THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM AIKEN COUNTY
COURT OF COMMON PLEAS
THE HONORABLE J. CORDELL MADDOX, JR.
CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2020-001103
CIVIL ACTION NO. 2016-CP-02-00263

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

APPELLANT,

versus

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

RESPONDENT.

FINAL BRIEF OF RESPONDENT

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(A) such townhomes were completed more than eight years prior to the filing of the lawsuit; and

(B) the Homeowners did not prove Mundy Construction was grossly negligent or reckless to defeat the application of the Statute of Repose.

II. The Trial Court, sitting as the factfinder in a case tried without a jury and who had considerable discretion regarding the award of damages, properly awarded actual damages to the non-barred Homeowners in the amount of $240,000.00 which was supported by the evidence presented.

III. The Trial Court did not err in declining to award punitive damages where the Homeowners did not prove by clear and convincing evidence Mundy Construction acted with conduct that was reckless, willful, or wanton.

IV. The Trial Court did not err in declining to find Mundy Construction liable on the Homeowners' breach of warranty claim because it already granted recovery to the Homeowners on their negligence claim based on the same set of facts; furthermore, the Homeowners abandoned this argument in their appeal by citing no authority and only making a broad, vague, and conclusory statement on the issue.

V. The Trial Court did not err in limiting the intervention of two homeowners to represent the class of the sixty-two (62) barred homeowners for appeal purposes only where these sixty-two (62) homeowners have no claims following this appeal because the Statute of Repose bars such claims; moreover, the Homeowners did not preserve this argument for appellate review by failing to file a motion for the Trial Court to reconsider its order limiting intervention.

COUNTERSTATEMENT OF THE CASE

This action arises out of a residential construction defect lawsuit by a single homeowner acting individually and on behalf of the owners of eighty-six (86) townhomes located in the Spencer Drive Extension neighborhood of Aiken, South Carolina which were completed from 2005 to 2009.

On February 8, 2016, Plaintiff Robin Napier, individually and on behalf of all others similar situated, commenced a suit in the Aiken County Court of Common Pleas against multiple defendants. [R.pp. 49-63; Compl.] Plaintiff Napier eventually filed a Third Amended Complaint on July 28, 2017. [R.pp. 64-81; Third Am. Compl.]

The Third Amended Complaint raised construction defect allegations against the general contractors and subcontractors/suppliers of the Spencer Drive Extension townhomes. The Third Amended Complaint generally alleged the townhomes contained latent building defects that, in combination with storms and other events, caused damages to the non-defective portions of the units. Specifically, the Third Amended Complaint alleged the defects permitted repeated water intrusion and differential settlement which resulted in damages to the framing, walls, windows, doors, roofing, siding, flashing, trim, and HVAC among other things. [R.pp. 67-75; Id. at ¶¶ 3-49; 55-60.]

Plaintiff Napier named Respondent Mundy's Construction, Inc. d/b/a Mundy Construction ("Mundy Construction") as one of the subcontractor defendants. She alleged that Mundy Construction performed the site preparation work at one or more of the townhomes. [R.p. 72; Id. at ¶ 36.]

Plaintiff Napier sought to maintain the suit as a class action pursuant to Rule 23 of the South Carolina Rules Civil Procedure and further asserted claims of negligence/gross

negligence and breach of warranty against Mundy Construction and the other named defendants. [R.pp. 76-81; Id. at ¶¶ 69-82; 88-98.]

Mundy Construction answered the Third Amended Complaint on July 28, 2017. [R.pp. 82-90; Answer.] It denied the material allegations of the Third Amended Complaint, including that it was responsible for any construction defects or damages or that any damages to the townhomes were caused by any actions of Mundy Construction. [R.pp. 84-85; Id. at ¶¶ 10, 13-14, 16.] It also asserted as a defense that the claims alleged in the Third Amended Complaint were barred by the Statute of Repose set forth in S.C. CODE ANN. § 15-3-640 *et al.* [R.p. 87; Id. at ¶ 27.] Finally, Mundy Construction maintained that any damages suffered by Plaintiff Napier and those homeowners she sought to represent resulted from the acts of others, including the homeowners, and that the homeowners further failed to mitigate their damages. [R.pp. 85-86; Id. at ¶¶ 20, 23-25.]

On January 12, 2018, the Trial Court, over the objection of multiple defendants, certified the case as a class action pursuant to Rule 23, describing the class of homeowners (the "Homeowners") as follows:

> An opt-out class of all persons and entities that own structures located on New Haven Lane, Amity Lane, Bennington Lane, and Hillsborough Lane in Aiken, South Carolina, excluding the Defendants, their owners, members and employees; and further excluding any homeowner who has already filed a construction defect lawsuit or who has previously completely released these Defendants.

[R.pp. 1-20; Certification Order.]

All named defendants in the case eventually settled with the Homeowners except for Mundy Construction. [R.p. 1106; Mundy Construction Pretrial Brief, p. 10.] The action between the Homeowners and Mundy Construction proceeded to a bench trial

before the Honorable J. Cordell Maddox, Jr. on May 28 and 29, 2019 upon the agreement of the parties to waive a jury trial. [R.pp. 1565-66; 1570, ll. 13-22; Trial Tr. Vol. II[1], pp. 1-2, 6, ll. 13-22.]

The Trial Court heard the testimony of the parties' witnesses and received into evidence numerous exhibits submitted by both parties. Following the conclusion of the testimony, the Homeowners and Mundy Construction each submitted post-trial position statements to Judge Maddox. [R.pp. 1223-28; 1108-11; Plaintiffs' Amended Post-Trial Position Statement; Mundy Construction Position Statement.]

In the Homeowners' position statement, they contended Mundy Construction was grossly negligent in its site preparation work which allegedly resulted in differential settlement causing large cracks in the foundations of the townhomes. They further argued the eighty-six (86) Homeowners were entitled to a judgment of actual damages in the amount of $8,470,438.47 plus $1,000,000.00 in punitive damages less $1,825,000.000 in previous settlements paid for a net judgment of $7,645,438.47. [R.pp. 1226; 1228; Plaintiffs' Amended Post-Trial Position Statement, pp. 4, 6.]

Mundy Construction maintained in its position statement that it was not responsible for the alleged defects in the concrete foundation slabs and that at a minimum the evidence presented demonstrated that Mundy Construction performed its work with slight care. [R.p. 1110; Mundy Construction Position Statement, p. 3.] It also argued that South Carolina's Statute of Repose, S.C. CODE ANN. § 15-3-640, which requires a plaintiff to bring its action within eight (8) years of substantial improvement to real

[1] The transcript containing the testimony of Rhett Whitlock and Tony Mundy, Sr. is referred to herein as "Trial Tr. Vol. I." The transcript containing the remaining testimony is referred to herein as "Trial Tr. Vol. II."

property, barred claims relating to sixty-two (62) of the eighty-six (86) townhomes in the class because the lawsuit was filed more than eight years after substantial completion based upon the certificates of occupancy for those sixty-two (62) homes. [R.p. 1111; Id. at p. 4.]

On April 14, 2020, the Trial Court filed its Final Order and Judgment. [R.pp. 35-41; Final Order.] In its Final Order and Judgment, the Trial Court found Mundy Construction liable for negligence but also determined that Mundy Construction's actions did not rise to the level of gross negligence or intent. [R.p. 39; Id. at p. 5.]

