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

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

Plaintiffs/Respondents,

v.

LISA A. BUFFINGTON,

Defendant/Appellant.

APPEAL FROM THE SUPERIOR COURT OF KLICKITAT COUNTY

HONORABLE RANDALL KROG

RESPONDENTS' APPELLATE BRIEF

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ASSIGNMENTS OF ERROR NOS. 1 AND 2 AND ISSUES PERTAINING THERETO:

The trial court's Ruling and denial of Buffington's Motion for Summary Judgment, and refusal to dismiss, based upon compulsory counterclaim and failure to join necessary parties, was correct and should be affirmed. The Lutz condemnation action did not mature until the Grant of Easement (hereinafter "GE") (Ex. 8) was invalidated by the trial court decision/judgment in Buffington v. Lutz, Klickitat County Case No. 06-2-002577 (hereinafter "First Case") (Ex. 1). Other property owners were not necessary parties to the narrow issue of access through and across Buffington Lot 82.

ASSIGNMENTS OF ERROR NOS. 3 AND 4 AND ISSUES PERTAINING THERETO

The trial court was correct in entering its Amended Ruling of the Court and its Judgment and Decree. The trial court rulings and decisions should be affirmed. Lutz did not have an implied easement that could defeat the necessity for granting a private way across Buffington. Lutz did not delay in commencing their condemnation action once it matured. It

was commenced within the 90-day stay period authorized by the Judgment in the First Case.

ASSIGNMENT OF ERROR NO. 5.

The trial court correctly considered the appraiser's testimony and appraisal in arriving at its determination of compensation to Buffington and the award should be affirmed.

STATEMENT OF THE CASE.

The trial court's Ruling on Summary Judgment Motion (CP 16) and Amended Ruling of the Court (CP 18), which contain the trial court's Findings of Fact and Conclusions of Law, is a succinct and accurate Statement of the Case for purposes of reviewing the issues appealed and affirming the trial court in every respect. Any Findings not excepted to are verities on appeal.

Respondents Lutz ("Lutz") emphasize the court's Findings and supplement Appellant Buffington's ("Buffington") Statement of the Case as follows.

Procedurally the status is that Lutz promptly paid Buffington and fully satisfied the trial court judgment monetary obligations for both the *compensation* for the private way of necessity granted, and for the

attorney fees and costs awarded. (CP 99, CP 106.) Buffington nevertheless has appealed.

I. History of the Parties' Acquisition, Possession and Use.

Buffington purchased Lot 82 with full knowledge it was abutted on the east and south sides by large-acreage parcels that were outside Ponderosa Park and not restricted by the CC&Rs of that development/association. She purchased Lot 82 pursuant to its legal description which was record notice of other restrictions on its use, including but not limited to 30 feet of Tamarack Road, a trail easement, well easement, and right of ways for placement of utilities. (Ex. 9 - purchase contract; Ex. 10 – deed; Ex 2; Ex. 3, Ex. 4; CP 18, P.177 [FF No. 1, lines 14-15].

Buffington contracted to purchase and took possession of Lot 82 in March, 1996. Since that time her only improvements to her lot are the erection of a small cabin, sheds and an outhouse. Water, electric and septic services are not connected. (CP 18, 179 [FF No. 7, last line; RP E. J. Walker Testimony {"RP WT"}, P. 11, lines 8-13; Ex. 19 - Walker appraisal, Pp. 21 and 25.) Buffington filed the First Case on September 26, 2006 a few days short of a ten-year period that elapsed after Lutz acquisition of Lutz parcels 110 and 112 and the GE. (CP 7, 40 {Shafton

Declaration attachment, First Case Complaint trial court clerk file stamped Sep 26 2006; CP 18, 176, lines 15-16.)

On September 30, 1996 Lutz received delivery of, and recorded with the county Auditor, their deeds to 110 and 112 and the later invalidated GE over Buffington's Lot 82. (Ex.7; Ex. 8.; CP 11, 139 - Lutz Declaration {"Lutz Dec."} p. 2, paragraphs 3 and 4;) In October 1996, Lutz used the roads of Ponderosa Park and the area described in the GE to construct the Lutz access road that became "Lutz Parkway." Over the ensuing years in full view of Buffington and the other Ponderosa Park property owners, Lutz continually used the roads and the GE to access, use and improve his parcels. The access, use and improvements were accomplished by passenger vehicles, logging equipment and vehicles, public utility equipment and vehicles, well drilling and septic systems installation equipment and vehicles, and manufactured home towing equipment and vehicles. Lutz tenants took up residence in the homes thus erected and accessed them pursuant to the believed to be valid GE. (CP 18, 179 [FF Nos. 8 and 9; CP 11, 139-140 - Lutz Dec., p. 3, paragraphs 4, 5 and 6.)

II. Procedure and Outcome of the First Claim. In the First Case Buffington, as plaintiff, sought quiet title to have the GE declared invalid.

Buffington based her suit on the grounds that Ponderosa Parcels, Inc. (principal Kershaw) had not reserved or retained authority to grant easements over Lot 82 after the sale to Buffington. Lutz, as defendant, counterclaimed to have the GE declared valid. (CP 7, 40-45 {Shafton Declaration attachments, First Case Complaint and First Case Answer and Counterclaim.}) The First Case was not decided on summary judgment. The First Case Findings, Conclusions and Judgment were not final and effective until after the trial on the merits. The effectiveness of the portion of the First Case Judgment and Decree that rendered the Lutz parcels landlocked, and which would have allowed Buffington to actually block Lutz access over Lot 82, was stayed for a 90 day period. This preserved the status quo allowing Lutz 90 days to determine how and where to seek permanent access, through private condemnation or otherwise, in light of the invalidity of the previously relied upon GE. (Ex. 1; Ex.40)

III. Asserted Alternate "Routes" or "Roads" to Lutz Have Not Been Constructed and Do Not Reach Lutz.

None of the "routes" or "roads" asserted by Buffington as alternates, to wit: Aspen, Golden Pine, Dancing Mountain or Teal Drive run to or touch a boundary of the Lutz parcels. The road between the platted parcels depicted on Cyrus' plat has not been constructed. (CP 18

181, 182 [FF Nos. 20 and 27]; RP-LT, P. 7, lines 10-18, P. 41, lines 9-21, P. 43, lines 24-25, P.44, lines1-8, P.50, Lines 15-25, P. 51, lines1-4, P. 60, lines5-12.

ARGUMENT IN SUPPORT OF AFFIRMANCE OF TRIAL COURT.

