

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-371

DECEMBER TERM, 2006

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	Washington Superior Court
	}	
Barrett M. Singer	}	
	}	DOCKET NO. 334-6-99 Wn Cv

In the above-entitled cause, the Clerk will enter:

This matter comes before the Court on the State's motion to recall the mandate. On June 30, 2006, this Court issued an opinion reversing the trial court's calculation of damages and remanding for further proceedings consistent with the opinion. The trial court took up the case and proposed to enter judgment in favor of the State pursuant to the damages calculation set out by this Court. The State moved for post-judgment interest from the date that the original verdict was entered. Defendant opposed the motion, and the trial court ruled that it did not have authority to decide the issue of interest. It stayed the matter upon stipulation of the parties to allow the state to seek a recall of the mandate.

In 1999, defendant was charged with cutting trees on state land. Mr. Singer agreed to develop and carry out a remediation plan, and he apparently did so. Nevertheless, the state prosecuted Mr. Singer criminally. Mr. Singer pleaded no contest to reduced charges and was convicted of a misdemeanor. The State then brought a civil complaint for damages which went to trial in 2001. The State sought compensatory and punitive damages as well as treble damages under 13 V.S.A.'3606. The jury awarded the State no compensatory damages, but it did award \$62,500 in punitive damages. The Court entered judgment on this amount on August 10, 2004. Defendant appealed, arguing that punitive damages were not appropriate where the jury had not awarded compensatory damages. The State cross-appealed, arguing that the trial court should have tripled the damage award before subtracting the cost of remediation.

On June 30, 2006, we issued a ruling in two parts. First, on an issue of first impression, we concluded that the trial court should have instructed the jury to multiply the value of the cut trees by three before subtracting the value of the replacement trees. State v. Singer, 2006 VT 46, & 9, 17 Vt. L. Wk. 206, 904 A.2d 1184. Second, we concluded that treble damages under the timber trespass statute preclude additional punitive damages. Id. & 15. We held that awarding the state both treble damages and punitive damages here would amount to an improper double recovery, because the State would then recover twice for the same injury—the wrongful cutting of its trees. @ Id. Therefore, we reversed the trial court's judgment of \$62,500, and remanded for entry of judgment in the State's favor in the amount of \$108,000, the value of the cut trees multiplied by three, less the value of the replacement trees, and excluding the jury's award of punitive damages. @ Id. & 16.

When a party appeals, the issue of whether a party is entitled to post-judgment interest is governed by Rule 37 of the Vermont Rules of Appellate Procedure.

[I]f a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the superior or District Court. If a judgment is modified or reversed with a direction that a judgment for money be entered in

the superior or District court, the mandate shall contain instructions with respect to the allowance of interest.

V.R.A.P. 37 (a). The Reporter's Notes clarify that a party is automatically entitled to post-judgment interest from the date of the original judgment only when a money judgment has been affirmed. V.R.A.P. 37, Reporter's Notes. On the other hand, when the appellate court does not affirm, but directs the lower court to enter a money judgment, the appellate court must deal with the question of interest in the mandate. @ Id. If interest is overlooked, a party conceiving himself entitled to interest from a date other than that of the entry of judgment in accordance with the mandate may seek recall of the mandate. @ Id.

Since this Court did not affirm the trial court's award of damages, the rule presumes that post-judgment interest will be available only from the date that the trial court enters judgment in accordance with the mandate. The trial court has not yet done so. To convince this Court that we should recall the mandate and specify that post-judgment interest should be calculated from August 10, 2004, the State must demonstrate that damages were ascertained in a meaningful way on that date. Westinghouse Credit Corp. v. D'Urso, 371 F.3d 96, 104 (2d Cir. 2004). Damages are not ascertained in a meaningful way if the trial court incorrectly determines liability, but errs in applying the appropriate method to calculate damages. @ Id. In considering motions to recall mandates, the Second Circuit has considered whether both parties appealed the original judgment and how that judgment was treated on appeal. Vermont Micro Systems, Inc. v. Autodesk, Inc., 138 F.3d 449, 452 (2d Cir. 1998). That court has also compared the first judgment with the second judgment as a means of determining whether damages were ascertainable in a meaningful way at the time of the first judgment. Id. (Holding that damages were not ascertainable. This becomes patently clear when the 1994 judgment is viewed in the light of the December 23, 1996 revised judgment. @).

The State argues that since the jury found that the State had suffered \$54,000 in lost trees, damages were ascertainable when the trial court entered judgment, and therefore, this Court should recall the prior mandate, and issue a mandate allowing post-judgment interest from August 10, 2004.

Mr. Singer, on the other hand, contends that the trial court's prior judgment demonstrated two errors of law which this Court subsequently rectified. First, Mr. Singer argues that the trial court wrongly interpreted 13 V.S.A. ' 3606 when it allowed the jury to subtract remediation efforts before trebling the damages. Because of this uncertainty in the law, the parties had no way to ascertain damages before the appeal. Secondly, Mr. Singer suggests that since the punitive damages award was ultimately vacated, punitive damages were not readily ascertainable either. Based on Rule 37 and the lack of ascertainable damages, Mr. Singer opposes post-judgment interest from August 10, 2004.

The solution to this question is straightforward. The trial court originally entered judgment in the amount of \$62,500, an amount that bore no relationship whatsoever to the value of the cut trees or the compensatory damages sought by the State. In addition, there is no logical mathematical way to get from \$62,500 to the \$108,000 eventually awarded by this Court. Therefore, there would be no way for either party to begin to calculate post-judgment interest based solely on the trial court's damage award. In addition, on appeal the State argued that it was entitled to both the treble damages less remediation and the punitive damage award found by the jury: in other words, the State sought \$170,500. When, at the outset of an appeal, parties face a potential damage award anywhere between \$0 and \$170,500, this Court cannot conclude that damages were readily ascertainable.

Therefore, the Court declines to recall the mandate. It shall stand as it is, and post-judgment interest shall accrue from the date that the trial court enters judgment on \$108,000.

FOR THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice