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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,

PETITIONER-RESPONDENT,

versus

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

RESPONDENT-PETITIONER.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals properly apply the any evidence standard of review in affirming the Trial Court's ruling that the Statute of Repose barred recovery for the sixty-two townhomes which were completed more than eight years prior to the filing of this action where evidence in the record supported a finding that the gross negligence and recklessness exceptions did not apply to negate the statute's bar?

COUNTERSTATEMENT 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 which raised construction defect allegations against the general contractors and subcontractors/suppliers and 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. 64-81.]

Plaintiff Napier named Respondent-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 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 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. The class is hereinafter referred to as the "Homeowners." [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 therefore 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. The Trial Court indicated to the parties that he did not want any actual damages award to exceed the value of any Homeowners' property. [R.p. 3123.] 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. [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 ruling that Mundy Construction was not grossly negligent or reckless and that therefore, the Statute of Repose barred

recovery for sixty-two (62) of the townhomes. The Court of Appeals concluded the record contained evidence which showed Mundy Construction exercised slight care. The Court of Appeals further held that the record did not contain any evidence Mundy's Construction was aware of the harm that would occur from inadequate compaction, and the record additionally contained evidence from which the Trial Court could find Mundy's Construction's failure to exercise due care was not knowing or conscious. 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."

The Homeowners 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 or reckless and that the Statute of Repose barred recovery for sixty-two (62) townhomes. Mundy Construction also 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 Court of Appeals denied both petitions for rehearing on May 22, 2024.

On June 21, 2024, Mundy Construction filed a 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. The Homeowners also filed a Petition for Writ of Certiorari with this Court seeking review of the Court of Appeals' opinion that the Trial Court had not erred in finding that Mundy

Construction was not grossly negligent or reckless and that the Statute of Repose barred recovery for sixty-two (62) townhomes. Mundy Construction responds to the Homeowners' Petition and respectfully requests this Court to deny their Petition for the reasons set forth herein.

COUNTERSTATEMENT 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 or ensuring testing was performed. [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 before 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 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 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 agreed, 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. [R.pp. 2888-2977; 2810.]

In its Final Order, the Trial Court found 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.] The Trial Court thus ruled that the Statute of Repose barred recovery for the sixty-two (62) 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.]). 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.] 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 determined the evidence in the record supported the finding that Mundy Construction was not grossly negligent or reckless and that the Statute of Repose barred recovery for sixty-two (62) of the units. The Homeowners now challenge that holding.

ARGUMENT

Under Rule 242(b) of the South Carolina Appellate Court Rules, "[a] writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." The following factors indicate the character of reasons which the Court will consider in granting a petition for writ of certiorari:

> **(1)** Where there are novel questions of law.
>
> **(2)** Where there is a dissent in the decision of the Court of Appeals.
>
> **(3)** Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
>
> **(4)** Where substantial constitutional issues are directly involved.
>
> **(5)** Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Id.

The Homeowners' Petition does not present any of the above factors or contain any other special or important reason as to why this Court should grant its Petition. The applicable standard of review required the Court of Appeals to leave the Trial Court's rulings undisturbed if any evidence in the record supported the rulings below. The Trial Court, sitting as the factfinder in the bench trial of this case, determined that the Statute of Repose barred recovery for sixty-two (62) of the units dated beyond the repose period because the actions of Mundy Construction did not rise to the level of gross negligence or intent to defeat the bar imposed by the State of Repose. The Trial Court judged the credibility of the witnesses and weighed the evidence presented, and the evidence in the record supports the Trial Court's decision. In reviewing the Trial Court's decision, the Court of Appeals properly adhered to the long-standing appellate standard of review. That the Homeowners dispute the decision of the factfinder and seek a third bite of the apple for another review of the evidence does not warrant consideration by this Court. The only pertinent question presented by the Homeowners' Petition is whether any evidence in the record supports the Trial Court's decision to apply the Statute of Repose to bar recovery for sixty-two (62) units. The answer is resoundingly yes, and for that reason, the Homeowners' Petition does not raise any special or important grounds meriting review by this Court.

