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STATE OF MICHIGAN

IN THE SUPREME COURT

JONES FAMILY TRUST, Plaintiff/Appellant, and SYLVIA JONES & BOBBY JONES, Appellant/Appellants, 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 Lower Court Case No.: 13-019698-NZ-2 HON. ROBERT L. KACZMAREK

PHILIP L. ELLISON (P74117)
Attorney for Appellant
P.O. Box 107
Hemlock, MI 48626
989/642-0055

GREGORY W. MAIR (P 67465)
ROBERT A. JORDAN (P73801)
Attorney for Defendants/Appellees
ROHDE BROS. EXCAVATING
and SAGINAW COUNTY LAND BANK
AUTHORITY
300 St. Andrews Road, Suite 302
Saginaw, Michigan 48638
989/790-0960

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APPELLEES SAGINAW COUNTY LAND BANK AUTHORITY AND ROHDE BROS. EXCAVATING, INC'S SUPPLEMENTAL BRIEF IN RESPONSE TO APPELLANT'S SUPPLEMENTAL BRIEF TO ITS APPLICATION FOR LEAVE BY ORDER OF THE MICHIGAN SUPREME COURT

ORAL ARGUMENT REQUESTED

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COUNTER STATEMENT OF QUESTIONS PRESENTED

I. DID THE TRIAL COURT CORRECTLY GRANT APPELLEE SAGINAW COUNTY LAND BANK AUTHORITY'S MOTION FOR SUMMARY DISPOSITION ON APPELLANTS' INVERSE CONDEMNATION CLAIM?

The Appellant answers: No.

The Appellees answers: Yes.

The Court of Appeals answered: Yes.

The Trial Court answered: Yes.

II. DID THE COURT OF APPEALS AFFIRM THE CORRECT MEASURE OF DAMAGES IN CONNECTION WITH THE APPELLANT'S BREACH OF THIRD-PARTY CONTRACT CLAIM?

The Appellant/Appellant answers: No.

The Appellees answers: Yes.

The Court of Appeals answered: Yes.

The Trial Court answered: Yes.

INTRODUCTION

This appeal is the result of a $20,000.00 Consent Judgment on Appellant's Breach of Third Party Contract claim set forth Appellee Rohde Bros. Excavating, Inc. ("Rohde Bros.) for property damage to Appellant's residence allegedly resulting from demolition of a neighboring property located at 343 S. 5th Avenue, Saginaw, Michigan. It is undisputed that the Appellant proposed the Consent Judgment and stipulated to entering the same, so it could immediately pursue a Claim of Appeal solely on the Breach of Contract Claim with respect to the measure of damages being limited to either the cost of repair or the difference in fair market value. Importantly, this stipulation was made in exchange for dismissing all other parties and all remaining claims instead of proceeding to trial.

Specifically, Appellant argued that not only was the measure of damages inapplicable to its contract claim, but that it should be unjustly enriched by being placed in a better position than it was had the alleged breach never occurred. The instant supplemental briefing is now Appellant's fourth opportunity to provide some semblance of authority to support either its position for being unjustly enriched or at least a different measure of damages. Despite these numerous opportunities, Appellant fails to set forth any authority whatsoever to support its arguments, much less any authority to refute the established case law supporting the measure of damages set forth by Appellees.

Appellant further argued that the Land Bank inversely condemned its property by setting into motion "destructive forces" through affirmative actions aimed directly at its property; despite the fact that Appellee Land Bank merely owned the neighboring blighted house, and the City of Saginaw was solely responsible for administering the subject demolition. The Court of Appeals was not swayed by Appellant's unsupported and contradictory arguments, and it correctly affirmed the trial court's Orders.

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STATEMENT OF FACTS

This matter arises out of the demolition of a neighboring property located at 343 S. 5th Avenue, Saginaw, Michigan that was carried out by Appellee Rohde Bros. Excavating, Inc. ("Rohde Bros.), wherein a piece of the roof section slid off and contacted with the side of the Appellant's property at 339 S. 5th Avenue, Saginaw, Michigan. ***See* Appendix 102a, Appellant's Amended Complaint.** The salient facts are that Appellee Saginaw County Land Bank Authority ("Land Bank") owned the property located at 343 S. 5th Avenue. The property was constituted blight under the Dangerous Building Ordinance, so the City of Saginaw ("City") used funding from Federal block grants it was issued for demolishing condemned and abandoned homes in the area; to demolish the property owned by Appellee Land Bank. ***See* Appendix 103a; Appendix 1b, Permit for Demolition.**

