THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable J. Cordell Maddox, Jr.
Circuit Court Judge

Opinion No. 2024-UP-114 (S.C. Ct. App. filed April 3, 2024)
Case No. 2016-CP-02-00263
Appellate Case No. 2024-001037

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

v.

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

PETITIONER-RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent-Petitioner Mundy Construction[1] asks this Court to review a finding that the Court of Appeals ("COA") did not make, namely, that the COA "require[ed] a defendant to plead lack of proximate cause as an affirmative defense." (Pet. at 1.) In couching its first Question Presented in this manner, Mundy attempts to collaterally attack the COA's well-supported finding that an avoidance of damages needs to be affirmatively pled and proven by the party seeking such an avoidance -- by coining a ground never ruled upon by the COA and first argued by Mundy in its Motion for Rehearing in the COA. The COA's finding, when correctly stated, does not conflict with this Court's decisions or involve novel issues, and is instead well-supported by South Carolina law and the record.

Mundy's second and interrelated Question Presented also does not warrant review. The COA correctly held that the trial court erred in *sua sponte* reducing the damages to account for "wear and tear" because *no evidence* was presented to support such a reduction. Further, the COA correctly found that the trial court's *sua sponte* reduction based upon an un-pled and un-proven avoidance defense prejudiced the Homeowners[2] because they had no notice of the avoidance defense and had no opportunity to present any evidence on or otherwise refute the depreciation for "wear and tear."

COUNTERSTATEMENT OF THE CASE

To avoid repetition, Homeowners incorporate in full its Concise Statement of the Case contained in Homeowners' Petition for Writ of Certiorari, filed on June 20, 2024.

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[1] "Respondent-Petitioner" is Mundy's Construction, Inc. d/b/a Mundy Construction, hereinafter "Mundy Construction" or "Mundy."

[2] "Petitioner-Respondent" is Robin Napier, individually and on behalf of all others similarly situated, hereinafter "Petitioner" or "Homeowners."

COUNTERSTATEMENT OF FACTS

Again, to avoid repetition and for the sake of brevity, Homeowners incorporate in full its Statement of Facts contained in Homeowners' Petition for Writ of Certiorari, filed on June 20, 2024. However, there are some "mischaracterizations" and incorrect assertions contained in Mundy's Statement of Facts which must be corrected.

Mundy failed to provide testimony or evidence to contradict Dr. Rhett Whitlock's testimony and failed to introduce evidence of wear and tear or the useful life of a slab foundation. Mundy attempts to fill the void in its missing evidence by distorting and ignoring the entirety of Dr. Whitlock's testimony on concrete cracking, earthquakes, and door slamming. As expressly found by the Court of Appeals, Mundy "mischaracterized Whitlock's testimony." (Order, App. p. 2.) Mundy proffers the same mischaracterizations here. For example, Mundy erroneously asserts Dr. Whitlock conceded a recent nearby earthquake may have caused the damage (Mundy had Dr. Whitlock read from an article not in evidence, and he denied knowledge of the earthquake). (TR1 at R. p. 1513.) And, Mundy omits that Dr. Whitlock testified that the weak earthquakes Mundy was referring to was "not likely to cause any damage." (TR1 at R. p. 1513, lns. 15 –23.)

The ensuing door frame reference is also grasping: "He [Dr. Whitlock] further conceded that some damage to door frames in the townhouses could occur from the slamming of doors." (Pet. at p. 11.) First, Dr. Whitlock's damage estimate, P. Ex. 940 at R. pp. 2468-2479, "excludes the cost to repair the vertical construction defects that were previously also part of this case." (Order at R. p. 0038, fn. 2.) Assuming Mundy is not insinuating that "door slamming" *caused* the extensive cracking in the foundations, the only relevance of door frames to this case is that cracks in the door frames were both corroborative and resulting evidence of the foundations faulting and the resulting structural movement radiating through the homes; in fact, the Trial Court explicitly found as follows:

> 16) Dr. Whitlock further collaborated his findings with the movement of stoops, patios, and other hardscapes and water line breaks, and movement of interior components, e.g., door frames becoming out of square. (Order at R. p. 0037.)

