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

AMENDED PETITION FOR REVIEW

Thomas F. Webster WSBA # 37325
Webster Law Office, PLLC
116 N. Main St.
Colville, WA 99114
(509) 685-2261
Fax (509) 685-2267

Wesley B. Ames
Pro Se Petitioner
4154Q Deer Creek Road
Valley, WA 99181
(760) 815-4845

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Rules

Other Authorities

A. IDENTITY OF PETITIONERS

Wesley B. Ames, Ames Development Corporation, and Stanley R. Ames, request this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISIONS

Petitioners request review of the decision of the Court of Appeals in Case No. 316611, consolidated with #318257. The Court of Appeals issued its decision on December 9, 2014 and denied Petitioners' motion for reconsideration on February 17, 2015. A copy of the decision is in the Appendix at pages A-1 through 34. A copy of the order denying petitioner's motion for reconsideration is in the Appendix at page A-35.

C. ISSUES PRESENTED FOR REVIEW

1. Petitioners request the Supreme Court to resolve the requirements for bond forfeiture by determining whether a bond posted to protect against the costs of delay in harvesting timber may be used as a general compensatory fund for purported costs caused by Respondent entering into a logging contract during litigation concerning the subject property.

2. Petitioners request the Supreme Court to definitively resolve whether massive, commercial logging by life tenants constitutes waste in Washington State, and whether the trial court therefore erred by ordering said massive, commercial logging in post-trial proceedings with no

evidence subject to cross-examination.

3. Petitioners request the Supreme Court to resolve differential treatment of the doctrine of invited error between the Divisions of the Court of Appeals and clarify the inapplicability of the doctrine to a situation in which Petitioners participated in an improper post-trial process in order to mitigate prejudice against them following error by the trial court in admitting and considering inadmissible hearsay evidence to determine logging rights.

D. STATEMENT OF THE CASE

The Statement of the Case provided herein is necessarily limited. A more complete statement of the underlying facts and proceedings is provided in the Appeal Brief in the Appendix (App.) at 43-70 and will therefore not be repeated in depth here.

This case concerns rights to property in Valley, Washington (the "Farm") between family members. After trial, Respondents Roy and Rubye Ames were granted a life estate in the property. In subsequent hearings based on completely untested declarations, the trial court granted Roy and Rubye Ames massive logging rights on the Farm. The court also forfeited a portion of a bond posted by Appellants Stan and Wes Ames[1]

In December of 1996, Petitioners/Appellants Stanley R. Ames,

[1] To avoid confusion, this brief will use the parties' first names.

through his corporation, Ames Development Corp. (together "Stan"), and Wesley B. Ames ("Wes") reached an oral agreement with Roy and Rubye to purchase the real property, which included the timber, located at 3885 Haverland Meadows Road, Valley, WA 99181 ("Farm") for $160,000, later changed to $216,000. Transcript of Trial (Tr.) at 808. Under the oral agreement, Roy and Rubye had the right to remain on the Farm and continue to conduct farming and limited logging, and retain the proceeds.

On July 15, 2011, Roy, completely under the control of the younger son, Randy, filed the present lawsuit in which he alleged that he was entitled to reverse the sale of the farm despite the years of payments, the additional, consistent and substantial care and support, a valid Quit Claim Deed, a written agreement between the parties, substantial conduct by all parties consistent with ownership by Stan and Wes, and Rubye's own letter to Randy confirming Stan and Wes owned the farm. After Randy isolated Roy from Rubye for more than three weeks and threats from Randy that Roy would not be returned, Rubye joined the lawsuit. Tr. at 771-780, *Passim.* Roy obtained a temporary restraining order in which the trial court clearly violated CR 65(b) because the TRO was for 39 days rather than the rule limit of 14 days[2], significantly harming Stan's and

[2] This illegitimate TRO was merely a harbinger of the trial court's conduct throughout the case. Multiple observers developed clear conclusions the

Wes' rights and interests.

Certified Public Account Larry Zoodsma testified that the value of the remainder interest which Stan and Wes were purchasing in 1996 was approximately $146,069 (Tr. at 546), even assuming the value of $370,000 for the land and timber from an appraisal conducted during the litigation at the request of Roy and Rubye with the timber valued as of 1997. *Id.* Mr. Zoodsma testified that this was a bad financial deal for Stan and Wes. Tr. at 547.

At the conclusion of trial, the court made a finding that Randy had isolated and manipulated Roy and Rubye for his own ends. Tr. at 1023. The court then ruled that it was utilizing the constructive trust doctrine to grant Roy and Rubye a life estate in the property. Tr. at 1025. The court indicated that it was bound by the historical practice of what had been done, unless there was some reason to deviate from that. Tr. at 1029.

After an extended post-trial process and a series of contradictory rulings, the court ordered that "the annual harvest shall be at a level of 19 mbf; in addition a harvest of lodgepole and grand fir, and necessary thinning [is] also authorized." *See* CP at 1489 at ¶2.9. This ruling allowed an immediate harvest of 400,000 board feet of lodgepole pine.

---

trial court was biased against Stan and Wes and signed declarations to that effect.

On May 10, 2013, Stan and Wes Ames appealed this final ruling. In an apparent attempt to circumvent any limitations by the court on logging, in late April and/or early May 2013, Roy and Rubye (with Randy as apparent primary actor) cut approximately 486 mbf of almost exclusively Douglas fir, a species not authorized for harvest in the court's orders on logging nor recommended in the Broden report.[3] *See* CP at 1565-1567, 1568-1585, 1622-1623, 1627-1629, 1630-1631, and 1641-1642.

The events related to the partial bond forfeiture are described in App. at 66-70, and are only briefly summarized here. As described therein, the trial court stayed logging pending decision on Stan's and Wes' motion for reconsideration subject to posting of a $10,000 bond. CP at 628-633, 756.

Earlier, in January or February, 2013Roy and Rubye had solicited and entered a log purchase contract with a sawmill, Vaagen Brothers, and had engaged a logger, without informing either of the ongoing litigation relating to the Farm and associated logging rights.

After learning Roy and Rubye had contracted with the mill, Stan Ames called the log buyer for the mill and inquired about the contract and mentioned the ongoing litigation. Subsequently, Vaagen Brothers terminated the log purchase contract.

The logger, Jason Baker submitted a $16,460 bill which included

[3] This illegal cutting is the subject of separate litigation in federal court: E.D.Wa Case No. 13-CV-0257.

$11,000 for alleged lost work. On April 1, 2013, Roy and Rubye filed a motion to forfeit the $10,000 bond which Stan Ames had posted. *See* CP at 1332-1333. They apparently alleged that contact from Stan Ames had induced the mill to cancel the contract and that as a result, Roy and Rubye were responsible for a $16,460 bill for logging work and alleged damages.[4] The trial court ultimately ruled the parties would share equally in satisfying this bill and ordered Stan and Wes Ames' portion of the bill be deducted from the $10,000 cash bond which Stan has previously posted. CP at 1480. The trial court found that Stan Ames' contact with the mill was a "but-for" cause of Roy's and Rubye's alleged loss.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The Court of Appeals erred in affirming forfeiture of a portion of a $10,000 cash bond when there was no legal authority to support the forfeiture.

Washington State standards for forfeiture of a supersedeas bond or other similar bond, and limitations on use of said bond, are unclear and need resolution by this Court. In affirming the bond forfeiture, the Court of Appeals has effectively endorsed misconduct in litigation by Respondents Roy and Rubye. The bond was forfeited without any evidence of loss by Roy and Rubye actually caused by delay or wrongfully caused by Stan and Wes. In doing so, the Court of Appeals used

[4] This was an apparent argument because Roy and Rubye made no legal or factual argument in their motion. *See* CP 1332-1333.

untenable reasoning to characterize the purported costs as being due to the reconsideration motion delay.

The parties and the courts below treated the bond as essentially a supersedeas bond. "The primary purpose of a supersedeas bond is to delay execution of the judgment while ensuring that the judgment debtor's ability to satisfy the judgment will not be impaired pending appeal." *Lampson Universal Rigging, Inc. v. Washington Pub. Power Supply Sys.*, 105 Wn.2d 376, 378, 715 P.2d 1131 (1986). It is meant to be a fund to compensate a party prevailing on appeal for "damages resulting from the delay in enforcement [of the judgment]." *Norco Const., Inc. v. King Cnty.*, 106 Wn.2d 290, 296, 721 P.2d 511 (1986).

While treating the bond in the same manner as a supersedeas bond, the Court of Appeals erroneously characterized the purported costs as being due to the delay occasioned by the motion for reconsideration (Op. at 31) while skipping over the actual proximate cause, which was Roy's and Rubye's improper and deceitful conduct in entering into the log purchase contract in the middle of litigation without informing the log purchaser of the litigation. The log purchaser's discovery of that deceit and the accompanying risk to the log purchaser caused the log purchaser to cancel the contract, ultimately resulting in Jason Baker's bill.

Such distortion of the relevant facts and inferences to be drawn

therefrom by the courts below is highly troubling.

Even though the Court of Appeals dismissively treated the issue, the trial court erroneously found that Stan had somehow interfered with a logging contract. CP at 1743-1746. Without being expressly characterized as such, this is essentially an assertion of tortious interference with contract. In order to establish a claim for tortious interference with a contractual relationship a party must establish the elements, including "... (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means;...." *Leingang v. Pierce Cnty. Med. Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997). "Exercising in good faith one's legal interests is not improper interference." *Id.*

The evidence before the trial court was that Roy and Rubye had a log purchase contract with Vaagen Brothers, which they obtained by deceitfully avoiding informing the log purchaser of the ongoing litigation. Stan Ames called Steve Delong, log buyer for Vaagen Brothers. Stan repeatedly told Mr. DeLong that he was not trying to interfere with the contract, he was merely wanting to understand the basis for, and terms of, the contract. The trial court had before it a signed Delong declaration confirming this account. *See* CP at 1635-1637.

Subsequently, Vaagen Brothers terminated the log purchase contract they had with Roy and Rubye. Roy and Rubye alleged that as a result of Vaagen's breach of the contract, Jason Baker, the logger which Randy Ames contracted , was not able to be paid. Mr. Baker submitted a bill to Roy and Rubye for $16,230, more than $11,000 of which was for alleged lost work which was not and could not be substantiated.

The undisputed facts before the trial court do not give rise to any conclusion of interference with a contract or any other improper conduct by Stan and Wes. The fact that Roy and Rubye deceitfully entered into a logging agreement in the middle of ongoing litigation was Roy's and Rubye's misconduct, not Stan and Wes's fault. It was simply unconscionable for the trial court to forfeit a substantial portion of the bond, contrary to the purpose for supersedeas bonds.

The purpose of and standards for forfeiture of such bonds is of significant public interest due to the frequency of their use. Clarification by this Court is needed to prevent Division 3 from creating erroneous law contrary to sound policy. As a matter of sound public policy, Defendants in an action should not be able to create artificial, and likely illusory, costs through their own misconduct, and then be rewarded by being compensated for their own misconduct by plaintiffs through the mechanism of bond forfeiture as was done in this case.

2. The Court of Appeals Erred in Affirming the Trial Court's Decision Allowing Large Volume Commercial Logging and Misused Prior Authority

As set out below, the Court of Appeals ignored contrary Washington precedent and the closest persuasive authority from other states, and even misused the authority it cited. The result is conflict between Divisions, bad policy, and a grave injustice against Stan and Wes.

a. Decisional Conflict on Doctrine of Invited Error

Both the trial court and the Court of Appeals mischaracterized Stan and Wes Ames' participation in the improper post-trial determination of logging rights through untested, hearsay declarations as "invited error" (see Op. at 24). To the contrary, Stan and Wes participated under duress and protest in the improper process initiated by counsel for Roy and Rubye and the trial court by the improper filing, admission, and consideration of improper hearsay evidence, e.g., the Broden Report. Stan's and Wes' participation was strictly in response to the already initiated improper proceedings and was made necessary in order to try to mitigate or at least blunt the prejudice caused by that improper process. In addition, Stan and Wes unsuccessfully attempted to correct any error through a motion for reconsideration.

Division 3's improper use of the doctrine of invited error conflicts with decisions from other Washington Court of Appeals holdings, as well

as decisions of this Court, ignoring the purpose of the invited error doctrine, which is to prohibit a party from setting up an error at trial and then complaining of it on appeal. As has been stated, this purpose would not be served by a rule that denies review to a party who introduces evidence in an effort to mitigate prejudice resulting from an adverse ruling. In this situation, the party did not 'set up' the error complained of on appeal." *State v. Watkins*, 61 Wn.App. 552, 558, 811 P.2d 953 (Wash. App., 1991) (citations omitted). Similarly, "Washington appellate courts have repeatedly held that a party prejudiced by an evidentiary ruling who then introduces the adverse evidence in an effort to mitigate its prejudicial effect is NOT precluded from obtaining review of the ruling." *Dickerson v. Chadwell, Inc.*, 814 P.2d 687, 691, 62 Wn.App. 426 (Wash. App., 1991).

Thus, in similar manner, the record shows Stan and Wes Ames did not invite the trial court error, but only tried, in the only way possible, to mitigate the prejudice already created by the trial court and Respondents, and prevent the necessity of appeal.

Further, even if Stan and Wes in some way invited error by participating in the improper post-trial proceedings, the doctrine of invited error still does not apply because Stan and Wes attempted to correct the trial court's error making the doctrine of invited error inapplicable. This

exception was pointed out in *City of Seattle v. Patu*, 58 P.3d 274, 274, 147 Wn.2d 717 (2002), and in *State v. Studd*, 137 Wn.2d 533, 552-553, 973 P.2d 1049 (1999) (requested corrective jury instruction made doctrine of invited error inapplicable to the requesting individuals).

Thus, in contrast to "setting up" the trial court error for appeal, Stan and Wes clearly placed the error before the trial court in their Motions for Reconsideration and requested correction. CP at 345-48, 639-411. After creating the initial error by admitting inadmissible hearsay evidence submitted by Respondents, the trial court created the necessity for appeal by refusing to correct its own error even after that error was clearly pointed out by Stan and Wes who requested correction.

As shown by the cases cited above, the present situation is simply not the type of situation which fits the purpose or requirements of the doctrine of invited error, and conflicts with holdings on this doctrine by other Courts of Appeals and by this Court. The result is the trial court's entire post-trial proceedings concerning timber harvest should be reversed and the inadmissible hearsay evidence excluded from consideration.

b. The Lower Courts Erred on the Issue of Timber Waste and Logging Rights of Life Tenants by ignoring the general rule that commercial logging by life tenants is waste.

In addition to the inapplicability of the doctrine of invited error, there

are at least three bases on which the trial court's grant of massive logging rights was wrong and indeed, abuse of discretion: (1) it was contrary to persuasive authority, including authorities cited by the courts below; (2) it conflicted with this Court's determination of waste; and (3) the result is grossly unjust. Further, in affirming the trial court, Division 3 wrongly stated the effects of the trial court ruling.

The Court of Appeals clearly erred in its use of purportedly persuasive authority to justify massive logging. Thus, Division 3, created a conflict with prior Court of Appeals rulings from other Divisions, improperly used the prior cases and treatise it cited, ignored the most compelling persuasive authority from other states, and mischaracterized Stan and Wes' Ames statements. The gross injustice resulting directly from the trial court's rulings emphasizes the magnitude of its legal error.

Preliminarily, the Court of Appeals falsely stated Stan and Wes Ames exaggerated when they referred to logging "half the forest" and similar statements. Op. at 24. In fact, Roy and Rubye have already logged off about 486 mbf out of an initial total of 1400 – 1500 mbf (about 1/3), in which they cut primarily Douglas fir which was not authorized by the trial court. CP at 1641-42.

Except for the stay now in effect, Roy and Rubye will also log off all of the lodgepole pine and grand fir (at least 400 mbf according to Broden

Report). Roy and Rubye have indicated their intent to carry out that additional logging as soon as they can. *See* CP at 1626. That means Roy and Rubye will have then logged off a total of at least 886 mbf, more than 60% of the total initial timber stand, leaving only 614 mbf of timber. However, cutting of 886 mbf would not be the end, because Roy and Rubye are also authorized to continue to cut an additional 19 mbf/year, which will continue to reduce the remaining timber volume because that annual harvest exceeds the annual growth. That is, applying the 1.4% annual growth rate determined from tree ring measurement (see, e.g., CP at 1362) to the residual 614 mbf shows the annual timber growth would only be 8.5 mbf/year (if we use an increased 2.0% growth rate the annual timber growth would be only 12 mbf/year). This shows the authorized continuing annual harvest of 19 mbf would continue to decrease the timber volume, so over the approximate life expectancy of Rubye Ames, the timber volume would decrease by 7-10 mbf/year, for a total additional decrease of about 49-70 mbf. The timber volume after Rubye Ames expected life would then be only about 544-565 mbf (i.e., almost 2/3 of the initial timber volume will have been cut).[5] By any measure, that represents massive logging resulting in dramatic damage to the value of

[5] Note there is also no principled limit on "thinning", so the actual remaining timber may even be substantially less than 544 mbf.

the remainder estate.

As a related point, the Court of Appeals erred, perhaps through lack of understanding, in characterizing the logging authorized by the trial court as "salvage." In no legitimate sense can the massive logging the trial court order permits be termed "salvage." To the contrary, such logging is clearly commercial harvest of a major portion of the timber stand without regard for the health of individual trees. It is no more "salvage" than elective cosmetic surgery is an essential, life saving, therapeutic procedure, and the lower courts' abuse of the term "salvage" constitutes an attempt to distort the present analysis.

Likewise, the trial court and the Court of Appeals also engaged in intellectual manipulation when stating "it would be foolish to let it die off ..." Op. at 27, citing CP at 1315. The uncontroverted declaration of forester Williamson made clear that significant tree death was NOT imminent, and could be readily managed by annually harvesting declining trees before death. CP at 1670-1671. For the courts below to ignore this fact in their rush to justify massive commercial logging due to a fictitious need to harvest large volumes of timber before the trees died is a travesty.

The Court of Appeals tried to justify the trial court's order, stating "the trial court's timber award did not deviate from the general rule for life tenants and timber." Op. at 28. Even the authorities cited by the Court of

Appeals do not support the ruling. For example, the quotations in the Op. at 28 from 51 A.L.R.2d include the clear limitation that the "exception" allowing substantial logging applies only to "timber estates". In contrast, the Farm has been used primarily for farming, with timber a minor secondary use. See, e.g., CP at 3. Even the forested portions of the farm have been used extensively for grazing cattle during the entire time Roy Ames actively worked the farm.

While Washington Courts have not directly addressed the issue of logging by life tenants, this Court has addressed timber waste, stating, "Removal of timber which does not amount to good husbandry of the land, or removal of a substantial amount of timber from land having a value primarily for its timber are classic examples of waste" *Seattle-First Nat. Bank v. Brommers,* 89 Wn.2d 190, 202, 570 P.2d 1035, 1042 (1977). This statement is consistent with the majority rule across the United States and in England; logging for commercial purposes is not permitted by life tenants. *See* "Timber Rights of Life Tenant," 51 A.L.R.2d 1374 at § 2 (1957)(collecting cases). In the present case, there was no admissible evidence presented to the court which suggested that logging off more than half (or even more than 2/3 as noted above) of the available timber amounted to "good husbandry of the land." As Larry Zoodsma testified at trial, even with the full value of the timber on the farm, Stan and Wes

were getting a poor financial deal. To allow Roy and Rubye to harvest half or more of the timber wrought an incredible injustice on Stan and Wes.

Further, the A.L.R. quotation cited by the Court of Appeals limits the life tenant's use, stating "the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settler on the estate." The settler on the estate is Roy and Rubye themselves, and the cultivation they carried on was primarily normal agriculture (hay, grain, and livestock), with only very limited logging. *Id.* Therefore, the massive logging authorized by the trial court and endorsed by the Court of Appeals clearly violates the general rule. This conclusion is also supported by the more persuasive authority from other jurisdictions.

For example, *Twin States Land & Timber Co. v. Chapman*, 750 So.2d 567, 572 (Miss. App., 1999) stated that under circumstances where the harvest is done "as a commercial enterprise, thereby damaging the value of the remainderman's estate, that the life tenant may be enjoined from further cutting and also be made to respond in damages for the diminished value of the remainder interest under principles of common law waste. Id. at 571 (citing *Threatt v. Rushing,*, 361 So.2d 329, 331.)

The case cited as authority in *Twin* States, Threatt *v. Rushing*, 361 So.2d 329, 331 (Miss., 1978) set forth the test as "[t]he correct test may

be stated thusly: Do the acts of the life tenant in cutting the timber damage or diminish the value of the chief inheritance? If so, such acts are actionable waste." In that case, cutting of 113 mbf out of a total of 1019 mbf "was in a large measure a commercial operation of Mrs. Threatt for profit and constitutes waste." *Id.*

The Mississippi Supreme Court recently reaffirmed its prior holdings that "a life tenant's harvesting of timber for commercial purposes constitutes waste." *In re Estate of Baumgardner*, 82 So.3d 592, 603 (Miss. 2012). *See also Chapman v. Thornhill*, 802 So.2d 149, 153-155 (Miss. App., 2001)(setting out the development of law concerning life tenants limited logging rights from English common law to the present). None of the exceptions mentioned in *Baumgardner* apply in this case.

The rule in Tennessee is similar, where the court stated that

> It is a universal rule that a tenant for life who is impeachable for waste may not cut timber for sale for the purpose of profit, or authorize another to do the same, unless in the one instance it be a tree farm or wild land valuable and operated only for its timber 21 A.L.R. 1004, citing McKee v. Dail, 1 Tenn.Ch.App. 689.
>
> *Thompson v. Thompson*, 206 Tenn. 202, 226 (Tenn., 1960) (emphasis added).

Thus, the *Thompson* court applied the A.L.R. statement and found that commercial logging did constitute waste. The massive logging allowed in the present case clearly cannot fall within the exception to the

general rule because the property at issue is not "a tree farm or wild land valuable and operated only for its timber." Instead, as noted above, the property was primarily used for farming, with only occasional, small scale logging.

The trial court's final order allowed Roy and Rubye to log off more than half the forest and keep more than half the proceeds as "logging costs" and then retain 60% of the "net" proceeds amounts. Even more, Roy and Rubye are now in position to extend the cutting to more than 2/3 of the timber previously present. The result was waste and gross injustice to Stan and Wes, dramatically damaging the value of their estate and largely destroying the timber value they purchased. The trial court's ruling was inconsistent with the prevailing law as it relates to waste, logging, and life tenants and so was manifestly unreasonable.

c. The trial court erred as a matter of law when it granted massive logging rights to Roy and Rubye under a life estate ordered through constructive trust.

As set out in App. at 42-87, the trial court ruling granting massive logging rights to Roy and Rubye was a gross injustice, and an abuse of discretion. The admissible evidence did not justify the allowed massive logging, which was a gross departure from the usual rule concerning timber waste and logging by life tenants and a gross departure from prior

practices on the Farm.

Indeed, in the wake of the trial court's logging order, it is difficult to discern what Stan and Wes are purchasing when a substantial portion of the value of the Farm is being stripped off with the trees. Stan's and Wes' purchase was already a bad financial deal for them even with the timber intact, but the direct result of the trial court ruling is grossly unjust to Stan and Wes and provided an unjustifiable windfall to Roy and Rubye.

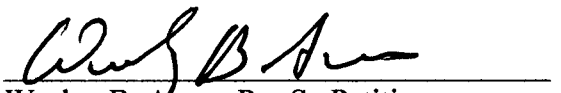
F. CONCLUSION

In order to establish correct controlling law on issues currently uncertain and to prevent a grave injustice, Appellants ask this court to accept review and to reverse the Court of Appeals decision sustaining the trial court's ruling forfeiting a portion of the $10,000 cash bond, and order the bond returned.

In order to correct conflict between this Court and the divisions of the Courts of Appeals and to prevent grave injustice, Appellants also request this Court to accept review and to reverse the Court of Appeals decision sustaining the trial court ruling allowing logging rights to the property to be determined based on an inadmissible report and allowing massive logging in violation of standards for a life estate and standards for determining waste, and order no additional tree cutting be the life tenants.

Submitted this 4th day of May, 2015

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



Wesley B. Ames, Pro Se Petitioner
4154Q Deer Creek Road
Valley, WA 99181

CERTIFICATE OF SERVICE

I certify that, on May 4, 2015, I served the attached AMENDED PETITION FOR REVIEW 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, and also served said PETITION FOR REVIEW on Petitioners Stanley R. Ames, Merita L. Dysart, and Ames Development Corporation by serving a copy via email to Thomas F. Webster, attorney for said Petitioners at tom@websterlawoffice.net.

Wesley B. Ames

APPENDIX 1

FILED
DEC 9, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

ROY A. AMES and RUBYE M. AMES, husband and wife Respondents, vs. WESLEY B. AMES; AMES DEVELOPMENT CORPORATION, an Oregon Corporation; and STANLEY R. AMES, individually; and MERITA DYSART, individually, Appellants.	)	No. 31661-1-III (consolidated with 31825-7-III) PUBLISHED OPINION

FEARING, J. — In 1997, Roy and Rubye Ames sold, without a written agreement, their property, consisting of farmland and timber, to their two oldest sons, Stanley and Wesley Ames. The parents retained a life estate. After another son moved to the property, the two oldest sons and their parents grew estranged. Roy and Rubye filed this action, asking the court to exercise its authority in equity to order title in the property returned to them. In the alternative, the parents sought recognition of their life estate and an unlimited right to control the property during their lives. The trial court awarded Roy and Rubye a life estate in the property, including a limited right to harvest timber.

Stanley and Wesley Ames appeal the timber award. We affirm the trial court.

FACTS

The Ames brothers do not challenge the trial court's findings of fact on appeal. We extensively rely on the findings in our recitation of facts.

Roy Ames and Rubye Ames are respectively 92 and 84 years old. They have been married for 67 years. The couple has five children: Wesley Ames, Stanley Ames, Merita Dysart, Randy Ames, and Arleta Parr.

The parents love their children, but in recent years and as a result of this lawsuit, have become estranged from the three older children, Wesley, Stanley, and Merita, who live in other states. The two younger children are presently close to Roy and Rubye. Despite their age, Roy and Rubye are fully competent and display a clear understanding of their financial affairs.

In 1966, Roy and Rubye Ames acquired a quarter section of farm and timber land in Stevens County. They have farmed the property and made improvements to the land since 1966, and have lived there continuously since 1976. They have managed the timber with occasional small scale logging. Their present income consists of a modest Social Security payment, occasional logging proceeds, limited farm income, and payments from Wesley and Stanley for the purchase of the property.

In 1997, Roy and Rubye needed income to supplement their farm income. They considered a reverse mortgage, but wanted the farm kept within the family. The youngest

son, Randy Ames, and his family had moved to Lithuania. The parents conferred with their other children, and Wesley and Stanley were willing and financially able to help their parents.

After careful discussions, Roy and Rubye Ames reached an agreement with sons Wesley and Stanley. Under the agreement, Wesley and Stanley would pay $216,000 over 30 years, with no interest, payable at $600 per month. If both Roy and Rubye died before full payment, the remaining payments would go to the other three children. Wesley and Stanley would then receive title to the real property, improvements, timber, and farm equipment. Roy and Rubye reserved a life estate, defined as including full possession, management, and control of the real property, improvements, timber, and farm equipment. The parties did not reduce the agreement to writing, but the agreement was restated in two e-mails from Stanley to Randy, on March 27 and March 29, 2009. Roy and Rubye Ames retained title to the property in their names.

At trial, Roy Ames testified he always "intended to control the farm, or have somebody else do it" during his lifetime. He declared: "I'm on the farm, all aspects of the farm, until I die." Clerks Papers (CP) at 416. Both Wesley and Stanley Ames anticipate living on the Stevens County property upon their respective retirements. Each will have limited income at retirement.

Since the 1997 agreement, Roy and Rubye Ames have continued in possession, management, and control of the real property along with the farm operation and the

timber. On January 11, 2006, Roy and Rubye deeded the land to Wesley Ames and Ames Development Corporation "in consideration of love and affection." CP at 886. The deed reserved no life estate. The accompanying real estate excise tax affidavit declared that the transfer was a gift without consideration. All parties understood the 2006 conveyance was intended to insulate the property from creditors and, in particular, from the State for any future medical care.

Beginning in 2009, Roy and Rubye Ames physically struggled to maintain the farm on their own. Roy and Rubye invited son Randy and his family, who had returned from Lithuania, to live on the farm so that Randy could help. The Ames family discussed building a house on the farm for Randy and his family. Wesley and Stanley, on the one hand, and Randy, on the other hand, negotiated a farm lease for Randy.

On September 6, 2010, Stanley, as President of Ames Development Corporation, entered both a rental agreement and a cash farm lease with Randy and his wife, Darlene. The farm lease allowed the "owners," Stanley and Ames Development Corporation, to "enter the property at any time for any purpose" and it partially limited Roy and Rubye's management of the timberland. CP at 417. The rental agreement and farm lease conflicted with Roy and Rubye Ames' life estate.

In recent years, Wesley and Stanley Ames have interfered with Roy and Rubye's right, pursuant to their life estate, to full control and management of the farm. Randy has participated in the interference but with different motives and by different means. Randy

Ames has sought to gain control and ownership of the property. Randy constructed an addition to Roy and Rubye's existing home, rather than building a new home. He manipulated his elderly parents and isolated them from their family and friends. On one occasion, Randy spirited Roy away for one week, took Rubye's cell phone, and prevented visits to his parents by neighbors, friends, and fellow church members.

In January 2011, Ames Development Corporation and Wesley Ames entered a housing and farming agreement with Roy and Rubye Ames. The agreement sought to "establish a relationship" between the parties in light of Randy Ames being a tenant on the farm. CP at 417. It granted Roy and Rubye rights they already held under the oral life estate, such as the right to possession and the right to lease the premises. The agreement limited some of their rights, including the right to come and go, the right to manage the timber, and the right to determine farming activities. Finally, it granted Stanley, Ames Development Corporation, and Wesley rights they did not have under the oral life estate, such as the right to enter and remain on the land at any time, the right to construct and remove buildings, and the right to confer with Roy and Rubye about all farm activities. Stanley, Ames Development Corporation, and Wesley could cancel the agreement at any time.

In July 2011, Stanley and Wesley Ames terminated the farm lease with Randy. Because of a lack of trust in Randy, Stanley and Wesley removed equipment from the farm to prevent Randy from farming. The two older brothers later returned the

equipment.

PROCEDURE

On July 15, 2011, Roy Ames filed suit against his three oldest children, Wesley Ames, Stanley Ames, and Merita Dysart. Roy requested either: (1) title in the property with an equitable lien for Wesley and Stanley for payments made toward the purchase of the real property and to be paid after both he and Rubye die, or (2) a life estate in the property with "total and absolute control of the property." CP at 14. Rubye Ames joined her husband as a plaintiff on October 25, 2011.

Trial proceeded on September 4, 5, 6, 7, 11, and 12, 2012. On the first day, Roy and Rubye Ames moved to dismiss their alternative claim for a life estate. The court granted that motion, but allowed Stanley and Wesley Ames to request, as a counterclaim, the same relief of a life estate for their parents.

At trial, Roy and Rubye Ames testified to why a life estate was no longer feasible, how much timber they harvested in the past, and their expectations for harvests in the future. Roy Ames testified to logging about $2,000 in timber each year since the 1997 agreement. Roy and Rubye both testified that they expected to enjoy full use and control of the property until they died, which included "timber and everything else." Report of Proceedings (Sept. 4, 2012) at 56. Rubye Ames testified that she and her older children needed "a clean break," because they could no longer cooperate. RP (Sept. 4, 2012) at 59.

During trial, Wesley and Stanley Ames voiced concern that Randy would clear cut the timber. Wesley testified: "We strongly believe that the timber will be harvested very heavily in order to obtain money, and we further expect that a substantial amount of that money would go under the control and use by Randy." RP (Sept. 11, 2012) at 726. Stanley testified that Randy will likely enjoy the benefit of any logging, stating: "Well, he will rationalize it in terms of Mom and Dad receiving benefit, but actually, just like all of our farm payments - it - there it goes to Randy and Darleen almost entirely." RP (Sept. 11, 2012) at 856.

