

No. 49988-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOHN K. KENNEL, as managing member of POTATO
PATCH LLC, a Washington Limited Liability Company,

Appellant,

v.

DAVID GREER NIELSEN and RITA NIELSEN, husband
and wife; EDWARD LUCKE and JOAN LUCKE, husband
and wife; JAMES STOVER and BONNIE STOVER,
husband and wife; WILLIAM TINNESAND and
DEBORAH TINNESAND, husband and wife; PENELOPE
RADEBAUGH, a married woman as her separate estate;
and JENNIE MOWATT, a single woman,

Respondents.

ON APPEAL FROM JEFFERSON COUNTY SUPERIOR COURT
Hon. Jeffrey P. Bassett

OPENING BRIEF OF APPELLANT POTATO PATCH LLC

Michael B. King, WSBA No. 14405
Kenneth W. Hart, WSBA No. 15511
Rory D. Cosgrove, WSBA No. 48647
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215
*Attorneys for Appellant Potato Patch
LLC*

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR	3
III. ISSUES.....	3
IV. STATEMENT OF THE CASE.....	4
A. In 1943, a public right-of-way was granted to Jefferson County in fee simple for use by the public forever. That right-of-way has never been vacated or abandoned by the County and exists somewhere on the Point Whitney Tracts.....	4
B. In 2010, the Potato Patch LLC bought several remote, undeveloped beachside properties, one of which is landlocked, in Jefferson County.	6
C. Potato Patch sued the Point Whitney Tracts owners to condemn a private way of necessity over Canyon Creek Road or, alternatively, to establish that Canyon Creek Road had become the previously unopened public right-of-way granted to Jefferson County.....	9
V. STANDARD OF REVIEW	11
VI. ARGUMENT	12
A. The trial court disregarded undisputed facts and improperly resolved disputed fact questions and competing inferences in granting Defendants summary judgment. Genuine issues of material fact remain for trial on where the McGrew ROW is located on the Point Whitney Tracts.....	12

	<u>Page</u>
B. The trial court erred by failing to reach the merits of Potato Patch’s declaratory-relief claim and by failing to determine the location of the McGrew ROW, the existence of which is undisputed but the location of which is disputed.....	16
C. The trial court misapplied RCW 8.24.010, disregarded undisputed evidence, and erred in resolving disputed issues of material fact on Potato Patch’s claim for a private way of necessity over Canyon Creek Road.	18
VII. CONCLUSION.....	21

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Washington Cases	
<i>Brown v. McAnally</i> , 97 Wn.2d 360, 644 P.2d 1153 (1982)	18, 19
<i>Grandmaster Sheng-Yen Lu v. King County</i> , 110 Wn. App. 92, 38 P.3d 1040 (2002)	16
<i>Kelley v. Tonda</i> , 198 Wn. App. 303, 393 P.3d 824 (2017).....	1, 11, 13
<i>Kennedy v. Martin</i> , 115 Wn. App. 866, 63 P.3d 866 (2003)	19, 20
<i>Kuyper v. State, Dep’t of Wildlife</i> , 79 Wn. App. 732, 904 P.2d 793 (1995)	11
<i>Lewis County v. State</i> , 178 Wn. App. 431, 315 P.3d 550 (2013).....	17
<i>Nollette v. Christianson</i> , 115 Wn.2d 594, 800 P.2d 359 (1990)	16, 17
<i>Owen v. Burlington N. Santa Fe R.R.</i> , 153 Wn.2d 780, 108 P.3d 1220 (2005)	11
<i>Pasado’s Safe Haven v. State</i> , 162 Wn. App. 746, 259 P.3d 280 (2011).....	16
<i>Ruvalcaba v. Kwang Ho Baek</i> , 175 Wn.2d 1, 282 P.3d 1083 (2012)	1, 18
<i>Sanders v. Day</i> , 2 Wn. App. 393, 468 P.2d 452 (1970)	12
<i>Shields v. Garrison</i> , 91 Wn. App. 381, 957 P.2d 805 (1998)	18
<i>Sorenson v. Czinger</i> , 70 Wn. App. 270, 852 P.2d 1124 (1993).....	19

	<u>Page(s)</u>
<i>Southside Tabernacle v. Pentecostal Church of God, Pac. Nw. Dist., Inc., 32 Wn. App. 814, 650 P.2d 231 (1982)</i>	11
<i>State ex rel. St. Paul & Tacoma Lumber Co. v. Dawson, 25 Wn.2d 499, 171 P.2d 189 (1946)</i>	18, 19
<i>Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 109 P.3d 805 (2005)</i>	11
<i>Wash. Fed. v. Harvey, 182 Wn.2d 335, 340 P.3d 846 (2015)</i>	11

Other State Cases

<i>Chanos v. MADAC, LLC, 903 N.Y.S.2d 506 (N.Y. App. Div. 2010)</i>	17
<i>Spencer v. Kosir, 733 N.W.2d 921 (Wis. Ct. App. 2007)</i>	18

