NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

EDWARD J. ALLARD, Appellant/Cross-Appellee, v. AL-NAYEM INTERNATIONAL, INC., Appellee/Cross-Appellant.	)	Case No. 2D09-4065

Opinion filed November 5, 2010.

Appeal from the Circuit Court for Pinellas County; W. Douglas Baird, Judge.

Martin S. Awerbach and Michael A. Cohn of Awerbach & Cohn, P.A., Clearwater, for Appellant/Cross-Appellee.

Marion Hale and Sharon E. Krick of Johnson, Pope, Bokor, Ruppel & Burns, LLP, Clearwater, for Appellee/Cross-Appellant.

LaROSE, Judge.

Edward J. Allard appeals the trial court's order granting Al-Nayem International, Inc., a rehearing as to damages suffered by Al-Nayem for Mr. Allard's

breach of a warranty deed. See Fla. R. App. P. 9.130(a)(4).[1] Al-Nayem cross-appeals, challenging an earlier final order granting an involuntary dismissal to Mr. Allard. See Fla. R. App. P. 9.030(b)(1)(A); 9.110(g). We affirm as to the involuntary dismissal but reverse the order granting rehearing.

Al-Nayem purchased commercial property from Mr. Allard for $1,650,000. The property had a restaurant and paved parking lot on its west side. A thirty-foot-wide drainage ditch crossed an unimproved portion on the east side. Al-Nayem later discovered that the Florida Department of Transportation actually owned the ditch.

Al-Nayem sued Mr. Allard for breach of the warranty deed. It also sued the title company for breach of the title policy. The trial court entered an order finding Mr. Allard and the title company in breach.[2] The trial court recognized that

> [t]he loss of the 30 foot swale decreases the plaintiff's ability to develop the property as it limits the size of any building which could be constructed to replace the decrepit and now closed . . . restaurant. In addition, the loss of the swale strands a small sliver of the property which also affects how the property can be developed.

The trial court then held a nonjury trial on damages. Al-Nayem relied on Burton v. Price, 141 So. 728 (Fla. 1932), apparently the only Florida supreme court

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[1]Non-final orders entered after final order on motions that suspend rendition are not reviewable; provided that orders granting motions for new trial in jury and non-jury cases are reviewable by the method prescribed in rule 9.110. *Other non-final orders entered after final order on authorized motions are reviewable by the method prescribed by this rule.*

Fla. R. App. P. 9.130(a)(4) (emphasis added). This appeal is from a nonfinal order granting a motion for rehearing entered after a final order on an authorized motion for involuntary dismissal. Accordingly, we have jurisdiction.

[2]Al-Nayem settled with the title company for $90,000.

case addressing the measure of damages for breach of the covenant of seisin.[3] The supreme court addressed whether the buyer could recover for breach. Id. at 728-29. Burton held that:

> the vendee may recover, if there be a failure of seizin as to a part of the premises described in the deed, and in such case the measure of damages is such fractional part of the whole consideration paid as the value at the time of the purchase of the part to which the title failed bears to the whole block purchased . . . .

Id. at 729. Burton did not explain how to apply its measure of damages. Nor did it indicate how improvements on property might impact value.

Al-Nayem reasoned that Burton required a simple arithmetic approach: divide the square footage of the DOT-owned ditch by the total square footage of the property and then multiply that number by the total purchase price. Mr. Allard argued that a different formulation of Burton applied, especially when dealing with improved property. He contended that Hillsboro Cove, Inc. v. Archibald, 322 So. 2d 585 (Fla. 4th DCA 1975), clarified that damages are based on the proportionate value of the excluded land, not its proportionate area. In that case, Hillsboro Cove discovered that a thirty-foot strip in a parcel of property it purchased belonged to someone else. Id. Hillsboro Cove had planned to construct part of a condominium there. It spent over $50,000 to secure title to the strip. Id. The trial court awarded Hillsboro Cove only $6011.88 in damages. Id. The Fourth District affirmed, holding that Burton's "value at the time of the purchase of the part to which the title failed bears to the whole block purchased" means "the

[3]The covenant of seisin is "an assurance that the grantor has the very estate in quantity and quality which he purports to convey." Burton v. Price, 141 So. 728, 729 (Fla. 1932). Seisin is breached when the buyer acquires no title or possession by a deed of conveyance containing covenants of seisin. Williams v. Azar, 47 So. 2d 624, 626 (Fla. 1950).

proportionate value of the strip, not the proportionate area . . . ." Id. at 586 (emphasis added). The Fourth District observed that "[t]he trial court as the trier of fact could find from the evidence that the 30-foot strip of property was not of any greater value per square foot than the major piece." Id. (also citing Williams v. Azar, 47 So. 2d 624 (Fla. 1950) (holding that grantor should pay costs of clearing title not to exceed the original proportionate value of the land at the time of purchase)).

