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

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S.C. SUPREME COURT

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 REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## SUMMARY OF ARGUMENT

Respondent Mundy's[1] Return to Petitioner Homeowners'[2] Petition for Writ of Certiorari focuses almost entirely on spinning the Record to support the Trial Court's legal conclusion that Mundy exercised *slight care.* In so doing, Mundy either fails to address or superficially addresses some of the most important issues in this appeal, *inter alia*:

1. The Trial Court's failure to consider the recklessness exception to the Statute of Repose[3] (or the application of the wrong standard);
2. The standard of care against which "slight care" or "due care" should be measured;
3. The significance of the voluminous and systemic building code violations and plan deviations, generally, and in light of the public policy of protecting homeowners, and other un-appealed evidence of recklessness.

These issues should be deemed conceded both procedurally and substantively and are further briefed in *seriatim* below, followed by a section debunking Mundy's revisionist factual spins regarding un-appealed issues not properly before this Court.

### Standard of Review

Mundy's *Standard of Review* is incomplete and is, therefore, incorrect. This is evident from the briefing of the standard of review in Homeowners' Petition, as augmented by standard of review briefing in Homeowners' Return to Mundy's Petition, both of which are hereby incorporated by reference. Relatedly, here, certain 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

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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."

[3] Surprisingly, Mundy habitually mirrors the Trial Court's conflagration of gross negligence and recklessness into "gross negligence and intent," while continuing to argue the erroneous gross negligence "or more" test.

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 Mundy 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.")

**Key Findings**

For the Court's ease of reference, the Trial Court made the following *findings of fact* (among others) regarding the defects and resulting damages caused by Mundy's:

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.)

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.)

Then, under a separate heading entitled "Damages," the Trial Court stated the following:

1) "The repair of the twenty-four remaining class residences will cost $1,902,965.00. However, the net value of the residences, i.e., market value, reduced by prior payouts in this matter, is $1,750,177.00, which is the maximum repair cost this Court would consider awarding." (Id. at R. p. 0040.)

2) "[…] Plaintiffs have documented loss of use in the amount of $461,511.00." (Id.)

Then, using an unpled and unproven avoidance of "wear and tear," the Trial Court awarded the

Homeowners $240,000 in "actual damages," (id.), or a mere $10,000 per Homeowner.[4]

## I. Mundy Fails to Address the Trial Court's Legal Error in Failing to Consider Recklessness, and Mundy Compounds the Error by Implying that Gross Negligence Is Akin to a Lesser Included Offense of Recklessness – Which is Patently Incorrect.

Mundy doubles down on the Trial Court's error by parroting the Trial Court's phraseology, "*gross negligence or intent,"* throughout Mundy's Return. Mundy expends a few paragraphs at the end on the issue that recklessness may be different than gross negligence but supersedes that with Mundy's erroneous argument that recklessness is a higher form of gross negligence, and therefore the finding of no gross negligence prevents a finding of recklessness. This flawed logic ignores the clear distinction between gross negligence and recklessness in the reported decisions in this state. Mundy also half-heartedly asserts that Mundy was not reckless because Mundy was not aware of the likelihood of potential harm, which ignores common sense.

Gross negligence, recklessness, and fraud are each independently enumerated by South Carolina law as exceptions to the Statute of Repose.[5] Mundy fails to address the legal error committed by the Trial Court when it incorrectly interpreted this Statute in holding:

> The Court finds Mundy Construction's actions do not rise to the level of gross negligence or **intent**. Because no gross negligence or **intent** is being found on behalf of the Defendant, the Statute of Repose will bar recovery for the 62 units that have produced certificates of occupancy dated beyond the Statute of Repose time period. […] (Order at R. pp. 0039-0040 (emphasis added).)

