

FILED
Court of Appeals
Division II
State of Washington
12/21/2017 1:58 PM

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.

**RESPONSE BRIEF OF RESPONDENTS DAVID GREER AND
RITA NIELSEN, JAMES AND BONNIE STOVER, AND JENNIE
MOWATT**

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I. INTRODUCTION

This case is straightforward and the material facts are not in dispute. Appellant Potato Patch, LLC (“Potato Patch”) purchased real property located in Jefferson County (the “Potato Patch Property”) knowing the Potato Patch Property lacked legal access. In pursuit of its desire to develop the Potato Patch Property, Potato Patch litigated and lost access claims across Canyon Creek Road in 2010 (the same road at issue in this dispute). Potato Patch did obtain access to the Potato Patch Property, however, through a different route to the east, over two properties also owned by Potato Patch.

Apparently not satisfied with its access, Potato Patch voluntarily relinquished its access and sued for access over Canyon Creek Road, again. In taking its second-bite at the apple, Potato Patch claimed it had a right to open an unestablished, never-used 1944 right of way granted to Jefferson County over the Point Whitney Tracts, commonly referred to as the “McGrew ROW.” Potato Patch also alleged a right to privately condemn land owned by Respondents, some of the owners of the Point Whitney Tracts (“Point Whitney Owners”).¹

¹ The Point Whitney Owners comprise David Greer and Rita Nielsen, James and Bonnie Stover, and Jennie Mowatt. Despite the fact that Edward and Joan Lucke own a parcel in the Point Whitney Tracts, and have access rights to Canyon Creek

Both of Potato Patch's claims fail as a matter of law. Potato Patch's McGrew ROW claim fails because it is undisputed that the McGrew ROW is landlocked and not connected to any road. As such, even if Potato Patch had a right to open the McGrew ROW in the absence of the County (which it does not), such a right would be useless because it would not provide Potato Patch with access to the Potato Patch Property. Further, it is beyond reasonable dispute that the McGrew ROW (which is public and by its express terms follows the eastern boundary of the Point Whitney Tracts) is not Canyon Creek Road (which is private and exists over 600 feet away from the eastern boundary of the Point Whitney Tracts). Potato Patch's argumentative assertions and speculation to the contrary do not change the fact that these are different roads.

Potato Patch's private condemnation claim likewise fails as a matter of law because it is undisputed that Potato Patch cannot access the upper half of Canyon Creek Road (across the Point Whitney Tracts property) without also crossing the lower half of Canyon Creek Road (across WDFW property). However, Potato Patch cannot cross the lower half of Canyon Creek Road because Potato Patch already litigated and lost

Road affected by Potato Patch's claims, Potato Patch never served the Luckes. Indeed, contrary to Potato Patch's misstatement in its Opening Brief (p. 10), the Luckes did not move for summary judgment (they are not parties) and were in fact dismissed by Potato Patch in order to pursue this appeal.

its access claims against the WDFW in 2010. Tellingly, the WDFW is not even a party to this lawsuit. Additionally, no reasonable finder of fact could find reasonable necessity exists to condemn the Point Whitney Owners' land where Potato Patch voluntarily landlocked its own property under established Washington law.

Potato Patch's attempt to ignore these undisputed facts on appeal is concerning. The trial court did not err in granting the Point Whitney Owners' motion for summary judgment dismissal of Potato Patch's claims and the trial court's ruling should be affirmed.²

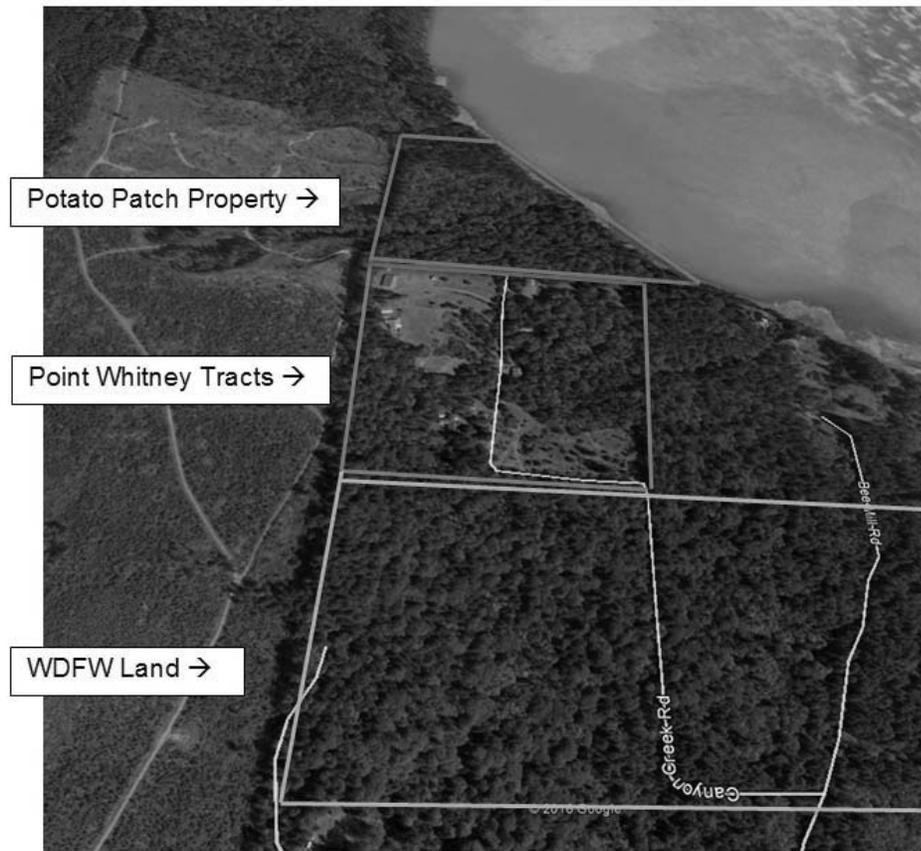
II. STATEMENT OF THE CASE

A. The Point Whitney Tracts is a Small, Quiet Community

The Point Whitney Tracts is a small, quiet, rural residential community comprising only seven parcels of land owned by the named respondents. CP 104. Many of the Point Whitney Owners purchased their lots specifically for the area's remote aesthetic. CP 104. Indeed, the Point Whitney Tracts is surrounded by undeveloped land, as depicted by the aerial photo below. CP 104. With the exception of some logging to the

² Potato Patch repeatedly references the trial court's denial of its own motion for partial summary judgment in its Opening Brief. Potato Patch did not appeal the trial court's denial of its motion for partial summary judgment. CP 411-17.

west (left) and the creation of the Point Whitney Tracts, this area has remained largely unchanged since 1990. CP 104.



B. The Private Canyon Creek Road was Created Exclusively for the Benefit of the Point Whitney Tracts

In 1990, the owner of what is now the Point Whitney Tracts entered into a stipulation with a neighboring land owner which provided the Point Whitney Tracts, and only the Point Whitney Tracts, a private easement over the land identified as WDFW Land above. CP 104, 107-15. The easement held by the Point Whitney Tracts is restricted to the

Point Whitney Owners' ingress, egress, and utilities. CP 108. This easement was used to create the Canyon Creek Road easement. CP 104, 115.³ Neither Potato Patch, nor any of its predecessors in interest, was a party to the stipulation which created the Canyon Creek Road easement. CP 107-15. The land identified as WDFW Land was subsequently acquired by the Washington State Department of Fish and Wildlife ("WDFW"). CP 30, 104, 164-65. Potato Patch did not make the WDFW a party to this lawsuit. CP 10.

