

JUN 02 2003

IN THE SUPREME COURT OF THE STATE OF VERMONT

JOSEPH JONES and ANNE JONES

Appellees,

vs.

VERMONT DEPARTMENT OF FORESTS,  
PARKS and RECREATION

Appellants.

Appeal From  
Rutland Superior Court  
Docket No.: S0202-97 RC Ca

SUPREME COURT DOCKET NO. : 2003-017

---

BRIEF OF APPELLEES

---

Submitted by:

Harry R. Ryan, III, Esq.  
John A. Serafino, Esq.  
Ryan Smith & Carbine, Ltd.  
P.O. Box 310  
Rutland, Vermont 05702-0310  
(802) 786-1000

STATEMENT OF ISSUES

1. An appellant waives issues not adequately briefed, including a showing of how the issues were preserved. The State has not briefed how it preserved its argument that the superior court misunderstood the nature of the lien involved here. Has the State waived its argument? .....Page 8
2. An appellant waives issues not adequately briefed, including a showing of how the issues were preserved, and citation to legal authority supporting the argument. The State has not briefed how it preserved its argument that the superior court lacked the authority to provide the remedy it did and has not cited any legal authority in support of its argument. Has the State waived its argument?...Page 10
3. The State admits that the court’s requirement of a 10% tax rate is in error and that the Joneses should have paid no tax. Should the judgment be amended to reflect that admission?.....Page 12
4. The trial court ruled that the State waived and is estopped to assert any violations based on the 1992 cuttings. The State challenges the court’s estoppel ruling, but not its waiver ruling. Should this Court affirm the judgment because it is supported by the unchallenged waiver ruling? .....Page 13

**TABLE OF CONTENTS**

STATEMENT OF ISSUES .....i

TABLE OF AUTHORITIES..... iii

STATEMENT OF THE CASE ..... 1

ARGUMENT..... 8

CONCLUSION ..... 29

TABLE OF AUTHORITIES

CASES

*Beecher v. Stratton Corp.*, 170 Vt. 137, 743 A.2d 1093 (1999)..... 17

*Braune v. Town of Rochester*, 126 Vt. 527, 237 A.2d 117 (1967)..... 12

*In re Central Vermont Medical Center*, 816 A.2d 531, 2002 Vt. LEXIS 349 (Vt. 2002)12

*Currier v. Letourneau*, 135 Vt. 196, 373 A.2d 521 (1977)..... 25, 27

*English v. Myers*, 142 Vt. 144, 454 A.2d 251 (1982) ..... 11

*Fireman's Fund Insurance Co. v. Knutsen*, 132 Vt. 383, 324 A.2d 223 (1974)..... 14

*Fisher v. Poole*, 142 Vt. 162, 453 A.2d 408 (1982)..... 22

*Fuller v. City of Rutland*, 122 Vt. 284, 171 A.2d 58 (1961) ..... 12

*Green Mountain Marble Co. v. State Highway Board*, 130 Vt. 455, 296 A.2d 198  
(1972)..... 25, 27

*Hall v. Miller*, 143 Vt. 135, 465 A.2d 222 (1983) ..... 25, 27

*Hogel v. Hogel*, 136 Vt. 195, 388 A.2d 369 (1978) ..... 14

*Houle v. Quenneville*, 173 Vt. 80, 787 A.2d 1258 (2001)..... 15

*Howard v. Usiak*, 172 Vt. 227, 775 A.2d 909 (2001)..... 18

*International Association of Firefighters Local #2287 v. City of Montpelier*, 133 Vt.  
175, 332 A.2d 795 (1975)..... 25, 27

*In Re J.A.*, 166 Vt. 625, 699 A.2d 30 (1997) ..... 8, 13, 28

*King v. Gorczyk*, 2003 VT 34 ¶ 21, n. 5, 2003 Vt. LEXIS 54 ..... 8

*Levinsky v. Diamond*, 151 Vt. 178, 559 A.2d 1073 (1989) ..... 12

*Mancini v. Thomas*, 113 Vt. 322, 34 A.2d 105 (1943)..... 18

*Maynard v. Travelers Insurance Co.*, 149 Vt. 158, 540 A.2d 1032 (1987)..... 8

<i>Merchants Mutual Casualty Co. v. Izor</i> , 118 Vt. 440, 111 A.2d 732 (1955).....	18
<i>Mullin v. Phelps</i> , 162 Vt. 250, 647 A.2d 714 (1994).....	15
<i>New England Partnership, Inc. v. Rutland City School District</i> , 173 Vt. 69, 786 A.2d 408 (2001) .....	9, 28
<i>New England Road Machine Co. v. Calkins</i> , 121 Vt. 118, 149 A.2d 734 (1959) .....	12
<i>Peck v. Patterson</i> , 119 Vt. 280, 125 A.2d 813 (1956).....	12
<i>Plante v. Johnson</i> , 152 Vt. 270, 565 A.2d 1346 (1989) .....	11
<i>Preston v. Montgomery Ward &amp; Co.</i> , 112 Vt. 295, 23 A.2d 534 (1942).....	18, 19
<i>In re Prof'l Nurses Serv., Inc.</i> , 164 Vt. 529, 671 A.2d 1289 (1996).....	28
<i>Scott Construction v. City of Newport Board of Civil Authority</i> , 165 Vt. 232, 683 A.2d 382 (1996) .....	1
<i>Stevens v. Department of Social Welfare</i> , 159 Vt. 408, 620 A.2d 737 (1992) .....	20, 21
<i>Town of Victory v. State</i> , 814 A.2d 369, 2002 Vt. LEXIS 251 (Vt. 2002) .....	12
<i>In re UNUM Life Insurance Co.</i> , 162 Vt. 201, 647 A.2d 708 (1994).....	28
<i>Wenzel v. Brault's Mobile Homes</i> , 152 Vt. 457, 566 A.2d 993 (1989).....	13

