STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

SARAH LAUBACK and DAVID LAUBACK,

Plaintiffs/
Counter-Defendants,

Case No. 21-187270-CB
Hon. Michael Warren

v

STATE FARM FIRE AND CASUALTY COMPANY

Defendant/Cross-Defendant,

and

BELFOUR USA GROUP INC. d/b/a BELFOR PROPERTY RESTORATION,

Defendant/Counter-Plaintiff/
Cross-Plaintiff.

____/

OPINION & ORDER REGARDING
DEFENDANT BELFOR USA GROUP INC.'S MOTION IN LIMINE TO LIMIT
EVIDENCE OF PLAINTIFFS' PURPORTED DAMAGES

At a session of said Court, held in the
County of Oakland, State of Michigan
August 15, 2022.

PRESENT: HON. MICHAEL WARREN

____/

OPINION

I
Overview

Before the Court is Defendant Belfor USA Group Inc.'s Motion in Limine to Limit Evidence of Plaintiffs' Purported Damages. Having reviewed the Motion, the Response, and entertaining exhaustive oral argument, the Court issues this Opinion and Order. Because all of the Plaintiffs' claims have been dismissed other than a breach of contract claim involving defective workmanship of construction services to rebuild the Plaintiffs' home, Defendant Belfor argues that the Plaintiffs cannot pursue most of the categories of damages which they seek. In an emphatic but less than precise fashion, the Plaintiffs counter that Defendant Belfor should pay for everything the Plaintiffs seek.

At stake are:

- Whether the Plaintiffs may seek $418,013 in damages which will allegedly be incurred to rebuild the house when the Plaintiffs demanded that Defendant Belfor stop its construction services? Because the Court has already narrowed the Plaintiffs' claims to breach of defective workmanship under the contract, only damages relating directly to the defective workmanship can be pursued and the remaining damages (i.e., those required to complete reconstruction of the home as opposed to repairing defective construction) are barred.

- Whether the Plaintiffs may seek $84,281.20 in damages for breach of contract, neglect, and misrepresentations when any claims for negligence and misrepresentations have been dismissed and the remedy the Plaintiffs seek in essence is rescission? Because the negligence and misrepresentations claims have already been dismissed, and the remaining relief of rescission is impossible to grant, the answer is "no," and these damages are barred.

- Whether the Plaintiffs may seek damages for $11,308.83 under an emergency services contract when this claim has never been pled? Because no party is entitled to seek relief for unpled claims, the answer is "no," and these damages are barred.

- Whether the Plaintiffs may seek $84,600 for damages in adjusted living expenses caused by the alleged breach of contract involving defective workmanship when the argument is cursorily made? Because the argument is deemed abandoned and in any event such damages could be considered by the jury to be consequential damages, the answer is "yes," and these damages may be sought.

- Whether the Plaintiffs may seek $650,000 for pain and suffering damages under the remaining breach of contract claim? Because generally breach of contract claims do not support such damages and the allegations here fall short of exemplary damages, the answer is "no," and these damages are barred.

- Whether the Plaintiffs may seek damages of $28,000 in connection with a water pipe repair, $15,000 in costs incurred by Murphy Homes, and $20,018 for remediation/restoration work by 1 Environmental and FRR, even if the contractors who repaired the water pipe, Murphy Homes, and FRR are barred from testifying? Because duly noticed witnesses may be able to quantify such damages at trial, the answer is "yes," and these damages may be pursued, subject to the ability to present admissible evidence at trial.

II
Breach of Contract Damages Generally

To prevail on a claim for breach of contract, the plaintiff must establish by a preponderance of evidence that (1) a contract existed, (2) the terms of the contract, (3) that the Defendant breached the contract, and (4) that the breach caused injury to the Plaintiff. See e.g., *Miller-Davis Co v Ahrens Constr, Inc,* 495 Mich 161, 178 (2014); *Bank of Am v First Am Title Ins Co,* 499 Mich 74, 100 (2016).

"The proper measure of damages for a breach of contract is the pecuniary value of the benefits the aggrieved party would have received if the contract had not been

breached." *Ferguson v Pioneer Sate Mut Ins Co,* 273 Mich App 47, 54 (2006). Only those damages "that are the direct, natural, and proximate result of the breach[ ]" may be recovered. *Alan Custom Homes Inc v Krol,* 256 Mich App 505, 512 (2003). Therefore, "[t]he party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate cause of the breach," *Doe v Henry Ford Health Sys,* 308 Mich App 592, 601 (2014), or those "that are contemplated by the parties at the time the contract was made." *Lane v KinderCare,* 231 Mich App 689, 693 (1998) (citations omitted). In other words, the plaintiff must establish a causal link between the alleged improper conduct of the defendant and the plaintiff's damages with reasonable certainty. See *Miller-Davis Co,* 495 Mich at 180; *Alan Custom Homes,* 256 Mich App at 512; *Gorman v American Honda Motor Co,* 302 Mich App 113, 118-119 (2013); *Doe,* 308 Mich App at 601-602. In addition, the damages must be reasonably foreseeable and "must not be conjectural or speculative in their nature, or dependent upon chances of business or other contingencies." *Doe,* 308 Mich App at 602. Although the amount of damages need not be determined with mathematical precision, *Severn v Sperry Corp,* 212 Mich App 406, 415 (1995), there must be a reasonably certain basis for computing them. *Doe,* Mich App at 601-602. See also *Chelsea Inv Group LLC v Chelsea,* 288 Mich App 239, 255 (2010). "[U]ncertainty as to the fact of the amount of damage caused by the breach of contract is fatal." *Van Buren Twp v Visteon Corp,* 319 Mich App 538, 551 (2017), citing *Home Insurance Company v Commerical and Industrial Security Services, Inc,* 57 Mich App 143, 147 (1974).

Michigan has long held that "[u]nder the rule of *Hadley v Baxendale*, 9 Exch 341; 156 Eng Rep 145 (1854), the damages recoverable for breach of contract are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made. 5 Corbin, Contracts, § 1007. Application of this principle in the commercial contract situation generally results in a limitation of damages to the monetary value of the contract had the breaching party fully performed under it. Thus, it is generally held that damages for mental distress cannot be recovered in an action for breach of a contract." *Kewin v Massachusetts Mutual Life Ins Co,* 409 Mich 401, 414-415 (1980). Thus, "in breach of contract cases, the general rule is that exemplary damages are not recoverable absent allegation and proof of tortious conduct that is independent of the breach." *Casey v Auto Owners Ins Co,* 273 Mich App 388, 402 (2006) (quotation marks and citation omitted). To award exemplary damages, "the act or conduct must be voluntary. *Detroit Daily Post Co v McArthur,* [16 Mich 447, 453 (1868).] This voluntary act must inspire feelings of humiliation, outrage, and indignity. *Kewin,* [409 Mich 401]. The conduct must be malicious or so willful and wanton as to demonstrate a reckless disregard of plaintiff's rights. *Wise v Daniel,* 221 Mich 229 (1922); *McFadden v Tate,* 350 Mich 84 (1957); *Bailey v Graves,* 411 Mich. 510 (1981)." *Veselenak v Smith,* 414 Mich 567, 574-575 (1982) (several citations omitted). Accordingly, "[a]s a practical matter, the conduct [which the Supreme Court] has found sufficient to justify the award of exemplary damages has occurred in the context of the intentional torts, slander, libel, deceit, seduction, and other intentional (but malicious) acts. Due to the required mental element, negligence is not sufficient to justify an award of exemplary damages." *Id.* at 575 (footnote omitted). Even a bad faith

breach of a contract is insufficient to establish the basis for tortious conduct that would lead to the recovery of exemplary damages. *Kewin,* 409 Mich at 423.

Further, "Rescission abrogates a contract and restores the parties to the relative positions that they would have occupied if the contract had never been made." *Bazzi v Sentinel Ins Co, 502* Mich 390, 408 (2018). Rescission is also a legal remedy granted in the sound exercise of a trial judge's discretion. *University of Michigan Regents v Michigan Automobile Insurance Placement Facility,* unpublished per curiam opinion of the Court of Appeals, issued January 20, 2022 (Docket No. 354808), p 4.

