

JUL 03 2003

IN THE SUPREME COURT
OF THE
STATE OF VERMONT

VERMONT DEPARTMENT OF FORESTS,)
PARKS AND RECREATION,)
)
Appellant)
)
v.)
)
JOSEPH JONES and ANNE JONES,)
)
Appellee)

Supreme Court
Docket No. 2003-017

Appeal from Rutland Superior Court
Docket No. S0202-97-RcCa

REPLY BRIEF OF APPELLANT
STATE OF VERMONT

STATE OF VERMONT

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INTRODUCTION

This brief addresses the four major arguments raised by the Joneses. First, the State properly preserved its objections to the court's rulings. Second, the State properly focused its main brief on equitable estoppel rather than waiver, because the Court's judgment does not mention waiver. Third, the Joneses fail to cite any evidence or legal authority to support the argument that in 1992 County Forester Philbrook knew of the violations that were cited in 1996, and thus failed to satisfy the first and second elements of estoppel. Fourth, the trial court's misunderstanding of the UVA statute resulted in an improper windfall to the Joneses.

ARGUMENT

- I. **The State properly preserved all factual and legal matters at issue in this appeal and was not required to raise them in post trial motions as a prerequisite to appellate review.**

All of the legal and factual issues presented by the State as grounds for this appeal were presented to the trial court in the proceedings below. This is evident not only from the very language of the lower court's order and judgment, but also from the State's Proposed Findings of Fact and Conclusions of Law submitted on January 11, 2001 following the trial, and in numerous other legal memoranda filed during the pendency of the matter before the Superior Court. Nor does the law support the Joneses' claim that the State had an obligation to again raise all such issues in post trial motions in order to preserve them for appeal.

- A) **All appeal issues were preserved before the Superior Court.**

During the course of this action the State properly preserved at the trial court level all issues raised in this appeal through argument of counsel at trial

and in numerous memoranda of law, proposed findings of fact and conclusions of law filed by the State before, during, and after the trial. The documents include: "Department's Proposed Findings of Fact filed 11/7/01, "Department's Pre-Trial Memorandum" filed 11/7/01, "Department's Letter to Judge Cohen in order to correct statements made at trial concerning burden of proof" filed 11/19/01, "Department's Supplemental Legal Memorandum" filed 12/20/01, and "Department's Proposed Findings of Fact (Revised) and Conclusions of Law" filed 1/11/02.

The Joneses never claim that the legal and factual matters raised by the State in this appeal were not preserved before the trial court, because as the Joneses are aware, and the record amply demonstrates, they were.¹ Rather, the Joneses argue that the failure to provide a specific record citation to where the legal arguments were raised below constitutes inadequate briefing. Legal authority cited by the Joneses does not support this incorrect interpretation of the

¹ The following issues were presented by the State to the trial court in the following submissions:

- A) Estoppel and Waiver (including State's lack of knowledge in 1992 about violations) 11/7/01 Pre-Trial Memo pages 10-13; 11/7/01 Proposed Findings of Fact page 3; 1/11/02 Revised Proposed Findings and Conclusions pages 4-5, 22-25;
- B) UVA program and lien creation 11/7/01 Pre-Trial Memo pages 1-3, 6-7; 12/19/01 Supplemental Legal Memo pages 2-5; 1/11/02 Revised Proposed Findings and Conclusions pages 11-12;
- C) Eligibility for opt out (including the Joneses' inability to opt out after they had been withdrawn from the program, 11/7/01 Pre-Trial Memo pages 13-15, 1/11/02 Revised Proposed Findings and Conclusions pages 10-11, 25-27;
- D) Remedy, (including why the Joneses' voluntary \$70,000 lien pay-off was not an issue in this case) 11/7/01 Pre-Trial Memo pages 14-15; 1/11/02 Revised Proposed Findings and Conclusions pages 10-11;
- E) Facts concerning violations in Stands 1 and 3 11/7/01 Proposed Findings of Fact pages 1-6; 1/11/02 Revised Proposed Findings and Conclusions pages 7-10, 15-17, 18-19.

