D.A. 12-2-93 O&J w/app. 83

IN THE SUPREME COURT OF FLORIDA

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DAVEY COMPRESSOR COMPANY,

Petitioner,

vs.

CASE NO. 81,538

CITY OF DELRAY BEACH,

Respondent.
_____/

INITIAL BRIEF OF PETITIONER DAVEY COMPRESSOR COMPANY

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STATEMENT OF THE CASE

This case is before the Court to review Davey Compressor Co. v. City of Delray Beach, 613 So.2d 60 (Fla. 4th DCA 1993) (App 1), which expressly and directly conflicts with decisions of other district courts of appeal on the measure of damages in groundwater contamination cases. Review by this Court is the culmination of more than five years of litigation which began in 1988, in Palm Beach County Circuit Court.[1] The Fourth District's opinion, which reversed in part and affirmed in part an $8.7 million judgment based on a jury verdict, became final in March, 1993. Because the opinion disregards Florida law on the measure of damages, this Court accepted the case for review.[2]

STATEMENT OF THE FACTS

In 1981, Aero-Dri Corporation ("Aero-Dri") began manufacturing dehydration filters and overhauling air compressors at a facility in the City of Delray Beach (the "City"). As part of the overhauling process, Aero-Dri cleaned and degreased air compressor parts with a variety of chemicals, primarily perchloroethylene, or

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[1]Citations to the record shall be indicated parenthetically by "R." followed by the page number, e.g., (R. 136). Citations to the trial transcript are indicated parenthetically by the letter "T." followed by the page number, e.g., (T. 161). Citations to the Plaintiff's and Defendant's exhibits received in evidence are indicated parenthetically by reference to the party which premarked the exhibit and the exhibit number, e.g., (City #1). Citations to documents contained in the appendix are indicated parenthetically by "App." followed by the page number, e.g., (App. 1).

[2]On September 9, 1993, the Court accepted this case for review under Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure.

"perc" (T. 773; R. 1388).[3] Because perc is hazardous, its use and disposal are regulated under both federal and state laws.[4] Florida has also established a Maximum Contaminant Level for perc of three micrograms per liter (three parts per billion) in drinking water.[5]

Aero-Dri employees used perc at work stations located throughout the facility. During the course of regular use, the perc would become dirty with oil, grease, and sand, and would require periodic replacement. From the time it began overhauling air compressors in Delray Beach, Aero-Dri employees disposed of the waste perc by dumping it onto the ground at the rear of the facility. (T. 563-567, 772-776, 804, 808-809, 838-839, 849, 852; R. 1388). This practice violated federal and state hazardous waste laws. Unbeknownst to Aero-Dri or its employees, the City operated a potable water supply wellfield less than a quarter mile from the Aero-Dri facility (R. 1388). The wellfield consisted of seven groundwater withdrawal wells, numbered 21-26, known as the "20-Series" wells (R. 1388). This was one of the City's most

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[3]Perchloroethylene (also known as tetrachloroethylene) is a highly volatile chlorinated solvent.

[4]Perc is a hazardous substance under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA") 42 U.S.C. § 9601 (West 1983 and Supp. 1993). Waste perc is a listed hazardous waste in rules the Environmental Protection Agency ("EPA") has promulgated under the Resource Conservation and Recovery Act ("RCRA") 48 U.S.C. § 6901) (West 1983 and Supp. 1993). See 40 C.F.R. § 261.33. EPA has delegated to the Florida Department of Environmental Protection ("DEP") primary authority to enforce RCRA in this state. DEP has adopted EPA's RCRA regulations by reference. See Chapter 17-730, Fla. Admin. Code.

[5]Fla. Admin. Code R. 17-550.310(2). A Maximum Contaminant Level is based on the potential health risk of the regulated compound.

productive wellfields and provided over eight million gallons of water per day for public water supply (T. 85-91).

From the commencement of operations in 1981 through June 1985, Lawrence and John Razete were the majority stock holders of Aero-Dri. The Razetes also owned Davey Compressor Company ("Davey") which manufactured new air compressors in Cincinnati, Ohio. In June 1985, the Razetes sold both Aero-Dri and Davey to Purvin Industries, Inc.[6] In January 1987, Purvin merged Aero-Dri into Davey after which Aero-Dri operated as a division of Davey with Purvin as the parent corporation.[7] (R. 1388; T. 2260-2262).

At the time of the acquisition of Aero-Dri in June 1985, Purvin relied on the warranties of the former owners that the facility was being operated in compliance with the law, and therefore undertook no investigation into the company's waste disposal practices (T. 2284). And because the management and personnel were left in place at Aero-Dri, improper disposal of waste solvents continued after Purvin's stock acquisition and the merger of Aero-Dri and Davey. In October 1987, following an inspection by Florida officials, Davey's Cincinnati-based management first learned of the improper hazardous waste disposal practices and immediately ordered the manager of the Aero-Dri

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[6]Purvin purchased the stock of Aero-Dri and Davey through two acquisition companies, ADC Acquisition Company and Purvin Acquisition Company (R. 1388).

[7]The Razetes also owned the real property at S.W. 10 Street in Delray Beach through a partnership called L&J Enterprises ("L&J"). L&J leased the property to Aero-Dri and subsequently Davey. (R. 1388).

facility to stop them (T. 2262-2267, 2277).[8] Davey promptly implemented assessment and remediation activities but unfortunately, the damage had already been done. (T. 2268, 2273-2274).

The State's inspection had been triggered by the City's discovery of elevated levels of perc in wells 21 through 24 of the 20-Series wellfield in August, 1987. (R. 1388; Davey #71). The solvents which had been discarded onto the ground at the rear of the Aero-Dri facility had percolated though the soils into the groundwater and migrated to the City's 20-Series wellfield (T. 951-959; R. 1388). In March 1988, the City installed an interim treatment system which, nine months later, it removed when it installed a "permanent" treatment system at the water treatment plant. (T. 152-154, 1794; City #238). The purpose of the interim and "permanent" systems was to remove the perc from the groundwater. Prior to installation of the "permanent" system, the City also purchased water from neighboring municipalities and implemented water conservation measures. (T. 871-872, City #238).

