

NO. A10-823

State of Minnesota
In Court of Appeals

TMT Land V, LLC,

Appellant,

v.

County of Washington,

Respondent.

**BRIEF, ADDENDUM AND APPENDIX OF
APPELLANT TMT LAND V, LLC**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE LEGAL ISSUES

1. Did the district court err in denying TMT Land V's motion for interest at the rate of 10% per year on the unpaid balance of its judgment, pursuant to the 2009 amendment to Minn. Stat. § 549.09?
 - (a) Description of how the issue was raised in the trial court: TMT Land V, LLC brought a motion for interest at the rate of 10% per year on the unpaid balance of its judgment.
 - (b) District court's ruling: The district court filed an order on March 10, 2009 amending the judgment in this case and directing the entry of a judgment *nunc pro tunc* with an effective date approximately four months earlier than the actual judgment, and the court therefore denied TMT Land V's motion for 10% interest as moot since the amended date of the *nunc pro tunc* judgment pre-dated the date on which the 2009 amendment to Minn. Stat. § 549.09 took effect.
 - (c) Preservation of issue for appeal: TMT Land V appealed to this Court from the judgment entered on March 12, 2009 pursuant to the district court's order filed on March 10, 2009.
 - (d) Most Apposite Cases and Statutes: Minn. Stat. § 117.195 and Minn. Stat. § 549.09 (2009).

STATEMENT OF THE CASE AND FACTS

The facts and the procedural history of the case are not in dispute.

Respondent TMT Land V, LLC (“TMT”) was the owner of a 19.86-acre tract of land in Woodbury, Minnesota. In late 2006, Washington County (the “County”) commenced a condemnation action, pursuant to Minnesota Statutes Chapter 117, to acquire 30,248 square feet of TMT’s land, together with a temporary easement over an additional 39,056 square feet of the property.

This was a so-called “quick take” condemnation under Minn. Stat. § 117.042. Accordingly, and consistent with the district court’s order granting the petition for condemnation on December 15, 2006, the County deposited its quick take payment with the district court and acquired part of TMT’s property on or about January 23, 2007. The County’s quick take payment was in the amount of \$46,000.00, which represented the County’s estimate of the damages, or the “just compensation,” to which TMT was entitled. The County subsequently updated its appraisal and increased its estimate of the damages to \$47,750.00, and it therefore deposited an additional \$1,750.00 (plus interest thereon in the amount of \$169.68) with the district court on or about March 31, 2009.

The case came on for a jury trial on June 15 to 18, 2009. At the conclusion of the case, the jury found that TMT was entitled to recover \$380,658.00 as just compensation for the taking of its property. *See Order for Judgment*, filed August 18, 2009. (Add. P. 10) On August 31, 2009 the County deposited with the Court the sum of \$370,728.52, which represented the balance of the principal amount to which TMT was entitled based on the jury verdict (\$332,908.00), together with interest based on the County’s

calculations (\$37,820.52). The judgment in the case was entered on October 30, 2009. (Add. P. 9 and P. 12)

In September 2009, the parties were attempting to finalize the details of the case. TMT requested the County to pay statutory interest at the rate of 10% per year pursuant to Minn. Stat. § 549.09, which had been amended in 2009 to provide for 10% interest on judgments over \$50,000.00. TMT and the County ultimately disagreed as to the applicability of the statutory amendment to Minn. Stat. § 549.09, and therefore as to the appropriate rate of interest in this case.

TMT therefore brought a motion before the district court for a determination that it was entitled to interest based on the 10% annual interest rate set forth in Minn. Stat. § 549.09, as amended in 2009. On March 10, 2010, the district court issued an order directing the entry of a judgment *nunc pro tunc* which had the effect of changing the date of the judgment in this case from October 30, 2009 to June 28, 2009. (Add. P. 2) The district court's order also denied TMT's motion for 10% interest on the ground that its motion was now moot since the newly-amended date of judgment in this case, namely June 28, 2009, pre-dated the effective date of the amendment to Minn. Stat. § 549.09 which provided for interest at the rate of 10% per year. *Id.*

TMT appealed to this Court from the judgment entered on March 12, 2010, which incorporated the district court's order dated March 10, 2010.

