

STATE OF MAINE

KENNEBEC, ss.

STATE OF MAINE, *et al.*,

Plaintiffs

v.

ROBERT W. TIBBETTS, JR.,
et al.,

Defendants

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-00-43

DECISION AND ORDER

This action was commenced by complaint in March of 2000 by the State of Maine and its Commissioner of Agriculture, Food & Rural Resources against Robert W. Tibbetts, Jr., Darrell L. Tibbetts and Robert W. Tibbetts, Sr. Robert W. Tibbetts, Sr. is the father of brothers Robert W. Tibbetts, Jr. and Darrell L. Tibbetts. The original complaint accused the defendants of violations of the Maine Unfair Trade Practices Act, 5 M.R.S.A. §§205-A-214 (1989 & Pamph. 1998), the Maine Forester Licensing Law, 32 M.R.S.A. § 5019 (1999), the Maine Consumer Solicitations Sales Act, 32 M.R.S.A. §§ 4661-4671 (1999), and the Maine Weights and Measures Law, 10 M.R.S.A. § 2301-2755 (1997 & Supp. 1998). The State sought injunctive and declaratory relief, civil penalties and attorneys fees from the defendants for the violations resulting from defendants' wood harvesting activities.

Filing of that complaint resulted in a consent decree and order of this court dated November 26, 2001. That order contained an injunction with specific requirements for future wood harvesting activities, the payment of restitution in the amount of \$10,000 payable to a fund to be administered and distributed by the Attorney General and costs and attorneys fees in the amount of \$3,000. Finally, the court retained jurisdiction for

purposes of such orders as may be necessary for the construction, modification or enforcement of any provision of the decree. The decree especially states that it, "... constitutes a 'first offense.'"

In December 2004, the plaintiffs brought a motion for relief alleging specific violations by the defendants of the November 2001 consent decree and order and asking this court to award further civil penalties, modification to the permanent injunction, restitution, attorney's fees and costs. After a multi-day testimonial hearing, the court issued its decision and order of January 19, 2006, finding that with respect to specific and various provisions of the consent order and to varying degrees, the defendants had violated the injunction imposed upon them by the November 2001 consent decree and order. By agreement with the parties at the commencement of the testimonial hearing on the merits, any evidence by any party regarding the relief requested by the State would be subject to further hearing once the court had made its decision whether the decree had been violated. This matter is now before the court after hearing on plaintiffs' request for relief found in their motion for relief under the consent decree.

This order will not repeat the findings in this court's decision and order of January 2006. Suffice it to say that all three defendants had made false representations to landowners concerning a number of characteristics of the defendants and the methods of harvesting to be used, some oral by direct representation and some oral and by printed solicitation material through Robert W. Tibbetts, Jr. as agent. The court also found that Robert W. Tibbetts, Jr. conducted activities constituting the practice of forestry services in violation of the Forester Licensing Law without being properly licensed. The court found all three defendants had made oral representation to the landowners that would tend to mislead them about their unconditional right to cancel

home solicitation sales. The court found that Darrell L. Tibbetts failed to provide appropriate wood measurement documents and other violations of the Wood Measurement Rules under the Weights and Measures Law. The court found all three defendants in violation of a requirement addressing specific information required to be included in all written contracts for harvesting with appropriate disclosures and further found defendant Darrell L. Tibbetts in violation of harvesting trees with less than seven days notice and by delivering copies of the signed contract and notification of intent to harvest to the landowner.

The court found Robert W. Tibbetts, Jr. and Darrell L. Tibbetts to have made oral or written representations that misled landowners as to the nature and extent of the harvest, the value and utilization of the wood, and the amount to be paid. Finally, the court found all three defendants to be in violation of the Maine Unfair Trade Practices Act, Maine Foresters Licensing Law, the Maine Consumer Solicitations Sales Act and the Maine Weights and Measures Law.

For purposes of determination of the specific relief requested, the court, of course, relies upon its observations and analysis made at the time of the hearing on the merits as to the culpability of each individual defendant. This analysis by the court as factfinder in hearing all of the testimony, observing the witnesses and considering the exhibits admitted into evidence, is characterized by the court's paragraph from its order of January 2006:

Each defendant was aware of the precise terms of the consent decree by virtue of their signature on the document prior to execution by the court. Robert W. Tibbetts, Jr. specifically and intentionally ignored the terms of the decree. Robert W. Tibbetts, Sr. continued to do business as usual without regard to the decree either through ignorance or negligence. Darrell Tibbetts believed he was in compliance with the decree but was negligent in failing to confirm the practices with the authority responsible for enforcement of its terms. As to a specific defendant with a specific provision of the decree, the culpability as to state of mind is a matter for

consideration at the stage of proceedings for the court to consider the relief requested. Because specific duties were created under the consent decree, a violation is a violation regardless of the state of mind of the defendant and the court must so hold.

