ATTORNEYS FOR APPELLANTS

Jeffrey J. Stesiak
Ryan G. Milligan
Pfeifer Morgan & Stesiak
South Bend, Indiana

ATTORNEYS FOR APPELLEE

Martin J. Gardner
Andria M. Oaks
Christopher J. Uyhelji
Gardner & Rans, P.C.
South Bend, Indiana

IN THE COURT OF APPEALS OF INDIANA

Julie Nordin and Mike Nordin,
Appellants-Plaintiffs,

v.

Town of Syracuse,
Appellee-Defendant

July 14, 2022

Court of Appeals Case No. 22A-CT-135

Appeal from the Kosciusko Circuit Court

The Honorable Michael W. Reed, Judge

Trial Court Cause No. 43C01-2005-CT-49

Vaidik, Judge.

Case Summary

[1] This Court has established distinct measures of damages for permanent damage to land and permanent damage to buildings. *Gen. Outdoor Advert. Co. v. La Salle Realty Corp.*, 218 N.E.2d 141 (Ind. Ct. App. 1966). When land is permanently

damaged, the measure of damages is the pre-damage market value of the land minus the post-damage market value. *Id.* at 150. When a building is permanently damaged—that is, when the cost of repairing the building exceeds the building's pre-damage market value—the proper measure of damages is the full pre-damage market value, without subtracting the post-damage market value. *Id.* at 151. The distinction exists because land generally cannot be completely destroyed, while a building that is beyond repair should be treated as if it's been completely destroyed. *Id.* In this case, which involves permanent damage to a building, the trial court applied the measure of damages for permanent damage to land. That is, the court subtracted the post-damage market value of the building from the pre-damage market value instead of awarding the full pre-damage market value. For this reason and the others discussed below, we reverse.

Facts and Procedural History

[2] In June 2018, Julie and Mike Nordin bought a property on Lake Wawasee in Syracuse, within walking distance of their farm. They paid $277,000. There is a cottage on the property that was built in the 1920s ("the Cottage"). The Cottage was unoccupied and in need of work at the time of the purchase, but the parties disagree as to the extent of work needed. The Town of Syracuse ("the Town") emphasizes that the 2017 county property-tax assessment for the Cottage (the structure alone, separate from the land) was only $14,700 and contends it was "an uninhabitable, dilapidated shell of a structure that needed an entirely new

bathroom, new dry wall, new windows, new ceiling tiles, walls replaced, new plumbing, new faucets, a new stove, and a new foundation." Appellee's Br. p. 21. The Nordins acknowledge the Cottage was "older" and "quaint" but say it needed just "minor repairs" that they planned to complete themselves—painting, patching drywall, and installing flooring, a toilet, and a range. Appellants' Br. pp. 5, 6.

[3] A week after the Nordins bought the property, before they had done any work, the Town issued a work order to shut off the water at the Cottage because a deposit had not yet been paid. But the water was already off, so when a worker turned the valve, the water was turned on. The Cottage was flooded with 6,000 gallons of water. A claim representative for the Town's insurer estimated the repair cost to be $55,928.44, reduced to $43,062.26 for "Non-recoverable Depreciation." Appellants' App. Vol. III p. 36. After the flooding, the tax assessment for the Cottage was $14,300.

[4] In October 2018, the Nordins' attorney sent the repair estimate to the Kosciusko County Area Plan Commission. The Plan Commission responded with a letter explaining that the Nordins' property lies within a "special flood hazard area" and that "substantially improved/damaged structures" located within such an area "must be reconstructed in compliance with the Kosciusko County Flood Control Ordinance." Appellants' App. Vol. IV p. 175. The Flood Control Ordinance defines "substantial damage" as "damage of any origin sustained by a structure whereby the cost of restoring the structure to it's [sic] before damaged condition would equal or exceed 50 percent of the market

value of the structure before the damage occurred." *Id.* The Plan Commission determined that "based on the assessed value of the structure, $14,300[1] and the value of damage you provided set by the insurance company of $43,000 it appears that the structure sustained substantial damage and is subject to bringing the home into compliance with the Kosciusko County Flood Control Ordinance." *Id.*

[5] According to the Nordins (with no dispute from the Town), compliance with the Flood Control Ordinance would require elevating the "entire foundation" of the Cottage, meaning that "repair" of the existing structure is impossible—the only option is "a complete retrofit or rebuild." Appellants' Br. pp. 4, 8, 21. As a result, the Nordins obtained two estimates for demolition of the Cottage and construction of a similar structure. One estimate was $255,000, and the second was $294,589.83. In addition, an appraiser estimated a replacement cost of $269,483.

