THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable J. Cordell Maddox, Jr.

Case No. 2016-CP-02-00263
Appellate Case No. 2020-001103

Robin Napier, individually and on behalf of all others similarly situated,……..Appellant,

v.

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

INITIAL REPLY BRIEF OF APPELLANT

JUSTIN O'TOOLE LUCEY, P.A.

/s/Justin Lucey
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SUMMARY OF ARGUMENT

Respondent Mundy's Construction, Inc. (hereinafter "Respondent," "Mundy," or "Mundy Construction") failed to address the most important issues in this appeal:

1. The erroneous, unpled, and unproven use/depreciation reduction for an asset of unlimited duration;

2. The lack of causal connection, let alone proximate cause, between normal homeowner use (wear and tear) of their home and foundations faulting as a result of inadequate compaction of the supporting soils;

3. The standard of care against which "slight care" or "due care" should be measured;

4. The significance of hundreds of building code violations, in light of the public policy of protecting homeowners; and,

5. Day laborers operating compactors – and the recklessness thereof.

These issues should be deemed conceded both procedurally and substantively.

Additionally, Respondent mirrors the Trial Court's inadvertent conflagration of gross negligence and recklessness and attempts to confuse many factual issues in a discrete attempt to collaterally attack unappealed findings. It becomes more and more apparent that the Trial Court's errors must be corrected.

I. Standard of Review

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.")

II. The Award of Damages Was Erroneous Both Because (1) It Was Not Based Upon Evidence and (2) It Was Controlled by Numerous Errors of Law

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. For the Court's ease of reference, 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 p. 4.)
>
> 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 p. 5.)

Then, under a 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 p. 6.)

2) "Additionally, Plaintiffs have documented loss of use in the amount of $461,511.00." (*Id.*)

3) "While difficult to decipher what damage resulted from the construction defects associated with Mundy's scope of work and what damages 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." (*Id.*)

Then, Trial Court awarded the Homeowners $240,000 in "actual damages," (*id.*), or a mere $10,000 per Homeowner, depending on the size of their home.

Respondent attempts to paint the Homeowners' appeal as solely challenging the damages award based upon a lack of support/evidence for the Trial Court's *sua sponte* reduction; this is incorrect. 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 pp. 4-5.) 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.

"Actual damages are properly called compensatory damages, meaning to compensate, to make the injured party *whole, to put him in the same position he was in prior to the damages* received insofar as this is monetarily possible." *See Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000) (emphasis added). In a construction case, the measure of damages that must be awarded as a result of a builder's negligence is the reasonable cost to repair. *See Sea Side Villas II Horizontal Prop. Regime v. Single Source Roofing, Corp*., 64 F. App'x 367, 374 (4th Cir. 2003) (in order to restore [Homeowners] to [their] preinjury status and to compensate [Homeowners] for the negligent actions of [contractor], the measure of damages is the reasonable cost to repair the defectively installed roof.") (applying South Carolina law); *see also Scott v. Fort Roofing and Sheet Metal Works, Inc.,* 299 S.C. 449, 385 S.E.2d 826, 827 (1989) ("When injury to property resulting from a trespass is remedial by restoration or repair, it is considered to be temporary, and the measure of damages is the cost of restoration and repair.") The only *potential* limitation to awarding damages based upon cost of repair is the value of the building *before* the damage was inflicted. *See id*; *see also* Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil* (2002) § 4-44; ("restoration costs are a valid measure of damages for injury to a building though the total compensation may be ***limited to*** the value of the building before the damage was inflicted") (emphasis added). The application of this limitation on damages depends on the circumstances. *John Thurmond & Assocs., Inc. v. Kennedy*, 284 Ga. 469, 473, 668 S.E.2d 666, 670

(2008) (we are not persuaded that either this language or the similar language in *Song* was intended by the Court of Appeals to create an immutable rule that damages may never exceed the fair market value of the property).[1]

Finally, while proof with mathematical certainty is not required, the amount of damages cannot be left to conjecture, guess or speculation. *Gauld v. O'Shaugnessy Realty Co*., 380 S.C. 548, 559, 671 S.E.2d 79, 85 (Ct. App. 2008) ("Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation.").