While Dr. Whitlock did admit that some door frame cracking could result from door slamming, he testified that the location and nature of most of the cracks indicated they related to the faulting foundations. (TR1 at R. p. 1514, lns. 6-19.)

Similar to the forgoing, Mundy spins tidbits of testimony and evidence to attempt to undermine other un-appealed findings in the Trial Court's Order. For example, Mundy tries to spin the responsibility of others for *surface testing*, and the occasional presence of another human being on the construction site into a theme that Mundy was not actually responsible for the failure to test the lifts and the resulting inadequate compaction, ignoring the Trial Court's Order that:

> 12) While compaction testing was performed on the final elevation of the subgrade on several lots, this testing 1) does not indicate the compaction of any of the subgrade (house support) below the top twelve (12) inches of soil at the surface; and 2) this surface testing evidences that the Defendant was aware that the lifts (layers) themselves were not being tested. (A "lift" is each layer of soil place upon the lot, in this case, pursuant to the plans, a six-inch layer of soil.)

(Order at R. p. 0038.)

Perhaps Mundy's biggest and most desperate stretch is to garner supporting evidence of any kind from the engineer's stormwater certification, Engineer Rickabaugh's letter (Def. Ex. 16 at R. p. 3100), that the site was stabilized, and the site construction complied with the plans. (Pet. at p. 9.) This is deceptive and erroneous. This Defense exhibit was stipulated into evidence in the following soliloquy:

> (Petitioner's Counsel) Lucey to Trial Court: "We've also agreed to stipulate a second defense exhibit into evidence, Defendant's 16, with the words that we wrote on top of it, expressly like it is. And it says, "*It is stipulated this a storm water permit application*." And the letter will go in, that way, he doesn't need to call the witness tomorrow to authenticate it."

(TR2 at R. p. 1647, ln. 21 – R. p. 1648, ln. 1 (emphasis added).)

To ensure there was no misrepresentation about the content or context of this exhibit being proffered by Mundy (such as is attempted in Mundy's Petition), as seen above, Homeowners required the words "It is stipulated [that] this is a storm water permit application" to be printed on top of the stipulated exhibit! Nonetheless, Mundy tries to spin this into supporting evidence, which it is not. It is nothing but a red herring.

Mundy's attempt to divert this Court's attention away from its own grossly negligent and reckless conduct by including irrelevant and factually strained references to empty-chair defendants, irrelevant facts, and outdated affidavits should fail, as none of the references would ameliorate Mundy's conduct even if the references were spot-on.

MUNDY'S PETITION FOR CERTIORARI SHOULD BE DENIED

Mundy's Petition for Certiorari should be denied for the numerous reasons set forth and briefed below. Other erroneous facts are addressed later in this brief and in Petitioner-Respondent's Reply Brief in Support of the Homeowners' Petition for Certiorari.

I. MUNDY'S PETITION DOES NOT MEET THE STANDARDS REQUIRED FOR CERTIORARI UNDER RULE 242, SCACR

This Court should deny Mundy's Petition for Certiorari because it fails to satisfy certiorari requirements. Rule 242, SCACR, provides that the following are generally accepted reasons warranting certiorari: (1) where there are novel questions of law; (2) whether there is a dissent in the COA's decision; (3) where the COA's decision is in conflict with this Court's decisions; (4) where constitutional issues are directly involved; and, (5) where a federal question is included and the COA's decision conflicts with the United States Supreme Court's decisions.

Mundy's Petition is devoid of these reasons warranting certiorari. Reasons 1, 2, 4, and 5 (above) are patently not applicable to the issues Mundy asks this Court to review, nor does Mundy

assert otherwise. Mundy's attempts to bootstrap itself into Reason 3, that the COA's decision is in conflict with this Court's decisions, are transparently inadequate.

Mundy attempts to create the qualifying conflict in two ways. First, Mundy attempts to recast the COA's decision that "wear and tear" is an affirmative defense that must be pled and proven into a decision that the defense of proximate cause must be pled and proven. Mundy thereafter briefs the non-existent proximate cause holding as being in conflict. This sleight of hand should be called out and overruled.

