THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable J. Cordell Maddox, Jr.

Case No. 2016-CP-02-00263
Appellate Case No. 2020-001103

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Jun 20 2024
S.C. SUPREME COURT

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

v.

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

PETITIONER'S PETITION FOR WRIT OF CERTIORARI

JUSTIN O'TOOLE LUCEY, P.A.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1), SCACR, Petitioner's Counsel certifies the Petition for Rehearing was finally ruled on by the Court of Appeals ("COA") by Order dated May 22, 2024.

INTRODUCTION AND SUMMARY OF GROUNDS FOR CERTIORARI

This construction defect case seeks damages for Petitioner Robin Napier, and 85 other class members ("Petitioner"), that resulted from Respondent Mundy's Construction's ("Respondent") systemic failure to adhere to the grading compaction requirements in the permitted plans and the building code. Left unreversed, the COA's decision provides a safe harbor for home building contractors and builders who recklessly, flagrantly, and/or grossly deviate from building codes and permitted plans and leave South Carolina homes and homeowners unprotected and defenseless.

This Court should grant certiorari to: (1) correct legal and factual errors relating to gross negligence and/or recklessness;[1] (2) address the novel issues presented and policies implicated; and (3) negate the adverse consequences the COA's decision will have on South Carolina's long-standing public policy of protecting homeowners.

QUESTIONS PRESENTED

I. Did the COA commit legal error when it sustained the Trial Court's substitution of "intent" for "recklessness" in evaluating the Respondent's conduct, in conflict with *Kawaauhau, Gore,* and *Tucker*?

II. Did the COA err in failing to recognize that compliance with the building code is the standard of care against which the Respondent's conduct must be measured?

III. Do systemic violations of the building code and permitted plans by a subcontractor constitute gross negligence or reckless disregard, generally, and in light of South Carolina's public policy of protecting homeowners?

IV. Did the COA err in holding there was no evidence in the record that Respondent was aware

[1] Hereinafter, when used in the context of the exceptions to the Statute of Repose, "gross negligence and recklessness" shall stand for "and/or."

of the harm that would result from inadequate compaction, when in fact a) the record contained evidence that the Respondent had knowledge of the risk of harm; b) it is patently evident that the purpose of running a "compactor" on the building pad is to compact the soils to support the ensuing residential structure rather than have unplanned compaction (settlement) cause the building to move; and, c) the law presumes that one intends the natural and probable consequences of his acts?

V. Did the COA err in sustaining a finding the Trial Court never made, *inter alia,* that that the Respondent's failure to exercise due care was not knowing or conscious, when a) the Trial Court made no such finding; b) no such evidence exists; and c) the Trial Court found conscious disregard; and, d) the law is that recklessness will be inferred from conduct which a person of ordinary reason and prudence would have been conscious of the probability of resulting injury?

VI. Did the COA fail to recognize that the Trial Court's legal conclusion was unsupported and contradicted by supported facts in the record, and thus should have been reversed when properly reviewed *de novo*?

CONCISE STATEMENT OF THE CASE

The class homes have suffered from improperly prepared building pads/soils. This has resulted in settlement and cracking in the slab foundations and consequential damages to the structure and finishes as the shifting radiates through the houses.

Petitioner filed suit on February 8, 2016, alleging two causes of action against numerous defendants: 1) Negligence/Gross Negligence; and 2) Breach of Warranty. (R. pp. 0049-0063.)" Prior to trial, Petitioner resolved all class claims except those against Respondent.[2] All claims against Respondent remained for trial. (R. pp. 1091-1096, Petitioner's Pre-Trial Brief.)

This matter came to trial May 28, 2019. Trial lasted one and a half days. On April 14, 2020, the Trial Court issued its Order and Judgment, barring recovery for 62 class members based upon the statute of repose and awarding the remaining class members ten percent (10%) of their damages. (R. pp. 0035-0041.)

Petitioner moved the Trial Court to reconsider. (R. pp. 1232-1365.) On July 20, 2020, the

[2] The Circuit Court granted final approval to two (2) sets of these settlements prior to trial.

Trial Court entered its Order denying reconsideration and amending the depreciation and use reduction of damages to a "wear and tear" reduction. (R. pp. 0042-0043.)

The Notice of Appeal was filed and served on August 3, 2020. Arguments were heard in this matter on October 11, 2023. The COA issued its Opinion on April 3, 2024. The COA already agreed with Petitioner that the Trial Court improperly reduced recoverable damages for wear and tear to the homes and reversed that portion of the Trial Court ruling. However, the COA erroneously sustained the Trial Court's finding that Respondent was not grossly negligent or reckless. This erroneous decision causes the statute of repose to bar recovery for 62 of the 86 homeowners, among other results.

STATEMENT OF FACTS

The following facts were proven at trial:

1) The class consisted of eighty-six (86) on four (4) streets.[3]

2) This suit was filed on February 8, 2016. (R. pp. 0049-0063, Summons and Complaint.)

3) The Certificates of Occupancy ("CO") for the homes on New Haven Lane and Amity Lane streets and most of the homes on Bennington Lane were issued more than eight (8) years before suit was filed.

4) The COs for the homes on Hillsborough Lane and for two (2) homes on Bennington Lane (151 and 155) were issued less than eight (8) years before the commencement of this action. (R. p. 2810, Ex. 991; R. p. 2360, Ex. 722, R. pp. 1710-1711, Ex. 472.)

5) Respondent was one of two site contractors that prepared the subsoils on this site for construction.[4]

6) Respondent had a duty to perform its work in accordance with the building code.[5]

7) Section 403.1 of the applicable building code mandates that "[f]ootings shall be supported on undisturbed natural soils or engineered fill." (R. pp. 1763-1764, Ex. 708.)

