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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

The Honorable R. Scott Sprouse
Circuit Court Judge

Appellate Case No. 2024-000057
Circuit Court Case No. 2019-CP-04-01942

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,

and.

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

v.

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 al, ... Fourth and Fifth-Party Defendants,

of whom

JLS Masonry, Inc. is the .... Appellants.

and

Natalie Zitek, individually, and on behalf of all others similarly situated and as assignee of the claims of Third-Party Plaintiff D.R. Horton, Inc., ... Respondent,

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INTRODUCTION

Zitek Respondents ("Respondents") concede this case was complex from the beginning. Respondents' Br. 1, 4. As with any trial, the parties and Judge Sprouse ("Trial Judge") adapted and reacted to constantly changing variables, including the settling of claims and dismissal of parties. Despite the Trial Judge's best efforts in trial management, the bifurcation of the trial into two phases did not go according to the Trial Judge's initial Trial Plan. Respondents now seek to take advantage of the fluid nature of the trial below by claiming "nearly all of the arguments" raised on appeal by Appellant JLS Masonry, Inc., ("JLS") cannot be considered by this Court. *See* Respondents' Br. 1–3. In doing so, Respondents aim to elevate form over substance and sidestep the clear law of South Carolina.

It is also clear that Respondents' arguments on appeal are inconsistent with their statements and representations during the trial. Indeed, the pre-trial, trial motions and transcripts, and post-trial motions support JLS's arguments on appeal. These documents underscore the magnitude of procedural improprieties, misapplication of the law, and the improper consolidation of class and non-class parties, which deprived JLS of due process, confused the jury, and led to a factually unsupported verdict against JLS.

STATEMENT OF FACTS

JLS rests upon the facts set forth in JLS's Initial Brief and specifically objects to the portions of Respondents' "Statement of the Facts" that lack citation to the record and those portions which mischaracterize the record. JLS further objects to Respondents' characterization of the underlying trial motions and improper assertion that JLS failed to preserve issues for appellate review.

ARGUMENT

It is unfeasible to address every single point raised in Respondents' Initial Brief, as Respondents' arguments are as varied and unmeritorious as they are muddling. After meticulously sifting through Respondents' arguments, JLS has surmised that Respondents' arguments can be broken down into two categories. First, Respondents raise various arguments that go toward issue preservation, arguing this Court cannot reach nearly all of the issues on appeal because they are not properly before this Court. Second, Respondents argue that none of the issues have any merit, regardless of whether they are preserved. Neither argument is persuasive.

JLS first addresses the various issue preservation arguments Respondents raise and why they should be disregarded. Second, JLS addresses the red herring argument Respondents raise with regard to the jury verdicts. Finally, JLS responds to certain points raised in Respondents' merits arguments. For the reasons that follow, this Court *can* and *should* consider the merits of the issues raised in JLS's Initial Brief, as those arguments are dispositive of this appeal and entitle JLS to the relief it seeks.

I. Issue Preservation

Respondents argue that this Court cannot reach the merits of JLS's arguments because JLS's arguments were "waived, abandoned, unpreserved, or otherwise procedurally precluded." Respondents' Br. 19; *see also* Respondents' Br. 19–25, 29–30, 46–47. In making these various arguments, Respondents either misconstrue the record or misunderstand South Carolina's preservation rules.

In South Carolina, it is "axiomatic that an issue cannot be raised for the first time on appeal." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Rather, in order for an issue to be properly presented to an appellate court in South Carolina, that issue must have been

raised to and ruled on by the trial judge. *Id.* In raising the issue to the trial judge, "the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge." *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011).

However, the Supreme Court of South Carolina "has cautioned that issue preservation 'is not a "gotcha" game aimed at embarrassing attorneys or harming litigants.'" *Johnson v. Roberts*, 422 S.C. 406, 411, 812 S.E.2d 207, 210 (Ct. App. 2018) (quoting *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012)), *aff'd,* 427 S.C. 258, 830 S.E.2d 910 (2019). Indeed, "a party is not required to use the exact name of a legal doctrine in order to preserve the issue" for appellate review. *Herron*, 395 S.C. at 466, 719 S.E.2d at 642. This is because, "[i]ssue preservation rules are designed to give the trial court *a fair opportunity to rule on the issues*, and thus provide" appellate courts a platform for meaningful review. *Id.* at 465, 719 S.E.2d at 642 (emphasis added).

Consequently, if there is any doubt as to whether an issue was properly preserved, appellate courts in South Carolina have erred on the side of caution and in favor of preservation. *See, e.g.*, *Johnson*, 422 S.C. at 412, 812 S.E.2d at 210 (finding an appellant preserved her arguments where the question of preservation was not entirely clear and noting "[i]n these situations, where the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation" (quotation marks and citation omitted)), *aff'd,* 427 S.C. 258, 830 S.E.2d 910; *see also Atl. Coast Builders & Contractors, LLC*, 398 S.C. at 332, 730 S.E.2d at 287 (Toal, C.J., concurring in result in part and dissenting in part) ("[A]n over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice.").

