

FILED
Court of Appeals
Division II
State of Washington
3/27/2018 9:57 AM
NO. 49988-6

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

REPLY BRIEF

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I. SUMMARY OF REPLY ARGUMENT

John Kennell and his wife—lifelong owners of property in Jefferson County—bought the potato patch and other nearby properties to pass them down to their daughter one day. The potato patch is, and has always been, landlocked to vehicular access. Consistent with Washington’s overriding public policy to make landlocked property useful, Kennell and his limited liability company, Potato Patch, sought to secure legal *vehicular* access to the potato patch property. That access cannot be accomplished unless Potato Patch is able to cross neighboring properties to the south, where both an access road and a public roadway are located.

Genuine issues of material fact remain for trial on the McGrew right-of-way’s (ROW) location on the Point Whitney Tracts and, alternatively, the location of a private way of necessity over the Point Whitney Tracts. Both claims will enable Potato Patch to obtain complete relief, even if such relief would not (yet) entitle Potato Patch to access its landlocked parcel.

Neither Jefferson County nor the Washington Department of Fish and Wildlife are necessary parties that must be joined under CR 19. But even if they are, the proper remedy is to remand with directions to join those parties—not to sustain the trial court’s dismissal of Potato Patch’s claims with prejudice.

This Court should reverse the trial court’s summary-judgment order and remand because genuine issues of material fact remain for trial on Potato Patch’s claims for declaratory relief and private condemnation.

II. REPLY ARGUMENT

A. **Genuine issues of material fact remain for trial on the McGrew ROW's location on the Point Whitney Tracts.**

Kennell testified by declaration that he did not buy the potato patch on speculation, as Defendants contend. CP 250. But whether Kennell speculated when he bought the potato patch knowing that it lacked legal access is irrelevant because there is an “overriding public policy goal against making landlocked property useless.” *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 8, 282 P.3d 1083 (2012). Defendants cite no authority to support that this policy should be ignored whenever the owners knew before they acquired title that their property was landlocked.

Canyon Creek Road is the only practicable way to reach the potato patch by vehicle. CP 249-50. The Kennells never used, and could not have used, the prior easement over the Duesing properties to access the potato patch by vehicle. CP 249. On rare occasions, they drove down the beach to access their family cabins located on the parcel north of the potato patch, but that was not a legally permitted access. CP 136, 250. Consequently, the Kennells have never had *legal* vehicular access to the potato patch and therefore could not have voluntarily relinquished such access. CP 249-50.

1. **Potato Patch can be awarded complete relief on its claims.**

Potato Patch does not dispute that a 165-foot gap exists between the McGrew ROW and Canyon Creek Road. CP 98-99. But nothing prevents Potato Patch from combining its pleaded legal theories to gain

legal access to its landlocked parcel. For instance, Potato Patch asserted claims for both declaratory relief and private condemnation. Its declaratory-relief claim sought to establish the McGrew ROW's location. Once established, and to the extent the McGrew ROW is not Canyon Creek Road, Potato Patch could use the private-way-of-necessity statute (RCW 8.24.010) to condemn the small 165-foot gap separating the McGrew ROW from the access road on the lower half of the Point Whitney Tracts.

2. Genuine issues of material fact remain for trial whether the McGrew ROW is Canyon Creek Road.

Defendants misrepresent on appeal that Jefferson County “wrote a letter indicating the McGrew ROW was not Canyon Creek Road.” Resp. Br. at 27 n.16 (citing CP 214). That letter stems from an inquiry in 2000 from Bill Duesing to the Jefferson County Public Works Department on the McGrew ROW's status. The letter states:

Public Works has completed the research on the above referenced right of way and has determined that the right of way has not been vacated and is still a matter of record. However, the right of way, based on our research, has never been actually used by the public, and does not connect to any other public facilities or right of way.

Since the right of way has not been used, and does not connect to any public facility, Public Works feels that without other compelling information, we would recommend to the Board of County Commissioners that the right of way be left unopened as it is of no public benefit. However, you can apply to open the right of way and go through the process in order to bring a final disposition of the right of way in question.

CP 214. Nowhere does the letter say that the McGrew ROW is not Canyon Creek Road.

