No. 301290-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

MIKE WALCH, et. al.,

Appellants

v.

KERRY A. CLARK, et. al.,

Respondents.

APPELLANTS' REPLY BRIEF

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ARGUMENT

I. The Walch Property Is Landlocked; Walch Have No Existing Legal Access And Therefore Are Entitled To An Easement By Necessity Pursuant To RCW 8.24.010.

The legal question to be decided by this court is whether the complete lack of legal access to real property satisfies the reasonable necessity requirements of RCW 8.24.010 et seq. Much attention has been focused on such things as railroad permits, zoning requirements, engineering studies, land use permits, and lowboys. Basically, it really does not matter what type of vehicle Walch might want to drive to their property; it does not matter what future development might be made of their property, or whether certain permits might be required; nor does it matter whether the ponds might be protected habitats. The core and essential question that determines the outcome of this case is whether the Walch property is landlocked and whether Walch have legal access to their property? The answer to the latter question is a resounding "**No.**" Even if Walch wanted to walk to their property carrying nothing more than a picnic basket, they could not do so without trespassing on adjoining land. This is the point erroneously disregarded by the Trial Court below. That is why the Trial Court decision must be reversed.

A. Easterly Dalle Road Route

To physically access the Walch land one travels from First Street (Highway 903) in the City of Cle Elum heading South on Owens Road (App. A, Ex. 45 and App. B, Ex. 54).

* At the point Owens Road intersects with the North edge of the BNSF railroad corridor, Owens Road ceases to be a public road (RP Vol. I, pp. 125-26; Exs. 54 & 57). Walch have no easement over Owens Road across the BNSF railroad corridor or the continuation thereof South of the BNSF railroad corridor. The City of Cle Elum owns no easement over the next portion of Owens Road to the South of the BNSF railroad corridor (Ex. 58).

* Proceeding South, the private Owens Road enters the BNSF railroad corridor. The parties stipulated, and the court found, that there are no public or private permits for the use of any portion of the BNSF railroad corridor, nor has BNSF granted any public or private permits to use the Owens Road railroad crossing (RP Vol. I, 4-5; *see also* RP Vol. I, p. 16, 127 & 130; Exs. 1, 9 & 54). Walch have no legal right to use any portion of this road or property.

* Immediately after the BNSF railroad crossing, and still within the railroad corridor, one would turn right (West) onto what is referred to as Dalle Road, a private road (RP Vol. I, p. 129). Dalle Road continues within the BNSF railroad corridor until it reaches the Northerly boundary of the Dalle land. Walch have no legal *right* to use the portion of Dalle Road within that corridor; any use is at the sufferance of the BNSF railroad. (RP Vol. I, 4-5; *see also* RP Vol. I, p. 16, 127 & 130; Exs. 1, 9 & 54).

Attached as Appendix "A" are the five (5) photographs included in Appendix 2 of Respondents Clark Brief. A-1 shows the *public* portion of Owens Road looking North from the BNSF railroad corridor. A-2 shows the *private* portion of Owens Road within the BNSF railroad corridor and South of the BNSF railroad corridor. It also shows the beginning of Dalle Road located within the BNSF railroad corridor. A-3 shows the entire portion of the BNSF railroad corridor crossing within the BNSF railroad corridor. A-4 shows the beginning of the *private* Dalle Road just South of the BNSF railroad corridor. A-5 shows the gate where Dalle Road meets the boundary of the Walch property.

Thus, from the Northern edge of the BNSF railroad corridor, Walch must trespass over the BNSF railroad corridor and then trespass on the BNSF

railroad crossing via Dalle Road, in order to reach a public roadway which begins North of the BSNF railroad corridor. And, although Walch have an the alternative, contingent easement route should the Dalle Road section in the BNSF railroad corridor be withdrawn, this alternative does not resolve the issue. Walch would still have to trespass on a *private* portion of Owens Road, then, trespass on the BNSF railroad corridor crossing to reach a public roadway.