8) Respondent had a duty to perform its work in accordance with the site plans, which

[3] R. p. 1638, lns. 1-8, TR2.
[4] R. p. 1548, lns. 10-12, TR1.
[5] R. p. 1548, ln. 13 – p.1549, ln. 12.

required that:

"ALL FILL SHALL BE PLACED IN 6 [INCH] LAYERS AND COMPACTED TO 98% MAXIMUM DRY DENSITY AT OPTIMUM MOISTURE."[6]

9) Respondent had a duty to make sure that the subgrade soils were properly compacted.[7]

10) The class members' foundations are cracking and faulting due to inadequate support by the soils below, which is caused by inadequate compaction of the soils during site preparation.[8] The foundations of the homes throughout the class have experienced substantial differential settlement due to the improper preparation of the subgrade.[9]

11) The differential settlement has caused large cracks in the foundations throughout the class, which were documented in the photographs admitted at trial. (*See*, *e.g.*, R. pp. 2530-2788, Ex. 963.)[10]

12) Dr. Whitlock documented the faulting foundations both by crack photographs and differential measurement surveys and collaborated his findings with the movement of stoops, patios, and other hardscapes and water line breaks. (e.g., R. pp. 1762-2357, Ex. 708; R. pp. 2530-2788, Ex. 963.)[11]

A. Respondent's Scope of Work Performed

13) Mundy, Sr. conceded that Respondent compacted all 86 building pads.[12]

14) Respondent did the majority of the sitework for the houses (clearing, grubbing, cutting, filling, rough grading, compaction) and solely did the soil compaction on all lifts for the 86 building pads.[13]

B. Concessions By Mundy, Sr.

Respondent's lone witness, Mundy, Sr., additionally conceded the following:

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[6] R. pp. 2480 - 2482, Ex. 949 (enlargement of typical site plan notes). *See also* R. p. 1407, lns. 3-21; R. p. 1410, ln. 24 – p. 1412, ln. 2 (violation of building code); R. p. 1418, lns. 11-22, (describing compaction requirements in site plans).
[7] R. p. 1406, ln. 10- p. 1412, ln. 1.
[8] R. p. 1402, ln. 20 – p. 1403, ln. 14. For discussion of cause of cracking in pictures, see R. pp. 1435-1440 and R. pp. 1455-1470. For discussion of measurements of differential movement, see R. pp. 1475-1477.
[9] R. p. 1402, ln. 20- p. 1403, ln. 14; R. pp. 0035-0041, Order.
[10] R. p. 1430, lns. 12-18.
[11] R. p. 1455, ln. 12 – p. 1470, ln. 12.
[12] R. p. 1542, ln. 24 - p. 1543, ln. 1.
[13] R. pp. 0898-0920; R. pp. 1712-1756; R. pp. 2364-2387; R. pp. 2834-2884.

15) Respondent performed the compaction for all 86 building pads in the class.[14]

16) Respondent only "eyeballed" whether the subgrade soils were compacted.[15]

17) Respondent had a duty to follow the building code and ensure its work was performed properly.[16]

18) Mundy, Sr. was not sure if anyone at Respondent was qualified to determine if compaction was properly performed.[17]

19) Mundy, Sr. failed to review site plans in the four (4) years that he worked on this project.[18]

20) Mundy, Sr. was unaware that the plans required compaction to "98% maximum dry density at optimal moisture." (*See infra*.)

C. Mundy, Sr.'s Impeachment

21) Mundy, Sr. was shown to have changed his prior deposition testimony at trial. For example, he attempted to retract his prior concession that Respondent used day laborers to operate the compactor and that Respondent did not even know the identity or qualifications of the persons who operated the compactor in its behalf.[19]

22) Mundy, Sr. attempted to change his testimony on one of the most important points at trial: whether he knew of the existence of the 98% compaction requirement in the plans during construction:

Mundy, Sr. was asked by the Judge:

> **Q. Mr. Mundy, before you sit down, let me ask you something just for my information. You've been here, you've heard this requirement that the soil be compacted and you've heard the 98 percent moisture content. *Were you aware of that requirement when you were doing the rolling and the compacting?***
>
> ***A. Yes. We were aware of it, yes.* (emphasis added).** (R. p. 1560, lns. 3-9.)

When confronted with his deposition transcript otherwise, Mundy, Sr. conceded three (3)

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[14] R. p. 1542, ln. 24 - p. 1543, ln. 1, TR1:
[15] R. p. 1535, ln. 17 – 1536, ln. 3, TR1.. R. p. 1411, ln. 11 - 1412, ln. 1, TR1.
[16] R. p. 1549, lns. 7-12, TR1. *See also,* R. p. 1552, ln. 21 - R. p. 1553, ln. 20.
[17] R. p. 1556, lns. 7-12, TR1.
[18] R. p. 1554, lns. 6-10, TR1.
[19] R. p. 1544, lns. 16-21 (admitting during his deposition, taken only 15 days before trial, he testified three (times under oath that Mundy "used day laborers to compact, [he] didn't know who they were, [he] didn't know their qualifications and [he] didn't know their job experience").

times that he had previously testified under oath that he did NOT know the compaction requirement when construction was ongoing. (R. p. 1561, lns. 2-16, lns 19-24.) When his own counsel tried to walk him back to the incorrect answer he had given the Trial Court, Mundy, Sr. conceded that the deposition testimony was the correct testimony:

> **Q. All right. I believe the court asked you when you were on site during back in 2005 to 2009?**
> **A.** ***Right.***
> **Q. Were you aware of a 98 percent compaction rate?**
> **A.** ***No.***
> **Q. Are you sure of that?**
> **A.** ***Yes.***

(R. p. 1563, lns. 5-11.)

23) Respondent failed to call its most knowledgeable, only licensed, grading employee/owner as a witness. (R. pp. 1394-1663.)

D. Respondent's Conscious & Reckless Failures

24) Dr. Whitlock testified that Respondent clearly knew the fill was not engineered or otherwise tested to confirm it would provide adequate, uniform support for the foundations of the homes.[20]

25) Dr. Whitlock testified that Respondent had an obligation to make sure that compaction testing was being performed as the lifts were installed and should have stopped work until lifts were tested and verified compaction requirements were met.[21]

26) The differential settlement and resulting damages were due to Respondent's gross deviations and total disregard for the requirements applicable to its work *and* complete lack of quality control.[22]

27) Respondent's 1) failure to use engineered fill; and 2) violation of the plans constituted two (2) building code violations on each and every lift on each and every building pad; Dr. Whitlock testified the fill was up to 12 feet in some locations (R. p. 1411, ln. 20 – p. 1412, ln. 8); if one uses a conservative estimate of an average of three feet of fill, that constitutes six (6) lifts per building pad, resulting in 18 building code violations per building pad or 1,548 building code violations by Respondent on the class properties.

