

IN THE SUPREME COURT OF OHIO

MICHAEL MARTIN

and

JENNIFER MARTIN

Appellants,

vs.

DESIGN CONSTRUCTION SERVICES,
INC.

Appellee.

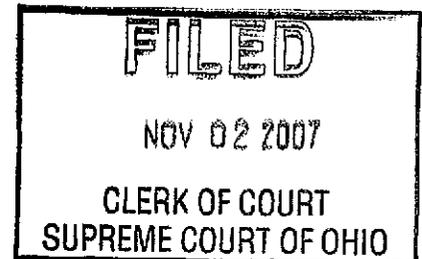
On Appeal from the Summit County Court
of Appeals, Ninth Appellate District

07-2023

Court of Appeals
CASE NO. 23422

NOTICE OF CERTIFIED CONFLICT BY APPELLANTS
MICHAEL AND JENNIFER MARTIN

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COUNSEL FOR APPELLEE, DESIGN CONSTRUCTION SERVICES, INC.

NOTICE OF CERTIFIED CONFLICT

Appellants Michael and Jennifer Martin hereby give notice to the Supreme Court of Ohio that the Court of Appeals for the Ninth Judicial District has certified a conflict to this Court. The Court of Appeals certify that a conflict exists as to the following issue:

Whether in an action for temporary damages to noncommercial real property, a failure to prove the difference between the fair market value of the whole property just before the damage was done and immediately thereafter is fatal to the claim.

(*Journal Entry Certifying Conflict*, p. 3). Pursuant to Section 3(B)(4) of Article IV of the Ohio Constitution, the Appellate Court determined that its judgment on this proposition of law differs from the Court of Appeals for the First Judicial District. *See Decisions attached: Martin v. Design Construction Services, Inc.* (Sept. 19, 2007), 2007-Ohio-4805, ¶18; *Adcock v. Rollins Protective Services Co.* (1981), 1 Ohio App.3d 160, 440 N.E.2d 548. The Court of Appeals also found that its decision on this case is in conflict with the Court of Appeals for the Eighth Judicial District. *Krofta v. Stallard* (July 21, 2005), Cuyahoga App. No. 85369, 2005 WL 1707013, 2005-Ohio-3720, ¶26.

In short, the Ninth District held that a homeowner's failure to prove the diminution in market value of the whole property will bar any claim as a matter of law. The other Districts held that failure to do so is not fatal to a homeowner's claim. Therefore, pursuant to Section 3(B)(4) of Article IV of the Ohio Constitution, and in accordance with S.Ct.Prac.Rule IV, Section 2(C), Appellants request that this Honorable Court issue an order finding a conflict and instructing the Clerk of Courts for the Ninth Judicial District to certify and transmit the record of this case to the Clerk of this Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Certified Conflict was sent by ordinary U.S. mail on November 6th, 2007, to Counsel for Appellee:

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STATE OF OHIO

COURT OF APPEALS
DANIEL M. HOPKINS
)ss:

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

COUNTY OF SUMMIT

2007 OCT 24 PM 2:20

MICHAEL MARTIN, et al.

SUMMIT COUNTY
CLERK OF COURTS

C.A. No. 23422

Appellees

v.

DESIGN CONSTRUCTION
SERVICES, INC.

Appellant

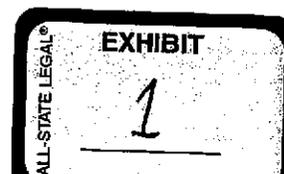
JOURNAL ENTRY

Plaintiffs Michael and Jennifer Martin have moved this Court to reconsider its decision and journal entry of September 19, 2007, which reversed an order of the Summit County Court of Common Pleas denying Defendant Design Construction Services Inc.'s motion for judgment notwithstanding the verdict. Design Construction has responded in opposition to the motion for reconsideration.

The Martins have also moved this Court to certify a conflict between the judgment in this case and those of the First District Court of Appeals in *Adcock v. Rollins Protective Services Company*, 1 Ohio App.3d 160 (1981) and the Eighth District Court of Appeals in *Krofta v. Stallard*, 8th Dist. No. 85369, 2005-Ohio-3720. Design Construction has not responded to this motion.

MOTION FOR RECONSIDERATION

In determining whether to grant a motion for reconsideration, a court of appeals must review the motion to see if it calls to the attention of the Court an obvious error in its decision or if it raises issues not considered properly by the Court. *Garfield Hts. City School Dist. v. State Bd. of Edn.*, 85 Ohio App. 3d 117 (1992).