Mr. Allard presented the trial court with cases from other jurisdictions to support his interpretation of Burton. See Edwards v. Johnson, 298 S.W.2d 336, 348 (Ark. 1957) ("[Where] [t]here is nothing to indicate that the parties dealt in terms of a fixed price per acre without reference to the improvements[,] . . . the purchaser's loss is equitably determined by first deducting the value of the improvements from the purchase price and then calculating the damage attributable to the shortage of acreage."); Wiedeman v. Brown, 210 S.W.2d 764, 764-66 (Ky. Ct. App. 1948) (determining that measure of damages for a small portion of a substantial tract separable from the part enhanced by the improvements was the average value of the land without the improvements); Anzalone v. Strand, 436 N.E.2d 960, 963 n.1 (Mass. App. Ct. 1982) (holding that the trial court improperly calculated the buyer's damages by prorating the purchase price in direct proportion to the diminution in square footage without deducting the value of improvements; listing cases from numerous jurisdictions rejecting strict prorating formula when dealing with improved property); Tinsley v. Hearn, 191 S.W. 127, 128 (Tenn. 1917) (holding that damages must be calculated by multiplying the number of acres of the deficiency by the average value per acre of the whole without the improvements).

Mr. Allard agreed that Burton applied. But, he argued that Al-Nayem's methodology was flawed for failing to account for improvements on the property. Al-Nayem insisted that Burton required the arithmetical calculation it presented, regardless of any improvements. Al-Nayem's expert testified that the DOT property comprised 7.65 percent of the total property; 7.65 percent of the purchase price was $126,225. Adding the stranded portion of the property increased the percentage to 13.5, putting damages at $222,750. The parties agreed that the amount of the title company settlement would be a setoff to any damages award. At the close of Al-Nayem's case, the trial court granted Mr. Allard's motion for an involuntary dismissal because Al-Nayem failed to present competent, substantial evidence of damages.

I. INVOLUNTARY DISMISSAL

We review the judgment granting the motion for involuntary dismissal at the close of Al-Nayem's case de novo. See Brundage v. Bank of Am., 996 So. 2d 877, 881 (Fla. 4th DCA 2008).

In granting Mr. Allard's motion, the trial court noted that Burton did not address the effect of property improvements on the damages calculation. It reasoned that Al-Nayem's method would unjustly award Al-Nayem the proportionate value, if any, of the restaurant improvements to which its use and enjoyment were unimpaired. The trial court ruled that the correct measure of damages must account for the value of improvements. If Al-Nayem's interpretation of Burton is to apply, "the calculation should occur after deduction of the value of substantial unaffected improvements to the property from the purchase price." We agree. Burton refers to "value," which, in our view, requires more than the simple calculation advanced by Al-Nayem.

Involuntary dismissal is proper where there is inadequate proof at trial on the correct measure of damages. TECA, Inc. v. WM-TAB, Inc., 726 So. 2d 828, 830 (Fla. 4th DCA 1999) (directing judgment for seller because buyer incorrectly presented only evidence of lost profits where proper measure of damages was difference between represented value and actual value or between purchase price and actual value); Nico Indus., Inc. v. Steel Form Contractors, Inc., 625 So. 2d 1252 (Fla. 4th DCA 1993) (directing judgment for seller because buyer incorrectly based testimony on percentage of work completed on partially performed construction contract where proper measure of damages was either quantum meruit or contractor's lost profit plus reasonable cost of materials and labor incurred). Al-Nayem's damages evidence was insufficient under Burton and the trial court properly granted Mr. Allard's motion for involuntary dismissal.

II. MOTION FOR REHEARING

Al-Nayem moved for a rehearing, arguing that because Florida case law is unsettled as to the measure of damages, it should have an opportunity to present evidence of damages based on the method approved by the trial court.[4] The trial court agreed and stated that it was granting the motion to avoid the injustice of a potential windfall to Mr. Allard.

The applicable standard of review is abuse of discretion. Campagna v. Cope, 971 So. 2d 243, 251 (Fla. 2d DCA 2008). However, we apply this standard in a restricted manner because the reason for granting the rehearing involves a question of law. See Krolick v. Monroe, 909 So. 2d 910, 913-14 (Fla. 2d DCA 2005); Bulkmatic Transp. Co. v. Taylor, 860 So. 2d 436, 444 (Fla. 1st DCA 2003).

[4]At trial, Al-Nayem offered no alternative methodology. Prior to trial, it did not attempt to secure a ruling from the trial court on the appropriate measure of damages.

