RECEIVED

Jun 21 2024

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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

APPELLATE CASE NO. 2024-001037
CIVIL ACTION NO. 2016-CP-02-00263

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

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

RESPONDENT,

versus

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

PETITIONER.

PETITION FOR WRIT OF CERTIORARI

David A. Anderson (S.C. Bar No. 11550)
Carmen V. Ganjehsani (S.C. Bar No. 73515)
James B. Robey, III (S.C. Bar No. 102452)
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
ATTORNEYS FOR PETITIONER MUNDY'S CONSTRUCTION, INC. d/b/a MUNDY CONSTRUCTION

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err in requiring a defendant to plead lack of proximate cause as an affirmative defense?

II. Did the Court of Appeals usurp the Trial Court's factfinding authority in an action tried without a jury where some evidence in the record supported the Trial Court's award of damages?

STATEMENT OF THE CASE

This action arises out of a residential construction defect lawsuit by a single homeowner acting individually and on behalf of the owners of eighty-six (86) townhomes located in the Spencer Drive Extension neighborhood of Aiken, South Carolina which were completed from 2005 to 2009.

On February 8, 2016, Plaintiff Robin Napier, individually and on behalf of all others similar situated, commenced a suit in the Aiken County Court of Common Pleas against multiple defendants. [R.pp. 49-63.] Plaintiff Napier eventually filed a Third Amended Complaint on July 28, 2017. [R.pp. 64-81.]

The Third Amended Complaint raised construction defect allegations against the general contractors and subcontractors/suppliers of the Spencer Drive Extension townhomes. The Third Amended Complaint generally alleged the townhomes contained latent building defects that, in combination with storms and other events, caused damages to the non-defective portions of the units. Specifically, the Third Amended Complaint alleged the defects permitted repeated water intrusion and differential settlement which resulted in damages to the framing, walls, windows, doors, roofing, siding, flashing, trim, and HVAC among other things. [R.pp. 67-75.]

Plaintiff Napier named Petitioner Mundy's Construction, Inc. d/b/a Mundy Construction ("Mundy Construction") as one of the subcontractor defendants. She alleged that Mundy Construction performed the site preparation work at one or more of the townhomes. [R.p. 72.]

Plaintiff Napier sought to maintain the suit as a class action pursuant to Rule 23 of the South Carolina Rules Civil Procedure and further asserted claims of negligence/gross negligence and breach of warranty against Mundy Construction and the other named defendants. [R.pp. 76-81.]

Mundy Construction answered the Third Amended Complaint on July 28, 2017. [R.pp. 82-90.] It denied the material allegations of the Third Amended Complaint, including that it was responsible for any construction defects or damages or that any damages to the townhomes were caused by any actions of Mundy Construction. [R.pp. 84-85.] It also asserted as a defense that the claims alleged in the Third Amended Complaint were barred by the Statute of Repose set forth in S.C. CODE ANN. § 15-3-640 *et al*. [R.p. 87.] Finally, Mundy Construction maintained that any damages suffered by Plaintiff Napier and those homeowners she sought to represent resulted from the acts of others, including the homeowners, and that the homeowners further failed to mitigate their damages. [R.pp. 85-86.]

On January 12, 2018, the Trial Court, over the objection of multiple defendants, certified the case as a class action pursuant to Rule 23, describing the class of homeowners (the "Homeowners") as follows:

> An opt-out class of all persons and entities that own structures located on New Haven Lane, Amity Lane, Bennington Lane, and Hillsborough Lane in Aiken, South Carolina, excluding the Defendants, their owners, members and employees; and further excluding any homeowner who has already filed a construction defect lawsuit or who has previously completely released these Defendants.

[R.pp. 1-20.]

All named defendants in the case eventually settled with the Homeowners except for Mundy Construction. [R.p. 1106.] The action between the Homeowners and Mundy Construction proceeded to a bench trial before the Honorable J. Cordell Maddox, Jr. on May 28 and 29, 2019 upon the agreement of the parties to waive a jury trial. [R.pp. 1565-66; 1570, ll. 13-22.]