Here, Respondents seek to elevate form over substance, arguing that JLS did not "properly" raise various issues to the Trial Judge or did not "properly" object to the Trial Judge. As elaborated below, none of Respondents' arguments have merit because JLS raised all the issues that are the subject of this appeal at trial and through post-trial motions.

a. Respondents' arguments regarding decertification

Respondents argue this Court must affirm the July 19, 2023, Order Denying Decertification because JLS did not appeal the January 2021 Order Granting Class Certification. Respondents' Br. 20. Respondents' argument wholly ignores the fact that JLS *was not a party* to the underlying litigation in January 2021.

Indeed, D.R. Horton did not file an affidavit of service with respect to JLS, and JLS voluntarily filed an answer on March 9, 2022, approximately one (1) year after D.R. Horton had filed its third-party complaint. *See* JLS Answer to DRH Third-Party Compl., Mar. 9, 2022. Once JLS was added as a third-party, JLS—along with other third-party and fourth-party defendants—continuously asserted they were not part of the class, and further moved for orders decertifying/confirming that they were not part of the class and that class issues and damages should not be imputed to them. *See* JLS Mot. to Decertify Class, June 23, 2023; DRH Mot. for Class Decertification, May 1, 2023; Harrelson Mot. for Decertification, June 20, 2023; NM Alex Carpet Mot. for Decertification, June 20, 2023; M&L Reyna Construction Mot. for Class Decertification, June 26, 2023. All the pre-trial motions to decertify were denied. *See* Order Den. All Motions to Decertify Class, July 19, 2023.

Thus, this argument is misleading at best, and ignores Respondents' position during trial, including Respondents' arguments that "the third-parties have no standing to even say anything about our class certification." *See* Trial Tr. vol. 1, 455–59, 470; Trial Tr. vol. 2, 667. It is

incontrovertible that the decertification issue was raised multiple times during the trial, and the Trial Judge specifically denied JLS' motion to decertify. *See* Appellant's Br. 15–16. To suggest that JLS did not "properly" bring its decertification argument before this Court because of a January 2021 Order that was filed over a year before JLS was added as a third-party is a red herring argument, and it flies in the face of the purpose of issue preservation rules in South Carolina. *See Atl. Coast Builders & Contractors, LLC*, 398 S.C. at 332, 730 S.E.2d at 287. Moreover, and rather confusingly, Respondents *concede that the issue of decertification was properly raised to the Trial Judge* later in their brief. *See* Respondents' Br. 25 (noting that the Trial Judge ruled on, inter alia, decertification and it was "properly denied"); *see also id.* at 34–36. As illustrated throughout this Reply, this is just one of many examples of Respondents' disingenuous arguments aimed at confusing the issues and this Court. Accordingly, they should be disregarded.

b. Respondents' arguments regarding Directed Verdict (DV), Judgment Notwithstanding the Verdict (JNOV), and Rule 59(e) motions.

Respondents further attempt to elevate form over substance by arguing that JLS did not make "proper" motions at trial, which renders all issues in these "improper" motions unpreserved. *See* Respondents' Br. 20–22. Specifically, Respondents take issue with the form of JLS's DV and JNOV motions and maintain none of JLS's motions at trial were proper. Further, Respondents go so far as to suggest that this Court cannot consider JLS's Rule 59(e) Motion for Reconsideration because it is a "nullity under the law." Respondents' Br. 22. Respondents' position is untenable for four reasons.

First, the *core (and dispositive) question* is whether these issues were raised to and ruled on by the Trial Judge. Undoubtedly, they were, as shown by the Trial Judge's orders denying the post-trial motions. *See* Order Den. JLS Mot. for JNOV, Nov. 8, 2023; Order Den. JLS Mot. to Reconsider, Dec. 12, 2023. JLS also moved for Directed Verdict at trial, and the motion was denied

from the bench. JLS Mot. for Directed Verdict, Sept. 14, 2023; Trial Tr. vol. 2, 861–62, 863–64. Again, South Carolina's issue preservation rules are "not a 'gotcha' game aimed at embarrassing attorneys or harming litigants," but rather merely a mechanism to ensure trial judges are given a full and fair opportunity to rule on an issue in the first instance. *See Atl. Coast Builders & Contractors, LLC*, 398 S.C. at 329, 730 S.E.2d at 285; *Herron*, 395 S.C. at 465, 719 S.E.2d at 642. Whether Respondents believe JLS never "properly" raised a DV or JNOV motion is an invitation for this Court to take a detour and engage in semantics—it is, like many of Respondents' arguments, a distraction. There are no "magic words" required to preserve issues for appeal. *See State v. Russell*, 345 S.C. 128, 132, 546 S.E.2d 202, 204 (Ct. App. 2001) (finding issue was preserved even though defendant did not use exact words "corpus delicti" in his request for a directed verdict); *see also S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 302–03, 641 S.E.2d 903, 907 (2007) (finding that although SCDOT did not phrase objection in the exact terms used in the issues on appeal, the objection was sufficiently specific to allow the trial judge to rule on the issue).