RESPONSE TO ASSIGNMENTS OF ERROR 1 AND 2.

IV. Lack of Basis for 2009 Condemnation Claim Being a Compulsory Counterclaim in the 2006 Quiet Title Case.

For the Lutz condemnation claim to be compulsory under CR 13(a) it had to arise out of the *transaction or occurrence* that was the subject matter of Buffington's First Case quiet tile action commenced in 2006[1]. The transaction/occurrence at issue in the First Case was whether the Ponderosa Parcels Inc. had the authority to encumber Lot 82 with an easement for Lutz after its conveyance of Lot 82 to Buffington. The First Case was narrow in respect to the issue raised and decided. Only the validity of the GE that encumbered a small portion of Lot 82 was adjudicated in the First Case. The trial judge specifically declined to rule as to the validity of the GE in respect to the other roads in Ponderosa Park that traversed the property of other owners or the owners association. (Ex. 40, P. 6, portion of Conclusion of Law 2 omitted/stricken by the trial

[1] CR 13(a) and (e) are set forth in Appendix 1 hereto.

judge.) For a potential counterclaim to be said to arise out the same transaction or occurrence of the initial claim, the potential counterclaim must be "logically related" to the initial claim. *Schoeman v. New York Life Ins. Co.*, 106 Wn.2d 855, 865-66; 726 P.2d 1 (1986); *Chee Chew v. Lord*, 143 Wn. App. 807, 813, 181 P.3d 25 (2008).

The Lutz claim for a private way of necessity was not logically related to Buffington's initial claim for quiet title. The only relation between the two claims is that they involve the same contested piece of land and access to it. The quiet title action involved the GE transaction as to Lot 82. The condemnation claim arose out of the Lutz determination after the First Case that there were no more reasonable and feasible alternatives to again litigating with Buffington. A private way of necessity condemnation claim involves and must address and adjudicate the additional myriad issues required to be adjudicated by the subject condemnation statute, RCW 8.24.010, RCW 8.24.025.[2]. Those issues are the selection, location and reasonableness of the chosen route, dimensions and scope of use of the chosen route, addressing any alternative routes asserted by the condemnee, and the valuation of the land condemned.

[2] RCW 8.24.010, 025 and .030 are set forth in Appendix 1 hereto.

Theses issue arose out of the landlocking of the Lutz parcels which didn't occur until the First Case was decided, and Lutzes' search for and elimination of other alternatives forced them to again litigate with Buffington. (CP 11, 141-142 [Declaration of Lutz, paragraphs 9 and 10.])

Buffington argues logical relation by asserting: "Both claims deal with whether or not and upon what terms the Lutzes can cross Ms. Buffington's property." (Buffington brief, P. 11.) This is not true. The First Case only dealt with the issue of whether Lutz could cross Buffington. The issues of upon *what terms* was not before the court. It was cross or not cross. Valid or invalid. Terms of crossing were not before the court because if the GE was valid, the terms were contained therein. Ingress, egress, pay assessments, etc. (Ex. 8.)

Even if a new claim or counterclaim is determined to be logically related to an original claim, it is not necessarily considered compulsory. If the new claim had not matured at the time of the original filing, then as an exception to CR 13(a), the claim is not considered compulsory. CR 13(e); *Lane v. Skamania County*, 164 Wn. App. 490, 497-98; 265 P.3d 156 (2011); *Chee Chew v. Lord*, 143 Wn. App. 807, 813, 181 P.3d 25 (2008).

When does a claim "mature" for purposes of CR 13(a)? The simple answer is when it comes into existence. *Lane v. Skamania County*, 164 Wn. App. 490, 497-98; 265 P.3d 156 (2011); *Chee Chew v. Lord*, 143 Wn. App. 807, 813, 181 P.3d 25 (2008). The Lutz condemnation claim didn't arise, come into existence, until the First Case was finally decided and the landlock of the Lutz parcels occurred. The basis for a condemnation action under RCW 8.24.010 did not exist when Buffington commenced the First Case. Before a private condemnation action is authorized, the plaintiff condemnor must prove the nonexistence of access to show "reasonable necessity." In other words, only after an unfavorable determination in the First Case could Lutz substantively proceed with a private condemnation action.

Asserting that the condemnation claim was mature and ripe at the time of the First Case makes no sense under the facts and circumstances before the court on summary judgment. At the time of the litigation of the First Case, it didn't make sense to incur the cost of an appraisal on the issue of compensation, and address alternative routes if asserted, until there was a determination that condemnation was the only way to avoid the landlocked situation. In addition, it was not a situation where Lutz

right to relief was all that was left to decide after the First Case. Only after the decision in the First Case was rendered did the necessity arise for Lutz to consider what relief needed to be sought. Only after considering other alternatives and routes as possible relief, did Lutz unfortunately have to litigate again with Buffington. (CP 11, 141-142 [Declaration of Lutz, paragraphs 9 and 10.])

Lutzs' claim for private condemnation had not arose, was not mature, and was not logically related to the First case quiet title action for purposes of CR 13. The determinative issues in both actions were distinct and separate. Even if the claims were found to be related, the requirements for a statutory condemnation action did not exist until the title was officially quieted and the easement terminated. This condemnation case was not a compulsory counterclaim in the First Case. The trial court's denial of summary judgement and refusal to dismissal must be affirmed.

V. No Failure to Join Necessary Parties; No Necessity to Condemn a Private Way of Necessity Against any Parties Other than Buffington.

Buffington's argument that Lutz must join other lot owners and prove a right to use Ponderosa Park roads, or condemn such a right against other owners, is a *red herring*. Whether based on a grant, the GE,

prescription, a ripening based upon acquiescence detrimentally relied upon by Lutz, estoppel, or otherwise, Lutz has had the use of the Ponderosa Park roads. For 18+ years now Lutz has had continuous and interrupted use of the Ponderosa Park roads with actual or constructive knowledge of such use by the other owners and the owners association. (CP 11, 138-142, [Lutz Dec.]) Only Buffington belatedly has tried to block Lutz access. It could not be assumed during the First Case, and cannot be assumed even now after all these years, that other owners or the owners association will opt for litigation as opposed to continued acceptance of Lutz. The trial and appellate courts are being urged to create a lawsuit with a great number of "parties" where there isn't one. Buffington's argument is based on sheer speculation that other parties will now want to litigate with Lutz. The court cannot assume, regardless of how it decides this case, that other owners or the PPOA will do anything other than continue to allow Lutz to use the roads. The court cannot assume, since it certainly hasn't occurred in the past, that the association or any other owner, if joined, will appear or contest. It cannot be assumed that once this case is finally decided that the other owners or the association on their behalf won't decide to amend CCRs, or by some other method, allow Lutz continuing access in order to avoid further disputes. Other owners and the owners association may

think twice about incurring attorney fees to defend against Lutz defenses of prescriptive easement, estoppel, waiver, laches and otherwise.

