

IN THE SUPREME COURT OF OHIO

MICHAEL MARTIN, et al., )  
 )  
Appellants, )  
 )  
vs. ) *On Appeal from the*  
 ) *Summit County Court of Appeals,*  
 ) *Ninth Appellate District*  
 ) *Case No. CA-23422*  
DESIGN CONSTRUCTION )  
SERVICES, INC., )  
 )  
Appellee. )

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**MEMORANDUM OF APPELLEE,  
DESIGN CONSTRUCTION SERVICES, INC.  
IN RESPONSE TO APPELLANTS'  
MEMORANDUM IN SUPPORT OF JURISDICTION**

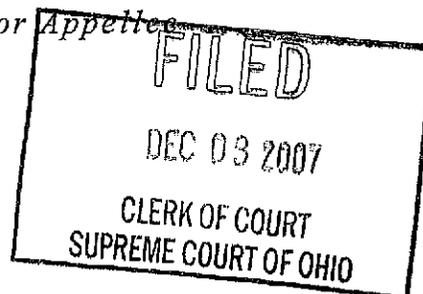
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In an action based on temporary damage to real property, the injured party is entitled to recover the reasonable cost of restoration, plus the reasonable value of the use of the property between the time of the injury and the restoration, unless such 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 of the property as a whole before and after the injury becomes the measure, and therefore, the injured party must prove the reasonable cost of restoration, the reasonable value of the loss of use of the property between the time of injury and the time of restoration, and the difference in the market value of the property as a whole before and after the injury .....	9
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**APPELLEE'S EXPLANATION OF WHY THIS CASE  
IS NOT ONE OF PUBLIC  
OR GREAT GENERAL INTEREST**

Appellants argue that this Court must review this case in order to provide a uniform application of the law regarding temporary damages to real property. The original rule was set forth in *Ohio Collieries Co. v. Cocke* (1923), 107 Ohio St. 238 in 1923. The rule has been uniformly followed since that time, and *Ohio Collieries* has never been overturned. The Ohio Jury Instructions which set forth the proper measure of damages for temporary injury to real property follow the holding in *Ohio Collieries*. Therefore, it is difficult to imagine how much clearer Appellants would like the rule to be. Based on the doctrine of *stare decisis* alone, this Court should deny jurisdiction of this case, as the rule for temporary damages to real property has already been set forth and is a well-established precedent.

Some courts, under certain circumstances, have carved a narrow and limited exception to the general rule of damages for items which have personal, intangible value to the owners. For instance, in *Denoyer v. Lamb* (1984), 22 Ohio App.3d 136, the court held that the property owner was permitted to recover restoration costs for trees improperly timbered, even if those costs exceeded the insignificant diminution in market value to the property, since the trees had special value to the owner. Appellants claim that this narrow exception relieves them from proving the issue of diminution in market value. This argument misapplies the holding of *Denoyer*, wherein the Court also held:

All cases it is to be noted stress the overall limitation of reasonableness, a concept well established in American jurisprudence.

*Id.*, at 140. The issue of reasonableness simply cannot be determined without proof of both restoration costs and market value.

Appellants also claim that this narrow exception implies that there is a split of authority as to how the general rule should be applied. However, that is not the case. It must be recognized that there is a distinction between application of the general rule for damages for injury to real property, and the exception to the general rule for damages which has been carved out for items which have personal, intangible value to the owners but not necessarily a separate market value. Appellants refuse to acknowledge that the exception simply does not apply in this case. Rather, courts have uniformly applied the general rule of damages for temporary damage to real property in cases such as the one at bar, which involve damage to an actual structure which has actual market value.

The rationale for the exception to the general rule for damages is that a property owner should not be completely denied recovery of damages where the property has no significant market value. In other words, diminution in value will not properly compensate the injured party. However, there is no place for that rule to be applied in cases of negligent construction of a building, as those structures have an inherent market value, irrespective of any intangible value which may also be attached to it. The Ninth District Court of Appeals recognized that the exception was not applicable to this

case, and rightfully held that Appellants' claims were barred by their failure to prove any diminution in the market value of their property due to the alleged negligent construction of the foundation walls.