The State seeks terms of injunctive relief to put all three defendants out of the wood harvesting business as independent contractors. In essence, the State argues that because the defendants had specific requirements to meet in the consent decree and did not meet those specific requirements, they cannot be trusted to engage in the wood harvesting business in any fashion except harvesting their own stumpage from their own land. This is an extreme sanction. Some defendants are more culpable and untrustworthy than others which is precisely the court's finding as expressed in the quoted paragraph above.

The problems start with the activities of Robert W. Tibbetts, Jr. He prepares and distributes printed brochures making misrepresentations as to the identity of the harvester, information and analysis which by law can only be provided by a licensed forester, and the history, size and capabilities of a nonexistent single harvesting organization believed to be the joint effort of his father and his brother. While, from the beginning, he has disclaimed a legal relationship with his father and his brother, it is clear that the representation is that it is a substantial harvesting organization operating over a large geographic area and with substantial assets.

Robert W. Tibbetts, Jr. formerly was a wood harvester but has become disabled and unable to engage in substantial physical activities. He leaves his brochures in rural mailboxes, posts them on bulletin boards in public offices and otherwise cruises for business. He then refers the contacts to his father, his brother and others. Certainly, the consent decree made him well aware of the statutory provisions governing present day

wood harvesting operations and the court can only conclude that he has intentionally violated the order. Therefore, the extreme sanction is appropriate.

As previously stated, Robert W. Tibbetts, Sr. is essentially retired and only engages in wood harvesting at his convenience. A man in his sixties, he has been harvesting since a very young man and has continued to do so through the enactment of most, if not all, of the legislation presently on the books. As a consequence, he has negligently not modified his practices to conform to present law. He, too, was aware of the provisions of the consent decree and he has obtained the benefit of the improper practices of Robert W. Tibbetts, Jr. but his culpability is the least of the three defendants. While penalties are appropriate, the court finds no reason why he should not be able to continue to act as a small time independent contractor in the wood harvesting business as long as he meets specific requirements to avoid misleading landowners and to assure that his business relationship with Darrell L. Tibbetts is in conformity with the law.

Darrell L. Tibbetts operates a wood harvesting business with the assistance of his wife, Jessica. He has trucks and wood harvesters and other equipment which he uses for land excavation and modification work as an adjunct to his wood harvesting operations. It appears from the evidence, that Darrell and his wife have attempted to comply with the consent decree but still do not understand the importance of a proper written contract, properly delivered to the owner with an understanding of the right to cancel, with a lapse period between contract and harvest affording the owner the opportunity to take a "second look," with provisions in the contract that make it clear he is not a certified professional logger under the statute or a licensed forester and that he not make any misrepresentations or take advantage of representations of others as to the value of the wood at the mill as it stands on the landowner's property. Darrell has made an attempt to educate the owners of the trees on the property and has provided

some information, albeit not correct, as to the value of the various species. He, as well as Robert W. Tibbetts, Sr., play fast and loose with the proper handling of the notice of intent to harvest and the forest management plans as might be existent with the landowner. By the same token, he appears to be negligent in his handling of the paperwork and the payment to the landowner, particularly in the matter of timeliness of payment.

Darrell has trucks capable of hauling harvested trees to the mills. He also has a mechanical harvester. He appears to have a relationship with some mills that assure him a market for the wood he has harvested. While there is some evidence that owners were misled in knowing the identity of the true party harvesting the wood, the State wishes the court to make a leap in inference finding that the activity of Darrell in entering into separate contracts with other harvesters for transportation of the wood to the mill, rental of the mechanical harvester and utilizing his relationship with the mill to obtain the best possible price is per se violation of the consent decree. It is true that the law clearly requires the true identity of all parties in a wood harvesting operation and appropriate records to substantiate that identification. To the extent Darrell presents wood to a mill, prepares paperwork and accepts payment in his own name for wood that was harvested by another from land from another, that is clearly an unacceptable practice.