"Intent" is not enumerated in the Statute, and while "fraud" is an intentional tort, "recklessness" is not, nor is it synonymous with "intent" or "intentional." Kawaauhau v. Geiger, 523 U.S. 57, 61–62, 118 S. Ct. 974, 977, 140 L. Ed. 2d 90 (1998) ([…]"intentional torts," as distinguished from negligent or reckless torts [,] […] generally require that the actor intend the consequences of an act, not simply the act itself.") (internal citations omitted). Homeowners did not allege that Mundy

[4] The "wear and tear" issue is addressed in Homeowners' Return to Mundy's Petition for Certiorari.
[5] S.C. Code Ann. 15-3-670(a), hereinafter "Statute."

committed fraud or any other intentional tort; rather, Homeowners showed that Mundy's conduct was grossly negligent and reckless. Because the Trial Court's interpretation and application of the Statute and its exceptions were incorrect, this Court must conduct a *de novo* review. Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008) ("Determining the proper interpretation of a statute is a question of law, [which] this Court reviews [] *de novo*.").

Mundy's contention that the Trial Court necessarily found there was no recklessness because it did not find gross negligence essentially asks this Court to consider gross negligence as a lesser included offense of recklessness. (See Resp't Ret. at p. 3.) Stated differently, Mundy is asserting that a finding of gross negligence is a mandatory threshold criterion for a finding of recklessness. Not only is such a contention unsupported by South Carolina law, it is illogical: if gross negligence were subsumed into recklessness, then the South Carolina General Assembly would not list them out separately in this Statute. Relatedly, if reckless conduct is the same thing as grossly negligent conduct, then why did the General Assembly specify that Code violations may be admissible as evidence of "gross negligence or recklessness"? (See S.C. Code 15-3-670(B)). As Homeowners briefed in detail already, gross negligence and recklessness are not the same: recklessness contemplates the conscious failure to exercise due care. Solanki v. Wal-Mart Store No. 2806, 410 S.C. 229, 237, 763 S.E.2d 615, 619 (Ct. App. 2014) ("If a person of ordinary reason and prudence would have been conscious of the probability of resulting injury, the law says the person is reckless or willful and wanton, all of which have the same meaning—the conscious failure to exercise due care.") Conversely, gross negligence is the failure to exercise slight care. And, consciousness does not equate to "intent," or intending that an injury occurs. Mundy's conscious failure to exercise "due care" was established during trial (see infra): the Trial Court found that Mundy knew what that standard was, and further that Mundy disregarded the standard.

## II. The Only Standards of Care Adduced at Trial Against Which Mundy's Conduct Could be Measured Were Not Addressed by Mundy

Homeowners briefed at length one of the challenging questions in this case: against what *standard* or baseline of conduct does one measure *slight care* or *due care*. There were only two standards adduced at trial: the International Building Code ("Code") requirements that a) one must comply with the permitted plans ("Plans"); and, b) one must use engineered fill; and the Plan requirement of 98% compaction.[6] Mundy did not offer evidence of a different standard of care at trial through expert testimony or otherwise, and thus the issue was uncontested. Mundy does not address or contest that these were the only standards adduced and thus this issue is conceded.[7]

### a. Proof Rolling Is Not a Standard of Care, Nor Was it Established as One

Rather than contest the standards adduced by Homeowners, Mundy attempts to backdoor a third standard of care that was never proffered at trial; namely, that Mundy's "proof rolling" is an acceptable substitute for density testing. Mundy never laid an evidentiary foundation that proof rolling was an accepted industry substitute for testing or was somehow a legitimate exception or modification to the Code or Plans. Mundy asserts that "Mundy, Sr. testified that he always used this field test to determine whether the soil was compacted." (Resp't Ret. at p. 8.) This is a correct interpretation as to Mundy Sr.'s testimony regarding proof rolling performed on *this job*; however, to the extent that Mundy is attempting to suggest that proof rolling qualifies as a "Mundy practice standard" or an industry testing standard, Mundy is distorting the testimony and is contradicted by Mundy Sr.'s express testimony that *this was the first and last project like this*. (TR1 at R. p. 1555,

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[6] "ALL FILL SHALL BE PLACED IN 6 [INCH] LAYERS AND COMPACTED TO 98% MAXIMUM DRY DENSITY AT OPTIMUM MOISTURE." Pl. Ex. 949 (enlargement of typical site plan notes). See also TR1 at R. p. 1407 lns. 3-21; R. p. 1410, ln. 24 – R. p. 1412, ln. 2 (violation of building code; R. p. 1418, lns. 11-22 (describing compaction requirements in site plans).