The Trial Court further ruled that the Statute of Repose barred recovery for the sixty-two (62) townhomes with certificates of occupancy dated beyond the eight (8) year Statute of Repose time period. Therefore, only the homeowners of twenty-four (24) units were entitled to any recovery. [R.p. 40; Id. at p. 6.]

In calculating damages, the Trial Court determined that the maximum repair cost the Court would consider awarding for the twenty-four (24) units remaining in the case based upon the evidence presented was $1,750,177.00 plus a loss of use amount of $461,511.00. Noting that it was difficult to decipher what damage resulted from construction defects and what damage occurred from the years of use of the townhomes and depreciation, the Trial Court reduced the amount of actual damages awarded to the remaining class members to $240,000.00. The Trial Court did not award any punitive damages, finding no gross negligence or intent on the part of Mundy Construction. Accordingly, judgment was entered against Mundy Construction in the amount of $240,000.00. [R.p. 40; Id. at p. 6.]

The Homeowners moved for reconsideration of the Trial Court's award of damages on April 24, 2020. [R.pp. 1232-46; Mtn to Reconsider.] The Homeowners further made a motion on April 24, 2020 seeking to permit class members Marianne Strohmeier and Barbara Von Bieberstein to intervene in the action both individually and on behalf of the sixty-two (62) homeowners who were barred from recovery due to the expiration of the Statute of Repose to protect the interests of the barred homeowners on appeal. [R.pp. 1229-31; Mtn. to Intervene.]

Mundy Construction responded to and opposed the Motion to Reconsider and the Motion to Intervene on May 4, 2020. [R.pp. 1373-81; 1366-72; Memo. in Opp. to Mtn. to Reconsider; Memo. in Opp. to Mtn. to Intervene.]

On July 20, 2020, the Trial Court granted the Motion to Intervene, permitting Marianne Strohmeier and Barbara Von Bieberstein to intervene both individually and on behalf of the barred homeowners for purposes of the Homeowners' appeal only. [R.pp. 44-48; Intervention Order.]

The Trial Court further denied the Homeowners' Motion to Reconsider but amended its statement regarding its award of reduced damages to the following:

> 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.

[R.p. 42; Order on Reconsideration.]

The Homeowners filed and served their Notice of Appeal on or about July 30, 2020.

COUNTERSTATEMENT OF FACTS

This class action lawsuit arises out of the development and construction of a patio home community located off of Spencer Drive Extension in Aiken, South Carolina (referred to hereafter as the "Community."). The Community consists of eight-six (86) homes and spans the following streets: New Haven Lane, Amity Lane, Bennington Lane, and Hillsborough Lane. [R.p. 35; Final Order, p. 1.] The townhomes are all single-family, zero lot line, vinyl siding homes that sit on concrete slab foundations approximately four inches thick supported by the soil underneath. Each building or unit includes three homes. [R.pp. 1574, ll. 16-19; 1575, ll. 7-12; Trial Tr. Vol. II, pp. 10, ll. 16-19; 11, ll. 7 - 12.]

ATC Development Corporation ("ATC") and its related entities served as the developer and general contractor for the Community. [R.pp. 1582, ll. 1-17; 1500, ll. 5-7; Id. at p. 18, ll. 1- 17; Trial Tr. Vol. I, p. 107, ll. 5-7.] The homes were built between 2005 and 2008. [R.pp. 1577, l. 18 – 1578, l. 6 ; Trial Tr. Vol. II, p. 13, l. 18 – 14, l. 6.]

Mundy Construction was retained by ATC to perform site work on an hourly basis at the Community. Mundy Construction is a local, family owned business operated by the father-son duo of Tony Mundy, Sr. and Tony Mundy, Jr. [R.p. 1527, ll. 8-14; Trial Tr. Vol. I, p. 134, ll. 8-14.] The father, Tony Mundy, Sr., started the company after serving in the Georgia National Guard Armory from 1964-1970 and then working as a firefighter with the City of Augusta, Georgia for the following twenty-seven years. [R.pp. 1524, l. 10 – 1525, l. 7; Id. at pp. 131, l. 10 – 132, l. 7.] After retiring from the fire department, Mundy, Sr. was employed by a company to remove underground storage tanks. Eventually, he went into the full-time business of removing tanks himself and

purchased his own equipment. [R.p. 1526, ll. 7-25; Id. at p. 133, ll. 7 – 25.] He started the company, Mundy Construction, in the early 1990s. [R.p. 1527, ll. 1-2; Id. at p. 134, ll. 1-2.]

Mundy Construction is located in Harlem, Georgia, and the company stores its equipment on some property in Aiken County. [R.pp. 1523, l. 18; 1527, ll. 3-7; Id. at pp. 130, l. 18; 134, ll. 3-7.] The company initially started out providing services for underground tank removal and eventually added demolition work for the City of Augusta as well as land clearing and hauling services. [R.p. 1527, ll. 17-25; Id. at p. 134, ll. 17 – 25.]

During the construction of the Community, Mundy Construction rented equipment to the general contractor, ATC. [R.p. 1537, ll. 5-10; Id. at p. 144, ll. 5-10.] Mundy Construction also provided land clearing services for the project, using its excavator to clear the land of trees and other materials. ATC assisted Mundy Construction with that work, using its own crew and its skid steer and backhoe. [R.p. 1528, ll. 6-20; Id. at p. 135, ll. 6 – 20.]

Mundy Construction also performed compaction of the building pads for the Community homes. In his trial testimony, Mundy, Sr. described the process for performing this work. The developer, ATC, and the site engineer, Hal Trotter of Hallum, LLC, would have a surveyor stake off the areas for which pads were needed. The areas were staked off and measured to the height desired. In some areas, dirt from the high sides of the streets would have to be cut down and moved to the low sides to balance and level the site. [R.pp. 1529, ll. 6-16; 1535, ll. 15-16; Id. at pp. 136, ll. 6-16; 142, ll. 15-16.]

According to Mundy, Sr., he drove a dump truck while his son operated the excavator, loading the dirt into the dump truck. Mundy, Sr. would then move the dirt to the pad while another subcontractor, Maddox Construction, would grade the dirt on the pad with a bulldozer. Mundy Construction would then use a packer to pack the dirt on the pad. [R.pp. 1529, l. 17 – 1533, l. 14; Id. at p. 136, l. 17 – 140, l. 14.]

Mundy, Sr. testified that he conducted inspections on the pads. When a load of dirt had been spread and packed, he would observe his tread depth over the pad to determine whether it needed more compaction before the next load was spread and packed. He would use a process known as "proof roll" where a dump truck is slowly moved over the pad. If the soil moves at all, then the soil is not compacted. Mundy, Sr. testified that he always used this field test to determine whether the soil was compacted. [R.pp. 1535, l. 17 – 1536, l. 13; 1558, ll. 7-16; Id. at pp. 142, l. 17 – 143, l. 13; 165, ll. 7-16.]

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 and that occasionally inspectors from the City of Aiken were also on site while he was working. [R.pp. 1536, ll. 14-20; 1548, ll. 1-9; Id. at pp. 143, ll. 14 – 20; 155, ll. 1-9.] He also testified that Mundy Construction was never tasked with testing soil samples. [R.p. 1541, ll. 4-6; Id. at p. 148, ll. 4-6.] According to Mundy, Sr., his company always tried to follow and comply with the applicable building codes, and he believed he was performing properly under the guidance from ATC, the site superintendent, the site engineer, and the City of Aiken to make sure his company was following the code.

