No. 316611 (consolidated with No. 318257)

COURT OF APPEALS, DIVISION 3
OF THE STATE OF WASHINGTON

Roy A. Ames and Rubye M. Ames
Respondents,

v.

Wesley B. Ames, Ames Development Corp.,
Stanley R. Ames and Merita Dysart
Appellants.

APPELLANTS' BRIEF

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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.

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[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

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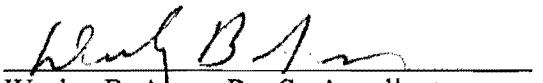
Attorneys for Appellants Stanley R. Ames, Ames Development Corp., and Merita L. Dysart



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CERTIFICATE OF SERVICE

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

That on the 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:

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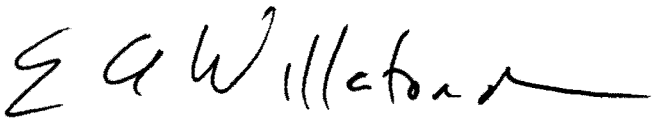

Erika A. Willaford, Legal Assistant

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

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