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IN THE SUPREME COURT OF FLORIDA

DAVEY COMPRESSOR COMPANY,

Petitioner,

CASE NO. 81,538

vs.

CITY OF DELRAY BEACH,

Respondent.
_____/

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

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

On April 20, 1988, the City of Delray Beach (the "City") filed suit against Davey Compressor Company ("Davey") in Palm Beach County Circuit Court to recover the costs of remediating contamination caused by Davey's improper disposal of hazardous wastes.[1] (RI. 418, 435). The wastes had seeped into the groundwater and migrated from Davey's facility to nearby property the City owned and used for potable water supply. (T. 951-9; Pretrial Stipulation at ¶¶ 11 and 12; RI. 1392-93; Op.1). At trial, the City introduced evidence on the expenses it had incurred in treating the contaminated water as well as computer projections on the estimated cost of treating the groundwater for another 88 years. (T. 154, 871-872, 1820, and 1852-1853; City 156 and 238). Davey offered evidence on the value of the damaged wells and the cost of replacing them at a new location. (T. 2114, 2245-51 and 3100). The trial court excluded such evidence. (T. 2249 and 3100) The jury returned a verdict in favor of the City in the amount of $8.7 million: $3.1 million for expenses incurred through trial and $5.6 million for future clean up expenses. (T. 3404-3405; RI 1646-1647).

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[1]Citations to the record shall be indicated parenthetically by "RI." 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 are indicated parenthetically by reference to the party which premarked the exhibit and the exhibit number, e.g., (City #1). Citations to the Fourth DCA's opinion are indicated parenthetically by "Op."

On appeal, Davey argued that the measure of damages for injuries to property, including interests in groundwater, is the diminution in the property's value or the cost of restoration, whichever is less. Davey also argued that the City should not have been awarded its estimated costs of decontaminating the groundwater after 1997, when the City's legal interest in the groundwater expires.[2] (T. 2225 and Davey #31).

The Fourth District reversed the future damages award, agreeing that the City could not recover decontamination costs after the expiration of its groundwater withdrawal permit. (Op. 5-7). But the Fourth District held that there was otherwise no limit to the amount the City could recover for the groundwater contamination: it could even recover damages exceeding the value of the property which had been injured. (Op. 3-5).

THE CONFLICT

Injuries to property interests are compensated by requiring the payment of the lost value of the property (up to its full value) or the cost of restoring the property, whichever is less. This rule applies to all property interests[3], including the right to use groundwater, and to all types of legal wrongs,

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[2]The State of Florida, which owns the groundwater, also brought a damages action against Davey. That suit, which the trial court and the Fourth District declined to consolidate with the City's suit, remains pending in Palm Beach County Circuit Court. State of Florida v. Aero-Dri Division of Davey Compressor, et al., Case No. 88-4071-AA.

[3]For damages to chattels, Florida has adopted the Restatement of Torts § 928. See, Meakin v. Drier, 209 So.2d 252 (Fla. 2d DCA 1968), Alonso v. Fernandez, 379 So.2d 685, 687 (Fla. 3d DCA 1980), and Badillo v. Hill, 570 So.2d 1067, 1069 (Fla. 5th DCA 1990).

including negligence, nuisance, and trespass. Prior to the Fourth District's decision below, this measure of damages had been consistently applied by this Court and other appellate courts of this State. Atlantic Coast Line R. Co., v. Saffold, 178 So. 288, 290 (Fla. 1938); Horn v. Corkland Corp., 518 So.2d 418 (Fla. 2d DCA 1988); Exxon Corp., U.S.A. v. Dunn, 474 So.2d 1269, 1273 (Fla. 1st DCA 1985); Crown Cork & Seal Co. v. Vroom, 480 So.2d 108, 112 (Fla. 2d DCA 1985); United States Steel Corp. v. Benefield, 352 So.2d 892, 894 (Fla. 2d DCA 1977); Standard Oil Co. v. Dunagan, 171 So.2d 622, 624 (Fla. 3d DCA 1965).

