Supreme Court No. 91511-3
(Court of Appeal No. 316611 (consolidated with #318257)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ROY A. AMES and RUBYE M. AMES, Respondents

v.

WESLEY B. AMES; AMES DEVELOPMENT CORPORATION, and Oregon Corporation; and STANLEY R. AMES, individually; and MERITA L. DYSART, individually, Petitioners

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PETITIONERS' REPLY TO RESPONDENTS' ANSWER

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A. ARGUMENT IN REPLY TO RESPONDENTS' ANSWER

1. Filing of Amended Petition for Review

In arguing against acceptance of Petitioner's Amended Petition for Review, Respondents misstate the facts relating to filing of Petitioner's Amended Petition for Review, and incorrectly attempt to elevate a one day delay in service of the Petition due to a problem with internet connectivity into a willful violation of the Court's filing schedule.

Petitioner's Amended Petition for Review was filed on May 4, 2015 in the Court of Appeals, Division 3 to be forwarded to this Court. Prior to filing the Amended Petition for Review in the Court of Appeals, Wesley Ames telephoned the Clerk, spoke with the case manager for Appeal No. 31661, and specifically inquired whether filing the Amended Petition with the Court of Appeals on May 4, 2015 would satisfy this Court's requirement for the Amended Petition to be filed by May 4, 2015, or whether the Amended Petition would need to be filed directly in this Court. After seeming to confer with someone else in the Clerk's Office, the case manager assured Wesley Ames that filing the Amended Petition in the Court of Appeals was acceptable and would satisfy the filing date requirement set by this Court.

In reliance on that assurance from the case manager, Wesley Ames filed the Amended Petition in-person at the Court of Appeals, Division 3

in Spokane, Washington on May 4, 2015, and the Amended Petition was duly forwarded to this Court and was received by this Court on May 7, 2015. Wesley Ames believes the filing date of May 4, 2015 is shown by the receipt stamp affixed by the Clerk's Office of the Court of Appeals. If the assurance Wesley Ames received from the Court of Appeals case manager was incorrect, it would be unfair to penalize Petitioners for the error.

On May 4, 2015, immediately prior to leaving to file the Amended Petition in the Court of Appeals, Wesley Ames attempted to send a service copy of the Amended Petition to Chris Montgomery, counsel for Respondents. Unknown to Wesley Ames at that time, the service email was unsuccessful. Wesley Ames did not discover the email failure until the following day, May 5, 2015, when he attempted to print out a copy of the service email for the file and was unable to find it. As a result, Wesley Ames prepared a Corrected Certificate of Service and re-served the Amended Petition via email to Respondents' counsel. In the service email on May 5, Wesley Ames specifically informed Respondents the service email which was attempted on May 4 did not go through successfully. See Ex. 1.

Wesley Ames current residence is in a rural area where the signal for internet service is sometimes inconsistent. Occasionally, internet service

is lost, resulting in communications failure. Such internet connection failure is the most likely reason for the service email failure on May 4, 2015.

Respondent' assertion Wesley Ames did not provide any explanation for the one-day service delay was knowingly false as shown by the email attached as Ex. 1.

Thus, Petitioners respectfully submit the Amended Petition should be accepted and considered by the Court.

2. Decision on Bond Forfeiture was Incorrect

As discussed in Petitioners'/Appellants' initial brief on appeal, the trial court's forfeiture of a portion of the bond posted by Petitioners was incorrect, being contrary to the purposes of such bonds.

Throughout their argument, Respondents lean heavily on their assertion (also indicated by the Court of Appeals) that Petitioners did not challenge the trial court's findings of fact. That assertion is patently incorrect.

Petitioners/Appellants did not specifically assign error to the trial court's findings of fact, because the trial court's erroneous findings of fact were subsumed within the trial court's erroneous decisions concerning bond forfeiture (and concerning timber harvest.(i.e., the same situation exists with respect to the trial court's findings of fact relating to logging).

Petitioners/Appellants did assign error to the trial court's erroneous decisions and did discuss particularly notable factual errors by the trial court. In particular, Petitioners/Appellants discussed the process leading to cancellation of the log sales contract by the timber company, Vaagen Brothers.

Respondents plainly misrepresent the facts, alleging Petitioners "contacted the timber company to inform it of the litigation." Petitioners' Ans. At 10. To the contrary, Petitioners only discovered the existence of the log sales contract through the discovery process, obtaining a copy in document production. That contract indicated an intent by Respondents to sell 500,00 board feet (500 mbf) of timber from the Farm, not the 19,000 board feet (19 mbf) authorized by the trial court, and showed a dramatically inflated logging cost.