III
Application of the Law to the Remaining Breach of Contract Claim

A
The Plaintiffs are not entitled to pursue damages for the cost of completion of construction because the predicate for these damages has been dismissed; however, the Plaintiffs may pursue the cost of replacing those items for which there was defective workmanship

The Court has previously dismissed the Plaintiffs' claim that Defendant Belfor is liable for failing to complete the reconstruction of the Plaintiffs' home. Yet, the Plaintiffs claim damages for exactly that. Because these are not damages that stem from defective workmanship, they are barred. Those damages far exceed the "[t]he proper measure of damages for a breach of contract" which "is the pecuniary value of the benefits the aggrieved party would have received if the contract had not been breached." *Ferguson,* 273 Mich App at 54. Moreover, because the Plaintiffs ordered Defendant Belfor to cease

and desist construction of the home, the Plaintiffs broke any chain of causation between the defective workmanship and the completion of construction. Such damages are not the direct, proximate result of Defendant Belfor. *Home Ins Co,* 57 Mich App at 146-147. As such, this category of damages is barred.

On the other hand, any damages incurred to replace any defective work are proper damages - this is exactly the proper measure of damages and such damages would be proximately caused by Defendant Belfor's alleged breach of contract.

B
The Plaintiffs may not seek $84,281.20 for breach of contract, neglect, delay, and misrepresentations because claims for negligence and misrepresentations have been dismissed and the remedy the Plaintiffs seek in essence is rescission which is impossible to grant

Repeating the pattern of asking for damages for claims that have already been dismissed, the Plaintiffs assert they are entitled to seek damages for neglect, misrepresentations, and delays. Because the underlying premise of such liability has been dismissed, no such damages may be pursued.

In addition, the Plaintiffs ask this Court in essence for the remedy of rescission - i.e., the Plaintiffs want a refund of the money paid to Belfor to return the parties to a pre-contractual basis. However, Belfor has constructed a roof[1] and otherwise performed a

[1] At oral argument, in an apparent misguided attempt to ignore the record, the Plaintiffs argued in passing that there were issues with the roof. Maybe there were - but those issues are not part of the Complaint and as far as this Court is aware, never made part of the record. The Court has been repeatedly graceful to the Plaintiffs and that grace has been returned with repeated discovery violations and dubious - if not specious

great deal of work - it is impracticable, if not impossible, to return the parties to their respective positions had the contract never been entered. As such, these damages are barred. *Bazzi, 502* Mich at 408. See also *Pioneer State Mutual Ins Co v Wright,* 331 Mich App 396, 409 (2020) ("Rescission abrogates a contract and restores the parties to the relative positions they would have occupied if the contract had never been made" [citation omitted]).

Finally, rescission damages are a matter of judicial discretion. Even viewing the evidence in the light most favorable to the Plaintiffs, the equities here do not warrant the remedy of rescission. To hold otherwise would basically grant the Plaintiffs a windfall of receiving a new roof and other work for free.

In sum, these damages are barred.

- arguments, exemplified by their request for damages on claims already dismissed and apparently weaved from whole cloth new allegations of liability during oral argument. The Plaintiffs have been skirting the edge of unethical conduct throughout these proceedings. They are hereby warned that any additional manufacturing of the facts without a record basis could very well result in additional sanctions if not a referral to the Attorney Grievance Commission. The Plaintiffs' counsel zeal for the Plaintiffs does not warrant such conduct. This is especially true for the upcoming jury trial. Enough is enough.

C

The Plaintiffs may not seek damages for $11,308.83 under an emergency services contract when this claim has never been pled

The Plaintiffs not only seek damages on claims that have been dismissed, they also seek damages on claims that have never been pled. The Complaint has never sought damages under the emergency services contract. As such, those damages are barred. MCR 2.111(B)(1) & (2).

D

The Plaintiffs may seek $84,600 in adjusted living expenses caused by the alleged breach of contract involving defective workmanship because the argument is deemed abandoned and in any event these damages could be considered consequential damages

The Plaintiffs argue that they have incurred $84,600 in adjusted living expenses incurred because of the defective workmanship of Defendant Belfor. Defendant Belfor argues that these damages are premised on the now dismissed theory of promissory estoppel and they were not contemplated of the parties at the time the contract was made. However, Defendant Belfor only cursorily argues this point and baldly asserts that adjusted living expenses were not contemplated. Why the Defendant is correct is not obvious.