Second, at best, Respondents' arguments amount to an exercise in splitting hairs over whether certain issues were preserved. When similar distinctions without a meaningful difference have been raised with respect to issue preservation, South Carolina appellate courts clearly favor finding an issue preserved in the interests of reaching the merits. *See, e.g.*, *Johnson*, 422 S.C. at 412, 812 S.E.2d at 210 (finding an appellant preserved her arguments where the question of preservation was not entirely clear and noting "[i]n these situations, where the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation" (quotation marks and citation omitted)), *aff'd,* 427 S.C. 258, 830 S.E.2d 910; *see also Atl. Coast Builders & Contractors, LLC*, 398 S.C. at 330, 730 S.E.2d at 285 (stating that

though appellate courts "should follow . . . longstanding precedent and resolve [an] issue on preservation grounds when it clearly is unpreserved," it is "good practice for us to reach the merits of an issue when error preservation is doubtful"). Thus, despite what Respondents suggest, this Court *can* and *should* reach the merits of the issues on appeal.

Third, regarding JLS's Rule 59(e) Motion for Reconsideration, Respondents cite no case law that purportedly makes a Rule 59(e) motion a "nullity under the law" because its substance relates to previous DV or JNOV motions raised during and after trial. *See* Respondents' Br. 22. It appears Respondents are suggesting that JLS's alleged "improper" DV and JNOV motions somehow infected JLS's Rule 59(e) Motion for Reconsideration, but they have not provided any legal support for this unprecedented argument.

A Rule 59(e) motion is separate and distinct from a DV or JNOV motion—illustrated in part by the fact these motions are governed by different rules of civil procedure. The Supreme Court of South Carolina has explained a motion under Rule 59(e) "long has been viewed as [a] 'motion for reconsideration' despite the absence of those words from the rule," and that "a party usually is allowed to ask the court to reconsider its decision *even if it means rehashing all or part of an argument previously presented*." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778–79 (2004) (emphasis added). The South Carolina Rules of Civil Procedure "contemplate two basic situations" where a party should consider filing a Rule 59(e) motion:

> [1] A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. [2] A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Id. at 24, 602 S.E.2d at 780 (emphasis in original). Thus, there is "nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible

misapprehension of an earlier argument, but also to revisit a previously raised argument." *Id.* at 22, 602 S.E.2d at 779. It is, however, "inherently unfair to disallow such an opportunity." *Id.* Consequently, JLS's Rule 59(e) Motion for Reconsideration was not a "nullity under the law," and the issues raised therein are properly before this Court.

Fourth, related to these ideas, the trial below was complex and fluid in nature. JLS was not a party defendant during Phase I of the trial. Trial Tr. vol. 1, 29:13–30:9, 469:25–470:3. Despite not being allowed to actively participate in much of Phase I, JLS still attempted to raise objections where possible. Trial Tr. vol. 1, 459, 467–68, 472:10-14; Trial Tr. vol. 2, 666–67, 696:19–22. The collapsing of Phase I and Phase II muddied the status of objections and the procedural posture of the trial as a whole. As the Supreme Court of South Carolina has instructed, if "a party is unsure whether he properly raised all issues and obtained a ruling, he *must* file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review." *Elam*, 361 S.C. at 25, 602 S.E.2d at 780 (emphasis added). That is precisely what JLS did here. The issues raised in JLS's Rule 59(e) Motion for Reconsideration are preserved.

c. Respondents' arguments regarding bifurcation

Respondents argue JLS waived or otherwise consented to the way bifurcation was ultimately handled at trial. Respondents' Br. 25, 46–47. Specifically, Respondents maintain that JLS's bifurcation arguments are unpreserved because JLS did not include the Trial Plan Order in its Notice of Appeal. They further argue that JLS "agreed" to the merger of Phase I and II. Respondents' Br. 25. These arguments should be rejected.

As an initial matter, it is unclear why Respondents maintain that JLS's arguments on this point are unpreserved because the Trial Plan Order was not contained in the Notice of Appeal. Rule 203 states that "a party intending to appeal must serve and file a notice of appeal," and this

notice "shall be served on all respondents within thirty (30) days after receipt of the written notice of *entry of the order or judgment.*"[1] JLS is appealing the final judgement arising out of the Trial Judge's co-mingling of the class versus non-class claims and parties—which necessarily *includes* the deviation from the Trial Plan Order during trial that resulted in an inconsistent and unsupported verdict. In other words, the Trial Plan Order is incorporated in the final judgement that is the subject of the appeal. A literal interpretation of Respondents' argument would require JLS to attach every pre-trial, trial, and post-trial order that is referenced in this appeal to the Notice of Appeal, contrary to the language of Rule 203 SCACR.

