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D.A. 12-2-93

IN THE SUPREME COURT OF FLORIDA

DAVEY COMPRESSOR COMPANY,

Petitioner,

v. CASE No. 81,538

CITY OF DELRAY BEACH,

Respondent.
_____/

ORIGINAL

ON REVIEW FROM THE
FOURTH DISTRICT COURT OF APPEAL
CASE NO. 90-02969

REPLY BRIEF OF PETITIONER, DAVEY COMPRESSOR COMPANY

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INTRODUCTION

Davey Compressor Company ("Davey") and the City of Delray Beach (the "City") do not disagree about the facts which resulted in the litigation below: The State of Florida issued the City a Consumptive Use Permit authorizing it to withdraw an average of 23 million gallons of groundwater a day from wells located throughout the City. The groundwater is used for potable water supply. Employees of Davey's Aero-Dri Division improperly disposed of hazardous wastes on property near six of the City's wells known as the "20-Series Wellfield." The hazardous wastes contaminated the groundwater supplying the 20-Series Wellfield. The City filed suit seeking to recover damages under theories of negligence, private nuisance, trespass, and strict liability.

At trial, the parties disagreed about the measure of damages. Davey advised the trial judge of the long-recognized Florida measure of damages for injury to property -- including groundwater contamination cases -- authorizing the recovery of the lesser of restoration costs or the diminution in value of the property. The Florida common law measure of damages limits recovery to the pre-tort value of the affected property so that a plaintiff may not recover more in repairing or restoring damaged property than the property was worth before it was injured. The City opposed the trial court's application of the measure of damages law and insisted then, as it does in this Court, that there should be no limit on the amount of restoration costs it may recover, even if

that amount exceeds the cost of obtaining uncontaminated water from other wells.

Midway through trial, the trial judge ruled that the City could recover the costs of remediating the groundwater to its original condition without regard to the value of the wellfield. Even though the State of Florida, Department of Environmental Regulation, had also brought suit against Davey to compel the remediation of the groundwater, the trial judge thought that application of the traditional common law measure of damages to the City's claim might result in the hazardous wastes not being cleaned up. (T. 1148-1155). Accordingly, in ruling on evidentiary issues, motions for directed verdict, and proposed jury instructions on damages, the trial judge held that the value of the City's well-field was not relevant. The jury awarded the City $8.7 million in past and estimated future restoration costs.

On appeal, the Fourth District recognized that the State of Florida owns the groundwater, and the City's right to use it, in the form of a Consumptive Use Permit issued by the State, expires in 1997. The Fourth District, therefore, reversed the award of future damages for restoration costs after the permit's expiration date. Though it recognized that the State owned the groundwater and the City had only a limited future interest in that water, the Fourth District nonetheless concluded that the City's right to use the groundwater was something other than a property right subject to the traditional measure of damages. Davey Compressor v. Delray Beach, 613 So.2d 60, 61 (Fla. 4th DCA 1993). Based on a contrived

"distinction" between a right of user and other property rights, the Fourth District erroneously held that the traditional measure of damages did not apply and, instead, established a new measure of damages allowing the City to recover all its remediation costs without regard to the precontamination value of the right to use the groundwater.

In its Initial Brief, Davey pointed out that a right to use groundwater is a species of property. Although the City's Answer brief goes to great lengths to attempt to support the Fourth District's flawed distinction between a right of user and all other property interests, ultimately the City acknowledges that a right of user is indeed a property right. But instead of addressing the conflict between the Fourth District's decision and the decisions of the other Florida appellate courts, the City has submitted an Answer Brief requesting affirmance of the opinion below based on its view of disputed facts which the jury was not allowed to consider because the trial court, at the City's request and over Davey's objection, gave the jury erroneous instructions on the measure of damages.

The City has not only misconceived the nature of this Court's review, it has confounded and contorted the measure of damages issue by confusing the purpose of damages with the measure of damages. Likewise, the City facilely equates the injury to its wellfield with the expenses it has incurred, and blandly asserts that its interest in the groundwater beneath its property is "unique," "irreplaceable," and "not susceptible to valuation." But

neither the trial court nor the jury ever determined that the City's wellfield could not be valued: The erroneous jury instructions precluded such determination. The flaws in the City's arguments are, unfortunately, compounded by its misleading use of authorities and mischaracterization of the proceedings below. None of the City's arguments supports affirmance of the Fourth District's new measure of damages.