[6] The Nordins sued the Town for negligence, seeking damages for "damage to property, loss of use of property, and lost rental income." Appellants' App. Vol. II p. 16. The Town moved for summary judgment, acknowledging the Nordins are entitled to damages but arguing the damages are limited to the difference in the fair market value of the Cottage before and after the flooding. Relying on the Cottage's pre-flooding tax assessment of $14,700 and post-flooding tax

---

[1] This appears to have been an error. As noted above, the tax assessment of the Cottage "before the damage occurred" (as the Flood Control Ordinance contemplates) was $14,700, not $14,300.

assessment of $14,300, the Town proposed a damages award of $400. The Town asserted the Cottage was "significantly deteriorated" and "uninhabitable" before the flooding and therefore a larger damages award would be a "windfall" for the Nordins. *Id.* at 29. The Town also argued that because the Cottage was uninhabitable even before the flooding, the Nordins cannot recover for loss of use or lost rental income. The trial court agreed with the Town on both issues and granted its motion, awarding the Nordins only $400 in damages.

[7] The Nordins now appeal.

Discussion and Decision

[8] The Nordins contend the trial court erred by granting the Town's motion for summary judgment. We review such motions de novo, applying the same standard as the trial court. *Hughley v. State*, 15 N.E.3d 1000, 1003 (Ind. 2014). That is, "The judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Ind. Trial Rule 56(C).

I. Physical Damage

[9] The Nordins argue the trial court erred by awarding them only $400 for the physical damage to the Cottage. As they note, the trial court based its ruling on *General Outdoor Advertising Co. v. La Salle Realty Corp.*, 218 N.E.2d 141 (Ind. Ct. App. 1966). The Nordins contend the court should not have relied on *General*

Outdoor at all. In the alternative, they assert that even if *General Outdoor* controls the trial court erred in calculating damages as a matter of law.

[10] Before addressing those issues, we note an obvious error the Nordins missed. In *General Outdoor*, this Court distinguished between damage to land and damage to buildings. We explained that when land is "permanently" damaged, "the measure of damages is the market value of the real estate before the injury, less the market value after the injury[.]" *Id.* at 150. But when, as here, a building is "permanently" damaged—which occurs when the cost of repairing the building exceeds the market value of the building before the damage—the "proper measure of damages" is "the market value before the injury," without subtracting the post-damage market value. *Id.* at 151; *see also City of Marion v. Taylor*, 785 N.E.2d 663, 665 (Ind. Ct. App. 2003), *trans. denied*; *Warrick Cnty. v. Waste Mgmt. of Evansville*, 732 N.E.2d 1255, 1258 (Ind. Ct. App. 2000); *Sanborn Elec. Co. v. Bloomington Athletic Club*, 433 N.E.2d 81, 88 (Ind. Ct. App. 1982). The reason for the distinction is that land "can never be completely destroyed," while a building that cannot be repaired should be treated as if it's been destroyed, even if it's still standing. *Gen. Outdoor*, 218 N.E.2d at 151.

[11] Here, the trial court used the measure of damages for permanent damage to **land**:

> The costs of restoration exceed the fair market value of the cottage prior to the incident in question; accordingly, Plaintiffs have suffered a permanent injury to these improvements. Plaintiffs' damages equal the difference between the fair market value of their cottage prior to the incident ($14,700.00), less the

> fair market value of the cottage after the incident ($14,300.00), or $400.00.

Appellants' App. Vol. II pp. 10-11. But this case involves damage to a building, so to adhere to *General Outdoor*, the court should have awarded the Nordins the full amount of what it found to be the pre-flooding market value of the Cottage, $14,700, without deducting the post-flooding market value. While the Cottage was not reduced to a pile of rubble, it was destroyed in that it cannot be repaired and is therefore useless in its current state. The Nordins should be compensated accordingly, notwithstanding the fact that Kosciusko County assessed the Cottage at $14,300 for property-tax purposes even after the flooding.

[12] Before simply ordering $14,700 in damages, though, we must address the Nordins' arguments. In support of their first contention—that the trial court should not have used the *General Outdoor* measure of damages at all—they rely on the following passage from the opinion:

> It should be noted that this court is not of the opinion that the measure of damages which we are following in this case will be equally applicable in all possible fact situations: for example, here we do not have a problem of a permanent damage which might involve salvage proceeds or demolition costs. Any measure of damages must be flexible enough to vary with the necessities of the situation.

