

IN THE SUPREME COURT OF OHIO

MICHAEL MARTIN

and

JENNIFER MARTIN

Appellants,

vs.

DESIGN CONSTRUCTION SERVICES,
INC.

Appellee.

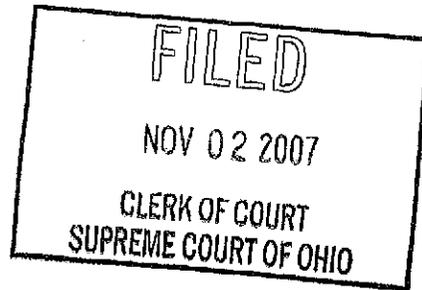
On Appeal from the Summit County Court
of Appeals, Ninth Appellate District

07-2024

Court of Appeals
CASE NO. 23422

MEMORANDUM IN SUPPORT OF JURISDICTION BY
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EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST

This case presents a critical issue for Ohio homeowners: whether owners of noncommercial real property may recover against the party responsible for negligently constructing their home even if they fail to prove by a preponderance of the evidence that the diminution in value of their homes. This case puts in issue the rights of homeowners to adequate redress of injuries to their property along with the uniform application of the law across the state. In order to provide confidence to homeowners and all Ohio citizens that the laws of the state will be uniformly applied, Appellants respectfully request that this Court grant jurisdiction to hear this case and review the decision from the Ninth District Court of Appeals.

In this case, the Ninth District Court of Appeals reversed a unanimous jury verdict entered in favor of Michael and Jennifer Martin (hereinafter "the Martins"), holding that proof of diminution in value of property was an absolute prerequisite to recovering the reasonable costs for repairing the property that was negligently constructed by the Appellee Design Construction Services, Inc. (hereinafter "Design Construction"). *Martin v. Design Constr. Servs., Inc.*, (Sept. 19, 2007) Summit App. No. 23422, 2007-Ohio-4805, at ¶18-20. In this decision (hereinafter "Decision"), the Court of Appeals imposed a legal straight jacket on a homeowner by requiring her to prove the market value of a property before it was even constructed.

The Decision permits a tortfeasor who negligently constructed a property to eviscerate a jury verdict and escape liability by simply claiming that the plaintiff did not properly prove the dollar amount of market loss they suffered as result of the negligently

constructed premises. In short, the Court of Appeals improperly extended a rule intended for cases involving temporary damages to real property to all cases involving real property.

In addition, the Ninth District Court of Appeals took a position in direct conflict with other appellate courts in Ohio. *Adcock v. Rollins Protective Servs. Co.* (1982), 1 Ohio App.3d 160, 161, 440 N.E.2d 548 (“[W]hen restoration is practical and reasonable, the owner is entitled to be compensated fairly and reasonably for his loss even though the market value of the building may not have been substantially decreased by the tort.”). See also *Krofta v. Stallard* (July 21, 2005), Cuyahoga App. No. 85369, 2005 WL 1707013, 2005-Ohio-3720, ¶26 (Court held it was error to grant motion for directed verdict in favor of defendant where there was no proof of diminution in market value). *Curtis v. Varquez* (Nov. 21, 2003), Ashtabula App. No. 03-A-0027, 2003 WL 22763578, 2003-Ohio-6224, ¶28-31 (“evidence regarding the pre-injury and post-injury market value of a rental property is impractical [and court should not dismiss] due to the failure to submit evidence regarding a difference in market value”). This rule is also contrary to the rule set forth in the Tenth and Sixth Districts. *Platner v. Herwald* (1984), 20 Ohio App.3d 341, 342, 486 N.E.2d 202 (Tenth District held the rule of damages to be applied was the cost of correction); *Moore v. McCarty's Heritage, Inc.* (1978), 62 Ohio App.2d 89, 92, 404 N.E.2d 167, 170 (Sixth District held that where plaintiffs have a right to hold the house for their own use as well as to hold it for sale, and if they elect the former, they should be compensated for the injuries done them without the restriction of diminution in value).

