

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Court of Appeal Cause No. 340449

IN THE COURT OF APPEALS, DIVISION III, OF THE STATE OF WASHINGTON

ROY A. AMES and RUBY M. AMES, Respondents/Plaintiffs

v.

WESLEY B. AMES and STANLEY R. AMES, Appellants/Defendants

APPELLANTS' REPLY BRIEF

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III. PRELIMINARY QUESTION

Addressing a preliminary point, Respondents argued Appellant's discussion of the conduct of former Judge Allen Nielson (now retired) and Attorney Chris Montgomery constituted ad hominin attacks, and further argued the discussion was improper under the ethical rules and was irrelevant.

By doing so, Respondents are arguing this Court and Appellants should ignore undeniable facts and refuse to acknowledge the inevitable conclusions to be drawn from those facts. Thus, Appellants respectfully submit Respondents arguments and allegations are fundamentally flawed. Indeed, it appears Respondent does not understand what is and is not an ad hominem attack, does not understand what does and does not constitute an ethical violation, does not understand what is or is not scurrilous, and does not even understand relevance.

As to the facts, it is undeniable Attorney Montgomery requested and Judge Nielson granted an initial TRO for 38 days rather than the 14 days allowed under the rules (CITE); undeniable both Mr. Montgomery and Judge Nielson were fully aware of the 14-day rule based on their extensive experience; undeniable both Mr. Montgomery and Judge Nielson knew all Defendants were out-of-state residents and were eligible to remove the case to Federal Court; and undeniable Mr. Montgomery's and Judge

Nielson's violation of the rule materially damaged Appellants' rights by eliminating the period during which Appellants could have removed the case to Federal Court after the initial hearing in the case was conducted. Appellants would then not have been subjected to the bias and apparent collusion between Mr. Montgomery and former Judge Nielson which persisted throughout the entire course of the case, including the proceedings which resulted in the rulings which are the subject of this appeal.

On the ethical matter, for Washington attorneys, remarks concerning a judge are governed by RPC 8.2(a). Under RPC 8.2(a), remarks critical of a judge are a violation only if the remarks made are knowingly false or with reckless disregard for the truth or falsity of the remarks. The standard for determining whether there is a violation is a reasonable attorney.

In this case, all Appellants' comments are demonstrable facts or are inevitable inferences and conclusions based on the demonstrable facts. Thus, Appellants respectfully submit none of Appellants' comments concerning former Judge Nielson were false, and certainly not knowingly false or made with reckless disregard for their truth or falsity.

Consequently, Appellants have committed no violation of ethical rules, while Respondent has presented an allegation and argument against

Appellants which is not supported by the law or by a reasonable extension of the law, and is presented only for the improper purpose of biasing this Court against Appellants. Further, Respondents, in fact, base their argument in baseless attack on Appellants' characters.

Therefore, Respondent's argument is, itself, properly sanctionable.¹

IV. ASSIGNMENTS OF ERROR OF FINDINGS OF FACT

Respondent alleges Appellants did not properly assign error to particular findings of fact. RB at 14-15. Appellants believe Appellants' Brief sufficiently identifies erroneous findings of fact and the associated issues, but to ensure the Court is adequately informed, Appellants assign error to the following findings of fact by the Superior Court in the document as CP at 345-354:

Finding E: Issues include failure of the Superior Court to account for missing timber and associated money.

Finding G: Issues include absence of support for Superior Court's assertion Respondents had commercial farm insurance at any time rather than residential insurance, failure of the Superior Court to acknowledge

¹ It should be noted that Respondent's prior counsel has just recently returned to practice after having been found in violation of ethical conduct and having his license to practice suspended for 6 months. Also notable, is the fact Superior Court judge Nielson supported Respondent's counsel, Attorney Montgomery, as a character witness in attempting to avoid heavier sanctions by the ethic's board. Their apparent relationship was not limited to the current case under appeal.

other parties, specifically Darleen Ames and Arleta Parr were responsible for the increased insurance premium rather than Appellants, and the availability of funds to Respondents to do needed work to again obtain standard rate insurance.

Finding H: Issues include availability of funds for addition, lack of support for rental intent and value, false statement concerning second house.

Finding I: Issues include unexplained delay in removing cut trees, validity of logger's representations, false statement concerning 5 lawsuits, false statement concerning discovery obligations, and false statement concerning causes for limited removal of logs.

Finding K: Issues include false statement concerning "reckless litigiousness", cause of log degradation, extra logging costs, narrow skidding trails, false statement concerning limited firewood harvesting.

