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STATE OF MICHIGAN
IN THE SUPREME COURT

JONES FAMILY TRUST,
Plaintiff/Appellant,

and

SYLVIA JONES, and
BOBBY JONES
Plaintiffs,

v.

SAGINAW COUNTY LAND BANK
AUTHORITY and ROHDE BROS.
EXCAVATING, INC.,
Defendants/Appellees

and

CITY OF SAGINAW, and HARDHAT
DOE, an unknown employee
Defendants
________________________________/

Supreme Court Case No.: 155863
Court of Appeals Case No.: 329442
Circuit Court Case No.: 13-019698-NZ-2
Honorable Robert L. Kaczmarek

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APPELLANT JONES FAMILY TRUST'S
REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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REPLY

In this case, the Trust did nothing wrong. The inhabitants of the Jones House did nothing wrong. The Blighted House did not cause damage to the Jones House by Acts of God or a freak natural event like a tornado. Instead, the Jones House was destroyed or otherwise totaled because of *the actions and act of a local government entity and its subcontractor*. Yet, the law has allowed this same government entity to destroy, in full, their large multi-generational home without having to pay anything near or approximating the replacement or repair costs. And moreover, the lower courts in this case have endorsed legal conclusions precluding the presentation of the real costs of repairing or replacing to the *Jones* jury. This is just flat wrong. Defendant Rohde Bros has *conceded* it breached the third-party contract, which also means it conceded all wrongful acts that had to occur to make this happen. The Land Bank also does not dispute its Blighted House was in violation of local building and safety legal obligations under the Dangerous Building Ordinance. Furthermore, the Court of Appeals found the damages arguments of the Trust to be, at least, "theoretically correct" yet then refused to allow the Trust to have their day in court. Leave is requested to reset the erroneous legal conclusions of the trial and intermediate appellate courts, and confirm the clear standard for contract and taking damages jurisprudence into the future for this case and the next one hundred that come after it.

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ARGUMENT

Appellees argue "there are no unique issues presented or errors by the lower courts warranting any review by this Honorable Court." **Answer, p. 1.** With due respect, this case and the concession of the facts supporting the judgment is at the legal pinnacle of three major legal issues that were given short thrift and were a clear legal blunder by the Court of Appeals. At the heart of all three issues is damages for a house totaled by a local government entity and its hapless subcontractor.

I. The *Price/O'Donnell* damages limitations regarding contract-based claims.

Despite Defendant Rohde Bros *conceding* it breached its third-party contractual legal obligations to the Trust, the Circuit Court limited the contract claim's damages, as a matter of law, to the standards used in tort law under *Price v High Pointe Oil Co, Inc*, 493 Mich 238; 828 NW2d 660 (2013). Never has this Court ever extended the *Price/O'Donnell* damages limitations to contract-based claims. Why? Because contract damages already have a separate legal standard already set by this Court—a standard having been in place for decades. E.g. *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 426; 751 NW2d 8 (2008). The Court of Appeals found Appellant's argument on the differentiation to be "theoretically correct" but then refused to reverse the Circuit Court's erroneous use of the *Price/O'Donnell* standard.[1] The contract-damages standard is clear: to be placed in "as good as a position as it would have been had the contract not been breached." To the extent that Rohde Bros believes that damages should be calculated and awarded in a particular or lesser way, it must make that argument to the

[1] Defendants argued that there was a failure to prepare to try the case to "the well-established precedent from this Honorable Court." Yet, Defendants has not cited even one single case where the *Price/O'Donnell* damages was applied to breach of contract claims. In truth, the lower courts refused to apply the well-established rules of contract damages long set by this Court.

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Jones jury as a matter *of fact*, rather than the judge as a matter *of law.* The trial court errored and caused the improper invasion of the province of the jury by swapping the legal standards applicable to a breach of contract claim. The Court of Appeals perpetuated the error by imparting its legal blessing. Reversal is required.

II. Inverse condemnation claim under *Peterman*.

Available damages liability is also at issue with the inverse condemnation claim because a separate basis of liability exists for the Saginaw County Land Bank Authority as a constitutional tort. The measure of damages for a constitutional taking are well set by this Court: "to put property owners in as good a position as they would have been had their property not been taken from them." *Dep't of Transp v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). There is no formula or artificial measure of damages applicable to all condemnation cases. *Id.* The amount of damages to be recovered by the property owner is generally left to the discretion of the trier of fact after consideration of the evidence presented." *Id.*

Takings jurisprudence does not mandate that physical possession or physical control over property is necessary to effectuate the constitutional tort of a taking. "Where private property has been *damaged* rather than *taken* by governmental actions, the owner may be able to recover therefor by way of an inverse or reverse condemnation action." *In re Acquisition of Land-Virginia Park,* 121 Mich App 153, 158; 328 NW2d 602 (1982)(emphasis added). That is what the Trust has suffered in this case. Governmental action falling short of actual physical occupancy, acquisition, or appropriation *still* constitutes a taking "if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter." *Id.* at 160. The Jones House was completely totaled. See **Appellant's Brief, Exhibit H** (expert report).