The cursory argument constitutes abandonment of the argument. *Houghton v Keller*, 256 Mich App 336, 339-340 (2003) ("failure to properly address the merits of [one's] assertion of error constitutes abandonment of the issue"; a party "may not merely announce his position and leave it to this Court to discover and rationalize the basis for

his claims . . . nor may he give issues cursory treatment with little or no citation of supporting authority" [citations omitted]); *People v Bennett,* unpublished per curiam opinion of the Court of Appeals, issued April 8, 2008 (Docket No. 274390), p. 3 ("We similarly decline to address whether the application of MCL 768.27a in this case violated defendant's right to due process. . . . [H]e devotes a single, short paragraph to this issue with no analysis and little citation to relevant authority. A party cannot assert a position and then it to this Court to search for authority to sustain or reject that position, or to unravel and elaborate for him his arguments" [citations omitted]). After all, "[t]rial Courts are not the research assistants of the litigants; the parties have a duty to fully present legal arguments for its resolution of their dispute." *Walters v Nadell,* 481 Mich 377, 388 (2008).

Moreover, Defendant Balfor ignores that Michigan jurisprudence has provided two bases on which to ground consequential contract damages - only one of which is that the contract contemplates them. The other is that the damages are the "direct, natural, and proximate cause of the breach." *Doe,* 308 Mich App at 601. See also *Kewin* 409 at 414 ("damages recoverable for breach of contract are those that arise naturally from the breach ***or*** those that were in the contemplation of the parties at the time the contract was made" [emphasis added]). That a family who is unable to occupy a home because of defective workmanship during reconstruction would need to incur alternative living expenses on its face appears to be the direct, natural, and proximate cause of the breach

of contract. The jury could very well find this is so. This category of damages is appropriate.

E

The Plaintiffs may not seek $650,000 for pain and suffering damages because generally breach of contract claims do not support such damages and the allegations here fall short of any conduct warranting the award of exemplary damages

The Plaintiffs seek $650,000 for pain in suffering arising from the alleged breach of the contract for defective workmanship. However, Michigan law has long generally barred such damages for breach of contract claims. *Kewin,* 409 Mich at 414-415. The Plaintiffs have not asserted claims that could possibly sustain the exception of exemplary damages. At best their allegations rise to the level of bad faith breach of the contract, which is not enough. *Id.* at 423. Because of the absence of allegations and proof of purposeful, willful, tortious conduct that inspires feelings of humiliation, outrage, and indignity that is independent of the breach of contract, the Plaintiffs may not seek damages for pain and suffering. *Id.* at 423. See also *Bailey,* 411 Mich at 515-516; *Veselenak,* 414 Mich at 574-575; *Casey,* 273 Mich App at 402.

F

The Plaintiff may seek $28,000 in connection with a water pipe breakage, $15,000 by Murphy Homes, and $20,018 for remediation/restoration work by 1 Environmental and FRR even if the contractors who worked on water pipe, Murphy Homes, and FRR are barred from testifying because duly noticed witnesses may be able to quantify the damages

The Plaintiffs argue they are entitled to seek $28,000 of damages in light of repairs necessitated from a broken frozen water pipe in the home, $15,000 from Murphy Homes

for construction work, and $20,018 for remediation/restoration work by 1 Environmental and FFR. The Defendants argue that these damages must be barred because this Court has struck the contractors who repaired the water pipe and Murphy Homes from the witness list, and FRR was never listed on the witness list.

True, the Court's prior rulings on the witnesses stand, which means the water pipe contractor, Murphy Homes, and FRR will not be able to testify. However, that is not necessarily fatal to the Plaintiffs' ability to prove these damages. There may have other duly noticed witnesses who can testify to the extent of those repairs and the amount of damages. Simply put, both parties only cursorily address this argument. The proof will have to be in the pudding at trial. As such, this portion of the Motion is denied.

ORDER

Based on the foregoing Opinion,

1. Other than damages relating directly to the alleged defective workmanship, the Plaintiffs are barred from seeking $418,013 to rebuild the house.

2. The Plaintiffs are barred from seeking damages of $84,281.20 for breach of contract, neglect, and misrepresentations.

3. The Plaintiffs are barred from seeking damages of $11,308.83 under the emergency services contract.

4. The Plaintiffs may seek damages of $84,600 in adjusted living expenses caused by the alleged breach of contract involving defective workmanship.

5. The Plaintiffs are barred from seeking damages of $650,000 for pain and suffering.

6. The Plaintiff may seek damages of $28,000 in connection with a water pipe repair, $15,000 in costs incurred by Murphy Homes, and $20,018 for remediation/restoration work by 1 Environmental and FRR, subject to the ability to present admissible evidence of such damages at trial.