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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

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APPELLANT JONES FAMILY TRUST'S
SUPPLEMENTAL BRIEF BY ORDER OF THE MICHIGAN SUPREME COURT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF QUESTIONS PRESENTED BY ORDER OF THE SUPREME COURT v

BACKGROUND OF CASE 1

ARGUMENT 5

I. This Court authorizes a 'destructive forces,' taking claims against Land Bank under *Peterman v Dep't of Natural Resources*, 446 Mich 177 (1994). 5

A. A taking without just compensation has occurred by the Land Bank. 5

B. The Land Bank mischaracterized its non-action and ignored *Peterman*. 8

C. The Circuit Court's analysis is all over the map. 8

D. The Court of Appeals confused *Peterman* as being limited to cases regarding how the damages occurred. 9

E. The Court should reverse and direct that a taking has occurred. 10

II. Rohde Bros admitted it breached its third-party contractual obligations, and there is a different standard of damages for the jury to consider. 10

A. Rohde Bros and the Circuit Court confused the clear differences in damages remedies. 11

B. The measure of damages for contract-based claims are different than tort-based claims. 14

RELIEF REQUESTED 16

RECEIVED by MSC 3/9/2018 12:32:28 PM

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TABLE OF AUTHORITIES

CASES

Adams Outdoor Advertising v East Lansing,
463 Mich 17; 614 NW2d 634 (2000) 7, 16

Alan Custom Homes, Inc v Krol,
256 Mich App 505; 667 NW2d 379 (2003) 11, 13

Corl v Huron Castings, Inc,
450 Mich 620; 544 NW2d 278 (1996) 14

Electro-Tech, Inc v H F Campbell Co,
433 Mich 57; 445 NW2d 61 (1989) 6

Hart v City of Detroit,
416 Mich 488; 331 NW2d 438 (1982) 6, 8

In re Acquisition of Land-Virginia Park,
121 Mich App 153; 328 NW2d 602 (1982) 7

Jim-Bob, Inc v Mehling,
178 Mich App 71; 443 NW2d 451 (1989) 10

Kewin v Massachusetts Mut Life Ins Co,
409 Mich 401; 295 NW2d 50 (1980) 11, 14

Lawrence v Will Darrah & Assoc, Inc,
445 Mich 1; 516 NW2d 43 (1994) 11

McManamom v Redford Twp,
273 Mich App 131; 730 NW2d 757 (2006) 15

Paul v Detroit,
32 Mich 108 (1875) 6

Pearsall v Eaton Co Bd of Supervisors,
74 Mich 558; 42 NW 77 (1889) 6

Peterman v Dep't of Natural Resources,
446 Mich 177; 521 NW 2d 499 (1994) 5, 6, 7, 8, 9

Price v High Pointe Oil Co, Inc,
493 Mich 238; 828 NW2d 660 (2013) 11, 17

Purcell v Keegan,
359 Mich 571; 103 NW2d 494 (1960) 15

Rassner v Fed Collateral Society, Inc,
299 Mich 206; 300 NW 45 (1941) 6

Skimin v Fuelgas Co,
339 Mich 523; 64 NW2d 666 (1954) 15

Spiek v Dep't of Transportation,
456 Mich 331; 572 NW2d 201 (1998) 8

St Paul Fire & Marine Ins Co v Guardian Alarm Co of Mich,
115 Mich App 278; 320 NW2d 244 (1983) 16

Thom v State Highway Comm'r,
376 Mich 608; 138 NW2d 322 (1965) 6

Vanderlip v Grand Rapids,
73 Mich 522; 41 NW 677 (1889) 7, 8

CONSTITUTIONAL PROVISIONS AND STATUTES

US Const, Am V 6

Const 1963, art 10, § 2 6

42 USC § 1983 5

COURT RULES

MCR 2.116 10

MCR 7.305 .... 10, 16, 17

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STATEMENT OF QUESTIONS PRESENTED BY ORDER OF THE SUPREME COURT

I. Whether the trial court erred in granting summary disposition in favor of defendant Saginaw County Land Bank Authority on the appellant's inverse condemnation claim?

Appellant answers: Yes.

