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CAUSE NO. 2019-33415

ABEL AND NANCY VERA, ET AL.,	§	**IN THE DISTRICT COURT OF**
	§	
***Plaintiffs*,**	§	
	§	
v.	§	
	§	**HARRIS COUNTY, TEXAS**
FIGURE FOUR PARTNERS, LTD., ET AL.,	§	
	§	
Defendants.	§	**234th JUDICIAL DISTRICT**

DEFENDANTS FIGURE FOUR PARTNERS, LTD., PSWA, INC., AND PERRY HOMES LLC'S COMBINED TRADITIONAL AND NO-EVIDENCE MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants Figure Four Partners, Ltd. ("Figure Four"), PSWA, Inc. ("PSWA") and Perry Homes, LLC ("Perry Homes") (collectively, the "Defendants") file this Combined Traditional and No-Evidence Motion for Partial Summary Judgment pursuant to Tex. R. Civ. P. 166a(b) and (i), and show the following:

SUMMARY

Defendants seek partial summary judgment on two claims and two measures of damages: vicarious liability; Water Code claims against Perry Homes and PSWA; stigma damages for Plaintiffs who suffered no physical property damage; and mental anguish damages. The evidence conclusively establishes Defendants had no right to control the work of the Contractors, precluding a vicarious liability claim. Likewise, there is no evidence Defendants controlled the details of LJA's work. Plaintiffs' Water Code claim may only be asserted against the property owner (Figure Four) and, therefore, is not viable against Perry Homes or PSWA.

Several Plaintiffs admit they suffered no physical harm to their property. Texas law arguably does not recognize stigma damages under any circumstances, but certainly does not allow stigma damages with no attendant physical injury to property. Moreover, those claims are barred

by the economic loss rule. Finally, negligence without other extreme conduct cannot support an award of mental anguish damages for Plaintiffs' negligence, nuisance, and trespass claims. Based on the foregoing, Defendants request a partial summary judgment in an effort to efficiently narrow the claims and issues for trial.

EXHIBITS

Defendants submit the following summary judgment evidence, which is attached hereto and incorporated herein by reference for all purposes:

- Exhibit 1: Affidavit of Taylor Gunn;
    - Exhibit 1-A: Warranty Deed
    - Exhibit 1-B: Agreement between Woodridge Municipal Utility District and Rebel Contractors, Inc.;
    - Exhibit 1-C: Agreement between Woodridge Municipal Utility District and Double Oak Construction, Inc.;
    - Exhibit 1-D: Agreement between Woodridge Municipal Utility District and Texasite, LLC;
- Exhibit 2: Affidavit of Andrew K. York; and
    - Exhibit 2-A: Various Plaintiff Fact Sheets.

STATEMENT OF UNDISPUTED FACTS

A. Figure Four acquires land for the development of single-family homes.

In January 2018, Figure Four purchased an approximate 268-acre tract of land known as "Woodridge Village" from Concourse Development, LLC. Ex. 1 and Ex. 1-A. Figure Four intended to develop the tract into a residential subdivision of single-family homes. *Id.* Woodridge Village is adjacent to a Kingwood subdivision called "Elm Grove."

B. Figure Four and the Woodridge MUD hire a team of professionals to lead the charge on the Development's design, required infrastructure, and lot development work.

Perry Homes, a residential homebuilder, was not the developer. Perry Homes purchases finished lots for home construction. *Id.* Figure Four, an affiliate of Perry Homes, owned the land made the subject of this lawsuit. Figure Four, however, is not an engineering firm, does not practice engineering, and does not perform the construction work necessary to convert raw land into residential lots. *Id.* Instead, Figure Four hires engineers to design and convert the raw land into a housing development. Figure Four also works with the local municipal utility district to assemble a team of expert consultants and contractors to build Woodridge Village. *Id.* Upon completion, Figure Four planned to sell lots in Woodridge Village to its homebuilding affiliate, Perry Homes. *Id.*

Figure Four hired LJA, an engineering firm that holds itself out as an expert in planning and designing residential developments, to prepare and oversee the construction of all engineering plans and designs for Woodridge Village, including all drainage and detention. *Id.* LJA prepared the designs, plans, and technical specifications (collectively, the "Construction Documents") and prepared and administered the bid package whereby the Woodridge Municipal Utility District ("MUD") elicited bids from contractors to perform the initial lot development tasks. *Id.* The MUD accepted bids and hired: (1) Double Oak for clearing and grubbing; (2) Rebel for excavation and construction of detention ponds, along with mass grading and construction of berms; and (3) Texasite to install water, sewer and drainage lines. *Id.*; *see also* Exs. 1-B, 1-C, and 1-D.

