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 ON SUPPLEMENTAL BRIEFING

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I. Introduction.

This brief will respond to the discussion made by Plaintiffs and Respondents Tom Lutz and Karen Lutz (the Lutzes) in Respondents' Supplemental Brief. The Lutzes' brief reiterated their argument to the effect that their claim under RCW 8.24 was not a compulsory counterclaim that was required to have been asserted in *Buffington v. Lutz,* Kliciktat County Superior Court No. 06-2-00257-7. Defendant and Appellant Lisa Buffington will not respond to that part of the Lutzes' brief for two reasons. First of all, this question is beyond the scope of the supplemental briefing. Secondly, Ms. Buffington has effectively dealt with that point in her Appellant's Brief and in her Reply Brief.

II. Discussion.

a. The Policy Requiring Assertion of Compulsory Counterclaims Need Not Yield to the Policy Allowing the Condemnation of a Private Way of Necessity.

The Lutzes first suggest that the policy underlying the compulsory counterclaim rule must give way to the policy allowing a party to condemn a private way of necessity because of what they contend is the importance of the latter policy. But the policy requiring a party who is

sued to assert counterclaims—judicial economy and conservation of the party's resources—is also important. It promotes speedy settlement of all controversies between the parties and therefore fosters judicial economy. *Chew v. Lord,* 143 Wn.App. 807, 813, 181 P.3d 25 (2008) Since both policies are important, the appropriate question is how they intersect with each other generally and in this case.

The enactments that apply here show that the policy underlying the compulsory counterclaim rule must prevail. Generally speaking, public policy is derived from legislative and constitutional enactments. *Lovato v. Liberty Mutual Fire Insurance Company,* 109 Wn.2d 43, 46, 742 P.2d 1242 (1987) In Article 1 § 16 of the Washington Constitution, the framers indicated that proceedings to condemn of private way of necessity would be treated as normal civil actions. Supplemental Brief, p. 8 The legislature then enacted RCW 8.24. Its doing so was part of its constitutional mandate to prescribe the procedure that would govern actions of this type. As the Court noted in noted in *State ex rel. Mountain Timber Co. v. Superior Court of Cowlitz County,* 77 Wash. 585, 589, 137 P. 994 (1914):

> We think the Legislature acted within its constitutional powers in defining a private way of necessity and establishing the procedure for making the right available.

The framers and the legislature also allowed the Supreme Court to promulgate rules that would govern all court proceedings. Supplemental

Brief pps. 5, 7 The Supreme Court has enacted the Civil Rules which include the compulsory counterclaim rule in CR 13(a).

The legislature could have, of course, abrogated the compulsory counterclaim rule in RCW 8.24 actions. Its doing so would have announced the superiority of the policy allowing people to condemn a private way of necessity over the policy underlying the compulsory counterclaim rule. But the legislature did not take that action. That means that it did not see the need to eliminate the compulsory counterclaim rule in connection with actions to condemn a private way of necessity. Therefore, the compulsory counterclaim rule applies in this context.

If an outcome is to be determined based on apparently competing policy considerations, a result that advances one of those two policies but does not offend the other should be adopted over one that clearly violates one of the two policies. That consideration requires application of the compulsory counterclaim rule here. In this case, the policy favoring condemnation of a private way of necessity will not be frustrated by applying the compulsory counterclaim rule in this particular case. The dismissal of the Lutzes' action does not mean that their parcels will be forever landlocked. They can enforce their easement implied by necessity over the land once owned by the Brokaws and now owned by the Cyruses. They can also seek a private way of necessity over other land in the area.

Supplement Brief, p. 10 On the other hand, if the Lutzes' action continues, the compulsory counterclaim rule and the policies that underlay it are offended by the multiplicity of actions that have taken place. That means that the compulsory counterclaim rule should be applied here.

For all these reasons, the Lutzes' attempt to render superior the policy allowing the condemnation of a private way of necessity in this case misses the mark.

b. The Compulsory Counterclaim Rules Does Not Yield Because of "Fairness."

The Lutzes rely on language in *Chew v. Lord,* 143 Wn.App. 807, 813, 181 P.3d 25 (2008), to the effect that "fairness" is one of the considerations behind the compulsory counterclaim rule. They assert that enforcing the compulsory counterclaim rule against them would not be "fair." This argument fails for three reasons.

