

NO. A10-823

State of Minnesota
In Court of Appeals

TMT Land V, LLC,

Appellant,

v.

County of Washington,

Respondent.

**REPLY BRIEF AND ADDENDUM 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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ARGUMENT

The 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). The district court back-dated the judgment in this case, pursuant to its order for judgment *nunc pro tunc*, so as to create the fiction that the judgment had been entered before the effective date of the new 10% interest statute. This, of course, had the effect of saving the County some money that would otherwise have been owed to TMT.

For the reasons that follow, we respectfully submit that the decision below was erroneous and the County's brief in support of that decision is significantly flawed.

I. THE COUNTY'S BRIEF DOES NOT FAIRLY OR ACCURATELY IDENTIFY OR ADDRESS THE RELEVANT ISSUES.

In a nutshell, the County's brief largely ignores the inconvenient facts and precedents and presents this Court with an incomplete and misleading view of the applicable law.

A. Perhaps the central theme of the County's argument is that it was entitled to have judgment entered "forthwith" after the jury's verdict on June 18, 2009. (County's Br. at 5, 9-11) This argument is largely premised on Minn. R. Civ. Pro. 58.01, which provides as follows:

Unless the court otherwise directs, and subject to the provisions of Rule 54.02, judgment upon the verdict of a jury, or upon an order of the court for the recovery of money only or for costs or that all relief be denied, shall be entered forthwith by the court administrator; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49 or upon

an order of the court for relief other than money or costs. Entry of judgment shall not be delayed for the taxation of costs, and the omission of costs shall not affect the finality of the judgment. The judgment in all cases shall be entered and signed by the court administrator in the judgment roll; this entry constitutes the entry of the judgment; and the judgment is not effective before such entry.

Minn. R. Civ. P. 58.01 (emphasis added). The Rule, however, clearly distinguishes between general verdicts, upon which judgment shall be entered “forthwith,” and special verdicts and verdicts with answers to interrogatories, which shall not be entered into judgment until after a court order directing that the appropriate judgment be entered.

In cases involving a special verdict, it cannot be disputed that the judgment is not to be entered until after the district court orders the appropriate judgment. Rule 58.01; *Northwestern State Bank v. Foss*, 177 N.W.2d 292, 294 (Minn. 1970) (“Where a special verdict is returned, entry of judgment must be pursuant to an order of the district court.”); *City of Maplewood v. Kavanagh*, 333 N.W.2d 857, 862 n.11 (Minn. 1983) (“Where there is a general verdict, as here, it is unnecessary for the judge to order entry of judgment. Such an order is only necessary when there is a special verdict.”). Similarly, a district court order is required before judgment may be entered on a verdict with answers to interrogatories. Rule 58.01; 2 Herr and Haydock, *Minnesota Practice, Civil Rules Annotated*, p. 426 (Fourth Ed.).

In the present case, the jury’s verdict: (1) was specifically denominated as a “Special Verdict,” and (2) it included answers to four separate interrogatories, the answers to which consisted of four different dollar figures ranging from \$7,730 to \$380,658. See Addendum at Add. P. 1. In short, this was *not* a simple general verdict

upon which judgment could have been entered “forthwith” pursuant to Rule 58.01. To the contrary, under Rule 58.01 judgment on the verdict in this case could *not* be properly entered until after an order from the district court directing the appropriate entry of judgment.

Accordingly, the central plank of the County’s argument – that it was entitled to have judgment entered “forthwith” – is simply erroneous.

B. The County also relies heavily on Minn. Stat. § 117.185 to support its argument that judgment should have been entered virtually contemporaneously with the jury verdict. (County’s Br. at 4-5, 9-10) This statute provides as follows:

Judgment shall be entered upon the verdict or decision, fixing the amount of damages payable to the several parties concerned and the terms and conditions of the taking and, until reversed or modified in a direct proceeding begun for that purpose, the judgment shall be binding upon the petitioner and all other parties thereto and upon their respective successors and assigns. The parties may stipulate in lieu of entry of judgment.

Minn. Stat. § 117.185. As the Court will note, there is nothing in this statute that demands the entry of judgment “forthwith,” or imposes any time requirements whatsoever with respect to the entry of judgment. The only requirement is that the judgment be entered “upon” the verdict.

“Upon” means “on” or “thereafter” or “thereon.” Merriam-Webster, *Webster’s Ninth New Collegiate Dictionary*, “Upon,” (1983). (The statute was enacted 12 years before the date of the cited definitions, but it was the oldest dictionary that counsel had available.) In the present case, the original judgment in October 2009 *was* entered

“upon” the jury verdict, as ordered by the district court. To be fair, both the original judgment and the judgment *nunc pro tunc* in June 2009 were entered “upon” the jury’s verdict. Both complied with Minn. Stat. § 117.185.

In summary, and contrary to the County’s argument, Minn. Stat. § 117.185 does not require that judgments in condemnation cases be entered “forthwith,” nor does it impose any timing requirements of any kind.

C. The County also places considerable reliance on *Kavanagh, supra*, to support its view that judgment should have been entered “forthwith,” or nearly contemporaneously with the jury verdict. (County’s Br. at 5, 9-10) This reliance is misplaced for five reasons:

- In *Kavanagh*, the Court explained that the issue it was deciding was “at what point in a condemnation proceeding the condemnor is barred from abandoning the condemnation and dismissing the proceeding.” 333 N.W.2d at 858. The Court held that, for a variety of policy reasons, the condemnor may not dismiss the condemnation after the jury returns its verdict. *Id.* at 862. This is, of course, not even close to the issue in the present case.
- *Kavanagh* does not address or even mention the doctrine of *nunc pro tunc*, which *is* at the heart of this appeal. This fact alone does not mean that *Kavanagh* is irrelevant to this appeal, but it may help to put it in the proper context.