Vermont Rules of Appellate Procedure.² The point of requiring error preservation on the appellate level is to insure that the trial court has been apprised of the issue and has had an opportunity to consider it in its decision making process. Rule 3(a) states plainly: "An appeal from a judgment preserves for review any claim of error in the record, including any claim of error in any of the orders specified in the second paragraph of Rule 4." V.R.A.P. 3(a). The reporter's notes to the original rule make this even clearer: "The final two sentences emphasize, as did 12 V.S.A. §2384 (now superceded) that any error in the record is reviewable on appeal." All issues in this appeal were properly preserved at the trial court level.

B) Post Trial Motions are not a prerequisite to an appeal.

The Joneses also argue that the State was required to file post-trial motions under Rule 58 (objections to proposed judgment) or Rule 59 (Motion to alter or amend judgment) in order to challenge the judgment of the trial court. APE at 9*. This is incorrect. As this court has stated: "A Rule 59(e) motion ... is not a prerequisite to appeal." *Osborne v. Osborne*, 147 Vt. 432, 433, 519 A.2d 1161, 1162 (1986). In *Osborne*, the allegation was that a claim not included in a

² The case cited by the Joneses does not hold that failure to provide a record reference to where one preserved a legal argument constitutes inadequate briefing. Instead in *New England Partnership, Inc. v. Rutland City School District*, 173 Vt. 69, 786 A.2d 408 (2001) this court found that where a party first raised a narrow and very specific issue on appeal and there was no reference to the issue in the lower court's decision and where the party did not indicate how or where or when the issue had been presented at the trial court level, that the specific issue had not been preserved for appeal. In the case at bar, where the lower court's ruling is an interpretation of the Use Value Appraisal statute and liens created and taxes imposed thereunder and the State is appealing the court's interpretation of the statute, it defies logic to suggest that the issue of lien creation under the statute was not fairly presented to the trial court.

* This brief uses the following abbreviations: APE (Appellee Brief), APB (Appellant's Main Brief), PC (Printed Case).

post-trial motion to amend was waived. However, the court found that where the party had raised the issue at the trial court level it was sufficiently preserved for review. In fact, *Osborne* and other cases decided by this court underscore the fact that one may not use such post-trial motions to raise issues that were not preserved at the trial court level. *In re Kostenblatt*, 161 Vt. 292, 301, 649 A.2d 39, 45 (1994). This court's rulings on the issue of post-trial motions make clear that the goal of such motions is to allow the court to use its inherent power to open, correct, modify or vacate its judgments in the event of an obvious or unintended error. *Osborne* 147 Vt. at 433. The use of post-trial motions to reargue issues that a party has raised with the lower court and received unfavorable rulings upon is strongly disfavored. One's obligation is to raise the issues during the trial, which in this case the State did.

The Joneses' argument that a post-trial motion by the State, challenging the proposed judgment pursuant to V.R.C.P. Rule 58, was a condition precedent to this appeal is similarly flawed. Again neither the language of the rule nor any legal authority exists to support the claim that filing objections to a proposed judgment is a prerequisite to the filing of an appeal. If one need not move to alter or amend the actual judgment after it is entered as a prerequisite to appeal, it would be illogical to suggest that one must submit objections to a proposed judgment in order to preserve issues when in order to appeal any of those issues, they must have been previously presented to the trial court.

Finally, where the trial court had issued an 11-page ruling containing findings of fact, conclusions of law and an order, and then incorporated that

ruling into its final judgment, it was clear that the court had made its decision to reject the arguments advanced by the State at trial and objecting to or moving to amend either the proposed judgment or the judgment as entered would have been precisely the type of duplicative pleading that is disfavored by courts and not required prior to filing an appeal.

II. The State properly focused its main brief on equitable estoppel because waiver was not the basis for the court's ruling.

The Joneses argue that the court based its ruling on a waiver theory and suggest that the State did not address this theory and therefore the lower court ruling should stand. APE 13. Both premises are incorrect and thus the conclusion is unsupported. The language used by the trial court makes clear that the decision is grounded in equitable estoppel and not waiver. The trial court ruled: "That the State is estopped from pursuing any alleged violations of the 1991 Forest Management Plan for logging that took place in 1992," Order PC 13, that "The State of Vermont is estopped from claiming any violations or development of the Jones property...." Final Judgment PC 1, and that "The State is estopped from asserting any such violations or 'Development' did occur." Final Judgment PC 1.