B. Easterly Contingent Route

The contingent route, outlined in Schedule B of the Walch Real Estate Contract (Ex. 1) and supposedly available "should the railroad no longer allow access" through the BNSF railroad corridor is legally insufficient as well. First, that route ends before it connects to Owens Road (BNSF Short Plat, Ex. 54). Second, at the point of intended connection, Owens Road is a private road which neither the City, the public, nor Walch has any legal right to use (RP Vol. I, p. 126). A *critical* point is that Owens Road is a private road beginning at the North side of the BNSF railroad corridor, running South over the tracks and beyond the BNSF railroad corridor all the way through Section 25 to the North edge of Section 36 where it continues a short distance before being terminated by Interstate 90. Even the City of Cle Elum does not

have an easement for that section of Owens Road. The City of Cle Elum's easement to the waterworks plant *commences* just South of the North line of Section 36 on the East side of the *private* Owens Road and proceeds Easterly (RP Vol. I, p. 130, lns 11- 16; BNSF Short Plat Ex. 54). Even if the *private* portion of Owens Road were a legal route for Walch, which it is not, it nonetheless bisects the BNSF railroad corridor and necessitates the use of the BNSF railroad crossing and BNSF railroad corridor to reach a public road (BNSF Short Plat Ex. 54, App. B). Again, Walch cannot reach their land without trespassing on the *private* lands of third parties and the BNSF railroad corridor.

At best, the Easterly routes to the Walch property exist merely at the indulgence or sufferance of the BNSF railroad corridor and the owners of the *private* portions of Owens Road. The need to wait for a denial or withdrawal of access was an unnecessary condition imposed by the Trial Court. No such prerequisite exists. Under the Washington Supreme Court's decision in *Brown v. McAnally,* 97 Wn.2d 360, 644 P.2d 1153 (1982), an access route created by a permissive use does not by itself prevent a later private condemnation claim under RCW 8.24.010. Nor does any existing contract right. *See State ex rel. Polson Logging Co. v. Superior Court,* 11 Wn.2d 545,

119 P.2d 694 (1941) (a private way of necessity for a logging road may be condemned, even though the petitioner already has a lease of that road for a period of time; the right to condemn may be exercised under the Washington Constitution Art. 1, § 16 and statute without reference to contract rights).

To condemn a private easement by necessity a landowner must only demonstrate a *reasonable* need for the easement for the use and enjoyment of his property. *Hellberg v. Coffin Sheep Co.* 66 Wn.2d 664, 666-67, 404 P.2d 770 (1965); *Kennedy v. Martin*, 115 Wn. App. 866, 63 P. 3d 866 (2003). Respondents argue that the necessity must exist at the time the private condemnation proceeding was commenced (Respondent Clarks' Brief at 12). That is the precise situation here: the Walch property is landlocked, with or without legal access. This fact alone clearly establishes a necessity per se. The Trial Court erred in finding otherwise.

C. Speculation About Potential Uses Or Potential Means to Acquire Alternative Access Does Not Defeat The Present-Existing Necessity.

To argue, as Respondents do, that Walch may enjoy many beneficial uses of the property under zoning ordinances is basically irrelevant. Walch must be able to legally reach their land before <u>*any*</u> use may be made. Without access, seeking land use permits, developing site plans, obtaining

bank financing or any other similar development activities are unnecessary and futile tasks. Walch was not required to prove that their intended potential use was guaranteed – Walch was required to prove that they lacked legal access to their property, and without such access, no "proper use and enjoyment" could be made. RCW 8.24.010. That they did, without question.

Moreover, the failure to obtain a BNSF railroad crossing permit is not fatal – such a permit will not resolve the permanent legal access problem. Railroad crossing permits are by their very nature permissive and terminable. Respondent Kerry Clark testified that he was familiar with BNSF railroad crossing permits and easement permits, and that such easements and permits contain language providing that they are permissive and terminable at the will of the railroad. (RP Vol. II, p. 129, ln 23 – p.130, lns.19). Likewise, Folkman recognized that his easement on BNSF property was terminable at will (RP Vol. II, p. 85,lns 15-24).