218 N.E.2d at 152. This language certainly shows, as the Nordins contend, that *General Outdoor* established a "proper" measure of damages, not a "mandatory"

measure. Appellants' Br. p. 12. But the Nordins fail to specify an alternative measure of damages. They merely assert that all the evidence should be presented to a jury and the jury should determine the appropriate amount of damages. *See id.* at 11 ("Damages are a determination for the jury, which is entitled to consider competing evidence of damages and fashion a damages award based on the circumstances of the case."). We are not convinced. The *General Outdoor* measure of damages, which is intended to protect property owners but also to "safeguard against a windfall," *see* 218 N.E.2d at 151, has been affirmed and applied many times since it was established. *See, e.g.*, *City of Marion*, 785 N.E.2d at 665; *Warrick Cnty.*, 732 N.E.2d at 1258; *Neal v. Bullock*, 538 N.E.2d 308, 309 (Ind. Ct. App. 1989), *reh'g denied*; *Sanborn Elec. Co.*, 433 N.E.2d at 88; *Smith v. Glesing*, 248 N.E.2d 366, 371 (Ind. Ct. App. 1969); *but see Baumholser v. Amax Coal Co.*, 630 F.2d 550, 554 (7th Cir. 1980). Without a compelling alternative, we decline to depart from that measure.

[13] The Nordins also assert that even if *General Outdoor* controls, the trial court erred in determining the pre-flooding market value of the Cottage to be $14,700. Again, we disagree. The Nordins contend the Town failed to show that $14,700, the pre-flooding property-tax assessment of the Cottage, "bears any resemblance to market value." Appellants' Reply Br. p. 6. However, they cite no authority saying a tax assessment cannot be evidence of market value. The Nordins also maintain that the estimated costs of repairing ($43,062.26 to $55,928.44) or rebuilding ($255,000 to $294,589.83) the Cottage are somehow reflective of its pre-flooding market value, but they don't tell us how. *See*

Appellants' Br. p. 13; Appellants' Reply Br. p. 5. It is undisputed that a restored or rebuilt cottage would be significantly nicer and more valuable than the old, unoccupied, and deteriorating structure the Nordins bought. The Nordins have not pointed to any other evidence to contradict the pre-flooding assessed value of $14,700. Therefore, we cannot say the trial court erred by using that amount in its damages calculation.[2]

[14] While the trial court properly relied on *General Outdoor* and correctly determined the pre-flooding market value of the Cottage, it did err in the respect noted at the outset: it should have awarded the Nordins the full pre-flooding market value of $14,700 rather than subtracting the post-flooding market value of $14,300. And there is one other error. The trial court's award of damages did not account for the cost of demolishing the Cottage, which must be done so that the Nordins can make full use of their property. Demolition costs were not at issue in *General Outdoor*, but the opinion made clear that such costs are a proper part of damages when a building cannot be repaired. 218 N.E.2d at 152. For these reasons, we reverse the award of only $400 for the physical damage to the Cottage and remand this matter to the trial court with instructions to address the two issues identified in this paragraph. The issue of the pre-flooding market

[2] In their reply brief, the Nordins seem to suggest the Cottage was worth $78,395, $111,330, $135,688, $145,518, $166,000, or $174,000 before the flooding. Appellants' Reply Br. pp. 6-7. We struggle to see how the appendix pages they cite support those valuations. *See* Appellants' App. Vol. IV pp. 220, 221, 226. In any event, the Nordins waived this argument by failing to raise it in their opening brief. *See Monroe Guar. Ins. Co. v. Magwerks Corp.*, 829 N.E.2d 968, 977 (Ind. 2005) ("The law is well settled that grounds for error may only be framed in an appellant's initial brief and if addressed for the first time in the reply brief, they are waived.").

value of the Cottage is settled; the Nordins are entitled to $14,700. Demolition costs are not settled. If the parties cannot reach a resolution, and if there is a genuine issue of material fact, that issue should proceed to trial.[3]

II. Loss of Use

[15] We also reverse the trial court's entry of summary judgment on the issue of loss of use.[4] The court concluded that the Cottage was in a "primitive," "unsafe," and "un-useable" condition even before the flooding and that "[t]he necessary repairs clearly exceeded 50% of its fair market value prior to the incident [$14,700], or $7,350," meaning the Nordins could not have used the Cottage without first "complying with the provisions of the Kosciusko County Flood Control Ordinance[.]" Appellants' App. Vol. II p. 11. As discussed above, this would have required elevating the "entire foundation" and "a complete retrofit or rebuild" of the Cottage. In short, the trial court found, as a matter of law, the Cottage was just as useless before the flooding as it is now.