Lutz use of the roads (their rights if you will) has in reality been authorized amicably, or at least without litigation against Lutz, with Buffington being the lone exception. This is simply not a case to which CR 19 applies. Joinder is supposed to result in judicial and court efficiency and economy. Buffington's desire is to create litigation that is wholly unnecessary.

Neither other owners or the owners association have claimed an interest relating to the subject of this action which requires CR 19(a)(2)(A) analysis.[3] They have complaints about Lutz tenants but haven't taken action to become a party in this matter, or commence a separate action against Lutz. Not for 18 years. Resolving this case between these two parties does not impair or impede the protection of any other owner's "interest." These other owners' interests may now be subject to many additional defenses if they try to block Lutz access, but there is no effect upon them unless they now try to prevent Lutz from using what he has in the past.

[3] CR 19(a) is set forth in Appendix 1 hereto.

Under CR 19(a)(2)(B) other parties are not necessary to prevent any additional harm or obligation as to Buffington. The association and the other owners can't fault her for exercising her rights even though Lutz prevailed.

Under CR 19(a)(1) the other owners and the association did not need to be parties to finally arrive at the final relief needed as between Buffington and Lutz. The private way granted to Lutz by the trial court simply returns matters to the long standing status quo as between the other owners and the association. Buffington is properly compensated for the taking in accordance with the law. If Buffington prevails and condemnation is denied, then it may well be that Lutz will have to voluntarily abandon the attempt to preserve his access through the Ponderosa Park. Lutz may have to go elsewhere, outside of Ponderosa Park, rather than engage in litigation with multiple parties, pay for multiple appraisals, and incur yet more litigation costs. But, since Lutz prevailed against Buffington, the other owners may see that the attorney fees they have to pay up front to get compensation in a forced condemnation action isn't worth their time and trouble. As to the roads in Ponderosa Park, all owners' parcels are encumbered by the road. Lutz and their tenants don't add enough wear and tear on the roads to result in big

number compensation to individual owners. The compensation "taking" or "making use" of an already created road on someone's parcel could be simply a contribution to a portion of the maintenance cost. It could be the other owners would like this dispute to end so that Lutz contributions to the association coffers might resume.

The cases relied upon by Buffington are distinguishable from this case. In *Henry v. Oakville,* 30 Wn. App. 240, 623 P.2d 892 (1981), a declaratory judgment case, the ordinances the trial court invalidated directly affected the non-joined bond holder's interest in getting paid for issuing the bonds under the ordinances. The bondholder clearly had a right to be heard in a case where the relief sought was to terminate the bond holder's right to receive 40 years of payments from the City. The bond holder had an immediate interest in the proceeding because the trial court's invalidation of the subject ordinances meant the bond holder wouldn't even receive its first payment. The trial court was reversed and remanded. The case was not dismissed.

*Treyz v. Pierce County,*118 Wn. App. 458, 76 P.2d 292 (2003) was another declaratory judgment proceeding regarding the validity of a county ordinance. The challenged ordinances were Pierce County's attempt to revamp and consolidate its county District Courts. Treyz, a part

time municipal judge whose position was eliminated by the ordinances, commenced the action to invalidate the ordinances which also affected the status of the positions of the other 8 *elected* District Court judges. Since the elected judges positions would be immediately affected if the ordinances were invalidated the court said they were necessary parties. The case was remanded, not dismissed.

In the case at bar, regardless of the outcome as between Lutz and Buffington, there is no immediate effect upon the other owners or the assciation. It is simply status quo as to Lutz use of the roads, unless someone now tries to block Lutz access. Then an entirely new set of circumstances and rights would have to be litigated.

In *Brown v. McAnally*, 97 Wn.2d 373, 646 P.2d 122 (1982) joinder of parties, or the failure to do so, wasn't even an issue in the case. The plaintiff joined the parties it decided to join. One of them happened to be a utility company in addition to the landowners. No one asserted any party was absent. The trial court's decision was remanded because it held that an action for a *private way of necessity* was essentially turned into one that would ultimately benefit the public. The attempt to benefit the public was considered to be an incorrect extension of the statute.

The forgoing comment regarding *Brown v. McAnally* applies to *Hallauer v. Spectrum Props.*, 143 Wn.2d 126, 18 P.3d 540 as well. Plaintiff Hallauer named certain parties and the case was decided on whether a right to condemn water use was properly awarded. No one asserted any party was absent. The decision doesn't help this court decide the alleged joinder failure in this case.

Finally, focusing not on the issues in the case at bar, and attempting to create litigation that may not even be necessary, it is argued that the other owners are necessary parties because an "easement" has to be "appurtenant." This argument misunderstands the difference between an "easement" and a "private way" established pursuant to the statue authorizing private condemnation. A private way can be condemned to benefit a property without regard to issues having to do with whether the way will be an *appurtenant* easement or an easement *in gross*. Lutz did not seek to be "granted an easement" by anyone. Lutz sought a judgment of condemnation for a private way pursuant to a statute providing for such relief. The granted private way serves the Lutz parcels, but that doesn't have anything to do with "appurtenance." The private way granted simply becomes a part of the "bundle of sticks" that go with title to the Lutz parcels going forward in time.

Other owners or the association were not and are not necessary parties in this singular dispute between Lutz and Buffington. They have no interests that will be affected one way or another by the decision in this case regardless of who is the ultimate prevailing party. If Lutz prevails nothing changes from what has been the situation in the past. If Buffington prevails that doesn't mean the other owners will decide to attempt to prevent Lutz use and access to the other roads. CR 19 joinder simply doesn't apply to this case.

RESPONSE TO ASSIGNMENTS OF ERROR 3 AND 4.

VI. Necessity for Private Way; Necessity Not Defeated by Claim of Implied Easement Over Other Property.

The argument by Buffington that an implied easement *by necessity* over the Brokaw/Cyrus parcels defeats a finding of *necessity* for a private way in this case is incorrect and the trial court did not err in so holding. The trial court correctly found that the necessity for a private way under RCW 8.24 was proven by Lutz in this case after the First Case decision landlocked the Lutz parcels. Easements by implication, whether characterized as implied from prior use, implied from the existence of a quasi easement or implied by necessity, arise by *implying* the *unstated* intent of the parties. Or put another way, such theories rely on implication to provide access

easements that the parties must have *forgot* to provide for in their conveyance. That is not this case. There was no unstated intent to imply in this case.

