No. 91511-3 (No. 31661consolidated with No. 318257)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ROY A. AMES and RUBYE M. AMES, Respondents

v.

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

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RESPONDENTS' ANSWER TO PETITIONERS' MOTION TO ACCEPT DELAYED FILING AND MOTION FOR LEAVE TO FILE AMENDED AND CORRECTED BRIEF AND ANSWER TO AMENDED PETITION FOR REVIEW

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IDENTITY OF PETITIONERS

Respondents Roy A. Ames and Rubye M. Ames are the Respondents at the Court of Appeals and Plaintiffs at trial.

COURT OF APPEALS DECISION

The decision of the Court of Appeals is Case No. 316611, consolidated with #318257, decided December 9, 2014, reported at *Ames v. Ames,* 184 Wn. App. 827, 340 P.3d 232 (2014). Petitioners' motion for reconsideration was denied on February 17, 2015. Respondents Roy and Rubye Ames do not seek review of these decisions, but instead request this Court to deny the Amended Petition for Review.

ISSUES PRESENTED FOR REVIEW

Respondents request the Motion to Accept Delayed Filing and Motion for Leave to File Amended and Corrected Petition for Review be denied and the Amended Petition for Review be dismissed due to the Petitioner's failure to articulate any basis for review set forth in RAP 13.4.

STATEMENT OF THE CASE

In 1997, Roy and Rubye Ames sold, by oral agreement, their property, consisting of farmland and timber, to their two oldest sons, Stanley and Wesley Ames, Petitioners herein. The parents retained a life

estate under that oral agreement. (RP 29; 31; 59-60; 112). 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.

After another son moved to the property, Wes and Stan, and their parents grew estranged. 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." Rubye Ames joined her husband as a plaintiff on October 25, 2011. (CP 01-65). The Trial Court awarded Roy and Rubye a life estate in the property, including a limited right to harvest timber, including the right to engage in salvage logging on the property in conformance with effective timber management practices to promote the health of the timber stand (CP at 419).

The Trial Court granted Petitioners' Motions For Reconsideration — In Part (CP 1481-1490). It confirmed the February 8, 2013 Decree and it incorporated the changes from the March 12, 2013 Hearing. The Trial Court stated it had reviewed and considered all materials submitted by

Wes and Stan, namely the Maurice Williamson Declarations dated November 14 and November 16, 2012; and the Steve Harris Declaration dated December 10, 2012. It considered expert evidence submitted by Roy and Rubye Ames: the Declaration of Rich Richmond dated December 16, 2012; Declarations of Robert Broden dated November 14 and 15, 2012; and the Declaration of Stan Long dated November 14, 2012 (CP 1483). It stated that "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." It recognized Roy's frugal management of the timber and that he and his wife would have need for some increased harvesting (Id.). The Trial Court stated its basis for the 19 mbf figure for harvesting as a compromise between the Broden Report and the Maurice Williamson Report, and articulated its basis for the 60/40 split between the life tenants and remaindermen. The Trial Court also noted that Roy and Rubye Ames had been prevented from harvesting any timber for the past eight (8) years due to the ongoing sibling dispute (CP 1484-1485).

Following the Petitioners' motion for reconsideration, on June 14, 2013 the Trial Court issued its ruling and entered an Order Re: Logging and Securing Logging Contracts (CP 1736-1742). This Order provided, among other things, that the March 4, 2013 Order authorized immediate

harvesting of timber up to 19 mbf (CP 1737) and it increased the share of net proceeds from the logging to which the Petitioners were entitled. The Trial Court concluded that Roy and Rubye had entered into a Log Purchase Agreement with Vaagen Brothers Lumber on February 13, 2013 and that after Stan had contacted Vaagen Brothers on March 20, 2013, Vaagen Brothers cancelled the Log Purchase Agreement (CP 1737-1738). The Trial Court reconfirmed its Orders that Roy and Rubye Ames, and not Wes and Stan Ames, are to be in charge of all aspects of compliance with the harvesting of timber in conformance with the Robert Broden Timber Management Plan and the marketing and selling of the timber to area mills." (CP 1738). Finally, the Trial Court ordered a partial forfeiture of the bond posted by Petitioners for granting a stay of logging operations pending their motion for reconsideration (CP 1736-1742).

Petitioners appealed the Trial Court's decision, which was affirmed by the Court of Appeals, Division III. *Ames v. Ames,* 184 Wn.2d 827, 340 P.2d 232 (2014). Respondents Roy and Rubye Ames also adopt the statement of facts as set forth in that Court of Appeals decision.

ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

I. The Amended Petition For Discretionary Review Was Not Timely Filed And It Exceeds The Twenty (20) Page Limit Set Forth In RAP 13.4.

After already receiving a 45-day extension to file their Petition for Review, Petitioners' initial Petition was filed March 20, 2015, one day late by Petitioner's own admission. Fifty pages in length, it exceeded the mandated 20-page limit. RAP 13.4 (f). On the same day Petitioners filed a Petitioner's Motion To Accept Delayed Filing And Motion For Leave To File Amended and Corrected Petition for Review.

