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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

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 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 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'S RETURN TO RESPONDENTS' CROSS MOTION TO STRIKE

Appellant D.R. Horton files this Return to Respondents' Cross Motion to Strike, which is Respondents'' *third* motion on the same issues (second motion for rehearing), and in opposition states as follows.

Introduction

If the Court is confused by what Respondents have filed, Appellant can understand why. This filing is an amalgamation of rehashed repeated rehearing requests, reiterated attempts to strike almost all of Appellant's Reply Brief and now Initial Brief, feigned misunderstanding of the Court's simple to understand October 21, 2024 and August 23, 2024 Orders, request to strike Appellant's Supplemental Designations that the Court gave Appellant permission to file, a demand to have a wholesale rewrite of Respondents' Briefs, and a myriad of factual mistakes throughout that impact the substance of Respondents' arguments and create confusion. Throughout all of this, Respondents' blame Appellants for this fiasco because, as Respondents put it, Appellants did not complain soon enough about Respondents' flagrant violation of the Rules of Appellate Procedure when Respondents both submitted Briefs replete with jury verdict references nominally against Appellant that occurred more than three weeks after the orders on appeal and after Appellant was no longer even in the trial. Almost all of IBP's Brief centers on the jury verdict and Gale's Brief uses it to prejudice Appellant as well. Respondents knew they were violating the most basic Appellate Rules to prejudice Appellant and now that they are caught at that flagrant and prejudicial behavior, they want permission to completely rewrite their briefs.

Appellant has already provided the Court with the sentences that should be stricken to conform to the Court's October 21, 2024 Order striking items from the Record on Appeal. Respondents could have done this on their own at any time before Appellant was forced to file its motion to strike. But they did not do so. Appellant previously filed a roadmap Respondents could have used as a guide, but they chose to ignore it. Instead, they now want to wholesale rewrite their briefs to make substantive changes, new arguments, and to take a new approach to

the appeal. That is not appropriate. Nor is that what Appellant did. As Respondents themselves stated, Appellant made very few changes to its Reply Brief other than to modify the areas the Court required. Allowing Respondents to wholesale rewrite their Briefs would prejudice Appellant.

Respondents' cross motion/rehearing motion consists of two main parts: (A) a rehearing request asking for the *third* time to eliminate most of Appellant's initial and reply briefs' substantive arguments and some supplemental designations and record on appeal documents because Respondents do not think Appellant should be allowed to make such arguments, and (B) an objection to striking from their Briefs the strikethroughs Appellant provided to the Court that correspond to the items the Court struck from the Record on Appeal (including the jury verdict discussion) unless they are allowed to completely rewrite their Briefs. Respondents already expressed their thoughts as to B in their Return to Appellant's Motion to Strike. The Court already denied Respondents' prior Motion and their Motion for Clarification, which the Court treated as a motion for rehearing, as to part A. Appellant requests the Court do so again and asks the Court to advise Respondents to cease filing rehearing motions, however the same may be named.

I. Rehearing Part A – Substantive Issues

First, most of this motion as to part A is a confused rehash of many of the same arguments and allegations of past motions that the Court has already denied at least twice. The last time the Court made it clear that there is no rehearing available to Respondents. *See* October 21, 2024 Order. "Any other requests made in Respondent Blue Ridge Building Products' "Request for Clarification" are denied. *See* Rule 221 (c), SCACR ("The appellate court will not entertain petitions for rehearing on a motion or petition unless the action of the court on the

motion of petition has the effect of dismissing or finally deciding a party's appeal."). *Id.* at fn 1. Respondents mischaracterized this Order as only modifying the date, however, the Court made it clear that it was denying all other requests Respondent Blue Ridge Building Products made and that rehearing motions are not allowed. Despite this clear edict, Respondents once again are asking for rehearing when they ask the Court to deny Appellant the opportunity to make two legitimate substantive arguments to advance Appellant's position on appeal: arguments regarding insurance and the discussion about inconsistent summary judgment decisions and how it impacts certain of the issues on appeal – both of these Respondents raised twice before. This is the *third* time Respondents are asking the Court to deny Appellant the right to make its arguments and to have the appellate judicial panel decide the issues on appeal. Accordingly, this third request should be summarily denied as another attempt at a rehearing.

