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. 2019CP041942
Appellant 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, ... Defendants

D.R. Horton, Inc., ... Appellant,

v.

A&J Landscaping & Grading LLC, A/K/A AJ Landscaping & Grading, Inc; Allpro Textures, LLC; 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-Vaughn Lumber Co., Inc.; BFK Builders, Inc; Builders Designhouse, LLC; BMC EAST, LLC D/B/A Coleman Floor, LLC; Builders Firstsource Southeast Group, LLC, A/K/A Builders Firstsourse 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 Buildings 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 Reyna 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) and IBP Assets, LLC d/b/a Blue Ridge Building Products are the ..... Respondents.

Appellant D.R. Horton's Opposition to Respondents' Motion to Strike

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Appellant D.R. Horton, Inc. files this Opposition to Respondents' Motion to Strike portions of Appellant's briefs, Record on Appeal, and arguments for the following reasons:

First, Respondents' Motion is a disguised Sur Reply Brief, which is not allowed under the South Carolina Appellate Court Rules. It should be denied for this reason alone. Were it otherwise, respondents would routinely concoct reasons to file so-called "motions to strike" in order to get the last bite at the apple. Actually, it is two last bites: the first being the motion, and the second being the reply to the appellant's opposition to the motion.

It is rare to read a reply brief and not have something to say in retort. Those retorts are to be made at oral argument. This "Motion to Strike" is also an attempt to learn more about

Appellant's plan for oral argument on the issues Respondents raised in their motion. If Respondents had any legitimate contentions with D.R. Horton's Initial Brief, those should have been fully and completely raised in their respective responsive briefs.

The "motion to strike" practice advanced by the Respondents will wreak havoc with the appeals process. Not only will such a tactic clog the Court of Appeals and Supreme Court with a flood of "motions to strike," it will prolong and delay appeals while such motions wind through the process of motion, response, and reply, thereby replaying the briefing all over again. What Respondents now ask the Court to do will require that the Court review all the Briefs, Designations of Record, and the Record on Appeal in the matter to even reach a decision on this "motion to strike." This will double the Court's work.

Second, the foregoing is also the proper way to handle any issues not only with the briefs but also with the Record on Appeal. The Court does not want an endless battle about what is or is not included in the Record on Appeal. Such battles impose undue burdens on the Court's time and resources and delay appeals. That is why the Appellate Court Rules were changed many years ago to eliminate the provision for the appellate court to "settle the record" when the parties could not agree on it. Now the Rule provides that the record "shall include all matter designated to be included by any party." Rule 210 (c), SCACR. Striking matter from the Record on Appeal is not allowed.

Accordingly, D.R. Horton included every item that every party designated, even many items Respondents designated that Appellant thinks may be irrelevant to the appeal. Appellant also included the items designated by Respondents that were either *never* included in the trial court record or occurred *after* the Notice of Appeal was filed. For example, while Respondents complain about pages 20-22 from the September 15, 2024 transcript having been designated by Appellant, Respondent IBP designated more pages from that date, including two of the pages it asks the Court

to strike plus other sequential pages before the two pages Appellant designated.[1] See Respondent IBP's Designation of Record. Appellant originally designated pages 721-723 while Respondent IBP designated pages 716-722.[2] Respondents cannot move to strike their own designations.

Additionally, both Respondents included in their Designations of Record the jury verdict, which occurred almost two months after the summary judgments at issue in this appeal were filed. See Respondents' Designations of Record. Summary judgments were granted on July 26 and 28, 2023, with expanded orders filed on August 7, 2023, and August 23, 2023. Record on Appeal pp. 33, 36, 42, and 70. The jury verdict was rendered on September 19, 2023. Respondents improperly included the after-the-fact jury verdict in an attempt to "poison the well" as to D.R. Horton, arguing that D.R. Horton was somehow negligent as to Respondents' respective work and had unclean hands precluding indemnity. See, for example, IBP Brief at pages 27-28. The jury verdict did not, however, address the work that Respondents performed or D.R. Horton's responsibility for that work. Therefore, it cannot possibly mean that D.R. Horton was negligent concerning Respondents. Nor can the jury verdict retroactively remedy the trial court's error as to summary judgment that occurred months before the trial. Nor can it be used to bolster the trial court's decision that the contracts were not clear and unequivocal. That jury verdict had nothing to do with the work performed by Respondents or D.R. Horton as to Respondents' work because Respondents' scope of work was excluded from the trial as of July 20, 2023 when Plaintiff stipulated that work would not be included at trial. Record on Appeal p. 969. Respondents' scope of work – and therefore D.R. Horton's responsibility with regard to Respondents' scope of work – was not before the trial court or jury when the verdict was rendered.

