

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF AIKEN )  
 )  
ROBIN NAPIER, individually and on behalf )  
of all others similarly situated, )  
 )  
 )  
Plaintiff, )  
 )  
 )  
vs. )  
 )  
MUNDY'S CONSTRUCTION, INC. )  
D/B/A MUNDY CONSTRUCTION, )  
 )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE SECOND JUDICIAL CIRCUIT  
CASE NO. 2016-CP-02-0263

**RECEIVED**

AUG 03 2020

**SC Court of Appeals**  
**FINAL ORDER AND JUDGMENT**

This matter came before me for the trial of the Plaintiff class's claims against Defendant Mundy's Construction, Inc. d/b/a Mundy Construction (hereinafter "Defendant"). Plaintiff and Defendant both waived their rights to a jury trial. Following various previously approved partial class action settlements, all that remained for trial were the Plaintiff class's claims for negligence/gross negligence and breach of warranty against Defendant Mundy. The bench trial took place on May 28 and 29, 2019. The Court's Memorandum of Decision and Judgment is below.

This is a certified class action in which the class asserts construction defects in eighty-six (86) homes in Aiken County constructed on four streets located off of Spencer Drive. The four streets on which the class homes are located are known as New Haven Lane, Amity Lane, Bennington Lane, and Hillsborough Lane. These four streets and the houses hereon have been referred to in this litigation as "Spencer Drive Extension" or the "Class Homes."

The Parties called two witnesses. The witnesses included Plaintiff's geotechnical expert, Dr. Rhett Whitlock, who was certified as an expert by stipulation and by the Court's certification. Defendant offered the testimony of its company founder ("Tony Mundy, Sr."). Defendant also submitted one or more short fact stipulations, including one as to the market value of the Plaintiff's residences. Defendant did not proffer a geotechnical expert or a repair/damage expert.

Both parties submitted post trial position statements. Additionally, Plaintiff procured and submitted transcripts of the testimony of Dr. Whitlock and Mundy, Sr.

### **FINDINGS OF FACT**

Based upon the evidence and the testimony adduced at trial, the Court makes the following findings of fact:

- 1) Plaintiff brought suit for cracking and differential movement taking place in the concrete foundations (“slabs”) upon which their homes were built. Plaintiff showed that “differential” movement occurs when portions of an otherwise fixed, approximately four-inch-thick concrete slab foundation (thicker at the edges/footings) moves in different directions causing cracking. Plaintiff showed that the concrete slabs were faulting downward (sinking) at different rates due to inadequate soil support, and this movement was causing cracking in the concrete slabs as one side of the slab subsided quicker than the other.
- 2) Defendant was a subcontractor that performed building site-earth-preparation work (“site work”) throughout the neighborhoods in the class.
- 3) Defendant was one of two site work subcontractors that performed the site work at the Class Homes. Both parties utilized Defendant’s and Maddox’s invoices to document the different scopes of work in which each site work subcontractor had engaged.
- 4) Plaintiff’s expert, Dr. A. Rhett Whitlock, testified that the invoices and job records reflected that Defendant was paid \$278,186.36 for its site work. This amounted to sixty-three percent (63%) of the total amount that the General Contractor paid for the site work across the Class Homes. Even if invoices for hauling and fuel were removed, the percentage did not materially change. Additionally, Maddox had a motor grader for street preparation work and Defendant did not. To the extent Maddox performed the preparation of the subgrade for the streets, Defendant’s proportionate share of building pad-site preparation (clearing, grubbing, cut, fill, spread, compaction, and pad grading) increased.
- 5) Mundy, Sr. conceded performing compaction on all building pads, i.e., compacting the dirt under the specific location for the slab foundations for the eighty-six Class Homes. There was no evidence of any other person or entity performing the compaction at the Class Homes.
- 6) Defendant employed untrained day laborers to operate its compactor.
- 7) The plans provided the following specification for compaction:

“ALL FILL SHALL BE PLACED IN 6 [INCH] LAYERS AND COMPACTED TO 98% MAXIMUM DRY DENSITY AT OPTIMUM MOISTURE.”<sup>1</sup>

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<sup>1</sup> Pl’s. Ex. 949 (enlargement of typical site plan notes).

- 8) Additionally, Dr. Whitlock testified that the building code provided the following requirements for fill generally and for fill at footers:

Section 403.1 of the applicable building code mandates that “[f]ootings shall be supported on undisturbed natural soils or engineered fill.”