The State presents the testimony of Steven Knockwood who is a former employee of Darrell L. Tibbetts. He is an independent wood harvester who testified that about half of the jobs he performed in the year 2005 were from contacts made by Robert W. Tibbetts, Jr. and that he compensated Robert W. Tibbetts, Jr. for that solicitation. He further testified that he rented from Darrell L. Tibbetts, on occasion, a mechanical harvester with operator for which he compensated Darrell L. Tibbetts. He

further testified that he entered into agreements with Darrell L. Tibbetts to haul timber from many of his jobs to the mill. Finally, he testified that he utilized the experience, knowledge and relationships of Darrell L. Tibbetts as to disposition of the harvested wood. In such cases, Darrell L. Tibbetts handled the payments from the mills. Further, he testified he uses a price sheet similar to that used by Darrell L. Tibbetts.

Since the consent decree, Mr. Knockwood had a contract for a harvest on the property of an elderly Massachusetts resident. The contract was finalized by his visit to her home. While admitting that he harvested the wood in October and November of 2005, he did not start making payments to her until late February of 2006. The scale slips utilized in the transaction identify Darrell L. Tibbetts as the contractor and Mr. Knockwood as the crew.

The court finds nothing suggesting culpability under the consent decree of Darrell L. Tibbetts by virtue of his activities with Mr. Knockwood on this particular operation except for his accepting the payment on paperwork in his name. The merits of the violation are not before the court at this time because they have not been properly pled. The State presented the evidence in an attempt to establish that notwithstanding this court's finding as result of the hearings on the merits, it should find that Darrell L. Tibbetts' violations of the consent order were intentional. Bringing forward such evidence after the substantive evidence of the violations has been determined in an attempt to change the finding by the court is not proper procedure. The Knockwood contract was not pled, was not presented at the time of the hearing on the merits and attempting to grandfather a new cause of action after the law of the case has been established is a questionable practice.

The State asks the court to permanently enjoin Robert W. Tibbetts, Jr. and Darrell L. Tibbetts from engaging in any wood harvesting services except on their own

property, entering into any agreement with owner of property to purchase and harvest timber on a landowner's property or soliciting timber harvesting business on their own behalf, or requesting and receiving any stumpage or timber payments on behalf of someone other than themselves from any mill or wood buyer. As expressly previously stated, the court believes that these provisions are appropriate with respect to Robert W. Tibbetts, Jr. The court believes the provision regarding requesting or receiving stumpage or timber payments directly or indirectly on behalf of someone other than themselves for any mill or wood buyer for harvested timber is appropriate.

Correspondingly, the State asks the court to permanently enjoin Robert W. Tibbetts, Sr. from engaging in any timber harvesting activities as an independent contractor except on his own property which the court is not willing to do. The court does believe that he should be enjoined from engaging in any sales or other activities with Robert W. Tibbetts, Jr. given the history of this case and any relationship with Darrell L. Tibbetts for transportation of harvested wood must necessarily be the subject of a separate written contract specific to that purpose and must mandate that all associated paperwork regarding payment for the timber be in conformity with the law as to the landowner and the wood harvester. In that regard, the court does not see anything inappropriate in requiring Robert W. Tibbetts, Sr. to have all checks received for harvested timber made payable to the landowner. He is free to enter into contracts regarding the manner in which he would receive compensation from the landowner provided the landowner receives the benefit of the gross sale..

Counsel for Darrell L. Tibbetts requests the court to consider an expiration date with respect to any injunction remaining as the result of this proceeding. The court does not believe that would be appropriate, however, inasmuch as the court retains jurisdiction on any injunctive order, there is nothing to prevent Darrell L. Tibbetts from

petitioning the court for modification of a permanent injunction based upon evidence of good faith compliance with all its terms over a reasonable period of time.

The court is satisfied that Robert W. Tibbetts, Jr. has intentionally or with gross disregard for the law committed six violations of the Unfair Trade Practices Act and will assess a \$3,000 civil penalty for each violation. In addition, Robert W. Tibbetts, Jr. has unequivocally been placing value on standing timber without a proper license and for that must be assessed a civil penalty of \$10,000.

The court has found that Robert W. Tibbetts, Sr. committed four violations of the Unfair Trade Practices Act and assesses a civil penalty of \$1,000 for each violation. In addition, Robert W. Tibbetts, Sr. violated the provisions of the Weights and Measures Law as a second violation and imposes a \$2,000 civil penalty in that regard.