The Decision does not reflect the realities of homeownership, and the rule established by the Court of Appeals is wholly inconsistent with homeowners' expectations regarding the appropriate remedy when a home is negligently constructed. When a person discovers that a home was damaged by the tortious acts of another during construction, the economically sound decision is for her to repair the damage incurred during construction. In deed, a plaintiff should do so in order for her to mitigate her damages.

The rule applied by the Ninth District Court of Appeals encourages a homeowner to immediately attempt to sell the damaged old home, purchase a new home that is equivalent in value to that of the old home, and then bring a legal action to collect the difference in price between the old and new homes. Of course, then a defendant will argue that these hypothetical plaintiffs did not properly mitigate their damages. The more common and reasonable approach to the discovery of an improperly constructed home is to repair the damage and seek compensation for the expense of the repairs from those responsible.

Similarly, homes are not fungible. A home has a unique location and distinct character. It is a source of pride for the owners; it is a place of safety. It is a place of memories. A person's emotional attachment to a home is not to be measured by a market appraisal. The decision forces an aggrieved homeowner to tolerate damage inflicted during construction if the repair cost exceeds an assessment of diminution in value, or if she is unable to ascertain the market value had the home been properly constructed.

Homeowners take pride in keeping their home in good repair. The desire to effect repairs extends to even minor impairments that may not have any measurable impact on

the property's market value. In many cases, the homeowner's pride of ownership results in the homeowner suffering greater loss than the value assigned by the market through an arms length transaction.

Furthermore, the Ninth District Court of Appeals took a position in direct conflict with other courts that encountered an identical situation, and will threaten the uniform application of the law across the state and undermines citizens' confidence in the Ohio judiciary. The rule adopted by the other courts of appeals provides for adequate compensation in such a circumstance. *See Adcock, Id.*, 1 Ohio App.3d at 161 *and its progeny*. In contrast, the Ninth District's Decision will deny homeowners adequate redress of injuries to their property.

A rule that allows the owner to recover reasonable repair costs when diminution in value is not proven provides the owner a measure of compensation more in line with the injury suffered. This is not to say that evidence of diminution in value should be completely ignored. It may very well play a role in determining the reasonableness of the restoration activities. A defendant may offer proof of diminution of market value to temper an outrageous request for restoration costs. Evidence of diminution in value, even if it does not proven by a preponderance of the evidence, allows a jury to evaluate whether the aggrieved owner's restoration activities were reasonable.

By applying a different rule for recovery of damages than other courts, the Ninth District creates a situation where aggrieved Ohio homeowner's will be treated disparately depending upon the appellate district in which he resides. Such disparate treatment undermines public confidence in the judiciary's ability to say definitively what the law is and to apply it uniformly. The legal question presented in this case does not involve

interpretation of any ordinance of any political subdivision of the state. It is solely a question of Ohio state law, and it is of great public importance that the Ohio courts speak with one voice in interpreting and applying the law.

Providing homeowners reasonable repair costs in cases where diminution in value is not proven is necessary to provide adequate redress for their injuries. To do otherwise is to leave the aggrieved owner in a worse position than they were prior to the injury. In essence, a homeowner in the Ninth District must prove the non-existence of a potential defense in order to recover anything. This is contrary to the fundamental principal of tort law to make the plaintiff whole. A homeowner should not be denied redress for their injuries solely because of his county of residence. Therefore, it is of great importance that the Supreme Court of Ohio reviews the ruling of the Ninth District, and adopts the rule as interpreted by the First, Eighth, Eleventh, Tenth, and Sixth Districts.

STATEMENT OF THE CASE AND FACTS

This case arises from the negligence of Design Construction in constructing the Martins' personal residence. The Martins jointly own the home located at 2251 Graybill Road, Uniontown, Ohio 44685, and reside there with their four children. Design Construction built the home in August of 1998. The Martins purchased the home in 2000.

