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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM AIKEN COUNTY
COURT OF COMMON PLEAS
THE HONORABLE J. CORDELL MADDOX, JR.
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2020-001103
CIVIL ACTION NO. 2016-CP-02-00263

Opinion No. 2024-UP-114 (S.C. Ct. App. filed April 3, 2024)

Robin Napier, individually and on behalf of all others similarly situated,

APPELLANT,

versus

Mundy's Construction, Inc. d/b/a Mundy Construction,

RESPONDENT.

PETITION FOR REHEARING

The Respondent, Mundy's Construction, Inc. d/b/a Mundy Construction ("Mundy Construction"), respectfully petitions the Court for a rehearing of its Opinion No. 2024-UP-114 pursuant to Rule 221(a), SCACR based upon the following points overlooked or misapprehended by the Court:

Procedural and Factual Background

This action arises out of a residential construction defect lawsuit by a single homeowner, Appellant Robin Napier, acting individually and on behalf of eighty-six (86)

townhomes located in the Spencer Drive Extension of Aiken, South Carolina which was completed from 2005-2009 (the "Homeowners"). The Homeowners sued a number of general contractors and subcontractors/suppliers in connection with the alleged defects, including Mundy Construction, a subcontractor who performed site preparation work at some of the townhomes.

After all other defendants settled, the case between the Homeowners and Mundy Construction proceeded to a bench trial before the Honorable J. Cordell Maddox, Jr.. After the trial judge heard testimony from witnesses, received into evidence numerous exhibits including photographic evidence, and reviewed the post-trial position statements submitted by the parties, the trial judge issued his Final Order and Judgment finding that while Mundy Construction was negligent, it was not grossly negligent. Because Mundy Construction was not grossly negligent, the trial judge further found the Statute of Repose barred recovery for sixty-two (62) townhomes. Finally, the trial judge awarded damages in the amount of $240,000.00 to the remaining twenty-four (24) unit holders.

The Homeowners appealed to this Court, arguing that the trial judge erred in not finding Mundy Construction to be grossly negligent which caused the Statute of Repose to bar recovery for sixty-two (62) townhomes. The Homeowners further argued that the trial judge erred in awarding damages in the amount of $240,000.00 based upon a reduction due to wear and tear in conjunction with exposure to other elements.

After hearing argument on October 11, 2023, this Court issued its opinion on April 3, 2024 affirming in part, reversing in part, and remanding for further proceedings. This Court held that the trial judge did not err in finding that Mundy Construction was not grossly negligent and that therefore, the Statute of Repose barred recovery for sixty-two

(62) of the townhomes.

This Court, however, determined that the trial judge's award of damages was not supported by the evidence and that additionally, under Rule 8(c), SCRCP, a defense such as wear and tear had to be affirmatively pled as an avoidance defense. This Court accordingly reversed and remanded the trial judge's calculation of damages, directing the trial judge to recalculate damages "excluding any reduction for wear and tear." Mundy Construction hereby petitions this Court for a rehearing of its holding that the trial judge's damages award was not supported by the evidence and that any wear and tear defense was an affirmative defense that had to be pled under Rule 8(c).

Argument

With all due respect to the Court's analysis in its opinion, Mundy Construction submits that the Court erred in reversing the damages award issued by the trial judge who was sitting as the factfinder in this case. The Court misapprehended two key principles in reversing the trial judge's award of damages: (1) the Court first misconstrued the affirmative defense pleading requirements of Rule 8(c) in holding that wear and tear was an affirmative defense; and (2) the Court failed to properly apply the requirement that, in an action tried without a jury, it must affirm a trial judge's damages award if there is any evidence to support such award.

1. The trial judge's finding that the Homeowners' damages were due in part to wear and tear in conjunction with exposure to other elements is a determination that the Homeowners did not prove that all of their damages were proximately caused by Mundy Construction; the lack of proximate cause is not an affirmative defense required to be pled.

A defense which challenges a plaintiff's claim of proximate causation, such as wear and tear in conjunction with exposure to other elements, is not required to be affirmatively

pled under Rule 8(c) of the South Carolina Rules of Civil Procedure. Whether a matter is an affirmative defense is controlled by Rule 8(c), which lists twenty-two (22) specific defenses: "accord and satisfaction, arbitration and award, assumption of risk, condonation, contributory negligence, discharge in bankruptcy, duress, fraud, illegality, injury by fellow servant, laches, license, misrepresentation, mistake, payment, plene administravit or the administration of the estate is closed, recrimination, release, res judicata, statute of frauds, statute of limitations, [and] waiver."

