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.

FINAL REPLY BRIEF OF
APPELLANT REPLYING TO RESPONDENT GALE

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INTRODUCTION

The brief filed by Respondent Builder Services Group, Inc. d/b/a Gale Contractor Services argues many things that are not an issue on this appeal. This is an appeal by Appellant D. R. Horton, Inc. against Gale for attorneys' fees, expenses and costs. It is based on a contract between the parties. That is all. When Plaintiff's counsel limited their claims on the eve of Gale's summary judgment hearing by filing a written stipulation, D. R. Horton's counsel acknowledged that this removed the other issues from the case. (Record pp. 1481 line 17-1482 line 1, Tr. July 20, 2023-July 21, 2023, pp. 171 lines 17-25 -172 line 1; Record pp. 969-971, Plaintiff's Stipulation As To Limitation On Claims, filed July 20, 2023) Only the attorneys' fees, expenses and costs incurred before the stipulation are at issue.

This is an appeal from the grant of a motion for summary judgment. Gale notes this in its brief, but then argues the appeal as though it is based on the trial judge's ruling after a full non-jury trial. The two standards are different. The standard for summary judgment is "reasonable inference" concerning a "genuine issue as to any material fact." Rule 56(c), SCRCP; *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023). "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Quail Hill, LLC v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010). "All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party." *Murray v. Holnam, Inc.*, 344 S.C. 129, 137, 542 S.E.2d 743, 747 (Ct. App. 2001).

Gale's Brief and Designation of Record also included references to items that were not before the trial court at the time the summary judgment decision was ordered. Appellant had

initially responded to such items in its Reply Briefs to avoid any confusion and misapprehensions such inclusions left lingering. For example, Respondent Gale referenced a Jury Verdict that came *after* D.R. Horton had settled with Plaintiff and *after* summary judgment had been issued. Gale also included references to Interrogatories and Document Production documents that were not filed in the trial court,[1] and a case filed in another county for which no facts or pleadings were offered in evidence to the trial court, all of which are not properly before the Court per the Court's Order of October 21, 2024. Similar references by Respondent IBP are also not properly before the Court per the Court's Order of October 21, 2024. A revised Record on Appeal has been filed excluding these items. None of these items will be addressed on the merits in the Reply Briefs due to the Court's October 21, 2024 Order as they were not properly raised in Respondent's respective Briefs and are not part of the Record.

ARGUMENT

The best reply to Respondent Gale's brief is a single line from Hamlet. It is spoken by Queen Gertrude to express doubts about whether another character is entirely forthright in what she is presenting as truth. "The lady doth protest too much, me thinks." (Hamlet, Act III, Scene II) In at least 19 places in its brief, Gale argues that it should win because D. R. Horton has not produced the underlying contract between the parties. Gale does not say that it did not sign such a contract. It does not say that such a contract never existed. It does not say that it did not ever have such a contract in its possession. It does not say that it is not bound by such a contract. Instead, it says over, and over, and over again that it should win because D. R. Horton cannot find the contract.

[11] A request for a filing date or filed copies was requested but not received and no confirmation that such a filing ever occurred has been received.

We know that such a contract was signed and is effective because D. R. Horton produced not one but four separate contracts that are evidence of it. The first is the Master Addendum to Independent Contractor Agreement effective as of January 1, 2006. (Record pp. 1531-1536) The second is the First Amendment to Master Addendum to Independent Contractor Agreement signed on May 21, 2008. (Record pp. 1530) The third is the Master Addendum to Independent Contractor Agreement effective as of July 1, 2015. (Record pp. 1544-1550) The fourth is the Amendment No. 1 to Master Addendum to Independent Contractor Agreement signed on October 23, 2015. (Record pp. 1551-1552) If there was no underlying Independent Contractor Agreement, there would have been no reason to sign these four contracts. That alone is sufficient to overcome Gale's motion for summary judgment.