During the construction of the house, Design Construction used dirt to backfill the inside of the garage's foundation. During this backfilling process, the bulldozer operator moved the bulldozer too close to the foundation walls, and caused those walls to flex outward and crack. Design Construction attempted to dig the backfill around the

damaged walls, straightened the walls, and returned the backfill surrounding the foundation. Unfortunately, according to the Martins' expert, this grout never properly cured and never reached its proper integrity.

In the spring of 2004, Michael Martin began to discover the extent of the damage caused by Design Construction's negligence. As Mr. Martin attempted to repair the wall, he discovered that what should have been solid block was all powder that just crumbled apart when he touched it with his fingers. He contacted Design Construction. For the first time, Design Construction admitted that a bulldozer put too much pressure on the foundation wall during construction. Nevertheless, it refused to take any responsibility for this matter.

The Martins hired a professional engineer to inspect the damaged foundation and identify any work needed to repair the foundation. The Martins did not attempt to sell the property because of the particularities of the home, e.g. its location, the school system, the neighborhood. They also thought it would be incredibly difficult to market a house with a defective foundation.

The Martins brought an action seeking redress for Design Construction's negligence in the Summit County Court of Common Pleas. The case was tried to a jury. The jury returned a unanimous verdict in favor of the Martins in the amount of \$11,770.00, most of the restoration costs sought by the Martins. Although the Martins produced evidence regarding the decrease in the fair market value of his home due to the damaged foundation, the jury found that the Martins failed to prove by a preponderance of the evidence the diminution in value of their home in an Interrogatory.

Design Construction did not move for a directed verdict at the close of the Martins' case. It moved for a directed verdict, or alternatively, a judgment notwithstanding the verdict after the jury entered a general verdict in favor of the Martins. Design Construction's motion was denied by the trial court. The trial court found: "that Plaintiffs did in fact present evidence of diminution of value...that award of \$11,770 permits the Plaintiffs to be fully compensated without the award being disproportionate to the value of the home." *Martin v. Design Construction Services, Inc.* (Sept. 19, 2007), 2007-Ohio-4805, ¶14.

In its appeal to the Ninth District Court of Appeals, Design Construction argued that the Court of Appeals should grant its Motion for Directed or Judgment Notwithstanding the Verdict. The Court of Appeals reversed the jury award to the Martins in the amount of the cost of repairs solely because the Martins did not prove by a preponderance of the evidence the diminution of value to their home cause by Design Construction's negligence. *Id.*, ¶23. The Court of Appeals held that introduction of evidence of diminution of value was not itself sufficient to allow recovery of the costs of repair, and that proof of diminution of value was a prerequisite to recovery as a matter of law.

The Court of Appeals erred in finding that proof of diminution of value was a prerequisite to the recovery of reasonable costs of repair for damage to a property owner's personal residence.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. I: In an action for damages to noncommercial real property caused by the negligence of a builder, the failure to prove the difference between the fair market value of the whole property just before the damage was done and immediately thereafter is not fatal to the claim.

“It is difficult to state a rule for measuring damages equally applicable in all cases [while] it is the purpose of the law to afford to the person damaged compensation for the loss sustained.” *Northwestern Ohio Natural Gas Co. v. First Congregational Church of Toledo* (1933), 126 Ohio St. 140, 150, 184 N.E. 512. “Ohio courts have recognized that in cases...in which the party has been able to repair injury to a building, the proper measure of damages will usually be the reasonable costs necessary to restore the structure.” *Arrow Concrete Co. v. Sheppard* (1994), 96 Ohio App.3d 747, 750, 645 N.E.2d 1310 (appellate court held that trial court could award the reasonable costs to repair a building where a concrete truck backed into a partially constructed building). Several courts will hold that restoration costs are appropriate for damages to a structure, in certain situations, without regard to the diminution of market value. *Sadler v. Bromberg* (1950), 62 Ohio Law Abs. 73, 106 N.E.2d 306 (case involving installation of wall tiles and plumbing fixtures in the kitchen and bathroom of the family residence. See also *Platner v. Herwald* (1984), 20 Ohio App.3d 341, 342, 486 N.E.2d 202; *Moore v. McCarty’s Heritage, Inc.* (1978), 62 Ohio App.2d 89, 92, 404 N.E.2d 167, 170.

