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COURT OF APPEALS
STATE OF NEW YORK

ROSBAUGH ET AL,
Respondent,

-against-

TOWN OF LODI,
Appellant.

NO. 27

20 Eagle Street
Albany, New York
February 13, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 Rosbaugh v. Town of Lodi.

3 MR. PIERCE: Good afternoon. I'm Alan Pierce
4 from Hancock Estabrook, counsel for appellant, Town of
5 Lodi. I'd like to reserve three minutes for rebuttal.

6 CHIEF JUDGE WILSON: Yes.

7 MR. PIERCE: Based on both counsels' briefing in
8 this case, this appears to be the first case in the State
9 of New York where treble damages have been awarded against
10 the municipality. That ruling cannot stand. The law is
11 clear here. The statute here, Real Property Actions - - -

12 JUDGE GARCIA: Because they're punitive, right?

13 MR. PIERCE: They're punitive in nature.

14 JUDGE GARCIA: So this is something of a strange
15 statute, right? It doesn't say, as the old statute I
16 understand said, calculate your damages and triple it.
17 That was 63. It says triple the stumpage value or 250 or
18 both, right?

19 MR. PIERCE: Yes.

20 JUDGE GARCIA: So let's say you had a case with
21 ten trees, stumpage value is \$10 - - - it's a \$100. Court
22 could triple it and be 300. In your view, that would be -
23 - - not ~~not~~ permissible in this case against
24 municipality, right? Treble damages.

25 MR. PIERCE: Yes. It would not be permissible.

1 JUDGE GARCIA: Or it could take the ten trees and
2 times it by twenty-five - - - 250 and get \$2,500. Would
3 that be punitive?

4 MR. PIERCE: Yes.

5 JUDGE GARCIA: Why?

6 MR. PIERCE: Because here, what allows treble
7 damages is - - - it depends on the conduct of the
8 defendant.

9 JUDGE GARCIA: No. But why would 10 times 250 be
10 punitive? Why couldn't the judge say, okay, I'm not going
11 to give you treble damages of \$300, but I'm going to give
12 you \$2,500?

13 MR. PIERCE: Well, here, the statute appears to -
14 - - it's not discretionary. It appears to - - - it's not
15 discretionary in this - - -

16 JUDGE GARCIA: It says - - - it says you can have
17 treble damages or 250 or both, right?

18 MR. PIERCE: Well, I believe the statute says you
19 - - - you shall recover it unless, under subdivision 2, the
20 defendant shows - - -

21 JUDGE GARCIA: You get what you get in 1, but I
22 thought 1 - - - maybe I'm reading this wrong. I thought 1
23 gave the court discretion to do treble stumpage value or
24 250 or both. Is that not right?

25 MR. PIERCE: Yes. I don't think it's - - - it is

1 unusual in the sense that there are other statutes where
2 the trebling - - -

3 JUDGE GARCIA: Treble value of the tree to - - -
4 or \$250 per tree or both.

5 MR. PIERCE: Yes.

6 JUDGE GARCIA: So what if the court in that case
7 says, I'm going to give you \$2,500? I'm not going to give
8 you treble damages. That would be punitive. But I'm going
9 to give you \$2,500 worth of damages because I'm going to do
10 250 per tree.

11 MR. PIERCE: Well, the language before - - - an
12 action may be maintained against such person for treble the
13 stumpage value of the tree - - -

14 JUDGE GARCIA: Right.

15 MR. PIERCE: - - - or timber or 250 or both. So
16 the statute in subdivision 1 says treble it.

17 JUDGE GARCIA: Yeah. But it says, instead of
18 trebling, you can give 250 per tree.

19 CHIEF JUDGE WILSON: Judge Garcia is trying to
20 ask you - - - or is asking you - - - I think he's asked
21 you, what if the sum of the statutory damages, 250, turned
22 out to be greater than the treble damages?

23 JUDGE GARCIA: And they give the statutory
24 damages. Why - - - is that punitive?

25 CHIEF JUDGE WILSON: These are tiny little trees

1 worth \$10 apiece.

2 MR. PIERCE: Yes.

3 CHIEF JUDGE WILSON: But you're getting 250 for
4 them. Treble would be 30. You're getting a lot more than
5 the treble. Why wouldn't that be punitive?

6 JUDGE GARCIA: Did I ask that?

7 CHIEF JUDGE WILSON: I think you did ask it.

8 MR. PIERCE: Well, I read the statute - - - I
9 read the statute, perhaps, as saying that whatever, whether
10 it's 250 per tree or the stumpage value under subdivision
11 1, it is to be trebled.

12 CHIEF JUDGE WILSON: Oh, you think the 250 is to
13 be trebled?

14 JUDGE CANNATARO: Oh, you're just saying 250 is
15 trebled after it's assessed?

16 MR. PIERCE: Yes.

17 JUDGE HALLIGAN: Have you seen any cases that
18 deal with this? I didn't locate any.

19 MR. PIERCE: Well - - -

20 JUDGE HALLIGAN: Exactly how it's applied, I
21 mean.

22 MR. PIERCE: The Fourth Department had a prior
23 case, Swenson.

24 JUDGE HALLIGAN: It grappled with the both point
25 - - - the 250 - - -

1 MR. PIERCE: I haven't seen a case. I ~~-----I~~
2 ~~-----I~~ didn't see a case. I - - - I don't think Mr.
3 Hutter - - - we didn't look at that. I read the statute as
4 saying, you get this or this or both and you treble it,
5 unless the defendant on the burden shifting says, well, I
6 thought - - - I thought this was my land. I thought I had
7 an easement, which is what the town thought. They ~~-----~~
8 ~~they~~ didn't prove their case, okay?

9 JUDGE RIVERA: Okay.

10 MR. PIERCE: So here - - - and ~~-----and~~ it's
11 interesting that here, in this statute, which is - - -
12 there is a lot of New York statutes with treble damages.
13 The court just recently dealt with General Business Law
14 349.

15 CHIEF JUDGE WILSON: So just to finish up Judge
16 Garcia's line of questioning, if it turned out that the
17 \$250 - - - because I think you read it to say that the
18 court could award just the 250, right or not?

19 MR. PIERCE: The court could award 250 per tree
20 as part of the compensatory damages, yes.

21 CHIEF JUDGE WILSON: Could it ~~-----could it~~ say,
22 I'm not going to give you stumpage value at all but just
23 the 250?

24 MR. PIERCE: Yes.

25 CHIEF JUDGE WILSON: Okay. So then suppose the

1 250 - - - suppose the trees were only worth \$10 apiece.

2 MR. PIERCE: Uh-huh.

3 CHIEF JUDGE WILSON: And I take it you read the
4 statute to say the 250 would be trebled.

5 MR. PIERCE: Yes.

6 CHIEF JUDGE WILSON: Right? Forget the trebling
7 for a moment. Would the - - - because of the disparity
8 between the 250 statutory damages and the actual \$10 value
9 - - - stumpage value of the tree, would that be punitive?
10 Or is it the fact of trebling that makes it punitive?

11 MR. PIERCE: Well, it's the trebling that makes
12 it - - - the trebling is ~~is~~ the issue here. And it's
13 - - -

14 CHIEF JUDGE WILSON: Okay.

15 MR. PIERCE: That's what make - - - that is
16 punitive in nature.

17 CHIEF JUDGE WILSON: So the - - - ~~so the~~ - - - so
18 as - - - vis-a-vis a municipal defendant, the - - - a
19 disproportion between the statutory award and the value of
20 the tree doesn't really matter.

21 MR. PIERCE: It doesn't.

22 CHIEF JUDGE WILSON: That ~~that~~ wouldn't
23 make it punitive?

24 MR. PIERCE: I'm not arguing that you - - - that
25 you have to look at whether 250 or the stumpage value is

1 the appropriate damages - - - compensatory damages against
2 the municipality. I'm not arguing that.

3 CHIEF JUDGE WILSON: It's ~~--- it's~~ the fact of
4 trebling?

5 MR. PIERCE: Right.

6 CHIEF JUDGE WILSON: Okay.

7 MR. PIERCE: It's the fact of trebling either one
8 or both - - -

9 CHIEF JUDGE WILSON: Uh-huh.

10 MR. PIERCE: - - - that makes - - -

11 JUDGE RIVERA: Can I ask - - -

12 MR. PIERCE: - - - it punitive in nature.

13 JUDGE RIVERA: Yeah. Can I - - -

14 MR. PIERCE: And that's because - - - oh.

15 JUDGE RIVERA: No. No. Finish it, please.

16 MR. PIERCE: That's because the statute makes it
17 dependent. As the two dissenters in the Fourth Department
18 said, well, if in fact it's compensatory in nature, the
19 trebling is compensatory in nature for esthetic and
20 intrinsic value of the trees, which is what the majority
21 said and it's what Professor Hutter argues in ~~--- in~~ part
22 from the majority - - -

23 JUDGE RIVERA: Yeah. Yeah.

24 MR. PIERCE: - - - as the dissenters said, well,
25 if that's the case, how come you don't get that

1 automatically if the defendant proves that they were not
2 acting in bad faith and - - -

3 JUDGE RIVERA: Let - - - let - - -

4 MR. PIERCE: Yes.

5 JUDGE RIVERA: Thank you for that. Let me ask
6 you this. It's not that anyone has raised it. That's my
7 own curiosity, and maybe I've just missed something. I ~~-----~~
8 ~~I~~ don't even understand why this applies to the
9 municipality. It ~~-----it~~ says, if any person. Are you
10 reading this or is there somewhere in some law or in a case
11 that person includes the municipality?

12 MR. PIERCE: Yes. And I - - -

13 JUDGE RIVERA: Okay.

14 MR. PIERCE: - - - apologize - - -

15 JUDGE RIVERA: Thank you.

16 MR. PIERCE: - - - because I don't - - -

17 JUDGE RIVERA: What would that be?

18 MR. PIERCE: - - - I don't have it at the tip of
19 my tongue - - -

20 JUDGE RIVERA: Oh, okay.

21 MR. PIERCE: - - - but there are statutes that
22 define person as including municipality.

23 JUDGE RIVERA: In this?

24 MR. PIERCE: I don't know that there's a case - -

25 -

1 JUDGE RIVERA: Because it seems - - - it seems
2 very odd to me the way it's written.

3 MR. PIERCE: Yes.

4 JUDGE RIVERA: If any person, et cetera, et
5 cetera, et cetera, and then says, on the land of another or
6 on the common or other land of a city, village, town, or
7 county - - - it seems kind of odd to think that you're
8 talking about a municipality as a person and - - - given
9 the way it's written.

10 MR. PIERCE: Yes. But there ~~-----there~~ are
11 statutes. And I apologize that - - -

12 JUDGE RIVERA: Yes. No. I know there are
13 statutes, so - - -

14 MR. PIERCE: It says - - -

15 JUDGE RIVERA: - - - general statutes in that
16 way. As I recall, those statutes usually say something
17 like unless - - - unless one would read the language to
18 mean other.

19 MR. PIERCE: Right.

20 JUDGE RIVERA: Right?

21 MR. PIERCE: And clear - - -

22 JUDGE RIVERA: Yes. Go ahead.

23 MR. PIERCE: - - - clearly, the statute, in many
24 ways, was designed against logging companies.

25 JUDGE RIVERA: Yes. That's why the whole ~~dispute~~

1 history of this - - -

2 MR. PIERCE: So the person includes corporations,
3 businesses - - -

4 JUDGE RIVERA: Yes. That's why it's - - - well,
5 yes, but person we usually understand to mean entity. So I
6 ~~-----~~ I could see that. But it just struck me as - - - as
7 very odd given the purpose of this statute is to stop,
8 right, this - - -

9 MR. PIERCE: Right.

10 JUDGE RIVERA: - - - this theft - - -

11 MR. PIERCE: Yes.

12 CHIEF JUDGE WILSON: Could the - - - could the
13 town - - -

14 JUDGE RIVERA: - - - in any way.

15 CHIEF JUDGE WILSON: - - - have been sued for
16 trespass or conversion and for damages?

17 MR. PIERCE: It could have been. I think there
18 are cases - - -

19 CHIEF JUDGE WILSON: That wouldn't ~~-----~~ ~~that~~
20 ~~wouldn't~~ have provided the treble damage remedy, but
21 presumably - - -

22 MR. PIERCE: Right.

23 CHIEF JUDGE WILSON: - - - you might be able to
24 prove the replacement value of the trees.

25 MR. PIERCE: Right. And here, all three causes



1 of action in that complaint were under 861.

2 JUDGE CANNATARO: Can I ask you another - - - I
3 think you've heard from a couple of my colleagues that the
4 statute seems strange - - - different than ~~than~~ other
5 statutes. And to me, one of the respects is that usually
6 when punitive damages are provided for by a statute, it
7 describes - - - you know, there's a baseline compensatory
8 damages, whatever it might be, and then if there's a
9 certain scienter or willfulness element involved, then you
10 can inflate those damages. And I think those aren't
11 typically related to the compensatory damage. It's - - -
12 you know, it's not generally restricted as a multiple of
13 the compensatories. And this is kind of backwards. It
14 sets the baseline as three times the stumpage value and has
15 a ~~a~~ reduction for a certain kind of defendant
16 in the case - - -

17 MR. PIERCE: Yes.

18 JUDGE CANNATARO: - - - which, to me, is
19 structurally unique in terms of something that you would
20 call punitive damages, backwards even.

21 MR. PIERCE: Well, ~~I~~ I'm not calling them
22 punitive. I'm calling them in the discussion that
23 Professor Hutter raised in his brief, that they're punitive
24 in nature. If we look at them, are they - - -

25 JUDGE CANNATARO: Well, you're saying they're

1 punitive in effect, ultimately, right?

2 MR. PIERCE: Yes. And - - -

3 JUDGE CANNATARO: Otherwise, you would have to
4 pay them because the rule is you can't assess punitive
5 damages against the municipality.

6 MR. PIERCE: Absolutely.

7 JUDGE CANNATARO: So you must be, at some level,
8 pointing the ~~the~~ punitive finger at the statute,
9 right?

10 MR. PIERCE: I am. That these are not
11 compensatory.

12 JUDGE CANNATARO: And all I'm saying is, this
13 doesn't look like any punitive damages provision I've seen
14 before.

15 MR. PIERCE: I ~~I~~ talk about two ~~two~~
16 sets of statutes. One, which this court is very familiar
17 with, Judiciary Law 487. And I agree, there, it uses the
18 word willful. There are other, and I've laid out several
19 of them in my brief, several other statutes that, like this
20 one, don't have that willful, knowingly standard for treble
21 damages. So New York statutes are kind of - - - there's a
22 variety of when treble damages are allowed. What's
23 interesting in 2003 when 861 was reenacted, the legislature
24 added the provisions about timber in the Environmental
25 Conservation Law that I cited in my brief. And it sets up

1 the exact same formula for treble damages, where they seem
2 to be presumed if there's a violation of the - - - so it's
3 Environmental Conservation Law 71-0703.

4 JUDGE CANNATARO: 71-0703.

5 MR. PIERCE: Yes.

6 JUDGE CANNATARO: And what does that relate to?
7 What kind - - - what kind of - - -

8 MR. PIERCE: It relates to timber.

9 JUDGE CANNATARO: It's another tree statute?

10 MR. PIERCE: It's a timber statute. That makes -
11 - -

12 JUDGE CANNATARO: So they do this with trees a
13 lot.

14 MR. PIERCE: - - - makes it a - - - makes it
15 misdemeanor, but also provides - - - so in addition to
16 other penalties, a person who violates subdivision 1 of
17 section 9-0303 shall be liable to a civil penalty of \$250
18 per tree or treble damages based on the stumpage value of
19 such tree or both. It's exactly the same.

20 JUDGE CANNATARO: But does it have a ~~reducer~~
21 reducer - - -

22 MR. PIERCE: Yes.

23 JUDGE CANNATARO: - - - unless someone else - - -

24 MR. PIERCE: Yes.

25 JUDGE CANNATARO: - - - someone acts in a certain



1 innocent way?

2 MR. PIERCE: Where the order or decision finds
3 that the defendant established by clear and convincing
4 evidence that such - - - when such defendant committed the
5 violation, he or she had cause to believe the land was his
6 or her own or that she had an easement or right away. It's
7 exactly the same formula, exactly the same language.
8 There's no case talking about it. But the legislature,
9 when it did 860 - - - reenacted 861 in 2003, did the same
10 thing in these two provisions in the Environmental
11 Conservation Law. So they decided this was the formulation
12 they were going to use for the theft of timber. And the -
13 - - and I don't think this court needs to look at
14 legislative history. And I'll ~~I'll~~ stop because I
15 know my light - - - but ~~but~~ the legislative history
16 here makes it very clear, this 2003 bill was a
17 ~~a~~ comprehensive bill, and it was designed to punish and
18 create a penalty for people who stole trees or took them
19 improperly and to deter conduct - - - the traditional
20 hallmarks of a punitive - - - a punitive in nature penalty.
21 Thank you.

22 CHIEF JUDGE WILSON: Thank you.

23 MR. HUTTER: Good afternoon. May it please the
24 court. Judge Garcia, in response to your - - - excuse me.
25 I have to fix the sound. I have it too loud. You can't



1 treble damage \$250 per tree, the compensatory scheme that's
2 clear in 861(1) that we're dealing with. And forget about
3 the environmental conservation. That's another beast,
4 totally different language, and we're not dealing with
5 that. 861 says the - - - here's the compensation package,
6 stumpage value - - - trebled stumpage value or \$250 per
7 tree or both.

8 JUDGE HALLIGAN: What do you do - - -

9 MR. HUTTER: The only thing - - - I'm sorry. The
10 only thing you would treble then would be stumpage value.
11 And that's it. And that's what this case is all about, is
12 an award of stumpage value which is treble. Is that
13 punitive? It's not looking at an award of damages that are
14 being trebled. It's a very simple compensation part. Yes,
15 Your Honor. I'm sorry.

16 JUDGE HALLIGAN: I was just going to ask you what
17 you do about B because B says, for good faith, whatever you
18 want to call them, logger, it's - - - it's 1X stumpage
19 value, and otherwise, it's 3X. So how is that not
20 punitive? Or are you compensating the good faith owner for
21 one-third of the value?

22 MR. HUTTER: I'll use the language that Judge
23 Troutman used in Hobish about the careful balancing. What
24 the legislature obviously did here is that we have a
25 problem of economic loss - - - economic harm.

1 JUDGE HALLIGAN: But - - - but just - - -

2 MR. HUTTER: Yes.

3 JUDGE HALLIGAN: - - - is the ~~---~~ ~~is the~~ good
4 faith - - - is the owner whose trees are taken in good
5 faith getting one-third of the value?

6 MR. HUTTER: He's getting his - - - in a - - - in
7 a good faith, he's just getting stumpage value.

8 JUDGE HALLIGAN: Stumpage value.

9 MR. HUTTER: That's it.

10 JUDGE HALLIGAN: So ~~---~~ ~~so~~ in bad faith, you're
11 getting 3X. And what is that multiplier tethered to if not
12 the bad faith, which seems to me like it sounds like
13 something punitive?

14 MR. HUTTER: It sounds like it is something
15 punitive, but it's part of the compensation package.

16 JUDGE HALLIGAN: But what is it compensating for
17 if it's not penalizing - - -

18 MR. HUTTER: This is the - - -

19 JUDGE HALLIGAN: - - - bad faith.

20 MR. HUTTER: This is the legislature's rough way
21 of figuring out, how do we value the property owner's loss.

22 JUDGE HALLIGAN: But the loss seems to me the - -
23 - the ~~---~~ ~~the~~ loss is going to be the same if I'm the
24 owner. It doesn't matter to me whether the tree is taken
25 in good faith or bad faith. I lose the tree. The value is

1 what it is. But it seems to me, under the scheme, given
2 the two subdivisions, that what I'm going to get turns
3 solely on the good faith or bad faith of the person that
4 cut it down. Is there some other metric that's - - -

5 MR. HUTTER: Yes.

6 JUDGE HALLIGAN: - - - at play?

7 MR. HUTTER: I - - - I - - - what the ~~-----~~ what
8 ~~the~~ legislature did in that situation, Your Honor, is
9 simply, if you've acted in good faith, we really want to
10 leave you alone and will penalize then the property owner -
11 - - the property owner - - - then to sacrifice the property
12 owner for the benefit of the good faith.

13 JUDGE HALLIGAN: You're saying that - - -

14 JUDGE CANNATARO: So - - -

15 JUDGE HALLIGAN: - - - compensation of stumpage
16 value penalizes a property owner?

17 MR. HUTTER: No.

18 JUDGE HALLIGAN: Do you agree?

19 MR. PIERCE: I'm saying, is - - - if they - - -
20 if they lose that. What I'm getting at is that - - - and I
21 think it goes back to - - - I'll start to explain this.
22 861, initially, had stumpage value treble. That was - - -
23 that - - - that was - - - ~~that was~~-----excuse me - - -
24 just treble - - - treble damage, just simply that. That
25 had been the law since 1803. And finally then in 2003 - -



1 - and this is where the legislative history is so
2 important. That's why I spent a lot of time in my brief
3 going through the - - - the bill jacket in that the
4 legislature of Senator Little's, we need to appropriately
5 reflect economic harm.

6 JUDGE TROUTMAN: Counsel, do you - - - if it is,
7 in fact, punitive - - - if ~~if~~ one were to find that
8 it is punitive, can it be imposed on the municipality?

9 MR. HUTTER: No. No. We've - - - ~~we've~~
10 I've - - - I know what my adversary did below - - - my
11 counsel below did, but I've certainly conceded that, Your
12 Honor.

13 JUDGE GARCIA: But Counsel - - -

14 MR. HUTTER: But - - -

15 JUDGE GARCIA: I'm sorry, here. Do you know of
16 any other instance where compensatory damages are reduced
17 because of the good faith of the defendant?

18 MR. HUTTER: No, Your Honor. No. And again,
19 getting back to Judge Halligan, you raised a question about
20 - - - about a case law. The - - - the ~~the~~ one case
21 that's in my brief, Halstead v. Fournia, which actually I
22 represented the defendant in that case, maybe I made the
23 argument that there was really no discretion as to what
24 must be done in the Third Department. And I think, looking
25 at it correctly said, as I said to Judge Garcia, you - - -

1 these are the - - - the alternatives, and that's it. You
 2 can't go beyond that. So I think there is sufficient case
 3 law, again, that's focusing on the compensation package.
 4 Now, what was troubling, I think, the legislature - - - and
 5 again, this is where - - - I ~~-----I~~ think here, reasonable
 6 people can differ. They're trying to figure out, how do we
 7 compensate the homeowner? How do we compensate the
 8 Rosbaughs who've - - -

9 CHIEF JUDGE WILSON: So do - - - do you - - -

10 MR. HUTTER: - - - had their trees destroyed.

11 CHIEF JUDGE WILSON: Do you agree with Mr. Pierce
 12 that your clients could have sued for trespass or for
 13 conversion and recovered replacement value of the trees?

14 MR. HUTTER: Yes, Your Honor. And certainly - -
 15 -

16 CHIEF JUDGE WILSON: Against - - - against the -
 17 - -

18 MR. HUTTER: - - - this is a - - -

19 CHIEF JUDGE WILSON: - - - against - - -

20 MR. HUTTER: - - - statutory cause of action.

21 The - - -

22 CHIEF JUDGE WILSON: Right. So the - - - the - -
 23 -

24 MR. HUTTER: - - - plaintiff's counsel - - -

25 CHIEF JUDGE WILSON: Right.



1 MR. HUTTER: - - - has decided not to pursue
2 common law, which would have given punitive damages.

3 CHIEF JUDGE WILSON: Against the municipality?

4 MR. HUTTER: No. It's not against municipality,
5 but at least on the surface, common law on trespass - - -

6 CHIEF JUDGE WILSON: Uh-huh.

7 MR. HUTTER: - - - is still a valid cause of
8 action generally for trespass. No one does it because,
9 again, first, you need the scienter element. And again,
10 punitive damages in New York, of course, are so difficult.
11 So all these actions now are really RPAPL 861. So - - -

12 JUDGE SINGAS: You mentioned the legislative
13 history. And I'm looking at the bill jacket from the
14 Department of Environmental Conservation. And it says,
15 current penalties are not high enough to deter the illegal
16 taking of timber from state or private lands. This
17 legislation, by increasing the penalties to allow for
18 treble the stumpage value, will provide for greater
19 deterrents for the knowing offender. That sounds very much
20 like punitive in nature.

21 MR. HUTTER: It - - - again, I - - - ~~I~~ I'll
22 certainly concede there is some punitive effect. The key
23 here is primarily - - - there is the - - - but you go back
24 also in that bill jacket, Your Honor, with Senator Little,
25 Assemblyman Parent, is that we're concerned about

1 appropriate economic harm.

2 JUDGE CANNATARO: But can those two things
3 coexist? Can you actually say that the true value of the
4 tree is triple the stumpage value but there's a punitive
5 element to it as well? I mean, I - - - those seem - - -

6 MR. HUTTER: I think that - - - yes.

7 JUDGE CANNATARO: - - - impossible to reconcile.

8 MR. HUTTER: The punitive - - - the ~~the~~
9 punitive element cannot trump - - - cannot destroy the
10 compensation - - - compensatory part. It is clear in that
11 regard that this is primarily compensation. And I ~~I~~
12 think in that respect - - -

13 JUDGE HALLIGAN: How is it - - -

14 MR. HUTTER: - - - the - - -

15 JUDGE HALLIGAN: How is it clear when the
16 distinction - - - when the ~~when the~~ difference
17 between 1X and 3X turns on the good faith or bad faith of
18 the person that cuts down the trees?

19 MR. HUTTER: That was - - - I - - - I think there
20 - - - what we're quibbling over now is how the legislature
21 drew the balance.

22 JUDGE HALLIGAN: No. I guess ~~what I~~ what I
23 - - - I'm trying to ask - - - maybe I'm ~~I'm~~ not doing
24 it very clearly, is - - - is the only point of distinction
25 I see, and I thought you agreed, but maybe you didn't,

1 between whether I get 1X or 3X if I'm the owner is whether
2 the person that cut it down acted in good faith or bad
3 faith.

4 MR. HUTTER: I - - -

5 JUDGE HALLIGAN: Okay.

6 MR. HUTTER: - - - fully agree.

7 JUDGE HALLIGAN: Okay. And so that seems to me
8 to have nothing to do with the actual value of what got cut
9 down. In fact, that actual value, the 1X stumpage value,
10 seems like that's full compensation. So ~~I'm~~ I'm just
11 trying to understand how, if what makes the difference
12 between 1X and 3X is - - - is the conduct of the person
13 that cuts it down, how that's not - - -

14 MR. HUTTER: Okay.

15 JUDGE HALLIGAN: - - - primarily punitive.

16 MR. HUTTER: First of all, there is nothing in
17 the legislative history about that point. But the - - -

18 JUDGE HALLIGAN: About what - - - I'm just
19 talking about the text in the - - -

20 MR. HUTTER: But I - - -

21 JUDGE HALLIGAN: - - - statute.

22 MR. HUTTER: I realize that. Again, this is what
23 the legislature - - - just what they came up with.

24 JUDGE HALLIGAN: Well, they may have - - -

25 MR. HUTTER: And it seems like - - -



1 JUDGE HALLIGAN: - - - but they may have come up
2 with a punitive scheme.

3 MR. HUTTER: The punitive was taken care of by
4 penal law by seeking the - - - allowing the DA to prosecute
5 - - -

6 JUDGE HALLIGAN: Damages surely - - -

7 MR. HUTTER: - - - and come to prosecute.

8 JUDGE HALLIGAN: But ~~-----but~~ surely damages can
9 be punitive. It need not be only something set forth in
10 the Penal Law, I ~~-----I~~ think, no?

11 MR. HUTTER: Well, the - - - if you're asking, is
12 there a separate issue here as to whether or not I could
13 pursue - - - that's not a punitive - - -

14 JUDGE HALLIGAN: No. No. I was asking whether
15 or not the fact that it's set forth in this statute as
16 opposed to in the penal law is dispositive of whether it's
17 punitive or not.

18 MR. HUTTER: No.

19 JUDGE HALLIGAN: I would think, no. Okay.

20 MR. HUTTER: No, not at all.

21 JUDGE CANNATARO: I mean, in any event, we - - -

22 JUDGE RIVERA: But Counsel, I ~~-----I~~ would - - -
23 I think, really, it's very difficult to appreciate fully
24 this argument you're making because it would make sense to
25 me if 861(1) was written, may maintain against such a



1 person for treble the stumpage value, which you say treble
 2 only applies to that, of the tree or timber and \$250. And
 3 then if section 2 would say, for the person who acts in
 4 good faith, you only get - - - right? You can only get the
 5 treble of the stumpage value because then it would be
 6 obvious that one is punitive and one is not.

7 MR. HUTTER: I'm not sure it's - - - I ~~-----~~
 8 don't think it's - - -

9 JUDGE RIVERA: And the stumpage value - - -

10 MR. HUTTER: I - - - I think - - -

11 JUDGE RIVERA: - - - excuse me - - - treble the
 12 stumpage value would be about compensation.

13 MR. HUTTER: Yeah. Same thing with - - - with -
 14 - - with Judge - - - looking at what Judge Halligan - - -

15 JUDGE RIVERA: But that's my point. That's my
 16 point. That I understand your argument to be, look, the
 17 legislature has identified this as compensation, and
 18 they've balanced off the ~~-----the~~ good actor, the bad
 19 actor, but it's still compensation. And all I'm saying is,
 20 that argument would resonate - - - would, I think, be more
 21 compelling if it was written to reflect that choice.

22 MR. HUTTER: Oh, I - - -

23 JUDGE RIVERA: But it isn't written to reflect
 24 that choice.

25 MR. HUTTER: If you phrase the question the way



1 you did more compellingly, I fully agree. But this is what
2 the legislature wrought~~te~~. They ~~-----they~~ decided at this
3 point that, gee, if you're - - - if you acted in good
4 faith, just pay - - - we're not going to give you the - - -
5 we're not going to give the homeowner the full value.

6 JUDGE CANNATARO: So the only way to salvage the
7 statute by approaching it that way is to undercompensate
8 the property owner for ~~-----for-----for~~ the full value
9 of what they lost?

10 MR. HUTTER: I - - - I think - - - I think that's
11 - - - that's really - - -

12 CHIEF JUDGE WILSON: But ~~-----but-----but~~
13 that's why - - -

14 MR. HUTTER: - - - the whole problem, Your Honor.

15 CHIEF JUDGE WILSON: But that's why I was - - -
16 that's why I was asking about trespass and conversion - - -
17 let's say conversion, particularly. Because if the
18 homeowner could sue for the full value through conversion,
19 why would they ever resort to the statute?

20 MR. HUTTER: Because they - - - they ~~-----they~~
21 have the scienter - - - the scienter aspect.

22 CHIEF JUDGE WILSON: For conversion?

23 MR. HUTTER: I think so - - - common law
24 trespass.

25 JUDGE SINGAS: I guess we're stumped - - -



1 MR. HUTTER: Again - - -

2 JUDGE SINGAS: - - - because we can't - - - we
3 can't really figure out - - -

4 MR. HUTTER: If it is the time now - - - I'm
5 ready to recite Joyce Kilmer if you want.

6 JUDGE CANNATARO: Yeah. That would do a good job
7 - - -

8 JUDGE SINGAS: I mean, honestly, when the intent
9 of an actor is in play, it's punitive in nature. And we
10 can't point to anything else that says otherwise. So no
11 matter what the legislature has called it, and they want to
12 call it compensatory, but if it looks like a duck and it
13 quacks like a duck, then it's punitive.

14 MR. HUTTER: Well, in response to your question,
15 Your Honor, yes, punitive goes on conduct. But when you're
16 tripling stumpage value, you're not tripling conduct - - -
17 you're not based on conduct. It's based upon the economic
18 harm. And I think that goes back to what I was trying to
19 get at, I think, with Judge Cannataro when I went through
20 the legislative history. The ~~the~~ idea back in the
21 eighth - - - turn of the century is that what's a tree
22 worth? And so they - - - roughly, they came up with the
23 stumpage - - - this - - - this trebling damages - - - this
24 trebling damages. And it's fascinating that if you look at
25 state - - - I have my brief, State of Vermont, even Oregon.

1 Oregon adopted their statute based upon the Dudley - - -
2 the Ffield Ceode, which carried over that 1803. And they
3 specifically say, the reason why we're going with this is
4 that, how do you value a tree? This idea about trebling is
5 probably the best way to figure out compensation.

6 JUDGE CANNATARO: That's the Joyce Kilmer
7 argument. Trees are beautiful and pleasing to the eye and
8 they're - - -

9 JUDGE RIVERA: But - - -

10 MR. HUTTER: Yes.

11 JUDGE RIVERA: But - - - but since - - -

12 MR. HUTTER: If can rely on that, I'll - - - I'll
13 - - - I'll rest.

14 JUDGE RIVERA: But since you read 861(1) to only
15 treble the stumpage as opposed to what counsel reads it as
16 both the stumpage and the 250 per tree, you don't
17 necessarily get that as compensation. You get 250 per
18 tree, possibly.

19 MR. HUTTER: Sure. And what Judge Garcia was
20 saying. I may be better off. And that's the other thing
21 which I think negates any punitive aspect.

22 JUDGE RIVERA: Well, that's for - - - all I'm
23 saying is, that's for the judge to decide. So I'm not
24 really clear again on this argument about the compensatory
25 package.

1 MR. HUTTER: What you're looking at - - - this is
 2 - - - again, the legislature is figuring out, how do we
 3 compensate? And they figure the best package would be
 4 stumpage value. First time we have stumpage value. But
 5 they're also recognizing is that that stumpage value with
 6 the factors is kind of vague. It's kind of ambiguous.
 7 Even if we get a ~~-----a~~ jury coming back with a amount, it
 8 may not be sufficient. So they erred on the side of - - -
 9 maybe this is a way of responding to what Judge Halligan
 10 was getting at. They erred on the side of, we will give
 11 treble.

12 JUDGE HALLIGAN: But only if you have bad intent.

13 MR. HUTTER: Yes. But again, that's ~~-----that's~~
 14 going again - - -

15 JUDGE RIVERA: All ~~-----all~~ I'm saying is - - -

16 MR. HUTTER: - - - it's based upon, though - - -
 17 Judge, it's based upon the - - - we haven't - - - it's
 18 based upon the stumpage value, economic loss. It's not
 19 necessarily based upon that conduct. That conduct goes
 20 separately under 2.

21 JUDGE RIVERA: All ~~-----all~~ ~~-----all~~ I'm saying
 22 is, you don't necessarily - - - I'm over here.

23 MR. HUTTER: Okay. I'm sorry.

24 JUDGE RIVERA: All I'm saying - - - that's okay.
 25 Because you're ~~-----you're~~ saying you don't treble the 250



1 per tree, you're not necessarily getting the treble on the
2 stumpage value. And nothing in 861(1) is connected to the
3 actual loss, right? In that way, other than the stumpage
4 value - - - just pure stumpage value in provision 3, which
5 helps understand provision 2. If it's the good faith actor
6 - - - or I shouldn't say good faith - - - the person who
7 owed - - - didn't intentionally seek to steal your trees,
8 right? Or ~~or~~ cut down your trees or otherwise.
9 They're just going to have to pay for the actual cost in
10 sum.

11 MR. HUTTER: Yes.

12 JUDGE RIVERA: That's right?

13 MR. HUTTER: And again, you may question the
14 legislature wisdom on that. That's not the role of the
15 court.

16 JUDGE RIVERA: I'm not questioning any wisdom.
17 I'm not - - - no, I'm not doing that at all. I'm just
18 saying, in terms of the way 1, 2, and 3 are written, your
19 argument, especially since you're saying treble only
20 applies to the stumpage value, it's - - - it's very hard to
21 find a path to your interpretation of the statute given the
22 way these three provisions are written. I understand, of
23 course, the argument you're making.

24 MR. HUTTER: No. I - - - I understand your
25 position, Your Honor. I just respectfully would disagree

1 with that.

2 JUDGE RIVERA: Of course.

3 MR. HUTTER: But again, I'm just figuring out my
4 time is up. Getting back to Judge Garcia, this is a beast
5 of a ~~of a~~ statute. It was a ~~a~~ legislative
6 compromise. And again, digging into that bill jacket, they
7 were concerned about economic harm. How do we best
8 compensate for economic harm? And to do that, they threw
9 in this aspect now of trebling stumpage value. Again,
10 reasonable people may differ on that. That's what - - -
11 obviously, what the legislature did. And they're really
12 going back to the 1803 roots.