II. Whether the measure of damages on the appellant's breach of third-party contract claim is the same as the measure of damages on a tort claim for the negligent destruction of property?

Appellant answers: No.

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BACKGROUND OF CASE / FACTS

This case involves two neighboring houses, one owned by the Saginaw County Land Bank Authority (being 343 S. 5th Ave, **Appendix #210a**), and the other by the Jones Family Trust (being 339 S. 5th Ave), in the City of Saginaw on their neighboring city lots. The Trust's House is the long-time home of Bobby and Sylvia Jones, and their various foster-later-adopted children. **Appendix #256a, #257a.** The Trust's House (and the property it rests upon) are titled to a trust known as the Jones Family Trust, the appellant. ***Id.*, at #255a.** This property and home has belonged to the family of Bobby Jones for generations.

Next door to the Trust's real property and home is a long-time eyesore—a blighted and long-abandoned structure at 343 S. 5th Ave. After the previous owners abandoned this house and stopped paying taxes, this abandoned shell of a house (the "Blighted House") and its property were forfeited to local taxing authorities. Ultimately, this house came to be owned by the Saginaw County Land Bank Authority—a governmental entity created pursuant to the LAND BANK FAST TRACK ACT, Public Act 258 of 2003. See **Appendix #210a**. The Land Bank did not revitalize or improve the Blighted House despite being its legal owner. The Land Bank's Blighted House was a direct and ongoing violation of the City of Saginaw's DANGEROUS BUILDINGS ORDINANCE. The Land Bank has acknowledged the Blighted House was a dangerous building and actively decided not to revitalize or improve it. Rather, the Land Bank made a special arrangement with the City

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of Saginaw to forgo ordinance enforcement and agree to permit the City's private-party demolition contractors to tear down the Blighted House using federal grants (Neighborhood Stabilization Funds) obtained from the federal government rather than charging back the demolition expense to the Land Bank (as the City would with a normal resident). **Appendix #213a-#214a**. After a competitive bidding process among various local private excavating companies, Rohde Bros was awarded the demolition contract as the lowest-priced qualified bidder to raze the Land Bank's Blighted House.[1] **Appendix #215a-#229a**.There were key provisions within this contract contractually accepted by Rohde Bros. See **Appendix #218a.** The demolition of the Blighted House started on the crisp and weather uneventful morning of September 18, 2012. **Appendix #230a.**

On the fateful morning, crews from Rohde Bros, on behalf of the Land Bank (after all, it is the Land Bank's property), commenced the process of beginning to demolish the Blighted House. Shortly after beginning, the workers lost control of a large portion of the Blighted House and its roof at approximately 8:06 a.m., which then crossed over and slammed into the side of the Trust's House.[2] The strike was captured, in decent part, on video. At the time of the strike, Sylvia Jones was across the street and watched, in horror, as a large section of the Blighted House slammed into the home where her husband—Bobby—and at least one child was having breakfast. **Appendix #240a**. Fortunately, no one was hurt or killed; the Trust's House, however, suffered a massive systemic blow. **Appendix #240a-#255a**. Immediately after the hit, Sylvia telephoned the offices of

[1] The illegal house was owned, controlled, and under the legal responsibility of the Land Bank.

[2] In the Court of Appeals record, **Exhibits D and G** are videos which were sent on CD to the Clerk of the Court of Appeals due to inability for TrueFiling to accept the same, and are part of the record.

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Richard (Dick) Rohde, the chief executive officer of Rohde Bros, to obtain help. **Appendix #264a**. He arrived and asserted to Sylvia that everything would be alright and that Rohde Bros would do whatever it took to make things right. **Appendix #267a**. Instead, Rohde Bros turned the matter over to their insurance carrier who failed to make good on the promises of Dick Rohde. To date, the multi-generational home of the Jones family sits damaged and empty. The occupants of the Trust's House (being Bobby and Sylvia Jones and their children) have been forced to abandon personal property (damaged or stolen[3]) and also flee the damaged Trust's House by moving to a smaller nearby house also owned by the Trust, which in turn caused lost rental profits in the form of the Trust being precluded from renting this other property to renters, as previously done. **Appendix #271a**. Bobby and Sylvia Jones lost out on their quiet enjoyment of their property in their golden years. Later, after utilities bills were skyrocketing from wasted fuel from the damaged heating systems caused by the strike, Sylvia had the utilities shut off to prevent unnecessary waste and to "winterize" the home.[4] **Appendix #271a, #275a.**