C. It is Undisputed that Canyon Creek Road is a Private Road

Canyon Creek Road is a private road easement.⁴ CP 15, 21, 205. The plat survey which created the Point Whitney Tracts specifically states Canyon Creek Road is an easement. CP 115. Canyon Creek Road was not dedicated to the public on the face of the plat, or anywhere else. CP 115. The lack of any public dedication language on the Point Whitney Tracts plat is obvious. Public dedication is legally required for a road to be public. Jefferson County does not maintain Canyon Creek Road. CP 64, 104, 117.

³ The plat which created Canyon Creek Road specifically references the stipulation entered into in Jefferson County Superior Court Cause No. 88-2-00243-5.

⁴ Canyon Creek Road comprises the roadway running North-South through the center of the Point Whitney Tracts, West-East on the Southern border of the Point Whitney Tracts and North-South through WDFW land. Canyon Creek Road is depicted on the map included on page 4 above, referenced by Potato Patch in its Opening Brief.

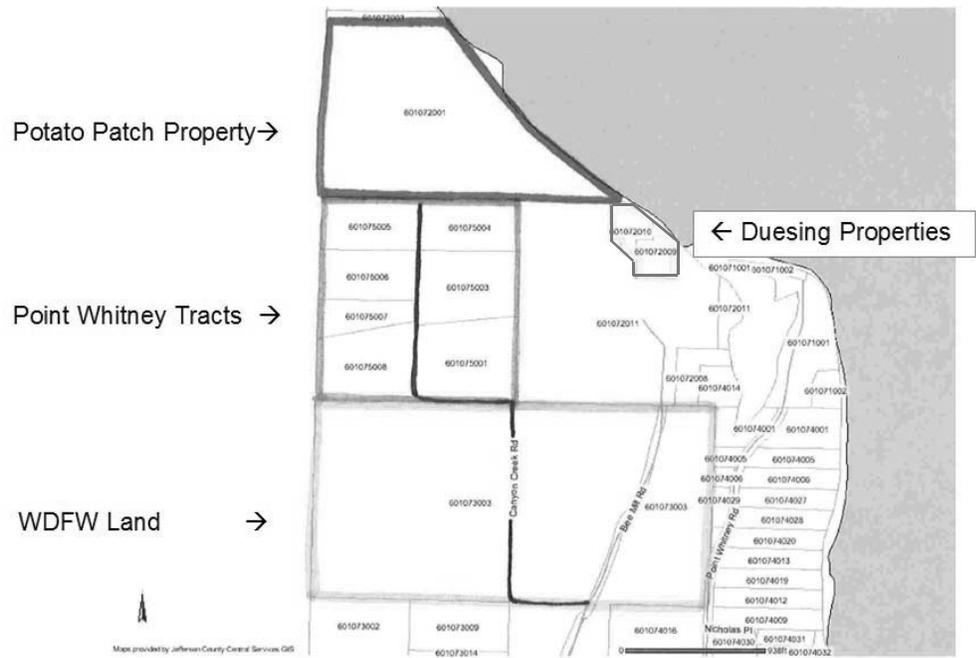
The fact that Canyon Creek Road is private is undisputed, as Potato Patch conceded Canyon Creek Road is private in Paragraphs 3.1 and 3.3 of Potato Patch's Amended Complaint: "Canyon Creek Road is a private easement;" "Canyon Creek Road is a privately owned property interest." CP 15 (Potato Patch's Amended Complaint, ¶¶ 3.1, 3.3) (underline added). It is surprising that Potato Patch now asserts that Canyon Creek Road is public on appeal.⁵ Canyon Creek Road has never been dedicated to the public. CP 115. Canyon Creek Road is a private easement which serves only the Point Whitney Tracts. CP 64, 104, 117, 175, 205.

D. Potato Patch Purchased the Potato Patch Property on Speculation

In early 2010 Potato Patch purchased the undeveloped Potato Patch Property (shown below), which lies directly north of the Point Whitney Tracts (shown below). CP 101, 132. At that same time, Potato Patch also purchased two properties to the southeast of the Potato Patch Property (the "Duesing Properties"). CP 132, 144, 161. Neither the Potato Patch Property nor the Duesing Properties had any legal road access at the time of Potato Patch's purchase, a fact known to Potato Patch

⁵ See Potato Patch's Opening Brief, p. 14. Potato Patch vacillated with respect to the private/public nature of Canyon Creek Road on summary judgment before the trial court as well. RP 43, ll. 12.

at the time of purchase. CP 145, 162, 250. Potato Patch purchased these properties for \$935,000. CP 144. As of 2010, Potato Patch and its managing member collectively owned interests in five properties in close proximity to the Point Whitney Tracts. CP 127-31. A parcel view of the properties relevant to this dispute is as follows:



Potato Patch and its managing member John Kennell (“Kennell”) also have ownership interests in two additional properties north of the Potato Patch Property (not depicted). CP 128. Historically, Potato Patch and Kennell have accessed these properties via boat and foot. CP 131. Kennell also used to access the northernmost property he owns with his

family via float plane. CP 105. Kennell now lives on waterfront property located on Bainbridge Island. CP 127-28.

E. It is Undisputed that Potato Patch Knew the Potato Patch Property Lacked Legal Access

Potato Patch knew the Potato Patch Property lacked legal access when it purchased the Potato Patch Property. CP 145, 162, 250. Potato Patch's Purchase and Sale Agreement, the Statutory Warranty Deed, and Potato Patch's Title Commitment Report all expressly stated that the Potato Patch Property lacks legal right of access. CP 145, 162, 250. The Statutory Warranty Deed highlights this lack of access by protecting the seller from any "[l]oss or damage by reason that there appears to exist no insurable right of access to and from the land herein described to a public right-of-way." CP 162. Lack of access was factored into the purchase price of the Potato Patch Property. CP 145. Notably, the Purchase and Sale Agreement contains a specifically negotiated provision under which the Seller would contribute to the buyer's cost in seeking legal access to the Potato Patch Property: "Buyer shall obtain the Canyon Creek Easement to [the Potato Patch Property] in the manner and location of his choice. Buyer and Seller shall each pay one-half of the cost, with a cap of \$25,000.00 for the Seller's contribution to the costs." CP 145. Apparently, the buyer and seller contemplated the buyer (Potato Patch)

suing neighboring properties for access, which is what Potato Patch did—
in 2010.

F. It is Undisputed that Potato Patch Already Sued for Legal Access Over Canyon Creek Road in 2010

Legally significant but disregarded by Potato Patch in its Opening Brief, it is undisputed that Potato Patch⁶ already sued for (and lost) access over Canyon Creek Road in 2010 (“2010 Lawsuit”). CP 137, 164-69, 177-78. Specifically, Potato Patch asserted claims against the WDFW (the landowner to the south of the Point Whitney Tracts) for (1) “an easement thirty feet in width for ingress and egress centered on Canyon Creek Road,” and (2) an easement from the end of Bee Mill Road to the Duesing Properties. CP 168-69 (¶¶ 7.1, 7.3). The fact that Potato Patch sued for access over Canyon Creek Road (which Potato Patch now contradictorily asserts is a public road in its Opening Brief) further demonstrates that even Potato Patch understands Canyon Creek Road is private.