Rule 8(c) also provides that "any other matter constituting an avoidance or affirmative defense" must be pled. It is under this seemingly broad catch all provision that this Court has held that the defense that the damages experienced by the homeowners were due to wear and tear in conjunction exposure to other elements rather than due to the actions or inactions of Mundy Construction was an affirmative defense that had to be specifically pled.

An affirmative defense is a defense that seeks to defeat or avoid the plaintiff's cause of action. "An affirmative defense conditionally admits the allegations of the complaint, but asserts new matter to bar the action." O'Neal v. Carolina Farm Supply of Johnston, Inc., 279 S.C. 490, 494, 309 S.E.2d 776, 779 (Ct. App. 1983); see also Garrison v. Target Corp., 435 S.C. 566, 583. 869 S.E.2d 797, 807 (2022) (citing *Avoidance*, Black's Law Dictionary 136 (6th ed. 1990) (defining "avoidance" as "the allegation or statement of new matter, in opposition to a former pleading, which, admitting the facts alleged in such former pleading, shows cause why they should not have their ordinary legal effect")).

Therefore, an affirmative defense asserts that even if the allegations in the plaintiff's complaint are true, "the plaintiff cannot prevail because there are additional facts

that permit the defendant to avoid legal responsibility." See Am. Cyanamid Co. v. St. Louis Univ., 336 F.3d 307, 311 n.4 (4th Cir. 2003) ("An affirmative defense seeks to defeat or avoid the plaintiff's cause of action. It avers that even if the petition is true, the plaintiff cannot prevail because there are additional facts that permit the defendant to avoid legal responsibility.") (quoting Farm Bureau Town & Country Ins. of Missouri v. Hilderbrand, 926 S.W.2d 944, 948 (Mo.Ct.App.1996)); see also Wright v. Southland Corp., 187 F.3d 1287, 1303 (11th Cir. 1999) ("An affirmative defense is generally a defense that, if established, requires judgment for the defendant even if the plaintiff can prove his case by a preponderance of the evidence.").

An affirmative or avoidance defense is a defense that shifts the burden of proof from the plaintiff to the defendant because an affirmative defense "assumes all elements of the plaintiff's case have been established." O'Neal, 279 S.C. at 494, 309 S.E.2d at 779. In a scenario where the plaintiff has proved a valid cause of action, the burden of proof as to an affirmative defense shifts to the defendant to show he is not liable. On the other hand, where the defendant denies an element of the plaintiff's cause of action, "[such a] defense is not affirmative and the burden of proof remains on the plaintiff to establish his case." Id.; Garrison v. Target Corp., 435 S.C. at 583, 869 S.E.2d at 807; see also Zivkovic v. S. California Edison Co., 302 F.3d 1080, 1088 (9th Cir. 2002) ("A defense which demonstrates that plaintiff has not met its burden of proof as to an element plaintiff is required to prove is not an affirmative defense.").

In any negligence action, the plaintiff bears the burden of proving not only duty and breach of duty, but also that the defendant proximately caused the plaintiff's injury. The element of proximate cause is an element of the plaintiff's case for which the plaintiff has

the burden of proof. The lack of proximate cause is not an affirmative defense that a defendant is required to plead since a defense that the defendant's actions or inactions were not the proximate cause of the plaintiff's injury attacks the sufficiency of the plaintiff's claim by denying an element of the plaintiff's case, without conceding the truthfulness of the plaintiff's claim or asserting a new matter to defeat it. See Korando v. Uniroyal Goodrich Tire Co., 637 N.E.2d 1020, 1024-25 (Ill. 1994). The defendant is under no obligation to plead lack of proximate cause as an affirmative defense because the burden of proving proximate cause in a negligence action remains, at all times, on the plaintiff. O'Neal, 279 S.C. at 494, 309 S.E.2d at 779; see also Robinson v. Boffa, 930 N.E.2d 1087, 1094 (Ill. App. Ct.. 2010) ("The defendant is not required to plead lack of proximate cause as an affirmative defense.").

