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Nov 21 2024
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeal

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

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

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

v.

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

D.R. Horton, Inc., ...Appellant,

v.

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

Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Sodfather, Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc, A/K/A Gale 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.

RESPONDENTS' REPLY MEMORANDUM IN SUPPORT OF THEIR CROSS-MOTION TO STRIKE OR, IN THE ALTERNATIVE, MOTION TO ALLOW SUPPLEMENTAL BRIEFING

Respondents IBP Assets, LLC d/b/a Blue Ridge Building Products (hereinafter "Blue Ridge") and Builder Services Group, Inc. d/b/a Gale Contractors Services (hereinafter "Gale") (collectively "Respondents") submit the following Reply in support of their cross-motion to strike or to allow supplemental briefing.

I. Effect of the Ruling on the Request for Clarification

Appellant D.R. Horton, Inc. (hereinafter "DR Horton") correctly points out that this Court denied a portion of Blue Ridge's Request for Clarification and cited Rule 221(c), SCACR. DR Horton is also correct that there is some confusion as to this Court's intent in footnote 1 of its Order filed October 21, 2024.

Despite DR Horton's characterizations, the Request for Clarification was not a motion or petition for rehearing. The purpose of a petition for rehearing is to state "points supposed to have been overlooked or misapprehended by the court." Rule 221(a), SCACR; Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234, 238 (1933).

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

The Request for Clarification was not captioned as a motion for rehearing. Nor did its content seek rehearing or reconsideration. It plainly states: "Blue Ridge accepts this Court's ruling. Blue Ridge merely requested clarification as to the effect of this Court's ruling on the briefs." (Request filed Sept. 10, 2024 at p. 2, ¶ 2.) Request 3.a. requested clarification as to the scope of the changes to be permitted in DR Horton's Reply briefs and Designations.

The Request for Clarification did not seek to change the Court's ruling.[2] 5 C.J.S. Appeal and Error § 798 (explaining that "the purpose of a motion for rehearing is to provide the appellate court an opportunity to correct any errors on issues already presented"). It was a standalone motion that sought guidance as to certain issues *going forward*. It concerned compliance with this Court's ruling, not rehearing or reconsideration of it. Furthermore, Respondents had no reason to seek rehearing because their motion was granted.

By the time the Court's Order was filed, Respondents had already filed their Final briefs. Again, the Request for Consideration sought guidance on application of this Court's Orders to their briefs. It thus appeared that the import of the Order was that the Court was satisfied with the final briefs as filed and therefore considered the matter closed. Respondents expected DR Horton to file its final Reply briefs and that the matter would proceed to oral arguments or disposition. Instead, DR Horton filed another round of final briefs, designations, and a motion to strike.

If the intent of Footnote 1 is as broad as DR Horton asserts, then any motion that relates to a prior motion could be deemed as "motion for rehearing" at the discretion of the court, regardless of its content and/or captioning. DR Horton's interpretation is inconsistent with its own conduct. DR Horton's Motion to Strike plainly covers the same ground as Request for Clarification #2. (See Blue Ridge correspondence filed Sept. 17, 2024.)

[2] Except with respect to the date, which was corrected.

Respondents do not seek to replow old ground. To the extent Respondents' cross-motion sought to strike DR Horton's initial brief and designations, their motion is withdrawn.

The question next arises how broadly Rule 221(c) is meant to apply. The language of the Rule does not appear to foreclose a party from raising to the Court's attention matters that arise after a ruling, including continuing rules violations or overreaches from the bounds of prior orders.

If the October 21, 2024 Order was intended to be the final ruling on briefs, regardless of what transpired thereafter, then DR Horton's motion to strike and Respondents' cross-motion are both improper. It is most assuredly Respondents' intent to abide by the Rules and this Court's Orders. The remainder of this brief assumes that this Court did not intend to foreclose matters upon which this Court has not previously ruled.