It is undisputed that Potato Patch needs access over all of Canyon Creek Road to reach the Potato Patch Property, which includes that portion of Canyon Creek Road which crosses WDFW land. CP 134, 139.⁷

⁶ Kennell and his wife (the “Kennells”) brought the 2010 Lawsuit in their individual names despite the fact that Potato Patch was the legal owner of the Potato Patch Property. CP 161.

⁷ Kennell Deposition p. 35, ll. 5-14, p. 79, ll.2-4. “2001” refers to Tax Parcel No. 601072001, which is the Potato Patch Property. CP 11 ¶ 1.2.

Further, it is undisputed that Potato Patch and its attorney recognized Potato Patch had a potential claim for a private way of necessity prior to bringing the 2010 Lawsuit. CP 138, 174. The Point Whitney Owners were not parties to the 2010 Lawsuit. CP 164. The WDFW is not a party to this lawsuit. CP 10. Tellingly, Potato Patch ignores the 2010 Lawsuit in its Opening Brief.

1. It is Undisputed that the Court Dismissed Potato Patch's Claims for Access Over Canyon Creek Road as a Matter of Law in the 2010 Lawsuit

The Court dismissed with prejudice Potato Patch's access claims for an easement over Canyon Creek Road on summary judgment. CP 177-78. The Court held:

That Plaintiffs' [Potato Patch] causes of action for Prescriptive Easement for Canyon Creek Road and for Implied Easement of Canyon Creek Road are dismissed with prejudice. (Underline added). CP 178.

Interestingly, the WDFW argued Potato Patch was not entitled to an easement over Canyon Creek Road, in part, because Potato Patch failed to join the Point Whitney Owners. CP 185. The WDFW argued that:

[Potato Patch's] claim regarding Canyon Creek Road fails for the additional reason that they have not joined parties that are necessary to afford [Potato Patch] with the complete relief they are seeking. Specifically, [Potato Patch] cannot access [the Potato Patch Property] without also quieting title against the landowners in Point Whitney Tracts . . . over whose property Canyon Creek Road connects the WDFW property with [the Potato Patch Property]. (Underline added). CP 185.

It is equally true in this case (and undisputed) that Potato Patch cannot now legally access the Potato Patch Property via Canyon Creek Road without obtaining legal access across land owned by the WDFW as well as land owned by the Point Whitney Owners. CP 134.⁸ These undisputed facts are unmentioned in Potato Patch's Opening Brief.

2. Potato Patch Obtained Legal Access to the Potato Patch Property Over the Duesing Properties in the 2010 Lawsuit

Potato Patch prevailed on its claim for access over what is commonly known as Government Lot 4 to the Duesing Properties (owned by Potato Patch), which gave Potato Patch access to the Potato Patch Property. CP 133, 189-92, 195-97, 249. This access is because the Duesing Properties abut the Potato Patch Property. CP 249, 260. As a result, Potato Patch owned land contiguous with the Potato Patch Property, which land was legally accessible via a public road (Bee Mill Road). CP 249, 260. Potato Patch even recorded an easement for ingress and egress over the Duesing Properties (in favor of the Kennells) to legally access the Potato Patch Property. CP 195-97, 260. Potato Patch and the

⁸ Kennell Deposition at p. 35, ll. 8-14 ("3003" refers to tax parcel 601073003, which is owned by the WDFW).

Kennells used the easement to access the Potato Patch Property by vehicle. CP 136, 250.⁹

3. It is Undisputed that Potato Patch Voluntarily Terminated the Easement and Its Legal Access

On January 10, 2014, the Kennells voluntarily terminated the easement burdening the Duesing Properties. CP 199-201. The Kennells unencumbered the Duesing Properties immediately prior to Potato Patch selling the properties to a third-party unrelated to this lawsuit. CP 142, 260. Shortly after relinquishing its access to the Potato Patch Property, Potato Patch brought this lawsuit against the Point Whitney Owners. CP 1. Potato Patch now argues it is entitled to condemn Canyon Creek Road to replace the access it had to the Potato Patch Property over the Duesing Properties. CP 10-18. Potato Patch sought this access in the absence of the WDFW, which Potato Patch previously sued for access over Canyon Creek Road (and lost). CP 10, 164-72.

G. The Unestablished, Never Used 1944 McGrew Right of Way

Having lost the 2010 Lawsuit seeking an easement over the private Canyon Creek Road and having sold its existing access over the Duesing Properties, Potato Patch tried to convince the trial court that it could

⁹ Kennell Deposition at 46, ll. 18-23 (“2010” refers to Parcel No. 601072010—one of the Duesing Properties). This is contrary to the statement made by Potato Patch in

access the Potato Patch Property via a never used, unestablished, 1944 right of way commonly referred to as the McGrew Right of Way (“McGrew ROW”). CP 26-40, 177-78, 199-201. Potato Patch even argued, as a matter of law, that the 1944 McGrew ROW was actually Canyon Creek Road, which is provably false. CP 31, 34. By its express terms, the McGrew ROW is to follow the eastern boundary of the Point Whitney Tracts (Canyon Creek Road over 600 feet away, is not close). CP 203. Further, it is undisputed that the McGrew ROW does not abut the WDFW property to the south (there is a 165-foot gap) and is therefore landlocked. CP 98. Finally, it is undisputed that the McGrew ROW does not cross the land owned by the WDFW and does not connect to any public right of way. CP 16, 205-06, 214.

1. Background to the McGrew ROW

The background to the McGrew ROW is not subject to dispute, and is as follows: In 1944, G.F. McGrew owned a portion of what is now the Point Whitney Tracts. CP 98. In 1944, G.F. McGrew conveyed a right of way for possible road purposes to Jefferson County by quit claim deed. CP 98, 203. It is undisputed that the McGrew ROW was granted solely to Jefferson County (which was never made a party to this lawsuit).

its Opening Brief that Canyon Creek Road “is the only way to reach the Potato Patch [Property] by vehicle.” Potato Patch’s Opening Brief, at 7.

CP 33, 203, Potato Patch’s Opening Brief, p. 4. It is undisputed that the McGrew ROW does not reference the Potato Patch Property, Potato Patch, or any of its predecessors in any way. CP 33, 203. By its express terms, the McGrew ROW is “to follow the eastern boundary” of the property then owned by G.F. McGrew:

A right of way for road . . . This road to follow the eastern boundary as near as possible except where natural obstacles prevent . . . (Underline added). CP 203.

It is undisputed that Jefferson County never established a road on the eastern boundary of the Point Whitney Tracts (or anywhere else on the Point Whitney Tracts). CP 32, 141, 205, 214. It is undisputed that no road currently exists on the eastern boundary of the Point Whitney Tracts. CP 141.

