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STATEMENT OF FACTS

This case arises from the negligent construction of the personal residence of Appellant Michael and Jennifer Martin (the “Martins”) by Appellee Design Construction Services, Inc. (“Design Construction”). 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 the diminution in value of their homes.

Contrary to other District Courts around Ohio, the Ninth District 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. This case puts in issue the rights of homeowners to adequate redress of injuries to their property. It also can provide the uniform application of the law across the state, to engender confidence to homeowners and all Ohio citizens that the laws of the state will be uniformly applied. For these reasons, the Martins respectfully request that this Court hold that a homeowner’s failure to prove the diminution in market value is not fatal to their claim as a matter of law.

The Martins jointly own the home located at 2251 Graybill Road, Uniontown, Ohio 44685 (the “home”) and reside there with their children (*Tr.* 1-4). It is a two-story, three bedroom home, with an attached garage below their children’s bedroom. *Id.* Design Construction built the home in August of 1998 (*Trial Exhibits 1 and 5*). It initially constructed the home for Ron Davis, one of its own subcontractors (*Exhibit 7 and Tr.* 36, 76). The home was subsequently transferred to his daughter, Charity Davis, in January of 1999 for \$119,000.00 (*Trial Exhibit 8 and Tr.* 82).

Design Construction used dirt to backfill the foundation of the attached garage (*Appx. 10*). As Design Construction would later reveal to the Martins, their “bulldozer inadvertently put to (sic) much pressure on the exterior walls of the garage foundation” during construction (*Trial Exhibit 6*). Design Construction attempted to cure the problem by filling “all the block cores in the distressed areas with solid concrete grouting,” and making cosmetic alterations to the exterior surface...” *Id.* After these procedures during construction, it summarily concluded that the foundation walls would support the structure above. *Id.*

The Martins purchased the home from Charity Davis and Matthew Herr in July of 2000 for \$167,000.00 (*Trial Exhibit 2* and *Tr. 68*). Shortly before the sale, the Martins had a home inspection performed on the residence (*Trial Exhibit 3*). The home inspection revealed minor cracking to the foundation, but “[t]he cracking appeared typical” to the inspector (*Trial Exhibit 3*, p. 5). He believed that “[t]here was not visible evidence of significant structural movement at this time”. *Id.*, p. 14. Ms. Davis did not indicate that she had any prior knowledge of the defective condition (*Trial Exhibit 4*). She did not indicate there were any “alternations or modifications to control the cause or effect of any problem identified above” or reveal her knowledge that she may have had about the attempts to repair the structure during construction (*Trial Exhibit 4*, p. 1 and *Tr. 10-11*).

At the time of the purchase, the Martins did not know that the home was damaged and were unaware of Design Construction’s actions during the building process (*Tr. 12-13*). In May of 2004, they first discovered that there may be a problem when the cracks in the foundation walls started to separate (*Appx. 12*). At this time, the Martins believed that this

was just a cosmetic problem. *Id.* The Martins did not realize that the condition was epidemic throughout the subsurface of the foundation (*Tr.* 121-122).

However, the actual cement blocks of foundation were falling apart because the material inside the blocks was just powder (*Appx.* 13). It became apparent that Design Construction used a mortar fill that never reached its necessary integrity (*Tr.* 134-136). This degenerative condition, occurring inside the blocks of the wall, was causing the foundation to fall apart all around the attached garage located below their children's bedrooms (*Tr.* 130 and *Trial Exhibits 9*). After consulting with some contractors, the Martins realized they should go back to the builder (*Appx.* 12 and *Tr.* 28-31).

The Martins first contacted Design Construction on July 27, 2004, to discuss the faulty construction (*Appx.* 12). After several calls, it finally sent a representative to view the property in the summer of 2004 (*Tr.* 75-80). In October 2004, Design Construction wrote the Martins a letter, which revealed for the first time what had happened to the foundation during construction (*Exhibit 6*). It stated that it felt "bad that the Martin's are dealing with this unexpected situation" but it was "not convinced that [it or any of its employees] hold any responsibility in this matter..." *Id.*

Because it was apparent that Design Construction refused to help them, the Martins hired a professional engineer to inspect the property and provide an opinion of what went wrong, and what work would need to be completed on the home (*Tr.* 27). The Martins did not attempt to sell the property, because they liked the location of the property and thought it would be incredibly difficult to market a house with a defective foundation (*Tr.* 36, 40, and 84).