Constitutional Provisions, Statutes, and Court Rules

CR 41(a)(1)	11
CR 56(c)	11
RCW 8.24.010	3, 4, 18, 20
RCW 7.24	17
RCW 7.24.010	16
RCW 7.24.020	16
RCW 58.17.165	2, 14
WASH. CONST. art. I, § 16	18

I. INTRODUCTION

*Some cases simply must be tried. In today’s legal culture, there seemingly prevails a belief that all lawsuits are somehow, someday subject to resolution by dispositive motion. But that never has been—and never will be—true. . . . [A] trial is necessary when the material facts are not agreed.*¹

This is one of those cases. A public right-of-way was conveyed to Jefferson County by G.F. McGrew in 1943 (the “McGrew ROW”) over property now known as the Point Whitney Tracts. That right-of-way was described in the deed as running north and south with the “road to follow the eastern boundary as near as possible except where natural obstacles prevent.”

Over 70 years later, Potato Patch LLC, the owner of a large, landlocked parcel directly to the north of the Point Whitney Tracts, brought a declaratory-judgment action against the tract owners. Potato Patch sought to establish the existence and location of the McGrew ROW and to establish a private way of necessity to gain legal access over the Point Whitney Tracts to his landlocked parcel—consistent with our state’s “overriding public policy goal against making landlocked property useless.” *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 8, 282 P.3d 1083 (2012).

Potato Patch moved for partial summary judgment, asking the trial court to determine the location of the McGrew ROW—which had

¹ *Kelley v. Tonda*, 198 Wn. App. 303, 307, 393 P.3d 824 (2017).

encumbered the tract owners' properties for over 70 years—and the location of the most reasonable alternative access route to establish a private way of necessity over the Point Whitney Tracts.

Potato Patch produced undisputed evidence on summary judgment that Jefferson County approved, as part of the Point Whitney Tracts subdivision, the construction of a road extending north to the boundary of Potato Patch's property and to the south bisecting the tracts called Canyon Creek Road. While the McGrew ROW had never been vacated or abandoned by the County, nowhere on the approved plat was the McGrew ROW shown. Nor was Canyon Creek Road identified on the plat as a private road, which would be required by RCW 58.17.165 were that the case. Potato Patch also produced undisputed evidence that a steep ravine along the eastern boundary of the Point Whitney Tracts made building an access road in that location impracticable.

The reasonable inference to be drawn from these undisputed facts was that, in approving the Point Whitney Tracts subdivision, the County intended that Canyon Creek Road serve as the public right-of-way that had been granted to the County in 1943 but had never been opened. And due to the topography, the right-of-way could not be developed with an access road directly adjacent to the eastern boundary of the Point Whitney Tracts.

But the trial court misapprehended the limited scope of the relief sought by Potato Patch in its partial summary-judgment motion and misapplied the private-way-of-necessity statute. In doing so, the court disregarded disputed material facts as well as the undisputed facts and the

reasonable inferences to be drawn from those facts. Instead, the court chose itself to resolve fact questions on the right-of-way's location and the most reasonable alternative route for a private way of necessity—tasks that could only be done by fact-finding at trial.

This Court should reverse the trial court's summary-judgment order and remand for trial. Genuine issues of material fact remain for Potato Patch's right to a statutory private way of necessity over Canyon Creek Road or, alternatively, a judgment declaring that Canyon Creek Road had become the previously unopened public right-of-way that McGrew granted to the County.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting Defendants summary judgment dismissing Potato Patch's claim for declaratory relief to determine the location of the McGrew public right-of-way. CP 350-53.

2. The trial court erred in granting Defendants summary judgment dismissing Potato Patch's claim for a private way of necessity over the Point Whitney Tracts under RCW 8.24.010. CP 350-53.

III. ISSUES

1. Judicial determination where the McGrew ROW is located. Canyon Creek Road, which bisects the Point Whitney Tracts, serves the tract owners and extends to the southern border of Potato Patch's property. A public right-of-way was conveyed to Jefferson County over the Point Whitney Tracts on the eastern boundary "as near as possible except where natural obstacles prevent." A steep ravine on the eastern boundary of the

Point Whitney Tracts creates a natural obstacle that makes building a public access road in that location impracticable. The subdivision plat approved by the County creating the Point Whitney Tracts omits the public right-of-way and fails to describe Canyon Creek Road as private. Do genuine issues of material fact remain for trial on Potato Patch's declaratory-judgment claim seeking to establish that Canyon Creek Road became the public right-of-way originally granted to the County by McGrew in 1943?

2. Private way of necessity over the Point Whitney Tracts.

Potato Patch produced undisputed evidence that the most reasonable alternative route to access its landlocked property was through Canyon Creek Road. Every other possible alternative route was impassable due to natural obstacles. Did the trial court misapply RCW 8.24.010 and disregard undisputed evidence in granting Defendants summary judgment and dismissing Potato Patch's claim for a private way of necessity over Canyon Creek Road?

