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FILED
COURT OF APPEALS DIVISION 1
STATE OF WASHINGTON
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No. 63572-7-1

COURT OF APPEALS DIVISION 1
OF THE STATE OF WASHINGTON

ROGELIO H.A. RUVALCABA and ELAINE H. RUVALCABA, husband and wife,

Appellants,

v.

KWANG HO BAEK and LYUNG SOOK BAEK, husband and wife, and ARNE S. IJMA and
SIEW LOON, husband and wife, and JOHN A. DYER and PAULINE T. DYER, husband and
wife; husband and wife, and STEVEN J. DAY and CATHERINE L. DAY, husband and wife,
and LIVINGSTON ENTERPRISES, LLC, an Alabama limited liability company, KAREN M.
OMODT, a single woman, MATTHEW GOLDEN and JANE BORKOWSKI, husband and wife,
and CARL E. JOHNSON and PHYLLIS JOHNSON, husband and wife, and WILLIAM V.
KITCHIN and CHERYL L. KITCHIN, husband and wife,

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY HON. JEFFREY
M. RAMSDELL

**REPLY BRIEF OF APPELLANT ROGELIO H.A. RUVALCABA
and ELAINE H. RUVALCABA**

Pierre E. Acebedo WSBA # 30011
ACEBEDO & JOHNSON, LLC.
Attorney for Appellants Rogelio
and Elaine Ruvalcaba

ORIGINAL

COMES NOW Appellants Rogelio and Elaine Ruvalcaba (“Ruvalcabas”), by and through their attorney of record **ACEBEDO & JOHNSON, LLC.**, and Pierre E. Acebedo and request that this Court **REVERSE** the trial court’s Order dismissing Respondents, Kwang Ho Baek, et al. (“Day Group”) and the trial court’s Order awarding Respondents Kitchens (“Kitchens”) attorney’s fees and costs, and submits this reply brief for the reasons stated below:

I. Trial court acted contrary to the request of the prior Appellate Court.

For the second time, the lower court has issued rulings that are the basis of an appeal. The decision of the prior Appellate Court in *Ruvalcaba v. Baek, et al*, 140 Wn. App. 1021, 2007 WL 2411691 (unreported Div.1 2007), provided strong language directing the trial court to provide a fully developed record so that an issue of first impression in Washington may be adjudicated on a full set of facts. In that prior appeal, the Court found that dismissal of the suit without a fully developed record was inappropriate. *Id.* at *4.

The Appellate Court requested the issues presented to be subject to **full discovery, argument and a trial** prior to the legal issues being appealed. *Id.* Once again, the trial court has done an end run around the dictate of the Appellate Court by basing its’ decision on a narrow reading that precludes a full and fair adjudication of the material issues of fact. The plethora of material issues highlighted herein must be fully developed through discovery and trial. To do otherwise would not only undermine

the dictate of the Appellate Court, but would also be a manifest injustice contrary to public policy.

II. The trial court ignored several genuine issues of material fact

The question of whether a self-created landlocked property defeats a finding of necessity under the private condemnation statute, RCW §8.24.010, *et seq.* is one of first impression in Washington. Importantly there is no basis in law in this state that precludes a landlocked owner's claim to avail themselves under the private condemnation statute based on intent alone. However, in this case, the trial court's decision to grant summary judgment was based *solely* on the basis that the Ruvalcabas intentionally sold off the severed parcel without reserving themselves an easement right. Whether the Ruvalcaba's actions were reasonable given the totality of circumstances is a factual issue that deserves full adjudication.

In addition, instead of dismissal of the Kitchins on adverse possession and estoppel, the trial court should have made a factual determination that access over Kitchins' property is not a "reasonable" alternative. This determination is fact specific and deserves a full and complete record prior to review.

A. The cost of the potential easement driveways and road upgrades is an issue of material fact.

The "Day Group" argues that the road would need to be brought up to fire code in order to grant an easement from 135th Street to Ruvalcabas property. This is an issue of fact that has had no discovery, no briefing

and no opportunity for argument. There have been no discussions with the Seattle Land Use Department as to whether a waiver could be obtained.