Importantly, the City, not Appellee Land Bank, is the governmental entity authorized to enforce the City's Dangerous Building Ordinance. Indeed, it is the Code Enforcement division of the City, whose function it is to protect general health, safety and welfare and enforcing the City's Dangerous Building Ordinance[1]. The City was further solely responsible for the demolition of the adjacent property owned by Appellee Land Bank pursuant to the Memorandum Of Understanding ("MOU") between the City and Appellee Land Bank. Pursuant to the City's obligations set forth in the MOU, the City solicited bid proposals for demolition of the 343 S. 5th Avenue property. ***See* Appendix 2b, Request for Sealed Bid Proposal.**

The Appellee Rohde Bros. bid the demolition project and was the contractor assigned to perfect the demolition process from start to finish on behalf of the City. ***See* Appendix 1b; Appendix 2b.** On September 18, 2012, the demolition took place during which time a piece of roof slid down and made contact with the side of the Appellant's property. ***See* Appendix 104a , paragraph(s) 16-17.** The impact took place near the top of the Appellant's two story residential

[1] *See e.g.* http://www.saginaw-mi.com/departments/communitypublicsafety/codeenforcement/

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structure.

Contrary to Appellant's allegations, the alleged damage from the contact was limited to the exterior siding, as well as an outdoor flood light on the Appellant's property. Despite the minimal damage, the Appellant alleges that the subject property, which is located in downtown Saginaw, is a total loss and must be rebuilt. ***See Appendix 102a*** .

After the impact, the Appellant continued to reside in the home until November of 2012. ***See Appendix 33b*, Deposition of Sylvia Jones, p. 72.** The Appellant contacted Troy O'Neill of Gohm Insurance Restoration to conduct an inspection of the Appellant's subject property. ***See Appendix 45b*, Deposition of Troy O'Neill, p. 11.** Mr. O'Neill could not relate any damage he observed to the demolition carried out by the Appellee Rohde Bros. ***See Appendix 45b*, p. 11.** Mr. O'Neill further never made any representations that Appellant's house was condemned, or that any serious structural damage had been done to the Appellant's property. ***See Appendix 46b*, p. 15.**

In November of 2012, over a month after the impact occurred, the Appellant voluntarily terminated the utilities for the subject property and transferred the utilities to a different property that the Appellant owned. ***See Appendix 33b*, p. 70.** This voluntary act was due to increased heating costs. Appellant then vacated the subject property and moved into the other property they owned, to which they transferred the utilities in November of 2012. ***See Appendix 33b*, p. 70-71.**

During the winter of 2012-2013, Appellant's unheated property at 339 S. 5th Avenue went through a severe frost heave, which impacted the entire property, including the dirt crawl space. As such, Appellant alleges that the subject property was damaged requiring a total tear down and rebuild of the house.

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PROCEDURAL HISTORY

Appellant subsequently filed its Complaint and Amended Complaint against various defendants, including but not limited to Appellees Land Bank and Rohde Bros. alleging, among other claims, inverse condemnation, under state and federal law, and breach of third-party contract respectively. ***See Appendix 104a.*** It is clear however, that Appellant voluntarily vacated the subject 339 S. 5th Avenue property over a month after the impact occurred and terminated the utilities.

Appellee Land Bank filed Motions for Summary Disposition, which included but were not limited to dismissing Appellant's inverse condemnation claims. The trial Court then issued Opinion and Order(s) granting the motions and dismissing Appellee Land Bank from Appellant's entire Complaint. ***See Appendix 74a*, Opinion and Order, dated August 29, 2014; *Appendix 60a*, Opinion and Order, dated September 29, 2014.** Specifically, the trial court found that there were no actions by Appellee Land Bank that directly and naturally resulted in damage to Appellant's property pursuant to the MOU with the City ***See Appendix 74a* ; Appendix 60a.**

Appellee Rohde Bros. subsequently filed Motions in Limine requesting that the trial court prohibit Appellant from admitting any argument, evidence and/or testimony with respect to cost of replacement and restoration of the subject property as the same are irrelevant for determining causation and/or fair market value for the subject property. This included prohibiting the admission of Appellant's expert's opinion on cost for replacement and bringing the subject house up to current building codes. ***See Appendix 125a*, Appellee Rohde Bros.' Motions in Limine, dated July 23, 2015.**