- 9) Defendant was aware that the lifts were not being tested as they were installed. Tony Mundy, Sr. testified that they relied upon the tire tracks of the compactor to determine suitability. Mundy, Sr. conceded that he only “eyeballed” whether the subgrade soils were compacted.
- 10) Dr. Whitlock testified that the foregoing practice is neither acceptable nor in compliance with the compaction specifications set forth in the plans.
- 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 compaction testing.
- 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 placed upon the lot, in this case, pursuant to the plans, a six-inch layer of soil.)
- 13) Dr. Whitlock testified that the class members’ foundations are faulting (cracking and differential subsidence) due to inadequate support by the soils below, which is caused by inadequate compaction of the soils during site preparation.
- 14) Dr. Whitlock testified extensively about the crack and subsidence photographs and differential measurement surveys entered into evidence, documenting the faulting foundations.
- 15) An exemplar survey of Dr. Whitlock’s crack and faulting photographic documentation was entered as Exhibit 963.
- 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. See Ex. 963.
- 17) Dr. Whitlock additionally testified that Defendant’s use of day laborers to operate the compactor was “irresponsible.”
- 18) The foundations of the homes throughout the class have experienced substantial differential settlement due to the improper preparation of the subgrade.
- 19) The differential settlement has caused large cracks (horizontal and vertical) in the foundations throughout the Class Homes.

- 20) Dr. Whitlock's laser level measurements were performed in a large sampling of the Class Homes, i.e., thirty-one (31) of the eighty-six (86) homes (circa 36%). These laser measurements were entered as part of several exhibits, including Exhs. 708 and 821.
- 21) The measurements of the differential deflection indicated that the slabs were generally deflecting under the front and rear, load bearing walls. This was consistent with the side slab cracks generally being wider at the top and the presence of differential settlement.
- 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.
- 23) The homes require substantial repairs to fix both the cracks in the foundations and protect against further settlement.
- 24) Dr. Whitlock calculated the necessary repairs on both a per unit and neighborhood basis in Exhibit 940.<sup>2</sup> This was the only cost of repair estimate offered at trial or otherwise in evidence.
- 25) Dr. Whitlock's repair protocol attempted to mitigate Plaintiff's damages by leaving in place/reusing the perimeter of the slabs (which were thickened to form a turned-down footing) and the perimeter building walls supporting the structure, while removing the interiors of the concrete slabs to install additional interior supports for the reinstalled concrete slab. Ex. 709, para 1(c).
- 26) 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.
- 27) Dr. Whitlock was knowledgeable, believable, and persuasive.
- 28) Defendant failed to call its only licensed, grading employee/owner as a witness, Tony Mundy, Jr.
- 29) Mundy, Jr. obtained his South Carolina Commercial Contractor's license, including a specialization in grading work, during these projects. In fact, several of these projects were listed on his application for grading and compaction experience.
- 30) Dr. Whitlock testified that Mundy, Jr. would have had to know how to properly compact residential building sites such as the Class Homes to pass his exam.
- 31) Mundy, Sr. was not sure if anyone employed by Defendant was qualified to determine if compaction was properly performed. Mundy, Sr. did not know if the General Contractor was qualified to inspect compaction.

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<sup>2</sup> This repair estimate, Ex. 940, excludes the cost to repair the vertical construction defects that were previously also part of this case.

- 32) Mundy, Sr. conceded that he was aware that earth movement and preparation required a building permit, that the building code required that a copy of the permitted plans be kept on site, that he was aware that the building code required that the work be performed in compliance with the permitted plans, but further conceded that he failed to review site plans in the four (4) years the work took place on the Class Homes.
- 33) As testified by Dr. Whitlock, the Defendant's failure to conform to the permitted building plans constituted an additional violation of the applicable building codes.<sup>3</sup>
- 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.
- 35) All prior settlements in this matter (horizontal construction and vertical construction) are itemized in this Court's prior Orders of Sept. 28, 2018 (Judge Keesley) and March 28, 2019 (Judge Benjamin) except a final settlement contribution by one of Defendant Mundy's carriers in the amount of \$335,000.00 which occurred on the eve of trial. Additionally, the prior settlement agreements were filed in support of the prior motions for partial class action settlement approval.

#### CONCLUSIONS OF LAW

In light of the foregoing findings of fact and its review of the applicable law, the Court has also reached the following conclusions of law:

- 1) 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. Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 346, 384 S.E.2d 730, 737 (1989).
- 2) Dr. Whitlock presented testimony to the court that the reason for the home damage was due to subsurface consolidation resulting in settlement of the buildings and causing cracks. Trial Tr. 9:14-9:19. Dr. Whitlock testified to a reasonable degree of certainty in his field that the consolidation occurred because of "consolidation of the soil that was poorly prepared during the construction of the building pads. That is the installation of the earth in the fill areas or the preparation of building pads and the cut areas." Trial Tr. 10:1-10:4.
- 3) Based on the billing statements presented by the Plaintiff and Dr. Whitlock evidencing Mundy Construction's participation in preparing the soil for future building pads, as well as Tony Mundy, Sr.'s own admission that he inspected the pads when the lifts were coming up (Trial Tr. 142:21-143:3), the Court finds Defendant Mundy Construction liable for negligence.
- 4) The Court finds Mundy Construction's actions do not rise to the level of gross negligence or intent.

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<sup>3</sup> Dr. Whitlock testified that the work spanned two versions of the International Residential Building Code, but that there was no material difference in the two versions as it applied to the subject matter of this suit.

- 5) 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. Therefore, only the twenty-two Hillsboro residences and 151 and 155 Bennington shall recover hereunder (a total of twenty-four residences/class members).

**DAMAGES**

- 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.
- 2) Additionally, Plaintiffs have documented loss of use in the amount of \$461,511.00.
- 3) While difficult to decipher what damage resulted from construction defects and what is from general depreciation, the Court finds that 14 years' worth of use and depreciation acts to reduce the amount of damages attributed to Defendant Mundy Construction.

**CONCLUSION**

Therefore, the Court awards the Plaintiff class their actual damages in the amount of Two Hundred and Forty Thousand Dollars (\$240,000.00). This amount shall be and hereby is entered as Judgment against Defendant Mundy Construction.<sup>4</sup>

AND IT IS SO ORDERED!

\_\_\_\_\_  
The Honorable J. Cordell Maddox, Jr.  
Presiding Judge for the Second Judicial Circuit

\_\_\_\_\_, 2020

<sup>4</sup> For purposes of future class member distribution, this amount shall be allocated amongst the class members pro rata in accordance with repair values previously set forth by Dr. Whitlock.



Aiken Common Pleas

**Case Caption:** Robin Ind/Behalf Of All Ot Napier VS Adiz Llc , defendant, et al

**Case Number:** 2016CP0200263

**Type:** Order/Other

So Ordered

s/ J. Cordell Maddox Jr.

Electronically signed on 2020-04-09 14:51:22 page 7 of 7

**From:** Justin Lucey  
**To:** Lee Weiland  
**Subject:** Fwd: Case No. 2016-CP-02-0263 Napier v. Mundy's Construction / Plaintiff's Response to Defendant Mundy's Memo in Opposition to Motion to Reconsider  
**Date:** Wednesday, July 29, 2020 9:50:39 AM

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----- Forwarded message -----

**From:** Maddox, J. Cordell Law Clerk (David Thompson) <cmaddoxlc@sccourts.org>  
**Date:** Thu, Jun 18, 2020 at 1:29 PM  
**Subject:** RE: Case No. 2016-CP-02-0263 Napier v. Mundy's Construction / Plaintiff's Response to Defendant Mundy's Memo in Opposition to Motion to Reconsider  
**To:** Collin Fuller <cfuller@lucey-law.com>, David Anderson <DAnderson@richardsonplowden.com>  
**Cc:** Justin Lucey <jlucey@lucey-law.com>, Maddox, J. Cordell <CMaddoxJ@sccourts.org>, Lee Weiland <lweiland@lucey-law.com>, Maddox, J. Cordell Secretary (Cynthia Hicks) <cmaddoxsc@sccourts.org>, James Robey <JRobey@richardsonplowden.com>, Carla Lindler <CLindler@richardsonplowden.com>, Jennifer Zambriczki <jzambriczki@lucey-law.com>

All,

My apologies. I left the Defendants proposed order out of the file by mistake. He has now reviewed it and finds that it is sufficient and is the order he will be signing. Mr. Lucey, I will upload that order so all he needs from you is the order granting the Motion to Intervene.

Sorry for the confusion,

David Thompson

**From:** Collin Fuller <cfuller@lucey-law.com>  
**Sent:** Thursday, June 18, 2020 1:02 PM  
**To:** David Anderson <DAnderson@richardsonplowden.com>  
**Cc:** Maddox, J. Cordell Law Clerk (David Thompson) <cmaddoxlc@sccourts.org>; Justin Lucey <jlucey@lucey-law.com>; Maddox, J. Cordell <CMaddoxJ@sccourts.org>; Lee Weiland <lweiland@lucey-law.com>; Maddox, J. Cordell Secretary (Cynthia Hicks) <cmaddoxsc@sccourts.org>; James Robey <JRobey@richardsonplowden.com>; Carla Lindler <CLindler@richardsonplowden.com>; Jennifer Zambriczki <jzambriczki@lucey-law.com>  
**Subject:** Re: Case No. 2016-CP-02-0263 Napier v. Mundy's Construction / Plaintiff's Response to Defendant Mundy's Memo in Opposition to Motion to Reconsider

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Judge Maddox,

Justin is out of pocket currently, but objects to Mr. Anderson's request for clarification as improper reargument. Thanks.

On Thu, Jun 18, 2020 at 12:37 PM David Anderson <DAnderson@richardsonplowden.com> wrote:

In our response in Opposition to Plaintiff's Motion to Reconsider we presented a suggested clarification to the final Order. Is it the intent of the proposed order to simply deny the motion to reconsider or was Mundy Construction's Memo in Opposition granted by the Court?

David A. Anderson  
Attorney at Law  
danderson@richardsonplowden.com

Richardson, Plowden & Robinson, P.A.  
P.O. Drawer 7788  
Columbia, SC 29202  
Tel: 803.576.3702 Fax: 803.779.0016  
Mobile: 803.318.8821

[www.RichardsonPlowden.com](http://www.RichardsonPlowden.com)

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-----Original Message-----

From: Maddox, J. Cordell Law Clerk (David Thompson) [mailto:[cmaddoxlc@sccourts.org](mailto:cmaddoxlc@sccourts.org)]  
Sent: Thursday, June 18, 2020 12:19 PM  
To: David Anderson; Justin Lucey; Maddox, J. Cordell  
Cc: Lee Weiland; Maddox, J. Cordell Secretary (Cynthia Hicks); James Robey; Carla Lindler; Collin Fuller; Jennifer Zambriczki  
Subject: RE: Case No. 2016-CP-02-0263 Napier v. Mundy's Construction / Plaintiff's Response to Defendant Mundy's Memo in Opposition to Motion to Reconsider

Good Afternoon,

I hope this email finds you well. After review of the briefs submitted by the parties, Judge Maddox is hereby granting the Plaintiff's Motion to Intervene but denying Plaintiff's Motion to Reconsider. It is his belief that this ruling will streamline the appeals process for both parties. He requests that Mr. Lucey draft both orders and e-file them by Monday, June 22nd, so that he may review and sign them before he goes on vacation on Wednesday.

If you have any questions or concerns please do not hesitate to contact me via email or phone.

Thank you,

David Thompson  
Law Clerk for the Honorable Judge J. Cordell Maddox, Jr.  
Office: (864) 260-4636  
Fax: (864) 260-6348

-----Original Message-----

From: David Anderson <[DAnderson@RichardsonPlowden.com](mailto:DAnderson@RichardsonPlowden.com)>  
Sent: Monday, June 15, 2020 1:17 PM  
To: Maddox, J. Cordell Law Clerk (David Thompson) <[cmaddoxlc@sccourts.org](mailto:cmaddoxlc@sccourts.org)>; Justin Lucey <[jlucey@lucey-law.com](mailto:jlucey@lucey-law.com)>; Maddox, J. Cordell <[CMaddoxJ@sccourts.org](mailto:CMaddoxJ@sccourts.org)>  
Cc: Lee Weiland <[lweiland@lucey-law.com](mailto:lweiland@lucey-law.com)>; Maddox, J. Cordell Secretary (Cynthia Hicks) <[cmaddoxsc@sccourts.org](mailto:cmaddoxsc@sccourts.org)>; James Robey <[JRobey@RichardsonPlowden.com](mailto:JRobey@RichardsonPlowden.com)>; Carla Lindler <[CLindler@RichardsonPlowden.com](mailto:CLindler@RichardsonPlowden.com)>; Collin Fuller <[cfuller@lucey-law.com](mailto:cfuller@lucey-law.com)>; Jennifer Zambriczki <[jzambriczki@lucey-law.com](mailto:jzambriczki@lucey-law.com)>  
Subject: RE: Case No. 2016-CP-02-0263 Napier v. Mundy's Construction / Plaintiff's Response to Defendant Mundy's Memo in Opposition to Motion to Reconsider

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Thanks Mr. Thompson.

David A. Anderson  
Attorney at Law  
[danderson@richardsonplowden.com](mailto:danderson@richardsonplowden.com)

Richardson, Plowden & Robinson, P.A.  
P.O. Drawer 7788  
Columbia, SC 29202  
Tel: 803.576.3702 Fax: 803.779.0016  
Mobile: 803.318.8821  
[https://urldefense.com/v3/\\_http://www.RichardsonPlowden.com\\_!!1HVHxrUang!G0uZ-6ZoLJzGhmluqJfFdFnk56KTMg\\_pjO84BnKXtkz\\_A4eJgx4xXSMnBoIc4Ng7EBw\\$](https://urldefense.com/v3/_http://www.RichardsonPlowden.com_!!1HVHxrUang!G0uZ-6ZoLJzGhmluqJfFdFnk56KTMg_pjO84BnKXtkz_A4eJgx4xXSMnBoIc4Ng7EBw$)

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From: Maddox, J. Cordell Law Clerk (David Thompson) [mailto:[cmaddoxlc@sccourts.org](mailto:cmaddoxlc@sccourts.org)]  
Sent: Monday, June 15, 2020 11:16 AM  
To: David Anderson <[DAnderson@RichardsonPlowden.com](mailto:DAnderson@RichardsonPlowden.com)>; Justin Lucey <[jlucey@lucey-law.com](mailto:jlucey@lucey-law.com)>; Maddox, J. Cordell <[CMaddoxJ@sccourts.org](mailto:CMaddoxJ@sccourts.org)>  
Cc: Lee Weiland <[lweiland@lucey-law.com](mailto:lweiland@lucey-law.com)>; Maddox, J. Cordell Secretary (Cynthia Hicks) <[cmaddoxsc@sccourts.org](mailto:cmaddoxsc@sccourts.org)>; James Robey

<JRobey@RichardsonPlowden.com>; Carla Lindler <CLindler@RichardsonPlowden.com>; Collin Fuller <cfuller@lucey-law.com>; Jennifer Zambriczki <jzambriczki@lucey-law.com>  
Subject: RE: Case No. 2016-CP-02-0263 Napier v. Mundy's Construction / Plaintiff's Response to Defendant Mundy's Memo in Opposition to Motion to Reconsider

Good Morning,

Thank you for the update. Judge Maddox will be making a ruling on both motions concurrently as requested as soon as possible.

Best,

David Thompson  
Law Clerk for the Honorable Judge J. Cordell Maddox, Jr.  
Office: (864) 260-4636  
Fax: (864) 260-6348

-----Original Message-----

From: David Anderson <DAnderson@RichardsonPlowden.com>  
Sent: Monday, June 15, 2020 10:41 AM  
To: Justin Lucey <jlucey@lucey-law.com>; Maddox, J. Cordell <CMaddoxJ@sccourts.org>  
Cc: Lee Weiland <lweiland@lucey-law.com>; Maddox, J. Cordell Law Clerk (David Thompson) <cmaddoxlc@sccourts.org>; Maddox, J. Cordell Secretary (Cynthia Hicks) <cmaddoxsc@sccourts.org>; James Robey <JRobey@RichardsonPlowden.com>; Carla Lindler <CLindler@RichardsonPlowden.com>; Collin Fuller <cfuller@lucey-law.com>; Jennifer Zambriczki <jzambriczki@lucey-law.com>  
Subject: RE: Case No. 2016-CP-02-0263 Napier v. Mundy's Construction / Plaintiff's Response to Defendant Mundy's Memo in Opposition to Motion to Reconsider

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Judge Maddox, It is my understanding the Judge Newman will issue a form 4 Order on today's hearing and allow you to consider both pending motions. Respectfully, David A. Anderson

David A. Anderson  
Attorney at Law  
danderson@richardsonplowden.com

Richardson, Plowden & Robinson, P.A.  
P.O. Drawer 7788  
Columbia, SC 29202  
Tel: 803.576.3702 Fax: 803.779.0016  
Mobile: 803.318.8821  
[https://urldefense.com/v3/\\_http://www.RichardsonPlowden.com\\_!!JHVHxrUang!DTPyFFUmK9B8CIRIOMaPJTE1UUhRgH53XeYcknh-GVGX\\_Ci9UjpkpHTq5GvojlHWPgw\\$](https://urldefense.com/v3/_http://www.RichardsonPlowden.com_!!JHVHxrUang!DTPyFFUmK9B8CIRIOMaPJTE1UUhRgH53XeYcknh-GVGX_Ci9UjpkpHTq5GvojlHWPgw$)

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-----Original Message-----

From: Justin Lucey [mailto:jlucey@lucey-law.com]  
Sent: Monday, June 15, 2020 10:33 AM  
To: Maddox, J. Cordell <CMaddoxJ@sccourts.org>  
Cc: Lee Weiland <lweiland@lucey-law.com>; David Anderson <DAnderson@RichardsonPlowden.com>; Maddox, J. Cordell Law Clerk (David Thompson) <cmaddoxlc@sccourts.org>; Maddox, J. Cordell Secretary (Cynthia Hicks) <cmaddoxsc@sccourts.org>; James Robey <JRobey@RichardsonPlowden.com>; Carla Lindler <CLindler@RichardsonPlowden.com>; Collin Fuller <cfuller@lucey-law.com>; Jennifer Zambriczki <jzambriczki@lucey-law.com>  
Subject: Re: Case No. 2016-CP-02-0263 Napier v. Mundy's Construction / Plaintiff's Response to Defendant Mundy's Memo in Opposition to Motion to Reconsider

Judge:

After arguing the Intervention motion, Judge Newman stayed the Intervention motion until, given the pending post trial motion in front of you, you decide whether it would be appropriate for you to accept and rule on the intervention issue.

Plaintiff respectfully request that an Order be issued on Intervention concurrently with the JNOV ruling so that there is no ambiguity as to any appeal deadlines.

Respectfully submitted,

Justin Lucey

> On Jun 15, 2020, at 10:06 AM, Maddox, J. Cordell <CMaddoxJ@sccourts.org> wrote:

>  
> I did not consider any motion under advisement. Only delayed. Hope  
> that helps you guys move forward wit your hearing in Aiken Cordell  
>  
> Sent from my iPhone  
>  
> On Jun 15, 2020, at 8:51 AM, Justin Lucey <jlucey@lucey-law.com> wrote:  
>  
>  
>  
> \*\*\* EXTERNAL EMAIL: This email originated from outside the  
> organization. Please exercise caution before clicking any links or  
> opening attachments. \*\*\*  
>  
> Judge Maddox:  
>  
> Plaintiffs Motion to Intervene has been scheduled to be heard this morning at 10am on the Aiken motion roster. I just wanted to make sure  
> that you did not already have this motion under consideration. Plaintiffs are fine with either forum.  
>  
> I can advise the motions clerk if it is under consideration.  
>  
> Respectfully Submitted  
>  
> Justin Lucey  
>  
> On May 15, 2020, at 10:33 AM, Lee Weiland <lweiland@lucey-law.com> wrote:  
>  
>  
> Good morning,  
>  
> Please find attached Plaintiffs' Response to Defendant Mundy Construction's Memorandum in Opposition to Plaintiffs' Motion to  
> Reconsider filed yesterday evening in the above-referenced matter.  
>  
> We are happy to travel to the Courthouse of your choice or set up a video conference to facilitate the disposition of these motions.  
>  
> Thank you,  
> Lee  
>  
> Lee Weiland  
> Remote Paralegal  
> Justin O'Toole Lucey, P.A.  
> 415 Mill Street  
> Mount Pleasant, SC 29464  
> Office: (843) 849-8400  
> Direct: (912) 228-8427  
> [https://urldefense.com/v3/\\_http://www.lucey-law.com\\_!!JHVHxrUang!DT](https://urldefense.com/v3/_http://www.lucey-law.com_!!JHVHxrUang!DT)  
> [PyFFUmK9B8CIRIOMaPJTE1UUhRgH53XeYcknh-GVGX\\_Ci9UpkpHTq5GvoOVY\\_L1Q\\$](https://urldefense.com/v3/_http://www.lucey-law.com_!!JHVHxrUang!H9DqZnYsQ3DXw8O6AkB1-N6aWQZF6Qo4jRP3i3ii56U4I3BGMS-kK2)  
> [\\_!!JHVHxrUang!H9DqZnYsQ3DXw8O6AkB1-N6aWQZF6Qo4jRP3i3ii56U4I3BGMS-kK2](https://urldefense.com/v3/_http://www.lucey-law.com_!!JHVHxrUang!H9DqZnYsQ3DXw8O6AkB1-N6aWQZF6Qo4jRP3i3ii56U4I3BGMS-kK2)  
> JVPbsMT5WRSw\$>  
>  
> From: David Anderson <DAnderson@RichardsonPlowden.com>  
> Sent: Monday, May 4, 2020 5:20 PM  
> To: Maddox, J. Cordell  
> <CMaddoxJ@sccourts.org<mailto:CMaddoxJ@sccourts.org>>; Maddox, J.  
> Cordell Law Clerk (David Thompson)  
> <cmaddoxlc@sccourts.org<mailto:cmaddoxlc@sccourts.org>>; Maddox, J.  
> Cordell Secretary (Cynthia Hicks)  
> <cmaddoxsc@sccourts.org<mailto:cmaddoxsc@sccourts.org>>  
> Cc: Lee Weiland  
> <lweiland@lucey-law.com<mailto:lweiland@lucey-law.com>>; Justin Lucey  
> <jlucey@lucey-law.com<mailto:jlucey@lucey-law.com>>; James Robey  
> <JRobey@RichardsonPlowden.com>; Carla Lindler  
> <CLindler@RichardsonPlowden.com>; Collin Fuller  
> <cfuller@lucey-law.com<mailto:cfuller@lucey-law.com>>; Jennifer  
> Zambriczki  
> <jzambriczki@lucey-law.com<mailto:jzambriczki@lucey-law.com>>  
> Subject: FW: Case No. 2016-CP-02-0263 Napier v. Mundy's Construction  
> Defendant Mundy's Memo in Opposition to Motion to Reconsider &  
> Proposed Order and Memo in Opposition to Motion to Intervene  
> Importance: High  
>  
> Good Afternoon: Please find attached Defendant Mundy's Construction, Inc. Memo in Opposition and Proposed Order to Plaintiff's  
> Motion to Reconsider as well as Mundy's Construction Memo in Opposition to Plaintiff's Motion to Intervene. I have taken the liberty to  
> also include a Word version of the Proposed Order referenced in our Motion in Opposition to Reconsider. Both of these were filed this  
> afternoon. Should you have any trouble in opening these attachments, please let me know. I do not plan to send any hard copies to your

Chambers unless the Court wishes for me to do so.

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> By Copy of this email, I am noticing Counsel of Record of this e-mail. Thanks for your attention to this matter and I hope that everyone is staying safe and strong during this COVID-19 era. Respectfully, David A. Anderson

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>  
> David A. Anderson  
> Attorney at Law  
> [danderson@richardsonplowden.com](mailto:danderson@richardsonplowden.com)<mailto:danderson@richardsonplowden.com>

>  
>  
> Richardson, Plowden & Robinson, P.A.  
> P.O. Drawer 7788  
> Columbia, SC 29202  
> Tel: 803.576.3702 Fax: 803.779.0016  
> Mobile: 803.318.8821

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> <20200514 Plts' Response to Mundy's Memo in Opp to Motion to Reconsider.pdf>  
> <20200514 Partial Transcript of Record.pdf>  
> <20200514 Def. Exh. 16 March 31 2009 Rickabaugh Letter.pdf> ~~~

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Collin Fuller

Justin O' Toole Lucey, P.A.

Office: 843-606-4718

Cell: 864-729-1241

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS  
) FOR THE SECOND JUDICIAL CIRCUIT  
) CASE NO. 2016-CP-02-00263

COUNTY OF AIKEN

ROBIN NAPIER, individually and on behalf  
of all others similarly situated,

Plaintiff,

vs.

MUNDY'S CONSTRUCTION, INC.  
D/B/A MUNDY CONSTRUCTION,

Defendant.

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AUG 03 2020

**SC Court of Appeals**

**ORDER GRANTING PLAINTIFF'S  
MOTION TO INTERVENE**

Pending before this Court is Plaintiff's Motion to Intervene pursuant to Rule 24, SCRPC. The Court took this Motion under consideration on June 15, 2020, and, having fully considered the parties' briefs, the Court grants Plaintiff's Motion for Appellate purposes only.

**FACTUAL BACKGROUND**

On April 14, 2020, Judge Maddox entered Final Order and Judgement (the "April 14 Order") in this matter. This Order awarded judgment to twenty-four (24) homeowners and barred the recovery of the remaining sixty-two (62) homeowners based upon the Statute of Repose.

As a result of the April 14 Order, Class Members Marianne Strohmeier and Barbara Von Bieberstein ("Intervenors") asked this Court for an Order that they are entitled to intervene in the above action both individually and on behalf of the other barred homeowners. Specifically, Intervenors sought to intervene to protect the rights and interest of the class members whose certificates of occupancy were eight (8) or more years old at the time this suit was filed ("Intervenor Subclass"). Intervenors adopted the allegations of the Third Amended Complaint.<sup>1</sup>

<sup>1</sup> Plaintiff's Third Amended Complaint was filed on or about July 28, 2017, on behalf of a class of eighty-six (86) homeowners.

## CONCLUSIONS OF LAW

Intervention may be sought as a matter of right under the provisions of Rule 24(a), SCRPC, or permissively in the Court's discretion under 24(b). In order to warrant intervention of right, the party seeking to intervene must: (1) establish timely application; (2) assert an interest relating to the property or transaction which is the subject of the action; (3) demonstrate that it is in a position such that without intervention, disposition of the action may impair or impede its ability to protect that interest; and (4) demonstrate that its interest is inadequately represented by other parties. See Rule 24(a), SCRPC; Ex Parte Reichlyn, 310 S.C. 495, 427 S.E.2d 661 (1993).

The Court finds that Intervenors have met the requirements of Rule 24(a), SCRPC, and are entitled to intervention as a matter of right.