[7] Mundy addresses the significance (or lack thereof) of a building code violation in a different context which is discussed elsewhere.

lns. 17-19.) Simply put, there was no competent evidence entered in this case that proof rolling in lieu of the expressly required testing was acceptable conduct, and Dr. Rhett Whitlock (who was found "knowledgeable, believable, and persuasive" by the Trial Court) testified that proof rolling was not an acceptable substitute for testing in compliance with the Code or Plans. (TR1 at R. p. 1411, ln. 11 – R. p. 1412, ln. 1.)

*More importantly,* there was an express and un-appealed *factual finding* by the Trial Court that proof rolling *was not an acceptable standard*:

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

(Order at R. p. 0037.) Mundy's attempt to argue that "eyeballing" in the rear-view mirror while sitting 20 feet away in the cab of a truck is the exercise of slight care in performing the Plan required density testing measurement of "98%" is absurd, even before the Trial Court's finding.

When one considers the Trial Court's express factual finding that "proof rolling is not an adequate indicator of compaction testing and is not in compliance with the plans" with Mundy's admission that he knew he had to comply with the Plans, but never bothered to look at the Plans over a four-year project, one must conclude there was gross negligence or reckless disregard.

## III. Mundy Failed to Address Whether the Systemic Nature of the Violations of the Code and Plans Compelled a Legal Conclusion of Gross Negligence Or Recklessness

Mundy argues at length that a single violation of the building code does not necessarily constitute gross negligence or intent. (See, e.g., Resp't Ret. at pp. 21-23.) Homeowners have never asserted otherwise. Mundy never addresses whether flagrant and *systemic* violations of the Code and Plans such as are present in this record constitute gross negligence and recklessness; and Mundy fails to address whether such conduct committed with full knowledge of the force and effect of the Code constitutes recklessness. This is briefed at length in Homeowners' Petition and

remains unaddressed by Mundy.

Under South Carolina law, **a single violation** of the building code constitutes **evidence** of gross negligence and separately constitutes evidence of recklessness. S.C. Code Ann. § 15-3-670(B).[8] What we have here, conversely, is a Defendant who admittedly *knew* he was supposed to comply with the *minimum standards* contained in the building codes and plans (TR1 at R. p.1548, ln. 13 – R. p.1549, ln. 12); "habitually tried to follow and comply with the applicable building codes" (Resp't Ret. at p. 17); but did not look at the Plans *once* over the course of four years on this Project; did not know the compaction requirement in the Plans; and engaged in conduct resulting in systemic Code violations and resulting extensive damage. **None of the foregoing is in dispute,** either because it was conclusively found by the Trial Court and not appealed by Mundy, or was admitted by Mundy during trial or in its Initial Brief, *inter alia*:

- Mundy agreed that it had a duty to comply with the Code. (TR1 at R. p. 1549, lns. 7-12.), and "always tried to follow and comply with the applicable building codes[.]" (Resp't Br. at p. 9; Resp't Ret. at p. 8.);

- Mundy knew that the Code required that the work be performed in compliance with the Plans. (Order at R. p. 0039, ¶32); Mundy knew that one could not move dirt or prepare a site without Plans, **but "conceded that he failed to review site plans in the four (4) years the work took place on the Class Homes."** (Id.);