The Trial Court heard the testimony of the parties' witnesses and received into evidence numerous exhibits submitted by both parties. Following the conclusion of the testimony, the Homeowners and Mundy Construction each submitted post-trial position statements to Judge Maddox. [R.pp. 1223-28; 1108-11.]

In the Homeowners' position statement, they contended Mundy Construction was grossly negligent in its site preparation work which allegedly resulted in differential settlement causing large cracks in the foundations of the townhomes. They further argued the eighty-six (86) Homeowners were entitled to a judgment of actual damages in the amount of $8,470,438.47 plus $1,000,000.00 in punitive damages less $1,825,000.000 in previous settlements paid for a net judgment of $7,645,438.47. [R.pp. 1226; 1228.]

Mundy Construction maintained in its position statement that it was not responsible for the alleged defects in the concrete foundation slabs and that at a minimum the evidence presented demonstrated that Mundy Construction performed its work with slight care. [R.p. 1110.] It also argued that South Carolina's Statute of Repose, S.C. CODE ANN. § 15-3-640, which requires a plaintiff to bring its action within eight (8) years of substantial improvement to real property, barred claims relating to sixty-two (62) of the eighty-six (86) townhomes in the class because the

lawsuit was filed more than eight years after substantial completion based upon the certificates of occupancy for those sixty-two (62) homes. [R.p. 1111.]

On April 14, 2020, the Trial Court filed its Final Order and Judgment. [R.pp. 35-41.] In its Final Order and Judgment, the Trial Court found Mundy Construction liable for negligence, but also determined that Mundy Construction's actions did not rise to the level of gross negligence or intent. [R.p. 39.]

The Trial Court further ruled that the Statute of Repose barred recovery for the sixty-two (62) townhomes with certificates of occupancy dated beyond the eight (8) year Statute of Repose time period. Therefore, only the homeowners of twenty-four (24) units were entitled to any recovery. [R.p. 40.]

In calculating damages, the Trial Court determined that the maximum repair cost the Court would consider awarding for the twenty-four (24) units remaining in the case based upon the evidence presented was $1,750,177.00 plus a loss of use amount of $461,511.00. Noting that it was difficult to decipher what damage resulted from construction defects and what damage occurred from the years of use of the townhomes and depreciation, the Trial Court reduced the amount of actual damages awarded to the remaining class members to $240,000.00. The Trial Court did not award any punitive damages, finding no gross negligence or intent on the part of Mundy Construction. Accordingly, judgment was entered against Mundy Construction in the amount of $240,000.00. [R.p. 40.]

The Homeowners moved for reconsideration of the Trial Court's award of damages on April 24, 2020. [R.pp. 1232-46.] On July 20, 2020, the Trial Court denied the Homeowners'

Motion to Reconsider, but amended its statement regarding its award of reduced damages to the following:

> While difficult to decipher what damage resulted from the construction defects associated with Mundy's scope of work and what damage resulted from other factors, the Court finds that 14 years' worth of general wear and tear in conjunction with exposure to other elements further reduces the amount of damages attributable to Defendant Mundy Construction.

[R.p. 42.]

The Homeowners filed and served their Notice of Appeal with the Court of Appeals on or about July 30, 2020. After hearing argument on October 11, 2023, the Court of Appeals issued its Opinion on April 3, 2024 affirming in part, reversing in part, and remanding for further proceedings. The Court of Appeals held that the Trial Court did not err in finding that Mundy Construction was not grossly negligent and that therefore, the Statute of Repose barred recovery for sixty-two (62) of the townhomes. See Opinion No. 2024-UP-114.

The Court of Appeals, however, determined that the Trial Court's award of damages was not supported by the evidence and that additionally, under Rule 8(c), SCRCP, a defense such as wear and tear had to be affirmatively pled as an avoidance defense. The Court of Appeals accordingly reversed and remanded the Trial Court's calculation of damages, directing the Trial Court to recalculate damages "excluding any reduction for wear and tear."

