STATE OF MICHIGAN
IN THE COURT OF APPEALS
(FROM THE 10TH CIRCUIT COURT FOR THE COUNTY OF SAGINAW)

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
_____/

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

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APPELLANT JONES FAMILY TRUST'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The Michigan Court of Appeals has jurisdiction to entertain and adjudicate this appeal of right pursuant to MCR 7.202(6)(a)(i) and MCR 7.203(A)(1) as the *Order of Judgment* issued by the Saginaw County Circuit Court, Judge Robert L. Kaczmarek presiding, on September 22, 2015 constitutes a final order/judgment.

STATEMENT OF QUESTIONS PRESENTED

I. Did the Circuit Court err in dismissing the constitutional inverse condemnation (takings) claims against Defendant Saginaw County Land Bank Authority?

Appellant answer: Yes.

II. Did the Circuit Court err in limiting contractual damages by imposing the negligence-based standard provided by *Price v High Pointe Oil*?

Appellant answer: Yes.

III. Is depreciation an element of damages which must be proved by the plaintiff or an affirmative defense to be raised by a defendant?

Appellant answer: An affirmative defense to be raised by defendant.

INTRODUCTION

The facts of this case are extremely simple, but the parties dispute the application of the facts to the relevant law, which in turn determines the extent of whom is properly responsible. On the morning of September 18, 2012, a demolition crew was knocking down a blighted house in Saginaw, Michigan owned by the Saginaw County Land Bank Authority. Suddenly, the Land Bank's roof on its blighted house broke away uncontrollably, crossed the property line, and walloped the neighboring house owned by the Jones Family Trust, the appellant. We need not speculate what happened because there is surveillance video of the strike (which is in the court record). The questions presented on appeal involves which defendant is responsible and on what theory?

BACKGROUND OF CASE

This case involves two neighboring houses, one owned by the Saginaw County Land Bank Authority (being 343 S. 5th Ave, **Exhibit A)**, and the other by Jones Family Trust (being 339 S. 5th Ave), in the City of Saginaw on their neighboring city lots.

The Jones House is the long-time home of Bobby and Sylvia Jones, and their various foster-later-adopted children. **Sylvia Jones Dep, pp. 13, 17-18.**[1] The Jones House and the property it sits upon are titled to a trust known as the Jones Family Trust, the appellant. ***Id.*****, at 6.** This property and home has been in Bobby's family for generations.

Next door to the Jones House is a long-time eyesore, a blighted and long-abandoned structure at 343 S. 5th Ave. After the previous, abandoning owners stopped paying taxes, this house (the "Blighted House") and its property were forfeited to the local taxing authorities and ultimately owned by the Saginaw County Land Bank

[1] *Defendants, City of Saginaw, Rohde Bros. Excavating Inc's Brief in Support of Motion for Summary Disposition*, Exhibit 4. For ease of reference, this deposition transcript will be referred to as "Sylvia Jones Dep, p. __" and is attached hereto.

Authority, a governmental entity created pursuant to the LAND BANK FAST TRACK ACT, Public Act 258 of 2003. See **Exhibit A**. The Land Bank did not revitalize or improve the Blighted House despite it violating the City of Saginaw's DANGEROUS BUILDINGS ORDINANCE. Instead, the Land Bank entered into an agreement with the City of Saginaw to concede the Blighted House as being a violation of the DANGEROUS BUILDING ORDINANCE by the City of Saginaw, who then had grants, obtained from the federal government, to raze such ill-kept or abandoned structures. **Exhibit B**. These funds are known as Neighborhood Stabilization Funds (NSFs). ***Id*.** After a competitive bidding process to various local excavating companies, the City of Saginaw awarded the contract to Defendant Rohde Bros Excavating, Inc as the lowest qualified bidder to raze the Land Bank's Blighted House. **Exhibit C.** There were key provisions within this contract accepted by and contractually imposed upon Rohde Bros, which become important later *infra*. The demolition on the Blighted House started on the crisp morning of September 18, 2012. Answer to First Amended Compl, ¶16; **Exhibit F.**

On the fateful morning of September 18th, crews from Rohde Bros began the process of demolishing the Blighted House. Shortly after beginning, the two employees/workers of Rohde Bros' 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 Jones Home. **Exhibits D and G**.[2] The strike was captured, in relevant part, on video. *Id*. 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 her home where her husband, Bobby, and at least one child were having breakfast. Fortunately, no one was

[2] **Exhibits D and G** are videos being sent on CD to the Clerk of the Court due to inability for TrueFiling to accept the same.

hurt or killed; the Jones House, however, suffered a massive systemic blow. **Exhibit H**. The occupants of the Jones House (being Bobby and Sylvia Jones and their children) had to abandoned personal property (damaged) and also flee the damaged Jones House by moving to a smaller nearby house also owned Jones Family Trust, which in turn caused loss rental profits in the form of the Trust being precluded from renting this other property to renters, as previously done. Bobby and Sylvia Jones lost out on their quiet enjoyment of their property in their later years. Later, after utilities bills were skyrocketing from wasted fuel from the damaged heating systems in the Jones House, Sylvia had the utilities shut off to prevent unnecessary waste and to "winterize" the home.[3] **Sylvia Jones Dep, pp. 86-87**.