In a case for negligent construction or breach of a duty to perform in a workmanlike manner, the proper measure of damages should be the reasonable costs of repairing the damage proximately caused by the defendant. Because an unsuspecting

buyer has received an already damaged structure, it is often impractical to make a plaintiff attempt to demonstrate the market value of the property before the injury. If a home owner purchases a home that was constructed with defects, there was no market value to measure before the injury. The structure always contained the injury. Strictly applying such a rule to claims for negligent construction cases is not appropriate. For this reason, the inflexible rule of damages applied by the Ninth District does not fully compensate a plaintiff in such cases.

The rule utilized by the Ninth District Court of Appeals stems from its interpretation of *Ohio Collieries Co. v. Cocke*. In that case this Court held:

“[i]f restoration can be made, the measure of damages is the reasonable cost of restoration, plus the reasonable value of the use of the property between the time of the injury and the restoration, unless such cost of restoration exceeds the difference in the market value of the property as a whole before and after the injury, in which case the difference in the market value before and after the injury becomes the measure.”

Id. (1923), 107 Ohio St. 238, 140 N.E. 356, *paragraph 5 of the syllabus*. Although the Ninth District concedes that the *Collieries* rule “is not to be inflexibly applied to every case without regard to whether the party alleging injury is fully compensated,” it nevertheless holds that failure to prove diminution of market value is fatal to claim as a matter of law. *Bartholet v. Carolyn Riley Realty, Inc.* (1998), 131 Ohio App.3d 23, 27, 721 N.E.2d 474. *Cf. Horrisberger v. Mohlmaster* (1995), 102 Ohio App.3d 494, 500, 657 N.E.2d 534, 538 (court held that “plaintiff must introduce evidence” of diminution in value).

The Ninth District Court of Appeals took this position in direct conflict with other courts that encountered an identical situation. Other courts consider the axiomatic

proposition of law that “[t]he cardinal rule of the law of damages is that the injured party shall be fully compensated.” *Adcock v. Rollins Protective Servs. Co.* (1982), 1 Ohio App.3d 160, 161, 440 N.E.2d 548, citing *Brady v. Stafford* (1926), 115 Ohio St. 67, 79, 152 N.E. 188. This Court previously mentioned in dicta that it would view the majority rule favorably. *Apel v. Katz* (1998), 83 Ohio St.3d 11, 20, 697 N.E.2d 600, 608 (this Court mentioned that “appellant’s view of the measure of damages is unduly restrictive as applied to the facts of this case, and does not recognize that some flexibility is permissible in the ascertainment of damages suffered in the appropriate situation.”).

The rigid *Collieries* rule must be interpreted to ensure that victims who suffer damage to their property are not denied compensation due to a hyperbolic and inflexible interpretation of *Collieries*. See *Adcock*, 1 Ohio App.3d at 161; *Krofta v. Stallard*, 2005-Ohio-3720, at ¶15; *Curtis v. Varquez* 2003-Ohio-6224, ¶28-31.

Notwithstanding the diminution of market value, most Districts who addressed this issue agree that a land owner may receive restoration costs when: 1) the owner holds the property for personal use; 2) there are reasons personal to the owner for seeking restoration; 3) the restoration damages are not grossly disproportionate to the value of the property. *Thatcher v. Lane Constr. Co.* (1970), 21 Ohio App.2d 41, 45-49, 254 N.E.2d 703; *Apel, Id.*, 83 Ohio St.3d at 20. This exception is applied to the *Collieries* rule because the owner of property has a right to hold it for his own use or hold it for sale; if he elected the former, he should be compensated for an injury wrongfully done him in that respect. *Denoyer v. Lamb* (1984), 22 Ohio App.3d 136, 139, 490 N.E.2d 615, 619. When diminution in value is not proven, the jury may consider evidence of diminution to

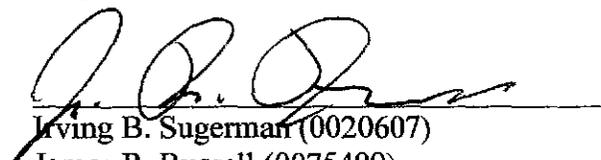
determine the reasonableness of the restoration costs. *Krofta, Id.*, 2005-Ohio-3720, at ¶26. Yet, even then, the finding is not dispositive to the case.

