

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 REPLY BRIEF OF APPELLANT

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STATEMENT OF FACTS

In response to Appellant's "Statement of Facts," Respondent complains that "most of those fourteen pages (there were actually five pages) contained arguments and conclusions." To the extent that Appellant's Statement of Facts did contain what Respondent characterizes as "arguments and conclusions," those so-called arguments and conclusions were statements intended to explain the limited facts that were necessarily presented because of the limited aspect of this case presented by Appellant to this Court for review; i.e. the amount of property damages that should have been awarded.

On the other hand, Respondent's brief is filled with facts that are irrelevant to the issue of the amount of property damages that should have been awarded in this inverse condemnation case. The Court will note that most of the factual information presented by Respondent pertains to Respondent's personal injury claim which has been resolved and is not before this Court. See Appellant's Initial Substitute Brief at p. 3.

The only commentary contained in Respondent's Statement of Facts that would arguably support a property damages award of greater monetary value than has been shown by Appellant pertains to Respondent's personal property loss. However, there is no evidence of personal property loss to which a monetary value can be attributed beyond \$10,000.00 claimed. A review of Respondent's testimony as to personal property loss which is the only evidence supporting the claim of personal property loss is found between tr. 405:14 and 410:1. But, for the purposes of the assessment of prejudgment interest, Appellant did fail to take into consideration \$5,660.00 of the personal property loss that was included in the claimed \$10,000.00 personal property loss. tr. 405:14 –

407:21, Respondent's Appendix, A1-3. The interest calculation on this figure from the day of loss, May 8, 2002, until the judgment on the verdict, February 14, 2005, would be $278/365 \times .09 \times \$5,660.00$ which equals \$1,406.78. Respondent's interest award would subsequently be \$5,361.57 rather than the \$3,954.79 earlier computed.

At p. 8 of Substitute Respondent's Brief, she contends that Appellant only verbally objected to the award of prejudgment interest. That statement is incorrect. See p. 5 of Appellant's Initial Substitute Brief.

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.

To paraphrase a well worn saying, 'It is like there is an elephant in the room and Respondent doesn't see it.' The transparent issue is the amount of property damages that could be awarded in this inverse condemnation case. The amount cannot exceed the greatest monetary value claimed and shown to relate to that property loss. *Heins Implement Co. v. Missouri Highway & Transportation Com'n.*, 859 S.W.2d 681, 692-693 (Mo. 1993); *Byrom v. Little Blue Valley Sewer District, et al.*, 16 S.W.3d 573, 577-578 (Mo. banc 2000). That amount is \$45,000.00. The failure to recognize the issue and its resolution would constitute plain error, if nothing more, Civil Rule 84.13(c).

Cases cited by Respondent to support the proposition that "the jury is given wide discretion in assessing amounts for damages to personal property even when the property owner is not sure of the value of the property," p. 12, Substitute Respondent's Brief, involve property damage claims included with personal injury claims associated with

nuisance claims against cities decided by courts before *Heins* and *Byrom*. Because these cases pre-dated *Heins* and *Byrom*, the property damage aspect of the nuisance claim against the City had not been fully separated from the personal injury aspect which resulted when the *Heins* court ruled that the property damage aspect of a nuisance case against a governmental entity with condemnation authority was limited to the relief allowed in an inverse condemnation claim.

Byrom clarified the effect of the *Heins* ruling as relates to a plaintiff's claim for damages involving both personal injury and property damages against a city which prior to *Heins* was a nuisance claim. *Byrom* made clear that the personal injury aspect, to include any personal suffering or loss of use and enjoyment of the property, was not a part of the inverse condemnation property damage part of the claim.

In this action, as reflected by the jury instructions, the distinction was drawn consistent with *Heins* and *Byrom*. See Respondent's jury instructions for her verdict directing personal injury claim, Supplemental Appendix A-8, her personal injury damages instruction, A-9, her property damage verdict directing instruction, A-10, and the property damages instruction, Initial Appendix A-6. Accordingly, any inferences to be drawn from case law cited by Respondent and the standard actually followed in this case that the standard for establishing damages in this inverse condemnation (property damage) claim is other than established by *Heins* and *Byrom*, is not germane.

Most of the evidence considered by Respondent at pp. 9-11 of her brief is only relevant, as a matter of law, to her personal injury claim. Respondent's testimony that her home was worth \$90,000.00 to \$100,000.00 at p. 10 of her brief is inconsistent with her

jury instruction and the evidence in the case that she planned to move back into the residence after it was restored, and her expert testimony that valued that temporary loss in value of the residence at \$35,000.00. See Appellant's Initial Substitute Brief at f.n. 1, pp. 4-5.

