NO. 328783-III
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

TOM G. LUTZ and KAREN LUTZ, husband and wife,

Plaintiffs/Respondents,

v.

LISA BUFFINGTON,

Defendant/Appellant,

APPEAL FROM THE SUPERIOR COURT

HONORABLE RANDALL KROG

REPLY BRIEF

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FACTUAL REJOINDER

As discussed in Brief of Appellant, Respondents Tom Lutz and Karen Lutz (the Lutzes) have an implied easement by necessity over land now owned by Gene Cyrus and Judith Cyrus. The Cyruses have divided a portion of their property into two short subdivisions of four parcels each. They created Dancing Mountain Road as a private road. During its length, Dancing Mountain Road goes between these two short subdivisions and ultimately intersects with Pipeline Road, a public thoroughfare. (CP 178, FF 3; Ex. 22, 31, 32) In Respondents' Appellate Brief, pps 5-6, the Lutzes contend that Dancing Mountain Road has not been constructed. This is not accurate. The Court found that it does exist. (CP 178, FF 3) It is also shown on maps of the area. (Ex. 22) In his testimony, Mr. Lutz stated that Dancing Mountain Road had been constructed approximately four to five years before the time of trial. (RP-LT, 40-41)[1] The trial court stated only that Dancing Mountain Road had not been constructed when the Lutzes bought the property from the Lutzes in 1996. (CP 184, CL 8)

The Lutzes also note that they satisfied the judgment entered against them. They were required to pay the compensation and damages within sixty days after entry of the Judgment/Decree Condemning

[1] The Lutzes refer to the transcript of Mr. Lutz' testimony as "RP-LT." Ms. Buffington will use the same designation.

Granting Private Way of Necessity, or the grant of the private way of necessity would be void. (CP 195) They timely made the payment, and a satisfaction of the judgment was given. (CP 236-38) The parties then agreed to the Stipulated Order by which the funds were placed in the trust account of Ms. Buffington's attorney not to be removed without further order of the trial court. The parties agreed and the trial court ordered that the deposit would not amount to an "acceptance of benefits" or, alternatively, that the arrangement amounted to sufficient security for return of the funds deposited should Ms. Buffington prevail on appeal. (CP 239-41) Therefore, Ms. Buffington has not lost her right to appeal by the operation of RAP 2.5(b)(1) and RAP 2.5(b)(2). The Lutzes have not contended to the contrary.

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RESPONSE TO ARGUMENTS

Response to Assignment of Error No. 1: The trial court erred by entering the Ruling of the Court dated February 1, 2014.

Response to Assignment of Error No. 2: The trial court erred by entering the Order of Denial dated February 27, 2014.

I. The Lutzes' Action to Condemn a Private Way of Necessity Is Barred Because It Should Have Been Brought as a Compulsory Counterclaim in *Buffington v. Lutz*.

Ms. Buffington maintains that the Lutzes' action to condemn a private way of necessity is barred because it was not pleaded as a counterclaim in *Buffington v. Lutz,* Klickitat County Superior Court No. 06-2-00257-7, the earlier action between the parties.

The Lutzes agree that CR 13(a) governs the issue and that a counterclaim is compulsory if it is logically related to the plaintiff's initial claim as set out in *Schoeman v. New York Life Insurance Co.*, 106 Wn.2d 855, 865-66, 726 P.2d 1 (1986). The Lutzes claim, however, that the two actions are not logically related because *Buffington v. Lutz, supra,* dealt with the invalid easement the Lutzes were granted in 1996; that the present action involves the condemnation of private way of necessity; and that the two claims bring up different factual and legal issues. (Respondents' Appellate Brief, p. 7) The Lutzes' argument is incorrect. A matter is

logically related if the counterclaim arises from the same aggregate set of operative facts as the initial claim, in that the same operative facts serve as the basis of both claims or the aggregate core facts upon which the claim rests activates additional legal rights otherwise dormant in the defendant. *Mattel, Inc. v. MGA Entertainment, Inc.*, 705 F.3d 1108, 1110 (9th Cir. 2013).[2] Under that test, the question of the 1996 easement's validity and the condemnation of a private way of necessity are logically related. Both relate to the Lutzes' desire to go over Ms. Buffington's property to reach the private roads within the Ponderosa Park subdivision and ultimately get to Pipeline Road, the nearest public thoroughfare. Furthermore, as the Lutzes must concede, the core of facts activated dormant rights in the Lutzes — their claim to condemn a private way of necessity.