28) Respondent's irresponsible use of untrained labor on the compactor constituted grossly

[20] R. p. 1411, ln. 11- ln. 14; R. p. 1412, ln. 2 – p. 1414, ln. 10, TR1.
[21] R. p. 1411, lns. 20-24, TR1.
[22] R. pp. 0274-0282.

negligent and reckless conduct.[23]

29) Mundy, Jr. obtained his South Carolina Commercial Contractor's license, including a specialization in grading work, during these projects, and in doing so, would have had to have known or learn how to properly compact this site to pass the test.[24]

30) Mundy, Jr. listed the "grading" of several of these neighborhoods as his qualifying work on his work experience affidavit submitted to LLR. (R. p. 1467, Ex. 938; R. p. 1445, ln. 20 – p. 1448, ln. 25) (describing his review of Mundy, Jr.'s file from LLR, how he obtained a Commercial Contractor's license with a specialty in grading in November 2006, he would have studied compaction requirements as part of obtaining license, and he listed grading the building pads on New Haven Lane, Amity Lane, and Bennington Lane on his work experience affidavit in support of his application.)

31) Dr. Whitlock testified the fact that someone did surface compaction testing on some of the finished lots on several streets provided additional evidence that there was a lack of testing during site preparation. (R. p. 1411, lns. 11 – p. 1412, ln. 18.) Dr. Whitlock explained that compaction testing on the final elevation of the subgrade does not indicate the compaction of the fill below the 12" layer on the surface. (R. p. 1412, lns. 19-22.)

32) Respondent's failures were conscious disregards as 1) Mundy, Jr. studied for his Commercial Contractor's license with a grading specialty during construction of the second neighborhood and procured his license during the construction of the third (3rd) neighborhood; and 2) Mundy, Sr. testified he was aware that you could not move dirt without a permit; you could not get a permit without plans; the building code required plans be followed; and, yet, he still had never looked at the plans in four (4) years.[25]

33) Dr. Whitlock testified that Respondent's previously admitted use of untrained day laborers to operate the compactor was "irresponsible."[26]

E. Repairs/Damages

34) The extensive repairs will require the owners to move out. The interior homes need to be gutted so new support piers can be installed under the interiors; and, then the homes must be rebuilt. [27] The necessary repairs will cost the class $8,470,438.47.[28]

35) The homes on Hillsborough Lane and 151 and 155 Bennington Lane that were less than eight years old at the time this suit was filed include six interior units, eleven end units without a carport, and seven end units with a carport. (R. pp. 2810; R. pp. 2888-2977.)

[23] R. p. 1409, lns. 1-3; R. p. 1411, ln. 20 - p. 1412, ln. 1; and R. p. 1421, lns. 10-22, TR1.
[24] R. pp. 2420-2465, Ex. 926.
[25] R. p. 1552, ln. 8 - p. 1553, ln. 20; R. p. 1554, lns. 6-10, TR1; R. p. 2467, Ex. 938.
[26] R. p. 1487, ln. 12 - p. 1488, ln. 5, TR1.
[27] R. pp. 2358-2359, Ex. 709; R. pp. 2468-2479, Ex. 940.
[28] R. pp. 2468-2479, Ex. 940 (WDP Cost of Repair Estimate); R. p. 1484, ln. 18 - p. 1495, ln. 17.

REASONS CERTIORARI SHOULD BE GRANTED

I. The COA Erroneously Affirmed a Trial Court Decision That Does Not Exist; It Affirmed a Trial Court Decision That Was Based on a Clear Error of Law; and Endorsed the Trial Court's Conflation of "Recklessness" with "Intent" Which Is Contrary to Supreme Court Precedent and South Carolina Law

The Trial Court relied on the statute of repose[29] in denying recovery to 62 homeowners. In doing so, it overruled Petitioner's argument that the gross negligence and recklessness Exceptions to the Statute barred the Respondent's ability to rely upon the statute of repose.

However, when the Trial Court considered the Exceptions, the Trial Court **did not** reach a conclusion as to whether Respondent's actions (or inactions) constituted "recklessness"; it did not do so in form (*i.e.*, it did not use the term "recklessness" or "reckless"); and, it did not do so in substance (*i.e.*, it did not consider the definition of recklessness without using the word itself). Instead, the Trial Court improperly substituted the requirement of "intent" for "recklessness" when considering whether the exceptions to the Statute applied in this case.

Therefore, by affirming the Trial Court's holding, the COA has endorsed the error of law committed by the Trial Court - an error which is contrary to South Carolina law and Supreme Court precedent. This Court must grant *certiorari* to correct this and other errors.

a. The Trial Court's Misinterpretation of the Plain Language of the Exceptions to the Statute of Repose, and the COA's Endorsement of That Misinterpretation, Are Contrary to This Court's Precedent Regarding Statutory Interpretation

The Exceptions (gross negligence, recklessness, and fraud) are each, independently, enumerated in South Carolina's code of laws:

The limitations provided by Sections 15-3-640 through 15-3-660 are not available

[29] The statute of repose is enumerated in S.C. Code Ann. § 15-3-640 - 15-3-660 (hereinafter "Statute" or "Statute of Repose."). The exceptions to the Statute at issue here are enumerated in S.C. Code Ann. § 15-3-670 (hereinafter "Exceptions").

> as a defense to a person guilty of **fraud, gross negligence, or recklessness** in providing components in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such an improvement, or to a person who conceals any such cause of action.

