D.A. 12-2-93 D47

IN THE SUPREME COURT OF FLORIDA

DAVEY COMPRESSOR COMPANY,

Petitioner,

v.

CITY OF DELRAY BEACH,

Respondent.

CASE NO. 81,538

On Review from the
Fourth District Court of Appeal
Case No. 90-02969

ANSWER BRIEF OF RESPONDENT CITY OF DELRAY BEACH

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STATEMENT OF THE CASE

This case arises out of the negligent and illegal disposal by the Aero-Dri Division of Davey Compressor Company ("Aero-Dri" or "Davey")[1] during the period from 1981 to 1987 of thousands of gallons of highly toxic liquid hazardous waste on to the ground behind its industrial air compressor reconditioning facility in Delray Beach, Florida. Those hazardous wastes migrated through the sandy soil into the groundwater below, and contaminated the City's drinking water wells known as the "20-Series" wells, which supply more than eight million gallons of water per day to the 53,000 residents of Delray Beach. The result is a very serious pollution problem that will take decades to clean up.

Petitioner's Statement of the Case is substantially accurate. However, because several material facts were omitted, we are providing that information herewith. First, petitioner understates the extent and the severity of its illegal disposal activities. As the Court below stated in its opinion, from 1981 to 1987, Davey purchased between 5,280 and 6,000 gallons of the highly toxic solvent "perchloroethylene" (also known as "tetrachloroethylene" or "perc"), for use in cleaning oil and grease from used air compressor parts. Davey Compressor Co. v. City of Delray Beach, 613 So.2d 60 (Fla. 4th DCA 1993). Expert testimony presented at the trial, utilizing a "materials balance" reconstruction, established that at least half of this -- many

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[1] Aero-Dri Division of Davey Compressor Co. and Davey Compressor Co. were initially each named as defendants. The parties stipulated at the outset of the trial that they are a single entity. See trial transcript (hereinafter cited as "T.___") at 9 and 3382.

thousands of gallons -- reached the groundwater in the vicinity of the City's wellfield following its illegal disposal on the ground by Davey (T.1438-53, AT10; [testimony of John Glass, Ph.D.]).[2] This disposal was carried out at the direction of the plant manager, Jack Champion, and with the active encouragement and support of the division president, Mario Bevilacqua (T.561-8, 576-82, AT5; T.522-8, 535-8, AT4; T.853-5, AT7).

When the City discovered the contamination, it reported this promptly to the Palm Beach County Health Department and the Florida Department of Environmental Regulation ("DER", subsequently renamed Department of Environmental Protection), the two regulatory agencies that oversee and enforce compliance with drinking water standards (T.98-105, AT2). These agencies initially directed the City to shut down five of the six wells in the system and procure potable water from other sources on an emergency basis, which the City did (purchasing it from Boynton Beach and Boca Raton), and then to install equipment to clean up the drinking water by treating it to reduce the "perc" levels so as to comply with the 3 parts per billion drinking water standard (T.98-121, 132-4, 146, 299-307, AT2; PX-33)[testimony of Robert Pontek, Director of Public Utilities for the City]; T.475-86, 499, AT3 [testimony of Arthur Williams of the Palm Beach County Department of Health]).

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[2] Citations to "AT ___" are to the tabs at which the cited document or testimony is located in Respondent's Appendix filed simultaneously herewith. "T. ___" refers to pages of the trial transcript. "R ___ " refers to pages of the record.

At the insistence of these regulatory agencies, the City retained the environmental engineering firm of CH2M Hill to design an interim and permanent treatment system to remove the waste solvents from the drinking water (T.110-114, AT2 [Robert Pontek]).[3] The temporary carbon treatment units, followed by long-term air-stripping units, provided a successful and cost-effective restoration of the drinking water supply to within regulatory standards established for the protection of public health. (T.158-167, 182-3, AT2 [Robert Pontek]; T.1993-2001, AT12 [Evan Nyer, engineering expert with the firm of Geraghty & Miller]; T.657, AT6 [Timothy Neal, Palm Beach County Department of Health]).

Groundwater is the principal source of drinking water in Florida (T.930-1, AT8), and is the only source in Delray Beach. The City has a drinking water withdrawal permit (also known as a "consumptive use" permit) from the South Florida Water Management District for the 20-Series wells (T.93-4, AT2). The City provides water to its residents pursuant to Chapter 180 of the Florida Municipal Public Works Law, which authorizes municipal drinking water supply systems, and Chapter 17 of the Florida Administrative Code under which DER regulates the operation of the wells and treatment plants, and requires compliance with drinking water standards (T.92-3, 95-6, AT2). Both practically and legally, the City could not simply abandon this wellfield and stop providing potable drinking water to its citizens. There was no other available, reliable, cost-effective source of drinking

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[3] The City asked Aero-Dri to take action to clean up the pollution, but they refused to do so (T.149-52, AT2). The cleanup referred to in petitioner's Initial Brief (p.4) was limited to the area immediately around its plant.

water. Furthermore, failure to remove the pollution via the 20-Series wells would have allowed it to flow into the nearby "golf course" drinking water supply wells -- a smaller field that provides the City's only other source of drinking water (T.173-5, AT 2).[4]

Finally, petitioner's criticism of the City's expert witness testimony on the likely cleanup time based upon computerized contaminant transport modeling (P.Br.8, n.19)[5] is completely unfounded. Four groundwater experts called by the City testified that the modeling procedures utilized were widely used for this purpose and regarded as reliable by experts in the field (T.1384-8, 1395-6, AT10 [John Glass, Ph.D.]; T.1690-4, AT11 [Charles McLane, Ph.D.]; T.961, 976-8, AT8 [Vincent Amy]; T.1158-9, 1193-5, AT9 [Timothy Sharp]). Even defendants' expert, Jack Riggenbach, conceded that it was widely used, and a good way to predict groundwater cleanup time (T.2884-5, 2889-90, AT16).[6]

SUMMARY OF THE ARGUMENT

The purpose of a damage award is to make the City whole for the injuries and losses suffered to its "right of user" in the groundwater as a direct result of the negligent and illegal conduct of the defendant Davey. The courts below correctly held that the City's right of user via the 20-Series wellfield to supply drinking water

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[4] Some older wells to the east were being phased out due to saltwater intrusion.

[5] Citations to "P.Br. " are to pages of the Initial Brief of Petitioner.

[6] Defendant's only other expert on the subject, Dr. Fred Molz, acknowledged that the model in question has been in the literature "for quite a while" and is recognized as a reliable tool to predict cleanup time, if properly calibrated (T.3088-9).

to its 53,000 residents was and is a unique property right, and that the City had no practical alternative but to clean up the pollution so as to restore potable drinking water to its citizens. The courts below correctly held therefore that the City was entitled to recover its reasonable and reasonably necessary costs of restoration.

The verdict and judgment in the trial court were in favor of the City as to liability based on negligence, nuisance, trespass and strict liability. Case law and public policy under each of these legal theories supports recovery of restoration costs in this case, since these are the damages that flowed logically and directly from defendant's wrongful acts. If the trial court's damages award is sustainable under any one of those four theories, it must be affirmed. Public policy and applicable case law, in addition, strongly favor restoration and cleanup of a public drinking water supply, and would disfavor any measure of damages that would allow a polluter to pay as damages less than the full restoration costs, leaving the City's residents and taxpayers either footing the bill, or drinking poisoned water.

The "diminution of value" test may be an appropriate measure of damages when the injury is permanent, the fair market value of the asset can be easily ascertained, and this will make the plaintiff whole. However, that test need not and should not be applied where it will not make the plaintiff whole and where (a) the injury is temporary and may be repaired, (b) public policy favors restoration of the property or resource, (c) restoration is in fact being taken, and (d) recovery of restoration costs would not result in an obvious and disproportionate windfall profit. In those cases, cost of restoration is the proper measure of damages.