G.F. McGrew conveyed to Jefferson County in fee simple a public right-of-way “for use of the public forever” 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 (emphasis added). A public right-of-way is the same nature as a “public highway”: “It is the right of travel by all the world, which constitutes a way a public highway.” *Roediger v. Cullen*, 26 Wn.2d 690, 692, 175 P.2d 669 (1946).¹

Here, the status or nature of Canyon Creek Road is irrelevant.² The critical fact is that Potato Patch produced evidence to support a reasonable inference that the McGrew ROW became Canyon Creek Road. The deed conveying the McGrew ROW to the County failed to specify its precise location, but did state that it was to follow the eastern boundary of

¹ See also JEFFERSON CTY. PUB. WORKS, OPEN RIGHT-OF-WAY PERMITS, at 2, <http://www.co.jefferson.wa.us/DocumentCenter/View/1013> (last visited Mar. 12, 2018) (“All public right-of-way is open to the public to use whether the road is opened to a full County road standard and maintained by the County, or opened to a reduced standard that will be privately maintained.”).

² Potato Patch may have *unartfully* alleged in its amended complaint that Canyon Creek Road is a “private easement” and a “privately owned property interest.” CP 15. But that evidentiary admission is “not binding.” 5B KARL B. TEGLAND, WASH. PRAC., EVIDENCE LAW & PRACTICE § 801.53 (6th ed., updated electronically June 2017) (citing *In re Estate of Nelson*, 85 Wn.2d 602, 608-09, 537 P.2d 765 (1975), *superseded by statute on other grounds in In re Estate of Black*, 153 Wn.2d 152, 162-62, 102 P.3d 796 (2004), and *Wood v. Thurston County*, 117 Wn. App. 22, 26-27, 68 P.3d 1084 (2003)).

the Point Whitney Tracts “as near as possible except where natural obstacles prevent.” CP 48. Undisputed evidence reflects that natural obstacles on the eastern boundary of the Point Whitney Tracts make it impracticable to build an access road in that location to reach the potato patch. CP 251. That the eastern boundary of the Point Whitney Tracts is over 600 feet away from Canyon Creek Road is by no means proof that it could not be the McGrew ROW. Rather, this demonstrates why fact finding by trial is necessary to determine whether, given the topography, the only practical place for the McGrew ROW is where Canyon Creek Road is located.³ That ROW has never been vacated or abandoned and thus must exist somewhere on the Point Whitney Tracts. CP 205-06.

Because no evidence supported the trial court’s conclusion that the McGrew ROW existed “separate and apart” from Canyon Creek Road, the trial court erred in dismissing Potato Patch’s declaratory-relief claim and concluding that, as a matter of law, the McGrew ROW is not Canyon Creek Road. CP 352; RP (1/13/17) 27.

Further, *Spencer v. Kosir*, 733 N.W.2d 921 (Wis. Ct. App. 2007), is directly on point. In *Kosir*, Spencer sued for a judicial declaration “confirming the existence and validity of [his] easement rights and a determination of an appropriate width and location of the easement.” 733 N.W.2d at 923. *Kosir* affirmed the trial court’s determination *on summary*

³ Stated differently, the question that has not been answered is whether 600 feet (the length of two football fields) is, as the deed for the ROW states, “as near as possible except where natural obstacles prevent” to the eastern boundary of the Point Whitney Tracts. This is inherently a fact question.

judgment that an easement—described as “a right of way for road purposes”—covered the eastern twenty feet of Kosir’s property. *Id.* at 925-26. The trial court in *Kosir* used the same types of factors to determine the location and scope of the easement as the trial court here should have used: locating the easement where it would least affect the servient estate’s property and where the least number of trees needed to be cut. *Id.* at 926.

Defendants attempt to distinguish *Kosir* on the basis that the easement in that case “did not specify the location of the easement.” Resp. Br. at 28 n.18. The conveyance document here also does not specify precisely the McGrew ROW’s location: “the eastern boundary *as near as possible except where natural obstacles prevent[.]*” CP 48 (emphasis added). The trial court here should have performed the same inquiry—and used the same or similar factors as in *Kosir*—to determine the McGrew ROW’s location. By failing to do so, the trial court erred in dismissing Potato Patch’s declaratory-relief claim on summary judgment.

