NO. 89348-9

SUPREME COURT OF THE STATE OF WASHINGTON

MIKE WALCH and MARCIA WALCH, husband and wife,

Petitioners,

v.

KERRY A. CLARK and PATRICIA L. CLARK, husband and wife; W.L. CLARK FAMILY, LLC, a Washington Limited Liability Company; ROBERT C. FOLKMAN and PATRICIA FOLKMAN, husband and wife,

Respondents.

THE CLARKS' ANSWER TO PETITIONER WALCHES' PETITION FOR REVIEW BY THE SUPREME COURT OF WASHINGTON **(ERRATUM SUBMISSION)**

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I. IDENTITY OF ANSWERING PARTY AND OVERVIEW OF ANSWER

The answering party/respondents are Kerry A. Clark and Patricia L. Clark, husband and wife, and the W.L. Clark Family, LLC, a Washington limited liability company (collectively "Clarks"), who were defendants at trial and respondents in the Court of Appeals. Clarks hereby answer the Petition for Review filed by Mike Walch and Marcia Walch, husband and wife ("Walches") in order to (1) restate and clarify the issue presented for review by Walches; (2) correct certain factual errors set forth in Walches' Statement of the Case; and (3) respond to certain unsupported assumptions and misstatements of the law in Walches' Argument Why Review Should be Accepted.[1]

II. RESTATEMENT OF THE ISSUES PRESENTED FOR REVIEW BY WALCHES

The Court of Appeals' unpublished opinion upheld the trial court's ruling that Walches had "not established a reasonable necessity for a private way of necessity because their property is not landlocked and because they have no

[1] Clarks do not assign error to that part of the Court of Appeals' Opinion upholding the trial court's decision dismissing Walches' claim of a statutory easement by necessity. Clarks do, however, seek review of the Court of Appeals' Opinion reversing the trial court's award of attorney fees to Clarks on their defense of Walches' common law easement claims, because they involved a common core of facts and related legal theories with Walches' statutory easement claim. *See* Clarks' pending Petition for Review of the Court of Appeals' decision on the attorney fees award.

guarantee that a future use of their property would include situating the RSE, Inc. manufacturing business on the property." *See* Court of Appeal's Opinion at 5-6. The Supreme Court has already established that Washington's private condemnation statute, RCW 8.24.010, cannot be invoked to condemn an access for future real estate development where existing access allows a landowner to make beneficial use of his or her real property.

In *Brown v. McAnally*, 97 Wn.2d 360, 644 P.2d 1153 (1982), after noting that RCW 8.24 "is not favored in law and thus must be strictly construed", the Court made clear that "[t]he taking is limited to necessary ingress and egress only"; therefore "[i]t is not extended to those necessities that may be created by the contemplation of a future real estate subdivision development." *Id.* at 370. Under *Brown*, because Walches have existing physical access to make beneficial use of their property for a variety of purposes, they cannot seek an easement by necessity solely to accommodate their super-load lowboys and to develop their presently vacant land for a singular conditional use, the permit for which may never be granted. *See also, Jobe v, Weyerhauser Co.*, 37 Wn. App. 718, 726, 684 P.2d 719 (1984), *review denied*, 102 Wn.2d 1005 (1984) (proposed easement for ingress and egress for purposes of developing property, where existing access exists, grants far more than a private way of necessity as

contemplated by the state constitution and RCW 8.24).

There is, therefore, only one issue of first impression in this state presented by Walches' Petition for Review that involves a significant question of law or an issue of substantial public interest warranting review under RAP 13.4(b), which is this: Where existing access allows a landowner to make beneficial use of his or her property, does the fact that the access traverses a railroad crossing, for which only a revocable crossing permit can be obtained, render the property "landlocked", thus allowing the landowner to condemn a second access under Washington's private condemnation statute, chapter 8.24 RCW?

"Although the Washington Constitution generally prohibits the taking of private property for private use, such property may be taken for the creation of a `private way of necessity'. Const. art. 1, §16 (amend. 9). Since the constitutional provision is not self-executing, RCW 8.24 fleshes out the constitution and more fully declares the conditions under which private property may be condemned for a `private way of necessity'." *Brown*, 97 Wn.2d at 366. By answering the issue stated above, the Court can further flesh out the scope of RCW 8.24, and settle the yet unanswered question of whether a revocable railroad crossing license or permit renders property "landlocked", thus allowing the

affected landowner to condemn a second access under RCW 8.24.010.