Gale is a sophisticated out-of-state corporation. (Record p. 1476 lines 12-14, July 20-21, 2023 TR p. 166, lines 12-14) The Termination section of each Master Addendum, which is in the penultimate paragraph, refers to its in-house "General Counsel." Small businesses do not have in-house general counsel. Also, the four contracts describe a sophisticated corporate structure with multiple subsidiaries. The 2015 Master Addendum "is entered into in contemplation of the announced transaction involving spin-off of Masco Corporation's services businesses in mid-2015 to TopBuild Corp," both of which are Gale by another name, and more evidence of sophistication. The 2006 Master Addendum shows the subcontractor headquartered in Michigan. The 2015 Master Addendum shows it headquartered in Florida. These are facts from Gale's own contracts. As a sophisticated business enterprise, it never would have agreed to any of these later contracts if there were not first an Independent Contractor Agreement.

D. R. Horton was entitled to continue to look for the Independent Contractor Agreement and, if found, present it at trial. Whether or not it was found, D. R. Horton was entitled to put

witnesses on the stand to testify about its contents. Gale and D. R. Horton had a business relationship lasting since 2006 – almost twenty years. (Record p. 1476 lines 4-6, July 20-21, 2023 TR p. 166, lines 4-6) It is entirely proper for D. R. Horton's witnesses to testify about Gale's obligation for D. R. Horton's attorneys' fees, expenses and costs throughout that relationship. This obligation is not unique to Gale. As shown by D. R. Horton's contracts with its other subcontractors, it is part of D. R. Horton's business model. (Record pp. 831-898; 913-968, Defendant D. R. Horton, Inc.'s Memorandum In Opposition To All Third-Party Defendant's Motions For Summary Judgment, filed July 11, 2023 and August 7, 2023) D. R. Horton does not build homes. It relies entirely on subcontractors for construction. (Record p. 1480 lines 3-7, July 20-21, 2023 TR p. 170, lines 3-7) That is the reason for the attorneys' fees, expenses and costs provision in all the subcontractor contracts.

Even without the Independent Contractor Agreement, each Master Addendum standing alone is sufficient to overcome Gale's motion for summary judgment. The relevant provisions, with D. R. Horton as "Builder" and Gale as "Contractor", are as follows:

> This Master Agreement modifies the terms of any Builder preprinted standard contractor/subcontractor agreement (including its attached exhibits) ("Standard Agreement") entered into between Builder and Contractor for the provision of goods and/or services by Contractor (the "Work") to a Builder building project ("Project"). This Master Addendum will supersede and control any conflicting terms or conditions of the Standard Agreement (the Standard Agreement as modified by the Master Addendum is referred to as the "Contract"). Therefore, notwithstanding anything to the contrary in the Standard Agreement, the following provisions will apply to any Contract.
>
> * * *
>
> Any defense, indemnification, hold harmless or similar obligation (collectively "Indemnification") imposed on Contractor under the Standard Agreement shall be limited to any claims, demands, damages, defense expenses (including attorneys' fees and litigation costs) or liabilities (collectively "Loss") covered by the terms of the Indemnification in the Standard Agreement that are caused by Contractor's … Work … .

> Other than as set forth above, Contractor's Indemnification shall not apply … to the extent that the Loss arises out of the work, negligence or misconduct of Builder … .
>
> * * *
>
> Contractor shall then have the duty to reimburse Builder only for the proportion of Builder's defense expenses that are attributable to Loss caused by Contractor and not excluded from indemnification in the preceding paragraph.
>
> * * *
>
> Contractor will name Builder as an additional insured on Contractor's CGL policy pursuant to an Additional Insured Endorsement … .
> (Record pp. 1531-1532; 1544-1545)

At minimum, these provisions create a jury issue. Beyond that, it is hard to refute the argument that they create an obligation for attorneys' fees, expenses and costs on the part of Gale that is independent of any other contract.