S.C. Code Ann. § 15-3-670 (emphasis added). The Trial Court's holding, affirmed by the COA, was as follows:

> 4) The Court finds Mundy Construction's actions do not rise to the level of gross negligence or **intent**.
>
> 5) Because no gross negligence or **intent** is being found on behalf of the Defendant, the Statute of Repose will bar recovery for the 62 units that have produced certificates of occupancy dated beyond the Statute of Repose time period. […]

(R. pp. 0039-0040, ¶¶4-5 (emphasis added).)

Petitioner did not allege "intent," fraud, or any other intentional conduct on the part of Respondent. Rather, Petitioner alleged from the inception of this case that Respondent's conduct constituted gross negligence *and* recklessness, thereby making the Statute unavailable as a defense for Respondent. At trial, Petitioner showed that Respondent's conduct was grossly negligent *and* reckless. The Trial Court's substitution of "intent" is not enumerated in the Exceptions, and while "fraud" is an intentional tort, "recklessness" is not, nor is it synonymous with "intent" or "intentional." (*See* Section I(b), *infra.*) The Trial Court's misinterpretation of the plain language of the Exceptions - and the COA's explicit endorsement of the Trial Court's error - is contrary to this Court's precedent regarding statutory interpretation. *See Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("[Because] the statute's language is plain and unambiguous and conveys a clear and definite meaning. . .the court has no right to impose another meaning.").

b. The Trial Court's Misinterpretation of the Plain Language of the Exceptions to the Statute of Repose, and the COA's Endorsement of It, Are Contrary to This Court's Precedent Regarding the Difference Between "Recklessness" and "Intentional Conduct"

By affirming the Trial Court's ruling, the COA is explicitly holding that "intent", or "intentional conduct" equates to "recklessness." This holding is contrary to Supreme Court precedent and must be reviewed by this Court. The Trial Court's legal conclusion was "an erroneous conception of the application of the law"[30] and that error was endorsed by the COA. This Court should reverse the improper application of the law and affirm the existing legal standard to provide guidance for future conduct.

"Recklessness" and "intent" are not synonymous, either as used in the Statute or generally in the law. *See Kawaauhau v. Geiger*, 523 U.S. 57, 61–62, 118 S. Ct. 974, 977, 140 L. Ed. 2d 90 (1998) ([…]"intentional torts," as distinguished from negligent or reckless torts [,] […] generally require that the actor intend the consequences of an act, not simply the act itself.") (internal citations omitted). For example, "the tort of outrage can be proven by evidence of *either* reckless *or* intentional conduct*." Gore v. Dorchester Cnty. Sheriff's Off.,* No. 2023-000922, 2024 WL 1293293, at *2 (S.C. Mar. 27, 2024) (emphasis added). The two are not synonymous when used in criminal law either. *See State v. Sterling*, 396 S.C. 599, 617, 723 S.E.2d 176, 186 (2012). ("[I]ntentional connotes a higher sense of awareness than mere recklessness.") (internal quotations omitted). The COA has previously held a civil jury charge equating "recklessness" with "intent" to be erroneous. *See Tucker v. Albert Rice Furniture Sales, Inc*., 295 S.C. 119, 123, 367 S.E.2d 427, 430 (Ct. App. 1988) ("The above charge is erroneous since it equates recklessness with intentional action. This is erroneous and we so hold.").

c. The Trial Court's Erroneous Interpretation and Application of the Exceptions to the Statute of Repose Should Have Been Reviewed *De Novo* by the COA, and the COA's Failure to Do So Is Contrary to This Court's Precedent

Because the Trial Court's interpretation and application of the Statute were incorrect, it

[30] *Pope v. Gordon*, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006).

should have been reviewed *de novo* by the COA. *See Wilson v. Gandis*, 430 S.C. 282, 291, 844 S.E.2d 631, 636 (2020) (Conclusions of law will be reviewed *de novo*); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper interpretation of a statute is a question of law, and [the COA] reviews questions of law *de novo*.") (emphasis added). The COA's failure to conduct a *de novo* review of what was plainly a misapprehension of the law was erroneous and contrary to this Court's precedent.

d. Had the COA Conducted a *De Novo* Review, It Would Have Found Ample Evidence of Recklessness

Under South Carolina law and this Court's binding precedent, "[i]f a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care." *Berberich v. Jack*, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011). One need not intend the harm that results from his conduct to be reckless. 57A Am. Jur. 2d Negligence § 264.

The Trial Court's legal error in considering *intent* instead of recklessness was material because the Respondent's conscious failure to exercise due care ***was found*** by the Trial Court: the Trial Court found that Respondent knew what the standard of care was and further that Respondent disregarded that standard. Had the COA conducted a *de novo* review using the correct standard and the Trial Court's own factual findings, it would have found ample evidence of recklessness.

As briefed by Petitioner, the **only** evidence at trial of any standard of care was presented by Petitioner: Dr. Whitlock testified that the building code and plan requirements established Respondent's standard of care with respect to its work. The Trial Court agreed, finding that "[Respondent] had a duty to follow the building code, make sure its work met with the applicable requirements in the plans, and ensure its work was performed properly." (R. p. 0039) (*citing*

Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 346, 384 S.E. 2d 730, 737 (1989).)

The Trial Court then found that Respondent *was aware* of the requisite standard of care, and that Respondent admittedly failed to follow that *known* standard:

> 32. Mundy, Sr. conceded that **he was aware** that earth movement and preparation required a building permit, that the building code required that a copy of the permitted plans be kept on site, that **he was aware** that the building code required that the work be performed in compliance with the permitted plans, but further **conceded that he failed to review site plans in the four (4) years the work took place on the Class Homes**.

