THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

v.

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

APPELLANT'S FINAL BRIEF

JUSTIN O'TOOLE LUCEY, P.A.

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   a. DID THE TRIAL COURT, THEREFORE, ERR IN APPLYING THE STATUTE OF REPOSE TO BAR SIXTY-TWO CLASS CLAIMS AND IN FAILING TO CONSIDER AND AWARD PUNITIVE DAMAGES?

STATEMENT OF THE CASE

In 1996, the General Contractor Defendants ("ATC") began developing and constructing hundreds of single-family townhomes in Aiken, South Carolina. These homes were located on streets that branch off of Spencer Drive off Whiskey Road behind the Aiken Mall and resulted in the below prior defective construction class action suits:

a) Laubenstein, et al. v. Adiz, et al., 2010-CP-02-02873 (Aiken County, South Carolina);
b) Martinez, et al. v. Adiz, et al., 2011-CP-02-00545 (Aiken County, South Carolina);
c) Knight, et al. v. Adiz, et al., 2011-CP-02-02653 (Aiken County, South Carolina); and
d) Marcum, et al. v. Adiz, et al., 2012-CP-02-03191 (Aiken County, South Carolina).

Each prior suit was successfully resolved on the homeowners' behalf. (R. pp. 1091-1092.)

ATC constructed the Spencer Drive Extension homes with many of the same subcontractors, including Respondent Mundy's Construction, Inc. d/b/a Mundy Construction (hereinafter "Respondent", "Mundy" or "Mundy Construction"). The construction of all the homes is almost identical: most homes are triplexes built using nearly identical floorplans with little

material variation. All homes are approximately 1,100 to 1,240 sq. ft., 2-bedroom/2-bathroom units with vinyl siding, architectural shingles, single-hung aluminum windows, and slab-on-grade foundations.

A.) The Spencer Dive Extension Townhomes

The final four Spencer Drive neighborhoods at issue here, New Haven Lane, Amity Lane, Bennington Lane, and Hillsborough Lane (hereinafter, "Spencer Drive Extension"), were the last series of homes ATC built along Spencer Drive. Each neighborhood is one street, and the four streets adjoin each other. There are only three types of units in the Spencer Drive Extension neighborhoods: end units with a carport; end units without a carport; and interior units. Building permits for these eighty-six homes were issued between August 2005 and February 2008. These homes were completed between November 2005 and January 2009.

The Spencer Drive Extension homes have suffered many of the same latent construction defects as the neighborhoods in the prior litigation. These defects include vertical construction deficiencies (above-the-finished grade) and improperly prepared slab subgrade supporting soils. The inadequately compacted soils have resulted in settlement and cracking in the slab foundations (referred to as "horizontal construction deficiencies") and consequential damages to the structure and finishes as the shifting radiates through the houses.

On February 12, 2008, Appellant Napier purchased her home on Bennington Lane. Defects manifested within the interior and exterior areas of Appellant Napier's home that mirror the same issues as in the previous neighborhoods, including, but not limited to, issues with windows, doors, exterior cladding, sheathing, flashings, roof, slab-on-grade foundation, and driveway slabs, all of which require repair.

B.) Class Representative Napier Filed Suit on February 8, 2016

Appellant Napier filed suit on February 8, 2016. (R. pp. 0049-0063, Summons and Complaint.) Appellant alleged two causes of action: 1) Negligence/Gross Negligence; and 2) Breach of Warranty. Suit was filed against ATC, numerous subcontractors, and the two sitework companies: Mundy Construction and Maddox Construction. Id.

Prior to trial, Appellant resolved all class claims except those against Mundy Construction.[1] These prior settlements did not resolve any of the issues related to the sitework that Mundy Construction performed. All claims against Mundy Construction remained for trial. (R. pp. 1091-1096, Appellant's Pre-Trial Brief.)

This matter was scheduled for date certain Jury Trial for the week of May 28, 2019. During the weekend prior to the commencement of trial, Mundy asserted that the case could not be completed within the allotted four days; therefore, the parties accepted The Honorable J. Cordell Maddox, Jr.'s offer of a bench trial and waived their jury demands. (R. pp. 3111-3113, May 27, 2019, Email Chain.) The bench trial lasted one and one-half days: from May 28, 2019, until mid-day on May 29, 2019. After Appellant rested, the Trial Court denied Mundy's motion for a directed verdict. (R. p. 1646, lns. 17-19) At the close of trial, the Trial Court took the Appellant's Motion for Judgment as a Matter of Law under advisement.[2] (R. p. 1655, lns. 11-12.)

The Trial Court invited post-trial position statements; both parties timely submitted these. (R. p. 1656, lns. 19-22). Additionally, Appellant ordered the transcript of each party's principal witnesses: Dr. Rhett Whitlock, P.E. for Appellant; Tony Mundy, Sr., for the Respondent. When

[1] The Circuit Court granted final approval to two sets of these settlements prior to trial.
[2] Respondent made a motion as to punitive damages but simply "preserved" its other end of trial motions. (R. p. 1641, TR2.)

this transcript (hereinafter referred to as "TR1" for first transcript) was received, Appellant added transcript cites to her post-trial position statement and resubmitted it.[3] (R. pp. 1223-1228.)

On November 20, 2019, the Trial Court submitted a damage/setoff inquiry to the Appellant; Appellant responded on November 26, 2019. (R. p. 3123.) On February 4, 2020, the Trial Court indicated certain findings it wanted made and added to Appellant's proposed order, with damages to be filled in later. (R. pp. 3132-3133.) Appellant submitted responsive material on February 27, 2020. (R. p. 2810.)

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 10% of their damages. (R. pp. 0035-0041.)

On April 24, 2020, Appellant moved the Trial Court to reconsider its analysis and decisions and briefed her position with the motion. (R. pp. 1232-1365.) After Respondent tendered judgment to the twenty-four remaining Appellants, Appellant's counsel moved to intervene several of the barred class members to represent that segment of the class should the Respondent negotiate a settlement of the "wear and tear" Appellants. Respondent submitted its oppositions to Appellant's motions on May 4, 2020, and submitted a proposed order denying the Motion to Reconsider but amending the Trial Court's prior findings to address one of Appellant's complaints. (R. pp. 1366-1381.)

On June 15, 2020, The Honorable Clifton Newman began consideration of the Motion to Intervene, and then deferred to the trial judge, Judge Maddox. (R. pp. 1681, lns. 6-24, June 15, 2020 Motion Hearing Transcript ("TR3").)

[3] Note, TR1 mistakenly refers to the Appellant's examining attorney as Mr. Floyd instead of Mr. Lucey. The balance of the Trial transcript is referred to as "TR2."

On June 18, 2020, the Trial Court indicated that it was granting the intervention but denying the reconsideration and instructed Appellant's counsel to prepare both orders. Thereafter, upon the objection of the Respondent, the Trial Court indicated that it had located the Respondent's proposed order denying the Motion to Reconsider, while amending the judgment, and that it would enter that Order instead. (R. p. 3146, Court Email Dated June 18, 2020.) Additionally, the Trial Court instructed Appellant's counsel to limit the grant of intervention to participation in the appeal only. (R. p. 3146, Court Email Dated June 24, 2020.)

On July 20, 2020, the 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.). And on July 20, 2020, the Order permitting intervention for the appeal only was entered ("Intervention Order"). (R. pp. 0044-0048.) Both were received by Appellant on July 20, 2020.

Hereinafter, the April 14, 2020, Order will be referred to as "the Original Order." The April 14, 2020, Order, as Amended by the July 20, 2020, Order (which essentially changed "use and depreciation" to "wear and tear"), will be referred to as the "Amended Order."

The Notice of Appeal was filed and served on August 3, 2020.