This Court held that the trial court erred by denying Design Construction's motion for judgment notwithstanding the verdict 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." In their motion for reconsideration, the Martins have neither identified an obvious error in this Court's decision nor raised an issue not considered properly by this Court.

The Martins have argued that this Court impermissibly weighed the evidence in deciding that the Martins had failed to prove diminution in value. At the trial of this matter, however, no witness offered any testimony regarding the value of the property immediately before the damage and immediately thereafter. Based on the evidence, the jury specifically found the Plaintiffs had failed to prove any diminution in value. This is inconsistent with and irreconcilable with any verdict for money damages to the Plaintiffs. According to the law of this district, there can be no recovery without at least a comparison of the repair cost with the diminution in value proximately caused by the injury. Because the motion for reconsideration has not brought any obvious errors to this Court's attention and has not raised any issues that the Court failed to consider properly, the motion is denied.

MOTION TO CERTIFY CONFLICT

The Martins have also moved this Court to certify that the decision in this case is in conflict with *Adcock v. Rollins Protective Services Company*, 1 Ohio App.3d 160

(1981) and *Krofta v. Stallard*, 8th Dist. No. 85369, 2005-Ohio-3720. The Martins have proposed that a conflict exists among the districts on the following issue:

Whether in an action for temporary damages to [noncommercial real property,] a failure to prove the difference between the [fair market] value of the whole property just before the damage was done and immediately thereafter is fatal to the claim.

When certifying a conflict, an appellate court must: 1) determine that its judgment is in conflict with a judgment of another court of appeals on the same question; 2) determine that the conflict is on a rule of law, not on the facts of the cases; and 3) clearly set forth in its opinion or its journal entry the rule of law believed to be in conflict with that of another district. *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St. 3d 594, 596 (1993).

The decision in this case conflicts with the judgment of the First District Court of Appeals in *Adcock v. Rollins Protective Services Company*, 1 Ohio App. 3d 160 (1981).

Both cases involved temporary damage to noncommercial real property and both plaintiffs failed to prove the difference between the fair market value of the whole property just before the damage was done and immediately thereafter. In *Adcock*, the First District held:

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 * * * 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.

Adcock, 1 Ohio App. 3d at 161. In contrast, in this case, this Court held:

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

Martin v. Design Construction Services Inc., 9th Dist. No. 23422, 2007-Ohio-4805, at ¶ 22-23 (citations omitted). Likewise, this Court's judgment conflicts with the Eighth District Court of Appeals decision in *Krofta v. Stallard*, 8th Dist. No. 85369, 2005-Ohio-3720. When faced with a similar fact pattern, the Eighth District held:

Usually, evidence regarding the diminution in value is needed to determine the reasonableness of the restoration costs. Failure to present such evidence, however, is not necessarily fatal to a claim.

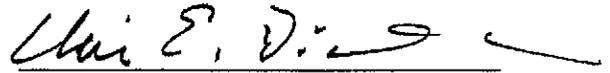
Krofta, at ¶26 (citations omitted).

The Martins have demonstrated that a conflict exists among the districts on this rule of law. Accordingly, the Martins' motion to certify a conflict is granted.

CONCLUSION

The Martins have neither identified an obvious error in this Court's decision nor raised an issue that this Court failed to consider properly. The motion for reconsideration is denied.

The Martins have demonstrated that a conflict exists between this Court's judgment in this case and the judgments rendered by the First and Eighth District Courts of Appeals in the above cited cases. The motion to certify a conflict is granted.



Judge



Judge

STATE OF OHIO)
COUNTY OF SUMMIT)

COURT OF APPEALS
NINTH JUDICIAL DISTRICT

SEP 19 2007

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

MICHAEL MARTIN, et al.

SUMMIT COUNTY
CLERK OF COURTS

C.A. No. 23422

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.

Westlaw.

440 N.E.2d 548

Page 1

1 Ohio App.3d 160, 440 N.E.2d 548, 1 O.B.R. 471
 (Cite as: 1 Ohio App.3d 160, 440 N.E.2d 548)

C

Adcock v. Rollins Protective Services Co.
 Ohio App., 1982.