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'[2] worth of general wear and tear in conjunction with exposure to other elements" has no support in the Order; had no support in the record; and was not asked for, pled, or even mentioned by the Defendant before, during, or after trial.[3]

a. Wear and Tear: Not Pled or Proven

Mundy's response to its failure to plead wear and tear (f/k/a depreciation and use) as a Rule 8(c), SCRCP, affirmative defense asserts that "wear and tear" does not constitute an "avoidance

[1] *See also*, *Aiken Cty. v. BSP Div. of Envirotech Corp.*, 657 F. Supp. 1339, 1364 (D.S.C. 1986), *aff'd in part, rev'd in part*, 866 F.2d 661 (4th Cir. 1989) (court refuses to deduct any amount from the total replacement cost of $2,865,500.00 for the use that Aiken County has received from the equipment to date since that use has been troublesome, inefficient, and unsatisfactory).

[2] 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?

[3] The depreciation deduction was 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.

or affirmative defense." (Resp't Br. at p. 28.) Respondent fails to address Rule 12(b), which mandates that "[e]very defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, […]," SCRCP 12(b), with a few enumerated exceptions, none of which includes "wear and tear." Respondent now advocates that the position that an award for damages caused by Mundy should be reduced on account of actions by others is not an avoidance or affirmative defense. This wrong and undermined by the existence and content of the twenty-two (22) avoidances and affirmative defenses Mundy pled. (Mundy's Ans. to Third Amd Cpt.)

"Wear and tear," like failure to mitigate, is clearly an avoidance of monetary liability; here, the defense invoked by the Trial Court *sua sponte* reduced Mundy's liability by 90%. And, none of the boilerplate defenses cited in Mundy's brief can be read to give Homeowners "notice" of a wear and tear defense. Mundy alternatively asserts that it did give notice of this defense to the Homeowners by denying the complaint (and amended complaints) and pleading that the damages resulted from the acts of others, including the Homeowners.[4] (Resp't Br. at pp. 28-29.) In reality, Mundy's affirmative defenses each referenced the damages being caused by the NEGLIGENCE of others, not normal wear and tear (or depreciation or use). (*See* Mundy's Ans. to Third Amd. Cpt, Seventh and Eighth Defenses.) To confirm the obvious, "wear and tear" does not fall within the ambit of "negligence," and these defenses relied upon by Mundy did not give notice to Homeowners of a need to address a wear and tear defense or damage reduction.

Mundy goes on to compound the foregoing errors by claiming *Mundy* submitted evidence in support of wear and tear. (Resp't Br. at p. 29.) Both of these are patently false. Mundy never

[4] Respondent also asserts its affirmative defense of failure to mitigate puts Homeowners on notice. This unsupported stretch of logic does not really merit any additional response.

mentioned the words "wear and tear" during trial, and Mundy did not proffer any wear and tear evidence. Having stumbled on an unrequested break in damages by the Trial Court, Mundy is trying to assert that the Homeowners' photographic exhibits permitted the Trial Judge to "observe" wear and tear (*See, e.g.*, Resp't Br. at p. 29.) 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.[5]

The Homeowners did not seek damages related to "wear and tear," either in vertical or horizontal construction. (*See* Pl. Ex. 940; Order at p. 4.) The Trial Court found that the "necessary" repairs testified to by Dr. Whitlock were "due to Defendant's disregard for the requirements applicable to its work and lack of quality control." (Order at p. 4.) Unless Respondent can retroactively show that the peeling trim paint shown in Homeowner exhibits *caused* the foundation damages (which is illogical, improper, and impossible – and is just not in the record), then relying on photographs showing "wear and tear" of vertical construction components to substantiate this damage reduction in the horizontal construction is a legal and factual farce. Even if the Homeowners sought damages related to the repair of these vertical construction components from Mundy, which they did not, is Mundy going to assert for the first time at oral argument that wear and tear of the vertical components (e.g., paint on entrance door trim) should result in a 90% reduction of *foundation* damages? Preposterous and unsupported. That was briefed otherwise in Appellant's principal brief in addressing the lack of proximate cause.