DR Horton is not incorrect in observing that the briefing is currently unbalanced. Despite DR Horton's constant heckling, Respondents seek a resolution of the briefing issues that results in a full and fair presentation of the issues on the merits and promotes finality of this Court's ruling.

From Respondents' perspective, DR Horton's interpretation of this Court's rulings allows DR Horton to continue to pummel Respondents with new arguments and materials while Respondents are frozen in place. As set forth below, Respondents have done nothing improper and should not be penalized by a ruling granting their motion.

II. Response to DR Horton's Allegations of Impropriety

Before proceeding, Respondents find it necessary to respond to DR Horton's arguments that they engaged in misconduct amounting to knowing violations of the Rules of this Court, and perhaps even ethical violations. Raising these types of concerns in litigation is a questionable practice. Rule 407, Scope, [7], SCACR. As these allegations relate to the merits of the pending motion, Respondents take this opportunity to address them.

A. References to the Jury Verdict

DR Horton spent much of its brief blasting Respondents for citing the jury verdict in their briefs. Yet DR Horton counter-designated it in reply. (DRH Suppl. DOM filed May 13, 2024, #9.)

Furthermore, the relevant Rule does not specify a date. It merely states that "[t]he Record shall not . . . include matter which was not presented to the lower court or tribunal." Rule 210(c), SCACR. The jury verdict was, of course, presented to the lower court.

DR Horton appears to recognize that that Rule 210(c) does not expressly impose a cutoff date. DR Horton now argues that this Court's Orders "allow[] documents beyond the date of the appealed order if the document is in conjunction with the order being appealed." (DRH Return filed Nov. 18, 2024, p. 8.) In fact, DR Horton seeks to reinsert portions of the trial transcript into the record. (Id. at pp. 15-17.)

Furthermore, judicial notice of an adjudicative fact may be taken at any stage of the proceeding. Rule 201(f), SCRE. This rule has been interpreted to allow appellate courts to take judicial notice. Id., comment (citing State v. Squires, 311 S.C. 11, 426 S.E.2d 728 (1992) and McCoy v. Town of York, 193 S.C. 390, 8 S.E.2d 905 (1940)). Under the substantially similar federal rule, "a court may take judicial notice of a fact at any stage in the proceeding, even for the first time on appeal." Loftus v. F.D.I.C., 989 F. Supp. 2d 483, 490 (D.S.C. 2013).

In contrast, DR Horton's citation to the subsequent trial cannot support judicial notice. It is hornbook law that a denial of summary judgment does not establish anything. Ballenger v. Bowen, 313 S.C. 476, 477, 443 S.E.2d 379, 379 (1994). Arguments and rulings denying dispositive motions do not qualify as adjudicative facts. See Rule 201(a), SCRE.

The verdict (and judgment) is relevant to the appeal. See Rule 209(c), SCACR. Respondents have explained why the verdict is relevant. DR Horton argued in its initial brief that it was not negligent with respect to its supervision of Respondents' work. (DRH Return filed Nov.

18, 2024, p. 8.) That much is true—but it is also irrelevant. It is DR Horton's next representation that drew the citation to the jury verdict. (See DRH Init. Br. p. 15 ("nor are the Respondents being asked to provide relief for any such concurrent or sole negligence").) This representation is manifestly false. DR Horton's damages claim against Respondents in this appeal is for *defense costs it incurred in this action in which it was found to be negligent*. (Id. pp. 23-24.)

It would be one thing if DR Horton and Respondents were all dismissed because Respondents' work turned out not to be involved. But here, DR Horton's negligence was alleged and subsequently proved, whereas Respondents' work was not involved and no negligence was proven as to Respondents.

Respondents did not cite the verdict in support of an argument that the trial court erred in failing to consider subsequent developments. Their argument is that the verdict is consistent with the trial court's ruling. The Zitek Plaintiffs not only alleged DR Horton was negligent; they subsequently proved DR Horton was negligent.

Furthermore, judicial notice of the verdict is consistent with judicial economy. Suppose this Court rules that the trial court erred because there is no evidence in the record that DR Horton was negligent. Respondents will cite the verdict on remand and obtain the same result, perhaps generating another appeal.