2. The Unestablished McGrew ROW is Unusable Because it is Not Connected to Any Road

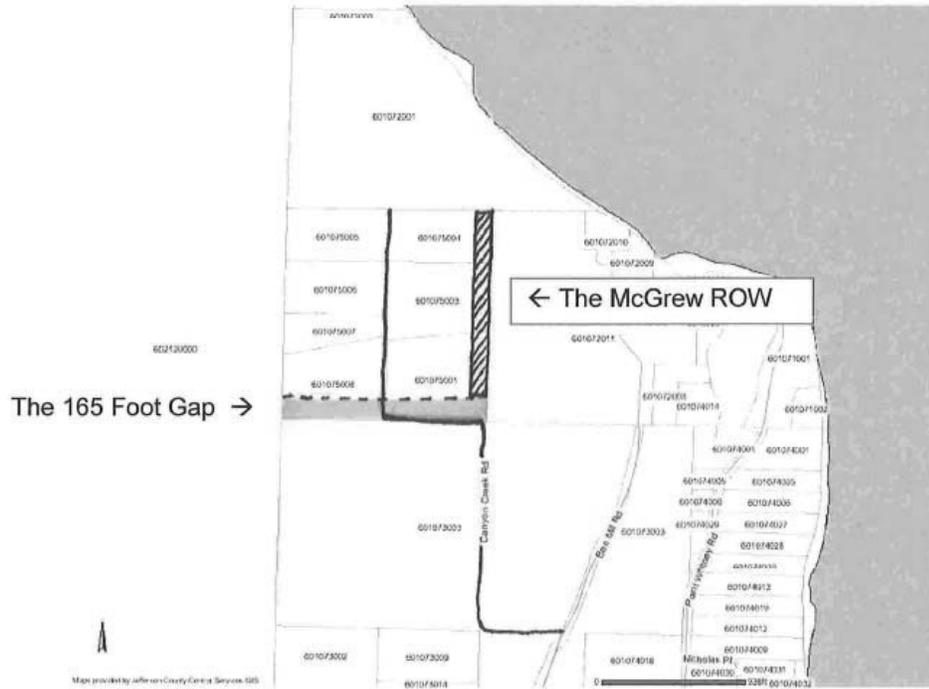
Legally significant, but disregarded by Potato Patch on appeal, is the undisputed fact that the McGrew ROW is landlocked and not connected to any road due to a 165-foot gap. CP 98.¹⁰ The McGrew ROW is landlocked because G.F. McGrew did not own the southerly 165 feet of the Point Whitney Tracts when he granted the McGrew ROW

¹⁰ Interestingly, Potato Patch cites to the uncontroverted Declaration of Susan Brandt, but apparently chose to disregard the undisputed fact that the McGrew ROW is

to Jefferson County. CP 98. The undisputed facts are as follows: in 1940 G.F. McGrew sold to Frank Stewart the lower (southern) 165 feet of the Point Whitney Tracts (“Stewart Property”). CP 98. This transfer occurred before G.F. McGrew conveyed the alleged McGrew ROW to Jefferson County. CP 98. As a result, Jefferson County has no interest in the Stewart Property because G.F. McGrew had no interest in the Stewart Property when he conveyed the McGrew ROW. CP 98. This means there is a legal gap of approximately 165 feet between the alleged McGrew ROW and the nearest road (the private Canyon Creek Road). CP 98. Potato Patch did not challenge these facts below.

Jefferson County also confirms the McGrew ROW is landlocked: “[the McGrew ROW] does not connect to any other public right of way, so it is essentially, “landlocked” from public access. By this I mean that there is no legal way for the public to get to this right of way.” CP 205-06. The alleged McGrew ROW would be depicted below in slashes. The 165-foot gap which land-locks the alleged McGrew ROW is depicted below:

landlocked. See Potato Patch’s Opening Brief, p. 4 (citing to the Declaration of Susan Brandt at CP 98).



CP 100.¹¹ Jefferson County (again, which is not a party to this lawsuit) cannot develop the McGrew ROW because it would need a deed from the owners of Tract 1 of the Point Whitney Tracts to cross the 165-foot gap. CP 98.

3. The McGrew ROW does not Cross WDFW Land

It is also undisputed that the McGrew ROW does not cross the land owned by the WDFW. CP 16 (§ 3.10: “the McGrew ROW exists in the . . . current location of the [Point] Whitney Tracts.”), 205-06, 214. As

¹¹ This map is a recreation of the map attached to the Declaration of Susan Brandt, title officer for Jefferson Title Company, which was included in the Point Whitney Owners’ pleadings before the trial court below. CP 98, 100.

such, even if the McGrew ROW were not landlocked via the 165-foot gap, Potato Patch still could not access the McGrew ROW because the McGrew ROW does not cross WDFW land and does not connect to any public right of way. CP 203, 214. This legally significant, undisputed fact is also ignored by Potato Patch on appeal.

H. Potato Patch Wants to Develop the Potato Patch Property

Potato Patch has expressed interest in developing the Potato Patch Property on a number of occasions. CP 288.¹² For example, in correspondence to the Point Whitney Owners dated October 26, 2009, Potato Patch indicated it “would like to have the option of splitting out three, 1.5 to 3 acre lots” as “money in the bank.” CP 135, 208-09. The Point Whitney Owners purchased their properties for the area’s tranquility and privacy. CP 105. Potato Patch’s development of the Potato Patch Property would increase traffic through the Point Whitney Tracts and irreparably damage the aesthetic of the Point Whitney Tracts. CP 105.

I. Potato Patch Moves for Summary Judgment and its Claims are Dismissed as a Matter of Law

In December, 2016 (over a year after commencement of its lawsuit), Potato Patch moved for summary judgment to establish “as a

¹² Potato Patch’s purchase and sale agreement noted that the sale was contingent upon buyer [Potato Patch] determining the Potato Patch Property’s suitability for “Buyer’s intended purpose to develop and build on it.” CP 288.

matter of law that the McGrew ROW was relocated to the location of Canyon Creek Road.” CP 31, 34-36. In response, the Point Whitney Owners¹³ cross-moved for summary judgment, arguing that both of Potato Patch’s claims failed as a matter of law for a multitude of reasons:

1. Potato Patch could not access the McGrew ROW because it is landlocked via a 165-foot gap;
2. It is beyond reasonable dispute that Canyon Creek Road is not the McGrew ROW;
3. Potato Patch failed to join Jefferson County, a necessary party to declare rights with respect to the McGrew ROW;
4. Potato Patch could not access the McGrew ROW because Potato Patch could not cross land owned by the WDFW;
5. Potato Patch could not demonstrate reasonable necessity for its private way of necessity claim without access across land owned by WDFW;
6. Potato Patch failed to join the WDFW (which Potato Patch already sued in 2010), a necessary party to declare rights concerning Canyon Creek Road;

¹³ Contrary to Potato Patch’s misstatement in its Opening Brief that the Luckes cross-moved for summary judgment, Potato Patch has never served the Luckes. In fact, Potato Patch dismissed the Luckes in order to appeal the trial court’s summary judgment dismissal of Potato Patch’s claims.

7. Potato Patch could not demonstrate reasonable necessity for its private way of necessity claim because Potato Patch voluntarily landlocked the Potato Patch Property;
8. Potato Patch's claims for access over Canyon Creek Road were barred by res judicata and/or collateral estoppel. CP 73-96.

The trial court dismissed Potato Patch's claims as a matter of law. RP 44, ll. 7-8. Potato Patch failed to demonstrate a genuine issue of material fact on the issue of whether the McGrew ROW was landlocked and therefore inaccessible by Potato Patch (regardless of where it exists). RP p. 22, ll. 8-11; p. 46, ll. 17-21 ("Unless [Potato Patch] can show that [it] still has some right to put a claim against the state for that lower portion or some other way to get into Canyon Creek, [its] got no case."). The trial court also agreed it was "clear" that the McGrew ROW was not Canyon Creek Road. RP 43, ll. 10-23. Finally, the trial court noted that Potato Patch would need to declare rights under the McGrew ROW with Jefferson County, to which the McGrew ROW was granted. RP 43, ll. 4-5.