To show that Roy competently managed the timber, Roy and Rubye offered a report from forester Robert Broden, entitled "Managing Your Woodlands: A template for your plans for the future," referred to as the Broden report. CP at 1286. Stanley and Wesley objected to admission of the report as an exhibit on the ground of hearsay. The court admitted the report, ostensibly under the hearsay exception for business records. Rubye testified that she and Roy had no intention of clear-cutting the forest, and planned to follow the report's recommendations to preserve the forest resource.

In the Broden report, Robert Broden recommended thinning of the forest to promote overall growth. In relevant portion, Broden wrote:

> The Lodgepole Pine on the property in particular has reached an age and condition where growth has slowed and increased natural mortality will become an annual event. In addition, there are areas of crown closure of the Douglas Fir and Grand Fir where some commercial thinning of the trees will promote or at least maintain healthier growth conditions for the

remaining timber.

. . . .

A salvage operation which would select the obvious mature trees susceptible to disease or damage for removal as well as a commercial thinning to space the mature trees to about 24 feet by 24 feet should promote healthy and disease resistant trees for future growth while maintaining wildlife habitat for deer, elk, bear and other small mammals. Scattered cavity nesting sites and raptor nests were noted in snags and timber on the property as well as on adjacent ownerships to the west and south. A reduction of the wildfire potential is also sought by removing dead and down fuels.

CP at 393.

Robert Broden further wrote:

Removal of the old Lodgepole Pine around the perimeter of the fields and a commercial thinning operation in the thicker canopied areas is proposed to promote understory foreage vegetation while still maintaining a substantial and healthy timber volume on the property.

CP at 400. Under the heading "Management of Forest Resources," Broden advised,

Protection from Pests

Observed insect pests on the property noted during the timber cruise included moderate bark beetle activity in the Lodgepole Pine and Fir Engraver beetle in the Grand Fir. Pathogens noted were minor problems with Douglas Fir Mistletoe in certain areas and a moderate amount of Mistletoe in the Western Larch. Harvest operations should work at eradicating these problems in the trees selected for removal.

CP at 401.

Robert Broden estimated the first two years of recommended thinning would yield about 400 mbf. "Mbf" is one thousand board feet of timber.

Meeting management goals will require an initial focus on the Lodgepole Pine and Grand Fir growing on the property around the meadow

> edges. Most of this is on the south and east sides of the meadow. The Lodgepole Pine is at a mature age and dying. In a few spots it has fallen down adding to the wildfire hazard. There is over 300 mbf of lodgepole pine on the property according to the timber cruise and the inspecting forester recommends the merchantable ones be removed in the initial harvesting as well as cleaning up the dead and down trees already in place. In addition, the Grand Fir is clustered on the southwest edge of the meadow on the most productive soils on the property for forage or timber production. Grand Fir is a poor market performer long term and is also more susceptible to insects and disease than other species present on the site. Several individual Grand Fir trees showed defect and disease in the walk through. Because of this, the removal of the Grand Fir at the earliest market opportunity and its replacement with either seedlings of another species or forage is highly recommended. The selective removal of the Lodgepole Pine and Grand Fir as well as the removal of other species that are diseased or defective would generate approximately 400 mbf initially in the first two years and promote considerable reduction in the fire hazard potential and increased growth in forage and timber production.

CP at 402-03.

Robert Broden further wrote:

> **Best Management Practices**
> Best Management practices would include the proper timing of harvests to avoid potential insect issues with the Pine IPS bark beetle. To avoid IPS, operation activities should occur after July 1 and cease prior to March 15 on any calendar year. This allows the slash created to dry out prior to the normal beetle flights in June. Harvest operations should occur during dry or frozen soil conditions to prevent soil compaction and subsequent loss of soil pore space.

CP at 407. Robert Broden also recommended, due to fluctuations in the local timber market, that a log purchase agreement be in place prior to any logging.

Against their wishes, the trial court awarded Roy and Rubye Ames a life estate. As for timber, the trial court orally ruled:

> I want to accord Mr. and Mrs. Ames here the ability to use their timber as long as it's not, again, wasteful, and it's something that - but, that is a - that is something that's common in this area. When people get older, they have that resource and they're able to use it. So, that's the timber and the logging.

RP (Sept. 12, 2012) at 1029-30. When Roy and Rubye's counsel requested greater clarity, the trial court asked counsel for suggestions.

Roy and Rubye Ames suggested that timber harvesting could be "in accordance with [Department of Natural Resources] rules and regulations," or conform to the Broden timber management plan already in evidence. RP (Sept. 12, 2012) at 1032. Stanley and Wesley Ames argued against the first option as allowing almost unlimited logging. The two older brothers agreed to the use of the Broden report on the condition that they could offer their own timber report.

The following colloquy occurred at the end of trial:

> THE COURT: And, the other suggestion here?
> MR. WEBSTER [Counsel for Stanley and Wesley Ames]: Well, the other suggestion, I believe, has some merit, but I don't believe that we should be - I think that we should be able to get an independent cruise [timber inventory] as well, because like minds made us agree on what can be harvested every year. I think that the one that Mr. Montgomery [Roy and Rubye Ames' counsel] has included, when I read it, it says that seven truckloads a year, or I think 320,000,000 board feet should be able to be taken out per year, and that the levels won't decrease with that much coming off. I don't know that . . .
> THE COURT: You want to get a second opinion.
> MR. WEBSTER: I think so, Your Honor.
> THE COURT: Sure.
> MR. WEBSTER: At the very least, if we go that way we should be able to get a second opinion. What we would propose is that a dollar

amount that can be taken in total from there would - would solve all disputes without having more costs.

THE COURT: Well, if we could get two opinions and then try to agree on a dollar amount, I think that would be a good solution, then we wouldn't have any room for argument, or . . .

MR. WEBSTER: I think that might be the best way to go, Your Honor, and if we got two opinions that say that the value of the timber land is not going to decrease with this type of management, I think that's where we're at to protect all the parties. Um, the other option we have as Chris gave to you, I would say that the traditional use has been $1500.00 a month - I mean, a year, over the 15 ½ years according to the testimony of Roy and Rubye. My clients are willing to double that and say that they could take up to $3,000.00 a year off for their own personal expenses. I think that's the simplest, the most cost effective, and it gives them double what they've traditionally used, and it doesn't cause any arguments. It's - it's a number.

THE COURT: Well, I - I think, you know, I don't know how much this is gonna cost to get, you know - the other, the Brogan [Broden] plan's already in, so to speak.

MR. MONTGOMERY: Yes.

THE COURT: So, we just need to get the other one and, you know, if it's not unduly expensive, in my mind that would be the better way to go. It would be sensible long-term, and if the property can be harvested, but not undermine the value, you know, unduly, I mean, I - and leave the title holders with, you know, some guarantee as to the resource, I think that's - that's the goal in my mind. But to maximize the amount that Roy and Rubye have available to them. So, I think that . . .

MR. WEBSTER: So, a second opinion, we'll organize that . . .

THE COURT: Yes.

MR. WEBSTER: . . . ascertain whether they're far off - I mean, in a perfect world, they're both gonna be right on, agreeing with each other, but we know that's probably not gonna happen, but - and then try to have a meeting of the minds?

THE COURT: Sure. That would be the best way to do it.

MR. WEBSTER: Um, if that fails, come back to court?

THE COURT: Yes.

MR. WEBSTER: Okay.

RP (Sept. 12, 2012) at 1034-35.

On November 15, 2012, Robert Broden supplemented his report by declaration. In that declaration, Broden estimated that, in 1997, the property contained about 1,006 mbf of standing timber. Based on a forestry technique termed "habitat typing," Broden estimated an annual average timber growth rate of 2.5 to 3 percent. CP at 326.

> Using the estimated volume of timber on the property in 1997 (1,006 mbf) and my estimate of growth of 2.5% (based on tree age and condition) means you should have been able to harvest 25.15 mbf annually since 1997 indefinitely, if done properly, and still maintained the 1,006 mbf of standing volume. 25 mbf equates to between 5 and 6 standard logging truck loads. The volume harvested by Roy and sent to Springdale Lumber would have been part of this 25 mbf. The fact that the harvest was well below this level is why at the time of the timber cruise in October of 2011 there was 1,471 mbf on the property. By today's date it would have grown to an estimated 1508 mbf.

CP at 326.

On November 15, 2012, Stanley and Wesley Ames filed, with the court, a timber report from forester Maurice Williamson. Williamson estimated the total timber stand at 1,523 mbf and an average annual timber growth of 1.4 percent. Williamson recommended:

> Based on the stand volume and property-specific growth rate actually determined, and a predicted annual mortality rate of 0.7%, the average annual timber harvest should be 10.7 MBF (thousand board feet) to maintain the timber stand at approximately its current volume. This harvest volume will correspond to approximately two to three truck loads depending on log size.
>
> The 10.7 MBF average annual harvest should concentrate initially on the short-lived lodgepole pine, followed by select harvest of grand fire [sic] and by removal of trees showing evidence of disease. Trees to be

> removed should be marked at breast height and on the stump by a knowledgeable forester able to identify such diseased trees and other trees whose removal would significantly promote stand health. Subsequent harvest should be mixed age select harvest in order to maintain a healthy stand with substantially the same volume, wildlife values, and aesthetic character as currently exists.

CP at 297. Like Broden, Williamson recommended limiting logging to after August 1 and prior to March 1 to prevent insect infestations.

In his report, Maurice Williamson highlighted his agreements and disagreements with Robert Broden:

> I have reviewed two Stewardship Reports prepared by Bob Broden concerning the property. His inventory methodology and results appear appropriate and the stand volume he determined is within the margin of error of our volume determination.
>
> **However, Mr. Broden assumed a 2.5% growth rate without determining the actual growth rate for the subject property and without accounting for natural mortality. As a result, the corresponding harvest level recommendation Mr. Broden provided are without factual support, are not applicable to this property, and should not be used for any purpose. Mr. Broden's suggested harvest levels, if followed, will result in substantial depletion of the stand volume and substantial change to the character of the forested areas of the property.**
>
> In accordance with my recommendations above, I concur with Mr. Broden's suggestion that the short lived lodgepole pine and grand fir should be specified for removal prior to excessive mortality which, as I have previously discussed, may be imminent in the lodgepole pine component.

CP at 301 (emphasis in original.)

In a November 16, 2012 declaration, forester Williamson continued to note his

disagreement with habitat typing:

> Habitat type can provide a crude estimate of growth potential but can be misleading if not adjusted for environmental factors, stand structure, stocking level, and age. Habitat typing is not used to determine a specific annual growth rate. Growth rates decrease as trees get older and larger. Habitat typing provides no direct evidence of actual growth of trees in a particular time frame and location. As a result, Bob Broden's use of habitat type to lead to a timber harvest level recommendation is unreliable and provides incorrect results.
>
> The only method to determine actual growth is through sampling, typically including radial growth sampling, which we have done. We analyzed the growth rings in the outer 1 inch of more than 60 sample trees, and observed an average of approximately 20 rings in that outer 1 inch. Thus, on average, that one inch represents the growth over the last 20 years.
>
> The annual growth rate of 1.4% determined by our sampling and analysis is therefore an average over the approximately 20 years, not just the current growth rate.

CP at 341.

After reviewing Robert Broden's reports and Maurice Williamson's report and declaration, the trial court, on December 3, 2012, sent the parties a draft decree and completed findings of fact and conclusions of law. In addition to the facts recounted above, the court found:

> G. A number of equitable considerations work in favor of Wesley and Stanley and in favor of formal ratification of a life estate for Roy and Rubye, with legal title and a remainder estate to be vested in Wesley and Stanley. First, the oral life estate was to recognize and respect Roy and Rubye's right to remain in possession and control of the real property improvements, timber and farm operation until they die. Wesley and Stanley have consistently over the years acknowledged this goal. They have also respected the original oral agreement by keeping their payments

current. But it would ignore the remainder estate if now, after fifteen years, Roy and Rubye obtained title to the property which, given the present family alignment, they then would leave to Randy and Arleta.

H. Wesley and Stanley have agreed to pay $216,000 over thirty years, or sooner, if the life estate comes to an end. While they are not paying any interest on the declining balance due, the terms have not proved to be in their long-term financial interest. One value of the real property, improvements, timber and farm equipment was set in 1997 at $69,996, resulting in a remainder estate worth only $27,633. At a current value of approximately $350,000, the remainder estate is valued at $138,173; again substantially below the agreed purchase price.

I. A major consideration for Wesley and Stanley in purchasing the property was to provide for their retirements. They spent their youths on the farm, and now in later years, have plans to move back. Their return is also necessitated by financial considerations.

J. Over the years, Wesley and Stanley have made expenditures to help keep the farm up. Ames Development Corp. alone has expended a total of $31,205.06 to cover farm operating expenses of $13,959.71 and building/equipment expenses of $17,246.35.

. . . .

M. Roy A. Ames correctly understands that his life estate allows him to harvest timber on the property as he needs money and to properly manage, i.e., maximize the resource. Roy A. Ames has managed his timber for decades, and, "the good condition of the current timber stand on the ownership is a testament to Roy's (landowner) long term commitment to forest stewardship." . . . Roy A. Ames has been frugal with this resource, and now, in his and his wife's later years, they will have need for some increased harvesting.

CP at 419-21; *see also* CP at 1542.

The trial court ordered the property conveyed to Stanley and Wesley Ames, with an express life estate for Roy and Rubye Ames. The court concluded:

> There shall be no limitations on the life estate, except – Wesley B. Ames and Stanley R. Ames shall be allowed to continue storage of cars on the property. . . . Roy A. Ames and Rubye M. Ames shall harvest timber in keeping with the Stand 1 Objectives at page 9 of the February 21, 2011

> Plan [the Broden Report]; with any harvesting increases to be by Court order. The holders of the life estate and the remaindermen shall each be afforded the opportunity to present expert witness declarations.

CP at 422.

In the draft decree, the trial court allowed Roy and Rubye Ames to harvest up to "19 mbf, plus the salvage removal of identified 'at-risk' species." CP at 379. Robert Broden previously estimated that the selective removal of the lodgepole pine and grand fir and removal of other species that are diseased or defective would generate approximately 400 mbf in the first two years.

On December 14, 2012, Stanley and Wesley Ames objected to the timber award to Roy and Rubye Ames. The oldest sons argued that allowing a 400 mbf harvest under the guise of "salvage" is inconsistent with the historical practice and the idea of limited additional income. The brothers asked the court to order a maximum amount of logging at 20 mbf, inclusive of any salvage. In the alternative, the brothers asked the court to use WAC 222-16-010 to define "salvage," which defines the term as, "the removal of snags, down logs, windthrow, or dead and dying material."

On January 11, 2013, the trial court amended his ruling to allow Roy and Rubye Ames to harvest 19 mbf plus salvage as WAC 222-16-010 defines. In the amended ruling, "[a]ny annual logging proceeds beyond the 19 MBF and 'salvage' shall be shared in proportion to respective adjusted proportional values of the Life Estate and Remainder Interests based on the current Washington State DSHS Life Estate valuation table,

namely 70%, 30%." CP at 547. On January 29, 2013, the trial court clarified that 70 percent goes to Roy and Rubye Ames and the remaining 30 percent to their oldest sons. The trial court observed that Robert Broden's supervision "will, in the long run, protect the remainder estate." CP at 549.

