

No. 88580

**IN THE
SUPREME COURT OF MISSOURI**

**DONNA J. COLLIER
Respondent/Plaintiff**

vs.

CITY OF OAK GROVE, MISSOURI

Appellant/Defendant

**Appeal from the Circuit Court of Jackson County, Missouri
Sixteenth Judicial Circuit
Civil Action No. 03CV-223403
Honorable Michael Manners**

SUBSTITUTE BRIEF OF APPELLANT

James H. Ensz MO 23860
Steven T. Majors MO 52859
ENSZ & JESTER, P.C.
2121 City Center Square
1100 Main Street
Kansas City, Missouri 64105
Telephone: 816-474-8010
Facsimile: 816-471-7910
jensz@enszjester.com
Attorneys for Appellant

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JURISDICTIONAL STATEMENT

The action in question was one for personal injury and property damage which arose out of recurrent sewer backups into Respondent's residence allegedly caused by Appellant City's defective sewer system. It was Respondent's theory that her personal injury resulted from Appellant City's negligence in the operation of its sewer system and that her property damages were as a result of a constitutional taking or act of inverse condemnation. The appeal by Appellant City was limited to Respondent's property damage claim and governed by the common law application of Mo. Const. Article I, Section 26. Pursuant to Mo. Const. Article V, Section 3, the action was within the Court of Appeals' general appellate jurisdiction. The action comes to the Supreme Court as a result of Appellant's Motion for Transfer pursuant to Civil Rule 83.02.

STATEMENT OF FACTS

The Jury's Property Damage Verdict Was in Error.

Respondent Donna J. Collier purchased and moved into her home on September 16, 1972, (tr. 318:6). At some point during the 1970's, Ms. Collier finished the basement (tr. 330:17), which was substantially updated in the 1980's (tr. 331:20). The Respondent testified that the first flooding of her basement by way of a sewer backup occurred in March of 1992 (tr. 332:1 – 334:16). Although Ms. Collier testified that she filed no insurance claim, she received payment for her damages from the Appellant City (tr. 336:4-13). After receiving the money to pay for damages, Ms. Collier paid some bills but did not use the money to replace the walls or carpet affected by the backup (tr. 420:5-11). Respondent then testified to a series of recurrent backups commencing in June, 1993, each emanating from a floor drain located in the basement family room, which occurred on average once a year during heavy rainfall. Physical damage was limited to the basement of the house (tr. 330:21 – 345:5; 368:24 – 370:10; 378:14 – 380:10). Respondent testified to having 13 backups in all, the last of which occurred in August of 2004 (tr. 380:6-10). Nevertheless, Respondent continued to live in her residence until September 17, 2004 (tr. 401:18-20; 455:4-7).

Respondent's claim of property damage and evidence supporting the same, which was the basis of her jury verdict directing instruction for property damage loss, was for a "partial temporary taking" of her residence and her personal property loss. The property damage verdict directing jury instruction (A-6) contemplated that Respondent should recover the difference in value of her property as it was on June 30, 1993, compared to

what it was on February 14, 2005, plus the value of the loss of the use of her residence after February 14, 2005, for the time it would take to repair it.

The effect that the contaminated state of the house had on Respondent's health and personal sensitivities was the subject matter of Respondent's \$60,000.00 personal injury judgment (A 1-3) and that judgment and any interest that might relate are not the subject matter of appeal and are not to be considered as part of a property damage inverse condemnation claim. *Byrom v. Little Blue Valley Sewer District, et al*, 16 S.W.3d 573, 576-577 (Mo. banc 2000). Furthermore, the personal injury judgment has been satisfied by Appellant (A 4-5).

The evidence as to the difference in the value of Respondent's property as a result of the sewer backups was in the form of Respondent's expert testimony which evaluated the diminution in value of her residence as a result of the flooding at \$35,000.00 (tr. 592:12 – 595:18). Respondent planned to move back into her residence after mold issues were remediated (tr. 412:14-25). Although there was evidence of what would be necessary to accommodate the repair of the damage to the residence so that Respondent could move back into it (tr. 645:11-18; 648:1-9), the only evidence of costs associated with that repair was for the cost of inspecting for the nature and extent of mold damage to the residence which cost was estimated to be \$1,500.00 to \$2,000.00 (tr. 647:10-22). There was no evidence presented as to the length of time Respondent would be required to be away from her residence as a result of the repair work or what the cost to Respondent would be of renting comparable lodging during the time of repair.