The trial court granted the above-referenced Motions in Limine for both the negligence and breach of third-party contract claims, and it correctly found that replacement cost for the subject property is inadmissible under both MRE 402 and MRE 403 as it has no tendency to

make any fact with respect to the fair market value of the subject property more or less probable. ***See** Appendix 182a*, Opinion and Order, dated August 31, 2015. Specifically, the trial court found that the correct measure of damages for the negligence and breach of contract claims is the difference in the fair market value of Appellant's property before and after the subject demolition as Appellant admitted that the cost of repair exceeded the value of the property. ***See** Appendix 182a.* As such, the trial court correctly granted the above-referenced motions. Consequently, Appellant's Claim of Appeal should be denied, and this Honorable Court should affirm the trial court.

Interestingly, instead of proceeding to trial, Appellant through its counsel offered to dismiss the other parties and all its claims, with the exception of the breach of third-party contract claim against Appellee Rohde Bros., in exchange for stipulating to entry of judgment solely against Appellee Rohde Bros. for the amount of $20,000.00 with respect to the third-party contract claim. ***See Appendix 199a*, Order, dated September 22, 2015.**

Appellant subsequently pursued its Claim of Appeal. Briefs were filed with the Michigan Court of Appeals. After hearing oral arguments on April 14, 2017, the Court of Appeals issued an opinion, dated April 20, 2017. ***See Appendix 54b*, Court of Appeals Opinion, April 20, 2017.** The Court of Appeals affirmed the trial court's orders. Specifically, the Court of Appeals found that there was nothing in the record supporting a conclusion that Appellee Land Bank performed any "affirmative actions aimed directly at Appellant's property," nor was it responsible for setting in motion any "destructive forces" to constitute a "taking." ***See Appendix 57b*, (*citing Marilyn Froling Revocable Living Trust*, 283 Mich App.at 295).**

With respect to the measure of damages for the breach of contract claim against Appellee Rohde Bros., the Court of Appeals correctly affirmed the trial court's order. ***See Appendix 58b.*** Importantly, the Court of Appeals could not find any authority to support the Appellee's

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requested measure of damages. ***See** Appendix 59b.*

While the Court of Appeals did distinguish the measure of damages in *Price* for a negligence action from a breach of contract claim, it ultimately concluded that the measure of damages in this case follows the same formula for both the breach of contract and negligence claims based on the relevant case law. The Court of Appeals further found that the contract at issue imposed a duty analogous to the common law duty to act with care. ***See** Appendix 59b.* Finally, the lower court correctly found that the trial court did not err in determining that depreciation constituted an element of damages to be proved the Appellant as opposed to an affirmative defense. ***See** Appendix 54b* **, p. 6-7.**

STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a Motion for Summary Disposition, a determination that an action is time barred and questions of statutory construction. *Ostroth v Warren Agency GP, LLC*, 474 Mich 36, 40, 709 NW2d 589 (2006). The decision whether to admit or exclude evidence or facts is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Kochoian v. Allstate Ins. Co.,* 168 Mich App 1, 12, 423 NW2d 913 (1988).

LAW AND ARGUMENT

I. THE TRIAL COURT CORRECTLY GRANTED APPELLEE SAGINAW COUNTY LAND BANK AUTHORITY'S MOTION(S) FOR SUMMARY DISPOSITION ON APPELLANTS' INVERSE CONDEMNATION CLAIM.

Appellant's Application challenges the Order granting Appellee Land Bank's Motion for Summary Disposition with respect to Appellant's inverse condemnation claims under the Michigan and U.S. Constitutions.

A. The Land Bank's Actions Do Not Constitute A "Taking" To Support A Claim For Inverse Condemnation.

It is undisputed that both the Michigan and the U.S. Constitutions prohibit the taking of

private property without just compensation. *Ligon v City of Detroit*, 276 Mich App 120, 124, 739 NW2d 900 (2007)(citing U.S. Const. Am. V. Appellant herein alleges a claim of inverse condemnation, which is a cause of action instituted by a landowner whose property has been *taken* for public use without commencing a condemnation proceeding. *Blue Harvest v Department of Transportation*, 288 Mich App 267, 277, 7992 NW2d 798 (2010) (emphasis added).