Double Oak, Rebel, and Texasite (the "Contractors") each entered into separate construction contracts with the MUD (the "Contracts") that memorialized their independent obligations and responsibilities. *Id.* In each Contract, Figure Four was a defined "Owner" for the

limited purpose of providing access and paying the Contractors on behalf of the MUD. *Id.*[1] As to the Contractor's obligations, each of the Contracts stated:

> 5.01. <u>INDEPENDENT CONTRACTOR</u>. It is understood and agreed that all Work done by Contractor shall meet with the approval of Owner's representative but that the detailed manner and method of doing the Work shall be under the control of Contractor as set forth more fully in these General Conditions, Owner being interested only in the result obtained, and that Contractor is an independent contractor as to all Work performed hereunder.

Exs. 1-B at §5.01; 1-C at § 5.01; 1-D at §5.01.

Separately, Figure Four contracted with LJA, not only to design the development and all necessary detention and drainage facilities, but also to oversee the construction as a site representative. Ex. 1. Figure Four paid LJA in excess of $100,000 for Project Representation Services, consistent with LJA's contractual and statutory obligations as licensed professional engineers to oversee the project and ensure the Contractors performed their work in accordance with the "Contract Documents" (including all plans and designs). *Id.* Consistent with this agreement, neither Figure Four, PSWA nor Perry Homes exercised actual control over the details, means, or methods of the activities and operations of the Contractors or LJA. *Id.*

C. Unprecedented rainfall events in May and September 2019 separately flood homes in Elm Grove and surrounding areas.

On May 7, 2019 heavy rains inundated the Houston area (the "May Rain"). Kingwood was hit especially hard, with most, if not all, of the surrounding areas under water. Due to the unprecedented rainfall, the area upstream of Woodridge Village as well as parts of Elm Grove located downstream experienced heavy flooding. *Id*. At the time, Double Oak, Rebel, and Texasite were actively working on their various scopes of work. *Id.* Within a matter of days, many of Elm

[1] As is typical in land development with a MUD, the developer—in this case Figure Four—pays the contractors and is reimbursed by the MUD after the development is complete and the MUD issues bonds to pay for the development work. *Id.* In the end, the MUD owns the utilities and detention facilities that the developer helped finance.

Grove property owners sued Figure Four, PSWA and Rebel for damages as a result of flooding from the May Rain. Additional Elm Grove homeowners filed two more lawsuits on May 17 and 24, 2019.

Five months later, Tropical Storm Imelda ("Imelda") brought another round of heavy rain to Kingwood, causing areas in and around Elm Grove to flood a second time. *Id.* According to Plaintiffs' own rainfall expert, the rainfall intensity during Imelda in the Kingwood area intermittently exceeded the threshold of a 1,000-year storm. Pls. Ninth Am. Pet., Ex. A-7 at 25. Of course, Plaintiffs amended their lawsuit to add new plaintiffs and claims arising out of Imelda.

Approximately 386 plaintiffs now assert claims against Defendants for violations of Texas Water Code Section 11.086, negligence, nuisance, and trespass. Their alleged damages include the costs of repair, mental anguish, diminution in value, and exemplary damages. However, each plaintiff's claim is unique; some apparently only suffered certain types of damages. As a result, Defendants file this motion for partial summary judgment based on the recoverability of certain categories of damages for certain plaintiffs, the applicability of the Water Code to non-property owner Defendants, and the alleged vicarious liability of Defendants for LJA's or the Contractors' conduct.

