No. 89348-9

SUPREME COURT OF THE STATE OF WASHINGTON

MIKE WALCH and MARCIA WALCH, husband and wife,

Petitioners,

v.

KERRY A. CLARK and PATRICIA L. CLARK, husband and wife; W.L. CLARK FAMILY, LLC, a Washington Limited Liability Company; ROBERT C. FOLKMAN and PATRICIA FOLKMAN, husband and wife,

Respondents.

PETITIONERS WALCHES' REPLY TO CLARKS' ANSWER TO WALCHES' PETITION FOR REVIEW BY THE SUPREME COURT.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Statutes & Rules

Other

IDENTITY OF PETITIONERS

Petitioners for Supreme Court Review, Mike Walch and Marcia Walch, were the Appellants at the Court of Appeals and the Plaintiffs at trial. Petitioners Walch submit this Reply to Respondent Clarks' Answer filed October 23, 2013.

COURT OF APPEALS DECISION

The decision at issue is the unpublished opinion, *Walch et al. v. Clark et al.*, No. 30123-III, filed July 23, 2013.

ISSUES PRESENTED FOR REVIEW

Clarks have not presented issues as defined in RAP 13(4)(5), but instead have substituted an argument. Therefore, Walches reassert the issues for review as follows:

1. Does the Decision of the Appellate Court conflict with the right of private condemnation, pursuant to the Washington State Constitution, which effectuates the overriding public policy against rendering landlocked property useless?

2. Does the Decision of the Appellate Court conflict with an existing Federal statute and a decision of the Washington Supreme Court which held that a party can never obtain a prescriptive right to cross the railroad land?

3. Does the Appellate Court's interpretation of a "reasonable necessity" involve a substantial public interest because it imposed an unreasonable and costly burden on the Walches to establish definitively the future use of the property?

4. Does the Appellate Court's interpretation of a "reasonable necessity" involve a substantial public interest because it requires landowners without legal access to trespass on neighbor's lands and be barred before a statutory easement of necessity can be sought?

WHY REVIEW SHOULD BE ACCEPTED

A. The Decision Of The Appellate Court Conflicts With An Existing Federal Statute And A Decision Of The Washington Supreme Court Holding That A Party Can Never Obtain A Prescriptive Right To Cross The Railroad Land.

Clarks mischaracterize the access currently owned by the Walches, and insert the red herring that future development is the *sole* reason for seeking a right of way by necessity. Currently, the Walches have *no* legal means of ingress and egress to their property. No matter the use of their land there is no legal access. The parcel is landlocked due to the nature of the surrounding property. Access is blocked by federal public interests to the North, South and East, a situation the Walches did not create. Reasonable necessity has been established by the Walches.

This is not solely a question of economic benefit and future development, but one of simple legal access for ingress and egress. Thus, *the Court of Appeals erred, in this situation, in considering potential future development as a condition of reasonable necessity. (Opinion at 8).* The only existing permissive use is revocable, traversing a railroad corridor and elevated crossing for which *no one* has a permit, even the City of Cle Elum. Based on the Supreme Court's decision in *State of Washington v. M.C. Ballard*, 156 Wash. 530, 287 P.27 (1930), a permanent, legal right to use that property as access is unobtainable.

The holding in *Ballard*, applying the federal statute and U.S. Supreme Court Decisions, made clear that BNSF could not alienate, nor could title be acquired, to the outer one hundred feet of the two-hundred-foot right of way existing on either side of the center line of the railroad. 156 Wash. at 533 (citing *Northern Pacific R. Co. v. Ely*, 197 U.S. 1 (1905) and *Northern Pacific R. Co. v. Concannon*, 239 U.S. 382 (1915)). Whether by grant, permit or adverse possession, Walches can never acquire a permanent legal right to cross the portion of the railroad or its corridor asserted by Clarks to be Walches' permissible access to their land.

In the context of implied easements, the Court of Appeals in *Woodward v. Lopez*, 174 Wn. App 460, 300 P.3d 417 (2013) addressed the definition of necessity:

> Absolute necessity is not required to establish an implied easement. *Evich v. Kovacevich*, 33 Wn.2d 151, 157-58, 204 P.2d 839 (1949). "The test of necessity is whether the party claiming the right can, at reasonable cost, on his own estate, and without trespassing on his neighbors, create a substitute." *Bays v. Haven*, 55 Wn. App. 324, 329, 777 P.2d 562 (1989). "Although prior use is a circumstance contributing to the implication of an easement, if the land cannot be used without the easement without disproportionate expense, an easement may be implied on the basis of necessity alone." *Fossum Orchards v. Pugsley*, 77 Wn. App. 447, 451, 892 P.2d 1095 (1995) (citing *Adams*, 44 Wn.2d at 507-09).