The possibility that the City might have also been able to bring an action to recover its costs under the federal Comprehensive Environmental Response, Compensation and Liability Act is irrelevant to the proper measure of damages in this case.

Finally, while the decision of the Fourth District Court of Appeal should be affirmed in all other respects, it should not have ruled as a matter of law that the City could not recover restoration costs that would be incurred after the expiration of its present consumptive use permit in 1997, when there was competent testimony, accepted by the jury and trial court, that such permits are routinely renewed and it was more probable than not that the City's permit would be renewed.

ARGUMENT

I. THE PURPOSE OF "DAMAGES" IS TO FULLY AND FAIRLY COMPENSATE THE PLAINTIFF FOR THE INJURY AND LOSSES SUFFERED AS A RESULT OF DEFENDANT'S MISCONDUCT.

It is black letter law that the purpose of a damage award is to make the plaintiff whole by compensating him for the injury he has suffered as a result of the defendant's misconduct. Fisher v. City of Miami, 172 So.2d 455, 457 (Fla. 1965). In this case, the City cannot be made whole unless it is allowed to recover the costs it has incurred, and will have to incur in the future, in repairing the damage caused by Davey's pollution of the City's drinking water supply. Such restoration costs have been allowed in other Florida cases and are an appropriate measure of damages under each of the four common law causes of action asserted by the City in this case.

The relevant case law on this subject is discussed in the next two sections of this brief. Relying on that case law, after extensive briefings and argument, the trial court correctly instructed the jury on damages in the following terms:

> In computing damages for the injury to the City's drinking water supply wells, the City is entitled to be compensated in an amount that will put the City in as good a position as it would have been had it not been for the occurrence of the Defendant's wrongful acts. The objective is to make the injured Plaintiff whole to the extent that it is possible to measure its injuries in terms of money.
>
> In this case, the City is entitled to be reimbursed for all of its costs and expenses incurred to date which you find were reasonable and reasonably necessary to provide a safe supply of the water to the residents and customers of the City that complies with the applicable drinking water standards established by the State of Florida . . . .
>
> You may award damages for reasonable and necessary future costs the Plaintiff may incur only if and to the extent that Plaintiff establishes such costs with reasonable certainty . . . .
>
> When determining the reasonable and necessary costs of restoring any interests Plaintiff may have in the groundwater, you shall only consider those measures necessary to treat the water removed from the ground so that the City had a sufficient safe supply of drinking water to deliver to the consumer. Safe drinking water is water which when delivered to the consumer does not exceed the maximum contaminant level (T.3390-2, AT18).

This instruction incorporates the elements of Florida Standard Jury Instruction §6.1a. Pursuant to these and other instructions, the jury returned a verdict in favor of the City as to liability based on negligence, nuisance, trespass, and strict liability for hazardous activity. It awarded plaintiff its past restoration costs of $3,097,488, plus $5,600,000 as damages for the future costs that will have to be incurred by the City to complete its cleanup of the pollution caused by Davey (R.1646-7). Judgment was entered by the trial court in the full amount, $8,697,488 (R.1650-2).

On appeal, the court below correctly ruled that the injury at issue was not, as Davey argued, to the City's real property, but to the City's "right to the use of the groundwater beneath its real property". Davey Compressor Co. v. City of Delray Beach, 613 So.2d at 61. The court applied the traditional measure of damages in negligence and nuisance cases, in effect affirming the trial court's instructions and the verdict and judgment on this point. Specifically, in negligence actions, the court below, citing a series of cases, held that "the plaintiff may recover all damages which are a natural, proximate, probable or direct consequence of the act, but do not include remote consequences". Id. at 62. Under the nuisance cause of action, the court below again followed well-settled precedent in holding that the City could recover "the reasonable cost of [its] own efforts to abate the nuisance of or prevent future injury". Id. Because the claim was not for damages to the real property itself on which the wells are located, the court below stated: "Therefore, the trial court did not err when it awarded past damages without regard to the value of appellee's property". Id.

Davey contends that this holding conflicts with decisions from other District Courts of Appeal. Davey asks this Court to rule that the City should not be made whole, but that instead its damages should be limited to the diminution in value of the property on which the wells are located.[7] This would nowhere near make the City whole for the injury it has sustained and the expenditures it has had to incur as

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[7] Unfortunately, the Fourth District limited the City's recovery of future abatement and cleanup costs to the remaining life of its water supply permit despite testimony that such permits are routinely renewed. If that ruling is allowed to stand, the City will be left substantially less than whole (see infra, point VI).

a direct and sole result of Davey's illegal conduct. For the reasons set forth below, the measure of damages adopted by the trial court, and by the court below on this point, is fully consistent with and supported by Florida law and should be affirmed.

II. THE INJURY IN THIS CASE IS TO A "RIGHT OF USER" IN A UNIQUE AND IRREPLACEABLE DRINKING WATER RESOURCE, AND NOT TO REAL PROPERTY AND PUMPING EQUIPMENT.

A. Petitioner Has Mischaracterized the Nature of the Injury as Damage to "Real Property".

Davey urges this court to apply a "diminution of value" rule as the measure of damages in this case, "which is the difference between the value of real property before and after the injury" (P.Br.15; emphasis added). It acknowledges the ample support in the case law for awarding damages based on costs of repairs, or restoration, but cites a series of real estate cases indicating that the diminution of value rule is generally preferred when the injury is permanent, or where the restoration costs exceed the diminution of value, or the value of, the real property itself. Id.

At the trial, Davey made the same argument, citing the same cases, and asserting that "the City's amended complaint rests solely upon claims arising under Florida common law for injuries to real property, . . ." Defendants' Memorandum of Law Regarding Appropriate Measure of Damages, p.2 (May 21, 1990)(R. 1811; emphasis in original).

In fact, as both the trial court and the Fourth District Court of Appeal correctly recognized, the City has not claimed damage to the real estate on which its wells are

located, nor to the pumps or other well equipment located on that land. Instead, the City's claim is "for injury to its right to the use of the groundwater beneath its real property". Davey Compressor Co. v. City of Delray Beach, 613 So.2d at 61. This right is to a self-regenerating supply of potable water which, until Davey polluted it, was suitable for drinking water, met all applicable regulatory standards, and provided safe drinking water for Delray Beach's 53,000 residents.

This right has unique value to a municipality, which has the statutory right and duty to supply potable water to its residents, the performance of which is relied upon by those citizens. Their health and livelihoods depend on the proper exercise of that right and duty by the City. The cases cited by Davey are simply irrelevant to damage to a right of user, which is not real property, Cf. Village of Tequesta v. Jupiter Inlet Corp., 371 So. 2d 663, 667 (Fla.), cert. denied, 444 U.S. 965 (1979), but a right which is of unique and inestimable value, and is being restored.

B. Federal and State Statutes Recognize the Unique Importance of Drinking Water for the Preservation of Life and Declare a Public Policy To Protect It.

Both the Florida Legislature and the United States Congress have declared unequivocally that the preservation of precious natural resources ranks among the highest goals of our society. These goals were summarized in the "declaration" of National Environmental Policy made by the Congress in the National Environmental Policy Act ("NEPA"):

> The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment . . . and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man,

> declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, to use all practicable means and measures . . . to create and maintain conditions under which man and nature can exist in productive harmony . . . .

NEPA § 101(a), 42 U.S.C. § 4331(a) (emphasis added).

This environmental call to arms is echoed in other pertinent federal statutes. The Clean Water Act ("CWA") was enacted to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters". CWA § 101(a), 33 U.S.C. § 1251(a). Congress declared: "[I]t is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited". Id. Congress also recognized "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use (including restoration, preservation and enhancement) of land and water resources . . ." CWA § 101(b), 33 U.S.C. § 1251(b). In the Resource Conservation and Recovery Act, Section 1003(b), 42 U.S.C. § 6902(b), Congress declared

> it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.