For this case, Plaintiffs retained two structure experts[4]—both former building officials from Berrien County—who inspected the Jones Home and offered their analysis. The first was Walter "Barney" Martlew, a former building inspector for the City of Benton Harbor and registered and licensed professional engineer. **Martlew Dep, p. 6.** Mr. Martlew also was appointed and 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*., pp. 6-7.** Second was Sam Hudson, a licensed residential builder. **Hudson Dep, p. 5.** Both experts' testimony contributed the damage to the Jones Home to the strike from the run-away Blighted House. **Exhibit H.** Of particular importance, Mr. Hudson was prepared to

[3] Because these defendants refused to fix their caused damage, additional foreseeable damage occurred when the Jones House's was further damaged by the frost heave caused by the natural cycle of Michigan's seasons.

[4] A third expert was retained and deposed for trial purposes, who provided the cost to rebuild the Jones House.

testify that "[e]xtensive upgrades [were] required to make the structure code compliant" and "may make the total cost of repairs impractical to consider." **Exhibit H, p. 6.** These experts concluded the Jones House "certainly suffered significant damage" which "are directly attributable to the strike incident." ***Id.*****, at 4.**

In May 2013, the Jones Family Trust, together with Bobby and Sylvia Jones, filed suit against Saginaw County Land Bank Authority, City of Saginaw, Rohde Bros Excavating, Inc, and an unknown employee named Hard Hat Doe as defendants. See Compl. Discovery was undertaken. For reasons unimportant to this appeal, Defendants City of Saginaw and Hard Hat Doe were voluntarily dismissed from the legal action, leaving just Defendants Land Bank and Rohde Bros. Neither remaining defendant admitted responsibility.

While various claims were asserted with various theories, only a small portion are relevant by this appeal. First, Plaintiffs alleged that the Land Bank, as a governmental entity, was 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).[5] As for Rohde Bros, Plaintiff alleged general negligence, trespass, and breach of third-party contract under the bid agreement between the Land Bank/City of Saginaw and Rohde Bros. **Exhibit C**, **p. 4.**

At the end of discovery, the Land Bank moved for summary disposition on the inverse condemnation claims. The Circuit Court summed up the argument precisely:

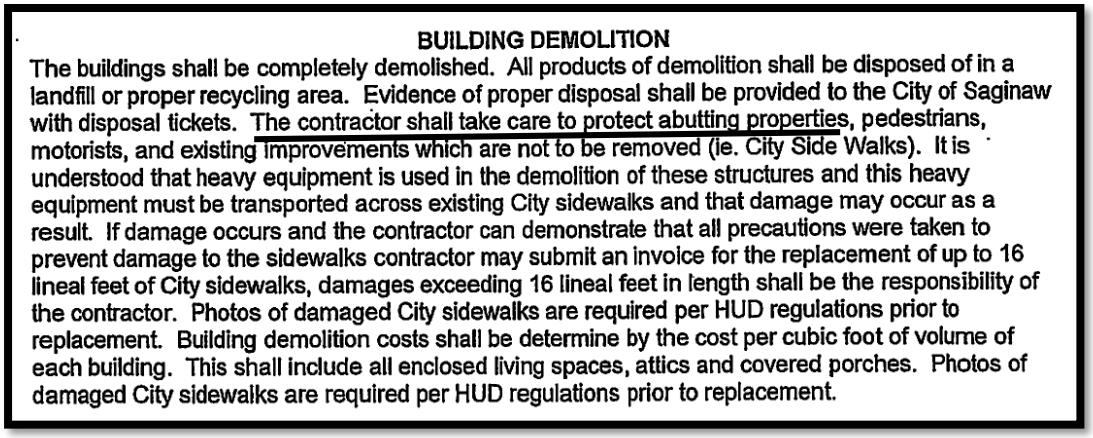
[5] Plaintiff also sought attorney fees and costs pursuant to 42 USC § 1988.