The negligence verdict and judgment moots DR Horton's equitable indemnification claim. Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. Clear View Const., LLC, 413 S.C. 615, 625-26, 776 S.E.2d 426, 432 (Ct. App. 2015) (holding that unclean hands bars an equitable indemnification claim). DR Horton should withdraw it. Instead, DR Horton demands that this Court decide a moot claim upon a contrived set of facts.

DR Horton's motion to strike references to the jury verdict goes to the merits. Its argument is that the jury verdict—which is law of the case—is insufficient of itself to support Respondents' position on appeal. That is not a proper ground for a motion to strike. DR Horton has not cited any Appellate Court Rule setting up an evidentiary disqualification of any reference to orders establishing the law of the case. Such orders exemplify the exception DR Horton would allow.

DR Horton represented to this Court and to Respondents that it is not seeking indemnity for its own negligence. Respondents are absolutely entitled to cite the jury verdict as law of the case refuting that false representation. DR Horton should also withdraw this argument.

At this point, Respondents' final briefs have been filed without *any* citation. This is prejudicial. Respondents are entitled to correct their briefs to make external citations to the verdict.

B. Unilateral Correction of Respondents' Briefs

DR Horton questioned why Respondents did not change their final briefs after this Court's Orders. The reason is simple. Parties to an appeal cannot make material changes to the content of their final briefs. Rule 211(b), SCACR. This issue was raised in Blue Ridge's Request for Clarification. (Req. 2.a. filed Sept. 4, 2024.) Respondents' final briefs removed the references to the record that were stricken and left their briefs otherwise unchanged. That appears to be in compliance with this Court's subsequent October 21, 2024 Order.

Furthermore, some of DR Horton's proposed changes are disputed. DR Horton's attempt to strike references to the insurance action is improper. DR Horton does not cite any rule that prevents parties to an appeal from pointing out that an argument is the subject of a separate action.

As a matter of public record, DR Horton sued Old Republic Insurance Company, the liability carrier for both Respondents. Amended Complaint, D.R. Horton, Inc. v. Am. Guar. and Liab. Ins. Co., *et al.*, No. 2023-CP-23-01810, ¶¶ 32, 53, 151-160, 414-420 (referring to Gale as "TopBuild"), 438-61 (Greenville County Comm. Pl.). Old Republic appeared and filed a

responsive pleading in that action. Id., Def. Old Republic Ins. Co's. 2nd Amended Answer filed July 8, 2024. Judicial notice of these pleadings is permissible to show that insurance issues are the subject of a separate action. Rule 201, SCRE.

DR Horton mistakenly treats the appellate court rules as evidentiary restrictions that allow it to create an "alternative reality" within appellate proceedings. DR Horton would have this Court restrict its opponents from craving reference to matters of public record to rebut arguments and characterizations in its briefs that are plainly not in accord with readily ascertainable facts.

III. Motion to Strike

As DR Horton recognizes, this Court's October 21, 2024, Amended Order struck the August 23, 2024 Order. Footnote 1 says the Amended Order was substituted in place of the prior Order. The Amended Order expressly states that the substitution was made "solely to correct a typo." Nothing in the Amended Order supports DR Horton's unilateral decision to file a new set of Reply briefs and Designations for the record. Accordingly, DR Horton's revised Reply briefs and Designations filed November 4, 2024 should be stricken and excluded from the record.

IV. Motion for Supplemental Briefing

This Court has spoken with respect to at least some of the documents Respondents believe should be stricken. Thus, complete relief cannot be granted upon their cross-motion to strike.

Respondents seek alternative relief because DR Horton has filed copious amounts of new material under the pretext of complying with this Court's Orders. The constant bombardment has created confusion as to which issues are in play for oral arguments. DR Horton seeks to avoid opposition by misdirection.

