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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable J. Cordell Maddox, Jr.

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 MOTION FOR REHEARING

JUSTIN O'TOOLE LUCEY, P.A.

/s/Justin Lucey
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April 18, 2024

COMES NOW Appellant, above named, and moves for a rehearing on this Appeal. While the South Carolina Court of Appeal's Opinion issued on April 3, 2024, commendably reversed one of the damage reductions by the Trial Court, this Court overlooked/failed to rule upon several points raised by Appellant and misconstrued several others.

SUMMARY OF POINTS OVERLOOKED/NOT RULED UPON

This Court did not rule upon several material points raised by Appellant, including:

1. That the Trial Court committed a legal error when it substituted "intent" for "recklessness;"

2. That compliance with the building code is the standard of care against which the Respondent's conduct must be measured; and,

3. That systemic violations (hundreds over four neighborhoods constructed in four years) of either or both of the building code's requirements 1) that fill be engineered; and, 2) that plans be followed, constitute gross negligence or reckless disregard, generally, and in light of South Carolina's public policy of protecting homeowners.

SUMMARY OF POINTS MISCONSTRUED

This Court misconstrued or misstated several matters/issues, including:

1. That the Trial Court found against recklessness, when in fact, the Trial Court either failed to consider recklessness, or considered it utilizing the wrong legal standard;

2. That there was some evidence supporting slight care when the wrong baseline (standard of care) was employed by the Trial Court to judge slight care;

3. That there was no evidence in the record that Respondent was aware of the harm that would result from inadequate compaction, when in fact a) there was; 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;

4. That the Trial Court found evidence that the 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; and,

5. Failure to recognize that when this Court reviews an unsupported legal conclusion *de novo*, and the conclusion is contradicted by supported facts which must be taken as true as if there

is some evidence to support them, this Court should reverse the unsupported legal conclusion.

<u>PREDICATE STATEMENTS BY THIS COURT REQUIRING REHEARING</u>

The following statements in the April 3, 2024, Opinion are patently erroneous and led to further errors:

Predicate Statement One

> "[T]he record contains evidence from which the trial court could find Mundy's Construction exercised slight care[.]"

Napier v. Mundy's Constr. Inc., No. 2020-001103, 2024 WL 1434409, at *2, ¶1 (S.C. Ct. App. Apr. 3, 2024) (the "Opinion"). There is no evidence in the record that Respondent used slight care to comply with the standard of care required by law, which was the only standard of care adduced at trial. Prior to finding that Respondent exercised slight care, the Court should have ruled on the issue briefed at length by Appellant: "[t]the standard of care against which "slight care" or "due care" should be measured. (Ap. Reply Br. P. 1, ¶3.)

Predicate Statement Two

> "[T]he record does not contain any evidence Mundy's Construction was aware of the harm that would occur from inadequate compaction[.]"

(Opinion at *2, ¶1.) The Record does contain evidence that Mundy's was or should have been aware of the harm that would occur from not performing its work in compliance with the building code: inadequate support for the building for which the dirt is being compacted to support, resulting in post-construction settlement.

Predicate Statement Three

> "[A]nd 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."

(Opinion at *2, ¶1.) This statement contains two fallacies. First, the Trial Court made no finding as to whether Mundy's knowingly or consciously failed to exercise due care, which is the correct

definition of recklessness. The Trial Court did not make *any* findings as to recklessness. Instead, the Trial Court found that Mundy's had not acted with "intent," which has no bearing on whether Mundy's acted recklessly. Second, the Record does not contain any evidence — let alone evidence referenced by the Trial Court—that Mundy's failure to exercise due care was not knowing or conscious; rather, the evidence leads to the exact opposite conclusion. Indeed, the Trial Court would not have been looking for any such evidence because it erroneously equated intent with recklessness. Had the Trial Court been reviewing the record for recklessness, as it should have, several of the Trial Court's own explicit holdings can only be interpreted as a finding of conscious disregard.