Under the Weights and Measures Law, the State asks the court to order restitution including both actual damages and liquidated damages of twice the amount of the actual damages. It references 10 M.R.S.A. § 2368(2). The requests for liquidated damages of twice the amount of actual damages, the State believes, results from a cross referencing 10 M.R.S.A. § 2368 to 26 M.R.S.A. § 626-A. Title 26 M.R.S.A. § 626-A is a provision in the employment law calling for liquidated damages of twice the amount of unpaid wages or benefits in the event an employer improperly handles the wages and benefits of an employee. It also has some specific monetary penalties. The court does not agree with the State that the cross-reference authorizes this court to impose liquidated damages of twice the amount of actual damages because section 626-A clearly relates to wages. Notwithstanding this court's previous experience in this

regard, it does not believe that the cross-reference authorizes the court to impose double damages.¹

The court has found that Darrell L. Tibbetts committed seven violations of the Unfair Trade Practices Act. As stated, the court believes that this was sheer negligence on the part of Darrell and his wife, Jessica, and will impose a civil penalty \$2,000 for each violation. The court has also found that Darrell Tibbetts violated the Weights and Measures Laws in his handling of the mill payments and paperwork, but more specifically in his improper use of a conversion factor which was expressly prohibited by law except under specific circumstances. The court imposes a civil penalty of \$3,000 in that regard.

The State argues that certain landowners who testified at the hearing on the merits are entitled to restitution. Two of the landowners testified in regard to the value lost in their contract with the defendants using the statement that they "would not have entered into the contract with Darrell L. Tibbetts if they thought they would receive less than" a specific sum of money. The State wishes the court to find that to be credible testimony by property owners of the value of their property. It is clear that under our law a property owner is qualified to render an opinion as to the value of his or her property. Notwithstanding that qualification, the landowner must still provide some foundation for that opinion whether it is based upon evidence of cost of purchase, assessed valuation for tax purposes, previous offers or the like. Simply stating that they would not have entered into a contract accept for a certain amount primarily based upon improper misrepresentations made to them by a nonlicensed forester does not

¹ The State references in this regard *State of Maine v. Michael Turner*, Ken. Sup. Ct. Dkt. No. AUGSC-CV-2002-229 in which this court imposed double damages in its order under the authority of cross-reference to 26 M.R.S.A. § 626-A. Such is the peril that lies in a court accepting a proposed order in a default judgment circumstance without independently examining the authority for such an order. Had the court closely examined 26 M.R.S.A. § 626-A it would have seriously questioned, as it has here, its authority to award double damages.

have sufficient credibility to cause this court to order restitution based upon those values expressed. Therefore, the court declines, in effect, to enforce the terms of a quasi-contract under the provisions of the Weights and Measure Law as it applies to wood harvesting. Again, in any event, liquidated damages of twice the amount is not statutorily authorized.

However, one landowner testified that he only received \$780 for the timber harvest on his five-acre property and to substantiate a loss he hired a licensed forester to conduct an appropriate evaluation cruise at an expense of \$400. The forester's opinion was that the value of the harvested timber was approximately \$4,603.98. While the forester testified that he believed this was a conservative estimate, it is also true that he did not know what the price at the mill was for that particular time after an evaluation by the mill of the quality of the wood delivered. Nevertheless, this is true credible testimony as to value and the law allows the landowner to receive restitution of the cost of the appraisal as well. Therefore, Mr. Grenier, the landowner, is entitled to a restitution award against Darrell L. Tibbetts and Robert W. Tibbetts, Jr. in the amount of \$4,223.98 made up of the value of the timber harvested less the amount actually received plus the cost of the forester appraisal.

The State asks for restitution for another landowner who testified that his property had been damaged by skidders and that a 15-foot pile of brush remained on the property. The State believes the testimony would support a minimum order of \$1,000 restitution against Robert W. Tibbetts, Sr. to allow the landowner "to attempt to restore his property to a more manageable state." Any relief requested must be based upon real evidence established to a probability. Simply providing an arbitrary figure of \$1,000 as a "minimum" would not be a proper action of this court.

There was evidence that Darrell L. Tibbetts harvested property of a landowner which violated a previously established forest management plan under the Forestry Statute. The landowner was required to incur a cost of \$300 to correct that action by Darrell L. Tibbetts and the court finds that he is entitled to restitution in that amount.

The amounts of restitution ordered are subject to pre-judgment interest from December 10, 2004, the date of filing of the motion for relief, and post-judgment interest in accordance with 14 M.R.S.A. §§ 1602-B and 1602-C. In addition, under the provisions of 14 M.R.S.A. § 1522(1)(A), the State is allowed court costs, reasonable attorneys fees and reasonable expert witness fees for any proceedings taken under 5 M.R.S.A. § 209, the Unfair Trade Practices Act.

