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

LISA BUFFINGTON,

Defendant/Appellant,

v.

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

Plaintiffs/Respondents,

APPEAL FROM THE SUPERIOR COURT OF KLICKITAT COUNTY

HONORABLE RANDALL KROG

RESPONDENTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

Respondents Lutz ("Lutz" or "Lutzes") understand the purpose for supplemental briefing is to aid the Court in weighing or comparing the policy of "judicial economy" within the compulsory counterclaim language of CR 13(a) and the policy of preventing or remedying "landlocked" real property under Washington Constitution Article 1, §16 and RCW 8.24.010.

I. Argument Against Necessity to Weigh or Compare Policies; CR 13(e) Exception to CR 13(a) Applies; Condemnation Claim Not Mature.

It is respectfully submitted that this weighing or comparison is not necessary as the trial court correctly ruled when it denied Appellant's ("Buffington") summary judgment motion for dismissal based on failure to bring a compulsory private condemnation counterclaim against her in *Buffington v. Lutz*, the "First Case." The trial court's ruling was that, under CR 13(e), Lutz did not have a *mature* private condemnation claim until they were landlocked by the final judgment entered in the "First Case." (CP 16, Pp 3-4). A claim not mature is not compulsory. (CR 13(e) and Respondent's Appellate Brief herein on this issue.)

The record in this case does not warrant a reversal of the trial court on the CR 13(e) maturity issue. The trial court considered the undisputed facts and history of Lutz use of the Buffington parcel, and the other private roads, as testified to by Mr. Lutz, in his Declaration opposing Buffington's summary judgment motion (CP 11), and at trial.

In 2006 when Buffington commenced the First Case there was no *specific* mature Lutz condemnation claim even as to Lutz Lots 112 and 113. That Lutzes would have to rely upon private condemnation sometime in the future was not, in 2006, a foregone conclusion.

The facts known to everyone long before 2006 and thereafter were that, from the moment Lutz received the Grant of Easement for Lot 110, he accessed Lots 112 and 113 together with Lot 110, via the Grant of Easement. The development of the Lutz lots for placement of residences using 110 to access was open and notorious. Had the Grant of Easement been found valid there was no reason to believe Buffington, or anyone else, would thereafter attempt to prevent access to *any* of the Lutz lots. Buffington did not commence the First Case until a few days short of ten years after Lutz recorded the Grant of Easement. Before Buffington's action there was no reason for Lutzes to believe they were going to have to condemn a private way of necessity over Buffington or anyone else for

any of their lots. (CP 11, Lutz Declaration in its entirety (except portions of paragraph 10 regarding Lutz estimate of costs to build roads which was excluded by the trial court on summary judgment).

Indeed, Lutz use of the Grant of Easement for Lot 110, valid or invalid, to access Lots 112 and 113 would be considered "adverse use" for prescriptive purposes as against Buffington and other owners along the route as to 112 and 113. Misuse or overburdening an easement by accessing parcels not benefitted by the easement would be adverse use giving rise to prescriptive rights. *Brown v. Voss*, 105 Wn.2d 366, 715 P.2d 514 (1986) (easement appurtenant to one parcel not to be extended to adjoining parcels; *Dunbar v. Heinrich*, 95 Wn.2d 20, 622 P.2d 812 (1980) (elements of a claim for prescriptive easement). Thus, it cannot be assumed or asserted, as possibly thought at oral argument in this case, that Lutz knew or believed, in 2006, he would have to sometime use *condemnation* to access 112 and 113. It is just as possible that due to the passage of time such access has ripened through prescription.

Therefore, only after the final judgment in the First Case was it necessary for Lutz to engage in the process of deciding how, where, and against whom condemnation might be practical. It was not a foregone

conclusion when Lutzes filed their Answer in the First Case that a private condemnation claim against Buffington would be required then or later.

Obviously, determining whether a claim is or was compulsory depends on the facts and circumstances and the nature of the claim being considered. A Maine court stated the following when determining how to apply its compulsory counterclaim rule very similar to CR 13(a).

> We determine whether the facts of a controversy constitute a compulsory counterclaim " *pragmatically*, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, *whether they form a convenient trial unit*, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." (Citation omitted.) (Emphasis added.)