Court of Appeals of Ohio, First District, Hamilton
 County.
 ADCOCK et al., Appellants,
 v.
 ROLLINS PROTECTIVE SERVICES COMPANY
 et al., Appellees.^{FN*}

FN* A motion to certify the record to the
 Supreme Court of Ohio was overruled on
 September 16, 1981 (case No. 81-896).
 April 15, 1981.

Action was brought to recover damages for
 temporary injury negligently caused by defendants.
 The Hamilton County Municipal Court directed
 verdict for defendants because plaintiffs did not
 present evidence of diminution in market value of
 their home proximately caused by defendants.
 Plaintiffs appealed. The Court of Appeals, Black,
 P. J., held that where owner does not plan to sell
 building but intends to use it as his home in
 accordance with his personal tastes and wishes, and
 when restoration is practical and reasonable, owner
 is entitled to be compensated fairly and reasonably
 for his loss even though market value of building
 may not have been substantially decreased by the
 tort, and owner may recover fair cost of restoration
 without proof of difference in value before and
 after, though diminution is relevant and may be
 taken into account.

Reversed and remanded.

West Headnotes

[1] Damages 115 ⇌ 108

115 Damages

115VI Measure of Damages

115VI(B) Injuries to Property

115k107 Injuries to Real Property

115k108 k. In General. Most Cited
 Cases

General rule that measure of damages for injury to
 real property is reasonable cost of restoration plus
 reasonable value of loss of use unless cost of
 restoration exceeds difference in market value
 before and after, in which case such difference
 becomes the measure, cannot be applied arbitrarily
 or exactly in every case without regard to whether
 its application would compensate injured party fully
 for losses which are proximate result of wrongdoer's
 conduct, but, rather, cardinal rule is that injured
 party shall be fully compensated.

[2] Damages 115 ⇌ 111

115 Damages

115VI Measure of Damages

115VI(B) Injuries to Property

115k107 Injuries to Real Property

115k111 k. Buildings or Other
 Improvements. Most Cited Cases

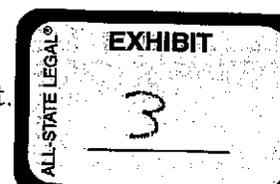
In action for temporary damage to building that
 owner does not plan to sell but intends to use as his
 home in accordance with his personal tastes and
 wishes, and when restoration is practical and
 reasonable, owner is entitled to be compensated
 fairly and reasonably for his loss even though
 market value of building may not have been
 substantially decreased by the tort, and owner may
 recover fair cost of restoration without proof of
 difference in value before and after, though
 diminution is relevant and may be taken into
 account.

**548 Syllabus by the Court

*160 1. The cardinal rule of the law of damages is
 that the injured party shall be fully compensated.

2. 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 may recover as damages the
 fair cost of restoring his home to a reasonable

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1 Ohio App.3d 160, 440 N.E.2d 548, 1 O.B.R. 471
 (Cite as: 1 Ohio App.3d 160, 440 N.E.2d 548)

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.

Thomas W. Amann, Cincinnati, for appellants.
 Nieman, Aug. Elder & Jacobs and John D. McClure, Cincinnati, for appellees.
 BLACK, Presiding Judge.
 Plaintiffs-appellants, John Adcock and Mary Jane Adcock, seek reversal of the judgment against them in their action to recover temporary damages negligently caused by defendants-appellees, Rollins Protective Services Company and Paul Dedman, **549 to plaintiffs' dwelling. The trial court directed a verdict for the defendants because, while the evidence included the cost of repairing the damage, the plaintiffs failed to present evidence of the diminution in the market value of their home proximately caused by the defendants. Plaintiffs assert that this was error and we agree.

Defendants conceded that their serviceman negligently burned several white vinyl floor tiles near the front door of the residence while inspecting a malfunction in the security system earlier installed by them. The only issue to be presented to the jury was the amount of damages. Plaintiffs claimed that the burn marks could not be removed, that identical replacements for the damaged tiles could not be found, and that the entire vinyl floor from the front entrance through the center of the residence and into the kitchen and a bathroom had to be replaced. Defendants agreed to stipulate the accuracy of plaintiffs' estimate for the cost of this total replacement, but they claimed that the injury could be corrected at a much reduced cost by taking replacement tiles from inconspicuous places (in closets or under appliances) and by putting in their place either the burned ones or non-matching new tiles.