Potato Patch likewise failed to demonstrate a genuine issue of material fact on the issue of whether Potato Patch could even reach the Point Whitney Tracts without crossing WDFW land. Without access across WDFW land (which access is necessary to reach the Point Whitney

Tracts), the trial court held it was not reasonably necessary to encumber the Point Whitney Tracts. RP 43-44, ll. 24-25, 1-8. The trial court also determined that Potato Patch could not demonstrate it was reasonably necessary to encumber the Point Whitney Tracts because Potato Patch had voluntarily relinquished the access it had through the Duesing Properties. RP 45, ll. 6-16.

III. SUMMARY OF ARGUMENT

Potato Patch's claims fail as a matter of law. Regardless of where the McGrew ROW exists, it is undisputed that the McGrew ROW is landlocked and not connected to any road. As a result, providing Potato Patch with the right to establish the McGrew ROW (which was granted to Jefferson County, a non-party) is an exercise in futility because such right will not provide Potato Patch access to the Potato Patch Property.

Further, it is not subject to reasonable dispute that Canyon Creek Road is not the McGrew ROW. By its express terms, the McGrew ROW is to follow the eastern boundary of the Point Whitney Tracts; Canyon Creek Road runs through the center of the Point Whitney Tracts (over 600 feet away); the McGrew ROW is public; Canyon Creek Road is private (and is privately maintained); in fact, Potato Patch even argued Canyon Creek Road was private (not public, like the McGrew ROW).

Similarly, it is undisputed that Potato Patch cannot access the upper half of Canyon Creek Road (which crosses the Point Whitney Tracts) without crossing the lower half of Canyon Creek Road (which crosses WDFW land). However, Potato Patch already litigated and lost access claims for the lower half of Canyon Creek Road in 2010. Further, reasonable minds cannot find reasonable necessity exists to encumber the Point Whitney Owners' property where Potato Patch voluntarily landlocked the Potato Patch Property.

Even if these dispositive facts were in dispute (which they are not), Potato Patch has failed to join multiple necessary parties, including the Luckes (who own a parcel in the Point Whitney Tracts but were never served), the WDFW (whose land Potato Patch must cross to access the Point Whitney Tracts), and Jefferson County (whose rights Potato Patch seeks to affect under the McGrew ROW). The trial court did not err in dismissing Potato Patch's claims on summary judgment.

IV. RESTATEMENT OF THE ISSUES

1. Did the trial court err in dismissing Potato Patch's McGrew ROW claim as a matter of law where: it is undisputed the McGrew ROW is landlocked and unconnected to any road; it is beyond reasonable dispute that the public, unopened McGrew ROW is not the private Canyon Creek

Road; and where Potato Patch failed to join Jefferson County, a necessary party?

2. Did the trial court err in dismissing Potato Patch's private way of necessity claim as a matter of law where: Potato Patch lacks access because Potato Patch previously litigated (and lost) access claims over Canyon Creek Road and where Potato Patch voluntarily landlocked the Potato Patch Property?

V. ARGUMENT

A. Summary Judgment Standards

Summary judgment is appropriate when “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). Questions of fact may be determined as a matter of law where reasonable minds could reach but one conclusion. *Ruff v. County of King*, 125 Wn.2d 697, 703-04, 887 P.2d 886 (1995). Once there has been an initial showing of the absence of any genuine issue of material fact, the non-moving party must respond with more than conclusory allegations, speculative statements, or argumentative assertions of the existence of unresolved factual issues. *Ruffer v. St. Cabrini Hosp.*, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990). A non-moving party may not rely on affidavits considered at face value; issues of material fact cannot be raised by merely claiming contrary facts. *Meyer v. University*,

105 Wn.2d 847, 852, 719 P.2d 98 (1986). As set forth below, the material facts are not in dispute and the trial court did not err in dismissing Potato Patch's McGrew ROW and private way of necessity claims as a matter of law.

B. The Trial Court Did Not Err in Dismissing Potato Patch's McGrew ROW Claim as a Matter of Law

The trial court did not err in dismissing Potato Patch's McGrew ROW claim as a matter of law. Nevertheless, Potato Patch mistakenly argues on appeal that genuine issues of fact *now* exist concerning the location of the McGrew ROW and whether the McGrew ROW became Canyon Creek Road.¹⁴ Potato Patch also mistakenly argues that "whether the County intended the McGrew ROW to become Canyon Creek Road . . . [and] whether McGrew intended for the right-of-way to be located where Canyon Creek Road is currently located . . . are necessarily questions of fact." Potato Patch's Opening Brief, p. 13.

Potato Patch's arguments are facially defective because Potato Patch wholly ignores the undisputed and dispositive fact that the McGrew ROW is landlocked and inaccessible by Potato Patch, regardless of where it exists. Further, even if the McGrew ROW was not landlocked (which it

¹⁴ Potato Patch argued below that the trial court could determine both the location of the McGrew ROW and that the McGrew ROW was Canyon Creek Road as a matter of law.

is), it is not subject to reasonable dispute that the McGrew ROW (an unopened, 1944 public right of way—not a road) is not Canyon Creek Road (a private road created in the 1990's) because each was created by separate written documents, by different parties, at different times, in different locations. Finally, Potato Patch's McGrew ROW claim fails as a matter of law because Potato Patch failed to join Jefferson County, a necessary party.

1. It is Undisputed that the McGrew ROW is Landlocked and not Connected to Any Road

Ignored by Potato Patch in its Opening Brief, it is undisputed that the McGrew ROW is landlocked via a 165-foot gap, which separates the McGrew ROW from any road. CP 98. As such, regardless of its location, Potato Patch cannot use the McGrew ROW to access the Potato Patch Property because the McGrew ROW is landlocked. As a matter of law, this undisputed fact is dispositive of Potato Patch's McGrew ROW.

The undisputed chain of title shows G.F. McGrew did not own all of the Point Whitney Tracts when he created the McGrew ROW in 1944. CP 98. The pertinent time periods are as follows:

- In 1939, G.F. McGrew purchased what is now the Point Whitney Tracts; CP 98
- In 1940, G.F. McGrew conveyed the lower 165 feet of the Point Whitney Tracts to Frank Stewart (creating the gap); CP 98

CP 98, 100. Again, this is undisputed. Potato Patch’s attempt to ignore this undisputed fact on appeal does not necessitate a trial. A trial on Potato Patch’s McGrew ROW claim would be an exercise in futility because establishing the McGrew ROW will not provide Potato Patch access to the Potato Patch Property. RP 46, ll. 18-21. The trial court did not err in dismissing Potato Patch’s McGrew ROW claim as a matter of law because the McGrew ROW is landlocked and inaccessible regardless of where it exists.

2. As a Matter of Law, the Public McGrew ROW is not the Private Canyon Creek Road

Even if the McGrew ROW was not landlocked (which it is), the trial court did not err in dismissing Potato Patch’s McGrew ROW claim on summary judgment because the McGrew ROW is not Canyon Creek Road as a matter of law, and reasonable minds could not reach a different conclusion. Potato Patch’s unsupported speculation, argumentative assertions, and wishful thinking do not change this result. It is not “logical” to conclude that the McGrew ROW is Canyon Creek Road, as Potato Patch suggests.¹⁵ Indeed, imagine arguing that France intended the Statue of Liberty to be the Eiffel Tower because they were both created in

¹⁵ Notably, Potato Patch argued below that the trial court could determine, as a matter of law, that the McGrew ROW was Canyon Creek Road.