Each Master Addendum covers "claims, demands" and "attorneys' fees and litigation costs". Each of these categories is a "Loss". Gale is required to cover them because they arise from its "Work." It is not necessary that Gale be found negligent. Gale did the "Work." It is responsible for defending its "Work." Gale had "the duty to reimburse" D. R. Horton for defense expenditures "attributable to Loss" relating to Gale's "Work."[2]

Almost a year before granting Gale's motion for summary judgment, the trial judge denied the motions for summary judgment filed by other third-party defendants concerning D. R. Horton's contracts that were even more exacting than this one. (Record pp. 80-83, Order, filed November 3, 2022; Record pp. 448-573, Defendant D. R. Horton, Inc.'s Memorandum In Opposition To Third-Party Defendants Five Star Foundations, LLC, Long Heating & Air Conditioning, Inc., Caryl Mechanics II, Inc. a/k/a Caryl Mechanicals, Inc., Alpha Omega Construction Group, Inc., General Shale Brick, Inc., P&T Construction, Inc., King's

[2] D.R. Horton incorporates herein its briefs filed in this appeal regarding Respondent IBP, including, for example, the discussion regarding the distinction between a duty to indemnify and a duty to defend.

Landscaping & Grading, LLC, AJ Landscaping & Grading, LLC, Landshapers, LLC, Rite Rug Company, Inc., a/k/a Rite Rug Co., Atlanta Floor Designs Center, Allpro Textures, LLC and Manale Landscaping, LLC's Motions For Summary Judgment, filed September 7, 2022) Litigants should be able to rely upon consistency within the same case.

Gale has acknowledged that its work on the project included insulation, gutters, downspouts and garage doors. (Gale's Initial Brief, p. 19, ll. 4-5) At the outset of the litigation, Plaintiff's counsel sent D. R. Horton a letter providing some more specifics about their claim. (Record pp. 111-116, Notice and Opportunity to Cure Letter dated December 11, 2019, filed February 28, 2020, at 10:02 a.m.) (Record pp. 111-116) The letter notes "missing/inadequate insulation at exterior walls" … "insufficient insulation in attics" … "Insufficient/improperly installed grading/drainage, resulting water damage" … and "Sloppy workmanship throughout Rose Hill."

The Complaint included 60 Jane and John Doe defendants alleged to have been involved in construction of the homes at the Rose Hill subdivision. (Record pp. 94-95, Complaint, Paragraphs 8 & 16) Gale is in that category. "Water intrusion" is alleged. That could come from improperly installed gutters or downspouts, which were part of Gale's "Work." Other allegations are more general, such as "failing to develop the Residences in accordance with applicable building codes, standard building practices, and accepted construction and design industry standards and practices; … and [o]ther deficiencies or failures as will be proven at trial." (Record pp.103-104, Complaint, Paragraph 67) That could relate to insulation and garage doors, which were part of Gale's "Work," as well as gutters and downspouts.

Gale was a target in the class action and its "Work" was part of the "claim, demand" in the lawsuit. Were it otherwise, Gale would have extricated itself from the litigation long before

the eve of trial. Instead, Gale's "Work" was not dropped until Plaintiff's counsel filed a last minute written stipulation limiting its claims. (Record pp. 969-971, Plaintiff's Stipulation As To Limitation On Claims, filed July 20, 2023). Until then, Gale was in the case and is responsible for the attorneys' fees, expenses and costs incurred by D. R. Horton for Gale's "Work." At the very least, this is a jury issue, which D.R. Horton's attorney argued to the court. "Your Honor, [it's] a factual issue of whether or not they've breached this part of the contract." (Record p. 1479 lines 7-9, July 20-21, 2023 TR p. 169, lines 7-9)

Finally, Gale complains that D. R. Horton's discussion of insurance is "improper." Certainly, not. Insurance is in their contract. Indeed, it is central to their contract. It is a requirement that D. R. Horton be named as an "Additional Insured" to relieve Gale from the expense of its contractual obligations. The resistance to D. R. Horton in this case is from Gale's insurance carrier, which is obligated to protect D. R. Horton as an Additional Insured.

