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ARGUMENT

1. THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY INSTRUCTION NO. 24, WHICH INSTRUCTED THE JURY TO AWARD PLAINTIFFS THE REASONABLE COST OF REPAIR OF ANY DAMAGE TO PLAINTIFFS' PROPERTY, BECAUSE THE EVIDENCE DID NOT SUPPORT THE SUBMISSION OF THE INSTRUCTION, IN THAT THERE WAS NO EVIDENCE OF THE FAIR MARKET VALUE OF PLAINTIFFS' PROPERTY BEFORE AND AFTER THE DUMPING OF THE CONCRETE.

Plaintiffs argue that the trial court did not err in submitting Instruction No. 24 to the jury, because the cost of repair was less than the diminution of value of their property in this case. (Respondents' Substitute Brief, page 120). However, they cite no evidence in the record of support of this assertion.

Plaintiffs' basic argument in support of the submission of Instruction No. 24 is that the sale price was diminished by the remediation costs and the indemnity provision, and therefore the fair market value must have gone down by at least as much as the cost of repair, and by more if any value is ascribed to the indemnity promise. Therefore, the argument concludes, the cost of repair must have been equal to or less than the diminution in fair market value.

There are two problems with this argument. First, there was no actual evidence at trial regarding the dollar value of the indemnity promise, and the plaintiffs are asking the Court in essence to speculate in ascribing any economic value to it. The reason why there is no evidence regarding its value is because the trial court sustained defendants' pre-trial motion in limine to exclude such evidence on the ground that it was inherently speculative. (Tr. 17-48; Supp. L.F. 18). If no value is ascribed to it, then the cost of repair

would, at best, be equal to the diminution in market value. Significantly, during the instruction conference, this appears to be the position plaintiffs' counsel advanced. (Tr. 2160). However, "equal" is not the same as "less", and the law only permits the cost of repair to be used as the measure of damages when it is less than, indeed, only a small percentage of than the reduction in fair market value. Sheridan v. Sunset Pools of St. Louis, Inc., 750 S.W.2d 639, 642 (Mo. App. 1988). The law presumes that the diminution in value of real property is the proper measure of damages, and substantial evidence must support a departure from this rule. Id. Even if some value is to be ascribed to the indemnity provision, there was no competent evidence at trial regarding what that value was. There was simply no reliable way to determine whether the cost of repair, which was known, constituted only a small percentage of the diminution in market value, which was never established.

The second problem with plaintiffs' argument is that it is based upon the assumption that fair market value of property always goes down by at least as much as the cost of repairing it. In addition to not being necessarily true, this argument would subvert the law of damages by encouraging plaintiffs to repair property even in situations where the reduction in fair market value is less, because it would be incumbent on defendant to prove that the reduction in fair market value was actually less than the cost of repair. The plaintiff would always have an incentive to repair the damaged property, regardless of the actual cost in terms of economic efficiency. However, the purpose of the repair exception to the diminution of fair market value standard for damages is to encourage repair only when it is substantially less than the reduction in the fair market value of the property.

Plaintiffs argue that the evidence of the eventual sale price of plaintiffs' property to Lowe's was prima facie evidence of the fair market value of the property at the time of sale, because it was a bona fide,

voluntary, and arms length transaction. (Respondents' Substitute Brief, page 121). Whether or not this is the case is beside the point. Plaintiffs did not present evidence of the fair market value of the property prior to the contamination, so there was insufficient evidence of the diminution in fair market value for the trial court to determine whether the cost of repair was substantially less.

Plaintiffs further contend that Southern Contractors is precluded from challenging the submission of Instruction No. 24 on the ground that it provided no evidence of the diminution of the fair market value of plaintiffs' property. (Respondents' Substitute Brief, page 122). Proving damages was plaintiffs' burden, not defendant's.