According to the well reasoned decisions of the First, Eighth, Eleventh, and Tenth Districts, a homeowner's failure to prove diminution of market value is not fatal to her claim for recovery of the cost of repairs to her home as a matter of law. This is especially true where the damages requested for restoration are not disproportionate to the overall market value of the property. The reasoned rule of law allows courts to afford the flexibility that is lacking in the rule utilized by the Ninth District. A jury may determine that evidence is insufficient to prove the actual diminution in value but still award restoration costs if it finds that plaintiff met the elements of the *Thatcher v. Lane Constr. Co.* test.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The Martins request that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum of Jurisdiction was sent by ordinary U.S. mail on November 1st, 2007, to Counsel for Appellee:

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STATE OF OHIO)
COUNTY OF SUMMIT)
CLERK OF COURTS)
SEP 19 AM 7:50)
IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

MICHAEL MARTIN, et al)
SUMMIT COUNTY C. A. No. 23422)
CLERK OF COURTS)

Appellees

v.

DESIGN CONSTRUCTION
SERVICES, INC.

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2005-05-2626

DECISION AND JOURNAL ENTRY

Dated: September 19, 2007

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

DICKINSON, Judge.

{¶1} During July 2000, plaintiffs Michael and Jennifer Martin bought a home in Uniontown. Defendant Design Construction Services Inc. had built the home two years earlier for the people from whom the Martins purchased it. In May 2005, the Martins brought this action against Design Construction, alleging that it had negligently built the foundation for the home's attached garage, which led to cracked and deteriorating foundation walls. The case was tried to a jury, which returned a verdict in favor of the Martins for \$11,770, the amount they had spent to repair the foundation. Design Construction moved for judgment

notwithstanding the verdict, arguing that the Martins were not entitled to recover the amount they spent to repair the foundation because they had failed to prove the difference between the value of their home before and after the damage to the foundation. The trial court denied Design Construction's motion, and Design Construction appealed. This Court reverses the trial court's judgment because the Martins failed to prove the diminution of value of their home as a result of Design Construction's alleged negligence and such proof is a prerequisite to recovery of the cost of repairs to real estate.

I.

{¶2} During 1998, Design Construction built a house at 2251 Graybill Road, Uniontown, Ohio, for Charity Davis and Matthew Herr. The house has a concrete block foundation. Design Construction applied a coat of mortar to the outside of the concrete blocks where they are above grade.

{¶3} Because of the topography of the lot, the grade of the yard at the rear of the garage is approximately three feet lower than the grade of the yard at the front of the garage. This means that approximately three feet of the garage foundation is above the grade of the surrounding yard at the rear of the exterior side of the garage and across the back of the garage. It also means that, during construction, Design Construction had to use dirt to backfill inside the garage foundation in order to have a level surface upon which to pour the concrete garage floor. As Design Construction was using a bulldozer to backfill the foundation,

the bulldozer operator got too close to the exterior side wall and the back wall, and the bulldozer's weight on the dirt inside the foundation caused those walls to flex outward. Don Shultz, Design Construction's president, testified that the damage to the foundation was not substantial enough to require major repairs. Instead, Design Construction dug the backfill out by hand to relieve the pressure, straightened the walls, and returned the backfill to the inside of the foundation. It also repaired cracks that had developed in the mortar on the outside of the foundation walls.

{¶4} A year later, Design Construction had the concrete blocks in the areas at which the walls had flexed filled with grout. Mr. Shultz testified that Design Construction had done so because it "didn't want to take any more chances with it" and doing so "would make those two solid concrete walls and they would never go anywhere or have any concerns with that."