On April 20, 1988, the City filed an eight-count complaint against Davey, Purvin, and the Razetes, seeking injunctive relief and a type of damages it called "response costs" (R. 418, 435). Under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9601, any person may bring suit under Section 107(a) to recover "costs of response" or "response costs" as defined in 42 U.S.C. § 9601 (24)

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[8]The State's inspection report noted numerous hazardous waste violations at the facility. (City #157, 164; T. 682-688, 694, 710-711).

and (25). Such costs include the reasonable and necessary expenses incurred in removing and remediating hazardous substances which have been released at a facility. Federal courts have exclusive jurisdiction over Section 107(a) claims and such cases are tried before a judge, not a jury. 42 U.S.C. § 9613(b).[9]

The City decided not to sue Davey and the other defendants under CERCLA. Instead, it filed suit in Palm Beach County Circuit Court, where it demanded a jury trial on a variety of state-law claims (App 2). Significantly, the complaint only sought "response costs" as damages -- a remedy available exclusively in federal court under CERCLA.[10]

In addition to suing for "response costs," the City also attempted to sue on behalf of the State under Section 403.412, Florida Statutes, and Section 60.05, Florida Statutes.[11] Under Section 403.412(2)(c), Florida Statutes, the State has 30 days from receipt of a verified complaint to take appropriate action. Because the City had served the State with a complaint and the

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[9]To prevail on a CERCLA claim against a responsible party, a plaintiff need only prove that the release of hazardous substances has caused it to incur necessary response costs consistent with the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP") 40 C.F.R. Part 300. Bunger v. Hartman, 797 F.Supp. 968, 971 (S.D. Fla. 1992).

[10]The City used the term "response costs" consistently throughout the Amended Complaint to describe the damages it sought. See, e.g., R. 435 ¶ 62 (private nuisance); ¶ 67 (trespass); ¶ 75 (negligence); and ¶ 81 (strict liability)("Defendants are fully liable for all response costs incurred by the City.")

[11]Count I of the City's Complaint was based on § 403.412, Florida Statutes, known as the Environmental Protection Act of 1971. Count II of the City's Complaint was based on Florida's nuisance statutes, Sections 60.05 and 823.05, Florida Statutes.

State had timely filed suit against Davey and the other defendants, the trial court entered summary judgment against the City on its two statutory claims.[12] (R. 778)

The defendants moved to consolidate the City and State cases for trial in order to avoid duplicative and inconsistent judgments (R. 1329 & 1380).[13] The trial judge denied the motion to consolidate (R. 1386), and Fourth District Court of Appeal denied the defendants' petition for review by certiorari.[14]

Prior to trial, the City voluntarily dropped its claim for punitive damages (R. 1473). It also abandoned its public nuisance claim (T. 3197).[15] The case finally went to the jury on the City's four common law claims: trespass, negligence, private nuisance, and strict liability. The damages the City sought on each claim were identical: "response costs."

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[12]The State received a verified complaint on April 25, 1988 (R. 495). On May 4, 1988, the State filed suit, State of Florida v Aero-Dri Division of Davey Compressor Co., Case No. 88-4071-AA (R. 495 & 1329). The trial court also awarded attorney's fees to the prevailing defendants as provided by Section 403.412(f), Florida Statutes (1989). The City unsuccessfully appealed the various attorney's fees awards assessed against it. City of Delray Beach v. Davey Compressor Co., 605 So.2d 885 (4th DCA 1992) and City of Delray Beach v. Aero-Dri, Division of Davey; et al., 606 So.2d 371 (4th DCA 1992).

[13]An award of future cleanup costs to the City would be inconsistent with the State's requested mandatory injunction directing the defendants to remediate the contamination.

[14]Davey Compressor Co. v. City of Delray Beach, Case No. 90-01178), (Fla. 4th DCA 1990).

[15]Although the case was pending for over two years, the City at no time sought the injunctive relief it had plead in its complaint.

Davey filed a pre-trial memorandum addressing the measure of damages under Florida law (R. 1811, 1817). Consistent with long-standing precedent, Davey argued that "response costs" can only be recovered under CERCLA, not under Florida common law, and that regardless of how the City characterized its losses, the City could not recover more than the total cost of replacing the wellfield. The trial judge decided not to follow Florida law on the measure of damages, though acknowledging that in doing so he was "flirting with reversal" (T. 1142-1157, 2249). Instead, he ruled that the City could recover all its past and future "response costs" without regard to the value of its wellfield.

At trial, the City offered no evidence on the value of the wellfield before or after it was contaminated. Similarly, the City offered no evidence on what it would cost to replace the wellfield. When Davey attempted to introduce evidence on the value of the City's wellfield and the cost of installing wells at a new location, the City objected on grounds of relevancy. (T. 2113-2114, 2245-2250). The trial court sustained the objections. Consistent with its earlier rulings, the judge also rejected Davey's jury instructions which tracked Florida law on the measure of damages (R. 1586; T. 3255-3256; R. 1603; T. 3390-3393).[16] Instead, the court instructed the jury that there was no limit on the "response

[16]Ironically, the City had originally sought information on the value of the wellfield from its consultants for use at trial, though it later maintained such information was irrelevant. (Davey #68, 69 & 53; T. 2245).

costs" they could award the City (R. 1603; T. 3255-3256, 3390-3393).

The City asked the jury for $3,097,488 in "response costs" it incurred through the date of trial (City #238; T. 1852-1853).[17] In addition, it asked the jury to award it future "response costs" ranging from $3.8 to $17.0 million (City #248).[18] The City used a computer-generated model which "predicted" that perc would remain in the 20-Series wellfield for a period ranging from 50 to 100 years (T. 1453-1454; 1623).[19] Past and future damages were based on the anticipated costs of operating the permanent water treatment system for this period of time. The jury awarded the City $3,097,488 for expenses incurred through the date of trial[20]

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[17]After the City rested, the trial court entered a directed verdict in favor of Purvin and the Razetes (R. 1648, 1653).