Citing McLane v. Wal-Mart Stores, 10 S.W.3d 602 (Mo. App. 2000), plaintiffs maintain that because Southern Contractors did not object to the introduction of plaintiffs' evidence of the cost of repair, the burden shifted to defendant to produce evidence of the diminution of fair market value. However, McLane is distinguishable in that the case dealt with temporary damage to leased premises, specifically, damage to the leased building's floor tiles and heating and air conditioning system, as well as missing ballasts, light tubes, and ceiling tiles. Id. at 604. It was “obvious” to the court that the diminution in market value would have been negligible, and that the cost of repair was the proper measure of damages. Id. at 607. That is certainly not the case in the situation presented here, where the decrease in fair market value and the cost of cleaning-up environmental pollution could both be quite substantial. McLane is inapplicable.

Finally, plaintiffs contend that the submission of Instruction No. 24, in the event that it was erroneous, could not have been prejudicial error, because even if the indemnity were given no value, the cost of repair would simply be equal to the diminution in fair market value. (Respondents' Substitute Brief,

page 122, n. 10). However, this argument presumes that the diminution in fair market value is always at least equal to the cost of repair, which is not the law and which was not supported by the evidence at trial. The trial court erred in submitting Instruction No. 24 to the jury in the absence of specific evidence that the cost of repair was significantly less than the diminution in fair market value.

II. THE TRIAL COURT ERRED IN ENTERING A JUDGMENT AWARDING PUNITIVE DAMAGES AGAINST DEFENDANT SOUTHERN CONTRACTORS ON PLAINTIFFS' TRESPASS AND NEGLIGENCE CLAIMS, BECAUSE THE EVIDENCE DID NOT SUPPORT THE AWARD OF PUNITIVE DAMAGES ON EITHER CLAIM, IN THAT THERE WAS A COMPLETE ABSENCE OF EVIDENCE SUPPORTING THE ELEMENTS OF EVIL MOTIVE OR RECKLESS INDIFFERENCE TO THE RIGHTS OF OTHERS, COMMISSION OF AN ACT INTENTIONALLY WITHOUT CAUSE OR EXCUSE, OR OUTRAGEOUS CONDUCT.

With regard to the sufficiency of the evidence in support of an award of punitive damages, plaintiffs say very little in their Substitute Brief against Southern Contractors specifically. Indeed, plaintiffs direct their argument in support of punitive damages almost exclusively at Mercantile. However, plaintiffs do attempt to justify the imposition of punitive damages against Southern Contractors in a few places in their Brief. First and foremost, plaintiffs justify punitive damages on the ground that there allegedly was evidence that Gerald Winter, the principal of Southern Contractors, knew that the stockpiles in question were contaminated when he began dumping the waste material behind Faye Creek Avenue. (Respondents' Substitute Brief, page 99). Plaintiffs deny that there was any evidence Mr. Winter received "certification" from Rick Uber of Cooper Industries that the waste stockpiles then remaining on the property were clean.

The record does not support plaintiffs on this point. While it is true that Gerald Winter and Rick Uber, representing Earth Sciences and Cooper Industries, visually inspected the waste piles on the Site, Mr. Winter never testified that he was relying on his visual inspection in determining whether the waste was clean. Rather, Winter believed that the walk-through tour of the waste piles on the Site with Rick Uber was to mark those piles that had tested positive for contamination:

... when Rick Uber came back and they walked the site and we reviewed that map with Don Duncan, and Don Duncan circled the piles, the circles of the material to make sure that we has the stuff that was considered to be one to ten. In my opinion, we were being told by all of the reports, and we weren't given all of the reports, but that everything else was clean. It was either one to ten or clean.

(Tr. 1715). Mr. Winter testified that “all testing was done by Earth Sciences. Mr. Uber was representing Cooper and Earth Sciences, and they were the one that was certifying that the material was clean that had been hauled out to the lot.” (Tr. 1737). Mr. Winter went on to testify: “I have -- to this day I do not have a copy of that report, but I was told by them that the material was clean, and I knew it had been tested.” (Tr. 1737). Winter was not relying on his own or anyone else's visual inspection of the waste piles, but on testing that he was told had been performed on the piles. He believed that it was clean when he hauled it off the Site. (Tr. 1736).