Second, Mundy attempts to create conflict by misstating and deliberately over-simplifying the standard of review on a damage award. Mundy casts the entire subject matter of damages to be beyond review, so long as there is any evidence which can be stretched beyond reason to support the damage award. More correctly, when the damage award gives rise to a mixed question of law and fact, the legal conclusion will be reviewed *de novo*, while the factual damage finding will be sustained if there is any evidence to support it. As briefed previously by the Homeowners, an award of damages based upon an error of law, such as happened here, is not sustained under any standard.[3] Therefore, the COA holding reversing the unpled, unproven wear and tear avoidance is not in conflict with prior decisions and does not warrant review.

Therefore, this Court should deny Mundy's Petition as it does not set forth legitimate grounds for this Court to grant certiorari. Nevertheless, the Homeowners respond to Mundy's attempted arguments below.

II. THE COA'S HOLDING REVERSING THE TRIAL COURT'S *SUA SPONTE* REDUCTION OF DAMAGES BASED ON AN UPLED AND UNPROVEN AVOIDANCE DEFENSE WAS CONSISTENT WITH THIS COURT'S PRECEDENT AND PROXIMATE CAUSE WAS NOT AT ISSUE EITHER IN THE TRIAL COURT OR IN THE COA

[3] See Section III for a discussion of the Standard of Review.

The COA correctly held that the Trial Court erred in *sua sponte* reducing the damages award based upon an unpled and unproven avoidance defense. Further, Mundy's recasting of the trial court's *sua sponte* invocation of a "wear and tear" or "depreciation" damage reduction to a "lack of proximate cause" finding is not only incorrect but is also not properly before this Court.

To be clear, the Court of Appeals expressly found that:

1. There was *no evidence* submitted that supported the wear and tear deduction;

2. The submitted photos provided *no evidence* of wear and tear;

3. Whitlock's testimony that inadequate compaction caused the homeowners' damages was clear and consistent;

4. *Wear and tear* needed to be pled as an avoidance;

5. If an avoidance requires an *accounting* (*i.e.*, an allocation of or reduction in damages), it must be pled to put the opposing party on notice of the issue to give that party an opportunity to present evidence otherwise;

6. Napier was not provided with advance notice of this avoidance employed *sua sponte* by the trial judge.

(Order, App. pp. 2-3.) Notably, the COA also took note of decisions holding that foundations are non-depreciable assets, having an indefinite lifespan. (Id. at fn. 2.) Any way one looks at it or considers it, the COA was correct to reverse the Trial Court on this issue.

a. Mundy's newly minted argument regarding proximate cause is incorrect and not properly before this Court.

Mundy did not appeal the Trial Court's factual findings, and the Trial Court made the following *findings of fact* (among others) regarding damages:

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.)

23) "The homes require substantial repairs to fix both the cracks in the foundations and protect against further settlement." (Id.)

24) "Dr. Whitlock calculated the necessary repairs on both a per unit and neighborhood basis in Exhibit 940.[2] [2] This repair estimate, Ex. 940, excludes the cost to repair the vertical construction defects that were previously also part of this case. This was the only cost of repair estimate offered at trial or otherwise in evidence." (Id.)

25) "Defendant did not offer a single witness (expert or layperson) to contradict Dr. Whitlock's defective compaction, defective site prep, quality control, causation, differential settlement, repair protocol, or repair cost opinions." (Id.)

26) "Dr. Whitlock was knowledgeable, believable, and persuasive." (Id.)

34) "Defendant's conduct has damaged the homeowners throughout the class and caused the need for extensive repairs. Dr. Whitlock's testimony was the only measure of damages presented at trial." (Id. at R. p. 0039.)

Contrary to Mundy's new characterization of the Trial Court's holdings, the Trial Court did not reduce the Homeowners' damages because of a failure of proof as to proximate cause, and the COA does not have the effect of "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." (Pet. at 13.) Whether the Homeowners proved that Mundy proximately caused the Homeowners' damages was not on appeal and was not considered by the COA; rather, the Homeowners appealed, and the COA considered the Trial Court's erroneous *sua sponte* reduction in damages based on speculative "wear and tear."