It is hereby ORDERED:

(1) Defendant Robert W. Tibbetts, Jr. is permanently enjoined and prohibited from:

(a) engaging in timber harvesting services, either directly or indirectly, on any property in Maine, except his own;

(b) entering into any agreement with any owner of property in Maine to purchase and/or harvest timber on a landowner's property;

(c) soliciting timber harvesting business on his own behalf or on behalf of any other persons by printed advertisements or direct contact (e.g., personal, mail, express mail, electronic mail, or telephone) with consumers or potential consumers; and

(d) requesting or receiving any stumpage or timber payments, directly or indirectly, on behalf of someone other than himself from any mill or wood buyer for harvested timber.

(2) Defendant Robert W. Tibbetts, Sr. is permanently enjoined and prohibited from:

(a) entering into and conducting timber harvesting under any agreement with any owner of property in Maine unless it specifically requires payments for harvested wood sold to be made directly to the landowner by the mill or the purchaser of the harvested wood;

(b) entering into any agreement with Darrell L. Tibbetts for transportation of harvested wood without expressed terms in writing and limiting compensation to Darrell L. Tibbetts to a trucking fee;

(c) entering into any wood harvesting agreement the form and required information which has not been approved by the Office of the Attorney General;

(d) engaging in any wood harvesting activities within seven (7) days of execution and delivery to the owner of a written contract in accordance with the Consumer Solicitations Sales Act;

(e) entering into any wood harvesting agreement without express notice to the landowner of right to cancel;

(f) engaging in any practices limited to a licensed forester without being so licensed.

(3) Darrell L. Tibbetts is permanently enjoined and prohibited from:

(a) engaging in any activities limited to a licensed forester without being properly licensed;

(b) entering into any wood harvesting agreement that does not expressly contain notice to the landowner of a right to cancel;

(c) engaging in any wood harvesting activities within seven (7) days of execution and delivery to the owner of a written contract in accordance with the Consumer Solicitations Sales Act;

(d) complying in full with the requirements of the Maine Forest Service regarding intent to harvest on all property harvested by him;

(e) utilizing any price list that has not been substantiated by the Maine Forest Service and containing a disclosure of the variation that may occur by the buyer's evaluation as to quality and value;

(f) entering into and conducting timber harvesting under any agreement with any owner of property in Maine unless it specifically requires payments for harvested wood sold to be made directly to the landowner by the mill or the purchaser of the harvested wood;

(g) engaging in any timber transportation services with any wood harvester without a written contract spelling out the terms and assuring that the wood delivered under said contract is done so in the name of the harvester and the landowner;

(h) renting any wood harvesting equipment to others without a written contract specifically spelling out the terms of the rental of equipment and operator without regard to any compensation based upon the wood harvested.

(4) Judgment for plaintiffs against defendant Robert W. Tibbetts, Jr. for \$18,000 civil penalty under the Uniform Trade Practices Act and \$10,000 civil penalty under the Maine Forester Licensing Law.

(5) Judgment for plaintiffs against defendant Robert W. Tibbetts, Sr. for \$4,000 civil penalty under the Uniform Trade Practices Act and \$2,000 as civil penalty under the Maine Weights and Measures Law.

(6) Judgment for plaintiffs against defendant Darrell L. Tibbetts in the amount of \$14,000 as civil penalty under the Uniform Trade Practices Act and \$3,000 as civil penalty under the Maine Weights and Measures Law.

(7) Judgment for plaintiffs against defendant Robert W. Tibbetts, Jr. and Darrell L. Tibbetts, joint and severally, in the amount of \$4,223.98 as restitution on behalf of Steven Grenier.

(8) Judgment for plaintiffs against defendant Darrell L. Tibbetts in the amount of \$300 as restitution on behalf of Thomas Cremona.

(9) Plaintiffs shall recover prejudgment interest on orders of restitutions at the rate of 4.28% commencing with the date of filing of motion for relief, December 10, 2004, and post-judgment interest at the rate of 10.36%.

(10) In accordance with the provisions of 14 M.R.S.A. § 522(1)(A), the plaintiffs are allowed their costs, reasonable attorneys fees and reasonable expert witness fees to be determined upon filing appropriate affidavits with the court with proper notice to the defendants.

(11) All injunctive provisions of the consent decree and order of November 26, 2001 remain in full force and effect.

The clerk may incorporate this order in the docket by reference pursuant to M.R. Civ. P. 79(a).

Dated: JANUARY 2, 2007



Donald H. Marden
Justice, Superior Court