{¶5} The Martins bought the home from Ms. Davis and Mr. Herr during July 2000. In a Residential Property Disclosure Form that Ms. Davis and Mr. Herr completed, they indicated that a crack in the back wall of the garage had been fixed during May 1999. An inspector hired by the Martins to examine the house before closing indicated that he had discovered some minor cracking and suggested monitoring:

Minor stress cracking evident. It appeared typical for the age and type of construction. There was not visible evidence of significant structural movement at this time.

The disclosure stated that a crack at the rear of the garage has been patched. Because of the design of the garage, where the floor is higher than the rear yard, further movement could continue slowly over time. I suggest monitoring. Some reinforcing may need added if movement continues.

{¶6} Mr. Martin acknowledged that there were cracks in the mortar on the outside of the above grade concrete blocks at the time the Martins moved into the house. He testified, however, that he assumed they were just in the mortar and not in the concrete blocks under the mortar.

{¶7} During the summer of 2003, Mr. Martin painted the outside of the garage foundation. During May 2004, he noticed that the cracks in the mortar were getting wider and concluded that it might be a problem, although he testified that he believed it was a cosmetic problem. He decided to attempt to repair the cracks with mortar cement. He used an angle grinder to widen the cracks as a first step in attempting to fill them. As he did so, the faces of some of the concrete blocks under the mortar fell off. He further testified that he discovered a powdery material inside the concrete blocks. At that point, Mr. Martin contacted several contractors to have them look at the problem, and they suggested that he contact the builder, which he did.

{¶8} Representatives of Design Construction examined the Martins' garage and denied responsibility for the problem. They acknowledged that, during construction, the bulldozer had caused the walls to flex. They suggested, however, that the problem with the concrete blocks had been caused by Mr. Martin painting

the foundation and his use of an angle grinder on the cracks in the mortar. They further told the Martins that, despite the cracks and crumbling blocks, they did not feel that "there [was] a concern for structural failure."

{¶9} The Martins hired a company named Master Masonry to repair the garage foundation. David Moody, the president of Master Masonry testified that, when Master Masonry excavated around the foundation, it discovered that the footers were not below the frost line as they should have been. He also testified that the grout with which the concrete blocks were filled had never cured. He suggested that the grout mixture had not contained enough concrete. Although he acknowledged that he does not recommend painting a concrete block foundation because doing so holds moisture inside the concrete blocks, he testified that he did not believe that the problem with the garage foundation was caused by Mr. Martin having painted it. He noted that the moisture in the foundation had to have come from somewhere. He testified that he believed the concrete blocks crumbled because the grout inside them had never cured.

{¶10} Master Masonry replaced the side and back walls of the garage foundation. It also placed insulation around the footers to protect them from frost. Master Masonry charged the Martins \$11,470 for its work. In addition, the Martins paid a structural engineer \$300 for work he did regarding repairs to the garage foundation.

{¶11} Mr. Martin testified that the Martins paid \$167,000 for the home in 2000. He further testified that he assumed that the fair market value of the home at the time of trial, if there had not been a problem with the garage foundation, would have been “somewhere around \$180,000.” Finally, he testified that he believed disclosing to a potential buyer that the foundation had been repaired would reduce by ten percent what that potential buyer would be willing to pay for the home:

Q. What is the value that is the harm that you’ve suffered by having to do these repairs?

.....

A Well, in my opinion, I would think that, like I said, if I was going to purchase the house and if the person, let’s say, had one without repairs and one with repairs, I would assume maybe ten percent would be a reasonable number, which would be about 18,000 that someone would want to drop the price for them to consider it when they could go to an identical house without repairs.

The Martins did not present any evidence tending to prove how much the fair market value of their home would have been reduced by the garage foundation problem if they had not repaired that problem.

{¶12} In its instructions, the trial court provided the jury the definition of “fair market value.” It then instructed the jury that, if it found for the Martins, they could recover the reasonable cost of necessary repairs, so long as that amount did not exceed the diminution in value of their home “immediately before and after the damage”:

If the damage to the property is temporary and such that the property can be restored to its original condition, then the owner may recover the reasonable costs of these necessary repairs. If, however, these repairs -- repair costs exceed the difference in the fair market value of the property immediately before and after the damage, then this difference in value is all that the owner may recover.

