MEASURE OF DAMAGES IN PROPERTY LOSS CASES

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By John W. Reis

Proving damages in a large property loss case is often tedious, sometimes complex, and occasionally treacherous. The drudgery of itemizing the damages is difficult enough. The battle over *entitlement* to economic damages is no less daunting. Once entitlement is established, the weary litigant may have little time or energy left to fully analyze the proper legal standards for recovering those damages. This article is intended as a survival manual of sorts -- a guide through the law on the proper measure of property damages in Florida.[1]

The General Rule of Recovery

For both real and personal property losses, the general rule of recovery is that a property owner can recover the cost of replacement, repair, or restoration of property, unless the damage is permanent and the restoration cost will exceed the diminution in the fair market value of the property, in which case the damages are limited to the diminution in fair market value.[2] More succinctly stated, an award of damages to property is generally limited to the restoration cost or the diminution in fair market value, whichever is less.[3] Thus, for example, in United States Steel Corporation v. Benefield, 352 So.2d 892, 894-95 (Fla. 2d DCA 1977), *cert. denied*, 364 So.2d 881 (Fla.1978), the court held that the plaintiff, a property owner, could not recover the full cost of restoring 26 damaged acres of land but was instead limited to the diminution in value, where the restoration cost was $13,084 but the property's entire value was only $12,116 ($466 per acre).

Establishing "Fair Market Value"

The term "fair market value" is defined as "the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell

it, taking into consideration all uses to which the property is adapted and might in reason be applied."[4] Three well-recognized guides to appraisal have evolved, all of which take the property's pre-loss physical depreciation into account: "(1) the cost approach; (2) the comparable sales approach; and (3) the income or economic approach."[5]

In the appraisal and insurance industries, the term "actual cash value" is often used to describe the pre-loss value of certain property, such as vehicles or appliances or structures. Appraisal guides, such as the Kelley Blue Book[6] for vehicles or the Marshall & Swift guide[7] on structures, can help estimate the actual cash value. Although no published Florida case has directly addressed the use of these insurance appraisal guides to determine diminution in market value, language from one Florida case indicates that the term "actual cash value" is "generally synonymous" with fair market value.

In American Reliance Insurance Company v. Perez, 689 So.2d 290 (Fla. 3d DCA 1997), home owners brought a class action against their property insurer on the meaning of the term "actual cash value." In determining that the term was not ambiguous, the court essentially equated "actual cash value" with "fair market value," stating as follows:

> The insurer contends that the policy language is unambiguous – that when an insured elects not to repair or replace damage to the insured building, then the insured is entitled to be paid only the "actual cash value," *i.e.*, an amount less a deduction for prior depreciation, because the damaged portion, not being new, had suffered actual physical depreciation before the hurricane damage. … We find that the controlling language is not ambiguous. The expression "actual cash value" is an often-used appraisal term, generally synonymous with "market value" or "fair market value."[8]

"Stigma" Damages

Damaged property sometimes carries a "stigma" associated with the event that caused the damage even after repairs have been made, especially in cases involving numerous construction defects, mold damage, or termite infestation. The owner of such

property will often desire not only the repair costs, but also the additional diminution in value associated with the stigma.

In Orkin Exterminating Company, Inc. v. DelGuidice, 790 So. 2d 1058 (5th DCA 2001), for example, the homeowners sought, and the jury awarded, $300,000 against a pest control company for the lost market value associated with the stigma of repeated termite infestations. The Fifth District reversed the award based on a provision in the parties' contract which limited the homeowners' remedy to re-treatment and repair of the damage, but went on to note that stigma/diminution damages would otherwise have been recoverable under the following circumstances:

> [T]he diminution in value damages of $300,000 could have properly been presented to the jury if competent substantial evidence had been presented that the cost to repair existing termite damage and the cost of providing effective termite eradication procedures would have constituted economic waste. In other words, had evidence been presented that the cost of repair was substantially greater than the diminution in value, diminution in value would have been the proper standard to apply.[9]

Under this holding, stigma damages are recoverable in Florida as an *element* of the diminution in market value when reparation is either impracticable or exceeds the overall diminution in value; however, such damages are not recoverable in *addition* to the repair cost when the diminution in value exceeds the repair cost.[10]