Respondent's evidence of personal property loss was at best speculative with the exception of a 12-year old carpet in the basement which was replaced in 2002 and valued by Respondent at \$1,000.00 (tr. 370:11-13; 408:10-12; 442:23 – 443:13). When first asked what the total value of her personal property loss was by her attorney, Respondent stated that she had "no idea" (tr. 408:13-18). But, when her attorney pursued the questioning she assessed the value of her total personal property loss at "probably \$10,000.00" (tr. 407:22-25).

The sum of the evidence of Respondent's claimed property damage loss supported a verdict of but \$45,000.00.¹

¹ Although Respondent's expert provided evidence that Respondent's residential property would have a value of \$95,000.00 without the presence of detrimental conditions (tr. 587:11 – 588:14), and Respondent was of the opinion that her residence had a value of between \$90,000.00 and \$100,000.00, but was not saleable because of mold issues (tr. 467:11 – 469:1), this evidence would have no relevance to Respondent's "temporary partial taking" claim and, furthermore, would allow a recovery that would be duplicative of recovery already made for her temporary partial taking claim. Per claim made by Respondent, the evidence of record, and her property damage jury directing instruction, the Respondent recognized that she was not losing her residence for all time ("a total taking" inverse condemnation action), but only until such time that the residence was repaired and returned to her in its pre-damaged condition. Respondent's evidence as to value of this repair or change in value as a result of the repair was \$35,000.00. If

The Pre-judgment Interest Award By The Court Was Erroneous.

At the conclusion of the submission of the evidence in the trial of the case, Respondent's attorney advised the Court that he would be asking for pre-judgment interest should Respondent obtain a verdict and that, as a matter of law, it was clear that the Court rather than the jury was to make the determination as to the amount of interest to be awarded (tr. 986:3-15). Appellant's attorney responded by stating that the law was clear that interest was only to be awarded from the day of judgment at the rate of 6% per annum (tr. 985:17-25). The Court then indicated its understanding that the question of pre-judgment interest was one for the Court and something that did not have to be submitted to the jury with which Appellant's attorney agreed (tr. 985:1-8).

After the jury entered its verdict on Respondent's claim for property damages in the amount of \$200,000.00 on February 14, 2005, the Court entered its judgment on the jury verdict in that amount (LF 96-98). On March 14, 2005, Appellant filed its Motion for New Trial objecting to any award of pre-judgment interest (LF 101-102). On April 7, 2005, the trial court denied Appellant's Motion for New Trial (LF 118) and amended the judgment on the verdict by "granting pre-judgment interest at the rate of 6% per annum

Respondent was to have made claim for a "total taking" of her residence, Appellant would have been entitled to ownership of the residence in consideration for the payment of the \$90,000.00 to \$100,000.00 at which the residence was valued.

from June 30, 1993." The Court's mathematical calculation resulted in a pre-judgment interest award to Respondent in the amount of \$139,528.76 (A 3).

Regardless of whether the trial court had the authority to award pre-judgment interest, the substantial evidence of record clearly shows the trial court's judgment as to the amount of this interest is grossly overstated. As considered in the last section, the total value of Respondent's property was no greater than \$100,000.00, *supra* fn 1, at pp 4-5. Respondent's personal property loss was no greater than \$10,000.00, *supra*. There was no evidence that Respondent had loss of use of her residence until September 17, 2004, *supra* at p. 2. Respondent's pre-judgment loss of her residence then lasted until the judgment on the verdict which occurred on February 14, 2005 (LF 96-98). The proper pre-judgment interest calculation that should have been made by the Court for Respondent's loss of use of her residence was $150/365$ times $.09$ times \$100,000.00 which equals \$3,698.63.

The only element of Respondent's personal property loss for which sufficient evidence was provided for the trial court to establish a pre-judgment interest calculation was with regard to the basement carpet, *supra* at pp. 3-4. Respondent specifically valued her carpet at \$1,000.00, with the date of loss established at May 8, 2002, *supra*. The mathematical calculation would be \$1,000.00 times 2 and $278/365$ times $.09$ equals \$256.16.

The total pre-judgment interest award that the trial court could have awarded, if any, was \$3,954.79 as opposed to the \$139,528.76 that it did award.

POINTS RELIED ON

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL ON RESPONDENT'S CLAIM FOR PROPERTY DAMAGES WHICH INCLUDED A REQUEST FOR REMITTITUR BECAUSE THE EVIDENCE OF RECORD AND JURY VERDICT DIRECTING INSTRUCTION PERTAINING TO PROPERTY DAMAGES ONLY SUPPORTED A VERDICT FOR \$45,000.00 AS OPPOSED TO THE \$200,000.00 AWARDED, SUCH THAT THE JUDGMENT ON THE VERDICT SHOULD BE REMITTED FROM \$200,000.00 TO \$45,000.00 ON RESPONDENT'S CLAIM FOR PROPERTY DAMAGES.