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This Court has explained "where [the government] set into motion the destructive forces that caused the damage to plaintiff's property," a taking has occurred. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 191; 521 NW2d 499 (1994). This is *exactly* what occurred here; it is undisputed that the Land Bank's Blighted House crossed the property line and struck the Jones House rendering it destroyed. Contrary to the Appellees suggestions, *Peterman* has clearly confirmed that an inverse condemnation action need not be a direct consequence of a government's action, as such a claim "can be sustained where damages were *an indirect consequence* of the government's actions..." *Estate Dev Co v Oakland Co Rd Comm'n*, unpublished decision of the Court of Appeals, issued Mar 24, 2011 (Docket No. 291989) at *11 (emphasis added). The Land Bank does not deny its acts proximately resulted in the Land Bank's subcontractors damaging and totaling[2] the Jones House. It cannot deny this because had it not acted to remove the Blighted House, the Jones House would still be standing. The Land Bank's affirmative actions of initiating and causing the demolition of its own dangerous and illegal building structure, and causing more than de minimis damage to neighboring private property constitutes an inverse condemnation under *Peterman*. Had the Land Bank not improperly set into motion its actions of knocking down its blighted house (as oppose to rehabbing it or correcting its structural shortcomings), the Blighted House would be still standing and the Jones House would remain proudly lived in and not totaled. The Court of Appeals overlooked that *Peterman*

[2] Plaintiff's expert, Sam Hudson, opined that the Jones House was totaled by the strike. *Defendants' Motion to Strike Plaintiffs' Alleged Experts Walter Martlew and Sam Hudson*, Exhibit 3 (Deposition of Hudson), pp. 37-38 (copy of transcript attached).

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remains good law and viable legal theory, and the Land Bank has not asked this Court to overrule this legal theory.

Peterman sets forth a critical legal concept utilized by the Trust. The DNR in *Peterman* simply built jetties which caused the neighbors' ultimate loss of its fast lands. The destruction of the Blighted House, undertaken with the same authority by the DNR to build jetties (i.e. health, safety and welfare), caused irreplaceable damages to the Jones House as a neighboring property. The Land Bank has offered no reasons to distinguish the losses occurred by the Petermans as being something legally different than the losses suffered by the Trust in this case. Both governments initiated activities—even lawful activities—that set into motion the forces that resulted in full-blown damage to the respective plaintiffs' properties. In *Peterman*, this Court found a taking; the Court of Appeals below declined to find a similar taking despite identical similar theories. The Court of Appeals' conclusion is not premised on any reasoned rationale that supports distinguishing *Peterman* from the instant case. The Court of Appeals' conclusion that "an allegedly negligent act committed by the government actor, *during* the demolition, led to the damage" is the "distinction that prevents the application of *Peterman* and *Estate Dev Co* in the case at bar" is in error. Any minor factual difference is without any legal distinction. Simply self-concluding that the Land Bank's action of demolishing the Blighted House "did not lead to any unintended consequences after the deliberate act was completed" is contrary to the facts of this case. This is because it did happen—directly. Just as the DNR did in *Peterman* and the road commission did in *Estate Dev*, the Land Bank set into motion the destructive forces that ultimately, even if an indirect consequence, caused damage and/or the destruction of the Jones House, regardless of

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whether it was through the legitimate or illegitimate exercise of the Land Bank's governmental power. In short, *Peterman* was improperly given short thrift. Michigan law supports that an inverse condemnation action could be sustained even where damages were _an indirect consequence_ of the government's actions and absent a direct invasion of property. But for the Land Bank's setting into motion the destructive forces by its later subcontractors to cause a large portion of the Land Bank's home to break away, leave the confines of the blighted property, and strike the Jones House, the Jones House would not have suffered loss—a loss that fully deprived the Trust, the owner, of the ordinary use of the Jones House. Such action, under Michigan case law, is or is the equivalent to a taking, and requires constitutional compensation. *Peterman, supra; Estate Dev, supra*. The Court of Appeals erred in allowing the wrongful dismissal of a proper and viable *Peterman* claim needing to be resolved by the *Jones* jury.

III. Depreciation is an affirmative defense.

Lastly, the Court of Appeals wrongly rejected the Trust's argument that its evidence of replacement costs was irrelevant due to the absence of depreciation. Once liability has been established, less certainty as to the amount of damages is required. *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 525; 687 NW2d 143 (2004). This Court has never held depreciation to be an element or required proof in a breach of contract claim or constitutional tort claim. Instead, seeking to impose depreciation is seeking to impose a mitigating circumstance that would _*lower*_ a damages award, and thus is an affirmative defense. See *Rasheed v Chrysler Corp*, 445 Mich 109, 132; 517 NW2d 19 (1994). Appellees have offered no precedence from this Court to the contrary. The Court of Appeals erroneously self-concluded that—

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> depreciation constitutes part of what a plaintiff must demonstrate in proving his or her damages with reasonable certainty, not something that a defendant must prove as an affirmative defense.

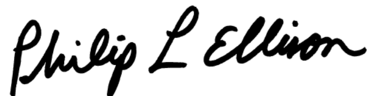
It too offered no actual legal precedence from this Court to support this erroneous legal conclusion. By its very legal nature, depreciation is an affirmative defense to claims for replacement and repair costs. The party asserting an affirmative defense has the burden of presenting evidence to support it. *Palenkas v Beaumont Hosp*, 432 Mich 527, 548; 443 NW2d 354 (1989). No defendant pled or proved this affirmative defense.

RELIEF REQUESTED

WHEREFORE, the Court is requested to take action on this case, pursuant to MCR 7.305(H)(1), by peremptorily reversing the final judgment of the Circuit Court and correct Court of Appeals' legal errors regarding the Land Bank's constitutional liability and Rohde Bros' contractual damages, and remand for trial. Otherwise, the Court is requested to grant full leave on the issues presented. MCR 7.305(H)(1).

RESPECTFULLY SUBMITTED:

OUTSIDE LEGAL COUNSEL PLC



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Date: July 31, 2017