

IN THE SUPREME COURT OF OHIO

MICHAEL MARTIN, et al.,)
)
Appellants,)
)
vs.)
)
DESIGN CONSTRUCTION)
SERVICES, INC.,)
)
Appellee.)

CASE NO. 2007-2023
and
CASE NO. 2007-2024

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

**MERIT BRIEF OF APPELLEE,
DESIGN CONSTRUCTION SERVICES, INC.**

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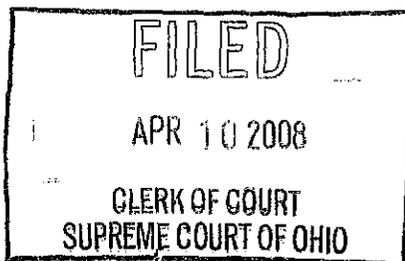


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STATEMENT OF FACTS

In August of 1998, Appellee constructed a home located at 2251 Graybill Road, Uniontown, Ohio. (See, Appellants' Complaint ¶ 7; Tr. 60, 76.) The home was constructed for the original owners, Charity Davis and Matt Herr, not the Appellants in this lawsuit. (Michael Martin Depo., pp. 11, 12; Tr. 8, 82.)

The home was a two-story residence, constructed on a lot which sloped downward from the front to the back. (Tr. 6-7, 242-243.) There was an attached garage, which was located underneath one of the bedrooms of the residence. (Tr. 6-7.) Due to the topography of the lot, the grade of the yard at the rear of the foundation wall was about three feet lower than the grade at the front of the foundation. (Tr. 25, 242-243, 246-247.) During construction, dirt was compacted inside the foundation under the garage so that the floor could be poured level. (Tr. 242-243.) During this process, a bulldozer pushed dirt too close to the wall at the back of the garage wall, which caused the wall to flex outward. (Tr. 244.) The backfill around the exterior of the wall was excavated, the wall was straightened, and repairs were made to cracks in the blocks. (Tr. 244-245.) Approximately one year later, upon evidence of minor cracking in the blocks, Appellee filled the interior cores of the blocks along the entire back and side foundation walls with a moist grout material to ensure a completely solid foundation. The exterior faces of the concrete blocks were parged with a waterproofing material. (Tr. 247-248.)

Appellants purchased the home from Charity Davis and Matt Herr in July, 2000. (See, Appellants' Complaint ¶ 8; Tr. 5, 8, 68, 82.) It is undisputed that Appellants received and reviewed an Ohio Residential Property Disclosure Form from Charity Davis and Matt Herr before purchasing the home. (Michael Martin Depo., pp. 11, 15, 16; Jennifer Martin Depo. p. 6; Tr. 10.) It is further undisputed that Appellants had a home inspection performed by a professional inspector prior to purchasing the home. (Michael Martin Depo., pp. 8, 9, 10, 11, 13, 15; Jennifer Martin Depo., p. 5-6; Tr. 9-10, 11, 40, 70.) The Disclosure Form reported that there had been damage to the garage foundation wall during the construction process, and that a repair had been required. (Michael Martin Depo., p. 15; Tr. 10.) Both the Property Disclosure Form and the home inspection report identified and reported that there were cracks in the garage foundation wall. (Michael Martin Depo. pp. 8-15; Jennifer Martin Depo. p. 6; Tr. 9-11, 40, 41, 70.) In fact, after receiving this information, Appellants personally inspected the foundation wall and saw the cracks. (Michael Martin Depo., pp. 15, 20-21, 24; Tr. 11, 41-42, 70.) Despite having notice from third-parties, and despite their own personal knowledge of the cracks in the garage foundation wall, Appellants did not have any additional testing or inspection done to investigate the matter before purchasing the subject home. (Michael Martin Depo., pp. 13, 15, 16; Tr. 41-42, 43-44.)

In 2003, Appellants excavated around the perimeter of the foundation and painted the exposed portion of the outside of the blocks. (Tr. 46-47.) In

2004, Appellants noticed that the hairline cracks were widening. (Tr. 12.) To address the issue, they used an angle grinder to widen the cracks, then cut a line and broke off the front face of the concrete blocks along a large portion of the side foundation wall to inspect the interior. (Tr. 44-46.) Appellants claim that the mortar inside the core of the blocks never properly cured or hardened. (Tr. 14.)

After Appellants filed suit, Appellee conducted discovery to explore the Appellants' allegations of damages. In response to written interrogatories regarding proof of their damages, Appellants stated in their verified answers that they would be producing a certified appraiser and a realtor to address the diminution in value of their real estate prior to and after the alleged damage to the property. (See Answers to Interrogatories Nos. 1, 2 and 6; Tr. 55.) Further, Appellee directly questioned Appellants at deposition regarding their estimation of the diminution in the value of their property because of the alleged damages. Appellants testified that they had no estimate or proof of damages. (Michael Martin Depo. p. 80; Tr. 56.)

At trial, Appellants testified that they had personal opinions that the value of their property due to the alleged damage to the garage foundation wall was diminished by ten thousand dollars. (Tr. 37, 38, 39, 84.) However, that testimony was directly challenged upon cross examination. It was then established that Appellants had not conducted any research into the value of surrounding properties, they had not consulted with any real estate experts, they did not have any expertise of any sort in valuing real estate in general,

and their opinions as to diminution in value were merely speculative and unsupported. (Tr. 37, 38, 54-55, 86.)

