

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No.: 2021-CP-27-00069
Appellate Case No. 2025-001116

RECEIVED

Jan 28 2026

SC Court of Appeals

Mark W. McGilton, Respondent,

v.

1223 May River Road, LLC, D.R. Horton, Inc., and
Lotty Trucking, LLC f/k/a Ramos Trucking, LLC, Defendants,

of which D.R. Horton, Inc. is the Appellant,

AND

1223 May River Road, LLC, Third-Party Plaintiffs,

v.

Kenneth Scott Builders, Inc., Third-Party Defendants.

APPELLANT'S REPLY IN SUPPORT OF ITS MOTION TO STRIKE PORTIONS OF
RESPONDENT'S BRIEF AND AMENDED DESIGNATIONS OF RECORD ON APPEAL

Appellant D.R. Horton files this Reply in support of its motion to strike those portions of Respondent McGilton's Brief and Amended Designations of Record on Appeal that include or refer to documents, emails, or materials that were not provided to the circuit court judge who issued the orders on appeal and filed with the circuit court. Such items are not properly includable in Respondent's Brief or in the Record on Appeal. This is especially important in this case of no liability, where Respondent's misstatements have improperly led the circuit judge to

strike Appellant's Answer – which Respondent hopes will result in a multi-million-dollar windfall – and where Respondent hopes to pad the record in order to preserve that error on appeal.

I. Respondent Failed to File Its Return Timely and it Should Not Be Considered.

This Court should not consider Respondent's Objection and Return to Appellant's Motion to Strike because it was filed late. Appellant filed its Motion on January 5, 2026. The Return was due on January 15, 2026. Respondent did not file its Return until January 21, 2026. Respondent did not request an extension from the Court or consent from Appellant. Appellant's Motion to Strike was filed because Respondent *twice* violated the appellate rules by designating matter for the record on appeal that was not before the circuit judge and included references to that material in its Brief. Respondent again violates the appellate rules by late filing its Return without obtaining an extension or consent. Because Respondent so clearly violated a bright line fundamental appellate rule – and did so not once but twice – and in its Return still tries to avoid the rule, Appellant does not consent to the late filing and asks the Court to disallow Respondent's Return and grant the relief requested in Appellant's Motion.

II. Respondent Did Not Identify Any Item Listed In Its Amended Designations That Should Not Be Struck as Appellant Requested.

Respondent violated the rules when it included matter that was not filed with the circuit court in its Initial Designations and violated the rules again when it filed its Amended Designations that also included matter that was not filed with the circuit court. Respondent's repeated and intentional violations of the rules are blatant and an attempt to circumvent the

rules and to confuse the Court as to what was provided to the circuit judge who issued the orders on appeal and filed with the circuit court at the time of the appealed Orders.

Respondent's Return did not object to the striking of any specific one of the 19 items that Appellant asked the Court to strike from Respondent's Amended Designations. Instead, Respondent admitted that items in its Amended Designations had not been filed with the circuit court and agreed those items would be struck.¹ However, Respondent then also vaguely implied that it might *not* strike all 19 items that Appellant identified were not filed with the circuit court without any clarification as to what it might not strike. Respondent had the opportunity to tell the Court which Amended Designation item numbers it objected to striking and why, but Respondent did not. Neither the Court nor Appellant should be left wondering what Respondent will and will not voluntarily strike. Accordingly, Appellant asks the Court to strike all 19 items as reflected in Appellant's Motion to Strike, Exhibit 5, because they were not filed in the circuit court, were not provided to the circuit judge who issued the orders on appeal, Respondent already amended the designations once without excluding all materials that violate the rules, Respondent deliberately included unfiled materials, and Respondent's Return was not timely filed.

III. Respondent's Brief Violates the Rules Because It Includes Matters Not Filed With the Circuit Court And Not Provided to the Circuit Judge Who Issued the Orders on Appeal.

¹The improper materials included in the Amended Designation are listed as numbers 3, 11, 16, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34, 45, 62, and 65. See Appellant's Motion to Strike, Exhibit 2 and the strikethroughs are reflected in Exhibit 5.