- Mundy admittedly used untrained day laborers to operate its compactor and did not know if anyone employed by Mundy was qualified to determine if compaction of the soils was properly performed. (Order at R. p. 0036, ¶6 and R. p. 0038, ¶31.);

- Mundy conceded that it (1) did not use engineered fill; and (2) knew that the lifts were not being tested as they were installed, each of which is a violation of the Code and Plans. (Order at R. p. 0037.);

- Mundy admittedly did not know that the Plans required a 98% density compaction. (TR1 at R. p. 1561, ln. 9 – R. p. 1562, ln. 8.); and,

[8] In a case considering the statute governing punitive damages, the South Carolina Supreme Court has found that violation of a *single* traffic statute constitutes evidence of recklessness and requires a court to submit the issue of punitive damages to the jury. Wise v. Broadway, 433 S.E.2d 857, 859 (S.C. 1993).

- Mundy repeated this course of conduct in the site preparation for all eighty-six Class Homes over four years. (Order at R. pp. 0036, 0039; Resp't Br. at pp. 8, 11.).

What results from the above *conceded* facts are *multiple* Code violations in the construction of *each* building pad—hundreds of Code violations. The Trial Court explicitly found that the proximate result of the above conceded facts was significant damage "require[ing] substantial repairs," and that the damage was "due to Defendant's **disregard for the requirements applicable to its work and lack of quality control**." (Order at R. p. 0038, ¶22 (emphasis added).) The systemic consequential damages amongst eight-six residences collaborates the systemic building pad compaction failures throughout the four streets.

A contractor violating a Code provision that he does not know exists once or twice *may* meet the test for exercising "slight care," but a contractor who knows the Code and Plans must be followed yet fails to look at the Plans or Code *once* and fails to follow them hundreds of times cannot reasonably be seen as exercising "slight care." Taken together, the above supports but one conclusion: Mundy knew what it was supposed to do, but recklessly or consciously disregarded that knowledge. These factual findings by the Trial Court cannot be disturbed because they have not been appealed (they also have evidentiary support). What can be disturbed, in fact reviewed *de novo*, is the legal conclusion as to whether the overwhelmingly flagrant and systematic nature of conduct compels a finding of gross negligence and/or recklessness[9] — and clearly it does.

Homeowners' Petition details the many other factual findings of the Trial Court which would have supported a finding of recklessness had the Trial Court considered recklessness instead of intent, and had the COA properly addressed this error of law. These findings were not appealed by Mundy and are incorporated herein by reference. (See Homeowners' Pet. at pp. 6-7, 9-12.)

## IV. Mundy's Arguments Against A Finding of Gross Negligence Contradict Findings of

[9] Hereinafter, when used in the context of the exceptions to the Statute of Repose, "gross negligence and recklessness" shall stand for "and/or."

**Fact by the Trial Court Which Were *Not* Appealed; and Misstate Evidence**

Mundy engages in a disjointed discussion regarding why Mundy couldn't/can't be found grossly negligent because it did nothing wrong to begin with.[10] The problem for Mundy is that the Trial Court has already found otherwise, Mundy has not appealed these findings, and Mundy's attempt to recast the evidentiary record to support new findings is improper and unpersuasive. The Trial Court has already expressly found that Mundy had a duty to comply with the Code and Plans and a duty to test the soils; that it violated those duties many times; and that Mundy's acts and omissions proximately damaged the Homeowner class. The Trial Court's factual findings in this regard are not in dispute; rather, the issue on appeal is whether Mundy's violations were so flagrant and numerous and whether the violations were committed with conscious disregard such that public policy and precedent mandate a finding of gross negligence and recklessness.

Instead of appealing the Trial Court's findings or addressing the foregoing question, Mundy attempts to retry the case by pointing to empty chairs and other parties on site, claiming that no one expected Mundy to test, and that since others were also responsible for surface/pad testing, that irrelevant fact relieves Mundy of responsibility for lift testing. These efforts must fail.