A number of other courts have ruled that claims dependent on the plaintiff's quiet title action were logically related compulsory counterclaims under that jurisdiction's equivalent to CR 13. In each, the claimant would not have needed the relief sought in the compulsory counterclaim had he, she, or it prevailed in the quiet title action that the plaintiff filed. *Turner v. Green,* 85 So.3d 1016 (Ala.App. 2011) — defendant's counterclaims for adverse possession and unjust enrichment

[2] Since CR 13 is substantially similar to FRCP 13(e), Washington courts look to federal cases interpreting FRCP 13(e). *Lane v. Skamania County*, 164 Wn.App. 490, 499, 265 P.3d 156 (2011).

based on placing improvements on the property were barred as compulsory counterclaims not pleaded in plaintiff's action to quiet title to the land; *Harper v. Harper,* 267 Ga.App. 553, 600 S.E.2d 659 (2004) — defendant's action to enforce an alleged contract to devise real property to him was barred because of his failure to assert this claim as a compulsory counterclaim in the personal representative's action to quiet title to real property that the defendant had transferred to himself; *Pence v. Rawlings,* 453 N.W.2d 249 (Iowa.App. 1990) — defendant's attempt to recover the value of labor and materials provided to real estate conveyed to him as a result of improper undue influence was compulsory counterclaim to action by conservator seeking to recover the property; *Orlando v. Prewett,* 236 Mont. 478, 771 P.2d 111 (1989) — action to foreclose mechanic's lien based on improvements placed on real estate was a compulsory counterclaim to action to quiet title in property free of claims made by defendants based on alleged contracts to devise them part of the property and sell them the remainder; *Executive Management, Ltd., v. Ticor Title Insurance Company,* 114 Nev. 823, 963 P.2d 465 (1998) — claims including slander of title and intentional interference with contractual relations in connection with the sale of a lot should have been brought as compulsory counterclaims in first action to quiet title to lot in question. Our case is no different from these. The Lutzes' need to condemn a

private way of necessity was dependent on their losing Ms. Buffington's suit to quiet title and to invalidate the easement improperly granted by Mr. Kershaw. The result should be the same — the Lutzes' action must be barred as an unasserted compulsory counterclaim.

The Lutzes further argue that the two claims are not logically related because they involve different types of legal claims. The fact that the claims and counterclaims are premised on different legal theories does not affect their ability to be deemed part of the same transaction. As has been stated:

> The statement in Rule 13(a) that a claim qualifies as a compulsory counterclaim if it arises out of the transaction or occurrence but is the subject matter of the opposing party's claim, gives rise to the critical question: what constitutes a "transaction or occurrence?" Courts generally have agreed that these words should be interpreted liberally in order to further the general policies to the federal rules and carry out the philosophy of Rule 13(a). Thus, the "transaction" requirement does not require the court to differentiate between opposing legal and equitable claims or between claims in tort and those in contract. Nonetheless, even the most liberal construction of the provision cannot operate to make a counterclaim that arises out of an entirely different or independent transaction or occurrence compulsory under Rule 13(a).

Wright, Miller, Kane, Marcus & Steinman, 6 Fed.Prac.&Proc.Civ. §1410.1.

The Lutzes have also maintained that their claim to condemn a private way of necessity is not a compulsory counterclaim because it had

not matured when they filed their answer in *Buffington v. Lutz, supra.* They have argued that their claim did not come into existence until *Buffington v. Lutz, supra,* was decided against them. That is not so, however. A counterclaim will not be denied treatment as a compulsory counterclaim solely because recovery on it depends on the outcome of the main action. *Wright, Miller, Kane, Marcus & Steinman*, 6 Fed.Prac.&Proc.Civ. §1990, set out in Appellant's Brief, p. 12-13. If the Lutzes claim to condemn a private way of necessity depended on the result of Ms. Buffington's suit to invalidate the easement, it had, by definition, matured when the Lutzes filed their answer in *Buffington v. Lutz, supra.*