[R.pp. 1548, ll. 13-18; 1549, l. 10; 1553, ll. 6-7, 19-20; Id. at pp. 155, ll. 13 – 18; 156, l. 10; 160, ll. 6-7, 19-20.]

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. Sherwood R. "Woody" Belangia, the owner of ATC, completed a work experience affidavit that averred that with respect to the development and construction of the Community, he "functioned as the general contractor in fact, performing all the tasks associated with that title: [ ] supervision of all site work including grading and underground utilities, . . . performing field audits and quality assurance inspections, ordering inspections, [and] ensuring regulatory compliance." [R.pp. 3089-90; Defendant's Ex. 11 (Belangia Aff.).]

Kenny Gordon of Maddox Construction, the other site preparation subcontractor for the Community, testified that Mundy Construction was not responsible for conducting any specific compaction testing, other than the proof rolling it did on site, and that such additional compaction testing was handled and coordinated by ATC who would retain geological engineers for such testing. [R.pp. 1702, ll. 5-15; 1707, ll. 8-11; 1708, ll. 14-17; Maddox Construction Dep., pp. 51, ll. 5-15; 83, ll. 8 – 11; 112, ll. 14-17.] He also confirmed Mundy, Sr.'s testimony that the general contractor always had someone on site while work was being performed. [R.pp. 1703, ll. 2-4; 1704, ll. 15-17; 1705, l. 18 – 1706, l. 13; Id. at pp. 59, ll. 2-4; 60, ll. 15-17; 80, l. 18 – 81, l. 13.]

Hal Trotter of Hallum, LLC, the site superintendent for the project, also confirmed in his testimony that Mundy Construction was not responsible for coordinating or conducting specific soil and compaction testing and that ATC coordinated such testing

for the Community. [R.pp. 1690, l. 17 – 1691, l. 14; 1692, ll. 7-10; 1693, ll. 12-20; 1500, ll. 10-13; Hallum, LLC Dep., pp. 182, l. 17 – 183, l. 14; 189, ll. 7-10; 190, ll. 12-20; Trial Tr. Vol. I, p. 107, ll. 10-13.]

Daniel K. Rickabaugh, P.E., the engineer who prepared the plans for the construction of the Community, issued a letter on March 31, 2009 to SC DHEC that based upon his visit to the Community after completion of construction, he determined the site was "considered to have reached final stabilization" and that construction complied with the approved plans. [R.pp. 3100; 1500, ll. 8-9; Defendant's Ex. 16 (Rickabaugh Ltr.); Trial Tr. Vol. I, p. 107, ll. 8-9.]

The invoices from Mundy Construction to ATC showed that Mundy Construction rented equipment to ATC and performed tank removal, demolition, and land clearing services to ATC on an hourly basis. [R.pp. 1536, l. 21 – 1537, l. 17; 2834-84; Trial Tr. Vol. I., pp. 143, l. 21 – 144, l. 17; Defendant's Ex. 1 (Invoices).] Mundy, Sr. testified these were the primary services Mundy Construction provided to ATC. [R.p. 1537, ll. 15-17; Trial Tr. Vol. I., p. 144, ll. 15-17.] Mundy Construction was paid approximately $278,000.00 total for its site work performed for approximately four years from March 2005 through February 2009. [R.pp. 36; 1538, ll. 4-15; 2885-87; Final Order, p. 2; Trial Tr. Vol. I., p. 145, ll. 4 – 15; Defendant's Ex. 2.]

The Homeowners offered Dr. Rhett Whitlock as a geotechnical expert at trial. The Homeowners claimed at trial that cracking and differential movement was taking place in the concrete foundations, or slabs, upon which their homes were built. The Homeowners presented evidence that differential movement occurs when portions of an otherwise fixed slab foundation move in different directions causing cracking. They

further showed that the slabs were sinking at different rates due to inadequate soil support and that this movement was causing cracking in the concrete slabs as one side of the slab subsided quicker than the other. Whitlock opined the inadequate soil support was caused by inadequate compaction of the soils during site preparation. [R.pp. 35-37; Final Order, pp. 1- 3.]

On cross-examination, Whitlock acknowledged that he never observed any work performed by Mundy Construction on the project site. [R.pp. 1489, l. 22 – 1490, l. 2; Trial Tr. Vol. I, pp. 96, l. 22 – 97, l. 2.] Whitlock further acknowledged that every newly constructed home will experience some degree of settlement, and that every concrete pad poured, even under the best of circumstances and under the best type of platform, can experience cracking. [R.pp. 1496, ll. 12-18; 1498, ll. 11-15; Id. at pp. 103, ll. 12 – 18; 105, ll. 11-15.]

Whitlock also acknowledged that South Carolina does experience multiple minor earthquakes each year and further acknowledged, after questioning, that a 4.1 magnitude earthquake occurred near Edgefield, South Carolina on February 14, 2014. [R.pp. 1512, l. 11 – 1513, l. 22; Id. at pp. 119, l. 11 – 120, l. 22.] He further conceded that some damage to door frames in the townhomes could occur from the slamming of doors. [R.p. 1514, ll. 13-17; Id. at p. 121, ll. 13-17.]

Numerous exhibits were submitted to the Trial Court for his consideration in rendering a decision on the Homeowners' claims. The Trial Court was provided hundreds of photographs of the conditions of the units at issue. [R.pp. 2484-2529; 2789-2833; Plaintiff's Exs. 953, 954, 955, 956, 957, 958, 959, 960, 962, 977, 978, 979, 980, 981, 993, 995, and 997.] The Homeowners provided a cost of repairs estimate to the Trial Court for

all eighty-six (86) units for a total of $8,470,438.47 or a cost of repair of approximately $98,000.00 per unit. [R.pp. 2468-79; Plaintiff's Ex. 940 (WDP Cost Estimate).] Mundy Construction also provided the Trial Court with appraisal values from a sampling of the townhomes showing market values of the homes ranging between $87,000.00 and $112,000.00 in October 2018. [R.pp. 2978-3080; Defendant's Exs. 4-9 (Appraisals).]

Finally, the Trial Court was presented with the Certificates of Occupancy for the units which showed that sixty-two (62) units were issued Certificates of Occupancy before February 8, 2008 and that twenty-four (24) units were issued Certificates of Occupancy on or after February 8, 2008. [R.pp. 2888-2977; 2810; Defendant's Ex. 3 (Certificates); Plaintiff's Ex. 991 (Chart of Certificates).]

In its Final Order, the Trial Court found that Mundy Construction had not complied with the plans and applicable building codes in compacting the soils of the building pads, including the requirement that fill shall be placed in 6 inch layers and compacted to 98% maximum dry density at optimum moisture. Therefore, the Trial Court found Mundy Construction liable for negligence. [R.pp. 36-39; Final Order, pp. 2-5.]

The Trial Court, however, determined that the evidence presented did not prove that Mundy Construction was grossly negligent or acted with intent. [R.p. 39; Id. at p. 5.] Additionally, the Trial Court ruled that the Statute of Repose barred recovery of damages for sixty-two (62) of the units which were issued Certificates of Occupancy dated outside of the Statute of Repose time period. [R.p. 40; Id. at p. 6.]

Finding that only twenty-four (24) units were entitled to the recovery of any damages, the Trial Court determined that the most damages which could be awarded

based upon evidence presented by the Homeowners was $2,211,688.00 ($1,750,177.00 in repair costs plus $461,511.00 for loss of use). [R.p. 40; Id.]