ARGUMENT

I. The Fourth District erred in holding that the City's interest in the groundwater beneath its property is not a property interest subject to Florida's measure of damages rule in property cases.

The Fourth District acknowledged Florida's traditional measure of damages in cases involving injury to property. 613 So.2d at 61, citing Keyes Co. v. Shea, 372 So.2d 493 (Fla. 4th DCA 1979). But the Fourth District held that measure of damages to be inapplicable to the City's case because, "[The City] sued, not for injury to its real property, but rather for injury to its right to the use of the groundwater beneath its property." 631 So.2d at 61. The distinction is specious. Loss of the right to use groundwater, or any other interest in property, is injury to a property right -- not a separate legal wrong with its own measure of damages.

In its Answer Brief, the City refuses to openly concede the lack of merit in the Fourth District's artificial dichotomy between an injury to a right to use groundwater and injury to all other rights in property. The City cites no case law which holds that damages for injury to a right of user in groundwater should be measured differently from injuries to other property rights.

At one point the City tries to explain what a "right of user" is without calling it "property." It does not do a very good job:

> 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.

City of Delray Beach Answer Brief (hereinafter "Br.") at 31. The notion that a right of user includes title to real estate -- and not the other way around -- turns property law on its head. Ultimately, the City admits its right of user is a property right. Br. 4 and 27.

Obviously, the City does not wish to concede the fallacy in the Fourth District's reasoning. But the distinction drawn by the Fourth District -- as a basis for not applying Florida's common law measure of damages -- is illusory. This case has always been a property damage case and the Fourth District's unremarkable observation that the property right involved is a right of user and not a fee interest in real property did not justify its failure to apply Florida's law on the measure of damages.

II. The City misconceives this Court's role by asking it to act as a de novo trier of fact regarding the value of its wellfield.

At several points in its Answer Brief, the City acknowledges that Davey correctly states the common law measure of damages for injury to property. See, e.g. Br. 20. The City also agrees that restoration costs which exceed the diminution in value should not be awarded unless the plaintiff proves an exception to the general

measure, i.e., that its property is proven to have no market value or that its interest in the property is "personal," such as in the case of shade trees or heirlooms.[1]

The City did not argue in the trial court or Fourth District that its wellfield was incapable of being valued. Throughout both proceedings, the City contended that restoration costs were recoverable without regard to the value of the affected property, as a matter of law and "policy". See, 613 So.2d at 61-62; Br. 17; T. 2247; R. 3653. Incredibly, the City now announces -- without attribution -- that the value of its wellfield is not ascertainable in order to fall within an exception to the general measure of damages. See, Br. 4-5, 20, 23, 27, 31. Neither the trial court nor the jury ever considered the value of the City's wellfield or made findings to the effect that replacement cost would provide inadequate compensation. The complete omission of record citations in the City's Answer Brief confirms this.

Surprisingly, the City now asks this Court to take on the additional role of jury and find that the City's water rights can not be valued, in spite of the great weight of authority to the contrary.[2] More importantly, it is fundamental that "an error in

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[1]See, e.g. Br. 27 ("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 remedy.")

[2]See, e.g. Bonnie G. Colby, Alternative Approaches to Valuing Water Rights, Appraisal J., April 1989 at 180; Bonnie G. Colby, Estimating the Value of Water in Alternative Uses, 29 Nat. Resources J. (Spring 1989). Water utility companies are also bought and sold or taken by way of inverse condemnation. See, e.g.

[a jury] charge as to the measure of damages for injuries alleged [in a tort action], which reasonably may have influenced rendition of a verdict for a larger amount than otherwise would have been determined upon, requires a new trial." Alonso v. Fernandez, 379 So.2d 685, 688 (Fla. 3d DCA 1980), quoting, Atlantic Coast Line Railroad v. Saffold, 130 Fla. 598, 178 So. 288 (1938). A new trial should be ordered to determine the value of the City's wellfield.[3]

III. There is no "public policy" which supports the adoption of the Fourth District's new measure of damages rule.

Recognizing the infirmity of the Fourth District's distinction between injuries to property and injuries to right to use property, the City urges affirmance on so-called "public policy" grounds.

Dade County v. Gen'l Waterworks Corp., 267 So.2d 633 (Fla. 3d DCA 1972) Indeed, Section 180.301, Florida Statutes (1991), which governs the purchase and sale of water utilities by municipalities, mandates that a city's governing body consider, amongst other things, the "most recent available income and expense statement for the utility," and "the reasonableness of the purchase price. . . ."