A search of Mundy's Response Brief to the COA evidences that Mundy did not raise or brief the issue of proximate cause to the Court of Appeals. In fact, the Response Brief does not contain the words "proximate cause." Mundy's "proximate cause" argument first appears in its Petition for Rehearing, pp. 3-8. The COA declined to entertain Mundy's Petition for Rehearing or to address the newly minted proximate cause grounds addressed therein so the record lacks a ruling on Mundy's proximate cause argument.

b. The COA was correct in finding that the Trial Court erred in applying an unpled, unsupported, and prejudicial damage reduction for use and depreciation and wear and tear.

Simply put, the COA properly found that the Trial Court's *sua sponte* reduction in damages based on "use and depreciation" and/or "wear and tear" was erroneous as a matter of law for several independent reasons: (1) Mundy did not plead or otherwise request such a reduction in damages; (2) even if Mundy had so pled or requested, there is no precedent to support such a reduction; (3) even if there were precedent to support such a reduction, there was no evidence entered in the record in this case to support a "use and depreciation deduction", or the revised "wear and tear" deduction, or any evidence concerning the "useful life" of the damaged foundations; and (4) because this reduction was not requested, pled, or supported by evidence, Homeowners were deprived of its right to offer contrary evidence or legal argument.[4] Finally, there was no proximate cause evidence adduced by Mundy that this alleged factor caused Homeowners' damages or interrupted the proximate cause established by Homeowners.

c. The *sua sponte* reduction was not pled, requested, or otherwise mentioned by Mundy.

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

d. The reduction was contrary to legal precedent: cost of repairs is the proper measure of damages.

[4] Had Homeowners been on notice of this defense, Homeowners could have asked Dr. Whitlock while he was on the witness stand whether any of the foundation damage addressed by his repair estimate was caused or contributed to by normal usage of the residences. While the answer is implicit in Dr. Whitlock's other testimony, it could have been squarely addressed to avoid the current frivolous argument by Mundy. Similarly, Homeowners could have asked Dr. Whitlock if foundations are contemplated to have a near infinite life, or whether they should be depreciated in contemplation of a regular replacement.

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

e. The reduction was contrary to legal precedent: there was no evidence of the useful life of the foundations, which are considered non depreciable because of their extremely long expected useful life.

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

According to established legal principles, a trial court must base its decisions on evidence presented during the trial. In this case, there was no evidence introduced to support the trial court's reduction of damages for wear and tear. As emphasized in Vortex Sports & Entm't, Inc. versus Ware, the court's review of a damages award is limited to correcting errors of law and does not extend to weighing evidence. See Vortex, 378 S.C. 197, 208, 662 S.E.2d 444, 450 (Ct. App. 2008). The Trial Court's decision was based upon an error at law and lacked a factual basis or evidentiary support, thus rendering the reduction in damages unjustified.

f. Concrete slab foundations are not depreciable.

Had Homeowners been afforded an opportunity to refute this unpled, unrequested, and unsupported reduction in damages - either *vis a vis* a pre-trial motion in *limine*, expert testimony, or presentation of other evidence - Homeowners would have shown that a foundation is not depreciable and has a virtually indefinite useful life. A foundation is quite distinguishable from shingles, which have a commonly known, shorter life expectancy of twenty to thirty years; one rarely, if ever, contemplates replacing one's foundation. The courts that have considered the issue have found or agreed that foundations are not depreciable. Hicks v. Kaufman & Broad Home Corp., 89 Cal. App. 4th 908, 923, 107 Cal. Rptr. 2d 761 (2001), as modified on denial of reh'g (July 3, 2001) ("[a] foundation's useful life … is indefinite…").[5]