STATEMENT OF THE CASE

On May 15, 2006, Appellee filed a motion *in limine* to prohibit Appellants from introducing evidence of cost of repairs, based on their failure to disclose any such evidence during discovery. Appellants filed a memorandum in opposition to the motion *in limine* on May 19, 2006, arguing that such proof was not required. Immediately prior to the selection of the jury and commencement of trial on May 22, 2006, the trial court ruled that during the trial, Appellants would have to produce evidence of diminution in market value of the property before and after the injury in order to substantiate their claims. (Tr. 302.) The case proceeded to trial on May 22, 2006, and was concluded on May 24, 2006.

Prior to the case being submitted to the jury, there was extensive discussion between the court and counsel regarding the correct jury instructions and jury interrogatories which should be submitted to the jury. (Tr. 303-313.) Over Appellee's objection, the trial court instructed the jury that Appellants could be awarded the cost of repairs to the garage foundation wall if Appellants intended to use the property for a residence. (Tr. 325.) Based on those instructions, the jury awarded damages equal to the cost of the repairs. (Tr. 343, 345.)

After consideration of all the evidence, the jury also determined and expressly stated in an Interrogatory that Appellants had failed to prove any

diminution in the value of the real estate as a result of the alleged property damage to the garage foundation wall. (Jury Interrogatory No. 6; Tr. 344.)

Due to the explicit finding of the jury that Appellants had failed to prove any diminution in the value of the property before and after the damage had occurred, Appellee moved for a directed verdict or, in the alternative, for judgment notwithstanding the general verdict. (Tr. 302-310, 340-341, 348-351, 353-355.) The trial judge expressly stated that he would defer ruling on the motions until the issue had been briefed by both parties.

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

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

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

Appellants' Proposition of Law No. 1:

In An Action For Damages To Noncommercial Real Property Caused By The Negligence Of A Builder, The Failure To Prove The Difference Between The Fair Market Value Of The Whole Property Just Before The Damage Was Done And Immediately Thereafter Is Not Fatal To The Claim.

Appellee's Response to Appellants' Proposition of Law No. 1:

In An Action Based On Temporary Damage To Real Property, The Aggrieved Party Must Prove The Reasonable Cost Of Repairs And The Diminution In Market Value, If Any, Before The Cost Of Repairs Can Be Awarded.

A. The Rule For Recovery Of Damages For Temporary Injury To Real Property Is Well-Settled, And Is Controlling In This Case.

The rule for recovery of damages for temporary damage to real property was set forth in *Ohio Collieries Co. v. Cocke* (1923), 107 Ohio St. 238 in 1923. The rule has been uniformly followed since that time, and *Ohio Collieries* has never been overturned. The Ohio Jury Instructions which set forth the proper measure of damages for temporary injury to real property follow the holding in *Ohio Collieries*. This rule of law is also repeated in Ohio Jurisprudence on Damages. Based on the doctrine of *stare decisis* alone, this Court should uphold the decision from the Ninth District Court of Appeals in this case, as the rule for temporary damages to real property has already been set forth and is a well-established precedent.

In *Ohio Collieries*, the Ohio Supreme Court expressly set forth the rule for determining damages for injury to real property as follows:

If 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 of the property as a whole before and after the injury becomes the measure.

Id., syllabus ¶ 5.

This holding has been expressly adopted and incorporated into the standard Ohio Jury Instructions, which provide:

Real Estate

If you find for the plaintiffs you will determine from a preponderance of the evidence the amount of money that will reasonably compensate the plaintiffs for the actual damage to the property.

The fair market value of real property is the price it would bring if offered for sale in the open market by an owner who desired to sell it, but was under no necessity or compulsion to do so, and when purchased by a buyer who desired to buy it, but was under no necessity or compulsion to do so – both parties being aware of the pertinent facts concerning the property.

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 cost of these necessary repairs. If, however, these 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.

Standard Ohio Jury Instructions, Section 23.60(3) and (4). This language is repeated as the standard rule of recovery in Ohio Jurisprudence, Damages, §52.

This Court has long recognized the importance of the doctrine of *stare decisis* as a necessary means to stabilize the judicial system. “*Stare decisis* is the bedrock of the American judicial system. Well-reasoned opinions become controlling precedent, thus creating stability and predictability in our legal system.” *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 217, 2003-Ohio-5849. “We adhere to *stare decisis* as a means of thwarting the arbitrary administration of justice as well as providing a clear rule of law by which the citizenry can organize their affairs.” *Galatis, supra*, at 226, citing, *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St.3d 1, 4-5. “As the United States Supreme Court has noted, ‘the doctrine of *stare decisis* is of fundamental importance to the rule of law.’” *Wampler v. Higgins*, 93 Ohio St.3d 111, 120, citing, *Patterson v. McLean Credit Union* (1989), 491 U.S. 164, 172. Accordingly, *stare decisis* is long revered. *Galatis, supra*, at 226.

Stare decisis compels adherence to precedent unless (1) the challenged decision was wrongly decided at that time or changes in circumstances no longer justify continued adherence to the decision, (2) the challenged decision defies practical workability, and (3) overruling the decision would not create an undue hardship for those who have relied upon it. *State ex rel. International Paper v. Trucinski*, 106 Ohio St.3d 203, 204, 2005-Ohio-4557. This Court has further required that “any departure from the doctrine of *stare decisis* demands special justification.” *Wampler, supra*, at 120. Failure to provide a compelling basis to overturn a prior decision mandates that the prior rule of law be followed. *Wampler, supra*.

In the present case, Appellants have not provided any evidence that the rule of law set forth in *Ohio Collieries* should be overturned. There is no evidence that the decision was wrongly decided, or that the decision defies practical workability. While some courts have noted that the rule in *Ohio Collieries* may be applied with some flexibility, Appellants have failed to provide sufficient justification for preventing the application of the rule based on the facts of the case at bar. Therefore, the doctrine of *stare decisis* precludes ignoring the general rule for recovery of damages based on temporary damage to real property, as Appellants request. Based on the *Ohio Collieries* rule for recovery of damages, the Ninth District Court of Appeals decision must be affirmed.