Proof Through a "Qualified" Witness

Courts require that proof of lost fair market value be established by competent, substantial evidence through a "qualified" witness.[11] Generally, the use of expert testimony is preferred.[12] However, most courts will allow a non-expert owner to testify to the value of his or her own property.[13] The rule is "based on the owner's presumed familiarity with the

characteristics of the property, his knowledge or acquaintance with its uses and purposes, and his experience in dealing with it."[14]

Burden to Establish the Lesser Figure

Because the owner is generally limited to the lesser of the restoration cost or the diminution in value, one issue which occasionally arises at trial is whether the owner has the burden to introduce both figures in order to establish which one is the lowest. One Florida case holds that an owner seeking repair costs need not prove that repair costs exceeded diminution in market value,[15] but another case holds that an owner seeking the diminution in value must show that repairs were either impracticable or in excess of the diminution in value.[16] Close analysis of the two cases highlights the distinction.

In American Equity Insurance Co. v. Van Ginhoven, 788 So. 2d 388 (Fla. 5th DCA 2001), plaintiff introduced evidence of, and was awarded at trial, a restoration cost of $48,144.50 for damages to a swimming pool caused by a contractor. On appeal, defendant argued that the damages should have been limited to the difference between the value of the land before and after the damages occurred. In its opinion, the court allowed the award to stand, noting that *neither* party introduced evidence to establish that the $48,144.50 was higher than the diminution in value:

> In the instant case, Fernandez proved that the costs associated with replacing the pool and repairing the damages less significant upgrades, was $48,144.50. The record fails to demonstrate that this cost exceeded the value of the pool in its original condition or its depreciation in value. Moreover, Fernandez demonstrated that replacing and repairing the damage was practicable by actually having it done. Accordingly, American Equity has failed to demonstrate on appeal that the trial judge erred in awarding Fernandez the cost associated with replacing her pool and repairing the other damaged property.[17]

Conversely, in Orkin Exterminating Company, Inc. v. DelGuidice, 790 So. 2d 1058 (5th DCA 2001), the plaintiff introduced evidence of diminution in value caused to a

house infested with termites but failed to establish that restoration would be either impracticable or in excess of the diminution in value. The court reversed the award and limited the remedy to the contract's exclusive remedy of repair, but also stated that it would have affirmed the diminution award if the plaintiff had shown the remedy of repair to be impracticable or "wasteful," *i.e.*, in excess of the diminution value. The distinction between the two cases is that the plaintiff in Van Ginhoven established the practicability of restoration by actually performing it, whereas the plaintiff in DelGuidice apparently abandoned the repair efforts and introduced no evidence that restoration was practicable.

The cautious practicioner should thus establish the practicability of restoration when seeking restoration costs or the impracticability/wastefulness of restoration when seeking diminution in value, leaving it to the opposing party to show that the alternative remedy is practicable, quantifiable, and lower.[18]

Going Beyond the Lesser Figure

Limitation to the lesser of the restoration cost or the diminution in value of an item of property does not necessarily prevent a party from introducing the higher figure into evidence. For example, the replacement cost of damaged property can be introduced as relevant evidence on the question of the diminution in value, or vice versa, in order to assist the jury in determining the degree of injury to the property.[19] In addition, courts have allowed recovery for loss of use, code upgrades, debris removal, waste remediation, personal or sentimental value, and extra value for unique service structures.

Loss of Use: Personal Property

In the personal property context, an owner is entitled to recover not only for repairs but also for the loss of use of property, so long as the loss is not total and the owner actually opts to repair.[20] The rule derives from the Restatement of Torts § 928 (1939), which provides:

> Where a person is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for
> (a) the difference between the value of the chattel before the harm and the value after the harm, or at the plaintiff's election, the reasonable cost of repairs or restoration where feasible, with due allowance for any difference between the original value and the value after repairs, and
> (b) the loss of use.

This provision was construed in Badillo v. Hill, 570 So.2d 1067, 1068 (Fla. 5th DCA 1990) as entitling the plaintiff in that case to make an election as to the theory of recovery, but preventing plaintiff from obtaining "a combination of cost of repairs plus lessened value before repairs, because that would permit a double recovery."[21]

Loss of Use/Living Expenses: Real Property

In the real property context, most jurisdictions follow the same rule as with personal property, allowing loss of use of realty if the damage caused the owner to be unable to use the property for a period of time.[22]

Code Upgrades

Property owners, faced with repairing or replacing property, may be required to comply with a regulation or code either newly enacted or from which the owner was previously exempt before the loss. Although no published Florida decision appears to have squarely addressed the issue in the tort or breach of contract context,[23] other jurisdictions have allowed the additional cost of code compliance.[24] Rationales for allowing such recovery include incentive to avoid cutting corners in the reconstruction and weighing the interests of public safety and the owner's full use of the property against the tortfeasor who caused the damage.

