case upon which the verdict was rendered.

DR Horton has also designated motions for summary judgment filed by two other subcontractors for the record on appeal. (DR Horton Proposed Designation filed Feb. 8, 2024, items 35 and 36.) These motions were not brought to the trial court’s attention when the Respondents’ motions were heard. They are not appropriate for the record on appeal as these arguments were not considered by the lower court for purposes of its rulings on Gale and Blue Ridge’s dispositive motions. Rule 210(b), SCACR.

These arguments and materials are not relevant to this appeal. Accordingly, the Respondents object to them and move to strike them from DR Horton’s briefs and the Record on Appeal and specifically from consideration in this appeal. Rule 209(b), SCACR. Specifically, Respondents request that the following line items should be stricken from the Record on Appeal filed June 12, 2024: Items 13-14; Items 35-36; Items 51-52; Item 66; and Item 61, pages 724-731, 862, 864, 868, and 933-34.

II. Arguments based upon the availability of liability insurance are not appropriate.

DR Horton also made several arguments based on the purported availability of insurance in its briefs. (Init. Br. p. 23 (claiming the trial court rulings were “a windfall to the Respondents’ insurance companies”); Reply Br. to IBP, p. 4 (characterizing Blue Ridge’s position as bad faith

⁴ DR Horton developed this argument using the trial transcript that Blue Ridge provided to reconcile the pagination issue created by DR Horton’s refusal to provide copies of the transcripts it designated to Respondents.

on the part of IBP’s insurance company, “using IBP as a subterfuge”).) These cavalier characterizations are improper and potentially prejudicial.

These arguments about liability insurance were not raised to or ruled upon by the trial court. Nor could the trial court have considered such arguments. Rule 411, SCRE. Moreover, a separate suit concerning DR Horton’s liability insurance claims related to this action is pending. D.R. Horton, Inc. v. American Guar. and Liab. Ins. Co., No. 2023-CP-23-01810 (Greenville County Comm. Pl.). It appears that DR Horton seeks to “poison the well” in that action by unsubstantiated, *ipse dixit* comments made in this appeal.

References to liability insurance, and particularly arguments based upon the availability of liability insurance, are not appropriate in this appeal. DR Horton also claimed it has a right to argue that Gale breached its subcontract by failing to provide insurance. (DRH Reply Br. to Gale, p. 7.) This issue was not raised in DR Horton’s Statement of Issues on Appeal. See Rule 208(b)(1)(B), SCACR. DR Horton does not contend that Respondents breached a contract to obtain insurance in this appeal. Therefore, these references should also be stricken from DR Horton’s briefs.

CONCLUSION

For the reasons set forth above, the Respondents respectfully request that this Court strike the offending materials from DR Horton’s Designation and the Proposed Record on Appeal; strike the referenced arguments from DR Horton’s briefs; and order that these may not be considered for purposes of the merits of this appeal.

[Signature page follows]

Respectfully submitted,

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Charleston, South Carolina

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Tree Landscaping, Inc., Third-Party Defendants,

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PROOF OF SERVICE

I certify that the *Respondents IBP Assets, LLC d/b/a Blue Ridge Building Products' and Builder Services Group f/k/a Masco Contractor Services Central Inc. f/k/a Gale Industries, Inc. d/b/a Gale Contractors Services' Joint Motion to Strike* was served on counsel of record on June 12, 2024, via email under Paragraph (d)(1) of Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022), Appellate Case No. 2020-000447.

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