Determining however that it was difficult to decipher what damage resulted from the construction defects associated with Mundy Constructions's scope of work and what damage resulted from other factors, the Trial Court found that years' worth of general wear and tear in conjunction with exposure to other elements reduced the amount of damages attributable to Mundy Construction. Accordingly, the Trial Court awarded damages to the Homeowners in the amount of $240,000.00. [R.pp. 40; 42; Final Order, p. 6; Order on Reconsideration.]

The Homeowners now appeal the Trial Court's bar of recovery to the owners of sixty-two (62) of the units and the amount of the damages awarded by the Trial Court for the remaining twenty-four (24) units.

STANDARD OF REVIEW

"In an action at law tried without a jury, an appellate court's scope of review extends merely to the correction of errors of law." Wilson v. Gandis, 430 S.C. 282, 291, 844 S.E.2d 631, 636 (2020) (internal citation omitted). An appellate court may not "disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings." Id. (internal citation omitted); see also Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976), *abrogated on other grounds by* In re Estate of Kay, 423 S.C. 476, 816 S.E.2d 542 (2018), ("In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings.").

"The judge's findings are equivalent to a jury's findings in a law action." Townes, 266 S.C. at 86, 221 S.E.2d at 775. As long as there is "any evidence" to reasonably support the trial judge's findings in an action tried without a jury, the appellate court must affirm the lower court's findings. The standard is not whether the trial judge's findings are supported by a preponderance of the evidence. Id. at 86, 221 S.E.2d at 776; see also Pope v. Gordon, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006) (In a bench trial, "[t]he trial judge's findings of fact will not be disturbed on appeal unless the findings are *wholly unsupported* by the evidence . . . .") (emphasis added); Shepard v. S.C. Dep't of Corrs., 299 S.C. 370, 372, 385 S.E.2d 35, 36 (Ct. App. 1989) ("In an action at law tried before a judge sitting without a jury, the trial judge's findings of fact have the same force and effect as a jury verdict and are conclusive on appeal when supported by competent evidence.").

In a bench trial, "[t]he judging of the credibility of witnesses and the weighing of evidence in a law case are uniquely functions of the trial court, not [the appellate court]," and [the appellate court] should sustain the trial court's findings sitting as the factfinder if such findings are supported by some evidence. Bivens v. Watkins, 313 S.C. 228, 230, 235, 437 S.E.2d 132, 133, 136 (Ct. App. 1993). Accordingly, the two issues central to this appeal – whether the Trial Court, sitting in the seat of the factfinder, correctly found that Mundy Construction was not grossly negligent or did not act with intent and further awarded a proper amount of damages – should be affirmed by this Court if any evidence supports the Trial Court's findings.

ARGUMENT

I. The Trial Court correctly ruled the eight-year Statute of Repose barred the recovery of damages for sixty-two (62) townhomes in the Homeowners' class action construction defect lawsuit because:

(A) such townhomes were completed more than eight years prior to the filing of the lawsuit; and

(B) the Homeowners did not prove Mundy Construction was grossly negligent or reckless to defeat the application of the Statute of Repose.

Mundy Construction presented evidence that sixty-two (62) of the eight-six (86) townhomes at issues in this class action were issued Certificates of Occupancy prior to February 8, 2008. [R.pp. 2888-2977; 2810; Defendant's Ex. 3 (Certificates); Plaintiff's Ex. 991 (Chart of Certificates).] This class action suit was filed on February 8, 2016, more than eight years after the completion of these sixty-two (62) units. [R.pp. 49-63; Compl.]

The Trial Court determined that South Carolina's Statute of Repose barred the recovery of damages for these sixty-two (62) units. [R.p. 40; Final Order, p. 6.] The Statute of Repose required the Homeowners to bring their action within eight (8) years of the substantial improvement to real property. S.C. CODE ANN. § 15–3–640. Specifically, Section 15–3–640 provides:

> No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than *eight years* after substantial completion of the improvement. For purposes of this section, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:
>
> (1) an action to recover damages for breach of a contract to construct or repair an improvement to real property;
>
> (2) an action to recover damages for the negligent construction or repair of an improvement to real property;

(3) an action to recover damages for personal injury, death, or damage to property;

(4) an action to recover damages for economic or monetary loss;

(5) an action in contract or in tort or otherwise;

. . .

(9) an action against owners or manufacturers of components, or against any person furnishing materials, or against any person who develops real property, or who performs or furnishes the design, plans, specifications, surveying, planning, supervision, testing, or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property.

§ 15-3-640.

South Carolina's Statute of Repose further specifies that "a certificate of occupancy issued by a county or municipality, in the case of new construction or completion of a final inspection by the responsible building official in the case of improvements to existing improvements, shall constitute proof of substantial completion of the improvement . . . ." Id.

A statute of repose represents "an absolute time limit beyond which liability no longer exists." Langley v. Pierce, 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993) (quoting First United Methodist Church v. United States Gypsum Co., 882 F.2d 862, 865–66 (4th Cir. 1989)). The statute is a societal recognition that at some point in the future liability no longer exists. "When causes of action are extinguished after such time, society generally may continue its business and personal relationships in peace, without worry that some cause of action may arise to haunt it because of some long-forgotten act or omission." Langley, 313 S.C. at 404, 438 S.E.2d at 244 (quoting Kissel v. Rosenbaum, 579 N.E.2d 1322, 1326–28 (Ind. Ct. App. 1991)).

To further that purpose, a statute of repose, unlike a statute of limitations, cannot be defeated by estoppel, waiver, or claims of tolling. G & P Trucking v. Parks Auto Sales Serv. & Salvage, Inc., 357 S.C. 82, 89, 591 S.E.2d 42, 45 (Ct. App. 2003). In short, a statute of repose is a substantive defense that prevents a cause of action from coming into being after a pre-determined period of time. See Langley, 313 S.C. at 403–04, 438 S.E.2d at 243–44.

The parties do not dispute that sixty-two (62) units were completed more than eight years before the lawsuit was brought on February 8, 2016. The Homeowners, through their counsel, conceded to the Trial Court that the Statute of Repose would bar recovery for the sixty-two (62) units unless they could prove certain exceptions to the statute applied. [R.pp. 1577, l. 18 – 1578, l. 16; Trial Tr. Vol. II, pp. 13, l. 18 – 14, l. 16.]

The Homeowners argue that the gross negligence and recklessness exception set forth in S.C. CODE ANN. § 15-3-670(A) prevent Mundy Construction from asserting the Statute of Repose as a defense. This Section provides in part:

> The limitations provided by Sections 15-3-640 through 15-3-660 *are not available as a defense to a person guilty of fraud, gross negligence, or recklessness* in providing components in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, planning, supervision, testing or observation of construction, construction of, or land surveying, in connection with such an improvement, or to a person who conceals any such cause of action.

§ 15-3-670(A) (emphasis added).

The Trial Court, sitting as the factfinder in this case, did not find that the actions of Mundy Construction rose to the level of gross negligence or intent and therefore concluded that § 15-3-670(A) did not prohibit Mundy Construction from asserting the Statute of Repose as a defense. [R.pp. 39-40; Final Order, pp. 5-6.] On appeal, the

Homeowners challenge the Trial Court's factual finding that Mundy Construction was not grossly negligent and did not act with intent.