ARGUMENT AND AUTHORITIES

A party may file a single motion for summary judgment under Tex. R. Civ. P. 166a that requests judgment on both traditional and no-evidence grounds. *Binur v. Jacobo*, 135 S.W.3d 646, 650 (Tex. 2004). "The fact that evidence may be attached to a motion that proceeds under subsection (a) or (b) does not foreclose a party from also asserting that there is no evidence with regard to a particular element." *Id.* at 651. When a party moves for summary judgment on both traditional and no-evidence grounds, the court first addresses the no-evidence grounds. *Merriman*

v. XTO Energy Inc., 407 S.W.3d 244, 248 (Tex. 2013). "[I]f the non-movant fails to produce legally sufficient evidence to meet his burden as to the no-evidence motion, there is no need to analyze whether the movant satisfied its burden under the traditional motion." *Id.*

A no-evidence motion, filed after an adequate time for discovery has passed, is essentially a motion for a pretrial directed verdict. *Id.*; *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581 (Tex. 2006). A no evidence challenge will be sustained when: (1) there is a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove the vital fact is not more than a mere scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. *Merriman*, 407 S.W. 3d at 248. This case has been pending for two years, during which time the Plaintiffs have taken eight depositions of various fact-witnesses presented by all defendants and the parties have exchanged approximately 100,000 documents. Adequate time for discovery has passed and, indeed, the parties have actually conducted adequate discovery to address the issues raised herein.

"[T]he party moving for a traditional summary judgment [has] the burden to submit sufficient evidence that establishe[s] on its face that 'there is no genuine issue as to any material fact' and that it is 'entitled to judgment as a matter of law.'" *Amedisys, Inc v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014) (quoting Tex. R. Civ. P. 166a(c)). "A defendant who conclusively negates at least one of the essential elements of a cause of action or conclusively establishes an affirmative defense is entitled to summary judgment." *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010).

A. Plaintiffs' Causes of Action for Vicarious Liability and Water Code violations should be dismissed, at least in part.

The Contracts conclusively establish Defendants did not exercise control over the details of the means and methods of the Contractors' or LJA's work. In the absence of contradicting evidence, the Contracts preclude vicarious liability as a matter of law. Moreover, there is no evidence Defendants exercised any control over the details of the Contractors' or LJA's work. The evidence actually shows the opposite – none of the Defendants exercised actual control over the details of the work performed by LJA or the Contractors. Therefore, Plaintiffs' claims for vicarious liability against Defendants should be dismissed.

Plaintiffs' claim under Section 11.086 of the Texas Water Code may only be asserted against the property owner. The evidence is undisputed that Figure Four owned the subject property, not Perry Homes or PSWA. As a result, the Water Code claims against Perry Homes and PSWA should be dismissed as a matter of law.

1. The evidence conclusively establishes independent contractor relationships and there is no evidence otherwise to support vicarious liability as to the Contractors or LJA.

Plaintiffs allege that Defendants are vicariously liable for the acts or omissions of all "subcontractors [and] independent contractors" that were working on Woodridge Village. *See* Pls. Ninth Am. Pet. at ¶¶ 42, 51. To prevail on a vicarious liability claim, a plaintiff must demonstrate that a contractor has the right to control the means and methods of the work to be accomplished by its subcontractor. *Baptist Memorial Hospital System v. Sampson*, 969 S.W.2d 945, 947 (Tex. 1998). An individual or entity that hires an independent contractor is generally not vicariously liable for the tort or negligence of that person because an independent contractor has sole control over the means and methods of the work to be accomplished. *Id*.

i. The Contractors' agreement controls.

"[A] contract between the parties that establishes an independent contractor relationship is determinative of the parties' relationship" absent controverting evidence. *Bell v. VPSI, Inc.*, 205 S.W.3d 706 (Tex. App.—Houston [1st Dist.] 2006, no pet.). Indeed, when "a contract establishes an independent contractor relationship and does not grant control over the details of the work to the principal, then evidence outside the contract must be produced to show that despite the contract terms, the true operating agreement vested the right of control in principal." *Farrell v. Greater Houston Transp. Co.*, 908 S.W.2d 1, 3 (Tex. App.—Houston 1995, writ denied). Even "sporadic action" or the "occasional assertion of control" are insufficient to upset the contractual relationship. *Id*. Rather, the exercise of control "must be so persistent and the acquiescence therein so pronounced" as to vitiate the contract. *Id.*; *see also Newspapers, Inc. v. Love*, 380 S.W.2d 582, 592 (Tex. 1964).

The Contracts between the MUD and each of the Contractors expressly state that the Owner—which by definition included Figure Four—did not control the details of the manner and methods by which the Contractors performed their work:

> 5.01. <u>INDEPENDENT CONTRACTOR</u>. It is understood and agreed that all Work done by Contractor shall meet with the approval of Owner's representative but that the detailed manner and method of doing the Work shall be under the control of Contractor as set forth more fully in these General Conditions, Owner being interested only in the result obtained, and that Contractor is an independent contractor as to all Work performed hereunder.