(R. p. 0039, ¶32 (emphasis added).) The Trial Court's "finding of fact" No. 32 evidences and substantiates the doing of a negligent act (failing to comply with the building code) consciously (knowing that he was required to comply with the building code). An actor need not *intend* to cause harm to be reckless. The Trial Court additionally found that "[Respondent] **was aware** that the lifts were not being tested as they were installed." (R. p. 0037, ¶9.) Again, while the foregoing conduct may not categorically evidence intentional conduct, the Trial Court's findings evidence awareness of non-compliance with the building code and permitted plans. Therefore, the Trial Court's legal error in substituting intentional conduct for reckless conduct resulted in the Trial Court ignoring its own black and white findings, which perfectly meet the definition of recklessness. The COA then affirmed this legal error, which affirmation must be corrected.

e. The Trial Court Did Not Consider Whether Mundy's Conduct Was Reckless, and Therefore the COA Erred in Affirming a Holding That Did Not Exist

It was impossible for the COA to hold that the Trial Court considered Mundy's awareness of the likelihood of harm or lack thereof; or that it considered whether Mundy's failure to exercise due care was knowing or conscious, **because the Trial Court did not consider whether Mundy's acted recklessly**. The Trial Court did not make a finding as to whether Respondent's conduct was reckless or rose to the level of recklessness, *nor* did the Trial Court assess Mundy's conduct with

the proper definition of recklessness, albeit without using the word itself. Put simply, the Trial Court was looking for evidence (or lack thereof) of *intentional conduct* instead of evidence (or lack thereof) of *recklessness* or *reckless conduct* in the record. As explained *supra*, the two are distinct legal terms requiring distinct conduct.

The COA's conclusions as to recklessness were as follows:

> [T]he record does not contain any evidence Mundy's Construction was aware of the harm that would occur from inadequate compaction; and the record contains evidence from which the Trial Court could find Mundy's Construction's failure to exercise due care was not knowing or conscious.

(App. p. 0004, ¶1.) These conclusions are based upon a proper definition of recklessness from our jurisprudence. *See Solanki v. Wal-Mart Store* No. 2806, 410 S.C. 229, 237, 763 S.E.2d 615, 619 (Ct. App. 2014) ("If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care."). However, the Trial Court did not use this or any other definition of recklessness in reaching its ill-gotten conclusion regarding the Exceptions because it was instead looking for "intent."

Both the COA's failure to consider and rule upon the Trial Court's legal error *and* the COA's affirming of a holding that the Trial Court never made each independently require correction. Since "intent" and "recklessness" are not legally synonymous, this Court should reverse the COA's affirmation of a holding that renders the two terms interchangeable.

II. The Trial Court Made No Findings and Listed No Evidence in Support of Its Conclusion That Respondent Exercised Slight Care to Comply with the Only Standards of Conduct Adduced at Trial

As previously briefed by Petitioner:

> Petitioner briefed at length one of the several, million-dollar questions in this case: against what *standard* does one measure *slight care* or *due care*. There were only two standards adduced at trial: the Building Code requirements that a) one must

> comply with the permitted plans and b) one must use engineered fill[31]; and the Plan requirement of 98% compaction.[32] Respondent did not offer evidence of a different standard of care at trial, either through expert testimony or otherwise, and thus the issue was uncontested. Respondent does not address or contest that these are the only standards adduced and this issue should be deemed conceded.

(App. pp. 0011-0012 (footnote omitted).)

As the only standard adduced at trial, slight care in the context of gross negligence must be measured against the building code and permitted plans. *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999) ("Gross negligence is a relative term, and means the absence of care that is necessary under the circumstances.") (internal citations omitted). " "Gross negligence" involves more than a simple breach of ***the standard of care***, which would establish ordinary negligence, and instead describes a flagrant or gross deviation from ***that standard***." (57A Am. Jur. 2d Negligence § 222 (emphasis added).)

In the context of the Tort Claims Act and other statutes which include a gross negligence exception to grants of qualified immunity, courts, including the COA, have logically reasoned that whether an actor has exercised slight care is necessarily measured against whatever standard of care that actor owes to a plaintiff. Often, that standard of care is enumerated in a statute. *Rainey v. S.C. Dep't of Soc. Servs*., 434 S.C. 342, 352, 863 S.E.2d 470, 475 (Ct. App. 2021) ("Here, the fact that DSS did not refer the allegations to law enforcement within twenty-four hours as required by statute raises a question as to whether DSS exercised slight care[…].").

Similarly, in considering whether the defendant had employed the requisite care in the

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[31] Dr. Whitlock described what "engineered" consisted of: "fills that placed (sic), compacted to a certain percentage compaction knowing what the parameters of the soil are." (TR1 at R. p. 1409, ln. 20 – TR1 at R. p. 1410, ln. 23.)

[32] "ALL FILL SHALL BE PLACED IN 6 [INCH] LAYERS AND COMPACTED TO 98% MAXIMUM DRY DENSITY AT OPTIMUM MOISTURE." Pl. Ex. 949 (enlargement of typical site plan notes). *See also* TR1 at R. p. 1407, lns. 3-21; TR1 at R. p. 1410, ln. 24 – TR1 at R. p. 1412, ln. 2 (violation of building code); and, TR1 at R. p. 1418, lns. 11-22 (describing compaction requirements in site plans).

control of a person with known violent tendencies, this 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, Petitioner advocates that the care used must be measured against the building code (which is adopted into law) and the permitted plans (which the building code—the law—requires a contractor to follow). Therefore, gross negligence would necessarily involve a flagrant or gross deviation from the building code or permitted plans. However, the COA affirmed the Trial Court's finding that Mundy exercised slight care, despite overwhelming evidence to the contrary.

a. The Court Must Decide the Baseline Against Which the Respondent's Conduct Is Judged

Perhaps an analogy to an automobile accident, which involves a licensed driver operating a vehicle, would help put this current situation in perspective. The building code provides minimum standards for construction, just like the rules of the road provide minimum constraints for driving on public streets. Like most standards, rules and codes are developed by professionals to prevent injury/defect. Both driving and building require a license to perform the task; and both require education and testing on the rules/standards before licensure. Once licensed, the holder can engage in the licensed conduct, and she is expected and required to know and follow the rules.

Now imagine a licensed driver was passing a slower car. However, the licensed driver passed the car in the presence of double yellow (non-passing) lines - at night - without headlights. As he was going around a curve, another car coming in the opposite direction spots the passing car at the last second and swerves off the road to avoid the passing car, flips her car, and is injured.