Debris Removal

Structural damages often involve removal of debris before rebuilding can begin. If the costs of debris removal is included within the overall rebuilding cost and if that total cost is less than the diminution in value, it follows that the cost is recoverable. However, in cases where the debris removal cost causes the restoration cost to exceed the diminution in market value or when a destroyed structure is not rebuilt but debris removal costs are nonetheless incurred, the question becomes whether the cost to remove debris from the land is recoverable *in addition* to the diminution in market value of the structure. Although no Florida cases provide a direct answer, this author argues that the cost of removing structural debris from the land should be allowed in either situation. The structure and land are separate items of property. Debris damages the land, not the structure. Debris removal restores the land, not the structure, especially where the structure is not rebuilt. Rebuilding of the structure does not commence until the old structural debris is removed. In addition, the land's diminution in value will be directly affected by the need to remove the debris. Accordingly, the debris removal cost should be recoverable as an element of the land damage separate and apart from the damage to the structure.

In rare instances, the debris will not have been removed by the time of trial. Nonetheless, the presence of debris will likely affect the value of the property to a potential purchaser, as with stigma damages discussed above in DelGuidice. Applying the DelGuidice rationale, the presence of debris should be a factor in determining the diminution of value even when the debris has not actually been removed.

Waste Remediation

In cases of damage to land caused by pollution or waste, public policy would seem to weigh in favor of allowing the owner the full cost to remediate the land in excess of diminution

in value as an incentive to remove the hazards posed by such waste. Early cases on the issue, however, were reluctant to allow such full remediation if the cost exceeded diminution in value. For example, in both Standard Oil Co. v. Dunagan, 171 So.2d 622 (Fla. 3d DCA 1965) and Crown Cork & Seal Co. v. Vroom, 480 So.2d 108 (Fla. 2d DCA 1985), landowners who sought restoration costs for contamination of their groundwater were limited to the diminution in value.

More recently, the Florida Supreme Court distinguished those cases in Davey Compressor Company v. City of Delray Beach, 639 So.2d 595 (Fla. 1994). There, the court awarded the City of Delray Beach the full cost of restoration of land polluted by the defendant. While not expressly receding from Dunagan and Vroom, the decision in Davey Compressor Company gave increased emphasis on the public policy of full remediation where the contamination adversely affects the public:

> Recognizing the environmental dangers that are directly associated with the negligent contamination of groundwater, we find that public policy supports restoration costs as the measure of damages in this case.[25]

Thus, entitlement to full remediation costs above diminution in value may be recoverable if the land poses a public health hazard.

Personal, Peculiar, or Sentimental Value

Certain property will possess a special value to the owner that is difficult to quantify in terms of market value. For example, family heirlooms, photographs, or other irreplaceable items are often imbued with tremendous sentimental value, but little objective market value. When such items are destroyed, the owner naturally desires compensation above the fair market value. Most jurisdictions will allow recovery above the objective diminution in market value for such items in certain circumstances.[26] Florida follows that trend.

In Carye v. Boca Raton Hotel and Club Limited Partnership, 676 So. 2d 1020 (Fla. 4th DCA 1996), the plaintiff, who lost jewelry acquired over a lifetime, sought entitlement to the sentimental value of the lost items. The Fourth District began by recognizing the right to recover for lost sentimental value in special circumstances, such as where the item has no market value or where limitation to the fair market value would be "manifestly unfair":

> It is often impossible to place what is a current market value on such articles but the law does not contemplate that this be done with mathematical exactness. The law guarantees every person a remedy when he has been wronged. If the damage is to personal property as in this case, it may be impossible to show that all of it had a market value. In fact it may be very valuable so far as the owner is concerned but have no value so far as the public is concerned. It would be manifestly unfair to apply the test of market value in such cases.[27]

The court then noted that the jewelry in question "obviously possessed sentimental value, as it was accumulated over forty-eight years of marriage and included engagement rings, wedding bands and anniversary presents."[28] However, because the jewelry "also had significant market value" -- $156,470 to be precise – and because limitation to that value was not "manifestly unfair," the court held that it was improper for the court to have allowed testimony regarding its sentimental value:

> [W]e conclude that in a situation where the lost property has both a market value and sentimental value, as is the case here, the burden again rests with the plaintiff to prove that the market valuation would be manifestly unfair.[29]

Under the Carye approach, a jury may consider the sentimental value of a lost item so long as plaintiff proves that (1) the item had sentimental value and (2) either (a) the item had no quantifiable market value or (b) limitation to the market value "would be manifestly unfair."

