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THE SUPREME COURT OF THE STATE OF DELAWARE

SALT MEADOWS HOMEOWNERS ASSOCIATION, INC., *et al.*,	)	Case No. 94, 2023
Plaintiffs below, Appellants,	)	Court Below:
v.	)	Delaware Superior Court
ZONKO BUILDERS, INC.,	)	C.A. No. S17C-05-018 RHR
Defendant below, Appellee.	)	

APPELLANTS' OPENING BRIEF

Dated: May 2, 2023

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NATURE OF PROCEEDINGS

This case presents the question of whether the owners (collectively, "Homeowners" or "Appellant") of certain property in Fenwick Island ("Salt Meadows") are entitled to recover: 1) post-judgment interest at the rate in effect when the trial court entered judgment; 2) pre-judgment interest from the date the Homeowners began to suffer damages due to the negligent construction of their homes at Salt Meadows; 3) the amount of damages awarded to the Homeowners by the jury for the damage caused to all areas of the homes at Salt Meadows, other than the columns ("Non-column Damages"), by Zonko Builders, Inc. ("Zonko" or "Appellee"), the general contractor of Salt Meadows; and 4) the amount of damages awarded to the Homeowners by the jury related to Zonko's negligent construction and/or negligent supervision of construction of the columns at Salt Meadows ("Column Damages"). The answer to each of these questions is "yes."

Liability in this matter was decided in 2021. A559-60. In this appeal, neither side challenges the trial court's finding that Zonko is liable for negligent construction and/or negligent supervision of Salt Meadows. Instead, the sole issues to be decided are: a) how much interest to award the Homeowners; and b) whether the trial court erroneously disturbed the jury's verdict.

After a two week trial on damages, a jury awarded Homeowners $12.9 million ($11.3 million for Non-column Damages; and $1.6 million for Column

Damages). The trial court disagreed with this finding and entered judgment (the "Appealed Order") in favor of the Homeowners in the amount of $8.3 million ($8.3 million for Non-Column Damages and $0 for Column Damages). Ex. A. In doing so, the trial court usurped the role of the jury and impermissibly replaced the jury's findings of fact with its own conclusions and inferences. The undisputed evidence admitted into the record, including testimony elicited by Zonko on cross-examination, is more than sufficient to support the jury's verdict. By failing to view the uncontroverted evidence in the light most favorable to the Homeowners, the trial court committed reversible error.

The trial court also erred by failing to award interest pursuant to the unambiguous language of 6 *Del. C.* § 2301 ("Section 2301"). First, the trial court erroneously set the post-judgment interest rate lower than that legal rate defined by Section 2301. 6 *Del. C.* § 2301(a). Second, the trial court erroneously interpreted the term "date of injury" in Section 2301(d) to mean the date on which Plaintiffs knew or should have known that their legal rights were violated (purportedly February 15, 2016 (the "Damages Discovery Date")), rather than the date on which Zonko violated the Homeowners', including the Association's legal rights (April 11, 2007 (the "Date of Injury")). 6 *Del. C.* § 2301(d).

The Superior Court' Appealed Order and the Decision on Post-Trial Motions ("Appealed Decision") underlying it, are inconsistent with well-settled statutory,

rule and case-based precedent of this Court. Thus, this Court should vacate the Appealed Order and remand the case to the trial court with the instruction to enter an order: 1) awarding: a) the costs that are not at issue on this appeal plus b) post-judgment interest from the date of final judgment in this matter; as well as c) pre-judgment interest from April 11, 2007, at the legal rate in effect on that date; and 2) denying Zonko's post-trial motions because the jury's verdict of $12.9 million is supported by the uncontroverted evidence admitted at trial.

SUMMARY OF ARGUMENT

The trial court erred by holding that:

1. the rate used to calculate Homeowners' post-judgment interest should be the rate in effect on May 12, 2022 (when the jury rendered its verdict), instead of February 15, 2023 (when the trial court entered judgment), despite the Superior Court rules of civil procedure defining a judgment and this Court's findings that Section 2301(a) is unambiguous;

2. the "date of injury" for purposes of calculating the pre-judgment interest owed to the Homeowners under Section 2301(d), is February 15, 2016, the approximate date when the Homeowners discovered damages at Salt Meadows, instead of April 11, 2007, the date when Zonko negligently constructed Salt Meadows, even though the plain meaning of Section 2301(d) and the legislative intent of the Delaware General Assembly support the opposite holding;

3. remittitur of the jury's award of Non-column damages is warranted in this case because, *inter alia*, the Court's conscious was shocked by the fact that the jury may have relied upon: a) evidence admitted into the record, without any objection from Zonko and/or b) evidence that Zonko did not move to strike and did not request a curative instruction after eliciting through cross-examination;

4. Zonko is entitled to judgment as a matter of law, because, *inter alia*, "there was no credible evidence that damage to one set of columns supporting a

deck would be found in every column in Salt Meadows, even though Zonko: 1) did not object and/or withdrew its objection to certain evidence identifying systemic damages throughout Salt Meadows; 2) Zonko did not move to strike and did not request a curative instruction for certain testimony it elicited through cross-examination; and 3) Zonko's own expert testified: a) that construction defects are the only cause he has determined as of the date of trial regarding the Homeowners' water infiltration; and b) that he was "looking at an area where there was water intrusions" every time he came to Salt Meadows (A4139:16-40:2).

STATEMENT OF FACTS

A. PRE-LITIGATION BACKGROUND

Salt Meadows is a community located in Fenwick Island, Delaware. A1628. Zonko and its subcontractors constructed Salt Meadows from September 1, 2004 through April 11, 2007 ("Date of Injury"). A1637-39; A3178:5-85:25. In early 2016, two Homeowners discovered water infiltration near the media room windows in their homes at Salt Meadows. A1631-32, A1635; A3185:4-87:18; A3192:21-95:18. The Homeowners held a semi-annual meeting on June 18, 2016, where the water infiltration issues were discussed and a decision was made to investigate whether there were similar issues in other homes. A5137-38; A3201:5-04:23. These issues were inspected by Jeremy Walbert of the Becker Morgan Group ("Homeowners' Engineer") in 2016.

On January 12, 2017, the Homeowners' Engineer issued a letter report ("January 12, 2017 Report") identifying numerous issues throughout each building at Salt Meadows. A155-174. The January 12, 2017 Report contained a water infiltration survey, which superimposed the areas where the Homeowners' Engineer observed water intrusion at each home onto the floorplans ("Blueprints") for the buildings at Salt Meadows to identify community trends and show where water was infiltrating the same part of the home in multiple buildings. A167-174; A4001:20-10:5.