See Exs. 1-B, 1-C and 1-D at § 5.01.

As in *Farrell* and *Bell*, this language is conclusive of the Contractors' status as independent contractors absent evidence otherwise. There is no evidence Defendants controlled the Contractors' work, much less that Defendants' control was so continuous and pervasive as to set

aside the Contracts. Therefore, Plaintiffs' claims for vicarious liability as to the Contractors should be dismissed

i. There is no evidence Figure Four controlled LJA.

Moreover, "[f]or the general contractor to be vicariously liable [for a subcontractor's actions], his control must rise to the level of directing how the work is to be performed or directing the safety of the performance." *Weiss v. Tucker*, No. 03-08-00088-CV, 2009 WL 790310, at *3 (Tex. App.—Austin Mar. 27, 2009, no pet.) A right of control requires more than a "general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations or deviations." *Id.* There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way. *Id.*

There is no evidence that Defendants controlled the details of the LJA's work. As a result, Defendants cannot be held vicariously liable for the conduct of LJA as matter of law. Therefore, summary judgment as proper as to Plaintiffs' vicarious liability claims against Defendants.

2. Neither Perry Homes nor PSWA owned the real property and, therefore, Plaintiffs' Water Code claims against them should be dismissed.

Plaintiffs allege that Figure Four, PSWA, and Perry Homes, are each liable under Section 11.086 of the Texas Water Code. Pls.' Ninth Am. Pet. at ¶¶ 26–37. Texas Water Code Section 11.086 provides that "[n]o person may divert or impound the natural flow of surface waters in this state, or permit a diversion or impounding by him to continue, in a manner that damages the property of another by the overflow of the water diverted or impounded." Tex. Water Code § 11.086. Section 11.086 requires that the alleged offending party own the underlying real property that provides the basis for a plaintiff's claim. *Kraft v. Langford*, 565 S.W.2d 223, 229 (Tex. 1978), *disapproved of on other grounds, Schneider Nat. Carriers, Inc. v. Bates*, 147 S.W.3d

264 (Tex. 2004) ("The statute is a rule of property. . . [a]s a rule of property which creates easements and limits their use, the statute has no application to persons or entities who are not proprietors of land.").[2]

In *Kraft*, the defendant engineer did not own the subject real property. 565 S.W.2d at 225. The engineer designed the drainage system made the subject of the plaintiff's claims. *Id.* The plaintiff sued the engineer in tandem with the landowner for allegedly violating Section 11.086. *Id.* The Texas Supreme Court held the engineer was "not subject to the statutory cause of action provided by [Section 11.086]" because the engineer did not own the property. *Id.* at 226; *see also id.* at 229 ("[A] party injured by excess overflow of surface water caused by the acts of a third party . . .must, as to the third party, look to the common law for remedy."). Stated simply, Section 11.086 does not create a viable cause of action against non-property owners. *Id.*; *Muzquiz v. R. M. Mayfield & Co.*, 590 S.W.2d 742, 743 (Tex. Civ. App.—Houston [14th Dist.] 1979) ("[T]he statute [Section 11.086] does not apply because the defendant [] was not a landowner and thus not within the provisions of the statute.").

Here, the undisputed evidence shows that neither Perry Homes nor PSWA owned the real property at Woodridge Village on May 7 or September 19, 2019. Figure Four was the only property owner at any relevant time. Ex. 1. While this cause of action may be asserted against Figure Four as the property owner (Figure Four contests the merits of this claim), the cause of action is facially improper as to Perry Homes and PSWA. To be clear, Figure Four disputes and denies that it diverted or impounded water in a manner giving rise to liability under the Texas

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[2]*See also City of Magnolia v. Smedley*, 2018 WL 2246533, at *4 (Tex. App.—Beaumont May 17, 2018, no pet.); *Techman v. City of Bellaire*, 1994 WL 268226, at *3 (Tex. App.—Houston [1st Dist.] June 16, 1994, writ denied) ("[11.086] only applies to proprietors of the land. . . [t]herefore, the [Defendant] could not be liable unless (1) *it owned the adjacent land*, and (2) it diverted or impounded water there in a manner that damaged the appellant's property.") (emphasis added) (internal citations omitted).