STATEMENT OF FACTS

Appellant's principal witness was engineer Dr. Rhett Whitlock, P.E. ("Dr. Whitlock"), who was qualified as an expert without objection. Dr. Whitlock's report, including his laser guided elevation surveys documenting the differential movement, and hundreds and hundreds of pictures, was entered into evidence (R. pp. 1762-2357, Ex. 708), along with his supplemental report as to the scope of repairs needed (R. pp. 2358-2359, Ex. 709; R. p. 1416, ln. 20 – p. 1418, ln. 9, TR1.)

Appellant published from the deposition of ATC's site supervisor, Hal Trotter ("Trotter"), principally as to ATC's reliance on Mundy, and the authenticity of the invoices approved by

Trotter showing what work Mundy performed. (R. p. 1686, lns. 9-14; R. p. 1687, ln. 21 – p. 1688, ln. 11; R. p. 1689, lns. 6-18.) Appellant also published from the deposition of the other site contractor, Maddox Construction. Appellant also called four homeowners, including Appellant Napier, to share their experiences with the cracking structures and to confirm pictures of their homes by Dr. Whitlock. (R. pp. 1565-1663, TR2)

Mundy Construction ("Mundy") was a self-described Father-Son site contractor operation. (R. p. 1527, lns. 8-14.) Although the son ("Mundy, Jr.") held the specialty site grading construction license for the company from the South Carolina Department of Labor Licensing & Regulation ("LLR"), it chose to call the father, Tony Mundy, Sr. ("Mundy, Sr."), as its only witness. (R. pp. 1394-1663, TR1 and TR2.) Mundy, Sr., conceded the principal points of Appellant's case which he had witnessed the day before. (See below.) He attempted to change his deposition testimony on several key points but was brought back to his prior concessions on cross examination. No other witnesses were called by the Respondent. (See below.) Respondent's exemplar appraisals of the value of the Appellant houses were admitted into evidence by stipulation. (R. p. 1648, ln. 2 – p.1649, ln. 5, TR2.)

Nearly all exhibits were entered into evidence by stipulation at the commencement of trial (R. pp. 3101-3102.)

(Undisputed Facts at Trial)

Then following facts were proven at trial:

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

2) The certificates of occupancy ("CO") for the homes were issued between November 23, 2005, and January 16, 2009. (R. p. 2810, Ex. 991).

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

[4] R. p. 1638, lns. 1-8, TR2.

4) Therefore, the COs for the homes on New Haven Lane and Amity Lane streets and most of the homes on Bennington Lane were issued more than eight years before suit was filed.

5) The COs for the homes on Hillsborough Lane and for two homes on Bennington Lane (151 and 155) were issued less than eight years before the commencement of this action. These twenty-four homes include six interior units, eleven end units without a carport, and seven end units with a carport. (R. p. 2810, Ex. 991; R. p. 2360, Ex. 722, R. pp. 1710-1711, Ex. 472.)

6) Mundy Construction was one of two site contractors that had prepared the subsoils on this site for construction.[5]

7) Mundy Construction had a duty to perform its work in accordance with the building code.[6]

8) 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.) .

9) Mundy Construction had a duty to perform its work in accordance with the site plans, which required that:

"ALL FILL SHALL BE PLACED IN 6 [INCH] LAYERS AND COMPACTED TO 98% MAXIMUM DRY DENSITY AT OPTIMUM MOISTURE."[7]

10) Mundy Construction had a duty to make sure that the subgrade soils were properly compacted.[8]

11) 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.[9]

[5] R. p. 1548, lns. 10-12, TR1.
[6] R. p. 1548, ln. 13 – p.1549, ln. 12, TR1.
[7] 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, TR1 (violation of building code); R. p. 1418, lns. 11-22, TR1 (describing compaction requirements in site plans).
[8] R. p. 1406, ln. 10- p. 1412, ln. 1, TR1.
[9] R. p. 1402, ln. 20 – p. 1403, ln. 4, TR1. For discussion of cause of cracking in pictures, see R. pp. 1435-1440 and R. pp. 1455-1470, TR1. For discussion of measurements of differential movement, see R. pp. 1475-1477, TR1.

12) The foundations of the homes throughout the class have experienced substantial differential settlement due to the improper preparation of the subgrade.[10]

13) 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.)[11]

14) 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.)[12]

15) Dr. Whitlock explained his methodology of surveying the differential movement to the Trial Court at length. (R. p. 1425, ln. 11- p. 1426, ln. 14, TR1) (describing process of performing differential measurement surveys using a laser level in the homes); The laser level slab plotted measurements were admitted both in R. pp. 2388-2419, Ex. 821 and appended to Dr. Whitlock's report in R. pp. 1762-2357, Ex. 708.

    a. Laser measurements were performed in the interior of a sample of thirty-one (31) of the eighty-six (86) homes (circa 36%) across all four streets;

    b. The laser level measurements showed substantial downward deviations in every home sampled.[13]

    c. The measurements of the differential deflection indicated that the slab foundations were generally deflecting under the front and rear load bearing walls. This was consistent with the slab cracks on the sides of the triplexes generally being wider at the top. (R. p. 1427, ln. 25- p. 1428, ln. 24, TR1.)

16) As to the collaborative findings, Dr. Whitlock explained: "I observed cracking in a lot of different things, in the streets, the curb and gutter, sidewalks, driveways, many, if not all the driveways had cracks and the foundations, those were cracked. The cracks reflected up through the foundations and into the homes themselves and into the drywall and ceilings." (R. p. 1402, lns. 3-9, TR1. See also, R. p. 1435, ln. 5 to 1436, lns. 3-25) (describing separations between foundations and patio slabs and separations in interior trim and door molding that he observed); (R. p. 1437, ln 3 – p. 1438, ln. 1)(describing a front stoop that moved away and sank down from the foundation at the front door sill due to "poor compaction"); (R. p. 1486, ln. 16 - p. 1487, ln. 3, TR1) (describing evidence of water line breaks due to additional deficient sitework).

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[10] R. p. 1402, ln. 20- p. 1403, ln. 14, TR1; R. pp. 0035-0041, Order.
[11] R. p. 1430, lns. 12-18, TR1.
[12] R. p. 1455, ln. 12 – p. 1470, ln. 12, TR1.
[13] R. pp. 2388-2419, Ex. 821 (WDP Slab Measurements); R. p. 1505, lns. 8-15, TR1; R. p. 1477, lns. 11-20, TR1 (describing how measurements of slabs showed downward deviations ranging from .5 to 2.13 inches and the typical displacement is over 1 inch).

17) Respondent did not offer a single witness (expert or layperson) to contradict Dr. Whitlock's opinions regarding defective compaction, causation, differential settlement, repair protocol, or repair cost.[14]

(Mundy's Proportion and Scope of Work Performed)

18) Dr. Whitlock testified and showed with the job site invoices that Mundy was paid $278,186.36 for its sitework, which amounts to 63% of the total amount the General Contractor paid for the sitework across the class.[15]

    a. The site superintendent (Trotter) initialed each Maddox and Mundy invoice verifying that the work documented in the invoices was performed. See Hallum, LLC, 30(b)(6) Dep. at R. p. 1694, lns. 11-14; R. p. 1695, lns. 4-7; R. p. 1698, lns. 2-14; R. p. 1699, ln. 17 - p. 1700, ln. 2 (designations published at trial).

19) Additionally, Dr. Whitlock testified that the evidence indicated that Maddox had a motor grader for street sitework, and Mundy did not. Since Maddox did the street preparation, Mundy's proportionate share of building pad site preparation (clearing, grubbing, cut, fill, spread, compaction, pad grading) increased.[16]

20) The Maddox published testimony evidenced indicated that much of Maddox's work related to non-building pad work (streets, retaining walls, utilities);[17]

21) Mundy, Sr., conceded that Mundy compacted all eighty-six building pads.[18]

22) In summary, the undisputed evidence was that Mundy 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 eighty-six building pads.[19]

(Concessions By Mundy, Sr.)