A. Insurance

If the Court reaches the merits, which Appellant thinks it should not, insurance is a contractual right that pervades this case because the parties' contracts provide that Appellant is an additional insured under the parties' contracts. This was discussed in Appellant's responses to Respondents many motions filings in this Court (which Appellant incorporates herein) and throughout Appellant's Initial Brief. Insurance is listed in every single "Statement of Issue on Appeal" and throughout Appellant's Initial Brief. *See* Appellant Initial Brief pp. i, 1, 5, 6, 8, 13, 15, 16, and 19. Respondents discussed insurance throughout their respective Briefs as well and it is cited in the transcript at the hearing on summary judgment. *See* ROA 1462-1463. For Respondents to assert that they were not aware that insurance was something for them to discuss in their Briefs or that they now need an opportunity to redo their Briefs to discuss insurance is baffling and simply not true.

This Court previously denied Respondents' motion to strike Appellant's argument regarding insurance and Respondents' rehearing attempt in the form of a Motion for Clarification. Orders dated August 23, 2024 and October 21, 2024. The Court should deny this second attempt at a rehearing attempt as well.

B. Inconsistent Rulings on Summary Judgment Motions

The other substantive concern that the Respondents have unilaterally determined should be struck from Appellant's briefing so that the appellate judicial panel that ultimately decides this appeal would not be allowed to weigh and consider it when deciding Appellant's appeal is how the fact that the trial court ruled inconsistently among the various contractors and subcontractors with identical or substantially similar contracts regarding summary judgment on the same legal issues should bear on the various Issues on Appeal. The inconsistency concern was discussed before Respondents filed their Briefs, indeed, it was well known even before a Notice of Appeal was filed. All one had to do was reflect on the summary judgment decisions from a single two-day hearing that was noticed for the purpose of hearing all the then pending summary judgment motions or review the court filings that include the summary judgment motions, orders, and various motions for reconsideration; or consider why two Respondents were granted summary judgment when a very long list of others with substantially similar or identical contracts were not. Or, simply read Appellant's Initial Brief where the concern is raised in both the statement of the case and in the facts section, on three pages of Appellants Brief at 4, 9, and 10 of the final bound version, (not just in one place or the other of Appellant's Brief as Respondent mistakenly claims) and review the documents that were designated to be included in the Record on Appeal. If Respondents chose not to address it in their Briefs, that was their choice. Their regret in ignoring the concern that was clearly discussed is not a basis to deny

Appellant its right to alert the Court to its concern, nor is it a reason to grant Respondents a wholesale rewrite of their Briefs. That would be fundamentally unfair to Appellant, especially after Respondents have forced all this extra work product via a protracted motions practice and had months to craft a new approach to the case. 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. Additionally, allowing Respondents a wholesale rewrite now would provide them an unfair advantage because they have already seen Appellant's Reply Briefs and engaged in protracted motions practice. It would be fundamentally unfair. Also, this would be granting a rehearing, which the Court does not allow.

Respondents also seek to strike more of Appellant's Briefs, Designations and Record on Appeal. This is just another attempt by Respondents to seek substantive changes to the Court's Orders. IBP's earlier denied Modified Request for Clarification and now this Cross Motion, rehash the even earlier joint motion to strike *which the Court did not grant* in an attempt to strike a reasoned legitimate argument D.R. Horton has made. Respondents' have not accepted that and are now attempting to position themselves as victims. They are not.

The Court granted Respondents' original motion to strike *only* on procedural grounds that affirmed that the record on appeal is limited by Rule 210(c), SCACR. The Order states that, "Appellant's May 13 reply brief is stricken to the extent it references any of the stricken items." The stricken items were limited to items not presented to the lower court and items filed after the date of the orders on appeal that were not in conjunction with the orders on appeal. Respondents have misunderstood the Court's Order or are feigning confusion in an attempt to expand the

Order to overreach into Appellant's substantive arguments. The order stated that the "record on appeal shall not contain transcripts of any proceedings that took place after that date, motions filed after that date, orders issued after that date, or any materials that otherwise were not presented to the lower court prior to, or in conjunction with, its issuance of the order on appeal." Order, August 23, 2024. D.R. Horton fully complied with the Court's Order. The phrase "or in conjunction with" seems to be not a limiting phrase, but instead allows documents beyond the date of the appealed order if the document is in conjunction with the order being appealed – such as an order granting a stay, for example, that the appeals court might need notice of.