As such, Appellant must establish that Appellee Land Bank's alleged *actions* amount to a constitutional "taking" of property. *Dep't of Transp v. Tomkins,* 481 Mich 184, 203; 749 NW2d 716 (2008) (emphasis added). The record evidence clearly establishes that Appellee Land Bank's alleged actions do not constitute a "taking" for the purposes of Appellant's inverse condemnation claim as it was not responsible carrying out or overseeing any demolition. "The paradigmatic taking requiring just compensation is a *direct* government appropriation or physical invasion of private property." *Lingle v Chevron USA, Inc.*, 544 US 528, 537 (2005) (emphasis added).

"While there is no exact formula to establish a de facto taking, there must be some action by the government *specifically directed toward the plaintiff's property* that has the effect of limiting the use of the property" (emphasis added) (internal quotations omitted). *Blue Harvest supra*, at 277 (*quoting Dorman v Clinton Twp*, 269 Mich App 638, 645, 714 NW2d 350 (2006)). Appellant must establish that (1) the government's actions were a substantial cause of the decline of the property's value and (2) that the government abused its powers in affirmative actions directly aimed at the property. *Id.* (*citing Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548, 688 NW2d 550 (2004)). Appellant must further prove a causal connection between Appellee Land Bank's actions and the alleged damages. *Id.* Moreover, any partial destruction or diminution of value to the property by an act of the government must directly, and not merely

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incidentally, affect the property to establish a taking. *Id.*

Appellant, albeit creatively but ultimately incorrectly, relies on *Peterman v Dep't of Natural Resources*, 446 Mich 177, 191, 521 NW2d 499 (1994) and the unpublished opinion from the Michigan Court of Appeals in *Estate Dev Co v Oakland County Rd Comm'n,* Docket No. 273383 (Mich App 2007) in an attempt to establish a taking by Appellee Land Bank. Neither case is applicable to the instant appeal in the context of Appellee Land Bank. This is because any alleged "destructive forces" (i.e. the demolition) would be set into motion by the City, not Appellee Land Bank. Appellant previously stipulated to dismiss the City from the inverse condemnation claims with prejudice.

In *Peterman supra*, this Honorable Court found that the Michigan Department of Natural Resources' ("DNR") construction of a boat launch ramp with jetties on its property, which depleted the beach and shoreline in front of the plaintiff's property. *Peterman supra* at p. 180-181. Appellant's Brief relies on *Peterman* to argue that it is making a "destructive forces" inverse condemnation claim. Herein, Appellant alleges that the "destructive forces" Appellee Land Bank set in motion was the demolition to the adjacent blighted property, which resulted in alleged damage to Appellant's property. Appellant goes on to state that it was Appellee Land Bank's subcontractors (i.e. Rohde Bros. Excavating, Inc.) who carried out the subject demolition, which allegedly resulted in damage to Appellant's property.

Appellant misstates the holding *Peterman* as this Honorable Court did not expressly create a "destructive forces" theory for inverse condemnation. Rather, this Honorable Court merely held that the DNR's actions constituted a taking, although it did not physically invade plaintiff's property, because the DNR's direct actions of constructing a boat launch ramp and jetties on its property caused the erosion to plaintiff's property. *Id.* at p. 191. Importantly, there was no dispute in *Peterman* that the DNR was responsible for the construction of the subject boat

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launch ramp. *Id.*

Similarly in *Estate Dev Co v Oakland County Rd Comm'n,* the Court of Appeals found that the defendant's direct actions of cutting trees and brush for a road commission project, which caused a culvert near plaintiff's property to be blocked by debris resulting in flooding on plaintiff's property could constitute a taking. *Estate Dev Co. supra*, at p. 3. As such, the *Estate Dev Co* Court found that defendant's actions of cutting trees and brush may establish a taking without physically invading plaintiff's land by setting into motion the destructive forces that resulted in the flooding of plaintiff's property. *Id.*

While the destructive forces theory in *Peterman* could potentially apply to the City, as the entity responsible for setting up and overseeing the subject demolition, Appellee Land Bank was not responsible for any such demolition or "destructive forces." Contrary to the allegations set forth in Appellant's Brief, the record herein is devoid of any facts establishing that Appellee Land Bank's direct actions set into motion any "destructive forces" that caused the damage alleged in Appellant's Complaint. Specifically, Appellee Land Bank was not responsible for the subject demolition. Appellant further fails to set forth any facts or evidence that Appellee Rohde Bros. was a subcontractor of Appellee Land Bank. Indeed, the MOU between Appellee Land Bank and the City categorically establishes that Appellee Land Bank was not involved with the demolition whatsoever as any contractor/subcontractor relationship would only be between the City and Appellee Rohde Bros.