[5] To reiterate, Dr. Whitlock's testimony was essentially adopted by the Trial Court as fact.

Lacking any probative evidence, Mundy goes on to assert that Dr. Whitlock's admission that even the best concrete can experience cracking necessarily means that not all the cracking was caused by Mundy. (Resp't Br. at p. 30.) Based upon this, Mundy *speculates* that some cracking might have been natural or unpreventable. But Mundy did not show that the natural cracking needed repair, or that eliminating the natural cracking would have materially changed the repair estimate. Again, a lack of evidence, a lack of causal connection, and a lack of proximate cause. Nor was there any probative evidence linking natural cracking with wear and tear.

In the penultimate attempt to retroactively establish support for a wear and tear reduction, Respondent clings to earthquakes and door slamming. (Resp't Br. at p. 30.) Respondent erroneously asserts Dr. Whitlock conceded a recent nearby earthquake (Respondent had Dr. Whitlock read from an article not in evidence, and he denied knowledge of the earthquake). (TR1 at p. 120.) And, Respondent ignores that Dr. Whitlock testified that the weak earthquakes Respondent was referring to was "not likely to cause any damage." (TR1 at p. 120, ln. 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." (Resp't Br. at p. 30.) First, Dr. Whitlock's damage estimate, P. Ex. 940, "excludes the cost to repair the vertical construction defects that were previously also part of this case." (Order at p. 4, fn. 2.) Assuming Respondent 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 p. 3.) 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 p. 121, lns. 6-19.)

Respondent concludes and summarizes its wear and tear arguments with the statement "[a]ll of the above is evidence that homes, overtime (sic), *can* experience damage unrelated to the construction of a home" (emphasis added). (Resp't Br. at p. 36.) "*Can*" is speculative and lacks the definitive support necessary for a 90% reduction in Appellant's damages.

Mundy neither pled nor proved "wear and tear," and thus basing a judgment on such an unpled and unproven defense was in error. *Mack v. Edens*, 306 S.C. 433, 436, 412 S.E.2d 431, 433 (Ct. App. 1991) ([A] court may not enter judgment on a ground that was neither pleaded nor proved by the party having the affirmative of the issue[…].") Appellant did not have notice of this defense either before or during trial, and the damage caused by the lack of notice briefed in Appellant's Initial Brief is clear. *Oldham v. O.K. Farms*, 871 F.3d 1147 (10th Cir. 2017) (notice and an opportunity to adduce evidence to address the new issues is required before a Court can rule on an issue it raised *sua sponte*). 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 Respondent. 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.

Reaching backward into the record to substantiate an unpled and unproven defense, like Respondent does here, is not supported by equitable or legal principles and requires reversal.

b. Appraisals Proffered by Respondent Do Not Support Trial Court's Reduction in Damages

The appraisals relied upon by Respondent to substantiate the Trial Court's reduction of damages is a desperate final attempt to conjure evidence *ex post facto*. Respondent uses the appraisals to illustrate that "the Trial Court had evidence before it that the estimated repair costs […] *were well over any depreciation* (sic) *in value of the units.*" (Resp't Br. at p. 31.) Essentially, Respondent used 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. (Resp't Br. at 32.) Attempting to use the appraisals in this manner misconstrues the evidence, and if the Trial Court did in fact use these appraisals to reduce repair costs, as Respondent surmises, it would illustrate an abject error of law.

Respondent surmises that the Trial Court based its $240,000 award on "diminution in value" of the homes. *See* Resp't Br. at p. 32 ("$9,610.00 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.[6] *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.")

[6] *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.").

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 Respondent.

If an appraisal is the basis for "diminution in value," then the appraisal value must take into account 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 Respondent explicitly did not consider the faulting foundations.