Heins Implement v. Mo. H'way Transp. Com'n., 859 S.W.2d 681, 692 (Mo. en banc 1993).

Byrom v. Little Blue Valley Sewer District, et al, 16 S.W.3d 573, 576-577 (Mo. banc 2000)

Armon v. Griggs, 60 S.W.3d 37, 41 (Mo.App. W.D. 2001)

Carmel Energy, Inc. v. Fritter, 827 S.W.2d 780 (Mo.App. W.D. 1992).

II. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR PREJUDGMENT INTEREST IN THE AMOUNT OF \$139,528.76 BECAUSE THE EVIDENCE OF RECORD ONLY SUPPORTED PREJUDGMENT INTEREST IN THE AMOUNT OF \$3,954.79, IF ANY, SUCH THAT PREJUDGMENT INTEREST SHOULD BE REMITTED FROM \$139,528.76 TO \$3,954.79, IF ANY.

State ex rel State Highway Commission of Missouri v. Green, 305 S.W.2d 688, 693-694

(Mo. Div. 1 – 1957)

Home Trust Co. v. Josephson, 95 S.W.2d 1148, 1152 (Mo. banc 1936)

Campbell v. Kelley, 719 S.W.2d 769, 771-772 (Mo. banc 1986);

§ 510.270 RSMo.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR NEW TRIAL ON RESPONDENT'S CLAIM FOR PROPERTY DAMAGES WHICH INCLUDED A REQUEST FOR REMITTITUR BECAUSE THE EVIDENCE OF RECORD AND JURY VERDICT DIRECTING INSTRUCTION PERTAINING TO PROPERTY DAMAGES ONLY SUPPORTED A VERDICT FOR \$45,000.00 AS OPPOSED TO THE \$200,000.00 AWARDED, SUCH THAT THE JUDGMENT ON THE VERDICT SHOULD BE REMITTED FROM \$200,000.00 TO \$45,000.00 ON RESPONDENT'S CLAIM FOR PROPERTY DAMAGES.

A. Standard of Review. With regard to a jury's verdict on damages, since an appellate court does not weigh the evidence, it is limited to inquiring as to whether the jury's verdict is supported by substantial evidence of record on in other words "whether the amount of verdict is responsive to evidence on the issue of damages." *Heins Implement v. Mo. H'way Transp. Com'n.*, 859 S.W.2d 681, 692 (Mo. en banc 1993).

B. Factual Analysis. Since Respondent only valued her residence at not more than \$100,000.00, the most she would ever be entitled to receive for her real estate loss was \$100,000.00 and that would have required that the property be taken from her for all time by Appellant and given to Appellant. But, Respondent planned to receive that property back after mold issues were resolved. The reduced value of the property because of the mold and other sewer backup issues was \$35,000.00, which was

presumably greater than the cost of repairing problems related to the sewage backups since there was no evidence as to that cost, other than a potential \$2,000.00 mold inspection charge that would have to have been incurred (tr. 647:10-22).

Respondent's instruction to the jury for her property damage loss requests that she be paid the \$35,000.00 for the loss in value of her residence and \$10,000.00 for her personal property loss. Although the instruction also requests compensation for the value of the loss of use of her residence during the time the sewer backup relating to damages is being repaired, there is no evidence as to the time it would take to repair the residence or associated economic loss (rental value of the property – see *Byrom v. Little Blue Water District*, 16 S.W.3d 573, 575, *supra*. The property damage jury Instruction 8, which is also found at A 6, reads as follows:

INSTRUCTION NO. 8

If you find in favor of plaintiff, you must award plaintiff such sum as you believe is the difference between the fair market value of plaintiff's whole property immediately before the sewer backup of 1993 and the value of plaintiff's remaining property as of the date of your verdict, which difference in value is the direct result of the backups and of the uses which defendant has the right to make of the property damaged, plus such sum as you may find from the evidence will fairly and justly compensate plaintiff for the loss of use thereof during the time reasonably necessary for the property to be repaired or replaced.

The phrase "fair market value" as used in this instruction means the price which the property in question would bring when offered for sale by one willing but not obliged to sell it, and when bought by one willing or desirous to purchase it but who is not compelled to do so.

In determining fair market value you should take into consideration all the uses to which the property may best be applied or for which it is best adapted, under existing conditions and under conditions to be reasonably expected in the near future.