Respondent's claim of personal property loss considered at pp. 11-12 of her brief is foreclosed beyond \$10,000.00 because that is the maximum value she placed on it. See *Heins, supra* at p. 3. Even as relates to personal property claims that are not inverse condemnation claims, if no value is given for the item of personal property, no recovery can be had for that item. *Bewley v. Allright Carparts, Inc.*, 617 S.W.2d 547, 550 (Mo. App. W.D. 1981).

Respondent claims at p. 12 of her brief that because the time needed to repair the residence was uncertain, the jury was free to award what it might for the time period Respondent was out of the residence for those repairs. Admittedly, there was no evidence to what that time period might be and what the rental value of that property might be during that time period. Consistent with *Heins, supra* at p. 3, Respondent cannot recover for property loss which is not valued. The case law cited by Respondent to the contrary at pp. 12-13, to the extent that it affects this particular issue, is overruled by implication by *Heins* and *Byrom, supra*, at p. 3. Furthermore, Respondent's complaint at p. 12 of her brief, "... the amount of time needed to repair the property or correct the problem with the city's sewer system was uncertain" belies the problem created by Respondent in pursuing an action that was a "temporary taking" that had not been abated

as though in many respects it was a "total taking" that was not abateable.¹ *Spain v. City of Cape Girardeau*, 484 S.W.2d 498, 503-506, (Mo. App. E.D. 1972) provides an extended discussion of the options that a landowner has for a future loss of use damages claim with an abateable taking or nuisance. The first option would be that Respondent could recover her reasonable rental expenses for the estimated time away from the property before the sewer system was repaired and thereafter, her residential property remediated. If Respondent had felt her future loss claim was too speculative at the time of the trial in this case, she had the option of bringing a second claim (lawsuit) after she had incurred the loss.

Respondent's unsupported contention at p. 13 of her brief that Appellant is making the argument that "damages were excessive" for the first time is untrue. Appellant timely first made the argument in its Motion for New Trial, LF 99-100, and thereafter in all briefs it filed in the Court of Appeals.

Appellant has admittedly not objected to the property damages instruction, A-6, because on face, it is not in error. See Respondent's Brief as pp. 13-14. If the instructions were scrupulously followed by the jury, they would have awarded damages in the amount of no more than \$45,000.00 which is the greatest amount supported by the evidence.

¹ Appellant City was in the process of repairing the defective sewer system at the time of trial. tr. 921:10 – 924:18.

At pp. 14-16 of her brief, Respondent reiterates her arguments earlier made that this inverse condemnation (property damage) claim should be considered like a personal injury claim for the purpose of evaluating damages. *Byrom v. Little Blue Valley Sewer District*, 16 S.W.3d at 578, rejects such a notion when it states:

"Recovery for a physical injury and loss of the use and enjoyment of property itself is not appropriate for an inverse condemnation claim, although such injuries may be relevant to calculating the lost value of the property. n15 Therefore, the trial court erroneously applied the law to award the Residents damages for their physical suffering and loss of the use and enjoyment of their homes apart from its effect on the market or rental value of their property. ...

Although the Residents' inverse condemnation claim is based on nuisance, compensation in this case is not determined according to the law of nuisance as recited in *McCracken*. n16 We hold the attempt to award damages for personal injuries in a *nuisance-based* inverse condemnation case for injury to property is erroneous as a matter of law. The Residents suffered physical injury, but their nuisance-based inverse condemnation claim only seeks compensation for injury to their *property* rights. Accordingly, they are not entitled to recover for the loss of use and enjoyment of their property caused by the odors apart from how that loss affects the overall lost value in their property rights. The judgment of the trial court is reversed."

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 \$5,361.57, IF ANY, SUCH THAT PREJUDGMENT INTEREST SHOULD BE REMITTED FROM \$139,528.76 TO \$5,361.57, IF ANY.

A. Preservation of Argument for This Court's Consideration.

Although Respondent, throughout her brief, alludes to a failure on the part of Appellant to preserve issues presently raised before this Court, she does not provide evidence of such a failure. Admittedly, the Points Relied Upon in the Substitute Brief more narrowly define the issues before this Court than did the recitation of the same general issues in the appellate court so that the precise issues before this Court are more easily identified. This is consistent with the dictates of Civil Rule 83.08(b) which in the first instance actually allows Appellant to file a brief to fully replace the brief considered by the Court of Appeals, which Court of Appeals Brief is abandoned. The civil rule then goes on to say the the "substitute brief shall include all claims the party desires this court to review. ..." Appellant is allowed to narrow its focus to place before this Court only those issues, or so much of them, as would warrant this Court's consideration.