In early 2013, Roy and Rubye Ames hired Jason Baker to prepare for logging, and Baker moved his equipment onto the Ames' farm in preparation for logging. On February 8, 2013, the trial court entered its decree, and summarized its rulings to date:

> [Roy and Rubye] are allowed to harvest timber on the property and manage said Timber Harvesting in accordance with the Timber Harvesting Report of Robert Broden of Brogue International dated November 1, 2012 (Exhibit "F"). SUBJECT TO timber harvest limitations as set-forth in the Timber Management Report and Goals of Robert Broden of Brogue International dated November 1, 2012, limited to an annual harvest of 19 mbf, plus salvage defined as the removal of snags, down logs, windthrown or dead or dying material, pursuant to WAC 222-16-010. Any annual logging proceeds beyond the 19 mbf and "salvage" shall be as per recommendations by Robert Broden, Forester, shared in proportion to respective adjusted proportional values of the Life Estate and Remainder Interests based on the current Washington State DSHS Life Estate valuation table, considered, but modified by discretion of the Court, namely 70% of the net proceeds after logging costs and taxes to Roy A. Ames and Rubye M. Ames, 30% of the net proceeds after logging costs and taxes to Wesley B. Ames and Stanley R. Ames. The adjustment balances the parents' full life estate interest, as against the continuing antagonism between their siblings which affects timber management. Any additional Timber Harvesting beyond that recommended by Robert Broden, Forester, shall be pursuant to further Order of this Court.

CP at 556-57. The court vested broad discretion in Robert Broden.

On February 13, 2013, Roy and Rubye Ames entered into a log purchasing

agreement with Vaagen Brothers Lumber, with Jason Baker delivering the timber to Vaagen Brothers. On February 15, 2013, Stan and Wes Ames moved to stay enforcement of the decree.

On February 19, 2013, Stanley and Wesley Ames moved for reconsideration, again asking the court to impose a maximum cap on logging. At a February 19 hearing, the trial court stayed logging on the property pending the outcome of the sons' motion for reconsideration, but ordered Stan and Wes to post a $10,000 bond within five days. On February 25, the brothers posted the $10,000 bond.

On March 1, 2013, Roy and Rubye Ames moved the court to amend the logging stay to allow them to harvest 19 mbf during the pendency of their sons' motion for reconsideration. Roy and Rubye argued that the delay caused by their sons' motion for reconsideration was unreasonable, given their advanced age and their need for money to complete the addition to their house. In the alternative, Roy and Rubye asked the court to increase the bond to $100,000 to cover the harvest of approximately 500 mbf of the total volume on the property of 1,508 mbf. The Broden Report estimated a 1997 volume of timber of 1,000 mbf. Thus, between 1997 and 2013, timber volume increased about 500 mbf. The couple characterized this increase as retirement savings, which, in their advanced years, they now sought.

Before considering Stanley and Wesley Ames' motion for reconsideration, the trial court granted, in part, Roy and Rubye Ames' two March 1 motions. On March 4,

2013, the trial court authorized the immediate harvest of timber up to 19 mbf.

On March 12, 2013, the trial court held a hearing for Stanley and Wesley Ames' motion for reconsideration. The court conceded that the Broden Report was not admissible under the hearsay exception for business records. The court noted that the doctrine of waste, as embodied in Broden's and Williamson's reports, protects remaindermen Stanley and Wesley from "unlimited logging," and that the two brothers agreed to resolve the issue through post-trial declarations. As the brothers had since submitted the Williamson Report, the court allowed Roy and Rubye Ames to similarly resubmit Broden's report. The trial court observed that both Broden and Williamson agreed that an immediate harvest of lodgepole and grand fir was needed to improve the stands overall health, noting:

> Broden, I believe it is, talks about then 400 MBF over the first two years . . . of harvesting the lodgepole and the grand fir, if I've got this straight. So, that would be over and above the 19 MBF. This would be - and that's – that's a substantial . . . logging here that's a concern to the defendants, but I can see where it would be. But, on the other hand, the evidence that I have in front of me is that that's the prudent thing to do. That Williamson and Broden say that that particular species is in bad shape. So, it would be foolish to just let it die off, it would seem to me, as opposed to harvest it and share in some manner the proceeds from that recognizing that both the . . . plaintiffs and the defendants have an interest in this resource.
>
> . . . .
>
> [S]o those equitable considerations lead me to the conclusion here that there has to be this logging in keeping with the avoidance of waste, in keeping with proper resource management, and, uh, the formula should be 60% to the plaintiffs and 40% to the defendants, and - and I do that mostly on these equitable grounds. I do that because the experts tell me when I

> read these reports that everybody agreed we should look at, uh, that there's this problem with diseased and dying trees and also a need for some thinning, and so, uh, that's where I come down. It would be the 19 MBF plus that amount of extra logging.

CP at 1315-17. The trial court affirmed its allowance of Roy and Rubye Ames to harvest 19 mbf plus salvage, plus an initial thinning to increase the overall health and growth of the forest, which, as noted in the Broden Report, might be as much as 400 mbf. The next day, on March 13, 2013, Roy and Rubye Ames filed an affidavit from Robert Broden to authenticate and submit his timber management report.

About March 20, 2013, Stanley Ames spoke with Steve DeLong from Vaagen Brothers Lumber about the log purchase agreement with Roy and Rubye. As the trial court later found:

> 1.11 Defendant, Stanley R. Ames, contacted Vaagen Brothers Lumber on or about March 20, 2013 and spoke to Steve DeLong about the Log Purchase Agreement. After that conversation, Steve DeLong, on behalf of Vaagen Brothers Lumber contacted Jason Baker d/b/a Mad Loggers and informed him that Vaagen Brothers Lumber would not be purchasing the timber on the Ames Farm until the legal issues were resolved;
>
> 1.12 Whether it was the intent of the Defendant, Stanley R. Ames, to interfere with the Log Purchase Agreement or not, his having contacted Vaagens had the effect of causing Vaagens to cancel the Log Purchase Agreement with the Plaintiffs, Roy and Rubye Ames;
>
> 1.13 After Steve DeLong ofVaagen Brothers Lumber contacted Jason Baker d/b/a Mad Loggers and informed him that they had cancelled the Log Purchase Agreement with Plaintiffs, Roy and Rubye Ames, Jason Baker d/b/a Mad Loggers moved his equipment off the Ames property and sent them an Invoice for $16,460.00 since was unable to perform under the contract;

CP at 1745. On March 25, 2013, Jason Baker wrote Roy and Rubye Ames to inform them that he suffered damages as a result of the Vaagen Brothers' cancellation of the log purchase agreement.

On April 1, 2013, Roy and Rubye Ames moved the trial court to order the $10,000 bond forfeited, pointing to Stan Ames communications with Jason Baker.

On April 11, 2013, the trial court entered an order granting Stanley and Wesley Ames' motion for reconsideration in part. The court increased Stan and Wes' share of net proceeds from logging over 19 mbf from 30 percent to 40 percent. Otherwise, the trial court denied the motion for reconsideration.

On May 10, 2013, Stanley and Wesley Ames moved the court to continue the stay of timber harvest during the appeal, replace the cash bond with a lien against their remainder interest in the property, and to order the return of the $10,000 cash bond already posted. On May 14, 2013, the trial court set bond for Stanley and Wesley's appeal at $55,000. The court deferred ruling on whether to forfeit the $10,000 bond already posted.

Also on May 14, 2013, the trial court struck the Broden Report from its December 4, 2012 findings and conclusions, and replaced it with the same report, but from Broden's March 20, 2013, declaration. On May 15, 2013, the trial court ruled that Roy and Rubye may transport and sell some timber cut between April 22, 2013 and May 10, 2013, with the proceeds to be disbursed consistent with the parties' share ordered by the court. A

May 15 order stayed all additional logging pending the outcome of Stanley and Wesley's appeal to this court and based on the $55,000 supersedeas bond.

On June 10, 2013, Roy and Rubye Ames filed a motion to forfeit the original $10,000 bond. In a declaration, the parents stated:

> The preparation work we had Jason Baker do, and the timing of his preparation work, were both authorized and reasonable. The fact that Jason Baker moved his equipment and performed the preparation work without being able to haul any logs to the mill so he could get paid was directly and solely the result of the Defendants' Request for Reconsideration, not from any improper action on our part. Therefore, we should not have to bear any part of the damages that resulted from the stay the Defendants obtained during their Request for Reconsideration.

CP at 1723-24. On June 14, 2013, the trial court granted Roy and Rubye's motion to forfeit the $10,000 bond in part, writing:

> The Court finds that the Plaintiffs and the Defendants should be held equally responsible for expenses related to the suspension of logging operations in March 2013: Specifically, the unpaid Invoice of Jason Baker d/b/a Mad Loggers in the amount of $16,460.00 admitted during the hearing as Plaintiffs' Exhibit No. "1". Plaintiffs shall be responsible for $8,230.00 and the Defendants shall be responsible for $8,230.00 of said Invoice.

CP at 1745. The trial court directed the court clerk to tender the sum of $8,230, from the $10,000 bond, for disbursement to Jason Baker. The remaining balance in the amount of $1,770.00 was to be returned to Stanley Ames.

LAW AND ANALYSIS

Stanley and Wesley Ames contend: (1) the trial court relied on inadmissible evidence, the Broden Report, when it concluded that timber harvesting consistent with the report is not waste; (2) the trial court's timber award constituted an abuse of its discretion in equity; (3) the trial court's timber award is inconsistent with the general rule that life tenants commit waste when they remove substantial amounts of timber; and (4) the trial court abused its discretion when it ordered the partial forfeiture of the $10,000 bond.

Broden Report

Wesley and Stanley Ames assign error to the admission of the Broden Report as a business record at trial. Nevertheless, the trial court did not resolve what timber rights to grant Roy and Rubye Ames at trial. At trial, neither party presented sufficient evidence on the issue. At the parties' suggestion, the trial court resolved the timber dispute through posttrial declarations. In turn, the trial court struck the Broden Report from the trial record and relied on a version of the report submitted posttrial by declaration.

The brothers Ames agreed to the procedure of submitting forester reports by declaration post-trial. In fact, they first suggested the procedure. They participated in this procedure by submitting Maurice Williamson's report. They complained of the court's declaration procedure only after the court ruled in favor of Roy and Rubye.

We estop Stan and Wes Ames from objecting to the declaration procedure that

they suggested. *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951, 205 P.3d 111 (2009). If the trial court committed any error, Wesley and Stanley Ames encouraged the error. Under the doctrine of invited error, a party may not materially contribute to an erroneous application of law at trial and then complain of it on appeal. *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995).

Timber Rights

Before this litigation, title to the Stevens County property rested in Stanley and Wesley Ames and no written instrument reserved a life estate in the land for Roy and Rubye Ames. The trial court therefore employed a constructive trust to impose the life estate upon title to the property. Stanley and Wesley Ames asked the trial court to grant Roy and Rubye Ames a life estate and do not assign error to the imposition of the constructive trust. Instead they contend the trial court abused its discretion, when granting the life estate, because it (1) improperly considered Roy and Rubye's financial need, and (2) allowed Roy and Rubye Ames to presently sell salvage timber instead of setting a maximum limit on logging. "We review the authority of a trial court to fashion equitable remedies under the abuse of discretion standard." *Sac Downtown Ltd. P'ship v. Kahn*, 123 Wn.2d 197, 204, 867 P.2d 605 (1994).

In their briefing, Stanley and Wesley Ames characterize the trial court's award as allowing "unrestricted and massive logging," "virtually unlimited" logging, and logging off "half the forest." Br. of Appellants at 33, 35, 42. The brothers exaggerate. The court

permitted Roy and Rubye Ames to harvest up to 19 mbf, plus salvage as WAC 222-16-010 defines, plus thinning as recommended by Robert Broden to promote the timber stand's overall health and growth. The net proceeds from any harvesting beyond 19 mbf and salvage go 60 percent to Roy and Rubye Ames and 40 percent to Stan and Wes Ames. For the first two years, this additional thinning might be significant, up to 400 mbf, given the current condition of the lodgepole, grand fir, and other timber.

Stanley and Wesley Ames argue briefly that the trial court improperly considered Roy and Rubye's financial need in fashioning its remedy. The brothers do not indicate how this consideration harmed them, but perhaps they claim that this consideration led the trial court to grant excessive logging rights. The brothers Ames, when raising this assignment of error as an isolated assignment, fail to support the argument with citations to legal authority and references to relevant parts of the record. Thus, we refuse to hear the assignment under RAP 10.3(a)(6). "Unsubstantiated assignments of error are deemed abandoned." *Kittitas County v. Kittitas County Conservation Coal.*, 176 Wn. App. 38, 54, 308 P.3d 745 (2013).

Regardless, this argument is without merit. The impetus for the 1997 agreement transferring the property to Stanley and Wesley Ames was to provide for Roy and Rubye Ames' financial security. Stanley and Wesley paid above market value for their remainder interest, based on their ability and willingness to help their parents. Sitting in equity, the trial court sought to give effect to the parties' original intent. Roy and

Rubye's continued financial security was a paramount concern. Courts may impose a constructive trust to give effect to the parties' intent. *Baker v. Leonard*, 120 Wn.2d 538, 548, 843 P.2d 1050 (1993). "When the equitable jurisdiction of the court is invoked by the parties, whatever relief the facts warrant will be granted." *Kreger v. Hall*, 70 Wn.2d 1002, 1008, 425 P.2d 638 (1967).

Clear, cogent, and convincing evidence must support "the basis for impressing the trust." *Baker*, 120 Wn.2d at 547. "Evidence is clear, cogent, and convincing if it shows that the ultimate fact in issue is highly probable." *Dave Johnson Ins. Inc. v. Wright*, 167 Wn. App. 758, 774, 275 P.3d 339, *review denied*, 175 Wn.2d 1008 (2012). Assuming this evidentiary burden applies to the conditions of the trust, not only the creation of the trust, overwhelming evidence supports the trial court's conclusion that the purpose of the transfer to the sons and retention of the life estate was for the purpose of the financial needs of Roy and Rubye Ames.

Stanley and Wesley Ames next argue that the trial court committed error when allowing Roy and Rubye Ames to engage in salvage logging. Stan and Wes write: "Predictably, Randy abused the discretion the court gave Roy and Rubye under the Broden report and logged off a 486 [mbf] of timber as soon as he could rationalize it to himself that he was not violating a court order." Br. of Appellants at 37. The older brothers argue that the court should have foreseen and prevented this abuse by setting a precise lid on logging.

The trial court noted that a numerical limit would have prevented Roy and Rubye Ames from effectively managing the forest. The court found that the life estate was intended to allow Roy Ames to harvest timber on the land to the extent he and his wife needed the proceeds. Roy Ames had been frugal in the past decades and the couple had need for increased harvesting. The sons do not challenge these findings.

Roy and Rubye Ames allowed the timber to grow beyond its 1997 volume of about 1,000 mbf to over 1,500 mbf. Both Robert Broden and Maurice Williamson agreed that the forest demanded thinning for health and growth, and Broden estimated the need for 400 mbf in thinning over the first two years. The trial court astutely observed: "So, it would be foolish to just let it die off, it would seem to me, as opposed to harvest it and share in some manner the proceeds from that recognizing that both the . . . plaintiffs and the defendants have an interest in this resource." CP at 1315.

Stanley and Wesley Ames next contend the trial court's timber award disrupts the general rule that life tenants commit waste when they remove substantial amounts of timber. Along these lines, the sons argue that there is no evidence that they and their parents intended something other than the general rule for life tenants.

Stanley and Wesley Ames ignore Roy and Rubye Ames' testimony that they intended to exercise full control and dominion over the land until they died, without the normal duties or restrictions of a life estate. Stan and Wes admitted themselves that this is not a typical life estate, noting: "The Court has already mandated significant deviations

from a standard life estate, such as requiring the Defendants to pay property taxes, allowing storage and exchange of cars, and allowing an annual visit." CP at 428.

Regardless, the trial court's timber award did not deviate from the general rule for life tenants and timber.

> The general rule that a life tenant impeachable for waste may not cut timber for commercial purposes is subject to a well-established exception, under which a life tenant may cut and sell timber. This exception has been established principally by modern authorities in favor of the owners of timber estates, that is, estates which are cultivated merely for the produce of salable timber and in which the timber is cut periodically. The reason for the distinction is, that since cutting the timber is the mode of cultivation, the timber is not to be kept as part of the inheritance, but part, so to say, of the annual fruits of the land; in these cases, the same kind of cultivation may be carried on by the tenant for life that has been carried on by the settlor on the estate, and the timber so cut down periodically in due course is looked upon as the annual profits of the estate and therefore goes to the tenant for life.