IV. STATEMENT OF THE CASE

A. In 1943, a public right-of-way was granted to Jefferson County in fee simple for use by the public forever. That right-of-way has never been vacated or abandoned by the County and exists somewhere on the Point Whitney Tracts.

In 1939, G.F. McGrew bought property that is now called the Point Whitney Tracts. CP 98, 100. In 1943, McGrew conveyed to Jefferson County in fee simple a public right-of-way for "road purposes" (CP 55):

A right of way for road, from point where present county road enters their property, thence in a generally northerly

direction to the north boundary of their property. This road to follow the eastern boundary as near as possible except where natural obstacles prevent[.]

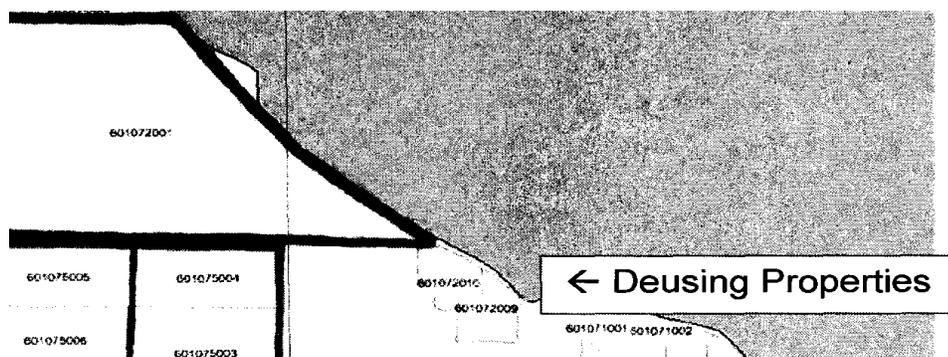
CP 48-50, 205. The deed was recorded in 1944. CP 48-49, 205. Canyon Creek flows east to west through the property, and a steep ravine exists on the eastern boundary. CP 205-06, 251. This ravine makes it impracticable to build an access road on the eastern boundary of the Point Whitney Tracts. CP 251 ¶18.

In 1987, Marvin Lorenzen and his wife took title to what would later become the Point Whitney Tracts. CP 54-55. Their deed specifically referenced the McGrew ROW that had encumbered the property for decades. CP 55 (“Subject to easement affecting a portion of subject property for road purposes in favor of Jefferson County as recorded Dec. 15, 1944, Auditor’s File No. 103323[.]”).

In 1991, Lorenzen subdivided the property into the Point Whitney Tracts. CP 43 ¶10; CP 63-64, 117, 205. At the time, the McGrew ROW still existed and had not been vacated or abandoned by the County. CP 205, 214. As part of the Point Whitney Tracts subdivision, a roadway was created and approved by the County, called Canyon Creek Road, that bisects the property running north and south. CP 43, 63-64, 117, 205. At the time, the North Mason Public Utility District installed an electrical vault at the northern terminus of Canyon Creek Road to “service [the] future electrical needs” of property that would soon be owned by Potato Patch LLC. CP 44, 139.

B. In 2010, the Potato Patch LLC bought several remote, undeveloped beachside properties, one of which is landlocked, in Jefferson County.