It is patently inaccurate to compare the Owens crossing to the Oakes Avenue crossing, for which the City of Cle Elum has an express crossing agreement (CP 117-122) and which is safeguarded by signals and crossing bars (RP Vol. I, p. 29, lns. 11 – 17) with the unpermitted crossing connecting with the *private* portion of Owens Road South of the BNSF railroad corridor.

No one has a permit to cross the Owens Road crossing and BNSF railroad corridor, *and the parties so stipulated* (RP Vol. I, pp 4-5; *see also* RP Vol. I, pp. 79 & 125-126).

Respondents' argument that BNSF cannot unilaterally close the Owens crossing is wrong. First, Owens Road is not a "public highway" where it crosses the railroad tracks. As discussed *supra,* Owens Road is a *private* road beginning on the North side of the BNSF railroad corridor running South through the corridor, over the tracks, continuing South of the corridor on private property and to the water treatment plant. The City of Cle Elum has an easement for a portion of the road beyond the corridor as described above, but the road through the BNSF railroad corridor and continuing South thereof is strictly *private.* In fact, the City of Cle Elum maintains a gate across its easement near the treatment plant facility (RP Vol. I, p. 130, ln 22 – p. 131, ln. 4). Second, neither the State of Washington, the Utilities and Transportation Commission, the City of Cle Elum nor Walch have the ability to compel BNSF to provide such access – the land is subject to Federal, not State, jurisdiction. *State of Washington v. M.C. Ballard*, 156 Wash. 530, 287 P. 27 (1930) (citing *Northern Pacific R. Co. v. Ely*, 197 U.S.

1, 49 L. Ed. 639, 25 S. Ct. 302 (1905) and *Northern Pacific R. Co. v. Concannon*, 239 U.S. 382, 60 L. Ed. 342, 36 S. Ct. 156 (1915).

Walch cannot access their property without trespassing on the land of *private* third parties and the BNSF railroad. They have no legal access through the BNSF railroad corridor, over the railroad crossing or over the *private* portions of Owens Road. Under these circumstances, an easement by necessity is authorized pursuant to Wash. Const. Art. I, Sec. 16 and RCW 8.24.010.

II. Condemnation Of The Easement By Necessity Is Not Barred By The Doctrines Of Estoppel And Laches.

The mere fact that Walch purchased landlocked property does not estop them from seeking an easement by necessity pursuant to RCW 8.24.010. In *Olivo v. Rasmussen*, 48 Wn. App 318, 321-2, 738 P.2d 333 (1987) a landowner opted to keep property knowing he would be landlocked rather than allow the State to take all of his property by condemnation. Thereafter, he was able to condemn a private way of necessity over a neighbor's property in spite of making this knowing election; estoppel was held specifically not to apply. Also, in *State ex rel. Polson Logging Co. v. Superior Court for Grays Harbor County, supra,* 11 Wn.2d 545, 568, 119

P.2d 694 (1941) the existence of an agreement giving a timber company an easement under contract for a logging road over route for a specified period of time did not estop timber company from condemning way of necessity for a permanent easement over the same route.

Whether to the East via the *private* portions of Owens Road and the BNSF railroad corridor or West across the Clark and Folkman lands, Walch must condemn a private way of necessity in order to gain legal access to their land. As discussed above, the Easterly route is legally impossible as it would require condemnation of BNSF railroad land. The Westerly route was chosen because it gave more direct access to the Walch property via the Oakes Avenue crossing, a crossing with gates and signal, and for which the City of Cle Elum has an express crossing agreement.