Petitioners had no reason at that point to believe Respondents would have deceived the timber company by deceitfully withholding the information that the property was the subject of litigation which would affect logging rights. Petitioner Stan Ames contacted the timber company in follow-up informal discovery to attempt to obtain additional information about the logging contract and logging arrangements by informal discovery, without the need for a third party subpoena and deposition.

Petitioners were surprised to learn that Respondents had entered a log purchase contract with a timber company in the middle of litigation concerning the subject property without informing the timber company of the litigation. The timber company cancelled the log purchase contract due to Respondents' deceitful concealment of the litigation, not due to any of Petitioners' actions. That is, it appears the timber company would have cancelled the contract no matter how they learned about the litigation. Thus, Petitioners did not cause the contract cancellation, and should not have been penalized for the results of Respondents' astonishing lack of ethical behavior toward the timber company.

3. Invited Error

While the Court of Appeals opinion is not the epitome of clarity on the application of invited error, it appears the Court of Appeals used invited error as a basis for justifying application of judicial estoppel.

As Petitioners pointed out in the Amended Petition, judicial estoppel could not properly be applied, and the doctrine of invited error cannot serve to save judicial estoppel.

As Petitioners set out in the Amended Petition, the relevant cases on the doctrine of invited error establish, *inter alia*: (1) that participation by a party in an improper process before the trial court under duress or as the only mechanism to mitigate the damaging effects of the court's error (as in

this case) does not constitute invited error, and (2) a party's attempts to have the trial court correct an error negates application of the doctrine of invited error.

With respect to the cases Petitioners cited concerning negating of invited error, Respondents deceptively misrepresent the cited cases *City of Seattle v. Patu*, 58 P.3d 274, 274, 147 Wn.2d 717 (2002) and *State v. Studd*, 137 Wn.2d 533, 552-553, 973 P.2d 1049 (1999). For example in *State v. Studd*, this Court ruled the doctrine of invited error did not apply to those parties who attempted correction in the trial court, i.e., parties Ameline and Fields. *Id.* In *City of Seattle v. Patu*, this Court referenced *State v. Studd*, specifically noting the distinction between attempted correction of an error through a corrective jury instruction (doctrine of invited error does not apply), and complaining of an erroneous instruction which the party had requested (doctrine of invited error does apply). *City of Seattle v. Patu*, 58 P.3d at 274.

In the present case, Petitioners did request correction through their motions for reconsideration, but the trial court refused to correct its own prior error.

Thus, as set out in Petitioners' Amended Petition and herein, the ruling of the trial court and the Court of Appeal is in conflict with prior decisions of this Court and Appeals Courts with respect to judicial

estoppel and the doctrine of invited error. Thus, this Court should properly consider this matter.

In addition, correct application of the doctrine of invited error presents an issue of substantial public concern in the conduct of litigation in this state. For this additional reason, this Court should review this case.

4. Trial Court Allowed Timber Waste Contrary to Prior Decision of this Court and Good Public Policy

This Court's consideration of the trial court's error concerning waste and timber harvest is fully proper and of the Court of Appeals affirmation of that trial court error, both because of conflict between the decisions of this Court concerning waste and because the decisions of the lower courts conflict with sound policy on a matter of substantial public interest.

First, the matter is of substantial public interest because the decisions of the courts below promote grossly exploitative timber harvest by life tenants, completely disregarding any values of forest other than timber harvest. Thus, values of wildlife habitat, plant diversity, and aesthetics are discarded by the lower courts in favor of solely timber harvest dollars.

While valuing timber harvest over all other forest values may have been accepted in an earlier era when the forests in this country and this state seemed limitless, that approach has, more recently, been recognized as grossly flawed. In particular, the citizens of this state and public policy

now recognize the importance of the other forest values.

This Court does not appear to have previously determined what constitutes timber waste by life tenants and what is allowable conduct by life tenants with respect to forested areas on a farm. Petitioners respectfully submit that this Court should not allow the propagation of the flawed, outdated approach adopted by the Court of Appeals in their precedential opinion in this case. Instead, this Court should accept this opportunity to address the issue of timber waste and forest use by life tenants. This Court can thereby establish a precedent for life tenants consistent with sound public policy recognizing forest values other than exploitation dollars, instead of promoting mere commercial exploitation of forested areas.