Respondents argue it is a limiting phrase, with which Appellant disagrees, but even if it is, Appellant has not unilaterally designated anything for the record on appeal that it believes is not relevant to the appeal. The documents about which Respondents complain are relevant to Appellant's substantive concerns that the appellate judicial panel is being asked to weigh and consider – what could be more relevant to the Record on Appeal?

Everything else that Respondent's Counsel seeks are substantive changes to the Order that go far beyond a feigned misunderstanding of the Court's Order. Respondents ask the Court once again to strike a substantive argument that applies across the Issues Appellant raised on Appeal. If a Court rules inconsistently on the legal interpretations of the validity of a contract or contractual provisions that are identical or substantially identical, that is fair for a litigant to raise and discuss within the Issues on Appeal as to each and every Issue on Appeal that is based on a legal interpretation of a contractual provision. That does not make consistency itself the "issue" on appeal – instead, it is one of the reasons for which the legal interpretation is incorrect within the discussion of the Issue on appeal. Respondents simply get this wrong. Moreover, Respondents were both alerted to the concern by Appellant in its initial brief, pages 4, 9, and 10,

by other parties both before and after August 23, 2023, September 1, 2023, and before any briefs were filed. IBP admitted this. If IBP and Gale missed it when they drafted their Response Briefs, that does not provide a basis for their motion to strike Appellant's legitimate argument presented to the Court. There were many instances where the trial court was made aware of the inconsistencies in its approach to the summary judgment orders, some of which are spelled out more completely below, in addition to those discussed in Appellants Brief, page 4, 9, and 10 and Revised Reply Brief.

First, many motions for summary judgments were heard during a two-day hearing set for July 20-21, 2023. See July 20-21, 2023 Transcript filed as attachment to Appellant Response to IBP Reply and Modified Request for Clarification. Contractors JLS Masonry, Rite Rug Company, AJ Landscaping, MJ Cowboys, LLC, M&L Reyna Construction, Nazareth Builders, LLCs, M&M Foundations, LLC, Gale, and IBP, among others, all participated in the hearing and soon thereafter on July 28, 2023, summary judgment decisions on identical or substantially similar contracts were issued with only two, IBP and Gale, being granted summary judgment. For Respondents to attempt to lead the Court into thinking that the pleadings and decisions regarding any of these contractors are not relevant to D.R. Horton's appeal as to how the *legal interpretation* of its contracts was handled by the trial court in this case is perplexing. In their Motions for Reconsideration, contractors denied summary judgment alerted the trial court to the fact that their contracts were the same or substantially the same as IBP's contracts and that the court granted summary judgment to IBP. See Attachment D filed as attachment to Appellant Response to IBP Reply and Modified Request for Clarification. D.R. Horton also alerted the Court in a responsive pleading that it had sought reconsideration of the IBP summary judgment decision that other contractors were attempting to use to bolster their motions for

reconsideration. See Attachment E filed as attachment to Appellant Response to IBP Reply and Modified Request for Clarification. The inconsistency concern was squarely before the trial court when it (i) ruled inconsistently on so many summary judgment motions on the same day on identical or substantially identical contracts, (ii) ruled on August 18, 2023 denying D.R. Horton's Motion for Reconsideration, (iii) ruled on IBP's expanded Order on August 23, 2023, and (iv) ruled on Gale's summary judgment order on September 1, 2023. Respondents' representations otherwise are either mistaken or misrepresentations.[1]

The inconsistency concern pervades the Issues on Appeal as to whether the court applied its legal analysis consistently across the contracts. Consistency is not a separate "Issue" on appeal, it is one reason Appellant argues it should prevail as to certain Issues on Appeal specified in Appellant's Briefs. For example, if only IBP is granted summary judgment on the basis that its contractual obligation of a duty to defend is legally unenforceable, but 10 other contractors have the same identical contract and the court does not grant them summary judgment as to the same provision, that is one reason why D.R. Horton should prevail and the case should be remanded because the court concluded 10 out of 11 times that the contractual provision was not legally unenforceable. When you add to that scenario that the hearing occurred at the same time, the contracts were the same or substantially the same and no distinction was made, the plaintiff was