I. The Court of Appeals properly applied the any evidence standard of review in affirming the Trial Court's ruling that the Statute of Repose barred recovery for the sixty-two townhomes which were completed more than eight years prior to the filing of this action where evidence in the record supported a finding that the gross negligence and recklessness exceptions did not apply to negate the statute's bar.

Mundy Construction presented evidence that sixty-two (62) of the eight-six (86) townhomes at issue in this class action were issued Certificates of Occupancy prior to February 8, 2008. [R.pp. 2888-2977; 2810.] This class action suit was filed on February 8, 2016, more than

eight years after the completion of these sixty-two (62) units. [R.pp. 49-63.]

The Trial Court therefore determined that South Carolina's Statute of Repose barred the recovery of damages for these sixty-two (62) units because the statute required the Homeowners to bring their action within eight (8) years of the substantial improvement to real property. S.C. CODE ANN. § 15–3–640. [R.p. 40.] The parties do not dispute that sixty-two (62) units were completed more than eight years before the lawsuit was brought on February 8, 2016. The Homeowners, through their counsel, conceded to the Trial Court that the Statute of Repose would bar recovery for the sixty-two (62) units unless they could prove that the gross negligence exception set forth in S.C. CODE ANN. § 15-3-670(A) applied. [R.pp. 1577, l. 18 – 1578, l. 16.] Section 15-3-670(A) provides in part:

> 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.

§ 15-3-670(A) (emphasis added).

The Trial Court, sitting as the factfinder in this case, did not find that the actions of Mundy Construction rose to the level of gross negligence or intent and therefore concluded that § 15-3-670(A) did not prohibit Mundy Construction from asserting the Statute of Repose as a defense. [R.pp. 39-40.] On appeal to the Court of Appeals, the Homeowners argued that the Trial Court erred in failing to find gross negligence or recklessness.

The South Carolina courts have held that gross negligence is the "intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally

that one ought not to do." Clyburn v. Sumter County Sch. Dist. No. 17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994); see also Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 331-32, 566 S.E.2d 536, 544 (2002) (stating gross negligence "is the failure to exercise even the slightest care"). "Where a person is so indifferent to the consequences of his conduct as not to give slight care to what he is doing, he is guilty of gross negligence." Staubes v. City of Folly Beach, 331 S.C. 192, 205, 500 S.E.2d 160, 167 (Ct. App. 1998). Gross negligence "means the absence of care that is necessary under the circumstances." Plyler v. Burns, 373 S.C. 637, 651, 647 S.E.2d 188, 196 (2007) (internal citation omitted).

The fact that more might have been done does not negate a finding an actor exercised at least slight care. Pack v. Associated Marine Insts., Inc., 362 S.C. 239, 246, 608 S.E.2d 134, 138 (Ct. App. 2004); see also Etheredge v. Richland Sch. Dist. I, 341 S.C. 307, 311-12, 534 S.E.2d 275, 277-78 (2000) (holding where defendant had no knowledge of animosity between students, and principal and security monitored hallways, the fact that school district might have done more did not negate the fact it exercised slight care for purposes of determining whether the gross negligence exception to the Tort Claims Act was applicable).

The evidence presented to and considered by the Trial Court, sitting as the factfinder, supports the finding that Mundy Construction's actions were not grossly negligent or anything more. The standard of review is critical here. "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 citation omitted). An appellate court may not "disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings." Id. (internal citation omitted); see also Townes Assocs., Ltd. v. City of

Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976), *abrogated on other grounds by* In re Estate of Kay, 423 S.C. 476, 816 S.E.2d 542 (2018), ("In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings.").

"The judge's findings are equivalent to a jury's findings in a law action." Townes, 266 S.C. at 86, 221 S.E.2d at 775. 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 . . . .") (emphasis added); Shepard v. S.C. Dep't of Corrs., 299 S.C. 370, 372, 385 S.E.2d 35, 36 (Ct. App. 1989) ("In an action at law tried before a judge sitting without a jury, the trial judge's findings of fact have the same force and effect as a jury verdict and are conclusive on appeal when supported by competent evidence.").