B. Any Limited Exception To The General Rule For Recovery Of Damages For Temporary Injury To Real Estate Does Not Apply To Damage To Real Property Which Has Market Value.

Some courts, under certain circumstances, have carved a narrow and limited exception to the general rule of damages for property which has no market value, but which has personal, intangible value to the owners. Under the exception, the aggrieved party may recover damages equal to the cost of repair, rather than being limited to the diminution in market value of the property before and after the damage.

However, application of the exception to the general rule is limited to instances where the damaged property does not have independent market value or does not affect the overall market value of the property. For instance, in *Denoyer v. Lamb* (1984), 22 Ohio App.3d 136, the court held that

the property owner was permitted to recover restoration costs for trees improperly timbered, even if those costs exceeded the insignificant diminution in market value to the property, since the trees had special value to the owner.

Appellants claim that this narrow exception relieves them from proving the issue of diminution in market value in this case, even though their property had clear and appreciable general market value. To support their position, Appellants rely heavily on *Adcock v. Rollins Protective Services Co.* (1981), 1 Ohio App.3d 160. In *Adcock*, the First District Court of Appeals modified the general rule of damages as follows:

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 general rule for damages based on temporary injury to real property provides that the diminution in market value of the property is an absolute limit or cap on the amount of recoverable damages. The rationale for the exception to the general rule is that a property owner should not be completely denied recovery of damages where the property which was

damaged has no independent market value or significant impact on the market value of the property as a whole. In other words, diminution in value will not properly compensate the injured party.

However, there is no place for that rule to be applied in cases of negligent construction of a building, as those structures have an inherent market value, irrespective of any intangible value which may also be attached to it. The Ninth District Court of Appeals recognized that the exception was not applicable to this case, and rightfully held that Appellants' claims were barred by their failure to prove any diminution in the market value of their property due to the alleged negligent construction of the foundation walls.

In *Adcock, supra*, and *Krofta v. Stallard* (2005), 2005-Ohio-3720, the cases which have been certified as a conflict, the courts held that the plaintiffs' failure to prove diminution in value was not necessarily fatal to the case. However, neither of those cases dealt with physical damage to the actual structure of the residence. In *Adcock*, servicemen negligently damaged a limited number of white vinyl floor tiles while performing repair work. The court noted that the plaintiffs had value in having the damaged floor tiles repaired to match the existing floor tiles, and thus awarded the cost of repair, even though the damage to the floor tiles did not affect the market value of the property as a whole. In *Krofta*, the plaintiffs alleged that their neighbors had trespassed on their property based on the placement of an electrical transformer and underground utility lines. The court found that the

defendants were not entitled to directed verdict even absent evidence of diminution in value.

In both *Adcock* and *Krofta*, however, the damaged property at issue did not have independent or significant market value in and of itself. In each of those cases, the courts acknowledged that there was, however, some kind of intangible value of the damaged property to the owners based on personal taste, even without independent market value, and without proof that the damage would have significantly affected the overall value of the property. Furthermore, in *Krofta*, the court found that the placement of the underground utility lines was a permanent, rather than temporary, damage to property, so repair costs were not even at issue. Neither *Adcock* nor *Krofta* dealt with actual physical damage to the residential structure itself, or to any property which had independent market value or impacted the market value of the whole property.

In fact, several of the cases relied upon by Appellants discuss the issue of damages to property without market value, as opposed to a case dealing with physical damage to property with independent market value. For instance, in *Apel v. Katz* (1998), 83 Ohio St.3d 11, the aggrieved party was awarded \$500 for trespass damages stemming from one party exceeding the scope of an easement on the neighbors' property. In *Apel*, the court specifically limited its ruling to damages in a trespass case and did not discuss damages in property cases in general. Similarly, the case of *Northwestern Ohio Nat. Gas Co. v. First Congregational Church of Toledo* (1933), 126 Ohio

St. 140, involved fire damages to a church. All of the evidence on the record established that the church had no independent market value, but it did have intangible personal value to the members of the congregation. Therefore, restoration damages were permitted.

Likewise, Appellants rely on cases dealing with landlords trying to recoup the cost of repairs to their leased premises. *See, e.g., Curtis v. Varquez* (2003), 2003-Ohio-6224 where court held that requiring the landlord to submit evidence of diminution in value of the property before and after damage to the interior of an apartment was simply impractical. Therefore, court allowed the landlord to “recover relatively minimal restoration costs as a result of damage caused by a tenant.” *Id.* at *4. However, some courts do not apply the exception to the general rule even in such landlord cases. *See, e.g., Cranfield v. Lauderdale* (1994), 94 Ohio App.3d 426; *Hague v. Saltsman* (May 10, 1989), Summit App. No. 13883. In *Cranfield* and *Hague*, the courts held that the failure to prove diminution in market value precluded any award for cost of repairs.

Finally, Appellants rely on cases where there was a direct first party contract between the owner and the contractor, where the courts held that the aggrieved party was entitled to the proper performance of the contract. *See, Scheider v. 1st Class Construction, Inc.*, 2002-Ohio-3368; *Moore v. McCarty's Heritage, Inc.* (1978), 62 Ohio App.2d 89 . However, it is undisputed that there was no direct contract between Appellants and Appellee

in this case. Rather, Appellants were the third owners of the residence. Therefore, the rationale of these cases does not apply to the case at bar.

