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Nov 13 2024

SC Court of Appeals

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, ..... Defendant

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 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 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 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.

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APPELLANT’S REPLY IN SUPPORT OF ITS MOTION TO STRIKE PORTIONS OF THE BRIEFS OF RESPONDENTS IBP ASSETS, LLC D/B/A BLUE RIDGE BUILDING PRODUCTS AND GALE INDUSTRIES, INC.

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Appellant D.R. Horton files this Reply in Support of its Motion to Strike Portions of the Briefs of Respondents IBP Assets, LLC D/B/A Blue Ridge Building Products’ and Gale Industries, Inc.’s Briefs and in support states as follows.

Respondents' response is a strange mixture of an attempt to pass the blame to Appellant for their Briefs that clearly and knowingly violate the Rules of Appellate Procedure and a request for a free pass and a do over as a reward for their having violated the rules so flagrantly.

Appellant's requested strikethroughs are measured and limited to those that strike (i) the jury verdict discussion and other matters that were included after the date the Court set of August 23, 2024 or (ii) were materials that were not provided to the trial court and are therefore inconsistent with the Rules of Appellate Procedure and the Court's October 21, 2024 Order.

This entire situation started when Respondents both decided to egregiously disregard the Rules of Appellate Procedure to prejudice Appellant. Respondents Briefs are replete with references to the jury verdict and other materials that were stricken in the Court's October 21, 2024 Order. Appellants seek to have those references struck from their respective Briefs.

**I. Appellant Has Not Waived Its Right to Have the Rules of Appellant Procedure Followed**

First, Respondents try to blame Appellant for their Briefs being replete with material that clearly and knowingly violate the Rules of Appellate Procedure. Appellant had nothing to do with Respondents Briefs or the fact that those Briefs include statements and references that violate the Rules of Appellate Procedure, including the jury verdict that occurred several weeks after the date of the last order on appeal. Appellant's Initial Brief did not mention anything about the jury verdict or anything else that was not allowed to be in its Brief in accordance with the Rules of Appellate Procedure. In stark contrast, Respondents IBP and Gale both included discussions about the jury verdict in their initial briefs. In fact, discussion of the jury verdict runs

throughout IBP's Brief and features prominently as a main theme.<sup>1</sup> Respondents also included references to materials not presented to the trial court, which is also not permitted, such as discovery never put into the record and a case in another jurisdiction that was never provided to the trial court and was therefore not considered by the trial court. Blaming Appellant for the situation Respondents now find themselves in – Briefs replete with material that should never have been included in their Briefs in the first place – is much like blaming the victim in other scenarios. It is inappropriate.

Second, Respondents attempt to blame Appellant by alleging that Appellant never raised its concern before this Motion to Strike and therefore has waived any right to raise it now. Of course, that is not accurate. Appellant filed its Motion to Strike shortly after the Court issued its October 21, 2024 Order. Until that Order was received, Appellant was unsure whether the Court was intending to clarify its prior Order to require Respondents to strike portions of their Briefs, as Appellant had urged the Court to do. Respondents were filing motions and rehearing motions and creating a lot of confusion. Appellant did not think adding to that confusion was helpful when it already had raised its concern about the jury trial and other issues being improperly included in the Briefs.

Ironically, one of Respondents' arguments was that Appellant's short discussion in its Reply Brief about why the jury verdict should not have been included in Respondents' Briefs and was not applicable to the equitable indemnification issue is what raised Respondents' ire *and caused them to ask the Court to strike it from Appellant's Brief*. Appellant's short response was defensively included in the Reply Brief due to Respondents' liberal use of the jury verdict

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<sup>1</sup> At least one of Respondents' counsel was a law clerk for the Court of Appeals and therefore presumably knew or should have known that basing their Brief on a jury verdict that occurred several weeks after the date of the last order on appeal clearly violates the Rules of Appellate Procedure.

throughout their Briefs. Appellant was required to strike such items from its Reply Brief and has done so. When Respondents did not likewise do so on their own volition,<sup>2</sup> and Appellant received the October 21, 2024 Order that was silent on this issue, Appellant filed this Motion to Strike. Filing this motion while the October 21, 2024 decision was pending would have been premature and likely would have confused matters because Respondent already had what appeared to be a rehearing motion pending.<sup>3</sup> Additionally, Gale advised the Court that it believed Appellant's response to IBP's motion was in fact a motion, while IBP asserted it was not. In any case, the Court did not treat it as a motion. Accordingly, Appellant has filed this Motion to Strike.

Third, Appellant thought perhaps Respondents would ask the Court for leave to remove the items from their Briefs that they knew violated the Rules of Appellate Procedure, especially after the Court made it clear that such items were not properly includable in the Record on Appeal. Respondents knew even before the Court told them explicitly that the jury verdict should not be included in the Record on Appeal or in their Briefs. Respondents also knew including a discussion about the jury verdict was highly prejudicial, yet such comments are replete throughout the Briefs, particularly IBP's. Despite the Court's Orders on August 23, 2024 and October 21, 2024, Respondents failed to ask the Court to allow them to modify their Briefs to comply with the Rules, therefore, they should not now be given leeway to revise their Briefs just because a motion to strike has been filed with specific marked sentences provided to the Court.