ARGUMENT

The sole issue on this appeal is whether or not TMT was entitled to 10% interest on the unpaid balance of its judgment pursuant to Minn. Stat. § 549.09 (2009). For the reasons that follow, we respectfully submit that TMT was clearly entitled to 10% interest.

Standard of Review

This appeal raises the issue of whether TMT was entitled to 10% annual interest under Minn. Stat. § 117.195 and Minn. Stat. § 549.09 (2009). Statutory interpretation is a question of law that is subject to *de novo* review. *State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 701 (Minn.1996).

I. TMT WAS ENTITLED TO INTEREST ON THE UNPAID BALANCE OF ITS JUDGMENT AT THE RATE OF 10% PER YEAR.

A. Under Minn. Stat. §§ 117.195 and 549.09, TMT Was Clearly Entitled To Interest At The Rate Of 10% Per Year.

In every condemnation case, the property owner receives a sum of money as “just compensation” for the property that is taken from him or her. The requirement of just compensation is intended to ensure that the owners are “made whole” for their losses. *Olson v. United States*, 292 U.S. 246, 78 L. Ed. 1236 (1934). In many cases, however, the government takes the property long before it pays the owner his or her full and final determination of just compensation. For this reason, it is undisputed that the owner is also entitled to receive interest on the final award or judgment. Indeed, the Minnesota courts have consistently held that the payment of interest is an “element” of the property owner’s constitutional right to just compensation. *State, by Spannaus v. Carney*, 309 N.W.2d 775,

776 (Minn. 1981); *State, by Humphrey v. Baillon Co.*, 480 N.W.2d 673, 675 (Minn. App. 1992), *review denied* (Minn. Mar. 26, 1992).

Minn. Stat. § 117.195 is a statutory recognition of the property owner's right to interest, and it provides that property owners in condemnation cases shall be entitled to interest from the date the government takes possession of their property until they are finally paid in full. In 1984, the Minnesota legislature amended Minn. Stat. § 117.195 to require that "[t]he rate of interest [in condemnation cases] shall be determined according to section 549.09." That statutory language has not changed since 1984 and it remains in effect today. It mandates that interest in condemnation cases shall be based upon the provisions of Minn. Stat. § 549.09.

In 2008, the statutory rate of interest under Minn. Stat. § 549.09 was 4%. In 2009, however, the Minnesota legislature amended Minn. Stat. § 549.09. The amended statute provided that interest (both pre-verdict and post-verdict interest) on a judgment or award over \$50,000.00 shall be at the rate of 10%, as follows:

Subdivision 1. When owed; rate.

(a) When a judgment or award is for the recovery of money, including a judgment for the recovery of taxes, interest from the time of the verdict, award, or report until judgment is finally entered shall be computed by the court administrator or arbitrator as provided in paragraph (c) and added to the judgment or award.

(b) Except as otherwise provided by contract or allowed by law, preverdict, preaward, or prereport interest on pecuniary damages shall be computed as provided in paragraph (c)...

*

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*

(c)(2) For a judgment or award over \$50,000, the interest rate shall be ten percent per year until paid.

Minn. Stat. § 549.09 (2009) (emphasis added). In short, Minn. Stat. § 549.09 (2009) expressly provides that interest on judgments over \$50,000 shall be at the rate of 10% per year. And under Minn. Stat. § 117.195, the interest rate in condemnation cases such as this must be determined in accordance with Minn. Stat. § 549.09.