In contrast to the cases relied on by Appellants, in the present case, the alleged negligent construction was related to physical damage to the foundation walls of the garage underneath the residence. In this case, the physical damage was to the structure itself, as opposed to a minor cosmetic issue on the interior of the residence. It is incomprehensible that owners such as Appellants would have some type of intangible personal value associated with a structural foundation wall made of concrete and mortar, which would be different than the value to some other owner. Therefore, the equitable rationale forming the basis of the decision in *Adcock* and *Krofta* is lacking in the present matter. Accordingly, the exception to the general rule for damage to real property, and thus the holding in the cases of *Adcock* and *Krofta*, simply does not apply to the case before this Court. Nor should the exception to the general rule for damages ever be applied in cases where the damaged property does have independent market value or does affect the overall market value of the entire property.

C. The Reasonableness Of Cost Of Repairs As A Measure Of Damages Cannot Be Determined Without Proof Of Diminution In Value Before And After The Temporary Damage To Real Property.

To establish a cause of action in negligence, a plaintiff must show the existence of a duty owed by the defendant, a breach of that duty, injury as a proximate result of the breach, and damages. *Anderson v. St. Francis-St. George Hosp., Inc.* (1996), 77 Ohio St.3d 82. The plaintiff bears the burden of

proving damages. Damages cannot be awarded if the plaintiff fails to meet this burden by presenting adequate proof. *Broadview Motors, Inc. v. Chief of Police City of Maple Heights* (1999), 135 Ohio App.3d 405. Stated another way, the non-breaching party must establish first the fact of damage and then sustain its burden of proof as to the amount of damages by proof on a reasonable basis. *Schulke Radio Productions, Ltd. v. Midwestern Broadcasting Co.* (1983), 6 Ohio St.3d 436.

“As 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.” *Bartholet v. Carolyn Riley Realty, Inc.* (1998), 131 Ohio App.3d 23, 27 (emphasis added); *see also, Cranfield, supra; Reeser v. Weaver Bros.* (1992), 78 Ohio App.3d 681. The trial court must dismiss a party’s claim where that party presents evidence of cost of repair without presenting evidence of diminution in value. *Smith v. Coldwell Banker Hunter Realty*, 2002-Ohio-4866, at *3; *Cranfield, supra; see also, Horrisberger v. Mohlmaster* (1995), 102 Ohio App.3d 494, 500 (“In the absence of market value evidence, the plaintiff generally cannot recover damages for restoration of the injured property.”)

In *Denoyer v. Lamb* (1984), 22 Ohio App.3d 136, 138-140 the court stated:

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

Id., at 140. **“That determination cannot be made without considering the value of the property before and after the injury.”** *Bartholet* (1998), at 27

(emphasis added by counsel). The issue of reasonableness simply cannot be determined without proof of both restoration costs and market value. *Id.*; *Cranfield, supra*; *Reeser, supra*.

In *Smith, supra*, the plaintiffs met with Joe Martin, a Coldwell Banker Hunter Realty (CBHR) representative, to select property to purchase and upon which to build a home. Martin also helped the plaintiffs select a builder for the home. The plaintiffs alleged that the builder failed to construct the home in a workmanlike manner, and filed suit against CBHR and Martin for money damages.¹ The case proceeded to trial, wherein the trial judge dismissed the case based on the plaintiff's failure to present the required evidence of diminution of fair market value damages along with their cost of repair damages. However, the trial court later granted the plaintiffs a new trial, finding that they were not required to present evidence of diminution of value in their case in chief. That decision was appealed by CBHR and Martin.

On appeal, the Court noted that the plaintiffs only presented evidence of cost of repairs without any evidence of diminution of value damages resulting from the construction defects. Therefore, the Court of Appeals held that the trial court was correct in dismissing the complaint, and that the trial court had committed reversible error in granting the plaintiffs a new trial.

In *Bartholet v. Carolyn Riley Realty, Inc.* (1998), 131 Ohio App.3d 23, homeowners sued their realty agent for fraud in failing to disclose basement water problems in the house they purchased. A bench trial was conducted.

¹ The builder had filed for bankruptcy.

The trial court awarded the plaintiffs restoration damages of over \$28,000. The realtor appealed, alleging that the damages should have been limited to \$3,000, the diminution in market value attributable to the water problem.

The Court of Appeals noted that the plaintiffs did present evidence of diminution in value during trial, but that the trial court chose to limit its consideration of damages to the cost of repair. The Court expressly held that **“as 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.”** *Id.* at 27, emphasis added by counsel. Therefore, the Court of Appeals held that the trial court erred by awarding damages for cost of repair without considering the diminution in value of the property, and reversed the trial court award.

Upon remand, the trial court considered evidence from the plaintiff’s expert witness, who was retained to render an opinion about the value and marketability of the property. The defendant also presented testimony from an expert witness, who determined that the diminution in value of the property due to water damage was \$3,000. The trial court once again held that the plaintiffs were entitled to the restoration damages.

The case was appealed on the sole issues of damages. *Bartholet v. Carolyn Riley Realty, Inc.* (Aug. 1, 2001), Summit App. No. 20458, appeal not allowed, 93 Ohio St.3d 1487. Upon the second appeal, the Court held:

In order to determine the diminution in value of the property, the party seeking restoration costs bears the burden of **establishing** the diminution in the property’s fair market value.

Id. at *1, *citing, Reeser v. Weaver Bros.* (1992), 78 Ohio App.3d 681, 691 (emphasis added by counsel). “Upon such **proof**, their recovery would nonetheless be limited to an amount not ‘grossly disproportionate’ to the diminution in the property’s fair market value.” *Id.*, *citing, Denoyer, supra.*, emphasis added by counsel. Further, the Court explained the trial court’s duty in determining damages:

The required exercise is to verify, or lend credence to, the repair cost as a fair measure of damage, by comparing that cost to the before and after valuation.