Before initiating litigation, on January 25, 2017, Homeowners sent Zonko a letter ("January 25, 2017 Letter") identifying numerous instances of water infiltration caused by the improper and deficient design, construction and workmanship at Salt Meadows. A176-178. The January 12, 2017 Report was enclosed in the January 25, 2017 Letter. A177.

B. PROCEDURAL HISTORY

On May 31, 2017, Homeowners initiated this construction defect action to recover damages from Zonko for the negligent construction and negligent supervision of the construction of the twenty homes located on Salt Meadows Drive in Fenwick Island, which are commonly referred to as Salt Meadows. A98-178; A1626-27.

On March 15, 2019, the Homeowners received an estimate from the Contractor for repairs to each home at Salt Meadows. A5812-22. Of note, the damages are customized for each home. A5814-19; Stated another way, the Contractor did **not** estimate every home to have the exact same damages. *Id*.; *see also* A3564:10-11.

On March 2, 2020, the Contractor issued invoice 10129F to the Homeowners, noting that the Contractor "found damage to deck under columns" at unit 40149. A5459. The Homeowners promptly scheduled a destructive investigation with Jason Boyd of CED Technologies, Inc. ("Zonko's Engineer").

A2605; A2622 and A2624-26. The investigation was held on April 1, 2020. A2605; A2628. The findings of Zonko's Engineer during the April 1, 2020 investigation were never produced to the Homeowners. A4079:20-21; A4081:19-20; A4106:5-7; A4128:23-29:4; A4131-4185:8. In contrast, on April 17, 2020, the Homeowners supplemented the Façade Investigation issued by the Becker Morgan Group on November 1, 2019 ("Expert Report") by providing Zonko with the letter report dated April 9, 2020, describing the Homeowners' expert's observations of a destructive investigation of the columns at the rear of 40149 Salt Meadows Drive. A495-97; A520; A2628-35.

On June 11, 2020, Michael Lewis, the owner of Custom Carpentry LLC (the "Contractor"), testified at his deposition that the home at 40154 Salt Meadows Drive was exhibiting similar water infiltration around its rear columns as that investigated at 40149 Salt Meadows Drive. A2606; A26438:15-40:9; A3529. Contractor further testified that Homeowners anticipated that repairs would be required to the columns located at all 20 homes at Salt Meadows. A2641:1-14.

Discovery in this matter closed on June 22, 2020. A183-86; A492. At no time before or after the close of the extended discovery deadline did Zonko request an investigation of any of the Homeowners' columns, other than the investigation on April 1, 2020. A2607. For example, among other things, Zonko never responded to the Homeowners' June 18, 2020 invitation to attend a second

destructive investigation of additional water infiltration to the rear decks at 40149 Salt Meadows Drive, including the 4 x 4 posts constructed in connection therewith. A2606; A2654. Regardless of Zonko's litigation strategy to ignore the Column Damages, the Homeowners still provided Zonko with copies of each and every invoice supporting their Column Damages. A520; A540; A547; A1068; A1382-83; A2916:20-21; A5448-49; A5459-61; A5549-51; A5554-55; A5558-59; A55640-65; A5567.

On August 4, 2020, the Homeowners further supplemented the Homeowners' Engineer's expert reports by producing the Homeowners' Engineer's field report, dated July 1, 2020, which discusses observations of the columns at the rear of 40149 Salt Meadows Drive during the second investigation held on July 1, 2020. A540; A2656-59; A6314-16.

On August 4, 2021, the Homeowners extended an offer to settle the litigation for $6.5 million pursuant to Section 2301(d) ("Settlement Offer"). A2681-82. The Homeowners held the Settlement Offer open for 30 days. A2682. Zonko did not accept the Settlement Offer.

More than four years after the commencement of this litigation, on September 20, 2021, the trial court entered an Order finding Zonko liable for negligent construction and negligent supervision of construction of Salt Meadows. A559-60.

C. HOMEOWNERS ESTABLISH DAMAGES CLAIM AT TRIAL

Trial to establish the amount of damages owed to the Homeowners by Zonko began on May 2, 2022 and concluded on May 12, 2022. A1067; A3029-4603. During Homeowners' case-in-chief, the following evidence was admitted without objection:

1. Testimony from Ms. Lambrow regarding similarities throughout the homes at Salt Meadows (A3157:17-58:9; A3159:14-65:5);

2. Testimony from Homeowners' Engineer regarding similarities between the water infiltration issues in the homes at Salt Meadows (A3994:14-A4010:13);

3. Testimony from Zonko's Engineer that construction defects were the only cause he has determined for the Homeowners water infiltration (A4139:16-40:2);

4. Testimony from Zonko's Engineer that he was "looking at an area where there was water intrusions" every time he came to Salt Meadows (A4139:16-19);

5. Invoices, cancelled checks, and other documents (collectively "Invoices") identifying the repairs paid for by Salt Meadows Homeowners Association, Inc. ("Association") relating to the construction defects at Salt

Meadows between June 18, 2020 and December 31, 2021, which totaled not less than $2,405,527.26 (A5143-5793);

6. Testimony from Kathy Lambrow, the Association's president, that the Association paid each Invoice (A3292:8-12);

7. Testimony from Ms. Lambrow that Invoices documenting the $2.4 million paid prior to trial included the payment of $74,622.01 for repairs to the columns at the rear of 40149 Salt Meadows Drive (A3330:21-31:6);

8. An estimate from the Contractor that the cost of repairing the construction defects at Salt Meadows was approximately $8.3 million as of March 15, 2019 (the "2019 Estimate") (A5812-22);

9. Testimony from the Contractor that some work that was not identified on the 2019 Estimate, such as repairs to the columns at 40149 Salt Meadows Drive (A3638:11-14);

10. Testimony from Ms. Lambrow that the costs of repairing the columns is not included in the 2019 Estimate because the problem was discovered after the 2019 Estimate was provided to the Association (A3457:7-10);

11. Testimony from the Contractor and Ms. Lambrow that $6,210,306.04 of work identified on the 2019 estimate from the Contractor remains to be done (A3313:11-21; 3577:5-624:13);

12. Testimony from Ms. Lambrow that, in addition to the Contractor, the Association paid other individuals and businesses, *inter alia*, to install drywall, paint, clean and manage the repairs (collectively, the "Additional Workers") (A3273:20-77:13);

13. Testimony elicited by Zonko on cross-examination of Ms. Lambrow that the Association believes:

a. The amount estimated to repair the columns is $1.4 million (A3457:7-10);

b. The amount of repairing the columns is not included in the 2019 Estimate because the problem was discovered after the 2019 Estimate was provided to the Association (A3457:7-10);

c. The amount estimated to pay the Additional Workers in connection with the remaining repairs at Salt Meadows is $500,000 (A3457:11-13); and

d. Inflation increases the remaining cost of the repairs identified in the 2019 Estimate, which totalled $6.2 million as of the trial, by 30% (A3457:13-20).