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[1] The pagination for these pages changed due to a transcript for trial dates September 11-15, 2023 being used rather than the original one Appellant designated covering only September 15, 2023.

[2] For example, Respondent IBP uses post-summary judgment documents and transcript references in its brief. See IBP Brief at pages 12, 18, 19, and 27-28, its Designations of Record designating portions of the September 11-15, 2023 trial transcript at pages 716-722 and designating the September 19, 2023 Jury Verdict.

Negligence or unclean hands with this type of construction defect case applies to each sub-contractor, to each scope of work, and to each contract on a stand-alone basis, none of which was before the trial court or the jury after the motions for summary judgment were granted. IBP makes a baseless argument that equitable indemnity in favor of D.R. Horton was foreclosed because of the subsequent jury verdict. If anything is to be stricken, it should be IBP's argument and its inclusion of the jury verdict and Respondent Gale's statements and designation regarding the jury verdict. Having made post summary judgment arguments and included post summary judgment matter in the Record on Appeal, Respondents cannot complain when Appellant simply responded to their sharp tactic and provided clarity to the Court of what actually occurred.

To illustrate further the hypocrisy underlying Respondents' "Motion to Strike," Respondent Gale designated discovery responses and a Greenville County case listed as items 73-75 in the Record on Appeal. Record on Appeal pp. 1655-1754 and see Gales' Designation of Record. None of these documents were filed with the trial court. Appellant had to ask Respondent Gale for the documents because they were *not* filed with trial court and *not* part of the trial court record. Appellant included them in the Record on Appeal because they were designated by a party and the Rules require Appellant to include all documents designated by a party. Rule 210 (c), SCACR. Respondents do not comply with the standard that they seek to apply to the Appellant, and have no right to complain when Appellant has to respond to their tactics.

Third, there is no appellate rule that allows a motion to strike. Respondents did not provide the Court any South Carolina Appellate Court Rule that allows them to file a motion to strike the opposing parties' briefs or designations of record. That is because there is no such rule. Respondents conceded this deficiency when they failed to provide the Court a citation to a rule that allows such a motion. That deficiency is fatal.

There are numerous reasons why a motion to strike rule does not exist in the appellate rules. Such a rule would derail the standard Brief, Responsive Brief, and Reply Brief process that the rules

specify. Inserting motions to strike within that framework would cause delay, endless back and forth squabbles, and lead to a process that would add months or years to an appeal and increase substantially the Appellate Court's work. Motions to strike would also require the Appellate Court to delve into the briefs in a separate process from the Appellate Court's current orderly process of brief review and oral argument.

The grant of a motion to strike can be appealed. *Thornton v. South Carolina Electric & Gas Corp.*, 391 S.C. 297, 705 S.E.2d 475 (Ct. App. 2011) (citing favorably an immediate appeal of the grant of a motion to strike in *Grazia v. S.C. State Plastering,* 390 S.C. 562, 703 S.E.2d 197 (S.C. 2010). This means that if an appellate court granted a motion to strike, that would create an appeal within an appeal, which likely would result in stays of appeals as the appeal of the motion to strike winds its way through the appellate process. This would add years to an appeal, increase the expense to litigants, stall justice, and impose additional work on the courts. The upheaval to the process, timeline, and workload of the Court cannot be overstated.

Fourth, there is a process in the South Carolina Rules of Civil Procedure that allows for motions to strike, but it is limited to *pleadings not briefs.* Rule12(f), SCRCP. Rule 12(f) is a rule for the trial courts and not the appellate courts and there is no corresponding rule in the South Carolina Appellate Court Rules. Briefs are not pleadings. There is no rule that allows Respondents' "Motion to Strike."

If the Court by analogy were to apply and expand Rule 12(f), then Respondents failed to timely raise the issues and thereby waived them. Rule 12(f) requires that any motion to strike must be filed *before* responding to the pleading at issue and if no response is required to a pleading, then within 30 days. The timing requirements of Rule 12(f) prevent Respondents' "Motion to Strike" as to anything in Appellant's Initial Brief and Designations of Record, which were filed February 8, 2024. Respondents did not file their Motion to Strike before filing their Response Briefs and not within 30 days of Appellant's Initial Brief and Designations of Record. Under Rule 12(f), all