- *Kavanagh* has nothing to do with interest in condemnation cases. Again, that does not necessarily mean it is irrelevant, but it helps to illustrate that it is not exactly on point with the issue on this appeal.
- In *Kavanagh*, the Court held that since there was a *general verdict* in that case the judgment should have been entered “forthwith” after the verdict (“[w]here there is a general verdict, as here, it is unnecessary for the judge to order entry of judgment.”). *Id.* Thus, the Court held that the condemnor could not dismiss the case after the jury returned its verdict. As noted above, however, the present case does *not* involve a general verdict but rather a special verdict with four interrogatories, and in such cases the judge must order the entry of judgment before it may be entered. The decision in *Kavanagh* is not only not on point with the issue in this case, but it is also irrelevant because it involved a case with a general verdict, which is subject to a different part of Rule 58.01 than the part of the Rule that is at issue on this appeal.
- Finally, it is worth noting that *Kavanagh* does not appear to have been a “quick-take” condemnation pursuant to Minn. Stat. § 117.042. In contrast, the present case was a “quick take” condemnation. The difference is that in “quick takes” the government takes early title to and possession of the property, long before any jury trial, by paying the property owner its estimate of the damages and obtaining a court order authorizing the “quick take.” This is significant because the discussion

in *Kavanagh* about when the rights of the parties vest is not comparable to a “quick take” condemnation such as this, in which the County already acquired the property two or three years before the jury trial.

In summary, the County’s reliance on *Kavanagh* is misplaced primarily because *Kavanagh* involved a general verdict, but also because of the other important distinctions between it and the present appeal.

D. The original judgment in this case was entered on October 30, 2009, based on the district court’s Order for Judgment dated August 18, 2009. In response to the County’s arguments on the motion for interest below, the district court “amended” the original judgment to make it effective as of June 28, 2009 – before the effective date of the new interest statute at issue in this case. Order Nunc Pro Tunc for Entry of Judgment upon Verdict, dated March 10, 2010. (App. Br. at Add. p. 2) The County argues that this judgment *nunc pro tunc* was entirely appropriate. We respectfully disagree.

As noted in our initial brief, the case(s) relied upon by the district court and by the County at the hearing on this matter (namely, *Hampshire Arms Hotel v. Wells*, 298 N.W. 452 (Minn. 1941) and *Wilcox v. Schloner*, 23 N.W.2d 19 (Minn. 1946)) do not support the County’s position. In *Hampshire*, the Court explained 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. In *Wilcox* the Court stated that “[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*). This

is consistent with the definition of “*nunc pro tunc*” from *Black’s Law Dictionary* cited in our initial brief; which is, to make the court records “speak the truth” when something, like a judgment or order for judgment, actually occurred but was not properly recorded due to a clerical error or something similar. This stands in sharp contrast to what happened in this case, which was to re-write history by pretending that the court administrator had actually entered judgment as of June 28, 2009, even though the first order for judgment was not filed until seven weeks later. This was not “correcting” the record, it was fabricating it for the benefit of one party over another.

Similarly, in *Duluth Ready-Mix Concrete, Inc. v. City of Duluth*, 520 N.W.2d 775, 777 (Minn. Ct. App. 1994), the Court stated that “A *nunc pro tunc* entry presupposes a judgment actually rendered by the court, but not correctly entered through clerical error.” Once again, in the present case there was no clerical error, because the district court administrator had no authority to enter judgment until after the district court’s order (on August 18, 2009 – after the effective date of the new interest statute) directing such judgment.

Finally, this Court has recognized that “Judgment *nunc pro tunc* is not a proper remedy when the delay in entering judgment was the result of the parties’ inaction.” *McDonell v. Eggestein*, 357 N.W.2d 168, 169 (Minn. Ct. App. 1985) (quoting from the “Syllabus by the Court”). In the present case, if the County (or, for that matter, Thone) had wished to request the district court to order the entry of judgment before August 1, 2009, it certainly could have done so. The fact that the County (and Thone) chose not to do so is not a reason to re-write history and pretend that a “clerical error” was the

reason why the judgment was not entered in June 2009. The reality is that neither party requested the judge to “hurry-up” the order directing the entry of judgment, so the judgment did not get entered until after mid-August 2009 when the district court requested the parties to submit proposed orders for the entry of judgment.

E. The County argues that the 10% interest rate applicable to judgments entered after August 1, 2009, was not reasonable under *State, by Humphrey v. Lupient*, 509 N.W.2d 361 (Minn. 1993). (County’s Br. at 11-12) At the outset, we understood that the County had abandoned this argument at the hearing below on TMT’s motion for 10% interest, when the County advanced for the first time its new *nunc pro tunc* argument and stated that “I think all of the submissions to the Court to date up until this morning [when the County submitted the *nunc pro tunc* cases] frankly could be ignored because the Court has the appropriate remedy before it [*i.e.*, a judgment *nunc pro tunc*].” (App. Br. at A-6) We also note that the County did not raise this issue on a Notice of Related Appeal, even though TMT’s appeal was limited to the statutory issues. Most importantly, the district court did not accept or even address this argument in any way. Instead, the district court understood that the statutory rate was presumptive and it decided to back-date the judgment to save the County some money.

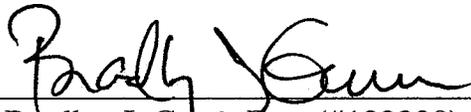
CONCLUSION

The Minnesota legislature expressly determined that interest on judgments over \$50,000 that were entered on or after August 1, 2009 shall be at the rate of 10% per year. The district court's back-dating of the judgment, to benefit the County, was not proper. 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: July 29, 2010

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