The 2009 amendment to Minn. Stat. § 549.09 applied to all judgments entered on or after August 1, 2009. Specifically, the amendment was contained in 2009 Minn. Laws, Ch. 83, Art. 2, Sec. 35, which provided as follows:

EFFECTIVE DATE. This section is effective August 1, 2009, and applies to judgments and awards finally entered on or after that date.

2009 Minn. Laws, Ch. 83, Art. 2, Sec. 35. In other words, the legislature expressly determined and declared that the amendment to Minn. Stat. § 549.09, which provided for interest at the rate of 10% per year, would apply to all judgments in excess of \$50,000 finally entered on or after August 1, 2009.¹

In the present case, the district court ordered that “judgment be entered in favor of Respondent, TMT Land V, LLC, and against Petitioner County of Washington, in the amount of \$380,658...” *Order for Judgment*, filed August 18, 2009. Judgment was subsequently entered on October 30, 2009. *See Notice of Entry of Judgment*, dated October

¹ It should be noted that Minn. Stat. § 549.09 was again amended by the legislature in 2010. The 2010 amendment provided that “the state or a political subdivision of the state” would no longer be subject to paying 10% interest on judgments or awards against them. 2010 Minn. Laws Ch. 249, Sec. 1. This amendment applied only to judgments and awards entered after the final enactment of the amendment, *id.*, and it therefore does not appear to have any relevance to this appeal, other than to illustrate that governmental entities *were* subject to the 10% interest requirement on judgments entered between August 1, 2009 and approximately April 15, 2010.

30, 2009. Thus, under the plain language of the 2009 amendment to Minn. Stat. § 549.09, TMT was entitled to interest on its judgment at the rate of 10% per year, since its judgment was well in excess of the \$50,000.00 threshold and it was entered after August 1, 2009.

B. The District Court Erred In Ordering A Judgment *Nunc Pro Tunc* So As To Pre-Date The Actual Date Of The Judgment In This Case, As Well As The Effective Date Of The 2009 Amendment To Minn. Stat. § 549.09.

At the hearing on TMT's motion for 10% interest, the district court began by stating to the County's attorney, "sure looks to me like it's ten percent, so convince me why it's not." (Appendix at A-2) The County's attorney then argued, for the first time, that since the jury verdict was returned on June 18, 2009 but the judgment was not entered until October 30, 2009, the district court should amend the judgment *nunc pro tunc* to make the judgment effective prior to the August 1, 2009 date on which the amendment to Minn. Stat. § 549.09 took effect. (*Id.* at A-2 to A-6)

The district court agreed with the County. On March 10, 2010, the district court filed an order directing the entry of a judgment *nunc pro tunc* which had the effect of changing the date on which the judgment was actually entered in this case from October 30, 2009 to June 28, 2009. (Addendum at Add. P. 2) The district court's order accordingly denied TMT's motion for 10% interest on the ground that its motion was now moot, since the "new" date of the entry of judgment in this case, namely June 28, 2009, pre-dated the effective date of the amendment to Minn. Stat. § 549.09 (*i.e.*, August 1, 2009) which provided for interest at the rate of 10% per year.

The district court's action was erroneous. The doctrine of *nunc pro tunc* applies only to correct the record when *something actually happened* but the event was not properly recorded through a clerical error or something similar. It may not be used, as the district court did in this case, to pretend that something (*i.e.*, the entry of a judgment) happened when it actually did not:

Nunc pro tunc. Lat. Now for then... Nunc pro tunc entry is an entry made now of something actually previously done to have effect of former date; office being not to supply omitted action, but to supply omission in record of action really had but omitted through inadvertence or mistake...

Nunc pro tunc merely describes inherent power of the court to make its records speak the truth, i.e., to correct record at later date to reflect what actually occurred at trial.

Black's Law Dictionary (6th ed. 1990) (emphasis added). Simply put, the district court in this case did not "correct" the record to "reflect what actually happened," but to the contrary it re-wrote the record to pretend that something (*i.e.*, the entry of judgment) happened when it did not.