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. Respondent now insinuating otherwise is a red herring at best, and deceptive at worst, as Respondent ignores its own stipulation 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.[7]

III. The Only Standards Adduced at Trial Against Which Slight Care or Due Care Could Be Measured by the Trial Court Were Not Addressed by Mundy

Appellant briefed at length one of the several, million-dollar questions in this case: against what *standard* does one measure *slight care* or *due care*. There were only two standards adduced

[7] "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 p. 84, lns. 2-18 (emphasis added).)

at trial: the Building Code requirements that a) one must comply with the permitted plans and b) one must use engineered fill; and the Plan requirement of 98% compaction.[8] Respondent did not offer evidence of a different standard of care at trial, either through expert testimony or otherwise, and thus the issue was uncontested. Respondent does not address or contest that these are the only standards adduced and this issue should be deemed conceded.[9]

a. Proof Rolling Was Not Established as a Standard

Rather than contest the standards adduced by Homeowners, Respondent attempts to backdoor a third standard of care that was never proffered at trial; namely, that Respondent 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 Building Code or Permitted Plans. Respondent asserts that "Mundy Sr. testified that he always used this field test to determine whether the soil was compacted," (Resp't Br. at p. 9 citing TR1 at p. 165, lns. 7-16.[10]) This is a correct interpretation as to Mundy Sr.'s testimony regarding proof rolling performed on *this job*; however, to the extent that the Respondent 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 p. 162, lns. 17-19.) Simply put, there was no competent evidence entered in this case that proof rolling in lieu

[8] "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 p. 14 lns. 3-21; p. 17 ln. 24 – p. 19, ln. 2 (violation of building code; p. 25 lns. 11-22 (describing compaction requirements in site plans).

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

[10] This suggestion occurs again at p. 19. In fact, Respondent factual spins at pages 19-22 are exact repeats of the same pages 9 to 10, with several quotes inserted.

of testing was acceptable conduct, and Dr. 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 Building Code or Permitted Plans. (TR1 at p. 18, ln. 11 – p. 19, ln. 1.)

Not only was there an absence of evidence that proof rolling was an acceptable standard, but there was an express *factual finding to the contrary* by the Trial Court:

> 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 p. 3.)

Respondent's attempt to argue that "eyeballing" in the rear-view mirror while sitting 20 feet away in the cab of a dump truck is the exercise of slight care in doing the plan required density testing measurement of "98%" is simply absurd.

IV. Respondent Failed to Address the Trial Court's Legal Error in Treating Gross Negligence and Recklessness as Essentially the Same, And Respondent Compounded the Error by Implying that Gross Negligence is Akin to a Lesser Included Offense Such that If there is a Finding Against Gross Negligence, There Can't be a Finding Of Recklessness

Gross negligence, recklessness and fraud are each, independently, enumerated by South Carolina law as exceptions to the Statute of Repose. (S.C. Code Ann. 15-3-670(a), hereinafter "Statute".) Respondent 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 pp. 5-6 (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). At trial, Appellant did not allege that Respondent committed fraud or any other intentional tort; rather, Appellant showed that Respondent's conduct was grossly negligent and reckless. Because the Trial Court's interpretation and application of the Statute were incorrect, it must be reviewed *de novo* by this Court. *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, and this Court reviews questions of law *de novo*.").

Respondent'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 Br. at p. 26, fn. 2.) Not only is such a contention unsupported by South Carolina law, it is illogical: if gross negligence were subsumed into recklessness, then the Legislature would not list them out separately in this and other statutes. As Appellant briefed in great 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, as briefed earlier, gross negligence is the failure to exercise slight care. And, as explained above, consciousness does not equate to "intent," or intending that an injury occurs. "Due care" as it relates to Respondent was established during trial (*see* Section *supra* re: standards of care); the Trial Court found that Respondent knew what that standard was, and further that Respondent disregarded those standards.

V) Respondent Failed to Address Whether The Sheer Volume, Magnitude, and Severity of The Violations of The Building Code And Permitted Plans Compelled A Legal Conclusion Of Gross Negligence Or Recklessness

Respondent argues at length that a single violation of the building code does not necessarily constitute gross negligence or intent. (*See, e.g.*, Resp't Br. at pp. 23-24.) Appellant has never asserted otherwise. Respondent never addresses whether flagrant and/or *systemic* violations of the building code and permitted plans such as are present in this record constitutes gross negligence; and Respondent fails to address whether such conduct committed with full knowledge of the force and effect of the building code constitutes recklessness. Much of this is briefed at length in Appellant's Brief, and unaddressed by Respondent.