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<sup>2</sup> Respondents should want to strike the sentences Appellant has asked to have stricken from their Briefs because if those sentences are not stricken, they will be the topic of conversation at oral argument as violations of the Rules of Appellate Procedure. Whichever attorneys included those sentences in the Briefs will have to own those during oral argument along with any censure the Court may impose for intentionally violating the Rules in order to cause unfair prejudice against a litigant.

<sup>3</sup> It appears Respondents have filed yet another motion for rehearing, this time in the guise of a cross-motion to strike. Appellant will file a response to that motion separately.

The requested markings are limited to those necessary to eliminate the portions of the Briefs that violate the Rules and items removed from the Record on Appeal.

A review of Appellant's Reply Brief will show the Court that Appellant did not engage in a game of undue advantage when the Court allowed it to revise its Brief to comply with striking certain references pursuant to its October 21, 2024. Appellant does not think Respondents should have any discretion to revise their briefs – the offending passages are already marked.

Finally, compliance with the Rules is not waived on any basis that Respondent claims as discussed herein. The judges may also *sua sponte* raise the issues as well when writing their opinion.

## **II. Specific Issues**

### **A. Jury Verdict**

The jury verdict issue is discussed extensively above, but Respondent also called it out specifically to say that “Furthermore, DR Horton cites no authority in support of its position that references to a public record must be stricken.” Respondents’ Response p. 3. This statement by Respondents is particularly confounding. Is not every document in the entire trial court record in this case a matter of public record? Under that standard, would any document ever be found inadmissible on appeal? Respondents have this notion incorrect. Generally, if a document was not admitted into the record before the date of the order on appeal or if the trial court did not have access to it at the time the trial court rendered its decision, it is not appropriate for it to be in a brief or in the record on appeal. Just as Respondents do not want the JLS Masonry motions and orders that were filed and decided after the August 23, 2023 order on appeal included in the briefs or the Record on Appeal, nor should a declaratory judgment action that was not provided to the trial court be in the briefs or the record on appeal.

The jury verdict in this case, occurred at least three weeks after the orders being appealed. Respondents should never have included any comment about the jury verdict in their Briefs. Moreover, given the flagrant and intentional violation of the Rules in which Respondents engaged in order to prejudice Appellant and to gain an unfair advantage, they should not be rewarded with a free pass or an opportunity to rewrite their Briefs. They have already seen Appellant's Reply Brief and now they want another chance to craft different arguments in response.

#### B. Discovery Responses

The Court has already struck the discovery responses from the Record on Appeal because they were not provided to the trial court. Nothing can cure that defect. Respondent Gale was alerted to the issue long before the Court ordered the discovery responses struck when Appellant expressed concern that it could not locate any record of the discovery ever being admitted into the court's record when Appellant was preparing the Record on Appeal. The Court has already Ordered the discovery responses struck from the Record on Appeal and the references in Respondents' Briefs should likewise be struck, just as the Court required of Appellant.

#### C. References to Alleged Declaratory Judgement Action

Respondents again make the assertion that they should be able to cite to and refer to any public records. Respondents' Response p. 4 But that is not how the appellate process works and that is not what they asked for when they asked for references to the jury verdict to be struck from Appellant's Brief. The declaratory judgment action was ordered struck by the Court because none of the pleadings were provided to the trial court before the trial court issued its order on August 23, 2023. Just as Respondents do not want the JLS Masonry motions and orders

that were filed and decided after the August 23, 2023 order on appeal included in the briefs or the Record on Appeal, nor should a declaratory judgment action that was not provided to the trial court be in the briefs or the Record on Appeal. Accordingly, references to it in Respondents' Briefs should also be struck.

Respondents also attempt to confuse the issue of the declaratory judgment action – specific pleading documents – with Appellant's argument that contractual insurance provisions apply to this case. Insurance is one of Appellant's contractual rights under a specific contractual provision as an additional insured with rights to insurance coverage, indemnification, and defense, all as separate and distinct contractual provisions under review in this appeal. Had Respondents wanted the trial court to consider the declaratory judgment action as part of the motion for summary judgment, it could have admitted the declaratory judgment pleadings into the record – they did not. Just as they did not admit into the record the discovery responses in "B" above. Accordingly, the strikethroughs Appellant has requested should be granted.

CONCLUSION

Appellant D.R. Horton asks this Court to order Respondents to strike the sentences from their Briefs as marked in Attachment A. Appellant has requested only necessary changes to the Briefs.

November 13, 2024

Respectfully,

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& 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 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 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 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.

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**PROOF OF SERVICE**

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The undersigned does hereby certify that on November 13, 2024, a copy of Appellant’s Reply in Support of its Motion to Strike Portions of the Briefs of Respondents IBP Assets, LLC D/B/A Blue Ridge Building Products And Gale Industries, Inc. 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.

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