In *Adcock v. Rollins Protective Services Co.* (1981), 1 Ohio App.3d 160 and *Krofta v. Stallard* (2005), 2005-Ohio-3720, the cases which have been certified as a conflict, the courts held that the plaintiffs' failure to prove diminution in value was not necessarily fatal to the case. However, neither of those cases dealt with physical damage to the actual structure of the residence. In *Adcock*, servicemen negligently damaged some white vinyl floor tiles while performing repair work. In *Krofta*, the plaintiffs alleged that their neighbors had trespassed on their property based on the placement of an electrical transformer and underground utility lines. In both of those cases, the damaged property at issue did not have significant market value in and of itself. In each of those cases, the courts acknowledged that there was, however, some kind of intangible value of the damaged property to the owners based on personal taste, even if the damage would not have affected the overall value of the property. Neither of those cases dealt with actual physical damage to the structure itself.

In contrast, in the present case, the alleged negligent construction was related to physical damage to the foundation walls of the residence. It is incomprehensible that owners such as Appellants would have some type of intangible personal value associated with a structural foundation wall made of concrete and mortar, which would be different than the value to some other

owner. Therefore, the exception to the general rule for damage to real property, and thus the holding in the cases of *Adcock* and *Krofta*, does not apply to the case before this Court.

Additionally, the ruling in this particular case was fact-specific based on trial court rulings about the measure of proof which would be required during the trial. Appellants completely ignore the fact that prior to this case proceeding to trial, Appellee filed a motion *in limine* requesting that Appellants be prohibited from introducing any evidence as to cost of repairs due to Appellants' failure to provide any evidence of the diminution in market value of the property during the discovery phase of the case. Based on the clear and unwavering precedent from the Ninth District Court of Appeals, which controlled this matter, the trial court expressly stated that Appellants would, in fact, be required to prove that issue during trial.

Though Appellants acknowledged in their discovery responses that they intended to retain a real estate appraiser to testify as an expert witness as to the value of their property prior to and subsequent to the injury and that the issue would be addressed further at trial, Appellants never identified any particular witness, and they failed to present any such expert testimony at trial. Likewise, although they had testified at deposition that they had no idea what the market value of their property was, Appellants expressed their opinions at trial about the monetary value of the alleged defects upon the property. They had no testimony, however, regarding the market value of the property before and after the alleged negligent construction. This testimony

was adamantly challenged during trial, and Appellee submitted a specific jury instruction to test this issue. In responding to this Interrogatory, the jury unanimously and expressly found that Appellants failed to prove any diminution in market value.

This is not a case where Appellants were blindsided by the requirement to prove their damages and improperly denied recovery of damages. Rather, Appellants and their counsel were completely and fully aware of the requirement that they prove the issue at trial, they acknowledged that burden of proof in their discovery responses when they stated that a real estate expert would be retained to testify on the issue, and they were fully aware that Appellee was challenging their measure of damages based on their failure to submit expert testimony.

In *Curtis v. Varquez* (2003), 2003-Ohio-6224, one of the cases relied upon by Appellants, the court specifically acknowledged that the defendant may move the trial court to require the plaintiff to produce evidence of diminished value, and as such, the trial court would have discretion to grant a directed verdict in favor of the defendant if the plaintiff failed to do so. That is the exact situation we have in the present case, as Appellee did, in fact, successfully move the court to require Appellants to prove the diminution in value before they could recover damages for cost of repairs. Therefore, the Court of Appeals decision should stand, and review by this Court is not warranted.

## STATEMENT OF FACTS

In August of 1998, Appellee constructed a residence located at 2251 Graybill Road, Uniontown, Ohio. The home was constructed for Charity Davis and Matt Herr, not Appellants. Appellants purchased the home from Charity Davis and Matt Herr in July 2000.

