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 REPLY BRIEF

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REPLY

NOW COMES Appellant JONES FAMILY TRUST, by counsel, and offers this short reply as authorized by the January 26, 2018 order of this Court.

I. The Land Bank acted to remove its unlawful structure and set into motion the forces which deprived the Trust of the ordinary use of its now full-totaled home; this is a taking.

In its response, Appellee Saginaw County Land Bank Authority asserts that it must be established that its "actions" amounted to an unconstitutional taking citing *Dep't of Treasury v Tomkins*, 481 Mich 184, 203; 749 NW2d 716 (2008). The Land Bank emphasizes the wrong word—it should have emphasized where its "actions *amounted"* to an unconstitutional taking. By focusing on the wrong concept, the Land Bank argues that a taking did not occur by its self-conclusion that it did not affirmatively act. This misstates the nature of Appellant's claim and falsifies the Land Bank's actual actions in this case. The Land Bank had an illegal house that it owned and maintained in violation of local public safety standards, i.e. the dangerous building ordinance. The Land Bank affirmatively took action by initiating the process to have the building knocked down, by contracting the job to the City of Saginaw, who later subcontracted those activities to Rohde Bros. Here, the Land Bank did not simply stand idle—it affirmatively set into motion the forces which ultimately caused its unsafe structure to leave the Land Bank's property limits and caused the full diminution of value of the neighboring Trust's house. Legally, the same general occurrence happened in *Peterman*. *Peterman v Dep't of Natural Resources*, 446 Mich 177; 521 NW2d 499 (1994). While the actions of both the DNR in *Peterman* and the Land Bank in this case were not the *intended* actions of the government actor, a taking still occurs "where [the government] set into motion the destructive forces that caused the damage to plaintiff's property." *Peterman, supra*, at 191. Substantially

damaged property, like seized property, is *still* an unconstitutional taking for which the owner should recover 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). In fact, it is actually an automatic taking. *Adams Outdoor Advertising v East Lansing*, 463 Mich 17, 23-24; 614 NW2d 634 (2000)("[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."). After all, as this Court has explained, the constitutional 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)). Yet that is what the Land Bank is wrongfully asking this Court to do. This Court should decline the invitation and instead affirm the strong and long-time constitutional principle outlined in *Peterman* in 1994 and *Vanderlip* in 1889—

> 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.[1] Contrary to its assertions, the Land Bank is constitutionally responsible for the result of its own decision and actions in starting

[1] The real problem in this case is that the same law firm (O'Neill, Wallace, and Doyle PC) represents all the potentially liable parties in this case—the Land Bank, Rohde Bros, and formerly the City of Saginaw. What should have happened is the Land Bank should have sued Rohde Bros as a third-party defendant for indemnification or contribution. But had it done so, the law firm of O'Neill, Wallace, and Doyle PC would have been disqualified from serving as counsel for one of these parties going forward.

the process of demolishing its own illegal house structure.[2] The Circuit Court errored in granting summary disposition in favor of the Land Bank. This error should be corrected by this Court.

II. Rohde Bros is responsible to the Trust in an amount the jury determines, as a question of fact, that would place it in a position equivalent to that which it would have attained had the contract been fully performed.

Before the strike, the Jones Family Trust had a house which could be ordinarily used. After the strike, repairs to the Trust's home will need to be made beyond its immediate pre-strike status and fulfill the current building codes in effect. In essence, Rohde Bros not only destroyed the house but also destroyed the Trust's right to the status of the house as it existed.[3] Under Michigan contract law of this Court, the standard is to award compensation in an amount "to put the injured party in as good a position as [he/she/it] would have had if performance had been rendered as promised." *Corl v Huron Castings, Inc*, 450 Mich 620, 622 fn7; 544 NW2d 278 (1996). In other words, "the goal in awarding damages for breach of contract is to give the innocent party the benefit of his bargain — to place him in a position *equivalent* to that which he would have attained had the contract been performed." *Tel-Ex Plaza, Inc v Hardees Restaurants, Inc*, 76 Mich App