At trial, the passing driver defends his conduct by testifying that he was being "careful" when passing, checking constantly for oncoming traffic. Is this slight care? In the eyes of the law

and standards of care, it is not. The driver's conduct must be measured against the known standards of care of the rules of the road, including the traffic signs/indicators (double yellow lines) and the required use of lights at night. Slight care, while ignoring the standard of care you are presumed to know as a licensed driver, is not slight care that matters, it is in fact a negligent, grossly negligent, or reckless lack of care. Moreover, can the passing driver defend a recklessness claim on the basis that he was not consciously disregarding the standards or the known risk? Absolutely not. His required and tested knowledge for licensure presumes that he knew the standards of care (for legality *and* safety) that he chose to disregard, causing an avoidable injury.

It is, and should be, the same in construction. One does not need to intend the specific harm to be charged with knowledge of the likely consequences. Like driving rules, building codes are not suggestions, and they must be followed to avoid both patent and latent defects and injury.

Rather than address this point, the COA has apparently adopted Respondent's effort to backdoor a third standard of care that was never proffered at trial; namely, that Respondent's alleged proof rolling is an acceptable substitute for (1) complying with the Permitted Plans; and (2) complying with the building code's testing requirements. Respondent never laid an evidentiary foundation that "eyeballing" tire track indentations in the rear-view mirror of a dump-truck (quasi proof rolling, albeit with the operator distantly observing instead of an engineer on the ground closely observing) was somehow a legitimate exception or modification to the building code or Permitted Plans, both of which required density (and moisture) testing. Simply put, there was no competent evidence entered in this case that proof rolling in lieu of testing was acceptable conduct, and Dr. Whitlock testified that proof rolling was not an acceptable substitute for testing in compliance with the building code or Permitted Plans. (R. p. 1411, ln. 11 –R. p. 1412, ln. 1.)

Not only was there an absence of evidence that proof rolling was an acceptable standard, but there was also an express *factual finding to the contrary* by the Trial Court:

11) Proof rolling with a dump truck, even if it occurred, **is not an adequate indicator of compaction density** and is not in compliance with the plans, which clearly required compaction testing.

(R. p. 0037, ¶11 (emphasis added).) The COA's apparent sanctioning of "eyeballing" as the exercise of slight care in doing the plan required density testing measurement of "98%" is unsupported and not logical. *Id*. It becomes even more so when one considers the sole testimony on soil moisture content presented at trial.

This Court may recall that the Plan requirement was that the soil be compacted to "98% maximum dry density at optimum moisture." Dr. Whitlock explained at trial how proper compaction cannot be achieved without the proper moisture content, which must be obtained by laboratory testing. (R. p. 1406, ln. 13 –R. p. 1410, ln. 23.) The significance and absence of moisture testing remained unaddressed by the Respondent throughout the trial.

Affirming a finding that Respondent exercised slight care, by performing "proof rolling," which was found to be inadequate at trial, would allow contractors to continuously fail to meet the standards required of them by law, so long as they perform any form of "testing", regardless of whether the "testing" is adequate. Not only is this notion illogical, but it also completely undermines the purpose of the building code and the exceptions to the Statute of Repose. This Court should reverse this finding and ensure that homeowners and homes are protected from such sloppy and inappropriate testing protocols.

b. The Opinion Does Not Address Whether the Sheer Volume, Magnitude, and Severity of the Violations of the Building Code and Permitted Plans Compelled a Legal Conclusion of Gross Negligence or Recklessness

The COA noted that a single violation of the building code does not necessarily constitute gross negligence or recklessness:

> Failing to comply with a building code alone is not gross negligence. *See* S.C. Code Ann. § 15-3-670(B) (Supp. 2023) ("For the purpose of [the gross negligence or recklessness exception to the statute of repose] the violation of a building code of

> a jurisdiction or political subdivision does not constitute per se ... gross negligence[ ] or recklessness[ ] but this type of violation may be admissible as evidence of ... gross negligence [ ] or recklessness.").

(App. p. 0004, ¶2.) The issue of whether a single violation of the building code constitutes gross negligence or recklessness was not pending before the Court.[33] The issue that was pending, which the COA did not rule on, was whether the systematic violations of the building code and permitted plans in this record constitute gross negligence and recklessness.

Petitioner briefed at length that the repeated *systemic* violations of the building code and permitted plans over the course of four (4) years in four (4) neighborhoods, such as are present in this record, constituted gross negligence and recklessness, especially when such conduct is committed with full knowledge of the force and effect of the building code. Respondent never briefed this issue; and the COA did not address it in the Opinion.

Under South Carolina law, **a single violation** of the building code only constitutes **evidence** of gross negligence and recklessness. S.C. Code Ann. § 15-3-670(B).[34] What we have here, in contrast, is a licensed subcontractor who admittedly *knew* he was supposed to comply with the *minimum standards* contained in the building codes and plans (R. p. 1548, ln. 13 –R. p. 1549, ln. 12); "habitually tried to follow and comply with the applicable building codes" (App. p. 0117, ¶2); but did not look at the construction plans *once* over the course of four (4) years on this Project; did not know the compaction requirement in the plans; and engaged in conduct resulting in systemic building code violations and extensive damage. **None of the foregoing is in dispute,** either because it was conclusively found by the Trial Court and not appealed by Respondent or

[33] Additionally, this statement is incorrect as written. Failure to comply with the building code can be considered as gross negligence by the finder of fact; it is just not automatic (not *per se*).

[34] In a case considering the statute governing punitive damages, the South Carolina Supreme Court has found that violation of a *single* traffic statute constitutes evidence of recklessness and requires a court to submit the issue of punitive damages to the jury. *Wise v. Broadway*, 433 S.E.2d 857, 859 (S.C. 1993).

was admitted by Respondent during trial or in his Initial Brief.