complaints about Appellant's Initial Brief and Designations of Record were waived by each Respondent. That waiver includes what is stated in Appellant's Initial Brief and Designations of Record, both filed February 8, 2024, and *every statement* in Appellant's subsequent Reply Briefs and Supplemental Designations of Record that pertain to or flow from Appellant's February 8, 2024 filings. That would include any statements and designations in Appellant's Initial Brief and Designations of Record about (a) the inconsistency of the trial court's rulings regarding the motions for summary judgment, (b) statements about the insurance provisions and the failure to provide Appellant the benefit of its insurance rights in the contracts, (c) the transcript pages from the September 15, 2024 trial transcript pages 20-22 (renumbered in the Record of Appeal to transcript pages 720-722 (ROA pp. 1513-1515) due to new pagination), (d) the facts about the trial court's ruling at Appellant's Initial Brief pages 13-14 about which Respondents now complain, and (e) Designations of Record, items 35 and 36 which are summary judgment motions and the trial court's orders that occurred before the Notice of Appeal was filed. Record on Appeal pp. 39, 63, 368, and 373. That leaves nothing in Respondents' Motion to Strike that should be considered by the Court because it all flows from Appellant's Initial Brief and Designations of Record. There is nothing in Appellant's Reply Brief and Supplemental Record on Appeal that does not either simply respond to Respondents' Response Briefs or expand further the statements already made in its February 8, 2024 filings.

Rule 12(f) SCRCP is decided much like a motion to dismiss, with all doubts and inferences decided in the nonmovant's favor. "A motion to strike under Rule 12(f), SCRCP, which challenges a theory of recovery in the complaint, is in the nature of a motion to dismiss under Rule 12(b)(6), SCRCP," *Grazia v. South Carolina State Plastering, LLC,* 390 S.C. 562, 703 S.Ed.2d 197) (2010), and "the pleading must be liberally construed in favor of the pleader and sustained if the facts and reasonable inferences to be drawn therefrom entitle the pleader to relief on any theory of the case." *Robinson v. Code,* 384 S.C. 582, 682 S.E.2d 495, 496 (Ct. App. 2009). Respondents' attempt to exclude

Appellant's arguments is analogous to a motion to dismiss because it challenges Appellant's theories of recovery under its contracts, which are the subject of the appeal. If the Court even considers Respondents' "Motion to Strike," then the Court should resolve the questions with all doubt and inferences decided in Appellant's favor.[3]

Fifth, the Appellate Court Rules provide the Appellant with the last word in briefing. Rule 208, SCACR. Respondents appear unhappy with the Rules and have decided to have the last word in briefing because not only does their "Motion to Strike" serve as a disguised Sur Reply Brief, they will now file a Sur Sur Reply Brief if they are allowed to file a memorandum in reply to Appellant's response in opposition to their motion. The Court should deny their motion, and deny them the opportunity to file a Sur Sur Reply Brief couched as a memorandum in reply to their improper "motion to strike." Respondents' "Motion to Strike" undermines well-established appellate practice and will quickly become the normal course of lawyering if the Court does not stop this in its tracks.

Sixth, Respondents argue that Appellant has improperly argued a new issue for the first time in its Reply Brief because Appellant advised the Court of Appeals of the trial court's inconsistent rulings on the same or substantially similar contracts in ruling on summary judgment before and after the summary judgment decisions filed between July 26-August 23, 2023 that are before this Court. The information Appellant provided in its Brief and Reply Brief is accurate and was before the trial court because the same trial judge conducted the hearings and issued the inconsistent rulings. The trial court was aware of its inconsistent rulings, as Appellant illustrated in both its briefs and for which Appellant provided references in the Record on Appeal. Appellant alerted the Appellate Court to the inconsistency in its Initial Brief and again in its Reply Brief. Appellant included in its Designations for the Record documents and orders filed in the trial court *prior* to the

[3] The timing requirements in Rule 12(f) SCRCP prevent litigants from lying in wait to complain. In this case, lying in wait to complain about statements and designations in Appellant's Initial Brief and Designations until *after* Appellant filed its Reply Brief, Supplemental Designations, and the Record on Appeal is a "gotcha" type of maneuver that is disfavored in South Carolina courts because such tactics do not promote a sense of justice and fairness.

summary judgment orders being appealed herein and provided information as to trial court's ongoing inconsistency and the trial court's perspective on that issue. That is not improper, especially when the trial court refused to stay ruling on the same issues on appeal over D.R. Horton's objection.

