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Sep 10 2024

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 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.

**REPLY IN SUPPORT OF
REQUEST FOR CLARIFICATION**

Respondent IBP Assets, LLC d/b/a Blue Ridge Building Products (hereinafter “Blue Ridge”) submits the following in reply to Appellant D.R. Horton, Inc.’s (hereinafter “DR Horton”) Response to Blue Ridge’s Request for Clarification of this Court’s August 23, 2024 Order:

1. With regard to request #1, Blue Ridge agrees that the cut-off date in this Court’s Order appears to be a typographical error, but Blue Ridge would show that clarification is needed because the date of the order on appeal concerning Blue Ridge was after August 17, 2023.

2. Request #2 concerned the effect of this Court’s Order striking certain materials from the Record on Appeal on the portions of the initial briefs referencing the stricken material. Contrary to DR Horton’s characterization, this was not a “gateway motion” and Blue Ridge accepts this Court’s ruling. Blue Ridge merely requested clarification as to the effect of this Court’s ruling on the briefs.

3. Request #3 concerned new materials in re-filed briefs and designations for the record on appeal. DR Horton’s Initial Revised Reply Brief, filed September 6, 2024, mooted the requests to some extent. However, it also raised objections that previously were raised in Respondents’ Joint Motion to Strike.

Specifically, DR Horton designated new materials in its Revised Supplemental Designation of Record filed September 6, 2024. (See items 23, 24, 25, and 26.) All four of these designations concern a separate appeal relating to a subcontractor that is not a party to this proceeding—JLS Masonry, Inc. See Zitek v. D.R. Horton, Inc., Appellate Case No. 2024-000057. DR Horton’s Initial Revised Reply Brief apparently cited these materials because they pre-date the August 23, 2023 deadline.

Nevertheless, these motions and orders were not raised to the trial court in arguing the motions from which this appeal was taken. The inclusion of these materials violates this Court’s Order, which states, “The record on appeal shall not contain . . . any materials that otherwise were not presented to the lower court . . . in conjunction with, its issuance of the order on appeal.”

By way of background, this class action suit was brought against DR Horton for construction defects. DR Horton asserted third-party claims against numerous subcontractors based on indemnity and related causes of action. Some of the subcontractors settled with DR Horton. This appeal concerns orders granting summary judgment for Blue Ridge and one other subcontractor. During the same time period, other subcontractors filed dispositive motions. Some of those motions were denied and DR Horton’s claims against them proceeded to trial.

In DR Horton’s Initial Brief of Appellant, filed February 8, 2024, the “Summary of Facts” section recited that the trial court’s ruling as to Respondents was inconsistent with its ruling as to other subcontractors. (DRH Init. Br., pp. 13-14.) That point was not listed in the Statement of Issues on Appeal. (Id. at p. 6.) Nor could it have been, because the inconsistency argument was not raised to the trial judge until *after* the orders concerning Respondents had been appealed and the remainder of the case had proceeded to trial. The date of the cited transcript is September 15,

2023 (id. at p. 14), which post-dates the cut-off date set in this Court’s August 23, 2024 Order (assuming the date was intended to be August 23, 2023.)

To support the reference in its Initial Brief, DR Horton designated a portion the transcript of the subsequent trial. (DRH Designation filed Feb. 8, 2024, #16.) DR Horton also designated motions filed by two other subcontractors that are unrelated to this appeal. (Id., items 35 and 36.) Despite its bluster, it was DR Horton that initially designated materials that were not presented to the trial court in conjunction with the issues in this appeal.

Respondents’ Joint Motion to Strike objected not only to materials presented to the trial court after this appeal was taken, but also to motions and orders concerning DR Horton’s third-party claims against other subcontractors. (Joint Mot. filed June 12, 2024, pp. 5-6.) This Court granted that motion, and the Court appears to have ruled that motions and orders concerning other subcontractors should not be included in the record on appeal. (Order filed Aug. 23, 2024.)

The ground for Blue Ridge’s objection to this material is very simple. Minimal procedural due process requires notice and a meaningful opportunity to be heard. Blanton v. Stathos, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002). Consistently with this fundamental requirement, the appellate court rules do not allow parties to raise issues on appeal that were not presented to the trial court. Rule 210(b), SCACR. New arguments may not be raised in reply briefs. Bochette v. Bochette, 300 S.C. 109, 112, 386 S.E.2d 475, 477 (Ct. App. 1989); State v. Wakefield, 323 S.C. 189, 191, 473 S.E.2d 831, 832 (Ct. App. 1996). Rule 211(b), SCACR. If both of these rules are violated by the raising of new arguments in a reply brief on appeal, due process is denied because the opposing party is not guaranteed an opportunity to respond. New issues may not be raised in final briefs. Rule 211(b), SCACR. Oral argument is at this Court’s discretion. Rule 215, SCACR.

In its Initial Revised Reply Brief Replying to IBP, which was filed after this Court’s ruling on the Joint Motion to Strike, DR Horton made the following representations which were not in the brief it replaced: It is asserted that “the trial judge ruled two different ways . . . on the *very same issues* as Respondent IBP, but their motions were denied.” (Compare DRH Init. Rev. Reply to IBP, p. 13 with DRH Init. Reply Br. Replying to IBP, pp. 12.13.) Also, “IBP was the anomaly, IBP was the aberrant decision.” (Id.)

DR Horton twice accuses Blue Ridge of omitting facts. (DRH Init. Rev. Reply to IBP, p. 13.) But the “facts” DR Horton raises are not properly before this Court.

DR Horton seeks to capitalize on the ruling that the transcript of the September 15, 2023 proceeding be stricken. It was by reference to that same transcript that Blue Ridge distinguished Respondents’ motions from those of other subcontractors. (Blue Ridge Init. Br., p. 12.) DR Horton responded to the Order striking irrelevant materials by reasserting its improper “inconsistent-rulings” argument based on some earlier trial court rulings that are just as unrelated. (DRH Rev. Suppl. DOM, #s 23-26.) Because the transcript of the subsequent trial has been stricken, DR Horton attempts to create the impression that Blue Ridge’s position is unsubstantiated.

Blue Ridge has not been afforded the opportunity to appear and make its case that the trial court ruled consistently because the facts concerning its dispositive motions are materially different. That issue is not properly before this Court. Consistently with due process, arguments and materials not raised until after Blue Ridge’s last opportunity to respond should not be considered in this appeal.

CONCLUSION

Respondent Blue Ridge requests clarification of this Court’s August 23, 2024 Order and a ruling that items 23 through 26 of DR Horton’s Revised Supplemental Designation may not be added to the record on appeal. The argument to which they pertain was not raised in Appellant

DR Horton's Statement of Issues on Appeal or advanced in Appellant's Initial Brief. They were not brought to the trial court's attention with respect to the orders on appeal. They were first raised after this Court struck matters not relating to this appeal from the record. These motions, like items 35 and 36 of DR Horton's February 8, 2024 Designation, pertain to other subcontractors, and are therefore subject to this Court's Order granting the Joint Motion to Strike. Finally, if this Court allows DR Horton's "inconsistent rulings" argument to be considered for the merits of this appeal, Blue Ridge requests an opportunity to meaningfully respond to it.

Respectfully submitted,

s/Timothy J. Newton

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PROOF OF SERVICE

I certify that I have served Installed Building Products, LLC A/K/A Installed Building Products II, LLC's Reply Brief in Support of Request for Clarification on the parties of record by emailing a copy to the attorneys of record as follows:

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