The South Carolina courts have held that gross negligence is the "intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." Clyburn v. Sumter County Sch. Dist. No. 17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994); see also Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 331-32, 566 S.E.2d 536, 544 (2002) (stating gross negligence "is the failure to exercise even the slightest care"). "Where a person is so indifferent to the consequences of his conduct as not to give slight care to what he is doing, he is guilty of gross negligence." Staubes v. City of Folly Beach, 331 S.C. 192, 205, 500 S.E.2d 160, 167 (Ct. App. 1998).

The fact that more might have been done does not negate a finding actor exercised at least slight care. Pack v. Associated Marine Insts., Inc., 362 S.C. 239, 246, 608 S.E.2d 134, 138 (Ct. App. 2004); see also Etheredge v. Richland Sch. Dist. I, 341 S.C. 307, 311-12, 534 S.E.2d 275, 277-78 (2000) (holding that where defendant had no knowledge of animosity between students, and principal and security monitored hallways, the fact that school district might have done more did not negate the fact it exercised slight care for purposes of determining whether the gross negligence exception to the Tort Claims Act was applicable).

The evidence presented to and considered by the trial judge, who was sitting as the factfinder in this case, supports the trial judge's finding that Mundy Construction's actions were not grossly negligent or anything more. The testimony of Mundy, Sr. demonstrated that he at a minimum used slight care in compacting the soil for the

building pads. He testified that while he was packing the soil on the pad, he would observe his tread depth over the pad to determine whether it needed more compaction before the next load was spread and packed. This process was known as proof roll testing of the place lifts where a dump truck is slowly moved over the pad. Mundy, Sr. testified that if the soil moved at all, he knew the soil was not compacted. He further testified that he always used this field test to determine whether the soil was compacted. [R.pp. 1535, l. 17 – 1536, l. 13; 1558, ll. 7-16 Trial Tr. Vol, I, pp. 142, l. 17 – 143, l. 13; 165, ll. 7-16.]

Mundy, Sr. further testified that while he was working on the project site, the general contractor, site superintendent, and an engineer were also on site observing, supervising, and instructing his compaction of the pads and that occasionally inspectors from the City of Aiken were also present. [R.pp. 1536, ll. 14-20; 1548, ll. 1-9; Id. at pp. 143, ll. 14 – 20; 155, ll. 1-9.] Mundy Construction was not tasked with actually testing the soil samples. [R.p. 1541, ll. 4-6; Id. at p. 148, ll. 4-6.] Mundy, Sr. additionally testified that Mundy Construction habitually tried to follow and comply with the applicable building codes, and he believed he was performing properly under the guidance from ATC (the general contractor), the site superintendent, the site engineer, and the City of Aiken to ensure Mundy Construction was in compliance with the code. [R.pp. 1548, ll. 13-18; 1549, l. 10; 1553, ll. 6-7, 19-20; Id. at pp. 155, ll. 13 – 18; 156, l. 10; 160, ll. 6-7, 19-20.]

The Trial Court also had before it evidence that Mundy Construction was not expected to, nor compensated to perform any additional examination of the compaction of the soils. Sherwood R. "Woody" Belangia, the owner of ATC, completed a work experience affidavit that averred that with respect to the development and construction of

the Community, he "functioned as the general contractor in fact, performing all the tasks associated with that title: [ ] supervision of all site work including grading and underground utilities, . . . performing field audits and quality assurance inspections, ordering inspections, [and] ensuring regulatory compliance." [R.pp. 3089-90; Defendant's Ex. 11 (Belangia Aff.).]

Kenny Gordon of Maddox Construction testified that Mundy Construction was not responsible for conducting any specific compaction testing, other than the proof rolling it did on site, and that such additional compaction testing was handled and coordinated by ATC who would retain geological engineers for such testing. [R.pp. 1702, ll. 5-15; 1707, ll. 8-11; 1708, ll. 14-17; Maddox Construction Dep., pp. 51, ll. 5-15; 83, ll. 8 – 11; 112, ll. 14-17.] He testified:

> Q: I guess who is responsible for calling in people like CSRA, the geotechnical engineers, to get compaction testing done?
>
> A: Here, it would have been Hal or Ronnie.
>
> Q: Hal Trotter or Ronnie –
>
> A: Thomas.
>
> Q: - - would have called them in?
>
> A: Yes, sir.
>
> Q: And that testing is how you determine if you hit the compaction requirements, right?
>
> A: Yes, sir.
>
> . . .
>
> Q: So typically you would prepare the pad and then someone from ATC would call and get compaction tests performed?
>
> A: Yes, sir.

[R.pp. 1702, ll. 5-15; 1708, ll. 14-17; Id. at pp. 51, ll. 5-15; 112, ll. 14-17.]

Gordon of Maddox Construction also corroborated Mundy, Sr.'s testimony that the general contractor consistently had someone present on site while work was being performed. [R.pp. 1703, ll. 2-4; 1704, ll. 15-17; 1705, l. 18 – 1706, l. 13; Id. at pp. 59, ll. 2-4; 60, ll. 15-17; 80, l. 18 – 81, l. 13.]

Hal Trotter of Hallum, LLC, the site superintendent for the project, further affirmed that Mundy Construction was not responsible for coordinating or conducting specific soil and compaction testing and that ATC coordinated such testing for the Community. [R.pp. 1690, l. 17 – 1691, l. 14; 1692, ll. 7-10; 1693, ll. 12-20; 1500, ll. 10-13; Hallum, LLC Dep., pp. 182, l. 17 – 183, l. 14; 189, ll. 7-10; 190, ll. 12-20; Trial Tr. Vol. I, p. 107, ll. 10-13.] He testified:

> Q: And Hallum relied on CSRA to conduct all necessary compaction and moisture soil tests, based on whatever the design called for, right?
>
> . . .
>
> A: Yes.

[R.pp. 1693, ll. 12-17; Id. at p. 190, ll. 12-17.]

Finally, Daniel K. Rickabaugh, P.E., the engineer who prepared the plans for the construction of the Community, confirmed that based upon his visit to the Community after completion of construction, he determined the site was "considered to have reached final stabilization" and that construction complied with the approved plans. [R.pp. 3100; 1500, ll. 8-9; Defendant's Ex. 16 (Rickabaugh Ltr.); Trial Tr. Vol. I, p. 107, ll. 8-9.]

This evidence heard and considered by the Trial Court as factfinder supports the Trial Court's factual finding that Mundy Construction at a minimum exercised slight care

and did its best to perform the work it was asked and paid to perform. This Court may not reverse the Trial Court's factual finding unless wholly unsupported by the evidence. Pope v. Gordon, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006). If there is any evidence to support the Trial Court's factual finding that Mundy Construction was not grossly negligent or more, then this Court should affirm. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 776 (1976); see also Faile, 350 S.C. at 332, 566 S.E.2d at 545 ("In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury [or here in this case, the trial judge as the factfinder]."). As set forth above, the evidence in the Record sufficiently supports the Trial Court's factual finding with respect to gross negligence. Mundy Construction used at least slight care in compacting the pads and 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.

In their appeal, the Homeowners focus their argument - that the Trial Court erred in not finding Mundy Construction grossly negligent - almost entirely on the evidence they presented at trial that Mundy Construction breached its duties of care by not complying with the plans and the applicable building codes in compacting the soil. But the Trial Court did consider this evidence and did find Mundy Construction liable for negligence. The Trial Court simply found that despite being negligent and failing to use "due care," Mundy Construction nevertheless exercised slight care. [R.pp. 35-40; Final Order.] See also Clyburn, 317 S.C. at 53, 451 S.E.2d at 887 ("Negligence is the failure to exercise due care, while gross negligence is the failure to exercise slight care.").