Ordinarily, Appellant would not include anything filed or done at a hearing after the Notice of Appeal was filed, but in this case, the information provided is relevant to the trial court's decision because it is about the exact same issue decided in an inconsistent way and the trial judge explicitly explains his thinking as to the basis of his decision. Because of the inconsistent rulings, D.R. Horton attempted to have the trial judge stay the case after filing its Notice of Appeal. This is a complicated class action involving a multitude of defendants. Appellant knew that the trial court would *necessarily* have to either amend, revoke, or apply its rulings on the contractual indemnity, duty to defend, and additional insured issues in this appeal, that an appeal was underway, and that judicial economy and fairness pointed toward guidance from the appellate court before trial. D.R. Horton even took the unusual step of a supersedeas to ask this Court to intervene to stay the trial because the issue was so central. When trial proceeded without a ruling on the supersedeas, D.R. Horton was compelled to settle; it could not proceed in the face of inconsistent rulings. Appellant should have received fair and consistent treatment throughout the pre-trial period and the trial. It did not and this Court should be aware of what occurred both before and after the summary judgment orders because the perception of fairness in the judicial system is inherently important to this Court. The trial court should not have continued to rule on the same issues in inconsistent ways during the appeal.

Respondents' argument that Appellant waived this concern as an issue misconstrues the difference between the issue itself and the Appellant's reasons for its position on the issue. Both of Appellant's briefs note that the Court ruled inconsistently on the same or substantially similar contracts for no reason other than the two Respondents' work was ultimately (on July 20, 2023) excluded from the trial scheduled to begin on September 5, 2023. This is not a separate "issue" on

appeal, but an explication of the four issues before the Court as to why the trial court erred when it ruled as it did on the contracts. It discusses the reasons why Appellant should prevail as to the issues on appeal. Appellant has not been improper in its briefing and designations and it did not waive any issue as Respondents assert.

Seventh, Respondents seek to strike all comments about insurance from this appeal and assert that raising the insurance aspect of this case was improper. That assertion is without merit. The insurance issue was before the trial court and its impact on the case was explained to the trial court, as Appellant quoted in its brief. See Appellant Reply Brief as to Respondent IBP at pages 7-8 It was argued to the trial judge. It is argued to the appellate court in this case, as well, because it is a central part of the contracts at issue that should have prevented any summary judgment grant to Respondents. Even if the contractual indemnity was properly excluded (which Appellant does not believe is correct), the duty to defend and the rights D.R. Horton has as an additional insured under the contracts should not have been excluded from the case. There is nothing improper about making that argument to this Court and, in fact, it is necessary to this appeal.

Eighth, Appellant's Hamlet quote did not insult any lawyer, nor is it improper to use a widely known Shakespearean quote to illustrate a point in a brief. The quote is so well-known that likely a formal citation was not technically needed; however, Appellant provided the citation should anyone involved in the appellate process desire to read the context from which the quote arose. The quote was used to emphasize that repetitive statements are sometimes a mask for something else. This was not improper and, to counsel's knowledge, Shakespeare has never been criticized for this observation of his concerning human nature.

Ninth, Respondent IBP complains that Appellant's counsel refused to provide it with the transcripts and suggests that this is a misdeed. Here is what occurred. Respondent IBP's counsel asked for all the transcripts that Appellant had in its possession to be provided to Respondent in a manner that circumvented the court reporters who are to be paid for preparing a transcript *and* for

any copies requested. S.C. App. Ct. R. 607 (h), SCACR Appellant properly ordered the transcripts for Appellant's use and served on counsel and filed with the Appellate Court those transcript requests. Respondent IBP's counsel could have ordered those transcripts at any time. He did not. Instead, he wanted Appellant to provide them to him free. Appellant advised Respondent's counsel that Appellant does not engage in that practice because it deprives court reporters of a portion of their compensation. See Attachment A. Respondent complained about the cost to his client. Respondent IBP asked for a listing of the transcripts and court reporters, which Appellant promptly provided to Respondent as a courtesy.

It appears that Respondent IBP still thinks that Appellant was required to provide transcripts to it for free, without paying the court reporter. It is Appellant's understanding that this practice would violate Rule 607 (h), SCACR, which outlines the compensation to court reporters. Of course, when the Record on Appeal is prepared and served on all counsel of record, the designated pages of each transcript cited would be provided and was provided, but that is vastly different from providing entire transcripts free to opposing counsel to save them the court reporter costs. Appellant did not behave improperly in not providing free transcripts to Respondent IBP and Appellant's counsel objects to IBP's mischaracterization of him in that regard.

As to the specific transcript IBP references in its "Motion to Strike," Appellant requested and received the transcript for September 15, 2023, which was one day of the trial transcript; somehow Respondent obtained the transcript for trial days September 11-15, 2023. IBP did not file or serve a transcript request for that transcript nor did it advise Appellant that it would be obtaining or using that transcript. When it came time to prepare the Record on Appeal, Appellant discovered that the pagination for its September 15, 2023 citation to the Record was inconsistent by over 600 pages with the additional pages of that transcript that Respondent IBP designated. Appellant had no idea Respondent had obtained that transcript and took steps to resolve the pagination issue with Respondent. Again, Appellant did nothing improper and is confused that IBP has made that

transcript an issue when Respondent is the one that failed to follow the rules when it did not file and serve a transcript request to alert all other parties of the transcript request.