**STATUTES AND COURT RULES**

32 V.S.A. § 3751 .....	13, 21
32 V.S.A. § 3752(5) .....	11
32 V.S.A. § 3755(c) .....	17
32 V.S.A. § 3756(f).....	17
32 V.S.A. § 3757(f).....	10
Public Act 178 § 292(a) .....	13
V.R.A.P. 10(b)(2).....	15

V.R.A.P. 28(a) .....	8, 10, 12, 13, 28
V.R.A.P. 30(a) .....	8
V.R.C.P. 52(a)(2).....	15
V.R.C.P. 58 .....	9, 10
V.R.C.P. 61 .....	14
V.R.C.P. 75(d) .....	12

## STATEMENT OF THE CASE

### *Subject of the Litigation*

This case is about the efforts of Joseph and Anne Jones to preserve 507 acres of forest land they owned in Mendon, Vermont. The State of Vermont temporarily thwarted those efforts by evicting the land from the Current Use Appraisal property tax program (“the Program”).<sup>1</sup> Despite the State’s efforts, the Joneses ultimately succeeded in permanently preserving the land, but due to the State’s efforts, their success came at an unfair cost.

As part of the Program, a forest management plan (“the Plan”) governed the property, violation of which could give rise to liability for a land use change tax. Payment of the tax was secured by a lien on the property. The Joneses had logging done on parts of their property. The State inspected it and did not issue an adverse inspection report. More than 4 years later, a new State inspector inspected the property and issued a report alleging that the logging violated the Plan, leading to the property’s removal from the Program and the triggering of the tax. During the intervening four years, the Joneses missed out on 2 opportunities to opt out of the Program without liability for the tax and without being subject to the lien. During that period, the State also raised the tax from 10% to 20% of fair market value. Had the

---

<sup>1</sup> “Through Vermont’s Current Use Appraisal Program, 32 V.S.A. §§ 3751-3775, individual landowners who actively manage twenty-five or more acres of agricultural or forest land are eligible for current-use rather than highest-and-best-use valuation.” *Scott Constr. v. City of Newport Bd. of Civil Auth.*, 165 Vt. 232, 235 – 36, 683 A.2d 382, 384 (1996).

Joneses known they had reason to opt out, they would have availed themselves of those opportunities.

The Rutland Superior Court ruled that the State failed to prove the alleged violations, waived the violations and is estopped to assert them.

### *Claims of the Parties*

The State claims that logging activities on the Joneses' property in 1992 violated the Plan, which took effect in 1991, rendering the property ineligible for the Program. Although in 1992 the State inspected the property for compliance with the Plan and was aware of the alleged violations, the State did not find the Joneses in violation until late 1996, after a new forester took over inspection responsibilities for the State. In 1997, the State removed the property from the Program and the Joneses appealed the findings of violation to the Rutland Superior Court.

The Joneses claim that the State has not met its burden of proving the alleged violations of the Plan. The trial court found that the Joneses did not violate the Plan. (Findings 53, 58; PC 8, 9). The evidence supports those findings.

The Joneses also claim that the State waived or is estopped to assert any violations. The trial court concluded the State waived the right to file an adverse inspection report. (PC 12). The State does not challenge that conclusion.

The trial court also concluded that the State is estopped to assert any violations. (PC 12). By waiting more than 4 years to cite the Joneses, the State deprived the Joneses of two opportunities to opt out of the Program free of any lien to secure the payment of a land use change tax. (PC 12 – 13). When the State first alleged the violations in 1996, the opt-out opportunities had expired and the tax rate had increased. Had the State acted promptly, the Joneses would have removed the property from the Program, free of the lien and any potential liability for the land use change tax.

The Joneses ultimately sold the land to the City of Rutland, under the conditions that the City convey it to the United States Forest Service for continued forest management and that it remain undeveloped productive forest land. (Tr. 12/20/01, p. 164; SPC 8). The Forest Service insisted on removal of all liens, including the lien imposed as part of the Program. (PC 374). The Joneses paid a land use change tax of approximately \$78,000 – 20% of the fair market value – to remove that lien. Having deprived the Joneses of the opportunity to avoid that expense, the State is estopped from asserting the violations.

### ***Statement of Facts***

The Joneses always wanted to maintain their 507-acre property as productive forest land and did not want it to be developed. After the State ejected the Joneses' property from the Program in 1997, several developers interested in building housing on the property offered to buy it from the

Joneses. The Joneses rejected these offers. Instead, they sold the property to the City of Rutland for substantially less than the developers had offered. In the sale to the City, the Joneses insisted on a provision in the deed ensuring that the land would never be developed and could continue to be productive forest land. The sale was also conditioned upon the City's promise to transfer the property to the U.S. Forest Service. (Tr. 12/20/01, p. 163 – 165; SPC 7, 8 & 9).

Consistent with the Joneses' intent and the Plan's requirements, in 1992 the Joneses authorized a professional forester<sup>2</sup> and a professional logger<sup>3</sup> to conduct logging operations on their property. The Plan divided the property into 5 "stands." It called for timber cutting in Stand 1 and patch cutting in Stand 3. (Finding 51; PC 8). The Joneses authorized the forester and logger to conduct logging operations "consistent with the 1991 Forest Management Plan." (Finding 16; PC 4). Thus, any violation of the Plan was without the Joneses' knowledge or permission. (Findings 17, 18; PC 4).

---

<sup>2</sup> The Joneses retained Mark D. Riley, Sr., a consulting forester for and principal of Vermont Forest and Field, Inc. (Tr. 11/8/01, p. 195). Mr. Riley testified in November 2001 that he had 21 years experience in this field. (Id.).