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

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[14] R. pp. 1394-1663, TR1 and TR2.

[15] R. p. 1450, ln. 18 – p. 1451, ln. 14, TR1; R. p. 1452, lns. 2-21; R. p. 1453, ln. 17 - p. 1454, ln. 1 (describing process of analyzing invoices from both Maddox and Mundy to determine amount of compaction and other sitework that each performed).

[16] R. p. 1454, lns. 2-24, TR1.

[17] R. p. 0036; R. p. 1702, lns. 23-25; R. pp. 1712-1716; R. pp. 1727-1739; R. pp. 1756-1761.

[18] R. p. 1542, ln. 24 - p. 1543, ln. 1, TR1.

Q. Mundy compacted the building pads on these streets, right?

A. *Right.*

[19] R. pp. 0898-0920; R. pp. 1712-1756; R. pp. 2364-2387; R. pp. 2834-2884.

23) Mundy performed the compaction for all 86 building pads in the class.[20]

24) Mundy only "eyeballed" whether the subgrade soils were compacted.[21]

25) The General Contractor did not self-perform cutting, filling, or compaction.[22]

26) Mundy had a duty to follow the building code and ensure its work was performed properly.[23]

27) Mundy, Sr., did not know if the General Contractor was qualified to inspect compaction.[24]

28) Mundy, Sr., was not sure if anyone at Mundy Construction was qualified to determine if compaction was properly performed.[25]

29) Mundy, Sr., failed to review site plans in the four (4) years that he worked on this project.[26]

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

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[20] R. p. 1542, ln. 24 - p. 1543, ln. 1, TR1:

Q. Mundy compacted the building pads on these streets, right?

A. Right.

[21] R. p. 1535, ln. 17 – 1536, ln. 3, TR1(claiming he would visually inspect the compaction of lifts when driving over with another load of dirt). Dr. Whitlock testified that proof rolling with a dump truck is not an adequate indicator of compaction density and is not in compliance with the Plans. R. p. 1411, ln. 11 - 1412, ln. 1, TR1.

[22] R. p. 1547, ln. 23 – p. 1548, ln. 3, TR1:

Q. [Y]ou agree that [the general contractor] did not self-perform any of the cutting, filling, or compaction on this site, correct?

A. Right.

Q. That's correct, yes?

A. Right

Mundy Sr. did not know what work the General Contractor was doing with skid steer and min-excavator (light construction equipment). R. p. 1550, lns. 12-17, TR1.

[23] R. p. 1549, lns. 7-12, TR1 (emphasis added):

Q. Do you deny telling me under oath in your deposition that Mundy had a responsibility to follow the building code in this work?

A. We tried to follow the building codes, yes.

Q. *Because you had a responsibility to, correct?*

A. *Yes.*

See also, R. p. 1552, ln. 21 - R. p. 1553, ln. 20.

[24] R. p. 1546, ln. 3 – p. 1547, ln. 19, TR1.

[25] R. p. 1556, lns. 7-12, TR1.

[26] R. p. 1554, lns. 6-10, TR1.

(General Contractor Relied Upon Mundy Construction)

Testimony by ATC's site superintendent (Trotter) published at trial established:

31) The site superintendent admitted he was not qualified to answer grading and compacting questions[27]; and,

32) The site superintendent testified repeatedly that he relied on the sitework subcontractors for proper compaction and to make sure their work met the requirements of the building code, construction documents, and industry standards.[28]

(Mundy, Sr.'s Impeachment)

33) Mundy, Sr. was shown to have changed his prior deposition testimony at trial. For example, he attempted to retract his prior concession that Mundy used day laborers to operate the compactor and that Mundy did not even know the identity or qualifications of the persons who operated the compactor in its behalf.[29]

34) 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, TR1.)

When confronted with his deposition transcript otherwise, Mundy, Sr. conceded three 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, TR1.) When his own counsel tried to walk him back to the incorrect answer he had given the

[27] R. p. 1685, lns. 13-24; R. p. 1687, ln. 14 – p. 1688, ln. 1688, ln. 11, TR2.
[28] R. p. 1685, lns 16-21; R. p. 1686, lns. 12-14; R. p. 1687, ln. 25 – p. 1688, ln. 6; R. p. 1689, lns. 61-13; R. p. 1696, ln. 24 – p. 1697, ln. 8, TR2, Hallum, LLC, 30(b)(6) Dep.
[29] R. p. 1544, lns. 16-21, TR1 (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").

Trial Court, Mundy, Sr., conceded that the deposition testimony was the correct testimony:

Mr. Anderson:

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, TR1.

35) Mundy failed to call its most knowledgeable, only licensed, grading employee/owner as a witness. (R. pp. 1394-1663, TR1 and TR2.)

36) Mundy, Sr., testified that Maddox did the rough grading prior to Mundy's compaction work. R. p. 1528, ln. 23 – p. 1529, ln. 21, TR1. However, Mundy, Jr., filed an affidavit with the LLR that Mundy Construction did the rough grading on three of these four streets. (R. p. 2467, Ex. 938.)

(Mundy's Conscious & Reckless Failures)

37) Dr. Whitlock testified that Mundy clearly knew that the fill was not engineered or otherwise tested to confirm it would provide adequate, uniform support for the foundations of the homes.[30]

38) Dr. Whitlock testified that Mundy 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.[31]

39) The differential settlement and resulting damages were due to Mundy's gross deviations and total disregard for the requirements applicable to its work *and* complete lack of quality control.[32]

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

40) Mundy's (1) failure to use engineered fill and (2) violation of the plans both constituted two building code violations on each and every lift on each and every building pad; Dr. Whitlock testified the fill was up to twelve feet in some locations (R. p. 1411, ln. 20 – p. 1412, ln. 8, TR1); if one uses a conservative estimate of an average of three feet of fill, that constitutes six lifts per building pad, resulting in eighteen building code violations per building pad or fifteen hundred and forty-eight building code violations by Mundy on the class properties;

41) The foregoing building code violations, each or cumulatively, constituted grossly negligent and reckless conduct by Mundy.

42) Mundy's irresponsible use of untrained labor on the compactor constituted grossly negligent and reckless conduct.[33]

43) 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.[34]

44) 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, TR1) (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).

45) Dr. Whitlock testified that 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, TR1.) 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, TR1.) (Hence, the Plan requirement that the 98% compaction be confirmed after each six-inch lift.) This testimony was unchallenged and uncontradicted.

46) Mundy'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 neighborhood; and 2) Mundy, Sr. testified that 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; yet he still had never looked at the plans in four years.[35]

[33] R. p. 1409, lns. 1-3; R. p. 1411, ln. 20 - p. 1412, ln. 1; and R. p. 1421, lns. 10-22, TR1.
[34] R. pp. 2420-2465, Ex. 926.
[35] R. p. 1552, ln. 8 - p. 1553, ln. 20; R. p. 1554, lns. 6-10, TR1; R. p. 2467, Ex. 938.

47) Dr. Whitlock testified that Mundy's previously admitted use of untrained day laborers to operate the compactor was "irresponsible."[36]

(Repairs/Damages)

48) Dr. Whitlock[37] testified that the homes require substantial repairs to fix both the cracks in the foundations and protect against further settlement.[38]

49) The cost of repairing the horizontal construction deficiencies is expensive. 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. The scope of repair calls for the following work: Remove all interior fixtures, cabinetry and furnishings; Remove current floor slabs leaving 1' concrete strip at perimeter turn-down to footings; Remove interior partitions; Re-level and underpin the footings; Install 24" diameter Sono-tube Piers at 8' o.c. (avg depth of 5') under the interior footprint of the house; Install 6" reinforced structural slab over the new piers, dowelled into the old slabs at perimeter footings; Reinstall all interior partitions, interior fixtures, cabinetry and furnishings. [39]

50) The necessary repairs will cost the class $8,470,438.47.[40]

51) 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.