Tenth, without any citation to the trial transcript, Respondents question Appellant's statement that D.R. Horton settled and left the trial. See Motion to Strike, page 6. The trial transcript clearly shows the settlement exchange in the trial court, with D.R. Horton tendering its defense to the third-party defendants still in the trial. D.R. Horton did not appear thereafter. Attachment B, Tr. September 11-15, 2023, pps. 698-702

Eleventh, what Respondents fail to tell the Court in their "motion to strike" shows why the motion should be denied. On Friday, June 7, 2024, counsel for IBP asked to preview the draft Record on Appeal. The Appellate Court Rules do not give them that right, but Appellant was willing to extend this courtesy. The Record on Appeal was due to be filed just two business days later on June 12th. Appellant advised Respondents that they would receive the draft Record on Appeal to preview on Saturday morning (estimate) with a deadline for changes or concerns due by 10:00 a.m. Monday. Appellant expedited the preparation and worked late Friday and early Saturday to get the draft to them as soon as possible, early Saturday afternoon. On Friday, neither Respondent indicated more time would be needed. Then came Monday morning at 9:59 a.m. when Respondent IBP sent an email complaining about rushed review and listing 10 items of concern. See Attachment C. An hour later (one hour after the deadline) Respondent Gale responded with a complaint about a lack of time and no proposed changes or concerns about any Record on Appeal documents. After Appellant carefully reviewed each of Respondent IBP's concerns, Appellant determined that the draft record was correct because each item included was designated by a party. Not a single complaint by either Respondent was due to a document being improper for any of the reasons Respondents now complain of in their "Motion to Strike." Throughout Monday, Respondent IBP sent a series of emails *retracting* each of its 10 concerns except one for which the incorrect pages had been designated by IPB. See Attachment D. Appellant had included the correct pages according to

the designations, but upon request by IBP Appellant substituted the new pages IBP requested.[4] Never did either Respondent complain about the record for any of the reasons in this "Motion to Strike." Accordingly, their arguments in this regard are waived.

The Respondents' "Motion to Strike" is not allowed by the South Carolina Appellate Court Rules or the South Carolina Rules of Civil Procedure. That is reason enough to deny it. Beyond that, it is an unconvincing veiled attempt to file a Sur Reply Brief and Sur Sur Reply Brief (when they respond to this opposition to their motion). This is all improper and a tactic that the Court should frown upon both from a substantive and procedural perspective. The Court will be flooded with motions to strike if it does not stop this practice here and now. The Courts will be bogged down and the appellate process distorted to give whoever files a motion to strike the last word, rather than the appellant having that as it is in the Rules. To review a motion such as this, the Court will need to delve into the briefs, designations of record, and record on appeal and make substantive rulings before oral argument. This will take enormous amounts of time and will deprive litigants of the current process of briefing and oral argument to resolve appeals. Respondents have distorted or omitted facts in order to prevail, have complained about things that are above reproach, have sought to short court reporters on their fees, and done the very things that they complain about concerning Appellant. Respondents' "Motion to Strike" is borderline frivolous. It should be denied.

s/ Carl F. Muller

Carl F. Muller, SC Bar #4131
Carl F. Muller, Attorney-at-Law, P.A.
PO Box 1717
Greenville, SC 29602-1717
864-991-8904 Phone
864-751-2831 FAX
carl@carlmullerlaw.com
Attorney for Appellant D.R. Horton, Inc.

[4] IBP said the incorrect pages was due to it having used the emailed copy of a document rather than the officially filed document and its exhibits.

ATTACHMENT

A

Gmail

Carl Muller <carl@carlmullerlaw.com>

RE: Appellant Case No. 2023-001401

Tim J. Newton <tnewton@murphygrantland.com>
To: Kay Kelly <kay@carlmullerlaw.com>, Carl Muller <carl@carlmullerlaw.com>
Cc: "rkendall@murphvgrantland.com" <rkendall@murphvgrantland.com>

Thu, Feb 8, 2024 at 3:54 PM

Carl,

Have you provided the transcripts? I haven't seen them yet. Can you forward them to me?

Tim N.

MURPHY GRANTLAND

Murphy & Grantland, P.A.