Water Code. However, Section 11.086 of the Water Code only applies to a property owner, and any such claim against a non-property owner such as PSWA, Perry Homes or any other Defendant in this case arises outside of the Water Code consistent with *Kraft*. Therefore, the court should Plaintiffs' claims arising under the Water Code as asserted against Perry Homes and PSWA.[3]

B. Some Plaintiffs are not entitled to certain measures of damages because they did not suffer any actual damage to real property.

As a whole, Plaintiffs allege and seek to recover stigma damages and mental anguish damages. Assuming *arguendo* they first prove liability, some Plaintiffs may arguably seek these damage measures. However, 70 Plaintiffs do not allege or claim the requisite physical harm as a precursor to their ability to recover these measures of damages. Likewise, the economic loss rule precludes such recovery. Even for those plaintiffs who suffered physical harm, there is no evidence of heightened culpability that would give rise to a claim for mental anguish.

1. Texas law affords no remedy for Plaintiffs without physical injury.

Two legal theories invalidate the claims of Plaintiffs who acknowledge that their property did not flood in the May and/or September events. Seventy of Plaintiffs fall into this category. Ex. 2, 2-A. First, Texas does not recognize stigma damages where no physical injury to property has occurred. *Houston Unlimited, Inc. v. Mel Acres Ranch*, 443 S.W.3d 820, 824–27 (Tex. 2014).[4] Second, Texas' adoption of the economic loss rule prohibits recovery for tort claimants seeking purely economic damages unaccompanied by physical injury to the plaintiff or to the plaintiff's property. *LAN/STV v. Martin K. Eby Constr. Co.*, 435 S.W.3d 234, 235 (Tex. 2014).

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[3] Figure Four disputes that it is liable for any alleged violation of Section 11.086.

[4] The Supreme Court left open the question in *Houston Unlimited* of whether stigma damages are recoverable where the plaintiff suffered physical harm to property.

i. Texas Courts Have Never Recognized Recovery for Stigma Damages Without an Attendant Physical Injury.

Texas does not recognize recovery for stigma damages, must less stigma damages in the absence of physical injury to a claimant's property. *See Houston Unlimited*, 443 S.W.3d at 827. In *Houston Unlimited*, the Court considered whether Mel Acres, the plaintiff ranch, could recover stigma damages when a nearby metals processing plant, the defendant, polluted the ranch's stock tank. *Id.* at 823. Mel Acres sued for nuisance, trespass, and negligence. *Id.* Mel Acres did not seek remediation costs, but sought only a loss of fair market value to the entire ranch. *Id.* Mel Acres alleged that the "stock tank remained 'adversely affected,' that the ranch had been 'devastated' as a 'functional property,' and that [the defendant's] conduct has limited the ranch's future use." *Id.* Stated simply, the plaintiff sought to recover stigma damages. *Id.* ("'Stigma damages essentially constitute 'damage to the reputation of the realty.'") (citation omitted). The jury awarded the plaintiff $349,312.50 in lost market value.

The Texas Supreme Court recognized that it "has never directly addressed the recoverability of stigma damages." *Id.* at 825. Without ultimately resolving the issue, the court addressed an "apparent conflict" between its earlier decisions regarding "mutually exclusive" landowners' remedies where their injury was either permanent or temporary. *Id.* ("Generally, we have permitted landowners to recover either the lost value of their land if the ***injury*** to the land is permanent or the cost to repair or remediate the land if the ***injury*** is temporary.") (emphasis added) (*citing Schneider Nat'l Carriers Inc. v. Bates*, 147 S.W.3d 264, 276 (Tex. 2004); *Kraft v. Langford*, 565 S.W.2d 223, 227 (Tex. 1978)). The court then noted that two of its other decisions support the proposition that a claimant can "recover both *repair costs* and the diminution of value remaining *after the repairs* were completed." 443 S.W.3d at 826–27 (emphasis added) (*citing*

Ludt v. McCullom, 762 S.W.2d 575, 576 (Tex. 1988); *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 441 (Tex. 1995)).