France. Such an argument is unsupported and nonsensical, and does not create a genuine dispute of fact. Likewise, the McGrew ROW does not become Canyon Creek Road simply because both exist on the Point Whitney Tracts.¹⁶

Additionally, Potato Patch's "plat dedication argument" is a red herring. Essentially, Potato Patch mistakenly asserts that Canyon Creek Road was not identified as 'private' on the plat which created the Point Whitney Tracts, and is therefore the public McGrew ROW. Potato Patch's arguments on appeal (as was the case below) ignore the express language of the McGrew ROW; misstate statutory law; conflict with road maintenance responsibilities; and contradict Potato Patch's own Complaint.

(a) By its express terms, the McGrew ROW is not Canyon Creek Road

It is clear from the face of the document that created the McGrew ROW that the McGrew ROW is not Canyon Creek Road. By its express terms, the unused 1944 McGrew ROW clearly states the location

¹⁶ Potato Patch argumentatively asserts there are issues of disputed fact about whether the County intended the McGrew ROW to be Canyon Creek Road. However, Potato Patch has submitted no evidence of the County's intent or briefed why such intent would override the express terms of the recorded documents. In fact, the County already wrote a letter indicating the McGrew ROW was not Canyon Creek Road. CP 214.

of the McGrew ROW is on the eastern boundary of the Point Whitney Tracts, nowhere near Canyon Creek Road:

A right of way for road . . . This road to follow the eastern boundary as near as possible except where natural obstacles prevent . . . (Underline added).

It is undisputed that Canyon Creek Road runs through the center of the Point Whitney Tracts, over 600 feet west of the eastern boundary. Potato Patch's argumentative assertions that it would be "logical" to establish the McGrew ROW over 600 feet away from the eastern boundary of the Point Whitney Tracts are insufficient to create an issue of fact.¹⁷ The trial court did not err in holding the McGrew ROW is not Canyon Creek Road as a matter of law based on the express terms of the document which created the McGrew ROW.

(b) Potato Patch misstates statutory law (again), which confirms Canyon Creek Road is private

As it did below, Potato Patch also argues that the private Canyon Creek Road is the public McGrew ROW because it was not identified as 'private' on the plat creating the Point Whitney Tracts. In support of its

¹⁷ Potato Patch's citation to *Spencer v. Kosir*, 733 N.W.2d 921, 923, 926 (Wis. Ct. App. 2007), an out-of-state, private easement case is inapposite. In *Spencer*, unlike here, the private easement did not specify the location of the easement in any way. The trial court located the private easement on the eastern boundary of the defendant's property (on summary judgment). Here, the express terms of the McGrew ROW already specify that the McGrew ROW exists on the eastern boundary of the Point Whitney Tracts.

mistaken argument Potato Patch references RCW 58.17.165.¹⁸ However, Potato Patch blatantly misstates the requirements of RCW 58.17.165. Indeed, the statute actually requires the opposite of what Potato Patch indicates the statute requires. Under RCW 58.17.165, the face of the plat must contain a dedication to the public if a road is to be dedicated to the public:

If the plat or short plat is subject to dedication, the certificate or a separate written instrument shall contain the dedication of all streets and other areas to the public . . . Said certificate or instrument of dedication shall be signed and acknowledge before a notary public by all parties having any ownership interest in the lands subdivided and recorded as the final plat.

RCW 58.17.165 (underline added). Washington courts confirm no dedication exists unless this requirement is met: “Washington’s subdivision statute, chapter 58.17 RCW, prohibits conveyance of real property to the public for any general or public use unless there has been a dedication, signed by all parties with an ownership interest in the land, that is clearly shown on the final plat.” *Richardson v. Cox*, 108 Wn. App. 881, 891, 26 P.3d 970 (2001) (citing RCW 58.17.020(3); RCW 58.17.165) (underline added). RCW 58.17.020(3) even defines “dedication” as “the

¹⁸ Notably, Potato Patch does not quote RCW 58.17.165 in its Opening Brief.

deliberate appropriation of land by an owner for any general and public use.” (Underline added).

That no such dedication to the public exists on the face of the plat which created the Point Whitney Tracts is obvious. Indeed, Potato Patch’s argument is illogical: a landowner does not need to “dedicate” its own land for a private use—the land is already privately owned. Potato Patch’s misreading of the statute also leads to absurd results: all roads not dedicated as private would automatically become public. This would create a default rule under which landowners inadvertently give away land to the public (in conflict with the clear definition in the statute requiring a dedication to be deliberate). Without an express dedication by the owners, no conveyance can take place under Washington law.

Potato Patch’s misunderstanding of clear statutory law does not create an issue of fact. The trial court did not err in holding Canyon Creek Road is not the public McGrew ROW as a matter of law because Canyon Creek Road remains private under statutory law.

(c) Canyon Creek Road is private, as demonstrated by the fact that it is privately maintained

Also ignored by Potato Patch on appeal is the undisputed fact that Canyon Creek Road is maintained pursuant to a private Road Maintenance Agreement between the Point Whitney Owners. The Point Whitney

Owners maintain Canyon Creek Road (not Jefferson County) because Canyon Creek Road is private. It is undisputed the unestablished McGrew ROW is public (which would then make it publicly maintained). The trial court did not err in dismissing Potato Patch's McGrew ROW claim as a matter of law because the privately maintained Canyon Creek Road is not the public McGrew ROW.

(d) Even Potato Patch conceded at one point that Canyon Creek Road is private, not public

Prior to its motion for summary judgment, Potato Patch alleged in its complaint that Canyon Creek Road is private (not public, like the McGrew ROW). CP 15 (Potato Patch's Amended Complaint, ¶ 3.1 "Canyon Creek Road is a private road easement;" ¶ 3.3 "Canyon Creek Road is a privately owned property interest."). Indeed, Potato Patch was clearly aware that the private Canyon Creek Road is not the public McGrew ROW. A letter from Jefferson County to Potato Patch's predecessor unequivocally states that the McGrew ROW "has not been used, and does not connect to any public facility." CP 214.

The McGrew ROW and Canyon Creek Road are simply not the same: one exists on the eastern boundary of the Point Whitney Tracts, the other runs through the middle of the Point Whitney Tracts (over 600 feet apart); one was granted to the public in 1944, the other is a private

easement created in 1990; one is unopened, the other is privately accessed and maintained; one does not cross WDFW land, the other does. In fact, other than its naked argument and the recorded document which created the McGrew ROW, and which located the McGrew ROW on the eastern boundary of the Point Whitney Tracts, Potato Patch has submitted no evidence of the McGrew ROW's location. A trial on these undisputed facts is unnecessary because reasonable minds can reach but one conclusion: the private Canyon Creek Road is not the public McGrew ROW. The trial court did not err in dismissing Potato Patch's McGrew ROW claim as a matter of law.

3. As a Matter of Law, Potato Patch's McGrew ROW Claim Fails because Potato Patch Failed to Join Jefferson County, a Necessary Party

As a matter of law, Potato Patch's McGrew ROW claim also fails because Potato Patch failed to join Jefferson County, a necessary party. Potato Patch's failure to join a necessary party is a complete defense.¹⁹ *See Northwest Greyhound Kennel Ass'n, Inc. v. State*, 8 Wn. App. 314, 319, 506 P.2d 878 (1973) (noting that suit is an exercise in futility and should be dismissed where persons who had an interest which would be

¹⁹ As set forth below, Jefferson County is one of many necessary parties absent from this lawsuit. Also missing are: the WDFW and Edward and Joan Lucke. As owners of property in the Point Whitney Tracts, Edward and Joan Lucke are named defendants but were never served by Potato Patch.

affected by a declaratory judgment were not made parties); *see also* Civil Rule 12(b)(7) (dismissal for failure to join necessary party under Rule 19).