The Homeowners are in essence asking this Court to hold that because the Trial Court found that Mundy Construction had not complied with certain building codes and standards, that such violations constitute gross negligence as a matter of law. Their argument is contradicted by statutory and other authorities.

As an initial matter, the statutory provisions governing the Statute of Repose and its applicability explicitly state that for the purpose of determining whether gross negligence or recklessness by a contractor exists, "the violation of a building code of a jurisdiction or political subdivision *does not constitute per se fraud, gross negligence, or recklessness* . . . ." S.C. CODE ANN. § 16-3-670(B). A violation of a building code instead only serves "as evidence of fraud, negligence, gross negligence, or recklessness." Id. The Trial Court took this evidence into consideration and concluded that in conjunction with other evidence presented by Mundy Construction, Mundy Construction's actions were not grossly negligent or done with intent. [R.pp. 35-40; Final Order.]

Second, while the case law of South Carolina has held that the violation of a building code may constitute negligence *per se* if the code has been adopted by local authorities, see Kincaid v. Landing Dev. Corp., 289 S.C. 89, 92-93, 344 S.E.2d 869, 872 (Ct. App. 1986), it has never been held in South Carolina that violation of a building code constitutes gross negligence *per se* as matter of law.

Other jurisdictions have also held that violation of a building code or other required standards does not establish gross negligence *per se* as a matter of law. North Carolina has held that evidence of a violation of the building code is insufficient to reach the "elevated level of gross negligence." Moore v. F. Douglas Biddy Constr. Inc., 587 S.E.2d 479, 483 (N.C. Ct. App. 2003). In Moore, the North Carolina Court of Appeals

affirmed the lower court's ruling that the plaintiffs' construction defect action against construction company was barred by the applicable statute of repose. The Court of Appeals further agreed with the lower court that the defendant was not equitably estopped from asserting the statute of repose defense even though the plaintiffs alleged that the defendant failed to follow manufacturer's specifications or building code requirements. Such evidence did not constitute more than ordinary negligence because the plaintiffs failed to show that defendant's actions constituted a conscious and intentional disregard of the rights and safety of others. Id.

Other case law is in accord with the Moore opinion. See Conway v. Hi-Tech Eng'g, Inc., 381 S.W.3d 56, 65 (Ark. 2001) (applying North Carolina law) (finding failure of defendants to consult with OSHA, ANSI, or any other safety or industry standards when designing automated log-stacking machine, while perhaps indicative of ordinary negligence, did not rise to the level of gross negligence); Cacha v. Montaco, Inc., 554 S.E.2d 388, 395 (N.C. Ct. App. 2001) (observing violation of a building code is not evidence of *per se* gross negligence); Olympic Products Co., A Div. of Cone Mills Corp. v. Roof Systems, Inc., 363 S.E.2d 367, 373-74 (N.C. Ct App. 1988) ("failure to check Code compliance" prior to applying roof system "does not indicate a reckless indifference which rises to the level of wilful or wanton negligence"); Rakowski v. Sarb, 713 N.W.2d 787, 792, 798 (Mich. Ct. App. 2006) (holding evidence showing that a ramp was constructed in violation of construction standards and a national building code constituted evidence of ordinary negligence only and therefore, trial court correctly granted summary judgment on plaintiff's gross negligence claim); Xu v. Gay, 668 N.W.2d 166, 170-71 (Mich. Ct. App. 2003) (observing defendant's failure to know about

industry standards and failure to implement the standards regarding placement of a treadmill was not evidence of gross negligence, but rather, only suggested ordinary negligence).

Therefore, the Homeowners' attempt to have this Court hold that the violation of the building code and other standards automatically requires a finding a gross negligence should be rejected. The Trial Court, as factfinder, heard and considered the evidence and properly found Mundy Construction was not grossly negligent and did not act with intent.

The Homeowners also argue in their Appellant's Brief, without citation to the Record, that Mundy Construction should be found grossly negligent or reckless as a matter of law because it was aware of the harm that would occur from inadequate compaction. The Trial Court made no such finding of fact in its Final Order, and there is no evidence in the Record to support this claim by the Homeowners. [R.pp. 35-40; Final Order.] The Homeowners also did not raise this point in their Post-Trial Position Statement or Motion to Reconsider. [R.pp. 1223-28; 1232-1246; Post-Trial Position Statement; Mtn to Reconsider.]

The Trial Court, sitting as the jury, properly found that the evidence did not show that Mundy Construction was culpable of gross negligence or anything more. This Court is bound to affirm the Trial Court's factual finding of no gross negligence or intent because some evidence reasonably supports its finding. Shepard v. S.C. Dep't of Corrs., 299 S.C. 370, 377, 385 S.E.2d 35, 38 (Ct. App. 1989) (in case tried before a trial judge without a jury, appellate court could not reverse the judge's factual finding of no proximate cause where some evidence reasonably supported the judge's finding); see also

Faile, 350 S.C. at 332, 566 S.E.2d at 545 (noting in most cases gross negligence is a factual determination).

The Homeowners did not prove to the Trial Court that Mundy Construction was either grossly negligent or reckless[2] to invoke the exception set forth under S.C. CODE ANN. § 15-3-670(A) to preclude the Mundy Construction from asserting the Statute of Repose as a defense. Therefore, the Trial Court properly ruled that the Homeowners could not recover damages for the sixty-two (62) townhomes which were completed

[2] While the Trial Court did not use the term "reckless," it found that Mundy Construction's actions did not rise to the level of gross negligence or intent. [R.p. 39; Final Order, p. 5.] Recklessness is a higher degree of negligence than gross negligence; therefore, where the Trial Court did not find Mundy Construction grossly negligent, it is understood that the Trial Court did not find that Mundy Construction's actions rose to the higher level of recklessness. See 18 S.C. JUR. *Negligence* § 9 (2012) (noting recklessness is higher level than gross negligence).

more than eight years prior to the filing of this action and thus was barred by the eight-year Statute of Repose.[3]

II. The Trial Court, sitting as the factfinder in a case tried without a jury and who had considerable discretion regarding the award of damages, properly awarded actual damages to the non-barred Homeowners in the amount of $240,000.00 which was supported by the evidence presented.

Concluding that only twenty-four (24) units were entitled to the recovery of any damages, the Trial Court determined that the most damages which could be awarded based upon evidence presented by the Homeowners was $2,211,688.00 ($1,750,177.00 in repair costs plus $461,511.00 for loss of use). [R.p. 40; Final Order, p. 6.] The Homeowners do not contest that valuation in their appeal for the twenty-four (24) units.

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[3] In footnote 53 of their brief, the Homeowners assert the Statute of Repose is not available to Mundy Construction because it covered up the Homeowners' causes of action. The Homeowners assert no authority or citation to the Record for this conclusory statement and further did not receive any ruling from the Trial Court on this issue. This issue is therefore not only abandoned by the Homeowners, but also not preserved for appellate review. See Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011) ("An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory."); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue . . . must have been raised to *and ruled upon* by the trial judge to be preserved for appellate review.") (emphasis added).. [R.pp. 35-40; 42; Final Order; Order on Reconsideration.]