Per the direction of the professional engineer, the Martins also hired contractors to rectify the problems with the construction (*Tr.* 119-120). After Master Masonry started its work, the Martins discovered that, in addition to the crumbling blocks, the footers were not at the proper depth below the frost line as they should have been (*Appx.* 13 and *Trial Exhibit 12*). The Martins' two independent experts testified that the grout mixture did not contain enough concrete and had never cured inside the foundation walls (*Appx.* 12 and *Tr.* 121-136).

The contractors had to replace the side and back walls of the foundation (*Appx.* 12). They also placed insulation around the footers to protect the blocks from damage due to freezing and thawing. *Id.* The Martins paid the contractors and the professional engineer \$11,770.00 in order to properly stabilize and repair the foundation of their home (*Appx.* 12).

Michael Martin testified that their home suffered a loss in market value in the amount of at least \$18,000.00 as a result of the degenerative foundation condition (*Tr.* 36-40). He testified that a potential buyer would pay much less for a home with an extensive foundation repair, as opposed to one without repaired defects. *Id.* They also paid \$50,000.00 more for the home than would someone who knew about the faulty construction (*Trial Exhibits 7 and 8*).

At the conclusion of the trial, the jury found in favor of the Martins on their claims for failure to perform in a workmanlike manner and negligence (*Tr.* 340-345). The jury entered a unanimous verdict in favor of the Martins for their out-of-pocket expenses incurred to repair the property. *Id.* Although Design Construction did not move for a directed verdict at the close of the Martins' case, it made a motion for a judgment notwithstanding the verdict after the jury verdict in favor of the Martins on June 2, 2006.

The trial court found: “that Plaintiffs did in fact present evidence of diminution of value...that award of \$11,770.00 permits the Plaintiffs to be fully compensated without the award being disproportionate to the value of the home” (*Appx.* 34). The argument of Design Construction “does not change the fact that evidence was presented” (*Appx.* 34). Moreover, the trial court did not reverse the jury verdict because “the jury found [that Design Construction] failed to construct the garage foundation in a workmanlike manner...” (*Appx.* 34).

The trial court entered a judgment in favor of the Martins in the amount of \$12,016.20 (*Appx.* 31). The Ninth District eviscerated the jury verdict by 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 Design Construction (*Appx.* 20). Subsequently, the Ninth District recognized a conflict between its holding and those of several other judicial districts throughout Ohio (*Appx.* 6-7).

ARGUMENT

Proposition of Law No. I: In an action for damages to noncommercial real property, 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.

Two views have developed among Ohio Courts regarding the measure of damages in cases involving damage to real property. The majority of courts who interpreted this Court’s ruling in *Ohio Collieries Co. v. Cocke* adopted a view measuring damages predominantly by restoration costs. The Ninth District is alone in its own strict view of the constraints of diminution in value. The Martins request that this Court expressly adopt the majority view.

This majority view generally follows the holding and reasoning of the First District Court of Appeals in *Adcock v. Rollins Protective Servs. Co. Id.*, (1982), 1 Ohio App.3d 160, 440 N.E.2d 548, *paragraph 2 of the syllabus*. In that case, the First District held that “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.” *Id.*, 1 Ohio App.3d at 161.

In holding that proof of diminution in value of property is an absolute prerequisite to recovering the reasonable costs for repairing the property that was negligently constructed, the Ninth District Court of Appeals relied on its own inflexible interpretation of *Ohio Collieries Co. v. Cocke*, (1923), 107 Ohio St. 238, 140 N.E. 356. 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*.

This Court has held that “[i]t 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 (this Court permitted the plaintiff to obtain restoration costs although there was no ascertainable market value). “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.

This Court previously indicated that it endorses the majority rule. In *Apel v. Katz*, this Court mentioned that generally the “failure of [plaintiffs] to put on evidence regarding the fair market value of their property before and after [the injury] is not fatal to [their] claim for damages”. *Id.*, (1998), 83 Ohio St.3d 11, 20, 697 N.E.2d 600, 608. This Court also mentioned that the opposite view is likely to be “unduly restrictive... and does not recognize that some flexibility is permissible in the ascertainment of damages suffered in the appropriate situation”. *Id.*

A. The Predominant View is that an Owner’s Failure to Present Evidence of Diminution of Market Value is not Fatal to Her Claim.