Under South Carolina law, **a single violation** of the building code constitutes **evidence** of gross negligence and recklessness. S.C. Code Ann. § 15-3-670(B).[11] 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 p. 155, ln. 13 – p. 156, ln. 12.); "habitually tried to follow and comply with the applicable building codes" (Resp't Br. at p. 20); but did not look at the construction 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 hundreds of building 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 Respondent, or was admitted by Mundy during trial or in his Initial Brief, *inter alia*:

- Mundy agreed that he had a duty to comply with the building code. (TR1 at p. 156, lns. 7-12.);

[11] 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 knew that the building code required that the work be performed in compliance with the permitted plans. (Order at p. 5, ¶32.);

- Mundy "always tried to follow and comply with the applicable building codes[.]" (Resp't Br. at p. 9.);

- Mundy knew that one could not move dirt or prepare a site without permitted plans, and "conceded that he failed to review site plans in the four (4) years the work took place on the Class Homes." (Order at p. 5, ¶32.);

- 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 p. 2, ¶6 and p. 4, ¶31.);

- Mundy conceded that he (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 building code and permitted plans. (Order at p. 3.);

- Mundy admittedly did not know that the permitted plans required a 98% density compaction. (TR1 at p. 168, ln. 9 – p. 169, ln. 8.); and

- Mundy repeated this course of conduct in the site preparation for all eighty-six Class Homes over four years. (Order at pp. 2, 5; Resp't Br. at pp. 8, 11.)

What results from the above *conceded* facts are (conservatively) twelve (12) building code violations per building pad, which equates to **one thousand thirty-two (1,032) statutory violations committed by Mundy on the Project**, or 1,548 individual pieces of evidence that Mundy was grossly negligent and reckless. 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 p. 4, ¶22 (emphasis added).)

A contractor violating a building 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 building code and permitted plans must be followed yet fails to do so hundreds of times cannot reasonably be seen as exercising "slight care." Taken together, the above supports but one conclusion: Respondent knew what it was supposed to do, but recklessly (at minimum) or consciously disregarded that

knowledge. These factual findings 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 constitutes gross negligence or recklessness — and clearly it does. The facts of this case compel a finding of gross negligence or recklessness.

VI. Respondent's Factual Arguments Against A Finding of Gross Negligence Contradict Findings of Fact by the Trial Court Which Were *Not* Appealed; and Misstate Evidence

Respondent engages (twice) in a lengthy, multifaceted discussion regarding why Mundy couldn't/can't be found grossly negligent because he did nothing wrong to begin with.[12] The problem for the Respondent is that the Trial Court has already found otherwise, Respondent has not appealed these findings, and Respondent'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 building code and plans and to test the soils, that he violated those duties, many, many times, and that Mundy's acts and omissions have proximately damaged the Homeowner class. The Trial Court's factual findings in this regard is not in dispute; rather, the issue on appeal is whether Mundy's violations were so flagrant and numerous and/or whether the violations were committed with conscious disregard such that public policy and precedent mandate a finding of gross negligence or recklessness.

[12] For example, Respondent 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 Br. at p. 22.)

Instead of appealing the Trial Court's findings or addressing the foregoing question, Respondent 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. All these efforts must fail.

a. 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

Respondent'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 Br. at p. 9.) The cited testimony actually indicates that these parties were "watching," (TR1 at p. 143), and Mundy, Sr. later testified that he did not know if the General Contractor was even qualified to inspect compaction. (Order at p. 4, ¶31.) Maddox testified that the engineer was checking silt fences and did not check compaction. (Maddox Construction, Inc. 30(b)(6) Dep. p. 119, lns. 16-24.) Respondent goes on to imply that the City Inspector gave him guidance on how to comply with the building code. (Resp't Br. at p. 9.) Mundy augmented his statements by conceding 1) that Mundy was the "one responsible for checking the compactor's work" (TR1 at p. 151, ln. 25 - p. 152, ln. 2); and 2) that Mundy *did not know* what the city inspector was checking on site. (TR1 at p. 152, ln. 20 - p. 153, ln. 2.)