Efstathiou v. The Aspinquid, Inc. et. al., 956 A.2d 110, 119, (2008 ME 145)

It is respectfully submitted that combining all the myriad issues of a private condemnation claim in the First Case would not have been pragmatic, and it certainly would not have formed a convenient trial unit. This is what Judge Krog correctly decided when applying CR 13(e).

In *Sky View Financial, Inc. v Bellinger*, 554 N.W.2d 694, 697, the Iowa court put it this way:

> A compulsory counterclaim is mature when the party possessing it is entitled to a legal remedy. Id.; Bronner v. Harmony Agri Servs., Inc., 490 N.W.2d 861, 863 (Iowa

> App.1992). The claim has not yet matured until the events giving rise to the cause of action develop. Stoller, 258 N.W.2d at 342. In Telegraph Herald, Inc. v. McDowell, this court held *that a right mature enough to be a compulsory counterclaim under rule 29 "must be presently enforceable, not merely determinable."* Telegraph Herald, Inc. v. McDowell, 397 N.W.2d 518, 520 (Iowa 1986). (Emphasis added.)

A Lutz private condemnation claim against Buffington might have been "determinable," that is, considered a future *possibility*. But it was not "presently enforceable" because Lutzes were not landlocked as to any of their lots when the First Case was filed. The facts and circumstances at the time of that filing was that they were accessing all their parcels pursuant to what they believed was a valid easement. The First Case was not decided on summary judgment. It was not finally determined that Lutzes knew, based on the public record, that the Grant of Easement they used was not valid, until Judge Reynolds' Judgment was entered, after trial, in the First Case. That is when Lutz became landlocked and that is when a private condemnation action as a remedy became mature, and potentially enforceable.

Judge Krog was correct determining any possible private condemnation claim by Lutz against Buffington was not mature under CR

13(e) in 2006. Any attempt to try this unique condemnation case was not a convenient trial unit for Judge Reynolds in 2006 either.

II. The "Rights" of the Parties, and the Application of the "Policies," Depends Upon the Facts and Circumstances and Not Upon the "Source."

It is submitted that it doesn't matter if the "source" of the rights of the parties are characterized as constitutional, statutory or created by court rule. Rights and the entitlement thereto are not determined by saying the Constitution is more important than a statute, or that a statute is more important than a court rule. A party's right to the benefit of a provision, statute or court rule, and the policies underlying same, are not considered or determined in a vacuum. Entitlement to rights, or entitlement to the benefits of a "policy," may depend upon all three sources. But determining applicability or entitlement depends upon consideration of the unique the facts and circumstances of the particular case.

Buffington is claiming the right to have CR 13(a) applied to dismiss Lutzes' condemnation claim against her. Lutzes are claiming the right pursuant to Washington Constitution Article 1 §16 and RCW 8.24.010 to access their landlocked property in the most reasonable manner in exchange for paying reasonable compensation.

Weighing or balancing the parties' "rights" requires determining or measuring how the scales tip when the pans or trays on each side of the scales are filled. What is put in the pans? The facts and circumstances of the parties as shown by the evidence and found by the trial court are put in the pans. Only by doing that can it be determined which way the scales will tip.

It is clear that the Founders that created Article 1 §16 and the legislators that enacted RCW 8.24.010 et. seq. wanted to provide a remedy to owners of landlocked property. To facilitate this remedy it was decided that the property of owners such as Ms. Buffington could be taken by the condemnation procedures upon payment of reasonable compensation. That such a constitutional provision and statute were enacted is a clear statement that, if the facts and circumstances warrant, landlocked owners are entitled to the remedy of access. Can this remedy be thwarted by a procedural court rule? Maybe, maybe not. It depends upon weighing and balancing the unique facts and circumstances of the case. In this case the CR 13(a) dismissal remedy sought by Buffington is not warranted by the facts and circumstances. The facts and circumstances tip the scales in favor of Lutz, regardless of the source of the claimed rights.

The facts and circumstances on the Lutz side of the scales, and the benefits of the policies they have proven they are entitled to, far outweigh the benefits of the policies Buffington claims through enforcement of the compulsory counterclaim rule. Lutzes have gained, and maintained, long tolerated access to 25 acres of property. Property that has been improved so as to provide affordable housing for Klickitat County and modest rental income to Lutzes. 25 acres are "in production" and being put to their best use.