If this Court does not review this case, two new measure of damages rules will apply in the Fourth District, and nowhere else in Florida:

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. (Op. 4-5).

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. Id.

Because the Fourth District's decision is such a significant departure from the measure of damages law in Florida, this Court should exercise its discretion to review the decision below.

SUMMARY OF THE ARGUMENT

The First, Second, and Third District Courts of Appeal have all held that plaintiffs in groundwater contamination and pollution cases may recover the costs of restoration or the

diminution in value to the damaged property, whichever is less. This measure of damages is supported by sound public policy: a plaintiff should not be able to recover the costs of restoration if the damaged property can be replaced for less than it costs to restore it. The decision of the Fourth District conflicts expressly and directly with the measure of damages rule enunciated by the other appellate courts of this State.

The Fourth District claimed that the measure of damages rule did not apply to the City's claim because it was suing, "not for injury to its real property, but rather for injury to its right to the use of the groundwater beneath its property." (Op. 3). The "distinction" is specious: interference with use rights is an element of damage to property. It is not a separate cause of action.

The Fourth District also decided that the City's past and projected future remediation expenses were actually nuisance abatement expenses which it could recover without regard to the value of the City's property. This holding also conflicts with decisions of this Court and the appellate courts of this state.

ARGUMENT

I. The Fourth District Has Rejected Established Law on the Measure of Damages.

In seeking to recover restoration costs without limit, the City's position is virtually indistinguishable from that of the plaintiff in Crown Cork & Seal Co. v. Vroom, 480 So.2d 108 (Fla. 2d DCA 1985). Vroom sued for "damage to certain real property allegedly resulting from contamination of well water on the property due

to the improper dumping of hazardous waste materials on adjacent property. . ." Id. at 109. Vroom incurred restoration costs and objected when the trial court limited the damages to the diminution in the value of the property:

> [P]laintiffs contend that the trial court erred in employing the difference between the value of the land before and after the contamination as the measure of property damages and in refusing to permit the cost of restoration as the measure. We disagree. See Atlantic Coast Line Railroad v. Saffold, 130 Fla 598, 178 So. 288 (1938); Clark v. J.W. Conner & Sons, Inc., 441 So.2d 674 (Fla. 2d DCA 1983); United States Steel Corp. v. Benefield, 352 So.2d 892 (Fla.2d DCA 1977).

480 So.2d at 112.

The cases cited in Vroom discuss the compelling reasons for the rule limiting the amount of the recovery to the lesser of diminution in value of the property or restoration costs. In Benefield, the Second District stated:

> [T]he rationale appears to be that if the diminution of value rule were to be applied when the cost of restoration is less the 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. On the other hand, it seems clear that if the cost of restoration grossly exceeds the diminution in value the fear of a plaintiff's windfall could not materialize.

352 So.2d at 894 (citations omitted). Thus, under Florida law, a property owner may not recover $1,000,000 to restore property which can be replaced for $500,000 or recover $50,000 to repair a car which may be bought new for $25,000.

In sharp contrast to the Second District, the Fourth District concluded, "the trial court did not err when it awarded past damages [restoration costs] without regard to the value of appellee's property." (Op. 5). By ruling that the value of the City's property was irrelevant, the Fourth District conflicted with numerous property damage and groundwater contamination cases which have held that the diminution in the value of the property limits the plaintiff's recovery.[4] Benefield at 894; Atlantic Coast Line R. Co. at 290; Standard Oil Co. at 624; Vroom at 112; Exxon Corp., U.S.A. at 1273. Indeed, in Horn, the failure of the plaintiff to offer evidence of the value of the injured property barred the plaintiff from introducing evidence of restoration costs. 518 So.2d at 420-421.

II. Injury to Property Subsumes Any Injury to the Right to Use the Property.

The Fourth District sought to avoid the measure of damages rule for injuries to property interests by claiming that the City's suit was really "for injury to its right to the use of the groundwater beneath its real property." (Op. 3). Not only is this an utterly spurious distinction, but by holding that injury to the right to use property is separate from a claim for injury to property, the Fourth District, on this issue, also conflicted directly with decisions of other appellate courts in this state.