Riley subcontracted with Randy Wilcox to perform some of the management tasks for the Jones property. (Tr. 12/20/01, p. 196). Wilcox testified in December 2001 that he had a degree in forestry from the University of Maine at Orono and 21 years experience as a forester. (Id.).

<sup>3</sup> Riley recommended Claude Dern as a logger and the Joneses hired him. (Tr. 12/20/01, p. 160 – 161).

The logging that forms the basis of the State's allegations occurred in 1992. The inspection that forms the basis of the State's allegations occurred in October of 1996. (Finding 40; PC 7).

Despite an inspection by State inspector James Philbrook in 1992 and the State's approval of reports prepared by professionals on the Joneses' behalf in 1993, 1994, 1995 and 1996, the State did not cite the Joneses for any alleged violation arising from the 1992 logging until 1996, when a new forester, Nathan Fice, took over for the State. (Findings 30, 37, 38, 40; PC 6, 7).

In 1996 the State formally alleged violations in Stands 1 and 3. Stand 1 consists of approximately 232 acres. Fice alleged that the Joneses had violated the Plan by conducting logging operations in a 15.8-acre segment of Stand 1 that reduced the total basal area in the Stand to below the Plan's requirements. (Finding 41; PC 7).

The 15.8-acre area of Stand 1 required logging in 1992 to conform to the Plan. (Finding 51; PC 8). Fice did not take any measurements before the 1992 cutting and in 1996 did not know the basal area for the 15.8-acre section before it was thinned in 1992. (Tr. 11/9/01 at 54; SPC 14).

The 15.8-acre area of Stand 1 where Fice took his basal area measurements in 1996 was an area that Fice created by selecting a section of Stand 1 so as to produce an area with the lowest basal area. (Finding 52; PC 8). Fice only measured trees in what he had already deemed to be "the area in violation." (Tr. 11/9/01 at 55; SPC 15). He stopped measuring trees when

he came to “the edge of the violation,” (Id. at 56; SPC 16), because that would have included thicker trees and resulted in a larger total basal area. (Id. at 56 – 57; SPC 16 & 17).

Fice testified that he and his predecessor, James Philbrook, had discretion to allow landowners who they believed had cut contrary to their respective plans to stay in the Program despite their violations. (Tr. 11/9/01 p. 50, 52; SPC 11 & 13). Fice knew from reviewing Philbrook’s notes that in 1992 Philbrook had inspected Stand 1 and considered it in violation. (Tr. 11/9/01, p. 57; SPC 17).

Fice testified that his discretion was “totally arbitrary” and there are no standards for deciding who he would allow to stay in the Program and who he would write up for violations. (Tr. 11/9/01 at 51 – 52; SPC 12 & 13).

If the Joneses had been made aware that any of the cutting done in 1992 was in violation of the Plan or even appeared to be in violation of the Plan, they would have availed themselves of the opportunity to opt out of the program in 1996 and remove any lien or liability for a land use change tax. (Tr. 12/20/01, p. 163; SPC 7).

### ***Course of Proceedings***

The Joneses appealed the State’s actions to the Rutland Superior Court. In pretrial proceedings the superior court ruled that the State had the burden of proving “that the appellants’ [sic] violated their forest management plan.” (Decision and Order, p. 3 (Feb. 8, 2001); SPC 3).

*Disposition Below*

The superior court held a bench trial and issued findings of fact, conclusions of law and an order. (PC 3 – 14). The court found that the cutting in Stands 1 and 3 did not violate the Plan. (Findings 53, 58; PC 8, 9).

The court also found that the State waived or is estopped to assert the violations alleged in 1996 due to its failure to assert the violations earlier. (PC 11 – 13). The court concluded that “[I]t would be unfair for the Joneses to be made ineligible for a government benefit where the ineligibility could have been avoided or mitigated had the government done its job correctly in the first place.” (PC 13).

The court ordered that the Joneses “are entitled to remove their property from the [Program] by electing the “1996 Use Value Program Withdrawal Option” effective as of August 30, 1996. The correct Land Use Change Tax figure that should be assessed to the property for violations occurring in 1992 or 1996 is 10%.” (PC 14).

The court also ordered the Joneses’ attorney to prepare a judgment. (PC 14). He did. (PC 2). The presiding judge signed it, (PC 2), and the clerk entered it. (PC 15).

## ARGUMENT

### 1. **The trial court's remedy provides no basis for reversal.**

The State argues that the trial court's remedy exceeds its authority under the UVA statute and grants a windfall to the Joneses. (Appellant's Brief at 12 – 16). This argument provides no basis for reversal.

#### A. **The State waived its argument about when the lien was created and has not established prejudicial error.**

The State first takes issue with the trial court's statement in the judgment that the lien was created "as a result of alleged violations." (Appellants' Brief at 13; PC 1). The State waived this argument by failing to establish in the argument section of its brief how it preserved this issue.

Issues that are not adequately briefed are waived. *In Re J.A.*, 166 Vt. 625, 626, 699 A.2d 30, 31 (1997). This Court measures the adequacy of an appellant's brief by the standards set forth in V.R.A.P. 28(a). *King v. Gorczyk*, 2003 VT 34 ¶ 21, n. 5, 2003 Vt. LEXIS 54 at \* 21, n. 5 (V.R.A.P. 28 "set[s] forth [the] requirements for adequate briefing.").

The argument section of an appellant's principal<sup>4</sup> brief must show "how the issues were preserved," V.R.A.P. 28(a)(4), by citing the relevant portions of the record in the printed case. See V.R.A.P. 28(d) ("References in the briefs to parts of the record shall be to the pages of the printed case"); V.R.A.P. 30(a) (The printed case shall contain "such extracts from the record

---

<sup>4</sup> See *Maynard v. Travelers Ins. Co.*, 149 Vt. 158, 160, 540 A.2d 1032, 1033 (1987) ("[I]ssues not raised in an appellant's original brief may not be raised for the first time in a reply brief.")

as are necessary to present fully the questions raised.”). An issue for which the appellant has not made such a showing is not before this Court and will not be considered. *New England Partnership, Inc. v. Rutland City School District*, 173 Vt. 69, 73, 786 A.2d 408, 413 (2001) (Court “will not search the record to determine if the issue was preserved for review.... Therefore, absent any indication the argument was raised below, the matter is not before us on appeal.”)

The State’s principal brief does not show how it preserved its challenge to the judgment. The Joneses’ counsel complied with the superior court’s order (PC 14) and submitted a proposed judgment, (PC 2, 15). The State had an opportunity to object in the superior court to the language it now challenges on appeal. V.R.C.P. 58.<sup>5</sup> But the State’s principal brief does not cite to any part of the record – of which the 380-page printed case is only a part – showing that it raised this challenge below. Since V.R.A.P. 28(a)(4) places that burden on the State, this Court should not consider the State’s argument on this point.

In any event, the challenged language merely reflects the reality that the lien imposed by the Program has no consequence to the taxpayers until “development” occurs. 32 V.S.A. § 3757(f) (lien to secure payment of the land use change tax to the municipality “upon development”). “Development”

---

<sup>5</sup> The last sentence of Rule 58 provides: “A form of judgment submitted in accordance with this rule shall be served upon all opposing parties, who shall file

means “the cutting of timber on property [in the Program] in a manner contrary to a forest management plan as provided for in section 3755(b) of this title.” 32 V.S.A. § 3752(5) (prior to amendment). The “alleged violations” referred to in the judgment were the alleged development on the Joneses’ land. The court’s use of this language is not error. If it is, it is mere surplusage and may be excised from the judgment without changing the result. *Plante v. Johnson*, 152 Vt. 270, 274 – 75, 565 A.2d 1346, 1348 (1989) (correcting in mandate a harmless error in the lower court’s judgment); *English v. Myers*, 142 Vt. 144, 149, 454 A.2d 251, 254 (1982).

**B. The State has not established that the court lacked authority to provide the remedy.**

The State next argues that the only remedy the superior court could provide the Joneses was “to have the inspection report vacated, their property reinstated in the program and the assessment reversed.” (Appellants’ Brief at 13 – 14). The State waived this argument by failing to establish in the argument section of its brief how it preserved this issue and by failing to cite any authority in support of its argument.

As argued above, see section 1.A, as the appellant, the State must establish how it preserved each argument. The State’s brief does not meet that burden on this point.

---

any objections to the judgment proposed within five days of service upon them unless the Presiding Judge orders such objections to be filed earlier.”

The argument section of the State's brief also fails to cite any legal authority in support of the argument as is required by V.R.A.P. 28(a)(4). Specifically, the State cites no decision of this Court, statutory text or procedural rule prohibiting the superior court from providing the remedy it provided here. The State's briefing is inadequate and should not be considered. *New England Road Mach. Co. v. Calkins*, 121 Vt. 118, 122, 149 A.2d 734, 738 (1959) (General statement that error was committed, without citation to authorities, is inadequate briefing and merits no consideration).

Assuming the superior court lacked authority under the statute to remedy the State's abuse of power, then it had such authority under V.R.C.P. 75(d) (court may modify governmental decision under review); *Town of Victory v. State*, 814 A.2d 369, 2002 Vt. LEXIS 251 (Vt. 2002), and its power to grant extraordinary relief in the nature of certiorari. *See In re Central Vermont Medical Center*, 816 A.2d 531, 536 n.1, 2002 Vt. LEXIS 349 at \*8 n.1 (Vt. 2002). Thus, this Court should affirm regardless of the court's authority granted by the statute. *Levinsky v. Diamond*, 151 Vt. 178, 185, 559 A.2d 1073, 1079 (1989) (This Court's function is to affirm "on any basis available and appropriate under our law."); *Braune v. Town of Rochester*, 126 Vt. 527, 533, 237 A.2d 117 (1967); *Fuller v. City of Rutland*, 122 Vt. 284, 287, 171 A.2d 58 (1961); *Peck v. Patterson*, 119 Vt. 280, 282, 125 A.2d 813 (1956)

**C. The State's characterization of the Joneses' satisfaction of the lien as a "voluntary decision" provides no basis for reversal.**

The State characterizes the Joneses' satisfaction of the lien on the entire property as "voluntary" and argues that the superior court improperly gave the Joneses a remedy for their voluntary decision. Appellants' Brief at 15. This argument entirely misses the point.

The Joneses would have opted out of the Program before 1997 had they known the State considered them in violation of the Plan. (Finding 39; PC 7; Tr. 12/20/01, p. 163; SPC 7). Opting out would have removed the lien entirely. See Public Act 178 § 292(a) (Vt., Adj. Sess. 1996) (landowner enrolled in Program who opts out "shall be relieved of any obligation under [the Program], including the obligation for a land use change tax.") The United States Forest Service insisted on removal of the lien. Thus, the lien thwarted the Joneses efforts to preserve the property, contrary to the purpose of the Program. 32 V.S.A. § 3751 (Program intended in part "to encourage and assist in the[] conservation and preservation" of forest land "for future productive use and for the protection of natural ecological systems; to prevent the accelerated conversion of these lands to more intensive use.")

The Joneses agree with the State that the court's requirement of a 10% tax rate is in error. (PC 2). As the State notes, the Joneses should not have been required to pay any tax to release the lien on the entire property. See Appellants' Brief at 16 ("the court's order allowing the Joneses to retroactively opt out means they would pay no LUCT at all.").