What results from the conceded facts are numerous building code violations per building pad and systemically throughout each of the four (4) neighborhoods.[35] The Trial Court explicitly found that the proximate result of the above-conceded facts was significant damage "require[ing] substantial repairs," and that the damage was "due to Defendant's **disregard for the requirements applicable to its work and lack of quality control**." (R. p. 0038, ¶22 (emphasis added).)[36]

A contractor violating a building code provision that he does not know exists once or twice *may* be simple and inadvertent negligence; but a licensed contractor who knows the building code and permitted plans must be followed, yet purposely fails to do so hundreds of times (or even dozens of times), cannot reasonably be seen as exercising "slight care." "Several connected or successive acts of simple negligence may support a finding of gross negligence, due to their compounding effect." 57A Am. Jur. 2d Negligence § 224.

Taken together, the above supports but one conclusion: Respondent knew what it was supposed to do, but recklessly (at minimum) and consciously disregarded that knowledge. These factual findings cannot be disturbed because they have not been appealed (they also have evidentiary support). What can be disturbed, in fact reviewed *de novo*, is the legal conclusion as to whether the overwhelmingly flagrant and systematic nature of conduct constitutes gross negligence and recklessness. The facts of this case compel a finding of gross negligence and recklessness. Otherwise, this Court is casting adrift its former stated policy of protecting homeowners and sending the wrong message to sloppy contractors.

It is the public policy of South Carolina to protect consumers, especially homeowners. *See*

[35] *See*, Statement of Facts, pg. 7.
[36] Disregard is defined as "pay no attention to; to ignore." (oed.com, "disregard", accessed on 15 April 2024).

e.g., 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 severing the offending clauses within the contract of adhesion would violate South Carolina's public policy of protecting homeowners); *Kennedy*, 299 S.C. at 346, 384 S.E.2d at 737 (1989) (expanding traditional tort concepts to provide innocent home buyers with protection, and taking "judicial cognizance" of the inherent unequal bargaining positions of a modern homebuyer as against the seller – be it builder, developer, or the like);[37] *Wright v. Craft*, 372 S.C. 1, 26–29, 640 S.E.2d 486, 500-01 (Ct. App. 2006) (highlighting South Carolina precedent that a car dealer's failure to accurately disclose a car's history was a deceptive trade practice, and recognizing dealer's provision of misleading information to consumers while knowing of its inaccuracy had the tendency to deceive); *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 501-02, 473 S.E.2d 52, 53–54 (1996) (recognizing the tort of bad faith as an extension of South Carolina law in third-party liability claims, and noting insureds are entitled to know they "will be dealt with fairly and in good faith."). It follows that application of these fundamental principles should serve a similar purpose here – aiding the party in the inferior bargaining position, the Homeowners, should a dispute arise. A shift in these, and like, protections should only result from this Court's measured consideration.

c. The Following Testimony by Respondent Is Dispositive

Respondent's President Tony Mundy, Sr., conceded he:

1. "can't build without a building permit." (R. p.-1552, lns. 8-11.);

[37] Pre-*Kennedy* cases also aimed to protect consumers in what is likely their largest purchase: a home. *See, e.g.*, *Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.,* 282 S.C. 415, 423, 321 S.E.2d 46, 51 (1984) (holding where lender undertook to repair defects in houses to facilitate further sales, the lender could be held liable in tort for negligent repairs); *Terlinde v. Neely,* 275 S.C. 395, 398-99, 271 S.E.2d 768, 769-70 (1980) (holding a subsequent purchaser of a home may pursue a claim in contract or tort against a developer).

2. "can't grade without a grading permit" (*Id., lns.* 12-14);

3. That when he walked on this property with his "compactor, [it] knew there were a full set of permitted plans… because that's the only way you can do it" (R. p. 1553, lns. 11-16); and,

4. "[E]veryone knows the building code requires you to follow the permitted plans" (R. p. 1553, lns. 17-20).

But, for the "four years" of the build out of these four neighborhoods, Respondent's President who ran the job "never asked for or looked at the permitted plans for the site." (R. p. 1554, lns. 6-10.) Because he never looked at the plans that he *knew* he was supposed to follow, he did not know of the 98% compaction requirement. (R. p. 1563, lns. 8-9.)

You know your job is to compact the soil adequately for the compacted soil to support the building; how do you claim that you are unaware that the likely consequence of failing to adequately compact is damage caused by an inadequately supported building? You can't. "If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning-the conscious failure to exercise due care." *Solanki v. Wal-mart,* 763 S.E.2nd 615, 619, 410 SC 229 (Ct. App. 2014) (citation omitted).

It is vastly important that this Court finds repeated and systematic ignorance to permitted plans and the building code provisions constitutes gross negligence and recklessness. Here, the Respondent did not solely fail to meet the standards of the building code and permitted plans, but completely disregarded their existence.

III. There Is Other Evidence of a Lack of Slight Care and Conscious Disregard in the Record

While the foregoing failure to look at the plans should be dispositive, there are other undeniable exemplars of the lack of slight care and conscious disregard in the Record. Several of these are noted in the Trial Court's Final Order:

> 6) Defendant employed untrained day laborers to operate its compactor.
>
> 9) Defendant was aware that the lifts were not being tested as they were installed.
>
> 22) The differential settlement and resulting damages were due to *Defendant's disregard* for the requirements applicable to its work and lack of quality control.

(R. p. 0036-0038, ¶6, ¶9, ¶22) (emphasis added).)

Dr. Whitlock's testimony regarding the "irresponsible" use of day laborers to operate the "compactor" - a fact which was conceded by Respondent and included as a finding of fact by the Trial Court - is notable.[38] Merriam-Webster lists "reckless" as a synonym for "irresponsible" (merriam-webster.com, "irresponsible"). The Trial Court's conclusion regarding Respondent's "disregard" for the standards, in combination with the Trial Court's prior conclusion and Respondent's admission that it had a "responsibility" to comply with the building code, clearly document the conscious nature of the Respondent's disregard.

Lastly, the concurrent schooling and testing of one of the Respondent's principals, as clearly testified by Dr. Whitlock, shows Respondent knew how to do it right while it was continuously failing to do so. (R. p. 1445, ln. 11 – R. p. 1447, ln. 2.)