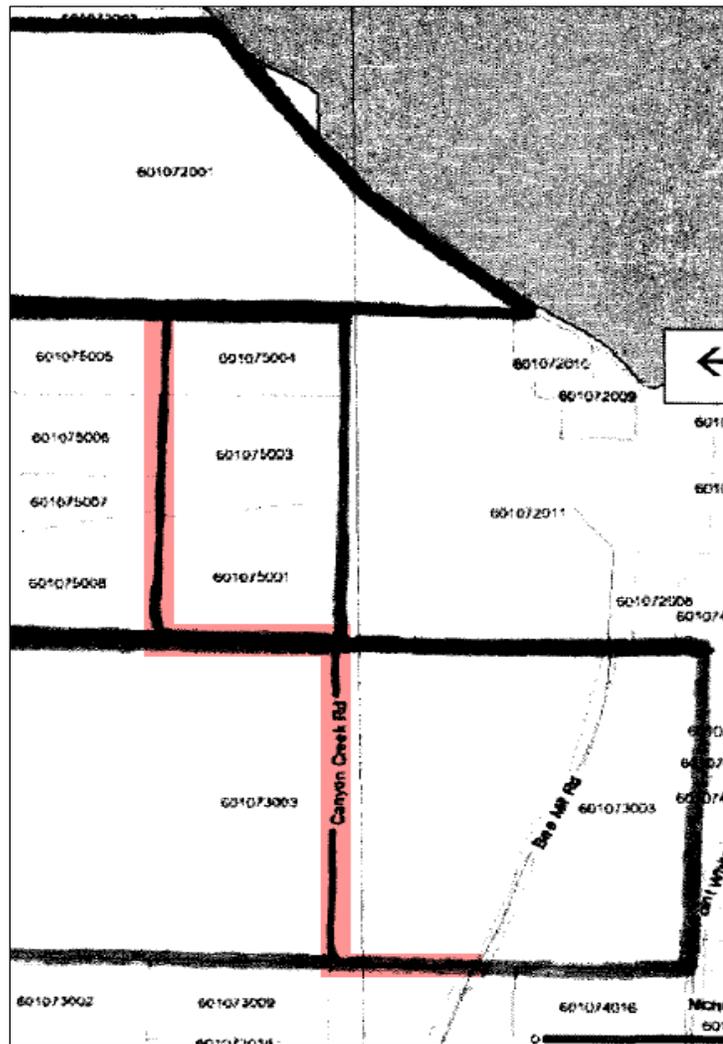
John Kennell and his wife, longtime residents of the Kitsap Peninsula, own two beachside properties near Quilcene Bay in Brinnon, Washington, located in Jefferson County. CP 128-30. The Kennells are the sole members of Potato Patch LLC (Potato Patch). CP 132. In 2010, Potato Patch bought a rural, undeveloped parcel bordering Quilcene Bay, lying directly to the north of the Point Whitney Tracts, called the potato patch. CP 41-42, 104, 130, 301.² Potato Patch also owned, but has since sold, beachside properties (commonly known as the Duesing properties) abutting the potato patch on the southeast. CP 132, 144-59, 170-72, 307-08. No viable access exists from the Duesing properties to the potato patch. CP 66 ¶5.



The potato patch, #801072001, sits to the northwest of the Duesing properties.

² “Potato Patch,” when capitalized, refers to the legal entity formed by the Kennells. The “potato patch,” when noncapitalized, refers to the landlocked property at issue that the Kennells bought in 2010. The property has been historically called the potato patch because its former owner’s father “had a vegetable garden on this land during the war.” CP 208.

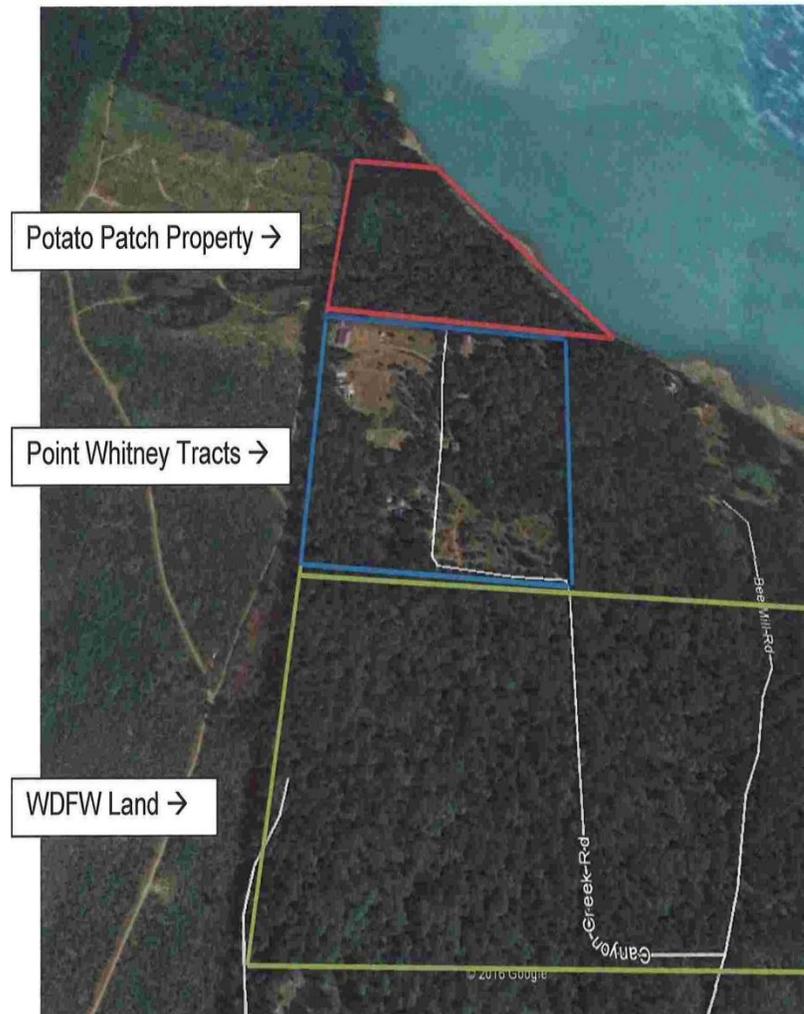
Canyon Creek Road runs to the southern boundary of the potato patch and is the only way to reach the Potato Patch by vehicle. CP 66, 134, 251, 117, 170. Respondents, who are the current owners of the Point Whitney Tracts, claim Canyon Creek Road is private and have denied Potato Patch access to the road. CP 42, 44.