[1] As Respondents know, many of the contractors and subcontractors had summary judgment motions heard during the same July 20-21 2023 two-day hearing period during which Respondents' hearings were heard. How do we know they know? They cited to that transcript in their Briefs. There is no mystery, confusion, lack of knowledge, or failure to bring anything to the trial court's attention. The trial court was a part of the hearing during the entire two-day period and heard the summary judgment motions and the motions to reconsider thereafter that also referenced the inconsistencies. When presented with motions to alter or amend in which the Court was alerted to what appeared to be inconsistent rulings on Section 10 of identical or substantially identical contracts, the Court denied those motions. (R. pp. 63-65; Order, August 18, 2023; JLS Masonry Motion to Alter or Amend, August 7, 2023. Others, such as MJ Cowboys, LLC and M&L Reyna Construction LLC, who were also denied summary judgment in the same order on July 28, 2023, were also denied relief on their motion to alter or amend. Order, August 18, 2023. The Court affirmed the legal validity of Section 10 of the parties' contracts when that provision was not declared void in the other contracts the Court ruled upon. Respondents are aware of this, as well, or should be.

the same, well, it becomes difficult to see how IBP can defend its position that summary judgment for his client was somehow correct and not an anomaly. In any event, Respondents have not grasped this distinction between a reason or argument within the framework of an Issue on Appeal and an Issue on Appeal. Inconsistency is not an Issue on Appeal in this class action construction case. Perhaps in a civil rights case, or a federal equal rights case. But not here. And not in this case where Appellant frames its Issues on Appeal.

Respondents seem to think that the way to prevail on an appeal is to strip the opposition of any ability to make legitimate arguments to the Court that may cause them to lose. But that is not how appellate practice works. And all of this is has been heard by the Court before. This is the second rehearing motion called by another name, and it should be denied.

1. As Part of its Quest to Strike Appellant's Substantive Arguments, Respondents Seek to Strike Every Document Appellant Listed as a Supplemental Designation and Some Documents in the Record on Appeal Since the Beginning of Briefing

Respondents are also trying to win the appeal by the ploy of disallowing a complete Record on Appeal. They are trying to take the appeal decision away from the appellate panel deciding the case by depriving Appellant and the panel of the records needed to decide the case. Respondents seek to *strike every single* supplemental designated document that Appellant designated. Respondents incorrectly state that these were all added as of November 4, 2024; however, that is incorrect. These are the documents the Respondents now find offensive in the Supplemental Designations and the Court can easily see that none of the documents violate the Court's August 23, 2024 or October 21, 2024 Orders:

Supplemental Designations

23. Form 4 Order Denying Motion for Summary Judgment by 3rd Party Defendants JLS Masonry, Inc., MJ Cowboys, LLC and M&L Reyna Construction LLC against D.R. Horton, filed July 28, 2023.

24. JLS Masonry, Inc. Motion for Summary Judgment, Filed May 1, 2023.

25. JLS Masonry Inc.'s Memorandum in Support of Its Motion for Summary Judgment with Exhibit A, filed July 11, 2023.

26. JLS Masonry, Inc. Notice of Motion and Rule 59(e) Motion to Reconsider and/or to Alter or Amend the Order Denying JLS Masonry's Motion for Summary Judgment, filed August 7, 2023.

27. MJ Cowboys LLC's Motion for Summary Judgment, filed May 1, 2023

28. Third Party Defendant M&L Reyna Construction, LLC's Notice of Motion and Motion for Summary Judgment, filed May 1, 2023.

29. Third Party Defendant M&L Reyna Construction, LLC's Memorandum in Support of its Motion for Summary Judgment, or in the Alternative, Partial Summary Judgment, filed July 11, 2023 and Exhibit A, M&L Reyna Construction, LLC's Independent Contractor Agreement.

30. MJ Cowboys LLC's Memorandum in Support of its Motion for Summary Judgment, filed July 11, 2023 and Exhibit A, MJ Cowboys LLC's Independent Contractor Agreement.