Finding L: Issues include "reckless litigiousness", alleged loss of rental value, calculation of alleged deficiency.

For each of the erroneous findings of fact, an additional important issue is the demonstrated lack of judicial integrity by the Superior Court judge. The entirety of the circumstances indicates concerted action by Respondents through their counsel and with the cooperation of the Superior Court judge to create erroneous finding of fact based on false declaration

statements by Respondents while at the same time denying Appellants opportunity to test Respondents' declaration statements. See, e.g., Second RP at 26. By denying an evidentiary hearing, the Superior Court judge eliminated all opportunity for Appellants to test Respondents' evidence through cross-examination, testing which was clearly critical for demonstrating the highly material falsities presented in the declarations submitted by Respondents.

V. ISSUES ASSOCIATED WITH ASSIGNMENTS OF ERROR

Respondent also asserted Appellants failed to identify issues pertaining to assignments of error. Again, Appellants believe Appellants' Brief sufficiently identifies the issues in the body of the brief. However, in an abundance of caution, Appellants provide the following statements of associated issues:

A. The Superior Court erred in forfeiting the \$45,000 and \$10,000 bonds posed by Appellants. Issues include improper identification and attribution of costs and fictitious rental values.

B. The Superior Court erred by granting all logging proceeds to Respondents. Issues include erroneous accounting for extent of logging and calculation of corresponding proceeds and costs.

C. The Superior Court erred by ordering a money judgment against Appellants. The issues include those associated with assignments of error A and B.

D. The Superior Court erred in ordering Respondents could proceed with additional logging. Issues include improper logging already conducted, residual timber, admission of inadmissible expert declaration testimony by the court below, and issues associated with assignments of error A and B.

VI. THE CORE ISSUE IN APPEAL IS ABUSE OF DISCRETION, NOT FRAUD

Despite Respondent trying to divert the Court's attention to fraud, the core issue before the Court is abuse of discretion by the Superior Court.

Whether or not legally actionable fraud occurred is not the question even though the existence of deceit (referred to as fraud) in the lower court proceedings deeply affects the credibility of Respondent's arguments as well as dramatically reducing the deference which this Court might accord findings and decisions of the Stevens County Superior Court.² Still, the core error is the abuse of discretion under which the lower court made findings and rulings which no reasonable judge would have done.

² Appellants are addressing the fraud by the logger, Jason Baker, in Stevens County Superior Court Case No. 2016-2-00423-5.

The standards for abuse of discretion are well-known and are set forth in Appellants' Brief and are therefore not repeated here.

The apparent fraud and the apparent judicial bias just provide further demonstration the Superior Court's actions constituted abuse of discretion. Appellants are saddened by the necessity of pointing out the misconduct which occurred in this case for multiple reasons, including recognizing it is highly preferable to refrain from direct criticism of the court as well as of opposing counsel. Unfortunately, in this case, as pointed out in Appellants' Brief, the misconduct so pervaded the proceedings as to make it impossible to comprehend the actions taken by the court below without acknowledging the misconduct. The misconduct was so obvious even court employees and others commented and offered condolences for the seemingly unjustified and biased rulings of the Superior Court judge. Because of the pervasiveness of the problem, even recognizing the likelihood this Court would not like to see the misconduct addressed, Appellants believed it was necessary. Still, Appellants apologize to the Court for the sometimes harsh language utilized and, again, are saddened by the need to present the misconduct, both direct and inferred, at all.

Appellants turn now to some of the specifics of Respondents assertions and their relationship to abuse of discretion.

Respondents appear to be trying to confuse the various declarations and reports of Robert Broden and mischaracterize Appellants' position. Appellants recognize the Broden reports submitted before the prior appeal in this case are established in this case, despite their major flaws.

As discussed in Appellants' Brief, Appellants object to the two later-submitted Declarations/Reports of Robert Broden. CP at 246-249 and CP at 266-268; CP at 71. Those declarations should never have been admitted because they do not satisfy the requirements for admissible expert evidence. See, e.g., AB at 32-35. As pointed out in Appellants' Brief, the Superior Court had an obligation to ensure reliability of purported expert evidence, and Respondents bore the burden of showing the purported expert evidence satisfied the requirements for admissibility of expert evidence. Neither the court nor Respondents made any effort to satisfy their obligations to establish reliability and admissibility of the declarations.

As a result, admitting the inadmissible Broden declarations was legally improper, and the Superior Court's consideration of those two Broden improperly admitted declarations led to abuse of discretion in making the court's corresponding findings of fact and rulings.