Id. at *3. The Court of Appeals expressly noted that calculating the diminution of value based solely on the cost of repairs is improper and does not satisfy the requirements set forth in *Ohio Collieries*.

In assessing these issues, the Court held in *Bartholet* that the plaintiff’s expert did not present sufficient evidence on the diminution in the fair market value of the property.

Hence, the trial court below did not rely on evidence from which it could make the required determination whether the cost of restoration or repair exceeded the difference in the market value of the property before and after the injury.

Id. at *3. Accordingly, the Court reduced the damages award to \$3,000.

Appellants in this case argued to the trial court that it was not necessary to *prove* diminution in value, but rather, it was sufficient to simply *present* evidence regarding diminution in value. (Tr. 348-351.) It is clear the trial court accepted this argument, based on the judgment entry dated July 13, 2006 which provided, “The Court first notes that Plaintiffs did in fact present

evidence of diminution in value". However, this proposition was addressed and squarely rejected in *Bartholet II, supra*. The Ninth District Court of Appeals provided in that case that the mere presentation of some evidence on value is not sufficient to prove the measure of damages. Rather, the Court held that the party seeking damages must not only present *some evidence* on the subject, the party must **prove** that the cost of repairs does not exceed the diminution in market value of the property before and after the alleged damage, so as to prove the reasonableness of the cost of repairs figure.

These findings were recently confirmed by in *South Shore Cable Construction, Inc. v. Grafton Cable Communications, Inc.*, Lorain App. No. 03CA008359, 2004-Ohio-6077, wherein the Court addressed the proper remedy of damages in a negligent construction case which arose when a communications company refused to pay invoices for a contractor who installed cable lines. The Court specifically held that:

Absent fraud, ***determination of diminution in value is effectively a prerequisite to awarding restoration costs.*** The party seeking restoration costs bears the burden of **proving** that it would not be grossly disproportionate to the diminution in value.

Id. at 7, emphasis added by counsel. Further, the Court held that the communications company

had the burden of **proving** diminution in value as a measure of damages **before** the trial court could reasonably award restoration (reinstallation) costs and set off 100% of the invoice." Therefore, as a matter of law, the trial court erred in granting the 100% set-off without first determining the diminution in value.

Id. at *8, emphasis added by counsel.

Likewise, in *Hague v. Saltsman* (May 10, 1989), Summit App. No. 13883, the Court held that

Without any proof of diminution, Hague cannot properly employ the Adcock analysis. The trial court was therefore constrained to apply the general rule that diminution in value correctly gauges the measure of damages to which Hague would otherwise be entitled. Hague's failure to so prove such diminution necessarily results in a failure to demonstrate damages.

See also, *Reeser, supra*; *Cranfield, supra*; *Thatcher v. Lane Construction Co.* (1970), 21 Ohio App.2d 41.

It is clear from the language utilized in these cases that the mere presentation of unsupported statements as to value is not sufficient to prove damages. Rather, the reasonableness of the cost of repair damages can only be determined if the established cost of repair figure is measured against an established diminution in value figure. Appellants certainly do not argue to this Court that it would be appropriate to award cost of repair damages without actual proof of what the cost of repairs is. To the same end, it would be improper to award any damages without actual proof of what the diminution in value is.

Accepting Appellants' argument that evidence must simply be submitted, but not proved, would eviscerate the notion of burden of proof. For example, in a case involving bodily injury, the injured plaintiff must not only submit evidence that she was injured, but she must also prove that the injuries were proximately caused by the defendant's conduct. *Darnell v. Eastman* (1970), 23 Ohio St.2d 13. Therefore, if the jury states in an interrogatory that the

plaintiff has failed to prove the proximate cause element by a preponderance of the evidence, the plaintiff's claim must fail as a matter of law. *Id.* In fact, in the present case, the jury found that Appellant Michael Martin was negligent in the use of the angle grinder to explore the property damages. However, the jury also found that Martin's negligence was not a proximate cause of the property damage. It would be imprudent to acknowledge the jury findings favorable to Appellants, but ignore the findings that are inconsistent with Appellants' position on this issue.

Appellants are incorrect in their argument that *Adcock* provides that, in all cases, an owner may recover cost of repairs without proof of diminution in market value if the owner uses the property as a residence. Rather, as discussed by the Court in *Bartholet* (1998), *supra*,

Adcock did not eliminate consideration of the element of diminution in value when determining damages to real property intended by the injured party to be used as a home. To the contrary, the court noted that "[t]he diminution in overall value is relevant to the issue of damages." (Emphasis added.) *Adcock*, 1 Ohio App.3d at 161, 440 N.E.2d 548. In later cases, the First District Court of Appeals interpreted its *Adcock* decision to mean that *Collieries* may not be arbitrarily or exactly applied without considering whether diminution in value would adequately compensate the plaintiff for the injuries suffered. See **477 *Cincinnati Riverfront Coliseum, Inc. v. Clark Eng. Co.* (Oct. 30, 1985), Hamilton App. Nos. C-840639 and C-840640, unreported, 1985 WL 11516. The *Adcock* court did *27 not substitute one arbitrary or exact formula for another. The *Adcock* modification, where adopted, merely permits a softening of the *Collieries* rule in cases where restoration does not require "grossly disproportionate expenditures" and where, for noneconomic reasons personal to the plaintiffs, restoration of the property is the only option that will

make them whole. *Denoyer v. Lamb* (1984), 22 Ohio App.3d 136, 138-140, 490 N.E.2d 615. These decisions are consistent with this court's previous examination of *Adcock*, in which we noted that *Adcock* means that the *Collieries* rule "is not to be inflexibly applied to every case without regard to whether the party alleging injury is fully compensated." *Hague v. Saltsman* (May 10, 1989), Summit App. No. 13883, unreported, at 6, 1989 WL 50691.