Predicate Statement Four

> "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.")."

(Opinion at *2, ¶2.) The issue of whether a single violation of the building code constitutes gross negligence or recklessness was not pending before the Court.[1] The issue that was pending, which this Court did not rule on, was whether the systematic violations of the building code and permitted plans in this record constitute gross negligence and/or recklessness.

Predicate Statement Five

> "Accordingly, we affirm the Trial Court's finding that Mundy's Construction's actions were neither grossly negligent nor reckless."

[1] 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*).

(Opinion at *2, ¶2.) This Court erred in affirming a Trial Court conclusion that does not exist. The Trial Court erroneously substituted "recklessness" with "intent." (Order at R. pp. 0039-0040.)[2] The Trial Court never ruled on whether Mundy's conduct constituted recklessness, and its failure to do so is material because a finding of no recklessness is unsupported by the record.

DISCUSSION

The Opinion should be reheard, reconsidered, and amended for the following reasons:

I. This Court Failed to Address the Threshold Issue of the Trial Court's Erroneous Application of the Law as It Relates to Recklessness and the Statute of Repose

As briefed at length by Appellant, the Trial Court improperly substituted the word "intent" for "recklessness" when considering whether the exceptions to the Statute of Repose applied in this case:

> 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. […]

(Order at R. pp. 0039-0040, ¶¶4-5) (emphasis added). The exceptions to the Statute of Repose, however, do not list "intent." Rather, gross negligence, recklessness and fraud are each, independently, enumerated by South Carolina law as exceptions to the Statute of Repose:

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

[2] Hereinafter, the April 14, 2020, Order, as Amended by the July 20, 2020, Order (which essentially changed "use and depreciation" to "wear and tear"), shall be referred to as "Order."

S.C. Code Ann. § 15-3-670 (emphasis added). Appellant did not allege fraud or any other intentional conduct on the part of Respondent. For this Court to properly affirm the Trial Court's holding, it would have had to first conclude that "intent" does, in fact, equate to "recklessness." It did not reach any such conclusion, and such a conclusion would be contrary to South Carolina law. The Trial Court's legal conclusion was "an erroneous conception of the application of the law"[3] and that error went unaddressed by this Court.

II. Recklessness and Intent Are Not Synonymous and Require Different and Distinct Conduct

"Intent" is not enumerated in the Statute, and while "fraud" is an intentional tort, "recklessness" is not an intentional tort, nor is it synonymous with "intent" or "intentional." *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). At trial, Appellant did not allege that Respondent committed fraud or any other intentional tort; rather, Appellant showed that Respondent's conduct was *both* grossly negligent *and* reckless.

"Recklessness" and "intent" are not synonymous, either as used in the Statute at issue or generally in the law. 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). In fact, this Court 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

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

is erroneous since it equates recklessness with intentional action. This is erroneous and we so hold.”).

Because the Trial Court’s interpretation and application of the Statute were incorrect, it should have been reviewed *de novo* by this Court. *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 this Court reviews questions of law *de novo*.”).

III. Because of the Trial Court’s Erroneous Application of the Law, This Court’s Findings Affirming the Trial Court’s Conclusion on Recklessness Is an Impossibility and Cannot Be Substantiated by the Record

To sustain a finding of “no recklessness,” this Court had to consider the proper definition of the term “recklessness,” and look to the record to substantiate the Trial Court’s holding. This Court’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.

(Opinion at *2, ¶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 because it was instead looking for “intent.”

It is impossible for this Court 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. 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.

Both this Court's failure to consider and rule upon the Trial Court's legal error *and* this Court's affirming a holding that the Trial Court never made each independently require rehearing.

IV. The Conscious Failure to Exercise Due Care Was Established and Found by the Trial Court

The Trial Court's legal error in considering intent instead of recklessness was material because the lack of "due care" by Respondent was established during trial *and* the Trial Court found that Respondent knew what the standard of care was and further that Respondent disregarded that standard.

