

Tennessee Court of Appeals Holds Defendant Has the Burden of Offering Alternative Measure of Damages to Prove that Plaintiff's Measure of Damages is Unreasonable

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In *Durkin v. MTown Construction, LLC*, 2018 Tenn. App. LEXIS 128, the Court of Appeals of Tennessee considered whether the lower court properly took judicial notice of an alternative measure of damages to the measure of damages advanced by the plaintiff. The Court of Appeals held that the defendant has the burden of offering evidence of alternative measures of damages if it seeks to argue that the plaintiff's measure of the damages is unreasonable. The Court of Appeals found that the lower court erred in taking judicial notice of alternative measures of damage when the defendant failed to meet its burden of proof. The court's holding establishes that, if the defendant does not offer evidence of alternative measures of damage, then the measure of damages introduced by the plaintiff will apply.

In *Durkin*, the plaintiff hired defendant MTown Construction (MTown) in 2016 to replace the roof of his residence. After removing the original roof, MTown placed tarps over the structure to prevent water intrusion until the new roof was installed. Subsequently, the interior of the home incurred significant water damage during a rain event. Mr. Durkin sued MTown for the water damage, alleging that MTown inadequately protected the structure from water intrusion. At trial, the plaintiff introduced evidence of the cost to repair the structure, which totaled \$118,926.12. MTown did not offer any evidence of alternative measures of damage. The trial court found MTown liable for the damage, but decided that the appropriate measure of damages was the diminution of the market value of the property. The judge took judicial notice of certain aspects of witness testimony [1] to conclude that the diminution in the market value of the home before and after the loss was \$144,000, which was the full value of the home as per the plaintiff's testimony. The judge then subtracted the assessed annual tax of \$25,500 and awarded the plaintiff \$118,500 for the dwelling. The defendant appealed, arguing that the judge improperly took judicial notice of unsubstantiated and disputed facts to determine the diminished value of the home.

The Court of Appeals acknowledged that, in Tennessee, the proper measure of damages for injury to real property is the lesser of either: (1) the cost of repairing the injury, or (2) the difference in the value of the premises immediately prior to and immediately after the injury (also referred to as the diminution of property value). Generally, the measure of damages will be the cost of repairs unless the repairs are not feasible or the cost of repairs is disproportionate to the diminution in the value of the property. However, the court held that the burden was on the defendant to show that the cost of repairs was disproportionate to the diminution value. While recognizing that a property owner can testify as to the value of his home, the Court of Appeals found that the evidence regarding the post-loss value of the home was insufficient and unreliable. The Court of Appeals further held that the defendant had the burden of proving an alternative measure of damages. Since the defendant failed to carry its burden of proving the diminution of value measure of damages, the Court of Appeals ruled that the lower court should have calculated the damages based on the cost of repairs rather than seek out additional valuation evidence or take judicial notice of certain facts to reach a diminution value. The court remanded the case for further proceedings on the damages issue.

The *Durnik* case establishes that, in Tennessee, the defendant has the burden of introducing evidence of an alternative measure of damages to challenge the measure of damages presented by the plaintiff and that it is improper for the trial court to take judicial notice of an alternative measure of damages on its own. This case also reminds us of the importance of understanding the measures

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of damage potentially applicable to a case, and being prepared to offer sufficient evidence in support of the measure of damages that you wish to advance. This case also sheds light on the importance of knowing the value of your claim under each applicable measure of damages, as well as recognizing which measure of damages is likely to apply in your respective jurisdiction.

[1] During cross-examination, plaintiff vaguely testified that he believed that the value of the home on the day before the loss was \$144,000, and that on the day after the loss the County Tax Assessor told him that the value was still \$144,000. However, plaintiff produced a microbial remediation expert who testified that, because the water in the house remained untreated for over 72 hours, the home required more extensive remediation. Based on the expert's testimony, the judge disregarded the plaintiff's testimony about the post-loss value of the home and concluded that the value after the loss was zero because no one would buy the house in such condition. As such, the judge found that the diminished value was \$144,000 (the full value of the home).

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