\$45,000.00 is the most that the jury could have awarded Respondent for her property damage claim.

C. **Legal Analysis.** Accepted law as it relates to damages recoverable for property damage loss is that claimant is entitled to the difference between the fair market value of the property as it was before the loss and its value afterwards. However, when that property can be restored to its former condition at a cost less than the diminution in value, the cost of restoration can be the proper measure of damages. *Jack L. Baker Companies v. Palsey Mfg. & Distribution Co.*, 413 S.W.2d 268, 273-274 (Mo. 1967). Plaintiff is not entitled to recover both the cost of having her residence repaired, and the reduced value of it because of its need for repair. To allow the recovery of both would give Respondent double damages. The standard for personal household property loss such as was considered here was the value of the goods to Plaintiff, excluding fanciful or sentimental value. *Bewley v. Allright Carparts, Inc.*, 617 S.W.2d 547, 550 (Mo.App. W.D. 1981).

Although appellate courts do not weigh the evidence, they do review the evidence to determine whether there exists substantial evidence to support a verdict or whether the amount of verdict is responsive to the evidence on issues of damages. *Heins Implement Co. v. Missouri Highway & Transportation Com'n.*, 859 S.W.2d 681, 692-693 (Mo. 1993). Per *Heins*, in condemnation cases, the property damage evaluation cannot exceed the largest amount reflected in the record.²

In *Boyd v. Lawler*, 985 S.W.2d 403, 404-405 (Mo.App. W.D. 1999), the court was considering a situation where defendant had damaged plaintiff's fence in the process of destroying trees and foliage about it. Plaintiff's testimony contemplated a cost of repair that seemed to include an entirely new fence when that which was damaged was but a section of the fence which was twenty-five to thirty years old. In reversing the trial court's judgment for damages and remanding the case for trial on the issue of the amount

² The Court of Appeals' response to Appellant City's contention that the jury verdict was excessive considers standards relevant to personal injury claims and the weighing of evidence where judge and jury have considerable discretion in determining whether an award is excessive. Slip Opinion, pp. 32-34. In property damage claims, such as an inverse condemnation claim, there must be specific evidence as to the value of property taken or damaged. When this court dismisses Appellant's position by stating, without more, "Moreover, evidence in the record supports the jury's damages award," (Slip Opinion, p. 33) it misstates that unequivocally revealed by the record.

of damages sustained by plaintiff, the court approvingly referred to an earlier appellate court ruling and a CJS recitation at p. 405 of its opinion:

As a general rule, a person who has sustained loss or injury may receive no more than just compensation for the loss or injury sustained. He is not entitled to be made more than whole, and he may not recover from all sources an amount in excess of damages sustained, or be put in a better condition than he would have been had the wrong not been committed.

In like fashion, the Court of Appeals rejected a jury's property damage award for lost rent where the owner's testimony as to value was insufficient to support the award. *Carmel Energy, Inc. v. Fritter*, 827 S.W.2d 780 (Mo.App. W.D. 1992). In ruling as it did there, this Court stated the established law, at pp. 782-783 of its opinion:

Competent and substantial evidence is required to support an award of damages and the burden is on the party seeking to establish his claim to prove every essential element of that claim, including the amount of damages. *Massey v. Goforth*, 305 S.W.2d 894, 897 (Mo.App. 1957). The amount may not be based on nothing more tangible than "a gossamer web of shimmering speculation and finely-spun theory." *Id.* A verdict which is not supported by the evidence as to the amount of damages must be set aside as promptly as a verdict that is not supported by the evidence at all. *Mitchell v. Mosher*, 362 S.W.2d 532, 536 (Mo. 1962) and *Pinkston v. McClanahan*, 350 S.W.2d 724, 728-29 (Mo. 1961). To the same effect, where the court is the trier of fact, there must be substantial evidence to

support the judgment, *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

The record supports monetary damages in the principal amount of no more than \$45,000.00. \$45,000.00 is the most that the jury could have awarded Plaintiff for her property damage claim. Where such a circumstance occurs, the Court must remit the verdict to the amount supported by the evidence. *Armon v. Griggs*, 60 S.W.3d 37, 41 (Mo.App. W.D. 2001); § 537.068 RSMo. (A 7).

II. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION FOR PREJUDGMENT INTEREST IN THE AMOUNT OF \$139,528.76 BECAUSE THE EVIDENCE OF RECORD ONLY SUPPORTED PREJUDGMENT INTEREST IN THE AMOUNT OF \$3,954.79, IF ANY, SUCH THAT PREJUDGMENT INTEREST SHOULD BE REMITTED FROM \$139,528.76 TO \$3,954.79, IF ANY.