14. Testimony from the Homeowners' Engineer that the cost of construction materials in the producer price index has increased approximately 47-48 percent since early 2020. A3973:2-23.

15. Testimony from Zonko's Engineer that the Homeowners' damages arise from defects in the original construction of the homes at Salt Meadows and "probably started soon after they were constructed." A4186:18-87:4.

On May 12, 2022 ("Verdict Date"), the jury rendered the following a special verdict in favor of the Homeowners in the amount of $12.9 million (A1807):

VERDICT FORM

1. Do you find that the plaintiffs incurred damages as a proximate result of defendant's negligence?

YES: ✓ NO: _____

If you answer "YES", proceed to question 2.

If you answer "NO", call the Bailiff.

2. What is the reasonable amount of damages you find for the plaintiffs excluding any damages for columns? $ 11,300,000.00

3. Do you find that the plaintiffs incurred column damage as a proximate result of defendant's negligence?

YES: ✓ NO: _____

If you answer "YES", proceed to question 4.

If you answer "NO", call the Bailiff

4. What is the reasonable amount of damages you find for the plaintiffs to repair the columns beyond that already paid for columns at Unit 40149?

$ 1,600,000.00

Please sign the form and return to the Courtroom.

Dated: May 12, 2022.

(FOREPERSON)

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A1807

Post-trial motions, briefs and supporting exhibits were filed from May 20, 2022 through July 19, 2022 (collectively, "Post-trial Motions"). A1827-2705. On January 31, 2023, the trial court entered the Appealed Decision, which (1) granted Zonko's Motion for Remittitur; (2) denied Zonko's Motion for New Trial as moot; (3) granted the Homeowners' Renewed Motion for Judgment as a Matter of Law; and (4) granted in part, denied in part the Homeowners' Motion for Costs and Interest. Ex A. The Appealed Order was entered on February 15, 2023 ("Judgment Date"). Ex. B. The Homeowners filed a Notice of Appeal on March 15, 2023. This Opening Brief now follows.

ARGUMENT IN SUPPORT OF APPEAL

I. THE TRIAL COURT ERRED BY AWARDING POST-JUDGMENT INTEREST AT THE RATE IN EFFECT ON THE VERDICT DATE, NOT THE JUDGMENT DATE.

A. QUESTION PRESENTED

Whether the trial court erred by awarding post-judgment interest at the rate in effect on the Verdict Date (6%) instead of the rate in effect on the Judgment Date (9.75%). Homeowners preserved the legal argument on appeal at A1977, A2671-72, A4803:1-7, A4805:7-23, 4816:5-18 and A4997:8.

B. STANDARD OF REVIEW

The Court shall review questions of statutory construction *de novo*. *Noranda Aluminum Holding Corp. v. XL Ins. Am., Inc.*, 269 A.3d 974 (Del. 2021).

C. MERITS OF THE ARGUMENT

The Homeowners and Zonko agree that the Homeowners are entitled to post-judgment interest from the date of the judgment. Ex. A, *21 ("The parties agree that Plaintiffs must be awarded post-judgment interest"). *See also* A1977; A2590, A2671-72; A4802:7-4805:22; A4997:8.

The parties further agree that Appealed Decision conflates the Verdict Date with the Judgment Date. Ex. B, ¶ 6. The only matter to be resolved on appeal is whether the award of "post-judgment interest at [6%,] the rate in effect as of May

12, 2022, the date of the verdict", is a legal error which must be reversed. Ex. B, ¶ 6. The Homeowners assert it is.

In Delaware, "[i]t is well-settled that unambiguous statutes are not subject to judicial interpretation. *Leatherbury v. Greenspun*, 939 A.2d 1284, 1288 (Del. 2007). As this Court recently held, "Section 2301(a) unambiguously requires that post-judgment interest accrue at the legal rate that was in effect on the date of judgment." *Noranda Aluminum Holding Corp.*, 269 A.3d at 979. There is no dispute that judgment in this matter was entered on the Judgment Date. *See* Ex B, ¶ 7) ("Judgment will not be entered until the Court enters a judgment consistent with its decision of January 31, 2023 and the entry of this Order on the docket."); *see also* Super. Ct. Civ. R. 54(a) ("defining "judgment" as "any order from which a writ of error or appeal lies."). On the Verdict Date, the jury returned a special verdict. *See* Super. Ct. Civ. R. 49(a) (defining a "special verdict" as a form completed by a jury containing "a special written finding upon each issue of fact."). A special verdict does not become a judgment unless and until approved by the Court. Super. Ct. Civ. R. 58(2). Here, the parties filed the Post-Trial Motions (A1827-2705), which "toll[ed] the finality of the Superior Court's judgment until the disposition of the last motion has been docketed." *Tomasetti v. Wilmington Savings Fund Soc.*, 672 A.2d 61, 62 (Del. 1996).

As a judgment does not exist until there is an order from which an appeal lies, judgment in this case did not exist until the Judgment Date, February 15, 2023. Super. Ct. Civ. R. 54(a). The legal rate in effect on the Judgment Date was 9.75%. *See* 6 *Del. C.* § 2301(a) ("[T]he legal rate of interest shall be 5% over the Federal Reserve Discount Rate."). Thus, the trial court's erroneous award of post-judgment interest at the rate in effect on the Verdict Date (6%) instead of the rate in effect on the Judgment Date (9.75%) must be reversed and remanded with an instruction to enter an order awarding the Homeowners post-judgment interest at the legal rate in effect on the date of entry of the final judgment in this matter.

II. THE TRIAL COURT ERRONEOUSLY APPLIED 6 *DEL. C.* § 2301(D) BY MISINTERPRETING THE PHRASE "DATE OF INJURY" TO BE A DATE OTHER THAN THE DATE ON WHICH THE RELEVANT LEGAL RIGHT WAS VIOLATED.

A. QUESTION PRESENTED

Whether the trial court erred by commencing its award of pre-judgment interest "on February 15, 2016 at the rate of 6%" instead of April 11, 2007, at the rate of 11.25%. Homeowners preserved the legal argument on appeal at A1975-76, A2672-2675, A4831:2-4838:2, 4861:18-4868:16, 4878:10-4879:14, and A4916:13-4917:2.

B. STANDARD OF REVIEW

A trial court's statutory construction is renewed *de novo*. *Noranda Aluminum Holding Corp.*, 269 A.3d 974.

C. MERITS OF THE ARGUMENT

The law in Delaware is clear. In a tort action such as this, 6 *Del. C.* § 2301(d) mandates that the trial court "**shall**" award interest "from the date of injury" when the plaintiff does three things:

1. Extend a written settlement demand;
2. That remains open for more than 30 days;
3. In an amount less than the judgment awarded to the offeree.