In O'Neal, this Court previously observed that a defendant can introduce evidence that the conduct of a third party was the sole proximate cause of the plaintiff's injury under a general denial to the plaintiff's complaint. The defendant was not required to plead as an affirmative defense that the plaintiff's injury was caused by a third party. Rather, under the defendant's general denial to the plaintiff's claim that the defendant proximately caused the plaintiff's injury, the defendant could present any evidence showing why the defendant's actions or inactions were not the cause of the plaintiff's injury. Id.; see also Robinson, 930 N.E.2d at 1094 ("A defendant has the right to rebut evidence tending to show that his acts are negligent and a proximate cause of the plaintiff's injuries and he has the related right to establish that some other causative factor was the sole proximate cause of the injuries . . . .").

Other jurisdictions have also held that it is sufficient for a defendant to defend

against a plaintiff's claim of proximate cause under a general denial in the answer without asserting such as an affirmative defense. See Clement v. Rousselle Corp., 372 So.2d 1156, 1158 (Fla. Dist. Ct. App. 1979) (observing proximate cause is requirement of the plaintiff's cause of action that can be put at issue by the defendant through a general denial). "[I]n a negligence action, the defendant is always free to argue that something other than its own negligence is wholly responsible for the plaintiff's injury, irrespective of whether it has pled that theory as an affirmative defense." Bauer v. J.B. Hunt Transp., Inc., 150 F.3d 759, 763 (7th Cir. 1998).

Therefore, under a general denial in its answer, a defendant can defeat a plaintiff's claim of proximate cause by presenting an array of evidence that the injury was not due to any action or inaction by the defendant, including, but not limited to, that the injury was caused by (1) a third party, Clement, 372 So.2d at 1158; (2) the plaintiff's preexisting medical condition, Robinson, 930 N.E.2d at 1194; or (3) weather conditions, Bauer, 150 F.3d at 763-64.

Similarly, a defendant can show, without affirmatively pleading so as a defense, that wear and tear in conjunction with exposure to other elements was the actual cause of the plaintiff's damages. That is what occurred in this case. The trial judge found that the damages suffered by the Homeowners were not entirely attributable to the negligence of Mundy Construction, but that some of the damages were due to other factors such as fourteen (14) years' worth of general wear and tear of the units combined with exposure to other elements. [R.p. 42.] Thus, the trial judge concluded that the Homeowners had not met their burden of proof in establishing that all of their claimed damages were caused by Mundy Construction.

This Court's holding that Mundy Construction was required to affirmatively plead wear and tear as a defense under Rule 8(c) in effect requires Mundy Construction to affirmatively plead lack of proximate cause. But proximate cause is the plaintiff's burden, and a defendant has the right to present evidence showing that some other causative factor was the proximate cause of the plaintiff's injuries even without having affirmatively pled so. See Robinson, 930 N.E.2d at 1094; O'Neal, 279 S.C. at 494, 309 S.E.2d at 779. Accordingly, Mundy Construction asserts that this Court misconstrued the lack of proximate cause with an affirmative or avoidance defense, which the Court also erroneously believed required the trial judge to perform an accounting. Under Rule 8(c) and case law precedent, Mundy Construction was not required to plead wear and tear in conjunction with exposure to other elements as an affirmative defense.[1]

2. The trial judge's award of damages was supported by some evidence in the record which, under the applicable standard of review, this Court cannot reverse.

Mundy Construction also asserts that this Court did not properly apply the required standard of review in reversing the trial judge's award of damages. In an action tried by the trial judge without a jury, "[t]he trial judge has considerable discretion regarding the amount of damages." Mellen v. Lane, 377 S.C. 261,275-76, 659 S.E.2d 236, 243-44 (Ct. App. 2008) (internal citation omitted). "Because of this discretion, [the appellate court's]

[1] In addition, in its Answer to the Third Amended Complaint, Mundy Construction gave notice that it denied that its actions or inactions were the proximate cause of any injury to the Homeowners. Mundy Construction denied all material allegations of the complaint, including that it was responsible for any construction defects or damages or that any damages to the townhomes were caused by any actions of Mundy Construction. [R.pp. 84-85; Answer, ¶¶ 10, 13-14, 16.] It also maintained that any damages suffered by the Homeowners resulted from the acts of others, including the Homeowners, and that the Homeowners further failed to mitigate their damages. [R.pp. 85-86; Id. at ¶¶ 20, 23-25.]

review on appeal is limited to the correction of errors of law. [The appellate court's] task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award." Id. (internal citation omitted).