[5] In Hicks, plaintiff class brought claims against a construction company for installing "inherently defective" concrete slab foundations under their homes. 89 Cal. App. 4th at 912. Central to the dispute was the matter that some foundations within the class had not yet manifested damage from the known deficiency. Id. at 923. The court rejected the defendant's argument that the plaintiff within the class whose foundations had not yet manifested damage did not possess claims because "[a] foundation's useful life … is indefinite," and therefore the likelihood of damage at any point in the future rendered the slabs non-performing or defective. Id.; See also Rutledge v. Hewlett-Packard Co., 238 Cal. App. 4th 1164, 1181, 190 Cal. Rptr. 3d 411, 426 (2015), as modified on denial of reh'g (Aug. 21, 2015) (recognizing that a home foundation has an "indefinite" useful life and drawing contrast with the limited useful life of a computer) citing Hicks, 89 Cal. App. 4th at 923; Quality Air Servs., LLC v. Milwaukee Valve Co., 671 F. Supp. 2d 36, 44–45 (D.D.C. 2009)

g. Mundy's efforts to backfill evidence after the *sua sponte* Trial Court ruling fail to fill the evidentiary void.

Mundy's post-trial and appellate arguments, rely on 1) Homeowners' photos of cracking foundations and damage consequential to the faulting slabs and 2) Mundy's cross-examination of the Homeowners' expert witness, Dr. Whitlock. Unfortunately for Mundy, the photos and testimony did not provide any evidence of wear and tear. Homeowners' photos, which Mundy first attempted to repurpose post-trial in response to Homeowners' Motion to Reconsider, do not evidence wear and tear causing foundation faulting,[6] nor did Dr. Whitlock's testimony support a depreciation claim. The COA expressly found that Mundy had "mischaracterized" Dr. Whitlock's testimony during cross examination and, contrary to Mundy's assertion, Whitlock's cross-examination testimony was consistent with his expert testimony that attributed the damaged slabs directly to Mundy's failure to meet compaction requirements, rather than wear and tear. In fact, wear and tear and depreciation were never discussed at trial, let alone established.

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

(likening the lengthy lifespan of HVAC valves to the indefinite lifespan of a home foundation) (discussing Hicks, 89 Cal. App. 4th at 923). See also Cal. Ins. Code § 2051 (prohibiting subtraction from payments under a fire insurance policy to account for depreciation of components which are not "normally subject to repair and replacement during the useful life" of the structure) Johnson v. Hartford Cas. Ins. Co., No. 15-CV-04138-WHO, 2017 WL 2224828, at *11-12 (N.D. Cal. May 22, 2017) (Certifying a class and subclass of insureds whose payments under Hartford insurance policies were reduced based on impermissible depreciation of components under Cal. Ins. Code § 2051, including "cement/concrete/asphalt" and "concrete foundations").

[6] Mundy fails to point out what evidence of *foundation* wear and tear the Judge could see in the photographs. Why? Because the photos hardly show the foundations, as they are covered with houses. The only visible portion of the foundations is the outermost edge of the slab at the perimeter; and the only condition visible on the edge is the cracking and faulting documented by Dr. Whitlock that resulted from Mundy's work.

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

i. The reduction in damages improperly assumes a betterment.

The *sua sponte*, unsupported reduction in damage improperly assumes that the homeowners are being placed in a better position by the repairs. In the instant case, if the subgrade had been properly compacted, then after ten years, the homeowners, hypothetically, would have had ten years of use and enjoyment and an intact, level foundation for unlimited future years of enjoyment. As the compaction was improper and resulted in a cracked slab foundation, at the end of the same ten years of use, the homeowners in the Appellant class have had ten years of service, and/but they have cracked slabs that need repair. In both instances, there were ten years of use; but in the latter event, each homeowner is facing an eighty-thousand-dollar repair. See, e.g. Duke Power, 303 S.C. at 457, 401 S.E.2d at 196 (when a damaged product/component has an indefinite useful life, a court awarding damages "cannot say with a reasonable assurance that the installation