B. The Memorandum Of Understanding ("MOU") Between Appellee Land Bank And The City Clearly Establishes That Appellee Land Bank's Actions Did Not Set Into Motion Any Destructive Forces To Constitute A "Substantial Cause" Of Any Alleged Damage To Appellant's Property, Nor Were Any Of Appellee Land Bank's Alleged Actions Affirmatively Aimed At Appellant's Property.

It is undisputed herein that Appellee Land Bank did not actually oversee, administer or perfect any demolition of the adjacent property. As such, no action taken by Appellee Land

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Bank, appropriated, invaded, interfered, directly aimed any actions at or took any portion of Appellant's property. Further, it cannot be disputed that the alleged actions of Appellee Land Bank, in no way, "set into motion any destructive forces" to substantially cause any alleged damage to Appellant's property.

Appellant grossly misstates Appellee Land Bank's role with respect to the subject demolition as Appellee Land Bank's only involvement in this matter was owning the adjacent blighted property. As such, the actions of the City or Appellee Rohde Bros. cannot be imputed to Appellee Land Bank. Indeed, it was the City, not Appellee Land Bank that was solely responsible for the rehabilitation and demolition of properties acquired by Appellee Land Bank, as well as subcontracting the demolition process pursuant to the City's Dangerous Building Ordinance, and the MOU between the City and Appellee Land Bank.

This is reflected in paragraph(s) two (2) and seven (7) of the MOU, which state as follows:

> 2. Article 4 – Property Rehabilitation, is amended to state the parties agree that the CITY is *solely responsible* for new construction and the rehabilitation of NSP 2 properties acquired by the LAND BANK AUTHORITY. The *CITY'S responsibilities include, but are not limited to, hiring the contractors, overseeing construction and paying for the rehabilitation activities*. The LAND BANK AUTHORITY will assist in paying for a portion of the new construction and rehabilitation activities. *However, the CITY is responsible for administering the process.*
>
> ***
>
> 7. Article 18 – Demolition, is a new provision that states the parties agree that the CITY is *solely responsible for the demolition* of NSP 2 properties acquired by the LAND BANK AUTHORITY and pursuant to the CITY'S Dangerous Building Ordinance. *The CITY'S responsibilities include, but are not limited to, hiring the contractors, overseeing demolition work and paying for demolition activities.* The LAND BANK AUTHORITY will assist in paying for a portion of the demolition activities. *However, the CITY is responsible for administering the process.*

***See Appendix 52b*, Memorandum of Understanding (emphasis added).**

If Appellant did not consider the City's actions of being solely responsible for

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administering the demolition process to be a "taking," then Appellee Land Bank's actions, or lack thereof, clearly do not establish a "taking" when Appellee Land Bank merely acquired the blighted, adjacent property prior to the City perfecting its demolition. Holding Appellee Land Bank liable for a "taking" when the City was solely responsible for enforcing the Dangerous Building Ordinance and carrying out all the demolition would be like holding the Budweiser Corporation liable for a dram shop action because a bar patron was overserved Bud Light.

As such, Appellee Land Bank's actions were not casually connected to Appellant's alleged damages as Appellee Land Bank was clearly not responsible for any alleged "destructive forces." Moreover, any subcontractors for the demolition would be subcontractors of the City, not Appellee Land Bank, pursuant to the bid contract for the subject demolition between the City and Appellee Rohde Bros., so. ***See Appendix 2b.***

Moreover, Appellant's inverse condemnation claim against Appellee Land Bank fails as any damage allegedly arising from the subject demolition was limited to marks on the exterior siding on the side of the house and an outdoor floodlight mounted to that side of the house. There is no evidence establishing that any other damage alleged by the Appellant was caused by the demolition as opposed to the frost heave that winter after the Appellant voluntarily terminated the utilities and vacated the property. Stated *supra*, Mr. O'Neill testified that he observed damage to the Plaintiffs' property but was unable to relate any of the damage to the subject demolition. ***See Appendix 45b*, p. 11.**

Appellant is clearly using this cause of action to hold Appellee Land Bank liable for the Appellant's own voluntary actions. For this reason and the reasons stated *supra*, any damage allegedly caused by the subject demolition is, at best, *incidental* to the damage Appellant voluntarily caused itself. The record is devoid of any "destructive forces" that Appellee Land Bank set into motion since it was not responsible whatsoever for enforcing the Dangerous

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Building Ordinance or any of the demolition that is the subject of Appellant's claim. Consequently, Appellant's inverse condemnation claims were properly dismissed.