An additional issue is that Respondent designated all of the electronic automatic NEF reports issued by the circuit court's automatic filing system for every filing made by every party to the case, which is both unnecessary and includes material that is not relevant to the appeal. That is item 65 of the Amended Designations, which Appellant also asks the Court to strike as reflected in Appellant's Motion to Strike, Exhibit 5.

Respondent compounded the violations in its Designations by relying upon the unfiled materials in its Brief thereby making alleged factual assertions not supported by the record. Once again, Respondent knew it was violating the rules, *admits to these violations in its Return*, and states that it will strike some materials and references in its Brief; however, there remains a gap between what Respondent has stated it will strike and what needs to be struck to comply with the rules.

Respondent attempts to overcome its violations by asserting that some of the statements are “argument.” That does not save Respondent’s violations because every single strikethrough is presented as an alleged fact in Respondent’s **Counter-Statement of the Case/Facts** – where argument is not allowed. Rule 208, SCACR, prohibits contested matter in this section of Respondent’s Brief. Respondent also attempts to overcome the violations by misdirecting the Court to other documents it asserts cures the violations. This also does not save Respondent’s violations because the other documents also either were not provided to the judge who issued the orders on appeal, were not filed with the circuit court, were not cited in the Brief, or they are not evidence but are instead more argument by Respondent wrongly included in its Counter-Statement of the Case/Facts section.

Respondent’s Return regarding strikethroughs to its Brief can be grouped into several categories:

(A) admissions the materials were not filed in the circuit court and should therefore be removed from its Brief, which includes Respondent’s numbered paragraphs 5, 7, 8, and part of 10;

(B) admissions that statements represented in the Brief as *factual* evidence were not based on any evidence filed with the circuit court; but is instead unverified contested argument

by Respondent's attorney, which includes Respondent's numbered paragraphs 3, 4, 6, 9, 11, part of 10, and 12; and

(C) an attempt by Respondent to overcome the failure to provide materials to the circuit judge who issued the orders on appeal or file materials in the circuit court that it relies upon in its Brief, which includes Respondent's numbered paragraphs 1 and 2.

The Group A strikethroughs represented in Respondent's paragraphs 5, 7, 8, and part of 10 are uncontested and should be struck consistent with Appellant's strikethroughs in Exhibit 4 of Appellant's Motion to Strike.

For the Group B strikethroughs, Respondent attempts to recategorize alleged factual statements it made in its Counter-Statement of the Case/Facts section as "argument." However, Respondent's statements are presented as facts in the facts section of its Brief and not as argument. *Argument is not appropriate in the Counter-Statement of the Case/Facts section.* Rule 208 (b)(1)(C) and (b)(2), SCACR. Respondent misapprehends or ignores the difference between arguments made by attorneys, which are not evidence and have no evidentiary significance, with factual evidence provided to the circuit judge through testimony, affidavits, and documents. The rules do not allow Respondent to include any documents, transcripts, or emails in the record on appeal that were used in argument *unless those materials* were filed with the circuit court and provided to the circuit judge who issued the orders on appeal. Attorney argument is not testimony or documentary evidence.

Respondent also disingenuously attempts to circumvent the rule by saying materials were "*presented*" to the circuit court as argument in other documents. But the items Appellant has objected to *were based on documents not provided* to the circuit court. They were not handed up to the judge, they were not provided to Appellant at the hearing, and they were not filed in the

circuit court. *The circuit judge never saw the materials* underlying the alleged “factual statements” that Respondent now tries to recast as arguments. Respondent has tried to confuse this Court with its “*presented*” argument when it knows, and has admitted, the materials were not provided to the circuit court.

Respondent asserts that the Group B strikethroughs should not be made because they are based on attorney arguments filed in various motions or memos. However, this also does not help Respondent because those documents were *not cited in its Brief* for those strikethroughs, attorney arguments are not facts, and all strikethroughs are in the Counter-Statement of the Case/Facts, which prohibits arguments. Rule 208, SCACR.