B. Collateral estoppel does not bar Potato Patch’s claims because the issues in the two actions are different.

Collateral estoppel requires: “(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.”
Dunlap v. Wild, 22 Wn. App. 583, 590, 591 P.2d 834 (1979).

Collateral estoppel does not apply because the critical issue decided in the 2010 lawsuit—access to Canyon Creek Road *over the Department’s land*—is indisputably different than the issues here.

In 2010, the Kennells sued the Washington Department of Fish and Wildlife, which owns land directly south of the Point Whitney Tracts, under three theories: prescriptive easement, implied easement, and adverse possession. CP 164-69. The Kennells sought to obtain access to the potato patch either via that portion of Canyon Creek Road on the Department’s property or Bee Mill Road. CP 45, 167-69. The trial court dismissed the Kennells’ claims against the Department for Canyon Creek Road, but granted their claims for beach access to the potato patch via Bee Mill Road. CP 178, 249.

By contrast, Potato Patch here sought a determination on the McGrew ROW’s location and the location and scope of a private way of necessity *on the Point Whitney Tracts*. CP 8-9. Potato Patch did not assert claims against the Department. Nor did Potato Patch’s claims implicate the Department or the Department’s interest in Canyon Creek Road. *See* Resp. Br. at 16 (“It is also undisputed that the McGrew ROW does not cross the land owned by the [Department].”).

While access to Canyon Creek Road was generally at issue in both lawsuits, the specific access here was asserted against different parties, over different property, and under different legal theories. *Compare* CP

10-18 (2015 amended complaint against Point Whitney Tract owners), *with* CP 164-69 (2010 amended complaint against the Department). The issues between the two actions are different, and thus collateral estoppel does not apply.

Further, application of collateral estoppel would work an injustice on Potato Patch. *Dunlap*, 22 Wn. App. at 588. An overriding public policy goal in Washington is to make landlocked property useful. *Ruvalcaba*, 175 Wn.2d at 8. Concluding that collateral estoppel applied here would render Potato Patch's property useless *in perpetuity*.

Nor is Potato Patch engaging in improper claim splitting: filing two separate lawsuits based on the same event. *Ensley v. Pitcher*, 152 Wn. App. 891, 898, 222 P.3d 99 (2009) (distinguishing collateral estoppel's requirement that the issue be litigated from res judicata's more lenient standard where issues that could have been litigated and resolved are barred). Claim splitting is based on the doctrine of res judicata, which Defendants do not assert applies here. *Id.* at 899; *Landry v. Luscher*, 95 Wn. App. 779, 782-83, 976 P.2d 1274 (1999). Regardless, this lawsuit does not present the same claims as the first lawsuit. *Babcock v. State*, 112 Wn.2d 83, 93, 768 P.2d 481 (1989) (stating that the key inquiry is whether the second suit presents the same claim as the first).

The trial court thus erred in granting Defendants summary judgment on the alternative ground that the 2010 lawsuit barred Potato Patch's claims. RP (1/13/17) 43-44.

C. Jefferson County is not a necessary party under CR 19. But even if it is, Potato Patch can join the County as a party on remand.

Defendants assert that Potato Patch’s failure to join Jefferson County—a “necessary” party they claim—dooms Potato Patch’s case. Resp. Br. at 32-33; RP (1/13/17) 23.

As an initial matter, Potato Patch has never conceded that the County must be joined as a party to declare rights under the McGrew ROW. Resp. Br. at 33 (citing CP 253). The McGrew ROW was conveyed to the County for “use of *the public forever* as a public road.” CP 48 (emphasis added). Because the McGrew ROW has never been vacated or abandoned, Potato Patch has every right as a member of the public to use it. CP 205-06. Once the ROW’s location has been established, Potato Patch would have the right to petition the County to open the ROW as stated in the Public Works letter. CP 214; *see also* JEFFERSON CTY. PUB. WORKS, OPEN RIGHT-OF-WAY PERMITS, <http://www.co.jefferson.wa.us/DocumentCenter/View/1013> (last visited Mar. 19, 2018).