The terms waiver and estoppel are often used together. This is because a waiver, which is defined as the "intentional relinquishment or abandonment of a known right", *Chimney Hill Owner's Ass'n. v. Antignani*, 136 Vt. 446, 453 (1978), may upon occasion satisfy the first two elements of estoppel, which are 1) knowledge of certain facts and 2) an intentional act that one knows or should expect another will rely upon. *Wesco v. City of Montpelier*, 169 Vt. 520, 524, 739

A.2d 1241,1243 (1999). “Waiver involves only the act or conduct of the party against whom it is asserted and does not take into account the acts of the party asserting it.” APE at 14. Thus, if waiver were the basis for the ruling the court would have restricted its analysis to actions of the State and would not have considered the actions of the Joneses. But the trial court focused heavily on the actions of the Joneses and ruled not on the basis of waiver, but upon estoppel, as the decisions and the very nature of the remedy make clear.

While detrimental reliance is not an element of waiver, it must be present to invoke equitable estoppel. The court’s ruling describes in detail the “detrimental reliance” of the Joneses upon the actions of the State and grants a remedy to address that reliance. PC 12. Indeed, absent the detrimental reliance element of estoppel there would be no basis for the court to award any relief to the Joneses beyond the withdrawal of the inspection report. The court’s choice of remedy makes clear that its decision is based on estoppel, and not waiver. The lower court’s use of waiver language was merely the means it chose to articulate its determination that the first two elements of estoppel had been met.

The Joneses’ claim that the State did not present argument on the theory of waiver is inapposite where that was not the basis for the lower court’s decision.

III. The facts necessary to support the elements of equitable estoppel or waiver were not proven at trial and therefore the defenses must fail.

In its initial brief, the State demonstrated why none of the elements of estoppel (and therefore none of waiver) were proven at trial. APB at 16-22. The Joneses’ brief does not show how the elements of estoppel are satisfied.

The most critical of these elements is knowledge. The record demonstrates that the State, through James Philbrook, then Rutland County Forester, was unaware of the cuttings in Stand 1 and Stand 3 of the Joneses' property that were discovered in 1996 and served as the basis for the violations in the adverse inspection report. The Joneses contend that the evidence does not support this fact. They are wrong. They try to prove this premise by citing testimony that is not relevant to the issue of whether Philbrook knew of the violations. It does not matter whether Dern finished logging in August of 1992, or that Philbrook saw some cutting in Stand 1, or that he thought the cutting he saw was contrary to the plan. APE at 16. The critical uncontested fact is that Philbrook testified that he did not go into the areas of the Joneses' parcel where the violation cuttings occurred and he therefore had no knowledge of their existence. The record is devoid of any evidence indicating that Philbrook ever knew of the 1992 cuttings. Philbrook says he didn't go there and didn't know about the cuttings and no witness testified otherwise.

The lower court, faced with conflicting and incomplete testimony about which cutting occurred where and when, found, based on all the evidence elicited at trial, that "It was unknown" whether the cuttings in Stands 1 and 3 had happened at the time of the Philbrook visit. PC-6 (Findings of Fact #34 and 35). If there is no proof that the cuttings had happened by the time of the Philbrook inspection, it is impossible to prove knowledge on his behalf. Yet the court also concluded that Philbrook "was aware of the cuttings that took place on Stands 1 and 3 in 1992." PC 11. The Joneses' response to the court's inconsistent

findings on the knowledge issue is to instruct this court to simply disregard one of the findings. APE at 18. No authority cited by the Joneses supports the notion that an appellate court should ignore an inconsistent finding of fact. The proper procedure, if there are contradictory findings of fact, is to examine the evidence and determine which is supported. In this instance the record supports the court's finding that it was unknown whether the cuttings had taken place at the time of the 1992 inspection. There is no support for a finding that Philbrook was aware of the cuttings at the time of the 1992 inspection, and that finding should be set aside.