Generally, a condemnor has a right to select the route which, according to his own views, is reasonably necessary for the full enjoyment of his land. *Wagle v. Williamson*, 51 Wn. App. 312, 315, 754 P.2d 684 (1988), appeal after remand, 61 Wn. App. 474, 810 P.2d 1372 (1991). Once a necessity is established, the potential condemnee may demonstrate the existence of a feasible alternative. *Kennedy v. Martin, supra.* However, merely showing the existence of a feasible alternative does not, in and of

itself, rebut the necessity; the relative merits of the two routes must be considered. *Wagle*, 51 Wn. App. at 316-17 (court should have considered the relative feasibility of the two routes, the cost of construction and maintenance, and the burdens imposed in the selection of routes). If the alternative route proposed requires the joinder of nonparties, that fact can be evidence of necessity supporting the condemnor's choice. The court in *Sorenson v. Czinger*, 70 Wn. App. 270, 852 P.2d 1124, *review denied*, 122 Wn.2d 1026, 866 P.2d 40 (1993) noted that:

> Nevertheless, evidence showing an alternative route would require the condemnation of property whose owners were not parties to the proceeding was held sufficient to show the necessity for the route selected by the condemnor in *State ex rel. Wheeler v. Superior Court*, 154 Wash. 117, 281 P.7 (1929); s*ee State ex rel. Stephens v. Superior Court,* 111 Wash. 205, 209, 190 P. 234 (1920) (questioning whether an alternative route over the property of nonparties could be considered by the court).

70 Wn. App. at 276. Respondents did not join any property owner to the East of the Walch property, nor did it join the BNSF railroad as a party to this suit. Implicit in that choice was the recognition that condemnation of the Easterly route was not feasible, or legally possible.

The fact that the Respondents have improved their property does not preclude the condemnation of the easement. First, there is no requirement in

RCW 8.24.010 et seq. that restricts private condemnation to undeveloped land. Second, the statute provides for compensation. Pursuant to RCW 8.24.030, the procedure to be followed for private condemnation of ways of necessity is the same that is to be followed for the condemnation of property by railroad companies: RCW 8.20.010 et seq. *See Taylor v. Greenler*, 54 Wn.2d 682, 344 P.2d 515 (1959). Once a necessity is established, the judge may enter an order directing that a jury be summoned to determine the compensation to be made for the land (unless a jury is waived as in other civil cases in courts of record). RCW 8.20.070.

Third, evidence at trial showed that space was adequate without relocating improvements to accommodate the easement. For example, even if relocation of an improvement was required, the lease with Clark's tenant, Marson, requires that the building and foundation be removed at the end of the term (RP Vol. II, p.120). Clark testified it would be possible to relocate the storm water drainage (RP Vol. II., pp.125-126). And, there is a 43-foot distance, plus and 10-foot buffer between the nearest building and the edge of the pavement where the proposed easement would be located (RP Vol. II, p.121). The principles of laches and estoppel simply do not apply to this case.

III. Respondents Failed To Appeal The Trial Court's Decision Declining To Review The Motion To Dismiss On Jurisdictional Grounds; The Land Use Protection Act Does Not Apply.

The Trial Court expressly declined to rule on Folkmans' Motion to Dismiss on jurisdictional grounds based on Walches' alleged failure to properly pursue its administrative remedies and the remedies under the Land Use Petition Act (LUPA) (Conclusion of Law 6, fn. 3, CP 451). Respondents did not appeal that decision pursuant to RAP 2.4. Therefore, Appellants Walch move to strike that portion of Folkmans' brief pertaining to those issues and arguments.

Without waiving Respondents' failure to appeal, Walch nonetheless were not required to file any administrative or LUPA appeals of the City of Cle Elum's approval of the Clark Short Plat and Stillwater Development project.

A. The City Of Cle Elum Had No Jurisdiction Or Authority To Condemn An Easement By Necessity On Walchs' Behalf

Conditioning approval of a subdivision upon the provision of access to adjacent property would have been improper under *Luxembourg Group, Inc. v. Snohomish County*, 76 Wn. App. 502, 887 P.2d 446 (1995).

