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S.C. SUPREME COURT

EXHIBIT “A”

**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.

**RESPONDENT-PETITIONER'S RETURN TO
PETITIONER-RESPONDENT'S MOTION FOR COSTS**

The Petitioner-Respondent, Robin Napier, individually and on behalf of all others similarly situated, has filed a Motion for Costs under Rules 222 and 242(j), SCACR seeking \$13,693.42 in taxable costs against Respondent-Petitioner Mundy's Construction, Inc. d/b/a Mundy Construction. For the reasons set forth herein, Mundy Construction objects to the award of costs to the Petitioner-Respondent.

The Petitioner-Respondent contends she is the prevailing party in this appeal. This contention, however, ignores the significant rulings upon which Mundy Construction prevailed and the costs incurred by Mundy Construction in having those rulings affirmed.

The Petitioner-Respondent brought this construction defect action against Mundy Construction on behalf of the owners of eight-six (86) townhomes. The Petitioner-Respondent sought damages of \$8,470,438.47 in repair costs, plus \$1,000,000.00 in punitive damages. [See Record on Appeal, pp. 1226; 1228.]

Following a bench trial, the circuit court ruled South Carolina's Statute of Repose, S.C. CODE ANN. § 15-3-640, barred recovery for sixty-two (62) of the townhomes. The circuit court determined in awarding damages, the maximum repair cost it could consider awarding for the twenty-four (24) remaining units was \$1,750,177.00 plus a loss of use amount of \$461,511.00. The circuit court awarded \$240,000.00 in damages for the remaining 24 units. [Record on Appeal, pp. 40; 42.]

The Petitioner-Respondent appealed to the Court of Appeals, arguing the gross negligence exception of the Statute of Repose applied to allow for the recovery of damages on the 62 units. The Petitioner-Respondent further argued the circuit court's award of damages on the remaining 24 units was not supported by the evidence.

The Court of Appeals issued its opinion on April 3, 2024 in which it affirmed in part, reversed in part, and remanded to the circuit court for further proceedings. See Opinion No. 2024-UP-114. The Court of Appeals held the circuit court did not err in finding that Mundy Construction was not grossly negligent and that therefore, the Statute of Repose barred recovery for sixty-two (62) of the townhomes. Id.

The Court of Appeals, however, determined the circuit court's award of damages was not supported by the evidence and that additionally, under Rule 8(c), SCRCF, 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 circuit court's calculation of damages, directing the circuit court to recalculate damages "excluding any reduction for wear and tear." Id.

Both the Petitioner-Respondent and Mundy Construction petitioned this Court for a writ of certiorari. On January 23, 2025, this Court issued its opinion denying the Petitioner-Respondent's petition for writ of certiorari and leaving the circuit court's bar of recovery for 62 of the townhomes in place. This Court also granted Mundy Construction's petition for a writ of certiorari as to Question I, dispensed with further briefing, and affirmed the Court of Appeals' opinion as modified.

This Court reversed the Court of Appeals' opinion as to the requirements of an affirmative defense under Rule 8(c), SCRCF and held the Court of Appeals erred by requiring Mundy Construction to affirmatively plead wear and tear as a defense. Nevertheless, this Court affirmed the remand to the circuit court for a recalculation of damages excluding any reduction based upon wear and tear.

The appeal resulted in the affirmance in favor of Mundy Construction of the denial of recovery to the Petitioner-Respondent of over \$6 million in claimed damages (damages denied for the 62 townhomes plus punitive damages denied). A determination has not been made yet as to the recoverable damages on the remaining 24 units because upon remand, the circuit court must recalculate those damages based upon all evidence presented at trial except for wear and tear.

Under these facts, Mundy Construction – not the Petitioner-Respondent - is the prevailing party in this appeal. “A party need not be successful as to all issues in order to be found to be a prevailing party.” Heath v. Cty. of Aiken, 302 S.C. 178, 182, 394 S.E.2d 709, 711(1990). A prevailing party has been defined as:

[t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered.

Id. at 182-83, 394 S.E.2d at 711 (internal citation omitted). “A court determines the prevailing party by evaluating the degree of success obtained.” Id. at 183, 394 S.E.2d at 711.

When evaluating the degree of success obtained by Mundy Construction versus the Petitioner-Respondent in this appeal, Mundy Construction was successful throughout the entire case on its position that the Statute of Repose barred recovery for the 62 townhomes with certificates of occupancy clearly dated beyond the eight (8) year Statute of Repose time period. This resulted in the savings of over \$6 million in potential damages against Mundy Construction. Mundy Construction also achieved clarity from this Court as to what constitutes an affirmative defense under Rule 8(c), SCRPC and what does not. As set forth in its Motion for Costs submitted contemporaneously herewith, Mundy Construction incurred \$5,665.64 in taxable attorney’s fees and costs to achieve the rulings in its favor in this appeal. Because the Petitioner-Respondent is not the prevailing party, it is not entitled to an award of costs.

Moreover, the costs sought by the Petitioner-Respondent are not reasonable. She seeks \$2,821.31 in costs for printing the final briefs, as well as \$5,247.11 in costs for printing the record on appeal. There is no attached documentation to verify the amount of these costs. In

addition, when the final briefs were filed with the Court of Appeals in April 2021, filing was governed by this Court's Order regarding the "Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020)" which did not require the filing of paper copies. The Court of Appeals, by letter dated October 22, 2021, thereafter requested the parties to file six bound copies of the final briefs and record on appeal. The number of paper copies required was therefore significantly reduced, and even with the printing of service copies and copies for counsel's personal use, the number of required copies should not have resulted in the significant costs incurred by the Petitioner-Respondent.

Finally, the Petitioner-Respondent requests her filing fee paid under Rule 242(c), SCACR, but this Court did not grant her petition for a writ of certiorari.

Therefore, Mundy Construction requests this Court to deny the Petitioner-Respondent's Motion for Costs or, in the alternative, significantly reduce the amount of allowable costs taking into consideration the costs incurred by Mundy Construction in the appeal which resulted favorable rulings for Mundy Construction and the reasonableness of costs and attorneys' fees sought by the Petitioner-Respondent in light of the success achieved by Mundy Construction.

[signature on following page]

Respectfully submitted,

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MUNDY CONSTRUCTION

February 27, 2025.