Minnesota law is consistent on this point, and contrary to the decision below. Specifically, the district court relied on *Hampshire Arms Hotel v. Wells*, 298 N.W. 452 (Minn. 1941), to support its order for *nunc pro tunc* relief. That reliance was misplaced.

In *Hampshire*, the Minnesota Supreme Court rejected the proposed entry of a judgment *nunc pro tunc* because it would not have accurately reflected the actual record of what happened in the case:

Where the entry is made to correct the record, a nunc pro tunc entry presupposes a judgment actually rendered by the court, but not correctly entered through clerical error. The office of such a nunc pro tunc entry

is correctly to record, not to supply judicial action. The record of a judgment presently (nunc) made is given effect as of a prior time (tunc) when it should have been entered. A court can give effect to a judgment as of an earlier time only when the judgment was rendered at that time. Here there was no clerical mistake to correct.

Hampshire, 298 N.W. at 453 (emphasis added). Simply put, the Court explained that a judgment *nunc pro tunc* is appropriate only in cases in which a Court had actually rendered judgment at an earlier date, but the judgment was not properly recorded because of a clerical error or something similar. The Court stated that a judgment *nunc pro tunc* is appropriate “only when” the judgment was *actually rendered* at some earlier date, but it was not properly recorded. *Id.*

Similarly, in *Wilcox v. Schloner*, 23 N.W.2d 19 (Minn. 1946), the Minnesota Supreme Court held that a *nunc pro tunc* order directing that the record reflect a motion for a directed verdict at the close of testimony, when in fact no such motion was made, was a “nullity” because “[t]he office of such a *nunc pro tunc* entry is correctly to record, not to supply judicial action... Here there was no clerical mistake to correct.” 23 N.W.2d at 22 (quoting *Hampshire*).

In the present case, the judgment was entered on October 30, 2009, and the district court erred by ordering a judgment *nunc pro tunc* to create the fiction that judgment had actually been entered in June 2009. Since the present case involved a special verdict, the judgment was properly entered only after the district court issued its order for judgment in August 2009 (and then only after the 30-day stay pursuant to General Rule 125). Minn. R. Civ. Pro. 58.01; *Kluge v. Benefit Ass'n of Ry. Emp.*, 149 N.W.2d 681, 688 (Minn. 1967) (judgment may not be entered on a special verdict until order from the

court); *City of Maplewood v. Kavanagh*, 333 N.W.2d 857, 862 (Minn. 1983) (it is necessary for the judge to order entry of judgment in cases involving a special verdict).

The district court's order in this case was not intended to correct a clerical oversight that mistakenly neglected to enter a judgment that had actually been rendered. On the contrary, the district court's order creates the legal fiction that judgment had been entered on June 28, 2009 when that did not actually happen. The doctrine or office of *nunc pro tunc* allows the court to correct the record when, through a clerical error or something similar, the record does not accurately reflect what actually happened. It does not, however, allow the court to re-write history by pretending that the judgment in this case was entered four months before it was actually entered. The decision below was erroneous and it must be reversed.

CONCLUSION

The Minnesota legislature expressly determined that interest on all judgments over \$50,000 that were entered on or after August 1, 2009 (with exceptions not relevant here) shall be at the rate of 10% per year. TMT therefore respectfully requests the Court to apply the plain language of Minn. Stat. § 549.09 (2009) and to order that TMT is entitled to pre-verdict and post-verdict interest at the rate of 10% per year.

Respectfully submitted,

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Dated: June 16, 2010

By: _____



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IN COURT OF APPEALS

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Appellate File Number: A10-823

v.

**CERTIFICATION OF BRIEF LENGTH:
APPELLANT'S BRIEF**

County of Washington,

Respondent,

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 3,280 words. This brief was prepared using Microsoft® Word 2000.

Respectfully submitted,

MALKERSON GUNN MARTIN LLP

Dated: June 16, 2010.

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