**2. The trial court's unchallenged waiver ruling supports the judgment regardless of any error in the estoppel ruling. The evidence supports estoppel.**

The State challenges the superior court's findings in support of its ruling that the State is equitably estopped to assert the alleged violations against the Joneses. The State has not established a basis for reversal. The State has failed to brief, and thus waived, any challenge to the superior court's ruling that the State "waived any claims it may have had concerning the Joneses' non-compliance." (PC 11). That ruling supports the judgment regardless of any error in the court's estoppel ruling. In any event, the State has not established error in the court's estoppel ruling.

"Issues not briefed are waived." *In re J.A.*, 166 Vt. 625, 626, 699 A.2d 30, 31 (1997). To brief an issue, an appellant must include it in the principal brief's statement of issues, V.R.A.P. 28(a)(1), and argue it in compliance with V.R.A.P. 28(a)(4), including a statement of the standard of review, how the issue was preserved, and the legal and record citations that support the argument.

The State did not brief any claim of prejudicial error in the court's waiver ruling. See issues and argument sections of Appellant's Brief. Since the State does not challenge the superior court's conclusion that the State "waived any claims it may have had concerning the Joneses' non-compliance," (PC 11), any error in the court's estoppel ruling is harmless and provides no basis for disturbing the judgment. See *Wenzel v. Brault's Mobile Homes*, 152

Vt. 457, 458 – 59, 566 A.2d 993, 994 (1989); *Hogel v. Hogel*, 136 Vt. 195, 198, 388 A.2d 369, 370 (1978); V.R.C.P. 61 (court must disregard harmless error).

The State does challenge the court's estoppel ruling. But waiver and estoppel are distinct theories. 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. *Fireman's Fund Ins. Co. v. Knutsen*, 132 Vt. 383, 391, 324 A.2d 223, 229 (1974). Waiver may be based upon what the party against whom it is asserted knew or should have known. See 132 Vt. at 392, 324 A.2d at 230 (insurer waived right to deny coverage where it "knew, or should have known" of facts supporting denial of coverage, but insured defendants anyway). Thus, the court's waiver ruling is not defeated by the State's alleged lack of actual knowledge or the Joneses' alleged knowledge and activities. The State's argument on these points, Appellants' Brief at 18 – 21, is irrelevant.

Since the superior court's waiver ruling supports the judgment regardless of any error in the estoppel ruling, this Court need not address the State's challenge to the superior court's estoppel ruling. If the Court does address the estoppel ruling, the Court should affirm it.

In its challenge to the court's estoppel ruling, the State contends that the court's findings regarding the knowledge and actions of the Rutland County Forester, James Philbrook, are "devoid of evidentiary support." Appellants' Brief at 17. The court's findings are not clearly erroneous.

This Court will affirm the trial court's findings of fact unless, "viewing the evidence in the light most favorable to the prevailing party and excluding the effect of modifying evidence, a finding is clearly erroneous." *Houle v. Quenneville*, 173 Vt. 80, 93, 787 A.2d 1258, 1267 (2001) (internal quotations and citations omitted). "A finding will not be disturbed merely because it is contradicted by substantial evidence; rather, an appellant must show there is no credible evidence to support the finding." *Mullin v. Phelps*, 162 Vt. 250, 260, 647 A.2d 714, 720 (1994) (internal quotations and citations omitted). V.R.C.P. 52(a)(2). *See also* V.R.A.P. 10(b)(2) ("If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of *all evidence relevant to such finding or conclusion.*") (emphasis added)

Under this standard of review, an appellant seeking to challenge a finding may not cherry-pick evidence and attempt to put a favorable spin on it. The State's attempt to do so fails to meet its burden of showing that the challenged findings are clearly erroneous.

The State cites evidence it contends supports its position. Appellants' Brief at 17 – 22. But that is merely "modifying evidence" that this Court must disregard. *See Houle*, 173 Vt. at 93, 787 A.2d at 1267. The State has made no effort to view the supporting evidence in the light most favorable to the Joneses or explain why the challenged findings are clearly erroneous when the evidence is viewed in that light.

The evidence cited by the State does not establish that there is no credible evidence to support the court's findings. The testimony relied upon by the State does not establish that the 1992 cutting in Stand 1 and Stand 3 for which Fice cited the Joneses in 1996 had not occurred when Mr. Philbrook was on the property in August 1992 or that Mr. Philbrook was not aware of it.

The State challenges the court's statement that Philbrook was aware of the cuttings that took place in Stand 1 and Stand 3 in 1992. Appellants' Brief at 17. The following support the court's determination:

- The unchallenged finding that on or about June 22, 1992, the Joneses authorized Claude Dern to conduct logging operations consistent with the Plan. (Finding 16; PC 4).
- Testimony that Mr. Dern completed the logging in Stand 3 before August 1992, and in other Stands in August 1992. (Tr. 11/8/01 p. 193; SPC 19).
- The unchallenged finding that Philbrook inspected the property in August 1992 and believed the cutting violated the Plan. (Finding 30; PC 6);
- Testimony from Fice that Philbrook's notes from Philbrook's 1992 inspection showed that Philbrook viewed the 1992 cutting in Stand 1 as a violation of the Plan. (Tr. 11/9/01, p. 57 SPC 17).
- Testimony that in 1992, Philbrook was aware of the cutting in Stands 1 and 3, and had accepted the 1993 conformance report. (Tr. 12/21/01, p. 54; SPC 14).

Since the State does not address this evidence, it has not established that the challenged ruling is clearly erroneous.

The State's argument also fails because it assumes, without support, that only actual knowledge is relevant to the elements of equitable estoppel.

It is not so limited. Knowledge may be imputed rather than actual. *See Beecher v. Stratton Corp.*, 170 Vt. 137, 141, 743 A.2d 1093, 1096 (1999) (lawyer, whose owes duty to his client, is charged with knowledge of statute of limitations applicable to client's claim).