The Supreme Court of the Territory of Guam rejected a similar argument in *Presto v. Lizama*, 2012 W.L. 6738314 (Supreme Court of the Territory of Guam 2012), based in part on Washington authority. In that case, a fence had been constructed on property owned by Ms. Lizama. Mr. Presto claimed that the fence was constructed partially on an area where an easement in his favor existed. The local Department of Public Works agreed with Mr. Presto and ordered demolition of a portion of the fence. Ms. Lizama sued the Department of Public Works seeking declaratory and injunctive relief, and Mr. Presto intervened on the department's side. The trial court ruled that the easement upon which Mr. Presto based his claim was invalid. Mr. Presto appealed and argued that he was entitled to an

easement by necessity. The appellate court rejected his claim because it was made for the first time on appeal. Three years later, Mr. Presto filed another action seeking an easement by necessity and alleging that his property was landlocked. The Court ruled that the claim for an easement by necessity was a barred compulsory counterclaim because it arose out of the same transaction as did the prior litigation. Mr. Presto also argued that his claim had not matured in the prior action just as the Lutzes do here. The Court rejected that argument in the following terms:

> Presto argues that before the court in (the prior case) concluded proceedings, he held a reasonable belief that an express or implied easement existed based on information provided to him by the Government of Guam. . . In that sense, Presto contends that an easement by necessity claim was not yet mature and was, instead, a mere theoretical possibility. . . Presto also argues that his reasonable belief was based in large part on the proposed road the original grantor planned to build to provide ingress and egress to his property, though the grantor ultimately abandoned that plan. . . . In other words, Presto is trying to argue that the necessity for the easement arose, not at the time the common grantor made the conveyance, but rather at the time this court issued its final decision in (the prior case). . .
>
> Finally, extracting insight from the *Lane v. Skamania County,* 164 Wn.App. 490, 499, 265 P.3d 156 (2011), Presto's easement by necessity claim was a compulsory counterclaim since the claim was based solely on pre-action events and only the right to relief depended upon the outcome of the main action. In other words, Presto should have considered that, in case he failed to prove the existence of an express easement or easement by implication, he would be required to alternatively argue

> for an easement by necessity to prevent the already-accrued claim from being barred. Presto was expected to have the foresight to assert an easement by necessity claim at the trial stages of (the prior suit) via alternative or amended pleading, and he failed to do so. . .

In the same way, the Lutzes' condemning a private of necessity would be necessary if Ms. Buffington prevailed on her claim to invalidate the easement in *Buffington v. Lutz, supra.* Just as Mr. Presto in *Presto v. Lizama, supra,* the Lutzes should have had the foresight to realize this to be the case and to add their claim as a counterclaim in *Buffington v. Lutz, supra.* Their failure to do so barred their subsequent action.

To summarize, the Lutzes' arguments have no merit and should be rejected. Their suit to condemn a private way of necessity should have been asserted as a counterclaim in *Buffington v. Lutz, supra.* Since it was not, it is barred, and this action should have been dismissed. The trial court's failure to do so was error.

II. The Lutzes' Action Should Have Been Dismissed for Failure to Join Necessary Parties.

The route that the Lutzes seek goes over Ms. Buffington's property to Tamarack Road, then to East Ponderosa Drive, and then to Pipeline Road, the public thoroughfare. Tamarack Road and East Ponderosa Drive are private roads that comprise easements over an additional twenty (20) lots in the Ponderosa Park subdivision. (CP 95-96; CP 182, FF 28) Since

the route the Lutzes have sought goes over these lots, the owners of those lots are necessary parties in the Lutzes' attempt to condemn a private way of necessity. (Appellant's Brief, pps. 14-19)

The Lutzes respond by stating that the other land owners haven't objected or sued. In point of fact, nine of the twenty owners have objected. (CP 99, 100, 104, 110, 111, 112, 113, 152) Even if they had not, this argument stands RCW 8.24 on its head. As RCW 8.24.030 provides:

> The procedure for the condemnation of land for a private way of necessity . . . shall be the same as that provided for the condemnation of private property by railroad companies, but no private property shall be taken or damaged until the compensation to be made therefor shall have been ascertained and paid as provided in the case of condemnation by railroad companies. . . .

In other words, the Lutzes are required to establish their right to a private way of necessity and pay for it before they can use the route. The other owners are not required to object — the Lutzes are required to sue them to obtain a private way of necessity in the first instance.

The Lutzes might claim rights over the easement granted by Mr. Kirshaw over the private roads. But that easement was invalid. (Appellants Brief, pps. 17-18) The Lutzes do not appear to argue to the contrary. In short, if the Lutzes want to establish a route over Ms. Buffington's parcel, they must obtain rights to use the entire route. This requires joining other property owners over whose land the route will run. The Lutzes failure to

do so deprived the trial court of jurisdiction and required dismissal of the action. The trial court erred by ruling to the contrary.