Regardless of how Mundy tries to spin the testimony, 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 pp. 3, 4, 5.)

Even if Respondent was correct that there were other negligent actors on the Project overlooking or implicitly condoning its conduct, that would not change the outcome here. This Court is not going to condone the systemic violation of the permitted plans and building codes by a contractor claiming, without collaboration, indeed – with implicit contradiction by the code violations themselves – that the building inspector guided him.

Even if the general contractor or engineer had approved of or participated in Mundy's co-negligence, that just makes them joint tortfeasors. Furthermore, the building code provides that the issuance of a Certificate of Occupancy by the building inspector is not an approval of non-conforming conditions. (TR1 at p. 92, ln. 18 - p. 93, ln. 4.) As testified by Dr. Whitlock, every contractor knows or should know that every contractor on site must comply with the building code; there are no special exceptions for site contractors that do not look at the plans. (TR1 at p. 95, lns. 6-14.)

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

Another example of Respondent stretching the evidence beyond its reasonable limit is its statement that "Evidence submitted to 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 Br. at p. 9.) Respondent then refers to a license application affidavit by Sherwood R. "Woody" Belangia, the owner of the general contractor entity. (Def. Ex. 11.) The license application simply avers that Belangia performed typical general contractor 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 or call for vendor testing if Mundy wasn't equipped to perform its own testing. And, contrary to the implication by Respondent, the affidavit only refers to Belangia performing these activities 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 (Def. Ex. 11) *with* dates of Certificate of Occupancies (Def. Ex. 68) or Table of Permits and CO's (Pl. Ex. 62).)

The only evidence of the general contractor directing any of the site work presented at trial related to the timing of the commencement of portions of the site work and adjustments in elevations that occurred during the development. (*See e.g.*, TR2 at p. 46, ln. 23- p. 47, ln. 8.) There was no evidence that the general contractor 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 p. 20, 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.

(Hallum LLC, 30(b)(6) Dep. at p. 53, lns. 2-14.[13]) The testimony actually 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 permitted plans.

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

Respondent attempts to conflate the evidence relating to the testing of the finished building pad by third-party vendors (CSRA) with the lift testing required by the plans while the pad is being built. (*See* Resp't Br. at pp. 10-11.) 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 p. 18, ln. 7 - p. 19, ln. 1.) Dr. Whitlock explained why surface testing is not a substitute for lift testing. (TR1 at p. 19, 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 p. 3.)

All testimony cited by Respondent on pages 10 and 11 of its Initial Brief (and again in its argument) 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

[13] *See also id.* at p. 61 ln. 25 - p. 62, ln. 6; p. 63, lns. 6-13; p. 267, ln. 24 – p. 268, ln. 8.

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 p. 16, lns. 1 – 9.)

However, even if the Maddox testimony represented (not quoted) by Respondent 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 p. 122, lns. 11-14 (emphasis added).) There was absolutely 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.

What is the Respondent implying here – that the compaction requirement in the plans is simply a ploy to secure a building permit – and it is generally understood and agreed that no one actually complies with that requirement – so Mundy's conduct in complete derogation of the code and plans – in tacit accord with others on site - should be excused as simple negligence? If anything, complicity would suggest aggravated misconduct.

d. Respondent's Misuse of the Storm Water Letter Highlights Respondent's Lack of Evidentiary Support

Respondent continues its attempted collateral attack on the un-appealed Trial Court findings with a cite to Engineer Rickabaugh's letter, Def. Ex. 16, for the proposition that the site was stabilized, and the site construction complied with the plans. (Resp't Br. at pp. 10-11). This is deceptive and erroneous.

This Defense exhibit was stipulated into evidence in the following soliloquy:

> (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 p. 83, ln. 21 – p. 84, ln. 1 (emphasis added).)

To ensure there was no misrepresentation about the content or context of this exhibit being proffered by the Defendant (such as is attempted in Respondent's Brief), 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, Defendant tries to spin this into supporting evidence, which it is not. It is nothing but a red, red, red herring.

Respondent'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.

VII. Appellant Did Not Waive Its Issues

Respondent attempts to assert wavier or lack of error preservation by Appellant on various issues; these assertions are incorrect.

a. Appellant Did Not Waive Its Argument Regarding Recklessness

Appellant did not waive its arguments relating to recklessness. The October 2, 2019 proposed order submitted by Appellant 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 that a Final Order be submitted in conformance with his instructions.

Moreover, Respondent'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 Respondent would suggest. The Trial Court expressly asked for short post-trial statements:

> And also, as I said yesterday or this morning maybe, it would be helpful to me when I get back and start wading through this. And I don't know if you could reduce your basic arguments *to two pages*.
>
> *I don't need a brief* because there's briefs and memos in here, but just reducing your positions to writing would help as I go back and start looking through this. Otherwise, I'm depending on my notes, and I may have missed something that you wanted me to pay more attention to. So I don't really need a closing argument at this point. I've got it all. I just want to make sure that you both have an opportunity to put something in front of me that you really want me to look at that's been introduced.

(TR2 at p. 92, ln. 23 – p. 93, ln. 7 (emphasis added).) Appellant's Motion to Reconsider also addressed recklessness. (Reconsider Motion p. 5.)

b. Appellant Did Not Waive Its Argument Regarding Implied Warranty

Contrary to the suggestion by Respondent, Appellant's alleged failure to re-brief implied warranty (from pretrial brief and jury charges) in the original and amended post-trial position statement does not equate to waiver. Implied warranty was briefed in Appellant's pre-trial brief and incorporated jury charges. There was no need to brief it again; and the post-trial position statements were expressly directed to be brief and not in the form of extensive memoranda.

c. Appellant Did Not Waive Its Argument Regarding Intervention

When Appellant submits a proposed order granting full intervention and the Trial Court expressly instructs Appellant to change the proposed order to limit the grant of intervention to appeal only (Maddox Clerk to Lucey email dated June 24, 2020) and the Trial Court enters the revised order (Order Granting Intervention), the Trial Court has clearly denied complete intervention and the issue is preserved.

CONCLUSION

There were clear "rules of the road" for Mundy to follow in the compaction of the Spencer Drive Extension neighborhoods; use skilled, competent equipment operators to produce acceptable workmanship; test each lift to 98% dry density compaction; use engineered fill; and achieve adequate compaction. Mundy did none of these things, evidencing a lack of slight care. Mundy Jr.'s concurrent licensure study and testing evidence consciousness and a lack of slight care. 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.

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Mount Pleasant, SC
February 19, 2021

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable J. Cordell Maddox, Jr.

Case No. 2016-CP-02-00263
Appellate Case No. 2020-001103

Robin Napier, individually and on behalf of all others similarly situated,……..Appellant,

v.

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

PROOF OF SERVICE

I, the undersigned, do hereby certify that I have this date served the foregoing **INITIAL REPLY BRIEF OF APPELLANT**, dated February 19, 2021, by personally serving the same pursuant to Section (g)(3) of the Supreme Court's Amended Order dated May 29, 2020, on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable):

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A copy of the sent email is enclosed with this Certificate of Service.

JUSTIN O'TOOLE LUCEY, P.A.

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Mount Pleasant, SC
February 19, 2021

From: Lee Weiland
To: David Anderson; James Robey; Carmen Ganjehsani
Cc: Lucey, Justin; Anna McCann; Jennifer Zambriczki; Lee Weiland
Subject: 2020-001103 Napier v. Mundy"s Construction // Initial Reply Brief of Appellant and Amended Designation of Matters
Date: Friday, February 19, 2021 4:16:48 PM
Attachments: 20210219 Appellant"s Initial Reply Brief.pdf
20210219 Proof of Service Reply Brief.pdf
20210219 Appellant"s Amended Designation of Matter.pdf
20210219 Proof of Service Amended Designation of Matter.pdf

Counsel,

Please find served upon you today, in compliance with the Supreme Court's Amended Order dated May 29, 2020, the Initial Reply Brief of Appellant, Amended Designation of Matters to be Included in the Record of Appeal, and respective Proofs of Record in the above-referenced appellate matter.

Please let me know if you have any questions.

Thank you,
Lee

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