Here, JLS specifically moved, along with other third-party subcontractors, to bifurcate the trial. *See* JLS Mot. to Bifurcate, June 23, 2023. In response, the Trial Judge entered a Trial Plan Order on August 17, 2023, which provided the trial would be bifurcated and proceed in two phases, with Phase I consisting of Respondents' class action claims against D.R. Horton and Phase II consisting of D.R. Horton's individual claims against the subcontractors. *See* Trial Plan Order, Aug. 17, 2023. Thus, JLS does not seek to challenge the Trial Plan Order on appeal; to the contrary, JLS wanted the Trial Judge to *adhere* to the Trial Plan Order. It was the Trial Judge's failure to adhere to this Trial Plan that caused the comingling of class and non-class matters.

Moreover, Respondents' contention that JLS "consented to (and arguably suggested)" that the Trial Judge should throw out his Trial Plan and collapse both phases of trial (*see* Respondents' Br. 47), ignores the fact that JLS s*pecifically moved for bifurcation*. The Trial Judge agreed to bifurcate. In accordance with the Trial Plan Order, Respondents brought their case against D.R. Horton first, and the third-party defendants were allowed to have only their principal party present in the courtroom to observe. *See* Trial Tr. vol. 1, 12. However, during Phase I—which, again, JLS

[1] Rule 203, SCACR (emphasis added).

was only allowed to observe[2]—the Trial Judge began to conflate Phase I and Phase II issues, instructing all the parties that, "we're going to cover the ground once during the trial."[3] *Id.* at 441. Both D.R. Horton and the non-class third-party defendants asked the Trial Judge for clarification regarding conflation of the Phase I and Phase II issues, including "a combination of liability stuff" and the understanding that subcontract agreement issues are reserved for Phase II. *See* Trial Tr. vol. 2, 440–44, 787:12–18. Implicitly acknowledging the class and non-class issues had already been conflated, the Trial Judge agreed that "although contractual and indemnity issues are Phase II issues, some questions may be 'merged' and 'the waters may be muddled' but that these are tactical decisions left to the attorneys." *Id.* at 443, 787–89.

After D.R. Horton and Respondents settled, JLS moved for disclosure of the settlement amount, moved for decertification and dismissal of D.R. Horton's indemnity claims from the bench, and moved to dismiss Respondents' claims pursuant to the statute of limitations. *See* Trial Tr. vol. 2, 697, 702, 710–21, 731–32. The excerpt that Respondents' point to as JLS "consenting" to the collapse of Phase I and Phase II (*see* Respondents' Br. 25) is nothing more than JLS accepting the fact that the Trial Judge had made up his mind as to how he wanted the trial to proceed. Every other third-party defendant had settled, and the writing was on the walls: the Trial Judge wanted the trial to finish that day. JLS had raised its objections *ad nauseum*, but the Trial Judge ruled: "This [has] turned into… a single trial, so we're going to deal with all of it at the same time now." Trial Tr. vol. 2, 736:2–4. Whereas Phase I lasted approximately nine (9) days,[4] Phase II (or what should have been Phase II) lasted less than one full day.[5] Taken in totality, the

[2] *Id*. 29:13–30:9; 470:1–6.
[3] Trial Tr. vol 2, 441:9–10.
[4] *See* Trial Tr. Cover Pages.
[5] *See* Trial Tr. vol. 2, 635–937 (opening statements on Sept. 15, 2023, to jury verdict and close of trial).

circumstances compel the conclusion that JLS was essentially railroaded into finishing trial before the weekend. *See, e.g.*, Trial Tr. vol 2, 870:9–14. Because JLS had already raised its objections and the issues were already preserved, the only course was to proceed as instructed by the Trial Judge. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 414–15, 529 S.E.2d 543, 547 (2000) (noting the court "does not require parties to engage in futile actions in order to preserve issues for appellate review").

Thus, to the extent Respondents argue JLS consented, waived, or otherwise suggested the trial deviate from the Trial Plan—a plan *it specifically moved for*—that argument is fundamentally flawed and ignores the reality of what occurred at trial. *See Allegro, Inc. v. Scully*, 418 S.C. 24, 33, 791 S.E.2d 140, 145 (2016) (noting the utility of preservation rules "would be grievously undermined were we to construe them to require futile additional argument after the trial judge *has made his position clear*" (emphasis added)), *abrogated on other grounds by Hall v. UBS Fin. Servs. Inc.*, 435 S.C. 75, 866 S.E.2d 337 (2021); *S.C. Dep't of Transp.*, 372 S.C. at 303, 641 S.E.2d at 907 (finding a party's statement at trial that, "I understand and, your honor, if you are going to use this form then that's fine, either way," was not a concession to the use of the form where the party had previously attempted to keep the form out). Accordingly, this Court should reject Respondents' arguments on this point.

d. *Stoneledge*, Standing, Statute of Limitations, Statute of Repose arguments

To the extent Respondents maintain that JLS's arguments regarding *Stoneledge*, Standing, the Statute of Limitations, or the Statute of Repose are unpreserved, this argument fails for the same reasons outlined above: these issues were raised to and ruled on by the Trial Judge.