(The map above came from Defendants' cross-motion for summary judgment. CP 77. Potato Patch added the pink line for illustrative

purposes to show Canyon Creek Road.) In the diagram above, the potato patch is the top parcel ending in #2001. The Point Whitney Tracts are the middle parcels ending in #5001, #5003, #5004, #5005, #5006, #5007, and #5008. Land owned by the Washington State Department of Fish and Wildlife (Department) is the bottom parcel ending in #3003.

The Duesing properties (ending in #2009 and #2010), the state owned land to the southeast (ending in #2011), and the land to the west and north of the potato patch, all have steep and unstable slopes that cannot safely support construction of an access road to the potato patch. CP 44-45; CP 66 ¶5; CP 251. Unless Potato Patch has a legal right of access over Canyon Creek Road, its property is landlocked. CP 42, 46, 65-70; RP (Jan. 13, 2017) 45.



(This map also came from Defendants' cross-motion for summary judgment. CP 75.)

C. Potato Patch sued the Point Whitney Tracts owners to condemn a private way of necessity over Canyon Creek Road or, alternatively, to establish that Canyon Creek Road had become the previously unopened public right-of-way granted to Jefferson County.

In October 2015, Potato Patch filed a declaratory-judgment action against the Point Whitney Tracts owners to establish the existence and

location of McGrew ROW and, alternatively, to condemn a private way of necessity over Canyon Creek Road. CP 1-9, 10-18. A month later, Potato Patch sought partial summary judgment on a narrow basis: to establish the location of the McGrew ROW. CP 26-27, 41-64, 65-70.

Point Whitney Tracts owners David Nielsen, Joan and Edward Lucke, Bonnie and Jim Stover, and Jennie Mowatt (Defendants below) brought a cross-motion for summary judgment to dismiss Potato Patch's claims. CP 73-96, 97-100, 103-17, 120-217. (Two Point Whitney Tracts owners did not contest Potato Patch's right to use Canyon Creek Road.)

The trial court granted Defendants summary judgment and dismissed Potato Patch's claims for declaratory relief and a private way of necessity. CP 350-53. The trial court refused to reach the merits of Potato Patch's declaratory-relief claim to determine the location of the McGrew ROW. The court made two interlineations to its summary-judgment order: (1) "Court ruling does not impact or limit whatever rights [Potato Patch] may have re[garding] McGrew ROW" and the (2) "Canyon Creek Easement is not McGrew ROW as a matter of law." CP 352; *see also* RP (Jan. 13, 2017) 27 ("McGrew still exists separate and apart from Canyon Creek."); RP (Jan. 13, 2017) 42 ("And as a matter of law, it's pretty clear they are separate and distinct parcels."). The trial court denied Defendants' motion for attorneys' fees and costs; Defendants have not appealed from that order. CP 418-19.

Potato Patch timely appealed. CP 411-12, 420-21. The Clerk of this Court issued a letter addressing the appealability of the trial court's

summary-judgment order. The trial court on Potato Patch’s CR 41(a)(1) motion for voluntary dismissal dismissed all claims against the remaining defendants. A commissioner of this Court ruled that the summary-judgment order “is appealable as a matter of right.”

V. STANDARD OF REVIEW

This Court reviews the grant of summary judgment de novo. *Wash. Fed. v. Harvey*, 182 Wn.2d 335, 339, 340 P.3d 846 (2015). Summary judgment is proper when there are no genuine issues of material fact. CR 56(c). “A material fact is one that affects the outcome of the litigation.” *Owen v. Burlington N. Santa Fe R.R.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005).

This Court must view all facts and reasonable inferences in a light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

“The object and function of summary judgment procedure is to avoid a useless trial. A trial is not useless, but is absolutely necessary where there is a genuine issue as to any material fact.” *Kelley v. Tonda*, 198 Wn. App. 303, 310, 393 P.3d 824 (2017) (internal citation omitted). “[E]ven if the basic facts are not in dispute, if the facts are subject to reasonable conflicting inferences, summary judgment is improper” because the trier of fact must resolve such inferences. *Southside Tabernacle v. Pentecostal Church of God, Pac. Nw. Dist., Inc.*, 32 Wn. App. 814, 821, 650 P.2d 231 (1982); *see also Kuyper v. State, Dep’t of Wildlife*, 79 Wn. App. 732, 739, 904 P.2d 793 (1995). “Summary

judgment procedures are not designed to resolve inferential disputes.”

Sanders v. Day, 2 Wn. App. 393, 398, 468 P.2d 452 (1970).

VI. ARGUMENT

A. The trial court disregarded undisputed facts and improperly resolved disputed fact questions and competing inferences in granting Defendants summary judgment. Genuine issues of material fact remain for trial on where the McGrew ROW is located on the Point Whitney Tracts.