### **1. Intervenors' Application is Timely**

Courts do not simply focus on whether/when the intervenor knew of the suit in determining the timeliness of its application – instead, it must be determined whether/when an event occurred which triggered the intervenor's particular interest in the suit causing the need to intervene. Pub. Citizen v. Liggett Grp., Inc., 858 F.2d 775, 785 (1<sup>st</sup> Cir. 1988) (“It is well-established that it is not the simple fact of knowing that a litigation exists that triggers the obligation to file a timely application for intervention.”). Thus, even when the intervenor has been aware of the underlying litigation, the “appropriate inquiry is when the intervenor became aware that its interest in the case would no longer be adequately protected by the parties.” Id. The triggering event may be in the form of an Order which creates the need to intervene in the litigation or changes the intervenor's circumstances as it relates to the ongoing litigation. See Davis v. Jennings, 304 S.C. 502, 504, 405 S.E.2d 601, 603 (1991) (“[Intervenor] had no reason to seek intervention prior to the sealing of the

records”); See also Pub. Citizen, 858 F.2d at 784 (“Timeliness is to be determined from all the circumstances.”) internal quotations omitted.

Here, the Court’s April 14 Order placed Intervenor on notice that their interests in the case might no longer be adequately protected by the current Class Representative, Napier. Thus, the timeliness of Plaintiff’s application for intervention must be measured against the April 14 Order.<sup>2</sup> Having filed its application only 10 days after the Order, Plaintiff’s application is timely.

## **2. Intervention as of Right is Warranted**

Having established that Plaintiff’s application is timely, Intervention as of Right must be granted if the remaining requirements are met.

Intervenor are asserting an interest relating to the property that is the subject of this suit. Intervenor are current class members whose homes are part of the property that is the subject of this suit.

Intervenor’s position is such that disposition of this action will foreclose their ability to protect their interests. As current class members and plaintiffs, should this action be disposed, Intervenor would forever lose the ability to enforce their rights against Defendant Mundy.

Finally, Intervenor have established that their interests might not be adequately represented by Napier in the future. The disparate treatment of the two classes of homes – the time barred homes and the non-time barred homes – in the April 14 Order, together with the Defendant’s attempted tender of judgment to the successful class members, demonstrates that Napier might no longer adequately be able to represent the interests of Intervenor and the time barred homeowners. For that reason, Intervenor are entitled to mandatory intervention so that they may avoid this

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<sup>2</sup> Defendant Mundy apparently argues that Intervenor should never have been a part of the Class because of the potentially applicability of the Statute of Repose, despite the overwhelmingly common questions of law and fact between all of the homes. Such a position places an unreasonable burden upon any class member(s) when proceeding in litigation such as this and would only serve to fracture future classes and create unnecessary additional litigation.

conflict and adequately represent their own interests and the interests of the sixty-two (62) time barred homeowners. Alternatively, this Court finds the foregoing would entitle Intervenors to permissive intervention.

WHEREFORE, for the reasons stated herein, the Court GRANTS Plaintiff's Motion to Intervene for appellate purposes only, including the appeal of this Court's denial of Plaintiffs Motion to Reconsider and Amend Judgment.

**IT IS SO ORDERED.**

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The Honorable J. Cordell Maddox  
The Second Judicial Circuit Court

June 22, 2020



Aiken Common Pleas

**Case Caption:** Robin Ind/Behalf Of All Ot Napier , plaintiff, et al VS Adiz Llc ,  
defendant, et al  
**Case Number:** 2016CP0200263  
**Type:** Order/Intervene

So Ordered

s/ J. Cordell Maddox Jr.

STATE OF SOUTH CAROLINA  
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS  
SECOND JUDICIAL CIRCUIT

Robin Napier, individually and on Behalf of  
all others similarly situated,

CIVIL ACTION NO: 2016-CP-02-00263

Plaintiff,

v.

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

Defendants.

ORDER

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AUG 03 2020

**SC Court of Appeals**

This matter comes before the Court pursuant to the Motion to Reconsider and Amend Judgment Dated/Enrolled April 14, 2020 filed on April 24, 2020 by Plaintiff Robin Napier, individually and on behalf of other similarly situated. After considering the arguments set forth by both parties, the Court holds that Plaintiff's Motion is DENIED.

Due to concerns from both parties regarding the language of Paragraph 3 under the Damages heading of the Court's Final Order and Judgment, the Court hereby amends said Paragraph to the following:

3) 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.

**AND IT IS SO ORDERED.**

The Honorable J. Cordell Maddox, Jr.  
Presiding Judge for the Second Judicial  
Circuit

\_\_\_\_\_  
May, 2020



Aiken Common Pleas

**Case Caption:** Robin Ind/Behalf Of All Ot Napier , plaintiff, et al VS Adiz Llc ,  
defendant, et al  
**Case Number:** 2016CP0200263  
**Type:** Order/Other

So Ordered

s/ J. Cordell Maddox Jr.