The intent on the part of Lutz and Brokaw in the conveyance of lots 110 and 112 in 1996 was to *purposely not* provide, reserve or in any way imply Lutz would use retained Brokaw property for access to 110 and 112 from the public/county Pipeline Road.

Easements by implication arise by intent of the parties, which is shown by facts and circumstances surrounding the conveyance. *Evich v. Kovacevich,* 33 Wn.2d 151, 157-58, 204 P.2d 839 (1949). The evidence establishing the facts and circumstances surrounding the Lutz purchase of Nos. 110 and 112 from Brokaw in 1996 was clear and uncontested. One fact and circumstance was the necessity for acquiring access to a public road, but another fact and circumstance was that the intent and purpose was not to meet this necessity by constructing roads to traverse Brokaw retained property. There was no evidence of intent, express or *implied* between Lutz and Brokaw to provide access to Nos. 110 and 112 across Brokaws' retained

properties.[4] Lutz intent was to purchase Nos. 110 and 112 only if he could obtain access over already constructed roads. CP 18 178, [FF Nos. 4 and 5]; RP-LT, P. 8, lines 6-25, P. 9, lines 1-25, P. 10, lines 1-18.) There was no easement across Brokaw in the Brokaw to Lutz deed for Nos. 110 and 112. (Ex. 7.) The Brokaws' subsequently sold the contiguous retained property and once again no type of easement was granted or reserved for the benefit of Lutz property. (Ex. 30.)

Therefore the trial court was correct in concluding the necessity requirement for a private way of necessity, which arose after the First Case decision landlocked Lutz, was not defeated by the theory of easement by necessity. Likewise the trial court was correct in concluding Lutz's right to seek a private way of necessity was not defeated by easement by implication. This is because none of the alternative routes suggested by Buffington constituted any sort of apparent and continuous quasi easement across Brokaw or other owners' properties for the benefit of the Lutz parcels.

The factors required to establish an *implied easement* are (1) former unity of title and subsequent separation; (2) prior apparent and

[4] It must be remembered that Lutz purchased No. 113, without access, from a party other than Brokaw in 1973. No evidence was introduced of any implied easement in that conveyance.

continuous quasi easement for the benefit of one part of the estate to the detriment of another; and (3) a certain degree of necessity for the continuation of the easement. *McPhaden v. Scott*, 95 Wn.App. 431, 437 975 P.2d 1033 (1999). (citations omitted). The first factor is essential for creation of an implied easement. The presence or absence of the second and third factors is not necessarily conclusive. Rather, they are aids to determining the presumed intent of the parties as disclosed by the extent and character of the use, the nature of the property, and the relation of the separated parts to each other. *McPhaden*, at 437.

The trial court specifically concluded and held, correctly, that there was no proof of the existence of the *McPhaden* factors 2 and 3. The trial court's Conclusion of Law 5 reads (CP 18, 183):

> There is no implied easement over the Brokaw property. Factors for establishing an implied easement are (a) former unity of title and subsequent separation; (b) prior apparent and continuous easement for the benefit of one part of the estate to the detriment of another and (c) certain degree of necessity for the continuation of the easement. While there was a former unity of title and subsequent separation, the parties Lutz and Brokaw, involved in the land transfer of 1996 of lots 110 and 112 did not discuss nor contemplate an easement over the retained Brokaw property. There was no quasi or continuous use of the Brokaw property for the benefit of plaintiff Lutz property, i.e., lot 110 and lot 112, after severance of title.

Courts often cite *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 404 P.2d 770 (1965) in private way of necessity and implied easement cases. As to implied easements, the court stated in 66 Wn.2d at 667:

> Concerning easement by implication as appurtenances to land, this court has said (*Bailey v. Hennessey,* 112 Wash. 45, 48, 191 P. 863 (1920)):
>
> > Easements by implication arise where property has been held in a unified title, and during such time *an open and notorious servitude has apparently been impressed upon one part of the estate in favor of another part*, and such servitude, at the time that the unity of title has been dissolved by a division of the property or a severance of the title, *has been in use* and is reasonably necessary for the fair enjoyment of the portion benefited by such use. The rule then is that upon such severance there arises, by implication of law, a grant of the right *to continue such use.* (Emphasis not in original, emphasis added.)
>
> The foregoing quotation was reiterated in *Rogers v. Cation,* 9 Wash.2d 369, **115 P.2d 702** (1941); *White v. Berg,* 19 Wash.2d 284, **142 P.2d 260** (1943), and *Evich v. Kovacevich,* 33 Wash.2d 151, 156, **204 P.2d 839** (1949).

McPhaden was not a way of necessity case, but it demonstrates a lack of evidence of the factor of prior *continuous quasi easement.* McPhadens sued to quiet title as against Scott's claimed implied easement

over McPhaden. Scott counterclaimed asserting an express easement and an easement by implication. The implied easement was denied because Scott failed to present evidence of prior apparent and continuous use. Scott's predecessor testified a road across McPhaden's parcel was a couple of ruts, with a culvert, that was used in 1957 and into the early 1960s when the culvert ceased to exist. That early use facilitated logging the area in which the parties' parcels are located. Scott acquired the parcel he sought access to in 1995, the same year McPhadens acquired their parcel. McPhadens brought their action shortly thereafter. Scott's predecessor also testified that her family had not driven a vehicle on the road since the early 1960s. The logger's testimony was he didn't know of anyone that had recently used the road. Scott admitted he couldn't testify as to any use other that what his predecessor testified to. The court held:

> "Because Scott failed to present evidence of *prior continuous use* and reasonable necessity, the trial court properly granted a directed verdict on the issue of easement by implication. (Emphasis added.)

McPhaden, at 439.[5]

[5] There also was no reasonable necessity because Scott could install a culvert and driveway on his own property without crossing McPhaden.

In *Dreger v. Sullivan*, 46 Wn.2d 36, 278 P.2d 647 (1955) a trial court finding of necessity under RCW 8.24.010 was reversed based upon the existence of an implied easement over the land of a common grantor. The facts in *Dreger* make it distinguishable and inapplicable to the case at bar. An implied easement was found because there was evidence of prior continuous quasi easement and use over the common grantor's retained property after severance of title.