Concurrently, by accepting review, the Court can also resolve the following issue of first impression in this state: *whether a trial court has discretion* under RCW 8.24.030 -- which, unlike RCW 8.24.010, is to be broadly construed -- to award attorney fees on common law easement claims included as alternative theories of relief in an action to condemn a private way of necessity, where the trial court finds that the common law and statutory easement claims involve a common core of related facts and legal theories. Stated another way, does RCW 8.24.030 contain a *per se* mandate requiring fee segregation whenever both common law and statutory easement claims are asserted in the same action. *See* Clarks' Petition for Review, filed September 23, 2013, and Folkmans' Petition for Review, filed September 24, 2013.

III. CORRECTING WALCHES' STATEMENT OF THE CASE

Page 4 of Walches' Petition for Review states: "The Walches did attempt to obtain a railroad crossing and access directly to the North of their property, but BNSF refused to consider any additional unguarded railroad crossings (RP Vol. II [5/11/11], p. 46)." Walches' citation to the record, how-

ever, does not support this statement.[2]

Walches have never applied for a railroad crossing license or permit for Owens Road, despite the fact that the issuance of such a permit would provide them with insurable legal access. RP (5/11/11) at 43; Ex. 1; CP at 21. Walches admit this fact in the following statement, at the bottom of page 6 of their Petition: "The Walches have not sought a revocable permit to cross the railroad at the Owens Road Private Crossing." Nonetheless, in an earlier conflicting statement, also at page 6 of their Petition, Walches state: ". . . the Walches do not have a revocable BNSF permitted easement for access to their property, *and BNSF was not willing to grant a revocable easement along its corridor* (RP Vol. II [5/11/11], pp. 4-5; & Ex. 9)." (Italics added.)

Once again, Walches' citations to the record do not support their statement, nor does it find support anywhere else in the record. Walches' citations at best stands for the proposition that they have no permanent easement; therefore, they are not able to get their access insured *at this time*. A revocable railroad crossing permit would solve Walches' "legal" access issue. RP (5/11/11)

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[2] At RP (5/11/11) 46-47, the trial court struck Mike Walch's statement, "[w]e were told that the Railroad would not do it", given in response to a question asking whether Walches ever filed an application with the railroad to allow temporary ramps to be constructed to haul equipment to their property over the railroad right-of-way.

at 43; Ex. 1; CP at 21. It would likewise cure Walches' unsupported statement at trial, that they could not get bank financing to construct their manufacturing facility because they lack insurable access. *Id.*

At page 4 of their Petition, Walches again misstate the record by asserting "[t]he parties stipulated that Walches' legal access does not include the railroad corridor two hundred feet (200') North and South of the centerline and that no permits exist for the Walches or the City of Cle Elum to cross the BNSF railroad corridor or private crossing." Walches' citations to the record, however, establish that the stipulation was limited to this: No *presently existing* recorded crossing permits exist; however, *this does not mean one cannot be obtained.* RP (5/10/11) at 3-5. Indeed, Kerry Clark and the Folkmans were previously able to obtain crossing permits from BNSF. RP (5/11/11) at 85; 94-95; CP at 990. And there is no bar to Walches obtaining a permit.

IV. WALCHES' ARGUMENT CONTAINS UNSUPPORTED ASSUMPTIONS AND INCORRECT STATEMENTS OF THE LAW

A. Walches' Property Has Not Been Rendered Useless by the Appellate Court's Decision.

Walches argue: "The effect of the Appellate Court's decision basically renders the Walch property useless." Walches' Pet. at 8. This argument depends upon the unfounded assumption that Walches cannot make any benefi-

cial use of their property with its existing access. The record, however, belies their argument. RP (5/10/11) at 108-109; Ex. 106.

B. The Court of Appeals' Decision Does Not Conflict With The Supreme Court's Decision in *Brown v. McAnally*.

At pages 9-11 of their Petition, Walches argue that the Court of Appeals' decision runs afoul of the Supreme Court's decision in *Brown v. McAnally*, wherein the court "recognized that if one is otherwise entitled to a private way of necessity, it may be condemned where an existing private way is already established." *Id.* at 367. Walches' reliance on *Brown* is fatally flawed, for two reasons: first, the easement by necessity must be along the same route as the existing private way; second, "the joint use of the private way of necessity must not differ from and must not be incompatible with the use to which it is already being put by the condemnees." *Id.* at 367-68.