Mundy Construction petitioned the Court of Appeals on April 18, 2024 for a rehearing of its holding that the Trial Court's damages award was not supported by the evidence and that any wear and tear defense was an affirmative defense that had to be pled under Rule 8(c). The Homeowners also petitioned the Court of Appeals for a rehearing of its holding that the Trial Court had not erred in finding that Mundy Construction was not grossly negligent and that the Statute of

Repose barred recovery for sixty-two (62) townhomes. The Court of Appeals denied both petitions for rehearing on May 22, 2024.

Mundy Construction now files this Petition for Writ of Certiorari with this Court seeking review of the Court of Appeals' reversal and remand of the Trial Court's damages award.

STATEMENT OF FACTS

This class action lawsuit arises out of the development and construction of a patio home community located off of Spencer Drive Extension in Aiken, South Carolina (referred to hereafter as the "Community"). The Community consists of eight-six (86) homes and spans the following streets: New Haven Lane, Amity Lane, Bennington Lane, and Hillsborough Lane. [R.p. 35.] The townhomes are all single-family, zero lot line, vinyl siding homes that sit on concrete slab foundations approximately four inches thick supported by the soil underneath. Each building or unit includes three homes. [R.pp. 1574, ll. 16-19; 1575, ll. 7-12.]

ATC Development Corporation ("ATC") and its related entities served as the developer and general contractor for the Community. [R.pp. 1582, ll. 1-17; 1500, ll. 5-7.] The homes were built between 2005 and 2008. [R.pp. 1577, l. 18 – 1578, l. 6.]

Mundy Construction was retained by ATC to perform site work on an hourly basis at the Community. Mundy Construction is a local, family owned business operated by the father-son duo of Tony Mundy, Sr. and Tony Mundy, Jr. [R.p. 1527, ll. 8-14.] The father, Tony Mundy, Sr., started the company after serving in the Georgia National Guard Armory from 1964-1970 and then working as a firefighter with the City of Augusta, Georgia for the following twenty-seven years. [R.pp. 1524, l. 10 – 1525, l. 7.] After retiring from the fire department, Mundy, Sr. was employed by a company to remove underground storage tanks. Eventually, he went into the full-time

business of removing tanks himself and purchased his own equipment. [R.p. 1526, ll. 7-25.] He started the company, Mundy Construction, in the early 1990s. [R.p. 1527, ll. 1-2.]

Mundy Construction is located in Harlem, Georgia, and the company stores its equipment on some property in Aiken County. [R.pp. 1523, l. 18; 1527, ll. 3-7.] The company initially started out providing services for underground tank removal and eventually added demolition work for the City of Augusta as well as land clearing and hauling services. [R.p. 1527, ll. 17-25.]

During the construction of the Community, Mundy Construction rented equipment to the general contractor, ATC. [R.p. 1537, ll. 5-10.] Mundy Construction also provided land clearing services for the project, using its excavator to clear the land of trees and other materials. ATC assisted Mundy Construction with that work, using its own crew and its skid steer and backhoe. [R.p. 1528, ll. 6-20.]

Mundy Construction also performed compaction of the building pads for the Community homes. In his trial testimony, Mundy, Sr. described the process for performing this work. The developer, ATC, and the site engineer, Hal Trotter of Hallum, LLC, would have a surveyor stake off the areas for which pads were needed. The areas were staked off and measured to the height desired. In some areas, dirt from the high sides of the streets would have to be cut down and moved to the low sides to balance and level the site. [R.pp. 1529, ll. 6-16; 1535, ll. 15-16.]

According to Mundy, Sr., he drove a dump truck while his son operated the excavator, loading the dirt into the dump truck. Mundy, Sr. would then move the dirt to the pad while another subcontractor, Maddox Construction, would grade the dirt on the pad with a bulldozer. Mundy Construction would then use a packer to pack the dirt on the pad. [R.pp. 1529, l. 17 – 1533, l. 14.]