6 *Del. C.* § 2301(d) (emphasis added); *see also Shapira v. Christiana Care Health Services, Inc.*, 99 A.3d 217, 223 (Del. 2014) ("a plaintiff is entitled to [pre-

judgment] interest if (1) the plaintiff extended the defendant a written settlement demand before trial, (2) the demand was valid for at least 30 days, and (3) the amount of damages recovered in the judgment was greater than the amount the plaintiff had demanded."). Here, there is no dispute that the Homeowners met each of these statutory prerequisites. Ex. A, at 17-18. Thus, the central question on appeal is whether the trial court erroneously calculated pre-judgment interest under Section 2301(d) based upon an incorrect "date of the injury". *See* Ex. B, ¶ 5.

The first step in interpreting a statute is to determine whether it is ambiguous. *Noranda Aluminum Holding Corp.*, 269 A.3d at 977-78. Statutory text is ambiguous only if it is reasonably susceptible to different conclusions or interpretations." *Id.* at 978. Parties' "disagree[ments] about the meaning of a statute does not create ambiguity. *Id*. Instead, when the text of the statute is plain and unambiguous, it must be applied as written. *Id.* at 977-78 ("If the plain statutory text admits only one reading, we apply it.").

This Court has repeatedly held that Section 2301 is plain, unambiguous and must be applied as written, regardless of which subsection is being interpreted. *See id.* ("Section 2301(a) unambiguously requires that post-judgment interest accrue at the legal rate that was in effect on the date of judgment."); *Shapira*, 99 A.3d at 223 (finding Section 2301(d) "is unambiguous" when determining if the statute could still apply to offers that expire after trial begins but before a jury renders the

verdict); *State Farm Mut. Auto. Ins. Co. v. Enrique*, 16 A.3d 938 (Del. 2011) ("Because all of the requirements under the plain and unambiguous statute are met, the trial judge must award prejudgment interest."); *Christiana Care Health Servs., Inc. v. Crist*, 956 A.2d 622 (Del. 2008) as revised (Aug. 4, 2008) ("The plain language of § 2301(d) requires that prejudgment interest be awarded when the settlement demand was less than the amount of damages upon which the judgment was entered.").

There is no credible argument that the term "date of injury" is reasonably susceptible to more than one interpretation. The plain meaning of the word injury is "[t]he violation of another's legal right." INJURY, Black's Law Dictionary (11th ed. 2019) ("1. **The violation of another's legal right**, for which the law provides a remedy; a wrong or injustice. … 3. Any harm or damage. • **Some authorities distinguish harm from injury, holding that while harm denotes any personal loss or detriment, injury involves an actionable invasion of a legally protected interest.**") (citing Restatement (Second) of Torts § 7, cmt. a (1965), emphasis added); *see also Injury, Oxford English Dictionary*, https://www.oed.com/view/Entry/96114?rskey =AvWNgS&result=1#eid (a "[w]rongful action or treatment; violation or infringement of another's rights; suffering or mischief willfully and unjustly inflicted."). The Homeowners' water infiltration issues arise from the common areas at Salt Meadows. A3994:14-

4010:13. The Association maintains the common areas at Salt Meadows. A3232:2-19. The Association is a Homeowner. A1626. At trial, the Association pursued damages arising from the common areas, in which it has held an interest since the Date of Injury. A3292:8-12. Under these undisputed facts, the trial court erred as a matter of law by failing to award interest from the Date of Injury.

Courts applying Section 2301(d) consistently interpret its unambiguous language to mean that prejudgment interest shall be calculated from the date on which the tortious conduct occurred. *See, e.g.*, *Rapposelli v. State Farm Mut. Auto. Ins. Co.*, 998 A.2d 425, 429 (Del. 2010) as corrected (Feb. 5, 2010) (awarding prejudgment interest to party injured in car accident under 6 *Del. C.* § 2301(d), without regard to date on which medical bills were paid); *Desantis v. Gardiner*, 2020 WL 240209, *4 (Del. Super. Jan. 10, 2020) (awarding prejudgment interest from the date on which a motor vehicle collision occurred, without regard for date on which medical bills arising therefrom were paid); *Amisial v. Scott*, 2019 WL 968929, *1 (Del. Super. Feb. 27, 2019) ("[T]he Plaintiffs' demand and the end result met the requirements of [6 *Del. C.* 2301(d)]. Accordingly, the Plaintiffs are due pre-judgment interest running from the date of the accident."); *O'Riley v. Rodgers*, 2013 WL 4773076, *2 (Del. Super. Sept. 4, 2013) ("Plaintiff's interest rate, both pre and post-judgment, will be the sum of the legal rate of 6.25%, the Federal Reserve Discount Rate on the date of the accident, September 18, 2006,

plus the statutorily mandated 5%, equaling 11.25%."); *Rodas v. Davis*, 2012 WL 1413582, *3 (Del. Super. Jan. 31, 2012) (awarding interest under 6 *Del. C.* § 2301(d) from the date of the accident)*; Drayton v. Price*, 2010 WL 1544414, *9 (Del. Super. Apr. 19, 2010) (same); *Jackson v. Madric*, 2006 WL 488621, *3 (Del. Super. Feb. 8, 2006) (same).

The majority of cases awarding pre-judgment interest under 6 *Del. C.* § 2301(d) involve car accidents, not latent construction defects, but such cases are instructive here. *Id.* In a personal injury case, the victim's right to pre-judgment interest is not affected by either the date on which she has her first doctor's appointment after the accident or the date on which she pays her first medical bill. *Id*. Rather, the Court consistently awards pre-judgment interest from the date on which the negligent act was committed. *See, e.g.*, *Rapposelli*, 988 A.2d at 429 (awarding prejudgment interest to party injured in car accident under 6 *Del. C.* § 2301(d), without regard to date on which medical bills were paid, because "[t]he General Assembly enacted *6 Del. C.* § 2301(d) to promote earlier settlement of claims by encouraging parties to make fair offers sooner, with the effect of reducing court congestion."); *Bullock v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 1980806, *7 (Del. Super. May 18, 2012) (awarding prejudgment interest under 6 *Del. C.* §2301(d) from date on which tortious conduct occurred, despite Defendant's argument that injury occurred at subsequent point in time); *Connelly*

v. Kingsland, 2012 WL 1408880, *5 (Del. Super. Mar. 30, 2012) ("The statute is clear, unambiguous and without qualification. … [T]here is no exception for periods of delay or perceived delay during the litigation."). Similarly, here, the Homeowners' pre-judgment interest should commence on April 11, 2007, the date on which their legal rights were violated by the defective construction of Salt Meadows. A4186:18-87:4. The trial court's award of interest from a subsequent date, February 15, 2016, is reversible error. Ex. B, ¶ 5.