First of all, the decision about what is "fair" has already been made. The compulsory counterclaim rule was promulgated by the Supreme Court in CR 13(a). The Court also discussed what would happen if a compulsory counterclaim was not asserted in the seminal case of *Schoeman v. New York Life Insurance Co.,* 106 Wn.2d 855, 726 P.2d 1 (1986). The letter of the rule and the Court's interpretation of the rule laid out the parameters of "fairness" in this context. Whether the Lutzes' claim

must fail because it should have been brought as a compulsory counterclaim in *Buffington v. Lutz, supra,* should be determined based on CR 13(a) and the opinions interpreting that rule.

Secondly, the Lutzes' conduct in *Buffington v. Lutz, supra,* was not fair and in keeping with the preservation of judicial economy that underlies the compulsory counterclaim rule. The Lutzes purchased three landlocked lots, known as lots 110, 112, and 113. They received an easement over Ms. Buffington's lot for the benefit of only Lot 112. As the trial court concluded in *Buffington v. Lutz, supra,* they were on notice that the easement they received was invalid because Ms. Buffington was already in title to her lot and she did not consent to the easement. (Ex. 40) Under the circumstances, there was no reason that the Lutzes should not have counterclaimed for a private way of necessity in *Buffington v. Lutz, supra.* They had a clearly invalid easement over Ms. Buffington's lot for the benefit of Lot 112 and no easement at all for Lots 110 and 113. The Lutzes suggest that there would first have had to have been a trial on the issue of the validity of the easement then followed by a trial on their claim to condemn a private way of necessity if they were unsuccessful on the validity of the easement. That certainly could not be true where Lots 110 and 113 are concerned because no easement existed for the benefit of

either of those two lots. It could also not be true for Lot 112 because the easement for the benefit of that lot was clearly invalid.

Finally, the Lutzes' conduct in connection with this area has hardly been exemplary. As the trial court found, their tenants have caused problems in the adjoining Ponderosa Park subdivision. The tenant on Lot 113 has been investigated for marijuana production. There have also been reports of firearms discharged on or near the property. The tenants have exceeded the speed limit as they travel on the private roads in Ponderosa Park. The tenants have been noisy and have allowed their dogs to roam freely. The trial court found that all these factors caused a reduction in value to Ms. Buffington's property. (CP 181; FF 23) But the Lutzes have apparently tolerated this conduct by their tenants.

The Lutzes go on to argue that Klickitat County will benefit from the development of their land. Because of the conduct of their tenants which they apparently tolerate, the Ponderosa Park subdivision has not benefited. In fact, as the trial court found, Ms. Buffington's property has decreased in value. In any event, enforcing the compulsory counterclaim rule here will not eliminate the Lutzes' ability to use their property as discussed above. They have options open to them to obtain other access.

c. The Lutzes Have Not Refuted Ms. Buffington's Authority on How Compulsory Counterclaims Based on Constitutional Provisions and Statutory Causes of Action Are Viewed.

The policy underlying the right to condemn a private way of necessity stems from Article 1, § 16 of the Washington State Constitution and RCW 8.24. In her Supplemental Brief, Ms. Buffington argued based on authority submitted that counterclaims based on constitutional or statutory provisions are treated the same as other counterclaims. Supplemental Brief, pps. 12-18

The Lutzes have not refuted this contention by citing cases coming to a different conclusion. In fact, they appear to concede the point by noting that at least some of the cases Ms. Buffington cited dealt with "counterclaims that were ripe and ready long before they were belatedly brought." Respondents' Supplemental Brief, p. 19 If counterclaims based on constitutional provisions are treated the same as other counterclaims, then the fact that policy underlying the Lutzes' claim to a private way of necessity has constitutional underpinnings doesn't matter. The Lutzes' action should be dismissed because it amounts to a compulsory counterclaims that wasn't brought in *Buffington v. Lutz, supra.*

CONCLUSION

The Lutzes' action in this matter amounted to a compulsory counterclaim that should have been asserted in *Buffington v. Lutz, supra.* Since it was not, this action should have been dismissed. The trial court erred by not doing so. As discussed in detail in the Supplemental Brief, the fact that the ability to condemn a private way of necessity advances a policy based on a constitutional provision does not change this result. The Court should reverse the trial court's decision and remand with directions to dismiss the Lutzes' claim for these reasons and also on the basis of the other arguments that Ms. Buffington has put forward.

Dated this 26 day of October, 2015.

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