C. *Appellant's Brief fails to set forth any argument that the second element for an inverse condemnation claim is met.*

Appellant's Brief fails to set forth any argument, whatsoever, establishing that Appellee Land Bank's actions satisfy the second element for its inverse condemnation claim. "The Takings Clause under the Fifth Amendment is substantially similar to the Takings Clause of the Michigan Constitution, and the two provisions should generally be interpreted coextensively." *Ypsilanti Fire Marshall v Kircher*, 273 Mich App 496, 516, n. 22, 730 NW2d 481 (2007)(*citing Tolksdorf v Griffith*, 464 Mich 1, 2, 626 NW2d 163 (2001); *Peterman supra*, at 184 n. 10.

As such, Appellant must establish that Appellee Land Bank "abused its legitimate powers in affirmative actions directly aimed" at Appellant's property. *Blue Harvest supra*, at 277. The Appellant's Complaint however, merely alleges that "determinations and decisions" between the City and Defendant Land Bank establish a "taking" on behalf of Appellee, Land Bank. ***See* Appendix 102a, at p. 3-4.**

Neither Appellant's Complaint, nor the instant Brief, establish how Appellee Land Bank's actions constitute a *taking*. Stated *supra*, there is no evidence that Appellee Land Bank, was responsible for administering any of the demolition process for the adjacent property. More importantly, the record is devoid of any evidence establishing that Appellee Land Bank *specifically directed* any affirmative action toward the Appellant' property. *Blue Harvest supra*, at 277.

All subject demolition was specifically directed to occur at the adjacent property, not the Appellant' property. There is further no evidence that Defendant, Land Bank, abused any of its legitimate powers. ***See* Appendix 74a.** Indeed, the MOU clearly establishes that Appellee Land Bank was not involved with any aspect of the subject demolition aside from owning the adjacent

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property. Simply stated, there were no destructive forces that Appellee Land Bank put into motion as it was not responsible for any demolition. Therefore, Appellee's inverse condemnation claims against Appellee Land Bank were correctly dismissed.

II. THE COURT OF APPEALS AFFIRMED THE CORRECT MEASURE OF DAMAGES IN CONNECTION WITH THE APPELLANT'S BREACH OF THIRD-PARTY CONTRACT CLAIM.

It is well established that prior to awarding any damages, the jury shall be instructed as to the proper measure of damages. *Gutov v. Clark*, 190 Mich. 381, 387, 157 N.W. 49, 51 (1916). As such, the proper measure of damages is a matter of law. *Id.* Moreover, the appropriate measure of damages for a breach of contract claim is to place the non-breaching party in as good a position it would have been in had the promised performance been rendered. *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 426 n.3 (2008); *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 98 (1989).

In connection with the negligence and breach of third-party contract claims against Appellee Rohde Bros., Appellant intended to rely on the testimony of its experts, including but not limited to the cost estimate from its expert at Bailey Construction; despite the fact that this testimony is overly prejudicial, not relevant or helpful to the jury as a matter of law pursuant to the correct measure of damages. ***See Appendix 305a*, Builder Estimate.**

The nature and cost of rebuilding the subject property is irrelevant, overly prejudicial and not helpful to the jury for Appellant's cause of action because it does not have the tendency to make a fact more or less true with respect to the correct measure of damages for the breach of third party contract claim. The lower courts correctly relied on *Price v High Pointe Oil Company, Inc.*, 493 Mich 238, 828 NW2d 660 (2013) and relevant contract cases to agree with the same.

In *Price v High Pointe Oil Company, Inc.*, this Honorable Court held that the appropriate

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measure of damages for negligent destruction of property is the difference in fair market value before and after the alleged damage, if the cost of repair exceeds the fair market value. *Id.* at 244. This Court stated as follows:

> 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.