Further, the Broden declarations at issue (CP at 246-249 and CP at 266-268) do not actually provide a properly determined level of residual

timber or of the amount of timber removed. Thus, contrary to Respondents' contention (e.g., RB at 23), there not competing forester's declarations concerning residual timber volume. The only expert evidence as to residual timber volume and thus the calculated removed timber (as well as the ease of the logging job) is in the declarations of Williamson (CP at 188-298), Berrigan (CP at 241-245), Winterowd (CP at 212-214), and Davidson (CP at 209-211). However, the judge did not even acknowledge the contents of the reports and declarations submitted by Appellants, reports and declarations which clearly showed the inadmissibility of the Broden declarations.

Contrary to Respondents' mischaracterization, for purposes of this appeal (see, e.g., RP at 18), Appellants are not objecting to the Superior Court allowing entry of declarations, specifically timber cruise reports or declarations, but do object to the Superior Court disallowing an evidentiary hearing despite Appellants' repeated request for such a hearing. Equally significant, Appellants' object to admission of the Broden expert declarations because, as noted above and in Appellants' Brief, they do not satisfy requirements for expert evidence. At the hearing, Appellants pointed out the deficiencies, thus objecting to their admission and consideration. See, e.g., CP at 71. Appellants also objected to the Superior Court refusing to allow even counsel for Stan Ames to

review Respondents' bank records and instead conducting only in camera review. By so doing, the court destroyed any opportunity for Appellants to correlate timber sales (whether as logs or as firewood) with bank records and consequent ability to demonstrate either Respondents had sufficient money available for carrying out needed work on the house and/or to show Respondents were concealing money received from timber sales, primarily firewood sales. This is particularly damaging because the court relied on a purported lack of money by Respondents to justify, in part, charges against Appellants for increased insurance costs and purported lost rent. Thus, the Superior Court denied to Appellants any opportunity to conduct proper discovery from Respondents or even to test Respondents' evidence through cross-examination in live testimony.

As testified at trial, Randall Ames has a history of avoiding the use of banks, to the extent possible, in order to avoid creating an auditable money trail.

The court below also abused its discretion by accepting a purported rental value of \$750/mo for an addition to the residence on the Ames farm without any objective evidence. The Court below ignored the fact the entire residence without shared occupancy was rented to Randall and Darleen Ames for a realistic \$250/mo. CP at 1-65 (see rental agreement in Exhibit I). There is no justification, either in the record or otherwise, to

support the astronomical assumed rental rate of \$750/mo for an isolated, small farmhouse with limited facilities.

This shows Respondents' claim of a rental value of \$750/mo for a portion of a shared residence is extraordinarily false. Clearly, no reasonable judge would have accepted a rental value of \$750/mo for a portion of a shared, remote, rural residence when the entire residence without shared occupancy actually rented for \$250/mo. Further, as pointed out, no reasonable judge would have accepted the \$750/mo valuation without objective support, e.g., in the form of comparable rentals.

Appellants respectfully request this Court note the fact Appellants had no opportunity to test Respondents' purported evidence with any type of cross-examination. As a result, Appellants were denied the basic opportunity to expose the incredible nature of many material declarations submitted by Respondents.

When considered in conjunction with the facially unbelievable character of multiple declarations submitted by Respondents and the court ignoring the content of Appellants' provision of proper expert evidence in

the form of cruise reports/declarations by Williamson and Berrigan, respectively, there is clear abuse of discretion by the Superior Court.³

VII. CONCLUSION

As discussed above and in Appellants' Brief, for each of the noted items erroneously ordered by the Superior Court and the identified erroneous findings of fact, no reasonable person could have taken the findings and rulings adopted by the Superior Court. Therefore, the Superior Court engaged in abuse of discretion in making its decisions.

The Superior Court's abuse of discretion directly produced injustice for Appellants, including large financial loss. In order to correct the errors of the Superior Court and in the interest of justice, Appellants request the Court provide the relief requested in Appellants' Brief.

Submitted this 15th day of March, 2017



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³ The clear abuse of discretion and even apparent collusion went so far as the judge asking Respondents' counsel on at least three occasions how counsel thought the court should rule.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of March, 2017, I personally served a copy of the attached APPELLANTS' REPLY BRIEF on Rubye Ames by delivering a copy to Dennis W Clayton, attorney for Plaintiff/Respondent, via email addressed to dennis@claytonlawfirmpllc.com, and served a copy on Stanley R. Ames via email addressed to stansnotes@yahoo.com

I certify under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.

SIGNED March 15, 2017 at Valley, Washington.



Wesley B. Ames