Mundy, Sr. testified that he conducted inspections on the pads. When a load of dirt had been spread and packed, he would observe his tread depth over the pad to determine whether it needed more compaction before the next load was spread and packed. He would use a process known as "proof roll" where a dump truck is slowly moved over the pad. If the soil moves at all, then the soil is not compacted. Mundy, Sr. testified that he always used this field test to determine whether the soil was compacted. [R.pp. 1535, l. 17 – 1536, l. 13; 1558, ll. 7-16.]

Mundy, Sr. further testified that the general contractor, the superintendent, and an engineer were on site observing, supervising, and instructing his compaction of the pads and that occasionally inspectors from the City of Aiken were also on site while he was working. [R.pp. 1536, ll. 14-20; 1548, ll. 1-9.] He also testified that Mundy Construction was never tasked with testing soil samples. [R.p. 1541, ll. 4-6.] According to Mundy, Sr., his company always tried to follow and comply with the applicable building codes, and he believed he was performing properly under the guidance from ATC, the site superintendent, the site engineer, and the City of Aiken to make sure his company was following the code. [R.pp. 1548, ll. 13-18; 1549, l. 10; 1553, ll. 6-7, 19-20.]

Evidence submitted to the Trial Court showed that Mundy Construction was not expected to, nor compensated to perform any additional examination of the compaction of the soils. Sherwood R. "Woody" Belangia, the owner of ATC, completed a work experience affidavit that averred that with respect to the development and construction of the Community, he "functioned as the general contractor in fact, performing all the tasks associated with that title: [ ] supervision of all site work including grading and underground utilities, . . . performing field audits and

quality assurance inspections, ordering inspections, [and] ensuring regulatory compliance." [R.pp. 3089-90.]

Kenny Gordon of Maddox Construction, the other site preparation subcontractor for the Community, testified that Mundy Construction was not responsible for conducting any specific compaction testing, other than the proof rolling it did on site, and that such additional compaction testing was handled and coordinated by ATC who would retain geological engineers for such testing. [R.pp. 1702, ll. 5-15; 1707, ll. 8-11; 1708, ll. 14-17.] He also confirmed Mundy, Sr.'s testimony that the general contractor always had someone on site while work was being performed. [R.pp. 1703, ll. 2-4; 1704, ll. 15-17; 1705, l. 18 – 1706, l. 13.]

Hal Trotter of Hallum, LLC, the site superintendent for the project, also confirmed in his testimony that Mundy Construction was not responsible for coordinating or conducting specific soil and compaction testing and that ATC coordinated such testing for the Community. [R.pp. 1690, l. 17 – 1691, l. 14; 1692, ll. 7-10; 1693, ll. 12-20; 1500, ll. 10-13.]

Daniel K. Rickabaugh, P.E., the engineer who prepared the plans for the construction of the Community, issued a letter on March 31, 2009 to SC DHEC that based upon his visit to the Community after completion of construction, he determined the site was "considered to have reached final stabilization" and that construction complied with the approved plans. [R.pp. 3100; 1500, ll. 8-9.]

The invoices from Mundy Construction to ATC showed that Mundy Construction rented equipment to ATC and performed tank removal, demolition, and land clearing services to ATC on an hourly basis. [R.pp. 1536, l. 21 – 1537, l. 17; 2834-84.] Mundy, Sr. testified these were the primary services Mundy Construction provided to ATC. [R.p. 1537, ll. 15-17.] Mundy

Construction was paid approximately $278,000.00 total for its site work performed for approximately four years from March 2005 through February 2009. [R.pp. 36; 1538, ll. 4-15; 2885-87.]