This is perfectly consistent with the undisputed fact that Southern Contractors was not the hazardous materials tester on the project (Tr. 1708-09), nor was it qualified to do testing work. (Tr. 1702). Southern Contractors relied on more qualified persons who were designated to perform the testing. (Tr. 1708-09). Regardless of whether the determination was correct, that was not Southern Contractors'

determination to make. The undisputed evidence was that Gerald Winter believed that the material was clean, and that he would never have deposited the material off-site, much less on his own property, had he believed otherwise. (Tr. 1663-64, 1724).

Plaintiffs' cite a June 28, 1996 report from AMI (Trial Exhibit 177) to support their argument that both Mercantile and Southern Contractors both knew that waste stockpiles were contaminated as of July 1, 1996, when the hauling to Faye Avenue Creek started. (Respondents' Substitute Brief, page 99). However, the report does not establish that Southern Contractors knew that the waste material being hauled off-site was contaminated, only that there was still contaminated material stockpiled on the Site.

Although plaintiffs dispute that Mercantile or Souther Contractors ever made a bona fide offer to remediate the property after the contamination was discovered, once again most of their arguments are directed at Mercantile. Plaintiffs do not so much dispute that Southern Contractors offered to remove the concrete from plaintiffs' property, but instead argue that the offer was not made in good faith insofar as it was conditioned on Mercantile's participation. (See Respondents' Substitute Brief, pages 86-87, 90). However, plaintiffs do not explain why this makes any difference to the question of whether Southern Contractors' offer was made in good faith, especially where plaintiffs then proceed themselves to criticize Mercantile for not wanting to participate in the remediation process. In addition, Plaintiffs cite no case in support of this position, which is not the law. Even an ineffective remediation offer is sufficient as a matter of law to extinguish liability for punitive damages in an action for trespass and negligence. Shady Valley Park & Pool v. Weber, Inc., 913 S.W.2d 28, 37 (Mo. App. 1995). Furthermore, plaintiffs ignore their own testimony, which established that Gerald Winter attempted on numerous occasions to get Mercantile involved in the remediation effort. Plaintiff Robert Kaplan himself testified that starting in February of 1997,

Mr. Winter attempted to bring Mercantile into negotiations with plaintiffs for the remediation of their property. (Tr. 2046, 2282). In fact, to the extent Winter's efforts to remedy the situation were delayed, it is clear from the record that the cause was plaintiff's insistence that the waste be tested prior to removal. (Tr. 2279, 2284).

The evidence for an award of punitive damages against Southern Contractors was wholly inadequate. There was no evidence that it acted with malice or conscious disregard or reckless indifference to the safety of others. Southern Contractors again emphasizes the applicability of Alcorn v. Union Pacific Railroad Co., 50 S.W.3d 226 (Mo. banc 2001), to the facts of the present case. In Alcorn, the Court reversed an award of punitive damages, despite evidence that the defendant was on notice as to the hazardous condition of the railroad crossing where plaintiff was injured, but failed to place additional warning devices at the crossing. Specifically, there was evidence that defendant was aware of a fatal collision at the same crossing only four months prior to plaintiff's accident. In the instant case, by contrast, there is no evidence that Southern Contractors in fact knew that the waste material he was hauling was contaminated or that he was depositing it on plaintiffs' property. If the evidence was insufficient to support an award of punitive damages in Alcorn, there is even less support for an award of punitive damages against Southern Contractors in the present case. *See also* Lopez v. Three Rivers Electric Cooperative, Inc., 26 S.W.3d 151 (Mo. banc 2000). Certainly there was no "clear and convincing" evidence sustaining an award of this harsh remedy against Souther Contractors, nor can plaintiffs point to such "clear and convincing" evidence in their Brief. The decision of the Court of Appeals effectively ignored the "clear and convincing" standard of proof propounded by this Court in Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104 (Mo.

banc 1996). Because of the lack of any evidentiary foundation for an award of punitive damages against Southern Contractors, the Court should reverse the judgment of the trial court.