Here, the State had a duty to know of any violations in Stands 1 and 3 and thus may be deemed to have had knowledge of the 1992 cuttings, even if Philbrook lacked actual knowledge. Philbrook's presence on the Joneses' property in August 1992 was an effort to fulfill the State's statutory duty to "inspect each tract to verify that the terms of the management plan have been carried out in a timely fashion" at intervals not exceed 5 years. 32 V.S.A. § 3755(c). (PC 11). The State was also obligated to review a property's eligibility for the Program annually. 32 V.S.A. § 3756(f). (PC 11). Thus, the State was on notice of the relevant logging activity. That is enough to support estoppel, whether or not Philbrook actually saw the cuttings in August 1992.

For equitable estoppel purposes in this case, the material fact is not the mere fact of the cutting itself, but that the State would actually cite the Joneses for the cutting's alleged nonconformity with the Plan rather than exercise discretion and allow the Joneses to stay in the Program. Until late 1996, the Joneses were unaware that the State considered the 1992 cuttings a basis for actually removing the Joneses' property from the Program. But the State knew – through Mr. Philbrook – that the 1992 cuttings allegedly

violated the Plan and – through Mr. Fice – that the State would act to remove the property. (Tr. 11/9/01, p. 57; SPC 17).

“Philbrook never wrote to Jones to advise Jones of his observations during his 1992 visit so that Jones would have been put on any notice of alleged problems and/or violations.” (Finding 31; PC 6). “Philbrook has no clear memory of going over any issue of nonconformance with” the Plan. (Finding 32; PC 6). “Philbrook left a phone message but he is not even sure he called the correct number, since he got an answering machine for ‘some chem clean company.’” (Finding 33; PC 6).

The State contends that the trial court’s findings are inconsistent. Appellants’ Brief at 18. This Court construes findings in support of the conclusions and judgment. *Howard v. Usiak*, 172 Vt. 227, 236 n. 2, 775 A.2d 909, 916 n.2 (2001). Thus findings that are inconsistent with the conclusions and judgment are disregarded. *Merchants Mut. Casualty Co. v. Izor*, 118 Vt. 440, 444, 111 A.2d 732 (1955); *Mancini v. Thomas*, 113 Vt. 322, 331, 34 A.2d 105, 111 (1943); *Preston v. Montgomery Ward & Co.*, 112 Vt. 295, 297, 23 A.2d 534, 535 (1942). If the findings are inconsistent as the State argues, the Court should disregard those which do not support the judgment.

The State challenges what it characterizes as a finding that “Philbrook’s failure to issue an adverse inspection report in 1992 was conduct through which Philbrook intended to communicate to the Joneses that their property was in conformance with their [Plan].” Appellants’ Brief at 18,

citing PC 12. The cited page of the printed case contains no such finding. Rather, the court stated: “Since the State knew of the 1992 cuttings and declined to file an adverse report... the Joneses had no reason to believe their property was in violation of the Plan.” (PC 12). This ruling is consistent with the court’s discussion of the alternative elements of estoppel under which “the party to be estopped must... intend that its conduct be relied upon, *or* the acts of the party to be estopped “must be such that the party asserting estoppel has a right to believe it can rely on them.” (Id) (emphasis added). The court’s discussion of what the Joneses “had... reason to believe” applies the second of these alternative elements of estoppel, not the first as the State argues. Since the State misconstrues the court’s ruling, its argument provides no basis for reversal.

The State argues that Philbrook notified the Joneses of “problems with their logging activities.” Appellants’ Brief at 19. Assuming that to be true, “problems with... logging activities” does not equate with “you have violated the Plan and can and will be removed from the Program,” which is what ultimately happened.

In any event, the evidence upon which the State relies does not render the court’s findings clearly erroneous. The State cites evidence that Philbrook had a discussion with an unidentified logger on the Joneses’ property and treats that evidence as if it constitutes binding evidence of the Joneses’ knowledge. Appellants’ Brief at 19. The State bases its argument

on the unsupported implicit premise that the logger was the Joneses' agent for the purpose of communicating with State officials regarding the legal status of their land. Absent evidence or legal citation supporting this premise, the State's reliance on evidence of Philbrook's alleged discussion with the unidentified logger is insufficient to render the court's findings clearly erroneous.

The State also relies on Philbrook's testimony of a conversation he allegedly had with Mr. Jones. Appellants' Brief at 19. When compared with Philbrook's prior practice of communicating with the Joneses in writing, (Finding 22; PC 5), the relative degree of informality of a phone call shows that unlike earlier occasions, in 1992 Philbrook did not view his inspection as raising sufficiently serious problems as to warrant written communication. Thus, the Joneses were not bound to view any alleged conversation (which Mr. Jones did not recall), as an indication of an eligibility threatening problem.

The State incorrectly argues that there are no extraordinary circumstances or any injustice to support estoppel. Appellants' Brief at 22. This case is akin to *Stevens v. Dep't of Soc. Welfare*, 159 Vt. 408, 620 A.2d 737 (1992), in which this Court upheld an estoppel against the State where the State had advised a Medicaid applicant how to manage her financial resources to ensure her eligibility for benefits. The applicant relied on the State's advice, but was nevertheless found ineligible. An important element

of this Court's rationale was the State's duty to inform the applicant. 159 Vt. at 420 – 21, 620 A.2d 737.

Here, the State's delay in citing the Joneses for violations imposed a great burden on the Joneses. The Joneses became liable for a land use change tax where they should have paid none at all under the 1992 or 1996 opt-out provisions. At worst, the Joneses should have been liable for a land use change tax at a rate of 10% – the rate in effect at the time of the alleged “development” in 1992 – not at the 20% rate in effect when the State finally got around to alleging violations in late 1996.

Recognizing an estoppel under the circumstances of this case imposes no burden on the public policy sought to be advanced by the Program.