It further instructed the jury, over Design Construction's objection, that if a landowner holds the property for personal use, he can recover the cost of restoration, so long as that amount is not "grossly disproportionate to the value of the property":

A land owner may receive restoration costs when the owner holds the property for personal use. There are reasons personal -- they are reasons and personal to the owner for seeking restoration. The restoration damages are not grossly disproportionate to the value of the property.

{¶13} The jury returned a general verdict for the Martins for \$11,770. In response to an interrogatory, the jury found that Design Construction had been negligent by operating a bulldozer too close to the garage foundation walls during construction. In response to another interrogatory, it found that the Martins had failed to "prove by a preponderance of the evidence any diminution in the fair market value of their real property based on the alleged defects in the construction of their home."

{¶14} Design Construction moved for judgment notwithstanding the verdict, arguing that, inasmuch as the jury found that the Martins had failed to prove the difference in the fair market value of their home immediately before and after the damage to the garage foundation, they were not entitled to recover the

cost of the repairs to the foundation. The trial court denied its motion, holding in part that the Martins had satisfied their burden by presenting evidence regarding diminution in value even if the jury did not believe that evidence:

The Court first notes that Plaintiffs did in fact present evidence of diminution of value. The fact that the jury found that Plaintiffs did not prove the amount by a preponderance of the evidence does not change the fact that evidence was presented. Secondly, the Court finds that pursuant to *Bartholet* that award of \$11,770 permits the Plaintiffs to be fully compensated without the award being disproportionate to the value of the home.

Design Construction appealed to this Court and has assigned three errors.

II.

A.

{¶15} Design Construction's first assignment of error is that the trial court incorrectly awarded the Martins the cost of repairing the garage foundation. According to Design Construction, the trial court should have granted its motion for judgment notwithstanding the verdict based on the jury's finding that the Martins failed to prove any diminution in value to their home caused by the damage to the foundation.

{¶16} An appellate court's review of the denial of a motion for judgment notwithstanding the verdict is identical to its review of the denial of a motion for directed verdict at the close of all the evidence. *Levey & Co. v. Oravec*, 9th Dist. No. 21768, 2004-Ohio-3418, at ¶6. Consideration of either motion requires a trial court to determine whether the nonmoving party has presented sufficient evidence

to meet its burden of proof. See *Id.* An appellate court's review of the denial of either motion, therefore, is de novo. *Id.*

{¶17} In *Ohio Collieries Co. v. Cocke*, 107 Ohio St. 238 (1923), the Ohio Supreme Court held that an owner of real property is entitled to recover the cost of repairs to that property only so long as that amount does not exceed the diminution in value of the property caused by the injury:

If restoration can be made, the measure of damages is the reasonable cost of restoration, plus the reasonable value of the loss of the use of the property between the time of the injury and the restoration, unless such cost of restoration exceeds the difference in the market value of the property as a whole before and after the injury, in which case the difference in the market value before and after the injury becomes the measure.

Id. at syllabus. In *South Shore Cable Const. Inc. v. Grafton Cable Communications Inc.*, 9th Dist. No. 03CA008359, 2004-Ohio-6077, at ¶29, this Court held that, if a party seeking to recover cost of repairs fails to present evidence of diminution in value, "the trial court may properly dismiss that party's claim." (Citing *Smith v. Coldwell Banker Hunter Realty*, 9th Dist. No. 20908, 2002-Ohio-4866, at ¶18.)

{¶18} In *Adcock v. Rollins Protective Services Co.*, 1 Ohio App. 3d 160 (1981), the First District Court of Appeals, while acknowledging that *Ohio Collieries* set forth the general rule for recovery of damages to real estate, adopted an exception to that rule for damages to residences that homeowners do not immediately plan to sell:

In an action for temporary damages to a building that the owner does not plan to sell but intends to use as his home in accordance with his personal tastes and wishes, when restoration is practical and reasonable, the owner is entitled to be compensated fairly and reasonably for his loss even though the market value of the building may not have been substantially decreased by the tort. The owner may recover as damages the fair cost of restoring his home to a reasonable approximation of its former condition, and his failure to prove the difference between the value of the whole property just before the damage was done and immediately thereafter is not fatal to the owner's lawsuit.