In its amended complaint and summary-judgment motion, Potato Patch asked the trial court to determine where the McGrew ROW is located on the Point Whitney Tracts to gain legal access to its landlocked property. CP 17, 31, 34-36. The existence of the McGrew ROW was not at issue: Defendants acknowledged that the County had never vacated or abandoned it. RP (Jan. 13, 2017) 23; CP 205-06.

Many of the facts set forth by the parties below about the McGrew ROW were undisputed. McGrew conveyed in fee simple to Jefferson County by quitclaim deed a public right-of-way on the “eastern boundary [of the Point Whitney Tracts] as near as possible except where natural obstacles prevent[.]” CP 48-50. That deed specified neither the precise location nor the dimensions of the public right-of-way. Defendants each own a parcel in the Point Whitney Tracts. CP 104-05. Canyon Creek flows east to west through the Point Whitney Tracts. CP 115. A “steep large ravine” exists on the eastern boundary of the Point Whitney Tracts that makes it impracticable to build an access road to reach the potato patch. CP 251 ¶18.

It was the trial court’s duty, based on the undisputed evidence presented, to establish the location of the McGrew ROW as a matter of law if possible, and if not, to reserve the question for trial. But the trial court failed to do either and instead applied an incorrect summary-judgment standard in dismissing Potato Patch’s claims.

The trial court erred in finding that the McGrew ROW is not Canyon Creek Road as matter of law. CP 352. The trial court stated in its oral ruling:

There is no way McGrew is Canyon Creek. There is no intention that McGrew is Canyon Creek. So McGrew still exists separate and apart from Canyon Creek.

RP (Jan. 13, 2017) 27. The trial court dismissed Potato Patch’s claims, stating that the “Canyon Creek Easement is not McGrew ROW as a matter of law.” CP 352 (emphasis in original). But whether the County intended the McGrew ROW to become Canyon Creek Road as part of the Point Whitney Tracts subdivision and whether McGrew intended for the right-of-way to be located where Canyon Creek Road is currently located—because of natural obstacles on the eastern boundary—are necessarily questions of fact. *See Kelley*, 198 Wn. App. at 320 (concluding that “the intent of the parties to convey an easement or a fee is a question of fact that may be illuminated by additional evidence presented on remand.”).

As the nonmoving party in the Defendants’ cross-motion for summary judgment, Potato Patch was entitled to have all of the facts and reasonable inference viewed in a light most favorable to Potato Patch.

Here, Potato Patch produced sufficient evidence on summary judgment to support a reasonable inference that the McGrew ROW became Canyon Creek Road. McGrew conveyed to the County for use by the public forever a public right-of-way to follow the eastern boundary of the Point Whitney Tracts “as near as possible except where natural obstacles prevent.” CP 48. The deed conveying the McGrew ROW failed to specify its precise location or dimensions. Natural obstacles on the eastern boundary of the Point Whitney Tracts make it impracticable to build an access road in that location. CP 251 ¶18. Nonetheless, because the right-of-way has never be vacated or abandoned, it must exist somewhere on the Point Whitney Tracts. CP 205-06.

In granting summary judgment to Defendants, the trial court failed to consider the undisputed fact that the McGrew ROW was not shown on the Point Whitney Tracts plat subdivision that was approved by the County. Nor did the trial court consider the undisputed fact that Canyon Creek Road was not identified on the plat as “private,” which was required if it were intended that the road be private. RCW 58.17.165.

No evidence supported the trial court’s conclusion that the McGrew ROW existed “separate and apart” from Canyon Creek Road and that Canyon Creek Road is private. RP (Jan. 13, 2017) 27. In fact, the evidence and reasonable inferences—when viewed in a light most favorable to Potato Patch—support the opposite conclusion: when Lorenzen developed the Point Whitney Tracts in 1991, he and the County intended that Canyon Creek Road would in effect serve as what had

previously been the unopened McGrew ROW. It was undisputed that an access road could not be built practicably along the eastern boundary of the property. Instead, a road bisecting the property was not only the most logical location for a public access road but, given the topography, also perfectly suited a plat design that divided Lorenzen's property into equally sized and accessible tracts. The Point Whitney Tracts have been encumbered by the McGrew ROW for over 70 years. CP 48. The trial court's concern about encumbering Defendants' property with a public access road was thus unfounded. RP (Jan. 13, 2017) 7.

When viewing the facts and all reasonable inferences in a light most favorable to Potato Patch, this Court should conclude that the trial court erred in granting Defendants summary judgment. Genuine issues of material fact remain whether the McGrew ROW became Canyon Creek Road or, if not, where the McGrew ROW is located on the Point Whitney Tracts. Potato Patch submitted undisputed evidence on summary judgment that a "steep large ravine" exists on the eastern boundary of the Point Whitney Tracts that makes it impracticable to build an access road in that location to reach the potato patch. CP 251. Because the topography on the eastern boundary of the Point Whitney Tracts undisputedly would not allow for a public right-of-way in that location, fact-finding by trial is indispensable to determine the McGrew ROW's location.