Because the buildable portion of the Lyons property has always been isolated from the county roads, their need for access is not a result of the proposed subdivision. Since the dedication requirement would not remedy any problem caused by the Luxembourg subdivision, the County does not satisfy Nollan's "essential nexus" requirement merely by invoking the legitimate purposes of the subdivision statute. *See Nollan*, at 837. *Requiring Luxembourg to dedicate property for a stub road extension amounts to an unconstitutional taking in this situation. See Unlimited,* 50 Wn. App. at 727.

The County relies on *Beeson v. Phillips*, 41 Wn. App. 183, 702 P.2d 1244 (1985) in support of its contention that the dedication requirement was proper. The plaintiffs in Beeson faced a problem similar to the Lyons problem; they could not access the buildable portion of their property from any existing road. The Beesons therefore sought a private way of necessity across the neighboring Phillips property under RCW 8.24.010, which provides:

> An owner . . . of land which is so situate 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 . . ..

Affirming a decree of appropriation, the court found the private condemnation was necessary because there was no other practical way of accessing the property. Beeson, at 188.

Analysis of whether a way of access is "necessary" for the purposes of a private condemnation action has no bearing on whether a dedication of a way of access is made necessary as the result of the prospective subdivision. Beeson merely recognizes that a private condemnation action is available to property owners like the Lyons who are otherwise unable to access a portion of their property.

76 Wn. App. at 505-07 (italics added).

B. Walch Lacked Standing To Appeal Under The Land Use Petition Act.

Because the City of Cle Elum had no authority, under the short plat process, to grant Walch an easement by necessity without compensation, the Walches were not an aggrieved party within the meaning of the LUPA statute; therefore Walch lacked standing to appeal the short plat decision. RCW 36.70C.060 provides:

> Standing to bring a land use petition under this chapter is **limited** to the following persons:
>
> > (1) The applicant and the owner of property to which the land use decision is directed;
> >
> > (2) Another person **aggrieved or adversely affected** by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:
> >
> > > (a) The land use decision has prejudiced or is likely to prejudice that person;
> > >
> > > (b) **That person's asserted interests are among those that the local jurisdiction was required to consider when it made the land use decision;**

> (c) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the land use decision; and
>
> (d) The petitioner has exhausted his or her administrative remedies to the extent required by law.

(Emphasis added.) The City of Cle Elum was not required to consider the Walchs' request for an easement by necessity, and in fact had no authority to do so. Therefore, Walch were not an aggrieved party within the meaning of the LUPA and therefore had no standing to appeal the land use decision.

In view of the foregoing, RCW 8.24. provides the exclusive means to condemn an easement by necessity as permitted by Washington Constitution Article I, Sec.16, *Taylor v. Greenler*, 54 Wn.2d 682, 344 P.2d 515 (1959); and *Leinweber v. Gallaugher*, 2 Wn.2d 388, 98 P.2d 311 (1940). Walch was not required to pursue any appeal, administrative or under LUPA, of the land use decision.

IV. The Trial Court Erred As A Matter Of Law By Awarding Respondents' Attorney Fees Under RCW 8.24.030 For Walchs' Separate Claims For Prescriptive Easement And Implied Easement

Walchs' effort to gain legal access to their landlocked property were focused upon three separate and independent legal grounds: implied easement, prescriptive easement and statutory easement by necessity; the elements of proof were separate and distinct. The evidence to support the independent claims was separate and distinct. The rules pertaining to attorney fee awards for the common law claims versus the statutory claims are separate and distinct. And, the attorneys for Clark and Folkman could have separated their time according to the three causes of action asserted against their clients. The three theories asserted by Walch obviously were not so intertwined factually or legally that this task could not be accomplished.