The United States District Court for the District of South Carolina has already considered a case such as this and ruled in favor of the party seeking enforcement of its contractual rights, as is D. R. Horton here. The case is *Midland Ins. Co. v. Delta Lines, Inc.,* 530 F. Supp. 190 (D.S.C. 1982). The case is almost on "all fours" with this one.[3] In brief, all the arguments of Respondent fall by the wayside because the contract is clear enough, and by including a requirement making Appellant an "Additional Insured" in their contract the parties have consciously decided how to allocate risk and made the indemnification and duty to defend arrangements ones for insurance. The parties' inclusion of insurance in their contract eliminates

[3] In *Federal Pacific Electric v. Carolina Production Enterprises,* 298 S.C. 23, 378 S.E. 2d 56 (Ct. App. 1989), the Court of Appeals correctly declined to apply *Midland* to allow Federal to escape liability for its *sole* negligence. Federal was not only the owner of a factory where an electrical explosion had occurred, it also manufactured the exploding electrical switch gear and its contractor installed the switch gear when Federal built the plant. Compare that with D.R. Horton, which builds nothing itself.

all arguments that the contract is against public policy. Indeed, to the contrary, it enhances public policy by not only respecting the parties' agreement but by also providing outside resources in the form of insurance to protect both. Moreover, the statute the Respondent relies upon in its attempts to overcome the indemnification provision in the parties' contracts, specifically prohibits voiding insurance contracts. S.C. Code. Ann. 32-2-10 ("The provisions of this section shall not affect any insurance contact . . .") But that is what the court did when it granted summary judgment – to the extent anything is clear about what the court did given the inconsistent ruling among the various defendants' contracts. When the trial judge granted summary judgment as to the parties' indemnity contractual provisions that were secured by the insurance provisions, he effectively voided the insurance provisions to the full extent of his ruling. That violates the statute. The contracts do not.

To the extent that the court erroneously lumped together the duty to indemnify, the duty to defend, and the insurance provisions as just an "indemnification provision," then such an approach also violates the statute because it likewise voids the insurance contracts. It also ignores the fact that South Carolina has repeatedly recognized that a duty to defend is separate from a duty to indemnify.

One might fairly ask why Respondent has agreed in the contract to defend an entire lawsuit, even claims not subject to indemnity. The answer is twofold. The first is that it has insurance for this, which the contract requires. The second is that every other contractor/subcontractor is in exactly the same position, which means that the contractors/subcontractors will divide the responsibility for defense among themselves. That is the way that it should be because D. R. Horton does not perform any of the work itself. It contracts for everything.

Gale's attempt to interject a case in another county that was not before the trial court is improper. The facts and pleadings of that case were not put into evidence; and all references to matters that were not before the trial court when the summary judgment decision was issued were ordered stricken from the Record on Appeal. Moreover, the case is irrelevant. A separate lawsuit by D. R. Horton against Gale's insurance company would not erase Gale's direct obligation to D. R. Horton under their contract. Again, at minimum, this is a jury issue.

CONCLUSION

This is a simple appeal. It is only about D. R. Horton's contractual claim against Gale for attorneys' fees, expenses and costs incurred before Plaintiff's eve-of-trial written stipulation limiting the class action claims. All the pages in Gale's brief about everything else are irrelevant because of that stipulation and D. R. Horton's resulting acknowledgement that its other claims should no longer stand. Contrary to Gale's brief, its duty to defend and obligation to D.R. Horton as an additional insured are separate and distinct from the duty to indemnify, but D.R. Horton prevails either way as shown by the judge's other rulings on identical contract provisions. This is an appeal from the grant of Gale's motion for summary judgment. The standard for that is exceedingly high, with all reasonable inferences required to be decided in favor of D. R. Horton and most strongly against Gale. It is a standard that Gale has not met. Even the trial judge in this case has so decided on other similar motions by other subcontractors at the Rose Hill subdivision, which is discussed in detail in Appellant's Reply Brief to Respondent IBP, and which is incorporated herein. D. R. Horton requests that the grant of summary judgment be reversed and that the case be remanded for trial on its claim, including its contractual right to attorneys' fees and expenses for enforcing that claim.

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

September 22, 2025

Respectfully,

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PROOF OF SERVICE

The undersigned does hereby certify that on September 22, 2025 a copy of Appellant's Final Reply Brief Replying to Respondent IBP and Appellant's Final Reply Brief Replying to Respondent Gale were 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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