Assignment of Error No. 3: The Trial Court Erred by Entering the Amended Ruling of the Court.

Assignment of Error No. 4: The Trial Court Erred by Entering the Judgment/Decree Condemning/Granting Private Way of Necessity.

I. The Lutzes Are Not Entitled to a Private Way of Necessity Because They Have an Easement Implied by Necessity Over Land Now Owned by the Cyruses.

As discussed in Appellant's Brief, pps. 20-27, the Lutzes are not entitled to a private way of necessity over Ms. Buffington's lot because they have an easement implied by necessity over the land once owned by their grantors — the Brokaws — and now owned by the Cyruses. The Lutzes contentions to the contrary are incorrect.

The Lutzes first argue that the Lutzes and the Brokaws purposefully did not provide for any easement over the Brokaws' property. It is clear that the Brokaws did not grant an easement to the Lutzes because no such easement is in the deed conveying Lots 110 and 112, and no easement exists in any other instrument. (Ex. 7) The trial court did not find, however, that the parties explicitly eliminated the easement implied

by necessity. The only discussion remotely related to this notion is contained in the first sentence of Finding of Fact No. 5 as follows:

> At the time of purchasing lot and lot Plaintiff Lutz did not discuss with Brokaw an easement over the remaining Brokaw property for ingress and egress. . .

The Lutzes bear the burden of proof of demonstrating a right to condemn a private way of necessity. That burden includes the demonstration of the absence of any easement, express or implied. *State v. Superior Court*, 107 Wash. 228, 233, 181 P. 689 (1919); *Dreger v. Sullivan,* 46 Wn.2d 36, 278 P.2d 647 (1955); *Roberts v. Smith,* 41 Wn.App. 861, 864, 707 P.2d 143 (1985). The absence of any finding that the parties intended to eliminate any implied easement is construed against the Lutzes as the parties bearing the burden of proof. *Ellerman v. Centerpoint Prepass, Inc.*, 143 Wn.2d 514, 524, 22 P.3d 795 (2001); *Pacesetter Real Estate, Inc. v. Fasules*, 53 Wn.App. 463, 475, 767 P.2d 961 (1989). In this situation, that amounts to a finding that the parties did not eliminate the easement implied by necessity.

Furthermore, no finding of intent to eliminate any implied easement can be made from the facts that we have. There is nothing to that effect in the deed from the Brokaws to the Lutzes. (Ex. 7) This presents an issue of deed interpretation. Every deed must be interpreted based upon the intentions of the parties that must be derived in the first instance from

the four corners of the deed and its language. *Hanson Industries, Inc. v. County of Spokane*, 114 Wn.App. 523, 527, 58 P.3d 910 (2002). An interpretation of an instrument cannot be based, however, on language that is not there. *Bank of East Asia v. Pang*, 140 Wash. 603, 610-11, 649 P. 1060 (1926); *City of Seattle v. Northern Pacific Railway*, 12 Wn.2d 247, 260, 121 P.2d 382 (1942). Furthermore, the Lutzes are asking the Court to consider evidence extrinsic to the deed from the Brokaws. Such evidence cannot be considered when the deed language is not ambiguous. *Zobrist v. Culp*, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981); *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). The deed from the Brokaws to the Lutzes conveys the property and does not discuss any easement, implied or otherwise. It cannot be viewed as eliminating any sort of implied easement for that reason.

Extrinsic evidence would not help the Lutzes because there was no finding of any parol agreement concerning any easement. Furthermore, and as the trial court did find, there were no discussions of any easement between the Lutzes and the Brokaws. (CP 178, FF 5) There can be no parol agreement when there is no meeting of the minds. And there can be no meeting of the minds when a subject is not broached is some way. A party's unilateral and subjective intentions are not meaningful. *City of*

Olympia v. Olympia Police Guild, 60 Wn.App. 556, 559, 805 P.2d 245 (1991).

In fact, the language of the deed confirms the existence of the easement implied by necessity. The intent to have the easement by necessity in place is made out when a grantor sells landlocked property. *State v. Superior Court, supra; Hellberg v. Coffin Sheep Co.* 66 Wn.2d 664, 667, 404 P.2d 770 (1965); *Roberts v. Smith, supra; Visser v. Craig,* 139 Wn.App. 152, 158-59, 159 P.3d 453 (2007).