For this case, two structural experts were retained[5]—both former building officials from Berrien County—who inspected the Trust's House and offered their analysis. The first was Walter "Barney" Martlew, a registered and licensed professional engineer and

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[3] Plaintiffs also suffered loss as to various pieces of personal property including damaged cabinets, a marble slab, mirrors, and items stolen after the abandonment of the house by looters, all resulting from the strike. **Appendix #190a.**

[4] Because these defendants refused to fix their caused damage, additional foreseeable damage occurred when the Trust's House was further damaged by the frost heave caused by the natural cycle of Michigan's seasons. That theory was accepted by the trial court. **Appendix #100a.**

[5] A third expert was retained and deposed for trial purposes. The third expert, a builder, provided the cost to rebuild the Trust's House. Rebuilding a similarly sized home would cost just under $300,000 to construct. Rebuilding was selected as the reasonable method of proving damages, because the total cost of repairs was too exorbitant to consider. **Appendix #247a.**

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former building inspector for the City of Benton Harbor. **Appendix #283a.** Martlew serves on the board of directors of Kalamazoo Area Building Authority, which provides direction and oversight for residential and commercial inspections for various governmental entities in Kalamazoo County. ***Id.*** The second was Sam Hudson, a licensed residential builder. **Appendix #293a.** Both experts contributed testimony explaining the damage to the Trust's House was caused by the strike from the run-away Blighted House. **Appendix #240a-#255a**. According to these experts—

> For occupancy to be granted for the house, it is necessary to jack the house up and install a new code-compliant foundation system. Over time a good portion of the misalignments caused by heaving may settle out. The cost of performing these activities, though, will be very expensive.

Appendix #247a. Of particular importance, Hudson found "[e]xtensive upgrades [are] required to make the structure code compliant" and "make the total cost of repairs impractical to consider." ***Id.*** In Mr. Hudson's words, the cost to save it would be "exorbitant." **Appendix #302a-303a**. Notwithstanding, these experts concluded the Trust's House "certainly suffered significant damage" which "are directly attributable to the strike incident." **Appendix #245a.** While repair is possible, see **Appendix #303a** ("you can save the Taj Mahal"), the cost of rebuilding provides an easier and simpler damages calculation to show the factfinder. The estimated cost to put the Trust back into a structure code compliant home is at least $295,125.00, excluding all other forms of damages.[6] **Appendix #305a.**

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[6] Other damages include value of loss of personal property, **Appendix #190a**, loss of rental income, **Appendix #191a-#192a**, and more.

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ARGUMENT

This Court has presented two questions via this MOAA. The first question asks whether the trial court erred in granting summary disposition in favor of defendant Saginaw County Land Bank Authority on the appellant's inverse condemnation claim. The second question asks whether the measure of damages on the appellant's breach of third-party contract claim is the same as the measure of damages on a tort claim for the negligent destruction of property. The Trust alleged that the Land Bank, as a governmental entity, was legally responsible via a constitutional theory of inverse condemnation pursuant to Article X, Section 2 of the Michigan Constitution, together with the Fifth and Fourteenth Amendments (made enforceable pursuant to 42 USC § 1983). As for Rohde Bros, the Trust alleged several theories including one that Rohde Bros ultimately admitted liability: breach of third-party contract. **Appendix #199a-#200a.** The question raised relates to the scope of damages. Because the first question is only applicable to the Land Bank and the second question is only applicable to Rohde Bros, they will be addressed in that order.

I. This Court authorizes a 'destructive forces' taking claim against Land Bank under *Peterman v Dep't of Natural Resources*, 446 Mich 177 (1994).