RCW 7.24.110 requires a party seeking a declaratory judgment to join all persons who have or claim any interest that would be affected as parties to the litigation. *Town of Ruston v. City of Tacoma*, 90 Wn. App. 75, 81-82, 951 P.2d 805 (1998). Joinder of interested parties in a declaratory-judgment action is generally required. *Primark, Inc. v. Buriens Gardens Assocs.*, 63 Wn. App. 900, 906-07, 823 P.2d 1116 (1992). The

trial court lacks jurisdiction if all necessary parties are not joined. *Treyz v. Pierce County*, 118 Wn. App. 458, 462, 76 P.3d 292 (2003).

A party is necessary if that party's absence would prevent the trial court from affording complete relief to existing parties to the action or would either impair that party's interest or subject any existing party to inconsistent or multiple liability. *Serres v. Wash. Dep't of Retirement Sys.*, 163 Wn. App. 569, 588, 261 P.3d 173 (2011) (citing CR 19); *Treyz*, 118 Wn. App. at 462; *Primark*, 63 Wn. App. at 906-07. That party must have a sufficient interest in the litigation such that a "judgment cannot be determined without affecting that interest." *Primark*, 63 Wn. App. at 906-07.

The trial court can afford Potato Patch complete relief for its declaratory-relief claim even absent the County as a party. Potato Patch asked the trial court in its summary-judgment motion to determine (1) the McGrew ROW's existence, (2) the McGrew ROW's status as a conveyance of fee simple to the public, (3) the McGrew ROW's location, and (4) Potato Patch's rights to the McGrew ROW. CP 31. None of these determinations required the County's participation in the lawsuit because the County would not be prejudiced by a determination in Potato Patch's favor. These determinations would not impair the County's interest in the McGrew ROW or subject it to inconsistent or multiple liability.

But even if this Court considered the County to be a necessary party, dismissal for failure to join necessary parties should generally be without prejudice. *Lakemoor Cmty. Club, Inc. v. Swanson*, 24 Wn. App. 10, 17-18, 600 P.2d 1022 (1979); *see also Williams v. Poulsbo Rural*

Telephone Ass’n, 87 Wn.2d 636, 649, 555 P.2d 1173 (1976) (“[I]t would be inappropriate to dismiss the case without first giving the plaintiff the opportunity to join all the parties essential to this declaratory judgment action.”) (remanding with instructions to dismiss without prejudice unless the beneficiaries are joined as parties), *overruled on other grounds by Chem. Bank v. Wash. Pub. Power Supply Sys.*, 102 Wn.2d 874, 691 P.2d 524 (1984); *Treyz*, 118 Wn. App. at 464 (remanding with directions to dismiss unless the necessary parties are joined within 90 days of the mandate).⁴ This Court may therefore remand this matter to dismiss the complaint without prejudice *unless* the County is joined as a party.

D. Genuine issues of material fact remain for Potato Patch’s private-condemnation claim.

1. Potato Patch produced sufficient evidence to establish reasonable necessity.

Private condemnation is “based on the policy that landlocked land may not be rendered useless and the landlocked landowner is entitled to the beneficial uses of the land.” *Kennedy v. Martin*, 115 Wn. App. 866, 868, 63 P.3d 866 (2003). “The landlocked landowner is given the right to condemn a private way of necessity to allow ingress and egress onto the

⁴ Defendants suggest in a footnote that the Washington Department of Fish and Wildlife and the Luckes are also necessary parties under CR 19. Resp. Br. at 32 n.19, 37-38 n.20. But the Luckes and the Department may be joined as party defendants by Potato Patch on remand. The Luckes were not served with the summons and complaint but may be served if necessary on remand. RP (1/13/17) 5. (Potato Patch voluntarily dismissed the Luckes, the Tinnesands, and Penelope Radebaugh in March 2017 to facilitate appellate review.) Further, Potato Patch’s decision not to join the Department in *this lawsuit* is not a complete defense because the Department is not a necessary party here. See Part II.B for the discussion on collateral estoppel involving the Kennells’ 2010 lawsuit against the Department.

land.” *Id.* “The only requirement is that the owner demonstrate a reasonable need for the easement for the use and enjoyment of his or her property.” *Id.* The necessity need not be absolute but must be reasonable necessity for the use and enjoyment of the condemnor’s landlocked property. *State ex rel. St. Paul & Tacoma Lumber Co. v. Dawson*, 25 Wn.2d 499, 507, 171 P.2d 189 (1946).