Here, Walches' existing access is the easterly route along Owens and Dalle Roads; they have no existing access or permission to use the proposed westerly route through the Clark and Folkman properties that they sought to condemn at trial. Moreover, there is no existing easement or road over this route, and its use for access by Walches' super-load lowboys would be incompatible with and impair the existing use of the Clark and Folkman properties. *See*, e.g., RP (5/11/11) at 79-80, 110-116, 140-143.

Walches' argument -- that *Brown* allows them to condemn a private way of necessity over the Clark and Folkman properties, because they or their predecessors used an alleged road over those properties -- demonstrates why the trial court correctly awarded Clarks and Folkmans their attorney fees on the common law easement claims asserted by Walches as alternative theories in their action to condemn a private way of necessity. From the inception of this case, through trial and post-trial proceedings and on appeal, Walches sought to establish the existence of an access road along the alleged Dalle Road Extension (the route they sought to condemn at trial), which they claim was historically used to haul heavy equipment similar to their super-load lowboys. *See*, e.g., CP 1-63, 214-15, 217, 234; RP (5/10/11) at 16-19, 52, 58, 61-65, 106-107; RP (5/11/11) at 24-27, 32-33, 61-62, 64; Ex. 53. Disproving the existence of this road, or a previously established prescriptive easement in its location, was thus critical to Clarks' and Folkmans' defense of both the statutory and common law easement claims asserted by Walches. *See* CP at 441, 450, 452-53.

C. The Court of Appeals' Decision Does Not Conflict With an Existing Federal Statute and a Prior Decision of the Washington Supreme Court Holding That a Party Can Never Obtain a Prescriptive Right to Cross Railroad Land.

Walches argue that, because they can never establish legal access over the railroad crossing by prescription under federal and Washington state law,

they are "landlocked" for purposes of bringing a private condemnation action under chapter 8.24 RCW. *See* Walches' Pet. at 11-13. Although Walches correctly note that, in order to obtain a prescriptive easement over the railroad crossing, the prescriptive easement must have ripened into a complete title by adverse possession prior to 1904, they never established at trial, or otherwise, that a prescriptive easement over the BNSF railroad corridor bisecting Owens Road had not been established prior to 1904; they simply make this assumption. There is no evidence in the record to establish when Owens Road was first created, when it was first used as access to the land now owned by Walches, and when the railroad crossing was installed.

Moreover, although these issues of fact might be germane if this case were remanded to the trial court for further proceedings, they are of no consequence to the primary issue presented if Walches' Petition for Review is granted; that is, whether the existence of a revocable railroad crossing license or permit along a route that provides access that allows a landowner to make beneficial use of his or her real property renders the property "landlocked", thus allowing the landowner to invoke chapter 8.24 RCW to condemn a second access. It is this issue alone that either raises a significant issue of law under the Washington Constitution, or involves an issue of substantial public interest that

should be resolved by the Supreme Court. *See* RAP 13.4(b). All other issues -- whether a prescriptive easement had been established prior to 1904, whether Walches' existing access is insufficient to accommodate their super-load low-boys, and whether their future commercial development plans for their presently vacant land may or may not be allowed -- are fact-specific and do not warrant Supreme Court review.

D. The Appellate Court's Interpretation of "Reasonable Necessity" Does Not Impose an Unreasonable and Costly Burden on Walches.

Walches argue that the Court of Appeals' decision places an undue burden on them to first demonstrate that their future use of their property would be allowed before they can condemn an easement by necessity over a second route. This case-specific argument is a red herring. The City Administrator for Cle Elum, Matt Morton, testified that Walches' intended future use of their property was "a conditional use" and there was no guarantee that, without having an actual land use application, Walches could get approval for their intended use of the property. RP (5/10/11) at 90.[3]

Walches' argument -- that the permitting process is merely "ministerial in nature" -- is without merit. To begin with, Walches have never filed a land

[3] At page 14 of their Petition, Walches incorrectly state that, "Morton indicated it was premature to give an opinion as to whether the use would be a conditional use".