The legislative history demonstrates the reasonableness of Homeowners' interpretation of Section 2301(a) and fatally undermines the trial court's implicit finding that an award of prejudgment interest from the date of Homeowners' injury is absurd. In Delaware, "[l]egislative intent takes precedence over the literal interpretation of a statute when the two would lead to contrary results." *Rapposelli*, 988 A.2d at 427. Here, the intent of the Delaware General Assembly is clear. Section 2301(d) was specifically intended "to encourage settlements by encouraging parties to make fair offers sooner, with the effect of reducing court congestion." *See Bishop v. Progressive Direct Ins. Co.*, 2019 WL 2009331, *4 (Del. Super. May 3, 2019) (internal citation omitted). Although the Court seemingly deduced fact from Zonko's asserted inability to find legislative history on this point (See Appealed Decision p. 20, accepting Zonko's claims that "it could not find any support in the legislative history of the statute that the legislature

intended 6 *Del. C.* § 2301(d) to encourage early settlement, but that courts have simply repeated that rationale without explanation."), the actual fact is that such support exists. Del. S.B. 310, 140th Gen. Assemb. (2000), available at https://legis.delaware.gov/BillDetail/9256 ("Original Synopsis: Current law generally limits pre-judgment interest only to cases involving contract disputes or liquidated amounts, providing no financial incentive for insurance companies or wrongdoers to make prompt, good faith offers of settlement to plaintiffs."). Indeed, before 6 *Del. C.* § 2301(d) became a law, the Delaware General Assembly knew, "[a]s presently written the plaintiff would receive pre-trial interest without consideration of all the factors causing delay or the reason for the rejection of a plaintiff's settlement demand." Del. S.B. 310, Senate Amendment 2, 140th Gen. Assemb. (2000), available at https://legis.delaware.gov/BillDetail?legislationId=10987. It considered and struck an amendment which would add the words "or any lessor period" after "the date of injury." *Id*. available at https://legis.delaware.gov/json/BillDetail/GetPdfDocument?fileAttachmentId=18045; *see also id*., available at https://legis.delaware.gov/BillDetail?legislationId=10987 (striking amendment even though original synopsis notes such amendment "gives discretion to the hearing officer or trial Judge to determine if the defendant should be penalized by having the amount of pre-judgment interest added to the judgment.") The Appealed Order is, thus, directly contrary to the

Delaware General Assembly's intent for passing what became 6 *Del. C.* § 2301(d), and must be reversed.

Additionally, the basis for the trial court's ruling should be disregarded. Generally, "[p]rejudgment interest serves two purposes: (1) compensating the plaintiff for the lost use of its money; and (2) divesting the defendant of any benefit it received by retaining the plaintiff's money during the case's pendency." *Fortis Advisors, LLC v. Dematic Corp*., 2023 WL 2967781, *1 (Del. Super. Apr. 13, 2023) ("*Fortis II*").

In *Fortis Advisors, LLC v. Dematic Corp*., the prevailing plaintiff in a breach of contract action requested an award of costs and interest. *Fortis II*, at *1. The defendant disputed when interest should begin to accrue, arguing that the date proposed by the prevailing party was "inequitable". *Id*. at 2. The Superior Court concluded as follows with respect to the prevailing plaintiff's conduct:

1. "demanded prejudgment interest in its complaint." (*Id*.);

2. "could not demand a particular amount of prejudgment interest until judgment was entered, since that calculation necessarily depends on both the amount of the judgment and the date it is entered." (*Id*.); and

3. prior to trial, the defendant "was aware of the amount of damages [the prevailing plaintiff] was seeking and the legal rate of interest in Delaware." (*Id*.).

The Superior Court ruled that "[u]nder those circumstances, the dollar amount of the interest that ultimately accrued does not make the award inequitable." *Id.* (citing *BTG Int'l., Inc. v. Wellstat Therapeutics Corp*., 2017 WL 4151172, *21 (Del. Ch. Sept. 29, 2017)). *See also CertiSign Holding, Inc. v. Kulikovsky*, 2018 WL 2938311, at *29 (Del. Ch. Jun. 7, 2018); *Miller v. Trimont Global Real Estate Advisors, LLC*, 587 F.Supp.3d 170, 200-01 (D. Del. 2022).

Similarly, here, Zonko was aware of Delaware law and Plaintiffs' assertion that it was injured when the homes were initially constructed when it made its decision to decline the Settlement Offer. A2681-82. Among other things, as in *Fortis II*: 1) the Homeowners demanded interest in both their original and their Amended Complaint (A1-97; A190-334); 2) the prejudgment interest could not be calculated until a judgment was entered; and 3) Zonko was aware of both the legal rate of interest in Delaware and that the Homeowners sought more than $13 million worth of damages. A551-56; A1404-1599. In the context of a Section 2301(d) settlement offer, "our law does not relieve [a party] of the burden of [its] decisions simply because of [its] after-the-fact regrets." *Trexler v. Billingsley*, 166 A.3d 101 (Del. 2017). Accordingly, as in *Fortis II*, the trial court should have awarded the Homeowners pre-judgment interest from the date on which Zonko completed construction of Salt Meadows, under the clear and unambiguous terms of 6 *Del. C.* § 2301(d). Instead, it disregarded binding case law presented by the

Homeowners and, instead, deferred to Zonko's incorrect and unsupported assertions.

Furthermore, the factual and legal underpinnings for the trial court's decision further evidence its erroneous application of the law. First, the trial court noted, "Plaintiffs did not extend an offer until litigation had been ongoing for one and a half years." Appealed Decision, p. 20. This point is irrelevant. *See Shapira*, 99 A.3d 217 (awarding prejudgment interest even though Section 2301(d) settlement offer was made less than thirty days prior to trial). Further, the trial court was mistaken where the Homeowners made a settlement offer in January 2017 and August 2021, respectively. Had Zonko accepted the offer before it expired, all parties would have saved hundreds of thousands of dollars and the Court would have avoided a two week trial on damages. This is exactly the intention the legislature had in mind when passing the statute.

Second, the Court notes, "[a]t least some of the current plaintiffs purchased their units several years after they were constructed; it seems clear to me that they should not be awarded prejudgment interest back before they even owned the damaged units." Appealed Decision, p. 21. While this argument may have surface appeal, its conclusion is counterfactual to the trial record. At trial, Kathy Lambrow testified that the Homeowners were seeking damages originating from water infiltration to common areas maintained by the Association, not the out of pocket

expenses of any individual homeowners. A3292:8-12. In Delaware, the Association is entitled to recover damages to the common areas. *Council of Unit Owners of Sea Colony E. v. Carl M. Freeman Assoc., Inc*., 1989 WL 48568 (Del. Super. Apr. 28, 1989) (finding that the association of owners of a condominium complex could recover "full recovery for complete relief from the deficiencies in the common areas.").