Here, the McGrew ROW was relevant to Potato Patch’s private-condemnation claim only to the extent it purported to provide another feasible route over the Point Whitney Tracts. Natural obstacles on the eastern boundary of the Point Whitney Tracts undisputedly make building an access road impracticable in that location. Irrespective of the feasibility of building a road over the McGrew ROW, no road other than Canyon Creek Road currently exists. Geological conditions and slope gradients on the properties to the west, north, and southeast of the potato patch rendered any potential legal access from those properties “ill advised.” CP 66. Potato Patch’s geological expert testified that Canyon Creek Road was the “best and most logical access” to the potato patch. CP 66; *see also* CP 251 (“Canyon Creek Road is the best viable option.”). Potato Patch thus produced sufficient evidence on summary judgment to create fact questions on reasonable necessity and the absence of another feasible route under RCW 8.24.010.

In addition, undisputed evidence reflects that Canyon Creek Road is the most feasible alternative route for a private way of necessity. CP 44-46, 251. Because Defendants produced *no evidence* of another feasible

alternative route, this Court need not apply the “priorities” listed in RCW 8.24.025.⁵ *See Kennedy*, 115 Wn. App. at 869-70.

Potato Patch can be afforded complete relief even if such relief would not immediately allow Potato Patch access to its landlocked property. While Potato Patch currently lacks access over the Department’s property, it intends to obtain that access if it prevails in this case. Defendants cite no authority to support that a landlocked owner must sue simultaneously every landowner over whose property access is required, rather than seek to gain access through separate negotiation or by a separate lawsuit, if necessary. Sustaining Defendants’ argument would be inimical to Washington’s “overriding public policy goal against making landlocked property useless.” *Ruvalcaba*, 175 Wn.2d at 8; *see also* CP 249 (“I was asked numerous times why I didn’t sue everyone at that time. My answer was I was only trying to tackle one issue at a time.”).

The trial court thus erred in orally concluding that, because Potato Patch had yet to secure access to Canyon Creek Road on the Department’s land, then it is unnecessary to encumber the Point Whitney Tracts. RP

⁵ RCW 8.24.025 states:

If it is determined that an owner, or one entitled to the beneficial use of land, is entitled to a private way of necessity and it is determined that there is more than one possible route for the private way of necessity, the selection of the route shall be guided by the following priorities in the following order:

- (1) Nonagricultural and nonsilvicultural land shall be used if possible.
- (2) The least-productive land shall be used if it is necessary to cross agricultural land.
- (3) The relative benefits and burdens of the various possible routes shall be weighed to establish an equitable balance between the benefits to the land for which the private way of necessity is sought and the burdens to the land over which the private way of necessity is to run.

(1/13/17) 38, 43-44. Should this Court reverse and remand, Potato Patch notes that to the extent the McGrew ROW is not Canyon Creek Road and Defendants are concerned about encumbering their property with a ROW that may never come to fruition, the trial court may grant conditional relief and require Potato Patch to secure access over Department-owned land before encumbering Defendants' property with a private way of necessity.

RCW 8.24.010 generally cannot be used to condemn state-owned land. *Jobe v. Weyerhaeuser Co.*, 37 Wn. App. 718, 724, 684 P.2d 719 (1984). A limited exception applies in cases where the easement to be condemned is already existing on state-owned land and owned by a private party. *See State ex rel. Polson Logging Co. v. Superior Court for Grays Harbor Cty.*, 11 Wn.2d 545, 119 P.2d 694 (1941) (allowing a petitioner to condemn a private way of necessity in an existing easement over state-owned land). A party may condemn an existing private easement if otherwise entitled to a private way of necessity. *Jobe*, 37 Wn. App. at 725. This exception still must satisfy the general rule that the easement to be condemned for joint use cannot be expanded or effectuate an increased burden on the servient owner's estate. *Granite Beach Holdings, LLC v. State, Dep't of Natural Resources*, 103 Wn. App. 186, 204, 11 P.3d 847 (2000).

In *Polson*, the Supreme Court held that because the State had already granted a private party an easement over the State's land, the easement was separate from the State's fee interest and thus subject to

condemnation under RCW 8.24.010. The easement condemned in *Polson* provided full access to the petitioner’s land.

