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October 9, 2023

Via E-mail

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RECEIVED

Oct 09 2023

SC Court of Appeals

Re: *Robin Napier, individually and on behalf of all other similarly situated v. Mundy's Construction, Inc. d/b/a Mundy Construction*
Circuit Court Case No.: 2016-CP-02-00263
Appellate Case No. 2020-001103

Dear Ms. Kitchings:

Pursuant to Rule 208(b)(7) of the South Carolina Appellate Court Rules, and in advance of argument scheduled for October 11, 2023, Appellant hereby submits the following as supplemental authority:

(1) South Carolina's Public Policy Protecting Homeowners

The case of *Damico versus Lennar Carolinas, LLC* was decided after final briefing concluded in the instant matter. See Appellant's Final Brief at 25-26.

It is the public policy of South Carolina to protect homeowners. *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 624, 879 S.E.2d 746, 761 (2022), *reh'g denied* (Nov. 17, 2022), *cert. denied* (June 5, 2023), *cert. denied*, 143 S. Ct. 2581 (2023) (finding that honoring the severability clause within adhesion contract would violation South Carolina's public policy expanding contract law to protect homeowners).

(2) Gross Negligence Must be Reviewed De Novo

Gross negligence is typically a mixed question of fact and law. The legal conclusion as to whether Respondent's conduct constitutes gross negligence or recklessness shall be reviewed *de novo*. See Appellant's Final Reply Brief at 17.

"Gross negligence is ordinarily a mixed question of law and fact." *Faile v. South Carolina Dep't of Juvenile Justice*, 350 S.C. 315, 331-32, 566 S.E.2d 536, 544 (2002). "And in considering mixed questions of law and fact, we review the factual portion of the inquiry for clear error and the legal conclusions *de novo*." *Nelson-Salabes, Inc. v. Morningside Dev., LLC*, 284

F.3d 505, 512 (4th Cir. 2002).¹

(3) The Standard Against Which the Respondent's Care, or Lack Thereof, Must Be Measured

The building code is the minimum standard of care for residential construction against which slight care must be judged. *See* Appellant's Final Brief at 24-26.

In considering whether the defendant had employed the requisite care in the control of a person with known violent tendencies, the Court held that the care must be measured by/against the defendant's adherence to the Court Order that had provided for the terms of the supervised release of the violent individual. *Faile v. South Carolina Dep't of Juvenile Justice*, 350 S.C. 315, 338, 566 S.E.2d 536, 548 (2002) ("No lesser measure of care would suffice..."). In this case, Appellant advocates that the care used must be measured against the building code and the plans.

(4) Damages Must be Based on the Evidence

Appellant has set forth the applicable South Carolina law providing that a judge's determination of damages must be based on the evidence. *See* Appellant's Final Brief at 21. To further support this argument, the Wisconsin case of *Three & One Company versus Geilfuss* explains that a reduction of damages without evidence to support that reduction is clearly erroneous.

The tenants did not offer evidence on depreciable life, and we hold that such evidence is outside the field of general knowledge. In such cases the findings of the trial court must be based upon testimony of witnesses or other evidence made a part of the record. *See Will of Gudde*, 260 Wis. 79, 85, 49 N.W.2d 906, 909 (1951). Therefore, the trial court's *sua sponte* reduction of the replacement cost of the carpeting and storm door for depreciation is clearly erroneous.

Three & One Co. v. Geilfuss, 178 Wis. 2d 400, 410–11, 504 N.W.2d 393, 397–98 (Ct. App. 1993) ("Whether the trial court applied the proper legal standard in determining damages is a question of law that we review *de novo*"). In the present case, the Court's *sua sponte* reduction of damages based on 14 years of "wear and tear," originally "use and depreciation," was not supported by any evidence or testimony at trial.

(5) Burden of Proof Relating to Avoidances

A reduction in damages must be based on the evidence, and the party insisting on such a reduction has the burden of proof. *See* Appellant's Final Reply Brief at 3-12.

¹ "[I]n considering mixed questions of law and fact, the court will review the factual portion of the inquiry for clear error and the legal conclusions and application of law to fact *de novo*." § 3:823. Mixed questions of law and fact, 2A Fed. Proc., L. Ed. § 3:823.

Similar to this case, in the Texas case of *Hollingsworth Roofing Co. versus Morrison*, a homeowner sued a roofer after the swimming pool remained open during roof repairs, allowing tar to fall into the pool. 668 S.W.2d 872 (Tex. App. 1974) (superseded by statute on other grounds as stated in *Hines v. Hash*, 843 S.W.2d 464 (Tex. 1992)). Judgment was entered for the cost to replaster the pool, but the defendant argued that the pool's value would be enhanced by replastering because it was already in need of such repairs. *Id.* at 876. The court held that "[t]he party urging such a contention has the burden to show that the repair, as made, resulted in an enhancement of value." *Id.* A judgment in favor of the plaintiff was ultimately affirmed on that issue because the defendant failed to produce any evidence establishing any enhanced value to the pool. *Id.*

In the present case, Respondent presented no evidence and failed to even plead wear and tear, leaving the record devoid of anything warranting the 90% reduction of damages.

(6) The Calculation of Damages Influenced by Legal Error Reviewed *De Novo*

The damages award in this case is not only erroneous because the basis for the reduction is not based on the evidence, but also because the reduction itself is based upon an error of law. *See* Appellant's Final Reply Brief at 3. This error must be reviewed *de novo*.

"The calculation of damages is a finding of fact and therefore is reviewable only for clear error, but to the extent those calculations were influenced by legal error, review is *de novo*." *U.S. ex rel. Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co.*, 86 F.3d 332, 334 (4th Cir. 1996); *see also Simms v. United States*, 839 F.3d 364, 368 (4th Cir. 2016) ("We review the district court's conclusions of law, including those regarding the availability and calculation of damages, *de novo*.").

Sincerely,



Justin Lucey, Esq.

cc: All Counsel of Record (*via Email*)