The Homeowners offered Dr. Rhett Whitlock as a geotechnical expert at trial. The Homeowners claimed at trial that cracking and differential movement was taking place in the concrete foundations, or slabs, upon which their homes were built. The Homeowners presented evidence that differential movement occurs when portions of an otherwise fixed slab foundation move in different directions causing cracking. They further showed that the slabs were sinking at different rates due to inadequate soil support and that this movement was causing cracking in the concrete slabs as one side of the slab subsided quicker than the other. Whitlock opined the inadequate soil support was caused by inadequate compaction of the soils during site preparation. [R.pp. 35-37.]

On cross-examination, Whitlock acknowledged that he never observed any work performed by Mundy Construction on the project site. [R.pp. 1489, l. 22 – 1490, l. 2.] Whitlock further acknowledged that every newly constructed home will experience some degree of settlement, and that every concrete pad poured, even under the best of circumstances and under the best type of platform, can experience cracking. [R.pp. 1496, ll. 12-18; 1498, ll. 11-15.] He also conceded that cracks can be caused by improper concrete which was found on the construction site. [R.pp. 1497, ll. 3-14; 1501, l. 18 – 1502, l. 16.]

Whitlock also acknowledged that South Carolina does experience multiple minor earthquakes each year and further acknowledged, after questioning, that a 4.1 magnitude earthquake occurred near Edgefield, South Carolina on February 14, 2014. [R.pp. 1512, l. 11 –

1513, l. 22.] He further conceded that some damage to door frames in the townhomes could occur from the slamming of doors. [R.pp. 1456, l, 11; 1461, ll. 24-25; 1514, ll. 13-17.]

Numerous exhibits were submitted to the Trial Court for his consideration in rendering a decision on the Homeowners' claims. The Trial Court was provided hundreds of photographs of the conditions of the units at issue. [R.pp. 2484-2529; 2789-2833.] The Homeowners provided a cost of repairs estimate to the Trial Court for all eighty-six (86) units for a total of $8,470,438.47 or a cost of repair of approximately $98,000.00 per unit. [R.pp. 2468-79.] The Trial Court also had before it evidence that Whitlock's repair protocol, upon which the estimated costs of repairs was based, had not actually been used by any home in the Aiken neighborhood at issue in this case. [R.pp. 1521, l. 24 – 1522, l. 15.]

Mundy Construction also provided the Trial Court with appraisal values from a sampling of the townhomes showing market values of the homes ranging between $87,000.00 and $112,000.00 in October 2018. [R.pp. 2978-3080.]

Finally, the Trial Court was presented with the Certificates of Occupancy for the units which showed that sixty-two (62) units were issued Certificates of Occupancy before February 8, 2008 and that twenty-four (24) units were issued Certificates of Occupancy on or after February 8, 2008. [R.pp. 2888-2977; 2810.]

In its Final Order, the Trial Court found that Mundy Construction had not complied with the plans and applicable building codes in compacting the soils of the building pads, including the requirement that fill shall be placed in 6 inch layers and compacted to 98% maximum dry density at optimum moisture. Therefore, the Trial Court found Mundy Construction liable for negligence. [R.pp. 36-39.]

The Trial Court, however, determined that the evidence presented did not prove that Mundy Construction was grossly negligent or acted with intent. [R.p. 39.] Additionally, the Trial Court ruled that the Statute of Repose barred recovery of damages for sixty-two (62) of the units which were issued Certificates of Occupancy dated outside of the Statute of Repose time period. [R.p. 40.]

Finding that only twenty-four (24) units were entitled to the recovery of any damages, the Trial Court determined that the most damages which could be awarded based upon evidence presented by the Homeowners was $2,211,688.00 ($1,750,177.00 in repair costs plus $461,511.00 for loss of use). [R.p. 40.]

Determining however that it was difficult to decipher what damage resulted from the construction defects associated with Mundy Constructions's scope of work and what damage resulted from other factors, the Trial Court found that years' worth of general wear and tear in conjunction with exposure to other elements reduced the amount of damages attributable to Mundy Construction. Accordingly, the Trial Court awarded damages to the Homeowners in the amount of $240,000.00. [R.pp. 40; 42.]