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). Accordingly, whether the Trial Court, sitting in the seat of the factfinder, correctly found Mundy Construction was not grossly negligent or anything more should be affirmed if any evidence supports the Trial Court's findings.

The testimony of Mundy, Sr. demonstrated that he at a minimum used slight care in compacting the soil for the building pads. He testified that while he was packing the soil on the pad, he would observe his tread depth over the pad to determine whether it needed more compaction before the next load was spread and packed. This process was known as proof roll testing of the place lifts where a dump truck is slowly moved over the pad. Mundy, Sr. testified that if the soil moved at all, he knew the soil was not compacted. He further 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 while he was working on the project site, the general contractor, site superintendent, and an engineer were also on site observing, supervising, and instructing his compaction of the pads and that occasionally inspectors from the City of Aiken were also present. [R.pp. 1536, ll. 14-20; 1548, ll. 1-9.] Mundy Construction was not tasked with actually testing the soil samples or ensuring testing. [R.p. 1541, ll. 4-6; Id. at p. 148, ll. 4-6.] Mundy, Sr. additionally testified that Mundy Construction habitually tried to follow and comply with the applicable building codes, and he believed he was performing properly under the guidance from ATC (the general contractor), the site superintendent, the site engineer, and the City of Aiken to ensure Mundy Construction was in compliance with the code. [R.pp. 1548, ll. 13-18; 1549, l. 10; 1553, ll. 6-7, 19-20.]

The Trial Court also had before it evidence that Mundy Construction, who was paid approximately $278,000.00 total for its site work performed for four years from March 2005 through February 2009, was not expected to, nor compensated to perform any additional examination of the compaction of the soils. [R.pp. 36; 1538, ll. 4-15; 2885-87.] 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 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 testified:

> Q: I guess who is responsible for calling in people like CSRA, the geotechnical engineers, to get compaction testing done?
>
> A: Here, it would have been Hal or Ronnie.
>
> Q: Hal Trotter or Ronnie –
>
> A: Thomas.
>
> Q: - - would have called them in?
>
> A: Yes, sir.
>
> Q: And that testing is how you determine if you hit the compaction requirements, right?
>
> A: Yes, sir.
>
> . . .
>
> Q: So typically you would prepare the pad and then someone from ATC would call and get compaction tests performed?

A: Yes, sir.

[R.pp. 1702, ll. 5-15; 1708, ll. 14-17.]

Gordon of Maddox Construction also corroborated Mundy, Sr.'s testimony that the general contractor consistently had someone present 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, further affirmed 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.] He testified:

Q: And Hallum relied on CSRA to conduct all necessary compaction and moisture soil tests, based on whatever the design called for, right?

. . .

A: Yes.

[R.pp. 1693, ll. 12-17.]

Finally, Daniel K. Rickabaugh, P.E., the engineer who prepared the plans for the construction of the Community, confirmed 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.]

This evidence heard and considered by the Trial Court as factfinder supports its factual finding that Mundy Construction at a minimum exercised slight care under the circumstances and did its best to perform the work it was asked and paid to perform. An appellate court may not reverse the Trial Court's factual finding unless wholly unsupported by the evidence. Pope, 369

S.C. at 474, 633 S.E.2d at 151. If there is any evidence to support the Trial Court's factual finding that Mundy Construction was not grossly negligent or more, then this Court should affirm. Townes Assocs., Ltd., 266 S.C. at 86, 221 S.E.2d at 776; see also Faile, 350 S.C. at 332, 566 S.E.2d at 545 ("In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury [or here in this case, the trial judge as the factfinder].").

As set forth above, the evidence in the record sufficiently supports the Trial Court's factual finding with respect to gross negligence. Mundy Construction used at least slight care in compacting the pads and was not expected to conduct more extensive testing – he was properly relying upon others who had undertaken that duty to ensure the pads were sufficiently compacted. The Homeowners' disagreement with the evidence and the inferences therefrom is not enough to overturn the Trial Court's judgment.