> Defendant Land Bank argues that this Court should summarily dismiss Plaintiffs' federal claim for an unconstitutional taking under the Fifth and Fourteenth Amendments of the U.S. Constitution is warranted because it did not carry out or administer the demolition project, did not specifically direct any action toward Plaintiffs' property to limit its use, there is no causal connection between its alleged actions and the damages alleged, and the nuisance exception to the Fifth Amendment's taking clause excuses it from payment of just compensation.

OPINION AND ORDER OF THE COURT, dated Sept 29, 2014, p. 3. Plaintiffs opposed. For the reasons discussed below, the Court granted (albeit erroneously) the Land Bank's motion for summary disposition. *Id.*, p. 14.

As to Rohde Bros, it attempted to defend on all sorts of grounds—nearly all of which unsuccessful.[6] **OPINION AND ORDER OF THE COURT, dated Sept 29, 2014, p. 19.** The Circuit Court set trial for the claims of trespass, negligence, and breach of third party contract. See **Register of Actions**. As to the third-party breach of contract, Plaintiffs' theory was that under terms of demolition contract (as agreed to by Rohde Bros for the demolition of the Blighted House), there contained an express promise to a specified class of third-parties: the abutting properties.

[6] Defendant Rohde Bros appealed, twice, the Circuit Court's decision to allow the case to go to trial. First, Rohde Bros, a private company, argued it had government immunity and took an appeal by right. This Court immediately dismissed the appeal finding a corporate entity cannot reasonably be considered a governmental party, agency, official, or employee, and thus no appeal by right for denial of governmental immunity. *Jones Family Trust v Saginaw County Land Bank Authority*, unpublished order of the Court of Appeals, issued Oct 24, 2014 (Docket No. 324106). Undaunted, Rohde Bros filed a delayed application for leave to appeal, which was also denied by this Court. *Jones Family Trust v Saginaw County Land Bank Authority*, unpublished order of the Court of Appeals, issued May 12, 2015 (Docket No. 324792).



BUILDING DEMOLITION

The buildings shall be completely demolished. All products of demolition shall be disposed of in a landfill or proper recycling area. Evidence of proper disposal shall be provided to the City of Saginaw with disposal tickets. The contractor shall take care to protect abutting properties, pedestrians, motorists, and existing improvements which are not to be removed (ie. City Side Walks). It is understood that heavy equipment is used in the demolition of these structures and this heavy equipment must be transported across existing City sidewalks and that damage may occur as a result. If damage occurs and the contractor can demonstrate that all precautions were taken to prevent damage to the sidewalks contractor may submit an invoice for the replacement of up to 16 lineal feet of City sidewalks, damages exceeding 16 lineal feet in length shall be the responsibility of the contractor. Photos of damaged City sidewalks are required per HUD regulations prior to replacement. Building demolition costs shall be determine by the cost per cubic foot of volume of each building. This shall include all enclosed living spaces, attics and covered porches. Photos of damaged City sidewalks are required per HUD regulations prior to replacement.

Exhibit C, p. 4. It is undisputed that the Jones House is an abutting property to the home being demolished, which Defendant Rohde Brother promised, by contract, that it "shall take care to protect" the same. The Court agreed and allowed this claim to go to the *Jones* jury. **OPINION AND ORDER OF THE COURT, dated Sept 29, 2014, p. 16.**

On the eve of trial, there remained all three Plaintiffs and a single defendant, Rohde Bros. As the remaining defendant, Rohde Bros filed a multi-part *Motion in Limine* just before trial. Despite no direct argument on the issue of damages limitations, the Circuit Court issued another *Opinion and Order* at 4:50p.m. on the day before trial. The Circuit Court discussed the Supreme Court's semi-recent decision of *Price v High Pointe Oil Co, Inc*, 493 Mich 238; 828 NW2d 660 (2013) reaffirming the common law "*O'Donnell* rule" "as the measure of damages to property applicable to <u>*negligence*</u> claims in Michigan."

> 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.

However, the Court then pulled a surprise, which is the main basis of this appeal—the Circuit Court applied the *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 (ie. 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 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**.

OPINION AND ORDER OF THE COURT, dated August 31, 2015 (copy attached). In other words, the Circuit Court applied the law of negligence to a claim of breach of third-party contract. Appellant asserts this conclusion, especially the highlighted portion, to be reversible error.