Unique Structures

Related to the issue of sentimental value is the issue of entitlement to damages beyond market value for unique service-type structures belonging to religious groups, hospitals, country

clubs, schools, colleges, charitable societies, and similar organizations. Although this author has uncovered no Florida cases directly addressing the issue, courts from other jurisdictions have recognized that diminution in fair market value may not adequately quantify the actual loss for such unique structures.[30] The principles announced in Carye, allowing damages beyond market value upon proof that such limitation would be "manifestly unfair," can be applied by analogy to such structures.

Goods for Sale

In the business context, the general rule is that the proper measure of damages for goods held for sale is not the retail selling price but is limited to wholesale cost of the goods at the time of the loss.[31]

> [T]he owner of a stock of goods held for sale, which has been damaged or destroyed, is entitled to recover, as damages, the reasonable cost of replacing such goods, which includes the wholesale cost at the time of the loss, plus any other reasonable expenses incurred in the replacement.[32]

The proper market for determining the market value of such goods is the wholesale market to which the injured party would have to go to in order to replace the goods.[33]

Conclusion

The road to recovery in substantial property loss cases can be twisted, dark, and scary. The practicioner cannot simply rely on the general rule limiting recovery to the lesser of either the restoration cost or the diminution in value, without also understanding the nuances of the issues covered in this article. The applicable law on these issues should be read thoroughly and, in many cases, will need to be applied by analogy in the absence of cases directly on point. As with any rough terrain, it should be traveled carefully, cautiously, and with as many guides as possible.

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[1] This article also draws from analogous case law in other Southeastern states, including Georgia, South Carolina, North Carolina, Virginia, Kentucky, Tennessee, Alabama, and Mississippi.

[2] United States Steel Corporation v. Benefield, 352 So.2d 892 (Fla. 2d DCA 1977), *cert. denied*, 364 So.2d 881 (Fla.1978); American Equity Insurance Co. v. Van Ginhoven, 788 So. 2d 388, 391 (Fla. 5th DCA 2001); Bisque Associates of Florida, Inc. v. Power of Quayside No. II Condominium Association, 639 So. 2d 997 (Fla. 3d DCA 1994); Keyes Co. v. Shea, 372 So.2d 493 (Fla. 4th DCA 1979); Airtech Service, Inc. v. MacDonald Construction Company, 150 So.2d 465 (Fla. 3d DCA 1963). *Cf.* Fuller v. Martin, 125 So.2d 4 (Ala. 1960);; Ryland Group v. Daley, 537 S.E.2d 732, 738 (Ga. Ct. App. 2000); Ray v. Strawsma, 359 S.E.2d 376 (Ga. Ct. App. 1987); Island Creek Coal Company v. Rodgers, 644 S.W.2d 339 (Ky. 1982); System Fuels, Inc. v. Barnes, 363 So.2d 747 (Miss. 1978)(Measure of damages for permanent injury to land is diminution in value; but where the property can be restored to its former condition at a cost less than the value determined by the diminution of the value of the land, the measure of damages is the cost of restoration of the property plus compensation for the loss of its use.); Huberth v. Holly, 462 S.E.2d 239 (NC Ct. App. 1995) ("[T]he general rule is that where the injury is completed (as opposed to a continuing wrong) the measure of damages 'is the difference between the market value of the property before and after the injury.' Huff v. Thornton, 23 N.C.App. 388, 393-94, 209 S.E.2d 401, 405 (1974)"); Scott v. Fort Roofing and Sheet Metal Works, Inc., 299 S.C. 449, 385 S.E.2d 826 (1989) ("Cost of repair or restoration is a valid measure of damages for injury to a building although compensation may be limited to the value of the building before the damage was inflicted."); Redbud Coop. Corp. v. Clayton, 700 S.W.2d 551, 560-61 (Tenn. Ct. App. 1985) ("Our appellate courts have uniformly held that the measure of damages for injury to real estate is the difference between the reasonable market value of the premises immediately prior to and immediately after injury but if the reasonable cost of repairing the injury is less than the depreciation in value, the cost of repair is the lawful measure of damages."); Chambers v. Spruce Lighting Co., 95 S.E. 192 (W.V. 1918).