31. M&M Foundations, LLC's Notice of Motion and Rule 59(e) Motion to Reconsider and/or Alter or Amend the Order Denying M&M's Motion for Summary Judgment, filed August 7, 2023.

32. M&L Reyna Construction, LLC's Notice of Motion and Motion for Reconsideration and/or to Alter or Amend Pursuant to Rule 59(e), SCRP, filed August 7, 2023.
33. MJ Cowboys LLC's Notice of Motion and Rule 59(e) Motion to Reconsider and/or Alter or Amend the Order Denying MJ Cowboys LLC's Motion for Summary Judgment, filed August 7, 2023.

34. Nazareth Builders, LLC's Motion for Reconsideration of the Court's July 29, 2023 Order Denying Summary Judgment, filed August 7, 2023.

35. Defendant D.R. Horton, Inc.'s Memorandum in Opposition to M&L Reyna Construction, LLC's Motion for Reconsideration and/or to Alter or Amend Pursuant to Rule 59(e), SCRP, filed August 17, 2023.

Respondents also again attempt to impugn Appellant's counsel's reputation by stating that Appellant's counsel inappropriately included Record on Appeal items numbered 35 and 36 and again ask to have these stricken. The Court already saw through this argument in the first joint motion to strike and declined to rule in Respondents' favor. Respondents are asking for yet another rehearing on this issue. Respondents also seek to strike Record on Appeal item number 7, which, along with 35 and 36 all have been in the Record on Appeal since the beginning of briefing. Documents listed in numbers 76-79 that Respondents also seek to strike were designated with the Court's permission pursuant to the Court's Order. All of these documents are cited by Appellant in its briefing, predate the Orders on Appeal in compliance with the Court's October 21, 2024 Order, and are relevant to the appeal. Here are the Records on Appeal Respondents seek to strike:

Record on Appeal Orders

7. Form 4 Order filed July 28, 2023 (denying summary judgment to 9 contractors/subcontractors)

Record on Appeal Pleadings

35. Defendant AJ Landscaping & Grading's Notice of Motion and Motion for Summary Judgment filed August 29, 2022[2]

36. Third-Party Defendant Rite Rug Company, Inc. A/K/A Rite Rug Co.'s Motion for Partial Summary Judgment filed August 26, 2022

76. JLS Masonry, Inc Motion for Summary Judgment, filed May 1, 2023

77. JLS Masonry Inc.'s Memorandum in Support of its Motion for Summary Judgment, filed July 11, 2023

a. Exhibit to Memorandum of Law - JLS – D.R. Horton Contract, filed July 11, 2023

[2] Note: While "35" occurs twice, one of the items is in the Supplemental Designations and the other is in the Record on Appeal.

78. Form 4 Order Denying Motion for Summary Judgment by 3rd Party Defendants JLS Masonry, Inc., MJ Cowboys, LLC, and M&L Reyna Construction LLC, against D.R. Horton, filed July 28, 2023

79. JLS Masonry, Inc. Notice of Motion and Rule 59 (e) Motion to Reconsider and/or to Alter or Amend the Order Denying JLS Masonry's Motion for Summary Judgment, filed August 7, 2023

There is nothing inappropriate about these pleadings being included in the Record on Appeal. These contractors had contracts with D.R. Horton that were identical or substantially similar to Respondents, but they were denied summary judgment by the same judge who granted summary judgment to IBP and Gale after participating in the same 2-day hearing on July 20-21, 2023. How do identical or substantially identical contracts fail for legal reasons for one contractor but not for another without being inconsistent legal rulings? This question obviously trouble Respondents and they do not want the Court of Appeals to be able to consider it. It is fair for D.R. Horton to ask the Court of Appeals to address this concern.