Dregers sought a private way of necessity over Sullivan to Dreger's landlocked parcel under RCW 8.24.020. The route sought was for a distance of one-half mile over what had been a county road which the county had vacated. After the vacation Dreger had used this road for access but it was conceded that such use was only pursuant to Sullivan granting permission. Dreger acquired his parcel from Copenhaver and Copenhaver retained a contiguous parcel south of Dreger. There was an access route from the Dreger tract south across Copenhaver to the same highway that Dreger would connect to if granted a way across Sullivan. Across Copenhaver the distance would be some two miles to the highway. Sullivan appealed the trial court's finding of necessity for a private way asserting Dreger had an easement over Copenhaver by implied grant. The

appellate court agreed with Sullivan and reversed. The facts that proved the continuous quasi easement requirement were that the access across Copenhaver's retained parcel and extending to Derger's had been in use for many years by Copenhaver and Dreger. Indeed Dreger had been using this access for transportation of livestock, hay and farm machinery for four years after the vacation of the road over Sullivan. This case was obviously based on a finding that there had been an apparent and continuous quasi easement existing for the benefit of Dreger's parcel to the detriment of Copenhaver's retained parcel and that the quasi easement existed after severance. The Dreger court stated, however, 46 Wn.2d 38:

> We recognize that under our "reasonable rule of necessity" a private way of necessity *might be condemned even though there is another means of ingress and egress to the property.* (Citing *State ex rel. Carlson v. Superior Court*, 107 Wash. 228, 181 P. 689 (1919). (Emphasis added.)

Another oft cited case is *State ex rel. Carlson v. Superior Court*, 107 Wash. 228, 181 P. 689 (1919) The plaintiff condemnor obtained title to a landlocked tract from his father and maintained an access roadway over his father's parcels for seven years. The son tried to condemn across a neighbor because it was shorter and less circuitous. No necessity under

the statute was found. So again, the facts were that there was an apparent and continuous existing route over the father grantor's land.

The *Roberts v. Smith*, 41 Wn.App. 861, 707 P.2d 143 (1986) decision is an anomaly. The *Roberts* court relies upon *Hellberg* and *State ex rel. Carlson v. Superior Court* as authority for its holding, but doesn't analyze the continuous quasi easement factor. Roberts owned a parcel, part of a large 40-acre tract, in which other owners owned parcels as well. This 40-acre tract was benefitted by a recorded easement on its west side extending to a county road. Roberts then acquired a second parcel from seller/grantor Harkness which was not benefitted by the recorded easement and had no other recorded access to a county road. After discussing options for access across Harkness and some of the other owners, Roberts decided to construct a road over his first parcel to his second parcel, and use the recorded easement through the 40 acre tract. The other owners objected, placed an obstruction across the easement and Roberts sued for a private way of necessity. The court found that there was no necessity for a private way across the recorded easement on the basis of implied easement across Harkness, but *didn't find evidence sufficient to establish an implied easement.* The court therefore didn't

address the issue of the other owners' assertion that there was an alternate way across Harkness that was continuous and in use when the separation of title occurred. The court stated in 41 Wn.App at 866:

> Further, this court is not prepared to state that the evidence presented clearly establishes an implied easement over grantor's land as was the case in *Dreger v. Sullivan, supra.*

The trial court's denial of a private way of necessity was affirmed only on the basis that the evidence "cast considerable doubt" on the issue of reasonable necessity. *Roberts,* at 866. Thus this case is an outlier. *Hellberg* and *State ex rel. Carlson v. Superior Court* found that that there were implied easements because there were prior and existing continuous quasi easements that defeated the necessity for a private way.

There was more than sufficient evidence to sustain the trial court's determination that Lutz had proved the necessity for a private way under RCW 8.24.010. There trial court's determination should be affirmed.

VII. *Ruvalcaba* "Delay" Case Not Applicable.

Ruvalcaba v. Kwang Ho Baek, 175 Wn.2d 1, 282 P.3d 1083 (2012) is clearly distinguishable and inapplicable to the case at bar.

The Supreme Court emphasized the Ruvalcabas *voluntarily* landlocked the partial they later sought access to pursuant to RCW 8.24.

Ruvalcabas were the *grantors* in the conveyance that landlocked the subject parcel. Lutz did not voluntarily landlock the Lutz parcels. What Lutz has been attempting to do throughout the years and all this litigation is un-landlock their parcels! Lutz has been trying to come within the "...overriding public policy goal against making landlocked property useless." *Ruvalcaba*, 175 Wn.2d at 8.

Before purchasing Lots 110 and 112 Lutz sought and obtained what he thought would be legal access. Thereafter he immediately and continuously, without interruption, relied on, and defended that written and recorded access until it was declared invalid by a court of law. When it was determined a condemnation action was the only reasonable way to proceed after the First Case decision, Lutz commenced their condemnation action within the 90-day period authorized by the First Case Judgment. Lutz did not delay in bringing their condemnation action.

There is irony in Buffington's assertion of delay on the part of Lutz. If it was so obvious to everyone that the GE was invalid when it was granted in 1996, then Buffington sat on her rights to oust Lutz from Lot 82, and the other roads of Ponderosa Park, for just short of 10 years. Another few days and the Lutz compulsory counterclaim in the First Case would have been for a prescriptive easement over Lot 82.

The *Ruvalcaba* court's criticism of Ruvalcabas for asserting financial impracticability as a basis for necessity does not apply to Lutz in this case. Lutz brought their action on the basis that the First Case decision rendered their parcels landlocked. Lutz introduced of evidence of what it would cost to recreate the wheel in terms of condemning against other owners, building new roads, and re-installing utilities. This evidence was not introduced to show necessity for a private way. This evidence was introduced to aid the trial court in comparing the reasonableness and feasibility of Buffington's suggested alternative routes with the status quo of roads and utilities already constructed and installed. This comparison was required by RCW 8.24.025.

Ruvalcaba will not sustain an overturning or reversal of the trial court's decision, rulings and judgment.

RESPONSE TO ASSIGNMENT OF ERROR NO. 5.

VIII. Substantial Evidence Supported the Compensation Award; The Measure of Compensation Is Not the Cost to Construct an Alternate Route.

Buffington's argument for disregarding Mr. Walker's testimony, expert opinion and appraisal does not make sense. Mr. Walker conducted an extensive and thorough appraisal and arrived at a logical and

supportable opinion as to the value of what was would be "taken" from Buffington's ownership and enjoyment of her parcel if the requested private way was granted. The trial court, under ER 702, was clearly entitled to hear and consider Mr. Walker's appraisal analysis and opinion, and give it such weight as he felt appropriate. Of major importance is that the trial judge didn't limit his award to the $1,180.00 arrived at by Mr. Walker. The judge generously also took into consideration Ms. Buffington's opinion and increased the $1,180.00 professionally appraised value by $11,250.00 for a total award of $12,430.00. CP 18, 186-187, [Amended Ruling, Conclusions of Law 17]) This sum for .08 of an acre all of which, except for 0.01 of an acre (620 square feet of net new encumbrance), was encumbered by other easements and restrictions when Buffington purchased Lot 82,. (Ex. 4; CP 18, 179-178 [FF 12, 13, 14 and 15.])