M.C. Dransfield, Annotation, *Timber Right of Life Tenant*, 51 A.L.R.2d 1374, 1375-76 (1957). Thus, the general rule in the United States is:

> The tenant for life is permitted to cut timber for the purpose of clearing the land, provided the part cleared, with that already prepared for cultivation, as compared to the remainder of the tract, does not exceed the proportion of cleared to wooded land usually maintained in good husbandry; and provided further, that he does not materially lessen the value of the inheritance.

Dransfield, supra, at 1382.

The Broden Report indicated that Roy and Rubye Ames allowed the timber to grow to over 1,500 mbf. Whether that timber was harvested and sold, or saved for later

harvesting within the forest itself, that 500 mbf of accumulated "annual profits" belongs to Roy and Rubye under the general rule of life estates.

Case law also supports the trial court's direction to sell salvage lumber and to thin the forest. *Wigal v. Hensley*, 214 Ark. 409, 216 S.W.2d 792 (1949) stands for the proposition that the court has the power and authority to order the sale of standing timber to prevent waste. Stan and Wes Ames argue that *Wigal* addressed only a jurisdictional issue where all parties agreed that logging would be beneficial. *Wigal* did not. The brothers argue, whether a court could authorize the sale of timber to prevent waste when the parties disagree about the utility of logging. But in *Wigal*, the appellant only challenged jurisdiction as a means of preventing the sale of timber. In *Wigal*, the court noted:

> [T]he timber involved should be cut and removed to prevent waste and to protect the interest of both the life tenant and remaindermen. The testimony of an expert forester who cruised the timber is that the pine timber had fully matured, would not advance further in height or diameter and should be removed in order to permit a new crop to mature; that 90 per cent of the hardwood timber had matured and was rapidly deteriorating in merchantableness because of damage by moisture and bugs; that all the timber was subject to the hazards of fire and windstorm; and that it was following the practice of good forestry husbandry to cut and remove the timber as provided in the sale agreement.

Wigal, 214 Ark. at 411.

Under *Kruger v. Horton*, 106 Wn.2d 738, 743, 725 P.2d 417 (1986), the removal of timber constitutes waste only if it decreases the value of land. Under *Pedro v.*

January, 261 Or. 582, 598, 494 P.2d 868 (1972), "a life tenant may, under certain circumstances, thin trees to promote growth." 261 Or. at 595. These persuasive authorities further show that the trial court's timber award does not propagate waste.

Partial Forfeiture of Supersedeas Bond

Stan and Wes Ames contend the trial court erred when it ordered the partial forfeiture of the $10,000 bond.

The parties refer to the $10,000 bond as a supersedeas bond and they cite cases concerning RAP 8.1. RAP 8.1 addresses a stay of judgment or decree through appeal. Here, the trial court stayed enforcement of its decree pending the outcome of Stanley and Wesley Ames' motion for reconsideration under CR 59. Since the stay concerned a pending motion before the trial court, and not the current appeal, CR 62 applies. *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291, 716 P.2d 956 (1986).

In relevant portion, CR 62 provides:

> (b) **Stay on Motion for New Trial or for Judgment.** *In its discretion and on such conditions for the security of the adverse party as are proper*, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to rule 59.

(Emphasis added.)

The question on appeal is not whether the trial court had authority to require the posting of the $10,000 bond, but whether the trial court held authority to order forfeiture of the bond to the extent of $8,230. Cr 62 does not mention the conditions under which

the trial court may forfeit all or a portion of the bond posted pending resolution of a motion for reconsideration. We find no cases that address the forfeiture of a bond posted pursuant to CR 62, so we rely on cases involving a supersedeas bond. One purpose of the bond on appeal is to enable the judgment creditor to be able to enforce the judgment after appeal. But our Supreme Court, in another setting, noted that, under RAP 8.1(b)(2), a party who supersedes enforcement of a trial court decision affecting property during an unsuccessful appeal is liable to the prevailing party for damages resulting from the delay in enforcement. *Norco Constr., Inc. v. King County*, 106 Wn.2d 290, 296, 721 P.2d 511 (1986). By analogy, the prevailing party should be free to use a bond posted pursuant to CR 62 to recover damages from the delay in enforcement of the trial court order.

The trial court ordered Stanley and Wesley Ames to post a $10,000 bond in order to stay their parents' property rights to harvest timber. Thus, Roy and Rubye Ames should be free to use the bond for damages resulting from the delay in their right to harvest.

Roy and Rubye Ames entered a log purchase agreement with Vaagen Brothers Lumber to purchase the timber, and contracted Jason Baker to harvest it. The trial court found that learning of the ongoing litigation caused Vaagen Brothers Lumber to cancel the log purchasing agreement, thus causing the parents to breach their agreement with Baker. But for the sons' motion for reconsideration, the parents would have successfully contracted Jason Baker to harvest timber. The delay in enforcement caused Roy and

Rubye Ames' damages. The trial court might have forfeited the entire bond to pay for the $16,460 in damages incurred, but only forfeited half the amount.

Stanley and Wesley Ames argue and their parents concede that the standard of review in the question of the forfeiture of the bond is unclear. The brothers ask this court to review the lower court's findings for substantial evidence, and its conclusions de novo. The parents ask this court to review the lower court's forfeiture of the bond for an abuse of discretion. We find no reason to resolve this dispute. Even if we addressed the issue anew, we would affirm the trial court.

Stanley and Wesley Ames attempt to construe the court's forfeiture of the bond as holding them liable for tortious interference with a contract. In turn, they argue that their parents did not establish all elements of the tort. While the tort might describe the sons' actions, the trial court did not order $8,230 dollars forfeited on that ground. If grounds exist under bond law to forfeit the bond, the applicability or lack of applicability of a tort is irrelevant to the forfeiture. The sons cite no law requiring courts to conduct a case within a case prior to forfeiting a bond.

Attorney Fees

Roy and Rubye Ames ask this court to award them attorney fees and costs on appeal on equitable grounds. RAP 18.9 provides:

> The appellate court on its own initiative or on motion of a party may order a party . . . , who uses these rules for the purpose of delay, [or] files a frivolous appeal . . . to pay terms or compensatory damages to any other

party who has been harmed by the . . . failure to comply.

Instead of arguing that their sons filed a frivolous appeal, Roy and Rubye Ames assert bad faith. The parents emphasize the sons' removal of farm equipment and Stan's phoning Vaagen Brothers Lumber to inform them of the ongoing litigation. Roy and Rubye allege that their sons are trying to drain their financial resources through a litany of meritless motions and this appeal. "Bad faith" on its own is not a ground for an award of attorney fees on appeal. We must address whether the appeal is frivolous.

An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal. *Lutz Tile, Inc. v. Krech*, 136 Wn. App. 899, 906, 151 P.3d 219 (2007). We resolve all doubts to whether an appeal is frivolous in favor of the appellant. *Lutz Tile*, 136 Wn. App. at 906. In light of the factual complexity of the background of the suit and the paucity of Washington law on timber rights and life estates, we do not conclude the appeal to be devoid of merit.

Stanley and Wesley Ames posted another bond to supersede the judgment while the case is on appeal. Roy and Rubye Ames also ask this court to order the forfeiture of this actual supersedeas bond. Following this court's disposition of the appeal, Roy and Rubye may raise that issue with the lower court.

CONCLUSIONS

We affirm the trial court and deny Roy and Rubye Ames' request for attorney fees.

Fearing, J.

WE CONCUR:

Siddoway, C.J.

Lawrence-Berrey, J.

APPENDIX 2

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

ROY A. AMES and RUBYE M. AMES, husband and wife, Respondents, vs. WESLEY B. AMES; AMES DEVELOPMENT CORPORATION, an Oregon Corporation; and STANLEY R. AMES, individually; and MERITA DYSART, individually, Appellants.	)	No. 31661-1-III (consolidated with 31825-7-III) ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of December 9, 2014 is hereby denied.

DATED: February 17, 2015

PANEL: Judges Fearing, Siddoway, Lawrence-Berrey

FOR THE COURT:

Laurel H. Siddoway, CJ

LAUREL H. SIDDOWAY, Chief Judge

APPENDIX 3

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' BRIEF

Loyd Willaford WSBA# 42696
Webster Law Office PLLC
116 N. Main St.
Colville, WA 99114-2306
(509) 685-2261
Attorneys for Appellants Stanley R. Ames, Ames Development Corp., and Merita L. Dysart

Wesley B. Ames, Pro Se Appellant
11174 Kelowna RD Unit 26
San Diego, CA 92126
(760) 815-4845

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS

II. TABLE OF AUTHORITIES

A. Cases

1. *Washington Cases*

2. *Other Jurisdictions*

II. TABLE OF AUTHORITIES

III. INTRODUCTION AND RELIEF REQUESTED

This case is a dispute between family members over rights to property in Valley, Washington. After a lengthy trial, Respondents Roy and Rubye Ames were granted a life estate in the property. In subsequent hearings, the trial court granted Roy and Rubye Ames large volume logging rights to the property. Appellants Stan and Wes Ames[1] assert in this appeal that the trial court erred in the amount of logging rights it granted. Stan and Wes are also appealing a post-trial ruling in which the trial court forfeited $8,230 of a $10,000 cash bond, which Stan and Wes Ames posted to secure a stay of logging during reconsideration of the trial court's final judgment in this case.[2]

IV. ASSIGNMENTS OF ERROR

A. The trial court erred when, after post-trial hearings, it granted Roy and Rubye Ames large volume logging rights to property in which the court had granted them a life estate. Roy and Rubye presented no evidence at trial or in the post-trial hearings indicating that they were entitled to these large volume logging rights based upon the original agreement that granted them a life estate in the property.

---

[1] To avoid confusion, this brief will use the parties' first names.

[2] This matter was appealed separately as Case No. 318257. On July 31, 2013, the Court ordered that appeal consolidated with Case No. 316611. On August 8, 2013 this Court's Commissioner denied a motion to vacate the order regarding the forfeiture. On October 24, 2013 this Court granted Stan and Wes' motion to modify the Commissioner's ruling and indicated that it would review the matter in the context of this appeal.

B. The trial court erred in failing to grant Stan and Wes' motion to reconsider its final order granting large volume logging rights to Roy and Rubye when Stan and Wes demonstrated there was no admissible evidence to support the granting of these logging rights and the law does not support grants of such logging rights to life tenants.

C. The trial court erred when it ordered the $8,230 of a $10,000 bond forfeited to pay for the alleged logging expenses Roy and Rubye incurred post trial.

V. STATEMENT OF THE CASE

A. Facts related to granting of logging rights

1. 1996 Agreement

In December of 1996, Appellants Stanley R. Ames, through his corporation, Ames Development Corp. (together "Stan"), and Wesley B. Ames ("Wes") reached an oral agreement with Respondents Roy A. Ames and Rubye M. Ames to acquire the real property, which included the timber, located at 3885 Haverland Meadows Road, Valley, WA 99181 ("farm"). Transcript of Trial (Tr.) at 808. Payments under the agreement began in February of 1997. Tr. at 107-108. The initial sale price was $160,000. Tr. at 696. Roy and Rubye later requested $600 per month in payments, so the initial agreement was modified to include the sale of the

farm equipment and to include a 30 year time period for payment. Tr. at 112. This increased the purchase price to $216,000. *Id.* Stan and Wes continued those payments for over 15 years. Stan and Wes also made substantial additional expenditures, such as repairs of the house, payment of property taxes and insurance, and have provided substantial labor on the house, farm buildings, farm equipment, and other matters. Tr. at 815, 45, 53-53. Roy and Rubye continue to reside on the property rent free and have kept all the proceeds from farming and limited logging. Tr. at 113-114.

Because Stan and Wes wanted their parents to be able to continue with the lives to which they were accustomed and to receive additional income, the oral agreement between Roy and Rubye and Stan and Wes provided for Roy and Rubye to continue to operate the farm as long as Roy was able to do so, and to retain the farm income from his efforts. Tr. at 809. It also provided that Roy and Rubye could live in the house on the farm as long as they wished and were able to do so. Tr. 696-697. Although Stan and Wes were not receiving any income from the farm, they reasonably expected to recover their investment from logging the timber once Roy and Ruby ceased their farming and limited logging activities. This was a key element of their retirement income expectations from purchasing the family farm. Tr. at 858.

2. Circumstances change beginning in 2004

By 2004, Roy, who was age 85 at the time, had ceased logging and also dramatically reduced his farming activities. *See* Tr. at 912. Roy and Ruby then asked Stan and Wes to take full responsibility for the farm, since Roy was unable to earn enough from the farm to pay the taxes, insurance and maintenance on the home, as well as the barns and other buildings and farm equipment, small tools and vehicles which were included with the purchase of the farm. Stan and Wes then assumed full ownership and responsibility for the farm and made all decisions as to its use. By 2007 Roy had essentially retired from farming. *See* Tr. at 706, 735. Stan and Wes attempted to arrive at an agreement for Randy, the youngest sibling brother, to live on the farm and provide support for the parents, Roy and Ruby Ames. Randy did not cooperate with Stan and Wes and instead, began making decisions on his own, without consulting either Stan and Wes, or even Roy or Ruby Ames. Activities on the farm and the use of the farm equipment were secretly controlled and performed by Randy Ames, Roy and Rubye's youngest son. Tr. at 735. Roy was generally not even aware of Randy's actions until after the fact. Tr. at 804.

3. Conveyance of farm in 2006

Beginning in about 2003, Arleta Parr, the youngest daughter of Roy and Rubye, repeatedly urged her parents and Stan and Wes to transfer the farm out of Roy and Rubye's names and to Stan and Wes to avoid problems such as those experienced by Arleta's mother-in-law. Tr. at 701-702. As a result, starting at least by the summer of 2005, Roy and Rubye investigated appropriate procedures for formally transferring the deed to the farm to Stan and Wes. *Id.* Rubye frequently encouraged Stan and Wes to undertake actions for that transfer. On November 22, 2005, on their own initiative, Roy and Rubye had the farm transferred by Quit Claim Deed from the Upper Columbia Corporation of Seventh-Day Adventists into their names in preparation for conveying the farm to Stan and Wes. Tr. at 65, 119. This conveyance was necessary because Roy and Rubye had many years before the sale to Stan and Wes, intended to leave the farm to the church. Tr. at 181. Roy and Rubye had the deed transferring the property fully back into their names recorded on January 11, 2006. Tr. at 65. On that same day, Roy and Rubye executed the Quit Claim Deed transferring the farm to Stan (in the name of his corporation, Ames Development Corp.) and Wes. *Id.* The deed to Stan and Wes was duly recorded on December 26, 2006, after several months of reminders to Stan and Wes by Rubye Ames. *Id.*

Pursuant to the 1996 oral agreement, Roy and Rubye retained all of the farm's income which was generated by Roy's own farming and logging activities. Tr. at 113. Roy and Rubye were responsible for the farm expenses. Tr. at 802. However, as Roy further reduced and finally ceased his farming activities, he did not earn enough to pay for the taxes, maintenance and other farm expenses. Therefore, in 2004, Roy and Rubye asked Stan and Wes to assume full responsibility for all decisions and responsibility for the farm. Therefore, over the period from about 2004 to 2009, Stan and Wes assumed full ownership and began paying the basic farm expenses such as property taxes and insurance and paid for substantial house repairs and other maintenance. Tr. at 734-735, 813.

Consistent with the oral agreement that Stan and Wes owned the farm, Stan and Wes kept numerous unrestored vintage and classic cars on the farm and repaired barns and other buildings. Tr. 734-735. Stan and Wes used one of the barns for car storage after Roy retired from farming, and Wes planted numerous fruit trees, shrubs, and vines in preparation for moving to the farm. Tr. at 840.

4. Problems with Randy beginning in 2004

At some time in 2003 or early 2004, Randy Ames and his family returned from Lithuania where they had left a failed business venture. Because Randy and his family represented they had no money and

nowhere to live, Roy and Rubye asked Stan and Wes to allow Randy and his family to stay on the farm. Stan and Wes gave their consent for a temporary stay. Randy and his family stayed on the farm for a few months before moving to a rough cabin located on the adjoining property. Randy's family subsequently moved to a rented house on a nearby farm: the Davis place. Randy also began working on the farm at issue in this case, with Roy telling Stan and Wes that Randy was just helping him. Stan and Wes had no objection to Randy helping Roy farm at that time. Tr. at 707.