The trial court further erred by concluding that the Association should not be able to recover damages for the repairs it has had to make to the areas it is required to maintain when such obligation has always and will continue to always exist. This Court has repeatedly held that a cause of action for tort "accrues" "at the time of the wrongful act, even if the plaintiff is ignorant of the cause of action." *Lehman Bros. Holdings, Inc. v. Kee*, 2021 WL 5816615, *4 (Del. Dec. 6, 2021). In a negligence action, specifically, the cause of action accrues when the elements of the claim have been met. *Id*. It is undisputed that water infiltration issues experienced by the Homeowners arise from defects in the original construction. A4186:18-20. Thus, under the facts of this case, the cause of action accrued in April 11, 2007, as even Zonko's Engineer agreed that the Homeowners' damages "probably started soon after they were constructed, at least some of the issues." A4187:3-4.

When, as here, "the text of [the] statute is clear [and] the Court need not go on to consider the act's legislative history." *Noranda Aluminum Holding Corp.*, 269 A.3d at 978 (internal quotation omitted). Zonko agrees that the Homeowners satisfied the statutory prerequisites under Section 2301(d). Ex. A, pp. 17-18. Accordingly, under the rules of statutory construction, the Homeowners "shall be" awarded pre-judgment interest "commencing from the date of the injury." 6 *Del. C.* § 2301(d). The unrefuted evidence in the record establishes that the Defendant injured the Plaintiffs when the homes were first built. A4186:18-87:4. As of April 11, 2007, the legal rate was 11.25% per annum, or $3,976.03 per diem ($12,900,000 judgment x 0.1125 interest rate / 365 days per year). Accordingly, this Court should reverse and remand the trial court's decision, to allow the Homeowners to be awarded simple prejudgment interest in the amount $3,976.03 per day, for each and every day between April 11, 2007 and February 15, 2023.

III. THE TRIAL COURT IMPERMISSIBLY SUBSTITUTED ITS FACTUAL FINDINGS FOR THOSE OF THE JURY WITH REGARD TO NON-COLUMN DAMAGES

A. QUESTION PRESENTED

Whether the trial court abused its discretion by reducing the Homeowners' non-column damages from $11.3 million to $8.3 million. Homeowners preserved the legal argument on appeal at A2552-2589 and A4957-5044.

B. Standard of Review

This Court reviews a trial court's remittitur rulings "for abuse of discretion." *In re Asbestos Litig.*, 223 A.3d 432, 434 (Del. 2019).

C. Merits of the Argument

"An abuse of discretion occurs when a court has exceeded the bounds of reason in view of the circumstances, or so ignored recognized rules of law or practice so as to produce injustice." *Greene v. Beebe Med. Ctr., Inc.*, 663 A.2d 487 (Table) (Del. 1995) (alterations, citations, and quotations omitted). Here, the trial court exceeded the bounds of reason by: 1) substituting its opinion for the jury's findings of fact; 2) disregarding undisputed evidence; 3) drawing inferences in favor of the moving party; and, 4) otherwise ignoring recognized rules of law and practice in a manner which produces injustice.

In Delaware, "a jury's verdict is presumed to be correct and just." *Storey v. Castner*, 314 A.2d 187, 193 (Del. 1973). "Faced with a motion for remittitur or additur, the trial court must evaluate the evidence and decide whether the jury award falls within a supportable range." *Reid v. Hindt*, 976 A.2d 125, 131 (Del. 2009) (internal quotation omitted). "Barring exceptional circumstances, the trial judge should set aside a jury verdict pursuant to a Rule 59 motion ***only*** when the verdict is manifestly and palpably against the weight of the evidence, or for some reason, justice would miscarry if the verdict were allowed to stand." *Burgos v. Hickok*, 695 A.2d 1141, 1145 (Del. 1997) (emphasis added).

"Recognizing that it would be remiss in its duties to invade an area within the exclusive province of the jury, the courts will yield to the verdict of the jury where any margin for reasonable difference of opinion exists in the matter of a verdict." *Storey v. Castner*, 314 A.2d 187, 193 (Del. 1973). "A verdict will not be disturbed as excessive unless it is so clear as to indicate that it was the result of passion, prejudice, partiality, or corruption; or that it was manifestly the result of disregard of the evidence or applicable rules of law." *Id*. (citations omitted). "[A] court's assessment of whether a jury's award of damages is within a range supported by the evidence must necessarily be based on the evidence presented to the jury and not on facts outside of the jury's purview." *Young v. Frase*, 702 A.2d 1234, 1237-38 (Del. 1997).

1. The Trial Record Supports The Jury's Award

The law is clear. In a tort action, the purpose of awarding damages is to make the party whole. *Council of Unit Owners of Sea Colony E. v. Carl M. Freeman Assoc., Inc.*, 564 A.2d 357, 363 (Del. Super. 1989). In construction defect litigation, such as this, the cost of repairs is the measure of damages. *Id*.

First, the trial court erroneously "agree[d] with Zonko's speculation that the jury improperly added amounts for inflation in awarding $11.3M." Ex A, 5. Here, the reasonable value of Homeowners' repair damages should be established as of the date of trial. *Council of Unit Owners of Sea Colony E.,* 564 A.2d at 363. As the trial court recognized on May 9, 2022, the fact that the cost of materials are more expensive in the wake of the COVID-19 pandemic is "probably common sense." A3911:2. The jury is permitted to use its common sense to reach conclusions based on the evidence. Pattern Jury Instruction 3.2; *Schulz v. Pennsylvania R.R. Co.*, 350 U.S. 523, 610 (1956) ("Issues of negligence, therefore, call for the exercise of common sense and sound judgment under the circumstances of particular cases.").

In this case, however, the jury need not rely exclusively on its common sense. In Delaware, finders of fact may consider testimony based on a property owner's personal knowledge when establishing the amount of damages. *See Eastern Shore Natural Gas Co. v. Glasgow Shopping Center Corp.*, 2007 WL

3112476, *2 (Del. Super. Oct. 3, 2007) (citations omitted). Here, the weight of the evidence supports the jury's finding.

At trial, Kathy Lambrow, a homeowner and the president of the Association, testified that the Association paid not less than $2,405,527.26 to repair the homes at Salt Meadows through December 31, 2021. A3292:8-12; A5143-5793. Ms. Lambrow further testified that additional repairs, including the following, remained to be performed at Salt Meadows:

1. not less than $6,210,306.04 of work identified in an estimate from Custom Carpentry dated March 15, 2019 (A3313:11-21);
2. repairs to columns that were discovered after the March 15, 2019 estimate was provided A3457:7-10, which the Contractor estimated to cost $1.6 million (A3538:20-39:5); and
3. not less than $500,000 for additional repair costs, such as drywall, painting and cleaning, that are not performed by Custom Carpentry (A3457:11-13).