If the Lutzes suggest that they somehow eliminated the easement implied by a necessity to which they are entitled, they may not able to assert a private way of necessity at all.. As the Court stated in *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012), a party that voluntarily land locks his or her property may not be entitled to condemn a private way of necessity. The Court in that case refused to adopt a "bright line" rule to that effect, apparently opting for a case-by-case analysis. 175 Wn.2d at 7-8. The Lutzes do not do well when the facts of this case are analyzed. In essence, they are arguing that they gave up their easement implied by necessity in favor of the invalid easement over Ms. Buffington's lot. They did so when they were on notice of the invalidity of that easement. (CP 54; CP 180, FF 17; Ex. 40) They also delayed for thirteen years before asserting the right to condemn a private way of

necessity. Under these circumstances, they should not be entitled to condemn a private way of necessity having given up a perfectly valid implied easement over the Brokaws' land.

The Lutzes go on to argue that no implied easement existed because there was no established use over the Brokaw parcel to the land that was sold to the Lutzes. In doing so, they contend that the "continuous user" is an element of the easement implied by necessity. It is not, as Professors Stoebuck and Weaver have confirmed. Stoebuck and Weaver, *Real Estate: Property Law* 17 Wash.Prac. § 2.5, discussed at Appellant's Brief, pps. 22-23. An easement implied by necessity exists when the grantor conveys a part of his or her land, retains part, and after the conveyance it is necessary to cross the grantor's parcel to reach a street or road from the conveyed parcel. (Appellant's Brief, p. 21) Those elements are clearly present in the 1996 conveyance from the Brokaws to the Lutzes.

Since the Lutzes clearly had an easement implied by necessity over the land owned by the Brokaws and deeded to the Cyruses, they are not entitled to condemn a private way of necessity over Ms. Buffington's lot. The trial court's contrary ruing was error.

II. The Lutzes Cannot Condemn a Private Way of Necessity Because They Delayed Too Long in Bringing the Action.

The Lutzes bought Lot 113 in 1973 and Lots 110 and 112 in 1996. They did not bring their action to condemn a private way of necessity until 2009. This delay shows that no necessity exists to grant the private way of necessity. Therefore, their action to do so should have been dismissed. Appellant's Brief, pps. 27-29

The Lutzes contend that they were trying to obtain an outlet for their property before 2009. Their only action, however, was obtaining an easement that they should have known was invalid at the time it was granted as the trial court found in *Buffington v. Lutz, supra.* (CP 180, FF 17; Ex. 40) Furthermore, that easement by its terms benefited only one of their three lots — what the parties have referred to as Lot 110, which was deeded to them by the Brokaws in 1996. (Ex. 8) What they should have done, especially as to Lot 113 which was acquired in 1973, was promptly file an action to condemn a private way of necessity. Had they done so as early as 1973, Ms. Buffington would have understood her risks with regard to the lot that she purchased in 1996 and may have negotiated for a lower price or bought a different lot. The Lutzes' lack of diligence means that they are not entitled to the relief they seek.

The Lutzes want to harp on Ms. Buffington's failure to bring an action to invalidate the easement until 2006. Her actions are not the focus of the inquiry. Only the actions of the party seeking to condemn a private way of necessity must be analyzed under the case-by-case analysis set out in *Ruvalcaba v. Baek, supra.*

In short, the Lutzes have not refuted Ms. Buffington's basic argument, that they are not entitled to condemn a private way of necessity because of their delay in seeking the remedy. The trial court should not have granted them this relief.

Assignment of Error No. 5: The trial court erred in awarding compensation in the amount of $1,180.00.

The trial court erred by adopting the view of Eric Walker as to the compensation to be paid for the property because Mr. Walker purported to adopt the "comparable sales" approach for valuing the easement to be obtained over Ms. Buffington's property without basing his opinion on any comparable sale. His opinion cannot amount to sufficient evidence for that reason.