On the morning of the trial, the parties met in chambers to discuss the case and the aftermath of the Circuit Court's 11th hour faxed decision. Plaintiffs had previously submitted jury instructions weeks before seeking to apply different instructions regarding damages for the *Jones* jury for each separate claim/theory proffered—the *Price* rule for negligence and the *Alan Custom Homes* rule for the breach of third-party contract. But with the Circuit Court's ruling as the law of the case, the most the jury could award was up to the *Price* negligence limitation. Plaintiffs' 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* limitation imposed, Rohde Bros conceded it breached of third-party contract claim and then stipulated to entry of a judgment ceding liability on the breach of third-party contract. However, the Court specifically ordered that—

> Plaintiff, Jones Family Trust, will be appealing to the Michigan Court of Appeals to challenge the damages limitation decreed by the *Opinion and Order of the*

> *Court*, dated August 31, 2015 [and the] Court finds that this issue is specifically preserved for appellate purposes.

See **ORDER OF JUDGMENT, Sept 22, 2015, p. 2**. Judgment was entered in favor of Plaintiff Jones Family Trust against Rohde Bros in the amount of $20,000.00 in light of the *Price* limitation, and this appeal now follows.

ARGUMENT

I. The Circuit Court erred in dismissing the inverse condemnation claims.

A. Standard of Review

Questions of law are reviewed de novo. *Ter Beek v City of Wyoming*, 495 Mich 1, 8; 846 NW2d 531 (2014). Grants of summary disposition based on questions of law are also reviewed de novo. *Young v Sellers*, 254 Mich App 447, 449; 657 NW2d 555 (2002).

B. Michigan law directs that when damage occurs to private property, the government must pay just compensation as a form of inverse condemnation.

> The federal and state constitutions both proscribe the taking of private property for public use without just compensation. US Const, Am V; Const 1963, art 10, § 2; *Adams Outdoor Advertising v East Lansing (After Remand)*, 463 Mich 17, 23; 614 NW2d 634 (2000); *Oakland Co Bd of Co Rd Comm'rs v JBD Rochester, LLC*, 271 Mich App 113, 114; 718 NW2d 845 (2006). The purpose of just compensation is to put property owners in as good a position as they would have been had their property not been taken from them. *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 543; 481 NW2d 762 (1992).

Heydon v MediaOne of Southeast Michigan, Inc, 275 Mich App 267, 279-280; 739 NW2d 373 (2007). A governmental entity's actions can be a taking of private property even though the agency never directly exercised control over the property, provided that some action by the government constitutes a direct disturbance of or interference with property rights. *In re Acquisition of Land-Virginia Park,* 121 Mich App 153, 159; 328 NW2d 602 (1982). "Where private property has been *damaged* rather than *taken* by

governmental actions, the owner may be able to recover therefor by way of an inverse or reverse condemnation action." *Virginia Park*, *supra*, at 158 (emphasis added). "An inverse condemnation suit is one instituted by an owner of land whose property, while not having been formally taken for public use, has been damaged by a public improvement undertaking or other public activity." *Id*. (emphasis added). Governmental action falling short of actual physical occupancy, acquisition, or appropriation still constitutes a taking "if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter." *Id*. at 160 (citations omitted).

To establish an inverse condemnation claim in such a case, an injured party must prove only two things: (1) that the government's actions were a substantial cause of the decline of the plaintiff's property, and (2) that the government abused its legitimate powers through affirmative actions directly aimed at the plaintiff's property. *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 549; 688 NW2d 550 (2004); *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 130; 680 NW2d 485 (2004). The Supreme Court has held that a 'substantial cause' may be established "where [the government] set into motion the destructive forces that caused the damage to plaintiff's property." *Peterman v Dep't of Natural Resources*, 446 Mich 177, 191; 521 NW2d 499 (1994); see also *Estate Dev Co v Oakland County Rd Comm'n,* unpublished opinion of the Court of Appeals, issued Nov 20, 2007 (Docket No. 273383), at *3 ("causation may be established where [the government] set into motion the destructive forces that caused the damage to the plaintiff's property," citing Peterman).[7] Our Supreme Court

[7] There are two cases unpublished appellate cases deriving from the same underlying case, *Estate Dev Co v Oakland Co Rd Comm'n*, unpublished decision of the Court of Appeals, issued Nov 20, 2007 (Docket No. 273383)(*Estate Dev Co I*) and *Estate Dev Co v Oakland Co Rd Comm'n*, unpublished

has explained that "*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 (emphasis added).