[18]Although Davey argued that expenses incurred by the City in violation of the Florida Consultant's Competitive Negotiation Act ("CCNA"), Section 287.055, Florida Statutes (1993) should not be awarded, this position was rejected by the trial court. (R. 1807; T 3183-3184, 2205-2215). The Fourth District did not address this issue on appeal. 613 So.2d at 61.

[19]The City's best estimate for projected groundwater cleanup was 88 years. (T. 1453-1455). But the computer models used by the City have not been in existence long enough to determine whether such long-term projections are reliable. Defendants objected to their use at trial on the grounds that they do not meet the standards established in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and recently reaffirmed by this Court in Flanagan v. Florida, 18 Fla L. Weekly S475 (Fla. Sept. 9, 1993). The trial court allowed the City to offer computer-based projections and the Fourth District declined to address the issue on appeal (T. 1378-1675; 613 So.2d at 61).

[20]The City's past damages consisted of capital, installation, and operating costs for the temporary carbon filter units and the four sixty foot high permanent air stripper towers; associated engineering costs; water testing costs; publicity costs for water conservation efforts; the cost of purchasing water from other

and $5,600,000 for estimated future "response costs" (R. 1646, 1650).

On appeal, Davey raised six grounds for reversal, only two of which were addressed by the Fourth District. Davey argued, and the Court agreed, that the City has no legal interest in the groundwater underlying its wellfield apart from that conferred by the water consumptive use permit issued by the South Florida Water Management District. 613 So.2d at 62. Because the City failed to establish a legal interest in the groundwater beyond the 1997 expiration date of the permit, the Court held that the City could not recover future damages for remediating the groundwater after that date. 613 So.2d at 61.

The Fourth District refused, however, to reverse the trial court's erroneous rulings on the measure of damages for injuries to property. The Court acknowledged that "as a general rule, damages for injury to real property cannot exceed the value of the property," 613 So.2d at 61, citing Keyes Co. v. Shea, 372 So.2d 493 (Fla. 4th DCA 1979), but concluded that the City's claim was for the "loss of use" of the groundwater, and therefore the value of the City's wellfield was irrelevant. Accordingly, the Fourth District announced two new measure of damages rules:

> 1. A property owner may recover all costs expended in remediating negligently caused groundwater contamination even if those costs exceed the cost of purchasing replacement property from which uncontaminated groundwater may be withdrawn.

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municipalities; and the costs of disposing of soil samples.

> 2. There is no limit to the amount a property owner may recover in abating a nuisance, even if the amount spent exceeds the actual value of the property itself.

613 So.2d at 61-62.

Davey sought this Court's review of that portion of the Fourth District's decision which held that the City could recover "response costs" without regard to the value of its wellfield.[21] Because the Fourth District's opinion expressly and directly conflicts with decisions of other district courts of appeal on the measure of damages in groundwater contamination cases, this Court accepted the case for review.

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[21]The City sought review of that portion of the decision which held that it could not recover response costs for the period of time after the expiration of its groundwater withdrawal permit. By Order dated September 15, 1993, this Court declined to review the City's appeal. City of Delray Beach v. Davey Compressor Co., Case No. 81,539, (Fla. Sept. 15, 1993).

SUMMARY OF THE ARGUMENT

The proper measure of damage in groundwater contamination cases and other cases involving injuries to property is well established in Florida. The injured party may recover either: (1) the costs of removing the contamination from the groundwater so that it may be used as it had been prior to the contamination; or (2) the diminution in the property's value, whichever is less. If the extent of the contamination is so great that the cost of restoring the groundwater will exceed the value of the property, then the injured party may recover the cost of purchasing replacement property and wells from which uncontaminated groundwater may be withdrawn. In all reported decisions involving groundwater contamination, damages to real property, and injuries to personal property, Florida courts have consistently held that the diminution in value rule precludes an injured party from recovering restoration costs which exceed the value of the property or its replacement cost.

The trial court decided not to follow Florida law and ruled that the City's entitlement to restoration costs was automatic -- both the value of the City's wellfield and its replacement cost were irrelevant. On appeal, the Fourth District acknowledged the general measure of damages rule noted above, but affirmed the trial court's past damages judgment of $3.1 million on the grounds that the City's suit was not for injury to its property but for its "loss of use" of the groundwater caused by the contamination. The court held that because the City sued for negligence, it could

recover all foreseeable and direct expenses incurred as a result of Davey's negligent groundwater contamination -- without regard to the value or the cost of replacing the City's wellfield. And, characterizing the City's damages as nuisance abatement costs, the Fourth District ruled that such costs could be recovered without regard to the value of the City's wellfield.

Though it offered lip service to Florida's measure of damages rule, the Fourth District's decision below is a radical departure from the established law on damages to property, including groundwater rights. The Fourth District's opinion declares that a "loss of use" claim exists independently from a cause of action which embodies all other injuries to the affected property. With utmost respect to the Fourth District, this conclusion defies common sense, and has absolutely no basis in the law. Use of property, whether real property, personal property, or groundwater, is just one of several rights and entitlements which inhere in property. There is not a separate cause of action for each of the "sticks" which comprise the "bundle of rights" we know as property. The City's suit to recover damages for groundwater contamination was a property damage suit, and the Fourth District's attempt to avoid the measure of damages rule by calling it a "loss of use" claim is totally without merit.

The Fourth District held that because the City sued for negligence, it could recover all foreseeable and direct expenses it incurred as a result of Davey's negligent contamination of the groundwater without regard to the value of the City's wellfield.

On this point, the Fourth District's opinion directly contradicts numerous property damage cases in Florida predicated on negligence. Florida courts have never allowed a negligently injured property owner to recover restoration costs without regard to the value of the injured property.

Equally devoid of merit was the Fourth District's conclusion that a property owner may recover nuisance abatement costs without regard to the value of the property being protected. Florida courts have consistently held that in groundwater contamination cases, whether sounding in nuisance, negligence, trespass, or strict liability, the injured party may not recover an amount which exceeds the value of the property or its replacement cost. In holding that the City could recover nuisance abatement costs without regard to the value of its wellfield, the Fourth District established a new measure of damages for nuisance cases which conflicts with the other district courts of appeal.