Stan and Wes subsequently discovered Randy and Darleen, Randy's wife, were not just helping Roy, but instead were acting independently on the farm. Tr. at 735. This included, in about 2007, bringing their own horses, cattle, and chickens onto the farm without informing anyone in advance. *Id.* They grazed their livestock in the hayfields on the farm, resulting in very little hay being harvested, and essentially no farm income being received by Roy and Rubye at least for the 2008 farming season. Tr. at 725, Due to the failure of Roy, Rubye, Randy, and Darleen to maintain or repair fences, Randy and Darleen's livestock frequently escaped onto public roads and neighbors' properties, creating liability risks for Stan and Wes. Tr. at 765, 803. Roy and Rubye took little to no action to correct or prevent these problems. They did

inform Stan and Wes of Randy's failure to control his animals. Stan and Wes then pressured Randy to correct the problems. Tr. at 804-805.

Randy and his family had been renting a house on the Davis place since about late 2004, but due to Randy and Darleen not properly caring for the place, they were forced by the landlords to leave that house sometime in 2008. Tr. at 568-569. Randy and Darleen again had nowhere to go, no job, and little or no money, so, at the request of Roy and Rubye, Stan and Wes allowed Randy and Darleen to again move onto the farm. Randy's family lived in the house with Roy and Rubye, but conflicts ensued due to insufficient space for eight people in a two bedroom home. While Randy and his family were living on the farm, Stan and Wes again attempted to reach an agreement with Randy and Darleen to continue living on the farm to assist Roy and Rubye. Tr. at 707. This attempt to reach an agreement took place from December of 2008 until the summer of 2009 and was marked by increasing demands from Randy, including his insistence on a clause to allow him to purchase the farm. Tr. at 706-709. The attempt to reach an agreement ended in August of 2009 when Randy informed Stan and Wes that he was taking a job on the Knutson place and would be moving his family there. Tr. at 709-710.

5. Roy and Rubye spend time in California in 2009-2010

In the fall of 2009, Roy and Rubye moved to Southern California and lived in a house across the street from their daughter, Merita Dysart, throughout the winter of 2009-2010. Tr. at 638. Merita made all arrangements for the house, including cleaning and repairing the house, and paid all of Roy and Rubye's expenses while they lived in the house. Tr. at 618. While Roy and Rubye were living in Southern California, Stan and Wes, with the full knowledge of Roy and Rubye, arranged for other tenants to live in the house on the farm. Roy and Rubye accepted and acknowledged Stan's and Wes' right as owners to make such arrangements.

6. Randy creates new problems in 2010

In the spring of 2010, Roy and Rubye moved back from California into the house on the farm. In about July 2010, Randy was fired from his job managing the Knutson place and given 30 days to vacate the house which Knutson had provided for them. Tr. at 710-711. Roy and Rubye again entreated Stan and Wes to allow Randy and his family to once again move back onto the farm because, once again, Randy and his family had nowhere else to go, no job, and no money. Tr. at 711. Despite the serious problems Stan and Wes experienced in 2009 when Randy and his family lived on the farm, Stan and Wes acquiesced to Roy's and Rubye's requests

and allowed Randy and his family to move onto the farm. *Id.* However, Stan and Wes insisted that Randy's and Darleen's stay be subject to a written agreement. *Id.* As a result, on September 6, 2010, Randy and Darleen signed two agreements with Stan and Wes: 1) a month-to-month House Rental Agreement, and 2) a Farm Lease Agreement. Tr. at 952. Roy and Rubye were fully aware of and supported the rights of Stan and Wes to enter into these agreements, since they owned the farm. Tr. at 733. Randy acknowledged Stan and Wes' ownership of the farm at all times in the rental and lease agreements and during negotiations for amendments to those agreements up until just prior to this suit.

Extremely divisive problems with Randy and Darleen began very soon after the House Rental and Farm Lease Agreements were signed. Randy and Darleen attempted to bar Merita from visiting her parents at the farm. Tr. at 647. Randy and Darleen also contracted for more than 40 horses belonging to someone else to be brought onto the farm. Tr. at 803-804. Randy and Darleen did this without the knowledge or consent of Stan and Wes, or the prior knowledge of Roy or Rubye. Tr. at 804. Randy and Darleen did not ensure adequate fencing or liability insurance was in place. Tr. at 765, 442. Randy and Darleen also brought approximately 300 chickens onto the farm, again without the prior knowledge of Roy or Rubye or Stan and Wes. *See* Tr. at 735. Randy and

Darleen allowed those chickens to wander and cause damage. Despite the problems, in their continuing attempts to provide for future assistance for Roy and Rubye, Stan and Wes again tried to negotiate an agreement under which Randy and Darleen would live on the farm in separate living quarters and assist Roy and Rubye. Once again, however, Randy became progressively hostile and demanding, eventually stating he could not work with Stan and Wes and completely ceasing communications. Tr. at 437 While the negotiations with Randy and Darleen were proceeding in the late fall of 2010, Roy and Rubye again moved to southern California, this time living with Merita in her own home. *See* Tr. at 638. Merita again paid all of their expenses, including travel costs.

7. January 2011 Agreement

The parties had proceeded under the original oral agreement without any dispute until Randy became involved with the farm. Tr. at 711-712. On December 20, 2010, Randy sent a letter to Roy and Rubye in which he asserted Roy and Rubye should assert control over the farm and used religious imagery to persuade Roy and Rubye to repudiate the agreement with Stan and Wes. *See* Tr. at 348-350. Roy had begun to experience memory problems. Rubye communicated her concerns about these memory problems to Stan and Merita. This memory loss was apparent in late 2010 when Rubye, together with Stan and Wes, realized

Roy's recollections and attitudes were in the process of changing. Therefore, all parties felt it was a good idea to complete a written agreement concerning Roy's and Rubye's use of the farm as previously discussed and begun, instead of continuing to rely on recollections of the oral agreement. Rubye talked with Roy about what he wanted in the agreement and relayed that information initially to Stan, and later to Wes. Roy demanded greater rights than the oral agreement had provided, but Stan and Wes acquiesced because they feared even greater changes in Roy's memories and desires would occur under the constant manipulation from Randy. Tr. at 729-730.

Stan and Wes acceded to Roy's demands but with limitations to protect them if Roy should make poor decisions. In addition, Stan and Wes recognized Roy and Rubye were already quite elderly, and were naturally concerned about age-related declines in Roy and Rubye's thinking and decision-making abilities, and the results such declines could have on the farm. Stan and Wes were further fully aware Roy was not physically capable of personally performing farm work, but they believed it would be much better for him mentally and emotionally to continue to have as much involvement with the farm as possible. Tr. at 727-730.

As a result, Stan and Wes prepared an initial proposed agreement incorporating both Roy's desires and the limitations. They separately

discussed the proposed agreement with Roy and Rubye by telephone, and then sent it to Roy and Rubye for review and revision. Before the first draft was sent, Wes made clear to Rubye in a telephone call that Roy and Rubye were free to consult with an attorney if they had any questions about the agreement. Wes repeated this reminder later during an in-person conversation overheard by Merita in her home. Later, during a discussion about the draft agreement between Merita and Rubye, Merita also told Rubye she and Roy could see an attorney if they had any questions about the agreement. In addition, in a telephone call between Rubye and Stan, Stan specifically emphasized that Rubye and Roy were free to discuss the agreement with an attorney or with anyone else if they had any questions or did not understand anything in the agreement. On multiple occasions when the option to see an attorney was mentioned to her, Rubye indicated that she and Roy did not think they needed to see an attorney because the agreement was clear and they understood it. Tr. at 745.

After Roy and Rubye reviewed the first draft, Ruby talked with Stan by telephone and relayed their desired revisions. Stan made the revisions and sent a revised draft the next day. In response to further communications for revisions from Roy and Rubye, Stan and Wes again revised the draft agreement in accordance with Roy and Rubye's request and forwarded a third draft for review and comments. After receiving Roy

and Rubye's further comments and making the corresponding revisions requested by their parents, Stan and Wes sent a fourth version of the agreement, which was again reviewed and subsequently signed by Roy and Rubye as witnessed by Merita. The agreement was then sent to Wes who signed it and forwarded it to Stan who signed it. A copy of the fully signed January 2011 Agreement was sent to Roy and Rubye who were then living with Merita for the winter. Tr. at 728-733, *passim.*

8. Continued problems with Randy in 2011

During the winter of 2010-2011, Randy and Darleen continued to live in the house on the farm under their rental agreement with Stan and Wes. Roy and Rubye wished to return for the summer of 2011. Stan communicated to Randy and Darleen they needed to move so their parents, Roy and Rubye Ames could move back onto the farm. Randy and Darleen refused to commit to a reasonable date when they would vacate the house, so Stan and Wes were forced to serve an eviction notice on them. *See* Tr. at 765.

Despite the signed January 2011 agreement, problems with Randy and Darleen continued to escalate, so much so that Rubye prepared a letter dated April 24, 2011 directed to Randy, confirming that Stan and Wes owned the farm, and asking Randy to stop causing such problems. Ex. D-18; Tr. 134-136. In late April of 2011, Randy and Darleen moved out of

the house into a cabin located on the adjoining property, where they had lived previously. On or about May 2, 2011, Roy and Rubye moved back into the house. Tr. at 129-130.

Due to the additional problems and damage Randy and Darleen had caused and were continuing to cause, Stan and Wes served on Randy and Darleen a notice that the farm lease would not be renewed. Tr. at 766-767. The lease would terminate by its terms on December 31, 2011. *Id.* Problems with Randy grew worse, with Randy continuing to refuse to communicate with Stan and Wes. In addition, Stan learned that significant assets were missing from the farm. As a result, Stan and Wes traveled to the farm on June 18, 2011, in coordination with their sister, Merita, to determine the extent of the problems and to attempt to find a resolution, but Randy was extremely hostile and confrontational. The next day Stan and Wes performed an initial partial inspection of the farm discovering, among other things, that numerous items were missing. Randy had also damaged the farm by digging large holes in a hayfield, exposing subsoil and many rocks. The damage made the field unusable for any of the usual field crops. Later that same day, Stan, Merita, and Wes took Roy and Rubye for a Father's Day dinner in Spokane. On June 20, Randy became so confrontational that he assaulted Stan while Stan and Wes were talking

with Roy about the damage Randy was doing to the farm and Stan and Wes' personal property, and the missing items. Tr. at 803-804.

Following Randy's assault on Stan on June 20, 2012, Randy took Roy to a secret location and prevented Rubye and Roy's family and friends from contacting him for three weeks. Randy threatened Rubye with never seeing Roy again if she did not support Randy and Roy's claims regarding farm ownership. Randy only brought Roy back to Rubye after insisting Rubye's niece depart, leaving Rubye with no other support. As Roy and Rubye's family and friends later testified, Randy isolated Roy and Rubye by constantly monitoring their communications, barring people from the farm, turning off the ringer on the home phone, and taking away phones from Rubye. Tr. at 579, 594. Rubye was forced to procure a secret phone to contact her friends and family. Tr. at 558-559.

9. Lawsuit initiated July 15, 2011

Due to Randy's assault on Stan and the theft of tools from the farm, damaged caused, and refusal to cooperate or maintain equipment he was using, on July 5, 2011, Stan and Wes served Randy and Darleen with an immediate termination notice for the farm lease. Only 10 days after the lease termination with Randy, on July 15, 2011, Roy, now completely under the control of Randy, filed the present lawsuit in which he alleged that he was entitled to reverse the sale of the farm despite the years of

payments, the additional, consistent and substantial care and support provided by Stan, Merita, and Wes, a valid Quit Claim Deed, a written agreement between the parties, substantial conduct by all parties consistent with ownership by Stan and Wes, and Rubye's own letter to Randy confirming Stan and Wes owned the farm. After Roy was isolated from Rubye for more than three weeks and Rubye received threats that Roy would not be returned, Rubye joined the lawsuit. Tr. at 771-780, *Passim.*

10. Contentious litigation for the next year[3]

Roy was able to obtain a restraining order which barred Stan and Wes from the farm and from directly contacting him. The restraining order was later amended to include Rubye Ames once she joined the lawsuit against Stan and Wes. The net result was Roy and Rubye were isolated from the children who had cared for them. It also drove a wedge between Roy and Rubye and their friends and other family members who had been close to them for over 60 years, increasing their isolation and dependence on Randy and Darleen. *See* Tr. at 548-630, *passim.*

[3] Roy and Rubye later amended their suit to assert a claim for conversion of over $10,000 allegedly "taken" by Merita. This claim was dismissed by the trial court after trial and no appeal was taken. Stan and Wes filed a separate lawsuit asserting Roy and Rubye had allowed Randy to damage their personal property on the farm. This suit was voluntarily dismissed at the beginning of trial in this matter.

11. Trial in September 2012

Trial in this matter began on September 4, 2012. Tr. at 1. On the eve of trial, Roy and Rubye moved to dismiss their claim for a life estate. CP at 216-225. The trial court granted this motion. CP at 335. The court also granted Stan and Wes' motion to amend their answer and assert a counterclaim to have a life estate imposed. CP at 206. The counterclaim which the court granted requested the court impose a life estate with the terms of the life estate "to be determined at trial." CP at 211.

During trial Roy testified that he had historically taken approximately $2,000 per year in logs off the property. Tr. at 54. Contrary to all prior agreements, he also testified that he believed the 1996 agreement meant he would control everything on the farm until he died. Tr. at 31. Roy testified that Stan and Wes had made improvements to the farm and equipment since the 1996 agreement. Tr. at 38. These repairs included roofing on the house, repairs to the floors, and repairing and replacing equipment. Tr. at 45, 52. Roy also admitted that Stan and Wes had paid property taxes on the property. Tr. at 54. Finally, Roy testified that he had not read the documents filed in this lawsuit. Tr. at 47.

Rubye testified that it was her understanding that agreement to sell the farm to Stan and Wes "included the logs." Tr. at 502. In response to a leading question from her attorney on redirect, she contradicted her

earlier testimony, saying she understood the agreement would have her and Roy in control of the logs until they died. Tr. at 503. Rubye agreed with her prior declaration in which she stated that $23,279 in logs had been taken off the property since 1997. Tr. at 501. This was an average of $1501 per year. *Id.*

Certified Public Account Larry Zoodsma testified that the value of the remainder interest which Stan and Wes were purchasing in 1996 was approximately $146,069. Tr. at 546. This assumed a value of $370,000 for the land and timber. This $370,000 figure was the value an appraisal conducted at the request of Roy and Rubye placed upon the farm with the timber in 1997. *Id.* Stan and Wes actually agreed to pay $160,000 and later increased this amount to $216,000 including farm equipment. . Mr. Zoodsma testified that this was bad financial deal for Stan and Wes. Tr. at 547.

Near the conclusion of trial, the Court asked the parties for supplemental briefing on its authority to fix the terms of the life estate. Stan and Wes supplied this briefing, CP at 226-230. They requested that the terms of the life estate they had asserted in their counterclaim limit Roy and Rubye's logging activities to firewood for personal use and $1500 in yearly income which was consistent with Roy and Rubye's past practice, CP at 230.

At the conclusion of trial, the court made a finding that Randy had isolated and manipulated Roy and Rubye for his own ends. Tr. at 1023. The court then ruled that it was utilizing the constructive trust doctrine to grant Roy and Rubye a life estate in the property. Tr. at 1025. The court indicated that it was bound by the historical practice of what had been done, unless there was some reason to deviate from that. Tr. at 1029. The court went on to rule that Roy and Rubye had the right with their "possessory interest" to log more than what has historically been done to allow for "unexpected expenses or costs", but this right would have to be exercised in manner mindful of the remaindermen's interest and the obligation not to commit waste. *Id.* Counsel for Roy and Rubye immediately sought clarification on the court's ruling regarding logging. Tr. at 1032. The Court ultimately ruled the parties could get different opinions on the amount of permissible logging and attempt to agree on a "dollar amount" of logging. Tr. at 1034.