A. Standard of Review. Pre-judgment interest was awarded by the trial court. Decrees or judgments of trial courts will be sustained unless there is no substantial evidence to support them, they are against the weight of the evidence, or they erroneously declare or apply the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. en banc 1976).

B. Legal Analysis. There is a strong argument to be made that since this was a jury-tried action for money damages, the jury should have made the determination as to whether pre-judgment interest should be awarded, and, if so, the amount. *State ex rel State Highway Commission of Missouri v. Green*, 305 S.W.2d 688, 693-694 (Mo. Div. 1 – 1957); § 510.270 RSMo. However, there is case law that would authorize the trial

court to add pre-judgment interest to a jury verdict when that verdict clearly defines a principal amount of money that has been owing from a defined time and it is obvious that the jury did not include interest in its verdict. *Home Trust Co. v. Josephson*, 95 S.W.2d 1148, 1152 (Mo. banc 1936); *Campbell v. Kelley*, 719 S.W.2d 769, 771-772 (Mo. banc 1986); *Dierker Ass. v. Gillis*, 859 S.W.2d 737, 746 (Mo.App. 1993); *Holtmeier v. Davani*, 862 S.W.2d 391, 406 (Mo.App. 1993); II Mo. Damages, Section 20.71 (Mo. Bar 2d Ed. 2001, 2004). As succinctly put in the Mo. Damages CLE at p. 20-75, *id.*:

Despite the confusion engendered by the prejudgment interest issue, the rule of *Home Trust*, 95 S.W.2d 1148, is relatively simple: When the damages amount is undisputed, the facts giving rise to the right of prejudgment interest are likewise undisputed, and mere mathematical calculation is needed to determine the verdict amount, such that the plaintiff would be entitled to a directed verdict with respect to the entitlement and amount of prejudgment interest, the trial court may simply assess the amount without input from the jury.

The author of the CLE section then goes on to say at p. 20-75, "Unless the *Home Trust* criteria are satisfied, the issue of prejudgment interest must be submitted to the jury in a jury-tried case." The mathematical calculation which could have been made here by the Court allowed for pre-judgment interest no greater than \$3,954.79, *supra* at p. 6. There was no evidence to support an award of pre-judgment interest on a verdict that was in excess of four times the amount it should have been for a period of time that was in

excess of twenty times the length of time it should have been, such as was done by the trial court.

CONCLUSION

To allow this property damage judgment on the verdict of \$200,000.00 to stand when the evidence of record supported a verdict of no more than \$45,000.00 would give Respondent a windfall and result in manifest injustice to Appellant. Even more egregious was the trial court's assessment of pre-judgment interest in the amount of \$139,528.76 when it should have been no more than \$3,954.79, if anything. Therefore, Appellant City of Oak Grove requests that the Court remit the amended judgment on the verdict on property damages by \$155,000.00 to \$45,000.00 and the trial court's award of pre-judgment interest by \$135,573.97 to \$3,954.79 or in its entirety to zero.

Respectfully submitted,
ENSZ AND JESTER, P.C.

| | |
|--------------------------------|----------------|
| James H. Ensz | MO 23860 |
| Steven T. Majors | MO 59138 |
| 2121 City Center Square | |
| 1100 Main Street | |
| Kansas City, Missouri 64105 | |
| Telephone: | 1-816-474-8010 |
| Facsimile: | 1-816-471-7910 |
| <i>Attorneys for Appellant</i> | |

CERTIFICATE OF WORD PROCESSING PROGRAM

The undersigned hereby certifies that this Brief was prepared on a computer, using Microsoft Word. A diskette containing the full text of the Brief is provided herewith, and has been scanned for viruses and is believed to be virus-free.

Attorney for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Brief herein is in compliance with Missouri Rule of Civil Procedure 84.06. According to the word count of the word processing system used to prepare the Brief, the Brief contains 3,820 words, 355 lines.

Attorney for Appellant

CERTIFICATE OF SERVICE

Counsel for Appellant certifies that a copy of the foregoing SUBSTITUTE BRIEF OF APPELLANT was mailed, *via* U.S. Mail, postage prepaid, this 7th day of September, 2007 to:

William L. Carr
LAW OFFICE OF WILLIAM L. CARR
3145 Broadway
Kansas City, MO 64111
Attorneys for Plaintiffs/Respondents

Attorney for Defendant/Appellant

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