JLS disputed and moved to dismiss D.R. Horton's implied warranty claim on the basis that it was purely an indemnity claim that would not pass muster under the *Stoneledge* precedent.[6] *See* JLS Mot. for Summ. J., May 1, 2023; JLS Mot. for Joinder and Partial Summ. J., July 11, 2023; JLS Mot. to Reconsider and/or Alter or Amend the Order Den. JLS Mot. for Summ. J., Aug. 7, 2023; JLS Mot. for Directed Verdict, Sept. 14, 2023. JLS also argued during trial that D.R. Horton lacked standing to bring an implied warranty claim because D.R. Horton's indemnity claims were purely derivative of Respondents' claims. *See* Trial Tr. vol. 2, 863–65. The Trial Judge denied these motions on July 28, 2023. *See* Order Denying JLS Mot. for Summ. J., July 28, 2023. The Trial Judge further denied the motions to reconsider on August 18, 2023. *See* Order Denying all Mots. to Reconsider, Aug. 18, 2023.

JLS further argued and submitted motions seeking dismissal of D.R. Horton's claims pursuant to the Statute of Limitations. *See* JLS Mot. for Directed Verdict, Sept. 14, 2023; JLS Mot. for JNOV and/or New Trial, Sept. 22, 2023; JLS Mot. to Reconsider, Nov. 20, 2023; *see also* Trial Tr. vol. 1, 467–68; Trial Tr. vol. 2, 731–32, 865. Likewise, JLS argued and submitted motions seeking dismissal of D.R. Horton's claims pursuant to the Statute of Repose. *See* JLS Mot. for Directed Verdict, Sept. 14, 2023; JLS Mot. for JNOV and/or New Trial, Sept. 22, 2023; JLS Mot. to Reconsider, Nov. 20, 2023. Accordingly, these issues are preserved.

II. Verdict challenges

Respondents argue two issues regarding the jury verdicts. *See* Respondents' Br. 18–19. First, they appear to argue that because JLS did not challenge the $15 million verdict against D.R. Horton, JLS's arguments are somehow "moot." Second, Respondents argue that JLS cannot

[6] *Stoneledge v. Clear View*, 413 S.C. 615, 622, 776 S.E.2d 426, 430 (Ct. App. 2015) (*Stoneledge I*) and *Stoneledge v. Builders Firstsource*, 413 S.C. 630, 637, 776 S.E.2d 434, 438 (Ct. App. 2015) (*Stoneledge II*).

challenge the $4 million verdict because it did not object to the jury charges at trial. Neither argument should be considered by this Court.

a. The $15 million verdict

Respondents appear to contend that JLS was required to challenge the $15 million verdict against D.R. Horton, and that JLS's failure to do so somehow makes that verdict "the law of the case" as to JLS. *See* Respondents' Br. 18.

Candidly, counsel for JLS has struggled to understand Respondents' reasoning on this point. A third-party subcontractor generally has the right to appeal a verdict as it *specifically pertains to them*, rather than appealing the entire verdict against the general contractor.

Further, Respondents cite to no case law that states or even suggests a subcontractor must appeal the entire verdict against the general contractor. Rather, Respondents just generally suggest an "unappealed ruling is the law of the case and requires affirmance." Respondents' Br. 18. Here, JLS is appealing the verdict against it. It is unclear what Respondents would require of JLS. A subcontractor can appeal the part of the verdict that pertains specifically to their liability.

Moreover, at trial, Respondents and D.R. Horton repeatedly prevented JLS from objecting or otherwise actively participating in Phase I of the trial because JLS was not a class defendant. Trial Tr. vol. 1, 455–59, 470; Trial Tr. vol. 2, 667. Respondents cannot now use the $15 million class verdict as a means to handcuff JLS to their class claims against D.R. Horton, especially here, where the record evidence underscores how forcefully Respondents argued the class did not apply to JLS. This Court should not consider Respondents' contrived argument regarding the supposed failure of a third-party defendant to challenge a verdict against a *different* party.

b. The $4 million verdict

Respondents argue that JLS cannot challenge the $4 million verdict against it because JLS did not specifically object to the jury charges or the verdict form. Respondents' Br. 19. Respondents, again, make a red herring argument. JLS consistently maintained that it was not a part of the class and should not be treated as a class defendant. As such, the verdict based upon class damages was erroneous and improper as to JLS. The imposition of class arguments onto JLS—despite both Respondents and the Trial Judge acknowledging during trial that JLS was not a class defendant—followed by the last-minute decision to merge the two-phase trial into one, created a legally untenable procedural mess that significantly prejudiced JLS in the form of an unjust verdict that is not supported by the facts. This Court has the opportunity to cure that injustice.

A trial judge may grant a new trial if the judge "believes the verdict is unsupported by the evidence." *Johnson v. Hoechst Celanese Corp.*, 317 S.C. 415, 421, 453 S.E.2d 908, 912 (Ct. App. 1995). Further, a trial judge has the authority to grant a new trial upon a finding "that justice has not prevailed or if the verdict is inconsistent and reflects the jury's confusion." *Sapp v. Wheeler*, 402 S.C. 502, 513, 741 S.E.2d 565, 571 (Ct. App. 2013).