Florida courts have permitted exceptions to the traditional measure of damages where application of the rule would not adequately compensate the injured party. In such cases, the injured party must show that the diminution in property value will not adequately compensate it. The City never attempted, and the trial court did not require it, to show that the traditional measure of damages would be inadequate. Both the trial court and the Fourth District ruled as a matter of law that an essential element of the measure of damages -- the diminution of value of the wellfield and its replacement cost -- was irrelevant and

inadmissible. Accordingly, there is and was no factual basis in the record to support an exception to the measure of damages rule, even if one had been sought.

There are no public policy arguments which would support this Court's rejection of established law and adoption of the Fourth District's measure of damages rule. Congress and the Florida legislature have both passed laws to protect the State's natural resources and to allow persons to recover cleanup expenses without regard to the value of the property. At the City's behest, the State of Florida sued Davey to compel the cleanup of the groundwater. But, the City chose not to avail itself of its federal "response costs" remedy because it wanted a jury trial in state court. Simply because the City failed to properly utilize available statutory remedies is an insufficient basis for this Court to jettison the long-established Florida common law on the measure of damages. Accordingly, the Fourth District's affirmance of the past damages award should be reversed and this case should be remanded to the Circuit Court for a new trial.

ARGUMENT

I. The Fourth District Erred in Applying a New Measure of Damages to This Groundwater Contamination Case.

A. In An Action for Injury to Property, Damages May Not Exceed the Value of the Property.

In Florida, as in most states, two measures of damages are applied to the wrongful injury to property: "(1) the so-called 'diminution in value' rule, which is the difference between the value of real property before and after the injury; and (2) the costs of repairing or restoring the property to its condition prior to the injury, usually referred to as the 'restoration' rule." United States Steel Corp. v. Benefield, 352 So.2d 892, 894 (Fla. 2d DCA 1977); Keyes Co. v. Shea, 372 So.2d 493, 496 (Fla. 4th DCA 1979).[22]

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[22]Reeser v. Weaver Bros., Inc., 605 N.E. 2d 1271, 1274 (Ohio 2d App. Dist. 1992); app denied, 598 N.E. 2d 1164 (Ohio 1992) ("If restoration can be made, measure of damages is the reasonable cost of restoration . . . unless such costs of restoration exceeds the difference in market value of the property . . . in which case the difference in market value before and after the injury becomes the measure"); Strzelecki v. Blasers Lakeside Industries, Inc., 348 N.W. 2d 311, 312 (Mich. App. 1984) ("[T]he measure of damages to real property, if permanently irreparable, is the difference between its market value before and after the damage. However, if the expense of repairs is less than the market value, the measure of damage is the cost of the repairs"); In re Commodore Hotel Fire & Explosion Cases, 324 N.W. 2d 245 (Minn. 1982) ("When property is not totally destroyed, the ordinary measure of damages is the difference in value before and after the loss, or the cost of restoration, whichever is less"); Burk Ranches, Inc. v. State, 790 P.2d 443 (Mont. 1992); Williams-Bowman Rubber Co. v. Industrial Maintenance, Welding and Machining Co., Inc., 677 F. Supp 539 (M.D. Ill. 1987)(construing Illinois law);Weld County v. Slovek, 723 P.2d 1309 (Colo. 1986); Business Men's Assurance Co. of America v. Graham, 1993 Mo. App. Lexis 381, Case No. 45,816 (Mo. App. Ct. Sept 7, 1993); Phillips Petroleum Co. v. Stokes Oil Co., Inc., 863 F.2d 1250, 1267 (6th Cir. 1988) (admiralty case); Ault v. Dubois, 739 P.2d 1117, 1120 (Utah App. Ct. 1987); See also 22 Am.Jur. 2d, Damages § 405 (1988); "L" Inv. Ltd. v. Lynch, 322 N.E. 2d 651, 654 (Neb. 1982).

In cases of permanent injuries to property, the diminution rule is applied. Atlantic Coast Line R. Co. v. Saffold, 178 So. 288, 290 (Fla. 1938); Clark v. J.W. Conner & Sons, Inc., 441 So.2d 674, 676 (Fla. 2d DCA 1983) (trespass); Standard Oil Co. v. Dunagan, 171 So.2d 622, 624 (Fla. 3d DCA 1965) (damages from groundwater pollution limited to diminution in value of property); Crown Cork & Seal Co. v. Vroom, 480 So.2d 108, 112 (Fla. 2d DCA 1985) (well contamination damages limited to diminution in value of the property); Exxon Corp., U.S.A. v. Dunn, 474 So.2d 1269, 1273 (Fla. 1st DCA 1985) (nuisance).

In cases of temporary injury to property, the measure of damages is typically the lesser of either the diminution in value, which is often measured in terms of loss of rental value, or restoration costs. Keyes, 372 So.2d at 496; Nitram Chemicals, Inc. v. Parker, 200 So.2d 220, 226 & 230 (Fla. 2d DCA 1967); Porter v. Saddlebrook Resorts, Inc., 596 So.2d 472, 475 and n.3 (Fla. 2d DCA 1992); Benefield, 352 So.2d at 894 and n.6. This measure of damages is equally applicable in cases of injury to personalty. Alonso v. Fernandez, 379 So.2d 685, 687 (Fla. 3d DCA 1980); Airtech Service, Inc. v. MacDonald Construction Co., 150 So.2d 465, 466 (Fla. 3d DCA 1963); Meakin v. Dreier, 209 So.2d 252, 254 (Fla. 2d DCA 1968); McMinis v. Phillips, 351 So.2d 1141 (Fla. 1st DCA 1977); Florida Standard Jury Instruction 6.2(g) and comment; Restatement (Second) of Torts § 928.[23]

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[23]In cases of temporary damage to personalty, Florida allows a plaintiff to elect between restoration costs and the diminution in value. See, e.g. McMinis, 351 So.2d at 1141. If a plaintiff

Regardless of the type of injury involved, i.e., "permanent" or "temporary," "real property" or "chattel," an important qualification to the general measure of damages exists: Damages are limited to the value of the property. Benefield, 352 So.2d at 894-95; As noted in Keyes:

> The costs of restoration, however, cannot be adopted as the measure of damages where the cost of restoring the property would exceed the value thereof in its original condition, or the depreciation in the value thereof, or the actual damage sustained by the plaintiff, or where restoration is impracticable.