52) Pursuant to Pl. Ex. 940 (R. pp. 2468-2479), the repair cost for each foregoing type of non-barred unit was $88,813.37, 98,586.32, and 106,734.87, respectively. This results in total repair damages for the non-barred group in the amount of $2.4m (rounded) (($88,813.37 x 6 = $532,880) plus (98,586.32 x 11 = $1,084,450) plus ($106,734.87 x 7 = 747,144) = $2,364,474).

53) Mundy did not dispute the need for repair; nor did it offer any competing proposed scope of repair or cost of repair.[41]

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[36] R. p. 1487, ln. 12 - p. 1488, ln. 5, TR1(explaining it "would be irresponsible for a contractor to use an untrained day laborer to run heavy equipment" because it is dangerous and the operator does not know what the machinery needs to do "and that is to compact the soil").

[37] Dr. Whitlock is a long-time member of the Construction Specification Institute, which, *inter alia*, sets standards for estimating the anticipated costs of projects.

[38] R. pp. 2358-2359, Ex. 709 (WDP Scope of Repair).

[39] R. pp. 2358-2359, Ex. 709; R. pp. 2468-2479, Ex. 940 .

[40] R. pp. 2468-2479, Ex. 940 (WDP Cost of Repair Estimate); R. p. 1484, ln. 18 - p. 1495, ln. 17, TR1 (discussing three different types of units in cost of repair estimate and how total amount was calculated by multiplying the cost of each unit type by the number of units of that type in the class).

[41] R. pp. 1394-1663, TR1 and TR2.

54) Mundy's only "repair evidence" was the offering of the appraised value of an exemplar of Appellant class homes.[42]

The evidence presented at trial clearly established that Mundy was grossly negligent and reckless in performing its work throughout the neighborhood. Mundy failed to offer a single witness or any evidence to (1) counter Appellant's claims; (2) to support Mundy's twenty-three affirmative defenses (R. pp. 0082-0090, Ans to Third Amd. Cpt.) or (3) to contradict the testimony and opinions of Dr. Whitlock. Appellant sought a verdict for the necessary repairs in the amount of $8,470,438.47, and a $1,000,000.00 punitive damage award.

Appellant conceded the following set offs if the award was calculated pursuant to the above: the amount paid by one of Mundy's insurance carriers ($335,000.00),[43] the payment by the concrete subcontractors ($190,000.00), the Maddox payment ($750,000.00) and one-half (1/2) of the $1,100,000.00 paid by the General Contractor/Developer for horizontal and vertical damages (i.e., $550,000.00); and requested a net judgment of $7,645,438.47. (R. p. 3121.)[44]

(Judgment and Post Trial)

As briefed above, Judge Maddox ruled there was no gross negligence (and did not address recklessness at all), barred sixty-two class members' claims based upon the statute of repose, and reduced the remaining Appellant class members' damages by ninety percent (90%) for "depreciation and use." R. p. 0040, Original Order p. 6.

[42] R. pp. 2978-3080.

[43] On May 22, 2019, Appellant dropped its demand to Mundy by over 50% in a final pretrial effort to resolve the case. The demand was divided between the two known insurance carriers based upon their exposure. One carrier accepted, procuring a covenant not to execute on Mundy and its owners' assets. One carrier declined. (R. p. 1095, Appellant's Pre-Trial Brief p. 5; R. p. 1106, Respondent's Pretrial Brief p. 10).

[44] If the Trial Court had issued a proportional or several verdicts, then the setoff would not apply.

Post-trial, Appellant moved for reconsideration, rehearing, and amendment of the April 14, 2020, Final Order, in the following particulars:

- "Conclusions of Law" Nos. 4 (No Gross Negligence) and 5 (Repose Bars 62 Homes Claims) as contrary to, and unsupported by, the evidence and law;
- "Damages" findings Nos. 1 and 2, as erroneously excluding the damages of the erroneously barred claimants; and,
- "Damages" finding No. 3, as it and all subparts are without any evidentiary or legal support, and the resulting judgment is woefully inadequate.

Additionally, because the Trial Court erred in not finding gross negligence, it further erred in not considering and awarding punitive damages; and additionally, erred in the other ways described herein.

STANDARD OF REVIEW

"In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." Wilson v. Gandis, 430 S.C. 282, 291, 844 S.E.2d 631, 636 (2020) (internal quotations omitted). The appellate court will not disturb the trial court's factual findings "unless they are found to be without evidence that reasonably supports those findings." Id. The trial court's conclusions of law will be reviewed *de novo*. Id. ("Of course, we review de novo the trial court's legal conclusions in an action at law.").

Therefore, the Trial Court's factual findings, *inter alia*, that Mundy's work violated the permitted plans and the building code, that Mundy "disregard[ed] the requirements applicable to its work", and that these violations, disregard, and lack of quality control caused the class foundation slabs to crack and differentially move, which the Trial Court found to be supported by Dr. Whitlock's reasoned testimony, are not reviewable; whereas, the Trial Court's legal conclusion that Mundy's conduct did not constitute gross negligence or recklessness, is to be reviewed *de novo*.

SUMMARY OF ERRORS

Appellant will show herein that the Trial Court erred as follows:

1. Originally finding that "14 years' worth of use and depreciation acts to reduce the amount of damages attributed to (Respondent) Mundy Construction," and thereafter reducing Appellant's damages, when:

    a. There is no legal precedent to support a "use and depreciation" adjustment to the damages awarded here;

    b. To the contrary, legal precedent mandates that the measure of damages to homeowners here is the cost of repair, specifically:

        i. the applicable legal precedent is that there is no reduction in repair costs for components of lengthy or potentially unlimited lifespan or for components that have not performed properly; and

        ii. legal precedent suggests that concrete slab foundations have an indefinite useful life.

    c. Even if there were legal precedent to support a "use and depreciation" adjustment,

        i. this *sua sponte* "use and depreciation" adjustment was not pled as an affirmative defense by Mundy, nor was such an adjustment ever requested;

        ii. There was no depreciation evidence presented;

        iii. There was no useful life evidence presented;

        iv. There was no evidence presented that a properly laid concrete slab foundation does not have an indefinite useful life;

        v. There was only approximately eight years of use at the time the defects manifested, and suit was filed; and

        vi. Because there was no "use and depreciation" adjustment pled or requested, Appellant was not put on notice of this issue, and therefore was deprived of an opportunity to present contrary evidence as to useful life, proximate cause, or any other aspect of this damages adjustment.

2. Issuing an amended finding that "14 years' worth of ~~use and depreciation~~ *general wear and tear in conjunction with exposure to the other elements* ~~acts to~~ *further* reduces the amount

of damages ~~attributed~~ attributable to (Respondent) Mundy Construction," and thereafter reducing Appellant's damages, when:[45]

a. There is no legal precedent to support a "wear and tear" adjustment to the damages awarded here;

b. To the contrary, legal precedent mandates that the measure of damages to homeowners here is the cost of repair, specifically:

    i. the applicable legal precedent is that there is no reduction in repair costs for components of lengthy or potentially unlimited lifespan or for components that have not performed properly; and

    ii. legal precedent suggests that concrete slab foundations have an indefinite useful life.

c. Even if there were legal precedent to support a "wear and tear" adjustment,

    i. this *sua sponte* "wear and tear" adjustment was not pled as an affirmative defense by Mundy, nor was such an adjustment ever requested;

    ii. There was no wear and tear evidence presented;

    iii. There was no useful life evidence presented;

    iv. There was no evidence presented that a properly laid concrete slab foundation does not have an indefinite useful life;

    v. There was only approximately eight years of use at the time the defects manifested, and suit was filed; and

    vi. Because there was no "wear and tear" adjustment pled or requested, Plaintiff was not put on notice of this issue, and therefore was deprived of an opportunity to present contrary evidence as to wear and tear, useful life, proximate cause, or any other aspect of this damages adjustment;

3. Failing to recognize that the only standards of care entered into the evidence was the Respondent's duty to comply with the building code and obligation to comply with the permitted plans – and that these are the standards against which the Respondent's alleged use of *slight* care or *due* care must be measured;

4. Failing to find that the Respondent failed to use slight care or due care to comply with the building code or permitted plans;

[45] Strikeouts are language in the Original Order; whereas italics are the changes in the amended finding denying Appellant's Motion to Reconsider.