In recognition of the paramount importance of the ready availability of drinking water, Congress enacted the Safe Drinking Water Act, 42 U.S.C. §§300f-300j-26. This Act provides for the promulgation of national drinking water standards (§ 300g-1), and places primary enforcement responsibility in the hands of the states (§ 300g-2).

The Florida Legislature has enacted similar laws and policies. The Legislature has declared that it is the policy of the State of Florida "to conserve the waters of the state and to protect, maintain, and improve the quality thereof for public water supplies". Florida Air and Water Pollution Control Acts, § 403.021(2), Fla. Stat. (1992) (emphasis added). The Legislature has also found that "[t]he pollution of the air and waters of this state constitutes a menace to public health and welfare, [and] creates public nuisances . . ." Id. at § 403.021(1). In light of the detrimental effects of pollution on human health, the Legislature declared that "abatement of the activities [causing] pollution of the air or water resources in the state . . . be increased . . . to ensure domestic water supplies". Id. at § 403.021(6) (emphasis added).

C. Consistent With This Public Policy, Case Law In Florida and Elsewhere Recognizes That the Proper Measure of Damages for Pollution of a Drinking Water Supply Is the Cost of Restoration.

The right of user in the groundwater is of unique importance to a municipality which has a duty to supply its citizens with a safe drinking water supply. This was expressly recognized by the Second District Court of Appeal in Martin v. Pinellas County, 444 So.2d 439 (Fla. 2d DCA 1983), a case which bears striking similarity to the present case. In that case, the defendants operated a landfill and borrow pit into which they had disposed of demolition debris, including hazardous waste. These materials had migrated into the groundwater and were threatening to contaminate the wellfield utilized by Pinellas County to supply drinking water to the populace of Pinellas and Pasco Counties. Pinellas County brought suit on the same common law

causes of action as are relied on in this case: negligence, nuisance, trespass and strict liability.

In affirming the trial court's entry of an injunction directing cleanup and removal of the hazardous waste, the court took note of the fact that the groundwater, which provides the drinking water for so many Florida residents, is threatened by "insidiously encroaching saltwater and other insults" and that "actions which threaten the continued supply of this most basic element must receive the immediate attention of all". 444 So. 2d at 440.[8] The court stated:

> We are, after all, dealing with the single most necessary substance for the continuation of life, and that substance is water. Any danger to that primary necessity is ecologically and humanly unacceptable. [Id. at 441].

In Brynnwood Condominium I Ass'n v. City of Clearwater, 474 So.2d 317 (Fla. 2d DCA 1985), the court dismissed a claim against the City for allegedly supplying water that caused corrosion in pipes. However, it recognized that a municipality may be held liable for injuries resulting from its negligence in permitting its water supply to become contaminated or polluted, thereby causing illness. The court stated:

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[8] In the present case, because of the emergency conditions which were more acute than in the Pinellas County case in that the contamination was already into the drinking water supply at levels that exceeded the drinking water standards, and because of the recalcitrance of Davey to immediately perform response action that would have been satisfactory to the Florida Department of Environmental Regulation and the City, the City undertook the cleanup itself rather than press for an injunction.

> In Florida, it is the policy of the state to assure that safe drinking water is available. To this end, a municipality which supplies water for public consumption must furnish potable drinking water, i.e., water fit for human consumption. §403.851-.864, Fla. Stat. (1983)[474 So.2d at 318][9].

The "restoration" costs expended by the City in responding to this severe pollution problem were incurred to fulfill this public policy mandate, and have been incurred solely as a direct and proximate result of Davey's misconduct. In this case, the City cannot be made whole unless it is allowed to recover the costs it has incurred, and will continue to incur, in responding to the contamination of its drinking water supply caused by Davey's illegal and improper dumping of hazardous waste. Such response costs have been allowed in other Florida cases and are an appropriate measure of damages under all of the common law theories of recovery asserted by the City in this case.

In an early but significant drinking well contamination case, Pensacola Gas Co. v. Pebley, 5 So. 593 (Fla. 1889), this Court affirmed the award to plaintiff of reimbursement of expenses which he incurred as a result of the pollution caused by the defendant, including costs incurred in attempting to clean up the pollution and in procuring a substitute water supply. The Court described those expenses:

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[9] As Robert Pontek, Director of Utilities for the City at the time of the pollution and the initiation of remedial measures, testified, the City carries out its duty to supply drinking water pursuant to these provisions, Chapter 180 of the Florida Municipal Public Works Law, as well as regulations by the Florida DER, the Palm Beach County Health Department, and the South Florida Water Management District to ensure that an adequate supply is provided and applicable drinking water quality standards are met. (T.92-3, 95-6, AT2).

> The evidence tends to show that in consequence of the injury done plaintiff's well by the gas company, the plaintiff was actually subjected to very considerable expense. That the water in his well became unfit for drinking, bathing, cooking, and for the use of stock. That for the purpose of procuring pure water he had three new wells bored, but that the water in the new wells was unfit for use just as the water in the old well was; that the plaintiff paid for the boring of the new wells, and that he furnished and paid for the piping therefor; that he had, for a number of months, to send at some distance to his neighbors for all the water he used on his premises, and that for the bringing of said water he had to pay; and now, can it be said that the plaintiff was only entitled to actual damages? . . . The jury, by their verdict, found that the plaintiff was entitled to compensatory damages . . . . [Id. at 597].

In the trial that followed the injunction proceeding in Martin v. Pinellas County, supra, the court awarded the plaintiff county the following elements of damages:

1. cost of construction of monitor wells;

2. cost for testing and monitoring, and for professional consultants' efforts in detection and avoidance;

3. cost for diversion of Pinellas County personnel from other tasks to assist with testing, monitoring and other related capacities;

4. cost for excavation and removal and clean-up by the county of Tyler Road borrow pit (one of the adjoining borrow pits which were the source of the pollution); and

5. prejudgment interest.

Pinellas County v. Martin, No. 82-13019-17 (Pinellas County Court, Nov. 28, 1986, Slip op. at 32-33)(AT1), aff'd with modifications sub nom. Martin v. Pinellas County, 533 So. 2d 1183 (Fla. 2d DCA 1988). As noted above, the County's complaint in that

case was based on common law negligence, nuisance, trespass and strict liability like the City's complaint in this case. The award by the court of "restoration" damages in the form of Pinellas County's response costs to investigate and clean up the pollution is consistent with the strong public policy in Florida to restore and preserve groundwater, and not allow it to be poisoned and abandoned. That policy was recognized and reflected in the rulings of the trial court and the Fourth District Court of Appeal in the present case, and should be affirmed by this Court.

These cases recognize that the need to protect drinking water is best served by requiring the polluter to pay for its cleanup. This is consistent with the law on damages that has been clearly established under the doctrines of negligence, nuisance, trespass, and strict liability for inherently dangerous activities. As discussed more fully below in Section III, in cases based on negligence, a plaintiff may recover all damages which are the natural and proximate result of the negligent act of the defendant. Under a nuisance claim, a plaintiff may recover any reasonable expenses which he has incurred on account of the nuisance, including the costs of abating the nuisance.

Under strict liability for inherently dangerous activities, a plaintiff may recover all damages which are a natural consequence of the dangerous activity. Under trespass, a plaintiff may recover all damages of which the trespass was the efficient cause, including costs incurred in removing the cause of a continuing trespass. Thus, this Court has ample authority to award the City its reasonable restoration

costs, which were the direct result of, and proximately caused by, the contamination of its water supply with hazardous pollutants by Davey.