The effect of the foregoing upon Buffington is that the most unproductive portion of Buffington's property has a private way imposed upon 0.08 of an acre, the use of which was encumbered with an existing road, a utility easement and other restrictions, all of which were acceptable to Buffington when she purchased this particular parcel. She made the decision to purchase this "dear" parcel despite the fact its longest boundary bordered the Lutz properties, outside of Ponderosa Park, and usable for purposes not restricted by Ponderosa Park rules. Buffington complains of the establishment of Lutz Parkway across the 0.08 acres. However the existence of this private way is nothing compared to her acceptance when she purchased of the 30 feet of Tamarack Road that traverses the entire west boundary of her parcel.

And what is the "policy" derived from CR 13(a) that she asserts is the overriding policy that justifies dismissal? That "judicial economy" was not served. That she should have been sued for private condemnation in 2006. That there were two trials instead of one.

The considerations behind compulsory counterclaims, and determining if one exists, are judicial economy, fairness and convenience. *Chee Chew v. Lord*, 143 Wn.App. 807, 813, 181 P.3d 25 (2008). Using the facts of this case in undertaking these considerations does not tip the scales in favor of Buffington.

There would have been more complicated and drawn out litigation of myriad additional issues, and thus substantially more judicial and court time involved, had a compensation claim against Buffington been prematurely undertaken in the First Case.

As was made clear in the discussion at oral argument, had a condemnation claim been brought in the First Case, there would likely have been *two trials* in any event. Judicial and court time would not have been saved, or contrarily, it would have been the same. This point is made by the colloquy between this Court and counsel for Buffington at oral argument. In response to questioning regarding the "economy" of litigating all the private condemnation issues, such as other routes,

compensation, etc., in the First Case, Buffington's counsel's response was that the case could have been "bifurcated." That assumes that a party moved for bifurcation, the trial court was amenable, and the other party didn't object. If there was objection, there would probably have been extra briefing and an extra hearing on bifurcation. Not economical, especially if premature. It also means that in reality there would be two trials. And, if appraisals and such would then be desired, the second trial would have occurred at a later time. Neither party would have wanted to incur that expense unless it was absolutely necessary.

Further, in regard to judicial economy, Buffington would have asserted in an earlier condemnation claim against her that the other Ponderosa Park owners along the routes long used by Lutz needed to be joined. This would have required Judge Reynolds to conduct separate hearings, just as was required before Judge Krog. There would have been significant additional judicial and court time involved in determining what other owners wanted to be joined, whether they wanted to participate, hearing what those parties wanted to litigate, and how much compensation they would claim.

As a practical matter we have seen how much court time and trouble has been wasted on this "joinder" of the owners issue. Not one of

It is not the case that: "The Superior Court and the parties have been faced with a multiplicity of actions where there should only have been one" (Appellants Supplemental Brief, P. 11, first sentence.) There has not been a "multiplicity" of actions. There were two trials, which is what there would have been in 2006 under the suggested "bifurcation" scenario. And to complain about a multiplicity of actions when it has been Buffington's position along that all the other owners should have been dragged into a condemnation action is disingenuous. Buffington *wants* a multiplicity of actions. Buffington's position has been all along that the Superior Court should have entertained a massive multiparty case with myriad issues. Judicial economy is not what Buffington has wanted at any time in this litigation.

There was no compulsory counterclaim in 2006 when the considerations of judicial economy, fairness and convenience are applied to this unique case.

III. CR 13(a) Does Not Outweigh Article 1, §16 and RCW 8.24 in this Case.

The Washington Supreme Court considers Article 1, §16 and RCW 8.24 of significant importance on the issue of preventing or remedying the existence of landlocked parcels of land. *State ex rel. Huntoon v. Superior*

Court for King County, 145 Wash. 307, 260 P.527 (1927) was a private condemnation of a private way case pursuant to Article 1, §16 and Chapter 133, Laws of 1913 (sections 6747-6749, Rem. Comp. Stat.) (Predecessor to RCW 8.24). Huntoon sought a reversal of a decree of the superior court awarding adjoining property owners the right to acquire, by condemnation, a private way of necessity over her land for ingress and egress to a public highway. Huntoon asserted the decree violated her rights guaranteed by Article 1, §16 not to have her property taken for private purposes. The court focused upon the language "... except for private ways of necessity..." and stated:

> This language seems by the strongest kind of implication to authorize the Legislature to provide for the taking of private property 'for private ways of necessity,' as well as for strict public use, and prescribe reasonable restrictions upon and methods of exercising eminent domain power in that behalf. It is also contended in behalf of Mrs. Huntoon that such taking is in violation of rights guaranteed to her by the Fourteenth Amendment to the Constitution of the United States. This court has repeatedly held that chapter 133, Laws of 1913, here drawn in question, is not violative of any rights guaranteed by the state or federal Constitution. State ex rel. Mountain Timber Co. v. Superior Court, 77 Wash. 585, 137 P. 994; State ex rel. Grays Harbor Logging Co. v. Superior Court, 82 Wash. 503, 144 P. 722; State ex rel. Eastern R. & L. Co. v. Superior Court, 127 Wash. 30, 219 P. 857; State ex rel. White Pine Sash Co. v. Superior Court (Wash.) 255 P. 1025.

It is suggested that the strong implication is that dismissing condemnation claims upon questionable application of a procedural rule is not favored.

In *State ex rel. Mountain Timber Co. v. Superior Court of Cowltiz County*, 77 Wash. 585, 137 P. 994 (1914) Mountain Timber sought reversal of a trial court decree denying its action to condemn a private way pursuant to Article 1, §16 and the predecessor to RCW 8.24 for access to enable logging on Mountain's property in the vicinity. The superior court's denial was based on concluding the private condemnation statute was unconstitutional. In reversing the trial court it was stated at 77 Wash. 590-591:

> 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. *As defined, it is promotive of the public welfare in that it prevents a private individual from bottling up a portion of the resources of the state.* (Emphasis added.)
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> In State v. Mountain Timber Co., 135 P. 645, this court said: 'The right of property is a legal right and not a natural right, and it must be measured always by reference to the rights of others and of the public.' If this be true, then there can be no universal law which, in the absence of constitutional restrictions, forbids a state from *providing for the condemnation of private ways of necessity in furtherance of the development of its material resources.* (Emphasis added.)
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> ***

> The taking of private property for private use for the promotion of the general welfare upon due notice and hearing and the payment of compensation *is not incompatible with due process of law as guaranteed by the federal Constitution.* Head v. Amoskeag Mfg. Co., 113 U.S. 9, 5 S.Ct. 441, 28 L.Ed. 889. (Emphasis added.)

Buffington asserts that if there are competing policy considerations "... the balance weights (sic) heavily in favor of enforcing CR 13(a)." (Buffington Supplemental Brief, p. 12, line 5.) To the contrary, as made clear in the above statements, the Supreme Court considers the policy for allowing condemnation of private ways of necessity to be important to not only the condemning landowner but also to society.

The furtherance of the development of the Lutz 25 acres as a resource not only for Lutzes, but for the public as described above, should not be "bottled" up any longer by Buffington's position in this case. The benefit to the citizens and courts of Klickitat County and the State resulting from finalizing legal access to the Lutz property outweighs Buffington's asserted desire to have one trial instead of two. Access to the Lutz property housing and the collection of taxes generated from residential property as opposed to unimproved or useless property is of significant value and importance.

IV. The Cases Cited by Appellant are Inapposite and Do Not Aid the Court with Respect to the Requested "Weighing" of Policies.

If *Matter of Estate of Hansen*, 81 Wn.App. 270, 914 P.2d 127 is of any use in deciding this case, it relates to the issue of when a cause of action is mature. The City of Kent brought forfeiture proceedings under state statutes to forfeit real and personal property of Hansen. Under those statutes Hansen had to respond in 45 days to contest personal property forfeiture and in 90 days to contest real property forfeiture. Hansen met those deadlines, and eventually the City abandoned the forfeiture proceedings. Thereafter in Hansen's bankruptcy proceeding, which he asserts was brought about by the City's wrongdoing, he and the trustee sued the City for civil rights violations under federal U.S.C §1983. The City asserted that the civil rights action was barred because it was a compulsory counterclaim and should have been brought in conjunction with his responses and pleadings in the forfeiture action. Over time it developed that the City abandoned the forfeiture proceedings and Hansen wasn't even prosecuted for Washington state crimes. He got some but not all of his property back. Obviously it wasn't until the City backed off, and the state decided not to prosecute, that the civil rights violations became

mature and practically enforceable. Obviously such claims matured well after the responses Hansen had to file in the forfeiture proceeding.