At the close of plaintiffs' case and again at the close of all the evidence, defendants moved for a directed verdict on the grounds that plaintiffs had failed to prove the diminution in market value of the property. The trial court granted the motion and

directed the verdict against the plaintiffs, relying on the general rule in Ohio that the measure of damages for injury to real property which can be restored " * * * 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 *161 and after the injury, in which case the difference in the market value before and after the injury becomes the measure." *Ohio Collieries Co. v. Cocks* (1923), 107 Ohio St. 238, 140 N.E. 356, paragraph five of the syllabus; *Klein v. Garrison* (1951), 91 Ohio App. 418, 108 N.E.2d 381 [49 O.O. 25].

[1] The trial court erred. The general rule cannot be " * * * an arbitrary or exact formula to be applied in every case without regard to whether its application would compensate the injured party fully for losses which are the proximate result of the wrongdoer's conduct." *Thatcher v. Lane Construction Co.* (1970), 21 Ohio App.2d 41, 48-49, 254 N.E.2d 703 [50 O.O.2d 95]. Accord, see *Paul v. First National Bank of Cincinnati* (1976), 52 Ohio Misc. 77, 89,369 N.E.2d 488 [6 O.O.3d 207]; Restatement of the Law of Torts (1939), Section 929, Comment *b*.

The cardinal rule of the law of damages is that the injured party shall be fully compensated. *Brady v. Stafford* (1926), 115 Ohio St. 67, 79, 152 N.E. 188. A rule that requires proof of diminution of market value may not fairly and reasonably compensate a homeowner who has no immediate intention of selling his residence and wants to keep it for his own use and enjoyment. The testimony of the plaintiffs amply reflected their plan to use their home for the remainder of their lives in accordance with their personal tastes and wishes.

[2] 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

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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. The diminution in overall value is relevant to the issue of damages, and evidence about such diminution, whether presented by the plaintiff or the defendant, may be taken into consideration**550 in assessing the reasonableness of damages.

Finding merit in the plaintiffs' assignment of error, we reverse the judgment of the Hamilton County Municipal Court and remand this cause for further proceedings.

Judgment reversed and cause remanded.

KEEFE and KLUSMEIER, JJ., concur.
Ohio App., 1982.
Adcock v. Rollins Protective Services Co.
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C

Krofta v. Stallard
Ohio App. 8 Dist., 2005.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District,
Cuyahoga County.

Vince KROFTA, et al. Plaintiffs-appellants
v.

Michael STALLARD, et al. Defendants-appellees
No. 85369.

July 21, 2005.

Background: Owners of residential property brought trespass action, alleging neighboring property owners located electrical transformer and underground utility lines on their property. The Berea Municipal Court, Cuyahoga County, No. 02-CVF-00729, directed a verdict in favor of neighboring property owners. Plaintiffs appealed.

Holding: The Court of Appeals, Dyke, P.J., held that plaintiff's failure to present evidence of diminution in the value of their land did not preclude their recovery for damages to property, including restoration costs.

Reversed and remanded.

Gallagher, J., filed an opinion concurring in part and dissenting in part

Trespass 386 ↩️ 50

386 Trespass
386II Actions
386II(D) Damages
386k50 k. Entry on and Injuries to Real Property. Most Cited Cases
Failure of owners of residential property to present

evidence of diminution in the value of their land, as a result of trespass upon their residential property resulting from neighboring property owners locating electrical transformer and underground utility lines on their property, did not preclude their recovery for damages to property; injury resulting from alleged trespass was permanent in nature, and restoration costs were an appropriate measure of damages to owners, who intended to use residential property according to their own personal preferences, regardless of effect of diminution in market value. Restatement (Second) of Torts, § 929.

Civil appeal from the Berea Municipal Court Case No. 02-CVF-00729, Reversed and Remanded.

George R. Penfield, Penfield & Associates, Fairview Park, Ohio, for Plaintiffs-Appellants.
Patrick M. Farrell, Hildebrand, Williams & Farrell, Fairview Park, Ohio, Ernest L. Wilkerson, Wilkerson & Associates Co., Cleveland, Ohio, for Defendants-Appellees.

JOURNAL ENTRY AND OPINION

DYKE, Presiding J.

*1 {¶ 1} Plaintiffs-Appellants, Vince and Jill Krofta ("Plaintiffs"), appeal from the order of the trial court which directed a verdict in favor of Defendants-Appellees, Michael and Julie Stallard ("Defendants"). For the reasons set forth below, we reverse and remand for additional proceedings consistent with this opinion.