Ms. Lambrow also testified, without objection, that costs have increased approximately 30% since the Contractor provided the March 15, 2019 estimate. A-A3457:13-20; *see also* A3630 ("Lambrow testified it's 30 percent. I don't know where she got that from. I didn't object to it.")). Additionally, Mr. Walbert testified, also without objection, that the post-pandemic cost increase has actually

been much higher, in the range of 47-48% according to the Producer Price Index. A3973:2-23.

Homeowners "need not establish the amount of damages with precise certainty where the wrong has been proven and injury established." *Siga Tech., Inc. v. Pharmathene, Inc.*, 132 A.3d 1108, 1131 (Del. 2015) (internal quotation omitted). *See also Beard Res., Inc.*, 8 A.3d at 613 ("Delaware does not require certainty in the award of damages where a wrong has been proven and injury established. Indeed, [t]he quantum of proof required to establish the amount of damage is not as great as that required to establish the fact of damage.") (internal quotations omitted, modification in original). Instead, "a Delaware Court has discretion to employ a flexible approach to damages in order to achieve a just and reasonable result." *Council of Unit Owners of Sea Colony E.*, 564 A.2d at 363.

Considering the evidence introduced at trial, a reasonable jury could have found that the reasonable amount of Homeowners' damages, excluding damages for columns, was $11.3 million. There is no dispute that, as of trial, the Homeowners had paid more than $2.4 million to repair Salt Meadows. A3292:8-12; A5143-5793. After subtracting this amount from the jury's $11.3 million award, the total of $8.9 million remains.

A reasonable jury could have reached the conclusion that the reasonable cost of future repairs at Salt Meadows would be $8.9 million, excluding damages for

columns. The unrefuted evidence at trial established that additional repairs by Custom Carpentry, unrelated to any columns, will reasonably cost $6.2 million, based on an estimate dated March 15, 2019. A3313:11-21; 3577:5-624:13. Common sense and general knowledge dictates that, since March 15, 2019, (a) the costs of goods and labor have increased dramatically; and (b) the availability of goods and labor have decreased dramatically. At trial, Homeowners' expert Jeremy Walbert testified as to both of these points. A3967:19-73:23; A4487:12-88:18. Even if the jury disregarded Ms. Lambrow's estimate that the Homeowners will pay approximately $500,000 in additional repairs for work that will not be performed by Custom Carpentry, the jury could have reasonably concluded that, as of the trial, the costs Homeowners will actually incur to complete the repairs identified on Custom Carpentry's March 15, 2019 estimate would be $8.9 million if the jury used an inflation rate of approximately 43.5% or higher ($6.2 million x .435 = $2.697 million; $6.2 million + $2.7 million = $8.9 million). Alternatively, if the jury included the estimated costs of future repairs for work that is not performed by Custom Carpentry ($500,000), it could reach the total of $8.9 million by marking up the remaining work from the March 15, 2019 estimate by approximately 35.5% ($6.2 million x .355 = $2.201 million; $6.2 million + $0.5 million + $2.2 million = $8.9 million). Either way, a reasonable jury could have reached the conclusion that the reasonable cost of future repairs at Salt Meadows

would be $8.9 million, excluding damages for columns, based on the unobjected testimony of Ms. Lambrow and Mr. Walbert.

After adding the undisputed amount paid by Homeowners ($2.4 million) to the reasonable amount of future repairs ($8.9 million), a reasonable jury considering all of the evidence introduced at trial could have reached the result that the reasonable amount of Homeowners' damages are $11.3 million, excluding damages for columns.

Moreover, there is nothing in the record indicating that the jury disregarded the trial judge's instructions or was otherwise confused. Thus, the trial court erred in finding that Zonko met its burden to establish the existence of a "manifest injustice" warranting remittitur. *Burgos v. Hickok*, 695 A.2d 1141, 1145 (Del. 1997) Instead, the jury's verdict must be honored because, as discussed above, it falls within a supportable range, based on the evidence introduced at trial. The Appealed Order must, accordingly, be reversed.

IV. THE TRIAL COURT IMPERMISSIBLY SUBSTITUTED ITS FACTUAL FINDINGS FOR THOSE OF THE JURY REGARDING DAMAGES TO HOMEOWNERS' COLUMNS

A. QUESTION PRESENTED

Whether the trial court erroneously granted Zonko's Renewed Motion for Judgment as a Matter of Law by, inter alia, substituting its opinion for the jury's findings of fact regarding the damages to the Homeowners' columns. Homeowners preserved the legal argument on appeal at A2600-2662, A4895:2-8, A4917:8-4936:12, and A4943:9-4944:18

B. Standard of Review

This Court "review[s] the Superior Court's decision to grant judgment as a matter of law *de novo*." *XL Ins. Am., Inc. v. Noranda Aluminum Holding Corp.*, 239 A.3d 390 (Del. 2020).

C. Merits of the Argument

A trial court must deny a motion for judgment as a matter of law unless "there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Super. Ct. Civ. R. 50(a). "When considering a motion for judgment as a matter of law, the Court must view the evidence and draw all reasonable inferences in a light most favorable to the non-moving party." *LCT Capital, LLC v. NGL Energy Partners LP*, 249 A.3d 77, 89 (Del. 2021) (internal citations omitted). As the Homeowners did in fact present sufficient evidence from

which a reasonable jury could conclude that the damages to the Homeowners' columns total not less than $1.6 million, especially when the evidence and all reasonable inferences are drawn in a light most favorable to the Homeowners, the appealed Order must be reversed.