Here, both the trial court and the Land Bank missed the utilized theory of Appellant's case: a 'destructive forces' inverse condemnation claim.[8] The Supreme Court in *Peterman* has confirmed the existence and set the standard for this type of claim: "the term 'taking' should not be used in an unreasonable or narrow sense" and thus when a government action "set[s] into motion the destructive forces that caused the erosion and eventual destruction of the property," a compensable taking has occurred. *Id.*, at 189, 191. This claim does not require and makes irrelevant any physical taking or invasion by the government. *Id*., at 190 ("inverse condemnation may occur even without a physical taking of property"). In other words and stated succinctly, "where real estate is actually invaded by superinduced water, earth, sand, or *other materials* [query: a roof from a neighboring government-owned building?]… it is a taking within the meaning of the Constitution. *Id.*, at 184, 188-189 (emphasis added).

There are only two cases which have dealt with a 'destructive forces' inverse condemnation claim under Michigan law: *Peterman* and *Estate Dev Co*.

A destructive forces claim was successfully prosecuted in *Estate Dev Co*. In that case, the basis for the taking claim is that the government agency, a road commission, engaged in affirmative acts in the exercise of its road construction activities that set into

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decision of the Court of Appeals, issued Mar 24, 2011 (Docket No. 291989)(*Estate Dev Co II*). This brief cited to *Estate Dev Co* when referring to these cases collectively.

[8] While this constitutional cause of action derives from *Peterman*, the name of this theory comes from *Estate Dev Co*.

motion the destructive forces that later caused the flooding to plaintiff's property, while not directly invading plaintiff's land. This Court concluded that such a theory is appropriate for resolution by the jury. Subsequently, the jury returned a verdict in favor of plaintiff on plaintiff's inverse condemnation claim in the amount of $1.7 million. On appeal, this Court affirmed an instruction wherein plaintiff only had to prove that governmental entity "set into motion destructive forces" which caused damages. As result, the standard of *Peterman* was applied: plaintiff must only need to show that the government committed a particular affirmative act that set forces into motion, even though the act need not be directly aimed at the property at issue, nor constitute an abuse of legitimate governmental powers.

Estate Dev Co is the singular progeny regarding destructive forces claims outlined in *Peterman*. The *Peterman* Court held that the government's action in constructing a boat launch and installing jetties, which later resulted in the diminishment of the plaintiffs' riparian lands, was sufficient to establish a taking. *Peterman, supra*, at 200, 207-208. The government (by way of the DNR) set into motion the destructive forces that caused the later erosion and eventual destruction of the plaintiffs' property, even though the legitimate exercise of installation of water-based structures did not invade the subject property or directly cause the damage. *Id.* at 191. The Supreme Court rejected the government's argument that it need not compensate the damaged parties because its actions were within its legitimate power. *Id*. The Supreme Court concluded that "simply because the state is acting [legitimately] to improve navigation does not grant it the power to condemn all property without compensation." *Id.* at 198.

Here, viewing the evidence and all inferences in the light most favorable[9] to the Jones Family Trust for a destructive forces inverse condemnation claim, Plaintiff suffered from the Land Bank's legitimate action of causing the Blighted House to be demolished, as the particular affirmative act, that set forces into motion which later result in the Land Bank's subcontractors damaging and nearly destroying the Jones House. In short, the Land Bank's affirmative action of causing the demolition of its own dangerous and illegal house causing substantial damage[10] to neighboring private property constitutes an inverse condemnation. Just as the DNR did in *Peterman* and the road commission did in *Estate Dev Co*, Defendant Land Bank set into motion the destructive forces that ultimately, even if an indirect consequence, caused damage and/or the destruction of the Jones House, regardless of whether it was though the legitimate or illegitimate exercise of the Land Bank's power. "The *Peterman* Court clearly indicated that an inverse condemnation action could be sustained where damages were *an indirect consequence* of the government's actions and absent a direct invasion of property." *Estate Dev Co II, supra*, at *11 (emphasis added). But for the Land Bank's setting into motion the destructive forces by its later subcontractors to cause a large portion of a house owned by the Land Bank to break away, leave the confines of the blighted property, and strike the Jones House, the Jones House would not have suffered the injuries which deprived the owner, the Jones Family Trust, of the

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[9] The inverse condemnation claim against the Land Bank was decided on a motion pursuant to MCR 2.116(C)(10). Thus, "[w]hen deciding a motion under MCR 2.116(C)(10), a court must view the evidence and all reasonable inferences arising from the evidence in a light most favorable to the nonmoving party. *Anzaldua v Neogen Corp*, 292 Mich App 626, 629; 808 NW2d 804 (2011).

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

Jones House's ordinary use. Such action, under Michigan case law, is or is the equivalent to a taking, and requires constitutional compensation. *Peterman, supra; Estate Dev Co, supra*. As such, the Circuit Court erred in dismissing the 'destructive forces' inverse condemnation claim against the Land Bank. As argued below, consistent with

> the instant [*Jones*] case shows that the Land Bank set into motion by entering into contracts and schemes of low-bid contractors and subcontractors, being the City and Rhode Bros, in causing the Land Banks blighted home to invade Plaintiffs' property and property interests ...