{¶ 2} The Plaintiffs commenced this action against Defendants on March 21, 2002. Plaintiffs are the owners of residential property adjacent to residential property owned by the Defendants. In the Complaint, Plaintiffs alleged that Defendants trespassed upon the Plaintiffs' property via the location on Plaintiffs' real estate of an electrical transformer and underground utility lines.

{¶ 3} Defendants answered the Plaintiffs'



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Complaint and included a counterclaim and third-party complaint naming Cleveland Electric Illuminating Company ("CEI") and Nicholas Kugler and Kugler Homes, the builder of the Defendants' home. CEI filed a counterclaim against the Plaintiffs and a cross-claim against the other third party defendant. CEI later dismissed Nicholas Kugler and Kugler Homes and the trial court granted default judgment against Nicholas Kugler and Kugler Homes in favor of Defendants.

{¶ 4} The trial of this matter commenced on August 27, 2004 in Berea Municipal Court. At trial, Plaintiffs presented damage estimates of the cost to relocate the underground utility lines and restore the land, as well as evidence respecting lost income from the property. Plaintiffs, however, did not present evidence as to the fair market value of their property either before or after the trespass. At the conclusion of Plaintiffs' case, Defendants moved for a directed verdict, which was granted by the Magistrate.

{¶ 5} On September 1, 2004, the Magistrate issued his finding, which was subsequently adopted by the trial court.^{FN1} It is from the trial court's granting of a directed verdict in favor of Defendants that Plaintiffs now appeal.

FN1. We note the court had previously entered default judgment against Nicholas Kugler and Kugler Homes and in favor of Defendant without determining damages. See *Jones v. Robinson* (Jan. 7, 2000), Montgomery App. No. 17914 (there must be a determination of damages before a default judgment constitutes a final appealable order.) While such ruling is not a final appealable order, the court's subsequent entry of a directed verdict in favor of defendant has rendered this issue moot. See *Gen. Acc. Ins. Co. v. Ins. Co. of N. Am.* (1989), 44 Ohio St.3d 17, 21, 540 N.E.2d 266 ("Even though all the claims or parties are not expressly adjudicated by the trial court, if the effect of the judgment as to some of the claims is to render moot the remaining claims or parties, then

compliance with Civ.R. 54(B) is not required to make the judgment final and appealable.")

{¶ 6} Plaintiffs' sole assignment of error states:

{¶ 7} "The Trial Court erred by directing a verdict in favor of defendants."

{¶ 8} In their only assignment of error, Plaintiffs assert that the trial court should not have precluded their recovery based upon their failure to present evidence of diminution in the value of their land as a result of the Defendants' trespass upon their residential property. Specifically, Plaintiffs contend that the proper measure of damages for a trespass upon residential property is the cost of restoring the land, not its diminution in value. Therefore, Plaintiffs maintain, they should still recover the restoration costs absent evidence of the difference in market value.

{¶ 9} We conduct a de novo review in order to determine whether the trial court properly entered a directed verdict. *Howell v. Dayton Power & Light Co.* (1995), 102 Ohio App.3d 6, 13, 656 N.E.2d 957; *Keeton v. Telemedia Co. of S. Ohio* (1994), 98 Ohio App.3d 405, 409, 648 N.E.2d 856.

*2 {¶ 10} The motion for directed verdict is to be granted when, construing the evidence most strongly in favor of the party opposing the motion, the trial court finds that reasonable minds could come to only one conclusion and that conclusion is adverse to such party. Civ.R. 50(A)(4); *Crawford v. Halkovics* (1982), 1 Ohio St.3d 184, 1 Ohio B. 213, 1 Ohio St.3d 184, 438 N.E.2d 890; *Limited Stores, Inc. v. Pan Am. World Airways, Inc.*, 65 Ohio St.3d 66, 1992-Ohio-116, 600 N.E.2d 1027. The motion does not test the weight of the evidence or the credibility of witnesses. *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 68-69, 430 N.E.2d 935. Rather, it involves a test of the legal sufficiency of the evidence to allow the case to proceed to the jury, and it constitutes a question of law, not one of fact. *Hargrove v. Tanner* (1990), 66 Ohio App.3d 693, 695, 586 N.E.2d 141.