[16] For two reasons, we disagree. First, there is a genuine issue of material fact as to what repairs, if any, were "necessary." As the Nordins note, "The cottage

---

[3] The dissent seems to take issue with both our reliance on the well-established *General Outdoor* measure of damages and our application of that measure. However, like the Nordins, the dissent fails to articulate a compelling alternative. It also asserts that "a genuine issue of material fact exists regarding whether the flooding negatively affected the value of the land and, if so, by how much." Slip op. at 15. Nowhere in their appellate briefs do the Nordins make any suggestion that the flooding negatively affected the value of the land on which the Cottage sits. Nor do the Nordins join the dissent's contention that "[t]he Town's negligence essentially resulted in a temporary taking by inverse condemnation." *Id.* at 16 n.6.

[4] The Nordins have abandoned their claim for loss of rental income. *See* Appellants' Reply Br. p. 12.

was not condemned or deemed uninhabitable or anything of the sort that would require a certain level of repairs to make it 'habitable,' leaving the matter to personal preference." Appellants' Reply Br. p. 14. And the Nordins insist they would have been happy in the Cottage with just a few "minor repairs." A jury might not believe them, but their insistence is enough to avoid summary judgment. *See Hughley*, 15 N.E.3d at 1004-06 (holding that party's "perfunctory and self-serving" affidavit was sufficient to avoid summary judgment).

[17] Second, even if more than just minor repairs were "necessary," the Town has not directed us to any evidence definitively establishing that the repairs would have cost more than $7,350. The Town asserts that "the costs associated with repairing the [Cottage] would have exceeded half of the fair market value of the [Cottage]," Appellee's Br. p. 27, but it doesn't provide a dollar figure or any record citation to support that claim. In fact, the Town did not include a single citation to the record in the loss-of-use part of its argument, in violation of Appellate Rule 46(A)(8)(a) and (B) (requiring that each contention in the argument section of the appellee's brief be "supported by citations to . . . the Appendix or parts of the Record on Appeal relied on"). All we have are conclusory statements from the Town and the trial court, which cannot be the basis for summary judgment. *See LaCava v. LaCava*, 907 N.E.2d 154, 166 (Ind. Ct. App. 2009) ("Conclusory statements are generally disregarded in determining whether to grant or deny a motion for summary judgment."). Therefore, on remand, the Nordins are entitled to a trial on their loss-of-use claim.

[18] Reversed and remanded.

Altice, J., concurs.

Crone, J., concurring in part and dissenting in part with opinion.

Julie Nordin and Mike Nordin,
Appellants-Plaintiffs,

v.

Town of Syracuse,
Appellee-Defendant

Court of Appeals Case No.
22A-CT-135

Crone, Judge, concurring in part and dissenting in part.

[19] I agree with the majority's decision to reverse and remand on the issues of damages and loss of use. But I cannot agree with its determination of the Cottage's pre-flooding market value as a matter of law and its restrictive approach to determining the proper measure of damages, so I must respectfully dissent on those points.

[20] Our state's highest court has proclaimed that "Indiana tort law seeks to make injured parties whole." *Patchett v. Lee*, 60 N.E.3d 1025, 1028 (Ind. 2016). "'Compensatory tort damages "are designed to place [plaintiffs] in a position substantially equivalent in a pecuniary way to that which [they] would have occupied had no tort been committed."'" *Id*. (quoting *Nichols v. Minnick,* 885 N.E.2d 1, 4 (Ind. 2008) (quoting *Restatement (Second) of Torts* § 903 cmt. a (Am. L. Inst. 1979)) (alterations in *Patchett*). In another case, our supreme court

reiterated the "well-established principle that damages are awarded to fairly and adequately compensate an injured party for her loss, and the proper measure of damages must be flexible enough to fit the circumstances." *Bader v. Johnson*, 732 N.E.2d 1212, 1220 (Ind. 2000).

[21] That principle was clearly stated over half a century ago by our Court in *General Outdoor* ("Any measure of damages must be flexible enough to vary with the necessities of the situation"), but the majority has chosen to ignore that portion of the case that it otherwise finds dispositive. By improperly faulting the Nordins for "fail[ing] to specify an alternative measure of damages" to the pre-flooding market value of the Cottage, slip op. at 8, the majority has also disregarded Indiana's summary judgment procedure. In their complaint, the Nordins alleged that the Town was negligent and that they suffered damages as a result of that negligence. The Town admitted liability but contested damages. As the party moving for summary judgment, the Town had the burden of making a prima facie showing that there is no genuine issue of material fact regarding the amount of the Nordins' damages and that the Nordins are entitled to that specific amount as a matter of law. *Munster Steel Co. v. CPV Partners, LLC*, 186 N.E.3d 143, 148 (Ind. Ct. App. 2022). Only after the moving party has met its burden does the burden then shift to the non-moving party to establish that a genuine issue of material fact actually exists. *Webb v. City of Carmel*, 101 N.E.3d 850, 864 (Ind. Ct. App. 2018). Even the majority admits that the Town failed to carry its burden, so the burden did not shift to the

Nordins to establish a genuine issue of material fact or allege all possible elements of their damages, let alone specify an alternative measure of damages.