[3]Another fact question the City asks this Court to decide -- although never resolved in the trial court -- is whether the 20 Series Wellfield could be relocated. This issue was hotly contested below. Davey's expert hydrogeologist testified that by relocating three wells, it would eliminate even the possibility of contaminant plume migration (T. 2353-2355). Existing aquifer information on the Golf Course Wells indicated sufficient water quantity (T. 2392-2393). The City's consultants never considered the possibility of resiting wells at the Golf Course Wellfield (T.198-199; 1251-1252), thereby undermining the unsubstantiated statement that the only available water was west of the City.

The feasibility of using the Golf Course also renders Davey Exhibit 53 extremely important. In that letter, the City's consultants conclude that the current costs of drilling a replacement 20 Series wellfield would be approximately $900,000.00, "comparable with the golf course wells which will be slightly more than $1,000,000 for the comparable construction." The City objected to Exhibit 53 on the ground the trial court had previously held that restoration costs would be the measure of damages. This objection was sustained. (T. 2245-2250).

Because it provides water to its residents, the City claims it should be awarded restoration costs as a matter of law. Specifically, the City states that its right to use the groundwater "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." (Br. 10). The City, however, is under no "duty" to provide water to its citizens. As with any provider of food, water or other consumable goods, if the City elects to furnish water to its resident, it must provide water that will not harm its residents. No statute requires municipalities to operate utilities. The City operates a business -- not a charity. It sells water to its customers.

Chapter 180 of the Florida Municipal Public Works Law (cited by the City at Br. 14) does not obligate a municipality to provide water to its residents. It only authorizes municipalities to buy and operate public utilities. Section 403.850-864, Florida Statutes (cited in Brynnwood Condominium I Ass'n. v. City of Clearwater, 474 So.2d 317 (Fla. 2d DCA 1985)) does not compel a municipality to provide water to its citizens. Section 403.850-864 does provide, however, that the State of Florida has "primary responsibility" for assuring safe drinking water. Fla. Stat. § 403.851 (1991). Under Section 403.855, only the Department of Environmental Protection, and not a supplier of water such as the City, may issue corrective orders and bring a civil action in response to contamination of a public or private water supply.

The City asks this Court to effectively create a "municipality" exception to the measure of common law damages. As discussed infra pp 12-13, if the City believed that its status as a municipality impaired its ability to replace its wellfield or otherwise made it incapable of valuation, it was required to establish this fact-based exception. But, the City never claimed an exception to the traditional common law measure of damages; instead, it contended that, as a matter of law, it was entitled to all its "response costs."

This is not a case where a local government brought suit on behalf of its residents. The proceeding below was not a class action and the City intentionally abandoned its claim for public nuisance. Moreover, the State of Florida (and not the City of Delray Beach) is the proper party to sue in a parens patriae capacity. See, Town of Orangetown v. Gorsuch, 544 F.Supp. 105, 108 (S.D.N.Y. 1982) (municipality may not sue on behalf of its residents to enjoin sewage plant construction, but may sue only to vindicate its own property interests); accord, In re Multidistrict Vehicle Air Pollution M.D.L. No. 3 State of Calif. v. Automobile Manufacturers Assoc., 481 F.2d 122, 131 (9th Cir. 1973); City of Safety Harbor v. Birchfield, 529 F.2d 1251 (5th Cir. 1976).

The City repeatedly asserts that the Fourth District's decision should be affirmed because of the public interest in preserving natural resources such as groundwater. But the City completely ignores the State's ownership interest in and statutory responsibilities regarding groundwater. The City's Answer Brief is

conspicuously silent regarding the State's pending lawsuit against Davey for natural resource damages and to compel the cleanup of the groundwater. Department of Environmental Regulation v. Aero-Dri Division of Davey Compressor Co., Case No. 88-4071. The public's interest in effecting groundwater remediation is being represented by the State and a new common law measure of damages is not required to protect the public interest.