Finally, Respondent also asserts that it is free to include references to materials not filed with the circuit court because, it asserts, Appellant did not contest the substance of the material in its Rule 59(e) motion. Respondent makes this claim regarding what it refers to as thousands of documents in numbered paragraphs 9 and 11. Respondent’s assertion that Appellant did not object to the substance of the documents is incorrect. See Appellant Motion to Reconsider, filed January 27, 2025, pp. 3, 11-13, and fn 4. Moreover, the documents were *never filed with the circuit court or even shown to the circuit judge*, were not fully or timely provided to Appellant, and are not properly included in this appeal.

All of the Group B strikethroughs Appellant requested should be granted.

The Group C strikethroughs include numbered paragraphs 1 and 2. The strikethrough discussed in paragraph 1 *specifically* refers to the deposition of the owner of Kenneth Scott Builders as the source of the alleged facts with a simple (R.p. ___) as the citation reference for the two statements attributable to that deposition testimony. Respondent did not provide that deposition testimony to the circuit court. Respondent asserts that the entirety of the Kenneth

Scott Builders deposition testimony was filed by Appellant on June 13, 2024 as Exhibit 4 to its Motion for Reconsideration. That is incorrect. Exhibit 4 consists of a small portion of the owner of Kenneth Scott Builder’s testimony – just a 3-page Exhibit, including the cover page – which is attached hereto as Exhibit A. Respondent’s Amended Designations, number 3, also confirms that only a portion of Kenneth Tosky’s (owner of Kenneth Scott Builders) deposition was filed with the circuit court, contrary to Respondent’s new incorrect assertion that the entire deposition was filed. The excerpt of that deposition *does not include the statements made in Respondent’s Brief*.

Respondent also in hindsight disingenuously attempts to attribute the statements to other persons and to rely on other documents, but that is not what its Brief says. It specifically states the deposition of the owner of Kenneth Scott Builders. Moreover, the deposition excerpt of Andy Rowland that Respondent says supports the statements also does not apply. That deposition excerpt is a single page of deposition testimony (plus a cover page and signature page) that does not mention anything related to the statements Appellant has asked the Court to strike. See attached Exhibit B. Respondent is once again attempting to use material never filed with the circuit court, never provided to the circuit judge who issued the orders on appeal, and misrepresenting what was filed.

The strikethrough discussed in Respondent’s paragraph 2 refers to an email without any citation followed by a separate sentence, “No discovery was produced. (R.p. __).” In its Return to Appellant’s Motion to Strike, Respondent provided additional information about that email by stating that it was filed as an exhibit to a memorandum filed years earlier on August 16, 2022. That reference was not provided in Respondent’s Brief – in fact, Respondent provided no cite for that email. *More importantly, that email was not provided to the circuit judge who decided the*

orders being appealed. The second sentence, “No discovery was produced. (R.p. __)” should be struck as there is no document filed with the circuit court that supports that alleged factual statement nor has Respondent alleged there is such a document.

CONCLUSION

Respondent filed its Return late, admits to numerous and repeated instances of including material that was not provided to the circuit judge in its Designations and Brief, and admits that it included many arguments of contested matter in the facts section of its Brief in violation of Rule 208 (b)(1)(C) and (b)(2), SCACR.

Appellant asks this Court to order Respondent to strike the sentences from its Brief as marked in Exhibit 4 and in its Amended Designation of Matter as marked in Exhibit 5. Appellant has requested only necessary changes to both. Appellant also asks this Court to order Respondent

to not use any documents, emails, statements, or references for any materials that were not both filed with the circuit court and provided to the judge who issued the orders on appeal.

January 28, 2026

Respectfully,

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Exhibit A
Excerpt of Kenneth Tosky Deposition (owner of Kenneth Scott Builders)

Exhibit B
Excerpt of Andy Rowland Deposition

EXHIBIT A

ELECTRONICALLY FILED - 2024 Jun 13 7:35 PM - JASPER - COMMON PLEAS - CASE#2021CP2700069

1 IN THE COURT OF COMMON PLEAS
2 FOURTEENTH JUDICIAL CIRCUIT
3 STATE OF SOUTH CAROLINA
4 COUNTY OF BEAUFORT

5
6 MARK W. McGILTON,
7 Plaintiff,

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9
10
11 vs.

