No. 316611 (consolidated with No. 318257)

COURT OF APPEALS, DIVISION 3
OF THE STATE OF WASHINGTON

Roy A. Ames, Respondent,
and
Rubye M. Ames, Respondent,
v.
Wesley B. Ames, Appellant,
Ames Development Corp., Appellant,
Stanley R. Ames, Appellant,
and
Merita Dysart, Appellant

APPELLANTS' REPLY BRIEF

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III. ARGUMENT IN REPLY

A. The de novo standard of review applies to grants of equitable relief.

Whether equitable relief is appropriate is a question of law which courts review de novo. *Niemann v. Vaughn Cmty. Church*, 154 Wn.2d 365, 375, 113 P.3d 463, 467, (2005). While courts will review the fashioning of equitable relief for abuse of discretion, *see id,* the issue in the present case involves the question of whether or not a court may use its equitable powers to grant massive logging rights to life tenants in the absence of any evidence that this was intended at the time of the creation of the life tenancy. This is a question of law which this Court should review de novo.

B. The trial court erred by including terms in the life estate for which there was no evidence of intent at the time of the agreement in 1996.

A party's interest in real property is fixed at the time it is acquired. *See Beam v. Beam*, 18 Wn. App. 444, 452, 569 P.2d 719 (1977). The trial court in the present case correctly ruled that in 1996, Respondents Roy and Rubye Ames intended to sell their farm to their sons, Appellants Stan and Wes Ames[1], reserving a life estate for themselves. The evidence presented around the formation of that agreement and the parties' conduct

[1] For ease of reference, this brief will again use the parties' first names.

for fifteen years following the agreement demonstrate that what was intended was a life estate with limited logging rights.

1. *The admissible evidence presented at trial did not support the granting of extensive logging rights to Roy and Rubye.*

After Roy and Rubye made the tactical decision to abandon their request for a life estate, Stan and Wes and made a clear request for the relief of a life estate with limited logging rights for Roy and Rubye. CP at 206. At trial, Roy and Rubye's counsel acknowledged the necessity of presenting evidence related to Stan and Wes' counterclaim. Tr. at 427 (ln 4-6). Despite this acknowledgement, Roy and Rubye presented no admissible evidence that would justify the court's granting them massive logging rights. Roy and Rubye presented almost no evidence related to the level of logging intended in the agreement between the parties. Roy and Rubye's conclusory statements in response to leading questions that they intended to control the logging were not evidence of what level of logging was intended. Rubye testified that the sale to Stan and Wes "included the logs." Tr. at 502. Stan Ames testified in great detail about the negotiations which led to the 1996 agreement. *See* Tr. at 808-811. In particular, Stan testified that the intent was to include "minimal logging" rights for Roy and Rubye. Tr. at 811. The idea was that Roy and Rubye would enjoy the farm as long as they could and would use it as they had in

the past. *Id.* When Roy and Rubye were no longer able to use the farm, it was to go to Stan and Wes intact. *Id.* Rubye's testimony about the limited logging which occurred on the property from 1996 forward confirmed this understanding. Tr. at 502.

The trial court granted extensive logging rights to Roy and Rubye based upon the theory that Roy and Rubye will have additional needs later in life and therefore should be able to tap the timber resource. But this argument has no factual support in the record. It is true that the sale of the property to Stan and Wes may have been prompted in part by Roy and Rubye's financial need; the sale price was increased to reflect that need. But there was never any conversation about massive logging rights being necessary to meet that need. Instead, Stan Ames testified that limited logging rights were discussed at the time of the 1996 agreement. Tr. at 810-811. Roy and Rubye presented no evidence to contradict this understanding. Until Randy appeared on the scene, there was never even a hint of a discussion of massive logging. Rubye testified that the parties' intent was to keep the forest "beautiful." Tr. at 976. This again confirms the understanding that logging was to be limited. Logging off half to two-thirds of the forest to benefit Randy will not leave it "beautiful;" it will leave the forest dramatically degraded. The clear, cogent, and convincing evidence in this case demonstrated that Stan and Wes' requested relief of a

life estate for Roy and Rubye with specific limited logging rights should have been the result in this case.