B. The trial court erred by failing to reach the merits of Potato Patch’s declaratory-relief claim and by failing to determine the location of the McGrew ROW, the existence of which is undisputed but the location of which is disputed.

By denying access over the existing road on the Point Whitney Tracts without providing any direction for where Potato Patch would have the right to gain access over Defendants’ property, the trial court failed to fulfill its duty to rule on the ripe issue before it.

The Uniform Declaratory Judgments Act (Act) permits Washington courts to “declare rights, status and other legal relations” of “person[s] interested under a deed.” RCW 7.24.010, .020. A person whose rights are affected by a deed may obtain a declaration of rights. *See Nollette v. Christianson*, 115 Wn.2d 594, 598, 800 P.2d 359 (1990).

The Act “is designed to settle and afford relief from insecurity and uncertainty with respect to rights, status and other legal relations.” *Pasado’s Safe Haven v. State*, 162 Wn. App. 746, 759, 259 P.3d 280 (2011). The Act “should be liberally interpreted in order to facilitate its socially desirable objective of providing remedies not previously countenanced by our law.” *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn. App. 92, 98, 38 P.3d 1040 (2002).

Before a Washington court may grant declaratory relief, a justiciable controversy must exist. *Nollette*, 115 Wn.2d at 599. A justiciable controversy is:

- an actual, present, and existing dispute;
- between parties having genuine and opposing interests;

- involving interests that must be direct and substantial, rather than potential, theoretical, abstract, or academic; and
- a judicial determination that will be final and conclusive.

Id. Each of these four elements must be met. *Lewis County v. State*, 178 Wn. App. 431, 437, 315 P.3d 550 (2013).

Defendants never contested that the trial court had the authority to grant Potato Patch declaratory relief or that a justiciable controversy existed. The parties disputed the location of the McGrew ROW. That dispute involved interests that were direct and substantial concerning the efficient use of land and one landowner's ability to reach its landlocked property. A judicial determination of the McGrew ROW's location would have been final and conclusive between Defendants and Potato Patch. *See Chanos v. MADAC, LLC*, 903 N.Y.S.2d 506, 508 (N.Y. App. Div. 2010) (concluding that a justiciable controversy existed for plaintiffs' declaratory-relief claim because both parties disputed the right-of-way's location).

Potato Patch in its summary-judgment motion asked the trial court to find that the McGrew ROW became Canyon Creek Road or, alternatively, to determine the location of the McGrew ROW on the Point Whitney Tracts. CP 26-27; *see generally* chapter 7.24 RCW (Uniform Declaratory Judgments Act). The trial court acknowledged in its oral ruling that the McGrew ROW existed. RP (Jan. 13, 2017) 23, 25, 27. The only issue before the trial court was to decide the McGrew ROW's location.

But the trial court, having concluded (erroneously) that Canyon Creek Road was not a public right-of-way, failed to reach the merits of Potato Patch's claim and determine the McGrew ROW's location. CP 352 (noting in its written order that the court's ruling dismissing the declaratory-relief claim did not affect Potato Patch's rights in the McGrew ROW). This was error. *E.g., Spencer v. Kosir*, 733 N.W.2d 921, 923, 926 (Wis. Ct. App. 2007) (affirming trial court's grant of declaratory relief determining the location of a "right of way for road purposes.").

C. The trial court misapplied RCW 8.24.010, disregarded undisputed evidence, and erred in resolving disputed issues of material fact on Potato Patch's claim for a private way of necessity over Canyon Creek Road.

The "overriding public policy" in Washington is "against making landlocked property useless." *Ruvalcaba*, 175 Wn.2d at 8. To advance this policy, our state constitution expressly permits condemnation of private property. WASH. CONST. art. I, § 16.

RCW 8.24.010 allows private condemnation of land for the construction of roads necessary for the proper use and enjoyment of landlocked property. *Brown v. McAnally*, 97 Wn.2d 360, 370, 644 P.2d 1153 (1982). Our state has long recognized that a private way of necessity may be condemned over an existing road or right-of-way. *See, e.g., id.* at 367; *State ex rel. St. Paul & Tacoma Lumber Co. v. Dawson*, 25 Wn.2d 499, 504, 171 P.2d 189 (1946); *Shields v. Garrison*, 91 Wn. App. 381, 383, 957 P.2d 805 (1998).

The necessity need not be absolute but must be a reasonable necessity for the use and enjoyment of the condemnor's landlocked property. *Dawson*, 25 Wn.2d at 507; *Kennedy v. Martin*, 115 Wn. App. 866, 868, 63 P.3d 866 (2003). The condemnor must prove both reasonable necessity and the absence of another feasible route. *Kennedy*, 115 Wn. App. at 869-70; *Sorenson v. Czinger*, 70 Wn. App. 270, 276, 852 P.2d 1124 (1993). The joint use of the private way of necessity must be compatible with the use to which it is already being put by the condemnees. *Brown*, 97 Wn.2d at 368.