Respondents' continued attempt to strike Appellant's substantive argument is concerning, but more concerning are the comments to the Court of Appeals in Respondents' motions practice that the trial court was not apprised of the concerns litigants had about what they perceived to be inconsistent rulings on legal interpretations of the contractual provisions. Appellant's earlier filings in response to Respondents' motions practice and this filing dispel any credibility of such assertions. Given what continues to transpire with Respondents' repetitious rehearing motions on matters after the Court has clearly denied their repeated requests, Appellant remains concerned that Respondents may attempt such contrived maneuvers at oral argument as well. Accordingly, Appellant added relevant documents to its Supplemental Designations to support its briefing and to address Respondents' misleading claims that the trial court was unaware of its inconsistent rulings on the same day it made numerous inconsistent summary judgment decisions. For that

reason, and more importantly, to provide the Court of Appeals a fully developed Record on Appeal from which to consider Appellant's discussion of what occurred at the trial court, Appellant Supplemented its Designations with records that are relevant to the Orders on Appeal and that occurred before the orders on appeal date of August 23, 2023. The Supplemental Designations are proper, were added pursuant to the Court's Orders, and should not be withheld from the judicial panel deciding this appeal. Some of these documents were the subject of prior motions and should not be stricken because doing so would amount to a rehearing.

2. Respondents Mistakenly Assert the Court's October 21, 2024 Order Struck Appellant's Initial Brief Quotation by Judge Sprouse About the Orders on Appeal

Nothing from Appellant's Initial Brief was struck, nor should anything be struck. *See* October 21, 2024 Order. The Order specifically strikes only material from Appellant's Reply Brief, to which Appellant timely complied. *Respondents seek rehearing on this issue which they pursued in their original motion to strike, which should be denied.* What Respondents complain about in a vague way is a quotation of the trial Judge who issued the summary judgment orders in the case commenting on the very Orders on Appeal in this case. This is the type of instance in which the Court's Order demonstrates that the phrase that the "record on appeal shall not contain transcripts of any proceedings that took place after that date, motions filed after that date, orders issued after that date, or any materials that otherwise were not presented to the lower court prior to, *or in conjunction with, its issuance of the order on appeal*" could expand the date allowed past the date of the order on appeal because "in conjunction with" could mean this very situation. The quotation in the Brief is the only reference in the Brief that mentions anything after the date of the Orders on Appeal, and it does so only because the Court discussed the Orders on Appeal.

Appellant understands that is an exception to the date limit generally imposed on matters allowed to be included in the Record on Appeal, because the Court was discussing the *Orders on Appeal in conjunction with* its issuance of the order on appeal. Other subcontractors were at that time still litigants in case. Here is the passage about which Respondents complain:

> Judge Sprouse commented about what appears to be an inconsistency in granting summary judgment to some third-party defendants and not others.
>
> "The other claims were made at summary judgment, those motions for summary judgment were denied, because there was some allegation that those third parties had committed negligence of some sort. Again, I have to consider this in a light most favorable to the non-moving party, and I'm going to find that there is some evidence in the record that a reasonable jury could base its decision in favor of the claim, so I'm going to deny the motion for a directed verdict."
> TR. 9/15/2023 pp. 20-21
>
> In contrast to his written Orders granting summary judgment (likely drafted by counsel for the Respondents), Judge Sprouse said that he granted summary judgment due to there being no negligence based on Plaintiff's Stipulation -- not because the contracts were not "clear and unequivocal."

The Court already did not strike this from Appellant's Brief the first time Respondents asked, thus this is a rehearing request.

The quotation begins near the bottom of page 9, however, the inconsistency discussion above the quotation does not contain any post August 23, 2024 references. Respondents' request to strike attempts to strike far more than the reference to the transcript to which they object. If anything is to be struck, and Appellant does not think anything should be, it would at most start at "Judge Sprouse commented about what appears to be an inconsistency . . . (Appellant Final Brief Bound, p. 9).

It would be helpful if the Court would allow the two pages from the transcript to be placed in the Record on Appeal for the panel hearing the appeal to determine whether they should or should not consider his comments about is ruling and being "in conjunction with."

II. Part B – Strikethrough Issues

Appellant's Motion to Strike and Reply in Support set forth Appellant's basis for the strikethroughs requested in Respondents' Briefs. The requests are measured, balanced, and reflect the Court's October 21, 2024 Order.[3] Respondents' hostility to removing the copious references to the jury verdict, award, negligence finding, etc, is curious and troubling given Respondents' professed understanding of and experience with the Rules of Appellate Procedure and the nature of attorney's roles as officers of the court.

