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FILED
SID J. WHITE
JUN 9 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

DAVEY COMPRESSOR COMPANY,

Petitioner,

vs.

CITY OF DELRAY BEACH,

Respondent.

CASE NO. 81,538

DCA Case No. 90-02969

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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INTRODUCTION

This cause is pending before this Court on two notices seeking to invoke the Court's "direct conflict" jurisdiction. The Petitioner in this case, DAVEY COMPRESSOR COMPANY (hereinafter DAVEY) was the Appellant in the district court of appeal and the defendant in the circuit court. The Respondent, CITY OF DELRAY BEACH (hereinafter CITY), was the Appellee in the district court of appeal and plaintiff in the circuit court. The District Court of Appeal, Fourth District, affirmed a judgment in favor of the CITY in part and reversed a portion of the judgment and remanded for a new trial. ***Davey Compressor Co. vs. City of Delray Beach***, 613 So. 2d 60 (Fla. 4th DCA 1993). The CITY and DAVEY then filed notices seeking to invoke this Court's jurisdiction. In this case, DAVEY seeks review of that portion of the decision affirming a portion of the judgment for damages sustained by the CITY resulting from DAVEY's active pollution of the water supply.

The CITY previously moved to consolidate both Case No. 81,538 and Case No. 81,539. This Court denied the Motion to Consolidate. While the CITY does not agree that DAVEY has demonstrated any jurisdictional conflict, it does suggest that if this Court somehow agrees with DAVEY that an arguable conflict exists, but disagrees with the CITY on its jurisdictional argument in Case No. 81,539, this Court should exercise its jurisdiction to review all aspects of the Fourth District's decision. This Court has, on occasion,

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exercised its discretion to determine all issues involved in a proceeding and not just the issues involved in the alleged "direct conflict."[1]

Based upon the reasons and authorities hereinafter set forth, it is submitted that this Court should not exercise jurisdiction to review that portion of the decision of the district court of appeal which affirmed the judgment in favor of the CITY.

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[1] E.g., ***North American Mortgage Investors vs. Cape San Blas Joint Venture***, 378 So. 2d 287 (Fla. 1979).

STATEMENT OF CASE AND FACTS

The relevant facts and procedural history are found on the face of the decision sought to be reviewed. To the extend that DAVEY's brief on jurisdiction cites to the underlying record or other matters not found on the face of the decision, they should be ignored for jurisdictional purposes. For example, much of the statement of the case and facts found at page 1 of DAVEY's jurisdictional brief cites to the trial transcript and to exhibits introduced at trial by the parties.

For these purposes, it is sufficient to state that the CITY supplies its residents with potable water pursuant to a water consumptive use permit issued by the South Florida Water Management District. The CITY's well field was located approximately one quarter to one half mile from an industrial facility operated by DAVEY. Between 1981 and 1987, DAVEY dumped toxic solvents directly onto the ground behind its facility and in August, 1987, the CITY discovered high levels of the toxic solvents in the ground water beneath its well field. The CITY took corrective action including the purchase of potable water from neighboring cities and the construction of an interim and a permanent water treatment system to remove the solvents. (A 1-2). Thereafter, the CITY sued DAVEY under both statutory and common law causes of action. Ultimately, the case proceeded to trial by jury on the common law claims of negligence, nuisance, trespass and strict liability. The jury found DAVEY liable on all claims and assessed $3,097,488.00 in past

damages and $5,600,000.00 in future damages. DAVEY sought review by the Fourth District.

DAVEY argued that the CITY could not recover damages which exceed the value of its property and the Fourth District rejected the contention. (A 3). The Fourth District recognized the "general rule" that damages for injury to real property cannot exceed the value of the property but distinguished the instant case from those which established the "general rule." (A 3-5).

SUMMARY OF THE ARGUMENT

DAVEY contends that the decision of the district court of appeal conflicts with decisions rendered by the First, Second, and Third District Courts of Appeal. DAVEY cites and relies on a number of cases from those districts which are inapposite. The instant case involved a municipality which was charged with the responsibility of providing safe, potable water to its residents. Each of the cases relied upon by DAVEY involved private individuals and did not involve governmental entities which had public health and safety responsibilities to discharge and which could not be abandoned or ignored in the same manner that private parties may abandon or ignore the use of private property.

Because there are no conflicting cases involving governmental entities in the State of Florida, this Court does not have and should not exercise jurisdiction to review that portion of the Fourth District's decision which affirmed the judgment for past damages. There are sound public policy reasons why a governmental entity's use of the groundwater supply cannot be equated with private use of real property. For example, if it were to cost a municipality twice the value of the real estate upon which its wells sat to provide safe, potable water while it looked for additional well fields, it would be contrary to logic and reason to limit recovery from an active polluter to the value of the real property. Furthermore, as the Fourth District correctly noted, the CITY was seeking damages for loss of use of groundwater and not for damage to real property. In that context, the decision of the Fourth District is in full accord with the law of the Florida.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, RELATING TO AN AWARD OF PAST DAMAGES, DOES NOT DIRECTLY AND EXPRESSLY CONFLICT WITH DECISIONS FROM OTHER DISTRICT COURTS OF APPEAL OR FROM THIS COURT.