Id (quoting O'Donnell v. Oliver Iron Mining Co., 262 Mich. 470, 247 N.W. 720 (1933)). The *Price* Court makes it clear that cost for a total tear down and rebuild of the subject property is excluded from damage calculations for a property damage claim. Appellant alleges that the trial court erred in relying on *Price* with respect to its breach of third-party contract claim because the measure of damages is different than the measure of damages for Appellant's negligence claim.

Appellant goes on to argue that the Court of Appeals "clearly struggled" with this issue and erred by finding that Appellant "may be theoretically correct" but failed to reach the proper resolution. At best, Appellant is only "theoretically correct" because the Court of Appeals found that this is a distinction without a legal difference in this case. The only authority Appellant cites in support of its position merely establishes the most basic contract principle that a breaching party must place the non-breaching party in the same position had the alleged breach never occurred.

Appellant completely misses the mark as there was no "struggle" since the Court of Appeals clearly understood what was plainly obvious to everyone except Appellant: regardless of negligence or breach of contract, the measure of damages in this case results in the same formula as a matter of law. While Appellant fails to cite any authority for the correct measure of damages for contract cases involving property damage, the Court of Appeals held that the same

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measure of damages is used in construction contract claims. *Caradoma v Thorious*, 17 Mich App 41, 169 NW2d 179 (1969). Specifically, the measure of damages is determined by the amount to correct the subject defect. *Id.* If the cost of correction exceeds the fair market value of the house, the measure of damages is the difference in the fair market value before and after the subject breach. *Id.* at 45.

The *Caradoma* Court stated as follows:

> But, where the defects are such that they cannot be remedied without the entire demolition of the building, and the building is worth less than it would have been if constructed according to the contract, the measure of damages is the difference between the value of the building actually tendered, and the reasonable value of that which was built.

Id. As such, *Caradoma* sets forth essentially the same formula for measuring damages in a breach of contract claim as the negligence claim in *Price supra*. For this case, the difference in value of Appellant's property before and after the demolition is used when the cost of repair exceeds the value of the home. Appellant further admits that the cost of repair far exceeds the value of the property. Consequently, the trial court correctly determined proper measure of damages in this matter and granted Appellee Rohde Bros.'s Motion in Limine for the same.

Appellant's Brief further sets forth numerous contradictions that undercut its own arguments. Appellant argues that the trial court's Order applying the negligence measure of damages to the contract claim, less than 24 hours before trial, prevented it from being prepared to argue damages to the jury. However, Appellant's Brief admits that it was prepared to argue fair market value with respect to its negligence claim. Appellant's Supplemental Brief, p. 11-12. While Appellant argues that it should be placed in the same position had the alleged breach never occurred, Appellant then contradicts itself by arguing that its damages would necessarily include the added costs of improvements to bring the existing structure up to current building codes.[2]

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[2] Similar to the egg shell negligence theory for an injured plaintiff with preexisting injuries, Appellant essentially argues that Appellee Rohde Bros. must take the subject property as it finds it. Appellant fails to cite any authority in

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Appellant is not requesting that it be placed in the same position; it is requesting that it be placed in a better position than it was before the breach by including the exorbitant costs for building a new house with improvements unrelated to the subject demolition. In essence, Appellant is requesting to be unjustly enriched by being placed in a better position than it would be in had the alleged breach never occurred (i.e. recovering the cost of building a brand new house in place of the 100 year old house that is the subject of Appellant's Complaint).

Indeed, the liability for a breach of contract claim is governed by the contract and the obligations set forth therein. As such, Appellee Rohde Bros. cannot be liable for the increased cost of replacing a defective component with a more expensive component. For example, if Appellant had a contract with Appellee to build a roof with a projected five year lifespan, and the roof is defective, Appellee would not be liable for the cost of replacement for a ten-year roof.

Ultimately, Appellant's damages are limited to the correction necessary to comply with the contract. *Diericlx v Vulcan Indus*, 10 Micah App 67, 72 (1968). In this case that is the difference between the value of Appellant's property before and after the demolition if that amount is less than the cost to correct the alleged damage. *Caradoma supra.*

Appellant wants to capitalize off this lawsuit to get a "Six Million Dollar Man" house that is built better and stronger than it was before. Again, Appellant fails to set forth any case law allowing for a measure of damages that places Appellant in a better position than it would have been in had the contract promised performance been rendered. This is further not a measure of damages that would arise naturally from any alleged breach.