[22] "Generally, '[t]he determination of damages is a question of fact[.]'" *Meridian Sec. Ins. Co. v. Hoffman Adjustment Co.*, 933 N.E.2d 7, 14 (Ind. Ct. App. 2010) (quoting *Bennett v. Broderick*, 858 N.E.2d 1044, 1051 (Ind. Ct. App. 2006), *trans. denied* (2007)), *trans. denied* (2011); *see also Warrick Cnty.*, 732 N.E.2d at 1260 ("The determination of damages is a function of the finder of fact when it requires an assessment of the credibility of witnesses and the weighing of evidence."). In its summary judgment motion, the Town baldly asserted that the land on which the Nordins' Cottage sits "was unaffected" by the flooding and that the county assessor's valuation of the Cottage for property-tax purposes was conclusive as to the Nordins' damages. Appellants' App. Vol. 2 at 25, 28. As for the land, it is undisputed that the Nordins cannot currently use it for its intended purpose because of the flooding caused by the Town's negligence; thus, at the very least, a genuine issue of material fact exists regarding whether the flooding negatively affected the value of the land and, if so, by how much. As for the Cottage, the Town's own insurance carrier estimated that the flooding caused damage that would cost roughly $50,000 to repair, which raises genuine issues of material fact regarding the Cottage's pre-flooding market value[5] and whether, as Plan Commission employee Matthew

[5] The majority is wrong to suggest that the Nordins bore the burden of "tell[ing] us how" the estimated repair costs "are somehow reflective of [the Cottage's] pre-flooding market value[.]" Slip op. at 8. The relevance of the estimated repair costs to the pre-flooding market value of the Cottage is a matter for a jury to determine.

Sandy suggested, the Nordins would have had to bring the Cottage into compliance with the Flood Control Ordinance when completing the allegedly minor repairs that they planned to do themselves before occupying the Cottage. *See* Appellants' App. Vol. 2 at 81-85 (Sandy's deposition); Appellants' App. Vol. 4 at 193 (Article 5, Section B of Flood Control Ordinance, which states that ordinance applies to "[a]ddition or improvement made to any existing structure where the cost of the addition or improvement equals or exceeds 50% of the value of the existing structure (excluding the value of the land)"). Both issues bear some relevance to the determination of the Nordins' damages and are matters for a jury, not an appellate court, to decide.

[23] Also, it is undisputed that the Nordins will have to comply with the Flood Control Ordinance when they rebuild their Cottage, which will result in tens of thousands of dollars of additional expenses that they might not have had to incur had no tort been committed, i.e., had the Town not negligently flooded the Cottage.[6] Because "[a]ny measure of damages must be flexible enough to vary with the necessities of the situation[,]" *General Outdoor*, 218 N.E.2d at 152, a jury should be allowed to determine whether the Nordins may recoup any or

[6] In support of its summary judgment motion, the Town designated a construction cost estimate obtained by the Hardins that projected the cost for demolishing the Cottage, installing pilings, and constructing a foundation in compliance with the Flood Control Ordinance at over $86,000. Appellants' App. Vol. 3 at 75 (Town's Ex. K). The Town's negligence essentially resulted in a temporary taking by inverse condemnation. *See Sloan v. Town Council of Town of Patoka*, 932 N.E.2d 1259, 1262 (Ind. Ct. App. 2010) ("A taking by inverse condemnation includes any 'substantial interference with private property which destroys or impairs one's free use and enjoyment of the property or one's interest in the property.'") (quoting *Ctr. Townhouse Corp. v. City of Mishawaka*, 882 N.E.2d 762, 770 (Ind. Ct. App. 2008), *trans. denied*).

all of those expenses as damages, in addition to the pre-flooding market value of the Cottage, demolition costs, and any other damages "proximately caused by the tortfeasor's breach of duty." *Bader*, 732 N.E.2d at 1220. The Nordins are the innocent parties in this case, and we should follow the Indiana tort law that seeks to make them whole, *Patchett*, 60 N.E.3d at 1028, rather than focus solely on "rais[ing] a safeguard against a windfall[,]" *General Outdoors*, 218 N.E.2d at 151, as the majority does here.