To condemn an easement by necessity under RCW 8.24.010, Walch was required to establish a reasonable need because their property is landlocked. To establish a prescriptive easement, Walch were required to show (1) use adverse to the right of the servient owner; (2) open, notorious, continuous, and uninterrupted use for ten years; and (3) knowledge of such use at a time when the owner was able to assert and enforce his or her rights.

Bradley v. American Smelting & Refining Co., 104 Wn.2d 677, 694, 709 P.2d 782 (1985).

Neither claim was dependent on the other. Each claim could have been brought in separate causes of action. Had that been done, no award of attorney fees for the prescriptive easement claim, or even the implied easement claim, would have been possible. Bringing the actions in the same suit does not alter the distinct nature of the claims for attorney fee purposes. *See Ruvalcaba v. Kwang Ho Baek,* 159 Wn. App. 702, 247 P.3d 1 (2011). The policy to promote judicial economy should not be thwarted by forcing landlocked property owners to bring separate and sequential causes of action in order to avoid excessive attorney fee awards to litigants who bootstrap attorney fees and expenses in common law causes of action to attorney fee awards under the statute.

RCW 8.24.030 provides: "In any action ***brought under the provisions of this chapter*** for the condemnation of land for a private way of necessity, reasonable attorneys' fees and expert witness costs may be allowed by the court to reimburse the condemnee" (emphasis added). The plain meaning of this language is that it authorizes an award of fees only for any action brought under the private condemnation statute. Clark, Clark, LLC and Folkman

were entitled to *reasonable* fees attributable to their attorneys' time actually spent on the statutory easement by necessity claim because of the attorney fee provision in RCW 8.24.030, nothing more. The Trial Court erred in awarding such fees pertaining to the prescriptive easement and implied easement claims.

V. Respondents Are Not Entitled To Fees Under CR 11.

As the Clarks have stated in their Respondent's Brief, the trial court in this action awarded attorney fees to the Clarks only pursuant to RCW 8.24.030. Although the Clarks argued in the alternative before the trial court that they also were entitled to attorney fees pursuant to CR 11, the trial court did not address the matter of awarding fees on that basis, thereby effectively declining to do so. This issue was not appealed by either the Clarks or Folkman and Appellants Walch move to strike that portion of Clarks' brief pertaining to CR 11 issues and arguments.

There is a clear qualitative difference between awarding fees under RCW 8.24.030 to a prevailing party and awarding fees under CR 11 for what amounts to making a frivolous claim. RAP 2.4(a) provides that "The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent

also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case." In this case, the Respondent Clarks did not file a timely notice of appeal or a notice of discretionary review concerning the trial court having declined to award them attorney fees pursuant to CR 11. In addition, affirmative relief for the Clarks on that issue is not demanded by the necessities of the case, because an issue over fees is secondary to the merits of the case and, in any event, the trial court awarded fees to the Clarks pursuant to RCW 8.24.030. Thus, the Clarks are precluded from asserting that they are entitled to fees pursuant to CR 11. If, as Walch contends, the decision on fees pursuant to RCW 8.24.030 was in error, the Clarks may not at this juncture of the case seek fees on the alternative basis of CR 11. They have abandoned such a claim by failing to appeal the adverse ruling by the trial court.

For purposes of RAP 2.4(a), a respondent seeks "affirmative relief" by seeking anything other than an affirmation of the lower court's ruling; a notice of cross appeal is essential if the respondent seeks affirmative relief, as distinguished from the urging of additional grounds for affirmance. *Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 271 P.3d 356

(2012); *Erakovic v. Department of Labor & Industries*, 132 Wn. App. 762, 134 P.3d 234 (2006).

Here, the Clarks now seek "affirmative relief", that is, attorney fees, on a basis which was rejected by the trial court, without having filed the notice of appeal which was necessary for them to preserve the issue in the appeal. They are therefore precluded from urging that fees be awarded pursuant to CR 11, and "the necessities of the case' do not demand otherwise. As the court observed in *Singletary*, " . . . we are unaware of any published case reversing the trial court in favor of the respondent absent a cross appeal." *Singletary v. Manor Healthcare Corp., supra*, 166 Wn. App. at 787, 271 P.3d at 363.