This is precisely the situation faced by the Walches. To the East is the inalienable railroad corridor and crossing, for which no permits have been granted to anyone; to the North is the inalienable BNSF railroad and corridor; to the South is the Interstate; and to the West is the Clarks' and Folkmans' land giving access to a legally permitted railroad crossing with safety lights and crossing guards. Walches have never expected to obtain the Western access for free; they simply sought a right of way for ingress and egress pursuant to the statute, RCW 8.24.010 et seq. That the Dalle family may have used the Eastern road through the railroad corridor and over the elevated crossing for 80 years, or that railroad crossing is used by the City of Cle Elum and other landowners (Clarks' Answer at 12), resolves nothing. No legal, permanent right to the railroad corridor or elevated crossing can be acquired by adverse possession, grant or permit.

Clarks basically assert that Walches must engage in futile acts, i.e. seeking unreliable and revocable permits to use the Owens Road crossing, in order to establish reasonable necessity. The parties stipulated that no permits exist for the elevated crossing (RP Vol. I, 4-5; *see also* RP Vol. I, p. 16, 127 & 130; Exs. 1, 9 & 54).[1] That none have been issued, even to the

[1] The City of Cle Elum does have a private agreement with the Owens Family to use Owens Road South of the BNSF railroad crossing from the North line of Section 36 to the City of Cle Elum's sewage treatment plant (RP Vol. I, p. 126; Ex. 58). Nonetheless, no written agreement exists as to the railroad corridor and crossing.

City of Cle Elum, illustrates the railroad's desire to avoid creating a permanent crossing at that elevated site. Again, there is no means to obtain permanent legal access to the East, either over the elevated crossing or within the adjoining corridor itself. The lack of legally obtainable access demonstrates a reasonably necessity and entitles the Walches to a right of way under the RCW 8.24.010 et seq.

B. The Decision Of The Court of Appeals Conflicts With The Existing Decision Of *Brown V. McAnally.*

Brown v. McAnally, 97 Wn. 2d 360, 644 P.2d 1153 (1982), recognizes that there is a distinction between permissible and legal access, and that permissible access does not preclude one from condemning a private way of necessity. 97 Wn. 2d at 368.

> Viewing the action before us in the light of the foregoing cases, it is apparent respondents possessed neither an express or an implied easement to use Brown Road *although a permissive user may have existed.* Lookout Point Road was thus *legally inaccessible* from respondents' property. Consequently, *respondents were entitled to a private way of necessity* for joint use along Brown Road, as it existed, for ingress and egress in the ordinary sense of a "way."

97 Wn.2d at 368 (italics added).

Brown v. McAnally, supra, does not limit the acquisition of a right of way only to existing roads. In *Brown*, the plaintiff specifically sought

to condemn an easement by necessity over an *existing* road. Walches do not. The *Brown* court addressed joint use of that specific existing road, recognizing the Respondents therein were entitled to a private way of necessity for joint use, but limited the scope of the right of way. It ruled that the trial court had exceeded its authority in using the private condemnation statute to create the way of necessity, because the scope of the way far exceeded that which was necessary for ingress and egress. In *Brown*, the way of necessity had been granted for the purpose of establishing a public county road.

The Walches have established that, because public, federal land interests block legal access to their property from the North, South and East, it is reasonably necessary to condemn a private way of necessity to the West for ingress and egress in order to make *any* use of their land. Nothing in *Brown* mandates that ways of necessity may only be established over existing roads. The location of the Walches' land and the status of the surrounding parcels demonstrate a reasonable necessity to condemn a right of way to the West over the Clarks' and Folkmans' lands. The condemnation is not sought strictly because there at one time may have been a road over the route chosen. Further, Walches are not required under the private condemnation statute to obtain land use permits before reasonable necessity could be established. The right of way is sought as

the most reasonable means of ingress and egress. Access is blocked by federal public interests to the North, South and East, a situation the Walches did not create. Reasonable necessity has been established by the Walches.