Under the majority view, “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 reasonable restoration costs where a concrete truck backed into a partially constructed building). This exception is applied to the *Collieries* rule because the owner of property may have an intrinsic value to the ownership of his land and should be compensated for an injury wrongfully done him. *Denoyer v. Lamb* (1984), 22 Ohio App.3d 136, 139, 490 N.E.2d 615, 619. As a result, these Courts have held 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 (court permitted restoration costs in a case involving installation of wall tiles and plumbing fixtures in the kitchen and bathroom of the family residence).

In *Adcock*, the First District held that in such actions 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...[he] 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 his claim. *Id.*, (1982), 1 Ohio App.3d 160, 161, 440 N.E.2d 548. In that case, the defendants conceded they were negligent but sought to avoid liability based on their claim that the plaintiffs failed to prove diminution in market value of the whole property. *Id.*, at 160. The Court held that plaintiffs did not have to prove the difference for the whole market value in order to obtain restoration costs for their damaged vinyl floor tiles. *Id.*, at 161.

The majority view has been expressly adopted by the Eighth, Fourth, and Sixth Districts. See *Krofta v. Stallard* (July 21, 2005), Cuyahoga App. No. 85369, 2005 WL 1707013, 2005-Ohio-3720, ¶26 (Court held it was an error to grant motion for directed verdict in favor of defendant where there was no proof of diminution in market value); *Arrow Concrete, Id.*, (1994), 96 Ohio App.3d at 750 (Fourth District indicated that restoration costs could be awarded without regard to market value). See also *Moore v. McCarty's Heritage, Inc.* (1978), 62 Ohio App.2d 89, 92, 404 N.E.2d 167, 170 (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 rule was also adopted by the Tenth and Eleventh Districts. See *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); *Thatcher v. Lane Constr. Co.* (1970), 21 Ohio App.2d 41, 254 N.E.2d 703, *syllabus* (although before *Adcock* the Tenth District held that a plaintiff may recover restoration costs for injury to noncommercial property where he has personal reasons for seeking restoration, and reasonable restoration can restore the property to a fair approximation of its former condition); *Schneider v. 1st Class Constr., Inc.* (June 28, 2002), Geauga App. No. 01-G-2380, 2002 WL 1400254, 2002-Ohio-3368, ¶15 (Court held in action against builder a party was entitled to judgment although neither party presented evidence as to any difference in market value before and after construction); *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 the case] due to the failure to submit evidence regarding a difference in market value”).

The basis for this rule is to ensure that victims who suffer damage to their property are not denied compensation due to a hyperbolic and inflexible interpretation of the *Collieries rule*. *Adcock*, 1 Ohio App.3d at 161. Still, the evidence of diminution is relevant to the issue of the reasonableness of the restoration costs incurred, but it may be presented by either the plaintiff or defendant. *Id.*, at 161; *Krofta*, 2005-Ohio-3720, at ¶15.

The majority rule is especially appropriate in cases for negligent construction or breach of a duty to perform in a workmanlike manner of a residential property. 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.

A rule that allows the owner to recover reasonable repair costs provides the owner a measure of compensation more in line with the injury suffered. This is especially true with regard to noncommercial property. A homeowner may have intrinsic value to holding his land for his own use rather than sale. The majority rule permits courts and juries to temper unreasonable awards, without dogmatically overruling jury awards without concern to the facts of each case.

To be sure, the diminution in value should continue to play a role in determining the reasonableness of the restoration activities. A defendant may offer proof of diminution of market value to temper more exorbitant requests for restoration costs. *See Smith v. Coldwell Banker Hunter Realty* (Sept. 18, 2002), Summit App. 20908, 2002 WL 31060377, 2002-Ohio-4866 (court reversed because the purchasers presented absolutely no evidence of diminution of market value but claimed they were entitled to restoration costs of \$67,000.00 for a home purchased at \$140,300.00).

In this case, the jury was able to consider evidence of diminution of value (*Appx.* 19). Nonetheless, the Ninth District held that the Martins were not entitled to restoration costs (*Appx.* 20). The Ninth District eliminated this fact-finding function of the jury. It essentially held the failure to present a certain quality or quantity of evidence is an absolute limiting factor on a damage award for an injury to property (*Appx.* 17-18, ¶18 and 19).¹

¹ The result appears as if the Ninth District reversed a jury verdict based on the manifest weight of evidence and then entered a final judgment contrary to Ohio law. *Hanna v. Wagner*, (1974), 39 Ohio St.2d 64, 68, 313 N.E.2d 842.