A. A taking without just compensation has occurred by the Land Bank.

In May 2013, the Trust, together with Bobby and Sylvia Jones, filed suit against the Land Bank asserting constitutional claims in that the Land Bank committed a state *and* federal taking of the Trust's property.[7] The federal and state constitutions both

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[7] *Peterman v Dep't of Natural Resources,* 446 Mich 177, 184 fn10; 521 NW 2d 499 (1994). However, in 2007, Ballot Proposal 4 was passed by more than 80% of voting the Michigan electorate providing additional rights to the citizenry and more limitations on the state and local governments. So, it is no longer technically accurate to find that both provisions are still coextensive.

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proscribe the taking of private property for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2. "An inverse or reverse condemnation suit is one instituted by a landowner whose property has been taken for public use without the commencement of condemnation proceedings." *Electro-Tech, Inc v H F Campbell Co*, 433 Mich 57, 88-89; 445 NW2d 61 (1989); *Hart v City of Detroit*, 416 Mich 488, 494; 331 NW2d 438 (1982). It has been well established that "it can never be lawful to compel any man to give up his property, when it is not needed, or to lose it, whether needed or not, without being made whole." *Paul v Detroit*, 32 Mich 108, 119 (1875). A "taking" of property need not be only the assumption of title by a government, but can also be the end result of serious injury to and diminution in the value of real property. *Thom v State Highway Comm'r*, 376 Mich 608, 613; 138 NW2d 322 (1965). It also includes "cases where the value is destroyed by the action of the government, or serious injury is inflicted to the property itself, or exclusion of the owner from its enjoyment, or from any of the appurtenances thereto." *Id.* "Property" protected by the constitutions includes not only title, but all character of vested rights, including possession, dominion, control, and the right to make any legitimate use of the premises. *Rassner v Fed Collateral Society, Inc,* 299 Mich 206, 213-214; 300 NW 45 (1941). Moreover, the concept of a taking "should not be used in an unreasonable or narrow sense." *Peterman, supra*, at 189 (citing *Pearsall v Eaton Co Bd of Supervisors*, 74 Mich 558, 561; 42 NW 77 (1889)). Takings have included a wide variety of circumstances which have a common theme: the government depriving the property owner of his or her property rights. *Peterson, supra*, at 189-192. In this case, the Trust's property suffered an invasion by the Land Bank's Blighted House and totaled the Trust's house without any compensation. That is a taking for which just compensation

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was required.[8] Failure to pay just compensation is an inverse or de facto taking. After all, Michigan law still has concluded that even 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." *In re Acquisition of Land-Virginia Park,* 121 Mich App 153, 160; 328 NW2d 602 (1982)(citations omitted). Put another way by this Court—

> Any injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking, and entitles him to compensation.

Peterman, supra, at 190 (quoting *Vanderlip v Grand Rapids*, 73 Mich 522, 534; 41 NW 677 (1889)). That is exactly what happened here when the Land Bank's Blighted House went out of control, invaded the Trust's property, and struck the Trust's home causing an injury that deprived the owner of its ordinary use.[9] The *Peterman* Court was even clearer: even assuming that a government "did not directly invade plaintiffs' land," a taking can occur when "it undoubtedly set into motion the destructive forces that caused the erosion and eventual destruction of the property… [and were] no less destructive than bulldozing the property..." Thusly, the Trust's property here was taken by either being a direct physical invasion or an invasion undertaken by the Land Bank setting into motion the destructive forces that caused the eventual destruction of the property, and no compensation was paid.

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[8] The Trust previously argued and still believes that under this Court's precedence of *Adams Outdoor Advertising,* the Trust should automatically recover because "[w]hen a governmental taking results from an actual, physical invasion of the property, a reviewing court need not apply a case-specific analysis, and the owner should ***automatically recover*** for a taking of his property.*" Adams Outdoor Advertising v East Lansing*, 463 Mich 17, 23-24; 614 NW2d 634 (2000)(emphasis added).

[9] According to Plaintiffs' expert, the Trust's house "suffered significant damage in areas... directly attributable to strike and made the house uninhabitable." **Appendix #245a**.

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B. The Land Bank mischaracterizes its non-action and ignored *Peterman*.

The Land Bank, in response, argues that it is not constitutionally responsible because it took no government action *directly* aimed at the Trust property and thus suggests it is absolved of constitutional liability. **Appendix #56a-#57a.** But the Land Bank's argument that a taking may only be established through an affirmative act made diametrically at the Trust's property is logically inconsistent with and contrary to the principles laid out *Peterman, Hart,* and *Thom*.