use application, or for a permit of any kind, for their property, which they described as being critical for fish, wildlife, and recreation. RP (5/10/11) at 89; RP (5/11/11) at 34-38; Ex. 109. Walches' argument, therefore, rests upon abject speculation. Moreover, it is well-established "that the grant or denial of a special or conditional use permit is adjudicatory in nature." *Kelly v. Chelan County*, 157 Wn. App. 417, 425, 237 P.3d 346 (2010). "That is, the legislative body has discretion to issue the permit or not." *Id.*

Until Walches file a land use application that complies with the City of Cle Elum's then-existing land use regulations, they have no right whatsoever to develop their property. *Id.* at 424. The City of Cle Elum may well deny Walches' land use application, or impose such restrictions on it that Walches decide it is not cost-effective to pursue it. In short, Walches cannot establish the element of "reasonable necessity" without first establishing that the necessity is based upon a lawful use of their land.

E. Petitioners' Trespass Argument is Without Merit.

At pages 18-20 of their Petition, Walches argue that the Court of Appeals' interpretation of "reasonable necessity" requires them to trespass over the BNSF railroad corridor. This argument is also without merit. Although Walches correctly note that trespass involves the unlawful entry onto land of

another, permissive entry onto such land negates the alleged trespass. *Bradley v. American Smelting & Ref. Co.*, 104 Wn.2d 677, 682, 709 P.2d 782 (1985). Here, Walches' predecessors-in-interest (the Dalle family) had been using the Owens Road railroad crossing to access their property for at least 80 years before it was sold to Walches in 2004. CP at 447, 825-26. The railroad crossing is also used by the City of Cle Elum to access its regional wastewater treatment plant, Peninsula Trucking to access its business, and by other landowners who must access their property over this route. CP at 247, 447; RP (5/10/11) at 109, 130-31. The evidence in the record, therefore, leads to the inescapable conclusion that the Owens Road railroad crossing has been permissively open for both public and private use, thus negating Walches' trespass theory.

The City of Cle Elum also made clear that, if the railroad crossing were ever closed, the City would appeal the closure; further, if the appeal were unsuccessful, the City would provide alternative access. RP (5/10/11) at 135-36. There is, moreover, no evidence that the railroad company ever intends to close the Owens Road crossing. CP at 989. And Walches purchased their property with full knowledge that its existing access was not suitable for their super-load lowboys. CP at 488-491; RP 5/11/11 at 32; Ex. 1.

Finally, even though Owens Road lying south of the railroad corridor is

a private road, Walches' access to Dalle Road, and then to their property, does not require them to use that portion of Owens Road. *See* Appendices A and B to Walches' Petition for Review. And even if Walches did need to use a portion of a private stretch of Owens Road to access their property, they may have an easement by prescription over this route; if not, they can condemn an easement over it. *See Brown*, 97 Wn.2d at 367-38.

IV. CONCLUSION

The only issue presented by Walches that arguably poses a significant question of law under the Washington State Constitution, or an issue of substantial public interest that should be determined by the Supreme Court, is simple and straightforward: Where existing access allows a landlord to make beneficial use of his or her property, is the property "landlocked", thus allowing the landowner to condemn a second access, where the existing access crosses a railroad right-of-way for which only a revocable crossing permit or license may be obtained? All other issues presented by Walches in their Petition for Review turn on case-specific facts of no constitutional or state-wide significance.

DATED this 24th day of October, 2013.

Respectfully submitted,

LATHROP, WINBAUER, HARREL,
SLOTHOWER & DENISON, LLP

By: _____

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CERTIFICATE OF SERVICE

I certify that on the 24th day of October 2013, I caused a true and correct copy of this document to be served on the following in the manner indicated below:

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OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, October 24, 2013 3:55 PM
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From: Kimberly Bailes [mailto:kbailes@lwhsd.com]
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Subject: Clark v. Walch, Supreme Court No, 89348-9, Erratum Submission of The Clark's Answer to Petitioner Walches' Petition for Review by the Supreme Court of Washington

Please find attached, for filing with your court in the matter of *Walch v. Clark, et al*, Supreme Court Cause No. 89348-9, the following document:

- The Clarks' Answer to Petitioner Walches' Petition for Review by the Supreme Court of Washington **(Erratum Submission)**

which is being submitted to correct a scrivener's error at page 7, second line from the bottom of the page, correcting "Walch" to "Clark". Otherwise there are no other changes.

Thank you for your assistance.

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