5. Having found that the Respondent's conduct amounted to ordinary negligence, failing to recognize that the Respondent's awareness of the likelihood of resultant harm from its actions elevated its conduct to legal recklessness (See Sec. II, *infra*, for a discussion of the effects of slight care versus due care in the dichotomy of gross negligence versus recklessness);

6. Failing to find that the only reasonable inference from the evidence is that Respondent acted with gross negligence and with reckless disregard, having made absolutely no effort to comply with the permitted plans or building code;

7. Finding that the Respondent was not grossly negligent, without evidentiary or legal support;

8. Finding that the Respondent was not reckless, despite the evidence to the contrary;

9. Failing to find that the Respondent's conduct barred its use of the Statute of Repose;

10. Failing to consider and award punitive damages;

11. Failing to additionally find that the forgoing conduct constituted a breach of the implied warranty of workmanship;

12. Reaching such findings as to gross negligence, recklessness, the statute of repose, and damages that were not in accordance with the findings of fact set forth by the Trial Court in its own order; and,

13. The other errors discussed herein.

DISCUSSION OF ERRORS

The Trial Court erred as to both the categorization of the Respondent's conduct and its reduction of recognized damages.

I) The Trial Court Erred in Applying an Unpled, Unsupported, Illogical Damage Reduction for Use and Depreciation and Wear and Tear.

Simply put, the Trial Court's *sua sponte* reduction in damages based on "use and depreciation" and/or "wear and tear" is erroneous as a matter of law for several independent reasons: (1) Mundy did not plead or otherwise request such a reduction in damages; (2) even if Mundy had so pled or requested, there is no precedent to support such a reduction; (3) even if there were precedent to support such a reduction, there was no evidence entered in the record in this

case to support a "use and depreciation deduction", or the revised "wear and tear" deduction, or any integral evidence concerning the "useful life" of the damaged foundations; and (4) because this reduction was not requested, pled, or supported by evidence, Appellant was deprived of its right to offer contrary evidence or legal argument. Finally, there was no proximate cause established for this quasi-affirmative defense/intervening/contributing factor causing Appellant's damages or interrupting the proximate cause established by Appellant. It is wrong.

a. The *sua sponte* reduction was not pled, requested, or otherwise mentioned by Respondent

Respondent did not set forth an affirmative defense seeking this relief; Respondent did not ask for this relief; and Respondent did not put in any evidence supporting this relief. It is not based upon any evidence; it is improper. Whitehead v. State, 352 S.C. 215, 220, 574 S.E.2d 200, 202 (2002) (a failure to plead an affirmative defense is deemed a waiver of the right to assert it).

b. The reduction was contrary to legal precedent

As set forth in Pope v. Heritage Communities, Inc., the cost of repair is the proper measure of damages in a construction defect case where proximate cause has been established. 395 S.C. 404, 415-16, 717 S.E.2d 765, 771, reh'd denied, cert. dismissed, (Ct. App. 2011) (Judge did not err by instructing the jury, "you must award damages for the cost of repairs…"). See also Sea Side Villas II Horizontal Prop. Regime v. Single Source Roofing, Corp., 64 F. App'x 367, 374 (4th Cir. 2003) ("In a construction case such as this, the measure of damages that must be awarded as a result of a builder's negligence is the reasonable cost to repair.") (applying South Carolina law); Peluso v. Singer General Precision, Inc., Link Div., 47 Ill.App.3d. 842, 856, 365 N.E.2d 390, 401 (Ill. App. Ct. 1977) ("[T]he cost of repair can include the expense necessary to conform those repairs to existing building codes.").

Even if a reduction in damages due to "wear and tear" was proper or supported under South Carolina law, it is impossible to conduct such a depreciation without evidence of the damaged component's useful life. Depreciating damages, where there is no evidence of the expected expiration of a component, is improper. Duke Power Co. v. Thornton, 303 S.C. 454, 456 – 57, 401 S.E.2d 195, 195 – 96 (Ct. App. 1991) (the proper measure of damages for destruction of power pole was full replacement cost; depreciation not proper to consider where there is **no discernable life expectancy**) (emphasis added). This South Carolina rule is followed in other jurisdictions. Bos. Old Colony Ins. Co. v. Tiner Assocs. Inc., 288 F.3d 222, 231 – 32 (5th Cir. 2002) (The past use and depreciation of property is irrelevant to the calculation of damages where significant amount of life should have remained in the property had it not been for the wrongful act of the defendant).

c. There was no evidence of depreciation a/k/a wear and tear, lifespan, or similar, which supported reduction

Even if Respondent had pled and/or requested this reduction in damages, and even if such a reduction was supported by South Carolina law, there simply is not a shred of evidence in the record of depreciation, of what lifespan should be used to calculate depreciation, or that depreciation was appropriate. A judge's determination of recoverable damages must be based on the evidence shown at trial. Renney v. Dobbs House, Inc., 275 S.C. 562, 567, 274 S.E.2d 290, 293 (1981) ("Whether a defendant is or is not in default, **it is incumbent upon the judge** and/or the jury **to make a judicial determination of the amount recoverable based on the proof**.") (emphasis added).There certainly was no evidence to support a 90% reduction in the useful life of the foundations due to wear and tear, or to support the 90% reduction applied by the Trial Court ($2.4m total damages reduced to $.240m). Awarding Respondent a wear and tear deduction, when

there was no evidence of wear and tear proximately causing any of Appellant's damages, let alone 90% of Appellant's damages, was in error.

d. Concrete slab foundations are not depreciable

Had Appellant been afforded an opportunity to refute this unpled, unrequested, and unsupported reduction in damages --either *vis a vis* a pre-trial motion in limine, expert testimony, or presentation of other evidence-- she would have shown that a foundation is not depreciable and has a virtually indefinite useful life. A foundation is quite distinguishable from shingles, which have a commonly known, shorter life expectancy of twenty to thirty years; one rarely, if ever, contemplates replacing one's foundation. The courts that have considered the issue have found or agreed that foundations are not depreciable. Hicks v. Kaufman & Broad Home Corp., 89 Cal. App. 4th 908, 923, 107 Cal. Rptr. 2d 761 (2001), as modified on denial of reh'g (July 3, 2001) ("[a] foundation's useful life … is indefinite…").[46]

[46] In Hicks, plaintiff class brought claims against a construction company for installing "inherently defective" concrete slab foundations under their homes. 89 Cal. App. 4th at 912. Central to the dispute was the matter that some foundations within the class had not yet manifested damage from the known deficiency. Id. at 923. The court rejected the defendant's argument that the plaintiff within the class whose foundations had not yet manifested damage did not possess claims because "[a] foundation's useful life … is indefinite," and therefore the likelihood of damage at any point in the future rendered the slabs non-performing or defective. Id.; See also Rutledge v. Hewlett-Packard Co., 238 Cal. App. 4th 1164, 1181, 190 Cal. Rptr. 3d 411, 426 (2015), as modified on denial of reh'g (Aug. 21, 2015) (recognizing that a home foundation has an "indefinite" useful life and drawing contrast with the limited useful life of a computer) citing Hicks, 89 Cal. App. 4th at 923; Quality Air Servs., LLC v. Milwaukee Valve Co., 671 F. Supp. 2d 36, 44–45 (D.D.C. 2009) (likening the lengthy lifespan of HVAC valves to the indefinite lifespan of a home foundation) (discussing Hicks, 89 Cal. App. 4th at 923). See also Cal. Ins. Code § 2051 (prohibiting subtraction from payments under a fire insurance policy to account for depreciation of components which are not "normally subject to repair and replacement during the useful life" of the structure) Johnson v. Hartford Cas. Ins. Co., No. 15-CV-04138-WHO, 2017 WL 2224828, at *11-12 (N.D. Cal. May 22, 2017) (Certifying a class and subclass of insureds whose payments under Hartford insurance policies were reduced based on impermissible depreciation of components under Cal. Ins. Code § 2051, including "cement/concrete/asphalt" and "concrete foundations").