Further, Appellants are factually and legally incorrect in their assertion that only the Ninth District Court of Appeals requires proof of diminution in value of the property before and after the damage. Rather, several Districts have adopted that position in various cases. *See, e.g., Reeser v. Weaver Bros., Inc.* (2nd App. 1992), 78 Ohio App.3d 681; *Cranfield v. Lauderdale* (8th App.1994), 94 Ohio App.3d 426; *Martin v. Lake Mohawk Property Owners Assn., Inc.*, Seventh App. No. 06-CA-841, 2007-Ohio-6432. The court in *Reeser* performed an extensive analysis as to why proof of diminution in value of the real estate must be required:

Thatcher [v. Lane Construction Co.] is a next step in the evolution of the rule of restoration costs, inasmuch as it provides a test to measure the reasonableness of restoration costs. By using the phrase 'disproportionate to' rather than the phrase 'in excess of', the Restatement, upon which Thatcher relies, makes clear that reasonable costs of restoration may exceed the difference between the before and after value of the land. However, this differential remains the touchstone of the reasonableness determination. Thus, evidence of the property's fair market value before and after the injury is required in order to assess whether the restoration costs sought are reasonable.

Id. at 689. Even the First District Court of Appeals, which produced *Adcock*, stated in a subsequent case:

Even in those cases that permit restoration costs as the measure of damages (almost all of which involve residential rather than commercial property), we find persuasive the test suggested in *Thatcher v. Lane Construction Co.* (1970), 21 Ohio App.2d 41, 50 O.O.2d 95, 254 N.E.2d 703, which requires the establishment of the fair-market value differential in order to determine whether restoration costs are reasonable.

Shell Oil Co. v. Huttenbauer Land Co., Inc. (Hamilton App. 1997), 118 Ohio App.3d 714, 721, fn 7.

Appellants confuse an issue of **recovery** with an issue of **proof**. Under the general rule for damages based on temporary injury to real property, the recovery of damages is limited by the diminution in market value of the property as a whole. In the cases cited by Appellants, the courts held that in certain limited circumstances, property owners may *recover* restoration costs, despite the rule set forth in *Ohio Collieries* and the basic Ohio Jury Instructions which provide that the diminution in market value of the property acts as a cap on recoverable damages. For example, in *Thatcher, supra*, the court permitted recovery of restoration costs of \$1,750, even though the diminution in market value of the property before and after the injury was only \$1,000. However, the court still recognized the importance of the overall concept of reasonableness of the award, and required proof of both cost of repairs and diminution in value before either could be recovered. *Id.*

As set forth previously herein, the rationale for application of the exception to the general rule attempts to make the injured party whole where

there is no independent market value to the damaged property. Therefore, courts have held that some flexibility in applying the *Ohio Collieries* rule might be appropriate in those cases. In those limited cases, however, the courts specifically found that damages in the amount of diminished market value would not properly compensate the injured party. What Appellants fail to recognize is that there is still a measure of *proof* required in order for the issue of recovery to be implemented.

As recognized by the Ninth District Court of Appeals in *Bartholet v. Carolyn Riley Realty, Inc.* (1998), 131 Ohio App.3d 23, some flexibility in applying the *Ohio Collieries* rule might be appropriate in cases where the property has intangible value in its original state for reasons of personal taste to the injured party. *Id.* at 27. The Court further held that even in such cases, however, a plaintiff would still have to prove the diminution in value, so that the court could determine whether the cost of repairs was unreasonable or grossly disproportionate to that figure. This holding is also reflected in the case of *Reeser v. Weaver Bros.* (1992), 78 Ohio App.3d 681, where the Court noted:

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

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

Appellants allege that requiring proof of diminished value, even in cases where the damaged property has its own market value, would place a “straightjacket” on plaintiffs who desired to retain their homes, as opposed to selling them. Such an argument ignores even a basic understanding of how market value is determined. No plaintiff is ever forced to sell a home to prove market value; rather, the definition of fair market value is the price a property would bring if offered for sale in the open market by an owner who desires to sell it, but is under no necessity or compulsion to do so, and when purchased by a buyer who desires to buy it, but is under no necessity or compulsion to do so – both parties being aware of the pertinent facts concerning the property. O.J.I. 23.60(3), (4). Therefore, Appellants’ assertion that they planned to keep their home has no bearing on what the market value would be if it were placed on the market.

Appellants’ contention that the measure of damages should be different in this case because the alleged damage to the foundation was caused prior to the completion of the home is also without merit. For new construction, one could obviously measure the market value of the home which should have been constructed versus a home constructed with structural defects, and in existing construction, there is clearly a market value to the home prior to and subsequent to the physical damage. *Cf., Stackhouse v. Logangate Prop. Mgt.*, 2007-Ohio-3171 (amount of proper recovery may be the fair market value if the house were constructed as ordered minus the currently imperfect house,

therefore, fair market value test is not prohibited when the underlying latent defect was a pre-existing condition).

According to the established case law on this issue, it was error for the trial court to award damages in the amount of the cost of restoration of the property, without first requiring *proof* of the diminution in value. *Cf., Bartholet II; supra; Cranfield, supra; Horrisberger, supra; Reeser, supra.* Since the jury expressly found that Appellants failed to prove any diminution in value, Appellants were not entitled to recover their cost of repairs.