The purpose of [the Current Use Value Program] is to encourage and assist the maintenance of Vermont's productive agricultural and forest land; to encourage and assist in their conservation and preservation for future productive use and for the protection of natural ecological systems; to prevent the accelerated conversion of these lands to more intensive use by the pressure of property taxation at values incompatible with the productive capacity of the land; to achieve more equitable taxation for undeveloped lands; to encourage and assist in the preservation and enhancement of Vermont's scenic natural resources; and to enable the citizens of Vermont to plan its orderly growth in the face of increasing development pressures in the interests of the public health, safety and welfare.

32 V.S.A. § 3751. The Joneses' handling of their land fulfilled these purposes. The Joneses relied on professional foresters and loggers to *fulfill* their responsibilities under the Plan, not to evade them. (Findings 2 – 7, 10 – 16; PC 3, 4). Any violations occurred without the Joneses' knowledge or permission. (Findings 17, 18; PC 4).

Philbrook would have approved an amendment to the Joneses' forest management plan to reflect the cuttings done in 1992 and in fact accepted the conformance reports concerning the Jones property for the years 1993, 1994, 1995 and 1996 without comment. (Findings 36 and 37; PC 6).

After being ousted from the Program, the Joneses conveyed the property to the City of Rutland under the condition that it never be developed. (Tr. 12/20/01, p. 164; SPC 8). Thus, recognizing an estoppel here imposes no burden on the public.

Estoppel is ultimately about "public policy, fair dealing, good faith, and justice" and "whether, in all the circumstances of the case, conscience and duty of honest dealing should deny one the right to repudiate the consequences of his representations or conduct." *Fisher v. Poole*, 142 Vt. 162, 168, 453 A.2d 408, 411 (1982).

The Joneses' good faith efforts to comply with the Plan stand in stark contrast to the State's conduct. Prior to 1992, the State communicated with Jones in writing regarding any problems found on the property. (Finding 22; PC 5). Following Philbrook's inspection in 1992, he chose not to cite any violations and did not write to the Joneses regarding any concerns he may have had. (Findings 30, 31; PC 6).

In October 1996, the State's new forester, Nathan Fice, inspected the Joneses' property and immediately jumped to the unfounded conclusion that the Joneses had intentionally violated the Plan. (Finding 41; PC 7). Fice

found violations without applying any written standards for making that determination. (Tr. 11/9/01, p. 52; SPC 13; Finding 44; PC 7). He admitted that his decision whether to take steps leading to the removal of the Joneses' property from the Program was "totally arbitrary." (Tr. 11/9/01, p. 52; SPC 13).

In Stand 1, he determined that the basal area was less than that called for in the Plan. To arrive at that conclusion, he measured the basal area in a 15.8-acre section of Stand 1, which totaled 232 acres. He chose that section, "so as to produce an area with the lowest basal area." (Finding 52; PC 8). He then extrapolated those readings to apply to the entire 232 acres of Stand 1, even though "[t]here are no standards for evaluating basal area violations by the percentage of a stand that may have a basal area less than required by a [plan]." (Finding 48; PC 8). In short, he concocted a violation. Thus, the State's conduct supports the superior court's estoppel ruling.

Since the evidence supports the court's estoppel ruling and the State has not challenged the court's waiver ruling, the State has not established any basis for disturbing the judgment.

**3. The trial court's findings and conclusions regarding the violations cited by the State provide no basis for reversal.**

The State argues that the superior court's findings of fact are clearly erroneous because the State presented evidence it contends supports its case. Appellants' Brief at 22. The State misapplies the clearly erroneous standard.

The State cites no authority for its implicit argument that the superior court was bound to credit the evidence upon which the State relies.

**A. The State did not prove a violation in Stand 1.**

The State challenges the superior court's findings regarding the alleged violation in Stand 1. Appellants' Brief at 23. The State correctly points out that the Plan identified a basal area for Stand 1 as a whole, i.e., the entire 232-acres. Appellants' Brief at 23. But the court's finding refers to the 15.8-acre section of Stand 1 that the State allegedly measured to establish the violation with respect to Stand 1, referred to in the record as the "dog leg." The Joneses' forester, Mr. Wilcox, testified that he could not recall taking any basal area measurements in 1991 with respect to that section of Stand 1. (PC 185 – 186).

In 1996, the State made no effort to determine whether the cutting allegedly observed in the dog leg occurred before or after the 1991 Plan took effect. Mr. Fice testified that it would have been prudent for him to have identified the tree stumps in the dog leg to determine when the trees were cut, but he did not do that. (Tr. 12/20/01, p. 31; SPC 6).

Since the evidence supports the court's findings regarding Stand 1, the State has not established a basis for reversal.

The State also argues that it established the "scientific reliability" of the method Fice used to measure the basal area in the dog leg area of Stand 1. Appellants' Brief at 25. The State cites pages of the Printed Case that do

not establish the method's scientific reliability. Many of the pages consist of Mr. Philbrook's testimony and have nothing to do with the method Fice used. (Appellants' Brief at 25, citing PC 106 – 116).

The other pages contain an excerpt from Fice's testimony in which he relates how he made the measurements. (Appellants' Brief at 25, citing PC 301 – 317). The cited pages do not establish the scientific reliability of his method.

The superior court was not bound to credit that testimony. It was the superior court's prerogative to weigh the testimony and to choose the evidence it found persuasive. *Currier v. Letourneau*, 135 Vt. 196, 199, 373 A.2d 521, 524 (1977). The credibility of witnesses, even expert witnesses, is a matter for the trier of fact. *Hall v. Miller*, 143 Vt. 135, 145, 465 A.2d 222, 227 (1983).