The trial court's invocation of Roy and Rubye's (in reality Randy's) alleged need as justification for increased logging rights also ignored the injustice to Stan and Wes of allowing a resource which they were and are purchasing to be plundered. This injustice turned what was already a poor financial deal for Stan and Wes into a catastrophic loss. *See* Testimony of Larry Zoodsma, Tr. at 547. The trial court found that this was a poor financial transaction for Stan and Wes. CP at 419 (Finding of Fact H). Yet, the court went on to sign an order that permitted Randy to think he could erode the value of Stan and Wes' investment by logging off the forest with impunity.

Finally, Roy and Rubye's argument that, because they have done no logging for several years due to the conflict between their children, they should be allowed to conduct massive logging now is also with merit. The evidence at trial established that Randy helped Roy and Rubye perform limited logging up until 2009. Tr. at 264 (ln 23). This evidence hardly supports the need for a massive logging operation now.

2. The trial Court erred in not applying the default rule regarding logging and life estates: life tenants are not permitted to practice commercial logging which diminishes the remainder value of the land.

Roy and Rubye attempt to argue that their post-trial logging plans are somehow in keeping with good stewardship and therefore fall outside the normal prohibition against commercial logging by life tenants. But they presented no admissible evidence at trial regarding logging plans and their own prior declarations regarding what they would do with the logging proceeds contradict their alleged concern for the forest. First, Randy Ames, will receive more than half the funds from the logging in exchange for his "work." *See* CP at 1628-1629. Second, Roy and Rubye apparently intended to use the remainder of the proceeds for personal matters such as taking trips. *See* CP at 1140-1141. Roy and Rubye's post-trial logging proposal had nothing to do with the health of the forest. It had everything to do with enriching Randy at the expense of Stan and Wes. This is further confirmed by Roy, Rubye, and Randy's conduct after trial in conducting massive logging exceeding even the trial court's authorization. *See* CP at 1568-1570.

C. The Broden Report was inadmissible as either a document exhibit at trial or as a post-trial affidavit.

The trial court's invocation of the parties' failure to request an evidentiary hearing under CR 59(g) as a basis for allowing inadmissible evidence to be considered in its decision was improper. First, there was no reason for Stan and Wes to request additional evidence. The evidence

before the court at trial was sufficient to grant them the relief they requested: a life estate for Roy and Rubye with specific, limited logging rights. Second, even if CR 59(g) had been invoked, the standard for admissibility of documents under that rule is the same as at trial. *Ghaffari v. Dep't of Licensing*, 62 Wn. App. 870, 876, 816 P.2d 66 (1991). Thus, the Broden Report would not have been admissible as an affidavit in such a proceeding. While Roy and Rubye are correct that expert *testimony* may be admitted by the trial court pursuant to ER 702, there was no such testimony in this case. Instead, at trial, out-of-court statements were submitted for the truth of the matter asserted: classic inadmissible hearsay for which there was no valid exception. Roy and Rubye are also correct that this problem also existed for the post-trial expert declarations submitted by Stan and Wes. But the fact that a trial court accepts inadmissible evidence from both parties does not make the evidence any less inadmissible. The Broden Report, upon which the trial court based its logging rights determination, was never admissible as evidence in this matter.

"An error in the admission of evidence requires reversal when the error is prejudicial. An error is prejudicial if it has a substantial likelihood of affecting the outcome of the case." *In re Guardianship of Stamm v. Crowley*, 121 Wn. App. 830, 843-44, 91 P.3d 126, 133 (2004)(citing

Carnation Co. v. Hill, 115 Wn.2d 184, 186, 796 P.2d 416 (1990)). In the present case, the trial court's final decree relied upon and even cited an inadmissible piece of evidence. This was highly prejudicial to Stan and Wes; reversal is required.