In this same footnote, the Homeowners also contend that the Statute of Repose does not apply because the building permits do not contain certain notice language that the Homeowners incorrectly contend is a precondition for enforcing the eight (8) year Statute of Repose. The language of the statute provides: "A building permit for the construction of an improvement to real property must contain in bold type notice to the owner or possessor of the property of his rights under this section to contract for a guarantee of the structure being free from defective or unsafe conditions beyond eight years after substantial completion of the improvement." S.C. CODE ANN. § 15-3-640. Again, this argument is not preserved for review because it was not ruled upon by the Trial Court and the Homeowners once again only make a conclusory argument regarding this provision. Nothing in this provision of the Statute of Repose prohibits a defendant from raising the eight (8) year time limitation as a defense. See S.C. CODE ANN. § 15-3-670 (providing the only limitations for when the Statute of Repose is not available as a defense).

Finding, however, that it was difficult to decipher what damage resulted from the construction defects associated with Mundy Constructions's scope of work and what damage resulted from other factors, the Trial Court found that years' worth of general wear and tear in conjunction with exposure to other elements reduced the amount of damages attributable to Mundy Construction. Accordingly, the Trial Court awarded damages to the Homeowners in the amount of $240,000.00. [R.p. 42; Order on Reconsideration.]

The Homeowners challenge the damages awarded by the Trial Court and contend there is no support in the Record for the Trial Court's damage calculation. The Homeowners first argue the Trial Court had no authority to consider wear and tear of the units or other factors contributing to the damages experienced by the Homeowners because Mundy Construction did not plead this as an affirmative defense.

Under Rule 8(c) of the South Carolina Rules of Civil Procedure, the only defenses required to be affirmatively pled are "accord and satisfaction, arbitration and award, assumption of risk, condonation, contributory negligence, discharge in bankruptcy, duress, fraud, illegality, injury by fellow servant, laches, license, misrepresentation, mistake, payment, *plene administravit* or the administration of the estate is closed, recrimination, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense." Therefore, Mundy Construction was not required to plead the grounds for which the Trial Court based its damages award as an affirmative defense.

In addition, in its Answer to the Third Amended Complaint, Mundy Construction did give proper notice of this defense to the Homeowners. Mundy Construction denied

all material allegations of the complaint, including that it was responsible for any construction defects or damages or that any damages to the townhomes were caused by any actions of Mundy Construction. [R.pp. 84-85; Answer, ¶¶ 10, 13-14, 16.] It also maintained that any damages suffered by the Homeowners resulted from the acts of others, including the homeowners, and that the homeowners further failed to mitigate their damages. [R.pp. 85-86; Id. at ¶¶ 20, 23-25.] Therefore, the grounds on which the Trial Court based its damages award were properly pled as a defense to the Homeowners' claim, and the Homeowners had notice of such defense.

Mundy Construction also submitted evidence supporting the Trial Court's award of damages. In an action tried by the trial judge without a jury, "[t]he trial judge has considerable discretion regarding the amount of damages." Mellen v. Lane, 377 S.C. 261,275-76, 659 S.E.2d 236, 243-44 (Ct. App. 2008) (internal citation omitted). "Because of this discretion, [the appellate court's] review on appeal is limited to the correction of errors of law. [The appellate court's] task in reviewing a damages award is not to weigh the evidence, but to determine if there is any evidence to support the damages award." Id. (internal citation omitted).

The evidence presented to the Trial Court substantiates its award of damages to the Homeowners. The Homeowners submitted hundreds of photographs of the units at issue to the Trial Court. These photographs allowed the Trial Court to observe the overall condition of the units and observe the wear and tear to the units. [R.pp. 2484-2529; 2789-2833; Plaintiff's Exs. 953, 954, 955, 956, 957, 958, 959, 960, 962, 977, 978, 979, 980, 981, 993, 995, and 997.]

The Homeowners' expert, Whitlock, further acknowledged on cross-examination that every newly constructed home will experience some degree of settlement, and that every concrete pad poured, even under the best of circumstances and under the best type of platform, can experience cracking. [R.pp. 1496, ll. 12-18; 1498, ll. 11-15; Trial Tr. Vol. I, pp. 103, ll. 12 – 18; 105, ll. 11-15.] Therefore, the Trial Court could consider that not all cracking and related damages were caused by Mundy Construction.

Whitlock further acknowledged that South Carolina does experience multiple minor earthquakes each year and further recognized, after questioning, that a 4.1 magnitude earthquake occurred near Edgefield, South Carolina on February 14, 2014. [R.pp. 1512, l. 11 – 1513, l. 22; Id. at pp. 119, l. 11 – 120, l. 22.] He further conceded that some damage to door frames in the townhomes could occur from the slamming of doors. [R.p. 1514, ll. 13-17; Id. at p. 121, ll. 13-17.] All of the above is evidence that homes, overtime, can experience damage unrelated to the construction of a home. Therefore, the Record contains evidence supporting the Trial Court's calculation of damages which accordingly may not be reversed by this Court on Appeal.

Moreover, the Trial Court had before it appraisal values from a sampling of the townhomes showing market values of the homes ranging between $87,000.00 and $112,000.00 in October 2018. [R.pp. 2978-3080; Defendant's Exs. 4-9 (Appraisals).] The appraisals also showed there was either an increase in value from when the homes were either first sold or sold in the early 2010s or only a very slight decrease in value. For example, 138 Hillsborough Lane was appraised at $87,000.00 in October 2018 and was purchased in August 2008 for $96,610.00 therefore showing a decrease in value of only $9,610.00 [R.pp. 2978-79, 2981; Defendant's Ex. 4]; 144 Bennington Lane was

appraised at $87,000.00 in October 2018 and was purchased in February 2008 for $94,200.00 therefore showing a decrease in value of only $7,200.00 [R.pp. 3013-14, 3016; Defendant's Ex. 6]; 231 New Haven Lane was appraised at $87,000.00 in October 2018 and was purchased in March 2011 for $85,000.00 therefore showing an increase in value of $2,000.00 [R.pp. 3030-31, 3033; Defendant's Ex. 7]; 116 Amity Lane was appraised at $96,700.00 in October 2018 and was purchased in June 2007 for $88,000.00 therefore showing an increase in value of $8,700.00 [R.pp. 3047-48, 3050; Defendant's Ex. 8]; and 110 Amity Lane was appraised at $112,000.00 in October 2018 and was purchased in May 2007 for $104,900.00 therefore showing an increase in value of $7,100.00. [R.pp. 3064-65, 3067; Defendant's Ex. 9.]

The Homeowners submitted evidence that the repair costs for the units was $88,813.37, $98,586.32, and $106, 734.87, depending on the type of unit. [R.pp. 2468-79; Plaintiff's Ex. 940.] As such, the Trial Court had evidence before it that the estimated repair costs either exceeded or were nearly the cost of the unit's value and were well over any depreciation in value of the units.

While it is true that the cost of repair or restoration is a valid measure of damages for injury to a building, such compensation may be limited to the value of the building before the damage was inflicted. Scott v. Fort Roofing and Sheet Metal Works, Inc., 299 S.C. 449, 451, 385 S.E.2d 826, 827 (1989). The [factfinder] "is not bound to accept all the submitted repair costs when awarding damages." Id. Furthermore, "[t]he fact that testimony is not contradicted directly does not render it undisputed [because] [t]here remains the question of the inherent probability of the testimony." Black v. Hodge, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct. App. 1991). A factfinder is also not required to

believe a plaintiff's evidence of uncontradicted damages. Steele v. Dillard, 327 S.C. 340, 343-44, 486 S.E.2d 278, 280 (Ct. App. 1997). Even if damages are uncontested, the factfinder may consider other factors showing that the plaintiff is not entitled to the full amount of those damages, such as that the damages are attributable to other causes. Id. at 344, 486 S.E.2d at 280. The factfinder is free to disagree with the plaintiff's presented amount of damages. Id.