In furtherance of its decision promoting commercial exploitation of forested areas by life tenants, the Court of Appeals simply refused to admit the obvious fact that the trial court opened the door to massive logging by Petitioners. As pointed out to the Court of Appeals and in Petitioners' Amended Petition, Petitioners have already cut almost 1/3 of the timber on the Farm under the guise of "necessary thinning", and are eagerly poised to remove another 1/3 of the timber (consisting of all of the lodgepole pine and all of the grand fir) if the logging stay is lifted. The result will be removal of 2/3 of the timber from the Farm, with the amount

of residual timber continuing to decrease due to the 19 mbf/year allowed even after the prior massive logging.

The Court of Appeals refused to recognize these plain facts. Instead, the Court of Appeals seemed to disregard these facts, stating that Petitioners exaggerated in referring to the logging allowed by the trial court as massive logging. In view of this dismissal by the Court of Appeals of these operative facts, the Court of Appeals' statements with reference to Petitioners' logging should be given no weight.

In summary, the logging authorized by the lower courts conflicts with prior decisions of this Court concerning timber waste, with persuasive authority from other jurisdictions on an issue not adequately addressed in decisions of this Court and the Courts of Appeals, and with sound public policy. Therefore, Petitioners respectfully submit this Court should accept review in order to correct precedent for future cases consistent with sound public policy and with current views in this state with respect to logging by life tenants.

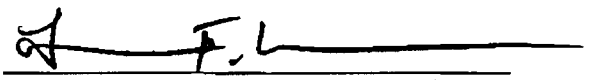
B. CONCLUSION

The errors by the courts below in this case are particularly problematic because the Court of Appeals decision was published and is therefore precedential. Allowing the Court of Appeals decision to stand

will propagate the errors into future cases. This Court now has the opportunity to correct the lower court error on matters which have not been adequately addressed in prior cases.

Thus, Petitioners request this Court to accept Petitioners' Amended Petition and review the Court of Appeals decision in this case.

Submitted this 24th day of June, 2015



THOMAS F. WEBSTER, WSBA # 37325
Attorneys for Petitioners Stanley R. Ames, Ames Development Corp., and Merita L. Dysart

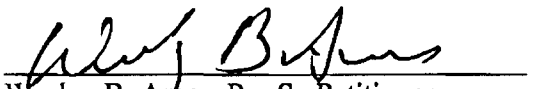


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EXHIBIT 1

Gmail by Google

wesley ames <wbames@gmail.com>

Appeal 316611 (WASC 91511-3)

wesley ames <wbames@gmail.com> Tue, May 5, 2015 at 5:23 PM
To: Chris Montgomery <mlf@cmlf.org>
Cc: wesley ames <wbames@gmail.com>

Chris,
Attached is the Amended Petition for Review filed yesterday. It appears the email yesterday did not go through successfully, so I am sending again today with a corrected certificate of service. As before, the signature pages are in a separate file, as are the Appendices.

Kindly confirm receipt by email reply. If you have any questions, let me know.
Wesley Ames

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7 attachments

20150504 PetReview_Amend2_WASC.pdf
78K

20150504 PetRev_Amend2_sig.pdf
34K

20150505 PetRevAmend2_CorrCOS.pdf
14K

20150504 PetAmendReview2Cover_TC_TA.pdf
9K

20150504 App3 Appellants' Brief.pdf
1168K

20150504 App1 Decision.pdf
1588K

20150504 App2 ord den rec.pdf
90K

CERTIFICATE OF SERVICE

I certify that, on June 24, 2015, I served the attached REPLY TO RESPONDENTS' ANSWER on Respondents Roy A. Ames and Rubye Ames by delivering a copy to Chris A. Montgomery, attorney for Defendants/Respondents, via email addressed to mlf@cmlf.org.

Randi Reagles

OFFICE RECEPTIONIST, CLERK

To: Randi Reagels
Subject: RE: Ames v. Ames - No. 91511-3 (No. 31661 consolidated with No. 318257)

Received 6-24-15

From: Randi Reagels [mailto:Randi@websterlawoffice.net]
Sent: Wednesday, June 24, 2015 3:04 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: mlf@cmlf.com; Tom Webster; wesley ames; jeanne@cmlf.org
Subject: FW: Ames v. Ames - No. 91511-3 (No. 31661 consolidated with No. 318257)

Dear Clerk,

Attached please find:

(1) Petitioner's Reply to Respondent's Answer.

Thank you,
Randi

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