Implicit throughout the court's analysis is the prerequisite of physical injury to the claimant's property. The *Schneider* and *Kraft* cases address how the nature of the injury—temporary or permanent—impacts the claimant's remedy. *Id.* at 826. Likewise, *Ludt* and *Parkway* presume the existence of a physical injury requiring repair.[5] *Id.* For example, the court stated, "[w]e held that the claimant in *Ludt*, however, could not recover for diminution in value because he 'failed to submit and obtain a jury finding sufficient to establish the permanent reduction in market value *after repairs.*'" *Id.* (emphasis in original). This is consistent with other jurisdictions across the country.[6]

Assuming Texas does recognize stigma damages as a compensable form of recovery, such damages would be necessarily conditional on the existence of a physical injury to the claimant's property that was repaired. Accordingly, the claims of those Plaintiffs who did not flood in either

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[5]*See,* Tex. Pattern Jury Charge 31.4A (requiring "partial destruction" for difference in market value only); *see also* Tex. Pattern Jury Charge 31.4B (contemplating the cost of repair for recovery of diminution of value).

[6]*See, e.g., Bradley v. Armstrong Rubber Co.*, 130 F.3d 168, 176 (5th Cir. 1977) ("The requirements of permanent and physical injury to property ensure that this does not open the floodgates of litigation by every property owner who believes that a neighbor's use will injure his property."); *Berry v. Armstrong Rubber Co.*, 989 F.2d 822, 829 (5th Cir. 1993) (affirming district court's dismissal of claim for stigma damages because property owner failed to demonstrate that defendant's hazardous substances physically damaged his property); *In re Paoli R.R. Yard PCB Litig.,* 113 F.3d 444, 463 (3d Cir. 1997) (requiring that property owner demonstrate physical damage to property to recover stigma damages in addition to "damage caused by negative publicity alone"); *Adams v. Star Enter.*, 51 F.3d 417, 424 (4th Cir. 1995) (property owners could not recover stigma damages for nearby oil spill under negligence and nuisance theories because their land was not contaminated); *Mercer v. Rockwell Int'l Corp.*, 24 F. Supp. 2d 735, 744–45 (W.D. Ky. 1998) (defendant's release of PCBs onto plaintiff's property must have caused a health risk for plaintiff to recover stigma damages); *Adkins v. Thomas Solvent Co.*, 487 N.W.2d 715, 725 (1992) (denying property owner's claim for property depreciation because neighboring waste site did not contaminate owner's land); *Golen v. Union Corp.*, 718 A.2d 298, 300 (Pa. Super. Ct. 1998) (denying property owner's claim for property depreciation because neighboring waste site did not contaminate owner's land); *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1246 (Utah 1998) (property owners must prove that hazardous substance migrated to property and caused physical injury to recover stigma damages); *see also* Jennifer L. Young, *Stigma Damages: Defining the Appropriate Balance Between Full Compensation and Reasonable Certainty,* 52 S.C. L. Rev. 409, 424 (2001) ("While most jurisdictions agree that plaintiffs must experience some physical injury to their property before they may recover stigma damages, jurisdictions are divided on whether the injury must be temporary or permanent.").

the May or September storms are barred. Any Plaintiffs who did not flood in the May storm, but flooded in the September storm, are barred from bringing any claim for stigma damages resulting from the May storm. Likewise, any Plaintiffs who flooded in the May storm, but did not flood in the September storm, are barred from bringing any claim for stigma damages resulting from the September storm.[7]

ii. The economic loss rule bars recovery absent physical injury.

The economic loss rule in Texas "has long restricted recovery of purely economic damages unaccompanied by injury to the plaintiff or his property. . . ." *LAN/STV v. Martin K. Eby Constr. Co.*, 435 S.W.3d 234, 235 (Tex. 2014). For unintentional torts, the injury requirement serves to prevent boundless liability to defendants where the tort concept of foreseeability fails to provide adequate limitation. *Id.*

LAN/STV makes clear that the economic loss rule exists to control unlimited liability to alleged unintentional tortfeasors. *LAN/STV*, 435 S.W.3d at 239, 249. There must exist some limitation on potential liability for pure economic losses arising out of unintentional torts, or such liability would be infinite. *Id.* at 239. Indeed, "liability for economic loss directly resulting from physical injury to the claimant or his property— such as lost wages or medical bills—is limited by the scope of the injury . . . [l]iability for a standalone economic loss is not." *Id.*

Consistent with Texas law, Plaintiffs who suffered no physical injury to real property are precluded from recovering economic damages in the form of "stigma" or diminution in value. As a result, the Plaintiffs identified in Exhibit 2-A should be barred from recovery of such damages. Without an attendant physical injury, their claims should be dismissed with prejudice.