Timothy J. Newton, Esquire

tnewton@murphygrantland.com

Post Office Box 6648

Columbia, South Carolina 29260

803-782-4100 ext. 1242

803-454-1242 dd

803-782-4140 fax

www.murphygrantland.com

From: Kay Kelly <kay@carlmullerlaw.com>
Sent: Thursday, February 8, 2024 3:36 PM
To: Court Of Appeals Filings <ctappfilings@sccourts.org>
Cc: nralephata@rlattorneys.com; abolyard@rlattorneys.com; rkendall@murphvgrantland.com; Tim J. Newton <tnewton@murphygrantland.com>; John Crawford <crawford@conlaw.com>; imhoff@conlaw.com
Subject: Appellant Case No. 2023-001401

Dear Clerk,

Good afternoon! On behalf of Attorney Carl Muller, please find the Initial Brief of Appellant, Proposed Designation of Record on Appeal with Proof of Service attached for service and filing. By this email I am serving all counsel.

THIS EMAIL SERVES AS EXHIBIT I FOR THE PROOF OF SERVICE TO ALL COUNSEL OF RECORD.

Should you need any additional information, please contact Attorney Carl Muller by email at carl@carlmullerlaw.com or by phone at 864-991-8904.

Thank you,

--

D. Kay Kelly, Legal Assistant

Carl F. Muller Attorney-At-Law

607 Pendleton Street Suite 201

Greenville, SC 29601

kay@carlmullerlaw.com

864.991.8904 -Office

864.751.2831 Fax

Gmail

Carl Muller <carl@carlmullerlaw.com>

RE: Appellant Case No. 2023-001401

Carl Muller <carl@carlmullerlaw.com>
To: "Tim J. Newton" <tnewton@murphygrantland.com>

Thu, Feb 8, 2024 at 3:56 PM

Tim,

You should get them from the Court reporters. That is part of their income.

Carl
[Quoted text hidden]
--
Carl F. Muller
carl@carlmullerlaw.com
864.991.8904
864.751.2831 fax
[Quoted text hidden]

ATTACHMENT

B

THE COURT: All right, Mr. Lucey, why don't you tell me what the agreement is, and then I'll let the defense confirm that.

MR. LUCEY: Yes, sir, with the agreement -- the signed agreement, I would add -- the signed agreement is that the Defendant will pay to the Plaintiff -- Defendant DR Horton will pay to the Plaintiff the agreed upon sum in this signed agreement, under typical terms and conditions, which ---. Plaintiff will provide to DR Horton a covenant not to execute as to DR Horton, except as to his rights against others -- the third-party defendants in this case. DR Horton -- number three, DR Horton will sign all of its claims, AI and KI included, with one exception, against the third and fourth-party defendants, to Plaintiffs. The exception is that DR Horton continues to have rights as to Probuild and as to ---.

The covenant that Plaintiff is to provide to DR Horton will become a global release when all collection action by Plaintiff have been completed. Number five, that release shall be a mutual release. Number six, the parties have agreed to the confidentiality term that was previously set forth in the executed installer settlement agreement -- short form settlement agreement, which term has been emailed to DR Horton counsel within -- just now, for their approval, and they have approved it.

Number seven, DR Horton's claims or related against an

entity named Dupree are excluded from the terms of this settlement. They are apparently an inactive entity of some sort. Number eight is the same as six. I did the confidentiality provision twice. Number nine, Plaintiff retains her right to allocate the proceeds from the settlement, and that's a material term and condition of the settlement.

Number ten, we already mentioned. DR Horton retains its AI rights against Probuild. Number eleven, expert work product rights are signed to the Plaintiff. Number twelve, Plaintiff will execute a release of the lien in favor of DR Horton while Plaintiff continues to execute on its judgment against the third and fourth-party defendants, and in the interim will not enroll judgment in the ---.

MR. CRAWFORD: That's correct.

THE COURT: Is that correct, Mr. Crawford?

MR. CRAWFORD: Yes, sir, that's correct, Your Honor.

THE COURT: Okay, Mr. Lucey, are you going to prepare the ---

MR. LUCEY: Yes, sir.

THE COURT: --- document? Okay. Okay. Well ---

MR. LUCEY: If the Court will give me a second, there might be a second one to put on the record. I can check real quick.

THE COURT: Okay. Check and ---

MR. LUCEY: Your Honor, if I may, they may need a few more minutes more. Will the Court prefer to excuse the jury until tomorrow morning, and ---

THE COURT: Well, let's ---

MR. LUCEY: We don't want -- well, I don't want to lose the Court's attention in case we have something else to go on the record.

