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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.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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Carmen V. Ganjehsani (S.C. Bar No. 73515)
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MUNDY'S CONSTRUCTION, INC. d/b/a
MUNDY CONSTRUCTION**

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ARGUMENT IN REPLY

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

In their Return, the Homeowners contend that wear and tear does not equate to proximate causation and thus had to be pled as an affirmative defense under Rule 8(c) of the South Carolina Rules of Civil Procedure. Yet, in its order, the Trial Court expressly stated it was determining what damage resulted from the construction defects associated with Mundy Construction’s scope of work versus what damage resulted from other factors, including wear and tear. [R.p. 42.] This is a quintessential illustration of proximate causation. Proximate cause is “the efficient or direct cause of an injury.” McNair v. Rainsford, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998). The Trial Court in this case was determining what was the direct cause of the entirety of the Homeowners’ injuries – Mundy Construction’s negligence or some other causative factor, including wear and tear. While recognizing that Mundy Construction’s negligence did cause some of the damages, the Trial Court did not find that all construction defects were caused by Mundy Construction’s work. As previously explained in Mundy Construction’s Petition to this Court, proximate causation is an element of the plaintiff’s case and lack thereof is not an affirmative defense required to be pled under Rule 8(c).

The Homeowners also argue that Mundy Construction did not preserve for appeal its argument that lack of proximate causation was not required to be pled as an affirmative defense, but this is wrong. The Homeowners were the appellants in the appeal with the duty to preserve issues. In their Appellants’ Brief to the Court of Appeals, the Homeowners made a conclusory,

two-sentence argument that wear and tear should have been pled as an affirmative defense with no accompanying analysis. See Appellant's Brief, p. 20. In its Response Brief, Mundy Construction pointed out that "wear and tear of the units or other factors contributing to the damages experienced by the Homeowners" was not among the list of affirmative defenses required to be pled under Rule 8(c). See Respondent's Brief, pp. 29-30.

After the Court of Appeals issued its Opinion and fully analyzed the issue of an avoidant affirmative defense, Mundy Construction was then able to discern the court's basis for its conclusion. Mundy Construction then promptly and properly pointed out in its Petition for Rehearing the court's misapprehension of the doctrine of an avoidant affirmative defense, including that proximate cause was an element for which the plaintiff bore the burden of proof and thus did not constitute an avoidance affirmative defense. The issue is thus preserved for this Court's review.

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

The pivotal issue as to the Trial Court's damages award is under what circumstances can an appellate court set aside that award in a case tried before the Trial Court sitting as the factfinder. The Trial Court's damages award issued here is equivalent to a jury's issuance of a damages award, and that award should not be set aside by an appellate court if there is any evidence or reason sustaining the award. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775-76 (1976).

The appellate court and the opposing party may disagree with the inferences drawn from

the evidence, but that does not serve as a basis for a reversal of the damages award. The interpretation of the evidence was for the Trial Court sitting as the factfinder. Furthermore, in this case, the damages award issued by the Trial Court can be reconciled by using the alternative measure for defective construction damages – the diminution in value of the property – where the cost to repair is significantly disproportionate to the property’s value as is the case here. See John Thurmond & Assoc. Inc. v. Kennedy, 668 S.E.2d 666, 668 (Ga. 2008). The Trial Court indicated its concern about any damages award exceeding the value of any Homeowner property, [R.p. 3123], and the award aligns with the Trial Court’s concern. The Trial Court also had before it evidence that the Homeowners’ expert’s repair protocol had not been actually used to repair any home in the same Aiken neighborhood at issue that had been part of other lawsuits. [R.p. 1522.] Given that a Trial Court sitting as the factfinder does not have to accept all submitted repair costs when awarding damages, Scott v. Fort Roofing and Sheet Metal Works, Inc., 299 S.C. 449, 451, 385 S.E.2d 826, 827 (1989), the Trial Court certainly had reason to reject a portion of the Homeowners’ repair protocol costs.

The effect of the Court of Appeals’ Opinion is to substitute the appellate court’s view of the evidence for that of the factfinder – in this case, the Trial Court sitting as the factfinder in a bench trial. This Court should grant Mundy Construction’s Petition as to the issue of damages to restore the wide discretion a trial court, sitting as the factfinder in a bench trial, has over its deliberation and verdict.

CONCLUSION

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

Respectfully submitted,

/s Carmen V. Ganjehsani _____

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