There can be no criticism of Mr. Walker's background and expertise as an appraiser of real property, and specifically in the context of appraising the acquisition and "taking" of easements or portions of property for other uses. That Mr. Walker had not in the past conducted an appraisal just like the case at bar is testimony to the fact that litigation and determination of the value of 0.08 of an acre is not something people, the

real estate industry, or the courts, run into on any regular basis. That doesn't mean you disregard Mr. Walker's expert professional testimony, opinion and complete appraisal. (Ex. 19) As to his knowledge and participation in condemnation and takings type appraisals and transactions, his testimony was that testified as an expert in such cases mostly at the county court level. He also testified in federal court in bankruptcy cases. In condemnation cases he represented and appraised for both private property owners and public sector buying entities such a county right of way and water departments. He has conducted appraisals for persons who wanted easements or acquisitions of property other than entire parcels (RP WT, P. 7, lines 1-21.)

Buffington's argument that value has to only be decided upon what a willing seller would sell for, and a willing buyer would pay, or that the measure in this case is the cost of constructing a road access somewhere else, is simply illogical[6]. The whole reason there are statutes providing for public and private condemnation is because some property owners may take the position that they "won't sell at any price." There may never be a

[6] Again, it is to be remembered that the evidence as to the cost of road building over other properties or routes was addressed to the issues of the unreasonableness and non-feasibility of the so-called alternate routes suggested by Buffington, not to show financial impracticability as foundation for the "necessity" requirement for a private way.

"willing seller" in certain cases. A person who demands more than her entire property is worth for encumbering 0.08 of the property is not "negotiating" as a willing seller. If the measure were always what an unwilling seller demands, there would be no reason for condemnation statutes and case law to even discuss "taking." Nothing is being "taken," and there is no "damage" if the entire so-called fair market value of a property, or more as asserted in this case, has to be paid for just the use of a portion of the property. Nothing is being "taken" and there is no "damage" if the measure is the entire cost of recreating the wheel in a separate location. Such an argument and approach turns the private condemnation procedure and policy "on its head" to use the language of the *Ruvalcaba* court. *Ruvalcaba* 175 Wn.2d at 8.

As is obvious, there is not a precise "market" ready for consulting or "googling" for private ways of necessity. There is not a plethora of "comparables" for appraisers to review. Especially for an area as small, and so set apart from the usable area of Lot 82, as is the private way that was granted. Therefore Mr. Walker and the court used the taking and damages approach to arrive at their respective opinions of just compensation for Ms. Buffington. That is what is required to be done in condemnation cases.

Of significance is that Lutz, as owners of landlocked property, have a constitutional right to sue for a private way of necessity. This right is provided for in Washington Constitution, Article I, Section 16 Eminent Domain:

> Private property shall not be taken for private use, *except for private ways of necessity*... ." (Emphasis added.)
>
> ***
>
> No private property shall be taken or damaged for public or private use without *just compensation* having been made. (Emphasis added.)

RCW 8.24.030 provides that compensation shall be "just" compensation. Asserting this case should be remanded so Buffington can again suggest it is just to award her more than her entire parcel is worth is far from any reasonable definition of the word "just."

State v. Sherrill, 13 Wn.App. 250, 534 P.2d 598, 601 (1975) stated the general rule in a *partial taking* case:

> The general rule is that the proper measure of just compensation in an eminent domain proceeding, where a partial taking is involved, is the difference between the [13 Wn.App. 255] fair market value of the entire property before the acquisition and the fair market value of the remainder after the acquisition measured as of the date of trial. WPI 150.06; See *In re Medina*, 69 Wash.2d 574, 418 P.2d 1020 (1966); *State v. Williams*, 68 Wash.2d 946, 416 P.2d 350 (1966); *State v. Wilson*, 6 Wash.App. 443, **493 P.2d 1252** (1972).

In the oft cited private way of necessity case that addressed compensation, *State ex rel. Polson Logging Co. v. Superior Court*, 11 Wn.2d 545,569, 119 P.2d 694 (1941) the court stated:

> Where property is acquired by virtue of the power of eminent domain, the compensation is to be estimated by the actual legal rights acquired by the condemnor *and not by the use that he may make of the right.* Compensation must, of course, be reckoned from the standpoint of what the property owner loses by having his property taken, *not by the benefit which the property may be to the condemnor.* See 20 C.J. 768, 776. (Emphasis added.)

In this case it is important not to confuse the consideration of benefits and burdens upon the parties' respective properties in selection of the route of the private way, with the issue of compensation to Buffington. RCW 8.24.025 Selection of route –Criteria calls for weighing the benefits and burdens to the parties' parcels if necessary to consider alternate routes to Lutz' chosen route. But the benefit of the private way of necessity to Lutz is not to be used as a factor in determining the compensation to Buffington. *Polson, supra, quoted above.* Buffington cannot argue that Lutz receives rental income from his property, so the amount of that income to Lutz can somehow be transferred to Buffington as part of her compensation. Neither can Buffington argue for or be awarded what it cost Lutz to construct Lutz Parkway, or as she would really prefer, the cost of constructing an entire new road in another location at 2015 prices. That is simply not the measure in

any type of condemnation case. Another example of the point is where a farmer has to acquire access to property in order to grow crops for commercial purposes and profit. Upon access being granted the farmer may gain the increased benefit of owning that property as an income producing asset. But the access may only be a burden over the condemnee of a seasonal farm lane or road for movement of farming equipment for sowing and harvesting. The condemnee doesn't get to claim a part of the farmer's profit as part of the *value* of her land. Her compensation is based on the reduction of the fair market value of her land, if any, by the farmer's use of the way. If a city decides to condemn a street for public use so access can be granted to adjoining property that will enable a developer to commercially develop a shopping mall (in order to facilitate jobs, the economy, etc.), the condemnee doesn't get to assert that they are entitled to the millions of dollars that the developer may ultimately receive by selling or leasing to Nordstrom or Target. The law, policy and reason for allowing landlocked property to be accessed is so that it will not lie fallow and unproductive.