The Court of Appeals, while upholding the Trial Court's conclusion that Statute of Repose barred recovery for sixty-two (62) of the units, reversed and remanded for recalculation the Trial Court's award of damages, and Mundy Construction seeks this Court to review that error of the Court of Appeals.

ARGUMENT

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

The Opinion of the Court of Appeals radically alters the law on affirmative defenses, effectively requiring all defendants to plead a lack of proximate cause and prove such even though proximate causation is a plaintiff's burden to meet. The Court of Appeals' Opinion also usurps a trial court's factfinding ability in an action tried without a jury and improperly substitutes its own decision-making for that of the trial court, contravening previously well-established standards of review. Based upon Rule 242(b), SCACR and the reasons set forth herein, Mundy Construction respectfully requests this Court to grant this Petition to review and correct the Opinion of the Court of Appeals which erroneously reversed the Trial Court's damages award in this case based upon fundamental misconstruction of applicable law.

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

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

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

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

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

Therefore, an affirmative defense asserts that even if the allegations in the plaintiff's complaint are true, "the plaintiff cannot prevail because there are additional facts that permit the defendant to avoid legal responsibility." See Am. Cyanamid Co. v. St. Louis Univ., 336 F.3d 307,

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

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

In any negligence action, the plaintiff bears the burden of proving not only duty and breach of duty, but also that the defendant proximately caused the plaintiff's injury. The element of proximate cause is an element of the plaintiff's case for which the plaintiff has the burden of proof. The lack of proximate cause is not an affirmative defense that a defendant is required to plead since a defense that the defendant's actions or inactions were not the proximate cause of the

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

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

Other jurisdictions have also held that it is sufficient for a defendant to defend against a plaintiff's claim of proximate cause under a general denial in the answer without asserting such as an affirmative defense. See Clement v. Rousselle Corp., 372 So.2d 1156, 1158 (Fla. Dist. Ct. App. 1979) (observing proximate cause is requirement of the plaintiff's cause of action that can be put

at issue by the defendant through a general denial). "[I]n a negligence action, the defendant is always free to argue that something other than its own negligence is wholly responsible for the plaintiff's injury, irrespective of whether it has pled that theory as an affirmative defense." Bauer v. J.B. Hunt Transp., Inc., 150 F.3d 759, 763 (7th Cir. 1998).

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

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

The Court of Appeals' holding that Mundy Construction was required to affirmatively plead wear and tear as a defense under Rule 8(c) in effect requires Mundy Construction to affirmatively plead lack of proximate cause. But proximate cause is the plaintiff's burden, and a defendant has the right to present evidence showing that some other causative factor was the proximate cause of the plaintiff's injuries even without having affirmatively pled so. See Robinson,

930 N.E.2d at 1094; O'Neal, 279 S.C. at 494, 309 S.E.2d at 779. Accordingly, Mundy Construction asserts that the Court of Appeals misconstrued the lack of proximate cause with an affirmative or avoidance defense, which the Court of Appeals also erroneously believed required the Trial Court to perform an accounting. The Court of Appeals' holding fundamentally alters the operation of an affirmative defense. Under Rule 8(c) and case law precedent, Mundy Construction was not required to plead wear and tear in conjunction with exposure to other elements as an affirmative defense.[1]

II. The Trial Court's award of damages was supported by some evidence in the record which, under the applicable standard of review, the Court of Appeals had no authority to reverse; the Court of Appeals furthermore failed to consider all evidence supporting the award.

Mundy Construction also asserts that the Court of Appeals did not properly apply the required standard of review in reversing the Trial Court's award of damages. In an action tried by the trial judge without a jury, "[t]he trial judge has considerable discretion regarding the amount of damages." Mellen v. Lane, 377 S.C. 261,275-76, 659 S.E.2d 236, 243-44 (Ct. App. 2008) (internal citation omitted). "Because of this discretion, [the appellate court's] review on appeal is limited to the correction of errors of law. [The appellate court's] task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award." Id. (internal citation omitted).