C. Clarks Misstate The Walches' Ability To Obtain Alternate Access.

Revocable permission, whether implicit or overt, does not provide the Walches legal access. That the City of Cle Elum would appeal the closure if the Owens Crossing is closed (Clarks' Reply at 12) is simply speculative and irrelevant as to Walches legal access. Furthermore, the secondary access provided in the Walches' deed has never been built or used, and still would require traversing private Owens road in a location that the Dalle family has never used for access. No prescriptive taking of that portion of the private road has ever occurred (R.P. Vol. I, p. 125-26; BNSF Short Plat, CP 235-237, Trial Ex. 54/App. "B"). Nor would condemning an easement over the privately owned sections of Owens Road resolve the problem. The railroad corridor and elevated crossing must still be traversed and the title policy will specifically except "lack of a right of access to and from the land across a railroad right of way" (CP 75-125; Trial Exs. 01 & B)). The speculations put forth by the Clarks are irrelevant and without merit. Had the Clarks and Folkmans believed the

Eastern route was an obtainable legal route, they could have joined the BNSF Railroad and property owners to the East under RCW 8.24.015. They did not.

D. Clarks Are Not Entitled To Attorney Fees For Common Law Claims.

Clarks argue that the use of the term "any action" in RCW 8.24.030 intended a broad application of that statute, so that it could encompass awarding fees expended on common law claims not brought pursuant to that statute. The full sentence using the term "any action" states as follows: "In any action ***brought under the provisions of this chapter for the condemnation of land for a private way of necessity***, reasonable attorneys' fees and expert witness costs may be allowed by the court to reimburse the condemnee" (emphasis added). The plain meaning of this language is that it authorizes an award of fees only for any action brought under the private condemnation statute. Only by taking the phrase "any action" entirely out of context can it be read to embrace common law causes of action such as for an implied easement or a prescriptive easement. That the statute does not mandate segregation of fees does not imply that any fees, whether for statutory or common law claims, are permitted under the statute. The award of non-statutory, common law attorney fees was based on untenable grounds, both an abuse of discretion

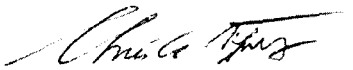
and an error of law by the Trial Court. The Appellate Court properly reversed that decision and there is no basis for review of that issue.

CONCLUSION

For the foregoing reasons, Petitioners Walch respectfully request that the Petition for Discretionary Review be granted, with the exception of any issue raised by Clark pertaining to attorney fees.