D. The Rulings In The Present Case Were Based On Express Court Directives Regarding Burden Of Proof.

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

Though Appellants acknowledged in their discovery responses that they intended to retain a real estate appraiser to testify as an expert witness as to the value of their property prior to and subsequent to the injury and that the issue would be addressed further at trial, Appellants never identified any

particular witness, and they failed to present any such expert testimony at trial. Likewise, although they had testified at deposition that they had no idea what the market value of their property was, Appellants expressed their opinions at trial about the monetary value of the alleged defects upon the property. They had no testimony, however, regarding the market value of the property before and after the alleged negligent construction. This testimony was adamantly challenged during trial, and Appellee submitted a jury instruction to test this issue. Specifically, the following Interrogatory was presented to the jury:

Did plaintiffs 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?

The jury unanimously answered this Interrogatory "No." Notably, Appellants completely ignore this express finding by the jury in their brief to this Court.

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

instructed to prove diminution in value but failed to do so, as in the case at bar.

“The purpose of using interrogatories is to test the general verdict.” *Colvin v. Abbey's Restaurant, Inc.* (1999), 85 Ohio St.3d 535, 537. Where the general verdict and a specific interrogatory are in conflict, the court must construe the matter in accordance with the interrogatory rather than the general verdict. *Tasin v. Sifco Industries, Inc.* (1990), 50 Ohio St.3d 102. For instance, in *Capital Control, Inc. v. Sunrise Point. Ltd.* (Nov. 24, 2004), Erie App. Nos. E-03-046, E-04-008, 2004-Ohio-6309, the plaintiff obtained a general verdict in its favor. This general verdict form stated that plaintiff was entitled to no compensatory damages, but was entitled to \$20,000 in punitive damages. In the answers to specific interrogatories, the jury found that the plaintiff had not suffered any actual damages and that the defendant had not acted with actual malice. The trial court entered a judgment for plaintiff, which awarded no damages. This result was upheld in appeal, since the trial court acted in conformity with Civil Rule 49(B) in ordering judgment based on the interrogatory which conflicted with the general verdict. In fact, the case law on this subject expressly provides that the trial court has no authority to simply ignore the express interrogatories which were submitted to the jury, which is what Appellants in this case are requesting the Court to do. *West v. Vajdi* (1987), 39 Ohio App.3d 60.

In *Curtis v. Varquez* (2003), 2003-Ohio-6224, one of the cases relied upon by Appellants, the court specifically acknowledged that the defendant

may move the trial court to require the plaintiff to produce evidence of diminished value, and as such, the trial court would have discretion to grant a directed verdict in favor of the defendant if the plaintiff failed to do so. That is the exact situation we have in the present case, as Appellee did, in fact, successfully move the court to require Appellants to prove the diminution in value before they could recover damages for cost of repairs. Therefore, the Court of Appeals decision should stand.

CONCLUSION

As there is already a well-established rule in place governing damages recoverable in cases with temporary injury to real property, and there is no reason to apply any exception to the general rule where there is damage to the structure of a residence which has market value, the Court of Appeals decision was legally sound and should be AFFIRMED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that a copy of the foregoing Brief was sent by regular U.S. mail to Irving B. Sugerman and James R. Russell, Counsel for Appellants, 11 South Forge Street, Akron, Ohio 44304, this 9th day of April, 2008.

Craig G. Peline

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Ohio Jurisprudence, Third Edition
Database updated February 2008

Damages
Rosemary Gregor, J.D.

III. Actual or Compensatory Damages
B. Measure and Elements of Compensatory Damages
4. Injury to, or Destruction of, Property
b. Real Property

Topic Summary Correlation Table Divisional References

§ 52. Temporary injury

West's Key Number Digest

West's Key Number Digest, Damages  109

For temporary injury to real property, a plaintiff is entitled to recover reasonable restoration costs, compensation for loss of use of the property between time of injury and restoration, and damages for personal annoyance and discomfort if the plaintiff is the occupant of property.[FN5]

Each element of recovery represents a separate and distinct type of damage, and the absence of one does not preclude recovery for others.[FN6] Recovery for loss of the use of the property is not contingent upon pleading or proving restoration costs. Indeed, restoration costs and loss of the use of the property are as separate and distinct types of damage, both of which are recoverable for harm to real property.[FN7]

Illustration:

The owner of property onto which a pipeline discharged untreated wastewater was entitled to seek damages for loss of the use of the property during the period the temporary nuisance existed, even though the owner did not seek recovery for restoration costs and failed to present evidence of preinjury and postinjury value of the property.[FN8]

Where the injury to real property is temporary, the measure of damages, if the property be rented or held for rent, is the diminution in its rental value during the continuance of the injury; however, if it be occupied by the owner, it is the diminution in the value of the use of the property during that period.[FN9]

Landowners seeking damages for temporary injury to real property in the form of reasonable restoration costs are required to present proof of restoration costs and proof of diminution in the fair market value of the property.[FN10]

Illustration:

Where the defendant's interference with the flow of surface water caused blowouts in the plaintiffs' field tile lines, the jury's award of compensatory damages was not supported by competent evidence because the plaintiffs did not introduce evidence of the preinjury and postinjury fair market value of the injured property and there was a scarcity of evidence relating to the plaintiffs' expected restoration costs.[FN11]

The amount of interest paid on real property held for commercial sale is not the proper measure of damages for a temporary injury to that property. The proper measure of damages for the loss of the use of real property when that property is held solely for commercial sale is the owner's loss of profits during the period in which lots could not be sold because of the tortious act, rather than the amount of interest paid on the property during the temporary injury.[FN12]