**a. Mundy's Attempt to Spin Dr. Whitlock's testimony Has Already Been Called Out by the Court of Appeals**

In a bold attempt to support Mundy's newly inserted proximate cause argument, given the absence of evidence entered by Mundy, Mundy attempts to spin Dr. Whitlock's cross examination testimony into evidentiary support for other, non-Mundy related causes of the foundation failures. The Court of Appeals expressly found that Mundy was "mischaracterizing" Dr. Whitlock's testimony. (App. Decision p. 2.) The Court of Appeals rejected Mundy's spin (some of which is

[10] For example, Mundy asserts without support, and in contradiction to the Trial Court's findings, that Mundy "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." (Resp't Ret. at p. 20.)

discussed further below) and found that Dr. Whitlock's testimony was consistent in that it was Mundy's failure to compact in accordance with the Code and the Plans that caused the failures.

**b. Mundy's Attempt to Deflect Responsibility for Third-Party Inspections and for Supervision to Others Is Foreclosed by the Un-Appealed Facts Found by the Trial Court**

Mundy's assertion that "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" is a manipulation of the trial testimony. (Resp't Ret. at p. 8.) The cited testimony actually indicates that these parties were "watching," (TR1 at R. p. 1536), and Mundy, Sr. later testified that he did not know if the General Contractor ("GC") was even qualified to inspect compaction. (Order at R. p. 0038, ¶31.) The other site contractor, Maddox Construction, testified that the engineer was checking silt fences and did not check compaction. (Maddox Construction, Inc. 30(b)(6) Dep. at R. p. 1709, lns. 16-24.) Mundy goes on to imply that the City Inspector gave him guidance on how to comply with the Code. (Resp't Ret. at p. 8.) Mundy augmented his statements by conceding 1) that Mundy was the "one responsible for checking the compactor's work," (TR1 at R. p. 1544, ln. 25 – R. p. 1545, ln. 2); and 2) that Mundy *did not know* what the city inspector was checking on site. (TR1 at R. p. 1545, ln. 20 – R. p. 1546, ln. 2.)

Regardless of how Mundy tries to spin it, this is simply an attempt to collaterally attack the Trial Court's un-appealed findings that Mundy was "aware" the lifts were not being tested, his use of day laborers on the compactor was "irresponsible", and that the "inadequate compaction" and the "differential settlement and resulting damages were due to the Defendant's *disregard* for the requirements applicable to its work and lack of quality control," and "Defendant had a duty to follow the building code, make sure its work met the applicable requirements in the plans, and ensure its work was performed properly." (Order at R. pp.0037-0039.)

Even if Mundy was correct that there were other negligent actors on the Project

overlooking or implicitly condoning its conduct, and even if that *was* at issue before this Court, that would not change the outcome. This Court cannot condone the systemic violation of the Plans and Code by a contractor claiming, without collaboration, indeed – with implicit contradiction by the Code violations themselves – that the building inspector guided him. And, even if the GC or engineer had approved of or participated in Mundy's co-negligence, that just makes them joint tortfeasors. Furthermore, the Code provides that the issuance of a Certificate of Occupancy by the building inspector is not an approval of non-conforming conditions. (TR1 at R. p. 1485, ln. 18 – R. p. 1486, ln. 4.) As testified by Dr. Whitlock, every contractor knows or should know that every contractor on site must comply with the Code; and there are no special exceptions for site contractors that do not look at the Plans. (TR1 at R. p. 1488, lns. 6-14.)