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[2] The Land Bank also tries to argue that it can simply 'contract away' its constitutional responsibilities to the City of Saginaw via the partial Memorandum of Understanding it supplied in the Appendix (see **Appendix #53b**) by arguing that the City was responsible for the demolition hiring and supervision. **Appellee Supp Br, p. 9-11.** The Land Bank cites no authority for this odd theory. While true the City of Saginaw could seemingly assume *financial* responsibility on behalf of the Land Bank (but it is unclear why it did), the City could not assume the Land Bank's ultimate *constitutional* and *legal* responsibility of not committing a taking with its destructive forces activities. After all, it is still the Lank Bank's house and legal responsibility. Like noted in Footnote 1, the Land Bank could and should have sued the City of Saginaw for breaching the Memorandum of Understanding between the Lank Bank and the City on a contribution theory or by breach of contract. It did not do so because the same law firm (O'Neill, Wallace, and Doyle PC) represents all the potentially liable parties in this case—the Land Bank, Rohde Bros, and formerly the City of Saginaw. See **Footnote 1, *supra*.**

[3] The Trust's 2,300 sq ft house was building in 1894 and today is located in a 'tough' section of Saginaw.

131, 134; 255 NW2d 794 (1977)(emphasis added). Had Rohde Bros "take[n] care to protect abutting properties" as it contractually promised it would (but failed to) do, the Trust would today have a house still standing and could be and was ordinarily used.

Instead, Rohde Bros argues that legal standard for damages for a contract claim should be changed in this State to be the same as a tort claim. It failed to cite any law of this Court that supports the same. Different claims have different measures of damages and have been that way since nearly the formation of Michigan's statehood. If this Court were to adopt Rohde Bros' arguments, this Court would have to literally overturn centuries of contract law precedence established via countless cases from the courts of this state. E.g. *Hammond v Hannin*, 21 Mich 374, 384 (1870)("Where a breach of contract occurs, the law aims to make compensation adequate to the real injury sustained, and to place the injured party, so far as money can do it, in the same position he would have occupied if the contract had been fulfilled."); *Corl, supra*, at 625-626. Yet, that is what the Circuit Court and Court of Appeals essentially did by failing to correctly apply the law of contracts, and it was in flagrant error.

The question the *Jones* jury ***actually*** needed to answer is what amount would place the Trust in the same position it would have occupied had Rohde Bros fulfilled its contractual promise? Rohde Bros says the only measure allowed is the depressed value which will not return the Trust to its normal house.[4] The Trust asserts that damages are the rebuild costs because returning the Trust's House to its original form via repairs "would probably be exorbitant" according the experts. See **Appendix #302a-303a**. Rebuild costs is acceptable for the jury to consider as an estimate in this breach of contract case. "When

[4] See **Footnote 3.**

the nature of a case permits only an estimation of damages or a part of the damages with certainty, it is proper to place before the jury all the facts and circumstances which have a tendency to show their probable amount." *Body Rustproofing, Inc v Mich Bell Tel Co*, 149 Mich App 385, 391; 385 NW2d 797 (1986).

So who gets to make the decision on damages? The lower courts errored in believing it is a question *of law*. It is not; it is a question *of fact*. 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).

Given this analysis and centuries of Michigan jurisprudence, the Circuit Court errored in determining, as a matter law, that the amount of contract damages is the same amount as damages for the common law tort of negligent destruction of property. Yet when properly using Michigan's contract law standards, Rohde Bros can ***still*** argue to a Saginaw jury what it believes the appropriate amount of damages should be. To the extent that Rohde Bros could convince the *Jones* jury to award less than the amount sought by the Trust, that is the province of the jury to decide. The trial court wrongfully invaded the province of the jury. The lower courts' errors should be reversed. We should not be afraid to let juries decide disputed questions of fact, including disputes on the amount of damages to be award which will "so far as money can do it" but the Trust "in the same position [it] would have occupied if the contract had been fulfilled." *Hammond*, supra, at 384.

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 its property. Remand is appropriate to determine the amount of just compensation required under the state and federal constitutions. See *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). 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: April 11, 2018

RESPECTFULLY SUBMITTED:

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