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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeal

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

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

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

v.

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

D.R. Horton, Inc.,Appellant,

v.

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

Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Sodfather, Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc, A/K/A Gale Contractors Service; Tucker Materials, Inc., A/K/A Gypsum; UTM Enterprises, Inc., Dupree Plumbing Company, Inc.; Willow Tree Landscaping, Inc.,Third-Party Defendants, of which Builder Services Group (f/k/a Masco Contractor Services Central Inc. f/k/a Gale Industries, Inc. d/b/a Gale Contractors Services)¹ and IBP Assets, LLC d/b/a Blue Ridge Building Products, are the Respondents.

**RESPONSE TO APPELLANT’S
MOTION TO STRIKE**

Respondents IBP Assets, LLC d/b/a Blue Ridge Building Products (hereinafter “Blue Ridge”) and Builder Services Group, Inc. f/k/a Masco Contractor Services Central Inc. f/k/a Gale Industries, Inc. d/b/a Gale Contractors Services (hereinafter “Gale”) (collectively “Respondents”) submit the following response to Appellant D.R. Horton, Inc.’s (hereinafter “DR Horton) Motion to Strike.

ARGUMENT

DR Horton’s untimely motion to strike should be denied. If this Court is inclined to grant DR Horton’s motion, Respondents request the opportunity to correct their briefs in keeping with this Court’s Order and Amended Order granting their Joint Motion to Strike.

I. DR Horton waived the objections made in its Motion to Strike.

DR Horton could have filed its motion to strike over six months ago. Respondents’ initial briefs and designations were filed on April 10, 2024 and had the issues been timely raised, the current confusion surrounding DR Horton’s reply briefs would not have occurred. Respondents

¹ This is in improper name identification the entity should be listed as *Builder Services Group, Inc d/b/a Gale Contractor Services*.

would have corrected their briefs and designations and DR Horton's reply briefs would have followed their normal course.

Respondents noted the jury verdict issue in their Joint Motion to Strike filed June 12, 2024 (p. 4, n.3.). DR Horton argued in response that "[i]f 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." (Appellant's Opp'n filed June 20, 2024, p. 5.) DR Horton did not move to strike until over four months later.

After extensive motion practice, two court orders, and re-filed briefs and record, DR Horton's request to strike has been waived. See 4 C.J.S. Appeal and Error § 659 (May 2024 Update) ("Defects and omissions in the appeal record which are not jurisdictional may be expressly or impliedly waived.").

II. Specific issues

A. Jury Verdict

This Court ruled that the jury verdict should be stricken from the record. (Order filed Aug. 23, 2024.) Blue Ridge requested clarification as to the effect of that ruling upon its brief. (Req. for Clarification filed Sept. 4, 2024.) This Court's amended Order filed October 21, 2024, did not address that request.

As set forth above, DR Horton waived its objections to the references in the verdict in Blue Ridge's brief because they were not timely raised. Furthermore, DR Horton cites no authority in support of its position that references to a public record must be stricken. Nevertheless, if this Court sees fit to strike references to the jury verdict, Respondents request an opportunity to correct their briefs as discussed below.

B. Discovery responses

As for the citations to D.R. Horton discovery responses, Gale contends that although the D.R. Horton Discovery Responses were not filed with the lower court as an exhibit, the lack of a contract in these discovery responses was incorporated by reference in the oral arguments below as well as is supported by the entire record of this matter. Any reference to the actual discovery responses can be removed if the Court instructs Respondent Gale to do so as there are other items already in the record that support the same contention.

C. References to the coverage action

DR Horton also moved to strike references to a related action it filed regarding liability coverage. This argument is without merit. The pleading has already been removed from the record. (See Amended Record on Appeal, item 73.) DR Horton cites no authority for its contention that public records that are available online may not be cited, and the undersigned knows of none. The Bluebook contains extensive guidance for the form of such citations.

As for the relevance of the coverage action, DR Horton hoisted itself on its own petard. The references in Respondents' briefs are responsive to statements DR Horton made in its initial brief. Respondents moved to strike those statements. (Joint Mot. to Strike filed June 12, 2024, pp. 6-7.) This Court's Orders are silent regarding that request.

DR Horton now moves to strike Respondents' responses to DR Horton's improper statements. Its argument is short, conclusory, and made without supporting authority. This is insufficient to support the requested relief. Cole v. S.C. Elec. & Gas, Inc., 355 S.C. 183, 196, 584 S.E.2d 405, 412 (Ct. App. 2003), aff'd as modified, 362 S.C. 445, 608 S.E.2d 859 (2005) ("Short, conclusory arguments unsupported by authority are deemed abandoned.").

Given DR Horton's concerns for fairness and equal treatment, references to liability coverage should never have been raised in the first place. Suggesting that Respondents are mere

pawns being controlled behind the scenes by insurance companies is precisely the type of prejudice of which DR Horton complains. Respondents appropriately responded by pointing out that insurance issues are the subject of a separate suit and should be addressed solely in that suit.

II. Alternative request to correct Respondents' briefs

Respondents do not seek to capitalize on a defective record. Moreover, Respondents were put at a disadvantage when the jury verdict was struck, but the Order did not provide Respondents with an opportunity to correct their briefs.

In the alternative, if this Court is so inclined to grant DR Horton's Motion to Strike, Respondents request an opportunity to file amended briefs. This is consistent with this Court's prior rulings. (See Orders filed Aug. 23, 2024 and October 21, 2024 ("If Appellant wishes to file an amended reply brief and supplemental designation, it shall do so within fifteen days of the date of this order.")) To avoid confusion, Respondents would also request that the briefing timeline be adjusted accordingly to allow the appeal to proceed normally from that point.

This request does not constitute consent to DR Horton's proposed changes to Respondents' briefs. Respondents request the opportunity to make changes as they deem fit to bring their briefs into compliance with the Appellate Court Rules and this Court's Orders.

CONCLUSION

DR Horton waived its argument that references to the jury verdict and the related insurance action in briefing be stricken by waiting until after final briefing was complete to raise the motion. In the alternative, Respondents request the opportunity to amend their briefs if this Court grants DR Horton's Motion to Strike, just as DR Horton was allowed to do.

Respectfully submitted,

[Signature page follows]

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November 8, 2024

Charleston, South Carolina