III. THE TRIAL COURT ERRED IN AWARDING DEFENDANT SOUTHERN CONTRACTORS ONLY \$1,000.00 IN ATTORNEY’S FEES, BECAUSE THE AWARD WAS CONTRARY TO THE OVERWHELMING WEIGHT OF EVIDENCE, IN THAT THERE WAS NO DISPUTE THAT DEFENDANT INCURRED \$167,539.00 IN LEGAL FEES, AND THAT THE SERVICES EXPENDED IN THE DEFENSE OF PLAINTIFF’S ORDINANCE VIOLATION CLAIM WERE INSEPARABLE FROM THE DEFENSE OF THE OTHER CLAIMS ASSERTED BY PLAINTIFFS.

Plaintiffs do not dispute that Gerald Winter and Southern Contractors expended a total of \$167,539.00 in attorney's fees in defending against all of plaintiffs' claims. However, plaintiffs defend the trial court's award of only \$1,000 in attorney's fees to defendants on the ground that the defendants failed to segregate their fees between the common law claims and the ordinance claim. (Respondents' Substitute Brief, page 125). to 341). This argument ignores the rule that there is no need to segregate attorney's fees between claims to the extent the claims are “identical and indivisible” or the same evidence applies to each. *See Brockman v. Soltysiak*, 49 S.W.3d 740 (Mo. App. 2001); *Architectural Resources, Inc. v. Rakey*, 912 S.W.2d 676, 678 (Mo. App. 1995). Plaintiffs assert, without explaining, that there were significant differences between their common law claims and their ordinance violation claim. (Respondents' Substitute Brief, page 126). Southern Contractors has already explained in its principal Substitute Brief that there was significant overlap, if not identity between these claims in terms of the facts underlying each and the elements

required to be proved. Plaintiffs assert that the damages were not the same because they asked only for attorney's fees in their ordinance violation claim. (Respondents' Substitute Brief, page 124). This is not the case. In their Amended Petition, plaintiffs also asked for civil penalties and "such other legal and equitable relief" as the court deemed just. (L.F. 84). Moreover, plaintiffs could not obtain attorney's fees on the other claims. On a related point, plaintiffs do not dispute that when asked to quantify the attorney's fees they were seeking in plaintiffs' Supplemental Answers to Interrogatories, plaintiffs requested \$76,990.66 for attorneys' fees associated with the remediation of the St. Louis property on behalf of Stone, Leyton & Gershman along with attorneys' fees of \$2,550.00 from the law firm of Barklage, Barklage, Brett, Ohlms & Martin, attorneys' fees of \$8,960.26 from the law firm of Ehlmann, Guinness & Flavin, additional attorneys' fees of \$1,912.70 from Pellegrini & Emmerich and finally plaintiff's attorneys' fees regarding litigation in an amount of \$278,699.74 submitted by Stone, Leyton & Gershman as of July 6, 2001. (L.F. 365). There was no specific allocation of the fees between the claims. Plaintiffs therefore are essentially estopped from criticizing the defendants for failing to allocate their billing entries between the common law claims and the ordinance violations claim when they failed to do so in seeking their own attorney's fees. The trial court committed a clear abuse of discretion in awarding these defendants only \$1,000 in attorney's fees for prevailing on plaintiffs' ordinance violation claim.

IV. THE TRIAL COURT ERRED IN TAXING AS COSTS TO PLAINTIFFS NUMEROUS ITEMS, INCLUDING MULTIMEDIA EXPENSES, PHOTOCOPYING CHARGES, WITNESS FEES, AND EXPENSES FOR EXPEDITED TRIAL TRANSCRIPTS, BECAUSE THE TAXING OF THESE EXPENSES AS COSTS WAS UNAUTHORIZED BY LAW, IN THAT THE EXPENSES ARE NOT RECOGNIZED AS COSTS UNDER

STATUTE OR CONTRACT, AND WERE NOT REASONABLY NECESSARY TO THE PROSECUTION OF PLAINTIFFS' CLAIMS.