[3] Courtney Enterprises, Inc. v. Publix Supermarkets, Inc., 788 So. 2d 1045 (Fla. 2d DCA 2001).

[4] American Reliance Insurance Company v. Perez, 689 So.2d 290 (Fla. 3d DCA 1997) (quoting City of Tampa v. Colgan, 121 Fla. 218, 230, 163 So. 577, 582 (1935) and citing 4 Nichols on Eminent Domain § 12.02[1], at 12-62 to 12-70 (rev. 3d ed. 1996)). *See also* Ocean Electric Company v. Hughes Laboratories, Inc., 636 So. 2d 112 (Fla. 3d DCA 1994) (fair market value looks at "the price which would be agreed upon at a voluntary sale between a willing seller and a willing purchaser."); Charles T. McCormick, *Damages* § 44 (1935) (market value defined as sale by leisurely seller to willing buyer).

[5] American Reliance Insurance Company v. Perez, 689 So.2d 290 (Fla. 3d DCA 1997) (citing McNayr v. Claughton, 198 So. 2d 366, 368 (Fla. 3d DCA 1967).

[6] *See*, *e.g.*, Kelley, Blue Book Used Car Guide: Private Party, Trade-in, Retail Values, 1987-2001 Used Car and Truck, July-Dec. 2002 (May 2002).
[7] *See*, *e.g.*, Marshall & Swift, Residential Cost Handbook (2002).
[8] 689 So. 2d at 291.
[9] 790 So. 2d at 1160.
[10] Similarly, in Ryland Group v. Daley, 537 S.E.2d 732, 739 (Ga. Ct. App. 2000), the jury awarded homeowners the cost to repair a house plus "stigma" damages associated with the home's history of construction defects. The trial court, however, subtracted the stigma damages, limiting the award to the reparation costs. On appeal, the appellate court affirmed the reduction, noting that stigma damages are not to be added to the cost to repair, though such damages may be recoverable as an element of the diminution in value. Because the plaintiff in Ryland Group had failed to introduce evidence of the home's fair market value -- a fundamental predicate to establishing diminution in value – there was no competent evidence to support the award.
[11] *E.g.*, Hillside Van Lines, Inc. v. Matalon, 297 So. 2d 848 (Fla. 3d DCA 1974); McDonald Air Conditioning, Inc. v. John Brown, Inc., 285 So. 2d 697 (Fla. 4th DCA 1973).
[12] Kipps v. Virginia Natural Gas, Inc., 441 S.E.2d 4, 5 (Va. 1994) ("An opinion on value is inadmissible when there is not evidence to support the opinion.").
[13] First Interstate Development Corp. v. Ablanedo, 476 So. 2d 692 (Fla. 5th DCA 1985) ("The rule has been established in Florida that an owner may testify as to the value of property which he owns."); Hill v. Marion County, 238 So.2d 163 (Fla. 1st DCA 1970); Harbond, Inc. v. Anderson, 134 So.2d 816 (Fla.2d DCA 1961); Salvage & Surplus, Inc. v. Weintraub, 131 So.2d 515 (Fla. 1st DCA 1961)"). *Cf* Imac Energy, Inc. v. Tittle, 590 So. 2d 163, 168 (Ala. 1991); Jetton v. Jetton, 502 So. 2d 756, 760 (Ala. 1987); Bono v. Hamilton, 669 So. 2d 912, 913 (Ala. Ct. App. 1995); Columbia Gas of Kentucky, Inc. v. Maynard, 532 S.W.2d 3 (Ky. Ct. App. 1975) (owner's estimate of what lost items were worth to him, unless so obviously preposterous as to be devoid of probative value, is enough to support award by properly instructed jury; that award must represent what property was actually worth to him in money, excluding any sentimental or fanciful value that for any reason he might place upon it, is a qualification to be incorporated in instructions.); Goodson v. Goodson, 551 S.E.2d 200 (NC Ct. App. 2001); Appeal of Boos, 382 S.E.2d 769 (NC Ct. App. 1989); Bumgarner v. Tomlin, 375 S.E.2d 520 (NC Ct. App. 1989); Responsible Citizens v. City of Asheville, 302 S.E.2d 204 (NC 1982); Doty v. Parkway Homes Co., 295 S.C. 368, 368 S.E.2d 670 (S.C. 1988)(An owner is competent to testify on his own behalf as to the reasonable value of his household goods.)). *See generally* 31 Am.Jur.2d Expert & Opinion Evidence, § 142. *But see* Port Largo Club, Inc. v. Warren, 476 So. 2d 1330 (Fla. 3d DCA 1985) ("Where fair market value is at issue, expert testimony is necessary to prove the value thereof."); Town of Rocky Mount v. Hudson, 421 S.E.2d 407, 409 (Va. 1992)(landowner's testimony that taking "ha[d] hurt [him] $20,000, at least" was insufficient to support damage award.").
[14] First Interstate Development Corp. v. Ablanedo, 476 So. 2d 692 (Fla. 5th DCA 1985).
[15] American Equity Insurance Co. v. Van Ginhoven, 788 So. 2d 388 (Fla. 5th DCA 2001).
[16] Orkin Exterminating Company, Inc. v. DelGuidice, 790 So. 2d 1058 (5th DCA 2001).
[17] Id. at 391.
[18] *Cf.* Magnus Homes, LLC v. Derosa, 545 S.E.2d 166, 167 (Ga. Ct. App. 2001) (affirming a judgment for repair costs even though the owner "failed to adduce any evidence of the diminution in the value of the residence constructed."); Bell v. First Columbus National Bank,