As fully articulated in JLS's Initial Brief, the verdict rendered by the jury was both inconsistent and unsupported by the facts. Appellant's Br. 42–45. It is clear that the jury was confused by the last-minute merger of Phases I and II. During deliberations, the jury proffered a question regarding the meaning of indemnity. The parties agreed a charge on indemnity should be read to the jury. *See* Trial Tr. vol. 2, 927:13–934:5. Taking into consideration the jury's proffered question and inconsistent verdict, there can be no doubt that the jury was confused on indemnity and how it interplayed with negligence and implied warranty when the closing statements were

made by the same Respondents' counsel on behalf of Respondents' claims and D.R. Horton's claims.

The jury's verdict finding that D.R. Horton was *not liable* for the implied warranty claims asserted by Respondents cannot logically be reconciled with a verdict finding JLS *liable* to D.R. Horton for implied warranty claims. There was no evidence to support a factual finding that JLS breached any implied warranty as to D.R. Horton, and Dr. Whitlock could not point to any individualized damages attributable to JLS, specific to JLS's work on each home. Trial Tr. vol. 2, 665:16–23, 844–48, 850–53, 859. Notably, D.R. Horton conceded it had made mistakes during its construction of the Project, including its own liability for implied warranties. Trial Tr. vol. 1, 47–49; Trial Tr. vol. 2, 633, 643, 644, 645. Thus, if, in spite of D.R. Horton's admissions regarding its breach of warranties, the jury still determined that D.R. Horton had *not* breached any warranties which caused damage to Respondents, what warranties did JLS breach that subjected D.R. Horton to liability based on breach of warranties? The answer can only be none based on the jury's verdict finding that D.R. Horton was not liable for any breach of warranties. JLS raised this question at trial. Trial Tr. vol. 2, 728:11–19, 729:11–19. Clearly, the verdict against JLS is inconsistent and reflects the jury's confusion, warranting a new trial. *See Sapp*, 402 S.C. at 513, 741 S.E.2d at 571 (noting a trial judge may grant a new trial "if the verdict is inconsistent and reflects the jury's confusion").

Moreover, the verdict against JLS was derived from the class damages, which were improperly attributed to JLS without the pre-requisite burden of proof as to D.R. Horton's individual claims against JLS. *See* Trial Tr. vol. 1, 466–67, 674:9–14; Trial Tr. vol. 2, 665:16–23 ("[The single repair cost for the neighborhood] is not a per lot estimate. It is a comprehensive repair for the neighborhood. You can't just divide it … and do separate repairs."). JLS challenges the verdict on the

grounds that it is inconsistent and unsupported by the facts. This type of challenge is *separate* and *distinct* from challenges to a jury charge or a verdict form. Indeed, the cases Respondents cite in their brief recognize this distinction. *See* Respondents' Br. 19; *Johnson*, 317 S.C. at 421, 453 S.E.2d at 912 (holding landowners failed to preserve any issue regarding a verdict form, but then stating "[a]lthough we view any alleged error with the map and verdict form as a trial error which must be preserved for appeal, the landowners argue a new trial should have been granted because the verdicts were inconsistent and against the weight of the evidence" and engaging in a *separate* analysis on that issue); *Ambruoso v. Lee*, No. 2010-UP-158, 2010 WL 10079451, at *3 (S.C. Ct. App. Feb. 23, 2010) (unpublished) (engaging in *separate* analyses regarding (1) a verdict form and (2) whether the evidence did not justify the verdict).

Respondents again conflate the issues and present another red herring argument in an attempt to muddle an already complex and confusing case. This Court should disregard such arguments.

III. Merits

JLS stands on the arguments contained in its Initial Brief but finds it necessary to address a few of Respondents' arguments on the merits.[7] Specifically, Respondents' merits arguments on the (1) Statute of Limitations, (2) Statute of Repose, (3) the applicability of *Stoneledge*, and (4) the class certification.

a. Statute of Limitations

Respondents argue that JLS's Statute of Limitations defense fails because, inter alia, it "contractually extended" the Statute of Limitations to ten years. Respondents' Br. 26. Respondents

[7] JLS's lack of response to any of Respondents' arguments should not be construed as conceding any argument or point. Rather, JLS seeks to respond to the most pressing—and grievous—arguments from Respondents' Initial Brief in this limited Reply Brief.

rely on an excerpt from JLS's subcontract for this proposition—specifically language gleaned from the homeowner's warranty section. *See id.* Respondents misconstrue the importance of—or otherwise misunderstand—this language.

To be sure, a "party can waive a statute of limitations defense." *RWE NUKEM Corp. v. ENSR Corp.*, 373 S.C. 190, 197, 644 S.E.2d 730, 734 (2007). However, this waiver "*must* be shown by *words* or *conduct*, including an express agreement, failure to claim the defense, or any action or inaction inconsistent with an intention to use the statute of limitations defense." *Anonymous Taxpayer v. S.C. Dep't of Revenue*, 377 S.C. 425, 440, 661 S.E.2d 73, 80 (2008) (emphasis added).