The home was a two-story residence, constructed on a lot which sloped downward from the front to the back. There was an attached garage, which was located underneath one of the bedrooms of the residence. The topography of the lot caused the grade of the yard at the rear of the foundation wall to be about three feet lower than the grade at the front of the foundation. During construction, dirt was compacted inside the foundation under the garage so that the floor could be poured level. During this process, a bulldozer pushed dirt too close to the wall at the back of the garage wall, which caused the wall to flex outward. The backfill around the exterior of the wall was excavated, the wall was straightened, and repairs were made to cracks in the blocks. Approximately one year later, upon evidence of minor cracking in the blocks, Design Construction filled the interior cores of the blocks along the entire back and side foundation walls with a moist grout material to ensure a completely solid foundation. The exterior of the concrete blocks were parged with a waterproofing material.

Appellants received and reviewed an Ohio Residential Property Disclosure Form from Charity Davis and Matt Herr before purchasing the home. Appellants also had a home inspection performed by a professional

inspector prior to purchasing the home. The Disclosure Form reported that there had been damage to the rear garage foundation wall during the construction process, and that a repair had been required. Both the Property Disclosure Form and the home inspection report identified and reported that there were cracks in the garage foundation wall. In fact, after receiving this information, Appellants personally inspected the foundation wall and saw the cracks. Despite having notice from third-parties, and despite their own personal knowledge of the cracks in the garage foundation wall, Appellants did not have any additional testing or inspections done to investigate the matter before purchasing the subject home.

In 2003, Appellants excavated around the perimeter of the foundation and painted the exposed portion of the outside of the blocks. In 2004, Appellants noticed that the hairline cracks were widening. To address the issue, they used an angle grinder to widen the cracks, then cut a line and broke off the front face of the concrete blocks along a large portion of the side foundation wall to inspect the interior. Appellants claim that the mortar inside the core of the blocks never properly cured or hardened. Appellants eventually had the entire side foundation wall and part of the back foundation wall removed and replaced. Appellants' allegations of negligent construction are based solely on damage to the foundation walls.

#### **STATEMENT OF THE CASE**

The case proceeded to trial on May 22, 2006, and was concluded on May 24, 2006. At the completion of the proceedings, Appellee moved for a

directed verdict, as Appellants failed to prove any diminution in the market value of their home. The motion was denied, and the case was submitted to the jury. The jury returned a general verdict in favor of Appellants in the amount of \$11,770.00. However, in completing specific jury interrogatories, the jury found that Appellants failed to prove by a preponderance of the evidence that there was any diminution in the market value of their home. Based on the jury's response to the specific interrogatory, counsel for Appellee renewed the motion for a directed verdict, and moved in the alternative for judgment notwithstanding the verdict. The trial judge expressly stated that he would defer ruling on the motions until the issue had been briefed by both parties.

Briefs were submitted by the parties and on July 13, 2006, the trial court entered its final decision denying the motion for directed verdict or judgment notwithstanding the verdict.

Design Construction appealed the verdict, based on clear precedent from the controlling District which mandated proof of the diminution in value before cost of repairs could be awarded. The Ninth District Court of Appeals held that Appellants were not entitled to damages, based on their failure to prove the difference in the value of their property as a whole before and after the alleged damage, and such proof is a prerequisite to recovery of the cost of repairs to real estate.

**ARGUMENT IN RESPONSE TO  
APPELLANTS' PROPOSITION OF LAW NO. 1**

Appellant's Proposition of Law No. 1: 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.

Appellee's Response to Appellants' Proposition of Law No. 1: In An Action Based On Temporary Damage To Real Property, The Injured Party Is Entitled To Recover 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 Of The Property As A Whole Before And After The Injury Becomes The Measure, And Therefore, The Injured Party Must Prove The Reasonable Cost Of Restoration, The Reasonable Value Of The Loss Of Use Of The Property Between The Time Of Injury And The Time Of Restoration, And The Difference In The Market Value Of The Property As A Whole Before And After The Injury.