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[7] Defendants are not admitting that Plaintiffs who suffered damage to property that was repaired are entitled to recover stigma damages. As discussed above, the Texas Supreme Court acknowledged in *Houston Unlimited* it had not decided whether such damages are recoverable. 443 S.W.3d at 825. Defendants expressly reserve the right to present further arguments and briefs on this issue at the appropriate time.

iii. Given the foregoing legal parameters, several Plaintiffs' claims should be dismissed as a matter of law.

The Plaintiffs identified in Exhibit 2-A affirmatively state their property suffered no physical damage during the May and/or September floods. Thus, taking the Texas Supreme Court's implicit physical injury requirement to recover stigma damages in tandem with or in the alternative to the Court's application of the economic loss rule, those Plaintiffs who did not suffer physical property damage during either storm do not have a valid claim for recovery of stigma damages under Texas law. Plaintiffs asserting no physical injury resulting from the May storm cannot recover purely economic losses related to the May storm, and those Plaintiffs asserting no physical injury resulting from Imelda cannot recover purely economic losses related to Imelda. The Court should dismiss those Plaintiffs' claims identified in Exhibit 2-A accordingly.

2. There is no evidence of willful and deliberate conduct, that would give rise to mental anguish damages.

Plaintiffs also seek to recover damages for "[m]ental anguish and/or emotional distress."[8] *See* Pls.' Ninth Am. Pet. at ¶ 78. In order to recover mental anguish damages resulting from a defendant's negligent injury to the plaintiff's property, the plaintiff must show the defendant acted with a heightened level of culpability. *City of Tyler v. Likes*, 962 S.W.2d 489, 498 (Tex. 1997) ("[W]e have consistently and recently held that without proof of heightened culpability, mental anguish is not recoverable . . . for injuries to economic rights"). The standard is even higher for trespass claims; the plaintiff must prove the defendant's trespass was willful and deliberate. *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 922 (Tex. 2013). There is no evidence to support either heightened standard and, therefore, summary judgment is proper on these damages.

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[8]Texas does not distinguish between "Mental Anguish" and "Emotional Distress" damages in the context of real property damage. *See City of Tyler v. Likes*, 962 S.W.2d 489, 499–500 (Tex. 1997) (compiling cases).

i. Negligent injury to property is insufficient to support mental anguish damages.

A plaintiff cannot recover mental anguish damages for injury to real property based solely on negligent damage to his property. *Id.* ("[M]ental anguish based solely on negligent property damage is not compensable as a matter of law."); *see also e.g.*, *Great Am. Ins., v. Hamel*, 444 S.W.3d 780, 811 (Tex. App.—El Paso, 2014) *rev'd on other grounds*, 525 S.W.3d 655 (Tex. 2017); *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 754 (Tex. App.—Houston [14th Dist] 1998). Mental anguish damages must be based on some malevolence, ill will, hostility, or other extreme conduct. *See Cox v. Helena Chem. Co.*, 2020 WL 6108319, at *8 (Tex. App.—Eastland Oct. 16, 2020, pet. filed) (upholding summary judgment on the denial of mental anguish where plaintiffs failed to proffer evidence showing the alleged "negligence was gross in nature and involved some ill will, animus, hostility, malevolence, or intention to harm the claimant personally"); *see also Parkway Co., v. Woodruff*, 901 S.W.2d 434, 445 (Tex. 1995) (refusing to allow recovery of mental anguish damages on evidence of defendants negligence and resulting property damage alone).

The Texas Supreme Court addressed this specific issue in the context of a flood in *City of Tyler v. Likes*, 962 S.W.2d 489, 492 (Tex. 1997) ("The primary issue is whether plaintiff may recover from the [defendant] for mental anguish resulting from the flood."). There, the plaintiff sued the City of Tyler, in part, for "negligently constructing and maintaining the culverts," and "negligently diverting water onto her property." *Id.* at 493. A heavy rain overwhelmed the drainage system constructed by the city and flooded the plaintiff's home. *Id.* In addition to $100,000 in property damage, the plaintiff alleged that she suffered over $150,000 in mental anguish damages resulting "'from the loss of many personal irreplaceable items' and 'because of

her feelings of insecurity both for her home, personal property and personal safety during times of rainfall.'" *Id.*