Equally disturbing is the proposed bargaining away of a paragraph here or a phrase there that Respondent IBP would offer up to strike from its Brief if a certain something was struck from Appellant's Brief. That is not faithful compliance with the Rules. And no, Respondents are not correct that the inconsistency of summary judgment decisions under substantially similar circumstances is just a response to Respondents wrongfully using the jury verdict in their Briefs. Inconsistent summary judgment decisions was raised in Appellant's Initial Brief before Respondents used the jury verdict.

Demanding a complete and wholesale rewrite of one's briefs as a condition of striking items that should never have been included in a brief first place is also not faithful compliance with the Rules. Also disconcerting is Respondents' demand to inject the motions practice that they have repeatedly engaged in with long and detailed rehearing motions into the briefing packet after the fact. Appellant objects to Respondents being able to start the briefing writing over and objects to this protracted motions practice being part of the briefing for the appeal without prior notice this would happen. Respondents never should have included the jury verdict in their Briefs. They did so knowingly, willingly, intentionally, with full understanding that they

[3] If the strikethroughs are made to Respondents' Briefs, then the last paragraph in the Introduction in Appellant's Reply Brief to Gale would be modified or deleted as applicable to reflect the strikethroughs.

were violating the most basic tenets of the Rules of Appellate Procedure and their Briefs are overflowing with the use of the jury verdict and the jury award. This was no mistake. This was no small reference. It was deliberate sabotage to prejudice Appellant. To allow them to rewrite their Briefs or to include the motions practice would reward their misdeeds. This has already cost Appellant substantial time and resources.

Moreover, as discussed above, contrary to Respondents' assertions insurance was discussed throughout Appellant's Initial Brief and is listed in every single Issue on Appeal. If Respondents did not thoroughly address it in their Briefs already, then it is anyone's guess why they did not. Additionally, the inconsistency in summary judgment decisions concern was raised on at least three pages in Appellant's Initial Brief, it is not and was not intended to be its own "Issue on Appeal" - Respondents do not get to choose that for Appellant, and the inconsistency in the summary judgment decisions was well-known among the litigants and the judge who held back-to-back summary judgment hearings with Orders that included multiple summary judgment movants in the same order. Inconsistency was not a secret and the concern was discussed in Appellant's Initial Brief.

Respondents show no remorse, acceptance, or candor in what they have done. They have tried to blame Appellant by saying Appellant did not complain about Respondents' Briefs soon enough. Appellant did complain, alerted the Court, provided Respondents a guideline to revise their Briefs, and when they failed to do so, filed a Motion to Strike.

Respondents show no remorse, acceptance, or candor in what they have done. In their Cross Motion to Strike they again try to lay the blame for their flagrant violation of the Rules by saying that Appellant discussed the "negligence rule" and indemnity and imply this led them to use the jury verdict. It is a shaky, feeble, tenuous, line to get there. To even get close,

Respondents must unskillfully misapply Appellant's discussion of negligence and there is little reason to think Respondents made that level of a mistake in analysis. Appellant's argument was simple: if, for example, IBP's work for Plaintiff is not negligent, then Appellant's supervision of IBP's work for Plaintiff also could not be negligent. That has nothing to do with and could never be the basis or justification for why Respondents violated the Rules and used the jury verdict in their Briefs to unfairly discredit and prejudice. That attempt to blame Appellant lacks candor.

Most of Respondents' Cross Motion to Strike is a Motion for Rehearing that harkens back to Respondents' first Motion to Strike and every motion it has filed since. This one too should be denied.

CONCLUSION

Appellant D.R. Horton asks this Court to Deny Respondents' Cross Motion as another Motion for Rehearing.

November 18, 2024

Respectfully,

s/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.

John T. Crawford, Jr., (S.C. Bar No. 69355)
Kenison, Dudley & Crawford, LLC
704 McBee Ave.
Greenville, South Carolina 29601
(864) 242-4899
(864) 242-4844 (fax)
crawford@conlaw.com
Attorneys for Appellant
D. R. Horton, Inc.

RECEIVED
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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

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 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 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 November 18, 2024, a copy of Appellant's Return to Respondents Cross Motion to Strike 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/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.