Plaintiffs' Brief in Opposition to Defendant Land Bank's Second Motion for Summary Disposition & Request for Summary Disposition pursuant to MCR 2.116(I)(2), at p. 9. The Circuit Court erred in dismissing and keeping from the jury this prima facie inverse condemnation claim against Defendant Saginaw County Land Bank Authority.

It is anticipated that the Land Bank will argue that it really was the employees of Rohde Bros who did the wrongful demolition causing the actual damage, and thus the Land Bank is absolved of constitutional responsibility. The workers at the scene were working for the Land Bank as subcontractors.[11] Pursuant to *Estate Dev II*, their actions are treated as the actions of the Land Bank, as this Court affirmed the use of jury instructions which provided that "[t]he government cannot avoid liability for inverse condemnation by authorizing work to be done by a third party whether the third party is an agent of the government or an independent contractor."[12]

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[11] The Land Bank contracted with the City of Saginaw (**Exhibit B**) who then, in turn, hired Defendant Rohde Bros (**Exhibit C**) to demolish *the Land Bank's* Blighted House.

[12] To the extent that the Land Bank is liable, it has clear-cut claims against the City of Saginaw and Rohde Bros for indemnification or contribution.

Because the actions taken by the Land Bank set into motion destructive forces which caused its imputed workers to have the Blight House strike to the Jones House, and cause damages needing extensive repairs/replacement, the loss of enjoyment of the property, lost rents, and other losses by setting into motion the destructive forces that caused the damage to the Jones Family Trust's property, an inverse condemnation action lies which must be reviewed by the *Jones* jury. The Circuit Court erred in granting summary disposition dismissing the case.

II. The Circuit Court erred applying the *O'Donnell* damages-limitation rule to the third-party breach of contract claim.

A. Standard of Review

Questions of law are reviewed de novo. *Ter Beek, supra*.

B. The Circuit Court erred in limiting the breach of third-party contract damages to the negligence limitation outlined in Price.

On the night before trial, the Circuit Court issued and faxed its decision limiting the scope of damages Plaintiffs could seek under the breach of third-party contract—limiting it to the same damages as provided under the negligence claim, the *O'Donnell* limitation. Plaintiffs' case was premised on seeking contract damages *far* in excess of the negligence claim damages. This limitation precluded the presentation of Plaintiffs' proposed case, as set and prepared to start about 15 hours from the issuance of the August 31st decision.

Plaintiff Jones Family Trust has appealed because the Circuit Court erred in limiting the scope of the claim of damages (and related evidence thereof) under the breach of third-party contract to the same damages under the negligence claim. While these parties agreed to an amount, this was with the clear understanding that the Circuit Court's imposed limitation would be challenged on appeal. This is that challenge.

Bonner v Chicago Title Ins Co, 194 Mich App 462, 472; 487 NW2d 807 (1992)("Where a party has claimed an appeal from a final order, the party is free to raise on appeal issues related to other orders in the case.").

It is undisputed: *Price v High Pointe Oil*, 493 Mich 238, 240; 828 NW 2d 660 (2013) provides that "the appropriate measure of damages in cases *involving the* ***negligent*** *destruction of property* is simply the cost of replacement or repair of the property unless permanently irreparable then the measure of damages is the difference between its market value before and after the damage." This is known (and referenced by the trial court) as the *O'Donnell* rule. As such, it is acknowledged (and has been for the case) that Plaintiffs' *negligence* claim against Defendant Rohde Bros is limited by *O'Donnell* rule as recently reaffirmed by *Price*. However, Plaintiff Trust also separately pled a claim for breach of third party contract with substantially greater claims of damages. In this case, the measure and scope of damages for contract claims are, and has long been, different from negligence-based claims. "It is well settled that the appropriate measure of damages for breach of a contract… is that which would place the injured party in as good a position as it would have been in had the promised performance been rendered." *Jim-Bob, Inc v Mehling*, 178 Mich App 71, 98; 443 NW2d 451 (1989); see also *Allison v AEW Capital Mgmt, LLP*, 481 Mich 419, 426; 751 NW2d 8 (2008)(same); *Corl v Huron Castings, Inc*, 450 Mich 620, 622 fn 7; 544 NW2d 278 (1996)(same); *Allen v Michigan Bell Telephone Co*, 61 Mich App 62; 232 NW2d 302 (1975)(same); *Ambassador Steel Co v Ewald Steel Co*, 33 Mich App 495; 190 NW2d 275 (1971)(same); *Dierickx v Vulcan Industries*, 10 Mich App 67; 158 NW2d 778

(1968)(same).[13] The damages recoverable for breach of contract are those that arise naturally from the breach. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). The recovery of damages for breach of contract is very flexible, *Lawrence v Will Darrah & Assoc*, 445 Mich 1, 12 fn 12; 516 NW2d 43 (1994), and is a question for the jury as the finder of fact, *McManamom v Redford Twp*, 273 Mich App 131, 141; 730 NW2d 757 (2006)("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."). "When 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).