In this request. Petitioners cited the following reasons for the delay *after* having already received a 45-day extension:

- Petitioner took a wrong turn and failed to get to the court before it closed on the last day of filing;
- Petitioner was busy with other litigation in his personal law practice;
- Petitioner was ill (no explanation was given as to the severity of the illness, nor its duration).

The extension was also allegedly required because the filed Petition did not "effectively present the issues for consideration." In other words, the Petition did not comply with RAP 13.4. No explanation was given as to why, after the 45-day extension of the filing date, Petitioners did nothing more than regurgitate their brief to the Court of Appeals.

Petitioner filed an Amended Petition for Review dated March 27, 2015 and served the same date. Once again, this Petition also exceeded the mandated 20-page limit and was untimely as it was filed eight days after the deadline. RAP 13.4 (a) & (f). On April 3, 2015, Supreme Court Clerk Ronald Carpenter notified the parties that Petitioner could *serve and file* a proposed amended petition for review by no later than May 4, 2015. Petition for Review was served on May 5, 2015, again a day late. No explanation has been offered as to why this third filing was also late. By letter dated May 7, 2015, Clerk Carpenter indicated that the [third] petition for review was received by this Court on May 7, 2015.

No explanation was given as to why Petitioners did not, or were unable to, comply with RAP 13.4. In the original request for an extension of time, Wes Ames stated that by agreement with his co-appellee Stan Ames, "I am performing the drafting of the initial brief." Although Wes Ames is filing as a pro se litigant, he is a lawyer living in California practicing Intellectual Property and Patent law. He has the skill, and has had ample time, to file in compliance with Washington's Rules on Appeal.

Petitioners Stanley Ames and Merita Dysart are represented by Thomas F. Webster, an attorney licensed to practice in the State of Washington.

Nothing offered by Petitioners in any way illustrates that the delay in timely filing a Petition for Review in compliance RAP 13.4 was excusable. *Cf. State v. Ashbaugh*, 90 Wn.2d 432, 439, 583 P.2d 1206 (1978) (late payment of filing fee; Washington Supreme Court noted "we do not condone willful and unexcusable failure to comply with applicable appellate rules). Petitioners' Petition for Review and Amended Petition for Review should be dismissed.

II. The Amended Petition for Review Does Not Articulate Any of The Basis Set Forth In RAP 13.4(b) to Justify Discretionary Review.

A Petition is granted within the discretion of this Court only:

1. If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

2. If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

3. If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

4. If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

As noted by the Court of Appeals, Petitioners did not challenge the Trial Court's Findings of Fact. *Ames v. Ames*, 184 Wn. 2d 827, 829, 340 P.2d 232 (2014).

A. Bond Forfeiture

The Court of Appeals affirmed the partial bond forfeiture based on CR 62, noting that the court ordered Petitioners to post the bond in order to stay their parents' property rights to harvest timber.

Petitioners argue that it was the alleged "misconduct" and "improper and deceitful conduct" of Roy and Rubye in entering in to a logging contract that was the proximate cause of their damages. *At the time Roy and Rubye entered into the logging contract with the logger and the timber company, the trial court's order allowed them to harvest 19 mbf plus salvage. After* those contracts were made, Petitioners sought a stay of enforcement and contacted the timber company to inform it of the litigation, resulting in the cancellation of the logging contracts. The trial court ordered a partial forfeiture of the bond as a result, splitting the expenses for delay between Roy and Rubye on the one hand, and Petitioners on the other (CP at 1745).

On appeal, Petitioners did not challenge the Trial Court's findings of fact. *Ames v. Ames, supra.* The Trial Court made no finding whatsoever that Roy and Rubye engaged in misconduct or acted in a

deceitful manner, thereby causing their own damages regarding the cancelled logging and timber contracts. As shown by the sequence of events above, it was the delay and Petitioners' actions that resulted in the cancellation of the contract by the timber company, and therefore the inability to log. Petitioners have demonstrated no public interest that requires this Court to review the appellate court decision pertaining to the partial forfeiture of the bond.

B. Invited error

Petitioners claim that the admission of the Broden Report was excluded by ER 803(a)(6), and that the doctrine of invited error was misapplied by the Court of Appeals in upholding that evidentiary ruling. The process by which the Trial Court determined the scope of the right to harvest timber was unusual, in part because the two sides did not produce evidence relating to the harvest of timber at trial nor did the Wes and Stan request an evidentiary hearing pursuant to RAP 59(g) (CP 1485). In addition, the two sides were unable to reach an agreement as to the scope. Roy and Rubye's logging rights were determined by a process that both sides agreed to, that of submitting expert opinions on the appropriate amount of timber that should be harvested (RP 1034; CP 413-424, at 422).

The appellate court applied principles of judicial estoppel in upholding the admission of the Broden Report:

> 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... 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.

184 Wn. App. 2d at 848 (citing *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951, 205 P.3d 111 (2009) and *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995)).