Mr. Walker initially used the before and after approach in his appraisal process. He determined the fair market value of Lot 82 without the Lutz requested private way over the 0.08 of an acre in the remote northern tip of Lot 82. The value of Lot 82 was $75,000.00. (Ex. 19; RP WT, Pp.9-

16.) Mr. Walker then concluded that if the private way was granted in the requested location the "after" would not reduce the fair market value. Ms. Buffington's property would sell for the same value regardless of the existence of the requested private way. Lot 82 would not be split up, the private way wouldn't interfere with access to or development of the logical building site on Lot 82, and maintenance of the private way would fall entirely upon Lutz. (RP WT, Pp. 16-18.)

So, because the before and after situation was essentially the same, Mr. Walker used the taking and damages approach. (RP WT, Pp.19-24). To Buffington's benefit Mr. Walker simply calculated the "taking" as if Lutz was buying the entire 0.08 of an acre. Mr. Walker didn't deduct anything for the other preexisting encumbrances in that northern tip of Lot 82. Using the fair market value of $75,000.00, he then calculated the unit value of the entire private way area sought and arrived at $1,180.00. (RP WT) P.21.)

The trial judge was entitled to hear and consider Mr. Walker's testimony and his acceptance of the $1,180.00 sum to include in the final total compensation award was clearly not error. The final compensation award was a total of $12,430 which the court characterized as $1,180.00

for the taking and $11,250.00 for damages. (CP 18, 186 [Conclusion of Law No. 17]; CP 99 [Judgment and Decree].)

Shields v. Garrison, 91 Wn.App. 381, 957 P.2d 805 (1998) was a private way of necessity case in which the court engaged in a calculation of compensation for the private way that was granted. The method of calculating compensation in *Shields* is not very apt in the case at bar due to the different and distinguishing facts. However it is clear that Buffington's suggested "methods of calculations" were not used.

Shields sought a private way of necessity, pursuant to RCW 8.24.010, over Garrisons and Fultons, who owned the property between Shields and the nearest accessible public road. Shields obtained summary judgment granting a way of necessity over a parcel of *undeveloped* property jointly owned by Garrisons and the Fultons, and over a *private road* that Garrisons had paid to construct and which was in existence. The case was tried on the issue of compensation and Shields appealed the court's award.

It is clear from the opinion that all three owners would be using the existing portion of the road. It is not clear whether the undeveloped portion of the granted way would be jointly used. Shields would be bearing the entire cost of constructing the road on this portion. *Shields,* at 91 Wn.App. 386. ("Shields was not required to pay for the total cost of the road, as she

will have to do for the roadway across the unimproved property... .") The court awarded $5000.00 "severance damages" for what it called the "short easement over the undeveloped parcel." *Shields,* at 91 Wn.App. 384, 386. The method of calculating this amount is not clear from the opinion. The length or distance of this short easement is not set forth in the opinion.

The *Shields* court awarded $8,423.30 to Garrisons for compensation for the existing road. Shields argued that Garrisons were only entitled to a nominal amount because the road was already in existence. Considering the existing road was an improvement installed by Garrisons at their initial expense, the court essentially determined what Shields' *late comer fee* ought to be. The method of calculating the $8,423.30 is in footnote 1 of the opinion. The court awarded "points" to each of the owners based on the distance each owner would travel over the road. Shields was required to pay only a portion of the construction cost of the exiting road. *Shields*, 91 Wn.App. at 387.

Although Buffington is entitled to use the private way for any use that won't interfere with Lutz ingress, egress and utilities, it will undoubtedly be just Lutz and their tenants that will use the portion of the way across Buffington that is not within the existing portion of Tamarack Road. More important is the fact that there was no road in existence on the portion of

Buffington not within Tamarack Road, and that Lutz bore the entire cost of constructing the extension from Tamarack to Lutz. There was no road in existence as was the situation for the Garrisons in *Shields*. Lutz has no *late comer fee* obligation. Lutz also paid the entire cost of installing the utility and communication lines that serve Lutz.

Akin to what the trial court did in *Shields*, the trial court below used an approach to compensation that conformed to the facts and circumstances before it. It concluded that a "mixed approach" which used the Walker approach and appraisal in conjunction with a reduction in in value based upon the Lutz use of the private way was most appropriate and just. CP 18, 185-182 [Conclusion of Law 15]) Based on the evidence presented, the trial court applied the most logical and appropriate method of calculating Buffington's compensation and there is no basis whatsoever for overturning said award.

IX. Response to Request for Attorney Fees on Appeal.

On September 26, 2014, 15 days after the September 11, 2014 entry of the trial court Judgment and Decree, Lutz paid and fully satisfied the monetary obligations for both the *compensation* for the private way of necessity granted, and for the *attorney fees and costs* awarded. A Notarized Satisfaction of Judgment in Full was entered. (CP 99 [Judgment

and Decree]; CP 106 [Satisfaction in Full). The amount of the *compensation* award was $12,430.00 which included the $1,180.00 based on Mr. Walker's testimony and appraisal about which Buffington complains in this appeal. The amount of the attorney fees and costs award was $$35,911.81, for a total of $48,341.81. Lutz paid the 15 days of interest that had accrued.

Washington courts have broad discretion in terms of determining what should be awarded Buffington in this case under the second paragraph of RCW 8.24.030. It reads:

> 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 fees *may be allowed* by the court to reimburse the condemnee. (Emphasis added.)

Use of the words "may" and "reasonable" means the court should carefully exercise its discretion, especially under the current law of this case and the present circumstances, those being that Buffington has been paid her compensation and attorney fees and costs.

The Washington Supreme Court addressed a court's discretion under RCW 8.24.030 in *Noble v. Safe Harbor Trust,* 167 Wn.2d 11, 216 P.3d 1007 (2009). The issues on appeal were stated by the court as:

> (1) Under RCW 8.24.030, does the trial court have the discretion to order Safe Harbor to pay Tillicum's attorney fees?
>
> *(2) Under RCW 8.24.030, did the trial court abuse its discretion by reducing Safe Harbor's attorney fees against the Nobles?* (Emphasis added.)

Noble sued to condemn a private way across Safe Harbor's property. Safe Harbor defended by asserting an alternative route existed, but didn't name or join an alternative condemnee. Noble then amended and joined Tillicum as a party understanding that Tillicum's property was what Safe Harbor was asserting was an alternate route. The trial court heard evidence of the routes across Safe Harbor and Tillicum and ruled the private way should be condemned as against Safe Harbor. Tillcum requested and the trial court granted Tillicum a fee award against Safe Harbor concluding that Safe Harbor was responsible for Tillicum having to litigate in the proceeding. Of significance is that the trial court reduced Safe Harbor's requested fees and costs against Noble by 70% based on the finding that

most of the attorney fees Safe Harbor incurred were due to Safe Harbor's actions and the involvement of the rejected Tillicum route in the case.