The trial court relied on MCI Worldcom Network Servs., Inc. v. Mastec, Inc., 995 So. 2d 221, 223 (Fla. 2008), for the proposition that "[g]enerally, a person or entity injured by either a breach of contract or by a wrongful or negligent act or omission of another is entitled to recover a fair and just compensation that is commensurate with the resulting injury or damage." The Eleventh Circuit certified MCI Worldcom to our supreme court because the case raised unsettled questions of Florida law as to the proper measure of damages for Mastec's severing of an MCI underground fiber-optic cable. Id. at 222-23. The supreme court held that MCI could not recover loss-of-use damages because it was able to redirect telecommunications traffic to other cables in its system and thus suffered no disruption of service. Id. However, MCI could still recover damages for repairs performed on the damaged cable. Id. at 225.

Even if we accept Al-Nayem's argument that, as in MCI Worldcom, the proper measure of damages in cases like this is an unsettled question of Florida law, that case is distinguishable. In contrast to the MCI Worldcom plaintiff, Al-Nayem persisted that its interpretation of Burton was the only correct measure of damages, despite considerable debate below about the correct measure of damages and Mr. Allard's argument that improvements must be considered. Al-Nayem "consciously elected to proceed upon . . . what was ultimately determined to be an invalid theory of damages." See St. Petersburg Hous. Auth. v. J.R. Dev., 706 So. 2d 1377, 1378 (Fla. 2d DCA 1998).

The trial court improperly granted a rehearing. "[A] party's failure to prove damages is not a proper ground for rehearing. . . ." Id. "Rehearing is not intended as a device to present additional evidence that was available, although not presented, at the

original trial." Id. Accordingly, the rehearing was improperly granted and we reverse as to that issue.

Affirmed in part and reversed in part.

NORTHCUTT, J., Concurs.
VILLANTI, J., Dissents with opinion.

VILLANTI, Judge, Dissenting.

I respectfully dissent from the majority opinion because, in my view, the trial court's order granting the motion for involuntary dismissal was erroneous. Because of this, I would reverse that order or, in the alternative, affirm the order granting Al-Nayem a new trial on damages.

This case was bifurcated for trial. At the bench trial on liability, the trial court found that Mr. Allard had breached the warranty deed he provided to Al-Nayem. Specifically, the court found that Mr. Allard breached the covenant of seisin when he purported to transfer property to Al-Nayem that Mr. Allard did not, in fact, own in its entirety.

At the subsequent bench trial on damages, Al-Nayem presented admissible evidence of its damages, relying on the supreme court's decision in Burton v. Price, 141 So. 728, 729 (Fla. 1932), which held that the measure of damages for breach of the covenant of seisin is "such fractional part of the whole consideration paid as the value at the time of the purchase of the part to which the title failed bears to the whole block purchased . . . ." This determination of the measure of damages was reaffirmed in Williams v. Azar, 47 So. 2d 624, 626 (Fla. 1950), and Hillsboro Cove, Inc. v. Archibald,

322 So. 2d 585, 586 (Fla. 4th DCA 1975) (limiting buyer to damages for breach of covenant of seisin based on "the proportionate cost of the 30-foot strip as of the date of conveyance" rather than the costs actually expended at a later date by the buyer to obtain the strip of land from a third party). Under Burton, Williams, and Hillsboro Cove, Al-Nayem was entitled to recover as damages the value of the land that it thought it purchased but which was actually not conveyed. Al-Nayem presented evidence of its damages based on the proportionate cost of the unconveyed land as of the date of conveyance. This was one estimate of value that is seemingly supported by the plain language of Burton, Williams, and Hillsboro Cove.

After Al-Nayem rested its case, Mr. Allard moved for an involuntary dismissal, arguing that Burton required Al-Nayem to present evidence of the value of the land without any improvements before it calculated the proportionate value of the unconveyed land. He contended that the evidence of the proportionate cost of the unconveyed land was legally insufficient. Mr. Allard also argued that, even if the Burton decision did allow for evidence of proportionate cost, it did so only in cases involving raw land, not improved land. This argument led to Mr. Allard's foray into out-of-state case law concerning the proper measure of damages under this circumstance.

Unfortunately, the trial court accepted the latter of Mr. Allard's arguments. In an effort to distinguish Burton, the trial court engaged in unfounded fact-finding about the facts of the Burton case, stating:

> Although the factual context of Burton is not fully fleshed out in the opinion, there are a couple of reasons to believe that the case concerned raw land, as opposed to improved property. First of course is the historical context of Pasco County in the early 1930's. Secondly is the court's reference to the property to which the formula was to apply as "lands". Despite the Plaintiff's suggestion that the case is controlling

> in all instances when there is a partial failure of seisin, this court finds nothing in the language of the opinion that compels that conclusion when the unaffected portions of the entire property sold contain substantial improvements.