The Joneses also argue that it does not matter whether the State actually knew of the non-compliance based on a legal conclusion that waiver will lie if a party knew or should have known. This interpretation that a waiver may be based on constructive knowledge is unsupported by the authority cited by the Joneses.³ Furthermore, the State does indeed challenge any decision based on a theory of waiver by demonstrating that the evidence adduced at trial does not support any of the elements of waiver, the first two of which are also the elements of estoppel.

The second element of estoppel involves conduct that a party knows or should know will be relied upon by another. The Joneses' theory of estoppel is

³ The Joneses cite *Fireman's Fund Ins. Co. v. Knutsen*, 132 Vt. 383, 324 A.2d 223 (1974) as support for their claim that a waiver can be based on imputed knowledge. The holding in *Knutsen* is the converse. The court refused to allow a waiver against an insurance company, where an insured had withheld information on his application. The court found that there was no reason that the insurance company "should have known" about the applicant's misrepresentations absent additional factual information being in their possession. Further the court held that while an exhaustive investigation into the applicant's background could have uncovered the false statements, the insurance company had no duty to conduct anything other than its usual routine inquiry.

that this element is satisfied through Philbrook's failure to either warn the Joneses of the possibility that they were in violation, or to issue an adverse inspection report. In order to support this theory, the Joneses invent certain duties that they ascribe to Philbrook and then argue that he failed to discharge them. Philbrook had no such obligations. The Joneses' list of Philbrook's duties includes: a duty to warn the Joneses in writing that they were in jeopardy of losing eligibility (Philbrook did in fact warn the Joneses in a phone call); a duty to issue an adverse inspection report (Philbrook could not cite the Joneses for violations he did not know about); and a duty to reject incomplete or inaccurate annual conformance reports from the Joneses about the logging done on their property (the Joneses, not Philbrook, had the duty to make these reports, and the Joneses, not Philbrook, knew the information was incomplete). The Joneses' citation of authority concerning duty is irrelevant.⁴ Philbrook had none of these invented duties and no obligation to discharge them.

Absent no duty there also could be no detrimental reliance on the conduct or actions of Philbrook. Moreover, the Joneses suffered no consequence as a result of any State action or inaction. The payment of the \$70,000 lien was not related to the adverse inspection report and the removal of the entire Jones parcel from the UVA program in 1996. Finally, the Joneses have not suggested

⁴ The Joneses suggest that *Stevens v. Dept. of Social Welfare*, 159 Vt. 408, 620 A.2d 737 (1992) supports their argument that Philbrook had a variety of duties toward the Joneses. This is not the holding of the case. Rather, this court found that the State had an affirmative duty to advise applicants about federal program eligibility criteria where the duty was imposed by federal law, and the State was administering the program. No corollary "duty" exists on behalf of employees of the Department of Forests, Parks and Recreation regarding potential violations of the UVA program.

any extraordinary circumstances that would support estoppel against the government.

IV. The Trial Court granted relief based upon its incorrect interpretation of the UVA statute and the taxes and liens imposed thereunder, resulting in a remedy that was not permitted by law and gave a windfall to the Joneses at the expense of the taxpayers.

A. The court's erroneous interpretation of the UVA statute is the basis for a remedy that is incorrect as a matter of law.

Where the Final Judgment in this cause states that the UVA lien on the Joneses' property was imposed as a result of the violations, rather than by operation of law upon entry into the UVA program, such language is not mere surplusage as argued by the Joneses, APE at 10, but tangible evidence that the trial court incorrectly interpreted the UVA law thereby granting a remedy that was unauthorized by the statute. The Joneses argue that the State has waived its opportunity to argue that the trial court misinterpreted the statute by failing to include a record reference to where this argument was raised below. APE at 8. This is inaccurate. That the State properly preserved this issue is addressed supra, but more importantly, the lower court's error is obvious on the face of the judgment.