First, the column damages awarded by the jury were well-supported by evidence presented at trial. During trial, the following evidence was admitted without objection:

1. Testimony from Ms. Lambrow regarding similarities throughout the homes at Salt Meadows (A3157:17-58:9; A3159:14-65:5);

2. Testimony from Homeowners' Engineer regarding similarities between the water infiltration issues in the homes at Salt Meadows (A3994:14-A4010:13);

3. Testimony from Zonko's Engineer that construction defects were the only cause he has determined for the Homeowners water infiltration (A4139:16-40:2);

4. Testimony from Zonko's Engineer that he was "looking at an area where there was water intrusions" every time he came to Salt Meadows (A4139:16-19);

5. Testimony from Kathy Lambrow, the Association's president, that the Association paid $74,622.01 for repairs to the columns at the rear of 40149 Salt Meadows Drive (A3330:21-31:6);

6. The Invoices supporting Ms. Lambrow's testimony regarding the amount paid to repair columns at 40149 Salt Meadows Drive (A5448-49; A5459-61; A5549-51; A5554-55; A5558-59; A55640-65; A5567);

7. Testimony from Ms. Lambrow that the cost of repairing the columns is not included in the 2019 Estimate because the problem was discovered after the 2019 Estimate was provided to the Association (A3457:7-10);

8. Invoice 10129F, which is dated March 2, 2020, and which notes that the Contractor "found damage to deck under columns" at 40149 Salt Meadows Drive (A5549-51);

9. Testimony from Ms. Lambrow that the Association anticipates that the total cost to repair the columns at Salt Meadows will be $1.4 million (A3457:7-10);

10. Testimony from Ms. Lambrow that the cost estimated to pay the Additional Workers in connection with the remaining repairs at Salt Meadows is $500,000 (A3457:11-13);

11. Testimony from Homeowners' Engineer that the cost of construction materials in the producer price index has increased approximately 47-48 percent since early 2020 (A3973:2-23);

These uncontroverted documents and testimony create a sufficient evidentiary basis to support the jury's verdict. *See, e.g. In re Asbestos Litig.*, 2011 WL 684164 (Del. Super. Feb. 2, 2011) (finding sufficient evidence supports the jury's verdict). First, if the jury found Ms. Lambrow and Mr. Walbert to be credible witnesses, it could have accepted their respective testimony regarding estimated column repairs at Salt Meadows ($1.4 million) and post-COVID price increases in construction materials (47-48%). 47 percent of $1.4 million is $658,000. Together, these figures total more than $2 million and provide an adequate evidentiary basis for the jury's verdict.

The testimony from Zonko's Engineer, Homeowners' Engineer and Ms. Lambrow regarding the recurrence of construction defects throughout Salt Meadows further bolster the evidentiary basis for the jury's verdict. First, Ms. Lambrow testified regarding the layout of every home at Salt Meadows, as well as similarities between buildings. A3157:17-58:9; A3159:14-65:5. Second, the Homeowners' Engineer testified regarding clusters of similar damages he observed throughout the Salt Meadows community beginning in 2016. A3994:14-A4010:13. Third, Zonko's Engineer testified both: a) that construction defects the

only cause he has determined for the Homeowners water infiltration; and b) that he was "looking at an area where there was water intrusions" every time he came to Salt Meadows (A4139:16-40:2). Taken in a light most favorable to the Homeowners, these unopposed similarities further support a reasonable determination that the columns supporting decks in the rear of each home at Salt Meadows need to be repaired.

The Appealed Decision clearly did not view the evidence in the light most favorable to the Homeowners and must be reversed based on the evidence admitted without Zonko's objection. Moreover, Zonko's failure to introduce any evidence contradicting the testimony and documents identifying damage to the columns at Salt Meadows further highlights the trial court's error. *See Haas v. Pendleton*, 272 A.2d 109, 109-10 (Del. Super. 1970) ("A jury has great latitude but … it cannot totally ignore facts that are uncontroverted and against which no inference lies."); *see also Itek Corp. v. Chi. Aerial Indus., Inc.*, 274 A.2d 141, 144 (Del. 1971) ("[A] party may not be heard to complain of a responsive answer to a question which he himself asked in cross-examination.")

1. The Invoices and Testimony of Homeowners' Witnesses Provide a Separate, Legally Sufficient Evidentiary Basis for the Jury's Findings.

The law is clear. Homeowners have the right to be made whole for the harm caused by Zonko's conduct. *Maier v. Santucci*, 697 A.2d 747, 749 (Del. 1997)

("The function of a damage award in a civil litigation is to provide just and full compensation to a plaintiff who suffers injury or loss by reason of the conduct of a tortfeasor.") (citation omitted); *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 2020 WL 948513 (Del. Ch. Feb. 27, 2020) ("Both contract and tort law thus conceive of damages as the pecuniary consequences of the breach or tort."); *Robinson v. Oakwood Village, LLC*, 2017 WL 1548549, *12 (Del. Ch. Apr. 28, 2017) ("At common law, damage was compensable for torts, including conversion or trespass, in the amount of the actual damages; that is, the tortfeasor's victim could be made whole for his loss.").

The trial court erroneously vacated the jury's award of column damages because "it was obvious to a layman – and should have been obvious to a professional engineer – that most of the 128 columns identified by Walbert were only superficially similar." Ex. A, p. 14. The trial court's conclusion that "there was no credible evidence that the damage to one set of columns supporting a deck would be found in every column at Salt Meadows" is counterfactual. Ex A, p. 14.

At trial, Homeowners' witnesses identified each and every invoice paid to repair certain columns at 40149 Salt Meadows Drive. A3325:20-3331:6; A4276:20-4277:15; A4554:20-A4559:10; A5143-5600. Each and every one of these invoices were produced months before trial, none of these invoices were objected to in the pre-trial order and each witness who testified was subject to

cross-examination. A520; A522; A540-542; A547; A549; A1066-1067; A1068-1070; A5448-49; A5459-61; A5549-51; A5554-55; A5558-59; A55640-65; A5567. An inadvertent and harmless error occurred when the Homeowners began to project their column damages on a per column basis (instead of a per home basis). *See, e.g.*, *Horsey v. State*, 892 A.2d 1084 (Del. 2006) (admitting color photograph of defendant was harmless error). Here, a demonstrative exhibit that was inadvertently published to the jury on May 12, 2021, consisted entirely of evidence previously admitted into the record, to which Mr. Walbert had previously testified. A3325:20-3331:6; A4276:20-4277:6; A-4517:16-4521:11; A4554:20-A4559:10; A5143-5600; A6170-A6176; A6432. This error was promptly rectified by the Court, *sua sponte*, and a curative instruction was provided to the jury. A4655:5-9 ("Members of the jury, there was a demonstrative put on the Elmo. You are not to pay any attention to that. If you saw anything, forget it. It's not going to be part of the evidence. It's nothing for you to consider back in the jury room."). All evidence indicates that the jury took this instruction to heart, as it awarded Homeowners $1.6 million for column repairs, not the higher amount referenced in the demonstrative exhibit that was inadvertently published prematurely. *Accord* A1807 *with* A6432.

The Appealed Order must be reversed, as a reasonable jury could have found that the reasonable amount of Homeowners' column related damages totaled $1.6

million by relying exclusively upon the uncontroverted testimony provided by and exhibits produced through the Association's president, Kathy Lambrow, especially when this unrefuted evidence is viewed in a light most favorable to the Homeowners.

CONCLUSION

For the foregoing reasons, this Court should reverse the Appealed Order and remand so that the statutory interest requirements and reasonable jury findings may stand.

Dated: May 2, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2023, a true and correct copy of the **Appellants' Opening Brief** was served via File & ServeXpress on the following counsel of record:

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