The Florida Constitution and Rule 9.030(a)(2)(A)(ib), **Fla.R.App.P.**, provide this Court with the jurisdiction to review decisions of district courts of appeal which expressly and directly conflict with decisions rendered by this Court or by other district courts of appeal. Decisions may be in conflict by announcement of conflicting rules of law or by application of rules of law to substantially similar facts in such a manner as to produce conflicting results. E.g., ***Mancini vs. State***, 312 So. 2d 732 (Fla. 1975); ***Nielsen vs. City of Sarasota***, 117 So. 2d 731 (Fla. 1960). It is apodictic that where cases involve dissimilar facts or substantially different issues, they cannot result in conflicting decisions for jurisdictional purposes.

The cases cited by DAVEY which apply a "lost market value" measure for permanent damage to private property are inapplicable to a claim for abatement of pollution to a municipal drinking water supply. None of the cases cited by DAVEY as demonstrating conflict are applicable because none of them involved injury to a right of a municipal user of underground water supplies which can be repaired and restored. Instead, they involve claims for permanent damage to privately owned real property where they diminution of value was readily ascertainable. E.g., ***United States Steel Corp. vs. Benefield***, 352 So. 2d 892 (Fla. 2d DCA 1977). Diminution in

value is an acceptable measure of damages when that will fairly compensate a private plaintiff for its injuries but that is clearly not the case where a municipality with distinct rights and obligations is involved.

Illustrating the point is the decision in ***Benefield*** wherein 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." (e.s.)

352 So. 2d at 894. The concept of overcompensation resulting in a profit is inappropriate in the context of a municipality which is obligated to provide its residents with safe, potable water unconnected with any profit motivations.

In point of fact, only two of the cases cited by DAVEY even involved injury to a water supply, although neither was a public water supply. One of those two cases involved a claim primarily for personal injury to persons who drank the contaminated water, and, with regard to the property damage claim, the Court stated that the appropriate measure of damages was diminished value but did not describe the "property" which was to be valued. ***Crown Cork & Seal Co., Inc. vs. Vroom***, 480 So. 2d 108, 111 (Fla. 2d DCA 1985). The Second District expressly limited its application of the

diminution of value test to "this **private** suit," 480 So. 2d at 112 (e.s.), implying that a different rule might obtain were a **public** water supply involved. The other case, ***Standard Oil Co. vs. Dunagan***, 171 So. 2d 622 (Fla. 3d DCA 1965), applied a diminished value test for permanent damage to private property caused by contaminated groundwater. Specifically, the Third District held that a plaintiff could not recover for loss of use **in addition to loss of the value** of property because this would result in a duplication of damages. Nothing on the face of the decision sought to be reviewed indicates that the CITY is in a position to recover or is even seeking to recover double damages - it is only seeking the actual cost of providing safe, potable water to its residents. Interestingly enough, in ***Dunagan***, one of the precise reasons why the landowner was denied damages for loss of use was "the possibility or probability of obtaining good water . . . from a public water supply." 171 So. 2d at 624. Likewise, the defendant in that case had actually sunk another well which had produced uncontaminated water but the plaintiffs refused to connect to the well or make use of it. Nothing of that nature appears on the face of the decision sought to be reviewed.

Because none of the cases relied upon by DAVEY to demonstrate conflict arise from a governmental entity's use of underground water supplies to provide potable water to residents, none of the cases are in express and direct conflict. Rules of law which may apply in the case of private citizens and private use of property have limited application, at best, in this context. Cases which

have sought to preclude "double dipping" or excess profits in the case of private individuals utilizing private property have no place in a discussion of public water supplies. At least one case involving the diminution of value test recognized that it applied to a "private" suit and, by implication, recognized that the rule could be different in the case of a "public" suit. Therefore, no conflict has been demonstrated and this Court should not grant discretionary review to DAVEY.

CONCLUSION

Based upon the foregoing reasons and authorities, it is respectfully submitted that DAVEY has not demonstrated that the decision of the District Court of Appeal, Fourth District, sought to be reviewed, is in express and direct conflict with decisions from other district courts of appeal or from this Court. All of the cases upon which DAVEY has relied dealt with private individuals seeking redress for damage to private property and none dealt with the instant situation, to wit, a municipality providing potable water to its citizens. Therefore, there can be no conflict, at least insofar as DAVEY is concerned.

By: _____
Steven R. Berger

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true copy of the foregoing was mailed this 7th day of June, 1993 to **Douglas Halsey, Esquire**, Suite 4980, 200 South Biscayne Boulevard, Miami, Florida 33131.

Respectfully submitted,

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