As briefed by Appellant, 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 established Mundy's standard of care with respect to his 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." (Order at R. p. 0039, Conclusion of Law ¶1) (*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**.

(Order at 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 in order to be reckless. The Trial Court additionally found that "[Respondent] **was aware** that the lifts were not being tested as they were installed." (*Id.* at 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 led to the Trial Court ignoring its own black and white findings which perfectly meet the definition of recklessness.

There is further discussion of additional evidence of conscious disregard and awareness of likely harm discussed further below.

V. There Was No Evidence That Respondent Exercised Slight Care to Comply with the Only Standards of Conduct Adduced at Trial

As previously briefed by Appellant:

> Appellant 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[4]; and the Plan requirement of 98% compaction.[5] 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. Reply Brief, pp. 11-12 (footnote omitted).)

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[4] 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.)

[5] "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).

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

In this case, Appellant advocates that the care used must be measured against the building code (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.

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 residential building code provides minimum standards for construction, just like the rules of the road provide the minimum constraints for operating a motor vehicle on public streets. Like most standards, rules and codes are developed by professionals to safeguard from injury/defect. Both driving and constructing require a license to perform the task; and both require education and testing on the rules/standards before the license is granted. Once the license is granted, the holder can engage in the licensed conduct, and he/she is expected and required to follow the rules.

Now imagine a licensed driver was passing a slower vehicle. However, the licensed driver passed the vehicle in the presence of double yellow (non-passing) lines - at night - without headlights. As he was going around a curve, another vehicle coming in the opposite direction spots the passing vehicle at the last second and swerves off the road to avoid the passing licensed driver, 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 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 there was no evidence that he was consciously disregarding the standards or the known risk? Absolutely not.

His required and tested knowledge for licensure proves that he knew the standards of care (for legality *and* safety) that he chose to disregard, causing an avoidable injury.

And it is and should be the same in construction: the known risk of not following a building code is failure. One does not need to anticipate the specific type or mode of failure 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.

Rather than address this point, this Court 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 (who was found "knowledgeable, believable, and persuasive" by the Trial Court) testified that proof rolling was not an acceptable substitute for testing in compliance with the Building Code or Permitted Plans. (TR1 at R. p. 1411, ln. 11 – TR1 at R. p. 1412, ln. 1.)

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

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

(Order at R. p. 0037, ¶11 (emphasis added).) This Court's apparent sanctioning of "eyeballing" in the rear-view mirror while sitting 20 feet away in the cab of a dump truck 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 the proper compaction cannot be achieved without the proper moisture content, which must be obtained by laboratory testing. (TR1 at R. p. 1406, ln. 13 – TR1 at R. p. 1410, ln. 23.) The significance and absence of moisture testing remained unaddressed by the Respondent throughout the trial.

VI. 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

This Court noted that a single violation of the building code does not necessarily constitute gross negligence or intent. (Opinion at fn. 3.) Appellant has never asserted otherwise. Appellant briefed at length that the *systemic* violations of the building code and permitted plans repeatedly 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 this Court 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).[6] What we have here, in contrast, is a Defendant/a licensed subcontractor who admittedly *knew* he was supposed to comply with the *minimum standards* contained in the building codes and plans (TR1 at R. p.

[6] 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).