The Court began its analysis stating that mental anguish damages are frequently denied because they (1) lack predictability, and (2) are difficult to quantify. *Id.* at 494–95 ("[T]he law has not yet discovered a satisfactory empirical test for what is by definition a subjective injury."). *Likes*, however, recognized that "[m]ental anguish damages are recoverable for some common law torts that generally involve intentional or malicious conduct[.]" *Id.* at 495. The Court noted that Texas law permits the recovery of mental anguish damages in negligence actions based on (1) personal injury, (2) breach of duty arising out of special relationships (*i.e.*, physician-patient) and, (3) cases involving "injuries of such a shocking and disturbing nature that mental anguish is a highly foreseeable result" (*i.e.*, wrongful death, bystanders to family member's serious injury). *Id.* at 495–96.

Likes, however, only involved negligent injury to real property. *Id.* The plaintiff did not allege that the "City intended or knew that its actions would result in the flooding of her home, or that it acted with malice." *Id.* at 495. Consequently, absent the exceptions noted above, the Court held that "mental anguish based solely on negligent property damage is not compensable as a matter of law." *Id.* at 497. Accordingly, the plaintiff could not recover mental anguish damages in connection with the flooding of her property without evidence of the defendant's heightened culpability.[9]

Here, there is no evidence that the Defendants acted with the requisite level of heightened culpability. There is no evidence Defendants acted with malevolence, ill will, hostility, or any

[9]*See also Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 753–57 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (prohibiting recovery for mental anguish in a gross negligence case).

other extreme act. At best, Plaintiffs' claim is one of negligent injury to real property, just like the plaintiff in *Likes*. As a result, the Court should dismiss Plaintiffs' claims for mental anguish.

ii. Negligence, without more, does not support mental anguish damages for an alleged nuisance.

Plaintiffs also apparently seek mental anguish damages on their nuisance claim. Mental anguish damages are not recoverable for a mere negligent nuisance. *Port of Houston Auth. v. Aaron*, 415 S.W.3d 355, 364-65 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (citing *Likes*, 962 S.W.2d at 497); *Sciscoe v. Enbridge Gathering (N. Tex.), L.P.*, 519 S.W.3d 171, 190 (Tex. App.—Amarillo 2015) *rev'd on other grounds, Town of Dish v. Atmos Energy Corp.*, 519 S.W.3d 605 (Tex. 2017). There is no evidence that Defendants intentionally created a nuisance. Consequently, Plaintiffs' claim for mental anguish fails.

iii. There is no evidence Defendants trespassed willfully and deliberately.

The heightened culpability requirement for recovery of mental anguish damages extends to trespass claims. *Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 922 (Tex. 2013). "Texas courts have required a showing of *deliberate and willful trespass* and actual property damage before awarding damages for emotional distress or mental anguish[.]" *Id.* (emphasis added).

The *Cox* case illustrates the need for deliberate and willful trespass to recover mental anguish damages. *Id.* In *Cox*, the plaintiff sued for trespass after overspray from an aerial application of herbicide drifted and damaged its cotton crops. *Id* at *1. The trial court granted partial summary judgment on the issue of trespass, emotional distress, and punitive damages. *Id.* On appeal, the court considered whether the dismissal of plaintiff's trespass claim, and mental anguish damages arising therefrom was appropriate. *Id.* The court noted, "an unauthorized entry onto the land of another is a trespass, and it is a willful trespass if it was intended and deliberately

done." *Id.* at *9. However, the court found that the plaintiff failed to produce evidence showing that defendants willfully and deliberately caused the herbicide drift. *Id.* Accordingly, the plaintiff's mental anguish damages based on its trespass claim were denied. *Id.*

There is no evidence that Defendants deliberately and willfully trespassed. Without such evidence, Plaintiffs cannot recover damages for mental anguish, and those claims should be dismissed as a matter of law.

PRAYER

Based on the foregoing, Defendants respectfully request the Court grant summary judgment and dismiss Plaintiffs' claims against Defendants for vicarious liability, violations of the Texas Water Code as alleged against Perry Homes and PSWA, stigma damages for the Plaintiffs identified in Exhibit 2-A, and mental anguish damages with prejudice, along with any such other and further relief, at law or in equity, to which Defendants may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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