In its brief, Davey suggests that the trial judge "decided not to follow Florida law in the measure of damages" and referred to an off-hand comment by the judge that he was "flirting with reversal" (P.Br.7). The fact is that the trial judge received lengthy briefs from both parties concerning Florida law on the appropriate measure of damages in this case, which included most of the cases that both sides presented to the Fourth District Court of Appeal below and are presenting to this Court. (R.1811,1817 and 3653). Judge Rodgers was satisfied that restoration costs, without consideration for diminution of value for any related property, was the proper measure of damages in this case. In articulating the basis for his ruling, he stated, among other things:

> My feeling is that water perhaps is more important than anything except air to human life. The contaminated water there must be cleaned up . . . . [M]y ruling is primarily based on the fact that the City has an obligation and a duty to provide potable water to its residents. It must do that, and it must do whatever is necessary to make sure that that's done. So the City cannot allow water that is contaminated to continue to mix and intermingle in with the groundwater; therefore, my ruling is that they must be allowed damages necessary to cleanup or cure the matter. . .
>
> I reject the argument that damages or the measure of damages is determined by the diminution of the value of the land because I think to allow that would say to someone that, well, you destroyed the land, it's worth $10,000 an acre, we've got 5 acres, that's $50,000 and we'll fine you $50,000 and he says, fine, I'll pay the fine and I'll dump all of the waste on there that I want to because it's cheaper than hiring somebody to haul it away because that's all I have to pay. [T.1148-9].

Responding to further arguments by Davey's counsel in support of a "diminution of value" test, the court stated:

> Well, we're in a new area, as we've all admitted. If the Appellate Court wants you to be able to just pay them for the cost of land and leave the pollutants under the land, then they better tell me so. [T.1150].

The trial court's ruling was consistent with Florida law and public policy.

III. THE COURT BELOW CORRECTLY HELD THAT THE PROPER MEASURE OF DAMAGES FOR INJURY TO A RIGHT OF USER IS THE REASONABLE COST OF RESTORATION OR REPAIR OF THE INJURY CAUSED BY DEFENDANT'S MISCONDUCT.

Under Florida common law, the measure of damages is guided by the nature of the injuries and losses suffered by the City. In this case, Davey's improper disposal of highly toxic waste solvents into the ground caused extensive pollution of the groundwater and damaged the City's drinking water supply, requiring immediate response action. This court has long held that the purpose of a damage award is to make the plaintiff whole -- that is, to compensate him for all of the injury he has incurred and will incur at the hands of a defendant to the extent that such injury can be measured in dollars. Fisher v. City of Miami, 172 So.2d 455, 457 (Fla. 1965).

In this case, the City cannot be made whole unless it is allowed to recover the costs it has incurred in responding to the contamination of its water supply caused by Davey's illegal and improper dumping of hazardous waste. Such "restoration costs" have been allowed in other Florida cases and are an appropriate measure of damages under all of the common law theories of recovery -- negligence, nuisance, trespass and strict liability -- asserted by the City in this case. If any one of them

support the damages awarded below, the Fourth District's ruling on this issue must be affirmed. The applicable law regarding damages under each of the City's common law causes of action is discussed below.

A. The Courts Below Correctly Held That The Proper Measure Of Damages For Negligence Is All Damages Reasonably And Foreseeably Caused By The Defendant's Negligent Conduct.

The Court below held that the City's damages resulted from foreseeable direct expenses incurred as a result of Davey's negligent groundwater contamination. The court articulated the proper measure of damages under a negligence theory as follows:

> In tort cases, the rule [is] . . . that the plaintiff may recover all damages which are a natural, proximate, probable or direct consequence of the act, but do not include remote consequences.

Davey Compressor Co. v. City of Delray Beach, 613 So.2d at 61, quoting Douglass Fertilizers & Chem., Inc. v. McClung Landscaping, Inc., 459 So.2d 335 (Fla. 5th DCA 1984). Thus, the court ruled that, under a negligence theory, the City could recover costs of restoring its drinking water supply.

The Fourth District's holding is consistent with the law of damages that has been clearly established in other negligence cases. Clausell v. Buckney, 475 So.2d 1023 (Fla. 1st DCA 1985); Taylor Imported Motors, Inc. v. Smiley, 143 So.2d 66 (Fla. 2d DCA 1962). Such damages may include expenses which have been incurred or will be incurred in the future by the plaintiff as a direct result of the injury inflicted upon the plaintiff by the defendant's acts or omissions.

Most of the cases cited by Davey (P.Br.15-20) are inapplicable because they do not address injury to a right of user which can be repaired and restored. Instead, they involve claims for damage to privately-owned real property, where the diminution of value was readily ascertainable. See, e.g., United States Steel Corp. v. Benefield, 352 So.2d 892 (Fla. 2d DCA 1977), cert. denied, 364 So.2d 881 (Fla. 1978). Diminution in value is an acceptable measure of damages when that will fairly compensate plaintiff for its injuries. It is especially appropriate where the injury is permanent, or will not in fact be repaired. None of those circumstances apply in the present case.

Davey cites Keyes Co. v. Shea, 372 So.2d 493 (Fla. 4th DCA 1979). That case recognized that where the injury can be repaired, restoration cost is the proper measure of damages, unless that would exceed the value of the property in its original condition. In this case, however, the City's right of user in the drinking water well field had a very substantial value prior to its injury by Davey, but that value is not ascertainable by reference to any market price.

In Clark v. J.W. Conner & Sons, Inc., 441 So.2d 674, 676 (Fla. 2d DCA 1983), also cited by Davey, the court explained that "[w]here the reduction in market value is an inadequate measure, recovery has been allowed for losses personal to the owner". The court there cited Fiske v. Moczik, 329 So.2d 35 (Fla. 2d DCA 1976), and Elowsky v. Gulf Power Co., 172 So.2d 643 (Fla. 1st DCA 1965) -- cases in which property owners were permitted a recovery of the replacement value of certain trees. As the court noted, "In these cases, a judgment for the difference in market value

would not have adequately compensated the owners for the intangible losses they suffered from the destruction of trees near their homes". 441 So.2d at 676. Davey also cites May v. Muroff, 483 So.2d 772 (Fla. 4th DCA 1986), but there the court recognized that even in cases of permanent injury to real estate, special circumstances may warrant an award of damages substantially in excess of the diminution in value.

Davey mischaracterizes several cases from other jurisdictions as well (P.Br.15,n.22). In Reeser v. Weaver Bros., Inc., 78 Ohio App. 3d 681, 605 N.E.2d 1271, 1275 (1992), the court recognized that in both negligence and nuisance cases, restoration costs may exceed the difference in market value to ensure that an injured landowner is fully compensated for the loss sustained. Similarly, neither Bd. of County Comm'rs v. Slovek, 723 P.2d 1309 (Colo. 1986), nor Maxedon v. Texaco Prod. Inc., 710 F.Supp. 1306 (D.Kan. 1989), authorize as a restrictive measure of recovery as Davey argues. In Slovek, the court opined that in negligence and trespass actions, restoration costs may indeed be appropriate to adequately compensate an injured party. 723 P.2d at 1314-1315. The court said:

> We prefer to leave the selection of the appropriate measure of damages in each case to the discretion of the trial court. . . . The trial court must take as its principal guidance the goal of reimbursement of the plaintiff for losses actually suffered. [Id. at 1316.]

The court then added:

> If the damage is reparable, and the costs, although greater than original value, are not wholly unreasonable in relation to that value, and if the evidence demonstrates that payment of market value likely will not adequately compensate the property owner for some personal or other special reason, we conclude that the selection of the cost of

> restoration as the proper measure of damages would be within the limits of a trial court's discretion. [Id. at 1317]

In Maxedon, the court indicated that so long as pollution to land is temporary, the amount of damages awarded may indeed exceed the value of the property injured. 710 F.Supp. at 1316.

Further, in Williams-Bowman Rubber Co. v. Indus. Maintenance Welding & Machine Co., 677 F.Supp. 539, 545 (N.D. Ill. 1987), the court held that:

> On a day-to-day basis, the Illinois appellate courts do not measure damages for injuries to real property by employing the diminution in value rule. Rather, the courts apply the cost of repair or the diminution in value measure of damages depending upon the nature of the injury involved. If real property is partially injured, and the injury may be repaired in a practicable manner, then the proper measure of damages is the cost of restoring the property to its condition prior to the injury.