of a new [product/component] d[oes] more than remedy the wrong done."). A damage reduction based on use incorrectly assumes that the homeowners in the latter scenario receive some betterment from the replacement of their slabs (i.e., a longer future slab life) – which is not true and has not even been argued. See, e.g., id. ("An injured party should not be required to pay out money, as defendants' [past use analysis] would require, upon a questionable assumption that one day [the value of having a newer component] will be recaptured."). The ten years of use received by the homeowners who received the bad compaction job did not confer a benefit on them, and any offset based on that use ignores the structural reality of the components at issue and, in any case, that the Homeowners bargained for a proper compaction job and non-defective slab. Id.[7] And, the only competent evidence showed that, contrary to recovering a benefit, the Homeowners will suffer an additional detriment of the inconvenience of displacement to permit a repair. To think that these unfortunate homeowners are coming out ahead in this is sheer fantasy. The fact that the Homeowners' use and enjoyment of their property is being disrupted by the consequential damages of the bad compaction job must foreclose the unsupported damage reduction from being applied.

In addition to the foregoing, there is absolutely no support for the Trial Court's random statement in the amended introduction to the third damage holding, "While difficult to decipher what damage resulted from construction defects *resulting from Mundy's scope of work* and what *damage resulted from other factors* ...[.]"[8] There was not a shred of evidence at trial that any foundation damage resulted from wear and tear (or from any "other factors") – or that anyone

[7] See Bos. Old Colony Ins. Co., 288 F.3d at 232 (where plaintiff "would not have been forced to replace the tower" but for the wrongful act of defendant, "evidence of the pre-collapse condition of the tower was irrelevant to the calculation of damages" and the proper measure of damages was the full cost of repair).

[8] Again, amended text in italics.

else's scope of work caused any of the damage - how could it be difficult to decipher (*sic* - distinguish?) the different causative factors - there was only one presented at trial.

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

j. That the reduction was *sua sponte* by the Trial Court did not relieve Mundy of the obligation to plead and prove the avoidance.

The trial court's invocation of "wear and tear" as an affirmative defense was procedurally flawed. Under Rule 8(c), SCRCP, affirmative defenses must be explicitly pled and supported by evidence. The trial court's *sua sponte* reduction did not align with these procedural requirements. The burden of proving an affirmative defense lies with the party asserting it. See Hoffman v. Greenville County, 242 S.C. 34, 39, 129 S.E.2d 757, 760 (1963) ("One who pleads an affirmative defense has the burden of proving it."). These requirements do not change when the court *sua sponte* invokes an affirmative defense or avoidance on behalf of a party. See Heins v. Heins, 344 S.C. 146, 152, 543 S.E.2d 224, 227 (Ct. App. 2001) ("It is well settled that ordinarily[,] a party may not receive relief not contemplated in his or her pleadings."); Collins Ent., Inc. v. White, 363 S.C. 546, 563, 611 S.E.2d 262, 270 (Ct. App. 2005) ("The failure to plead an affirmative defense is deemed a waiver of the right to assert it.").

The trial court's decision to apply wear and tear as a reduction without proper pleading and evidence prejudiced the Homeowners, who had no opportunity to address or refute this new issue. The COA's decision to reverse the trial court's damage award and remand for recalculation, excluding any reduction for wear and tear, is supported by both legal and procedural principles.

The COA's corrective action was appropriate to ensure fair and just compensation based on the evidence presented.

III. THE COA'S DAMAGE REVIEW IS CONSISTENT WITH THE PRECEDENT OF THIS COURT

As briefed to the COA:

> In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." Wilson v. Gandis, 430 S.C. 282, 291, 844 S.E.2d 631, 636 (2020) (internal quotations omitted). The appellate court will not disturb the trial court's factual findings "unless they are found to be without evidence that reasonably supports those findings." Id. The trial court's conclusions of law will be reviewed *de novo*. Id. ("Of course, we review de novo the trial court's legal conclusions in an action at law.")
>
> Therefore, the Trial Court's factual findings, *inter alia*, that Mundy's work violated the permitted plans and the building code, that Mundy "disregard[ed] the requirements applicable to its work", and that these violations, disregard, and lack of quality control caused the class foundation slabs to crack and differentially move, which the Trial Court found to be supported by Dr. Whitlock's reasoned testimony, are not reviewable; whereas, the Trial Court's legal conclusion that Mundy's conduct did not constitute gross negligence or recklessness, is to be reviewed *de novo*.

(Final Brief of Appellant (Homeowners), p. 16.)