Therefore, the Martins request that this Honorable Court definitively adopt the majority rule as the law in Ohio. The Martins are not asking this Court to overrule the law from *Collieries*. To the contrary, the Martins request that this Court hold that, in an action for damages to noncommercial real property, the failure to prove the diminution of market value before and after the injury is not fatal to the claim.

B. The Ninth District Now Requires that an Owner Prove the Diminution of Market Value in Order to Recover any Damages.

The Ninth District takes a much different view regarding the diminution of market value. It concedes that the *Ohio Collieries* rule “is not to be inflexibly applied to every case without regard to whether the party alleging injury is fully compensated”. *Bartholet v. Carolyn Riley Realty, Inc.* (1998), 131 Ohio App.3d 23, 27, 721 N.E.2d 474. Yet, it now holds that failure to prove diminution of market value is fatal to claim as a matter of law (*Appx.* 20). *Cf. Horrisberger v. Mohlmaster* (1995), 102 Ohio App.3d 494, 500, 657 N.E.2d 534, 538 (Ninth District previously held that “plaintiff must introduce evidence” of diminution in value). The new rule adopted by the Ninth District requires a plaintiff to essentially prove a limiting defense in order to recover a lesser amount. In the Ninth District, if one fails to definitely prove this potential defense, the court will dismiss the case as a matter of law.

Even the courts who interpreted *Ohio Collieries* more stringently have not taken this same strict view as the Ninth District. In *Reeser v. Weaver Brothers, Inc.*, the Second District held that the plaintiff was not entitled to certain damages because the plaintiff did not present *any* evidence of pre-injury and post-injury fair market value of their commercial property. *Id.*, (1992), 78 Ohio App.3d 681, 692, 605 N.E.2d 1271. There the plaintiff

argued that he was entitled to \$200,000.00 because of the continuing injury to the commercial property. *Id.* The Court reiterated that “the rule...does not appear to be, however, an immutable rule applicable to every case involving an injury to real property”. *Id.*, 78 Ohio App.3d at 687.

In this particular case, the Martins presented evidence that the difference in market value before and after the injury was actually greater than their restoration costs of \$11,770.00 (*Tr.* 35-40, 82-84 and *Appx.* 20). Their restoration costs were not grossly disproportionate to the \$167,000.00 that they paid for their home. Design Construction never argued at trial that the restoration costs were excessive or unreasonable. It only argued to the jury that it was not negligent and should not be responsible for the same (*Exhibit 6*). Design Construction did not move for a directed verdict during the trial. It only moved for a judgment notwithstanding the verdict after the jury entered its verdict.

The reasoned majority rule allows courts to afford the flexibility that is lacking in the rule utilized by the Ninth District. The Martins request that this Court reject this inflexible interpretation of the rule regarding damages to noncommercial real property.

C. As an Alternative, an Owner May Meet the *Thatcher* Test in lieu of Presenting Evidence of the Diminution in Market Value.

The most recent decision by the Ninth District seems to reject the applicability of *Thatcher* to any of these cases. In *Thatcher v. Lane Constr. Co.*, the court allowed the owner of real estate to collect restoration costs in accordance with his own personal tastes where his costs of \$1,750.00 were more than the diminution of market value in the amount of \$1,000.00. *Id.*, (1970), 21 Ohio App.2d 41, 42-43, 254 N.E.2d 703. The Tenth District suggested that an appropriate test is that an owner may receive restoration costs without

comparing the diminution of market value when: 1) the owner holds the property for personal use; 2) there are reasons personal to the owner for seeking restoration; and 3) the restoration damages are not grossly disproportionate to the value of the property. *Id.*, 21 Ohio App.2d at 44-45; *Krofta v. Stallard*, 2005-Ohio-3720, ¶26.² The reason for this test is that if the owner of noncommercial property elects not to sell her home, she should still be compensated for an injury wrongfully done her in that respect. *Denoyer v. Lamb* (1984), 22 Ohio App.3d 136, 139, 490 N.E.2d 615 (court held plaintiff could recover \$7,412.83 without proving diminution of market value of land).

This rule allows courts more flexibility in awarding damages. It ensures that the *Ohio Collieries* rule is applied equitably to noncommercial homeowners who have personal reasons for seeking restoration to the prior condition of the property. Further, it ensures that the restoration costs are reasonable since an award is tempered by the overall market value of the property.