IV. The City has not correctly described the applicable case law.

The City states that "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." In fact, none of the City's cited authorities reach this express holding. Of all the cases relied upon by the City, only two deal with the subject of groundwater contamination, and those two do not even discuss the measure of damage. In Pensacola Gas Co. v. Pebley, 5 So. 593 (Fla. 1889), the Court affirmed an award of $500 to a plaintiff whose well had been contaminated. A thorough reading of the decision, however, reveals that the measure of damages was not challenged. Similarly, in Pinellas County v. Martin, 82-13019-17 (Pinellas County Circuit Court, Nov. 28, 1986), there is no discussion of the measure of damages, or whether the proper remedy is diminution in value or restoration costs.[4] Indeed, the restoration costs awarded in Pinellas came about only after the defendant willfully

[4]The City cites Pinellas as being affirmed with modifications in Martin v. Pinellas County, 533 So.2d 1183 (Fla. 2d DCA 1988). The measure of damages, however, was not addressed on appeal.

disregarded a mandatory injunction compelling it to undertake the cleanup.[5]

In contrast, the groundwater contamination cases relied upon by Davey, Crown Cork & Seal Co. v. Vroom, 480 So.2d 108, 112 (Fla. 2d DCA 1985); Standard Oil Co. v. Dunagan, 171 So. 622, 624 (Fla. 3d DCA 1965); and Johansen v. Cumbustion Engineering, Inc., No. CV191-178, 1993 U.S. Dist. LEXIS 13385 (S.D.Ga. June 4, 1993); accord, Reeser v. Weaver Bros., Inc., 605 N.E.2d 1271 (Ohio 2d App. Dist. 1992); all specifically discuss measures of damages and, in the case of Crown Cork and Johansen, expressly hold that restoration costs will not be allowed where they exceed the value of the property.

There are not "numerous cases," as the City claims, 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." Br. 29 citing Orange Beach Water, Sewer and Fire Authority v. M/V Alva, 680 F.2d 1374 (11th Cir. 1982); Hartford Elec. Light. Co. v. Beard, 213 A.2d 536 (Conn. Cir. Ct. 1965); Ohio Power Co. v. Johnston, 247 N.E.2d 338 (Ohio Ct. App.

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[5]The City also cites the 1915 Arkansas case of Ross & Ross v. St. Louis I.M. & S.R. Co., 179 S.W. 353 (Ark. 1915), in which the court stated restoration costs would be awarded for removal of debris discarded into a pool used in connection with a cotton gin. 179 S.W. at 354. The court provides no explanation for its holding, and more importantly, fails to state whether the cost of removing the debris exceeded loss of value of the property as a whole. Indeed, because the plaintiff property owner had initially sought an award for depreciation in value, it could very well be that restoration costs were less than diminution in value.

1968); and Wisconsin Tel. Co. v. Reynolds, 87 N.W.2d 285 (Wisc. 1958). The preceding cases do not involve injuries to natural resources such as groundwater, rivers, parks, or beaches. They do not address questions of public interest in preserving such resources. Rather, these decisions involved accidental damages to a pipeline, a light pole, a power cable pole, and an underground telephone cable, respectively.[6]

Without exception, the cases hold that restoration costs and diminution in value must both be considered in deciding the measure of damages for injury to property. In order to award restoration costs in excess of diminution in value, a court must consider the value of the property. As explained in Johansen:

> Under the more flexible approach suggested by Section 929, [of the Restatement (Second) of Torts,] comment b, [County of Weld v.] Slovek [723 P.2d 1309 (Colo. 1986)], and Henninger [v. Dunn, 101 Cal. App. 3d 858 (Cal. Ct. App. 1980)], deciding whether restoration costs are an appropriate remedy requires analysis of all the surrounding circumstances. Disproportionality between restoration costs and diminution in value is the central consideration. For an injured party to recover restoration costs in excess of diminution in value, however, it must show sufficient personal reasons supporting restoration and that repairs actually will be made. Even upon a showing of personal reasons supporting restoration, the restoration costs

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[6]Significantly, the courts awarded restoration costs after determining there was no market value for the damaged articles. 680 F.2d at 1383-84; 213 A.2d at 537; 247 N.E.2d at 340; and 87 N.W.2d at 289. As observed by the Eleventh Circuit in Orange Beach: "Where no market value has been established by recent comparable sales, other evidence is admissible touching value such as . . . the cost of reproduction, less depreciation, . . ." 680 F.2d at 1384, quoting Carl Sawyer, Inc. v. Poor, 180 F.2d 962, 963 (5th Cir. 1950).

> still must be reasonable in light of the special considerations presented -- that is, given those considerations, they must not be disproportionate to diminution in value. Furthermore, a mere subjective preference for the land in its pre-tort condition is not a sufficient personal reason in support of allowing a restoration cost in excess of diminution in value.