Based on this logic, the trial court concluded that Burton was not controlling and that it was free to follow the out-of-state law on damages brought forth by Mr. Allard. In doing so, the trial court determined that Al-Nayem's evidence of damages based on the proportionate cost of the unconveyed land was legally insufficient, and it granted the involuntary dismissal on this basis. The flaw in this logic is twofold.

First, as noted above, the trial court's attempt to distinguish Burton was based on unsupported speculation about the facts underlying that decision. The Burton decision itself contains no facts concerning whether the land at issue was improved or unimproved. More importantly, the holding in Burton makes no such distinction. Even if it did not like it, the trial court had no discretion to write into Burton qualifications that do not exist in the language of the opinion itself.

Second, contrary to Mr. Allard's argument and the trial court's conclusion, Al-Nayem did, in fact, introduce legally sufficient evidence of its damages. Even if, as Mr. Allard contends, Burton requires that damages be calculated based on the value of the unconveyed land rather than its cost, Al-Nayem's evidence of the proportionate cost of the unconveyed land was, in fact, some evidence of the value of that land. Mr. Allard was free to put on opposing evidence supporting a different value. He was free to argue that Al-Nayem's evidence of value should not be deemed worthy of belief. But he could not argue that Al-Nayem had wholly failed to introduce evidence of its damages or that Al-Nayem's evidence was not legally sufficient. This is particularly true given that Hillsboro Cove specifically refers to calculating damages based on "the proportionate

cost of the [unconveyed land] as of the date of conveyance." 322 So. 2d at 586. Thus, in my view, this court should reverse the trial court's order granting the motion for involuntary dismissal and remand for further proceedings.

To the trial court's credit, it ultimately recognized its error when it granted Al-Nayem's motion for rehearing and ordered a new trial on damages, stating that it was doing so "to arrive at a just result and not produce injustice as a result of procedural disadvantage." Unquestionably, the unconveyed land included in the sale from Mr. Allard to Al-Nayem had some value. To paraphrase Will Rogers, "it's land—they're not making it anymore." Once the trial court found that Mr. Allard breached the warranty of seisin, Al-Nayem was entitled to some measure of damages for the loss of that land. The trial court's earlier ruling granting the motion for involuntary dismissal denied Al-Nayem an award of damages to which it was entitled, and the trial court rectified that error by granting Al-Nayem a new trial on damages. It was within the trial court's discretion to render such a ruling, see Fla. R. Civ. P. 1.530(d) (permitting the court, on its own initiative, to order a new trial for any reason for which it could have granted a new trial on the motion of a party if it does so within the time for ruling on a timely motion for rehearing or new trial made by a party), and I see no abuse of discretion in this ruling.

Finally, contrary to the majority's opinion, I see nothing in the record to support the conclusion that Al-Nayem "consciously elected to proceed upon" an invalid theory of damages. Aside from the fact that Al-Nayem's theory of damages was not invalid, nothing in the record before this court shows that Al-Nayem was on notice of Mr. Allard's disagreement with Burton or its measure of damages at any time before Mr. Allard made his motion for involuntary dismissal after Al-Nayem had rested its damages

case. And, significantly, the court did not rule at the end of the bench trial. Instead, it took the matter under advisement and then issued a written ruling approximately a week later. Thus, the first notice Al-Nayem had of the trial court's disagreement with Burton was after the bench trial had concluded. At that point, Al-Nayem immediately sought a new trial by way of a motion for rehearing so that it could meet the trial court's newly adopted evidentiary standard. Under these circumstances, the trial court was absolutely within its discretion to grant a new trial on damages to allow Al-Nayem to meet this new standard.

I recognize that, as a general proposition, "a party's failure to prove damages is not a proper ground for rehearing." St. Petersburg Hous. Auth. v. J.R. Dev., 706 So. 2d 1377, 1378 (Fla. 2d DCA 1998). This is based on the presumption that "litigants who have concluded a trial on the merits have presented all available, competent, material evidence in support of their case." Id. However, this general rule does not contemplate the situation in which the court decides posttrial to adopt an out-of-state measure of damages rather than to apply long-standing Florida law. In that instance, to refuse to allow Al-Nayem to attempt to meet the evidentiary requirements newly adopted by the trial court would result in a miscarriage of justice.[5] Therefore, I would also affirm the trial court's order granting a new trial on the issue of damages.

[5]" 'In civil jurisprudence it too often happens that there is so much law, that there is no room for justice, and that the claimant expires of wrong in the midst of right, as mariners die of thirst in the midst of water.' " Hous. Auth. of City of Tampa v. Burton, 874 So. 2d 6, 13 (Fla. 2d DCA 2004) (Villanti, J., dissenting) (quoting Caleb Charles Colton, *available at* http://www.theotherpages.org/unsort05.html (last visited Oct. 12, 2010)).