In *Peterman*, the Department of Natural Resources erected a boat launch and jetties that altered the littoral drift of the current causing the deprivation of sand that had previously nourished the Peterman's beachfront. Like the Land Bank, the Department argued the loss caused by its action was "an indirect consequence" and thus not a taking. This Court flatly rejected that argument. While true that some forms of property damage which are "too remote, trivial or uncertain" is not compensable[10], those forms of property devastation caused by the setting into motion the destructive forces that cause the eventual destruction of neighboring property *is* compensable as a taking under *Peterman*.

C. The Circuit Court's analysis is all over the map.

In deciding the inverse condemnation takings claims, the Circuit Court had legal conclusions all over the board, many of which were logically inconsistent. But at its core, the Circuit Court concluded that the Land Bank's argument that a taking may only be established through an affirmative act aimed directly at the Trust's property is inconsistent with this Court's recognition in *Peterman* that a taking may occur even if the act is not

[10] A prime example of this is highway notice under the doctrine of legalized nuisance. *Spiek v Dep't of Transportation*, 456 Mich 331, 342; 572 NW2d 201 (1998).

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"directly aimed" at the destructed property. **Appendix #67a**. As to this aspect, the Circuit Court was right. The Circuit Court went on to correctly explain that this Court, in *Peterman*, rejected the DNR's argument that a taking cannot occur (i.e. not embraced within the Takings Clause) when it "never actually invaded the plaintiffs' property." **Appendix #68a**. However, the Circuit Court then errored in determining there was a lack of mandatory "direct action" which set into motion the forces that destroyed the Trust's house, and thusly the Land Bank was not responsible. **Appendix #69a**. However, that is not the correct standard employed by this Court in *Peterman*. According to this Court, even assuming the government "did not directly invade plaintiffs' land, it undoubtedly set into motion the destructive forces that caused the erosion and eventual destruction of the property," and that is a taking requiring just compensation. In short, if a government sets into motion the forces that eventually cause the destruction of property, a taking has occurred which requires just compensation. That is what happened here. The Land Bank did not correct its violation of the Dangerous Building Ordinance, but instead set into motion the actions and forces to knock down the Land Bank's Blighted House. In the course of doing so, injury to the neighboring property occurred which deprived the owner of its ordinary use. Such "is equivalent to a taking, and entitles [the victim] to compensation." *Peterman, supra*, at 190.

D. The Court of Appeals confused *Peterman* as being limited to cases regarding <u>*how*</u> the damages occurred.

The Court of Appeals' analysis is pithy and erroneous. The Court of Appeals attempted to distinguished *Peterman* for <u>*how*</u> the damages occurred. It held that "[h]ad, for example, the demolition of the home caused erosion to the Trust's property in the months after the demolition, *Peterman*… would arguably be controlling." The Court of

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Appeals confused the nature of a destructive forces claim as a constitutional claim solely premised on post-action erosion. In other words, according to the Court of Appeals, a *Peterman* claim is only viable if the damage occurs after the physical 'work' of the government is complete and *later* erosion has occurred (whether installing jetties or demolishing a house). This clearly is not the lesson from *Peterman*. A takings claim premised on *Peterman* is not about erosion; it is about creating constitutional liability when the government sets into motion (even if done legitimately) the destructive forces and a compensable taking occurs. The Court of Appeals analysis should be discarded in full.

E. The Court should reverse the lower courts and rule that a taking has occurred.

As such, the Circuit Court errored dismissing the takings claims against the Land Bank pursuant to MCR 2.116(C)(10) and also errored in not granting summary disposition in favor of the Trust pursuant to MCR 2.116(I)(2). This Court is requested to take preemptory action pursuant to MCR 7.305(H).

II. Rohde Bros admitted it breached its third-party contractual obligations, and there is a different standard of damages for the jury to consider.