{¶ 11} A motion for a directed verdict is properly

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granted when the party opposing it has failed to adduce any evidence on one or more essential elements of this claim. *Id.*; *Cooper v. Grace Baptist Church* (1992), 81 Ohio App.3d 728, 734, 612 N.E.2d 357. However, where there is substantial evidence upon which reasonable minds may reach different conclusions, the motion must be denied. *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275, 344 N.E.2d 334, 338.

{¶ 12} “A trespass upon real property occurs when a person, without authority or privilege, physically invades or unlawfully enters the private premises of another whereby damages directly ensue * * *.” *Linley v. DeMoss* (1992), 83 Ohio App.3d 594, 598, 615 N.E.2d 631. See, also, *Chance v. BP Chem., Inc.* (1996), 77 Ohio St.3d 17, 24, 670 N.E.2d 985. A trespasser is only liable if his trespass proximately caused the damages. *Allstate Fire Ins. Co. v. Singler* (1968), 14 Ohio St.2d 27, 29, 236 N.E.2d 79.

{¶ 13} In the instant action, we find that the injury resulting from the alleged trespass in this case was permanent in nature. As the Magistrate stated in his findings, the injury “will exist indefinitely and require the expenditure of time, effort and money to restore the property to its original condition.”

{¶ 14} The general rule regarding damages for a permanent trespass was set forth in *Ohio Collieries Co. v. Cocks* (1923), 107 Ohio St. 238, 140 N.E. 356, paragraph 5 of syllabus, which states: “ * * * 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 costs 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.”

{¶ 15} This rule, however, “is not an arbitrary or exact formula to be applied in every case without regard to whether its application would compensate the injured party fully for losses which are the proximate result of the wrongdoer’s conduct.” *Thatcher v. Lane Constr. Co.* (1970), 21 Ohio

App.2d 41, 48, 254 N.E.2d 703. Instead, in an action for compensatory damages for damage to residential property, we find persuasive the rule proscribed in Restatement of Law 2d, Torts (1979), section 929, which states in its entirety:

*3 {¶ 16} “(1) If one is entitled to a judgment for harm to land resulting from a past invasion and not amounting to a total destruction of value, the damages include compensation for

{¶ 17} “(a) the difference between the value of the land before the harm and the value after the harm, or at his election in an appropriate case, the cost of restoration that has been or may be reasonably incurred,

{¶ 18} “(b) the loss of use of the land, and

{¶ 19} “(c) discomfort and annoyance to him as an occupant.

{¶ 20} “(2) If a thing attached to the land but severable from it is damaged, he may at his election recover the loss in value to the thing instead of the damage to the land as a whole.”

{¶ 21} The comments to this section of the Restatement indicate that: “b. *Restoration.* Even in the absence of value arising from personal use, the reasonable cost of replacing the land in its original position is ordinarily allowable as the measure of recovery. * * * If, however, the cost of replacing the land in its original condition is disproportionate to the diminution in the value of the land caused by the trespass, *unless there is a reason personal to the owner for restoring the original condition*, damages are measured only by the difference between the value of the land before and after the harm. * * * ” (emphasis added.)

{¶ 22} A number of courts have held that an owner is not limited to the diminution in value of the property and instead may recover the reasonable costs of restoration to the property when the real estate is used for residential purposes, when the owner has personal reasons for seeking restoration, and when the diminution in fair market value does not adequately compensate the owner for the injury.

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Apel v. Katz, 83 Ohio St.3d 11, 1998-Ohio-420, 697 N.E.2d 600; *Adcock v. Rollins Protective Serv. Co.* (1981), 1 Ohio App.3d 160, 440 N.E.2d 548; *Thatcher*, supra. See, also, *Francis Corp. v. Sun Corp.* (Dec. 23, 1999), Cuyahoga App. No. 74966 (holding that where an owner is required by law to repair the property, restoration costs are an appropriate measure of damages, regardless of the diminution in value of the property).

{¶ 23} More specifically, in *Denoyer v. Lamb* (1984), 22 Ohio App.3d 136, 138, 490 N.E.2d 615, the court held "when the owner intends to use the property for a residence or for recreation or for both, according to his personal tastes and wishes, the owner is not limited to the diminution in value (difference in value of the whole property before and after the damage) * * *. He may recover as damages the cost of reasonable restoration of his property to its preexisting condition or to a condition as close as reasonably feasible, without requiring grossly disproportionate expenditures and with allowance for the natural processes of regeneration within a reasonable period of time."