DR Horton made only vague allusions to inconsistent rulings in its initial brief in a way that failed to squarely place the issue in contention in this appeal. Then, after Respondents' briefs

were filed, DR Horton brought out the argument with full force, counting on Respondents' inability to meaningfully contest it.

It may be that this Court views DR Horton's "inconsistent rulings" argument to be properly preserved. However, even if this Court rules for DR Horton on issue preservation, the fact remains that the necessity of a response to that issue was highly doubtful. A ruling that DR Horton's "inconsistent rulings" argument is in play creates unfair surprise to Respondents.

What Respondents request is some way of bringing this to the Court's attention for purposes of consideration of the merits briefing. Respondents do not seek to protract this litigation. Nor do they seek wholesale re-writing of their briefs, as DR Horton hyperventilates. Respondents request supplemental briefing to address the limited issues that have been raised in this cross-motion. They rely on the authorities submitted in their cross-motion.

A. Unpreserved Argument in Reply Briefs

DR Horton appears to take the position that Respondents' citations to a trial court order establishing the law of the case justifies DR Horton's sharp practice of developing an undesignated and unpreserved argument in reply briefs on appeal. DR Horton's return to Respondents' objections merely appeals to its own opinions and prior arguments.

Respondents cited numerous authorities in support of their position that arguments are not properly made in reply briefs on appeal unless they were (1) raised to and ruled upon by the trial court, (2) specified in Appellant's Statement of Issues on Appeal, and (3) argued in Appellant's initial brief. DR Horton contends that these are mere "notice pleading" provisions and that Respondents were sufficiently apprised of the issues to appropriately respond. This is incorrect.

The purpose of rules governing appellate briefs is "to conserve the time and energy of the court and clearly to advise the opposite party of the points he is obliged to meet." 5 Am. Jur. 2d Appellate Review § 462 (Oct. 2024 Update) (citing Thys Co. v. Anglo Cal. Nat'l Bank, 219 F.2d

131, 133 (9th Cir. 1955)). Meticulous compliance with the briefing rules is necessary because they are "sensibly designed to make appellate briefs as valuable an aid to the decisional process as they can be." Id. (citing Jaworski v. Master Hand Contractors, Inc., 882 F. 3d 686 (7th Cir. 2018)).

DR Horton's Statement of Issues on Appeal does not identify inconsistent rulings by the trial court as an issue on appeal. This alone sufficiently demonstrates that the argument should not be considered in this appeal. Rule 208(b)(1)(B), SCACR.

Moreover, DR Horton did not argue the trial court erred in ruling inconsistently in its initial brief. DR Horton mentioned motions for summary judgment filed by other subcontractors in the Statement of the Case section of its Initial Brief (p. 9). This section "shall not contain contested matters." Rule 208(b)(1)(C), SCACR. Therefore, this reference cannot support an argument that the issue was raised in DR Horton's initial brief.

DR Horton also quoted a portion of the trial transcript in its Summary of the Facts section. (DRH Init. Br., pp. 13-14.) The problem here is that this refers to events that occurred after Respondents' dispositive motions were granted. This Court has stricken the referenced transcript from the record on appeal.

This ruling prejudices Respondent Blue Ridge because it attempted to address this issue in its brief by referring to the full context of the same document. As it stands, DR Horton has been allowed to quote from a stricken document. In contrast, Blue Ridge is made to appear as if it lacked a citation. Blue Ridge requests the opportunity to address this, just as DR Horton has done.

Since this Court's first Order, DR Horton has submitted rafts of new documents purporting to support an argument that the "inconsistent rulings" issue was preserved for appeal. This contention is futile.

What DR Horton has not pointed to is a place where DR Horton said, "Your Honor, Blue Ridge or Gale's dispositive motions should not be granted because other similar motions were denied." What DR Horton cited are "coat-tail" motions that commonly follow a successful motion in which other defendants seek an early exit through the same route.