"The judge's findings are equivalent to a jury's findings in a law action." Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). As long as there is "any evidence" to reasonably support the trial judge's findings in an action tried without a jury, the appellate court must affirm the lower court's findings. The standard is not whether the trial judge's findings are supported by a preponderance of the evidence. Id. at 86, 221 S.E.2d at 776; see also Pope v. Gordon, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006) (In a bench trial, "[t]he trial judge's findings of fact will not be disturbed on appeal unless the findings are wholly unsupported by the evidence . . . .").

Further, in a bench trial, "[t]he judging of the credibility of witnesses and the weighing of evidence in a law case are uniquely functions of the trial court, not [the appellate court]," and [the appellate court] should sustain the trial court's findings sitting as the factfinder if such findings are supported by some evidence. Bivens v. Watkins, 313 S.C. 228, 230, 235, 437 S.E.2d 132, 133, 136 (Ct. App. 1993).

That this Court may disagree with the trial judge's characterization and view of the evidence presented at trial does not mean that some evidence as to wear and tear in conjunction with exposure to other elements did not exist at trial. The Homeowners' expert was cross-examined about his repair estimate, questioned about his methodology, and asked about causation of the Homeowners' damages. He conceded that settlement cracks could occur under the best conditions, that cracks can be caused by improper concrete which was found on the construction site, and that seismic activity, which had recently

occurred in the area, can cause cracks. The Homeowners' expert also agreed that general use of the homes, such as slamming of doors, could cause cracks. [R.pp. 1456, 1461, 1490-92, 1494-98, 1501-02, 1512-14.]

The trial judge's duty was to weigh and consider the above evidence, which it did in issuing its damages award. The photographs submitted into evidence and the testimony of the Homeowners' expert on cross-examination is all some evidence that can support the trial judge's damages award, even if this Court would not have issued the same award based upon this evidence. See Final Brief of Respondent, pp. 30-31.

Lastly, this Court did not address the evidence which Mundy Construction presented to the trial judge showing the Homeowners' estimated repair costs either exceeded or were nearly the cost of each unit's value and were well over any depreciation in the value of the units. The Homeowners submitted evidence that the repair costs for the units was $88,813.37, $98,586.32, and $106, 734.87, depending on the type of unit. [R.pp. 2468-79; Plaintiff's Ex. 940.]

Mundy Construction presented to the trial judge evidence of the units' appraisal values from a sampling of the townhomes showing market values of the homes ranging only between $87,000.00 and $112,000.00 in October 2018. [R.pp. 2978-3080; Defendant's Exs. 4-9 (Appraisals).] The appraisals also showed there was either an increase in value from when the homes were either first sold or sold in the early 2010s or only a very slight decrease in value. For example, 138 Hillsborough Lane was appraised at $87,000.00 in October 2018 and was purchased in August 2008 for $96,610.00 therefore showing a decrease in value of only $9,610.00 [R.pp. 2978-79, 2981; Defendant's Ex. 4]; 144 Bennington Lane was appraised at $87,000.00 in October 2018 and was purchased in

February 2008 for $94,200.00 therefore showing a decrease in value of only $7,200.00 [R.pp. 3013-14, 3016; Defendant's Ex. 6]; 231 New Haven Lane was appraised at $87,000.00 in October 2018 and was purchased in March 2011 for $85,000.00 therefore showing an increase in value of $2,000.00 [R.pp. 3030-31, 3033; Defendant's Ex. 7]; 116 Amity Lane was appraised at $96,700.00 in October 2018 and was purchased in June 2007 for $88,000.00 therefore showing an increase in value of $8,700.00 [R.pp. 3047-48, 3050; Defendant's Ex. 8]; and 110 Amity Lane was appraised at $112,000.00 in October 2018 and was purchased in May 2007 for $104,900.00 therefore showing an increase in value of $7,100.00. [R.pp. 3064-65, 3067; Defendant's Ex. 9.]

While the cost of repair or restoration may be one valid measure of damages for injury to a building, such compensation may be limited to the value of the building before the damage was inflicted. Scott v. Fort Roofing and Sheet Metal Works, Inc., 299 S.C. 449, 451, 385 S.E.2d 826, 827 (1989). The [factfinder] "is not bound to accept all the submitted repair costs when awarding damages." Id. Furthermore, "[t]he fact that testimony is not contradicted directly does not render it undisputed [because] [t]here remains the question of the inherent probability of the testimony." Black v. Hodge, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991). A factfinder is also not required to believe a plaintiff's evidence of uncontradicted damages. Steele v. Dillard, 327 S.C. 340, 343-44, 486 S.E.2d 278, 280 (Ct. App. 1997). Even if damages are uncontested, the factfinder may consider other factors showing that the plaintiff is not entitled to the full amount of those damages, such as that the damages are attributable to other causes. Id. at 344, 486 S.E.2d at 280. The factfinder is free to disagree with the plaintiff's presented amount of damages. Id.