Instead, the Day Group Defendants argue that access should be over either the severed property or the ‘access property.’ They state that a waiver of the maximum slope requirements could be obtained from Seattle Land Use Department yet ignore the possibility that a waiver of the fire code road standards could also likely solve that issue. It is a genuine issue of material fact.

B. Material issues of fact exists as to which potential easement route is “reasonable” given the costs involved.

In deciding whether an easement option is “reasonable”, the court must look at the relative cost to one party versus probably injury to the other. *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 601; 73 P.670 (1903).

Day Group Defendants claim that an easement to Ruvalcabas’ property should be secured, if at all, via the severed property or the ‘access’ property. The Kitchin Defendants, however, argue that the severed property is not a ‘reasonable’ route. As pointed out by the Kitchins, the Day Group Defendants’ “evidence of the alleged feasibility of access over the severed parcel **is incomplete and should not be accepted at face value** as proof of feasibility.” [emphasis added]. They also state that the severed parcel has steep slopes, high elevations, and slide area, mak[ing] real access . . . unjustified, difficult, impractical and very, very costly.” (CP 440).

Appellants have established two further easement route options. Clearly there are multiple factual issues to be resolved. The Ruvalcabas' expert has provided cost estimates for easements from 135th Street, Option A (\$17,150.00) and Option B (minimal) and the corresponding estimate for access from 42nd Avenue at more than \$220,000.00. (CP 424, 430-431). Day Group Defendants claim that upgrades to the road would require improvements costing over \$1 million. (CP 209).

C. There is a material issue of fact as to whether access from 42nd Avenue is feasible or reasonable.

There is conflicting testimony from Appellants, the Day Group Defendants and the Kitchins as to the feasibility of building an easement from 42nd Avenue to the landlocked property. While the Kitchins were granted summary judgment based on adverse possession and estoppel, their arguments in relation to whether the lower slope could feasibly provide access is valid.

They make the point that feasibility is not just a matter of engineering but also of reality and how a piece of property is normally used. The Kitchins question whether access from 42nd Avenue could provide a driveway that would allow someone to walk up and down to get the mail, children to ride bikes on it or in any other way provide normal access to a property such that it is "reasonable" access in an urban setting. (CP 436-437) We agree. However, as between the co-defendants, this is an issue of fact that is material to the outcome of this case.

D. Physical and legal obstacles prevent access via an implied easement over the Kitchins' property.

The Kitchins were dismissed from this suit based on statute of limitations, laches or estoppel. While the dismissal is not challenged by the Ruvalcabas, we believe the court incorrectly granted summary judgment. Instead of dismissing the Kitchins on these procedural issues, the trial court should have made a determination as to the “reasonableness” of the severed property as a route to the Ruvalcabas property. Without such a record, the appellate court will not be able to determine whether the Ruvalcabas are permitted or forever precluded from bringing a private condemnation action.

From the very beginning, the Ruvalcabas never believed, nor ever asserted, that an implied easement should be granted through the Kitchins property. Instead, it emphasizes why the Kitchins' property (severed property) was never brought into this lawsuit by the Ruvalcabas in the first place. The Kitchins contend that the physical barriers posed by the slope and the location of the home and garage cause that property to be impassable and therefore not a “reasonable” alternative.

This is the same conclusion that Mr. Ruvalcaba came to when he sold the severed property. (CP 387). He knew there was no reasonable means of accessing his property from the severed property. Instead, he tried to obtain easements from his neighbors. Mr. Ruvalcaba continues to seek access with easements today, (over 30 years of effort). Only after

exhausting all other options did the Ruvalcabas petition for private condemnation.

The trial court's dismissal also provides a legal barrier over the severed parcel such that Appellants may avail themselves of the private condemnation statute. In *Graff v. Scanlan*, 673 A.2d 1028 (1996), the Court looked at both the legal and physical obstacles that preclude the use of the implied easement to determine if actual necessity exists. Here the trial court made no factual findings regarding whether the slope, home, or garage present physical obstacles or if the legal dismissal of the Kitchins provides a legal barrier and thereby proves actual necessity to use the condemnation statute.

