Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-319

MAY TERM, 2021

Paul Epsom* & Kristine Kelley* v. David S. Crandall & Mark Johnson	}	APPEALED FROM:
	}	Superior Court, Windsor Unit, Civil Division
	}	DOCKET NOS. 429-9-15 Wrcv & 503-10-16 Wrcv
		Trial Judge: Robert P. Gerety, Jr.

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

Plaintiffs appeal from the trial court's denial of their request for an award of interest running from the date of a jury verdict in their favor. We affirm.

This is the second appeal in this timber-trespass case. The jury returned special verdicts in plaintiffs' favor on April 2, 2018. Following the verdicts, the court issued a ruling on April 4, 2018, indicating that plaintiffs would be entitled to a judgment against defendant Crandall, the adjoining landowner, for the actual damages found by the jury ($19,500) plus a $1000 civil penalty, for a total of $20,500. It rejected plaintiffs' request for treble damages against Crandall. The court concluded that plaintiffs were also entitled to the entry of final judgment against defendant Johnson, the logger hired by Crandall, in the amount of total actual damages, $19,500. Crandall was required to indemnify Johnson. The court indicated that it would prepare a proposed final judgment order consistent with its decision and would serve it on the parties, who would have an opportunity to file written objections.

Plaintiffs then filed various motions, including a motion for a new trial, judgment notwithstanding the verdict, a request for additional damages and costs, reconsideration of the treble-damages conclusion, and a request for prejudgment interest. Plaintiffs mistakenly labeled April 4, 2018, as the "date of entry of judgment," and they sought prejudgment interest from the date of a mill receipt for the cut timber (September 24, 2014) to the date of the entry of judgment.

On August 28, 2018, the court denied plaintiffs' requests, with the exception of their request for costs. It concluded that plaintiffs were not entitled to prejudgment interest because the damages were not readily ascertainable and because plaintiffs failed to show how their financial position was harmed by defendants' tortious conduct such that prejudgment interest was necessary to restore them to the position they enjoyed before the tort. See Smedberg v. Detlef's Custodial Serv., Inc., 2007 VT 99, ¶ 39, 182 Vt. 349 ("Prejudgment interest on compensatory damage awards is meant to restore—to the extent possible—harmed plaintiffs to the financial position they would have enjoyed but for the tort . . . .").

The following day, Crandall's insurer sent a check to plaintiffs for $22,948, representing the damages and penalty plus costs, which plaintiffs refused. The court issued a final judgment order on September 7, 2018.

Plaintiffs appealed, challenging among other things the denial of their request for prejudgment interest running "from the time between the date of the mill receipt [(in late 2014)] and the date of entry of judgment." Epsom v. Crandall, 2019 VT 74, ¶ 37, 211 Vt. 94. We rejected their argument and affirmed the trial court's decision.

Following our decision, plaintiffs wrote to defendants' counsel requesting payment including interest running from April 4, 2018—the date of the trial court's order following the jury verdict—to the date of plaintiffs' post-appeal letter. Defendants refused, explaining that post-judgment interest did not begin to run until entry of the final judgment order in September 2018 and they did not owe any post-judgment interest because they tendered full payment to plaintiffs on August 29, 2018. Defendants mailed plaintiffs another check, which plaintiffs refused.

Plaintiffs then filed a motion with the court, arguing that they were entitled to interest running from the date of the jury verdict—April 2, 2018—to the present. Defendants opposed their request. The court denied the motion, agreeing with defendants that the question of plaintiffs' entitlement to prejudgment interest had been litigated and decided against plaintiffs in 2018 and affirmed on appeal; it concluded that plaintiffs were not entitled to post-judgment interest because defendants had tendered full payment to them in August 2018. This appeal followed.

On appeal, plaintiffs reiterate their argument that they are entitled to interest running from the date of the jury verdict. They contend that their damages became liquidated either on that date or on April 4, 2018, when the court issued a ruling that included a proposed final judgment order. Based on their argument that interest began to run from April 2018, plaintiffs contend that Crandall's tender on August 29, 2018, was not full payment and it did not stop interest from accruing.

We find no error. The question of plaintiffs' entitlement to prejudgment interest—that is, interest accruing up to the point of entry of judgment—was litigated and decided against them by the trial court in 2018 and affirmed by this Court in 2019. "It is a rule of general application that a decision in a case . . . of last resort is the law of that case on the points presented throughout all the subsequent proceedings therein, and no question then necessarily involved and decided will be reconsidered by the Court in the same case on a state of facts not different in legal effect." Coty v. Ramsey Assocs., Inc., 154 Vt. 168, 171 (1990) (alteration in original). Plaintiffs' request for prejudgment interest running from the fall of 2014 necessarily included the period from the verdict to entry of judgment. It would make no sense to seek or award prejudgment interest only up to the date of the court's April 4 ruling, as plaintiffs suggest they did in 2018. In fact, their initial request for prejudgment interest shows that they sought prejudgment interest up to the date that they mistakenly believed judgment was entered. This makes sense; the award of prejudgment interest is governed by Vermont Rule of Civil Procedure 54(a) which provides that a "judgment" "include[s] the principal amount found to be due, all interest accrued on that amount up to and including the date of entry of judgment, and all costs allowed to the prevailing party." (Emphasis added.) To the extent that plaintiffs believed they have a stronger claim for prejudgment interest running only from April 2 or April 4, 2018, rather than beginning in the fall of 2014, they should have raised such argument in their initial request for prejudgment interest. They cannot do so now. See Havill v. Woodstock Soapstone Co., 2007 VT 17, ¶ 10, 181 Vt. 577 (mem.) (concluding that because defendant failed to raise various arguments concerning award of prejudgment interest in

first appeal, "the issues were therefore waived" based on "principle that appeals may not be prosecuted in a piecemeal fashion").

Given our conclusion, it follows that plaintiffs are not entitled to post-judgment interest. No post-judgment interest accrued because Crandall tendered the full amount due on August 29, 2018, without conditions. See EBWS, LLC v. Britly Corp., 2007 VT 37, ¶ 36, 181 Vt. 513 (explaining that, "when damages are liquidated or reasonably certain," a "defendant can avoid the accrual of interest by simply tendering to the plaintiff a sum equal to the amount of damages" (quotation omitted)); Perkins v. Factory Point Nat'l Bank, 137 Vt. 577, 581 (1979) ("A tender, to be effective, must be without conditions."). Crandall provided plaintiffs the opportunity to avoid the loss of the use of their money; plaintiffs declined that opportunity. See Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 834-35 (1990) (explaining that "policy underlying the [federal] postjudgment interest statute[is]compensation of the plaintiff for the loss of the use of the money" and concluding based on plain language of federal statute that post-judgment interest runs from date of entry of judgment not date of verdict). Plaintiffs state that they were concerned about the effect accepting the check would have on their appeal. Their concerns do not establish that Crandall made a conditional tender of the amount owed and plaintiffs offer no legal support for their assertion that Crandall was obligated to include the words "without prejudice" to render his tender unconditional.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

William D. Cohen, Associate Justice