12. Post-Trial Hearings

The parties were unable to agree on dollar amount of logging per year. On November 15, 2012, Stan and Wes filed a timber management plan prepared by Maurice Williamson which identified approximately 1.5 million board feet of timber on the property. CP at 298. Mr. Williamson

stated that an average annual harvest level of 10,600 board feet would not deplete the volume of the forest. CP at 299.

Roy and Rubye relied on a report by Bob Broden which they had submitted at trial and which had been admitted over Stan and Wes' objection.[4] This reported identified approximately 400,000 board feet of timber which it recommended for harvest. CP at 597. On November 15, 2013, Mr. Broden submitted a supplemental declaration that suggested that an annual average harvest of 25,000 board feet would be sustainable. CP at 326. Mr. Broden also suggested an "annual program of salvage removal and pre-commercial thinning." The parties submitted numerous declarations offering opinions on the viability of Mr. Broden and Mr. Williamson's proposals. CP at 315-317; 329-355.

After an extensive hearing on the timber harvest and other issues, on November 20, 2013, the court ruled that Roy and Rubye could harvest 19,000 board feet per year plus "salvage" identified in the Broden report. CP at 1238. The court then signed[5] a document entitled Trial, Findings of Fact, Conclusions of Law And Ruling. CP at 413-424. In that document the court ruled that Roy and Rubye could harvest timber according to the

[4] The court later reconsidered it ruling on the admissibility of this report, but then adopted Mr. Broden's revised report in its final decree. The references to the report will cite this final report.

[5] These findings, conclusion, and ruling were not filed until December 4, 2013.

objectives listed in the Broden report with additional harvests by court order. CP at 422.

At a November 27, 2012 hearing, the Court heard extensive argument on the question of what additional "salvage" would entail. The court was prepared to rule that Roy and Rubye could harvest 20,000 board feet per year with no allowance for additional salvage, CP at 1106, but ultimately the court reserved ruling on the issue. CP at 1107.

On December 3, 2013, the court issued a memorandum stating that it would leave the timber harvest decisions to what it termed a "neutral expert", Department of Natural Resources employee Steve DeCook. CP at 358. Mr. DeCook subsequently filed a declaration indicating that he was not permitted to serve in this capacity. CP at 499-502.

At a December 18, 2012 hearing, the Court again changed its position on the timber harvest and ruled that it would revisit the issue. CP at 1133. After several rounds of additional informal submissions by counsel of proposed final documents, *see* CP 547-549, on February 8, 2013, the court entered a final decree. CP at 552-607. This Decree allowed Roy and Rubye to log 19,000 board feet per year plus "salvage" as defined by WAC 222-16-010. CP at 556. Additional logging was permitted in accordance with the Broden report with the net proceeds to be shared 70% to Roy and Rubye and 30% to Stan and Wes. *Id.* The court

left open the possibility of even more logging beyond these amounts to be permitted by court order. CP at 559.

Stan and Wes timely moved for reconsideration of the trial court's final decree. CP at 639-653. On February 19, 2013, the court granted Stan and Wes' motion to stay enforcement of the Decree, specifically to not permit logging pending reconsideration. CP at 756. The court required a $10,000 bond to issue the stay of enforcement pending the hearing on reconsideration. *Id.* Stan Ames posted this bond. CP at 757. Roy and Rubye filed motions to increase the bond amount bond and to modify the stay. CP 758-771. The trial court modified the stay to allow 19,000 board feet of immediate logging. CP at 779-780. The court did not increase the bond amount. *Id.*

At a March 12, 2013 hearing, the trial court partially granted Stan and Wes' motion for reconsideration. CP at 1310-1316. In particular, the court reversed its decision at trial concerning the admissibility of the Broden report. CP at 1311(lns 7-13). This ruling was omitted from the final order on reconsideration which was drafted by Roy and Rubye's counsel, CP at 1481-1490.[6] The court went on to acknowledge the lack of evidence related to logging produced at trial. CP at 1311 (lns 16-20). The

[6] This order also contained a large section concerning the court's consideration of life estate tables which were not addressed at all in the Court's oral ruling. *Compare* CP at 1310-1316 *to* CP at 1488-1489 (¶2.9).

final order on reconsideration included a reference to an amended Broden Report. CP at 1486-1487. Roy and Rubye filed this amended report on March 20, 2013, CP at 1373-1376, after the court had already orally ruled on reconsideration utilizing the prior report. In the end, the Court modified its prior ruling to reflect a 60% - 40% split of logging proceeds in favor of Roy and Rubye. CP at 1316. This was reflected in the final order on reconsideration which was filed April 11, 2013. CP at 1489. This appeal followed. CP at 1748-1762.

B. Facts related to partial bond forfeiture

On February 15, 2013, Stan and Wes timely sought an order staying enforcement of the logging rights portion of the decree pending outcome of the reconsideration. CP at 628-633. The trial court ordered the logging stayed and required a $10,000 cash bond. *See* CP at 756. The Court later modified its ruling to allow 19 mbf of logging pending reconsideration, but did not alter the bond amount. *See* CP at 779-780. Stan Ames posted the bond. CP at 757.

Roy and Rubye had begun logging operations in January or early February 2013. They represented to the mill, Vaagen Brothers, and the logger, Jason Baker, which they hired that they intended to log approximately 500 mbf of timber. *See* Report of Proceedings of June 11

and June 14, 2013 Hearings (RP) at 13:12-13. The logger told them he would only do the job if he could handle 20 loads. RP at 19:21-22. The mill which had agreed to buy the logs from Roy and Rubye canceled the contract because it learned the property was still involved in litigation. *See* CP at 1635-1637.

On April 1, 2013, Roy and Rubye filed a motion to forfeit the $10,000 bond which Stan Ames had posted. *See* CP at 1332-1333. They apparently alleged that contact from Stan Ames had induced the mill to cancel the contract and that as a result, Roy and Rubye were responsible for a $16,460 bill for logging work and alleged damages.[7] The trial court initially ruled the parties would share equally in satisfying this bill and ordered Stan and Wes Ames' portion of the bill be deducted from the $10,000 cash bond which Stan has previously posted. CP at 1480. After hearing Stan and Wes' objection to the lack of admissible evidence justifying this remedy, the Court agreed to hold an evidentiary hearing on the matter. *Id.*.

At the same hearing in which it delayed ruling on the motion to forfeit the bond, the Court granted Stan and Wes' Ames motion for reconsideration in part. On April 11, 2013, the Court ordered that "the annual harvest shall be at a level of 19 mbf; in addition a harvest of

[7] This was an apparent argument because Roy and Rubye made no legal or factual argument in their motion. *See* CP 1332-1333.

lodgepole and grand fir, and necessary thinning [is] also authorized." *See* CP at 1489 at ¶2.9. This ruling allowed an immediate harvest of 400,000 board feet of lodgepole and grand fir and was the pretext used for logging off the douglas fir under the guise of "thinning."

On May 10, 2013, Stan and Wes Ames timely appealed this final ruling to this Court. They also filed a motion for alternate security to stay enforcement of the logging ruling pending outcome of the appeal. *See* CP at 1492-1498. On May 15, 2013, the trial court denied this motion and ordered that a $55,000 cash bond would be required to stay the logging. CP at 1552-1555.

In an apparent attempt to circumvent any limitations by the court on logging, in late April and early May 2013, Randy cut approximately 486 mbf of largely Douglas Fir, a species not authorized for harvest in the court's orders on logging.[8] *See* CP at 1565-1567, 1568-1585, 1622-1623, 1627-1629, and 1630-1631. Stan and Wes, upon learning of this massive logging operation, immediately moved the court for an emergency order stopping the logging. CP at 1559-1563. Stan and Wes also moved the court for an order vacating the bond requirement given that the logging which was to be stayed had now occurred. CP at 1638-1640. The trial court ultimately revised its bond ruling to require a $45,000 bond which

[8] This illegal cutting is the subject of separate litigation in federal court: E.D.Wa Case No. 13-CV-0257.

could be posted from the proceeds from the sale of the downed timber.[9] CP at 1736-1742 at 6.

At a June 11, 2013 evidentiary hearing, Jason Baker, the logger whose bill for the January and February 2013 logging operations Roy and Rubye alleged that they were required to pay, testified that he was not informed that there was litigation related to the property prior to the cancellation of the log purchase agreement. RP at 20:19-24. Mr. Baker also testified that he charged Roy and Rubye $11,000 for five days lost work. *Id.* at 14:11-20. Mr. Baker did not produce evidence of this lost work, and he testified that he had not used the equipment used to do other work for three months after February 2013. *Id.* at 27:4 – 28:10

Mr. Baker further testified that he was not asked to participate in the May 2013 operations. RP at 33:17-20. Mr. Baker also stated that he would be willing to be paid from the additional operations necessary to process the downed timber. *Id.* at 30:12 - 31:4.

Also at the June 11 evidentiary hearing, Stan Ames testified that while he did talk to the mill, he did not induce them to cancel the contract. RP at 52:9-14 The court also had before it a declaration from the mill's log buyer that his cancellation of the contract was not at the inducement of

[9] Stan and Wes timely moved this Court to vacate the trial court's bond requirement. On August 8, 2013, the Court Commissioner denied the motion in conclusory fashion. On October 24, 2013, this Court denied Stan and Wes's motion to modify the Commissioner's ruling on the bond amount, again in a conclusory fashion.

Stan Ames, it was merely a precaution against getting involved in ongoing litigation. *See* CP at 1635-1637. Finally, Randy Ames testified that Steve DeLong, the log buyer, did not tell him the reason for the cancellation of the log contract. RP at 49:2-4. Roy and Rubye Ames did not testify at the evidentiary hearing.

The trial court found that Stan Ames' contact with the mill was a "but-for" cause of Roy's and Rubye's alleged loss. RP at 74:12-14. The court ordered that Stan and Wes Ames would be responsible for $8,230, which represented 50% of the Baker bill, and that this amount would be released to Roy and Rubye through their attorney's trust account to be paid to Jason Baker. *See* CP at 1743-1746 at 3-4.

VI. LAW AND ARGUMENT

A. The trial court erred as a matter of law when it granted massive logging rights to Roy and Rubye.

The trial court granted Stan and Wes's request to impose the equitable relief of imposing a life estate on the farm in favor of Roy and Rubye. The Court chose to employ the constructive trust doctrine. A constructive trust arises where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted

to retain it. *Proctor v. Forsythe*, 4 Wn. App. 238, 242, 480 P.2d 511 (1971); *Thor v. McDearmid*, 63 Wn. App. 193, 206, 817 P.2d 1380 (1991).

While trial courts have discretionary power to fashion equitable relief and the application of that power is generally reviewed under an abuse of discretion standard, see e.g., *Sac Downtown Ltd. P'ship v. Kahn*, 123 Wn.2d 197, 204, 867 P.2d 605 (1994), in the context of a constructive trust the evidence supporting the imposition of the trust must be clear, cogent, and convincing. *Baker v. Leonard*, 120 Wn.2d 538, 548, 834 P.2d 1050 (1993). In interpreting the clear, cogent, and convincing evidence standard, Washington appellate courts have ruled, "[c]lear, cogent, and convincing evidence is a quantum of proof that is less than 'beyond a reasonable doubt,' but more than a mere 'preponderance.' It is the quantum of evidence sufficient to convince the fact finder that the fact in issue is 'highly probable.'" *Tiger Oil Corp. v. Yakima County*, 158 Wn. App. 553, 562, 242 P.3d 936 (2010) (internal citations omitted). Further, the "clear, cogent, and convincing evidence" standard is not met if the evidence supports some other hypothesis or does not unmistakably

point to the existence of the claimed trust. *Engel v. Breske*, 37 Wn. App. 526, 530-531, 681 P.2d 263 (1984) (emphasis added).

1. There was no evidence to support the trial court's remedy of allowing massive logging on a property upon which the court imposed a life estate.

While there was substantial evidence supporting the imposition of a life estate, there was simply no evidence produced which suggested the intent of the parties to the 1996 agreement was that Roy and Rubye would be able to strip the timber value off the property by immediately being able to log off half or more of the timber. To the contrary the only admissible evidence before the court suggested the intent of the parties was the Roy and Rubye could conduct limited light logging for small amounts of additional income. It was only after they under the control of Randy and Darleen and had sued their children that Roy and Rubye asserted a right to log off the majority of the timber on land their sons purchased from them.

While Washington Courts have not directly addressed the issue of logging by life tenants, our Supreme Court has said, "Removal of timber which does not amount to good husbandry of the land, or removal of a substantial amount of timber from land having a value primarily for its timber are classic examples of waste" *Seattle-First Nat. Bank v. Brommers,* 89 Wn.2d 190, 202, 570 P.2d 1035, 1042 (1977). This

statement is consistent with the majority rule across the United States and in England; logging for commercial purposes is not permitted by life tenants. *See* "Timber Rights of Life Tenant," 51 A.L.R.2d 1374 at § 2 (1957)(collecting cases). In the present case, there was no admissible evidence presented to the court which suggested that logging off more than half the available timber amounted to "good husbandry of the land." As Larry Zoodsma testified at trial, even with the full value of the timber on the farm, Stan and Wes were getting a poor financial deal. To allow Roy and Rubye to harvest half or more of the timber and then give Randy half or more of the proceeds as "payment" for his logging work was an incredible injustice to Stan and Wes.

2. The Court's Final Ruling and Decree regarding logging was based upon inadmissible evidence.

This Court, over Stan Ames' objection, admitted the Timber Management Report of Bob Broden (Exhibit P-68) into evidence at trial . This report was classic hearsay. The defendants were given no opportunity to cross-examine Mr. Broden regarding the report, and the person through whom report was admitted, Rubye Ames, admitted to being unfamiliar with its contents. The report consisted entirely of out of court statements by Bob Broden about the condition of forest and the alleged past logging practices of Roy and Rubye, and it was offered for the truth of these

statements. In fact, in its initial Final Ruling, the Court even quoted from the report as if it were true.

While the Court admitted the Broden report under the business record exception (ER 803(a)(6)), Tr. at 974-975, 977, the report failed to meet the business record exception because there was no testimony by "a custodian or other qualified witness" as to the identity of the document and mode of preparation such that the court could reasonable conclude that the report was reliable. *See* RCW 5.45.020. A custodian or other qualified witness must do more than just say, "I asked someone to prepare a report" to meet the business records exception. First, there must be a business and the person offering the record must have been a "custody of the record as a regular part of his [or her] work" or the person must have supervised the record's creation. *Cantrill v. Am. Mail Line*, 42 Wn.2d 590, 608, 257 P.2d 179 (1953). There was no evidence at trial that Rubye was involved in the logging business for which this report was allegedly prepared. There was also no evidence that she supervised the creation of the report. In fact, Rubye testified that she was unfamiliar with the report. Tr. at 980 ("I did not do this, so I can't say what the purpose of it was.")).

The Broden report was obviously prepared for the purposes of litigation, and it is the report of a non-testifying expert. Such reports are not admissible under the business records exception. *In re Welfare of*

J.M., 130 Wn. App. 912, 924, 125 P.3d 245 (2005) ("[T]he business records exception does not, nor should it, allow for the admission of expert opinions for which the opportunity to cross-examine would be of value.") As was amply demonstrated by the post-trial proceedings, the Broden report contained substantial amounts of opinion testimony for which an opportunity to cross-examine would have been of value. The report was inadmissible and any information from the report should not have been considered by the court in fashioning its remedy. While the trial court acknowledged its error in admitting the report at trial in its oral ruling on reconsideration, the court's final order on reconsideration did not reflect this ruling and the final order continued to treat the Broden Report as it were admissible evidence. While trial courts have some discretion in fasihioning equitable remedies, they do not have discretion to rely on inadmissible evidence to do so.

3. *The virtually unlimited logging allowed by the court's Final Ruling and Decree is inequitable and inconsistent with the facts in this case and the law regarding timber rights of life tenants.*

There was no evidence presented at trial or afterward that suggested that Roy and Rubye should be entitled to virtually unlimited logging allowed by the Broden Report which was a series of suggestions with no firm boundaries on logging activities. There was no evidence that

logging was even discussed during the initial negotiations regarding the transaction which led the court to impose a life estate. The very meager evidence offered at trial as to logging suggested that Roy and Rubye had occasionally undertaken very limited logging undertaken to supplement their income. Roy and Rubye themselves offered no testimony as to the timber other than Roy testifying he had made decisions about logging and Rubye testifying that she wanted the forest to remain beautiful and had no intention of clear-cutting. This is far from the clear, cogent, and convincing evidence necessary to justify overturning the normal presumption against logging by life tenants and certainly does not justify the virtually unlimited logging allowed by the court.