372 So.2d at 496 (quoting 25 C.J.S. Damages § 84 at 924); see also, May v. Muroff, 483 So.2d 772, n.1 (Fla. 4th DCA 1986) ("Both parties agree that the cost of restoration of the land would be an inappropriate remedy since the cost of restoration would greatly exceed the diminution in the value of the property"); Badillo v. Hill, 570 So.2d 1067, 1069 (Fla. 5th DCA 1990) ("Most authorities and case law hold that a plaintiff cannot recover a sum greater than the chattel's pre-injury value.") citing, Annotation Damages: Duty to Minimize, 55 A.L.R.2d 936 (1957); McCormick, Damages 476 (1935); see also, Kluger v White, 281 So.2d 1, 3 (Fla. 1973)

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elects repair costs, though, the award is reduced by the difference between the original value and value after repairs, because a "plaintiff whose chattel has been damaged should not be unjustly enriched by the repairs necessitated by a tortfeasor." 351 So.2d at 1142. As indicated infra, however, repair costs may never exceed the pre-injury value of the affected property.

(repair costs cannot be recovered where they exceed the fair market value of the automobile before collision).[24]

As explained in Benefield and Badillo, supra, the rationale underlying the cap on damages is that compensation for the greater injury, i.e., total destruction of the property, should not exceed that for a partial injury. 570 So.2d at 1069. If it were otherwise, a plaintiff would be overcompensated "in that he would enjoy recovery of the decreased value of the land and then be in a position to repair the damage at the lesser cost, thus making a profit on the difference." 352 So.2d at 894. See also, "L" Inv., 322 N.W.2d at 656 ("[W]e believe the award for such damage should not exceed the market value of the property. . . . It seems that one ought not to be able to recover a greater amount for partial destruction than one could recover for total destruction"). Simply put, a negligent party should not be forced to pay $30,000 for car repair and rental expenses when the plaintiff could have purchased a new car for $20,000.

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[24]Scott v. Ft. Roofing and Sheet Metal Work, 385 S.E. 2d 826, 827 (S.Car. 1989) ("Cost of repair or restoration is a valid measure of damages for injury to a building although compensation may be limited to the value of the building before the damage was inflicted");Burk Ranches, Inc. v. State, 790 P.2d at 447 (Mont. 1990) ("Even though repair is theoretically possible, if the cost of repair greatly exceeds the decreased value of the property, the injury is presumptively permanent and the decreased value rule applies");Brandywine 100 Corp. v. New Castle County, 527 A.2d 1241 (Del. 1987); Mikol v. Vlahopoulos, 340 P.2d 1000, 1001 (Ariz. 1959); Reeser, 605 N.E. 2d at 1278; Maxedon v.Texaco Producing, Inc., 710 F.Supp. 1306, 1316 (D. Kan. 1988)(construing Kansas law): Strzelecki, 348 N.W. 2d at 312; Business Men's, 1993 Mo. App. Lexis at *25; Phillips Petroleum, 863 F.2d at 1257; Ault, 739 P.2d at 1120; See also, Weld County, 723 P.2d at 1316-17.

If the goal of compensatory damages is to make a plaintiff whole, an award of damages to the City sufficient to purchase a replacement wellfield would have accomplished that objective. Following Benefield, supra, two potential remedies were available in this case: (1) the costs of restoring the groundwater to its original condition via remediation; or (2) the value of the wellfield or its replacement cost. Both remedies provide the City with full compensation because, in either case, the City gets a supply of potable water. Florida law requires that a defendant pay the lesser of the two.

In addition, under the existing measure of damages rule, the City was entitled to seek temporary "loss of use" damages until a replacement wellfield was brought on line. Such interim damages could have included the costs of purchasing water from nearby communities and a temporary treatment system pending acquisition of the replacement wellfield.

Thus, the diminution in value rule works. It would have awarded the City the cost of a replacement wellfield and interim damages for the period of time before a new wellfield became operational. This measure provides compensation to an injured plaintiff without penalizing the defendant excessively. Because there is no justification for the Fourth District's abandonment of the general measure of damages, this Court should quash the

decision below, and remand for a new trial in accordance with Florida's measure of damages rule.[25]

B. Florida Does Not Recognize "Loss of Use" as a Cause of Action Separate from the Underlying Property Damage Claim.

The Fourth District expressly acknowledged that under the "general rule, damages for injury to real property cannot exceed the value of the property." 613 So.2d at 61 (citation omitted). To avoid this limitation, however, the Fourth District ruled that the City was not suing for property damage:

> The record, however, shows appellee sought damages for all of its response costs and related expenses as a result of appellant's unlawful disposal practices. Therefore, appellee sued, not for injury to its real property, but rather for injury to its right to the use of the groundwater beneath its real property.

Id.

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[25]Because the City presented only evidence of its restoration costs, Davey moved for a directed verdict after the City rested. In Horn v. Corkland Corp., 518 So.2d 418 (Fla. 2d DCA 1988), the Second District affirmed entry of a directed verdict in a trespass case involving the flooding of real property where the plaintiff only offered evidence of cleanup costs.

> During trial, the [plaintiffs] proffered the testimony of a local nursery man who testified as to the costs of cleanup the property after the trespass. . . .
>
> The usual measure of damages for trespass to real property is the difference in value of property before and after the trespass. . . . When asked his opinion regarding the fair market value of this property, [the plaintiffs] could not respond. . . . Because [plaintiffs] presented no evidence in support of the proper measure of damages . . . there was no jury issue.

518 So.2d at 420-21 (citations omitted).

This conclusion is contradicted not only by the City's own pleadings but also established Florida law on property damage suits. In the lower court, the City stated "it has specific property rights with respect to each of the 20-Series wells." Plaintiffs Supplemental Memorandum in Opposition to Defendants' Motion for Summary Judgment (R. 786).

> As an owner of property and proprietary rights [the City] may maintain a cause of action for injury to those rights.
>
> . . . .
>
> The City's use of its property -- the wells and wellfield -- and the underlying groundwater at those sites, at a minimum, has been substantially impaired by Defendants' actions.