DATED the 6th day of November, 2013

Respectfully submitted,



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APPENDIX

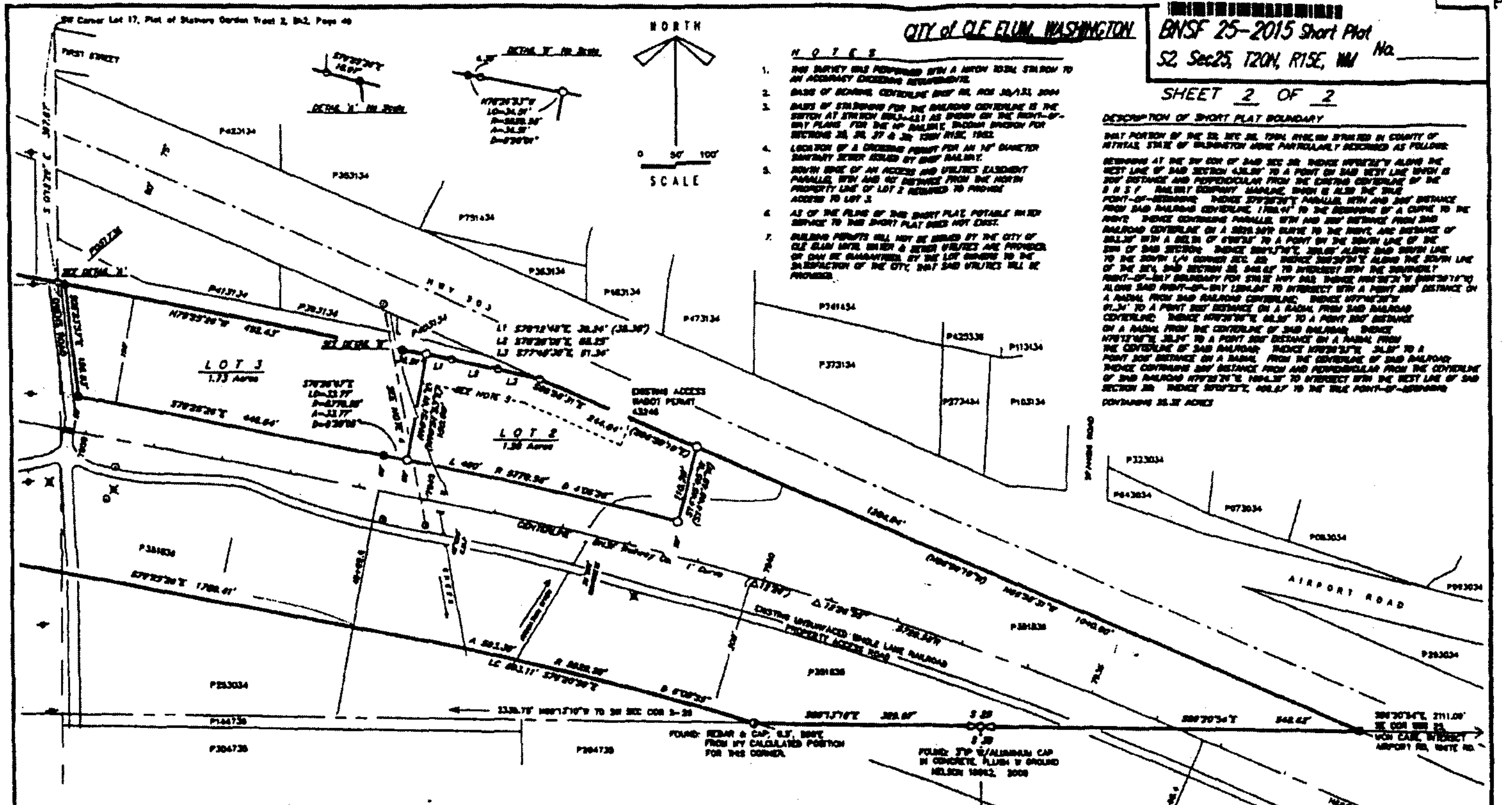
A

CITY of CLE ELUM, WASHINGTON

BNSF 25-2015 Short Plat No.______

S2, Sec25, T20N, R15E, WM

SHEET 2 OF 2



NOTES

DESCRIPTION OF SHORT PLAT BOUNDARY

CONTAINING 35.37 ACRES

PROPERTY OWNERS, WITHIN 300' OF PROPOSED SHORT PLAT ON SHEET 1 OF 2

PROPERTY OWNERS, WITHIN 300' OF PROPOSED SHORT PLAT ON SHEET 2 OF 2

LEGEND

RECEIVING NUMBER 201008170004

— AUDITOR'S CERTIFICATE —

FILED OF RECORD THIS 17 DAY OF August 2010 AT [illegible] IN BOOK K OF SHORTPLATS, PAGE 163, AT THE REQUEST OF Bob Bailey

Kittitas County Auditor

Deputy County Auditor

806 LLC
PROFESSIONAL LAND SURVEYING
4201 HWY 970, CLE ELUM, WA 98922
509-674-5521

K-163

K/163 201008170004

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document on all parties or their counsel of record on November 6, 2013, as follows:

Party	Method of Service
Douglas W. Nicholson Attorney at Law P.O. Box 1088 Ellensburg, WA 98926	X US Mail Postage Prepaid ○ Certified Mail Postage Prepaid ○ Federal Express ○ ABC/Legal Messenger ○ UPS Next Day Air ○ By Fax ○ Hand delivered by: X Email to: dnicholson@lwhsd.com
Party	**Method of Service**
Bill H. Williamson Williamson Law Office P.O. Box 99821 Seattle, WA 98139-0821	X US Mail Postage Prepaid ○ Certified Mail Postage Prepaid ○ Federal Express ○ ABC/Legal Messenger ○ UPS Next Day Air ○ By Fax ○ Hand delivered by: X Email to: williamsonb@msn.com

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

DATED this 6th day of November, 2013, at Colville, Washington.

Chris A. Montgomery WSBA # 12333

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, November 06, 2013 8:34 AM
To: 'Chris Montgomery'
Cc: dnicholson@lwhsd.com; williamsonb@msn.com; rick@colelaw.net
Subject: RE: Mike Walch, et al v. Kerry A. Clark, et al - Supreme Court No. 89348-9

Received 11/6/13

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From: Chris Montgomery [mailto:mlf@cmlf.org]
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To: OFFICE RECEPTIONIST, CLERK
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Dear Supreme Court Clerk and Counsel,

There was an error in the Table of Authorities for the Adams citation. That has been corrected. Accordingly, I am submitting a corrected Petitioners Walches' Reply to Clarks' Answer to Walches' Petition for Review by the Supreme Court. Please disregard my earlier filing from today. Sorry for any confusion. The Certificate of Service is attached as the last page. Thanks!

Very truly yours,

MONTGOMERY LAW FIRM

By: Chris A. Montgomery