In this case, the trial court gave the jury an instruction in line with *Thatcher*. The Martins presented evidence regarding their reasons for wishing to restore their home rather than sell the defectively constructed property (*Tr.* 36-40). The Martins testified that they like the school system, the neighborhood, proximity to church and favorite shopping venues, and stability for their family. *Id.* The Martins asked the jury for restoration costs of \$11,770.00 for a residential property they purchased for \$167,000.00. Thus, the jury could have relied on this instruction in entering an award for the Martins.

² Oddly enough, the Ninth District previously commented that there may be an exception to the general rule when a noncommercial owner has personal reasons for seeking restoration. *Bohaty v. Centerpointe Plaza Assoc. Limited Partnership*, 2002-Ohio-749.

Therefore, the Martins request that this Court hold that an owner of noncommercial real property may receive restoration costs without proof of the diminution in value if an owner proves: 1) she holds the property for personal use; 2) there are reasons personal to the owner for seeking restoration; and 3) the restoration damages are not grossly disproportionate to the value of the property.

CONCLUSION

It is a fundamental concept of Ohio law that an injured party must be fully compensated for the loss that she has sustained.

The majority of Ohio District Courts who have reviewed the issue presented to this Court agree that a homeowner should be given flexibility in proving damages for a wrong to her property. They hold that the failure to prove the diminution in market value is not fatal to her claim. The Ninth District's view is wholly inconsistent with homeowners' expectations regarding the appropriate remedy when a home is negligently constructed. Essentially, a homeowner cannot be awarded anything if they do not prove the defendant's affirmative defense that they are entitled to less than their out-of-pocket expenses.

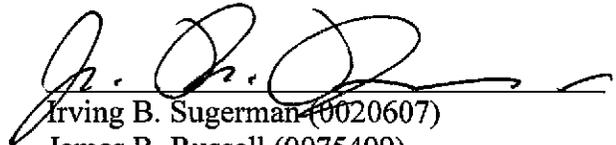
The rule promulgated by the Ninth District does not comport with the realities of homeownership. The Ninth District encourages a homeowner to immediately attempt to sell the damaged old home, purchase a new home that is equivalent in value to that of the old home, and then bring a legal action to collect the difference in price between the old and new homes. The majority rule, on the other hand, takes into account that a home often has a unique location and distinct character. Often, an owner's emotional attachment to a home restored to its condition prior to the injury simply cannot be measured by a market appraisal.

Likewise, the Ninth District rule does not account for situations, such as with the Martins, where it may be impractical or impossible to prove the market value before the injury. Indeed, the Martins received damaged property from the moment they took title to the home.

It is respectfully submitted that this Court should hold that, in an action by a noncommercial property owner for reasonable restoration costs, the failure to present evidence regarding the fair market value of her home, before and after the injury, is not fatal to her claim.

Therefore, the Martins request that this Court reverse the decision of the Ninth District and reinstate the unanimous jury verdict in favor of the Martins.

Respectfully submitted,



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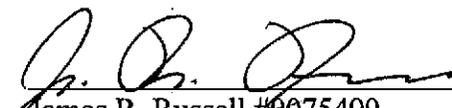
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CERTIFICATE OF SERVICE

I certify that a copy of this Appellant's Merit Brief was sent by ordinary U.S. mail on March 13, 2008, to Counsel for Appellee:

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IN THE SUPREME COURT OF OHIO

MICHAEL MARTIN

and

JENNIFER MARTIN

Appellants,

vs.

DESIGN CONSTRUCTION SERVICES,
INC.

Appellee.

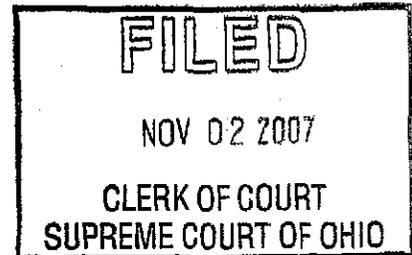
On Appeal from the Summit County Court
of Appeals, Ninth Appellate District

07-2023

Court of Appeals
CASE NO. 23422

NOTICE OF CERTIFIED CONFLICT BY APPELLANTS
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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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COUNSEL FOR APPELLANT,
MICHAEL AND JENNIFER MARTIN

STATE OF OHIO

COURT OF APPEALS
DANIEL M. HERRIGT
JSS.

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.