III. There is no "remedy" at law that requires the Ruvalcabas to purchase another property to provide access to his landlocked parcel.

The Day Group Defendants claim that the Ruvalcabas' easement should be over what they have called the "access" parcel. Simply using this nomenclature does not make the neighboring property a reasonable means of accessing the landlocked property.

Access via this property is not reasonable for the same reason as the Kitchin's property. The slope is above the maximum allowable buildable slope for permitting purposes and the building of retaining walls is prohibitively expensive. Importantly, the notion that the Ruvalcabas could purchase the "access" property is moot since that property has already sold.

Moreover, purchasing a neighboring property never has and never will be the required remedy for a landlocked property owner. If this was the required remedy, there would **never** be an instance where a property was truly landlocked. By the Day Group Defendants' argument, the landlocked owner would simply have to wait until one of the neighboring properties went on the market for sale, buy the property, grant the landlocked property an easement right and then resell the property.

Day Group Defendants' argument is preposterous since this purported "remedy" completely eviscerates the body of law established hundreds of years ago that provides for an implied easement. An implied easement is provided by the law based on necessity and without regard to fault. It provides access where a landowner has sold off property without reserving access to a public road. Day Group Defendants' purported remedy also completely nullifies the purpose of the private condemnation statute. Neither of these actual legal remedies would be necessary if the "remedy" for a landlocked property owner was simply to buy a neighbors property at some nebulous point in the future.

Defendants provided absolutely no legal basis for this purported "remedy" and cite no cases that even discuss any such "remedy" let alone rule that the landlocked owner must avail themselves of this "remedy."

Furthermore, the Ruvulcabas were, and remain unable, to finance the purchase of another property with a purchase price of approximately \$500,000.00. Even if Appellants could have purchased the "access"

property, whether this option was “reasonable” is a factual issue that has had absolutely no record established at the trial court level.

IV. Trial court erred by not viewing the evidence in the light most favorable to the Ruvulcabas.

The Ruvalcabas’ evidence shows that they did not believe they were *permanently* landlocking their property. (CP 386-389). Their intention when selling the severed property was to establish easements with neighbors. (CP 388). Contrary to the Kitchins’ assertion, **prior to selling the severed parcel**, the Ruvalcabas did, in fact, negotiate easements with several neighbors which almost completed the necessary access to his property save for a one portion that was the final piece necessary for full access. (CP 391-393, 395) Unfortunately, he was unable to secure full access rights and he has been struggling to find a resolution since that time.

Such evidence was not considered by the trial court. The Ruvulcabas are entitled to have a full and complete hearing on the facts before their claims are summarily denied.

V. Trial court erred in precluding Ruvalcaba’s claims based on “fault.”

Day Group Defendants’ assertion that because the Ruvalcaba’s caused their own problem, they have no legal remedy is an incorrect application of the law. The private condemnation statute does not include an intent requirement. The intention of the property owner is irrelevant as to whether they state a claim for a private way under RCW §8.24.010, *et seq.* The statute does not contain a requirement that the landlocked

property owner have no knowledge of the situation creating the lack of access.

The court below added an element of proof to the statute that simply does not exist. If the legislature intended to require innocence or lack of knowledge on the part of the property owner seeking a remedy provided by the statute, it would have added that requirement. It did not and it is improper and an abuse of discretion for the court to read this requirement into the statute. There is also a strong public policy presumption that property should be put to use and not rendered useless. The private condemnation statute effectuates this purpose by providing a method by which any property that does not have access to a public road can gain such access.

VI. Trial court erred in relying on *English Realty* and *Graff*.

A. *English Realty* is factually distinguishable from the instant case.

In *English Realty*, the Louisiana Court denied the landlocked owner from using a private condemnation statute to secure access. The Court stated that “the property’s enclosure was not a direct consequence of the location of the land but of the act of the party seeking relief.” *English Realty*, 228 La. 423, 433, 82 So.2d. 698, 701 (1955). There, the landowner systematically sold off portions of an 18 acre property to various people over many years. In doing so, they sold off the last remaining outlet available to a public roadway.