Not only is the purpose of compaction widely known and self-evident, to alleviate any doubt, the Building Code that Respondent's Vice President[39] studied to get his license warns of the risk of failure of inadequate compaction repeatedly. (*Id.*; R. pp. 1762-1766 (Pl. Ex. 708).) As documented by Dr. Whitlock's report, the commentary to Building Code Section R506.2 warns:

> …For concrete slabs placed on uncompacted fill … <u>differential settlement may take place due to subsequent compaction of the soil, which can result in cracking of the floor slab and the interior wall/ceiling finishes.</u> (R. p. 1764) (emphasis in original).)

[38] At trial, Respondent attempted to dispute using unknown day laborers testified to in his deposition by identifying the names of the laborers used but without information as to their skill set, except that at least one of them had been fired by the other site contractor. (R. p 1556, ln. 19 – R. p. 1557, ln. 20.)

[39] Tony Mundy, Jr. was the Vice President of Respondent. (R. p. 1527, ln. 14.)

Similarly, the commentary to Building Code Section R506.2.1 states:

> To minimize differential settlement due to consolidation of uncompacted fill and the problems associated with such differential settlement, any fill beneath a concrete slab is required to be compacted. Properly compacted fill, besides minimizing the settlement, increases the soil load-bearing characteristics. (R. pp. 1764-5.)

Dr. Whitlock went on to note:

> Cracks also allow free passage of radon gas which is known to exist in the Aiken, South Carolina area. (Aiken is known to have areas that require mitigation per the IRC.) Exposure to radon can lead to lung cancer. In addition, water and insects, such as termites and ants, can enter through such cracks. (R. p. 1765.)

So, there were known risks that Respondent was, or should have been,[40] aware of when he failed to exercise the proper care in complying with the Building Code and Plans and consciously ignored their requirements, failing to even look at the plans. Sanctioning this kind of behavior would severely hinder the purpose of the building code and is a prime example of why the statute of repose has exceptions.

IV. When a Trial Court's Conclusion of Law Is Unsupported by the Record, and Contradicted by the Trial Court's Own Findings of Fact Which Are Supported by the Record (Which Must Be Accepted as True), a *De Novo* Review of the Unsupported Legal Conclusion Should Result in a Reversal

The Trial Court's predicate conclusions regarding the exceptions to the statute of repose were *both* unsupported by the evidence *and* were controlled by an erroneous application of the law, and therefore must be reviewed *de novo*. *Pope v. Gordon*, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006) ("The trial judge's findings of fact will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or controlled by an erroneous conception of the

[40] Constructive knowledge of the risk of harm suffices. The *Solanki* Court applied a reasonable person standard... if a reasonable person would have been conscious of probability of harm... then you are reckless (paraphrasing). A reasonable person, in the instant case, would have been conscious that a failure to follow the plans and the building code in preparing soil for residential home construction would likely result in problems (or, harm). A construction professional holding itself out as skilled in soil compaction and preparation would be certain to know of this danger.

application of the law."); *Wilson v. Gandis*, 430 S.C. 282, 291, 844 S.E.2d 631, 636 (2020) (Conclusions of law will be reviewed *de novo*); *Williams v. Gov't Employees Ins. Co*., 409 S.C. 586, 593, 762 S.E.2d 705, 709 (2014) ("When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the Trial Court properly applied the law to those facts.")

"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).[41] The Trial Court's legal conclusions ignored its own findings of established, uncontested facts, which require reversal.

V. Because the Court of Appeals Erred in Its Analysis of Gross Negligence and Recklessness, It Further Failed to Reverse the Trial Court on the Statute of Repose

As Petitioner previously briefed to the COA:

> Had the Trial Court correctly found that Respondent's conduct was grossly negligent or reckless, it would not have mistakenly applied the statute of repose to bar the claims of seventy-five percent of the class members. . . . Notably, as briefed to the Trial Court, the finding of grossly negligent or reckless conduct removes the availability of the statute of repose defense as to all causes of action, not just gross negligence, as the statute is actor specific.

(App. pp. 0087-0088 (footnote and citation omitted).) Assuming this Court finds gross negligence and/or recklessness in its *de novo* review of the conclusions of law in light of well supported facts, this Court should additionally find that the statute of repose did not operate to bar the claims of the bulk of the class, and the balance of the damages already found by the Trial Court before the

[41] "[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.

application of the of repose, should be awarded in full by this Court.

VI. Because the Court of Appeals Erred in Its Analysis of Gross Negligence and Recklessness, It Further Failed to Reverse the Trial Court on the Availability and an Award of Punitive Damages.

As Petitioner Briefed to the COA:

> The overwhelming evidence of building code violations evidenced the grossly negligent and reckless conduct that would have justified an award of punitive damages. As articulated in different fashion earlier, there is not a single aspect of Mundy Construction's work that can be described as building code compliant. There is not a single act by Mundy Construction that can be described as attempting to comply with the compaction requirement of the permitted plans. The fact that these were conscious failures, and therefore deemed reckless or grossly negligent failures, is conclusively established by the Respondent's concession that they knew they were required to comply with the building code, they knew the building code required compliance with the plans, they doubly knew, because Mundy, Jr. tested to procure his sitework construction license during these projects, but they made absolutely no effort to look at the plans or comply with the building code. These acts mandated an award of punitive damages.

(App. Brief, pp. 35-36.) Assuming this Court finds gross negligence and recklessness it its *de novo* review of the conclusions of law considering well supported facts, this Court should also find that punitive damages were available and either award the very reasonable punitive damages sought by the Petitioner in the Trial Court ($1,000,000), or remand for the Trial Court to make the award.

CONCLUSION

This Court should grant Certiorari as to all questions presented and weigh in on these very important issues that affect hundreds of thousands of South Carolina homeowners.

This Court should amend the COA's legal conclusions on gross negligence and recklessness in accordance with the evidence and South Carolina law, vacate the Trial Court's rulings on the statute of repose, and enter judgment for the entire Petitioner class for their full damages, including punitive damages.

JUSTIN O'TOOLE LUCEY, P.A.

/s/Justin Lucey

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