Respondents maintain JLS waived the Statute of Limitations defense through its words via a contract.[8] "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). "Where an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001).

The subcontract language Respondents rely upon provides:

> 8.2 Home Owners Warranty. In addition to the warranty in Paragraph 8.1, Contractor ***warrants*** that the Work shall remain free of defects ***<u>for the following warranty periods</u>*** beginning on the earlier of the date of occupancy by, or transfer of title from Owner to, the initial homeowner of the property on that is the subject of the Work: (i) for a period of **<u>ten (10) years</u>** all structural elements . . .
>
> Furthermore, notwithstanding the foregoing, Contractor agrees that **all express and *implied* warranties** shall remain in full force and effect **for so long as** Owner is obligated to warrant the Work pursuant to applicable law.

[8] Certainly, JLS's conduct does not give rise to any reasonable inference that it waived the Statute of Limitations defense, as JLS continuously and repeatedly raised this defense throughout trial. *See* Trial Tr. vol. 1, 467, 468; Trial Tr. vol. 2, 731, 865–66.

Respondents' Br. 26 (emphasis Respondents').

Here, nothing in the above quoted language *expressly* states JLS is waiving any Statute of Limitation defense. To the contrary, the above language is merely a homeowner's warranty clause. JLS offering a ten-year warranty to D.R. Horton may extend the usual warranty period and contractually bind JLS to repair its work for that extended warranty period; it does not, however, extend the time period for D.R. Horton *to sue* JLS. Quite simply, Respondents conflate a contractual obligation of warranty with a statutory protection from filing suit. To construe the above language as an *express agreement* to waive the Statute of Limitations flies in the face of basic contract interpretation and South Carolina's requirement that waiver be voluntary and intentional. *See Anonymous Taxpayer*, 377 S.C. at 440, 661 S.E.2d at 80 (holding that parties may waive a statute of limitations defense by "express agreement"); *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994) ("Waiver is a voluntary and intentional abandonment or relinquishment of a known right.").

Because there is no contract language that clearly and expressly waives the Statute of Limitations, Respondents' arguments are without merit. *Cf. Publix Super Markets, Inc. v. Richardson*, No. 9:23-CV-01089-RMG, 2023 WL 11887251, at *2 (D.S.C. July 24, 2023) (finding contract language foreclosed a statute of limitation defense where the language *expressly* provided: "Guarantor waives the benefit of any statute of limitations affecting Guarantor's liability under this Guaranty," and noting the "Parties' intentions, as determined by the Guaranty's language is *clear*: the Guarantors waive any statute of limitations defense that they might otherwise assert under the Guaranty" (emphasis added)).

b. Statute of Repose

Respondents make similar arguments regarding the Statute of Repose, arguing that JLS contractually extended the Statute of Repose because of the warranty language. Respondents' Br. 41. This argument fails for the same reasons above. Additionally, Respondents argue the gross negligence exception applies to the situation here. This argument also fails.

The primary purpose of South Carolina's Statute of Repose, S.C. Code § 15-3-640, is to confer a substantive right on developers to be exempt from liability after a certain time period. *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 182, 708 S.E.2d 787, 793 (Ct. App. 2011); *see also Langley v. Pierce*, 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993) ("A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time."). Unlike a statute of limitations, a statute of repose creates an "*an absolute time limit* beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body." *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) (emphasis added). The statute also provides that a certificate of occupancy "shall constitute proof of substantial completion" unless the parties agree in writing on a different date. S.C. Code Ann. § 15-3-640.

Here, Respondents highlight the same contract language in arguing JLS waived or otherwise extended the Statute of Repose. Respondents' Br. 41. In doing so, Respondents conflate a contractual obligation of warranty with a substantive right to be exempt from liability—a right which was specifically conferred by the legislature to protect JLS from suits like this. Nothing in the above contract language should be construed as a waiver or an extension of the eight year limit on liability granted by of the Statute of Repose. *See McGill*, 381 S.C. at 185, 672 S.E.2d at 574 ("The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties'

intentions as determined by the contract language."). Because there is no contract language that clearly and expressly waives or otherwise extends the Statute of Repose, Respondents' arguments are without merit. *Cf. Publix Super Markets, Inc.*, No. 9:23-CV-01089-RMG, 2023 WL 11887251, at *2 (finding contract language foreclosed a statute of limitation defense where the language *expressly* provided: "Guarantor waives the benefit of any statute of limitations affecting Guarantor's liability under this Guaranty," and noting the "Parties' intentions, as determined by the Guaranty's language is clear: the Guarantors waive any statute of limitations defense that they might otherwise assert under the Guaranty"); *see also Tsonev for Est. of Shearer v. McAir, Inc.*, 272 N.C. App. 689, 693–94, 847 S.E.2d 788, 792 (2020) (noting a party had signed an agreement that explicitly provided "*you may not bring any action against us more than two (2) years after the Completion Date*" and finding that the Statute of Repose was waived because the contract "*clearly* limited the time in which an action could be brought" (second emphasis added)).