In response to Mundy's incomplete description of the standard of review, Homeowners further briefed:

> Respondent's *Standard of Review* omits the proverbial "flip side" of the coin when it recites this Court's scope of review for cases tried without a jury; namely, Respondent omits that conclusions of law will be reviewed *de novo*. Wilson v. Gandis, 430 S.C. 282, 291, 844 S.E.2d 631, 636 (2020). That is important here, because Appellant Robin Napier, individually and on behalf of all others similarly situated (hereinafter "Appellant" or "Homeowners") asserts that the Trial Court's ruling was based on numerous misapprehensions of law, each of which must be reviewed *de novo* by this Court.
>
> Relatedly, here, certain of the Trial Court's findings of fact were *both* unsupported by the evidence *and* were controlled by an erroneous application of the law. 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.") Furthermore, the Trial Court's legal conclusions

> ignored its own findings of established, uncontested facts, and Respondent cannot now backfill facts into an appeal that were not proffered or proven at trial in an effort to sustain the Trial Court's legal errors. 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.")
>
> . . . .
>
> The Trial Court's *sua sponte* reduction in damages is erroneous *both* because it was not based upon any evidence in the record (and, in fact, contradicts the factual findings made by the Trial Court) *and* because the reduction itself was based upon an error of law…

(Final Reply Brief of Appellants (Homeowners), pp. 1-2.) Homeowners further addressed the review of damages:

> The damages award is *not only* erroneous because the basis for the reduction is completely absent from the record (and the Order), but also because the reduction itself is based upon an error of law. Essentially, the Trial Court *reduced by 90%* what the Trial Court *itself* called the "necessary" and "substantial" repairs "to fix both the cracks in the foundations and protect against further settlement[;]" (and related loss of use) after the Trial Court squarely found that the need for these substantial repairs "were due to Defendant's disregard for the requirements applicable to its work and lack of quality control." (Order at R. pp. 0038-0039.) Ultimately, the pre-reduced award for the "necessary" and "substantial" repairs needed to fix the damages caused by Defendant was found to be $98,520 per home (inclusive of $19,230 per home loss of use). What evidence was this reduction to $10,000 per unbarred home based upon and what legal maxim allows for such a reduction? The answer to each of these questions individually warrants a reversal, and together they overwhelmingly require it.

(Id. at pp. 3-4.) Homeowners summarized as follows the evidence at trial confirmed by the Trial Court's findings:

> The Trial Court's factual findings cited above unequivocally show that the Trial Court found that Respondent proximately caused all damages testified to by the Homeowners' testifying engineer; that the cost of repair of this damage was $1,902,965.00, plus $461,511.00 in loss of use; and that it was Respondent's conduct that necessitated the repairs. The subsequent reduction of this amount by 90% based upon "14 years'[9] worth of general wear and tear in conjunction with exposure to other elements" has no support in the Order; had no support in the

[9] As an additional matter, "14" years of use is clearly erroneous – especially as the Trial Court cut off claims for any residence older than eight years! And who ever heard of deducting wear and tear from loss of use?

> record; and was not asked for, pled, or even mentioned by the Defendant before, during, or after trial.[10]

(Id. at p. 5.)

Here, the COA correctly found that the Trial Court's wear and tear damage finding was *both* unsupported by the evidence *and* was 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."). There is no evidence in the record to support a wear and tear deduction; and awarding such a deduction when it's not pled or proven is an error of law. Nothing about the COA opinion is inconsistent with prior decisions of this Court.

IV. MUNDY'S OTHER ATTEMPTS TO BACKFILL THE MISSING EVIDENCE ALSO FAIL

The appraisals relied upon by Mundy to substantiate the Trial Court's reduction of damages is a desperate final attempt to conjure evidence *ex post facto*. Mundy uses the appraisals to illustrate that the Trial Court had evidence before it "showing the Homeowners estimated repair costs […] *were well over any depreciation* (sic) *in value of the units.*" (Pet. at p. 20.) Eventually, Mundy uses the appraisals to show that the subject homes either appreciated in value between date of original sale and the appraisal date, or only depreciated a small amount. (Id. at p. 20-21.) Mundy then speculates that the Trial Court based its $240,000 award on "diminution in value" of the homes.