This court need only review the language of the judgment and compare it to the language of the statute to reach the conclusion that the law has been misinterpreted. Section § 3757(f) of Title 32 unambiguously sets forth that the application for the UVA program constitutes a lien to secure the land use change tax, which is payable only if the land is developed. The vast majority of the Joneses' property was not developed and therefore the lien upon it was not

payable. The heart of the problem is that the lower court improperly linked the Joneses' voluntary \$70,000 lien pay off on 484 acres in 2001 with the 1996 violations on 20.3 acres. The two matters are not connected.

The Joneses' payment of the \$70,000 UVA lien on the remaining 484 acres of their undeveloped land is the financial consequence of their voluntary act, unconnected with the violations, to convey their property to the U.S. Forest Service. The Joneses' choice of the ultimate buyer of their property (the City of Rutland was an intermediary owner before the final transaction put the property in the hands of the U.S. Forest Service) has nothing to do with this case. The decision of the Joneses to voluntarily pay off the lien is not a result of any action by the State. Nor is it a consequence of violations on the 20.3-acre parcel of their land that they developed by cutting contrary to their plan, which resulted in the imposition of a land use change tax on that acreage.⁵ The remainder of the property had not been developed so no tax was due on it. If the Joneses had chosen a different buyer, the lien simply could have remained on the property and would not have been payable unless or until development occurred.

In response to the State's argument that the UVA statute did not give the trial court authority to permit a retroactive withdrawal from the program, the Joneses make the astonishing assertion that the lower court's incorrect decision should be affirmed "regardless of the court's authority granted by statute".

⁵ The Joneses misrepresent the State's position regarding the propriety of 10% lien pay off rate for the 20.3-acre violation on the Jones property. APE at 12. The State pointed out that ordering the use of a specific lien rate by the trial court was inconsistent with its grant of a retroactive opt out, because under the opt out, the lien was discharged without payoff. Furthermore, where the trial court never reached the issue of whether violations had occurred, it was unnecessary to determine what land use change tax should be imposed as a result of those violations. These

APE at 11. The Joneses suggest that if “the superior court lacked authority under the statute, ... it would have been permitted ” to award its chosen remedy under the authority of V.R.C.P. 75(d). APE at 11. This is untrue. The appeal in this case was authorized by 32 V.S.A. §3758(e) and is therefore an appeal pursuant to Rule 74. The Joneses’ suggestion that the relief granted was in the “nature of certiorari” or supported by this court’s ruling in *Town of Victory v. State*, 814 A.2d 369 (2002) demonstrates only a failure to comprehend the rules and the holding in *Victory*.⁶ APE at 11.

B. The court’s remedy gives the Joneses a windfall and puts them in a better position than any other UVA participant, including those in full and complete compliance with the statute.

This \$70,000 remedy awarded by the trial court gives a windfall to the Joneses at the expense of the taxpayers of the State of Vermont. This remedy put the Joneses in a better position than anyone else in the UVA program, even a participant who was never out of compliance. The flaw in the trial court’s analysis can be seen in the following hypothetical. Assume all the facts of the case remain the same, except that the State did not issue an adverse inspection report in 1996. It matters not whether the violations were undetected or never existed. The Joneses never would have opted out of the UVA program during

inconsistencies underscored the failure of the court to understand any of the aspects of the UVA program and lien operation. APB at 16.

⁶ In *Victory* this court found that the town did not have a statutory right to appeal actions of the Department of Forests, Parks and Recreation under Rule 74 and thus was limited to an appeal under Rule 75. This court further found, however, that the Superior Court had interpreted its review power under that rule too narrowly and that depending on information that had not been developed due to improper limits on discovery, that the trial court could order relief in the nature of certiorari or mandamus if the law, facts and circumstances warranted. Thus the Joneses’

the special limited legislative opt out periods (offered between 1992-1997) because they were not warned that they might be involuntarily removed from the program due to possible violations because no violations had been found. This means that in 2000 the entire Jones tract would still be in the program. The UVA lien would still exist on all ±500 acres and the Joneses would still decide to sell their land to the U.S. Forest Service who would insist that the lien be removed. The Joneses would have no choice but to voluntarily pay off the entire \$70,000 UVA lien if they wished to accomplish their goals. Would the Joneses be entitled to a retroactive opt-out under these circumstances? No, according to the logic of the lower court, because the Joneses did not detrimentally rely on any conduct or statement of the State.