D. Participation in irregular post-trial hearings did not constitute waiver of the right to object to the proceedings.

A party may object to a trial court's rulings as late as motion for a new trial in order to give the trial court the opportunity to correct its errors and preserve the issues for appellate review. *See State v. Ray*, 116 Wn. 2d 531, 541, 806 P.2d 1220 (1991). Stan and Wes continually objected to the trial court's consideration of the Broden Report. In their motion for reconsideration, Stan and Wes also objected to the trial court's entire post-trial procedure. *See* CP at 639-653. This gave the trial court the opportunity to correct its error and base its ruling upon the admissible evidence presented at trial. There has been no waiver by Stan and Wes of any of their appellate rights.

E. The "damages" allegedly suffered by Roy and Rubye by their breach of Jason Baker's contract were not caused by a delay in enforcement of the trial court's decree.

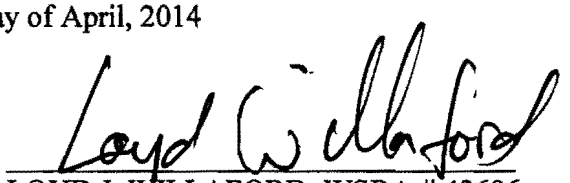
To obtain damages allegedly caused by a stay of enforcement of a judgment, a party must demonstrate that the damages were proximately caused by the stay. *See Norco Const., Inc. v. King Cnty.*, 106 Wn.2d 290,

294, 721 P.2d 511 (1986). In their Respondents' Brief, Roy and Rubye attempt to allege that their failure to pay Jason Baker's contract was somehow caused by a delay in their ability to log between the February 19, 2013 stay order and their April 1, 2013 motion. But they were able to log 19 mbf during this period. *See* CP at 779-780. In addition, by the time of the June 11, 2013 evidentiary hearing, Roy and Rubye (Randy) had conducted a massive logging operation. Mr. Baker testified that he was willing to have his invoice satisfied by doing the work delivering these logs. Report of Proceedings at 30:12-31:4 (June 11, 2013). Roy and Rubye (Randy) declined to have Mr. Baker perform this work. Thus, it was Roy and Rubye's (Randy's) choice not to pay Mr. Baker. The failure to pay Mr. Baker had nothing to do with the stay of enforcement of the decree allowing logging and, thus, was not proximately caused by the stay. To reiterate the point made in Appellants' opening brief, a supersedeas bond is not a general fund to seek damages from the other party without due process. It is designed to secure a party against damages caused by delay in enforcement of a judgment. No such damages occurred in this matter. The alleged damages suffered by Roy and Rubye stemmed solely from their refusal to pay Mr. Baker for a contract which Roy and Rubye entered into knowing that litigation was ongoing.

IV. CONCLUSION

For all the reasons given above, and the reasons given in their Appellants' Brief, Stan and Wes Ames request that this Court reverse that portion of trial court's Decree which granted massive logging rights to Roy and Rubye Ames. Given that Roy and Rubye have now engaged in far more logging than even the trial court's decree allowed, Stan and Wes ask this Court to direct the trial court to enter a decree which grants Roy and Rubye a life estate in the property with no additional logging rights. Stan and Wes also request that this Court reverse the trial court's order forfeiting a portion of the bond posted by Stan and Wes. They further request that Court direct the trial court to release to them all of the bond monies which they have posted.

Submitted this 22nd day of April, 2014



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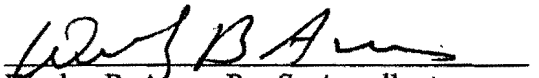

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is a person of such age and discretion to be competent to serve papers.

That on the 22nd day of April, 2014, I caused to be served a copy of the Appellants' Reply Brief via hand delivery and/or email to the persons hereinafter named:

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GR 17(a)(2) Declaration

I am the person responsible for the filing of the foregoing document, to which this declaration is attached as the last page pursuant to GR17(a)(2).

1. The document that is to be filed is titled: Appellants' Reply Brief signature page for Wes Ames.

2. I have examined the document which was emailed to my office on April 22, 2014 and have determined that it consists of the declaration and signature page, not including this declaration, and that it is complete and legible.

3. My address, fax number and phone number are listed below.

Under penalty of perjury under the laws of the State of Washington, I declare the preceding statements to be true and correct.

DATED this 22nd day of April, 2014

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