However, the case wasn't decided based upon the compulsory counterclaim positions of the parties. The case was decided on other grounds. The grounds were that requiring a party to bring Section 1983 claims in the short periods of time to answer in the forfeiture proceedings would be incompatible with the policies which underlie the 3-year statute of limitation period for Section 1983 claims. The court held at 81Wn.2d, 282:

> We hold that under *Hayes*, *Robinson*, and *Wilson*, the short period following seizure and notice during which protesting parties are required to respond and seek a hearing cannot be imposed, directly or indirectly, on the parallel federal cause of action which may accrue by virtue of the seizure, under 42 U.S.C. § 1983. Consequently, a § 1983 claim is not foreclosed by reason of res judicata by a claimant's failure to raise it when responding to the in rem forfeiture proceeding.
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> Forfeiture proceedings are quasi-criminal only insofar as necessary to protect constitutional rights; the forfeiture itself is strictly a civil in rem proceeding. Rozner v. City of Bellevue, 116 Wash.2d 342, 351, 804 P.2d 24 (1991). We hold that Hansen was not required under CR 13(a) to raise his § 1983 claims in the forfeiture actions brought by the City.

Hanson doesn't apply to the case at bar, except that it could certainly be argued that the civil rights claim was not a compulsory counterclaim because it clearly was not mature at the time of the forfeiture proceedings.

State v. Fields, 85 Wn.2d 126, 530 P.2d 284 (1975) and *State v. Gresham,* 173 Wn.2d 405, 269 P.3d 207 (2012) do not address the policy balancing issue raised by this Court. These cases discuss what happens when a court rule and a statute address the same procedure. In *Fields* a search warrant was issued under the then *new* CrR 2.3(b) expanded grounds for issuing search warrants to investigate all crimes including misdemeanors. The trial court quashed the warrant because RCW 10.79.015 allowed warrants to issue only for felony investigations. The court rule was held to apply. In *Gresham* the discussion was admissibility of prior convictions and bad acts in molestation cases under RCW 10.58.090 and ER 404(b). When the same procedure is addressed, and the rule and the statute cannot be harmonized, the rule prevails.

RCW 8.24 only sets forth procedures *after* a private condemnation action is filed. The statute doesn't address *when* one must be filed. *Fields* and *Gresham* don't help this court decide if the trial court's applying the CR 13(e) exception to CR 13(a) was error in this case

Jones v. Double "D" Properties, Inc., 352 Ark 39, 98 S.W. 405 (2003), *Mushitz v. First Bank of South Dakota*, 457 N.W. 2d 849 (S.D. 1990) and *Shelter Harbor Fire Dist. v. Vacca*, 835 A.2d 446 (R. I. 2003) are just three more cases, like all those already considered by this court, where the counterclaims were ripe and ready long before they were belatedly brought. Again, as stated previously, the source of the claimed entitlement to a policy is not the deciding factor. In regard to determining *when* the policies behind CR 13(a), CR 13(e) and RCW 8.24.010 require a private condemnation counterclaim to be brought, these cases are of no help to this Court.

V. Conclusion.

Lutzes' condemnation claim was timely brought once it became mature. Upon becoming landlocked by the First Case Judgment Lutzes explored various alternatives to remedy the situation. Ultimately the action against Buffington became the most reasonable approach. It wasn't determinable until after the First Case concluded what alternatives might present themselves. It could have been that hearing Buffington prevailed on the facts of this case would have made it easier for Lutz to work with other owners and alternatives. What was the most reasonable alternative couldn't be determined until the landlock occurred.

The Washington Supreme Court puts a high priority on the policy that access to productive properties should not "bottled up." *Mountain Timber Co.* supra.

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 Buffington'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.

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The trial court should be affirmed in every respect.

Respectfully submitted this 19th day of October, 2015

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