The award of fees in favor of Tillicum against Safe Harbor was reversed. The reduction of Safe Harbor's requested fees and costs against Noble was affirmed. The court stated in 167 Wn.2d at 17:

> In a condemnation action for private way of necessity, RCW 8.24.030 permits, *but does not require a trial court to grant a condemnee attorney fees.* (Emphasis added.)

The Supreme Court affirmed the trial court's 70% reduction of fees (which was also earlier affirmed by the Court of Appeals in *Noble v. Safe Harbor Family Preserv. Trust,* 141 Wash. App. 168, 169 P.3d 45 (2007)) stating in 167 Wn.2d at 23:

> As to the second issue in this case, we affirm the trial court's order reducing Safe Harbor's attorney fees award against the Nobles. Under RCW 8.24.030, the trial court has discretion to determine what amount, *if any*, a condemnee receives in attorney fees from a condemnor. *In doing so, a trial court may consider a condemnee's actions in light of the particular circumstances of each case. Here, the trial judge considered Safe Harbor's actions during the course of the case to increase the cost of litigation. In attempting to " balance the equities," the trial court concluded that Safe Harbor's award against the Nobles should be lessened by 70 percent. This is an appropriate exercise of the trial court's discretion.* (Emphasis added.)

It is respectfully submitted that Buffington's defense strategy has been, from the outset, to increase the cost of this litigation. From the outset it has been clear that once the wheat was separated from the chaff, as the trial court has now done with its rulings and decision, the outcome was quite evident. It has also been quite evident, especially on a common sense basis, that the Lutz selected route was and remains the most practical and reasonable solution to this overall set of facts. The trial court so concluded. Also evident was the fact that interference with Buffington's use of her property would be minimal. "Compensation" for the area condemned was never going to be a sum equal to or greater than the appraised value of her entire lot, which was her position at trial, and which apparently continues to be her position on appeal. She sought "just less than $83,000.00." (CP 18, 181 [FF 25]) On remand, if ordered, she seeks compensation "based on the cost of Lutzes' constructing an alternate route." (Buffington brief on appeal, P. 38) It is telling that Buffington didn't call an expert to support or verify her position on compensation. Her position is not supported by facts,

the real estate industry, real property appraisal standards, or the applicable statues and cases. (RP WT; Ex. 19 [Walker appraisal])

The trial court award of $12,430.00 for taking and damages was significantly less than what Buffington sought. Although RCW 8.24.030 is a unilateral fee provision and doesn't necessarily consider whether the condmenor was the "prevailing party," clearly the overall outcome favorable to Lutz in the trial court can be considered when determining if it is reasonable, necessary or just to award Buffington even more attorney fees. Lutz accepted the trial court's exercise of discretion on the issue of fees and didn't cross appeal in this matter. The awards have been paid. It is not "just" to require Lutz to pay anything more.

As the Supreme Court interpreted RCW 8.24.030 in *Noble v. Safe Harbor,* it is a legitimate exercise of discretion to deny Buffington additional attorney fees for bringing this appeal. Whatever amount that may be requested, under *Noble v. Safe Harbor*, it is subject to being reduced. Since the trial court ruled correctly in every respect this court should exercise its discretion by not awarding anything further for Buffington's fees and costs on appeal.

X. Conclusion.

The trial court committed no error as its findings, conclusions rulings and decisions below are wholly supported by substantial evidence and the record. The trial court had the jurisdiction and power to deny Buffinton's Motions for Summary Judgment and render its final Judgment and Decree. Lutz did not fail to bring a compulsory counterclaim and did not fail to join necessary parties.

Lutz was correctly granted a private way of necessity. It was not proven that Lutz had an implied easement of any nature, under any theory, that defeated the necessity for granting a private way across Buffington. Lutz did not delay in bringing their condemnation action once it matured.

The trial court correctly considered the appraiser's testimony and appraisal in arriving at its determination of reasonable compensation for Buffington.

The trial court should be affirmed in every respect.

Respectfully submitted this 6th day of April, 2015

ERNEST L. NICHOLSON – WSBA #6804
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APPENDIX 1

Rule 13. COUNTERCLAIM AND CROSS CLAIM

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

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(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

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Rule 19. JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

(a) Persons To Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a

practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder Not Feasible. If a person joinable under (1) or (2) of section (a) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the persons absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the persons absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons joinable under (1) or (2) of section (a) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of rule 23.

(e) Husband and Wife Must Join--Exceptions.(Reserved. See RCW 4.08.030.)

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§ 8.24.010. Condemnation authorized - Private way of necessity defined.

An owner, or one entitled to the beneficial use, of land which is so situate with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity or to construct and maintain any drain, flume or ditch, on, across, over or through the land of such other, for agricultural, domestic or sanitary purposes, may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity, or for the construction and maintenance of such drain, flume or ditch, as the case may be. The term "private way of necessity," as used in this chapter, shall mean and include a right-of-way on, across, over or through the land of another for means of ingress and egress, and the construction and maintenance thereon of roads, logging roads, flumes, canals, ditches, tunnels, tramways and other structures upon, over and through which timber, stone, minerals or other valuable materials and products may be transported and carried.

History. 1913 c 133 § 1; RRS § 936-1. Prior: 1895 c 92 § 1. Formerly RCW 8.24.020, part

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§ 8.24.025. Selection of route - Criteria

If it is determined that an owner, or one entitled to the beneficial use of land, is entitled to a private way of necessity and it is determined that there is more than one possible route for the private way of necessity, the selection of the route shall be guided by the following priorities in the following order:

(1) Nonagricultural and nonsilvicultural land shall be used if possible.

(2) The least-productive land shall be used if it is necessary to cross agricultural land.

(3) The relative benefits and burdens of the various possible routes shall be weighed to establish an equitable balance between the benefits to

the land for which the private way of necessity is sought and the burdens to the land over which the private way of necessity is to run.

History. 1988 c 129 § 2.

§ 8.24.030. Procedure for condemnation-Fees and costs.

The procedure for the condemnation of land for a private way of necessity or for drains, flumes or ditches under the provisions of this chapter 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 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.

History. 1988 c 129 § 3; 1913 c 133 § 2; RRS § 936-2. Prior: 1895 c 92 § 2.