Similarly here, the easement that would later become the section of Canyon Creek Road running over the Department’s land to the south of the Point Whitney Tracts existed before the Department bought the land. So if on remand Potato Patch prevailed on its claims against Defendants, and the Department is thereafter unwilling to grant Potato Patch access, RCW 8.24.010 would provide Potato Patch a means to condemn a right to use the portion of Canyon Creek Road located on the Department’s land, and thereby gain full access to its property.

Thus, Potato Patch’s claims are not “purely hypothetical speculation,” as Defendants contend, but would ultimately give Potato Patch legal access to its property—an overriding public-policy interest in Washington. Resp. Br. at 37. The relief sought by Potato Patch would not unduly expand the number of parties that may use Canyon Creek Road and the purposes for which the road would be used: Kennell made clear in his declaration that he does not intend to build a large development on the Potato Patch. See *Granite Beach*, 103 Wn. App. at 204; CP 44, 46, 250-51.

2. Potato Patch did not voluntarily landlock its property.

Defendants rely on the Supreme Court’s recent decision in *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 282 P.3d 1083 (2012), to argue that Potato Patch’s claims are barred because Potato Patch

supposedly voluntarily landlocked its property. *Ruvalcaba* is easily distinguishable.

The Court in *Ruvalcaba* was careful not to adopt a bright-line rule “automatically preclud[ing] a private way of necessity any time a landowner voluntarily landlocks his or her own parcel.” 175 Wn.2d at 7-8. Instead, the Court limited its holding to that case’s particular “set of factual circumstances.” *Id.* at 8. Because the Ruvalcabas had landlocked their own parcel, made claims of reasonable necessity based on financial impracticability, and waited approximately 35 years to bring a condemnation action, the Court held that no reasonable finder of fact could find reasonable necessity. *Id.*

Unlike in *Ruvalcaba*, the potato patch parcel is, and has always been, landlocked with no practical road access, legal or otherwise. CP 250. In 2011, Kennell recorded an easement for *beach access* across the Duesing properties to the potato patch, but that easement never gave Kennell “legal road access” to the potato patch. CP 195-97, 249-50. In fact, Potato Patch’s geological expert testified by declaration that it was impossible to engineer road access from the Duesing properties to potato patch, even though the parcels were adjacent to each other. CP 66. Potato Patch thus could not have created practical road access, despite owning contiguous properties, and Kennell was only able to use the prior easement over the Duesing properties to access the potato patch by foot along the beach. CP 249-50. Therefore, unlike in *Ruvalcaba*, when Kennell was forced to give up the beach-access easement as a condition of selling the

Duesing properties in 2014, Kennell did not voluntarily landlock the potato patch. CP 132, 250.

Further, Kennell did not wait anywhere near 35 years to bring a condemnation action. (The Kennells bought the potato patch and the Duesing properties at the same time in 2010. CP 132, 199-201.) And Potato Patch’s reasonable-necessity argument was premised on *geographical* impracticability—not financial impracticability, which was rejected by the court in *Ruvalcaba*—of building a road to access the potato patch. CP 68-70.

The trial court thus erred in its oral ruling granting Defendants summary judgment on the alternative ground that Kennell had abandoned legal access to the potato patch. RP (1/13/17) 45.

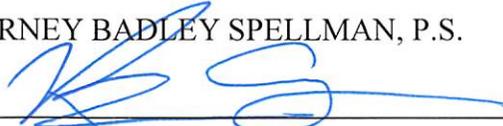
III. CONCLUSION

The trial court improperly granted Defendants summary judgment by applying the wrong summary-judgment standard and because genuine issues of material fact remain for trial on the McGrew ROW’s location and on reasonable necessity for Potato Patch’s private-condemnation claim. To the extent this Court deems the Department or the County “necessary” parties under CR 19, this Court may remand this matter to the trial court for Potato Patch to join those parties if feasible.

Respectfully submitted: March 27, 2018.

CARNEY BADLEY SPELLMAN, P.S.

By


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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:

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DATED: March 27, 2018.



Patti Saiden, Legal Assistant

CARNEY BADLEY SPELLMAN

March 27, 2018 - 9:57 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

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