{¶ 24} In *Thatcher*, supra, the court reiterated the principle behind these decisions:

*4 {¶ 25} " * * * An owner of real estate has a right to enjoy it according to his own taste and wishes, and the arrangement of buildings, shade trees, fruit trees, and the like may be very important to him * * * and the modification thereof may be an injury to his convenience and comfort in the use of his premises which fairly ought to be substantially compensated, and yet * * * the disturbance of that arrangement, therefore, might not impair the general market value. * * * The owner of property has a right to hold it for his own use as well as to hold it for sale, and if he has elected the former he should be compensated for an injury wrongfully done him in that respect, although that injury might be unappreciable to one holding the same premises for purposes of sale. * * * "Id. at 46, 254 N.E.2d 703, quoting *Gilman v. Brown* (1902), 115 Wis. 1, 91 N.W. 227.

{¶ 26} Usually, evidence regarding the diminution in value is needed to determine the reasonableness

of the restoration costs. *Shell Oil Co. v. Huttenbauer Land Co.* (1977), 118 Ohio App.3d 714, 721 n. 7, 693 N.E.2d 1168, citing *Thatcher*, supra. Failure to present such evidence, however, is not necessarily fatal to a claim in tort for damages to real property. *Apel*, supra. Where, as here, the owner intends to use his residential property according to his own personal preference, restoration costs are an appropriate measure of damages, regardless of the effect of the diminution in market value. See *Francis Corp.*, supra. Accordingly, the trial court erred by directing a verdict in favor of Defendants. Plaintiffs' sole assignment of error is sustained and the case is reversed and remanded for additional proceedings consistent with this opinion.

Judgment reversed and cause remanded.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellants recover of said appellees their costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

COLLEEN CONWAY COONEY, J., concurs.
 SEAN C. GALLAGHER, J., concurs in Part and dissents in Part (See Attached concurring and dissenting Opinion).

N.B. This entry is an announcement of the court's decision. See App.R.22(B), 22(D) and 26(A); Loc.App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App. R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section

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2(A)(1).

CONCURRING AND DISSENTING OPINION

SEAN C. GALLAGHER, J., concurring in Part and dissenting in Part. GALLAGHER, J.

*5 I concur with the majority's decision to reverse and remand the case; however, I respectfully dissent from the majority's opinion as to the determination of damages.

The general rule in an action to recover damages for injury to real property permits a landowner to recover reasonable restoration costs, plus the reasonable value of the loss of use of the property between the time of the injury and the time of restoration. *Jones v. Dayton Power & Light Co.* (Dec. 19, 1994), Greene App. No. 94-CA-49. Under the general rule, however, damages for recoverable restoration costs are limited to the difference between the pre-injury and post-injury fair market value of the real property. *Id.*, citing *Ohio Collieries Co. v. Cocks* (1923), 107 Ohio St. 238, 140 N.E. 356; *Reeser v. Weaver Bros., Inc.* (1992), 78 Ohio App.3d 681, 692, 605 N.E.2d 1271. As a result, if restoration costs exceed the diminution in fair market value, under the general rule the diminution in value becomes the measure of damages. *Id.* Also, the burden of establishing the diminution in market value is on the complaining party. *Id.*

However, there is an exception to the general rule, which is noted by the majority. Ohio law holds that the general rule is not an exclusive formula to be applied in every case. Under the exception, where noncommercial property is involved, restoration costs may be recovered in excess of diminution in fair market value when there are reasons personal to the owner for seeking restoration and when the diminution in fair market value does not adequately compensate the owner for the harm done. *Jones*, supra, citing *Thatcher v. Lane Construction Co.* (1970), 21 Ohio App.2d 41, 254 N.E.2d 703; *Denoyer v. Lamb* (1984), 22 Ohio App.3d 136, 490 N.E.2d 615.

I do not agree with the majority's determination that restoration costs may in some instances be awarded

without evidence of diminution in market value. A property owner cannot establish that restoration costs are reasonable without having evidence of the diminution of market value. See *Reeser*, 78 Ohio St.3d at 691, 679 N.E.2d 300. While the exception permits recovery in excess of the diminution in fair market value, a property owner must nevertheless establish both "reasons personal to the owner for seeking restoration" and that the "diminution in fair market value does not adequately compensate the owner for the harm done." Without evidence of both requirements, a determination cannot be made that the restoration costs are reasonable.

Accordingly, I would reverse the decision of the trial court, remand the matter, and allow appellants an opportunity to supplement their evidence of damages.

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