Here, the Ruvalcaba's decision to sell the severed property without reserving a completed easement was a direct consequence of the location and slope of the property. (CP 387-388). In essence, the decision was entirely dependant on the Ruvulcabas' inability to access their property from the severed property.

The Louisiana court precludes the use of the private condemnation statute when the cause of the landlock was truly voluntary, and this Court should find the same here. Although the Ruvulcabas' decision to sever the parcel without an easement was a voluntary one, it was predicated on the facts known at the time that access simply was not possible via that route. (CP 388). Therefore, it was not a *truly voluntary* decision; rather it was forced based on the physical attributes of the property.

If the slope between the landlocked parcel and the severed property were instead a vertical cliff with absolutely no possible easement route, the Ruvulcabas' decision would have been obvious. Here, the Ruvulcabas' decision to sever the property without an easement was also based on the belief that the sloped property could not support an access route. Consequently, the Ruvulcabas should not be punished for making what they believed to be a rational decision based on the physical nature of the property.

In *Olivio v. Rasmussen*, 48 Wn App. 318, 738 P.2d 333 (1987), the landowner was given the choice between a condemnation award that completely eliminated all of his property rights or a lower condemnation

award based on the voluntary landlocking of the parcel. The landowner made the affirmative decision to permanently landlock his property.

Despite the landowners choice, the Court in *Olivio* still granted the owner a private condemnation easement finding that the decision was not “truly voluntary”. Likewise, the Ruvalcabas should not be punished for choosing the “lesser of two evils.” *Id.* at 322. Further, the public policy dictates that land should not be rendered useless. That is precisely what the trial court has done by punishing the Ruvalcabas.

B. The application of *English Realty* should be limited to its facts.

The trial court erred as a matter of law by holding *English Realty* 228 La. 423 as persuasive authority. This is because even in Louisiana, the jurisdiction where the case was decided, the appellate court specifically limited the holding to the presented facts. *Lafayette Airport Commission v. Roy*, 265 So.2d 459, 465 (Ls.Ct.App.1972), *cert. denied*, 411 U.S. 916, 93 S. Ct. 1543, 36 L.Ed.2d 307 (1973).

The facts here are clearly distinguishable and deserve a full and complete hearing on the merits. *English Realty* was based on the notion that the original owner **could have established access to a public road.** *Id.* at 432-33. Therefore, the owner was precluded from condemning a private right of way over the land of a neighbor. In contrast, Ruvalcabas **could not** grant themselves an access easement because it was simply physically impossible.

C. The facts of *Graff* are distinguishable.

Likewise, the facts of *Graff v. Bernard*, 673 A.2d 1028, (Pa. 1996), are distinguishable and not applicable in the present case. In *Graff*, the landowner claiming condemnation over his neighbor's property had every opportunity to design the 10 lot subdivision in such a manner as to provide access to each lot. *Id.* at 1034-35. There were no physical characteristics that prevented reasonable access to each lot. *Id.*

These facts are unlike the Ruvulcabas' predicament they faced with an impossibly steep-sloped property. The Ruvalcabas had the belief that there was no possible route over the severed property. They never intended to landlock themselves, however, they knew their access would need to be secured via easements over other neighboring properties. Whether the Ruvalcabas' decision was reasonable in light of their knowledge at the time they sold the severed property is a factual issue that bears consideration at trial.

VII. Trial court erred in granting the Kitchins' attorney's fees.

The court erred when it granted Kitchins' attorneys fees for their involvement in this suit because notice of such a claim was not provided as required by common law and statute, RCW §4.84.250, the Ruvulcabas did not join the Kitchins in this suit and the Kitchins were not prevailing parties against the Ruvulcabas. Rather, they prevailed against claims made by the Day Group Defendants.