[10] The depreciation deduction was also not requested by Mundy; however, in response to Appellant's Motion to Reconsider, Mundy asked the Trial Court to change the reference to "wear and tear." (See Mundy's proposed amended order appended to its Opp. to Motion to Reconsider, R. p. 01381.)

(Id. at p. 22.) ("$9,610.00[11] times twenty-four (24) equals $230,640.00.") Nowhere in the Trial Court's order (or the trial record) appears the phrase "diminution in value" nor should it. "Diminution in value" was not raised by any party (or the Court) and is a theory of recovery typically proffered by an injured party, and most often occurs in the case of "an injury of a permanent nature to real property" where repair is either impossible or insufficient.[12] Yadkin Brick Co. v. Materials Recovery Co., 339 S.C. 640, 645, 529 S.E.2d 764, 767 (Ct. App. 2000); New v. Max G. Crosby Const. Co., No. 2004-UP-282, 2004 WL 6307901, at *2 (S.C. Ct. App. Apr. 27, 2004) ("where there is a permanent injury to land, damages are based on the diminution in value of the property based on its value before the injury and after the injury.") Diminution in value, like any damage model, must be based on evidence. Here, the Homeowners never pled damages based upon diminution in value; rather, they sought the reasonable cost of repair of the damages proximately caused by Mundy. And Mundy never advocated an award based upon diminution in value.

If an appraisal is the basis for "diminution in value," then the appraisal value must consider the cause which the injured party claims has diminished the value, *i.e.*, the permanent title impediment, the change in zoning, or the taking as a result of imminent domain. Gauld, 380 S.C. 548 at 562, 671 S.E.2d at 87 (explaining that an appraisal which does not consider the impediment at issue is too speculative to create an issue of fact). Here, the "appraisals" stipulated into evidence and used by Mundy explicitly *did not consider* the faulting foundations.

[11] This was the reduction in value of one home in one appraisal. Three of the five appraisals, ignored by Mundy, indicated an increase in value.

[12] See, e.g. Hildreth v. Cty. of Kershaw, No. 2005-UP-134, 2005 WL 7083478, at *3 (S.C. Ct. App. Feb. 22, 2005) ("Thus the repairs by Rabon would not alleviate the diminution in value to the property itself.").

Mundy did not introduce the appraisals to show "diminution in value," because the appraisals *explicitly did not consider the allegations made regarding the defective foundations.* Rather, Mundy introduced the appraisals as a safeguard against an award that could potentially exceed the cost to repair the homes. Mundy now insinuating otherwise is a red herring at best, and deceptive at worst, as Mundy ignores its own stipulation on the record that the appraisals were made without regard to the allegations of construction defects: The parties "stipulate[d] … that the appraised values … did not consider allegations alleged in the present suit."[13] (TR2 at R. p. 1648, lns. 12-13.)

CONCLUSION

For the reasons set forth herein, Homeowners respectfully request that this Court deny Mundy Construction's Petition for Writ of Certiorari and affirm the Court of Appeals' Opinion on the holding reversing the wear and tear damage reduction. The Court of Appeals' decision to remand for recalculation of damages was aimed at correcting legal errors and ensuring the damage award was based on proper legal and evidentiary grounds. The Court of Appeals acted within its authority in requiring Mundy to plead and prove wear and tear as an affirmative defense and did not usurp the Trial Court's fact-finding authority.

-SIGNATURES ON FOLLOWING PAGE-

[13] "And we have a third stipulate on … plaintiff is going to stipulate to the six appraisals in evidence so the value is sitting there, and we've handwritten a stipulation that. . . the six homes represent fair market value as of the October 8th -- October 19th, 2018 date, that *the appraised values of these dates did not consider allegations alleged in the present suit*… In other words, we're not stipulating to this as an established fact. We're stipulating that this is what the testimony would be." (TR2 at R. p. 1648, lns. 2-18 (emphasis added).)

JUSTIN O'TOOLE LUCEY, P.A.

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