e. The reduction in damages ignores proximate causation

The *sua sponte*, unsupported reduction in damage also ignores proximate cause. See Bos. Old Colony Ins. Co., 288 F.3d at 232 (where plaintiff "would not have been forced to replace the tower" but for the wrongful act of defendant, "evidence of the pre-collapse condition of the tower was irrelevant to the calculation of damages" and the proper measure of damages was the full cost of repair).

In the instant case, if the subgrade had been properly compacted, then after ten years, the homeowners, hypothetically, would have had ten years of use and enjoyment and an intact, level foundation for unlimited future years of enjoyment. As the compaction was improper and resulted in a cracked slab foundation, at the end of the same ten years of use, the homeowners in the Appellant class have had ten years of service, and/but they have cracked slabs that need repair. In both instances, there were ten years of use; but in the latter event, each homeowner is facing an eighty-thousand-dollar repair. See, e.g. Duke Power, 303 S.C. at 457, 401 S.E.2d at 196 (when a damaged product/component has an indefinite useful life, a court awarding damages "cannot say with a reasonable assurance that the installation of a new [product/component] d[oes] more than remedy the wrong done."). A damage reduction based on use incorrectly assumes that the homeowners in the latter scenario receive some betterment from the replacement of their slabs (i.e., a longer future slab life) – which is not true and has not even been argued. See, e.g., Id. ("An injured party should not be required to pay out money, as defendants' [past use analysis] would require, upon a questionable assumption that one day [the value of having a newer component] will be recaptured."). The ten years of use received by the homeowners who received the bad compaction job did not confer a benefit on them, and any offset based on that use ignores the structural reality of the components at issue and, in any case, that the Appellant bargained for a

proper compaction job and non-defective slab. Id. And, the only competent evidence showed that, contrary to recovering a benefit, the Homeowners will suffer an additional detriment of the inconvenience of displacement to permit a repair. To think that these unfortunate homeowners are coming out ahead in this is sheer fantasy. The fact that the homeowners' use and enjoyment of their property is being disrupted by the consequential damages of the bad compaction job must foreclose the unsupported damage reduction from being applied.

In addition to the foregoing, there is absolutely no support for the Trial Court's random statement in the amended introduction to the third damage holding, "While difficult to decipher what damage resulted from construction defects *resulting from Mundy's scope of work* and what *damage resulted from other factors* ...[.]"[47] There was not a shred of evidence at trial that any foundation damage resulted from wear and tear (or from any "other factors") – or that anyone else's scope of work caused any of the damage - how could it be difficult to decipher (*sic* - distinguish?) the different causative factors - there was only one presented at trial.

Creating precedent for essentially a "useful life" depreciation of damages (especially *sua sponte*, without evidence or facts) and including the years during which a case is pending is flatly ridiculous and would (1) chill settlements and (2) encourage delay in resolving construction defect lawsuits.

II) The Trial Court's Order Fails to Recognize That the Building Code Is the Minimum Standard Governing Construction Practices in South Carolina; and That It Is the Public Policy of This State to Protect Homeowners, Not Negligent, Sloppy, Site Contractors.

The building code sets a minimum standard of care for residential construction such that violation of the code is *per se* negligent. See Kincaid v. Landing Dev. Corp., 289 S.C. 89, 93, 344

[47] Again, amended text in italics.

S.E.2d 869, 872 (Ct. App. 1986) (violation of a building code is negligence per se when it has been adopted); Belfor USA Grp., Inc. v. Banks, No. 2:15-CV-01818-DCN, 2016 WL 3753218, at *7 (D.S.C. July 14, 2016) ("A building code violation can support a negligence per se claim."); See also Trustees of Cambridge Point Condo. Tr. v. Cambridge Point, LLC, 478 Mass. 697, 707, 88 N.E.3d 1142, 1151 – 52 (2018) ("A developer … not only is subject to the implied warranty of habitability but also must comply with the **minimum standards** prescribed by the building code."); Id. ("[The public policy of Massachusetts] [has] consistently recognized the rights of individuals to obtain legal redress when their homes fail to meet minimum standards. These rights—whether grounded in the implied warranty of habitability or in the building code … are so vital that we have consistently held that they cannot be waived."); Uebele v. Oehmsen Plastic Greenhouse Mfg., Inc., 125 Wis. 2d 431, 434–35, 373 N.W.2d 456, 458 (Ct. App. 1985) ("The express purpose and scope of the building code… is to protect the health and safety of the public by establishing **minimum standards** for the design, construction, and structural strength of all public buildings.") (emphasis added).

It is the public policy of this state to protect homeowners. See, e.g., Sapp v. Ford Motor Company, 386 S.C. 143, 148, 687 S.E.2d 47, 49-50 (2009) (acknowledging the "long line of South Carolina cases directed towards protecting consumers in only the residential context" as well as "cases from around the country expanding protections afforded to homebuyers"); Beachwalk Villas Condominium Ass'n, Inc. v. Martin, 305 S.C. 144, 146, 406 S.E.2d 372, 374 (1991) ("We find that extension of the holding in Kennedy to architects is a logical expansion of our law to provide protection for homebuyers. . ."); Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 343, 384 S.E.2d 730, 735-36 (1989) ("We have therefore taken judicial cognizance of the fact that a modern buyer of new residential housing is normally in an unequal bargaining position as against

the seller"); Terlinde v. Neely, 275 S.C. 395, 399, 271 S.E.2d 768, 770 (1980) (holding a subsequent purchaser of a home may pursue a cause of action in contract or tort against a developer because the court's "objective is to protect innocent purchasers from latent defects"); Rogers v. Scyphers, 251 S.C. 128, 135, 161 S.E.2d 81, 84 (1968) (holding public policy demands the imposition of a legal duty on a builder to refrain from constructing housing that is defective).

This Trial Court erred and failed to protect homeowners when it *sua sponte* reduced the homeowners' damages and failed to recognize and enforce the building code as the minimum standard against which slight care must be judged. Each and every contractor has their own independent duty to comply with the building code. 2003 & 2006 International Building Code, Sec. R113.1 ("Unlawful Acts: It shall be unlawful for any person, firm or corporation to... construct ... any building... in conflict with or in violation of any of the provisions of this code.") (emphasis added). Any person who constructs in violation of the approved construction documents (e.g., plans) violates the code and is subject to penalties. 2003 & 2006 International Residential Building Code, Sec. R.113.4 "Violative penalties."

III) The Trial Court Erred in Failing to Find Gross Negligence and Recklessness and in Expressly Finding a Lack of Gross Negligence.

There was only one reasonable inference from the evidence adduced at trial, the transcripts supplied post trial, and indeed, the facts as found by the Trial Court itself in the Amended Final Order on appeal – that Respondent was grossly negligent and reckless.