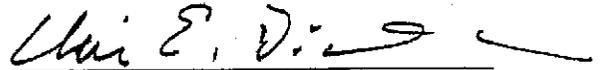
Krofta, at ¶26 (citations omitted).

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
IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
SEP 19 2007

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.

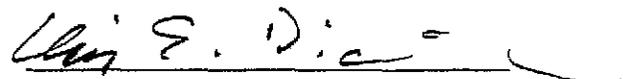
Judgment reversed.

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.

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

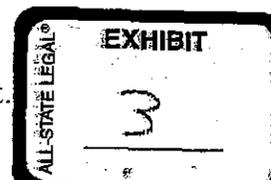
115 Damages
115VI Measure of Damages
115VI(B) Injuries to Property
115k107 Injuries to Real Property
115k111 k. Buildings or Other
Improvements. Most Cited Cases

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



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

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)

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.
1 Ohio App.3d 160, 440 N.E.2d 548, 1 O.B.R. 471

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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.

Ohio App. 8 Dist., 2005.

Krofta v. Stallard

Not Reported in N.E.2d, 2005 WL 1707013 (Ohio App. 8 Dist.), 2005 -Ohio- 3720

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STATE OF OHIO
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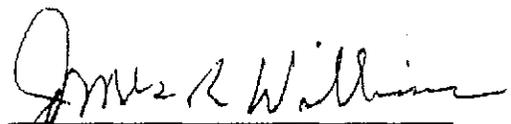
IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MICHAEL MARTIN, <i>et al.</i> ,)	Case No. CV-2005-05-2626
)	
Plaintiffs,)	
)	JUDGE HUNTER
v.)	
)	JUDGE WILLIAMS
DESIGN CONSTRUCTION)	(Sitting by Assignment)
SERVICES, INC.,)	
)	
Defendant.)	<u>JUDGMENT ENTRY</u>

This matter came before the Court upon the final jury trial and post verdict motions of the parties. Upon review of the General Verdict in favor of the Plaintiffs Michael and Jennifer Martin, the Orders issued on July 13, 2006, and August 4, 2006, the Plaintiffs Michael and Jennifer Martin are entitled to a judgment against the Defendant Design Construction Services, Inc.

It is therefore ORDERED, ADJUDGED, AND DECREED Michael and Jennifer Martin are entitled to judgment against Defendant Design Construction Services, Inc., in the amount \$12,016.20. All additional court costs shall be taxed to Defendant Design Construction Services, Inc.

IT IS SO ORDERED.


JUDGE WILLIAMS

PRAECIPE FOR THE CLERK:
Pursuant to Civil Rule 58(B), you are hereby instructed to serve upon all parties not in default for failure to appear, notice of the judgment and its date of entry upon the journal.

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SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS

SUMMIT COUNTY, OHIO

MICHAEL MARTIN, et al.,

CASE NUMBER CV 2005 05 2626

Plaintiffs,

JUDGE JAMES WILLIAMS
(Sitting by Assignment)

vs.

DESIGN CONSTRUCTION
SERVICES, INC.,

Defendant.

ORDER

On May 24, 2006, a jury awarded the Plaintiffs compensatory damages in the amount of \$11,770.00. Twelve interrogatories were submitted to the jury. In finding for the Plaintiffs, the jury concluded: Defendant failed to construct the garage foundation in a workmanlike manner; Defendant was negligent; damages resulted from Defendant's negligence; Plaintiffs did not prove diminution of fair market value by a preponderance of the evidence; and Plaintiffs were twenty-five percent negligent but their negligence was not a proximate cause of the damages.

On June 2, 2006, the Defendant filed a Motion for Directed Verdict, or in the alternative, a Motion for Judgment Notwithstanding the Verdict. Both sides have fully briefed the issues raised by this Motion.

The same test is used for a motion for judgment notwithstanding the verdict and a motion for directed verdict. The trial court judge must construe the evidence most strongly in favor of the non-movant and if upon all of the evidence there is substantial evidence to support the non-movant's position upon which reasonable minds may differ, the motion must be denied. The trial judge does not determine the weight of the evidence or the credibility of the witnesses and although he examines the materiality of the evidence he does not look at the conclusions to be

drawn. Cardinal v. Family Foot Care Centers, Inc. (1987), 40 Ohio App.3d 181.