493 So.2d 964, 965 (Miss. 1986) ("Plaintiff can choose to prove either the reasonable cost of replacement or repairs or diminution in value, and if he proves either of these measures with reasonable certainty, damages are allowable, so long as the plaintiff will not be unjustly enriched and the defendant does not demonstrate that there is a more appropriate measure of damages."); Nutzell v. Godwin, 1989 WL 76306 at *1-2 (Tenn. Ct. App.) ("We hold that the plaintiffs do not have the burden of offering alternative measures of damages. The burden is on the defendant to show that the cost of repairs is unreasonable when compared to the diminution in value due to the defects and omissions.").

[19] Fuller v. Martin, 125 So.2d 6 (Ala. 1961); Ryland Group v. Daley, 537 S.E.2d 732 (Ga. Ct. App. 2000) ("This difference in value may be illustrated by the reasonable cost of repair of defects.") (quoting Eldridge, Georgia Personal Injury & Property Damage – Damages, §§ 8-2 and 8-3); Huberth v. Holly, 462 S.E.2d 239 (NC Ct. App. 1995) ("Nonetheless, replacement and repair costs are relevant on the question of diminution in value and when there is evidence of both diminution in value and replacement cost, the trial court must instruct the jury to consider the replacement cost in assessing the diminution in value."); Richard W. Cooper Agency v. Irwin Yacht & Marine Corp., 264 S.E.2d 768 (NC Ct. App. 1980) ("[T]he law recognizes that the cost of repairs has a logical tendency to shed light upon the question of the difference in market value."); Redbud Coop. Corp. v. Clayton, 700 S.W.2d 551, 561 (Tenn. Ct. App. 1985) ("Of course, the trier of fact can also take into consideration the reasonable cost of restoring the property to its former condition in arriving at the difference in value immediately before and after the injury to the premises."); Averett v. Shircliff, 237 S.E.2d 92 (Va. 1977) ("The reasonable cost of repairs is one of the evidentiary factors in determining the market value of an automobile after it has been damaged.").

[20] Florida Drum Company v. Thompson, 668 So.2d 192 (Fla. 1996) ("Any loss of use, deterioration, or other damage that occurs after this reasonable period of time has passed is not the defendant's responsibility."); Badillo v. Hill, 570 So.2d 1067, 1068-69 (Fla. 5th DCA 1990); Hillside Van Lines, Inc. v. Matalon, 297 So.2d 848 (Fla. 3d DCA 1974) ("A person whose chattel is damaged, but not totally destroyed, is entitled to the difference between the value before and after the damage, or at his election, the reasonable cost of repair with due allowance for the difference between the original value and the value after repair and to be compensated for the loss of use); *Cf.* Newman v. Brown, 90 S.E.2d 649 (SC 1955).