Although often used interchangeably, recklessness contemplates a slightly different situation than gross negligence; each is applicable to Respondent's Mundy's actions. While ordinary negligence is the failure to exercise "due care", gross negligence is "the failure to exercise slight care." Solanki v. Wal-Mart Store No. 2806, 410 S.C. 229, 237, 763 S.E.2d 615, 619 (Ct. App. 2014). "Gross negligence is a relative term, and means the absence of care that is

necessary under the circumstances." Steinke v. S.C. Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 395, 520 S.E.2d 142, 153 (1999) (internal citations omitted).

Recklessness, on the other hand, is the failure to use due care while conscious of the probability that injury will result (ordinary negligence plus awareness). Id. ("'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.'") (quoting Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011)). One can employ some care and still be reckless, provided that the care exercised was not reasonable under the circumstances (negligent) and the actor was conscious that injury was likely to result (awareness).

Alternatively, one can be ignorant of the potential for harm, but nonetheless be grossly negligent if he fails to exercise slight care. And, an actor who fails to exercise even slight care and is conscious of the potential for harm is considered both grossly negligent *and* reckless – as is the case with Mundy.

In failing to recognize the sole reasonable inference, the Trial Court ignored:

i. That the standard of care was established, and the violations of the building code and plans were detailed by an expert that the Trial Court found "knowledgeable, believable, and persuasive;" (R. p. 0038, Order)

ii. The permitted plans required that each six-inch "lift" or layer of dirt placed on the construction site must achieve a specified compaction criteria:

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

iii. It was undisputed that the only way to comply with this requirement was to perform testing;

iv. It was undisputed that no lifts were tested; that Respondent simply "eyeballed" its work;

v. And that this resulted in inadequate compaction and proximately caused the slab foundations to fault, incur differential settlement, and to damage the residences;

vi. That Respondent Mundy was at all times aware of the probability that the aforementioned harm would result from inadequate compaction;

vii. Besides violating the building code by failing to use engineered soils, the violation of the compaction directive in the permitted plans constituted an additional building code violation, on each lift for the eighty-six homes;

1. More specifically, there were actually two violations for each lift on each of the 86 homesites, resulting in hundreds and hundreds of violations;

viii. That these hundreds of building code violations were uncontradicted;

ix. That the additional overwhelming evidence was that the Respondent used unskilled, day laborers in the compaction of the building pads for these properties, and that this was "irresponsible;"[48]

x. That the only standard(s) of care in evidence was the requirement to comply with the permitted plans and the requirement to comply with the building code;

xi. That Respondent conceded these were the standards of care with which he was required to comply;

xii. As these were the only standards of care in evidence, that it was against these standards that the Respondent's possible "slight care" should be measured; and

xiii. That, having found that the Respondent was, at minimum, negligent under an ordinary negligence standard, Respondent's awareness of the likelihood of harm required a finding of recklessness as a matter of law;

b. The uncontroverted evidence adduced at trial was that Respondent knew and conceded it had to comply with the building code, knew and conceded it had to

[48] Although Respondent tried to paint a different story at trial, he was repeatedly brought back to his sworn deposition testimony.

comply with the permitted plans, but made absolutely no effort to do so, and never looked at the plans over a four-year period;

c. The Trial Court should have found that the systemic violation of the building code requirement that disturbed soils be engineered, and the systemic violation of the building code requirement that work be performed in accordance with the permitted plans; resulting in two or more building code violations per lift on each of the 86 residences, constituted gross negligence;

d. The uncontradicted evidence is that Respondent did not know what the compaction requirement that was contained in the permitted plans during construction[49] – so it was a physical impossibility for Respondent to use *some care* in attempting to comply with the compaction requirement, which required testing, when the Respondent never knew the required performance standard/requirement;

e. The uncontradicted evidence is that the building code required that disturbed soils under foundations to be "engineered," which requires testing. As the Respondent did not perform or arrange any testing whatsoever, it was a physical impossibility for Respondent to have used *some care* in attempting to comply with the engineered soil requirement, which required engineering;

f. The single inference of gross negligence and recklessness is further compelled by Mundy, Jr.'s soil compaction licensure test during the execution of these jobs, the passing of which evidenced that he knew how to comply with the permitted plans and building code, and *simply chose not to do so*; and

g. There is simply an absence of evidence to support a finding that Respondent used some care in properly compacting the building pad in compliance with the permitted plans and building code; and the failure to find gross negligence and recklessness and the express finding of no gross negligence, were all in error.

IV) Respondent's Fabrication to the Trial Court on One of the Most Important Factual Issues Further Compels the Trial Court Towards the Single Reasonable Inference.

Mundy, Sr.'s response to the Trial Court's single question - whether he knew of the 98% compaction plan requirement[50] during construction--was shown to be false. Mr. Mundy was asked by the Judge:

[49] The lack of forthrightness on this very important fact is addressed in more detail below.
[50] "ALL FILL SHALL BE PLACED IN 6 [INCH] LAYERS AND COMPACTED TO 98% MAXIMUM DRY DENSITY AT OPTIMUM MOISTURE." R. pp. 2480-2482, Ex. 949.

THE COURT: 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?

THE WITNESS: Yes. We were aware of it, yes.

(R. p. 1560, lns. 3-9, TR1.)

When confronted with his deposition transcript otherwise, Mundy, Sr. conceded three times that he had previously testified under oath that he did NOT know the compaction requirement when construction was ongoing:

THE COURT: You can because I opened that back up. Mr. Mundy, have a seat. They may have one more question for you because I made the mistake of asking you. I'm sorry about that. Thank you. I'll give you each one.

RECROSS-EXAMINATION:

BY MR. FLOYD:

Q Did I just hear you tell this court that you knew that this job site required 98 percent compaction and optimal moisture, that you knew that during construction?

A I would say yes.

Q Do you deny telling us under oath six weeks ago that you did not know what the compaction requirement was?

A Well, if I answered that that way back then, I would say it was no.

MR. ANDERSON: Objection, Your Honor.

THE COURT: Well, my question was it's been thrown about here and I just wanted to know. So he said no in a prior deposition?

MR. FLOYD: He said no, he did not know what the compaction requirements were six weeks ago.

MR. ANDERSON: Objection, Your Honor. May 13th is when his deposition was taken. That's not six weeks ago.

MR. FLOYD: Six days ago.

BY MR. FLOYD:

Q Just so we're clear on this court record. We have a court reporter taking down everything that's said here. You don't deny stating under oath at your deposition in May that you did not know what the compaction requirements were for this job while you were on that job site?

A Yes.

Q You do not deny it. Thank you, sir.

(R. p. 1561, ln. 2 – p.1562, ln. 8, TR1 (emphasis added).)

When his own counsel tried to walk him back to the false 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, TR1.) If a factfinder finds there is sufficient evidence to prove that a party's asserted justification for an action is false or unworthy of credence, the factfinder is entitled to

infer wrongdoing from that dishonesty. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (proof of pretextual or dishonest testimony permits adverse inference).[51]

V) Respondent Mundy's Negligence Must Be Measured Against the Duties Which He Breached – Namely, His Duty to Comply with the Building Code and Permitted Plans.

Against what standard of care/conduct should the question of slight care be measured? The only standards of care established at this trial were compliance with the building code and the permitted plans. There can be no doubt that no slight care was employed by Mundy to comply with either standard. However, were the Trial Court to find that Mundy's "eyeballing" the depth of his tire tracks indicated at least "slight care" in the operation his compactor (and mind you, there was no testimony to support this or any industry standard other than the building code and permitted plans), then Appellant still prevails on the question of aggravated conduct as it was shown that Mundy failed to use "due" care, and was cognizant[52] of the likely harm that would result from its failure to use due care.

The only evidence at trial of any standard of care was presented by Appellant with Dr. Whitlock's testimony. Dr. Whitlock testified that the building code and plan requirements

[51] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (holding that '"the factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.'" (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993)).

[52] Note that actual or constructive knowledge of the risk of harm should suffice. 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 of it.

established Mundy's standard of care with respect to his work. Respondent conceded that he was bound by the requirements of the building code and, therefore, implicitly agreed that it controlled his attendant duties and set the standard of care. Therefore, 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).