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[4]The Fourth District had previously recognized that damages were limited to the value of the property. Keyes v. Shea, 372 So.2d 493, 496 (Fla. 4th DCA 1979); May v. Muroff, 483 So.2d 772, 772 n.1 (Fla. 4th DCA 1986)

In Standard Oil Co. v. Dunagan, 171 So.2d 622 (Fla. 3d DCA 1965), the plaintiff property owner brought suit for damages stemming from the contamination of groundwater used for drinking water. The Third District reaffirmed that the measure of damages in a groundwater contamination case is "the difference between the value of the property before the injury occurred and the value afterward." id at 624. The Court specifically rejected the idea (also advanced by the Fourth District in the decision contested here) that the plaintiffs should receive additional compensation for their loss of use of the groundwater:

> Diminished enjoyment or use of the property by the plaintiffs as a result of the damage to their water supply is not an element of damage to be added to the loss of value of the property. Such matters should be taken into consideration in determining the loss of value, otherwise they would result in duplication of damages as held in Atlantic Coast Line R.R. Co. v. Saffold, 130 Fla. 598, 178 So. 288, 290.

171 So.2d at 624.

Accordingly, it was futile for the Fourth District to attempt to avoid the measure of damages rule by restyling the City's claim as one for injury to its right to use groundwater. Injury to the right to use inheres in the groundwater contamination claim and creates no new cause of action, much less a new measure of damages.

In addition, the Third District, in Standard Oil, confirmed that in assessing damages, the relative cost of replacing the damaged property and water supply is critical:

> [I]n determining the effect on the value of the property occasioned by the leakage of gasoline, there should be taken into

> consideration the possibility or probability of obtaining good water from [other] parts of the property or from other sources such as from adjoining property.

Id. Although Davey offered evidence of the value of the City's wellfield as well as the cost of replacing the damaged potable water wells, the Fourth District affirmed the trial court's rejection of such evidence. In ruling that the value of the damaged property and replacement costs were irrelevant in a groundwater contamination case, the Fourth District's opinion below directly conflicted with the Third District's holding in Standard Oil.

Finally, as an alternative ground for its rejection of the measure of damages rule, the Fourth District characterized the City's decontamination of the groundwater at its water treatment plant prior to selling it to customers as "nuisance abatement" expenses. Irrespective of the characterization of the City's off-site treatment of the water which it had by then removed from its property pursuant to State permit, Florida courts have uniformly held that nuisance damages may not exceed the value of the injured property. See e.g., Exxon Corp. U.S.A. at 1373 ("where the injury to real estate resulting from a nuisance is permanent, the measure of damages is the depreciation in the value of the property.")

CONCLUSION

The Courts of this State have consistently held that in cases involving injury to property interests, damages are measured by the diminution in value of the property or the cost of restoration, whichever is less. A suit based on the wrongful contamina-

tion of groundwater is a suit for injury to a property interest. The First, Second, and Third District Courts of Appeal have expressly affirmed the injury-to-property measure of damages in groundwater contamination cases. This Court should accept jurisdiction to resolve the conflict among the appellate courts which has been created by the Fourth District's decision to allow the recovery of restoration expenses without regard to the value of the damaged property.

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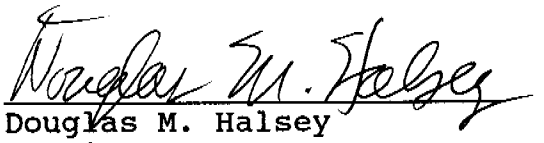

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Jurisdictional Brief was served this 27th day of April, 1993, by U.S. mail upon:

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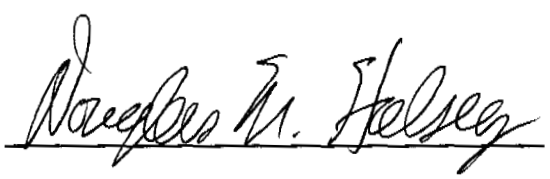

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