[21] citing Merrill Stevens Dry Dock Co. v. Nicholas, 470 So.2d 32 (Fla. 3d DCA 1985). The court in Badillo went on to hold that loss of use is limited to a "reasonable time" – a period measured on an objective basis and not accounting for plaintiff's actual financial or physical ability to expeditiously repair the item – and allowed reasonable rental costs to be used a measure of loss of use damages, whether or not the plaintiff actually rented another item. *Cf.* Averett v. Shircliff, 237 S.E.2d 92 (Va. 1977) (deviating slightly from § 928 of the Restatement of Torts by deeming the measure of damages for an item that can be restored to its former condition to be the reasonable cost of repairs "with reasonable allowance for depreciation.").

[22] System Fuels, Inc. v. Barnes, 363 So.2d 747 (Miss. 1978)(allowing loss of use expense in addition to the cost restoration of the property); Huff v. Thornton, 213 S.E.2d 198, 204 (NC 1975) ("To stop [at diminution in value] would not fully compensate the plaintiffs for the losses sustained by them as a direct and natural result of the negligence of the defendants. … [T]he plaintiffs cannot have the use of their house during the time reasonably necessary for its repair or replacement and must obtain lodging elsewhere for such period of time. For this loss they are

entitled to recover ….”). *Compare* Standard Oil Co. v. Dunagan, 171 So.2d 622 (Fla. 3d DCA 1965) (plaintiffs whose land was permanently damaged from discharge of gasoline from defective tanks and who sought diminution in value damages plus loss of use of water supply rather than cost of repairs were not entitled to *add* the loss of use figure to their recovery, but were allowed to *factor* the loss of use into the diminution in value) *with* Blake v. Hi-Lu Corp., 781 So.2d 1122 (Fla. 3d DCA 2001) (reinstating jury verdict that had awarded damages not only for repair costs of a home damaged by Hurricane Andrew, but also for “loss of use.”) and American Equity Insurance Co. v. Van Ginhoven, 788 So. 2d 388, 391 (Fla. 5th DCA 2001) (in affirming plaintiff’s award for the cost to repair a home, court stated, “Clearly, loss of use damages can be considered as part of the overall damages,” citing to Standard Oil Co. v. Dunagan, 171 So.2d 622 (Fla. 3d DCA 1965); but court actually affirmed the trial court’s *denial* of loss use, on the ground that the trial court’s award of prejudgment interest was an adequate substitute for loss of use.).

[23] In the eminent domain context, owners have been denied compensation for compliance with code upgrades. State Department of Transportation v. Bennett, 592 So.2d 1150 (Fla. 4th DCA 1992); Malone v. Div. of Admin., Dep't of Transp., 438 So.2d 857 (Fla. 3d DCA 1983), *rev. denied*, 450 So.2d 487 (Fla.1984). However, the owners in Malone had rebuilt their processing plant on an entirely different parcel of land and the owners in Bennett had sought the diminution in value rather than the cost to repair. Arguably, the public policy implications of condemnation proceedings distinguish such cases from tort and breach of contract actions. Eminent domain proceedings provide “just compensation” to the owner for the taking of property. The purpose of the taking is to benefit and protect the public. There is no similar balancing test between “just” compensation and public benefit in tort and breach of contract cases, where the loss originated not for public benefit but by a third party’s breach of duty.

[24] Service Unlimited v Elder, 542 N.W.2d 855 (Iowa Ct. App. 1995) (Court properly computed damages for inadequate insulation by using “cost of repair” instead of “reduction in value” where there was insufficient space between ceiling and roof to simply add additional layer of insulation over existing insulation, requiring installation of new insulated roof over existing roof, even though cost of repair was disproportionate to additional heating and cooling costs, where homeowners testified heating and cooling problems continued after larger air conditioner was installed, and they were still unable to maintain second level at comfortable temperature.); *see also* Zindell v. Central Mutual Ins. Co. of Chicago, 269 N.W. 327 (Wis. 1936); Aetna Ins. Co. v. 3 Oaks Wrecking & Lumber co., 382 N.E.2d 283 (Ill. App. 1978); Peluso v. Singer General Precision, Inc., 365 N.E.2d 390 (Ill. App. 1977) (reasoning that such recovery will discourage the cutting of corners in meeting code requirements); and A.J. Jacobson Co. v. Commercial Union Assur. Co., 83 F.Supp. 674 (D. Minn. 1949). *But see* Mercer v J. & M. Transp. Co., 103 Ga. App 141, 118 SE.2d 716 (The proper measure of damages was not the cost of restoration, where a 25 to 30-year-old house was totally destroyed, and did not originally have plumbing, wiring, bathrooms, or modern heating, and where the cost of restoration would be far in excess of the difference in value before and after the injury to the premises.).