As general rule, if restoration can be made of the damage to commercial property by reason of a lessee's failure to maintain the premises, the measure of damages is the reasonable cost of restoration plus the reasonable value of loss of use of property between time of injury and restoration, unless such cost of restoration exceeds the difference in market value of property as a whole before and after injury, in which case, the difference in market value before and after injury becomes the measure.[FN13] Thus, restoration costs are permitted with respect to damage to commercial property occasioned by the lessee's failure to maintain the premises unless such costs exceed the difference in fair market value before and after damages.[FN14]

Illustration:

The lessor's failure to present evidence of the leased property's fair market value before and after the commercial property was closed by the lessee and allowed to fall into disrepair was fatal to the lessor's counterclaim for damages to the property resulting from the lessee's failure to maintain the property, even though the lessor presented evidence of cost of repair, because without this information, the court simply could not apply the required test and determine whether restoration costs exceeded the difference in fair market value before and after the lessee's damage.[FN15]

CUMULATIVE SUPPLEMENT

Cases:

Under Ohio law, the measure of damages in cases of temporary injury to real property is the cost of repairs unless the cost of repairs exceeds the diminution in market value after the injury, in which case the diminution in value is the proper measure. *Ohio Environmental Development Ltd. Partnership v. Envirotech Systems Corp.*, 478 F. Supp. 2d 963 (N.D. Ohio 2007).

If injury to land is temporary and thus susceptible to repair, then, generally, the landowner may recover 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. *Stackhouse v. Logangate Property Mgt.*, 172 Ohio App. 3d 65, 2007-Ohio-3171, 872 N.E.2d 1294 (7th Dist. Mahoning County 2007).

[END OF SUPPLEMENT]

[FN5] *Horrisberger v. Mohlmaster*, 102 Ohio App. 3d 494, 657 N.E.2d 534 (9th Dist. Wayne County 1995).

As to the application of this rule in cases involving injury to, and destruction of, buildings, see § 53.

A.L.R. Library

Expense incurred by injured party in remedying temporary nuisance or in preventing injury as element of damages recoverable, 41 A.L.R. 2d 1064.

Forms

Complaint, petition, or declaration—Allegation—Repairable injury to property—Cost of repairs. 8 Am. Jur. Pleading and Practice Forms, Damages, Form 92.

Measure of damages—Original condition restorable—Cost of repairs—Loss of use or diminution of rental value. 8 Am. Jur. Pleading and Practice Forms, Damages, Forms 341, 342.

[FN6] *Horrisberger v. Mohlmaster*, 102 Ohio App. 3d 494, 657 N.E.2d 534 (9th Dist. Wayne County 1995).

[FN7] *Henderson v. Spring Run Allotment*, 99 Ohio App. 3d 633, 651 N.E.2d 489 (9th Dist. Wayne County 1994).

[FN8] *Henderson v. Spring Run Allotment*, 99 Ohio App. 3d 633, 651 N.E.2d 489 (9th Dist. Wayne County 1994).

[FN9] *City of Norwood v. Sheen*, 126 Ohio St. 482, 186 N.E. 102, 87 A.L.R. 1375 (1933).

[FN10] *Horrisberger v. Mohlmaster*, 102 Ohio App. 3d 494, 657 N.E.2d 534 (9th Dist. Wayne County 1995).

[FN11] *Horrisberger v. Mohlmaster*, 102 Ohio App. 3d 494, 657 N.E.2d 534 (9th Dist. Wayne County 1995).

[FN12] *Henderson v. Spring Run Allotment*, 99 Ohio App. 3d 633, 651 N.E.2d 489 (9th Dist. Wayne County 1994).

[FN13] *Shell Oil Co. v. Huttenbauer Land Co.*, 118 Ohio App. 3d 714, 693 N.E.2d 1168 (1st Dist. Hamilton County 1997).

[FN14] *Shell Oil Co. v. Huttenbauer Land Co.*, 118 Ohio App. 3d 714, 693 N.E.2d 1168 (1st Dist. Hamilton County 1997).

[FN15] *Shell Oil Co. v. Huttenbauer Land Co.*, 118 Ohio App. 3d 714, 693 N.E.2d 1168 (1st Dist. Hamilton County 1997).

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OHJUR DAMAGES § 52

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1 Ohio Jury Instructions 23.60 (2006)

Ohio Jury Instructions
General Instructions
Ohio Judicial Conference

Current through January 2008 Update

Volume One
Chapter 23: Damages [Rev. 5-6-06]

23.60 Real estate

1. If you find for the plaintiff, you will determine from a preponderance of the evidence the amount of money that will reasonably compensate the plaintiff for the actual damage to the property.

2. PERMANENT. When real property has been permanently or irreparably damaged, the measure of damage is the difference in the fair market value of the whole property, including improvements thereon, immediately before and immediately after the damage occurred.

3. FAIR MARKET VALUE. The fair market value of real property is the price it would bring if offered for sale in the open market by an owner who desired to sell it, but was under no necessity or compulsion to do so, and when purchased by a buyer who desired to buy it, but was under no necessity or compulsion to do so--both parties being aware of the pertinent facts concerning the property.

4. TEMPORARY. 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 cost of these necessary repairs. If, however, these 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.

COMMENT

Ohio Collieries Co. v. Cocke (1923), 107 Ohio St. 238, 140 N.E.2d 356.

However, Thatcher v. Lane Construction Co. (1970), 21 Ohio App.2d 41, 50 O.O.2d 95, 254 N.E.2d 703, states:

The general rule that the measure of damages for injury to real estate shall not exceed the difference in the market value of the entire tract immediately before and immediately after the injury 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.

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