LEXIS 13385 *14-17. (emphasis supplied) (citations omitted) (footnotes omitted);[7] see also, United States Steel Corp. v. Benefield, 352 So.2d 892, 894 (Fla. 2d DCA 1977); Badillo v. Hill, 570 So.2d 1067, 1069 (Fla. 5th DCA 1990); Reeser, 605 N.E.2d at 1277-78; Burk Ranches, Inc. v. State, 790 P.2d 443, 447 (Mont. 1990); Brandywine 100 Corp. v. New Castle County, 527 A.2d 1241 (Del 1987); "L" Inv. Ltd. v. Lynch, 322 N.W.2d 651, 655-656 (Neb. 1982).[8] In every case cited by the City in which restoration costs

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[7]The "flexible" approach approved in Johansen contemplates restoration costs in excess of diminution value under limited circumstances, i.e., an evidentiary showing of "personal" value or inadequacy of market value. See, Restatement(Second) of Torts, §929. The flexible approach is contrasted with those decisions in which damages are unconditionally limited to the market value of the property immediately preceding the damage. "L" Inv. Ltd. v. Lynch, 322 N.W.2d at 651, 656 (Neb. 1982); Mikol v. Vlahopoulos, 340 P.2d 1000, 1001 (Ariz. 1959); see also, Burk Ranches, Inc. v. State, 790 P.2d 443, 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," citing Benefield, supra).

[8]The City claims that Davey "mischaracterized" the holdings in Reeser and Slovek, supra, and that these decisions support the decision below. (Br. 21). Obviously, the Court must come to its own conclusion as to which party is mischaracterizing the case law. The following quotations from Reeser, however, should provide some assistance. In discussing Slovek, the Reeser court observed:

> Slovek does not authorize as expansive a recovery as [plaintiff] Reeser argues that it authorizes. Slovek clearly requires evidence

exceed diminution in value, there are statements to the effect that market value was shown to be inadequate compensation or that the damaged property was of "personal" value to the plaintiff. See, Fiske v. Moczik 329 So.2d 35 (Fla. 2d DCA 1976); Trinity Church v. John Hancock Mutual Life Ins. Co., 502 N.E.2d 532, 537 (Mass. 1987); Culver-Stockton College v. Missouri Power & Light, 690 S.W. 2d 168 (Mo. Ct. App. 1985).

Other authorities cited by the City, e.g. Cities Service Co. v. State, 312 So.2d 799, 800 (Fla. 2d DCA 1975), simply do not stand for the proposition for which they are cited. Similarly, the City's comments on the Florida Standard Jury Instructions are also misleading. The City quotes the damage instruction given and states that "this instruction incorporates the elements of Florida Standard Jury Instruction §6.1a." Br. 7. Section 6.1a, though, is only the introductory instruction on damages. Section 6.1a provides that "you should award (claimant) an amount of money that the greater weight of the evidence shows will fairly and adequately

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> of market value in order to assess whether the restoration costs sought are reasonable. Therefore, Reeser's reliance on Slovek as excusing her lack of evidence of diminution of fair market value is misplaced.

605 N.E. 2d at 1277. Reeser then proceeds to hold:

> In other words, as to restoration costs, when restoration costs exceed the diminution in fair market value, the diminution of fair market value becomes the measure of damages. Such recovery necessarily requires evidence of the pre-injury and post-injury market value of the injured real property.

605 N.E. 2d at 1278.

compensate him for such [loss] [injury] [or] [damage] . . . ." It then instructs the reader to consider the elements enumerated in Section 6.2, which, in the case of 6.2(g), lists the common law "measure of damage" for injuries to personal property.

CONCLUSION

For the foregoing reasons, the Court should reverse the Fourth District's decision affirming the award of restoration costs to the City without regard to the value of the City's wellfield, and remand this case for a new trial in accordance with Florida law.

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I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner, Davey Compressor Company, was served this 23rd day of November 1993, by U.S. mail upon:

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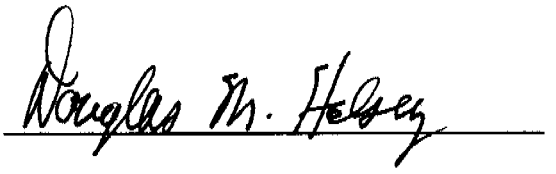

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