Appellants confuse an issue of recovery with an issue of proof. In the cases cited by Appellants, the courts held that in certain limited circumstances, property owners may *recover* restoration costs as opposed to the diminution in market value of the property, despite the rule set forth in *Ohio Collieries* and the basic Ohio Jury Instructions. In those limited cases, however, the courts found that the diminished market value would not properly compensate the injured party. What Appellants fail to recognize is that there is still a measure of *proof* required in order for the issue of recovery to be implemented. As recognized by the Ninth District Court of Appeals in *Bartholet v. Carolyn Riley Realty, Inc.* (1998), 131 Ohio App.3d 23, some flexibility in applying the *Ohio Collieries* rule might be appropriate

in cases where the property has intangible value in its original state for reasons of personal taste to the injured party. *Id.* at 27. The Court further held that even in such cases, however, a plaintiff would still have to prove the diminution in value, so that the court could determine whether the cost of repairs was unreasonable or grossly disproportionate to that figure. This holding is also reflected in the case of *Reeser v. Weaver Bros.* (1992), 78 Ohio App.3d 681, where the Court noted:

We agree that *Denoyer* does hold that restoration costs are not limited to the diminution in the market value of the real property. However, that is not to say that *Denoyer* authorizes recovery of restoration costs in any amount.

*Id.* at 687. It is clear from these holdings that Courts recognize the necessity of proving diminution in value to test the reasonableness of the restoration costs.

Appellants allege that requiring proof of diminished value, even in cases where the damaged property has its own market value, would place a “straightjacket” on plaintiffs who desired to retain their homes, as opposed to selling them. Such an argument ignores even a basic understanding of how market value is determined. No plaintiff is ever forced to sell a home to prove market value; rather, the definition of fair market value is the price a property would bring if offered for sale in the open market by an owner who desires to sell it, but is under no necessity or compulsion to do so, and when purchased by a buyer who desires to buy it, but is under no necessity or compulsion to do so – both parties being aware of the pertinent facts

concerning the property. O.J.I. 23.60(3), (4). Therefore, Appellants' assertion that they planned to keep their home has no bearing on what the market value would be if it were placed on the market.

Appellant's contention that the measure of damages should be different in this case because the alleged damage to the foundation was caused prior to the completion of the home is also without merit. For new construction, one could obviously measure the market value of the home which should have been constructed versus a home constructed with structural defects, and in existing construction, there is clearly a market value to the home prior to and subsequent to the physical damage.

In addition to unsound legal arguments, Appellants rely on cases which can be readily distinguished from the present case. For instance, nearly all of the cases were filed in small claims or municipal courts, which had jurisdictional limits on the amount of damages which could be recovered. It was noted therein that in courts with smaller jurisdictional limits, it would be preclusive to require a plaintiff to present expert testimony regarding the diminution in value. The present case, in contrast, was filed in the Summit County Court of Common Pleas, with no jurisdictional limit, and Appellants asserted several causes of action for damages. Further, the physical damage was to the structure itself, as opposed to a minor cosmetic issue on the interior of the residence. Therefore, the equitable rationale forming the basis of the decision in those cases is lacking in the present matter.

Further, all of the cases relied upon by Appellants deal with minor damage to one particular interior issue such as flooring or bath tiles, or trespass with no actual resulting physical damage to the property. In contrast, the subject case involves alleged negligent construction to the physical structure of the residence. Where a minor cosmetic interior issue or legal trespass with no resulting damage may require application of the exception to the general rule of damages, in cases involving damages to the physical structure itself, the diminution in market value cannot be ignored when assessing the reasonableness of the repair costs. Allowing plaintiffs in such a case to recover damages without proof of both the cost of repairs and the diminution in market value would be akin to allowing a plaintiff in a bodily injury case to recover damages for medical expenses without proving proximate causation. When the issue is physical damage to the foundation, the bedrock of the entire residence, Appellants should be required to prove diminution in value and the cost of repairs as the measure of damages before recovering either.

## CONCLUSION

As there is already a well-established rule in place governing damages recoverable in cases with temporary injury to real property, and there is no reason to apply any exception to the general rule where there is damage to the structure of a residence which has market value, and as this case is not one of public or great general interest, Appellants' application for jurisdiction for further review of this matter should be denied.

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## CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing Memorandum was sent by regular U.S. mail to Irving B. Sugerman and James R. Russell, Counsel for Appellants, 11 South Forge Street, Akron, Ohio 44304, this 30th day of November, 2007.

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Kristen E. Campbell