CIVIL ACTION NUMBER
2018-CP-07-00607

12
13
14 ALFREDO URIOSTEGUI and JACOB-AU TRUCKING LLC,
15 and KENNETH SCOTT BUILDERS, INC.,
16 Defendants.

17 -----/

18 The deposition of KENNETH SCOTT TOSKY, a
19 witness in the above-entitled cause, taken
20 pursuant to Notice and agreement, before Ceil
21 Weser, Certified Court Reporter and Notary
22 Public, at The Nexsen Pruet Law Firm, 7 Arley
23 Way, Bluffton, South Carolina, on the 15th day
24 of September, 2021, commencing at or about the
25 hour of 10:40 a.m.



ELECTRONICALLY FILED - 2024 Jun 13 7:35 PM - JASPER - COMMON PLEAS - CASE#2021CP2700069

Page 30

1 I will have to get you the names on the
2 other one's. I don't recall. It has been a
3 while since we have had that site portion of the
4 work that we self-performed.
5 **Q Do you remember how many?**
6 A There were two others.
7 **Q So three total that were doing --**
8 A Three total equipment operators.
9 **Q And these would be employees that were**
10 **operating the equipment?**
11 A Yes, sir.
12 **Q Did those employees work for anyone**
13 **else?**
14 A No, sir.
15 **Q To your knowledge?**
16 A To my knowledge; and I will say that
17 two of them were fire fighters so they had their
18 shifts at the Fire Department. I did know they
19 were fire fighters.
20 **Q But to your knowledge none of the**
21 **equipment operators otherwise worked in the**
22 **construction industry?**
23 A Not that I am aware of.
24 **Q What is the nature of Kenneth Scott**
25 **Builders? What do you do?**

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1 **Q So would that include equipment?**
2 A That includes -- I don't recall. I
3 could see the paragraph, but I don't recall the
4 exact words for exactly what it said that is
5 included in that value. It is an audited
6 statement by an accountant.
7 **Q Who was your accountant that did that**
8 **statement for you? I am assuming one was done**
9 **for you.**
10 A It was done for us. It was a fellow on
11 Hilton Head and I don't recall his name. And
12 again I can get you the information, but I don't
13 recall.
14 **Q Is that the same accountant that you**
15 **use now?**
16 A No, sir.
17 **Q Who is the accountant you use now?**
18 A Troy Lowther L-o-w-t-h-e-r.
19 **Q And where does Troy Lowther work out**
20 **of?**
21 A Out of Ridgeland, South Carolina.
22 **Q Does he work for a company?**
23 A He does, and I am trying to remember
24 the company name. And I don't recall the
25 company name.

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1 A We are classified as a BD 5 general
2 contractor, which allows us to build any
3 vertical construction; any site work, which is
4 horizontal; renovations for residential;
5 renovations for commercial; new builds for
6 commercial; new builds for residential.
7 **Q You said BD 5?**
8 A BD 5 is unlimited, which allows us to
9 do any type of aboveground or below ground
10 construction.
11 **Q How long have you had that designation?**
12 A I would have to look that up. It took
13 me a while to get qualified for that
14 financially-wise; and I don't know what year
15 exactly that was.
16 **Q What are the qualifications for that**
17 **financial-wise?**
18 A Financially you have to be -- I don't
19 recall. I can give you a guess, but I can't
20 recall the exact numbers.
21 **Q Give me to the best of your**
22 **recollection.**
23 A I think it was a \$250,000 value of
24 construction or value of company without debt or
25 anything like that.