(emphasis added).

The case law Davey cites (P.Br.16) involving injuries to personal property are equally inapplicable to the measure of damages sought by the City. Those cases involve repairs of tangible property such as cars and airplanes, where the market value can be easily assessed. See Badillo v. Hill, 570 So.2d 1067 (Fla. 5th DCA 1990); Alonso v. Fernandez, 379 So.2d 685 (Fla. 3d DCA 1980); Kluger v. White, 281 So.2d 1 (Fla. 1973); Meakin v. Dreier, 209 So.2d 252 (Fla. 2d DCA 1968); Airtech Service, Inc. v. MacDonald Construction Co., 150 So.2d 465 (Fla. 3d DCA 1963). With respect to such property, the courts limit recovery of restoration costs to pre-injury value to ensure that a plaintiff whose property has been damaged is not unjustly enriched by making unwarranted or excessive repairs. See McMinis v. Phillips, 351 So.2d 1141,

1142 (Fla. 1st DCA 1977).[10] The 20-Series wellfield is hardly such a "shelf item", which can be readily replaced at an easily ascertained market price. The City simply seeks to restore its drinking water supply to its condition prior to Davey's pollution so that it may be safely used by consumers. This will not result in a windfall.

Thus, this Court has ample precedent to award the City its reasonable costs in responding to the contamination of its water supply with hazardous pollutants by Davey. As the Fourth District ruled, "the record supports the [City's] claim for damages . . . resulting from [Davey's] negligence". Davey Compressor Co. v. City of Delray Beach, 613 So.2d at 62.

B. The Courts Below Also Correctly Held That The Proper Measure Of Damages For Nuisance Is The Cost of Abating The Nuisance.

Similarly, both the record and the case law amply support the City's claim for damages incurred to abate the pollution caused by Davey. In cases sounding in nuisance, a plaintiff may recover "any reasonable expenses which he has incurred on account of the nuisance." Id. at 61; Nitram Chem., Inc. v. Parker, 200 So.2d 220, 225 (Fla. 2d DCA), cert. denied, 204 So.2d 330 (1967), quoting Prosser, THE LAW OF TORTS § 91 (3rd ed. 1964); Antun Inv. Corp. v. Ergas, 549 So.2d 706, 708 (Fla. 3d DCA 1989). The losses which naturally flowed from Davey's negligent conduct were the incurrence by the City of substantial past costs and expected future costs to abate the nuisance caused by its illegal dumping of liquid hazardous waste onto the ground.

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[10] Despite this policy, in McMinis, the First District awarded plaintiff damages for the costs of repairing his airplane even though the plane's value was in fact increased by such repairs. 351 So.2d at 1142.

Davey claims that the authorities cited in Antun Inv. Corp. v. Ergas, 549 So.2d at 709 n.6., hold that abatement costs in nuisance actions are limited to the diminution in property value. (D.Br.28). That is not true. In fact, Antun cites Nitram Chem., Inc. v. Parker, which, as discussed above, authorizes the recovery of "any reasonable expenses which [the plaintiff] has incurred on account of the nuisance".[11]

In addition, Davey erroneously argues that Johansen v. Cumbustion Eng'g, Inc., No. CV191-178, 1993 U.S. Dist. LEXIS 13385 (S.D. Ga. June 4, 1993), is analogous to this case. The Johansen decision characterized the strict application of an absolute ceiling on allowable restoration costs as "overly rigid", advocating a more flexible approach. Id. at *13.[12] The court stated that in awarding damages, the overall principle by which courts are to be guided is compensation to the plaintiff. Id. at **5, 13. In Johansen, the court limited restoration and abatement costs to the land's diminution in value because the restoration and abatement costs were grossly disproportionate to the land's diminution in value.[13]

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[11] Contrary to Davey's assertion (P.Br.28), the City does not claim that Antun authorizes the recovery of "unlimited" or "unreasonable" abatement costs.

[12] In so doing, Johansen disapproved of the measure of damages rule adopted by the courts in "L" Inv., Ltd. v. Lynch, 212 Neb. 319, 322 N.W.2d 651 (1982) and Mikol v. Vlahopoulos, 86 Ariz. 93, 340 P.2d 1000 (1959), both cited by Davey (D.Br.15, n.22, 18). Id. at *13, n.10. See also Ault v. Dubois, 739 P.2d 1117, 1120, n.3 (Utah App. 1987)(Diminution in value should not be viewed as inflexible ceiling on recoverable damages; where property has special significance to owner and repair seems likely, cost of repair may be appropriate even if it exceeds diminution in value.)

[13] The plaintiffs estimated that the land's restoration and abatement costs would reach $20 million, while the diminution in value of the land was at most $673,000. Id. at *4.

Johansen held that Georgia law allows recovery of restoration costs "so long as restoration would not be an `absurd undertaking`". Id. at *8. Restoration in this case is far from absurd. Johansen also indicated that recovery in excess of diminution in value is appropriate if the property in question has a unique characteristic or was put to any special use sufficient to justify allowing recovery in excess of the land's diminution in value. Id. at *5, *18, *24-25. The type of property involved in Johansen had no such characteristics, and the requested restoration would have cost nearly forty times the value of the property.

C. The Courts Below Also Correctly Held That For Trespass To A Right Of User Which Has Special Value And The Damage Is Being Repaired, A Plaintiff May Recover Its Restoration Costs.

One whose rights have been invaded by a trespass can recover all damages which have been directly occasioned thereby -- including expenses incurred by the injured party in avoiding injurious consequences. 87 C.J.S. Trespass § 108 (1954 and Supp. 1991); 75 AM. JUR.2d Trespass § 117 (1991). In general, in an action for trespass the plaintiff is entitled to all damages of which the trespass was the efficient cause, even where they did not result until sometime after the act was committed. Fletcher v. Florida Pub. Co., 319 So.2d 100 (Fla. 1st DCA 1975), cert. denied, 431 U.S. 930 (1977); 75 AM. JUR.2d Trespass § 141 (1991). Specifically, a plaintiff may recover costs incurred in removing the cause of a continuing trespass. For example, in Anchorage Yacht Haven, Inc. v. Robertson, 264 So.2d 57, 61 (Fla. 4th DCA 1972) -- a case involving a boat which sank in a yacht basin and remained there for several

years -- the Fourth District awarded the plaintiff not only the reasonable rental value of the space which the sunken boat occupied but also "the reasonable cost of removing the boat".

D. The Proper Measure Of Damages For Strict Liability For Engaging In An Abnormally Hazardous Activity Is Also Reimbursement Of The City's Costs Of Cleaning Up The Pollution Resulting From That Activity.

Finally, under the cause of action based on strict liability for inherently dangerous activities, there is liability for all damages which are a natural consequence of the dangerous activity. See Cities Service Co. v. State, 312 So.2d 799, 800 (Fla. 2d DCA 1975). A plaintiff may recover all damages resulting from a harm the possibility of which makes the activity abnormally dangerous. See RESTATEMENT (SECOND) OF TORTS § 519 (1977); Great Lakes Dredging and Dock Co. v. Sea Gull Operating Corp., 460 So. 2d 510 (Fla. 3d DCA 1984).

IV. RESTORATION COSTS IS AN ESPECIALLY APPROPRIATE MEASURE OF DAMAGES FOR POLLUTION OF A MUNICIPAL DRINKING WATER SUPPLY, WHICH IS A UNIQUE AND IRREPLACEABLE RESOURCE.

A. A Measure of Damages Which Would Allow a Polluter to Poison a Public Drinking Water Supply and Not Pay for the Costs of Cleaning It Up Would be Contrary to Law and Public Policy.