(R. 791-792) (emphasis supplied). Attached as exhibits to the City's Opposition Memorandum were copies of its deeds and easements for the 20-Series wellfield (R. 912-934).

The City's losses resulted from the physical damage to the groundwater caused by Davey's release of perc. Because of the contamination of the water -- a tangible, physical thing in which the City had a lawful protectable interest -- the City sustained property damage. The property damaged was the 20-Series wellfield, consisting of the City's wells, the property on which the wells were located, and its term-of-years interest in the groundwater underlying the wellfield. This is property. If an office building is rendered untenantable due to the negligence of a neighboring landowner, the tenant who is forced to vacate his place of business has suffered property damage. He does not have a separate and

independent claim against the tortfeasor for his "loss of use" of the building.

In Village of Tequesta v. Jupiter Inlet Corp., 371 So.2d 663 (Fla. 1979), cert. denied, 444 U.S. 965 (1979), this Court made clear that under Florida law private citizens and/or local governments have no vested ownership interest in the groundwater. Id. 667. Rather, the State owns the groundwater, and the only right of a property owner to the groundwater underlying his land is to the use, or "usufruct," of the water and not to the water itself. The right to use water, however, is not unlimited. Pursuant to the Florida Water Resources Act of 1972, Section 373.01 - 373.619, Florida Statutes, non-domestic consumers of water, such as the City of Delray Beach, may withdraw groundwater only as authorized pursuant to a Consumptive Use Permit issued by the State of Florida Department of Environmental Protection or one of the water management districts. Id. at §§ 373.203-373.249.[26]

The fact that the City of Delray Beach has only a limited right to withdraw groundwater, however, does not mean that damage to that groundwater is something other than property damage. Unquestionably, from a constitutional perspective, if the State deprived the City of its consumptive use permit this would constitute a destruction of "property" compensable by inverse condemnation. 371 So.2d at 671; See also, Schick v. Fla. Dept. of Agriculture, 504 So.2d 1318 (Fla. 1st DCA 1987) (A constitutional

[26]As provided in Section 373.219(1), Florida Statutes, "no permit shall be required for domestic consumption of water by individual users."

taking was alleged where the plaintiff claimed that defendant's pollution deprived it of an existing use of the water in its wells.)[27]

More fundamentally, the right to use property is an element of property ownership itself:

> While the word "property," in common use, is applied to the tangible physical thing commonly called property, in the law it is not the material object but the right and interest which one has in it, to the exclusion of others, which constitutes property. Property, in a legal sense, consists in the domination which is rightfully and lawfully obtained over a material thing, with the right to its use, enjoyment, and disposition.

Tatum Bros. Real Estate & Inv. Co. v. Watson, 1926, 92 Fla. 278, 109 So. 623, 626 (Fla. 1926). The City had a right to use the groundwater underlying the 20-Series wellfield. The City's lawful and protectable interest in the groundwater was damaged by Davey's conduct. That the State of Florida owns the groundwater did not alter the nature of the City's claim as one for property damage. Leaseholds, mineral rights, and other limited interests in real property do not cease to be "property" by virtue of a reversionary interest in the property's fee owner.

"Loss of use" is not a cause of action which stands on its own, nor is it a new type of injury tantamount to personal in-

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[27]As observed by the Court in Tequesta, the Florida Constitution, unlike the constitutions of other states, does not expressly forbid "damage" to property without compensation. 371 So.2d at 669. Article X, section 6, of the Florida Constitution only forbids the "taking" of private property. Id. Accordingly, there are no takings cases compensating property owners for the State's impairment of their water use rights.

juries, property damages, and contract damages. Moreover, under Florida law, "loss of use" is an element of damages for injuries to property. See, Florida Standard Jury Instruction 6.2(g); Restatement (Second) of Torts § 929; Antun Inv. Corp. v. Ergas, 549 So.2d 706, 709 n.6 (Fla. 3d DCA 1989); see also, Alonso v. Fernandez, 379 So.2d 685, 687 (Fla. 3d DCA 1980); Badillo v. Hill, 570 So.2d 1067, 1068 (Fla. 5th DCA 1990).

As indicated in Florida Standard Jury Instruction 6.2(g), loss of use damages compensates a plaintiff for the temporary inconvenience or expense incurred while its property is replaced or repaired. Florida Standard Jury Instruction 6.2(g) provides, in part:

> You shall also take into consideration any loss (claimant) sustained [for towing or storage charges and] by being deprived of the use of his (reference property) during the period reasonably required for its [replacement] [repair]. (emphasis supplied)

See also, Restatement (Second) of Torts § 931. This limitation makes eminent sense. If a party's building or automobile is damaged, its business may suffer losses due to the interruption in its use of the property. 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.

Accordingly, not only is there no sound basis for the Fourth District's distinction between "injuries to property" and "injuries to the right to use property," it is completely unnecessary. The

existing diminution in value rule provides for the recovery of "loss of use" damages as an element of a property damage claim. Loss of use damages, however, may not be awarded without regard to the value of the damaged property.

By holding that the value of injured property is immaterial in computing damages, future plaintiffs may now sue for the greater of either restoration costs or diminution in value within the Fourth District. This holding has two adverse consequences. First, it relieves a plaintiff from its duty to mitigate. For example, if the topsoil on a plaintiff's farm is washed away due to the adjoining property owner's negligence, the farmer may recover $200,000 to have new top soil brought in, even if a replacement farm may be purchased for $150,000. Second, as indicated in Benefield, supra, it overcompensates the plaintiff at the expense of penalizing the defendant. A landowner is under no common law duty to restore its damaged property simply because it has been awarded restoration costs. This is especially true in the case of a nuisance caused by a neighbor's use of its property. Because a landowner has no obligation to restore its property, an award of restoration costs that exceeds the value of the injured property allows the owner to purchase replacement property and pocket the difference as a profit. This Court should reverse the Fourth District's creation of a new cause of action for "loss of use" damages exceeding the value of the injured property.

confuses the purpose of compensation with the measure of damages. When a defendant negligently damages a plaintiff's home or car, there is no question that the defendant should pay for those damages proximately caused by his or her conduct. This does not mean, though, that a plaintiff may repair its home or car at three times the replacement cost, and then claim that the repair costs were a "foreseeable and direct expense" resulting from the defendant's negligence.