> Judicial estoppel prevents a party from asserting one position in a judicial proceeding and later taking an inconsistent position to gain an advantage. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). The core factors are whether the later position is clearly inconsistent with the earlier position, whether judicial acceptance of the second position would create a perception that either the first or second court was misled by the party's position, and whether the party asserting the inconsistent position would obtain an unfair advantage or imposes an unfair detriment on the opposing party if not estopped.

Ashmore, 165 Wn.2d at 951-52.

Invited error was merely an alternative theory upon which to uphold the admission of the Broden Report. The present case is

distinguishable from the cases cited by Petitioners involving attempts to mitigate erroneous rulings, *State v. Watkins*, 61 Wn. App. 552, 811 P.2d 953 (1991) or *Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426, 814 P.2d 687 (1991). In this case, the Trial Court made a point of noting that the Petitioners took part in the declaration proceeding post trial, (CP 1309-1310), and, as quoted above, the Court of Appeals noted that Petitioners first suggested the procedure. And, in the cases cited by Petitioners involving erroneous jury instructions, *City of Seattle v. Patu*,147 Wn. 2d 717, 58 P.3d 273 (2002) and *State v. Studd*, 137 Wn.2d 533, 973 P.2d 1049 (1999), the Washington Supreme Court affirmed the application of the doctrine of invited error. No conflict in appellate case law has been shown. The Petitioners have not articulated any grounds for discretionary review of this determination conforming to any of the four bases specified in RAP 13.4(b).

C. Timber Harvest and Waste

Petitioners argue the Court of Appeals erred in affirming the trial court's decision to grant Roy and Rubye Ames a life estate, including the right to harvest timber consistent with the parties' original intent and in conformance with best practices in timber management. The Petitioners persist in mischaracterizing the Trial Court decision as allowing

"commercial" or "massive logging" allegedly constituting waste. The Court of Appeals specifically noted this mischaracterization.

> 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.

184 Wn. App. at 850 (italics added). Petitioners merely rehash factual determinations by the Trial Court, and fault the Court of Appeals for not applying decisions from other jurisdictions, claiming abuse of discretion. The only case cited by Petitioners from Washington is *Seattle-First Nat. Bank v. Brommers*, 89 Wn.2d 190, 202, 570 P.2d 1035 (1977). Therein the Washington Supreme Court commented that "[r]emoval 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."

It was good forest management that underpinned the Trial Court's decision to allow the logging as outlined in the Broden Report, and it was

good forest management the was cited by the Court of Appeals in its decision affirming the Trial Court. The land consisted of the family farm and timberland which Roy and Rubye managed with occasional small scale logging. 184 Wn. App. at 830. This clearly does not qualify as land having value *primarily* for its timber, nor do Petitioners make such an argument. They simply disagree with the factual findings of the Trial Court, which they did not challenge on appeal.

Petitioners cite no Washington authority to support their argument that the logging as permitted by the Trial Court, and affirmed by the Court of Appeals, constitutes waste. Instead, they cite out-of-state authority, without articulating any reason why such authority supports the criteria of RAP 13.4.

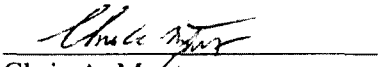
CONCLUSION

Petitioners have failed to offer any reasonable excuse for their failure to file their Petition for Review in a timely fashion and in proper form, or for their late filing of their Amended Petition for Review. Petitioners have failed to identify how the Court of Appeals decision conflicts with any Court of Appeals or Supreme Court decision from the State of Washington. They have identified no violations of the State of Washington or United States Constitutions. Nor have they made any effort whatsoever to articulate an issue of substantial public interest

presented by the decision below. For the foregoing reasons, Respondents Roy and Rubye Ames respectfully request that the Petition for Discretionary Review be dismissed, and that their Motion to Accept Delayed Filing And Motion For Leave to File Amended and Corrected Petition for Review be denied.

DATED the 8th day of June, 2015

Respectfully submitted,



Chris A. Montgomery
WSBA #12377
Attorney for Respondents
Roy A. and Rubye M. Ames

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document on all parties or their counsel of record on June 5th 2015, as follows:

Party	Method of Service	
Wesley B. Ames 4154 Q Deer Creek Road Valley, WA 99181	☐ US Mail ☐ Certified Mail ☐ Federal Express ☐ Fax 509-447-0235 ☐ UPS Next Day Air ☐ ABC/Legal Messenger	☐ Hand Delivered by: ☒ E-mailed to: wbames@gmail.com
Thomas Franklin Webster 116 N. Main Street Colville, WA 99114	☐ US Mail ☐ Certified Mail ☐ Federal Express ☐ Fax ☐ UPS Next Day Air ☐ ABC/Legal Messenger	☐ Hand Delivered by: ☒ E-mailed to: tom@websterlawoffice.net

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

DATED June 5th 2015, at Colville, Washington.

Chris A. Montgomery
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OFFICE RECEPTIONIST, CLERK

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Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Good Afternoon!

Attached please find Respondents' Answer to Petitioners' Motion to Accept Delayed Filing and Motion for Leave to File Amended and Corrected Brief and Answer to Amended Petition for Review for filing with the Court on this date.

Thank you.

Very truly yours,

Jeanne L. Nixon
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