The Trial Court therefore had discretion to consider the estimated cost of repairs against the values of the properties and make a determination of damages based on that evidence in conjunction with the other factors as discussed above. The evidence presented to the Trial Court showed that the estimated repair costs exceeded or were close to the value of the units and were well above any depreciation in value. "[D]amages for defective construction, whether those damages are the result of a breach of contract or negligence of the contractor, [may be] determined by measuring the cost of repairing or restoring the damage, *unless the cost of repair is disproportionate to the property's probable loss of value*." John Thurmond & Assoc. Inc. v. Kennedy, 668 S.E.2d 666, 668 (Ga. 2008) (emphasis added). When the latter is the case, damages may be measured by the diminution in value of the property. Id.

Based upon the appraisal evidence submitted by Mundy Construction, the most a unit decreased in value, when there was a decrease, was around $9,610.00. For the twenty-four (24) units not barred by the Statute of Repose, the Trial Court's award of $240,000.00 adequately represents a total diminution in value of the units based upon this figure ($9,610.00 times twenty-four (24) equals $230,640.00).

"The trial judge who heard the evidence and is more familiar with the evidentiary atmosphere at trial possesses a better-informed view of the damages than [the appellate court]." Rush v. Blanchard, 310 S.C. 375, 381, 426 S.E.2d 802, 806 (1993). Accordingly, this Court should affirm the Trial Court's award of damages to the Homeowners of the twenty-four (24) non-barred units in the amount of $240,000.00.[4]

III. The Trial Court did not err in declining to award punitive damages where the Homeowners did not prove by clear and convincing evidence Mundy Construction acted with conduct that was reckless, willful, or wanton.

The Trial Court further did not err in concluding that the Homeowners were not entitled to punitive damages. Having correctly found that Mundy Construction was not grossly negligent and did not act with intent, as thoroughly discussed above in Section I. of the Argument hereof, there was no basis for the Trial Court to award punitive damages. Punitive damages are only awarded "where there is evidence the defendant's conduct was reckless, willful, or wanton" which must be proven by clear and convincing evidence. Fairchild v. S.C. Dep't of Transp., 398 S.C. 90, 99, 727 S.E.2d 407, 411-12 (2012). Mere negligence, which the Trial Court found here, is not enough to support an award of punitive damages. Id. The Trial Court therefore did not err in failing to consider or award punitive damages to the Homeowners.

[4] In their Brief, the Homeowners offer discussion on depreciation and the useful life of a foundation. The Trial Court, however, in its Order on Reconsideration amended its initial factual support of its award of damages to clarify that it was not referring to the legal concept of depreciation or useful life. [R.pp. 40; 42; Final Order, p. 6; Order on Reconsideration.]

IV. The Trial Court did not err in declining to find Mundy Construction liable on the Homeowners' breach of warranty claim because it already granted recovery to the Homeowners on their negligence claim based on the same set of facts; furthermore, the Homeowners abandoned this argument in their appeal by citing no authority and only making a broad, vague, and conclusory statement on the issue.

The Homeowners further assert in their brief that the Trial Court should have considered its claim for breach of warranty.[5] This argument, however, that the Trial Court should have determined that Mundy Construction is liable for breach of warranty, has been abandoned on appeal because the Homeowner's argument is conclusory, not supported by cited authority, and otherwise vague. See Potter v. Spartanburg Sch. Dist. 7, 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011) ("An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory."); see also Jones v. Lott, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) (noting "broad general statements of issues may be disregarded by [the appellate court]," and the court should not have to "grope in the dark" to ascertain the precise points at issue), *abrogated on other grounds by* Repko v. Cnty. of Georgetown, 424 S.C. 494, 818 S.E.2d 743 (2018).

Furthermore, in their Post-Trial Position Statement, the Homeowners only asked the Trial Court to find Mundy Construction negligent or grossly negligent. [R.p. 1228; Post-Trial Position Statement, p. 6.] The Homeowners therefore waived any breach of warranty claim.

Finally, the Homeowners may only receive one recovery under South Carolina. Under South Carolina law, the election of remedies is the act of choosing between different remedies allowed by law on the same set of facts. Jones v. Winn–Dixie

[5] The Homeowners did not list this issue in their Statement of Issues on Appeal. "Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR.

Greenville, Inc., 318 S.C. 171, 175, 456 S.E.2d 429, 431 (Ct. App. 1995). Its purpose is to prevent double recovery for a single wrong. Save Charleston Found. v. Murray, 286 S.C. 170, 175, 333 S.E.2d 60, 64 (Ct. App. 1985). Where a party has asserted only one primary wrong, he is entitled to only one recovery. Jones, 318 S.C. at 175, 456 S.E.2d at 432.

In this case, because the Homeowners' negligence and breach of warranty claims are based upon the same facts, the Homeowners' damages on its breach of warranty claim would be cumulative to the damages on its negligence claim. Once the Homeowners prevailed on their negligence claim, their remaining theory for recovery for breach of warranty became irrelevant. The Trial Court accordingly did not err in failing to find Mundy Construction liable for breach of warranty and awarding damages on such claim.

V. The Trial Court did not err in limiting the intervention of two homeowners to represent the class of the sixty-two (62) barred homeowners for appeal purposes only where these sixty-two (62) homeowners have no claims following this appeal because the Statute of Repose bars such claims; moreover, the Homeowners did not preserve this argument for appellate review by failing to file a motion for the Trial Court to reconsider its order limiting intervention.

The Homeowners lastly assert that the Trial Court erred in limiting the intervention of Marianne Strohmeier and Barbara Von Bieberstein on behalf of the barred sixty-two (62) homeowners for purposes of the appeal only.[6] It is not necessary to consider whether the Trial Court should not have limited intervention for only the appeal because, as set forth herein under Section I. of the Argument, the sixty-two (62)

[6] The Homeowners also did not list this issue in their Statement of Issues on Appeal.

homeowners are barred from any recovery due to the expiration of the Statute of Repose. There is nothing further for these intervenors to protect after the appeal.

Second, the Homeowners did not preserve this issue for appeal. They did not move the Trial Court to reconsider its order granting the limited intervention for appeal purposes only. "When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party must move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal." Bennett v. Rector, 389 S.C. 274, 284, 697 S.E.2d 715, 720 (Ct. App. 2010) (internal citation omitted). Having failed to ask the Trial Court to reconsider its order granting only a limited intervention, the Homeowners have waived this argument for appellate review.

CONCLUSION

For the reasons set forth herein, Respondent Mundy's Construction, Inc. d/b/a Mundy Construction respectfully requests this Court to affirm the rulings of the Trial Court, who served as the factfinder in a case tried without a jury, including the Trial Court's finding that Mundy Construction was not grossly negligent and did not act with intent and therefore the Statute of Repose barred recovery of damages for sixty-two (62) of the units. Further, Mundy Construction requests this Court to affirm the actual damages award in the amount of $240,000.00 for the non-barred units. Mundy Construction finally requests this Court to deny all other relief sought by the Homeowner in their appeal.

Respectfully submitted,

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April 12, 2021.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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