**c. The Belangia Affidavit Does Not Assist Mundy With Its Collateral Attack**

Another example of Mundy stretching the evidence beyond its reasonable limit is its statement that "[e]vidence 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." (Resp't Ret. at p. 8.) Mundy then refers to a license application affidavit by Sherwood R. Belangia, the owner of the GC entity. (R. pp. 3087-3099.) The application simply avers that Belangia performed typical GC functions during the development of various neighborhoods. It does not say that Mundy was not still expected to do its job; it does not say Mundy was not paid to do its job; and it does not say Mundy was not required to perform its own testing in accordance with the Code and the Plans or call for vendor testing if Mundy wasn't equipped to perform its own testing. And, contrary to the implication by Mundy, the affidavit only refers to Belangia performing GC functions on one of the four streets in this suit. The affidavit actually *predates* the work on the other three streets and is simply not pertinent to this dispute. (*Compare* Affidavit dates (R. pp. 3087-3099) *with* dates of Certificate of Occupancies and Table of Permits (R. p. 2810).)

The only evidence presented at trial of the GC directing any of the site work related to the timing of portions of the work and adjustments in elevations during initial development. (See e.g., TR2 at R. p. 1610, ln. 23- R. p. 1611, ln. 8.) There was no evidence that the GC told Mundy how to do its job. Quite the opposite, the site superintendent testified he relied upon the site contractors:

> Q. What were your responsibilities as site superintendent?
>
> A. To oversee the day-to-day operations, make sure inspections were called in. *I really relied on my subs to make sure the work was complete and up to code.*

(Hallum LLC, 30(b)(6) Dep. at R. p. 1685, lns. 16-21 (emphasis added).) And similarly:

> Q. Look at the general notes on page 1 of this. You see general note number 7?
>
> A. Yes
>
> Q. What does it say ?
>
> A. All fills shall be placed in a 6-inch layers and compacted to a 98 percent maximum dry density at optimum moisture.
>
> Q. Is the compaction – that's the standard for the compaction we were talking about, right ?
>
> A. Yes
>
> Q. How did you make sure that the site work contractors complied with that requirement?
>
> A. I relied on their expertise.

(Id. at R. p. 1686, lns. 2-14.[11]) The testimony adduced at trial shows that Mundy was expected to follow applicable Codes by all parties on site, that the general contractor relied on Mundy's expertise, and that Mundy himself *knew* he was required to follow the Code and Plans.

**d. The Final Surface Testing of the Building Pad Was Different Than the Density Testing Requirement Applicable to Each Lift**

Again, to whitewash the Trial Court's *un-appealed* factual findings, Mundy conflates the evidence relating to the testing of the finished building pad by third-party vendors (CSRA) with

[11] See also id. at R. p. 1687, ln. 25 – R. p. 1688, ln. 6; R. p. 1689, lns. 6-13;R. p. 1696, ln. 24 – p. 1697, ln. 8.

the lift testing required by the Plans while the pad is being built. (See Resp't Ret. at pp. 18-19.) As testified by Dr. Whitlock, the testing of the finished pad by CSRA was a separate requirement entirely from the requirement to test the lifts as the grading comes up; the latter is squarely the responsibility of Mundy as the site contractor. (TR1 at R. p. 1411, ln. 7 – R. p. 1412, ln. 1.) Dr. Whitlock explained why surface testing is not a substitute for lift testing. (TR1 at R. p. 1412, lns. 9 – 22.) The Trial Court agreed and found that the existence of the surface testing was evidence that Mundy knew that the lifts were not being tested as they came up. (Order at R. p. 0037.)

All testimony cited by Mundy on pages 8 and 9 of its Petition (and again in its Return) which reference "testing" being the responsibility of others to perform, call for, or arrange, concerns *surface* testing, ***not*** lift testing. There is not a shred of evidence in the record that anyone other than Mundy was responsible for, or assumed responsibility for, lift testing. Maddox's testimony that the general contractor would call for the pad testing (surface testing) is completely irrelevant to the independent requirement that the site subcontractor tests his lifts as they come up. As testified to by Dr Whitlock, Mundy did not need to call a vendor; Mundy could have tested the lifts for 98% compaction themselves. (TR1 at R. p. 1409, lns. 1 – 9.)