13 JUDGE RIVERA: Okay.

14 MR. HUTTER: Unless there are further questions,
15 I'll rest, Your Honor.

16 CHIEF JUDGE WILSON: Thank you.

17 MR. PIERCE: There are ~~there are~~ three
18 things I'd like to say.

19 CHIEF JUDGE WILSON: I was afraid you were going
20 to say there were three branches to your argument.

21 MR. PIERCE: No. Economic harm. That's not what
22 the Appellate Division majority based this decision on.
23 They said it's the intrinsic and aesthetic ~~esthetic~~
24 value. And I'm a tree hugger. I love trees, but that's
25 not economic harm, not at all. And here, I think - - -

1 JUDGE CANNATARO: But Counsel, would you - - -
2 would you agree that when the statute was drafted, the only
3 thing they really could have been thinking about was
4 economic harm? And ~~and~~ I mean that in the sense that
5 this ~~this~~ statement by the Appellate Division, that
6 part of the trees value is its environmental, historical,
7 and aesthetic quality. I ~~I don't~~
8 ~~don't~~ feel like that was in the mind of the legislature
9 when it was drafted. At this time, trees were commodities.
10 The value of the tree was the value of the wood - - -

11 MR. PIERCE: Uh-huh.

12 JUDGE CANNATARO: - - - in the tree. And the
13 value of a horse or dog was in the value of whatever, you
14 know, you could make from them, not ~~not~~ the love or
15 the affection or any of those things. So I ~~I~~
16 wonder if you would agree that your adversary's explanation
17 of what the value is just doesn't jive with what the
18 Appellate Division says the value is.

19 MR. PIERCE: I don't think it does. I don't
20 think it does. And - - - and ~~and~~ ~~and~~ the
21 legislative history, to the extent you want to look at it,
22 would not jive with that.

23 JUDGE HALLIGAN: Can I ask you about - - -

24 JUDGE RIVERA: Well, what is the whole - - - what
25 is all of the language in the legislative history and the

1 focus on forestry and promoting forestry? I mean, it ~~-----~~
2 ~~it~~ may not be about how lovely is a tree, but it's
3 certainly beyond the ~~-----the~~ cost of timber wood.

4 MR. PIERCE: Yeah. They say the enactment - - -
5 and this is from plaintiff's brief - - - the comprehensive
6 bill in 2003 was part of a comprehensive bill intended to
7 deter the illegal taking of trees and timber, compensate
8 owners. The bill jacket says, we want to better enable
9 public and private land owners to discourage timber theft
10 by providing for - - -

11 JUDGE TROUTMAN: So the ~~-----the~~ deter, is that
12 the punitive aspect as opposed to compensating for
13 economic?

14 MR. PIERCE: Both deterring - - - and they talk
15 about penalty levels and sufficient disincentives, language
16 talking about stopping illegal taking and - - - and ~~-----~~
17 ~~and~~ penal in nature. The second thing is - - - that I
18 wanted to say was, you know, we've talked about various
19 values here. Ballpark numbers, they had an expert witness.
20 About \$50,000 stumpage value got trebled to \$150,000 for
21 these trees. Now, when you put it in those kind of numbers
22 that are in this case, that's very punitive. And the last
23 thing I think that I want to say is, you know, you can look
24 at, like, the case - - - Real Property Action and
25 Proceedings Law 853. There might be four things. 853,

1 it's in the same article as 861. And there's a First
 2 Department case that said those treble damages are punitive
 3 in nature, not you, but the First Department said so.
 4 Trial Court did. And the last thing is, you know, these
 5 other state statutes, you don't need to get there. But I
 6 think I've shown in the reply brief that, generally
 7 speaking, all the other states who have timber statutes
 8 with treble damages patterned on New York statute, all
 9 find, like you did in Hobish, that you can't have both
 10 treble and punitive because the treble is punitive in
 11 nature.

12 JUDGE RIVERA: Can I ask that at - - - at the
 13 time of the enactment of the statute - - - and ~~-----~~ and I
 14 know there have been amendments. Was there some
 15 significant theft by mistake, sort of the person who did
 16 not have an interest in actually stealing something that -
 17 - - in other words provision 2, was it really - - - was
 18 there a lot of that going on, if I could put it that way?

19 MR. PIERCE: In this case, Your Honor?

20 JUDGE RIVERA: No. No. Not in this case.

21 MR. PIERCE: Well - - -

22 JUDGE RIVERA: Not in this case. I'm saying - -
 23 -

24 MR. PIERCE: Well - - -

25 JUDGE RIVERA: - - - as general matter - - -

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MR. PIERCE: - - - apparently - - -

JUDGE RIVERA: - - - in terms of what the legislature was concerned with.

MR. PIERCE: Everything about this statute dating back to the early 1800s would suggest that, apparently, there was a fair amount of theft of trees and timber taking - - -

JUDGE RIVERA: Because of the way boundaries - - -

MR. PIERCE: - - - taking place.

JUDGE RIVERA: - - - were drawn or the - - -

MR. PIERCE: Yeah.

JUDGE RIVERA: - - - way title was passed? Okay. Okay.

MR. PIERCE: Yeah. So - - -

JUDGE RIVERA: Thank you.

MR. PIERCE: And here, I'd just ask - - - I'd conclude by saying, I ask you to modify the order appealed from, remand to sSupreme cCourt for the court to delete the provision in the judgment allowing - - - or providing for treble damages. Thank you.

CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)

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C E R T I F I C A T I O N

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Rosbaugh et al v. Twon of Lodi, No. 27 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Brandon Deshawn

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