1548, ln. 13 – TR1 at R. p. 1549, ln. 12); "habitually tried to follow and comply with the applicable building codes" (Resp't Br. at p. 20); but did not look at the construction plans *once* over the course of four years on this Project; did not know the compaction requirement in the plans; and engaged in conduct resulting in hundreds of building code violations and resulting 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 was admitted by Respondent during trial or in his Initial Brief, *inter alia*:

- Mundy agreed that he had a duty to comply with the building code. (TR1 at R. p. 1549, lns. 7-12.);
- Mundy knew that the building code required that the work be performed in compliance with the permitted plans. (Order at R. p. 0039, ¶32.);
- Mundy "always tried to follow and comply with the applicable building codes[.]" (Resp't Br. at p. 9.);
- Mundy knew that one could not move dirt or prepare a site without permitted plans, and "conceded that he failed to review site plans in the four (4) years the work took place on the Class Homes." (Order at R. p. 0039, ¶32.);
- Mundy admittedly used untrained day laborers to operate its compactor and did not know if anyone employed by Respondent was qualified to determine if compaction of the soils was properly performed. (Order at R. p. 0036, ¶6 and R. p. 0038, ¶31.);
- Mundy conceded that he (1) did not use engineered fill; and (2) knew that the lifts were not being tested as they were installed, each of which is a violation of the building code and permitted plans. (Order at R. p. 0037, ¶9.);
- Mundy admittedly did not know that the permitted plans required a 98% density compaction. (TR1 at R. p. 1561, ln. 9 – TR1 at R. p. 1562, ln. 8.); and,
- Mundy repeated this course of conduct in the site preparation for all 86 Class Homes over four years. (Order at R. pp. 0036, 0039; Resp't Br. at pp. 8, 11.)

The Trial Court's findings echo the foregoing. What results from the *above-conceded* facts are (conservatively) twelve (12) building code violations per building pad,[7] which equates to over **one thousand statutory violations committed by Respondent on the Project**, or over one thousand individual pieces of evidence that Respondent was grossly negligent and reckless. 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**." (Order at R. p. 0038, ¶22 (emphasis added).)[8]

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

[7] Dr. Whitlock testified that some lots had as much as 12 feet of fill on them and that there had been substantial cutting and filling through the area. (TR1 at R. p. 1411, ln. 20 – TR1 at R. p. 1412, ln. 8.) Both Dr. Whitlock and Respondent testified about it being a "balanced" site, that all the cut was reused as fill on the site (to avoid the cost of disposal). Using ¼ of the 12 feet of fill as the average fill to illustrate the number of violations occurring, a three-foot fill average would have six lifts per site, two building code violations for each lift (failure to use engineered fill and failure to comply with the permitted plans), 12 building code violations for 86 houses would be one thousand thirty-two (1,032) building code violations.

[8] Disregard is defined as "pay no attention to; to ignore."(oed.com, "disregard", accessed on 15 April 2024).

negligence or recklessness — and clearly it does. The facts of this case compel a finding of gross negligence or recklessness. Otherwise, this Court is casting adrift its former stated policy of protecting homeowners[9] and sending the wrong message to sloppy contractors.

VII. The Following Testimony by Respondent Is Dispositive

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

1. "can't build without a building permit." (TR1 at R. p.-1552, lns. 8-11);
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" (TR1 at R. p. 1553, lns. 11-16); and,
4. And "everyone knows the building code requires you to follow the permitted plans" (TR1 at 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." (TR1 at 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. (TR1 at R. p. 1563, lns. 8-9.)

You know that the plans contain the rules; and you know the building code requires that you look at the rules. With the foregoing knowledge, you fail to look at the rules for four straight years on four jobs. Conscious disregard is knowing you should do something but failing to do it, and that is what the foregoing constituted. How do you claim slight care, or deny conscious and reckless disregard? You can't.

Similarly, 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

[9] It is the public policy of South Carolina to protect homeowners. *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 624, 879 S.E.2d 746, 761 (2022), *reh'g denied* (Nov. 17, 2022), *cert. denied* (June 5, 2023), *cert. denied*, 143 S. Ct. 2581 (2023) (finding that severing the offending clauses within the contract of adhesion would violate South Carolina's public policy of protecting homeowners).

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).

A) 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:

1. 6) Defendant employed untrained day laborers to operate its compactor. (Order at R. p. 36, ¶6 .)
2. 9) Defendant was aware that the lifts were not being tested as they were installed. (Order at R. p. 0037**,** ¶9.)
3. 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. (Order at R. p. 0038, ¶22 (emphasis added).)

Dr. Whitlock's testimony regarding the "irresponsible" use of day laborers to operate the "compactor" — a fact which was conceded by Mundy's and included as a finding of fact by the Trial Court --- is notable.[10] This finding is notable because Merriam-Webster lists "reckless" as a synonym for "irresponsible" (merriam-webster.com, "irresponsible"). The 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

[10] At trial, Respondent attempted to dispute the use of 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. (TR1 at R. p 1556, ln. 19 – TR1 at R. p. 1557, ln. 20.)

and testing of one of the Respondent's principals, as clearly testified by Dr. Whitlock, shows Respondent knew how to do it right while they were continuously failing to do so. (TR1 at R. p. 1445, ln. 11 – TR1 at 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[11] studied to get his license warns of the risk of failure of inadequate compaction repeatedly. (*Id.*; Pl. Ex. 708 (Whitlock Report) R. pp. 1762-1766.) As documented by Dr. Whitlock's report, the commentary to Building Code Section R506.2 warns:

> …For concrete slabs placed on uncompacted fill … 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. (*Id.* at R. p. 1764) (emphasis in original).

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. *(Id.* at. R. pp. 1764-5.)

Dr. Whitlock when 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. *(Id.* at R. p. 1765.)

So, there were known risks that Respondent was, or should have been,[12] 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.

[11] Tony Mundy, Jr., was the Vice President of Respondent. (TR1 at R. p. 1527, ln. 14.)

[12] 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

VIII. 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 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*. (GEICO), 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).[13]

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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.

[13] "[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.

The Trial Court's legal conclusions ignored its own findings of established, uncontested facts, which well supported facts require reversal of the erroneous conclusions, for the reasons briefed herein.

IX. 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 Appellant previously briefed to this Court:

> 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.
>
> 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.

(App. Brief, pp. 35-36 (footnote and citation omitted).) Assuming this Court finds gross negligence and/or recklessness it its *de novo* review of the conclusion 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 application of the of repose, should be awarded in full by this Court.

X. 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 Appellant Briefed to this Court:

> 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.

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

CONCLUSION

How can one exercise slight care to comply with a rule that one doesn't know exists because one doesn't look at the rule book that one knows one is supposed to comply with? One can't. If you know you are supposed to look at the rule book, but you don't, can that be anything other than conscious disregard? No.

There were clear, simple, and very few "rules of the road" for Respondent to follow in the compaction of the Spencer Drive Extension neighborhoods; use skilled equipment operators to produce acceptable workmanship; use engineered fill; and test each six-inch lift to 98% dry density compaction. Respondent did none of these things, evidencing a lack of slight care to comply with the standard of care and reckless disregard for that standard. Respondent's Vice President's concurrent licensure study and testing evidence consciousness and a lack of proper care. The

numerous and flagrant omissions compelled a finding of gross negligence or recklessness at the Trial Court then, and in this Court now.

It does not take a careful reading of the Trial Court's post-trial order to perceive that the Trial Court overwhelming believed and emphasized with the case put on by the homeowners; the Trial Court was simply operating under a misunderstanding of its own "rules of the road," the legal standards that it was supposed to employ in evaluating Respondent's conduct.

This Court should amend its legal conclusions on 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 Appellant class for their full damages, including punitive damages.

JUSTIN O'TOOLE LUCEY, P.A.

/s/Justin Lucey
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SC Court of Appeals

April 18, 2024

VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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

Dear Ms. Kitchings:

Please find enclosed a check in the amount of $50.00, which represents the required filing fee for the ***Motion For Rehearing*** filed by Appellant on April 18, 2024, in the above-referenced matter.

Should you have any questions or concerns, please do not hesitate to contact me.

Best regards,

Lee Weiland
Paralegal

Enclosure
cc: All Counsel of Record