While RAP 2.4(a) does not limit the scope of argument a respondent may make, it qualifies any relief sought by the respondent beyond affirmation of the lower court. *State v. Sims*, 171 Wn.2d 436, 256 P.3d 285 (2011). In *State v. Sims*, because the State, as a respondent, was seeking partial reversal of a trial court order, not just advancing an alternative argument for affirming the trial court, it was seeking affirmative relief within the meaning of RAP 2.4(a). Its failure to file a cross appeal prohibited it from seeking that relief

before the appellate court. The same result is required here for the Clarks' claim that they are entitled to an award of attorney fees under CR 11.

VI. Walch Are Entitled To Attorney Fees On Appeal

Not only must the Clarks' claim for attorney fees pursuant to CR 11, and Folkmans' LUPA claim, be rejected for failure to appeal the adverse decisions below on those claims, but the Walches are entitled to recover attorney fees incurred in having to respond to this contention. The court ruled in *Pugel v. Monheimer,* 83 Wn. App. 688, 922 P.2d 1377 (1996), that attorney fees may be awarded to an appellant under RAP 18.9 for a violation of RAP 2.4(a) on the basis that the respondent, whose cross-appeal had been dismissed as untimely, later submitted a brief assigning error to the trial court and making various claims for affirmative relief to which the plaintiff was forced to respond. RAP 18.9(a) states, in pertinent part, that "The appellate court on its own initiative or on motion of a party may order a party or counsel, . . . who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply . . . ". Under the same reasoning as applied in *Pugel,* Walch is

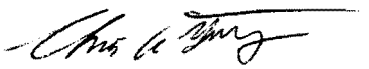
entitled to fees incurred in responding to an argument on an issue concerning which the Clarks and Folkman failed to file the required notice of appeal.

CONCLUSION

The Trial Court decision, dismissing Walchs' claim for an Easement by Necessity pursuant to RCW 8.24.010 should be reversed and remanded 1) for an award of an Easement by Necessity along the route proposed by Walch from Oakes Avenue, East along the Southern boundaries of Clark, Clark, LLC, and Folkman parallel with the Interstate 90 right-of-way fence to the Walch property and 2) for a valuation determination consistent with the provision of RCW 8.24.010 et seq. The award of attorney fees should be remanded and 1) limited to only those fees directly associated with the statutory Easement by Necessity claim using the *Lodestar* method to calculate an award of reasonable attorney fees. All fees pertaining to the common law prescriptive easement and implied easement claims should be disallowed.

DATED this 8th day of August, 2012.

Respectfully submitted,



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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

MIKE WALCH and MARCIA WALCH, husband and wife, Appellants, vs. KERRY A. CLARK and PATRICIA L. CLARK, husband and wife; W.L. CLARK FAMILY, LLC, a Washington Limited Liability Company; and ROBERT C. FOLKMAN and PATRICIA W. FOLKMAN, husband and wife, Respondents.	)	NO. 301290-III AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) ss.
COUNTY OF STEVENS)

TISHA D. CLEGG, being first duly sworn, upon oath, deposes and states as follows:

On August 8, 2012, I caused a true and correct copy of Appellants' Reply Brief to be placed in the United States Mail, first class, postage pre-paid, pursuant to CR 4(d)(4), to the persons addressed as follows:

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DATED this 8th day of August, 2012.

Tisha D. Clegg

SUBSCRIBED AND SWORN to before me this 8th day of August, 2012.

DANIELLE R. THUERINGER
NOTARY PUBLIC
STATE OF WASHINGTON
COMMISSION EXPIRES
8-09-15

NOTARY ~~PUBLIC in and for~~ the State of Washington, residing at Colville
My Appointment Expires: 8-9-15

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