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1 **Q How long has he been your accountant?**
2 A Four years.
3 **Q When you had the audit done, did you**
4 **use your normal accountant?**
5 A I had to go a specialty. He wasn't
6 certified to do audited.
7 **Q And was this relatively recently that**
8 **you attained this certification, or was it**
9 **within the last ten years? Or the last five**
10 **years?**
11 A It was within the last five years.
12 **Q Did you have it in 2018?**
13 A Yes, sir.
14 **Q At the beginning of 2018?**
15 A Yes, sir.
16 **Q You are capable of doing any type of**
17 **construction? You were capable of doing any**
18 **type of construction in 2018, is that correct?**
19 A Yes, sir.
20 **Q What did you focus on in 2018? Let us**
21 **talk about the beginning of 2018.**
22 MR. BROWN: Objection to the form.
23 THE WITNESS: We focused on custom
24 homes. We focused on-site work, which
25 is horizontal construction; and we

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1 reason not to believe it.
 2 BY MR. SHELTON:
 3 Q So it is possible that Alfredo operated
 4 equipment that you had rented at Cypress Ridge?
 5 A It could be.
 6 Q And then at 355, 896023: Hauled
 7 on-site at Cypress Ridge.
 8 The next invoice -- both invoices state
 9 that, is that correct?
 10 A That is correct.
 11 Q And one is 8:00 to 4:30. The next is
 12 8:00 to 5:00.
 13 Then I am going to 356, and we have an
 14 invoice that ends in 021 and an invoice that
 15 ends in 020, and both of those indicate at least
 16 in part: Hauled on-site at Cypress Ridge, is
 17 that correct?
 18 A That is correct.
 19 Q On 357, 026, that is the last three
 20 digits of the invoice state: Hauled on-site at
 21 Cypress Ridge, 8:00 to 5:00, is that correct?
 22 A That is correct.
 23 Q And then 896, ending in 027, invoice
 24 states: Hauled on-site moving dirt at Cypress
 25 Ridge.

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1 Is that correct?
 2 A Yes.
 3 Q And then the last three invoices dated
 4 March 8th, March 9th and March 7th all say:
 5 On-site hauling dirt?
 6 A Yes, sir.
 7 Q So on-site hauling dirt, to be specific
 8 that means he is at Cypress Ridge working all
 9 day, is that fair to say?
 10 A That is fair to say.
 11 Q And does it appear that the last 14
 12 invoices state: Hauled on-site at Cypress
 13 Ridge?
 14 A Yes, sir.
 15 Q Did you ever see his truck overnight at
 16 Cypress Ridge?
 17 A Not personally.
 18 Q But referring back earlier in your
 19 deposition, I believe I recall that your
 20 daughter referred to --
 21 A That is correct.
 22 Q That has happened in the past?
 23 A That is correct.
 24 Q And you do not know how many times?
 25 A I do not know how many times.

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1 Is that correct?
 2 A That is correct.
 3 Q It has an indication it says: This
 4 truck started late. I was fixing it.
 5 A It does.
 6 Q And truck number 702, do you have any
 7 idea what that references?
 8 A I am assuming the other truck that --
 9 that the other trucking company that he brought
 10 in to assist him. I don't know it for a fact.
 11 I am assuming that is what it means.
 12 Q And then 358, again truck number 701:
 13 Hauled on-site moving dirt at Cypress Ridge.
 14 Is that correct?
 15 A Yes, sir.
 16 Q 8:00 to 5:00?
 17 A Yes, sir.
 18 Q And then at the bottom of 358 the same?
 19 A Yes, sir.
 20 Q And then we are now at March 5, 2018:
 21 Hauled on-site dirt to Cypress Ridge, 8:00 to
 22 5:00.
 23 March 6, 2018 -- if I didn't say 2018,
 24 I want to correct the record, 2018. It says:
 25 Hauled on-site at Cypress Ridge.

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1 Q Do you have any idea where Alfredo had
 2 work done on his truck? That is a very poorly
 3 worded question. Let me reword it.
 4 A Yeah.
 5 Q Do you have any knowledge as to where
 6 Alfredo serviced his truck?
 7 A I have no clue.
 8 Q When his truck was broken down, do you
 9 know the nature of those breakdowns?
 10 A No, sir.
 11 Q But you do know it happened more than
 12 once?
 13 A From what Gabby said, yes. I don't
 14 know how many times, but I do from what she had
 15 told me.
 16 Q I notice there is no invoice from
 17 March 13, 2018.
 18 Do you know whether you paid him for
 19 the load or the time that he worked that day?
 20 A I don't know the answer to that.
 21 Q It is true that he loaded dirt for you
 22 that day, correct? Or unloaded dirt at 1227 May
 23 River Road?
 24 A Yes, sir.
 25 Q I am about to go into another exhibit