Id. at 161. The Martins have urged this Court to follow *Adcock* and hold that proof of diminution of value was not a prerequisite to recovery of their cost of repairs in this case.

{¶19} This Court has previously refused to follow *Adcock*:

We decline to adopt the trial court's interpretation of *Adcock* in this district. As a matter of law, diminution in the value of real property is a limiting factor on the damage award for the injury to the property.

Bartholet v. Carolyn Riley Realty Inc., 131 Ohio App. 3d 23, 27 (1998). The Martins have not convinced it to do so in this case.

{¶20} In *Bartholet*, this Court recognized that some flexibility in applying the *Ohio Collieries* rule might be appropriate in cases in which "the property has intangible value in its original state for reasons of personal taste to the injured party." *Bartholet*, 131 Ohio App. 3d at 27. Even in such cases, however, the property owner would still have to prove the diminution in value:

Even when an award somewhat higher than the diminution in value of the property might be appropriate, the restoration costs awarded must not be grossly disproportionate expenditures. . . . That

determination cannot be made without considering the value of the property before and after the injury.

Id.

{¶21} The Martins have further argued that they did present evidence of diminution of value in this case. Mr. Martin testified that, even after the repair to the garage foundation, he believed the fair market value of his home had been reduced \$18,000 as a result of having a repaired foundation. The Court notes that Mr. Martin was not asked to opine on the difference in the fair market value immediately before and after the damage to the foundation. Presumably, if he had been, he would have testified to an even greater diminution in value.

{¶22} The Court will assume without deciding that Mr. Martin was qualified to testify regarding the diminution in value to his home. The jury, however, did not believe his testimony, specifically finding that the Martins had not proven "any diminution in the fair market value of their real property based on the alleged defects in the construction of their home." Contrary to the trial court's holding in its ruling on Design Construction's motion for judgment notwithstanding the verdict, the Martins' burden was not just to introduce evidence of diminution in value; it was to prove diminution in value:

The party seeking restoration cost bears the burden of proving that it would not be "grossly disproportionate" to diminution in value.

South Shore Cable Const. Inc. v. Grafton Cable Communications Inc., 9th Dist. No. 03CA008359, 2004-Ohio-6077, at ¶29 (quoting *Bartholet v. Carolyn Riley Realty Inc.*, 9th Dist. No. 20458, 2001 WL 866281, at *1 (Aug. 1, 2001)).

{¶23} The Martins failed to prove diminution in value to their home caused by Design Construction's negligence. Accordingly, they were not entitled to recover the cost of their repairs. Design Construction's first assignment of error is sustained.

B.

{¶24} Design Construction's second and third assignments of error are that the trial court incorrectly instructed the jury regarding "an exception to the general rule for damages to real property" and incorrectly denied it summary judgment based on the statute of limitations. In light of this Court's ruling on its first assignment of error, these assignments of error are moot and are overruled on that basis.

III.

{¶25} Design Construction's first assignment of error is sustained and its second and third assignments of error are overruled. The judgment of the trial court is reversed.

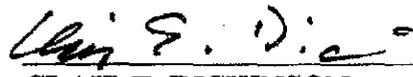
Judgment reversed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellee.


CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, P. J.
CONCURS

CARR, J.
CONCURS, SAYING:

{¶26} I concur with the majority but write separately to clarify that my dissent in *Bartholet v. Carolyn Realty, Inc.* (1998), 131 Ohio App.3d 23, 28-29, is

inapplicable to the instant case, because the Martins did not allege a cause of action for fraud.

APPEARANCES:

CRAIG G. PELINI and KRISTEN E. CAMPBELL, Attorneys at Law, for appellant.

JAMES R. RUSSELL, JR., Attorney at Law, for appellees.