However, even if the Maddox testimony represented (not quoted) by Mundy related to the lifts instead of the finished pad, Mundy, as the site subcontractor, had an obligation to stop work until the lift was properly tested – regardless of who was calling for the testing:

> They should at least know that the soil should be compacted and compacted well and *not continue filling and compacting* without having some testing done to ensure that they were achieving what they needed to achieve.

(TR1 at R. p. 1515, lns. 11-14 (emphasis added).) There was ***no*** evidence adduced that ***anyone*** but Mundy was responsible for testing the lifts, and if anyone else had assumed that obligation, then it was still Mundy's responsibility to stop work until it occurred – otherwise he would be violating the plans and the building code. The time to contest or otherwise muddy the Trial Court's factual

findings has passed and Mundy's efforts to do so now are improper.

**e. Mundy's Misuse of the Storm Water Letter Highlights Mundy's Lack of Evidentiary Support**

Mundy continues its attempted collateral attack on the un-appealed Trial Court findings with a cite to Engineer Rickabaugh's letter, Def. Ex. 16 at R. p. 3100, for the proposition that the site was stabilized, and the site construction complied with the plans. (Resp't Ret. at p. 9). This is deceptive and erroneous. This Defense exhibit was stipulated into evidence as follows:

> (Appellant 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), Homeowners required the words "It is stipulated [that] this is a storm water permit application" to be printed on top of the exhibit! Mundy *still* tries to spin this into supporting evidence, which it is not. Mundy's attempt to divert this Court's attention away from its own grossly negligent and reckless conduct by including strained references to empty chairs, irrelevant facts, and outdated affidavits should fail.

## V. Homeowners Did Not Waive Their Argument Regarding Recklessness

Homeowners did not waive their arguments relating to recklessness. The Homeowners' trial brief incorporated the attached jury charges by reference. See Charge Number 10 defined recklessness, R. p. 1060 ("Recklessness is an extension of the concept of negligence, and it means the knowing failure to exercise reasonable care under all of the surrounding circumstances (citation omitted)"). The October 2, 2019, proposed order submitted by Homeowners (R. pp. 3115-3122) included numerous findings of recklessness (and gross negligence). The Trial Court indicated it was only finding simple negligence, thereby expressly overruling any finding of recklessness.

Further, the Trial Court ordered by email dated February 4, 2020 (R. pp. 3132-3133) that a Final Order be submitted in conformance with his instructions.

Moreover, Mundy's assertion that recklessness was not raised in the position statement is incorrect and meaningless; point ten addresses "conscious disregards," a clear reference to the slightly different test for recklessness (as compared to gross negligence). Additionally, pursuant to the Trial Court's express instructions, the position statements were brief highlights – not akin to an appellate brief as Mundy's would suggest. The Trial Court expressly asked for short post-trial statements. (TR2 at R. p. 1656, ln. 23 – R. p. 1657, ln. 7.) Homeowners' Motion to Reconsider also addressed recklessness. (MTR at R. p. 1236.) Homeowners did not waive their argument regarding the Trial Court's failure to adequately apply the exceptions to the Statute of Repose, including the Trial Court's conflation of "recklessness" with "intent."

## CONCLUSION

There were clear "rules of the road" for Mundy to follow in the compaction of Homeowners' building pads: use skilled and competent employees to produce acceptable workmanship; use engineered fill; and test each lift to 98% dry density compaction. Mundy did none of these things, showing a lack of *any* care. Mundy Jr.'s concurrent professional licensure shows consciousness *and* a lack of *any* care. As described in the Petition, the Code itself warns of the likely mode of failure resulting from inadequate compaction. The numerous and flagrant omissions compelled a finding of gross negligence or recklessness at the Trial Court then, and in this Court now.

This Court should amend the negligence finding in accordance with the evidence and South Carolina law, vacate the Trial Court's rulings on the statue of repose and wear and tear, and enter judgment for the entire Appellant class for their full damages.

-SIGNATURE ON FOLLOWING PAGE-

JUSTIN O'TOOLE LUCEY, P.A.

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