The Fourth District's reliance on Douglass Fertilizers and Taylor is misplaced. Both decisions addressed the recovery of lost profits in tort. Lost profits are not an issue in this case. Moreover, the central issue was the "remoteness" of the damages -- not their measure. The "remoteness" of damages, and the "measure of damages," are not interchangeable concepts. The former is a question of causation, i.e., whether a plaintiff's losses were proximately caused by defendant's tortious behavior. As an example, in the classic case of Petition of Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968), "remoteness" addressed whether the damage to a grain elevator caused by the flooding of a river was a foreseeable consequence of a barge owner's negligence in securing its boat upstream. Even assuming it was foreseeable, the "measure of damages" in that case would still be the lesser of (1) the costs of repairing the elevator, or (2) its diminution in value.

In essence, the Fourth District held that there is a single measure of damages to be applied in all negligence cases, i.e., a plaintiff may recover all expenses incurred as a foreseeable and

246 (Pa. Super 1981). Accordingly, Antun does not support an award of unlimited abatement costs.[28]

The Southern District Court of Georgia recently addressed the recovery of abatement costs in the context of a water pollution case. In Johansen v. Cumbustion Engineering, Inc., 1993 U.S. Dist. Lexis 1993 Case No. CV191-178 (S.D. Ga. June 4, 1993) (App. 3), plaintiff property owners alleged that mining wastes from the defendant's property were contaminating their land and rivers. The fair market value of plaintiffs' property was $1.347 million; however, plaintiffs sought approximately $20 million in restoration damages to construct and maintain a wetlands filtration system for twenty years. 1993 U.S. Dist. Lexis at *2-5.

Construing Georgia law, the Johansen Court first held that plaintiffs' past damages were limited to the diminution in value of their land. 1993 U.S. Dist. Lexis at *18. With regard to plaintiffs' claims for expenses to prevent future injuries to their property, the Court again held that the diminution in value rule limited plaintiffs' recovery:

> [T]he central question concerning future damages is whether treatment costs in excess of the diminution in value of plaintiffs' lands is a "reasonable cost to the plaintiff of avoiding future invasions."
>
> . . . .

[28]In fact, a close reading of Antun reveals that restoration costs -- not abatement costs -- were awarded. Plaintiffs recovered $37,436 for "out-of-pocket costs incurred in restoring the property." 549 So.2d at 708-709 (emphasis supplied). Moreover, the value of the damaged property was not specified.

> As with the § 929 restoration costs, the evidence now before the Court is insufficient to warrant allowing evidence of abatement costs in excess of the diminution in value of plaintiffs' lands. . . .
>
> . . . .
>
> Evidence of treatment costs in excess of the diminution in value of plaintiff's lands is not relevant. . . .

1993 U.S. Dist. Lexis at *24-25 (citations omitted). Johansen involved a motion in limine brought by the defendant property owner to exclude evidence of restoration costs. Applying Georgia law, the defendant's motion was granted.

The same rationale that limits restoration costs to the value of the injured property applies with equal force to claims based on nuisance. The City could not recover a greater amount in abating a nuisance than it could recover for the total destruction of its wellfield.

E. No Exception to the Measure of Damages Rule Was Considered Because the Trial Court and Fourth District Both Held That the Diminution in Value Rule Did not Apply.

Florida and foreign courts have recognized limited exceptions to the traditional measure of damages. Several Florida courts have noted that in cases involving the destruction of ornamental shrubs and trees the reduction in property value may be an inadequate remedy and restoration costs maybe awarded. See, Clark v. J.W. Conner & Sons, Inc., 441 So.2d 674, 679 (Fla. 2d DCA 1983); Fiske v. Moczik, 329 So.2d 35 (Fla. 2d DCA 1976); Elowsky v. Gulf Power Co. 172 So.2d 643 (Fla. 1st DCA 1965). Tracking the language of comment b to § 929(1)(a), Restatement (Second) of Torts, these

cases hold that where the reduction in market value is shown to be an inadequate remedy "recovery has been allowed for losses personal to the owner." Clark, 441 So.2d at 676; Fiske, 329 So.2d at 37; Restatement (Second) of Torts, § 929(1)(a) comment b ("[U]nless there is a reason personal to the owner for restoring the original condition, damages are measured by the difference between the value of land before and after the harm").

The "personal interest" referred to by these authorities, however, has generally been limited to emotional or aesthetic values, such as the value of a "homestead" or a garden, see, §929(1)(a) comment b, supra, and not commercial expectations. Clark, 441 So.2d at 676; Johansen, 1993 U.S.Dist. Lexis at *16-18. In denying restoration costs to property owners whose rivers were contaminated by a neighbor's mining operations, the District Court in Johansen held that, under Georgia law, "mere subjective preference for the land in its pre-tort condition is not a sufficient personal reason in support of allowing restoration costs in excess of diminution in value." Id.

The municipality of Delray Beach does not purport to claim a "personal interest" in its wellfield. Yet, even if it did, those cases that allow for the recovery of restoration costs make it clear that the diminution in market value must be shown to be inadequate. Clark, 441 So.2d at 676; Fiske, 329 So.2d at 37; Johansen, 1993 U.S.Dist. Lexis at *15; Reeser, 605 N.E. 2d at 1278("In order to recover reasonable restoration costs, [plaintiff] was required to present evidence of the diminution in the fair

market value"); Weld County, 723 P.2d at 1316-1317; Business Men's, 1993 Mo. App. Lexis at *26 ("To qualify for the cost of repair exception, the plaintiff must present evidence showing that the cost of repair is insignificant to the total market value"); Trinity Church v. John Hancock Mutual Life Ins. Co., 502 N.E. 2d 532, 537 (Mass. 1987); See also, Culver-Stockton College v. Missouri Power & Light Co., 690 S.W. 168 (Mo. App. Ct. 1985); Rhoades, Inc. v. United Air Lines, Inc., 244 F.Supp 341, 344 (W.D. Pa. 1963); Orange Beach Water, Sewer and Fire Protection Auth. v. M/V Alva, 680 F.2d 1374, 1383-84 (11th Cir. 1982) (admiralty); See generally, Restatement of Torts (Second) § 929 and comment b.