In their appeal to the Court of Appeals, the Homeowners focused their argument almost entirely on the evidence they presented at trial that Mundy Construction breached its duties of care by not complying with the plans and the applicable building codes in compacting the soil. But the Trial Court did consider this evidence and did find Mundy Construction liable for negligence. The Trial Court simply found that despite being negligent and failing to use "due care," Mundy Construction nevertheless exercised slight care. [R.pp. 35-40.] See also Clyburn, 317 S.C. at 53, 451 S.E.2d at 887 ("Negligence is the failure to exercise due care, while gross negligence is the failure to exercise slight care.").

In their Petition, the Homeowners continue to ask this Court to hold that because the Trial Court found that Mundy Construction had not complied with certain building codes and standards,

that such violations constitute gross negligence as a matter of law. Their argument is contradicted by statutory and other authorities.

The statutory provisions governing the Statute of Repose and its applicability explicitly state that for the purpose of determining whether gross negligence or recklessness by a contractor exists, "the violation of a building code of a jurisdiction or political subdivision *does not constitute per se fraud, gross negligence, or recklessness* . . . ." S.C. CODE ANN. § 16-3-670(B). A violation of a building code instead only serves "as evidence of fraud, negligence, gross negligence, or recklessness." Id. The Trial Court took this evidence into consideration and concluded that in conjunction with other evidence presented by Mundy Construction, Mundy Construction's actions were not grossly negligent under the circumstances. [R.pp. 35-40.]

Second, while the case law of South Carolina has held that the violation of a building code may constitute negligence *per se* if the code has been adopted by local authorities, see Kincaid v. Landing Dev. Corp., 289 S.C. 89, 92-93, 344 S.E.2d 869, 872 (Ct. App. 1986), it has never been held in South Carolina that violation of a building code constitutes gross negligence *per se* as matter of law.

Other jurisdictions have also held that violation of a building code or other required standards does not establish gross negligence *per se* as a matter of law. See Conway v. Hi-Tech Eng'g, Inc., 381 S.W.3d 56, 65 (Ark. 2001) (applying North Carolina law) (finding failure of defendants to consult with OSHA, ANSI, or any other safety or industry standards when designing automated log-stacking machine, while perhaps indicative of ordinary negligence, did not rise to the level of gross negligence); Moore v. F. Douglas Biddy Constr. Inc., 587 S.E.2d 479, 483 (N.C. Ct. App. 2003) (holding where defendant failed to follow manufacturer's specifications or building

code requirements, such evidence did not constitute more than ordinary negligence because the plaintiffs failed to show that defendant's actions constituted a conscious and intentional disregard of the rights and safety of others); Cacha v. Montaco, Inc., 554 S.E.2d 388, 395 (N.C. Ct. App. 2001) (observing violation of a building code is not evidence of *per se* gross negligence); Olympic Products Co., A Div. of Cone Mills Corp. v. Roof Systems, Inc., 363 S.E.2d 367, 373-74 (N.C. Ct App. 1988) ("failure to check Code compliance" prior to applying roof system "does not indicate a reckless indifference which rises to the level of wilful or wanton negligence"); Rakowski v. Sarb, 713 N.W.2d 787, 792, 798 (Mich. Ct. App. 2006) (holding evidence showing that a ramp was constructed in violation of construction standards and a national building code constituted evidence of ordinary negligence only and therefore, trial court correctly granted summary judgment on plaintiff's gross negligence claim); Xu v. Gay, 668 N.W.2d 166, 170-71 (Mich. Ct. App. 2003) (observing defendant's failure to know about industry standards and failure to implement the standards regarding placement of a treadmill was not evidence of gross negligence, but rather, only suggested ordinary negligence).

Therefore, the Homeowners' attempt to have this Court hold that the violation of the building code and other standards automatically requires a finding a gross negligence should be rejected. The Trial Court, as factfinder, heard and considered the evidence, including the violations of the code and other standards, and properly found, based upon the presented evidence, Mundy Construction was not grossly negligent and did not act with intent.

Despite the unambiguous language in the Statute of Repose and case law that establishes that violation of a building code does not constitute *per se* gross negligence, the Homeowners insist the project for which Mundy Construction was hired must be divided up into hundreds of

building code violations which then automatically constitutes gross negligence. There is no authority for a such a position and nevertheless, the Trial Court had this evidence before it, considered it, and within its function as factfinder, found that given the entirety of evidence presented, Mundy Construction was not grossly negligent under the circumstances.