The Trust, together with Bobby and Sylvia Jones, filed a First Amended Complaint against the Land Bank asserting trespass, negligence, and breach of third-party contract. **Appendix #102a-#124a**. A plaintiff may simultaneously pursue all of his remedies regardless of legal consistency, so long as plaintiff is not awarded double recovery. *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 98; 443 NW2d 451 (1989). The Trust did just that, which resulted in all three claims going to the *Jones* jury. The Trust's largest claim was, by far, the breach of third-party contract claim.

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A. Rohde Bros and the Circuit Court confused the clear jurisprudential differences in damages remedies.

Just before trial, Rohde Bros filed a multi-part *Motion in Limine* seeking in part to limit available damages by requiring the sole use of the negligence rule in *Price*[11] despite claims of negligence and also breach of contract. **Appendix #127a.** Rohde Bros never cited the correct contract damages standard. **See *id.*** In response, the Trust (and the other plaintiffs) asserted that "*Price* does not deal with the remedies for contract-based claims nor trespass (intentional tort) claims" and the Circuit Court "has allow three separate theories to go to the jury on the wrongs alleged to be committed by Defendant Rohde Bros: negligence, breach of third-party contract, and trespass by employee." **Appendix #145a.** Each have their own respective compensable measure of damages. *Id.* For the breach of third-party contract claim, the Trust sought a contract-based damages instruction. **Appendix #171a**.[12]

Yet, the Circuit Court issued an *Opinion and Order* at 4:50p.m. on the evening before trial discussing this Court's decision of *Price*. The Circuit Court opined—

> If injury to property caused by negligence is permanent or irreparable, [the] measure of damages is [the] difference in its market value before and after said injury, but if [the] injury is reparable, and [the] expense of making repairs is less than [the] value of [the] property, [the] measure of damages is [the] cost of making repairs.

---

[11] *Price v High Pointe Oil Co, Inc*, 493 Mich 238; 828 NW2d 660 (2013).

[12] "[Y]ou must determine the amount of the damages suffered which are the direct, natural, and proximate result of the breach of contract" citing *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003); *Lawrence v Will Darrah & Assoc, Inc*, 445 Mich 1, 11-12; 516 NW2d 43 (1994); *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 414; 295 NW2d 50 (1980).

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Appendix #184a. For the negligence claim, this was expected and undisputed. It is also known as the *O'Donnell* rule. ***Id.* at fn3.** However, the Circuit Court then pulled a surprise by applying this *negligence* limitation to the pending *third-party breach of contract* claim—

> Finally, with respect to the breach of contract claim, the Court observes the gravamen of the claim sounds in tort notwithstanding its label. As intended third-party beneficiaries, Plaintiffs have no expectancy under the contract other than that they receive the benefit the contracting parties intended for such third-parties receive. In this case, that benefit simply involves a promise by Rohde Bros to "take care" in the performance of their contractual undertaking for the benefit and protection of certain classes of reasonably identifiable third-persons and property while undertaking its performance of the contract for demolition services. The contract provides, in pertinent part:
>
> The contractor shall take care to protect abutting properties, pedestrians, motorists, and existing improvements which are not to be removed (i.e. City Side Walks).
>
> *Defendants, City of Saginaw, Rohde Bros Excavating, Inc's Brief in Support of Motion for Summary Disposition., Ex. 3, 4 (underlined emphasis added).*
>
> This language identifies no additional duty that is not already imposed by operation of the common law. In other words, even absent this specific contractual promise to exercise care to protect abutting properties and other third parties while performing the contract, Rohde Bros was already under a duty to do precisely that under common law tort principles.
>
> Michigan law recognizes that a contracting party is subject to a "preexisting common-law duty to use ordinary care in order to avoid physical harm to foreseeable persons and property in the execution of its undertakings. That duty, which is imposed by law, is separate and distinct from defendant's contractual obligations ..." *Loweke v. Ann Arbor Ceiling & Partition Co., L.L.C.*, 489 Mich. 157, 172[; 809 NW2d 553] (2011). See also *Courtright v. Design Irr, Inc.*, 210 Mich.App. 528, 530, 534 N.W.2d 181, 181-183 (1995)("While performing a contract, a party owes a separate, general duty to perform with due care so as not to injure another. Breach of this duty may give rise to tort liability. *Clark v. Dalman*, 379 Mich. 251, 261, 150 N.W.2d 755 (1967). The duty to act with due care encompasses the duty to prevent injury from a peril created during performance.").
>
> Consequently, with respect to the breach of contract claim, there is no contractual expectancy possessed by the third-party Plaintiffs under the relevant provision beyond the expectation that the common law duty of ordinary care would be followed - it is nothing more than a promise not to act negligently. As Michigan law instructs that the *O'Donnell* rule is to be applied as the measure the damages for