Even if the testimony of Fice and Philbrook cited by the State was expert opinion testimony, the court was free to reject it. *International Ass'n of Firefighters Local #2287 v. City of Montpelier*, 133 Vt. 175, 178, 332 A.2d 795, 797 (1975) (opinion testimony establishes nothing as a matter of law); *Green Mountain Marble Co. v. State Highway Bd.*, 130 Vt. 455, 464, 296 A.2d 198, 204 (1972). Thus, the superior court's finding is not clearly erroneous.

To support its argument, the State relies on an inference about Fice's knowledge that the dogleg portion of Stand 1 was overstocked. Appellants' Brief at 24. But the State cites no authority requiring the superior court to

draw this inference. Thus, the court's failure to draw this inference does not support the State's claim of error.

The State relies on evidence allegedly supporting a finding that the cutting *in the dog leg* area of Stand 1 violated the Plan because it brought the basal area *in the dog leg area* of Stand 1 below that required by the Plan. Appellants' Brief at 24 (the State "determined... that the total basal area of *the dogleg* was 45.") (emphasis added). It is undisputed that "[t]here are no standards for evaluating basal area violations by the percentage of a stand that may have a basal area less than required by a Forest Management Plan." (Finding 48; PC 8). Given that unchallenged finding, the court's finding that the State had not proved a violation with respect to Stand 1 is not clearly erroneous.

**B. The State did not prove a violation in Stand 3.**

As to the alleged violation in Stand 3, the State appears to argue that the only thing that mattered was the size of the patch cuts. Appellants' Brief at 25 – 26. But it is undisputed that Mr. Fice had discretion in how to deal with an apparent violation and in this case would have wanted to talk to the forester responsible for the cutting to hear his rationale for the size of the patch cuts. (PC 343 – 345). Mr. Fice did not talk to the forester, Wilcox, because he assumed Mr. Jones was responsible for marking the areas to be cut. Fice was shocked and surprised to learn later that Wilcox, not Jones, was responsible for the patch cuts in Stand 3. Had he known that, he would

have viewed it differently. (PC 344 – 345). Thus, the mere size of the patch cuts does not necessarily support a finding of a violation.

The State contends that the trial court erroneously determined that the patch cuts in that Stand were accomplishing the Plan's goals. (Appellants' Brief at 26 – 27; Finding 58; PC 9). The State argues that the superior court should not have believed the testimony of Mr. Riley, an experienced forester, that the patch cuts in Stand 3 were "doing exactly what the plan intended them to do." (PC 271 – 272). Instead, the State argues, the court should have believed only the testimony of Mr. Fice.

Viewing the evidence in the light most favorable to the Joneses and excluding the effect of any modifying evidence, including Fice's testimony, the trial court's finding was not clearly erroneous. It was the court's prerogative to choose whose testimony was worth crediting. *Currier*, 135 Vt. at 199, 373 A.2d at 524; *Hall*, 143 Vt. 135 at 145, 465 A.2d at 227; *International Ass'n of Firefighters*, 133 Vt. at 178, 332 A.2d at 797; *Green Mountain Marble Co.*, 130 Vt. 455 at 464, 296 A.2d at 204. The State has not established a violation in Stand 3.

**C. The superior court was not required to defer to the Department's discretion.**

The State challenges the superior court's findings about the lack of standards for establishing basal area violations. Appellants' Brief at 29 – 30. Contrary to the State's argument, Appellants' Brief at 29, the superior court was not required to defer to Mr. Fice's alleged expertise. The testimony cited

by the State does not establish that the challenged findings are clearly erroneous.

The State argues that the superior court erred in failing to defer to the alleged expertise of the Department employees. Appellants' Brief at 29. The State does not show where it raised this issue below as required by V.R.A.P. 28(a)(4). It thus waived this issue. *In Re J.A.*, 166 Vt. at 626, 699 A.2d at 31; *New England Partnership, Inc.*, 173 Vt. at 73, 786 A.2d at 413.

The cases cited by the State are not controlling. *In re UNUM Life Ins. Co.*, 162 Vt. 201, 206, 647 A.2d 708, 712 (1994), involved an agency's prospective regulation of a life insurance policy, based upon a weighing of public policy concerns. It did not involve review of an agency's retrospective factual determination. Here, the trial court conducted a *de novo* trial and the State had the burden to prove that the two Plan violations it alleged actually occurred. *In re UNUM* is inapposite.

*In re Prof'l Nurses Serv., Inc.*, 164 Vt. 529, 532, 671 A.2d 1289, 1291 (1996), addressed the deference this Court gives to an agency's statutory interpretation. It does not require a superior court, conducting a *de novo* trial, to accept the agency's factual finding.

As argued above, Appellee's Brief at 25, the superior court was not bound to accept Fice's testimony, despite his alleged expertise.

The testimony cited by the State, Appellants' Brief at 29 – 30, does not establish standards for determining whether violations occurred, as was the

superior court's concern. Rather, it addresses the factors that inform Fice's exercise of discretion. Since the State has not established that findings 47 or 48 are clearly erroneous, their argument provides no basis for disturbing the judgment.

### CONCLUSION

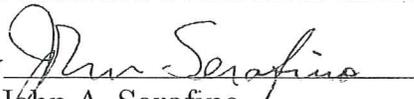
The Court should delete paragraph 4 of the judgment and replace it with the following:

4. In light of the relief granted in the preceding paragraph, the Joneses owed no Land Use Change Tax.

See Appellants' Brief at 16 ("the court's order allowing the Joneses to retroactively opt out means they would pay no LUCT at all."). In the alternative, the judgment should be affirmed.

Dated: May 30, 2003.

JOSEPH JONES AND ANN JONES

By   
John A. Serafino  
Harry R. Ryan, III  
Ryan Smith & Carbine, Ltd.  
P. O. Box 310  
Rutland, Vermont 05702-0310