Here, Potato Patch seeks a declaration on the location and right to access the McGrew ROW. It is undisputed that the McGrew ROW was granted to Jefferson County (not Potato Patch). CP 16 (Potato Patch's Amended Complaint, ¶ 3.9). Nevertheless, Jefferson County is not a party to this lawsuit. Without the County as a party, the trial court could not grant complete relief; the County would not be bound by a ruling establishing the location of the McGrew ROW or Potato Patch's right to access it. Potato Patch has even conceded that Jefferson County would need to be joined as a party to declare rights under the McGrew ROW. CP 253 (Potato Patch noting that rights under the McGrew ROW could not be extinguished without joining Jefferson County). The trial court did not err in dismissing Potato Patch's McGrew ROW claim because Potato Patch failed to join a necessary party.

C. The Trial Court did not Err in Dismissing Potato Patch's Private Way of Necessity Claim as a Matter of Law

As a matter of law, Potato Patch's private way of necessity claim fails because Potato Patch: cannot demonstrate reasonable necessity without access across the lower half of Canyon Creek Road; cannot demonstrate reasonable necessity because Potato Patch voluntarily

landlocked the Potato Patch Property; and is barred by the doctrine of collateral estoppel as a result of its 2010 Lawsuit, which also sought access over Canyon Creek Road. In fact, a review of the undisputed history of this matter demonstrates Potato Patch is simply ignoring undisputed facts which are dispositive of its private way of necessity claim. The trial court did not err in dismissing Potato Patch's private way of necessity claim under RCW 8.24 *et seq.* as a matter of law.

1. Standards Governing Private Way of Necessity Claims, Generally

“[T]he statute which gives a landlocked owner a way of necessity over lands of a stranger is not favored in law.” *Brown v. McAnally*, 97 Wn.2d 360, 370, 644 P.2d 1153 (1985) (underline added). The statute must be strictly construed. *Beeson v. Phillips*, 41 Wn. App. 183, 187, 702 P.2d 1244 (1985). “To strictly construe a statute simply means that given a choice between a narrow, restrictive construction and a broad, more liberal interpretation, we must choose the first option [narrow construction].” *Pac. Nw. Annual Conference of United Methodist Church v. Walla Walla Cty.*, 82 Wn.2d 138, 141, 508 P.2d 1361 (1973) (underline added).

Private way of necessity claims are governed by RCW 8.24.010, which states:

An owner, or one entitled to the beneficial use, of land which is so situate[d] with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity . . . may condemn and take lands of such other sufficient in area for the construction and maintenance of such private way of necessity. (Underline added).

In order to obtain a private way of necessity, the need must “be reasonably necessary under the facts of the case, as distinguished from merely convenient or advantageous.” *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 7, 282 P.3d 1083 (2012). “The condemnor has the burden of proving the reasonable necessity for a private way of necessity.” *Id.* (citing *Noble v. Safe Harbor Family Pres. Trust*, 167 Wn.2d 11, 17 (2009)). Here, Potato Patch cannot demonstrate it is reasonably necessary to encumber the Point Whitney Tracts because it cannot access the lower half of Canyon Creek Road (access it tried to achieve in a previous lawsuit and failed to obtain) and because it voluntarily landlocked the Potato Patch Property.

2. As a Matter of Law, Potato Patch Cannot Demonstrate Reasonable Necessity in the Absence of Access over the Lower Half of Canyon Creek Road

As a matter of law, Potato Patch cannot demonstrate reasonable necessity without access over the lower half of Canyon Creek Road. Here, it is undisputed that Potato Patch cannot legally access the Potato Patch Property via Canyon Creek Road without also crossing land owned by the

WDFW. CP 139. It is also undisputed that Potato Patch lacks access across WDFW land. Indeed, Potato Patch's lack of access across WDFW land (the lower half of Canyon Creek Road) is readily demonstrated by the fact that Potato Patch already litigated and lost claims against the WDFW for access over Canyon Creek Road in 2010. CP 164-72, 177-78. Indeed, this dispositive fact (unmentioned by Potato Patch in its Opening Brief) was specifically referenced by the trial court in its oral ruling:

I find compelling . . . [that] there's already been a previous determination with regard to a 2010 lawsuit and the [WDFW] as to Canyon Creek below. And that to me seems to be a crucial reason for this Court not to take a leap, that I should for some reason allow encumbrance of Canyon Creek above the line [the Point Whitney Tracts] when there is no access to it below the line [WDFW]. So for that reason, I am granting summary judgment in favor of the defendants on this case. RP 43-44, l. 25; ll. 1-9 (underline added).

As a result, even if Potato Patch were to prevail against the Point Whitney Owners (which it should not), Potato Patch would still not have legal access to the Potato Patch Property. Again, this lack of access across WDFW land is one of several reasons why the trial court dismissed Potato Patch's private way of necessity claim as a matter of law:

[T]he biggest problem I'm having here, Mr. Seaman, is you're trying to have me determine that it's necessary to encumber this tract of property [the Point Whitney Tracts], this road [the upper half of Canyon Creek Road], when I don't know whether you have any right to encumber what's below it [WDFW property]. And if they [Potato Patch]

can't even access what's below it, then I'll be damned if they are going to access what's above it. RP 38, ll. 2-8 (underline added)

Potato Patch even impliedly recognized that it cannot be afforded complete relief without access over WDFW land. Potato Patch's managing member testified that "[i]f I cannot access Canyon Creek Road across the Point Whitney Tracts, accessing Canyon Creek Road across WDFW property makes no sense." CP 251 (§ 16, ll. 4-6). So true, is the inverse: if Potato Patch cannot cross Canyon Creek Road through WDFW property, accessing Canyon Creek Road through the Point Whitney Tracts makes no sense. In fact, the trial Court specifically referenced this fatal issue during oral argument. RP 38, ll. 2-17.

No genuine issue of material fact exists: it is undisputed that Potato Patch needs access across WDFW land to reach the Point Whitney Tracts via Canyon Creek Road and it is undisputed that Potato Patch lacks such access. The relief sought by Potato Patch is purely hypothetical speculation. The trial court did not err in dismissing Potato Patch's private way of necessity claim as a matter of law because Potato Patch cannot demonstrate it is reasonably necessary to encumber the Point Whitney Tracts without access over WDFW land.²⁰

²⁰ Tellingly, Potato Patch failed to join the WDFW in this case, another necessary party. It is fairly obvious why Potato Patch tactically chose not to join the WDFW

3. As a Matter of Law, Potato Patch’s Private Way of Necessity Claim Fails because It Voluntarily Landlocked the Potato Patch Property

As a matter of law, Potato Patch’s private way of necessity claim fails because Potato Patch voluntarily landlocked the Potato Patch Property. Although ignored by Potato Patch on appeal, the fact that Potato Patch voluntarily gave up access to the Potato Patch Property is undisputed. CP 250 (Decl. of Kennell, ¶ 10). Under Washington law, summary judgment dismissal of a plaintiff’s private way of necessity claim is appropriate where the plaintiff voluntarily landlocks their own property. *Ruvalcaba*, 175 Wn.2d 1. *Ruvalcaba* is directly on point.