EXHIBIT B

1 IN THE COURT OF COMMON PLEAS
2 FOR THE STATE OF SOUTH CAROLINA
3 JASPER COUNTY

4 DEPOSITION OF
5 THEODORE "ANDY" ROWLAND
6 JULY 16, 2024

7 MARK W. MCGILTON,

8 Plaintiff,

9 vs. CASE NO. 2023-CP-27-00069

10 1223 MAY RIVER ROAD, LLC,
11 D.R. HORTON, INC., and
12 LOTTY TRUCKING, LLC f/k/a RAMOS TRUCKING, LLC,

13 Defendants.

14 _____
15 1223 MAY RIVER ROAD, LLC,

16 Third-Party Plaintiff,

17 vs.

18 KENNETH SCOTT BUILDERS, LLC,

19 Third-Party Defendant.
20 _____

21 TIME: 10:07 A.M.

22 LOCATION: SHELTON LAW FIRM
23 HILTON HEAD, SOUTH CAROLINA

24 REPORTED BY: KELLY B. BAEKELANDT, RPR,
25 CSR (GA)
CLARK BOLEN
CHARLESTON, SC 29405
843-762-6294
WWW.CLARKBOLEN.COM

1 Q. Okay. So do you have to pull a permit
2 to do grading work on a multi-lot development?

3 A. Yes. Yes. You have to have a permit,
4 yes.

5 Q. Okay. And to pull a permit, do you have
6 to have a grading license?

7 A. That I don't know the answer to.

8 Q. Okay. Do you know if D.R. Horton has a
9 grading license?

10 A. I don't know that either.

11 Q. Okay. In this case, in your analysis of
12 this case, what is D.R. Horton? Is it an owner,
13 developer, general contractor, engineer, what are
14 they in this case?

15 A. I would say that that -- who is in what
16 role against all the tiers of this is one of the
17 most taxing questions in the whole case. We
18 know -- if you -- if you asked me who is
19 D.R. Horton, I would say they're a developer. I
20 also know just from general experience that they
21 typically would hire a GC, a builder to build
22 individual houses, and that they might have
23 multiple ones of those in any given development.
24 So I -- I can't say that they acted as the
25 general contractor. In my interpretation of it,

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CERTIFICATE OF REPORTER
STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

I, KELLY B. BAEKELANDT, Registered Professional Reporter and Notary Public for the State of South Carolina at Large, do hereby certify that the witness in the foregoing deposition was by me duly sworn to testify to the truth, the whole truth and nothing but the truth in the within-entitled cause; that said deposition was taken at the time and location therein stated; that the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed by computer-aided transcription; that the foregoing is a full, complete and true record of the testimony of the witness and of all objections made at the time of the examination; and that the witness was given an opportunity to read and correct said deposition and to subscribe the same.

Should the signature of the witness not be affixed to the deposition, the witness shall not have availed himself/herself of the opportunity to sign or the signature has been waived.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal on July 25, 2024, at Bluffton, Beaufort County, South Carolina.

KELLY B. BAEKELANDT
REGISTERED PROFESSIONAL REPORTER
RPR, CSR (Georgia)
My Commission expires
June 16, 2026

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Jan 28 2026

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No.: 2021-CP-27-00069
Appellate Case No. 2025-001116

Mark W. McGilton, Respondent,

v.

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of which D.R. Horton, Inc. is the Appellant,

AND

1223 May River Road, LLC, Third-Party Plaintiffs,

v.

Kenneth Scott Builders, Inc., Third-Party Defendants.

PROOF OF SERVICE

The undersigned does hereby certify that on January 28, 2026, a copy of the APPELLANT'S
REPLY IN SUPPORT OF ITS MOTION TO STRIKE PORTIONS OF RESPONDENT'S BRIEF
AND AMENDED DESIGNATIONS OF RECORD ON APPEAL was served by email on all

counsel of record as follows and filed by electronic mail with the Clerk of Court for the South Carolina Court of Appeals.

January 28, 2026

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