Mundy testified to using an eyeballing method to determine suitability of the pads for construction – this method does not show any slight care was exercised to comply with the testing requirements contained in the plans and building code. Measuring Mundy's work against the minimum standard set by the building code *requires* a finding of gross negligence on the part of Mundy as the facts are undisputed that he exercised *no slight care* to comply with the code or plans. See Will v. Elec. Contractors Examining Bd. of City of Erie, 168 Pa. Cmwlth. 535, 538 – 39, 650 A.2d 1226, 1227–28 (1994) (finding that gross negligence of a contractor is measured against the standards of care governing his work); See also Clyburn v. Sumter Cty. Sch. Dist. No. 17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994) ("Negligence is the failure to exercise due care, while gross negligence is the failure to exercise slight care.")

In addition to making no effort to comply with his admitted standard of care, the conscious, consistent, systematic, and repetitious nature of Mundy's violations cause his actions to rise above mere negligence. See Klairmont v. Gainsboro Rest., Inc., 465 Mass. 165, 177, 987 N.E.2d 1247, 1257 (2013) (Defendant's actions rose above "mere negligence" and thus constituted unfair trade practices where defendant knowingly violated the building code repeatedly and consistently for

years in an effort to save money by avoiding legitimate, permitted improvements to defendant's premises).

VI) Gross Negligence Must Be Found Where a Contractor/Subcontractor Knowingly Disregards the Building Code Applicable to His Trade.

The conscious failure to do something which is incumbent upon one to do is gross negligence under South Carolina law. Toney v. LaSalle Bank Nat. Ass'n, 896 F. Supp. 2d 455, 479–80 (D.S.C. 2012), aff'd, 512 F. App'x 363 (4th Cir. 2013) ("Gross negligence is defined as … the intentional, conscious failure to do something which it is incumbent upon one to do…") (internal quotations omitted). It is incumbent upon a builder or contractor to comply with the building code and the permitted plans. Kennedy, 299 S.C. at 346, 384 S.E.2d at 737 ("The Court of Appeals itself correctly recognized in Kincaid v. Landing Dev. Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct.App.1986) that a violation of a building code violates a legal duty for which a builder can be held liable in tort for proximately caused losses.").

A contractor, like Mundy, who does not read the building plans must be found guilty of gross negligence, because he cannot be said to have exercised *any* care to comply with those plans without *reading* them. Further, Respondent's knowledge of his duties as a sitework contractor and that it was incumbent upon him to follow the building plans demonstrate that his negligence was "conscious". (See R. pp. 0036-0039, April 14, 2020, Judgment and Order.)

VII) Because the Trial Court Erred in Failing to Find Gross Negligence or Recklessness, It Erred in Failing to Find that the Statute of Repose was Not Available to Mundy.

South Carolina Code Section 15-3-670 provides that the statute of repose is not a defense to any person guilty of recklessness or gross negligence. There is evidence that Mundy was guilty

of gross negligence and recklessness, which makes the defense of the statute of repose unavailable as to any of Appellant's claims involving the homes on Spencer Drive Extension.[53]

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. The inapplicability of the statute of repose was briefed in Appellant's opposition to Respondent's Motion for Summary Judgement, which was denied before trial by the Honorable Clifton Newman. This brief in opposition to the application of the statute of repose was resubmitted to the Trial Court during and after the trial.

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. (See, R. pp. 0927-1045, Appellants Memorandum in Opposition to Summary Judgment from the Spring of 2019 for further briefing on this matter, and the trial evidence of gross negligence and reckless conduct described elsewhere herein.)

VIII) Because the Trial Court Erred in Failing to Find Gross Negligence, It Erred in Failing to Consider and Award Punitive Damages.

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,

[53] Further, the Statute of Repose is not available to Mundy, because it covered up Appellant's causes of action. Additionally, Mundy's motion should be denied because the building permits do not contain the notice language that is a precondition for enforcing the eight (8) year statute of repose set forth in Section 15-3-640.

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.

IX) The Trial Court Further Erred in Failing to Find That the Foregoing Conduct Additionally Constituted a Breach of the Implied Warranty of Workmanship.

The foregoing described conduct clearly additionally constituted a breach of the implied warranty of workmanship, which law was briefed to the Trial Court in Appellant's jury charges submitted with Appellant's Pre-Trial Brief.[54] The Judgment should be amended to confirm this obvious result.

X) The Trial Court Erred in Limiting the Intervention to the Prosecution of this Appeal.

The Trial Court recognized the potential intra-class conflict that may have been created by its application of the statute of repose and granted intervention so that the barred class members could have a say in their rights. However, the Trial Court limited this intervention to this appeal – which makes no sense. The purpose of part of this appeal is to vacate the repose finding and procure an instruction to the trial Court to enter a full monetary judgment for the balance of the class. If the repose barred Appellants are successful, they should be permitted to continue on when the matter is returned to the Trial Court.

The background of the intervention is set forth in the original June 15, 2020, motion hearing transcript. (R. pp. 1670-1672, TR3 p. 7 to 9.) While Appellant's counsel immediately recognized

[54] Additional legal precedent as to many of the matters addressed herein was previously submitted to the Trial Court in the form of Appellant's jury charges, incorporated into Appellant's Pre-Trial Brief. R. pp. 1091-1096.

the potential for conflict resulting from the Original Order, Respondent's unsolicited, attempted tender of the full Judgment to the prevailing class members created a further conflict. As a practical matter, it was important to create an avenue whereby the two sub-classes could negotiate separately should the occasion arise, potentially allowing the prevailing class members to settle their claims while the barred claimants pressed their case. The considerations will be as important on remand as they are here and now, making it error to limit the grant of intervention to the prosecution of this appeal.[55]

CONCLUSION

The Appellant class carried and satisfied its burdens in this matter; the class put on a thorough, complete, and expeditious case. Respondent did the opposite. Frankly, Respondent barely put on a case, dismissing its expert before trial, not calling its most important witness (the LLR construction license holder, Mundy, Jr.), and failing to contradict 98% of Appellant's well-supported evidence. It is hard to comprehend why the Trial Court chose to protect Respondent's gross negligence and lack of defense, and minimize the judgment Respondent would suffer, when all the evidence and law mandated a substantial homeowner recovery for the entire victimized homeowner class. Perhaps the lapse of time between trial and judgment, due to a busy Court schedule, clouded the Trial Court's memory.[56] Whatever it may be, this is this Appellate Court's

[55] Intervenors Marianne Strohmeier and Barbara Von Bieberstein adopt the Appellant's Initial Brief and Designation of Matter.

[56] Perhaps the clouded memory is evidenced by the Court's statement in its February 4, 2020, email instruction, and resulting order, that there were two witnesses at trial. There were not two witnesses; there were eight witnesses heard by the Court. In addition to Dr. Whitlock, Appellant called four homeowners, including the class representative and called two construction site witnesses by deposition publication. Respondent called a single witness.

opportunity to correct the Trial Court's indefensible conclusions. Eighty-six homeowners are hoping this Court avails itself of this opportunity.

Appellant seeks an order of this Court amending the negligence finding to gross negligence and recklessness, vacating the repose ruling, vacating the "wear and tear" damage reduction, and entering judgment for Appellant actual damages after set off in the amount of $7,645,438.47, grant the $1,000,000 punitive damage award sought by the Appellant class, and instructing the Trial Court to enter judgment thereon, including pre and post-judgment interest.

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April 12, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

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

v.

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

CERTIFICATION FOR FINAL BRIEF OF APPELLANT

I, Justin O'Toole Lucey, of Justin O'Toole Lucey, P.A., do hereby certify that the Final Brief of Appellant complies with Rule 211(b), SCACR.

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