In support of their Motion, the Defendant argues that Plaintiffs failed to present any evidence of diminution of value and pursuant to Smith v. Coldwell Banker Hunter Realty, Summit App. No. 20908, 2002 Ohio 4866, the verdict must be set aside.

Defendant cites Smith, as stating the trial court must dismiss a party's claim where that party presents evidence of cost of repair without presenting evidence of diminution of value.

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. Id. (citations omitted)

The Smith court further examined their holding in an earlier case, Bartholet v. Carolyn Riley Realty, Inc. (1998), 131 Ohio App.3d 23, 25, wherein the Court stated "[a]s a matter of law, diminution in the value of real property is a limiting factor on the damage award for the injury to that property...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." Id. (citations omitted). Concerning, the rule requiring evidence of diminution of value, the Court stated "there must be some flexibility in applying that limitation when the property has intangible value in its original state for reasons of personal taste to the injured party." Id. at 27.

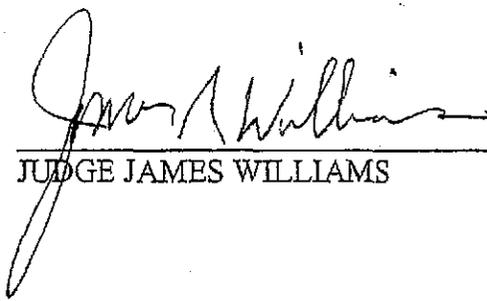
Therefore, based upon the proceeding, the Court is not persuaded by Defendants' argument that this Court must set aside the jury verdict of \$11,770. The Court first notes that Plaintiffs did in fact present evidence of diminution of value. The fact that the jury found that

Plaintiffs did not prove the amount by a preponderance of the evidence does not change the fact that evidence was presented. Secondly, the Courts 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. Finally, the jury found that Defendants failed to construct the garage foundation in a workmanlike manner and that as a result of Defendant's negligence, Plaintiffs suffered damages. The award of \$11,770 is not inconsistent with the jury's findings.

Therefore, it is the order of this Court that there is ample evidence to support the jury award of \$11,770 in compensatory damages.

Accordingly, Defendants' Motion for Directed Verdict or Judgment Notwithstanding the Verdict is DENIED.

IT IS SO ORDERED.



JUDGE JAMES WILLIAMS

cc: Attorney Kristen E. Campbell
Attorney James R. Russell, Jr.

IN THE SUPREME COURT OF OHIO

MICHAEL MARTIN

and

JENNIFER MARTIN

Appellants,

vs.

DESIGN CONSTRUCTION SERVICES,
INC.

Appellee.

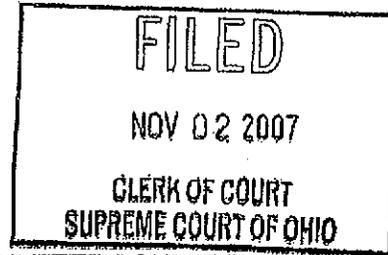
On Appeal from the Summit County Court
of Appeals, Ninth Appellate District

07-2024

Court of Appeals
CASE NO. 23422

NOTICE OF APPEAL OF APPELLANTS MICHAEL AND JENNIFER MARTIN

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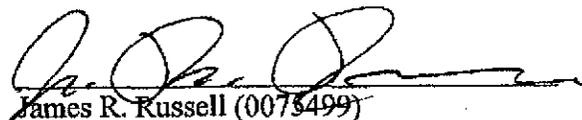
COUNSEL FOR APPELLEE, DESIGN CONSTRUCTION SERVICES, INC.

NOTICE OF APPEAL

Appellants Michael and Jennifer Martin hereby give notice to the Supreme Court of Ohio that they are appealing the ruling from the Summit County Court of Appeals, Ninth Appellate District, entered in *Martin, et al., v. Design Construction Services, Inc.*, Case No. 23422 on September 19, 2007. Not only has the Ninth Appellate District certified a conflict on a ruling at law in this case, but it is also one of public or general interest.

WHEREFORE, Appellants respectfully request that this Court accept jurisdiction over this case, overrule the decision of the Ninth District Court of Appeals, and uphold the jury verdict and decision of the trial court entered in this case.

Respectfully submitted,



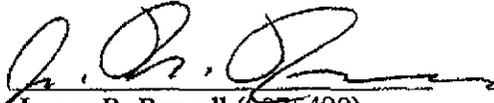
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COUNSEL FOR APPELLANTS,
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CERTIFICATE OF SERVICE

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

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