In *Ruvalcaba*, the plaintiffs owned a single parcel of land which abutted a public road. The plaintiffs sold the portion of their parcel that abutted the public road (“Access Parcel”). This left the plaintiffs with only a landlocked parcel (“Landlocked Parcel”). The plaintiffs subsequently sought a private way of necessity over their neighbors’ properties. The plaintiffs argued “that the steep slope between the Access Parcel and the Landlocked Parcel made it impracticable to build a road for ingress and egress across the Access Parcel.” *Id.* at 5. The defendants

as a party to this lawsuit: Potato Patch already litigated and lost its claims for access over the lower half of WDFW land in 2010 (and lost). As stated above, Potato Patch’s failure to join the WDFW is a complete defense. *See Northwest Greyhound*, 8 Wn. App. at 319; Civil Rule 12(b)(7).

moved for summary judgment dismissal of the plaintiffs' claims. The defendants argued that the plaintiffs "could not establish that an easement was 'reasonably necessary' because they voluntarily landlocked their property." *Id.* The Court agreed with the defendants. The Court held that no reasonable finder of fact could find reasonable necessity where the plaintiffs voluntarily landlocked their own parcel, made claims of reasonable necessity based on the financial impracticability of gaining access via the relinquished parcel, and waited a substantial amount of time before bringing their claims. *Id.* at 8.

Here, Potato Patch seeks to do what the Court expressly rejected in *Ruvalcaba*. Potato Patch purchased the Potato Patch Property (landlocked parcel) along with the Duesing Properties (access parcels). CP 132. The Duesing Properties abut the Potato Patch Property. The Duesing Properties are legally accessed via Bee Mill Road. CP 189-93. Potato Patch used the Duesing Properties to access the Potato Patch Property, and even recorded an easement across the Duesing Properties, which easement gave Potato Patch access to the Potato Patch Property. CP 195-97. These facts are undisputed.

Potato Patch then terminated the easement and sold the Duesing Properties to a third-party. CP 199-201. Having severed the Potato Patch Property from access to a public road, Potato Patch now wants to condemn

a private way of necessity over its neighbors, the Point Whitney Tracts. Indeed, in furtherance of its mistaken claim, Potato Patch makes an argument substantially similar to that of the plaintiffs in *Ruvalcaba*: that it was impractical to build a road from the Duesing Properties to the Potato Patch Property due to a steep slope. CP 260 (“a road could not be built due to the steep slope”). In its oral ruling, the trial court noted that Potato Patch’s relinquishment of access to its own property formed an additional basis for holding reasonable necessity did not exist as a matter of law:

I should have thrown into, as part of my decision, I was very concerned about the fact that [Potato Patch] seemed to have given up any possible access [it] had through Bee Mill [the Duesing Properties] . . . [it] seems to have done damage to [it]self. And I don’t think it’s fair and equitable for [Potato Patch] to then encumber other people because of what [it] has done. RP 45, ll. 7-15.

The trial court did not err in dismissing Potato Patch’s private way of necessity claim because no finder of fact could find reasonable necessity where Potato Patch voluntarily landlocked the Potato Patch Property.

4. Potato Patch’s Claims for Access Over Canyon Creek Road Are Barred by Collateral Estoppel

As a matter of law, Potato Patch’s claims for access over Canyon Creek Road are barred by the doctrine of collateral estoppel. Collateral estoppel precludes relitigation of issues previously decided. *Dunlap v. Wild*, 22 Wn. App. 583, 588, 591 P.2d 834 (1979). “A nonparty to [the] prior adjudication may invoke collateral estoppel defensively against a

party to the earlier action.” *Id.* at 589. For collateral estoppel to apply: “(1) the issue decided in the prior adjudication must be identical with one presented in the action in question; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice.” *Id.* at 590. All elements are easily satisfied in this case.

Here, the issues are identical. Potato Patch sued the WDFW for access over Canyon Creek Road in 2010 and lost on summary judgment. CP 177-78. Having lost its claims against the WDFW, Potato Patch brought suit against the Point Whitney Owners for access over Canyon Creek Road. CP 10-18. The summary judgment dismissal of Potato Patch’s access claims in the 2010 Lawsuit was a final judgment on the merits. Potato Patch was the party or in privity with the party asserting claims for access over Canyon Creek Road in 2010.²¹ Finally, application of collateral estoppel will not work an injustice: Potato Patch knew it had a potential claim for a private way of necessity over Canyon Creek Road

²¹ The Kennells, Potato Patch’s sole members, prosecuted the 2010 Lawsuit in their individual capacity, despite the fact that Potato Patch was the named owner of the Potato Patch Property at the time. CP 161. Potato Patch is nothing more than an alter-ego of the Kennells, and is certainly in privity with the Kennells.

in 2010 and chose not to pursue it. Indeed, Potato Patch has tactically chosen to claim-split. Collateral estoppel bars the relitigation of the issue of whether Potato Patch has access over Canyon Creek Road to the Potato Patch Property—Potato Patch does not. The trial court did not err in dismissing Potato Patch’s private way of necessity claim because Potato Patch’s claim is barred by collateral estoppel.

VI. CONCLUSION

Potato Patch’s claims fail as a matter of law. Although disregarded by Potato Patch on appeal, it is undisputed that the McGrew ROW is landlocked and unconnected to any road. As such, regardless of where the unestablished McGrew ROW exists, Potato Patch cannot use the McGrew ROW to access the Potato Patch Property. Further, it is beyond reasonable dispute that the McGrew ROW is not Canyon Creek Road. Potato Patch cannot transform the McGrew ROW (which, by its express terms, exists on the eastern boundary of the Point Whitney Tracts) into Canyon Creek Road (which undisputedly bisects the middle of Point Whitney Tracts, over 600 feet away). Even if this were not the case (which it is), Potato Patch’s McGrew ROW claim still fails because Potato Patch has failed to join Jefferson County, a necessary party.

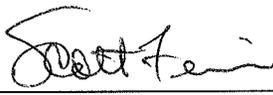
Potato Patch’s private condemnation claim likewise fails as a matter of law because Potato Patch cannot demonstrate it is reasonably

necessary to condemn the Point Whitney Tracts in the absence of access across WDFW land (which is not a party to this lawsuit). That Potato Patch cannot access WDFW land is binding law here because Potato Patch already sued for (and lost) access claims over the lower half of Canyon Creek Road (across WDFW land) in 2010. Nor can Potato Patch demonstrate reasonable necessity where Potato Patch voluntarily terminated its access to the Potato Patch Property. Finally, Potato Patch is collaterally estopped from asserting claims for access rights over Canyon Creek Road, having previously litigated (and lost) those access claims in 2010. A trial on the location of the McGrew ROW and the most “logical” location to establish a private way of necessity cannot cure these fatal defects. Indeed, a trial on these issues would be useless because neither claim provides Potato Patch with access to the Potato Patch Property.

The trial court did not err in granting summary judgment dismissal of Potato Patch’s claims and the trial court’s ruling should be affirmed.

RESPECTFULLY SUBMITTED this 21st day of December, 2017.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

I am 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 **Response Brief of Respondents David Greer and Rita Nielsen, James and Bonnie Stover, and Jennie Mowatt** in the manner noted below:

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DATED this 21st day of December, 2017, at Seattle, Washington.



 Verna M. Garton

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December 21, 2017 - 1:58 PM

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

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