Throughout the trial, Davey contended that the present case was in reality nothing more than a claim for damage to real estate, and regardless of how much the City has to spend to clean up Davey's pollution, the City is precluded by the "diminution of value" rule from recovering any amounts that would exceed the diminution in value of the real property on which the City's wells are located. See,

e.g., Defendants' Memorandum of Law Regarding Appropriate Measure of Damages (May 21, 1990)(R.1811). As the trial court and the Fourth District Court of Appeal both recognized, however, the City does not claim damage to its real estate or to the pumps and equipment that constitute the wells themselves, but rather damage to the right of user of the groundwater.

The property right that has been devalued is not the real property but the right of user itself by pollution of the groundwater. This is a unique and priceless asset. How can you put a dollar value on a self-regenerating water supply that supports the life of 53,000 citizens? There is no market for such a resource, any more than one could put a dollar value on clear air. If there is any way to measure the extent of the damage done by the defendant, it is the cost of repairing that damage. This is an excellent reason to use restoration cost as the measure of damages in this case. The public policy reasons set forth in Section II above, coupled with the law on measure of damages set forth in Sections II and III, fully support this approach.

In addition to this Court's decision in Pensacola Gas Co. v. Pebley, supra, and the several decisions in Pinellas County v. Martin, supra, and Brynnwood Condominium I Ass'n Inc. v. City of Clearwater, supra, there are numerous other cases in Florida and elsewhere that hold that where the "diminution of value" test will fail to adequately compensate the plaintiff, or where the value of the resource is not readily susceptible to a market determination, restoration cost is the proper measure. In Fiske v. Moczik, 329 So. 2d 35 (Fla. 2d DCA 1976), and Elowsky v. Gulf Power Co., 172 So.2d 643 (Fla. 1st DCA 1965), property owners were permitted to

recover the replacement value of damaged trees. The court in each case found that a judgment for the difference in market value would not have adequately compensated the owners for the injury. This court in Florida Pub. Util. Co. v. Wester, 7 So.2d 788 (1942), held that where property manifestly had value - in that case pictures, antique furniture and heirlooms - which had been damaged by fire and which were not readily susceptible of a market value, market value could not be used to place a cap on recoverable damages:

> It is often impossible to place what is a current market value on such article, but the law does not contemplate that this be done with mathematical exactness. The law guarantees every person a remedy when he has been wronged. If the damage is to personal property as in this case, it may be impossible to show that all of it had a market value. In fact it may be very valuable so far as the owner is concerned, but have no value so far as the public is concerned. It would be manifestly unfair to apply the test of market value in such cases. [Id. at 790].

This approach is adopted in the RESTATEMENT (SECOND) OF TORTS §928 (1979), which allows recovery of the cost of repairs to personal property even when those costs exceed replacement cost when the property "has peculiar value to the owner". Id., comment on Clause (a) at 544.[14] In the present case, where the resource involved has enormous value, though that value is not susceptible to market pricing, the case for not capping the plaintiff's recovery by reference to estimated value of the real property or some hypothesized value of the right of user itself, is even stronger than in Wester.

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[14] The RESTATEMENT takes a similar position with respect to damage to real property. Id. at §929, and comments at 545-6.

There are numerous cases in other jurisdictions recognizing that where there is injury to a resource in which there is a public interest in preserving, such as water or utility company property, the cost of restoring the asset or service is the proper measure of damages. These courts have recognized that for such resources market value cannot be fairly determined. See Orange Beach Water, Sewer and Fire Protection Auth. v. M/V Alva, 680 F.2d 1374 (11th Cir. 1982) (water pipeline); Hartford Elec. Light Co. v. Beard, 3 Conn. Cir. Ct. 323, 213 A.2d 536, 537 (1965) (electric transmission line); Ohio Power Co. v. Johnston, 47 Ohio Op. 2d 93, 247 N.E.2d 338, 341 (1968) (electric transmission line); and Wisconsin Tel. Co. v. Reynolds, 2 Wis. 2d 649, 87 N.W.2d 285, 289 (1958) (telephone transmission line).

Even where private property is involved, where public policy will be better served by encouraging restoration by awarding damages based on costs of repairs rather than diminution in value, courts have used restoration cost as the measure of damages. In Ross & Ross v. St. Louis, I.M. & S.R.Co., 120 Ark. 264, 179 S.W. 353 (1915), where defendant Railway Company dumped burning cotton into a plaintiffs' pool used to supply water for their cotton gin, plaintiffs' measure of damages was not the diminished value of the plant, but the cost of restoring the plant to its former condition, together with compensation for the usable value during the time the plaintiffs were deprived of its use.

Even in states that traditionally use the "diminution of value test" in cases where the market value is readily ascertainable, those states hold that where it is not practical to ascertain market value, cost of repair or restoration is the proper measure

of damages. Trinity Church in Boston v. John Hancock Mut. Life Ins. Co., 399 Mass. 43, 502 N.E.2d 532 (1987)(damage to a church); Bd. of County Comm'rs v. Slovek, supra (allowing restoration cost plus damages for loss of use in case of land damaged by water flooding); Puget Sound Power & Light Co. v. Strong, 117 Wash. 2d 400, 816 P.2d 716 (1991)(cost of replacement of damaged utility pole allowed); Culver-Stockton College v. Missouri Power and Light Co., 690 S.W.2d 168, 172 (Mo. Ct. App. 1985) (no market value for building on college campus).

Only two of the cases cited by Davey involved injury to water supply wells (P.Br.16). One involved a claim primarily for personal injury to those who drank the contaminated water, Crown Cork & Seal Co. v. Vroom , 480 So.2d 108 (Fla. 2d DCA 1985). With regard to the property damage claim, the court stated that the appropriate measure of damages was diminution of value, but did not describe the "property" which was to be valued. There is no indication that plaintiff sought to clean up the pollution, and it is cited by Davey as involving "permanent injury to property" - which, of course, is not the case here. The Court expressly limited its application of the diminution of value test to "this private suit", Id. at 109, implying that a different rule might obtain were a public water supply involved.

Standard Oil Co. v. Dunagan, 171 So.2d 622 (Fla. 3d DCA 1965), also applied a diminished valued test for permanent damage to private property, and is distinguishable therefore on both those grounds from the present case. Here again, there was no evidence that any cleanup or restoration was undertaken by the plaintiff.

As the trial court in this case accurately recognized, any measure of damages that would allow a defendant to pollute a municipal drinking water wellfield, pay damages in an amount reflecting the diminution in value (if any) of the real estate on which the wells are located, and leave the residents and taxpayers of the City footing the substantial bill to clean up the mess is inconsistent with the well established purpose of damages to "make the plaintiff whole" for the injury caused by the defendant. Indeed, if a number of industrial concerns were to do this, the result would be widespread groundwater contamination and either the citizens of the state would be shouldering major cleanup costs, or the entire drinking water supply system of the state would be poisoned. Florida's public policy of protecting and preserving its drinking water supplies can only be served by allowing a plaintiff in a case such as this to recover its restoration costs.

Even if this Court were to try to adapt the "diminution of value" rule to determine the value of the right of user, perhaps represented in some surrogate fashion by the "market value" of the wellfield before and after Davey's pollution of the groundwater, this would be a totally speculative and effectively impossible task. The right of user includes, among other things, right or title to the real estate on which the wells and pumping equipment are located, the self-generating supply of potable groundwater, the statutory right and duty to withdraw the groundwater to provide it to its citizens, and the consumptive use permit coupled with the

expectation of its continued renewal.[15] It would be pointless speculation to try to place a monetary value on this combination of ingredients. While one might be able to place a value on the real estate and pumping equipment, those are not the items that were damaged. The most important ingredient is the naturally regenerating potable groundwater, which is precisely what Davey seriously damaged and which is not susceptible of market evaluation.