THE COURT: Well, that's what I was going to suggest. Let me -- I'm going to send the jury home, because it may be that you're able to reach a resolution with everybody, and I want to give you that opportunity. And I want to give the third-party attorneys an opportunity to talk to their client.

MR. IMHOFF: And I need to put on the record some tender to them, Your Honor, whenever you're ready to do that.

THE COURT: Okay. Okay. All right, let me get the jury in. I'm going to dismiss them for the day, and ---

MR. BAILIFF: You ready?

THE COURT: Yes, sir.

[Whereupon, the jury enters the courtroom.]

THE COURT: Mr. Foreman, ladies and gentlemen of the jury, thank you very much for your patience today. I know it's been a long day, that you've sat back there for a period of time. A lot has been going on in the courtroom while you were out. Some of the issues have been resolved in the case. Now, some issues remain, so what I'm going to do -- the

parties are still working out the details of where we're going -- how we're going to proceed, so I'm going to send you home for the day. Just be back in the morning. We'll start at 9:00. But some -- the case is simplified. So, thank you for your patience, and I hope everyone has a good evening. We'll see you in the morning.

[Whereupon the jury exits the courtroom.]

THE COURT: All right, we'll stand down and take this time -- Mr. Imhoff, you need something on the record?

MR. IMHOFF: Yes, sir, that's correct. Just to give them more time, if you don't mind.

THE COURT: Yes, sir, I'm here, and y'all take as long as you need.

MR. IMHOFF: No, what I mean is may I put that on the record -- tender to the third parties, Your Honor.

THE COURT: Yes, sir. Yes, sir. Yes, sir.

MR. IMHOFF: Thank you, Your Honor. For the record, Your Honor, DR Horton has settled with Plaintiff, putting on the record now that DR Horton tenders its defense pursuit to independent contractor agreements with the third parties, and the additional insured provisions of certificates of insurance that have been provided by insurance companies and the third parties pursuant to those independent contractor agreements, that we ask those insurance companies and subcontractors to defend DR Horton in this case. The remaining third parties

that we are aware of are Silver Line, BKF, JLS Masonry, MJ Cowboys, MM Foundations, M & L Reyna, Probuild and Builders First Source, and any remaining third parties who have not settled, except for and apart from Dupree Plumbing, who will be subject, Your Honor, to any verdict against DR Horton in this case.

THE COURT: Okay. All right, that is noted for the record.

MR. IMHOFF: Thank you, Your Honor.

MR. ROSS: Judge, Jeff Ross here for JLS. As you can imagine, we would hereby move to get a disclosure of the settlement amount that they have paid, and also the amounts of attorney's fees that they've assigned over to the Plaintiff so we know how to re-evaluate our case with the change of circumstances that we've got here today.

THE COURT: Okay.

MR. IMHOFF: It's confidential, Your Honor.

MR. LUCEY: And it would be meaningless -- wouldn't be meaningful anyway at this point and time, because Plaintiff has retained the right to allocate the proceeds. Plaintiff hasn't performed ---.

THE COURT: Okay. I'm not going to require that at this time. Okay, we'll stand down. If anybody else needs anything put on the record, I'll be here.

MR. IMHOFF: Thank you, Your Honor.

ATTACHMENT

C

Gmail

Carl Muller <carl@carlmullerlaw.com>

Preview of Draft ROA

Tim J. Newton <tnewton@murphygrantland.com>
To: Vikki Wulf <chocolateincluded@msn.com>, Alicia Bolyard <abolyard@rlattorneys.com>
Cc: Carl Muller <carl@carlmullerlaw.com>

Mon, Jun 10, 2024 at 9:58 AM

Carl,

First, we object to the rushed deadline imposed by DRH.

Having said that, here are some specific objections to the proposed ROA.

To my knowledge, nobody designated the following:

Affidavit of Steven Moore filed Nov. 23, 2020

ICAs in DRH Memof filed Sept. 7, 2022

Excerpts of depositions of Whitlock and Maddox in IBP filing April 19, 2023

DRH exhibits in July 11, 2023 filing

DRH exhibits in July 19, 2023 filing

Appellant's Initial Brief – this was never before the trial court

Transcript (Apr. 21, 2023), p. 6

Transcript (July 20, 2023), pp. 157-64

Transcript (Sept. 1, 2023), pp. 1-4 (this is probably just the title pages, but I didn't have a chance to verify that)

Also, the wrong DRH offers to cure were included with IBP Dec. 2, 2020 filing (should be 4 Dartford Court and 102 Yount Court)

Tim N.

MURPHY GRANTLAND

Murphy & Grantland, P.A.