Finally, the Homeowners contend the Trial Court's ruling as to the Statute of Repose must be reversed because the Trial Court did not consider the recklessness exception of the statute. The Homeowners argue the Trial Court's alleged misinterpretation of the exceptions to the Statute of Repose warrant *de novo* appellate review.

First, the Homeowners never preserved this issue for appellate review. At the lower court level, the Homeowners specifically asked the Trial Court to find Mundy Construction was grossly negligent so as to defeat the Statute of Repose. [R.pp. 1223-1228 (the Homeowners' Am. Post-Trial Position Statement arguing that Mundy Construction's "gross negligence negates the statute of repose on all claims"); 1578, ll. 13-16 (stating to the court that the Statute of Repose will bar claims unless the Homeowners show gross negligence).] After the Trial Court issued its Final Judgment, the Homeowners did not request the Trial Court to make any clarification with respect to its finding that Mundy Construction's actions did not rise to the level of gross negligence or intent and did not argue that the Trial Court had used any wrong standard. [See Mtn to Reconsider, pp. 1232-1246.] Likewise, the Homeowners did not argue to the Court of Appeals in their opening appellants' brief that the Trial Court used any wrong standard warranting *de novo* review. See McClurg v. Deaton, 395 S.C. 85, 87 n. 2, 716 S.E.2d 887, 888 n. 2 (2011) (stating an issue may not be raised for the first time in a reply brief).

Second, recklessness is a higher degree of negligence than gross negligence; therefore, where the Trial found that Mundy Construction's conduct did not meet the threshold of gross negligence, it cannot meet the higher standard of recklessness. See 18 S.C. JUR. *Negligence* § 9 (2012) (noting recklessness is higher level than gross negligence); Osborn v. Univ. Med. Assocs. of Med. Univ. of S.C., 278 F. Supp.2d 720, 730 (D.S.C. 2003) (noting "reckless" is synonymous with willful and wanton behavior and represents a higher degree of negligence than gross negligence); Solanki v. Wal-Mart Store No. 2806, 410 S.C. 229, 237, 763 S.E.2d 615, 619 (Ct. App. 2014) (observing while reckless conduct may support an award of punitive damages, mere gross negligence will not).

Lastly, the courts have described recklessness as the following: "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." Berberich v. Jack, 392 S.C. 278, 287, 709 S.E.2d 607, 612 (2011). The Court of Appeals correctly held the record in this case would not support a finding of recklessness because the record does not contain any evidence that Mundy Construction was aware of any resulting harm that could occur. In fact, the evidence before the Trial Court showed that others were tasked with the duty to conduct testing on the pads before the pads were put to use.

The Trial Court, sitting as the jury, properly found the evidence did not show Mundy Construction was culpable of gross negligence or anything more. The appellate courts are bound to affirm the Trial Court's factual finding of no gross negligence or intent because some evidence reasonably supports its finding. Shepard, 299 S.C. at 377, 385 S.E.2d at 38 (in case tried before a trial judge without a jury, appellate court could not reverse the judge's factual finding of no

proximate cause where some evidence reasonably supported the judge's finding); see also Faile, 350 S.C. at 332, 566 S.E.2d at 545 (noting in most cases gross negligence is a factual determination).

Because the Homeowners did not prove that Mundy Construction was either grossly negligent or reckless to invoke the exception set forth under S.C. CODE ANN. § 15-3-670(A), the Trial Court properly ruled the Homeowners could not recover damages for the sixty-two (62) townhomes which were completed more than eight years prior to the filing of this action and thus such recovery was barred by the eight-year Statute of Repose.

CONCLUSION

For the reasons set forth herein, Respondent-Petitioner Mundy Construction respectfully requests that the Court deny the Homeowners' Petition for Writ of Certiorari and affirm the Court of Appeals' Opinion to the extent it held the evidence in the record supported the finding that Mundy Construction was not grossly negligent or reckless and the Statute of Repose thus barred recovery for sixty-two (62) housing units.

Respectfully submitted,

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