In the proceedings below, the City never sought an exception to the measure of damages rule on the grounds that its application would result in inadequate compensation. Instead, the City simply contended that the rule did not apply. Accordingly, the City never demonstrated that adherence to the traditional measure of damages would result in inadequate compensation. Having never plead nor proven an exception to the general measure of damages rule, it was error to award the City damages without considering the value of its wellfield.

II. There is No Reason for This Court to Create a New Common Law Measure of Damages for Groundwater Contamination Cases in View of the Statutory Remedies for Response Costs.

Because of concerns about the threat of hazardous wastes to human health and the environment, both Congress and the Florida legislature passed laws allowing the EPA, the Florida DEP and other persons to bring suit to recover "response costs incurred in

cleaning up hazardous wastes."[29] Significantly, such statutory remedies do not limit the amount of response costs recoverable to the value of the affected property.

In State of Ohio v. U.S. Dept. of the Interior, 880 F.2d 432, 455 (D.C.Cir. 1989), the Court addressed the inadequacy of common law damages in the context of natural resource damages. There, the State of Ohio challenged a Department of Interior regulation that limited natural resource damages under CERCLA to "the lesser of restoration or replacement costs; or diminution of use values." 43 C.F.R. § 11.35(b)(2)(1987). Id. at 441. The Interior Department's "lesser of" rule operated "on the premise that, as the cost of a restoration project goes up relative to the value of the injured resource, at some point in time it becomes wasteful to require responsible parties to pay the full cost of restoration." 880 F.2d at 433. Ohio contended, however, that the "lesser of" rule was contrary to the intent of Congress. The Court agreed:

> The legislative history [of CERCLA] illustrates, however, that a motivating force behind the CERCLA natural resource damage provisions was Congress's dissatisfaction with the common law. Indeed, one wonders why Congress would have passed a new damage provision at all if it were content with the common law.

880 F.2d at 455; see also, S.Rep. No. 848, 96th Cong., 2d Sess. 13 (1980) ("[T]raditional tort law presents substantial barriers to recovery . . . . [C]ompensation ultimately provided to injured

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[29]For claims brought under Section 107(a) of CERCLA, the "response costs" must be reasonable, necessary and consistent with the National Contingency Plan. 42 U.S.C. § 9607(a).

parties is generally inadequate"); 126 Cong. Rec. 26347 (1980) ("Existing environmental, common, compensatory, and liability laws are not adequate . . . [and] provide little to no relief for clean-up and compensation."); accord, Braswell Shipyards, Inc. v. Beazer East, Inc., No. 92-1476 1993 U.S. App. Lexis 21462 (4th Cir., Aug. 23, 1993) (acknowledging the "fundamental, if elusive, distinction between response costs and economic losses"); Federal Ins. Co. v. Susquehanna Broadcasting Co., 738 F.Supp. 896 (M.D.Pa. 1990) ("The obligation to pay response costs [] under CERCLA [] is not limited by reference to a common law measure or limitation upon the damages recoverable").

In Florida, several statutory remedies exist. Pursuant to Section 403.787(4), Florida Statutes (1991), the owner or operator of a facility from which there has been a release of CERCLA hazardous substances is liable for "all costs of removal or remedial action incurred by the department" as a result of the release. Under Section 403.412, Florida Statutes (1991), the "Environmental Protection Act of 1971," a private citizen may bring suit against any person to enjoin such person from violating any pollution control statute, or may sue the State to compel it to enforce laws and regulations intended to protect the air, water, and other natural resources of the state. Finally, pursuant to Section 376.313(3), Florida Statutes (1991), private citizens are authorized to bring private actions for damages caused by the release of CERCLA hazardous substances or other "pollutive conditions."

In light of the existing statutory remedies enacted to protect the environment and injured property owners, there is no reason to create a new measure of damages authorizing the recovery of "response costs" in common law cases -- without regard to the value of the injured property. The City could have sought relief under CERCLA and other statutory remedies -- but elected not to. The City could have also sought injunctive relief compelling the Defendants to clean up the private nuisance they had created -- but it did not. And, in response to the City's verified complaint, the DEP brought suit pursuant to the provisions of Section 403.412 against Davey to compel the cleanup of the groundwater owned by the State of Florida.

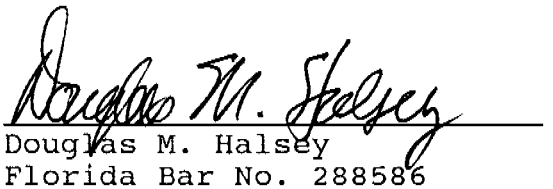
Given the enactment of far-reaching statutory remedies that allow for recovery of "response costs" without regard to the value of the damaged property, it was inappropriate for the Fourth District to rewrite the long-established common law measures of damages simply because the City chose not to avail itself of the remedy Congress created for precisely this kind of contamination. Cf, Bankston v. Brennan, 507 So.2d 1385, 1387 (Fla. 1987) (when legislature actively enters a particular field, prudent course is for courts to defer to legislative branch); Hartley v. Ocean Reef Club, Inc., 476 So.2d 1327, 1329 (Fla. 3d DCA 1985) (determination of public policy and significant changes of law are best left to the legislature). The "response costs" the City sought in its complaint were recoverable in federal court under Section 107(a) of CERCLA. The Fourth District erred in grafting a response cost

remedy onto Florida common law claims which are governed by a totally different measure of damages rule.

CONCLUSION

For the foregoing reasons, this Court should reverse the Fourth District's affirmance of the City's past damages award and remand this case to the circuit court for a new trial.

DOUGLAS M. HALSEY, P.A.



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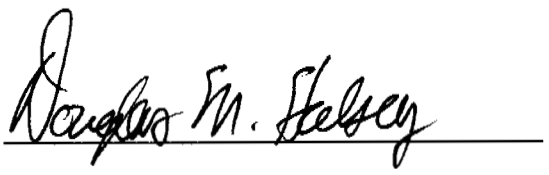

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