B. The City Has No Other Available Source For A Wellfield That Could Replace the 20-Series Wells.

Davey apparently concedes that in order to properly make the City whole, it should pay the City whatever it would cost to replace the damaged wellfield, assuming it is feasible to replace such a wellfield. Specifically, Davey states:

> If the goal of compensatory damages is to make a plaintiff whole, an award of damages to the City sufficient to purchase or replace the wellfield would have accomplished that objective. . .
>
> In addition, under the existing measure of damages rule, the City was [also] entitled to seek temporary "loss of use" damages until a replacement wellfield was brought on line. Such interim damages could have included the cost of purchasing water from nearby communities and a temporary treatment system pending acquisition of the replacement field (P.Br.19).

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[15] In its brief before this Court, Davey for the first time acknowledges that the property that it damaged included "the City's wells, the property on which the wells were located, and its term-of-years interest in the groundwater underlying the wellfield." (P.Br.21). This is in contrast to its position up to this point, which is that the only relevant property that should be valued is the real estate on which the wells were located. However, Davey neither at the trial nor here suggests any way to place value on the groundwater or the right of user. Having failed to take this position at the trial or proffer any evidence that would support its position, Davey cannot make this belated offer for the first time in this Court -- even apart from the fact that the offer does not present a concrete alternative that this Court can adopt.

At the trial, Robert Pontek, the City's former Director of Utilities, testified that when the pollution of the 20-Series wells was first discovered, the City sought the most cost-effective response to the problem. This included consideration of the availability of a variety of alternatives, including the possibility of abandoning the 20-Series wells and trying to find some other wellfield in some other location. Mr. Pontek testified that this was considered and rejected for several reasons. First, the only possible source for siting a new wellfield would be west of the City, which would take a very long time and involve "tremendous cost". Second, if they abandoned the 20-Series wells, the contamination from Davey's disposal that had already reached those wells would move into the nearby golf course wells, a smaller adjacent series of wells, and "cause them to be inoperative." Third, the water quality is inferior to the west and, because that area has been used for agriculture, the City was "very concerned about the use of pesticides" there which would, even if all other hurdles could be overcome, require costly pretreatment. Consequently, restoration of the 20-Series wellfields was determined to be the most cost-effective solution. (T.118-121, 172-183, AT2). In addition, William Greenwood, Mr. Pontek's successor, called as a witness by defendant, testified that even apart from the problems identified by Mr. Pontek, the cost of constructing a comparable wellfield west of the City, exclusive of land acquisition costs, would be at least $7-8 million. (T.3105-6, AT17).[16]

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[16] Dr. Mark Morris, project manager for CH2M Hill, the engineering firm retained by the City, testified that replacing the 20-Series wells was not a reasonable option (T.2115, AT13).

Davey asserts that the City offered no evidence on the value of the wellfields or on what it would cost to replace the wellfield (P.Br.7). The testimony just referred to indicates that it was not feasible to simply "replace" the wellfield and, even if the City had tried to do so, it would have ended up with inferior water at a cost that would have exceeded in all likelihood the "restoration" cost damages awarded by the trial court, and would have allowed no provision to meet the immediate need to supply potable drinking water to the City residents during the period of years it would have taken to acquire the real estate, secure the necessary permits, install new wells, and design, build and install appropriate pretreatment technology.

Contrary to Davey's assertion (P.Br.7), Davey did not offer to introduce evidence on the value of the City's wellfield or the cost of installing wells at a new location. Indeed, having made no such proffer at the trial, Davey cannot now argue that the judgment below should be reversed so as to enable it to introduce evidence which it never offered at the trial. The question referred to in Davey's brief (id.) at T.2113-2114 and 2245-2250, as to which the trial court sustained an objection, related to the original cost of installing the well equipment back in 1975-1978, which counsel for Davey contended was relevant to its diminution of value theory. Because those cost figures were not probative as to the value of the right of user in the groundwater (or for that matter even the then-present cost of replacing the wellfield) the trial court properly sustained the objection.

To conclude this point, Davey did nothing to rebut the City's testimony that it was neither feasible nor cost-effective to replace the 20-Series wells, and the City had

no choice but to clean up the pollution and restore the groundwater extracted pursuant to its right of user so as to comply with public drinking water standards. Nor did Davey offer any competent and substantial evidence as to the value of the City's right of user to the groundwater. We submit that if it could be valued, the value would be certainly no less than the cost of restoration of this valuable resource, which is essential to human life.

C. Allowing Recovery of Restoration Costs Will Not Result In A "Windfall Profit" to the City.

The rationale behind the "diminution of value" test is a desire to avoid a windfall profit to a plaintiff where restoration costs would substantially exceed the value of the property, and where comparable property can presumably be obtained from another source. This Court can reconcile that line of cases with the present case, and can make the City whole without abandoning those cases and their rationale which, for the reasons set forth above, are distinguishable from the present case.

Indeed, near the end of its analysis, Davey acknowledges the need to make the City whole, and reaches the following conclusion:

> The party is fully compensated, however, by either replacing or repairing the property, and awarding it a reasonable sum for loss of the property's use while it was replaced or repaired. See Badillo, 570 S.2d at 1068; see also Meakin, 209 So.2d at 254. [P.Br.24; emphasis added]

In the present case, since replacement was not feasible, the Court correctly instructed the jury that recovery of restoration costs, or the cost of "repairing the property" in Davey's words, was appropriate.

Having in effect agreed with what the trial court did, Davey then appears to retreat somewhat from that position by asserting that it could lead the plaintiff to fail to mitigate damages. (P.Br.25). The trial court specifically addressed this subject by giving instructions to the jury, at Davey's request, both on contributory negligence (T.3385-6, AT18) and the duty of the City to mitigate the losses or damages, and that any recovery by the City should be reduced by any amount that the jury found attributable to any failure to mitigate (T.3392-3, AT18).

Davey then contends that an award of restoration costs that exceeds the value of the injured property might give the plaintiff a windfall profit because "a landowner has no obligation to restore its property" (P.Br.25). That fear has no application to the present case where the City has already undertaken restoration, and where in fact it has no practical alternative but to complete that restoration.

Indeed, Davey's concerns would be fully met by a measure of damages that would allow an award of restoration costs when (a) the damage is temporary and may be repaired, (b) public policy favors restoration of the resource, (c) restoration is in fact being undertaken, and (d) recovery of restoration costs would not result in an obvious and disproportionate windfall profit.

The instructions on damages given by the trial court were fully consistent with this approach and ensured to the extent possible that no windfall would result by instructing the jury that the award of damages was designed "to make the injured plaintiff whole to the extent that it is possible to measure its injuries in terms of money." (T.3390, AT18). The Court instructed that the reimbursable expenses must

be "reasonable and reasonably necessary to provide a safe supply of the water to the residents and customers of the City that complies with the applicable drinking water standards established by the State of Florida". With respect to future damages, the trial court stated:

> You may award damages for reasonable and necessary future costs the plaintiff may incur only if and to the extent that plaintiff establishes such costs with reasonable certainty. [T.3391-2, AT18]

As to both past and future damages, the Court charged that "damages which are uncertain, speculative or conjectural cannot be recovered". (T.3391-2). Of course it is a well settled rule that where a defendant's wrongful conduct creates the difficulty in proving damages, he is not entitled to complain of the resulting uncertainty. Miller v. Allstate Ins. Co., 573 So.2d 24, 28 (Fla. 3d DCA 1990). The burden of uncertainty must be borne by the tortfeasor. Key West Hand Print Fabrics, Inc. v. Serbin, Inc., 269 F.Supp. 605, 614 (S.D.Fla. 1966), aff'd, 381 F.2d 735 (5th Cir. 1967).