Appellant has no expectancy under the contract other than the benefit that Appellee Rohde Bros. "take care to protect abutting properties." ***See* Appendix 2b.** This Honorable Court previously found that absent an express contractual promise to exercise "care to protect abutting

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support of this argument, and Appellee is unaware of any case law in Michigan that makes it liable for the costs of bringing the subject property up to current building codes, when the failure to do the same was solely caused by virtue of Appellant's ownership of the subject property.

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properties," Appellee Rohde Bros. was already under a duty to do exactly that under common law tort principles. *Loweke v Ann Arbor Ceiling & Partition Co., LLC*, 489 Mich 157, 172 (2011); *Courtright v Design Irr., Inc.*, 210 Mich App 528, 530, 534 NW2d 181 (1995).

There are no additional duties identified in the contract, and there is nothing in the record that the parties intended to impose a higher contractual duty than that already afforded by the operation of common law. *Lawrence v Will Darrah & Assoc, Inc,* 445 Mich 1, 7 (1994); ***See also* Appendix 2b.** As such, Appellant has no contractual expectancy beyond the expectancy of the common law duty that Appellee Rohde Bros. would not act negligently.

Pursuant to *Caradoma*, the Appellant's only expectancy would be to have the exact same house it had prior to the demolition had no alleged breach occurred. *Caradoma supra*, at 45. Consequently, the correct measure of damages is the difference in the value of the house before and after the subject demolition. *Id.* Clearly, Michigan law instructs that the correct measure of damages in this matter for both the negligence and the breach of third-party contract claims is the same: the difference in fair market value of the subject property before and after the demolition carried out by Appellee Rohde Bros, if the damage is not repairable. *Id*; *Price supra*, at 244. A cursory review of the estimate by Appellant's building expert shows that it is merely evidence for the cost of building a new two-story structure for the subject property to bring it up to current building codes, not the difference in fair market value for the existing structure. ***See* Appendix 52b.**

The subject estimate further fails to address depreciation for the subject property. ***See* Appendix 52b.** Absent depreciation, the subject estimate is not a replacement for the existing structure, but the price to replace a theoretical new house. *Strzelecki v. Blaser's Lakeside Indus. of Rice Lake, Inc.*, 133 Mich. App. 191, 194, 348 N.W.2d 311, 313 (1984). In *Strzelecki*, this Honorable Court stated as follows:

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> Clearly, replacement cost alone, without any deduction for depreciation, is not sufficient evidence of market value at the time of the loss. If replacement cost without depreciation was allowed, the plaintiff would recover an amount as if the property were new at the time it was destroyed.

Strzelecki supra, at 194-95 (*citing State Highway Comm'r v. Predmore,* 341 Mich 639, 642, 68 NW2d 130 (1955); and *Bluemlein v. Szepanski,* 101 Mich App 184, 192, 300 NW2d 493 (1980), *lv. den.* 411 Mich. 995 (1981)). Consequently, evidence with respect to the cost of replacement standing alone, including but not limited to the Bailey estimate, is irrelevant pursuant to MRE 402 and MRE 403, and the trial court correctly prohibited the same.

Appellant alleges that depreciation is an affirmative defense that must be pled by a defendant not an element of damages. Again, Appellant cites no case law establishing that depreciation is an affirmative defense. Conversely, it is established law in Michigan that replacement cost alone, without any deduction for depreciation, is insufficient evidence of fair market value at the time of loss. *Bluemlein supra*, at 191-194.

In other words, it would be in error to instruct the jury and admit evidence and/or testimony on replacement cost because it would allow the Appellant to recover an amount equal to what they would have received if the subject property was brand new when the alleged damage occurred. *Id.* at 190-192. Clearly, depreciation is a component for establishing fair market value of the subject property. *Id.* Fair market value in turn is the measure of damages for claims involving the destruction of property that must be proved by the plaintiff. *Price supra.* Consequently, depreciation is an element of damages that must be proved by Plaintiff, not an affirmative defense.

RELIEF REQUESTED

WHEREFORE, for the reasons stated, Appellees respectfully requests that this Honorable Court DENY Appellant's Application for Leave to Appeal.

Respectfully submitted,

/s/ ROBERT A. JORDAN

ROBERT A. JORDAN (P73801)
GREGORY W. MAIR (P67465)
Attorney for Appellee
300 St. Andrews Rd., Ste. 302
Saginaw, Michigan 48638

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