In response to Southern Contractors' challenge of the trial court's award to plaintiffs of "costs" in an amount in excess of \$30,000, plaintiffs concede that the law only authorizes the taxing of costs when specifically authorized by statute or agreement of the parties. (Respondents' Substitute Brief, page 126). See Architectural Resources, Inc. v. Rakey, 912 S.W.2d 676, 679 (Mo. App. 1995). However, plaintiffs point to no statutory or contractual authority in support of the taxing of any of the specific expenses which the trial courts taxed as costs over Southern Contractors' objection that there was no statutory or contractual authority for taxing many of the items as costs.

Plaintiffs argue that the Southern Contractors' attorney used Courtroom Technology Consultants' ("CTC") during trial with numerous witnesses. (Respondents' Brief, pages 126-27). The implication is that Southern Contractors thereby agreed to share the costs. There was no express or implied agreement between the parties regarding the sharing of these expenses, nor can plaintiffs point to evidence of any such agreement. To the extent that Southern Contractors' attorney referred to exhibits that had already been scanned in by CTC when examining certain witnesses, this was for the convenience of the Court and opposing counsel. However, plaintiffs retained CTC principally for their own convenience. There was no statutory or contractual authority for the trial court to award multimedia technology expenses in this case. The Court of Appeals correctly reversed the trial court's award of costs and remanded the issue to the trial court for reconsideration. The Court should adopt this portion of the Court of Appeals' opinion.

Plaintiffs contend that the trial court did not err in taxing photocopying and expedited transcript expenses as costs in light of the length of trial and the number of documents involved. (Respondents'

Substitute Brief, page 127). However, plaintiffs cite no statutory or contractual authority in support of the taxing of these expenses as costs. In the absence of such authority, the trial court had no discretion to tax these expenses as costs.

CONCLUSION

For the reasons set forth above, the Court should reverse and remand the trial court's judgment awarding actual damages to plaintiffs, because there was insufficient evidence of the difference in fair market value of plaintiffs' property. Furthermore, the Court should reverse the trial court's judgment awarding the plaintiffs punitive damages from Defendant Southern Contractors, because the evidence at trial was wholly inadequate to submit the issue of punitive damages to the jury. In addition, the Court should modify the trial court's judgment awarding Defendant Southern Contractors \$1,000 in attorney's fees by awarding defendant the undisputed amount of legal fees incurred in the defense of this action. Finally, the Court should adopt the decision of the Court of Appeals to the extent that it reversed the award of costs to the plaintiffs and remanded for reconsideration, or by reducing the amount of the award by striking those items which are not authorized as costs under statute.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of Appellant, Avanti Marketing Group, d/b/a Southern Contractors, brief and electronic duplication of the same (virus-free) were forwarded on this 26th day of August, 2003, to all known counsel of record by U.S. Mail, postage paid and correctly addressed as follows: **Thomas P. Rosenfeld**, STONE, LEYTON & GERSHMAN, Attorney for Respondent, 7733 Forsyth Blvd., Suite 500, St. Louis, Missouri 63105; **Harold Wilson**, HUSCH & EPPENBERGER, Attorney for Co-Appellant U.S. Bank, 190 Carondelet Plaza, Suite 600, St. Louis, MO 63105.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the type-volume limitations contained in Supreme Court Rule 84.06(b).

1. Exclusive of all exempted portions, this brief contains 3,703 words;
2. This brief has been prepared in proportionally spaced type face using Word Perfect 7.0 in 13-point Times New Roman font;
3. Computer disks containing copies of this Brief were filed with this Court and served upon opposing counsel, and previously were scanned for viruses and determined to be virus-free.