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> the negligent injury to real property resulting from a party's failure to exercise ordinary care, it again provides the measure of damages even when the cause is pled in the form of a breach of contract action.
>
> Therefore, in light of the foregoing, **the Court determines the appropriate measure of damages to the House in this case, regardless of the theory pled to support recovery of those damages, is the cost of repair only if the injury is reparable and the expense of repair is less than the market value of the property; otherwise, the measure of damages is the difference in the value of the property before and after the injury**.

Appendix #186a-#188a. In other words, the Circuit Court applied the law of *negligence* to a claim of breach of *third-party contract* with less than 24 hours before trial was to start.[13] The primary claim was the breach of third-party contract, which was to be argued to the jury as far in excess of the negligence-based damages. To that end and with the *Price*/*O'Donnell* limitation imposed, Rohde Bros conceded it breached its third-party contract with Plaintiffs, and then stipulated to entry of a judgment ceding liability on the breach of third-party contract with the Trust reserving the right to appeal. **Appendix #199a-#200a.**

On appeal, the Court of Appeals clearly struggled with the problem, but then fails to reach a proper resolution. The panel found that the Trust "may be theoretically correct" in that the *Price/O'Donnell* standard, a tort standard, does not apply to the breach of third-party contract claim because the contract damages standard is different, i.e. to be placed in as good as a position as it would have been had the contract not been breached." **Appendix #206a.** Yet, the panel ultimately framed the *contractual* promise of Rohde Brothers to "take care" as nothing more than the reciting a duty "analogous" to the

[13] Weeks earlier, Plaintiffs had submitted jury instructions seeking to apply different instructions regarding damages for the *Jones* jury for each separate claim/theory proffered—i.e. the *Price* rule for negligence and the *Alan Custom Homes* rule for the breach of third-party contract. **Appendix #171a.**

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common-law [tort] duty to act with care, and thus damages were limited by *Price/O'Donnell.* **Appendix #206a.** The Trust assigns this conclusion as being in legal error.

B. The measure of damages for contract-based claims are different than tort-based claims.

This Court has asked whether the measure of damages on the Trust's breach of third-party contract claim is the same as the measure of damages on a tort claim for the negligent destruction of property. The answer is clearly no. Never has this Court ever extended the *Price/O'Donnell* damages limitations to contract-based claims; Rohde Bros has failed to cite any such precedence. This is because different claims have different measures of damage. This Court has held, repeatedly, that a plaintiff's remedy for breach of contract is an award of damages that 1.) arise naturally from the breach *or* 2.) those that were in the contemplation of the parties at the time the contract was made. E.g. *Kewin, supra*, at 414. Here, the Trust asserts that it is contractually entitled to its house as it stood before the strike. After all, the purpose of a contractual remedy is to "place the nonbreaching party in as good a position as if the contract had been fully performed." *Corl v Huron Castings, Inc*, 450 Mich 620, 625; 544 NW2d 278 (1996). Had Rohde Bros fully performed its <u>*contractual*</u> promise to take care to protect abutting properties (i.e. the Trust House), the Trust's house would have remained unchanged and not damaged in the least. If Rohde Bros has some means by which to return the Trust's House to original form before being struck, then let's get the fix started. The problem is that it is impossible to do that in the real world.