Respondents also maintain that the gross negligence exception to the Statute of Repose applies because JLS's expert "admitted many building code violations exist in the masonry," and Respondents argue "[t]his admission, alone, is proof of gross negligence." Respondents' Br. 43. This argument is wholly without merit because South Carolina case law is abundantly clear: "[f]ailing to comply with a building code alone is not gross negligence." *Napier v. Mundy's Constr., Inc.*, No. 2024-UP-144, 2024 WL 1434409, at *3 (S.C. Ct. App. Apr. 3, 2024) (unpublished); *see also* S.C. Code Ann. § 15-3-670(B) (Supp. 2023) ("For the purpose of [the gross negligence or recklessness exception to the statute of repose] the violation of a building code of a jurisdiction or political subdivision does not constitute per se . . . gross negligence[ ] or recklessness[ ] but this type of violation may be admissible as evidence of . . . gross negligence [

] or recklessness."). Consequently, Respondents' arguments regarding the Statute of Repose lack merit.

c. *Stoneledge* arguments

Respondents argue that *Stoneledge* and its progeny are distinguishable because D.R. Horton's claims were not contingent on Respondents' claims. Respondents' Br. 36–39. However, when pressed at trial, D.R. Horton was unable to show specific or separate damages as to JLS's work. Trial Tr. vol. 2, 846–48, 850–53, 859. Indeed, not only did D.R. Horton not know what houses JLS worked on, nor the costs associated with repairing JLS's work, D.R. Horton admitted to its own sole negligence during trial, including its own liability for implied warranties. Trial Tr. vol. 1, 47–49, Trial Tr. vol. 2, 633, 643, 644, 645. Likewise, the damages asserted against D.R. Horton were class damages, and no individualized damages were presented by D.R. Horton against JLS. As such, D.R. Horton's breach of warranty claim against JLS was merely derivative of Respondents' claims against D.R. Horton, and thus barred under the *Stoneledge* precedent. As argued in JLS's Initial Brief, this case falls squarely within the precedent of *Stoneledge* and its progeny. Appellant's Br. 20–26. This Court should dismiss on that basis.

d. Class certification arguments

Respondents' arguments regarding JLS' status as a class defendant are duplicitous at best.[9] Regardless, the record is replete with evidence showing that JLS and the subcontractors were not part of the class certified with respect to Respondents' claims against D.R. Horton. The July 19, 2023, Order impermissibly imposed the arguments raised by Respondents in support of maintaining the class previously certified as to D.R. Horton only, onto the subcontractors, without conducting the pre-requisite Rule 23 class certification analysis with respect to the subcontractors.

[9] Trial Tr. vol. 1, 455–59, 470; Trial Tr. vol. 2, 667; *cf.* Respondents' Br. 25 (noting that the Trial Judge ruled on, inter alia, decertification and it was "properly denied"); *see also id.* at 34–36.

The July 19, 2023, Order essentially adopted the original certification order entered on January 27, 2021, (which, as noted above, was *before* JLS was added as a third-party defendant) and concluded Respondents had met their burden regarding class certification. That was error of law for two basic reasons: (1) Respondents only asserted claims against D.R. Horton, and had no claims against JLS or any of the subcontractors; and (2) at the time of the original Rule 23 analysis, JLS was not a defendant and Judge Maddox[10] concluded that class damages would be appropriate as to D.R. Horton's liability, not the subcontractors. There is no merit to Respondents' argument, and it should be dismissed.

CONCLUSION

For the foregoing reasons, this Court should reach the underlying merits of the issues on appeal. Furthermore, for the reasons above and those set forth in JLS's Initial Brief, this Court should dismiss the case based on the nonexistent implied warranty claim that was impermissibly allowed to go to the jury. In the alternative, a new trial is warranted based on the Trial Judge's improper conflation of the class versus non-class issues and damages, including improper treatment of JLS as a *de facto* class defendant, improper denial of the Motion to Decertify, JNOV, and denial of the Rule 59(e) Motion for Reconsideration.

Respectfully submitted,

[10] Judge Maddox was the original judge before Judge Sprouse. Thus, not only was the January 2021 original certification order entered before JLS was even a party, it was issued by an entirely different Circuit Judge.

Dated: October 23, 2024

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse
Circuit Court Judge

Appellate Case No. 2024-000057
Circuit Court Case No. 2019-CP-04-01942

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,

and.

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

v.

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 al, ... Fourth and Fifth-Party Plaintiffs and Defendants,

of whom

JLS Masonry, Inc. is the .... Appellant.

v.

Natalie Zitek, individually, and on behalf of all others similarly situated and as assignee of the claims of Third-Party Plaintiff D.R. Horton, Inc., ... Respondent,

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PROOF OF SERVICE

I, the undersigned of the law offices of Gordon Rees Sculls Mansukhani LLP, does hereby certifies that I served JLS Masonry, Inc.'s Reply Brief of Appellant JLS Masonry, Inc. via email on counsel of record via email as listed below:

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Dated: October 23, 2024

By: *s/Nosizi Ralephata.*