But even if the "inconsistent rulings" issue was preserved for appeal, it was not properly raised as an argument in this appeal. The only possible argument that DR Horton raised an "inconsistent rulings" argument in its initial brief is a general reference to other subcontractors' motions that were granted in its "Summary of the Facts" section. (DRH Init. Br., p. 14.) The reference to the record is blank. (Id.) This plainly precedes the "Argument" section that follows on the same page. (Id.) Although the Rules allow argumentative statements of facts within the argument section (Rule 208(b)(1)(E)), the reference to other subcontractors' motions is not in the Argument section.

Arguments in briefs must be preceded by a statement of "the particular issue to be addressed." Rule 208(b)(1)(E). Arguments must be supported by "discussion and citations of authority." Id. DR Horton's Initial Brief does not specify inconsistent rulings as a particular issue to be addressed or support its position with a discussion and citations to authority as required by the SCACR.

DR Horton mentioned a similarity of contracts. (DRH Init. Br., p. 14.) "The interpretation of an unambiguous contract is a question of law." Miles v. Miles, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011). However, the other subcontractors' motions were denied based on the existence of genuine issues of material fact. (R. p. 20, 39.) This defeats DR Horton's contention that the new materials merely support its pre-existing argument as to the legal interpretation of the contracts. (DRH Return filed Nov. 18, 2024, p. 9.) There is nothing to indicate the trial court

interpreted the other subcontractors' subcontracts differently. There are no arguments or records designated to ascertain what factual issues accounted for the trial court rulings. Respondents and this Court are left to speculate as to what relevance these other motions and orders may have.

Moreover, it is well established that a denial of summary judgment does not establish anything. Ballenger, 313 S.C. at 477, 443 S.E.2d at 379. Thus, even if the argument is preserved, it is devoid of merit.

Therein lies the prejudice to Respondents. Ever since this Court granted Respondents' Joint Motion to Strike, DR Horton has continued to escalate its unpreserved argument that the trial court ruled inconsistently. Even if it was preserved, it is futile. DR Horton seeks to make a mountain out of a molehill by default, evading any response.

DR Horton's initial brief quoted from a document that has been stricken from the record. However, the quote remains in its brief. After Respondents' Joint Motion to Strike was granted, DR Horton escalated vague allusions to inconsistent rulings in its initial brief into a full-blown argument in reply and designated numerous new documents for that purpose.

Therefore, Respondents request leave to file supplemental briefing for the limited purpose of satisfying due process on this issue. See Kurschner v. City of Camden Plan. Comm'n, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) ("The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review.").

B. Insurance Issues

DR Horton is correct that insurance issues were raised in Respondents' Joint Motion to Strike. To the extent this motion sought to strike insurance-related matters, that portion is withdrawn.

Respondents would show, however, DR Horton made extended arguments in its Reply briefs that the trial court eviscerated availability of insurance. (DRH Reply to Gale filed Nov. 4,

2024, pp. 7-8.) There is no citation to the record in support of that argument. To Respondents' knowledge, it was first raised with respect to them in DR Horton's amended Reply briefs on appeal.

Respondents continue to object to DR Horton's improper and derogatory statements concerning insurance in its Reply briefs. An appellant's right to file a reply brief does not entitle it to take that opportunity to malign respondents with unsubstantiated accusations to which they cannot respond.

CONCLUSION

Respondents withdraw their request to strike except with respect to DR Horton's November 4, 2024 revised supplemental brief and initial designations. Respondent Blue Ridge withdraws its consent to remove any portion of its brief. Respondents continue to request leave to amend their briefs should DR Horton's pending Motion to Strike be granted.

Respondents request leave for limited supplemental briefing to address the "inconsistent rulings" issues that was not squarely raised in DR Horton's initial brief. If this request is denied, Respondents request that the motions briefing concerning these issues be considered along with the merits of the appeal.

Respectfully submitted,

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PROOF OF SERVICE

We certify that we have served Respondents' Reply Memorandum in Support of Their Cross-Motion to Strike or, in the Alternative, Motion to Allow Supplemental Briefing on the parties of record by emailing a copy to the attorneys of record as follows:

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