The Trust's experts have opined that the cost to return the Trust's House to its original form "would probably be exorbitant." See **Appendix #302a-303a**. As such, the

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better proof of damage (and still being lesser amount) is the rebuild costs.[14] But for the Circuit Court's order in limine, the Trust was prepared to argue that the reasonable measure of damages under the breach of third-party contract, given that originalism was going to be exorbitant, was the rebuild cost of the Trust House following the strike—that which would place the Trust in as good a position as it would have been in had the promised performance been rendered—a safe, freestanding home. The fact that damages cannot be measured easily or with mathematical certainty or absolute accuracy is no ground for _denying_ them. *Skimin v Fuelgas Co*, 339 Mich 523, 530-531; 64 NW2d 666 (1954). As this Court observed—

> where injury to some degree is found, we do not preclude recovery for lack of precise proof. *We do the best we can with what we have.* We do not, "in the assessment of damages require a mathematical precision in situations of injury where, from the very nature of the circumstances, precision is unattainable." *Particularly is this true where it is defendant's own act or neglect that has caused the imprecision.*

Purcell v Keegan, 359 Mich 571, 576; 103 NW2d 494 (1960)(emphasis added). Because the amount of damages suffered is a question of fact for the jury to decide, *McManamom v Redford Twp*, 273 Mich App 131, 141; 730 NW2d 757 (2006), the *Jones* jury should have been allowed to consider proposed calculations for rebuilding as the less and more reasonable calculation in lieu of uncertain and exorbitant restoration costs to determine whether such a proposed amount would place the nonbreaching party in as good a position as if the contract had been fully performed.[15]

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[14] If Rohde Bros has other evidence of the amount of repair not being "exorbitant," it could present those facts and figures to the *Jones* jury and ask the jury to award _*that*_ amount.

[15] To the extent that Rohde Bros could convince the *Jones* jury to award less, that is the province of the jury to decide. This is a question of fact for the jury to decide, not precluded from the jury's consideration by the judge. After all, "damages are an issue of fact, and questions of fact are, of course, generally decided by the trier of fact—in this case, the jury." *McManamom, supra,* at 141.

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So, the ancillary question this Court should be asking is *why*—why do we treat the measure of contract damages differently than the measure of tort damages? A tort is an obligation imposed *by law* for which damages can be awarded by law. A contractual obligation occurs when a party *voluntarily agrees*, but is not required, to assume such a legally binding obligation. Yes, the scope of potential remedies can be much greater in a breach of contract than a breach of tort; however, a party can decide, before entering into the contract, whether to enter into such an agreement to voluntarily assume such legally-enforceable obligations. Should a party to a contact want to limit certain remedies, he/she/it can do so by negotiation and simply decline to enter into the contract altogether. See *St Paul Fire & Marine Ins Co v Guardian Alarm Co of Mich*, 115 Mich App 278; 320 NW2d 244 (1983). After all, contracting parties are free to limit remedies by agreement, and imposing contractual terms limiting damages are valid unless found unconscionable or in violation of some other law or policy. If Rohde Bros did not want to assume this risk, it could have declined to enter into the demolition contract altogether or sought contractual terms that limited undesired business and legal risks—such as placing a limit on contractual damages. But now that Rohde Bros has not limited its remedies, it cannot recast existing contractual damages to tort level minimums.

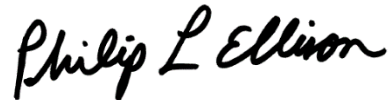
RELIEF REQUESTED

WHEREFORE, this Court is requested, pursuant to MCR 7.305(H), to peremptorily vacate the lower courts' decisions regarding the takings claims against the Saginaw County Land Bank Authority, find that a taking without just compensation (i.e. inverse condemnation) has occurred, and if appropriate, order that the Trust should automatically recover for a taking of his property pursuant to *Adams Outdoor Advertising*. Remand is appropriate to determine the amount of just compensation required under the state and

federal constitutions. Additionally, this Court is requested, pursuant to MCR 7.305(H), to peremptorily vacate the lower courts' decisions using/affirming the *Price/O'Donnell* negligence limitation for the breach of third party contract claim against Rohde Bros, and remand for a damages-only trial requiring the use of the correct measure of damages law as outlined above, i.e. that a plaintiff's remedy for breach of contract is damages that arise naturally from the breach resulting in the Trust being placed in as good of a position as it would have been in had the contract not been breached. In the alternative, this Court is requested to grant full leave to resolve these issues. MCR 7.305(H).

Date: March 9, 2018

RESPECTFULLY SUBMITTED:



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