The trial judge had discretion to consider the estimated cost of repairs against the values of the properties and make a determination of damages based on that evidence in conjunction with the other factors as discussed above. The trial judge could also consider that the Homeowners' expert testified that his repair protocol, upon which the estimated costs of repairs was based, had not actually been used by any home in the Aiken neighborhood at issue in this case. [R.p. 1522.]

The evidence presented to the trial judge showed that the estimated repair costs exceeded or were close to the value of the units and were well above any depreciation in value. "[D]amages for defective construction, whether those damages are the result of a breach of contract or negligence of the contractor, [may be] determined by measuring the cost of repairing or restoring the damage, *unless the cost of repair is disproportionate to the property's probable loss of value*." John Thurmond & Assoc. Inc. v. Kennedy, 668 S.E.2d 666, 668 (Ga. 2008) (emphasis added). When the latter is the case, damages may be measured by the diminution in value of the property. Id.

Based upon the appraisal evidence submitted to the trial judge by Mundy Construction, the most a unit decreased in value, when there was a decrease, was around $9,610.00. For the twenty-four (24) units not barred by the Statute of Repose, the Trial Court's award of $240,000.00 adequately represents a total diminution in value of the units based upon this figure ($9,610.00 times twenty-four (24) equals $230,640.00). The trial judge had also indicated to the parties that he did not want any actual damages award to exceed the value of any Homeowners' property. [R.p. 3123.] The trial judge's damages award aligns with the presented evidence and the trial judge's statement to the parties.

This Court did not address this additional evidence which supported the trial judge's $240,000.00 damages award. The appraisal evidence is competent evidence in this record which should not be disregarded. Accordingly, for this additional reason, Mundy Construction maintains that the damages award comports with the any evidence standard and should not have been reversed.

CONCLUSION

For the reasons set forth herein, Respondent Mundy Construction respectfully requests that the Court grant its Petition for Rehearing and affirm the Trial Court's award of damages.

Respectfully submitted,

/s Carmen V. Ganjehsani
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April 18, 2024.

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Respondent, Mundy's Construction, Inc. d/b/a Mundy Construction, do hereby certify that I have this date served the foregoing Petition for Rehearing, dated April 18, 2024, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Order dated May 6, 2022, on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable):

Justin O'Toole Lucey
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A copy of the sent e-mail is attached to this Certificate of Service.

/s Carmen V. Ganjehsani
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Dated: April 18, 2024.

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Subject:	2020-001103 Napier v. Mundy"s Construction
Date:	Thursday, April 18, 2024 12:51:45 PM
Attachments:	2020-001103 Napier v. Mundy (Petition for Rehearing) (3340032).pdf

Pursuant to the Supreme Court's Order dated May 6, 2022, please find served upon you the Petition for Rehearing in the above-referenced appeal on behalf of the Respondent Mundy's Construction, Inc. d/b/a Mundy Construction.

Carmen Ganjehsani

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April 18, 2024

Filed via e-mail (ctappfilings@sccourts.org) and hand delivery
The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Robin Napier v. Mundy's Construction, Inc.
Appellate Case No. 2020-001103
RPR File No.: 119-136

Dear Ms. Kitchings:

Enclosed for filing is the Petition for Rehearing on behalf of Respondent Mundy's Construction, Inc. d/b/a Mundy Construction in the above-referenced case, along with our Certificate of Service. We are also filing this Petition electronically with the Court of Appeals via e-mail at ctappfilings@sccourts.org pursuant to Section (b)(2) of the Supreme Court's May 6, 2022 Order.

Also enclosed is our firm's check in the amount of $50.00 for the filing fee in this matter.

We have served this Petition for Rehearing on counsel for Appellant upon their primary email addresses listed in the Attorney Information System.

Should you have any questions regarding this matter, please do not hesitate to call.

Sincerely,

/s Carmen V. Ganjehsani

Carmen V. Ganjehsani

Encs.
cc: Justin O'Toole Lucey (jlucey@lucey-law.com)
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