The trial court here found in its oral ruling that there was no "justifiable basis to find necessity over the tracts through Canyon Creek [Road]" because Potato Patch did not prove the McGrew ROW is an "inaccessible route." RP (Jan. 13, 2017) 42-43. This ruling presents at least two fatal flaws.

First, for Potato Patch's private-condemnation claim, the McGrew ROW was relevant only to the extent that it purported to provide another feasible route over the Point Whitney Tracts. But regardless whether a road could be built over the McGrew ROW, no other road currently exists. Natural obstacles on the eastern boundary of the Point Whitney Tracts undisputedly make building an access road impracticable. Potato Patch's expert, Dan McShane, testified by declaration that geological conditions and slope gradients on the properties to the west, north, and southeast of the potato patch rendered any potential legal access "ill advised."

CP 66 ¶4. McShane testified that Canyon Creek Road was “the best and most logical access” to the potato patch. CP 66 ¶7.

Paradoxically, after rejecting the argument that Canyon Creek Road is public, the trial court dismissed Potato Patch’s private-way-of-necessity claim for lack of proof that the McGrew ROW is inaccessible, while at the same time declining to find where the right-of-way is located. The trial court effectively required Potato Patch to prove the impossible, that is, to prove it could not access its property over the McGrew ROW without knowing where the right-of-way is even located, if not on Canyon Creek Road. The net result of the trial court’s ruling was to leave the potato patch landlocked until the County decided to open the McGrew ROW somewhere, someday, on the Point Whitney Tracts.

Second, the trial court’s oral ruling seemingly allowed the Point Whitney Tracts owners to choose the path for Potato Patch’s private way of necessity. RP (Jan. 13, 2017) 43. But once a condemnor proves that a private way of necessity exists and that the route selected is the most reasonable alternative, a court cannot interfere with the condemnor’s selection of a route for the private way of necessity absent bad faith. *Kennedy*, 115 Wn. App. at 868-70. Here, Potato Patch presented undisputed evidence that Canyon Creek Road was the most feasible route for a private way of necessity. Thus, in dismissing Potato Patch’s claim, the trial court misapplied RCW 8.24.010, improperly resolved fact issues on summary judgment, and disregarded undisputed evidence that natural

obstacles on the eastern boundary of the Point Whitney Tracts make it impracticable to build an access road in that location.

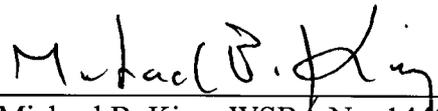
This Court should reverse the trial court's summary-judgment order on Potato Patch's claim for private way of necessity and remand for trial.

VII. CONCLUSION

This Court should conclude that the trial court improperly granted Defendants summary judgment. The trial court applied the wrong standard on summary judgment. Genuine issues of material fact remain for trial on the McGrew ROW's location and on Potato Patch's claim for private way of necessity. This Court should reverse the summary-judgment order and remand for trial.

Respectfully submitted: October 23, 2017.

CARNEY BADLEY SPELLMAN, P.S.

By 
Michael B. King, WSBA No. 14405
Kenneth W. Hart, WSBA No. 15511
Rory D. Cosgrove, WSBA No. 48647
Attorneys for Appellant Potato Patch LLC

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Email to the following:

Scott Feir Christopher M. Reed Montgomery Purdue Blankenship & Austin PLLC 5500 Bank of America Tower 701 Fifth Avenue Seattle, WA 98104-7096 sef@mpba.com creed@mpba.com vgarton@mpba.com	Shane Seaman Cross Sound Law Group 18887 State Highway 305 NE Ste 1000 Poulsbo, WA 98370-8065 Shane@shaneseamanlaw.com
-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

DATED: October 23, 2017



Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

October 23, 2017 - 11:38 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49988-6
Appellate Court Case Title: John K. Kennell, as Managing Member of Potato Patch, Appellant v. David Nielsen, et al, Respondents
Superior Court Case Number: 15-2-00214-6

The following documents have been uploaded:

- 7-499886_Briefs_20171023113550D2639930_0693.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Opening Brief.PDF

A copy of the uploaded files will be sent to:

- cosgrove@carneylaw.com
- creed@mpba.com
- sef@mpba.com
- shane@crosssoundlaw.com
- shane@shaneseamanlaw.com
- vgarton@mpba.com

Comments:

Sender Name: Patti Saiden - Email: saiden@carneylaw.com

Filing on Behalf of: Michael Barr King - Email: king@carneylaw.com (Alternate Email:)

Address:

701 5th Ave, Suite 3600

Seattle, WA, 98104

Phone: (206) 622-8020 EXT 149

Note: The Filing Id is 20171023113550D2639930