A. The Ruvalcabas did not join the Kitchins

The Kitchins were not joined as parties by the Ruvalcabas for the simple reason that the facts showed the severed property was not a ‘reasonable’ means of access. The first appeal required the Ruvalcabas seek declaratory judgment to establish this fact prior to seeking a private way easement under the statute. *Ruvalcaba, Id.* (CP 78-82). The Ruvalcabas amended their complaint to include a request for a declaration by the court that “ingress and/or egress over the lower portion of the property which was originally owned by the Ruvalcaba remains unreasonable . . .” (CP 146). Rather than to simply argue the issue of ‘reasonableness’ without joining the Kitchins, which would have been possible and logical, the Day Group Defendants moved the court to force joinder of the Kitchins as necessary parties. (CP 80-81). The Ruvalcabas never requested nor desired the Kitchins’ involvement in this suit. Instead, they adamantly opposed the Day Group Defendants’ motion for joinder. (CP 91).

The law does not require that the Kitchins be joined. The Court in *Sorenson v. Czinger*, 70 Wn. App 270, 276, 852 P.2d 1124 (1993) stated “failure to join the owner of property over which a proposed alternative route would pass does not absolutely preclude consideration if the evidence shows it is otherwise feasible.” The Ruvalcabas should not be responsible for the Kitchins attorney’s fees because the Day Group Defendants attempted to foist off the easement onto Kitchins’ property and

failed. The Day Group Defendants are wholly responsible for the Kitchins' involvement in this case.

B. The Kitchins did not provide notice of their claim.

The Kitchins did not plead a request for attorney's fees. In order to be entitled to an award of fees, common law and RCW §4.84.250 require notice of such a claim. The Kitchins never provided any notice whatsoever. It was not until their Order Granting Defendants' Motion for Attorney's Fees (CP 456-61, 552) that the issue was first raised and summarily granted by the trial court. There was no opportunity for Ruvalcabas to argue or state any contrary position. The failure to plead a claim for attorney's fees is fatal to the Kitchins award and amounts to an error of law by the trial judge.

C. The Ruvalcabas never claimed an easement over the Kitchins' property.

The Ruvalcabas were not and are not adverse to the Kitchins as to the issue of access through their property. It is a distortion of the purpose behind attorney's fee awards to force the Ruvalcabas to shoulder the burden of the Kitchins attorney's fees when they never wanted their involvement and did not argue that there was an easement right to their property. Rather, the Day Group Defendants' attempt to avoid the private way condemnation by arguing for an implied easement over Kitchins property was directly adverse to the Kitchins interest. The Day Defendants failed in their ploy to establish that an implied easement exists.

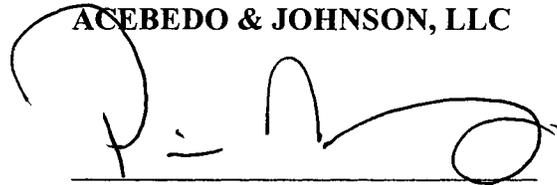
Therefore, the Day Group Defendants are the non-prevailing party and should have to pay the Kitchins attorneys fees.

VIII. Conclusion

The Ruvalcabas request that this Court REVERSE the trial court's Order dismissing Respondents, Kwang Ho Baek, et al. ("Day Group") and the trial court's Order awarding Respondents Kitchins ("Kitchins") attorney's fees and costs, and REMAND this case for a trial on its' merits.

DATED this 18th day of December, 2009.

ACEBEDO & JOHNSON, LLC

A handwritten signature in black ink, appearing to read 'P. E. Acebedo', written over a horizontal line.

Pierre E. Acebedo, WSBA #30011

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Court of Appeals No. 63572-7-1

DECLARATION OF SERVICE

COMES NOW, Shayna E. Sterling, and declares under penalty of perjury of
the laws of the State of Washington that the following is true and correct:

Declaration of Service

ORIGINAL

I am over the age of majority and not a party interested in the above-entitled action and am competent to be a witness therein.

That on December 18, 2009, I delivered via ABC Legal Services a true and correct copy of the Petitioners Appellate Reply Brief to the following at their respective addresses:

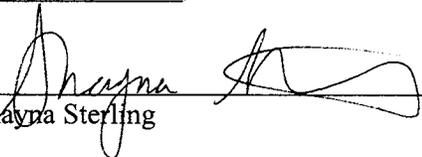
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- Facsimile
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- Overnight Courier
- Email

Dated this 18th day of December, 2009.



Shayna Sterling