[25] 639 So. 2d at 597.

[26] Restatement (Second) of Torts § 929 cmt. B (1979); *see also* Kates Transfer and Warehouse Company v. Klassen, 59 So. 355 (Ala. 1912); Carye v. Boca Raton Hotel and Club Limited Partnership, 676 So. 2d 1020 (Fla. 4th DCA 1996); Huberth v. Holly, 462 S.E.2d 239, 243 (NC Ct. App. 1995) (“When, however, the land is used for a purpose that is personal to the owner, the

replacement cost is an acceptable measure of damages."); Plow v. Bug Man Exterminators, Inc., 290 S.E.2d 787, 789 (termite damage to personal residence), *disc. rev. denied*, 294 S.E.2d 224) (NC 1982); Doty v. Parkway Homes Co., 295 S.C. 368, 368 S.E.2d 670 (S.C. 1988); T.M. Nelson v. The Coleman Company, 155 S.E.2d 917 (SC 1967); Younger v. Appalachian Power Co., 202 S.E.2d 866 (Va. 1974) ("When diminution in market value can be reasonably ascertained, that is the appropriate measure of damages; but when the damaged property has no ascertainable market value or when market value would be a manifestly inadequate measure, then some other measure must be applied."); Solite, Corp. v. Richmond, Fredericksburg and Potomac R.R. Co., 1989 WL 646148 (Va. Ct. App. 1989).

[27] Id. at 1021 (quoting Florida Pub. Utils. Co. v. Wester, 150 Fla. 378, 7 So. 2d 788, 790 (1942) and citing McDonald Air Conditioning, Inc. v. John Brown, Inc., 285 So. 2d 697, 698 (Fla. 4th DCA 1973) ("If the item has no market value, such as heirlooms, etc., of necessity other sources must be used to determine value.").

[28] Carye, 676 So. 2d at 1021.

[29] Id. (citing Campins, 461 N.E.2d at 720 n. 1 (burden of establishing lack of market value rests with plaintiff)).

[30] Leonard Missionary Baptist Church v. Sears, Roebuck and Co., 42 S.W.3d 833 (Mo.Ct.App. 2001) (church); Trinity Church v. John Hancock Mutual Life Ins. Co., 502 N.E.2d 532 (Mass. 1987) (church); Commonwealth of Pennsylvania v. Crea, 483 A.2d 996 (Pa. Cmmw. 1997) (bridge); and Newton Girl Scout Council v. Massachusetts Turnpike Auth., 138 N.E.2d 769 (Mass. 1956) (girl scout camp); *see also* Roman Catholic Church of Archdioces of New Orleans v. Louisiana Gas Serv. Co., 618 So.2d 874, 877-80 (La. 1993); Moulton v. Groveton Papers Co., 114 N.H. 505, 323 A.2d 906, 911 (1974); Regal Construction Co. v. West Lanham Hills Citizen's Association, 256 Md. 302, 260 A.2d 82, 84 (1970).

[31] Ocean Electric Company v. Hughes Laboratories, Inc., 636 So. 2d 112 (Fla. 3d DCA 1994); Kaplan v. City of Winston-Salem, 209 S.E.2d 743 (NC 1974). *But see* Ishee v. Dukes Ford Company, 380 So.2d 760 (Miss. 1980) ("The proper measure of tort damages for a plaintiff holding personalty for sale in the retail market is the total diminution in retail market value proximately caused by the defendant's tort. Cost of repair may be recovered, as well as the remaining diminution in pre-tort value after the proposed repairs, but in no event may cost of repair be recovered to the extent it exceeds the total diminution in pre-tort value in the case of one holding personalty for sale rather than for personal use.").

[32] Ocean Electric, 636 So.2d at 116.

[33] Id.