Davey concedes that the City may recover restoration costs if it can show that the diminution in market value test is inadequate and if it has some "personal interest" in the wellfield. (P.Br.31). In this case, since the pollution must be and is being cleaned up, any measure of damages less than recovery of restoration costs is inadequate to make the City whole. The term "personal interest" derives from cases such as Fiske v. Moczik, supra, and Elowsky v. Gulf Power Co., supra, cited by both parties, in which restoration costs are recoverable without regard to the market value of the asset, or its diminution, because the interest of the plaintiff in the asset (in those cases the restoration of shrubbery) warrants their restoration. Surely the special

interest that the City has in its right of user to the drinking water supply for its citizens is every bit as "special", "personal", and worthy of restoration as the interests of the plaintiffs in Fiske and Elowsky. Finally, even if it were possible to determine a market value by reference to what it might cost to locate another drinking water supply well, (e.g., the wellfield that was explored to the west of the City) the trial testimony showed that the costs of doing so would be approximately the amount of the damages that in fact were awarded by the trial court below.

V. CERCLA DOES NOT PREEMPT COMMON LAW, AND THE POSSIBLE EXISTENCE OF A FEDERAL CAUSE OF ACTION UNDER CERCLA IS IRRELEVANT TO A DETERMINATION OF THE MEASURE OF DAMAGES FOR COMMON LAW CLAIMS

Davey mischaracterizes the prayer for relief in the City's broadly drawn complaint by focusing on the phrase "response costs" and inferring that by virtue of this phrase, the City was really seeking a type of relief which can only be obtained in the Federal District Court under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9601. (P.Br.4-6, 32-36). Whether or not the City could have proceeded in the Federal District Court under that alternative theory, it chose instead to proceed in state court, as it was entitled to do, invoking traditional common law causes of action that are fully applicable to pollution cases. Nothing in CERCLA preempts common law causes of action, and Davey nowhere contends that it does.

It is clear from the context of the City's complaint that the phrase "response costs" is synonymous with "restoration costs". The phrase referred to the costs incurred by the City in cleaning up the pollution caused by Davey and seeking to

restore the polluted groundwater (restoring the damage done to its right of user) so as to enable it to provide potable drinking water to its citizens.

The complaint was broadly drawn, since the City was not sure at the time the complaint was filed whether injunctive relief or damages or both would be appropriate: The complaint sought injunctive relief (which eventually turned out not to be feasible) as well as past and future restoration costs (see Plaintiff's First Amended Complaint, App. 2 to Initial Brief of Petitioner Davey Compressor Company, prayer for relief at p.14, par.2); compensatory damages for "response costs" incurred . . . in mitigating the damage caused by defendants' unlawful discharges of solvents and other wastes (Id. par.3), reimbursement of any and all future response costs incurred by plaintiffs to remedy the aforesaid damage (Id. par.4) and "such other and further relief as this Court deems proper" (Id. par.7). That prayer for relief was certainly broad enough to include all properly recoverable damages in this case.

The possible existence of an alternative cause of action under CERCLA in the Federal District Court is legally irrelevant to the present case.[17]

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[17] In several material respects, a claim under CERCLA would not have been as useful as common law tort claims, since CERCLA does not authorize injunctive relief on behalf of any entity other than the Federal Government, and, while it authorizes a declaratory judgment for liability as to future restoration costs, unlike established common law tort doctrine, it does not allow a present monetary judgment for such future costs, a feature that was important to the City given the fact that it was faced with the prospect of a long-term cleanup and the uncertain long-term viability of the defendant.

VI. THE COURT BELOW ERRED IN HOLDING THAT THE CITY COULD NOT RECOVER ITS FUTURE CLEANUP COSTS BEYOND THE TERM OF ITS CURRENT WATER SUPPLY PERMIT, DESPITE SUBSTANTIAL EVIDENCE, WHICH THE JURY ACCEPTED, THAT SUCH PERMITS ARE ROUTINELY RENEWED, AND THE PERMITTING OFFICIAL EXPECTED TO RENEW THE CITY'S PERMIT BEYOND 1997.

Because the Florida law of damages directs that a plaintiff be made whole for the past and future economic losses that it will suffer as a result of defendants' misconduct, the Court below erred in vacating that portion of the verdict and judgment entered by the trial court for future restoration costs beyond the life of the City's water supply consumptive use permit, which expires on December 10, 1997. See Davey Compressor Co. v. City of Delray Beach, 613 So.2d at 62. Although this issue was not specifically within the scope of the petition for review filed by Davey, it is inextricably part of the damages issue that they raise, and may properly be considered by this Court. Savoie v. State of Florida, 422 So.2d 308, 310 (Fla. 1982).

At the trial, an issue was raised by the defendant as to the likelihood that the South Florida Water Management District ("SFWMD") would renew the City's consumptive use water supply withdrawal permit, issued pursuant to the Florida Water Resources Act of 1972, §§373.216-219, Fla. Stat. (1987), beyond the expiration date of the current permit, which is December 10, 1997. Evidence was initially taken from Steven Lamb, Director of the Water Use Management Division of the SFWMD, outside the presence of the jury, based upon which the trial judge determined that it would be appropriate to submit the testimony to the jury and allow the jury to determine as a matter of fact whether it was more likely than not that the permit would be renewed. Evidence was introduced at the trial through Mr. Lamb's

testimony that the SFWMD will routinely renew a municipality's water supply withdrawal permit. Mr. Lamb testified as follows:

> Q. Under the present criteria, if the City of Delray Beach were to come in for a renewal application on this date, would it be granted, in your opinion?
>
> A. Everything being consistent with groundwater conditions, as I'm aware of them today, and interpretation of our rules, I don't -- I think the staff recommendation would be the same as it was in '87 for this particular wellfield and configuration.
>
> Q. Other than for saltwater intrusion, are you aware of any permit denials to a municipality?
>
> A. Not that I'm aware of, we have not denied public water supplies (T.2232-3, AT14).

Thus, the jury had ample evidence before them upon which they could determine that the City's water withdrawal permit would be renewed and that the City would be able to continue to draw water from the aquifer for years after the expiration of its current permit.

The court below focused exclusively on other testimony in which on cross-examination Mr. Lamb agreed in response to a leading question that it was speculative as to whether or not the City's permit would be reissued. Davey Compressor Co. v. City of Delray Beach, 613 So.2d at 62. The court below then stated:

> Since appellee failed to establish its legal interest in the groundwater beneath its wellfield beyond the expiration date of its water consumptive use permit, appellee cannot recover future damages after the expiration date of the permit. See Sallas v. State Road Dept., 220 So.2d 378, 379-80 (Fla. 1st D.C.A. 1969) [Id.]

Whether the City established its legal interest was a question of fact to be determined by the jury. Granted, on cross-examination, Mr. Lamb conceded that there was some element of speculation in terms of what would happen in the future; there always is. The testimony had to be heard in its entire context, as it was by both the jury and the trial judge. Clearly by its verdict, the jury found that it was more probable than not, based upon the totality of the evidence, that the permit would be renewed, and that for the City to proceed on that assumption in expending funds to clean up the pollution with the reasonable expectation that it would be allowed to continue to furnish drinking water into the foreseeable future was reasonable. Indeed, it makes no sense to assume that the permit would not be renewed, since this would leave the City residents without their drinking water.

The Fourth District erred in reversing the trial court on this point. This Court should therefore reverse the Fourth District Court of Appeal on this issue and reinstate the judgment entered by the trial court.

CONCLUSION

For the reasons set forth above, the decision of the Fourth District Court of Appeal affirming the trial court's instructions and rulings as to the proper measure of damages should be affirmed. The ruling of the court below affirming the award of past damages in the amount of $3,097,488, as well as the recoverability of future damages up to and including December 10, 1997, should be affirmed. However, that portion of the decision below that reversed that portion of the trial court's award of

$5,600,000 for future damages which included damages beyond December 10, 1997, should be reversed, and the judgment of the trial court should be reinstated.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer Brief of Respondent City of Delray Beach, and the accompanying Appendix of Respondent City of Delray Beach, was served this 25th day of October, 1993, by U.S. mail, first-class prepaid, upon:

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