Here, Plaintiff Jones Family Trust simultaneously sought to pursue <u>*all*</u> available remedies (trespass, negligence, and breach of third-party contract) regardless of legal consistency, as long as not awarded a double recovery. *Jim-Bob, supra*, at 92 (a plaintiff may simultaneously pursue all of his remedies… regardless of legal consistency, so long as plaintiff is not awarded double recovery.). Plaintiff Jones Family Trust had separate claims with separate (but likely partially overlapping) measures of damage, with a negligence claim delineated by *Price* and a breach of contract claim delineated by *Jim-Bob* and *Alan Custom Homes*. The Circuit Court erred in limiting Plaintiff Jones Family Trust's available damages under the breach of third-party contract

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[13] This is the same measure of damages for a constitutional taking. *DOT v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999)("The purpose of just compensation is to put property owners in as good a position as they would have been had their property not been taken from them. *** There is no formula or artificial measure of damages applicable to all condemnation cases. The amount of damages to be recovered by the property owner is generally left to the discretion of the trier of fact after consideration of the evidence presented.").

claim via the August 31, 2015 OPINION AND ORDER OF THE COURT, by applying the *O'Donnell* negligence law limitation.[14]

Below, at the eve of trial, Plaintiff was prepared to argue that the measure of damages under the breach of third party contract was the repair/rebuild cost of the Jones Home following the strike—that which would place the Jones Family Trust in as good a position as it would have been in had the promised performance been rendered—was well in excess of the amount it could have obtained solely with a negligence claim given the *O'Donnell* damages limitation. See **Transcript, Sept 1, 2015, p. 9.** Expert Sam Hudson was prepared "to provide expert testimony to establish what would be needed to repair or replace the home," while Expert Thomas Bailey, a local expert, was prepared to testify as to the cost to rebuild which would be modern code compliant. Mr. Hudson would have opined that rebuilding, not repairing, was the only possible scenario given the damage to the Jones House. By the damages limitation placed upon breach of third-party contract claim, both experts were precluded from testifying as to the same.

As such, the Circuit Court committed error in using the *O'Donnell* damages limitation on the breach of third-party contract claim. Because the Court forced the parties into a paradigm whereby Plaintiff was handcuffed and would have been prevented from making the proper arguments and presenting the evidence of damages sought under the standards of <u>*contract*</u> law to the jury, the parties agreed to an amount under the *O'Donnell* limitation after Rohde Bros conceded it breached the third party

[14] This is not to say that Rohde Bros could not argue to the *Jones* jury that damages <u>*should*</u> be limited to the fair market value; however, this is a question of fact for the jury to decide, not precluded from consideration by the judge. *McManamom*, *supra*, at 141 (damages are question for jury to find a matter of fact, not of law).

contract with the Jones Family Trust. See ORDER OF JUDGMENT. Given the error of the Circuit Court and given the entry of a final judgment against Defendant, Rohde Bros in the amount of $20,000.00 for the breach of third party contract claim in favor of Plaintiff, Jones Family Trust, [b]ased upon the *Opinion and Order of the Court*, dated August 31, 2015 and that Plaintiff, Jones Family Trust, appealed to the Michigan Court of Appeals to challenge said damages limitation imposed. This Court is requested to vacate the damages limitation rulings of the lower court, remand with instructions to apply the correct standard of damages to the breach of contract claim, and allow the issue to be placed to the *Jones* jury for a damages-only trial.

III. Depreciation is an affirmative defense to be raised by a defendant.

A. Standard of Review

Questions of law are reviewed de novo. *Ter Beek, supra*.

B. The Circuit Court erred in requiring Plaintiff to prove decepriation as part of its damages proofs.

As part of its August 31, 2015 order, the Circuit Court also explained, quoting *Strzelecki v Blaser's Lakeside Industries of Rice Lake, Inc*, 133 Mich App 191, 194-195; 348 NW2d 311 (1984)[15], that—

> Clearly, replacement cost alone, without any deduction for depreciation, is not sufficient evidence of market value at the time of the loss. See *State Highway Comm'r v. Predmore*, 341 Mich. 639, 642, 68 N.W.2d 130 (1955); *Bluemlein v. Szepanski*, 101 Mich.App. 184, 192; 300 N.W.2d 493 (1980), lv. den. 411 Mich. 995 (1981). 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. *Bluemlein, supra*.