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

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

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

That the Court of Appeals may have disagreed with the Trial Court's characterization and view of the evidence presented at trial does not mean that some evidence as to wear and tear in conjunction with exposure to other elements did not exist at trial. The Homeowners' expert was cross-examined about his repair estimate, questioned about his methodology, and asked about causation of the Homeowners' damages. He conceded that settlement cracks could occur under the best conditions, that cracks can be caused by improper concrete which was found on the construction site, and that seismic activity, which had recently occurred in the area, can cause cracks. The Homeowners' expert also agreed that general use of the homes, such as slamming of doors, could cause cracks. [R.pp. 1456, 1461, 1490-92, 1494-98, 1501-02, 1512-14.]

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

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

Mundy Construction presented to the Trial Court evidence of the units' appraisal values from a sampling of the townhomes showing market values of the homes ranging only between $87,000.00 and $112,000.00 in October 2018. [R.pp. 2978-3080.] The appraisals also showed there was either an increase in value from when the homes were either first sold or sold in the early 2010s or only a very slight decrease in value. For example, 138 Hillsborough Lane was appraised at $87,000.00 in October 2018 and was purchased in August 2008 for $96,610.00 therefore showing a decrease in value of only $9,610.00 [R.pp. 2978-79, 2981]; 144 Bennington Lane was appraised at $87,000.00 in October 2018 and was purchased in February 2008 for $94,200.00 therefore showing a decrease in value of only $7,200.00 [R.pp. 3013-14, 3016]; 231 New Haven Lane was appraised at $87,000.00 in October 2018 and was purchased in March 2011 for $85,000.00 therefore showing an increase in value of $2,000.00 [R.pp. 3030-31, 3033]; 116 Amity Lane was appraised at $96,700.00 in October 2018 and was purchased in June 2007 for $88,000.00

therefore showing an increase in value of $8,700.00 [R.pp. 3047-48, 3050]; and 110 Amity Lane was appraised at $112,000.00 in October 2018 and was purchased in May 2007 for $104,900.00 therefore showing an increase in value of $7,100.00. [R.pp. 3064-65, 3067.]

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

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

The evidence presented to the Trial Court showed that the estimated repair costs exceeded or were close to the value of the units and were well above any depreciation in value. "[D]amages

for defective construction, whether those damages are the result of a breach of contract or negligence of the contractor, [may be] determined by measuring the cost of repairing or restoring the damage, *unless the cost of repair is disproportionate to the property's probable loss of value*." John Thurmond & Assoc. Inc. v. Kennedy, 668 S.E.2d 666, 668 (Ga. 2008) (emphasis added). When the latter is the case, damages may be measured by the diminution in value of the property. Id.

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

The Court of Appeals did not address in its Opinion or in its order denying the petition for rehearing this additional evidence which supported the Trial Court's $240,000.00 damages award. The appraisal evidence is competent evidence in this record which should not be disregarded. Accordingly, for this additional reason, Mundy Construction maintains that the damages award comports with the any evidence standard and should not have been reversed by the Court of Appeals.

CONCLUSION

For the reasons set forth herein, Petitioner Mundy Construction respectfully requests that the Court grant its Petition for Writ of Certiorari to review the Court of Appeals' reversal of the Trial Court's award of damages and reinstate the damages award.

Respectfully submitted,

/s Carmen V. Ganjehsani
David A. Anderson
S.C. Bar No. 11550
Carmen V. Ganjehsani
S.C. Bar No. 73515
James B. Robey, III
S.C. Bar No. 102452
RICHARDSON, PLOWDEN & ROBINSON, PA
1900 Barnwell Street (29201)
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
ATTORNEYS FOR PETITIONER MUNDY'S CONSTRUCTION, INC. d/b/a MUNDY CONSTRUCTION

June 21, 2024.