Indeed, there was so little evidence about logging that the court failed to substantively address the issue in its oral ruling at the conclusion of trial until prompted by Roy and Rubye's counsel. Tr. at 1032. The Court then invited comment on the issue. This ultimately led to the completely irregular and improper practice of additional substantive hearings under the guise of "presentment." There was no opportunity for cross-examination of witnesses during these hearings and the hearings were replete with inadmissible hearsay. In short, even if these hearing had produced substantive evidence justifying unlimited logging by Roy and

Rubye, which they did not, the evidence would not have been proper for the court to consider.

Stan and Wes's mid-trial proposal to limit Roy and Rubye's logging to $1500 in value per year was consistent with Roy and Rubye's historical practice. The court's ruling at the November 20 presentment was for hearing of a 19 mbf annual cap. This would have produced approximately $7,000 in income at current prices ($370 per mbf). While more generous than the historical practice, this cap was still within the realm of reason. However, the court's inclusion of the salvage logging loophole essentially allowed unlimited logging. Thus, the court's final ruling was unsupported by the facts in this case and the law regarding timber rights of life tenants.

The unrestricted and massive logging operation is what the court's adoption of the inadmissible Broden plan allowed. *See* CP at 597 (400,000 board feet of lodgepole and fir arguably slated for immediate harvest along with other "thinning"). In fact, Randy Ames, in between the trial court's ruling on reconsideration on April 11, 2013 and the filing of this appeal on May 10, 2013, conducted a massive logging operation, allegedly in conformity with the Broden plan, CP at 1627-1629. Almost 500,000 board feet Douglas fir, the most valuable timber on the property, was severed. CP at 1641-1642. According to a letter from Bob Broden,

Randy apparently intends to log off the 400,000 board feet of the lodgepole and fir referenced in the Broden plan at a later date. *See* CP at 1626. Combined with 486,000 board feet of already severed Douglas fir, this would represent approximately 2/3 of the total timber on the property. Allowing Roy and Rubye to take log off this amount of timber has unjustly enriched Roy and Rubye at the expense of Stan and Wes who have made payments for this timber for more than 16 years in good faith.

4. The trial court abused its authority in equity.

"When the equitable jurisdiction of the court is invoked by the parties, whatever relief the facts warrant will be granted.." *Kreger v. Hall*, 70 Wn. 2d 1002, 1008, 425 P.2d 638, 642 (1967). A trial court, sitting in equity, seeks to "fashion broad remedies to do substantial justice to the parties and put an end to litigation." *Paris v. Allbaugh*, 41 Wn. App. 717, 719, 704 P.2d 660, 662 (1985).

The trial court in this matter fashioned a remedy which, rather than ending litigation, has invited and necessitated additional litigation. Stan and Wes repeatedly requested a simple, easy to follow rule with regard to logging: a hard cap on the volume of logging. *See*, e.g, CP at 139 (trial brief request for $2000 per year cap); CP at 230 (supplemental briefing request for $1500 per year cap). In post trial hearings, Stan and Wes

requested a cap at a much higher level that Roy and Rubye had historically logged. CP at 1097 (requesting a cap of 19,000 board feet per year).

The reason for the hard cap request was that Randy has repeatedly demonstrated that he cannot trusted to exercise any discretion he is given in fashion consistent with the rights of others. *See* factual history relayed *supra* at 6-11, 15-18, and 35. And Roy and Rubye have demonstrated that they cannot and will not control Randy. *See* Id. This was an equitable consideration which the trial court completely failed to address in its final order, despite Predictably, Randy abused the discretion the court gave Roy and Rubye under the Broden report and logged off a 486,000 board feet of timber as soon as he could rationalize it to himself that he was not violating a court order.

At one point, the trial court agreed with the approach of hard cap. CP at 1106 (imposing an annual 20,000 board feet cap). But in the end, the court imposed an ambiguous set of rules based upon an inadmissible report. With the Court's remedy, Roy and Rubye (in reality Randy) received a windfall and Stan and Wes are left with much less than what they agreed to pay for in 1996. The court's relief was not in accord with the facts in this case, and it did substantial damage and injustice to Stan and Wes. The discretion which the Court left with Roy and Rubye to have Randy do the logging and receive the bulk of the proceeds was particularly

galling. The only person to benefit from the court's remedy was the non-party, Randy, whom the court found had manipulated his parents. This was a most inequitable result.

5. The court improperly considered Roy and Rubye's alleged financial need in fashioning its remedy.

The Court justified its split of net proceeds in favor of Roy and Rubye by suggesting that Merita, Stan, and Wes would likely not be providing support to Roy and Rubye in the future as they had in the past. This was a consideration that was pure speculation which had nothing to do with the 1996 agreement. The net result is that Stan and Wes were forced to pay far more than they bargained for in 1996 simply because the trial court felt sympathy for Roy and Rubye. Because this consideration had no basis in fact and was unrelated to the intent of the parties in 1996, it was a manifest abuse of discretion for the trial court to use it deprive Stan and Wes of their remainder interest in the timber.

B. The Court erred in failing to reconsider its final decree after Stan and Wes pointed out the lack of admissible evidence and the lack of authority to allow massive logging by life tenants.

Rulings on motion for reconsideration are reviewed for an abuse of discretion. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003). In this case, the trial court abused its discretion by not

reconsidering its decree in light of the problem of a lack of admissible evidence and lack of applicable law to support the decree. Stan and Wes pointed these errors to the court in their motion for reconsideration. CP at 642-653. The court chose to ignore the errors.

1. The trial court misread and misapplied the cases it cited in support of its ruling on reconsideration.

In its ruling on reconsideration, the trial court cited *Wigal v. Hensley*, 214 Ark. 409, 216 S.W.2d 792 (1949) for the proposition that trial courts have authority to order a sale of timber to prevent waste. CP at But in that case, the parties did not dispute that logging would benefit all parties, the only issue was jurisdictional; could the court order the sale?. *Wigal*, , 214 Ark. at 412. *Wigal* did not address the issue of whether the court could order the sale where the issue of waste is contested. In the present case, while the inadmissible Broden Report made vague references to some diseased trees, it did not say that immediate harvest was needed to prevent waste. Thus, even if the report could be considered in this context, which it could not, it does not support the trial court's reasoning that Roy and Rubye should be entitled to an immediate massive harvest to prevent alleged waste.

The trial court also cited *Fort v. Fort*, 223 Ga. 400, 156 S.E.2d 23 (Ga., 1967) for the proposition that it would be following the practice of

good forestry/husbandry to cut and remove timber to prevent waste. But the court ignored a reference in that case to a statute which emphasizes that life tenants must commit "no acts tending to the permanent injury of the person entitled in remainder or reversion." *Id.*, 223 Ga. at 405. (quoting Ga. Code § 85-604). This point was emphasized again in *Robinson v. Hunter*, 254 Ga. App. 290, 292, 563 S.E.2d 189 (Ga. App., 2002). The evidence before the court in the present matter was that allowing a massive immediate logging operation would harm Stan and Wes' long term interests because the logs would not grow back in Stan and Wes' lifetime. This is a permanent injury to Stan and Wes. In addition under the Georgia law, there must be evidence that the proposed harvest is necessary for good husbandry and not for mere profit to the life tenants. *See Fort*, 223 Ga. at 406. There was no such evidence in this case.

Finally, the court cited *Kruger v. Horton*, 106 Wn.2d 738, 743 (1986) for the proposition that "The removal of timber constitutes waste only if it decreases the value of the land." CP at In *Kruger*, the issue was the absence of evidence that the value of the land had been reduced by logging. There was no life estate in that case. The logging in *Kruger* was done by purchasers before repossession by the seller under a real estate contract. The *Kruger* court made the distinction between situations where

there was specific retained interest in timber and where the timber was not addressed. *Kruger,* 106 Wn.2d at 146 n.2. The court held "the sellers lost their right to possess the timber on the property when they allowed the purchaser to take possession of the property under the real estate contract." *Id.*, 106 Wn.2d at 744. In the present case, Stan and Wes, as remaindermen, retain an interest in the timber and therefore any diminution in the value of the timber is waste. *See Pedro v. January*, 260 Or. 582, 494 P.2d 868, 876 (Or. 1972)("The net value of the timber removed is sufficient evidence upon which to award damages. The depreciation in value of the property caused by the removal of the timber could be [m]ore than the net value of the timber but it could not be [l]ess.")

2. The court ignored the general rule that commercial logging by life tenants is waste.

In looking to judicial opinions from other states, the trial court ignored the prevailing view that life tenants have only limited rights to log. In a very instructive example, the Mississippi Supreme Court recently reaffirmed its prior holdings that "a life tenant's harvesting of timber for commercial purposes constitutes waste." *In re Estate of Baumgardner*, 82 So.3d 592, 603 (Miss. 2012). The court allowed only three exceptions to this rule: harvest may be permissible "(1) when

necessary to raise funds to pay the taxes on the property, (2) to provide timber for repair of fences and other improvements on the property, and (3) when necessary for the proper management and preservation of the property." *Id. See also Chapman v. Thornhill*, 802 So.2d 149, 153-155 (Miss. App., 2001)(setting out the development of law concerning life tenants limited logging rights from English common law to the present).

None of these exceptions apply in the present case. Roy and Rubye freely admit that they would use the proceeds from the logging to pay for personal wants such as additions to their home and for caretaking. *See* CP at 1529 (outlining alleged damages from a delay in receiving funds during appeal). There was no mention of payment of taxes. And there was no discussion of any need for timber for necessary repairs to fences or other improvements. Finally, there was no admissible evidence that massive logging is necessary to preserve the property. The trial court's final order allowed Roy and Rubye to log off half the forest and keep more than half the proceeds as "logging costs" and then retain 60% of the "net" proceeds amounts. The result was gross injustice to Stan and Wes. The court's ruling was completely inconsistent with the prevailing law as it relates to logging and life tenants and so was manifestly unreasonably.

C. The trial court erred in forfeiting a portion of a $10,000 cash bond when there was no legal authority or evidence to support the forfeiture.

As an initial matter, it is not clear from the case law what standard of review this Court uses in reviewing decisions to forfeit a supersedeas bond. In criminal bond cases, the Court reviews trial court decisions on bond forfeiture for abuse of discretion. *See, e.g., State v. Kramer*, 167 Wn. 2d 548, 552, 219 P.3d 700 (2009).

Stan and Wes assert that the proper standard of review for rulings on civil supersedeas bond forfeiture should be whether substantial evidence supports the trial court's factual findings. The Court should conduct a de novo review of the trial court's legal conclusions.

1. The trial court lacked authority to forfeit the bond.

Roy and Rubye cited no legal authority for the proposition that the trial court had the power to forfeit the bond for alleged damages sustained by them when Vaagen brothers canceled a contract. "The primary purpose of a supersedeas bond is to delay execution of the judgment while ensuring that the judgment debtor's ability to satisfy the judgment will not be impaired pending appeal." *Lampson Universal Rigging, Inc. v. Washington Pub. Power Supply Sys.*, 105 Wn.2d 376, 378, 715 P.2d 1131 (1986). A supersedeas bond is not a general fund from which a party can use to recover alleged damages from the party who posted the bond. It is meant to be a fund to compensate a prevailing on appeal for "damages

resulting from the delay in enforcement [of the judgment]." *Norco Const., Inc. v. King Cnty.*, 106 Wn.2d 290, 296, 721 P.2d 511 (1986).

If Roy and Rubye had wanted to seek compensation for alleged interference with a contract, the proper vehicle was a separate civil action, not a bond forfeiture. Roy and Rubye did not allege that any of their damages were the result of a delay in enforcement of their logging rights and therefore the trial court lacked authority to forfeit the bond.

2. *There was no evidence to support a finding that Stan interfered with a contract.*

The trial erroneously found that Stan had somehow interfered with a logging contract. CP at 1743-1746. In order to establish a claim for tortious interference with a contractual relationship a party must establish "(1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage." *Leingang v. Pierce Cnty. Med. Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997). "Exercising in good faith one's legal interests is not improper interference." *Id.*

In the present case, while Roy did apparently have contractual relationships with Vaagen Brothers and Jason Baker, neither Stan nor Wes Ames did anything to interfere in those relationships. Merely speaking with a party to a contract about its contents cannot be interference without some evidence of intent to interfere. There was no such evidence in this case. In addition there was positively no evidence to support a finding of improper purpose or means. The trial court's conclusion that a "but-for" causation of a contract breach is sufficient to justify a bond forfeiture is simply legally incorrect.

The evidence before the trial court was that Roy and Rubye Ames had a log buying contract with Vaagen Brothers, which they obtained in the middle of ongoing litigation. They did not inform Vaagen Brothers about the ongoing litigation. During this litigation, Stan Ames called Steve Delong, log buyer for Vaagen Brothers, and spoke with him about the contract. Stan asked Mr. Delong if he was aware of the ongoing litigation, which Roy and Rubye (Randy Ames) had apparently concealed from him. Stan repeatedly told Mr. DeLong that he was not trying to interfere with the contract, he was merely wanting to understand the basis for, and terms of, the contract. The trial court had before it a signed declaration in which Mr. Delong confirmed this account of his conversation with Stan Ames. *See* CP at 1635-1637.

Sometime after the conversation between Steve Delong and Stan Ames, Vaagen's Brothers subsequently terminated the contract they had with Roy and Rubye to buy logs during the reconsideration process. Roy and Rubye Ames alleged that as a result of Vaagen's breach of the contract, Jason Baker, the logger which Randy Ames contracted with was not able to be paid. Mr. Baker submitted a bill to Roy and Rubye for $16,230, more than $11,000 of which was for unsubstantiated lost work.

These were the undisputed facts before the trial court. They do not give rise to any claim for interference with a contract. Stan and Wes were not parties to any of these contracts and had no part in their failure. The fact that Roy and Rubye entered into logging agreements in the middle of ongoing litigation was not Stan and Wes's fault. It was simply unconscionable for the trial court to charge Stan and Wes $8,230 for Roy and Rubye (Randy's) failures. Stan and Wes respectfully request that this Court vacate the order forfeiting $8,230 of the bond and order the $10,000 bond be released to Stan Ames.

VII. CONCLUSION

For all of the above reasons, Appellants Stan and Wes Ames ask this court to reverse the trial court's ruling allowing logging rights to the property to be determined according to the inadmissible Broden Report. They request that this Court instruct the trial court on remand to impose a hard annual cap of 19,000 board feet of logging. In addition, Stan and Wes request that the Court vacate the order forfeiting a portion of the $10,000 cash bond and direct that both this bond and the $45,000 bond be returned to Stan and Wes.

Submitted this 9th day of December, 2013

LOYD J. WILLAFORD, WSBA # 42696
Attorneys for Appellants Stanley R. Ames, Ames Development Corp., and Merlia L. Dysart

Wesley H. Ames, Pro Se Appellant
11174 Kelowna Road, #26
San Diego, CA 92126

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 9th day of December, 2013, I caused to be served a copy of the Appellants' Brief via hand delivery and/or email to the persons hereinafter named:

ATTORNEY FOR RESPONDENTS
Chris Montgomery
Attorney at Law
344 E. Birch
Colville, WA 99114
Hand Delivered

PRO SE APPELLANT
Wesley Ames
11174 Kelowna Road, #26
San Diego, CA 92126
Email: wbames@gmail.com

E A Willaford

Erika A. Willaford, Legal Assistant

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

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).

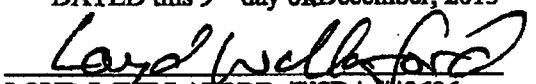
1. The document that is to be filed is titled: Apellants' Brief signature page for Wes Ames

2. I have examined the document which was emailed to my office on December 9, 2013, 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 9th day of December, 2013



LOYD J. WILLAFORD, WSBA #42696
116 N Main ST
Colville, WA 9914
Phone 509-685-2261
Fax 509-685-2267