[15] The holding of *Strzelecki* is not binding on this Court as being a pre-1990 decision. MCR 7.215(J)(1).

The Circuit Court then precluded "the replacement cost (new) as inadmissible" under both MRE 402 and MRE 403 concluding that such evidence—

> has no tendency to show what the fair market value of the property was at the time of the injury and, even assuming some minimal relevancy could be articulated, its probative value would be substantially outweighed by the danger of unfair prejudice and misleading and/or confusing the jury on the issue of valuation of property.

OPINION AND ORDER OF THE COURT, dated August 31, 2015, p. 8.

Under contractual damages, the standard for determining the damages suffered by a party are those "which would place the injured party in as good a position as it would have been in had the promised performance been rendered." *Jim-Bob, Inc, supra.* It was and is Plaintiff's theory that the value of damages is replacement costs because replacement would require meeting all modern building codes (and losing all existing non-conforming uses). See **Exhibit H, p. 6**. Expert Sam Hudson was prepared "to provide expert testimony to establish what would be needed to repair or replace the home," while Expert Thomas Bailey, a local expert, was prepared to testify as to the cost to rebuild which would be modern code compliant. Testimony of the residential builder set rebuild costs as being the *lesser* amount than actual replacement costs.

However, the issue of depreciation involves a reduction in the liability, thus is an *affirmative defense* to the evidence of damages to be proffered by plaintiff. An affirmative defense presumes liability but places the burden falls squarely onto the raising party to prove mitigating circumstances that would *lower* a damages award. *Rasheed v Chrysler Corp*, 445 Mich 109, 132; 517 NW2d 19 (1994). When a defendant

injures a plaintiff, it takes them as it find them.[16] In opposition to the motion in limine "Plaintiffs assert that the costs to repair or replace (i.e. reset) the Jones House to the condition it was before the strike is the true measure of damages (which will require meeting modern building code requirements)." To the extent that defendants would seek to reduce their liability, i.e. seeking to impose depreciation, their arguments must be presented to the jury via a jury instruction by a raised affirmative defense.[17]

As such, depreciation is not an element of damages to be proved by Plaintiff Jones Family Trust in its case in chief. The amount of damages to be recovered by the property owner is generally left to the discretion of the trier of fact after consideration of the evidence presented. See *VanElslander, supra.* No binding case law requires depreciation to be proven ***by a plaintiff*** as an element of damages. Whether depreciation should be applied is a question of fact as to the amount of damages—a question of fact for the *Jones* jury, not the trial court—as an affirmative defense to be affirmatively raised by the defendants and argued to the jury for their consideration. See *McManamom*, *supra*, at 141 ("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."). As such, the Court erred in concluding that it "disagrees with the assertion that depreciation is simply a defense to the amount of damages" and removed non-depreciated replacement

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[16] M Civ JI 50.10, explains: You are instructed that the defendant takes the plaintiff as [he / she] finds [him / her]. If you find that the plaintiff was unusually susceptible to injury, that fact will not relieve the defendant from liability for any and all damages resulting to plaintiff as a proximate result of defendant's negligence.

[17] Defendants did not raise the same via its listed affirmative defenses and is thus waived. The failure to raise an affirmative defense as required by the court rule constitutes a waiver of that affirmative defense. *Campbell v St John Hosp*, 434 Mich 608, 616; 455 NW2d 695 (1990). Additionally, the assertion of an affirmative defense must include the facts supporting the defense and the party asserting an affirmative defense has the burden of providing evidence to support the defense. MCR 2.111(F)(3); *AG ex rel DEQ v Bulk Petroleum Corp*, 276 Mich App 654, 664; 741 NW2d 857 (2007).

damages from the jury. This Court is requested to reverse the Circuit Court's holding of requiring Plaintiff to prove depreciation.

RELIEF REQUESTED

WHEREFORE, the Court is requested to reverse the dismissal of the inverse condemnation claims (state and federal) as to Defendant Saginaw County Land Bank Authority and reverse the damages limitation imposed by the Circuit Court as to the breach of third-party contact as to Defendant Rohde Bros Excavating, Inc and remand for a damages-only trial. Appellant also requests an award of standard costs pursuant to MCR 7.219.

RESPECTFULLY SUBMITTED:

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Date: January 18, 2016