Appellant objected to an award of prejudgment interest that was not liquidated at time of trial commencement in its Motion for New Trial, LF 100-101. In its Court of Appeals Briefs, to thereafter include letter briefs requested by the Court of Appeals, it placed the arguments before that Court that are presently before this one.

B. The Amount of Prejudgment Interest That Could be Awarded had to be Ascertainable.

A principal figure against which prejudgment interest can be measured must be established before the time of trial or during the course of trial to be awarded under any circumstance. When the principal amount and the time period for which it is applicable for the purposes of applying interest is established as a matter of fact before trial, then the interest can be calculated and mathematically applied as a matter of procedure. When the principal amount and time period for which it is applicable for the purposes of applying interest is a factual issue establishable at trial by the finder of fact, as it was here, prejudgment interest is a substantive matter to be determined by the trier of fact, be it judge or jury, based on the evidence presented at trial. Appellant's initial Substitute Brief, pp. 14-15.

Traditionally, the jury has been required to ascertain the interest when the principal amount and subsequently interest is unascertainable before the start of trial, *supra*. If the jury should have been the agent that awarded prejudgment interest in this case, then Respondent is entitled to none, since the jury did not make such a decision. Regardless, be it judge or jury that made the decision, the principal figure against which interest could be applied and the time period for which it was applicable was only established after the start of trial, i.e. it was a substantive matter that gave rise to more than a ministerial calculation of an interest charge against a pre-determined amount.

C. Respondent's Failure to Address Appellant's Prejudgment Interest Issue.

Appellant's position in its second argument concerning prejudgment interest awarded by the trial court, if it could be done, is basically no different than that in its first argument concerning the jury's verdict on damages; the greatest amount that the evidence supports is far less than found by the trial court. Respondent's Brief does not address this issue. Rather, it addresses the issue of whether prejudgment interest can be awarded in inverse condemnation cases. It can be, but only under the appropriate circumstances and to the extent that the evidence of record supports such an award. This is consistent with the dictates of *Byrom* and *Heins*, earlier addressed, *supra* at p. 3.

Appellant has no issue with the proposition of law advanced by Respondent, as applicable to herself, that she is entitled to be compensated so as to put herself in as good a position pecuniarily as if her property had not been taken and to receive the full equivalent of the value of such use at the time of the taking, paid contemporaneously with the taking. Nor, does Appellant take issue with the various cases supporting that proposition and that prejudgment interest is a vehicle by which the value of the taking can be measured for the time period of the taking before judgment. However, Respondent is only entitled to what would be just compensation, not more than that.

In the instant case, the highest value given to Respondent's residence was \$100,000.00; Appellant's initial Substitute Brief, pp. 4-5. She was only without the use of her residence before judgment from September 17, 2004 until the day of judgment, February 14, 2005. Appellant's initial Substitute Brief, p. 2. The most that Respondent established in the way of personal property that was taken from her from a specified time, May 8, 2002, was a carpet valued at \$1,000.00, Appellant's initial Substitute Brief, p. 4,

and a variety of other personal property valued at \$5,660.00. Appellant's Substitute Reply Brief, pp. 1-2. When interest at the legal rate of 9% is assessed for the greatest values of record for Respondent's property loss prejudgment for the appropriate periods of time, the awardable amount of interest whether done by judge or jury, is no more than \$5,361.57. The trial court awarded prejudgment interest on the unsupportable \$200,000.00 verdict from the date of the first basement flooding, June 30, 1993, at the rate of 6%, such that its prejudgment interest award was \$135,573.97. LF 118.

PLAIN ERROR REVIEW

Respondent has argued that Appellant has not properly placed the issues argued in its briefs before this Court. Appellant believes it has, but should this Court not agree with Appellant, Appellant requests that this Court recognize the plain error exhibited pursuant to Civil Rule 84.13(c) and exercise its discretion to review Appellant's arguments on the merits.

CONCLUSION

Appellant City reiterates its conclusion stated in its initial Substitute Brief for reasons there stated that this 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 prejudgment interest by \$134,167.19, rather than \$135,573.97, to \$5,361.57, or in its entirety to zero rather than to \$3,954.79, or in its entirety to zero.

Respectfully submitted,
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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 2,993 words, 278 lines.

Attorney for Appellant

CERTIFICATE OF SERVICE

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

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