Timothy J. Newton, Esquire

tnewton@murphygrantland.com

Post Office Box 6648

Columbia, South Carolina 29260

803-782-4100 ext. 1242

803-454-1242 dd

803-782-4140 fax

www.murphygrantland.com

ATTACHMENT

D

Tim J. Newton
to Alicia, Vikki, me

Mon, Jun 10, 11:55 AM (10 days ago)

All,

I noticed a couple things. It looks like Gale designated Appellant's Initial Brief, so I'm withdrawing that issue (see below). Also, Gale designated pages 157 to 173 of the transcript of the July 20-21, 2023 hearing, so I'm withdrawing that also. Sorry Alicia—I didn't have time to verify that within DRH's deadline.

Tim N.

MURPHY GRANTLAND

Murphy & Grantland, P.A.
Timothy J. Newton, Esquire
tnewton@murphygrantland.com
Post Office Box 6648
Columbia, South Carolina 29260
803-782-4100 ext. 1242
803-454-1242 dd
803-782-4140 fax
www.murphygrantland.com

From: Tim J. Newton
Sent: Monday, June 10, 2024 11:59 AM
To: Alicia Bolyard <abolyard@rlattorneys.com>; Vikki Wulf <chocolateincluded@msn.com>
Cc: Carl Muller <carl@carlmullerlaw.com>
Subject: RE: Preview of Draft ROA

Also, regarding the transcript of the hearing September 1, 2023, pages 1-4: I agree those pages are necessary to identify the transcript, so that objection is withdrawn.

Murphy & Grantland, P.A.
Timothy J. Newton, Esquire
tnewton@murphygrantland.com
Post Office Box 6648
Columbia, South Carolina 29260
803-782-4100 ext. 1242
803-454-1242 dd
803-782-4140 fax
www.murphygrantland.com

T

Tim J. Newton Mon, Jun 10, 1:36 PM (10 days ago)
to Alicia, Vikki, me

Carl,

Regarding the exhibits to memoranda: It looks like these are all attachments to memoranda that DRH designated or counter-designated without specifying exhibits. We'll withdraw the objections to those as to lack of designation. Blue Ridge does question their relevance.

Regarding the transcript dated April 21, 2023: we'll withdraw that as well. It looks like there was a typo, so there is no page 5.

That resolves everything from Blue Ridge's perspective as to the ROA matching designations, with the **one exception** of the offer to cure letters. We specified the correct letters at least twice in Blue Ridge's brief. I'm attaching a printout of the correct pages for reference. The correct pages need to be substituted for the ones in the ROA draft circulated this weekend.

Tim N.

MURPHY GRANTLAND

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tnewton@murphygrantland.com
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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. 2019CP041942
Appellant 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, ... Defendants,

D.R. Horton, Inc., ... Appellant,

v.

A&J Landscaping & Grading LLC, A/K/A AJ Landscaping & Grading, Inc; Allpro Textures, LLC; 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-Vaughn Lumber Co., Inc.; BFK Builders, Inc; Builders Designhouse, LLC; BMC EAST, LLC D/B/A Coleman Floor, LLC; Builders Firstsource Southeast Group, LLC, A/K/A Builders Firstsourse 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 Buildings 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 Reyna 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) and IBP Assets, LLC d/b/a Blue Ridge Building Products are the ..... Respondents.

PROOF OF SERVICE

The undersigned does hereby certify that on June 20, 2024, Appellant's Opposition to Respondents' Motion to Strike with Attachments was served by email on all counsel of record by copy of this email and filed by electronic mail with the Clerk of Court for the South Carolina Court of Appeals.

Other Counsel of Record:

Alicia N. Bolyard, Esquire
Resnick & Louis, P.C.
146 Fairchild Street, Suite 130
Charleston, SC 29492
843-647-7114
abolyard@rlattorneys.com
Attorneys for Respondent/Third-Party Defendant Builder Services Group, LLC f/k/a Masco Contractor Services Central, Inc. f/k/a Gale Industries, Inc. d/b/a Gale Contractor Services

Everett A. Kendall, II, Esquire
Timothy J. Newton, Esquire
Murphy & Grantland, P.A.
4406-B Forest Drive
Columbia, SC 29206
803-782-4100
rkendall@murphygrantland.com
tnewton@murphygrantland.com
Attorneys for Respondent/Third-Party Defendant Installed Building Products, LLC a/k/a Installed Building Products II, LLC; and IBP Asset, LLC d/b/a Blue Ridge Building Products, LLC

s/D. Kay Kelly
D. Kay Kelly
Assistant to Carl F. Muller
607 Pendleton Street, Suite 201
Greenville, SC 29601
864-991-8904
carl@carlmullerlaw.com