Consider another hypothetical: What if the Joneses' buyer of choice did not require that the lien be removed? If that were the case the property would have changed hands with the lien intact and no one would have paid off the lien.

These two hypotheticals demonstrate that it was the voluntary actions of the Joneses and not the actions of the State that created the circumstances that led to the Joneses' pay off of the \$70,000 lien. First the Joneses chose, year after year after year, not to opt out of the UVA program. Presumably they stayed in the program because they enjoyed the tax benefit they derived from their participation in the program. They also may have stayed in the program, despite their awareness of legislative opt out periods, because they did not yet know that the sale of their land to their buyer of choice would require a lien pay off. Second

suggestion that the trial court's remedy was appropriate based on Rule 75 or *Victory* is simply wrong.

the Joneses chose to sell their property. They were not obligated to sell their property. Third, the Joneses made a voluntary decision to pay off the lien. A transfer of land carrying a UVA lien did not require a lien pay off. Under 32 V.S.A. §3757 the land could have been transferred to any buyer with the lien intact. The lien would not have been payable unless or until development occurred, and after transfer, that would have been the obligation of the new buyer, and not the Joneses. Again the pay off was optional but the Joneses decided to do it to accomplish their personal goal to have the U.S. Forest Service, rather than anyone else, own the 500 acres that surrounded their home.

The reason for these choices doesn't matter. What matters is that they were choices, totally voluntary ones, and they, not any action of the State, are the reason that the Joneses paid a land use change tax of nearly \$70,000 on their property.

Thus the error of the trial court in reaching the legal conclusion that the lien on the 484 acres was a result of the violations was compounded by its unwillingness to recognize that the pay off of that lien was the result of voluntary actions of the Joneses unconnected to the violations at issue in this case. To grant the Joneses a \$70,000 windfall on this basis is error and must be reversed.

CONCLUSION

As argued above and in the State's initial brief, the cornerstone of the lower court's decision rests upon a finding of fact that the State had knowledge of these violations in 1992. This finding is unsupported by the record and thus cannot stand. Absent knowledge, the court's decision on an estoppel theory is

unsupported and must fail. The Joneses have not and cannot suggest a legal theory of recovery available to them if this finding is set aside. Nor is there any support in the record for the court's finding that Philbrook would have approved the violations after the fact. Philbrook's trial testimony was directly contrary to this finding.

The lower court erred in using these and numerous other erroneous findings of fact, as detailed in the State's initial brief, as a basis for concluding that the State had an affirmative duty to cite the Joneses for violations so that the Joneses could have participated in one of the legislative opt-out periods for the UVA program. Neither the trial court in its rulings nor the Joneses in their brief ever addresses the issue that once an adverse inspection report is issued and one's property is removed from the program, one is no longer entitled to opt out.

Similarly the trial court and the Joneses ignore the indisputable fact that the lien pay off had nothing to do with the violations at issue but was instead a voluntary act of the Joneses that only happened because their buyer of choice would not accept the property until the lien had been removed.

Finally, while the court did not reach the issue of whether the issuance of the adverse inspection report was proper, choosing instead to base its decision on a theory of estoppel, its findings of fact on the violations themselves were not supported by the record and should be set aside as clearly erroneous.

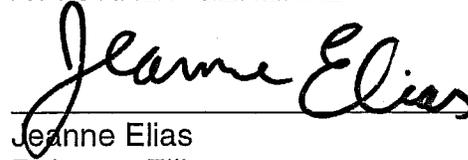
The Joneses' request for an amended judgment should be denied as they did not file a cross claim in this appeal. The decision of the trial court is unsupported by law or fact and should be reversed.

Dated: July 3, 2003

STATE OF VERMONT

WILLIAM H. SORRELL
ATTORNEY GENERAL

By:

A handwritten signature in cursive script that reads "Jeanne Elias". The signature is written in black ink and is positioned above a horizontal line.

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