The Lutzes argue in favor of Mr. Walker's conclusion but do not refute the rule of law that governs assessment of compensation in this context. Compensation for condemned land is based on its fair market value defined as the amount of money that a well-informed purchaser,

willing but not obliged to buy the property would pay, and which a well-informed seller willing but not obliged to sell would accept taking into consideration all uses to which the property is adapted and might in reason be implied. *Shields v. Garrison,* 91 Wn.App. 381, 385, 957 P.2d 805 (1998). There is simply no evidence — much less substantial evidence — that a reasonable seller in Ms. Buffington's position would accept anything other than slightly less what it would cost the Lutzes to acquire and build a road over an alternative outlet. And there is no evidence that a reasonable seller in Ms. Buffington's position would accept $1,180.00 for the right to go over her land when the expense to build an alternate route would be much more expensive — in other words, a comparable sale. That is the flaw in Mr. Walker's testimony that precludes it from being substantial evidence — he based his value on the comparable sales method of valuing real property without producing any comparable sales.

The Lutzes argue that the value should not be based upon that of an unwilling seller. (Respondents' Brief, pps. 30-31) That is not a concern because the definition of fair market value assumes a willing seller. And, as Mr. Walker conceded, a willing seller is self-interested and will try to maximize any purchase price. (RP 46) He further agreed that Ms. Buffington would ask the Lutzes to pay about what it would cost them to put their road toward another outlet and that the Lutzes would pay no

more than that sum. (RP 53-54) The trial court found that M.s Buffington was asking for slightly less than $83,000.00. (CP 181, FF 25) That is the amount the Lutzes should be required to pay.

An element of compensation includes the cost to build the improvement, in this case Lutz Parkway and the utilities that the Lutzes brought to their rental house. *Shields v. Garrison, supra*, 91 Wn.App. at 387. The trial court's award did not include any consideration of this cost.

In short, there was no substantial evidence to support the trial court's award of compensation. Its judgment should be reversed with directions to recalculate compensation based upon the Lutzes' cost of building an alternative route.

ATTORNEY'S FEES ON APPEAL

The condemnee is entitled to attorney's fees whether or not the condemnor establishes a right to a private way of necessity. *Beckman v. Wilcox,* 96 Wn.App. 355, 979 P.2d 890 (1999). Furthermore, the condemnee is entitled to attorneys' fees on appeal even when the condemnee is not the prevailing party on appeal. *Sorensen v. Czinger,* 70 Wn.App. 270, 852 P.2d 1124 (1993). Based on this authority, Ms. Buffington is entitled to an award of attorney's fees irrespective of the substantive outcome of this appeal.

The Lutzes do not even attempt to refute or distinguish this authority. Rather, they ask the Court not to award Ms. Buffington attorney's fees based on their assertion that she has unnecessarily increased the costs of litigation by appealing. This argument fails because Ms. Buffington has the absolute right to appeal. The Lutzes allude to her actions before the trial court, specifically not calling an appraiser to testify.[3] In any event, the trial court made an award of attorney's fees based upon proceedings before it. The Court of Appeals' ruling should be based upon proceedings before the Court of Appeals.

It would make sense to deny Ms. Buffington attorney's fees if her arguments were frivolous. An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and the appeal is so totally devoid of merit that there is no reasonable possibility of reversal. In considering whether an appeal is frivolous, it must be remembered that a civil appellant has the right to appeal and that all doubts as to whether an appeal is frivolous should be resolved in favor of the appellant. Furthermore, an appeal is not frivolous simply because the appellant's arguments are rejected. *Green River Community College District No. 10 v. Higher Education Personnel Board*, 107 Wn.2d 427, 442, 730 P.2d 653

[3] As all agree, there were no comparable sales of easements in the area. Ms. Buffington did not call an appraiser because any opinion an appraiser might have little value as she has discussed.

(1986); *Ames v. Ames*, 184 Wn.App. 826, 857, 340 P.3d 232 (2014). Ms. Buffington's appeal is not frivolous. She has made well supported arguments and should prevail.

Clear authority entitles to Ms. Buffington to an award of attorneys' fees on appeal whether or not she prevails. There is no reason not to award them. The Court should grant her this relief.

CONCLUSION

The Lutzes arguments do not carry the day. The Court should reverse the Judgment/Decree Granting Private Way of Necessity with directions to dismiss the action with prejudice based on Assignments of Error Nos. 1-4. Alternatively, and on the basis of Assignment of Error No.5, the Court should reverse with directions to determine appropriate compensation based on the cost of constructing an alternative route. Finally, Ms. Buffington should be awarded her attorneys' fees on appeal.

DATED this 27 day of April, 2015.

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